Public Lands, Sunshine Law

Number: AGO 72-326

Date: June 17, 2011

Subject:
Public Lands, Sunshine Law

To: John P. Murphy, Representative, 49th District, Clearwater

Prepared by: Arthur C. Canaday and Rebecca Bowles Hawkins, Assistant Attorneys General

RE: PUBLIC LANDS--SUNSHINE LAW--right of public to use shore lands between high and low water lines; filling vacancy on city commission by secret ballot.

QUESTIONS:

1. What are the legal rights of the public in gaining ingress and egress to water front property on the Gulf of Mexico when the upland is privately owned; can the upland owner prohibit the public from using the beach and water area?

2. May a city councilor commission utilize a secret ballot in filling a vacancy and if the secret ballot is used, is the replacement legal under Florida law?

SUMMARY:

The public has the right to the use of the navigable waters of this state and the foreshore between the ordinary or mean high and low water marks; it cannot trespass upon private property in order to gain access thereto.

A city commission should not use a secret ballot in filling a vacancy in office; however, such an initial violation of the Sunshine Law may be cured by a subsequent corrective open public vote upon the matter.

As to the first question, it should be stated that an upland private property owner is without legal rights to prohibit the public from using "the beach and water area," if by that terminology you mean the shallow navigable water and the space between ordinary or mean high and low water. The following statement by the Florida Supreme Court in the landmark case of Broward v. Mabry, Fla. 1909, 50 So. 826, while speaking of a freshwater lake, is equally applicable to beaches and shores:

". . . [S]uch water may be regarded as being of a public character, and the title to the land thereunder, including the shore or space" between ordinary high and low water marks, when not included in the valid terms of a grant or conveyance to private ownership, is held by the state in its sovereign capacity in trust for the lawful uses of all the people of the state in the water and the land, subject to lawful governmental regulation of such uses. . . ."

While members of the public have the right to the use of the foreshore, they have no right to trespass on private property to get to the public beach. In many cases, public easements are provided for this purpose; and in those instances where no access is available, the local authorities might want to consider providing one where use "of the water body would warrant obtaining the access.

Your attention is also invited to the recent case of City of Daytona Beach v. Tona-Rama, Inc., 1 D.C.A., August 31, 1972, in which the court held that the public had acquired a prescriptive easement over the dry sand area of the beach for recreational purposes. The requisites for prescriptive easement are that the land" had been used continuously and" uninterruptedly over a period or twenty years or more and that the use had been open and notorious and under a claim of right. Downing v. Bird, Fla. 1954, 100 So.2d 57; City of Miami Beach v. UndercIiff Realty & Investment Co., Fla. 1945, 21 So.2d 783; City of Miami Beach v. Miami Beach Improvement Co., Fla. 1943, 14 So.2d 172. Under appropriate circumstances, the public may have acquired a prescriptive easement to both the soft sand area (the area landward of the mean high water mark) of a given area of beach and the access routes as well.

Answering your second question: I have heretofore ruled in AGO 071-32 that the election of the chairman of a county school board by secret ballot of the members of the board during a public meeting was a violation of the Sunshine Law. Section 286.011, F.S. However, in Bassett v. Braddock, Fla. 1972, 262 So.2d 425, the Florida Supreme Court ruled that a secret ballot election of a school board chairman followed by a voice vote of the members at the same public meeting was valid. A majority of the court had the view that "any initial violation by secret written ballot was cured and rendered 'sunshine bright' by the corrective open, public vote which followed." Thus, the city commission may wish to affirm the election of the commissioner to fill the vacancy by voice vote at a subsequent public meeting. I do not think the Supreme Court intended in *Bassett* to condone such action as a regular practice. Although the initial ballot can be rendered valid by a subsequent public affirmation, the initial misconduct is not thereby excused. In cases where the initial violation was done knowingly and intentionally, it is my opinion that the members participating would still be subject to prosecution for violation of the criminal provisions of the Sunshine Law.