

IN THE SUPREME COURT OF THE STATE OF HAWAII

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Supreme Court

SCWC-11-0000625

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SIERRA CLUB)

Civil No. 10-1-2424-11 (KES)

(Agency Appeal)

Petitioner-Appellant-Appellee,)

vs.)

APPLICATION FOR WRIT OF
CERTIORARI FROM THE JUDGMENT
ON APPEAL BY FOLEY, J. ENTERED
ON SEPTEMBER 25, 2012

CASTLE & COOKE HOMES HAWAII,)

INC.; THE LAND USE COMMISSION OF)

THE STATE OF HAWAII; OFFICE OF)

PLANNING, STATE OF HAWAII;)

DEPARTMENT OF PLANNING AND)

PERMITTING; and NEIGHBORHOOD)

BOARD NO. 25,)

INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

HONORABLE DANIEL R. FOLEY
Presiding Judge

Respondents-Appellees-Appellants.)

HONORABLE ALEXA D. M. FUJISE
Associate Judge

HONORABLE KATHERINE G.
LEONARD
Associate Judge

**RESPONDENT-APPELLEE-APPELLANT CASTLE & COOKE HOMES HAWAII,
INC.'S MEMORANDUM IN OPPOSITION TO PETITIONER SIERRA CLUB'S
APPLICATION FOR WRIT OF CERTIORARI FILED ON NOVEMBER 21, 2012**

AND

CERTIFICATE OF SERVICE

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HAWAII, INC.

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PERMITTING; and NEIGHBORHOOD)	HONORABLE DANIEL R. FOLEY
BOARD NO. 25,)	Presiding Judge
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Respondents-Appellees-Appellants.)	HONORABLE ALEXA D. M. FUJISE
)	Associate Judge
)	
)	HONORABLE KATHERINE G.
)	LEONARD
)	Associate Judge
)	

RESPONDENT-APPELLEE-APPELLANT CASTLE & COOKE HOMES HAWAII, INC.'S MEMORANDUM IN OPPOSITION TO PETITIONER SIERRA CLUB'S APPLICATION FOR WRIT OF CERTIORARI FILED ON NOVEMBER 21, 2012

COMES NOW, Respondent-Appellee-Appellant CASTLE & COOKE HOMES HAWAII, INC. ("Respondent Castle & Cooke"), by and through its attorneys, MATSUBARA – KOTAKE, and hereby respectfully submits and files its Memorandum in Opposition to Petitioner-Appellant-Appellee SIERRA CLUB's ("Petitioner Sierra Club") Application for Writ of Certiorari filed herein on November 27, 2012 as follows:

I. INTRODUCTION

Petitioner Sierra Club's Application for Writ of Certiorari ("Application") should be denied, because the Intermediate Court of Appeal's ("ICA") interpretation of Hawai'i Revised

Statutes (“HRS”) § 26-34 does not constitute “grave errors of law or of fact,” nor does the ICA’s decision contain “obvious inconsistencies” with the prior decisions of the ICA, this Court or federal courts. The acceptance or rejection of an application for a writ of certiorari is discretionary. See HRS § 602-59(a) (Supp. 2011). In deciding whether to accept an application, this Court reviews the decisions of the ICA for (1) grave errors of law or of fact; or (2) obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of those errors or inconsistencies dictating the need for further appeal. See HRS § 602-59(b).

The sole issue raised in this Application by Petitioner Sierra Club is the issue of the alleged disqualification of LUC Commissioner Duane Kanuha (“Kanuha”). **(ICA Record On Appeal (hereinafter referred to as “ICA”) 9 @ PDF 193-206).** The record and law clearly reflect that Commissioner Kanuha was validly serving as a “holdover” incumbent member, and he was legally able to continue to hold office and vote in the subject Land Use Commission of the State of Hawai‘i (“LUC”) proceeding until his successor was appointed and qualified pursuant to HRS §26-34 or until the end of the second legislative session following expiration of his regular term. Commissioner Kanuha was clearly a legal “holdover” incumbent member and there are no grave errors of law or obvious inconsistencies in this matter.

II. STATEMENT OF THE CASE

This case originates from Respondent Castle & Cooke’s Petition for a Land Use District Boundary Amendment (“Petition”) to the LUC for a District Boundary Amendment to reclassify approximately 767.649 acres of land from its current state Land Use Agricultural District designation to the state Land Use Urban District designation¹. Respondent Castle & Cooke’s

¹ Under Hawai‘i Revised Statutes §205-2, “[t]here shall be four major land use districts in which

Petition for the reclassification of land from agricultural to urban is necessary to allow for the residential and commercial development of the Koa Ridge Makai and Castle & Cooke Waiawa Project. Respondent Castle & Cooke's Koa Ridge Makai and Waiawa Project ("Project") are located in Waipio and Waiawa, Island of Oahu, State of Hawai'i. **(ICA 31 @ PDF 7-153, ICA 61 @ PDF 57-282, ICA 63 @ PDF 7-102 and ICA 63 @ PDF 103-252).** HRS § 205-4 **Amendments to district boundaries involving land areas greater than fifteen acres**, requires LUC approval for any petition to reclassify changes in the district boundaries involving lands greater than 15 acres.

The LUC held hearings on the merits of Castle & Cooke's Petition on January 21-22, 2010, February 18-19, 2010, March 18, 2010, April 21-22, 2010 and May 20, 2010 with closing oral arguments held on August 19, 2010. **(ICA 49, 51, 53, 55, 57 and 59).**

Prior to the LUC's approval of the Petition, Petitioner Sierra Club filed a Motion to Disqualify holdover Commissioner Kanuha on the basis that he failed to obtain Senate confirmation on his appointment to a second term and that Commissioner Kanuha does not possess the requisite substantial experience or expertise in traditional Hawaiian land usage and knowledge of cultural practices. **(ICA 21 @ PDF 112-126).** The LUC, after considering the Motions and documents by the parties and having heard arguments of counsel, and being fully advised of the premises regarding their respective positions, by motion duly made and seconded, voted 6-0 to deny Sierra Club's Motion to Disqualify Duane Kanuha. As a result, the LUC did not disqualify Commissioner Kanuha. **(ICA 59 @ PDF 313-314, lines 1-17).**

all lands in the State shall be placed: urban, rural, agricultural, and conservation." Generally, agricultural districts include activities or uses as characterized by the cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry, aquaculture and game and fish propagation and urban districts allow for activities or uses characterized by residential, commercial, and higher density uses.

On September 23, 2010, the LUC conducted its Deliberation and Action meeting on Respondent Castle & Cooke's Petition to amend the Agricultural Land Use District Boundary into the Urban District. (ICA 59 @ PDF 314, lines 19-24).

The LUC, at that meeting, indicated its clear intent that the purpose of the deliberation and action meeting was to determine by way of motion the LUC's decision on whether to grant in whole or in part Respondent Castle and Cooke's request to reclassify the subject property or to deny the Petition and if granted, what conditions of approval to impose. (ICA 59 @ PDF 319, lines 9-12, ICA 59 @ PDF 319, lines 13-15, ICA 59 @ PDF 320, lines 7-25, ICA 59 @ PDF 320-321, lines 25-5, ICA 59 @ PDF 321, lines 6-12).

The LUC, after discussions and deliberations, moved by way of motion to approve the Petition at issue in this case by a 7-1² vote in favor of Respondent Castle & Cooke at its "Deliberation and Action" meeting on August 23, 2010. (ICA 59 @ PDF 330-331, lines 13-5). A subsequent LUC hearing for the ministerial act of adopting the Findings of Fact, Conclusions of Law, Decision and Order ("D&O") also passed in favor of Respondent Castle & Cooke by a 6-0 vote on October 15, 2010. (ICA 59 @ PDF 347-348, lines 15-12). Commissioner Kanuha voted in favor of both approval of the Petition and adoption of the D&O.

²The following relevant legal authority requires that six affirmative votes are necessary to approve a district boundary amendment: Hawai'i Revised Statutes §205-1 Establishment of the commission, states in relevant part: ". . . The commission shall consist of nine members who shall hold no other public office and shall be appointed in the manner and serve for the term set forth in section 26-34 . . . Six affirmative votes shall be necessary for any boundary amendment." Hawai'i Administrative Rules §15-15-13 Quorum And Number Of Votes Necessary For A Decision, states in relevant part: "(a) Unless otherwise provided by law, a majority of all the members to which the commission is entitled shall constitute a quorum to do business, and the concurrence of a majority of all the members to which the commission is entitled shall be necessary to make a commission decision valid provided all approvals of petitions for boundary amendments under section 205-4, HRS, shall require six affirmative votes"

III. ARGUMENT

A. Commissioner Duane Kanuha Was A Valid Holdover Commissioner At The Time Of The LUC's Approval Of The Petition

Commissioner Duane Kanuha maintained a valid position with the LUC as a holdover member.³ The ICA's finding that Commissioner Kanuha was not disqualified to serve as a Commissioner is consistent with the statutory provisions of HRS §26-34 and is consistent with the fact that Commissioner Kanuha was clearly a legal "holdover" incumbent member, who is legally able to continue to hold office until his successor is appointed and qualified.

1. HRS §26-34 Provides For Holdover

HRS § 26-34, subsections (a) and (b) provides the following in full:

"§26-34 Selection and terms of members of boards and commissions.

(a) The members of each board and commission established by law shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. Unless otherwise provided by this chapter or by law hereafter enacted, the terms of the members shall be for four years; provided that the governor may reduce the terms of those initially appointed so as to provide, as nearly as can be, for the expiration of an equal number of terms at intervals of one year for each board and commission. Unless otherwise provided by law, each term shall commence on July 1 and expire on June 30, except that the terms of the chairpersons of the board of agriculture, the board of land and natural resources, and the Hawaiian homes commission shall commence on January 1 and expire on December 31. **No person shall be appointed consecutively to more than two terms as a member of the same board or commission; provided that membership on any board or commission shall not exceed eight consecutive years.**

(b) **Any member of a board or commission whose term has expired and who is not disqualified for membership under subsection (a) may continue in office as a holdover member until a successor is nominated and appointed;** provided that a holdover member shall not hold office beyond the end of the second regular legislative session following the expiration of the member's term of office. (emphasis added).

³ Respondent Castle & Cooke's position is that it clearly obtained the affirmative votes necessary for a boundary amendment at the LUC action meeting by a 7-1 vote regardless of whether or not Commissioner Kanuha's vote was valid.

Commissioner Kanuha was not disqualified under HRS § 26-34(a) as he had not been a commissioner appointed consecutively to more than two terms as a member of LUC nor had his membership on the LUC exceeded eight consecutive years. Not obtaining Senate consent to a second term did not disqualify Commissioner Kanuha from serving as a holdover after the expiration of his first term. This was not a disqualification under the plain language of HRS § 26-34(a). Petitioner Sierra Club's position is incorrect in asserting that Commissioner Kanuha was not a valid holdover for failure to obtain Senate confirmation for a second term. There is no statutory requirement that a holdover obtain Senate confirmation to become a valid holdover.

Furthermore, the holdover provision of HRS § 26-34 has been clarified in a Hawai'i Attorney General Opinion in a context similar to the present matter. In Attorney General Opinion Number 80-4, the Attorney General ("AG") was asked to opine as to the length of time a holdover member of the Board of Regents may serve, particularly when that person was re-nominated but failed to be confirmed by the Senate.

The AG Opinion explains that the purpose for such holdover provisions is to further the public policy of not permitting an office of trust created for the public good to cease operating for the lack of an office holder. Thus, it is common for state statutes to provide for a holdover mechanism where the incumbent shall continue to hold office until his successor is appointed and qualified. In such cases, the incumbent retains the office as a *de jure* officer, or one who holds office as a matter of law pursuant to statute. The fact that the incumbent is not confirmed for an additional term has no effect on his holdover status which is conferred by law. **(ICA 21 @ PDF 86-89)**. Clearly, the requirement of senate confirmation for a second term is a qualification for the second term, and failure to obtain confirmation for a second term has

absolutely no impact on an incumbent's holdover status extending from a valid first term. In other words, failure to obtain confirmation to a second term is a disqualification from serving a second term, but one's first term and any holdover status arising therefrom is not affected because the two terms are separate.

Furthermore, the language of HRS § 26-34 does not support Petitioner Sierra Club's position. The fundamental starting point for statutory interpretation is the language of the statute itself, and where the statutory language is plain and unambiguous the court's sole duty is to give effect to its plain and obvious meaning. *See State v. Hitchcock*, 123 Hawai'i 369, 235 P.3d 365 (2010).

The ICA correctly found that the Senate's failure to confirm Commissioner Kanuha did not constitute a disqualification as a holdover status under subsection (a) of HRS § 26-34. The ICA correctly held that, "HRS §26-34(a) is clear that the sole disqualification is that "[n]o person shall be appointed consecutively to more than two terms as a member of the same board or commission; provided that membership on any board or commission shall not exceed eight consecutive years."" (See Sierra Club Application, slip op. at 5-6 (Appendix A).

Commissioner Kanuha is clearly not disqualified under the statutory provisions of HRS § 26-34 as he has not been a commissioner appointed consecutively to more than two terms as a member of the same commission nor has his membership on the commission exceeded eight consecutive years.

B. Holdover Provision Serves Legitimate Public Purpose Of Avoiding Vacancies In Office Which Could Shut Down Operation of Boards Or Commissions

The holdover provision of HRS § 26-34 was designed precisely for this situation where a Commissioner is not confirmed and a successor is not appointed. The policy for such a holdover provision is to further the public policy of not permitting an office of trust created for the public

good to cease operating for the lack of an office holder. Vacancies in public office are contrary to the proper and efficient administration of business and under the common law there is a principle that vacancies in office are to be avoided whenever possible; that the law abhors vacancies. *See, e.g., 67 Corpus Juris Secundum* § 100 (West 2002).

The holdover situation is especially critical in this instance to address Petitioner Sierra Club's argument regarding Commissioner Kanuha being the Commission member designated as being the member with "substantial experience or expertise in traditional Hawaiian land usage and knowledge of cultural land practices."⁴ (ICA 9 @ PDF 202-203). The committee report cited by Petitioner Sierra Club goes on to state that the Committee on Water, Land Agriculture, and Hawaiian Affairs found Commissioner Kanuha qualified as having substantial experience or expertise in traditional Hawaiian land usage and knowledge of cultural land practices and recommended that the Senate advise and consent to Commissioner Kanuha. "As affirmed by the record of votes of the members of your Committee on Water, Land Agriculture, and Hawaiian Affairs that is attached to this report, your Committee, after full consideration of the background, experience, and qualifications of the nominee, **has found the nominee to be qualified for the position to which nominated and recommends that the Senate advise and consent to the nomination.**" (emphasis added). (ICA 21 @ PDF 123). The public would ultimately suffer by giving effect to the Petitioner Sierra Club's erroneous interpretation which would terminate holdover and cause vacancies in office, a result that the legislature intended to be avoided by enacting the holdover statute. The ICA was correct in its holding that Commissioner Kanuha was a valid holdover.

⁴ Sierra Club's Application footnote No. 6, on page 5 improperly makes a citation to a quote that is not part of the record and is in violation of HRAP Rule 28 (b) and (c). Petitioner Castle & Cooke requests that all such citations or references that are not part of the record should be stricken.

C. Hawai'i State Constitution Does Not Address The Holdover Provisions

While the *Hawai'i State Constitution*, Article V, Section 6 establishes the general guidelines for the executive and administrative offices and departments, it does not address the holdover provision which is established under HRS § 26-34. Petitioner Sierra Club's argument in Section C on page 11 of its Application is incorrect. **(ICA 114 @ PDF 16)**. First and foremost we are not dealing with an "interim appointment" but rather a "holdover" commissioner. The plain and unambiguous language of the *Hawai'i State Constitution* clearly states that when there is a vacancy in any office when the senate is not in session the governor may fill the office by granting a commission and that the governor's granting of a commission is for an "interim appointment." In this case it is clear that there was no vacancy of any commissioner when the senate was not in session. Commissioner Kanuha was not granted a commission when the senate was not in session and fortunately, there was no vacancy at the LUC. As stated above Commissioner Kanuha is a holdover member and clearly not an "interim appointment" as described within Article V, Section 6 of the *Hawai'i State Constitution*. Article V, Section 6 of the *Hawai'i State Constitution* does not address holdover members but rather "interim appointments" which is an appointment made by the governor when the senate is not in session.

Furthermore, the *Hawai'i State Constitution* clearly states that, "[i]f the manner or removal of an officer is not prescribed in this constitution, removal shall be as provided by law." As already argued above HRS § 26-34 specifically authorizes "holdover" commissioners and provides for the removal of commissioners that exceed eight consecutive years and holdovers are removed once a successor is nominated and appointed or by the end of the second regular legislative session following the expiration of the holdovers term in office. Clearly

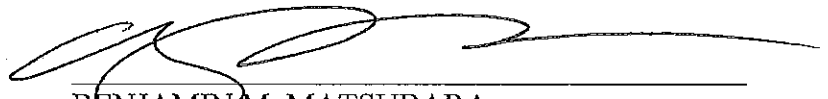
Commissioner Kanuha is not an interim appointment and Sierra Club's attempted analogy of the Constitutional arguments are obviously misleading and not applicable to this matter.

IV. CONCLUSION

Petitioner Sierra Club's Application for Writ of Certiorari should be denied, because it failed to raise any "grave errors" nor any "obvious inconsistencies" with the prior decisions of the ICA, this Court or federal courts. The ICA's Opinion should be affirmed, because the ICA's interpretation of the HRS § 26-34 The ICA did not commit any "grave errors of law or of fact," and its decision is not inconsistent with other decisions. Accordingly, for this and the other reasons discussed above, Respondent Castle & Cooke requests that Petitioners Sierra Club's Application for Writ of Certiorari should be rejected.

Dated: Honolulu, Hawai'i, December 5, 2012.

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)	Associate Judge
)	
)	HONORABLE KATHERINE G.
)	LEONARD
)	Associate Judge
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a file-marked copy of the foregoing document was duly served upon the parties listed below, AS INDICATED BELOW on December 5, 2012.

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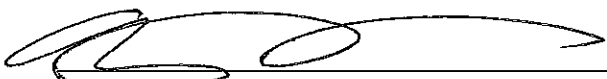
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