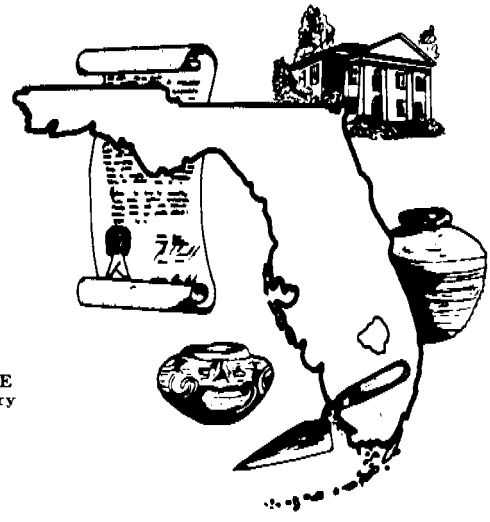
RESPONDENT'S BRIEF



STATE OF FLORIDA
DEPARTMENT OF STATE
Division of Archives, History
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IN THE SUPREME COURT OF FLORIDA

THE CITY OF DAYTONA BEACH, a municipal corporation, organized and existing under the laws of the State of Florida; McMILLAN AND WRIGHT, INC., a Florida corporation, and HARRY DOAN,

Petitioners,

-vs-

TONA-RAMA, INC., a Florida corporation; THE STATE OF FLORIDA BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND; and J. DONALD JARRETT and ELMO D. JARRETT,

Respondents,

-vs-

THE STATE OF FLORIDA,

Intervenor.

CASE NO. 43, 352

BRIEF OF RESPONDENTS, TONA-RAMA, INC. J. DONALD JARRETT and ELMO D. JARRETT

ANTHONY J. GREZIK of
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326 South Grandview Avenue
Daytona Beach, Florida
Attorneys for above Respondents

INDEX

INDEX TO CITATION OF AUTHORITIES

INDEX TO CITATION OF AUTHORITIES (cont)

INTRODUCTION

Throughout this litigation the Petitioners, McMillan and Wright, Inc., and its only stockholder, Harry Doan, attempt to justify the Skytower structure situated in the soft sand area of the Atlantic Ocean Beach primarily because said corporation for a long period of time (before comprehensive zoning evolved) was permitted to construct a pier, which extended easterly from the upland over the soft sand, the wet sand, and out into the Atlantic Ocean approximately 1,000 feet.

Said existing pier structure as a matter of law can not and should not justify the wrongful encroachment by said petitioners of a part of the Atlantic Ocean Beach within the corporate limits of the City of Daytona Beach.

Said Petitioners seek this Court to grant to them a right, in effect a monopoly, to use an area of the soft sand of the beach, which has consistently and vigorously been denied by the City of Daytona Beach to the other hundreds of oceanfront property owners within the City of Daytona Beach.

At the commencement of this law suit the Respondents alleged that the issues presented involve a matter of great public interest. If encroachments such as the one involved in this law suit are to be

permitted, the "World's Most Famous Beach" in Daytona Beach will gradually cease to exist as one of the State's outstanding natural resources.

STATEMENT OF THE CASE

Respondent corporation, Tona-Rama, Inc., commenced this litigation on the 4th day of December, 1969, in the Circuit Court of Volusia County seeking declaratory judgment, and in the alternative general equitable relief and or a review under Chapter 176, Florida Statutes.

Said Respondent alleged that existing ordinances of the City of Daytona prohibited building structures East of the established building line on properties fronting on the Atlantic Ocean Beach and building structures East of the established bulkhead line along the entire ocean-front of the City.

Respondent further asserted that City Resolution 69-165 was unconstitutional and invalid, as being conditional on its face, and an improper delegation of legislative authority. That the adoption of Resolution 69-307 attempting to cure the defects of 69-165 was ineffective as a matter of law.

Respondent claimed the land area of the Atlantic Ocean Beach East of the established bulkhead line and wall had been put to public use and that said general public use had been open, notorious, continuous and uninterrupted for a period exceeding twenty years. That the controversy presented a question of great public importance involving

public rights and the preservation of a great natural resource.

The court allowed the State Attorney of the Seventh Judicial Circuit to intervene on behalf of the public. The court permitted the Board of Trustees of the Internal Improvement Trust Fund to become party plaintiff on behalf of the public. Thereafter, Respondents, J. Donald Jarrett and Elmo D. Jarrett were allowed to become parties plaintiff being stockholders of Respondent corporation, residents, citizens, and taxpayers of the City of Daytona Beach having a personal stake in the controversy and issues involved in said cause.

Being a Retired Circuit Judge, Judge P. B. Revels very diligently devoted a great deal of time to the case. Extended pre-trial conferences were held and ample time was given to all counsel on all matters brought before the Court. This resulted in the stipulation of the salient material facts and the admitting into evidence of many exhibits relevant and material to the cause (R-219, 231).

The Petitioners further admitted certain facts in their response to Requests for Admissions filed in said cause (R-139).

A Motion for Summary Judgment was filed on behalf of all Petitioners. Thereafter all Respondents filed Motions for Summary Judgment. Sworn affidavits were filed in support of Respondents' Motions for Summary Judgment, which material facts Petitioners failed to

controvert (R-176, 182, 217, 444).

The Circuit Court entered a Summary Judgment in favor of Respondents which decision was affirmed by the First District Court of Appeal

The First District Court of Appeal certified said case to this Court as presenting a question of great public interest.

STATEMENT OF THE FACTS

During the month of February, 1969, Petitioner Harry Doan made application to the City of Daytona Beach requesting permission to erect a Skytower on the Ocean Pier which he and his defendant corporation operated. (Resolution 69-165 and permit 9518 allowing said Skytower were so vague that the actual construction was on land adjoining the pier structure to the South on the soft sand area).

The matter came before the City Planning Board for consideration and after some time was approved by a split vote and recommended to the City Commission with a number of conditions, among which were "providing all legal aspects be resolved by the City's Legal Department" and ..... "and does not interfere with the recreational use of the beach." (R-52)

The City advertised a public hearing, published on June 9, 1969, which notice failed to inform the general public that the proposed use would be located Easterly of both the building line and the bulkhead line. (R-29)

The Skytower use matter came on for hearing before the City Commission on June 18, 1969, and during said meeting Commissioner Ellison stated he was concerned with the bulkhead line and building line.

The City Attorney, John Chew, questioned several legal points as to zoning involved; if the public had used the area so long it was now public property; that the height exceeds that permitted by law - the law permits 150 feet and the proposed tower is 176 feet (R-32).

Thereupon, the City Commission adopted Resolution 69-165, which on its face stated it was subject to the matter being approved from a legal standpoint by our legal department. (R-30)

The City Attorney wrestled with this problem for almost four months. On October 8, 1969, a letter was directed to the Attorney General by the City Attorney which rather significantly set forth the initial position of City Legal Department in this controversy. (R-35, 36, 37).

Apparently, the Attorney General could not and did not answer the complex questions posed in the letter of October 8th. The City Attorney thereafter put a much simpler proposition to the Attorney General by letter dated October 20, 1969. (R-224, Ex. P)

The letter of October 21, 1969, from the Attorney General to the City Attorney certainly does not begin to answer questions in letter of October 8th (R-220, Ex. C). The real issues involved were circumvented.

The City Commission on October 22, 1969, passed Resolution 69-307 (R-220, Ex. D) as an amendment of Resolution 69-165.

At the time of adopting 69-307 the City Commission required Petitioner corporation McMillan and Wright, Inc., to execute a letter which stated: (R-47)

> " this is to advise that should litigation arise out of granting of the subject application, the undersigned will retain competent counsel and defend at no expense to the City of Daytona Beach, and furnish insurance protecting City against liability.
>
> By /s/ Harry Doan
> President "

The City of Daytona Beach issued Building Permit No. 9518 on October 23, 1969 (R-43). Respondent corporation alleged that the issuance of said permit was wrongful and improper and pursued an administrative remedy on November 3, 1969, filing a Notice of Appeal' with the Chairman of the Board of Adjustment of the City and with the Chief Building Official of the City (R-42).

The administrative remedy of appealing the Chief Building Official's decision was denied to Respondents by an arbitrary decision of the Deputy Building Official on the grounds Respondent was not a person adversly aggrieved or affected (R-46).

The Respondents did on December 20, 1969, for the second time

file an appeal with the Board of Adjustment of the City of Daytona Beach (R-61). This appeal again was denied by the Deputy Building Official (R-65).

During the course of said litigation the parties involved stipulated as to the physical characteristics of the land area involved. It was agreed that from the seawall Easterly for a distance of approximately 150 feet is an area of dry, loose white sand which is covered by waters of the Atlantic Ocean during hurricanes or extremely high tides. That Easterly from the dry sand area is an area of sand which is at times covered by the tidal waters of the Atlantic Ocean (R-226).

That the physical characteristics of the sand areas as above described have existed for a period of more than 20 years preceding the date of filing of pleadings in this cause, and said characteristics correctly depict the area as it now exists (R-227).

The parties hereto stipulated certain photographs would be admitted subject to relevancy and materiality which depict the land area involved, and which show that no construction had commenced at the time the law suit was filed and served upon defendants (R-227, 228 Exs. A-1 through A-15).

The sworn affidavit of J. Donald Jarrett, President of Tona-Rama, Inc., in support of Motion for Summary Judgment, has attached

a certified copy of City Ordinance 53-159 which established the existing bulkhead line during the year 1953 (R-451-458). Section 8 of City Charter 1939 permitted City to adopt Ordinance 53-159, which Ordinance was affirmed in Section of Article XVII of Zoning Ordinance 67-200 (R-461-465, 466-468).

Said sworn affidavit sets forth facts that the area of land upon which the Skytower is constructed has been used continuously for more than 20 years by the general public for recreational purposes and for purposes of ingress and egress to and from the Atlantic Ocean waters. That the soft sand area Easterly of the seawall bulkhead line does not support vegetation nor is vegetation indigenous to said dry or soft sand area. That the City of Daytona Beach maintains the entire area along the oceanfront Easterly of the seawall-bulkhead line within the boundary of the City. That City Police patrol and police this entire area on a daily and routine basis and City has been so doing for more than 20 years (R-446-450).

That after an extreme high tide or a Northeastern windstorm, the soft sand area is non-existent and the entire Atlantic Ocean Beach from the seawall-bulkhead line to the Atlantic Ocean waters is wet sand (R-448).

A sworn affidavit was executed in support of Respondents' Motion for Summary Judgment by Henry Autry, a Real Estate Broker, who has

lived in close proximity to the Atlantic Ocean Beach for a period exceeding 20 years. Since 1955 Henry Autry has served as a member and Chairman since 1962 on the Board of Adjustment of City of Daytona Beach. Henry Autry stated in his affidavit that the Chief Building Official or his Deputy did not have authority to exercise power of determining who has standing to make an appeal to the Board of Adjustment. That during his 15 years service on the Board he did not know of any prior denial to any applicant making an appeal to said quasi-judicial Board. Autry further stated that the refusal to process said appeals by the Respondents was contrary to the usual standard operating procedures customarily followed prior to the issuance of Permit 9518 (R-475, 476). Autry further stated that prior to the granting of the Skytower use the officials of the Building Department and City Officials in general have always zealously defended the oceanfront bulkhead line as established by Ordinance 53-159. Autry further stated the general public has used the beach area upon which the Skytower is located for recreational purposes for a period exceeding 20 years (R-477).

A sworn affidavit was executed by C. Aubrey Vincent in support of Respondents' Motion for Summary Judgment. He stated he had been a resident of Volusia County for 25 years and had practiced law for 20 years at two locations within about 575 feet of the Atlantic Ocean Beach land upon which the Skytower is situated. For more than 20 years he

observed said land area being used by the general public for recreational purposes, such as: sun bathing, picnicking, playing ball and frolicking, walking and running to and from the Atlantic Ocean waters, and parking of vehicles. Vincent served as City Attorney of Daytona Beach from 1956 to 1958. He stated the City has maintained and serviced the Atlantic Ocean Beach as a public highway for a period of 20 years and City has regularly provided a clean-up crew to remove trash and rubbish from the general beach areas. That the City provided police services to the beach area on a daily basis for more than 20 years (R-482-484).

Karl H. Lutz and Kenneth A. Fluhrer executed sworn affidavits in support of Respondents' Motion for Summary Judgment. Both are retired police officers of the City of Daytona Beach, having been residents of the area 25 years and 24 years respectively. Lutz served as a police officer from 1947 to 1969. Fluhrer served as a police officer from 1947 to 1965. Each stated that their duties included patrolling and policing the Atlantic Beach area within the corporate limits of the City from the seawall Easterly to the Atlantic Ocean waters. Each stated they observed the general public using the area where the Skytower is located for recreational purposes and the parking of vehicles. Each stated that frequently vehicular traffic use extended and was observed from the seawall-bulkhead line to the Atlantic Ocean waters (R 485-488).

POINTS INVOLVED

POINT I

SUMMARY JUDGMENT ENTERED BY THE CIRCUIT COURT AND AFFIRMED BY THE FIRST DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED BY THE SUPREME COURT IN THAT NO LAWFUL AUTHORITY FOR THE CONSTRUCTION OF A SKYTOWER ON THE ATLANTIC OCEAN BEACH IN DAYTONA BEACH, FLORIDA, EVER EMANATED FROM THE PETITIONER CITY OF DAYTONA BEACH.

POINT II

THE DOCTRINE OF COMPARATIVE INJURY AND BALANCE OF CONVENIENCE AND OR THE DOCTRINE OF LACHES OR ESTOPPEL IS NOT JUSTIFIED AS A DEFENSE TO THE PETITIONERS.

POINT III

THE PUBLIC HAS ACQUIRED RIGHTS TO THE ATLANTIC OCEAN BEACH AREA INVOLVED IN THIS CAUSE BY VIRTUE OF PRESCRIPTION OR BY THE COMMON LAW DOCTRINE OF CUSTOM.

ARGUMENT

POINT I

SUMMARY JUDGMENT ENTERED BY THE CIRCUIT COURT AND AFFIRMED BY THE FIRST DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED BY THE SUPREME COURT IN THAT NO LAWFUL AUTHORITY FOR THE CONSTRUCTION OF A SKYTOWER ON THE ATLANTIC OCEAN BEACH IN DAYTONA BEACH, FLORIDA, EVER EMANATED FROM THE PETITIONER CITY OF DAYTONA BEACH.

It is one of the Respondents' contentions that the City of Daytona Beach acted contrary to law in granting the Skytower to be constructed.

The Charter Laws of the City of Daytona Beach being the basic Charter Act, known as Chapter 67-1274, Laws of 1967, approved by the Governor and filed with the Secretary of State on July 12, 1967, provide, in part, as follows:

Sub-Pt. A, Sec. 19. ENACTMENT OF ORDINANCES AND RESOLUTIONS:

(a) In addition to other acts required by the law or by specific provision of this Charter to be done by ordinance, those acts of the City Commission shall be done by ordinance which: (Emphasis added)(R-473)

(8) Amend or repeal any ordinance previously adopted, except as otherwise provided herein with respect to repeal of ordinances reconsidered under the referendum powers. (Emphasis added)(R-473)

It is the contention of Respondents that the City of Daytona Beach acted contrary to the City Charter in adopting Resolution 69-165 and issuing building permit 9518 without taking appropriate action to change existing

ordinances concerning the building line, bulkhead line, and ordinance regulating the height restriction of observation towers.

The Supreme Court of Florida in case of City of Coral Gables v. City of Miami Beach, et al, 190 So. 427, upheld the principal of law that a municipal ordinance cannot be repealed by a mere resolution, and to accomplish such a repeal a new ordinance must be passed.

19 R. D. L. p. 901

An act that is required to be accompllshed by ordinance may not be accomplished by resolution. A resolution cannot be substituted for, and have the force and effect of, an ordinance, nor can a resolution supply initial authority which is required to be vested by ordinance.

Brown v. St. Petersburg.
153 So. 141

A resolution is ordinarily of a temporary character, whereas an ordinance prescribed a permanent rule of conduct or government.

If the organic law requires an act to be done by ordinance, or if such requirement is implied by necessary inference, a resolution is not sufficient.

Certain Lots, Inc., vs. Town of Monticello, 159 Fla. 134; 31 So. 2d 905

Further Section 7 of Sub-Pt. A of the City Charter provided as follows: (R-472)

(n) BUILDINGS

(1) Power to regulate generally: For the purpose of promoting health, safety, morals or the general welfare of the community, the city commission is hereby empowered to regulate the height, number of stories and size of buildings, signs and other structures; the kind of materials of which they may be constructed; the general appearance of such buildings or structures; the percentage of lot that may be occupied; the size of yards, courts and other open spaces; the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes; and to establish setback building lines. (Emphasis added).

(4) passage, etc., of regulations; notice and hearings. The city commission of the City of Daytona Beach, Florida, shall provide for the manner in which such regulations and restrictions, kind of materials to be used, and the boundaries of such districts shall be determined, established and enforced, and from time to time amended, supplemented or changed. However, no such regulation, restriction or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least ten (10) days before such public hearing is held a notice of the time and place of such hearing shall be published one time in a newspaper of general circulation in the City of Daytona Beach. (Emphasis added)

The City of Daytona Beach passed and adopted Resolution 69-307 on October 22, 1969, without complying with the above section of its Charter. No public notice was given in a newspaper of general circulation of at least 10 days indicating that a public hearing would be held to consider the subject matter involved.

Where city commission did not comply with notice and public hearing provisions of City Charter.... such ordinance .... was invalid.

Ellison v. City of Fort Lauderdale, 183 So. 2d 193

It is submitted that the City of Daytona Beach cannot do indirectly what is required to be done directly. Therefore, if the City sought to do by resolution that which should be done by ordinance, the required procedure under its Charter and general law must be followed.

It is commonly required by charter provisions that ordinances be published in some manner within the municipality. Such a requirement is mandatory, and unless an ordinance is published in accordance with the requirement, it is void.

Carlton v. Jones, 158 So. 170

There is no question that the purpose of Resolution 69-307 was to make valid Resolution 69-165 which, on its face, affirmatively shows an improper delegation of legislative authority to the legal department. Therefore, the validity of Resolution 69-165 must fall or stand on the efficacy and legality of Resolution 69-307.

The Florida Constitution, Article III, LEGISLATURE, Section 6 Laws stated then and now, states as follows:

"Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be

> briefly expressed in the title. No law shall be revised or amended by reference to its title only. Laws to revise or amend shall set out in full the revised or amended act, section, subsection, or paragraph or a subsection .... (Emphasis added)

The title of a legislative act in not a part of the basic act, operative provisions of act being those which follow the enabling clause....

Hillsborough County v. Price
149 So. 2d 912

The enabling clause of 69-307 did no more than to strike the words delegating legislative authority:

> "Subject to the matter being approved from a legal standpoint by our Legal Department".

Certainly the effect of 69-307 could not be retroactive. Resolution 69-307 failed to adopt 69-165 as amended. It appears to have been an act in futility.

Let us pursue the matter further with a question. Can the title of an original invalid resolution be referred to in considering the validity of the title of a resolution which purports to be an amendatory resolution?

This question was answered in the negative in the case of Moore v. State, 41 So. 2d 310.

If indeed Resolution 69-307 is to be considered an amendatory resolut ion, it is invalid because an act which amends an invalid act is void.

Williams v. Dormany,
126 So. 117

POINT II

THE DOCTRINE OF COMPARATIVE INJURY AND BALANCE OF CONVENIENCE AND OR THE DOCTRINE OF LACHES OR ESTOPPEL IS NOT JUSTIFIED AS A DEFENSE TO THE PETITIONERS.

The Petitioners in their brief under Point 2 attempt to make out a case as being entitled to consideration under the doctrine of comparative injury and balance of convenience.

Their initial position is to the effect that a small encroachment into the soft sand area of the public beach should be tolerated and excused since a much greater area of the public beach remains open and free for use by the general public. Certainly such a proposition has no real basis in fact or in law.

If this relative lesser encroachment is in fact legally founded, the Petitioners would be likewise legally entitled to encroach on the entire 102 feet of the riparian right lands extending over the soft sand area to wherever the mean high water line may be established.

Petitioners further make much mention of expending the sum of $125,000.00 to erect the said skytower structure. It is stated in the brief that the capital investment will be recouped over a period of four

or five years. Petitioner Harry Doan testified on February 12, 1970, at the hearing on the question of a temporary injunction that the investment would be paid off within four years. (R-411-412). Petitioners have managed to delay and otherwise prolong the final outcome of this law suit and, consequently, Petitioner Harry Doan and his corporation are in the midst of the fourth year of operations. Therefore, their capital investment is recouped and little or no financial loss will be suffered.

The enforcement of the mandatory injunction will cause virtually no financial loss to Petitioners. These facts clearly demonstrate that the equitable doctrine of comparative injury and balance of convenience should not be applied to this case.

The stipulated statement of facts agreed to by the Petitioners conclusively establishes that the Petitioner Harry Doan and his corporation knowingly assumed the risk in proceeding with construction after litigation was commenced:

> "The parties hereto, to avoid the necessity of presenting extended testimony and evidence and for the purpose of this pending action only, stipulate and agree to the following statement of facts:
>
> 1. That subsequent to the application for a sky tower use and prior to the actual construction of the sky tower facility, Harry Doan, individually, and as President of McMillan and Wright, Inc., was fully aware of certain questions and objections that were being raised as to said sky tower use by the City Attorney, Assistant City Attorney, City Planner, minority members of the

Planning Board and minority member of the City Commission of Daytona Beach, which questions included:

a. The zoning classification of the land in question.
b. The granting of said use East of the bulkhead sea wall and building line of the City of Daytona Beach.
c. The prescriptive rights of the public to the area of the Atlantic Ocean Beach involved.
d. The ownership of the land in question.
e. That the area in question was part of a public highway. (R-229, 230)

Petitioners knew or should have known that public rights had vested to the property in question and their rights could only be in common with the rights acquired by the general public.

Petitioners, along with the hundreds of other oceanfront property owners, have acquiesed to general public use over a period in excess of twenty years to the soft sand area easterly of the established bulkhead line within the corporate limits of the Petitioner City of Daytona Beach.

The facts in this case clearly show that Petitioners are not entitled to the benefit of the doctrine of comparative injury and balance of convenience nor to the doctrine of equitable estoppel or on any other equitable grounds.

Petitioners cite and rely upon several Florida cases in support of their contention that the Court should apply the doctrine of

comparative injury and balance of convenience in the instant case. From a review of these cases, the facts present situations that are far removed from the facts and circumstances existing in the case now before the Court. The encroachments and violations of restrictive covenants in these cases eminate from an initial and basic innocense and good faith, non-existence in the instant case as established by the record and as set forth herein.

Petitioners in their brief to the District Court of Appeal cited the case of Texas Co. v. Town of Miami Springs, 44 So. 2d 808 in support of their defense of equitable estoppel. The facts and circumstances of that case and the instant case are no where similar.

In the Texas case the company was told no existing ordinance prohibited the construction of a service station. The company in good faith submitted plans and specifications to the City, and permits were issued even before the company took title to the property involved. The City later granted renewal of the permits.

Some time later the City passed an ordinance as an "emergency matter" creating a distance of 850 feet between service stations and thereby took measures to enforce said ordinance against the Texas Company.

The Texas Company went to court and obtained a temporary injunction against the City. In the course of the litigation the City was dilatory in filing its answer for fifteen months after filing of the original bill and eleven months after the injunction was entered. During this period of time the Company not only had expended $12,500.00 to purchase the land, but had completed construction of the service station at great cost.

Notwithstanding the above facts, the lower court ruled for the City and dismissed the action of the Texas Company as being without equity.

The Supreme Court reversed the Circuit Court of Dade County and stated that the appellant's cause was pregnant with equity. The court further stated that the whole picture presents a typical case of estoppel.

Everything in the instant case presents a contrary picture; the Petitioner Harry Doan and his corporation assumed the risk involved and are not entitled to the benefit of equity. The actions on the part of the City of Daytona Beach support this conclusion.

The case of Daniel v. Sherrill 48 So. 2d 736 was relied upon by Petitioners in support of their equitable estoppel position. That case involves a title to lands situation. The Supreme Court reversed

a Circuit Judge's decision and held that Plaintiffs (State) were estopped from questioning the validity of tax deeds from the State, under which Plaintiffs claimed title to the land, and the truth of the recitals in such deeds. In no way does the Rule of Law in that case support the cause of the Petitioners.

Petitioners also cited the case of Bregar vs. Britton, 75 So. 2d 753. That involved a zoning matter where the County Commissioners of Hillsborough County changed zoning to allow a Drive-In-Theatre and several months later rescinded the zoning leaving the property in a classification not permitting a Drive-In-Theatre.

The Supreme Court affirmed the Circuit Court in holding that the placing of the property in Zone "A" (Agriculture) is unjust, arbitrary and without regard to the conditions existing and has no relation to public health, safety or welfare.

If the Petitioners rely on that case for support, their cause is not enhanced.

The case of Trustees v. Claughton, 86 So. 2d 775, was relied upon by Petitioners on the question of equitable estoppel. The case involved a quiet title action. The deed from Trustees conveyed small island and some of the submerged lands surrounding it. The issues involved equitable estoppel to some extent and the question of how far the grantee could fill submerged land under the rights vested by the original

deed. The facts in that case and the law applicable is far removed from the issues now before this court.

City of Gainesville v. Bishop, 174 So. 2d 100, was cited by Petitioners in support of their cause in their brief to the District Court of Appeal. The facts and law in that case and in the case of Sakolsky v. City of Coral Gables, 151 So. 2d 433, are distinguishable from the case at bar on at least the following points:

a) There is no question that Petitioners were aware of the matters in dispute before and after issuance of the permit.

b) The facts do not establish that Petitioner Harry Doan and his corporation acted in good faith in proceeding to construct the Skytower in face of a pending law suit and the immediate action taken to the Board of Adjustment challenging the property of the building permit.

c) The zoning classification of the land in question was being challenged.

d) The validity of Zoning Resolutions 69-165 and 69-307 was questioned.

e) The interpretation of Zoning Ordinance 67-200 was involved.

f) The violation of bulkhead line adopted by Ordinance 53-159 was involved.

g) The violation of building line established by existing ordinance of the City was involved.

h) The interpretation of City Charter provisions relevant and material to the issues was involved.

i) The interpretation of the Acts of the Legislature establishing the Atlantic Ocean Beach as a public highway between the low and high water mark was involved.

j) The question of whether the Atlantic Ocean Beach land East of the bulkhead line became a public highway by virtue of more than four years maintenance by the City.

k) Whether a prescriptive right had been acquired by the public to the land in question was involved.

l) Whether public rights had been acquired to the soft sand area of the Atlantic Ocean Beach by common law doctrine of custom was involved.

POINT III

THE PUBLIC HAS ACQUIRED RIGHTS TO THE ATLANTIC OCEAN BEACH AREA INVOLVED IN THIS CAUSE BY VIRTUE OF PRESCRIPTION OR BY THE COMMON LAW DOCTRINE OF CUSTOM.

A. PRESCRIPTION

Florida courts have recognized that an easement for a public right may be acquired by prescription and that the elements for this acquistion are identical to those for roads or highways (1 Fla. Jur. Adv. Poss., Sec. 54; Miami Beach v. Undercliff Realty & Invest. Co., 21 So. 2d 783; Miami Beach v. Miami Beach Improv. Co., 14 So. 2d 172). Both of the above cited cases recognized the prescriptive right theory but in both cases the evidence was held insufficient to establish public prescription. It is significant that in both cases evidence was adduced showing the City of Miami Beach to have recognized the riparian owners claims.

Later Florida cases have been more definitive on the nature of prescriptive right acquisition. In Downing v. Bird (100 So. 2d 75), the Supreme Court of Florida speaking through Mr. Justice O'Connell compared the theory to adverse possession and set forth the elements in the following language:

> "While there are slight differences in the essentials of the two actions, they are not great. In acquiring title by adverse possession, there must of course be "possession".
>
> In acquiring a prescriptive right this element is use of the privilege, without actual possession. Further, to acquire title the possession must be exclusive, while with a prescriptive right the use may be in common with the owner, or the public. "

The Court in that case stated that there is nothing to show that the use was so continuous, uninterupted, open and notorious as to impute to the owner of the lands that the public was exercising the privilege under a claim of right adverse to the owner.

The case of Zetrouer v. Zetrouer, reported in 103 So. 626 used language indicating that continuous and uninterupted use of land alone would be sufficient to create a prescriptive right and that it might not be necessary that the use be adverse. (Emphasis added)

The case of Hunt Land Holding Company v. Schramn, (121 So. 2d 697) has further defined in detail the nature of the evidence necessary to prove acquisition of prescriptive rights. The language of the opinion in holding that a prescriptive right for a drainage easement had been shown is pertinent:

> "Declarations or assertions by a claimant are not essential to possession or to sue under claim of right; rather, the adverse character of possession or use

> is a question discoverable and determinable from all the circumstances of the case. Stetson v. Youngquist, 1926, 76 Mont. 600 248 p. 196.
>
> Thus we see that the presumption of permissive use may be overcome by knowledge imputed to the owner of adverse use by the party claiming the prescriptive right, that it is not necessary that this be done by declaration or assertions but it may be effectuated by use inconsistent with the owner's use and enjoyment of his lands, and, further, that the use need not be exclusive but may be in common with the owner or the public."

That case held that evidence of forty-five years continuous use without objection is sufficient evidence to establish prescriptive right.

B. COMMON LAW DOCTRINE OF CUSTOM

The case before this Court presents a question of great public importance. This case like the recent Supreme Court of Oregon (Dec. 1969) case involves the dry-sand or soft-sand area along an ocean shore. The land area has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited.

The Oregon case is almost identical to the subject case from a factual standpoint. In the Oregon case, an owner of a tourist facility on the oceanfront was enjoined from constructing fences or other im-

provements in the dry-sand area between the sixteen foot elevation contour line (vegetation line) and the ordinary (mean) high tide line of the Pacific Ocean.

The issue in the Oregon case was whether the State had the power to prevent defendant landowners from enclosing the dry-sand area contained within the legal description of their oceanfront property.

The main theory of the State's case was:

> "The landowner's record title to the disputed area is encumbered by a superior right in the public to go upon and enjoy the land for recreational purposes."

It is Respondents' position that a like theory is present in the instant case. We submit and contend that the Oregon case strongly supports the position of Respondents in the case now before the Court.

The people of Florida would welcome a landmark decision upholding the rights of the public to go upon and enjoy the beaches for recreational purposes.

Justice Denecke of the Oregon Supreme Court concurred specially and based the public's right upon the following factors:

> (1) long usage by the public of the dry sands area, not necessarily on all the Oregon beaches, but wherever the public uses the beach;

(2) a universal and long held belief by the public in the public's right to such use;

(3) long and universal acquiescence by the upland owners in such public use; and

(4) the extreme desirability to the public of the right to the use of the dry sands.

State ex rel Thornton v. Hay 462 P. 2d 671

This same combination of facts exist in the present case and therefore would justify and support a similar ruling by this Court.

ADOPTION OF BRIEFS

The Respondents, Tona-Rama, Inc., a Florida corporation, and J. Donald Jarrett and Elmo D. Jarrett, adopt and include herein all points and arguments contained in the brief of the Trustees of the Internal Improvement Trust Fund and the State of Florida, and the amicus curiae briefs filed by the Sierra Club and Barry Lessinger, Esquire, on behalf of Coastal Concern.

CONCLUSION

Petitioner Harry Doan and his corporation were put on notice from the time their request first was considered by the City Planning Board through the issuance of a building permit that the use and City's authority granting same were being questioned.

Petitioners disregarded the law suit and proceeded with the construction of the Skytower full speed ahead. Apparently, petitioners operated on the premise that once the structure is completed - either the opposition will lose interest or the Courts will somehow allow the the structure to stand.

The facts in this case establish that the City acted contrary to law in allowing the Skytower structure to be located some sixty-five feet Easterly of the seawall-bulkhead line upon the Atlantic Ocean Beach proper.

The facts further establish that the use by the general public has been so open, visible, continuous, uninterrupted and notorious as to impute to the appellants that the public was exercising the privilege under a claim of right adverse to any interest Harry Doan and his corporation may have to the beach land in question.

The city has for more than 20 years openly improved, posted

City signs, provided life guards, and routinely graded and maintained the beach, and the public has daily used the beach. There is no suggestion in the Record that anyone's permission was sought or given; rather, the public used the land under a claim of right.

If encroachments such as the Skytower use are permitted, the public rights to the World's Most Famous Beach would erode and cease to exist.

The decision of the Circuit Court and of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the above Respondent's Brief were furnished by mail this 27th day of April, 1973, to J. Lewis Hall, Esquire, Post Office Box 1228, Tallahassee, Florida; to Isham W. Adams, Esquire, 121 Broadway, Daytona Beach, Florida; to Barry Scott Richard, Esquire, Assistant Attorney General, Capitol Building, Tallahassee, Florida; and to James R. McAtte, Esquire, 28 W. Government Street, Pensacola, Florida.

Anthony J. Grezik