IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 93-821
DISTRICT COURT CASE NO. 95-03813
CIRCUIT COURT CASE NO. CL 94-9509 AB

CITY OF WEST PALM BEACH,

PETITIONER,

vs.

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND LEISURE RESORTS, INC.,

RESPONDENTS.

ON PETITION FOR DISCRETIONARY JURISDICTION FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF THE CASE AND THE FACTS

This case requires construction of the riparian act of 1921 ("the Butler Act") in light of the public trust doctrine. Under the public trust doctrine, lands under navigable waters are held in trust for all the people. Art. X, § 11, Fla. Const. The Butler Act, incorporating and replacing the Riparian Act of 1856, Ch. 791, Acts of 1856, allowed riparian owners to gain title to adjacent submerged sovereignty lands by filling, bulkheading, or "permanently improv[ing]" these lands. Ch. 8537, § 1, Laws of Fla. (1921). In 1957 the Legislature expressly repealed the Butler Act statewide,[1] confirming the title of riparian owners to lands which had been filled or "developed" before the Act's repeal. Ch. 57-362, § 9, Laws of Fla., now codified at § 253.12, Fla. Stat. (1997).

While the Butler Act was still in effect, the City of West Palm Beach (the City) applied to the predecessor agency to the Army Corps of Engineers (the Corps) for a permit to fill, dredge, and construct piers within the Intracoastal Waterway (Lake Worth). (R. at 34.) The purpose was to provide a yacht basin and an area for offstreet parking. (Id.)

As was its general practice, the Corps conditioned its approval on state authorization of the dredging.(R. at 32.) The Corps' practice was to send notice to the Board of Trustees of

[1] The Butler Act was impliedly repealed as to tidal lands outside Dade and Palm Beach counties in 1951. Ch. 26776, Laws of Fla. (1951); Duval Engineering and Contracting Co. v. Sales, 77 So. 2d 431, 433 (Fla. 1954).

the Internal Improvement Trust Fund (the Trustees) regarding any application for a permit to dredge lands within Florida waters, and to withhold issuance of the permit if the Trustees objected. (R. at 137, 144, 154, 155, 157, 159, 163-64, 172-73.) As explained by the Corps in 1954, this policy was based on concern for the state's ownership rights to submerged bottom lands. (R. at 123.) In no instance did the Trustees or the Corps treat dredging as an "improvement" under the Butler Act, divesting the state of ownership. (R. at 179.)

The Board of Trustees interposed no objection to the City's proposed dredging. (R. at 32.) This permission was in accord with the Trustees' general practice. (R. at 179.) Both during the period of the Butler Act and for more than a decade afterwards, the Trustees freely granted permission for dredging in Fort Worth, often conditioned on payment for the fill obtained. (Id.) However, in no instance did the Trustees grant, or the applicant claim, a right to the dredged area itself. (R. at 180.) Dredging was allowed on condition that "the channel dredged shall be open to the full and free use of the public," (R. at 125), with no "impairment of public rights to free use of the waters of Lake Worth," (R. at 128).

Similarly, the Corps' permit to the City in this case specified "That no attempt shall be made by the permittee . . . to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure." (R. at 22.)

After the Butler Act was repealed, riparian owners could

apply to the Trustees for a disclaimer as to lands “filled or developed” while the Act was in force. § 253.129, Fla. Stat. (1997). In 1969 the City applied to the Trustees for a disclaimer to the filled parcel only, not to any of the yacht basin. (R. at 209-11.)

In the 1970’s, the Trustees began requiring submerged lands leases “in order to insure that all public and private activities on sovereignty lands which generate revenues or exclude traditional public uses provide just compensation for such privileges.” Fla. Admin. Code R. 18-21.001(5). However, preexisting uses could be “grandfathered in” without payment of lease fees until 1998. Fla. Admin. Code R. 18-21.00405.

In the 1980's the Trustees began to require registration of such “grandfathered” structures. In 1984 the City applied to the Trustees for "grandfathered" status for its marina so that it would not have to pay annual submerged lands lease fees. (R. at 196.) The diagram attached to its application shows a commercial marina, with its waterward boundary at the end of four docks. (R. at 201.) The City Commission acknowledged that the city owned dock facilities which had been leased to Leisure Resorts, Inc., a Delaware corporation, but which were located "on land owned by the State of Florida and not leased to the City." (R. at 204.) The City's application for "grandfathered" status was made jointly with its lessee Leisure Resorts. (R. at 196, 200.)

The City needed either a lease or "grandfathered" status because it sought to exclude the public from public lands:

> The activity which is the subject of this application is private boat slip rentals. . . . The docks are used to rent slips to privately owned boats. The slips are not available to the general public for docking boats on a transient basis, but are restricted to those boat owners who pay a fee for their use. The dock area is open to the general public, but the docks are not available for swimming purposes.

(R. at 202.)

The docks were granted grandfathered status in 1985. (R. at 195.) Although this status expired January 1, 1998, the City could have applied for a waiver or partial waiver of lease fees available to government organizations. Fla. Admin. Proc. R. 18-21.011(b)10.

Instead, however, in 1992 the City sought ownership status because it proposed to build a bigger marina, with "bigger boat slips for bigger boats." (Tr. at 32.) In order to avoid the need for the consent of the Trustees and, if such consent was granted, compensation to the public through lease fees, (Initial Brief at 11), the City sued the Trustees to quiet title to the docks previously granted "grandfathered" status, as well as to all the dredged lands surrounding them, a north-south dredged band 200 feet wide waterward of the docks, and an east-west dredged band 200 feet wide extending to the edge of the channel. (R. at 7.) The Trustees filed a quiet title counterclaim. (R. at 14.) The City's lessee Leisure Resorts, Inc., filed a breach of warranty of title action against the City, which was consolidated with the City's case against the Trustees, and Leisure Resorts also intervened in the City's case. (R. at 74-76.)

The City produced evidence that it had constructed docks and performed dredging before the repeal of the Butler Act, and moved for summary judgment. (R. at 62.) The Trustees agreed that no facts remained in dispute, conceded that the City was entitled to the land immediately beneath its docks pursuant to Jacksonville Shipyards v. Department of Natural Resources, 466 So. 2d 389 (Fla. 1st DCA 1985), and moved for summary judgment quieting title in the Trustees as to the remaining area claimed. (R. at 90.)

More than ninety-five percent of the lands claimed by the City "were neither filled in nor improved by any wharf or pier or similar structure, remaining covered by open waters." (R. at 109.) The trial court granted summary judgment in favor of the Trustees, holding that the lands under open waters had not been "improved" so as to take them out of public ownership and grant fee title to the riparian owner under the Butler Act. (R. at 235.) The City appealed.

Before the Fourth District Court of Appeal rendered its decision in this case, the Third District Court of Appeal handed down its decision in State Board of Trustees of the Internal Improvement Trust Fund v. Key West Conch Harbor, Inc., 683 So. 2d 144 (Fla. 3d DCA 1996), rev. denied, 695 So. 2d 698 (Fla. 1997). Over a vigorous dissent, the third district held that dredging performed in connection with a dock could constitute a permanent improvement under the Butler Act, provided that the lands under open waters remained “subject to a navigational easement for the

benefit of the public." Key West, 683 So. 2d at 146.

The Fourth District Court of Appeal initially followed Key West Conch Harbor. City of West Palm Beach v. Board of Trustees of the Internal Imp. Trust Fund, 22 Fla. L. Weekly D2028 (4th DCA August 27, 1997). However, after the Trustees moved for rehearing[2] the court issued a new opinion holding that the public trust doctrine requires the Butler Act to be strictly construed, strict construction shows "permanently improved" to refer to significant structures, and the riparian owner gained title only to the lands beneath significant structures, not to the submerged lands around them. City of West Palm Beach v. Board of Trustees, 714 So. 2d 1060 (Fla. 4th DCA 1998).

[2] The City's Initial Brief incorrectly states that the motion was filed by the Attorney General on behalf of the State. (Init. Brief at 8.) In this instance the Attorney General signed the motion as additional counsel for the Trustees.

SUMMARY OF ARGUMENT

Because of the common law and constitutional public trust doctrine, the Riparian Act of 1921 ("Butler Act") must be construed to grant no greater amount of sovereign submerged lands than the Act's express language requires. The Act should not be construed so broadly as to grant the riparian owner fee title to an entire harbor basin, of which the vast majority remains submerged under navigable waters. The Act should be construed narrowly, retaining public ownership of dredged areas unoccupied by fill or wharves. Because the State retains ownership of unoccupied lands under navigable waters, the Act's repeal precludes expansion of the docks or additional filling without obtaining consent from the Board of Trustees of the Internal Improvement Trust Fund.

Narrowly construed, the language of the Butler Act restricts the general meaning of "permanently improved" to the specific context of substantial structures. The Act expressly retains the public's rights over open waters. Fee title, with its attendant right to exclude the public, was granted only as to land which had been actually and permanently bulkheaded, filled in, or wharfed out.

The opinion of the Fourth District Court of Appeal is consistent with Supreme Court precedents upholding the public trust doctrine. The fourth district's opinion is also consistent with numerous cases interpreting the riparian acts of 1856 and 1921 as granting riparian owners the right to fill in or wharf

out from the shore. No Supreme Court case has treated the repealed riparian acts as conveying fee title to lands under navigable waters based on a riparian owner making the waters more navigable by dredging the bottom lands.

ARGUMENT

I. BECAUSE OF THE PUBLIC TRUST DOCTRINE, A GRANT OF SOVEREIGNTY LANDS MUST BE BY CLEAR AND EXPRESS WORDS, WITH NO MORE GRANTED THAN IS CLEARLY EXPRESSED.

The issue before the Court is whether the Riparian Act of 1921 (the Butler Act) conveyed fee title to an entire dredged harbor basin. It is undisputed that more than ninety-five percent of the lands claimed by Petitioner the City of West Palm Beach (the City) remain submerged under navigable waters, unoccupied by any structure. (R. at 109, Affidavit of Florida registered land surveyor.)

The issue is not whether the City can use the waters around its docks. It has the same right to use navigable waters as any other member of the public. See White v. Hughes, 139 Fla. 54, 59, 190 So. 446, 449 (Fla. 1939) (explaining that the State "holds the fore-shore in trust for its people for the purposes of navigation, fishing and bathing"). Additionally, if the City compensates the public for the privilege or obtains partial waiver of payment as a governmental institution, it may continue to allow its lessee to operate a commercial marina which rents private boat slips. Fla. Admin. Code R. 18-21.001(5), R. 18-21.011(b)10. The issue is not use, but rather whether the City owns the submerged lands around its docks. City of West Palm Beach v. Board of Trustees of Internal Improvement Trust Fund, 714 So. 2d 1060, 1061 (Fla. 4th DCA 1998).

The question before the Court is of constitutional

importance. Under the Florida Constitution, title to lands under navigable waters "is held by the State, by virtue of its sovereignty, in trust for all the people." Art. X, § 11, Fla. Const. This constitutional mandate embodies the common law public trust doctrine, a principle as vital as it is venerable. Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339, 344 (Fla. 1986) (explaining that Article X, Section 11, "is largely a constitutional codification of the public trust doctrine contained in our case law"), cert. denied, 479 U.S. 1065, 1075 S. Ct. 950, 93 L. Ed. 2d 999 (1987).

In Coastal, this Court held that lands under navigable waters "differ from other state lands," refusing to construe the Marketable Record Title Act to grant sovereign lands without clear language in the Act. 492 So. 2d at 342, 344. Sovereign lands “cannot be conveyed without clear intent and authority, and conveyances, where authorized and intended, must retain public use of the waters." Id. at 343. The legislature will not be presumed "to casually dispose of irreplaceable public assets." Id. at 344. In fact, the Court questioned whether such a divestment would be constitutional. Id.

The authority to dispose of sovereignty lands has been "rigidly circumscribed by court decisions." Coastal Petroleum, 492 So. 2d at 342. At common law lands under navigable waters have long been subject to a public trust, held by the state "for the use of all the people." State v. Gerbing, 56 Fla. 603, 609, 47 So. 353, 355 (1908); State v. Black River Phosphate Co., 32

Fla. 82, 98, 13 So. 640, 645 (1893). The people of Florida hold "the absolute right to all their navigable waters and the soils under them for their own common use . . . ." Black River, 32 Fla. at 93, 13 So. at 644 (citing Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 410, 10 L. Ed. 997 (1842)). Public policy forbids "indiscriminate giveaways" of sovereign lands. Bryant v. Lovett, 201 So. d 720, 724 (Fla. 1967).

Because of the public trust doctrine, the riparian acts must be narrowly construed. Trustees of Int. Improvement Fund v. Claughton, 86 So. 2d 775, 786 (Fla. 1956) (holding that the grant made by the Butler Act "should not be extended beyond its terms"). The legislature "must be held to have acted with a due regard for the preservation of" navigable waters and the lands beneath them. Black River, 32 Fla. at 106, 13 So. at 648. The general rule of strict construction applicable to all government grants applies "a fortiori" to grants of lands held in trust for the public. Id. at 107, 13 So. at 645. Because of the "special reasons" to apply strict construction to grants of lands held in public trust, "no further encroachment upon the rights of the public . . . can be held to have been intended by the government, than the words of the grant . . . expressly make or necessarily imply." Sullivan v. Richardson, 33 Fla. 1, 118, 121, 14 So. 692, 709, 710 (1894), aff'd, 169 U.S. 128, 18 S. Ct. 268, 42 L. Ed. 687 (1898); Black River, 32 Fla. at 113, 13 So. at 650.

The State has "presumptive title" to sovereign lands. Williams v. Guthrie, 102 Fla. 1047, 1055-56, 137 So. 682, 686

(1931) (holding a dock an insufficient "improvement" under the Butler Act to "negative the presumptive title of the state"). Courts will not presume "that anything was intended to pass that is not denoted by clear and special words." Black River, 32 Fla. at 107, 13 So. at 648. In any grant of sovereignty lands, only those lands are conveyed which the words of the grant clearly intend. Coastal, 492 So. 2d at 343; see also City of Berkeley v. Superior Court, 606 P. 2d 362, 369 (Cal.) (stating that if a statute purporting to "abandon the public trust" can reasonably be construed to "retain the public's interest in tidelands, the court must give the statute such an interpretation"), cert. denied, 449 U.S. 840, 101 S. Ct. 119, 66 L. Ed. 2d 48 (1980).

Although the Butler Act has been held valid because it was enacted for a public purpose, State v. City of Tampa, 88 Fla. 196, 210, 102 So. 336, 340 (Fla. 1924), the Act's terms must not be read so expansively as to give away lands still submerged, defeating the public trust as public purposes change. See Gerbing, 56 Fla. at 609, 47 So. at 355 (holding that the Trustees "cannot abdicate general control" over sovereign lands "since such abdication would be inconsistent with the implied legal duty of the states to preserve and control such lands and the waters thereon and the use of them for the public good").

The purposes of the public trust evolve with changing times, from concerns with navigation to concerns with conservation. National Audubon Soc'y v. Superior Court, 658 P. 2d 709, 719 (Cal.), cert. denied, 464 U.S. 977, 104 S. Ct. 413, 78 L. Ed. 2d

351 (1983). Federal legislation such as the Coastal Zone Management Act encourages the states to use their sovereign authority over navigable waters to protect the public interest in the environment. 16 U.S.C. § 1451(i).

An expansive reading of the Butler Act to include lands still submerged could expose sovereign lands to expanded docks, additional dredging, or even filling, without the protections of the constitutional public trust doctrine. Both the fourth district and the trial court recognized this danger. If the City gained title to the dredged lands surrounding its piers, plus an area extending 200 feet in front of the piers toward the channel, plus a 200-foot wide band extending all the way to the channel, it would have "a form of ownership which could give rise to expansion of the existing marina or even to the filling in of the submerged lands for more intensive development." West Palm Beach, 714 So. 2d at 1061. As conceded by Petitioner's counsel, under such an interpretation upland owners, subject only to permit requirements, could continue to fill in the dredged land long after repeal of the Act:

> THE COURT: Does that mean you can come along and do the filling in later after you do the dredging originally?
>
> MR. DONEY: This case isn't about filling. I mean, I understand; maybe your thinking is that is the next step. Now, it is true --
>
> THE COURT: Well, if I rule the way you want me to rule, that could be the next step; couldn't it? I understand permits might be a real problem.
>
> MR. DONEY: Yes. In theory it could be.

THE COURT: In theory that's what you could do.

MR. DONEY: I don't know if anyone has intended to do that. Who knows?

THE COURT: You have that kind of ownership of the land?

MR. DONEY: Correct. Correct.

(Tr. at 31.)

Petitioner rightly notes that the 1957 repeal of the Butler Act marked a legislative decision, in light of changing circumstances, to change the former policy favoring coastal development. (Init. Brief at 18.) Yet under Petitioner's interpretation of the Butler Act the legislature would have given away in 1921 its discretion to change its policy with regard to lands still under navigable waters, not occupied by any structure.

The Florida Legislature should not be held to have given away "the discretion of its successors in respect to matters the government of which, from the very nature of things, must vary with varying circumstances." Black River, 32 Fla. at 101, 13 So. at 646 (quoting Illinois Central R. Co. v. Illinois, 146 U.S. 387, 460, 13 S. Ct. 110, 36 L. Ed. 1018 (1892)). The public trust requires continuous supervision and control over sovereign lands. National Audubon, 658 P. 2d at 727; see also State v. Central Vermont Ry., Inc., 571 A. 2d 1128, 1133 n. 4 (Vt. 1989) (stating that, under the railway's broad interpretation of "the wharfing statutes," the legislature "would have delegated, beyond the power of all subsequent legislatures, control of over a mile

of submerged lands"), cert. denied, 495 U.S. 931, 110 S. Ct. 2171, 109 L. Ed. 2d 501 (1990). There is a great difference between giving riparian owners limited parcels to serve as foundations for wharves versus giving away a whole harbor basin. See Black River, 32 Fla. at 98-99, 13 So. at 645.

The dissent in Key West Conch Harbor stressed the violation of the public trust inherent in an expansive reading of the Butler Act:

> This Great Land Giveaway threatens our coasts. In turn, it threatens us. Most importantly, it threatens successive generations of Floridians. Ironically, what was once intended to bolster our livelihood and bring prosperity to our shores, now robs us of our treasures.

State Board of Trustees of the Internal Improvement Trust Fund v. Key West Conch Harbor, Inc., 683 So. 2d 144, 148 (Fla. 3d DCA 1996) (Gersten, J., dissenting) rev. denied, 695 So. 2d 698 (Fla. 1997).

The Riparian Act of 1921 need not and should not be so broadly construed. There is no need to reach the issue whether, in light of Coastal Petroleum, 492 So. 2d at 344, such an expansive grant of sovereign lands would be valid if intended. To the contrary, as shown below, such an expansive interpretation does violence to the express language of the Act.

II. THE RIPARIAN ACT OF 1921 CONVEYED FEE TITLE ONLY TO LAND WHICH HAD BEEN BULKHEADED, FILLED IN, OR WHARFED OUT, NOT TO LANDS UNDER OPEN WATERS.

In context, the Butler Act's general terms "permanently

improved" refer back to the specific terms "build wharves" and "erect warehouses, dwellings, or other buildings." Ch. 8537, § 1, Laws of Fla. (1921). The riparian acts of 1856 and 1921 allowed riparian owners to develop parcels of submerged lands for the benefit of commerce by wharfing them out from the shore or bulkheading and filling them in toward the shore. Ch. 791, Acts of 1856; Ch. 8537, § 1, Laws of Fla. (1921).[3] However, the Act of 1921 made explicit the proviso read into the Act of 1856 by this Court: no title was conveyed until the submerged lands were actually bulkheaded or filled or "permanently improved." Ch. 8537, § 1, Laws of Fla. (1921); Black River, 32 Fla. at 108-09, 13 So. at 648-49 (holding that the act's sweeping "divestment" language was limited by the act's specific language concerning construction of wharves or buildings).

In pertinent part, the Butler Act reads as follows:

> Section 1. Whereas, It is for the benefit of the State of Florida that water front property be improved and developed; and
>
> Whereas, the State being the proprietor of all submerged lands and water privileges within its boundaries, which prevents the riparian owners from improving their water lots; therefore
>
> The State of Florida, for the consideration above mentioned, subject to any inalienable trust under which the State holds said lands, divests itself of all right, title and interest to all lands covered by water lying in front of any tract of land owned by the United

[3] The 1921 act was passed primarily to apply the 1856 act to owners of uplands extending to the high water mark rather than merely to owners of uplands extending to the low water mark. Pembroke v. Peninsula Terminal Co., 108 Fla. 46, 69, 146 So. 249, 256 (1933). With a few modifications, the Butler Act essentially reenacted the act of 1856. Id.

> States or by any person, natural or artificial, or by any municipality, county or governmental corporation under the laws of Florida, lying upon any navigable stream or bay of the sea or harbor, as far as to the edge of the channel, and hereby vests the full title to the same, subject to said trust in and to the riparian proprietors, giving them the full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to affect the purposes described, and to fill up from the shore, bank or beach as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce, and upon lands so filled in to erect warehouses, dwellings or other buildings and also the right to prevent encroachments of any other person upon all such submerged land in the direction of their lines continued to the channel by bill in chancery or at law, and to have and maintain action of trespass in any court of competent jurisdiction in the State, for any interference with such property, also confirming to the riparian proprietors all improvements which may have heretofore been made upon submerged lands.
>
> Provided, that the grant herein made shall apply to and affect only those submerged lands which have been, or may be hereafter, actually bulk-headed or filled in or permanently improved continuously from high water mark in the direction of the channel, or as near in the direction of the channel as practicable to equitably distribute the submerged lands, and shall no wise affect such submerged lands until actually filled in or permanently improved.
>
> . . . . . .
>
> Sec. 8. Nothing in this Act contained shall be construed to prohibit any person from boating, bathing or fishing in water covering the submerged lands of this State or from exercising any of the privileges heretofore allowed by law as to such submerged land and water covering the same, until such submerged lands shall be filled in or improved by the riparian owner as herein authorized.

Ch. 8537, §§. 1, 8, Laws of Fla. (1921).

The above language is virtually identical to that in the Act of 1856, with the additions of section eight, the concluding paragraph of section one, and language in the third paragraph of

section one expressly making the grant subject to the public trust. Ch. 791, Acts of 1856; Ch. 8537, § 1, Laws of Fla. (1921).

In Black River, this Court construed the 1856 Act as giving upland owners exclusive rights only to those parcels of submerged lands which had actually been filled in or which served as foundations for substantial structures. 32 Fla. at 108-09, 13 So. at 648-49. Stressing the enacting clause "giving the full right and privilege to build wharves," 32 Fla. at 109, 13 So. at 649, the Court refused to extend the benefits of the Act to upland owners who had not made "improvements of the character indicated." Id. at 111, 127, 13 So. at 649, 654 (rejecting the ownership claim of a riparian owner based on mining operations performed on submerged lands).

Narrowly construed in accordance with the public trust doctrine, the general terms "permanently improved" are limited by the specific terms "build wharves" and "erect warehouses, dwellings or other buildings." Ch. 8537, § 1, Laws of Fla. (1921); see also Central Vt. Ry., 571 A. 2d at 1133 (stating that general words in a statute will not impair public rights unless the language makes such intent clear). It is well settled that general terms following specific terms are construed to apply to things of the same type as the specific terms. Dunham v. State, 140 Fla. 754, 758, 192 So. 324, 326 (1939) (citing Ex parte Amos, 93 Fla. 5, 15, 112 So. 289, 293 (1927)). For example, this Court has limited the term "improvements" in a

mechanics lien statute to "improvements of like character" to those specifically mentioned in the statute. Goldsmith v. Orange Belt Securities Co., 115 Fla. 683, 688-89, 156 So. 3, 5-6 (1934) (construing "improvements" as structures and refusing to extend statutory coverage to persons who merely cleared or cultivated the land).

In the context of the Butler Act, "permanent improvements" are limited to substantial structures.[4] Upland owners were specifically allowed "to build wharves" over navigable waters, "to fill up" portions of the waters, "and upon lands so filled in to erect warehouses, dwellings or other buildings." Ch. 8537, § 1, Laws of Fla. (1921). As noted by the court below, it is anomalous to characterize "submerged, dredged lands as being a permanent improvement."[5] West Palm Beach, 714 So. 2d at 1065. Dredging the bottom lands does not create a structure, by its nature is not "permanent," and only by straining language can be called "continuous" with Petitioner's docks.

The Trustees have conceded that the Butler Act conveyed to Petitioner the four docks, which were "actually . . . permanently improved continuously from high water mark in the direction of

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[4] Petitioner's citations to an encyclopedia, a dictionary, and a construction lien law for other meanings of "improvement," (Init. Brief at 32-33), are outweighed by the limiting language of the Butler Act itself and by the public trust doctrine.

[5] Discussing the lands dredged "about every six months" in Jacksonville Shipyards, Inc. v. Department of Natural Resources, 466 So. 2d 389, 390 n. 3 (Fla. 1st DCA 1985), the court below commented that "the shifting waters and currents made the condition of [dredged] submerged lands anything but permanent." West Palm Beach, 714 So. 2d at 1065.

the channel." See Ch. 8537, § 1, Laws of Fla. (1921). However, the Butler Act did not convey to Petitioner the submerged lands of an entire harbor basin.

Moreover, the Butler Act explicitly retained the public's rights to submerged lands as long as they remained submerged:

> Sec. 8. Nothing in this Act contained shall be construed to prohibit any person from boating, bathing or fishing in water covering the submerged lands of this State or from exercising any of the privileges heretofore allowed by law as to such submerged land and water covering the same, until such submerged lands shall be filled in or improved by the riparian owner as herein authorized.

Ch. 8537, § 8, Laws of Fla. (1921).

The most reasonable interpretation of this section is that the people retained their traditional common law rights in the submerged lands except for those portions which the riparian owner actually filled in or wharfed out, "improved . . . as herein authorized." Once the upland owner had "filled in or improved" the submerged lands as authorized, the owner could exclude the public and maintain actions of trespass against persons who encroached on their lands. Id., §§ 1, 8; see also Board of Trustees of Intern. Imp. Trust Fund v. Bankers Life & Cas. Co., 331 So. 2d 381, 383 (Fla. 1st DCA) (observing that the Butler Act protected “the public right of boating, bathing and fishing until filling actually took place”), cert. denied, 341 So. 2d 290 (Fla. 1976). This interpretation construes all parts of the statute in harmony with one another. See Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992) ("It is axiomatic that all parts of a statute must be

read together in order to achieve a consistent whole").

In contrast, Petitioner's interpretation would give the riparian owner the right to exclude the public from swimming or boating in waters still open, based on their having been made more navigable by dredging. This interpretation is unreasonable and violates the public trust. See Coastal Petroleum, 492 So. 2d at 343 (holding that conveyances of sovereign lands "must retain public use of the waters").

Repeal of the Butler Act withdrew any right to convert sovereign lands into private ownership by occupying them with fill or wharves. The only way for the City to expand its docks now is with the consent of the Trustees. See §§ 253.03, 253.04, Fla. Stat. (1997) (vesting the Trustees with title to sovereign lands and responsibility for appropriate management of sovereign lands in light of the public trust).

III. NO SUPREME COURT CASE TREATS DREDGED LANDS AS "PERMANENTLY IMPROVED" SO AS TO TRANSFER TITLE UNDER THE RIPARIAN ACTS.

The fourth district's interpretation of Butler Act "improvements" as significant structures is consistent with Supreme Court precedent. Although not specifically addressing the question of dredging, this Court has consistently construed improvements under the riparian acts as substantial structures, either wharves or buildings erected upon fill. Black River, 32 Fla. at 110, 13 So. at 649 (explaining that the state, being unprepared "to undertake the work of building such wharves or

filling in the water, . . . determined to encourage the riparian owner to do what the state alone could do of itself, or authorize another to do"); Panama Ice & Fish Co. v. Atlanta & St. A.B. Ry. Co., 71 Fla. 419, 422, 71 So. 608, 609 (1916) (stating that riparian owners acquire no vested rights so long as the submerged lands "remain unimproved by the construction of wharves, or unreclaimed by filling in from the shore and converting the water into land"); Brickell v. Trammell, 77 Fla. 544, 570, 82 So. 221, 230 (1919) (viewing the 1856 act as conveying the right "to wharf out or to fill in to the edge of the channel"); Deering v. Martin, 95 Fla. 224, 257, 116 So. 54, 65-66 (1928) (Brown, J., concurring) (viewing the 1921 act as conveying the right "to wharf out or fill up from the shore . . . and upon land so filled in to erect improvements consisting of buildings, warehouses, etc.").

Submerged lands retained "their original character and remain[ed] public" so long as they were "left open, unoccupied by a wharf, dock, or other enclosure, so long as the tide ebbs and flows over them . . . ." Black River, 32 Fla. at 121, 13 So. at 652 (quoting a Massachusetts case). Until the water was filled in ("made land"), the only improvements contemplated by the act were wharves. Id. at 115, 13 So. at 650; see also Frank Edward Maloney et al., Water Law and Administration, the Florida Experience 357, 360 (1968) (stating that the 1856 act "granted to riparian owners the right to build wharves and docks out into the water and to fill up from the shore to the channel" and the 1921

act "vested rights in riparian proprietors to bulkhead, fill in, and build wharves").

This Court has held even a dock too insubstantial to be a "permanent improvement" under the Butler Act. Williams, 102 Fla. at 1055, 137 So. at 686 ("The dock for which recovery was sought was not essentially such a permanent improvement of the character required by the Riparian Rights Act as to vest title in the riparian proprietor").

The only Supreme Court case alleged by Petitioner to support its position is Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957). (Init. Brief at 25.) However, in Hayes dredging appears solely as a component of filling: "By dredging and filling they built a subdivision," constructing "dredged-in" peninsulas extending toward the channel; appellees propose "to dredge and fill" newly acquired submerged land; appellants' lot is "located on dredged-in fill." Hayes, 91 So. 2d at 798, 801. Nothing in Hayes suggests that title was acquired to dredged areas under the Butler Act.

Nor has this Court treated dredging as conveying title when it was done for navigational purposes. In upholding a riparian owner's title to lands bulkheaded and filled under the Butler Act, the Court mentions that the riparian owner also improved navigation by dredging a channel and a turning basin. Holland v. Pierce Financing & Constr. Co., 157 Fla. 649, 652, 27 So. 2d 76, 78 (1946). However the Court does not suggest that the riparian owner thereby acquired ownership of the channel and turning

basin, only of the lands "bulkheaded and filled in toward the channel." Id. at 658, 27 So. at 81.

As noted by the fourth district, this Court has consistently required “significant permanent improvements,” usually upon fill, for title to vest under the Butler Act.[6] West Palm Beach, 714 So. 2d at 1065. From Black River through Coastal Petroleum, this Court has narrowly construed conveyances of sovereign lands in light of the public trust doctrine.

However, lower courts in the past two decades have been reading the long-repealed Butler Act with increasing expansiveness, with decreasing concern for the public trust. This erosion of the public trust began with Jacksonville Shipyards, Inc. v. Department of Nat. Res., 466 So. 2d 389 (Fla. 1st DCA 1985), the authority primarily relied upon by Petitioner. The question before the Jacksonville court was whether filling was required for a riparian owner to gain title under the Butler Act. Jacksonville Shipyards, 466 So. 2d at 391 (invalidating an administrative rule which required structures to be built on fill in order to constitute a "permanent improvement" under the Butler Act). As noted by both the third and fourth district courts of

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[6] The Court's view also reflects contemporaneous agency practice. See Green v. Stuckey’s, 99 So. 2d 867, 868 (Fla. 1957) (stating that “the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight”). While the Butler Act was in force and for more than a decade after its repeal, the Trustees freely granted permission for dredging of sovereign lands. (R. at 179.) However, in no instance did the Trustees view dredging as an improvement conveying title under the Butler Act. (R. at 180.)

appeal, Jacksonville Shipyards did not specifically address the question whether dredging itself was a "permanent improvement" under the Butler Act. State Board of Trustees of the Internal Improvement Trust Fund v. Key West Conch Harbor, Inc., 683 So. 2d 144, 146 (Fla. 3d DCA 1996), rev. denied, 695 So. 2d 698 (Fla. 1997); West Palm Beach, 714 So. 2d at 1065; see also City of Miami Beach v. Traina, 73 So. 2d 860, 861 (holding that a court decides only those questions brought to its attention, even if the question is implied by the facts). Nevertheless, dredging was included along with docks and piers in the long list of "improvements" mentioned by the Jacksonville court. Jacksonville Shipyards, 466 So. 2d at 390 n. 3.

The broad reading of "permanent improvement" by the Jacksonville court was followed by the fifth district's characterization of a ramshackle family dock as a "permanent improvement" under the Butler Act. Department of Natural Resources v. Industrial Plastics Technology, Inc., 603 So. 2d 1303, 1304, 1306 (Fla. 5th DCA 1992), rev. denied, 617 So. 2d 318 (Fla. 1993). Next, the third district held that dredging around a dock "and mooring areas" constituted a "permanent improvement" under the Butler Act. Key West, 683 So. 2d at 146. And finally, the fourth district's initial decision in this case read the Butler Act to convey an entire yacht basin, even though the lands claimed remained almost entirely under navigable waters. City of West Palm Beach v. Board of Trustees, 22 Fla. L. Weekly D2028 (Fla. 4th DCA August 27, 1997), opinion withdrawn and superseded

on rehearing by West Palm Beach, 714 So. 2d 1060.

On rehearing the fourth district returned to the direction laid out by this Court in Black River, Williams, Coastal, and numerous other cases:

> Application of the rule of strict construction to the Butler Act leads to the conclusion that to obtain title to submerged lands, a riparian owner needed to either build wharves . . . or, at the very least, erect permanent structures on the underwater property. The notion that the dredging of submerged lands in conjunction with the building of a permanent improvement could expand the Act's reach to convey title to land beyond the improvement itself, is antithetical to the strict construction of the statute in favor of the state.

West Palm Beach, 714 So. 2d at 1063. The Butler Act

> granted owners exclusive rights only over those parcels of submerged land underneath the foundations for wharves or "permanent" structures or which were filled in and used for the construction of "warehouses, dwellings, or other buildings." Only such land is "actually . . . permanently improved" within the meaning of the statute.

Id. at 1064. "If the legislature had intended to grant title to land that was only dredged, it would have so stated, as it did in the case of land that was filled in or bulkheaded." Id.

It is the City, together with its corporate lessee, who would receive a "substantial financial benefit" from an expansive reading of the Butler Act. (See Initial Brief at 42.) As this Court has stated, lands under navigable waters "constitute tremendously valuable assets." Hayes, 91 So. 2d at 800. These assets are held in trust by the Governor and Cabinet, sitting as Trustees of the Internal Improvement Trust Fund. Id.; § 253.03, Fla. Stat. (1997). Although Trustee rules allow the City to

apply for consent to expand its docks and for complete or partial waiver of lease fees as a governmental organization, Fla. Admin. Code R. 18-21.011(b)10, the Butler Act gave the City no fee title to lands still under navigable waters. Ownership of lands under navigable waters is vested in the Trustees for the benefit of all the people, not just for the benefit of the riparian owner and its private lessee. Art. X, § 11, Fla. Const.

It is respectfully submitted that this Court should affirm the court below and reject the "loose 'reasonableness' standard" of Key West Conch Harbor." See West Palm Beach, 714 So. 2d at 1066 (holding such a loose standard "inappropriate to the issue of whether the state has been divested of title to submerged lands"). It is time to call a halt to the erosion of the public's rights in sovereign lands before any more lands are lost.

CONCLUSION

For all the foregoing reasons, the grant of sovereign lands under the repealed Butler Act should not be expanded beyond lands actually and permanently filled in, bulkheaded, or covered by substantial structures. The holding of the third district in State Bd. of Trustees of Internal Imp. Trust Fund v. Key West Conch Harbor, Inc., 683 So. 2d 144 (Fla. 3d DCA 1996), should be disapproved; and the holding of the court below should be affirmed.

DATED: November 30, 1998.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by

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