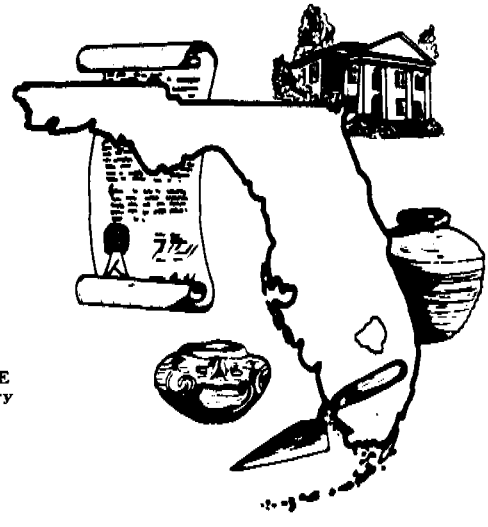
REPLY BRIEF



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,

and

THE STATE OF FLORIDA,

Intervenor.

CASE NO. 43,352

REPLY BRIEF OF PETITIONERS

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I N D E X

AUTHORITIES CITED

Florida Cases

Foreign Cases

PRELIMINARY STATEMENT

This is Reply Brief to the briefs filed by respondent State of Florida and by respondent Tona Rama, Inc., J. Donald Jarrett and Elmo D. Jarrett.

The Statement of Points Involved in both briefs are substantially similar to the Points Involved as stated in our brief and we will therefore present our argument herein under the same Statement of Points Involved as previously stated by us.

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.

Plaintiff State contends that the City of Daytona Beach did not comply with its charter requirements and more specifically contends that permit for construction of the observation tower could be granted only by enactment of an ordinance by the City Commission.

The answer to this argument is that the City Commission in authorizing issuance of the permit acted in accordance with zoning ordinances duly enacted pursuant to charter authority.

The City was vested with zoning powers in its charter. (R. 24)

Pursuant to this charter authority and in full compliance with prescribed procedures, the City enacted a zoning ordinance containing specific provisions for AE District, in which district "ocean pier facilities and observation tower facilities *** and expansion or enlargement of any such uses or facilities." (R. 120)

Subsequently Ordinance 67-200 above described was amended in 1969 by Ordinance 69-103 to authorize construction of giant slide facilities in AE District and to limit height

of observation tower to 150 feet and giant slide height to 50 feet above mean sea level. (R. 40-41)

Ordinance establishing AE Zoning District and adopting map showing ocean pier and lands of McMillan and Wright, Inc., are in the Record, pages 22, 27.

The zoning ordinance prescribes the procedure for application for permit and for granting permit for uses permitted in AE District (R. 121) and this was the procedure followed in issuance of permit for construction of the tower.

Resolution 69-165 of the City Commission, adopted June 18, 1969, recited the application for permit, ten (10) days notice of and holding of public hearing and approved the application, subject only to approval by Legal Department as to legal questions. (R. 110)

After some four months study and consideration by the City Attorney of the legal questions and objections, including conferences and correspondence with the Director of the Trustees of the Internal Improvement Fund and with the Attorney General of the State of Florida, all of which will be discussed more fully in a following section of this Brief, the City Commission by subsequent resolution dated October 22, 1969, amended Resolution 69-165 by deleting the condition of approval of the Legal Department, thus giving unconditional approval to the application for permit to construct the tower. (R. 114)

Thus it clearly appears from the record that the City had charter authority to establish zoning classifications, to prescribe permitted uses in the several zoning districts, and prescribe procedures for administration of the zoning ordinance.

The zoning ordinance was duly enacted, the classifications established, the permitted uses enumerated and the procedures prescribed for implementation of the ordinance.

The action of the City Commission in approving the application was not a legislative matter requiring legislative action by enactment of an ordinance but an administrative action pursuant to an existing ordinance and was appropriately dealt with by resolutions.

The action of the Commission was lawful as to authority, correct as to procedure and proper in the exercise of its discretion.

Plaintiffs rely on the cases of Miami Beach v. Undercliff Realty & Investment Co., 21 So. 2d 783 (Fla. 1945) and Miami Beach v. Miami Beach Improv. Co., 14 So. 2d 172 (Fla. 1943) to establish the proposition that the public may acquire an easement by prescription.

This is not the issue in this case. The issue herein is whether or not the public has acquired prescriptive easement to the owner's land so exclusive as to prevent use of

some 230 square feet of its land for construction of an observation tower as an integral part or enlargement of an existing structure on owner's land.

The two cases above cited lay down the same rules that are set forth in Downing v. Bird, 100 So. 2d 57 (Fla. 1958) which we relied upon in our main brief.

In Miami Beach v. Undercliff, supra, this Court said:

> "It is true that in earlier days preceding the remarkable development of Miami Beach, when it had a small population, many persons used the beach for bathing, sunning and other recreational purposes. The fact that the upland owners did not prevent or object to such use is not sufficient to show that the use was adverse or under claim of right. It has not been shown that there has been an open, notorious, continued and uninterrupted use of the beach by the public, in derogation of the upland proprietors' rights for a period of twenty years, or for any period."

And in Miami Beach v. Miami Beach Improv. Co., supra, this Court said:

> "The use of the property by the public was consistent with appellee's ownership ***."

These two cases lay down the rules that were adhered to in Downing as follows:

Prescriptive right can be acquired only if:

(a) The use is open, notorious, continued and uninterrupted for the period of twenty years or more and

(b) The use is adverse or under claim of right, and

(c) The use is in derogation of and not consistent with owner's interest, and

(d) Mere use of a beach for bathing, sunning and other recretational purposes without prevention or objection by the owner is not sufficient to show that the use was adverse or under claim of right.

Zetrouer v. Zetrouer, 103 So. 2d 626, cited by respondent State simply states that prescriptive rights to roadways may be acquired by open, notorious and continued use for twenty years, and in Hunt Land Holding Company v. Schramn, 121 So. 2d 697, also cited by respondent, the Court stressed the element of knowledge by the owner acquired by such owner by declarations or assertions or by use inconsistent with owner's use and enjoyment of his lands.

Respondents rely upon and quote from numerous cases from other states, Oregon, Texas, Massachusetts, Connecticut and others to support the propositions that the beaches belong to the people to the exclusion of private ownership, that the burden is upon the owner to prove that he objected or prevented use of his lands and similar propositions, all of which are in conflict with Florida decisions.

In Seaway Company v. Attorney General, 375 S. W. 2d 923 (Tex. Civ. App. 1964) cited by respondents, the rule in Texas is stated:

> "Thousands of people are shown to have used the beach, ***. Evidence shows they used it at will without asking permission and there is no evidence of any objection by owners.

The rule is of course exactly opposite to the rule in this state as set forth in Miami Beach v. Undercliff, supra, as follows:

> "The fact that the upland owners did not prevent or object to such use is not sufficient to show that the use was adverse or under claim of right."

The Oregon case, State, ex rel. Thornton v. Hay, 462 P. 2d 671, cited by respondents, lays down a rule that is totally at variance with innumerable decisions of this Court that establish the rule of private ownership to the mean high water mark. The Oregon rule is:

> "The landowner's record title (to dry sand area of beaches) is encumbered by a superior right in the public to go upon and enjoy the land for recreational purposes. (Parenthetical insert supplied)

The contention of the Attorney General for the Oregon rule is buttressed by the argument or observation that the people of Florida would welcome a decision upholding the rights of the people to such beaches for recreational purposes - we have the temerity to suggest that there might be

people who have bought, paid for and improved their beach property which would not be exactly prostrated with joy over such a revolutionary decision and radical departure from our present concept of the rights to private property.

Other cases cited from other jurisdictions contain equally glaring differences and distinctions readily apparent without argument or even comment herein.

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.

Our contention is that the doctrine of comparative injury and balance of convenience is applicable to this case because the benefits to be derived by plaintiffs from the judgment is the making available for recreational purposes some 225 to 230 square feet of sandy beach, but the loss to the owner is some $125,000.00 cost of construction of the tower plus the cost of demolition - or in other words the benefits are wholly disproportionate to the loss that will be sustained under the judgment.

To this plaintiff-respondents present two arguments:

(a) That the owner knew of legal questions and objections to the construction of the tower but nonetheless proceeded with construction, and

(b) That the owner will not suffer the entire loss because it will have recouped a part of the investment through profit in operation of the tower.

We will now discuss these two arguments.

The respondents first contend that the owner knew of the legal questions involved and quote an isolated paragraph

of the stipulation as conclusive proof of the point.

The stipulation relating to the knowledge of owner, McMillan and Wright and Harry Doan, of questions and objections relating to construction of the tower is not evidence of "assumption of risk" or "taking a chance" that plaintiff State and plaintiff competitor would have this Court believe. (PCB 21-22; PSB 17)

The stipulation (Pg. 229-230) does state that the owner knew of questions and objections made after application for permit and the actual beginning of construction of the tower - but what respondents do not include in their argument is the full truth as shown by the entire stipulation and by the record - which truth and facts are that when the questions were raised and objections made the officials of the City of Daytona Beach gave approval for construction of the tower on the condition that the matter be approved from a legal standpoint by the City Legal Department. (R. 110)

Subsequent to such conditional approval on June 10, 1969, the City Attorney carried on correspondence with Mr. Apthorpe, Executive Director of Trustees of the Internal Improvement Fund, and with Mr. Faircloth and held personal conference with Mr. Apthorpe, with which Mr. Faircloth was

familiar (R. 111-113) and received what the City Attorney considered was a clearance of all legal questions and objections so that on October 22, 1969, the City Commission removed the above mentioned condition as to legal approval from the resolution of approval, thus giving unconditional approval for construction (R. 114), which approval was implemented on October 23, 1969, by issuance of building permit. (R. 115)

Certainly the owner was entitled to understand and believe that the questions and objections, of which he had knowledge, had been and were resolved prior to issuance of the permit.

Respondents insinuation that Doan rushed in, got a permit, and started construction in the face of known questions and objections, took a chance, assumed the risk, acted in wanton disregard of public rights, is wholly at variance with the record and stipulated facts. (Stip. pgs. 219-230)

The truth of course is, as shown by the stipulation and record, that the owner waited for advertisement of his application, public hearing thereon, and then waited further time for the City Legal Department to clear up legal questions and objections relating to ownership of the lands, bulkhead lines, zoning classification and prescriptive

rights of the public and final unconditional approval by the Commission, and then, finally, issuance of the permit.

This brings us to the answer to the argument (PCB 7; PSB 22-24) that neither the letter from Mr. Apthorpe nor the letter from Mr. Faircloth constitute authority for the action of the City.

The brief of the State argues that Attorney General Faircloth's letter restricts its coverage to the area between the low water mark and the high water mark (PSB 22-24), and argues that this was not the area upon which the tower was built.

This argument of course contains all the fallacies usually achieved by quoting out of context - a technique long ago discredited by the courts.

The letters of Mr. Apthorpe and Mr. Faircloth must be construed in the light of the entire situation as it existed and with the several questions and objections relating thereto.

The plaintiffs in the Amended Complaint clearly presented the contention that the high water mark was the wall which lies westward or landward of the tower site (R. 55) and the State more expressly alleged in its Motion to intervene that "the construction is upon that portion of said lands ** lying easterly (or oceanward) of the mean

high water mark (R. 72; emphasis and parenthetical insert supplied)

The State also in its Cross-Complaint alleged upon information and belief that all of the lands lying oceanward from the seawall and on which the tower was constructed were sovereignty lands. (R. 83-84)

The purposes of the letters to Mr. Apthorpe and Mr. Faircloth and their letters in reply must be construed in the light of the contentions to be resolved, the questions to be answered and the objections to be ruled upon, and the letters must be construed together.

Mr. Apthorpe's letter makes it clear -

1. No state approved bulkhead line marking the limits of oceanward development is involved.

2. It is his understanding that the tower site is landward of the mean high water mark.

3. The high water mark is the boundary between state and private ownership.

4. The Trustees do not have authority to grant a permit landward of the high water mark.

5. The City of Daytona Beach has jurisdiction over the tower site

It is obvious from this letter that if the tower site is above the high water mark the Trustees had no jurisdiction and that the City did have jurisdiction.

Mr. Faircloth's letter supplements Mrs. Apthorpe's letter and makes clear -

1. That by act of the Legislature (Chapter 67-1274) the City has jurisdiction over that portion of the beach lying between the high and low water marks.

These two letters make it clear that the Director of the State agency charged with preservation and control of state or public lands and the Attorney General of the state informed the City that the City had jurisdiction over the tower site, without regard to the high water mark and if the existing pier is considered a concession, business, etc., the City could regulate and license an addition thereto.

Considering the two letters together, the City Attorney could hardly come to any other opinion than that the City had jurisdiction, that the State was not involved and above all else, that the State asserted no claim of jurisdiction over the matter.

The letters also make it clear that these two state officials were fully advised as to the situation and made no claim of right by or for the State.

We submit that the City Commission had every right to rely upon the letters from Mr. Apthorpe and Mr. Faircloth and issue the permit and that the owner had every right to believe that all questions and objections had

been resolved by the City and the State.

In the State's brief our brief is quoted (pgs. 20-21) as stating that the capital investment of $125,000.00 tower construction costs will be recouped in four or five years. Actually we said anticipated recoup in four or five years - and even that was an overstatement of the record because Mr. Doan in his testimony only said that he had the hope that he might pay off the investment in four years. (R. 410) Thus through the alchemy of lawyers' advocacy the hope of Mr. Doan in the record is transmuted into positive fact in the State's brief.

What has happened - what the profits have been - what the losses will be under the judgment of the Circuit Court is, at this time - in the absence of further fact finding procedures - pure speculation - and there is nothing so uncertain of realization as the hopes of investers and the speculation and conjecture of lawyers.

Thus it is that the facts established by the record are that the benefits of the judgment to the plaintiffs is the rescue of some 230 square feet of beach sand and the loss to the owner is the $125,000.00 paid for construction of the tower plus the costs of demolition of the tower.

We submit that on the basis of the record facts and the applicable law of Florida as shown by the authorities

cited and quoted in our main brief, the owner is entitled to the benefits of 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.

The Summary Judgment entered herein was contrary to law and violative of the Rules of Civil Procedure governing such judgments and the limitations thereon imposed by this Court in numerous decisions.

In Miami Beach v. Undercliff, 21 So. 2d 783 (quoted in previous section of this brief), this Court said:

> "*** many persons used the beach for bathing, swimming and other recreation purposes. The fact that the upland owners did not prevent or object to such use is not sufficient to show that the use was adverse or under claim of right." (Emphasis supplied)

Summary judgment was entered herein solely on the basis of the showing that the public had in fact used the beach here involved for more than twenty years.

This fact is insufficient to support the judgment.

Relevant and material facts shown by this record that were ignored or overlooked are:

1. That the owner operated on its tract or parcel of land a recreational facility and that it was in the interest of the owner that persons bent on recreation congregate on or near its facility.

2. There is absolutely no evidence in this record of any overt act or direct expression of claim of right made to the owner to put in on notice of adverse claim.

3. There is absolutely no evidence in this record of any use of owner's land that was inconsistent with the owner's interest.

4. There was positive proof that on occasion the owner had exercised his right of ownership by having undesirable members of the public removed from the pier and pier property. (R. 403)

5. The only evidence of any member of the public using the property under claim of "right" is the testimony of three witnesses, one of whom said he claimed such right because his father told him he could use it; (R. 297) another witness who claimed his "right" because everyone used the beach he thought he could (R. 321), and one witness who used it because he thought it was public property (R. 248) - <u>None of these claims were communicated to owner</u>.

It is therefore apparent that the evidence as to material issues is entirely insufficient to sustain the summary judgment.

The key issue herein is whether or not there is

proof of adverse use or proof of notice to the owner that the use by the public was adverse and hostile.

The test of adverse use and notice thereof is whether or not the use was so inconsistent with the owner's use and enjoyment of the land, or so inconsistent with owner's interest as to put the owner on notice of the adverse use and claim.

The key fact in this record, and it is uncontradicted, is that the owner operated a recreational facility on its property.

This fact enhances the presumption that the use by the public for recreational purposes was permissive.

This fact establishes that the use by the public was consistent with the owner's interest - whose business flourished in direct proportion to the number of people attracted to the facility and the vicinity of the facility.

This fact further raises the logical inference that the use by the public was by invitation, express or implied, and that the members of the public using the beach were in fact invitees.

Certainly the owner who operates an attraction on his property impliedly extends an invitation to the public to patronize it - and when the public responds in a manner consistent with the use and interest of the owner, the

burden falls all the more heavily on claimants of prescriptive use to establish both the adverse use and the notice thereof to the owner.

The evidence in this case wholly fails of sufficiency to carry the burden of adverse use and notice to the owner.

The judgment herein should be reversed with directions to dismiss the Amended Complaint.

Respectfully submitted,

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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 10th day of May, 1973.

J. Lewis Hall