o/a 5-7-85

IN THE SUPREME COURT
STATE OF FLORIDA

CITY OF DAYTONA BEACH SHORES,

Appellant,

CASE NO. 65,912

v.

STATE,

Appellee.

COUNTY OF ST. JOHNS, et al.,

Appellant,

v.

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

Appellee,

CASE NO. 66,700

APPELLANTS' REPLY TO SUPPLEMENTAL ANSWER BRIEF

(County of St. Johns, et al.)

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STATEMENT OF THE CASE AND FACTS

Appellants will not contest the Statement of the Case and Facts contained in Appellees' supplemental answer brief.

ARGUMENT

ST. JOHNS COUNTY AND THE CITY OF ST. AUGUSTINE BEACH HAVE THE AUTHORITY TO CHARGE MOTOR VEHICLE BEACH SERVICE CHARGES AS A PART OF THE TAXING AUTHORITY GRANTED THEM BY FLORIDA STATUTE §125.01(1)(q), 125.01(1)(r) and 125.01(5).

In response to Appellees' answer to supplemental brief, the Appellants would first point out that there are **two** major **differences** between County Ordinance 80-17, as amended - which includes 84-46 - and County Ordinance 85-29.

1.) County Ordinance 80-17, as amended, is bottomed upon the **regulatory and police power** of the County as authorized by the "County Home Rule" statute (Florida Statute Chapter 125) and the two Florida Special Acts (65-2178 and 21543) **whereas** County Ordinance 85-29 is bottomed upon the **taxing power** of the County as specifically authorized by Florida Statutes 125.01(1)(q) and (r) and 125.01(5).

2.) County Ordinance 80-17, as amended, charges a motor vehicle beach user fee for motor vehicle uses pertaining to County beaches which are defined by section 4 of the ordinance (A-59) as ". . .the ocean beaches bordering the Atlantic Ocean **between** the **mean** high and **mean** low water marks in the unincorporated areas of St. Johns County" **whereas** County Ordinance 85-29 charges a motor vehicle service charge for motor vehicle uses pertaining to county beaches which are defined by section 2 of the ordinance (A-5 of supplemental brief) as ". . .the ocean beaches bordering the Atlantic Ocean

between the extreme high and low water marks within the unincorporated areas of St. Johns County."

Appellees' supplemental answer brief asked the question - where does the extreme high water line lie? The answer may be found by observing the photographs attached as A-4, A-5, A-6 to Appellants' initial reply brief.

Appellees' argument that the parties stipulated at the trial of the 80-17 ordinance that the land west of the mean high water mark was impressed by public rights of custom and usage is simply not accurate. The transcript attached to Appellees' answer brief clearly shows that the trial court wanted to limit the factual matters to the areas in which the county was charging its 80-17 user fees - (line 7 page 59 and line 16 page 62 of transcript attached to Appellees' supplemental answer brief) - that is - the beach area between the mean high and mean low water marks. The soft sand area above the mean high water mark was not at issue before the court. In any event, Toma-Rama, (City of Daytona Beach v Toma-Rama, Inc., 294 So 2d 73 (Fla. 1974)) recognized that a public right of custom and usage - if established - is subject to appropriate governmental regulation. (page 78)

Appellants concede Appellees point that the County receives gasoline sales tax revenues from the State that may be used to repair county owned roads. Appellants reject the States' implied contention that the County must use its gasoline sales tax revenues to repair state owned and/or federal owned roads. The county gasoline sales tax revenues were not disbursed to the county to repair the states' major highways located within the county - they were not disbursed to the county to repair the states roads located within the state owned park systems within the county - and they were not disbursed to the county to repair the state owned beaches within the county.

The State complains that charging a service charge to drivers of

motor vehicles to take their motor vehicles onto a crowded recreational beach and using the revenues therefrom to police the vehicles and provide services for the beach during their use is somehow inconsistent with Florida law. The state would ignore the fact that the service charge **is consistent** with the state gasoline sales tax which in effect charges a tax to drivers of motor vehicles to drive their motor vehicles upon the state roads, the private roads, the county roads, the city roads and the federal roads located within the State of Florida. It **is consistent** with the local option gas tax authorized by Florida Statute 336.025. It **is consistent** with Florida Statute 372.57 - fishing licenses charged by the State; and with Florida Administrative Code 16 Q 21 - fees charged by the State to process applications concerning private use of sovereign lands; and with Florida Administrative Code 16 D-2.02 - user fees charged by the State for the use of state park facilities; and with Florida Administrative Code 17-4.29 - fees charged by the State to process applications for dredge and fill permits concerning navigable waters. It **is consistent** with the parking meters placed on the streets and the parking lots near the Supreme Court Building and The Capitol where people who wish to drive to these public buildings must pay to park their car while using public state owned properties. It **is consistent** with the holding in Neptune City v Avon-By-The Sea, 294 A 2d 47 (New Jersey 1972) that reasonable sovereign beach user fees collected to defray the cost of beach regulation are entirely within the common law public trust doctrine pertaining to sovereign lands. The minor inconvenience of paying a nominal service charge to take a motor vehicle onto a crowded recreation beach **is not inconsistent** with Article X, Section 11 of the Florida Consititution which specifically authorizes the sale and private use of sovereign lands. It **is consistent** with Merrill-Stevens Co. v Durkee, 62 Fla. 549, 57 So 428 (Fla. 1912) cited by Appellee

wherein the Court stated:

> "The State may in the interest of the public welfare, grant limited rights in portions of the lands under navigable waters within its borders, or may **permit the use** thereof, when the rights of the whole people of the State as to navigation and other uses of the waters are **not materially impaired.** The rights of the people of the State in the navigable waters and the lands thereunder including the shores or spaces between ordinary high and low water marks, are designed for the public welfare, and the State **may regulate** such rights and **the uses** of the waters and the lands thereunder for the benefit of the whole people of the State as circumstances may demand. . ." (page 559)

It **is consistent** with the holding in State v Black River Phosphate Company, 32 Fla. 82, 12 So 640 (Fla. 1893) that the States' power to regulate sovereign lands may be delegated by the state to municipalities and other governmental bodies. (32 Fla. 100)

Reasonable stewardship over the beaches means that conduct on the beaches must be regulated and services and facilities must be provided to serve the ever-increasing crowds such as those shown in Appellants' photographs. (A-1)(A-2)(A-3) Those services and facilities must be financed - and the State has not done so. Where the increasing number of motor vehicles threatens to degrade the quality of the beach experience, the real trustees of the public trust are those who seek to maintain that quality. Establishing a municipal service taxing benefit unit pursuant to general law (Florida Statute 125.01(1)(q)) to finance the services provided **is consistent** with the public trust doctrine and the general and special laws of the State of Florida.

Appellee again discusses the County stipulation that the beach fee collectors do not have knowledge of the total number of people who enter the County beaches each year by foot. They probably don't know the total number of people who enter the beaches each year by motor vehicles either. The relevant portion of stipulation #17 was that "The beach collectors

estimate that on the average approximately 2 to 3 people are in each motor vehicle that enters the beach during the beach fee collection season." (A-44) The photographs (A-1, 2, 3) then show that the 96% finding by the St. Johns County Board of County Commissioners was accurate. In addition to the photographic evidence, the parties stipulated that the sheriffs deputies, life guards and beach user fee supervisor and fee booth collectors relied on their beach experiences at arriving at the percentages presented to the County Commissioners. (A-44) The commissioners also relied upon their own beach experiences in making their legislative percentage findings. At trial - the state offered no evidence to rebut those findings.

Appellees' assertion on page 4 of its' answer to supplemental brief that the City of St. Augustine Beach has a duty to maintain the historic sites and public squares within another municipality, the City of St. Augustine, is consistent with the Appellees' assertion in its' answer to initial brief that the County has a duty to maintain state owned beaches and roads - but neither assertion is supported by law. (please see pages 14 and 15 of Appellants' initial reply brief and Point V of Appellants' initial brief)

Appellees cited Bryant v Lovett, 201 So 2d 720 (Fla. 1967) and State v Florida National Properties, Inc., 338 So 2d 13 (Fla. 1976) but these cases have no relevancy to the issues at hand. Bryant v Lovett held that a special act could not authorize a county to convey exclusive easements to private individuals to plant and harvest oysters upon the bottom of Apalachicola Bay when the Florida Constitution at that time provided:

> "All grants and commissions shall be in the name and under the authority of the State of Florida, sealed with the great seal of the State, signed by the Governor, and countersigned by the Secretary of State."

After reciting the above portion of the Florida Constitution the court then held that:

"The grants here involved were not executed in accordance with the command of this section, and were delivered without compensation to the State, and must therefore be held to be void and ineffectual to convey any interests in the sovereignty lands involved. We do not construe or hold that Section 14 of Article IV, supra, applies to grants, including deeds and leases, by the State, where there is a valuable consideration flowing to the State for same."

Appellants do not quarrel with the statement in State v Florida National Properties, Inc., 338 So 2d 13 (Fla. 1976) that the state may exercise control over sovereign lands without specific statutory provisions. Neither do we quarrel with the holding in State v Black River Phosphate Company, 32 Fla. 82, 13 So 640 (Fla. 1893) that the states' power to regulate sovereign lands may be delegated by the state to municipalities and other governmental bodies.

Florida Statute 196.199 cited by Appellee provides:

"(b) All property of this state which is used for governmental purposes shall be exempt from **ad valorem** taxation except as otherwise provided by law."

Florida Statute 253.03(5) cited by Appellee provides that:

"(5) It is the specific intent of the Legislature that this act repeal any provision of state law which may require the Board of Trustees of the Internal Improvement Trust Fund to pay taxes or assessments of any kind to any state or local public agency on lands which are transferred or conveyed to the Board of Trustees of the Internal Improvement Trust Fund . . . "

St. Johns County ordinance 85-29 does not levy ad valorem taxes on the states' lands. St. Johns County ordinance 85-29 does not require the Board of Trustees to pay taxes or assessments on lands owned by the Board.

Appellees also cited Dickinson v City of Tallahassee, 325 So 2d 1 (Fla. 1975) which held that the City of Tallahassee could not charge the State a 10% tax on all purchases made by the State of electricity within

the city limits. St. Johns County ordinance 85-29 does not charge the state a tax for any purchases and specifically exempts government owned vehicles (A-6 of Appellants' supplemental brief) from the motor vehicle beach service charge.

State ex rel. Charlotte County v Alford, 107 So 2d 27 (Fla. 1958) cited by Appellee recognized that ". . . the Legislature may provide for the taxation of lands or other property of the State. . ." The Court then held that the language in the legislative act in question did not authorize Charlotte County to levy a tax on state owned lands. Again - St. Johns County ordinance 85-29 does not levy a tax on state owned lands nor does it take any funds from the Board of Trustees or any other State agency. Alford is not relevant to the case at bar.

Appellee also cited Broward County v Janis Development Corporation, 311 So 2d 371 (Fla. 4th. DCA 1975) which is a case wherein the 4th. District Court of Appeal held that road impact fees levied by a Broward County ordinance were:

> ". . .simply an exaction of money to be put in trust for roads, which must be paid before developers may build. There are no other requirements. There are no specifics provided in the ordinance as to where and when these monies are to be expended for roads, apparently this was to be left for future commission determination. This fee, therefore, is an exercise of the taxing power."

The Florida Supreme Court then discussed Janis in Contractors and Builders Association of Pinellas County v Dunedin, 329 So 2d 314 (Fla. 1976) stating:

> "But the fees in Janis Development and Venditti-Siraro bore no relationship to (and were greatly in excess of) the costs of the regulation which was supposed to justify their collection. In each case, the fees were required to be paid as a condition for issuance of building permits. In the Janis Development case, $200.00 per dwelling unit built was put into a fund for road maintenance. In Venditti-Siraro, one percent of estimated construction costs went into a fund for parks.

> Because the surcharges were collected for purposes extraneous to the enforcement of the building code, the courts concluded that the surcharges amounted in law to taxes, which the municipalities had not been authorized to impose. In contrast, evidence was adduced here that the connection fees were less than costs Dunedin was destined to incur in accommodating new users of its water and sewer systems. We join many other courts in rejecting the contention that such connection fees are taxes." (page 318)

The Dunedin court went on to state with approval:

> "The avowed purpose of the ordinance in the present case is to raise money in order to expand the water and sewerage systems, so as to meet the increased demand which additional connections to the system create. **The municipality seeks to shift to the user expenses incurred on his account.** (page 318)

The court then held that Dunedin's utility impact fee ordinance would be valid if the city amended it to ". . .incorporate appropriate restrictions on use of the revenues it produces."

In the case now before the Court, St. Johns County ordinance 80-17, as amended, - the regulatory ordinance - makes specific findings in Section 19 (A-63) as to the regulatory need and uses for the motor vehicle beach user fee and in Section 9B (A-69) finds that the fees are a "necessary adjunct" to the other County beach regulatory ordinances such as those regulating beach traffic direction and the possession of alcohol on the beach. Section 6 requires that the fee revenues be expended only for certain defined beach costs incurred during the days and times that the fees are collected (A-64) and Section 6A requires that the fees be reduced (A-70) if such fee revenue exceeds those defined beach costs. St. Johns County ordinance 80-17 as amended, thus meets the concerns expressed by the 4th. District Court of Appeal in Janis. It is also interesting to note that the 4th. District Court of Appeal recently approved a Palm Beach County ordinance requiring subdivision developers to pay an impact fee for road improvements outside the subdivisions. Home

Builders v Palm Beach County, 446 So 2d 140 (Fla. 4th. DCA 1983).

The Appellee stated in it supplemental reply brief that taxing the beneficiary of a trust is tantamont to taxing the trust and the corpus itself. It is respectfully suggested that the federal internal revenue code does not recognize this unique principle nor does the Appellee cite any state law that might shed light on the matter. The Appellee further posits that the State is not an abstract, remote corporate entity like General Motors but the citizenry itself. Appellant, however, would contend that the Board of Trustees has abdicated its trust responsibilities to service, maintain, and regulate its own beaches and, in actuality, is a remote far away entity that insists that others do its job for it free of charge. The Board of Trustees apparently takes the same General Motors attitude that "what is good for General Motors is good for the country" no matter who has to foot the bill.

St. Johns County ordinances 80-17 as amended, and 85-29 do not seek to trample upon the rights of the sovereign but merely "seek to shift to the users the expenses incurred on (their) behalf" as approved in Dunedin supra at page 318. If the Appellee is correct in its' contention that taxing the people who use sovereign land is taxing the sovereign itself - one has to wonder why the State recently announced that - it would tax itself - to wit: would require ocean beach users within the Anastasia State Park to pay a 50¢ per person entry fee. (see A-1 and A-2 of of Appellants' initial reply brief.) The States' actions do not reflect a "tax thyself" exercise in circular reasoning but do reflect the very real fact that there is nothing inherently wrong or illegal with requiring people who demand and receive extraordinary services to help pay the costs of such services.

Appellee cited Tre-O-Ripe Groves, Inc. v Mills, 266 So 2d 120 (Fla. 1st. DCA 1972) which held that where a taxpayer leased land from the National Aeronautics and Space Administration for use in growing citrus fruit, immunity from taxation of the federal property was lost and assessment of a tangible personal property tax was not illegal. The holding of this case is much like the language in Florida Statute 196.199(2) and (4), all of which deal with property taxes and are not relevant to the County user fees or service charge ordinances under consideration by this Court.

Appellee next asserts that the beaches are not held by the State for the purpose of sale or conversion into other values or for "commercial exploitation." St. Johns County has no quarrel with that concept and in fact goes to extraordinary lengths to keep the beaches open for motor vehicle entrants as well as for the few who are fortunate enough to live within walking distance. The local public pressure to close the beaches to motor vehicles and relieve the county of the burdens such large, continuous, and often rowdy crowds of people looking for a good time have on the county taxpayers is strong indeed. Appellants point out that the words "commercial exploitation" in their ordinary sense mean "to selfishly utilize for gain or profit". St. Johns County beach ordinances - including 80-17 as amended, and 85-29 - are all designed to allow the greatest number of people to use the ocean beaches in a safe and clean environment with the users contributing only toward the costs of the services they receive. These ordinances - in theory and in fact - do not produce revenues greater that the costs to the County and City of the services provided to the persons paying the fees during the times that the fees are charged. There is **no profit** to St. Johns County or to the City of St. Augustine Beach.

Appellee next suggests that the Florida Supreme Court should not

allow ". . .each county and municipality to fragmentize or decentralize sovereignty itself and divide the beaches as many ways as there are local governments . . ." Appellants respectfully suggest that this is not a decision that the Florida Supreme Court should make but is a policy decision that should be made by the Florida Legislature. The Florida Legislature has in the past recognized that decentralization is not a necessary evil - it created the 67 Florida Homerule counties and the hundreds of Homerule municipalities to help carry the burdens of government. It recognized that landowners in these different local governments would be assessed different ad valorem tax millages to meet different local governmental needs and conditions and did not find fault with the concept. When the legisalture does not want decentralization the legislature is quite capable of halting it. Florida Statute 125.01(4) provides that:

> "(4) The legislative and governing body of a county shall not have the power to regulate the taking or possession of saltwater fish, as defined in s. 370.01, with respect to the method of taking, size, number, season, or species. However, this subsection shall not be construed to prohibit the imposition of excise taxes by county ordinance."

Appellants respectfully suggest that the Florida Legislature has been aware for many years that New Smyrna Beach, Daytona Beach Shores, St. Johns County and the City of Jacksonville Beach (the Nichols case) have been charging motor vehicle beach user fees. If the legislature intended that such fees should not be charged by these entities - either under their police power or the taxing power provided by Florida Statute 125.01(1)(q) and 125.01 (5) - the Legislature is quite capable of adding sections to Florida Statute Chapter 125 (pertaining to counties) and to Florida Statute Chapter 166 (pertaining to municipalities) that would prohibit the imposition of such beach user fees and service charges by local governmental entities.

CONCLUSION

For the reasons stated in Appellants' briefs, St. Johns County ordinances 85-29 and 80-17 as amended and City of St. Augustine Beaches ordinances 79 and 110 as amended, are legal and valid ordinances enforceable in accordance with their terms.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered to Stephen L. Boyles, State Attorney, to Clyde E. Shoemake, Assistant State Attorney, attorneys for plaintiff, 440 South Beach Street, Daytona Beach, Florida, 32014, by U.S. Mail and to Lee R. Rohe, Esquire, Assistant General Counsel, 3900 Commonwealth Blvd., Suite 1003, Tallahassee, Florida 32303 by Federal Express, this 26th. day of April, 1985.

James G. Sisco