OA 5-7.85

IN THE SUPREME COURT
STATE OF FLORIDA

CITY OF DAYTONA BEACH SHORES,

Appellant,

v. CASE NO. 65,912

STATE,

Appellee.
_____/

COUNTY OF ST. JOHNS, et al.,

Appellant,

v. CASE NO. 66,700

BOARD OF TRUSTEES OF THE
INTERNAL IMPROVEMENT TRUST
FUND, STATE OF FLORIDA,

Appellee.
_____/

APPELLEE'S
SUPPLEMENTAL ANSWER BRIEF
(County of St. Johns, et al.,
Appellant
v.
Board of Trustees of the Internal
Improvement Trust Fund
Appellee)

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INTRODUCTORY STATEMENT

Appellee will use the same designations and symbols for citations to the record and appendix as were adopted in the other Answer Brief.

STATEMENT OF THE CASE AND FACTS

The Appellee accepts the statement of the case and facts as set forth in Appellants' Supplemental Initial Brief on pages one and two. The transcript of the hearing of March 28 concerning the stay and Ordinance No. 85-29 begins at page 1180 of the record.

The Court should be aware that the County enacted 85-29 as a means of reinstating the beach toll after the Final Judgment of February 22nd struck the other beach toll ordinances, Ordinance 80-17, et al. The County and City are now charging beachgoers a toll under 80-17, as amended, which includes 84-46. The Appellants stand to derive at least $230,000 or more from tolls during this spring and summer.[1]

1/ Such a figure is low when compared to New Smyrna Beach's 1984 toll revenue of $525,927 New Smyrna has only five miles of "tolled" beach while St. Johns County has 20 miles. [Brief of Amicus New Smyrna Beach, A-1, filed in companion case Daytona Beach Shores v. State, Case No. 65,912].

ARGUMENT

POINT VI

APPELLANTS DO NOT HAVE AUTHORITY TO IMPOSE A "TAX" UPON BEACHGOERS ENTERING THE SOVEREIGN FORESHORE AND ITS RECREATIONAL ADJUNCT

St. Johns Ordinance No. 85-29, passed as an attempt to avoid the Final Judgment of February 22, is different from the subject (Ordinance No. 84-46) of the Final Judgment only in form and not in substance.

Like 84-46, Ordinance No. 85-29 impounds the sovereign foreshore and soft sand area with the sole purpose of charging beachgoing motorists a toll of two dollars. Section Three of 85-29 makes the same groundless "findings" as Ordinance 84-46. Again, like 84-46, Ordinance 85-29 erroneously assumes that beachgoers in cars are somehow different than pedestrian beachgoers.[2]

Like 84-46, Ordinance 85-29 recites that 96 percent of the beachgoers in the county arrive by car at the beach. And that beachgoers who are forced to drive their car onto the beach are somehow more likely to litter than a pedestrian beachgoer. These so-called "legislative findings" have been addressed in Appellee's other Answer Brief at pages 32-36.

2/ Whether a beachgoer arrives by car or foot makes no difference in terms of whether he may need police protection, a Port-O-Let or trash receptacle. It should also be recalled that the trial court took judicial notice of the lack of off-beach parking in the county. Section 3(a) of 85-29 also recognizes the "shortage."

Section 3(e) of 85-29 declares that vehicular use of the dry sand area of the "county beaches"[3] near the access ramps is the primary cause of the expenditure of ad valorem tax dollars.[4] Under the Addendum, or stipulation of facts, entered at the final hearing of January 23rd, Appellant acknowledged it had no record of how much time the grader spends grading sand ramps at the beach [See Paragraph 10, Addendum, R-926]. Moreover, as cited in the other Answer Brief at page 40, Appellants have a duty to maintain road surfaces. Special Act 21543 also declares the beach a "public highway."

Parenthetically, if Appellant did not keep the sand ramps clear, the County's toll "facility" would become unworkable or impassable since cars would not be able to travel beyond the toll booths because of the accumulation of loose sand. Vehicles bogged down in the sand would obstruct toll collections.

3/ "County beaches" are defined as the beach lying between the "extreme high and low water marks. . . ." The description of "extreme high and low water mark" is patently ambiguous where the land surveys introduced at the July 1984 hearing show only the mean high and low water lines and an "observed" high and low water line. Perhaps an extreme high water line would be one reached by the most powerful of all hurricanes? But, if so, where does it lie?

4/ Counties use ad valorem tax revenues and gasoline sales tax revenues for the repair of roads through a revenue-sharing plan outlined in Sections 206.60 and 206.605, Florida Statutes (1983). It it is assumed, arguendo, that many beachgoers are from out of the county, then it can be argued that they are, in all likelihood, buying gasoline in St. Johns County to return home. Of course, interstate and intrastate tourists visiting St. Augustine are also likely to refuel in the county before departing the area.

Those duties referred to in Sections 3(g), (h) & (k) of 85-29 are the same duties the County and City owe to pedestrians and motorists anywhere else within the county. Any of the historic sites and public squares of St. Augustine, for example, require the same regulation of traffic, parking, pedestrian use of the streets, etc., etc. Indeed, many of St. Augustine's streets within the historic district are very narrow and require especial traffic regulatory precautions.

But notwithstanding the County's employment of distracting and illusory financial and beach use minutia as a means of decoying the beneficiary of a trust (beachgoing public) into relinquishing its rights to the shore, Appellants' ordinances cannot be soft-pedaled with the judiciary. For let it not be lost sight of that 85-29 attempts to do the same thing as 84-46, but under a different label: impound the beach and charge people, under threat of imprisonment or fine, for exercising constitutional and custom and usage rights.[5] A beach toll by any other name would smell just as foul.

5/ See Appendix 1 herein, a certified copy of page 425 of the Record which is a stipulation (paragraph K) that the soft sand area is impressed with Tona-Rama rights of custom and usage. Appellant and Appellee also stipulated that all "proofs" entered into evidence at the hearing of July 28, 1984 were admitted for the final hearing. [See page 6 of Appellants' Initial Brief] Moreover, the testimony of Powers and Franklin reveals long-term recreational use of the soft sand area. [R-1038 and 1023-27] And at the July hearing counsel for the County stipulated to recreational use of the beach after being questioned by the Court. [R-1042, Lines 15-18 and R-1044 and 1045, Lines 22-25. See Appendix 2 herein, copies of transcript cited.]

As a tax imposed upon just one segment of beachgoers, without any legal or classificatory justification, Ordinance 85-29 must also fail as a denial of equal protection. Ordinance 85-29 makes the same glaring mistake as Ordinance 84-46.[6]

Ordinance 85-29 cites various sections of Chapter 125. Section 125.01(1)(q) allows a county to establish "municipal service taxing or benefit units" for various services to be financed by "service charges, special assessments or taxes" within such unit only.

However, Section 125.01(1) qualifies the county's power to carry on county government:

> "To the extent not inconsistent with general or special law. . . ."

For starters, the County's so-called tax ordinance is inconsistent with Article X, Section 11 of the Florida Constitution, the Florida Trust Doctrine, Section 253.03, Florida Statutes, rights of custom and usage, and City of Daytona Beach v. Tona-Rama, 294 So.2d 73 (Fla. 1974). Implementation of 85-29 is achieved through blocking access to the sovereign foreshore and its recreational adjunct. The same arguments made against 80-17 and 84-46 apply to 85-29.

6/ Where the County, incidentally, relied upon county employees for an estimate of how many people drive versus how many walk and those employees have no knowledge of how many walk, the County's 96 percent estimate for drives is illusory. [Addendum, R-927]

At page six of the Supplemental Initial Brief, the County states that government vehicles are not charged a toll (tax) nor are persons who leave their vehicles off the beach. (Of course, most beachgoers are forced to drive onto the beach.) Therefore, according to the County, "the State is not taxed."

Appellant's control over use and possession of sovereignty lands goes for beyond county government.[7]

Appellant is making a distinction without a difference. Appellant's 85-29 "taxes" those who are entering the beach for purposes of using the sovereign foreshore and soft sand area. Taxing the use of state property is like charging a tax for members of the public to enter or use the facilities of any state property. As pointed out at page 6 of the Attorney General's Answer Brief in the case companion to this one:

> "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."

7/ This Court has held that another county could not grant rights to plant and harvest oysters upon sovereign lands even though Franklin County relied upon a special act. Bryant v. Lovett, 201 So.2d 720 (Fla. 1967). The State's right of control over sovereignty lands is so "inherent" that such control can be exercised with or without specific statutory provision. State v. Florida National Properties, Inc., 338 So.2d 13 (Fla. 1976).

All of the cases cited by Appellant on page seven are neither on point nor authority for the County's scheme to tax beachgoers using sovereign lands.

Fire District No. 1 of Polk County v. Jenkins, 221 So.2d 740 (Fla. 1969), concerned the levy of special assessments against mobile home spaces.

Gallant v. Stephens, 358 So.2d 536 (Fla. 1978), had to do with a private property owner challenging a taxing unit under Article VII, Section 9 of the Florida Constitution.

Tucker v. Underdown, 356 So.2d 251 (Fla. 1978) and Charlotte County v. Fiske, 350 So.2d 578 (Fla. 2nd DCA 1977), likewise involved disputes between private property taxpayers and taxing units created by local government.

State property is immune from direct and indirect taxation. It is basic Florida law that local government cannot tax or levy special assessments on state-owned land or the public's use of it. Sections 196.199 and 253.03(5), Florida Statutes. See also Dickinson v. City of Tallahassee and State ex rel Charlotte County v. Alford.[8]

At page 30 of State v. Alford, supra, Justice Drew wrote:

> "Undoubtedly in those counties and cities where state buildings, universities, churches and similar tax exempt properties are located, there

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8/ 325 So.2d 1 (Fla. 1975)
107 So.2d 27 (Fla. 1958). See also Article VII, §1(a), Florida Constitution and Broward County v. Janis Development Corp., 311 So.2d 371 (Fla. 4th DCA 1975).

> is a heavier tax burden upon the remaining property but this has never been recognized as a valid reason for subjecting such properties to taxation. The fact that such political entities continue to clamor for the establishment of such tax exempt institutions within their boundaries effectively destroys the argument that they are detrimental to the welfare of such communities."

Similarly, the County and City derive tremendous financial gain from the beach. [See page 31 of other Answer Brief] Private real estate bordering the beach is high in demand and price thus providing a windfall of high ad valorem assessments and revenues. It is commonly known that the price of just one Florida oceanfront condominium unit, in a building of many units, can range from a little less than $100,000 well into the hundreds of thousands of dollars.

In Dickinson v. City of Tallahassee, supra, this Court reminded the parties therein at page 3 that:

> "In resolving these diametrically opposed theories of intergovernmental finance, we have concluded the State must prevail. Precedent and logic both dictate that the sovereign's general freedom from taxation derives from an 'immunity,' not from an 'exemption.'
>
> The State's immunity from taxation is so well established in Florida's jusispruduce that little elaboration is needed here."

The First DCA has held that sovereign lands in particular are not subject to taxation. Lobean v. Trustees of the Internal Improvement Fund, 118 So.2d 226 (Fla. 1st DCA 1960).

The County would have the Court believe that the Appellee and the beachgoing public are different entities for tax purposes. But such an assertion misses the whole point regarding

the constitutional trust doctrine. The Appellee holds legal, nominal title to the sovereign foreshore for the use and enjoyment of the equitable titleholder, the public. It is the citizenry which has beneficial use of the trust corpus. Taxing the beneficiary's legal relationship to the trust is tantamount to taxing the trust and the corpus itself.

It is not the character or nature of the owner of property but rather tha utilization of property for a predominantly public or private purpose which is the major criterion in determining liability for taxes. Tre-O-Ripe, Inc. v. Mills, 266 So.2d 120 (Fla. 1st DCA 1972).

Taxing public use of the beach is taxing use of a statewide resource. Thus, a locality is gaining from a resource and its use which transcend the locality in terms of the rights and ownership adhering to that resource. In the present constitutional trust context, who else is the sovereign or the state but its citizens at large. The State is not an abstract, remote corporate entity like General Motors but the citizenry itself, or in the language of Article X, Section 11, "all the people."

Appellee has not sued the County and City so that seven members of the Board of Trustees can recreate upon the beaches lying within the County's boundaries. The Appellee has sued on behalf of all the people for whom the beaches are held in trust. Taxing the people who seek use of sovereign land is taxing the very exercise of sovereignty itself where the sovereign consists of the people.

The right to use sovereign lands should remain unhindered. Allowing each county and municipality to tax the public use of public land is to fragmentize or decentralize sovereignty itself and divide the beaches as many ways as there are coastal local governments; each with its own idiosyncratic and discriminatory rules for entry to the beach. Such a prospect is highly repugnant to the constitutional trust doctrine. Merrill-Stevens Co. v. Burkee, 57 So. 428, 431 (Fla. 1912); Hayes v. Bowman, 91 So.2d 795, 799 (Fla. 1957).

Appellants' actions amount to reducing the beaches into "several and individual ownership" and converting them into money. See Merrill v. Stevens and Hayes, supra.

Eleven years ago, Justice Ervin's dissent in Tona-Rama, supra, sounded the alarm:

> "With Florida's population burgeoning and its recreational needs multiplying by leaps and bounds, the State's courts can ill afford any longer to be profligate with its public areas and allow them to be frittered away upon outmoded pretexts for commercial exploitation."
> Id. at 81.

But unlike the case sub judice, Tona-Rama concerned private interference with the public's use of public beach. In 1974, who would have imagined that the real assault upon Florida's beaches would have been later led by local governments like the Appellants in the case sub judice and its companion case?

Who would have surmised in 1974 that, disguising itself in regulatory garb, local government would be the most pernicious denier of the public's organic rights and the most efficient "commercial" exploiter of Florida's beaches? As noted in Tona-Rama, supra, the judiciary has a "positive and solemn duty as a last resort" to protect the public's rights to the enjoyment and use of the public shore. Id. at 81.

SUMMARY OF ARGUMENT

In substance, Ordinances 85-29 and 121 are the same as those ordinance declared invalid by the Final Judgment of February 22. Ordinance 85-29 was yet another evasive manuever by the County to dodge circuit and appellate court rulings. To paraphrase the trial court judge, 85-29 walks like a duck, talks like a duck, quacks like a duck and therefore probably is a duck--illegal beach toll. [R-1189]

Following on the heels of 80-17 and 84-46, ordinance 85-29's so-called "legislative findings" are like a rerun of an old late night movie. For 85-29 impounds the beach and demands money from beachgoers exercising time-honored organic rights. 85-29 also contains the same discriminatory and irrational classification scheme as 80-17 and 84-46.

Ordinances passed under Chapter 125 must not conflict with general law. Appellant's special acts do not confer taxing authority.

State-owned land is immune from taxation. Imposing a tax upon people who seek access to sovereignty land rather than on the land itself makes no difference. Public use of public land is immune from "taxes."

Appellant has not cited one case which contains facts similar to the facts sub judice.

Appellant must finance its operations from lawful sources of revenue already available, i.e. ad valorem taxes and motor fuel sales taxes. The beach already contributes great value to Appellants' ad valorem assessments because of the high values of oceanfront real estate.

Simply put, 85-29 conflicts with Article X, §11 of the Florida Constitution, the Trust Doctrine, Section 253.03 and case law.

Florida's beaches will be divided as many ways as there are coastal counties and municipalities if Appellants are allowed to succeed. Tona-Rama foresaw future "commercial exploitation" of Florida's beaches. But who wold have guessed, in 1974, that the most pernicious assault of all would emanate from local governments in the form of so-called "regulation" or "taxation"?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to James G. Sisco, Esquire, Post Office Box 1533, St. Augustine, Florida 32084 and David G. Conn, Esquire, Post Office Drawer G-1, St. Augustine, Florida 32083, this 24th day of April, 1985.

Lee R. Rohe

Lee R. Rohe, Esquire
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