More than a Line in the Sand: Defining the Shoreline in Hawai'i After *Diamond v. State*

I. INTRODUCTION

Where is the shoreline? In Hawai'i, this deceivingly simple question has a complex answer with implications for a host of legal issues. The location of the shoreline can influence property boundary disputes[1] and a variety of land use,[2] tort,[3] criminal,[4] beach access,[5] and jurisdictional issues.[6] The location of the shoreline can also play a role in issues that do not reach judicial or administrative hands.[7]

In its simplest form, Hawai'i's definition of the shoreline is the upper reach of the wash of the waves.[8] This definition was enunciated in a series of landmark Hawai'i Supreme Court cases during the 1960s and 1970s, namely

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[1] *E.g.*, *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968).

[2] *E.g.*, Hawai'i Coastal Zone Management Act, HAW. REV. STAT. §§ 205A-1 to -71 (2001 & Supp. 2006) (regulating the development of coastal lands). The Coastal Zone Management Act ("CZMA") defines the "[c]oastal zone management area" as lands "seaward from the shoreline". *Id.* § 205A-1.

[3] *E.g.*, Lansdell v. County of Kauai, 110 Hawai'i 189, 130 P.3d 1054, 1060, 1065-66 (2006) (finding no State liability under HAW. REV. STAT. § 520 [1993 & Supp. 2005] for land that was not part of a public beach park). For beachfront property, these questions of ownership may be determined by the location of the shoreline. *See* Farrior v. Payton, 57 Haw. 620, 636, 562 P.2d 779, 789 (1977) (citing *Ashford*, 50 Haw. 314, 440 P.2d 76 and finding that "no competent evidence of [the shoreline] boundary" or "vegetation line" was established in a tort case arising from an injury suffered on coastal property).

[4] *E.g.*, State v. Kelly, Nos. 25198, 25199, 2003 WL 22534428 (Haw. App. Nov. 7, 2003) (mem.) (finding a beachfront camper's argument that he did not trespass, because waves sometimes washed over his campsite, unpersuasive).

[5] *E.g.*, HAW. REV. STAT. § 115-2 (1993) ("Absence of public access to Hawai'i's shorelines . . . constitutes an infringement upon the fundamental right of free movement in public space and access to and use of coastal and inland recreational areas."); Akau v. Olohana Corp., 65 Haw. 383, 652 P.2d 1130 (1982) (finding a private right of action to enforce public access to beaches based on non-statutory rights).

[6] *Cf.* Coulter v. Bronster, 57 F. Supp. 2d 1028, 1037-38 (D. Haw. 1999) (citing Hawaiian Navigable Waters Pres. Soc'y v. Hawai'i, 823 F. Supp. 766 (D. Haw. 1993)) (analyzing state jurisdiction to regulate a canal).

[7] For example, property owners wary of potential tort liability may change the rules of beach access and use near their properties based on their own interpretation of the shoreline, rather than an official interpretation. *See, e.g.*, Tim Ruel, *Fishing for Beach Access*, HONOLULU STAR-BULL., Oct. 6, 2002, *available at* http://starbulletin.com/2002/10/06/business/story1.html (describing how fishing access was curtailed by one resort's fear of liability).

[8] *See, e.g.*, Diamond v. State, 112 Hawai'i 161, 168, 145 P.3d 704, 711 (2006) (citing *In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968) and HAW. REV. STAT. § 205A-1 (2001)).

In re Ashford,[9] *County of Hawai'i v. Sotomura*,[10] and *In re Sanborn*.[11] Grounded in Hawaiian tradition, custom, and usage,[12] these decisions differ markedly from other common law jurisdictions.[13]

Due to a number of possible factors,[14] litigation squarely concerning the interpretation of Hawai'i's shoreline definition did not reach the appellate level again for nearly thirty years following these seminal decisions.[15] The issue reemerged in June 2006, when a settlement[16] between environmental groups and the Hawai'i Department of Land and Natural Resources ("DLNR") ultimately led to the harmonization of shoreline definitions found in Hawai'i statutes, case law, and administrative rules.[17] On the heels of this change the

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[9] 50 Haw. 314, 440 P.2d 76 (1968).

[10] 55 Haw. 176, 517 P.2d 57 (1973).

[11] 57 Haw. 585, 562 P.2d 771 (1977).

[12] *See, e.g.*, *Ashford*, 50 Haw. at 315-17, 440 P.2d at 77-78.

[13] Common law jurisdictions predominantly rely on tides to define a shoreline reference plane. *See generally* Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 200-02 (1974).

[14] One factor may be a lull in large-scale coastal development since *Sanborn*, particularly on Oahu. Interview with David L. Callies, Benjamin A. Kudo Professor of Law, William S. Richardson Sch. of Law, Univ. of Haw. at Manoa, in Honolulu, Haw. (Oct. 13, 2006). There is also a general culture in Hawai'i of an unspoken desire to "work it out" rather than risk being labeled an uncooperative developer. *Id.* Factors that may have spurred re-emerging shoreline location litigation include increasing population, rapidly increasing coastal property values, eroding beaches, and eroding neighborliness.

[15] Although subsequent cases addressed issues involving the shoreline, such cases did not focus on interpreting the definition to locate the shoreline. *See, e.g.*, Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990) (addressing legal consequences of natural changes to the shoreline boundary due to erosion); Sotomura v. County of Hawai'i, 460 F. Supp. 473 (D. Haw. 1978) (finding that the Hawai'i Supreme Court's interpretation of the shoreline in *Sotomura* deprived property owners of due process and constituted a taking without just compensation); *In re* Banning, 73 Haw. 297, 832 P.2d 724 (1992) (addressing legal consequences of natural changes to the shoreline boundary due to accretion); State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977) (addressing legal consequences of natural changes to the shoreline boundary due to lava flow).

[16] *See, e.g.*, Jan TenBruggencate, *Expect More Beach from State Shoreline Pact*, HONOLULU ADVERTISER, Dec. 13, 2005, at B5 (discussing the terms of settlement).

[17] *See* HAW. REV. STAT. § 205A-1 (1993) ("'Shoreline' means 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."); *In re* Sanborn, 57 Haw. 585, 588, 562 P.2d 771, 773 (1977) ("The law of general application in Hawai'i is that beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves." (citing County of Hawai'i v. Sotomura, 55 Haw. 176, 181-82, 517 P.2d 57, 61-62 (1973))); *see also* HAW. ADMIN. R. § 13-222-2 (2006) ("'Shoreline' means the upper reaches of the wash of the waves, other than storm or 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.").

Hawai'i Supreme Court decided *Diamond v. State*,[18] addressing the use of vegetation in locating the shoreline.[19] While these recent developments have settled some issues related to the definition of the shoreline, the matter is hardly closed. Broad questions related to the "who?, why?, when?, where?, and how?" of shoreline location remain.

In Part II, this Note traces the history of today's shoreline definition to provide a framework for analysis of the definition and its application. Part III provides an overview of shoreline certifications and seaward boundary determinations, and distinguishes the two. Part IV examines *Diamond* and its implications for future shoreline determinations. Part V presents several questions left unanswered by the *Diamond* decision and addresses some of the inevitable conflicts that will arise from the application of Hawai'i's shoreline definition. In conclusion, Part VI suggests these problems can best be mitigated by clear statutory command, diligent administrative implementation, and more fundamentally, a shift in the way all parties, public and private, view shoreline property.

II. BACKGROUND

An examination of Hawai'i's current shoreline definition first requires a survey of its legal evolution (judicial and statutory) and recent re-emergence in litigation. It is important to recognize that the definition, and its evolution and re-emergence, are premised on a unique historical and cultural platform. Indeed, a juxtaposition of collective and individual property rights, and modern and ancient surveying methods, along with a special appreciation for the role of the shore in Hawaiian life, all flow directly into the definition.[20]

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[18] 112 Hawai'i 161, 145 P.3d 704 (2006).

[19] *See id.* at 172-75, 145 P.3d at 715-18.

[20] *See generally* Statute Laws of Kamehameha III, 1847, vol. II, 81-87 (Rep. Haw.) (reciting the principles of the Board of Commissioners to Quiet Land Titles and discussing some challenges associated with applying allodial land title concepts to traditional collective property rights); Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982) (addressing the juxtaposition of pre-Mahele collective property rights and modern private property rights); State v. Zimring, 58 Haw. 106, 109-15, 566 P.2d 725, 729-31 (1977) (providing a detailed history of Hawaiian land titles and boundaries); *In re* Boundaries of Pulehunui, 4 Haw. 239 (1879) (describing the use of natural features to define ancient Hawaiian land boundaries); Marion Kelly, Changes in Land Tenure in Hawaii, 1778-1850, 1-26 (June 1956) (unpublished M.A. thesis, University of Hawai'i) (on file with author) (describing in detail ancient Hawaiian land divisions and their relation to "the character and conditions of the immediate environment").

A. Hawai'i Supreme Court Precedent

The current Hawai'i shoreline definition, grounded in Hawaiian tradition and usage, was established in a series of cases issued by the Hawai'i Supreme Court in the 1960s and 1970s.[21] These cases have been labeled at times as "historic and visionary,"[22] and at others as suspect "judicial activism."[23]

The shoreline was defined as the "upper reach of the wash of waves" in the 1968 landmark case *In re Ashford*.[24] The dispute in *Ashford* concerned the location of the *makai* (seaward)[25] boundaries of two parcels of private land sought to be registered in land court.[26] Both properties were described in royal land patents[27] as running *ma ke kai* (along the sea).[28] The State contended that *ma ke kai* described "the high water mark that is along the edge of vegetation or the line of debris left by the wash of the wave during ordinary high tide."[29] The property owners contended that the phrase described the boundaries at the mean high water ("MHW") mark, calculated from published tide heights.[30]

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[21] *In re* Ashford, 50 Haw. 314, 440 P.2d 76 (1968); *Sotomura*, 55 Haw. 176, 517 P.2d 57; *Sanborn*, 57 Haw. 585, 562 P.2d 771.

[22] HAW. DEP'T OF LAND AND NATURAL RES., REPORT TO THE TWENTY-THIRD LEGISLATURE, REGULAR SESSION OF 2006, REQUESTING A REVIEW AND ANALYSIS OF THE ISSUES SURROUNDING THE SHORELINE CERTIFICATION PROCESS FOR THE PURPOSE OF ESTABLISHING SHORELINE SETBACKS 3 (2005), *available at* http://www.state.hi.us/dlnr/reports/OCCL06-Shoreline-Certification.pdf [hereinafter SHORELINE REPORT]. The report's authors added: "These decisions afforded broad recognition and protection of shoreline areas and public beach access and still stand as the most distinguished legacies of the [Hawai'i Supreme] Court to the law and people of Hawaii." *Id.*

[23] Paul M. Sullivan, *Customary Revolutions: The Law of Custom and Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99, 132 (1998); *see also* County of Hawai'i v. Sotomura, 55 Haw. 176, 189, 517 P.2d 57, 65 (1973) (Marumoto, J., dissenting) ("[I]n my opinion, the holding is plain judicial law-making.").

[24] 50 Haw. 314, 316, 440 P.2d 76, 77 (1968).

[25] Under an island-centric coordinate system commonly used in Hawai'i, *mauka* refers to inland, or toward the mountains, and *makai* refers to ocean, or toward the sea. *See, e.g.*, Fong v. Hashimoto, 92 Hawai'i 637, 640 nn.1-2, 994 P.2d 569, 572 nn.1-2 (App. 1998) (citing MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY (6th ed. 1986)), *vacated*, 92 Hawai'i 568, 994 P.2d 500 (2000).

[26] *Ashford*, 50 Haw. at 314, 440 P.2d at 77.

[27] For a description of the role of royal land patents in Hawaiian property law, see generally *State v. Zimring*, 58 Haw. 106, 109-15, 566 P.2d 725, 729-31 (1977).

[28] *Ashford*, 50 Haw. at 314, 440 P.2d at 77.

[29] *Id.* at 315, 440 P.2d at 77.

[30] *Id.* at 314-15, 440 P.2d at 77. Shorelines defined by mean high water ("MHW") exist at the intersection between the shore and a reference plane fixed by a nineteen year average of high tides. *See generally* Borax Consol., Ltd. v. Los Angeles, 296 U.S. 10 (1935); Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 224-25 (1974). Compare MHW to ordinary high water ("OHW"), which is a plane defined by the highest regularly recurring high

The difference in the two interpretations was significant; the State argued that the shoreline was twenty to thirty feet *mauka* (inland) of the line claimed by the property owners.[31] Relying on *kama'aina* testimony[32] and reportedly keeping in harmony with ancient Hawaiian land boundaries,[33] the court ruled that the phrase *ma ke kai* in royal land patents established the boundary of the shoreline "along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of the waves."[34]

The rule pronounced in *Ashford* was further developed five years later in *County of Hawai'i v. Sotomura*.[35] At issue in *Sotomura* was the location of the seaward boundary of property subject to eminent domain initiated by the County of Hawai'i.[36] Unlike *Ashford*, however, the location of the seaward boundary had been previously established by registration of the property in land court.[37] The court held that the precise location of the high water mark on registered oceanfront property, like unregistered land, is subject to change and may always be altered by erosion.[38] Furthermore, the court held "as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further *mauka*, the presumption is that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth."[39]

In addition to its holding, *Sotomura* announced that *Ashford* was "a judicial recognition of longstanding public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right."[40] The court

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tide. *See generally* Richard Hamann & Jeff Wade, *Ordinary High Water Line Determination: Legal Issues*, 42 FLA. L. REV. 323 (1990).

[31] The difference between these two interpretations was further underscored by testimony that the property owners' method would have established the shoreline under water in some areas of the islands, even during low tide. *Ashford*, 50 Haw. at 317 n.4, 440 P.2d at 78 n.4.

[32] For the purpose of testimony in these cases, a *kama'aina* is "'a person familiar from childhood with any locality.'" *Id.* at 315 n.2, 440 P.2d at 77 n.2 (quoting *In re* Boundaries of Pulehunui, 4 Haw. 239, 245 (1879)).

[33] *Id.* at 316-17, 440 P.2d at 77-78.

[34] *Id.* at 315, 440 P.2d at 77.

[35] 55 Haw. 176, 517 P.2d 57 (1973).

[36] *Id.* at 177, 517 P.2d at 59.

[37] *Id.* at 178, 517 P.2d at 59. The county argued that despite the location of the high water mark shown on the land court application, erosion had moved the seaward boundary further *mauka*. *Id.* The landowners contended that "land court proceedings are res judicata . . . [and] the certificate of registration shall be conclusive evidence of the location of the seaward boundary." *Id.* at 178, 517 P.2d at 60.

[38] *Id.* at 180, 517 P.2d at 61.

[39] *Id.* at 182, 517 P.2d at 62. Although the "trial court correctly determined that the seaward boundary lies along 'the upper reaches of the wash of waves,'" it erred in locating the shoreline at the debris line, which lay *makai* of the vegetation line. *Id.*

[40] *Id.* at 181-82, 517 P.2d at 61.

also emphasized that "[p]ublic policy . . . favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible,"[41] justifying this as a result of the public trust doctrine.[42]

Four years after *Sotomura*, the Hawai'i Supreme Court revisited the shoreline definition once again in *In re Sanborn*.[43] The case arose from the Sanborns' attempt to obtain Kauai County approval of a beachfront subdivision.[44] At issue was whether the property's beachfront title line was to be determined according to Hawai'i's "general law of ocean boundaries," or by survey distances and azimuths contained in the Sanborns' land court registration.[45] The court reiterated that "the law of general application in Hawaii is that beachfront title lines run along the upper annual reaches of the waves, excluding storm or tidal waves."[46] The court concluded that this water mark is "a natural monument" that controls over even land court judgments based on distances and azimuths.[47]

B. Shoreline Setback—Hawai'i's Statutory Shoreline

In 1970, the Hawai'i Land Use Law was amended to include the Shoreline Setback Law, which enabled counties to pass setback regulations controlling development of coastal property within a given distance from the shoreline.[48] In 1986, the setback provisions were incorporated under the Hawai'i Coastal Zone Management Act ("CZMA"), establishing a more comprehensive system of coastal management and protection.[49]

These setback statutes essentially adopt the *Ashford—Sotomura—Sanborn* shoreline definition as a reference line from which the setback is measured.[50]

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[41] *Id.* at 182, 517 P.2d at 61-62.

[42] *Id.* at 183-84, 517 P.2d at 63 ("Land below the high water mark, like flowing water, is a natural resource owned by the state 'subject to, but in some sense in trust for, the enjoyment of certain public rights.'" (quoting Bishop v. Mahiko, 35 Haw. 608, 647 (1940))). "The public trust doctrine, as this theory is commonly known, was adopted by this court in King v. Oahu Railway & Land Co., 11 Haw. 717 (1899)." *Id.*

[43] 57 Haw. 585, 562 P.2d 771 (1977).

[44] *Id.* at 586, 562 P.2d at 772.

[45] *Id.* at 588, 562 P.2d at 773.

[46] *Id.* (citing *Sotomura*, 55 Haw. at 181-82, 517 P.2d at 61-62).

[47] *Id.* at 594, 562 P.2d at 777. Like *Sotomura*, *Sanborn* reaffirmed that "land below high water mark is held in public trust by the State, whose ownership may not be relinquished, except where relinquishment is consistent with certain public purposes." *Id.* at 593-94, 562 P.2d at 776.

[48] *See generally* Dennis J. Hwang, *Shoreline Setback Regulations and the Takings Analysis*, 13 U. HAW. L. REV. 1, 6 (1991) (citing HAW. REV. STAT. § 205 (Supp. 1989) and HAW. REV. STAT. § 205-32 (1970) (repealed 1986)).

[49] *See* HAW. REV. STAT. § 205A (1993 & Supp. 2006).

[50] *See, e.g.*, HAW. REV. STAT. § 205A-1 (1993).

The CZMA's legislative history indicates the legislature's intent to follow the Hawai'i Supreme Court's precedent, its shared commitment to "reserve as much of the shore as possible to the public," and a desire to "'clarify the manner in which the shoreline is determined to protect the public interest.'"[51]

C. Re-emergence of Hawai'i Shoreline Litigation

For a number of possible reasons,[52] litigation squarely concerning the interpretation of the shoreline definition did not reach the appellate level for nearly thirty years following the seminal *Ashford*, *Sotomura*, and *Sanborn* decisions.[53] In October 2006, the Hawai'i Supreme Court revisited the issue in *Diamond v. State*,[54] which centered on a dispute regarding the use of vegetation to determine the shoreline for CZMA setback purposes.[55]

As *Diamond* was making its way through the appeals process, the shoreline issue also re-emerged when two environmental groups, Public Access Shoreline Hawai'i ("PASH") and the Sierra Club (collectively, the "Groups") filed suit against the Hawai'i Board of Land and Natural Resources ("BLNR").[56] The Groups contended that the definition of "shoreline" in the administrative rules adopted by the BLNR pursuant to the CZMA, contained language that was contradictory to the underlying shoreline protection statute and Hawai'i shoreline case law.[57] At the time, the BLNR defined "shoreline" as "the upper reaches of the wash of the waves . . . usually evidenced by the edge of vegetation growth, *or where there is no vegetation in the immediate*

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[51] Diamond v. State, 112 Hawai'i 161, 173, 145 P.3d 704, 716 (2006) (quoting STAND. COMM. REP. NO. 550-86 [1986], *reprinted in* 1986 HAW. HOUSE J., at 1244).

[52] *See supra* note 14.

[53] Although subsequent cases addressed issues involving the shoreline, those cases did not focus on interpreting the definition to locate the shoreline. *See, e.g.*, Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990) (addressing legal consequences of natural changes to the shoreline boundary due to erosion); Sotomura v. County of Hawai'i, 460 F. Supp. 473 (D. Haw. 1978) (finding Hawai'i Supreme Court's interpretation of the shoreline in County of Hawai'i v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973), deprived property owners of due process and constituted a taking without just compensation); *In re* Banning, 73 Haw. 297, 832 P.2d 724 (1992) (addressing legal consequences of natural changes to the shoreline boundary due to accretion); State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977) (addressing legal consequences of natural changes to the shoreline boundary due to lava flow).

[54] 112 Hawai'i 161, 145 P.3d 704 (2006).

[55] *See id.* at 172-75, 145 P.3d at 715-18.

[56] *See* Complaint, Pub. Access Shoreline Hawaii v. Bd. of Land & Natural Res., No. 05-1-1332-07 VSM (Haw. Cir. Ct. filed July 25, 2005).

[57] *See id.* at 2. The shoreline setback law mandates the BLNR adopt rules prescribing procedures for official determinations of the shoreline. HAW. REV. STAT. § 205A-42 (1993). Pursuant to this statutory command, the BLNR devised the shoreline certification process. *See* HAW. ADMIN. R. § 13-222 (1988).

vicinity, the upper limit of debris left by the wash of the waves."[58] The Groups argued that the rule established an absolute preference for the vegetation line over the debris line, thereby allowing the State to favor coastal vegetation as an indicator of the shoreline, even if the debris line lay *mauka* of the growing plants.[59] The Groups also asserted that consideration of the debris line only "where there is no vegetation in the immediate vicinity" was not in harmony with the policy of "extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible."[60] The additional language arguably caused the "backwards and harmful result of weakening shoreline protection and diminishing public uses and access"[61] by "creat[ing] a perverse incentive for landowners to grab as much public beach as possible by artificially inducing vegetation."[62]

In a settlement announced in December 2005, the Groups agreed to drop the lawsuit and BLNR officials agreed to begin the process of amending the rule.[63] In June 2006, the definition of "shoreline" in the administrative rules was amended, effectively bringing the shoreline definition in the Hawai'i Revised Statutes, Hawai'i Supreme Court case law, and Hawai'i Administrative Rules into harmony.[64]

III. APPLYING THE SHORELINE DEFINITION

Official shoreline location happens in two ways: (1) shoreline certification, and (2) seaward boundary determinations, i.e., judicially determined property boundaries.[65] This section first provides a synopsis of the shoreline

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[58] HAW. ADMIN. R. § 13-222-2 (1988) (current version at HAW. ADMIN. R. § 13-222-2 (2006)) (emphasis added).

[59] *See* Complaint at 2, Pub. Access Shoreline Hawaii v. Bd. of Land & Natural Res., No. 05-1-1332-07 VSM (Haw. Cir. Ct. filed July 25, 2005).

[60] *See id.* at 2-3 (citing HAW. ADMIN. R. § 13-222-2 (1988) and *In re* Ashford, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968)).

[61] *Id.* at 3.

[62] Debra Barayuga, *State's Shoreline Rule Leads to Lawsuit*, HONOLULU STAR-BULL., July 26, 2005, *available at* http://starbulletin.com/2005/07/26/news/story1.html (quoting Isaac Moriwake, Earthjustice attorney representing Public Access Shoreline Hawai'i and the Sierra Club).

[63] *See, e.g.*, Tom Finnegan, *Groups Drop Shoreline Suit*, HONOLULU STAR-BULL., Dec. 13, 2005, *available at* http://starbulletin.com/2005/12/13/news/story08.html; Joint Stipulation for Dismissal Without Prejudice, Public Access Shoreline Hawaii v. Bd. of Land & Natural Res., No. 05-1-1332-07 VSM (Haw. Cir. Ct. Dec. 12, 2005).

[64] *See supra* note 17.

[65] *See generally* Press Release, Peter T. Young, Chairperson, Haw. Bd. of Land and Natural Res., Certified Shorelines Address Setbacks—Not Ownership or Access (Nov. 7, 2003) (on file with author), *available at* http://www.eng.hawaii.edu/~hals/Shoreline%20Viewpoint-Peter%20Young.pdf [hereinafter Certified Shorelines].

certification procedure, and then distinguishes "shoreline certifications" from "seaward boundaries."

A. *Shoreline Certification Synopsis*

In 1988, the DLNR created the shoreline certification process to establish a baseline from which shoreline setbacks are measured.[66] Coastal property owners typically seek shoreline certification in order to acquire permits and variances necessary for improvements in the setback area.[67] However, the certification may also be utilized by property owners seeking an after-the-fact variance[68] or a subdivision application.[69]

To certify a shoreline, a property owner will usually hire a private licensed land surveyor to prepare a survey map and photograph and stake the suggested shoreline.[70] The surveyor's findings and supporting documents[71] are submitted to the state land surveyor for review.[72] Upon the State's receipt, public notice of the application is posted in The Environmental Notice,[73] and comments

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[66] *See* HAW. ADMIN. R. § 13-222 (1988). "The purpose of [Hawai'i Administrative Rules § 13-222] is to standardize the application procedure for shoreline certifications for purposes of implementing the shoreline setback law and other related laws." *Id.* § 13-222-1. A shoreline setback is the coastal area where property improvements are regulated by the CZMA. *See* HAW. REV. STAT. § 205A-42 to 43 (1993).

[67] See Interview with Sat Freedman, Associate, Damon Key Leong Kupchak Hastert, in Honolulu, Haw. (Oct. 18, 2006); Interview with Pat Cummins & Mary Cummins, Licensed Prof'l Land Surveyors, Hawai'i Land Consultants, in Honolulu, Haw. (Oct. 23, 2006).

[68] *See, e.g.*, Interview with Sat Freedman, Associate, Damon Key Leong Kupchak Hastert, in Honolulu, Haw. (Oct. 18, 2006).

[69] *See, e.g.*, Interview with Pat Cummins & Mary Cummins, Licensed Prof'l Land Surveyors, Hawai'i Land Consultants, in Honolulu, Haw. (Oct. 23, 2006).

[70] *See* HAW. ADMIN. R. § 13-222-7(b)(8) (1988). Maps submitted for shoreline certification must be based on a survey conducted within ninety days prior to the filing for a shoreline certification. *Id.* § 13-222-9(c).

[71] *See id.* § 13-222-7(b)(5) to (6) (requiring surveyor's maps and photos to be included with application). Many other details are required with the application. *See, e.g., id.* §§ 13-222-7 to 9. For example, the surveyor must designate the type of evidence used to locate the shoreline, such as the vegetation line, the debris line, the actual upper reach of the wash of the waves, the face of artificial structures such as seawalls, or a combination thereof. *Id.* § 13-222-9(e)(4).

[72] *Id.* § 13-222-10.

[73] *Id.* § 13-222-12(a). *The Environmental Notice* is published semi-monthly through the Office of Environmental Quality Control. *Id.*; *see also* HAW. REV. STAT. § 205A-42(b) (1993) (requiring public notice of applications for shoreline certification). *The Environmental Notice* is available at http://www.state.hi.us/health/oeqc/notice/current_issue.pdf. Pending applications can also be viewed on the website of the Land Survey division. *See* Shoreline Certifications—Department of Accounting and General Services, http://www.hawaii.gov/dags/survey/applications-for-shoreline-certification (last visited Feb. 2, 2007). Any interested person may also request to be placed on the DLNR's mailing list to receive notification of applications, proposed certifications, and rejections. HAW. ADMIN. R. § 13-222-12(b) (1988).

from the general public are accepted for fifteen calendar days.[74]

After the fifteen-day window, with the application materials and public comments in hand, the state surveyor may schedule a site inspection.[75] The state surveyor may also consult interested persons who submitted comments in response to the public notice and include them in the site visit.[76] As a practical matter, it seems that site inspections are frequently employed.[77] Once the state surveyor is satisfied with the location of the shoreline, the application is forwarded to the Chairperson of the BLNR for review and approval.[78]

Whether the application is proposed or rejected by the BLNR Chairperson, notice of the decision is published[79] and an appeals period begins.[80] If no timely appeals are filed, or if appeals are resolved in favor of the applicant, the shoreline is "certified"[81] and valid for twelve months.[82]

Standing to appeal a shoreline certification is limited to parties with an interest that is distinguishable from the broader public interest.[83] Because members of the general public do not necessarily have standing to appeal a proposed shoreline certification, their primary opportunity for input is during the application process. This heightens the importance of comments submitted upon notice of a shoreline certification application.

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[74] HAW. ADMIN. R. § 13-222-12(c) (1988); *see also* HAW. REV. STAT. § 205A-42(b) (1993).

[75] HAW. ADMIN. R. §§ 13-222-10(a) to (b) (1988).

[76] *Id.* § 13-222-10(b). In the past, the state surveyor's discretion *not* to consult with interested persons has been an issue of contention, with an allegation that practices of the state surveyor in this regard can change abruptly. *See* Alan D. McNarie, *Shoving at the Shoreline*, HAW. ISLAND J., Oct. 1-15, 2004, *available at* http://hawaiiislandjournal.com/2004/10a04a.html. Jerry Rothstein, founder of Public Access Shoreline Hawai'i ("PASH"), reported never being denied the opportunity to perform a timely site inspection for the sixteen years prior to the retirement of former state surveyor Randall Hashimoto. *Id.* However, Rothstein complained that then-acting state surveyor Mel Masuda "began turning down PASH requests for site visits unless 'credible facts or information' were attached with the requests." *Id.*

[77] *See* SHORELINE REPORT, *supra* note 22, at app. c. (listing more frequent site inspections as one of the changes being implemented by the DLNR); Interview with Pat Cummins & Mary Cummins, Licensed Prof'l Land Surveyors, Hawai'i Land Consultants, in Honolulu, Haw. (Oct. 23, 2006).

[78] HAW. ADMIN. R. § 13-222-10(d) (1988).

[79] *Id.* § 13-222-10(e).

[80] *See id.* §§ 13-222-10(f) to (g), -26(c).

[81] *Id.* § 13-222-10(f) to (g). Automatic acceptance of a shoreline certification is possible if the DLNR fails to respond in a timely manner. *Id.* § 13-222-7(g).

[82] *Id.* § 13-222-11(a); *see also* HAW. REV. STAT. § 205A-42(a) (1993).

[83] *See* HAW. ADMIN. R. § 13-222-26(a) (1988) (limiting standing to the property owners who requested the certification, government agencies whose jurisdiction includes the land in question, persons or agencies who can show their interest is clearly distinguishable from that of the general public, and other persons or agencies who can show substantial interest in the matter).

In 2005, the DLNR and University of Hawai'i Sea Grant College partnered to create a coastal specialist position to assist in the identification of shorelines, making official the DLNR practice of involving a Sea Grant agent in site visits to controversial shorelines.[84] This can be interpreted as a recognition by the DLNR that shoreline determinations require "adopting science-based evaluation and interpretation" techniques that involve different evidence than is used in traditional surveying practices.[85] In addition to the vegetation line and debris line referenced by the definition, the DLNR has suggested other types of evidence that may be used to locate the shoreline. These include: elevation, salt deposits, rock coloration, and other geomorphologic indicators;[86] biological indicators;[87] neighboring shorelines;[88] anecdotal evidence provided by people familiar with the area;[89] and evaluation of seasonal wave run-up statistics and models.[90]

The DLNR has reported other changes in the shoreline certification process that are also not reflected in the administrative rules. These include: review by a five-member panel before signature by the DLNR chairperson; increased scrutiny and enforcement of rules related to landscaping near the shoreline; and outreach and education of surveyors with respect to DLNR policies and shoreline definition interpretation.[91]

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[84] *See* Press Release, Peter T. Young, Chairperson, Haw. Bd. of Land and Natural Res., DLNR Gets Sea Grant Specialists to Assist in Shoreline Certifications (Sept. 20, 2005) (on file with author), *available at* http://www.hawaii.gov/dlnr/chair/pio/HtmlNR/05-N95.htm.

[85] SHORELINE REPORT, *supra* note 22, at app. c; *see also* McNarie, *supra* note 76 (reporting that Sea Grant Coastal Specialist Dolan Eversole urges that "[w]hat we really have to get to is using all sets of evidence, as many pieces of evidence as possible in a given case").

[86] *See* HAW. ADMIN. R. § 13-222-16(b)(12) (1988); MORRIS ATTA ET AL., HAW. DEP'T OF LAND AND NATURAL RES., SHORELINE CERTIFICATION WORKSHOP MATERIALS, http://www.hawaii.gov/dlnr/occl/files/Shoreline/HALS_SHORELINE_files/frame.htm (last visited Feb. 2, 2007); McNarie, *supra* note 76.

[87] *E.g.*, ATTA ET AL., *supra* note 86.

[88] *Cf.* Diamond v. State, 112 Hawai'i 161, 167, 145 P.3d 704, 710 (2006).

[89] *See, e.g.*, McNarie, *supra* note 76 (quoting Sea Grant Coastal Specialist Dolan Eversole's description of appropriate evidence).

[90] SHORELINE REPORT, *supra* note 22, at app. c; McNarie, *supra* note 76 (quoting Sea Grant Coastal Specialist Dolan Eversole's description of appropriate evidence).

[91] SHORELINE REPORT, *supra* note 22, at app. c. Although surveyors in the Hawai'i Association of Land Surveyors are not required to participate in continuing education programs, the group's annual meetings include presentations intended to keep members informed of current rules and practices. Interview with Pat Cummins & Mary Cummins, Licensed Prof'l Land Surveyors, Hawai'i Land Consultants, in Honolulu, Haw. (Oct. 23, 2006).

B. Seaward Boundary Line

The difference between a "certified shoreline" and a "seaward boundary line" has become a confusing and potentially divisive issue.[92] Confusion is predictable because the definition of "shoreline" for certification purposes is essentially identical to the definition Hawai'i courts have used to determine property boundary lines.[93] Despite their similarity, however, the two lines "are not necessarily the same because their purposes, the impacts and the processes for determining these 'lines' are uniquely and significantly different."[94]

The most critical of these differences is that shoreline certifications are not designed to determine ownership.[95] Instead, the line of ownership dividing public and private coastal property is the seaward boundary. Markedly different from the shoreline certification process outlined above, determinations of seaward boundary lines often take the form of quiet title actions, eminent domain actions, or land court petition actions.[96] The state's responsibility to uphold the public trust and preserve its interest in property triggers the need for "a more rigorous and cautious approach."[97] In these situations, the state does not rely on shoreline certifications, but conducts its own survey in recognition of the "importance of lateral [shoreline] access over state-owned lands for recreation, native gathering practices and other purposes."[98]

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[92] *See* inversecondemnation.com, http://www.inversecondemnation.com (Oct. 25, 26, 28, 30, 2006). Honolulu attorney Robert Thomas posted a series of comments discussing how the local media confused shoreline certification with ownership and access in coverage of *Diamond*. *Id.* For an outline of the differences between certified shorelines and seaward boundary lines see Certified Shorelines, *supra* note 65.

[93] *See* Certified Shorelines, *supra* note 65; *see also supra* note 17.

[94] Certified Shorelines, *supra* note 65.

[95] HAW. ADMIN. R. § 13-222-1 (1988) (explaining that the purpose of shoreline certifications is to "implement[] shoreline setback law and other related laws"); Certified Shorelines, *supra* note 65. *But cf.* SHORELINE REPORT, *supra* note 22, at app. c. (noting disagreement among members of the working group on whether shoreline certifications delineated the *makai* property boundary). The working group noted that both certifications and boundaries use the same shoreline definition, and reported anecdotally that property owners often assume a certified shoreline marks ownership. *Id.*; *see also* Interview with Mark Sperry, Honolulu Real Estate Agent, Caron B Realty, in Honolulu, Haw. (Oct. 7, 2006) (reporting that a shoreline certification is often required as part of a home buyer's addendum to a "Deposit, Receipt, Offer, and Acceptance" form for shoreline property.)

[96] *See* Certified Shorelines, *supra* note 65 (citing County of Hawai'i v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973) and *In re* Castle, 54 Haw. 276, 506 P.2d 1 (1973) as examples of seaward boundary determinations).

[97] *Id.*

[98] *Id.*

IV. INTERPRETING THE SHORELINE DEFINITION: *DIAMOND V. STATE*

The 2006 *Diamond* decision addressed whether an induced vegetation line can trump other evidence in defining a certified shoreline.[99] The case provided the opportunity for the court to interpret Hawai'i's shoreline definition. The background of the case includes three separate shoreline certifications, numerous site surveys, and two written opinions delivered by the BLNR.[100] This long history, which occupied nearly half of the supreme court's thirty-page opinion, illustrated two of the broader questions surrounding the location of the shoreline: *where* is the shoreline and *how* is it determined?[101] The court touched on both of these broader issues, but provided only limited guidance applicable to future shoreline certifications.

A. Facts of the Case

In July 2002, Carl Stephens landscaped the seaward portion of his Kauai oceanfront lot by cutting several trees along the shoreline area of his property and planting irrigated vegetation, including salt-tolerant *naupaka*, in its place.[102] The landscaped area lay along a public right of way bordering Stephen's property,[103] and PASH and the Sierra Club, acting as *amici*, alleged that the newly planted vegetation covered twenty to thirty feet of public beach.[104]

In an effort to build on his property, Stephens applied for and was granted a series of three shoreline certifications from 2001 to 2002.[105] During the first certification, the state surveyor, Randall Hashimoto, conducted a site visit and noted that vegetation *makai* of the shoreline located by Stephens' surveyor was "'either planted or induced' by human activity."[106] Accordingly, Hashimoto did not use that vegetation to locate the shoreline, which was certified in October 2001.[107]

Stephens was "forced to redo the survey" in May 2002 to comply with county rules regarding his building permit.[108] Hashimoto accompanied

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[99] Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006).

[100] *See id.* at 164-69, 145 P.3d at 707-12.

[101] *See id.*

[102] *Id.* at 164, 145 P.3d at 707.

[103] *Id.*

[104] Brief for Public Access Shoreline Hawai'i & Sierra Club as Amici Curiae at 2, Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006) (No. 04-1-0042).

[105] *Diamond*, 112 Hawai'i at 165-67, 145 P.3d at 708-10.

[106] *Id.* at 165, 145 P.3d at 708. The court does not identify the source of the language "either planted or induced," but it is presumed to have come from the state surveyor's testimony.

[107] *Id.*

[108] *Id.*

Stephens' surveyor and used the *naupaka* he had rejected on his earlier visit.[109] The resulting shoreline was located five to eleven feet *makai* of its previous position.[110] Hashimoto later conducted another site visit, this time with local resident and environmental activist Caren Diamond present.[111] Diamond presented photographic evidence of the upper wash of the waves during winter surf to support a more *mauka* location of the shoreline.[112] Despite this evidence, the shoreline was certified at the *naupaka* as previously recommended by Hashimoto.[113] Diamond, along with attorney and neighbor Harold Bronstein, filed appeals with the BLNR, then with the Circuit Court of the Fifth Circuit, and ultimately with the Hawai'i Supreme Court.[114]

Even though Stephens' shoreline certification had already expired, the Hawai'i Supreme Court agreed to address whether the BLNR's denial of appeal was based on a misinterpretation of the shoreline definition in the CZMA.[115] The court avoided the issue of mootness by applying an exception for cases "'involving questions that affect the public interest and are capable of repetition yet avoiding review.'"[116] The court found that: (1) the definition was a "matter of vast public importance," and (2) the appeals process would be frustrated if the court refused to review the shoreline definition in a shoreline certification because the process generally takes longer than a certification's one-year life span.[117]

B. Where Is the Shoreline?

Although the court found merit in the BLNR's argument that "[i]t is within the discretion and expertise of the DLNR to decide what is the best evidence

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[109] *Id.* Hashimoto later defended his use of the *naupaka* with the reasoning that if the vegetation withstood the yearly cycle of high surf, it would establish a stable vegetation line by which he could determine the shoreline. *Id.* He later stated that a vegetation line would have precedence over a debris line because it is "more stable." *Id.*

[110] *Id.* at 165-66, 145 P.3d at 708-09.

[111] *Id.* at 166, 145 P.3d at 709.

[112] *Id.*; *see also* Brief for Public Access Shoreline Hawai'i & Sierra Club as Amici Curiae at 4, Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006) (No. 04-1-0042).

[113] *Diamond*, 112 Hawai'i at 166, 145 P.3d at 709.

[114] *Id.* at 166-69, 145 P.3d at 709-12.

[115] *Id.* at 169-71, 145 P.3d at 712-14.

[116] *Id.* at 170, 145 P.3d at 713 (citing Okada Trucking Co., Ltd. v. Bd. of Water Supply, 99 Hawai'i 191, 196, 53 P.3d 799, 804 (2002)).

[117] *Diamond*, 112 Hawai'i at 172, 145 P.3d at 715. Although the court found that the BLNR's interpretation was not moot in a legal sense, the issue as it related to Stephens' property in particular was moot in a practical sense because the property, since sold, had already been built upon by the time the court rendered a decision. *See, e.g.*, Jan TenBruggencate, *Ruling Upholds Shoreline Access*, HONOLULU ADVERTISER, Oct. 26, 2006, at A1, *available at* http://the.honoluluadvertiser.com/article/2006/Oct/26/ln/FP610260344.html.

available that accurately reflects the location of the shoreline,"[118] it concluded that the BLNR did not use this discretion to comply with the statutory mandate to locate the shoreline at the upper reach of the wash of the waves.[119] The crux of the court's reasoning can be found in its examination of Hashimoto's testimony during the contested case hearing that followed the second certification (stating that he would use the vegetation line even if the waves washed *mauka*), and the BLNR's Order Denying Appeal following the third certification (stating that there was evidence that the waves sometimes washed *mauka* of the vegetation line).[120] Calling these perspectives "troubling,"[121] the court reasoned that Hashimoto and the BLNR failed to adhere to the "plain and obvious"[122] meaning of the CZMA shoreline definition by suggesting "the shoreline is not demarcated by the highest point that the waves reach on [the] shore in non-storm or tidal conditions."[123]

As simple as this plain language analysis seems, the court's conclusion illustrates one of the questions left open by the definition: where is the "upper reach of the wash of the waves"? The court defines the plain meaning of "upper" as the "highest—i.e., the furthest *mauka*—reach of the waves."[124] However, this seemingly clear definition may not be universally applicable. For example, where is the "upper" wash of the waves in the case of wave run-up that crests a dune, and is aided by gravity to wash further *mauka* down the back of the dune?[125] In this case, the "highest" point is arguably at the dune crest, but this is not the same as the point "furthest *mauka*." In much of its decision, the court relied heavily on *Sotomura*'s policy declaration that the location of the shoreline should extend "'to public use and ownership as much of Hawai'i's shoreline as is reasonably possible.'"[126] This policy suggests that gravity-aided wash of the waves can be used to define the shoreline as far *mauka* as possible. Shoreline photographs used as part of the Office of Conservation and Coastal Lands Integrated Shoreline Workshop mark the

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[118] *Diamond*, 112 Hawai'i at 172, 145 P.3d at 715.

[119] *Id.* at 173, 145 P.3d at 716.

[120] *Id.* at 172-73, 145 P.3d at 715-16.

[121] *Id.* at 173, 145 P.3d at 716.

[122] *Id.* at 172-73, 145 P.3d at 715-16 (citing Peterson v. Hawai'i Elec. Light. Co., 85 Hawai'i 322, 327-28, 944 P.2d 1265, 1270-71 (1997) for the proposition that the court's statutory construction must give effect to the plain and obvious meaning and language of a rule).

[123] *Id.* at 173, 145 P.3d at 716.

[124] *Id.* at 172, 145 P.3d at 715.

[125] *See* SHORELINE REPORT, *supra* note 22, at 10.

[126] *Diamond*, 112 Hawai'i at 173, 145 P.3d at 716 (citing County of Hawai'i v. Sotomura, 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973)).

shoreline at a debris line *mauka* of a dune crest, suggesting that the upper wash of the waves can indeed be pushed *mauka* by gravity-aided wash.[127]

A practical look at this issue can lead to the opposite conclusion. Regular wash of the waves with enough energy to crest a beach feature and take advantage of gravity could erode the feature, eventually removing gravity from the issue. Absent a long-term change in wave energy, it can therefore be assumed that waves that can take advantage of gravity are not representative of the seasonally recurring high waves, and do not threaten to limit the public's access to the beach. Another problem with strictly adhering to a "furthest *mauka*" rule is that it could push the certified shoreline far enough *mauka* to overlap with roads and houses, presenting a tangled takings "nightmare."[128] A paucity of any judicial precedent or clearly published DLNR policy on this issue leaves it ripe for litigation.

C. How to Define the Shoreline

After refocusing the BLNR's interpretation of the CZMA on the upper reach of the wash of the waves, the court's decision then turned to the question of how this determination should, and should not, be reached. The decision focused on two of the narrower issues related to this how question: (1) whether there is a preference for the vegetation over the debris line; and (2) whether induced vegetation can be used to locate the shoreline.[129]

The court began this discussion noting legislative history that shows preferential language for the vegetation line over the debris line was removed in 1979.[130] Also, it was noted that *Sotomura* involved a vegetation line that was *mauka* of the debris line, such that the vegetation line could have been evidence of waves washing higher than the visible debris line.[131] As such, the court read *Sotomura*'s language extolling the virtues of the vegetation line as a "more permanent monument"[132] in the context of moving the shoreline *mauka*, in favor of the declared public policy of extending "'to public use and ownership as much of Hawai'i's shoreline as is reasonably possible.'"[133] The

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[127] *Cf.* ATTA ET AL., *supra* note 86, at slide 13 (gravity-aided wash is illustrated by the slide titled "Shoreline Certification Guidelines," showing a debris line that lies *mauka*, and downhill, of a scarp).

[128] McNarie, *supra* note 76 (quoting Dolan Eversole, University of Hawai'i Sea Grant Coastal Specialist, who argues for a balanced approach because "[i]f we go with the uppermost reach . . . we're going to be condemning roads and houses. It's going to be a nightmare").

[129] *Diamond*, 112 Hawai'i at 173-74, 145 P.3d at 716-17.

[130] *Id.* at 173 n.8, 145 P.3d at 716 n.8 (citing 1979 Haw. Sess. L. Act 200, § 1 at 416).

[131] *Id.* at 175, 145 P.3d at 718.

[132] County of Hawai'i v. Sotomura, 55 Haw. 182, 517 P.2d 57 (1973).

[133] *Diamond*, 112 Hawai'i at 174, 145 P.3d at 717 (citing *Sotomura* 55 Haw. at 182, 517 P.2d at 61-62). The BLNR also relied on *Sotomura*, but asserted that the decision created a per

court flatly rejected the BLNR's proposition that *Sotomura* created a per se preference for the vegetation line, for three commingled reasons: (1) the vegetation line is not always permanent, such as when it has been recently introduced;[134] (2) *Sotomura* did not contemplate owners planting and promoting salt-tolerant vegetation;[135] and (3) unlike *Sotomura*, the vegetation on Stephens' property moved the shoreline *makai*, contrary to the policy of extending more of the beach to public use and access.[136]

Without belaboring the point, the court recognized that the definition states that the upper wash of the waves is "usually" evidenced by the vegetation line and the debris line.[137] This suggests that the court's decision applies, in a practical sense, only to those shoreline certifications on the fringe, where for some reason the vegetation or debris lines do not acceptably mark the upper wash of the waves. A discussion of what constitutes a "usual case" and what marks an "outlier" is largely absent from the court's decision. However, one example of a possible outlier is addressed by the final portion of the court's decision—induced vegetation.

The court found that Stephens' vegetation line was not an adequate indicator of the shoreline because it was "artificially planted."[138] The CZMA does not define the term "vegetation," but it is defined by Hawaii Administrative Rules § 13-222-2 as "any plant, tree, shrub, grass or groups, clusters, or patches of the same, *naturally rooted and growing*."[139] Diamond and Bronstein contended that Stephens' vegetation line was not "naturally rooted and growing," while the BLNR followed Hashimoto's logic that "because it had survived more than one year without human intervention" the vegetation was a good indicator of the shoreline.[140]

The court agreed with Diamond and Bronstein, once again on policy grounds, finding that by allowing induced vegetation to determine the shoreline, the BLNR "encourage[d] private land owners to plant and promote salt-tolerant vegetation to extend their land further *makai*."[141] This allowed the court to avoid the deference generally granted to an administrative agency's

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se preference for the vegetation line over the debris line, because customary boundaries, in order to be known to the people, must be "easily recognizable" and "not so evanescent as being a point where someone happens to observe the run-up of a wave." *Id.* at 169, 145 P.3d at 712.

[134] *Id.* at 175, 145 P.3d at 718.

[135] *Id.*

[136] *Id.* at 173, 145 P.3d at 717-18 (citing *Sotomura*, 55 Haw. at 181-82, 517 P.2d at 61-62).

[137] *Id.* at 173-74, 145 P.3d at 716-17.

[138] *Id.* at 175, 145 P.3d at 718.

[139] *See also id.* (citing Haw. Admin R. § 13-222-2 (2006)) (emphasis added).

[140] *Id.*

[141] *Id.*

interpretation of a rule,[142] by finding that the interpretation was inconsistent with the policy and objectives set forth in the CZMA, as well as *Sotomura*.[143]

The court cast its decision as a "reconfirm[ation]" of those policies.[144] However, the only guidance provided for future certifications is that the decision "reject[s] attempts by landowners to evade this policy by artificial extensions of the vegetation lines on their properties."[145] It is thus difficult to determine how artificial vegetation will be distinguished from natural vegetation in future certifications. It does not appear that the court has created a blanket rule banning the use of "artificial" vegetation—whatever that may be—in determining the shoreline.[146] Rather, in its decision not to announce such a rule, the court seems to have granted the DLNR continued deference to interpret "naturally rooted and growing," subject to the limitation that merely because vegetation survives a single wave season, it is not necessarily naturally rooted and growing.[147]

Clearly, *Diamond* is not the final word on the use of vegetation as a proxy for the upper reach of the wash of the waves. Although use of the vegetation line presents problems, its use is not unique to the Hawaiian shoreline. The vegetation line is used in Oregon to determine the landward limit of the public's right to beach access,[148] in Texas to determine property boundaries based on civil law land grants,[149] and can even be applied to the determination

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[142] *Id.* (citing Camara v. Agsalud, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984)).

[143] *Id.* (citing *Camara*, 67 Haw. at 216, 685 P.2d at 797 and *In re* Water Use Permit Apps., 94 Hawai'i 97, 145, 9 P.3d 409, 457 (2000)); *see also* HAW. REV. STAT. § 205A-2 (1993) (enumerating the CZMA's objectives and policies).

[144] *Diamond*, 112 Hawai'i at 175-76, 145 P.3d at 718-19.

[145] *Id.*

[146] Honolulu attorney Robert Thomas pointed out the folly of such a rule soon after the court's decision, noting "obvious issues of proof" and declaring the impossibility of applying such a rule. *See* inversecondemnation.com, http://www.inversecondemnation.com (Oct. 26, 2006). Thomas asked: "Will the mere touch of man anywhere in the planting or growing process be sufficient to qualify vegetation as 'artificial' under the court's new rule?" *Id.*

[147] *See Diamond*, 112 Haw. at 175, 145 P.3d at 718.

[148] *See* OR. REV. STAT. ANN. § 390.605(2) (2005) ("'Ocean Shore' means the land lying between extreme low tide of the Pacific Ocean and the statutory vegetation line as described by O.R.S. 390.770 or the line of established vegetation, whichever is farther inland."). *See generally*, State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969); Erin Pitts, Comment, *The Public Trust Doctrine: A Tool for Ensuring Continued Public Beach of Oregon Beaches*, 22 ENVTL. L. 731 (1992).

[149] *See generally* Matcha v. Mattox, 711 S.W.2d 95 (Tex. App. 1986); Thomas M. Murray, Comment, *The Texas Courts' Adventures in Locating Texas Coastal Boundaries: Redrawing a Line in the Sand:* Kenedy Memorial Foundation v. Dewhurst *Defining an Exception to* Luttes v. State, 35 ST. MARY'S L.J. 459 (2004). The use of the vegetation line in Texas is especially illuminating, given the magnified economic interest created by the role that mineral rights can play in shaping shoreline disputes. *See* Gunther Greulich, *Historic MHW or Shoreline? The Ongoing Littoral Dilemma*, 66 SURVEYING & LAND INFO. SCI. 27, 39 (2006).

of the shoreline in jurisdictions that use a MHW definition.[150] These examples suggest that vegetation *can* be a reliable proxy for the shoreline.

The looming desire for a relatively precise, replicable, and permanent marker of the shoreline argues against using the sometimes transient vegetation line.[151] However, if permanence and replicability were the bellwether of shoreline markers, then the azimuths, metes, and bounds system used for typical property boundary determinations would also be used to determine shorelines.[152]

It has been suggested that vegetation is an acceptable tool for determining the shoreline for coastal zone management purposes, but not for precise property boundaries.[153] However, vegetation *can* be an acceptable land boundary marker,[154] and the concept of a "precise" shoreline boundary is unrealistic given the dynamic nature of the shore.[155] Furthermore, there exists a strong argument that determination of the shoreline for coastal zone management purposes requires even *more* precision than seaward boundary determinations. Since regulation of the coastal zone can have the effect of barring property owners from developing parts of their property, severely limiting the value of that property,[156] private property owners have a vested

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[150] *See generally* Greulich, *supra* note 149, at 39. MHW merely defines a reference plane. In MHW jurisdictions, the intersection of this reference plane with the shore is the shoreline. Evidence other than tide heights is required to physically locate this intersection.

[151] These traits are generally provided as justification for using predictable tide heights to define the shoreline. *See, e.g.*, *In re* Ashford, 50 Haw. 314, 321, 440 P.2d 76, 80 (1968) (Marumoto, J. dissenting) (arguing that the majority had effectively rejected "a practice scientific in concept, uniform in application and precise end result").

[152] *See, e.g.*, Brief for Public Access Shoreline Hawai'i & Sierra Club as Amici Curiae at 9, Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006) (No. 04-1-0042).

[153] Greulich, *supra* note 149, at 38. *But see In re* Boundaries of Pulehunui, 4 Haw. 239 (1879) (describing the use of natural features to define Hawaiian land boundaries); Marion Kelly, Changes in Land Tenure in Hawaii, 1778-1850, 1-26 (June 1956) (unpublished M.A. thesis, University of Hawai'i) (on file with author) (describing in detail ancient Hawaiian land divisions and their relation to "the character and conditions of the immediate environment").

[154] *See, e.g.*, Sowerwine v. Nielson, 671 P.2d 295, 299 (Wyo. 1983) (discussing the importance of natural monuments, including trees, in delineating property boundaries); Ryan v. Boucher, 534 N.Y.S.2d 472, 473 (App. Div. 1988) ("A discernible line of trees may be used to describe a boundary line . . . ."). Also note that even in jurisdictions that define the shoreline relative to tide height, vegetation can play an important role. Although the tide height can be measured with precision, it is the intersection of this plane with the shore that defines the shoreline. *See, e.g.*, Harkins v. Del Pozzi, 310 P.2d 532, 534 (Wash. 1957) ("The line of ordinary high tide is that line which the water impresses on the soil by covering it for sufficient periods to deprive the soil of vegetation . . . .").

[155] *See, e.g.*, BRUCE S. FLUSHMAN, WATER BOUNDARIES 73-75 (2002) ("On closer inspection" even the certainty of a MHW shoreline "vanishes.").

[156] *See, e.g.*, Shaffer v. Earl Thacker Co., Ltd., 3 Haw. App. 81, 85, 641 P.2d 983, 987 (1982) ("The greatest value of the . . . property is the fact that it is not subject to [a] setback.");

interest in a precise shoreline certification. Conversely, misapplied regulation can allow development too close to the beach, eventually leading to loss of public beach area. Both development and beach loss can be far more permanent than a seaward boundary, creating a significant public interest in a precise shoreline definition.

The definition's other answer to the "how?" question—the debris line—suffers from limited practical utility. The debris line can become difficult to identify within a few days of the high wash of waves.[157] If a suitable debris line remains visible, it is likely that a survey could be conducted when the high wash of the waves can be observed directly. Despite this limited utility, the debris line is a more direct indicator of the upper wash of the waves than the vegetation line, and can counter concerns that the wash of the waves is too "evanescent" to be reasonably determined.[158]

Perhaps the most sensible conclusion to be drawn is that any single piece of evidence, in isolation from other lines of available evidence, makes a poor marker of the shoreline.[159] The court's decision in *Diamond* is practically, but not explicitly, a subtle endorsement of this conclusion. Diamond and Bronstein submitted several different types of evidence regarding the upper wash of the waves, including *kama'aina* testimony, photographs, and expert testimony.[160]

This also appears to be the conclusion reached by the BLNR after consultation with Sea Grant experts,[161] and is similar to the conclusion drawn by jurisdictions that use the ordinary high water mark ("OHWM")[162] to locate

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see also Interview with John Jubinsky, Gen. Counsel, Title Guaranty of Hawai'i Inc., in Honolulu, Haw. (Oct. 20, 2006) (noting that the value of property is severely limited if the owner is not permitted to build).

[157] *See* Robynne Boyd, *Our Beaches Are Disappearing*, HONOLULU WEEKLY, June 23, 2004, *available at* http://homepage.mac.com/juanwilson/islandbreath/01-access/access06shore definition.html (quoting Zoe Norcross, Sea Grant Coastal Process Extension Agent for Maui County, who states that "[t]here's not exactly a clear line that is formed by the highest reach of the wave, after a few days or weeks it can be obscured").

[158] Diamond v. State, 112 Hawai'i 161, 168-69, 145 P.3d 704, 711-12 (2006) (quoting the BLNR's position that "reason dictates that the boundaries could not be so evanescent as being a point where someone happens to observe the run-up of a wave").

[159] *See, e.g.*, Greulich, *supra* note 149, at 40 (concluding that vegetation should not be used in isolation of other evidence to determine the shoreline in MHW jurisdictions).

[160] *See* Brief for Public Access Shoreline Hawai'i & Sierra Club as Amici Curiae at 11-12, Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006) (No. 04-1-0042).

[161] *See* SHORELINE REPORT, *supra* note 22, at app. c; McNarie, *supra* note 76; ATTA ET AL., *supra* note 86.

[162] Ordinary high water ("OHW") jurisdictions, such as Florida, use a reference plane at the height of regularly recurring high tide to define the shoreline. *See generally* Hamann & Wade, *supra* note 30, at 342-76.

the shoreline.[163] Both OHWM and "upper reach of the wash of the waves" suffer issues related to temporal variation in their location.[164] Judicial scrutiny applied to OHWM has validated several lines of evidence, including some of those proposed by the BLNR, and can help to solve some of these issues.[165] Evidence used in OHWM shoreline determinations can include aerial and ground photography, photogrammetry, and eyewitness testimony.[166]

For Hawai'i's shoreline determinations, it remains to be seen if a more comprehensive approach settles these issues of proof, or merely provides even more ammunition for contention in locating a given shoreline.

V. COUNTING FOR THE FUTURE—BEYOND *DIAMOND*

Diamond's heavy reliance on *Sotomura* illustrates one of the vexing twists of the shoreline definition. *Sotomura*, and *Ashford* before it, were cases concerning seaward boundaries, not shoreline certifications. As noted by BLNR chairperson Peter Young, the basic reasons for determining the shoreline for these two purposes are very different.[167] Why, then, is *Sotomura*'s policy statement, in favor of public *use* and *ownership* given such weight in *Diamond*, which concerns the setback baseline for a building permit on private property? The simple answer is that the policies announced by the CZMA are similar to those announced in *Sotomura*. As noted by the court in *Diamond*, one of the objectives of CZMA is to "[p]rotect beaches for public use and recreation."[168]

To understand the question in more depth, it is important to recognize that development of private portions of the coastal zone can have a drastic impact on public beaches. The clearest manifestation of this proposition is found in the construction of seawalls, which are generally built on eroding beaches to

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[163] *See generally id.* at 348-76.

[164] To illustrate the imprecision of OHW, it is described as some level "higher than low or average stages, but does not include extremely high water stages . . . ." *Id.* at 364-72. The "when?" question is also an issue in OHW jurisdictions. *See id.* at 366-67 (citing, for example, Heckman Ranches v. State, 589 P.2d 540 (Idaho 1979), which explains that periodic inundation of land will place the OHW above that inundation if it destroys the agricultural value of the soil).

[165] *See e.g.*, Macnamara v. Kissimmee River Valley Sportsmans' Assoc., 648 So. 2d 155, 159 (Fla. Dist. Ct. App. 1994) (per curiam) (endorsing use of "the best evidence attainable and best methods available" to determine OHW) (quoting Martin v. Busch, 112 So. 274, 283 (Fla. 1927)). *See generally* Hamann & Wade, *supra* note 30.

[166] *See* Hamann & Wade, *supra* note 30, at 372. *See generally* Elizabeth H. Boak & Ian L. Turner, *Shoreline Definition and Detection: A Review*, 21 J. COASTAL RES. 688 (2005).

[167] *See* Certified Shorelines, *supra* note 65; *see also* discussion *supra* Part III.B.

[168] Diamond v. State, 112 Hawai'i 161, 175, 145 P.3d 704, 718 (2006) (citing HAW. REV. STAT. § 205A-2(b)(9) (2001)).

protect structures on property lying *mauka*.[169] It is well demonstrated that seawalls can accelerate erosion, eventually leaving no dry sand beach for public use.[170] Structures built too close to the beach also contribute to passive erosion by limiting the *mauka* input of material to the beach.[171] These types of development can thus contribute to the already alarming disappearance of Hawaiian beaches. Coastal geologists have found that approximately twenty-five percent of Oahu's beaches,[172] and twenty percent of Maui's beaches,[173] have been lost or significantly narrowed by erosion. It is suspected that "a thorough analysis of all sandy shoreline in the state would yield much higher numbers of beach loss."[174] The impact of such beach loss is of particularly noteworthy concern given the importance of beaches to the State's tourism economy,[175] and "incurs costs to all aspects of Hawaiian life."[176] In this

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[169] For an introduction to seawalls and their effects on beach areas, see generally Todd. T. Cardiff, Comment, *Conflict in the California Coastal Act, Sand and Seawalls*, 38 CAL. W. L. REV. 255, 255-61 (2001). Caren Diamond called irrigated shorefront vegetation "de facto vegetative seawalls". Jan TenBruggencate, *Erosion Hasn't Slowed Shoreline Construction*, HONOLULU ADVERTISER, Sept. 18, 2006, *available at* http://the.honoluluadvertiser.com/article/2006/Sep/18/ln/FP609180340.html.

[170] *See, e.g.*, COASTAL LANDS PROGRAM, HAW. DEP'T OF LAND AND NATURAL RES., HAWAII COASTAL EROSION MANAGEMENT PLAN 12 (2000) [hereinafter COASTAL EROSION] (citing, for example, O.H. Pilkey & H.L. Wright, *Seawalls Versus Beaches*, J. COASTAL RES. (SPECIAL ISSUE) 41-64 (1988)), *available at* http://www.hawaii.gov/dlnr/occl/files/coemap.pdf.

[171] *Id.* at 12 (citing O.H. Pilkey & H.L. Wright, *Seawalls Versus Beaches*, J. COASTAL RES. (SPECIAL ISSUE) 41-64 (1988)).

[172] *Id.* at 13-14 (citing C.H. Fletcher & R.A. Mullane, *Beach Loss Along Armored Shorelines of Oahu, Hawaiian Islands*, 13 J. COASTAL RES. 209-15 (1998)).

[173] Surfrider Foundation, State of the Beach Report 2006, http://www.surfrider.org/stateofthebeach/05-sr/index.asp (follow "Hawaii" hyperlink; then follow "Beach Erosion" hyperlink) (last visited Feb. 2, 2007).

[174] COASTAL EROSION, *supra* note 170, at 4.

[175] In 2003, accommodation and food services accounted for 12.8% of the Hawai'i's payroll. *See* ALMANAC OF THE 50 STATES 97 (2006 ed.) (compiling payroll data from BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS (2003)). Compare this to California and Florida, coastal states with well developed tourism industries, where these industries were responsible for less than 4.5% of the states' payroll. *Id.* at 35, 81; *see also* COASTAL EROSION, *supra* note 170, at 4 ("Beach loss seriously impacts the visitor economy in Hawaii." (citing TRAVEL INDUS. OF AM. & OFFICE OF TOURISM INDUS., U.S. DEP'T OF COMMERCE, TRAVEL AND TOURISM CONGRESSIONAL DISTRICT ECONOMIC IMPACT STUDY (1997))). For a broad summary of the economic consequences of shoreline management, see LINDA K. LENT, U.S. ARMY CORPS OF ENGINEERS, NATIONAL SHORELINE MANAGEMENT STUDY, ECONOMICS OF THE SHORELINE (2004), *available at* http://www.iwr.usace.army.mil/NSMS/Economics.pdf. Note also that ocean recreation can play a substantial role in the economy. *See, e.g.*, U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 1 (2004), *available at* http://www.oceancommission.gov/documents/full_color_rpt/welcome.html.

[176] COASTAL EROSION, *supra* note 170, at 15 ("The beaches are among the principle reasons many Hawaiians call these islands home.").

context, it is easy to defend *Diamond*'s reliance on *Sotomura*'s policy. CZMA regulations can just as easily protect, or threaten,[177] beach access as can the determination of a public—private property boundary.[178]

Given that *Diamond* relied on precedent set by cases involving seaward boundaries, the natural question to ask is whether the court's decision will be applied to future seaward boundary determinations.[179] It has been argued that the issue of public/private boundary was not before the court in *Diamond*, and therefore the case carries no precedent for seaward boundary cases.[180] While the direct applicability of *Diamond*'s CZMA interpretation is indeed limited in this way, it might not be as limited in a practical sense.[181] The definition interpreted in *Diamond* is substantially identical to the one found in *Ashford*, and the court relied heavily on *Sotomura* to formulate its interpretation. Despite the fact that the *Sotomura* decision was found by a federal court to be a compensable taking,[182] *Diamond* demonstrates that the state *Sotomura* decision has not been abandoned by the Hawai'i Supreme Court.[183] Although

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[177] PASH's late Jerry Rothstein used the tag "administrative erosion" to refer to administrative decisions that, directly or indirectly, restrict public coastal access. Surfrider Foundation, State of the Beach Report 2006, http://www.surfrider.org/stateofthebeach/05-sr/index.asp (follow "Hawaii" hyperlink; then follow "Beach Access" hyperlink) (last visited Feb. 2, 2007).

[178] *See* McNarie, *supra* note 76 (quoting PASH founder Jerry Rothstein for the contention that improper shoreline certifications can lead to legal but potentially destructive seawalls).

[179] *See, e.g.*, inversecondemnation.com, http://www.inversecondemnation.com (Oct. 28, 2006).

[180] *See* inversecondemnation.com, http://www.inversecondemnation.com (Oct. 25, 28, 2006).

[181] Public beach users are not likely to heed legal details of where private property ends and public beach begins. Repeated references to "beach access" by the local press during the coverage of *Diamond* made it even more likely that the public will assert its rights to the beachfront. *See, e.g.*, TenBruggencate, *supra* note 117.

[182] *See* Sotomura v. County of Hawai'i, 460 F. Supp. 473 (D. Haw. 1978). *But see* Sullivan, *supra* note 23, at 130. Sullivan states:

> The *Sotomura* [federal] case was not appealed by the State of Hawai'i. It therefore stands today to cast continuing doubt not only on the constitutional validity of the Hawai'i Supreme Court's decisions both in *Sotomura* and it's predecessor, *Ashford*, but on the manner in which the Hawai'i Supreme Court applied 'tradition, custom, and usage' as a source of law.

Id. Note that the state *did* attempt to appeal the district court's decision, but the appeal was dismissed because it was not filed in a timely manner. *See* Sotomura v. County of Hawai'i, 679 F.2d 152 (9th Cir. 1982).

[183] The *Sotomura* federal case is not the final word on the federal court's acceptance of the *Ashford* shoreline. For example, in Napeahi v. Paty, 921 F.2d 897, 901-903 (9th Cir. 1990), the court found "ample basis" to accept the trial court's determination that an "along the sea" boundary was located in a manner consistent with *Ashford*, and remanded the case for a determination of whether the land in question was submerged "within the meaning of *Ashford* [and] *Sotomura*."

CZMA setback issues do not raise the same specter of unconstitutional taking as seaward boundary cases,[184] it is still difficult to understand why the court would drift from *Diamond*'s *Sotomura*-based principles next time it is required to decide the location of a seaward boundary.

Whether *Diamond* is applied in this manner or not, one thing is clear: Justice Marumoto's prediction that *Ashford* would "'count for the future'" continues to ring true.[185] It is unlikely that the issue of shoreline location will go away soon. Just as coastal property derives its value in part from its scarcity, one can assume that the public's interest in staking a claim to beach areas will only increase as dwindling beaches are sought out by an increasing population.

A. Departure from Common Law

Conceptually, *Ashford*'s departure from the common law's MHW shoreline definition can be troubling.[186] However, Hawai'i is not alone in departing from the common law in the practical determination of the shoreline.[187] It has been argued that the difficulty in establishing clear and consistent shoreline boundaries has led to the general practice of determining the scope of beach access "more by past practice . . . than by the constitutional, statutory, or case law of the [s]tate."[188]

The wave-pounded shores of Hawai'i dramatically alter the context in which *Ashford* was decided. Hawai'i differs from many common law jurisdictions in its physical setting. In England, where the mean high water ("MHW") definition of the shoreline developed, the tide can vary by more than fifteen vertical feet,[189] and many multiples of that horizontally.[190] In contrast, Hawai'i's shores are characterized by small tidal fluctuations (typically one to two feet)[191] overshadowed by seasonally large surf (often reaching more than

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[184] *See generally* Hwang, *supra* note 48.

[185] *In re* Ashford 50 Haw. 314, 318 n.1, 440 P.2d 76, 78 n.1 (1968) (Marumoto, J., dissenting) (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 165-66 (1921)).

[186] *See* Sullivan, *supra* note 23, at 125-28.

[187] *See generally* Robert Thompson, *Property Theory and Owning the Sandy Shore: No Firm Ground to Stand On*, 11 OCEAN & COASTAL L.J. 47 (2005/2006).

[188] *Id.* at 48.

[189] *See, e.g.*, BBC Weather Tide Tables, http://www.bbc.co.uk/weather/coast/tides/ (last visited Feb. 2, 2007).

[190] The horizontal amplification of these large tidal variations is striking. In Blackpool, England, the tide creates an approximately half-mile ebb twice a day. *See, e.g.*, Blackpool Tourist Info, http://www.blackpool.com/tourist.html (last visited Feb. 2, 2007).

[191] *See, e.g.*, *Ashford*, 50 Haw. at 335, 440 P.2d at 89 (Marumoto, J., dissenting) (citing Halstead v. Gay, 7 Haw. 587, 587 (1889)).

thirty vertical feet). It thus seems natural and sensible that the shoreline in Hawai'i is defined by waves, rather than tides.[192] As *Sotomura* illustrates, *Ashford* should not be understood simply as a customary usage decision based on the practices of surveyors at the time of the Mahele, but rather as recognition of a traditional practice that protected public beach access.[193] While dissenting Justice Marumoto took little interest in such "hoary" traditions,[194] a strong public trust doctrine breathes new life into this aspect of the *Ashford* decision.[195]

In a slightly more practical sense, the definition can be troubling in other ways. Its imprecision creates room for bias, which can arise from any number of pecuniary, moral, or political motivations.[196] However, room for bias is not unique to Hawai'i's shoreline definition. Even if a "fixed" shoreline reference, such as the MHW mark, is used, the shoreline will remain ambulatory because the intersection of that fixed reference and the shore will move with erosion, accretion, avulsion, and lava deposition.[197] Furthermore, a surveyor's determination of the shoreline, even when located against a fixed reference, is inherently uncertain and courts have recognized this fact.[198] In this light, imprecision in the location of the shoreline becomes primarily an issue of proof that is common to all shoreline location disputes (albeit one that can be especially difficult to resolve in coastal settings).[199] This issue of proof

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[192] *But see* BRUCE S. FLUSHMAN, WATER BOUNDARIES 95 (2002) (finding it remarkable that the civil law and common law systems developed "similar rules of law for determining the effect of the dynamics of shoreline movement on adjacent property boundaries," despite the fact that the English coast is "battered" by the open ocean, while the Mediterranean Sea is "relatively calm and tideless").

[193] *See* County of Hawai'i v. Sotomura, 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973).

[194] *Ashford*, 50 Haw. at 330, 440 P.2d at 86 (Marumoto, J., dissenting) ("The effect of [the state's *kama'aina* witness] testimony is that throughout the Hawaiian kingdom, by tradition and custom, dating from the hoary past, vegetation line was the seaward limit of private title to oceanside lands and below that line was the seashore or beach which belonged to the public.").

[195] *Cf.* Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627, 650 (1989) (contending that once the public gains beach access by an easement, by custom, or otherwise, it is protected by the public trust doctrine).

[196] SHORELINE REPORT, *supra* note 22, at 3 (noting room for bias in interpreting the shoreline definition).

[197] *See, e.g.*, Frank E. Maloney & Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 224-25 (1974).

[198] *See* BRUCE S. FLUSHMAN, WATER BOUNDARIES 140 (2002) ("'We recognize that Dr. []'s opinion is not free from doubt, but there are many cases in which certainty is unobtainable. No closed-circuit television camera keeps sentinel over the weathered shores . . . .'" (quoting Alexander Hamilton Life Ins. Co. v. Virgin Islands, 757 F.2d 534, 543 (3d Cir. 1985))).

[199] *Id.* ("'Dr. [] has the status of an expert because he has knowledge, training, and experience in his calling, and he is thereby privileged to express an opinion . . . . This opinion need not be categorical in order to merit reliance; rather, in the context of a civil case, it simply

emphasizes the importance in the practical details of the way in which the shoreline is located.

B. When Is the Shoreline Determined?

The *Diamond* court did not explicitly address a shortcoming of the BLNR's position during Stephens's certifications: *when* does wave run-up define the upper reach of the wash of the waves? By refocusing the shoreline on the upper reach of the wash of the waves, a highly time-dependent variable, the court made this "when?" question much more important to the shoreline certification process.

The BLNR identified *naupaka* as an "ideal indicator of the upper wash of the waves because of its salt tolerance and ability to withstand *occasional* salt water inundation, such as may be found in storm *or other unusually high wave conditions*, while not surviving if constantly inundated or subjected to ripping or undermining by wave action."[200] These references to "occasional" inundation and "other unusually high wave conditions" demonstrate the BLNR's failure to fully acknowledge the definition's mandate to examine the upper reach of the wash of the waves *during the season* in which the waves are highest.[201] The plain language of the definition thus calls for neither "constant" inundation nor "unusually high wave[s]," but rather recognizes that the waves used to determine the shoreline can occur seasonally and creates specific exceptions for unusually high run-up caused by "seismic or storm waves."[202] During the period between Hashimoto's October 2001 site visit (rejecting the *naupaka*), and his May 2002 site visit (accepting the *naupaka*), there were only two named storms in the Eastern Pacific, and neither created unusually high wave run-up on the north shore of Kauai.[203] Similarly, there

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must be sufficiently persuasive to convince a trier of fact . . . .'" (quoting Alexander Hamilton Life Ins. Co. v. Virgin Islands, 757 F.2d 534, 543 (3d Cir. 1985))).

[200] Diamond v. State, 112 Hawai'i 161, 166, 145 P.3d 704, 709 (2006) (emphasis added).

[201] *See id.*

[202] HAW. REV. STAT. § 205A-1 (2001) ("'Shoreline' means 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.").

[203] *See* National Hurricane Center, 2001 East Pacific Hurricane Archive, Tropical Cyclone Report: Hurricane Narda, http://www.nhc.noaa.gov/2001narda.html (last visited Feb. 2, 2007); National Hurricane Center, *supra*, at Tropical Cyclone Report: Hurricane Octave, http://www.nhc.noaa.gov/2001octave.html (last visited Feb. 2, 2007). Neither statute, case law, nor administrative materials clarify what qualifies as a "storm wave", but licensed surveyor Pat Cummins reported that the BLNR's policy as understood by surveyors refers to named storms. Interview with Pat Cummins & Mary Cummins, Licensed Prof'l Land Surveyors, Hawai'i Land Consultants, in Honolulu, Haw. (Oct. 23, 2006).

were no reported tsunamis affecting Kauai during this period. Thus, wave run-up between the two site visits was the result of seasonally high waves of the type apparently contemplated by plain language chosen by the legislature,[204] when it turned to the wash of the waves "during the season of the year in which the highest wash of the waves occurs" to define the shoreline.[205]

Diamond and Bronstein's position on the issue of when wave run-up defines the shoreline called for the shoreline to be located at the "annually recurring highest reach of the highest wash of the waves."[206] Although the court rejected the BLNR's position that waves that wash *mauka* of the vegetation line do not define the shoreline, neither did it explicitly endorse Diamond and Bronstein's position. This leaves for another day a determination of which waves will determine the shoreline, and which waves are included within the scope of the term "seismic or storm waves."

C. Who Determines the Shoreline?

Diamond also did not address another question that can arise in shoreline determination: *who* determines the shoreline? This is closely related to the thorny issue of enforcement.

Clearly, surveyors are particularly important to the shoreline determinations. This importance is magnified by the rule that surveyors' findings can be granted a presumption of competence by the courts.[207] Locating the shoreline, however, can require understanding of lines of evidence that do not fall within the typical province of a surveyor's expertise.[208] *Diamond* requires that a surveyor distinguish naturally-rooted vegetation from "artificial" vegetation, and BLNR policy apparently requires that he or she spot salt-tolerant

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[204] *Cf. Diamond*, 112 Hawai'i at 172, 145 P.3d at 715 (applying plain language statutory construction to "ascertain the effect of the intention of the legislature") (citing Peterson v. Hawaiian Elec. Light Co., Inc. 85 Hawai'i 322, 327-28, 944 P.2d 1265, 1270-71 (1997)).

[205] HAW. REV. STAT. § 205A-1 (2001).

[206] *Diamond*, 112 Hawai'i at 173, 145 P.3d at 716.

[207] *See* Hudson v. Erickson, 216 P.2d 379, 383 (Wyo. 1950) ("'In the case of official surveys, it will always be presumed that the surveyor did his duty, and that his work was accurate.'") (quoting 11 C.J.S. *Boundaries* § 104, at 692)). *See generally* Hamann & Wade, *supra* note 30, at 391.

[208] *C.f.* Tara Godvin, *More Science Urged to Decide Definition of State's Shoreline*, HONOLULU ADVERTISER, Mar. 10, 2006, *available at* http://the.honoluluadvertiser.com/article/2006/Mar/10/ln/FP603100372.html (reporting that BLNR Chairperson Peter Young was "uncomfortable with surveyors being the only ones in the field charting the shoreline, which prompted him to bring the University of Hawai'i in on the process"). The need for experts in other fields led the DLNR to have non-surveyors assist during shoreline certification site inspections. *See* Young, *supra* note 84 ("The inspections are made to get evidence and consider all aspects of the coastline that could affect the location of the shoreline (i.e. evidence of dunes, debris, vegetation, etc.).").

species.[209] It is nonsensical to grant all surveyors a special presumption of botanical expertise, or special knowledge of seasonal wave statistics.

It is clear that public input is important to shoreline determinations. *Kama'aina* testimony gives the public a recognized voice in seaward boundary determinations.[210] Similarly, the rules allowing for public comment on shoreline certifications, along with the discretion given to the state surveyor to allow consultation during site visits,[211] makes "[p]ublic input invaluable in the shoreline review process."[212] Public participation is not limited to formal shoreline certifications; remember that Caren Diamond photographed Carl Stephens' landscaping efforts years before his first shoreline certification application.[213]

In enforcement terms, public participation is common and valuable in environmental regulation.[214] The primary benefit of community participation is that it widens the scope of detection, providing a cost-effective way to deter violators who may be able to otherwise avoid close government oversight.[215] The benefits of this public input are not limitless, however. The public cannot be expected to have the same technical skills as the state surveyor and coastal specialists,[216] and unless they are allowed by the state surveyor to participate in a site visit, will not be granted access to private property.

Although public participation creates an economic benefit to government agencies such as the DLNR, these public resources are limited. Note that

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[209] *See* ATTA ET AL., *supra* note 86, at slide 17 (slide titled "Shoreline Certification Salt-Tolerant Vegetation" depicts several salt-tolerant species).

[210] *See, e.g., In re* Ashford, 50 Haw. 314, 316-17, 440 P.2d 76, 78 (1968); *see also In re* Boundaries of Pulehunui, 4 Haw. 239 (1879) (allowing *kama'aina* testimony on the location of ancient Hawaiian land boundaries).

[211] *See* HAW. ADMIN. R. § 13-222-12(c) (1988) (defining public comment period); *see also* HAW. REV. STAT. § 205A-42(b) (2001) (creating public comment period); *see, e.g., Diamond*, 112 Hawai'i 161, 145 P.3d 704 (noting that Caren Diamond accompanied the state surveyor on site visit).

[212] *See* Press Release, Haw. Dep't of Accounting and General Servs., DAGS Offers New Online Access to Subdivision and Shoreline Maps (Sept. 13, 2006) (on file with author), *available at* http://www.hawaii.gov/dags/news-releases/dags-offers-new-online-access-to-subdivision-and-shoreline-maps ("Public input is invaluable in the shoreline review process and the new webpage facilitates participation in that process.").

[213] *See* Brief for Public Access Shoreline Hawai'i & Sierra Club as Amici Curiae at 2, Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006) (No. 04-1-0042).

[214] *See* David Kimo Frankel, *Enforcement of Environmental Laws in Hawai'i*, 16 U. HAW. L. REV. 85, 108-09 (1994); U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 180 (2004), *available at* http://www.oceancommission.gov/documents/full_color_rpt/welcome.html.

[215] *See generally* Frankel, *supra* note 214, at 108-09. This widened detection net may be especially helpful in Hawai'i. It is difficult to imagine that the DLNR's Division of Conservation and Resources Enforcement has resources available to dedicate enough officers to monitor *every* shorefront property for the propagation of vegetation *makai* of the property line.

[216] *See id.* at 109.

Caren Diamond's co-plaintiff, Harold Bronstein, was also her attorney and neighbor.[217] Without this sort of fortunate association, it seems far less likely that Ms. Diamond could have mounted a "successful" challenge to Stephens' shoreline certification.[218] Even where public participation is focused and organized, it can be difficult to successfully recruit and maintain enough volunteers.[219] Unlike some models of environmental regulation, public input in shoreline determinations does not offer a monetary reward that can be used to create community interest.[220]

If the shoreline determination process is to rely on public input, community interest is vital. However, this model presupposes an informed, active, and aware community, which may not always be the case. The 2004 U.S. Ocean Commission concluded that "the American public feels little sense of urgency for safeguarding our coastal and ocean resources."[221] While the Hawaiian community may be more active and knowledgeable about shoreline issues than the general American public, a system that relies too heavily on this assumption risks lax enforcement that is likely to result in future conflicts between public and private land owners.

For private property owners, public input adds yet another layer to what is already a time-consuming, multi-jurisdictional process.[222] Carl Stephens was required to wait through five appeals and nearly three years before he could build on his property,[223] which he eventually sold because of the headache of

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[217] *See, e.g.*, Joan Conrow, *Over the Hedge*, HONOLULU WEEKLY, Dec. 13-19, 2006, at 7, *available at* http://honoluluweekly.com/cover/2006/12/over-the-hedge/.

[218] Whether the challenge was successful is a matter of perspective. Stephens was granted his shoreline certification, and the property was developed, despite Diamond and Bronstein's victory before the Hawai'i Supreme Court. *See, e.g.*, TenBruggencate, *supra* note 117.

[219] For example, PASH encountered this problem in its shoreline monitoring efforts. *See, e.g.*, McNarie, *supra* note 76 (PASH founder Jerry Rothstein calling for more public participation).

[220] *Cf.* Frankel, *supra* note 214, at 108 (describing several environmental regulation schemes that include monetary rewards for public participation).

[221] U.S. COMM'N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 242 (2004), *available at* http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf. The commission states:

> While the public has a general sense that the ocean is important, most people lack a full awareness and understanding of the ocean, its health, the benefits it provides, and its connection to the nation's collective well-being. This information gap is a significant obstacle in achieving responsible use of our nation's ocean and coastal resources, empowering public involvement in ocean-related decision making, and realizing support for wise investments in, and management of, ocean-related activities.

Id.

[222] For a discussion of how shoreline certification fits into the larger scheme of permitting and regulation in coastal areas, see generally COASTAL EROSION, *supra* note 170, at 21.

[223] *See* Answering Brief of Defendant-Appellee at 3, Diamond v. State, 112 Hawai'i 161, 145 P.3d 704 (2006) (No. 04-1-0042).

the process.[224] Even a less contested shoreline certification is likely to take far more time than the forty-five to sixty days suggested by the DNLR.[225]

Jurisdictional division of the shoreline area can also complicate the process; while beaches are managed by the State, dunes are managed by the counties. Similarly, while the State determines the shoreline as a baseline for setback, the actual setback distance and permitting process is governed by the counties.[226] For some developments, federal jurisdiction adds yet another layer to this process. While the State controls submerged lands seaward of the shoreline to the limit of its jurisdiction,[227] federal regulations can apply to navigable waters seaward of the MHW mark,[228] requiring developments that alter those waters to seek U.S. Army Corps of Engineers approval.[229]

It is unlikely that Carl Stephens is the only property owner to find these processes burdensome and frustrating. This frustration is compounded when one recognizes that it is very difficult to "win" a litigated shoreline dispute. Stephens sold his property rather than wait through the appeals process for his building permit, and Caren Diamond and her neighbors were not able to stop the property from being developed in what they contended was the no-build setback.[230] In essence, both parties lost.

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[224] *See* TenBruggencate, *supra* note 117. Carl Stephens lamented that "[y]ou get the shoreline certified, and they appeal it, and by the time you go through the protests, your certification expires and you have to start over. My place is now being built, but I've since sold it. I was just tired of it." *Id.*

[225] In practice, the process takes a minimum of three to five months. *See* Posting of Sat K. Freedman to Damon Key Leong Kupchak Hastert Articles Blog, http://www.hawaiilawyer.com/pubs/skf_shorelines_9_2006.htm (Sept. 4, 2006). Three to five months is much longer than the forty-five to sixty days suggested by the DLNR's Customer Support website. Haw. Dep't of Land and Natural Res., Customer Support Site, http://hawaiideptland.custhelp.com (search "Will I need a shoreline certification to subdivide my beachfront property") (last visited Feb. 2, 2007).

[226] *See* HAW. REV. STAT. § 205A-43 (2001) (creating a minimum setback of twenty feet, and a maximum of forty feet).

[227] *See, e.g.*, 43 U.S.C. § 1312 (2005).

[228] *See, e.g.*, 43 U.S.C. § 1311(d) (2005).

[229] *See, e.g.*, 33 U.S.C. § 403 (2005) (prohibiting the alteration of navigable waters without a U.S. Army Corp. of Engineers' permit); *see also* 33 U.S.C. § 1344 (2005) (prohibiting discharge of dredged materials into U.S. waters). *See generally* COASTAL EROSION, *supra* note 170, at 17.

[230] *See, e.g.*, TenBruggencate, *supra* note 117.

VI. CONCLUSION—*HO'OLAULIMA*—MANY HANDS WORKING TOGETHER[231]

Given the strong interests involved, disputes over the shoreline are inevitable. The dynamic nature of the shore makes these disputes complex, and calls for an organic approach to its use, development, and regulation.

The clearest lesson that can be drawn from *Diamond* is that although Hawai'i's shoreline definition is simple, its interpretation and implementation are not. Relying on the court to provide direction in specific cases is an inefficient method of solving shoreline disputes, and it can be difficult to determine the impact of court guidance on future shoreline determinations. In accord with its desire to clarify the issue,[232] the Legislature should repeatedly reaffirm the policy of preserving the public's interest in the shoreline, and ensure adequate funding for the DLNR to continue to develop, implement, and enforce an improved shoreline determination process. The process must effectuate the public's right to beach access, but in a manner that is reasonably predictable and fair to property owners.[233]

One should not expect that formal legal solutions—a regulation here, a court decision there—can quiet shoreline disputes in one fell swoop. Instead, this legal world merely provides a framework for people to find a way to share a

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[231] The authors recognize COASTAL EROSION, *supra* note 170, at 16, as a source that recognizes the native Hawaiian concept that resolution of divisive coastal issues can be facilitated by "*Ho'olaulima*" or "many hands working together."

> Solutions to the apparent conflict of landowner expectations on retreating coastlines subject to coastal hazards, are not easy, they are not cheap, and they will require that all parties come to the table willing to define levels of acceptable change to past practices of coastal use. Parties with aspirations to conflict, to place blame, and guided by distrust, will achieve only dissension, discord, and ultimately failure. The result will be continued beach loss. Parties with the intention to compromise, to reach understanding, and to work in the spirit of achievement and accomplishment will promote the ability of this generation to pass on a healthy and viable coastal environment to our children and grandchildren.

Id.

[232] Diamond v. State, 112 Hawai'i 161, 173, 145 P.3d 704, 716 (2006) (citing STAND. COMM. REP. NO. 550-86 [1986], *reprinted in* 1986 HAW. HOUSE J., at 1244).

[233] One way of encouraging healthy public discourse on the BLNR's interpretation of the definition is to make its interpretation of the definition more accessible, perhaps by publishing it in administrative rules. *See* HAW. REV. STAT. § 91-3 (Supp. 2006) (requiring public discussion prior to enactment of administrative rules). The BLNR should note the rising tide of ecology-based management, an approach that has moved from the province of environmentalists into the public eye, and is sure to call for heightened protection of threatened areas of the shoreline. For an example of ecology-based management principles reaching the general public, see generally Joel K. Bourne, *Loving Our Coasts to Death*, NATIONAL GEOGRAPHIC, July 2006, at 64-87. *See also* COASTAL EROSION, *supra* note 170, at 15 (beach and dune loss affects ecosystems).

valuable Hawaiian resource. This sharing is the essence of *aloha*, as it is embodied in Hawaiian law.[234]

Like Chief Justice Richardson in *Ashford*, public and private property owners alike should fundamentally shift their shoreline frame of reference away from typical notions of property and boundaries. To accept the notion of an imprecise, fuzzy, and shared shoreline is to accept that all parties must enter the shoreline arena prepared to share its benefits *and* its risks.[235]

For private property owners, who already accept and pay for the physical risks associated with coastal property,[236] it is important to recognize the strong public interest in preserving access to beaches, and accept the likelihood that regulation will limit their autonomy with respect to the use and development of their land.[237] As *Diamond* illustrates, fighting this likelihood through litigation is merely an expensive way of publicizing a threatened right of beach access. For the public, it is important to recognize the special value that property owners attach to their coastal homes, and avoid the perception that regulation is being used as a substitute for taking private property.

Simeon L. Vance[238] & Richard J. Wallsgrove[239]

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[234] *See, e.g.*, HAW. REV. STAT. § 5-7.5 (1993) ("'Aloha' means mutual regard and affection and extends warmth in caring with no obligation in return. 'Aloha' is the essence of relationships in which each person is important to every other person for collective existence.") For one perspective on how this spirit of aloha is manifested in Hawaiian property law, see Posting of Prof. Alfred L. Brophy to PropertyProf Blog, http:// http://lawprofessors.typepad.com/property/2006/04/aloha_jurisprud.html (Apr. 18, 2006).

[235] An illustration of the effects and risks of a dynamic shoreline is the fact that title insurers are likely to specifically exempt their policies from shoreline determinations. Interview with John Jubinsky, Gen. Counsel, Title Guaranty of Hawai'i Inc., in Honolulu, Haw. (Oct. 20, 2006) ("[The shoreline] [l]iterally is a moving boundary . . . . It is where it is.").

[236] For an overview of the risks associated with owning coastal property, see generally DOLAN EVERSOLE & ZOE NORCROSS-NU'U, UNIV. OF HAWAI'I SEA GRANT COLLEGE PROGRAM, NATURAL HAZARD CONSIDERATIONS FOR PURCHASING COASTAL REAL ESTATE IN HAWAI'I, Aug. 2006, *available at* http://www.hawaii.gov/dlnr/occl/files/Purchasing%20Coastal%20Real%20Estate.pdf.

[237] This concept is analogous to the limits placed on owners of historically important buildings. *Cf., e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

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