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Is customary use doctrine constitutional? Walton County judge declines to rule on it.



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DeFUNIAK SPRINGS — In two separate rulings, one on a motion and the other following a court hearing, Walton County Judge David Green declined to rule on the constitutionality of Florida's existing customary use doctrine.

His doing so didn't shock anyone paying attention to the 3 1/2-year legal battle being waged between the county and private beach landowners over control of the white sand of the county's beaches. Green had succinctly stated his intentions regarding constitutional questions last November.

"This court does not have the authority to rule that the customary use doctrine adopted by the Florida Supreme Court is unconstitutional," he wrote.

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Daytona Beach vs. Tona-Rama is the landmark 1974 Florida Supreme Court case that established a standard of proof for what constitutes customary use. Customary use is a proposition by which Walton County has staked a claim that the dry sand areas of its coastline should be open to the public.

"This came as no surprise to us based on the judge's prior rulings," said Kent Safriet, who represented two private beach property owners at the hearing when constitutionality issues were turned aside. "Judge Green believes he is handcuffed. He believes he has to follow the Tona-Rama decision no matter how bad he feels it is."

In ruling against Safriet's clients in Walton County vs. Northside Holdings LLC and Lavin Family Development LLC, Green opened the door for the attorney to appeal his constitutionality case to the First District Court of Appeals. That brings it one step closer to the Florida Supreme Court, where Safriet believes "Tona-Rama" must ultimately face scrutiny.

He has filed legal notice of his intent to appeal.

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"My hope with this case was to get the issue up to the Appellate Court in a streamlined fashion. That's its next stop," he said. "The DCA, though, may feel equally handcuffed. It may pass it straight on to the Supreme Court to revisit their decision."

As Green noted in a 10-page final judgment in the Walton County vs. Northside Holdings LLC and Lavin Family Development LLC case, the Florida Supreme Court took it upon itself in 1974 to create a state-specific standard by which customary use could be identified. Justices said customary use exists where use of the beaches has been shown to be "ancient," "uninterrupted," "reasonable," and "free from dispute."

At the hearing, Safriet unsuccessfully argued that the Supreme Court's adoption of Tona-Rama was invalid and the doctrine was unconstitutional because it violated "the fundamental and established property right to exclude others from one's property."

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He claimed that opening beach property to the public through customary use amounted to an illegal "judicial taking" of land.

Green noted that the 1974 Supreme Court was "obviously well aware" of a long-established legal precedent giving private property owners the "right to exclude" trespassers, yet nonetheless ruled in Tona-Rama that customary use could be established on Florida's beaches.

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"The court was treating this right of the public to enter privately-owned beachfront property as something which is inherent in the title to the land," Green wrote.

"(The court) is without authority to enter a judgment finding the doctrine of customary use as established by the Florida Supreme Court unconstitutional as a violation of the prohibition against taking of property ... because this court must follow the holdings in Tona-Rama as binding precedent," Green wrote.

Safriet also argued that the customary use "test" adopted by the Supreme Court was unconstitutionally vague. That was another notion Green declined to rule on.

"This court is not persuaded that it can rule a standard specifically stated and adopted by the Florida Supreme Court is unconstitutionally vague," he wrote. "Despite the lack of guidance given by the Florida Supreme Court in Tona-Rama concerning the terms in question, this court is still bound by the decision and must attempt to follow it as best it can."

David Theriaque, the attorney representing Walton County in the customary use lawsuit, did not return a phone call from the Northwest Florida Daily News seeking comment. He did issue a statement last week to the News Service of Florida calling Green's ruling in the Walton County vs. Northside Holdings LLC and Lavin Family Development LLC case "an important step in keeping the beaches of Walton County free and accessible to residents and guests."

On the same day Green issued his final judgment, he also published a ruling in which he rejected arguments made in a motion filed in what one attorney called "the big case." That is an overarching lawsuit filed by the county in 2018 seeking a declaration of customary use along its 26 miles of beach, 16.4 miles of which are privately owned.

In the motion, attorneys for several clients argued that because Walton's beaches were once owned by the United States and conveyed to its initial private owners through patent deeds, "the elements required to prove (the public's) rights under the doctrine of public use cannot be established."

Specifically, attorneys argued that the county cannot prove, given the transfer of ownership, that public use has been "uninterrupted," "free from dispute" or "ancient."

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"Because two of the necessary elements of any claim to acquisition of rights under the customary use doctrine are that the use was without interruption and free from dispute, the (property owners) assert that the county's claim must fail for the lack of these two elements," Green said in summarizing the argument.

But again, Green deferred to the Florida Supreme Court as the party responsible for defining what the terms "ancient," "uninterrupted," "reasonable" and "free from dispute" mean in the context of customary use.

"The Tona-Rama case leaves the terms undefined," he wrote. "This court, however, cannot find, at this point in the proceedings ... that the elements of proof enunciated in the Tona-Roma case cannot be met."