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For Florida

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Prepared by: Philip A. Dales, III, Research Assistant  
Ocean Law Program

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## A PROPOSED OPEN BEACHES STATUTE FOR FLORIDA

### INTRODUCTION

That there is an awareness that consideration should be given to enacting "open beach" legislation is an indication in itself that pressure and growth of society are mitigating in favor of the open recognition of the concept that the active beach, roughly that beach affected by the action of the waves, are subject to a public easement which has been used and should continue to be used by the public as a common. The dry sands area, more specifically the berm, in which the public in general has not had a strictly legal right to enjoy vis-a-vis the private land owner of the uplands, is basically not the edge of the permanent coast but is part of the littoral drift system, and as such is part and parcel of the activity of the waters along the shoreline at all of its tides, and is in a state of constant change. Mean high tide is therefore a certain elevation but beach size is a factor of wave action at that elevation. It would appear therefore that all beach, exposed and unexposed, should be subject to a public trust or easement up to the point highest high tide reaches the edge of the permanent coast. Theoretically the state could wait until in the cyclical nature of beach process a beach was eroded, establish a line of state ownership and claim all

lands deposited seaward thereafter.

It would appear however that the law should conform more realistically to the dynamic cyclical nature of beach accretion and erosion with the least disjunction of present norms, and therefore acknowledge its constant change. As a result, through the historical concepts of our common law, and through the police power of the state in the interest of public health, safety, and welfare, rather than deprive private citizens' "ownership" of the beaches, it should be recognized that they are subject to public use as a common, the use of which by the private owner is absolutely subject to the police powers of the state by reason of its character as a unique, limited natural resource, and the effect of that use on the public and other littoral landowners.

Rather than argue over the particularities of private ownership and state confiscation, I think it is more in keeping with what needs to be accomplished or re-established, to avoid the drawing of inflexible lines having no relation to the natural process of the beach itself, but to simply regulate through the police power what use a private littoral landowner can make of his land. The State, therefore, clearly states that usage of the beach by the public has been an immemorial custom, that it is the policy of the State for reasons of public health, safety, and welfare that this be unequivocally established rather than

left to the nuances of old common law lost to history but preserved in the action, use and apparent public belief of its character as a common area, and that an upland littoral landowner may not make any use of his land to prevent public access and use of the beach of his property.

Consequently, rather than pursue the means utilized in the Oregon Statute or Childs bill, which required extensive litigation and a case by case showing of legal sufficiency of facts constituting one of the three ways of establishing public rights in private rights, namely, prescription, dedication, and common usage, I believe that it is within the competence of the legislature to prescribe what is sufficient to create public rights in private rights, recognize facts as being so sufficient, and declare the state of the law as to those rights and that area of the coastal shore. I also believe that with the growing pressures of population and society that it can be demonstrated that access to and use of the beach and its scenic vistas is vitally related to public health, safety and welfare, therefore it is also within the competence of the legislature through its police powers to prescribe the use of such land areas by the littoral owners in order to protect existing public rights or to create them, and to preserve the areas.

The Open Beaches Act does just that, it invokes the doctrines

of dedication, prescription, public trust and custom, invokes the police power and suggests condemnation where appropriate to secure title or access. The Act also creates a rebuttable presumption in favor of the public right to enter and use the coastal beaches in the case or necessity of litigation. Thus property rights will not be adversely affected by the Act. Beach will continue to accrete and erode contiguous to the edge of the permanent coast of the private owner, but mere title will not be of critical controlling importance since the use of that area is prescribed by law and various presently existing permit systems.

Lastly, in order that this resource not be destroyed nor public use defeated, it is necessary to promulgate recommendations of the Coastal Zone and Wetlands Committee of October 1973 that the vital role dune systems play in the natural process of the beach system, and in the protection of upland property and retarding beach erosion be recognized and standards protecting them be established, which this Act attempts to do.

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AN ACT relating to the creation of a state policy with respect to Florida's beach resources; providing for a declaration of legislative findings; providing definitions; declaring all public rights and easements in the land between the extreme low tide and the line of vegetation; making the Division of Recreation and Parks of the Department of Natural Resources responsible for the regulation and management of public recreational activity on beaches of the state; requiring the Division of Marine Resources of the Department of Natural Resources in their regulation under Ch. 161 Florida Statutes of physical activity likely to affect the physical condition of the beach or shore to protect the vital dune systems, to deny any variances for a form of physical activity which would result in the material alteration of the existing dune structures, to issue permits for physical activity only after due regard is given to the protection of public access to the beaches of the state, and to make surveys of the coastal shores to establish beach limits, dune lines, and vegetation lines.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Chapter 375, Florida Statutes, is amended by adding section 375.260, to read:

375.260 Public right to the use of land commonly known as beaches.

(1) The short title of this act shall be known as the "Open Beaches Act of 1973."

(2) Declaration of policy; legislative findings. It is the declared public policy of the State of Florida to preserve and protect scenic and recreational use of Florida's coastal beaches, and that the public use of the coastal beaches shall be legislatively protected so far as is constitutionally possible. The legislature therefore finds:

(a) That there has been an increasing encroachment on what in the past has been considered a public right of use and access to the state's coastal shore;

(b) That the coastal shores of Florida are a heritage of all the people of Florida;

(c) That the coastal shores of the state are being irreparably damaged to the harm of the people and State of Florida;

(d) That over the years the public has made frequent and uninterrupted use of the coastal shore which use has been legally sufficient to affirm rights or easements in the public through dedication, prescription, custom, grant, or otherwise;

(e) That it has been an immemorial custom as far

back as the history of the Florida region runs for the public to make recreational use of the coastal shores;

(f) That legislation should once and for all clearly establish for the citizens of Florida the right to free and unrestricted use of the coastal shores of Florida;

(g) That it is in the public interest to unequivocally protect and preserve the public rights and easements in the coastal shore;

(h) That given the pressures of present society, its rapid growth and subsequent diminution of recreational natural resources available, particularly regarding the finite physical limitation of the coastal shores of this state, it is vitally related to the public health, safety, and welfare, that the public be not deprived of its right of access to or use of the coastal shores and that this right be clearly enunciated by the Legislature;

(i) That the dynamic cyclical nature of the coastal shore requires that certain private activities in exercise of ownership rights in those areas be prescribed in the interest of the public health, safety, and welfare in order to protect this natural resource and its scenic beauty as is required by the Florida Constitution, Art. II, § 7.

(j) That public access and use of open beaches of



the coastal shore will not adversely affect or violate the property rights of others.

(3) As used in this Act, the term -

(a) "Improvement" means a durable structure, appurtenance or other addition, modification, or alteration constructed, placed or made on or to the "coastal shore."

(b) "Coastal shore" is that coastal land and water area comprised roughly of two dynamic systems constituting the life processes of a natural beach; namely, the littoral drift system and the dune system, and which might be referred to simply as the "zone of active sand."

(c) The "open beach" is that area of the coastal shore affected by wave action directly from the open sea which is protected for use by the public as a common, in particular:

(i) In the case of typically sandy or shell beach with a discernible vegetation line which is constant or intermittent, it is that area known as the berm and beach face or plunge zone which lies seaward from the line of vegetation to the sea, and seaward as far as ordinary waves move the sand particles.

(ii) In the case of a beach having no discernible vegetation line, it is that area known as the berm and beach face or plunge zone.

(iii) Provided that this act shall not apply to river or harbor areas inland from the coastal shore, or predominately vegetated areas.

(d) "Berm" is that area of the coastal shore above water which is usually a nearly horizontal terrace of sand brought ashore by the waves, namely the observable sand commonly making up the familiar part of the beach.

(e) "Beach face" or "plunge zone" is the steeply sloping seaward side of the berm against which the waves are in constant contact and focus their energy.

(f) "Backshore" is that area of high ground normally consisting of the dune system and the berm, where waves rarely reach and across which sand movement is controlled by wind and water action (sometimes of seasonal variation), but primarily by wind.

(g) The "line of vegetation" is the extreme seaward boundary of natural vegetation. It includes the line of vegetation on the seaward side of dunes or mounds of sand typically formed along the line of highest wave action, and, where such a line is clearly defined the same shall constitute the "line of vegetation." In any area where there is no clearly marked vegetation line, recourse shall be had to the nearest clearly marked line of vegetation on each side of such area to determine the

elevation reached by the highest waves. The "line of vegetation" for the unmarked area shall be the line of constant elevation connecting the two clearly marked lines of vegetation on each side. In the event the elevation of the two points on each side of the area are not the same, then the extension defining the line reached by the highest wave shall be the average elevation between the two points. Such line shall be connected at each of its termini at the point where it begins to parallel the true vegetation line by a line connecting it with the true vegetation line at its farthest extent. Such line shall not be affected by occasional sprigs of grass seaward from the dunes and shall not be affected by artificial fill, the addition or removal of turf, or by other artificial changes in the natural vegetation of the area. Where such changes have been made, and thus the vegetation line has been obliterated or has been created artificially, the line of vegetation shall be reconstructed as it originally existed, as such is practicable; otherwise, it shall be determined in the same manner as in other areas where there is no clearly marked "line of vegetation." In the case of a beach having no discernible vegetation line, the beach shall include all area formed by wave action.

(h) "Area caused by wave action" means the area to the point affected by the highest wave of the sea not a storm

wave, typically the entire berm. It may include scattered stones washed up by the sea.

(4) The open beach. By reason of their traditional use as a thoroughfare, as a haven for fishermen and sea venturers, their frequent and uninterrupted use by the general public, and that it has been customary as far back as the history of the Florida region runs for the public to make recreational use of the coastal shores, the necessity for purposes of public health, safety and welfare for them to be free and open in connection with navigation and rescue operations as well as recreation, the Florida legislature declares and affirms that the open beach areas of the coastal shores of Florida are impressed with a state interest and that the public shall have free and unrestricted right to use them as a common to the full extent that such public right may be extended consistent with such property rights of littoral landowners as may be protected absolutely by the Florida and Federal Constitutions.

(5) (a) The division of recreation and parks, in accordance with their statutory authority, shall undertake appropriate court proceedings to:

(i) establish and/or protect the public right to the open beaches as created by this act;

(ii) or in the alternative to establish, protect, settle, and confirm all such public rights and easements

which otherwise than by this act have arisen through dedication, prescription, custom, grant, or otherwise by reason of frequent and uninterrupted public use;

(iii) determine the existing status of title ownership and control; and

(iv) condemn such easements as may reasonably be necessary to accomplish the purposes of this act.

(b) Actions brought under the authority of this section may be for injunctive, declaratory, or other suitable relief.

(6) The following rules applicable to considering the evidence shall be applicable in all cases brought under subsection (5) of this act:

(a) a showing that the area is a beach shall be prima facie evidence that the title of the littoral owner does not include the right to prevent the public from using the areas as a common;

(b) a showing that the area is a beach shall be prima facie evidence that there has been imposed upon the beach a prescriptive right to use it as a common;

(c) a showing that the area is a beach shall be prima facie evidence of a public belief that there had been a dedication in fact of the beach for use as common sufficient to establish the intent of the littoral owner to so dedicate;

(d) a showing that the area is a beach shall be prima facie evidence of customary usage of such beach by members of the public as far back as the history of the Florida region runs sufficient to establish public rights to use the area as a common.

(7) No portion of the public rights and easements to the open beach shall be alienated by any agencies except as may be permitted by the Florida Legislature in a special act.

(8) The Division of Recreation and Parks may acquire ownership of or interest in lands abutting, adjacent or contiguous to the coastal beach area as may be appropriate for protection, enhancement and full utilization of the open beach, or access in such areas of land which are held in private ownership.

(9) (a) In order to promote the public health, safety and welfare, to protect the open beaches recognized and declared by this act, and to protect the safety of the public using such areas, and to preserve values adjacent to and adjoining such areas, the natural beauty of the "coastal shore" and the public recreational benefit derived therefrom, it is necessary to control and regulate improvements on the coastal shore. Therefore, no person shall make an improvement on any property that is within the coastal shore area without first following the procedures set forth in Chapter 161. In addition to the conditions which must be met under Chapter 161 Florida Statutes, before a permit is allowed other factors

must also be taken into consideration before any permit is granted by the Division of Marine Resources. They are:

(i) The public need for healthful, safe, esthetic surroundings and conditions; the natural scenic, recreational and other resources of the area; and the present and prospective need for conservation and development of those resources;

(ii) The physical characteristics or the changes in the physical characteristics of the area and the suitability of the area for particular uses and improvements;

(iii) The land uses, including public recreational use if any, and the improvements in the area, the trends in land uses, and improvements, the density of development and the property values in the area;

(iv) The need for recreation and other facilities and enterprises in the future development of the area and the need for access to particular sites in the area;

(v) That the backshore, primarily the dune system, has a vital role in the natural dynamic cyclical beach processes, protects upland property and retards beach erosion and should be protected.

(b) Therefore, the Division of Marine Resources of the Department of Natural Resources, according to procedures prescribed by Chapter 161 Florida Statutes, shall establish coastal construction

setback lines (§ 161.053) which in addition to their present requirements shall protect the dune systems, but in no case shall construction be permitted to be initiated within fifty feet (50') of the coastal shoreline at its highest mean high tide or a line tracing the landward extent of the first trough of the primary dune line, whichever is greater. In addition in order that the integrity of the dynamic coastal shore shall be fully protected in order that the public rights and easements to the use of the open beaches be guaranteed through the continued health of these natural processes no variance shall issue for a form of construction which would result in the material alternation of the existing dune structures.

(c) The Division of Recreation and Parks in conjunction with the Division of Marine Resources shall cause to be made and completed within one year of the effective date of this act a survey of the coastal beach of Florida in order that the line of vegetation and primary dune line might be clearly set forth for the convenience of the public but also for the protection of the private owners of that land and beach in the coastal shore area, and also in order that coastal construction setback lines may be readjusted to include the protection of dune systems.

(d) The Division of Recreation and Parks in conjunction with the Division of Marine Resources is directed to periodically



reexamine the line of vegetation and primary dune line for the purpose of obtaining information and material suitable for a reevaluation and redefinition of such lines, if necessary, so that the private and public rights and interests in the open beach shall be preserved.

(e) The Division of Recreation and Parks in conjunction with the Division of Marine Resources may, from time to time, recommend to the Legislature adjustment of the vegetation line and the primary dune line as presently described herein.

(10) The Division of Recreation and Parks of the Department of Natural Resources shall be responsible for the regulation and management of public recreational activity in coastal shore areas declared by this act to be open beaches in order to preserve the integrity of and protect the scenic and recreational values of the littoral owners. Such regulation shall be promulgated and made public within six (6) months of the effective date of this act.

(11) (a) No person shall create, erect, maintain, or construct any obstruction, barrier, or restraint of any nature which interferes with the free and unrestricted right of the public, individually and collectively, to enter, leave, cross, or use as a common the open beaches.

(b) It shall be unlawful to materially alter sand dunes, such as by: erecting walls; excavating; moving large amounts

of sand or earth; or trampling the dunes with heavy equipment.

(c) Violation of this section shall be punishable as provided in Chapter 370.041 and 161.121 or a \$1000 fine whichever is greater.

(12) The owner or person in control of any property subject to a public easement declared to be open beach area by this act shall not be liable for any injury to another person or damage to property of another resulting from a condition of the property within the open beach area unless the injury or damage results from a condition that he created and knew of or, in the exercise of reasonable care, should have known that it was likely to cause injury to persons or damage to property.

(13) Immediately after the effective date of this act, the land, but not the improvements to the land within the open beach area, is exempt from ad valorem taxation.

(14) Severability. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

(15) Effective date. This act shall take effect immediately upon becoming law.