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5TH CIRCUIT COURT
STATE OF HAWAII
CLERK. CHRISTINE MARTINEZ

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

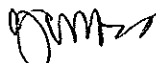
STATE OF HAWAII

CAREN DIAMOND AND BEAU BLAIR,)	CIVIL NO. 10-1-0116
)	
Plaintiffs-Appellants,)	FINDINGS OF FACT; CONCLUSIONS OF
)	LAW; DECISION AND ORDER; EXHIBIT
vs.)	"A"
)	
STATE OF HAWAII, BOARD OF)	
LAND AND NATURAL RESOURCES,)	
CRAIG DOBBIN, AND WAGNER)	
ENGINEERING SERVICES, INC.,)	
)	
Defendants-Appellees.)	
_____)	

FINDINGS OF FACT; CONCLUSIONS OF LAW; DECISION AND ORDER

This cause was before the Honorable Kathleen N. A. Watanabe for oral argument on January 5, 2011, and Harold Bronstein having appeared on behalf of the Plaintiff-Appellants, Caren Diamond and Beau Blair, Linda L. W. Chow, Deputy Attorney General, having appeared on behalf of the Defendant-Appellee, State of Hawaii, Board of Land and Natural Resources, and Walton D. Y. Hong having appeared on behalf of the Defendants-Appellees, Craig Dobbin and Wagner Engineering Services, Inc., and the Court having reviewed the Record On Appeal and the Briefs submitted by the parties, the

I do hereby certify that this is a full, true and
correct copy of original on file in this office.



Clerk, Circuit Court, Fifth Circuit

Court hereby makes the following Findings of Fact; Conclusions of Law; Decision and Order.

Findings of Fact

1. On January 11, 2008, an application for shoreline certification for 7310 Alealea Road, Lot 12, Wainiha II Subdivision, Wainiha, Hawaii, commonly referred to as TMK 4-5-8-09-051, DLNR File No. KA-313 was submitted on behalf of the owner, Craig Dobbin, by Ronald J. Wagner, Wagner Engineering Services, Inc. (R.A. 21-27).¹

2. The shoreline certification application was based upon a field survey of the "conditions existing on December 4, 2007". (R.A. 27; App. 46-47)².

3. By letter dated February 17, 2008, the Appellants requested the State Surveyor, Reid Siarot to conduct a site visit of the subject property. (R.A. 34).

4. The Appellants were present at the State Surveyor's site visit on April 18, 2008. (R.A. 36).

¹ The abbreviation R.A. shall be used for the Record on Appeal.

² The abbreviation App. shall be used for reference to the Appendix to the Plaintiffs-Appellants' Opening Brief filed September 30, 2010.

5. Based upon the April 18, 2008 site visit, the State Surveyor recommended that "the State of Hawaii should have no objections to adopting the dune crest as the shoreline as delineated on the map, prepared by Ronald J. Wagner, Licensed Professional Land Surveyor". (R.A. 43).

6. The proposed shoreline certification for 7310 Alealea Road, Wainiha, Hawaii, Lot 12, Wainiha II Subdivision was published in the OEQC bulletin on June 8, 2008.

7. On June 27, 2008, the Appellants filed with the Board of Land and Natural Resources a timely Notice of Appeal of the proposed shoreline for Lot 12. (R.A. 44-49).

8. Appellants' Brief; Exhibits "A" - "P"; Declaration of Beau Blair, Declaration of Caren Diamond and the Declaration of Barbara Robeson were filed on October 24, 2008. (R.A. 70-141).

9. Appellees' Answering Brief was filed on November 12, 2008. (R.A. pgs. 143-221).

10. By Memorandum to Laura H. Thielen, Chairperson, Board of Land and Natural Resources dated June 17, 2009, it was recommended by staff that Chairperson Thielen:

. . . deny the Appellants' appeal in this matter, based upon their failure to provide evidence sufficient to support the relocation of the shoreline at their proposed location.

(R.A. 235-237; App. 70-71).

11. On June 19, 2009, Thielen approved the recommendation to deny the Appellants' appeal. (R.A. 236; App. 71).

12. On the same day, June 19, 2009, Findings of Fact, Conclusions of Law, and Decision and Order denying the Appellants' appeal were signed on behalf of the Chairperson. (R.A. 238-252; App. 31-45).

13. On June 25, 2009 the proposed certified shoreline map was signed by the Chairperson. (R.A. 253).

Prior Administrative Proceedings - DLNR File KA-034-2A

14. On June 27, 2005, an application for shoreline certification for the same property, i.e., 7310 Alealea Road, Wainiha, Hawaii, TMK 4-5-8-09-011, DLNR File KA-034-2A had been submitted on behalf of the prior owner, Jeffrey Galloway, by Dennis Esaki, Esaki Surveying and Mapping, Inc. (R.A. 1-7).

15. On August 8, 2005, a Notice of Shoreline Certification Application for Lot 12, DLNR file no. KA-034-2A was published in the OEQC Bulletin. The proposed shoreline was based upon a field survey of May 17, 2005. (R.A. 1-7; App. 74-76).

16. On August 17, 2005, Caren Diamond, Beau Blair, and Barbara Robeson requested that the State Surveyor make a site visit to the subject property arguing in part that "the shoreline as proposed has used naupaka and other salt tolerant, unnaturally

cultivated, promoted and irrigated vegetation to delineate a "vegetation line" for shoreline certification purposes. (R.A. 13).

17. As a result of the site visit on October 19, 2005, Reid Siarot, the State Surveyor recommended that the shoreline be located at the "debris line near the mauka edge of the naupaka hedge". (R.A. 17; App. 65).

18. This recommendation by the State Surveyor Reid Siarot located the shoreline "further mauka than delineated on the (proposed) map" submitted by the Applicant. (R.A. 17; App. 65).

19. On April 12, 2006, State Surveyor, Reid Siarot wrote to Russell Tsuji, Administrator, Land Division with respect to File No. KA-034-2A, and recommended that:

. . . this application be rejected, as the Applicant did not revise the shoreline map in accordance with the October 19, 2005 recommendations. (Emphasis added).

(R.A. 18; App. 66).

Prior Circuit Court Proceedings - Civil No. 09-1-0197

20. On July 20, 2009, a timely Notice of Appeal was filed by the Appellants with the Fifth Circuit Court, State of Hawaii in Diamond, et al. v. State of Hawaii, et al., Civil No. 09-1-0197.

21. The Court in Civil No. 09-1-0197 received briefs from all parties and heard oral argument on March 2, 2010.

22. The Court's Findings of Fact; Conclusions of Law; Decision and Order were filed on April 6, 2010. (R.A. 271-283, Exhibit "A").

23. The Court's Decision and Order in Civil No. 09-1-0197 vacated the BLNR's Findings of Fact; Conclusions of Law and Decision and Order Denying Appellants' Appeal of the Shoreline Certification dated June 19, 2009. (R.A. 271-283; Exhibit "A")

24. The Court's Decision and Order further vacated the certified shoreline published for final certification in the OEQC Bulletin on June 8, 2008, and approved and affirmed by the BLNR's Chairperson on June 25, 2009, and remanded the matter back to the BLNR for proceedings consistent with the Court's Decision and Order filed April 6, 2010. (R.A. 271-283, Exhibit "A").

25. A Final Judgment in Civil No. 09-1-0197 was entered on May 19, 2010.³

26. Pursuant to the Court's Order of remand, the BLNR prepared Amended Findings of Fact; Conclusions of Law and Decision and Order, dated May 21, 2010 which for the second time denied the Plaintiffs/Appellants' appeal and located the shoreline in the

³ Defendant-Appellee Craig Dobbin filed a Notice of Appeal to the Intermediate Court of Appeal on June 17, 2010. Defendant-Appellee State of Hawaii filed a Cross Appeal on June 21, 2010.

exact same place previously vacated by this Court. (R.A. 271-283; App. 94; Exhibit "A").

Current Circuit Court Proceedings - Civil No. 10-1-0116

27. On May 25, 2010, Appellants filed a timely Notice of Appeal in the Fifth Circuit Court in Diamond, et al. v. State of Hawaii, et al., Civil No. 10-1-0116.

28. Appellants, Diamond and Blair are concerned citizens who have resided in the area of the subject property for over 28 and 35 years respectively and are familiar with the property's shoreline.

29. Over the past eight (8) years during the winter months, Diamond and Blair have both observed and photographed the upper reaches of the wash of the waves in Wainiha, including Lot 12.

30. The annual northwest swells and high winter surf that Diamond and Blair have both observed and photographed washing onto Lot 12 over the past eight (8) years are not storm and/or seismic waves as defined by HRS 205A-1, et seq.

31. During December, 2003, and January and February, 2004, Diamond and Blair observed and photographed newly planted naupaka and beach heliotrope trees on Lot 12. (App. 83-85).

32. Subsequent to the planting of the naupaka and beach heliotrope trees, Appellants also observed and photographed irrigation

lines on Lot 12, which were used to water the newly planted vegetation. (App. 83-85).

33. The vegetation planted on Lot 12 during December, 2003, and January and February, 2004 has been artificially induced by human intervention and does not represent evidence of the shoreline.

34. On October 19, 2005, Reid Siarot, the State Surveyor did not use the newly planted vegetation to determine the location of the shoreline. (R.A. 17; App. 65-66).

35. On October 19, 2005, the State Surveyor recommended the shoreline be moved from the front of the newly planted naupaka hedge to the back of the naupaka hedge, which was located approximately 20 feet mauka of the dune crest. (R.A. 17; App. 65-66).

36. The beach fronting Lot 12 is currently covered with salt tolerant Naupaka and beach heliotrope trees planted by the prior owner to create an artificial shoreline.

37. Appellants have both observed and photographed over the recent years that as the winter waves wash onto the Dobbin property, the waves push sand and other debris mauka.

38. The sand and other debris pushed mauka by the winter waves gets stuck and trapped in the roots of the newly planted naupaka and beach heliotropes on Lot 12.

39. The naupaka and beach heliotropes planted on Lot 12 act as a barrier that prevents and/or hinders the observation of the true

debris line that evidences the "upper reaches of the wash of the waves at high tide during the season of the year in which the highest wash of the waves occurs".

40. The evidence submitted by the Plaintiffs/Appellants, including the photographs, clearly shows that the "upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs" reaches further mauka onto Lot 12 than the BLNR's "current" location of the shoreline at the "dune crest".

Conclusions of Law

1. Pursuant to HRS 91-14(g)(5), Findings of Fact Nos. 27, 34, 35, 36, 38, 40, 41, 46, 48, 50, 51, 52, 53, 56, 58, 59, 60, 66, 68, 69, 70, 72, and 73 contained in the Board of Land and Natural Resources (BLNR) Amended Findings of Fact, Conclusions of Law, and Decision and Order, dated May 21, 2010 are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;

2. Conclusions of Law No. 4, 9, 10, and 11 contained in the BLNR's Amended Findings of Fact, Conclusions of Law, and Decision and Order, dated May 21, 2010 are in violation of HRS 205A-1, et. seq.;

3. Conclusions of Law No. 4, 9, 10, and 11 contained in the BLNR's Amended Findings of Fact, Conclusions of Law, and Decision and Order, dated May 21, 2010 are in excess of the BLNR's statutory authority or jurisdiction pursuant to HRS 205A-1, et. seq.;

4. Conclusions of Law No. 4, 9, 10, and 11 contained in the BLNR's Amended Findings of Fact, Conclusions of Law, and Decision and Order, dated May 21, 2010 are affected by other error of law;

5. Conclusions of Law No. 4, 9, 10, and 11 contained in the BLNR's Amended Findings of Fact, Conclusions of Law, and Decision and Order, dated May 21, 2010 are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

6. The BLNR's Amended Decision and Order dated May 21, 2010 denying the Plaintiff-Appellant's appeal of the proposed certified shoreline of the property identified as 7310 Alealea Road, Wainiha, Kauai, Hawaii, TMK 4-5-8-09-051 is arbitrary, capricious, and/or characterized by an abuse of discretion or clearly unwarranted exercise of discretion in applying HRS 205A-1, et. seq.;

7. The BLNR's Amended Decision and Order dated May 21, 2010 approving and affirming the certified shoreline as delineated in the shoreline survey map that was published for certification on June 8, 2008, and resigned by the Chairperson on May 21, 2010, is arbitrary, capricious, and/or characterized by an abuse of

discretion or clearly unwarranted exercise of discretion in interpreting HRS 205A-1, et. seq.;

8. The BLNR's characterization as unreliable the evidence with respect to both the detailed Declarations of Caren Diamond, Beau Blair and Barbara Robeson, and the photographs submitted in support of the appeal is arbitrary, capricious and constitutes an abuse of discretion or unwarranted exercise of discretion.

9. The map of the certified shoreline published on June 8, 2008 based upon the "conditions existing on December 4, 2007" and indicating the "shoreline follows dune crest, December 4, 2007" and resigned by the Chairperson on May 21, 2010 does not accurately or correctly reflect the "upper reaches of the wash of the waves at high tide during the season of the year in which the highest wash of the waves occurs" in accordance with HRS 205A-1, et. seq. (App. 46-47; 94).

10. The vegetation planted on lot 12 in 2003 and 2004 was planted seaward of the shoreline as located by Reid Siarot, State Surveyor at the October 19, 2005 site visit to the subject property. This artificially induced and enhanced vegetation is incorrectly being used to currently locate the shoreline and/or hinder the true evidence of the location of the shoreline in accordance with HRS 205A-1.

11. The current location of the certified shoreline for Lot 12 is essentially the same location that Reid Siarot, State Surveyor rejected and recommended moving approximately twenty (20) feet further

mauka on or about October 19, 2005 in DLNR File KA-034-2A. (App. 65-66).

12. The May 21, 2010 recertified shoreline incorrectly allows for the manipulation of the shoreline based upon artificially induced and enhanced vegetation.

13. The BLNR's interpretation of HRS 205A-1, et. seq. that only the "current" years evidence of the upper reaches of the wash of the waves should be considered in determining the shoreline is arbitrary, capricious and/or characterized by an abuse of discretion or clearly unwarranted exercise of discretion in applying HRS 205A-1, et. seq., as it conflicts with and/or contradicts the purpose and intent of HRS 205A-1, et. seq..

14. Public policy favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible.

15. The utilization of artificially planted vegetation in determining the certified shoreline encourages private land owners to plant and promote salt tolerant vegetation to extend their land further makai contrary to the objectives and policies of HRS 205A and the public policy of the State of Hawaii.

16. The BLNR's interpretation of HRS 205A-42 to mean that the certified shoreline reflects the "current" location of the shoreline as it would be at high tide during the season of the current year in which the highest wash of the waves occurs is

arbitrary and capricious and constitutes an abuse of discretion or unwarranted exercise of discretion.

17. The BLNR's interpretation of HRS 205A-1 to limit its analysis of the upper reaches of the wash of the waves for only the "current" season is contrary to the intent of the statute and public policy to preserve as much shore as reasonably possible for public use.

18. The vegetation planted on Lot 12 during December, 2003, and January and February, 2004 has been artificially induced by human intervention and does not represent evidence of the shoreline.

19. As proposed by the Appellants, the shoreline for Lot 12 should be located approximately 20 feet mauka of the certified shoreline as shown on the shoreline certification map published for final certification on June 8, 2008 and resigned by the Chairperson on May 21, 2010.

20. The BLNR's determination of the location of the shoreline is not presumptively valid even if made within its sphere of expertise. Paul's Elec. Service, Inc. v. Befitel, 104 Hawaii 412, 91 P.3d 494 (2004).

21. The rules adopted by the State of Hawaii, Board of Land and Natural Resources, HAR 13-222-1, et. seq., Shoreline Certifications, do not contain any criteria indicating that the determination of the location of the shoreline is limited solely to

evidence of the "current" season's high surf, i.e. "the upper reaches of the wash of the waves, other than storm and seismic waves at high tide during the season of the year in which the highest wash of the waves occurs".

22. The evidence submitted by the Plaintiffs/Appellants, including the photographs, clearly shows that the "upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs" reaches further mauka onto Lot 12 than the BLNR's "current" location of the shoreline at the "dune crest".

23. The BLNR's interpretation of HRS 205A-1 and HRS 205A-42 which is based upon the limited duration of a shoreline certification in conjunction with the definition of shoreline, and which requires that the BLNR's certified shoreline determination reflect the "current" location of the shoreline is arbitrary, capricious and constitutes an abuse of discretion or unwarranted exercise of discretion.

24. The Findings of Fact; Conclusions of Law; Decision and Order filed April 6, 2010 in Diamond, et al. v. State of Hawaii, et al., Civil No. 09-1-0197, a copy of which is attached hereto as Exhibit "A" and by reference made a part hereof is incorporated herein.

Decision and Order

1. The BLNR's Amended Findings of Fact, Conclusions of Law, and Decision and Order Denying Appellants' Appeal of Shoreline Certification dated May 21, 2010 for 7310 Alealea Road, Wainiha II Subdivision, Wainiha, Hawaii, TMK 4-5-8-09-051, DLNR File No. KA-313 is hereby reversed and vacated.

2. The certified shoreline as delineated on the shoreline survey map for the subject property that was published for final certification in the OEQC Bulletin on June 8, 2008 and reapproved and reaffirmed by the BLNR's Chairperson, Laura Thielen on May 21, 2010 is hereby reversed and vacated.

3. The shoreline for Lot 12 should be located approximately 20 feet mauka of the shoreline as shown on the shoreline certification map published for final certification on June 8, 2008 and resigned by the Chairperson on May 21, 2010.

4. Any further certified shoreline proceedings before the BLNR for 7310 Alealea Road, Wainiha, Hawaii, Wainiha II Subdivision, Lot 12, TMK 4-5-8-09-051 shall be consistent with this Court's Findings of Fact; Conclusions of Law; Decision and Order.

FEB 16 2011

DATED: Lihue, Hawaii, _____.

SEAL

KATHLEEN N.A. WATANABE

JUDGE OF THE ABOVE ENTITLED COURT

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

2010 APR -6 PM 3:45

STATE OF HAWAII

CIRCUIT COURT
STATE OF HAWAII

CAREN DIAMOND AND BEAU BLAIR,)	CIVIL NO. 09-1-0197	CLERK
)		
Plaintiffs-Appellants,)		
)	FINDINGS OF FACT; CONCLUSIONS OF	
vs.)	LAW; DECISION AND ORDER	
)		
STATE OF HAWAII, BOARD OF)		
LAND AND NATURAL RESOURCES,)		
CRAIG DOBBIN, AND WAGNER)		
ENGINEERING SERVICES, INC.,)		
)		
Defendants-Appellees.)		

FINDINGS OF FACT; CONCLUSIONS OF LAW; DECISION AND ORDER

This cause was before the Honorable Kathleen N. A. Watanabe for oral argument on March 2, 2010, and Harold Bronstein having appeared on behalf of the Plaintiff-Appellants, Caren Diamond and Beau Blair, Linda L. W. Chow, Deputy Attorney General, having appeared on behalf of the Defendant-Appellee, State of Hawaii, Board of Land and Natural Resources, and Walton D. Y. Hong having appeared on behalf of the Defendants-Appellees, Craig Dobbin and Wagner Engineering Services, Inc., and having reviewed the Record On Appeal and the Briefs submitted by the parties, the Court hereby makes the following Findings of Fact; Conclusions of Law; Decision and Order.

I do hereby certify that this is a full, true and correct copy of original on file in this office.

Waller

Clerk, Circuit Court, Fifth Circuit

EXHIBIT "A"

FINDINGS OF FACTParties

1. Appellee Craig Dobbin ("Appellee Dobbin") is the owner of the property identified as 7310 Alealea Road, in the District of Wainiha, Halelea, Island of Kauai, also identified as Ta Map Key No. (4)5-8-009:51 ("Subject Property"). Record on Appeal ("ROA") at page 241.
2. Appellee Wagner Engineering Services, Inc. ("Appellee Wagner") submitted an application for shoreline certification on behalf of Appellee Craig Dobbin as his surveyor. ROA, pg. 241.
3. Appellant Caren Diamond ("Appellant Diamond") is a resident of the District of Wainiha, Island of Kauai who lives in close proximity to the Subject Property. ROA, pg. 47.
4. Appellant Diamond uses the public resources in close proximity to the Subject Property for all types of recreational and other outdoor activities and spiritual renewal. ROA, pg. 47.
5. Appellant Beau Blair ("Appellant Blair") resides on Kuhio Highway, directly mauka of the Subject Property. ROA, pgs. 47-48.
6. Appellant Blair has used the beach and shoreline area in close proximity to the Subject Property for active recreation and quiet enjoyment. ROA, pgs. 47-48.

Procedural History

7. On January 11, 2008, an application for shoreline certification for 7310 Alealea Road, Lot 12, Wainiha II Subdivision, Wainiha, Hawaii, commonly referred to as TMK 4-5-8-09-051, DLNR File No. KA-313 was submitted on behalf of the owner, Craig Dobbin, by Ronald J. Wagner, Wagner Engineering Services, Inc. ROA, pgs. 21-27.
8. The shoreline certification application was based upon a field survey of the "conditions existing on December 4, 2007". ROA, pg. 27; App. 16¹.
9. By letter dated February 17, 2008, the Appellants requested the State Surveyor, Reid Siarot to conduct a site visit of the subject property. ROA, pg. 34.
10. The Appellants were present at the State Surveyor's site visit on April 18, 2008. ROA, pg. 36.
11. Based upon the April 18, 2008 site visit, the State Surveyor recommended that "the State of Hawaii should have no objections to adopting the dune crest as the shoreline as delineated on the map, prepared by Ronald J. Wagner, Licensed Professional Land Surveyor". ROA, pg. 43.

¹ The abbreviation App. shall be used for reference to the Appendix to the Plaintiffs-Appellants' Opening Brief filed November 3, 2009.

12. The proposed shoreline certification for 7310 Alealea Road, Wainiha, Hawaii, Lot 12, Wainiha II Subdivision was published in the OEQC bulletin on June 8, 2008. ROA, pg. 174.
13. On June 27, 2008, the Appellants filed with the Board of Land and Natural Resources a timely Notice of Appeal of the proposed shoreline for Lot 12. ROA, pgs. 44-49.
14. Appellants' Brief; Exhibits "A" - "P"; Declaration of Beau Blair, Declaration of Caren Diamond and the Declaration of Barbara Robeson were filed on October 24, 2008. ROA, pgs. 70-141.
15. Appellees' Answering Brief was filed on November 12, 2008. ROA, pgs. 143-221.
16. By Memorandum to Laura H. Thielen, Chairperson, Board of Land and Natural Resources dated June 17, 2009, it was recommended by staff that Chairperson Thielen:

. . . deny the Appellants' appeal in this matter, based upon their failure to provide evidence sufficient to support the relocation of the shoreline at their proposed location.

ROA, pgs. 235-237; App. 40-41.
17. On June 19, 2009, Thielen approved the recommendation to deny the Appellants' appeal. ROA, pg. 236; App. 41.
18. On the same day, June 19, 2009, Findings of Fact, Conclusions of Law, and Decision and Order denying the Appellants' appeal

were signed on behalf of the Chairperson. ROA, pgs. 238-252; App. 1-15.

19. On June 25, 2009, the proposed certified shoreline map was signed by the Chairperson. ROA, pg. 253; App. 16.
20. On July 20, 2009, a timely Notice of Appeal; Exhibit "A" was filed by the Appellants with the Fifth Circuit Court, State of Hawaii.

Prior Certification

21. On June 27, 2005, an application for shoreline certification for the same property, i.e., 7310 Alealea Road, Wainiha, Hawaii, TMK 4-5-8-09-011, DLNR File KA-034-2A had been submitted on behalf of the prior owner, Jeffrey Galloway, by Dennis Esaki, Esaki Surveying and Mapping, Inc. ROA, pgs. 1-7.
22. On August 8, 2005, a Notice of Shoreline Certification Application for Lot 12, DLNR file no. KA-034-2A was published in the OEQC Bulletin. The proposed shoreline was based upon a field survey of May 17, 2005. ROA, pgs. 1-7; App. 44-46.
23. On August 17, 2005, Caren Diamond, Beau Blair, and Barbara Robeson requested that the State Surveyor make a site visit to the subject property arguing in part that "the shoreline as proposed has used naupaka and other salt tolerant, unnaturally cultivated, promoted and irrigated vegetation to delineate a

"vegetation line" for shoreline certification purposes. ROA, pg. 13.

24. As a result of the site visit on October 19, 2005, Reid Siarot, the State Surveyor recommended that the shoreline be located at the "debris line near the mauka edge of the naupaka hedge". ROA, pg. 17; App. 35; 47.

25. This recommendation by the State Surveyor Reid Siarot located the shoreline "further mauka than delineated on the (proposed) map" submitted by the Applicant. ROA, pg. 17; App. 35; 47.

26. On April 12, 2006, State Surveyor, Reid Siarot wrote to Russell Tsuji, Administrator, Land Division with respect to File No. KA-034-2A, and recommended that:

. . . this application be rejected, as the Applicant did not revise the shoreline map in accordance with the October 19, 2005 recommendations.

ROA, pg. 18; App. 35-36.

Observations of the Subject Property

27. Appellants, Diamond and Blair are concerned citizens who have resided in the area of the subject property for over 28 and 35 years respectively and are familiar with the property's shoreline. App. 18, 24.

28. Over the past eight (8) years during the winter months, Diamond and Blair have both observed and photographed the upper reaches

of the wash of the waves in Wainiha, including Lot 12. App. 19, 25.

29. ~~The annual northwest swells and high winter surf that Diamond and Blair have both observed and photographed washing onto Lot 12 over the past eight (8) years are not storm and/or seismic waves as defined by HRS 205A-1, et seq.~~ App. 19, 25.

30. During December, 2003, and January and February, 2004, Diamond and Blair observed and photographed newly planted naupaka and beach heliotrope trees on Lot 12. App. 50-56; 59.

31. Subsequent to the planting of the naupaka and beach heliotrope trees, Appellants also observed and photographed irrigation lines on Lot 12, which were used to water the newly planted vegetation. App. 50-56; 59.

32. The vegetation planted on Lot 12 during December, 2003, and January and February, 2004 has been artificially induced by human intervention and does not represent evidence of the shoreline. App. 20, 26.

33. On October 19, 2005, Reid Siarot, the State Surveyor did not use the newly planted vegetation to determine the location of the shoreline. ROA, pg. 17; App. 35-36.

34. On October 19, 2005, the State Surveyor recommended the shoreline be moved from the front of the newly planted naupaka hedge to the

- back of the naupaka hedge, which was located approximately 20 feet mauka of the dune crest. ROA, pg. 17; App. 35-36, 47.
35. The beach fronting Lot 12 is currently covered with salt tolerant Naupaka and beach heliotrope trees planted by the prior owner to create an artificial shoreline. App. 19, 25.
36. Appellants have both observed and photographed over the recent years that as the winter waves wash onto the Dobbin property, the waves push sand and other debris mauka. App. 19, 25.
37. The sand and other debris pushed mauka by the winter waves gets stuck and trapped in the roots of the newly planted naupaka and beach heliotropes on Lot 12. App. 19, 25.
38. The naupaka and beach heliotropes planted on Lot 12 act as a barrier that prevents and/or hinders the observation of the true debris line that evidences the upper reaches of the wash of the waves at high tide during the season of the year in which the highest wash of the waves occurs. App. 19, 25.

CONCLUSIONS OF LAW

1. On judicial review of contested administrative cases, an agency's exercise of discretion is reviewable to determine if it is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion. HRS §91-14(g).

2. HRS §205A-1 defines "shoreline" as "the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves."
3. HRS §205A-42(a) provides that "[t]he board of land and natural resources shall adopt rules pursuant to chapter 91 prescribing procedures for determining a shoreline and appeals of shoreline determinations that are consistent with subsection (b)."
4. Pursuant to the authority provided in HRS §205A-42(a), the Board adopted chapter 13-222, Hawaii Administrative Rules ("HAR").
5. HAR §13-222-7 requires an applicant for a shoreline certification to submit an application in writing with information regarding, amongst other things, the purpose of the certification, the location of the property, photographs of the proposed shoreline, maps of the proposed shoreline, and a statement regarding when the field survey was done.
6. HAR §13-222-10 requires the State Surveyor to determine the shoreline based on his review of the map, photographs, other

documents and information provided by the applicant, and the State Surveyor's knowledge of the affected area.

7. HAR §13-222-10 allows the State Surveyor to make a site inspection prior to determining the shoreline. The State Surveyor may also consult with the licensed land surveyor who made the field survey and map and any interested persons who submitted comments to the application to resolve differences in interpretation of the shoreline.
8. The BLNR's characterization as either "anecdotal evidence and/or unreliable evidence" with respect to both the detailed Declarations of Caren Diamond, Beau Blair and Barbara Robeson, and the photographs they submitted in support of their appeal is arbitrary, capricious and/or characterized by an abuse of discretion or clearly unwarranted exercise of discretion, not in accordance with HAR §13-222-10.
9. The map of the certified shoreline published on June 8, 2008 and signed by the Chairperson on June 25, 2009 based upon the "conditions existing on December 4, 2007" does not correctly reflect the "upper reaches of the wash of the waves at high tide during the season of the year in which the highest wash of the waves occurs", as provided in HRS §205A-1.
10. The vegetation planted on lot 12 in 2003 and 2004 was planted seaward of the shoreline as located by Reid Siarot, State

Surveyor at the October 19, 2005 site visit to the subject property, and its use to locate the current shoreline is not in accordance with HRS §205A-1.

11. The current location of the certified shoreline for Lot 12 is essentially the same location that Reid Siarot, State Surveyor rejected and recommended moving further mauka on or about October 19, 2005 in DLNR File KA-034-2A.
12. The current certified shoreline appears to incorrectly allow for the manipulation of the shoreline based upon artificially induced and enhanced vegetation, not in accordance with HRS §205A-1.
13. The BLNR's interpretation of HRS §205A-1, et. seq. that only the "current" year's evidence of the upper reaches of the wash of the waves should be considered in determining the shoreline is arbitrary, capricious and/or characterized by an abuse of discretion or clearly unwarranted exercise of discretion in applying HRS §205A-1, et. seq., as it conflicts with and/or contradicts the purpose and intent of HRS §205A-1, et. seq.
14. Public policy favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible. County of Hawaii v. Sotomura, 55 Haw. 176 (1973).
15. The utilization of artificially planted vegetation in determining the certified shoreline encourages private land owners to plant and promote salt tolerant vegetation to extend

their land further makai contrary to the objectives and policies of HRS §205A and the public policy of the State of Hawaii. Diamond, et al. v. State of Hawaii, et al., 112 Haw. 161 (2006).

16. The BLNR's interpretation of HRS §205A-42 to mean that the certified shoreline reflect only the "current" location of the shoreline as it would be at high tide during the season of the current year in which the highest wash of the waves occurs is arbitrary and capricious and/or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.
17. The BLNR's interpretation of HRS §205A-1 to limit its analysis of the upper reaches of the wash of the waves for only the "current" season is contrary to the intent of the statute and public policy to preserve as much shore as reasonably possible for public use.

DECISION AND ORDER

1. The BLNR's Findings of Fact, Conclusions of Law, and Decision and Order Denying Appellants' Appeal of Shoreline Certification dated June 19, 2009 for 7310 Alealea Road, Wainiha II Subdivision, Wainiha, Hawaii, TMK 4-5-8-09-051, DLNR File No. KA-313 is hereby vacated.
2. The certified shoreline as delineated on the shoreline survey map for the subject property that was published for final

certification in the OEQC Bulletin on June 8, 2008 and approved and affirmed by the BLNR's Chairperson, Laura Thielen on June 25, 2009 is hereby vacated.

3. This matter is remanded to the BLNR with specific instructions to appropriately consider and give due weight to Appellants' proposed evidence and to correctly apply the applicable statutes, case law and administrative rules within forty-five (45) days of this Order.

4. Any further certified shoreline proceedings before the BLNR for 7310 Alealea Road, Wainiha, Hawaii, Wainiha II Subdivision, Lot 12, TMK 4-5-8-09-051 shall be consistent with this Court's Findings of Fact; Conclusions of Law; Decision and Order.

DATED: Lihue, Hawaii, APR 6 2010



KATHLEEN N.A. WATANABE
JUDGE OF THE ABOVE-ENTITLED COURT