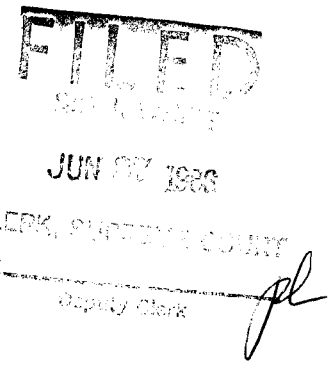
IN THE

SUPREME COURT OF FLORIDA

Case No. 68,399



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

PETITIONER,

vs.

SAND KEY ASSOCIATES, LIMITED,

RESPONDENT.

ON APPEAL FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT

REPLY BRIEF OF PETITIONER

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TABLE OF CITATIONS

ARGUMENT

THIS COURT SHOULD RESOLVE UNCERTAINTIES IN FEDERAL LAW SO AS TO AVOID HOLDING SECTION 161.051, FLORIDA STATUTES UNCONSTITUTIONAL.

Sand Key* asks this Court to hold that federal law dictates the ownership of accretion to Sand Key's Pinellas County property, and to dismiss the pending appeal in Case No. 66,372 as moot, in order, Sand Key says, to avoid a constitutional question. Holding that federal law applied, however, would make the pertinent part of section 161.051, Florida Statutes void under the Supremacy Clause of the U.S. Constitution. Federal case law does not dictate such a result. This Court should resolve uncertainties in federal law so as to uphold the full intent of the Florida Legislature.

There is no settled federal rule requiring application of federal law to determine the ownership of accretion to land once obtained from the federal government. Hughes v. Washington, 389 U.S. 290 (1967), required use of federal law, but Hughes was effectively overruled by Oregon v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1967). In California, ex rel. State Lands Commission v. United States, 457 U.S. 273 (1982), the Court stated that Hughes had survived Corvallis, but as Justice Rehnquist

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* Respondent Sand Key Associates, Limited is referred to herein as Sand Key. Petitioner Board of Trustees of the Internal Improvement Trust Fund of the State of Florida is referred to as the State.

observed, concurring in California, ex rel. State Lands:

> [T]he Court's discussion regarding the continuing vitality of Hughes v. Washington is dicta... It is difficult to reconcile Hughes with Corvallis and we should postpone that endeavor until required to undertake it.

457 at 290. With the rationale of Hughes removed by Corvallis, and with the continuing vitality of Hughes questioned by the apparent next Chief Justice of the U.S. Supreme Court, this Court need not feel bound to follow the discredited Hughes opinion.

Sand Key suggests that a decision in Case No. 66,372 should be resisted to avoid deciding a constitutional question. Sand Key's assumption that deciding the earlier appeal, which has already been briefed and was orally argued on November 6, 1985, would require a constitutional construction assumes the correctness of Sand Key's arguments in the first appeal. Sand Key has argued that applying section 161.051 literally would unconstitutionally deprive waterfront owners of the vested right to accretion. As the State has demonstrated, when the 1965 Beach and Shore Preservation Act reserved for the State ownership of accretion caused by state permitted structures, there was no Florida law granting waterfront owners artificially caused accretion. Florida law under Martin v. Busch, 93 Fla. 535, 112 So.2d 274 (1927), indicated that artificially caused extension of land onto what had been sovereign water would vest title to the new land in the State. In Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So.2d

209, (Fla. 2nd DCA 1973), the district court held upland owners entitled to artificially caused accretion. The 1965 statute cannot be voided, however, for taking away rights that were not created until 1973. Thus, this Court may safely give section 161.051 its natural meaning without affecting constitutionally protected property rights.

If this Court were to hold that federal law governs this case, the State asks that the Court reach a decision in Case No. 66,372 as well. If the Court were to do as Sand Key requests, rule for Sand Key based on federal law and dismiss the earlier appeal, the State's chance of getting the U.S. Supreme Court to grant certiorari would be lost. If the first appeal were dismissed, the district court's construction of section 161.051 would remain the only Florida case law on the meaning of section 161.051. Since the district court's construction of section 161.051, gives the disputed accretion to Sand Key, that construction would remain as an independent state law basis for the decision, precluding U.S. Supreme Court review of the federal basis for this Court's decision. If this Court were to rule that federal law governs, the only way to prevent that decision on an uncertain question of federal law from becoming final, would be to go ahead and resolve the state law question as well.

CONCLUSION

This Court should rule that state law, not federal, governs the ownership of accretion to oceanfront property,

whether or not the upland owner can trace title to a federal grant. If the Court were to rule that federal law does apply, then the Court should nonetheless resolve the issues raised by Case No. 66,372 so that the possibility of U.S. Supreme Court review will not be foreclosed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail to Richard J. Salem, Esquire, 111 Parker Street, Suite 301, Post Office Box 3399, Tampa, Florida 33601, this 27 day of June, 1986.

STEVEN A. BEEN, ESQUIRE