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COVER STORY

Over The Hedge

Kaua'i resident Caren Diamond fights to save our shores from land-hungry homeowners

BY JOAN CONROW | DEC 13, 2006

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For the past seven years, Caren Diamond has prowled her neighborhood beaches, camera in hand. It's not that she's a shutterbug, or member of the paparazzi hoping for a shot of the rich and famous—though homes along that particular stretch of spectacular North Shore Kaua'i shoreline rent for upwards of \$3,500 per night.

When you really know in your heart that what you know is right, it gives you the inspiration to continue.

No, Diamond is after the guys who steal the sand. Beach sand. Public sand. Our sand.

And not bucketfuls, or even dump trucks full, either. We're talking about large swatches—some of them 30-by-70-feet—of public beach that are getting fenced or landscaped or grassed or otherwise incorporated into a rich person's yard.

It's been happening all around the state for years. But it was only in late October, in response to legal action brought by Diamond and Kaua'i attorney Harold Bronstein, that the Hawai'i Supreme Court stepped in and stopped it, clarifying once and for all that the public beach extends to the seasonally highest wash of the waves.

'When you really know in your heart that what you know is right, it gives you the inspiration to continue,' says Diamond, who had no idea it would take a years-long struggle to legally clarify an issue that seemed to her perfectly clear.

Like so many issues, this one didn't come to Diamond's attention until it started

This week

Rail Done Right?

It's news (or should be) when West Oahu's new city councilman comes out unequivocally against the city's \$5.4 billion rail plan. After all, the primary beneficiaries of the embattled commuter train were meant to be Oahu's westsiders, victims of one of the worst commutes on the planet.

Linmark's Leftovers

Rolling the R's author R. Zamora Linmark returns to Honolulu to promote his second novel Leche, a compelling and often funny tale of a young, gay Filipino.

Toxic Decline

Researchers from the National Oceanic and Atmospheric Administration (NOAA) have discovered a hazardous toxin in the endangered Hawaiian monk seal. Ciguatoin is a toxin produced by coral reef algae, affecting sea life and fish consumed by humans.

Counting Degrees

The Hawaiian Islands are now listed by the Endangered Species Coalition as third on the list of the top 10

Recent Comments

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happening in her own neighborhood, a lush, remote, dazzlingly beautiful section of coastline in an area known as Ha'ena.

'This was a forest,' Diamond says, gesturing at an expanse of shoreline now

lined with lawn-fronted, heavily landscaped mansions, all being openly rented to tourists—even though such visitor uses aren't allowed in that neighborhood.

'They cut it down and planted naupaka and irrigated it and grew it out seaward until now there is no beach,' Diamond says, as waves rush in to lap around our feet for emphasis. A big north swell is running, and the rough surf is frothing up into the naupaka, leaving us no place to walk.

'All of this has been stolen from the people,' Diamond asserts, as passionate about the issue now as she was in July 2000, when she first spotted a work crew felling trees on a lot purchased the year before by a Washington state investor.

'When the foundation of houses started going up on our sandy beaches, I quickly educated myself in the process of how shorelines get certified,' says Diamond, who previously had no interest in politics or the law.

What she couldn't understand was why the shoreline was consistently being set at the vegetation line—and worse, an artificially created vegetation line—when Hawai'i state law 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 vegetation growth, or the upper limit of the debris left by the wash of the waves.'

At the crux of the matter, then, is the definition of shoreline—that nebulous point where public ends and private begins. The state Legislature has been inclined to interpret that line liberally, in the interests of the citizens at large.

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*If someone considers it the
ownership line, we correct them
and tell them it s not.*

*—Peter Young,
Dept. of Land and
Natural Resources*
.....

The state Supreme Court, too, had established itself firmly on the side of the people in 1973, ruling that '[p]ublic policy, as interpreted by this Court favors extending to public use and ownership as much of Hawai'i's shoreline as possible.'

And once again, in this most recent decision, 'they're saying, 'Hey, as much beach as is reasonably possible should be available for public use and ownership,' Bronstein says. 'The Legislature said we want the highest wash of the waves at the highest time of the year. This is the Legislature's intent.'

The question now, Bronstein says, is 'will administrators follow the public policy? It's been obvious there's been resistance.'

For the past two decades, the Department of Land and Natural Resources (DLNR),

list of the top 10 endangered ecosystems. "Every native forest bird is at risk," says Marjorie Ziegler, executive director of the Conservation Council for Hawaii.

RE:Play it straight

[June 22: "Call for Hawaiian Trustee"] My name is Rita Kawehi Kanui, and I would like to bring a white flag into this discussion that for many has gone off the path of brotherly love. It seems that "sickpuppy691" (whomever that is) has a personal vendetta against Eric, and I would like to bring some focus to this discussion.

Getting real

[June 22: "Goodbye, Hello"] These efforts [of the Hawaii Symphony] are remarkable, and commendable, but they do not address the root of the problem. The lack of a proper space for concerts is the real challenge faced by an orchestra in Honolulu.

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which certifies the privately financed shoreline surveys, has been inclined to take an approach that favors the interests of landowners over the public.

Although the agency recently changed its rules, prodded by what DLNR director Peter Young calls ‘discussions with



Earthjustice,’ an environmental law firm, for years the agency had opted administratively to use the vegetation line almost exclusively, noting that it ‘is advantageous over the debris line in that it is practical, easily identifiable and stable.’

That didn’t set right with Diamond, who also contends that state surveyors typically did their inspections in summer or fall—well outside of the season when 20- to 30-foot North Shore surf starts pounding the shoreline and claiming its share of the beach.

Tired of having her documentation and complaints ignored, Diamond decided to start challenging the certifications, which create the line for measuring the inland setback for home construction.

Carl Stephens, a Washington state electrical contractor, was the first target, though Diamond doesn’t identify him as such. ‘I don’t feel anything toward these people. It’s all about the beach,’ she says. ‘These people come and go, but hopefully now, the beach won’t.’

According to court documents, Stephens did not conduct a shoreline certification survey after buying an oceanfront parcel in Ha’ena, Kaua’i, in December 1999. But that didn’t stop him from hiring a contractor the following summer to cut the trees along the coast, including the big old false kamane that for decades had shaded the shoreline, and begin planting naupaka and spider lilies along the mauka side of his lot.

Stephens then hired Hanalei-based Wagner Engineering Services to conduct a shoreline certification—based on a July site visit—that was accepted by former state surveyor Randall Hashimoto in October 2001. At the time, Hashimoto noted the vegetation seemed newly planted, and so he had not used it in determining the shoreline.

When Stephens failed to begin construction on his mansion within six months of certification, as specified by Kaua’i County rules, he was required to redo the process, and hired Kaua’i surveyor Dennis M. Esaki to shepherd it through.

In May 2002, Esaki and Hashimoto went out to the lot together and set the shoreline boundary. Only this time, Hashimoto decided the installed landscaping did count—a decision that suddenly extended Stephens’ lot makai by nearly 11 feet on the eastern boundary and 5 feet on the western side, along the public easement. Esaki submitted a new application to the DLNR, and in July 2002, Hashimoto came back out for his official inspection, according to court records.

Diamond was there, too, with her pictures of north shore surf washing well into the vegetation, of the landscaping being installed, the beach nearly covered with water during the wintertime. But Hashimoto was unmoved, and Stephens got his certification.

.....
This was a forest “They cut

*it down and planted naupaka and
irrigated it and grew it out
seaward until now there is no
beach.
—Caren Diamond*

In August 2002, Diamond joined forces with Bronstein—his pro-bono legal work includes the successful fight to stop tour boats from operating in the Hanalei River—and the two filed an appeal of the certification to the Board of Land and Natural Resources (BLNR).

Bronstein, who lives in the neighborhood, shares Diamond's love for the beach and her dismay at both how it's changed, and government's unwillingness to look out for the public interest. 'I did it as a citizen, but was lucky enough to have the skills to do it as an attorney,' he says.

The two were granted a contested case hearing, in which retired Judge Boyd Mossman made a visit to the site and ended up issuing a decision in favor of Stephens, in part because the vegetation he'd planted had become so well-established in the past two years it had created a stable line of demarcation, which the state surveyor said he preferred over the high wash of the waves or debris line.

Meanwhile, Stephens' certificate had again expired and he hired Kaua'i surveyor Dennis Esaki to send in another application, based on the shoreline set previously. Diamond, Bronstein and another resident, Beau Blair, were ready with another administrative appeal, but the BLNR denied it in 2003.

In April 2004, Diamond and Bronstein filed an appeal of the Board's decision in Kaua'i's Circuit Court. Judge George Masuoka sided with the Board, and denied a subsequent appeal. In 2005, Bronstein and Diamond filed an appeal with the state Supreme Court, which on Oct. 24 reversed Masuoka's ruling and reaffirmed the shoreline must be as wide as possible.

'I never thought of giving up,' Diamond says. 'I think it's just a debt for getting to live here. I've been so blessed to enjoy the beach. I felt some obligation not to just watch it go.'

Young says he's 'kind of happy about the ruling because it indicates we are doing the right thing now. If we had not changed [our rules], we might have thought that the sky was falling.'

Stephens did not return a call seeking comment, but he reportedly told *The Honolulu Advertiser* in October that the repeated appeals of his shoreline certification were so frustrating that he ended up selling the house. 'You get the shoreline certified, and they appeal it, and by the time you go through the protests, your certification expires and you have to start over. My place is now being built, but I've since sold it. I was just tired of it,' Stephens is quoted as saying.

Real property and court records show Stephens has invested in a number of high-end properties on Kaua'i; in fact, he still owns one vacation rental and two vacant lots in the same subdivision as the house he recently sold.

Stephens isn't the only one who has felt the heat. The prolonged legal wranglings have also taken a toll on Diamond. She claims she's been yelled at, someone tried to run her off the road and another man threw a chain saw at her when she told

him to stop cutting down trees. Her own work and much of her life also has gone by the wayside as she devoted herself to the issue. Still, she says her crusade has won her 'more friends than enemies' and she doesn't take the attacks personally.

'It's not me, I've just put words to what's happening,'



Diamond says. 'The

incredibly rich are used to getting their way, having their way, getting what they want. And they want their own private beach. It's effectively privatizing the beach.'

Although the BLNR has made some significant changes in how it's handling certifications, Diamond and others say the public will need to be vigilant to ensure the beach doesn't end up in private hands, or barricaded by plants.

'The Supreme Court's ruling vindicates the public's right to shoreline access and use, but we still need our state and county officials to get serious about protecting these rights from getting buried under walls of vegetation and concrete,' says Hawai'i Sierra Club director Jeff Mikulina.

Diamond concurred that trying to secure enforcement at the local level has been maddening. 'Most of our complaints go right to O'ahu. We haven't seen effective enforcement from our [county] planning department. They've been extremely ineffective. It's clear they support developers and citizens have a closed door.'

Young says his agency is 'very concerned about the encroachment of private owners out into the public areas. I ask our guys when they're out doing an inspection of a property for a certification to keep your eyes open—does something look like it needs a closer look? We have followed up on cases where it seems the owner has encroached.'

Diamond, however, thinks that ultimately, 'we probably need to establish something where people can take their complaints to and we can follow up to see that it gets enforced. I get calls all the time from people with complaints.'

Complaints also may soon be coming from beachfront landowners. Dean Uchida, a private property rights advocate and executive director of the Land Use Research Foundation, says the Supreme Court decision is likely to 'create some tension between property owners and the public. It raises the question, where is the public's right to access and where does private property begin?'

But Young says the ruling shouldn't cause any confusion. 'Because the shoreline certification line is not an ownership line, it shouldn't be part of the discussion,' he says. 'If someone considers it the ownership line, we correct them and tell them it's not.'

Although Uchida concedes the case against Stephens' certification appeared to be 'a legitimate claim, there are things the regulators could have done to stop that. But instead the courts stepped in, and in trying to fix that one problem, they may have created problems in more stable areas.'

Uchida says that he thinks the battle will continue to be waged on a case-by-case basis 'and either side might sue, the public or the landowner. People need to realize the shoreline is a very dynamic area. There's never gonna be a one size fits all solution with our shorelines.'

The Domino Effect

Intensive seaside plantings do more than infringe on the public's sandy beaches. They also act as living sea walls, blocking the normal movement of sand and contributing to severe erosion in much the same way as sea walls built of rip rap and concrete.

When naupaka and other salt-tolerant plants are planted along the beach, they tend to grow into a dense, nearly impenetrable berm that prevents sand from following its natural course.

Over time, this can lead to drastic changes in a shoreline. On Kaua'i's north shore, the once-broad beach at Ha-'ena is becoming steep, banked and narrow as sand builds up against what resident Caren Diamond calls a 'vegetative sea wall' planted by oceanfront homeowners.

'And then the beach starts eroding and they [landowners] demand a seawall to protect their property,' she says. Similar scenarios have already played out in Lanikai and much of leeward Maui.

Unfortunately, as the coastline on either side of a seawall takes the brunt of the wave action, erosion begins to occur in those areas, too, prompting more walls to be built in a domino effect chain that interrupts the normal movement of sand and ultimately destroys the integrity of the shoreline.

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