

No. 29919

IN THE SUPREME COURT 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)
Petitioners-Plaintiffs-Appellants,	)	SECOND CIRCUIT COURT
vs.	)	Honorable Joseph Cardoza
SOLOMON P. KAHOOHALAHALA, <i>et al.</i> ,	)	
	)	
Respondent-Defendant-Appellee.	)	

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PETITIONERS-PLAINTIFFS-APPELLANTS' APPLICATION TO TRANSFER

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**PLAINTIFFS-APPELLANTS’ APPLICATION TO TRANSFER**

**I. REQUEST TO TRANSFER**

Pursuant to Haw. R. App. P. 40.2 and Haw. Rev. Stat. § 602-58 (1993), Petitioners-Plaintiffs-Appellants Alberta S. DeJetley, *et al.* (Petitioners), respectfully request transfer of this appeal from the Intermediate Court of Appeals to the Supreme Court. The Record on Appeal was filed on August 31, 2009. This application is timely. See Haw. R. App. P. 40.2(a) (“A application [for transfer] . . . for an appeal may be submitted no earlier than 10 days after the filing of the record on appeal . . .”).

**II. STATEMENT OF RELEVANT FACTS AND PRIOR PROCEEDINGS**

The nine seats on the Maui County Council are determined by “residency area,” and the island of Lanai has one seat. Maui Charter § 3-3 (2003). The Maui Charter requires Council members continually maintain residence in their respective residency areas:

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.*

*Id.* (emphasis added). This appeal presents a purely legal question of great public importance: the meaning of the Charter’s requirement that a Council member “shall immediately forfeit office and

the seat shall thereupon become vacant.” A coalition of Lanai residents and voters brought a declaratory judgment action in the Circuit Court for the Second Circuit to enforce section 3-3 of the Charter because Respondent-Defendant-Appellee Solomon P. Kahooalahala (Kahooalahala) – the council member who occupies the Lanai residency area seat – does not reside there.<sup>1</sup> Record on Appeal (“R.”) at 0009.

On March 29, 2009, on the eve of Kahooalahala’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. R. at 0035. The circuit court was required accept as true the allegation that Kahooalahala is not a resident of the Lanai residency area,<sup>2</sup> but determined that if Kahooalahala was not a Lanai resident, section 3-3 of the Charter merely imposes upon him a duty to resign. The circuit court held that if he fails to resign, that he is subject to impeachment for “nonfeasance” pursuant to section 13-13 of the Maui Charter “or other appropriate proceeding,” but that Petitioners could not seek a declaratory judgment that Kahooalahala was not a resident of Lanai. R. at 0035. The circuit court also protected Kahooalahala from discovery requests seeking information about his actual residence. R. at 0040.

The circuit court also refused to allow Petitioners in the alternative to amend the complaint to explicitly state what was implicit, and specify that a writ of quo warranto was being sought. R. at 0039.

The circuit court entered the Judgment on June 23, 2009. R. at 0041. Upon receipt of the Judgment on July 1, 2009, Petitioners timely filed the Notice of Appeal on July 6, 2009. R. at 0042. Petitioners requested the Intermediate Court of Appeals expedite consideration of the appeal because “[t]his appeal presents a purely legal question of great public importance which calls out for this

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1. On August 20, 2009, this Court heard oral arguments in a separate but related case, *Dupree v. Hiraga*, No. 29464. That case is Kahooalahala’s appeal from the decision of the State of Hawaii Board of Registration (County of Maui), which determined after an evidentiary hearing that Kahooalahala is a Lahaina resident, and could not register to vote as a Lanai resident. On July 1, 2009, this Court transferred the *Dupree* appeal from the Intermediate Court of Appeals.

2. See *Baehr v. Lewin*, 74 Haw. 530, 545-46, 852 P.2d 44, 52-53 (1993) (motion for judgment on the pleadings governed by same standard as motion to dismiss for failure to state a claim) (citing *Marsland v. Pang*, 5 Haw. App. 463, 474, 701 P.2d 175, 186, *cert. denied*, 67 Haw. 686, 744 P.2d 781 (1985)).

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)." On July 16, 2009, the ICA entered an Order Denying Plaintiffs-Appellants' Motion to Expedite, noting "[d]enial of the motion does not preclude Appellants from . . . submitting an application for a transfer to the supreme court."

### **III. STATEMENT OF POINTS OF ERROR**

1. The circuit court erred when it determined Maui Charter § 3-3 (2003) may not be enforced by a declaratory judgment. This error includes the circuit court's legal conclusion that impeachment pursuant to Maui Charter § 13-13 (2003) or a recall election pursuant to Maui Charter § 12.1 (2003) are the only remedies for violation of Maui Charter § 3-3 (2003). The error by the circuit court is in the Record at R. at 0035. Petitioners objected to the error. R. at 0033.

2. The circuit court erred when it denied Appellants' motion for leave to amend the First Amended Complaint. The error by the circuit court is in the Record at R. at 0039. Petitioners objected to the error. R. at 0036, 0038.

### **IV. THIS CASE MEETS THE STATUTORY QUALIFICATIONS FOR TRANSFER TO THE SUPREME COURT**

The resolution of the purely legal issues presented by this appeal are of critical importance to all citizens of Maui County, because every day this farce continues is one less day they have a Lanai resident on the Council. The entire electorate is deprived of the very basis of representation that their Charter guarantees. This Court should resolve this case now.

Transfer of an appeal from the ICA to this Court is mandatory if the appeal involves "a question of imperative or fundamental public importance," and is discretionary if it involves "a question of first impression or a novel legal question." Haw. Rev. Stat. § 602-58 (1993). *See also County of Hawaii v. C & J Coupe Family Ltd. P'ship*, 119 Haw. 352, 357 n.2, 198 P.3d 615, 619 n.2 (2008). Under either standard, this appeal should be transferred. The meaning of "immediately forfeit" and "shall thereupon become vacant" are plain: the circuit court has the power to declare 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, each of which require a petition by either 5% or 20% of

the voters who voted in the last election. Since the Maui County Council lacks the power to judge the qualifications of its members or to remove those who do not continually maintain residency in their residency areas or who are convicted of a felony,<sup>3</sup> if the circuit court's judgment is not reversed, the Charter's requirements will be rendered meaningless.

The issues in this appeal are of imperative or fundamental public importance because they affect 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 the Maui County Council be a resident of Lanai at all times. Maui Charter § 3-1 (2003). The residency requirement is in the Charter, meaning that all Maui citizens are entitled to have all council members be residents of their respective districts. Thus, the resolution of the plain 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, not simply Lanai residents even though they are especially impacted.

The circuit court's judgment deprives Maui residents of their remedies when a council member is not – or ceases to be – a resident of his or her residency area, or is adjudicated a felon. The circuit court determined that section 3-3's immediate forfeiture and vacancy requirement is not self-executing, and that impeachment or recall are the methods to implement it. 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

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3. Compare Maui Charter § 3-6 (2003) ("Powers of Council" – no provision regarding removal of council members) with U.S. Const. art. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members"); Haw. Const. art. III, § 12 ("Each house shall be the judge of the elections, returns and qualifications of its own members.").

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 this Court, Maui residents will continue to live under the cloud of having a non-Lanai resident purport to represent them on the Maui County Council.<sup>4</sup> Additionally, the issues in this appeal are of first impression and novel, so if transfer is not mandatory under section 602-58, this Court should exercise its discretion and transfer the appeal.

DATED: Honolulu, Hawaii, September 14, 2009.

Respectfully submitted,

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4. Time is also of the essence in this case. Petitioners will file the Opening Brief shortly, well before the October 10, 2009 due date established by the Notice of Entering Case on Calendar ((Aug. 31, 2009). In light of the two-year terms of Maui 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 the appeals process. *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.”). 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 resolution of this appeal takes, the more this threat looms because the next election for the Maui County Council is November 2010. Thus, no extensions of time to submit the Answering Brief or any Reply Brief should be granted, if requested. *See* Haw. R. App. P. 29.