

BEACH ACCESS CONFLICT CASE STUDY: DESTIN, FLORIDA

Location: City of Destin, Okaloosa County, Florida

Destin is located along the coast of the Florida Panhandle at the western end of a peninsula separating the Choctawhatchee Bay from the Gulf of Mexico. This region of Florida is known as “The Emerald Coast” due to its clear, green coastal waters and miles of sugary white sand beaches.

Timeframe: Mid-1990’s through 2012

Summary

The region of the Florida Panhandle that includes Destin was once colloquially referred to as the “Redneck Riviera” because of the multitude of southern families who have vacationed in the area for decades. More recently, regional tourism interests have remarketed the region as “The Emerald Coast.” The more enticing nickname has succeeded both in attracting a wider variety of national and international visitors and contributing to a real estate boom driven by individuals looking to invest in upscale coastal property. Over the past few decades, the population of permanent residents, seasonal visitors, and vacationers has increased significantly. At the same time, however, Destin’s beaches have become increasingly narrow due to severe erosion and rising sea level.

The limited portion of remaining beach has set the stage for “turf wars” between private beachfront property owners and public beach users over access to and along the beach. The issue of lateral access, or the public’s ability to walk along the beach, is particularly controversial due to the minimal tide fluctuations of the Gulf of Mexico. In Destin, the property of many beachfront homeowners extends to the “mean high tide line” (MHTL). Many owners have sought to restrict public access to their dry sand beach property via “No Trespassing” signs, flags, and fencing. Several cases exist of public beach users being evicted from these private beaches and faced with trespass violations enforced by the local sheriff’s department.

Over the past decade, Destin has attempted to address the beach access issue by proposing several new city ordinances. Most of these proposals, however, have failed to garner sufficient support for adoption, or have limited applicability such that the adopted ordinance fails to adequately resolve the tension. Consequently, this controversy has led to restraining orders, arrests, litigation, and an ongoing conflict between private beachfront property owners trying to protect their right to exclude, and the beach-going public (represented by the City of Destin) seeking to protect the public interest in maintaining access to and along Florida’s beaches.

Transferability

One of the primary drivers of Destin’s beach access conflict can be traced to the question of government power in the regulation of private property. Local governments must take into account both the private and public interest in the decision-making process, guiding their willingness to protect or expand public access to beaches via legislation. Officials may seek to avoid governmental involvement in such fiercely contested issues for fear of political backlash, as well as potentially hefty litigation costs if unfavorable legislation is challenged.

Transferability also depends upon the other indirect drivers of the conflict between private beachfront property owners and public beach users in a coastal jurisdiction. For example, Destin’s conflict is exacerbated by the minimal tide fluctuations along the Gulf of Mexico. Unlike Florida’s eastern coast, where the relatively wide tidal fluctuations of the Atlantic Ocean can span over 100 yards of sand, tides in the Gulf of Mexico fluctuate by only several feet. As such, while Atlantic Coast

tidal changes leave substantial room for public beach users below the MHTL during lower tides, space on Destin’s narrow beaches remains constricted regardless of tide.

Nevertheless, similarly situated coastal jurisdictions can effectively utilize the “Best Practices” discussed below to potentially avoid or minimize many of the difficulties experienced in Destin.

Best Practices

- ❖ Emphasize policies that encourage communication, agreement, and mutually beneficial solutions between private property owners, public beach users, and local governments to allow public access to the beach. For example, property owners may receive property tax reductions, or a limitation of liability, as a means of incentivizing owners to allow public access.
- ❖ Develop partnerships among diverse interest groups that facilitate a collaborative problem-solving approach to conflicts.
- ❖ Develop proactive legislation and use litigation when needed to challenge proposed land uses that will conflict with public access to (perpendicular access) and along (lateral access) beaches.
- ❖ Empower local governments via Florida’s “Home Rule” provision, codified in Chapter 166 for municipalities and Chapter 125 for counties, to implement local ordinances that effectuate fundamental objectives set forth in the State’s Comprehensive Plan. One such objective, Fla. Stat. §187.201(8)(b)(2), seeks to “[e]nsure the public’s right to reasonable access to beaches.”

Hawaii provides an example of a state that has empowered its local governments to address beach access issues at the local level. In Hawaii, the state’s primary role in the coastal areas is to preserve and protect coastal resources within the conservation district and support public access along and below the shoreline (HRS Chap. 205A). Generally, Hawaii’s counties have the primary authority and duty to develop and maintain public access to and along the shorelines (HRS §§ 46-6.5, 115-5 & 115-7). HRS § 115-9 provides a remedy and fine of up to \$2000 if private homeowners obstruct existing public rights-of-way to or along the shoreline. Local County Planning Departments are responsible for enforcement in their jurisdictions.

In Florida, the state’s Comprehensive Plan sets an aspirational goal of assuring the public’s right of “access to beaches.” Although the state initiative is not mandatory, local governments have the power to prohibit homeowners and developers from obstructing public rights-of-way to or along the shoreline.

FULL CASE STUDY DESCRIPTION

History

While American Indians inhabited the region as early as the seventh century A.D., the more immediate history of the City of Destin began in about 1845 with the arrival of the first recorded white settler, Captain Leonard Destin. Captain Destin moved to the area that would later carry his name from New London, Connecticut, and pioneered the area’s prosperous fishing industry that has persisted to the present day. For well over a century, Destin remained a small, quiet fishing village, with a population of less than 2000 full-time residents through the early 1970s.

However, by the mid-1970s, word of Destin’s enchanting natural beauty had spread far beyond the south. The small fishing village, which still had only one two-lane highway at that time, began to receive significant attention from private real estate investors looking for vacation properties and tourists seeking a place to take their families during spring break and the summer

months. Developers responded to the mounting interest by constructing condominiums, golf courses, luxury shopping centers, and amusement parks. The new development and increased tourism raised the local tax base to \$4.5 billion, and the City of Destin was incorporated as a municipality in 1984. Dubbed as the “World’s Luckiest Fishing Village,” Destin is home to the largest fishing fleet in Florida.

For years the Panhandle’s coastline, including Destin’s beaches, had been receiving vast amounts of accreted sand as a result of ephemeral ocean currents and underwater topography. These natural deposits widened the beaches, inducing confidence in further (and perhaps riskier) oceanfront development. By the early 1980s, for example, developers had laid claim to more than 60 acres of sand that had accreted to an undeveloped peninsula known as Holiday Isle. Located across the bay from Destin, Holiday Isle had previously been considered undevelopable. By the 1980s, however, so much sand had accreted on the island that developers, undaunted by the shifting sands, began construction on several massive high-rise projects.

However, drastic changes to the natural processes that for years had deposited sand along the Panhandle followed in the wake of Hurricane Opal in 1995. Opal, a Category 3 storm that ripped through the coast and leveled 20-foot sand dunes, radically changed the tidal patterns affecting Destin’s coastline. The once accreting beaches began to erode rapidly, roughly at a rate of five feet per year between 1995 and 2005. With billions of dollars in development investments and tourism revenue at stake, the City of Destin appealed to the state for assistance in battling the erosion problem. Florida, like many coastal states, runs a beach renourishment program to protect its 825 miles of sandy beaches, over half of which are categorized as critically eroded. Beach renourishment was at the root of the U.S. Supreme Court decision *Stop the Beach Renourishment v. Florida Dept. of Environmental Protection*, 560 U.S. 702 (2010). It is also at the crux of the present debate between private property rights and the public interest in beach access.

As Destin’s beaches have eroded, the population of both full time residents and visitors has continued to grow, along with associated increases in beachfront development and use. According to the most recent statistics from the U.S. Census Bureau (2012), the City of Destin has a current population of 12,809 full-time residents, and supports an annual influx of nearly five million visitors. An estimated 65,000 people visit Destin’s beaches weekly during the peak summer season. The increase in population, combined with the decrease in available dry sand beach, has catalyzed a battle between public beach users and private property owners wishing to exclude the public from their property. In Florida, over 60% of dry sand beaches are owned by private beachfront property owners whose deeds often include all property landward of the MHTL. The state owns the wet sand beach seaward of the MHTL, which is held in trust for the public. Ever changing tides, however, often make it difficult to determine and enforce where property lines begin and end.

In Destin, the private versus public beach conflict began over a decade ago, soon after the local real estate market skyrocketed. According to the Emerald Coast Association of Realtors, the average price of residential properties more than doubled between 2000 and 2005, peaking at \$950,000 in August 2006. (Since the crash, the average sale price has dwindled to approximately \$350,000). As the market grew, many people seeking a quiet refuge purchased beachfront residences along Destin’s coast. However, as erosion made beaches increasingly narrow, beach users began overflowing from crowded public beaches to the empty (and private) dry sand adjacent to residences. Issues sprang up with members of the public trespassing on beachfront homeowners’ property, using their backyard picnic tables, and even their outdoor hot tubs. More commonly, however, many beachfront owners were simply perturbed that their previously peaceful beaches were becoming crowded with a sea of multicolored umbrellas, loud music, and tourists a few feet from their backdoor. In response, property owners started to erect “No Trespassing: Private Beach” signs, fenced off their property line, and called the sheriff’s office to handle interlopers.

Concerned that tourists were being chased off the beach, Destin’s city council considered adopting the “Pedestrian Zone Ordinance,” which declared the first ten feet of dry sand landward of

the MHTL open to the public, regardless of ownership (DESTIN, FLA. PROPOSED ORDINANCE NO. 351, June 19, 2000). Under this proposed ordinance, landowners were to voluntarily grant the last ten feet of their property, just inland of the MHTL, to the city in the form of easements. This proposal was quickly abandoned due to objections that it would amount to a “taking” of personal property without just compensation.

Another proposed ordinance, the “Dry-Sand Buffer Zone Ordinance,” was similarly sidelined due to stiff opposition by interest groups. This proposal sought to establish a twenty-five foot private property zone around the last permanent private structure adjacent to the dry sand beach, leaving all other areas of the dry sand beach open to the public. In promoting this ordinance, the city’s land use attorney attempted to utilize the Doctrine of “Customary Use” [recognized by the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama Inc.*, 294 So. 2d 73 (Fla. 1974), but limited by the Fifth Circuit in *Reynolds v. County of Volusia*, 659 So. 2d 1186 (Fla. 5th DCA 1995), to a tract-by-tract determination]. In order to establish that the public had acquired the right to use Destin’s beaches through customary use, the city attorney began the arduous process of interviewing various individuals who had been visiting these particular beaches for decades. However, while the city attorney was attempting to meet the demanding burden of proof necessary to show that the recreational use of Destin’s beaches had been ancient, reasonable, without interruption, and previously free from dispute, the city ultimately decided to table the Dry-Sand Buffer Zone Ordinance.

Instead of handling the dispute through legislation, Destin opted for a more passive approach by having individual property owners call the Okaloosa County Sheriff’s Office to handle clashes between private landowners and public beach users. The sheriffs’ deputies became de facto arbitrators, using the “debris line” to determine the MHTL. The Sheriff’s Office adopted a somewhat lenient approach by allowing ten to fifteen feet above the MHTL for public use, so long as no disturbance or misconduct was reported. This vague property line determination and often-inconsistent enforcement led to complaints from both sides.

In 2002, Destin’s mayor and the Okaloosa County Sheriff’s Office requested an advisory opinion from Florida’s Attorney General, in which the question was posed “[w]hether a private property owner holding title to certain dry sand areas of the beach falling within the area defined as ‘beach’ within the beach management ordinance may utilize local law enforcement and enforcement of state trespass laws to curtail or discourage the public’s right of customary use to this same dry sand area of the beach?” (2002-38 Fla. Op. Att’y Gen., June 24, 2002). The Attorney General responded in the affirmative, stating that “[p]rivate property owners who hold title to dry sand areas of the beach falling within the jurisdictional limits of the City of Destin may utilize local law enforcement for purposes of reporting incidents of trespass as they occur.”

Nature of the Legal Dispute

The heart of the legal dispute revolves around the conflict between private property rights, specifically the right to exclude, and the public’s interest in access to beaches. The City of Destin is concerned with public access to and along the beaches due to the large number of tourists drawn to the region by the beautiful white sand beaches and emerald green coastal waters. In order to maintain a steady flow of beach tourism, while also protecting development on critically eroding beaches, the city favors beach renourishment projects that create wider beaches.

However, many beachfront property owners oppose beach renourishment projects that add large swaths of sand to the narrow beaches abutting their properties. Although private property lines are established by the MHTL, renourishment projects establish a “construction control line” along the previously established MHTL, then depositing sand on the state-owned wet sand beach and land submerged by the water. This creates a wider, publicly owned beach that is legally accessible to public beachgoers, and, in doing so, establishes a barrier of sand and tourists between privately-owned waterfront property and the ocean.

Actions and Approaches

Legislation

The City of Destin has adopted or attempted to adopt several ordinances to address the issue of public beach access, including the following:

- ❖ ***Beach Management Ordinance*** (ORDINANCE NO. 350 – June 19 , 2000):
adopted – Applies to beach vendors and concessionaires, and only east of Henderson Beach State Park where beaches become narrower. This ordinance prohibits beach “set-ups” (umbrellas/chairs) within twenty feet of the water, which had been used to restrict the public’s ability to laterally traverse the beach.
- ❖ ***Pedestrian Zone Ordinance*** (ORDINANCE NO. 351 – June 19, 2000):
rejected – Proposed a ten-foot zone above the MHTL for lateral pedestrian movement along the beach, and prohibited beach set-ups within the ten-foot pedestrian zone. Under this ordinance, beachfront property owners were to grant voluntary easements to the city.
- ❖ ***Dry-Sand Buffer Zone Ordinance*** (APPENDIX A: Draft Ordinance):
rejected – Created a twenty-five foot buffer zone from the most seaward permanent structure on a private beach, from which the public was excluded. The remaining portion of the dry sand beach would be left open to the public, based on the Doctrine of Customary Use.

Police Powers

When most of Destin’s proposed legislation to address public beach access failed, the city turned to Okaloosa County’s Sheriff’s Office to handle disputes and enforce trespassing violations. Sheriff’s deputies have thus been put in the position of arbitrators, which has led to varying determinations of property lines as well as inconsistent enforcement.

Attorney General Opinions

On several occasions, the city has attempted to determine the legal status of the ongoing conflict. For example, Destin’s mayor and the Okaloosa County Sheriff’s Office wrote to the Florida Attorney General to inquire: (1) whether the city had the authority to apply its Beach Management ordinance to certain identified dry sand areas of the beach; (2) if so, whether that right was dependent on the existence of a customary right of recreational use by the general public; and (3) whether private property owners could utilize local law enforcement and state trespass laws to “curtail or discourage the public’s right of customary use to this same dry sand area of the beach?” (2002-38 Fla. Op. Att’y Gen., June 24, 2002). The Attorney General responded in the affirmative.

Litigation

In 2006, a group of 167 private property owners banded together to oppose a beach renourishment project that would add 100 feet of sand to critically eroding beaches. Prior to the project, the landowners’ houses were within a few feet of the water, effectively prohibiting crowds of public beach users from using the narrow beach between their residences and the ocean. As one homeowner put it, the renourishment project would mean that “... you no longer own waterfront property, you own public beachfront property.”

Private property owners formed a citizen coalition called “Save Our Beaches” and began a long legal battle to block the renourishment project. The case reached the Florida Supreme Court in 2008, where it was determined that the new beach created through renourishment does, in fact, belong to the public. The landowners appealed, claiming Florida’s high court had affected a “judicial taking,” and certiorari was granted by the United States Supreme Court. In 2010, the US Supreme Court ruled in favor of the Public Trust Doctrine and public beach access in *Stop the Beach Renourishment v. Florida Dept. of Environmental Protection*. This Supreme Court decision has given the state the authority to act in the interest of the public trust, enabling any person to recreate on taxpayer-funded sand placed on beaches through renourishment projects.

In addition to the beach renourishment litigation, beginning in 2009, several residents and visitors were arrested for trespassing on private beaches due to phone calls from homeowners to the Okaloosa County Sheriff’s Office. Although the arrestees were simply laterally traversing the beach, they were deemed trespassers because they walked on the privately-owned dry sand portion of the beach. Litigation ensued in which Florida’s laws regarding the Public Trust Doctrine and Customary Use were challenged. The district court found that the homeowners were not being deprived of a fundamental constitutional right, and the suit was dismissed. The homeowners then appealed to the 11th Circuit, but the Court of Appeals upheld the dismissal of the homeowners’ claims in 2012.

Resolution

The 2006-2007 Walton County/Destin Beach Restoration Project, the subject of the *Stop the Beach Renourishment* litigation, was completed in the summer of 2007. The project restored approximately seven miles of beach extending from Destin (in Okaloosa County) to Walton County. This was the first restoration of the project area, and no subsequent nourishment has occurred. According to a five-year monitoring report, of the total 2,714,000 cubic yards of sand initially deposited during this project, only 93,060 cubic yards (or approximately 3%) had eroded as of September 2012.

Walton County submitted a local government funding request for a renourishment project involving five miles of beach in western Walton County to the Florida Department of Environmental Protection (FL DEP) for the 2014/2015 fiscal year. However, the FL DEP denied the request, noting that “this project has been deemed premature.” As such, no future beach renourishment project is currently planned for the area at this time.

Based on the U.S. Supreme Court’s 2010 decision and the 11th Circuit’s 2012 decision, it appears highly unlikely that beachfront property owners will be able to successfully oppose beach renourishment projects on critically eroding beaches, exclude the public from utilizing the dry sand deposited from such renourishment projects, or keep the public from laterally traversing the beach. What remains to be seen is what will happen if the renourished sand again erodes away and public beachgoers migrate back onto landowners’ private dry sand beach. The landowner purportedly retains the right to exclude individuals, post “No Trespassing” signs, and call the sheriff for enforcement.

Key Stakeholders

- ❖ City of Destin
- ❖ Okaloosa County
- ❖ Walton County
- ❖ Private Beachfront Landowners
- ❖ Public Beach Users (residents and visitors)

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