



Legal Challenges  
to  
Local Regulation of  
Beach Access Ways and the  
Sandy Beach Itself

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# City or County can prohibit lots of things in beach access ways and on the sandy beach:

- Commercial Solicitation - unless staying in one place.
- Retail Sales - except suntan lotions.
- Rentals – except chairs, umbrellas and boats.
- Requiring upland owner’s permission to rent chairs, umbrellas and boats.  
[Especially where beach nourished, see Florida Statute 161.201 (protect upland owner’s business)]
- Shovels and digging holes.
- Possession of Alcohol.
- Leaving personal property overnight.
- Placing *anything* in a beach access.
- Camping

# All that is needed is an ordinance.

- Cities and Counties in Florida enjoy “Home Rule.”
- This means they can enact any law that the state legislature could enact to address a local matter *provided*:
  - The state has not prohibited the local gov’t from acting, or
  - The state has not adopted so many laws on the subject that a court will find that state preemption is implied.
- Violations enforceable by criminal or civil penalties.

# Types of Legal Challenges We See:

- Due Process Violation
- Substantive Due Process Violation
- First Amendment Violation
- Equal Protection Violation
- Dormant Commerce Clause Violation - rare

# Due Process Violation (dealing a bottom card)

- The local government did not follow the right procedures required by state law, its own charter or even other ordinances.
- Requires a do-over and some vested rights might be created in the interim.

# Due Process Violation (dealing a bottom card)

Beware of the “land use vs conduct ordinance” trap:

- Land use regulations (zoning, LDR's, Comp Plans) require specialized notices and hearings that are not needed to adopt a conduct ordinance.
- An ordinance that “substantially affects the use of land” must go through the extra steps.

# Lack of Due Process (dealing a bottom card)

Example:

Ordinance bans use of personal watercraft in certain areas and requires PWC rental businesses to be located directly on the water – immediate access.

Land use or conduct?

# Substantive Due Process Violation (stacking the deck)

- The right procedures were followed, but the ordinance is “arbitrary” or “capricious,” and unlikely to accomplish the local government’s stated goal.
- In legalese, there is not a rational nexus between the effect of the regulatory scheme and a legitimate governmental purpose.



# Substantive Due Process Violation (stacking the deck)

- Opponents may argue that the government had an ulterior and improper motive to adopt.
- Or the ordinance may be just a stupid idea.
- “Separation of powers” requires the court to defer to the wisdom of the city or county commission unless it is clear that there is no legitimate purpose or no rational nexus.

# Substantive Due Process Violation (stacking the deck)

Example:

Ordinance bans all retail sales on beach except Pepsi products, no Coke allowed. Arbitrary?

But what if only retail allowed is any type of suntan oil, spray or cream? Not arbitrary because items needed on the beach?

# First Amendment (Free Speech) Violation

- “[T]he last few years have taught us that there is nothing that cannot be characterized as speech if one only has will to do so.” *Funtana Village v. City of PCB*, 2016 WL 375102 (N Dist Fla 2016)
- Protected “speech” includes expressive conduct and touches any medium capable of communicating ideas or emotions.

# First Amendment (Free Speech) Violation

Speech can be subjected to time, place and manner restrictions if the regulation:

- Is not triggered by the content of the speech, and
- Is narrowly tailored to serve a significant or compelling governmental interest, and
- Reasonable alternative forms of speech are available.

# First Amendment (Free Speech) Violation

Commercial speech is profit driven and harder than ideological speech so less protected and can be restricted if:

- The government has a substantial interest in restricting that speech;
- The regulation directly advances the asserted governmental interest; and
- The regulation is narrowly tailored, but not necessarily the least restrictive means available.

# 1<sup>st</sup> A Example – No solicitation on beach.

- Ordinance prohibited roving commercial solicitation on the sandy beach (think back to the heyday of the time-share phenomenon).
- Solicitors were allowed to pick a spot and solicit from there; if beachgoers wish to approach and engage they may.
- Constitutional?

# 1<sup>st</sup> A Example – No solicitation on beach.

- Yes.
- City has a significant interest in prohibiting unreasonable interference with the “flow, recreation, enjoyment and privacy of persons” on the beach.
- Only commercial speech involved.
- Ample alternatives available off the beach and barking on the beach itself. *Resort Development v. City of PCB*, 636 F Supp 1078 (1986)

# 1<sup>st</sup> A Example – No Alcohol on the Beach

- Ordinance prohibited possession of alcohol on beach and halted alcohol sales 2 hours earlier each night during college spring break.
- 1<sup>st</sup> Amendment? Really?
- Constitutional?



# 1<sup>st</sup> A Example – No Alcohol on the Beach

- Beachfront bars and restaurants sued city claiming that sale and service of alcohol on the beach until 4:00 AM was “inextricably intertwined” with entertainment hosted in their venues which is protected by the 1<sup>st</sup> A.
- City argued not a restriction on speech at all, only the exercise of City’s 21<sup>st</sup> A power to regulate alcohol.

# 1<sup>st</sup> A Example – No Alcohol on the Beach

Court was tempted to agree with City but instead of bogging down in whether “speech” was involved, Court conducted time, place and manner analysis and found:

- Ordinance Content Neutral – all types of music and entertainment affected the same
- Ordinance narrowly tailored to serve significant governmental interest – reduce underage drinking and a slew of alcohol related crimes.
- Ample alternatives for expression available.

City won. *Funtana, supra.*

# 14<sup>th</sup> A Equal Protection Violation - Animus

- Rarely today is a law proposed which discriminates on its face against a protected class.
- This is because to survive judicial strict scrutiny such a law must serve an extraordinarily compelling purpose and be incredibly narrow.

# 14<sup>th</sup> A Equal Protection Violation - Animus

- But a facially neutral law is still unconstitutional if:
  - Discrimination against a protected class was a “substantial or motivating” factor in adopting the law,  
and
  - The government cannot rebut that fact by showing that the law would have been adopted in the absence of the discriminatory motive.

# 14<sup>th</sup> Amendment Equal Protection- Example

Example:

Ordinance prohibited possession of alcohol on the sandy beach during spring break adopted in response to escalating violence in midst of large assemblies on the beach.

Plaintiffs John and Jane Doe joined the beachfront bars and alleged race-based animus was motivating factor for at least a majority of City Council members.

# 14<sup>th</sup> Amendment Equal Protection Example

Plaintiffs' Argument of race based animus – 5 steps:

1. Historically, spring break visitors were overwhelmingly Caucasian or “the good kids” or the “northern kids.”
2. Beginning in 2014 African Americans began to participate in Spring Break in large numbers and national media coverage focused disproportionately on African American participation in spring break incidents.

# 14<sup>th</sup> Amendment Equal Protection Example

Plaintiffs' argument – continued:

3. The national and local news coverage created a race-based animus in local citizens and officials against spring break and its African American participants.
4. This animus evidenced by public statements of citizens and elected officials that the ordinances will deter “uninvited guests, 100-milers and thugs” from “preying” on the “good kids.”

# 14<sup>th</sup> Amendment Equal Protection Example

Plaintiffs' argument – continued:

5. The plaintiffs presented expert testimony that those pejorative terms were code words for African Americans.



# 14<sup>th</sup> Amendment Equal Protection Example

“Drawing the line between facially race-neutral statements and racially charged code words is difficult.” *Funtana, supra; Lloyd v. Holder*, 2013 WL 6667531 (S.D.N.Y. 2013)

“Whether one of these terms evinces racial animus ‘may depend upon various factors including context, inflection, tone of voice, local custom, and historical usage.’” *Funtana, supra; Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006).

# 14<sup>th</sup> Amendment Equal Protection Example

- Court denied preliminary injunction because:
  - Not enough for race to be “in the air” during City Council meetings.
  - Even if race was a motivating factor behind the spring break ordinances, “in the context of this case – citizens, City Council members, etc, consistently referred to 100-milers, thugs, etc, *in connection with* criminal activity” that was actually occurring. *Funtana, supra.*

# 14<sup>th</sup> Amendment Equal Protection Example

In legalese, even if race-based animus contributed to decisions,

City met its burden of showing that the spring break ordinances would have been adopted in the absence of any racial issue.

# Take-Aways:

- The law recognizes that sandy beaches in Florida are a special place, historically devoted to recreation.
- Local governments have broad discretion to adopt laws to protect not just the health and safety of beachgoers, but also their comfort and privacy.

# Take-Aways:

- These laws can regulate both land use and conduct. If in doubt or facing stiff opposition, follow both procedures – avoid an expensive argument.
- If speech may be involved, try to stay in commercial context and always allow ample alternatives.

# Take-Aways:

- If there are racial or ethnic undertones, build clear record of purpose and speak carefully to avoid “code words” and grounds for a discrimination claim which may be motivated by economics.

Questions?

**Douglas Sale** is a Founding Partner of the law firm Harrison Sale McCloy with 15 lawyers and offices in Panama City, Santa Rosa Beach and Destin, Florida.

He represented the Local Sponsor in negotiating the Project Cooperation and Project Partnership Agreements for the Panama City Beach 1997 nourishment project and for all subsequent re-nourishment projects. He was lead counsel in obtaining over 1,000 nourishment easements for the initial, 18 mile project and later in obtaining additional licenses for a sea-oats project. He also represented the Local Sponsor in constructing the initial nourishment and several subsequent re-nourishment projects, including one completed this year.

This summer, the 600 member Florida Municipal Attorneys Association awarded Doug its Lifetime Distinguished Service Award named after Claude Mullis, former general counsel of the Florida League of Cities. There have only been nine recipients of this award during the past 18 years, including its inaugural recipient, the late Claude L. Mullis, in 1999.

He earned his J.D., Cum Laude, from the University of Florida, where he served on the Law Review and as a Member of the Order of the Coif. He earned his B.A., Magna Cum Laude, from Vanderbilt University, majoring in Political Science with additional emphasis on Economics, and was chosen to be a Member of the Tennessee Alpha Chapter of the Phi Beta Kappa Society.

As City Attorney for the City of Panama City Beach for 35 years, he was responsible for drafting and defending all of the City's laws regarding access and use of the sandy gulf beach. This presentation is based upon several of those ordinances.