SCWC-11-0000345

IN THE SUPREME COURT OF THE STATE OF HAWAII

CAREN DIAMOND AND BEAU BLAIR, Petitioners/Plaintiffs-Appellants-Appellees-Cross-Appellees, vs. 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 CAREN DIAMOND AND BEAU BLAIR, Petitioners/Plaintiffs-Appellants/Appellees-Cross-Appellees, vs.	Case No. 30573 and Case No. CAAP-11-0000345 (Consolidated) Civil No. 09-1-0197 APPEAL FROM THE FINAL JUDGMENT, FILED HEREIN ON MAY 19, 2010, WHICH REFERS TO THE COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, FILED HEREIN ON APRIL 6, 2010 AND FINDINGS OF FACT, CONCLUSIONS OF LAW; DECISION AND ORDER FILED ON APRIL 6, 2010, AND THE FINAL JUDGMENT FILED ON MAY 19, 2010 Civil No. 10-1-0116 APPEAL FROM THE FINAL JUDGMENT, FILED HEREIN ON MARCH 31, 2011, WHICH REFERS TO THE COURT'S FNDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER, FILED HEREIN ON FEBRUARY 16, 2011 AND

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.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW; DECISION AND ORDER FILED ON FEBRUARY 16, 2011, AND THE FINAL JUDGMENT FILED ON MARCH 31, 2011 FIFTH CIRCUIT COURT HONORABLE KATHLEEN N.A. WATANABE Judge

STATE OF HAWAII, BOARD OF LAND AND NATURAL RESOURCES' RESPONSE TO CAREN DIAMOND AND BEAU BLAIR'S APPLICATION FOR WRIT OF CERTIORARI FILED ON DECEMBER 3, 2012

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I. INTRODUCTION

Petitioners Caren Diamond and Beau Blair (together "Petitioners") filed an application for writ of certiorari challenging the Intermediate Court of Appeals' (ICA) reversal of the March 31, 2011 judgment entered in the circuit court. The application should be rejected because the ICA properly reversed the circuit court's judgment.

II. COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether on administrative review, the circuit court's improper fact finding and weighing of evidence warranted reversal by the ICA.

2. Whether the ICA correctly determined that the Board of Land and Natural Resources (Board) Amended Findings of Fact; Conclusions of Law and Decision and Order (Amended D&O) was consistent with the definition of "shoreline boundary" as defined by HRS § 205A-1.

3. Whether the ICA correctly determined that the appeal of the May 19, 2010 circuit court judgment in Civil No. 09-1-0197 was rendered moot by the Board's Amended D&O, filed on May 21, 2010.

III. STATEMENT OF PRIOR PROCEEDINGS

Respondent Craig Dobbin (Dobbin) is the owner of the property identified as 7310 Alealea Road, in the District of Wainiha, Halelea, Island of Kauai, also identified as Tax Map Key No. (4) 5-8-009:51. JEFS 50 at PDF 185.[1] Petitioner Caren Diamond (Diamond) lives in close proximity to Dobbin's property and uses the public shoreline resources in close proximity to the property for recreational and other outdoor activities and spiritual renewal. JEFS 48 at PDF 85. Petitioner Beau Blair (Blair) resides directly mauka of Dobbin's property and has used

[1] Citations to the record on appeal will be abbreviated as follows: "JEFS __ at PDF __." The JEFS reference is to the JEFS online document number in CAAP 11-0000345. The PDF reference is to the specific PDF page number(s) of that ICA document.

the beach and shoreline area in close proximity to Dobbin's property for active recreation and quiet enjoyment. JEFS 48 at PDF 85-86.

On January 14, 2008, Respondent Wagner Engineering Services, Inc. (Wagner) submitted an application for shoreline certification to the Department of Land and Natural Resources on behalf of Dobbin (Dobbin application). JEFS 48 at PDF 48-54. By letter dated May 28, 2008, the State Surveyor indicated that the State of Hawaii had no objections to the shoreline as proposed in the Dobbin application and recommended its adoption. JEFS 48 at PDF 80. Public notice of the proposed shoreline certification was published in the Office of Environmental Quality Control's Environmental Notice on June 8, 2008. JEFS 50 at PDF 91.

The Dobbin application has resulted in two decisions by the Board, two appeals to the circuit court, and two appeals to the intermediate court of appeals, Case No. 30573 and CAAP No. 11-0000345, and the present application for writ of certiorari to the Supreme Court.

Case No. 30573 (hereinafter referred to as the "first appeal"): Petitioners filed their Notice of Appeal with the Board from the proposed shoreline certification on June 28, 2008. JEFS 48 at PDF 82-87. The Board issued a Findings of Fact, Conclusions of Law, and Decision and Order (D&O) on June 19, 2009. JEFS 50 at PDF 164-78. The D&O denied Petitioners' appeal and approved and affirmed the certified shoreline as delineated in the shoreline survey map published on June 8, 2008. *Id.*

Petitioners appealed the D&O to the circuit court on July 20, 2009.[2] The circuit court issued its Findings of Fact; Conclusions of Law; Decision and Order (circuit court's first order) on April 6, 2010 which vacated the D&O. JEFS 32 at PDF 18-30. The circuit court remanded the matter to the Board with specific instructions to "appropriately consider and give due weight

[2] *Diamond, et al., v. State of Hawaii, et al.,* Civil No. 09-1-0197, Fifth Circuit Court.

to [Petitioners'] proposed evidence and to correctly apply the applicable statutes, case law and administrative rules within forty-five days of this Order." JEFS 32 at PDF 30. This decision was appealed to the ICA as *Diamond, et al.,v. Dobbin, et al.*, Case No. 30573.

CAAP No. 11-0000345 (hereinafter referred to as the "second appeal"): Pursuant to the circuit court's first order, the Board issued an Amended D&O on May 21, 2010. JEFS 50 at PDF 184-199. The Amended D&O approved the certification of the shoreline as delineated in the shoreline survey map published on June 8, 2008. *Id.*

Petitioners appealed the Amended D&O to the circuit court on May 25, 2010.[3] The circuit court issued its decision on February 16, 2011, vacating the Amended D&O. JEFS 32 at PDF 2-30; App. 1 to Opening Br.

This decision was appealed to the ICA as *Diamond, et al., v. Dobbin, et al.*, CAAP No. 11-0000345.

Consolidated Appeals: By order dated August 25, 2011, the ICA consolidated the two appeals. JEFS 63.

The ICA issued a Memorandum Opinion on August 31, 2012, finding the first appeal moot and reversing the circuit court's judgment in the second appeal. JEFS 117. Judgment was entered on October 2, 2012. JEFS 121.

Petitioners filed their application for writ of certiorari to the Supreme Court on December 3, 2012.

[3] *Diamond, et al., v. State of Hawaii, et al.,* Civil No. 10-1-0116, Fifth Circuit Court.

IV. DISCUSSSION

A. The ICA Properly Concluded That the Circuit Court Could Not Substitute Its Findings of Fact in The Second Appeal

On secondary review, the focus of this Court is whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91-14(g) (1993). *Citizens Against Reckless Dev. v. Zoning Bd. of Appeal, City and County of Honolulu*, 114 Hawai`i 184, 193, 159 P.3d 143, 152 (2007) (citing *Korean Buddhist Dai Won Sa Temple of Hawaii v. Sullivan*, 87 Hawai`i 217, 229, 953 P.2d 1315, 1327 (1998)). An administrative agency's findings of fact will not be set aside on appeal unless they are shown to be clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or the appellate court, upon a thorough examination of the record, is left with a definite and firm conviction that a mistake has been made. *Topliss v. Planning Comm'n*, 9 Haw. App. 377, 383, 842 P.2d 648, 653 (1993).

As the finder of fact in the underlying shoreline determination, the Board had ample authority to weigh the evidence presented and to judge the credibility of the witnesses. The record clearly shows that there was substantial evidence supporting the Board's findings of fact. Despite the presence of substantial evidence, the circuit court in the second appeal ignored the substantial and probative evidence in the record and made its own determinations of credibility of the witnesses and the weight of the evidence. JEFS 32 at PDF 2-30.

> It is well established that courts decline to consider the weight of the evidence to ascertain whether it weighs in favor of the administrative findings, or to review the agency's findings of fact by passing upon the credibility of witnesses or conflicts in testimony, especially the findings of an expert agency dealing with a specialized field.

Moi v. Dept. of Public Safety, 118 Hawaii 239, 242 188 P.3d 753, 756 (2008).

The circuit court did not review the Amended D&O as it should have done pursuant to HRS § 91-14(g). The circuit court not only failed to properly review the Board's findings of fact, it also looked beyond the record on appeal and made its own findings of fact. The ICA correctly determined that the circuit court "engaged in unwarranted fact finding and weighing of the evidence" and that it "substituted its own judgment for that of the BLNR in weighing the evidence presented to BLNR." JEFS 117 at PDF 6-7.

B. The ICA Correctly Determined That the Amended D&O Properly Applies the Definition of Shoreline Boundary

Petitioners call into question the Board's interpretation of HRS chapter 205A. Petitioners allege that the Board cannot consider "only one year's wave data." Application at 10. In support, they rely on *Paul's Electrical Service, Inc. v. Befitel*, 104 Haw. 412, 91 P.3d 494 (2004), and *Diamond v. State Board of Land and Natural Resoucres*, 113 Hawai`i 161, 145 P.3d 704 (2006).

Paul's Electrical involved an appeal of a Department of Labor and Industrial Relations (DLIR) decision to suspend Paul's Electrical from new government construction contracts for a period of time. On appeal, the issue was the time in which DLIR was required to provide the notice of violation under its statute. The Court stated that, "[t]o the extent that the legislature has authorized an administrative agency to define the parameters of a particular statute, that agency's interpretation should be accorded deference." *Paul's Electrical Service, Inc.*, 104 Hawai`i at 417, 91 P.3d at 499.

"As a general rule, an administrative agency's decision within its sphere of expertise is given a presumption of validity and one who seeks to overturn the agency's decision bears the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *Topliss v. Planning Comm'n*, 9 Haw. App. 377, 383-84, 842

P.2d 648, 653 (1993) (internal citations omitted). "[W]here an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous." *County of Kauai v. Office of Information Practices*, 120 Hawai`i 34, 40, 200 P.3d 403, 409 (2009). The statutory authority provided to the Board under HRS chapter 205A for the determination of shorelines is very broad and the Board should be accorded deference in its interpretation of the statute.

The Coastal Zone Management Act (CZMA), HRS chapter 205A, was enacted to "preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii." *Mahuiki v. Planning Comm'n*, 65 Haw. 506, 517, 654 P.2d 874, 881 (1982). The implementation of this policy has been left largely to the counties through their administration of special management area use permit procedure and requirements. *Id.*

When HRS chapter 205A was amended in 1986, the purpose of the proposed amendment was to "transfer the shoreline setback provisions from Chapter 205 to Chapter 205A, and assign to the Board the responsibility to determine the shoreline setback lines." Sen. Stan. Comm. Rep. No. 733-86, in 1986 Senate Journal, at 1123-24. The Board was given the responsibility to "adopt rules pursuant to chapter 91 prescribing procedures for determining a shoreline and appeals of shoreline determinations." HRS § 205A-42.

The only guidance provided to the Board by the Legislature on how to determine a shoreline is the definition of shoreline provided in HRS § 205A-1. "Shoreline" is defined 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." HRS § 205A-1.

The Board's interpretation is consistent with the definition of shoreline contained in HRS § 205A-1 and with the ruling in *Diamond v. State Board of Land and Natural Resources,* 113 Hawaii 161, 145, 145 P.3d 704 (2006). The Board and the State Surveyor use a multi-variable approach to determine the location of the upper wash of the waves for shoreline certification purposes. The multi-variable approach takes into consideration all pertinent and appropriate evidentiary factors in a shoreline setting, based on the shoreline type, location, and exposure to large waves. JEFS 50 at PDF 187-88. Some of the indicators of the wash of the waves considered by the State Surveyor in recommending the location of the certified shoreline include, but are not limited to, debris lines, vegetation lines, wet lines, artificial structures, dune crests, erosion scarps, salt deposits, discoloration, and saltwater-dependent biota. *Id.* The State Surveyor also considers other features or facts unique to each shoreline and makes appropriate adjustments to the interpretation of the evidence as those features or facts are determined by the State Surveyor to affect the natural movement of the wash of the waves within the subject shoreline area. *Id.* Such features and facts include the presence and effect of artificially induced vegetation or artificially created topographic anomalies that are not representative of the overall trends of the natural shoreline in the subject shoreline area. *Id.* The State Surveyor also incorporates in his shoreline recommendation any pertinent information about the shoreline that is presented by the owner of the subject property and any other members of the public who have personal knowledge and familiarity with the shoreline conditions of the subject property during high surf conditions in the season of high surf. *Id.*

The Board applied the multi-variable approach to the present shoreline certification. The Board weighed the evidence presented by Petitioners (JEFS 50 at PDF 191-94) and Respondents Dobbins and Wagner (JEFS 50 at PDF 195-96). The Board found the State Surveyor's findings based on an April 18, 2008 site visit, to be persuasive. JEFS 50 at PDF 190. During the site visit, the State Surveyor observed that the "area has 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 [sic] wash of the waves." JEFS 50 at 190.

Like the present appeal, *Diamond* involved a secondary appeal of a shoreline certification. Both HRS § 205A-1 and the ruling in *Diamond* agree that the definition of the shoreline is "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." HRS § 205A-1; *Diamond,* 113 Hawai`i at 176, 145 P.3d at 7189. Neither requires that the highest wash of the waves be the highest waves that have ever washed over a particular shore. The Board's multi-variable approach is consistent with this definition. The Board's interpretation is not palpably erroneous and should be accorded deference in this case. The ICA properly determined that the "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].'" JEFS 117 at PDF 8.

C. The ICA Correctly Determined that the Amended D&O Rendered the First Appeal Moot

The first appeal, Case No. 30573, is moot. "It is axiomatic that mootness is an issue of subject matter jurisdiction." *Kaleikini v. Thielen*, 124 Haw. 1, 12, 237 P.3d, 1067, 1078 (2010). It is the duty of counsel to bring to the tribunal's attention, without delay, facts that may raise a

question of mootness. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997) (citation omitted). "If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993) (citation omitted).

The mootness doctrine is properly invoked where "events ... have so affected the relations between the parties that the two conditions for justiciability relevant on appeal-adverse interest and effective remedy-have been compromised." *In re Application of J.T. Thomas*, 73 Haw. 223, 225-26, 832 P.2d 253, 254 (1992). It is the duty of courts to decide actual controversies and "not to give opinions upon moot questions or abstract propositions, which cannot affect the matter in issue before it." *Wong v. Bd. of Regents, Univ. of Haw.*, 62 Haw. 391, 394-95, 616 P.2d 201, 204 (1980) (citations omitted). "Courts will not consume time deciding abstract propositions of law or moot cases, and have no jurisdiction to do so." *Id.*

The first appeal was rendered moot by the issuance of the Amended D&O. This Court should not engage itself in abstract propositions of law when subsequent events, culminating in this application, have caused the first appeal to no longer be a live controversy between the parties. The ICA properly declined to address the issues raised in the first appeal, Case No. 30573, on the basis of mootness.

V. CONCLUSION

The ICA was correct to reverse the circuit court's judgment. The application for writ of certiorari should be rejected.

DATED: Honolulu, Hawaii, December 18, 2012.

Respectfully submitted,

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