O/A 5-7-85

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CITY OF DAYTONA BEACH SHORES,
a Florida municipal corporation,

Petitioner,

vs. CASE NO. 65,912

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

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

On Discretionary Review from the District
Court of Appeal, Fifth District

JIM SMITH
ATTORNEY GENERAL

LOUIS F. HUBENER
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR RESPONDENT

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

TABLE OF CONTENTS

TABLE OF CITATIONS

Florida Statutes

Florida Constitution

Other

PRELIMINARY STATEMENT

In this brief the following abbreviations and reference symbols are used:

"City". . . . .refers to the City of Daytona Beach Shores, defendant in the trial court.

"State: . . . .refers to the State of Florida ex rel. Stephen L. Boyles, plaintiff in the trial court.

"R" . . . . . .refers to the record on appeal.

"A" . . . . . .refers to the appendix to this brief.

"TR". . . . . .refers to the transcript of the proceedings below conducted on August 23 and November 17, 1982.

STATEMENT OF THE CASE

The State accepts the City's Statement of ıe Case.

STATEMENT OF THE FACTS

The State accepts the City's Statement of ıe Facts.

The Court should clearly understand that t e City bars access to the Atlantic Ocean beach within its co porate limits not only from existing ramp facilities but also rom beach approaches. The City has placed sawhorses on th hard sand and foreshore areas extending below the mean high wa er line to bar movement along the beach.

As the City notes, the authority to exact olls is claimed not only by other municipalities but also by cou ties (e.g., Nassau, St. Johns, etc.) along the Atlantic coas .

SUMMARY OF ARGUMENT

The City of Daytona Beach Shores ("City") has no power or authority to impose a user charge or fee for use of a beach which is not municipally owned. Title to the wet sand area (between the mean high and mean low water line) of the beach in question is vested in the State of Florida Board of Trustees of the Internal Improvement Trust Fund. The City has no legal authority to charge a fee for access to state owned land. The City's charter only confers the power to restrict, limit, regulate or tax the use of the ocean beach for businesses, occupations or professions. Section 166.201, F.S., confers no authority on the City to restrict access to or charge admission to state-owned beaches or the privately owned soft sand areas.

The public trust doctrine holds that sovereignty lands are held by the State in trust for all the people. The people have the right to use the wet sand or foreshore of the beaches for such purposes as boating, bathing, fishing, recreation and commerce. If under the authority the City relies upon it may charge a user fee for vehicular access to the beach, it may also charge a fee to all persons seeking use of the beach because all contribute to the need for the services financed by the user fee. Such a fee infringes upon the public's right to unhindered access to navigable waters and the foreshore, and its right by custom to use of the dry sand area of the beaches.

The City's ordinance, which imposes a fee upon vehicles, is not a regulation. It merely exacts a fee from automobile drivers which is then used to provide miscellaneous services for all persons using the beach (e.g., trash collection, fire and rescue, comfort stations, pedestrian access, landscaping, etc.). This fee does not ensure traffic control or regulation. Rather, it is strictly a revenue raising measure that, not incidentally, also happens to provide relief from ad valorem taxation. Furthermore, it unlawfully requires automobile drivers alone to pay for services which are used by all beach goers.

ARGUMENT

POINT I

THE CITY HAS NO LEGAL AUTHORITY TO IMPOSE A TAX OR A USER CHARGE UPON VEHICLES OR PERSONS USING BEACHES THAT ARE STATE SOVEREIGNTY LANDS.

The City and the amici curiae argue that by virtue of Art. VII, §2(b), Fla. Const., and §166.021, F.S., a municipality may exercise any power for municipal purposes, and enact any legislation the State Legislature could enact, including legislation controlling the use of and access to state land, unless expressly prohibited by law or the State Constitution. This argument both oversimplifies municipal-state relationships and overreaches the power each has with respect to use of sovereignty lands.

We are concerned here with a city ordinance that imposes a toll upon any vehicle that seeks access to the hard sand area from within the city or which may have entered the City's jurisdiction by driving along the foreshore or hard sand area from an access point outside city limits. The City contends this toll is a permissible "user charge" or, alternatively, a police power regulation. If that is correct, a fee could as well be charged all other persons using the beach because the authority on which the city relies makes no distinction between vehicles

and people. Hence, the fundamental question of public access to the State's beaches is at issue.[1]

To begin with, it is well established that even with Home Rule powers local government cannot tax State lands. The State, as the sovereign, is immune from such taxation. Dickinson v. City of Tallahassee, 325 So.2d 1 (Fla. 1975); State ex rel. Charlotte County, 107 So.2d 27 (Fla. 1958). This is true even though the constitution does not specifically prohibit local government from taxing state property. Thus, for the City to argue that it may enact any law not expressly prohibited by the Constitution or statutes simply fails to recognize that the State has retained certain sovereign rights and powers and that local government has not been authorized by Home Rule to control the

---

[1] It is assumed here that the City now concedes that the State holds title to the beach below the mean high water line. The trial court's final judgment concluded that this area was a "road," title to which had passed to the city. [A 10] The opinion of the Fifth District Court of Appeal explicitly rejected this finding: "Arguments pertaining to whether title to this right-of-way passed to the city during reclassification under the transportation statutes are without merit. Section 337.29(3), F.S., by itself cannot provide a basis for alienating property which is constitutionally vested in the State of Florida. See Art. X, §11, Fla. Const. (1968); State ex rel. Ellis v. Gerbing, 56 Fla. 603, 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)." [A 4] The City's brief does not argue that the Fifth District erred in so holding. In fact, the City argues that the state's title to the sovereignty lands makes no difference as to the powers the City may wield.

use of or access to any state property regardless of whether it is protected by the public trust doctrine.

That the City has imposed a tax on people who want access to sovereignty land rather than on the land itself makes no difference. A charge on vehicles entering the wet sand area is no more legitimate than a hypothetical charge by the City of Tallahassee on persons or vehicles seeking entrance to the Capitol or to the Supreme Court. That these persons and buildings require municipal services--streets, sidewalks, traffic signals, police and fire protection--does not legitimize imposing a "user charge" on state property simply because the property cannot be taxed. State property is immune from direct and indirect taxation.

Just as fundamental in this case are the rights of the public to unhindered use of the foreshore. These rights are recognized as part of the public trust doctrine which was endowed with constitutional status in 1970:

> **Sovereignty lands.**-The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

Art. 10, §11, Fla. Const. (1970).

The public trust doctrine arose as part of the common law. Sovereign ownership of land beneath navigable waters ensured the protection of public rights to the free use of the water bodies. The common law provided that the sovereign's title to such lands was held in trust for the public. This trust doctrine was applicable to the English colonies, the original thirteen states and to all new states, as a "trust imposed by common law . . . which the state assumed . . . when it was admitted to the Union." State ex rel. Buford v. City of Tampa, 88 Fla. 196, 102 So. 336, 340 (Fla. 1924); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (Fla. 1909).

Protected by this doctrine are the public's rights to the use of beaches for bathing, recreation, fishing and navigation. White v. Hughes, 139 Fla. 54, 190 So. 446 (1939); State ex rel. Ellis v. Gerbing, 56 Fla. 603, 47 So. 353 (1908). Lands under navigable waters subject to the trust are

> . . . the property . . . of the people of the State in their united or sovereign capacity, and [are] held not for the purposes of sale or conversion into other values . . . but for the use and enjoyment of the same by all the people of the State . . .
>
> [A]bdication [of control over sovereignty lands] is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for use of the public . . . cannot be relinquished by a transfer of the property. The control of the state

> for the purpose of the trust can never be lost except as to such parcels as are used in promoting the interests of the public therein . . . .

State v. Black River Phosphate Co., 13 So. 640, 645 (1983).

A few years after Black River Phosphate, the Florida Supreme Court again expressed the State's duty under the trust to preserve and control sovereignty lands:

> The States cannot abdicate general control over such lands and the waters thereon, since such abdication would be inconsistent with the implied legal duty of the States to preserve and control such lands and the waters thereon and the use of them for the public good.

State ex rel. Ellis v. Gerbing, 47 So. 353 (1908).

The City's arguments amount to the proposition that the State has abandoned the public trust in which its foreshores are held by not expressly prohibiting the imposition of a user charge on users of a beach within a municipality's jurisdiction. In fact, the opposite is true. Such a fee clearly diminishes and interferes with the ancient rights vouchsafed by the public trust doctrine, a doctrine for some years now of constitutional magnitude. No provision of the State Constitution, and certainly no statute, suggests that the due exercise of these rights may be subject to municipal control and taxation. See Op. Atty. Gen. 075-85.

In Maloney, Fernandez, Parrish & Reinders, Public Access: A Guaranteed Place To Spread Your Towel, U. of Fla. L.R. 853 (1977), p. 854, 855, the authors state:

> Public rights in the foreshore or wetsand area, the area between the mean high tide and mean low tide lines, date back to the Roman civil law. Great flowing waters, the sea, and its shores were res communes -- things open to common use by all citizens. The law protected public rights in unhindered navigation and fishing and guaranteed free access to navigable waters and the foreshore. (e.s.)

The article goes on to state:

> State ownership of tide lands and submerged lands beneath navigable waters was confirmed by the United States Supreme Court; however, the state's title was
>
> > title held in trust for the people of the State, that they may enjoy the navigation of the waters, carrying on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . The idea that [a state's] legislature can deprive the State of control over its bed and waters, and place the same in the hands of a private corporation . . . is a proposition that cannot be defended. [Illinois Central R.R. v. Illinois, 146 U.S. 387, 452-454 (1982)]. (e.s.)

Barricading the beaches and charging fees for admission to public trust lands abrogates the established liberty of the public to "unhindered free access to navigable waters and the foreshore." These are rights which not even the State may

abrogate. Municipalities, which are no more than creations of the State, can have no powers greater than the St te.

In seeking to justify its impairment of the public trust, the City relies heavily on Neptune City v. Avon-b -the Sea, 294 A.2d 47 (N.J. 1972). This case, however, may be distinguished in several significant respects. First, the access fee charged by the beach municipality was authorized by a state statute. Second, the state statute applied only to municipalities that owned a portion of the beach upland and operated thereon in a proprietary capacity various bathing and recreational facilities. Third, the fee authorized was for "access to the beach and bathing and recreational grounds so provided and for the use of the bathing and recreational facilities. . . ." Id. at 50. (E.S.) As the New Jersey court noted, ". . . the municipality owns the bordering land, which is dedicated to park and beach purposes, and no problem of physical access by the public to the ocean exists." Id. at 53. In this case, there is no statutory authority for the ordinance; the City does not own or operate a beach resort or facilities of any kind; the City is attempting to control all access to the beach within its municipal limits.

For the same reason, since we are not concerned with the City's proprietary powers, its reliance on the local ordinance proposed in Maloney, supra, is misplaced. The model ordinance

proposed therein empowered the local government to "impose reasonable . . . fees for the use of public beaches and public access ways acquired through purchase or dedication. . . ." Maloney, supra at 879. (See also footnote 12, id.) The City does not seek to justify its toll by virtue of ownership. In fact, since it owns none of the soft sand part of the beach, any attempt to restrict the public's access thereto would be inconsistent with the "customary rights doctrine" recognized in City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73 (Fla. 1974).

POINT II

THE BEACH ADMISSION TOLL IS NEITHER A PERMISSIBLE USER CHARGE NOR A POLICE POWER REGULATION.

The City, obviously confused about what it has done, argues that the beach admission toll is either a user charge under §166.201, F.S., or a police power traffic regulation, or perhaps both. In fact, as the Fifth District's opinion held, it is neither.

Neither the City nor the amici cite one case holding that a municipality may impose a user charge for use of a facility or of land which the municipality neither owns nor operates. In fact, the City avoids mention of the leading Florida case on the subject, Contractors & Buildings Ass'n of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976). In that case, the Florida Supreme Court held that a municipality that owned and operated a

water and sewer system could, as the proprietor, impose a charge on new users of the system as long as the money collected was restricted to financing the capital costs of expanding the system. The Court reasoned that:

> In principle . . . we see nothing wrong with transferring to the new user of a municipally owned water or sewer system a fair share of the costs new use of the system involves.

Contractors & Builders Ass'n v. City of Dunedin, supra at 317-318.

The City neither owns nor operates the Atlantic Ocean Beach. It has constructed no capital facilities on the beach serving either automobiles or pedestrians. What the City does is provide the beach the same services it furnishes off the beach - police, fire and rescue, trash collection, traffic control, and street maintenance (i.e., the Dunlawton ramp). These are the routine services that virtually all municipalities provide throughout their jurisdictions and which are supported through their legitimate taxing powers. It is clear, however, that since the City neither owns nor operates beach facilities, and since the beach itself is not a municipal facility, the City may not impose a "user charge" upon motor vehicles seeking to drive or park on the beach. Moreover, the revenue generated by such an ordinance merely subsidizes city wide services, as the Fifth District's opinion found, and hence is a tax the City has no power to impose. Contractors and Builders Ass'n, supra at 317.

The beach access fee is even more difficult to justify as a police power traffic regulation. Although the State readily concedes that the City may enact appropriate ordinances under the police power regulating the beach, including traffic flow thereon,[2] the ordinance in question is not regulatory in nature. It does nothing to regulate the number of vehicles on the beach, the hours during which they may be driven on the beach, parking, speed limits or any other use. The ordinance merely exacts a fee to underwrite services provided city-wide. As the trial court succinctly noted:

> "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.

---

[2] The State does not question the City's authority to regulate traffic on the beach even to the point of excluding automobiles altogether, if necessary for the public safety. See, Town of Atlantic Beach v. Oosterhout, 127 Fla. 159, 172 So. 687 (1937); White v. Hughes, 139 Fla. 54, 190 So. 446 (1939).

The City attempts to justify the beach admission toll by arguing that all revenue is "used for direct beach-related expenses." [City's brief, p. 29] Of course, this argument ignores both the fact that the beach is not a municipal facility, and that the services provided there are the same basic services furnished throughout the municipality. To the best of respondent's knowledge, "user fees" are not imposed for municipal police protection, fire protection, traffic control and routine road maintenance.

The City cites Chase v. City of Dunford, 54 So.2d 370 (Fla. 1951), and State v. City of Miami Beach, 47 So.2d 865 (Fla. 1950), for the proposition that a municipality may impose parking fees in aid of its police power traffic control function. The State does not take issue with the ruling in State v. City of Miami Beach, supra, that parking meter revenues may be used to pay off bonds issued for construction of municipal parking facilities. However, the City ignores the statement in that case that if parking meter revenues were used for "defraying municipal expenses ordinarily financed by ad valorem taxation or the funds otherwise diverted" the scheme would be primarily revenue raising, and hence a tax. In the instant case, the toll revenues are by the very language of the ordinance used to defray the costs of a spectrum of municipal services, not just traffic regulation.

In concluding its opinion, the Fifth District observed that the City's ordinance unlawfully discriminated against vehicle drivers because they alone were charged the access fee intended to defray the cost of the municipal services provided at the beach. The court was absolutely correct in so holding. Without question, the people who use the beach generate the demand for the limited services provided. Whether they arrive by automobile or by foot does not determine the need for police, fire and rescue services, or trash collection. It should not be the vehicle drivers alone who lighten the tax burden of the city residents, most of whom benefit by the influx of visitors. The discrimination between drivers and pedestrians bears no relationship to the purpose of the ordinance and hence denies equal protection. Lasky v. State Farm Insurance Co., 296 So.2d 9 (Fla. 1974); Contractors & Builders Ass'n, supra at 321 ("For purposes of allocating the cost of replacing original facilities, it is arbitrary and irrational to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant.")

The City has not argued here, as it did before the trial court and district court of appeal, that it has any rights pursuant to §§335.04 and 337.29(3), F.S., which provide a means by which local government may assume responsibility for roads within its jurisdiction and obtain title thereto. It has, however, alluded to these statutes and the trial court ruling in

its statement of the facts. Based on the record, there is substantial doubt that any such reclassification of the Atlantic Beach and Dunlawton properly occurred. In any event, the City has not pursued that contention, and the district court pointedly ruled that §337.29(3), F.S., could not transfer title to sovereignty land such as the Atlantic Ocean beach even if such land is considered a highway. (See footnote 1, ante p. 5) Even assuming, however, that the Dunlawton ramp and the beach can be considered "local roads," the City has no authority to impose a toll on vehicles using them. Day v. City of St. Augustine, 104 Fla. 261, 139 So. 880 (1932).

Day concerned the legality of a toll the City of St. Augustine imposed for use of a bridge crossing the Matanzas River. The Florida Supreme Court recognized that a toll could be imposed on special facilities such as bridges pursuant to a legislative franchise. However, a toll could not be imposed on ordinary public streets:

> The right to use a special facility such as a bridge constructed across that water is not such an inherent right in the public that either citizens or taxpayers must be permitted to use that facility free instead of being compelled to pay toll for it. On the other hand, the right to travel the public highways (when not exercised as a means of conducting a private business thereon) is subject only to the police power and the power of taxation, an inherent right which, in its very essence, is quite different from the use of a special facility such as a bridge.

> We may therefore grant the appellant's argument that a city would have no right to erect toll gates along its streets as a means of raising revenue from citizens, taxpayers, and others who travel thereon, but such principle, if conceded, would not necessarily apply to special facilities, the construction and operation of which are inherently the subject of franchises, and not such a right in common as the right of free travel on a city street.

Day, supra, 139 So. 885. Whatever may be argued about the powers granted municipalities under Home Rule, those provisions of the constitution and statutes cannot diminish the inherent right of all persons to travel the public roads "subject only to the police power and the power of taxation." Id. The right to travel freely is a common right; it is fundamental; it is not a mere privilege which a city may prohibit at will or arbitrarily. Teche Lines, Inc. v. Danforth, 195 Miss. 226, 12 So.2d 784 (1943); Thompson v. Smith, 155 Va. 367, 154 S.E. 579 (1930). Restricting the liberty to move about within the corporate limits of a city according to one's willingness to pay for municipal services is an abridgment of this fundamental right.

In the larger context in which this case must be seen, the public's fundamental rights are very much in the balance. Both municipalities and counties claim the right to exact the so-called "user charges" from those seeking to avail themselves of a few hours enjoyment of the sea and its shores - the state's most

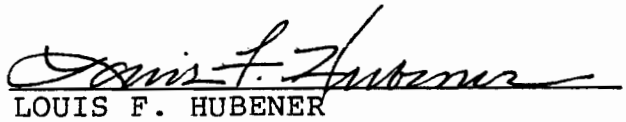
well-known resource. If allowed, it requires no leap of imagination to foresee the day when barricades stretch the length and breadth of Florida's shores. Nor is it a remote prospect, should the beaches be seen simply as local roads, that tolls on other travelers on other roads will follow. And what is there finally to attenuate this right to levy a "user charge" on property the City does not own? Do the cities and counties now wait, like so many medieval principalities and powers, to exact tribute from all who enter the realm? The authority on which they purport to rely would not foreclose such results.

CONCLUSION

The decision of the District Court of Appeal, Fifth District, is correct and should be affirmed.

Respectfully submitted,

JIM SMITH
Attorney General



LOUIS F. HUBENER
Assistant Attorney General

Department of Legal Affairs
The Capitol - Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to STEPHEN L. BOYLES, ESQUIRE, State Attorney, 440 South Beach Street, Daytona Beach, Florida 32014; LEE R. ROHE, Assistant General Counsel, Department of Natural Resources, 3900 Commonwealth Boulevard, Tallahassee, Florida 32303; and PETER B. HEEBNER, ESQUIRE, 523 North Halifax Avenue, Post Office Box 5578, Daytona Beach, Florida 32018 this 14th day of March, 1985.

Louis F. Hubener