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; *et al.*, Plaintiffs-Appellants, vs. SOLOMON P. KAHOOHALAHALA, *et al.*, Defendants-Appellees.	CIVIL NO. 08-1-0678(3) (Maui) (Declaratory Judgment) APPEAL FROM FINAL JUDGMENT (entered June 23, 2009) SECOND CIRCUIT COURT Honorable Joseph Cardoza

OPENING BRIEF FOR THE APPELLANTS

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

A. Felony Conviction Or Nonresidence Results In Immediate Forfeiture And Vacancy

Maui's nine council seats are allocated by "residency area,"and the island of Lanai has one seat. Maui's 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.*

Maui Charter § 3-3 (2003) (emphasis added). Appellants, a coalition of Lanai residents and voters, sought a declaratory judgment that Defendant-Appellee Solomon P. Kahoohalahala (Kahoohalahala) – the person who occupies the council seat for the Lanai residency area – does not reside there, had immediately forfeited office and therefore the Lanai council seat was vacant. On the eve of Kahoohalahala'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 incorrectly viewed this issue from Kahoohalahala's perspective rather than from the electorate's. The court determined as a matter of law that if Kahoohalahala 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 for "nonfeasance" pursuant to section 13-13 of the Maui Charter "or other appropriate proceeding," but that Appellants could not seek a declaratory judgment that Kahoohalahala had forfeited office and the Lanai seat was vacant. The circuit court also refused to allow Appellants, in the alternative, to amend the complaint to explicitly state what was implicit, and specify that a writ of quo warranto or like remedy was being sought. Resolution of the questions of law presented by this appeal are of critical importance to all citizens of Maui County, because under the circuit court's ruling, the entire electorate is deprived of the very basis of representation that their Charter guarantees. Every day a non-Lanai resident attempts to act for Lanai on the Maui Council is one more lost day of Charter-guaranteed Lanai representation.

The meaning of "immediately forfeit" and "shall thereupon become vacant" are plain: the circuit court may declare a council member who is adjudicated guilty of a felony or who ceases to be a resident of his residency area has automatically forfeited office and the seat is vacant without further action by the electorate, 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. The forfeiture and vacancy requirements of the Charter are self-executing, and do not require an impeachment proceeding or a recall election to remove a council member who is adjudicated a felon or ceases to be a resident of his residency area. The protection of the electorate is the paramount intent behind the self-executing requirements of "immediate forfeit[ure]" and the automatic vacancy for felons and non-residents. The Charter's words are plain and straightforward. While a felon or nonresident may also be removed by recall or impeachment, these remedies do not satisfy the Charter's requirement of immediacy. The circuit court's reliance on these two remedies – to the exclusion of declaratory judgment – is misplaced because each subverts the Charter's mandatory language by leaving enforcement to the electorate's discretion.

B. Questions Presented

The Maui Charter requires a council member convicted of a felony or who ceases to be a resident of his residency area "shall immediately forfeit office and the office thereupon shall become vacant."

1. The first question presented is whether under Haw. Rev. Stat. § 632-1 (1993), a circuit court may declare a forfeiture has occurred and the council seat is vacant upon a determination a council member is not a resident of his residency area, or whether the Charter means only that a council member is subject to an impeachment proceeding for "nonfeasance" after a council member refuses to resign, or a recall election after he is in office for at least six months.

2. The second question is whether the circuit court abused its discretion when it did not "freely give" leave to amend the form of the complaint to label the relief sought as a writ of quo warranto.

C. Relief Sought On Appeal

The circuit court's final Judgment, entered June 23, 2009 (R:CV08-1-0678(3) Doc. 0041), should be vacated and the case remanded for further proceedings.

II. STATEMENT OF FACTS AND PROCEEDINGS IN THE COURT BELOW

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

Kahoohalahala is a resident of Lahaina, not Lanai.[1] 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 voters are entitled to have all council members be residents of the correct residency areas. 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." *Id.* § 3-3 (emphasis added).

B. Lanai Residents Sought Declaration Of Forfeiture And Vacancy

Kahoohalahala now occupies the Lanai seat on the Maui County Council.[2] The Maui County Council lacks the power to judge the qualifications of its members, or remove those who do not continually maintain residency in their residency areas or who are convicted of a felony.[3] Consequently, the First Amended Complaint sought a declaration that Kahoohalahala was not a resident of his residency area, had forfeited the office of Lanai council member, and the office was vacant. R:CV08-1-0678(3) Doc. 0008 (First Amended Complaint (Jan. 30, 2009) (copy attached as Appendix (App.) 1)). It asserts a single claim that Kahoohalahala is violating the mandatory residency requirement to be Lanai's member of the Maui County Council because he was not a Lanai

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1. In reviewing a motion for judgment on the pleadings, the allegations in the pleadings must be taken as true. *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)). The complaint alleged Kahoohalahala is not a resident of Lanai. *See* R:CV08-1-0678(3) Doc. 0008.

2. 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.

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.").

resident and had not been one from the commencement of his term. R:CV08-1-0678(3) Doc. 0008 at 8 (First Amended Complaint ¶ 39). The First Amended Complaint sought "a declaration that because Mr. Kahoohalahala was not and is not a continuous resident of the residency area of Lanai, he must immediately forfeit the office of Lanai council member of the Maui Council." R:CV08-1-0678(3) Doc. 0008 at 9 (First Amended Complaint ¶ 43). The First Amended Complaint also sought an injunction prohibiting "Mr. Kahoohalahala from acting upon any alleged claim or right to hold office as Lanai's representative on the Maui Council." R:CV08-1-0678(3) Doc. 0008 at 9.

C. Circuit Court Determined It Had Jurisdiction

On March 4, 2009, the circuit court denied Kahoohalahala's motion to dismiss, holding that it had jurisdiction to enforce the Charter. R:CV08-1-0678(3) Doc. 0031 (Order Denying Defendants' Motions to Dismiss First Amended Complaint (Mar. 4, 2009) (copy attached as App. 2)). During the hearing, the circuit court explained its rationale:

> THE COURT: [T]he sole question relates to the Court's subject matter jurisdiction related to the challenge under County charter section 3-3 of a council member's residency. . . . Now, with respect to the first amended complaint, and the remaining claim relating to the immediate forfeiture of office due to a lack of residency and the Court's jurisdiction over this matter, Hawaii Revised Statutes Section 603-21-5 provides that this Court exercise general civil jurisdiction. And in an action seeking enforcement of the County charter, specifically in this instance Section 3-3 in the Court's view falls under both subsection two and 3 of Hawaii Revised Statutes section 603-21.5. The Circuit Court has jurisdiction over all civil causes of action unless precluded by the State constitution or by statute. The Court also concludes there's no express [state] constitutional provision or statute that precludes this Court from hearing an action brought to enforce County charter Section 3-3. Since the first amended complaint is based on a claim to – and it is a request to enforce that provision of the County charter, the Court concludes that the Court does have subject matter jurisdiction. . .

2/6/2009 TR at 19 (line 19) – 20 (line 19), PDF at 2) (copy attached as App. 3).

D. The Circuit Court Determined "Shall Immediately Forfeit" And "Shall Become Vacant" Mean Kahoohalahala May Be Removed By Impeachment Or Recall By At Least 5% Of The Electorate

On March 19, 2009, on the eve of the date Kahoohalahala's responses to discovery requests seeking information about his actual residence were due, the circuit court granted Kahoohalahala's February 17, 2009, motion for judgment on the pleadings. R:CV08-1-0678(3) Doc. 0035. Kahoohalahala's motion asserted a recall election pursuant to Maui Charter § 12.1 (2003) is the "exclusive remedy" for "removal of elected officials." R:CV08-1-0678(3) Doc. 0017 at 4. Appellants responded that a recall election – a discretionary process subject to a 20% petition requirement from which council members are immunized for six months after taking office – could not satisfy the mandatory requirements of section 3-3 ("the council member shall immediately forfeit office and the seat shall thereupon become vacant"). R:CV08-1-0678(3) Doc. 0033. In his reply memorandum, Kahoohalahala altered his approach and claimed that in addition to a recall election, impeachment under section 13-13 – a separate discretionary process which has a 5% petition requirement – was an additional means of removal. R:CV08-1-0678(3) Doc. 0034 at 2 ("an elected official can be removed in one of two ways: Recall and Impeachment"). Although Appellants had no opportunity to address the impeachment issue because it was raised for the first time in Kahoohalahala's reply, the court not only considered the argument, but 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.

R:CV08-1-0678(3) Doc. 0035 at 3 (Order Granting Defendant Solomon P. Kahoohalahala's Motion for Judgment on the Pleadings (Mar. 19, 2009) (a copy attached as App. 4)). 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 act 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. at 5 n.2.

The circuit court had not been briefed on the impeachment argument because it was only raised by Kahoohalahala's reply memorandum,[4] so Appellants filed a motion to alter or amend the order or judgment pursuant to Haw. R. Civ. P. 60(b), or for leave to amend the First Amended Complaint to conform the form of the complaint to a writ of quo warranto. R:CV08-1-0678(3) Doc. 0036. On May 7, 2009, the circuit court denied the motion. R:CV08-1-0678(3) Doc. 0039 (Order Denying Plaintiffs' Motion for Relief from Order or Judgment Or, in the Alternative, for Leave to Amend (May 7, 2009) (copy attached as App. 5)). The circuit court also entered an order protecting Kahoohalahala from discovery. R:CV08-1-0678(3) Doc. 0040.

The circuit court entered final Judgment on June 23, 2009. R:CV08-1-0678(3) Doc. 0041. Upon receipt of the Judgment on July 1, 2009, Appellants timely filed the Notice of Appeal on July 6, 2009. R:CV08-1-0678(3) Doc. 0042. This appeal followed.

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4. *Cf.* Haw. Cir. Ct. R. 7(b) ("a reply must respond only to arguments raised in the opposition").

STATEMENT OF POINTS OF ERROR

1. The circuit court erred when it determined that if Kahoohalahala was not a Lanai resident, the court could not issue a declaratory judgment that he immediately forfeited office and the Lanai residency seat thereupon became vacant under Maui Charter § 3-3 (2003). 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:CV08-1-0678(3) Doc. 0035. Appellants objected to the error. R:CV08-1-0678(3) Doc. 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:CV08-1-0678(3) Doc. 0039. Appellants objected to the error. R:CV08-1-0678(3) Doc. 0036, 0038.

STANDARD OF REVIEW

I. *DE NOVO* – INTERPRETATION OF A MUNICIPAL CHARTER, MOTION FOR JUDGMENT ON THE PLEADINGS

"The interpretation of the charter is similar to the interpretation of a statute." *Maui County Council v. Thompson*, 84 Haw. 105, 106, 929 P.2d 1355, 1356 (1996) *quoted in Citizens for Equitable & Responsible Gov't v. County of Hawaii*, 108 Haw. 318, 323, 120 P.3d 217, 222 (2005). "Statutory interpretation is 'a question of law reviewable *de novo*.'" *Rees v. Carlisle*, 113 Haw. 446, 452, 153 P.3d 1131, 1137 (2007) (quoting *State v. Levi*, 102 Haw. 282, 285, 75 P.3d 1173, 1176 (2003)). In *Rees*, the Court applied the established rules of statutory construction to the interpretation of a municipal ordinance:

> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.

Rees, 113 Haw. at 452, 153 P.3d at 1137 (quoting *Peterson v. Hawaii Elec. Light Co., Inc.*, 85 Haw. 322, 327-28, 944 P.2d 1265, 1270-71 (1997)).

The standard of review of a grant of a motion for judgment on the pleadings pursuant to Haw. R. Civ. P. 12(c) is *de novo*. *Ruf. v. Honolulu Police Dep't*, 89 Haw. 315, 319, 972 P.2d 1081, 1085 (1999) (citing *Alexander v. City of Chicago*, 994 F.2d 333, 335 (7th Cir. 1993); *Kruzits v. Okuma Mach. Tool. Inc.*, 40 F.3d 52, 54 (3d Cir. 1994)). The court's "task on appeal is to determine whether the circuit court's order . . . supports its conclusion that [the movant] is entitled to judgment as a matter of law and, by implication, that it appears beyond a doubt that the [nonmoving party] can prove no set of facts in support of [its] claim that would entitle [it] to relief under any alternative theory." *Baehr v. Lewin*, 74 Haw. 530, 550, 852 P.2d 44, 54 (1993) *quoted in Ruf*, 89 Haw. at 321, 972 P.2d at 1087. "In considering a motion for judgment on the pleadings, the trial court is required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Ruf*, 89 Haw. at 321, 972 P.2d at 1087 (quoting 5A Charles A. Wright & Arthur Miller, *Federal Practice and Procedure: Civil* § 1368, at 518-19 (2d ed. 1990)). This Court must accept as true the allegation Kahoohalahala ceased to be a resident of the Lanai residency area, because in reviewing a motion for judgment on the pleadings, the allegations in the pleadings must be taken as true. *See Baehr*, 74 Haw. at 545-46, 852 P.2d at 52-53 (citing *Marsland*, 5 Haw. App. at 474, 701 P.2d at 186).

II. ABUSE OF DISCRETION – FAILURE TO ALLOW AMENDMENT OF COMPLAINT

Rule 15(a) of the Hawaii Rules of Civil Procedure provides that "leave [to amend] shall be freely given when justice so requires." Haw. R. Civ. P. 15(a). In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment – leave to amend should, as the rule requires, be freely given. *Keawe v. Hawaiian Elec. Co.*, 65 Haw. 232, 239, 649 P.2d 1149, 1154 (1982). A circuit court's denial of leave to amend is reviewed for abuse of discretion. *R.S. Ellsworth, Inc. v. Amfac Fin. Corp.*, 65 Haw. 345, 353, 652 P.2d 1114, 1119 (1982).

ARGUMENT

The circuit court may issue a declaratory judgment that a council member who ceased to be a resident of his residency area or who is convicted of a felony, immediately forfeited office and that a vacancy exists on the council. *See* Haw. Rev. Stat. § 603-21.5(a)(2) (1993) ("The several circuit courts shall have jurisdiction . . . [over] [a]ctions for penalties and forfeitures incurred under the laws of the State."). The circuit court, however, determined the Charter requirements of forfeiture and vacancy only mean that the council member has a duty to immediately resign, and if he fails to do so, he may be subject to impeachment for "nonfeasance," or may be subject to a recall election after six months in office. The Charter's text – "immediately forfeit office and the seat shall thereupon become vacant" – means the office is immediately and automatically forfeited and a vacancy automatically exists, not merely that the office may be vacant if an impeachment or recall is successful. The plain language of section 3-3 of the Maui Charter may be enforced by declaratory judgment.

I. THE CIRCUIT COURT MAY DECLARE A FORFEITURE, AND THAT A VACANCY EXISTS

A. The Charter Requires Immediate Forfeiture And Vacancy

By specifically reinforcing the "immediate" forfeiture with the "thereupon" created vacancy, the Maui Charter created its own self-executing remedy for council members who are adjudicated guilty of a felony or who cease to be residents of their residency areas.

1. Plain Text Of The Charter: "Shall Immediately Forfeit Office"

The nine members of the Maui County Council are elected for two-year terms by "residency area." The islands of Lanai and Molokai are entitled to one seat each, and the other seven seats are for districts on the island of Maui. The vote is "at-large," meaning that all Maui County voters may cast ballots for each seat. Section 3-1 of the Charter provides:

> There shall be a council composed of nine members who shall be elected-at large. Of the nine members elected to the council, one shall be a resident of the Island of Lana`i, one a resident of the Island of Moloka`i, ... The county clerk shall prepare the nomination papers in such a manner that candidates desiring to file for the office of

> council member shall specify the residency area from which they are seeking a seat. The ballots shall, nevertheless, be prepared to give every voter in the county the right to vote for each and every council seat.

Maui Charter § 3-1 (2003).

The Charter further requires council members continuously maintain residency in their residency areas, upon penalty of immediate forfeiture and vacancy. Section 3-3 of the Charter provides:

> To be eligible for election or appointment to the council, a person must be a citizen of the United States, a voter in the county, a resident of the county for a period of ninety (90) days next preceding the filing of nomination papers and at the time of filing of nomination papers a resident in the area from which the person seeks to be elected. *If a council member ceases to be a resident of the county, or 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). All residents of Maui County are entitled to vote for a Lanai resident, and have a Lanai resident continually serve in the Lanai seat. The Charter makes no distinction between a council member's failure to maintain residency and a council member's conviction of a felony.

Kahoohalahala immediately forfeited office when he ceased to be a resident of the Lanai residency area (a fact which the circuit court must have accepted as true). The fundamental starting point for interpretation of a statute or charter provision is the language of the provision itself, and the Charter's requirements of immediate forfeiture and immediate vacancy are plain. *Rees*, 113 Haw. at 452, 153 P.3d at 1137. *See also Dalton v. City and County of Honolulu*, 51 Haw. 400, 422, 462 P.2d 199, 211 (1969) ("The object is always to ascertain and give effect to the intention of the legislature. This intention, however, must be the intention as expressed in the statute, and where the meaning of the language is plain, it must be given effect by the courts or they would be assuming legislative authority."). "Forfeit" means "[t]o lose, or lose the right to, by some error, fault, offense or crime." *Black's Law Dictionary* 548 (5th ed. 1979). If the immediate nature of "forfeit" is not obvious from the word itself, the Maui Charter included the term "immediately," reinforcing the

requirement that the forfeiture occurs when a council member is adjudicated guilty of a felony or ceases to remain a resident of his residency area. Maui Charter § 3-3 (2003). The forfeiture is also mandatory, as evidenced by use of the term "shall." *See Leslie v. Bd. of Appeals, County of Hawaii*, 109 Haw. 384, 393, 126 P.3d 1071, 1080 (2006) ("shall" indicates mandatory language).

2. *Pioneer Mill*: Forfeiture Is Automatic, Immediate, Self-Executing

The clear meaning of "forfeit" in section 3-3 is confirmed by case law, because section 3-3 is consistent with the common law, which holds that if residency is a requirement of election to office the requirement is continuous, and a change of residency automatically vacates the office. *See, e.g., Salamanca Township v. Wilson*, 109 U.S. 627, 628-29 (1883) (ceasing to be a resident results in vacancy). The circuit court acknowledged the residency and nonfelon requirements result in forfeiture. R:CV08-1-0678(3) Doc. 0035 at 5 ("If Defendant is not a resident of the Lanai District, as alleged by Plaintiffs, he is under a duty to immediately forfeit his office."). However, the circuit court concluded the "immediate" forfeiture required by the Charter is merely a responsibility of the council member, and does not occur automatically, despite the mandatory nature of forfeiture and the meaning of the word itself.

While interpretation of section 3-3 of the Charter is an issue of first impression, the Hawaii Supreme Court has considered the term "forfeit" before. In *In re Pioneer Mill Co., Ltd.*, 53 Haw. 496, 498, 497 P.2d 549, 551 (1972), the Court *sua sponte* determined a land court judge had forfeited office by announcing his candidacy for lieutenant governor, and consequently, a judgment rendered after his announcement was ineffective. At the time, the Hawaii Constitution provided "[a]ny justice or judge who shall become a candidate for an elective office shall thereby forfeit his office."[5] After trial but before entering a judgment in the case, the land court judge announced he was a candidate. The Supreme Court held the judge became a candidate when he announced he was running, and it did not matter that he had not yet formally taken out nomination papers. *Id.* at 499, 497 P.2d at 552. Consequently, the judgment rendered after he announced his candidacy was invalid because he had earlier forfeited office by virtue of the announcement:

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5. *See* Haw. Const. art. V, § 3 (amended 1978). That requirement was subsequently eliminated when article V was amended and redesignated as article VI.

> We have concluded that the Land Court judge had become a candidate for public office at the time he rendered the decision below, and that under the Hawaii Constitution, *he had forfeited* his judgeship.

Id. at 498, 497 P.2d at 551 (emphasis added). While the timing of the forfeiture was not the express issue before the Court, the conclusion that forfeiture is automatic, immediate, and self-executing was the essential component of the Court's reasoning. It vacated the judgment and remanded the case for a new trial because everything the judge did after he announced his candidacy was void as he had *already* forfeited office automatically. *Id.* at 505, 497 P.2d at 555. The Court refused to substitute its judgment regarding the wisdom of the forfeiture requirement, and rejected the dissent's argument it was "a rather silly provision and should be interpreted as strictly as possible." *Id.* at 499, 497 P.2d at 552. Failing to effectuate the plain meaning of the forfeiture provision would "rewrite the Constitution" and impermissibly usurp the intent of the framers. *Id.* at 500, 497 P.2d at 552.

Pioneer Mill is consistent with other cases in holding that upon a prohibited action, forfeiture of office is automatic and immediate. *See, e.g., Pombo v. Fleming*, 32 Haw. 818, 823 (Terr. 1933) (county supervisor who took another position "gave up that position as effectually as though he had expressly resigned"); *Hollinger v. Kumalae*, 25 Haw. 669, 689 (Terr. 1920) (acceptance of office of supervisor automatically vacated the offices of state senator and state representative).

The immediate and self-executing nature of the plain meaning of "forfeit" is also reflected in Hawaii's Uniform Act on Status of Convicted Persons, which provides:

> (b) *A public office held at the time of conviction is forfeited as of the date of the conviction*, if the conviction is in this State, or, if the conviction is in another state or in a federal court, as of the date a certification of the conviction from the trial court is filed in the office of the lieutenant governor who shall receive and file it as a public document. An appeal or other proceeding taken to set aside or otherwise nullify the conviction or sentence does not affect the application of this section.

Haw. Rev. Stat. § 831-2(b) (Supp. 2008) (emphasis added). While this statute does not govern Maui council members because "public office" is defined as state offices only, the use of the term "forfeit" to mean immediate and self-executing is the same as in *Pioneer Mill* and the Maui Charter.

3. Other Jurisdictions: "Automatic" Forfeit

Other jurisdictions are in accord. In *Lipscomb v. Randall*, 985 S.W.2d 601 (Tex. Ct. App.1999), the court held that similar "forfeiture" language indicated immediate, instantaneous, and self-executing loss of office without the necessity of further action. In that case, the city charter – like the Maui Charter – provided "a Councilperson shall forfeit his office if he . . . is convicted of a crime." *Id.* at 603 (quoting Flower Mound, Tex., Rev. Charter § 3.02.2(2).[6] A council member was arrested for assaulting his wife, and was convicted. The town's charter – unlike the Maui Charter – contained an enforcement mechanism, and provided "that the town council shall 'be judge of the election and qualifications of its own members, and other elected officials of the Town.'" *Id.* at 604 (quoting Flower Mound, Tex., Rev. Charter § 3.03). The town council found he had forfeited office by virtue of his conviction, and appointed another person to fill the vacant seat. *Lipscomb*, 985 S.W.2d at 604. The former council member sought and was granted a writ of mandamus, and the trial court ordered that he continue as a council member. *Id.* The other members of the council appealed, asserting "the charter provision at issue authorizes *automatic* forfeiture of office upon conviction of a crime involving moral turpitude." *Id.* (emphasis added). The court of appeals agreed and reversed, holding the forfeiture provision was self-enacting and automatic:

> Flower Mound's charter provides that "[a] Councilperson shall forfeit his office if he . . . is convicted of a crime involving moral turpitude." It is undisputed that this provision is self-enacting. Thus, if applicable to [the former council member], the charter provision makes the forfeiture of office automatic upon conviction.

Id. at 605 (citing *City of Alamo v. Garcia*, 960 S.W.2d 221, 222 (Tex. Ct. App. 1997) (automatic forfeiture based on violation of absenteeism requirement); *Harrison v. Chesshir*, 316 S.W.2d 909, 914 (Tex. Ct. App. 1958) (automatic forfeiture when officeholder moved out of county), *rev'd on other grounds*, 320 S.W.2d 814 (Tex. 1959)). The court rejected the forfeited council member's argument that his appeal of the conviction suspended the forfeiture or made it contingent on some future event because the language of the charter unambiguously provided for "instantaneous" forfeiture upon conviction:

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6. In *Lipscomb*, the event triggering automatic loss of office was a conviction of a "crime of moral turpitude," not "a felony" as in the Maui Charter.

> Additionally, the analyses of both [the former council member] and the dissent fail to take into account the plain and unambiguous language of the charter that requires automatic forfeiture of office when a councilperson is "convicted" without reference to whether the conviction is later suspended or annulled by a subsequent trial de novo appeal. *As previously discussed, Flower Mound's forfeiture provision is self-enacting and automatic; forfeiture occurs instantaneously upon the happening of a single triggering event – conviction of a crime involving moral turpitude.* Neither the express language of the charter nor decisional law interpreting similar forfeiture provisions allow a subsequent event (such as the filing of appeal or a trial de novo) to undo, or retroactively nullify, the forfeiture.

Lipscomb, 985 S.W.2d at 608 (emphasis added) (citing *Prince v. Inman*, 280 S.W.2d 779, 781-82 (Tex. Ct. App. 1955) (school trustee vacated his position pursuant to a self-enacting constitutional provision when he moved outside the school district and the fact that he moved back into the school district 32 days later did not entitle him to return to office); *City of Alamo*, 960 S.W.2d at 222 (violation of attendance requirement); *Harrison*, 316 S.W.2d at 914 (moving out of the county)). The court concluded its duty was to enforce the charter as written:

> Certainly, if the citizens of Flower Mound through their elected town council representatives intended to exempt from automatic forfeiture councilpersons such as Randall who suffer a municipal court conviction that has been appealed to county court for trial de novo, they could have easily said so in the town charter. We refuse to add such an exemption to the charter by judicial fiat, as the dissent would have us do.
>
> We, therefore, hold that under the express provisions of the charter and applicable Texas law, Randall's seat on the city council was *instantly forfeited when he was convicted in municipal court of assaulting his wife*. His subsequent appeal to county court did not automatically restore him to office or otherwise entitle him to reclaim the forfeited seat.

Lipscomb, 985 S.W.2d at 608 (emphasis added).

Similarly, in *Dalton v. Mosley*, 286 S.W.2d 721 (Mo. 1956), a state statute provided that an officer who shall "fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall

thereby forfeit his office." *Id.* at 731. A sheriff subject to this statute was adjudicated guilty of failing to enforce state law, and the court held that by force of this statute "the respondent had automatically lost his right to the office of Sheriff of St. Louis County prior to the institution of this proceeding." *Id.* In *In re Simmons*, 395 P.2d 1013 (Wash. 1964), a felony conviction carried with it the automatic forfeiture of a judgeship and created an immediate vacancy in that office. The court held that legal proceedings to remove the official were merely ancillary to and in aid of the forfeiture, and not a condition precedent to the forfeiture. The court further explained that after committing the forbidden act and forfeiting the office, the official became a mere "usurper, and thus his ouster must go as a matter of course." *Id.* at 731-32. *See also Alamo v. Strohm*, 545 N.Y.S.2d 1 (N.Y.A.D.), *aff'd*, 544 N.E.2d 608 (N.Y. 1989) (senator who automatically forfeited seat under state law after conviction of a felony was ineligible to run in the election to fill out his remaining term); 63c Am. Jur. 2d *Public Officers and Employees* § 165 (2009) ("A provision that an officer who is guilty of specified conduct 'shall thereby forfeit his or her office' is self-executing.") (citing *State* ex rel. *McKittrick v Whittle*, 63 S.W.2d 100 (Mo.1933) (state constitution's requirement that official "shall thereby forfeit his or her office" upon some act was self-executing), *superseded by statute on other grounds as stated in State* ex rel. *Attorney Gen. v Shull*, 887 S.W.2d 397 (Mo. 1994)).

The reasoning in *Lipscomb* and the other authorities noted above apply with even more force in the case at bar because Maui's Charter is more explicit than the charters and statutes in those cases: it provides that upon felony conviction or non-residency, the forfeiture and vacancy is "immediate," which leaves no doubt that forfeiture is automatic and mandatory, and not contingent upon some future discretionary event that may never occur such as impeachment or a recall election.

4. Plain Text Of The Charter: "And The Seat Shall Thereupon Become Vacant"

If "shall immediately forfeit" alone was not clear, the Charter further provides "and the seat shall thereupon become vacant," emphasizing the loss of office and the vacancy are immediate and self-executing. "The word 'vacancy' when applied to official positions, means in its ordinary and popular sense, that an office is unoccupied and that there is no incumbent who has a lawful right to continue therein until the happening of a future event[.]" *Black's Law Dictionary* at 1514 (6th ed. 1990), *quoted in Office of Hawaiian Affairs v. Cayetano*, 94 Haw. 1, 7, 6 P.3d 799, 805 (2000). The

immediate and self-executing nature of forfeiture in section 3-3 means that Kahoohalahala forfeited any claim to the Lanai residency seat and the seat became unoccupied when he "ceased to be a resident of [his] residency area during [his] term of office."

Office of Hawaiian Affairs v. Cayetano, 94 Haw. 1, 9, 6 P.3d 799, 807 (2000) illustrates the self-executing nature of the vacancy in section 3-3. The case was instituted in the Hawaii Supreme Court on an agreed statement of facts pursuant to Haw. Rev. Stat. § 602-5(3) (1993) and Haw. R. App. P. 18. The Attorney General argued that as a result of *Rice v. Cayetano*, 528 U.S. 495 (2000), the case in which the U.S. Supreme Court held the election for the trustees of the Office of Hawaiian Affairs (OHA) was unconstitutional, the trustees' offices were vacant. *Office of Hawaiian Affairs*, 94 Haw. at 7, 6 P.3d at 805. The Hawaii Supreme Court concluded *Rice* changed the trustees from *de jure* to *de facto* officers, but did not automatically create vacancies. *Id.* at 8, 6 P.3d at 806 ("Nonetheless, even if the eight OHA trustees are *de facto* trustees, Respondent offers no legal authority, and we have found none, to support the conclusion that there is an automatic vacancy when an office holder becomes a *de facto* official due to the finding by a federal court."). Because vacancy was *not* automatic, a quo warranto-like remedy could be used to accomplish it. *Id.* The Court, noted, however, that quo warranto may not be necessary if a statute establishes standards for the creation of a vacancy:

> Respondent argues that if HRS §§ 17-7 or 13D-5 contained an additional provision stating that "a vacancy within the meaning of this statute is created when it is determined that a sitting OHA trustee was elected by a process that violates the Fifteenth Amendment," OHA would have to concede that *Rice* created eight vacancies. *If there was such a provision in the statute, we agree that, as a matter of law, Respondent would prevail.* However, as Respondent acknowledges, there is no such provision in the statute.

Id. at 7 & n.11, 6 P.3d at 805 & n.11 (emphasis added). By way of example, the Court referenced Hawaii's Uniform Act on Status of Convicted Persons (Haw. Rev. Stat. § 831-2 (1993)) as a situation of a "provision in a statute" where conviction of a felony automatically creates a vacancy. *Office of Hawaiian Affairs*, 94 Haw. at 7, 6 P.3d at 805. The Court cited the felony trigger to explain how vacancies are created by statute in non-felony situations. Similarly, in the case at bar, there *is* a provision in the statute, namely the automatic vacancy requirement triggered either by felony

conviction or nonresidence. *See* Maui Charter § 3-3 (2003) (upon conviction or nonresidency, council member "shall immediately forfeit office and the seat *shall thereupon become vacant*") (emphasis added). The people of Maui were entitled to frame their home rule charter to require council members not be convicted of a felony and maintain continuous residency in the residency area which they purport to represent. *See* Haw. Const art. VIII, § 2 ("Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law."); *Kunimoto v. Kawakami*, 56 Haw. 582, 584 n.4, 545 P.2d 684, 686 n.4 (1976) (charter is organic law of county); *Haub v. Montgomery County*, 727 A.2d 369, 370 (Md. 1999) (home rule charter is local constitution). "Vacancy in, or removal from, office as a result of conviction of a public officer is not a punishment." *Zempel v. Twitchell*, 367 P.2d 985, 992 (Wash. 1962). "Removal from office is simply a consequence of a reasonable and sound public policy, and a condition imposed upon a public official in furtherance of the public interest in good government." *Id.* "Public officials can and should be removed, irrespective of detriment to the individuals involved if the interests of the community so require." *Id.*

B. The Circuit Courts Have Jurisdiction To Declare A Forfeiture And Vacancy

The judiciary has the power to enforce section 3-3 of the Maui Charter, and circuit courts have plenary jurisdiction to consider actions for forfeiture. *See* Haw. Rev. Stat. § 603-21.5(a)(2) (1993) ("The several circuit courts shall have jurisdiction . . . [over] [a]ctions for penalties and forfeitures incurred under the laws of the State."). The responsibility of enforcing the non-felon and residency requirements in section 3-3 has not been delegated to another branch.

1. The Maui Council Lacks Power To Enforce The Continuous Residency Requirement

The Maui County Council cannot judge the qualifications of its members or remove those who do not continually maintain residency in their residency areas. *Cf. Lipscomb*, 985 S.W.2d at 604 (charter provided that council shall "be judge of the election and qualifications of its own members, and other elected officials of the Town"). Often, legislative bodies have the authority to determine whether their members may be seated and whether they may remain. *See, e.g.*, 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."). In cases where a member of Congress or the Hawaii Legislature is to be removed, it is up to those bodies to take action, not the courts. *See, e.g., Morgan v. United States*, 801 F.2d 445, 447 (D.C. Cir. 1986) (courts have no jurisdiction); *Akizaki v. Fong*, 51 Haw. 354, 461 P.2d 221 (1969) (the Hawaii House has the power to judge the qualifications of its members).

The Maui County Council, however, has no similar authority and has not been granted the power by the Charter or by the Rules of the Council (Resolution No. 09-3) to remove members who fail to meet and maintain the Charter's residency and non-felon requirements. *See* Maui Charter § 3-6 (2003) (section entitled "Powers of Council" contains no grant of authority for council to remove members).

2. The Circuit Court May Declare Forfeiture And Vacancy

The Charter does not expressly mandate how immediate forfeiture and vacancy are enforced, and does not delegate enforcement power to the council. Thus, declaratory relief is available to enforce the Charter's mandatory residency and nonfelon requirements. *See* Haw. Rev. Stat. § 603-21.5(a)(2) (1993) ("The several circuit courts shall have jurisdiction . . . [over] [a]ctions for penalties and *forfeitures* incurred under the laws of the State.") (emphasis added); *Hawaii's Thousand Friends v. City and County of Honolulu*, 75 Haw. 237, 245, 858 P.2d 726, 731 (1993) (declaratory relief is available when other remedies are not exclusive). *Cf. Rees v. Carlisle*, 113 Haw. 446, 458, 153 P.3d 1131, 1143 (2007) (declaratory relief not available to enforce municipal ordinance which granted prosecutor or attorney general exclusive enforcement authority).

The declaratory judgment statute empowers circuit courts to issue declarations, provided an "actual controversy exist between contending parties," and 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 plaintiff who seeks to enforce a legal right:

> In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed . . . .

> Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding. Where, however, a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed; but *the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, a remedy equitable in nature, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment in any case where the other essentials to such relief are present.*

Haw. Rev. Stat. § 632-1 (1993) (emphasis added). The legislature intended the circuit court's authority to be broadened:

> This chapter is declared to be remedial. Its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle the party to maintain an ordinary action therefor. It is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people.

Haw. Rev. Stat. § 632-6 (1993). This statute has been interpreted to confer broad standing on plaintiffs seeking declaratory relief, and the command that it is to be "liberally interpreted and administered, with a view to making the courts more serviceable to the people" indicates any doubt whether declaratory relief is available to enforce a legal right should be resolved in favor of the remedy, especially where, as here, the plaintiffs are Maui County residents protecting their right of Lanai representation as guaranteed them by the Maui Charter. The circuit court acknowledged it had jurisdiction under the general jurisdiction statute, Haw. Rev. Stat. § 603-21.5 (1993), noting "in an action seeking enforcement of the County charter, specifically in this instance Section 3-3 in the Court's view falls under both subsection two and 3 of Hawaii Revised Statutes section 603-21.5."

R:CV08-1-0678(3) Doc. 0031 (Order Denying Defendants' Motions to Dismiss First Amended Complaint (Mar. 4, 2009) (copy attached as App. 2)); 2/6/2009 TR at 19-21 (copy attached as App. 3).

C. A Quo Warranto-Like Remedy Is Also Available

The declaratory judgment statute expressly provides declaratory relief need not be the exclusive available judicial remedy, and only when "a statute provides a special form of remedy for a specific type of case" is declaratory judgment unavailable. Haw. Rev. Stat. § 632-1 (1993) ("the mere fact that an actual or threatened controversy is susceptible of relief through a general common law remedy, a remedy equitable in nature, or an extraordinary legal remedy, whether such remedy is recognized or regulated by statute or not, shall not debar a party from the privilege of obtaining a declaratory judgment"). Haw. Rev. Stat. § 632-1 (1993). Here, neither state law nor the Charter mandates a special, *exclusive* judicial remedy for violation of Maui Charter § 3-3 (2003).

1. Declaratory Judgment And Quo Warranto Are The Same Relief

In addition to a declaratory judgment, to enforce the forfeiture and vacancy under section 3-3 of the Maui Charter, the circuit court may also issue a writ of quo warranto pursuant to Haw. Rev. Stat. § 659-1 (1993) *et seq*. A writ of quo warranto commands an office holder to respond to a claim he or she lacks the authority to hold office. *Office of Hawaiian Affairs v. Cayetano*, 94 Haw. 1, 8-9, 6 P.3d 799, 806-07 (2000) (writ available to create vacancy in office where statute does not do so automatically). The writ is an ancient remedy, now defined by statute:

> This is an order issuing in the name of the State by a circuit court and directed to a person who claims or usurps an office of the State or of any subdivision thereof, or of any corporation or quasi-corporation, public or private, or any franchise, inquiring by what authority the person claims the office or franchise.

Haw. Rev. Stat. § 659-1 (1993). A writ of quo warranto is not the exclusive means to challenge an official's claim of entitlement to office under section 3-3 of the Charter, and in this case merely duplicates a declaratory judgment:

> Nothing in this chapter shall preclude the obtaining of relief available by quo warranto *by other appropriate action.*

Haw. Rev. Stat. § 659-10 (1993) (emphasis added). This section was added by the Legislature in 1972 (first codified as Haw. Rev. Stat. § 659-55, subsequently renumbered to 659-10). *See* 1972 Sess. Laws, ch. 90, § 3(1).[7] In *Hawaii's Thousand Friends v. City and County of Honolulu*, 75 Haw. 237, 858 P.2d 726 (1993), the Court held that similar language in the Coastal Zone Management Act (CZMA) allowed a plaintiff to elect whether to seek relief under the CZMA or by a "generic" declaratory judgment. *Id.* at 245, 858 P.2d at 731 (CZMA section providing "[n]othing in this section shall restrict any right that any person may have to assert any other claim or bring any other action" "clearly allowed" a person to "bring a generic declaratory action under HRS § 632-1 without the need to proceed under" the CZMA) (citing Haw. Rev. Stat. § 205A-6(e) (1988)). In *Office of Hawaiian Affairs*, the Court rejected the Attorney General's argument that a writ was unnecessary because the original jurisdiction action in the Hawaii Supreme Court qualified as "other appropriate action" to "obtain relief available by quo warranto" under Haw. Rev. Stat. § 659-10 (1993). *Office of Hawaiian Affairs*, 94 Haw. at 8-9, 6 P.3d at 806-07. The Court reached this conclusion because original jurisdiction actions are limited in scope:

> Although HRS § 659-10 provides that the chapter shall not preclude the obtaining of relief available by quo warranto by other appropriate action, whether the trustees should be removed cannot be resolved in this action. *This original proceeding is limited in scope to the questions presented by the parties and cannot extend beyond the proposed questions and agreed statement of facts.* Any court presiding over a quo warranto proceeding will need to consider more than the agreed facts presented by the parties in the instant case.

Id. at 9, 6 P.3d at 807 (emphasis added). In other words, because the two actions – an original jurisdiction case and a petition for a writ of quo warranto – are fundamentally different procedures, they could not consider the same issues and facts. Nor could an original action grant the same relief as a writ of quo warranto – a ruling on vacancy.

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7. Before adoption of this statute, a writ of quo warranto was the only form of action to challenge an official's claim of entitlement to office. *See Kaleikau v. Hall*, 27 Haw. 420, 431 (Terr. 1923) (a writ of quo warranto is the form of action to challenge officeholder's qualifications, not declaratory judgment). The subsequent enactment of section 659-10 superceded *Kaleikau*, and brought actions challenging officeholders into harmony with modern notice pleading practice under the rules of civil procedure, which emphasize substance and not the technical form of action.

Unlike *Office of Hawaiian Affairs v. Cayetano*, in the present case, a declaratory judgment and a writ of quo warranto to enforce section 3-3 are substantively the same, and neither is "limited in scope" regarding the available relief. In an action seeking declaratory relief or an issuance of a writ of quo warranto, the circuit court has the authority to determine the council member has ceased to be a resident of his residency area (or has been adjudicated a felon), and conclude he has thereby immediately forfeited office and the seat is vacant.

The circuit courts have general jurisdiction in declaratory judgment actions. *See* Haw. Rev. Stat. § 603-21.5(a)(3) (1993) (circuit courts have jurisdiction over "civil actions and proceedings"). *See also id.* § 603-21.5(a)(2) ("The several circuit courts shall have jurisdiction . . . [over] [a]ctions for penalties and *forfeitures* incurred under the laws of the State.") (emphasis added). Consequently, Appellants sought a declaration that Kahoohalahala was not a Lanai resident, that he forfeited office, and that the Lanai council seat was vacant. R:CV08-1-0678(3) Doc. 0008. To issue the declaration, the circuit court would need to determine whether Kahoohalahala is a resident of Lanai. The First Amended Complaint also sought injunctive relief pursuant to the statute which provides the circuit courts jurisdiction to grant "further relief" that may be "necessary and proper." R:CV08-1-0678(3) Doc. 0008. *See* Haw. Rev. Stat. § 632-3 (1993 & Supp. 2008) ("Further relief based on a declaratory judgment may be granted whenever necessary or proper, after reasonable notice and hearing, against any adverse party whose rights have been adjudicated by the judgment."). Initially, the circuit court concluded it had jurisdiction under Haw. Rev. Stat. § 603-21.5 (1993). R:CV08-1-0678(3) Doc. 0031 ("in an action seeking enforcement of the County charter, specifically in this instance Section 3-3 in the Court's view falls under both subsection two and 3 of Hawaii Revised Statutes section 603-21.5"). Later, however, the circuit court determined it could not issue declaratory relief. R:CV08-1-0678(3) Doc. 0035.

The circuit courts also have jurisdiction to issue writs of quo warranto. Haw. Rev. Stat. § 603-21.7 (1993) (circuit courts have jurisdiction over "actions or proceedings in or in the nature of habeas corpus, prohibition, mandamus, quo warranto . . ."). In an action seeking a writ of quo warranto inquiring by what authority Kahoohalahala "claims the office" of Lanai council member, the court would need to determine whether Kahoohalahala is a resident of Lanai or Lahaina, in the exact same way as in a declaratory action. Haw. Rev. Stat. § 659-1 (1993).

As the above comparison shows, in the present case, any difference between declaratory relief and a writ of quo warranto is in form only. The First Amended Complaint gave Kahoohalahala clear notice under Haw. R. Civ. P. 8 of the claims against him under Maui Charter § 3-3, even if it did not use the words "quo warranto." *See, e.g.*, R:CV08-1-0678(3) Doc. 0008. at 8 (First Amended Complaint ¶ 39) ("Mr. Kahoohalahala is violating the mandatory residency requirement to be Lanai's member of 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."); R:CV08-1-0678(3) Doc. 0008 at 9 (First Amended Complaint ¶ 43) ("Mr. Kahoohalahala was not and is not a continuous resident of the residency area of Lanai,[and] he must immediately forfeit the office of Lanai council member of the Maui Council."). *See also Perry v. Planning Comm'n*, 62 Haw. 666, 685, 619 P.2d 95, 108 (1980) ("Modern judicial pleading has been characterized as 'simplified notice pleading.' Its function is to give opposing parties 'fair notice of what the . . . claim is and the grounds upon which it rests.'") (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *Henderson v. Professional Coatings Corp.*, 72 Haw. 387, 395, 819 P.2d 84, 92 (1991) ("Pleadings should not be construed technically when determining what the pleader is attempting to set forth but should be construed liberally so as to do substantial justice.") (citation omitted); *Hall v. Kim*, 53 Haw. 215, 224, 491 P.2d 541, 547 (1971) ("[B]y the adoption of H.R.C.P. we have rejected the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and in turn accepted the principle that the purpose of pleading is to facilitate a proper decision on the merits.") (citation and quotation marks omitted).

Substance matters, not form, and the First Amended Complaint pleaded the facts necessary for the circuit court to issue a writ of quo warranto as well as declaratory relief, so if it was necessary to seek a writ of quo warranto, the First Amended Complaint should be treated as one.

2. If Substantive Difference, Amendment Is The Remedy, Not Dismissal

If the First Amended Complaint was not sufficient to assert a claim under section 3-3 for a writ of quo warranto, the circuit court's denial of the motion for leave to amend was an abuse of discretion, and the judgment should be vacated and the case remanded to allow Appellants to amend the form of their complaint. Rule 15(a) of the Hawaii Rules of Civil Procedure requires liberal amendment of pleadings:

> In the absence of any apparent or declared reason . . . such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. . . . the leave should, as the rules require, be "freely given."

Hirasa v. Burtner, 68 Haw. 22, 26, 702 P.2d 772, 775 (1985) (citing *Bishop Trust Co. v. Kamokila Dev. Corp.*, 57 Haw. 330, 337, 555 P.2d 1193, 1198 (1976) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962))).

In the case at bar, the circuit court did not state why it denied Appellant's motion for leave to file an amended complaint to specify that the relief sought is in the form of quo warranto. R:CV08-1-0678(3) Doc. 0039. The failure to articulate any reason for the denial is alone an abuse of discretion. *See, e.g.*, Haw. R. Civ. P. 15(a) (Absent "any apparent or declared reason . . . the leave should, as the rules require, be 'freely given.'"); *Keawe v. Hawaiian Elec. Co.*, 65 Haw. 232, 239, 649 P.2d 1149, 1154 (1982) (same). The circuit court did not cite to any undue delay, bad faith or dilatory motive, a repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or the futility of amendment. Nor does the Record indicate any of these elements exist:

(1) Appellants did not delay, and requested amendment promptly upon the circuit court's determination declaratory relief was not available. *Cf. R.S. Ellsworth, Inc. v. Amfac Fin. Corp.*, 65 Haw. 345, 353, 652 P.2d 1114, 1119 (1982) (request to amend on appeal and six years after original complaint denied for long delay). The case was still in the pleading stages, and Kahoohalahala had not yet responded to discovery requests seeking proof of his claimed Lanai residence (and, in any event, the proposed amendment would not alter his responses since the requested amendment addressed form only, not substance). *Cf. Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Haw. 92, 101, 176 P.3d 91, 102 (2008) (plaintiff waited to seek amendment one week before discovery deadline and on the day dispositive motions were due).

(2) There is nothing in the Record reflecting any improper purpose, as the requested amendment was simply to remove any technical issue whether the declaratory relief sought by Appellants is the same as a writ of quo warranto.

(3) There is nothing in the Record to establish Appellants had a pattern of "repeated failure to cure deficiencies by amendments previously allowed." Haw. R. Civ. P. 15(a). Indeed, Appellants had amended the complaint once previously as a matter of right before Kahoohalahala answered in order to simplify the complaint by *eliminating* two causes of action. R:CV08-1-0678(3) Doc. 0008.

(4) Kahoohalahala would suffer no prejudice by amendment since it was merely to harmonize the form of the pleading with its substance, and the underlying claim – that Kahoohalahala was not a resident of his residency area under section 3-3 – would not change. *Jones* ex rel. *Stafford v. Jones*, 30 Haw. 565, 573 (Terr. 1928) (no prejudice to amend form of complaint, since defendant had same degree of notice), *aff'd*, 35 F.2d 943 (9th Cir. 1929). The case was also dismissed in the pleading stage, emphasizing the lack of prejudice. *Cf. Kamaka*, 117 Haw. at 101, 176 P.3d at 100 (prejudice to allow eve-of-trial amendment to add new claims).

(5) Amendment would not be futile. *Cf. Office of Hawaiian Affairs v. State*, 110 Haw. 338, 365, 133 P.3d 767, 794 (2006) (amendment futile where the claim was identical to a claim that had been properly dismissed); *Gonsalves v. Nissan Motor Corp. in Haw.*, 100 Haw. 149, 58 P.3d 1196 (2002) (existing complaint sufficiently articulated plaintiff's retaliation, negligence, and implied contract claims, so amendment was unnecessary or futile).

Consequently, the circuit court abused its discretion when it refused to allow Appellants to label the form of the relief sought as a writ of quo warranto, and instead dismissed the case. *See Baldonado v. Way of Salvation Church*, 118 Haw. 165, 171-72, 185 P.3d 913, 919-20 (2008) (circuit court should have granted leave to amend to raise new issue because plaintiffs had standing and were not legally barred from raising the claim).

II. DISCRETIONARY IMPEACHMENT OR A DISCRETIONARY RECALL ELECTION ARE NOT MANDATORY "IMMEDIATE FORFEITURE" OR "IMMEDIATE VACANCY"

The courts are essential in enforcing the Charter's mandatory forfeiture and vacancy requirements. While a forfeiture is immediate, and a vacancy is created when a council member is adjudicated guilty of a felony or ceases to maintain residency, a judicial determination is the only *mandatory* means to effectuate these requirements if the council member does not voluntarily follow the law and vacate office. *See* 63c Am. Jur. 2d *Public Officers and Employees* § 120 (2009) (if

residency is prerequisite to office, a change of residence vacates the office, "although a change of residence may, of itself, automatically provide grounds for having an office declared vacated, it cannot be said that the office is vacated until such vacation is declared by a court or other authorized official or governing body"). The circuit court's conclusion that impeachment or a recall election are the remedies available to enforce section 3-3 – but a declaratory judgment and a writ of quo warranto are not – abdicates the indispensable role of the courts in enforcing the Charter's mandatory residency and nonfelon requirements.

The circuit court rejected both declaratory judgment and a writ of quo warranto, and concluded impeachment or a recall election are the means of enforcing the immediate forfeiture and vacancy requirements of section 3-3.[8] In the circuit court's reasoning, "shall immediately forfeit office and the seat shall thereupon become vacant" means only that Kahoohalahala had a duty to resign, and if he failed to do so he may be subject to a discretionary impeachment proceeding for "nonfeasance" (which cannot be immediately instituted because it requires a petition signed by at least 5% of the voters in the last election), or a future recall election (which requires a petition signed by 20% of the voters, and from which council members are immune for six months after taking office).

The circuit court's conclusion effectively rewrote the Maui Charter by ignoring the terms "shall," "immediate," "forfeit," and "vacancy," transforming a mandatory, self-executing, and immediate forfeiture and vacancy into a nonimmediate, discretionary process. *Cf. Pioneer Mill*, 53 Haw. at 500, 497 P.2d at 552 (failing to effectuate the plain meaning of the forfeiture provision would "rewrite the Constitution"). This is reversible error because the circuit court's conclusion ignored the words "immediately" and "forfeit." *See Coon v. City and County of Honolulu*, 98 Haw. 233, 250, 47 P.3d 348, 365 (2002) (rules of statutory construction require rejection of interpretation of a statute that renders any part of the statutory language a nullity).

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8. R:CV08-1-0678(3) Doc. 0035 at 5 n.2 ("This order provides only that declaratory relief is not an appropriate means of removing an elected official from office[.]"). Although the circuit court only expressly eliminated declaratory relief, it also rejected quo warranto as reflected by its refusal to allow amendment of the complaint to specify that the relief sought is in the form of quo warranto. R:CV08-1-0678(3) Doc. 0039.

A. Neither Impeachment Nor Recall Are "Immediate"

"Immediate" means *now*, not some future time contingent upon third party action. The immediacy expressly mandated by section 3-3 cannot be contingent upon 5% or 20% of the electorate taking action in the future, because the date of forfeiture is the date of adjudication of guilt, or, in this case, nonresidency, not some future date after petition signatures are gathered, or when, after an election, the offending council member might be recalled. The plain meaning of "immediate" and "forfeit" is that forfeiture is automatic and self-executing, so even if a council member refuses to leave office immediately, the forfeiture occurs upon violation, not some time in the future after someone might institute a petition drive and might acquire the correct number of signatures. *See* 63c Am. Jur. 2d *Public Officers and Employees* § 119 (2009) ("A conviction under the terms of a state statutory provision that a public office will become vacant upon the officer's conviction of specified crimes is not affected by the filing of an appeal, as the vacancy of office apparently occurs automatically, or by operation of law, at the point of conviction.").

Further emphasizing the inapplicability of the recall provision to effectuate the "immediate forfeiture" requirement in section 3-3 is the fact that council members are immune from recall for six months after taking office. Maui Charter § 12-9 (2003) ("Immunity to Recall. The question of the removal of any officer shall not be submitted to the voters until such person has served six (6) months of the term during which the officer is sought to be recalled, nor, in case of an officer retained in a recall election, until one (1) year after that election."). Thus, if a council member is adjudicated guilty of a felony or ceases to be a resident of his residency area within six months of taking office, the recall is delayed, and if a subsequent recall attempt is not successful, the council member is insulated from removal for another year, even if he commits another felony or has moved outside of his residency area. A six-to-eighteen-month delay is not "immediate."

The circuit court's conclusion that forfeiture and vacancy under section 3-3 are "immediate" – but may only be effectuated if the council member fails to resign *and* enough voters sign a petition to either institute an impeachment proceeding or a recall election, *and* the impeachment lawsuit is sustained or the recall election results in a 50%-plus-one majority vote – ignores the natural meaning of the Charter's words.

B. Impeachment And Recall Are Discretionary, Not Mandatory

The Charter's continuous residency requirement is mandatory, not discretionary, as reflected in the use of "shall." "If a council member ceases to be a resident of the county, or 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). Use of the term "shall" indicates mandatory action. *Leslie*, 109 Haw. at 393, 126 P.3d at 1080. The circuit court, however, determined forfeiture can only be accomplished by impeachment or recall, both of which are discretionary acts.

Impeachment and recall are not mandatory because nothing requires they be initiated. The Charter's impeachment provision provides:

> Appointed or elected officers *may* be impeached for malfeasance, misfeasance or nonfeasance in office or violation of the provisions of Article 10. Such impeachment proceedings shall be commenced in the Circuit Court of the Second Circuit, State of Hawai`i. The charge or charges shall be set forth in writing in 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) (emphasis added). Use of "may" indicates discretionary action. *See In re Doe*, 108 Haw. 144, 153, 118 P.3d 54, 63 (2005) ("Because that statute states that the court 'may' appoint a guardian, discretion resided in the court as to whether to do so or not."). Thus, nothing requires a council member who is convicted of a felony or who ceases to be a resident of his residency area be impeached.

A recall election is also discretionary:

> Any elective officer or member of a board or commission provided for in this charter *may* be removed from office by the voters of the county. The procedure to effect such removal shall be in accordance with this Article.

Id. § 12-1 (emphasis added). Recall also requires a petition "signed by not less than twenty percent (20%) of the voters registered in the last general election." *Id.* § 12-3.2. Like impeachment, nothing requires a recall election for a council member who fails to adhere to section 3-3.

Discretionary acts cannot satisfy the mandatory nature of section 3-3's immediate forfeiture requirement, and the circuit court's conclusion that impeachment and recall are the enforcement mechanisms for the Charter, to the exclusion of declaratory relief, renders the mandatory nature of "shall immediately forfeit office and the seat shall thereupon become vacant" illusory. The circuit court's judgment, by eliminating declaratory relief as a means to enforce section 3-3, effectively grafted a 5% or 20% petition requirement into the immediate forfeiture and vacancy requirements and rendered the plain text of the Charter a nullity. The Maui Charter says "*shall* immediately forfeit office." It does not say "shall resign and if he does not resign he *may* be subject to recall." It does not say "shall resign or *may* be subject to impeachment."

Consequently, the circuit court's conclusion that impeachment and recall are the remedies for a violation of section 3-3 (but declaratory relief and quo warranto are not), is wrong. As discretionary actions, impeachment and recall are remedies that *may* be pursued to remove a council member who is convicted of a felony or ceases to maintain residency in his residency area. But they are not the *only* recourse available to remedy a violation of section 3-3 of the Charter, to the exclusion of a declaratory judgment action.

CONCLUSION

Maui County residents are entitled to have a Lanai resident occupy the Lanai residency seat on the council. A declaratory judgment by the circuit court is the only way to enforce the immediate forfeiture and vacancy requirements of the Maui Charter when a council member is not a residency of his residency area. The circuit court's judgment entered on June 23, 2009, should be vacated and the case remanded to the circuit court for further proceedings.

DATED: Honolulu, Hawaii, September 29, 2009.

Respectfully submitted,

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