UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

WALTER E. BLESSEY, JR.,

Plaintiff,

v. CASE NO.: 3:18-cv-1415-MCR-CJK

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

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS
AND INCORPORATED MEMORANDUM OF LAW

Defendant WALTON COUNTY ("County"), by and through its undersigned counsel, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), hereby files this Motion to Dismiss and Incorporated Memorandum of Law directed at Counts I and II of the Plaintiff's Complaint (ECF No. 1), and states as follows:

I.

INTRODUCTION

1. The Plaintiff's Complaint (ECF No. 1) contains two (2) separate counts against the County: (1) a takings claim; and (2) a due process claim. The general allegations underpinning these claims are found in Paragraphs 6 through 27 of the Complaint.

2. Count I, which is set forth at Paragraphs 28 through 36 of the Complaint, alleges a violation of the Takings Clause under the Fifth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983.

3. Count II, which is set forth at Paragraphs 37 through 52 of the Complaint, alleges violations of substantive and procedural due process rights under the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983.

4. The Plaintiff requests relief in the form of a declaration that the common law doctrine of customary use is unconstitutional under the Fifth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983, as well as an award of attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988.

5. Paragraph 14 of the Plaintiff's Complaint references the Florida Legislature's recent enactment of House Bill 631, which became effective on July 1, 2018 ("HB 631").

6. HB 631 is codified at Chapter 2018-94, Laws of Florida, Section 10, and creates Section 163.035, *Florida Statutes*, entitled "Establishment of recreational customary use." A true and correct copy of Chapter 2018-94, Laws of Florida, is attached and incorporated herein by reference as Exhibit "A."

7. In addition to retroactively invalidating the County's ordinance which protected the public's customary use of the beaches in Walton County, Florida, and which this Court upheld against a facial challenge,[1] this new Florida statute codifies a two-step process whereby a local government can seek to judicially affirm the existence of the public's recreational customary use of a beach. (*See* Ex. A at 8-9).

8. Pursuant to Section 163.035(3)(a)1.-3., *Florida Statutes*, the first step requires the local government to hold a duly-noticed public hearing to identify: (a) the specific parcels of property over which the affirmation of customary use is sought; (b) the detailed, specific, and individual uses sought on those parcels; and (c) each source of evidence upon which the local government will rely to prove the existence of customary use under the statutorily enumerated elements.

9. In the second step, Section 163.035(3)(b)1., *Florida Statutes*, requires the local government to file a complaint for declaration of customary use in the state circuit court in the county in which the subject properties are located and to give notice of such action to the owners of each parcel subject to the complaint in order to provide the owners an opportunity to intervene.

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[1] *See Alford v. Walton Cnty.*, Case No. 3:16cv362/MCR/CJK (Order on Summary Judgment dated Nov. 22, 2017) (vacated as moot in light of adoption of HB 631).

10. Section 163.035(3)(b)2., *Florida Statutes*, specifies that the state circuit court proceeding is *de novo* and requires the state circuit court to determine "whether the evidence presented demonstrates that the recreational customary use for the use or uses identified in the notice of intent have been ancient, reasonable, without interruption, and free from dispute." (*See* Ex. A at 9). Section 163.035(3)(b)2., *Florida Statutes*, further provides that there is no presumption as to the existence of customary use, and "the governmental entity has the burden of proof to show that recreational customary use exists." (*Id.*).

11. On its face, the Plaintiff's Complaint establishes that the Plaintiff's claims are founded upon the County's announced intention to follow the new statutory process prescribed in HB 631 and codified in Section 163.035, *Florida Statutes*.[2] (*See* ECF No. 1 at ¶¶ 15-19). However, as of the filing of the Plaintiff's Complaint, the County has not formally commenced such process, nor has the state circuit court made any determination as to a recreational customary use upon the dry sandy areas of the beaches in Walton County, Florida.

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[2] As an aside, it bears noting that the law firm representing the Plaintiff in this suit -- Hopping, Green & Sams, P.A. -- was intimately involved in drafting HB 631 and lobbied the Florida Legislature in favor of its passage.

12. Based upon the foregoing, the County submits that the Court lacks subject matter jurisdiction over the Plaintiff's claims. The County further submits that the Plaintiff's Complaint fails to state a claim upon which relief can be granted. Accordingly, the Court should dismiss the Plaintiff's Complaint.

II.

MEMORANDUM OF LAW

A. Standard of Review

A motion to dismiss under Rule 12(b)(1) can assert either a factual attack or a facial attack to subject matter jurisdiction. *McElmurray v. Consol. Gov't of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). In a facial attack, the Court is required to "look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990).

Similarly, in ruling on a Rule 12(b)(6) motion, the Court must accept all factual allegations as true and construe them in a light most favorable to the plaintiff. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002); *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). Pursuant to Rule 8(a)(2), a complaint must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v.*

Twombly, 550 U.S. 544, 570 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While detailed factual allegations are not required, the pleader must do more than merely invoke labels, conclusions, and the formulaic elements of a cause of action. *Id.* (citing *Twombly*, 550 U.S. at 555).

A complaint may be dismissed pursuant to Rule 12(b)(6) if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Lopez v. First Union Nat'l Bank of Fla.*, 129 F.3d 1186, 1189 (11th Cir.1997); *see also Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231-32 (11th Cir. 2000). While the Court at the 12(b)(6) stage primarily examines the allegations of a complaint, the Court is not always limited to the four corners of the complaint. *Halmos v. Bombardier Aerospace Corp.*, 404 Fed. Appx. 376, 377 (11th Cir. 2010). "[A] district court may take judicial notice of matters of public record without converting a Rule 12(b)(6) motion into a Rule 56 motion." *Id.*; *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take

judicial notice."); *Thaeter v. Palm Beach Cnty. Sheriff's Office*, 449 F.3d 1342, 1352 (11th Cir. 2006).

B. Governmental Liability Under Section 1983

As the Eleventh Circuit summarized in *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030 (11th Cir. 1987):

> It is well established that section 1983 itself creates no substantive rights; it merely provides a remedy for deprivations of federal rights established elsewhere. To sustain a cause of action based on section 1983, the [plaintiffs] must establish two elements: (1) that they suffered a deprivation of "rights, privileges, or immunities secured by the Constitution and laws" of the United States, and (2) that the act or omission causing the deprivation was committed by a person acting under color of law. Thus, section 1983 imposes liability only "for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." It does not provide a remedy for "any and all injuries inflicted by persons acting under color of state law." Absent the existence of an underlying constitutional right, no section 1983 claim will lie.

Id. at 1032 (internal citations omitted); *see also U.S. Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275, 1288 (11th Cir. 2001); *Arrington v. Cobb Cnty.*, 139 F.3d 865, 872 (11th Cir. 1998).

C. Customary Use In Florida

Florida courts have long recognized the importance of Florida's beaches and the public's paramount right to utilize the same. Indeed, more than seventy-five (75) years ago, the Florida Supreme Court in *White v. Hughes*, 190 So. 446 (Fla. 1939), recognized the "superior" nature of the public's right to use the beach for bathing and recreational purposes:

> There is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight. . . . The attraction of the ocean for mankind is as enduring as its own changelessness. The people of Florida – a State blessed with probably the finest bathing beaches in the world – are no exception to the rule. . . . We, and our visitors too, enjoy bathing in their refreshing waters. The constant enjoyment of this privilege of thus using the ocean and its fore-shore for ages without dispute should prove sufficient to establish it as an American common law right, similar to that of fishing in the sea, even if this right had not come down to us as a part of the English common law, which it undoubtedly has. . . . It is difficult indeed to imagine a general and public right of fishing in the sea, and from the shore, unaccompanied by a general right to bathe there, and of access thereto over the foreshore for that purpose. Universal and habitual practice in England and America for many years has established this right.

Id. at 448-49. Hence, Florida courts have steadfastly protected the public's paramount right to enjoy and recreate in Florida's waters and on her beaches.[3]

Subsequent to *White*, the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (Fla. 1974), adopted the doctrine of customary use "to afford the [public] rights in beach property." *Id.* at 78. In so doing, the Court reiterated the special treatment afforded to the public's use of beaches in Florida:

> We recognize the propriety of protecting the public interest in, and right to utilization of, the beaches and oceans of the State of Florida. No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches. And the right of the public of access to, and enjoyment of, Florida's oceans and beaches has long been recognized by this Court.

Id. at 75. The Court further recognized the need to protect the interest and rights of the public to the full use of Florida's beaches, stating:

> The beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title. The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency – the traditional uses of land – but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The

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[3] The terms "beach" and "shore" are defined to encompass the area landward from the mean low-water line to the line of permanent vegetation. *See* § 161.54(3), Fla. Stat. (2018).

> interest and rights of the public to the full use of the beaches should be protected.

Id. at 77; *cf. Crystal Dunes Owners Ass'n v. City of Destin*, 476 Fed. Appx. 180, 185 (11th Cir. 2012) ("[W]e agree, beachfront property is different from non-beachfront property under Florida law.").

Based upon the above-pronouncements and citing *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969), the Court in *Tona-Rama* adopted the customary use doctrine as a means to protect the public's right to the full use of Florida's beaches, holding:

> If the recreational use of the sandy area adjacent to mean high tide has been **[1]** ancient, **[2]** reasonable, **[3]** without interruption and **[4]** 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, Inc., 294 So. 2d at 78 (internal brackets and numbering added).[4] The Court explained that the public's customary right to use the dry sand area of the beach

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[4] In *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969), the Oregon Supreme Court concluded that the public had a customary right to use the dry sand areas of the beaches along the Pacific coastline. In so doing, the Oregon Court noted that its holding based on custom "takes from no man anything which he has had a legitimate reason to regard as exclusively his." *Id.* at 678.

does not create any interest in the land itself, but rather creates a superior "right of use" that "cannot be revoked by the land owner."[5] *Id.*

As previously discussed, the Florida Legislature during the 2018 legislative session passed and Governor Scott signed into law HB 631, which became effective on July 1, 2018. HB 631 provides that local governments may not adopt or maintain customary use ordinances unless the governmental entity first follows the prescribed

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[5] The Court in *Tona-Rama* compared the rights of the upland owner to the rights of a part-owner of a land-locked, non-navigable lake. *See Tona-Rama, Inc.*, 294 So. 2d at 78 (citing *Duval v. Thomas*, 114 So. 2d 791 (Fla. 1959)). In *Duval*, the Florida Supreme Court held that an owner of a portion of a lake could not interfere with the rights of others to utilize the entire lake, stating:

> We take judicial knowledge of the importance of 'tourism' to our state. Florida is advertised as a playground, a retreat from the hurryscurry of the modern world and from the rigors of northern climes. Fishing and swimming are prominent if not principal items of the entertainment the stranger expects to find here. If the enjoyment of non-navigable lakes were to be curtailed or restricted by a holding that the owner of a portion of one of them, and his guests, should enjoy the waters only within the property lines the damage would be immeasurable.

Duval, 114 So. 2d at 795.

statutory process, including seeking and obtaining a judicial determination affirming the existence of the recreational customary use.[6]

D. The Plaintiff's Complaint Should Be Dismissed In Its Entirety For Lack Of Subject Matter Jurisdiction

Federal courts are granted "[t]he judicial Power of the United States" pursuant to Article III, Section 1 of the Constitution. However, in order to remain faithful to the tripartite structure of the authority granted to each governmental branch, "the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1546-47 (2016). Further, "'[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Id.* at 1547.

The constitutional minimum for standing consists of three elements. In particular, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be

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[6] On July 12, 2018, Governor Scott issued Executive Order 18-202 stating, in part, that HB 631 is intended to create a uniform legal process "to expand beach access" and directed certain state agencies to "engage in all appropriate efforts to ensure that access to Florida's public beaches is not restricted so that families and visitors can continue to enjoy our world-class public beaches." Executive Order 18-202 further directs all state attorneys to "ensure that the ability of the public to access Florida's public beaches in accordance with longstanding Florida law is preserved and is not infringed."

redressed by a favorable judicial decision." *Id.* Further, as the party invoking federal jurisdiction, a plaintiff bears the burden of establishing these elements. *Id.*

Turning to the instant case, the Plaintiff's Complaint establishes on its face that there is no actual case or controversy in this matter, nor can the Plaintiff meet any of the requirements for standing. As previously discussed, the Plaintiff's Complaint is founded upon the County's announced intention to follow the newly-enacted statutory process prescribed in HB 631 (now codified in Section 163.035, *Florida Statutes*) to seek judicial affirmance in state circuit court of the existence of a recreational customary use upon the dry sandy portions of the beaches in Walton County, Florida. (*See* ECF No. 1 at ¶¶ 15-19). While couched in terms of a challenge to the common law customary use doctrine, the Plaintiff's Complaint is in reality no more than a poorly disguised and premature effort to end-run Florida's new recreational customary use statute. However, the Plaintiff has not and cannot demonstrate any injury in fact caused by the County's conduct that is likely to result in a favorable decision to the Plaintiff, which is a condition precedent to this Court having subject matter jurisdiction in this case.

Further, the Plaintiff's request for declaratory relief in his Complaint does not provide this Court with subject matter jurisdiction. It is well established that before a Federal court may issue relief under the Declaratory Judgment Act, there "must be a case or controversy that is live, is 'definite and concrete,' and is susceptible to 'specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Gagliardi v. TJCV Land Trust*, 889 F.3d 728, 734-35 (11th Cir. 2018). As with any Federal suit, when a party seeks declaratory relief, "the courts are required to examine whether there is an 'actual controversy,' without which a declaration may not issue." *Id.* at 735.

Moreover, "[a] declaratory judgment devoid of 'sufficient immediacy and reality' cannot render a case justiciable." *Id.*; *see also Golden v. Zwickler*, 394 U.S. 103, 108 (1969) ("[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite. This is as true of declaratory judgments as any other field.'"); *Emory v. Peeler*, 756 F.2d 1547, 1552 (11th Cir. 1985) (noting that "the continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative threat of future injury" and "[t]he remote possibility

that a future injury may happen is not sufficient to satisfy the 'actual controversy' requirement for declaratory judgments").

Again, the Plaintiff's Complaint is premised entirely upon the County's announced intention to follow the newly-enacted statutory process prescribed in HB 631 to seek judicial affirmance in state circuit court of a recreational customary use upon the dry sandy portions of the beaches in Walton County, Florida. (*See* ECF No. 1 at ¶¶ 15-19). At this juncture, however, the County has not issued the notice of intent and conducted a public hearing as prescribed in HB 631, nor has the County filed a complaint in the state circuit court and obtained an affirmance of any recreational customary use, let alone a recreational customary use upon the Plaintiff's property. Rather, the Plaintiff's request for declaratory relief is based upon facts which are "conjectural, hypothetical, or contingent" as opposed to "real and immediate." *See Emory*, 756 F.2d at 1552.

Accordingly, based upon the foregoing, the Court should dismiss the Plaintiff's Complaint in its entirety for lack of subject matter jurisdiction.

E. Count I Of The Plaintiff's Complaint Fails To State A Cause Of Action For A Fifth Amendment Takings Claim

In Count I of the Complaint, the Plaintiff alleges that the customary use doctrine violates the Plaintiff's rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983. For the reasons discussed below, the Court should dismiss Count I of the Plaintiff's Complaint because it fails to state a claim upon which relief can be granted.

The Fifth Amendment's Takings Clause, which extends to the states through the Fourteenth Amendment, provides: "[Nor] shall private property be taken for public use, without just compensation." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005). "[T]he Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *Id.* (quoting *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 314 (1987)).

While eminent domain is the classic taking, the Courts recognize that government regulation can interfere with private property rights to such an extent to result in a taking. *Lingle*, 544 U.S. at 537. Such a regulation is deemed a *per se* taking if it requires a permanent physical invasion of private property, *id.* at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)), or if

the regulation deprives an owner of all economically beneficial use of the property, *id.* (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)).

Even if a regulation is not a *per se* taking, it may rise to a taking under the multi-factor analysis set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), which focuses on the magnitude of the economic impact of the regulation and the extent of interference with property rights. *Lingle*, 544 U.S. at 540. The Supreme Court has also recognized a land-use exaction theory of taking, as set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and reaffirmed that a plaintiff may pursue a takings claim under any of the above theories. *Lingle*, 544 U.S. at 548.

The Fifth Amendment's Takings Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of . . . a taking." *First English Evangelical Lutheran Church*, 482 U.S. at 315. The Supreme Court in *Lingle* noted that the Takings Clause merely requires compensation for governmental interference with private property that is otherwise valid. *Lingle*, 544 U.S. at 543.

"[I]n general, '[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to a taking.'" *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984)). Further, compensation for a taking need not be furnished "in advance of or even contemporaneously with the taking." *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990) (citing *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985)). Rather, "[a]ll that is required is the existence of a 'reasonable, certain and adequate provision for obtaining compensation' at the time of the taking." *Id.* (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974)).

In order for a Fifth Amendment takings claim to be ripe, a plaintiff must first seek compensation through the procedures the state has provided, because the Fifth Amendment does not proscribe the taking of property; it proscribes the taking of property without just compensation. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 n.40 (1981). If an adequate procedure for seeking just compensation is provided by the state, a property owner cannot claim a violation of the Takings Clause until it has used that procedure and been denied just compensation. *Williamson Cnty. Reg'l Planning Comm'n*, 473 U.S. at 194-97.

There is a two-prong test for ripeness for regulatory takings under the Takings Clause of the Fifth Amendment: (1) there must be a final decision about how a regulation will be applied to the property; and (2) the owner cannot pursue a regulatory Takings Clause claim until he has sought compensation, if an adequate procedure exists. *Id.* at 186-91, 194. If the state provides a procedure for seeking compensation, the owner must pursue that remedy and be denied just compensation before the takings claim is ripe. *Id.* at 194-95.

"[N]o constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a Section 1983 action." *Id.* at 193-94 & n.13; *see also Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 735, 737 (1997). In this regard, the Eleventh Circuit has recognized that a state remedy of inverse condemnation is available for alleged takings violations in Florida. *See Busse v. Lee Cnty.*, 317 Fed. Appx. 968, 972 (11th Cir. 2009) (affirming dismissal of takings claim for lack of jurisdiction on ripeness grounds where plaintiff had failed to allege that he sought and was denied compensation through Florida's inverse-condemnation remedy).

In this instant case, there has been no final state court determination affirming a recreational customary use of the dry sandy area of the beach on the Plaintiff's property, nor has there been any official act to do so. In fact, the statutorily-imposed process to affirm the existence of any such recreational customary use as it pertains to the Plaintiff's property pursuant to HB 631 has not even begun. Rather, as the Plaintiff admits in his Complaint, the County has merely announced its intention to seek a judicial affirmation of the existence of the public's longstanding customary use of the beaches in Walton County, Florida, in accordance with HB 631. (*See* ECF No. 1 at ¶¶ 15-19).

Moreover, despite the County's pronouncement of its intent to pursue the process prescribed in HB 631, the County Commission may ultimately choose not to do so, or, even if the County does pursue such statutory process, the state circuit court could potentially not affirm the existence of a recreational customary use. Simply put, the Plaintiff's takings claim is premature, as established by the Plaintiff's own admission in his Complaint that nothing has been done to allegedly "take" his property. Rather, the Plaintiff is attempting to use this proceeding to improperly

preempt a decision by the state circuit court before the matter has even been submitted to such court.[7]

Thus, the Plaintiff has not and cannot satisfy the ripeness requirement to maintain his Fifth Amendment takings claim. Accordingly, on this additional basis, the Court should dismiss Count I of the Plaintiff's Complaint for failure to state a claim upon which relief may be granted. *See Nat'l Advert. Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir. 2005) ("Strict application of the ripeness doctrine prevents federal courts from rendering impermissible advisory opinions and wasting resources through review of potential or abstract disputes.").[8]

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[7] Even assuming the Plaintiff's takings claim is not premature, which it is, the Plaintiff has failed to allege that he sought and was denied compensation through Florida's inverse-condemnation remedy. On this additional basis, the Court should dismiss Count I of the Plaintiff's Complaint for failure to state a claim upon which relief may be granted.

[8] The County submits that the public's customary right to utilize the dry sandy areas of the beaches in Walton County, Florida, if affirmed by a state circuit court in accordance with HB 631, would not constitute an actionable taking because a property owner cannot maintain a takings claim for loss of a property right that he or she did not have in the first place. *See, e.g., Stevens v. City of Cannon Beach*, 854 P.2d 449, 456-57 (Or. 1993) (rejecting takings claim, holding "doctrine of custom as applied to public use of Oregon's dry sand areas is one of 'the restrictions that background principles of the State's law of property . . . already place upon land ownership'" and, thus, "plaintiffs never had the property interests that they claim were taken by defendants' decisions and regulations"), *cert. den.*, 510 U.S. 1207 (1994).

F. Count II Of The Plaintiff's Complaint Fails To State A Cause Of Action For A Substantive Or Procedural Due Process Violation

In Count II of the Complaint, the Plaintiff alleges that the customary use doctrine violates the Plaintiff's substantive and procedural due process rights under the Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983. For the reasons discussed below, the Court should dismiss Count II of the Plaintiff's Complaint because it fails to state a claim upon which relief can be granted.

1. Substantive Due Process

"The substantive component of the Due Process Clause protects those rights that are 'fundamental,' that is, rights that are 'implicitly in the concept of ordered liberty . . .' [A]reas in which substantive rights are created only by state law . . . are not subject to substantive due process protection under the Due Process Clause because 'substantive due process rights are created only by the Constitution.' As a result, these state law based rights constitutionally may be rescinded so long as the elements of procedural – not substantive – due process are observed." *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (*en banc*) (internal citations omitted); *see also Kentner v. City of Sanibel*, 750 F.3d 1274, 1279 (11th Cir. 2014).

These state-created rights include land-use rights. *Lewis v. Brown*, 409 F.3d 1271, 1272 (11th Cir. 2005) (citing *Greenbriar Village, L.L.C. v. Mountain Brook, City*, 345 F.3d 1258, 1262 (11th Cir. 2003) ("'Property interests are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The rights of waterfront owners in Florida are "state-created rights, not fundamental rights." *Kentner*, 750 F.3d at 1280 (citing *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105 n.3 & 1111 n.9 (Fla. 2008)).

There is an exception to the general rule that there are no substantive due process claims for non-fundamental rights – that being, where a person's state-created rights are infringed upon by a legislative act, in which event the substantive component of the Due Process Clause will provide protection from "arbitrary and irrational" governmental action. *Lewis*, 409 F.3d at 1273 (citing *McKinney*, 20 F.3d at 1557 n.9); *Kentner*, 750 F.3d at 1279-80.

In *McKinney*, the Eleventh Circuit "established a test, culled from prior Supreme Court precedents, to help distinguish executive from legislative acts: 'Executive acts characteristically apply to a limited number[] of persons (and often to only one person); executive acts typically arise from the ministerial or

administrative activities of members of the executive branch. The most common examples are employment terminations. Legislative acts, on the other hand, generally apply to larger segments of – if not all of – society; laws and broad-ranging executive regulations are the most common examples.'" *Lewis*, 409 F.3d at 1273 (quoting *McKinney*, 20 F.3d at 1557 n.9).

"Substantive due process challenges that do not implicate fundamental rights are reviewed under the 'rational basis' standard." *Kentner*, 750 F.3d at 1280.

> Under rational basis scrutiny governments "are not required to convince the courts of the correctness of their legislative judgments." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 724, 66 L.Ed.2d 659 (1981). "Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Id.*

Id. at 1281. "This standard is 'highly deferential' and we hold legislative acts unconstitutional under a rational basis standard in only the most exceptional of circumstances." *Id.*

In this case, the Plaintiff does not directly challenge HB 631, which authorizes a local government to seek a judicial affirmation of the existence of a recreational customary use. Rather, the Plaintiff purports to be attacking the common law doctrine of customary use in and of itself. Under such circumstances, the County

submits that the Plaintiff has failed to plead and cannot plead an alleged claim for violation of his substantive due process rights under the Fourteenth Amendment. Accordingly, on this additional basis, the Court should dismiss Count II of the Plaintiff's Complaint for failure to state a claim upon which relief may be granted.

2. Procedural Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law. The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Zinermon v. Burch, 494 U.S. 113, 125-26 (1990) (internal citations omitted).

Due process generally "requires notice and the opportunity to be heard incident to the deprivation of life, liberty or property at the hands of the government." *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). A procedural due process claim brought pursuant to Section 1983 requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." *Id.*

When a government acts legislatively, property owners are typically not entitled to any additional procedural due process. *75 Acres, LLC v. Miami-Dade Cnty.*, 338 F.3d 1288, 1294 (11th Cir. 2003). The reason being that, when a legislature enacts a law affecting a general class of persons, those affected have all received procedural due process through the legislative process. However, when a government acts in an adjudicative fashion, procedural due process is implicated. The Eleventh Circuit has recognized and regularly applied this principle in procedural due process cases. *Id.* The distinction hinges on whether the government action is determined to be legislative or adjudicative in nature. *Id.*

Here, the Plaintiff has not and cannot establish any of the three requirements to state a procedural due process claim pursuant to Section 1983. Again, as previously discussed, the statutorily-imposed process to seek judicial affirmance in state circuit court of the existence of a recreational customary use upon the dry sandy

portions of the beaches in Walton County, Florida, has not even begun.[9] Rather, as the Plaintiff admits in his Complaint, the County has merely announced its intention to seek a judicial affirmation of the existence of the public's longstanding customary use of the beaches in Walton County, Florida, in accordance with HB 631. (*See* ECF No. 1 at ¶¶ 15-19).

Moreover, it is indisputable that the two-step process set forth in HB 631 for a local government to affirm a recreational customary use requires notice to property owners and an opportunity for such property owners to be heard, at both the local level and during the state circuit court proceeding. (*See* Ex. A at 8-9). The Plaintiff alleges in his Complaint that the County intends to utilize this statutorily-imposed process which, by law, requires notice and an opportunity to be heard. (*See* ECF No. 1 at ¶¶ 15-19). Thus, the County submits that the Plaintiff has failed to plead and cannot plead a procedural due process violation under the Fourteenth Amendment. Accordingly, on this additional basis, the Court should dismiss Count II of the Plaintiff's Complaint for failure to state a claim upon which relief may be granted.

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[9] As previously stated, the law firm representing the Plaintiff in this suit -- Hopping, Green & Sams, P.A. -- was intimately involved in drafting HB 631 and lobbied the Florida Legislature in favor of its passage.

III.

CONCLUSION

In sum, for the reasons stated herein, the Court should dismiss the Plaintiff's Complaint in its entirety for lack of subject matter jurisdiction and for failure to state claims upon which relief may be granted.

WHEREFORE, Defendant WALTON COUNTY moves this Court for entry of an Order granting this Motion to Dismiss and dismissing Counts I and II of the Plaintiff's Complaint.

RESPECTFULLY SUBMITTED on this 19th day of July 2018.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

I HEREBY CERTIFY that the foregoing Motion to Dismiss and Incorporated Memorandum of Law complies with the word count limit prescribed in N.D. Fla. Loc. R. 7.1 and contains 6,284 words.

/s/ *David A. Theriaque*
DAVID A. THERIAQUE, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court by using the *CM/ECF* system and served a copy thereof via Electronic Mail to:

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Mohammad O. Jazil, Esquire
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on this 19th day of July 2018.

/s/ David A. Theriaque
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