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, STATE OF 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

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

References in the brief to Petitioner shall refer to the City of West Palm Beach, Florida. References to Respondents shall include the Board of Trustees of the Internal Improvement Trust Fund and the State of Florida Department of Environmental Protection. References to the Respondents' Answer Brief are designated (State Ans. Brief at ___). References to the Amicus Curiae, Attorney General Robert A. Butterworth, Answer Brief are designated (AG Ans. Brief at ___). References to the Record are designated (R.___). References to the transcript of the hearing on the Cross-Motions for Summary Judgment held on September 14, 1995 are designated (T.___). References to the Appendix are designated (A.___).

This will certify that the size and style of type used in this brief is 12 point Courier New, a font that is not proportionately spaced.

SUMMARY OF ARGUMENT

Changes in the public trust doctrine which occur over time cannot operate to divest title which has previously vested.

The City has no ability, and the record before this Court shows no intention, to fill submerged lands at Palm Harbor Marina. Such ability is under the absolute control of the State and Federal governments.

Both the State and the Attorney General acknowledge that construction of “wharfs” or “wharfing out” over navigable waters constitute a permanent improvement under the Butler Act. The War Department issued the City a permit to build five "timber wharfs." The City’s construction of four wharfs and wharfing out from the new bulkhead line satisfy the title-vesting conditions of the Butler Act.

Indefeasible title to Palm Harbor Marina vested by operation of law pursuant to the provisions of the Butler Act. Notwithstanding the Attorney General’s untimely change in position, a concession by the attorneys for the State does not operate to vest such title.

Confirming the City’s title to Palm Harbor Marina in its entirety will not erode the public trust doctrine, will not endanger sovereignty submerged lands and will not result in a flood of disclaimer applications because of the decision in this case.

ARGUMENT

I. The Public Trust Doctrine is Not Eroded by Confirming the Vesting of Title that Occurred More Than 50 Years Ago

The State suggests that the "purposes of the public trust evolve with changing times from concerns with navigation to concerns about conservation." (State Ans. Brief at 13.) This suggestion may very well be true. It does not, however, have any application to the case at bar. Such a fluid view of the public trust doctrine overlooks the plain language of the Riparian Rights Acts. Both the original act and the Butler Act are title-vesting statutes. Once the conditions for vesting title have been met, the public trust doctrine cannot operate to divest title due to some changing purpose in the public trust.

This Court expressly rejected an effort to weaken the title-vesting provisions of the Butler Act in Holland v. Fort Pierce Financing & Const. Co. (Fla. 1946), where the Court said:

> That appellee bulkheaded and filled in toward the channel of the river is not denied. The proof shows that ample space was left for the purpose of navigation and for the requirements of commerce, and that the paramount authority of the federal government was obtained for the construction of the improvement. The appellee having proceeded in accordance with the requirements of the Riparian Act of 1921, its title to and possession of the land so bulkheaded and filled in became as valid and indefeasible as that of its upland.

This Court again expressly rejected such an effort ten years later in Trustees of the Internal Improvement Trust Fund v. Claughton, 86 So.2d 775 (Fla. 1956), when the Court said:

> Despite the language of the Butler Bill that the grant therein was made 'subject to any inalienable trust under which the state holds all submerged lands and water privileges within its boundaries,' **this Court knows, since everyone knows it, that the Butler Bill has operated to divest the State of its sovereign lands just as effectively as though a grant thereof without such a limitation had been made to a riparian owner.** (Emphasis added.)

The State argues that "[a]n 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 protection of the constitutional public trust doctrine." (State Ans. Brief at 13.) The State further argues that if the City gained the title it seeks, the City 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." Id.

Both arguments by the State are without legal or factual support. Any future dredging, filling or other type of marina expansion is within the complete and absolute control of the State and Federal governments. Without getting the express written approval of other governmental agencies, the City could not do any of those things, nor is there any record indication whatsoever that the City has any desire to do them.

The City's Initial Brief contains extensive cites to the regulations which restrict expansion and fill. A decision by this Court that confirms the City's title to Palm Harbor Marina

in its entirety will not result in the City having the unfettered ability to expand the marina or fill in the submerged lands between the piers.

The State also argues that under the City's interpretation of the Butler Act, the legislature would lose its discretion to change policy regarding lands still under navigable waters. (State Ans. Brief at 14.) Once again, the State confuses the Legislature's discretion to change policy with the title-vesting provisions of the Butler Act. During the 100 years that the Riparian Rights Acts were in effect, the policy of the State of Florida was to benefit commerce by encouraging riparian owners to improve the lands under water lying in front of their upland tract(s) of land. If riparian owners timely complied with the statutes' conditions, title to the lands under water vested. The legislature did not retain discretion to "divest" the riparian owner of title at some time in the future in order to accomplish a different legislative policy.

In 1957, the legislature exercised its discretion to change policy regarding Florida's submerged lands and repealed the Butler Act. That exercise of discretion and the Act's repeal did not affect the City's title to Palm Harbor Marina which vested in 1948. See §253.129, Fla. Stat.

II. The War Department Issued the City a Permit to Build Five Timber Wharfs, Permanent Improvements Expressly Contemplated by the Butler Act

Quoting directly from the Butler Act, the State acknowledges that the Act gives riparian owners the right to "build wharves" into streams or waters of the bay or harbor as far as may be necessary to affect the purpose described. (State Ans. Brief at 16-17.) The State then argues that in the context of the Butler Act, "permanent improvements" are limited to "substantial structures." (State Ans. Brief at 19.)

The State's argument makes no sense. A functional wharf is not limited to the actual "structure." To be functional, it includes the water surrounding the structure so that it can be used for loading and unloading vessels. Significantly, both Riparian Rights Acts provide that the State "divests itself of all right, title and interest to **all lands covered by water lying in front of any tract of land**." If this were not the case, the State's offer to riparian owners to "build wharfs" at their own expense would contain no incentive to do so.

To complete its argument, the State claims that "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. Id. At 20. The State's argument is flawed because the State insists on making "dredging," and dredging alone, the issue in this case.

The City has made it very clear that it seeks title to Palm Harbor Marina, a 26 acre commercial marina project constructed over 50 years ago which includes a bulkhead, fill, piers, finger piers, and channels. The marina could not have been constructed and could not continue to function without the "dredging" of the 26 acre area. The "permanent improvements" on which the City bases its title include all of those substantial structures constructed by the City and the dredging necessary to construct them.

Significantly, the State overlooks the express language used by the War Department's engineer, George Coslow, in describing the nature of the project. Mr. Coslow said:

> The work includes 5 **timber wharfs** with the side finger piers to create berths for small boats and with larger T-heads to accommodate larger boats, all extending lakeward of the established U.S. bulkhead line but on an alignment between U.S. pierhead points 42 and 46. (R.30)

The City built four wharfs over navigable waters. The City "wharfed out" parcels of submerged land from the shore of lands the City owned. Simply put, the City did precisely what the State claims is necessary to vest title under the Butler Act. Accordingly, the City's title to the entire 26 acres of Palm Harbor Marina vested in 1948 when the permanent improvements were complete.

III. A Declaration by this Court that "Permanent Improvements" include Bulkhead, Fill, Timber Wharfs, Finger Piers, Channels and Dredging Essential to Construction of Such Improvements Does Not Violate the Public Trust

Finally, the State argues that no Supreme Court case treats "dredged" lands as permanently improved so as to transfer title under the Riparian Acts. (State Ans. Brief at 22.) Once again, the State misapprehends the request before this Court. The City is not asking the Court to declare that the act of "dredging" 26 acres of submerged lands vested title in the City. The City is very clearly seeking a declaration that the construction of a 26 acre marina which includes a 1380 foot bulkhead, five acres of fill, four timber wharfs with 68 finger piers and two 200 foot channels is a "permanent improvement" under the Butler Act, such that title to the marina vested in the City when the improvement was completed in 1948.

The State claims that erosion of the public trust doctrine began with Jacksonville Shipyards, Inc. v. Department of Nat. Res., 466 So.2d 389 (Fla. 1st DCA 1985). (State Ans. Brief at 25.) The permanent improvements made by the riparian owner were described by the district court as follows:

> Prior to May 29, 1951, appellant made certain structural additions to the adjacent submerged lands now in question, including piers, docks, wharves, dry docks, railroad trestles and dredging. The facts with respect to the improvements actually situated on these submerged lands as of May 29, 1951 are not at issue here. Id. at 391.

The Department of Natural Resources, based on the Board of Trustees' vote, denied the shipyard owner's application for a disclaimer from the State for the 17.3 acres of improvements. Id. Interestingly, the State argued that title vested in the upland owner only if such owner had entirely "filled" the lands under water. Id.

The district court reversed, finding that "filling in" is not a condition precedent under the Butler Act. Id. at 391. The Court noted that the Butler Act provides in pertinent part that:

> The grant herein made shall apply to and affect only those submerged lands which have been, or may be hereafter, actually bulkheaded or filled in or permanently improved. Id. (Emphasis added by the Court)

The court also examined the history of the Act and this Court's description of its purpose in Holland, supra. Id. The court concluded that:

> The plain language of the Butler Act provides for acquisition of title of submerged lands by bulkheading, filling or permanently improving. The DNR rule purporting to require that the upland owner have filled the submerged land in order for the owner to apply for disclaimer confirming title, is in derogation of the statute and therefore invalid. Id. at 393.

The district court was not "eroding" the public trust doctrine. Rather, the court was upholding the express language of the Butler Act which provides for acquisition of title to submerged lands by bulkheading **or** filling in **or** permanently improving.

If this Court considers the nature of the improvement in the Jacksonville case, i.e. a shipyard, the First District court's conclusion makes sense. The Butler Act was an act to benefit commerce. The entire 17.3 acres of shipyard were designed to accomplish the purpose of the act. Those 17 acres were the "lands under water" lying in front of the riparian owner's uplands into which the shipyard owner "built wharves into the streams" as far as was necessary to affect the purpose described.

To be **functional**, the shipyard includes submerged lands that have been filled, submerged lands that are covered by piers and submerged lands situated between the piers and the fill. Title to all those lands was confirmed by the district court. Id. At 393. Under the same analysis, the City's title to the entire 26 acres of Palm Harbor Marina should be confirmed.

IV. Title to Palm Harbor Marina Vested in 1948, not in 1995 by Concession of Counsel for the State

The court below, based on what it understood to be a concession by the State, ruled that the City has title to the "footprint" beneath its piers pursuant to the Butler Act. City of West Palm Beach v. Board of Trustees of Internal Improvement Trust Fund, 714 So.2d 1060 (Fla. 4th DCA 1998). The Attorney General, in his *parens patriae* capacity, claims for the first time in his amicus brief that the City does not even own the "footprint." (AG Ans. Brief at 1.) Moreover, the Attorney General takes the extreme position that the City did nothing

whatsoever in 1946 to vest title to Palm Harbor Marina under the Butler Act other than fill. Id. at 10.

The Attorney General appeared in this matter in the court below in his capacity as attorney for the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida. (A.1; A. 2) The Attorney General had two opportunities to argue on behalf of the Board of Trustees that the City has no Butler Act title and did not do so. The Attorney General may not now, for the first time, take an inconsistent position before this court by claiming that he is acting in a different capacity. See generally Palm Beach Co. v. Palm Beach Estates et al., 148 So. 544 (Fla. 1933).

Assuming, arguendo, that the Attorney General is a proper amicus before this Court, the arguments he makes are without merit. Initially, the Attorney General argues that concessions by counsel for the Trustees cannot serve to convey sovereignty submerged lands. (AG Ans. Brief at 9.) While the State's concession should certainly preclude the State from arguing a contrary position, the City's title does not arise by virtue of concessions by counsel for the Trustees. The City's title to Palm Harbor Marina vested by operation of law fifty years ago by virtue of the permanent improvements the City made pursuant to the plain language of the Butler Act.

V. The Attorney General Correctly Acknowledges that a "Wharfs" are Permanent Improvements under the Butler Act; Title to Palm Harbor Marina Includes the Water Around its Wharfs

The Attorney General also claims that "docks in a municipal yacht basin, where individuals dock their personal pleasure boats, is a far cry from a wharf constructed in aid of commerce." Id. at 13. The Attorney General then asks the question: "in the context of an 1856 grant, are these docks the "wharves" mentioned in the statute?" and answers the question in the negative. Id. at 13-14.

This Court has only to look at the War Department engineer's description of the marina project to determine that the Attorney General's conclusion is just simply mistaken. First, there is nothing in this record that supports the Attorney General's claim that Palm Harbor Marina is a municipal yacht basin solely for docking pleasure boats from Palm Beach. What the engineer wrote in recommending approval of the marina project was:

> The proposed yacht basin **and facilities** will provide much needed berthing space for local boats operating at Palm Beach **and West Palm Beach**, and also for pleasure craft **using the Intracoastal Waterway channel**. The application is recommended for approval. (R. 30)

Second, the War Department's engineer examined the project plans. He wrote his own description of what the City was planning to build. The engineer stated that:

> The work includes 5 **timber wharfs** with the side finger piers to create berths for small boats and with larger T-heads to accommodate larger boats, all extending

> lakeward of the established U.S. bulkhead line but on an alignment between U.S. pierhead points 42 and 46.

The Attorney General relies on a definition for "wharf" contained in an 1857 dictionary authored by Noah Webster. Id. at 14. There, "wharf" is defined as:

> A perpendicular bank or mound of **timber** or stone and earth raised on the shore of a harbor, river, canal & or extending some distance into the water for the convenience of lading and unlading ships and **other vessels**. Id.

The City spent over $440,000 of its taxpayers' money to build four "timber wharfs," and the remainder of Palm Harbor Marina. The Riparian Rights Acts of 1856 and 1921 encouraged riparian owners to spend their own money "to benefit commerce" so that the State would not have to do so. Benefitting commerce included bringing goods **and buyers of goods** to Florida. Palm Harbor Marina, a commercial marina that facilitated berthing of small boats, large boats and pleasure craft, accomplished the purpose expressly advanced by the Riparian Rights Acts.

The Attorney General asks this Court to place a construction on the Butler Act so restrictive that the only means of vesting title are to bulkhead and fill. (AG Ans. Brief at 21.) This unreasonable construction is not supported by the express language of the Butler Act. The Act states that the State of Florida:

> divests itself of all right, title and interest to **all lands covered by water** lying in front of any tract of land ...

> as far as to the edge of the channel ...
>
> 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 purpose described,

Necessarily, building wharves into the streams contemplates that there will be lands covered by water surrounding such wharves. Moreover, the title vesting language is clear. Full title to "all lands covered by water" lying in front of any tract of land will vest when such lands are bulkheaded **or** filled **or** permanently improved. Ch. 8537, §1, Laws of Fla. (1921) Only this reasonable construction of the Butler Act allows Palm Harbor Marina to **function** as a marina.

As a corporate citizen of Florida, the City shares the concerns of the Attorney General and the State that a decision by this Court not encourage a flood of disclaimer applications seeking ownership of what remains of Florida's coastline and other navigable waters. That is why the City is convinced that the opinion it seeks from this Court will not result in the outcome feared by the Attorney General and the State.

This case is not about dredging. The issue in this case is not whether "dredging" constitutes a permanent improvement under the Butler Act. The court below was mistaken when it framed the issue in that fashion in its June, 1998 opinion. The earlier August, 1997 opinion rendered by the court below accurately

stated the issue as follows:

> Rather, the issue really appears to be whether all the activities of the city in constructing a municipal marina or boat basin including four substantial piers in 1947 and 1948, and the dredging of the boat basins in between and surrounding the piers resulted in a **permanent improvement** so that title vested in accordance with the Butler Act. (Emphasis added by the court.)

City of West Palm Beach v. Bd. Of Trustees of the Internal Imp. Trust Fund, 22 FLW D2028(Fla. 4th DCA Aug. 27, 1997). This statement of the issue gives recognition to the City's entire marina project which is what the Butler Act requires.

This Court may render a very narrow opinion in this cause, one that will protect sovereignty submerged lands generally and one that will protect the investment made by the City's taxpayers in 1948, specifically. This Court may expressly opine that dredging alone does not vest title under the Butler Act. Rather, dredging is only one element of a host of improvements necessary for a marina to function. Title vests only when submerged lands have been bulkheaded, filled in or "permanently improved." "Permanently improved" can be limited to the scope of the project described in the War Department (or other appropriate permitting agency) permit for the permanent improvements. In the City's case, title would have vested to the 26 acre marina project in 1948.

The City accepted the State's offer of title to submerged lands on the condition that the City permanently improve such

lands at the City's expense. The City constructed Palm Harbor Marina, a 26 acre permanent improvement, at its taxpayers' expense in 1948. It is fundamentally unfair for the State to renege on its offer more than fifty years later. It is equally unfair to apply today's principles of conservation to the City's efforts and expenditures that occurred more than 50 years ago under a policy to benefit commerce. The City kept its part of the bargain. It does no injustice to the public trust for the State to keep its part of the bargain as well.

CONCLUSION

For the foregoing reasons, together with the reasons stated in the City's Initial Brief, this Court should reverse the Final Judgment entered below and direct the Court to enter Final Summary Judgment in favor of the City thereby quieting fee simple title in and to the subject lands in the City of West Palm Beach. The State should further be ordered to issue a disclaimer to the City in accordance with Section 253.129, Fla. Stat., thereby confirming title in the City of West Palm Beach in and to the subject lands.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by mail to Gary M. Dunkel, Esquire, Lewis, Vegosen & Rosenbach, P.A., 500 Australian Avenue So., 10th Floor, West Palm Beach, FL 33401, Maureen Malvern, Esquire, 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, FL 32399, Robert A. Butterworth, Jr., Esquire, Office of the Attorney General, PL-01 The Capitol, Tallahassee, Florida 32399-1050, and Thomas M. Shuler, Esquire, P.O. Drawer 850, Apalachicola, FL 32329 this _____ day of February, 1999.

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