

ORDINANCE 2018 - 18

**AN ORDINANCE OF THE NASSAU COUNTY
BOARD OF COUNTY COMMISSIONERS
RECOGNIZING AND CONFIRMING THE
CUSTOMARY USE BY THE PUBLIC OF THE
BEACH, IN THE UNINCORPORATED AREAS
OF NASSAU COUNTY; PROVIDING FOR
FINDINGS; PROVIDING FOR
CODIFICATION AND SCRIVENER ERRORS;
PROVIDING FOR JUDICIAL REVIEW AND
SEVERABILITY; AND PROVIDING FOR AN
EFFECTIVE DATE.**

WHEREAS, the State of Florida recognizes that private property along the State's beaches may extend to the mean high water line as defined by Florida Statutes, and that the portion of the exposed beach below mean high water is typically owned by the State, held in trust for all the people; and

WHEREAS, the public regularly traverses along, and uses the beach for customary public purposes on the unincorporated dry sand beach below the mean high water line and above the mean high water line up to the easternmost toe of the frontal dune system without regard to ownership; and

WHEREAS, the public regularly traverses along and recreates on, the unincorporated dry sand beach seaward of the erosion control line commencing at the toe of the dune (easternmost) to the water; and

WHEREAS, it is nearly impossible for a beachgoer to know where the mean high water line is on any given day since that line is dynamic, arrived at using a mathematical average of the movement of the high water line over a constantly rolling period of time; and

WHEREAS, the recent passage of Chapter 2018-94, Laws of Florida (HB 631), means that the County may pass an ordinance prior to July 1, 2018, recognizing the customary right of members of the public to utilize the dry sand beaches of the County as they have without dispute since time immemorial; and

WHEREAS, the majority of the beach in the unincorporated portion of Amelia Island has been renourished pursuant to Florida Statutes, Chapter 161; and

WHEREAS, the Supreme Court of Florida, in Walton County, et. al. v. Stop the Beach Renourishment, Inc., Fla. Department of Environmental Protection, (Fla. S. Ct. 2008) indicated that pursuant to Florida Statutes, §161.191(1), the erosion control line becomes the new fixed boundary between public lands and private upland property after the erosion control line is recorded. The Court also stated that private upland owners hold the bathing, fishing and navigation rights described above in common with the public; and

WHEREAS, as a result of the renourishment of the majority of the beach within the unincorporated area of the beach, erosion control lines have been established by the State and recorded in the Official Records of Nassau County, Florida; and

WHEREAS, pursuant to Florida Statutes, Chapter 161, the erosion control line supersedes the mean high water line and establishes the “demarcation” between public and private boundaries; and

WHEREAS, the Board of County Commissioners engaged a surveying company to mark, with PVC pipes, the erosion control line in the unincorporated beach areas; and

WHEREAS, the survey markings indicate that the majority of the erosion control line is located within the first dune structure (easternmost dune); and

WHEREAS, the Florida Legislature in Florida Statutes, Chapter 161, indicated that actions may be taken by the State or local governments as to the protection of private structures and public infrastructure as long as there is a preservation of public beach access; and

WHEREAS, the public may not know of the existence of the erosion control line; and

WHEREAS, the Florida Supreme Court, in *The City of Daytona Beach v Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974), stated “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 the particular area of the beach as they have without dispute and without interruption for many years”; and

WHEREAS, the Fifth District Court of Appeal clarified the term “custom” stating it is inherently a source of law that emanates from long term, open, obvious, and widely accepted and widely exercised practices. The Fifth DCA also held that a customary use determination requires the courts to ascertain, in each case, the degree of customary and ancient use the beach has been subjected to. *Trepanier v. County of Volusia*, (5th DCA 2007); and

WHEREAS, the Florida House of Representatives’ Final Bill Analysis of CS/HB 631 refers to the common law public trust doctrine in Article 10, Section 11 of the State’s Constitution. In addition, the Analysis referenced the Fifth D.C.A. which states, “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. 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.” (*Reynolds v. County of Volusia*, 659 So. 2d 1186 (Fla. 5th DCA 1995)); and

WHEREAS, the House of Representatives Final Bill Analysis also cited Attorney General Opinion 2002-38 (6/24/2002) wherein the Attorney General found that “the right of a municipality to regulate and control dry sand beach property within its municipal boundaries is not dependent on the finding of the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*”; and

WHEREAS, the United States District Court, Northern District of Florida, in *Alford v. Walton County*, 3:16-CV-00362-MCR-CJK (Northern Dist. Fla. 2017) quoted from the Florida Supreme Court decision in “*The City of Daytona Beach v Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974), (stating the customary use right prohibits a property owner from interfering with the public’s recreational use of the dry sand area of the beach), disputes over this right must be determined on a case-by-case basis, and the extent to which the customary use doctrine applies to the Alford’s property is in dispute. Even assuming this right exists in relation to the Alford’s property, it extends only to the public’s right to recreational use of the dry sand area and does not divest the property owner of private property rights”. The Court also found that the County’s adoption of a customary use ordinance was not “*ultra vires*”; and

WHEREAS, Attorney General’s Opinion (AGO 2002-38) referenced by the Bill Analysis (CS/HB 631) was cited by the United States District Court, Northern District of Florida, in *Alford v. Walton County* (cited above); and

WHEREAS, the Federal Court (*Alford*) quoted from the Attorney General’s Opinion (AGO 2002-38), “the opinion answered questions regarding whether the City of Destin, Florida has the authority to apply its beach management ordinance to certain identified dry sand areas of

the beach regardless of the ownership or legal control of those areas.” The answer by the Attorney General was yes, they could; and

WHEREAS, the Board of County Commissioners, based on CS/HB 631, appointed a public Fact Finding Committee to gather information, including testimony and documents, regarding the customary public use of the beach, including the dry sand areas; and

WHEREAS, the Board of County Commissioners also posted notice on its website asking for documents, affidavits, photographs, etc., to be sent to the Fact Finding Committee in furtherance of the customary public use of the beach fact finding; and

WHEREAS, the Fact Finding Committee held five (5) publicly advertised meetings, published in newspapers and by posting on the county website, heard testimony and received documents and photographs that addressed the public customary use of the beaches in the unincorporated portion of Amelia Island; and

WHEREAS, the advertisements for notice of the Fact Finding Committee in the newspaper were 3” x 8” in size and were published on May 11, 2018, May 18, 2018, May 17, 2018, and May 24, 2018; and

WHEREAS, the County’s intent in recognizing the customary use of the dry sand beaches within the County is not only to recognize and preserve the *status quo* with regards to public access and use, but also to ensure the present and future ability to expend public resources on beachfront property that may be privately owned by deed or other instrument; and

WHEREAS, the County accordingly, based on CS/HB 631, must act to secure the right of the public’s customary use of the beach for recreational purposes; and

WHEREAS, the Board of County Commissioners has conducted three (3) advertised public hearings on June 11, 2018, June 21, 2018, and June 25, 2018 and heard testimony, received

documents, and received a report from the Fact Finding Committee, as to the public customary use of the beach; and

WHEREAS, representatives of various condominium associations and private property owners have appeared at Fact Finding Committee and County Commission meetings and presented documents, affidavits and testimony as to the customary public use seaward of the erosion control line, as well as landward and seaward of the mean high water line; and

WHEREAS, documents, affidavits and testimony from condominium association representatives and private property owners support and dispute certain types of customary use; and

WHEREAS, the majority testimony, documents and affidavits from the public support the customary public uses as defined in this Ordinance.

NOW THEREFORE, BE IT ORDAINED by the Nassau County Board of County Commissioners, as follows:

Section I. Findings. The foregoing shall be incorporated as findings of fact.

Section II. Additional Findings.

A.) The Customary Use Doctrine

1. Art. X, §11 of the Florida Constitution declares that the State holds title to land under navigable waters, including beaches of the Atlantic Ocean below the mean high water lines, in trust for all the people.
2. The Florida Supreme Court has long recognized the right of the public to access and enjoy Florida's oceans and beaches as a natural adjunct to use of the foreshore (wet sand) area—most notably in the 1939 case of *White v. Hughes* and the 1974 case of *City of Daytona Beach v. Tona-Rama, Inc.*

According to the Court, as a matter of custom, the public acquires rights to utilize dry sandy areas of privately owned beaches for recreational purposes if the public's use of those beaches has been ancient, reasonable, without interruption and free from dispute. However, the right of customary use of privately owned beaches does not create any interest in the land. Additionally, the right can also be abandoned by the public and is subject to appropriate regulations.

3. In deciding the *Tona-Roma* case, the Florida Supreme Court concluded that privately titled Florida beaches are used differently than other privately titled land: "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 portions of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of land—but have 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."

4. The State Comprehensive Plan, as codified at Florida Statutes, §187.201(8)(b)2, expresses the Legislature's intent to preserve the public's right to reasonable access to beaches.

5. The Coastal Management Element of the Nassau County Comprehensive Plan and the Recreational and Open Space Element includes objectives to ensure beach access and the overall quality of the beach environment.

6. The United States District Court for the Northern District recently recognized in the 2017 case of *Alford v. Walton County*, that the public's right to utilize the dry sand area of Florida beaches does not arise by judicial recognition but is acquired by custom, which emanates from long-term, open, obvious and widely accepted and widely-exercised public use. The court further held that Walton County was legally empowered to enact a customary use ordinance under present law.
7. In the 2007 case of *Trepanier v. County Of Volusia*, the Fifth District Court of Appeal explained that evidence of the long-term, customary use of a beach by the public could be demonstrated by reference to a general area of the beach and need not be proven on a parcel-by-parcel basis.
8. The Florida Legislature passed and the Governor signed into law House Bill 631, Florida Chapter 2018 - 94, to be codified as a new section to the Florida Statutes. The new section, Florida Statutes, §163.035, provides a difficult, impractical and expensive legal process to ensure public access to beaches for local jurisdictions that fail to enact a customary use ordinance prior to July 1, 2018.
9. An amendment to House Bill 631, Florida Chapter 2018-94, was added on the floor of the Senate and adopted by the House, which granted more leeway for the County to adopt a customary use ordinance prior to July 1, 2018 as follows: "APPLICABILITY.—This section does not apply to a governmental entity with an ordinance or rule that was adopted and in effect on or before January 1, 2016, and does not deprive a governmental entity

from raising customary use as an affirmative defense in any proceeding challenging an ordinance or rule adopted before July 1, 2018.” (Emphasis added).

B.) Customary Use of the Beaches of Nassau County Landward of the Mean High Water Line Prior to the Erosion Control Line

1. The public has utilized the dry sand areas of the unincorporated areas of Nassau County on the Atlantic Beach landward of the mean high water line to the toe of the dune(s) or in the absence of a dune to the westernmost landward side toward the sea wall, property line (individual or homeowner/condominium association) and seaward of the mean high water line for customary public uses, including, but not limited to, recreational uses such as: sunbathing (including sitting on the dry sand area with or without chairs), walking, jogging, bicycling, building sand castles, in some areas driving (see Section IV), exercising, kiting, photographing, picnicking, utilizing umbrellas, walking dogs, horseback riding, fishing, family gatherings, camping, bonfires, use of tent structures, tourist related activities and other similar public beach recreational activities in current and earlier ancient and historic times, without documented dispute or interruption since time immemorial.
2. There is documentation of historical customary public use of the beach including the dry sand areas. Members of the public submitted testimony, photographs, affidavits, records, and statements demonstrating longstanding, continuous customary use of the beach and dry sand beach

areas. The statements and documents have been made part of the record of this Ordinance's adoption.

3. The Fact Finding Committee, Board of County Commissioners, and staff have also received documented evidence and testimony as to the historical customary use activities in the nineteenth and twentieth centuries, and the County will continue to further document the public's ancient, historic and more recent customary use of the beach and dry sand beach, and will enter such documentation and history into the record of the Board of County Commissioners (the "Board") at its public hearings.
4. Public access to the dry sand beach landward of the mean high water line to the toe of the easternmost dune line and seaward of the mean high water line has never been hindered or restricted in any manner (except as set forth in Section IV).
5. The Nassau Sea Turtle Patrol is a nonprofit corporation that patrols the entire length of the beach in Nassau County (which includes the unincorporated areas of the beach) utilizing all-terrain vehicles in order to ensure the protection of sea turtles.
6. The County places trash cans on all areas of the beach and cleans the beach daily.

C.) Customary Use of the Beaches of Nassau County Since the Establishment of the Erosion Control Line

1. The erosion control line as set forth in the Official Records of Nassau County, Florida OR Book 265, Page 269 and OR Book 568, Page 337, indicates, based on actual survey verification, commences at the dune walkover adjacent to Sandpiper Condominiums and runs south the entire length of the beaches of the unincorporated areas of Nassau County. The survey indicates that the majority of the erosion control line is located within the first eastern dune structure within the unincorporated areas of the beach of Nassau County. A portion of the erosion control line between Peters Point and the dune walk over for Sandpiper Condominiums is located in the dry sand area in front of the dune system.
2. The public has utilized the dry sand beach areas of the unincorporated areas of Nassau County on the Atlantic Beach, seaward of the erosion control line since the establishment of the erosion control lines for many customary public uses, including, but not limited to, recreational uses such as: sunbathing (including sitting on the dry sand area with or without chairs), walking, jogging, bicycling, building sand castles, in some areas driving (see Section IV), exercising, kiting, photographing, picnicking, utilizing umbrellas, walking dogs, horseback riding, fishing, family gatherings, camping, bonfires, use of tent structures, tourist related activities and other similar public beach recreational activities since the establishment of the erosion control line, including up to the date of this Ordinance.
3. There is documentation of customary use of the dry sand beach (as described herein) seaward of the erosion control line. Members of the public

submitted testimony, affidavits, photographs, and records demonstrating longstanding, continuous customary use of the dry sand beach, up to the erosion control line. The statements, affidavits and photographs have been made part of the record of this Ordinance's adoption. There has also been a minority of the total documents submitted disputing certain customary public uses seaward of the erosion control line.

4. The Fact Finding Committee, Board of County Commissioners, and staff have also received affidavits, documented evidence and testimony as to the public customary use activities (as defined herein) seaward of the erosion control line, and the County will continue to further document the public's customary use of the dry sand beach (seaward of the erosion control line), and will enter such documentation and history into the record of the Board of County Commissioners at its public hearings.
5. Customary public access to the dry sand beach seaward of the erosion control line, prior to HB 631, has never been hindered, or contested, nor have fencing, barriers or other obstructions segmented the dry sand beach.
6. The Nassau Sea Turtle Patrol is a nonprofit corporation that patrols the entire length of the beach in Nassau County (which includes the unincorporated areas of the beach) utilizing all-terrain vehicles in order to ensure the protection of sea turtles.
7. The County places trash cans on all areas of the beach and cleans the beach daily both seaward and landward of the erosion control line.

D.) Traditional Uses of the Sandy Beach Areas Landward of the Erosion Control Line

1. Florida Statutes, Chapter 161 addresses traditional public uses landward of the erosion control line.
2. This customary public use Ordinance is not intended to address the statutory traditional public access set forth in Florida Statutes, Chapter 161. This customary use Ordinance does not address any customary public uses (as defined herein) landward of the erosion control line.

E.) Local Government Action Consistent with Customary Use

1. For decades, Boards have demonstrated a commitment to ensuring public access to the dry sand beach by purchasing and/or dedicating beachfront public parks, and by building parking lots, dune crossovers, restrooms and other amenities strategically spaced along the beach to accommodate broad public access and recreational use of the entire beach. There are public walkover structures to areas of the unincorporated beaches that provide access to beach areas landward of the erosion control line. The public access areas are marked accordingly. Use of the public walkover structures will continue.
2. The County has provided lifeguard towers for the protection of swimmers and routine law enforcement patrols for approximately fifty (50) years. The law enforcement patrols cover all areas of the beach landward and seaward

of the erosion control line and landward and seaward of the mean high water line.

3. The County has, within the past forty plus (40+) years, adopted ordinances that regulate beach areas in the unincorporated area of the County, above and below the mean high water lines and above and below the erosion control lines.
4. The Nassau County Property Appraiser does not assess the dry sand beach portion of parcels, where the deeds reflect ownership to the mean high water line for the purposes of ad valorem taxation.
5. Nassau County has a Tourist Development Council, established in 1989, that has spent millions of dollars since its creation advertising the beaches of Amelia Island, including the unincorporated areas of Amelia Island. In addition, the Tourist Development Council has recommended, to the Board of County Commissioners and the Board approved spending Tourist Development funds for beach clean-up after major storms. The clean-up encompassed the beach above and below the mean high water line and the erosion control line. In addition, the Tourist Development Council recommended, and the Board approved the expenditure of the Tourist Development funds for daily beach clean-up both above and below the mean high water line and seaward and landward of the erosion control line.
6. Renourishment of the beaches, of the unincorporated areas, occurred with both private and public funds.

F.) Authority to Adopt Customary Use Ordinance

1. Art. VIII, §1(f) of the Florida Constitution grants non-charter counties the power of self-government and authorizes the Board to enact ordinances not inconsistent with general or special law.
2. Florida Statutes, §125.01(1), provides the Board with the power to carry on county government consistent with law, and Florida Statutes, §125.01(3)(b), states that the provisions of that section shall be liberally construed in order to secure for counties the broad exercise of home rule powers.
3. A “reading” of Florida Chapter 2018-94 (HB 631), in conjunction with other authority listed herein, does not prohibit enactment of a customary use ordinance prior to July 1, 2018. In fact, it encourages it.

G.) Legislative Finding

1. The Board finds as a legislative fact binding on the County government: that the beach, including the dry sand beach, above and below the mean high water line and above the mean high water line to the toe of the easternmost dune line or in the absence of a dune, to the westernmost landward side toward the sea wall, and seaward of the erosion control line is a significant asset of Nassau County, vital to quality of life for residents and visitors, the primary attraction of tourists to the County, and a critical component of the County’s economic development; that since time immemorial, the public has enjoyed access to the dry sand beach and has

made customary public use of the dry sand beach above and below the mean high water line and seaward of the erosion control line and such use has been ancient, reasonable, without interruption, and free from dispute; and that because of this customary access and use, the public has the right of access to the beach and a right to use the beach for customary public use.

2. The Board further finds that it can engage, and has engaged, in reasonable regulation of both the privately-owned beach areas and the public's beach areas.
3. The Board has a significant and legitimate government interest in ensuring public access to, and customary use of, the dry sand beach, as described herein and the provisions in this Ordinance are narrowly tailored to achieve that goal.
4. At the same time, the Board acknowledges that some areas of the dry sand beach may be privately owned as reflected in deeds, and those landowners may make use of their property subject to Florida Statutes, Chapter 161 and other State and local regulation(s). It is not the intent of this Ordinance to affect in any way the title or the littoral rights of the owners of land adjacent to the Atlantic Ocean, nor to impair the right of such owners to contest the customary use determinations set forth herein.
5. The Board desires to balance all uses of the beach.

Section III. Public Access and Definition.

A.) Public Access and Use.

1. The public's longstanding customary public use (as defined herein) of the dry sand beach seaward of the erosion control line and seaward and landward of the mean high water line to the dune system (easternmost) or if there is no dune system, to any sea wall, bluff, toe, rock revetment toe or any permanent dune vegetation for customary public purposes is hereby recognized and protected. The public, individually and collectively, subject to the provisions herein, shall have the right of personal ingress and egress to from and along the dry sand beach from public approaches, public dune crossovers or from the wet sand beach, and the right to make customary public use of the dry sand beach seaward of the erosion control line.
 2. It is prohibited for any person to obstruct or hinder the right of the public, individually and collectively, to enter or leave the dry sand beach by way of any public approach, public dune crossover or from the wet sand beach or to use lawfully any part of the dry sand beach seaward of the erosion control line for customary public purposes. It is further prohibited for any person to obstruct or hinder the right of the public, individually or collectively, to customarily use, lawfully, any part of the dry sand area landward of the mean high water line to the toe of the easternmost dune or seaward of the erosion control line for customary public use purposes (as defined herein).
- B.)** For purposes of this Ordinance, the term, "dry sand beach," shall mean the entirety of the dry sand of the Atlantic Ocean beaches in Nassau County landward of the Atlantic Ocean to the erosion control line (where there is an erosion control line). The dry sand area would also include areas landward of the mean high

water line where there is no erosion control line to the dune system (easternmost) or if there is no dune system, to any sea wall, bluff, toe, rock revetment toe or any permanent dune vegetation.

- C.) The term "customary public use" shall mean uses, including, but not limited to, recreational uses such as: sunbathing (including sitting on the dry sand area with or without chairs), walking, jogging, bicycling, building sand castles, in some areas driving (see Section IV), exercising, kiting, photographing, picnicking, utilizing umbrellas, walking dogs, horseback riding, fishing, family gatherings, camping, bonfires, use of tent structures, tourist related activities and other similar public beach recreational activities.

Section IV. Driving on Certain Areas of the Dry Sand Beach.

- A.) Driving on the beach in the unincorporated areas of Nassau County is pursuant to Senate Bill 1577 and the Final Judgment recorded in Official Records Book 0657, Page 0060 of the Official Records of Nassau County. Driving, pursuant to the aforementioned authority, is seaward of the erosion control line and in some areas landward of the mean high water line to the easternmost toe of the dunes.

Section V. State and Local Regulating Legislative Provisions.

- A.) State regulations regarding the beach remain in effect, including Florida Statutes, Chapter 161. State regulations include, but are not limited to: coastal construction regulations, erosion control lines, and restrictions regarding dunes and vegetation.
- B.) County Ordinances regulating the unincorporated areas of the beach remain in effect, including, but not limited to:

1. Ordinance 76-10, as Amended;

2. Ordinance 93-15, as Amended;
3. Ordinance 2002-31, as Amended;
4. Ordinance 2000-13, as Amended;
5. Ordinance 74-32, as Amended; and
6. Ordinance 2016-06, as Amended.

C.) The County reserves the right to further address and amend regulatory beach ordinances.

D.) The regulations cited, as well as beach driving in Section IV, shall remain in effect.

Section VI. Scrivener Errors. Scrivener's errors may be corrected as deemed necessary.

Section VII. Judicial Review and Severability.

A.) This Ordinance is subject to judicial review in the Fourth Judicial Circuit in and for Nassau County. In any proceeding in which a landowner or citizen challenges this Ordinance, the County may raise customary use as an affirmative defense.

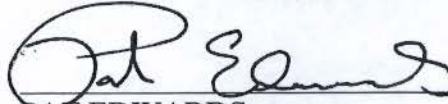
B.) If any section, sentence, clause, or phrase of this Ordinance is held to be invalid or unconstitutional by any court of competent jurisdiction, then said holding shall in no way affect the validity of the remaining portions of this Ordinance.

Section VIII. Effective Date. Pursuant to Florida Statutes, §125.66, this Ordinance shall take effect upon filing with the Secretary of State.

PASSED AND ADOPTED by the Nassau County Board of County Commissioners this

25th day of June, 2018.

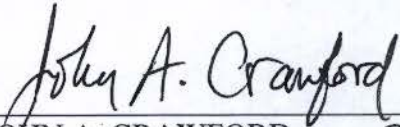
**BOARD OF COUNTY COMMISSIONERS
NASSAU COUNTY, FLORIDA**



PAT EDWARDS

Its: Chairman

ATTEST AS TO CHAIRMAN'S SIGNATURE:




JOHN A. CRAWFORD

Its: Ex-Officio Clerk

By: Michael Droudy
Chief Deputy Compliance and Accountability

Approved as to form by the Nassau County Attorney:


MICHAEL S. MULLIN