9/a 5-7-85

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,912

CITY OF DAYTONA BEACH SHORES, ETC.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

AMICUS CURIAE BRIEF

OF

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT

TRUST FUND

AND

DEPARTMENT OF NATURAL RESOURCES

STATE OF FLORIDA

LEE R. ROHE, ESQUIRE
Assistant General Counsel
Department of Natural Resources
Suite 1003, Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32303
Telephone: (904) 488-7150

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CITATION OF AUTHORITIES

INTRODUCTION

The Petitioner, City of Daytona Beach Shores, shall be referred to as the "City" or "Petitioner" or the "Shores." References to the record and documentary evidence shall be made in the same manner as described on pages two and three of Petitioner's Initial Brief.

STATEMENT OF THE FACTS

On page four of Petitioner's Initial Brief, it is stated that at the time of the passage of the Shores ordinance in question, 82-14, beach tolls were in effect in the Town of Ponce Inlet, the City of New Smyrna Beach, St. Johns County and in the City of Jacksonville Beach.

What should be brought to the Court's attention is that on August 19, 1983, Judge Graziano of Volusia County Court struck Ponce Inlet's beach toll [See Appendix 1]. St. Johns County's beach toll was recently struck by Circuit Court Judge Richard Watson [See Appendix 2]. And the City of Jacksonville Beach long ago discontinued the practice of charging tolls to beachgoers. As of this writing, the Board of Trustees has already filed suit against the City of New Smyrna Beach which has ignored the State Attorney's request to not impose the toll [See Appendix 3][1].

1/ The City of New Smyrna rolled up its toll booths to the beach and began charging the public on the fifth of this month.

Although Nassau County has not, as of this writing, imposed its "seasonal beach fee" for 1985, in 1983 the county charged beachgoers a fee of fifteen dollars to ride on raw land, sandy beach which contained no facilities whatsoever [See Appendix 4].[2]

On page seven of Petitioner's Brief, counsel writes:

> "The City Charter extends the municipal boundaries two miles easterly into the Atlantic Ocean."

However, the west boundary of the City of Daytona Beach Shores also merits interest. The remaining boundaries of the city encompass very little of the residential areas lying to the west of Highway A1A (known locally as Atlantic Avenue) [See Appendix 5]. In effect, the city is a "strip city" lying almost entirely upon the seaward side of A1A. As a result, the City of Daytona Beach Shores, approximately five miles long and approximately 650 feet wide (on the average), is composed of mostly commercial property, i.e., hotels, motels and restaurants. Thus, those people who live to the west of A1A in single-family homes are not residents, voters or taxpayers of the City of Daytona

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2/ Nassau County Ordinance 83-11 levies a "seasonal fee" of fifteen dollars for driving on the sovereign foreshore. It matters not whether you visit the beach only once - the fee is still fifteen dollars. Resolution No. 83- 25 allows the Clerk's office and "other designated retail stores" to not only collect the fee but also to charge one dollar for its collection. Revenues for 1983 amounted to $65,117. Approximately $4,341 was distributed to the Clerk's office and retail stores as a "service fee." Consequently, the use of sovereign lands is providing a direct source of income for local merchants (A-43). (Beach toll money collected from New Smyrna and Ponce Inlet beachgoers has probably paid for the legal fees associated with the two amici curiae briefs being read by this court.)

Beach Shores because they have been gerrymandered out of the city. The city's policies regarding the beach are largely influenced by its commercial "residents" and the elite beachfront residents of a few hi-rise condominiums. The largest segment of the city's population consists of transient tourists staying in hotels or motels along the beach.

THE CITY'S LEVY OF A BEACH TOLL AMOUNTS TO AN UNLAWFUL VENTURE INTO THE REALM OF THE SOVEREIGN

The Florida Legislature has unequivocally charged the Board of Trustees with control of sovereign lands, including beaches lying below the mean high water line. Article X, §11, Florida Constitution, Sections 253.001, 253.002, 253.03(1)(b), 253.04, 253.05, 253.12 and 253.127.

In fact, the Board of Trustees is legislatively restrained in how it may dispose of sovereign lands. Section 253.02(2) and (3), 253.034(1)(a), 253.111, 253.115(1), 253.47, 253.61, 253.665, 253.71 and 253.77.

Section 253.034(1)(a) states in pertinent part:

> "All submerged land shall be considered single-use lands and shall be managed primarily for the maintenance of essentially natural conditions, the propogation of fish and wildlife, and public recreation . . . ." [Emphasis added.]

Section 253.77(1) prohibits any "agency of the state" possessing regulatory power involving the issuance of "permits" from issuing "any permit, license or other evidence of authority" regarding sovereign lands vested in the Board of Trustees until the Trustees have given consent.

Section 253.05 is a legislative declaration that no state or local public agency can require the Trustees to pay taxes or assessments "of any kind." Thus, Chapter 253 gives exclusive control over state lands, including sovereign lands, to the Board of Trustees.[2]

Yet, although the City can point to no form of permission from the Trustees, be it in the form of a lease or otherwise, the City has barricaded and closed off sovereign lands and the sovereign foreshore to members of the public. Entry to sovereign land is gained only after payment of a beach toll.

Such an act on the part of the city is tantamount to exercising control over sovereign lands. Conditioning entry to land is the act of either an owner or one having a possessory interest in land. For it is only a tenant, for example, who is vested with the right to exclusive possession. See Boyer, Vol. 2 Florida Real Estate Transactions, 1984 Ed., §35.03(3).

And yet the city has no lease agreement or other form of consent empowering it to control entry of members of the public to sovereign lands.[3]

2/ The Department of Natural Resources acts as agent for the Board. The staff for the Board, the Division of State Lands, is housed within the Department of Natural Resources. Section 20.25(2)(g).

3/ The undersigned is not suggesting that the City could have cured its illegal operation by obtaining a lease. Such an instrument would probably be void as in derogation of the trust doctrine, the Florida Constitution and statutory law. As trustees, not even the Board of Trustees can do anything contra the constitutional trust doctrine.

Selling tickets to the shore, or levying beach tolls, would be legally under real property law as selling licenses or permits in real property. 20 Fla.Jur.2d, Licenses in Real Property §47-51. For the activity to be engaged in by beachgoers involves the use of certain property in order for the intended activity to take place. But the City has no legal capacity to grant or sell licenses for recreation to the public. (Use of another's property to generate money is unjust enrichment.)

In fact, the City has done nothing less than taken a natural resource which belongs to the public and exploited that resource for local gain. Sovereign lands are not held by the State for purposes of sale or conversion into other values, or for reduction into several or individual ownership, but for the use of all the people of the State for navigation, commerce, fishing and other useful purposes. Merrill-Stevens Co. v. Durkee, 57 So. 428, 431 (Fla. 1912).

In Hayes v. Bowman, 91 So.2d 795 (Fla. 1957), Justice Thornal wrote at page 799:

> "Such title is not held primarily for purposes of sale or conversion into money. Basically it is trust property and should be devoted to the fulfillment of the purposes of the trust, to wit: the service of the people."
> [Emphasis added.]

If the titleholder to constitutional trust property (sovereign lands) cannot "convert it into money," then the City has not even a scintilla of colorable right to generate revenue through trust property. When money is derived from state land, it should be deposited in the Internal Improvement Trust Fund. Section 270.22, Florida Statutes.

As a self-appointed tollkeeper, the City is attempting to exercise the rights of a sovereign proprietor of land. For the so-called "regulation" of the beach by the City has the effect of wresting ownership rights of possession and dominion of the beach away from the Board of Trustees and the public.[4]

Allowing each coastal local government to control and manage sovereign land to the extent of denying or conditioning public access to them amounts to reducing the state's sovereign lands into "several or individual ownership." Merrill-Stevens Co. v. Durkee, supra.

From not only a legal but also public policy standpoint, the potential for abuse or exploitation of constitutional trust property by local governments would be enormous.[5] As Florida's population continues to grow and the coastal areas continue to develop, those who are wealthy enough to live in oceanfront residences will pressure local governments to remove the beaches from

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4/ Under the constitutional trust doctrine, the Board of Trustees, holding legal title to the land, is trustee of the trust corpus while the public is beneficiary and equitable titleholder. The corpus, of course, is the land itself.

5/ Add to this prospect, the fact that Florida's coastline measures 1,197 miles in length or 8,426 miles in length if bays and sounds are included. See Hayes v. Bowman, 91 So.2d 795, 799 (Fla. 1957).

the public's use through various "regulatory" schemes. Florida's public beaches would slowly be converted into private or semi-private beaches for the enjoyment of only beachfront residents and oceanfront hotel or resort patrons. As noted above, Petitioner's political boundaries and narrow territorial extent seem metaphorically representative of the city's narrow view of trust lands. A better illustration of why the sovereign's control over Florida's beaches should remain paramount is not to be found. Only the sovereign, through the trust doctrine, can represent the broad public interest and perspective which attaches to a resource as popular and vital to all citizens as Florida's beaches. Florida's beaches and the rights associated with them are too valuable, socially and economically, for a relatively small number of local officials to control. The shore and the sea transcend the boundaries of any particular locale; sovereign lands must remain within the control of the sovereign. If not, each locality would then produce its own idiosyncratic rules for beach entry and use.

Counsels for amici curiae, New Smyrna Beach, believes that allowance for local appropriation of Florida's beaches is somehow "creative." But interpreting the trust doctrine in this manner

is not progressive, legally imaginative or original but rather retrogressive.[6] The trust doctrine finally achieved constitutional status in 1970, but it will be only a dry, abstract platitude if not given meaning and effect within the daily lives of all Floridians.

The Court is urged to adopt a more "modern" viewpoint regarding the trust doctrine. They suggest that the State's defense of sovereign lands, on the basis of public property rights and the trust doctrine, is stodgy and archaic. But the trust doctrine as it has evolved from ancient law has withstood the vagaries of time and countless rulers. It should now be upheld once more against those who seek to ignore or devalue it through the legal pretext of police power "regulation." Indeed, it has been the judiciary which has invoked and preserved it over the centuries. As in life's rules of conduct, there are some doctrines and fundamental precepts in our legal heritage and jurisprudence that <u>are</u> sound <u>because</u> they have stood the test of time.

6/ Medieval history holds many examples of what can happen when authority over sovereignty waterbodies becomes decentralized. See Appendix 6, excerpt from Encyclopedia Americana, "Castles On The Rhine," Vol. 5, pages 791-92 (1978 edition).

Breathing legal sanctity into the City's "regulatory" scheme would be an impermissible transfer of legal authority from the Board of Trustees to a subdivision of the State. This court has said, in Deering v. Martin, that:

> "The State cannot abdicate general control over the lands under navigable waters within the State, since such abdications would be inconsistent with the implied legal duty of the State to preserve and control such lands and the waters thereon and the use of them for the public good."
> 116 So. at 61.

The use of the waters and shores has always been of "common right public." Under English common law, the use of the sea and shore were:

> ". . . In the subjects for the inherent privileges of passage and navigation and fishing, as public rights, and since Magna Charta the King has had no power to obstruct . . . the right of the people . . . ." State v. Black River Phosphate Co., 13 So. 640, 643 (Fla. 1893).

Sovereign lands enjoy a distinct and separate status from other classes of public lands. Lands under navigable waters, including the shore, are for the use of each and all of the people as their common property. Id. at 644.

Just as fundamental and ancient a right as that associated with sovereign lands is the right associated with the "recreational adjunct" to the sovereign foreshore - the public's right to the soft sand area of the beach.

In this court's landmark case of City of Daytona Beach v. Tona-Rama, Inc., Justice Adkins wrote:

> "No 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. [Emphasis added.] 294 So.2d 73, 75 (Fla. 1974).

It should be mentioned that the Petitioner in the case sub judice is the neighboring city to the City of Daytona Beach. Like Daytona Beach, the beaches within the Petitioner's limits are used by the public as a public thoroughfare, public bathing beach, recreation area and playground.

In Tona-Rama, supra, this court quoted, at page 75, from White v. Hughes, 190 So. 446 (Fla. 1939). The White case upheld the public's use of the beach for bathing and recreation as a superior right to motorists driving autos on the beach. 190 So. at 450.

But if a city, like Petitioner, has the police power authority to prohibit cars on the beach, without providing off-beach parking for those cars, then beachgoers have been effectively denied their rights to the beach. In order to exercise those rights of bathing, recreation, etc., it is necessary to take one's vehicle onto the beach to find a place to park it.

Judge Dauksch, in the opinion under review by this court, recognized the use of the automobile as a necessary instrument for the exercise of those rights the state is defending:

> "In light of the fact that there are so few municipal parking spaces anywhere but on the beach, people are forced to drive their automobiles on the beach as one of the only means of access." City of Daytona Beach Shores v. State, 454 So.2d 651, 655 (Fla. 5th DCA 1984).

This court should therefore be cautious about fashioning any rule which would allow a local government, through "regulation," to prohibit automobiles on beaches where use of the auto is inextricably entwined with the exercise of the "superior rights" of bathing and recreation.

The power to regulate and restrain does not include the power to prohibit unless the activity is in and of itself a nuisance. Carter v. Town of Palm Beach, 237 So.2d 130 (Fla. 1970).

In the case sub judice, to prohibit cars would be tantamount to prohibiting the use of the beach and the public's exercise of rights protected by the constitutional trust doctrine and common law.

The Attorney General has been confronted with the issues now before the court. In an opinion involving municipal regulation of activities on state-owned beaches, the Attorney General opined that:

> "This municipal power to regulate is subject to the state's paramount power to regulate and control the use of its sovereign lands. . . . A further limitation upon a municipality's power to regulate activities upon, and use of, state-owned property . . . is that such regulation must not be in violation of constitutional protections afforded to the public for the use of, and access to, state sovereignty lands." [Emphasis added.] 1979 Op. Atty. Gen. Fla. 079-71 (August 10, 1979) at page 176.

Petitioner City of Daytona Beach Shores has gone beyond regulation of an activity when it controlled entry to state-owned beaches. Payment of a toll to enter the beach bears no rational relationship to the regulation of activities on the beach for safety of the beachgoers. Those who pay the toll are just as likely to be endangered by the commission of crimes, rowdiness, vicious dogs without leashes, drunk driving, etc., etc., as those who do not pay the toll. Payment of a toll has nothing to do with regulating the speed or direction of traffic, the provision of life-saving rescue service, police protection or removal of litter. The city must furnish these services throughout the city. When the city sells a ticket to the state-owned beach, the purchaser's health, welfare and safety is not enhanced. Instead of devoting its time and money to the expensive and consuming task of stopping traffic to collect money, the city should concentrate its resources upon a better delivery of public protective measures.

In conclusion, it seems incredible that Petitioner has attempted to condition or restrict the exercise of public rights so commonly held and of right for so long that they have been taken for granted down through the millenia. Where Florida's beaches and the sea provide recreation, refreshment, delight, health, awe and mystery, there is something obscene about anyone trying to barricade access to a source of renewal and wonder:

> ". . . the heaven, the stars, the light, the air, and the sea are all of them things belonging so much in common to the whole society of mankind that no one person can make himself master of them, nor deprive others of the use of them. . . ."
> Sullivan v. Richardson, 14 So. 692, 709 (Fla. 1894).

THE CITY HAS A LEGAL DUTY TO ENSURE THE PUBLIC'S HEALTH, WELFARE AND SAFETY AND CANNOT CHARGE FOR A DUTY ALREADY OWED

The City complains of having to provide its beaches with police protection, sanitation, ramp maintenance and traffic regulation. On the one hand, the city, composed of many hotels, motels, restaurants and other tourist-oriented businesses advertises its beaches as a tourist attraction. On the other hand, the city, after encouraging people to visit the beaches, complains about having to perform the duty of keeping a safe, clean and orderly city for visitors.

From Petitioner's brief, one is given the impression that the fine beaches located within the city are a burden and a chore for the Petitioner. Not once is it recognized that the beach is a priceless asset to the city. It is well known that people come from all over the state, country and world to visit the beaches within the Greater Daytona area. Merchants and innkeepers derive a substantial income from the lure of the sea and beaches. Thus, the city businessmen directly benefit from the public's use of the beach. City businesses and the city government itself heavily depend upon the beaches being kept orderly and clean for

visitors. Of course, other public streets and gathering places within the city likewise receive police patrol and litter pickup. In effect, Petitioner is complaining about taking care of the goose that lays the golden egg.

But even if it were not in the city's economic self-interest to patrol the beach and pick up trash (as it does elsewhere within the city), the Petitioner would still have a legal duty to do so.

Chapter 20951, Laws of Florida (1941), declared that portion of Dunlawton Avenue from Atlantic Avenue (A1A) easterly to the ocean a state road. The so-called "ocean extension" of Dunlawton was never included within DOT's functional re-classification scheme when public hearings were held by DOT [TA-73 & 74]. Under Point II of the undersigned's amicus brief before the Fifth DCA, the argument is made that Dunlawton's ocean extension remains a state road to this day.

Judge Dauksch, in the opinion now under review, stated at page 654 that:

> "The state along with the Board of Trustees of the Internal Improvement Trust Fund and Department of Natural Resources in its amicue brief, argues that the Atlantic Ocean beach is a state road and therefore only the state has control over it. Both of these positions miss the point.

> "The Atlantic Ocean beach is precisely what it is described to be - a beach. A beach is not a road. . . . Section 337.29(3), Florida Statutes by itself cannot provide a basis for alienating property which is constitutionally vested in the State of Florida. See Article X, Section 11, Florida Constitution (1968); State ex rel. Ellis v. Gerbing, 47 So. 353 (Fla. 1908) (sovereignty in tidal lands are held for the benefit of the people and that trust can never be wholly alienated)."

For the record, the undersigned has never made any arguments regarding whether title to the Atlantic Ocean beach was alienated. Rather, the undersigned merely argued that a road perpendicular and leading to the beach, Dunlawton Avenue, had never been re-classified into a local road by DOT.

Notwithstanding the issue of whether Dunlawton's extension leading to the beach is a State or local road, the Atlantic Ocean beach and its access roads are being used by motorists seeking beach entry and beach passage. An implied dedication of the beach access ramps for road purposes has clearly taken place. Section 95.361, Florida Statutes.

Petitioner's Brief, page eight, recounts the city manager's testimony that the tolls were being used for "public works, the pick-up of garbage and trash and keeping the beach approaches passable. . . ." The City also provides police patrol on the beach.

The city argues that it must collect money for these basic governmental duties. Yet if the access ramps leading to the beach are considered part of the same street system running through the city and over the beaches, then it is clear that the city must provide regular grading to the access ramps to keep them safe.

A municipality has a duty to keep its streets in a safe condition, both as to their lawful use and as to their surface requirements. [Emphasis added.] City of Tampa v. Eason, 198 So. 753 (Fla. 1941).

Similarly, a municipality like the Petitioner must provide police protection, sanitation and trash pick-up and rescue services as duties to the public which cannot be made contingent upon beachgoers paying a toll to state-owned lands. For the Petitioner attempts to impose a toll for general police and rescue (fire) protection without the use by the public of any municipal facility or improvements. Beachgoers, on the beach, are no different than any other state or local citizen traveling elsewhere within the city who is owed police and rescue protection. Police and fire or rescue service are governmental duties owed generally to the public. 1982 Op. Atty. Gen. Fla. 082-10, 23 (February 23, 1982).

The Fourth DCA has held that the disposition of sewage, refuse and rubbish involve the well-being and health of a community. The health of a community demands that garbage be removed. The necessity creates the duty and it is incumbent upon a municipality to assure its collection and disposal. A1A Mobile Home Park v. Brevard County, 246 So.2d 126, 130 (Fla. 4th DCA 1971).

What are duties of a municipality should be determined on a case by case basis. In Barth v. City of Miami, this court opined:

> "What are governmental functions and what are corporate authority or duties of a municipality are not comprehensively defined in the law but are to be determined in each case upon a judicial interpretation. . . . " [Emphasis added.] 1 So.2d 574, 577 (Fla. 1941).

On thing is clear in the law regarding a municipality's authority or police power:

> "The public duties of municipalities are by law required to be performed so as to do no injury to private rights that is not immediately essential to conserve the public peace, health, safety, morals and general welfare." [Emphasis added.] Maxwell v. City of Miami, 100 So. 147, 149 (Fla. 1924).

In the case sub judice, the Petitioner attempts to employ municipal police power and municipal governmental duties as a means of controlling entry to the sovereign foreshore and its

recreational adjunct, the soft sand area. The rights to use constitutional trust property and the soft sand beach are clearly fundamental, organic rights stemming from ancient common law and now, as well, from Florida Constitutional law. The exercise of Petitioner's "home rule" authority under Chapter 166, or police power authority, comes into direct conflict with the exercise of the public's organic, constitutional rights.

The organic law contains limitations upon police and municipal powers that may be sought to be conferred by statute. Id. at 149. See also Section 166.021(3)(c), Florida Statutes.

Ordinances must not be inconsistent with the general laws of the state, including the common law, equity and public policy. Blitch v. City of Ocala, 195 So. 406 (Fla. 1940).

If any doubt exists as to the extent of a power attempted to be exercised by ordinance which may affect state law, the doubt is to be resolved against the ordinance. City of Miami Beach v. Rocio Corp., 404 So.2d 1066 (Fla. 3rd DCA 1981) cert. denied at 408 So.2d 1092.

Interestingly enough, Petitioner's Ordinance 82-14, Section 3, refers to municipal government duties as "beach-related services." The Petitioner is no longer discharging its governmental duty but suddenly becomes the provider of

"beach-related services." But what is the difference between governmental duties and "beach-related services"?

Is the city policeman who arrests an assailant in an assault and battery incident on the beach providing a "beach-related service" merely because the assault and battery took place on the beach as opposed to on A1A?

Or, is the repair of a pothole on a street leading to the beach, but located some distance from the beach, the provision of a "beach-related service"?

Are the crimes, refuse and needs of humanity "beach-related" merely because they happen to occur on the beach?

And how is it that the need for traffic regulation on the beach is a need different than that of traffic regulation elsewhere in the city so that the cost of speed limit signs, posted on the beach, qualifies for beach toll money?

Petitioner asserts that because beach toll revenues were kept in a separate account, the money was not co-mingled with general revenue and therefore not a general revenue-raising measure.

No records were kept by Petitioner of the amount of time a particular grader was used at the beach ramps versus at any other location. No records were offered which would have shown the number of hours a policeman spent at the beach versus time spent elsewhere.

To the extent toll money is used for salaries or other costs is also the extent to which the general revenue fund is relieved. Consequently, the use of toll money indirectly raised or relieved the general revenue fund balance.

Moreover, as Judge Dauksch observed at page 655 of the decision under this court's review, supra, the Petitioner's ordinance must fail because monies collected are not paying for only those "beach-related services" caused by vehicular use. Vehicular use does not, per se, cause police protection, sanitation and trash clean-up.

THE PLACEMENT OF BARRICADES UPON ROADS LEADING TO THE BEACH VIOLATES THE RIPARIAN RIGHTS OF THE PUBLIC

Riparian rights are rights deemed to exist as a matter of constitutional rights and property law. Feller v. Eau Gallie Yacht Basin, Inc., 397 So.2d 1155 (5th DCA 1981); Game and Freshwater Fish Commission v. Lake Islands, 407 So.2d 189, 191 (Fla. 1981).

Section 197.228(1), Florida Statutes, offers a good definition of riparian rights. By common law, they include ingress/egress, boating, fishing and bathing.

The Petitioner, in the case sub judice, barricaded various public rights-of-way leading down to the ocean beaches from Atlantic Avenue. Entry to the beach within Petitioner's city limits was prohibited from either Atlantic Avenue or the beaches lying to the south and north of the city's boundaries [TA-18, 23, 36].

Riparian rights arise from ownership of waterfront property. But they can also arise from public property which lies adjacent to a waterbody. Chapter 20951, Laws of Florida 1941, describes Dunlawton Avenue as "continuing in an easterly direction approximately 180 feet to the Atlantic Ocean Beach." The other access

ramps were public rights of way leading to the sovereign foreshore or hard sand area suitable for driving an automobile. In such an instance, riparian rights would inure to the public.

Riparian rights generally are incident to a street easement only when and at the points where the street, by express provision or by intendment, extends to a naviable body of water. City of Tarpon Springs v. Smith, 88 So. 613 (Fla. 1921).

In City of Tarpon Springs, a street, Anclote Boulevard, ran to the edge of the Anclote River. A great number of sponging vessels used the shore at Anclote Boulevard for mooring, loading and unloading cargo. The public for a long time had freely enjoyed access from the waters of the river to and over Anclote Boulevard. Id. at 617.

When a private party, in City of Tarpon Springs, tried to block the public's access to the river along the street this court was faced with a similar question as the one in the case at bar. The rule formulated was clear: where riparian rights of ingress/egress to the water attach to an upland street, no one can deny the exercise of those rights.

Likewise, Brickell v. Town of Ft. Lauderdale, 78 So. 681 (Fla. 1918), held that the public cannot be blocked from the water where public streets extend to the water. Moreover, this

court held that the City of Ft. Lauderdale had a duty to maintain public use "against encroachments." The New River, in Brickell, was considered a "natural highway" to which the public had a right of access. Id. at 684.

The public's riparian rights are not subordinate to private beachfront owners. Where a private, riparian owner interferes with the public's exercise of riparian rights, the private owner must give way. Game and Fresh Water Fish Commission v. Lake Islands, 407 So.2d 189, 191 (Fla. 1981).

The Petitioner should be in no better position than a private owner when exercising control over property (beach access ramps) which provides ingress and egress to the water.

In Lake Islands, this court struck a State rule which prohibited the use of motorboats on lake Iamonia. It was found that to deny use of a motorboat was tantamount to depriving an island owner of riparian rights to the lake and ingress/egress from certain island property. Similarly, to deny the public access to the Atlantic Ocean unless a toll is paid also deprives the public of riparian rights which are meant to be exercised without restrictions unless such exercise interferes with the rights of others.

As the state could not do in Lake Islands, Petitioner here cannot do. The City has shown no compelling, urgent reason to restrict the public's common law riparian rights.

NICHOLS V. CITY OF JACKSONVILLE IS NOT PERSUASIVE

On pages 18 and 19 of Petitioner's brief, it is argued that the First District Court of Appeal's decision in Nichols v. City of Jacksonville Beach, 262 So.2d 236 (Fla. 1st DCA 1972) is a better decision than the one by the Fifth DCA now under review. But no mention is made of the fact that Jacksonville Beach's ordinance was based upon an enabling statute, Chapter 29187, Special Acts 1953.[7]

Under Chapter 29187, Jacksonville Beach was given express authority to "tax and regulate traffic . . . upon the ocean beach."[8] Thus, the one dollar toll was upheld as a tax supported by express enabling authority.

Petitioner has no color of authority under enabling legislation. Moreover, the State of Florida was not a party to the Nichols case. Although it is somewhat difficult to discern

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7/ Chapter 29187 can be traced back to Chapter 18623, Special Acts of 1937. Undoubtedly, the city needed additional taxing authority during the Depression.

8/ Chaper 29187 is probably an impermissible a local tax on the use of state-owned land. See Dickinson v. City of Tallahassee, 325 So.2d 1 (Fla. 1975); State ex rel. Charlotte County, 107 So.2d 27 (Fla. 1958). See also 253.03(5), Florida Statutes.

exactly what is the scope of Nichols, the arguments and issues raised in Nichols do not appear at all similar to those associated with the case sub judice. In fact, the trial court judge, in Nichols, may not have known or understood that the beach is either privately-owned in the soft sand area or state-owned in the hard sand area; for the trial court found that if the city charged one dollar for parking on the beach, it would be a charge comparable to that of a private parking lot.

CONCLUSION

The state is vested with the authority to control and administer sovereign lands. When local "regulation" does more than merely direct the flow and speed of traffic, enforce local and state laws for the protection of the public at large, or impose order on crowds of beachgoers, but instead erects barricades and obstructs the public's ancient rights, then the line between police power regulation and proprietary control over sovereign lands has been crossed. Beach tolls have no rational relationship to local police power.

Allowing the Petitioner, with its narrow and parochial interests, to control access to a resource which belongs to all citizens, not just those who reside within the City, would be a derogation of sovereignty and the constitutional trust doctrine. The Board of Trustees, composed of statewide elected public officials, constitute the only political body capable of representing the broad interests of all the people of Florida regarding a statewide resource like Florida's beaches. To relinquish control to local governments would divide Florida's beaches as many ways as there are coastal municipalities or counties.

Cities have a legal governmental duty to provide for the public's health, welfare and safety. The beach lying within the City of Daytona Beach Shores should receive the same public protective measures as any other non-beach area of the City.

Not only are constitutional trust rights and rights of custom and usage (under Tona-Rama) being violated by the acts of Petitioner, but the public's common law riparian rights are also denied.

The Nichols case is not similar to the case sub judice because it relies upon express enabling legislation, no matter how questionable that special act may be, and the sovereign's interest is not represented in Nichols.

This court should uphold the Fifth DCA's decision, but in doing so, should address the broad public interest of beach access and the constitutional trust doctrine. The lower court's decision concerned itself with only municipal powers. It is time that the trust doctrine be reaffirmed as the public's antidote to insidious local actions which seek to appropriate and exploit one of Florida's most valuable resources.

Respectfully submitted,

Lee R. Rohe, Esquire
Assistant General Counsel
Department of Natural Resources
Suite 1003, Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32303
Telephone: (904) 488-7150

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief of Board of Trustees of the Internal Improvement Trust Fund and Department of Natural Resources, State of Florida, has been furnished by U.S. Mail to Stephen L. Boyles, Esquire, State Attorney, 440 South Beach Street, Daytona Beach, Florida 32014; Peter B. Heebner, Esquire, Post Office Box 5578, Daytona Beach, Florida 32018; Robert W. Elton, Esquire, 648 South Ridgewood Avenue, Daytona Beach, Florida 32014; C. Allen Watts, Esquire 926 South Ridgewood Avenue, Daytona Beach, Florida 32014; Clyde Shoemake, Esquire, Assistant State Attorney, Seventh Judicial Circuit of Florida, 103 Canal Street, New Smyrna Beach, Florida 32069; Louis Hubener, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301; Lester A. Lewis, Esquire, Post Office Box 390, Daytona Beach, Florida 32015; this 15th day of March, 1985.

Lee R. Rohe

Lee R. Rohe, Esquire
Assistant General Counsel