UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

WALTER E. BLESSEY, JR.,

Plaintiff,

Case No.:

v.

WALTON COUNTY, a political subdivision of the State of Florida,

Defendant.
_____/

COMPLAINT

Walter E. Blessey, Jr. ("Plaintiff"), hereby files this Complaint against Walton County to seek relief under the U.S. Constitution and 42 U.S.C. § 1983. In support, Plaintiff alleges:

Parties

1. Plaintiff is Walter E. Blessey, Jr., a citizen of Florida who owns beachfront property in Walton County, Florida.

2. Specifically, Mr. Blessey owns property located at 314 Highland Avenue, Santa Rosa Beach, Florida, 32459, which property extends seaward to the mean high water line of the Gulf of Mexico and includes the dry sand beach.

3. Defendant, Walton County (the "County") is a citizen of the State of Florida, acting through its Board of County Commissioners ("Board").

Jurisdiction

4. This Court has jurisdiction under 28 U.S.C. § 1331 because Plaintiff raises questions under the U.S. Constitution, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a)(3) because the

Plaintiff challenges the County's deprivation of rights under color of state law; and under 28 U.S.C. § 2201 because the Plaintiff seeks declaratory and injunctive relief.

Venue

5. The U.S. District Court for the Northern District of Florida is the appropriate venue because the Defendant resides in this District, 28 U.S.C. § 1391(b)(1), and a substantial part of the events or omissions giving rise to the claim occurred within this District, *id.* § 1391(b)(2). Moreover, according to the Local Rules of the Northern District, the Pensacola Division is the appropriate venue because the cause of action arises in Walton County, Florida.

General Allegations

A. Doctrine of Customary Use

6. The issues in this case deal with what is known as the Doctrine of Customary Use. The Doctrine of Customary Use is derived from old English common law that predates the United States becoming a Country.

7. The Doctrine of Customary Use was first acknowledged (and raised sua sponte) by the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974).

8. The Florida Supreme Court in *Tona-Rama*, 294 So. 2d at 78, cited Tiffany Real Property to explain the English common law doctrine:

As stated in Tiffany Real Property, (Third Edition), Vol. 3, § 935:

> "In England, persons of a certain locality or of a certain class may have, by immemorial custom, a right to make use of land belonging to an individual. Thus, there may be a custom for the inhabitants of a certain town to dance or play games on a particular piece of land belonging to an individual, or to go thereon in order to get water. So there may be a custom for fishermen to dry nets on certain land, or for persons in a certain

> trade (victualers) to erect booths upon certain private land during a fair. The custom, to be valid, 'must have continued from time immemorial, without interruption, and as of right; it must be certain as to the place, and as to the persons; and it must be certain and reasonable as to the subject matter or rights created.'
>
> . . .
>
> "Occasionally in this country it has been decided that rights to use private land cannot thus be created by custom, for the reason that they would tend so to burden land as to interfere with its improvement and alienation, and also because there can be no usage in this country of an immemorial character. In one state, on the other hand, the existence of such customary rights is affirmed, and in others this is assumed in decisions adverse to the existence of the right in the particular case." (pp. 623-624)

9. The Florida Supreme Court then went on to find:

> If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of 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.

Tona-Rama, 294 So. 2d at 78.

B. County's Assertions of Customary Use

10. In an attempt to secure the ability of the general public and tourists to use private beach property, including that specific property of Plaintiff, the County's Board of County Commissioners adopted Ordinance 2016-23 on October 25, 2016, which sought to protect the "public's long-standing customary use of the dry sand areas of all of the beaches in Walton County for recreational purposes" (the "Ordinance"). **See Exhibit A** which is a true and correct copy of the Ordinance.

11. Specifically, the Ordinance provided that "the public at large, including residents and visitors to the County, have utilized the dry sand areas of all of the beaches in the County for

recreational purposes since time immemorial."

12. Recognizing the Doctrine of Customary Use, the Ordinance purports to provide the following regarding private property owners affected by the Ordinance:

> [T]he owners of property that contains a portion of the dry sand areas of the beach may make any use of their 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.

13. Prior litigants have challenged the Ordinance on the grounds that the Ordinance was invalid and void at its adoption[1] and also on facial takings grounds.[2]

14. Florida House bill, 2018 Fla. HB 631, was adopted and becomes effective on July 1, 2018 ("HB 631"). HB 631 sets forth the judicial procedure for a governmental entity that wishes to declare recreational customary use on private property. As of July 1, 2018, the County's Ordinance will no longer be in effect.

15. The County has indicated its intent to utilize this process and seek a judicial declaration that the entire shoreline of Walton County is subject to customary use.

16. Specifically, at the Board of County Commissioners' Regular Meeting on March 13, 2018, County Attorney Sidney Noyes asked for direction or approval from the Board for her and the County Attorney's office to move forward and work on the issue of customary use in order to be prepared to take action on July 1, 2018 when the County's Ordinance becomes void.[3]

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[1] Second Amended Complaint, Alford, *et al.*, v. Walton County, No. 3:16-cv-362 (U.S. N.D. Fla. 2016).

[2] First Amended Complaint, Goodwin, *et al.*, v. Walton County, No. 3:16-cv-364 (U.S. N.D. Fla. 2016).

[3] **See** http://walton.granicus.com/MediaPlayer.php?view_id=2&clip_id=592 ("Video"). The discussion regarding customary use begins at the 24 minute and 46 seconds and ends at 41 minute and 31seconds. Citations to the Video will be in the following format Minute:Second (i.e., 24:46).

Attorney Noyes also asked for direction to continue working on this issue with Attorney David Theriaque, Special Counsel to the Board, who was previously retained by the Board to represent the County on issues regarding customary use. **See** Video at 26:19. The Board agreed and directed Attorney Noyes to prepare to be ready to begin the establishment proceeding following July 1, 2018. **See** Video at 25:39 to 26:44.

17. One of the public comments questioned the process for filing and timing, and Attorney Noyes responded that Attorney Theriaque and Dr. James Miller are working together "to make sure we have all the research completed for all twenty-six miles as quickly as we possibly can so that we can move forward as quick as we can." **See** Video at 29:59 to 31:01.

18. Responding to public comment expressing concern of the outcome of the customary use litigation, Commissioner Tony Anderson answered that "we feel very comfortable that it will win, we have plenty of documentation to show that." **See** Video at 34:40 to 35:16. After sharing some personal experiences related to the beach property at issue, Commissioner Anderson stated that "as long as I'm on this Board and drawing a breath, we are going to continue to fight for this – you have my word on that." **See** Video at 35:17 to 36:05.

19. Accordingly, the County has expressed that it is presently in the process of working on this issue and will take action to declare recreational customary use on private property under the Doctrine of Customary Use.

20. The County's consistent assertion of customary use over Plaintiff's beachfront property, and by definition the owners of other beachfront property, respectively, creates a cloud on Plaintiff's (and others) title to his property. Such assertions also instill in the public and tourists a false and illegal basis by which they believe they can freely utilize private property.

21. The County's assertions have also caused great uncertainty regarding the enforcement of trespass laws by the Walton County Sheriff's Office and landowners themselves.

C. Relationship of Old English Common Law to the Laws of the United States

22. When the United States of America was established, the Constitution of the United States and its amendments were adopted as the law of the United States.

23. The United States rejected many of the English laws (both statute and common law). After all, that is the very reason for the American Revolution, the Declaration of Independence from England, and the foundation of the U.S. Constitution.

24. The U.S. Constitution expressly rejected English law in many ways. For example, it guaranteed the right of free speech and freedom of the press, and guaranteed the right to peaceably assemble and petition the government (First Amendment); protected the right to bear arms (Second Amendment); prohibited the quartering of soldiers without consent of the owner (Third Amendment); prohibited unreasonable searches and seizures (Fourth Amendment); prohibited the taking of private property for public use without just compensation (Fifth Amendment); and prevents a state from depriving a person of life, liberty, or property, without due process of law (Fifth and Fourteenth Amendments).

25. Florida law has recognized this fundamental concept that any common law must be consistent with and not violate the U.S. Constitution, federal statutes, state constitution or state statutes:

> The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the 4th day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state.

§ 2.01, Fla. Stat.

26. Case law demonstrates that provisions of English common law have been found repugnant to the U.S. Constitution. *See Bridges v. California*, 314 U.S. 252, 265 (1941) ("No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed."); *Brown v. Mueller*, 1997 U.S. Dist. Lexis 12102, at *23 n. 4 (E.D. Mich. June 24, 1997) ("[W]ith respect to Plaintiff's 'common law' rights and causes of action, the Court notes that common law is superseded by the United States Constitution, the Michigan Constitution, subsequent legislative enactments, such as 42 U.S.C. § 1983, and the cases that interpret and apply these laws."); *American Federation of Labor v. Swing*, 312 U.S. 321, 325 (1941) (finding that a state common law that prevented "peaceful picketing or peaceful persuasion" violated the First Amendment guarantee of freedom of speech); *Cullinane v. Arnold*, No. SA CV 97-779 GLT(EEx), 1998 U.S. Dist. LEXIS 5575, at *7, 81 A.F.T.R.2d (RIA) 1629 (C.D. Cal. Mar. 24, 1998) ("Assuming a pre-Constitution common-law right to the documents Plaintiff has requested, such a right has been superceded by our Constitution and congressional enactments.").

27. The English common law Doctrine of Customary Use is inconsistent with and violates the U.S. Constitution. As such, the Doctrine of Customary Use cannot exist in Florida.

Count I – Violation of the Fifth Amendment's Takings Clause

28. Plaintiff re-alleges paragraphs 1- 27 above.

29. The common law Doctrine of Customary Use as it existed in England allows the public use of private property and did not require just compensation to the landowner.

30. The Fifth Amendment to the U.S. Constitution, as applicable to the County through the Fourteenth Amendment to the U.S. Constitution, prohibits "private property [from] be[ing] taken for public use, without just compensation."

31. The Fifth Amendment to the U.S. Constitution was ratified on December 15, 1791.

32. As of December 15, 1791, any law adopted by the State of Florida (whether statutory or common law by the judiciary) must be consistent with the U.S. Constitution.

33. Plaintiff owns certain beachfront property that the County has asserted is open to public use without compensation to Plaintiff under the common law Doctrine of Customary Use.

34. The County, under color of state law, is using the English common law to use private property for public recreational customary use, without providing just compensation to the owners of such private property, including the Plaintiff.

35. The County's assertion of the Doctrine of Customary Use violates the Plaintiff's rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983.

36. Plaintiff is entitled to an award of attorney's fees, costs and expenses pursuant to 42 U.S.C. § 1988.

WHEREFORE Plaintiff respectfully requests the Court to declare that the Doctrine of Customary Use is unconstitutional and award Plaintiff his attorney fees and costs.

Count II – Violation of Due Process Rights

37. Plaintiff re-alleges paragraphs 1- 27 above.

38. The Fourteenth Amendment to the U.S. Constitution prohibits the County from

depriving any person of "life, liberty, or property, without due process of law" – both procedural and substantive due process of law.

39. The Fourteenth Amendment to the U.S. Constitution was ratified on July 9, 1868.

40. As of July 9, 1868, any law existing or adopted by the State of Florida (whether statutory or common law by the judiciary) must be consistent with the U.S. Constitution.

41. The Doctrine of Customary Use fails to afford procedural and substantive due process.

42. Specifically, the vague elements and uncertain standards of the Doctrine of Customary Use deprive persons of "life, liberty, or property, without due process of law."

43. The void for vagueness aspect of the due process clause has been stated as follows:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); *see also A. B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 238-40 (1925).

44. Recently Justice Gorsuch has stated:

> Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death. The founders cited the crown's abuse of "pretended" crimes like this as one of their reasons for revolution. See Declaration of Independence ¶21. Today's vague laws may not be as invidious,

> but they can invite the exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.

Sessions v. Dimaya, 138 S. Ct. 1204, 1223-24 (2018) (Gorsuch, J., concurring in part).

45. In *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974), the Florida Supreme Court first recognized the English common law Doctrine of Customary Use in Florida. In following select portions of the English common law rule, the Florida Supreme Court stated the four elements to establish a customary right to use private property: "If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner." *Id.* at 78.

46. The English common law Doctrine of Customary Use, however, actually has seven elements.

> The custom, to be valid, [1] 'must have continued from time immemorial, [2] without interruption, and [3] as of right; [4] it must be certain as to the place, and [5] as to the persons; and it must be [6] certain and [7] reasonable as to the subject matter or rights created.'

Tona-Rama, 294 So. 2d at 78, citing Tiffany Real Property, (3rd ed.), Vol. 3 § 935; *see State Ex. Rel. Haman v. Fox*, 594 P.2d 1093, 1101 (Idaho 1979).

47. The Florida Supreme Court does not explain its basis for eliminating certain elements of the English common law doctrine. More importantly, the Florida Supreme Court fails to explain or provide any guidance as to what "ancient, reasonable, without interruption and free from dispute" means or how one proves or disproves any of these four elements. *See, e.g.*, *Trepanier v. Cty. of Volusia*, 965 So. 2d 276 (Fla. 5th DCA 2007). Rather, the Florida Supreme Court leaves it to lower courts which will be required to "make it up" as Justice Gorsuch would

say.

48. Because the Customary Use Doctrine fails to provide landowners fair notice, it is void for vagueness and unconstitutional. For example, there are no definitions or explanations for Florida's four elements of customary use and no standards regarding what evidence is sufficient to prove or establish them. A court is left to make them up.

49. As such, the common law Doctrine of Customary Use, while valid under England's common law, is repugnant to the U.S. Constitution and cannot be the law of Florida. *See* § 2.01, Fla. Stat.; *see also Gillies v. Orienta Beach Club*, 159 Misc. 675, 681, 289 N.Y.S. 733, 740 (Sup. Ct. 1935) (refusing to accept customary usage from the law of England as part of the law of New York, and including in its reasoning that "England is of the Old World, our State is of the New").

50. The County, under color of state law, is using the English common law Doctrine of Customary Use to deprive Plaintiff of life, liberty, and property, without procedural or substantive due process of law.

51. The County's assertion of the Doctrine of Customary Use violates the Plaintiff's rights under the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983.

52. Plaintiff is entitled to an award of attorney's fees, costs and expenses pursuant to 42 U.S.C. § 1988.

WHEREFORE Plaintiff respectfully requests the Court to declare that the Doctrine of Customary Use is unconstitutional and award Plaintiff his attorney fees and costs.

Relief Requested

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Declare that the Doctrine of Customary Use is unconstitutional under the Takings Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution, and 42 U.S.C. § 1983;

B. Declare that the Doctrine of Customary Use is unconstitutional under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, and 42 U.S.C. § 1983;

C. Award attorney's fees, costs and expenses under 42 U.S.C. § 1988; and

D. Grant such other relief as the Court may deem proper.

Respectfully submitted by:

/s/ D. Kent Safriet
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Attorneys for Plaintiff

Dated: June 14, 2018

ORDINANCE NO: 2016-23

AN ORDINANCE OF WALTON COUNTY, FLORIDA, PROTECTING THE PUBLIC'S LONG-STANDING CUSTOMARY USE OF THE DRY SAND AREAS OF THE BEACHES; PROVIDING FOR A BUFFER AREA AROUND PRIVATE PERMANENT STRUCTURES; PROVIDING FOR PENALTIES FOR VIOLATION OF THIS ORDINANCE; PROVIDING AUTHORITY, SEVERABILITY, AND AN EFFECTIVE DATE.

WHEREAS, the recreational use of the dry sand areas of all of the beaches in the County is a treasured asset of the County which is utilized by the public at large, including residents and visitors to the County; and

WHEREAS, the dry sand areas of all of the beaches in the County are a vital economic asset to the County and the State of Florida; and

WHEREAS, the public at large, including residents and visitors to the County, have utilized the dry sand areas of all of the beaches in the County for recreational purposes since time immemorial; and

WHEREAS, the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 75 (Fla. 1974), expressly recognized the doctrine of customary use in the state of Florida; and

WHEREAS, the research and analysis of Dr. James Miller, as well as the testimony of citizens of the County, confirm that the doctrine of customary use has applied to all of the beaches in Walton County since before 1970; and

WHEREAS, the County desires to ensure that the public's long-standing customary use of the dry sand areas of all of the beaches in Walton County for recreational purposes is protected; and

WHEREAS, the County recognizes and acknowledges the rights of private property owners to enjoy and utilize their property; and

WHEREAS, the County desires to establish a fifteen (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; and

WHEREAS, the public at large, including the residents and visitors to the County, shall not utilize such fifteen (15) foot buffer zone, except to utilize an existing or future beach access point for ingress and egress to the beach; and

WHEREAS, such fifteen (15) foot buffer zone is not intended to constitute an abandonment of the public's right, based upon its long-standing customary use, to utilize the dry sand areas for recreational purposes in such buffer zone, but rather is provided voluntarily and solely as an accommodation to the private property rights of those individuals who own property on which a portion of the dry sand areas of the beach is located; and

WHEREAS, no individual, group, or entity shall interfere with the public's ability to continue its long-standing customary use of the dry sand areas located outside of the fifteen (15) foot buffer zone; and

WHEREAS, the owners of property that contains a portion of the dry sand areas of the beach may make any use of their 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.

NOW, THEREFORE, BE IT ORDAINED BY THE WALTON COUNTY BOARD OF COUNTY COMMISSIONERS THAT CHAPTER 23 OF THE WALTON COUNTY CODE OF ORDINANCES IS HEREBY CREATED TO READ AS FOLLOWS:

SECTION 1: AUTHORITY.

The authority for the enactment of this Ordinance is Chapter 125, *Florida Statutes*.

SECTION 2: REGULATION OF DRY SAND AREAS.

1. The 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. Except as stated in Paragraph 3, no individual, group, or entity shall impede or interfere with the right of the public at large, including the residents and visitors of the County, to utilize the dry sand areas of the beach that are owned by private entities for recreational purposes.

2. The dry sand area of the beach is defined 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.

3. The public at large, including the residents and visitors of the County, shall not utilize a fifteen (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 is necessary to utilize an existing or future public beach access point for ingress and egress to the beach. The foregoing buffer zone requirement shall not apply to the Walton County Sheriff's Office, the Walton County

Tourist Development Council, the South Walton Fire District, and other emergency service providers.

4. The following recreational activities are permitted for members of the public on the dry sand areas of the beach that are owned by private entities: walking; jogging; sitting on the sand, in a beach chair, or on a beach towel or blanket; using a beach umbrella that is ten (10) feet or less in diameter; sunbathing; picnicking; fishing; playing beach games; building sand castles; and similar traditional recreational activities.

5. The following recreational activities are prohibited for members of the public on the dry sand areas of the beach that are owned by private entities: erection of tents as defined in the Beach Activities Ordinance.

SECTION 3: PENALTY PROVISION.

A violation of this Chapter shall constitute a civil infraction punishable by a fine not to exceed $500.00. Each occurrence of a violation, or, in the case of continuing violations, each day a violation occurs or continues, constitutes a separate offense. In addition to issuance of fines, the County shall have the power to sue for relief in civil court to enforce the provisions of this Ordinance.

SECTION 4: SEVERABILITY.

If any portion of this Ordinance is determined by any Court to be invalid, the invalid portion shall be stricken, and such striking shall not affect the validity of the remainder of this Ordinance. If any Court determines that this Ordinance, or any portion hereof, cannot be legally applied to any individual(s), group(s), entity(ies), property(ies), or circumstance(s), such determination shall not affect the applicability hereof to any other individual, group, entity, property, or circumstance.

SECTION 5: EFFECTIVE DATE.

This Ordinance shall become effective on April 1, 2017.

PASSED AND DULY ADOPTED in regular session, by the Board of County Commissioners of Walton County, Florida, this 25th day of October 2016.

BOARD OF COUNTY COMMISSIONERS OF WALTON COUNTY, FLORIDA

Attest:

for Alex Alford, Clerk of Circuit Court and County Comptroller

Sara Comander, Chair