The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Community Affairs

BILL:	SB 1622
INTRODUCER:	Senator Trumbull and others
SUBJECT:	Recreational Customary use of Beaches
DATE:	March 28, 2025
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Collazo	Cibula	JU	**Favorable**
2.	Hackett	Fleming	CA	**Pre-meeting**
3.			RC	

I. Summary:

SB 1622 repeals s. 163.035, F.S., which establishes procedures that a governmental entity must follow when attempting to establish a "recreational customary use of property." The customary use doctrine gives the public a right to use a portion of the dry sand area of a privately-owned beach.

The statutory procedures include:

- A public hearing to adopt a formal notice of intent to affected property owners, which notice alleges the existence of a recreational customary use on their properties.
- A judicial proceeding to consider whether the alleged customary use has been ancient, reasonable, without interruption, and free from dispute.

Repeal of the statute means a return to how customary use rights were determined prior to enactment of the statute:

- A governmental entity may declare the existence of a customary use and adopt a local customary use ordinance without following the procedures in s. 163.035, F.S.
- Property owners must file a lawsuit challenging the ordinance and demonstrate in court that the public does not enjoy customary use rights over their privately-owned beaches.
- Courts will apply the common law doctrine of customary use when ascertaining, on a case-by-case basis, whether the public enjoys customary use rights over privately-owned beaches.

The bill takes effect upon becoming a law.

II. Present Situation:

Customary Use

Establishment of the Customary Use Doctrine

In Florida, the public enjoys the right to access shorelines and beaches that are located below what is called the "mean high tide line." The State Constitution provides that "title to the 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."[1] This is known as the common law public trust doctrine.

However, the beaches of the state also include land beyond what is described in the public trust doctrine. The dry sand beach located *above* the mean high water line may be owned privately, as recognized by statute.[2] In fact, the part of the beach falling landward of the mean high-water line is usually owned by the owner of the adjacent lot. The only publicly-owned part of the beach is that part falling between the mean high and low water lines, which is called the foreshore region.[3]

In the subsection of the State Comprehensive Plan addressing coastal and marine resources, the Legislature seeks to "[e]nsure the public's right to reasonable access to beaches."[4] Like other lands, the privately-owned portion of the beach may be subject to explicit or implied easements, limitations based on traditional rights of use, or common law prohibitions considered nuisances.[5] Courts have also recognized the public's ability to access and use the dry sand areas of privately-owned beaches for recreational purposes.

In 1974, the Florida Supreme Court established what has become known as the customary use doctrine in Florida in *City of Daytona Beach v. Tona-Rama, Inc.*[6] In *Tona-Rama*, the Court concluded that "[i]f the recreational use of the sandy area adjacent to the 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." The Court also recognized, however, that "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."[7]

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[1] FLA. CONST. art X, s. 11.
[2] *See* s. 177.28, F.S. (providing, with emphasis added, that the "[m]ean high-water line along the shores of land immediately bordering on navigable waters is recognized and declared to be the boundary between the foreshore owned by the state in its sovereign capacity *and upland subject to private ownership*").
[3] Erika Kranz, *Sand for the People: The Continuing Controversy Over Public Access to Florida's Beaches,* 83 FLA. BAR. J. 10, 11 (Jun. 2009), available at https://www.floridabar.org/the-florida-bar-journal/sand-for-the-peoplethe-continuing-controversy-over-public-access-to-floridas-beaches/ (last visited Mar. 26, 2025)
[4] Section 187.201(8)(b)2., F.S.
[5] *Id.*
[6] 294 So. 2d 73 (1974).
[7] *City of Daytona Beach v. Tona-Rama, Inc*., 294 So. 2d 73, 78 (1974).

In 2007, the Fifth District Court of Appeal issued its opinion in *Trepanier v. County of Volusia*,[8] which qualified the customary use doctrine as articulated by the Florida Supreme Court in *Tona-Rama.* In *Trepanier,* the appellate court said:

> 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.[9]

The appellate court also held that a determination of customary use "requires the courts to ascertain *in each case* the degree of customary and ancient use the beach has been subject to …."[10]

Regulation of Beaches by Local Governments

The Florida Attorney General issued an opinion in 2002 addressing the regulation of the dry sand portion of beaches. The City of Destin adopted a beach management ordinance to provide for the regulation of public use and conduct on the beach. The Sheriff of Okaloosa County and the city mayor inquired about the regulation.[11]

The Attorney General issued three findings in its opinion:

- The city may regulate the beach in a reasonable manner 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 may use local law enforcement agencies for purposes of reporting incidents of trespass as they occur.[12]

[8] 965 So. 2d 276 (Fla. 5th DCA 2007).
[9] *Id*. at 289.
[10] *Id*. at 288 (quoting, with emphasis added, *Reynolds v. County of Volusia*, 659 So. 2d 1186, 1190-91 (Fla. 5th DCA 1995)).
[11] Op. Att'y Gen. Fla. 2002-38 (2002).
[12] *Id*.

In 2016, Walton County enacted an ordinance (the "Customary Use Ordinance") which declared that "[t]he public's long-standing customary use of the dry sand areas of all of the beaches in the County for recreational purposes is hereby protected."[13]

Except for the buffer zone described below, the ordinance prohibited any individual, group, or entity from "imped[ing] or interfer[ing] with the right of the public at large, including the residents and visitors of the County, [from] utiliz[ing] the dry sand areas of the beach that are owned by private entities" for certain specified uses, including:

- Traversing the beach.
- Sitting on the sand, in a beach chair, or on a beach towel or blanket.
- Using a beach umbrella that is 7 feet or less in diameter.
- Sunbathing.
- Picknicking.
- Fishing.
- Swimming or surfing off the beach.
- Staging surfing or fishing equipment.
- Building sand creations.[14]

However, the ordinance prohibited the public at large, including the residents and visitors of the county, from using a 15-foot buffer zone located "seaward from the toe of the dune or from any permanent habitable structure owned by a private entity that is located on, or adjacent to, the dry sand areas of the beach, whichever is more seaward, except as necessary to utilize an existing or future public beach access point for ingress and egress to the beach."[15] It also prohibited the use of tobacco, possession of animals, or erection or use of tents by members of the public on the privately-owned dry sand areas of the beach.[16]

The county's Customary Use Ordinance was not popular with beachfront homeowners because it interfered with their "ability to keep their private beachfront property just that, private."[17] Lionel and Tammy Alford, owners of beachfront property in the county, sued the county in federal district court seeking, among other things, a declaration that the ordinance was "*void ab initio* on grounds that customary use is a common law doctrine reserved to the courts for determination on a case-by-case basis, and therefore, the County exceeded its authority and acted *ultra vires* by legislating customary use on a county-wide basis."[18]

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[13] Walton County, Fla., Ord. No. 2017-10, ss. 1, 4 (adopted Mar. 28, 2017) (amending earlier Ord. No. 2016-23), available at https://waltonclerk.com/vertical/sites/%7BA6BED226-E1BB-4A16-9632-BB8E6515F4E0%7D/uploads/2017-10.pdf; *see also* Walton County, Fla., Ord. No. 2016-23, s. 1 (adopted Oct. 25, 2016) (the original customary use ordinance), available at https://waltonclerk.com/vertical/sites/%7BA6BED226-E1BB-4A16-9632-BB8E6515F4E0%7D/uploads/2016-23.pdf.

[14] *Id.* The ordinance defined the "dry sand area of the beach" as "the zone of unconsolidated material that extends landward from the mean high-water line to the place where there is marked change in material or physiographic form, or to the line of permanent vegetation, usually the effective limit of storm waves, whichever is more seaward." Ord. No. 2017-10, s. 2, *supra* note 13.

[15] Ord. No. 2017-10, s. 3, *supra* note 13.

[16] Ord. No. 2017-10, s. 5, *supra* note 13.

[17] Amelia Ulmer, *Ancient and Reasonable: The Customary Use Doctrine and Its Applicability to Private Beaches in Florida*, 36 J. LAND USE & ENVTL. L. 145, 159 (2020) [hereinafter "*Ancient and Reasonable*"].

[18] *Alford, et al., v. Walton County*, 2017 WL 8785115, at **1-2 (N.D. Fla. 2017).

The district court sided with the county and upheld the Customary Use Ordinance. Based on its analysis of *Tona-Rama* and *Trepanier*, the district court concluded that the county did not act outside its authority in adopting the ordinance.[19] The district court did note, however, that "property owners have a right under Florida law to *de novo* as-applied judicial review and a determination of the existence of customary use rights."[20] The decision was appealed to the U.S. Eleventh Circuit Court of Appeals, which directed, without explanation, that the district court vacate the judgment, apparently in response to arguments that the legislative invalidation of the ordinance by HB 631 (2018 Reg. Session) mooted the claim.[21]

HB 631 (2018 Reg. Session)

While the Alfords' case was pending in the U.S. Eleventh Circuit Court of Appeals, the Legislature enacted a new law, HB 631, which it codified as s. 163.035, F.S., entitled the "establishment of recreational customary use." The statute establishes a process by which a governmental entity may seek a judicial determination of the recreational customary use of private beach property.[22]

Under the statute, a governmental entity[23] may not adopt or keep in effect an ordinance or rule that is based upon the customary use of any portion of a beach above the mean high water line, unless the ordinance or rule is based upon a judicial declaration affirming recreational customary use of the beach.[24] The governmental entity may seek a judicial determination of a recreational customary use of private beach property by following the process outlined in the statute.[25]

First, the governmental entity must adopt, at a public hearing, a formal notice of intent to affirm the existence of a recreational customary use on private property. The notice must specifically identify:

- The parcels of property, or the specific portions of the property, for which the customary use affirmation is sought.
- The detailed, specific, and individual use or uses of the parcels to which the customary use affirmation is sought.
- Each source of evidence the governmental entity will rely upon to prove that the recreational customary use has been ancient, reasonable, without interruption, and free from dispute.[26]

The governmental entity must provide notice of the public hearing to the owner of each parcel of property at the address recorded in the county property appraiser's records. The notice must be:

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[19] *Id*. at *16.
[20] *Id*.
[21] *Alford v. Walton County*, 0:17-prici-15741 (11th Cir. June 27, 2018) (reflecting on the docket that the Court granted appellants' motion to vacate the district court's order and judgment concerning customary use ordinance claim); Alyson Flournoy et al., *Recreational Rights to the Dry Sand Beach in Florida: Property, Custom and Controversy,* 25 OCEAN & COASTAL L.J. 1, 33 fn. 110 (2020).
[22] Chapter 2018-94, s. 10, Laws of Fla. (enacting CS/HB 631 (2018 Reg. Session)).
[23] The term "governmental entity" includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. Section 163.035(1), F.S.
[24] Section 163.035(2), F.S.
[25] Section 163.035(3), F.S.
[26] Section 163.035(3)(a), F.S.

- Provided at least 30 days before the public meeting by certified mail with return receipt requested.
- Published in a newspaper of general circulation in the area where the parcels of property are located.
- Posted on the governmental entity's website.[27]

Second, within 60 days after adopting the notice of intent, the governmental entity must file a Complaint for Declaration of Recreational Customary Use with the circuit court in the county where the subject property is located. This cause of action is similar to a declaratory judgment.[28] The governmental entity must provide notice of filing the complaint to the owner of each parcel as required above for the notice of intent. The notice must allow the owner to intervene in the proceeding within 45 days after receiving the notice. The governmental entity must also provide verification that the notice has been served to the property owners so that the court may establish a schedule for the proceedings.[29]

Proceedings under the statute are conducted *de novo,* which means anew. The court must determine whether the evidence presented by the governmental entity demonstrates that the recreational customary use or uses identified in the notice of intent have been ancient, reasonable, without interruption, and free from dispute. No presumption exists regarding the existence of a recreational customary use of the property in question. The governmental entity bears the burden of proof to demonstrate that the recreational customary use exists. A parcel owner who is subject to the complaint may intervene in the proceeding as a party defendant in the proceeding.[30]

These customary use provisions do not apply to a governmental entity having an ordinance or rule that was adopted and in effect on or before January 1, 2016. Additionally, the provisions do not deprive a governmental entity from raising customary use as an affirmative defense in any proceeding that challenges an ordinance or rule that was adopted before July 1, 2018.[31]

Executive Order 18-202

Governor Rick Scott signed Executive Order 18-202 (Jul. 12, 2018) only about two weeks after HB 631 took effect.[32] In his executive order, Governor Scott directed state agencies to not adopt any rule restricting public access to any state beach having an established recreational customary use.[33] He also directed the Secretary of the Department of Environmental Protection and the Director of the Florida State Parks System to engage in "appropriate efforts" to ensure access to Florida's public beaches.[34]

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[27] *Id.*
[28] A declaratory judgment is a binding adjudication in which a court establishes the rights of the parties without requiring enforcement of its decision. It is generally used to resolve legal uncertainties for the parties. BLACK'S LAW DICTIONARY (12th ed. 2024).
[29] Section 163.035(3)(b)1., F.S.
[30] Section 163.035(3)(b)2., F.S.
[31] Section 163.035(4), F.S.
[32] Fla. Exec. Order No. 18-202 (Jul. 12, 2018), available at https://clarkpartington.com/wp-content/uploads/2024/04/EO-18-202.pdf.
[33] Fla. Exec. Order No. 18-202, *supra* note 32, s. 1.
[34] Fla. Exec. Order No. 18-202, *supra* note 32, s. 2.

To assist with implementing the executive order, Governor Scott also directed the Secretary and Director to:

- Establish an online reporting tool for members of the public to report any violations of their right to public beach access; identify and allocate staff to coordinate with the public in reviewing complaints; and refer any such complaints to appropriate local authorities.
- Submit a report to the Legislature, on or before December 31, 2018, regarding comments received through the public hotline.
- Serve as a liaison between local government entities and members of the public regarding the appropriate implementation of HB 631 by county and municipal governments.[35]

The Governor also urged all governmental entities not headed by an official serving at the pleasure of the Governor, including county and municipal governments, to refrain from adopting any ordinance or rule that would restrict or eliminate access to public beaches.[36]

Following the executive order, not much changed for local governments. They still had to follow the procedures in s. 163.035, F.S., to enact new customary use ordinances. And now they were "urged" to not further restrict beach access.[37]

Walton County Lawsuit

In 2018, consistent with the procedures outlined in s. 163.035, F.S., Walton County filed a complaint in circuit court seeking a declaration affirming the existence of customary uses on 1,194 private properties in the county.[38] Specifically, the complaint sought a judgment declaring that:

- The uses identified in the county's 2017 Customary Use Ordinance were recreational customary uses on each of the specific parcels listed in the complaint.
- The recreational customary uses identified in the formal notice of intent were ancient, reasonable, without interruption, and free from dispute.[39]

Litigating the case took almost 5 years. It was set to proceed with a 7-week bench trial beginning on May 22, 2023, but never did. Ultimately, the property owners who were represented by counsel and objected to the establishment of customary uses on their privately-owned beaches either:

- Obtained a dismissal with prejudice and a finding that customary uses do not exist on their beaches; or
- Negotiated a settlement agreement allowing the public a 20-foot transitory area for walking and sitting, and a finding that customary uses do not exist on their beaches.[40]

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[35] *Id.*
[36] Fla. Exec. Order No. 18-202, *supra* note 32, s. 3.
[37] *Ancient and Reasonable, supra* note 17, at 161.
[38] *In re: Affirming Existence of Recreational Customary Use on 1,194 Private Properties Located in Walton County, Florida,* Case No. 2018-CA-000547 (Fla. 1st Cir. Ct. Dec. 11, 2018) (Complaint for Declaration of Recreational Customary Use) available at http://publicfiles.surfrider.org/Legal/Complaint_for_Declaration_of_Recreational_Customary_Use_12-11-18.pdf [hereinafter "Section 163.035, F.S., Complaint"]; *see also* s. 163.035(3)(b)1., F.S. (requiring governmental entities to file a "Complaint for Declaration of Recreational Customary Use").
[39] Section 163.035, F.S., Complaint, *supra* note 38, at 44-45.
[40] *In re: Affirming Existence of Recreational Customary Use on 1,194 Private Properties Located in Walton County, Florida,* Case No. 2018-CA-000547 (Fla. 1st Cir. Ct. Feb. 14, 2024) (Final Summary Judgment on Remaining Parcels attaching

Out of the initial 1,194 properties at issue, the court only had to decide whether the public had customary use rights over 95 unrepresented properties that never objected to the litigation. Because there had been no opposition to the evidence presented by the county, the court effectively had no choice but to conclude that the public had established customary use rights over the 95 properties.[41]

III. Effect of Proposed Changes:

The bill repeals s. 163.035, F.S., which establishes procedures that a governmental entity must follow when attempting to establish a "recreational customary use of property."

As detailed above, the statutory procedures include:

- A public hearing to adopt a formal notice of intent to affected property owners, which notice alleges the existence of a recreational customary use on their properties.
- A judicial proceeding to consider whether the alleged customary use has been ancient, reasonable, without interruption, and free from dispute.

Repeal of the statute means a return to how customary use rights were determined prior to enactment of the statute:

- A governmental entity may declare the existence of a customary use and adopt a local customary use ordinance without following the procedures in s. 163.035, F.S.
- Property owners must file a lawsuit challenging the ordinance and demonstrate in court that the public does not enjoy customary use rights over their privately-owned beaches.
- Courts will apply the common law doctrine of customary use when ascertaining, on a case-by-case basis, whether the public enjoys customary use rights over privately-owned beaches.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

Settlement Agreement), available at https://clarkpartington.com/wp-content/uploads/2024/04/Final-Judgment-on-Remaining-Parcels-A5288243xA3759.pdf; *see also* Will Dunaway, Clark Partington, Attorneys at Law, *Customary Use Litigation in Walton County, Part II* (Dec. 5, 2023), https://clarkpartington.com/2023/12/05/customary-use-litigation-in-walton-county-part-ii/ (last visited Mar. 28, 2025)

[41] *Id.*

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The repeal of s. 163.035, F.S., means the upland owners of privately-owned beaches will either have to acquiesce to governmental entities' customary use ordinances or incur the legal costs associated with opposing customary uses on their particular beaches. Accordingly, the bill may have a negative fiscal impact on the upland owners of privately-owned beaches.

C. Government Sector Impact:

Under the bill, governmental entities will no longer have to follow the procedures of s. 163.035, F.S., to establish customary use rights over privately-owned beaches, which could save them the legal costs associated with litigating the issue in court. Accordingly, the bill may have a positive fiscal impact on governmental entities.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill repeals section 163.035 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.