IN THE
SUPREME COURT OF FLORIDA

CASE NO. 66,372

THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Petitioner,

vs.

SAND KEY ASSOCIATES, LIMITED,

Respondent.

PETITION FOR REVIEW OF THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT SAND KEY ASSOCIATES, LIMITED

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II. DID THE DISTRICT COURT RULE PROPERLY THAT TO THE EXTENT FLORIDA STATUTES §161.051 (1981) MAY APPLY TO UPLAND LITTORAL OWNERS LIKE SAND KEY, IT IS A STATUTE IN DEROGATION OF THE COMMON LAW, AND THUS, MUST BE STRICTLY CONSTRUED TO APPLY ONLY TO THE UPLAND OWNER OF THE IMPROVED LAND?

STATEMENT OF THE CASE

Plaintiff-Respondent Sand Key Associates, Limited ("SAND KEY") adopts the Statement Of The Case of Defendant-Petitioner, The Board of Trustees of the Internal Improvement Trust Fund (the "STATE"), with the following modifications.

The District Court of Appeal, Second District, of the State of Florida reversed an order of Final Partial Summary Judgment in favor of the STATE entered in the Circuit Court of the Sixth Judicial Circuit, in and for Pinellas County, and certified a question to this Court. The symbol "Appn" will refer to the Appendix to this Brief.

SAND KEY filed a Complaint instituting this action in the Circuit Court, seeking to quiet title to accretions to certain real property situated on Sand Key in Clearwater, Florida. (Appn 1). The STATE answered, interposing an Affirmative Defense to the effect that the STATE claimed title to the accretions by operation of Florida Statutes §161.051 (1981). (Appn 7). SAND KEY filed a Reply, denying the averments of this Affirmative Defense. (Appn 10).

SAND KEY subsequently moved to amend its Complaint, by adding a separate Count II, and making the original Complaint Count I. (Appn 11). The trial court granted this Motion on January 17, 1984. (Appn 17). Both Counts of the Amended Complaint sought a judgment quieting title to the real property described therein, on separate legal theories.

Count I is based on Florida law, and Count II is based on Federal law.

SAND KEY filed a Motion for Summary Judgment as to Count I only, contending that Florida Statutes §161.051 (1981) was unconstitutional as applied; and therefore the STATE had no legal basis to claim title to the accretions. (Appn). At the hearing on SAND KEY's Motion, the STATE moved instanter for Summary Judgment, seeking a declaratory judgment that Florida Statutes §161.051 (1981) was constitutional. (Appn 28). The trial court entered an Order styled "Final Partial Summary Judgment", which denied SAND KEY's Motion, and granted the STATE's Motion, issuing a Final Declaratory Judgment which expressly declared that pursuant to Florida Statutes §161.051 (1981), the STATE holds title to all the accretion that resulted from works and improvements described in that Statute, including accretion to the property of upland littoral owners who neither participated in nor contributed to the improvement, and that the Statute was constitutional as so applied. (Appn 29). The trial court denied SAND KEY immediate possession of the real property in controversy, and further enjoined SAND KEY from taking immediate possession of this real property. (Appn 29).

SAND KEY filed a Notice of Appeal to the District Court (Appn 31), which reversed the Circuit Court's order in an opinion (Appn 32) holding that the Circuit Court's construction of the

Statute effectively divested SAND KEY of its property rights without compensation. (Appn 35). The District Court ruled that the Statute was in derogation of the common law and therefore must be strictly construed. (Appn 35). Construing the Statute strictly and saving it from constitutional infirmity, the District Court held that the Statute applies only to the upland owner of the improved property, and thus the disputed five acres of accreted property and all property rights incident thereto belong to SAND KEY. (Appn 36).

In its opinion reversing the Circuit Court, of which petitioner seeks review, the District Court certified the following question to this Court:

> "PURSUANT TO SECTION 161.051, FLORIDA STATUTES (1981), IS THE STATE ENTITLED TO ACCRETED LAND OF ONLY THE UPLAND OWNER OF THE IMPROVED PROPERTY OR TO THE ACCRETED LAND OF ALL UPLAND LITTORAL OWNERS, WHETHER OR NOT THEY PARTICIPATED IN OR CONTRIBUTED TO THE IMPROVEMENT?"

(Appn 36).

STATEMENT OF THE FACTS

SAND KEY adopts the STATE's Statement Of The Facts, with the following modifications.

SAND KEY operates a beachfront resort hotel on Sand Key, in Clearwater, Florida. It derives title to real property fronting the Gulf of Mexico through a United States Patent granted to its predecessor in interest in 1883. (Appn 16).

In 1974, the STATE issued a permit for, and subsequently constructed, a jetty on the south side of Clearwater Pass, approximately one-half (1/2) mile north of SAND KEY's upland property. SAND KEY neither participated in this project, nor in any way contributed to the buildup of accretion on its property. (Appn 29). Over the past several years there has been a gradual buildup of land, which now exceeds five (5) acres, on SAND KEY's property as a result of alluvion deposits on the tide lands caused by accretion. (Appn 2). The STATE and SAND KEY agree that this gradual buildup is accretion. (Appn 29). The parties also agree that SAND KEY owns the upland property. (Appn 28).

The dispute here centers entirely upon the legal question of the ownership of the accreted land. Although the STATE concedes that SAND KEY in no way caused or contributed to the accretion resulting from the STATE's own jetty construction (Appn 29), the STATE claims that it has title to the accreted land pursuant to Florida Statutes §161.051 (1981). (Appn 7).

SAND KEY, in the trial court, contended that Florida Statutes §161.051 (1981) was unconstitutional as advanced by the STATE, inasmuch as such an interpretation would constitute a taking of its property without just compensation, in violation of both the Federal and State Constitutions.

Count II, the federal law claim, is not at issue before this Court. No arguments were presented to the trial court on this Count. (Appn 29). SAND KEY submits that, as the District Court held, it is entitled to immediate possession of the accreted land, on the basis that the District Court properly construed Florida Statutes §161.051 (1981) strictly and constitutionally as applying to only the upland owner of the improved property.

SUMMARY OF THE ARGUMENT

The District Court properly rejected the STATE's construction of Florida Statutes §161.051 (the "Statute") pursuant to which the STATE claims title to the accretion on SAND KEY's upland. The correct construction, the District Court ruled, is that when a landowner constructs an "improvement" under authority of the Statute, title vests in the STATE to only such accretion as results on that person's land.

Riparian and littoral landowners have a vested property right to all future accretion provided it is beyond their control, whether naturally or artificially caused. The fact that the STATE owns submerged tidelands gives it no legal right to accretions. The law of Florida, as this Court and others have repeatedly reaffirmed, is in complete harmony with the common law rule of accretion. The STATE's highly strained argument that it is not is based on dictum from a concurring opinion in one 1927 case that had nothing to do with accretion.

This vested property right would be taken without just compensation and due process of law, in violation of the State and Federal Constitutions, if the Statute were applied to upland owners who neither participated in nor contributed to improvements. In fact, the Statute would then authorize the STATE to confiscate all of Florida's privately held beachfront land without due process, merely by building jetties

and causing accretion. Therefore, the construction of the Statute urged by the STATE would render the Statute unconstitutional.

The District Court properly ruled that because the Statute would change the common law rule if applied to all upland owners, it must be strictly construed to apply only to the owner of the improved property. The latter construction is consistent with the common law rule and is the reasonable reading of the statutory language. Moreover, by thus construing the Statute, the District Court saved it from constitutional infirmity, and a statute should be construed in a manner that would render it constitutional. As construed by the District Court, the Statute does not apply to the accretion to SAND KEY's property, which belongs to SAND KEY under the common law.

Accordingly, this Court should either deny the STATE's petition for review, or grant the petition and either affirm in all respects the decision of the District Court, or rule the Statute unconstitutional as applied to SAND KEY and approve the decision of the District Court in all other respects.

ARGUMENT

I

THAT FLORIDA STATUTES §161.051 (1981) AS DETERMINED BY THE DISTRICT COURT, WOULD RESULT IN AN UNCONSTITUTIONAL DIVESTMENT OF PROPERTY RIGHTS WITHOUT COMPENSATION IF APPLIED TO UPLAND OWNERS, OTHER THAN THE UPLAND OWNER OF THE IMPROVED LAND, WHETHER OR NOT THEY PARTICIPATED IN OR CONTRIBUTED TO THE IMPROVEMENT.

The only issue on this appeal is the construction and constitutionality of Florida Statutes §161.051 (1981) (the "Statute"), which in pertinent part states that:

> "[w]here any person, firm, corporation, county, municipality, township, special district, or any public agency shall construct and install projects when permits have been properly issued, such works and improvements shall be the property of said person. . . . No grant under this section shall affect title of the state to any lands below the mean high water mark, and any additions or accretions to the upland caused by erection of such works or improvements shall remain the property of the state if not previously conveyed. . . ." 1/

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1. Accretion is new land formed by the deposit of alluvion, "an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. . . . The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference." County of St. Clair v. Lovingston, 90 U.S. (23 Wall) 46, 68, 23 L.Ed. 59 (1874).

The District Court held, properly, that the Statute:

> "does not explicitly state that it applies to all upland littoral owners . . . [and] we hold that it applies only to the upland owner of the improved property."

(Appn 35). It reversed the trial court's holding that the Statute applied to all upland owners, including those who, like SAND KEY, neither participated in nor contributed to the work or improvement. Such a construction, the District Court held, would render the statute unconstitutional as violative of due process. In the words of the District Court,

> "the lower court's order effectively divested Sand Key of its littoral rights without compensation." 2/

(Appn 35). That holding is a simple and correct statement of the law: SAND KEY has vested littoral rights which cannot be taken without just compensation and due process, and thus the Statute, if applied to SAND KEY, would be unconstitutional.

A. SAND KEY, as an Upland Owner, Has a Vested Riparian Right to Future Accretion Occurring on Its Land.

The District Court recognized that the common law gives upland owners:

> "littoral or riparian rights includ[ing] the right of ingress and egress from the water to the land and the right to the land growing out of accretion or reliction. Such property

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2. Emphasis in quoted matter supplied throughout.

> rights are vested and cannot be taken away without just compensation. Thiesen v. Gulf F.&A. Ry. Co., 75 Fla. 28, 78 So. 491 (1917)."(Appn 34)

This basic tenet of real property law, that a riparian owner has a vested right to accretion that occurs on his land, has been consistently reaffirmed by Florida courts over the years. See, e.g., State of Florida and Board of Trustees of the Internal Improvement Trust Fund v. Florida National Properties, Inc., 338 So. 2d 13 (Fla. 1976); Brickell v. Trammel, 77 Fla. 544, 82 So. 221 (1919); Thiesen, supra; Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909); Gillilan v. Knighton, 420 So. 2d 924 (Fla. 2d DCA 1982); Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209 (Fla. 2d DCA 1973); Mexico Beach Corp. v. St. Joe Paper Co., 97 So. 2d 708 (Fla. 1st DCA 1957), cert. den. 101 So. 2d 817 (Fla. 1958).

Over a century ago, the Supreme Court of the United States spelled out the nature and origin of the vested property right to accretion resulting from the deposit of alluvion:

> "In light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction. . . . The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The 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 sen-

> tit onus debet sentire commodum" lies at its foundation. The owner takes the chance 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."

County of St. Clair v. Lovingston, 90 U.S. (23 Wall) 46, 68-69, 23 L.Ed. 59, 64 (1874). The courts of this State have unfailingly followed this doctrine. In Medeira Beach, supra, where the court held that:

> "[t]itle to accreted lands by the great weight of authority vests in the riparian owners of abutting lands."

(272 So. 2d at 211-12), it counted the right to accretion among the many "greater rights" enjoyed by waterfront owners and protected by law, including commercial exploitation of water access, views and wharfing rights.

1. The STATE's Common Law Ownership of Submerged Lands Gives It No Right to New Land Formed by Accretion.

Because the riparian or littoral owner has a vested right to accretions, the government cannot defeat that right by claiming title to once-submerged lands. Regardless of whether a state may hold title to soil covered by water, once accretion occurs and alluvion encroaches upon the tide land, the accreted land vests in the upland owner. Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). The rationale for this rule is that the state has ownership of submerged lands only because they are submerged:

> "The ordinary high water mark is well established as the dividing line between private riparian and sovereign or public ownership of the land beneath the water. This dividing line was not chosen arbitrarily.
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> * * *
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> "It is apparent that the reasoning behind this line is demonstrated in the day to day utilization of the waterfront property by its riparian owner. Although the mean or high water mark is an average over a number of years, the daily mark of a high tide on the shore gives both the riparian and the public notice of their possible use of the land on either side of the mark. Freezing 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."

Medeira Beach, supra, 272 So. 2d 213.

2. The Law Recognizes No Differences between Naturally and Artificially Caused Accretion.

The District Court properly refused to draw any distinction between accretions resulting in part from man-made structures, as here, and those resulting solely from natural forces. While the latter case has arisen more often, the settled common law rule treats the former case identically.

In County of St. Clair v. Lovingston, supra, where the United States Supreme Court spelled out the doctrine of accretion, it made clear that:

> "Alluvion may be defined as an addition to riparian land, gradually and imperceptibly

made by the water to which land is contiguous. . . . Whether it is the effect of natural or artificial causes makes makes no difference."

90 U.S. (23 Wall) at 68. 3/

Where the question of artificially caused accretion has arisen in the Courts of our State, no distinction ever has been drawn. For example, in Medeira Beach, supra, this Court was called upon to decide whether "a strip of accreted land become[s] the property of the upland riparian owner even where the accretion is the result of a lawful exercise of the police power by a municipality to prevent beach erosion," 272 So. 2d at 211. It answered that question with an unequivocal yes, holding that:

> "whether the accretion is the effect of natural or artificial causes make no difference."

272 So.2d at 212, citing County of St Clair v. Lovingston, supra. 4/

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3. The STATE quotes from cases that mention that accretion is a natural process, then adds emphasis to the word "natural", disingenuously attempting to imply that there is a difference between accretion occurring without human intervention and accretion set in motion by an artificial instrumentality. The process of accretion -- land building up from deposit of alluvion -- is always a "natural" process, which is all that the STATE's cases say. There is no legal significance to whether the underlying cause is man-made.

4. The Medeira Beach court did not squarely address itself to the effect of Florida Statutes §161.051 (1981), because the erosion control project there in question predated the statute's enactment, but observed it to be of questionable constitutionality (272 So. 2d at 214).

Of course, the common law rule is premised on the fact that accretions are usually beyond the upland owner's control. But an exception to that rule -- reserving title to the state when a riparian property owner has caused or participated in the buildup of accretion on his own land -- is clearly inapplicable here. The parties admit that SAND KEY did not, in any way, consent to, participate in, or cause the accretion that occurred on its shore. (Appn 29). As the Illinois Supreme Court explained in Brundage v. Knox, 279 Ill. 450, 117 N.E. 123 (1917):

> "When the accretion is due, wholly or in part, to artificial causes, and those causes are not the act of the party owning the original shore land, the decisions hold, and justice would seem to require, that the same rules prevail as to ownership of the accretion as in the case of accretions formed solely by natural causes . . . 'upon no principle of reason or justice should he (an upland owner) be deprived of accretions forced upon him by the labor of another without his consent or connivance, and thus cast off from the benefit of his original proprietorship.'"

Id. at ___, 117 N.E. at 128 (emphasis added) (citing Lovingston v. St. Clair County, 64 Ill. 63). These principles are and have always been the law in nearly every state of the United States. See, Annot., 63 A.L.R.3d 249, 265 (1975).

3. The Thrust Of The State's Argument Rests Upon Dictum Quoted Out Of Context From A Concurring Opinion In An Entirely Inapposite Case.

The STATE suggests that Florida's common law of artificial accretion is not what the Second District held

it to be in Medeira Beach, and not what Lovingston and countless other decisions in virtually every common law jurisdiction have held it to be.5/ Instead, the STATE pretends that under Florida law, artificially caused accretions belong to the STATE, even when accreting to the upland of an owner who did not participate in or contribute to the accretion. In support of its assertion that Florida's common law rule has always been different from the universal common law rule, the STATE cites not one single decision, for in fact our courts have followed the majority rule -- see, e.g., Medeira Beach -- and have never once followed the supposed rule advanced by the STATE. See Florida National Properties, supra.

The STATE's contention that in 1965 Florida had no common law rule of ownership for artificially caused accretion is baseless. Florida Statutes §2.01 (1981) provides:

> "The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state."

Thus, Florida has always followed the English common law rule "not only as declared by the English courts, but also as declared by the courts of the American States". Coleman v. Davis, 120 So. 2d 56 (Fla. 1st DCA 1960) (Drew, J.). Accord-

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5. See Annot., 63 A.L.R. 3d 249 (1975).

ingly, before the Statute was enacted, the common law rule, as set forth in Section I.A. above, and as articulated in County of St. Clair v. Lovingston, supra, for example, was plainly the law of this State. See also Florida National Properties, supra, where this Court held that there had been no change in the common law right to accretion.

Indeed, the STATE's argument is based upon dictum quoted out of context from a concurrence in a totally inapposite 1927 case. Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927) dealt with the drainage of inland lakes and resulting reliction. That decision does not even mention accretion, artificial or otherwise, to oceanfront land or otherwise, and has nothing to do with the case at bar. Reliction and accretion are distinct and separate phenomena, governed by different legal doctrines. The most complete definition of accretion, or build-up of alluvion, in Lovingston, supra, points out that "[i]t is different from reliction . . . ." 90 U.S. at 68-69, 23 L.Ed at 64. Martin thus properly followed the established common law rule that while accretion belongs to the riparian, reliction belongs to the Crown. King v. Yarborough, 6 Eng. Rep. 491, 496 (House of Lords 1828). The STATE's purported linkage of the two doctrines is founded entirely on the appearance of the phrase "the doctrine of accretion and reliction" in a concurrence in Martin. That phrase, quoted out of context, is the single

thread by which the STATE's argument hangs -- and unravels. Plainly that some decisions have in dicta referred to both accretion and reliction in passing provides no support to the STATE's position here. That this is the cornerstone of the STATE's brief shows precisely how little substance there is in its contention.

B. SAND KEY's Vested Littoral Rights May Not Constitutionally Be Taken by the STATE Without Just Compensation and Due Process of Law.

The District Court applied the well-settled Florida law that once vested, the

> "riparian rights . . . in the land growing out of accretion . . . cannot be taken away without just compensation. Thiesen v. Gulf, F. & A. Ry. Co., 75 Fla 28, 78 So. 491 (1917).
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> * * *
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> "The lower court's order [by applying the Statute to upland owners other than the upland owner of the improved land] effectively divested Sand Key of its littoral rights without compensation."

(Appn 35). Thus, if this Court were to adopt a different construction than the District Court, the Statute would be unconstitutional as applied, for denial of due process of law. State of Florida and Board of Trustees of the Internal Improvement Trust Fund v. Florida National Properties, Inc., supra; Brickell v. Trammell, supra; Thiesen v. Gulf, F. & A. Ry. Co., supra; Broward v. Mabry, supra; Feller v. Eau Gallie

Yacht Basin, Inc., 397 So. 2d 1155 (Fla. 5th DCA 1981) ("Riparian rights exist in Florida as a matter of constitutional rights and property law"); Kendry v. State Road Dept., 213 So. 2d 23 (Fla. 4th DCA 1968) ("Riparian rights are property rights that may not be taken without just compensation."); Moore v. State Road Dept., 171 So. 2d 25 (Fla. 1st DCA 1965); Mexico Beach Corp. v. St. Joe Paper Co., supra.

This Court has repeatedly affirmed the vested rights of riparian owners against unconstitutional incursions by the State. In the leading case of Thiesen v. Gulf F. & A. Ry. Co., supra, this Court invalidated the STATE's purported conveyance of rights to tidelands -- in violation of the rights of riparian owners -- holding that:

> "Riparian rights we think are property, and, being so, the right to take it for public use without compensation does not exist. The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability, whether for residence or business purposes. The right of access to the property over the waters, the unobstructed view of the bay, and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not, in many cases, be exchanged for the price of an inland lot in the same vicinity. In many cases, doubtless, the riparian rights incident to the ownership of the land were the principal, if not sole, inducement leading to its purchase by one and the reason for the price charged by the seller."

75 Fla. at _____, 78 So. at 507. Accord, Brickell v. Trammel, supra, 82 So. at 227.

The case at bar is remarkably similar to State of Florida and Board of Trustees of the Internal Improvement Trust Fund v. Florida National Properties, Inc., 338 So. 2d 13 (Fla. 1976), in which this Court struck down Florida Statutes §253.151. That statute purported to deprive riparian land owners of their vested rights. It provided for a permanent boundary line between the riparian upland and navigable water. In its opinion, which this Court quoted with approval in affirming the judgment, the Circuit Court observed that:

> "[b]y relying upon §253.151, the State, through the Trustees, claims not only the lands to which Plaintiff has already gained title through the operation of accretion and reliction, but also seeks to deny to Plaintiff the right to acquire additional property in the future through the process of accretion and reliction. Both Federal and Florida courts have held that an owner of land bounded by the ordinary high water mark of navigable water is vested with certain riparian rights, including the right to title to such additional abutting soil or land which may be gradually formed or uncovered by the processes of accretion or reliction, which right cannot be taken by the State without payment of just compensation. . . .
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> * * *
>
> "Fla. Stat. §253.151 as applied by the Trustees in the instant case, constitutes a taking of Plaintiff's property, including its riparian right to future alluvion or accretion, without compensation in violation to the due process clause of the Fourteenth Amendment of the United States Constitution and the due process clause of Art. I, Sec. 9, of the Florida Constitution."

338 So. 2d at 17.

The parallels between this case and Florida National Properties are clear. If this Court were to reverse the District Court and endorse instead the STATE's proposed construction of Florida Statutes §161.051 (1981), the boundary line between the littoral or riparian upland property owners' land and navigable waters would be just as permanently fixed. There would be just as plain a taking of the vested riparian rights, including the right to accretion, all without just compensation. The retroactive destruction of a vested right violates the precept of due process of law. See Rupp v. Bryant, 417 So. 2d 658 (Fla. 1982); Village of El Portal v. City of Miami Shores, 362 So. 2d 275 (Fla. 1975); State of Florida and Board of Trustees of the Internal Improvement Trust Fund v. Florida National Properties, Inc., supra; McCord v. Smith, 43 So. 2d 704 (Fla. 1949); Feller v. Eau Gallie Yacht Basin, Inc., 397 So. 2d 1155 (Fla. 5th DCA 1981). Thus, to apply the Statute to all upland owners would render it unconstitutional.

C. If the Statute Carried the Unconstitutional Construction Urged by the STATE, It Would Empower the STATE to Confiscate All Private Beachfront Property.

The STATE's unconstitutional construction of the Statute, soundly rejected by the District Court, would authorize a mass confiscation by legislative fiat, without compen-

sation, of any and all Florida beachfront property. Under the STATE's reading of the Statute, the STATE would be privileged to initiate public works projects that cause accretions to occur to all of our beaches and, in so doing, eliminate virtually all private riparian property in Florida without any semblance of notice, hearing, or compensation for the taking of a valuable property right, in an unprecedented denial of constitutional due process.

In Michaelson v. Silver Beach Improvement Assoc., Inc., 173 N.E.2d 273 (Mass. 1961), the Commonwealth created a beach by pumping sand against a riparian owner's seawall. The Supreme Judicial Court of Massachusetts held that the riparian owner has title to the newly-created upland because:

> "Otherwise, there would be no limit to the Commonwealth's power. Suppose, for example, the Commonwealth caused a dredger to move along the entire Massachusetts coast, piling up sand and rock just below the line of private ownership. Navigation might well be improved; but, if the contention of the Defendant association were followed, a public beach would be created in front of the property of all the littoral proprietors."

Id. at 277.

It is incumbent upon this Court to protect the private property owner's riparian property rights against such unconstitutional mass confiscation by the STATE. In doing so, this Court should be cognizant that there will be no loss of public rights to the foreshore portion of the beach lying between the mean high and low tide lines. Public access to

the beach fronting SAND KEY's property is protected by law and complemented by an immediately adjacent and rather expansive public beachfront park. 6/

The District Court properly upheld SAND KEY's vested property right to accretion to its upland by refusing the unconstitutional construction of the Statute urged by the STATE. This Court, therefore should either deny the STATE's petition for review or, in the alternative, grant the petition and either affirm in all respects the ruling of the District Court, or rule the Statute unconstitutional as applied to SAND KEY and affirm the decision of the District Court in all other respects.

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6. Ironically, the STATE urges that the unconstitutional construction of the Statute permitting a taking without any compensation or due process "is in harmony with . . . the Save Our Coasts program," under which the STATE "has spent millions of dollars buying up beaches and shores. . ." (Initial Brief of the STATE, p. 10). If the STATE chooses to acquire beachfront land, the Save Our Coasts program is a viable, constitutional means of doing so. There is no "harmony" between the constitutional and the unconstitutional.

II

THE DISTRICT COURT PROPERLY RULED THAT TO THE EXTENT THE STATUTE MAY APPLY TO UPLAND LITTORAL OWNERS LIKE SAND KEY, THE STATUTE IS IN DEROGATION OF THE COMMON LAW AND THUS MUST BE STRICTLY CONSTRUED TO APPLY ONLY TO THE UPLAND OWNER OF THE IMPROVED PROPERTY.

As Section I.A. above conclusively shows, the common law vests riparian and littoral owners with the right to all future accretion to their land. As the District Court correctly concluded in construing the Statute:

> "To the extent that section 161.051 applies to other upland littoral owners who neither participated in nor contributed to the improvement, the statute is in derogation of the common law and must be strictly construed. The presumption is that no change in the common law is intended unless the statute explicitly so states. Inference and implication cannot be substituted for clear expression. Carlisle v. Game and Fresh Water Fish Commission, 354 So. 2d. 362 (Fla. 1977).
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> "Section 161.051 does not explicitly state that it applies to all upland littoral owners. Therefore, construing the statute strictly, we hold that it applies only to the upland owner of the improved property. Section 161.051 does not affect Sand Key's vested right to accretion on its property."

(Appn 35).

A. The Reasonable Construction of the Statute Adopted by the District Court is Consistent with the Common Law Rule.

That a statute in derogation of the common law must be strictly construed and that no change in the common law is intended unless the statute is explicit in that regard are

fundamental principles of statutory construction. See, e.g., Carlisle v. Game and Fresh Water Fish Commission, 354 So. 2d 362 (Fla. 1977); Southern Attractions, Inc. v. Grau, 93 So. 2d 120 (Fla. 1956). Significantly, the Statute contains no expression of any legislative intent whatsoever to modify existing common law rights of riparian property owners. It is most unlikely that the Florida Legislature ignored this rule of construction when enacting this Statute.

The statutory language itself, as the District Court found, contains no all-inclusive statement of application. When the pertinent language is read in its entirety, limited application consistent with the common law is the only reasonable construction. By its very terms, the Statute applies only as between the State and a person or entity who is granted a permit and constructs works and improvements pursuant to its provisions.

Florida Statutes §161.051 (1981) states in pertinent part:

> "[w]here any person, firm, corporation, county, municipality, township, special district, or any public agency shall construct and install projects when permits have been properly issued, such works and improvements shall be the property of said person. . . . No grant under this section shall affect title of the state to any lands below the mean high water mark, and any additions or accretions to the upland caused by erection of such works or improvements shall remain the property of the state if not previously conveyed. . . ."

The Statute consists of two interrelated provisions. The first sentence grants title to any authorized work or improvement to the person or entity that created the work or improvement. The last clause of the second sentence, on which the STATE relies, is not a further grant, but rather is a qualification and limitation upon the first sentence. Consistent with and in codification of the common law, the second sentence can only refer to additions and accretions that may be created on the land of the person or entity who built such works or improvements, and provides that these remain the property of the State. Conspicuously absent is any language "granting" title to the State in any accretions that would not already belong to the State.

Thus, as the District Court held, the Statute does not purport to affect title to additions or accretions occurring on the property of a third person, such as SAND KEY, who neither participated in nor contributed to the improvement which resulted in the accretion.

Therefore, under a reasonable construction, the Statute is entirely consistent with the controlling common law in Florida, as discussed in Section I, supra: accretions belong to the upland owner unless the upland owner was the party who caused the accretion to occur on his own land. See Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., supra.

B. The District Court's Construction Properly Saved the Statute from Constitutional Infirmity.

Implicit in the District Court's reasoning is the compelling mandate to construe the Statute to save it from constitutional infirmity. The Court held that the construction advanced by the STATE "divested Sand Key of its littoral rights without compensation", a violation of constitutional due process. See Section I.B., above. By adopting the construction it did, the District Court was able to find the Statute constitutional.

It is a cardinal principle of statutory construction that "an enactment should be interpreted to render it constitutional if possible." State v. Keaton, 371 So. 2d 86, 89 (Fla. 1979) (footnote omitted). This Court has held that if a statute is reasonably susceptible to two interpretations, one of which would be unconstitutional and the other valid, it is the duty of the Court to adopt that construction which will save the statute from constitutional infirmity. See, e.g., Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981 (Fla. 1981); Leeman v. State, 357 So. 2d 703 (Fla. 1978).

The District Court's strict construction -- that only so much of the accretion that settles on the upland of those who create or cause the public works project to be

built remains the property of the State -- is consistent with the common law and also saves the Statute from these constitutional infirmities. Therefore, this Court should deny the STATE's petition for review or, in the alternative, grant the petition and approve the decision of the District Court in all respects.

CONCLUSION

The District Court properly construed Florida Statutes §161.051 (1981) as not divesting SAND KEY of its vested littoral property right to the accretion formed on its upland.

If the Statute were construed to apply to SAND KEY, it would amount to a taking by the STATE of SAND KEY's property without just compensation and due process of law, violating both the United States Constitution and the Florida Constitution. The District Court's construction both saves the statute from constitutional infirmity and codifies the common law rule instead of derogating it, and is therefore the only reasonable construction.

Therefore, SAND KEY requests that this Court take the following action:

1. deny the STATE's petition for review of the District Court's decision; or

2. grant the STATE's petition and approve the District Court's decision in all respects; or

3. grant the STATE's petition, hold that Florida Statutes §161.051 (1981) is unconstitutional as applied to SAND KEY, and approve the District Court's decision in all other respects.

This Court should remand the case for entry of a judgment for SAND KEY.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to STEVEN A. BEEN, ESQUIRE, General Counsel's Office, Department of Natural Resources, 3900 Commonwealth Boulevard, Tallahassee, Florida 32301, on this 28 day of March, 1985.

_____
Richard J. Salem