No. 28175

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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 HAWAII, 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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONS, STATUTES AND RULES

OTHER AUTHORITIES

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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 HAWAII, 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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I. SUMMARY OF ARGUMENT

Grains of sand add up. The doctrine of accretion and erosion – passed down through the common law of the Kingdom, the Territory, and the State – had always balanced the bitter with the sweet: while an owner lost ownership of land eroded by natural forces, she gained ownership of any accreted land. "The rules applying to accretion and erosion are inseparably bound together, the gains of one compensating for the losses of the other."[1] The accretion and erosion rules insured that riparian and littoral properties remained so, even when the water's edge shifted naturally over time. Accreted lands were thus always recognized as the private property of the upland owner, who also possessed the right to register and quiet title to such property.

In Act 73, however, the State of Hawaii radically altered that ancient balance. Overthrowing the reciprocal system of accretion and erosion, the legislature instead decreed that the government henceforth owns everything. Under this new one-sided regime, the State not only continues to acquire private lands lost to erosion, but now also owns accreted lands, and no one but

1. *The Rights of a Riparian Owner in Land Lost by Erosion*, 24 Yale L.J. 162 (1914).

the State is able to register or quiet title to accreted land unless upland owners overcome a virtually insurmountable standard of proof.

The circuit court correctly recognized that the Hawaii Constitution prohibits the State from destroying settled expectations and confiscating private property rights by legislative fiat, and declaring – without even the minimal protections of predeprivation condemnation procedures and payment of just compensation – that what had been private property for centuries is, from here forward, public property. Plainly and simply, Act 73 is a raw land grab by the State, and the judgment of the circuit court should be affirmed.

II. INTEREST OF PACIFIC LEGAL FOUNDATION AS AMICUS CURIAE

Founded in 1973, Pacific Legal Foundation (PLF) has a tradition of appearing as a friend of the court and on behalf of parties in support of federal and Hawaii constitutional rights in Hawaii and federal courts, and has participated in some of the most important regulatory takings, shoreline, and property decisions from the U.S. and Hawaii Supreme Courts.[2] PLF is a nonprofit tax-exempt public interest law foundation organized under the laws of the State of California, registered with the State of Hawaii, supported primarily by voluntary private donations from thousands of citizens across the country, including numerous supporters in Hawaii. PLF is participating in this case to provide the Court with historical perspective on the accretion rules and takings remedies, and because it is concerned whenever the government attempts to upset long-standing rules and settled expectations, and take private property by legislative decree.

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2. *See, e.g., Leslie v. Bd. of Appeals, County of Hawaii*, 109 Haw. 384, 126 P.3d 1071 (2006) (shoreline); *Palazzolo v. Rhode Island*, 533 U.S. 601 (2001) (shoreline regulatory takings); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (same); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (same); *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989) (shoreline); *Maui Tomorrow v. State of Hawaii*, 110 Haw. 234, 131 P.3d 517 (2006) (public trust issues and federal civil rights); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005) (eminent domain); *Robinson v. Ariyoshi*, 933 F.2d 781 (9th Cir. 1991) (takings and water rights); *Public Access Shoreline Hawaii v. Hawaii Planning Comm'n*, 79 Haw. 425, 903 P.2d 1246 (1996) (public trust); *In re Water Use Permit Applications*, 96 Haw. 27, 25 P.3d 802 (2001) (public trust); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) (regulatory takings); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (regulatory takings); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (regulatory takings).

III. BACKGROUND

"Accreted" lands or "accretion" refers to land "gradually deposited by the ocean on adjoining upland property." *Hughes v. Washington*, 389 U.S. 290, 291 (1967); *Halstead v. Gay*, 7 Haw. 587 (1889). The accretion doctrine insures that riparian and littoral property owners maintain their parcel's access to water, which is often the most valuable feature of their property. *Hughes*, 389 U.S. at 293; *State* ex rel. *Kobayashi v. Zimring*, 58 Haw. 106, 119, 566 P.2d 725, 734 (1977).

Act 73 purports to transform private accreted lands into public property. The Act expressly says so, and makes no attempt to disguise its goals or the means used to achieve them.[3] Act 73 simply declares that all accreted lands "not otherwise awarded" are "public lands."[4] Furthering that end, the Act prohibited anyone but the State from registering title to accreted lands, and prohibited anyone but the State from bringing an action to quiet title. Thus, Act 73 on its face takes existing but unregistered accretions, as well as prevents owners from acquiring title to future accretions.[5]

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3. Act 73 did not purport to be an exercise of the State's power of eminent domain, which is exercised pursuant to the procedures set forth in Haw. Rev. Stat. ch. 101. Condemnations by the State are usually initiated when the head of a department directs the Attorney General to bring suit. *See* Haw. Rev. Stat. § 101-14 (2005). Act 73 contains no such authorization, or any similar provision. Because no condemnation or compensation mechanism was provided for in Act 73, it is presumably an exercise of the State's police power. *See* Op. Br. at 1 ("Act 73 was enacted on May 20, 2003, Session Laws of Hawaii (2003) at 130, to 'protect the people's right to use and enjoy the state's beaches.'"). An arguably laudable goal does not insulate the State from having to follow the Constitution. *See Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) ("The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done."). The legislature plainly knows how to enact statutes that exercise the State's eminent domain powers to take private property for public use. For example, the Land Reform Act contains a procedure by which residential leaseholds are condemned, and a mechanism to determine just compensation. *See* Haw. Rev. Stat. § 516-23 (2005) ("Within twelve months after the designation of all or part of the development tract for acquisition, the Hawaii housing finance and development corporation shall acquire through voluntary action of the parties, or institute eminent domain proceedings to acquire the leased fee interest in the tract or portion so designated; provided that negotiations for acquisition by voluntary transaction shall not be required before the institution of eminent domain proceedings. Except as otherwise provided in this part, the corporation shall exercise its power of eminent domain in the same manner as provided in chapter 101.").

4. The legislation makes no distinction between "classes" of accreted land as relied upon by the State. *See* Opening Brief at 3-4.

5. The State asserts that Act 73 is not unconstitutional since Act 221 had already deprived (continued...)

It is not disputed that declaring accreted land to be public property is a complete reversal of long-established common law. The State admits, as it must, that "[u]nder common law, oceanfront littoral landowners generally own accreted land." Op. Br. at 3 (citing *State* ex rel. *Kobayashi v. Zimring*, 58 Haw. 106, 199, 566 P.2d 725, 734 (1977)).[6] Prior to Act 73, the law of the Kingdom, Territory, and State uniformly recognized the property rights of littoral owners to accreted land. The Supreme Court of the Kingdom of Hawaii held:

> Land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, *belong to the owner of the contiguous land to which the addition is made.*

Halstead v. Gay, 7 Haw. 587 (1889) (emphasis added). Territorial courts took judicial notice of Kingdom law, treating it as precedential:

> The court expressed the view that the former governments of these islands were, as to the present government, foreign governments. That is a mistaken view. The courts of this Territory should take judicial notice of the laws of Hawaii which were enacted at any time prior to the annexation of these islands by the United States. So also as to the principal facts of Hawaiian history. The supreme court has decided that where a country has been acquired by the United States the laws which prevailed there prior to the acquisition are not regarded as foreign laws but those of an antecedent government which the courts of the United States will take judicial notice of.

In re Pa Pelekane, 21 Haw. 175 (1912) (citing *United States v. Perot*, 98 U.S. 428 (1878); *United States v. Chaves*, 159 U.S. 452 (1895)). After Statehood, the Hawaii Supreme Court again confirmed the accretion rule, holding that littoral property owners possess such land:

> "Land now above the high water mark, which has been formed by the imperceptible accretion against the shore line of a grant, has become attached by the law of accretion to the land described in the grant and belongs to the littoral proprietor." *Halstead v. Gay*, 7 Haw. 587

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5. (...continued)
littoral landowners of their accretion property rights. Op. Br. at 14-15, 28-30. The State's argument is wrong: Act 221 says nothing about ownership of accreted land. Rather, it merely clarified the registration process, which does not affect ownership.

6. For the reciprocal rule of erosion, see *County of Hawaii v. Sotomura*, 55 Haw. 176, 181, 517 P.2d 57, 61 (1973) (State acquires title to eroded newly submerged lands), *cert. denied*, 419 U.S. 872 (1974).

(1889). "[T]he accretion doctrine is founded on the public policy that littoral access should be preserved where possible. . . ." *State v. Zimring*, 58 Haw. 106, 119, 566 P.2d 725, 734 (1977).

In re Banning, 73 Haw. 297, 832 P.2d 724 (1992).

IV. ARGUMENT

The State seizing possession of existing-but-not-awarded accreted land, and denying registration and quiet title to accreted land is not merely a "regulatory taking." Act 73 is a per se physical acquisition of land. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (state's reassignment of interest is a per se taking); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (government's invitation for the public to enter Hawaii Kai Marina was a per se physical taking); *United States v. Causby*, 328 U.S. 256 (1946) (government had not merely destroyed property, but was using it for its own purposes).[7]

This brief focuses on two critical issues. First, the right to future accretions is property protected by the Hawaii and U.S. Constitutions from uncompensated acquisition and arbitrary and capricious government action. Second, the alternatives available to remedy unconstitutional acts by government include invalidation, as well as a claim for damages in inverse condemnation.

A. THE RIGHT TO FUTURE ACCRETION IS CONSTITUTIONALLY PROTECTED PROPERTY

Act 73 tossed the accretion rule, its rationale, and its long history aside. The State's power to enact such laws, however, is constrained by article I, section 20 of the Hawaii Constitution, which provides, "[p]rivate property shall not be taken or damaged for public use without just compensation." Haw. Const. art. I, § 20. Article I, section 5 also prohibits laws that purport to transform, with the stroke of a pen, private property into public property without the attendant safeguards of pre-deprivation procedures, including condemnation and pre-taking payment of just

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7. Even if Act 73 is deemed to be an ad hoc regulatory taking to be analyzed under the three-part test of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), the "character of the government action" is so extreme – a "virtual abrogation of the right" of littoral landowners to own and register accreted land – it would be an impermissible taking. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 716 (1987) (law that destroyed fractional devisable interests struck down as a taking).

compensation: "[n]o person shall be deprived of life, liberty or property without due process of law[.]" Haw. Const. art. I, § 5.

It is well-accepted that the Takings and Due Process Clauses of the U.S. and Hawaii Constitutions prohibit the State from simply rewriting the accepted rules of property and declaring that what has always been private property is now public. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (the state may not, "by *ipse dixit* . . . transform private property into public property without compensation"); *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) (government cannot wipe out property rights simply by legislating the property out of existence). *See also Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) (government cannot wipe out property rights by prospective legislation).

Act 73 takes two distinct private property rights. The first is existing accreted land; the second is the right to future accretion. Existing accreted land is plainly "property." The State asserts that it may freely confiscate future accretion because it is not "property" within the meaning of article I, section 20. Op. Br. at 15-19. "Private property" protected by the Hawaii Constitution is broadly interpreted. The 1968 amendments added the term "or damaged" to article I, section 20, and was intended to broaden the range of protected property interests. *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973). The mere fact that the accretions have not yet occurred does not impact that the right to own and register accreted land is a long-existing state-recognized right, and is a fundamental attribute of littoral land. *See Hodel v. Irving*, 481 U.S. 704, 716 (1987) (future inchoate rights may be property); *Babbitt v. Youpee*, 519 U.S. 234, 239 (1997) (noting that the statue in *Hodel* was struck down because "[s]uch a complete abrogation of the rights of descent and devise could not be upheld.").

The Hawaii Supreme Court recognizes both choate and inchoate interests as property. In *State* ex rel. *Kobayashi v. Zimring*, 58 Haw. 106, 119, 566 P.2d 725, 734 (1977), the court held that lands ceded by the Republic of Hawaii to the United States encompassed future interests, including land added by future lava accretions. *Id.* at 124, 566 P.2d at 736. The court held:

> It is well known that the term "property" is extremely broad. Without limiting adjectives or other qualifications, *the term includes property which is real, personal and mixed, choate and inchoate, corporeal or incorporeal.* The U. S. Supreme Court in interpreting the treaty by

> which Louisiana was acquired stated that "(t)he term 'property' as applied, comprehends every species of title inchoate or complete."

Id. at 122-23, 566 P.2d at 736 (emphasis added) (citations omitted). The rationale of the *Zimring* rule applies with equal force to littoral owners' interest in future accretion created naturally at the shoreline.

In *Hughes v. Washington*, 389 U.S. 290 (1967), the Washington Constitution provided that all post-statehood accreted land belonged to the state. *Id.* at 290 ("Article 17 of [Washington's] new constitution, as interpreted by its Supreme Court, denies the owners of ocean-front property in the State any further rights in accretion that might in the future be formed between their property and the ocean."). The U.S. Supreme Court held that state law could not affect federal rights, and the owners of federally patented land could not be deprived by state law of their rights to future accreted land. *Id.* at 293-94. In his concurring opinion, Justice Stewart examined the Takings Clause implications of a state wiping out existing rights to future accretions by state constitutional mandate, state legislation, or state judicial doctrine, and bears quoting at length:

> It follows that Mrs. Hughes cannot claim immunity from changes in the property law of Washington simply because her title derives from a federal grant. *Like any other property owner, however, Mrs. Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation.*

Id. at 295-96 (Stewart, J., concurring) (emphasis added). Justice Stewart seemed to presage the case at bar when he noted:

> Accordingly, if Article 17 of the Washington Constitution had unambiguously provided, in 1889, that all accretions along the Washington coast from that day forward would belong to the State rather than to private riparian owners, this case would present two questions not discussed by the Court, both of which I think exceedingly difficult. First: Does such a prospective change in state property law constitute a compensable taking?

Id. (Stewart, J., concurring). The scenario Justice Stewart proposes is precisely what Act 73 attempts to accomplish, transforming private property into public property by declaration:

> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. *But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant*

> *precedents, no such deference would be appropriate.* For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. *Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.*

Id. at 296-97 (Stewart, J., concurring) (emphasis added). Justice Stewart concluded:

> There can be little doubt about the impact of that change upon Mrs. Hughes: *The beach she had every reason to regard as hers was declared by the state court to be in the public domain.* Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. *But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property-without paying for the privilege of doing so.* Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

Id. at 297-98 (Stewart, J., concurring) (emphasis added).

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), Florida enacted a statute that reassigned interest on interpleaded funds from the owners of the principal to the state. *Id.* at 448 (the statute at issue determined "All interest accruing from moneys deposited shall be deemed income of the office of the clerk of the circuit court"). *Cf.* Act 73 ("accreted lands not otherwise awarded" are "Public lands"). Florida, like the State in the case at bar, asserted that it could, without impediment from the Takings Clause, confiscate the right because it was a future interest and a mere "unilateral expectation." The Court rejected the argument, holding that because the state recognized the right of interest, it could not arbitrarily reassign ownership of that right, even though it would accrue in the future:

> [The owner of the interpleaded funds], however, had more than a unilateral expectation. . . .

> It is true, of course, that none of the creditor claimants had any right to the deposited fund until their claims were recognized and distribution was ordered. *That lack of immediate right, however, does not automatically bar a claimant ultimately determined to be entitled to all or a share of the fund from claiming a proper share of the interest*, the fruit of the fund's use, that is realized in the interim. To be sure, § 28.33 establishes as a matter of Florida law that interest is to be earned on deposited funds. *But the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest.*

Id. at 161-62 (emphasis added) (citing *Aron v. Snyder*,196 F.2d 38, 40 (D.C. Cir.), *cert. denied*, 344 U.S. 854 (1952)). *See also Phillips v. Washington Legal Foundation*, 524 U.S. 156, 172 (1998) (interest on lawyer's trust accounts is "private property").[8] The Court invalidated the Florida statute:

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.
>
> To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. *This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.*

Webb's Fabulous Pharmacies, 449 U.S. at 164 (emphasis added). Similarly, in *Babbitt v. Youpee*, 519 U.S. 234 (1997), the Court struck down a federal statute whereby small interests in Indian land would escheat to the tribe, and could not be passed to heirs by descent or devise. By their nature, rights of descent and devise are contingent future interests, yet the Court recognized them as private property, protected by the Takings Clause from government confiscation. *Id.* at 245.

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8. A property right need not have "vested" in order to be recognized as property for purposes of the Takings Clause and insulated from uncompensated public appropriation. *See* Kenneth R. Kupchak, Gregory W. Kugle & Robert H. Thomas, *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawaii*, 27 U. Haw. L. Rev. 17 (2004).

The ability to own and to register title to future accretions is not simply a unilateral expectation, but an expectation "that has the law behind it." *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979). The Supreme Court of Hawaii has recognized from the days of the Kingdom to the present that accreted lands become the private property of the upland owner, and owners reasonably expect that accretions, when they occur, become theirs. *See Halstead v. Gay*, 7 Haw. 587 (1889); *In re Banning*, 73 Haw. 297, 832 P.2d 724 (1992). These expectations cannot be appropriated by the State unless and until they are condemned and just compensation has been provided.

B. AN AFTER-THE-FACT INVERSE CONDEMNATION CLAIM FOR DAMAGES IS NOT THE EXCLUSIVE REMEDY FOR UNCONSTITUTIONAL ACTS

"*So sue me.*" This is the essence of amicus curiae Hawaii's Thousand Friends' argument opposing the injunctive relief sought by the property owners, and the circuit court's judgment that Act 73 is repugnant to the Hawaii Constitution. Amicus argues that if Act 73 violates article I, section 20, the sole remedy available to property owners whose rights have been violated is to sue for damages in an inverse condemnation action. Amicus Br. at 7-11. Circuit courts, amicus asserts, are without power to invalidate unconstitutional acts.

The Takings Clause of the Hawaii Constitution, however, is not merely a waiver of sovereign immunity, nor is it a license for the government to run roughshod over established property rights as long as it remains subject to after-the-fact inverse condemnation lawsuits by property owners for damages. Article I, section 20 is a normative command as well as remedial: the State must not take private property without first condemning it and paying just compensation. Because Act 73 does not contain a compensation mechanism, it must be invalidated. In *In re Pa Pelekane*, 21 Haw. 175 (1912), the Supreme Court held that the power to take private property for public uses is a sovereign power, and that the Takings Clauses of the U.S. and state constitutions are *limitations* on the use of the power. In other words, if predeprivation process and compensation is not provided, the power cannot be exercised.

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a plurality of the U.S. Supreme Court rejected the argument that a post-deprivation damages remedy was the only available claim to a property owner who claimed that a statutory scheme violated the Takings Clause:

> Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief.

Id. at 522. *See also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (the Takings Clause "stands as a shield against the arbitrary use of governmental power"); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (court affirmed district court's invalidation of statute for violation of the Takings Clause because statute "made no provision for the payment of compensation"). Consequently, the only constitutional way for the State to acquire accreted land is to condemn and pay for it, which Act 73 plainly does not do. "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). In that case, the seminal "regulatory takings" decision, the Court did not hold there was no violation of the Takings Clause because the property owners whose interests were taken by the statute could have sued for inverse condemnation, nor did the Court order the government to pay for the private property taken. Rather, the Court concluded that "the act *cannot be sustained* as an exercise of the police power" and struck it down. *Id.* at 414 (emphasis added).

The Hawaii Supreme Court has never held that a court may not invalidate actions violating the Hawaii Constitution. Indeed, the court has never formally recognized under Hawaii law an inverse condemnation remedy for damages, holding in *Allen v. City & County of Honolulu*, 58 Haw. 432, 438-39, 571 P.2d 328, 331 (1977) that *invalidation* is the only remedy for a regulation that takes property.[9] In that case, the plaintiff sought damages for the government's taking of property, and did not seek injunctive relief. The Hawaii Supreme Court rejected as a matter of law the claim for damages, holding that the only remedy available to a property owner is declaratory and injunctive relief. *Allen*'s holding that declaratory and injunctive remedy is the exclusive remedy has not survived the U.S. Supreme Court's holding in *First English Evangelical Lutheran Church of*

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9. *See also Austin v. City & County of Honolulu*, 840 F.2d 678 (9th Cir. 1988) (Hawaii has not recognized inverse condemnation as a cause of action). The court has in dicta assumed the claim is valid. *See, e.g., Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n*, 79 Haw. 425, 903 P.2d 1246 (regulatory taking occurs when government's application of a law to a particular landowner denies all economically beneficial use of property), *cert. denied*, 517 U.S. 1163 (1995); *Hasegawa v. Maui Pineapple Co.*, 52 Haw. 327, 475 P.2d 679 (1970) (when regulation goes too far, it will be recognized as a taking).

Glendale v. County of Los Angeles,482 U.S. 304 (1987).[10] However, the Hawaii Supreme Court has never held that the availability of an after-the-fact claim for inverse condemnation or damages is the *only* remedy that may be pursued by a property owner who asserts that a government action violates article I, section 20.

Thus, the limitation of remedies in *Allen* to only injunctive relief is no longer viable, and a property owner who alleges that a government action violates article I, section 20 of the Hawaii Constitution has the choice of seeking declaratory and injunctive relief, or damages, or both. A choice of remedies is consistent with the traditions of Hawaii law regarding government appropriations of private property. The Constitution of 1852, for example, provided that property could not be taken or appropriated for public use by the King, unless "reasonable compensation" was *first* provided. Indeed, accepting amicus' argument would mean that government could simply buy its way out of illegal actions and purchase validation of otherwise unconstitutional conduct, a rule that governs no other constitutional right.[11]

The U.S. and Hawaii constitutions mandate a compensation remedy when the government *de facto* takes property and refuses to pay for it, but the courts *also* have the power to invalidate an action that violates the constitution. Act 73 seizes private property but does not contain any mechanism for predeprivation process or payment of compensation, so it must be invalidated. *See, e.g., Babbitt v. Youpee*, 519 U.S. 234 (1997) (court affirmed grant of declaratory and injunctive relief for violation of the Takings Clause); *Hodel v. Irving*, 481 U.S. 704 (1987) (court invalidated statute for violating Takings Clause); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (court invalidated federal government's attempts to acquire public navigational easement on private

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10. In *First English*, the Court recognized that a just compensation remedy is constitutionally required for a taking, even if a court eventually invalidates the unconstitutional regulation, or the government withdraws it. When applying the Hawaii Constitution, Hawaii courts may interpret it to afford greater protection than provided by the U.S. Constitution. *Hawaii Hous. Auth. v. Lyman*, 68 Haw. 55, 704 P.2d 88 (1985).

11. For example, 42 U.S.C. § 1983 provides a remedy for money damages when state actors violate federal constitutional rights. Thus, a plaintiff who alleges that a state law infringes upon free speech rights would have a claim for damages. The availability of the § 1983 remedy, however, does not prohibit the plaintiff from seeking declaratory and injunctive relief. *See, e.g., Wyner v. Struhs*, 179 Fed. Appx. 566, 2006 WL 1071850 (11th Cir. 2006), *cert. granted sub nom., Sole v. Wyner* (Jan. 12, 2007) (plaintiff alleged Speech Clause violation, and sought injunctive relief).

property); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (court invalidated government's action for violating the Takings Clause); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (invalidation remedy for violation of Takings Clause).

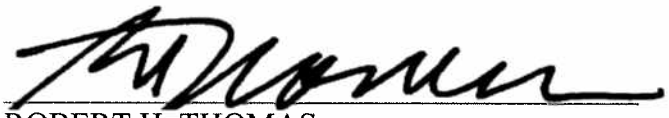
V. CONCLUSION

The Hawaii and U.S. Constitutions prohibit the State from radically altering long-standing common understandings of property law, and declaring with the swipe of a pen that what for centuries has been considered a class of private property is *ipse dixit* public property without compensation. If the State wants to confiscate accreted land for the public, it must exercise its power of eminent domain and pay for it. Because Act 73 does not contain a compensation mechanism, it must be invalidated. The judgment of the circuit court should be affirmed.

DATED: Honolulu, Hawaii, April 27, 2007.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT



ROBERT H. THOMAS
Attorney for Amicus Curiae
Pacific Legal Foundation

No. 28175

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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 HAWAII, 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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of foregoing document was duly served upon the following individuals by mailing said copy, postage prepaid, to their last known addresses as follows:

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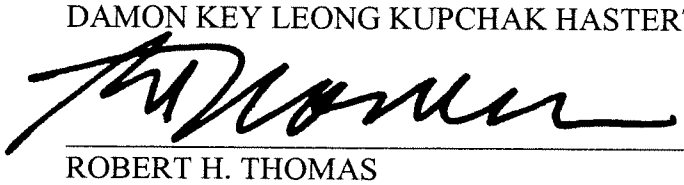

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