LAYING OUT AN "UNWELCOME MAT" TO PUBLIC BEACH ACCESS

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"Florida is advertised as a playground, a retreat from the hurryscurry of the modern world and from the rigors of northern climes. Fishing and swimming are prominent if not principal items of the entertainment the stranger expects to find here."[1]

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1. Duval v. Thomas, 114 So.2d 791.795 (Fla. 1959).

I. INTRODUCTION

There is no doubt that public beach access is a hotly disputed issue in the State of Florida. Ninety-nine percent of coastal residents, as well as tourists, depend upon public access points to reach the beach; while less than one percent of Florida's coastal residents own beachfront property.[2] To some, the beach offers a vacation from their everyday life; to others, the beach offers a way of life. Amidst this sun, sand, and surf, however, lies an ongoing battle between beachfront property owners and the public. To some the beach is a playground; while to others the beach is a backyard. This beach turf war may lead Florida courts to dip their judicial toes in the rough surf, as they have time and time again. This Comment revisits the issue of public beach access and the doctrine of customary usage. Additionally, this Comment will visit the remaining issues that surround the battleground of the over-development of Florida Panhandle beaches, while discussing problems associated with public beach access. Finally, this Comment illustrates how four individual elements in Florida's history have created "the perfect storm" for Florida to test the strength of its policy on preserving public beach access.[3]

II. DEFINING THE BATTLEGROUND

To the average tourist who comes to visit a town on the beach, it may seem like the beach is their playground. However, to coastal residents, there are limitations and lines drawn on that tropical playground.

The battle over beach access concerns two rights — the right of the public to use the beach, and the right of the private landowner to exclude.[4] The concept of private land ownership is deeply embedded in U.S. property law. However, the importance of protecting the public interest in the beaches and oceans weighs strongly against this concept.[5] The increasing development of condominiums and mega-resorts in small beach towns is eroding the

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2. See FLA. COASTAL MGMT. PROGRAM, DEP'T OF ENVTL. PROT., BEACH ACCESS SIGNS, available at http://www.dep.state.fl.us/secretary/legislative/coastal/programs/access_signs.htm (last visited Nov. 24, 2002) [hereinafter BEACH ACCESS SIGNS].

3. Referring to "the [1991] storm of the century, boasting waves over one hundred feet high[,] a tempest created by so rare a combination of factors that meteorologists deemed it 'the perfect storm'." The Perfect Storm, available at http://www.wwnorton.com/catalog/fall00/005032.htm (last visited Nov. 24, 2002) (phrase coined by NOAA meteorologist Bob Case); see also SEBASTIAN JUNGER, THE PERFECT STORM (Harper Collins 1997) (depicting the story of the perfect storm and its victim, the swordfishing boat Andrea Gail).

4. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW CASES AND MATERIALS 89 (2d ed. West Group 2002).

5. See id.

character for which tourists seek out Florida's beaches, especially the quiet and undeveloped character of the Emerald Coast.[6] "With Florida's population burgeoning and its recreational needs multiplying by leaps and bounds, 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."[7]

There are two important beach access issues: horizontal access and perpendicular access.[8] Horizontal, or lateral, access encompasses the public's right to walk along the beach below, or parallel to, the mean high-tide line.[9] Perpendicular access deals with getting to the beach; in other words, the access from the road to the public segment of the beach.[10]

III. DRAWING THE LINE IN THE SAND

Traditionally, in the United States, the cleavage between private and public land is the "mean high-tide line."[11] Florida provides its boundary in the Florida Constitution:

> 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.[12]

The mean high-tide line is a fictional line that is measured by averaging "all high-tides over an 18.6 year cycle, as determined by the Department of Commerce, National Oceanic Survey."[13] This line

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6. The "Emerald Coast" is the name for the coastal area along the Northwest Florida Panhandle between Pensacola and Panama City Beach. It includes the communities and towns of Navarre, Fort Walton Beach, and Destin. The Emerald Coast is characterized by sugar-white, sandy beaches and emerald green, crystal-clear waters. See EMERALD COAST, available at http://www.see-emeraldcoast.com (last visited Nov. 24, 2002).

7. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 81 (Fla. 1974) (Ervin, J., dissenting).

8. KALO, supra note 4, at 83; DONNA R. CHRISTIE, PUBLIC ACCESS TO BEACHES AND SHORES 1 (citing unpublished supplemental materials to COASTAL AND OCEAN LAW CASES AND MATERIALS, Florida State University College of Law, Fall 2002, on file with author).

9. KALO, supra note 4, at 83.

10. Id. (addressing incidental access issues that concern parking, concessionaires, and dispersal).

11. KALO, supra note 4, at 43.

12. FLA. CONST. art. X, § 11 (emphasis added).

13. KALO, supra note 4, at 43. See generally Borax Consolidated Ltd. v. Los Angeles, 296 U.S. 10, 26-27 (1935).

is a legal fiction because it cannot be permanently drawn in the sand separating private land from public land. However, in some areas where the tide does not fluctuate, the mean high-tide line is evidenced best as the line between the dry sand and the wet sand.[14] This fictional line has only created trouble between private landowners and the public.[15]

IV. TRADITIONAL TOOLS TO PRESERVE PUBLIC BEACH ACCESS

A. The Public Trust Doctrine

The State holds the land seaward of the mean high-tide line in trust for the public.[16] Historically, the public trust doctrine encompassed navigation, commerce, and fishing — the traditional triad.[17] Over time, the public trust doctrine has been judicially expanded to include bathing and swimming.

> The public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people. The public's right to use the tidal lands and water encompasses navigation, fishing and recreational uses, including bathing, swimming and other shore activities.[18]

In recent years, the doctrine has been extended even further to include the right of access to the beach. In Matthews v. Bay Head Improvement Ass'n,[19] a non-association member brought suit against an association that controlled access to a municipal beach, on grounds that the association was denying the public its right of

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14. The dry sand extends landward to the vegetation line, while the wet sand extend seaward into the ocean or Gulf of Mexico. Id.

15. Id.

16. See FLA. CONST. art X, § 11; see also FLA. STAT. § 161.051 (2002) ("No grant under this [coastal construction] section shall affect title of the state to any lands below the mean high-water mark."); see also FLA. STAT. § 187.201 (8)(a) (2002) (introducing a comprehensive plan announcing Florida's goal of preserving public beach access in that "Florida shall ensure that development ... and beach access improvements in coastal areas do not endanger public safety or important natural resources. Florida shall, through acquisition and access improvements, make available to the state's population additional beaches ..., consistent with sound environmental planning."). Additionally, in its comprehensive plan Florida provides a state policy to "[e]nsure the public's right to reasonable access to beaches." FLA. STAT. § 187.201(8)(b)(2).

17. KALO, supra note 4, at 41.

18. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 358 (N.J. 1984).

19. Id.

access to the beach in violation of the public trust doctrine.[20] Additionally, the plaintiff alleged that the public had the right to use the association's private land as incidental to its use of the public trust land.[21] The New Jersey Supreme Court preserved the public's right of access to the public trust lands on the beaches. In perceiving the public trust doctrine as a fluid doctrine to be molded to address modern social problems, the court held that "the public must be given both [reasonable] access to and use of privately-owned dry sand areas as reasonably necessary."[22] Thus, this court extended the public trust doctrine to include perpendicular access and horizontal, or lateral, access.

B. Prescriptive Easement

Along with the land that the State holds in "trust" for the public, the State may acquire a prescriptive easement over the dry-sand area of the beach. A prescriptive easement is:

> created only by adverse use of the privilege with the knowledge of the person against whom it is claimed, or by a use so open, notorious, visible and uninterrupted that knowledge will be presumed, and exercised under a claim of right adverse to the owner and acquiesced in by him; and such adverse user [sic] must have existed for a period equal at least to that prescribed by the statute of limitations for acquiring title to land by adverse possession.[23]

In other words, "the public can acquire easements in private land by long-continued user [sic] that is inconsistent with the owner's exclusive possession and enjoyment of his land."[24] However, Florida courts have "declined to find such prescriptive right in the public because of the absence of an adverse nature in the public's use of the private beach land"[25] in major recreational areas.

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20. Id. at 358.

21. Id.

22. Id. at 365 (emphasis added).

23. J.C. Vereen & Sons, Inc. v. Houser, 123 Fla. 641, 645, 167 So. 45, 47 (Fla. 1936); see also Downing v. Bird, 100 So.2d 57 (Fla. 1958); see also Zetrouer v. Zetrouer, 89 Fla. 253, 103 So. 625 (Fla. 1925). In Florida, the statute of limitations is seven years for adverse possession, while the statute of limitations for prescriptive easements is twenty years.

24. State ex rel. Thornton v. Hay, 462 P.2d 671, 675 (Or. 1969).

25. City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73, 75-76 (Fla. 1974) (referring to City of Miami Beach v. Undercliff Realty & Investment Co., 21 So.2d 783 (Fla. 1945), and City of Miami Beach v. Miami Beach Improvement Co., 14 So.2d 172 (Fla. 1943), where the

C. Implied Dedication

As an alternative to a claim of prescription, the public can assert a claim of implied dedication. An implied dedication is the "setting apart of land for public use, and to constitute such a dedication there must be an intention by the owner clearly indicated by his words or act[ions] to dedicate the land to the public use."[26] The essential element of an implied dedication is the intent of the landowner to dedicate the land to the public.[27] It is hard to reconcile the intent of the landowner to dedicate when he or she is in court objecting to the dedication.[28] However, previous owners may have been responsible for the dedication and had the requisite intent to dedicate.

In addition to tools such as public trust doctrine, prescriptive easement, and implied dedication, the public has used the First Amendment[29] to preserve beach access.[30]

V. MODERN TOOL BASED ON TRADITIONAL CUSTOM: THE DOCTRINE OF CUSTOM

The doctrine of custom is based on seven requirements — the customary use must be ancient, exercised without interruption, peaceable and free from dispute, reasonable, certain, obligatory, and consistent with other customs or other law.[31]

In State ex rel. Thornton v. Hay, the public brought suit against beachfront property owners to prevent them from enclosing

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court declined to find prescriptive easements in both cases).

26. City of Miami Beach v. Miami Beach Improvement Co., 153 Fla. 107, 113, 14 So.2d 172, 175 (Fla. 1943).

27. Id.

28. Additionally, it is hard to reconcile a landowner's intent to dedicate when a municipality is attempting to enforce an alleged implied dedication where the municipality has been collecting ad valorem taxes on the land in question. See City of Miami Beach v. Undercfliff Realty & Investment Co., 21 So.2d 783 (Fla. 1945).

29. See Leydon v. Town of Greenwich, 777 A.2d 552 (Conn. 2001) (holding local ordinance, allowing only residents and guests access to town beachside park, overbroad and violative of First Amendment right to engage in protected expressive and associational activities).

30. Additionally, private beachfront landowners have argued Fifth Amendment takings. See Lucas v. South Carolina Coastal Council, 112 S.Ct 2886, 2899 (1992) (determining the South Carolina Beachfront Management Act prohibited beachfront landowner from building any structures on land, and thus deprived landowner of all economical use of property; the court held that the state had effected a categorical taking); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (concluding there must be an essential nexus between the exaction imposed that required landowner to grant public easement for public beach access across beachfront property and effect of permitted use of the property); see also Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148 (Cal. App. 1st DCA 1985).

31. State ex rel. Thornton v. Hay, 462 P. 2d 671, 677 (Or. 1969) (drawing from 1 WILLIAM BLACKSTONE, COMMENTARIES *75-*78).

the dry-sand area contained on the beachfront deeds.[32] Resort owners wanted to erect fences in the dry-sand area to reserve the dry sand beach area for the resort guests.[33] The issue in the case was whether Oregon had the power to prevent these beachfront property owners from enclosing the dry-sand area.[34] The Oregon Supreme Court held that the public did not acquire a prescriptive easement to go onto the dry-sand area for recreational purposes, but the public did establish a right to the dry-sand area by the doctrine of custom.[35] The court found that 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 .... [F]rom 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 ....[36]

The effect of the court's holding — that the public had established a right to the use of the dry-sand area of the beach based upon customary usage — was that the resort owners were enjoined from erecting a fence blocking the public's access.[37]

The court did not ignore the equitable issue surrounding the resort owners argument that they had expectations when buying the beachfront property — the expectation of privacy and the resulting payment of higher value for that expectation. The court reasoned that the public's use was so ancient, customary, and notorious that it created a presumption of notice of the custom on coastal land purchasers.[38] The announcement of Oregon's doctrine of customary usage effectively opened up all Oregon beaches to the public.

Recently, in denying certiorari in Stevens v. City of Cannon City,[39] the United States Supreme Court upheld Oregon's application[40] of its doctrine of customary usage, originally

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32. Id.
33. Id.
34. Id.
35. Id. at 676.
36. Id. at 673.
37. Id. at 678.
38. Id. at 677-78.
39. 510 U.S. 1207 (1994).
40. Stevens v. City of Cannon Beach, 835 P.2d 940 (Or. Ct. App. 1992), affirmed by 854 P.2d 449 (Or. 1993), cert. denied, 510 U.S. 1207 (1994).

announced in Thornton.[41] In Stevens,[42] resort owners were denied a permit to build a replacement retaining-seawall in front of the resort in light of a city ordinance that prohibited building on the beach. The resort owners brought an inverse condemnation suit against the City on grounds the City had effected a taking of their property without just compensation.[43] The Court held there was no taking and thus, no compensation was required.[44] Based on Oregon's doctrine of customary use, the property interest that the landowners purported to have in the land was not part of their estate to begin with because the public had been using the beach for time immemorial.

In addition to Oregon, Texas and Hawaii have used the doctrine of customary use to preserve the public's interest in beach access.[45] Furthermore, Texas has codified its public policy in keeping the beaches open to the public along with enforcement mechanisms.[46]

In Florida, the Florida Supreme Court established its version of the doctrine of customary usage:

> 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

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41. Thornton, 462 P. 2d 671 (Or. 1969).

42. Stevens, 835 P.2d 940 (Or. Ct. App. 1992), affirmed by 854 P.2d 449 (Or. 1993), cert. denied, 510 U.S. 1207 (1994).

43. Id. Landowners' claim was based on the Supreme Court's holding in Lucas v. South Carolina Coastal Council, 112 S. Ct 2886, 2899 (1992), that a categorical taking has occurred "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use" requiring compensation; the only exception to this is if the nature of the owner's estate is such that the proscribed use or interests were not part of his title to begin with based on background principles of property law or nuisance law.

44. Id.

45. See In re Ashford, 440 P.2d 76 (Haw. 1968); Moody v. White, 593 S.W.2d 372 (Tex. Civ. App. 1979).

46. Texas Open Beaches Act, TEX. NAT. RES. CODE ANN. § 61.020 (creating a presumption that the sandy beaches of the state are public beaches). See also Texas Open Beaches Act, TEX. NAT.RES. CODE ANN. § 61.01 (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 an 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 on the Gulf of Mexico).

> 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.[47]

In City of Daytona Beach v. Tona-Rama, Inc., a beachfront landowner in Daytona Beach operated an ocean pier on the dry sand area where he constructed an observation tower.[48] Plaintiff brought suit against this landowner to enjoin the erection of the observation tower, arguing that the public had acquired a prescriptive easement in the property.[49]

On writ of certiorari,[50] the Florida Supreme Court held that there were not sufficient facts to warrant a prescriptive easement because of the lack of adversity "inconsistent with the owner's use and enjoyment of the land."[51] In other words, had the defendant objected to the public coming upon its pier, and had the public's presence been adverse to the owner's use and enjoyment, then the court may have found a prescription to be proper. However, the court declined to find a prescriptive easement, but instead adopted the doctrine of customary usage.

Florida's doctrine differs, however, from Oregon's doctrine of customary use in that the effect of Tona-Rama is not to open all Florida beaches to the public. "[The] doctrine [of customary use] requires the courts to ascertain in each case the degree of customary and ancient use the [particular] beach has been subjected to ...."[52] The courts will decide the customary usage of Florida beaches on an ad hoc basis, based on a showing of the elements for customary usage for a particular beach. This case is the first element that creates "the perfect storm" for Florida to test the strength of its policy in preserving public beach access.

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47. City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d. 73, 78 (Fla. 1974) (emphasis added).

48. Id. at 74.

49. Id. at 74-5.

50. Id. The trial court found that the public had acquired a prescriptive easement and granted summary judgment in favor of the plaintiff, ordering defendant to remove the observation tower. Id. In affirmation, the First District Court of Appeal approved the destruction of the tower. Id. The decision was appealed to the Florida Supreme Court. Id.

51. Id. at 77.

52. Reynolds v. County of Volusia, 659 So.2d 1186, 1190 (Fla. 5th DCA 1995) (declining to apply the doctrine of customary use on grounds of the lack of private fee ownership in the dry sand beach because beach area had been expressly dedicated to the general public for the many purposes customarily incident to the use of the beach).

VI. UNCONQUERED ISSUES — THE FLORIDA PANHANDLE BATTLEGROUND

A. Destin, Florida[53] — The World's Luckiest Fishing "Village"[54]

Destin may still be the world's luckiest place to fish, but it has hardly retained its "village-like" character. Once part of what people in the south called the Redneck Riviera because "it was where working-class families throughout the South often took their vacations,"[55] it is now part of what is called the Emerald Coast, a more affluent name to attract more affluent, upper-class families.[56] Destin has, however, somehow retained its family-like character, rather than morphing into a spring-break haven for college and high-school students — Destin offers something for everyone.[57] But are there enough beaches to go around for everyone?[58] This is the enduring question that has haunted the Destin City Council.

The problem of lack of beach access is heightened in Destin due to minimal tide fluctuations, where the mean high-tide line is evidenced as the "debris line."[59] This has created a host of problems

53. Destin, Florida, has a population of approximately 11,119 full time residents. US Census Bureau (2000), at http://www.factfinder.census.gov (last visited Nov. 11, 2002).

54. Not only will this section examine the current public beach access problems in Destin, Florida, but this section will also update the events in Destin since this comment's predecessor, S. Brent Spain, Comment, Florida Beach Access: Nothing But Wet Sand?, 15 J. LAND USE & ENVTL. L. 167 (1999).

55. Carrie Alexander, Jewels of Florida's Emerald Coast Sparkle With Sun and Fun – White beaches and glassy green waters draw visitors to Destin and Fort Walton Beaches, ORLANDO SENTINEL, June 13, 2001, at L3.

56. See id.

57. See Charlotte Crane, Destin Lives on Tourism, PENSACOLA NEWS J., June 16, 2002, at 4B.

58. See Karen Spencer, Belligerent Beachgoer Sparks Confrontation, DESTIN LOG, June 2000, available at http://www.destin.com/news/archives/jun00/belliger.shtml (last visited Sept. 21, 2002) (relaying the opinion of veteran beach services manager George Noble, who moved to Destin in 1966, as saying, "[n]ot enough beach is left to go around.").

59. See John Ledbetter, Wanted: More Beach Talk, DESTIN LOG, Jan. 2000, available at http://www. destin.com/news/archives/jan00/wantedmo/shtml (last visited Sept. 21, 2002) (covering City of Destin's former land-use attorney David Theriaque discussing the problem of lateral beach access).

for Destin[60] resulting in beach turf wars between private beachfront landowners and the public concerning public beach access.[61]

The City of Destin has been grappling with the beach turf wars for the past few years, trying to keep the beachfront landowners happy and trying to satisfy the need to preserve the public's access to the beach. During 1999 and 2000, there were three ordinances proposed to address the public beach access problems:

- Beach Management Ordinance
- Pedestrian Zone Ordinance
- Dry-Sand Buffer Zone Ordinance

1. The Beach Management Ordinance

The proposed beach management ordinance applied to beach concessionaires and vendors. This ordinance restricted the ability of beach vendors to set up umbrellas and chairs (known as "beach set-ups") close to the water's edge to avoid blocking the public's lateral access along the beaches.[62] The Destin City Council unanimously passed the beach management ordinance, prohibiting rental "beach set-ups" within twenty feet of the water, applying only east of Henderson Beach State Park where the beaches are narrower.[63]

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60. See John Ledbetter, Sand Sitters Not Cited, DESTIN LOG, May 2000, available at http://www.destin.com/ news/archives/may00/sandsitt/shtml (last visited Sept. 21, 2002) (reporting how non-beachfront Destin landowners announced that the "sand belongs to all" and protested with a sit-down on the beach to frustrate beachfront property owners' efforts to keep the public off the dry-sand area of the beach); John Ledbetter, Beach Ordinances to Bypass Planning Commission, DESTIN LOG, May 2000, available at http://www.destin.com/news/archives/may00/beachord.shtml (last visited Sept. 21, 2002) (recognizing that "businesses [will] feel a backlash from customers who are intimidated to use the beach"); Karen Spencer, Tourist Finds Beach Rules Confusing, DESTIN LOG, July 2000, available at http://www.destin.com/news/archives/ jul00/touristf.shtml (last visited Sept. 21, 2002). This article involved an incident on the beach where a father-and-son outing turned into a dispute. The tourist "placed his chair under an umbrella rented out by the adjoining resort and went out to swim with his son . . . . [He] sat on [his] chair under one of their umbrellas drinking a diet Mountain Dew." Id. The Silver Dunes property manager asked him to move, telling him that he couldn't use his private beach equipment on Silver Dunes beach property. Id. The property manager subsequently called the police. Id.

61. See Spain, supra note 54.

62. See John Ledbetter, Public Beach Access to be Discussed, DESTIN LOG, May 2000, available at http://www.destin.com/news/archives/may00/publicbe.shtml (last visited Sept. 21, 2002).

63. DESTIN, FLA., ORDINANCE NO. 350 (June 19, 2000). See John Ledbetter, Sheriff's Policy Satisfies Council on Beach Issue, DESTIN LOG, June 2000, available at http://www.destin.com/news/archives/ jun00/sheriffs.shtml (last visited Sept. 21, 2002).

2. The Pedestrian Zone Ordinance

The proposed pedestrian zone ordinance, proposed by beachfront landowners as a compromise, established a ten-foot area for pedestrian lateral access along the beach, additionally prohibiting beach set-ups in the pedestrian zone. This ordinance was to be implemented by the landowners voluntarily granting easements to the City of Destin.[64] However, after public comments that the ordinance could effect a taking, the ordinance was superfluous, and the ordinance could create enforcement problems, the proposed ordinance failed to pass for lack of legislative sponsorship.[65]

3. The Dry Sand Buffer Zone Ordinance

The proposed dry-sand buffer zone ordinance was based on Florida's doctrine of customary usage announced in Tona-Rama[66] and proposed by the Destin City Land Use Attorney.[67] This ordinance carved out a twenty-five foot buffer zone from the most seaward permanent structure on the private beach while leaving the rest open for public use.[68] Attempts were made by the Destin City

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64. Ledbetter, supra note 63 (quoting Tom Becnel, a beachfront property owner and developer, who described the ordinance as a gift: "The landowners are offering a gift to the city. ... When you're offered a gift you either take it or reject it. You don't negotiate over it.").

65. DESTIN, FLA. PROPOSED ORDINANCE NO. 351 (June 19, 2000) (rejected).

66. City of Daytona Beach v. Tona-Roma, Inc., 294 So. 2d 73 (Fla. 1974).

67. David Theriaque, former Destin City Land Use Attorney.

68. Ledbetter, supra note 62; Spain, supra note 54, at 191 (Appendix A: Destin Draft Ordinance). The proposed ordinance, based on the language of customary usage, provided:

> AN ORDINANCE OF THE CITY OF DESTIN PROTECTING THE PUBLIC'S LONG STANDING CUSTOMARY USE OF THE DRY SAND AREAS OF THE BEACHES; PROVIDING FOR A BUFFER AREA AROUND PRIVATE PERMANENT STRUCTURES, PROVIDING FOR PENALTIES FOR VIOLATION OF THIS ORDINANCE; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.
>
> SECTION 1: AUTHORITY.
>
> The authority for the enactment of this Ordinance is Article 1, Section 1.01(b) of the City Charter, and Section 166.021, Florida Statutes.
>
> SECTION 2: FINDINGS OF FACTS.
>
> WHEREAS, the recreational use of the dry sand areas of the City's beaches is a treasured asset of the City which is utilized by the public at large, including residents and visitors to the City; and
>
> WHEREAS, the dry sand areas of the City's beaches are a vital economic asset to the City, Okaloosa County, and the State of Florida;

Land Use Attorney to build a record and collect information concerning the public's customary use of the beach.[69] Specifically, the City sought historical and archaeological information to establish that the beach had been used by the public for "time immemorial."[70] The ordinance received opposition from private beachfront landowners, coupled with threats of litigation from the Southeastern Legal Foundation, Inc. to the Destin City Council that it would fight the City if the ordinance passed.[71] After numerous fact-gathering workshops and public comments voicing concern over this ordinance, the ordinance failed to pass.

B. No Disturbances, No Harm

Instead of opting to pass a pedestrian zone ordinance or a dry sand buffer ordinance to deal with the beach turf wars, the City of Destin decided to leave the issue to the Okaloosa County Sheriff's Office.[72] The Sheriff's Office uses the debris line in the sand as a

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> and
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> WHEREAS, the public at large, including residents and visitors to the City, have utilized the dry sand areas of the City's beaches since time immemorial; and
>
> WHEREAS, the Florida Supreme Court in City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974), has expressly recognized the doctrine of customary use in the state of Florida; and
>
> WHEREAS, the City desires to ensure that the public's long-standing customary use of the dry sand areas of the City's beaches is protected; and
>
> WHEREAS, the City recognizes and acknowledges the rights of private property owners to enjoy and utilize their property; and
>
> WHEREAS, in order to minimize such conflicts, the City desires to establish a twenty-five (25) foot buffer zone around any permanent structure owned by a private entity that is located on, or adjacent to, the dry sand areas of the City's beaches;...

69. Id., John Ledbetter, Now's A Time for Beachgoers to Speak Up, DESTIN LOG, Nov. 2000, available at http://www.destin.com/news/archives/nov99/nowsatim.shtml (last visited Sept. 21, 2002); see also John Ledbetter, Witnesses Theriaque Says He Wants Less Griping, DESTIN LOG, Nov. 2000 available at http://www.destin.com/news/archives/nov99/des-beac.shtml (last visited Nov. 24, 2002).

70. Ledbetter, supra note 63.

71. See Southeastern Legal Foundation at http://southeasternlegal.org. The Southeastern Legal Foundation is a conservative public interest law firm that advocates limited government, individual economic freedom, and free enterprise system. Its mission is to look for cases to engage in litigation and public policy advocacy.

72. Sheriff Cobb, Okaloosa County Sheriff's Department, addressing the Destin City Council during Destin City Council Meeting, June 19, 2000. Since the City of Destin does not have its own municipal police force, it contracts with the Okaloosa County Sheriff's Department for law enforcement services. This issue, however, will have to be revisited if the

surrogate for the mean high water line, allowing the public leeway of ten to fifteen feet landward.[73] If the public beachgoer goes ten to fifteen feet landward of the debris line and is not creating a disturbance or misconduct, he is left alone.[74] However, if the public beachgoer goes ten to fifteen feet landward of the debris line and the private beachfront property owner asks the Sheriff's Office to ask the party to leave, then the deputies will ask the public beachgoer to leave.[75] If the public beachgoer refuses, then he will be given a "Notice to Appear" in court.[76]

The Destin City Council, although interested in finding a compromise for beachfront property owners and the public, was likely worried most about the possible cost of litigation if they were to pass the dry-sand buffer zone ordinance. Small local governments, such as Destin, do not have the financial resources to battle large "public policy" interest groups that have bottomless spending accounts, even if the ordinance is supported by the doctrine of customary use announced in City of Daytona Beach v. Tona-Rama, Inc.[77]

In 2002, the Destin City Mayor and Okaloosa County Sheriff[78] requested an advisory opinion from the Office of the Attorney General for the State of Florida[79] regarding the beach management ordinance, doctrine of customary use, and use of the Sheriff's Office in enforcement.[80] The Attorney General for the State of Florida responded:

Sheriff changes the policy. See Ledbetter, supra note 63. Will Destin be willing to make a stance then?

73. Id.
74. Id.
75. Id.
76. Id.
77. 294 So.2d 73, 75 (Fla. 1974).
78. Craig Barker and Charlie Morris, respectively.
79. Robert A. Butterworth.
80. 2002-38 Fla. Op. Att'y Gen. (June 24, 2002) states the issues as follows:

> "....[w]hether the City of Destin is authorized to apply its beach management ordinance to certain identified dry sand areas of the beach ..., [w]hether the City of Destin's authority to apply the beach management ordinance to the dry sand portion of the beach is dependent on the existence of a customary right of recreational use by the general public as enunciated by the Supreme Court of the State of Florida in City of Daytona Beach v. Tona-Rama, Inc., " [and] " [w]hether a private property owner holding title to certain dry sand areas of the beach falling within the area defined as 'beach' within the beach management ordinance may utilize local law enforcement and enforcement of state trespass laws to curtail or discourage the public's right of customary use to this same dry sand area of the beach? ...

> [ ] The City of Destin may regulate in a reasonable manner the beach within its corporate limits to protect the public health, safety, and welfare. This regulation must have a rational relation to and be reasonably designed to accomplish a purpose necessary for the protection of the public. The city may not exercise its police power in an arbitrary, capricious, or unreasonable manner. Such regulation may be accomplished regardless of the ownership of this area, with the exception of state ownership, and without regard to whether the public has been expressly or impliedly allowed to use that area of the beach by a private property owner who may hold title to the property.
>
> [ ] 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.
>
> [ ] Private property owners who hold title to dry sand areas of the beach falling within the jurisdictional limits of the City of Destin may utilize local law enforcement for purposes of reporting incidents of trespass as they occur.
>
> The city's beach management ordinance[81] does not expressly specify that it be applied only on public land or land on which the public has been expressly granted a right of use and access ... [T]he ordinance as written applies to all areas falling within the definition of "beach," regardless of whether such areas are located on public or private property and regardless of whether the public has been expressly or impliedly allowed to use such areas by a private property owner.[82]

The Attorney General advised that "whether th[e] 'customary right of use' [announced in City of Daytona Beach v. Tona-Rama, Inc.][83]

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81. DESTIN, FLA. ORDINANCE NO. 350 (June 19, 2000).
82. 2002-38 Fla. Op. Att'y Gen. 1-2 (June 24, 2002).
83. 294 So.2d 73 (Fla. 1974).

exists in a particular piece of property is a mixed question of law and fact that must be resolved judicially."[84]

In his advisory opinion, the Attorney General recognized the importance of the common-law doctrine of customary use and opined that it may be relied on for ad hoc determinations of the degree of customary and ancient use of the beach.[85] Finally, the Attorney General stated that:

> private property owners who hold title to dry sand areas of the beach falling within the jurisdictional limits of the City of Destin may utilize local law enforcement for purposes of reporting incidents of trespass upon their property on a case-by-case basis .... However, local law enforcement officers may not be pre-authorized to act as agents of private landowners for the purpose of communicating orders to leave private property to alleged trespasses ...[86]

It is still to be determined what this means for the preservation of the public's right of beach access. By keeping the dry-sand area buffer zone ordinance off the "ordinance books," the City appeases the private beachfront property owners. Additionally, by relaxing the enforcement of its trespass law using local law enforcement on a case-by-case basis, the City calms the public's fear of legal action from frolicking too far landward of the "debris" line. Although at this time Destin has declined an invitation into the litigious side of determining the scope of the doctrine of customary use, the City of Destin, as a test case, is the second element that creates "the perfect storm" for Florida to test the strength of its policy of preserving public beach access.

VII. THE EFFECT OF PINECREST LAKES, INC. V. SHIDEL[87] ON THE PRESERVATION OF PUBLIC BEACH ACCESS

Another prominent issue in the battle to preserve public beach access is that local governments have approved development orders that are inconsistent with its comprehensive plan policy on preserving public access to the beaches. In essence, these local governments have allowed developers to develop over public easements that are public beach accessways.[88] A recent Florida

84. 002-38 Fla. Op. Att'y Gen. 4 (June 24, 2002).
85. Id.
86. Id. (emphasis added).
87. 795 So.2d 191 (Fla. 4th DCA 2001), rev. denied, 821 So.2d 300 (Fla. 2002).
88. Issuing development orders that allow development over public beach accessways is in

decision that has developers acting more cautiously[89] may be a tool that proponents of public beach access may be able to use.

In Pinecrest Lakes, Inc. v. Shidel,[90] property owners challenged the Martin County[91] Board's approval of a $3.3 million apartment development on grounds that it was inconsistent with the county's comprehensive plan.[92] The trial court reviewed the record created before the County Commission using a "substantial competent evidence" standard of review and found the development order consistent with the county's comprehensive plan.[93] However, on appeal the Fourth District Court of Appeal remanded the case to the trial court for de novo review to determine whether the development order was consistent with the comprehensive plan and if not, to fashion an appropriate remedy.[94] Using de novo review, the trial court found that the development order was inconsistent with the county's comprehensive plan and the developer had acted in bad faith by continuing construction during the appeal.[95] The court ordered an injunction on further development, and ordered the removal of the apartment buildings.[96]

On it's second appeal, the Fourth District Court of Appeal affirmed the trial court's finding of inconsistency and affirmed the removal of the apartment buildings that were in violation of the comprehensive plan.[97] The court held that the complete demolition and removal of a development was an appropriate remedy where the development was inconsistent with the county's comprehensive

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violation of the Florida Comprehensive Plan, which provides in its coastal and marine resources element the assurance of the public's right to reasonable access to the beaches. See FLA. STAT. § 187.201(8)(b)(2) (2002). Thus, development orders in violation of this policy would be inconsistent with the policy of the comprehensive plan. Additionally, through the Local Government Comprehensive Planning and Land Development Regulation Act, Florida requires that all development orders and land development regulations be consistent with the local comprehensive plan, which must be consistent with the state comprehensive plan. See generally FLA. STAT. § 163.3194(3)(a) (2002). Finally, the Florida Coastal Protection Act requires developers to provide comparable alternative accessways if the development interferes with the public's right of access established through "private lands to lands seaward of the mean high tide or water line by prescription, prescriptive easement, or any other legal means ...." See FLA. STAT. § 161.55(5) (2002) (emphasis added to illustrate that 'any other legal means' may include rights established by the doctrine of customary use).

89. Ron Word, High Court Rules Developers Must Destroy Apartments, TALLAHASSEE DEM., June 7, 2002, at 8B.

90. 795 So.2d 191 (Fla. 4th DCA 2001).

91. Martin County, Florida.

92. Id.

93. Pinecrest Lakes, 795 So.2d at 194-95.

94. Id.

95. Id.

96. Id.

97. Id. See generally John Cardillo, Recent Developments, 17 J. LAND USE & ENVTL. L. 183, 192-96 (2001) (summarizing recent developments in Florida environmental and land use decisions).

plan.[98] The court declined to use the alternative form of relief of compensating the aggrieved party for any diminution in property value.[99] In May 2002, the Florida Supreme Court denied review.[100] Finally, on September 5, 2002, the demolition of the $3.3 million luxury apartment complex was commenced.[101] "It is the first time in Florida that a developer has been forced to raze a project already built."[102]

The plaintiff in Pinecrest Lakes was a local resident who alleged that the development order was inconsistent with the county's comprehensive plan.[103] Florida creates standing for any party adversely affected by a development order that changes the density or intensity of a parcel of property inconsistent with the local comprehensive plan.[104] Thus, local residents and general members of the public have standing to maintain an action against a local government on grounds that a development order is inconsistent with the comprehensive plan.

The effect of Pinecrest Lakes on the preservation of public beach access is that members of the public may be able to enjoin development over public accessways based on inconsistency with the local comprehensive plan.[105] Additionally, if there is continuous construction during an appeal of the local government's decision — indicia of bad faith — then a court may be willing to order the demolition and removal of the development.[106] If the State of Florida and local governments are serious about preserving the public's beach access, this may be the appropriate remedy for preservation. The courts, as Pinecrest Lakes has indicated, are already prepared to use this tool to enforce the comprehensive plan.[107] Pinecrest Lakes and the remedy it offers is the third

98. Pinecrest Lakes, 795 So.2d at 207-08.
99. Id.
100. Pinecrest Lakes, Inc. v. Shidel, 821 So.2d 300 (Fla. 2002).
101. Razing of Apartments Makes History in Florida, ST. PETE. TIMES, Sept. 7, 2002, at 5B.
102. Id.
103. Id.
104. FLA. STAT. § 163.3215(3)(2002) states that:

> [a]ny aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to challenge any decision of such local government granting ... an application for ... a development order ..., which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan adopted under this part ... The de novo action must be filed no later than 30 days following rendition of a development order or other written decision ...

105. 795 So.2d 191 (Fla. 4th D.C.A. 2001), rev. denied, 821 So.2d 300 (Fla. 2002).
106. See id.
107. Id.

element that creates "the perfect storm" for Florida to test the strength of its policy of preserving public beach access.

VIII. CONSISTENCY AND ENFORCEMENT OF COMPREHENSIVE PLANS

Florida is one of the most aggressive states in requiring comprehensive plans and enforcing the consistency doctrine. Florida's Local Government Comprehensive Planning and Land Development Regulation Act requires the adoption of a local comprehensive plan with mandatory and discretionary elements.[108] Two of the mandatory elements of a local government comprehensive plan are a recreational and open space element and a coastal management element for coastal governments.[109] The statute specifically provides for public access to the beaches as follows:

> (6) [t]he comprehensive plan shall include the following elements:
>
> (e) A recreation and open space element indicating a comprehensive system of public and private sites for recreation, including, but not limited to, natural reservations, parks and playgrounds, parkways, beaches and public access to beaches, open spaces, and other recreational facilities.[110]

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108. FLA. STAT §§ 163.3177, 163.3194 (2002).

109. FLA. STAT §§ 163.3177(6)(e), 163.3177(6)(g) (2002) (providing a coastal management element). In addition, Florida's coastal construction statute protects perpendicular access and access to the sand beach:

> PUBLIC ACCESS — Where the public has established an accessway through private lands to lands seaward of the mean high tide or high 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 developer shall have the right to improve, consolidate, or relocate such public accessways so long as the accessways provided by the developer are:
>
> a) Of substantially similar quality and convenience to the public;
>
> b) Approved by the local government;
>
> c) Approved by the department whenever improvements are involved seaward of the coastal construction line; and
>
> d) Consistent with the coastal management element of the local government comprehensive plan ...

FLA. STAT. § 161.55(5) (2002).

110. FLA. STAT. § 163.3177(6)(e) (2002) (emphasis added).

The City of Destin's Comprehensive Plan originally provided incentives to encourage public beach access.[111] However, recent amendments to Destin's comprehensive plan have not been as consistent with Florida's comprehensive plan policy in preserving public beach access as the subsequently drafted comprehensive plan.[112] The amendments eliminate the requirement that the city provide public beach access facilities, and instead require only incentives to encourage public beach access.[113] Regardless of the proposed amendments, the city's comprehensive plan must be consistent with the state comprehensive plan and state law, which does provide for reasonable public access to beaches.[114] Florida's aggressive stance on consistency and enforcement of comprehensive plans is the fourth element that creates "the perfect storm" for Florida to test the strength of its policy of preserving public beach access.

IX. PROBLEMS ASSOCIATED WITH PUBLIC BEACH ACCESS

A. Overcrowding and Adjacent Landowners

One major problem with limited public beach access points is that of overcrowding. If the access points are few and far between then the public has to crowd onto one or two beaches to bathe or swim. Of course, the public can access the beach at those points and then walk down the beach to spread out, but realistically, the beachgoer is more likely to walk approximately 500 feet in the hot sun before she plops down on her towel and goes for a swim. This overcrowding can result in the beachfront landowner next to these public beach access points bearing the brunt of the crowd. It would be more fair to spread out these beach access points throughout the municipality or county, so as to share the crowd as this would cut down on the crowding at any one beach.

In Destin, there are eleven recorded public beach access points.[115] On the east side of Destin, there are seven beach access

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111. The original comprehensive plan read: "The City shall require public beach access to the extent lawful and promote additional beach access by adopting incentive provisions where mandated beach access is unlawful." DESTIN, FLA. COMPREHENSIVE PLAN, POLICY 1-1.3.3 (June 9, 2002), available at http://www.cityofdestin.com (last visited November 1, 2002) (emphasis added). The amendments to the comprehensive plan read: "Incentives shall be developed to encourage provision of public beach access where possible." DESTIN, FLA. COMPREHENSIVE PLAN, POLICY 1-1.3.3 (June 9, 2002), available at http://www.cityofdestin.com (last visited January 29, 2003) (emphasis added).

112. Id.

113. Id.

114. Florida provides in the Comprehensive Plan a state policy to "[e]nsure the public's right to reasonable access to beaches." FLA. STAT. § 187.201(8)(b)(2) (2002).

115. From west Destin to east Destin respectively, the non-fee charging beach access points

points fairly close to one another, all within a few blocks.[116] However, on the west side of Destin, there are only four beach access points.[117] Two of the beach access points on Restaurant Row are right next to each other, while the other two are clear across town at the end of an isle.[118] It is not clear whether there are additional public beach access points, obtained by the public through prescription, prescriptive easement, or other legal means, such as customary use, that have not been recorded and that may fall in the large area of land between these four access points.

B. Locating Public Beach Access Points

"[M]ost [public beach] accesses are so small and so inadequately designated 'you have to be an Eagle Scout to find them[.]'... Trying to locate public accesses is frustrating and time consuming for those not familiar with the area ..."[119] If people cannot find the beaches, they certainly do not have reasonable access to them.

> Finding exactly where all these [public beach access] points are located can be a difficult challenge for those who want to spend the day at the beach. Many public beach access ways are underused because no one knows they exist. In 1995, a public access study found that only 35 percent of access points on publicly owned lands are adequately marked. To the beach goer, this statistic translates into restricted access to a public resource.[120]

The Florida Department of Environmental Protection is the state agency responsible for implementing the Florida Coastal Management Program that ensures Florida's coast is available to the public by offering uniform beach access signs free of charge to

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are: Norriego Point, Gulf Shore Drive, Scenic Highway 98 at Restaurant Row, June White Decker Park, Shirah St., Hutchinson St., Crystal Beach Drive, Barracuda St., Pompano St., and James Lee Park. Additionally, there is a state park that charges a fee for entrance, the Henderson Beach State Recreation Area. ENG'G DEP'T, CITY OF DESTIN, CITY OF DESTIN STREET MAP, available at http://www.cityofdestin.com (last visited Nov. 9, 2002).

116. Id.

117. Id.

118. Id.

119. Karen Spencer, Destin Resident Asks City For Better Public Access, DESTIN LOG, July 2000, available at http://www.destin.com/news/archives/jul00/destinre.shtml (last visited November 24, 2002).

120. See BEACH ACCESS SIGNS, supra note 2.

local governments.[121] Although the number of access signs available each year may be restricted by the availability of annual financial resources, local governments can apply to receive beach access signs that will help steer the public to public beach access points.

C. Parking

Parking has proved to be problematic in preserving reasonable access to public beaches.[122] In addition to problems associated with locating the beach via public beach access signs, once members of the public find the access point, they will have to be able to park. If there is no parking, then there is a restriction on reasonable public beach access. Local governments are facing problems trying to provide adequate parking. In places such as Daytona Beach, Florida, it has become a necessity for beachgoers to park on the beach.[123] In City of Daytona Beach Shores v. State of Florida, the Florida Supreme Court was faced with issues concerning the validity of beach "user fees" for vehicle entry onto the beach.[124] The court stated that charging users a reasonable access fee for cars was permissible, and that since "little other parking is available to the public, prohibiting motor vehicle access to the beaches would deny beach use to many and effectively restrict their use to beach residents."[125]

Parking on the beach is an extreme measure to correct the lack of parking and, while vehicular traffic is now prohibited on coastal beaches,[126] local governments are still facing the problem of providing the public with reasonable parking access to the beach. Recently in Destin, the City Council has made efforts to provide more adequate parking by adding additional spaces and paving crushed-shell parking lots.[127] This will help indicate to the public that it is not just a parking lot, but it is parking for a public beach

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121. Id.

122. See Spencer, supra note 119.

123. See City of Daytona Beach Shores v. State of Florida, 483 So.2d 405 (Fla. 1985).

124. Id. at 406.

125. Id. at 408.

126. FLA. STAT. § 161.58 (2002) (providing that vehicular traffic is prohibited except where local governments have authorized it by at least three-fifths vote prior to 1985 and determined by 1989 that less than 50% of peak user demand for off-beach parking is available).

127. See Fraser Sherman, Beach Access Upgrade Inches Closer to Reality, DESTIN LOG, May 2002, available at http://www.destin.com/news/archives/may02/020503c.shtml (last visited Sept. 22, 2002); Fraser Sherman, Norriego Point Parking Lot Gets Paved, DESTIN LOG, Oct. 2001, available at http://www.destin.com/news/archives/ oct01/norriego.shtml (last visited Sept. 22, 2002). See generally Fraser Sherman, Beach Access Sites to be Fixed Up, DESTIN LOG, April 2001, available at http://www. destin.com/news/archives/apr01/beachacc.shtml (last visited Sept. 21, 2002); Spencer, supra note 119.

accessway. Although the Destin City Council is making efforts to add additional parking spaces, the Okaloosa County's Tourist Development Council (TDC) will likely only add one or two more spaces. As the crowds in Destin grow larger with every summer, these few extra spaces may not provide any help in alleviating the lack of parking.

Naples, Florida, provides a parking scheme that may be more amenable to smaller coastal governments. The City of Naples uses parking meters and parking permits for local residents to solve its parking problems. Residents who own property within Collier County or who register their vehicles in Collier County may receive a permit[128] to park at all City of Naples beaches free of charge.[129] Visitors who are lodging within the city limits may purchase a temporary parking permit and enjoy the same privileges as other permit holders.[130] Visitors who are not lodging within the city limits may pay and park at the meters provided at city beaches and at beach-ends at city streets.[131]

D. Blocked Accessways

As discussed earlier in this Comment, there is a problem when public beach access is blocked, whether it involves easements blocked by approved development or by individual beachfront residents, or whether it involves beach concessionaires and vendors blocking lateral access. This problem can arise when developers grant local governments an easement for public access and then subsequently build over that accessway. If local governments do not act as a watchdog over these developments, the limited public beach access points can disappear. In addition to developers, individual beachfront residents may block accessways with chains, fences, or pilings. Local governments must ensure these platted public beach access easements are preserved; in the case of developers blocking them by building over them, local governments must require alternate access or compensation from the developers to acquire other access or enhance existing access points.

In addition to developers and individual beachfront property owners, concessionaires and vendors block public beach access when beach set-ups are too close to the water's edge, impeding the public's lateral beach access. Local governments can enact ordinances that

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128. The permit is a beach-parking sticker that is affixed to the bumper of the vehicle. Additionally, this permit allows people to park at meters, free of charge.

129. CITY OF NAPLES, FLORIDA, BEACH PERMITS, available at http://www.naplesgov.com/questions/beach/ beach.htm (last visited Nov. 11, 2002).

130. Id. (noting that such temporary permits last only one week and cost ten dollars).

131. Id.

restrict the ability of these vendors to block access below the mean high tide line, or debris line. For example, the City Council in Destin passed a beach management ordinance that prohibited beach vendors from putting out their beach set-ups within 20 feet of the water's edge.[132]

X. CONCLUSION

Disputes over public beach access will continue to prevail until the Florida Supreme Court revisits the doctrine of customary use. This Comment has presented four individual elements in Florida's recent history that have created "the perfect storm" for Florida to test the strength of its policy on preserving public beach access. Tona-Roma with its announcement of Florida's doctrine of customary use, together with Destin as the perfect test case, Pinecrest Lakes and the remedy it offers, and Florida's aggressive stance on the consistency and enforcement of comprehensive plans all create the perfect environment for taking the doctrine of customary use back to the Florida courts. After all, "bathers have the 'right of way' to the use of the beach, not only for access to and from the water, but for reclining on the beach near the water's edge for rest and recreation between their dips in the surf ...."[133] It is about time for Florida courts to dip their judicial toes back into the rough surf.

132. DESTIN, FLA., ORDINANCE NO. 350 (June 19, 2000). See John Ledbetter, Sheriff's Policy Satisfies Council on Beach Issue, DESTIN LOG, June 2000, available at http://www.destin.com/news/archives/jun00/sheriffs.shtml (last visited Sept. 21, 2002).

133. White v. Hughes, 139 Fla. 54, 71; 130 So. 446, 453 (Fla. 1939).