NOS. 30573 and CAAP-11-0000345

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

NO. 30573
(CIVIL NO. 09-1-0197)

CAREN DIAMOND and BEAU BLAIR,
Petitioners/Plaintiffs-Appellants/Appellees-Cross-Appellees,
v.
CRAIG DOBBIN and WAGNER ENGINEERING SERVICES, INC.,
Respondents/Defendants-Appellees/Appellants-Cross-Appellees
and
STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES,
Respondent/Defendant-Appellee/Appellee-Cross-Appellant.

and

NO. CAAP 11-0000345
(CIVIL NO. 10-1-0116)

CAREN DIAMOND and BEAU BLAIR,
Petitioners/Plaintiffs-Appellants/Appellees-Cross-Appellees,
v.
CRAIG DOBBIN and WAGNER ENGINEERING SERVICES, INC.,
Respondents/Defendants-Appellees/Appellants-Cross-Appellees
and
STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES,
Respondent/Defendant-Appellee/Appellee-Cross-Appellant.

PETITIONERS/PLAINTIFFS-APPELLANTS/APPELLEES-CROSS-APPELLEES
CAREN DIAMOND AND BEAU BLAIR'S APPLICATION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT
FROM JUDGMENT ON APPEAL FILED OCTOBER 2, 2012

and

APPENDIX

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NOS. 30573 and CAAP 11-0000345

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

PETITIONERS/PLAINTIFFS-APPELLANTS/APPELLEES-CROSS-APPELLEES
CAREN DIAMOND AND BEAU BLAIR'S APPLICATION FOR
WRIT OF CERTIORARI TO THE SUPREME COURT
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Statement of the Questions Presented

I.

Whether the Intermediate Court of Appeals Gravely Erred in its Failure to Consider and Apply Hawaii Supreme Court's Decision in Paul's Elec. Service, Inc. v. Befitel, 104 Hawaii 412, 91 P.3d 494 (2004) with respect to the "deference", if any, the Circuit Court should have afforded the Board of Land and Natural Resources in the Circuit Court's review of the BLNR's discretionary determination with respect to the location of the "shoreline" pursuant to HRS 205A-1, et.seq.

II.

Whether the Intermediate Court of Appeals Gravely Erred in its Interpretation and Application of the Hawaii Supreme Court's Decision in Diamond, et al. v. State of Hawaii, et al., 112 Hawaii 161, 145 P.3d 704 (2006) with respect to the BLNR's discretionary determination of the location of the shoreline pursuant to HRS 205A-1, et. seq.

III.

Whether the Intermediate Court of Appeals Gravely Erred in Concluding that the Circuit Court's 2010 Judgment in Civil No. 09-1-0197 was Rendered Moot when the BLNR filed its Amended Decision and Order on May 21, 2010

Statement of the Prior Proceedings and Statement of the Case

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

On June 27, 2005, pursuant to HAR 13-222-2, et. seq., an application for shoreline certification File No. KA-034-2A, for the same property, i.e., 7310 Alealea Road, Wainiha, Hawaii, TMK 4-5-8-09-011 was submitted by Dennis Esaki, Esaki Surveying and Mapping, Inc. on behalf of the prior owner, Jeffrey Galloway. (Docket No. 48; pgs. 15-21; R.A. 1-7).

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. (Docket No. 48; pgs. 15-21; R.A. 1-7).

On August 17, 2005, Caren Diamond, Beau Blair, and Barbara Robeson requested the State Surveyor to make a site visit.

As a result of the site visit on October 19, 2005, the State Surveyor, recommended that the shoreline be located at the "debris line near the mauka edge of the naupaka hedge". This recommendation located the shoreline "further mauka than delineated on the (proposed) map" submitted by the Applicant. (Docket No. 48, pg. 40; R.A. 17; emphasis added).

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.

(Docket No. 48, pgs. 40 and 42; R.A. 18; App. 65-66; emphasis added).

Administrative Proceedings - DLNR File KA-313

On January 11, 2008, pursuant to HAR 13-222-2, et. seq., 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 by Ronald J. Wagner, Wagner Engineering Services, Inc., on behalf of the owner, Craig Dobbin. (Docket No. 48, pgs. 48-54; R.A. 21-27).[1] The shoreline certification application was based upon a field survey of the "conditions existing on December 4, 2007". (Docket No. 48, pg. 54; R.A. 27)[2].

The proposed shoreline certification for Lot 12, Wainiha II Subdivision, 7310 Alealea Road, Wainiha, Hawaii, was published in the OEQC bulletin on June 8, 2008. On June 27, 2008, Diamond and Blair filed a Notice of Appeal with the Board of Land and Natural Resources. (Docket No. 48, pgs. 82-87; R.A. 44-49).

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[1] The abbreviation R.A. shall be used for the Record on Appeal for the administrative proceedings before the Board of Land and Natural Resources.

[2] The Record on Appeal in The Intermediate Court of Appeals shall be by reference to the ICA Docket and Page No.

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

(Docket No. 50, pgs. 160-162; R.A. 235-237).

On June 19, 2009, Thielen approved the recommendation to deny the appeal. (Docket No. 50, pg. 161; R.A. 236). 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. (Docket No. 50, pgs. 164-178; R.A. 238-252). On June 25, 2009 the proposed certified shoreline map was signed by the Chairperson. (Docket No. 50, pg. 180; R.A. 253).

Fifth Circuit Court Proceedings Re: Civil No. 09-1-0197 (KA-313)

On July 20, 2009, a Notice of Appeal; Exhibit "A" was filed by Diamond and Blair with the Fifth Circuit Court, State of Hawaii in Diamond, et al. v. State of Hawaii, et al., Civil No. 09-1-0197.

The Court received briefs from all parties and heard oral argument on March 2, 2010.

The Court's Findings of Fact; Conclusions of Law; Decision and Order was filed on April 6, 2010. (Docket No. 20, pgs. 88-100; R.A. 271-283).

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. The Court 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. Finally, the Court remanded the matter back to the BLNR for proceedings consistent with the Court's Decision and Order filed April 6, 2010. (Docket No. 20, pgs. 88-100; R.A. 271-283).

A Final Judgment in Civil No. 09-1-0197 was entered on May 19, 2010.[3]

Defendant-Appellee Craig Dobbin filed a Notice of Appeal to the Intermediate Court of Appeal on June 17, 2010, i.e. S.Ct. No. 30573. Defendant-Appellee State of Hawaii filed a Cross Appeal on June 21, 2010.

Fifth Circuit Court Proceedings Re: Civil No. 10-1-0116

Pursuant to the Court's Order of remand in Civil No. 09-1-0197, the BLNR prepared Amended Findings of Fact; Conclusions of Law and Decision and Order, dated May 21, 2010. (Case No. 30573, Docket No. 33, pgs. 28-42). The Amended Decision and Order

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[3] The Court's Judgment entered May 19, 2010 is not moot. See Diamond v. State Board of Land and Natural Resources, 112 Haw. 161, 145 P.13d 704, 714-715 (Hawaii 2006).

recertified the shoreline in the same location as previously vacated by the Court in its Order and Decision filed April 6, 2010.

On May 25, 2010, a timely Notice of Appeal; Exhibit "A" was filed for a second time with the Fifth Circuit Court, State of Hawaii in Diamond, et al. v. State of Hawaii, et al., Civil No. 10-1-0116. (Docket No. 20, pgs. 9-26).

The Court received briefs from all parties and heard oral argument on January 5, 2011. (Docket No. 82).

The Circuit Court's Findings of Fact; Conclusions of Law; Decision and Order were filed by the Court in Civil No. 10-1-0116 on February 16, 2011. (Docket No. 32, pgs. 2-30).

A Final Judgment in Civil No. 10-1-0116 was entered on March 31, 2011. (Docket No. 32, pgs. 31-32).

Defendant-Appellee Craig Dobbin filed a Notice of Appeal to the Intermediate Court of Appeal on April 18, 2011. Defendant-Appellee State of Hawaii filed a Notice of Cross Appeal on April 29, 2011.

Pursuant to the Order Granting Plaintiffs-Appellees' Motion to Consolidate Appeals filed August 25, 2011, the appeals in No. 30573 and CAAP-11-0000345 were consolidated for decision. (Docket No. 63).

The Memorandum Opinion of the Intermediate Court of Appeals was filed on August 31, 2012. (Appendix, at pages 3-11).

Judgment on Appeal was filed on October 3, 2012. (Appendix, at pages 1-2). On October 29, 2012, Petitioner timely filed their Request for Extension of Time to file their Petition for Writ of Certiorari.

ARGUMENT

Relying upon Paul v. Dep't of Transp., State of Hawaii, 115 Hawaii 416, 425, 168 P.3d 546, the Intermediate Court of Appeals (ICA) in its Memorandum Opinion filed August 31, 2012, erroneously reversed the Circuit Court's Judgment entered March 31, 2011. The Court in its Opinion concluded:

> . . . , an appellate court's review of an agency decision is "qualified by the principle that the agency's decision carries a presumption of validity and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences." Paul v. Dep't of Transp., State of Hawaii, 115 Hawaii 416, 425, 168 P.3d 546, 555 (2007); (Appendix, at page 7; emphasis added).

The ICA in its Memorandum Opinion further concluded:

> While it is true that BLNR was presented with evidence showing the shoreline to be further mauka, it was within the discretion of BLNR, relying on its expertise, to weigh all the evidence and make a factual determination. Therefore, the circuit court erred in failing to give proper deference to BLNR's findings of Facts in certifying the shoreline boundary. (Emphasis added).
>
> Additionally, the circuit court erred when it held that [t]he 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 determine 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 purposes and intent of HRS §205A-1, et. seq." (Appendix, at page 10; emphasis added).

Paul v. Dept. of Transp., supra, relies upon a 1996 decision, i.e., Bragg v. State Farm Mutual Auto Ins., 81 Hawaii 302, 304, 916 P.2d 1203, 168 P.3d 556 (1996) (quoting *Univ.[.] of Hawaii Prof['] Assembly v. Tomasu*, 79 Hawaii 154, 157, 900 P.26 161, 164 (1995)). The ICA's reliance on Paul v. Dept. of Transp., supra, is wrong, or at the very least in conflict with the Hawaii Supreme Court's decision in Paul's Elec. Service, Inc. v. Befitel, 104 Haw. 412, 91 P.3d 494 (2004).

In Paul's Elec. Service, Inc. v. Befitel, 104 Hawaii 412, 91 P.3d 494 (2004), the Hawaii Supreme Court, at pages 416-420 took the opportunity to "clarify the standard of review for agencies' discretionary determinations". (Emphasis added). The Court, at page 419 stated:

> In the past, we have also held that the party seeking to overturn an agency's action "has the heavy burden of making a convincing showing that the decision is invalid[.]" *Id.* This is correct - an appellant does have a heavy burden - but it is imprecise insofar as it suggests that the standard of review is something different (or more rigorous) than abuse of discretion. Agency determinations, even if made within the agency's sphere of expertise, are not presumptively valid;

Paul's Elec., at 419; emphasis added.

The Court went further at page 419 and stated:

> Thus, an appellant seeking to overturn an agency's determination made within the agency's sphere of expertise has a high burden

> to demonstrate that the agency abused its discretion. A "high burden," a "heavy burden," and "deference" are all ways of expressing this same concept: that a determination made by an administrative agency acting within the boundaries of its delegated authority will not be overturned unless "arbitrary, or capricious, or characterized by ... [a] clearly unwarranted exercise of discretion." (HRS § 91-14(g)(6)).

(Paul's Elec., at 419-420; emphasis added).

Simply put, contrary to the ICA's analysis, neither "deference" nor a "presumption of validity" constitutes the basis for an analysis to reverse the Circuit Court's Judgment, filed March 31, 2011.

The BLNR's attempt to set an arbitrary and capricious preference for the use of the "current" season's high surf over other relevant evidence of the upper reaches of the wash of the waves, including the use of historical evidence, and in this case, the State surveyor's prior recommendation of October 19, 2005, conflicts with the manifest purpose of the statute it seeks to implement, i.e. HRS 205A-1 and 205A-42. Diamond v. State Board of Land and Natural Resources, 112 Haw. 161, 145 P.3d 704 (Hawaii 2006); Maunaloa Bay Beach Ohana 28 v. State of Hawaii, 122 Hawaii 34, 222 P.3d 441, 452-453 (Hawaii. App. 2009). Such a restriction of the evidence allows the landowner to pick and choose the time most favorable to certify the shoreline, and is clearly contrary to the legislature's "intent to reserve as much of the shore as possible to the public". Diamond, supra, 112 Haw. at 174.

As the court observed in Diamond, the use of words like "upper reaches," "high tide," and "highest wash" confirms the Legislature's "intent to reserve as much of the shore as possible to the public." Diamond, 112 Haw. at 174.

Moreover, it does not follow that just because the shoreline certification itself lasts for only one year, only one year's wave data shall be considered. It is a clear abuse of discretion to analyze only one year's wave data to locate the shoreline, especially when as in this case, a physical structure will be present on the property for decades to come based upon that shoreline determination.

In Diamond v. State Board of Land and Natural Resources, 112 Hawaii 161, 145 P.3d 704 (Hawaii 2006), the Hawaii Supreme Court in reversing the BLNR's Order Denying Appeal with respect to the appeal of a shoreline in the same subdivision, stated:

> . . . to the extent that the Order Denying Appeal suggests that, as a matter of law, the shoreline is not demarcated by the highest point that the waves reach on shore in non-storm or tidal conditions, the Order is erroneous. (Emphasis added).

Diamond at 715-716.

The simple truth is that the Appellees' proposed location of the shoreline is approximately the same location of the shoreline recommended by the same State Surveyor based upon the State Surveyor's own observations of the same property on October 19, 2005. (App. 35). Diamond, supra; Application of Ashford, 50 Haw.

314, 315, 440 P.2d 76, 77 (1968); County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57, 61 (1973). The State Surveyor simply can not ignore his own prior recommendation of October 19, 2005, which approximately two (2) years earlier, locates the shoreline as "mauka of the dune crest". (App. 35). See Tr. January 5, 2011, at pages 28-40; Docket No. 82, pgs. 28-40.

In County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57, 61 (1973), the Hawaii Supreme Court held that public policy "favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible". In Diamond, supra, at 145 P3d 704, 715, the Hawaii Supreme made clear that as to HRS 205A-1 the "plain and obvious meaning of the statute is that the shoreline is determined by the highest - i.e. the furthest mauka - reach of the waves." (Emphasis added).

Specifically, the Hawaii Supreme Court in Diamond, supra, 145 P.3d at 715 stated:

> Plaintiffs' interpretation of HRS § 205A-1 is correct insofar as the plain and obvious meaning of the statute is that the shoreline is determined by the highest - *i.e.*, the furthest mauka - reach of the waves. As the BLNR admits in its answering brief, "[t]he main thrust of this definition is that the shoreline is the *highest* point to which the waves reach on shore." (Emphasis added). Indeed, the statute utilizes such language as "the *upper* reaches of the wash of the waves" and "at *high* tide during the season of the year in which the *highest* wash of the waves occurs." (Emphasis added).

(Emphasis in the original).

CONCLUSION

The Circuit Court's Findings of Fact, Conclusions or Law, Decision and Order filed February 16, 2011 were well within the Court's statutory authority, and should not be disturbed on appeal. The Circuit Court's Findings of Fact, Conclusions of Law; Decision and Order filed February 16, 2011 are not wrong as a matter of law, and are consistent with the State of Hawaii's public policy favoring "extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible". Diamond, et al. v. State of Hawaii, et al., supra; County of Hawaii v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973; See HRS 91-14(g).

The Circuit Court was not required to "give proper deference to BLNR's Findings of Facts in certifying the shoreline boundary", nor were the BLNR's Findings "presumptively valid". The Circuit Court clearly had a definite and firm conviction that a mistake had been made in locating the shoreline, and acted well within its statutory authority in reversing the BLNR's Decision and Order. See HRS 91-14(g).

Accordingly, based upon the foregoing the Writ of Certiorari should be granted.

DATED: Lihue, Hawaii, December 3, 2012.

/s/ Harold Bronstein
HAROLD BRONSTEIN
Attorney for Plaintiffs-
Appellants/Appellees-Cross-Appellees,
Caren Diamond and Beau Blair

NO. CAAP 11-0000345

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

CAREN DIAMOND and BEAU BLAIR,	)	CIVIL NO. 10-1-0116
	)	
Plaintiffs/Appellees,	)	
	)	
vs.	)	
	)	
CRAIG DOBBIN, and WAGNER ENGINEERING SERVICES, INC.,	)	
	)	
Defendants-Appellants/ Cross Defendants-Appellees,	)	
	)	
and	)	
	)	
STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES,	)	
	)	
Defendant-Appellee/ Cross Appellant.	)	
	)	

APPENDIX

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NOS. 30573 and CAAP-11-0000345

IN THE INTERMEDIATE COURT OF APPEALS

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NO. 30573
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STATE OF HAWAI'I, BOARD OF LAND AND NATURAL RESOURCES,
Defendant-Appellee/Appellee-Cross-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT

JUDGMENT ON APPEAL

(By: Foley, Presiding J., for the court[1])

Pursuant to the Memorandum Opinion of the Intermediate Court of Appeals of the State of Hawai'i entered August 31, 2012, the Judgment of the Circuit Court of the Fifth entered March 31, 2011 is reversed.

DATED: Honolulu, Hawai'i, October 3, 2012.

FOR THE COURT:

Presiding Judge

[1] Foley, Presiding J., Fujise and Leonard, JJ.

NOS. 30573 and CAAP-11-0000345

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

NO. 30573
(CIVIL NO. 09-1-0197)

CAREN DIAMOND and BEAU BLAIR,
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Defendant-Appellee/Appellee-Cross-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT

MEMORANDUM OPINION
(By: Foley, Presiding J., Fujise and Leonard, JJ.)

In appellate case number 30573 (30573), Craig Dobbin (Dobbin) and Wagner Engineering Services, Inc. (WESI)

(collectively, Appellants) appeal from the May 19, 2010 Judgment (2010 Judgment) entered in the Circuit Court of the Fifth Circuit. Judgment was entered in favor of Caren Diamond (Diamond) and Beau Blair (Blair) and against State of Hawai'i Board of Land and Natural Resources (BLNR), Dobbin, and WESI. BLNR cross-appealed from the 2010 Judgment.

In appellate case number CAAP-11-0000345 (CAAP-11-345), Appellants appeal from the March 31, 2011 Judgment (2011 Judgment) also entered in the Circuit Court of the Fifth Circuit[1] (circuit court) in favor of Diamond and Blair and against BLNR, Dobbin, and WESI. BLNR cross-appealed from the 2011 Judgment.

On August 25, 2011, this court consolidated 30573 and CAAP-11-345 for decision.

The circuit court's 2010 Judgment was rendered moot when BLNR filed its "Amended Findings of Fact; Conclusions of Law and Decision and Order" (BLNR Amended D&O) on May 21, 2010. Therefore, we do not address the issues raised in 30573. See Wong v. Bd. of Regents, University of Hawaii, 62 Haw. 391, 394, 616 P.2d 201, 203-04 (1980). See also Application of Thomas, 73 Haw. 223, 225-26, 832 P.2d 253, 254 (1992).

On appeal, Appellants contend the circuit court erred in reversing and vacating the BLNR Amended D&O when

(1) the actions of BLNR were consistent with the statutory authority granted to it;

(2) BLNR's findings of fact were not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;

(3) BLNR correctly exercised its discretion and committed no error of law; and

(4) the circuit court wrongfully substituted its own judgment on the evidence and ignored BLNR'S determination.

---

[1] The Honorable Kathleen N.A. Watanabe presided over both matters.

On cross-appeal, BLNR, contends the circuit court erred when

(1) it incorrectly applied the standard of review;

(2) it failed to confine its review to the record on appeal and improperly engaged in fact finding; and

(3) it found BLNR's interpretation of Hawaii Revised Statutes (HRS) § 205A-1 to be erroneous.

I. BACKGROUND

Dobbin is the owner of the property identified as 7310 Alealea Road, on the island of Kaua'i, also identified as Tax Map Key No. (4)5-8-009:051 (the Property). Diamond and Blair are residents of Kaua'i and reside near the Property. Diamond and Blair both use the beach, public resources, and the shoreline area in close proximity to the Property.

Dobbin hired WESI to survey the Property and on January 11, 2008, WESI submitted the application to the Department of Land and Natural Resources (DLNR) for shoreline certification. On April 18, 2008, DLNR and the State Land Surveyor (State Surveyor) conducted a site visit of the Property. Based on that 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 [WESI], Licensed Professional Land Surveyor."

On June 27, 2008, Diamond and Blair filed an appeal with BLNR contesting the proposed shoreline for the Property. On June 19, 2009, BLNR issued its "Findings of Facts, Conclusions of Law, and Decision and Order" (BLNR D&O) approving the proposed shoreline boundary and denying Diamond and Blair's appeal. On June 25, 2009, the proposed certified shoreline map was finalized.

On July 20, 2009, Diamond and Blair filed a notice of appeal with the circuit court. On April 6, 2010, the circuit court entered its "Findings of Fact; Conclusions of Law; Decision and Order" (April 6, 2010 D&O), which vacated the BLNR D&O and

remanded the matter back to BLNR. On May 19, 2010, the circuit court entered judgment. Appellants appealed to this court and BLNR cross-appealed in 30573.

On remand, BLNR issued its BLNR Amended D&O dated May 21, 2010, placing the shoreline in the same location as previously approved by the BLNR. On February 16, 2011, subsequent to another appeal filed by Diamond and Blair, the circuit court entered its "Findings of Fact; Conclusions of Law; Decision and Order" (February 16, 2011 D&O), reversing and vacating the BLNR Amended D&O. The circuit court entered judgment on March 31, 2011. Appellants appealed to this court and BLNR cross-appealed in CAAP-11-345.

II. STANDARD OF REVIEW

A. Administrative Agencies

> In determining whether an agency determination should be given deference, the standard to be applied is as follows:
>
> > [W]hen reviewing a determination of an administrative agency, we first decide whether the legislature granted the agency discretion to make the determination being reviewed. If the legislature has granted the agency discretion over a particular matter, then we review the agency's action pursuant to the deferential abuse of discretion standard (bearing in mind that the legislature determines the boundaries of that discretion). If the legislature has not granted the agency discretion over a particular matter, then the agency's conclusions are subject to de novo review.
>
> *Paul's Electrical Service, Inc. v. Befitel*, 104 Hawai'i 412, 419-20, 91 P.3d 494, 501-[02] (2004).

Olelo: The Corp. for Cmty. Television v. Office of Info. Practices, 116 Hawai'i 337, 344, 173 P.3d 484, 491 (2007).

B. Administrative Agency Decisions - Secondary Appeals

> Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal. In an appeal from a circuit court's review of an administrative decision the appellate court will utilize identical standards applied by the circuit court. Questions of fact are reviewed under the "clearly erroneous" standard. In contrast, an agency's legal conclusions are freely reviewable. An agency's interpretation of its rules receives deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose.

Hawaii Teamsters & Allied Workers, Local 996 v. Dep't of Labor & Indus. Relations, 110 Hawai'i 259, 265, 132 P.3d 368, 374 (2006) (internal quotation marks and citations omitted).

III. DISCUSSION

Appellants and BLNR contend the circuit court abused its discretion in engaging in fact finding and ignoring the deference afforded to agencies with respect to issues of fact. The circuit court held that twenty-three of BLNR's findings of fact from the BLNR Amended D&O were "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record[.]" Appellants argue that the circuit court's "review of the findings of fact contained in the [BLNR Amended D&O] consisted of the circuit court's wholesale dismissal of the [BLNR's] findings of fact and the insertion of its own findings of fact based on the circuit court's own interpretation of the evidence."

The Hawai'i Supreme Court has held that courts are free to reverse an agency decision if affected by an error of law, but, "in deference to the administrative agency's expertise and experience in its particular field, the courts should not substitute their own judgment for that of the administrative agency where mixed questions of fact and law are presented." Camara v. Agsalud, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984). Furthermore, an appellate court's review of an agency decision is "qualified by the principle that the agency's decision carries a presumption of validity and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences." Paul v. Dep't of Transp., State of Hawai'i, 115 Hawai'i 416, 425, 168 P.3d 546, 555 (2007).

BLNR's findings of fact are reviewed under the clearly erroneous standard. See Hawaii Teamsters & Allied Workers, Local 996 v. Dep't of Labor & Indus. Relations, 110 Hawai'i 259, 265, 132 P.3d 368, 374 (2006). A finding of fact is "clearly

erroneous when (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made." Del Monte Fresh Produce (Hawaii), Inc. v. Int'l Longshore and Warehouse Union, Local 142, AFL-CIO, 112 Hawai'i 489, 499, 146 P.3d 1066, 1076 (2006) (internal quotation marks omitted) (quoting In re Water Use Permit Applications, 94 Hawai'i 97, 119, 9 P.3d 409, 431 (2000)).

The circuit court's February 16, 2011 D&O demonstrated that it engaged in unwarranted fact finding and weighing of the evidence. Findings of Fact 28 through 40 rely on evidence submitted by Diamond and Blair which support the finding of a shoreline further mauka[2] than the shoreline certified by BLNR. The circuit court found that Diamond and Blair "have both observed and photographed over the recent years that as the winter waves wash on [the Property], the waves push sand and other debris mauka[,]" and the evidence submitted by Diamond and Blair "clearly shows" a shoreline boundary which is further mauka than the boundary approved by BLNR.

Based on the evidence submitted by Diamond and Blair, the circuit court concluded that 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."

The circuit court further reasoned that

> [t]he BLNR's characterization as either "anecdotal evidence and/or unreliable evidence" with respect to both the detailed Declarations of Cared 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[.]

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[2] In Hawaiian, mauka means inland. Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary at 242 (1986).

BLNR did not disregard the evidence submitted by Diamond and Blair, but instead weighed the strength of Diamond and Blair's evidence against evidence presented by DLNR and the State Surveyor. BLNR found that Blair's "testimony did not refer to specific observations she made of the shoreline, either as to the location of the highest wash of the waves or any dates when these high tides occurred." BLNR found the photographic evidence submitted by Diamond and Blair was either unclear, did not contain an accurate depiction of the waves or high water mark, or did not contain accurate dates on when the photos were taken.

In contrast, BLNR, in the BLNR Amended D&O, found the findings of DLNR and the State Surveyor that were based on the April 18, 2008 site visit, to be persuasive. BLNR, in relying on these findings, found that DLNR and the State Surveyor considered "in their shoreline determination, any pertinent information about the shoreline that is presented by the owner of the subject property and any other member of the public that has personal knowledge and familiarity with the shoreline conditions of the subject property[.]" DLNR and the State Surveyor found the area had "undergone a significant change in the character of its coastal vegetation species distribution. . . . This is having a notable impact on the shape and elevation of the frontal dune as well as the extent of inundation for wash of the waves." BLNR acknowledged that the previous site visit of October 19, 2005, identified a shoreline that was further mauka than the proposed shoreline location. However, BLNR noted that DLNR and the State Surveyor found there was no evidence that the waves had extended to the October 19, 2005 shoreline location in the previous two winters.

In Findings of Fact 27 through 38 and Conclusions of Law 8 and 9 of the April 6, 2010 D&O, the circuit court substituted its own judgment for that of BLNR in weighing the evidence presented to BLNR. BLNR was presented with adequate evidence supporting its ultimate shoreline determination, and as

such, its findings of fact were not clearly erroneous. While it is true that BLNR was presented with evidence showing the shoreline to be further mauka, it was within the discretion of BLNR, relying on its expertise, to weigh all the evidence and make a factual determination. Therefore, the circuit court erred in failing to give proper deference to BLNR's findings of facts in certifying the shoreline boundary.

Additionally, the circuit court erred when it held that

> [t]he 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."

The circuit court's characterization of BLNR's findings as only allowing evidence from the current year to determine the upper reaches of the wave is a misstatement of BLNR's findings. BLNR found "[c]ontrary to [Diamond and Blair's] allegation, the State Surveyor and [DLNR] did incorporate and consider [Diamond and Blair's] historical evidence but determined that the direct evidence from the site visit was more compelling for the purposes of locating the shoreline that is representative of the current conditions." BLNR did not restrict its analysis of the upper reaches of the waves to the current year, but rather, "took into evaluation all relevant factors present on [the Property]."

The BLNR Amended D&O was not contrary to the definition of "shoreline boundary" as defined by HRS § 205A-1:

> 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.

HRS § 205A-1. The debris line and the line marking the edge of vegetation growth are used as evidence to determine the shoreline, depending on the location and stability of each line. See Diamond v. State, Bd. of Land and Natural Resources, 112 Hawai'i 161, 175, 145 P.3d 704, 718 (2006). BLNR's certification

was not contrary to the definition of shoreline boundary. BLNR properly considered all evidence in determining the highest wash of the waves. The circuit court erred in substituting its judgment for BLNR.

IV. CONCLUSION

The March 31, 2011 Judgment entered in the Circuit Court of the Fifth Circuit is reversed.

DATED: Honolulu, Hawai'i, August 31, 2012.

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Presiding Judge

Associate Judge

Associate Judge