DISSENT BY ACOBA, J., WITH WHOM DUFFY, J., JOINS

I would accept the application for writ of certiorari,[1] filed by Petitioners & Respondents/Plaintiffs-Appellees Maunalua Bay Beach Ohana 28, Maunalua Bay Beach Ohana 29, and Maunalua Bay Beach Ohana 38, all Hawai‘i non-profit corporations, individually and on behalf of all others similarly situated (collectively, Plaintiffs) on April 22, 2010 (Plaintiffs' Application), and the application for writ of certiorari filed by Respondent & Petitioner/Defendant-Appellant State of Hawai‘i (the State) on April 26, 2010 (State's Application).[2]

I.

Briefly stated, the instant case arises out of a class inverse condemnation[3] suit in which Plaintiffs allege that Act 73, effective on May 20, 2003, effected a taking of accreted lands over which they maintain ownership rights and of future

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[1] This court can accept certiorari to clarify a decision of the Intermediate Court of Appeals (ICA). See State v. Mikasa, 111 Hawai‘i 1, 1, 135 P.3d 1044, 1044 (2006) (affirming the ICA, but granting certiorari "to clarify the application by [the ICA] of the law relevant to a defendant's claim"); Nacino v. Koller, 101 Hawai‘i 466, 467, 71 P.3d 417, 418 (2003) (affirming the ICA, but granting certiorari "to clarify the law regarding . . . the statute involved"); Korsak v. Hawai‘i Permanente Med. Group, 94 Hawai‘i 297, 300, 12 P.3d 1238, 1241 (2000) (granting certiorari "to clarify several aspects of the ICA opinion").

[2] On May 13, 2010, the Pacific Legal Foundation filed a memorandum as an amicus curiae in support of Plaintiffs' application. On May 13, 2010, Hawai‘i's Thousand Friends filed a brief as an amicus curiae in opposition to Plaintiffs' application.

[3] "Inverse condemnation" is defined as "[a]n action brought by a property owner for compensation from a governmental entity that has taken the owner's property without bringing formal condemnation proceedings." Black's Law Dictionary 332 (9th ed. 2004).

accretion, and therefore, that they are entitled to just compensation under the Hawai‘i Constitution.

Under common law, oceanfront littoral landowners[4] (littoral owners) generally own accreted land. In 1985, Act 221 was enacted, which amongst other things, added a new section, HRS § 183-45, to Chapter 183 of the Hawai‘i Revised Statutes (HRS). That section prohibited the erection of structures or retaining walls, dredging or grading, or any other use of accreted lands which interferes or may interfere with the future natural course of the beach, including erosion and accretion, and imposed penalties for violations of that section.[5]

Act 221 also added a new section to Chapter 501 of the HRS, which was designated HRS § 501-33, and required that an applicant attempting to register accreted land prove by a preponderance of the evidence that such land was natural and permanent. The new section defined "permanent" as accreted land

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[4] The term "littoral" means "[o]f or relating to the coast or shore of the ocean." Black's Law Dictionary at 1018. The littoral owner is thus, the shoreline owner of property directly abutting the ocean.

[5] That section, HRS § 183-45 provided as follows:

> **§ 183-45 Accreted land.** No structure, retaining wall, dredging, grading, or other use which interferes or may interfere with the future natural course of the beach, including further accretion or erosion, shall be permitted to accreted land as judicially decreed under section 501-33 or 669-1(e). This provision shall not in any way be construed to affect state of county property.
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> Any structure or action in violation of this provision shall be immediately removed or stopped and the property owner shall be fined in accordance with section 183-41(e). Any action taken to impose or collect the penalty provided for in this subsection shall be considered a civil action.

1985 Haw. Sess. Laws Act 221, § 1 at 401 (emphases added).

having been in existence for at least twenty years (20-year requirement). HRS § 501-33 provided as follows:

> **§ 501-33 Accretion to land.** An applicant for registration of land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent. 'Permanent' means that the accretion has been in existence at least twenty years. The accreted portion of the land shall be considered within the conservation district unless designated otherwise by the land use commission under chapter 205. Prohibited uses are governed by section 183-45.

1985 Haw. Sess. Laws Act 221, § 2 at 401-02 (emphasis added). Correlatively, Act 221 revised HRS § 669-1 to require the same burden of proof for persons filing actions to quiet title in accreted lands. HRS § 669-1 was amended to read as follows:

> (e) Action may be brought by any person to quiet title to land by accretion. The person bringing the action shall prove by a preponderance of the evidence that the accretion is natural and permanent. 'Permanent' means that the accretion has been in existence for at least twenty years. The accreted portion of land shall be considered within the conservation district unless designated otherwise by the land use commission under chapter 205. Prohibited uses are governed by section 183-45.

1985 Haw. Sess. Laws Act 221, § 3 at 402 (emphasis added).

In 2003, Act 73 was enacted and amended HRS § 501-33 to provide in pertinent part that "no applicant other than the State shall register land accreted along the ocean, except that a private property owner whose eroded land has been restored by accretion may file an accretion claim to regain title to the restored portion." 2003 Haw. Sess. Laws Act 73, § 4 at 129 (emphasis added). Act 73 also amended HRS § 669-1 to provide in pertinent part that "no action shall be brought by any person other than the State to quiet title to land accreted along the ocean, except that a private property owner whose eroded land has

been restored by accretion may also bring such an action for the restored portion." 2003 Haw. Sess. Laws Act 73, § 5 at 129 (emphasis added). Act 73 also amended the definition of "public lands," HRS § 171-2, to include "accreted lands[6] not otherwise awarded." 2003 Haw. Sess. Laws Act 73, § 2 at 128. Act 73 expressly provided that it would not apply to pending registrations of accreted land or actions to quiet title, but only to registrations and actions filed after the effective date of Act 73. Act 73 provides that

> [a]pplications for the registration of land by accretion and actions to quiet title to land by accretion pending at the time of the effective date of this Act shall be processed under the law existing at the time the applications and actions were filed with the court. Applications for the registration of land by accretion and actions to quiet title to land by accretion filed subsequent to the effective date of this Act shall be processed in accordance with this Act.

2003 Haw. Sess. Laws Act 73, § 6 at 130 (emphases added). As previously indicated, the effective date of Act 73 was May 20, 2003.

II.

On September 12, 2006, the court filed an order approving the parties' stipulation for leave to file an interlocutory appeal as to the court's partial summary judgment order (PSJ order). The State claimed on appeal that Act 221 had the effect of denying all ownership rights over lands which

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[6] Act 73 amended the definition section of chapter 171, HRS § 171-1 to include a definition of "accreted lands" defined as "lands formed by the gradual accumulation of land on a beach or shore along the ocean by the action of natural forces." 2003 Haw. Sess. Laws Act 73, § 1 at 128.

accreted after the effective date of Act 221, but before the effective date of Act 73. The ICA determined however, that "Act 221, on its face, did not affect the common-law rights of a littoral owner to accreted lands[,]" and "did not change the supreme court's precedent that accreted land above the high-water mark belongs to the littoral owner of the land to which the accretion attached." According to the ICA, "oceanfront accretions above the high-water mark belonged to the adjoining property owner[.]" Maunalua Bay Beach Ohana 28 v. State, 122 Hawai'i 34, 54, 55, 222 P.3d 441, 461, 462 (2009). The ICA thus rejected the State's contention that littoral owners had no ownership rights in lands which accreted after the effective date of Act 221.

The ICA also determined that "Act 73 effectuated a permanent taking of littoral owners ownership rights to existing accretions . . . that had not been registered or recorded or made the subject of a then-pending quiet-title lawsuit or petition to register the accretions." Id. at 57, 222 P.3d at 464. According to the ICA, "Act 73 clearly changed the common law by declaring that all accreted lands [(except for the two exceptions)[7]] were now state or public property." Id. at 55, 222 P.3d at 462. Thus, "littoral owners who had such accreted lands when Act 73

[7] As indicated, there are two statutory exceptions listed in Act 73 to the prohibition against registration and quiet title actions by non-government landowners. These exceptions are (1) private property owners whose eroded land had been restored by accretion may bring an action for the restored portion and (2) private property owners who had applications to register accreted lands or actions to quiet title in such lands pending as of the effective date of Act 73. 2003 Haw. Sess. Laws Act 73, §§ 4-6 at 129-30.

became effective on May 20, 2003 had their ownership rights in their accreted lands taken from them by the passage of Act 73." Id.

With respect to future accretion, the ICA determined that "Plaintiffs and the class they represented had no vested property rights to future accretions to their oceanfront land and, therefore, Act 73 did not effect an uncompensated taking of future accretions[.]" Id. at 54, 222 P.3d at 461.

Although the issue of whether class certification was "not certified as final judgment for appeal purpose and [was not before the [ICA,]" the ICA noted that, although "certification of a class for purposes of determining generically whether Act 73 effectuated a taking of littoral owners' future accretions might have been appropriate," it had "questions about whether the class certification was proper for determining whether Act 73 effectuated a taking of those accretions existing as of the effective date of Act 73, since each littoral owner's factual situation regarding existing accretions would be different and not conducive to class adjudication." Id. at 55-56, 222 P.3d at 462-63 (emphases added). The ICA also stated that "[n]otably absent from Plaintiffs' complaint [was] any allegation that Plaintiffs [had] ownership rights in accreted lands that existed at the time Act 73 was enacted." Id. at 56, 222 P.3d at 463.[8]

[8] In their application, Plaintiffs assert that these statements were improper. See infra.

The ICA ultimately vacated "that part of the [court's] PSJ order which concluded that Act 73 took from oceanfront owners their property rights in all future accretion that was not proven to be the restored portion of previously eroded land[,]" and remanded the case to the court "for a determination of whether Plaintiffs [had] accreted lands that existed when Act 73 was enacted and, if so, for a determination of the damages they incurred as a result of the enactment of Act 73." Id. at 57, 222 P.3d at 464.

The State subsequently filed a motion for clarification arguing that the ICA's holding should be clarified to establish that its holding that Act 73 effected a taking, did not include lands which accreted prior to the effective date of Act 221. The State also filed a motion seeking an award of attorneys' fees pursuant to the private attorney general doctrine, and costs pursuant to Hawaii Rules of Appellate Procedure (HRAP) Rule 39. The ICA denied both motions without any explanation. In its application, the State challenges the ICA's denial of its motion for clarification. Additionally, Plaintiffs challenge the ICA's denial of its requests for attorneys' fees and costs.

III.

The State's Application raises the following questions:

> 1. Did the ICA err in failing to clarify its decision to make clear that Act 73 did not effect a Taking with respect to [land which accreted prior to June 4, 1985, the effective date of Act 221], because, inter alia, the State has always taken the position that Act 73 has no effect upon [land which accreted prior to June 4, 1985, the effective date of

> Act 221], and because Act 73 cannot properly be construed to affect [land which accreted prior to the effective date of Act 221]?
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> 2. Did the ICA err in holding that Act 73 effected a Taking with respect to [land which accreted after Act 221 became effective, but before the effective date of Act 73], because, inter alia, it incorrectly construed Act 221's 'permanency' requirement that newly accreted land remain for 20 years as only restricting a littoral owner's ability to register or quiet title to the accretions, but as having no impact on the ownership of the accretions?

(Emphases omitted and emphases added.)

Plaintiffs' Application raises the following questions:

> 1. Did the ICA commit grievous error and disregard controlling decisions from this [c]ourt when it held that the State can permanently fix the seaward boundary of oceanfront properties and deprive littoral property owners of future accretion without paying just compensation?
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> 2. Did the ICA commit grievous error by *sua sponte* criticizing the [c]ircuit [c]ourt's order granting class certification - - which was not appealed - - without notice to the parties and without any valid basis for suggesting that class certification was improper?
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> 3. Did the ICA commit grievous error by flagrantly misstating the record regarding the Petitioners' ownership of accreted land, the exercise of which was never disputed by the State?
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> 4. When [Plaintiffs] proved the State unconstitutionally took accreted beachfront land from property owners throughout the islands, did the ICA grievously err and disregard this [c]ourt's decisions in holding that [Plaintiffs] were not entitled to fees under the private attorney general doctrine?

(Underscored and bolded emphases omitted and emphases added.)

IV.

In connection with the first question presented in the State's Application, the State argues that Act 73 did not effect a taking as to land which accreted before the effective date of Act 221 because (1) Act 73 may not apply retroactively as HRS § 1-3 prohibits retroactive application of laws unless "'otherwise expressed or obviously intended'" and Act 73 cannot

be construed as such, (2) it has always been the State's position that Act 73 did not affect lands which accreted prior to the effective date of Act 221 and "littoral owners with [such land] are not barred by Act 73, even today, from registering or quieting title to such accreted lands[,] and (3) because the State does not assert ownership over those lands, Plaintiffs' takings claim as to those lands "is not ripe."[9]

In connection with the second question presented in the State's Application, the State argues that the 20-year requirement set forth under Act 221 "applied not only to registration and quieting title, but to ownership as well[,]" (emphasis omitted), and consequently, no person could have owned any land which accreted after the effective date of Act 221, but before the effective date of Act 73, because none of those lands could have become permanent (there being less than 18 years between those two acts). The State contends that construing Act 221 as not affecting ownership would be incorrect because (1) landowners would not be able to "register or quiet title to those accretions, [but] they would be able to exercise every meaningful ownership interest in those accretions, including excluding the public from [those lands,]" (2) such construction would undermine the purpose of protecting public access to and enjoyment of Hawai‘i's beaches and Hawai‘i's constitutional

[9] This claim was not raised on appeal to the ICA.

commitment to conserving Hawai‘i’s natural resources for the benefit of the people.

V.

In connection with the first question presented in Plaintiffs’ application, they argue that (1) the cases relied on by the ICA in holding that Plaintiffs had no vested right to future accretions were inapplicable, (2) other courts have held that the government may not “fix” the movable shoreline boundary, (3) in particular, United States v. Milner, 583 F.3d 1174 (9th Cir. 2009), held that the riparian right to future accretion is a vested right.

In connection with the second question presented in their application, Plaintiffs argue that the ICA misstated the record regarding Plaintiffs’ ownership rights because (1) the record indicates that evidence regarding ownership would go to issues on damages as opposed to liability and Plaintiffs advised the court that witnesses would testify on their behalf regarding the amount and value of the property “taken” by Act 73, and (2) conveyance documents indicate that accreted lands were conveyed to Plaintiffs.

In connection with the third question presented in their application, Plaintiffs argue that the ICA gravely erred in criticizing class certification because (1) the propriety of certification was not before the court, (2) trial courts have broad discretion over class certifications and their decision is

normally undisturbed on appeal (citing Life of the Land v. Land Use Comm'n of State of Hawai'i, 63 Haw. 166, 623 P.2d 431), (3) "[i]t 'is well-settled that all unchallenged conclusions by the circuit court are considered binding upon this [c]ourt[,]'" (quoting Alvarez Family Trust v. AOAO Kaanapali Alii, 121 Hawai'i 474, 467, 221 P.3d 452, 489 (2009) (other citation omitted)), and (4) even if class certification was properly before the ICA, class certification is proper in inverse condemnation cases "because the landowners' damages are formulaic and easily calculated[,]" (citation omitted).

In connection with the fourth question presented in their application, Plaintiffs argue that the ICA gravely erred in summarily denying Plaintiffs' request for attorney's fees under HRAP Rule 39(b) and the private attorney general doctrine "or at a minimum[, in] denying [its request] without prejudice so that [Plaintiffs] could renew their request on remand."

VI.

As previously stated, under common law, littoral owners owned all accreted lands and could therefore legally assert ownership in those lands by registering those lands or bringing an action to quiet title thereto. Act 221, which was enacted in 1985, essentially required that any person attempting to register or quiet title in accreted land, prove by a preponderance of the evidence that the accretion was natural and permanent, defined as

accretion having been in existence for at least twenty years. See 1985 Haw. Sess. Laws Act 221, § 3 at 401-02.

It is not entirely clear from the plain language of Act 221, whether the littoral owner maintains ownership over accreted lands during the pendency of the 20-year period. The statute does not expressly state that the littoral owner does not own accreted land, unless and until the owner is able to prove that it has been in existence for at least 20 years, as the State would contend. Rather, the plain language of Act 221 requires an applicant seeking to register or quiet title in accreted lands to "prove by a preponderance of the evidence that the accretion is natural and permanent," i.e., that the accretion has been in existence for at least 20 years. See 1985 Haw. Sess. Laws Act 221, § 3 at 401-02. This would seem to enact an evidentiary standard or burden of proof for legally asserting one's ownership rights in accreted lands. On the other hand, because Act 221 prohibits the littoral owner from legally asserting or recording his or her ownership interest in accreted lands, in the absence of meeting the 20-year requirement, the act may be construed to affect the littoral owners' ownership rights in accreted lands.[10] With regard to its effect on the ownership rights of littoral owners then, Act 221 is ambiguous, and legislative history must be resorted to.

[10] Notably, if the State's interpretation of Act 221 were accepted, and Act 221 did actually divest littoral owners of ownership over accreted lands, unless and until the owner was able to prove that such lands had been in existence for at least 20 years, Act 221 arguably effected a taking.

The legislative history indicates that the 20-year requirement for registering accreted lands or bringing actions to quiet title in such land, was intended as part of an evidentiary standard as opposed to an alteration of the existing common law ownership rights in accreted lands. The legislative history states:

> Your Committee amended the bill to clarify that an applicant for registration of land by accretion or a person brining an action to quiet title to land by accretion shall prove by a preponderance of the evidence that the accretion is natural and permanent. This clarification better emphasizes the standard of proof that must be met in such cases.

S. Stand. Comm. Rep. No 194, in 1985 Senate Journal, at 1292 (emphasis omitted and emphasis added). The legislature expressly stated that it "[did] not intend to affect the existing law in regard to ownership of and other rights relating to land created by accretion," and that "it [was] the intent of [the legislature] that the bill . . . not affect existing law." H. Stand. Comm. Rep. No. 194, in 1985 House Journal, at 1143 (emphases added).

Inasmuch as the legislative history reveals that the legislature did not intend for Act 221 to affect the landowners' right of ownership in accreted lands, littoral owners continued to own those lands notwithstanding the passage of Act 221. Rather, Act 221 "emphasize[d] the standard or proof that must be met[,]" in the event that the landowner attempted to establish ownership by registering or quieting title to accreted land. S. Stand. Comm. Rep. No. 194, in 1985 Senate Journal, at 1292.

This interpretation is further supported by the 20-year requirement which was intended to provide a "clear standard for determining when accreted land becomes permanent and stable." Id. at 1291 (emphasis added). It is apparent that Act 221 did not change ownership, but as pointed out by Plaintiffs, "merely created a system for minimizing boundary disputes that arose from the changeable nature of the high water mark." As further noted by Plaintiffs, Act 221 accomplished this by imposing "a 'waiting period' for recording title to impermanent 'accretion' which comes and goes with the seasons[,]" and thereby "create[d] a period of 'stability' for recording, but it did not affect ownership[,]" which was constantly changing due to the moveable and unpredictable nature of the high water mark.

VII.

As noted by the ICA, prior to Act 73, under Hawai'i common law, the State owned the land from the sea to the highwater mark and all land above the high water mark including accretion, was owned by the littoral owner. In 2003, Act 73 amended Hawai'i law such that only the State could register or quiet title in accreted lands, unless the private property owner's land had been restored by accretion or the owner had an action pending, under the law set forth by Act 221, as of the effective date of Act 73. 2003 Haw. Sess. Laws Act 73, §§ 4-5 at 129-30. Additionally, Act 73 declared all land which had not been previously registered or in which title had not been

quieted, State land. Id. Of course, the "legislature may, by legislative act, change or entirely abrogate common law rules through its exercise of the legislative power under the Hawaii State Constitution, but in the exercise of such power, the legislature may not violate a constitutional provision." Fujioka v. Kam, 55 Haw. 7, 10, 514 P.2d 568, 570 (1973). It is clear then, that the legislature was free to eliminate littoral owners' common law right to accretion, so long as in doing so, the legislature did not violate a constitutional provision. It is well established that the government may "take" private property for public use[11] and that such taking does not violate the constitution if the government pays just compensation. Haw. Const. art I, § 20. Thus, the legislature could abrogate entirely the common law right of littoral owners to accreted lands, subject only to the requirement that the government pay just compensation for those lands.

As reiterated, Act 73 specifically states that "no applicant other than the State shall register [or quiet title in] land accreted along the ocean," subject to the two exceptions discussed supra. 2003 Haw. Sess. Laws Act 73, §§ 4-6 at 129-30 (emphasis added). Furthermore, Act 73 amended the definition of "public lands," HRS § 171-2, to include "accreted lands not otherwise awarded." 2003 Haw. Sess. Laws Act 73, § 2 at 128.

[11] Plaintiffs do not dispute that if Act 73 "takes" private property, it is for a public use.

Thus, inasmuch as Act 73 prohibits any applicant other than the State from registering or quieting title in accreted lands, subject to the two exceptions, Act 73 declares all accreted land that had not yet been registered or in which title had not been quieted, State land.

Hence, Act 73 manifestly effected a taking as to all accreted lands which had not been registered or in which title had not been quieted, with the exception of accreted lands for which petitions for registration or actions to quiet title were pending as of the effective date of Act 73 or previously eroded land that had been restored by accretion.

VIII.

On appeal, the State specifically argued that Act 73 had no effect "whatsoever upon [accretions which took place prior to the effective date of Act 221], and thus necessarily no taking of [those lands] has occurred." The State maintains that, consequently, littoral owners with land that accreted prior to the effective date of Act 221, "are not barred by Act 73, even today, from registering or quieting title to such accreted lands." While the ICA determined that "Act 73 effectuated a permanent taking of littoral owners' ownership rights to existing accretions to the owners' oceanfront properties that had not been registered or recorded or made the subject of a then-pending quiet-title lawsuit or petition to register the accretions[,]" Maunalua Bay, 122 Hawai‘i at 57, 222 P.3d at 464, it did not

expressly indicate whether its holding excluded or included lands which accreted prior to the effective date of Act 221.

Furthermore, the ICA summarily denied the State's motion for clarification on January 20, 2010. In connection with the first question presented in its application, the State contends that the ICA erred in failing to clarify that Act 73 "did not apply to [land which accreted prior to the effective date of Act 221]." In light of the State's position that Act 221 had no effect on lands which accreted prior to its effective date, and that thus, Act 73 had no effect on such lands, the ICA should have made clear that its holding did in fact include lands which accreted prior to the effective date of Act 221. Accordingly, the State's application should be granted as to its first question.

IX.

In connection with the first question presented in Plaintiffs' Application, regarding the effect of Act 73 on future accretion, "a claimant must first establish 'a vested interest protectable under the Fifth Amendment[,]'" to succeed on a takings claim. Kepoo v. Kane, 106 Hawai'i 270, 294, 103 P.3d 939, 963 (2005) (quoting Sangre de Cristo Dev. Co. v. United States, 932 F.2d 891, 894 (10th Cir. 1991) (brackets omitted)).[12] In addition to the cases cited to by the State, Kepoo, 106 Hawai'i at 270, 103 P.3d at 963, held that the voiding of a lease

[12] Kepoo was not cited by the parties or the ICA.

of state land to developers for construction and operation of a cogeneration power plant did not constitute a taking.

This court explained that it was not a taking inasmuch as the plaintiffs "did not acquire a vested interest in the lease because it was not preceded by the requisite environmental study, which, in Hawai‘i, is a condition precedent to approval of the request and commencement of proposed action." Id. at 295, 103 P.3d at 964 (internal quotation marks and citations omitted). Thus, it would seem that there can be no vested right for purposes of a takings analysis, where a particular property right is subject to a condition precedent.

Prior to the effective date of Act 73, the littoral owners' right to future accretion was subject to the condition precedent that the land would in fact accrete at some point in the future. That right, because contingent on events which may or may not happen at some point in the future, would not be vested. Furthermore, the legislature was free to abrogate that property right. Fujioka, 55 Haw. at 10, 514 P.2d at 57; Damon v. Tsutsui, 31 Haw. 678, 693-94 (Haw. Terr. 1930). Once Act 73 made all accreted lands, which had not been registered or to which title had not been quieted, State lands, all subsequent accretions to those lands become State lands. Thus, as of the effective date of Act 73, any right to future accretions then became vested in the State, not the littoral owner. See infra.

State by Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977), provides further instruction. In Zimring, the State of Hawaii sought to quiet title in itself "to approximately 7.9 acres of new land added to the acreage of the island of Hawaii when the Puna volcanic eruption of 1955 overflowed the shoreline and extended it [(hereinafter, lava extensions)]." Id. at 107, 566 P.2d at 727. The defendants, owners of a parcel of land next to those lava extensions, "entered upon [them] and made improvements thereon which included bulldozing and planting trees and shrubs." Id. at 108, 566 P.2d at 728. The State served the [defendants] with a notice and demand to vacate the disputed land and to cease and desist from conducting any further activities thereon." Id. Thereafter, the State filed a complaint against the defendants and their predecessors-in-interest. Id. Following various motions by the parties and an interlocutory appeal, the court concluded, inter alia, that "[t]he State . . . failed to carry its burden of proof to establish its title in the land." Id. at 110, 566 P.2d at 729.

In resolving the State's claim to title over the lava extensions, the Zimring court explained that the historical development of "private title in Hawaii[13] makes clear the validity of the basic proposition in Hawaiian property law that land in its original state is public land and if not awarded or

[13] For a survey of the historical development of private property ownership in Hawaii, see Zimring, 58 Haw. at 106, 566 P.2d at 725.

granted, such land remains in the public domain." Id. at 114, 566 P.2d at 731. This court explained that, [a]side from acquisition of documented title, one [could] also show acquisition of private ownership through operation of common law." Id. at 114-15, 566 P.2d at 731.

The Zimring court agreed with the defendants' statement that "'the common law on accretion and avulsion in other states [was] not directly on point.'" Id. at 119, 566 P.2d at 734. However, this court disagreed with their contention "that the 'logic of cases based on these concepts would lead to the rule that volcanic additions on the Island of Hawaii go to the abutting owner.'" Id. Zimring stated that "[w]hen accretion is found, the owner of the contiguous land takes title to the accreted land." Id. (citing Halstead v. Gay, 7 Haw. 587, 588 (1889). It was explained however, that "[w]hile the accretion doctrine is founded on the public policy that littoral access should be preserved where possible, the law in other jurisdictions makes it clear that the preservation of littoral access is not sacrosanct and must sometimes defer to other interests and considerations." Id. (emphases added).

Zimring cited Los Angeles Athletic Club v. Santa Monica, pointing out that in that case, the California District Court of Appeal stated that "'[i]t is well settled that the littoral rights of an upland owner who owns no title to tidelands adjoining his property are subject to termination by whatever

disposition of tidelands the state, or its grantees, in the exercise of their trust, choose to make.'" Id. at 120, 566 P.2d at 734 (quoting Los Angeles Athletic Club, 147 P.2d 976, 978 (Cal. Dist. Ct. App. 1944)).

In short, Zimring rejected the argument that common law on accretion and avulsion supported the proposition that lava extension should go to the abutting owner. Id. at 119, 566 P.2d at 734. It would be inconsistent to acknowledge that the common law right to accretion "is not sacrosanct[,]" id., and thus, "littoral rights . . . are subject to termination[,]" id. (citation omitted), yet find that the right to future accretion is vested and that the State must pay just compensation each time the land further accretes in the future. Such cannot be the case.[14]

While the ICA concluded that Plaintiffs have no vested right in future accretions, it relied on a string of cases from other jurisdictions as well as definition of vested rights set forth in Tsutsui, 31 Haw. at 693-94. Both Plaintiffs and amicus curiae, Pacific Legal Foundation, argue that the cases upon which the ICA relied were inapplicable. It is necessary to make clear that Plaintiffs have no vested right under Hawai'i case law. While the ICA reached the proper ultimate conclusion on the issue

[14] The ICA discussed Zimring, supra, in its general review of precedent established by this court. However, it did not cite to Zimring in support of its conclusion that Plaintiffs do not have a vested right in future accretion. See Maunalua Bay, 122 Hawai'i at 43, 222 P.3d at 450.

of future accretions, to the extent the ICA focused on cases from other jurisdictions, it is not clear that the ICA's holding is supported by Hawai'i law and certiorari should be accepted as to Plaintiffs' first question.

B.

As previously stated, Plaintiffs assert that a Ninth Circuit case, Milner, 583 F.3d at 1174, supports the proposition that littoral owners' interest in future accretion is a vested right. In Milner, at issue was whether homeowners, who had erected structures to prevent erosion, were liable for, inter alia, common law trespass of lands which the United States claimed to have held in trust for the Lummi Nation. Id. at 1180. In holding that homeowners had trespassed upon tidelands of the Lummi and wrongfully denied them the right to future accretion, the Ninth Circuit explained that "[u]nder the common law, the boundary between the tidelands and the uplands is ambulatory; that is, it changes when the water body shifts course or changes in volume." Id. at 1187 (citations omitted). It was observed that the Supreme Court had stated that

> "[t]he riparian right to future alluvion[15] is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim "qui sentit onus debet sentire commodum" [he who enjoys the benefit ought also to bear the burdens] lies

[15] Alluvion is the "addition of land caused by the buildup of deposits from running water[.]" Black's Law Dictionary at 90. The definition of accretion states that accretion is the "gradual accumulation of land by natural forces, [especially] as alluvium is added to land situated on . . . the seashore." Id. at 23.

> at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if, a gradual gain, it is his."

Id. at 1187-88 (emphases added) (quoting County of St. Clair v. Lovingston, 90 U.S. 46, 68-69 (1874)). The Milner court explained:

> By this logic, both the tideland owner and the upland owner have a right to an ambulatory boundary, and each has a vested right in the potential gains that accrue from the movement of the boundary line. The relationship between the tideland and upland owners is reciprocal: any loss experienced by one is a gain made by the other, and it would be inherently unfair to the tideland owner to privilege the forces of accretion over those of erosion. Indeed, the fairness rationale underlying courts' adoption of the rule of accretion assumes that uplands already are subject to erosion for which the owner otherwise has no remedy.

Id. at 1188 (emphases added). Milner thus concluded that because the "Lummi have a vested right to the ambulatory boundary and to the tidelands they would gain if the boundary were allowed to ambulate, the [h]omeowners [did] not have the right to permanently fix the property boundary absent consent from the United States or the Lummi Nation." Id. at 1189-90. That court further stated, "[t]he Lummi similarly could not erect structures on the tidelands that would permanently fix the boundary and prevent accretion benefitting the [h]omeowners." Id. at 1190.

On the other hand, the State points to another Ninth Circuit case, Western Pac. Ry. Co. v. Southern Pac. Co., 151 F. 376 (9th Cir. 1907), which it asserts reaches the opposite conclusion.[16] The Western Pac. court rejected the argument that there could be a vested right in future accretion. Id. at 399.

[16] The ICA also relied on this case in support of its conclusion that Plaintiffs did not have a vested right in future accretion.

That court stated that under the definition of a vested right set forth in Pearsall, supra, "there can be no question, . . . that the right to future possible accretion could be divested by legislative action." Id. That court further stated that "[t]o say that one who acquires from the state title to tide lands acquires therewith a vested right to all possible future accretion is to impose a restriction on the power of the state to occupy or improve for the public benefit the adjacent submerged lands." Id. (emphasis added). While recognizing that Lovingston, 90 U.S. 46, stated that the riparian right of future accretions is a vested right, the Western Pac. court stated "we are unable to see how one can have a present vested right to that which does not exist, and which may never have an existence." Id. (emphasis added).

Insofar as those cases are arguably in conflict, those cases are not binding on this court as they did not involve constitutional considerations. Furthermore, while Milner and Lovingston stated that the riparian right to future alluvion is a vested right, that right is limited to the context of those cases. In those cases, the riparian or littoral owner had a vested right to future accretions insofar as they owned accreted lands under common law. So long as they owned those accretions under common law, any future accretion was arguably vested. Under the rationale employed in Lovingston, 90 U.S. at 68-69, and Milner, 583 F.3d at 1187-88, if the right to future alluvion or

accretion is similar to the "the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase," once the State is required to pay just compensation for all land which was not registered or to which title was not quieted as of the effective date of Act 73, the State is the owner of the accreted land to which future accretions will form, not the littoral owner. Moreover, post-Act 73, it is the State that has a vested right to future accretions as the owner of the lands to which those future accretions will attach. By analogy, the State is the owner of the tree and its fruits, or the owner of the flocks and herds along with their natural increase.

Under Plaintiffs' interpretation of vested rights, one who sells their tree continues to maintain a vested right in the fruit of that tree. Clearly, once the State became the owner of the accreted lands as of the effective date of Act 73, the littoral owners' ownership right to accretion and future accretion was effectively cut off. The ICA stated that "Plaintiffs and the class they represented had no vested property rights to future accretions to their oceanfront land and, therefore, Act 73 did not effect an uncompensated taking of future accretions[.]" Maunalua Bay, 122 Hawai'i at 57, 222 P.3d at 464. The ICA's opinion should be clarified to establish that inasmuch as Plaintiffs' have no vested right to future accretion, Plaintiffs had no ownership interest in any lands which accreted after the effective date of Act 73.

Additionally, on appeal, Plaintiffs did not cite to Milner, 583 F.3d at 1174, in connection with its argument that Plaintiffs have a vested right in future accretions. Plaintiffs did however, rely on Lovingston, 90 U.S. at 46, from which the above-stated quoted language in Milner is derived. Notably, the ICA addressed Lovingston only insofar as Western Pac., 151 F.3d at 376, rejected that quote as mere dictum. See Maunalua Bay, 122 Hawai‘i at 53, 222 P.3d at 460. The foregoing analysis indicates that although Milner and Lovingston state that the right to future alluvion is a vested right, see supra, Plaintiffs' reliance on that language is misplaced. Thus, assuming arguendo that this court were bound by the Supreme Court's decision in Lovingston, that case does not support Plaintiffs' position that the right to future accretion is a vested right. The ICA's failure to further explore the applicability of the Supreme Court's Lovingston decision serves as another reason for granting certiorari in this case.

C.

Briefly stated, in holding that Plaintiffs have no vested right in future accretions, the ICA said that "article XI, section 1 of the Hawai‘i State Constitution . . . clearly diminishes any expectation that oceanfront owners in Hawai‘i had and may have in future accretions to their property." Id. at 53-54, 222 P.3d at 463-64. Plaintiffs contend that the ICA's suggestions is both wrong and legally irrelevant. Plaintiffs

maintain that the ICA's suggestion is (1) wrong in light of the fact that Palazzolo v. Rhode Island, 533 U.S. 606 (2001), "makes clear that those who buy land after an uncompensated taking still have the right to compensation[,]" and (2) irrelevant because "the law regarding seaward boundaries and property right predated the adoption of the Hawaii State Constitution in 1978." (Bolded emphasis and citation omitted.) According to Plaintiffs, "[l]ater adopted laws do not weaken [Plaintiffs'] property rights." (Citations omitted.) Thus, "[i]n assessing the landowners vested rights, the fact Hawaii chose to constitutionalize [the public trust doctrine] in 1978 cannot affect pre-existing land boundaries."

The ICA's reference to "article XI, section 1 of the Hawai‘i State Constitution" was not dispositive to its determination that Plaintiffs had no vested right in future accretion. In fact, that provision of the Constitution is irrelevant, not for the reason suggested by Plaintiffs, but because the littoral owners' expectations in future accretion is speculative for purposes of determining whether such owners had a vested interest in future accretion in this case. Once the ICA determined that Plaintiffs had no vested right in future accretions, the ICA's inquiry as to whether Act 73 effected a taking as to those lands should have ended there. The ICA's opinion should be clarified in this regard.

X.

A.

With respect to the fourth question presented in Plaintiffs' application regarding the denial of their request for attorney's fees, "[t]his court 'reviews the denial and granting of attorney's fees under the abuse of discretion standard.'" Abastillas v. Kekona, 87 Hawai'i 446, 449, 958 P.2d 1136, 1139 (1998) (quoting Eastman v. McGowan, 86 Hawai'i 21, 27, 946 P.2d 1317, 1323 (1997) (brackets and ellipsis omitted)). This court has recognized the private attorney general doctrine as an exception to this general or "American Rule" that "each party is responsible for paying his or her own litigation expenses." Sierra Club v. Dep't of Transp. of State of Hawai'i, 120 Hawai'i 181, 218, 202 P.3d 1226, 1263 (2009).

The private attorney general doctrine "is an equitable rule that allows courts in their discretion to award attorney's fees to plaintiffs who have vindicated important public rights." Id. (internal quotation marks, brackets and citations omitted) (emphases added). Three factors are considered in determining whether the doctrine should apply "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [sic] (3) the number of people standing to benefit from the decision." Id. (bracketed text in original).

The first prong of the three-prong test requires this court to consider the strength or importance of the public policy vindicated by the litigation. As indicated however, the doctrine is an equitable rule that allows courts in their discretion to award attorney's fees to plaintiffs who have vindicated important public rights." Id. (internal quotation marks and citations omitted) (emphasis added). Although one's right to just compensation where the government has taken private property for public use is protected by Article I, Section 20 of Hawaii's Constitution, in asserting that right, plaintiffs necessarily seek to vindicate the right of the private property owner to just compensation. The very nature of a takings claims protects the interest of the private party or parties from whom the State has taken property. However, Plaintiffs arguably vindicated a public policy by establishing that Act 73 effected a taking. Plaintiffs correctly point out that the right to just compensation where the State "takes" private property for public use, is protected by the Hawai'i State Constitution. See Haw. Const. art I, § 20. Under circumstances where private and public interests are arguably equipoised, Plaintiffs' application should be granted as to its fourth question.

B.

With regard, to Plaintiffs' request for costs, Plaintiffs argue that they are the prevailing party on the predominant issue. The ICA either abused its discretion in

denying costs, or alternatively, because the ICA denied Plaintiffs costs without any explanation, its denial must be clarified to establish that it did not abuse its discretion in denying costs.

XI.

Briefly noted, the second question raised in Plaintiffs' Application is whether the ICA erred in criticizing class certification when that issue was not on appeal. As acknowledged by the ICA, class certification was not challenged on appeal, and therefore, any comment regarding class certification was dictum. See Black's Law Dictionary at 1177 (defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential"). Inasmuch as this case is in the middle of trial, and the court may rely on the ICA's comments which amount to dicta, the ICA's opinion should be clarified in that regard as the comments do not establish the law of the case.

Moreover, the instant case is an interlocutory appeal. Because then, the class certification order was not made final and not appealed, the ICA's comments regarding the propriety of class certification were tantamount to an advisory opinion. It is axiomatic, that "'courts are to avoid advisory opinions on abstract propositions of law.'" Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 87, 734 P.2d 161, 165 (1987) (quoting Hall

v. Beals, 396 U.S. 45, 48 (1969) (brackets omitted)). Plaintiffs' application should be granted as to their second question and the ICA's opinion should be modified accordingly.

XII.

Plaintiffs' third question is whether the ICA gravely erred in misstating the record regarding Plaintiffs' ownership rights in accreted land. The ICA stated:

> Notably absent from Plaintiffs' complaint is any allegation that Plaintiffs have ownership rights in accreted lands that existed at the time Act 73 was enacted. Moreover, the deeds by which Plaintiffs acquired the beach-reserve lots suggest that there were seawalls built on the lots, raising questions concerning the existence of any accretions. Because Plaintiffs have not alleged specific accretions which the State has taken from them by the enactment of Act 73 and, more damagingly, have not alleged that any accreted land even exists, the circuit court, on remand, must determine whether Plaintiffs have been injured by the enactment of Act 73.

Maunalua Bay, 122 Hawai'i 56-57, 222 P.3d 463-64 (emphases added). Plaintiffs argue that (1) the evidence regarding ownership goes to damages as opposed to liability, (2) the record indicates that Plaintiffs advised the court that witnesses would testify on their behalf regarding the amount and value of the property "taken" by Act 73, and (3) conveyance documents indicate that accreted lands were conveyed to Plaintiffs.

Like the ICA's comments regarding the propriety of class certification, the issue as to whether Plaintiffs' alleged any ownership rights in accreted lands which existed at the time Act 73 was enacted was not raised on appeal. Therefore, the ICA's comments regarding Plaintiffs' ownership rights in accreted land were dicta. See supra. Plaintiffs' application should be

granted as to their third question because the ICA erred in commenting on issues not before it on appeal. Thus, the ICA's opinion should be modified accordingly.

XIII.

Based on the foregoing, I would accept both the Plaintiffs' and the State's Applications.