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, and 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 (Inverse Condemnation) APPEAL FROM THE ORDER GRANTING PLAINTIFF'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT FILED FEBRUARY 13, 2006 (filed Sep. 1, 2006) FIRST CIRCUIT COURT HON. Elizabeth Eden Hifo

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AMICUS CURIAE BRIEF OF
HAWAII'S THOUSAND FRIENDS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

TREATISES

AMICUS CURIAE BRIEF OF
HAWAII'S THOUSAND FRIENDS

I. INTRODUCTION

Prior to 2003, an owner of shoreline lands in Hawai'i could apply to register title in the Land Court, or to quiet title as to other lands, to adjoining land formed by accretion provided he or she could "prove by a preponderance of the evidence that the accretion is natural and permanent," where "permanent" was defined as meaning "that the accretion has been in existence at least twenty years." § 501-33, H.R.S. (1993); see also § 669-1(e), H.R.S. (1993) (similar to the quoted portion of § 501-33, except for the insertion of the word "for" between "existence" and "at").

In 2003, the Hawai'i State Legislature adopted House Bill 192, House Draft 1, Senate Draft 1, Conference Draft 1, which was approved by the Governor of the State of Hawai'i as Act 73, 2003 Haw. Sess. Laws. 128 ("Act 73") on May 20, 2003, on which date it became effective. Act 73 amended §§ 501-33 and 669-1(e) to provide that owners of shoreline lands could no longer register or quiet title to accreted lands except as to accretion restoring previously eroded land; it also amended § 171-2, H.R.S. (1993) to provide that henceforth accreted lands not so registered or to which title had not been quieted would be "public lands."

On May 19, 2005, Plaintiffs Maunalua Bay Beach Ohana 28, et

al., filed their complaint[1] alleging themselves to be owners of shoreline lands with claims to adjoining accreted lands "which existed on May 20, 2003 and which had not previously been registered or been made the subject of then-pending registration proceedings" [hereinafter "existing unregistered accretions"] as well as to "all future accretion which was not proven to be the restored portion of previously accreted land" [hereinafter "future accretions"]. Complaint at 2, R. 1:2. The Complaint, filed on behalf of the named Plaintiffs and "all others similarly situated as owners of oceanfront property in the State of Hawaii on and/or after May 19, 2003," id. at 3, alleged that the enactment of Act 73 worked a taking of Plaintiffs' private property in existing unregistered accretions and future accretions in violation of Art. I, § 20 of the Constitution of the State of Hawai'i, which states that "[p]rivate property shall not be taken or damaged for public use without just compensation." Complaint at 7, R. 1:7.

Plaintiffs' Amended Motion for Class Certification filed October 28, 2005, R. 1:295, was granted. Order Granting Plaintiffs' Amended Motion for Class Certification Filed on October 28, 2005, filed December 30, 2005. R. 2:74.

Plaintiffs filed their Amended Motion for Partial Summary Judgment on February 13, 2006, R. 2:106 ("Plaintiffs' Motion for

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[1]Complaint filed May 19, 2003, Record on Appeal ("R.") 1:1.

PSJ"), seeking "partial summary judgment on their claim for Injunctive Relief, barring enforcement of Act 73 unless and until the State of Hawai'i acknowledges that it must provide just compensation to the class members and undertakes to do so in conjunction with these proceedings." Motion for PSJ at 2, RE. 2:107. After a hearing on May 3, 2006, the court granted the motion. Order Granting Plaintiffs' Motion for Partial Summary Judgment Filed February 13, 2006, entered September 1, 2006. R. 3:5 ("Order Granting PSJ"). This appeal interlocutory followed.

The Order Granting PSJ held that Act 73

> 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 declared accreted land to be "public land" and prohibited littoral owners from registering existing and future accretion under Haw. Rev. Stat. Chapter 501 and/or quieting title under Haw. Rev. Stat. Chapter 669.

Order Granting PSJ, at 2, R. 3:6. No explanation was given for the conclusory statement that Act 73 had "effected an uncompensated taking." Id. (emphasis added).

Hawaii's Thousand Friends files this amicus curiae brief to argue: (1) that, as to "future accretions" as defined above, Act 73 works no taking because Plaintiffs have never had vested property rights in future accretions and therefore no such right can be taken from them; and (2) that, as to both existing unregistered accretions, as defined above, and future accretions, Plaintiffs' remedy, if any, for the alleged taking of private

property is the payment of just compensation by the State, not the award of equitable relief against the State that would enjoin the operation of Act 73.

II. QUESTIONS PRESENTED

A. Does a Littoral Landowner Have a Vested Property Right in Future Accretions?

B. If Legislation Works a Taking, Can Its Operation be Enjoined When the State's Sovereign Immunity Bars Injunctive Relief and the Plaintiff Landowner Has an Adequate Remedy at Law?

III. ARGUMENT

A. PLAINTIFFS HAVE NO VESTED PROPERTY RIGHT IN FUTURE ACCRETIONS, AND THUS NO SUCH RIGHT CAN BE TAKEN FROM THEM

Plaintiffs rely principally upon Halstead v. Gay, 7 Haw. 587 (1889), In re Sanborn, 57 Haw. 585, 562 P.2d 771 (1977), State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977), and Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990), in characterizing Hawaii property law as supporting their view of the rights of oceanside landowners to accreted lands. Plaintiffs' Motion for PSJ, at 2-4, R. 2:82, 85-87. Whatever their value may be in the explication of the rights of oceanside landowners as to existing unregistered accretions as defined above, these cases say little or nothing about such landowners' vested property rights, if any, in future accretions.

The language from Halstead cited by Plaintiffs addressed oceanside landowners' claims to accretions that had already

matured into vested property rights through the passage of time; the case says nothing about the relevant question here, which is the power of the Legislature to change prospectively the rules by which as-yet inchoate claims to ownership of future accretions may vest or, as under Act 73, to declare that thereafter no such private rights may vest.

Sanborn did not concern accreted land at all, but dealt instead with discrepancies between the physical location of the shoreline and the "distances and azimuths" set forth in an earlier land court decree, a discrepancy the court ascribed to seasonal differences in the location of the upper wash of the waves. Id., 57 Haw. 588-90 & fn.3, 562 P.2d at 773-774 & fn.3.

Zimring and Napeahi, like Halstead, concerned the legal effect of past changes in the shoreline; nothing was said as to future accretions. Furthermore, any support Plaintiffs hope to obtain from language in Zimring about the importance of "assuring upland owners access to the water and the advantages of this contiguity," Plaintiffs' Motion for PSJ at 3 (citing Zimring and 7 R. Powell, Real Property ¶ 983 (1976)), is wholly vitiated by the Zimring court's recognition that "[i]n California it is also well settled that being cut off from contact with the sea is not basis for proper complaint," id., 58 Haw. At 119-120, 566 P.2d at 734 (citing Los Angeles Athletic Club v. Santa Monica, 147 P.2d 976, 978 (Calif. App. 1944)), and the fact that the Zimring court

terminated the former oceanside landowner's litoral status when it held that title to new land formed by a volcanic eruption belonged instead to the State.

Clearly, then, Hawaii's courts have never recognized a litoral landowner's claim of vested rights in future accretions, and the question is thus one of first impression. Indeed, few courts in any jurisdiction have addressed the question. Although the issue is by no means free from controversy, one treatise cites three cases as stating that "a riparian owner has no vested right as to future accretions." 4 Tiffany Real Property § 1226 & fn.1 (1975 & 2006 Suppl.) (citing Western Pacific R. Co. v. Southern Pacific Co., 151 F. 376 (9th Cir. 1907), Cohen v. United States, 162 F. 364 (C.C. N.D. Calif. 1908), and Eisenbach v. Hatfield, 26 P. 539 (Wash. 1891)).

In the absence of binding precedent, then, this court is free to determine that Plaintiffs have no vested property right in future accretions and, therefore, that Act 73 took no such rights from them. Amicus HTF asks that the court make just such a determination and hold that Plaintiffs instead have only an inchoate right to obtain title to such lands when and if the statutory prerequisites to registration are met, subject however to the right of the Legislature to change the rules pursuant to which such expectancy interests may mature and, as it did with the enactment of Act 73, to foreclose the possibility that such

interests could ever mature. As the Hawaii Supreme Court noted in Damon v. Tsutsui, 31 Haw. 678 (1930), when it addressed the question of whether the inchoate rights of individual ahupua'a tenants in offshore fisheries could be terminated by legislation, "[a] mere expectancy of the future benefit, or a contingent interest in property founded upon anticipated continuance of existing laws, is not a vested right, and such right may be enlarged or abridged or entirely taken away by legislative enactment." Id., 31 Haw. at 693 (citation omitted). This result would also be consistent with the policy of this State, recently reaffirmed in Diamond v. State of Hawaii, Board of Land and Natural Resources, 112 Hawai'i 161, 145 P.3d 704 (2006), that "favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." Id., 112 Hawai'i at 175, 145 P.3d at 718 (quoting County of Hawaii v. Sotomura, 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973), cert. denied, 419 U.S. 872 (1974)).

B. THE TRIAL COURT LACKED JURISDICTION TO ENJOIN THE OPERATION OF ACT 73, AND IN ANY EVENT PLAINTIFFS HAVE AN ADEQUATE REMEDY AT LAW TO OBTAIN THE JUST COMPENSATION CONSTITUTIONALLY MANDATED FOR A TAKING OF PRIVATE PROPERTY FOR PUBLIC USE

The State of Hawai'i is the only defendant named in this action. Complaint filed May 19, 2005, at 3, R. 1:1, 3. It is well settled that, in general, "the State's liability is limited by its sovereign immunity, except where there has been a 'clear

relinquishment' of immunity and the State has consented to be sued." Taylor-Rice v. State of Hawai'i, 105 Hawaii 104, 109, 94 P.3d 659, 664 (2004) (citing Bush v. Watson, 81 Hawai'i 474, 481, 918 P.2d 1130, 1137, reconsideration denied, 82 Hawai'i 156, 920 P.2d 370 (1996), cert. denied, 519 U.S. 1149 (1997)). Furthermore, "the State has waived immunity to suit only to the extent as specified in HRS chapters 661 and 662." Taylor-Rice, 105 Hawaii at 110, 94 P.3d at 665 (citing Waugh v. University of Hawai'i, 63 Haw. 117, 125, 621 P.2d 957, 965 (1980)). The relief available against the State under Chapter 661 is limited to payment of money damages,[2] and Hawaii's appellate courts have never suggested that injunctive relief is available under Chapter 662.

Plaintiffs alleged that the trial court had jurisdiction over their claims pursuant to § 662-3, H.R.S., and Article I, § 20 of the Hawaii Constitution, as well as § 632-1, H.R.S. Complaint at 6, R. 1:6. Nowhere, however, have Plaintiffs identified any statutory waiver of the State's immunity that would permit a suit against the State for injunctive relief. Their efforts to overcome this deficiency through reliance on Babbitt v. Youpee, 519 U.S. 234 (1997), and Eastern Enterprises

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[2]The Hawaii Supreme Court held in Spencer v. McStocker, 11 Haw. 581 (1898), that the predecessor of § 661-1 "does not extend to any causes involving an investigation of equitable rights" but instead "has reference only to such claims for the recovery of money as are particularly specified." Id., 11 Haw. at 583.

v. Apfel, 524 U.S. 498 (1998), Plaintiffs' Motion for PSJ, at 8-11, R. 2:106, 116-19, are doomed as well, because Plaintiffs fail to recognize that in both of those cases, unlike the present case, the defendants included government officials sued in their official capacities.[3]

Finally, even if Plaintiffs had sued the appropriate State officials in their official capacities,[4] injunctive relief would nevertheless be unavailable to them because "[e]quitable relief is not available to enjoin the alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1017 (1984) (citations omitted). The attorney for the State assured the trial court that "if we took property, we will pay for it," Transcript of Proceedings before the Honorable Eden E. Hifo, Circuit Court Judge Presiding on May 3, 2006, at 7 lines 12-13 (statement of Mr. Wynhoff, Deputy Attorney General),[5] and the

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[3]In Youpee, Petitioner-Defendant Bruce Babbitt was sued in his official capacity as Secretary of the Interior. In Eastern Enterprises, Defendant-Respondent Kenneth S. Apfel was sued in his official capacity as Commissioner of Social Security.

[4]Plaintiffs were explicitly warned of this jurisdictional defect, see Defendant State of Hawaii's Memorandum in Opposition to Plaintiffs' Amended Motion for Partial Summary Judgment Filed February 13, 2006, filed March 21, 2006, at 19 fn.10, R. 2:123, 146, but they have made no effort to take corrective action.

[5]See also id., at 7 lines 19-22 ("And the State's position is clear. To the extent we've taken property, we'll pay for

court specifically recognized those assurances, stating: "Mr. Wynhoff has said if it's a taking, we will pay for it. They agree just compensation must be paid." Id., at 29 lines 7-9 (statement of Judge Hifo, presiding). The State's position on this point is consistent with its position in earlier litigation before the U.S. Court of Appeals for the Ninth Circuit.[6]

The State has not yet identified the legal authority that would authorize an inverse condemnation against the State for money damages. Section 661-1, H.R.S. (1993), does not by its terms waive the State's immunity for claims arising from violation of constitutional rights, and the Hawai'i Supreme Court has rejected the argument that such violations are compensable under Chapter 662. Figueroa v. State of Hawai'i, 61 Haw. 369, 604 P.2d 1198 (1980). Nevertheless, this court should accept the State's position that money damages are available to a plaintiff in an inverse condemnation action. "[T]he condemnation clauses in most [state] constitutions, which clauses provide for payment of just compensation upon the taking of private property for public use, constitute consent to suit," 6A Julius L. Sackman, Nichols' The Law of Eminent Domain § 30.01[2] at 39-8 to 30-9 &

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it.") (statement of Mr. Wynhoff, Deputy Attorney General).

[6]"This State permits its citizens to bring actions [in State court] under the Takings Clause of the United States and Hawai'i Constitutions." Cardenas v. Anzai, 311 F.3d 929 (9th Cir. 2002), Brief of [State] Appellees dated May 8, 2001, 2001 WL 34095151, at *29 (citations omitted).

fn.12 (Rev'd 3d ed. 1964 & 2006 Suppl.) ("Nichols") (citing cases)), or because the Takings Clauses of the United States and Hawai'i Constitutions are self-executing. 3 Nichols, § 8.01[4], at 8-20 to 8-21 & fn.43 (citing cases).[7]

IV. CONCLUSION

For all of the above reasons, Amicus Hawaii's Thousand Friends asks this court to hold: (a) that Plaintiffs have no vested property rights in future accretions and that accordingly Act 73 works no taking of such rights; and (b) that Plaintiffs' remedy, in the event a taking is held to have occurred, is the payment of just compensation for those vested property rights that may have been taken, not the invalidation of Act 73.

DATED: Honolulu, Hawai'i, March 30, 2007.

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[7]See also Rose v. State of California, 123 P.2d at 510 (Calif. 1942) ("Since article I, section 14 [of the Constitution of California] . . . is a restriction placed by the Constitution upon the State itself, and upon all of its agencies who derive from it their power of eminent domain, it cannot be said that the mere failure of the legislature to enact a statute allowing suit to be brought against the state entitles the state to disregard and violate that limitation. The logical inference is that said constitutional provision is intended to be self-enforcing.").

CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing document was duly served upon the following by U.S. Mail, postage prepaid to their last known addresses as follows:

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