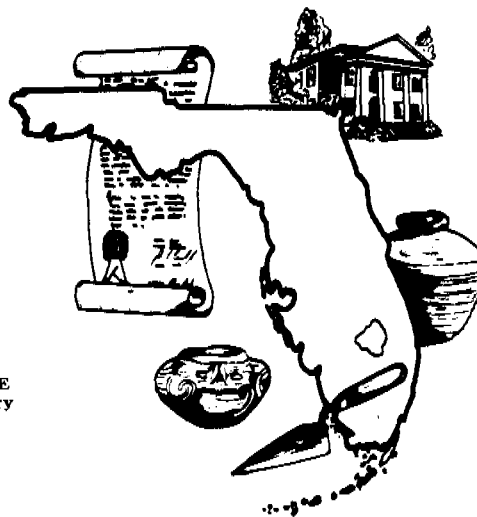


PETITION

FOR CERTIORARI

STATE OF FLORIDA
DEPARTMENT OF STATE
Division of Archives, History
and Records Management



DETERMINATION OF JURE MAXIMUM OF TWENTY MINUTES TO THE
CERTIORARI SIDE

IN THE SUPREME COURT

THE CITY OF DAYTONA BEACH, a municipal)
corporation organized and existing un-)
der 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;)
J. DONALD JARRETT; and ELMO D. JARRETT,)

Respondents,)

vs.)

THE STATE OF FLORIDA,)
Intervenor.)

43352
FILED

FEB 6 1973

SID J. WHITE
CLERK SUPREME COURT

By *[Signature]*
Chief Deputy Clerk

PETITION FOR WRIT OF CERTIORARI TO THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

Petitioners, THE CITY OF DAYTONA BEACH, a municipal corporation, McMILLAN AND WRIGHT, INC., a Florida corporation, and HARRY DOAN, jointly and severally, present this a petition for writ of certiorari and state:

1. Petitioners seek to have reviewed a decision of the District Court of Appeal, First District, dated the 31st day of August, 1972, and filed in the records of said District Court on the 31st day of August, 1972, in Minute Book 6, page 193, as modified by the opinion and decision of said District Court on rehearing, dated the 23rd day of January, 1973, and filed in the records of said District Court on the 23rd day of January, 1973, in Minute Book 6, page 293.
2. This petition is presented under and pursuant to Article 5, Section/B(3) of the Florida Constitution, and Rule 4.5c of the Florida Appellate Rules.

3. This petition is accompanied by a certified copy of the certificate of the First District Court of Appeal certifying its decision to this court as one passing upon a question of great public interest within the meaning of Article 5, Section B(3) of the Florida Constitution, and a conformed copy of the decision certified.

The following are the facts of the case:

A. In October of 1969, the City of Daytona Beach under and pursuant to its comprehensive zoning ordinance (1) issued to petitioners, McMillan and Wright, Inc. and Harry Doan, a permit to erect an observation tower to be operated in connection with and as a part of said petitioners' ocean pier recreational facilities (2). Before issuing such permit the City of Daytona Beach obtained an opinion from the State Attorney General and the Executive Director of the Board of Trustees of the Internal Improvement Trust Fund confirming (3) its legal authority to issue the same .

B. Following soil test borings and the moving of construction equipment to the site, Tona-Rama, Inc., the operator of an observation tower in the immediate vicinity, instituted suit in the Circuit Court of Volusia County seeking to enjoin the construction of the competing tower (4) .

-
- (1) See Ordinance 67-200, Zoning Ordinance of the City of Daytona Beach, Florida, included in the record.
(2) TR 64,399,401,408
(3) TR 111-113
(4) TR 337

C. On leave of court the State of Florida by and through Stephen Boyles as State Attorney of the Seventh Judicial Circuit, intervened and sought a temporary injunction prohibiting construction of the tower contending that (1) the tower was being constructed oceanward of the mean highwater mark, (2) the area where the tower was being erected was a public highway by legal enactment, and (3) the City of Daytona Beach on behalf of the State of Florida had possessed and used said lands where the tower was being constructed, for more than 20 years and by reason thereof had acquired prescriptive rights which legally prohibited the city from granting the permit (5). Following an extended hearing such application for temporary injunctive relief was denied (6) and the erection of the tower pursuant to contractual commitment (7) proceeded to completion (8) at a cost exceeding \$175,000.00 (9).

D. On pre-trial conference counsel for the respective parties stipulated to facts and the admission of exhibits which clearly established that the easternmost part of the base of the tower is substantially (more than 70 feet) above the mean high waters of the Atlantic Ocean (10). It was further stipulated between the State of Florida (the Board of Trustees of the Internal Improvement Trust Fund having adopted the same) (11) and all defendants that the evidence given on the state's application for temporary injunction be transcribed and that such evidence and the other stipulated facts constituted the state's case as to alleged prescriptive rights (12).

(5) TR 83

(6) TR 101-104

(7) TR 410,411, Defendant's Exhibits 4 and 6, and TR 225 and exhibits therein referred to.

(8) Stipulated Exhibits A1, A2, A3 and A4

(9) TR 414, defendant's Exhibits 4, 5, 6 and 7

(10) TR226, 227, Exhibit A-16

(11) TR 199

(12) TR 230

E. The remaining plaintiffs filed affidavits in support of their motion for summary judgment; the burden of these several affidavits is to the effect that members of the public have used the general area where the base of the tower is located for more than twenty years for sunbathing, picnicking, playing ball and frolicking, walking or running to and from the Atlantic Ocean waters, and parking of vehicles (13) .

F. Harry Doan, whose testimony was a part of the evidence received on the state's application for a temporary injunction, testified on February 13, 1970, that he had been connected with the pier in one capacity or another for over ten years (14) ; that he purchased all the stock of McMillan and Wright, Inc. approximately three years before (15) ; that in addition to fishing he utilized the pier for holding summer teenage dances, offering helicopter rides and has built and operates a sky ride over the pier (16) .

G. Mr. Doan in his testimony admitted that the public has over the years made some use of the pier property in the general area where the base of the tower is located but never any use objectionable to him (17) . He testified that he on occasions when adding pilings or washing down the pier would ask the people in the area to move and always received their cooperation (18) ; that the property was policed and on occasions he found it necessary to forceably eject undesirables (19) . He further testified that the Daytona Beach Police maintained a sign prohibiting parking within 75 feet of the pier but that

(13) TR 483-489
(14) TR 295
(15) TR 394
(16) TR 399,405

(17) TR 401,407
(18) TR 402,405
(19) TR 403

he did not object to their doing so since it did not interfere in any way with the operation of his businesses conducted upon the property (20) .

H. Within the corporate limits of the City of Daytona Beach the area between the bulkhead walls or high sand dunes and the mean highwater line comprises many acres. Of this the base of the tower in question occupies a circle of 17 or 18 feet in diameter (21) . It is an integrated part of the pier recreational facilities located in the only area of the city zoned "Amusement Entertainment" where rides, games and other attractions designed to promote the tourist industry are provided (22) .

I. The affidavit of Merle M. Keller for the purposes of summary judgment establishes that persons occupying the beach in the vicinity of the pier at a time when activities in connection with the pier required the use of that particular portion of said beach did upon request remove themselves from the area so that such activities could be maintained, and further that the tower structure does not interfere with the customary use of the Atlantic Ocean beach in the area of the pier where the base of the tower is located (23) .

4. On the foregoing facts the trial court, without giving consideration to the doctrine of relative convenience for taking any evidence relating to the ability of petitioners to remove the concrete tower base or the cost incident thereto,

(20) TR 406


(21) TR 19

(22) Ordinance 67-100, zoning ordinance of the City of Daytona Beach, included in the record; Defendant's Exhibit No. 1

(23) TR 408-428, 565

entered a summary final judgment mandatorily enjoining petitioners to remove the tower and restore the area to its former condition. This judgment was affirmed by the District Court of Appeal in the attached opinion. On petition for rehearing the District Court sought to limit its original decision and certified to this Court the importance of its decision. Petitioners seek certiorari to challenge the numerous novel legal principles announced by the District Court of Appeal and pray for relief from a summary judgment mandatorily requiring the demolishing of a structure built on private property by the property owner, said injunction being based on the proposition that permissive use of the property has given the whole world prescriptive rights in the property superior to and exclusive of the owner's private property rights. Such introduces a new principle of law which if upheld will require the owners of beach property or other property where any limited public use is permitted to prohibit any governmental agency from regulating traffic, keeping the peace, or invoking any sanitary measures like placing a trash barrel thereon.

WHEREFORE, The decision hereby sought to be reviewed being erroneous, petitioners request this Court to grant a writ of certiorari and enter its order quashing said decision and granting such other and further relief as shall seem right and proper to the Court.


J. LEWIS HALL
Post Office Box 1228
Tallahassee, Florida 32302

ISHAM W. ADAMS
121 Broadway
Daytona Beach, Florida

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing petition for writ of certiorari to the District Court of Appeal, First District, has been furnished to Anthony J. Grezik, 326 South Grandview Avenue, Daytona Beach, Florida, and to Barry Scott Richard, Deputy Attorney General, The Capitol, Tallahassee, Florida, by mail this 6 day of February, 1973.



Attorney

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1973

THE CITY OF DAYTONA BEACH,
etc., et al.,

§

Appellants,

-vs-

§

CASE NO. P-335

TONA-RAMA, INC., etc.,
et al.,

§

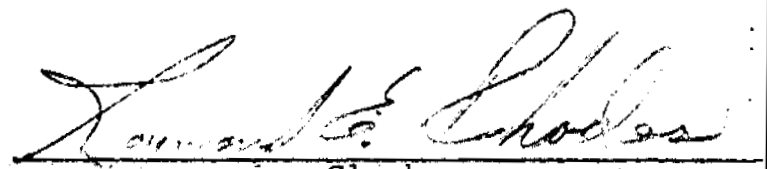
Appellees.

§

C E R T I F I C A T E

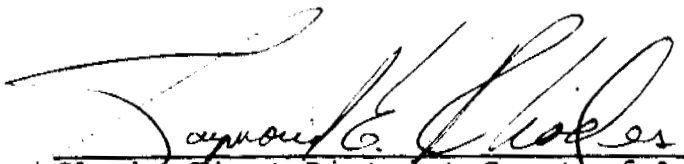
This Court having rendered its decision and filed its opinion in the above entitled cause on the 31st day of August, 1972 and its opinion on petition for rehearing on the 23rd day of January, 1973, does hereby determine and certify that said decision is one which passes upon a question of great public interest as contemplated by Section 4 (2), Article V, Constitution of Florida.

WITNESS the Honorable Sam Spector, Chief Judge, and Seal of the Court this 30th day of January, A. D. 1973.


Clerk

A True Copy

ATTEST:


Clerk, First District Court of Appeal
Tallahassee, Florida

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JULY TERM, A. D. 1972

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, :

Appellants, :

v. :

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

Appellees, :

v. :

THE STATE OF FLORIDA, :

Intervenor, :

NOT FINAL UNTIL TIME
EXPIRES TO FILE REHEARING
PETITION AND DISPOSITION
THEREOF IF FILED,

CASE NO. P-335

Opinion filed August 31, 1972.

An Appeal from the Circuit Court for Volusia County.
P. B. Revels, Judge.

Isham W. Adams, for Appellants,

Anthony J. Grezik, of Grezik and Johnson, for Appellees,

Robert L. Shevin, Attorney General, and Barry Scott Richard,
Assistant Attorney General, for Intervenor.

WIGGINTON, J.

Appellants seek review of a summary final judgment rendered in an
action brought by appellees for declaratory and injunctive relief. It is contended
on appeal that the pleadings, affidavits, depositions, exhibits, and other

evidence in the file create genuine issues of material facts which may be resolved only upon a trial of the cause and not disposed of summarily by the judgment rendered herein.

The primary issue delineated by the pleadings calls for a judicial declaration as to the ownership of a parcel of land forming a part of the Atlantic Ocean beach and consisting of the soft sand area lying easterly of the established bulkhead line paralleling the beach on the west and the mean high water mark of the ocean which forms the border of the soft sand area on the east. The parcel in question is approximately 150 feet deep east and west and is adjacent to and southerly of an existing pier extending into the ocean. The soft sand area of the beach does not support vegetation and, although not normally covered by tidal action of the ocean, is occasionally covered by the sea during hurricanes, northeastern windstorms and extreme high tides.

As the purported record title owner of the parcel of land in question, appellants McMillan and Wright, Inc., applied to the City of Daytona Beach for a building permit authorizing it to construct an observation tower to be operated in connection with and as a part of its pier recreational facilities. The location of the tower is immediately south of and adjacent to the existing pier and within the soft sand area of the beach. After much deliberation and an extensive investigation of the legal aspects of the application, a resolution was adopted by the City approving the application and authorizing the issuance of the requested permit.

Objection to the construction of the observation tower and a challenge to the City's right to grant a building permit for such construction were promptly registered by appellees as citizens and taxpayers of the community. After test borings were made but before construction of the tower was commenced, this action was instituted seeking declaratory relief as to ownership of the land on

which appellants planned to construct the tower and an injunction to restrain any further action by appellants in the furtherance of its construction plans. After issue was joined on the pleadings, extensive discovery proceedings were had by which the depositions of many citizens, both interested and disinterested, were taken. Pretrial conferences were held and voluminous exhibits introduced pertinent to the issues raised for adjudication. Both sides filed motions for summary judgment supported by further affidavit proof.

A fair and objective consideration of all the evidence before the trial court establishes the following undisputed facts. For more than twenty years prior to the institution of this action the general public visiting the ocean beach area had actually, continuously, and uninterruptedly used and enjoyed the soft sand area of the beach involved in this proceeding as a thoroughfare, for sunbathing, picnicking, frolicking, running of dune buggies, parking, and generally as a recreation area and playground. The public's use of the area in question for the purposes hereinabove stated was open, notorious, visible, and adverse under an apparent claim of right and without material challenge or interference by anyone purporting to be the owner of the land. The City of Daytona Beach has constantly policed the area for the purpose of keeping it clear of trash and rubbish and for preserving order among the users of the beach; has controlled automobile traffic using the hard sand area of the beach and enforced a prohibition against parking by vehicles on the area in question; and has otherwise exercised the police power of the City over the area for the convenience, comfort, and general welfare of all persons using and enjoying the beach area.

Appellants, purporting to be the record title owners of the parcel of land in dispute, testified that the public's use of the soft sand area owned by them was not inconsistent with nor did it adversely affect their use of the parcel in the operation of their pier so they had no reason to prohibit or interfere with the public's use of the area during the preceding years. They testified also that

in washing down the pier or replacing piling from time to time they did exercise the authority of requiring people in the area to move back a safe distance so as not to interfere with this work.

From these facts the trial court found that there had accrued in favor of the public a prescriptive right to an easement for thoroughfares, bathing, recreation, and playground purposes in and over the soft sand area of the beach lying between the bulkhead line on the west and the high water mark on the east. Based upon such findings the trial court concluded that, because of the existence of such prescriptive right, the City of Daytona Beach had no lawful authority to issue a building permit authorizing appellants, McMillan and Wright, Inc., to construct on the soft sand area any permanent structure in conflict with the public right. The court therefore mandatorily enjoined McMillan and Wright, Inc., to remove the skytower built by it on the soft sand area during the pendency of this litigation and to restore the land to its original status as it existed prior to the commencement of such construction.

We have carefully considered the totality of the evidence which was before the trial court in its consideration of the motion for summary judgment filed by the respective parties. Although there appear several instances of disputed facts in the affidavits and depositions filed in the cause, such issues are more colorable than real and are not sufficiently substantial to create an issue which must necessarily be resolved by trial. The undisputed evidence supports the findings made by the trial court, and appellants have failed to demonstrate that such findings are either erroneous or constitute an abuse of discretion. It is our view that the sporadic exercise of authority and dominion by the owners over the parcel in question was not sufficient to preserve their rights as against the prescriptive rights which accrued to the benefit of the public by its use of the beach area.

Appellants further contend that the trial court applied to the facts found by it in this case incorrect principles of law when it concluded that there had accrued to the public a prescriptive right to the soft sand area of the beach involved in this case. With this contention we are unable to agree. In the cases of *City of Miami Beach v. Miami Beach Improvement Co.* (1) and *City of Miami Beach v. Undercliff Realty & Investment Co.*, (2) the Supreme Court of Florida recognized that under proper factual circumstances the public may acquire a prescriptive right in beach or oceanfront land as against the rights of the record title holder.

In setting forth the elements necessary to be proved in order to establish a prescriptive right in land, the Supreme Court in *Downing v. Bird* (3) said:

"In either prescription or adverse possession, the right is acquired only by actual, continuous, uninterrupted use by the claimant of the lands of another, for a prescribed period. In addition the use must be adverse under claim of right and must either be with the knowledge of the owner or so open, notorious, and visible that knowledge of the use by and adverse claim of the claimant is imputed to the owner. In both rights the use or possession must be inconsistent with the owner's use and enjoyment of his lands and must not be a permissive use, for the use must be such that the owner has a right to a legal action to stop it, such as an action for trespass or ejection.

"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."

(1) *City of Miami Beach v. Miami Beach Improvement Co.*, (Fla. 1943) 14 So. 2d 172.

(2) *City of Miami Beach v. Undercliff Realty & Investment Co.*, (Fla. 1945) 21 So. 2d 783.

(3) *Downing v. Bird*, (Fla. 1958) 100 So. 2d 57, 64, 65.

Based upon the foregoing authorities, we conclude that the trial court applied correct principles of law to the facts found by it in holding that the public has acquired a prescriptive right to the continued use and enjoyment of the soft sand area constituting the parcel of land involved in this case and that appellant City of Daytona Beach was without lawful authority to grant to appellant, McMillan and Wright, Inc., as owners of the land, a building permit to construct the observation tower which forms the basis of this dispute.

During the course of our consideration this court became concerned with whether the following adjudicatory provision of the judgment appealed was impermissibly broad, to wit:

"(3) That the Defendant City of Daytona Beach, Florida, is hereby enjoined from authorizing or purporting to authorize any person, firm, or corporation to build or construct any permanent structure on any of the lands described in paragraph three of Plaintiff State of Florida's cross complaint."

Upon further study we have concluded that the quoted provision of the judgment is not so sweeping in its terms as to prevent appellant City of Daytona Beach from exercising supervisory jurisdiction over the soft sand area of the beach within its corporate limits in the proper exercise of its police power. Within the narrow limits of its authority, the City is empowered to build or construct on the area in question structures such as lifeguard towers, public sanitation facilities and the like as in its discretion will be in the public interest and not inconsistent with the prescriptive easement vested in the public generally.

The judgment appealed is affirmed.

SPECTOR, Chief Judge, and JOHNSON, J., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1973.

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, :

Appellants, :

v. : CASE NO. P-355

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

Appellees, :

v. :

THE STATE OF FLORIDA, :

Intervenor. :

Opinion Filed January 23, 1973.

An Appeal from the Circuit Court for Volusia County.
P. B. Revels, Judge.

Isham W. Adams, for Appellants.

Anthony J. Grezik of Grezik & Johnson, for Appellees.

Robert L. Shevin, Attorney General, and Barry Scott Richard,
Assistant Attorney General, for Intervenor.

ON PETITION FOR REHEARING

SPECTOR, Chief Judge.

Appellants have filed a timely petition for rehearing by
which they urge this court to recede from our earlier decision
affirming the trial court. Alternatively, they ask that we
certify the decision to the Supreme Court of Florida as one

passing upon a question of great public interest within the meaning of Article V, Section 4(2), Florida Constitution.

While the factual circumstances of this case require adherence to our initial decision, we deem it necessary to clarify our opinion lest it be construed as lending the approval of this court to all of the theories argued by appellees in their brief in support of the trial court's judgment.

In its brief, the appellee Board of Trustees of Internal Improvement Trust Fund advanced the following argument in support of the judgment reviewed herein:

"There has been a growing concern recently in coastline areas to secure public access to beaches and other coastal areas. The public's rights for the use and enjoyment of land are expanding, partly due to growing judicial recognition of the need to preserve beaches for public recreation. This is evidenced by recent decisions by the California and Oregon Supreme Courts. See, *Gion v. Santa Cruz*, 2 Cal. 2d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); *State ex. rel. Thornton v. Hay*, 462 P.2d 671 (1969).

"The public possesses property rights in nearly all the coastal tidelands through either state ownership or public rights to use privately owned coastal property. There exist three methods by which the public has been permitted to acquire and/or maintain legal right of access to beaches and other recreational areas, none of which require any 'adverse' use by members of the public in the strict sense of the term."

We now expressly reject the contention embodied in the foregoing excerpts from the appellees' brief. Were we to accept such notions, it would amount to expropriation of private property without compensation by sheer judicial fiat. Our initial decision herein was and is in no way influenced by the appellees' notions that the need to preserve beaches for public recreation in any way authorizes the taking of such beaches from their lawful owners.

One of the cases relied on by appellees, State ex rel. Thornton v. Hay, 462 P.2d 671 (Or., 1969), indicates that in 1967 the Oregon State Assembly, in response to "public debate and political activity", enacted legislation by which it was sought to establish as the public policy of that state the very concepts urged by the appellees in the quoted excerpt from their brief. The Oregon legislation reads as follows:

"ORS 390.610 (1) The Legislative Assembly hereby declares it is the public policy of the State of Oregon to forever preserve and maintain the sovereignty of the state heretofore existing over the seashore and ocean beaches of the state from the Columbia River on the North to the Oregon-California line on the South so that the public may have the free and uninterrupted use thereof.

"(2) The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of lands abutting, adjacent and contiguous to the public highways and state recreation areas and recognizes, further, that where such use has been sufficient to create easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public easements as a permanent part of Oregon's recreational resources.

"(3) Accordingly, the Legislative Assembly hereby declares that all public rights and easements in those lands described in subsection (2) of this section are confirmed and declared vested exclusively in the State of Oregon and shall be held and administered in the same manner as those lands described in ORS 390.720.

" * * * ."

Even though the above statute had been enacted by the legislature, the Oregon Attorney General conceded, with the court's approval, that "such legislation cannot divest a person of his rights in land, Hughes v. Washington, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967), and that the defendants' record title, which includes the dry-sand area, extends seaward to the ordinary or mean high-tide line." State ex rel. Thornton v. Hay, supra, at p. 675.

We deem it important to emphasize that our decision is not the product of any new legal principle. The concept of prescriptive easements is one long recognized by the courts of this and other jurisdictions. In *Zetrouer v. Zetrouer*, 89 Fla. 253, 103 So. 625, 626, the late Mr. Justice Terrell, speaking for the court, said:

"Where the common law obtains, 20 years' continuous and uninterrupted use has always created a prescriptive right as well in the public as private individuals. Such a right once obtained is valid and may be enjoyed to the same extent as if a grant existed, it being the legal intendment that its use was originally founded upon such a right. . . .

"Prescription is a mode of acquiring title to property by immemorial or long-continued enjoyment. It refers to personal usage restricted to the claimant and his ancestors or grantors. The original theory was that the right claimed must have been enjoyed beyond the period of the memory of man, which for a long time in England went back to the time of Richard I. To avoid the necessity of proving such long duration a custom arose of allowing a presumption of a grant on proof of usage for a long term of years, which is now regulated by statute in most states."

Thus, it is by virtue of this ancient doctrine that the public's right to a prescriptive easement has arisen in the beach area involved. The nature and extent of use by the public cannot be denied. It has been used by a multitude of people for many, many years. It has been regularly patrolled by police in Daytona Beach. The city has installed garbage and trash barrels along the beach. The record even shows that the city has installed showers for use of the bathing public on the easterly side of the seawall. The extensive use of the beach by such huge numbers of bathers clearly supports the trial court's finding that a prescriptive easement exists here.

Not all use of beaches or shorelines gives rise to a prescriptive easement. Neither occasional use by a large number of bathers nor frequent or even constant use by a smaller number

of bathers gives rise to a prescriptive right in the public to use privately owned beaches.

There are many beaches along our entire shoreline that are resorted to by local residents and visitors alike without giving rise to prescriptive easements. It is only when the use during the prescribed period is so multitudinous that the facilities of local governmental agencies must be put into play to regulate traffic, keep the peace and invoke sanitary measures that it can be said that the public has acquired a prescriptive right to use privately owned beaches. These elements and circumstances were found to exist in the case at bar by the trial court.

We share appellees' concern with the problems posed by the development of our privately owned shorelines. Nonetheless they are privately owned. Confiscation is not permitted under the state or federal constitutions, *Hughes v. Washington*, supra.

As clarified above, we adhere to our initial opinion.

Our decision affirming the trial court's judgment is one which passes upon a question of great public interest within the meaning of Article V, Section 4(2), Florida Constitution, and we hereby certify this decision to the Supreme Court of Florida pursuant thereto.

WIGGINTON and JOHNSON, JJ., CONCUR.

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

FILED

FEB 6 1973

SID J. WHITE
CLERK SUPREME COURT

By _____
Chief Deputy Clerk

CASE NO. P-335

#43352

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,)

Appellants,)

vs.)

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

Appellees,)

vs.)

THE STATE OF FLORIDA,)

Intervenor.)

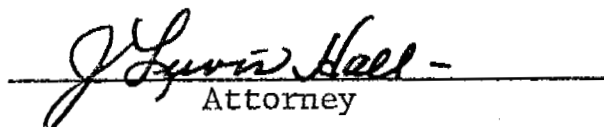
CERTIFICATE OF FILING
PETITION FOR CERTIORARI

I DO CERTIFY that a petition for writ of certiorari,
a copy of which is attached hereto as Exhibit "A", has been
filed in the Supreme Court of Florida, this 6 day of
February, 1973.



ISHAM W. ADAMS
121 Broadway
Daytona Beach, Florida
Attorney for Appellants

I HEREBY CERTIFY that a true copy of the foregoing
has been furnished to Anthony J. Grezik, 326 South Grandview
Avenue, Daytona Beach, Florida, and to Barry Scott Richard,
Deputy Attorney General, The Capitol, Tallahassee, Florida,
by mail this 6 day of February, 1973.



Attorney

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1973

TUESDAY, FEBRUARY 13, 1973

THE CITY OF DAYTONA BEACH, ETC.,
ET AL.,

Petitioners,

vs.

TONA-RAMA, INC., ETC., ET AL.,

Respondents.

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ORDER ALLOWING
CERTIORARI

CASE NO. 43,352

The Petition herein for a Writ of Certiorari to the District Court of Appeal, First District of Florida, is granted and the cause is hereby set down for oral argument at 9:30 o'clock a.m. Thursday, April 5, 1973.

A maximum of 20 minutes to the side is allowed but counsel is expected to use only so much of that time as is necessary.

Either side may waive oral argument. If both sides waive oral argument the case will be promptly assigned for decision and the cause expedited.

The time for filing briefs on the merits is set forth in Rule 4.5c(6), F.A.R.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

cc: Honorable Raymond E. Rhodes
Honorable J. Lewis Hall
Honorable Isham W. Adams
Honorable Anthony J. Grezik
Honorable Barry Scott Richard