Honolulu Weekly
Published April 25, 2013
By Joan Conrow

Caren Diamond figured it was all settled back in 2006, when the Hawaii Supreme Court issued its landmark decision in her case — the public beach extends to the highest seasonal wash of the waves.

The case, Diamond vs State of Hawaii, was supposed to put a stop to the state's use of vegetation to determine the shoreline, which becomes the starting line for a building setback. The practice tends to favor the landowner, especially when the plants have been cultivated.

“But the state kept doing it over and over again, so we went to the Supreme Court,” says Diamond, who lives on the North Shore of Kauai, not far from the coastline she has fought for decades to protect. The high court held oral arguments on April 4 and has not issued a decision.

Diamond is again challenging how the state Department of Land and Natural Resources (DLNR) sets the shoreline. This time she's contesting its “single-year snapshot” approach, in which the state surveyor is guided solely by what's visible the day of the site visit, even if historical photographs indicate the highest wash is further mauka.

“If there's no history, then there's no future,” Diamond said.

The case was brought by Kauai attorney Harold Bronstein on behalf of Diamond and Beau Blair, who have long argued that landowners are manipulating the shoreline by intentionally cultivating and irrigating naupaka and other vegetation. They contend the thick plantings impede the high wash of the waves and hide the debris line left behind. In this particular case, some 20 feet of public beach is under dispute because the state's own survey had initially set the shoreline further mauka.

Kauai Circuit Judge Kathleen Watanabe initially ruled against the state. She found that intentionally cultivating vegetation for the purpose of creating an artificial line undermines the intent of state law, which is to give the public as much use of the beach as is reasonably possible. In signing the 2010 order, Watanabe struck down a certification based on a shoreline boundary that the state itself had rejected five years prior.

She also found the “single-year snapshot” interpretation of the law to be “arbitrary, capricious and/or characterized by an abuse of discretion” because it “conflicts with and/or contradicts the purpose and intent” of the state shoreline statute.

Watanabe's ruling was later overturned by the Intermediate Court of Appeals, prompting Bronstein to seek a decision from the high court.

During oral arguments, it seemed the Justices quickly and clearly grasped the key issue. As Justice Richard Pollack noted, under the state's “single-year-snapshot” policy, he could seek multiple certifications and choose the one most favorable to him before building his house.

Deputy State Attorney Linda Chow acknowledged that could be possible.

“Is that the position you want to advocate for the state – that everybody in this state is going to lose the ability to use our beaches because the storms are less this year than prior years?” Pollack asked.

The state claimed that it doesn't really work like that, because the certification is good for only one year and doesn't affect access. But as Justice Simeon Acoba noted, houses are typically permanent, so the certification does have consequences for the public beach.

Pollack also questioned why the DLNR had initially treated Chipper Wichman, director of the National Tropical Botanical Garden, as an expert witness in naupaka growth, but then later “almost ridiculed” his credentials. “It sounds like to me that they're trying to justify something.”

The Justices also questioned why the state gave so little weight to historical photographic evidence of the shoreline presented by Blair and Diamond, who have lived in the area for decades, and dismissed their evidence as “anecdotal and/or unreliable.”

Circuit Judge Watanabe had found state had acted arbitrarily and/or capriciously in dismissing evidence compiled over eight years to document the highest wash of the waves on the lot.

Acoba wanted to know whether Wichman, Blair or Diamond were allowed to testify, and was told no, the state had considered only documents. That prompted him to ask, “How much credibility do you get from paper?”

When Acoba pressed for more details on what documentation and evidence had been presented to the Board of Land and Natural Resources, Chow said she wasn't sure, as she didn't have the record.

"You don't have the record?” asked an incredulous Acoba. “Don't you represent DLNR?"

Bronstein later told the Justices that the full Board never did consider the issue, as presented by Chow. Instead, the decision to reject Diamond's appeal of the shoreline was made by DLNR staff and signed by then-Director Laura Thielen.

“The public policy is to extend as much beach to the public as possible, and that's the way it should be,” Bronstein said in his closing statements.

Diamond said the problem stems from the state's reluctance to enforce against landowners who intentionally cultivate the beach. In addition to allowing property owners to encroach onto the public beach, the vegetation accelerates erosion.

She is now concerned because the state has recently taken the position that it will not require landowners to remove vegetation or other encroachments onto the public beach as a condition of certifying the shoreline.

Instead, it will rely on Act 160, which requires landowners to ensure their plants don't impede on the public beach. But though the law has been used to clean up shorelines at Kahala and

Diamond Head since it was adopted three years ago, no enforcement has ever been taken against North Shore Kauai landowners.

“It's the legacy that DNLR left up here, which is destruction of some of Hawaii's most beautiful beaches,” Diamond said.