O/a 5-7-85

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THE SUPREME COURT OF THE STATE OF FLORIDA

FILED
SID J. WHITE
MAR 13 1985
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

CITY OF DAYTONA BEACH SHORES,
a Florida municipal corporation,

Petitioner,

vs.

THE STATE OF FLORIDA, ex rel
STEPHEN L. BOYLES,

Respondent.

CASE NO.: 65-912
(Fifth District Court of Appeal Case No. 83-263)

BRIEF OF AMICUS CURIAE SONS OF THE BEACH, INC., & THE NO RAMP TOLL COMMITTEE

TABLE OF CONTENTS

TABLE OF CITATIONS ii

STATEMENT OF THE CASE AND FACTS 1

POINT I 6

POINT II 11

POINT III 14

CONCLUSION 16

TABLE OF CITATIONS

CASE	PAGE
Borough of Neptune City v. Borough of Avon By the Sea, 294 A 2d47 (New Jersey 1972)	8
City of Daytona Beach Shores v. State of Florida 454, So.2d 651 (5th DCA 1984).	1
City of Maitland v. Orlando Bassmasters, 431 So.2d 178 (5th DCA 1983)	9
Contractors and Builders Ass'n v. City of Dunedin, 329 So.2d 314	8
Department of Legal Affiars v. District Court of Appeal, 434 So.2d 310 (Fla. 1983)	10
Nichols v. City of Jacksonville, 262 So.2d 236 (Fla. 1st DCA 1962)	4 & 10
Public Beach Access: A Guaranteed Place to Spread Your Towel, 29 University of Florida Law Review 853 (1977).	7
State v. Black Rivers Phosphate Co. 13 So. 640 (Fla. 1893)	6
Yonge v. Askew, 293 So.2d 395 (1st DCA 1974)	11

STATEMENT OF THE CASE AND FACTS

This is an appeal by the City of Daytona Beach Shores from an opinion of the Fifth District Court of Appeal which held that a city ordinance requiring motorists entering the Atlantic Ocean Beach to pay a ramp toll, and the city's barricade of this state-owned beach, were illegal. City of Daytona Beach Shores v. State of Florida, 454 So.2d 651(5th DCA 1984).

This brief is submitted by amicus curiae, Sons of the Beaches, Inc. and the No Ramp Toll Committee, on the side of Respondent, State of Florida. Both organizations are made up of many Florida citizens, primarily in the Daytona Beach area, who support public beach access and oppose beach barricades and ramp tolls.

On June 9, 1982, the city passed Ordinance 82-14 providing for a beach ramp toll within its municipal boundaries. At the time this ordinance was passed the cities of Ponce Inlet and New Smyrna Beach also had ramp tolls on their respective beaches. (Contrary to petitioner's brief, the City of Jacksonville Beach did not) The City of Daytona Beach Shores ordinance stated that it was passed to establish a user charge for the use of the vehicle beach ramps to gain access to the Atlantic Ocean beach within its city limits. Furthermore, the ordinance contained the following findings in support of the fees:

(1) The City Council of the City of Daytona

> Beach Shores has determined that a clean, safe and attractive beach is necessary for the health, welfare and safety of the citizens of Daytona Beach Shores.
>
> (2) The City Council has considered the increase in cost of providing police protection, clean-up service, beach ramp maintenance, capital improvements, and similar services to the increasing members of the general public utilizing the Atlantic Ocean beach.
>
> (3) The expense of these services is being borne largely through taxes upon property within the City, while the need for such services is being generated by users who do not share in the costs.
>
> (4) The City Council desires to continue and improve the services being provided <u>to all beach users</u> and to provide capital improvements for the future enjoyment and cleanliness of the Atlantic Ocean beach. (underlining supplied to emphasize that services not just for motorists).

The ordinance imposed a fee of $ 2.00 per vehicle on all vehicles entering the beach at existing beach ramps and through the northerly boundary of the Atlantic Ocean Beach to be levied during holidays and weekends. The toll was $1.00 during the week. The duration of the toll would be from March 1 through Labor Day each year. A season permit could be obtained for a $15.00 fee if purchased during the season but a $7.50 charge would be imposed if the purchaser bought the permit between January and March. The ordinance provided further that the use of funds generated by the toll, after deducting for direct costs, would be used to reduce the general fund budget expenses for existing beach-related services, for law enforcement, fire and rescue, and public works. The remaining funds would be utilized for future beach improvements such as permanent comfort stations, improved

pedestrian access, acquisition of off-beach public parking and landscaping.

The record reflects that 217 feet of the beach was being barricaded by the city for purposes of collecting the toll and of this distance, twenty-three feet was below the mean high water mark.

On August 13, 1982, the State of Florida, through the State Attorney filed a complaint seeking a declaratory judgment and permanent injunction prohibiting the City of Daytona Beach Shores from enacting a toll for vehicular traffic on the City's beaches. The state requested a preliminary injunction and a hearing was held August 23, 1982. On September 1, 1982, the trial judge issued a preliminary injunction which provided that the City of Daytona Beach Shores would be enjoined from exacting any toll from any person or vehicle, traveling, or using the Atlantic Ocean beach within its boundaries, upon entering any areas of access. A trial was held and the court entered its final declaratory judgment striking down the ordinance. The trial court made the following findings:

> (1) The City of Daytona Beach Shores has exclusive jurisdiction over the Dunlawton ramp and the Atlantic Ocean beach, which are both functionally classified by the Florida Department of Transportation as local roads. Title to these roads has been transferred to the municipality by virtue of Section 337.29(3), Florida Statutes.
>
> (2) The foreshore in the city is a "road right-of-way" that is specifically excluded from the lands under control of the Trustees of the Internal Improvement Trust Fund as provided in section 253.03, Florida Statutes.
>
> (3) Under the home rule provisions of the

Florida Constitution and Florida Statutes, the city has the express power to charge user fees without prior legislative approval. However, once a street is publicly dedicated to free use by the public, the public's right to free use thereof vests, and the municipality may not thereafter impose a user fee for ordinary passage.

(4) Article X, Section 11, Florida Constitution imposes a public trust on the Atlantic Ocean beach between the ordinary high and low water marks which requires the public to have uninhindered free access to the foreshore which thereby supercedes any authority a municipality might have to charge a toll for access to the foreshore or wet sand area.

(5) As to the soft sand area, the beach ramp toll is not an appropriate governmental regulation and violates the public's quasi-prescriptive right to use the dry sand area for recreational use which is an adjunct of the wet sand area. In addition, because of generations of use the public has earned the perpetual right to free use thereof without being subject to any sort of admissions charge, user fee, or toll.

Additionally, the Fifth District Court of Appeal made these findings in striking down the ordinance:

Although the ordinance states that the City Council has determined that "a clean, safe and attractive beach is necessary for the health, welfare and safety of the City of Daytona Beach Shores," this beach ramp toll _is not_ an exercise of the city's police power. The regulation of traffic and the law enforcement aspects of the ordinance are only remotely implicated by this ordinance.

The ordinance also cannot be considered a valid exercise of the city's regulatory powers because it represents a purely revenue raising measure for underwriting various governmental activities and, as such, is not regulation. _But see Nichols v. City of Jacksonville_, 262 So.2d 236 (Fla. 1st DCA 1962) (imposition of a toll to control

vehicular traffic was held to be valid exercise of city's regulatory power.) If the ordinance only sought to regulate and police vehicular traffic rather than imposing a user charge for vehicles using the beach ramps, and then applying those revenues to underwrite city-wide services, the ordinance _might_ withstand attack. Instead, the ordinance pays for municipal services from police protection and fire and rescue services to capital improvements.

The ordinance also must fail as a user fee because the monies collected are not designed to pay for only beach-related municipal services caused by vehicular use. The record reflects that city-wide services are benefited by the revenues collected and therefore drivers of vehicles on the beach are asked to subsidize governmental activities unrelated to the purpose for which they are charged. Furthermore, drivers of vehicles are asked to pay the entire cost of beach related clean-up expenses when they are only partly responsible for the problem. This unjustly discriminates against those persons who decide to drive to the beach rather than walk there. _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._

We are mindful of the difficult problem facing small municipalities who have assumed a duty to provide municipal services on the Atlantic Ocean beach. However, this does not give a city the right to have one segment of its beach-going population bear the entire burden of beach-related expenses.

The City of Daytona Beach Shores Ordinance 82-14 is not a valid exercise of its police or proprietary powers and therefore we affirm the declaratory judgment and permanent injunction.

POINT I

IS THE MUNICIPAL IMPOSITION OF A USER FEE FOR VEHICLES ENTERING AND UTILIZING THE ATLANTIC OCEAN BEACH TO DEFRAY THE COST OF MAINTAINING AND REGULATING THAT BEACH A VAILD EXERCISE OF MUNICIPAL POLICE POWERS?

Florida's Constitution, Article X, Section 11, states that "title to lands under navigable waters .... including beaches below the mean high water line, is held by the State, by virtue of its sovereignty, in trust for all the people."

Long before the 1968 Florida Constitution, this public trust doctrine was part of the common law adopted in Florida as set forth in State v. Black Rivers Phosphate Co. 13 So.640 (Fla. 1893). The public's right to use the beach dates back to ancient Roman law. The public trust doctrine is no longer just a doctrine. The people voted to make it part of Florida's constitution in 1968.

As noted by Judge Upchurch, in Volusia County, driving a car on the beach has been as much a long-standing recreational use of the foreshore as bathing, fishing and boating.

The City of Daytona Beach Shores has taken away this long-standing recreational use by the beneficiary (all the people), without authority from the trustee (the State). Thus, the ordinance violates the Florida Constitution.

In petitioner's argument as to Point I, petitioner attempts to justify its ordinance by the Municipal Home Rule Powers Act. However that Act expressly recognizes that municipalities may not legislate on "any subject expressly

preempted to state or county government by the Consititution or by general law."

The State of Florida is charged by the Constitution with administering the beaches, as trustee for all the people. The State of Florida did not authorize the City of Daytona Beach Shores to barricade the beach and collect a toll. On the contrary, as trustee for all the people, the State has determined that the city should not charge a ramp toll fee and barricade state property.

If the City of Daytona Beach Shores can charge Florida citizens an entrance fee for using the people's trust property, then all cities on Florida's coastlines and all cities encompassing state sovereignty lands can charge an admission fee to the beach, pedestrians and motorists alike. Such a policy would turn our coastal beaches into private beaches controlled by our coastal cities, rather than the state. Fortunately, the State has foreseen this problem and is acting statewide to prevent it. See Public Beach Access: A guaranteed Place to Spread Your Towel, 29 University of Florida Law Review 853 (1977).

In its argument as to Point I, petitioner has confused user fees with regulatory fees. The city has municipal police powers by virtue of its charter. It has the duty to provide police protection throughout its city limits without special fees. It cannot charge a user fee for providing police protection on the beach, anymore than it could barricade State Highway A1A as it enters the city and charge a user fee for providing police protection there. Regulatory fees under the police power cannot be used for capital improvements and maintenance.

On the other hand, user fees are charged for capital improvements and maintenance on city-owned projects, such as sewer plants. Contractors & Builders Ass'n v. City of Dunedin, 329 So.2d 314. The Atlantic Ocean beach is not a city owned project. Even a legitimate user fee must be reasonable and non-discriminatory.

PETITIONER'S USER FEE VIOLATES EQUAL PROTECTION

Petitioner's ordinance gives no reason for discriminating against people who use a motor vehicle to get to the beach. The City of Daytona Beach Shores is a "strip" city only one block wide, but approximately 5 miles long along the Atlantic Ocean. The oceanfront land is owned primarily by large hotels, motels and condominiums. There is little or no public parking off the beach.

Thus, in this city, charging motorists $2.00 to drive onto the beach, but allowing pedestrians to use beach services for free, results in discrimination against nonresidents. All city residents are within easy walking distance of the beach. Wealthy tourists who can afford oceanfront lodgings can walk to the beach. Everyone else must pay a toll.

The very case relied on by petitioner to justify its ordinance held that an oceanfront town in New Jersey could not discriminate against nonresidents in charging a beach user fee. Borough of Neptune City v. Borough of Avon By The Sea, 294 A 2d47

(New Jersey 1972). In that case, the borough owned the oceanfront land bordering the ocean, and provided ample public parking off the beach. More importantly, the State of New Jersey expressly delegated its power to administer the State's trust to the cities bordering the Atlantic Ocean. The State of New Jersey expressly authorized such cities to charge a reasonable fee to the people, the beneficiaries of the trust. (See page 50 of that opinion.) In contrast, the State of Florida has ordered the City of Daytona Beach Shores to stop charging its discriminatory fee.

As in New Jersey, Florida courts have struck down ordinances which discriminate against nonresidents of a particular city, expecially in the area of recreational pursuits. In City of Maitland v. Orlando Bassmasters, 431 So.2d 178 (5th DCA 1983) the Court struck down an ordinance allowing only city residents to park near its boat ramps in a lakeside park.

In the instant case, the Fifth District Court of Appeal reached a similar result:

> The ordinance also must fail as a user fee because the monies collected are not designed to pay for only beach-related municipal services caused by vehicular use. The record reflects that city-wide services are benefited by the revenues collected and therefore drivers of vehicles on the beach are asked to subsidize governmental activities unrelated to the purpose for which they are charged. Furthermore, drivers of vehicles are asked to pay the entire cost of beach related clean-up expenses when they are only partly responsible for the problem. This unjustly discriminates against those persons who decide to drive to the beach rather than walk there. 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.

Finally Petitioner City of Daytona Beach Shores improperly cites and relies on Nichols v. City of Jacksonville Beach, 262 So.2d 236 (1st DCA 1972) which was a per curiam affirmance. Neither the Circuit Court's opinion nor the ordinance in question should have been attached in Petitioner's Appendix and they should not be considered by this Court. See Department of Legal Affairs v. District Court of Appeal, 434 So.2d 310 (Fla. 1983).

POINT II

DOES ART.X,SEC.11, Fla.Const. (1968), OF THE PUBLIC TRUST DOCTRINE REQUIRE PUBLIC ACCESS TO NAVIGABLE WATERS AT THE FORESHORE WITHOUT ANY COST?

Petitioner's issue should fairly be restated as follows: Does the Public Trust Doctrine (codified in Art.X, Section 11, Fla.Const. 1968) prevent the Petitioner from barricading the State-owned beach and charging the beneficiaries for using their own beach, without the State of Florida's permission?

Petitioner asserts that the public trust doctrine is only concerned with private landowners restricting the public's use of the beach. There is no such indication in the language of the constitutional trust. This would be a shortsighted interpretation which would allow oceanfront cities to restrict public beach access as they please, and render the constitutional trust meaningless. Cities are just as capable of trampling on the public's rights as private landowners, especially when a small city is controlled by wealthy oceanfront landowners who want a private beach.

In the case of constitutional trust property, such as the Atlantic Ocean beach, Municipal Home Rule does not mean that a city can automatically do whatever the State of Florida can do.

In Yonge v. Askew, 293 So.2d 395 (1st DCA 1974) the Court upheld an action of the Trustees of the Internal Improvement Trust Fund which administers the constitutional trust

property. In that case, the Trustee disapproved dredging of navigable connections into the Crystal River. At page 401, the Court held as follows:

> While the development of petitioner's land may be in the public interest of Citrus County, there is no showing that it is in the interest of all the people of the State of Florida for whom respondents hold the bottoms of Crystal River in trust.

Likewise in this case, while Petitioner's beach user fee may benefit the residents of the City of Daytona Beach Shores (by reducing taxes), there is no showing that it is in the interest of all the people of the State of Florida.

The answer to Petitioner's Point II is as follows. The Public Trust Doctrine does not require the City of Daytona Beach Shores to provide public access to navigable waters and the foreshore at all, cost or no cost. However, it cannot restrict public access by charging a fee which is to be used for maintenance and improvement of the State's property. Nor can it barricade the State-owned beach at its city limits.

The city can build access roads to the beach, as it may build streets generally. However, once that street has been dedicated to free public use, it cannot then charge a toll to pay for it. The city can purchase land along the ocean for public parks, and charge a fee for using this land to recapture its purchase money. The attorney general recognized the difference in 1975:

> A municipality may charge a fee for admission to and use of a municipally owned

> beach, provided that such fee is reasonably related to the expenses incurred in operating the beach, and is not discriminatory. In the absence of legislative authorization, however, a municipality cannot charge fee for, or otherwise regulate or restrict, public admission to and use of the wet-sand beaches of the state, which are owned by the state and held in trust for all the people. Op, Atty.Gen., 075-84, March 18, 1975.

In modern times, the Public Trust Doctrine must be interpreted in a way which protects public beach access for "all the people" by a uniform, nondiscriminatory policy. Only the State of Florida should decide that policy.

POINT III

IS THE ORDINANCE 82-14 A VALID EXERCISE OF THE CITY'S REGULATORY POWERS OR A REVENUE-RAISING MEASURE?

ANSWER: THE ORDINANCE IS NOT A "POLICE POWER" REGULATION. IT IS A DISCRIMINATORY USER FEE, WHICH IS A REVENUE-RAISING MEASURE, AND IT DOES NOT RESTRICT THE FUNDS TO BEACH USE.

In its argument as to Point III, Petitioner City of Daytona Beach Shores incorrectly asserts that it was the Fifth District Court of Appeal which first determined that the ordinance was a revenue raising measure, and petitioner attempts to place the burden of proof on the Court.

In fact, it was the Circuit Court which determined that the ordinance was for revenue, in the following exerpt:

> "Governmental regulation" connotes an exercise of the police power for the public health and welfare. The erection of sawhorses and barricades for the purpose of stopping traffic to exact a toll in order to raise revenue for underwriting government activity is a pure revenue raising measure, and, as such, is not associated with the term "regulation". Examples of regulation by the charging of a fee might be a tariff for the purpose of limiting imports, or parking meter charges for the purpose of preventing long term parking in high-turnover areas. _The beach toll at issue here has no such regulatory features. Accordingly, the Court holds that toll collection activity is not a form of "appropriate governmental regulation"_, does not qualify as an exception to the Customary Rights Doctrine, and is inherently inconsistent with the open, free, recreational use of the soft sand area which has been preserved and protected, free from dispute or interruption, since this area was first inhabited, and upon which motorists have freely driven their cars for over fifty years.

The trial court's determination as to facts is presumed correct, and it is the City of Daytona Beach Shores which has the burden of proving error.

With regard to the record, the ordinance itself indicates it is not a police power regulation. The fifth "whereas" recites that previously beach service costs were paid from city taxes. The sixth "whereas" clause recites a desire to improve services for all beach users (including pedestrians who pay nothing) and a desire to make capital improvements.

Section 3 of the ordinance provides that "the funds will be used to reduce General Fund Budget expenses for existing beach related services, for law enforcement, fire and rescue, and public works." Thus, the ordinance does not restrict funds to regulatory measures, nor even require that the funds be used for the beach at all.

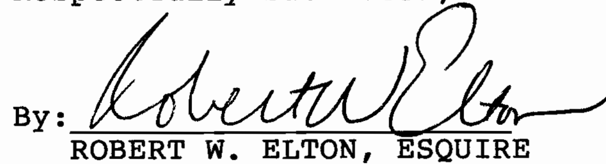
Petitioner's testimony from its manager or councilman as to actual use of the funds is not relevant; it is the ordinance which is suspect, not the manager.

Finally Petitioner contends that since nonresidents must pay a license fee for the privilege of hunting elk in Montana, Florida citizens can be charged a fee for exercising their constitutional right to use their own beach. Florida citizens' constitutional rights are treated differently from privileges. Exercise of those rights should not be called a privilege, to be taxed or taken away at the whim of a small city.

CONCLUSION

Sons of the Beaches, Inc. and the No Ramp Toll Committee respectfully submit that Florida's beaches should remain open to "all the people". The State of Florida has properly fullfilled its duty herein as trustee for the people, when it determined that Petitioner's beach barricades and beach tolls were illegal.

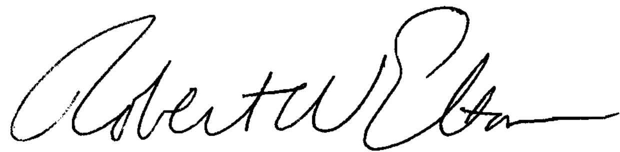
Respectfully submitted,



By: ROBERT W. ELTON, ESQUIRE

<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing 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; Clyde Shoemake, Esquire, Assistant State Attorney, Seventh Judicial Circuit of Florida, 440 South Beach Street, Daytona Beach, Florida 32014; Louis Hubener, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301; Lester A. Lewis, Esquire, Post Office Box 390, Daytona Beach, Florida 32015; C. Allen Watts, Esquire, 926 South Ridgewood Avenue, Daytona, Florida 32014; Lee R. Rohe, Esquire, Assistant General Counsel, Department of Natural Resources, Suite 1003, Douglas Building, 3900 Commonwealth Boulevard, Tallahassee, Florida 32303 this 11 day of March, 1985.



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