City of Naples

City Council Minutes

Regular Meeting Dec. 7, 1983

City Council Chambers
735 Eighth Street South
Naples, Florida 33940

CITY COUNCIL MINUTES
Regular Meeting

City Council Chambers
735 Eighth Street South
Naples, Florida 33940

Time 9:05 a.m.

Date December 7, 1983

Mayor Billick called the meeting to order and presided as Chairman.

ROLL CALL: Present: Stanley R. Billick ITEM 2
Mayor

R. B. Anderson
Lyle S. Richardson
Harry Rothchild
Wade H. Schroeder
Randolph I. Thornton
Kenneth A. Wood
Councilmen

Also present:
Franklin C. Jones, City Manager
David W. Rynders, City Attorney
Mark Wiltsie, Assistant to the City Manager
Roger J. Barry, Community Development Director
Bill Hanley, Finance Director
John R. McCord, City Engineer
Steve Cramer, Chief Planner
William Savidge, Public Works Director
Ellen P. Marshall, Deputy Clerk

See Attachment #1 - Supplemental Attendance list

INVOCATION - Reverend Hixon Helton ITEM 1
First Baptist Church

ANNOUCEMENTS ITEM 3

MAYOR BILLICK - noted that he had signed a proclamation on behalf of the City commending Dr. Kennedy and the Career and College Counseling Center. ITEM 3-a

CITY MANAGER JONES - noted the publicizing of the change in the treatment of water using chloramine to reduce trihalomethanes. ITEM 3-b

----------CONSENT AGENDA----------

Mayor Billick noted the following items to be considered under the Consent Agenda.

APPPROVAL OF MINUTES - 11/15/83 - Workshop Meeting ITEM 4
11/16/83 - Regular Meeting

---RESOLUTION 83-4377 ITEM 5

A RESOLUTION AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE AN EASEMENT TO FLORIDA POWER & LIGHT COMPANY FOR THE PURPOSE OF CONSTRUCTING AND MAINTAINING ELECTRIC UTILITY FACILITIES TO PROVIDE SERVICE TO THE NEWLY CONSTRUCTED PUBLIC WORKS UTILITY CENTER AND EQUIPMENT MAINTENANCE SHOP ADDITION; AND PROVIDING AN EFFECTIVE DATE.

Title not read.

---RESOLUTION 83-4378 ITEM 6

A RESOLUTION REAPPOINTING AN EMPLOYEE OF THE FIRE DEPARTMENT TO SERVE ON THE BOARD OF TRUSTEES OF THE CITY OF NAPLES FIREMEN'S RETIREMENT TRUST FUND; AND PROVIDING AN EFFECTIVE DATE.

Title not read.

MOTION: To APPROVE the minutes and ADOPT the resolutions as presented.

----------END CONSENT AGENDA----------

COUNCIL MEMBERS	MOTION	SECOND	VOTE YES	VOTE NO	ABSENT
Anderson				CONSENSUS	
Richardson					
Rothchild					
Schroeder	X				
Thornton		X			
Wood					
Billick					

COUNCIL MEMBERS	MOTION	SECOND	VOTE YES	VOTE NO	ABSENT

----------ADVERTISED PUBLIC HEARINGS----------

---RESOLUTION 83-____ ITEM 7

A RESOLUTION GRANTING A VARIANCE FROM THE MOST RESTRICTIVE COASTAL CONSTRUCTION SETBACK LINE ESTABLISHED BY SECTION 7-41 OF THE CODE OF ORDINANCES OF THE CITY OF NAPLES TO PERMIT CONSTRUCTION OF A SINGLE FAMILY RESIDENCE APPROXIMATELY 100 FEET NORTH OF THE NORTH RIGHT-OF-WAY LINE OF TWELFTH AVENUE SOUTH AT THE BEACH; AND PROVIDING AN EFFECTIVE DATE.

Title read by City Attorney Rynders.

Public Hearing: Opened - 9:26 a.m. Closed - CONTINUED TO DECEMBER 21,1983

Attorney L. N. Ingram distributed a letter and material referring to possible prescriptive rights the public-at-large and the City of Naples may have on the real property concerned (Attachment #2). Mr. Rothchild asked for a recess in order to study the material and Mr. Schroeder suggested postponing the entire matter for two weeks. After discussion, it was the consensus of Council to hear discussion on the matter and then to decide whether or not to take immediate action. Attorney Paul Schryver stated his objection to not having been given a copy of Attorney Ingram's material prior to this meeting. Mr. Thornton moved to adopt the resolution, seconded by Mr. Richardson. Joel Metts, representing the petitioner, outlined the petitioner's proposal to move his existing home from 3rd Street and 11th Avenue South to the property in question. Attorney Shcryver noted a 1982 letter from Reid Silverboard, then the City's Chief Planner, that noted that the petition was not in contravention of the City's coastal control line. Attorney Ingram reviewed the material he had distributed, citing the possibility of the existence of prescriptive rights and mentioned that aerial photographs of the area, which spanned a period of years, were available from the Department of Agriculture. Mr. Schroeder suggested that City Attorney Rynders check into what the City had to do to determine if there were any prescriptive rights involved. Petitioner Kenney Schryver outlined his reasons for wanting to move his existing home to the property in question. Mr. Rothchild questioned this justification. Herbert Johnson, resident, noted his objection to approval based on the fact that his recent petition had been denied and said he felt the petitions were similar. He also stated that he did not feel there had been sufficient notice to adjacent property owners. Ed McMahon, president of the Old Naples Association, read a statement indicating the reasons for the opposition of the Association's Board of Directors (Attachment #3). City Attorney Rynders explained that variances were always granted by resolution and that this matter did not fall under zoning, but under the coastal control line regulations. Mrs. Sydney Combs, Mrs. Wells Kinkaid, Alan Mengel, and Dr. Anne Cook, all residents of the area under consideration, voiced their objections to approval of the petition. Most of them also complained that they had not been notified of this hearing. Lee Potter Smith, local resident, stated his opinion that an 8000 square foot house could be built on the property in question without any variances. James Hirst, engineer representing the petitioner, explained the coastal control lines and the reasons for their existence. He stated his feeling that they were mainly used as guidelines and were not inflexible. Jim Weigel, resident of Old Naples, stated that in his opinion as a registered appraiser the proposal of the petitioner would lower the value of the adjacent homes.

---RESOLUTION 83-____ (Cont) ITEM 7 Cont)

Mayor Billick suggested that the petitioner attempt to reach a better understanding with the adjacent property owners and that Council not take any action at this meeting, thereby compensating the neighbors for any lack of notice they felt had occurred. He also asked City Attorney Rynders to address the prescriptive rights at the next meeting. Mr. Thornton withdrew his motion to approve the resolution and Mr. Richardson withdrew his second.

MOTION: To CONTINUE the Public Hearing at the next regular meeting in two weeks.

*** *** ***

BREAK: Recessed - 11:15 a.m. Reconvened - 11:28 a.m.
Mr. Anderson was not present.

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SECOND READING OF ORDINANCES ITEM 8

---ORDINANCE 83-4379 ITEM 8-a

AN ORDINANCE APPROVING AN AMENDMENT TO A PREVIOUSLY APPROVED DEVELOPMENT PLAN FOR PROPERTY LOCATED WEST OF THE AIRPORT, EAST OF GORDON RIVER, AND SOUTH OF THE AVION PARK SUBDIVISION; AND PROVIDING AN EFFECTIVE DATE. PURPOSE: TO PERMIT SAID PROPERTY TO BE UTILIZED AS A MARINA, BOAT STORAGE AND RECREATION FACILITY IN LIEU OF A COMMUNICATION AND OFFICE COMPLEX.

Title read by City Attorney Rynders.

Public Hearing: Opened - 11:29 a.m. Closed - 11:30 a.m.
No one present to speak for or against

MOTION: To ADOPT the ordinance as presented on Second Reading.

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---ORDINANCE 83-4380 ITEM 8-b

AN ORDINANCE RELATING TO CHARGES FOR COLLECTION AND DISPOSAL OF GARBAGE AND REFUSE; AMENDING SECTION 10-9(B) AND (C) OF THE CODE OF ORDINANCES OF THE CITY OF NAPLES; AND PROVIDING AN EFFECTIVE DATE.
PURPOSE: TO INCREASE THE FEES FOR COLLECTION AND DISPOSAL OF GARBAGE AND REFUSE FOR SINGLE-FAMILY AND MULTI-FAMILY RESIDENCES AND TO REVISE THE RATE SCHEDULE FOR COMMERCIAL ESTABLISHMENTS.

Title read by City Attorney Rynders.

Public Hearing: Opened - 11:31 a.m. Closed - 11:32 a.m.
No one present to speak for or against.

MOTION: To ADOPT the ordinance as presented on Second Reading.

----------END ADVERTISED PUBLIC HEARINGS----------

Mr. Anderson returned to the Council table - 11:33 a.m.

COUNCIL MEMBERS	MOTION	SECOND	YES	NO	ABSENT
Anderson	X		X		
Richardson			X		
Rothchild			X		
Schroeder			X		
Thornton		X	X		
Wood			X		
Billick			X		
(7-0)					
Anderson					X
Richardson			X		
Rothchild			X		
Schroeder			X		
Thornton	X		X		
Wood		X	X		
Billick			X		
(6-0)					
Anderson					X
Richardson			X		
Rothchild			X		
Schroeder		X	X		
Thornton			X		
Wood	X		X		
Billick			X		
(6-0)					

COUNCIL MEMBERS	MOTION	SECOND	VOTE YES	VOTE NO	ABSENT

----------FIRST READING----------

---ORDINANCE 83-____ ITEM 9

AN ORDINANCE RELATING TO REMOVAL AND IMPOUNDMENT OF MOTOR VEHICLES AND CERTAIN OTHER PROPERTY; AMENDING SECTION 23-11 OF THE CODE OF ORDINANCES OF THE CITY OF NAPLES TO PROVIDE FOR AUTHORITY FOR THE REMOVAL AND IMPOUNDMENT OF SUCH VEHICLES; PROVIDING FOR NOTICE AND HEARING RELATING THERETO; PROVIDING FOR RELEASE OF IMPOUNDED VEHICLES; PROVIDING FOR DISPOSITION OF UNRECOVERED VEHICLES; AMENDING SECTION 7-14 OF THE CODE OF ORDINANCES TO PROVIDE FOR THE REMOVAL OF WATERCRAFT PARKED ON PRIVATE PROPERTY WITHOUT THE OWNER'S CONSENT; REPEALING ALL ORDINANCES IN CONFLICT HEREWITH TO THE EXTENT OF SUCH CONFLICT; PROVIDING A SEVERABILITY CLAUSE; AND PROVIDING AN EFFECTIVE DATE.
PURPOSE: TO AUTHORIZE THE REMOVAL AND IMPOUNDMENT OF MOTOR VEHICLES AND CERTAIN OTHER PROPERTY AND TO PROVIDE A PROCEDURE FOR NOTICE AND HEARING RELATING THERETO.

Title read by City Attorney Rynders.

In response to questions from Council members, City Attorney Rynders explained that this ordinance concerned vehicles on public property and right-of-ways and boats on private property. He suggested that Council may wish to address the problem of boats on public property with a different ordinance. Mr. Anderson also noted that there was a state law that covered boats beached on sea oats. In response to questions from Jim McGrath, citizen, the City Attorney also noted that there was a provision for vehicles on private property elsewhere in the Code of Ordinances and also in the State statutes. City Manager Jones noted that a schedule of costs would be worked up after a contract was made with someone to do the towing.

Anderson			X		
Richardson		X	X		
Rothchild			X		
Schroeder			X		
Thornton			X		
Wood	X		X		
Billick			X		
(7-0)					

MOTION: To APPROVE the ordinance as presented on First Reading.

*** *** ***

DISCUSSION/ACTION ON RECOMMENDATION OF BLUE RIBBON COMMITTEE REGARDING PLACEMENT OF A BAND SHELL IN CAMBIER PARK. Pursuant to Council action at Regular Meeting of August 17, 1983. ITEM 10

Mayor Billick noted the recommendation of the Blue Ribbon Committee as contained in the memorandum from City Manager Jones dated November 30, 1983 (Attachment #4). The Mayor then thanked the members of the Blue Ribbon Committee for their work. It was the consensus of Council to approve the recommended location for the band shell. George Schnakenberg, president of the Naples Concert Band, Inc., thanked Council; Assistant to the City Manager Wiltsie; Parks & Recreation Advisory Board Chairman Mckay; Henry Watkins, Chairman of the Blue Ribbon Committee; and all Committee members for their work on this project.

Anderson	X		CONSENSUS		
Richardson					
Rothchild					
Schroeder					
Thornton					
Wood		X			
Billick					

*** *** ***

---RESOLUTION 83-4381 ITEM 11

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NAPLES, FLORIDA DESIGNATING THE CITY OF PRIEGO, SPAIN AS A SISTER CITY; AUTHORIZING THE MAYOR TO ACT AS THE OFFICIAL REPRESENTATIVE OF THE CITY OF NAPLES WITH REGARD THERETO; AND PROVIDING AN EFFECTIVE DATE.

Title read by City Attorney Rynders.

COUNCIL MEMBERS	MOTION	SECOND	VOTE YES	VOTE NO	ABSENT
---RESOLUTION 83-4381 (Cont) ITEM 11 (Cont)					
Anderson			X		
Richardson		X	X		
Rothchild			X		
Schroeder	X		X		
Thornton			X		
Wood			X		
Billick			X		
(7-0)					

City Attorney Rynders noted that the correct name of the proposed sister-city was City of Priego de Cordoba and that corrected copy of the resolution had been distributed to Council. At Mayor Billick's request, City Manager Jones reviewed the information in his memorandum dated December 2, 1983 (Attachment #5).

MOTION: To ADOPT resolution as corrected.

*** *** ***

DISCUSSION/ACTION REGARDING POSSIBLE BILLS TO BE PRESENTED TO THE COLLIER COUNTY LEGISLATIVE DELEGATION FOR INTRODUCTION DURING THE 1984 LEGISLATIVE SESSION. Requested by City Manager. ITEM 12

Council members did not have any local legislation to suggest to the Legislative Delegation at this time. Mr. Anderson noted the need for tighter regulations on pollution originating from the east side of Naples Bay; however, he further noted that such a request would probably best be directed to the state health regulating agency.

*** *** ***

---RESOLUTION 83-4382 ITEM 13

A RESOLUTION AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE AN AGREEMENT WITH DEAN WITTER REYNOLDS INC. RELATING TO FINANCIAL ADVISORY SERVICES IN CONNECTION WITH THE ISSUANCE OF BONDS TO FUND THE WASTEWATER TREATMENT PLANT EXPANSION PROJECT; AND PROVIDING AN EFFECTIVE DATE.

Anderson		X	X		
Richardson	X		X		
Rothchild			X		
Schroeder			X		
Thornton			X		
Wood			X		
Billick			X		
(7-0)					

Title read by City Attorney Rynders.

MOTION: To ADOPT the resolution as presented.

*** *** ***

---RESOLUTION 83-4383 ITEM 14

A RESOLUTION AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE AN AGREEMENT BETWEEN COLLIER COUNTY, THE CITY OF NAPLES AND THE STATE ATTORNEY, RELATING TO THE PROSECUTION OF CITY AND COUNTY ORDINANCE VIOLATIONS; AND PROVIDING AN EFFECTIVE DATE.

Title read by City Attorney Rynders.

Mr. Rothchild read a letter addressed to him from Collier County Attorney Burt Saunders (Attachment #6) and asked that Council not take action until J. Sandy Scatena was able to address Council on the matter.

MOTION: To DEFER action until Mr. Scatena was present.

Anderson				X	
Richardson				X	
Rothchild	X		X		
Schroeder				X	
Thornton				X	
Wood				X	
Billick		X	X		
(2-5)					

---RESOLUTION 83-4383 (Cont) ITEM 14 (Cont)

Gilbert Weil, citizen, ascertained from City Attorney Rynders that prosecution for worthless checks was pursued under City ordinances.

MOTION: To ADOPT the resolution as presented.

COUNCIL MEMBERS	MOTION	SECOND	VOTE YES	VOTE NO	ABSENT
Anderson	X		X		
Richardson			X		
Rothchild				X	
Schroeder			X		
Thornton			X		
Wood		X	X		
Billick			X		
(6-1)					

*** *** ***

CORRESPONDENCE & COMMUNICATIONS

Gilbert Blanquart, citizen, addressed Council asking for review of the agreement with Palmer Cablevision and that some steps be taken to have them improve service, especially in view of the recent rate increase. Mr. Anderson noted that the agreement specified that Cablevision would deliver a picture equal in quality to the picture they received at their main antenna and he felt that criteria had not been adhered to.

*** *** ***

ADJOURN: 12:18 p.m.

Stanley R. Billick
Stanley R. Billick, Mayor

Janet Cason
Janet Cason
City Clerk

Ellen P. Marshall
Ellen P. Marshall
Deputy Clerk

These minutes of the Naples City Council approved 12/21/83

Supplemental Attendance List - Regular Meeting, December 7, 1983

Reverend Hixon Helton
W. W. Gilman
Mr. & Mrs. Herbert S. Johnson
Edward McMahon
Charles Johnson
Roger Haines
Paul Schryver
Kenney Schryver
William Bledsoe
Walter Olson
Jim Weigel
Larry Ingram

Bruce Green
James Hirst
Sam Aronoff
Mary Springrose
Jim McGrath
Lodge McKee
Chuck Moelke
Dr. Floyd Peterson
Herb Anderson
Glenn Mckay
Gilbert Weil

Bob Russell
Gilbert Blanquart
Alan Mengel
Mrs. Sydney Combs
Mrs. Wells Kinkaid
L. Potter Smith
Dr. Anne Cook
George Schnakenberg
Dallas Rudrud
Joel Metts
Thelma Crawford

News Media

Jim Forner, TV-9
Susan Gardner, TV-9
Jerry Pugh, TV-9

Matt Spina, Naples Daily News
Chris Boyd, Miama Herald

Other interested citizens and visitors.

L. N. INGRAM, III
ATTORNEY AT LAW
SUITE 302 NINE HUNDRED BUILDING
900 SIXTH AVENUE SOUTH
TELEPHONE (813) 262-4121
NAPLES, FLORIDA 33940

December 7, 1983

Members of The City Council
The City of Naples
735 Eighth Street South
Naples, Florida 33940

Re: Public Hearing to Consider a Request for a Coastal Construction Setback Line Variance, City File CCL 83-7, to Allow Construction of a Single-family Residence.

Gentlemen:

Prior to considering the foregoing Petition it is my suggestion and request that each of you read in detail the Opinions of the Supreme Court of the State of Florida, rendered in the cases of:

The City of Daytona Beach Vs. Tona-Rama, Inc., 294 So. 2d 73 (Florida Supreme Court, 1974),

and

Hollywood, Inc., Vs. City of Hollywood, 321 So. 2d 65 (Florida Supreme Court, 1975).

We have enclosed copies of both of these cases for your review.

We make the foregoing request as it appears that both the Public and the City of Naples have obtained prescriptive easements to use at least part of the real estate the subject of the foregoing Petition as a Public Park and Public Access to the beach abutting the real property concerned.

Should the City Council of the City of Naples grant the Setback Line Variance the subject of the referenced Petition, it may very well be jeopardizing both the rights of the Public-at-Large and the City of Naples to utilize and enjoy the prescriptive rights that undoubtedly have been obtained through long-standing use of the real properties concerned.

Thanking you for your consideration of this matter, I am

Sincerely,

L. N. (Larry) Ingram, III

Enclosures (2)

The CITY OF DAYTONA BEACH, a municipal corporation organized and existing under the laws of the State of Florida, et al., Petitioners,

v.

TONA-RAMA, INC., a Florida corporation, et al., Respondents.

No. 43352.

Supreme Court of Florida.

March 25, 1974.

Rehearing Denied May 30, 1974.

Action was brought for declaratory judgment and injunctive relief to prevent erection of defendant's public observation tower on beach. The Circuit Court, Volusia County, P. B. Revels, J., entered summary judgment for plaintiff, and an appeal was taken. The District Court of Appeal, 271 So.2d 765, affirmed. On writ of certiorari, the Supreme Court, Adkins, C. J., held that even if public had acquired easement by prescription to unused sands of owner's ocean front parcel of land, owner could make any use of land consistent with, or not calculated to interfere with, exercise of easement by public, and erection of sky tower by owner was consistent with recreational use of land by public and could not interfere with exercise of any easement public may have acquired by prescription.

Decision of District Court of Appeal quashed and cause remanded to District Court with instructions to remand to trial court for purpose of entering final judgment for defendant.

Ervin and Boyd, JJ., dissented and each filed an opinion.

Mager, District Court Judge, concurred in part and dissented in part and filed an opinion.

294 So.2d—5½

1. Dedication ⇐20(1)

It is possible for public to acquire an easement in beaches of state by finding of a prescriptive right to beach land.

2. Easements ⇐36(1)

If use of alleged easement is not exclusive and not inconsistent with rights of owner of land to its use and enjoyment, it would be presumed that such use is permissive rather than adverse, and such use will never ripen into easement.

3. Dedication ⇐20(2)

Unless owner of beach front parcel of land loses something by reason of use by sunbathing tourists of unused sands, public could obtain no easement by prescription.

4. Dedication ⇐62

Navigable Waters ⇐41(1)

Even if public had acquired easement by prescription to unused sands of owner's ocean front parcel of land, owner could make any use of land consistent with, or not calculated to interfere with, exercise of easement by public, and erection of sky tower by owner was consistent with recreational use of land by public and could not interfere with exercise of any easement public may have acquired by prescription.

5. Navigable Waters ⇐33, 41(1)

If recreational use of sandy area of beach adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by ocean front owner, but owner may make any use of his property which is consistent with such public use and not calculated to interfere with exercise of right of public to enjoy dry sand area as a recreational adjunct of wet sand or foreshore area.

6. Dedication ⇐53

Right of customary use of dry sand area of beaches by public does not create any interest in land itself.

7. Dedication ⇐63(1)

Navigable Waters ⇐33

Right of customary use of dry sand area of beaches by public cannot be revoked by landowner, but it is subject to appropriate governmental regulation and may be abandoned by the public.

8. Dedication ⇐44

Evidence failed to show any adverse use by public of dry sand area of beach.

Isham W. Adams, Daytona Beach, and J. Lewis Hall, Tallahassee, for petitioners.

Robert L. Shevin, Atty. Gen., Barry Scott Richard, Deputy Atty. Gen., and Anthony J. Grezik, of Grezik & Johnson, Daytona Beach, for respondents.

ADKINS, Chief Justice.

This cause is here on petition for writ of certiorari supported by certificate of the District Court of Appeal, First District, that its decision in City of Daytona Beach v. Tona-Rama, Inc., 271 So.2d 765, is one which involves a question of great public interest. We have jurisdiction. Fla. Const., art. V, § 3(b)(3), F.S.A., F.A.R. 4-6, 32 F.S.A.

For clarity, the parties will be referred to as they appeared in the trial court. Respondents, Tona-Rama, Inc., et al., were plaintiffs, and petitioners, McMillan and Wright, Inc., et al., were defendants. Toma-Rama, Inc. will be referred to as plaintiff and McMillan and Wright, Inc. as defendant.

Defendant has owned water front property in Daytona Beach, Florida, for more than 65 years and operated on the property an ocean pier extending 1,050 feet over the Atlantic Ocean as a recreation center and tourist attraction. Defendant provided such attractions as fishing space, helicopter flights, dances and skylift.

The tract of land upon which the pier begins extends 102 feet north and south along the ocean front and approximately 1,050 feet landward of the mean high water mark. 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. Defendant secured a permit for and constructed the observation tower which precipitated this litigation. The circular foundation of the tower is 17 feet in diameter and the diameter of the tower is four feet. It occupies an area of approximately 225–230 square feet of the 15,300 square feet of land to which defendant holds record title. The observation tower is an integral part of the pier and can only be entered from the pier.

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.

Building permit was issued by the City for construction of the tower after public hearings. After the permit was issued, the tower was constructed at a cost of over $125,000.

Plaintiff operated an observation tower near the site of the pier of defendant and protested the issuance of the permit. When work in connection with the erection of the tower had progressed to completion of test borings and other arrangements, plaintiff commenced this action against defendant for a declaratory judgment and injunctive relief to prevent the erection of defendant's public observation tower. Among other contentions, plaintiff alleged that by continuous use of the property for more than 20 years, the public had acquired an exclusive prescriptive right to the use of the land of defendant. The application of plaintiff for a temporary injunction was denied and the tower was completed. Thereafter, the parties moved for summary judgment and at the hearing thereon testimony taken on application for

temporary injunction, stipulated facts, and affidavits were submitted. The trial court entered a summary judgment in favor of plaintiff and directed the defendant to remove the observation tower within 90 days. Upon appeal, the judgment of the trial court was affirmed and the case certified to us as being one which passes on a question of great public interest.

The facts presented before the trial court were not sufficient to support a summary judgment which, in effect, deprived a land owner of meaningful use of a large portion of the land for which he paid, which he presently occupies in part, and on which he pays taxes.

The land in question is a parcel of white, powdery sand running between the hard-packed driving surface of Daytona Beach and the existing seawalls. By stipulation of the parties, the land is above the normal high water mark and would be subject to being covered by the waters of the Atlantic Ocean only during hurricanes or extremely high tides.

We recognize the propriety of protecting the public interest in, and right to utilization of, the beaches and oceans of the State of Florida. No part of Florida is more exclusively hers, nor more properly utilized by her people than her beaches. And the right of the public of access to, and enjoyment of, Florida's oceans and beaches has long been recognized by this Court.

White v Hughes, 139 Fla. 54, 190 So. 446 (1939), was a suit brought to recover damages from injuries received by plaintiff White when struck by an automobile driven by defendant on the beach of the Atlantic Ocean between high and low water marks, the hard or wet sand area. The Florida Statute had declared the hard sand area to be a public highway. The trial court instructed the jury that the public in using the beach for the purpose of bathing and recreation had "rights at least equal" to the rights of motorists on that part of the beach. This instruction was held to be error, the Court saying:

"There is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto. The lure of the ocean is universal; to battle with its refreshing breakers a delight. Many are they who have felt the lifegiving touch of its healing waters and its clear dust-free air. Appearing constantly to change, it remains ever essentially the same.

. . . . . .

"The Sovereign state may in the interest of the general welfare authorize the beach or shore to be appropriately used as a public highway. And most of our Florida beaches, when the tide is out, afford marvelously perfect highways, which are obliterated and re-built twice each day by the unseen hand of the Almighty. However, we are of the opinion that such an authorization for highway uses must be subject to reasonable use of the beach or shore for its primary and long established public purposes, for which the State holds it in trust, and subject to lawful governmental regulations.

"For the above reasons we hold that the right of the public to use the beach for bathing and recreational purposes is superior to that of the motorists driving automobiles thereon." 190 So. 446, pp. 448-450.

[1] It is possible for the public to acquire an easement in the beaches of the State by the finding of a prescriptive right to the beach land. City of Miami Beach v. Undercliff Realty & Investment Co., 155 Fla. 805, 21 So.2d 783 (1945), and City of Miami Beach v. Miami Beach Improvement Co., 153 Fla. 107, 14 So.2d 172 (1943). However, in both of the cases cit-

ed above and relied upon by the District Court of Appeal, First District, in the case *sub judice*, this Court declined to find such prescriptive right in the public because of the absence of an adverse nature in the public's use of private beach land.

This Court in City of Miami Beach v. Undercliff Realty & Investment Co., *supra*, said:

"It is true that in the 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 a claim of right. It has not been shown that there has been an open, notorious, continuous 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." 21 So.2d 783, p. 786.

This Court in Downing v. Bird, 100 So. 2d 57 (Fla.1958), set forth the test for right of access by prescription:

"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.

"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.*" (Emphasis supplied.) (p. 64)

[2] If the use of an alleged easement is not exclusive and not inconsistent with the rights of the owner of the land to its use and enjoyment, it would be presumed that such use is permissive rather than adverse. Hence, such use will never ripen into easement. This principle was recognized in J. C. Vereen & Sons v. Houser, 123 Fla. 641, 167 So. 45 (1936), where this Court quoted with approval from Jesse French Piano & Organ Co. v. Forbes, 129 Ala. 471, 29 So. 683, 685, 87 Am.St.Rep. 71, as follows:

"No easement can be acquired when the use is by express or implied permission. . . . The user or enjoyment of the right claimed, in order to become an easement by prescription, must have been adverse to the owner of the estate over which the easement is claimed, under a claim of right, exclusive, continuous, and uninterrupted, and with the knowledge and acquiescence of the same. . . . *One circumstance always considered is whether the user is against the interest of the party suffering it, or injurious to him. There must be an invasion of the party's right, for, unless one loses something, the other gains nothing.*" (Emphasis supplied.) (167 So. p. 47.)

In the case *sub judice*, the land in issue is occupied in part by the Main Street pier, a landmark of the Daytona Beach oceanfront for many years, and the land and pier are owned by the defendant. The pier is used as a recreation center and tourist attraction. It is utilized for fishing and dances, and offers a skylift and helicopter flights by the present owner.

That portion of the land owned by defendant which is not occupied by the pier has been left free of obstruction and has been utilized by sunbathing tourists for untold decades. These visitors to Daytona Beach, including those who have relaxed on the white sands of the subject lands, are

the lifeblood of the pier. As such, they have not been opposed, but have been welcomed to utilize the otherwise unused sands of petitioner's oceanfront parcel of land.

The sky tower, which was substantially completed when the trial judge's order halted it, consists of a metal tower rising 176 feet above the ocean and a 25-passenger, air-conditioned gondola which was to be boarded from the pier to rise, rotating slowly, to the top of the tower, remain rotating at the top for a few minutes, and then descend. The tower utilizes a circle of sand only 17 feet in diameter. A building permit was issued in October, 1969, and the project was completed, representing an investment of over $125,000, by the time the hearings were held.

The trial judge held that the land upon which the tower was constructed was

> "[A] public thoroughfare, public bathing beach, recreation area and playground."

Upon this finding, the trial judge declared that the lands had been rendered public by prescriptive right. The District Court of Appeal, First District, affirmed, thus approving the destruction of the $125,000 investment and dooming any meaningful use of the property by the owner. In effect, the owner of the land is paying taxes for the sole benefit of the public.

As noted above, such prescriptive right has been recognized by this Court, and under proper circumstances is just. However, such a situation is not presented in the case *sub judice*.

The District Court of Appeal, First District, opined:

> "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." City of Daytona Beach v. Tona-Rama, Inc., 271 So.2d 765, p. 767.

The District Court also holds that the test of Downing v. Bird, *supra*, has been met. We cannot agree. The public has continuously, and over a period of several decades, made uninterrupted use of the lands in issue. However, neither the trial court, nor the District Court, reached the other requirement for prescription to be properly effective—adverse possession inconsistent with the owner's use and enjoyment of the land.

[3] The use of the property by the public was not against, but was in furtherance of, the interest of the defendant owner. Such use was not injurious to the owner and there was no invasion of the owner's right to the property. Unless the owner loses something, the public could obtain no easement by prescription. J. C. Vereen & Sons v. Houser, *supra*.

[4] Even if it should be found that such an easement had been acquired by prescription, the defendant-owner could make any use of the land consistent with, or not calculated to interfere with, the exercise of the easement by the public. See Tiffany Real Property, (Third Edition), Vol. 3, Section 811. The erection of the sky tower was consistent with the recreational use of the land by the public and could not interfere with the exercise of any easement the public may have acquired by prescription, if such were the case.

The beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title. The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of land—but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be protected.

Two states, Oregon and Hawaii, have used the "customary rights doctrine" to afford the rights in beach property. State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969); In re: Ashford, 50 Haw. 314, 440 P.2d 76 (1968). See also Fla. Law Review, Easements: Judicial and Legislative Protection of the Public's Rights in Florida's Beaches by W. Roderick Bowdoin, Vol. XXV, No. 3, pp. 586–590 (Spring 1973).

[5] As stated in Tiffany Real Property, (Third Edition), Vol. 3, § 935:

"In England, persons of a certain locality or of a certain class may have, by immemorial custom, a right to make use of land belonging to an individual. Thus, there may be a custom for the inhabitants of a certain town to dance or play games on a particular piece of land belonging to an individual, or to go thereon in order to get water. So there may be a custom for fishermen to dry nets on certain land, or for persons in a certain trade (victualers) to erect booths upon certain private land during a fair. The custom, to be valid, 'must have continued from time immemorial, without interruption, and as of right; it must be certain as to the place, and as to the persons; and it must be certain and reasonable as to the subject matter or rights created.'

. . .

"Occasionally in this country it has been decided that rights to use private land cannot thus be created by custom, for the reason that they would tend so to burden land as to interfere with its improvement and alienation, and also because there can be no usage in this country of an immemorial character. In one state, on the other hand, the existence of such customary rights is affirmed, and in others this is assumed in decisions adverse to the existence of the right in the particular case." (pp. 623-624)

If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area.

[6, 7] This right of customary use of the dry sand area of the beaches by the public does not create any interest in the land itself. Although this right of use cannot be revoked by the land owner, it is subject to appropriate governmental regulation and may be abandoned by the public. The rights of the owner of the dry sand area may be compared to rights of a part-owner of a land-locked nonnavigable lake, as described in Duval v. Thomas, 114 So. 2d 791 (Fla.1959).

[8] Testimony was presented that the public's presence on the land and its use of the land was not adverse to the interest of defendant, but rather that the defendant's Main Street pier relied on the presence of such seekers of the sea for its business. Thus, the issue of adversity was clearly raised and the evidence failed to show any *adverse* use by the public. In fact, the construction of the sea tower was consistent with the general recreational use by the public. The general public may continue to use the dry sand area for their usual recreational activities, not because the public has any interest in the land itself, but because of a right gained through custom to use this particular area of the beach as they have without dispute and without interruption for many years.

The decision of the District Court of Appeal is quashed and this cause is remanded to the District Court with instructions to further remand the same to the trial court for the purpose of entering final judgment for defendant.

It is so ordered.

McCAIN, DEKLE and CARLTON (Retired), JJ., concur.

ERVIN, J., dissents with opinion.

BOYD, J., dissents with opinion.

MAGER, District Court Judge, concurs in part and dissents in part with opinion.

BOYD, Justice (dissenting).

I respectfully dissent.

Historians estimate that the North American continent has been inhabited by man for at least ten thousand years, and that, at the time Columbus discovered America, twenty-five thousand Indians lived in Florida.[1]

One does not have to be a Chamber of Commerce publicity director to assume that these earliest of Floridians enjoyed the beautiful sandy beaches at Daytona. They were followed by countless Europeans, and, for many decades, the City of Daytona Beach has exercised dominion over the beaches, as if the beaches were owned and controlled by the City government. Thus, the case before us obviously presents a unique situation in which the land has been treated by the public *and* local government for many decades as publicly owned land. The public has used it for swimming, hiking, auto driving, and related purposes for a period much longer than twenty years, without interruption. The City has furnished police, sanitation, life guard, and other municipal services, normally provided to City-owned beach property, during said time. With the exceptions of being registered in the public records as privately owned, and the payment of taxes, the property has had all the attributes of a publicly owned beach continuously for more than twenty years. Surely, when the present owner purchased the land in question, it was common knowledge that the public had, for centuries, used both the wet and dry sand near the ocean for recreational purposes.

The majority view holds that prescriptive rights for the public could occur only by uses adverse to the owner. However, as many courts have noted:

> "The ultimate burden of proving a prescriptive right rests on the claimant or one who is to be benefited by its establishment, and he must clearly show that all the elements necessary to constitute a valid claim to such a right are present. *There is a conflict of authority, however, as to whether the use of a claimed easement by prescription raises a presumption of permissive use or a presumption of adverse user. It is held in some cases that where a claimant has shown an open, visible, continuous, and unmolested use of land for the period of time sufficient to acquire an easement by adverse user, the user will be presumed to be adverse and under a claim of right, so as to place upon the owner of the servient estate, in order to avoid the acquisition of an easement by prescription, the burden of rebutting this presumption by showing that the use was permissive.*"[2]

If this building be permitted to stand, then the owner might well next decide to erect a gargantuan hotel on the property, and the adjoining property owners, demanding equal protection of the law, might then begin to construct a series of hotels along the waterfront—similar to the series that now exists along the East side of Collins Avenue in Miami Beach. This would form a concrete wall, effectively cutting off any view of the Atlantic Ocean from

1. *See* C. W. Tebeau, A History of Florida (1971).

2. 25 Am.Jur.2d Easements and Licenses § 119 (1966). (Footnotes omitted.) (Emphasis supplied.) For the sake of brevity, the reader is referred to the cited section, and its respective 1973 Annual Cumulative Supplement, where over twenty-five cases, in support of the emphasized portion of the foregoing quote, are noted.

the public. A repetition of the concrete wall created by such buildings would be extremely detrimental to the people of this State and to our vital tourism industry.

In my opinion, the trial court and the District Court of Appeal, First District, were correct in ordering the structure removed, for the reason that it encroaches upon the prescriptive rights of the public.

The record shows that the building was constructed, with a building permit granted by the City of Daytona Beach, apparently in good faith by the owner of record, who has been paying taxes on the property, and whose equitable rights should not be completely ignored. The trial court should require an accounting of all costs expended and all income received from this recreational structure, and if the money received thus far from the investment has not reimbursed all of those who have invested in the facility in good faith, they should be allowed to recoup their investments before removal of the structure. The equitable principles involved in the elimination of a non-conforming use would apply here.

The majority opinion ably defines the law generally applicable to beach properties. The intermittant, occasional use of dry sand beach property by individuals or groups for recreational purposes does not establish prescriptive easements. If such were the law of this state, countless thousands of beach lots would have questionable titles. I dissent to the majority opinion only because the property here in question is totally unique in character by its treatment and use as a public beach for many decades. Only property having the same unique characteristics should be affected by any decision against this owner.

I offer no comment or opinion as to how far back from the wet sand the owner should be denied building privileges, but I don't think the government can collect taxes while denying the owner some reasonable use of the property not in conflict with the prescriptive rights of the public.

Therefore, I respectfully dissent to the majority opinion, and would affirm the decision of the District Court of Appeal, First District.

ERVIN, Justice (dissenting).

I concur with much of the reasoning and the conclusions of Justice Boyd reflected in his excellent dissent.

It is clear to me that the majority has no sound basis in law to substitute its judgment on the instant facts for the prescriptive easement findings of the trial judge affirmed by the District Court. The cases are legion that factual findings upon issues such as are presented in this case, i. e., primarily whether a public easement had accrued should not be appellately disturbed. See 5 A. C.J.S. Appeal and Error § 1669, pp. 635-641 incl.; Holding v. Holding (Fla.) 46 So.2d 893; Carolina Lumber Co. v. Daniel (Fla.App.) 97 So.2d 156.

The decision of the District Court upholds a factual determination of the Circuit Court that the existence of the observation tower constructed by petitioners McMillan and Wright, Inc., denied the public the full use of the beach area involved in this litigation as a thoroughfare, bathing beach, and playground—which had been used as such by the public "openly, notoriously, continuously and uninterrputed" for over twenty years.

On appeal the District Court ruled:

"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.

* * * * * *

"Based upon the foregoing authorities, [City of Miami Beach v. Miami Beach Improvement Co., 153 Fla. 107, 14 So. 2d 172 (1943); City of Miami Beach v. Undercliff Realty & Investment Co., 155 Fla. 805, 21 So.2d 783 (1945);

Downing v. Bird, 100 So.2d 57 (Fla. 1958)] we conclude that the trial court applied correct principles of law to the facts found by it in holding that the public has acquired . . . use and enjoyment of the soft sand area . . ."

Upon petition for rehearing, the District Court filed a follow-up opinion which indicated that its decision was *not* based upon public policy notions concerning access to beaches and coastal areas, but that it was based on the ancient doctrine of prescriptive easement.

While I think that under the particular facts of this case the finding below of a prescriptive easement in favor of the public to the instant beach area should be affirmed, I believe a broader view of the law is applicable which if pronounced by this Court would afford more realistic protection of the public's rights not only in the subject beach area but to hundreds of miles of Florida beaches which have been used by Florida inhabitants from time immemorial.

I think the law of custom applies. This concept is explicated in the University of Florida Law Review, Volume XXV, Spring 1973 Number 3, pages 590 to 592, incl. See State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969).

What is overlooked by the majority is that as to prescriptive public coastal areas, navigable waters, tide lands and sovereignty lands, the judiciary has a positive and solemn duty as a last resort to protect the public's rights to the enjoyment and use of any of such lands. There is ample precedent of this Court to afford this protection, including those relating to the inalienable trust doctrine in sovereignty lands and navigable areas. Cf. State ex rel. Ellis v. Gerbing (1908), 56 Fla. 603, 47 So. 353, and Hayes v. Bowman (Fla.1957), 91 So.2d 795.

In this case the majority refuses to accede to a positive finding of the Courts below that the public prescriptively owned and enjoyed the famed Daytona Beach frontage sand area (even to the extent of using it for a race course) for years far exceeding the period necessary for the exclusion of any private interest therein. The finding below is a matter of common knowledge to anyone familiar with the history and use of the Atlantic Ocean coastal area opposite the City of Daytona Beach.

This precedent of the Court majority is a regrettable and unfortunate one which will serve to render more uncertain the rights of the general public to enjoy Florida's prescriptive public beach areas which historically they have so long enjoyed. It will encourage, as Justice Boyd so ably points out, further private, commercial intrusions and obstructions upon public domain areas which have been used as such since time immemorial.

The majority decision is of the same genre as the holdings in Daniell v. Sherrill (Fla.1950), 48 So.2d 736; Trustees of Internal Improvement Fund v. Lobean (Fla. 1961), 127 So.2d 98; Zabel v. Pinellas County Water and Navigation Control Authority (Fla.1965), 171 So.2d 376, and Trustees of Internal Improvement Fund v. Wetstone (Fla.1969), 222 So.2d 10, and similarly declines to protect the paramount interests of the public in public land areas, but in this case the decision rests upon even less tenable grounds. With Florida's population burgeoning and its recreational needs multiplying by leaps and bounds, the State's courts can ill afford any longer to be profligate with its public areas and allow them to be frittered away upon outmoded pretexts for commercial exploitation.

MAGER, Associate Justice, (dissenting, in part; concurring, in part):

I find myself in the somewhat unusual position of *disagreeing* with the reasoning and conclusions of the majority insofar as it fails to recognize the establishment of the prescriptive rights of the public to the beach areas in question; but, at the same

time, *agreeing* with the result reached by the majority insofar as it would *not* direct the removal of the observation tower built during the pendency of litigation. I therefore must concur with the reasoning and conclusions of Justices Ervin and Boyd to the extent that there has accrued in favor of the public a prescriptive easement to the beach area in dispute. I cannot, however, subscribe to the minority views that the observation tower must be torn down.

In my view, the application of the well established principles of law relating to public prescriptive easements must be made to depend upon the peculiar facts and circumstances of each case. A tailor-made application of these principles is more poignantly evident in declaratory proceedings where mandatory injunctive relief is sought.

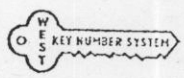
In an equitable proceeding, where the court strives to do equity amidst an atmosphere encompassing the preservation of public beach areas, on the one hand, and a recognition of the private ownership of property, on the other hand, the courts must *and* should endeavor to balance the equities of the parties. In Loeffler v. Roe, 69 So.2d 331 (Fla.1954), this Court pointed out that 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 of the other party. The doctrine of "comparative injury" or "balance of conveniences" is set forth in 17 Fla.Jur. Injunctions, Sec. 24, as follows:

> "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 of 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."

See also 40 A.L.R.3d 601.

An application of this concept is appropriate under the facts and circumstances of the case sub judice. The observation tower, which was built in good faith by the owner of record on what he perceived to be his "own land", occupies "an area of approximately 225 to 230 square feet" of the 15,300 square feet in dispute. It would seem to me that the observation tower can remain intact without abrogating the public's prescriptive easement in the 15,000 some odd square feet of otherwise unencumbered beachfront.

Under these circumstances public and private use can operate in tandem. The public interest is thus fully preserved without completely obliterating the vestiges of private ownership.



STATE of Florida, Petitioner,

v.

Wilmon CONEY, Respondent.

No. 43392.

Supreme Court of Florida.

Oct. 31, 1973.

Rehearing Granted April 17, 1974.

Proceeding on writ of certiorari to the District Court of Appeal, First District, to review its decision reported at 272 So.2d 550, alleged to be in conflict with a Supreme Court decision. The Supreme Court, Boyd, J., in holding that there was no conflict held that information is not required to be in the actual possession of the State's attorney before discovery may be had; defendant may be properly allowed discovery as to criminal records of State's witnesses to the extent that such information is in the actual or constructive posses-

HOLLYWOOD, INC., a Florida Corporation, Petitioner-Cross Respondent,

v.

CITY OF HOLLYWOOD, a Municipal Corporation, Respondent-Cross-Petitioner.

No. 44662.

Supreme Court of Florida.

April 23, 1975.

Rehearing Denied Nov. 18, 1975.

County tax assessor brought action for equitable relief and declaratory decree whether city or corporation owned two miles of ocean-front beach. City cross-claimed against corporation and corporation counterclaimed against city for cancellation of city's notice of claim to real estate and for damages for filing such allegedly false notice. The Circuit Court, Broward County, Stewart F. Lamotte, Jr., J., found that title was in corporation, and city appealed. The District Court of Appeal, 283 So.2d 581, reversed and remanded for new trial, and corporation petitioned and city cross-petitioned for writ of certiorari to review. The Supreme Court held that pamphlets, magazines, brochures, advertisements, plats, deeds and testimonial evidence relating to intent of developer to dedicate beach to public, tax rolls indicating that city treated such property as belonging to it, evidence of fact that city granted United States easement and evidence of city's continuous maintenance of beach were admissible with regard to city's claim of ownership of beach by dedication, that city was entitled to jury trial on issues of dedication and actual possession, that city did not waive its right to jury trial and that denial of city's motion for jury trial was abuse of discretion.

Quashed in part and remanded.

Overton, J., concurred in judgment only.

Dekle, J., dissented.

321 So.2d—5
Fla Cases 321-323 So.2d—1

1. Dedication ⇐43

In action involving conflicting claims of ownership of two miles of ocean-front beach, pamphlets, magazines, brochures, advertisements, plats, deeds and testimonial evidence relating to intent of developer to dedicate beach to public, tax rolls indicating that city treated such property as belonging to it, evidence of fact that city granted United States easement for deposit of spoil on beach and evidence of city's continuous maintenance, upkeep and improvement of beach were admissible with regard to city's claim of ownership of beach by dedication and had a bearing on question of city's acceptance of dedication.

2. Jury ⇐9

Questions as to right to jury trial should be resolved, if at all possible, in favor of party seeking jury trial.

3. Jury ⇐13(16)

City, which was a defendant in county tax assessor's suit for equitable relief and declaratory decree as to the ownership of two miles of ocean-front beach and which, in defending against counterclaim seeking removal of cloud on counterclaimant's title, was a defendant in actual possession of the property, was entitled to a jury trial on issues of dedication and actual possession of property, notwithstanding assertion that jury trial was not allowable in suit in equity. U.S.C.A.Const. Amends. 7, 14; West's F.S.A.Const. art. 1, § 22; West's F.S.A. §§ 45.011, 65.061.

4. Jury ⇐25(6)

Where an amended pleading injects a new issue in case, time for filing a demand for jury trial is revived though party making demand may have waived right to jury trial at time of initial responsive pleadings. 30 West's F.S.A. Rules of Civil Procedure, rule 1.430.

5. Jury ⇐25(6)

City did not waive its right to jury trial in action involving conflicting claims

On January 11, 1924, the plat of Hollywood Beach Second Addition was recorded by Young's Home Seekers Realty Company; on September 9, 1924, the plat of Hollywood Central Beach was recorded by the same company. On November 25, 1925, the Respondent, City of Hollywood, was created. In August, 1927, Young deeded to Respondent all of "the streets, drives, boulevards, alleys, ways, walks, avenues, parkways, and highways, by whatever name they may be termed, platted and described in that certain plat, also named in an amended plat, of Hollywood Central Beach". Although Block 205 was not labeled on the plat, the then current price list made it clear that 205 was a "parkway". Almost two years later, on April 25, 1929, two large money judgments were entered against Home Seekers Realty Company, leading to later execution sales and Sheriff's deeds. The Respondent's minutes of July 2, 1930, show that it had actual express notice of the proposed execution sale. On September 1, 1930, Highway Construction Company of Ohio, Inc., acquired title to Block C, Hollywood Beach Second Addition; later, on December 1, 1930, that same company acquired title to Block 205, Hollywood Central Beach. Thereafter, on February 18, 1931, Highway Construction Company conveyed title to Petitioner by fee simple deed, which Petitioner recorded February 21, 1931. In June, 1964, Respondent recorded its notice of claim of ownership. In August, 1964, the tax assessor for Broward County sued both Petitioner and Respondent for a declaratory decree and equitable relief, alleging that both parties claimed ownership of two miles of ocean-front beach and that the tax status of the land was unclear. In September, 1964, Respondent filed its cross-claim against Petitioner.

Petitioner claims that its title to the land in question was derived from a Sheriff's Deed issued to Highway Construction Company, which company subsequently conveyed its interest to Petitioner in 1931. Respondent predicates its claim of ownership upon various acts and occurrences, including documentary and testimonial evidence reflecting ownership by virtue of a deed from the original owner, as well as ownership arising by dedication and prescription. The trial court held, *inter alia*, that Respondent possessed neither title nor other interest or rights in the property, and that title is in the Petitioner.

The District Court of Appeal, Fourth District, reversed and remanded for a new trial, finding that the trial court erred in rejecting certain documentary and testimonial evidence bearing on the Respondent's claims of ownership by dedication. In reversing, the District Court adopted the seven methods for indicating an intent to dedicate land to public purpose as set forth in City of Palmetto v. Katsch.[13] The District Court found that the rejected evidence related to each of the categories established as a test in *Katsch, supra,* and that it had a direct bearing on the issue of acceptance of dedication. The District Court advised the trial court, on remand, to consider the applicability of City of Daytona Beach v. Tona-Rama, Inc.[14] to the issue of prescription, however, subsequently that decision was quashed by this Court.[15] The District Court held also that prior decisions by it on an earlier interlocutory appeal and by this Court on petition for certiorari were neither conclusive nor dispositive of the Respondent's claim of ownership of the land.[16] Additionally, the District Court rejected Respondent's claim for a jury trial.

[1] The Respondent defended its ownership of the beach in question under sev-

13. *Id.*

14. 271 So.2d 765 (Fla.App.1973).

15. City of Daytona Beach v. Tona-Rama, Inc., 291 So.2d 73 (Fla.1974).

16. 232 So.2d 769 (Fla.App.1970), cert. den., Fla., 238 So.2d 111.

eral legally independent theories, including deed, dedication, prescription and adverse possession. To support its theory of common law dedication, Respondent proffered, *inter alia*: many of Young's publications (including pamphlets, magazines, brochures and advertisements) clearly stating that it was his intent that the beach be dedicated to the City; oral testimony of young's officials and salesmen which corroborates the documentary evidence; oral testimony of Young's purchasers which corroborates the documentary evidence; the plats themselves; deeds to lots west of the boardwalk indicating conveyance as waterfront property; Young's price list describing Block 205 as a "parkway"; the Respondent's newspaper advertisements prior to 1930 proclaiming ownership of the beach; the fact that the present beach has always been open to public use and no permission was needed to use the beach; Respondent's tax rolls beginning in 1926, showing that it has always treated the beach property as public land belonging to it; Respondent's publications which have proclaimed its municipal ownership of the beach continuously since 1926; evidence of the fact that in 1938 Respondent granted an easement to the United States for deposit of spoil on the beach; and evidence of Respondent's continuous maintenance, upkeep and improvement of the beach since 1925. This voluminous mass of data was not admitted by the trial court, an act which was held to be error by the District Court; we agree. Relying on *Katsch, supra,* the District Court held:

> ". . . a 'common-law dedication' is the setting apart of land for public use, and to constitute it there must be an intention by the owner, clearly indicated by his words or acts, to dedicate the land to the public use, and an acceptance by the public of the dedication. This seems to be the general rule, and whether an express or an implied dedication is relied on, *the intention of the owner to set apart the lands for the use of the public is the foundation and essence of every dedication* . . . .
>
> "The act of dedication is affirmative in character, need not be by formal act or dedication, may be by parol, may result from the conduct of the owner of the lands dedicated, *and may be manifested by a written grant, affirmative acts, or permissive conduct of the dedicator.* In fact, any manner in which the owner sees fit to indicate a present intention to appropriate his lands to public use meets the requirement of the law.
>
> "The means generally exercised to express one's purpose or intention to dedicate his lands to the public use are by a (1) written instrument executed for that purpose; (2) filing a plat or map of one's property designating thereon streets, alleys, parks, etc.; (3) platting one's lands and selling lots and blocks pursuant to said plat indicating thereon places for parks, streets, public grounds, etc.; (4) recitals in a deed by which the rights of the public are recognized; (5) oral declarations followed by acts consistent therewith; (6) affirmative acts of the owner with reference to his property, such as throwing it open in a town, fencing and designating streets thereon; (7) acquiescence of the owner in the use of his property by the public for public purposes.
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> * * * * * *
>
> "The evidence which was rejected related to each of the categories enumerated in City of Palmetto v. Katsch, supra. The evidence, additionally, had a direct bearing on the question of *acceptance* of dedication. The acceptance of a dedication may be by formal action of the proper authorities or it may be by public user. Robinson v. Town of Riviera, 1946, 157 Fla. 194, 25 So.2d 277 . . . .
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> * * * * * *
>
> "To reiterate, the excluded evidence directly related to the issue of the dedica-

tor's intention to dedicate and the mode and manner of the acceptance of such dedication as to both Block 205 and Block C. The City, therefore, should be afforded the opportunity of presenting evidence on the issue of common law dedication and the trial court should give due consideration thereto. Cf. Boothby v. Gulf Properties of Alabama, Fla.1948, 40 So.2d 117.

"In considering the evidence bearing upon the issue of common law dedication consideration must also be given to the legal effect of the 1927 deed executed by appellee's predecessor in title in favor of the City as such deed may relate to Block 205. The City sought to introduce the deed *and* other extrinsic evidence to establish that the conveyance of "walks" and "parkways" referred to in the deed was intended by the owner thereof to be a conveyance of Block 205. Whether the City would have been successful in *proving* what the grantor's intention was with respect to the use of the word "parkway" does not determine the question of *admissibility* of the deed and consideration of extrinsic evidence . . . ."

Turning our attention to that portion of the District Court's opinion which refers the trial court to the decision of the District Court of Appeal, First District, in City of Daytona Beach v. Tona-Rama, Inc.,[17] we note that this Court in reversing that opinion said:[18]

"It is possible for the public to acquire an easement in the beaches of the State by the finding of a prescriptive right to the beach land . . . .

* * * * * *

"This Court in Downing v. Bird, 100 So.2d 57 (Fla.1958), set forth the test for right of access by prescription:

'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.'

* * * * * *

"The beaches of Florida are of such a character as to use and potential development as to require separate consideration from other lands with respect to the elements and consequences of title. The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of land—but has served as a thoroughfare and haven for fishermen and bathers, as well as a place of recreation for the public. The interest and rights of the public to the full use of the beaches should be protected . . . .

* * * * * *

"If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area."

Contrary to the facts in that case, we find that the evidence of prescription sub judice

17. *See* Note 14, *supra*.

18. *See* Note 15, *supra*, at pp. 75–78, incl.

satisfies the test of adverse user set forth therein; for example: for over half a century, Respondent uninterruptedly published to the world that the beach belonged to Respondent; although Respondent never asked permission to use the beaches, yet it has openly and adversely occupied the beach by improving it, erecting showers, planting trees, posting city signs, providing life guards and routinely raking, grading and maintaining the beaches; the public has used the beaches daily; Respondent has carried the property on its tax rolls as public beach, although the county did not always do so; although Petitioner twice wrote Respondent (once in 1945 and again in 1948) advising it that the company owned the land and that it wished the lands placed in the company's name on the tax rolls, Respondent refused to do so; and Respondent spent well over a million dollars on the beaches in its maintenance and improvement of them over a 50-year period. We conclude that on remand the trial court would be well advised to consider the facts developed sub judice in light of this Court's opinion in the *Tona-Rama* case, *supra*.

We have considered the remaining issues raised by Petitioner and find them to be without merit.

Respondent by its cross-petition seeks reversal of the trial court's order, affirmed by the Fourth District Court of Appeal, denying it a trial by jury. The District Court simply rejected the Respondent's claim for a jury trial, saying that "the City has failed to demonstrate that it is a '*defendant* . . . in actual possession' so as to give rise to a trial by jury," citing Fla.Stat. § 65.061 and Albury v. Drummond, 95 Fla. 265, 116 So. 236 (1928).

The facts are that in August, 1964, the tax assessor for Broward County sued both Petitioner and Respondent for a declaratory decree and equitable relief. Although no demand for jury trial was made in its original answer, filed September 3, 1964, the Respondent on February 3, 1970, filed a written motion for a jury trial on the issue of the dedication of the subject property to the municipality prior to 1930, and on the issue of the actual possession of the property. The essential grounds of the motion were that the issues of dedication and possession were factual issues which should be determined by a jury and that no prejudice could be shown to either party by granting a trial by jury. The trial judge, by order dated March 23, 1970, summarily denied the motion for a jury trial. Then, on May 22, 1970, the Respondent filed an amended answer and amended cross-claim against Petitioner, and on June 4, 1970, filed a demand for a jury trial on the issues of dedication and right to possession of the property, based on Fla.Stat. 65.061. Apparently the Respondent also filed another motion for jury trial on August 17, 1970, but in any event all demands and motions for jury trial made by the Respondent were denied by the trial judge.

In its amended answer the Respondent alleged, *inter alia*, that the subject property had been dedicated to the public and that the Respondent had actually possessed and used the property for the benefit of the public for more than twenty years. By cross-claim against Petitioner, Respondent sought to quiet title and to remove the cloud on Respondent's title caused by Petitioner's recorded deed from Highway Construction Company.

Petitioner counter-claimed against the Respondent seeking to remove the cloud from its title by cancellation of Respondent's previously recorded Notice of Claim to Real Estate and also counter-claimed for damages against Respondent for filing the allegedly false Notice of Claim to Real Estate. As noted above, the Respondent was denied requests for a jury trial before and after the filing of the amended answer and counter-claims.

Respondent's claim to a right to a trial by jury is based on Fla.Stat. 65.061, which reads in pertinent part as follows:

"65.061. Quieting Title; additional remedy (1) Jurisdiction.—Chancery courts

. . . shall determine the title of plaintiff and may enter a judgment quieting the title and awarding possession to the party entitled thereto, *but if any defendant is in actual possession of any part of the land, a trial by jury may be demanded by any party* whereupon the court shall order an issue in ejectment as to such lands to be made and tried by a jury. Provision for trial by jury does not affect the action on any lands that are not claimed to be in the actual possession of the defendant. The court may enter final judgment without awaiting the determination of the ejectment action." (Emphasis supplied)

Respondent's position is that not only was it a defendant in the original suit filed by the tax assessor, but that it was also a counter-defendant against whom affirmative relief and damages were sought by counter-claimant, Petitioner, and granted by the trial judge. It is also contended that the evidence is irrefutable that Respondent was in actual possession of the beach for half a century, exercising exclusive domain and control thereover, thus meeting both tests of F.S. 65.061. In its brief, the Petitioner raises several arguments in support of its contention that the Respondent is not entitled to a jury trial. It is argued, for example, that the Respondent was not a defendant, but a plaintiff, in a quiet title action; that the suit sought declaratory and equitable relief, which raised issues for the court and not a jury; that in the actual trial the Respondent assumed the position of plaintiff upon whom the burden of proof rested; that the respondent's contention that affirmative relief was awarded based on Petitioner's counter-claim against the Respondent is unsupported by the record; and that the record completely negates the assertion that the Respondent was in actual possession of the locus in quo. Finally, Petitioner contends that since neither it nor Respondent made any demand for jury trial within a ten-day period following the last pleading, provided by Florida Rules of Civil Procedure 1.430, the Respondent waived the right to a jury trial.

[2, 3] We hold that the Respondent was entitled to a jury trial on the issues of dedication and actual possession of the property and that the right to that jury trial has not been waived. Questions as to the right to a jury trial should be resolved, if at all possible, in favor of the party seeking the jury trial, for that right is fundamentally guaranteed by the U. S. and Florida Constitutions. See U. S. Constitution, Amendments 7 and 14, and Florida Constitution, Article I, Declaration of Rights, § 22.

There is substantial evidence in the record to support the Respondent's contention that it was in actual possession of the property, that it openly improved the beaches for nearly half a century by constructing groins, rehabilitating the beach after devastating hurricanes, planting trees, erecting showers, posting city signs, providing life guards, and routinely and continuously raking, cleaning, grading and maintaining the beaches. For the fifteen fiscal years ending in 1969, the Respondent's expenditures totalled $1,189,631.43 for the improvement and maintenance of the pubic beaches. Finally, it is undisputed that the public has daily used the beaches.

In the City of St. Petersburg v. Meloche, 92 Fla. 770, 110 So. 341 (1926), the issue before this Court was what constituted possession under the adverse possession statutes. We held:

"[2] As to the title of the complainant by adverse possession, it is true that, his claim not being founded upon a written instrument, or color of title, paragraph 2 of section 2936 of Revised General Statutes of Florida applies as to what constitutes the occupation or possession required, viz.:

'1. Where it [the land] has been protected by substantial inclosure; or, 2—where it has been usually cultivated or improved.'

"In considering the meaning of the word 'improved' as used in the statute, each case depends upon the circumstances of that particular case. In the one under consideration it could hardly be expected that the land should be cultivated as a farm, or even to have been inclosed by substantial fence. Reclaiming it from submerged land, having a house extending upon a portion of it, planting some trees upon it, placing the black dirt upon it, keeping a wood pile thereon, and the general notice to the public, might appear sufficient. In the case of Bensdorff v. Uihlein, 132 Tenn. 193, 177 S. W. 481, 2 A.L.R. 1364, we find very similar circumstances. Under a statute practically the same as ours as to the necessary occupancy or possession, it was held that a triangular piece of land was so adversely held by the claimants, though the only evidence was that they had paved the same, it lying contiguous to their store building, and had used it as an entrance to their store; the general public being also permitted to constantly use the same." At 342.

It is difficult to comprehend how the Respondent could do more to possess the beach property, short of erecting buildings and enclosures, than by caring for it, maintaining it and allowing unquestioned use of the beach property by the public.

In Albury v. Drummond, *supra*, this Court held that in a suit to quiet title the Court must first find that the land or some particular part thereof is in the actual possession of one or more of the defendants before a jury trial may be had by any party. The question thus becomes whether either party to this dispute was a defendant in possession of the land.

Section 45.011, F.S.A., defines "plaintiff" as "any party seeking affirmative relief whether plaintiff, counter-claimant, crossclaimant, or third party plaintiff, counterclaimant or crossclaimant." "Defendant" is defined as "any party against whom such relief is sought." Applying these definitions to the case sub judice, we find that the Respondent easily fits within the definition of the term "defendant". Not only was the Respondent an original defendant in the suit brought by the tax assessor for Broward County against both Petitioner and Respondent, more importantly affirmative relief was sought and in fact obtained by Petitioner in its counterclaim against Respondent. The trial court below specifically granted the relief sought by Petitioner in the first of its two counter-claims by ordering that the Notice of Claim to Real Estate filed by Respondent on June 22, 1964, and recorded in the Broward County records, be cancelled of record. There is no question that the Respondent, in defending against the counter-claim, the nature of which was an action to remove a cloud on Petitioner's title, was a defendant in actual possession of the property.

[4, 5] We find no merit in Petitioner's remaining contentions regarding, *inter alia*, Respondent's waiver of its right to a jury trial, and that a jury trial is not allowable in a suit in equity. Adams v. Citizens Bank of Brevard, 248 So.2d 682 (Fla. 4th DCA 1971). With respect to the question of waiver, we notice that although no timely demand for a jury trial was made by either party within ten days of the initial last pleadings directed to the issues desired to be tried, amended pleadings were filed by Respondent in May, 1970, and by Petitioner in June, 1970. In his Final Judgment the trial judge noted that the amended pleadings of Respondent first raised the issue of ownership by prescription, and the pleadings support this conclusion. *Where an amended pleading injects a new issue in the case* the time for filing a demand for a jury trial is revived although the party making the demand may have waived the right to a jury trial at the time of the initial responsive pleadings. See Leopold v. Richard Bertram and Co., 276 So.2d 225 (Fla. 3d DCA 1973) and Moretto v. Sussman, 274 So.2d 259 (Fla. 4th DCA 1973). It is not contended that Respondent failed to make a demand for jury trial timely to its amended answer and cross-claim.

[6] The determination of whether a trial judge abused his discretion in denying a demand for jury trial must be decided on a case by case basis; however, due to the extreme time lapse between the filings of the pleadings in this case, the fact that amended pleadings were filed raising new issues, and the apparent lack of prejudice resulting to the Petitioner in granting Respondent a jury trial, we hold that the trial judge abused his discretion in denying Respondent's demand for jury trial.

In conclusion, conflict having been demonstrated, as to the denial of a jury trial, that portion of the District Court's opinion denying Respondent a jury trial is quashed with directions to remand for proceedings consistent herewith.

ADKINS, C. J., ROBERTS, BOYD and McCAIN, JJ., and FERRIS, Circuit Judge, concur.

OVERTON, J., concurs in judgment only.

DEKLE, J., dissents.

WEST KEY NUMBER SYSTEM

SUN FIRST NATIONAL BANK OF MELBOURNE, etc., Petitioner,

v.

Lael N. BATCHELOR, etc., Respondent.

No. 47101.

Supreme Court of Florida.

Oct. 1, 1975.

Rehearing Denied Nov. 20, 1975.

After remand, 266 So.2d 185, administrator ad litem of estate filed amended complaint seeking $400,000 in damages for conversion and for obtaining property by undue influence. The Circuit Court, Brevard County, Tom Waddell, Jr., J., entered summary judgment for defendants, and administrator appealed. The District Court of Appeal affirmed, 308 So.2d 649, and certified two questions of law. On writ of certiorari, the Supreme Court, England, J., held that release given by administrator ad litem to bank which released all its claims against bank arising out of any conduct on part of bank's former trust officer did not operate to discharge claimed liability of former trust officer arising out of same tort.

First certified question answered affirmatively and decision of District Court of Appeal quashed; District Court of Appeal directed to remand case to trial court.

1. Release ⇐29(2)

Statute abolishes in toto the common-law rule to effect that the release of one or more tort-feasors operates as a discharge of all other tort-feasors who may be liable for the same tort. West's F.S.A. § 768.041(1).

2. Release ⇐27

Release given by administrator ad litem to bank which released all its claims against bank arising out of any conduct on part of bank's former trust officer did not operate to discharge claimed liability of former trust officer arising out of same tort. West's F.S.A. § 768.041(1).

3. Release ⇐29(2)

Word "damage," in statute which provides that a release or covenant not to sue as to one tort-feasor for property "damage" to, personal injury of, or the wrongful death of any person shall not operate to release or discharge the liability of any other tort-feasor who may be liable for the same tort or death, means "loss, injury or deterioration caused by * * * one person to another in respect to his * * * property." West's F.S.A. § 768.041(1).

Statement read by Ed McMahon, President of the Old Naples Association at a Regular Council Meeting, December 7, 1983 - Item #7

The Board of Directos of the Old Naples Association discussed the proposed request for variance requested by Mr. Schryver. The Unanimous vote of the Board was to request that you reject this application.

I discussed this with the members of the Presidents' Council at our meeting on Monday morning, December 5, and was told by all those present that they were opposed to this and wished me to convey this to you:

Anita Utter - Aqualane Shores

Bill Brickman - Crayton Road

Virginia Newman - Moorings

Elwood Olsen - Naples Civic Association

Paul Hockwalt - Park Shore

Dan Spina - Coquina Sands

The position of the Old Naples Association has always been that no variance should be granted unless it made common sense or was an extreme hardship to the individual. Neither of these apply in this instance. The lost is of sufficient size to build a substantial house. Mr. Schryver knew prior to purchase what the coastal setback line was. If he wished to develo the lot on which his house sits presently for condominiums, he could have torn it down to do so as many other developers in the area have done.

If you approve this you are NOT being consistent. Let me cite a few cases:

1. On November 15 you denied Mr. Lassiter a 12' variance in his front yard setback on the street side with the comment that he should build his house within the required lot area which was large enough.

2. On the same date you denied Mr. Leo Wagner a 5' variance to construct a garage and save a tree.

3. On February 15 you denied Mr. Brian Beardsley's request to convert living quarters on the 2nd floor of Gulf Coast Coin Brokers to office space.

Without sufficient parking and told him that a prudent buyer should be aware of the conditions affecting his property when he purchased it.

Now you have been asked to approve a 30' variance forward of the Coastal Set-Back line on our shore line which actually places the line forward of the adjacent property.

In view of previous decisions and the fact that your Beach Study Committee is recommending even more restrictive setback, we urge you very strongly to reject the request.

AGENDA ITEM #10
12/7/83

ATTACHMENT #4

City of Naples

--- MEMO ---

TO: HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL

FROM: CITY MANAGER FRANKLIN C. JONES

SUBJECT: PROPOSED BAND SHELL/CAMBIER PARK

DATE: NOVEMBER 30, 1983

BACKGROUND:

At both the August 3rd and 17th City Council meetings, the Naples Concert Band, Inc., made a request to City Council for permission to utilize a portion of Cambier Park for a proposed band shell. At the August 17th meeting, Council decided to appoint a Blue Ribbon Committee to review this request in further detail.

ANALYSIS:

The Blue Ribbon Committee, comprised of Henry B. Watkins, Jr., Glenn McKay, George Schnakenberg, and John Anson Smith, met on several occasions, and on November 8, approved a site in Cambier Park for placement of the proposed band shell. The site recommended is located in the northern section of the Park, centrally located between Park Street and Eighth Street, South. This facility and the use is consistent with the deed restrictions which govern the Cambier Park property. We have attached minutes the Blue Ribbon Committee's November 8, meeting and the minutes of of the Parks & Recreation Advisory Board of November 8, which include a site plan of the park. This proposal has been reviewed and approved by the city staff.

RECOMMENDATION:

Based on actions by the Blue Ribbon Committee, the Parks & Recreation Advisory Board and the staff, I recommend that the City Council indicate support for the construction of a band shell on the proposed site. This will allow the Naples Concert Band, Inc., to begin fundraising activities. Final plans for the construction will be brought back to the Council for final approval.

Respectfully submitted,

Franklin C. Jones
City Manager

Prepared by:

Mark W. Wiltsie
Assistant to the City Manager

ATTACHMENT #5

City of Naples

--- MEMO ---

TO: HONORABLE MAYOR AND MEMBERS OF CITY COUNCIL

FROM: CITY MANAGER FRANKLIN C. JONES

SUBJECT: SISTER CITY AFFILIATION WITH PRIEGO, SPAIN

DATE: DECEMBER 2, 1983

Background: The Sister City Program was established in 1956 to provide a people-to-people international cultural exchange. The City of Naples has participated in the program since 1976 when it recognized Espinal, Columbia, as a sister city. Our city government participation is very small and consists mainly of an annual dues payment of $250 to the Town Affiliation Association which is shared by Collier County. Beyond that, most of the activities are carried out by voluntary groups in the two cities.

We have now been requested by the Naples-Collier County Sister City Program, Inc., to recognize the City of Priego, Spain, as an additional sister city. The reason for this is that Priego was the founding city for Espinal, Columbia. The City of Priego and the City of Espinal are now recognizing each other as sister cities and felt it appropriate to also recognize Naples as a sister city of each.

Analysis: The action to accomplish the recognition of Priego brings no additional obligation to the City of Naples and all of the future programs of cultural exchange will be carried out by the voluntary group, Naples-Collier County Sister City Program, Inc.

We have attached a letter and resolution from the City of Priego indicating that the necessary action has been taken to recognize the City of Naples as its sister city. The attached City Council resolution would complete the process for Naples by establishing this relationship. It is common for cities to identify more than one sister city and the relationship between Priego and Espinal seems to be a good basis for Naples and Collier County to recognize Priego.

Recommendation: Based on the interest shown by the City of Priego and the Naples-Collier County Sister City Program, Inc., I recommend that the attached resolution be adopted.

Respectfully submitted

Franklin C. Jones
City Manager

FCJ/tan
attch.

Board of County Commissioners

OFFICE OF THE COUNTY ATTORNEY
COLLIER COUNTY, FLORIDA

BURT L. SAUNDERS
COUNTY ATTORNEY

KENNETH B. CUYLER
ASSISTANT COUNTY ATTORNEY

R. BRUCE ANDERSON
ASSISTANT COUNTY ATTORNEY

COLLIER COUNTY COURTHOUSE
BUILDING "F"

NAPLES, FLORIDA 33942
813-774-8400

December 6, 1983

Councilman Harry Rothchild
600 Regatta Road
Naples, FL 33940

Re: State Attorney, City of Naples, Collier County Prosecutor Agreement

Dear Councilman Rothchild:

This is to confirm our telephone conversation of December 5, 1983, in which we discussed the above contract. I advised you that in light of Mr. Scatena's lengthy involvement in the above contract, and in light of the fact that Mr. Scatena cannot attend the City Council meeting on Wednesday, I have no objection to the item being continued for two weeks in order for you to be able to have Mr. Scatena's input. However, I would suggest that if the Agreement is approved by the City, that the effective date still be December 1, 1983.

I appreciate your interest in this matter, and if I can be of any further service to you, please do not hesitate to ask.

Very truly yours,

Burt L. Saunders

BURT L. SAUNDERS
Collier County Attorney

BLS/d/5