NO. 28175

IN THE SUPREME COURT 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

PETITIONERS-PLAINTIFFS-APPELLEES' OPPOSITION TO PETITIONER STATE OF HAWAII'S APPLICATION FOR WRIT OF CERTIORARI FILED APRIL 26, 2010

CERTIFICATE OF SERVICE

PAUL ALSTON 1126
LAURA P. MORITZ 7860
1001 Bishop Street, 18th Floor
Honolulu, Hawai`i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
E-mail:palston@ahfi.com
lmoritz@ahfi.com

Attorneys for Petitioners-Plaintiffs-Appellees

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Petitioners, 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 (collectively, the "Maunalua Parties") respectfully submits this Opposition to the *Application for Writ of Certiorari* filed herein on April 26, 2010 (the "Application") by Petitioner State of Hawai`i. This Opposition is made pursuant to the Hawai`i Rules of Appellate Procedure Rule 40.1(e) and the Record on Appeal in Appeal No. 28175.

I. INTRODUCTION

The State's Application for *certiorari* review is baseless. There is no reason for this Court to review the issues identified by the State for four reasons. First, the State does not contend that the ICA committed any grave error or disregarded any controlling State or Federal

decisions, which are the essential prerequisites for review by this Court. Second, the Application misrepresents the record, which conclusively demonstrates that the State is judicially estopped from pursuing its lawyer-created "Class" theories. Third, the State is wrongly asking this Court to review issues it never raised before the ICA and which it cannot raise now. And, finally the State's Class theories are inconsistent with the underlying statutes because:

- By its terms, Act 73 applies to all unrecorded accretion existing as of May 2003, regardless whether it had existed in 1985; and
- Act 221 did not alter Hawai`i common law - - or the rights of littoral owners - - with respect to accreted land ownership.[1]

Accordingly, the Maunalua Parties respectfully request the State's Application be denied and the Court's *certiorari* review be limited to those issues identified in the Maunalua Parties' *Application for Writ of Certiorari* filed April 22, 2010.

II. BRIEF SUMMARY OF RELEVANT FACTS

A. The Common Law, Act 221, and Act 73

For over 100 years, the decisions of this Court recognized oceanfront landowners' vested right to have their properties expand seaward as accretion occurs.[2] In 1985, the State enacted Act 221, which allowed landowners to record their title to accretion only when they could prove it was "permanent," meaning it had been in existence for at least 20 years. Contrary

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[1] In addition to its incorrect discussion of the relevant issues and alleged error by the ICA, the State's persistent rhetoric about "public access" is both incorrect and offensive. This case is not about "preserving" the public beach; it is about expanding the public beach by taking land from private landowners without paying for it.

[2] Accretion is "recorded" by either a quiet title decree or a land court decree. For simplicity, although these legal processes are different, they are referred to herein as "recording." In 1985, Act 221 (1985) ("Act 221") allowed littoral owners to record title to accreted land only if it was "permanent." That Act did not, however, alter littoral owners' title to accreted property. 1985 Haw. Sess. Laws 401. *Maunalua,* 122 Hawai`i at 54, 222 P.2d at 461.

to the State's argument, Act 221 did not affect ownership; it only affected when recording could take place.

In May 2003, the State adopted Act 73, which prohibited landowners from recording title to virtually all (1) all future accretion which was not simply restoring eroded land; and (2) all existing accretion which had not previously been recorded.[3] Thus, without providing just compensation, Act 73:

- Took from beachfront property owners their unregistered and unrecorded accreted land (other than that which was the subject of registration or quiet title proceedings on May 19, 2003) and declared all such land to be "state land";
- Took from beachfront property owners their vested property right in maintaining their *makai* boundary at the shoreline in the event of future accretion (other than that which restored eroded land) by making it "state land"; and
- Caused severance damages to beachfront owners' remaining property by depriving them of their vested right to maintain their *makai* boundary at the shoreline and to enjoy the benefits of accreted land.

B. This Action

In 2005, the Maunalua Parties filed a class action seeking declaratory and injunctive relief and damages on the basis that Act 73 was unconstitutional and could not be enforced without payment of just compensation. After the class was certified pursuant to HRCP 23(b)(1) and (2), the Maunalua Parties and the State filed cross-motions for summary judgment. After hearing the motions, the Circuit Court ruled that Act 73 effected a ***sudden change in the***

[3] The only exceptions were (1) land subject to then-pending judicial proceedings to record title; and (2) accretion that restored eroded parcels to their original dimensions. Act 73, §§ 4, 5; H.R.S. §§ 501-33, 669-1(e).

common law and, therefore, "an uncompensated taking" of littoral owners' accreted land and their vested right to have their *makai* boundary "ambulate" as accretion occurred.

The Circuit Court found in favor of littoral owners' property rights and correctly ruled:

- Act 221 did not alter Hawai`i common law with respect to littoral owners' ownership of accreted land, and did not take from private owners any accretion formed before or after it was enacted; and
- Act 73 was an uncompensated taking of accretion rights by declaring all existing unrecorded accretion to be "public land" and prohibiting littoral owners from recording past and future accretion.

The State appealed.

The ICA affirmed in part and reversed in part. It correctly held the State took existing unrecorded accretion without just compensation.[4]

III. ARGUMENT

A. The Standard for Certiorari Review

Hawai`i Revised Statutes ("H.R.S.") § 602-59(b) provides, in relevant part:

> (b) The application for writ of certiorari shall tersely state its grounds, which ***shall*** include:
>
> (1) Grave errors of law or fact; or
>
> (2) Obvious inconsistencies in the decision of the [ICA] with that of the supreme court, federal decisions, or its own decision,
>
> and the magnitude of those errors or inconsistencies dictating the need for further appeal.

[4] It is the Maunalua Parties' position that the ICA ***incorrectly*** held that Act 73 was not an unconstitutional taking of the right to a moveable boundary that encompasses ***future accretion***. That position is set forth in the Maunalua Parties' own *Application for Writ of Certiorari,* filed April 22, 2010.

(Emphasis provided.) The State's Application fails to mention these criteria and makes no effort to explain why review is appropriate in light of these standards. The State, evidently, deems it sufficient to merely disagree with the ICA's determination in making this Application for review. The State is wrong. Because the Application does not claim, much less demonstrate, any error that meets this threshold requirement, it should be denied outright.

B. The ICA Properly Concluded Act 221 Did Not Affect Ownership of Accretion

Contrary to the State's arguments, Act 221 was plainly NOT intended to affect ownership of past and future accretion. It did not instantaneously vest all then-existing accretion in the littoral owners, and it did not divest them of any interest in subsequently formed accretion. Act 221 simply restricted when accretion owned by littoral owners could be recorded.[5] Specifically, Act 221 changed the recording statutes to provide as follows:

> § 501-33 Accretion to land. An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent. "Permanent" means that the accretion has been in existence for at least twenty years...

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. Act 221

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[5] The State correctly notes that Act 221 was also concerned with protecting the beach as a natural resource, but it grossly misstates the nature of the concern. Act 21 sought to insure that where accretion occurred, it occurred naturally and not as a result of "enhancement efforts" by a landowner attempting to expand his property at public expense (*e.g.*, by planting and/or watering vegetation, constructing barriers, etc.) SCRep. 346, House Journal at 1146; SCRep 790, Senate Journal at 1223. Act 221 prohibited landowners from recording temporary accretion not formed naturally. 1985 HAW. SESS. LAWS 401. Act 221 did not change the law of littoral owners' rights to naturally accreted land.

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. At its essence, Act 221 sought to ensure any recorded accretion was truly natural and permanent. *Id.* 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 impermanent "accretion" 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.

That Act 221 was ***not*** a vehicle for reforming the rules for determining ownership of oceanfront land is further evident from the fact that, after Act 221 the State continued to recognize Hawai`i littoral owners' rights to natural and permanent accretion. The State is judicially estopped from arguing otherwise, for the record shows that after Act 221 passed, the Land Court in the State ***repeatedly and successfully*** required littoral owners who sought to record accretion to prove its existence for more than 20 years at the time of their petition ***regardless*** whether all or part of that accretion occurred prior to Act 221. There is no evidence the State ***ever*** treated accretion as "vested" upon Act 221's passage, contrary to what it would have the Court believe now.

The only evidence in the record regarding the implementation of Act 221 shows that, at the State's urging, the Land Court continued to recognize rights to natural and permanent accretion, but only if they could prove it had been in existence for at least 20 years **at the time**

their petition was filed. This is directly opposite the State's current "Class" theories, which would allow recording of ***any*** pre-1985 accretion, but not any that occurred later. For example:

- *In re Application of Banning*: the petitioner sought to register accretion based upon the vegetation line as it existed in 1982, but 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.) The Land Court expressly rejected the petition in March 1994, stating petitioner must show the accretion existed for more than 20 years prior to the 1994 petition, ***in direct contrast to what the State now says should have happened.*** (ROA II: 352-368.) The petitioner ultimately filed an amended request for a smaller area which had existed for more than 20 years. (ROA II: 370-381.)

- *In re Application of Waialua Agricultural Co., Ltd.*: the owner was permitted to claim accretion based on 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 re Application of Crozier*: the 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 re Application of Banning*: accretion petition was granted pursuant to findings which, among other things, determined that the accretion had existed for more than 20 years. Such findings were based on the State Land Surveyor's report that the area was formed by natural accretion ***and*** the new boundary was established in May 1967 (more than 20 years prior), not by the shoreline as it existed in 1985. (ROA II: 270-307.)

Courts continued to recognize littoral owners' right to accretion after Act 221, as well. *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 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). Act 221 did not change the law of littoral owners' rights to naturally accreted land, and the State's argument that Act 221's 20-year permanency requirement applied to "ownership" has no merit.

C. The ICA Properly Concluded That Act 73 Effected a Taking of *All* Unrecorded Existing Accretion

The ICA did not err in finding Act 73 took existing unrecorded accretion without just compensation and no "clarification" regarding that Act's effect on ownership of accretion that existed before 1985 is appropriate. The State's position that Act 73 did not take accretion existing prior to Act 221 - - the so-called "Class I" accretions - - is simply groundless and based upon its lawyers' after-the-fact wishful thinking.

Act 73 changed H.R.S. §§ 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 sate land except as otherwise provided in this section and shall be considered within the conservation district. ...

Courts are to give plain and obvious meaning to an unambiguous statute by reading statutory language in context and "construe it in a manner consistent with its purpose." *Coon v. City and County of Honolulu,* 98 Hawai`i 233, 244, 47 P.3d 348, 359 (2002); *Housing Finance & Development Corp. v. Castle,* 79 Hawai`i 64, 77, 898 P.2d 576, 589 (1995). Act 73's broad impact is evident for several reasons:

- 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;"

- 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 50 or 100 years) could after May 19, 2003 claim any rights, much less record its title; and

- 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.

Contrary to the State's new arguments, Act 73 does not present any question of retroactive application because it does not take accreted land "retroactively." Rather, it takes what unrecorded accretion exists ***at the time of passage*** in May 2003. This is not a "retroactive" application. Act 73 declares ***all*** **existing unrecorded** accretion, not "some" of that accretion, to be State land. Except for the recovery of eroded land, it states all - - not some - - future registration proceedings are banned. The State's lawyers are trying to rewrite, narrow, and qualify Act 73 into Constitutional compliance by their creative redesign, but that effort has no support in the statutory language or legislative history, and it is plainly baseless.

D. The Proposed "Clarifications" Are Not Only Unsupported by the Statutory Language, but they are at Odds with the State's Prior Positions regarding Accreted Land

The State's current position with respect to accretion existing prior to 1985 is not only inconsistent with rules of statutory construction, but also it is entirely at odds with the record. Contrary to the argument in the Application, the State previously contended unrecorded accretion existing in 1985 could not be recorded unless it had been in existence for at least 20 years. This position is found ***throughout*** the record, as demonstrated above. As a result, the

discussion of the State's so-called "classes" of accretion has no place in this Appeal. The State's artificial designations do, however, underscore the State's inability to reconcile Act 73 with the pre-existing common law and the takings clause of the Constitution of the State of Hawai`i. The State's shifting position is particularly offensive in light of the new argument - - raised for the first time in the State's Application - - that the Maunalua Parties' takings claim for accretion existing prior to 1985 is "not ripe" because the State "has never asserted any interest in applying Act 73 to interfere in any way with plaintiffs' ownership of Class I accreted lands..."

The State's position in recordation proceedings filed in the Land Court between 1985 and 2003 demonstrate the falsity of that statement. If the State's current position - - that no pre-1985 accretion was taken by Act 73 - - has always been its position, then all applications for registration of accretion between 1985 and May 2003 should have been granted as to all pre-Act 221 accretion without any need for proof of how long that accretion had been in existence. But, as discussed above, the Land Court applications between 1985 and 2003 for pre-1985 accretion paint a much different picture. Petitioners who sought to register accretion after 1985 were required to show it had been in existence for 20 years, even if they were registering accretion shown to exist prior to 1985, *i.e.,* the so-called "Class I" accretions.[6] Every one of these petitions

[6] *See In re Application of Banning* (in 1994, petitioner sought to register accretion based upon the vegetation line as it existed in 1982. The Land Court expressly rejected the petition in March 1994, stating petitioner must show the accretion existed for more than 20 years prior to the 1994 petition, ***in direct contrast to what the State now says should have happened***) (ROA II: 352-368); *In re Application of Waialua Agricultural Co., Ltd.* (owner permitted to claim accretion based on 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 re Application of Crozier* (new shoreline recognized based on findings that the State Land Surveyor found it to be "natural and existing for more than 20 years") (ROA II: 340-351; ROA III: 18.); and *In re Application of Banning* (accretion petition was granted pursuant to findings based on the State Land Surveyor's report that the new boundary was established in May 1967 (more than 20 years prior), not by the shoreline as it existed in 1985) (ROA II: 270-307).

was decided on the premise that all accretion covered by the petition was subject to the 20-year permanency test imposed by Act 221. These documents conclusively show the State's contention - - that it has "**always** taken the position that Class I (*i.e.,* pre-1985) accreted lands are wholly unaffected by Act 73, and that littoral owner with Class I accreted land are not barred by Act 73, even today, from registering or quieting title to such accreted (and regardless of 20-year permanency),"[7] - - is patently **false.**

The State's lack of consistency is further proven by the fact that in 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). Similarly, in its Opening Brief in the Intermediate Court of Appeals, the State argued that under Act 221 "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). These positions cannot be reconciled with the claim in the Application that:

> ...the State has always taken the position that Class I accreted lands are wholly unaffected by Act 73, and that littoral owners with Class I accreted land are not barred by Act 73, even today, from registering or quieting title to such accreted lands (and **regardless of 20-year permanency**).

(Application at 4, underlining in original and bold added.)

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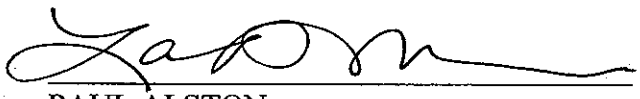
[7] *See* Application, page 4 (emphasis in original).

IV. CONCLUSION

Based on the foregoing, the Maunalua Parties respectfully request that the State's Application for Writ of Certiorari be denied.

DATED: Honolulu, Hawai`i, May 11, 2010.



PAUL ALSTON
LAURA P. MORITZ

Attorneys for Petitioners-Plaintiffs-Appellees