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, 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 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

STATE OF HAWAII'S MOTION FOR CLARIFICATION

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STATE OF HAWAII'S MOTION FOR CLARIFICATION

Appellant State of Hawaii respectfully asks that this court make clear that its opinion did not find a taking (requiring just compensation) with respect to **Class I** accreted lands -- i.e., land accreted prior to the enactment of Act 221 on June 4, 1985. That is, it is the State's understanding that the Court's ruling that "Act 73 permanently divested a littoral owner of his or her ownership rights to any existing accretions to oceanfront property that were unregistered or unrecorded as of the effective date of Act 73 or for which no application for registration or petition to quiet title was pending and, therefore, Act 73 effectuated a taking of such accretions," slip. op. at 34-35, only applies to **Class II** accreted land, i.e., land that accreted **after** the effective date of Act 221, but before the effective date of Act 73, i.e., between June 4, 1985 and May 19, 2003. We respectfully ask that this Court confirm and/or clarify that the State's understanding is correct. The State has this understanding for three independent reasons.

A. Because the State has always taken the position that Act 73 has no effect upon Class I accreted lands, it would be absurd to require the State to compensate landowners for accretions the State denies any ownership of, and which the landowners fully own without dispute.

First, and most importantly, the State has **always** taken the position that Class I accreted lands are wholly unaffected by Act 73, and that littoral landowners 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).[1] Because the State does not assert any interest or control over such Class I accreted lands through Act 73, it would make little sense to find the State has by way of Act 73 committed a taking with respect to such lands, when the State has never asserted, and will never assert, based upon Act 73 any interest in Class I accretions.

It would be absurd to insist that Act 73 deprives littoral landowners of Class I accretions when the State has never asserted, and will never assert, such a position, and then require the

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[1] See, e.g., Defendant State of Hawaii's Memo. in Opp. to Plaintiffs' Amended Mot. for Partial Summary Judgment [filed 3/21/06] at 7, 8, 13 [2 R. 134, 135, 140] ("Act 73 . . . does not affect ownership of land that had accreted before June 4, 1985"; "Act 73 does not affect Class I land"; "Act 73 does not affect Class I land at all. Such land is and remains owned by the littoral owner, the same as before passage of Act 73."); State's Open. Br. at 6, 11-12 ("Act 73 (2003) had [no] affect whatsoever upon **Class I** accretions"; "[T]o the extent that littoral landowners owned (and could register or quiet title to) Class I accreted land prior to Act 221 and Act 73, that ownership continued undiminished through and after the enactment of both of those acts."); State's Reply Br. at 2 & n.5 ("Act 73 had no affect on Class I accretions"; "the State will allow littoral owners to obtain record title to ... Class I accretions. ").

State to pay compensation for accreted land the State disclaims any ownership interest in. Conversely, it would be anomalous for the State to pay "compensation" to littoral landowners for such accreted land when no one, including the State, is saying the landowners do not own such accretions. What is there to "compensate" when the littoral landowners continue to own such accretions, and no one, including the State, is denying their ownership, or taking any steps to deny their ownership?

This Court in its opinion properly noted the State's position, which is that "**neither** Act 221 nor **Act 73 affected littoral owners' interest in Class I accretions** and, therefore, no taking of Class I accretions has occurred." slip. op. at 32-33. This Court's opinion properly did not dispute that proposition: i.e., that Act 73 has no affect upon littoral owners' interest in Class I accretions.[2]

B. Any attack on Act 73 as effecting a compensable taking of Class I accretions is not ripe.

Second, 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 (assuming, arguendo, plaintiffs' property has such Class I accretions), plaintiffs have **no ripe claim** with respect to Class I accretions. See Save Sunset Beach Coalition v. City and County of Honolulu, 102 Haw. 465, 483, 78 P.3d 1, 19 (2003) ("Under the ripeness doctrine, a court should 'reserve judgment upon a law pending concrete executive action to carry its policies into effect [.]'"). Only if and when the State were to reverse course and assert that Act 73 has deprived littoral landowners of Class I accretions would the issue of a taking as to such accretions be ripe. That has not occurred. See Bremner v. City and County of Honolulu, 96 Haw. 134, 144, 28 P.3d 350, 360 (Haw. App. 2001) (finding constitutional challenge unripe because "[w]hile future application of the [law in an "arbitrary and discriminatory" fashion] may indeed run afoul of constitutional safeguards, we find it equally possible that, given reasonable care, the opposite outcome may obtain."). Given the State's consistent position rejecting application of Act 73 to Class I accretions, it is not only "equally possible," but highly likely, that Act 73 will not be applied by the State to Class I accretions. Until an unlikely switch in the State's position occurs, any taking claim as to Class I accretions is clearly unripe.

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[2] Of course, once that proposition is accepted, it obviously and necessarily follows that Act 73, having no effect on Class I accretions, does not effect a compensable taking of Class I accretions.

C. The only proper construction of Act 73 is that it has no affect whatsoever on Class I accretions.

Finally, although the above reasons are more than sufficient to preclude this Court from ruling that Class I accretions were taken by Act 73, another independent reason, already explained in our briefs, see Open. Br. at 9-12; Reply Br. at 1, is that the only proper construction of Act 73 is that it has no effect whatsoever on Class I accretions. We briefly reiterate those arguments here.

Significantly, HRS § 1-3 reads:

> §1-3 **Laws not retrospective.** No law has any retrospective operation, unless otherwise expressed or obviously intended.

HRS §1-3 bars Act 73 from having retroactive effect upon Class I accretions, as it cannot be said that retroactive application of Act 73 (allowing only the State to own most accreted land along the ocean) to Class I accretions was "otherwise expressed or obviously intended." The language of the Act itself certainly does not express any retroactive impact upon Class I accretions, nor is such an impact "obviously intended."

Although Section 6 says that "[a]pplications for the registration of land by accretion and actions to quiet title to land by accretion filed subsequent to the effective date of this Act shall be processed in accordance with this Act," that should be interpreted to cover post-effective date filings regarding only Class **II** (and Class III) accretions, not as to Class **I** accretions. For there is nothing in the language of the Act, or its legislative history, to suggest that the legislature intended to alter littoral landowners' rights in Class **I** accretions that had been owned, by definition, for at least 18 years. The legislature was focused on stopping new expansions of private property (at the expense of public enjoyment of, or access to, oceanfront lands), not depriving littoral landowners of accretions deposited at least 18 years prior. See SCRep. 1224, 2003 Senate Journal at 1546 ("The measure will help protect Hawaii's public lands and fragile beaches by ensuring that coastal property owners do not inappropriately claim **newly deposited** lands makai of their property as their own."). Class I accretions, of course, being at least 18 years old (at the time Act 73 was enacted), are plainly not "newly deposited." In sum, HRS § 1-3 precludes applying Act 73 to Class I accreted land.

Second, and significantly, the Hawaii Supreme Court in Wong v. Takeuchi, 88 Hawai'i 46, 961 P.2d 611 (1998), reaffirmed the "general rule . . . that [s]tatutes or regulations which say nothing about retroactive application are not applied retroactively if such a construction will

impair existing rights, create new obligations or impose additional duties with respect to past transactions." 88 Haw. at 51, 961 P.2d at 616. Were Act 73 interpreted to strip away longstanding (18 years minimum) littoral ownership rights in Class I accretions, that construction would "impair existing rights," in direct violation of Wong v. Takeuchi's command to reject retrospective interpretations that would impair existing rights. Littoral landowners' rights in Class I accretions, after all, at the time the accretions came into existence -- by definition, before the enactment of Act 221 in June of 1985 -- could be enjoyed immediately upon their formation. Moreover, those rights continued in full force not only until the enactment of Act 221 in 1985, but for at least the next 18 years thereafter (because Act 221 had no retroactive effect upon Class I accretions, as explained in the State's Open. Br. at 8-9). Thus, if Act 73 were construed to then suddenly deny or otherwise impair those littoral landowner rights to Class I accretions upon its enactment in 2003, that would disrupt not only "existing," but also long-enjoyed (at least 18 years), rights. Wong thus bars such an interpretation of Act 73.

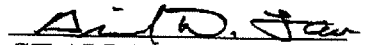
Finally, and as an additional independent reason, Act 73 should not be interpreted to apply to Class I accretions because to do so would raise grave constitutional concerns. See In re Doe, 96 Hawai'i 73, 81, 26 P.3d 562, 570 (2001) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is adopt the latter"). Because serious Takings Clause questions would arise if Act 73 were interpreted to affect Class I accretions, such an interpretation must be avoided.

In sum, Act 73, as a matter of proper statutory construction, had no effect whatsoever upon Class I accretions.

CONCLUSION

For any one of the above independent reasons, therefore, the State of Hawaii respectfully asks that this Court clarify and/or confirm that its opinion did not find a taking with respect to Class I accreted lands, i.e., land accreted prior to the enactment of Act 221 on June 4, 1985.

DATED: Honolulu, Hawaii, January 11, 2010.



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