

February 25, 2005

Mr. Neal Howard
Mobile County, Alabama

Dear Mr. Howard:

In January you requested help from the MS-AL Sea Grant Legal Program with issues about beach access at Dauphin Island. This email contains the results of my research into your questions. Please be aware that this email is for informational purposes only and is not formal legal advice.

Facts

From your emails and other sources, I understand the facts of the situation to be as follows. The land on the west end of Dauphin Island is privately owned down to the high-water mark. The shore seaward of the high-water mark is owned by the state, and the public has the right to use it. Most of the private beachfront land has been developed for condominiums and other residential properties. While the land, structures, and most of the infrastructure on the west end are privately owned, the roads on Dauphin Island are maintained by Mobile County at public expense.

Until recently, non-landowners have been able to use the public shore on the west end of Dauphin Island by parking on the rights-of-way of the public roads and walking across private land to the shore. However, in the last couple of years, two things have changed: first, the property owners have started to prohibit people from crossing their property to access the beach; second, the Town of Dauphin Island, at the property owners' request, has restricted parking on the west end to members of the Property Owners' Association (POA). These changes have severely limited the ability of non-landowners to access the shore on the west end.

There is also a beach renourishment project occurring on the west end, which will ameliorate ongoing erosion that was severely exacerbated by Hurricane Ivan in 2004. The bulk of this \$6 million project is being funded by the Federal Emergency Management Agency (FEMA) with some contribution by the Town of Dauphin Island. The project will help protect the private residences and infrastructure as well as \$1.5 million worth of public roads.

Questions

I have paraphrased your questions as follows:

- (1) What rights do non-landowners have to access the public shore on the west end of Dauphin Island?
- (2) What authority does the Town have to restrict parking on the west end rights-of-way to property owners?

(3) Who owns renourished beaches?

1. What rights do non-landowners have to access the public shore on the west end of Dauphin Island?

As you are probably aware, the shoreline seaward of the high-water mark (sometimes referred to as the “wet sand”) is owned by the state and may always be used by the public, even when it is bordered upland by privately owned “dry sand.” Of course, the right to use the wet sand is considerably less meaningful when it can be accessed only by boat or by wading through the surf for miles from a public access point. Various legal means exist that may be of potential use to non-landowners seeking to secure access to the public shore on the west end. These include the public trust doctrine, prescriptive easement, implied dedication, and custom.

In your email you asked specifically about how the public trust doctrine might be used to secure public access to the shore. As you note, the public trust doctrine has been invoked in other states (notably New Jersey) to ensure that the public can pass across private land to access the public shore. However, the court decisions in these states represent very expansive interpretations of the doctrine and have not been widely replicated elsewhere. These decisions are not binding in Alabama, and Alabama courts have yet to follow them. If you would like to read the seminal case in this area, I suggest the New Jersey Supreme Court decision in *Matthews v. Bay Head Improvement Assn.*, 471 A.2d 355 (N.J. 1984).

The public may in some cases acquire a “prescriptive easement” or “easement by prescription” that authorizes its members to pass over private land. A prescriptive easement may be established when the public uses the land “for a period of twenty years or more, adversely to the owner of the premises, under claim of right, exclusive, continuous, and uninterrupted, with actual or presumptive knowledge of the owner.” *Jones v. Johnson*, 827 So.2d 768, 771-72 (Ala. 2002). Determining whether a prescriptive easement has been established requires careful examination of the specific facts at hand.

Similar to prescriptive easement is the legal concept of “implied dedication” by a landowner of a piece of his/her land to public use. Implied dedication “is accomplished when there have been acts which evidence an unequivocal *intent* by the owner to dedicate the property to a public use *and* an *acceptance* by the members of the public of the property for that public use.” *Ritchey v. Dalgo*, 514 So.2d 808, 810 (Ala. 1987) (emphasis in original). As with prescriptive easement, determining whether there has been an implied dedication requires a very fact-specific analysis.

Finally, the ancient doctrine of custom has been used to grant the public right to use private dry sand beach to access the shore. This doctrine requires (1) “long and general” usage (2) without interruption, that is (3) “peaceable and free from dispute,” (4) reasonable and appropriate, (5) certain, (6) not left to the option of the landowner, and (7) not “repugnant, or inconsistent, with other customs or with other law.” *State ex rel.*

Thornton v. Hay, 462 P.2d 671, 677 (Or. 1969). The doctrine of custom, while a sensible one, is rarely invoked and may have a very low probability of success in your situation. *Thornton*, from 1969, remains the leading case.

Summing up, any of the above four approaches might help secure public access to the west end shore. However, I would hesitate to suggest that any of them carries a high likelihood of success. An Alabama attorney who is experienced in property and land-use issues should be able to give you further guidance if you want to pursue any of these options.

Of course, the public always retains the right to access public shore by boat or by walking laterally along the shore from a public access point.

2. What authority does the Town have to restrict parking on the west end rights-of-way to property owners?

According to your email, the Town of Dauphin Island has posted “No Parking Without Property Owner Decal” signs along rights-of-way on the west end, and has begun ticketing violators. This action restricts parking on the west end to property owners. In other words, for the purpose of parking on the west end rights-of-way, the Town has established two classes of citizens: property owners, who may park; and non-property owners, who may not park.

Legal classifications such as these may raise a question of whether the government is violating the U.S. Constitution’s 14th Amendment guarantee of equal protection of the laws. Although there are no Alabama cases, the issue of restricting on-street parking to abutting property owners has been litigated elsewhere. In some cases the restriction has been upheld, while in others it has been struck down. The leading case is the U.S. Supreme Court’s decision in *County Bd. of Arlington County, Va. v. Richards*, 434 U.S. 5 (1977). In that case, Arlington County restricted parking in a neighborhood near a large office and commercial complex to neighborhood residents, those doing business with the residents, and some visitors. The ordinance was intended to alleviate the noise, traffic, and pollution problems caused by commuters who worked at the nearby complex. The Court upheld the ordinance because it found that the ordinance’s discrimination between residents and nonresidents “rationally promote[d] the regulation’s objectives.” 434 U.S. at 7.

As the Court indicated in *Arlington County*, a discriminatory ordinance (I assume it is an ordinance) such as Dauphin Island’s must, at the very least, bear a rational relationship to a legitimate government purpose. Thus, you might consider two questions: (1) whether the Town has a legitimate purpose for the ordinance, and (2) whether restricting parking to property owners is rationally related to that purpose. If the answer to either of these questions is no, then the ordinance may be unconstitutional. This should be the analysis a court would use if the Dauphin Island parking restriction were challenged.

3. Who owns renourished beaches?

By an Alabama statute passed in 2000, Ala. Code § 9-15-55, title to beach land created by a beach renourishment project undertaken by a coastal municipality is retained by the state. The statute should apply to the Dauphin Island renourishment because the Town is financing part of the project. Thus, the public should have the same right to access the renourished beach as it has to access any other part of the public shore.

I hope this information is helpful to you. Please let me know if you have any further questions. Thank you for bringing your questions to the Sea Grant Legal Program.

Sincerely,
Josh Clemons
Research Counsel