UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

LIONEL AND TAMMY ALFORD, AS CO-TRUSTEES OF THE LIONEL D. ALFORD, JR. AND TAMMY NIX ALFORD REVOCABLE TRUST,

Plaintiffs,

v. **Case No. 3:16cv362/MCR/CJK**

WALTON COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA,

Defendant.
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ORDER

Previously, the Court granted Plaintiffs' Motion for Clarification, finding that diversity jurisdiction exists, ECF No. 76, and in light of that decision, the Court now vacates the prior order and judgment and substitutes this Order instead.[1]

In July 2016, Plaintiffs Lionel and Tammy Alford ("Alfords"), who own beachfront property in Walton County, Florida ("County"), brought suit pursuant to

[1] Previously, the Court resolved the federal constitutional challenge raised in Count I, found Counts II and III as moot, and declined to exercise jurisdiction over Count IV, a state law challenge to the County's Customary Use Ordinance. ECF No. 73. Because diversity jurisdiction exists—the Alfords reside in Kansas and the amount in controversy (the value of their underlying property) exceeds $75,000—the Court must also address Count IV. This Order vacates the prior decision and judgment and addresses all counts. Only minor, non-substantive changes have been made to the Court's decision on Count I.

42 U.S.C. § 1983, claiming that certain County regulations pertaining to the dry sand beach on their property violate their free speech rights (Count I) and substantive due process rights (Count II), and seeking declaratory relief. They also raised a state law claim that the regulations are inconsistent with other state statutes (Count III). Specifically, the Alfords challenge recent amendments defining and prohibiting beach "obstructions," *see* Walton Cty. Code. §§ 22-54(g)(2)(a)(3), 22-55 ("Obstruction Amendments"), within an ordinance amending Walton County's Waterways and Beach Activities Ordinance (Ord. No. 2016-16) (June 14, 2016), codified in Chapter 22 of the Walton County Code. The Alfords contend that the Obstruction Amendments, which prohibit obstructions on the beach, including "ropes, chains, signs, or fences," effectively prevent them from conveying messages to public beachgoers regarding the boundary of their property, as well as religious and political messages, and preclude them from excluding the general public from their private property.

In October 2016, during the pendency of this case, the County enacted a new ordinance, recognizing the public's customary right to use the beaches.[2] *See* Walton

[2] The doctrine of "custom" originated in English common law and has been acknowledged by the Florida Supreme Court to exist in Florida, stating that "the right of the public of access to, and enjoyment of, Florida's oceans and beaches has long been recognized." *City of Daytona Beach v. Tona-Rama, Inc*., 294 So. 2d 73 (Fla. 1974). Although the doctrine of customary use is recognized in Florida, the doctrine has not been established to apply uniformly on a statewide basis; instead, the Florida Supreme Court has articulated a statewide interest in protecting Florida's beaches but "the specific customary use of the beach in any particular area may vary, [and] proof

Cty. Code Ch. 23, "Customary Use Ordinance" (Ord. No. 2017-10) (amended Mar. 28, 2017, effective April 1, 2017). In December 2016, the Alfords amended their Complaint to add Count IV, challenging the Customary Use Ordinance and seeking a declaration that the ordinance is *void ab initio* on grounds that customary use is a common law doctrine reserved to the courts for determination on a case-by-case basis, and therefore, the County exceeded its authority and acted *ultra vires* by legislating customary use on a county-wide basis. The County then agreed to a preliminary injunction against enforcement of the Obstruction Amendments, and the parties filed the pending summary judgment motions.[3]

Pending before the Court are the Alfords' Motion for Partial Summary Judgment on Count I, on the ground that the Obstruction Amendments violate their First Amendment right to free speech, ECF No. 53, and the County's objection to certain evidence or references by Plaintiffs' counsel with respect to Count I, ECF No. 59. Also pending are cross Motions for Partial Summary Judgment as to Count IV, regarding the validity of the Customary Use Ordinance, ECF Nos. 44, 61.

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is required to establish the elements of a customary right." *Trepanier v. Cty. of Volusia*, 965 So. 2d 276, 289 (Fla. 5th DCA 2007).

[3] Early in the suit, the Alfords filed a Motion for Preliminary Injunction based on their First Amendment challenge to the Obstruction Amendments. The Court expedited the trial pursuant to Rule 65 of the Federal Rules of Civil Procedure. Before the scheduled trial, however, after the County adopted the Customary Use Ordinance, the County agreed to a preliminary injunction as to the Obstruction Amendments, and trial was placed back on an ordinary schedule, allowing time for discovery and dispositive motions.

Having fully and carefully considered the arguments, the record, and the applicable law, the Court finds that the Obstruction Amendments violate the First Amendment and thus the Alfords will be granted summary judgment on Count I, that the County's motion to exclude evidence is moot, and that Counts II and III are also moot in light of the ruling on Count I. As to Count IV, the County is entitled to summary judgment and the Alfords' motion will be denied.

I. Background

The Alfords own beachfront property in Walton County, Florida, and their private property extends seaward to the mean high water line, including the dry sand beach. In the past, they have placed signs on the dry sand area of their property, such as "no trespassing" signs to demarcate the boundary of their private property in an attempt to preserve the private nature of their yard, which includes the dry sand area.[4] The Alfords plan to continue doing so in the future as well, but they have been notified by the County that, pursuant to the County's regulations regarding use and conduct on the beach, beachfront property owners will be subject to a fine of up to $500 for placing any sign, rope, fence or chain in the dry sand portion of their backyard or for excluding the public from the dry sand area. The ordinances at issue, i.e., the Obstruction Amendments and the Customary Use Ordinance, while not

[4] In the past, the Alfords have placed signs on their property to "warn against or discourage trespass." ECF No. 43 at 6. They have also placed signs on the dry sandy area of the beach in support of political candidates and others with religious messages.

completely unrelated to each other, are challenged on different grounds, were enacted at different times, and are located in different Chapters of the Walton County Code.

A. Obstruction Amendments

The County has regulated waterways in some form since 1982. *See* Walton Cty. Code, Ord. No. 82-5, § 1 (July 27, 1982). The current regulation is the Walton County Waterways and Beach Activities Ordinance ("Beach Activities Ordinance"), Walton Cty. Code Ch. 22, originally adopted in 2013. The Beach Activities Ordinance, Chapter 22, regulates everything from public boat ramps, no wake zones, and vessel speeds, to animals on the beach, beach vendors, and public beach parking. As relevant here, in 2013, Section 22-54(g) originally required personal property items or obstructions, including "fences, ropes, chains, or signs" to be removed from the beach during overnight hours, but provided for an exception if a permit was obtained from the County Administrator, who had discretion to issue permits, unless the item would be injurious to public health or safety.[5] *See* § 22-54(g), Ord. No. 2013-04 (2013). The Obstruction Amendments at issue were added in June 2016, and they altered this permitting section by providing that no permits shall issue for

[5] The 2013 Beach Activities Ordinance also included a section expressly stating, "This chapter makes no finding of fact that the public either has or has not customarily used any particular piece of gulf front property beach." Sec. 22-52, Ord. No. 2013-04 (2013). This section has since been eliminated and replaced with the Customary Use Ordinance, discussed *infra*, located in Chapter 23, added to the Code in October 2016.

"[o]bstructions, including but not limited to ropes, chains, signs or fences," Walton Cty. Code § 22-54(g)(2)(a)(3), and also making it unlawful to maintain an obstruction on the beach, stating "[o]bstructions include but are not limited to ropes, chains, signs, or fences," Walton Cty. Code § 22-55 (Ord. No. 2016-16).

The public process leading to the enactment of the Obstruction Amendments began on March 16, 2016, when the County held a public workshop on beach access. Prior to this workshop, the County had received complaints about the ever-increasing obstructions on the beach, a trend since mid-2015.[6] The meeting began with a presentation on the law of "customary use" by David A. Theriaque, outside legal counsel for the County. The public was permitted to comment on the presentation and the issue of beach access. At the end of the meeting, the Board of County Commissioners (the "Board") directed the County Attorney's Office to "begin changing the beach activities ordinance to address obstructions on the beach."[7] ECF No. 53-1 at 201. More specifically, one of the Commissioners, Cecilia Jones, stated that:

[6] The complaints included, *inter alia*, concerns over aesthetics, confusion about property lines, and hazards on the beach. There was no official tally of the complaints entered with the County, as they were voiced via emails, telephone, social media, and various public meetings. Brian Kellenberger, Director of Beach Operations, acknowledged during his deposition that not all complainants offered their "pure motivation" for complaining, however. ECF No. 53-1 at 127. He suggested that "[t]hey will come up to me with all sort [sic] of motivations in order to get a change in behavior by a third party." *Id.*

[7] According to Sidney Noyes, the Assistant County Attorney, she was not surprised that the County attorneys were instructed to begin drafting amendments to the beach ordinance because

> [she] would like to direct staff to work with Mr. Theriaque in coming up with some kind of action, some kind of plan to bring back to us [regarding beach access]. And please include those atrocious fences and those unsightly signs that if a mouse did get caught in our fences he would not live. If a turtle got caught in those fences. And even our public. We just don't need – aesthetically we don't need those ugly fences. We don't need those no trespassing signs.

ECF No. 53 at 23. After the March meeting, Assistant County Attorney Sidney Noyes began drafting proposed amendments to the existing Beach Activities Ordinance.

On June 14, 2016, the County held a public hearing on the proposed Obstruction Amendments. First, § 22-54(g), previously titled "Obstructions on the Beach," was proposed to be renamed as "Personal property on the beach between one hour after dusk and one hour after sunrise." While the 2013 version made it unlawful to leave any item on the beach overnight absent a permit and entrusted the County Administrator with discretion to grant permits, the proposed amendment specified, in part, that "[n]o county permit shall be issued for . . . [o]bstructions, including, but not limited to ropes, chains, signs, or fences." Walton Cty. Code § 22-54(g)(2)(a)(3). Additionally, a new section was proposed, entitled "Prohibition of obstructions on the beach," which expressly stated that it is unlawful for any person to place an obstruction on the beach and also defines obstructions as: "Obstructions

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of the large number of complaints the Board had received from the public regarding signs on the beach. ECF No. 53-1 at 203.

include, but are not limited to ropes, chains, signs, or fences." Walton Cty. Code § 22-55.[8]

Property owners who were opposed to the amendments voiced a number of concerns, including that they would be exposed to liability if they could not use signs to prevent the pubic from accessing their property. They also complained that the Sheriff's Office had implemented a Standard Operating Procedure ("SOP") memorandum indicating that state trespassing laws would only be enforced if a beachfront property owner's property line had been surveyed and marked, which could not be done under the ordinance.[9] Thus, the beachfront property owners were concerned that they would no longer have the right to enjoy their property free from trespassers despite paying property taxes. Even those property owners who were in favor of banning obstructions on the beach, such as fences, chains, and ropes, expressed concern about banning all signs because of the Sheriff's SOP memorandum. These property owners suggested that restrictions on the placement, size, and number of signs could still enhance aesthetics and safety, as they had in

[8] This section had previously been designated "reserved."

[9] The SOP memorandum itself is not part of the record, and neither the Commissioners nor the audience indicated when the SOP was distributed to the public. However, a number of individuals stated they had erected signs and fences on their property in order to comply with the SOP and were concerned that the trespassing laws would not be enforced if they removed them.

other areas of the County.[10] Other members of the public supported the proposed amendments as drafted because they would preserve the aesthetics of the beach as well as address safety concerns caused by improperly anchored signs, which otherwise could blow into the dunes, injuring children and endangering wildlife.

After hearing public comment, the Board discussed the safety issues regarding children and endangered species,[11] the aesthetics of the beach, the Sheriff's SOP, and the importance of enforcing the County's existing beach activities ordinance.[12]

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[10] The Planning Manager for the Division of Planning and Development Services for the Walton County Board of County Commissioners, Charles M. Carpenter, testified by deposition that Chapter 7 and Chapter 13 of the County's Land Development Code regulate signage. The Chapter 13 regulations pertain only to the County's scenic corridors, which have different restrictions on signs relating to number, size, color, material, and height. Elsewhere in the County, Chapter 7 regulations on signs dictate the height, placement, size, and method of attachment. These regulations also include safety provisions, such as "building setbacks, not being an obstruction to wildlife in wildlife conservation zones, lighting, glare, placement in clear visibility zone for traffic, [and] method of attachment." ECF No. 53-1 at 193.

[11] Although there was no evidence presented to the Board suggesting that children or endangered species had been harmed by obstructions on the beach in the past, the Board considered public comments that obstructions posed a safety concern because of the risk that they could blow into the dunes and because they are difficult to see at night.

[12] In depositions, the County's corporate representatives further explained the County's motivations behind the Obstruction Amendments. Jeffrey McVay, Lead Code Enforcement Officer, said he understood the purpose was to aid in lateral movement along the beach for code enforcement, lifeguards, and emergency response vehicles. McVay and Kellenberger both testified that the amendments were necessary due to a ruling against the County in another case in which that court found the previous language did not prohibit a chain on the beach because it was merely an "obstruction" and not an "unlawful obstruction." Moreover, Scott Caraway, Environmental Manger for Public Works, also suggested that the Ordinance would assist the County in complying with its Habitat Conservation Plan ("HCP"), which was adopted to comply with the Endangered Species Act. Caraway noted that the HCP said "permanent physical structures constructed on the beach or dune can potentially impact sea turtle[s] and beach mice." ECF No. 53-1 at 176.

A motion was made to adopt an ordinance banning only fences, chains, and ropes, not signs, because of the concern that if property owners could not erect signs the Sheriff would no longer enforce the trespass laws due to the lack of notice to violators. This motion was denied.[13] A second motion was made to adopt the amendments as proposed, including the total sign ban along with the ban of ropes, chains, and fences, which passed on a vote of three to two.[14] The final version of Section 22-55, titled "Prohibitions of obstructions on the beach," states: "It shall be unlawful for any person to place, construct or maintain an obstruction on the beach. Obstructions include, but are not limited to ropes, chains, signs, or fences." Walton Cty. Code, § 22-55, Ord. No. 2016-16 (June 14, 2016). This section exempts only sand fences[15] and does not include a definition of "signs."[16]

[13] In voting against the motion, Commissioner Jones stated "I'm looking at these signs. I mean there's [sic] red signs and white signs and big signs and little signs and they all look ugly." Video Recording of June 14, 2016 Regular Meeting of the Board (ECF No. 55).

[14] In support of adopting the ordinance as proposed, Commissioner Cindy Meadows stated, "I think we need to remove everything and then if we want to add things back into it we can. But I think it'd be cleaner and easier to remove all things during day and night." Video Recording of June 14, 2016 Regular Meeting of the Board (ECF No. 55). She suggested that, once adopted, only then would the Board start looking at the beach in a "comprehensive manner," which would include consideration of all the issues that were discussed at the meeting. *Id*. She also noted that removing all obstructions during the day and night was the best option because otherwise the Board would have to try to "parse" up the types of signs on the beach. *Id.*

[15] Although not at issue, Section 22-55 provides a sole exemption for sand fences that "have received all necessary permits from state and federal agencies." Walton Cty. Code § 22-55. Sand fences are defined as "a tool used in dune restoration projects for rebuilding sand dunes." Walton Cty. Code, Ch. 22.

[16] Noyes testified during her deposition that "signs" could be interpreted to mean anything on the beach that "communicates a message," including but not limited to, "a cooler with a

B. Customary Use Ordinance

Four months later, on October 19, 2016, the County held a Customary Use Workshop, with Dr. James Miller, a senior level consultant in archaeology and historic preservation and a former State Archaeologist of Florida, and offered evidence of the public's customary use rights in Walton County. Although the content of Dr. Miller's presentation is not in evidence,[17] the record reflects that the County subsequently held a public hearing on October 25, 2016, to consider a draft ordinance on customary use entitled, "Protecting the Public's Long-Standing Customary Use of the Dry Sand Areas of the Beaches." Ord. No. 2016-23 (Oct. 25, 2016). The ordinance ultimately passed with an effective date of April 1, 2017. The final version declares: "The public's long-standing customary use of the dry sand areas of all of the beaches in the County for recreational purposes is hereby recognized and protected."[18] Walton Cty. Code, § 23-2(a) (Ord. No. 2017-10)

Budweiser sign." ECF No. 53-1 at 208. McVay stated that a sign's content was not considered, and that small wedding chalkboards, County signs, vendor sandwich boards, and No Trespassing signs were all "obstructions," although he suggested there was an exception for the posts, ribbons, and signs that demarcate sea turtle nests on the beach. Kellenberger testified that it is not the signs themselves that are "physical obstructions" to traversing the beach; rather, he suggested that signs with citations to Florida Statutes marking private property were "literal obstruction[s]" to traversing the beach. ECF No. 53-1 at 118-19.

[17] Apparently, Dr. Miller has prepared a report on customary use in Walton County entitled "The Historical Basis for Customary Use in Walton County, Florida, with reference to the Alford Property." ECF No. 70, Notice of Serving Expert Witness Disclosures. This report, however, was not attached to the Motions for Summary Judgment and is not a part of the record.

[18] The Customary Use Ordinance defines the dry sand area of the beach as "the zone of unconsolidated material that extends landward from the mean high water line to the place where there is marked change in material or physiographic form, or to the line of permanent vegetation,

(March 28, 2017).[19] In the purpose section of the Customary Use Ordinance, the County observed that "the Florida Supreme Court in *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 73 (Fla. 1974), expressly recognized the doctrine of customary use in the state of Florida," and further noted that, based on "the research and analysis of Dr. James Miller, as well as the testimony of citizens of the County," customary use has applied to Walton County beaches "since before 1970." Walton Cty. Code, § 23-2(a) (Ord. No. 2017-10). The Customary Use Ordinance prohibits any "individual, group, or entity [from] impe[ding] or interfer[ing] with the right of the public at large, including the residents and visitors of the County, to utilize the dry sand areas of the beach that are owned by private entities for the uses as described in subsection (d)." *Id.* § 23-2(a). The Ordinance specifies that the public may walk, jog, sunbathe with or without a beach umbrella, picnic, fish, build sand castles, and other similar traditional recreational activities on the dry sand area of the beach "owned by private entities." *Id.* at § 23-2(d). The Ordinance imposes a buffer zone that prohibits public recreation within fifteen feet of the dunes or any privately owned habitable structure. *Id.* at § 23-2(c). However, the buffer zone does

usually the effective limit of storm waves, whichever is more seaward." Walton Cty. Code at § 23-3(b).

[19] The Board also created a committee to formulate amendments to the ordinance prior to its effective date. On March 28, 2017, the Board met and adopted minor changes to the ordinance that further defined the specific allowable uses of the beach. The Customary Use Ordinance went into effect on April 1, 2017. *See* ECF No. 71 (stipulation as to Ord. No. 2017-10).

not apply "to the Walton County Sheriff's Office, the Walton County Tourist Development Council, the South Walton Fire District, and other emergency service providers." *Id.* The Customary Use Ordinance imposes a $500.00 fine for impeding or interfering with the public's use of the dry sand areas outside of the buffer zone.

II. Discussion

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "The moving party bears the initial burden of informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact." *Rice-Lamar v. City of Ft. Lauderdale*, 232 F.3d 836, 840 (11th Cir. 2000) (citing *Celotex Corp.*, 477 U.S. at 323). An issue of fact is material if, under the governing substantive law, it might affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where "reasonable minds could differ on the inferences" to be drawn from undisputed facts, summary judgment will be denied. *See Miranda v. B & B Case Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992) (citing *Mercantile Bank & Trust Co. v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985)). The evidence, and all factual inferences reasonably drawn from the evidence, must be viewed in the light most

favorable to the nonmoving party, *see Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993), and credibility determinations are impermissible in this context, *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000).

A. First Amendment Challenge

The First Amendment prohibits the enactment of laws "abridging the freedom of speech." U.S. Const., amend. I. Laws that silence or suppress speech based on the views expressed or messages represented in that speech (i.e., content-based regulations) are "presumptively invalid," regardless of the government's motive, and are subject to strict scrutiny review. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015); *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring) ("With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one."). To survive strict scrutiny, a content-based restriction must be shown to be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end." *Boos v. Barry*, 485 U.S. 312, 321 (1988) (quoting *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *see also R.A.V.*, 505 U.S. at 395 (noting a content-based regulation can be considered

narrowly tailored only if the restriction is "*necessary* to serve the asserted compelling interest") (emphasis in original, quotation and alterations omitted).

Content-neutral restrictions on speech that impose reasonable time, place, and manner restrictions, on the other hand, are subject to intermediate scrutiny. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Intermediate scrutiny requires courts to ensure that "the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Id.* (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Additionally, even if facially content-neutral, a law will be considered a content-based regulation of speech, subject to strict scrutiny, if it cannot be "justified without reference to the content of the regulated speech," or if the law was adopted by the government "because of disagreement with the message [the speech] conveys." *Reed*, 135 S. Ct. at 2226–27 (quoting *Ward*, 491 U.S. at 791). Thus, in evaluating the constitutionality of an ordinance restraining speech, courts first consider whether the restriction is content based or content neutral. *See id*. at 2228; *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1258 (11th Cir. 2005).

The Alfords challenge the Obstruction Amendments to the Beach Activities Ordinance, Sections 22-54(g)(2)(a)(3) and 22-55, as facially unconstitutional.[20] The Alfords first argue that the Obstruction Amendments are content-based restrictions because the County's motive for enacting them was its disagreement over the content of property owners' speech and further because the amendments restricted more speech than necessary to advance the County's interests. The Alfords contend that the public records in evidence demonstrate that the County disfavored property owners' "no trespassing" message, and in fact, the County explored ways to chill their expression at public meetings. Thus, they insist that the amendments were intended to target beachfront property owners. The Court disagrees and finds no improper or content-based motive on the County's part.

As the Supreme Court has observed, the consideration of governmental motives can be "a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383–84 (1968). Specifically, when a court is "asked to void a statute . . . on the basis of

[20] In Count I, the Alfords assert a First Amendment claim alleging both a facial and an as-applied free speech challenge to the Obstruction Amendments, as well as a claim that the Obstruction Amendments unconstitutionally burden their free exercise of religion. ECF No. 43 at 8. The Alfords address only their facial free speech challenge in the Motion for Partial Summary Judgment, and although they raise a vagueness challenge, they do so for the first time only in their Reply, ECF No. 58. The Court will not consider an argument raised for the first time in reply. *See Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005) ("[A]rguments raised for the first time in the reply brief are not properly before a reviewing court.") (internal citations omitted); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) (noting that the doctrines of overbreadth and vagueness are distinct). In any event, because the Court ultimately finds that the Alfords are entitled to prevail on their facial free speech claim, there is no need to address any of the other claims or theories included or sought to be included in Count I.

what fewer than a handful of [legislators have] said about it," the "stakes are sufficiently high to eschew guesswork" because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Id.* at 384. The record in this case includes the comments of only a handful of County Commissioners at the public hearings expressing a particular hostility towards the "No Trespassing" signs. ECF No. 53 at 23 (Commissioner Jones stated "[w]e just don't need – aesthetically we don't need those ugly fences. We don't need those No Trespassing signs."). Despite these remarks, the same Commissioners also expressed concerns that all signs, regardless of their content, posed public safety and aesthetic concerns, i.e. interests that are entirely justified without reference to the content of signs. Considering the record as a whole, the handful of comments made by less than a majority of the Commissioners does not "cast any material doubt on [the] content-neutral character" of the ordinance. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 648 (1994). *Cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (zoning ordinance regulating the location of adult movies theaters was content-neutral because the city's *predominate* interest was protecting against crime, preserving property values, and maintaining aesthetics, not "suppression of free expression"); *Funtana Vill., Inc. v. City of Panama City Beach*, No. 5:15cv282-MW/GRJ, 2016 WL 375102, at *3 (N.D. Fla. Jan. 28, 2016) (plaintiffs were unlikely to be successful in showing an ordinance was content based

despite comments by a handful of county officials indicating special concern over a type of music because "there [was] not sufficient evidence to impute those comments to the City Council as a whole."). Thus, although the record includes some disparaging comments about unsightly "No Trespassing" signs and discussions about the public's right of customary use, it clearly reflects that a wide range of concerns influenced and motivated the County's decision to enact the Obstruction Amendments.

Moreover, the amendments will not be considered a content-based restriction of speech merely because they may have a greater impact on beachfront property homeowners than others in the County. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791 (citing *City of Renton*, 475 U.S. at 47-48). A "differential impact," without more, does not demonstrate that a regulation is content-based. *See Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 696 (2010). Thus, even assuming the Obstruction Amendments disproportionately affect beachfront property owners as compared to other property owners in the County, this incidental impact affects all types of beachfront property owners equally, and it results because of concern for the beachfront nature of the property, not the

viewpoint or content expressed by the signs.[21] *See id.* (a restriction is valid if "justified without reference to the content or viewpoint of the regulated speech") (internal quotations and marks omitted).

The Alfords also argue that, even if the Obstruction Amendments are considered content neutral, they cannot survive intermediate scrutiny because the restriction of speech is facially overbroad, restricting more speech than necessary without any attempt to narrowly tailor the restrictions to the legitimate government purpose. On this ground, the Court agrees. The restriction stated in the Obstruction Amendments is content neutral, banning as "obstructions" "ropes, chains, signs or fences." As such, the amendments, which ban protected speech, will be upheld only so long as the restriction is (1) "narrowly tailored to serve a significant governmental interest," and (2) "leaves open ample alternative channels for communication." *Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015). Regarding the governmental interest, signs "pose distinctive problems that are subject to municipalities' police powers." *City of Ladue*, 512 U.S. at 48. In fact, the Supreme Court has expressly acknowledged that "[s]igns take up space and may obstruct

[21] The Alfords fail to acknowledge that the Beach Obstruction Ordinance also prevents vendors, who are not beachfront owners, from placing advertisement signs on the beach. In fact, the sign ban equally restricts both commercial and non-commercial speech. Additionally, the Beach Obstruction Ordinance impacts the County's beach signs and trash receptacles. Noyes indicated that the Beach Obstruction Ordinance could even potentially apply to any beachgoer who had a "sign" on their cooler.

views, . . . and pose other problems that legitimately call for regulation." *Id.* It is well-settled that public safety is a significant interest. *See Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 507–08 (1981) (describing both "traffic safety" and "the appearance of the city" as "substantial government goals"). Moreover, aesthetics, safety to County workers, and protection of endangered species were also identified as legitimate interests expressed at the public hearings.[22] The County has a significant and legitimate interest in regulating obstructions, including signs, as well as ropes, chains, and fences, on the beach to further these governmental interests.

However, a content-neutral time, place, or manner restriction regulating speech must be narrowly tailored such that it does not "burden substantially more speech than is necessary to further the government's legitimate interest," *McCullen*

[22] The amending ordinance, 2016-16, states in the preamble that obstructions on the beach, particularly fences, are a safety hazard, and also states that the amendments promote the health, safety, welfare, and quality of life of the people in the county. While the amending ordinance did not specifically mention aesthetics, the ability of County workers to traverse the beach, and wildlife, these concerns were specifically voiced at the public hearings and County workshops, by County workers, and were subsequently articulated in the deposition of Noyes as additional bases for adoption of the amendments. The County has offered evidence that the proliferation of signs on the beaches were ugly, unattractive, and caused clutter; restricted the ability of County code enforcement and emergency workers to traverse the beach; and could cause a "take" of an endangered species in violation of the Endangered Species Act. *See* ECF No. 53-1 at 62, 113, and 205. The Alfords argue that the County needed concrete evidence that signs had previously caused harm or conducted a safety analysis. The Court disagrees. "To demonstrate the significance of its interest, the [County] is not required to present detailed evidence . . . , [but] is entitled to advance its interests by arguments based on appeals to common sense and logic." *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1318 (11th Cir. 2000) (citations omitted). Because the County Commissioners relied on complaints from the public and employees during multiple public hearings, the County relied on sufficient evidence to advance these interests. Thus, the Court finds that these interests are all significant governmental interests.

v. Coakley, 134 S. Ct. 2518, 2535 (2014) (quoting *Ward*, 491 U.S. at 799), and also must "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (quoting *Clark*, 468 U.S. at 293). Unlike a content-based regulation, a content-neutral regulation of speech need not be "the least restrictive or least intrusive means of serving the government's interest," but a total ban may impermissibly restrict expression, placing an undue burden on speech that does not advance the government's goals. *McCullen*, 134 S. Ct. at 2535; *see also Metromedia*, 453 U.S. at 528–30 (Brennan, J., concurring) (concluding that "a city may totally ban [billboards] if it can show that a sufficiently substantial governmental interest is directly furthered by the total ban, and that any more narrowly drawn restriction, *i.e.*, anything less than a total ban, would promote less well the achievement of that goal"). Stated otherwise:

> [w]here certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and mean, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency.

McCullen, 134 S. Ct. at 2534 (internal quotations omitted). Additionally, "an ordinance cannot be said to be narrowly tailored if the record shows that obvious less-burdensome alternatives were *completely disregarded*." *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1301 (11th Cir. 2017) (emphasis added).

The Obstruction Amendments are not narrowly tailored and consequently restrict substantially more speech than necessary to achieve the County's legitimate

interests. The record reflects that the County *admittedly* failed to consider any less restrictive alternatives in passing the ordinance. In fact, the County Commissioners were generally in favor of a total sign ban because it would be "cleaner and easier to remove all things during day and night" and a total ban would avoid the difficulties of having to "parse" up the types of signs on the beach. Video Recording of June 14, 2016 Regular Meeting of the Board (ECF No. 55). Thus, rather than consider *any* obvious less-restrictive alternatives, such as limiting the number or size of signs, the County "completely disregarded" any less-restrictive alternatives or effective alternate channels of communication merely out of administrative convenience, which does not pass intermediate scrutiny. *FF Cosmetics FL*, 866 F.3d at 1301. The First Amendment does not condone the adoption of regulations that restrict speech out of "mere convenience." *See McCullen*, 134 S. Ct. at 2534.

Nor does the County even argue that no less restrictive means exist. Although silencing all signs on the beach may have been "the path of least resistance" because it easily accomplished the County's goals, the First Amendment demands a "close fit between ends and means," which the County's total sign ban fails to do. *See id.* The County admitted that a single sign on the beach would not block County officials from traversing the beach. ECF No. 53-1 at 219. As to the legitimate interest in protecting endangered species, the County acknowledged that the concern arises

primarily at night,[23] and that signs present during the day would not pose a known threat to sea turtles.[24] Even assuming that the County's legitimate interests in aesthetics and safety would strongly support a limit or even a ban of obstructions on the beach, the County's total restriction of ropes, chains, signs and fences was nevertheless not narrowly tailored to these interests because the amendments eliminated *all speech*, rather than attempting to consider a limit to the size, number, and timing of signs, as the County has done in the past for its Scenic Highway corridors, or other means of communicating property lines.

The County argues only that it did not need to consider limiting the ban because property owners retain alternative channels of communication on the remainder of their property. First, this argument conflates the twin elements of the content neutral analysis, which demands both a narrowly tailored restriction as well as alternative channels for communication. *See Ward*, 491 U.S. at 791. The existence of an alternative channel itself, such as the fact that other places exist on the Alfords' private property where they can post messages and erect fences, does

[23] No lights are permitted on the beach during sea turtle season. Therefore, signs, fences, and ropes pose a hazard to officials traversing the beach at night because the officials are only allowed to use red lights that fail to illuminate items blocking their way. Additionally, the County suggests, without evidence, that a taking of a sea turtle could occur if the turtles were to bump into a sign on the beach, which would only occur at night, and return back to the water rather than lay eggs.

[24] The County identifies two other endangered species that are present on its beaches, the piping plover and the Choctawhatchee mouse; however, the County does not suggest the Ordinance is intended to further the protection of these species. ECF No. 53-1 at 161.

not relieve the County of its obligation to consider less restrictive means before completely banning signs. The County has an obligation to avoid restricting speech to a greater degree than necessary.

Second, it is clear from this record that placing signs on other portions of the Alfords' property is not a reasonable alternative channel for communication of the information. Messages relating to use or ownership of the dry sand portion of the beach and intended to be conveyed directly to those traversing the Alfords' beachfront property would likely be ineffective if located on another portion of the property. In addition to the total sign ban, the County has eliminated other alternative channels of communication by means of any symbolic expression of property rights by forbidding ropes, fences, and chains. "[A] message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative." *Clark*, 468 U.S. at 294. This type of symbolic expression "may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the expression of free speech." *Id.* It is not disputed that fences, ropes, and chains could be regulated on the beach, but the prohibition of this type of symbolic message together with a total sign ban and a corresponding lack of exceptions or reasonable time, place, or manner restrictions, lends weight to a conclusion that more speech

than necessary is regulated by the definition of "obstruction" in the Obstruction Amendments.

Importantly, this total restriction applies to the Alfords' private property. "A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there." *City of Ladue*, 512 U.S. at 58 (citation omitted); *see also Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 811 (1984) (concluding that a ban on speech on public property only did not raise First Amendment concerns because "[t]he private citizen's interest in controlling the use of his own property justifies the disparate treatment"); *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272, 1291 (S.D. Fla. 1999) ("[T]he government has broader power to regulate expression on public property [than on private property]."). The County argues that it has an interest in regulating obstructions on privately owned beach property because of the public's longstanding right to use the beach. While this may be true, *see City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974) (stating the customary use right prohibits a property owner from interfering with the public's recreational use of the dry sand area of the beach), disputes over this right must be determined on a case-by-case basis, and the extent to which the customary use doctrine applies to the Alfords' property is in dispute. Even assuming this right exists in relation to the

Alfords' property, it extends only to the public's right to recreational use of the dry sand area and does not divest the property owner of private property rights. *See id.* at 78 (stating that the "right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself" and "is subject to appropriate governmental regulation"). The Court has already agreed that the County has a legitimate governmental interest in regulating obstructions on the beach. Nonetheless, the County has cited no authority to support its contention that the right of customary use provides grounds to justify a total sign and symbolic message ban, without consideration of less restrictive alternative means for the protection of the property owners' free speech rights. Nothing about the public's customary use right itself would restrict a property owner from posting a political message, an advertisement, or a message demarcating the private property boundary.[25] As such, the Obstruction Amendments are not narrowly tailored to the County's interest in protecting the public's customary use right, even assuming it exists on this portion of the beach. The Court concludes that the Obstruction Amendments defining "obstructions," Walton Cty. Code §§ 22-54(g)(2)(a)(3) & 22-55, are facially

[25] The extent to which a "no trespassing" sign could impermissibly exclude the public from recreational use in an area where the public right of customary use has been established is not addressed in the Obstruction Amendments, which simply ban all signs, fences, ropes and chains from all areas of the dry sand beach, with no exceptions or time, place and manner limitations. The public record shows that the County chose to ban all speech without considering whether this ban was narrowly tailored to its legitimate interest. Moreover, even assuming a customary use right exists, there still may be valid reasons to mark a property line, as shown by the public discussions about the Sheriff's SOPs.

unconstitutional. In light of this conclusion, the Court has no need to address the Alfords' First Amendment overbreadth or as-applied arguments, which are moot.

Finally, the County argues that, even if a portion of the Obstruction Amendments are found unconstitutional, the Ordinance as a whole should not be stricken because it contains a broad severability provision that would permit the survival of any portion of the Ordinance not implicated by a court challenge. The Court agrees. The Beach Activities Ordinance provides that "[i]f any portion of this Ordinance is determined by any Court to be invalid, the invalid portion shall be stricken, and such striking shall not affect the validity of the remainder of this Ordinance."[26] Ord. No. 2016-16. The Eleventh Circuit has recognized that courts have an obligation to uphold legislative enactments by striking "only the unconstitutional portions," where possible, and that "Florida law clearly favors (where possible) severance of the invalid portions of a law from the valid ones." *Solantic*, 410 F.3d at 1269 n.16 (quoting *Coral Springs Street Sys, Inc. v. City of Sunrise*, 371 F.3d 1320, 1347 (11th Cir. 2004)). The Florida Supreme Court requires the following severability analysis:

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid

[26] Additionally, the Walton County Code § 1.7, Severability of Parts of Code, provides: "[I]f any section, subsection, sentence, clause, phrase or portion of this Code or any ordinance is for any reason declared to be unconstitutional, inoperative, or void, such holding or invalidity shall not affect the remaining portions of this Code or any ordinance."

> provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Coral Springs, 371 F.3d at 1347.

The Court finds that the Obstruction Amendments can be separated from the Beach Activities Ordinance. Striking § 22-54(g)(2)(a)(3), which states that no permits can be given for "[o]bstructions, including but not limited to ropes, chains, signs or fences," preserves the basic prohibition in subsection (g) against leaving personal property on the beach between one hour after dusk and one hour after sunrise, unless a permit has been granted, Walton Cty. Code § 22-54(g)(1), and also preserves the other permitting provisions and restrictions found in § 22-54(g)(2). Similarly, striking the definition of "obstruction" from § 22-55 (the sentence, "Obstructions include, but are not limited to ropes, chains, signs, or fences.") leaves intact the general prohibition of obstructions on the beach, although the term "obstructions" is left undefined. Nonetheless, the Court finds that, for purposes of the third prong of the severability analysis, striking only part of the definition (such as, only the word "signs") would parse the amendments too narrowly. It cannot be said that the County would have passed the one without the other because, in fact, a vote was taken on a version of the amendments that omitted the word "signs" and included only fences, ropes, and chains, but the Board rejected the proposal. Thus,

the entire definition as drafted will be stricken and severed from both sections of the Beach Activities Ordinance.

This in no way compromises the County's ability to revisit the issue and craft a new definition with reasonable time, place and manner restrictions to accomplish the County's legitimate public purposes without imposing a total ban on signs and other symbolic speech. *See City of Ladue*, 512 U.S. at 58 (stating the Court's decision that a total sign ban was unconstitutional "by no means leaves the City powerless to address the ills that may be associated with residential signs"). The Court is "confident that more temperate measures could in large part satisfy [the County's] stated regulatory needs without harm to the First Amendment rights of its citizens." *Id.* The Alfords are entitled to summary judgment on Count I and a declaration that the definition of "obstructions" in Walton County Code §§ 22-54(g)(2)(a)(3) and 22-55 is unconstitutional and must be stricken from the Beach Activities Ordinance. Moreover, in light of this conclusion, the Count II Substantive Due Process challenge, seeking only declaratory relief, and the Count III state law claim, asserting the Obstruction Amendments are inconsistent with state law statutes, are moot.

B. Motion to Exclude

The County moves to exclude certain references by Plaintiffs' attorneys in their reply brief, which the County asserts improperly insinuated that the County

might have violated the Florida Sunshine Law and improperly referenced the County's assertion of attorney-client privilege during a deposition of the County Attorney. The Alfords respond that these references are neither false nor irrelevant, that they did not, in fact, accuse the County of violating Florida's Sunshine Law, and that the references were merely made in response to the County's attempt to "distance itself" from comments made by the Assistant County Attorney who was designated as a corporate representative. ECF No. 60 at 2. The Court did not reference or rely on these comments or draw any adverse inferences from them in determining the motion for summary judgment on Count I. Therefore, the motion to exclude is moot.

C. Customary Use Ordinance

The parties also filed cross motions for summary judgment on Count IV, in which the Alfords claim that the County's enactment of the Customary Use Ordinance was an *ultra vires* act that is *void ab initio*. The Alfords contend that customary use is a common law doctrine and that its application must be judicially determined, not legislated. The County disagrees and argues that its enactment of the Customary Use Ordinance is a valid exercise of constitutional and statutory "home rule" authority. The Court looks to Florida law on this issue. *See Shapiro v. Associated Int'l Ins. Co.*, 899 F.2d 1116, 1118 (11th Cir. 1990) (federal courts are bound to follow the decisions of the Florida Supreme Court on issues of state law).

Initially, the Court notes that although the Florida Supreme Court has acknowledged the existence of the public's customary use rights in relation to Florida's beaches, *see City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73 (1974), it has not directly addressed the *ultra vires* question at issue nor has it described precisely how the doctrine applies to Florida's beaches. In the absence of a ruling by the Florida Supreme Court, decisions of the Florida District Courts of Appeal are controlling on federal courts in Florida, unless there is some indication that the Florida Supreme Court would decide the issue otherwise. *See Blanchard v. State Farm Mut. Auto. Ins. Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990). And in instances where there is no Florida authority on an issue, the Court must make an "educated guess" as to how Florida courts would decide the issue. *See Trail Builders Supply Co. v. Reagan*, 409 F.2d 1059, 1061 (5th Cir. 1969).[27]

Florida law describes an "ultra vires" act as "one that is unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." *Liberty Counsel v. Florida Bar Bd. Of Governors*, 12 So. 3d 183, 191 (Fla. 2009) (citing Black's Law Dictionary 1559 (8th ed. 2004)) (internal quotations omitted). In Florida, a county "engages in an 'ultra vires' act when it lacks the authority to take the action under statute or its own governing laws." *Id.* at 191–92. Generally, courts

[27] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*) (adopting the case law of the former Fifth Circuit developed before October 1, 1981, as precedent in this Circuit).

are asked to determine whether a county's authority has been preempted by state statute or whether the county acted contrary to its own ordinances or charter. *See, e.g.*, *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924, 928-29 (Fla. 2013) (finding that a city's ordinance was preempted by state statute because it was in conflict with state statute); *Town of Lauderdale–by–the–Sea v. Meretsky*, 773 So. 2d 1245, 1249 (Fla. 4th DCA 2000) (reversing declaratory judgment in favor of landowners regarding a wall built on a public right-of-way when "the Town Commission authorized an act contrary to its own ordinances and, therefore, its approval was ultra vires and void"). When a county's adoption of an ordinance is allegedly *ultra vires*, any person affected by the ordinance "may have determined any question of validity arising under such municipal ordinance and obtain a declaration of rights." *See Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So. 2d 504, 505–06 (Fla. 3d DCA 2002) (internal omissions omitted) (quoting Fla. Stat. § 86.021).

Considering the Florida Constitution first, the Court observes that it grants non-charter counties, like the Walton County, the "power of self-government as is provided by general or special law." Art. VIII, § 1(f), Fla. Const. Also, the board of county commissioners of a non-charter county "may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law." *Id.* Under state statute, "[t]he legislative and governing body of a county shall have the

power to carry on county government" so long as it is "not inconsistent with general or special law." Fla. Stat. § 125.01(1). Article VIII, section 1(f), and chapter 125, Florida Statutes, have been liberally construed to grant full "home rule" authority to Florida counties. *See Speer v. Olson*, 367 So. 2d 207, 210 (Fla. 1978) (explaining that "the county governing body . . . has full authority to act through the exercise of home rule power."); *see also* Fla. Stat. § 125.01(3)(b) ("The provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section and to secure for the counties the broad exercise of home rule powers authorized by the State Constitution."). Thus, the only expressed limitation on a non-charter county's authority to act is "that [its] ordinances be not inconsistent with general or special law, or conflict with a municipal ordinance adopted by a municipality within the county." *Fillingham v. State*, 446 So. 2d 1099, 1102 (Fla. 1st DCA 1984); *see also Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010) (stating a county act "may be inconsistent with state law if (1) the Legislature has preempted a particular subject area or (2) the local enactment conflicts with a state statute" (internal quotation omitted)). This indicates that a county is free to adopt ordinances on any subject so long as it is not expressly prohibited by or inconsistent with a state law.

The Alfords have not argued, and the Court has not found, any state statute prohibiting or preempting the County's authority to recognize or endorse the

customary use doctrine. The Alfords reference Article V, Section 20(c)(3) of the Florida Constitution, which delineates the jurisdiction of circuit courts in Florida as including, among other things, all actions that involve property boundaries or a right of possession of real property. This provision does not speak to a county's authority.[28] Nor have the Alfords cited any case expressly finding that a county acts beyond its authority by adopting an ordinance on customary use. Instead, they creatively argue that under Florida law, the common law customary use doctrine is a fact intensive determination to be made by courts in each case and therefore reason that the County has usurped the judiciary's role and acted inconsistent with state common law. This argument requires an examination of the customary use doctrine under Florida law.

The Florida Supreme Court expressly recognized the customary use doctrine's application to Florida's beaches in *City of Daytona Beach v. Tona-Rama, Inc*., 294 So. 2d 73 (Fla. 1974). In *Tona-Rama*, the operators of an observation tower protested the issuance of a permit to defendant to build a second operation tower on a nearby pier. 294 So. 2d at 74-75. Specifically, the plaintiff contested the permit by arguing that the public had gained a right to use the property through a prescriptive easement. The Florida Supreme Court concluded that no prescriptive

[28] The Alfords also contend that there is a "serious Fifth Amendment" question as to whether the application of custom effected an uncompensated taking. However, the Alfords have not raised a Fifth Amendment challenge in this suit.

easement had been created because the public's use of the beach had not been adverse, but nevertheless, the court found that the public could continue to use the beach based on their "right gained through custom to use this particular area of the beach." *Id.* at 78.

The Florida Supreme Court's discussion recognizing the doctrine of customary use began with the broad observation that "[n]o part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches. And the right of the public of access to, and enjoyment of, Florida's oceans and beaches has long been recognized by this Court." *Id.* at 75. The court commented further on the public's unique interest in, and appreciation of, Florida's beaches, stating:

> There is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight. Many are they who have felt the lifegiving touch of its healing waters and its clear dust-free air. Appearing constantly to change, it remains ever essentially the same.

Id. (quoting *White v. Hughes*, 190 So. 446, 448 (Fla. 1939)). The court continued by explaining that Florida's beaches are used inherently differently from other Florida lands and "require separate consideration from other lands with respect to the elements and consequences of title." *Id.* at 77. The court declared, "[t]he interest and rights of the public to the full use of the beaches should be protected." *Id.* (recognizing that "[t]he sandy portion of the beaches are of no use for farming,

grazing, timber production, or residency–the traditional uses of land–but ha[ve] served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public.").

Based on these broad observations, the Florida Supreme Court in *Tona-Rama* declared that the public's right of customary use exists in a Florida beach "[i]f the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute." *Id.* at 78. If these elements are present, a private property owner "may make any use of his property which is consistent with [the] public use" so long as the public's right is not revoked and the private owner's use does not "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." *Id.* That said, the customary use doctrine "does not create any interest in the land itself" for the public. *Id.* In explaining the nature of the right of customary use, Florida Supreme Court also stated that the right can be abandoned by the public, that it is "subject to appropriate governmental regulation," and that it is comparable to the rights of "a part-owner of a land-locked nonnavigable lake." *Id.* (emphasis added). After discussing the doctrine and considering a detailed record of the particular beach at issue, the Florida Supreme Court found that the public could continue to use the beach based on the public's "right gained through custom to use

this particular area of the beach the beach as they have without dispute and without interruption for many years." *Id.* at 78.

Although few courts in Florida have confronted the doctrine of customary use since *Tona-Rama*, the Alfords rely on discussions of the doctrine found in two decisions of Florida's Fifth District Court of Appeal. *See Trepanier v. Cty. of Volusia*, 965 So. 2d 276 (Fla. 5th DCA 2007) (finding issues of fact as to whether the customary use doctrine applied, requiring remand); *Reynolds v. Cty. of Volusia*, 659 So. 2d 1186 (Fla. 5th DCA 1995) (denying inverse condemnation claim and discussing but not relying on the doctrine of customary use because title did not include the sandy beach in this instance). The Alfords rely almost exclusively on language from these two cases for the proposition that only a court can determine whether the public's customary use right attaches to particular property. The Court's review of these cases, however, does not lead to a conclusion that the County acted *ultra vires*.

In *Reynolds*, the Fifth District Court of Appeal addressed whether Volusia County could regulate the dry sandy beach area for parking and recreational use through its Unified Beach Code, and the plaintiffs counterclaimed for inverse condemnation. The court discussed the customary use doctrine, noting that the public's right of customary use of the beaches can be regulated; however, the case ultimately turned on the fact that a plat recorded in 1889 provided "a clear and

unequivocal dedication of the beach area to the general public," so the land was not privately owned in that instance. *Reynolds*, 659 So. 2d at 1190. The court concluded that absent private ownership, the doctrine of customary use did not apply. *Id.* Nevertheless, the court commented in *dicta* that:

> [the] doctrine [of customary use] requires the courts to ascertain in each case the degree of customary and ancient use the beach has been subjected to and, in addition, to balance whether the proposed use of the land by the fee owners will interfere with such use enjoyed by the public in the past.

Id. The court offered no additional analysis of the type of proof required or of a county's authority to regulate customary use rights on private land.

The Fifth District Court of Appeal revisited the customary use doctrine in *Trepanier*, where beachfront property owners challenged the right of Volusia County to issue permits for beach traffic and parking on their properties, and the county ultimately prevailed. In defense, the county maintained that the public had a customary right to drive and park on the beach. In addressing customary use, the Fifth District Court of Appeal reasoned that *Tona-Rama* did not intend to announce as a matter of law that a customary right to use the sandy beach area extended to the entire coastline of Florida. *Trepanier*, 965 So. 2d at 287–88 (explaining that "the only evidence of undisputed, uninterrupted use [in *Tona–Rama*] was the area of beach in proximity to the tower within the City of Daytona Beach"). The court noted that the Florida Supreme Court in *Tona-Rama* had considered a detailed factual

record specific to one area and found that the public had gained a right to recreational use through custom on that particular area of the beach. *Id*. at 287 (citing *Tona-Rama*, 294 So. 2d at 78). Although also reiterating its statement from *Reynolds* that "*Tona-Rama* [] require[s] the courts to ascertain in each case" the legality of the customary right, the court in *Trepanier* further explained that a party claiming a customary right need not prove that a specific parcel of property was customarily traversed by the public. *Id*. at 290. Instead, the proof need only show that "the general area of the beach where [the parties'] property is located" was customarily used by the public for recreation "and that the extent of such customary use on private property is consistent with the public's claim of right." *Id*.

Notably, the court took judicial notice of a Volusia County Beach Code ordinance as providing language that "cogently describes the test" for customary use as, "Does evidence establish the existence of the public's right to access and use a particular area of privately owned beach?" *Id*. The ordinance stated:

> It is not the intent of the Charter or of this chapter to affect in any way the title of the owner of land adjacent to the Atlantic Ocean, or 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*, or to reduce or limit any rights of public access or use that may exist or arise other than as customary rights.

Id. (quoting Volusia County Beach Code § 20-82). The Volusia County ordinance also stated that the county's intent was "to determine as a legislative fact binding on

county government that since time immemorial the public has enjoyed access to the beach and has made recreational use of the beach; [and] that such use has been ancient, reasonable, without interruption, and free from dispute."[29] *Trepanier*, 965 So. 2d at 281 n.10. In its analysis, the Fifth District Court of Appeal considered these elements, which were also stated in *Tona-Rama* as historically used to determine proof of customary use.[30] *Id.* at 290-91. In doing so, the court identified disputes of fact and remanded for further proceedings. At the end of the day, while the validity of Volusia County's Beach Code as a matter of home rule authority was not at issue in *Trepanier*, the Fifth District Court of Appeal's language approving the ordinance's description and regulation of customary use is instructive. In fact,

[29] At least one other Florida county has adopted a similar ordinance that determines as a "legislative fact binding on County 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.

St. Johns County, Beach Code § 2.01 (2007). St. Johns County also indicated in the ordinance that "[t]he intent [wa]s to mandate that county government define, protect, and enforce the public's customary rights of beach access and use . . . [not] 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." *Id.* (emphasis added).

[30] The court also considered the history of legalized custom as discussed in David J. Bederman's comprehensive article, "The Curious Resurrection of Custom; Beach Access and Judicial Takings," Colum. L. Rev. 1375 (1996). *See Trepanier*, 965 So. 2d at 289-90.

nothing in *Reynolds* or *Trepanier* indicates that a county has no authority to regulate a customary use right, contrary to the Alfords' assertion.

Another discussion of customary use doctrine can be found in a Florida Attorney General Opinion ("AG Opinion") from 2002, which discussed the implementation of the customary use doctrine in Florida. Fla. Op. Att'y Gen. 2002–38 (May 24, 2002). The AG Opinion answered questions regarding whether the City of Destin had the authority "to apply its beach management ordinance to certain identified dry sand areas of the beach regardless of the ownership or legal control of these areas," and if so, whether the City's authority to do so was "dependent on the existence of a customary right of recreational use by the general public as enunciated by the Supreme Court of the State of Florida in *City of Daytona Beach v. Tona-Rama, Inc*." *Id.* The AG answered that a city may "regulate and restrict certain activities [occurring on property within its boundaries when] reasonably calculated to protect the public health, safety, and welfare," and that this right to regulate is not dependent on *Tona-Rama*. The AG opinion further noted, consistent with *Tona-Rama*, that the public's "right of use cannot be revoked by the land owner, [although] it is subject to appropriate governmental regulation and may be abandoned by the public." Using the language of *Reynolds*, the opinion explained that determining "whether this 'customary right of use' exists in a particular piece of property," however, "must be resolved judicially" in any individual case. *Id.*

While the AG's opinion is not binding on the Court and does not speak to a county's authority to enact an ordinance, the opinion "is entitled to careful consideration" and will be regarded as "highly persuasive." *Nat'l R.R. Passenger Corp. v. Rountree Transp. & Rigging, Inc.*, 286 F.3d 1233, 1266 n.32 (11th Cir. 2002) (quoting *Florida v. Family Bank of Hallandale*, 623 So. 2d 474, 478 (Fla. 1993)). The AG opinion is based on *dicta* from *Reynolds*, which was subsequently confirmed and refined by the Fifth District Court of Appeal in *Trepanier*, in which the court stated that proof of custom is required as to a general area of the beach (as opposed to each parcel). Nonetheless, neither the AG Opinion nor the Fifth District Court of Appeal cases indicates that a county lacks authority to recognize and regulate custom. Instead, these authorities confirm that the public's right is *acquired* by custom, which is "inherently a source of law that emanates from long-term, open, obvious and widely-accepted and widely-exercised practice," *Trepanier*, 965 So. 2d at 289, and is subject both to regulation and judicial resolution where property owners dispute its existence.[31]

In this case, the County's Customary Use Ordinance primarily recognizes, regulates, and protects what the County has found to be a longstanding recreational

[31] In other words, the right is acquired by open customary use, not created out of whole cloth by judicial fiat or legislative decree. Thus, the County's recognition of customary use on its beaches does not create a new right and, where challenged, the Ordinance will be enforceable only to the extent the record supports a finding that customary use in fact has long existed in the area, under the elements required in *Tona Rama*.

public use of Walton County beaches. ECF No. 71-1. The Ordinance is expressly based on the County's legislative research, analysis, and testimony confirming that customary use has applied to all beaches in Walton County since before 1970 and "since time immemorial," and notes that the doctrine of customary use is recognized by the Florida Supreme Court's decision in *Tona-Rama*. The Ordinance articulates the types of recreational uses permitted on the beach, establishes a set-back zone that voluntarily preserves a fifteen-foot space for use exclusively by the property owner, and provides a buffer-zone exception for emergency service providers.[32] Although broadly declaring a purpose to protect the public's recreational customary use right, the Ordinance does not usurp the court's function by precluding individual property owners from seeking a judicial resolution where the property owner disputes the existence of the custom in the area of beach surrounding and including their private property.[33] As *Trepanier* illustrates, even where there is a previously adopted county ordinance claiming as "legislative fact binding on county government" that customary use applies to all of the county's beaches, 965 So. 2d at 281 n.10, the

[32] While designating a buffer zone, the Ordinance also expressly preserves and does not "abandon" the public's custom as to that area. This language does not purport to preclude a property owner from challenging the existence of the customary use right or asserting public abandonment of any such right, as occurred in *Trepanier*, 965 So. 2d at 290.

[33] This understanding of Florida's customary use doctrine is consistent with Bederman's description of the customary use doctrine, which the Fifth District Court of Appeal relied on as persuasive authority on customary use in *Trepanier*, as well as the Florida Supreme Court's understanding of custom as described in *Sullivan v. Jernigan*, 21 Fla. 264 (1885).

individual property owners are still permitted to dispute the existence of that right on their property, *id.* at 290.

To be sure, Florida values its sandy beaches different from other land. *See Crystal Dunes Owners Ass'n Inc. v. City of Destin, Fla.*, 476 F. App'x 180, 185 (11th Cir. 2012)[34] (noting that "beachfront property is different from non-beachfront property under Florida law") (citing *Tona-Rama*, 294 So. 2d at 75). This policy is abundantly evident from the Supreme Court's discussion in *Tona-Rama*. Moreover, the Legislature has expressed a clear intent to preserve both the beaches and the public's right to reasonable access of the beaches.[35] *See* Fla. Stat. § 187.201(8)(b)2 (stating as part of the State Comprehensive Plan that it is a state goal to "[e]nsure the public's right to reasonable access to beaches"). Florida law is equally clear that the right of customary use can be regulated but disputes regarding the existence of the right in any particular "general area of the beach" are fact-intensive inquiries that

[34] While unpublished opinions are not considered binding, they may be considered as persuasive authority. See 11th Cir. R. 36-2; see also United States v. Futrell, 209 F.3d 1286, 1289 (11th Cir. 2000).

[35] The Florida Legislature has similarly found:

> [T]he beaches in this state and the coastal barrier dunes adjacent to such beaches . . . represent one of the most valuable natural resources of Florida and [ ] it is in the public interest to preserve and protect them from imprudent construction which can . . . interfere with public beach access.

Fla. Stat. § 161.053(1)(a).

must be judicially resolved, *Trepanier*, 965 So. 2d at 290,[36] considering proof of the elements identified by the Florida Supreme Court in *Tona-Rama*, i.e., whether the use is "ancient, reasonable, without interruption and free from dispute," 294 So. 2d at 78. This longstanding appreciation for Florida beaches, articulated by the Legislature and the Florida Supreme Court alike, and the absence of legislation limiting a county's authority to regulate the public's recreational customary use, leads the Court to conclude that a county does not act outside the bounds of its home rule authority in adopting an ordinance that recognizes and regulates customary use.[37] Thus, although property owners have a right under Florida law to *de novo* as-applied judicial review and a determination of the existence of customary use rights, the County's decision in this instance to recognize, regulate, and protect a public right of customary use on beaches in Walton County does not on its face impair that right and, therefore, is "not inconsistent with general or special law," Fla. Stat. § 125.01(1). The Alfords have not asserted an as-applied challenge in this case. *See*

[36] There is no indication that the Florida Supreme Court would decide the matter differently than the Fifth District Court of Appeal, which relied on *Tona-Rama.*

[37] The County has submitted supplemental authority showing that bills seeking to preclude a county or municipality from establishing a right of customary use outside of a judicial proceeding have been introduced to the Florida Legislature—one was rejected and two are currently pending. *See* ECF Nos. 80, 83. The parties dispute the significance of those proposed or rejected bills, and the Court finds no need to consider them in this case. It is sufficient to the Court's analysis that under Florida law today, a county has broad authority to legislate as to property rights and customary use, that the Legislature has not limited this authority, and that Florida case law clearly provides that any property owner can challenge a county's proof of custom as applied to his or her property in court.

Second Amended Complaint, ECF No. 43 (Count IV, requesting only a declaration that the adoption of the Customary Use Ordinance is *ultra vires*). The Court decides only that Walton County's Customary Use Ordinance regulating customary use is not void *ab initio* as an *ultra vires* act. Therefore, the County is entitled to summary judgment on Count IV.

Accordingly:

1. The Clerk is directed to **VACATE** the Court's Order, ECF No. 73, and Judgment, ECF No. 74, dated September 26, 2017, and substitute this Order instead.

2. Plaintiffs' Partial Motion for Summary Judgment on Count I, ECF No. 53, is **GRANTED.** The Court declares as follows:

> The beach obstruction amendments to the Walton County Code, namely, § 22-54(g)(2)(a)(3), to the extent it defines "obstructions [as] including but not limited to ropes, chains, signs, or fences," and § 22-55 to the extent it states, "Obstructions include, but are not limited to ropes, chains, signs, or fences," are facially unconstitutional in violation of the First Amendment and are **STRICKEN**. This declaration does not impact any other provision of the Walton County Waterways and Beach Activities Ordinance.

2. Count II and Count III are **MOOT** and **DISMISSED without prejudice**, in light of the ruling on Count I.

3. As to Count IV, the County's Motion for Partial Summary Judgment, ECF No. 61, is **GRANTED**, and the Alfords' Motion for Partial Summary Judgment, ECF No. 44 is **DENIED**. The County is entitled to judgment in its favor on Count IV.

4. The Objection and Motion to Exclude, ECF No. 59, is **MOOT**.

5. The Taxation of Costs, ECF No. 81, under the prior judgment is also **VACATED**. Each party is to bear its own costs because there is no clear prevailing party. To the extent the taxation of costs have been paid by the County, the sum is to be refunded.

6. The Clerk is directed to enter judgment accordingly and close the file.

DONE AND ORDERED this 22nd day of November, 2017.

M. Casey Rodgers

M. CASEY RODGERS
CHIEF UNITED STATES DISTRICT JUDGE