O/a 5-7-85

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

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FEB 19 1985
CLERK, SUPREME COURT
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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)

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE

On June 9, 1982, the City of Daytona Beach Shores, a Florida municipal corporation, enacted Ordinance 82-14 providing *inter alia* for a fee for vehicles entering the Atlantic Ocean beach via existing beach ramps or through the northerly boundary of the City (R-135-139).

On August 13, 1982, the State of Florida *ex rel* Stephen L. Boyles, The State Attorney of the Seventh Judicial Circuit, filed its Complaint seeking Declaratory Judgment and injunctive relief (R-122-128). This action was apparently precipitated by a request by the Florida Department of Natural Resources acting as agents for the Trustees of the Internal Improvement Trust Fund.

On August 23, 1982, an evidentiary hearing was held before the Honorable John Upchurch regarding the State's request for a preliminary injunction.

Subsequent to that hearing, the Court entered its preliminary injunction dated September 1, 1982 (R-208-210). The City immediately filed its Answer and Affirmative Defenses (R-211-213) and filed a Motion for Rehearing (R-214-216).

On November 17, 1982, a trial was held on the State's prayer for Declaratory Judgment and permanent injunctive relief. After the submission of memoranda by all parties, the Court issued its Final Declaratory Judgment on January 28, 1983 (R-335-343). An appeal of this Final Declaratory Judgment was

perfected to the Fifth District Court of Appeal. After briefing and oral argument, the Fifth District Court of Appeal rendered an Opinion filed July 19, 1984 (R-348-353).

The City of Daytona Beach Shores timely filed its Motion for Rehearing and Clarification (R-354-356) and its Motion for Certification of a Great Public Interest (R-357-358). On August 22, 1984, the Fifth District Court of Appeal did deny the City of Daytona Beach Shores' Motion for Rehearing and Clarification and Motion for Certification of a Great Public Interest (R-357-358).

It is from this Decision of the Fifth District Court of Appeal that the City of Daytona Beach Shores petitioned this Court's certiorari jurisdiction alleging an express and direct conflict with the First District Court of Appeal in <u>Nichols v. City of Jacksonville</u>, 262 So.2d 236 (Fla. 1st DCA, 1972) and for the further reason that the status of this law was in flux and clouded by the Opinion of the Fifth District Court of Appeal leaving all levels of government in question as to what legal authority they may have on the Atlantic Ocean beach.

For the purposes of this Brief, the City of Daytona Beach Shores will be referred to as the "City" and the State of Florida will be referred to as the "State". The following abbreviations shall be utilized:

"R" for "Original Record on Appeal";

"A" for "Appendix to Brief".

References to documentary evidence introduced by either party are referred to as "Plaintiff's (or Defendant's) Exhibit #____".

Because there were two separate evidentiary hearings, the Transcript on Appeal will be referred to as:

"TA" for "Transcript of Proceedings of August 23, 1982.

"TB" for "Transcript of Proceedings of November 17, 1982.

STATEMENT OF THE FACTS

The City of Daytona Beach Shores is a Florida municipal corporation operating pursuant to its Charter dated November 26, 1970. That Charter specifically authorizes the City to establish user charges for municipal services by ordinance (A-1, Page 7).

The Charter acts as a grant of power to the City pursuant to the provisions of §166.01, Fla.Stat., et seq, "Municipal Home Rule Powers Act".

On June 9, 1982, the City passed Ordinance 82-14 providing for a beach ramp toll within the municipal boundaries of the City of Daytona Beach Shores (R-135-139, A-2). At the time of the passage of this ordinance, there existed operating beach ramp tolls in the Town of Ponce Inlet, the City of New Smyrna Beach, St. John's County, and in the City of Jacksonville Beach. In fact, the beach ramp toll of the City of New Smyrna Beach had been previously validated by the Circuit Court in Buckles v. City of New Smyrna Beach, Case No. 73-2618 (May 6, 1975; J. Cobb). The City of Jacksonville beach ramp toll had been expressly validated by the First District Court of Appeal in Nichols v. City of Jacksonville, 262 So.2d 236 (Fla. 1st DCA, 1972).

The City's Ordinance 82-14 contained findings by the City Council as follows:

"WHEREAS, 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 the Daytona Beach Shores,

WHEREAS, 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,

WHEREAS, 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, and

WHEREAS, the City Council desires to continue and improve the services being provided to all beach users and to provide capital improvements for the future enjoyment and cleanliness of the Atlantic Ocean beach,..."

The ordinance provided for a toll on any vehicle seeking to enter the Atlantic Ocean beach through the existing beach ramps within the City and through the northerly boundary of the Atlantic Ocean beach. A toll of $2.00 was assessed per vehicle on any holiday, Saturday and Sunday, and $1.00 on any weekday. The toll would continue from March 1 through Labor Day of each year. The ordinance also provided for season permits. The use of the funds generated was clearly restricted to municipal services to the Atlantic Ocean beach. Section 3 of that Ordinance states:

"Section 3. The funds collected pursuant to this ordinance shall be used solely as follows:

(a) After deducting direct costs, 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.

(b) Any funds remaining will be used for future beach improvements as follows:

(1) Permanent comfort stations.

(2) Improved pedestrian access to the beach (walkovers).

(3) Acquisition of eventual off-beach public parking.

(4) Landscaping." (R-138)

The State of Florida, ex rel Stephen L. Boyles, State Attorney of the Seventh Judicial Circuit, filed its Complaint claiming that the City has no authority to impose a beach ramp toll which acts as a restriction on the public to the use of or access to the land easterly of the mean high water mark of the Atlantic Ocean, which the State holds in trust for all the people. Hearings were held on August 23, 1982 and November 17, 1982. At the hearings on August 23, 1982, the State of Florida called a surveyor employed by the Florida Department of Natural Resources who introduced a survey showing the mean high water mark (R-133). The surveyor testified that of the 217 feet of beach being barricaded, approximately 23 feet was below the mean high water mark (TA-23). At trial, the State also as-

serted that the easterly terminus of Dunlawton, a main arterial road running from the mainland to the Atlantic Ocean beach within the City limits was a State highway upon which no municipal toll booth could be placed.

The City placed into evidence by the testimony of Mr. Wallace T. Fish, of the Florida Department of Transportation, that neither the Atlantic Ocean beach nor the Dunlawton approach is a State highway, but in fact, is classified as a local road under the exclusive control of the City of Daytona Beach Shores. At the hearing on August 23, 1982, Mr. Robert Holmquist, City Manager of the City of Daytona Beach Shores, also testified that the revenues from the beach ramp toll were kept in a separate enterprise fund and in a separate checking account with the Flagship Bank. The funds are accounted for in a separate fund as approved by the City's auditors (TA-55). The City Charter extends the municipal boundaries two miles easterly into the Atlantic Ocean (TA-62).

As a result of this hearing, the Court issued its preliminary injunction on September 1, 1982 (R-208-210).

A trial was held on November 17, 1982, on the issue of the issuance of a Final Declaratory Judgment and permanent injunction. At that hearing it was stipulated that all of the evidence, testimony, exhibits and arguments which were produced at the hearing for temporary injunction on August 23, 1982, were admissible for purposes of review by the Court in determining a Final Declaratory Judgment (TB-2). The state immedi-

ately rested based on its prior evidence submitted on August 23, 1982 (TB-2).

In behalf of the City, Councilman Otto Schultze was called to testify. He testified as to the financial needs of the City to generate revenue to amortize beach-related costs (TB-8). Councilman Schultze also related that the funds generated by the beach ramp toll were to be used for no other purposes than direct beach-related costs and improvements (TB-9). Councilman Schultze also testified that by the passage of the beach ramp toll the City was in no way intending to interfere with the right of the public to use and enjoy the beach (TB-9). Councilman Schultze also testified under cross-examination that the ordinance and especially Section 3 was meant to exclude any expenditure that was not related to the beach (TB-12). Mr. Robert Holmquist, City Manager for the City of Daytona Beach Shores, was then called to testify. He testified that the annual beach-related expenses to the City of Daytona Beach Shores is approximately $126,000.00 (TB-22). The City Manager also briefly described the services rendered by the City to the beach, which include public works, the pick-up of garbage and trash, and keeping the beach approaches passable by vehicles entering and leaving the beach (TB-24). The City also provides regular police patrol and criminal investigation on the Atlantic Ocean beach (TB-24). The City, through Mr. Holmquist, offered into evidence a summary of the beach ramp toll account and a disposition of the revenues (TB-27). Mr.

Holmquist testified that none of the funds received from the beach ramp toll had ever been used to pay anything other than direct beach-related expenses (TB-33).

The City called Mr. Joseph Fox, the Public Works Director for the City of Daytona Beach Shores, to testify. He testified as to the various public works activities of the City on the beach. Mr. Fox testified that if the City did not continue its public works activities on the ramps and removing the obstructions on the beach, that the beach and ramps would be impassable to vehicular traffic within four or five days (TB-39).

On January 28, 1983, Judge John Upchurch entered his Final Declaratory Judgment. The Court specifically found:

1. That the City of Daytona Beach Shores has exclusive jurisdiction over the Atlantic Ocean beach and the Dunlawton approach by virtue of the grant of authority under the 1968 Florida Constitution and the Municipal Home Rule Powers Act, together with Chs. 334-339 (Fla.Stat.). Further, there is a specific statutory grant of authority over the Atlantic Ocean beach and the Dunlawton approach by virtue of §166.201, Fla.Stat.

2. That the foreshore in the City is a "road right-of-way" that is specifically excluded from the lands under the control of the Trustees of the Internal Improvement Trust Fund in §253.03, Fla.Stat.

However, the Court found the beach ramp toll to be unlawful for the following reason:

1. A municipality may not impose a toll on a dedicated public street.

2. That Art.X,§11, Fla.Const., 1968, imposes a public trust on the Atlantic Ocean beach between the ordinary high and low water marks which requires the public to have unhindered free access to the foreshore.

3. That as to the soft sand area, the proposed beach ramp toll is not an "appropriate governmental regulation" as contemplated by the City of Daytona Beach v. Tona-Rama, Inc., 204 So.2d 73 (Fla.1974).

The Fifth District Court of Appeal affirmed the trial Court's Declaratory Judgment and permanent injunction, but for reasons other than stated in the trial Court's Opinion. The Fifth District Court of Appeal dismissed the evidence contained in the Record on Appeal by finding that the Atlantic Ocean beach is not a road but is a beach subject to different rules. The Fifth District Court of Appeal concluded that the City is vested with both police and regulatory powers which included a power to impose a user fee for certain municipal services. The Fifth District Court of Appeal further concluded that the City, as a valid exercise of its police power, has authority if not the duty to regulate vehicular traffic on the Atlantic Ocean Beach, citing Orla Ralph v. City of Daytona Beach, 412 So.2d 875 (Fla. 5th DCA, 1982, Sup.Ct. Case No. 62,094 (Fla.(Feb.

17, 1983), rehearing pending);(Town of Atlantic Beach v. Oosterhaut, 172 So. 687 (Fla.1937)))). Although, the opinion is not clear, The Fifth District Court of Appeal apparently determined that the use of tolls for any other purpose than to control vehicular traffic was not a valid exercise of the City's regulatory power. Use of those funds for any other municipal services on the Atlantic Ocean beach is apparently illegal or unconstitutional. There is not a single citation or a statement of authority for that position. The Fifth District Court of Appeal acknowledges that its Opinion conflicts with Nichols v. City of Jacksonville, 262 So.2d 236 (Fla. 1st DCA, 1962). The Opinion then states that the Record reflects that the monies collected are used for nonbeach-related municipal services. There is no reference to any portions of the Record (nor can there be) to support that contention. Finally, there is a veiled statement by the Fifth District Court of Appeal that the attempt to levy a user fee on drivers of vehicles and not on pedestrians is in some way an unconstitutional classification.

POINTS ON APPEAL

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 VALID EXERCISE OF MUNICIPAL POLICE POWERS?

POINT II

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

POINT III

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

ARGUMENT AS TO POINT I

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 VALID EXERCISE OF MUNICIPAL POLICE POWERS?

The "Municipal Home Rule Powers Act", §166.021, Fla.Stat., states in part as follows:

> "(1) As provided in Art.VIII, §2(b), of the State Constitution, a municipality shall have the governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law. (emphasis added)
>
> (2) "Municipal purpose" means any activity or power which may be exercised by the State of its political subdivisions.
>
> (3) The legislature recognizes that pursuant to the grant of powers set forth in §2(b), Art.VIII, Fla.Const., the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the State Legislature may act, except:
> ...(b) any subject expressly prohibited by the Constitution;
> (c) any subject expressly preempted to state or county government by the Constitution or by general law; and
> (d) any subject preempted to a county pursuant to a county charter adopted under the authority of §1.(g), 3, and 6(e),Art.VIII, Fla.Const. ...

There are no citations to statutes or judicially imposed limitations in the Opinion of the Fifth District Court of Appeal herein or elsewhere which prohibits or preempts the authority of a municipality to impose a user fee on vehicles utilizing the Atlantic Ocean beach. There is no provision of the Constitution, Statutes, or case law that prohibits or preempts to the State the power to impose use fees on vehicles utilizing the Atlantic Ocean beach.

The beach in the City of Daytona Beach Shores is used regularly by thousands of vehicles for transportation and for parking each year. This use by vehicles has been ongoing for many, many years. Since its inception, the City has provided police, fire and rescue, maintenance, and public improvements on the Atlantic Ocean beach within its boundaries. Much argument was made in the trial and appellate court as to whether or not the Atlantic Ocean beach can be deemed a "right-of-way", a "local road", or is simply "a beach". Do different rules apply if it's a road or a beach? This question was not answered by the trial and appellate Court. The trial Court concluded that the Atlantic Ocean beach was a "right-of-way" or a "local road" because of its longtime usage by vehicles for a road. The Fifth District Court of Appeal determined that it was not a road, but a beach. However, that distinction seems to make no difference in the analysis by both the trial court and the appellate court. They concede that the City has the right, if not the obligation, to regulate and maintain the Atlantic Ocean

beach. Further, they have the power to impose a user fee for municipal services. However, here, the logical analysis ends.

The test of the validity of a municipal ordinance is whether or not it offends constitutional guarantees and whether or not it is designed to carry out a proper legislative purpose. 56 Am.Jur.2d, Municipal Court.§361.

The next question in this analysis is whether or not the municipal power to regulate vehicles on the Atlantic Ocean beach includes the power to charge reasonable user fees. In other words, by statute, and by judicial determination, a municipality may impose user fees in its proprietary as well as regulatory function. City of Daytona Beach Shores v. State of Florida, 454 So.2d 651 (Fla. 5th DCA, 1984); Nichols v. City of Jacksonville, 262 So.2d 236 (Fla. 1st DCA, 1972); Buckles v. City of New Smyrna Beach, In the Circuit Court, Seventh Judicial Circuit, In and For Volusia County, Case No. 73-2618-01, (May 6, 1975; J. Cobb); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J., 1972); Baldwin v. Montana Fish and Game Commission, 436 U.S. 371 (1978); Harkow v. McCarthy, 171 So. 314 (Fla.1936); Chase v. City of Sanford, 54 So.2d 370 (Fla.1951).

The Opinion of the Fifth District Court of Appeal apparently states that a beach ramp toll can only be enacted and utilized for the regulation of traffic and the law enforcement relating to that regulation. The Fifth District Court of Appeal also states:

> "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." p.654-655

From this language it is difficult to determine upon what basis the Fifth District Court of Appeal determined that the Ordinance 82-14 was invalid. If the Court invalidated the Ordinance because they construe the language of the Ordinance and the Record at trial to allow the use of toll revenues for law enforcement, fire and rescue, and public works not related to the beach, then the Court clearly misread the Ordinance and misread the Record on Appeal.

It is undisputed from the record that the language of the Ordinance and the clear intention of the City Council was for all funds generated by the beach ramp tolls be used <u>exclusively</u> for direct beach-related services including law enforcement, fire and rescue and public works. In fact, the record clearly shows that all funds were placed in a separate

enterprise fund, were completely segregated from other city funds to the extent of being placed in a separate banking institution.

The second possible construction of the Fifth District Court of Appeal's Opinion is that it is appropriate to use tolls for the purposes of regulation and law enforcement of vehicular traffic. However, it is not lawful to use those revenues for law enforcement, fire and rescue and public works on the Atlantic Ocean Beach. There is absolutely no citation, no cases nor statutes in support of this contention. Further, if that be the gravimen of the Court's Decision, that clearly conflicts with <u>Nichols v. City of Jacksonville</u>, 262 So.2d 236 (Fla. 1st DCA, 1962). The Court in <u>Nichols v. City of Jacksonville</u>, 262 So.2d 236 (Fla. 1st DCA, 1962), was reviewing Ordinance #6674 of the City of Jacksonville Beach (A-3) Section 4 of that Ordinance states:

> "The funds collected by virtue hereof are required and shall be used to defray the expense of lifeguard service on the ocean beach; the collection and removal of refuse and debris from the ocean beach and adjacent public walkways; the collection and disposal of refuse and debris from public thoroughfares and public parking areas normally used by persons relative to the use of the ocean beach as a recreation area; the providing of traffic control on the ocean beach; the construction, maintenance and operation of sanitary facilities for the use of persons using the ocean beach; the installation, maintenance and operation of other recreational facilities; the installation and maintenance of lighting along the public walkways adjacent to the ocean beach and to

> cover the cost of purchase, supervision, protection, inspection, installation, operation, maintenance, control and use of all materials and activities necessary to effectuate the purpose of this Ordinance."

Uses authorized by this Ordinance of funds generated by beach ramp tolls are substantially broader than that contained in §3 of Ordinance 82-14 of the City of Daytona Beach Shores. Yet, this Ordinance was validated by the Circuit Court, who determined that the use of the funds were regulatory in nature and was not unreasonable. (A-4) Subsequently, that Ordinance and the Opinion by the Circuit Court was approved by the First District Court of Appeal in Nichols, who stated:

> "From such review we are not convinced that the trial Court applied erroneous principles of law at arriving at its ultimate conclusion that the Ordinance in question constituted a reasonable exercise of police power by Appellee City in light of the evidence adduced at the trial." p.236

Thus, we have the First District Court of Appeal determining that the imposition of a beach ramp toll in Jacksonville Beach, which could be used for the purposes of public works, lifeguard service, maintenance, refuse collection, construction of sanitary facilities and recreational facilities, lighting, and any and all other uses necessary to effectuate the purpose of this Ordinance, was an appropriate regulation. In the case at Bar, the Fifth District Court of Appeal found that the collection of a beach ramp toll for more restrictive uses relating to public

use of the beach is a purely revenue-raising measure, therefore an improper exercise of the City's regulatory powers.

It should be again noted that there is no citation in the Fifth District Court of Appeal's Opinion to support any of those statements.

All presumptions are in favor of an ordinance's validity and all ordinances will be construed, if possible, to give a result which renders them constitutionally valid <u>High Ridge Management Corp. v. State of Florida</u>, 354 So.2d 377 (Fla. 1977). If reasonable argument exists on a question of whether an Ordinance is arbitrary or unreasonable, the legislative body must prevail <u>City of Miami Beach v. Cayfetz</u>, 92 So.2d 798 (Fla.1957) In <u>Lewis v. Chas. C. Mathis, Jr.</u>, 345 So.2d 1066 (Fla.1977) the Florida Supreme Court stated:

> "The legislature has wide discretion in choosing a classification and therefore, the presumption is in favor of the validity of the statute.
>
> Those who complain of unjust discrimination by the State in violation of the State and Federal Constitutions have the burden of showing that the alleged discrimination has no conceivable basis, in differences of conditions, sufficient to justify the statutory regulation under attack."

In <u>Harkow v. McCarthy</u>, 171 So. 314 (Fla.1936), the Florida Supreme Court stated:

> "Undoubtedly, a City may not 'make gain under an illegal exercise of the police power,' but it is well settled that a license fee may be of a sufficient amount to include the expense of issuing the license

> and the cost of necessary inspection or police surveillance connected with the business or calling licensed, and all the incidental expenses that are likely to be imposed upon the public in consequence of the business licensed. The Courts will not seek to avoid an ordinance by nice calculations of the expense of enforcing police regulations, but will promptly arrest any clear abuse of the power." p.317

In State v. Ocean Highway and Port Authority, 217 So.2d 103 (Fla.1968), the Supreme Court again stated:

> "Appropriate respect for the authority of a coordinate branch of the government impels us to accord presumed validity to an act of the Legislature. To disturb it on constitutional grounds, invalidity must be demonstrated beyond a reasonable doubt. A legislative decision regarding the public need and welfare of a particular area should not be disturbed unless it can be demonstrated that the conclusion is clearly unwarranted or is prohibited by some express constitutional limitation." p.105

In Summary, Ordinance 82-14 is clothed with the presumption of validity. Municipal police powers are limited only by express prohibitions or preemptions by the Constitution or the legislature or by judicially imposed limitations. No citation to any express limitation to the City's passage of Ordinance 82-14 is contained in the Opinion of the Fifth District Court of Appeal. No abuse of discretion nor arbitrary classification is stated. Therefore, Ordinance 82-14 is a valid exercise of the police power of the City of New Smyrna Beach.

ARGUMENT AS TO POINT II

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

The Opinion of the Fifth District Court of Appeal herein contains a finding that the Atlantic Ocean beach is not a road, contrary to the findings by the trial Court. The appellate Court stated that it was a beach and therefore, not a road.

> "The fact that this particular beach is unique in that it can accommodate vehicular traffic does not change its inherent nature as a beach." p. 654

The appellate Court then cites Art.X,§11, Fla.Const. (1968), and State ex rel Ellis v. Gerbing, 47 So. 353 (Fla.1908) p.654 and discusses the "Public Trust Doctrine".

Thereafter, the appellate Court makes no further reference to the "Public Trust Doctrine". However, it may be inferred from the Opinion that the Constitutional provision and the "Public Trust Doctrine" has some impact on municipal powers regarding the Atlantic Ocean beach.

If this was in fact an unstated consideration by the Fifth District Court of Appeal, then it is clearly unfounded.

The "Public Trust Doctrine", as stated in Gerbing and in Art.X,§11, Fla.Const., simply prohibits a private ripar-

ian owner from charging a fee to the public for access to public waters as a method of making a profit. However, the "Public Trust Doctrine" does not prohibit a public body with regulatory authority over the Atlantic Ocean beach from charging a user fee to amortize the cost of maintaining and regulating that beach. §166.201, Fla.Stat.

It is also clear from the record that at no time is any person prohibited free access at any time to the Atlantic Ocean waters or the foreshore. It is only vehicles who are required during specific hours and days to pay a very small fee to amortize the cost of maintenance and policing of the beach. Therefore, a condensed issue remains for examination by this Court.

> "Does the 'Public Trust Doctrine' prohibit a municipality from imposing a user charge on vehicles entering the Atlantic Ocean beach?"

In order to properly examine these issues, the following diagram is provided to show the various portions of the beach and the law applicable to each.

The area under discussion here is the beach within mean low water and high tide upon which the "Public Trust Doctrine" is imposed. Gerbing only states the common law doctrine that the state holds in trust the lands between the high and low water marks for the rights of the public for navigation, commerce, fishing, boating and other public uses. Gerbing simply provides that the State may sell those lands to private ownership only when the public and private rights are not im-

Art.X,§
Fla.Con:
(1968)

Foresho

N

High Tide Line

"Hard Sand"
Ellis v. Gerbing
"Public Trust"

COASTAL CONSTRUCTION CONTROL LINE

DNR Ch. 161 Permit Authority
for Permanent Structure

Mean High Water Line

ATLANTIC OCEAN

"Soft Sand"
Public Prescriptive Rights
City of Daytona Beach v.
Tona-Rama

M P

217' Approx.

Reference is made to State survey of Mean High Water Mark entered into evidence at Hearing on Preliminary Injunction on Aug. 23, 1982 (R-13

paired. State of Florida, Department of Natural Resources v. Contemporary Land Sales, Inc., 400 So.2d 488, 491 (Fla. 5th DCA, 1981). Gerbing does not stand for the proposition that the State cannot delegate its control over these areas to the municipalities of the State of Florida. Further, it is impossible to use Gerbing as a basis for invalidating a beach ramp toll unless there is a finding that a toll in fact is contrary to the public interest.

The "Public Trust Doctrine" is well evaluated in a comprehensive Law Review article, "Public Beach Access: A Guaranteed Place To Spread Your Blanket", 29 U.Fla.L.Rev. 859 (1977). This article states clearly that the "Public Trust Doctrine" is concerned with private upland owners prohibiting the public's access to public beaches and waters. id at 860.

In this excellent and comprehensive Law Review article, not one mention is made of any restrictions by common law or by Statute on a beachfront municipality to impose a reasonable user fee that is nondiscriminatory. In fact, this article, which purports to carefully review this issue in the State of Florida proposes a model beach access ordinance to be passed by municipalities pursuant to the "Local Government Comprehensive Planning Act" of 1975. Section 6.3 of that proposed Ordinance regards charging of fees and states:

> "The [local recreation department] may impose reasonable and nondiscriminatory fees for the use of public beaches and public accessways acquired by purchase or by dedication to the [local government]." p. 879

In New Jersey, the "Public Trust Doctrine" is applied to beach access. In a landmark case of Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972), the New Jersey Supreme Court stated:

> "We ought also to say that we fully appreciate the burdens, financial and otherwise resting upon our oceanfront municipalities by reason of the attraction of the sea and of beaches in the summer season to large numbers of people not permanently resident in the community. The rationale behind N.J.S.A. 40:61-22.20 certainly is that such municipalities may properly pass on some or all of the financial burden, as they decide, by imposing reasonable beach user fees, which we have held here must be uniform for all. We think it quite appropriate that such municipaliities may, in arriving at such fees, consider all additional cost legitimately attributable to the operation and maintenance of beachfront, including direct beach operational expenses, additional personnel and services required in the entire community, debt service of outstanding obligations incurred for beach improvements and preservation, and a reasonable annual reserve designed to meet expected future expenses therefor. They may also, we think, very properly regulate and limit, on a first-come, first-serve basis, the number of persons allowed on the beach at any one time in the interests of safety." p.55

Therefore, the "Public Trust Doctrine" as it relates to the hard sand area between mean high and mean low tides can only be violated if it can be shown that the municipality is interfering with the public's access to the beach and waters to such an extent as to be contrary to the public interest. Municipal regulation of protected trust doctrine

rights may be necessary in order to prevent injury and to protect the public interest. A.G.O. 079-71 (1979)

There is not one case, Statute, or Constitutional provision cited by the Fifth District Court of Appeal which restricts the municipality's right to impose a user fee on the Atlantic Ocean beach or its access points. There is not one finding by the appellate Court that the imposition of a user fee is contrary to the public interest, but for a minor hindrance to vehicles. The exaction of a toll for the ingress of a motor vehicle to the Atlantic Ocean beach is not unreasonable.

There are times when the public interest demands that there be some impairment of individual freedom and use of public water bottoms Sarasota County Anglers Club, Inc. v. Burns, 193 So.2d 691 (Fla. 1st DCA, 1967), cert.den., 200 So.2d 178, (Fla.1967).

As stated in Gerbing and its successors, the "Public Trust Doctrine" exists to protect the public's right to enjoy recreation associated with public waters. It is designed to prohibit a private upland owner from hindering public access to those waters. If a municipality chose, because of financial constraints or otherwise, not to police or maintain the Atlantic Ocean beach, does that promote the public interest which is the basis for the "Public Trust Doctrine"? Of course not. The "Public Trust Doctrine" must be examined in a context of contemporary Florida. The modern issue on the Atlantic Ocean

beach is not unfettered access, but overaccess. With massive influx of population not only in our Atlantic Ocean cities, but especially in Central Florida, the pressure on our beach grows daily. That pressure impacts the safety of all our citizens by increasing the encounters between pedestrians and vehicles. This influx impacts the health of our citizens by increasing the debris that humans leave behind. Congestion brings with it the increased incidence of crime. The pressure of increased vehicles has a substantial impact on the environmental health of the beach and its dunes itself. If it can be argued that the "Public Trust Doctrine" prohibits the imposition of a beach ramp toll, how does that support the public interest element which is the underpinning of the "Public Trust Doctrine"? If there are no places to park off of the beach when the beach becomes full, is not the public practically restricted in its right to access these public waters? If municipal public works are not continued to remove debris and sand buildup to allow vehicles to enter and to travel along the Atlantic Ocean beach, will not this practically restrict the public's access to this beach?

In light of modern times and pressures, the implementation of a rational nondiscriminatory user fee, designed to improve the access and quality of life to people enjoying the Atlantic Ocean beach is in fact, an enhancement of the "Public Trust Doctrine". To rationalize otherwise, is to deny the reality of modern Florida. Like ostriches, we must not stick

our heads in the sands of our beach to avoid the reality around us.

> "The law regarding the public use of property held in part for the benefit of the public must change as the public's need changes. The words of Justice Cardozo expressed in a different context nearly a half-century ago are relevant today in our application of this law: 'We may not suffer it to putrify at the cost of its intimating principle.'" (Clark, Ed-N-G), Waters and Water Rights, at 202 (1967)

ARGUMENT AS TO POINT III

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

An additional statement contained in the Fifth District Court of Appeal's Opinion is as follows:

> "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, 1972)(imposition of a toll to control vehicular traffic was held to be valid exercise of City's regulatory power). id at 654

This argument was never made to the Court by the Respondents. No record was made by the Respondents indicating in any way that the charges by the City do not relate to the cost of the regulation. No citation is made to the record or to any facts contained therein in the Fifth District Court of Appeal's Decision providing any basis that the funds generated were used for other than direct beach-related expenses. The very words of Ordinance 82-14 and the implementation of that Ordinance as established in the record show that all funds were used for direct beach-related expenses necessary for the protection of the public health, safety and enjoyment of the Atlantic Ocean beach.

In Chase v. City of Sanford, 54 So.2d 370 (Fla.1951), this Court stated:

> "The mere fact, however, that some revenue might result to the City from the operation of the parking meters does not, ipso facto, classify the charge as a tax; and many decisions may be found in which ordinances authorizing a City to apply the revenue from parking meters not only to the narrow and restricted purpose of a mere installation, operation and maintenance of the meters, but also to the broad purposes of general traffic control, have been upheld as a valid use of revenues derived from the exercise of the City's police power." p.72

In that same Opinion, this Court cited the authority of State v. City of Miami Beach, Fla., 47 So.2d 865 and stated:

> "It was held in the City of Miami Beach case that a covenant by the City to fix and maintain rates and collect charges for the use of its off-street and on-street parking facilities sufficient to the pay the principal and interest on bonds issued for the purpose of acquiring, equipping, maintaining and improving existing and additional parking facilities was proper. The off-street and on-street parking facilities maintained by the City of Miami Beach are part of one general regulatory scheme to control and regulate the tremendous amount of traffic there and the cost of improving and extending which necessitated the issuance of the bonds there involved." id at p.373

There is no legal requirement that the funds generated by the beach ramp toll be attributable precisely to cost

attributable to vehicles. There only must be a reasonable relationship of the Ordinance to the legitimate City purpose of having those persons who create a need for municipal expenditures and who benefit from such expenditures contribute toward the funding of the services provided by the expenditures. The fact that the City has made a determination not to attempt to collect a user fee from people who enter the beach by foot or to collect tolls at heavily-trafficked points of entrance does not invalidate the Ordinance. It is a rational legislative decision. In The Estate of Leo Greenburg, 390 So.2d 40 (Fla. 1980), this Court stated:

> "Where utilizing the rationality test, the equal protection clause is not violated merely because a classification made by the laws is not perfect. Equal protection does not require a State to choose between attacking every aspect of the problem or not attacking it at all, and a Statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it. Dandridge v. Williams

To be constitutional, a statutory classification need not be all-inclusive. Newman v. Carson, 280 So.2d 426 (Fla. 1973).

In Hull v. Board of Commissioners of Halifax Hospital Medical Center, 453 So.2d 519 (Fla. 5th DCA, 1984), the Court stated:

> "Under Florida's equal protection analysis, appellants have the burden of showing 'that there is no conceivable, factual predicate which would rationally support the classification under attack.'"

In Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 98.Ct. 1952, 56 L.Ed.2d 354 (1978), the U.S. Supreme Court determined that a Montana Statute requiring non-residents to obtain a license to hunt elk was not unconstitutional. That Court further found that the license fees were an economic means not unreasonably related to the preservation of a finite resource and a substantial regulatory interest of the State. This is analogous to the City of Daytona Beach Shores' desire to preserve a finite resource and to enforce a substantial regulatory interest in a clean, safe ocean beach used by thousands of people on a daily basis. Finally, in an early Decision by this Court, in Harkow v. McCarthy, 171 So. 314 (Fla. 1936), this Court stated:

> "...Those who enjoy a privilege rather than the general public may be required to pay the extra cost of providing and maintaining the means to the enjoyment of the privilege and the extra cost of the supervision and policing of it."

See also Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J.,1972).

In summary, there is absolutely no basis for the Fifth District Court of Appeal's determination that the revenue-raising aspect of Ordinance 82-14 renders it an unreasonable exercise of police power. Further, there is no record support whatsoever that the funds were utilized for any other purpose than the cost of the reasonable regulation of the Atlantic Ocean beach. The burden is on those who challenge the

Ordinance to provide record support for improper expenditures or an unreasonable classification for charging fees for vehicles entering and utilizing the Atlantic Ocean beach. That burden has not been met by the Respondents nor the Fifth District Court of Appeal.

SUMMARY

Ordinance 82-14 is a reasonable exercise of municipal police power regarding a subject which is not prohibited nor preempted by the Constitution, Statutes, nor judicial authority. Ordinance 82-14 is not prohibited by Art.X,§11, Fla.Const., the "Public Trust Doctrine", as it is in fact promoting the gravimen of the "Public Trust Doctrine". There is no record support either in the words of the Ordinance or the record in this cause to show that Ordinance 82-14 created an improper classification or generated funds which were used for any other purposes than direct regulatory expenses.

Respectfully submitted,

By:
PETER B. HEEBNER, ESQUIRE

<u>CERTIFICATE OF SERVICE</u>

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 18th day of February, 1985, by U.S. Mail to: Stephen L. Boyles, Esq., State Attorney, 440 South Beach Street, Daytona Beach, Florida, 32014; Lewis F. Hubener III, Esquire, Assistant Attorney General, Department of Legal Affairs, Office of the Attorney General, The Capitol, Tallahassee, Florida, 32301; and to Lee R. Rohe, Esq., Assistant General Counsel, Department of Natural Resources, 3900 Commonwealth Boulevard, Tallahassee, Florida, 32303; Lester A. Lewis, Esq., Smalbein, Eubank, Johnson, Rosier & Bussey, P.A., Post Office Box 390, Daytona Beach, Florida 32015; and C. Allen Watts, Esq., Fishback, Davis, Dominick, Bennett, Foster, Owens & Watts, 926 South Ridgewood Avenue, Daytona Beach, Florida 32014.

PETER B. HEEBNER, ESQUIRE