

No. 29919

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

ALBERTA S. DEJETLEY; JOHN R. DELA CRUZ; DEBORAH YOOKO DELA CRUZ; LAURIE ANN DELIMA; ROY Y.H. DELIMA; MICHAEL "PHOENIX" DUPREE; <i>et al.</i> ,	)	CIVIL NO. 08-1-0678(3)
	)	(Maui) (Declaratory Judgment)
	)	APPEAL FROM FINAL JUDGMENT
	)	(June 23, 2009)
	)	
Plaintiffs-Appellants,	)	SECOND CIRCUIT COURT
	)	
vs.	)	Honorable Joseph Cardoza
	)	
SOLOMON P. KAHOHALAHALA, ROY T. HIRAGA, <i>et al.</i> ,	)	
	)	
	)	
Defendants-Appellees.	)	

K. HAMAKAOU  
CLERK OF APPELLATE COURTS  
STATE OF HAWAII

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FILED

**PLAINTIFFS-APPELLANTS' MOTION TO EXPEDITE**

**MEMORANDUM IN SUPPORT OF MOTION**

**DECLARATION OF ROBERT H. THOMAS**

**EXHIBITS "1" TO "7"**

**CERTIFICATE OF SERVICE**

KENNETH R. KUPCHAK	1085-0
ROBERT H. THOMAS	4610-0
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ALBERTA S. DEJETLEY *et al.*

## **PLAINTIFFS-APPELLANTS' MOTION TO EXPEDITE**

Pursuant to Haw. R. App. P. 2, Plaintiffs-Appellants ALBERTA S. DEJETLEY, JOHN R. DELA CRUZ, DEBORAH YOOKO DELA CRUZ, LAURIE ANN DELIMA, ROY Y.H. DELIMA, MICHAEL "PHOENIX" DUPREE, GAREK PAUL ELIGADO, SHEILA A. ELIGADO, LAWRENCE G. ENDRINA, DARLENE JANICE ENDRINA, REYNOLD MASAJI GIMA, BRUCE HARVEY, JENNIFER PHILOMENA LICHTER, RON MCOMBER, PHYLLIS S. MCOMBER, SHERRI MORA, JOHN W. ORNELLAS, GAIL RIENER FRENCH, NEAL S. TAMASHIRO, TOM URPANIL JR. AND BEVERLY ZIGMOND (Appellants) move to expedite consideration of this appeal, including transmission of the record and an expedited briefing and argument schedule.

Maui Charter § 3-3 (2003) provides that a council member who is adjudicated a felon or who ceases to continually be a resident of the residency area to which he was elected "shall immediately forfeit office and the seat shall thereupon become vacant." Defendant-Appellee Solomon P. Kahoolalahala, who occupies the Lanai residency seat on the Maui County Council, is not a resident of the Lanai residency area and has forfeited office, and Appellants sought a declaratory judgment to enforce section 3-3. The circuit court held as a matter of law that a declaratory judgment action was not an available remedy, and that impeachment and recall are the only available remedies to enforce the Charter's residency and "nonfelon" requirements.

The resolution of this legal issue is of critical public importance to all citizens of Maui County, who are entitled to know whether their Charter requires them to institute an impeachment proceeding or a recall election to remove a council member who is adjudicated a felon or ceases to be a member of his residency area. Maui citizens also need to know whether Kahoolalahala illegally occupies the Lanai residency area seat on the council. Time is of the essence

since the members of the Maui County Council are elected for two year terms and the next election is scheduled to be held in November 2010, and consideration of this appeal in the normal course may subject it to a claim of mootness.

This motion is based up Haw. R. App. P. 2, the Memorandum in Support and exhibits and declaration attached thereto, and the Record and files in this case.

DATED: Berkeley, California, July 2, 2009.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT



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KENNETH R. KUPCHAK  
ROBERT H. THOMAS  
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Attorneys for Plaintiffs-Appellants  
ALBERTA S. DEJETLEY, *et al.*

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Defendants-Appellees.	)	
_____	)	

**MEMORANDUM IN SUPPORT OF MOTION**

**I. SUMMARY**

This appeal presents a purely legal question of great public importance which calls out for this Court's immediate attention: the meaning of the Maui Charter's requirement that a council member who is adjudicated a felon or ceases to continually be a resident of the residency area to which he was elected "shall immediately forfeit office and the seat shall thereupon become vacant." *See* Maui Charter § 3-3 (2003). Appellants, a coalition of Lanai residents and voters who – along with all County citizens are entitled to a council person who continually resides on Lanai – brought suit to enforce the Charter because Defendant-Appellee Solomon P. Kahoolalahala, the council person who occupies the Lanai resident's seat, does not reside on Lanai.<sup>1</sup> On the eve of

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1. In a separate case, the State of Hawaii Board of Registration, County of Maui determined that Kahoolalahala is a Lahaina resident for purposes of voter registration. *See Dupree v. Hiraga*, Case No. BOR-08-01 (Findings of Fact, Conclusions of Law, and Decision of the Board of Registration, County of Maui (Nov. 1, 2008)). Kahoolalahala has appealed the Board's decision to this Court. The briefing in that appeal has been completed, and an application to transfer the case to the Supreme Court has been filed. *See Dupree v. Hiraga*, No. 29464. *See* Declaration of Robert H. Thomas (Thomas Dec.) ¶ 3.

Kahoolalahala's deadline to respond to discovery requests regarding proof of his claimed Lanai residency, the circuit court granted his motion for judgment on the pleadings. The circuit court determined as a matter of law that if Kahoolalahala is not a Lanai resident, section 3-3 of the Charter merely imposes upon him a duty to resign, and if he fails to do so, that he is subject to impeachment pursuant to section 13-13 of the Maui Charter "or other appropriate proceeding," but that a declaratory judgment action is not a legal method of enforcing section 3-3. Appellants, on the other hand, assert that the meaning of "immediately forfeit" and "shall thereupon become vacant" are plain, and mandate that a council member who is adjudicated guilty of a felony or ceases to be a resident of his residency area has automatically forfeited office, and the seat is vacant without further action and without resorting to impeachment or recall, and that section 3-3 may be enforced by a declaratory judgment action.

The resolution of this legal issue is of critical importance to all citizens of Maui County, who are entitled to know whether their Charter requires they institute an impeachment proceeding or a recall election to remove a council member who is adjudicated a felon or ceases to be a member of his residency area. Maui citizens also need to know whether Kahoolalahala legally occupies the Lanai residency area seat on the council. Time is of the essence since the members of the Maui County Council are elected for two year terms and the next election is scheduled to be held in November 2010, and consideration of this appeal in the normal course may subject it to a claim of mootness. *See* Maui Charter § 3-2 (2003) (council members elected for two-year terms). Even though this issue will not be moot even if the case extends beyond the next election because it is capable of repetition yet evading review, expedited consideration would eliminate the mootness issue.

Expediting the appeal will not work any great burden on the parties. The issue presented is a purely legal question, and the circuit court granted judgment on the pleadings. The Record consists only of a few pleadings, legal memoranda, and the circuit court's orders. Under the

standard of review, the allegations in the pleadings must be taken as true, so there is no voluminous factual record. *Dunlea v. Dappen*, 83 Haw. 28, 32, 924 P.2d 196, 200 (1996). Additionally, the circuit court’s legal conclusion is subject to *de novo* review by this Court. *Ruf v. Honolulu Police Dep’t*, 89 Haw. 315, 319, 972 P.2d 1081, 1085 (1999) (“On appeal, we review *de novo* the trial court’s order granting the motion.”) (citation omitted). The parties thoroughly briefed the issues below, and it will be a relatively simple matter to draft and file their briefs in this Court on an expedited basis.

## II. FACTS<sup>2</sup>

### A. The Maui Charter Requires Council Members Continuously Maintain Residency In Their Residency Areas

The Maui Charter mandates that “[t]here shall be a council composed of nine members who shall be elected-at large . . . [and] [o]f the nine members elected to the council, one shall be a resident of the Island of Lanai[.]” Maui Charter § 3-1 (2003). All County residents and registered voters are entitled to vote for – and have serve – a registered voter and resident from the correct residency area. If a council member ceases to be a resident of her residency area, or is adjudicated guilty of a felony, the council member “shall immediately forfeit office and the seat shall thereupon become vacant.” Section 3-3 of the Maui Charter provides:

*If a council member . . . ceases to be a resident of the council member’s residency area during the council member’s term of office, or if a council member is adjudicated guilty of a felony, the council member shall immediately forfeit office and the seat shall thereupon become vacant.*

Maui Charter § 3-3 (2003) (emphasis added).

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2. The circuit court entered judgment in this case on June 23, 2009, and the Notice of Appeal was filed on July 2, 2009, concurrently with this motion. Thomas Dec. The Record on Appeal, therefore, has not been completed. However, because the circuit court granted judgment on the pleadings and this Court’s review is *de novo*, the Record will not be voluminous. Appellants have attached to this Memorandum as Exhibits the documents which will comprise the relevant portions of the Record on Appeal.

**B. Board Of Registration Determined Kahoohalahala Is Not A Resident Of Lanai, But Resides In Lahaina**

On November 1, 2008, after an evidentiary hearing, the State of Hawaii Board of Registration, County of Maui confirmed that Kahoohalahala did not reside on Lanai but resides in Lahaina, and consequently was not a registered Lanai voter because he “did not abandon his residence in Lahaina, Maui, Hawaii, and did not relocate his permanent residence to Lanai City, Lanai, Hawaii.” *Dupree v. Hiraga*, Case No. BOR-08-01, Findings of Fact, Conclusions of Law and Decision ¶ 14, at 4 (Nov. 1, 2008) (a copy is attached as Exhibit 1, and was also attached as Exhibit “A” to the Complaint and First Amended Complaint in this case). Kahoohalahala appealed the Board’s decision to this Court, and briefing in that case has recently been completed. *See supra* note 1. The following day, Kahoohalahala was purportedly elected to as the Lanai seat on the Maui County Council.<sup>3</sup>

**C. Lanai Residents Sought Declaration Of Forfeiture And Vacancy Under The Maui Charter**

On November 24, 2008, Appellants filed a Complaint for Declaratory and Injunctive Relief for Violations of the Charter of the County of Maui (Complaint), seeking a declaratory judgment that by virtue of his Lahaina residency, Kahoohalahala had forfeited the office of Lanai council member under Maui Charter § 3-3, and the office was vacant. A copy of the Complaint is attached as Exhibit 2.<sup>4</sup> The First Amended Complaint For Declaratory And Injunctive Relief For

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3. Pursuant to Haw. R. Evid. 201, this court may take judicial notice that Kahoohalahala currently occupies the Lanai residency seat on the Maui County Council, and Appellants request the court do so.

4. The Complaint also included claims contesting Kahoohalahala’s election, but those claims were subsequently removed in the First Amended Complaint after the Hawaii Supreme Court dismissed an original “contest for cause” action filed against Kahoohalahala because “[a]ny challenge to a candidate’s qualifications for county office must be pursued in accordance with HRS § 12-8 (Supp. 2007), not HRS §§ 11-172 and 11-174.5.” *See Ornellas v. Kahoohalahala*, No. 29476, Order of Dismissal (Dec. 15, 2008).

Violation Of The Charter Of The County Of Maui First Amended Complaint (filed Jan. 30, 2009) (FAC) asserts a single claim that “Mr. Kahoohalahala is violating the mandatory residency requirement to be Lanai’s member of the on the Maui County Council because he is not, and has not been continuously, from the time he filed nomination papers or thereafter, a resident in the area from which he sought to be elected.” Maui Charter § 3-3.” FAC ¶ 39 (a copy of the First Amended Complaint is attached as Exhibit 3). On March 4, 2009, the circuit court denied Kahoohalahala’s motion to dismiss. *See Order Denying Defendants’ Motions to Dismiss First Amended Complaint* (Mar. 4, 2009) (a copy of the court’s minute order is attached as Exhibit 4).

**D. The Circuit Court Determined That “Shall Immediately Forfeit” And “Shall Become Vacant” Mean That Kahoohalahala Is Subject To Impeachment But Not To A Declaratory Action**

On March 19, 2009, the circuit court granted Kahoohalahala’s motion for judgment on the pleadings. The court framed the issue as follows:

[T]he issue presented is whether Maui County Charter § 3-3 allows Plaintiffs to seek removal from office by means of declaratory relief under Hawaii Revised Statutes § 632-1, or whether Plaintiffs must seek relief through another procedure such as the impeachment provision found in Maui Charter § 13.13.

*Order Granting Defendant Solomon P. Kahoohalahala’s Motion for Judgment on the Pleadings at 3* (Mar. 19, 2009) (a copy is attached as Exhibit 5). The circuit court concluded:

If Defendant is not a resident of the Lanai District, as alleged by Plaintiffs, he is under a duty to immediately forfeit his office. Defendant’s alleged failure to “immediately forfeit office” constitutes “nonfeasance,” *i.e.*, “[t]he failure to ace when a duty to act existed” (*see, Black’s Law Dictionary* 1080 (8th ed. 2004)). As Plaintiffs allege nonfeasance, § 13-13 of the Maui County Charter governs.

Here, there can be no reasonable dispute that the twenty-one (21) plaintiff do not constitute at least five percent (5%) of the voters registered at the last general election held on November 4, 2008. For purposes of this motion and pursuant to Hawaii Rules of Evidence, Rule 201, the Court takes judicial notice of this fact. As there is no verified petition for impeachment before the Court signed by not less



than five percent (5%) of the voters registered in the last general election, this matter cannot be pursued as an impeachment proceeding and must be dismissed.

*Id.* at 5 (footnote omitted). In the footnote, the court stated:

This order provides only that declaratory relief is not an appropriate means of removing an elected official from office and is not intended to prohibit removal from office by another appropriate mechanism. No party contends that impeachment is the only means of removal. The Maui County Charter sets forth a procedure for recall. *See*, Maui County Charter § 12.1.”

*Id.* On May 7, 2009, the circuit court denied Appellants’ motion to alter or amend the judgment pursuant to Haw. R. Civ. P. 60(b), or for leave to amend the FAC. *See* Order Denying Plaintiffs’ Motion for Relief from Order or Judgment Or, in the Alternative, for Leave to Amend (May 7, 2009) (a copy is attached as Exhibit 6).

The circuit court entered Final Judgment on June 22, 2009. *See* Exhibit 7. Upon receipt of the Final Judgment on July 1, 2009, Appellants filed the Notice of Appeal on July 2, 2009 concurrently with this motion.

### **III. ARGUMENT**

#### **A. Appeals Expedited When Issue Is Of Public Interest Or Time Is Of The Essence**

Rule 2 of the Hawaii Rules of Appellate Procedure permit this Court to suspend the rules and expedite an appeal:

In the interest of expediting a decision, or for other good cause shown, either Hawai’i appellate court may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Haw. R. App. P. 2. Appeals may be expedited when issues raised are of great importance to the community, or when time is of the essence. *See, e.g., State v. Kahlbaun*, 64 Haw. 197, 200 n.3, 638 P.2d 309, 313 n.3 (1981) (appeal expedited “because issues of great public importance were

involved.”); *National City Bank v. Battisti*, 581 F.2d 565, 569 (6th Cir. 1977) (expediting an appeal under Fed. R. App. P. 2 because it “involve[s] important issues which reach far beyond the particular controversy between the petitioners and the Board”). The avoidance of mootness is also a concern. *See, e.g., Carter v. State*, 512 So.2d 1079, 1080 (Fla. Dist. Ct. App. 1987) (“If this case is not expedited, any relief to which appellant is entitled may be rendered moot by the mere passage of time.”). Both elements – public interest and time of the essence – are present in this appeal.

**B. Whether “Forfeiture” Means Only “Subject To Impeachment Or Recall” Is Of Pressing Public Interest**

The issue presented by this appeal affects more than just the parties to the case. Whether a declaratory judgment action is an available means of enforcing the Maui Charter provision that requires immediate forfeiture by a council member who ceases to be a resident of his residency area or who is adjudicated a felon, is of concern to all citizens of Maui County, who are entitled by their Charter to have one member of their on the Maui County Council be a resident of Lanai at all times. Maui Charter § 3-1 (2003). The fundamental interest to be protected here is that of the people . . . in choosing whomever they please to represent them[.]” *Akizaki v. Fong*, 51 Haw. 354, 356, 461 P.2d 221, 222 (1969). Since the members of the Maui County Council are voted upon at large (meaning that all voters vote for all residency areas), the resolution of the meaning of section 3-3, and whether it requires automatic and immediate divestiture of office, or whether it merely means “subject to impeachment or a recall election” are of obvious import to all.

The circuit court’s determination leaves Maui residents unsure of their rights and remedies when a council member is not or ceases to be a resident of his residency area, or is adjudicated a felon. The Charter’s impeachment provision provides that a lawsuit may not be brought unless instituted by a “verified petition for impeachment signed by not less than five percent (5%) of the voters registered in the last general election.” Maui Charter § 13-13 (2003). The recall election provision immunizes officers for six months after taking office, *id.* § 12-9, and requires a petition

“signed by not less than twenty percent (20%) of the voters registered in the last general election.” *Id.* § 12-3.2. The declaratory judgment statute, on the other hand, merely requires an “actual controversy exists between contenting parties,” and that the court is satisfied a declaratory judgment will “serve to terminate the uncertainty or controversy.” Haw. Rev. Stat. § 632-1 (1993). In those cases, the circuit courts have jurisdiction “to make binding adjudications of right” by a single plaintiff who seeks to enforce a legal right. *Id.* The circuit court’s judgment, however, by eliminating declaratory judgment as a vehicle to enforce section 3-3, effectively grafted a 5% or 20% petition requirement into the forfeiture and vacancy provisions in section 3-3. Until the issue of appropriate vehicle to enforce section 3-3 of the Maui Charter is finally resolved by a court with the power to establish precedent, Maui residents will continue to live under the cloud of having a non-Lanai resident purport to represent them on the Maui County Council.

### **C. Time Is Of The Essence**

In light of the two year terms of council members, any attempt to enforce the continuous residency and “non felon” requirements in Maui Charter § 3-3 by declaratory judgment could evade appellate review merely because of the passage of time while a case progresses through the circuit court and court of appeals process (which now includes a discretionary layer of Supreme Court review). A case presents the threat of becoming moot “where a challenged governmental action would evade full review because of the passage of time [and] would prevent any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit.” *Clark v. Arakaki*, 118 Haw. 355, 360-61, 191 P.3d 176, 180-81 (2008). The longer this appeal takes, the more this threat looms because the next election for the Maui County Council is November 2010. This case was dismissed as a matter of law on the pleadings and Appellants were deprived of the opportunity to conduct discovery, so the circuit court proceedings were relatively speedy. Even then, it took the circuit court approximately half a year to reach Final Judgment on the legal question. The appeals process has just commenced with the entry of Final Judgment on

June 22, 2009, and the filing of the Notice of Appeal on July 2, 2009, and Appellants are not aware of how long an unexpedited appeal could take, but do note that now that this Court has the jurisdiction to hear appeals-of-right, its docket has appeared to become less speedy than when it was assigned appeals by the Supreme Court prior to 2006. Thomas Dec. ¶ 5.

Additionally, the appellate clerk may ministerially grant one 30-day extension for Kahoohalahala’s answering brief, and this Court in its discretion may grant further extensions of time for filing briefs “for good cause.” *See* Haw. R. App. P. 29. In *Dupree v. Hiraga*, No. 29464, the appeal now pending in this Court in which Kahoohalahala appeals the State Board of Registration’s factual determination that he resides in Lahaina and not on Lanai, Kahoohalahala has taken advantage of the ministerial Clerk’s extension to file his opening brief, and has received additional extensions of time by motion, delaying the filing date from February 21, 2009 until May 18, 2009. Thomas Dec. ¶ 6. If the present appeal is not expedited, Kahoohalahala will presumably take the same course of action here, pushing resolution of the issue closer and closer to November 2010.

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**IV. CONCLUSION**

Consideration of this appeal should be expedited, and a briefing and argument schedule established. This appeal presents a straightforward legal issue of great public importance which may otherwise evade appellate review because of the two year terms of council members on the Maui County Council.

DATED: Berkeley, California, July 2, 2009.

Respectfully submitted,

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