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NOS. SCWC-30573 and SCWC-11-0000345

IN THE SUPREME COURT OF THE STATE OF HAWAII

CAREN DIAMOND and BEAU BLAIR,	)	Case No. 30573
	)	
Plaintiffs-Appellants/	)	Civil No. 09-1-0197
Appellants-Cross Appellees,	)	(Agency Appeal)
	)	
vs.	)	FIFTH CIRCUIT
	)	
CRAIG DOBBIN and WAGNER	)	HONORABLE KATHLEEN N.A.
ENGINEERING SERVICES, INC.,	)	WATANABE, Judge
	)	
Defendants-Appellees/	)	
Appellants-Cross-	)	
Appellees,	)	
	)	
and	)	
	)	
STATE OF HAWAII, BOARD OF LAND	)	
AND NATURAL RESOURCES,	)	
	)	
Defendant-Appellee/	)	
Appellee-Cross Appellant.	)	
	)	
CAREN DIAMOND and BEAU BLAIR,	)	Case No. CAAP-11-0000345
	)	
Plaintiffs-Appellants/	)	Civil No. 10-1-0116
Appellants-Cross Appellees,	)	(Agency Appeal)
	)	
vs.	)	FIFTH CIRCUIT
	)	
CRAIG DOBBIN and WAGNER	)	HONORABLE KATHLEEN N.A.
ENGINEERING SERVICES, INC.,	)	WATANABE, Judge
	)	
Defendants-Appellees/	)	
Appellants-Cross-	)	
Appellees,	)	

)  
and )  
)  
STATE OF HAWAII, BOARD OF LAND )  
AND NATURAL RESOURCES, )  
)  
Defendant-Appellee/ )  
Appellee-Cross Appellant. )

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RESPONDENTS/DEFENDANTS-APPELLEES/  
APPELLANTS-CROSS-APPELLEES CRAIG DOBBIN'S  
AND WAGNER ENGINEERING SERVICES, INC.'S RESPONSE  
TO PETITIONERS/PLAINTIFFS-APPELLANTS/APPELLEES-CROSS-  
APPELLEES CAREN DIAMOND AND BEAU BLAIR'S APPLICATION  
FOR WRIT OF CERTIORARI FILED ON DECEMBER 3, 2012

and

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**RESPONDENTS/DEFENDANTS-APPELLEES/  
APPELLANTS-CROSS-APPELLEES CRAIG DOBBIN'S  
AND WAGNER ENGINEERING SERVICES, INC.'S RESPONSE  
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APPELLEES CAREN DIAMOND AND BEAU BLAIR'S APPLICATION  
FOR WRIT OF CERTIORARI FILED ON DECEMBER 3, 2012**

Come now Respondents/Defendants-Appellees/Appellants-Cross-Appellees CRAIG DOBBIN and WAGNER ENGINEERING SERVICES, INC., herein collectively called the "Respondents", and in response to the Application for Writ of Certiorari, filed herein on December 3, 2012, by Plaintiffs-Appellants/Appellees-Cross Appellees Caren Diamond and Beau Blair, herein collectively called "Diamond/Blair", respectfully request that the writ for certiorari be denied.

**I. INTRODUCTION**

Diamond/Blair filed their application for a writ of certiorari challenging the Intermediate Court of Appeals' (herein the "ICA") reversal of the Fifth Circuit Court's decision in substituting its judgment for that of the State of Hawaii Board of Land and Natural Resources, herein the "BLNR", in locating the shoreline on a parcel of land in Haena, Kauai, Hawaii.

A right to appeal is based on statute and exists only when jurisdiction is given by some constitutional or statutory provision. *Lingle v. Hawaii Gov't Employees Ass'n AFSCME, Local 152, AFL-CIO*, 107 Haw. 178, 111 P.3d 587 (2005). The right to appeal from an administrative agency's decision is governed by the Hawaii Administrative Procedures Act, Chapter 91 of the Hawaii Revised Statutes. Strict compliance with the Hawaii Administrative Procedures Act is required. *Tanaka v. Dept. of Hawaiian Home Lands*, 106 Haw. 246, 103 P.3d 409 (2004).

In the secondary appeal below, the ICA found that the Fifth Circuit Court engaged in unwarranted fact finding and weighing of the evidence, substituted its own judgment for that of the BLNR in weighing the evidence presented to the BLNR, and failed to give proper deference to the BLNR's findings of fact in certifying the shoreline boundary. Respondents submit there are no legal issues presented that warrant the exercise of this Court's decision to grant certiorari.

## **II COUNTER STATEMENT OF QUESTION PRESENTED**

The only issues on appeal are:

- (1) Whether the BLNR's actions in determining the shoreline to be at the crest of the beach dune was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
- (2) Whether the exercise of the discretion afforded the BLNR in determining the shoreline at the crest of the beach dune was arbitrary, or capricious, or characterized by an abuse of discretion, or was clearly an unwarranted exercise of that discretion; and
- (3) Whether the locating of the shoreline at the crest of the beach dune was against the public policy.

## **III. COUNTER STATEMENT OF THE CASE**

The facts that are necessary to the issue of whether the Court has jurisdiction over this appeal, are as follows:

### **A. Proceedings Before the Board of Land and Natural Resources**

As noted by the ICA, the Circuit Court's 2010 Judgment and subject of Case No. 30573 was rendered moot when the BLNR filed its Amended Findings of Fact; Conclusions of Law and Decision and Order (the subject of CAAP-11-345). Accordingly, and notwithstanding the

consolidation of the cases herein, all references herein will be to the Record on Appeal in Case No. CAAP-11-345.

Dobbin is the owner of the property identified as Tax Map Key: (4<sup>111</sup>) 5-8-009-051, situated at Haena, Island and County of Kauai, State of Hawaii, herein the "Property".<sup>1</sup> Diamond/Blair are residents and reside near the Property.

As required by the County of Kauai, Dobbin hired Wagner to obtain a shoreline certification for the Property, and on January 11, 2008, Wagner submitted the application to the Department of Land and Natural Resources, herein "DLNR" for certification. JEFS 48, at pdf 48-54. On April 18, 2008, DLNR and the State Land Surveyor, herein "State Surveyor", conducted a site visit at the Property with Ron Wagner, Diamond and Blair present. JEFS 48, at pdf 71-76. Based on the site visit, the State Surveyor recommended the State of Hawaii had no objections in adopting the dune crest as the shoreline, as proposed by Wagner. JEFS 48, at pdf 80.

On June 27, 2008, Diamond/Blair filed an appeal with the BLNR, contesting the proposed shoreline for the Property. JEFS 48, at pdf. 44.<sup>2</sup> On June 19, 2009, the BLNR issued its Findings of Fact, Conclusions of Law, and Decision and Order, herein the "BLNR First D&&O", approving the proposed shoreline boundary and denying Diamond/Blair's appeal. JEFS 48, at pdf 164-177. Diamond/Blair appealed to the Fifth Circuit Court, being Fifth Circuit Civil No. 09-1-0197, herein referred to as the "First Appeal".

On April 6, 2010, the Circuit Court entered its Findings of Fact; Conclusions of Law; Decision and Order, herein the "Court's First FOF/COL", which vacated the BLNR's First

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<sup>1</sup> As the Record on Appeal was filed with the ICA without page numbering and electronically in batches due to its length, references herein are made by first referencing the JEFS online docket number for Case No. CAAP-11-345, followed by the specific pdf page(s) of that document.

<sup>2</sup> The appeal was also joined by the North Shore Ohana, which was found lacking in standing in the appeal. JEFS 48, at pdf 100.

D&O, and remanded the matter back to the BLNR, "with specific instructions to appropriately consider and give due weight to Appellants' [Diamond/Blair's] proposed evidence, and to correctly apply the applicable statutes, case law and administrative rules within forty-five (45) days of this Order." JEFS 20, at pdf 100. On May 19, 2010, the Circuit Court entered judgment, and Respondents appealed to the ICA and the BLNR cross-appealed in Case No. 30573.

Upon remand, the BLNR issued its Amended Findings of Fact, Conclusions of Law, and Decision and Order, herein "BLNR's Amended D&O", on May 21, 2010, which again certified the shoreline at the same location previously approved, i.e., at the crest of the beach dune. JEFS 50, at pdf 184.

Diamond/Blair appealed the BLNR's Amended D&O again to the Circuit Court, being Fifth Circuit Civil No. 10-1-0116, herein the "Second Appeal". JEFS 20, at pdf 9.

On February 16, 2011, the Circuit Court issued its Findings of Fact; Conclusions of Law; Decision and Order in the Second Appeal, herein the "Court's Second FOF/COL", reversing and vacating the BLNR's Amended D&O, and ruling that the shoreline for the Property should be located approximately 20 feet mauka of the shoreline which was twice certified by the BLNR as the crest of the beach dune. JEFS 32, at pdf2.

The Circuit Court entered judgment on March 31, 2011, and Respondents appealed on April 18, 2011. The BLNR filed its Notice of Cross-Appeal on April 29, 2011, which is Case No. CAAP-11-345.

#### IV. ARGUMENT

##### A. The BLNR correctly exercised its discretion in view of the reliable, probative, and evidence on the whole record.

The standard for review of administrative agencies is a two part test. The first is whether the legislature empowered the agency with discretion to make a particular determination. *Paul's Electrical Service, Inc., v. Befitel*, 104 Haw. 412, at 417, 91 P.3d 494, at 499 (2004).

Section 205A-41, H.R.S., clearly sets forth this empowerment to the BLNR, stating:

"The board of land and natural resources shall adopt rules pursuant to chapter 91 prescribing procedures for determining a shoreline and appeals of shoreline determinations...."

The shoreline is defined in §205A-1, H.R.S., 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."

If the agency's determination was within its realm of discretion, the second part of the test is whether the agency abused its discretion, or acted arbitrarily, capriciously, or by a clearly unwarranted exercise of discretion. *Paul's Electrical Service, Inc. v. Befitel*, supra, at 417.

Pursuant to the authority and discretion granted under Chapter 205-A, H.R.S., the State Surveyor conducted a site visit on the property on April 18, 2008, and based in part on that site visit, the 2005 application of a prior owner, and the application of Dobbin, recommended that the State had no objections to adopting the dune crest as the shoreline as proposed by Wagner on behalf of Dobbin. In determining the location of a shoreline, the State Surveyor and DLNR used a Multi-Variable Approach, taking into consideration all pertinent and appropriate evidentiary factors. JEFS 50, at pdf 187-188.

The State Surveyor and DLNR also considered evidence submitted by Diamond/Blair, including *inter alia*, photographic evidence depicting where they contended the highest wash of the waves to be. Diamond/Blair also argued that an earlier 2005 shoreline certification application by the previous owner of the property and an October 19, 2005 site visit for that application (wherein the State Surveyor recommended that the shoreline should be located at the mauka edge of a naupaka hedge, approximately 20 feet further inland of the dune crest) was controlling.

Dobbins submitted evidence through affidavits and declarations from prior owners and contractors as to the state of the vegetation along the shoreline in the past.

The BLNR found the evidence offered by Diamond/Blair to be unclear, not containing an accurate depiction of the wash of the waves, or not containing accurate dates on when the photos were taken. The BLNR also noted other shortcomings as to Diamond/Blair's evidence. JEFS 50, at pdfpp. 191-194.

It is noteworthy that both the October 2005 and the April 2008 site visits were conducted by the same State Surveyor and DLNR staff. Although aware of a recommended location further mauka two years earlier, they specifically found in the 2008 site visit of no evidence that upper wash of the waves had extended beyond the dune crest in the two previous winters. JEFS 58, at pdf. 71.

The BLNR did not disregard the evidence submitted by Diamond/Blair, but found the evidence presented by the State Surveyor and DLNR to be more persuasive. Moreover, the State Surveyor did not ignore his own prior recommendation, but acknowledged the same in reaching his subsequent recommendation to locate the shoreline at the dune crest. To maintain that an agency must adhere to a prior recommendation more than two years earlier, and ignore current

evidence to the contrary, would be an abuse of the discretion given by law to the BLMR to periodically determine shorelines. Section 205A-42, H.R.S., provides that "no determination of a shoreline certification "shall be valid for a period longer than twelve months".

In *Diamond v. State Board of Land and Natural Resources*, 112 Haw. 161, at 168-169, 145 P.3d 704, at 711-712 (2006), the Hawaii Supreme Court stated that:

"[R]eason dictates that the boundaries could not be so evanescent as being a point where someone happens to observe the run up of a wave. To the contrary, '[t]he *Ashford* decision was a judicial recognition of long-standing public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right.' *County of Hawaii v. Sotomura*, 55 Haw. 171 [176], 181-182, 517 P.2d 57, 61 (1973)(emphasis added). Clearly identifiable markers are necessary for a boundary to be 'easily recognizable' and 'known to the people living thereon on in the neighborhood.'"

The locating of the shoreline at the dune crest, rather than an obscure line approximately 20 feet inland of the dune crest, is an easily recognizable boundary, consistent with *Diamond*, supra.

The actions of the BLMR, in weighing the evidence presented by Diamond /Blair against that of the State Surveyor and DLNR was correct in view of the reliable, probative, and substantial evidence on the whole record. Its decision to locate the shoreline at the dune crest was not an abuse of its discretion, arbitrary, capricious, nor an unwarranted exercise of discretion. The ICA decision to uphold that agency's determination was not the result of blind adherence to a presumption, nor dogged deference contrary to law, but rather the careful conclusion that Diamond/Blair had not sustained their burden to show the agency 's determination was "[a]rbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion", as required by §91-14(g), H.R.S.

**B. Diamond/Blair failed to meet their heavy burden of making a convincing showing that the decision of the BLNR was invalid.**

Diamond/Blair argues that *Paul's Elec. Service.*, *supra*, clarified the standard of review for agencies' discretionary determination, and that the agency determination, even if made within the agency's sphere of expertise, is not presumptively valid. They also argue that the ICA's reliance on *Paul v. Dept. a/Transportation*, 115 Haw. 416, 168 P.3d 546 (2007), as to deference given to an agency's decision, was wrong or in conflict with the Hawaii Supreme Court's decision in *Paul's Elec. Service*, *supra*.

The quotation to *Paul's Elec. Service*, *supra*, on page 8 on Diamond/Blair's Application for Writ of Certiorari, simply misstates the law by omitting a part thereof. The entire paragraph reads as follows (with the omitted portion being underscored):

"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.* That 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; however, an agency's discretionary determination are entitled to deference, and an appellant has a high burden to surmount that deference:" 104 Haw. 412, at 419, 91 P3d. 494, at 501.

Further, *Paul's Elec. Service*, *supra*, is not wrong or in conflict with *Paul v. Dept. of Transportation*, *supra*, as contended by Diamond/Blair. The current principle on deference is stated in *Paul v. Dept. a/Transportation*, *supra*, as follows:

"This court's review is further 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 consequence." 115 Haw. 416, at 419, 168 P.3d 546, at 555.

As such, the Circuit Court was required to give proper deference to the BLNR's findings of fact in certifying the shoreline at the dune crest, and that such findings were presumptively

valid. The Circuit Court simply failed to give such deference and erroneously engaged in its own fact finding and substituting its judgment for that of the agency within the agency's sphere of expertise.

**C. Locating the shoreline at the dune crest protects the shoreline and is not contrary to public policy.**

The locating of the shoreline at the dune crest by the BLMR is consistent with the public policy of reserving as much of the shore as possible to the public. The ICA, in *Maunalua Bay Beach Ghana* 28, 122 Haw. 34, 222 P.3d 441 (2009), went through an historical analysis of the case law relating to the delineation of the shoreline, and stated:

"In summary, under Hawai'i Supreme Court precedent, (1) the 'highest reach of the highest wash of the waves' delineates the boundary between private oceanfront property and public property for ownership purposes, as well as the baseline for measuring the shoreline setback line and determining the shoreline area, the so-called no building zone. " 122 Haw. 34, at 46, 222 P.3d 441, at 453..

An objective of the Hawaii Coastal Zone Management Program is the protection of valuable coastal ecosystems, including disruption and minimizing adverse impacts thereon. The vegetative backside of the beach dune plays an important role in protecting the shoreline. As was brought to the ICA's attention in Dobbin's Opening Brief, filed in CAAP-11-000345, at page 29,

"Vegetation is an important factor in stabilizing coastal dunes. Plant leaves and stems trap blowing sand, encouraging the buildup of the dune. Where vegetation is absent, sand often blows over and beyond the dune, becoming lost from the active beach system and creating blowouts in the dune. \*\*\*

\*\*\* Key in the protective properties of the dune is the size of the dune sand reservoir and the condition of the vegetation. The more established the vegetation (in existence greater than two years) and the thicker the root system, the more protection will be provided by the dune." Hwang, *Hawaii Coastal Hazard Mitigation Guidebook*, January 2005, at page 128.

The BLNR also recognized the change in the character of the coastal vegetation, which "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." JEFS 50, at pdf 190.

Locating the shoreline at the dune crest, rather than into the vegetative backside of the beach dune, would reduce the wearing down of the beach dune and the loss of its vegetative role in preserving the coastal ecosystem. This easily recognizable boundary balances the public policy of extending Hawaii's shoreline as far as is reasonably possible for public uses and enjoyment, with private ownership and the protection of the beach dune in preserving and stabilizing the shoreline.

## **V. SUMMARY AND CONCLUSION**

The standard for review is one in which this Court must determine whether the ICA incorrectly determined whether the Circuit Court was right or wrong in its decision, applying the standards set forth in §91-14(g), *H.R.S. Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Haw. 217, 953 P.2d 1315 (1998).

"In summary, when 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 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 Elec. Service*, supra, at 419-420.

The BLNR correctly exercised its discretion in its sphere of expertise in originally, and again on remand, locating the shoreline at the dune crest. In so doing, it used a multi-variable approach, as well as weighing the strength of the evidence of Diamond/Blair against evidence presented by the State Surveyor and DLNR, within its matter discretion and sphere of expertise. The findings of the BLNR were clearly supported by the reliable, probative, and substantial

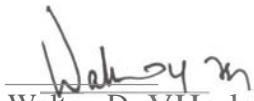
evidence on the whole record. Its conclusions were not arbitrary or capricious or characterized by any abuse of discretion or by any unwarranted exercise of discretion.

Nevertheless, the Circuit Court in the first appeal by Diamond/Blair remanded, and on the second appeal by Diamond/Blair reversed the decision of the BLNR. As correctly found by the ICA, the Circuit Court failed to give proper deference to the BLNR's findings, but instead engaged in unwarranted fact finding and weighing of the evidence.

There is no basis for the granting of a writ of certiorari, for the ICA's decision was correct under the law in ruling that the Circuit Court wrongfully reversed the BLNR in certifying the shoreline for the property at the crest of the beach dune.

Dated: December 17, 2012.

Respectfully submitted,

  
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Attorney for Defendants-Appellees/  
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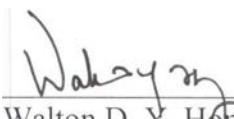
**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Respondents/Defendants-Appellees/Appellants-Cross-Appellees Craig Dobbin's and Wagner Engineering Services, Inc.'s Response to Petitioners/Plaintiffs-Appellants/Appellees-Cross-Appellees Caren Diamond and Beau Blair's Application For Writ of Certiorari Filed On December 3, 2012, were served on the following by depositing the same in the United States Postal Service, postage prepaid, on this date:

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Dated: Lihue, Hawaii, this 17th day of December, 2012.

  
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