Sand for the People
The Continuing Controversy Over Public Access to Florida's Beaches

by Erika Kranz

Lola Carlisle, an Atlanta resident visiting Seagrove, on the Florida Panhandle's Emerald Coast in July 2007, thought her summer vacation was going to end up as a trip to jail after her children were building sandcastles on property a nearby homeowner claimed was private.[1] She and her family had been vacationing in Seagrove for a decade but had never before been told to move off of "private" beach, and she questioned whether the white sand upon which her family had laid its towels was really private.[2] However, when sheriff's deputies arrived at the scene, Carlisle complied with the officers' order that they move several hundred feet to a nearby public area rather than risk arrest.[3] Less fortunate was Eduardo Gonzalez, another beachgoer who that same day in the same county was arrested for trespassing on a private beach after he refused to move to public sand only three feet away.[4]

Florida is known worldwide for snowy-white beaches that provide peace, quiet, and natural beauty and also anchor the tourism that constitutes an essential part of the state's economy. Yet over the last two decades, access to the state's 1,200 miles of coastline has come under stress.[5] Beachgoers have encountered "No Trespassing" signs on beaches previously presumed to be open to public access; others have been asked to leave by landowners, private security guards, or the police as above. While these incidents remain fairly uncommon, they have sensationalized a growing conflict between landowners desiring privacy and security and those who feel the beach should be, and always has been, free for public use.

While many beach visitors believe that public sand begins seaward of the dune line or the line where vegetation ends and bare sand starts, regardless of whether the upland property owner is a private individual or public entity, in Florida, the part of the beach falling landward of the mean high water mark is typically 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: the foreshore region. However, while beachfront property owners in Florida generally have title to the dry sand beach down to the average high tide line, ownership of this property does not necessarily mean that the exclusion-of-others stick is within the bundle of rights attached to this part of the property. Title to any property may be subject to explicit or implied easements, limitations based on traditional right of use, or common law prohibitions of activities considered nuisances.[6] Beachfront land is no different: The right to this property is far from absolute.

At the root of the access issue are two competing values deeply entrenched in American society: The notion that private property may be held to the exclusion of others, and the tradition of allowing the nation's coastlines to be free for public use. Some property owners who paid high prices to live adjacent to the beach believe that their deeds entitle them to limit access to the sand within their property lines.[7] Yet tourists and locals often feel that Florida's sand is a public resource belonging to none, open to all. The issue is especially important in a state where beaches are a large part of the coastline and an anchor of the tourism-based economy.

The following discussion will outline various theories used in Florida and in other states to preserve or limit the public's access to the beach, examine the successes and failures of these doctrines, and assess the potential for these tools to be useful to Florida in a future effort to preserve public access to beaches around the state. Unfortunately, no perfect tool yet exists in the state; Florida's best chance for a broadly applicable tool for beach access is to follow Oregon's lead by expanding the customary use doctrine, which the state has already recognized in a limited way. Without such measures, the state and private property owners could be subjected to imperfect and expensive case-by-case litigation

or property condemnations.

State of the Coasts

According to the state's Department of Environmental Protection, at least 60 percent of Florida beaches are private, offering little or no public access; many beachfront homeowners have claimed these beaches as their own.[8] While Florida law requires the state to ensure "the public's right to reasonable access to beaches,"[9] over the last two decades, local governments have routinely ceded public access points to developers, allowing waterfront communities to exclude others from the dry sand beach in exchange for the significant tax revenues these communities provide.[10] While this move can increase property values and benefit private landowners, other Florida residents and visitors to the state may find themselves without sand to sit upon.

In some ways, not much has changed over the last three centuries — the earliest settlements in America were beachfront property; St. Augustine, founded in 1565, is a prime example.[11] Like their modern counterparts, early Americans enjoyed swimming and walking along the beach.[12] Over time, working class and upper class beach towns popped up along the coast.[13] Railroads made Florida's beaches accessible to tourists from the north as far south as Miami by the late 19th century; the development of coastal roads continued this trend.[14] What *has* changed over time is the level of competition for use of the Florida coastline and the level of public access to it, as more coastal development means less open space and the need for more dedicated beach access points.[15]

Florida is far from the only state struggling with the issue of private use versus public access to its beaches. North Carolina recently experienced litigation similar to what recent incidents along the Emerald Coast will likely trigger. In *Fabrikant v. Currituck County*, 210 S.E.2d 19 (N.C. App. 2005), residents of an exclusive beachfront community on the northern Outer Banks sought to establish that their title to the dry sand beach adjoining their properties gave them the right to exclude others from this portion of the beach.[16] The state argued that the public had acquired the right to use the dry sand beach through customary use, an expanded public trust doctrine, implied dedication, or prescriptive use.[17] A Connecticut resident successfully sued a neighboring town for denying him access to that town's beach; the state's Supreme Court ruled that the beach park could not be closed off to nonresidents.[18] A California court recently responded to private landowners' concerns by overturning the California Coastal Commission's order requiring coastal residents to remove gates and "No Trespassing" signs at a Malibu beach.[19] Examining other states' approaches sheds light on Florida's options for better ensuring beach access in the future.

Public Trust Doctrine and the Wet Sand Beach

The public trust doctrine has its roots in Roman laws that required that the seas and tidal land remain open to all for fishing and navigation. As history tells, in A.D. 530, the Roman Emperor Justinian asked his legal scholars to codify the empire's laws; the resulting Institutes of Justinian included the provision that "by the law of nature these things are common to all mankind; the air, running water, the sea and consequently the shores of the sea." Thus was born the idea of a public trust seashore.[20] The idea has been passed down through the legal systems of many other nations. The United States and Florida inherited it as part of our country's English common law legacy.[21] The doctrine was first incorporated into American law during the Revolutionary War, and the Supreme Court's first assertion of the doctrine to establish federal sovereignty over navigable waters came with *Martin v. Waddell*, 41 U.S. 367 (1842).[22] Today, nearly every state's laws have incorporated the doctrine, though variation between states exists.

Florida's public trust ownership began with statehood in 1845, when the state took title to all sovereign lands within its jurisdiction not expressly granted to private interests by the Spanish government prior to the 1819 Treaty of Cession or conveyed by the federal government while Florida remained a territory.[23] With control over public trust lands came the state's responsibility to ensure that these lands remain free for public use.[24]

It must be noted that the part of the beach under contention is the *dry sand beach*, that part of the beach falling above the mean high water mark, calculated as an average of high tides over a number of years. The federal rule for calculating this all-important line is determined by "the average height of all waters over a period of 18.6 years."[25] The wet sand beach falling seaward of this line is governed by the public trust doctrine. This doctrine holds that these parts of the beach that have traditionally been used for travel, hunting, fishing, and more recently recreation are held by the state in trust for the use of its citizens.[26] Like the beds of navigable rivers, private landowners may not hold this part of the beach to the exclusion of others. Following the federal rule for measuring the mean high water mark, Florida's constitution asserts state ownership of beaches below these "mean high water lines... in trust for all the people."[27]

There is more to public use of this wet sand foreshore, however, than a stated right to do so. To exercise that right, the public must have access. Unless the public enters solely at public access points such as public beaches, this means crossing private property; thus, without a public right of access across private dry sand beach, the wet sand beach remains a public resource in name only. This right of access includes two factors.[28] First, the public must have access to the beach from public roads — perpendicular access. Secondly, high tides completely submerge the foreshore, at which time the public must move along the dry sand part of the beach to access these submerged public lands.

Further complicating the issue is the fact that the mean high tide mark, calculated as an average of high tides over a historical period, may be much different than current high tides. If this line is higher than the actual high

tide, under the public trust doctrine, the state has sovereignty over the dry sand beach falling below this line. However, if the mean high tide line, the dividing line between private and public property, falls below current high tide levels, the public may find itself having to wade in waist-deep water to avoid privately owned property.[29] Among other things, beach access advocates identify this absurdity as supporting the need to open expanded areas of the beach to the public if the right to use and enjoyment of the coast is to be fully realized.

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Perpendicular Access to the Dry and Wet Sand Beach

While Florida technically has thousands of designated public beach access points, many of these corridors are plagued by issues such as access ways being blocked by adjacent land owners; hidden, missing, or inaccurate signage; dune walkover access ways closed due to damage or erosion; inadequate or nonexistent parking at public access points; and inadequate or nonexistent beach facilities such as restrooms, lifeguards, sidewalks, or showers.[30] The number and placement of beach access points is not consistent throughout the state. Some counties with large spans of sandy beach have relatively few public access corridors.[31]

The state could rectify many of these issues with better funding and enforcement, including a crackdown on local government acquiescence to the desires of wealthy beachfront property owners.[32] The remainder of this discussion will focus on the legal pathways to ensuring the public a beach to sit, rest, and stroll upon once perpendicular access to the coast is assured.

Tools for Ensuring Dry Sand Beach Access

While the law granting state sovereignty and public access to the part of the beach seaward of the mean high water mark is well settled, the law governing the dry sand part of the beach is far more tenuous and frequently litigated. A variety of different theories exist under which Florida and other states have expanded public access to this coveted part of the beach. Florida is nowhere near as liberal in its beach access law as certain other states, such as New Jersey, Oregon, and Texas. Florida has had some success opening up the dry sand beach to the public, but none of these doctrines has yet provided the wide-ranging, broadly applicable mandate of public access that many would like to see in the sunshine state. The following is a look at a number, but not all, of the legal tools available to states looking to define coastal access. Florida courts will likely have the opportunity in coming years to explore the opportunities provided by these tools to balance the interests of landowners desiring to exercise their property rights to ensure privacy and security and the interests of Florida's citizens and visitors desiring access to the state's beaches.

Expanded Public Trust Doctrine

While the public trust doctrine ordinarily provides only for public sovereignty over the wet sand part of the beach, some jurisdictions have used an expanded public trust doctrine to extend the beach owned by the state beyond the mean high water mark, holding that adjacent private lands may be subject to public use incidental to the use of the public foreshore. There is much variation in the doctrine, as states define the scope and form of its application with their borders.[33]

New Jersey pioneered the use of this doctrine and has expanded its breadth more recently. In *Matthews v. Bay Head Improvement Association*, 471 A.2d 355 (1984), the state used an expanded public trust doctrine to say that swimmers, boaters, and fishermen are permitted to use part of the dry sand beach falling within private property to sunbathe, rest, and relax:

> Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry-sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. . . . The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean.[34]

The court limited the public right to "reasonably necessary" uses "subject to the accommodation of the interests of the owner" — there is no "unrestricted right to cross at will over any and all property bordering on [the foreshore]."[35] This expanded reading of the public trust doctrine ensured both reasonable perpendicular access to the coast and lateral access along the water's edge.[36]

Twenty years later, the New Jersey Supreme Court went even further, upholding an appeals court's ruling invalidating a private beach club's attempt to charge $15,000 for a lifetime membership or $700 per season fees for beach access and ruling that the

club must open "all" of the dry sand beach to the public for "reasonable" fees.[37] The private club defendants had argued that preventing the club from generating a profit through beach access fees deprived it of the property's sole beneficial use and was, therefore, a taking.[38] The appeals court, however, found that "the notion that lands are to be held in public trust, protected, and regulated for the common use and benefit, is incompatible with the concept of profit."[39] The state's Supreme Court agreed that the club may not limit public access to the dry sand beach, but may charge reasonable fees based on the services provided,[40] striking a balance between property owners' rights and public access.

The fight for coastal access rights also extends to the Great Lakes. Ordinarily, just as the shores at the seaside are public land seaward of the mean high water mark, the swath of sand between the waterline and ordinary high water mark of navigable lakes — often defined as the line where vegetation starts — is held in public trust.[41] However, a 1923 Wisconsin Supreme Court ruling rejected application of the doctrine, holding that the public's right to lakes is restricted to uses associated with water navigation and that lakefront property owners have "exclusive privileges" to the land between their property line and the water's edge.[42] Thus, private adjacent landowners may exclude others from this public land, and as lake level drops the amount of property that they exclusively may use increases.[43] Contrary to this is a 2005 Michigan Supreme Court ruling that upheld public use of lakefront land, guaranteeing access to the state's 3,200 miles of Great Lakes shoreline for traditional activities such as navigation, hunting, and fishing.[44] Ohio and Indiana accord with Michigan's grant of access, while Illinois, like Wisconsin, favors property rights over public access.[45]

The Texas legislature amended that state's laws to extend the area to which public trust rights apply all the way to the vegetation line separating uplands from the dry sand beach.[46] North Carolina may be prime for an extension of the public trust doctrine to the dry sand beach, as in *Concerned Citizens v. Holden Beach Enterprises*, 404 S.E.2d 810 (1989). The state's Supreme Court rejected the lower court's suggestion that expansion of the public trust doctrine would be a taking.[47]

Florida's case law, however, does not suggest a high likelihood of the expansion of the public trust doctrine to cover the dry sand beach in the foreseeable future. *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974), the sole expanded public trust case to reach the state's high court thus far resulted in an affirmation of the public's right to use the dry sand beach based on a different theory, and, as discussed below, its effects have been very limited.

Prescriptive Easement

Prescriptive easement is another channel through which the public may acquire access to private property. A claimant may establish such a right-of-way after demonstrating his or her uninterrupted use of the property for a set number of years — 20, as defined by the Florida Supreme Court.[48] To prove adverse use, the claimant must also establish that his or her use of the private property was open, notorious, and visible, and against the owner's will.[49] Further, a claimant must demonstrate that the owner did not succeed in causing a "substantial interruption" in his or her use of the property. The use must also be related to a certain limited and defined area of land: If a right-of-way is a path, that corridor must have a reasonably certain route.[50]

The use of prescriptive easement to establish access to the dry sand beach for the general public involves a fairly difficult burden of proof. Unlike other states, which have allowed for a relaxation of the adverse use requirement, Florida courts have not generally found prescriptive easements over private dry sand beach because they have found the public's use of these areas has not been adverse.[51] For a prescriptive easement to be established, there must be some claim of right other than permission from the owner.[52] In *City of Miami Beach v. Undercliff Realty & Investment Co.*, 21 So. 2d 783 (Fla. 1945), the court refused to designate a prescriptive easement after finding no evidence that the use was adverse; similarly, in *City of Miami Beach v. Miami Beach Improvement Co.*, 14 So. 2d 172 (Fla. 1943), the court found that public use of the beach was "not antagonistic to the ownership of the property." In *Tona-Rama*,[53] though the public had used the area for more than the required 20 years, the court found that use to be consistent with the rights and interests of the property owner, who had in fact encouraged the public to come onto his land in order to derive a profit. Adding to the difficult set of standards for establishing a prescriptive easement, judges have typically disfavored such easements.[54]

The inquiry into whether an easement has been established is necessarily ad hoc and intensely fact-based. Portions of the dry sand beach are only public under this theory after claimants have prevailed in litigation. This piecemeal approach is inadequate to fully deliver the public's right to access the coast, as launching lawsuits against every beachfront property owner in the state would be prohibitively expensive and time consuming. In order to establish public access across the state's expansive coastline, the state would have to litigate against thousands of beachfront owners, possibly prompting property owners determined to defend against a prescriptive easement to take measures to prevent the public from using their sand.[55] Along with state courts' refusal to apply the doctrine to beaches in the past, the ad hoc, piecemeal nature of prescriptive easement hinders its effectiveness as a large-scale tool for protecting public access to the dry sand beach in Florida.

Express or Implied Dedication

Related to, but distinct from, the concept of prescriptive easement is that of implied dedication, which may either be demonstrated through express statements of the property owner or manifested through actions.[56] Florida courts have recognized both express and implied dedications as sources of public rights to the dry

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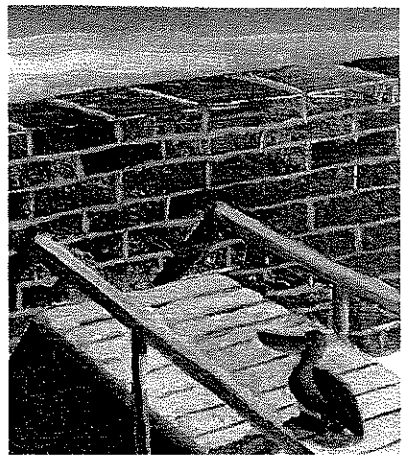

sand beach; however, dedications are both revocable by the landowner and available only on a tract-by-tract basis, making them an unworkable source of widespread and lasting beach access rights.[57]

Texas courts have used implied dedication to establish public access to dry sand beaches.[58] Texas law requires both evidence of the landowner's intent to dedicate the land and acceptance of the dedication by appropriate public authorities, followed by public maintenance and control of the property.[59] Even if Florida emulated Texas' use of implied dedication to ensure public access to the dry sand beach, this approach, like the use of prescriptive easements, is ad hoc and fact-specific, potentially necessitating thousands of individual lawsuits against unhappy property owners.[60]

Mandatory Dedication

Local governments have for many years conditioned large-scale developments' approval on developers' dedication of essential services such as streets, sidewalks, and water or sewer infrastructure.[61] However, states may be forestalled from requiring express dedications of beach access from property owners under *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987). In *Nollan*, the California Coast Commission agreed to issue a permit for the expansion of a beachfront house on the condition that the property owners grant lateral public access across the beachfront. The Supreme Court held that a mandatory dedication of beachfront property for a public beach access was an unconstitutional taking.[62] Though *Nollan* concerned the dedication of upland, rather than the dry sand beach, courts could generalize this holding.

Eminent Domain

A simple way that states may provide coastal access is through the use of eminent domain, a legal proceeding through which the state asserts its authority to condemn property for public use.[63] However, when the government uses eminent domain, it must provide just compensation to the property owner.[64] The exceedingly high costs of coastal property make this option unattractive if not impossible for states to implement on a large-scale basis.[65]

Implied Reservation

Under the doctrine of implied reservation, when a parcel of land is "landlocked" — surrounded completely by other parcels — that property's owner may claim an easement across another's land out of necessity.[66] The reasoning behind the doctrine is that when a property is sold, no grantor would intend to convey an inaccessible property. Traditionally, courts will find an implied easement only if privity requirements are met and the owner of the landlocked property is unable to access his or her land without the easement.[67]

A North Carolina study suggested that beachfront properties formerly owned by the state meet the privity requirement.[68] Further, though public trust lands between the mean high water mark and the waterline may be accessible elsewhere through public beaches or access ways, a court could still find that the landlocked property necessitated an implied reservation.[69] A court could, thus, find an implied reservation created by the original conveyance of the property from the state to a private owner if the state intended to reserve a right of access for the public.[70] This intention, however, could prove difficult to establish absent some historical evidence suggesting that the state meant to retain this right.[71] The state could also be barred from asserting such an easement by the doctrine of laches, which would prevent enforcement of this right if doing so would be unfairly prejudicial because of lack of notice: Presumptively, because no implied easement has yet been enforced, private landowners were unaware of any implied easement.[72]

Purpresture

Under common law, a purpresture may result when a private property owner encroaches on private rights, but unlike nuisance, this encroachment need not be noxious.[73] Texas law treats purpresture similarly to public nuisance. The state's Supreme Court in *State v. Goodnight*, 11 S.W. 119 (Tex. 1888), held that enclosing public lands for private use is a nuisance, "whether viewed as a wrong merely to the body politic or as an infringement of the privileges of its citizens."[74] The court held that though a fence was on private property, because it blocked access to adjacent public grazing lands, it was within the state's authority to require its removal.[75] In most other states, however, purpresture will be found only when a private party has physically invaded public lands.[76]

Purpresture law could be used to protect public access to public trust lands in cases where private owners have fenced the dry sand beach, limiting the public's right to use the part of the beach owned by the state.[77] However, this application of the purpresture doctrine differs in a significant way from the factual context of *Goodnight* — in that case, only one landowner was involved, but in the case of beach access, no individual property owner is solely responsible.[78] Proving causation would, thus, be far trickier when trying to use the law to protect beach access.

A beach purpresture case reached the Florida Supreme Court in 1974. In *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9 (Fla. 1974), a nonprofit organization argued that a private condominium's fences around parts of the dry sand beach constituted a purpresture blocking the public's enjoyment of rights acquired through prescriptive easement, implied dedication, and/or custom. The case was dismissed on standing grounds, and the state's high court to this day has not ruled on the issue.

Customary Use

Where the public has established over time a right to use the beach, private property owners may not interfere with continued enjoyment of that right. However, to establish a customary right, the use must be "ancient, exercised without interruption, peaceable and free from dispute, reasonable, certain, obligatory, and consistent with other customs or other law."[79]

Florida's Supreme Court has used this doctrine to ensure public access to beaches in the past. In *City of Daytona Beach v. Tona-Rama Inc.*, 294 So. 2d 73 (Fla. 1974), the court recognized a common law principle of the public's "customary use" of the state's dry sand beaches. The court declined to find that the public had established a public easement over a private ocean pier because of lack of adversity,[80] but stated that "[t]he 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 this particular area of the beach as they have without dispute and without interruption for many years."[81] *Tona-Rama* may have looked like major step toward universal beach access, but several years later in *Reynolds v. County of Volusia*, 659 So. 2d 1186 (Fla. 5th DCA 1995), the court clarified the scope of the prior case, stating that courts must determine the degree of customary and ancient use that particular beaches have supported. *Tona-Rama*'s holding has, thus, been limited to the beach that was the subject of the original litigation; under *Reynolds*, the doctrine of custom must be applied on a case-by-case basis.

Oregon has used the doctrine to protect beach access more broadly. In *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969), the court ordered a private property owner to remove a fence he had erected on the dry sand beach within his property line. The court looked to evidence of historical use, a history of common public understanding, and present public policy: Native Americans and Oregonians had long used the beach for cooking and other purposes; the public generally assumed that the dry sand beach was public; and state and local police patrolled the dry sand part of the beach, and municipal governments paid to keep the area free of trash.[82] Finding that the public had frequented beaches from time immemorial,

the court found the requirements of customary use satisfied.[83] Further, the court held that the right to use of beaches all across the state belongs to the public as a whole, not just to nearby residents.[84] A few states, such as Hawaii and Texas, have followed Oregon's lead.[85]

Use of the custom doctrine as defined by Oregon courts has the benefit of having more broad applicability and potentially requiring far less litigation than does the similar prescriptive easement doctrine. To establish an easement, a claimant must demonstrate actual notorious use of a particular parcel over time; to prove customary use, the claimant must prove only that the type of land involved has historically been used for public purposes.[86]

However, as suggested above, Florida's customary use doctrine differs from Oregon's: While *Thornton* opened all Oregon beaches to the public, *Tona-Rama* had only a limited effect in Florida because courts require that customary usage be shown for a particular beach. Documenting such use can be expensive or even impossible,[87] and, according to a 2002 legal opinion issued by the state attorney general's office, the dry sand beach is not subject to public use under the "customary right of use" doctrine until that right has been established by a court.[88] Thus, unless Florida courts are willing to broaden the impact of *Tona-Rama* beyond the limitations defined in *Reynolds*, the customary use doctrine cannot preserve public access to dry sand beaches throughout the state.

Natural Accretion and Beach Nourishment

Accretion is the gradual addition of soil to the shore of a riparian owner's land, caused by natural shifting tides, winds, or storms. Florida follows the common law standard for natural accretions: Title to accreted land vests in the riparian owner whose land has been extended seaward.[89] Normally, accretion occurs at an imperceptibly slow rate; riparian owners take the bitter with the sweet, gradually gaining or losing land as sand accretes or is eroded. Sometimes, the natural process is sped up through unnatural means. Beach nourishment generally involves adding sand dredged from the ocean floor to the seaward slope of beaches shrunken by natural or human-caused erosion. Under Florida's Beach and Shore Preservation Act, when public money is used to fund the expansion of a beach, the added sand becomes property of the state, free for public use.[90]

In 2006, a Florida appeals court challenged this option for retaining public access to dry sand beach, ruling in favor of property owners who argued that application of the act effected an unconstitutional taking of riparian owners' property without just compensation, particularly their littoral right to accretions.[91] Had this ruling stood, the state and counties would have had to obtain property owner permission before initiating restoration projects, potentially meaning the end of publicly funded projects abutting private property and the creation of no new public beachfront.[92]

In the fall of 2008, the Florida Supreme Court reversed the district court of appeal's decision and upheld the constitutionality of the Beach and Shore Preservation Act.[93] Noting that the act balances public and private interests and fulfills the state's "obligation to conserve and protect Florida's beaches," the court found no material or substantial impairment of upland owners' littoral rights.[94] The court explained that upland owners' littoral rights of access, use, and view are akin to nonpossessory easements; the right to accretions a contingent, future interest; and upland property's physical contact with the water was ancillary to the littoral right of access to the water.[95]

Along a similar vein, in 2007, the legislature passed a law that requires that in takings disputes concerning beach restoration, courts must weigh any loss in value against enhancements of value created by the nourishment project.[96] If the enhancement in value exceeds the level of damage, the property owner may not recover against the state. If the level of damage to value is greater than the enhancement, the level of enhancement shall be offset against the damage caused by the restoration project.[97] Though limited in scope, these judicial and legislative actions may represent a move toward more liberal beach access policy in Florida's future.

Conclusions

Given the importance of Florida's beaches to the state's tourism-based economy, ensuring public access to this sandy asset is essential. Numerous legal tools are available that might provide more populist alternatives to Florida's beach privatization trend, though no single existing tool has the capacity for broad utility in preserving public access to the state's beaches. The doctrine of expanded public trust that has proved so successful at opening up New Jersey's beaches remains largely untested in Florida courts. Customary use, though addressed by Florida's Supreme Court, has thus far been limited to parcel-by-parcel application rather than opening up the entire state's beaches as it was used to do in Oregon. Prescriptive easement, implied dedication, and implied reservation are similarly limited to piecemeal application and would be extremely costly and time consuming to litigate throughout the state. Mandatory dedications are likely barred by the takings clause under *Nollan*, and eminent domain is too expensive to be used in a widespread effort to acquire public dry sand beach property. A recent point of light, however, comes from the Florida Supreme Court's decision protecting public access to beaches created through publicly funded beach nourishment projects, citing the state's constitutional duty to protect Florida's beaches.[98]

The state finds itself in a very tough place in its effort to preserve public access to one of its most valuable resources. This year, the Florida Legislature declined to pass a bill that would have declared the state's dry sand beaches to be public. The 2009 bill would have prevented private entities from restricting the public's access to the beach.[99] Whether the state's courts would uphold such a statutory provision remains to be seen. Regardless, given Florida's coastal access law today, the state is currently without any particularly effective tools to provide

its citizens and visitors lasting access to its beaches. Florida's best chance for a broadly applicable tool for beach access is an Oregon-style broadening of the customary use doctrine recognized in *Tona-Rama*. Without such an expansion of that doctrine, the state will likely be confined to parcel-by-parcel litigation, a strategy too time consuming and expensive for the state to sustain over time. ❑

[1] Heather Civil, Beach Conflict Making Waves, July 15, 2007, http://community.emeraldcoast.com/onset?template=article.html&id=16864.
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[3] *Id.*
[4] *Id.*
[5] Jane Costello, *Beach Access: Where Do You Draw the Line in the Sand?*, NY TIMES, Jan. 21, 2005, *available at* http://query.nytimes.com/gst/fullpage.html?res=9B00E1D81038F932A15752C0A9639C8B63&sec=&spon=&pagewanted=all.
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[8] *See* Costello, *Beach Access: Where Do You Draw the Line in the Sand?*, NY TIMES, Jan. 21, 2005.
[9] FLA. STAT. §187.201(8) (2005).
[10] Costello, *Beach Access: Where Do You Draw the Line in the Sand?*, NY TIMES, Jan. 21, 2005; Jennifer Sullivan, *Laying Out an "Unwelcome Mat" to Public Beach Access*, 18 J. LAND USE 331, 346 (2003).
[11] Amy F. Blizzard, *Shoreline Access in Three States: Reciprocal Relationships Between State and Local Government Agencies and the Role of Local Governments in Shoreline Access Program Evaluation* 9 (Nov. 30, 2005) (unpublished Ph.D. dissertation, Eastern Carolina University).
[12] *Id.* at 10.
[13] *Id.* at 12
[14] *Id.* at 12, 14.
[15] STEPHEN HOLLAND, PUBLIC ACCESS TO THE FLORIDA COAST: 1995 ISSUES 1, 2 (Fla. Dep't of Comm. Affairs 1995).
[16] *See* Fast Facts: Public Use of the Beach, http://dcm2.enr.state.nc.us/Facts/publicuse.htm.
[17] *See id.* Note that the case was dismissed on procedural grounds.
[18] *Leydon v. Town of Greenwich*, 777 A.2d 552 (Conn. Sup. Ct. 2001).
[19] *T-WR, L.L.C. v. California Coastal Com.*, 152 Cal. App. 4th 770 (2007).
[20] Steve Strunsky, *A Walk Along the Water Is Not a Simple Matter*, NY TIMES, Jan. 13, 2002, *available at* http://query.nytimes.com/gst/fullpage.html?res=9401E7DE1139F930A25752C0A9649C8B63&sec=&spon=&pagewanted=all.
[21] *Brickell v. Trammell*, 82 So. 221, 226 (Fla. 1919).
[22] Blizzard, *Shoreline Access in Three States: Reciprocal Relationships Between State and Local Government Agencies and the Role of Local Governments in Shoreline Access Program Evaluation* 9 (Nov. 30, 2005) (unpublished Ph.D. dissertation, Eastern Carolina University).
[23] HOLLAND, PUBLIC ACCESS TO THE FLORIDA COAST: 1995 ISSUES at 24 (Fla. Dep't of Comm. Affairs 1995).
[24] *Id.*
[25] *Borax Consolidated, Ltd. v. Los Angeles*, 296 U.S. 10 (1935).
[26] *See City of W. Palm Beach v. Bd. of Trs. of the Internal Improvement Trust Fund*, 746 So. 2d 1085, 1089 (Fla. 1999).
[27] FLA. CONST. art. X, §11. Other states, such as California, guarantee access only below the low tide line. Blizzard, *Shoreline Access in Three States: Reciprocal Relationships Between State and Local Government Agencies and the Role of Local Governments in Shoreline Access Program Evaluation* at 35 (Nov. 30, 2005) (unpublished Ph.D. dissertation, Eastern Carolina University). Some states use the line of debris left by the surf at high tide as a proxy for the line between private and public land; others use vegetation lines to separate the beach and the uplands. *Id.*
[28] *See generally* Christopher City, *Private Title, Public Use: Property Rights in North Carolina's Dry-Sand Beach* 4 (2001) (unpublished Master's project, University of North Carolina at Chapel

Hill), *available at* http://dcm2.enr.state.nc.us/facts/dry-sand.pdf.

[29] See Strunsky, *A Walk Along the Water Is Not a Simple Matter*, NY TIMES, Jan. 13, 2002.

[30] HOLLAND, PUBLIC ACCESS TO THE FLORIDA COAST: 1995 ISSUES at 20–22 (Fla. Dep't of Comm. Affairs 1995).

[31] *Id.* at 20.

[32] *See* Surfrider Foundation, State Report, Beach Access, www.surfrider.org/qa_access.aspx?stsel=FL, for information and recommendations on improving perpendicular access along Florida's coasts.

[33] City, *Private Title, Public Use: Property Rights in North Carolina's Dry-Sand Beach* at 20 (2001) (unpublished Master's project, University of North Carolina at Chapel Hill).

[34] *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365 (N.J. 1984); *see also* Robert Hanley, *As Battle for Beach Access Rages in New Jersey, Private Club Digs its Heels into Sand*, N.Y. TIMES July 4, 2004, *available at* http://query.nytimes.com/gst/fullpage.html?res=9901EEDD1F38F937A35754C0A9629C8B63.

[35] *Matthews*, 471 A.2d. at 364–65.

[36] *See* Sullivan, *Laying Out an "Unwelcome Mat" to Public Beach Access*, 18 J. LAND USE at 335 (2003).

[37] *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club*, 879 A.2d 112 (N.J. 2005).

[38] *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 851 A.2d 19, 28 (N.J. Super Ct. App. Div. 2004).

[39] *Id.* at 33.

[40] *Raleigh Ave. Beach Ass'n*, 879 A.2d at 116.

[41] *See* Dan Egan, *Exclusive "Public" Beaches Rile Some: Michigan Court Case Renews Wisconsin's Debate over Public Access*, KNIGHT RIDDER TRIBUNE BUSINESS NEWS, Apr. 17, 2006, at 1.

[42] *Doemel v. Jantz*, 193 N.W. 393. (Wis. 1923).

[43] *See id.*

[44] *Glass v. Goeckel*, 703 N.W.2d 1 (Mich. 2005).

[45] *See, e.g., Beach Cliff Bd. of Trs. v. Ferchill*, 2003 Ohio 2300 (Ohio Ct. App., Cuyahoga County May 8, 2003); 312 IND. ADMIN. CODE 1-1-26, 6-1-1 (1996); *Schulte v. Warren*, 75 N.E. 783 (Ill. 1905).

[46] TEX. NAT. RES. CODE ANN. §61.011 (Vernon Supp. 1999).

[47] *Concerned Citizens v. Holden Beach Enterprises*, 404 S.E.2d 810, 815 (1989); City, *Private Title, Public Use: Property Rights in North Carolina's Dry-Sand Beach* at 23 (2001) (unpublished Master's project, University of North Carolina at Chapel Hill).

[48] *Downing v. Bird*, 100 So. 2d 45 (Fla. 1958).

[49] *J.C. Vereen & Sons, Inc. v. Houser*, 167 So. 45 (Fla. 1936).

[50] *Downing*, 100 So. 2d 45.

[51] *See City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 75-76 (Fla. 1974).

[52] *Downing*, 100 So. 2d 45.

[53] *Tona-Rama*, 294 So. 2d at 77.

[54] HOLLAND, PUBLIC ACCESS TO THE FLORIDA COAST: 1995 ISSUES at 28 (Fla. Dep't of Comm. Affairs 1995).

[55] City, *Private Title, Public Use: Property Rights in North Carolina's Dry-Sand Beach* at 12 (2001) (unpublished Master's project, University of North Carolina at Chapel Hill).

[56] *Miami Beach*, 14 So. 2d at 175.

[57] Brent Spain, *Comment: Florida Beach Access: Nothing But Wet Sand*, 15 J. LAND USE & ENVTL. L. 167, 171 (1999).

[58] *See* City, *Private Title, Public Use: Property Rights in North Carolina's Dry-Sand Beach* at 11-12 (2001) (unpublished Master's project, University of North Carolina at Chapel Hill).

[59] *See Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. Civ. App. 1964).

[60] City, *Private Title, Public Use: Property Rights in North Carolina's Dry-Sand Beach* at 12 (2001) (unpublished Master's project, University of North Carolina at Chapel Hill).

[61] HOLLAND, PUBLIC ACCESS TO THE FLORIDA COAST: 1995 ISSUES at 31 (Fla. Dep't of Comm. Affairs 1995).

[62] *Nollan*, 483 U.S. 825 (1987).

[63] HOLLAND, PUBLIC ACCESS TO THE FLORIDA COAST: 1995 ISSUES at 28 (Fla. Dep't of Comm. Affairs 1995).

[64] *Id.*

[65] *See id.*

[66] *Blanton v. City of Pinellas Park*, 887 So. 2d 1224 (Fla. 2004).

[67] *See generally id.* for a discussion of way of necessity law in Florida.

[68] DAVID BROWER, UNC SEA GRANT, ACCESS TO THE NATION'S BEACHES: LEGAL AND PLANNING PERSPECTIVES 101 (1978).

[69] *Id.* at 102.

[70] *Id.* at 101.

[71] City, *Private Title, Public Use: Property Rights in North Carolina's Dry-Sand Beach* at 15 (2001) (unpublished Master's project, University of North Carolina at Chapel Hill); *see also Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. Civ. App. 1964).

[72] City, *Private Title, Public Use: Property Rights in North Carolina's Dry-Sand Beach* at 15 (2001) (unpublished Master's project, University of North Carolina at Chapel Hill).

[73] *Id.* at 16.

[74] *State v. Goodnight*, 11 S.W. 119, 120 (Tex. 1888).

[75] *Id.*

[76] City, *Private Title, Public Use: Property Rights in North Carolina's Dry-Sand Beach* at 17 (2001) (unpublished Master's project, University of North Carolina at Chapel Hill).

[77] Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627, 647 (1989).

[78] *See id* at 649.

[79] Sullivan, *Laying Out an "Unwelcome Mat" to Public Beach Access*, 18 J. LAND USE at 336 (2003).

[80] *Tona-Rama, Inc.*, 294 So. 2d at 77.

[81] *Id.* at 78.

[82] *Thornton*, 462 P.2d at 673.

[83] *Id.* at 671.

[84] *Id.* at 678.

[85] *See Public Access Shoreline v. Hawaii County Planning Comm'n*, 903 P.2d 1246, 1255-56 (Haw. 1995); *County of Hawaii v. Sotomura*, 517 P.2d 57, 61 (Haw. 1973); *Arrington v. Mattox*, 767 S.W.2d 957, 958 (Tex. Ct. App. 1989).

[86] City, *Private Title, Public Use: Property Rights in North Carolina's Dry-Sand Beach* at 18 (2001) (unpublished Master's project, University of North Carolina at Chapel Hill).

[87] Blizzard, *Shoreline Access in Three States: Reciprocal Relationships Between State and Local Government Agencies and the Role of Local Governments in Shoreline Access Program Evaluation* at 55 (Nov. 30, 2005) (unpublished Ph.D. dissertation, Eastern Carolina University).

[88] Robert Butterworth, Attorney General, Advisory Legal Opinion — AGO 2002-38, May 24, 2002, *available at* http://myfloridalegal.com/ago.nsf/Opinions/45605C3FD5AA4AD985256BC70052F5BD.

[89] *Bd. of Trs. v. Sand Key Assocs.*, 512 So. 2d 934, 936 (Fla. 1987)

[90] Beach and Shore Preservation Act, 161 FLA. STAT. §§161.088; 161.101; 161.141; 161.161; 161.191; 161.201; 161.211 (2005).

[91] *Save our Beaches, Inc. v. Fla. Dept. of Envt'l Protection*, 2006 WL 1112700 (Fla. App. April 28, 2006).

[92] *Verdict Still Out on Beach Restoration*, THE DESTIN LOG, April 13, 2008, *available at* www.thedestinlog.com/news/href_4267___article.html/nwfdailynews_www.html; Heather Civil, *Florida Supreme Court to hear Beach Restoration Case Thursday*, NORTHWEST FLORIDA DAILY NEWS, Apr. 17, 2007, *available at* www.nwfdailynews.com/article/2699.

[93] *Walton County v. Stop the Beach Renourishment, Inc.*, 2008 WL 4381126 (Fla. Sept. 29, 2008).

[94] *Id.*

[95] *Id.*

[96] Ch. 2007-99, Laws of FL.

[97] *Id.*

[98] *Walton County*, 2008 WL 4381126.

[99] H.B. 527/S.B. 488 (Fla. 2009).

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