IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 93,821

**CITY OF WEST PALM BEACH,**

Petitioner,

vs

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

Respondent.

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On Appeal from a Decision of the
Fourth District Court of Appeals

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# BRIEF OF *AMICUS CURIAE*, ATTORNEY GENERAL ROBERT A. BUTTERWORTH, IN SUPPORT OF RESPONDENT

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## CERTIFICATE OF TYPE SIZE

This brief was typed using Times New Roman 14 point font.

## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

The Attorney General appears here pursuant to his long established historical and common law authority to act in a *parens patriae* capacity to secure the health safety and welfare of the people of Florida. The Attorney General is granted wide discretion in determining what matters involve the public interest. *State ex rel Shevin v. Exxon Corp.*, 526 F. 2d 266, 268-69 (5th Cir. 1976). Accordingly, his conclusion that a matter involves the public interest is presumed to be correct. *State ex rel Shevin v. Yarbrough*, 257 So. 2d 891, 895 (Fla. 1972). *See also, Lawyer v. Dept. of Justice*, 117 S.Ct. 2186 (1997). The Attorney General believes that the issue before the court *is* one of great public importance - the conveyance into private hands of lands held in a public trust, recognized by Art., § 11, Fla. Const.[1] This

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[1] Art. X, § 11, Fla. Const., provides:

> Sovereignty lands. The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below high water lines, is held by the State, by virtue of its sovereignty, in trust for all of the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such land may be authorized by law, but only when not contrary to the public interest.

conveyance is based on interpretations of statutes passed in 1856 and 1921, and repealed in 1951 and 1957. Conveyance of some of the state's most valued assets, lands which remain submerged sovereignty lands, based on statutes repealed over 40 years ago is a matter of great importance.

## STATEMENT OF THE CASE AND FACTS

This case is before the court on conflict jurisdiction pursuant to Art. V, § 3(b)(3), Fla. Const., and 9.030((a)(2)(A)(iv), Fla. R. App. P. The facts which give rise to this conflict and the issue raised in this brief by the Attorney General are simple and not in dispute.

Prior to the repeal of the Butler Act in 1957, the City of West Palm Beach constructed the "improvements" which are the subject of this suit. These "improvements" include an area of fill, four large docks with finger docks extending at angles to them, and a dredged area around the docks providing deep water access to the docks and to the intracoastal waterway. The construction of these "improvements" was sanctioned by a permit from the United States as a "municipal yacht basin."

The City applied for a disclaimer pursuant to § 253.129, Fla. Stat., claiming the title to the land had vested under the terms of the Butler Act. A disclaimer had been granted for the filled area in 1969, but the agency denied the disclaimer for the

remaining property and this litigation ensued. On cross motions for summary judgment, the DEP conceded that the Petitioner was entitled to a disclaimer for the land under the "footprint" of the docks. However, the DEP disputed the Petitioners' claim of title to the dredged lands. The trial court agreed that the dredged area was not subject to a disclaimer and the City appealed. The Fourth DCA, on rehearing, agreed with the trial court and found that the dredging of a boat basin and channel to the Intracoastal Waterway was not sufficient to vest title under the Butler Act. The Court recognized a direct conflict with the decision of the Third DCA in *BOT v. Key West Conch Harbor*, 683 So. 2d 144 (Fla. 3rd DCA 1996)(land under marina docks, *and dredged area,* subject to disclaimer).

## SUMMARY OF ARGUMENT

Once this court recognizes the conflict inherent in this case, it can exercise its ancillary jurisdiction to look at the larger question suggested by its facts. That is, this court can and should address the proper scope of the grants in the Riparian Acts of 1856 and 1921 to settle the law and stop the expansion of these grants long after their repeal by decisions of the District courts like *Industrial Plastics* and *Key West Conch Harbor*.

Concessions by counsel for the Trustees cannot serve to convey sovereignty submerged lands. Assuming that the Attorney General's argument is correct, and that mere construction of a dock is insufficient to vest title under the Riparian Acts, then this court should reverse the district court's holding that the Petitioner, City, owns even the land beneath the "footprints" of the docks in the subject marina.

The grant of title to submerged lands by the Riparian Acts of 1856 and 1921 were in derogation of the common law and the public trust doctrine and therefore must be construed strictly in favor of the sovereign. The plain and special words of the grant in the Riparian Acts must govern, and neither docks nor dredged areas are included in those grants.

The grant of title to submerged lands to riparian owners in the 1856 Act to

Benefit Commerce, as interpreted by this court in *State v. Black River Phosphate*, was a grant of title to those riparian owners who built wharves or filled the property in. The Butler Act in 1921 did not change the grant, but added the restriction recognized in *Black River Phosphate*, that the improvement had to be completed for title to pass. The lower courts have erroneously looked to the words "permanent improvement," a *restriction on the grant*, rather than to the grant itself. This error has lead to the erroneous conclusion that any "permanent improvement" would vest title without regard to the actual grant for wharves and filling *in aid of commerce*.

Contemporaneous definitions of a "wharf" would indicate that it was considered much more than a mere dock. The contemporaneous definition of wharf contemplated a bank or mound of timber or stone and earth raised on the shore. A simple dock, even a 200 foot long dock, simply does not comply with the intent of the grant.

This court has several times addressed the improvements necessary for title vesting under the Riparian Acts. Invariably, those improvements have been characterized as filling land. Even in cases where other improvements were made, only title to the filled land has been addressed by this court. This more contemporaneous understanding of the nature of the grant should control over more modern understandings of the words used in these ancient grants. A municipal

yacht basin used to dock the personal craft of the residents of Palm Beach, consisting of docks and dredged areas, is not what either the 1856 or 1921 legislatures had in mind when they approved these grants of sovereignty submerged lands. Construing these grants strictly in favor of the sovereign, this court should protect the integrity of the State's sovereignty submerged lands and reject the Petitioners' attempted expansion of these grants.

This court should affirm the court below on the dredged lands and reverse and remand with respect to the lands under the docks. ***None*** of these lands should have been included in the granting of title by the Riparian Acts f 1856 or 1921.

## ARGUMENT

### THE SUPREME COURT CAN CONSIDER THE SCOPE OF THE GRANTS UNDER THE RIPARIAN ACTS OF 1856 AND 1921

In this brief, the Attorney General admittedly asks this court to look somewhat beyond the holding of the District Court in this case. The District Court specifically addressed the question of whether areas dredged in conjunction with the building of docks would come within the grants of the Riparian Acts of 1856 and 1921. This question, however, suggests a broader issue - what is the proper scope of those grants with respect to lands which remain submerged. This court can and should address these broader issues.

Restricted and clarified by the 1980 amendment to the Constitution (Art. V, Sec. 3(b)(3), Fla. Const.), the Florida Supreme Court has subject-matter jurisdiction over cases which directly and expressly conflict with opinions from another district court or from the Supreme Court. *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). The Supreme Court has the final and inherent authority to decide what is direct and express conflict, as this is within their discretion.

Once the Supreme Court has taken valid jurisdiction, the Court is able, in its discretion, to consider ancillary issues and rule on the merits. *Angrand v. Key*, 657 So.2d 1146 (Fla. 1995); *Savoie v. State*, 422 So.2d 308 (Fla. 1982) (ruling on merits

of motion to suppress rather than certified conflict over waiver issue); *PK Ventures v. Ray*, 690 So.2d 1296 (Fla. 1997) (considering economic loss rule though not raised at trial level). This exercise of judicial power is reasoned to avoid needless delay in administration of justice and piecemeal litigation. Logically, however, the Court will not render an opinion in cases where the ancillary issues have not been argued or briefed before the Court. Instead the Court shall reverse the judgment of the district court and remand there. *North Shore Hospital Inc. v. Barber*, 143 So.2d 849 (Fla. 1962).

The issue of the proper scope of the conveyances under the Riparian Acts is now properly before this court in a case whose facts lend themselves to an analysis of the issue. This court can and should address this question for the benefit of the people of Florida and the integrity of their sovereignty submerged lands.

## CONCESSIONS OF COUNSEL CANNOT SERVE TO CONVEY TITLE TO SOVEREIGNTY SUBMERGED LANDS

In defense of the Plaintiffs' Motion for Summary Judgment, counsel for the Trustees conceded that the current state of the case law from the district courts of appeal required a conclusion that the lands under the docks constructed by the City would be eligible for a disclaimer under § 253.129, Fla. Stat., the savings provisions of the repeals of the Riparian Acts. This concession is unremarkable based on the holdings in *DNR v. Industrial Plastics Technology, Inc.*, 603 So. 2d 1303 (Fla. 5th

DCA 1992)(residential boathouse and dock eligible for disclaimer) and *BOT v. Key West Conch Harbor*, 683 So. 2d 144 (Fla. 3rd DCA 1996)(land under marina docks *and dredged area*, subject to disclaimer).

Assuming, *arguendo*, that those cases are wrongly decided and that construction of docks (especially residential or noncommercial) is not sufficient to vest title under the Riparian Acts, then the concession of the Trustees' counsel cannot serve in this case to transfer the title to the submerged lands. This court, in *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So.2d 339, 342-43 (Fla. 1986), quoting from *Martin v. Busch*, 93 Fla. 535, 573 112 So. 274, 286-87 (1927), held:

> Even after title to sovereignty lands was subsequently assigned to the Trustees, their authority to dispose of the land was rigidly circumscribed by court decisions and was separate and distinct from their authority to dispose of swamp and overflowed lands. We answered the first certified question in the negative when we held in *Martin v. Busch*, 93 Fla. 535, 573 112 So. 274, 286-87 (1927), that:
>
> > ***The State Trustee defendants cannot, by allegation, averment or admission in pleadings or otherwise affect the legal status of or the State's title to sovereignty, swamp and overflowed or other lands held by the Trustees under different statutes for distinct and definite State purposes****....*

Further,

> [***i]f by mistake or otherwise*** sales or conveyances are made by the Trustees of the Internal Improvement Fund of sovereignty lands, such as lands under navigable waters in the State or tide lands, . . . ***such sales and conveyances are ineffectual for lack of authority from the state.***

As argued below, this court should reverse (or refute) the holdings in *Industrial Plastics* and *Key West Conch Harbor* and determine in this case that, despite the concession of the Trustees' counsel, the Petitioner, City, is entitled to a disclaimer only to the lands filled in, and not for the lands under the docks or the dredged areas, which remain sovereignty submerged lands.

## THE CONVEYANCES OF SOVEREIGNTY SUBMERGED LANDS BY THE RIPARIAN ACTS OF 1856 AND 1921 MUST BE STRICTLY CONSTRUED IN FAVOR OF THE STATE

The Riparian Act of 1856 and the Butler Act convey sovereignty submerged lands, held by the state under the public trust doctrine, into private hands. Since these conveyances are in derogation of the public trust doctrine, they must be "strictly construed in favor of the sovereign." *Trustees of Internal Improvement Fund v. Claughton*, 86 So.2d 775, 786 (Fla.1956). This court, in *State v. Black River Phosphate Co*., 32 Fla. 82, 13 So. 640, 648 (1893), stated:

> the rule applicable to all grants by the government, which is that they are to be strictly construed, or be taken most beneficially in favor of the state or public, and against the grantee. [Citations omitted]. It will not be presumed that anything was intended to pass that is not denoted by clear and special words.

*See also, Sullivan v. Richardson*, 33 Fla. 1, 118, 121, 14 So. 692, 709, 710 (1894).

## THE "CLEAR AND SPECIAL" WORDS OF CONVEYANCE IN THE RIPARIAN ACTS OF 1856 AND 1921 DO NOT CONVEY ANY LANDS THAT REMAIN SUBMERGED

In 1856, Florida enacted "An Act to Benefit Commerce," which is commonly known as the Riparian Act of 1856. Section one of the Act provides:

> that the state of Florida for the considerations above mentioned, divest themselves of all right, title, and interest to all lands covered by water lying in front of any tract of land, owned by a citizen of the United States or by the United States, for public purposes, lying upon any navigable stream, or bay of the sea, or harbor, as far as to the edge of the channel, and hereby vest the full title to the same in and unto the riparian proprietors, giving them full right and privilege **to build wharves** into streams or waters of the bay or harbor as far as may be necessary to effect 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 the lands so filled in to erect warehouses, 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 for the purposes within mentioned.

The second, section provides:

> that nothing, in this act contained shall be so construed, as to release the title of the state of Florida, or any of its grantees, to any of the swamp or overflowed lands, within the limits of the same, but the grant, herein contained shall be limited to those persons and body corporate, owning lands actually, **bounded by, and extending to low-water mark,** on such navigable streams bays and harbors. (e.a.)

*State v. Black River Phosphate Co.*, 13 So. 640, 641 (Fla. 1893). Although the statute is drafted in terms of an unqualified grant of title to the upland owner who owns to the low water line, this court in *Black River Phosphate*, applying the public trust doctrine and construing the grant most favorably to the sovereign, held that

> yet it never was the purpose of the act that any beneficial use of the submerged land or bed or the waters distinct from that appertaining to any other member of the public should vest in the riparian owner, or be enjoyed by him, except and until there has been an application of the submerged land to the designated purposes of the statute by making improvements of the character indicated. Until this is done none of the exclusive privileges offered by or flowing from the statute, as incident to such improvements, arise. **The making of these improvements are contingencies upon which the legislature intended that the exclusive rights necessary to the enjoyment of the same should arise**.

*Id*. at 649 (e.a.). In other words, this court required that before title to the submerged lands would pass, the indicated improvements had to be done. The improvements indicated were clearly a reference to the grant of title to build wharves and fill up the lands.

The language of the grant envisions the building of wharves and the filling in of lands in aid of commerce. In this case, title was confirmed for the building of docks for, in the terms of the City's Corps of Engineers permit, a "municipal yacht basin." 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. The same type of development gave rise to the disclaimer in *Key West Conch Harbor*. Even a further cry from the terms of the 1856 grant is the residential dock and boat house, the construction of which vested the owner with title in *Industrial Plastics*. Since there is no dispute about the grant in terms of bulkheaded and filled lands, the question then becomes, what is meant by a wharf in the terms of the grant in the 1856 statute.

In the cases cite above, and including the case at bar, the "improvement" leading to the vesting of title is alleged to be a dock. In the context of an 1856

grant, are these docks the "wharves" mentioned in the statute?[2] The answer is no. Bouvier's Law Dictionary, 1856 edition defines a wharf to be "a space of ground prepared for the reception of merchandise from a ship or vessel, so as to promote the convenient loading and discharge of such vessel." (Appendix A) In *An American Dictionary of the English Language*, by Noah Webster dated 1857 (Appendix B), wharf is defined as:

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

The language of the original grant in 1856 contemplate wharves and filling in of land. In 1921, Florida enacted the "Butler Act", ch. 8357, Laws of Florida 1921, which provided:

> The state of Florida, for the consideration above mentioned, subject to any inalienable trust under which

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[2] Another question raised by these disclaimer requests is what do the Riparian Acts mean by "commerce." Providing individuals space to dock their personal pleasure boats in a municipal yacht basin is far different from providing wharves and warehouses for the prosecution of commerce. Commerce is defined as "The buying and selling of goods, especially on a large scale, as between cities or nations; business; trade." *American Heritage Dictionary*, 1979. Applied as of 1856, it would be even clearer that a marina for personal pleasure boats would not qualify for the vesting of title as it is unlikely that such use would have been considered "in aid of commerce."

> 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 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 in no wise affect such submerged lands until actually filled in or permanently improved.'

(emphasis added) This act amended the original Riparian Act in two pertinent

respects: 1) the grant was extended to owners of riparian land who owned to the high water line (as opposed to the low water line) and, 2) the requirement that the "improvements" actually be made, imposed by this court in *Black River Phosphate*, was incorporated into the Act.

"The purpose of the [Butler A]ct was manifestly to confirm the accepted meaning of the act of 1856. . . . In the nature of the grant and in the resulting title to filled lands the two acts differ in no respect. *Commodores Point Terminal Co. v. Hudnall*, 283 F. 150, 178-79 (S.D. Fla. 1922). The language of the **grant**, the privilege to build wharves and fill property and thereby vest title, was not changed by the 1921 Act. Rather, the additional language requiring that the land be "actually bulk-headed or filled in or permanently improved" was a **restriction** on the original grant.

Courts construing the grant by looking at the restriction have improperly expanded the scope of the grant to include any "permanent improvement" without reference to the fact that said language is not part of the grant, but a ***limitation*** on it. *See, e.g. Jacksonville Shipyards v. DNR*, 466 So. 2d 389, 391 (Fla. 1st DCA 1985); *Key West*, 683 So. 2d at 144; *Industrial Plastics*, 603 So. 2d at 1305-06. The grant remained the same, the restriction refers back to the original grant of the right to build wharves or fill in the property. It is simply incorrect to conclude from the

1921 Act that any "permanent improvement" would vest title to the property. Even after the 1921 Act, only a "permanent improvement" which came within the original grant would vest title - wharves or fill. Docks, and especially dredged areas clearly do not fall within this category.

This court has not addressed the grant of the Riparian Acts of 1856 and 1921 in 40 years. Early on in *Black River Phosphate*, the grant was construed thusly:

> As the holder of such title, he was to have the right and privilege to **build wharves** into the stream or waters of the bay or harbor as far as may be necessary to effect the purpose of landing and storing goods which at any time are to become or be the commerce of such stream or other waters, not obstructing the channel, but leaving full space for the requirements of commerce. He also has the right to **fill up the water** from the shore, bank, or beach as far as he may desire, not obstructing the channel; being thus allowed to extend the shore from the original high-water mark towards the edge of the channel by supplanting the water by earth, converting pro tanto the natural water way into earth; and with the further right and privilege, in the latter case, of erecting warehouses or other buildings 'upon lands so filled in.'

*State v. Black River Phosphate Co.*, 13 So. 640, 649 (Fla. 1893) (e.a.). Later, in *Panama Ice & Fish Co. v. Atlanta & St. A.B. Ry. Co.*, 71 So. 608, 609 (Fla. 1916), this court similarly construed the statute, holding:

> So long as such submerged lands remain unimproved by the construction of **wharves**, or unreclaimed by **filling in**

> from the shore and converting the water into land, the riparian owner, though the legal title is in him, has, in so far as the statute is concerned, no greater right to the beneficial use of such submerged lands and the waters above them than any other citizen, except for the purpose of protecting from invasion the right to improve which the statute gives. (e.a.)

After quoting the terms of the grant, this court held in *State v. City of Tampa*, 102 So. 336, 341 (Fla. 1924):

> The statute is applicable in this case to the owners of the two islands, who may, acting under its provisions and within its scope, **bulkhead the area and fill** in the same within appropriate limits as riparian owners. (e.a.)

So far, this court has always addressed the Riparian Act in terms of filling to vest title.

In *Williams v. Guthrie*, 137 So. 682 (Fla. 1931), this court was faced with a dispute between two private parties regarding rights to possession of submerged lands. Recognizing that the State was not a party, but that it was incumbent upon the court to take notice of the State's rights, this court stated on rehearing that the Butler Act was not overlooked in the original decision and that:

> 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[.]

*Id*. at 686. This is the first clear statement, in all of the cases under the Riparian

Acts, addressing the specific question presented here - is the construction of a dock sufficient to vest title under the Acts? The answer there was a resounding NO. Again, in 1931, this court stated:

> The right to fill in, to utilize, and to protect the submerged land, as authorized, is the qualified title that is vested by the statute in the riparian owner. **Filling in is the proprietary use of the submerged land that is contemplated by the statute in making the qualified grant.**

*Trumbull v. McIntosh*, 138 So. 34, 36 (Fla. 1931) (e.a.)

The next time this court was presented with a case under the Riparian Acts, the petitioner had done significant improvements including:

> That in addition to the purchase price of the uplands, plaintiff and its grantees have expended more than one million dollars in bulkheading, filling, reclaiming and the construction of improvements on said lands. That when plaintiff purchased the said uplands the river had not been dredged to sufficient depth to accommodate sea-going vessels and said uplands were not accessible to deep water and no inlet had been dredged across the river to the Atlantic Ocean and said property had no substantial value until plaintiff dredged a channel across the river, dug a turning basin, dredged slips, constructed piers, and installed spur connections across the filled in lands.

*Holland v. Fort Pierce Financing & Const. Co.*, 27 So.2d 76, 78 (Fla. 1946). In the face of the allegations of these "improvements," the court held:

> The riparian act of 1921 vests in the riparian owner, i.e., the owner of upland extending to high water mark on any navigable stream, bay of the sea or harbor, title to the submerged area from the high water mark in direction of but only to the edge of the channel, but the title thus vested is a qualified one, which will become absolute when and if the upland owner shall **actually bulkhead and fill** in from the shore.

*Id*. at 80 (e.a.). It is clear especially from the *Fort Pierce Financing* case, that the contemporaneous interpretation of the Riparian Acts did **not** include vesting of title through the construction of docks or especially by dredging. If those "improvements" would have vested title, then why did the petitioners in all those cases ignore the possibility of vesting title to those lands? The only logical answer is that at the time no one would have dreamed that the Acts would vest such title. It isn't until later, many years after the Acts were repealed, that riparian landowners began to ask for title to these lands and courts began to force the State to acknowledge such transfers. The obvious contemporaneous understanding of the Acts must guide this court in its interpretation of this ancient grant.

After citing back to *Fort Pierce Financing*, in 1954 this court held:

> From this it follows that unless the upland owner has bulkheaded and filled in the submerged lands in front of his uplands he has acquired no title therein and they may be subject to sale pursuant to Chapter 26776, Acts of 1951, the condition of the grant not having been fulfilled.

*Duval Engineering & Contracting Co. v. Sales*, 77 So.2d 431, 433 (Fla. 1954).

Again, in *Hayes v. Bowman*, 91 So. 2d 795, 800 (Fla. 1957), this court stated:

> By Chapter 8537, Laws of 1921, the so-called Butler Bill (deriving its name from its sponsor Senator J. Turner Butler of Duval County), the right of an upland owner to dredge, bulkhead and fill in front of his land to the edge of the channel was provisionally granted to the owners of lands extending to the high-water mark instead of being limited to ownerships which extended to the low-water mark. The privilege did not apply over public bathing beaches. Section 271.07, Florida Statutes, F.S.A. It should be noted that no title is acquired until such submerged lands are actually filled in or permanently improved. Sections 271.01 and 271.08, Florida Statutes, F.S.A. Before this was done, the State's offer to riparian owners for them to secure title by improving the foreshore could be withdrawn and the provisional rights the reverted to the State. *Duval Engineering & Contracting Co. v. Sales*, Fla.1954, 77 So.2d 431.

The provisions of the **grant** are clear - bulkhead and fill to get title. The **restriction** is that the "permanent improvement" must be accomplished. The words "permanent improvement" clearly refer back to the more limited words of the express grant and cannot be construed to expand it. Finally, the last time this court addressed a claim under the Butler Act was in *Stein v. Brown Properties*, 104 So. 2d 495, 499 (Fla. 1958), where this court denied the applicant title to the property with this statement:

> These parcels have not been and may never be improved

> to the extent that land may be created to which marketable title may vest even were the position of the appellee chosen over that of the State. In other words, adopting the construction most favorable to the owner, or prospective owner, of an interest in the submerged and tide lands the present physical condition of the property is not such that it can be said the title to it is marketable for at best this situation could arise only when it is raised above the surface of the ocean and above high tide.
>
> [2] Although the 'source' of title to submerged land, adjacent to upland affected by the acts, is the statutory right and not the process of raising it above the surface of the water by filling and such improvement is the proprietary use contemplated by the statutes providing for the qualified grant, *Trumbull v. McIntosh,* 103 Fla. 708, 138 So. 34, no title is acquired until such submerged lands are filled in or permanently improved. *Hayes v. Bowman*, Fla., 91 So.2d 795.

There is no mention of any other method of vesting title in this case other than filling the land and "raising it above the surface of the water." If building a dock or dredging a boat basin would have been sufficient to vest title, this court would have mentioned these or other options. It did not.

Never, in any of the cited cases, was there an argument that the building of a dock would vest title to the lands under the "footprint" of the dock in the riparian owner. The district court cases criticized in this brief all greatly expanded the meaning of the grant in the Riparian Acts far beyond their original intent. The use of the words in the original grant requiring the construction of a wharf or a fill

clearly denotes a raising of land above the level of the waters. Simply constructing a dock (even with a boathouse) is insufficient. *Williams, supra.* Certainly, contrary to the holding in *Industrial Plastics*, a residential dock is not a "wharf" constructed in aid of commerce as envisioned in these ancient grants.[3]

Modern meanings of words used in ancient statutes should not be used to change the essential meanings of those laws. This is especially true in this instance where the newly interpreted language would significantly increase the scope of a grant of sovereignty submerged lands, which is a grant that must be strictly construed in favor of the sovereign. Applying this rule of construction, this court should follow the lead of all of its previous cases and construe this grant to vest only when the riparian owner has strictly complied with the terms of the law by building a wharf (as that term was known to our 19th century ancestors) in aid of commerce (not for pleasure craft) or has filled in lands in the direction of the channel and improved said land in aid of commerce. Any other interpretation would be a

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[3] The court in *Industrial Plastics* reached back to an Alaska case from 1964 construing provisions of Alaska statutes and administrative rules which granted a preference for ownership of tidelands to "those who occupied or developed [the tidelands] for municipal business, residential or other beneficial purposes." *State v. A.J. Industries*, 397 P. 2d 280, 282 (Al 1964). Using this Alaska statute, which specifically recognizes residential use, to interpret a Florida law was error. This is especially true since the Florida grants were **in aid of commerce**, a fact which the court completely ignored.

disservice to current and future generations of Floridians who count on the quality of their sovereignty submerged lands for the quality of their lives!

## CONCLUSION

This court should once and for all address the proper scope of the grants of sovereignty submerged lands set forth in the Riparian Acts of 1856 and 1921 and find that the court below was correct in denying petitioners request for a disclaimer for dredged lands. In addition, this court should reach the question of the vesting of title to lands not filled but still submerged under the docks at issue, refute the holdings of the district courts in *Industrial Plastics*, *Key West Conch Harbor*, and *Jacksonville Shipyards*, and find that the mere construction of docks is insufficient to vest title under the Riparian Acts.

Respectfully submitted this ___ day of _____, 1998.

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I HEREBY CERTIFY that a copy of the foregoing was served by U.S. Mail, this _____ day of _____, 1998, on the following:

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