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NOVEMBER 3, 2018 – CUSTOMARY USE HEARING

The Board of County Commissioners, Walton County, Florida held a Public Hearing to consider a Formal Notice of Intent to Affirm the Existence of Recreational Customary Use on Private Properties in Walton County, Florida on November 3, 2018 at 9:00 a.m. at the South Walton High School Auditorium in Santa Rosa Beach, Florida.

The following board members were present: Commissioner W. N. (Bill) Chapman, Chairman; Commissioner Tony Anderson, Vice-Chairman; Commissioner Sara Comander, Commissioner Cecilia Jones, and Commissioner Melanie Nipper. Mr. Larry Jones, County Administrator; Attorney Sidney Noyes, County Attorney; and Attorney David Theriaque, Theriaque and Spain-Special Counsel; were also present.

Chairman Chapman called the meeting to order. He introduced the commissioners and staff in attendance. He briefly discussed the meeting process which will be followed. He read the following into the record:

“We will begin the county commission’s Public Hearing on whether to adopt a Formal Notice of Intent to Affirm the Existence of Recreational Customary Uses on Certain Properties in Walton County, Florida.

The Public Hearing will proceed as follows: First there will be a presentation by the county attorney and the county’s special land use attorney. This will be followed by public comments limited to three minutes each, followed by comments by attorneys representing clients which will be limited to ten minutes each.

At the conclusion of all comments, the county commission will vote on whether to adopt a Formal Notice of Intent to Affirm the Existence of Recreational Customary Uses on Certain Properties in Walton County, Florida.”

Attorney David Theriaque, Special Counsel to the board, briefly presented an overview of customary use, the county's actions to maintain customary use, the recent actions of the Florida Legislature, and areas of the beach which are at issue. He discussed the doctrine of Customary Use citing court cases in Oregon (Thornton v. Hay 462 P.2d 671 (Or. 1969)) and in Florida (City of Daytona Beach v. Tona-Roma case (294 So. 2d 73 (Fla. 1976))). The Florida Supreme Court defined beach front property as being different than any other property in the State of Florida. He stated historic use must be determined in the general area, not lot by lot. He discussed Ordinance 2017-10 which adopted the establishment of customary use in Walton County. Attorney Theriaque commented that lawsuits had been filed against the county since the passage of the 2017 ordinance and said that several people had lobbied the legislature for the law that would invalidate the ordinance (HB 631). He reviewed Exhibits A and B of the Formal Notice of Intent and addressed the county's position on customary use. He said evidence has proven that customary use has occurred for generations and that purchasing beach front property does not give the owner a right to exclude the public's use of the dry sand.

Dr. James J. (Jim) Miller, PhD, LLC, briefly discussed his archeological qualifications and presented a summary of his findings resulting from his research of the historical basis for customary use. His findings were based on the Elements of Customary Use: ancient, without interruption, free from dispute, and reasonable. He stated findings of Native American pottery and tools support a generational use of the beaches. Dr. Miller's presentation covered the different beach uses and activities beginning with 3000 B.C. through the 1980's. The first private ownership of land near the beach occurred during the 1890's. He found no interruption of the right of use until the last 10 years. He found the use of the beach is a normal and expected human activity that is within the realm of the ordinary; the use is appropriate to the character of the land with no

competing uses of the beach; and is appropriate to the traditions of the community. (A copy of his presentation was submitted.)

Attorney Sidney Noyes, County Attorney, expressed her gratitude to everyone who submitted affidavits. She also thanked Florida Beaches for All and all the volunteers for their efforts in the collection of nearly 13,000 affidavits.

Ms. Ann Tucker, Chairwoman of the Muscogee Nation of Florida-Florida Tribe of Eastern Creek Indians, discussed the importance of customary use to the Muscogee Tribe and the generational use of the shores by the tribal nation long before Florida became a state. She reported the current tribal government preserves and protects 4,000 year old mounds in south Walton County. Ms. Tucker stated that generations ago, the tribe came to the shores to gather shells for the graves of their deceased members. Some of the oldest tribal graves are found in the Bruce community still covered in the shells; the tradition continues to today. She continued discussing the tribe's reliance on the beaches for food and medicinal ingredients. Ms. Tucker described the removal of Indian tribes through governmental legislation around the time of statehood. She said her 94 year old mother has lived in the area all of her life and is the first educated tribe member. She said permanent structures were not built by her people due to storm surge and hurricanes. Tribe members were taught to take only what is needed not everything you want. The tribe sees no difference between the elimination of customary use and the controlled access the tribe lives under. Ms. Tucker stated the tribe does not support the continued development of investment properties motivated by greed. Historical evidence is documented by the Treaty of Fort Jackson with the Department of the Interior-Bureau of Indian Affairs and is available for legal use to fight for customary use.

Ms. Brenda Anderson Rees discussed her family's history in Walton County since early territorial days and spoke in support of customary use.

Ms. Grace Marse discussed how she has had uninterrupted beach use for 70 years and spoke in favor of customary use.

Ms. Heidi Ellis discussed her families' activities on the beaches of Walton County. She encouraged the continuance of customary use.

Ms. Karen McGee wife of the late Judge Tom McGee, discussed her husband's efforts in the fight for customary use. She discussed the abuses of the vendors and encouraged the board to address those issues. She spoke in support of customary use and told stories of her families' beach activities throughout the years.

Chairman Chapman stated that the meeting will be available on YouTube at the conclusion of the meeting and available on the county website on Monday.

The meeting recessed for lunch at 11:00 a.m. reconvened at 11:40 a.m.

Chairman Chapman stated that public comment would be taken. Any comments made during the September 8, 2018 meeting and affidavits have been made a part of the record.

The following individuals spoke in opposition of Customary Use: Mr. Lee Shook, Ms. Jennifer Kiessling, Mr. Bill Hackmeyer, Mr. Bill Frazier, Mr. John Crunk, Mr. Harry Meier, Mr. Mark Whitaker, Mr. Alan Osborne, Mr. John Carroll, Ms. Veronica Cherry, Ms. CeCe Allen, Ms. Nora Murphy, Mr. Tommy Francis, Ms. Julie Hilton, Ms. Kelly Kean, Mr. Adam Miller, Attorney Ted Borowski, Attorney Wade Williamson, Mr. Eddie Grant, Mr. Eddie Mitchell, Attorney Bruce Anderson, Mr. Chris Ellis, and Ms. Deborah Whatley. Some speaking in opposition recommended that the county purchase more beach front property and others voiced concern regarding the inadequacies of the current infrastructure. A few questioned if the beach front property owners

would be compensated for the taking of their property. Some comments were in favor of customary use, but objected to the process being followed and the development resulting from a declaration of customary use.

The following individuals spoke in support of Customary Use: Mr. Pete Foley, Ms. Debbie Hardman, Mr. Carl Valentino, Mr. Brian Montague, Mr. Dan McMurtry, Mr. Phillip Walker, Ms. Caroline Geary (submitted documentation supporting customary use), Mr. Bill Horn, Ms. Stacy Froeschner, Mr. Buzz Livingston, Mr. James Kermick, Ms. Jacquelyn Fudge, Mr. Johnny Woodward, Mr. Robert Hartley, Ms. Linda Cook, Ms. Jacque Markel, Ms. Catherine Provencher (submitted documentation supporting customary use), Mr. Dave Rauschkolb, Ms. Kathy Kojm, Ms. Karen McGaha, Ms. Pat Cummins, Mr. Richard Butela, Ms. Coy Bowman, Mr. Jim Caldwell, and Mr. Duncan Moore. Many discussed their years of activities on the beach and some stated that the issue is not about property rights, but rather beach use.

Speakers on both sides of the issue expressed a need to find a compromise. One suggestion was to dedicate the area 30 feet landward of the Mean High Water Line to the public.

The meeting recessed at 1:50 p.m. and reconvened at 2:00 p.m.

Chairman Chapman called the meeting back to order and stated attorneys wishing to speak on behalf of groups would be given 10 minutes each to present their positions.

Attorney Daniel Uhlfelder, representing Florida Beaches for All, briefly stated his clients supported customary use and the actions taken by the board in 2016 and 2017. He discussed the processes and comments which preceded the passage of HB 631 and noted that the bill singled out Walton County. He compared the customary use ordinances passed by Walton County to other counties' customary use ordinances and found no difference. Attorney Uhlfelder stated in his opinion that customary use elements have been met. He stated the Tony-Roma case has not been

overturned and is still in effect. That case determined that the sandy beach is 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.” (*City of Daytona Beach v. Tona-Rama, Inc.*, 271 So.2d 765, p. 767.) He voiced that full use of the beaches should be protected.

Attorney Will Dunaway, Clark Partington Law Firm, objected to the board’s attempt to establish customary use. He reported he had previously submitted more than 40 written objection letters and was submitting 20 more letters at this meeting. He voiced objections to admission of testimony and to the affidavits stating they were hearsay and should not be submitted into evidence. He stated the attorneys for beach front property owners would be presenting arguments objecting to customary use and detailed the segments each attorney would address. Attorney Dunaway presented an overview of the customary use doctrine in Florida and why it has not been established outside of Daytona. He reviewed the basis for the Tona-Roma case and stated the use in Walton County is a different use than that noted in 1976 case. There has never been a court finding of customary use on any of the beaches in Walton County. The four elements must all be passed to enact customary use; if one is not upheld customary use is void. He implied that the county sold the property through Government Land Patents into private property where it was subdivided and approved by previous boards. He noted the western portion of the county has an established Erosion Control Line (ECL) in which all properties seaward of the ECL is public.

Attorney Dana Matthews, Matthews & Hawkins, requested objection letters previously submitted to Attorney Noyes and a letter requesting certain properties be excluded from the Formal Notice of Intent be submitted into the record. The board concurred. Attorney Matthews reviewed the county’s history of development patterns beginning in 1849. He discussed the development

impact on the county should customary use be declared. He suggested that the area from Sandestin west to the county line should not be included in the Formal Notice of Intent. He stated the board could choose to approve the Formal Notice of Intent which would lead to litigation costing thousands of dollars or not adopt the Intent and use the money to buy beach access property.

Attorney Kent Safriet, Hopping, Green and Sams, stated he had previously submitted letters of objection and exclusion from the customary use declaration. He discussed the history of tourism, the carrying capacities of the Beaches of South Walton, and the board's role in creating the present conflict. He reported in 2000 there were approximately 1.2 million tourist and no use conflicts; in 2009 there were approximately 2.2 million visitors with no use conflicts. He said the use conflicts have occurred in more recent years. He reported in 2017 there were 4 million visitors to Walton County beaches. Attorney Safriet said that some land owners cannot set up their own recreational equipment due to the number of tourist on the beaches. He said the county cannot continue to grow tourist numbers without providing proper infrastructure to support it. The real problem is overcrowding. Attorney Safriet voiced concerned that implementing customary use will double the current numbers and people will be turned away due to congestion. He recommended going back to the 2009 numbers and before conflict uses occurred so that everyone can be accommodated. He recommended the land owners and the county reach a compromise.

Attorney David Pleat, Pleat & Perry, requested to place in the record letters he had previously submitted voicing objection and requesting exclusion. The board concurred. Attorney Pleat discussed the misconceptions of HB 631 (F.S. 163.035) and stated this law evens out the playing field. There is no statute of limitations and a decision does not have to be made today. He recommended the county consider alternatives such as purchasing more beach front parcels, increasing the number of accesses to the beach, and increase the information educating the public

on the locations of the beach access points. He encouraged the board to reach out to the beach front property owners and bring them into the problem solving process. He requested to not move forward with Formal Notice of Intent.

Attorney David Smolker, Smolker Bartlett Loeb Hinds & Thompson, requested that previously submitted objections letters listing parcel numbers be made a part of the record. The board concurred. Attorney Smolker discussed why HB 631 was passed. He said the Florida Constitution states only a court of law can establish the existence of customary use and that a county board or individual cannot pass such laws. HB 631 was passed to ensure the law is followed properly. He encouraged the board to do a proper plan as stated in F.S. 163.035, perform an adequate study to determine carrying capacity, identify properties which can be acquired, prepare a fiscal plan to determine cost, and find a dedicated revenue source and capital improvements plan to be implemented over a period of years. He read the following quote by Oliver Wendell Holmes “We are in danger of forgetting that a strong public desire through the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” He encouraged the board to not move forward with customary use.

Attorney Mary Grace Rahm, Clark Partington, discussed the fiscal effects adopting customary use would have on the county. She said there is no need to establish customary use in the areas in which the ECL has already been established. The public will always be allowed to use the beaches. She noted that some beach front plats which were approved by previous boards did not require the dedication of the beach to the public. Attorney Rahm encouraged the board to purchase beach front property to be used for public beach accesses and to make aware to the public all accesses. She addressed the issue of commercial vendors on public beaches. She stated the county would have to prove to the court that the public use of private beach is reasonable while

50% of county maintained public beach is covered with vendors. She encouraged the board to not adopt the Formal Notice of Intent.

Attorney Noyes read the Formal Notice of Intent and briefly discussed the noted exhibits. She said it would be the decision of the board whether or not to adopt the intent.

Motion by Commissioner Comander, second by Commissioner Jones, to adopt a Formal Notice of Intent to Affirm the Existence of Recreational Customary Uses on Certain Properties in Walton County, Florida. Ayes 5, Nays 0. Chapman Aye, Anderson Aye, Comander Aye, Jones Aye, Nipper Aye.

There being no further items to discuss, the meeting was adjourned at 3:15 p.m.

Approved: _____

W. N. (Bill) Chapman, Chairman

Attest: _____

Alex Alford, Clerk of Courts and County Comptroller