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SCWC-11-0000625

IN THE SUPREME COURT OF THE STATE OF HAWAII

SIERRA CLUB,

Petitioner-Appellant-Appellee,

vs.

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,

Respondents-Appellees-Appellants.

Civil No. 10-1-2424-11-KKS
(Agency Appeal)

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

INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

HONORABLE DANIEL R. FOLEY
Presiding Judge

HONORABLE ALEXA D.M. FUJISE
Associate Judge

HONORABLE KATHERINE G. LEONARD
Associate Judge

RESPONDENT-APPELLEE-APPELLANT THE LAND USE COMMISSION'S RESPONSE TO SIERRA CLUB'S APPLICATION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

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I. INTRODUCTION

This case concerns a dispute over the meaning of the word "disqualified" as used in Hawaii Revised Statutes (HRS) § 26-34.[1] Respondent Land Use Commission approved a petition for a land use district boundary amendment that would enable Respondent Castle & Cooke to develop several parcels in Waiawa and Waipio. Unhappy with the decision approving the petition, Petitioner Sierra Club came up with the novel argument that the petition had been illegally approved because one of the commissioners had not been re-appointed to a *second* term and was therefore "disqualified" from serving as a holdover to his *original* term. This argument is inconsistent with the plain language of HRS § 26-34, and the ICA issued a straightforward opinion rejecting the Sierra Club's argument. The ICA's decision is correct, contains no grave errors of law or fact, and is consistent with the decisions of this Court, the federal courts, and its own decisions. See HRS § 602-59. This Court should decline certiorari.

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[1] HRS § 26-34 **(Selection and terms of members of boards and commissions)** provides, in pertinent part:

> (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 . . . . 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.

HRS § 26-34 (2009) (emphasis added).

II. BACKGROUND

In Hawai'i, all state lands are categorized into one of four major land use districts: urban, rural, agricultural, or conservation. See HRS § 205-2(a). The land use boundaries are semi-permanent; that is, they "shall continue in full force and effect" subject to amendment. HRS § 205-3. The Land Use Commission (Commission), composed of nine member-commissioners,[2] can amend a land use boundary with six affirmative votes. See HRS §§ 205-1; 205-4.

On May 16, 2008, Castle & Cooke Homes Hawai'i, Inc. (Castle & Cooke) petitioned the Commission for a change in the land use district boundary from "agricultural" to "urban" use on approximately 767.649 acres of land located in Waipio and Waiawa, O'ahu.[3] **[ICA 31 at 7-153/ RA2980-3126]**[4] Amendments to district boundaries involving land areas greater than fifteen acres, as was the case here, are governed by the procedures set forth in HRS § 205-4.

HRS § 205-4 provides that after receiving a petition for land use district boundary amendment, the Commission must hold a hearing and determine whether certain statutory criteria have been met. See HRS § 205-4(g) ("No amendment of a land use district boundary shall be approved unless the commission finds upon the clear preponderance of the evidence that the proposed boundary is reasonable, not violative of section 205-2 and part III of this chapter,

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[2] The members of the Commission are "appointed in the manner and serve for the term set forth in [HRS] section 26-34." HRS § 205-1. HRS § 26-34(a) provides that the members of the commission "shall be nominated and, by and with the advice and consent of the senate, appointed by the governor" for four-year terms.

[3] Several amendments to the petition were filed later. See Amended Petition **[ICA 61 at 57-282/ RA7749-7972]**; "First Amendment to Amended Petition . . . ." **[ICA 63 at 7-102/RA7973-8067]**; "Third Amendment to Amended Petition" **[ICA 63 at 103-252/RA8067-8217].**

[4] In light of the voluminous record and for this Court's ease, parallel citations to the record on appeal are provided when applicable. The first citation refers to the ICA docket number on JEFS followed by a pin cite to the particular PDF page(s); the second citation refers to the page numbers in the agency record (found on the bottom right hand corner of each page). For example, **[ICA 31 at 7-153/RA2980-3126]** refers to ICA docket # 31 at PDF pages 7-153, which is the agency record's pages 2980-3126.

and consistent with the policies and criteria established pursuant to sections 205-16 and 205-17."). Here, the Commission held several hearings on the merits of the petition, and the evidentiary portion of the record closed on May 20, 2010. **[ICA 59 at 9-10/RA7358-7359]** On August 19, 2010, the parties presented oral argument, and the Commission chair took the matter under advisement. **[ICA 59 at 106/RA7455]** In order for the Commission to approve Castle & Cooke's petition, it needed "six affirmative votes." HRS § 205-4(h).

On September 23, 2010, the Commission held a meeting as planned. **[ICA 59 at 297-341/RA7646-7690]** Present at the meeting were commissioners Kyle Chock, Thomas Contrades, Charles Jencks, Lisa Judge, Duane Kanuha, Normand Lezy, Nicholas Teves, Jr., and Chair Vladimir Devens. **[ICA 59 at 286/RA7635]** On the agenda for the meeting were (1) "deliberation and action" on the Castle & Cooke petition and (2) action on a disqualification motion that had been filed by the Sierra Club. **[ICA 21 at 41-42/RA1401-02]**. The Sierra Club's motion argued that Commissioner Kanuha was disqualified from serving as a commissioner because he was not a valid holdover member. **[ICA 21 at 113/RA1473]**

Duane Kanuha had been appointed and confirmed as an LUC Commissioner in 2005 for a four-year term. On March 3, 2010, Governor Linda Lingle submitted Kanuha's name for re-confirmation to the Commission. **[ICA 21 at 120/RA1480]** Despite a recommendation of confirmation from the Committee on Water, Land, Agriculture, and Hawaiian Affairs, **[ICA 21 at 123/RA1483]** the Senate rejected Kanuha's re-appointment to a second term. **[ICA 21 at 124-25/RA1484-85]** However, Kanuha continued to serve as a holdover member pursuant to HRS § 26-34(b) (providing that "[a]ny 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[.]"). Several months after the Senate

failed to reconfirm Commissioner Kanuha, the Sierra Club filed its motion to disqualify him as a commissioner *nunc pro tunc* as of April 26, 2010. **[ICA 21 at 112-26/RA1472-86]**

The commissioners voted 6-0 to deny the Sierra Club's motion to disqualify commissioner Kanuha. **[ICA 59 at 313-14 /RA 7662-7663]** (Commissioners Kanuha and Jencks abstained from this vote.) **[Id.]**

The Commission then voted 7-1 in favor of approving, incrementally, Castle & Cooke's petition for land use district boundary amendment. **[ICA 59 at 330-331/RA7679-7680]** Commissioners Contrades, Teves, Judge, Jencks, Chock, Lezy, and Kanuha voted in favor of the boundary amendment; Chair Devens voted against the motion; and Chair Heller was excused. **[Id.]**

At the October 15 meeting, the Commission voted 6-0 to adopt the findings of fact, conclusions of law, decision and order prepared in favor of Castle & Cooke, with amendments. **[ICA 59 at 347-48/RA7696-98]** The decision and order was filed that same day. **[ICA 23 at 40-165/RA1799-1924]**

The Sierra Club appealed the Commission's decision to the circuit court, claiming that the Senate's failure to reconfirm Kanuha to a second term constituted a disqualification under HRS § 26-34 and that Castle & Cooke's petition therefore lacked the necessary six affirmative votes to pass. **[ICA 9 at 21-38]** At a hearing on July 19, 2011, the circuit court agreed, wrongly, that Commissioner Kanuha was not a holdover member because the Senate did not reconfirm his appointment. **[ICA 71 at 20 (lines 1-12)]** The court thus also concluded that the boundary amendment lacked the six affirmative votes necessary to pass. **[Id. (lines 18-19); at 22 (lines 7-11)]** Final judgment was entered on October 5, 2011. **[ICA 9 at 486-89]** Both Castle & Cooke

and the Commission filed notices of appeal (prematurely and after the final judgment was entered), and the ICA consolidated all four appeals into one case. **[ICA 77]**

Based on the plain language of HRS § 26-34, the ICA correctly concluded that the Senate's failure to confirm Kanuha for a second term did not constitute a "disqualification" under HRS § 26-34(a). **[ICA 136 at 5]** Instead, the sole disqualification under HRS § 26-34(a) is that no person can be a board or commission member for more than two terms or more than eight consecutive years. **[Id.]** Because Kanuha had not served more than two terms or for more than eight consecutive years as a commissioner, Kanuha was not "disqualified" under HRS § 26-34(a). **[Id. at 5-6]** Therefore, the ICA reversed the decision of the circuit court. **[Id. at 6]** The ICA's decision was entirely consistent with the plain language of the statute and is not inconsistent with the decisions of this Court or the federal courts. This Court should reject the Sierra Club's application for certiorari.

III. ARGUMENT

Under the plain language of HRS § 26-34, Commissioner Kanuha was a valid holdover member at the time of the district boundary amendment vote.

By statute, the Land Use Commission consists of nine members who are "appointed in the manner and serve for the term set forth in section 26-34." HRS § 205-1. HRS § 26-34 ("Selection and terms of members of boards and commissions") provides, in pertinent part:

> (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 . . . . Unless otherwise provided by law, each term shall commence on July 1 and expire on June 30 . . . . *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.*

HRS § 26-34 (2009) (emphasis added).

Subsection (b) of HRS § 26-34 is an example of a *de jure* holdover provision, which is designed to prevent temporary vacancies from occurring in public offices.[5] See 63C Am. Jur. 2d § 119 ("Constitutional or statutory provisions generally provide that a public officer holds over

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[5] "The law abhors vacancies in public offices, and courts generally indulge in a strong presumption against a legislative intent to create, by statute, a condition which may result in an executive or administrative office becoming, for any period of time, wholly vacant and unoccupied by one lawfully authorized to exercise its functions." Territory v. Morita, 41 Haw. 1, 27 (Haw. Terr. 1955) (Towse, C.J., dissenting).

Petitioner wrongly asserts that HRS § 26-34(c) applies here. **[App. at 11]** By the plain language of that subsection, "a vacancy occurring . . . *during a term* shall be filled for the *unexpired term thereof*. . . ." Here, there was no "vacancy occurring" "during a term." Instead, Kanuha's original term had expired, and the holdover provision prevented a vacancy from ever occurring. Accordingly, an "interim" commissioner could not be appointed pursuant to Article V, section 6 of the Hawai'i Constitution because no vacancy existed during a term.

on the expiration of his or her term of office until a successor is chosen and qualified, and the purpose of such provisions is to prevent a temporary vacancy in a public office.") and see Office of Hawaiian Affairs v. Cayetano, 94 Hawai'i 1, 7, 6 P.3d 799, 805 (2000) (defining an officer *de jure* as "one who has been legally elected or appointed to an office and who has qualified himself [or herself] to exercise the duties thereof according to the mode prescribed by law."). When an officer's term expires and there is no duly appointed successor ready to take his or her place, "the law itself fills the vacancy by providing that the incumbent will hold over[.]" Id.; see also 63C Am. Jur. 2d. § 147 ("State constitutions may provide that public officers are to continue in office after the expiration of their official terms until their successors are duly qualified. Such a constitutional provision is self-executing and mandatory" and "becomes operative only after the officer's term has expired."). Under HRS § 26-34, a commission member's term is actually "four years *plus* the time it takes to appoint and confirm his successor." Attorney General's Opinion No. 80-4, 1980 WL 26212 (1980).

"[W]here the terms of a statute are plain, unambiguous and explicit, [a court] is not at liberty to look beyond that language for a different meaning. Instead, [the court's] sole duty is to give effect to the statute's plain and obvious meaning." Bakhta v. County of Maui, 109 Hawai'i 198, 124 P.3d 943, 953 (2005) (quoting T-Mobile USA, Inc. v. County of Hawai'i Planning Comm'n, 106 Hawai'i 343, 352-53, 104 P.3d 930, 939-40 (2005)). Here, the terms of the statute are clear. A member of a 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 so long as that person is not "appointed consecutively to more than two terms as a member of the same board or commission" and "provided that membership on any board or commission shall not exceed eight consecutive years." HRS § 26-34(a)-(b). This

length on limitation of service is the sole disqualification of HRS § 26-34(a). The ICA gave effect to the plain meaning of the statute when it correctly determined that the Senate's failure to confirm Kanuha for a second term did not constitute a disqualification under HRS § 26-34(a).

The Sierra Club urges this Court to look *beyond* the plain language of HRS § 26-34 to hold that failure to gain the advice and consent of the Senate to a *second term* is also a disqualification from serving as a holdover member.[6] This is not the case. A holdover is an *extension* of a term to which advice and consent of the Senate has *already been given.* Failure to obtain the advice and consent of the Senate to a *second term* is not a "disqualification" within the plain language of HRS § 26-34(a). In other words, an appointee's "failure to gain confirmation for a second term precludes him from entering into a second four-year term, but has no effect on his holdover tenure which is conferred by law." Attorney General's Opinion No. 80-4, 1980 WL 26212 (1980).[7]

In this case, Commissioner Kanuha was appointed to the Land Use Commission in 2005. His original term expired on June 30, 2009, but he continued to serve as a valid holdover member until his successor was nominated and appointed, and would have been permitted to

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[6] Sierra Club argues that the definition of "disqualified" should not be limited to the plain language of HRS § 26-34(a) but instead should be expanded to include the Black's Law Dictionary definition. **[App. at 7-8]** The Court should decline the Sierra Club's invitation to broaden the definition of "disqualified" *beyond* what was intended by the Legislature. "Rules of interpretation are resorted to for the purpose of *resolving an ambiguity and not for creating one."* Territory of Haw. v. Morita, 41 Haw. 1, 6 (Haw. Terr. 1955). Sometimes, "giving a literal interpretation to the words [of a statute] . . . lead[s] to an unreasonable, unjust, impractical or absurd consequence." Id. In this case, grafting the dictionary definition of the word "disqualified" into HRS § 26-34 would contravene the Legislature's intent.

Most importantly, HRS § 26-34(b) does not say "disqualified" **period**, but "disqualified . . . **under subsection (a).**" The only **dis**qualifications under subsection (a) are the "more than two terms" and "shall not exceed eight consecutive years" disqualifications.

[7] While Attorney General opinions are certainly not binding on this Court, they can be "highly instructive." See Kepo'o v. Watson, 87 Hawai'i 91, 952 P.2d 379 (1998) (citing several Attorney General opinions and finding them to be "persuasive in relation to the present case").

serve until the end of the second legislative session after his term expired.[8] See HRS § 26-34(b) (last clause). The fact that Kanuha was not confirmed by the Senate to a *second term* has no effect on his status as a holdover member from his original term. In other words, the Senate's rejection of Kanuha's confirmation only affected Kanuha's ability to serve a second term, it did nothing to affect his holdover status from his first term. And because no successor had yet been appointed and confirmed, nor had the second legislative session after term-expiration ended, Kanuha was a valid holdover. His holding over prevented a vacancy from occurring. Cf. Barron v. Kleinman, 550 A.2d 324, 326 (Del. 1988) (dismissing the claim that an incumbent who had been "rejected" by the Senate could not continue to serve in office as a holdover and noting that "[w]here an incumbent holds office after the expiration of a term under a general power of appointment he is viewed as a *de jure* officer subject to the holdover provisions of [the Delaware Constitution].").

As to Sierra Club's argument on page 9 of its petition – that our view is absurd because a commissioner could continue to hold office after Senate rejection – there is nothing absurd given that § 26-34(b) limits a rejected holdover's service to the end of the second legislative session after expiration. And *only* our interpretation prevents the vacancy the law abhors.

Moreover, the real absurdity lies in Sierra Club's approach. Under its view of "disqualification," a person who was not even re-nominated by the Governor (as opposed to being re-nominated but rejected), would also be "disqualified" under its approach for failure to have been "**nominated** and, by and with the advice and consent of the senate, appointed by the

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[8] The Governor is entitled to at least a reasonable time after a term expires to nominate a qualified person to a commission. See Life of the Land v. Burns, 59 Haw. 244, 251, 580 P.2d 405, 410 (1978); cf. Hanabusa v. Lingle, 119 Hawai'i 341, 351, 198 P.3d 604, 614 (holding that the governor's duty to appoint members to the University of Hawaii's Board of Regents is subject to a reasonable time standard).

governor." HRS § 26-34(a). Under Sierra Club's approach, no board member or commissioner could ever hold over unless they were re-nominated, consented-to, and re-appointed. That would likely lead to numerous vacancies.

The ICA's conclusion that Kanuha was a valid holdover member is entirely consistent with the plain language of HRS § 26-34 and is buttressed by the statute's legislative history. In 1984, the Legislature amended HRS § 26-34(b) – the holdover provision. The House Standing Committee Report noted:

> [T]he bill, as received, would allow for a member's term of office to extend beyond eight years. However, the intent of the proposed amendment to section 26-34 . . . is to allow any member of a board or commission whose term has expired and who is not disqualified for membership to serve *only two years* beyond the member's four-year appointment. *Accordingly, your Committee has amended the bill by changing the word "qualify" . . . to "disqualify" to clarify legislative intent.*

S. Stand. Comm. Rep. No. 690-84, in 1984 House Journal, at 1194.

The Senate Standing Committee explained that the purpose of the bill was "to authorize a holdover member of a board or commission to continue membership until a successor is nominated and appointed; it also limits such membership not to extend beyond the second regular legislative session following the expiration of the member's term of office." S. Stand. Comm. Rep. No. 229-84, in 1984 Senate Journal, at 1087. The Committee found that "limiting the *length of service* of a holdover . . . commission member better serves the intent of Article V, [s]ection 6 of the State Constitution." Id. The House Standing Committee Report explained that the holdover provision was necessary because "in most instances a full complement of Board members is required to legally conduct business, and . . . in the past, a number of logistical problems have arisen when less than a full complement of members were available." H. Stand. Comm. Rep. No. 604-84, in 1984 House Journal, at 1148. The Report went on to find that

"allowing holdover membership with *limitations on the length of service* of a holdover board or commission member better serves the intent of Article V, section 6 of the State Constitution[.]" Id. (emphasis added). The only constraint mentioned in the legislative history was a limitation on the *length of service*; there is nothing in either HRS § 26-34 or its legislative history to indicate that failure to gain Senate confirmation to a *second term* is a "disqualification" from serving as a holdover member.

At the time of the Commission's vote on the land use boundary district amendment, Kanuha was serving as a holdover commissioner from his original term. Because Kanuha had not been appointed consecutively to more than two terms, had not served more than eight consecutive years on the Commission, and the end of the second legislative session after expiration had not yet occurred, he was a valid holdover member at the time of the vote. The ICA's decision is correct.

IV. CONCLUSION

This Court should deny certiorari. There is no grave error here. The ICA's decision was completely consistent with the plain language of HRS § 26-34 and is consistent with the legislature's intent when they enacted the holdover provision. For these reasons, the Land Use Commission respectfully urges this Court to deny Petitioner's application for certiorari.

DATED: Honolulu, Hawaii, December 6, 2012.

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SCWC-11-0000625

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HONORABLE KATHERINE G. LEONARD
Associate Judge

CETTIFICATE OF SERVICE

I certify that on December 6, 2012, a copy of Respondent-Appellee-Appellant THE LAND USE COMMISSION'S Response to Sierra Club's Application for Writ of Certiorari was served electronically (through the Court's JEFS system), or conventionally (by mailing copies via USPS, first class, postage prepaid), upon the following:

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