THE NEWSLETTER OF THE REAL PROPERTY & FINANCIAL SERVICES SECTION OF THE HAWAII STATE BAR ASSOCIATION

KA NU HOU

FROM THE CHAIR

April 2012

Aloha Section Members:

Welcome to the first 2012 issue of Ka Nu Hou, the semi-annual newsletter of the Real Property and Financial Services Section of the Hawaii State Bar Association. RPFSS has over 400 members and is the largest section in the HSBA. Our primary mission has been to provide top-notch continuing legal education opportunities for our members through a variety of means, including presenting seminars and informal brown bag sessions, and publishing practice manuals, books, and this newsletter. We are enthusiastically pursuing that mission again this year.

We would be remiss if we did not recognize and extend a big mahalo to our immediate past-Chair **Grace Kido** and previous board members for the outstanding job that they did last year in leading our section. We are also fortunate to have another distinguished group of board members and past chairs who are leading the charge in 2012 (see list at the end of newsletter).

Thus far, we've started the year off with a bang with four excellent brown bag sessions. These lunch hour programs have all been free of charge to RPFSS members -- and this is one of those rare occasions in which you get much, much more than what you pay for.

Lorrin Hirano led things off in January with an informative session on civil unions and recent developments at the Bureau of Conveyances. In February, **Sarah Morihara** and **Mike Hamasu** led a team from **Colliers International** in providing us with their outlook for the local commercial real estate market in 2012. We had a globe-spanning session in March on Chinese investments in Hawaii featuring visiting Shanghai attorney **Jonathan You**, local attorney **Russell Leu** who participated from Beijing via Skype, and tax attorney **Roger Epstein**. Students and faculty members from the Williams S. Richardson School of Law also participated in the session via Skype. Finally, surveyor **Jim Thompson** gave an outstanding presentation earlier this month on ALTA surveys, shoreline issues and deregistration of Land Court properties. Attendance has been excellent at these sessions -- many thanks to all of our stellar speakers! And there's much more to come this year with additional brown bag sessions and seminars in the pipeline (see "Save the Date" section below).

We're looking forward to a great finish to 2012. Many thanks for the privilege of serving as your Chair this year.

Aloha,

Kyle T. Sakumoto, Chair
Real Property and Financial Services Section

In this Issue:

The Wash of the Waves: How the Stroke of a Pen Recharacterized Accreted Lands as Public Property by **E. Kumau Pineda**, a third year law student at the William S. Richardson School of Law. Mr. Pineda was the recipient of our 2011 Jep Garland Award, which is one of two awards presented each year by the RPFSS. Congratulations to Kumau!

"Save the Date":

Friday, May 18, noon to 1:00 p.m. – Brown Bag Presentation at HSBA Conference Room, 1100 Alakea, Suite 1000, Speakers: Alan Kido and Nathan Aipa on the Hawaii Realtors 2012 update of the standard Purchase Contract form (Board Meeting to follow)

Friday, June 15, noon to 1:00 p.m. – Brown Bag Presentation at HSBA Conference Room, Speaker: Wes Chang on using technology to leverage your real estate practice (Board Meeting to follow)

Tuesday, July 10 (morning), Legislative Update by David Rair and Lisa Ayabe at HEI Conference Room.

Friday, September 21, HSBA convention, morning seminar on insurance issues; afternoon seminar with **Charlie Pear** and **Lorrin Hirano** on Land Court issues.

The Wash of the Waves:

How the Stroke of a Pen Recharacterized Accreted Lands as Public Property

E. Kumau Pineda[1]

I. INTRODUCTION

Hawaii's state-owned beaches are open to the public to engage in everything from recreation to important cultural activities. Many Hawai'i residents view the beach as a lifeline that makes possible a multitude of enjoyable hobbies such as fishing, surfing, and swimming. Littoral property owners also have the right to enjoy their property that extends makai (seaward)[2] to the "highest reach of the highest wash of the waves."[3] This definition of a beachfront owner's property line is subject to forces of nature such as accretion, erosion, and avulsion.[4] Accretion is the process by which an area of land is "formed by the gradual accumulation of land on a beach or shore along the ocean by the action of natural forces."[5] Erosion on the other hand, is "the process by which land is gradually covered by water."[6] Under the longstanding common law, oceanfront owners assumed the risk of property loss due to erosion, but preserved their right to any newly accreted land.[7] Lastly, avulsion "denotes the process by which there is a sudden and perceptible change in the location of a body of water."[8] The boundary line, however, remains the same in cases where there has been an abrupt shoreline change due to the process of avulsion.[9]

In 2003, the Hawai'i State Legislature adopted Act 73, which provided that beachfront property owners no longer had a private right to own accreted lands.[10] Act 73 included two exceptions for private landowners to gain title to accreted land: (1) if the accretion restored previously eroded land; or (2) if a pending application for registration of land or to quiet title was initiated before Act 73's effective date.[11] In 2005, a group of landowners in the Portlock area of O'ahu filed a class action inverse condemnation[12] lawsuit alleging that Act 73 constituted a taking

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[1] J.D. Candidate 2012, William S. Richardson School of Law, University of Hawai'i at Mānoa. I would like to thank Professor Melody MacKenzie for her guidance and support during the writing process.

[2] MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 114, 225 (6th ed. 1986) (seaward, "toward the sea").

[3] Diamond v. State, 112 Haw. 161, 164, 145 P.3d 704, 707 (2006) (interpreting the precedent setting Hawai'i Supreme Court holding in *In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968) (shoreline boundary "usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves")); *see* HAW. REV. STAT. § 205A-1 (2010); HAW. CODE R. § 13-222-2 (LexisNexis 2006). Although the *Diamond* court further defined *Ashford*'s "upper reaches of the wash of the waves" demarcation as the "highest reach of the highest wash of the waves," this shoreline definition is still generally referred to as the *Ashford* rule/standard.

[4] *See* Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 36, 222 P.3d 441, 443 (App. 2009) (citing 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY §§ 66.01[1]-66.01[2], at 66-2 to 66-9 (2006)).

[5] HAW. REV. STAT. § 171-1 (2010); *See* Hughes v. Washington, 389 U.S. 290, 290-91 (1967) (accretion refers to land "gradually deposited by the ocean on adjoining upland property"); BLACK'S LAW DICTIONARY 23 (9th ed. 2009) (accretion is the "gradual accumulation of land by natural forces, esp. as alluvium is added to land situated on the bank of a river on the seashore").

[6] *Maunalua Bay*, 122 Haw. at 36, 222 P.3d at 443 (citing POWELL, *supra* note 4).

[7] *Id.* at 37, 222 P.3d at 444.

[8] *Id.* at 36, 222 P.3d at 443.

[9] *Id.* at 37, 222 P.3d at 444; *see* Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 130 S. Ct. 2592, 2599 (2010) ("regardless of whether an avulsive event exposes land previously submerged or submerges land previously exposed, the boundary between littoral property and sovereign land does not change").

[10] 2003 Haw. Sess. Laws Act 73, §§ 1-8 at 128-29 (codified at HAW. REV. STAT. §§ 171-1, 171-2, 343-3, 501-33, 669-1 (2010)).

[11] Act 73 significantly amended HAW. REV. STAT. §§ 501-33, 669-1 (2010); *see supra* note 10 (other sections amended by Act 73).

[12] United States v. Clarke, 445 U.S. 253, 257 (1980) (quoting DONALD G. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971) ("[I]nverse condemnation is 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'") (emphasis omitted)).

of their property rights without just compensation.[13] Although the Intermediate Court of Appeals of Hawai'i ("ICA") in *Maunalua Bay Beach Ohana 28 v. State* held that Act 73 effectuated an uncompensated taking of existing accreted land as of the Act's effective date, the court determined that the Act was not a taking of future accretions.[14] Under this reasoning, the right to future accreted land in Hawai'i is no longer considered a property interest under the Hawai'i State Constitution.[15]

Although the homeowners prevailed in Circuit Court, the ICA's bifurcation of "existing accreted land" and "future accretion rights"[16] marked a departure from the common law of accretion and shoreline boundaries. As a result of the *Maunalua Bay* decision, oceanfront owners still assume the risk of property loss due to erosion, but no longer have the right to newly accreted land. Similarly, the "highest wash of the waves" boundary classification between public and private property adopted by the Hawai'i Supreme Court in *In re Ashford*[17] is no longer absolute.[18] The public-private shoreline distinction that was once evidenced by the "debris line" or "vegetation line" is only true where there has either been erosion or no change to the beach since May 20, 2003.[19] In cases where there has been accretion, however, there is now a strip of public beach extending somewhere mauka (inland)[20] from the highest wash of the waves that is not easily ascertainable.[21]

This Note will discuss the common law of accretion in the Kingdom, Territory, and State of Hawai'i that subjected littoral owners to property loss due to erosion, but preserved their right to any newly accreted land. To provide context, Part II focuses on the seminal Hawai'i common law cases on accretion and shoreline boundaries,[22] followed by the statutory background of Act 221[23] and Act 73. Part III provides an overview of the *Maunalua Bay* decision itself, discussing the facts, procedural history, and the court's constitutional determinations on "existing accreted" land and "future accretion" rights. Part IV critiques the ICA's conclusion that there is no vested right to future accretions, and the practical consequences of the decision. Part V concludes that although public policy favors public use and ownership of Hawaii's shoreline, in this case, public access to the beach could have been preserved

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[13] *Maunalua Bay*, 122 Haw. at 36, 222 P.3d at 443; *see* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); HAW. CONST. art. I, § 20 ("Private property shall not be taken or damaged for public use without just compensation.").

[14] *Maunalua Bay*, 122 Haw. at 36, 222 P.3d at 443.

[15] HAW. CONST. art. I, § 20; HAW. CONST. art. I, § 5 ("No person shall be deprived of . . . property without due process of law . . . ."); U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of . . . property, without due process of law").

[16] Interview with Carl C. Christensen, Visiting Assistant Professor of Law at the William S. Richardson School of Law, in Honolulu, Haw. (Apr. 12, 2011) [hereinafter Christensen Interview] (stating that although the Plaintiffs and the State largely ignored this issue, the ICA latched onto this distinction, which was advanced in the amicus brief he filed on behalf of Hawaii's Thousand Friends); Brief for Hawaii's Thousand Friends as Amici Curiae Supporting Defendant-Appellant, *Maunalua Bay* at 4-7, 122 Haw. 34, 222 P.3d 441 (App. 2009) (No. 28175).

[17] 50 Haw. 314, 440 P.2d 76 (1968).

[18] The *Ashford* "upper reaches" standard was affirmed and clarified in *Diamond*, 112 Haw. 161, 145 P.3d 704. *See supra* text accompanying note 3.

[19] *See supra* text accompanying note 3 (debris line or vegetation line—whichever is farthest mauka (inland)).

[20] PUKUI & ELBERT, *supra* note 2, at 242.

[21] *See* MELODY KAPILIALOHA MACKENZIE, SUSAN K. SERRANO, & D. KAPUA'ALA SPROAT, NATIVE HAWAIIAN RIGHTS HANDBOOK 2d ed. (forthcoming 2011) [hereinafter HANDBOOK] ("*Determining the location of the shoreline is critical*, not only because it potentially affects public access, but also because structures cannot be located within the shoreline setback area, which must be at least twenty feet but not more than forty feet inland from the shoreline.") (emphasis added).

[22] *See* Halstead v. Gay, 7 Haw. 587 (1889); *Ashford*, 50 Haw. 314, 440 P.2d 76; Cnty. of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973) ("*Sotomura I*"); *In re* Sanborn 57 Haw. 585, 562 P.2d 771 (1977); State *ex rel.* Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977); *In re* Banning, 73 Haw. 297, 832 P.2d 724 (1992); Diamond v. State, 112 Haw. 161, 145 P.3d 704 (2006).

[23] Act 221 is the predecessor to Act 73—discussed *infra* text accompanying Section II. B.

without changing the common law and creating a new distinction between existing accreted land and future accretion rights.[24]

II. BACKGROUND

A. HAWAIʻI SUPREME COURT PRECEDENT

Ownership of accreted lands was first addressed in 1889 by the Supreme Court of the Kingdom of Hawaiʻi in *Halstead v. Gay*, a case that hinged on whether the defendant's presence on accreted land constituted trespassing.[25] In determining the property's makai boundary, the court in *Halstead* interpreted the phrase in the deed, "ma kahakai a hiki i ka hope o ka holo mua ana," to mean the "high-water mark on the sea beach."[26] The court held that the "land now above high-water mark, which has been formed by imperceptible accretion against the shore line existing at the date of the survey and grant, has become attached *by the law of accretion* to the land described in the grant."[27] The court concluded "that the plaintiff has the rights of a littoral proprietor, and that the accretion is his."[28]

The Hawaiʻi Supreme Court revisited the issue of makai boundaries over three quarters of a century later in *In re Ashford*, the 1968 landmark case in which the property owners sought registration of two parcels of land described in the royal patents as running "ma ke kai" (along the sea).[29] The petitioners asserted that ma ke kai described the boundaries at the "mean high water" mark, based on U.S. Coast and Geodetic Survey publications.[30] The State contended that the public property line was approximately twenty to thirty feet mauka of the boundary claimed by the property owners, as demonstrated by "the high water mark that is along the edge of vegetation or the line of debris left by the wash of the waves during ordinary high tide."[31] When Kamehameha V issued the royal patents for the *Ashford* properties in 1866, the custom was to rely on kamaʻāina testimony for boundary determinations.[32] Relying on kamaʻāina testimony,[33] the *Ashford* court held "that 'ma ke kai' is along the *upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris* left by the wash of waves."[34]

In 1973, the Hawaiʻi Supreme Court further advanced the *Ashford* rule in *County of Hawaii v. Sotomura* ("*Sotomura I*"), a case in which the makai boundary was at issue in a county initiated eminent domain action.[35] The seaward boundary that was registered with the land court eleven years earlier had subsequently eroded.[36] Rather than

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[24] *See Banning*, 73 Haw. at 309, 832 P.2d at 731.

[25] 7 Haw. 587 (1889).

[26] *Id.* at 589.

[27] *Id.* at 590 (emphasis added) ("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." *Id.* at 588 (citations omitted)).

[28] *Id.* at 590.

[29] 50 Haw. 314, 315, 440 P.2d 76, 77 (1968).

[30] *Id.*; *see* Robert H. Thomas, Mark M. Murakami & Tred R. Eyerly, *Of Woodchucks and Prune Yards: A View of Judicial Takings From the Trenches*, 35 VT. L. REV. 437, 448-49 (2010).

[31] *In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968).

[32] *Id.*

[33] *Id.* at 315 n.2, 440 P.2d at 77 n.2; *see In re* Boundaries of Pulehunui, 4 Haw. 239, 245 (1879) (a native-born "familiar from childhood with any locality"); MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 124 (6th ed. 1986) ("Native-born, one born in a place . . . acquainted, familiar").

[34] *Ashford*, 50 Haw. at 315, 440 P.2d at 77 (emphasis added) (departing from the mean high water mark shoreline definition). The kamaʻāina witnesses in *Ashford* testified, "that according to ancient tradition, custom and usage, the location of a public and private boundary dividing private land and public beaches was along the upper reaches of the waves as represented by the edge of vegetation or the line of debris." *Id.* at 316, 440 P.2d at 78; *see* Asami Miyazawa, *Public Beach Access: A Right for All? Opening the Gate to Iroquois Point Beach*, 30 U. HAW. L. REV. 495 (2008).

[35] 55 Haw. 176, 517 P.2d 57, *reh'g denied*, 55 Haw. 677 (1973), *cert. denied*, 419 U.S. 872 (1974).

[36] *Id.* at 180, 517 P.2d at 61; *see also* Napeahi v. Paty, 921 F.2d 897, 900 (9th Cir. 1990) (affirming that eroded oceanfront land becomes state land, subject to the terms of the "public trust").

using the certified land court makai boundary for the valuation method, the court held that, "registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion."[37] Relying on *Ashford*, the court held that as a matter of law

> where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka; the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth.[38]

The court further reasoned that, "while the debris line may change from day to day or from season to season, *the vegetation line is a more permanent monument*, its growth limited by the year's highest wash of the waves."[39] Aside from pronouncing that the location of a seaward boundary is to be determined by the *Ashford* standard, the *Sotomura I* court reasoned that *Ashford* "was a judicial recognition of long-standing public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right."[40] Relying on the "public trust doctrine,"[41] the court also articulated that "[p]ublic policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible."[42]

The Hawai'i Supreme Court's *Sotomura I* decision was later challenged in the U.S. District Court case of *Sotomura v. County of Hawaii* ("*Sotomura II*").[43] The same landowners from *Sotomura I* asserted that the Hawai'i Supreme Court radically departed from Hawai'i common law by using the *Ashford* standard and vegetation line in its determination of the shoreline boundary.[44] The federal district court held that *Sotomura I* violated the landowners' substantive due process rights and found no authority for using the *Ashford* standard aside from the *Ashford* decision itself.[45] The court stated that prior to *Ashford*, the mean high water level was used to determine the high water mark.[46] The *Sotomura II* court concluded that the

> Hawaii Supreme Court's retroactive application of the Ashford standards to locate the seaward boundary of property at the vegetation line, following erosion, ignoring vested property rights and without determining the extent of actual erosion, was so radical a departure from prior state law as to constitute a taking of the Owners' property by the State of Hawaii without just compensation.[47]

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[37] *Sotomura I*, 55 Haw. at 180, 517 P.2d at 61.

[38] *Id.* at 182, 517 P.2d at 62.

[39] *Id.* (emphasis added). This vegetation line "preference" is addressed in detail in Diamond v. State, 112 Haw. 161, 175, 145 P.3d 704, 718 (2006).

[40] *Sotomura I*, 55 Haw. at 181-82, 517 P.2d at 61.

[41] *See* HAW. CONST. art. XI, § 1. The public trust doctrine was first adopted by the Hawai'i Supreme Court in *King v. Oahu Ry. & Land Co.*, 11 Haw. 717 (1899), later proposed by the Constitutional Convention of Hawai'i of 1978, and adopted by the voters of Hawai'i in November 1978.

[42] *Sotomura I*, 55 Haw. at 182, 517 P.2d at 61-62. The court further noted that "[l]and below the high water mark, like flowing water, is a natural resource owned by the state 'subject to, but in some sense in trust for, the enjoyment of certain public rights.'" *Id.* at 183-84, 517 P.2d at 63. *But see id.* at 189, 517 P.2d at 65 (Marumoto, J., dissenting) ("I will not indulge in an extensive dissertation against the holding, for to do so will be but an exercise in futility. I merely point out that, in my opinion, the holding is plain judicial law-making.").

[43] 460 F. Supp. 473 (D. Haw. 1978) ("*Sotomura II*"). Although an appeal from the Hawai'i Supreme Court to the U.S. District Court of Hawaii is no longer permitted, it was procedurally proper at the time.

[44] *Id.* (arguing that *Sotomura I* violated the landowners' constitutional due process rights and constituted a taking of property without just compensation); *see* HANDBOOK, *supra* note 21.

[45] *Sotomura II*, 460 F. Supp. at 482 (The State of Hawai'i, took "the Owners' property without their having been afforded any notice of the intended action, or any hearing or opportunity to present evidence or argument, or any trial by jury of the issues of fact bearing on the court's ruling.").

[46] *Id.* at 478.

[47] *Id.* at 482-83 ("in violation of rights secured to them by the Fourteenth Amendment to the United States Constitution"); *see id.* at 481 ("A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation.").

In what has been described as "an apparent response to the anticipated federal district court opinion in *Sotomura II*,"[48] the Hawai'i Supreme Court affirmed its *Sotomura I* holding in the 1977 case of in *In re Sanborn*.[49] In *Sanborn*, a case involving a proposed oceanfront subdivision, the court addressed the issue of whether the beachfront title line would "be determined according to Hawaii's general law of ocean boundaries, or . . . certain distances and azimuths contained in the Sanborns' 1951 land court decree of registration."[50] The court affirmed that "[t]he law of general application in Hawaii is that beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves."[51] The court further reasoned that aside from exceptions in the land court statute itself, the public trust doctrine "can similarly be deemed to create an exception to our land court statute, thus invalidating any purported registration of land below high water mark."[52] The court also reiterated its holding in an earlier case, *McCandless v. Du Roi*,[53] "that 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."[54]

In another 1977 case, *State ex rel. Kobayashi v. Zimring*, the Hawai'i Supreme Court revisited shoreline boundaries in a state action to quiet title in itself to new land added to an oceanfront property as a result of a 1955 lava flow.[55] Although the original property was no longer littoral, the deed described the shoreline boundary as being "along high water mark."[56] The court provided historical context by acknowledging that, "the people of Hawaii are the original owners of all Hawaiian land."[57] It was not until King Kamehameha III's series of land reform actions in the 1840s that private individuals were able to hold title to land.[58] The court emphasized that the "encapsulation of the origin and development of the private title in Hawaii makes clear the validity of the basic proposition in Hawaiian property law that land in its original state is public land and if not awarded or granted, such land remains in the public domain."[59]

The court also stated "[a]side from acquisition of documented title, one can also show acquisition of private ownership through operation of common law or as established by pre-1892 Hawaiian usage pursuant to HRS § 1-1."[60] The court concluded that with the exception of land transferred to private ownership through common law or as established by pre-1892 Hawaiian usage, "all land not awarded or granted remains public land."[61] After balancing the

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[48] HANDBOOK, *supra* note 21 (manuscript at 13-7).
[49] 57 Haw. 585, 562 P.2d 771 (1977).
[50] *Id.* at 588, 562 P.2d at 773.
[51] *Id.* (citing *Sotomura I*, 55 Haw. 176, 181-82, 517 P.2d 57, 61-62 (1973)).
[52] *Id.* at 593, 562 P.2d at 776 ("Under this analysis, any purported registration below the upper reaches of the wash of waves in favor of the appellees [is] ineffective." *Id.* at 594, 562 P.2d at 776).
[53] 23 Haw. 51 (1915).
[54] *Sanborn*, 57 Haw. at 596, 562 P.2d at 778 (citing *McCandless*, 23 Haw. 51).
[55] 58 Haw. 106, 108, 566 P.2d 725, 728 (1977); *see* Dennis J. Hwang, *Shoreline Setback Regulations and the Takings Analysis*, 13 U. HAW. L. REV. 1 (1991).
[56] *Zimring*, 58 Haw. at 108, 566 P.2d at 728.
[57] *Id.* at 111, 566 P.2d at 729; *see* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 26-27 (2008).
[58] *Zimring*, 58 Haw. at 111, 566 P.2d at 729; *see In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864); Stuart Banner, *Preparing to Be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawaii*, 39 LAW. & SOC'Y. REV. 273, 290 (2005); Maivan C. Lam, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233, 253 (1989).
[59] *Zimring*, 58 Haw. at 114, 566 P.2d at 731.
[60] *Id.* at 114-15, 566 P.2d at 731.

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage.

HAW. REV. STAT. § 1-1 (2010); *see* Paul M. Sullivan, *Customary Revolutions: The Law of Custom and Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99, 132 (1998).

[61] *Zimring*, 58 Haw. at 115, 566 P.2d at 731.

competing interests of the owner and the State, the court held that the avulsive littoral addition of new land resulting from a lava flow belonged to the State.[62] Aside from the holding itself, *Zimring* also stands for the proposition that "[w]hile the accretion doctrine is founded on the public policy that littoral access should be preserved where possible, the law in other jurisdictions makes it clear that the preservation of littoral access is not sacrosanct and must sometimes defer to other interests and considerations."[63]

The Hawai'i Supreme Court directly addressed the issue of accretion in the 1992 case of *In re Banning*.[64] At issue was the land court's determination on whether the shoreline property owner could register title to accreted land, and whether public access on the accreted area was impliedly dedicated to the general public.[65] The *Banning* court noted that under the applicable statute, "[a]n 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*."[66] Although a neighboring landowner and the State argued that the registration should be denied because the "accreted" land did not satisfy the statutory requirements, the land court had determined that the accreted land was natural and permanent.[67] The land court had also "concluded that the general public had used the trustees' accreted land for recreation and access to the beach for at least twenty years with the acquiescence of the trustees, and therefore, it held that those areas were impliedly dedicated by the trustees to the general public for recreation and access."[68]

Relying on *Halstead*, the *Banning* court restated that "[l]and now above the high water mark, which has been formed by 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."[69] The court also relied on language from *Zimring* that "the accretion doctrine is founded on the public policy that littoral access should be preserved where possible."[70] The court further stated that other

> reasons ordinarily given for th[is] general rule as to accretions are . . . that the loss or gain is so imperceptible that it is impossible to identify and follow the soil lost or to prove where it came from, that small portions of land between upland and water should not be allowed to lie idle and ownerless, or that, *since the riparian owner may lose soil by the action of the water, he should have the benefit of any land gained by the same action*.[71]

The court in *Banning* determined that the land court erred in holding "that rights to accreted land (as it was accreting) could be acquired by adverse public use under the theory of implied dedication."[72] In doing so, the court declined to adopt the theory of implied dedication as espoused by the California Supreme Court in *Gion v. City of Santa Cruz*.[73]

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62 *Id.* at 128, 566 P.2d at 739.
63 *Id*. at 119, 566 P.2d at 734.
64 73 Haw. 297, 832 P.2d 724 (1992).
65 *Id.*
66 *Id.* at 302, 832 P.2d at 727.
67 *Id.*
68 *Id.* at 302, 832 P.2d at 727-28.
69 Halstead v. Gay, 7 Haw. 587, 590 (1889) (quoted in *Banning*, 73 Haw. at 303, 832 P.2d at 728).
70 State *ex rel.* Kobayashi v. Zimring, 58 Haw. 106, 119, 566 P.2d 725, 734 (1977) (quoted in *Banning*, 73 Haw. at 303, 832 P.2d at 728).
71 *Banning*, 73 Haw. at 303-04, 832 P.2d at 728 (emphasis added) (citing 65 C.J.S. *Navigable Waters* § 82(1), at 256 (1966) (footnotes omitted)).
72 *Id.* at 304, 832 P.2d at 728.
73 *Id; see Gion v. City of Santa Cruz,* 465 P.2d 50 (Cal. 1970) (ignoring widespread public use of a property for more than five years resulted in implied dedication of the property to the public).

The *Banning* court restated *Sotomura I*'s acknowledgement "that public policy 'favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible.'"[74] The court also reiterated that "[t]his interest must be balanced against the littoral landowner's right to the enjoyment of his land."[75] The court in *Banning* ultimately held that "[u]nder the facts of this case, public access to the beach can be preserved without infringing on the enjoyment of the littoral landowner in his accreted land."[76]

Most recently, in 2006, the Hawai'i Supreme Court readdressed Hawaii's shoreline definition in *Diamond v. State*.[77] Under section 205A-1, the Coastal Zone Management Act ("CZMA"),

> "Shoreline" means the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves.[78]

This statutory definition essentially mirrors the shoreline demarkation adopted in *Ashford*.[79] In certifying the makai boundary, however, the state Board of Land and Natural Resources ("BLNR") used the "stable vegetation line" in the property's shoreline certification, even though the artificially planted vegetation occurred seaward of the debris line.[80] In the end, the *Diamond* court looked to the plain meaning of section 205A-1, its legislative history, and *Sotomura I*'s public policy that "favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible,"[81] and determined that the vegetation line cannot trump the debris line if the vegetation line is makai of the debris line.[82]

B. THE STATUTORY BACKGROUND

In 1985, the Hawai'i State Legislature passed House Bill No. 194, "A Bill for an Act Relating to Accretion," which was enacted as Act 221.[83] Among other things, Act 221 added a new section to Chapter 183 of the Hawai'i Revised Statutes, section 183-45.[84] Section 183-45 prohibited erecting structures or retaining walls, dredging, grading, or any other use of accreted lands that interferes or may interfere with the future natural course of the beach, including accretion and erosion, and imposed penalties for violations.

Act 221 also added a new section to Hawaii's Land Court Registration statute, Chapter 501, section 501-33, which required that an applicant for registration of accreted land prove by a preponderance of the evidence that the accreted land was natural and permanent. Section 501-33 further defined "permanent" as accreted land having been

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[74] *Banning*, 73 Haw. at 309, 832 P.2d at 731 (emphasis omitted) (citing *Sotomura I*, 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973)).
[75] *Id.* at 310, 832 P.2d at 731.
[76] *Id.* Under the facts of *Banning*,

> the easements which have been granted by the land court are not critical for public access to the beach. In fact, alongside the trustees' property, Lot 20-A, is a public access way, Lot 20-X, that leads to the beach. Because the public access way on Lot 20-X is not extended to include the accreted land just beyond it, public access to the beach will not be curtailed.

Id. (the court further stated that there were several other beach access points in the general proximity).

[77] 112 Haw. 161, 145 P.3d 704 (2006).
[78] HAW. REV. STAT. § 205A-1 (2010).
[79] *See In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968).
[80] *Diamond*, 112 Haw. at 168, 145 P.3d at 711 (Vegetation that "is able to survive through the seasons over several year without human intervention provides a good indication of the location of the shoreline.").
[81] *Sotomura I*, 55 Haw. 176, 182-84, 517 P.2d 57, 61-62 (1973).
[82] *Diamond*, 112 Haw. at 175, 145 P.3d at 718 (the public-private shoreline boundary is evidence by the debris line or vegetation line—whichever is farthest mauka).
[83] 1985 Haw. Sess. Laws Act 221, §§ 1-3 at 401-02 (codified at HAW. REV. STAT. §§ 183-45, 501-33, 669-1(e)).
[84] 1985 Haw. Sess. Laws Act 221, § 1 at 401.

in existence for at least twenty years.[85] Similarly, Act 221 amended section 669-1, Hawaii's Quiet Title law, to require a claimant to show by a preponderance of the evidence that an accretion was natural and permanent, essentially mirroring the requirement for applications for registration of property in land court under section 501-33.[86]

In 2003, the Hawaiʻi State Legislature enacted Act 73, which amended sections 501-33, 669-1, 171-1, 171-2, and 343-3.[87] Prior to Act 73's passage, however, a nearly identical measure was introduced during the 2002 Regular Session in response "to pleas to expand the public beaches."[88] Although the then-governor vetoed the bill because of constitutional concerns,[89] a newly elected governor in 2003 was more in favor of the measure.[90] Act 73 began as House Bill No. 192 and was first heard by the House Committee on Water, Land Use, and Hawaiian Affairs, which concluded that, "the State must act decisively to protect the people's right to use and enjoy the state's beaches against those private property owners seeking to increase their original titled-lands by accretion."[91] The House Committee on Judiciary similarly emphasized that public beaches had to be protected from being transformed into private lands through accretion claims.[92]

After crossing over to the Senate, the Committees on Water, Land, and Agriculture, and Energy and Environment relied on the public trust doctrine to determine that, "this measure will stop the unlawful taking of public beach land under the guise of fulfilling a nonexistent littoral right supposedly belonging to shorefront property owners."[93] The Senate Committee on Judiciary and Hawaiian Affairs similarly ascertained that the measure would "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."[94] After the Committee on Conference made minor amendments, Act 73 was enacted on May 20, 2003.[95]

Most notably, the amendment to section 501-33 "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."[96] Similarly, the amendment to section 669-1 "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 an action for the restored portion."[97] Act 73 also amended the definition of "public lands" in section 171-2 to include "accreted

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[85] 1985 Haw. Sess. Laws Act 221, § 2 at 401-02.

[86] 1985 Haw. Sess. Laws Act 221, § 3 at 402 ("'Permanent' means that the accretion has been in existence for at least *twenty years*.") (emphasis added).

[87] 2003 Haw. Sess. Laws Act 73, §§ 1-8 at 128-29 (codified at **HAW. REV. STAT.** §§ 171-1, 171-2, 343-3, 501-33, 669-1).

[88] Brief for Petitioners for a Writ of Certiorari to the U.S. Supreme Court at 4, Maunalua Bay Beach Ohana 28 v. State, 131 S. Ct. 529 (2010) (No. 10-331), 2010 WL 3518678, at *4.

[89] *Id.* at *5 (citing Statement of Objections to House Bill No. 2266 by Benjamin J. Cayetano, Governor of Hawaiʻi, April 26, 2002).

[90] *Id*.

[91] H. REP. NO. 369, 22d Sess. (Standing Comm. 2003), *reprinted in* 2003 HAW. HOUSE J. 1273, 1273 (Haw. 2003) ("The purpose of this bill is to effectuate the State's constitutional mandate, relating to accreted lands . . . that all public natural resources are held in trust by the State for the benefit of the people.").

[92] H. REP. NO. 626, 22d Sess. (Standing Comm. 2003), *reprinted in* 2003 HAW. HOUSE J. 1360, 1360 (Haw. 2003).

[93] S. REP. NO. 1147, 22d Sess. (Standing Comm. 2003), *reprinted in* 2003 HAW. SEN. J. 1503, 1503 (Haw. 2003) (although there was testimony in support of the measure, the BLNR requested a deferral at that juncture).

[94] S. REP. NO. 1224, 22d Sess. (Standing Comm. 2003), *reprinted in* 2003 HAW. SEN. J. 1546 (Haw. 2003).

[95] REP. NO. 2, 22d Sess. (Conf. Comm. 2003), *reprinted in* 2003 HAW. SEN. J. 729, 945-46 (Haw. 2003); measure history *available at* http://www.capitol.hawaii.gov/session2003/status/HB192.asp.

[96] 2003 Haw. Sess. Laws Act 73, § 4 at 129 (emphasis added).

[97] *Id.* § 5 at 130 (emphasis added) ("The accreted portion of land shall be state land except as otherwise provided in this section.").

lands not otherwise awarded."[98] In addition, section 6 of Act 73 expressly provided that it would not apply to pending registrations of accretion and quiet title actions, but only to registrations and actions filed after the Act 73's effective date of May 20, 2003.[99]

III. THE CONSTITUTIONALITY OF ACT 73: MAUNALUA BAY BEACH OHANA 28 V. STATE

A. FACTS AND PROCEDURAL HISTORY OF THE CASE

In May 2005, homeowners of the Portlock region of O'ahu formed three non-profit entities, Maunalua Bay Beach Ohana 28, Maunalua Bay Beach Ohana 29, and Maunalua Bay Beach Ohana 39 (collectively, "Plaintiffs"), and filed an inverse condemnation[100] class action lawsuit on behalf of themselves and all non-governmental owners of beachfront property in Hawai'i on and/or after May 19, 2003, challenging the constitutionality of Act 73.[101]

The Portlock beachfront lots were originally owned and developed in leasehold by Bishop Estate.[102] Each oceanfront lot lease agreement described the property by specific metes and bounds, but the leases did not include a narrow strip of land, or "beach-reserve lot," located between the lot and the ocean.[103] Although Bishop Estate sold its fee interest in the beachfront lots to the Portlock homeowners in the late 1980s or early 1990s, it reserved fee interest in the beach-reserve lots for itself.[104] Bishop Estate eventually sold Plaintiffs the beach reserve lots on May 6, 2005, but reserved utility and access easements for itself, along with the right to grant easements over the lots to public utilities and government agencies.[105] In addition, "[p]laintiffs *agreed to continue to allow the public to use the beach-reserve lots* 'for access, customary beach activities and related recreational and community purposes'; and Plaintiffs accepted numerous restrictive covenants that ran with the lots."[106]

In September 2006, the Circuit Court of the First Circuit ("circuit court") granted Plaintiffs' amended motion for partial summary judgment for declaratory relief, but no injunctive relief was granted.[107] In relevant part, the circuit court held that

> 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 declared accreted land to be "public land" and prohibited littoral owners from registering existing and future accretion under [Hawaii Revised Statutes (HRS)] Chapter 501 and/or quieting title under [HRS] Chapter 669.[108]

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[98] *Id.* § 2 at 128 (Act 73 also amended the definition section of chapter 171 to include a definition of "accreted lands," to be defined as "lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of natural forces." *Id.* § 1 at 128).

[99] *Id.* § 6 at 130.

> Applications for the registration of land by accretion and actions to quiet title to land by accretion pending at the time of the effective date of this Act shall be processed under the law existing at the time the applications and actions were filed with the court. Applications 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.

Id.

[100] *See* HAGMAN, *supra* note 12, at 328.

[101] Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 35-36, 222 P.3d 441, 442-43 (App. 2009).

[102] *Id.* at 35 n.1, 222 P.3d at 442 n.1; *see* Wong v. Cayetano, 111 Haw. 462, 466 n.3, 143 P.3d 1, 5 n.3 (2006) ("Although the Bishop Estate was subsequently renamed as Kamehameha Schools, it is referred to herein by its former name.").

[103] *Maunalua Bay*, 122 Haw. at 35 n.1, 222 P.3d at 442 n.1 (Bishop Estate reserved the beach-reserve lots for itself).

[104] *Id.*

[105] *Id.*

[106] *Id.* (emphasis added).

[107] *Id.* at 36, 222 P.3d at 443.

[108] *Id.* (emphasis added).

After granting the State's interlocutory appeal, the ICA

> conclude[d] that (1) Plaintiffs and the class they represented *had no vested property rights to future accretions* to their oceanfront land and, therefore, Act 73 did not effect an uncompensated taking of future accretions; and (2) Act 73 *effectuated a permanent taking of littoral owners' ownership rights to existing accretions* to the owners' oceanfront properties that had not been registered or recorded or made the subject of a then-pending quiet-title lawsuit or petition to register the accretions.[109]

Accordingly, the ICA vacated the circuit court's conclusion "that Act 73 took from oceanfront owners their property rights in all future accretion that was not proven to be the restored portion of previously eroded land."[110]

B. ACT 73, AN UNCOMPENSATED TAKING OF EXISTING ACCRETION

On appeal to the ICA, the State categorized accreted lands into three classes: (1) Class I, pre-Act 221, i.e., before June 4, 1985; (2) Class II, after Act 221, but before Act 73, i.e., between June 4, 1985 and May 19, 2003; and (3) Class III, post Act 73, i.e., on or after May 20, 2003.[111] The State contended that although Act 221 and Act 73 did not affect Class I accreted land, Act 73 was enacted before Class II accreted land could become permanent under the twenty year standard.[112] As such, the State argued that Act 73 did not effect a taking of Class II and Class III accretions.[113]

The ICA, however, cited to the legislative history of Act 221, which expressly stated that, "the legislature did 'not intend to affect the existing law in regard to ownership of and other rights relating to land created by accretion.'"[114] Although Act 221 established "a burden of proof and clear standards for registering or quieting title to accreted lands . . . . Act 221 did not change the supreme court's precedent that accreted land above the high-water mark belongs to the littoral owner of the land to which the accretion attached."[115] On that basis, the ICA concluded that Act 221 did not change the longstanding common law, and littoral owners could have ownership interests in Class II accretions when Act 73 was enacted.[116]

The ICA determined that "Act 73 clearly changed the common law . . . . Therefore, littoral owners who had such accreted lands when Act 73 became effective on May 20, 2003 had their ownership rights in their accreted lands taken from them by the passage of Act 73."[117] The court cited to *Loretto v. Teleprompter Manhattan CATV Corp.,* a case in which the U.S. Supreme Court held that "when the 'character of the governmental action,' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[118]

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[109] *Id.* at 57, 222 P.3d at 464 (emphasis added).

[110] *Id.*; Plaintiffs' applications for a writ of certiorari to the Hawai'i Supreme Court and the U.S. Supreme Court were both denied. *See* Maunalua Bay Beach Ohana 28 v. State, No. 28175, 2010 WL 2329366 (Haw. June 9, 2010); 131 S. Ct. 529 (2010).

[111] *Maunalua Bay*, 122 Haw. at 54, 222 P.3d at 461.

[112] *Id.* (Plaintiffs "just had a hope that sometime in the future they might be able to assert control and dominion over Class II accretions."); 1985 Haw. Sess. Laws Act 221, § 2 at 401-02 (codified at HAW. REV. STAT. § 501-33) (Applicants "shall prove by a *preponderance of the evidence* that the accretion is *natural and permanent*. 'Permanent' means that the accretion has been in existence at least *twenty years*.") (emphasis added).

[113] *Maunalua Bay*, 122 Haw. at 54, 222 P.3d at 461.

[114] *Id.* (citing H. REP. NO. 346, 13th Sess. (Standing Comm. 1985), *reprinted in* 1985 HAW. HOUSE J. 1142-43 (Haw. 1985)).

[115] *Id.* at 54, 222 P.3d at 461.

[116] *Id.* at 55, 222 P.3d at 462.

[117] *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

[118] *Loretto*, 458 U.S. at 434-35 (internal citation omitted) (In a permanent physical taking, "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand."); *cf.* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (identifying "several factors that have particular significance" when determining whether a regulatory

The ICA ultimately held that Act 73 effectuated an unconstitutional taking, because it "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."[119] This part of the ICA's holding, however, was not determinative of whether Act 73 constituted a taking of future accretions.

C. VESTED PROPERTY RIGHTS IN FUTURE ACCRETIONS

On review of the circuit court's determination that Plaintiffs had vested property rights to future accretions to their littoral land, the ICA first noted that under Hawai'i common law, land accreted to beachfront property belongs to the beachfront property owner.[120] The court contrasted this common law doctrine with Act 73, which stated that, "all accreted lands (except those which restored eroded lands or were the subject of proceedings pending at the time Act 73 was enacted) now belong to the State."[121] Providing support to Act 73, the court relied on Hawaii's statutory common law exceptions under section 1-1, which allows departure from the common law where "expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage."[122]

The ICA further stated that, "the Hawai'i Supreme Court has held that 'our state legislature may, by legislative act, change or entirely abrogate common law rules through its exercise of the legislative power under the Hawaii State Constitution, but in the exercise of such power, the legislature *may not violate a constitutional provision*.'"[123] Plaintiffs asserted that Act 73 took their right to future accretion without just compensation, and thereby violated article I, section 20 of the Hawai'i State Constitution.[124] The ICA, however, reasoned that Plaintiffs' future accretion arguments were purely speculative, and that, "other courts have held that a riparian owner has no vested right to future accretions."[125]

The ICA rejected as "dictum," the U.S. Supreme Court's determination in *County of St. Clair v. Lovingston* that "[t]he riparian right to future *alluvion*[[126]] is a vested right . . . . The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his."[127] The ICA relied on three federal cases in characterizing *Lovingston*'s language as dictum. First, in *Western Pacific Ry. Co. v. Southern Pac. Co.*, the Ninth Circuit Court of Appeals stated with regard to this language in *Lovingston*, "[w]e cannot think that the court meant to announce the doctrine that the right to alluvion becomes a vested right before

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taking has occurred: (1) economic impact on the claimant; (2) extent the regulation interfered with distinct investment-backed expectations; and (3) character of the governmental action); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) ("[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.").

[119] *Maunalua Bay*, 122 Haw. at 55, 222 P.3d at 462.

[120] *Id.* at 52, 222 P.3d at 459.

[121] *Id.*

[122] HAW. REV. STAT. § 1-1 (2010).

[123] *Maunalua Bay*, 122 Haw. at 52-53, 222 P.3d at 459-60 (emphasis added) (citing Fujioka v. Kam, 55 Haw. 7, 10, 514 P.2d 568, 570 (1973)).

[124] HAW. CONST. art. I, § 20 ("Private property shall not be taken or damaged for public use without just compensation."); *see* U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation."); *see also* HAW. CONST. art. I, § 5 ("No person shall be deprived of . . . property without due process of law."); U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of . . . property, without due process of law").

[125] *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460.

[126] 90 U.S. 46, 56 (1874) (At "common law, alluvion is the addition made to land by the washing of the sea, a navigable river, or other stream, whenever the increase is so gradual that it cannot be perceived in any one moment of time."); BLACK'S LAW DICTIONARY 90 (9th ed. 2009) (Alluvion is the "addition of land caused by the buildup of deposits from running water.").

[127] *Lovingston*, 90 U.S. at 68-69 (emphasis added).

such alluvion actually exists."[128] Second, the ICA cited to a U.S. District Court decision, *Cohen v. United States*, which reasoned that "[t]he riparian owner has no vested right in future accretions. The riparian owner cannot have a present vested right to that which does not exist, and which may never have an existence."[129] Third, the court employed another U.S. District Court decision, *Latourette v. United States*, which ruled that the "plaintiff had no vested right in the continuance of future accretions to his property by way of sands carried by the winds and in turn washed by the sea upon his lands."[130]

In addition to these three federal cases, the ICA also relied on the Hawai'i Supreme Court case of *Damon v. Tsutsui*, a decision based on purported vested offshore fishing rights.[131] Described in *Maunalua Bay* as a "a somewhat similar situation," the *Damon* court reasoned that

> [r]ights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. On the other hand, a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right.[132]

Damon also stated that "[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."[133]

Finally, the ICA relied on the public trust doctrine, as articulated in article XI, section 1 of the Hawai'i State Constitution, which mandates that

> [f]or the benefit of present and future generations, *the State* and its political subdivisions *shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water*, air, minerals and energy sources, *and shall promote the development and utilization of these resources in a manner consistent with their conservation* and in furtherance of the self-sufficiency of the State.
>
> *All public natural resources are held in trust by the State for the benefit of the people*.[134]

The court cited to the Hawai'i Supreme Court case of *In re Water Use Permit Applications*, which adopted "the public trust doctrine as a fundamental principle of constitutional law in Hawai'i."[135] Relying on the notion that "[t]he public trust is a dual concept of sovereign right and responsibility,"[136] the ICA in *Maunalua Bay* reasoned that the public trust doctrine "clearly diminishes any expectation that oceanfront owners in Hawai'i had and may have in future accretions

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[128] 151 F. 376, 399 (9th Cir. 1907) ("Within that definition of vested rights, there can be no question, we think, that the right to future accretion could be divested by legislative action.") (quoted in *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460).

[129] 162 F. 364, 370 (N.D. Cal. 1908) (quoted in *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460).

[130] 150 F. Supp. 123, 126 (D. Or. 1957) (quoted in *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460).

[131] 31 Haw. 678, 693 (1930); *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460 (In *Damon,* "the Hawai'i Supreme Court held that it was not unconstitutional to terminate, by legislation, a statute that granted exclusive fishing rights in offshore fisheries to certain tenants of an ahupua'a.").

[132] *Damon*, 31 Haw. at 693 (citing 12 C.J. § 955).

[133] *Damon*, 31 Haw. at 693 (citing 6 A. & E. ENCY. L. 957).

[134] HAW. CONST. art. XI, § 1 (emphasis added); *Maunalua Bay*, 122 Haw. at 54, 222 P.3d at 461.

[135] 94 Haw. 97, 132, 9 P.3d 409, 444 (2000).

[136] *Id.* at 135, 9 P.3d at 447.

to their property."[137] The court ultimately held that Plaintiffs had "no vested right to future accretions that may never materialize and, therefore, Act 73 did not effectuate a taking of future accretions without just compensation."[138]

IV. ANALYSIS

"Instead of honoring indisputable incidents of riparian ownership, the Hawai'i court - without any supporting precedent - effectively eliminated the right to an ambulatory boundary and accretion for the purpose of avoiding the duty to pay compensation."[139]

- Brief for Petitioners for a Writ of Certiorari to the U.S. Supreme Court

"The United States Supreme Court . . . and the Hawaii Supreme Court . . . both make very clear that expectant or contingent interests are not vested rights, and thus may be legislatively abolished."[140]

- Brief for State of Hawaii in Opposition to Petitioners' Application for a Writ of Certiorari to the Hawai'i Supreme Court

A. DID ACT 73 TAKE FUTURE ACCRETIONS?

The Plaintiffs in *Maunalua Bay* applied for a writ of certiorari to the Hawai'i Supreme Court[141] and inter alia, raised the question:

> Did the ICA commit grievous error and disregard controlling decisions from this Court when it held that the State can permanently fix the seaward boundary of oceanfront properties and deprive littoral property owners of future accretion without paying just compensation?[142]

Plaintiffs specifically argued that: (1) the cases relied on by the ICA to hold that Plaintiffs had no vested right to future accretions were inapplicable; and (2) other courts have held that the government may not "fix" the ambulatory shoreline boundary.[143]

Although the Hawai'i Supreme Court has held that the state legislature may abrogate common law rules, the exercise of such power "*may not violate a constitutional provision*."[144] To prevail in their takings claim, Plaintiffs first had to establish that they had a constitutionally protected vested interest.[145] The court would then need to decide whether Act 73 constituted a taking under article I, section 20 of the Hawai'i State Constitution and the Fifth Amendment of the U.S. Constitution.[146]

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[137] *Maunalua Bay*, 122 Haw. at 54, 222 P.3d at 461.

[138] *Id.*

[139] Brief for Petitioners for a Writ of Certiorari to the U.S. Supreme Court, *supra* note 88, at *18.

[140] Brief for State of Hawaii in Opposition to Petitioners' Application for a Writ of Certiorari to the Hawai'i Supreme Court at 1, Maunalua Bay Beach Ohana 28 v. State, 2010 WL 2329366 (Haw. June 9, 2010) (No. 28175).

[141] Plaintiffs' applications for a writ of certiorari to the Hawai'i Supreme Court and the U.S. Supreme Court were both denied; *see* Maunalua Bay Beach Ohana 28 v. State, No. 28175, 2010 WL 2329366 (Haw. June 9, 2010); 131 S. Ct. 529 (2010) (denying petitioners' application for a writ of certiorari).

[142] Brief for Petitioners for a Writ of Certiorari to the Hawai'i Supreme Court at 2, Maunalua Bay Beach Ohana 28 v. State, 2010 WL 2329366 (Haw. June 9, 2010) (No. 28175).

[143] *Id.*; *see* United States v. Milner, 583 F.3d 1174 (9th Cir. 2009) (holding that the riparian right to future accretion is a vested right).

[144] Fujioka v. Kam, 55 Haw. 7, 10, 514 P.2d 568, 570 (1973) (emphasis added).

[145] Kepo'o v. Kane, 106 Haw. 270, 294, 103 P.3d 939, 963 (2005) (citing Sangre de Cristo Dev. Co. v. United States, 932 F.2d 891, 894 (10th Cir. 1991)).

[146] *Id.*; *see* HAW. CONST. art. I, § 20 ("Private property shall not be taken or damaged for public use without just compensation"); U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"); *see also* HAW. CONST. art. I, § 5 ("No person shall be deprived of . . . property without due process of law."); U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of . . . property, without due process of law").

While discussing whether Plaintiffs' rights were vested, the ICA dismissed as dictum, the U.S. Supreme Court's determination in *Lovingston* that, "*[t]he riparian right to future alluvion is a vested right*. It is an inherent and essential attribute of the original property."[147] In *Lovingston*, due to a river changing course, accreted land was formed along the landowner's property after the original land survey date.[148] The city argued that because of improvements to the waterway, the river's new course was not a natural change and that the city held title to the accreted land as a result of gaining title to lands previously held by the United States.[149] The evidence, however, showed that the defendants played no role in the improvements and that it was not clear whether the accreted land would have been formed by natural causes alone.[150] The Court reasoned that because the landowner would not have had a remedy if the river changed to his detriment, the landowner was entitled to the accretion where additional land was formed to his benefit.[151]

Despite the Court's holding in *Lovingston*, the ICA primarily relied on three federal cases concerning governmental development of submerged land to support the notion that future accretion is not a present, vested property right. Contrary to *Maunalua Bay*, all three of these federal cases[152] stand for the principle that riparian ownership is subject to the government's correlative rights to improve navigation and commerce and to develop its submerged lands, even if this interferes with future accretion or blocks riparian access.[153]

The ICA first relied on *Western Pacific*, a case in which the Ninth Circuit reasoned that there could not be a vested right in future accretion.[154] In *Western Pacific*, the plaintiff had an exclusive right to construct wharves on his littoral property.[155] Although land subsequently "accreted" to the plaintiff's property, "[t]he evidence show[ed] that the low-tide line of 1852 remained substantially unchanged until the year 1882, and that about that time changes in its position took place as the result of the deposit of material taken out of the channel."[156] The defendants later began dredging the newly formed land and when enjoined, contended that the added land was the result of dredging, not accretion.[157] Nonetheless, the court in *Western Pacific* stated that, "[t]he rights of littoral owners in adjacent navigable waters depend on the local laws of the several states, subject to the paramount authority of the United States to protect navigation and to make improvements in aid of the same."[158] In *Maunalua Bay*, however, the State did not

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[147] Cnty. of St. Clair v. Lovingston, 90 U.S. 46, 68 (1874) (emphasis added).

[148] *Id.* at 46.

[149] *Id.* at 50 (through Acts of Congress and the Illinois legislature).

[150] *Id.*

[151] *Id.* at 69. In reaching the ultimate holding that the United States never had title to the accreted land in controversy and therefore could not transfer title to the city, the Court reasoned that

> [t]he title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim "qui sentit onus debet sentire commodum" ["he who enjoys the benefit ought also to bear the burdens"] lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his.

Id.

[152] Western Pac. Ry. Co. v. Southern Pac. Co., 151 F. 376 (9th Cir. 1907), Cohen v. United States, 162 F. 364 (N.D. Cal. 1908), Latourette v. United States, 150 F. Supp. 123 (D. Or. 1957).

[153] *See*, *e.g.*, Gibson v. United States, 166 U.S. 269, 276 (1897) ("[R]iparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard."); *see* Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 130 S. Ct. 2592 (2010); *see also* Brief for Petitioners for a Writ of Certiorari to the U.S. Supreme Court, *supra* note 88, at *14.

[154] *Western Pacific*, 151 F. at 399 (this case, however, was in the context of governmental dredging operations in a public harbor, not legislative "fixing" of shoreline boundaries).

[155] *Id.* at 390.

[156] *Id.* at 396 (a large amount of dredging and depositing was conducted under municipal authority).

[157] *Id.* at 397.

[158] *Id.* at 390.

assert any rights to develop its submerged lands.[159] Additionally, unlike Hawaii's 114 years of judicial recognition of the benefit of accretion and the burden of erosion,[160] there was no such common law right to wharf out to navigable waters in *Western Pacific*.[161]

Second, the ICA cited to the U.S. District Court case of *Cohen*, which involved diverting water from a creek that abutted the plaintiff's property for governmental improvements to the same public harbor that was at controversy in *Western Pacific*.[162] Although the creek diversion resulted in a loss of natural accretion to the plaintiff's land, it was unclear from the evidence whether the seasonal overflow of the creek had any irrigation, mineral, or soil enrichment value.[163] Further, the property owner in *Cohen* was not actually divested of her right to any future accretion.[164]

Finally, the ICA relied on the U.S. District Court case of *Latourette*, which concerned governmental jetty improvements built in aid of navigation that allegedly led to reduced accretion and consequential damages to the littoral owner's property.[165] Although the plaintiff argued that the jetty interfered with the normal drift of sand that would accrete and compensate for normal winter erosion, the claimant did not contend that the jetty itself caused any new washing or erosion of the plaintiff's property.[166] Nonetheless, the court further stated that "[t]he government is not liable to compensate riparian owners for consequential damages caused by improvement made upon navigable waterways in aid of navigation."[167]

Although decided after the U.S. Supreme Court rejected the *Maunalua Bay* Plaintiffs' application for a writ of certiorari, the Court's plurality opinion in *Stop the Beach Renourishment v. Florida Department of Environmental Protection* restated that the government's right to develop its submerged lands can subvert riparian property rights.[168] In *Beach Renourishment*, the state undertook a beach expansion program to restore an eroded beach, which created a state-owned artificial beach seaward of the existing beach.[169] The plaintiffs objected to the project, contending that Florida, and by extension the Florida Supreme Court took their right to accretions.[170] The Court, however, held that the renourishment project did not constitute a taking, reasoning that the project was no different from a natural avulsion.[171]

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159 *See* Brief for Petitioners for a Writ of Certiorari to the U.S. **Supreme** Court, *supra* note 88, at *14.

160 *See* Brief for Petitioners for a Writ of Certiorari to the U.S. Supreme Court, *supra* note 88, at *9 ("Nothing in Hawai'i law impeded movement of the seaward boundary in response to natural forces or limited littoral owners' rights to hold future accretion."); *see generally* Halstead v. Gay, 7 Haw. 587 (1889). *But see* Christensen Interview, *supra* note 16 (stating that Hawai'i courts have never recognized the right to future accretion, and that it was therefore a case of first impression); Brief for Hawaii's Thousand Friends as Amici Curiae Supporting Defendant-Appellant, *Maunalua Bay*, *supra* note 16, at 4.

161 *Western Pacific*, 151 F. at 390.

162 Cohen v. United States, 162 F. 364, 370 (N.D. Cal. 1908) ("riparian owner has no vested right in future accretions").

163 *Id.* at 369-71.

164 *Id.* (although the creek was diverted, the property owner still had a right to accretion if the creek was restored).

165 Latourette v. United States, 150 F. Supp. 123, 126 (D. Or. 1953) ("[P]laintiff had no vested right in the continuance of future accretions to his property by way of sands carried by the winds and in turn washed by the sea upon his lands.").

166 *Id.* at 125-26.

167 *Id.* at 125 (citing United States v. Willow River Power Co., 324 U.S. 499 (1945).

168 Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 130 S. Ct. 2592, 2611 (2010).

169 *Id.* at 2600.

170 *Id.* at 2601, 2610 (The Takings Clause of the Fifth Amendment "applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land."). Notably, the Court cited to *Lovingston* when defining accretion. *Id.* at 2598 (no reference to *Western Pacific*, *Cohen*, or *Latourette*).

171 *Id.* at 2612-13.

Similar to Hawai'i common law, avulsions in Florida belong to the state.[172] Although the plaintiffs' had a right to accretion, this right was subordinate to the state's right to fill its submerged land.[173] The Court stated that the Florida Supreme Court "did not abolish the Members' *right to future accretions*, but merely held that the right was not implicated by the beach-restoration project because of the doctrine of avulsion."[174] As such, it was unnecessary for the Court to address whether the right to future accretion is merely a contingent future interest.[175] Although the beach-restoration project was upheld in *Beach Renourishment*, it is still uncontroverted that "[i]f a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property."[176]

Unlike the relevant laws at issue in *Beach Renourishment*, *Western Pacific*, *Cohen*, and *Latourette*, Act 73 was not enacted to improve navigation or to develop or fill state submerged lands.[177] Rather, Act 73 unambiguously redefined the long established ambulatory shoreline demarcation to a fixed shoreline definition. Act 73 and the ICA's decision both appear to be at odds with the Hawai'i Supreme Court's long standing recognition of a riparian owner's vested right to accreted land and the un-fixed nature of the shoreline boundary definition.[178]

Other courts have ruled that the government may not redefine the ambulatory shoreline definition to a fixed boundary.[179] Most recently, the Ninth Circuit addressed this issue in *United States v. Milner*.[180] In *Milner*, littoral owners built seawalls to mitigate erosion, which limited the expansion of an Indian tribe's adjoining tidelands.[181] Relying on *Lovingston*'s determination that the "riparian right to future alluvion is a vested right,"[182] the court reasoned that "*both the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains* that accrue from the movement of the boundary line."[183]

> The relationship between the tideland and upland owners is reciprocal: any loss experienced by one is a gain made by the other, and it would be inherently unfair to the tideland owner to privilege the forces of accretion over those of erosion. Indeed, the fairness rationale underlying courts' adoption of the rule of accretion assumes that uplands already are subject to erosion for which the owner otherwise has no remedy.[184]

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172 *Id.* at 2612 ("The Florida Supreme Court decision before us is consistent with these background principles of state property law.") (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028-29 (1992)); *see* State *ex rel* Kobayashi v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977).

173 *Beach Renourishment*, 130 S. Ct. at 2595.

174 *Id.* (emphasis added); *see* Thomas, Murakami & Eyerly, *supra* note 30.

175 *Beach Renourishment*, 130 S. Ct. at 2601 n.5.

176 *Id.* at 2602.

177 *See* 2003 Haw. Sess. Laws Act 73, §§ 1-8 at 128-29 (codified at **HAW. REV. STAT.** §§ 171-1, 171-2, 343-3, 501-33, 669-1 (2010)).

178 *See* Halstead v. Gay, 7 Haw. 587, 589 (1889) ("[I]t follows that the plaintiff has the rights of a littoral proprietor, and that the accretion is his."); State *ex rel* Kobayashi v. Zimring, 58 Haw. 106, 119, 566 P.2d 725, 734 (1977) ("When accretion is found, the owner of the contiguous land takes title to the accreted land."); *In re* Banning, 73 Haw. 297, 832 P.2d 724, 725 (1992) ("Land now above the high water mark, which has been formed by imperceptible accretion against the shore line of grant, has become attached by the law of accretion to the land described in the grant and belongs to the littoral proprietor.") (quoting *Halstead*, 7 Haw. at 588).

179 *See* United States v. Milner, 583 F.3d 1174 (9th Cir. 2009); *see generally* Hughes v. Washington, 389 U.S. 290, 293 (1967); Purdie v. Attorney General, 732 A.2d 442, 447 (N.H. 1999); Bd. of Trs. v. Medeira Beach Nominee, Inc., 272 So.2d 209, 211-212 (Fla. Dist. Ct. App. 1973); Soo Sand & Gravel v. M. Sullivan Dredging, 244 N.W. 138, 140-141 (Mich. 1932).

180 *Milner*, 583 F.3d 1174.

181 *Id.*

182 Cnty. of St. Clair v. Lovingston, 90 U.S. 46, 68 (1874).

183 *Milner*, 583 F.3d at 1188 (emphasis added); *see* Nebraska v. Iowa, 143 U.S. 359, 360-61 (1892); Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 326 (1973) ("Riparianness also encompasses the vested right to future alluvion . . . .") (overruled on other grounds by Oregon *ex rel.* State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977)).

184 *Id.*

State courts have also addressed the issue of state attempts to reclassify longstanding common law shoreline definitions, and in at least three of those cases, the new boundaries constituted a taking or an unlawful exercise of police power.[185] In *Purdie v. Attorney General*, the littoral landowners brought an inverse condemnation suit in response to a recently enacted state statute that recognized the state's "public trust rights" in property up to the "high water mark."[186] This constituted a significant change from the state common law that limited public ownership of the beach to the "mean high water mark."[187] The New Hampshire Supreme Court held that the statute constituted a taking without just compensation, reasoning that, "the legislature *went beyond these common law limits by extending public trust rights* to the highest high water mark."[188] Similar to the case in *Maunalua Bay*, "[a]lthough it may be desirable for the State to expand public beaches to cope with increasing crowds, the State may not do so without compensating the affected landowners."[189]

In *Board of Trustees v. Medeira Beach Nominee, Inc.*, land accreted to an oceanfront landowner's property as a result of a governmental beach stabilization program.[190] The Florida Court of Appeals affirmed the judgment in favor of the landowner's action to quiet title to the accretion.[191] The court reasoned that, "[f]reezing the boundary at a point in time . . . as is suggested here by the state, not only does damage to all the considerations above but *renders the ordinary high water mark useless as a boundary line* clearly marking the riparian's rights and the sovereign's rights."[192] Similarly, *Maunalua Bay*'s fixed boundary line determination contravened *Ashford*'s seemingly clear highest wash of the waves demarcation.[193]

In rejecting fixed shoreline boundaries,[194] *Lovingston* and its progeny support the fundamental principle that littoral owners have vested rights to future accretion. This is consistent with the "access to water rationale" of permitting a boundary to follow the changing shoreline to maintain "land as riparian that was riparian under earlier conditions, thus assuring the upland owners of access to the water along with the other advantages of such contiguity."[195]

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185 *See, e.g.*, Purdie v. Attorney General, 732 A.2d 442, 447 (N.H. 1999); Bd. of Trs. v. Medeira Beach, 272 So.2d 209, 211-12 (Fla. Dist. Ct. App. 1973); *see* Brief for Petitioners for a Writ of Certiorari to the U.S. Supreme Court, *supra* note 88, at *14 n.9; *see also* Soo Sand & Gravel v. M. Sullivan Dredging, 244 N.W. 138, 140-41 (Mich. 1932) (unless there was a paramount public trust consideration, riparian rights could not be taken by the state without just compensation).

186 *Purdie*, 732 A.2d at 444.

187 *Id.* at 444-48.

188 *Id.* at 447 (emphasis added) ("Although the legislature has the power to change or redefine the common law to conform to current standards and public needs, property rights created by the common law may not be taken away legislatively without due process of law.") (internal citation omitted).

189 *Id.* (the legislation had the same effect of expanding the public beach to the detriment of the oceanfront landowners without providing just compensation).

190 *Medeira Beach*, 272 So.2d at 211-12.

191 *Id.* (the landowner also sought to obtain a judicial shoreline determination).

192 *Id.* at 213 (emphasis added). The court further reasoned that

> [p]ublic policy weighs heavily in this decision as well. The public today stands in danger of losing access to beaches entirely 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. The foreshore between the mean high and low tide lines is public property.
>
> It should be remembered that even beachfront property owners are members of the public. Their status as riparian owners, however, has historically entitled them to greater rights, with respect to the waters which border their land, than inure to the public generally.

Id. at 213-14.

193 *See In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968).

194 *See supra* text accompanying note 189.

195 Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 38, 222 P.3d 441, 445 (App. 2009) (quoting POWELL, *supra* note 4 ("[t]he most persuasive and fundamental rationale")).

In addition to *Western Pacific*, *Cohen*, and *Latourette*, the ICA relied on the Hawai'i Supreme Court case of *Damon* to support its determination that future accretion is not property. *Damon* is cited for the proposition that "[r]ights are vested when the right to enjoyment, *present or prospective*, has become the property of some particular person or persons as a present interest."[196] *Damon*'s definition of a vested right actually supported the Plaintiffs' position, because the right to future accretion is a "right to enjoyment, *present or prospective*" and became the property of the Plaintiffs as a present interest.[197] Although land may never accrete, Hawaii's common law has long recognized that if accretion occurs, the additional land becomes property of the littoral owner.[198]

Although the ICA characterized *Damon* as a case that presented a "somewhat similar situation" to *Maunalua Bay*, the issue in *Damon* was whether a lessee had vested offshore fishing rights that were originally granted to his predecessors in interest.[199] Relying on the Hawai'i Supreme Court case of *Haalelea v. Montgomery*,[200] the *Damon* court stated that Kamehameha III first granted fishing rights to the commoners and the landlords in 1839.[201] These fishing rights, however, were limited "only to the extent and with limitations expressed in the grant."[202] Shortly after the United States annexed Hawai'i in 1898,[203] the Hawai'i Organic Act of 1900 repealed these fishing laws.[204] Fishing rights were only "vested" for persons who became tenants by April 30, 1900, the Organic Act's date of passage.[205] On that basis, the lessee who became a tenant "in 1926, did not have any 'vested' rights within the meaning of the Organic Act and therefore the repealing clause was operative."[206] Although common law rights may be legislatively changed or abrogated in accordance with the constitution,[207] as seen in *Damon* and other cases, there is no vested property right in the continuance of an existing statute.[208] Repealing *exclusive* fishing rights through the 1900 Organic Act in *Damon* markedly differs from abolishing the common law right to accretion that was not created by a grant or statute.[209]

Up until Act 73 was enacted in 2003, littoral rights to accretion and an ambulatory shoreline boundary were firmly rooted in Hawai'i common law.[210] As discussed in the U.S. Supreme Court case of *PruneYard Shopping Center v. Robins*, "[q]uite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish *'core' common-law rights*."[211] Riparian rights such as the right to accretion are "core" common law rights that have long been recognized by both the U.S. Supreme Court in *Lovingston*,[212] and the Hawai'i Supreme

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[196] Damon v. Tsutsui, 31 Haw. 678, 693 (1930) (emphasis added) ("On the other hand, a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws, does not constitute a vested right.") (quoted in *Maunalua Bay*, 122 Haw. at 53, 222 P.3d at 460).
[197] *See Damon*, 31 Haw. at 693 (emphasis added).
[198] *See* Halstead v. Gay, 7 Haw. 587 (1889).
[199] *Damon*, 31 Haw. at 679-82; *see* Brief for Pacific Legal Foundation as Amici Curiae Supporting Plaintiff-Petitioners at 6, Maunalua Bay Beach Ohana 28 v. State, 2010 WL 2329366 (Haw. June 9, 2010) (No. 28175).
[200] 2 Haw. 62 (1858) (during the Kingdom of Hawai'i).
[201] *Damon*, 31 Haw. at 682.
[202] *Id.* at 683, 689 (the fishing rights were originally defined and regulated by the law of 1839 until the Organic Acts of 1846).
[203] VAN DYKE, *supra* note 57, at 200.
[204] *Damon*, 31 Haw. at 691; *see* VAN DYKE, *supra* note 57 at 227.
[205] *Damon*, 31 Haw. at 692.
[206] *Id.* at 693.
[207] *See* Fujioka v. Kam, 55 Haw. 7, 10, 514 P.2d 568, 570 (1973).
[208] *See* United States v. Darusmont, 449 U.S. 292, 298 (1981) (Holding that there is no "vested right in the rate of taxation, which may be retroactively changed at the will of Congress."); American Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1379 (Fed. Cir. 2004).
[209] *See* Brief for Pacific Legal Foundation as Amici Curiae Supporting Plaintiff-Petitioners, *supra* note 199, at 6.
[210] *See generally* Halstead v. Gay, 7 Haw. 587 (1889); *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968).
[211] PruneYard Shopping Center v. Robins, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) (emphasis added).
[212] Although the ICA largely disregarded Cnty. of St. Clair v. Lovingston, 90 U.S. 46 (1874), the case is still cited for its authority on accretion. *See* Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 130 S. Ct. 2592, 2598 (2010) (citing *Lovingston*).

Court in *Halstead*. Although the Hawai'i Supreme Court has never explicitly discussed the right to future accretion, this analysis was unnecessary because there was never a distinction made between existing and future accretion rights.[213] What is clear is that the ambulatory shoreline definition has been a "core" common law right in Hawai'i from as early as 1866, as indicated in *Ashford*.[214]

The ICA correctly stated that, "the public trust doctrine [is] a fundamental principle of constitutional law in Hawai'i . . . [and] a dual concept of sovereign right and responsibility."[215] The court, however, was incorrect in concluding that that the public trust doctrine diminishes beachfront owners' expectations of future accretions. Although the public trust doctrine, as articulated in article XI, section 1, was adopted twenty-five years before the enactment of Act 73, the ICA's rationale is at odds with the U.S. Supreme Court's rejection of the "notice" defense in *Palazzolo v. Rhode Island*.[216] The theory underlying the notice defense argument is that because property rights are created by the state, prospective legislation "can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value."[217] Although Plaintiffs in *Maunalua Bay* purchased title to the beach reserve lots after Act 73 was enacted and likely had notice of the limitation,

> [t]he State may not put so potent a Hobbesian stick into the Lockean bundle . . . . Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause.[218]

Palazzolo principally holds that even if Plaintiffs purchased land after a "taking," the landowners would still have the right to just compensation.

Although ignored by the ICA in *Maunalua Bay*, the U.S. Supreme Court has also held that certain contingent future interests are property that cannot be taken without just compensation.[219] In *Babbitt v. Youpee*, the U.S. Supreme Court invalidated a federal statute on takings grounds that allowed small interests in Indian land to escheat to the tribe, but could not be passed to heirs by descent or devise.[220] Similarly, even though the interest had not yet accrued, the Court in *Webb's Fabulous Pharmacies, Inc. v. Beckwith* concluded that a state statute claiming the potential future interest on monies litigants deposited in court was a taking.[221] Regardless of the ICA's reasoning, practical consequences have arisen.

B. PRACTICAL CONSEQUENCES

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213 *See* Brief of Land Use Research Foundation of Hawaii as Amicus Curiae Supporting the Petitioners for a Writ of Certiorari to the U.S. Supreme Court at 9 n.3, Maunalua Bay Beach Ohana 28 v. State, 131 S. Ct. 529 (2010) (No. 10-331), 2010 WL 4035363, at *9 n.3 ("This should come as no surprise since only once land is actually accreted and becomes permanent would a property owner institute a judicial action to confirm title and ownership."). *But see supra* text accompanying note 160 (arguing that this was a case of first impression).

214 *See Ashford*, 50 Haw. at 315-16, 440 P.2d at 77-78; *supra* text accompanying note 33; *see also* HANDBOOK, *supra* note 21.

215 *Maunalua Bay* Beach Ohana 28 v. State, 122 Haw. 34, 54, 222 P.3d 441, 461 (App. 2009) (quoting *In re* Water Use Permit Applications, 94 Haw. 97, 132, 9 P.3d 409, 444 (2000)); HAW. CONST. art. XI, § 1.

216 Palazzolo v. Rhode Island, 533 U.S. 606, 608-09 (2001); *see* Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533 (2002).

217 *Palazzolo*, 533 U.S. at 626.

218 *Id.* at 627.

219 *See* Babbitt v. Youpee, 519 U.S. 234, 245 (1977); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161, 164 (1980).

220 *Babbitt*, 519 U.S. at 245 (even though future interests that may not come into existence).

221 *Webb's*, 449 U.S. 155, 161, 164 ("[A] State, by *ipse dixit*, [*he himself said it*] may not transform private property into public property without compensation.").

Although Hawai'i is not alone in its departure from the common law,[222] *Maunalua Bay*'s holding further complicates Hawai'i shoreline boundary law by contradicting the *Ashford* standard. Under *Ashford*'s fairly straightforward shoreline definition, the "upper reaches of the wash of waves" demarcates the public/private boundary.[223] The *Diamond* court further defined the plain meaning of "upper" as "the highest -- i.e., the furthest mauka -- reach of the waves."[224] Although not perfect, the rule is in harmony with the ambulatory nature of the shoreline, which moves in accordance with accretion, erosion, and avulsion. One simply had to look for the "debris line" or the "vegetation line," and whichever was furthest mauka determined the public-private boundary.[225] The court in *Diamond* also clarified the issue to a certain extent, by holding that artificial vegetation cannot trump the debris line and extend littoral property farther makai.[226] Because the *Ashford* rule accounted for all changes to the shoreline, the standard consistently applied to cases of beach accretion or erosion.

Act 73 and the ICA's decision, however, fixed the farthest makai boundary for *private* landowners by barring any new land court applications or quiet title actions to register accreted land after May 19, 2003.[227] Now, the highest wash of the waves demarcation is only accurate in cases where the beach has not changed, or in cases of beach erosion that would extend the state's boundary. In cases where there has been accretion to littoral property, however, the fixed private boundary would lay somewhere farther mauka from the highest wash of the waves. Both the ICA's decision and Act 73 effectively created unidentifiable state-owned strips of public beach where accretion has formed as of May 20, 2003. This adds further confusion to the notion that *Ashford*'s "seemingly clear definition may not be universally applicable."[228]

V. CONCLUSION

Although littoral owners' rights are subject to the State's rights to improve navigation and fill submerged lands, Act 73 fixed the shoreline boundary of Hawaii's ever-changing shoreline without just compensation. Contrary to longstanding Hawai'i common law, the ICA's decision created a new distinction between existing "vested" accretions and "unvested" future accretions to save Act 73 from total constitutional invalidity. *Maunalua Bay* ultimately stands for the proposition that Act 73 extinguished all private landowners' constitutional rights to gain title to any land accreted after May 19, 2003.[229]

Of course the legislature may abrogate the common law, but the legislative action must still pass constitutional muster.[230] In support of the State's argument, the ICA rejected as dictum, U.S. Supreme Court precedent, and instead relied on dictum from distinguishable lower federal court cases.[231] The ICA also relied on the

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[222] *See* Simeon L. Vance & Richard J. Wallsgrove, *More Than a Line in the Sand: Defining the Shoreline in Hawai'i After Diamond v. State*, 29 U. HAW. L. REV. 521 (2007); *see also* Robert Thompson, *Property Theory and Owning the Sandy Shore: No Firm Ground to Stand On*, 11 OCEAN & COASTAL L.J. 47 (2005/2006).

[223] *In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968).

[224] Diamond v. State, 112 Haw. 161, 172, 145 P.3d 704, 715 (2006).

[225] *Id.*

[226] *Id.* at 175, 145 P.3d at 718.

[227] *See generally* Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 222 P.3d 441 (App. 2009).

[228] Vance & Wallsgrove, *supra* note 222, at 535.

[229] *See* HAW. CONST. art. I, § 20 ("Private property shall not be taken or damaged for public use without just compensation."); U.S. CONST. amend. V ("[n]or shall private property be taken for public use, without just compensation"); *see also* HAW. CONST. art. I, § 5 ("No person shall be deprived of . . . property without due process of law"); U.S. CONST. amend. XIV, § 1 ("[n]or shall any State deprive any person of . . . property, without due process of law").

[230] Fujioka v. Kam, 55 Haw. 7, 10, 514 P.2d 568, 570 (1873).

[231] *See* Cnty. of St. Clair v. Lovingston, 90 U.S. 46, 68-69 (1879); *see also* Western Pac. Ry. Co. v. Southern Pac. Co., 151 F. 376, 399 (9th Cir. 1907); Cohen v. United States, 162 F. 364, 370 (1908); Latourette v. United States, 150 F. Supp. 123, 126 (D. Or. 1957).

Hawai'i Supreme Court case of *Damon* that, if applicable, should have cut in favor of Plaintiffs.[232] Even though it was undisputed that Act 73 served a legitimate public purpose, the State's argument that the public trust doctrine diminished any expectations of future accretions was also at odds with U.S. Supreme Court precedent that rejected the "notice" theory.[233]

In the interest of balancing public and private rights, the ICA could have invalidated Act 73, with little or no harm to the public. The Plaintiffs in *Maunalua Bay* had their separately purchased abutting beach-reserve lots "taken" from them, even though the public was allowed to use the lots.[234] Although there were likely other areas in Hawai'i where accreted lands did not have reservations for public use, as the *Banning* court illustrated, Act 221 already provided clear and difficult standards for landowners to register accreted property.[235] Although public policy favors public use and ownership of Hawaii's beaches, in this case, public access to the beach could have been preserved without changing the common law of accretion and further mystifying Hawaii's shoreline definition.[236]

[232] Damon v. Tsutsui, 31 Haw. 678, 693 (1930).
[233] Palazzolo v. Rhode Island, 533 U.S. 606, 626-27 (2001).
[234] Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 222 P.3d 441 (App. 2009); *see supra* text accompanying note 192.
[235] *In* re Banning, 73 Haw. 297, 832 P.2d 724 (1992).
[236] *See id.* at *309*, 832 P.2d at 731.

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