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Appeals court ruling awaited on case involving seven Walton County beach properties

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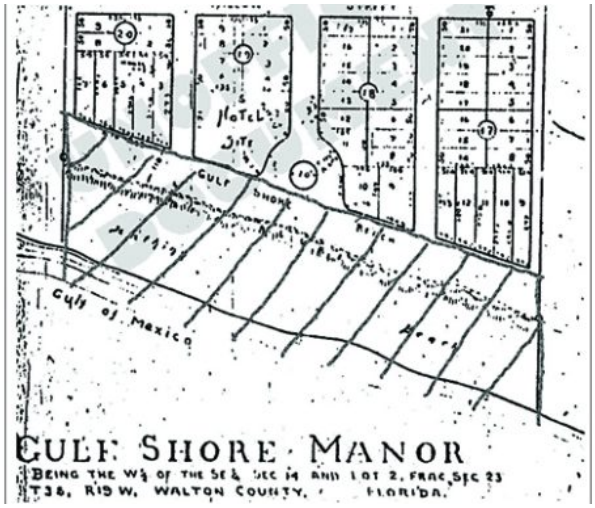

By DOTTY NIST

The First District Court of Appeal (DCA) in Tallahassee is weighing arguments in an appeal by Walton County of a circuit court decision involving customary use and seven beachfront properties.

The lots are contained in property originally platted in 1925 as the Seagrove-area Gulf Shore Manor subdivision. The properties had later been replatted as part of the Jasmine Dunes and Seawalk subdivisions.

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Oral arguments in the appeal case were presented on Oct. 25 with Adam Tanenbaum, Bradford Thomas, and M. Kemmerly Thomas, DCA judges, hearing the arguments.

Filed in November 2021, by Walton County, the appeal was of a ruling by Walton County Circuit Court Judge David Green on a motion for summary judgment by Jasmine Dunes and Seawalk subdivision homeowners and the Jasmine Dunes Homeowners Association. Judge Green had determined that Walton County had abandoned any claim to customary use of the beach on the properties in question.

Judge Green's determination was based on a March 28, 1978, resolution approved by the Walton County Board of County Commissioners (BCC) that reads: "All property lying between the Gulf of Mexico and Blocks 17, 18, 19, and 20 of Gulf Shore Manor Subdivision, including strip designated as 'Gulf Shore Beach' and a strip designated as 'Bathing Beach' according to the plat of Gulf Shore Manor recorded in Deed Book 63 at Page 603, records of Walton County Florida, be, and the same is hereby, renounced and disclaimed."

The BCC resolution had not specifically mentioned customary use.

The property owners filing the motion had stated that their property had been identified on the Gulf Shore Manor plat as either "Gulf Shores Beach" or "Bathing beach."

The properties had been among the 1,194 for which Walton County had originally sought in Walton County Circuit Court to affirm a right by the public to customary recreational use of the beach. That December 2018 filing by the county had been in line with Section 163.035, Florida Statutes, which had set forth a process for local governments to use to affirm the existence of customary use.

The owners of the properties were not named as defendants and were not required to intervene. However, hundreds had done so in opposition to the county effort.

With a settlement agreement since executed in that case and the vast majority of the 1,194 parcels already dismissed, in September 2023 the BCC had voted to have their legal team convert any already-filed dismissals without prejudice to with-prejudice (final) dismissals. Clay Adkinson, acting county attorney, had described the approved action as one, for property owners who had intervened in the lawsuit, "eliminating any remaining parcels in the case that have not signed the settlement agreement or subject to summary judgment or otherwise subject to appeal or counterclaim."

The seven former Gulf Shore Manor parcels were subject to appeal.

At the Oct. 25, 2023, oral arguments, attorney David Theriaque spoke on behalf of Walton County on the county's appeal of the circuit court decision. He maintained that the BCC's adoption of the resolution in 1978

could not legally constitute an abandonment of the public's right to customary use of the beach on the properties.

There was little discussion by the panel of judges on that question.

There was more discussion on questions raised in a cross appeal on behalf of the property owners as well as a number of general questions from the judges about customary use and Walton County's customary use complaint.

Speaking on behalf of the property owners, attorney Kent Safriet defined as the "threshold issue" the discussion of customary use by the Florida Supreme Court in 1974 in the landmark City of Daytona Beach v. Tona-Rama, Inc. (Tona-Rama) case.

He posed the question whether that discussion had been "dicta" (opinions or individual views of the author of a court opinion contained in that document not binding as legal precedent) or whether it represented "substantial law that the Florida Supreme Court created."

"And second," Safriet continued, "if the discussion was not dicta, then does the judicially-created doctrine of customary use, which authorizes the general public to physically invade private property, thereby eliminating the landowner's fundamental and established right to exclude, violate the United States Constitution as either a taking or due process violation…"

Judge Tanenbaum asked why it mattered what the Florida Supreme Court had said, since there was a state statute in place (Section 163.035 Florida Statutes) that requires a court to make a determination whether customary use exists.

Safriet spoke in favor of the statute in that it had put the power to adjudicate property rights in the hands of the courts on the basis of evidence. However, he criticized Walton County for not having named the owners of each of the 1,194 properties as defendants in the county's court complaint stemming from the statute.

"That's created issues, obviously," Safriet said. "In this case, rather than sit back and not do anything, a lot of my clients intervened to defend their rights because of this new statute, and so they're here arguing that this whole thing is unconstitutional—the customary use doctrine—but the statute itself is not."

Theriaque countered that the property owners' cross appeal was premature and based on "hypothetical upon hypothetical." He urged for the court to address the issues related to Judge Green's ruling and whether the court had correctly determined that the county in 1978 had the legal authority to abandon the public's customary use rights.

Theriaque called the argument about Tona-Rama and dicta "almost irrelevant," due to the legislature's adoption in 2018 of Section 163.035, Florida Statutes, which had set forth the procedure for local government

to use to seek to affirm customary use—and tasked the courts with determining whether the evidence presented demonstrates that the uses sought to be affirmed have been ancient, reasonable, without interruption, and free from dispute, the elements of customary use.

“The legislature set forth the test to establish customary use; to the extent that somebody wants to challenge what the legislature did in this statute, that’s not before this court,” Theriaque argued.

“There’s a process to challenge a statute; it wasn’t followed here,” he charged.

Judge Tanenbaum pointed to the property owners’ argument in the cross appeal.

Theriaque replied that there is a statutory process for challenging a statute, which. he said, requires notifying the state attorney of such a challenge.

Safriet countered that the property owners’ position is that the statute “does not create a substantive cause of action or right for customary use, it creates only procedural,”—but that even if the panel were to interpret the statute as creating such an action or right, and the statute is invalidated and eliminated, the Tona-Rama decision remains, “that judicially adopts and creates the customary use doctrine…”

“That is the heart of the matter,” he emphasized.

“Because, again,” Safriet warned, “if the statute goes away, what we’re going to have is local governments adopting ordinances, declaring customary use has been ancient, uninterrupted, free from dispute, etc., on properties.. then the landowners are going to have to file suit against the counties and against that ordinance saying it is invalid under the Fifth Amendment, 14th Amendment, and…the separation of powers, because the legislative body doesn’t have the ability to adjudicate property rights, which is the exclusive jurisdiction of the court.”

As of Nov. 28, there had been no ruling by DCA on the appeal or cross appeal.

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