***AMENDED AGENDA**
FERNANDINA BEACH CITY COMMISSION
SPECIAL MEETING
JUNE 26, 2018
5:00 PM
CITY HALL COMMISSION CHAMBERS
204 ASH STREET
FERNANDINA BEACH, FL 32034

1. CALL TO ORDER

2. ROLL CALL

3. PLEDGE OF ALLEGIANCE

4. ORDINANCE - SECOND READING

4.1 **CODE AMENDMENT - CUSTOMARY USE OF BEACHES AND PUBLIC ACCESS -** ORDINANCE 2018-14 AMENDING CHAPTER 90, ARTICLE II, BEACHES, OF THE CODE OF ORDINANCES; BY CREATING A NEW DIVISION 3 TITLED CUSTOMARY USE OF BEACHES AND PUBLIC ACCESS; CREATING SECTION 90-60 PUBLIC POLICY; CREATING SECTION 90-61 PUBLIC ACCESS PRESERVATION; CREATING SECTION 90-62 PROHIBITING PERSONAL ACCESS OBSTRUCTIONS; CREATING SECTION 90-63 EROSION CONTROL; CREATING SECTION 90-64 PROHIBITING POSTING PROPERTY; CREATING SECTION 90-65 ENFORCEMENT AND VIOLATIONS; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE. *Synopsis: Amends Chapter 90 of the City Code pertaining to customary use of beaches and public access.*

5. DISCUSSION / ACTION ITEM

5.1 ***"PRIDE MONTH" RECOGNITION** - *This item is placed on the agenda at the request of Mayor Miller.*

6. ADJOURNMENT

ANY PERSON WISHING TO APPEAL ANY DECISION MADE BY THE COMMISSION WITH RESPECT TO ANY MATTER CONSIDERED AT SUCH MEETING OR HEARING WILL NEED A RECORD OF THE PROCEEDINGS, AND, FOR SUCH PURPOSES, MAY NEED TO ENSURE THAT A VERBATIM RECORD OF THE PROCEEDINGS IS MADE, WHICH RECORD INCLUDES THE TESTIMONY AND EVIDENCE UPON WHICH THE APPEAL IS MADE.

Persons with disabilities requiring accommodations in order to participate should contact the City Clerk at (904) 310-3115 or TTY/TDD 711 (for the hearing or speech impaired).

CITY COMMISSION AGENDA ITEM
City of Fernandina Beach

SUBJECT: Ordinance 2018-14
Code Amendment - Customary Use of Beaches and Public Access

ITEM TYPE: Ordinance (w/o fiscal impact)

REQUESTED ACTION: Consider Ordinance 2018-14 at First Reading.

SYNOPSIS: This Ordinance amends the City Code by adopting a customary use beach Ordinance for access to the public. This Ordinance does not negate the City's actions to get a judicial determination of customary use. This Ordinance, in response to Florida Laws Ch. 2018-94, gives the City an affirmative defense of customary use should a property owner challenge a City Ordinance related to beaches such as no open fires on the beach. The City Attorney is still pursuing a judicial determination of customary use through the Courts as a declaratory action in order to get a ruling protecting the dry sand areas of the beaches for public access.

FISCAL IMPACT: None

CITY ATTORNEY COMMENTS: No additional comments.

CITY MANAGER RECOMMENDATION(S): I recommend that the City Commission approve proposed Ordinance 2018-14 at First Reading.

Tammi E. Bach, City Attorney	06/18/2018
Nicole Bednar, Administrative Services Manager	06/19/2018
Dale Martin, City Manager	06/19/2018

Submitted By: Katie Newton, Legal Assistant Date: May 31, 2018

COMMISSION ACTION: Approve

ORDINANCE 2018-14

AN ORDINANCE OF THE CITY COMMISSION OF THE CITY OF FERNANDINA BEACH, FLORIDA, AMENDING CHAPTER 90, ARTICLE II, BEACHES, OF THE CODE OF ORDINANCES; BY CREATING A NEW DIVISION 3 TITLED CUSTOMARY USE OF BEACHES AND PUBLIC ACCESS; CREATING SECTION 90-60 PUBLIC POLICY; CREATING SECTION 90-61 PUBLIC ACCESS PRESERVATION; CREATING SECTION 90-62 PROHIBITING PERSONAL ACCESS OBSTRUCTIONS; CREATING SECTION 90-63 EROSION CONTROL; CREATING SECTION 90-64 PROHIBITING POSTING PROPERTY; CREATING SECTION 90-65 ENFORCEMENT AND VIOLATIONS; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

NOW THEREFORE BE IT ORDAINED BY THE CITY COMMISSION OF THE CITY OF FERNANDINA BEACH, AS FOLLOWS:

SECTION 1. That the Code of Ordinances, City of Fernandina Beach, Florida, is hereby amended by adding Division 3, titled: "Customary Use of Beaches and Public Access", to Article II, Beaches:

DIVISION 3. CUSTOMARY USE OF BEACHES AND PROTECTION OF PUBLIC ACCESS.

SECTION 2. That the Code of Ordinances, City of Fernandina Beach, Florida, is hereby amended by adding a section to be numbered 90-60, which section shall read as follows:

Sec. 90-60. Public Policy.

The intent of this Code is to determine as a legislative fact binding on City government that since time immemorial, the public has enjoyed access to the beach and has made recreational use of the beach; that such use has been ancient, reasonable, without interruption, and free from dispute; and that because of this customary access and use, the public has the right of access to the beach and a right to use the beach for recreation and other customary purposes. The intent is to mandate that city government define, protect, and enforce the public's customary rights of beach access and use. It is not the intent of this Code to affect in any way the title of the owner of land adjacent to the Atlantic Ocean, nor to impair the right of any such owner to contest the existence of the customary right of the public to access and use any particular area of privately-owned beach, nor to reduce or limit any rights of public access or use that may exist or arise other than as customary rights. It is therefore declared and affirmed to be the public policy of this City, that the public, individually and collectively, subject to the provisions of this Code, shall have the right of personal ingress and egress to and from the beach and the right to make recreational and other customary uses of the beach. The Office of the City Attorney shall be authorized to take all steps legally necessary to protect and defend the public right of access and use declared by this Code.

SECTION 3. That the Code of Ordinances, City of Fernandina Beach, Florida, is hereby amended by adding a section to be numbered 90-61, which section shall read as follows:

Sec. 90-61. Preservation of Public Access.

The City shall not vacate any approach to the beach or allow the same to be used for private purposes not otherwise preserved to a property owner as a matter of law.

SECTION 4. That the Code of Ordinances, City of Fernandina Beach, Florida, is hereby amended by adding a section to be numbered 90-62, which section shall read as follows:

Sec. 90-62. Prohibiting Obstructions to Personal Access to the Beaches.

Except as provided for otherwise in this Code, it shall be prohibited for any person to create, erect, or construct any structure, barrier, or restraint either vegetative or man-made that will interfere with or obstruct the right of the public, individually and collectively, to enter or leave the beach by way of any approach or to use lawfully any part of the beach for recreation and other customary purposes.

SECTION 5. That the Code of Ordinances, City of Fernandina Beach, Florida, is hereby amended by adding a section to be numbered 90-63, which section shall read as follows:

Sec. 90-63. Construction of an Erosion Control Structure. The provisions of Section 90-62 above shall not be construed to prohibit the construction by a private property owner of an erosion control structure permitted under applicable laws and regulations by the City, County, Army Corps of Engineers and the Florida Department of Environmental Protection.

SECTION 6. That the Code of Ordinances, City of Fernandina Beach, Florida, is hereby amended by adding a section to be numbered 90-64, which section shall read as follows:

Sec. 90-64. Prohibition of Posting.

It shall be prohibited for any person to display or cause to be displayed on any beach or approach, any sign, marker, or warning stating that the public beach is private property or that the public does not have the right of access contrary to the lawful access rights of the public.

SECTION 7. That the Code of Ordinances, City of Fernandina Beach, Florida, is hereby amended by adding a section to be numbered 90-64, which section shall read as follows:

Sec. 90-65. Enforcement and Violations.

Violations of the provisions of Sections 90-62 and 90-64 shall be punished as provided for in Section 1.12 of this Code.

SECTION 8. SEVERABILITY. In the event that any word, phrase, clause, sentence or paragraph hereof shall be held invalid by any court of competent jurisdiction, such holding shall not affect any other word, clause, phrase, sentence or paragraph hereof.

SECTION 9. EFFECTIVE DATE. This Ordinance shall take effect immediately upon its final passage and adoption.

ADOPTED this 26th day of June, 2018.

CITY OF FERNANDINA BEACH

_____

John A. Miller
Commissioner – Mayor

ATTEST:

Caroline Best
City Clerk

APPROVED AS TO FORM AND LEGALITY:

Tammi E. Bach
City Attorney

An act relating to the possession of real property; amending s. 66.021, F.S.; authorizing a person with a superior right to possession of real property to recover possession by ejectment; declaring that circuit courts have exclusive jurisdiction; providing that a plaintiff is not required to provide any presuit notice or demand to a defendant; requiring that copies of instruments be attached to a complaint or answer under certain circumstances; requiring a statement to list certain details; providing for construction; amending s. 82.01, F.S.; redefining the terms "unlawful entry" and "forcible entry"; defining the terms "real property," "record titleholder," and "unlawful detention"; amending s. 82.02, F.S.; exempting possession of real property under part II of ch. 83, F.S., and under chs. 513 and 723, F.S.; amending s. 82.03, F.S.; providing that a person entitled to possession of real property has a cause of action to regain possession from another person who obtained possession of real property by forcible entry, unlawful entry, or unlawful detainer; providing that a person entitled to possession is not required to give a defendant presuit notice; requiring the court to award the plaintiff extra damages if a

defendant acted in a willful and knowingly wrongful manner; authorizing bifurcation of actions for possession and damages; requiring that an action be brought by summary procedure; requiring the court to advance the cause on the calendar; transferring, renumbering, and amending s. 82.045, F.S.; conforming provisions to changes made by the act; amending s. 82.04, F.S.; requiring that the court determine the right of possession and damages; prohibiting the court from determining question of title unless necessary; amending s. 82.05, F.S.; requiring that the summons and complaint be attached to the real property after two unsuccessful attempts to serve a defendant; requiring a plaintiff to provide the clerk of the court with prestamped envelopes and additional copies of the summons and complaint if the defendant is served by attaching the summons and complaint to the real property; requiring the clerk to immediately mail copies of the summons and complaint and note the fact of mailing in the docket; specifying that service is effective on the date of posting or mailing; requiring that 5 days elapse after the date of service before the entry of a judgment; amending s. 82.091, F.S.; providing requirements after a judgment is entered for the plaintiff or the defendant; amending s. 82.101,

F.S.; adding quiet title to the types of future actions for which a judgment is not conclusive as to certain facts; providing that the judgment may be superseded by a subsequent judgment; creating s. 163.035, F.S.; defining the term "governmental entity"; prohibiting a governmental entity from adopting or keeping in effect certain ordinances and rules based upon customary use; providing an exception; requiring a governmental entity seeking to affirm the existence of a recreational customary use on private property to follow certain procedures; providing notice requirements for a governmental entity seeking to affirm such recreational customary use; requiring the governmental entity to file a specified complaint with a certain circuit court within a certain time; providing notice requirements for the filing of such complaint; specifying that proceedings resulting from such complaint are de novo; requiring the court to consider specific factors when determining whether a recreational customary use exists; specifying that the governmental entity has the burden of proof; specifying that an owner of a parcel of property subject to the complaint has the right to intervene in the proceeding; providing applicability; repealing s. 82.061, F.S., relating to

service of process; repealing s. 82.071, F.S., relating to evidence at trial as to damages; repealing s. 82.081, F.S., relating to trial verdict forms; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 66.021, Florida Statutes, is amended to read:

66.021 Ejectment ~~Procedure~~.—

(1) RIGHT OF ACTION.—A person with a superior right to possession of real property may maintain an action of ejectment to recover possession of the property.

(2) JURISDICTION.—Circuit courts have exclusive jurisdiction in an action of ejectment.

(3) NOTICE.—A plaintiff may not be required to provide any presuit notice or presuit demand to a defendant as a condition to maintaining an action under this section.

(4) ~~(1)~~ LANDLORD NOT A DEFENDANT.—When it appears before trial that a defendant in an action of ejectment is in possession as a tenant and that his or her landlord is not a party, the landlord must ~~shall~~ be made a party before further proceeding unless otherwise ordered by the court.

(5) ~~(2)~~ DEFENSE MAY BE LIMITED.—A defendant in an action of ejectment may limit his or her defense to a part of the property

mentioned in the complaint, describing such part with reasonable certainty.

(6) ~~(3)~~ WRIT OF POSSESSION; EXECUTION TO BE JOINT OR SEVERAL.—When plaintiff recovers in an action of ejectment, he or she may have one writ for possession and for~~,~~ damages and costs or, at his or her election ~~if the plaintiff elects~~, may have separate writs for possession and for damages and costs.

(7) ~~(4)~~ CHAIN OF TITLE.—The ~~Plaintiff with his or her~~ complaint and the ~~defendant with his or her~~ answer must include ~~shall serve~~ a statement setting forth, chronologically, the chain of title upon which the party ~~on which he or she~~ will rely at trial. Copies of each instrument identified in the statement must be attached to the complaint or answer. ~~If any part of the chain of title is recorded,~~ The statement must include ~~shall set forth~~ the names of the grantors and the grantees, the date that each instrument was recorded, and the book and page or the instrument number for each recorded instrument ~~of the record thereof; if an unrecorded instrument is relied on, a copy shall be attached. The court may require the original to be submitted to the opposite party for inspection~~. If a ~~the~~ party relies on a claim or right without color of title, the statement must ~~shall~~ specify how and when the claim originated and the facts on which the claim is based. If defendant and plaintiff claim under a common source, the statement need not deraign title before the common source.

(8)~~(5)~~ TESTING SUFFICIENCY.—If either party seeks ~~wants~~ to test the legal sufficiency of any instrument or court proceeding in the chain of title of the opposite party, the party must ~~shall~~ do so before trial by motion setting up his or her objections with a copy of the instrument or court proceedings attached. The motion must ~~shall~~ be disposed of before trial. If either party determines that he or she will be unable to maintain his or her claim by reason of the order, that party may so state in the record and final judgment shall be entered for the opposing ~~opposite~~ party.

(9) OPERATION.—This section is cumulative to other existing remedies and may not be construed to limit other remedies that are available under the laws of this state.

Section 2. Section 82.01, Florida Statutes, is amended to read:

82.01 Definitions ~~"Unlawful entry and forcible entry" defined~~.—As used in this chapter, the term:

(1) "Forcible entry" means entering into and taking possession of real property with force, in a manner that is not peaceable, easy, or open, even if such entry is authorized by a person entitled to possession of the real property and the possession is only temporary or applies only to a portion of the real property.

(2) "Real property" means land or any existing permanent or temporary building or structure thereon, and any attachments

generally held out for the use of persons in possession of the real property.

(3) "Record titleholder" means a person who holds title to real property as evidenced by an instrument recorded in the public records of the county in which the real property is located.

(4) "Unlawful detention" means possessing real property, even if the possession is temporary or applies only to a portion of the real property, without the consent of a person entitled to possession of the real property or after the withdrawal of consent by such person.

(5) "Unlawful entry" means the entry into and possessing of real property, even if the possession is temporary or for a portion of the real property, when such entry is not authorized by law or consented to by a person entitled to possession of the real property ~~No person shall enter into any lands or tenements except when entry is given by law, nor shall any person, when entry is given by law, enter with strong hand or with multitude of people, but only in a peaceable, easy and open manner~~.

Section 3. Section 82.02, Florida Statutes, is amended to read:

82.02 Applicability ~~"Unlawful entry and unlawful detention" defined~~.—

(1) This chapter does not apply to residential tenancies under part II of chapter 83 ~~No person who enters without consent~~

~~in a peaceable, easy and open manner into any lands or tenements shall hold them afterwards against the consent of the party entitled to possession~~.

(2) This chapter does not apply to the possession of real property under chapter 513 or chapter 723 ~~This section shall not apply with regard to residential tenancies~~.

Section 4. Section 82.03, Florida Statutes, is amended to read:

82.03 Remedies ~~Remedy for unlawful entry and forcible entry~~.—

(1) A person entitled to possession of real property, including constructive possession by a record titleholder, has a cause of action against a person who obtained possession of that real property by forcible entry, unlawful entry, or unlawful detention and may recover possession and damages. The person entitled to possession is not required to notify the prospective defendant before filing the action.

(2) If the court finds that the entry or detention by the defendant is willful and knowingly wrongful, the court must award the plaintiff damages equal to double the reasonable rental value of the real property from the beginning of the forcible entry, unlawful entry, or unlawful detention until possession is delivered to the plaintiff. The plaintiff may also recover other damages, including, but not limited to, damages for waste.

(3) Actions for possession and damages may be bifurcated.

(4) All actions under this chapter must be brought by summary procedure as provided in s. 51.011, and the court shall advance the cause on the calendar ~~If any person enters or has entered into lands or tenements when entry is not given by law, or if any person enters or has entered into any lands or tenements with strong hand or with multitude of people, even when entry is given by law, the party turned out or deprived of possession by the unlawful or forcible entry, by whatever right or title the party held possession, or whatever estate the party held or claimed in the lands or tenements of which he or she was so dispossessed, is entitled to the summary procedure under s. 51.011 within 3 years thereafter~~.

Section 5. Section 82.045, Florida Statutes, is transferred, renumbered as section 82.035, Florida Statutes, and amended to read:

82.035 ~~82.045~~ Remedy for unlawful detention by a transient occupant of residential property.—

(1) As used in this section, the term "transient occupant" means a person whose residency in real property ~~a dwelling~~ intended for residential use has occurred for a brief length of time, is not pursuant to a lease, and whose occupancy was intended as transient in nature.

(a) Factors that establish that a person is a transient occupant include, but are not limited to:

1. The person does not have an ownership interest, financial interest, or leasehold interest in the property entitling him or her to occupancy of the property.

2. The person does not have any property utility subscriptions.

3. The person does not use the property address as an address of record with any governmental agency, including, but not limited to, the Department of Highway Safety and Motor Vehicles or the supervisor of elections.

4. The person does not receive mail at the property.

5. The person pays minimal or no rent for his or her stay at the property.

6. The person does not have a designated space of his or her own, such as a room, at the property.

7. The person has minimal, if any, personal belongings at the property.

8. The person has an apparent permanent residence elsewhere.

(b) Minor contributions made for the purchase of household goods, or minor contributions towards other household expenses, do not establish residency.

(2) A transient occupant unlawfully detains a residential property if the transient occupant remains in occupancy of the residential property after the party entitled to possession of the property has directed the transient occupant to leave.

(3) Any law enforcement officer may, upon receipt of a sworn affidavit of the party entitled to possession that a person who is a transient occupant is unlawfully detaining residential property, direct a transient occupant to surrender possession of residential property. The sworn affidavit must set forth the facts, including the applicable factors listed in paragraph (1)(a), which establish that a transient occupant is unlawfully detaining residential property.

(a) A person who fails to comply with the direction of the law enforcement officer to surrender possession or occupancy violates s. 810.08. In any prosecution of a violation of s. 810.08 related to this section, whether the defendant was properly classified as a transient occupant is not an element of the offense, the state is not required to prove that the defendant was in fact a transient occupant, and the defendant's status as a permanent resident is not an affirmative defense.

(b) A person wrongfully removed pursuant to this subsection has a cause of action for wrongful removal against the person who requested the removal, and may recover injunctive relief and compensatory damages. However, a wrongfully removed person does not have a cause of action against the law enforcement officer or the agency employing the law enforcement officer absent a showing of bad faith by the law enforcement officer.

(4) A party entitled to possession of real property ~~a~~

~~dwelling~~ has a cause of action for unlawful detainer against a transient occupant pursuant to s. 82.03 ~~s. 82.04~~. The party entitled to possession is not required to notify the transient occupant before filing the action. If the court finds that the defendant is not a transient occupant but is instead a tenant of residential property governed by part II of chapter 83, the court may not dismiss the action without first allowing the plaintiff to give the transient occupant the notice required by that part and to thereafter amend the complaint to pursue eviction under that part.

Section 6. Section 82.04, Florida Statutes, is amended to read:

82.04 Questions involved in this proceeding ~~Remedy for unlawful detention~~.—The court shall determine only the right of possession and any damages. Unless it is necessary to determine the right of possession or the record titleholder, the court may not determine the question of title.

~~(1) If any person enters or has entered in a peaceable manner into any lands or tenements when the entry is lawful and after the expiration of the person's right continues to hold them against the consent of the party entitled to possession, the party so entitled to possession is entitled to the summary procedure under s. 51.011, at any time within 3 years after the possession has been withheld from the party against his or her consent.~~

~~(2) This section shall not apply with regard to residential tenancies.~~

Section 7. Section 82.05, Florida Statutes, is amended to read:

82.05 Service of process ~~Questions involved in this proceeding~~.—

(1) After at least two attempts to obtain service as provided by law, if the defendant cannot be found in the county in which the action is pending and either the defendant does not have a usual place of abode in the county or there is no person 15 years of age or older residing at the defendant's usual place of abode in the county, the sheriff must serve the summons and complaint by attaching them to some conspicuous part of the real property involved in the proceeding. The minimum amount of time allowed between the two attempts to obtain service is 6 hours.

(2) If a plaintiff causes, or anticipates causing, a defendant to be served with a summons and complaint solely by attaching them to some conspicuous part of real property involved in the proceeding, the plaintiff must provide the clerk of the court with two additional copies of the summons and the complaint and two prestamped envelopes addressed to the defendant. One envelope must be addressed to the defendant's residence, if known. The second envelope must be addressed to the defendant's last known business address, if known. The clerk of the court shall immediately mail the copies of the summons

and complaint by first-class mail, note the fact of mailing in the docket, and file a certificate in the court file of the fact and date of mailing. Service is effective on the date of posting or mailing, whichever occurs later, and at least 5 days must have elapsed after the date of service before a final judgment for removal of the defendant may be entered ~~No question of title, but only right of possession and damages, is involved in the action~~.

Section 8. Section 82.091, Florida Statutes, is amended to read:

82.091 Judgment and execution.—

(1) If the court enters a judgment for the plaintiff, the ~~verdict is in favor of plaintiff, the court shall enter judgment that~~ plaintiff shall recover possession of the real property that he or she is entitled to and ~~described in the complaint with his or her~~ damages and costs. The court~~, and~~ shall award a writ of possession to be executed without delay and execution for the plaintiff's damages and costs.

(2) If the court enters a judgment for the defendant, the court shall ~~verdict is for defendant, the court shall enter judgment against plaintiff dismissing the complaint and~~ order that the defendant recover costs.

Section 9. Section 82.101, Florida Statutes, is amended to read:

82.101 Effect of judgment.—No judgment rendered either for

the plaintiff or the defendant bars any action of trespass for injury to the real property or ejectment between the same parties respecting the same real property. A judgment is not conclusive as to ~~No verdict is conclusive of~~ the facts therein ~~found~~ in any future action for ~~of~~ trespass, ejectment, or quiet title. A judgment rendered either for the plaintiff or the defendant pursuant to this chapter may be superseded, in whole or in part, by a subsequent judgment in an action for trespass for injury to the real property, ejectment, or quiet title involving the same parties with respect to the same real property ~~or ejectment~~.

Section 10. Section 163.035, Florida Statutes, is created to read:

163.035 Establishment of recreational customary use.—

(1) DEFINITION.—The term "governmental entity" includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority.

(2) ORDINANCES AND RULES RELATING TO CUSTOMARY USE.—A governmental entity may not adopt or keep in effect an ordinance or rule that finds, determines, relies on, or is based upon customary use of any portion of a beach above the mean high-water line, as defined in s. 177.27, unless such ordinance or rule is based on a judicial declaration affirming recreational

customary use on such beach.

(3) NOTICE OF INTENT TO AFFIRM RECREATION PUBLIC USE ON PRIVATE PROPERTY; JUDICIAL DETERMINATION.—A governmental entity that seeks to affirm the existence of a recreational customary use on private property must follow the procedures set forth in this subsection.

(a) Notice.—The governing board of a governmental entity must, at a public hearing, adopt a formal notice of intent to affirm the existence of a recreational customary use on private property. The notice of intent must specifically identify the following:

1. The specific parcels of property, or the specific portions thereof, upon which a customary use affirmation is sought;

2. The detailed, specific, and individual use or uses of the parcels of property to which a customary use affirmation is sought; and

3. Each source of evidence that the governmental entity would rely upon to prove a recreational customary use has been ancient, reasonable, without interruption, and free from dispute.

The governmental entity must provide notice of the public hearing to the owner of each parcel of property subject to the notice of intent at the address reflected in the county property

appraiser's records no later than 30 days before the public meeting. Such notice must be provided by certified mail with return receipt requested, publication in a newspaper of general circulation in the area where the parcels of property are located, and posting on the governmental entity's website.

(b) Judicial determination.—

1. Within 60 days after the adoption of the notice of intent at the public hearing, the governmental entity must file a Complaint for Declaration of Recreational Customary Use with the circuit court in the county in which the properties subject to the notice of intent are located. The governmental entity must provide notice of the filing of the complaint to the owner of each parcel of property subject to the complaint in the same manner as is required for the notice of intent in paragraph (a). The notice must allow the owner receiving the notice to intervene in the proceeding within 45 days after receiving the notice. The governmental entity must provide verification of the service of the notice to the property owners required in this paragraph to the court so that the court may establish a schedule for the judicial proceedings.

2. All proceedings under this paragraph shall be de novo. The court must 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. There

is no presumption regarding the existence of a recreational customary use with respect to any parcel of property, and the governmental entity has the burden of proof to show that a recreational customary use exists. An owner of a parcel of property that is subject to the complaint has the right to intervene as a party defendant in such proceeding.

(4) APPLICABILITY.—This section does not apply to a governmental entity with an ordinance or rule that was adopted and in effect on or before January 1, 2016, and does not deprive a governmental entity from raising customary use as an affirmative defense in any proceeding challenging an ordinance or rule adopted before July 1, 2018.

Section 11. Section 82.061, Florida Statutes, is repealed.

Section 12. Section 82.071, Florida Statutes, is repealed.

Section 13. Section 82.081, Florida Statutes, is repealed.

Section 14. This act shall take effect July 1, 2018.

HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	CS/HB 631	**FINAL HOUSE FLOOR ACTION:**	
SUBJECT/SHORT TITLE	Possession of Real Property	95 **Y's** 17 **N's**	
SPONSOR(S):	Civil Justice & Claims Subcommittee; Edwards-Walpole and others	**GOVERNOR'S ACTION:**	Approved
COMPANION BILLS:	CS/SB 804		

SUMMARY ANALYSIS

CS/HB 631 passed the House on February 14, 2018. The bill was amended in the Senate on March 5, 2018, and was returned to the House on March 6, 2018. The House concurred in the Senate amendment and subsequently passed the bill as amended on March 8, 2018.

Ejectment is a cause of action to recover possession of property from a second person possessing it in hostility to the first person's rights. CS/HB 631 modernizes the statute and requires that a party attach, to the party's initial pleading, a copy of all documents that the party relies on for establishing chain of title and ownership.

Unlawful entry, forcible entry, and unlawful detainer are also causes of action based on a party forcefully or unlawfully taking possession of another party's land or tenements without his or her consent. The bill:

- Creates statutory definitions for each cause of action consistent with the common law;
- Provides that the statutes governing these actions do not apply to certain residential tenancies or to the possession of real property involving a mobile home;
- Specifies the measure of damages and remedies available;
- Allows a court to determine questions of title in limited circumstances, provided that such determination is not binding on a future action for trespass, injury to real property, ejectment, or quiet title; and
- Provides special requirements for service of process in such actions.

The state generally owns the property under navigable waters up the mean high water mark, whereas upland landowners own the land down to such mean high water mark. The term "customary use" refers to a general right of the public at large to possess and use certain dry sand areas for recreational purposes. Where a customary use of a dry sand area is shown, the property owner may not use traditional causes of action like ejectment, forcible entry, or trespass to stop such public use of the private land.

The bill prohibits a governmental entity from adopting or keeping in effect an ordinance or rule establishing customary use of privately owned dry sand areas. A governmental entity seeking to establish the customary use of privately owned lands is required to adopt, at a public hearing, a formal notice of intent, provide notice to affected parcel owners, and file a complaint with the circuit court to determine whether the land is subject to the customary use doctrine. This section of the bill does not apply to a governmental entity that had an ordinance or rule adopted and in effect prior to January 1, 2016. A governmental entity may raise customary use as an affirmative defense in proceedings challenging an ordinance or rule adopted prior to July 1, 2018.

The bill does not appear to have a fiscal impact on state or local governments.

The bill was approved by the Governor on March 23, 2018, ch. 2018-94 L.O.F., and will become effective on July 1, 2018.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Ejectment

"Ejectment" is an action at law for a person to recover possession of real property from a second person possessing it in hostility to the first person's right. Ejectment proceedings are governed by ch. 66, F.S. To be entitled to recover property in ejectment, the plaintiff must have a present right of possession to the property that is the subject of the action and must show that he or she has been ousted or deprived of possession by the defendant.[1] Although ch. 66, F.S., is silent as to which court has jurisdiction over ejectment actions, s. 26.012(2)(f), F.S., grants circuit courts exclusive original jurisdiction over such actions.

Current law provides that all parties to the action must, in their initial pleading (that is, in their complaint or answer), attach a statement setting forth chronologically the chain of title on which he or she will rely at trial.[2] For portions of the chain of title that are recorded, the party must state the names of the grantors and the grantees and the book and page of the record. For instruments in the chain of title that are unrecorded, the party is required to attach a copy of the instrument to their statement setting forth chain of title and the court may require the party to produce the original for inspection by the opposing party. Lastly, where a party relies on a claim or right without color of title, the statement must specify how and when the claim originated and the facts on which the claim is based.[3]

Effect of Proposed Changes

CS/HB 631 amends s. 66.021, F.S., to clarify the circumstances under which an individual has a right of action of ejectment, provides that circuit courts have exclusive jurisdiction in an action of ejectment, and specifies that a plaintiff is not required to provide any presuit notice or demand to a defendant prior to filing suit.

With respect to the statement setting forth the chronological chain of title, the bill allows a party to provide the instrument number of a recorded instrument instead of providing the book and page number. Moreover, the bill removes the distinction between recorded instruments and unrecorded instruments for purposes of attachment. Under the bill, a party must attach any instrument, whether recorded or unrecorded, to the statement setting forth the chain of title.

Lastly, the bill provides that an action brought pursuant to s. 66.021, F.S., is cumulative to other existing remedies and does not limit other remedies that are available under current law.

Unlawful Entry, Forcible Entry, and Unlawful Detention

Section 82.01, F.S., entitled "'Unlawful entry and forcible entry' defined" states that "no person shall enter into any lands or tenements except when entry is given by law, nor shall any person, when entry is given by law, enter with strong hand or with multitude of people, but only in a peaceable, easy and open manner." Similarly, s. 82.02, F.S., provides that "[n]o person who enters without consent in a peaceable, easy and open manner into any lands or tenements shall hold them afterwards against the consent of the party entitled to possession." The possession protected is actual possession, as disclosed by some visible act or evidence of continuous control. Constructive or theoretical possession

is an insufficient basis for suit.[4] Moreover, as stated in ss. 82.01 and 82.02, F.S., these actions do not apply to residential tenancies.

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[1] *Davis v. Hinson*, 67 So.3d 1107 (Fla. 1st DCA 2011).
[2] S. 66.021(4), F.S.
[3] Id.
[4] *Goffin v. McCall*, 108 So. 556 (1926)

A party alleging unlawful entry, forcible entry, or unlawful detention is entitled to relief under the summary procedure statute, s. 51.011, F.S., if the action is instituted within three years from the date of entry.[5] Under the summary procedure statute, the plaintiff's initial pleading must contain the matters required by the statute prescribing such procedure or, if none are so required, must state a cause of action. If no person can be found at the usual place of residence of defendant, summons may be served by posting a copy in a conspicuous place on the property described in the complaint and summons.[6] The defendant's answer must contain all defenses of law or fact and must be served within five days after the service of process.[7]

In actions under ch. 82, F.S., the trial court is not allowed to resolve or make determinations as to questions involving title. Rather, the court may only determine the right of possession and damages.[8] Section 82.071, F.S., provides that if the fact finder grants judgment for the plaintiff, damages are fixed at double the rental value of the premises from the time of the unlawful or wrongful holding. Additionally, the judgment must state that the plaintiff recover possession of the property described in the complaint, together with damages and costs, and award a writ of possession to be executed without delay and execution for the plaintiff's damages and costs.[9] Where judgment is entered for the defendant, current law requires the court to enter an order dismissing plaintiff's complaint and ordering that the defendant recover costs.

Lastly, current law provides that no judgment rendered either for a plaintiff or defendant bars any action of trespass for injury to the property or ejectment between the same parties respecting the same property. Moreover, no verdict is conclusive of the facts found in any action of trespass or ejectment.[10]

Effect of Proposed Changes

CS/HB 631 amends portions of ch. 82, F.S., related to unlawful entry, forcible entry, and unlawful detention. The bill provides definitions for forcible entry, real property, record titleholder, unlawful detention, and unlawful entry. The definitions created by the bill are consistent with current common law. Furthermore, the bill specifies that these actions do not apply to residential tenancies under part II of ch. 83, F.S., to the possession of mobile homes or recreational vehicles in a lodging park under ch. 513, F.S., or to mobile home tenancies in a mobile home park under ch. 723, F.S.[11]

The bill also amends ss. 82.03 and 82.04, F.S., related to remedies in such actions and adds additional language addressing a court's role in such proceedings. Specifically, the bill:

- Specifies that a party bringing an action pursuant to ch. 82, F.S., is not required to provide notice to a defendant prior to filing an action;
- Requires the court to award a plaintiff damages equal to double the reasonable rental value of the real property if it is determined that the entry or detention by the defendant was willful and knowingly wrongful;
- Allows the court to award a plaintiff other damages, including but not limited to, damages for waste;
- Allows the court to bifurcate actions for possession and damages;
- Requires the court to advance cause of actions brought pursuant to ch. 82, F.S., on the calendar; and

[5] The statute of limitations on all of these actions is 7 years. See s. 95.12, F.S. The three-year limitation only applies to actions where a party wishes to use the expedited procedures under the summary procedure statute.
[6] S. 82.061, F.S.
[7] S. 51.011(1), F.S.
[8] S. 82.05, F.S.
[9] S. 82.091, F.S.
[10] S. 82.101, F.S.
[11] The eviction actions in those statutes appear to provide an adequate remedy.

- Allows the court to determine questions of title in such actions, but only when it is necessary to determine a right of possession or determine the record titleholder.

Additionally, the bill expands the service of process requirements for parties instituting an action of unlawful entry, forcible entry, or unlawful detention. A plaintiff is required to attempt to obtain service as provided by law at least twice. If a plaintiff cannot effect service in those two attempts and the defendant does not have a residence in the county or no person 15 years of age or older is residing at the defendant's residence in the county, then the sheriff is required to serve the summons and complaint by posting it in a conspicuous place on the property. The minimum amount of time allowed between the two attempts to obtain service is six hours. Where a plaintiff intends to effect service solely through the posting in a conspicuous place on the property, the bill requires the plaintiff to additionally provide the clerk of court with copies of the summons and complain as well as two prestamped envelopes containing specific information.[12]

The bill amends s. 82.101, F.S., to provide that a judgment rendered pursuant to ch. 82, F.S., may be superseded, in whole or in part, by a subsequent judgment in an action for trespass for injury to the real property, ejectment, or quiet title involving the same parties and the same real property.

The bill repeals ss. 82.061, 82.071, and 82.081, F.S., relating to service of process, damages, and trial evidence, respectively. The substance of those sections are addressed elsewhere in the bill and the forms are outdated. Lastly, the bill makes conforming changes to other portions of ch. 82, F.S.

Customary Use of Real Property

The common law public trust doctrine is embodied in Art. 10, s. 11 of the state's Constitution. Under that provision, title to the portion of lands beneath navigable waters up to the mean high water line is owned by the state and held in trust for the people. The doctrine applies to all navigable waters, both freshwater and salt water.

The state's beaches include more land than what is set aside for the people under the public trust doctrine. While areas above the mean high water line are subject to private ownership,[13] Florida courts have recognized the public may acquire rights to the dry sand areas of privately owned portions of a beach through common law prescription, dedication, and custom. In 1974, in the case of *City of Daytona Beach v. Tona-Rama*,[14] the Florida Supreme Court found that:

> If the recreational use of the sandy area adjacent to the mean high tide has been ancient, reasonable, without interruption and 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.

This is the general description of the customary use doctrine.

Application of the customary use doctrine was limited by the 2007 case of *Trepanier v. County of Volusia*.[15] The Volusia County beaches of Daytona Beach and New Smyrna Beach have a large width of firmly packed sands. On those beaches, custom and use has historically allowed automobiles to drive and park on the beach. A county ordinance established a method for marking the travel and parking lanes that, due primarily to the effects of hurricanes, crept closer to beachfront homes over time. Homeowners challenged the county's lane markings, and the county argued in defense that

[12] The bill's service of process requirements are similar to service of process in actions for possession of residential premises, under s. 48.183, F.S.
[13] S. 117.28(1), F.S.
[14] 294 So.2d 73 (Fla. 1974)
[15] 965 So.2d 276 (Fla. 5th DCA 2007)

customary use allowed for driving and parking on the beach. The Fifth District Court of Appeal (DCA) acknowledged the doctrine of customary use enunciated in *Tona-Rama*, but noted that the doctrine is based on the common law concept of prescriptive easement, which is based on the law of adverse possession. The court noted:

> Acquisition of rights by one in the lands of another, based on possession or use, is not favored in the law and the acquisition of such rights will be restricted. Any doubts as to the creation of the right must be resolved in favor of the owner.[16]

The Fifth DCA further held:

> While some may find it preferable that proof of these elements of custom be established for the entire state by judicial fiat in order to protect the right of public access to Florida's beaches, it appears to us that the acquisition of a right to use private property by custom is intensely local and anything but theoretical. "Custom" is inherently a source of law that emanates from long-term, open, obvious, and widely-accepted and widely-exercised practice. It is accordingly impossible precisely to define the geographic area of the beach for which evidence of a specific customary use must be shown, because it will depend on the particular geography and the particular custom at issue.[17]

Notably, the Fifth DCA has also held that a customary use determination "requires the courts to ascertain *in each case* the degree of customary and ancient use the beach has been subjected to . . . ."[18]

In addition to state courts addressing the issue of customary use, in 2002, an opinion by the state Attorney General discussed the issue following an inquiry by the mayor of Destin and the Okaloosa County Sheriff's Office.[19] In that opinion, the Attorney General found:

1. The City may regulate in a reasonable manner the beach within its corporate limits to protect the public health, safety, and welfare. This regulation must have a rational relation to and be reasonably designed to accomplish a purpose necessary for the protection of the public. The city may not exercise its police power in an arbitrary, capricious, or unreasonable manner. Such regulation may be accomplished regardless of the ownership of this area, with the exception of state ownership, and without regard to whether the public has been expressly or impliedly allowed to use that area of the beach by a private property owner who may hold title to the property.
2. The right of a municipality to regulate and control dry sand beach property within its municipal boundaries is not dependent on the finding of the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*
3. Private property owners who hold title to dry sand areas of the beach falling within the jurisdictional limits of the City may utilize local law enforcement for purposes of reporting incidents of trespass as they occur.[20]

In 2017, the United States District Court for the Northern District of Florida addressed the related issue of whether adopting a customary use ordinance was beyond the power of a county or municipality. Walton County in 2016 adopted an ordinance declaring the dry sand areas of the county subject to the customary use doctrine. Based on that finding, the ordinance prohibits signs, fencing and other obstructions within the dry sand areas. The court ruled that the adoption of a customary use ordinance

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[16] Id. at 284, quoting *Downing v. Bird*, 100 So.2d 57, 64-65 (Fla.1958).
[17] Id. at 289.
[18] Id. at 288, quoting *Reynolds v. County of Volusia*, 659 So.2d 1186 (Fla. 5th DCA 1995)(emphasis added).
[19] 2002-38 Fla. Op. Att'y Gen., June 24, 2002.
[20] Id.

was within the power of the county. The court left open the question of whether an individual property owner may file an as-applied challenge to the ordinance as it affects his or her property rights.[21]

These court decisions and the Attorney General opinion show that local officials, municipalities, and private property owners have struggled to determine the scope of local authority regarding customary use ordinances and determining who may affect the property rights of private property owners through the common law doctrine of customary use.

Effect of Proposed Changes

CS/HB 631 establishes a process by which a governmental entity may seek the judicial determination of a recreational customary use of private beach property. The process appears designed to reduce ongoing and protracted litigation among property owners and governments. After defining what a governmental entity is, the bill provides that a governmental entity may not adopt or keep in effect an ordinance or rule that is based upon customary use of any portion of a beach above the mean high-water line, unless the ordinance or rule is based upon a judicial declaration affirming recreational customary use of the beach.

Notice

The new procedure created in the bill requires that the governmental entity, at a public hearing, adopt a formal notice of intent to affirm the existence of a recreational customary use on private property. The notice must specifically identify:

- The parcels of property or the specific portions of the property, for which the customary use affirmation is sought;
- The detailed, specific, and individual use or uses of the parcels to which the customary use affirmation is sought; and
- Each source of evidence the governmental entity will rely upon to prove that the recreational customary use has been ancient, reasonable, without interruption, and free from dispute.

The governmental entity must provide notice of the public hearing to the owner of each parcel of property at the address recorded in the county property appraiser's records. The notice must:

- Be provided at least 30 days before the public meeting by certified mail with return receipt requested;
- Be published in a newspaper of general circulation in the area where the parcels of property are located; and
- Be posted on the governmental entity's website.

Judicial Determination

Within 60 days after adopting the notice of intent, the governmental entity must file a Complaint for Declaration of Recreational Customary Use with the circuit court in the county where the subject property is located. This is a newly created cause of action and is similar to a declaratory judgment.[22] The governmental entity must provide notice of filing the complaint to the owner of each parcel as required above for the notice of intent. The notice must allow the owner to intervene in the proceeding within 45 days after receiving the notice. The governmental entity must also provide verification that the notice has been served to the property owners so that the court may establish a schedule for the proceedings.

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[21] *Alford, et al v. Walton County*, 3:16-cv-00362-MCR-CJK, Order dated November 22, 2017.

[22] A declaratory judgment is a binding adjudication in which a court establishes the rights of the parties without requiring enforcement of its decision. It is generally used to resolve legal uncertainties for the parties. BLACK'S LAW DICTIONARY (10th ed. 2014).

The proceedings will be conducted de novo, or anew. The court must determine whether the evidence presented by the governmental entity demonstrates that the recreational customary use or uses identified in the notice of intent have been ancient, reasonable, without interruption, and free from dispute. No presumption exists regarding the existence of a recreational customary use of the property in question. The governmental entity bears the burden of proof to demonstrate that the recreational customary use exists. A parcel owner who is subject to the complaint may intervene in the proceeding as a party defendant in the proceeding.

Application

These customary use provisions do not apply to a governmental entity having an ordinance or rule that was adopted and in effect on or before January 1, 2016. Additionally, the provisions do not deprive a governmental entity from raising customary use as an affirmative defense in any proceeding that challenges an ordinance or rule that was adopted before July 1, 2018.

The bill provides an effective date of July 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

June 15, 2018
News Leader Edition

NOTICE OF PUBLIC HEARING
CITY COMMISSION
CITY OF FERNANDINA BEACH

NOTICE IS HEREBY GIVEN that a Public Hearing is scheduled for **Tuesday, June 26, 2018, at 5:00 PM** in the City Commission Chambers, 204 Ash Street Fernandina Beach, Florida to consider the following application:

ORDINANCE 2018-14

AN ORDINANCE OF THE CITY COMMISSION OF THE CITY OF FERNANDINA BEACH, FLORIDA, AMENDING CHAPTER 90, ARTICLE II, BEACHES, OF THE CODE OF ORDINANCES; BY CREATING A NEW DIVISION 3 TITLED CUSTOMARY USE OF BEACHES AND PUBLIC ACCESS; CREATING SECTION 90-60 PUBLIC POLICY; CREATING SECTION 90-61 PUBLIC ACCESS PRESERVATION; CREATING SECTION 90-62 PROHIBITING PERSONAL ACCESS OBSTRUCTIONS; CREATING SECTION 90-63 EROSION CONTROL; CREATING SECTION 90-64 PROHIBITING POSTING PROPERTY; CREATING SECTION 90-65 ENFORCEMENT AND VIOLATIONS; PROVIDING FOR SEVERABILITY; AND PROVIDING FOR AN EFFECTIVE DATE.

Interested parties may appear at said hearing and be heard as to the advisability of any action, which may be considered. Any persons with disabilities requiring accommodations in order to participate in this program or activity should contact 310-3115, TTY/TDD 711 or through the Florida Relay Service at 1-800-955-8771 at least 24 hours in advance to request such accommodation.

IF ANY PERSON DECIDES TO APPEAL ANY DECISION MADE BY THE BOARD/COMMISSION WITH RESPECT TO ANY MATTER CONSIDERED AT SUCH HEARING, S/HE WILL NEED TO ENSURE THAT A VERBATIM RECORD OF THE PROCEEDINGS IS MADE, WHICH RECORD INCLUDES THE TESTIMONY AND EVIDENCE UPON WHICH THE APPEAL IS TO BE BASED.

For information, please contact the Staff of the City Clerk's Office, 204 Ash Street, between the hours of 8:00 AM – 5:00 PM, Monday through Friday, (904) 310-3115.

CITY COMMISSION AGENDA ITEM
City of Fernandina Beach

SUBJECT: Discussion
"Pride Month" Recognition

ITEM TYPE: Discussion

REQUESTED ACTION:

SYNOPSIS: This item is placed on the agenda at the request of Mayor Miller.

FISCAL IMPACT: N/A

CITY ATTORNEY COMMENTS: N/A

CITY MANAGER RECOMMENDATION(S): N/A

Dale Martin, City Manager 06/22/2018

Date: June 22, 2018

Submitted By: Nicole Bednar, Administrative Services Manager

COMMISSION ACTION: