NO. 28175

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

MAUNALUA BAY BEACH OHANA 28, a Hawaii Non-Profit Corporation; MAUNALUA BAY BEACH OHANA 29, a Hawaii Non-Profit Corporation, MAUNALUA BAY BEACH OHANA 38, a Hawaii Non-Profit Corporation, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, vs. STATE OF HAWAI`I, Defendant-Appellant.	CIVIL NO. 05-1-0904-05 EEH APPEAL FROM THE ORDER GRANTING PLAINTIFFS' AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT FILED FEBRUARY 13, 2006, filed on September 1, 2006 FIRST CIRCUIT COURT HONORABLE EDEN ELIZABETH HIFO Judge

PLAINTIFF-APPELLEES' ANSWERING BRIEF

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PLAINTIFF-APPELLEES' ANSWERING BRIEF

I. INTRODUCTION

In this interlocutory appeal, the State of Hawai`i (the "State") paints Appellees[1] as enemies of public beach access. The State's rhetoric is both offensive[2] and wrong. In truth, this case is about the State's effort to take, by legislation, accretion *mauka* of the shoreline for public use without compensation. Expanding publicly owned oceanfront land may be worthwhile, but

[1] "Appellees" shall refer to Plaintiffs-Appellees Maunalua Bay Beach Ohana 28, Maunalua Bay Beach Ohana 29, Maunalua Bay Beach Ohana 38, individually and on behalf of all others similarly situated.

[2] The tenor of the State's rhetoric is unmistakable: "This case pits the interests of private beachfront landowners against the interests of the general public, and against the people's constitutionally declared desire and command that the State's treasured beaches be preserved for the enjoyment of all." (*Opening Brief* at 1). The State's rhetoric notwithstanding, this case is **not** about "preserving" the public beach; it is about **expanding** public lands by proclaiming the State owns land *mauka* of the shoreline recognized by law.

the State cannot steal private property. If the State wants to take all unrecorded[3] accretion for itself, the State must pay for it.

This case concerns ownership of accretion, not public access to the land that lies *makai* of the boundary that separates public and private land. Appellees do not seek to deny public access to the beach. No one disputes that private landowners living along the shoreline ***do not*** own the property *makai* of the upper wash of the waves; that land has been, and always will be, public land. At issue here is whether the Circuit Court correctly determined that Act 73 (2003) ("Act 73") was an uncompensated taking of vested private rights in existing and future accretion which lies *mauka* of the boundary which has been recognized by this Court for over 100 years.

Under Act 73, the seaward boundary of virtually every oceanfront parcel was fixed as of May 19, 2003.[4] Although it left these owners subject to losing property due to erosion or rising sea levels, Act 73 fixed the seaward boundaries based upon the metes and bounds in the last recorded instrument for their land. All unrecorded accretion - - past and future - - was declared to be "state land." The State has never paid, or even tried to pay, for taking this property. Unless and until it does so, as the Circuit Court ruled, Plaintiffs and those they represent are entitled to an injunction against enforcement of Act 73.

As explained below, the Circuit Court correctly determined Act 73 is unconstitutional unless the State pays just compensation. The State's arguments have no merit because:

- In Hawai`i and all across the United States, private accretion rights are acknowledged and defended by the Courts. Hawai`i is like many other States which have tried - - and failed - - to "legislate" uncompensated and

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[3] For simplicity, in this *Answering Brief,* the methods of memorializing seaward boundaries through Land Court registration under H.R.S. Chap. 501 or Circuit Court quiet title proceedings under H.R.S. Chap. 669 shall both be referred to as "recording" accretion.

[4] The only exceptions were for owners who were, on that date, prosecuting Land Court registration or Circuit Court quiet title actions. Act 73, § 6.

unconstitutional takings of private accretion rights by converting shifting shoreline boundaries into fixed ones, thus violating private landowners' vested rights;

- The State's so-called "classes" of accretion are fiction. The Circuit Court correctly omitted them from its order because they are fabrications with no basis in the common law or historical development of accretion rights. Indeed, the State's own treatment and interpretation of the so-called "classes" of accretion is belied by positions it took before this litigation in proceedings to establish recordable title to accretion.

- Whether viewed as a "regulatory taking" or as a "physical" taking, Act 73 took Appellees' vested interest in existing and future accretion without compensation. It declared all existing and future accretion to be state property and denied private owners the right to record all natural and permanent accretion by changing the legal effect of the seaward boundary identified in conveyance documents.

- Only if the State continues to permit littoral landowners to assert ownership over naturally accreted land and allows recording under H.R.S. Chapters 501 and 669, respectively, does no taking occur.

II. COUNTER-STATEMENT OF THE CASE

A. Nature of the Case

The issue before this Court is a simple one: ***Does Act 73 take Appellees' vested rights to accretion without compensation?***

No one in this action is suggesting the State should not increase the size of public beaches by expanding them into areas *mauka* of the shoreline. Large public beaches are wonderful; they bring much happiness to Hawai`i's citizens and tourists, alike. However, private landowners are under no obligation to donate their private property for the cause.[5] If the State wishes to increase the width of public beaches it can surely do so, but not without compensating private landowners.

[5] As the Supreme Court has recognized, this unconstitutional guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central v. New York,* 438 U.S. 104, 123-124 (1978) (quoting *Armstong v. United States,* 364 U.S. 40, 49 (1960).

Act 73 forever took away a portion of Appellees' parcels which have oceanfront boundaries running "*ma ke kai,*" "*ma kahakai,*" or, "along the shoreline." Hawai`i common law has ***always*** recognized littoral landowners' vested rights to accretion above the high water mark. *See* Section II-C, *infra.* In 1985, Act 221 (1985) ("Act 221") limited the terms under which title to such land could be recorded, but it did not alter littoral owners' title. 1985 HAW. SESS. LAWS 401. Act 73, in contrast, said all existing and future accretion was (and would forever be) state land. 2003 HAW. SESS. LAWS 128-130. By doing this without paying compensation to the littoral owners, the State went too far. In fact, this is precisely what the Takings clause prohibits: "a State, by *ipse dixit,* may not transform private property into public property without compensation.... This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 (1980).

B. Course and Disposition of Proceedings

Appellees filed the action below on May 19, 2005 and alleged two claims for relief: (1) payment of just compensation under Article I, Section 20 of the Constitution of the State of Hawai`i; and (2) declaratory and injunctive relief. (ROA I: 1-11).[6] By amended motion on October 28, 2005, Appellees' class representatives moved for class certification, which was granted. The class was certified to include:

> [A]ll non-governmental owners of oceanfront real property in the State of Hawai`i on and/or after May 19, 2003.

(ROA II: 74-77). While Appellees' Motion for Class Certification was pending, the State filed its Motion for Summary Judgment filed October 17, 2005 (the "Motion for Summary

[6] Citations to the Record on Appeal shall be referred to by "ROA," followed by the Volume Number, which will be followed by the page number(s).

Judgment"), which argued the named Appellees (now class representatives) could not seek relief because they acquired fee simple title to the property adjacent to the accreted land only after Act 73 was signed into law. (ROA I: 239-294). The Circuit Court denied the State's Motion for Summary Judgment.[7] (ROA II: 72-73). That ruling is not on appeal.

On February 13, 2006, Appellees filed Plaintiffs' Amended Motion for Partial Summary Judgment (the "Motion for Partial Summary Judgment"). (ROA VII:106-122). In that motion, Appellees sought partial summary judgment in their favor for Injunctive Relief because there was no dispute that (1) Act 73 is a taking of private property; and (2) the State is refusing to pay for such taking.

On August 31, 2006, the Circuit Court granted Appellees' motion and - - after some wrangling between counsel as to the proper language for the Order - - ruled that:

(1) [Act 73] represented a sudden change in the common law and effected an uncompensated taking of, and injury to, (a) littoral owners' accreted land, and (b) littoral owners' right to ownership of future accreted land, insofar as Act 73

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[7] The State suggests the class representatives in this action have no interest in accreted rights. (*Opening Brief*, pages 21, fn. 15, 27-28). It is improper for the State to raise this issue on this Appeal and, even if the issue were ripe, the State is wrong. The named Appellees' standing to sue was addressed in the briefing on the States' *Motion for Summary Judgment* and the granting of Appellees' *Motion for Class Certification*, neither of which forms the basis for this Appeal, which was specifically limited in scope by stipulation of the parties and the certification of interlocutory appeal. (ROA III: 11-13; Notice of Appeal, Exhibit B thereto, ROA III: 74-76). Moreover, even if the class representatives lacked standing, the only appropriate remedy would be to remand to allow some other representative to step in. *See, e.g., Manual for Complex Litigation* (Fourth) § 21.26 (2004) (noting that where replacement of a class representative is necessary because Rule 23(a) requirements are not met, "courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative"); *In re Pharmaceutical Industry Average Wholesale Price Litigation,* 230 F.R.D. 61, 80 (D. Mass. 2005) (plaintiffs granted leave to amend their complaint to name additional class representatives). However, there is no legitimate attack on the standing of these named Appellees because they succeeded to the prior owner's interests and the duty to pay just compensation is unaffected by transfers of ownership. *See Palazzolo v. Rhode Island,* 533 U.S. 606 (2001) and *Hughes v. Washington,* 389 U.S. 290 (1967), both of which support Appellees' right to bring this action either as the successor in interest to the prior owner's interest or in the interest of challenging an unconstitutional taking.

declared accreted land to be "public land" and prohibited littoral owners from registering existing and future accretion under H.R.S. Chap. 501 and/or quieting title under H.R.S. Chap.669.

(2) [Act 221] was not intended to alter, and did not alter, the common law of Hawai`i with respect to the ownership of accreted land by the littoral owner. Such land belongs to the littoral landowner, whether or not title thereto is ever registered under H.R.S. Chap. 501 and/or title is ever quieted under H.R.S. Chap.669, and it was not taken by the State from littoral landowners so long as the littoral landowners remained free to record their title thereto.

(3) Land which accreted naturally and imperceptibly before Act 221 was not made "public land," and was not taken from littoral landowners;

(4) Land which accreted naturally and imperceptibly after Act 221 is not public land and ... was not taken by the State from littoral landowners by Act 73, even if the land is not "permanent" within the meaning of Act 221, so long as littoral landowners remain free to register title to "permanent" accreted land under Haw. Rev. Stat. Chapter 501 and/or quiet title under Haw. Rev. Stat. Chapter 669. (ROA III: 7).

With this, the Circuit Court granted Appellees' Amended Motion for Summary Judgment insofar as Plaintiffs sought declaratory relief. (ROA III: 5-8). The Court left it to the State to decide whether to enforce or abandon Act 73 and thereby minimize its obligation to pay just compensation.[8] This interlocutory appealed followed because all parties recognized that the course of future proceedings depended upon the threshold question whether Act 73 works a "taking."

C. Factual and Historical Background

(1) *Common Law*

As the State concedes,[9] long-standing common law in Hawai`i provides the owner of contiguous oceanfront land also owns any accretion appurtenant thereto. *See, e.g., Halstead v.*

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[8] The State told the Court that it plans to enforce Act 73 and will pay compensation, if owed. (May 3, 2006 *Transcript of Hearing*, at 7).

[9] *Opening Brief* at 3.

Gay, 7 Haw. 587, 588 (1889) (land formed by the gradual and imperceptible accretion from the water belongs to the owner of the contiguous land to which the addition is made); *State v. Zimring,* 58 Haw. 106, 119, 566 P.2d 725, 734 (1977).[10]

Ownership of accretion has never been dependent upon recordation because seaward boundaries are always changing. Shoreline landowners have always (at least until Act 73) had the opportunity to memorialize their ownership of accretion through recordation, but contrary to Appellant's contention, Hawai`i law has ***never*** required the recording of accreted lands to establish property boundaries. Instead, the "high water mark" has always been the controlling boundary.

As this Court explained thirty years ago, if the metes and bounds description of a shoreline parcel varied from the "high water mark", that mark (as it moves over time) is the controlling boundary - - regardless of dimensions which may appear in **any** recorded document. *In re Sanborn,* 57 Haw. 585, 598, 562 P.2d 771, 778-779 (1977) (holding distances and azimuths in a land court decree are not conclusive in fixing a title line on a body of water, where the line is also described in general terms as running along the body of water).

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[10] This same rule applies under federal law and in other states. *See, e.g., Hughes v. Washington,* 389 U.S. at 293 ("[a] long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore"); *Board of Trustees v. Medeira Beach Nominee, Inc.,* 272 So.2d 209, 211-212 (Fla. Ct. App. 1973) ("Title to accreted lands by the great weight of authority vests in the riparian owners of abutting lands"); *Soo Sand & Gravel v. M. Sullivan Dredging Co.,* 259 Mich. 489, 498, 244 N.W. 138, 140-141 (1932) ("The state cannot impair or defeat riparian rights by a grant of land under water; nor cut off the owner's access to the water by construction of a highway; nor grant to strangers the right to erect wharves in front of his property; nor erect a bathhouse on the shore to interfere with the right of access...") (citations omitted).

(2) *Act 221*

In 1985, the State enacted Act 221, which allows recording of accretion only when its permanence was established after a 20 year period.[11] Act 221, however, did not affect ownership; it only changed the rules with respect to when recording could take place. Act 221 also specifically prohibited property owners from artificially extending their seaward boundary by means of planting foliage, sea wall construction, and other methods. 1985 HAW. SESS. LAWS 401. In essence, Act 221 sought to ensure accretion established by recording was truly natural and permanent. *Id.*

After Act 221, Courts ***continued*** to recognize Hawai`i littoral landowners' rights to natural and permanent accretion. See *In re Banning*, 73 Haw. 297, 832 P.2d 724 (1992); *Napeahi v. Paty,* 921 F.2d 897 (1990) (noting, first, the Hawai`i Supreme Court holding in *Sanborn* regarding the changing of seaward boundaries through erosion and, second, that the precise location of the high water mark on the ground is subject to change and may always be altered by erosion).

(3) *Other Related - - but Unsuccessful - - Legislative Efforts*

In 2002 (one year before Act 73's passage) virtually identical legislation (H.B. 2266) was **vetoed** by then-Governor Cayetano based on the same concerns raised in this action. Governor Cayetano's objections were as follows:

> The purpose of House Bill No. 2266 is to permit only the State to own accreted land ... This is marked departure from the clearly established common law of this State and it does not appear that adequate consideration has been given to the impact of this measure or how it is to be implemented. Moreover, there are many

[11] Under common law, accretion is a term that "denotes the process by which the area of owned land is increased by the gradual deposit of soil to the action of a bounding river, stream, lake pond, or tidal waters." *State v. Zimring,* 58 Haw. 106, 119, 566 P.2d 725, 734 (1977), citing 7 R. POWELL, REAL PROPERTY (1976) p 983. The term also refers to the resulting land added. Oxford Dictionary of Current English, Revised 2nd Ed., 1996.

unanswered questions raised by the bill that could have significant effects on private landowners.

Statement of Objections to House Bill No. 2266 by Benjamin J. Cayetano, Governor of Hawai`i, April 26, 2002.

(4) *Act 73*

Governor Lingle signed Act 73 into law on May 20, 2003. Act 73 does two things: **First**, it gives the State full ownership of accretion which the littoral owner had not already recorded. It says unrecorded accretion "shall be state land".[12] H.R.S. §§ 501-33; 669-1(e). **Second**, it amends H.R.S. §§ 501-33 and 669-1(e) to permit only the State to record oceanfront accretion.[13] Specifically, Act 73 changed HRS §§ 501-33 and 669-1(e) to read:

> § 501-33 Accretion to land. An applicant for the registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent~~.~~; provided that no applicant other than the State shall register land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may file an accretion claim to regain title to the restored portion. ... The accreted portion of this land shall be state land except as otherwise provided in this section and shall be considered within the conservation district.
>
> § 669-1(e) Action may be brought by any person to quiet title to land by accretion~~.~~; provided that no action shall be brought by any person other than the State to quiet title to land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may also bring such action for the restored portion. ... The accreted portion of the land shall be state land except as otherwise provided in this section and shall be considered within the conservation district. ...

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[12] This language conspicuously absent from Act 221 and its inclusion in Act 73 fatally undermines the State's argument that Act 221 made accretion state land and deprived Appellees' ownership rights in newly accreted property. If the State's argument were correct, the declaration of state ownership would have been found in Act 221, not Act 73.

[13] "...[N]o applicant other than the State shall register land..." H.R.S. § 501-33. "...[N]o action shall be brought by any person other than the State to quiet title to land..." H.R.S. § 669-1(e).

Act 73 is a "regulatory taking" because it is legislation which goes "too far." This concept was first recognized by the United States Supreme Court in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922), where the court reasoned that "a strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change." Hawai`i courts also recognize regulatory takings occur when the government denies a landowner of all economically beneficial use of property without providing compensation. *Public Access Shoreline Hawaii v. Hawai`i County Planning Commission,* 79 Hawai`i 425, 452, 903 P.2d 1246, 1273 (1995). Legislative actions are subject to the same regulatory takings analysis that applies to regulations and ordinances. *Lucas v. Southern Carolina Coastal Comm'n,* 505 U.S. 1003, 1015 (1992) (concerning the effect of state legislation upon the property rights of beachfront owners and holding that the taking of all economic value by regulation is considered a "categorical" taking).

(5) *The Proceedings Below*

The State is not confused by the Circuit Court's order; it simply dislikes the clarity of the result. After the State's *Motion for Summary Judgment* failed, Appellees sought summary judgment. (ROA II: 106-122). The Circuit Court found in favor of littoral landowners' property rights and correctly ruled:

- Act 73 was an uncompensated taking of accretion rights by declaring accreted land to be "public land" and prohibiting littoral owners from recording accretion which had not already been recorded;

- Act 221 did not alter Hawai`i common law with respect to littoral landowners' ownership of accreted land, and did not take from private owners any accretion formed before or after it was enacted.

(ROA III: 5-8).

III. COUNTER-STATEMENT OF POINTS ON APPEAL

1. Did the Circuit Court correctly determine that permanently fixing littoral landowners' seaward boundary at a line fixed by metes and bounds in pre-existing title documents pursuant to Act 73 altered the owners' vested rights and was a taking under the Hawai`i constitution?[14]

For the reasons set forth herein, the answer to this issue is "yes". The Circuit Court made the correct decision and should be affirmed by this Court.

IV. STANDARDS OF REVIEW

Appellant State of Hawai`i correctly says this appeal involves *de novo* review of the Circuit Court's Order. *Kalima v. State of Hawai`i,* 111 Hawai`i 84, 98, 137 P.3d 990, 1004 (2006) ("The interpretation of a statute is a question of law reviewed *de novo*").

VI. LEGAL ARGUMENT

A. Legislative "Land Grabs" Involving Littoral Owners' Rights to Accretion Are Takings For Which Just Compensation Must be Paid.

This is not the first time a state government tried to take accretion without compensation from its private citizens by fixing seaward boundaries at a particular point in time. Both federal and state courts, however, have consistently held that littoral owners possess a **vested** right to existing and future accretion which cannot be taken without paying just compensation.

The proper framework for analyzing the constitutional implications of taking accretion rights is found in the United States Supreme Court's decision *Hughes v. Washington, supra* (a case conspicuously absent from the State's Opening Brief).[15] In *Hughes,* plaintiff Hughes owned

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[14] Pursuant to *England v. Board of Med. Examiners*, 375 U.S. 411 (1964) Plaintiffs reserved their rights to have a federal court determine the implications of Act 73 under the U.S. Constitution. (ROA I: 6).

[15] The United States Supreme Court also considered the constitutional implications of accretion takings in *Bonelli Cattle Company v. Arizona,* 414 U.S. 313, 328-330 (1973) (which the State

property bordering the ocean and sued the State of Washington to establish whether her right to accretion was abolished by the Washington Constitution enacted in 1889 (Hughes' predecessor in interest had acquired title from the United States prior to the 1889 enactment). The United States Supreme Court held Hughes ***did*** acquire the right to future accretion and cited the rule that "[a] long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore." *Id.*, 389 U.S. at 293. The Court justly determined:

> Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, and continually vulnerable to harassing litigation challenging the location of the original water lines. While it is true that these riparian rights are to some extent insecure in any event, since they are subject to considerable control by the neighboring owner of the tideland, this is insufficient reason to leave these valuable rights at the mercy of natural phenomena which may in no way affect the interest of the tideland owner.

Id., 389 U.S. at 293-294.

Hughes' common-sense rationale echoes in federal and state decisions alike. When governments try to fix the boundary of riparian land permanently (but for erosion)- - as the State did here - - they fail. In *County of St. Clair v. Lovingston,* 90 U.S. 46 (1874), the county tried to eject a private landowner from his accreted land because the survey of the river bank had

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also ignored). In *Bonelli,* the Supreme Court relied on *Hughes* in holding the riparian owner - - not the state - - owns land surfaced by the narrowing of the river channel caused by a government project. Although *Bonelli* was later overruled on grounds not relevant to this case, by *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), application of the federal common law principles to accretion along the ocean (as here) has been specifically upheld. *See State Lands Commission v. United Sates,* 457 U.S. 273, 282 (1982) (noting that under *Hughes,* oceanfront property is sufficiently different so as to justify a 'federal common law' regarding accretion rights). This is **not** to suggest that federal law controls the definition of the "shoreline" in Hawai`i. As this Court made clear in *In re Ashford*, 50 Haw. 314, 440 P.2d 76(1968), since the source of the State if Hawai`i's title to land *makai* of the shoreline is unique because it was derived from King Kamehameha, other jurisdictions cannot provide guidance in defining the shoreline. They can, however, providing guidance on the nature of the littoral owners' rights - - regardless where the boundary lies.

changed over time, but the United States Supreme Court refused, holding "the riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property." 90 U.S. at 69.[16]

Florida courts - - also citing *Hughes* - - have similarly refused to allow the State of Florida to claim accreted land as its own. *Board of Trustees v. Medeira Beach Nominee, Inc.*, 272 So.2d 209, 212-213 (Fla. App. 1973) (holding that riparian rights to future alluvion are vested and "freezing" the boundary at a point in time does damage to all the considerations supporting the accretion doctrine). In *State v. Florida National Properties,* 338 So.2d 13 (1976), the Florida Supreme Court held it unconstitutional for the Florida state legislature to establish a boundary line between riparian owners upland property and navigable waters as of the date of statehood.

The Michigan's Supreme Court refused to allow its State Department of Conservation to lease shore lands along Lake Superior for gravel removal to any one other than the riparian owner, acknowledging the rule that "the shore owner of privately owned lands shall have exclusive right to enter into such lease, namely, riparian (or littoral) rights, which are property

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[16] The few old cases that purport to hold littoral owners have no vested right to future accretion are not viable in light of more recent decisions, such as *Hughes*, and they are easily distinguished on the facts and law. For example, *Western Pacific Ry. Co. v. Southern Pac. Co.*, 151 F. 376 (9th Cir. 1907) was decided long before *Hughes* and *Bonelli* and principally concerned the rights of an incorporated city in California to expand its boundaries through accretion (*see* 151 F. at 382) and the right to construct a wharf into San Francisco Bay (*see* 151 F. at 390). Further, the Ninth Circuit in *Western Pacific* misinterpreted California law in holding that shoreline accretion did not belong to the littoral owner. *See Strand Improv. Co. v. City of Long Beach*, 173 Cal. 765, 161 P.2d 975 (1916). *Western Pacific* concerned interference with the opportunity to receive future accretion, not the right to remain a littoral landowner, which is at stake in this case. As discussed below, the flaw in Act 73 is that it separates littoral owners from the shoreline.

not generally to be taken by the state without just compensation to the owner." *Soo Sand & Gravel Co. v. M. Sullivan Dredging Co.*, 259 Mich. 489, 495-496, 244 N.Y. 138, 140 (1932).

New Hampshire's Supreme Court also refused to allow the state to take private property by legislatively changing coastal boundaries from the "ordinary" high tide line to the "highest" high tide line in the name of protecting the "public trust". In *Purdie v. Attorney General,* 143 N.H. 661, 666-667, 732 A.2d 442, 447 (1999), the New Hampshire Supreme Court echoed the principles argued here by the Appellees: "Although the legislature has the power to change or redefine the common law to conform to current standards and public needs, [citations omitted], ***property rights created by the common law may not be taken away legislatively without due process of law***." *Id.* (emphasis added).[17]

These failed efforts by other states to take accreted land rights underscore the significance and severity of the State's action here. It is indisputable that Act 73 changed every littoral owner's property line from a "moveable" boundary determined by natural cycles of erosion and accretion to one that - - subject to the negative effects of erosion - - is "fixed" based upon the documents recorded as of May 2003, regardless what nature may have added in the interim.[18] The State's unlawful action is applicable equally to all littoral owners whether they

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[17] *See also Manry v. Robison,* 122 Tex. 213, 56 S.W.2d 438 (Tex. Sup. Ct. 1932) (holding accretion rights, to which riparian owners succeeded from Mexican colonial grants, are vested property rights which cannot be deprived by legislative action); *Brainard v. Texas,* 12 S.W.3d 6, 18 (Tex. Sup. Ct. 1999) ("the rights of the riparian to additions to land by accretion or reliction are vested property rights").

[18] As the California Supreme Court recognized in *Strand Improvement,* the historical roots of the common law rule regarding accretion was explained by Blackstone:

> The law of alluvion is thus stated by Blackstone: "And as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make *terra firma*, or by dereliction, as when the sea shrinks below the usual water marks; in these cases the law is held to be that if the gain be by little and little, by

have existing accretion or may have accretion some day in the future, and regardless when they purchased their respective properties. [19]

B. In Contrast to Act 221, Act 73 was Unquestionably Intended to Have Retroactive Effect on Ownership of Accretion

Although the State claims otherwise,[20] Act 221 was NOT intended to affect ownership of past and future accretion. Nothing in the text supports the State's view, and the legislative history of Act 221 expressly confirms the State is wrong: the House Committee report from the House of Representatives says Act 221 was not intended "to affect the existing law in regard to ownership of and other rights relating to land created by accretion." SCRep. 346, 1985 House Journal at 1143.[21]

In contrast, Act 73 necessarily has retroactive effect; without it, Act 73 makes no sense. This is true for three reasons:

1. It declares **all** accretion not previously recorded or the subject of a then-pending proceeding to be "state land" – which is a direct repudiation of littoral owners' ownership. It does not say that only accretion formed after May 2003 is "state land;"

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small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimus non curat lex*; and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss." 2 Bl. Com. 262.

Strand Improvement, 173 Cal. at 771, 161 P. at 977-978.

[19] Regulations otherwise unconstitutional absent compensation are not transformed into "background law" by mere virtue of the passage of title from one owner to the next. "A law does not become a background principle for subsequent owners by enactment itself." *Palazzolo, supra,* 533 U.S. at 629, citing *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987).

[20] *Opening Brief* at 4 (arguing that Act 221 "prohibited littoral landowners from claiming any **ownership** ... in accreted lands" until "they became permanent."

[21] Since it did not affect ownership, Act 221 is not subject to any takings challenge.

2. It forbids future proceedings to record title to accretion by private owners (except for recovery of previously eroded land). This means that no littoral owner who owned accretion *makai* of the boundaries in the original conveyance (even if it had been in existence for 500 or 100 years) could after May 19, 2003 claim any rights, much less record its title; and

3. It applies pre-existing law only to then-pending proceedings and forbids new filings by private owners (except for recovery of erosion), thus making it impossible for private owners with old permanent accretion to record their title.

The command in H.R.S. § 1-3 is to give laws retrospective effect when "obviously intended." Under this standard, laws that take away or impair vested rights under existing law must be deemed retrospective. *See Employees' Retirement Sys. of the Territory of Hawai`i v. Wah Chew Chang,* 42 Haw. 532 (1958). Act 73 declares <u>all</u> unrecorded accretion - - not <u>some</u> accretion - - is state land. It says (but for recovery of erosion) all - - not some - - future private proceedings are banned.[22] The State's lawyers cannot, on this appeal, rewrite, narrow, and qualify Act 73 based upon their own design, which has no support in its text or legislative history.

C. Appellants' "Class" Designations are Fiction: They have no Historical Basis, They are Inconsistent with the State's past Litigation Posture, and They Misrepresent Both the Effect of Act 221 and Plaintiffs' Rights to "Future" Accretion.

In Act 73, the State said in simple and unambiguous language that it owns ***all*** unrecorded accretion. "The accreted portion of ... land **shall be state land**..." H.R.S. §§ 501-33, 669-1(e) (emphasis added). "...[N]o applicant other than the State shall register land..." H.R.S. § 501-33. "...[N]o action shall be brought by any person other than the State to quiet title to land..." H.R.S. § 669-1(e).

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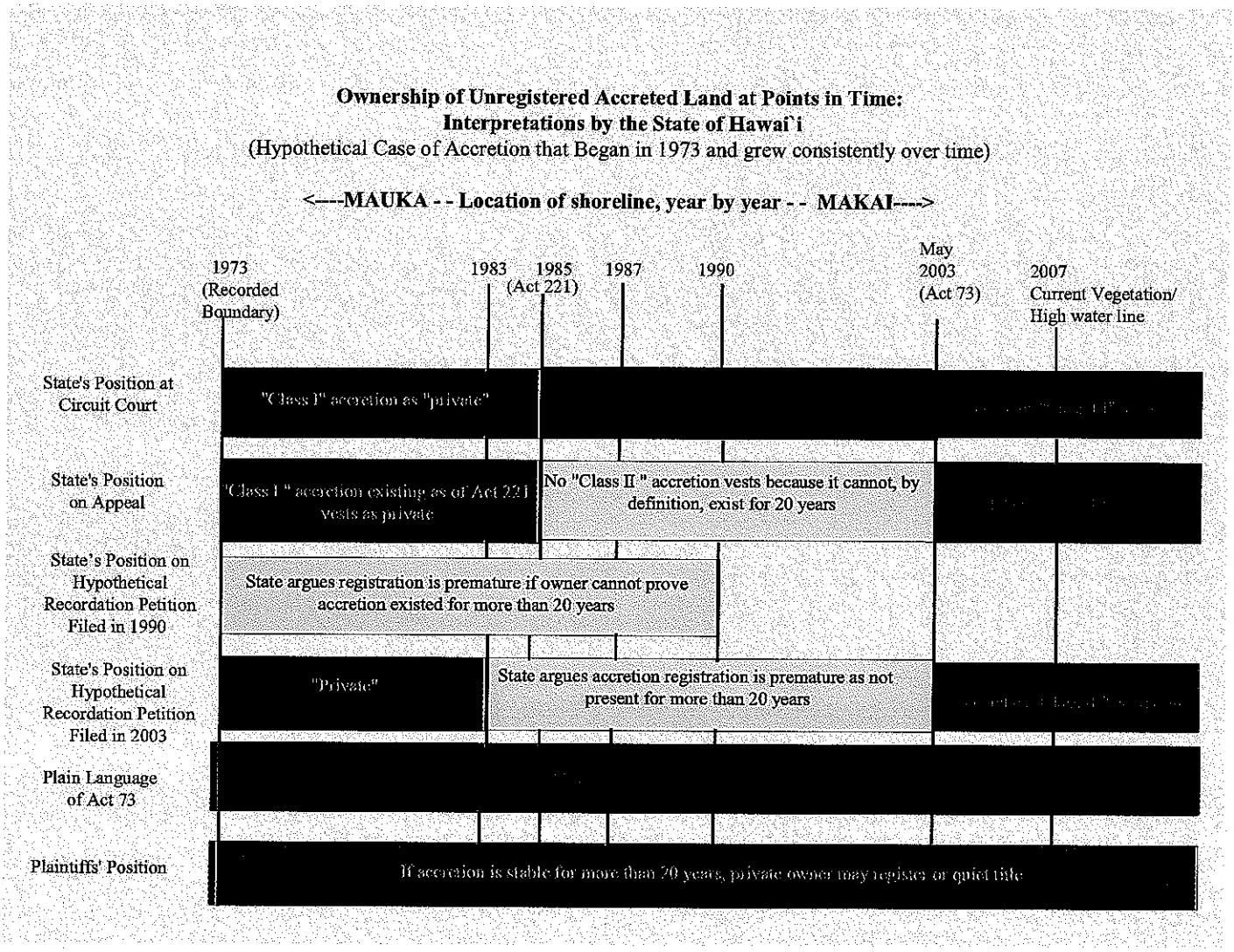
[22] What is more, the State did all of this by quietly signing legislation and providing no notice whatsoever to potentially affected property owners before doing so. This raises obvious due process issues. See, e.g., *Jones v. Flowers,* 547 U.S. 220 (2006) (holding due process requires further effort to provide notice to property owner at risk of losing interest when the government is aware notice attempts have failed).

Here, as in the Circuit Court, the State vainly struggles to narrow this sweeping language by fabricating historically unsupported distinctions. Its so-called "classes" of accretion have no role in this case—beyond demonstrating the State's inability to reconcile Act 73 with the pre-existing common law and the takings clause of the Hawai`i Constitution. Indeed, the State's own definitions of the "classes" has changed on appeal, as it grasps for a rationale to justify Act 73. These flaws in the State's approach clearly understood by examining a simple hypothetical demonstrating how it proposes to treat a littoral owner whose property gained accretion consistently from before Act 221 (say, for illustration only, 1973) through the present based upon recordation efforts in (1) 1990 and (2) 2003 and how such efforts would have been treated by the State at certain points in time.

According to the State's *Opening Brief*, all accretion existing before Act 221's passage was vested (regardless how long it had been in existence in 1985) and was, therefore, unaffected by Act 221 (*Opening Brief* at 8-9). The State also contends the "clock" started anew for all accretion formed after 1985 and, therefore, all post-1985 accretion became State land under Act 73 (without creating a "taking") because: (1) Act 221 imposed a 20-year permanence requirement before recordation (which the State wrongly equates with the start of ownership); and (2) no new permanent accretion could have been created during the 18-year span between enactment of Act 221 and enactment of Act 73. (*Opening Brief* at 6, 8). However, nothing in the record is consistent with the State's current position. To the contrary, the record shows that after Act 221's passage, in Land Court the State repeatedly required littoral owners who sought to record accretion to prove its existence for more than 20 years at the time of their petition regardless what accretion occurred before Act 221. Indeed, there is no evidence the State **ever**

treated accretion as "vested" upon Act 221's passage, contrary to the position in its *Opening Brief*:



The State's differing positions on Act 221's effect is evident in its response to recordation proceedings actually filed in the Land Court between 1985 and 2003. Instead of recognizing accretion already existing as of 1985 was vested (as it now argues), in those cases, the State through its Surveyor) insisted that all accretion be shown to have existed for 20 years, regardless of when the petition was filed between 1985 and 1993. (ROA II: 270-381). Of course, as shown in the comparison graphic, above, the plain language of Act 73 states all accretion - - no matter

when it came into existence - - is now State land if not previously recorded. H.R.S. §§ 501-33, 669-1(e). The State's inconsistencies only magnify the vulnerability of its flawed accretion law theories.

(1) *The State's Shell Game: Shifting Positions on Retrospective Impact of the Various "Classes"*

At the Circuit Court, the State argued in its *Reply re Proposed Orders on Motion for Summary Judgment filed August 31, 2006,* that:

> Before Act 221 (1985) a littoral owner automatically **owned** Class I accreted land and could register or quiet title to that accreted land at any time. After Act 221 (1985), a Class I littoral owner still **owned** Class I accreted land, but could only register or quiet title to this land if [it] had been in existence for at least 20 years.

(ROA III: 2). This theory failed for the State before the Circuit Court, and the State now asserts a different position. Now, the State contends Act 221 "should not be construed to have retroactive impact" because, ***to cite the State's example,*** "an accretion formed in 1980, enjoyed for 5 years until Act 221's effective date in 1985, could no longer be enjoyed upon Act 221's passage, and that non-enjoyment would continue for at least 15 years until year 2000 (when the accretion would be deemed 'permanent')". (*Opening Brief* at 8-9, fn. 5). Apparently, the State has now realized "serious Takings clause questions would arise if these Acts were interpreted to affect Class I accretions, [and] such interpretations must be avoided." (*Opening Brief* at 11). In fact, the State's argument for "classes" of accreted land is based on its new contention that Acts 221 and 73 are "not retrospective" and "should not be construed to have retroactive impact." (*Opening Brief* at 8-9). This position is disingenuous and contradictory of the State's position before the Circuit Court below. *Id.*; (ROA III: 2). It is hard to follow what principles now apply to each "class" the State defined in the proceedings below.

Prior to Act 73, all private oceanfront property owners owned both the land naturally accreted to their adjacent property **and** had a vested interest in any accretion formed in the future. The State now argues no pre-1985 accretion was taken by Act 73. (*Opening Brief* at 12). If that is true, all applications for pre-1985 accretion between 1985 and May 2003 should have been granted to littoral owners without any need for proof of how long the natural accretion had been in existence. However, Land Court applications between 1985 and 2003 for pre-1985 accretion paint a much different picture:

- In *In re Application of Banning*; Petition of Deborah Putnam: in 1994, the petitioner sought to register accretion based upon the vegetation line as it existed in 1982. However, the State refused to recognize that line as the legal boundary because it was "not acceptable" in light of Act 221. (ROA III: 36, 43). In March 1994, the Land Court registrar expressly rejected the petition, saying the petitioner was required to show the accretion existed for more than 20 years prior to the petition in 1994, directly contrary to what the State now says should have happened. (ROA II: 352-368). Subsequently, the landowner filed an amended request for a smaller area which had existed for more than 20 years. (ROA II: 370-381).

- In *In re Application of Waialua Agricultural Co., Ltd.*; Petition of James & Paula Wicklund: the owner was allowed to claim accretion based upon the State Land Surveyor's report regarding the shoreline in 1967, not the shoreline as it existed in 1985 or any later time. (ROA II: 308-339).

- In *In re Application of Crozier*; Petition of Kenneth & Rhonda Martyn, Trustees: new shoreline was recognized based on findings that the new shoreline was found, by the State Land Surveyor, to be "natural and existing for more than 20 years". (ROA II: 340-351; ROA III: 18).

- In *In re Application of Banning;* Petition of Elspeth Kerr: the accretion petition was granted based upon Findings of Fact and Conclusions of Law ("Findings") which included, among other things, a determination that the accretion had existed for more than 20 years. The Findings were based upon the State Land Surveyor's amended return dated May 20, 2004 wherein the State Land Surveyor reported the additional area appeared to have been formed by natural accretion ***and*** that the new boundary was established in May 1967 (more than 20 years prior), and not by the shoreline as it existed in 1985. (ROA II: 270-307).[23]

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[23] In another case involving the same locale, *In re Banning,* 73 Haw. 297, 832 P.2d 724 (1992), the Hawai`i Supreme Court discussed Act 221 in the context of accretion occurring from 1925

Every one of these petitions was approved or **rejected** by the Land Court on the premise that the petition was subject to the 20-year permanency test imposed under Act 221, with that period running continuously up to the date of the petition. If, as the State now claims, all accretion existing before Act 221 became vested in private ownership - - regardless how long it existed - - then the petitions should have been granted for all pre-Act 221 accretion and only the newest accretion should have been subject to the new permanency test. These documents conclusively show the State's posture herein is inconsistent with how the law worked before Act 73 and that the "Class I, II and III" scheme was invented for purposes only of defending itself against Appellees' takings claims.

(2) *The So-Called "Classes" Are Belied by Plain Statutory Language and Long-Standing Common Law*

As noted above, the State's characterization of "Class II" land in its *Opening Brief* is also contrary to the express terms of Act 221 and common law on accretion rights. Act 221 did not change ownership rights to accreted land, it only delayed access to the courts for recordation procedures. First, Act 221 ***did not*** include the specific language stating that all accreted land was "public land" until after twenty years passed. To the contrary, as cited in the State's *Opening Brief*, the legislature's intent was ***not*** to affect existing law regarding accretion rights. (*Opening Brief* at 9, citing SCRep. 346, 1985 House Journal at 1143). Second, it has never been the law in Hawai`i that ownership of accretion is dependent upon recordation and that oceanfront accretion

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onward. The underlying Land Court petition was filed in 1988. Nowhere in the Court's decision is there any distinction between pre- and post-1985 accretion.

is public land unless and until the littoral owner obtains a court decree recording his new boundary.[24]

The State is correct in saying Act 221 was concerned with protecting the beach as a natural resource, but the State is incorrect - - again - - as to the nature of the concern. Act 221 sought to insure that where accretion occurred, it occurred naturally and not by "enhancement efforts" by an landowner bent on expanding his property at public expense (*e.g.*, by planting and/or watering of vegetation, constructing barriers, etc.). SCRep. 346, House Journal at 1146; SCRep. 790, Senate Journal at 1223. Act 221 prohibited recording of impermanent accretion not formed naturally. 1985 HAW. SESS. LAWS 401. Act 221 did not, however, change the law of littoral owners' rights to naturally accreted land.

With few exceptions, the oceanfront boundary of private land in Hawai`i has always been determined by the "high water mark." *Halstead v. Gay, supra,* 7 Haw. 587. The "high water mark", as it moves over time, is the controlling boundary regardless of the metes and bounds description in a recorded shoreline boundary or any other document. *In re Sanborn, supra,* 57 Haw. at 598, 562 P.2d 778-779 (distances and azimuths in a land court decree are not conclusive in fixing a title line on a body of water, where the line is also described in general terms as running along the body of water). Under *Sanborn,* the recording processes (procedures which the State concedes were permitted both before and after enactment of Act 221) do not make

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[24] Earlier, the State agreed with Appellees' view when it told the Circuit Court that it would be a mistake to "equat[e] the ability to register or quiet title with ownership." *See State of Hawai`i's Reply re Proposed Orders on Motion for Summary Judgment.* (ROA III: 1-4). In fact, Appellees did not equate these issues; Appellees have consistently argued that ownership is not dependent on recordation, although Act 73, does materially impair the littoral owners' property rights by denying the right to record ownership. There is no need to decide whether this prohibition, by itself, works a "taking." Act 73's effect flows from the combined effect of that prohibition and, the more direct effect of the explicit declaration that **all** unrecorded accretion (except recovered erosion) is now State land.

metes and bounds descriptions conclusive determinations of ownership as to seaward boundaries. *Id.*

Clearly, Act 221 was not a vehicle for reforming the rules for determining ownership of oceanfront land. It merely created a system for minimizing boundary disputes that arose from the changeable nature of the high water mark. The imposition of a "waiting period" for recording title to accretion both reduces evidentiary disputes and prevents owners from recording title to accreted land which comes and goes with the seasons. Act 221 creates a period of "stability" for recording, but it did not affect ownership, which was (until Act 73) always changing with the location of the shoreline.

D. "Fixing" Appellees' Seaward Boundaries at a Certain Point in Time Effects a Taking, whether Characterized as Regulatory or Physical

(1) *Shoreline Owners' Must Either be Permitted to Register and Quiet Title to Accreted Land in Existence Or They Must Receive Just Compensation*

Act 73 appropriated Appellees' accretion rights by enacting a regulation which allows the State to physically invade property whenever it chooses to do so. As discussed at length in section II-C and VI-A, above, Hawai`i's common law as to accreted land rights is long-standing and well established: land formed by the gradual and imperceptible accretion from the water belongs to the owner of the contiguous land to which the addition is made. *Halstead v. Gay, supra.*[25] In Hawai`i, "beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves." *In re Sanborn, supra,* 57 Haw. at 588, 562 P.2d at 773. The accretion doctrine exists so that shoreline owners are assured of their littoral property rights with

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[25] *Halstead v. Gay* concerned a trespass action where defendant contended the owner had no right to exclude him from land above the high water mark. The court disagreed. Because the grant conveyed all land above the shoreline, the accretion belonged to the contiguous landowner. *Halstead v. Gay,* 7 Haw. at 588.

"access to the water and the advantages of this contiguity." *Zimring, supra,* 58 Haw. at 119, 566 P.2d at 734 (quoting 7 R. Powell, Real Property ¶ 983 (1976)). *See also In re Banning, surpa,* 73 Haw. at 303-304 (explaining that riparian owners who face losses due to accretion should have the benefits of accretion).[26]

Superficially, the State argues Act 73 does not take accretion that existed prior to passage of Act 221 in 1985 and on the surface, the State appears to concede it will not take such rights. Scratch the surface, however, and it becomes apparent the State is just playing with words. In fact, the State has gone on record with its intention not to allow any littoral landowner to record to ***any*** accreted land, ***including land which existed prior to 1985.***[27] If the State will not allow littoral owners to obtain record title (leaving the boundaries between public and private land open to debate and dispute) and Act 73 says all unrecorded accretion is public land, then littoral owners can sell only the land described in their recorded deeds and buyers cannot take steps to establish ownership of accretion even if it predated Act 221 or existed for more than 20 years

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[26] Act 73 does not maintain the symmetry of this "bargain." Littoral owners can still lose from accretion, but they can only recover what accretion **restores** to eroded property, not what it **adds**.

[27] In their *Response to Defendant State of Hawai`i's Response and Objections to Proposed Order Granting Plaintiffs' Amended Motion for Summary Judgment filed February 13, 2006,* Appellees' explained to the Court that in post-hearing discussions between counsel regarding the validity of the State's classifications of accreted land, "the State revealed its view that no littoral owner can now obtain quiet title or register any accretion that existed prior to 1985, which Act 221 was passed". (ROA II: 264-411). The State's response thereto was oblique, at best:

> First, the parts of Act 73 (2003) relevant to this issue state, "no applicant other than the State shall register land accreted along the ocean" and "no action shall be brought by any person other than the State to quiet title to land accreted along the ocean." Plaintiffs argued that language effected a taking as to all accreted land. The court specifically rejected the claim as to Class I accreted land on the basis that littoral owners (not the State) still own the Class I land.

(ROA III: 1-4). In any event, Act 73 is clear: unrecorded accretion is now State land and may not be recorded by registration or quiet title.

prior to Act 73. Because such a position is in direct conflict with the common law, it is an unlawful, unconstitutional taking and must not be allowed absent compensation to Appellees.

(2) *Appellees Must be Allowed to Exercise Ownership and Record All Permanent Accretion*

In its *Opening Brief*, the State glibly says:

> The passage of Act 221 in 1985 made clear that as to accretions occurring after Act 221's effective date, ***littoral landowners could claim no ownership*** in those accreted land [sic] until such accretions had attained "permanent" status, by being in existence for 20 years. ... Accordingly, Act 221 meant that littoral landowners had no ownership interest in any Class II accretions until those accretions stayed in existence for 20 years.

(*Opening Brief* at 12-13). This argument is directly at odds with the State's position before the Circuit Court, where it plainly stated that accretions existing as of Act 221's passage were **not** intended to be subject to its permanency requirement:

> The State's position in this litigation is completely consistent with "the practices of the Land Court prior to adoption of Act 73." Before Act 221 (1985) a littoral owner automatically owned Class I accreted and could register or quiet title to that accreted land at any time. After Act 221 (1985), **a Class I littoral owner still owned Class I accreted land,** but could only [record] this land if had been in existence for at least 20 years.

(ROA III: 2). In any event, as discussed herein and agreed by the Circuit Court (and even by the State, at times), Act 221 did not change the law with respect to the **ownership** of accreted lands. It only changed the recording procedure with respect to accreted land. Because Act 73 denies littoral owners all attributes of ownership, including the right to record natural and permanent accretion formed after the enactment of Act 221, an unconstitutional taking has occurred.

(3) *Changing the Effect of Appellees' Shoreline Title Takes Vested Ownership Rights and Compensation must be Paid*

"[T]he riparian right to future alluvion or accretion is a vested right similar to the rights of a tree owner to the fruits of the tree." *County of St. Clair v. Lovingston, supra,* 90 U.S. 46;

Board of Trustees v. Medeira Beach, supra. "Riparianness also encompasses the vested right to future alluvion, which is an 'essential attribute of the original property.'" *Bonelli Cattle Company, supra,* 414 U.S. at 326, citing *County of St. Clair v. Lovingston,* 90 U.S. at 68. Prior to Act 73, all non-governmental littoral owners had a property right both in the land naturally accreted to their adjacent property as well as to the right to any accretion that might form in the future. *Id*; *see* discussion at Section IV-A, *supra.* Act 73 effectively changes the legal oceanfront boundary from the shoreline to a fixed boundary - - be it (1) the original boundary; or (2) the boundary reflected in some subsequent order obtained through accretion recordation proceedings at some date prior to May 2003. Notwithstanding the State's contention to the contrary, Act 73 unequivocally strips all of Appellees' vested rights to accretion.

The State contends the loss of future land is only "potential", that "it does not have a significant economic impact on the littoral landowner." The State is way off the mark. The rights lost by Act 73 are not a mere possibility: in effect, Act 73 rewrites all littoral owners' deeds so their shorefront boundaries are not *ma ke kai* (or its equivalent) but fixed lines. The accretion rights lost are present and immediate whether the accretion is existing (and previously unrecorded) or may occur some day in the future. As discussed at length above, long-standing law in Hawai`i recognizes the nature of accreted land as ever-changing, but the right of the littoral landowner thereto has always been undisputed. The State may not shape and define property rights by prospective legislation. *Palazzolo v. Rhode Island, supra.* Accretion rights - - present and future - - are an element of the "bundle of sticks" Appellees' paid for when they purchased their property.

The right to "future" accretion is a key component of Appellees' property rights because it ensures littoral landowners they will remain littoral landowners. "[T]he quality of being riparian,

especially as to navigable water, may be the land's 'most valuable feature' and is part and parcel of the ownership of the land itself." *Bonelli Cattle Company, supra,* 414 U.S. at 326, citing *Hughes v. Washington, supra.* It is no mystery why property along the beach is usually the most expensive on the market: it is adjacent to the shoreline. Property which is near the beach but interrupted by a park, public restroom, lifeguard station or shower is not as valuable as land directly on the shoreline. If the State insists on owning any future accretion, Appellees lose the most valuable aspect of their homes; they lose the guarantee they will remain owners down to the high wash of the waves. In this regard, *Pearsall v. Great Northern Railway Co.,* 161 U.S. 646 (1896), cited by the State, affirms Appellees' position. "Rights are vested ...when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest." *Pearsall,* 161 U.S. at 673. Until Act 73, Appellees' each had a right - - both present and prospective - - to maintain their ownership of land adjacent to the shoreline. The "present interest" discussed in *Pearsall* was clearly spelled out in each and every title document granting each member of the class the right to enjoy the parcel that runs "*ma ke kai,*" "*ma kahakai,*" or along "the high water mark".

Straining for authority to support its position, the State cites *Silberman v. Jacobs,* 267 A.2d 209 (Md. 1970), *Randall v. Kreiger,* 90 U.S. 137 (1874) and *Bowen v. Gilliard,* 483 U.S. 587 (1987) for the proposition that future accreted rights are "inchoate" and therefore not subject to "taking" only upon payment of just compensation. These cases, however, concern dower rights and welfare benefits, not private property rights evident in the chain of title. They have nothing to do with altering rights created by deeds which assure littoral owners they will continue to enjoy riparian status.

Appellant's reliance on *Penn Central Transp. Co. v. New York City, supra,* is misplaced. Act 73 is not a regulation that leaves title in Appellees' name and simply regulates all value from the property; it is a regulation that strips title from Appellees altogether and entitles the State to enter the accreted area at any time for its own purposes and to allow the public to enter, as well. Further, title to the shoreline portion of their land is arguably the most valuable aspect of the property whether or not it can be built upon. Act 73 most certainly effects "the main parcel" of Appellees' land; the value of Appellees' land is almost entirely dependent upon status as an oceanfront parcels.

E. Public Access is not the Issue

Unable to defend its unlawful legislation, the State is trying to paint Appellees as the enemies of public access, but the State is changing the issue. This action is not about public access. The public will always have access to the area between the legal shoreline and the water, ***just as it did prior to Act 73.*** With or without Act 73, Appellees have no right to exclude the public from the beach *makai* of the upper wash of the waves - - it is not their property and never has been. As recognized by the Florida court in *Board of Trustees v. Medeira Beach, supra*:

> The public today stands in danger of losing access to beaches in many places. Yet, quieting title here in the state will not solve the access problem. Nor will quieting title in the upland owner result in any loss of public rights in the foreshore or beach which the public always has a right to use.

Id., 272 So. 209 at 211. However, if Act 73 is allowed to stand, the words "along the shoreline," "*ma kahakai,*" or "*ma ke kai*" in littoral owners' deeds will longer have any force or effect, no matter how much money an owner paid for such title to land. The State's dismissive attitude in its Opening Brief does not acknowledge the true value of oceanfront ownership or the State's power to regulate access and build structures on State land. Certainly, the State has not, cannot, and will not guarantee each and every landowner that no structures or sidewalks will ever be

constructed on accreted land. In addition, landowners suffer special injuries by the losing the right to store boats and other watercraft on accreted land (as they could before Act 73, as owners of the property).[28] *Board of Trustees v. Medeira Beach,* 272 So.2d at 214.

Appellees do not dispute the State may have an interest in increasing the size of the beach for the benefit of the public. Increasing the size of the beach, however, is not a burden the State may unilaterally impose on littoral owners without paying for it. Of the State wants to increase the size of the public beach - - so be it - - but it may not insist private property rights be donated in order to do so.

F. The Circuit Court Properly Ruled That Accreted Land (And Future Accreted Land) Cannot Be Retained by the State Illegally: If the State Refuses to Pay, Injunctive Relief is Appropriate

The legislative scheme did not intend or provide for damages, and thus, this Court is able to grant the injunctive remedy set forth in its Order to precluding enforcement of Act 73 unless and until the State undertakes to provide just compensation. (ROA III: 5-8). *Allen v. City and County of Honolulu,* 58 Haw. 432, 571 P.2d 328 (1977). In *Allen,* the City and County of Honolulu was prohibited from enforcing a prohibitive zoning measure where doing so would deny plaintiffs a property right without compensation. *Allen* explained that in Hawai`i, courts may not require just compensation in lieu of equitable relief which protects the landowners' rights. *Id.,* 58 Haw. at 438, 571 P.2d at 331. Specifically, the *Allen* court said

> Prohibiting damages for development costs does not mean that a property owner must suffer an injury without compensation, for if the facts establish that the

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[28] Hawai`i Administrative Rules § 15-210-13(b) makes it unlawful to store a boat or other vessel in a public park, which includes, by definition, a beach. Code of Hawai`i Rules § 15-210-2. In addition, Act 73 prohibits Appellees not only from storing their own boats on (what used to be their own) accreted land, but also it obligates them to allow strangers to store their outrigger canoes there free of charge. H.R.S. § 200-20 (permitting canoe clubs to store outrigger canoes, free of charge, on state shoreline areas).

> doctrine of equitable estoppel should apply to prevent the City from enforcing newly enacted prohibitive zoning, then the property owner is entitled to continue construction. Once the City is estopped from enforcing the new zoning, if it still feels the development must be halted, it must look to its powers of eminent domain. In order for the City to operate with any sense of financial responsibility the choice between continued construction and paying to have it stopped by condemnation, if possible, must rest with the City -- not property owners.

Id. When a legislative act takes property rights without providing payment of just compensation, injunctive relief is appropriate because the choice whether to pay or forego enforcement must rest with the executive branch, not the Courts.[29] The legislative body assesses the desirability of legislation on the assumption compensation will not be required to achieve its objectives, and determining a particular land use control requires compensation is an appropriate function of the judiciary, whose function includes protection of the individuals from the excesses of government. *Id.* "But it seems a usurpation of legislative power for a court to force compensation. Invalidation, rather than forced compensation, would seem to be more expedient means of remedying legislative excesses." *Id.*, citing Fulham and Scharf, "Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance," 26 Standford L. Rev. 1439, 1450-1451 (1974).[30]

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[29] *Marks v. Ackerman,* 39 Haw. 53, 1951 WL 7071 (1951), where the Supreme Court of the Territory of Hawai`i declined to grant an injunction to restrain the filing of a motion for an order of possession in appending eminent domain proceeding has no relevance here. In *Marks*, proper eminent domain proceedings were underway and the government clearly acknowledged its obligation to pay compensation so there was nothing to enjoin if the taking was for a valid public purpose. Here, the State failed to commence proper condemnation proceedings and persists in its refusal to pay just compensation for property rights taken by Act 73.

[30] In another case generated from *Hawai`i, Sotomura v. County of Hawai`i*, 460 F.Supp. 473 (D. Hawai`i 1978), the United States District Court of Hawai`i granted plaintiff landowners an injunction against all state and county authorities restraining them from claiming ownership or exercising possession for any real property for which compensation had not been paid. "The failure of the Hawai`i Supreme Court to give the owners a meaningful hearing before relocating their boundary inland affords adequate ground for granting the injunction requested by owners." Id. at 478.

The United States Supreme Court addressed this issue in *Babbitt v. Youpee,* 519 U.S. 234 (1997), which concerned Section 207 of the Indian Land Consolidation Act (the "Act"). Section 207 prohibited Indians from devising to their heirs fractional interests that did not meet certain economic criteria. Instead of passing to one's heirs, the interests escheated to the tribe, without any compensation to those who lost their property. The potential heirs of fractional interests sued, seeking declaratory and injunctive relief prohibiting the enforcement of § 207. The Supreme Court ruled the escheat scheme in § 207 - - like Act 73 - - "completely abolish[ed] one of the sticks in the bundle of rights" constituting property rights for a class of landowners **and could not be enforced**. *Babbitt, supra,* 519 U.S. at 242. Like the State legislature could have done here, Congress could have pursued other options to consolidate the fractional interests, such as paying just compensation. *Id.* Because it did not, the Court refused to allow § 207 of the Indian Land Act to stand. It was "an extraordinary and impermissible regulation of [property rights] and effects an unconstitutional taking without just compensation." *Id.* Just as the United States Supreme Court enjoined enforcement of § 207, this Court must enjoin enforcement of Act 73.

Governments may not exercise ownership over property rights for which they refuse to pay. HRS § 101-30 requires the State to make payment before an order of possession will issue, and then, only after proper, formal condemnation proceedings are commenced. This the State did not do. The State may not keep what it refuses to pay for.

V. CONCLUSION

For the reasons set forth herein, Appellees respectfully request the Circuit Court's Order be affirmed.

DATED: Honolulu, Hawai`i, May 30, 2007.

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