

DEPARTMENT OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of an Appeal of a Shoreline) DLNR File No. OA-1756
Certification of a Portion of Laniakea)
Beach, situate at Kawailoa, Waialua, Oahu) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
State of Hawaii, Department of) AND ORDER
Transportation, Highways Division)
) CERTIFICATE OF SERVICE
TMK Nos.: (1) 6-1-005:023; (1) 6-1-)
009:021 and 022, and (1) 6-1-010:019 and)
020)
_____)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

If any statement denominated a conclusion of law is more properly considered a finding of fact, then it should be treated as a finding of fact; and conversely, if any statement denominated as a finding of fact is more properly considered a conclusion of law, then it should be treated as a conclusion of law.

FINDINGS OF FACT

1. The State of Hawaii, Department of Transportation, Highways Division (“DOT-H”) is the managing agency of a portion of Kamehameha Highway located between Laniakea Beach located seaward of the highway, and the parcels identified as Tax Map Keys (1) 6-1-005:023; (1) 6-1-009:021 and 022, and (1) 6-1-010:019 and 020 located landward of the highway (“Property”).

2. On May 10, 2017, the Department of Land and Natural Resources (“DLNR”) received a certified shoreline application submitted by DOT-H, requesting a determination of shoreline for the Property. Public notice of the acceptance of the

application for processing was published in the Office of Environmental Quality Control Environmental Notice (“Environmental Notice”) on May 23, 2017.

3. A map provided by DOT-H as part of the certified shoreline application located a portion of the shoreline of the Property along the base of a series of concrete barriers located on parcels (1) 6-1-009:021 & 022 and 6-1-010:020. The unimproved parcels are owned by the City and County of Honolulu (“City”) and referred as the “Laniakea Support Park” (“Park Area”).

4. The State Land Surveyor (“State Surveyor”) conducted a site inspection of the Property on June 14, 2017, and subsequently determined the shoreline location to be along the base of the concrete barriers. The State Surveyor based the determination of the shoreline on observations made at the site inspection.

5. The State Surveyor recommended the shoreline for certification as depicted in the map provided by DOT-H, public notice of which was published in the Environmental Notice on July 23, 2017.

6. On August 1, 2017, Appellant Douglas Meller (“Applicant”) filed a Notice of Appeal pursuant to section 13-222-26, Hawaii Administrative Rules (“HAR”).

7. Appellant contends that the certification of the shoreline at the base of the concrete barriers is improper as the barriers obstruct the highest naturally occurring inland wash of the waves.

8. In his Opening Brief, Appellant contends that the concrete barriers are unauthorized and that certifying the shoreline at the base of the concrete barriers was in error pursuant to section 13-222-19, HAR. In support of this position, Appellant refers to the decision in *Save Laniakea Coalition v. State of Hawaii, Department of*

Transportation, 1st Circuit Court, State of Hawaii, Civil No. 14-1-0005-01 (“Save Laniakea Coalition”).

9. In *Save Laniakea Coalition*, the First Circuit Court (“court”) ruled that DOT-H’s initial placement of the concrete barriers along Kamehameha Highway, on the makai side of the Park Area cannot be maintained in that area without obtaining a Special Management Area (“SMA”) permit, as required by the City. The court found that the concrete barriers installed by DOT-H blocked vehicle access and parking in the Park Area, for members of the public who wanted to park in the Park Area in order to access Laniakea Beach on the other side of Kamehameha Highway. *Appellant Douglas Meller’s Opening Brief*, Exhibit A.

10. The court did recognize that DOT-H received numerous complaints about the slow moving, extremely congested vehicle traffic and the hazardous pedestrian crossing movement on Kamehameha Highway in the Laniakea Beach area, particularly on holidays. *Id.*

11. However, the court further noted that lack of access to parking in the Park Area effectively denies plaintiffs reasonable access to Laniakea Beach and its adjacent ocean resources and that plaintiffs cannot be deprived of such access without the protections that City permit processes afford. *Id.*

12. The court ordered that the DOT-H remove the concrete barriers within 30 days of the court’s order and that DOT was not allowed to re-install the barriers until DOT-H either 1) complies with all requirements of the law in order to install such barriers, or 2) the City lawfully directs the installation of the traffic barriers on the Park

Area as part of the City's determination of the permitted and duly authorized usage of its own park land or 3) until further order of the Court. *Id.*

13. It appears as though DOT-H relocated the concrete barriers to their current location further mauka in the Park Area where they do not inhibit vehicle access and parking in order to comply with the Court's order. *Opening Brief*, pg. 7.

14. Appellant provides photographs represented to have been taken between February 21 and 23, 2016, that shows ocean water ponding at the base of the concrete barriers. Appellant contends that the photographs are evidence that the concrete barriers obstruct the upper reach of the wash of the waves.

CONCLUSIONS OF LAW

1. Section 13-222-19, HAR reads in its entirety: "The chairperson shall not certify the shoreline in cases where an unauthorized improvement encroaches on state land or where an unauthorized improvement interferes with the natural shoreline processes. The property owner shall first resolve the encroachment or violation problem with the applicable department prior to the chairperson certifying the shoreline."

2. For purposes of this appeal, Appellant need not provide evidence of the actual upper reach of the wash of the waves, but may instead show that unauthorized improvements encroach on state land or that an unauthorized improvement interferes with the natural shoreline processes.

3. In the *Save Laniakea Beach* decision, the court determined that the concrete barriers were not authorized improvements.

4. DOT-H has not provided any evidence in their Opposition Brief that the relocation of the concrete barriers is sufficient to qualify them as authorized

improvements. Without such evidence, deference must be given to the Court's order and that the concrete barriers remain an unauthorized improvement under section 13-222-19, HAR.

5. In reviewing the photographs, it is possible, but not certain, that the concrete barriers do inhibit the upper reach of the wash of the waves. It is noted that the photos do not provide strong evidence of waves washing past the concrete barriers in the open spaces between the concrete barriers. Therefore the most mauka extent of the wash of the waves cannot be determined through the photographs.

6. However, the photographic evidence shows that during the season of high surf, waves wash at least to the base of the concrete barriers in their present location. Therefore, the concrete barriers likely interfere with the natural shoreline processes.

7. In *Diamond v. State Board of Land and Natural Resources*, 112 Hawai'i 161, 145 P.3d. 704 (2006) ("Diamond") the Hawaii Supreme Court noted that public policy favors extending as much of Hawaii's shoreline as reasonably possible to ensure public ownership and use. *Id.*, 112 Hawai'i at 175, 145 P.3d at 718. While the Department notes that this appeal does not involve balancing the public interest in the use of the shoreline against private property ownership, the Department must also carry out its duties in a fair and consistent manner.

8. In cases where the structure is privately owned and protecting a private property, the Department would consider any interference with natural shoreline process as triggering section 13-222-19, HAR, even if waves have only nominal contact with the improvement. The private property owner would then be responsible either to provide

sufficient evidence that the structure is an authorized improvement or remove the structure.

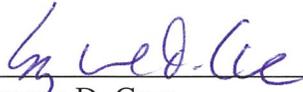
9. The Department appreciates that DOT-H's intent in installing the concrete barriers was to address issues of public health and safety, however, in order to certify the shoreline, DOT-H must comply with section 13-222-19, HAR, as well as all other regulatory requirements, like any other applicant requesting a shoreline certification.

10. In order to certify the shoreline, DOT-H need not remove the barriers in order to determine the location of the upper reach of the wash of the waves uninhibited by the barriers. Rather the shoreline can be certified in the proposed location if DOT-H provides satisfactory documentation that the concrete barriers in their current location is an authorized improvement pursuant to the *Save Laniakea Beach* decision as well as section 13-222-19, HAR or that the concrete barriers do not interfere with the natural shoreline processes.

ORDER

It is hereby ordered that the appeal filed by Appellant on August 1, 2017, is granted and the proposed shoreline certification is determined to be improper.

DATED: Honolulu, Hawaii, July 5, 2018.



Suzanne D. Case
Chairperson

DEPARTMENT OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER was duly served upon the following parties as
indicated, by means of hand delivery or U.S. Mail, postage prepared on
JUL - 6, 2018, addressed as follows:

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