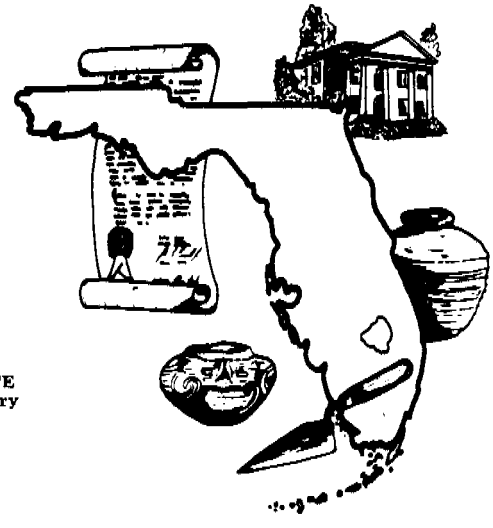
PETITIONER'S BRIEF



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

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; J. DONALD JARRETT; and ELMO D. JARRETT,

Respondents,

-vs-

THE STATE OF FLORIDA,

Intervenor.

CASE NO. 43,352

FILED

APR 2 1973

SID J. WHITE
CLERK SUPREME COURT

By _____ Chief Deputy Clerk

BRIEF OF PETITIONERS

ISHAM W. ADAMS
121 Broadway
Daytona Beach, Florida 32018

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

ATTORNEYS FOR PETITIONERS

I N D E X

CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

This suit was brought by Tona-Rama, Inc., operator of a recreational facility in Daytona Beach, Florida, against McMillan and Wright, Inc., the owner of a competitive recreational facility, Harry Doan, sole owner of stock in McMillan and Wright, Inc., and the City of Daytona Beach. The Complaint alleged that the City had unlawfully issued permit to McMillan and Wright for construction of an observation tower on land owned by the State of Florida, used as a public highway and to which the public had acquired exclusive prescriptive rights for recreational purposes, all of which was adverse to interest of Tona-Rama, Inc. Later the State of Florida intervened as party plaintiff.

Mandatory injunction was entered requiring McMillan and Wright to remove observation tower which had been constructed at a cost in excess of $125,000.00, and occupied approximately 225 to 230 feet of the 15,300 feet to which McMillan and Wright had record title.

The District Court of Appeal affirmed.

In this brief we will refer to Tona-Rama, Inc., as plaintiff or plaintiff-competitor, and to the State as State or plaintiff State and will refer to the City of Daytona Beach as defendant City or City and will refer to defendants

McMillan and Wright as McMillan and Wright or as owner.

Reference to the record will be as follows:

1. Citations to the record will be (R. _____)

2. Stipulated facts may be also cited as (Stip. _____)

3. Exhibits will be referred to by number or letter and appropriately identified.

HISTORY OF THE CASE

Tona-Rama, Inc., plaintiff below and respondent herein, commenced this action against McMillan and Wright and its principal officer for declaratory judgment and injunctive relief to prevent the erection by McMillan and Wright, petitioner herein, of a public observation tower at Daytona Beach, Florida. Plaintiff, respondent herein, operates a public observation tower at Daytona Beach, Florida, and standing to sue was claimed on the basis that competition by McMillan and Wright's observation tower would injure plaintiff's business. (R. 3) McMillan and Wright had theretofore applied for and been granted permits by the City of Daytona Beach to erect an observation tower on lands owned by McMillan and Wright. When an administrative appeal of the granting of permits was rejected by the administrative appellate officer on the grounds that plaintiff did not have standing to bring an appeal, this action was instituted. (R. 1-47)

After commencement of the action, the trial court permitted the State Attorney for the Seventh Circuit to intervene as a plaintiff on behalf of the State of Florida. Claim was made on behalf of the State that the owners of the beachfront land in question had no right to erect the observation tower. (R. 70)

Motion for preliminary injunction to halt construction of the observation tower came on for evidentiary hearing before the trial judge, following which an order denying preliminary injunction was entered on the ground that clear factual evidence of the plaintiff's claimed rights had not been presented. (R. 73) Later, the evidence adduced at the preliminary injunction hearing, together with certain affidavits, became the basis for summary judgment motions by plaintiff and the intervenors. Cross-motions were filed by the property owners. The trial judge entered summary judgment on behalf of plaintiff and intervenors, adjudging that the property owner must dismantle the observation tower, and must never erect any structure on its beach property thereafter. (R. 574)

Appeal was taken from the summary judgment, and the opinion affirming that judgment (after opinion on rehearing petition) is here on certiorari, certified as a case presenting a question of great public interest.

STATEMENT OF THE FACTS

McMillan and Wright, Inc., a corporation, is record title owner of certain waterfront property in Daytona Beach, Florida, and for more than sixty five years has operated on said property an ocean pier extending 1,050 feet over the Atlantic Ocean (R. 392), as a recreation center and tourist attraction, offering and providing such attractions as fishing space, helicopter flights, dances and skylift. (R. 395, 399)

The tract or parcel of land to which McMillan and Wright has record title and upon which the pier begins extends 102 feet north and south along the ocean front and approximately 150 feet landward of the mean high water mark. (R. 226, 400)

This area of approximately 15,300 square feet is an area of dry sand and is covered by water only on rare occasions during extremely high tide and during hurricanes. (Stip. R. 226)

It is on this area that the owner secured permit for and has constructed the observation tower that precipitated this litigation. (R. 227)

The circular foundation of the tower is 17 feet in diameter and the diameter of the tower is 4 feet (R. 438) and thus occupies an area of approximately 225-230 square

feet of the 15,300 square feet of land to which McMillan and Wright holds record title. The observation tower is an integral part of the pier and can only be entered from the pier. (R. 408)

Oceanward and easterly of the dry sand area is the foreshore, that is, the area between the high and low water marks and is designated herein as the hard or wet sand area. (R. 226-227)

On October 23, 1969, the City of Daytona Beach issued building permit to owner, McMillan and Wright, Inc., for construction of an observation tower. (R. 220)

This permit was issued after public hearings and after the City Attorney had consulted and exchanged correspondence with Honorable James W. Apthorp, Executive Director of the Board of Trustees, Internal Improvement Fund of the State of Florida, and Honorable Earl Faircloth, Attorney General of the State of Florida, both of which officials informed the City Attorney in writing that the Trustees had no authority in the matter since the proposed tower was landward of the mean high water mark and that the City of Daytona Beach had jurisdiction to regulate and license the observation tower as an addition to the existing pier. (R. 111, 112-113, 220)

Tona-Rama, Inc., a corporation, operated an observation tower near the site of the pier of McMillan and Wright,

which corporation had protested issuance of the permit to McMillan and Wright filed complaint generally alleging that the construction of the tower by McMillan and Wright would adversely affect the interests of Tona-Rama, Inc. (R. 3); that the site of the tower was a public highway (R. 9) and that by continuous use of the property for more than twenty years the public had acquired an exclusive prescriptive right to the use of the land of McMillan and Wright. (R. 10)

At the time of service of process herein on McMillan and Wright, work in connection with the erection of the tower had progressed to completion of test borings and other arrangements. (Stip. R. 225)

Thereafter, on or about January 14, 1970, Honorable Stephen L. Boyles, State Attorney, Seventh Judicial Circuit, without authority of the Trustees of the Internal Improvement Fund, or the Governor of Florida, (Stip. R. 221) filed motion in behalf of the State of Florida to intervene in said suit, alleging that: (1) the proposed tower was being constructed on land lying easterly or oceanward of the mean high water mark (R. 72, 101-102), (2) the State of Florida and its people had acquired exclusive prescriptive rights to the lands of McMillan and Wright (R. 71, 102)and (3) the land on which the tower was being constructed was a public highway. (R. 71, 102)

Thereafter, plaintiff competitor, Tona-Rama, Inc., filed Amended Complaint (R. 49-65) containing generally the same allegations contained in the original Complaint of unlawful competition (R. 50, 58); that the site of the tower was a public highway (R. 54-55) and the prescriptive rights of the public. (R. 55)

The case came on for hearing before Honorable Horace D. Reigle, Circuit Judge, for temporary injunction, which after full hearing (R. 233-443) was denied, the Court finding that:

1. There was no evidence that the tower had been constructed on land easterly and oceanward of the mean high water mark,

2. The lands designated by statute to be a public highway were lands between the high and low water marks and there was no evidence that the tower was constructed thereon, and

3. The evidence did not justify issuance of temporary mandatory injunction to remove the tower, now substantially completed, on petition of the State, which would cause great damage to the owner for which the state would not be liable by bond or otherwise. (R. 101-104)

Thereafter the tower was completed in accordance with the owner's contracts. (R. 408-410)

By order of this Court, Honorable Percy B. Revels, retired Circuit Judge, was designated to conduct further proceedings herein. (R. 123)

Thereafter, the parties moved for summary judgment and on hearing thereon (R. 494-545), testimony taken on application for temporary injunction (R. 233-443), stipulated facts (R. 219-230) and affidavits (R. 447-489) were submitted and the Court thereafter entered summary judgment in favor of plaintiff competitor and plaintiff State, directing the owner, McMillan and Wright, to remove the observation tower erected by it within ninety (90) days. (R. 574)

The evidence upon which the summary judgment was entered is summarized as follows:

1. Charles E. Jackson, City Manager of Daytona Beach, called by the state as an adverse witness:

Mr. Jackson testified about the location of the pier, and the commencement of work on the observation tower immediately south of the pier; (R. 249) that the hard sand area of Daytona Beach is a public road; (R. 251) and automobile traffic is permitted thereon. (R. 260) The city is involved with the entire beach area around and about the pier in the following ways: (a) the public service department keeps the beach clean by picking up litter between the water's edge and the seawalls, (b) the police department maintains order among those who are using the beach area

for recreational purposes, (c) the city issues beach concession licenses, and (d) the public service department sends motor graders to the Main Street beach approach to keep it free of excess sand accumulations and to maintain the lifeguard tower road. (R. 257-258)

The observation tower does not hinder operation of the lifeguard tower. (R. 280) Vehicular traffic on the beach is supposed to stay on the hard sand area (R. 258) and "dune buggies" or similar vehicles are not supposed to use the soft sand area as a road. (R. 268-269) The police power exercised by the City is to regulate traffic on the roadway and maintain order. (R. 262) The grading done by the City is necessary to road maintenance; the City does not grade the soft sand area. (R. 271-272) The City charges property owners for the refuse collection done by the public service department (R. 273); the pier facility is charged for refuse collection about the premises.

The area in which the observation tower foundation stands was not used for traffic before construction. (R. 280)

2. Mr. William K. Kerris, long time Daytona Beach resident, called by the State:

Mr. Kerris testified that he had lived in the Daytona Beach area since 1921. He has used the beaches at Daytona regularly, and large numbers of other people would

regularly use the beach for recreational purposes. (R. 291-297) The area under the pier was used for recreational purposes during the same period. (R. 297) When asked by what authority he used the beach, Mr. Kerris said, "My father told me to go down to the beach and I went. And the whole beach as far as I am concerned was there and it was there for our use." (R. 297) Mr. Kerris has driven on the beach and has observed others doing so over a long period of time. (R. 302-305) Mr. Kerris said he had never been thrown off the beach, but that he had never interfered with anyone or done anything in a way which might cause him to be unwanted. (R. 309-310) The area in which the tower is constructed was not open to vehicular traffic under normal circumstances, and even after construction commenced on the tower Mr. Kerris continued to use and enjoy the beach. (R. 314-315)

3. Mr. Robert P. Miller, long time Daytona Beach resident, called by the State:

Mr. Miller has been a resident of the Daytona Beach area for 38 years, and is familiar with the beach area and the public's use of it since 1945. (R. 316-320) During that time he observed others using the beach for recreational purposes. (R. 320, 324) When asked by what authority he used the beaches, Mr. Miller replied, "I don't think anyone ever told me that I could or couldn't. Everybody did so I

did." (R. 321) The erection of the tower had not interfered with his use of the beaches. (R. 326) In the course of using the beach Mr. Miller never did anything which would give rise to a request to leave the beach. (R. 327)

4. Mr. Karl H. Lutz, long time Daytona Beach resident, called by the State:

Mr. Lutz resided in Daytona Beach for about 25 years; for 18 of those years he was a traffic lieutenant for the City. (R. 332) The police regulated traffic and parking upon the beach area east of the seawall in the subject area. (R. 335) Mr. Lutz testified that people used the beaches during the 18 years that he was a traffic lieutenant. (R. 336) The area of soft sand adjacent to the pier was not used customarily for vehicular traffic. (R. 337)

5. Mr. William M. Thames, long time Daytona Beach resident, called by the State:

Mr. Thames testified that he had lived in Ormond Beach for the prior 6½ years; that he had lived in the Daytona Beach area intermittently for a number of years. (R. 240-241) He could not testify about beach area use for 20 years next preceding the action, however. He said that, to his observation, people had used the beach for recreation purposes throughout that time. (R. 243-248) During this time, Mr. Thames used the beaches as a citizen, and because he considered

them public property. (R. 248) Mr. Thames did not testify whether he considered the soft sand area as public property, as distinguished from the sovereignty lands which lie eastwart of the mean high water mark.

6. Mr. Russell Calvin Smith, Director of Public Service, City of Daytona Beach, called allegedly as an adverse witness by the State:

Mr. Smith testified that he had been in the Daytona Beach area for 17 years, (R. 353) and that he had been Director of Public Service of the City of Daytona Beach for a short period of time. He testified that he had observed people using the Atlantic Ocean for swimming and the hard and soft sand areas for sunbathing. (R. 356) He said that the City undertook to pick up trash on the entire beach area (R. 355) but that some public labor and some privately contracted labor was used for such purposes and the City does its best "to stay off of private property for litter control." (R. 359) The City does some grading on the beach area (R. 357), but grading is normally done on the public highway areas.(R. 362) The area in question has not been graded, to the best of Mr. Smith's knowledge. (R. 363)

The City maintains trash barrels on the beach at 250 foot intervals. (R. 360) These are placed on the soft sand area, so that high tides do not take them away. (R. 355)

Mr. Smith testified that he did not know whether any trash barrel was located on the property owned by McMillan and Wright. (R. 360)

7. Mr. Fred I. Holmes, Plans Examiner and Deputy Building official of Daytona Beach, called by the State:

Mr. Holmes testified that a permit was issued by the City of Daytona Beach for the construction of the observation tower in question. (R. 369)

8. Mr. Stephen L. Boyles, State's Attorney for the Seventh Judicial Circuit of Florida, called as an adverse witness by the defendants:

Mr. Boyles testified that as attorney for the State he had no knowledge or evidence that the observation tower was being constructed east or oceanward of the mean high water mark of the Atlantic Ocean. (R. 379, 386)

9. Mr. Harry Sterner Doan, stockholder of McMillan and Wright, called by the defendants:

Mr. Doan is the sole stockholder of the company which owns the ocean pier at Daytona Beach. (R. 393-394) The pier was built in 1904 (Stip., R. 221); it extends from the present bulkhead 1,050 feet eastward into the Atlantic Ocean; is constructed on wooden piling and built in "bins." (R. 392)

The ocean pier is a business operation. Helicopter

rides are sold from the pier roof, teenage dances are promoted during the summer, a cable skylift is operated there, fishing space is for sale and the observation tower business operates there. (R. 399) The pier and the property on which it is located has been used continuously by McMillan and Wright for business purposes. (R. 404-405) In connection therewith, McMillan and Wright has permitted persons to use the beach area under the pier for recreational purposes. (R. 402) This use was permissive by McMillan and Wright, and has never been objected to by the company except when necessary in conjunction with maintenance of the pier or with maintenance of order. (R. 402-403) Parking regulation about the pier is not objectionable to McMillan and Wright. (R. 406)

At the time of the preliminary injunction hearing, the observation tower was constructed and substantially completed. (R. 407) It can be entered only from the pier and is physically a part of the pier. (R. 408)

Before constructing the observation tower, McMillan and Wright made application to the duly constituted authorities of the City of Daytona Beach to erect the tower. (R. 408) After lengthy proceedings, the City of Daytona Beach issued a permit for the construction of the observation tower. (R. 409) After the permits were issued, the tower was constructed at a cost of over $125,000.00. (R. 409)

The contract documents, and the documents evidencing the State's initiatives to tax the tower, are in the record. (R. 411-416)

Mr. Doan testified that the tower foundation was seventeen feet in diameter (17'), and the needle was four feet in diameter (4'). (R. 439) The needle is immediately adjacent to the pier; part of the foundation is underneath the pier. (R. 439-440)

The preliminary injunction was denied because this evidence did not demonstrate a clear case of public prescriptive rights in the property of McMillan and Wright. (R. 101-104) This same evidence was presented in support of plaintiff's motion for summary judgment, together with certain affidavits described hereafter. The preliminary injunction testimony was stipulated into evidence for purposes of the summary judgment motions, but with the proviso that the parties reserved rights to rebut certain evidence and to conduct further direct and cross-examination of the witnesses for the purposes of clarifying the testimony. (R. 230)

After Judge Percy B. Revels assumed the case, the plaintiffs filed motions for summary judgment on the "prescriptive rights" theory. (R. 445) These motions were supported by affidavits. (R. 447-489) Defendants moved for summary judgment also. (R. 217) The affidavits filed in

support of the plaintiff's summary judgment motion show:

1. Affidavit of J. Donald Jarrett, majority stockholder of plaintiff (R. 447-475):

Mr. Jarrett's affidavit stated that his company, Tona-Rama, operated an observation tower at the Daytona Beach Boardwalk area, located west of the bulkhead line; and that the McMillan and Wright observation tower was constructed east of the bulkhead line in the same vicinity. He identified what he said was a certified copy of the City of Daytona Beach charter provisions declaring that Daytona Beach from high to low water marks of the Atlantic Ocean was a public highway.

Mr. Jarrett's affidavit further stated that he had observed people using the soft sand area of Daytona Beach for recreational purposes for twenty years preceding the affidavit, including the soft sand area on which the McMillan and Wright observation tower has been constructed. Mr. Jarrett reaffirmed the activities of the City of Daytona Beach which were the subject of testimony at the preliminary injunction hearing; and he claimed to swear that the City of Daytona Beach had certain powers to establish a bulkhead line and to zone the ocean pier and lands on which it stood for Amusement-Entertainment (AE). (R. 449, 450)

2. Affidavit of Henry Autry, Chairman of Board of Adjustment (Zoning Appeals) of City of Daytona Beach, filed in support of plaintiff's summary judgment motion:

Mr. Autrey identified himself as Chairman of the Board of Adjustment (Zoning Appeals) of the City of Daytona Beach, and apparently disavowed the authority of the Deputy Building Official involved to deny Tona-Rama's appeal from the granting of permits to McMillan and Wright allowing the latter to construct the observation tower at the ocean pier. Mr. Autry stated that the officials of the Building Department and other city officials in general have always zealously restricted building on the eastern side of the bulkhead line. (R. 477)

Mr. Autrey's affidavit stated that he had observed over the prior twenty five years the use of Daytona Beach by the public for recreational purposes, including the general area where the McMillan and Wright observation tower is now constructed. It also stated that the beach was susceptible to vehicular traffic from ocean to the edge of wet sand areas when unusual tides or storms caused the entire beach to be wet sand. (R. 478)

3. Affidavit of C. Aubrey Vincent, long time Daytona Beach area resident, submitted in support of plaintiff's summary judgment motion: (R. 483-485)

Mr. Vincent's affidavit stated that he has frequently observed over the past twenty five years that people use the Daytona Beaches for recreational purposes, including the general area in which the subject observation tower is constructed. He was City Attorney for two years (1956-58), and affirmed that the City collected refuse from the beach during that time, and that police officers patrolled the beaches to maintain order. His affidavit with regard to the effect of high tides on the beaches is essentially similar to Mr. Autrey's; and he describes certain step accessways between the soft sand area and the Surf Bar in the general vicinity.

4. Affidavit of Karl H. Lutz, long time Daytona Beach area resident, submitted in support of plaintiff's summary judgment motion: (R. 485-487)

Mr. Lutz (who testified at the preliminary injunction hearing) submitted an affidavit which essentially reaffirmed his testimony on public recreational use of the beach. He said he was a policeman at Daytona Beach for twenty two years (1947-1969); during which time he says that he and other policemen policed the entire beach area, including the soft sand area. Mr. Lutz makes the conclusory statement that the entire beach area east of the seawall "was part of the public highway ... of the City of Daytona Beach."

5. Affidavit of Kenneth A. Fluhrer, long time Daytona Beach area resident, submitted in support of plaintiffs' summary judgment motion: (R. 488-489)

Mr. Fluhrer's affidavit stated that he had been a Volusia County resident for thirty four years and a Daytona Beach police officer for eighteen years (1947-1965). Regarding use of the beaches by the public, and patrol of them by the police, this affidavit is substantially identical to Mr. Lutz's affidavit.

It was expressly stipulated that no bulkhead line has been established relating to subject property. (R. 226)

On this record, Judge Revels held that the "prescriptive rights" claim of plaintiffs was established as a matter of undisputed fact, and summary judgment was entered mandatorily enjoining McMillan and Wright to remove the observation tower within ninety (90) days. (R. 571-574.

POINTS INVOLVED

POINT 1

THE EVIDENCE IN THIS CASE SHOWS CONCLUSIVELY THAT THE USE OF PETITIONER'S LAND BY THE PUBLIC WAS CONSISTENT WITH OWNER'S USES AND PURPOSES AND IN NO WAY ADVERSE THERETO.

POINT 2

THE CIRCUIT COURT AND THE DISTRICT COURT OF APPEAL FAILED TO CONSIDER AND GIVE EFFECT TO THE DOCTRINE OF COMPARATIVE INJURY AND BALANCE OF CONVENIENCE.

POINT 3

THE RECORD HEREIN ~~DOES NOT~~ JUSTIFY DISPOSING OF THE ISSUES HEREIN BY SUMMARY JUDGMENT.

A R G U M E N T

POINT 1

THE EVIDENCE IN THIS CASE SHOWS CONCLUSIVELY THAT THE USE OF PETITIONER'S LAND BY THE PUBLIC WAS CONSISTENT WITH OWNER'S USES AND PURPOSES AND IN NO WAY ADVERSE THERETO.

The proceedings in the Circuit Court and in the District Court of Appeal indicate that the issues in this case have been distorted because the lands of McMillan and Wright border on the Atlantic Ocean and of course their oceanward boundary is the average mean high water mark of that body of water, and further distorted by the fact that the foreshore, that is, the land between the high water mark and the low water mark is public land. No one denies these facts, but plaintiffs, according to their contentions in the lower courts, seem to contend that these facts, by some magic beyond the powers of Florida courts yet to perceive, have a special significance in determining the issues in this case, and have the effect of depriving defendant McMillan and Wright and others similarly situated of their property without due process of law.

The contentions of the plaintiff State that the public has property rights in privately owned coastal property were so radical in nature, so invalid in concept and so violative of constitutionsl rights of citizens that the District Court deemed it appropriate to expressly reject and repudiate such contentions.

To put the issues herein in proper focus and perspective, we think it necessary to state that there is no magic, no special considerations, and no overriding principles of law applicable to the issues herein that are different from those considerations and principles of law applicable to any other tract or parcel of land regardless of what may constitute its boundary lines.

The man who owns land adjacent to a public park and operates thereon a business dependent upon patronage of the public and as an incident thereto permits members of the public who are his patrons and customers, or potential patrons and customers, to congregate thereon, park their automobiles and engage in pastimes thereon, all of which increases his profit or potential for profit, does not thereby forfeit his rights of ownership and use of his lands, even though the park may be an added attraction and the congregating of large numbers of people causes extra vigilance on the part of agencies of government in regard to law enforcement and sanitation.

So long as the use of the owner's land by the public is consistent with the use thereof by the owner and is conducive to his own interest and profits, the use by the public is presumed permissive and is entirely lacking in the elements of adversity that are essential to establishment of a public easement against the claim and rights of the owner.

The owner who operates a tourist attraction thrives and prospers in direct proportion to the number of members of the public who are attracted thereto and any added attraction that may exist on or adjacent to the lands of the operator is merely an added inducement to effectuate the purpose and goal of the operator, to-wit: to bring potential customers and patrons to the pay window or cash register of his attraction.

The operator of a drive-in hamburger stand does not lose his rights of ownership to the parking area or the dining facilities on his property simply because his patrons and potential patrons use these facilities, even if, as an incident to public safety, these facilities are patrolled by the police and similarly served by governmental sanitation agencies as an incident to public health.

The whole essence of the situation before this Court - and the whole essence of the law applicable to this situation is that the use by the public of the lands in question was entirely consistent with the owner's use, conducive to his interests and profits and in no wise or in any manner or means adverse to the owner's interest.

The record does not show a single overt act nor demonstrate a course of action or conduct designed to or having the legal effect of notice to the owner that the use of its land was under any claim of right by the public, or any

governmental agencies acting for and in behalf of the public, - but on the other hand the record is replete with evidence of permission or implied permission, and even invitation by the owner to the use of its lands for each and every purpose for which it was used by the public - because every use by the public was in the interest of the owner, contributed to his profits or possibilities of profit, and enhanced the good will and reputation of its attraction.

Undoubtedly, the owner herein has prospered, has afforded the public a variety of entertainment, and has followed business policies acceptable to the public.

Let us suppose, however, that the defendant had pursued policies that restricted the use of its land by the public, imposed regulations that irritated his prospective patrons, and otherwise pursued policies that antagonized the members of the public upon which the success of its business depended. This course of conduct would have afforded owner substantial evidence in this case to resist the contentions of the state and its private competitor, but owner's business would probably be bankrupt.

The owner, however, did not pursue such policy destructive of the good will of the public upon which it depended, but permitted use of its land by the public - limited its use by the public only when necessary for public safety - incurred no ill will by the public and has prospered by patronage of the public - and yet is threatened thereby with the loss of its

lands and great financial injury and damage.

Prior to the decision of the District Court of Appeal in this case, there was no reported court decision in Florida Jurisprudence which held that the public had acquired a prescriptive right in beach areas, although several cases had presented such contentions.

There are cases in this state in which the courts have held, on the facts, that a public prescriptive right in beach areas had not been established. City of Miami Beach v. Miami Beach Improvement Company, 14 So. 2d 172 (Fla. 1943); City of Miami Beach v. Undercliff Realty & Investment Company, 21 So. 2d 781 (Fla. 1945)

It is perhaps for that reason that the District Court relied essentially on Downing v. Bird, 100 So. 2d 57 (Fla. 1958)

That opinion clearly sets forth the principles of law that demonstrate that the public has acquired no prescriptive rights herein which requires McMillan and Wright to dismantle and remove its observation tower. Downing did not involve beachfront property. It involved a claim of prescriptive rights to use a portion of plaintiff's property as a roadway, a use inconsistent with owner's use and adverse to his interests. The property was located in Homestead, Florida, and the controversy arose because the owner's predecessor in title created a dirt road over certain property which provided access to property which was later transferred to

another owner.

Although the third party owner of the parcel to which access was provided had other ways to reach his property, the roadway created by owner's predecessor in title continued to be used. Eventually the City of Homestead paved a substantial portion of the roadway.

Plaintiff brought an action to force removal of the paving and to establish his exclusive ownership of the roadway. As a defense to this action the claim of prescriptive right to the roadway was raised.

The lower court held for the defendant and dismissed the complaint.

On appeal, this Court reversed and held that the right of prescription had not been established on the facts and pleadings.

In reversing, this Court 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 ejectment." (Emphasis supplied.)

The Court also said:

> "Further in either prescription or adverse possession, the use or possession is presumed to be in subordination to the title of the true owner, and with his permission and the burden is on the claimant to prove that the use or possession is adverse. This essential element as well as all others must be proved by clear and positive proof, and cannot be established by loose, uncertain testimony which necessitates resort to mere conjecture." (Emphasis supplied)

The evidence in this case fails to meet this standard. In the face of the legal principle that use or possession is presumed to be in subordination to title and in the face of the undisputed fact that the owner of the pier property permitted use of the property for recreational purposes and in the face of the fact that the pier property was an amusement-entertainment enterprise, the success of which depended on people being in the vicinity for recreational purposes, the plaintiffs'contention that use of the property for recreational purposes was inconsistent with the owner's use and adverse to his interest falls of its own weight.

The clear fact is that the operators of the pier and associated facility encouraged the use of the area for recreational purposes because large groups of recreation minded persons was necessary for the success of the enterprise.

Mr. Doan, executive officer of the owner corporation, did on occasion cause persons to move away from the pier when

necessary to maintain or repair it, and on occasion required persons to be evicted who disrupted the use of the pier for recreational purposes, but undoubtedly on these occasions Mr. Doan effectuated the purposes of the owner as tactfully and diplomatically as possible since it is apparent he did not incur the ill will of any major segment of the public who continued to use the recreational facility of the owner to the extent that it was able to construct the observation tower at a cost in excess of $125,000.00 and anticipated recoup of its capital investment over a period of four or five years. (R. 410)

There is nothing in the record sufficient to overcome the presumption that the use of the soft sand beach area was and is in subordination to the title of the true owner, McMillan and Wright. As above stated, there is no proof whatsoever of a single overt act to put the owner on notice of any adverse claim on the part of the public or any member of it. Nor was the course of conduct on the part of the public generally in frequenting the recreational area operated by owner so inconsistent with the owner's purposes and uses as to constitute legal notice to the owner that his patrons and potential patrons were using his land under claim of right.

We do not dispute the testimony of the half dozen or more witnesses who testified to the use of the owner's land

for recreational purposes. We simply say that such use by the public was entirely consistent with the owner's uses and purposes, conducive to its interests and an essential part of the profitable operation of its business.

The District Court's opinion seems to be that the public acquired a prescriptive right because the area was patrolled by police and the City picked up litter collected in a barrell thereon. It is shown by the record that the owner paid for the collection of litter in connection with its payment for water furnished by the City.

Undoubtedly the police in patrolling the hard sand area which had been declared by statute to be a public highway, occasionally found need in the interest of crowd control and protection of the public highway and in the interest of public safety to patrol at least a portion of owner's property, but there is no evidence whatsoever that any action by any police officer or by any litter collector ever amounted to an overt act or expression that would put the owner on notice that such conduct was under claim of right for and in behalf of the public to use owner's land without its permission, express or implied.

As a matter of fact, the record shows that the City avoided patrolling the dry sand area, avoided the same with its road equipment and refrained as much as possible from collecting litter on private premises. The City attempted

to restrict vehicular traffic to the hard or wet sand area and sought to minimize use of the dry sand area for parking purposes.

In summary, the present case fails to establish a prescriptive right so exclusive as to prohibit the owner from using approximately 225 or 230 feet of its land to add to an already existing structure on the property.

The evidence in this case, when measured by the standard set forth in the Downing case, supra, wholly and totally fails to establish an exclusive prescriptive right in the public to the exclusion of all rights and claims of the owner to its land.

The Circuit Judge found that the public had used the lands of owner for more than twenty years and that such use was open, notorious, continuous and uninterrupted, and that "such use was adverse under claim of right."

The fact that owner conducted a recreational facility on the land; that recovery of its cost of operation and profits depended upon public patronage; that of necessity it desired and encouraged the congregating of people on, near and adjacent to its lands and recreational facility, cast an added burden upon the plaintiffs to establish by clear and convincing proof that at some point, at some time, or in some manner there was some overt act, some condition or situation

that would constitute legal notice to the owner that the members of the public, whose presence and patronage had been encouraged and invited by the owner, had, by some change of attitude or purpose, become a hostile crowd collected on its property with the intent to establish a prescriptive right of use to the exclusion of owner's rights of dominion, possession and use.

The only claim of right asserted was by the witness, Kerriss, who testified that he derived his rights because his father told him he could use the beach; (R. 297) and the witness, Miller, who testified that everyone used the beach so he thought he could; (R. 321); and the witness, Thames who considered the beaches to be public property, (R. 248) although the witness gave no reason for this thought on his part.

This testimony is far short of the requirements of Downing, supra, and clearly comes within that class of testimony designated in Downing as "loose, uncertain testimony which necessitates resort to mere conjecture."

There is no proof that either of these witnesses, or any other person or agency made known the secret and unannounced claims or brought the same to the attention of the owner, until this suit was instituted.

The Circuit Judge did not make a finding that the use

was not permissive, nor did he make a finding that the use by the public was inconsistent with the owner's use, nor did he find the commission of a single act nor a course of conduct by the public so inconsistent with the owner's interest or so adverse and hostile to its ownership as to put the owner on notice that the public was asserting any claim of right to owner's land.

In summary, the judgment of the Circuit Court is as insufficient in law to justify the relief granted as the record is insufficient in fact to support the findings of the Court.

If the judgment entered herein had been filed as a complaint and the relief granted in the judgment had been stated as a prayer to the complaint, the allegations of fact stated therein would not be sufficient to withstand a motion to dismiss on the grounds that the allegations of fact would not justify the relief sought.

We wish to make it abundantly clear that we do not contest the police power of the City of Daytona Beach to regulate conduct of business on the soft sand area, and to decide what business uses may be made thereof. The real issue is whether the courts or the duly constituted authorities of the City of Daytona Beach will henceforth decide what purposes may properly be pursued on the beaches in the jurisdiction of the City.

POINT 2

THE CIRCUIT COURT AND THE DISTRICT COURT OF APPEAL FAILED TO CONSIDER AND GIVE EFFECT TO THE DOCTRINE OF COMPARATIVE INJURY AND BALANCE OF CONVENIENCE.

It is a fundamental rule of justice, inherent in the principles and maxims of equity, that the harsh and drastic writ for mandatory injunction will not issue when the benefits therefrom are wholly disproportionate to the injury or damage that would be caused thereby.

The facts that justify application of the doctrine of comparative injury and balance of convenience to this case are quite simple. The lands of the defendant, McMillan and Wright, Inc., are shown by the record to run 102 feet north and south along the beach and 150 feet east and west, so that the total area owned by McMillan and Wright and claimed by the plaintiffs to be subject to prescriptive use by the public is approximately 15,300 square feet. (R. 226, 400) Of this total of 15,300 square feet, the tower erected by defendant, McMillan and Wright, Inc., uses a portion of this land, circular in shape and only 17 feet in diameter, or a total area of approximately 225 to 230 square feet. (R. 408,438)

It is shown by the record (R. 258, 268-269) that the space occupied by the tower is not used for vehicular traffic

and lies immediately adjacent to and is an integral part of the pier. (R. 408) The ownership, use and dominion of the pier is not in question. The tower has been erected at a cost of more than $125,000.00.

The Circuit Court ordered the tower to be torn down so that the public would have the advantage of the 225 to 230 feet of space now occupied by the tower.

These facts clearly demonstrate that the equitable doctrine of comparative injury and balance of convenience should be applied in this case.

There is, of course, one other factor or element properly to be considered in respect to application of the doctrine of comparative injury and balance of convenience and that is the element of good faith, honest mistake, or in essence the absence of bad faith, wilfulness or wanton disregard of the rights of others.

In the instant case, the record is replete with the good faith efforts of the owner to fully investigate its rights under the law, avoid conflicts and controversy and to peacefully enjoy its property and use the same for the purpose of engaging in a lawful business, to-wit: construction and operation of a recreation facility.

The owner waited until the City secured the opinion of the Attorney General of the State of Florida and letter of disclaimer from the Director of the Internal Improvement Fund

of the State of Florida. Owner secured permit for construction of the tower from the City of Daytona Beach after numerous public hearings and legal opinions rendered in connection therewith.

The owner successfully defended against an attempt for temporary injunction brought by competitive private interests and constructed the tower on lands to which it had record title.

This Court has laid down the general principle governing mandatory injunctions in the case of Johnson v. Killian, 27 So. 2d 345 (Fla. 1946), wherein the Court said:

> "The remedy of injunction is drastic, Seaboard All Florida Railway Company v. Underhill et al., 105 Fla. 409, 141 So. 306, and should be granted only cautiously and sparingly, Willis, et al. v. Hathaway et al., 95 Fla. 608, 117 So. 89; also an injunction will not be granted where there is an adequate remedy at law.
>
> "Mandatory injunctions are looked upon with disfavor, and the courts seem even more reluctant to issue them than prohibitory ones. Allen v. Stowell, et al., 145 Cal. 666, 79 P. 371, 68 L.R.A. 223, 104 Am. St. Rep. 80. One court has announced that relief of this kind 'for the most obvious reasons should be granted only in situations which so clearly call for it as to make its refusal work real and serious hardship and injustice.' Lyons v. Walsh, 92 Conn. 18, 101 A. 488, 490, L.R.A. 1917F, 680." (Emphasis supplied)

In the later case of Loeffler v. Roe, 69 So. 2d 331 (Fla. 1953) this Court, citing Johnson, supra, restated the

doctrine as follows:

> "We make no pretense of prejudging the matter, but it is a fundamental principle of equity that courts will not require the performance of an act where the harm to the person coerced is wholly disproportionate to the benefit to the other party. Johnson v. Killian, 157 Fla. 754, 27 So. 2d 345." (Emphasis supplied)

The two cases, supra, simply follow the doctrine stated in the earlier case of Gibson v. City of Tampa, 154 So. 832 (Fla. 1934), wherein the Court said:

> "A court of equity may properly refuse to grant an injunction when it appears that greater injury and inconvenience will be caused to the defendant by granting the injunction than will be caused to the complainant by refusing it."

Other cases decided by this Court involving mandatory injunctions relating to removal of structures likewise demonstrate the reluctance of this Court to approve such writs, particularly when the benefits are small and the damage to be caused thereby is great.

In the case of Washingtonian Apartments Co. v. Schneider, 75 So. 2d 904 (Fla. 1954), this Court found the facts to be that a structure had been erected closer to adjoining property than was permitted by covenants running with the lands involved and reversed judgment of the circuit court requiring removal of the structure, stating the law to be:

> "Mandatory injunctions are not favored by the courts. Johnson v. Killian, 157 Fla. 754, 27 So. 2d 345. In that case, which resembles the present one, we held that the relative conveniences would be weighed and if it were found that the cost of removal of an encroaching building was great and the corresponding benefit to the adjoining owner small, the mandatory injunction would be denied and the complaining party would be left to his remedy at law." (Emphasis supplied)

The doctrine of comparative injury and balance of convenience has been applied by this Court in cases involving public lands and waters.

In McDowell v. Trustees of the Internal Improvement Fund, 90 So. 2d 715 (Fla. 1956), this Court had before it the fact that a riparian owner had dredged fill from submerged lake botton, the same being sovereignty land, and used it to build a peninsula adjacent to the shoreline. The Circuit Court enjoined further dredging but refused mandatory injunction requiring the riparian owner to remove the peninsula. The Trustees appealed and this Court affirmed the judgment of the Circuit Court refusing the mandatory injunction.

This Court, in refusing mandatory injunctive relief to the Trustees, said:

> "We think that this ruling was within the chancellor's discretion, for mandatory injunctions are viewed with great circumspection by the courts, and an order of the trial court in connection therewith ordinarily will not be disturbed.

In the case of Ortega Co. v. Justiss, 175 So. 2d 554 (DCA 1, 1965), the Court had before it facts involving erection of structures in violation of certain contracts relating thereto. The circuit court denied mandatory injunction. In a thorough and comprehensive opinion, the Court reviewed numerous authorities, affirmed the judgment of the circuit court refusing mandatory injunction, and in summary of the law of Florida, quoted with approval the following:

> "In the subject order transferring the case, the chancellor made extensive findings of fact and applied the doctrine of comparative injury or balance of conveniences as set out in 17 Fla. Jur., Injunctions, Sections 24 and 25, pages 389 and 390, viz:
>
> 'Situations may exist that require application of the principle of balancing the relative conveniences of the parties, the rule being that equity will not require by injunction the performance of an act where the harm to the person coerced is wholly disproportionate to the benefit to the other party, or, indeed, when greater injury and inconvenience will result to the defendant from an injunction than will be caused to the plaintiff by its refusal.
>
> * * * * * * * * * *
>
> 'In view of the drastic character of mandatory injunctions, the rule about balancing the relative conveniences of the parties applies with special force where mandatory injunctive relief is sought. Thus, if the cost of removal of an encroachment is great and the corresponding benefit to the adjoining owner small, such relief will be denied. The complainant will be left to his remedy at law.'"

It is, therefore, apparent that the doctrine of comparative injury and balance of convenience is an integral and inherent part of the law of Florida relating to injunctions, and more particularly to mandatory injunctions.

It is obvious that in addition to the numerous other errors, the Circuit Court and the District Court of Appeal erred grievously in issuing and affirming mandatory injunction which will benefit the public only to the extent of making some 225 to 230 square feet of soft sand available for sunbathing in contrast to the damage and detriment of the owner who is required to destroy a tower at considerable cost which it has erected on its own land at a cost of more than $125,000.00.

We particularly call the Court's attention to the fact that the claim asserted by the plaintiffs is for an easement for use of the beach for entertainment, recreation and pleasure. This is not a case involving title to the lands involved, nor an assertion of claim for a way of necessity.

There are thousands of acres of beach area available to the public in Florida; there are thousands of square feet of beach area available to the public in close proximity to the observation tower erected by owner herein, including some 15,000 square feet of owner's own land.

This is a suit brought by a competitive enterprise to which the great State of Florida has injected its sovereign powers to do battle over some 225 to 230 square feet of the lands of McMillan and Wright. The presence of the state herein may appear to dignify an action to which the doctrine of De minimis non curat lex is clearly applicable and we make this statement with full awareness that such doctrine is not usually applicable to unlawful usurpation of or trespass upon the lands of another.

When the mandatory injunction issued in this case is weighed in the scales of equity - when the excessive damages by loss of a $125,000.00 investment by the owner is contrasted with the benefit to the public of recreational use of some 225 to 230 square feet of beach area - out of literally thousands of acres of beaches available for such use, the absurdity of the judgment herein is readily apparent.

The standard of justice laid down by this Court in Johnson, supra, is that mandatory injunction will not issue unless "its refusal worked real and serious hardship and injustice."

The serious hardship and injustice perceived by the Circuit Court and the District Court was the loss for recreational purposes of some 230 square feet of sandy beach.

When compared with the loss to the owner imposed by the judgment of the Circuit Court and the District Court, it must be said that those Courts apparently conceived the value of the 230 square feet of sandy beach to be of such magnitude as to make the price of land on Wall Street look like the consolation prize at a bingo game conducted for charity at a country carnival.

POINT 3

THE RECORD HEREIN DOES NOT JUSTIFY DISPOSING OF THE ISSUES HEREIN BY SUMMARY JUDGMENT.

We are aware that this Court deems every issue in every case to be of importance in the administration of justice, but we do feel it appropriate to say that the settlement of some issues brought before this Court are more far-reaching in their effect and impact than are other issues.

The issues before this Court are of importance to every riparian landowner in the State of Florida and the decision herein will be of far-reaching effect.

It is axiomatic that summary judgment is proper only in a case in which there is no genuine issue as to any material fact and that movant is entitled to judgment as a matter of law.

Rule 1.510 of the Rules of Civil Procedure prescribed by this Court reflect the philosophy that issues requiring full exploration of the factual situation should not be summarily disposed of.

This philosophy is reflected in the landmark decision of Holl v. Talcott, 191 So. 2d 41 (Fla. 1966).

A movant for summary judgment "has the burden of showing conclusively that genuine issues of material fact do not exist" and that "it must first be determined that the movant

has successfully met his burden of proving a negative, i.e., the non-existence of a genuine issue of material fact."

In our Statement of the Case we have attempted to set forth in detail the proof offered by plaintiffs in support of motion for summary judgment, and while we admit that plaintiffs proved the use by the public of the lands in issue, we submit that the plaintiffs did not carry the burden of proving that such use was not permissive, nor the burden of proving the uses of the public to be inconsistent with the owner's use, nor the burden of proving the use by the public was adverse to the owner's interest, nor the burden of proving some overt act or course of conduct having the legal effect of putting owner on notice of claim of right by or in behalf of the public.

No purpose would be served by repeating in detail the proof offered by plaintiffs in support of summary judgment motions. It in summary consists only of proof of long, continued use by the public of Daytona Beach beaches for recreational purposes; the testimony of three witnesses that they asserted a claim to the beach for reasons that have previously been discussed; that the City of Daytona Beach regulates traffic on the portion of the beach which is a public highway and maintains order generally in the area; that the City collects refuse on the beaches for which it charges, and the City grades the beach roadway (foreshore) and access routes

thereto. This degree of proof leaves gaping holes in the proof necessary to state without equivocation that there are no genuine issues of fact in this case.

In view of the fact that the facility operated by the owner on the property is a recreational facility and that the property of owner was used for recreation purposes by the public, the element of permissiveness presents a real issue that should be explored more fully by full trial.

We submit that in the posture of the case before the Circuit Court the entry of summary judgment on a matter of such vital public interest as presented in this case should not have been disposed of by summary proceedings.

This Court has repeatedly stressed the fact that summary judgment should never be entered if there are genuine issues of material fact and should never be entered when the factual issues are such that inferences of ultimate fact may be properly drawn from evidentiary facts.

In Stephens v. Dichtenmueller, 216 So. 2d 448 (Fla. 1968), Mr. Justice Drew, in a concurring opinion agreed to by a majority of the Court, quoted with approval the language of this Court in National Airlines, Inc. v. Florida Equipment Co. of Miami, 71 So. 2d 741 (Fla. 1954), as follows:

> "'The function of the rule authorizing summary judgments is to avoid the expense and delay of trials when all facts are admitted or when a party is unable to support by any competent evidence a contention of fact.

"'But the facts admitted, in order to justify a summary judgment, must be the ultimate facts as distinguished from evidentiary facts. It not infrequently happens that there is actually no conflict in evidence as to what was done or said, but the inferences of ultimate fact to be drawn from these evidentiary facts may be quite different. It is peculiarly within the province of the jury to draw these inferences and determine the ultimate facts. The constitutional guaranty of the right of trial by jury is respected only when this rule is strictly applied.

"'Of course, a litigant by merely asserting a fact, without any evidence to support it, cannot avoid a summary disposition of his case. Before this phrase of the rule comes into play, the record must show that all evidence which may support that litigant's contentions must be before the Court.'" (Emphasis by the Court)

And quoting from Rivaux v. Florida Power and Light Company, 78 So. 2d 714 (Fla. 1955):

"'The jury system is a sacred part of the American concept of the administration of justice. The right to a jury trial is guaranteed by the Constitution and that right should not be taken from a litigant lightly and never taken from him when there is a genuine issue of a material fact present in a law suit. This Court, and other courts of the land, have upheld the entry of summary judgments in those cases where there is no genuine issue of any material fact and one or the other of the parties is entitled to a judgment as a matter of law. Where that situation appears clearly from the record, it is not a denial of any constitutional right to take the case from the jury because under such facts the Constitution does not guarantee a jury trial. (Emphasis by the Court)

It will thus be observed that this Court is acutely aware that untimely entry of summary judgment, which deprives a party of full development of facts and the inferences of ultimate fact that may be drawn therefrom, is in legal effect, a denial of due process of law guaranteed by the state and federal Constitutions.

In this case where property rights are involved and where the evidentiary facts give rise to many inferences of ultimate fact, it would seem all the more necessary that in the interest of justice and in preservation of owner's rights of due process of law, that summary judgment be denied and trial afforded the owner.

Respectfully submitted,

ISHAM W. ADAMS
121 Broadway
Daytona Beach, Florida

J. Lewis Hall

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

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies hereof have been furnished, by mail, to Grezik and Johnson, 328 South Grandview Avenue, Daytona Beach, Florida, and to Mr. Barry Scott Richard, Deputy Attorney General, The Capitol, Tallahassee, Florida, this 2nd day of April, 1973.

J. Lewis Hall

FILED
MAR 1 1973
SUPREME COURT

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

-vs-

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

Respondents.

CASE NO. 43,352

COME NOW the petitioners herein and move the Court for order approving Stipulation hereto attached, and extending time for filing Petitioners' Brief to and including the 2nd day of April, 1973, and extending time for filing Respondents' Brief to and including the 27th day of April, 1973, and giving Petitioners ten (10) days thereafter in which to file Reply Brief, and re-scheduling oral argument in accordance with the attached Stipulation.

J. LEWIS HALL
Post Office Box 1228
Tallahassee, Florida 32302
OF COUNSEL FOR PETITIONERS

I HEREBY CERTIFY that copies hereof have been furnished, by mail, to Grezik and Johnson, 328 South Grandview Avenue, Daytona Beach, Florida, and to Mr. Barry Scott Richard, Deputy Attorney General, The Capitol, Tallahassee, Florida, this 1 day of March, 1973.

J. Lewis Hall

IN THE SUPREME COURT OF FLORIDA

THE CITY OF DAYTONA BEACH, etc., et al., Petitioners, vs. TONA-RAMA, INC., etc., et al., Respondents.	)	CASE NO. 43,352

STIPULATION EXTENDING TIME
FOR FILING BRIEFS

Subject to the approval of the court the parties hereto, by and through their respective attorneys, stipulate:

1. That the petitioners shall have to and including the 2nd day of April, 1973, in which to file their brief on the merits and the respondents shall have to and including the 27th day of April, 1973, in which to file their brief in opposition, and petitioners shall thereafter have ten days in which to file their reply brief.

2. That oral argument of said cause be reset so as to allow filing of briefs in accordance with this stipulation.

Reset

DATED this 1st day of March, 1973.

J. Lewis Hall -
J. LEWIS HALL
P. O. Drawer 840
Tallahassee, Florida

and

ISHAM W. ADAMS
121 Broadway
Daytona Beach, Florida

Attorneys for Petitioners.

GREZIK AND JOHNSON
328 South Grandview Avenue
Daytona Beach, Florida

By Anthony J. Grezik
Anthony J. Grezik
Attorneys for Tona-Rama, Inc; J. Donald Jarrett and Elmo D. Jarrett

ROBERT L. SHEVIN
Attorney General

By Barry Scott Richard
Barry Scott Richard
Deputy Attorney General
The Capitol, Tallahassee, Florida
Attorneys for State of Florida Board of Trustees of the Internal Improvement Trust Fund; and the State of Florida.