Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

No. 29464

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

MICHAEL P. DUPREE, Appellant-Appellee, vs. ROY T. HIRAGA, Clerk of the County of Maui, and SOLOMON P. KAHOOHALAHALA, Appellees-Appellants.	Case No. BOR-08-01 (Agency Appeal) APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF THE BOARD OF REGISTRATION, COUNTY OF MAUI, DATED NOVEMBER 1, 2008

ANSWERING BRIEF FOR THE APPELLEE MICHAEL P. DUPREE

APPENDICES "1" - "5"

STATEMENT OF RELATED CASES

CERTIFICATE OF SERVICE

FILED
2009 JUN -8 PM 3:49

KENNETH R. KUPCHAK 1085-0
ROBERT H. THOMAS 4610-0
CHRISTI-ANNE H. KUDO CHOCK 8893-0

DAMON KEY LEONG KUPCHAK HASTERT
1600 Pauahi Tower
1003 Bishop Street
Honolulu, Hawaii 96813
www.hawaiilawyer.com
Telephone: (808) 531-8031
Facsimile: (808) 533-2242

Attorneys for Appellant-Appellee
MICHAEL P. DUPREE

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

No. 29464

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

MICHAEL P. DUPREE, Appellant-Appellee, vs. ROY T. HIRAGA, Clerk of the County of Maui, and SOLOMON P. KAHOOHALAHALA, Appellees-Appellants.	Case No. BOR-08-01 (Agency Appeal) APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF THE BOARD OF REGISTRATION, COUNTY OF MAUI, DATED NOVEMBER 1, 2008

ANSWERING BRIEF FOR THE APPELLEE MICHAEL P. DUPREE

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

TABLE OF CONTENTS

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

TABLE OF AUTHORITIES

Page

CASES

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

STATUTES

Hawaii Revised Statutes

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

RULES

OTHER AUTHORITIES

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

I.
STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from a determination by the Board of Registration, County of Maui (Board) that Solomon P. Kahoohalahala (Kahoohalahala) is a resident of Lahaina, Maui and not Lanai, after the evidence demonstrated he attempted to change his registration to Lanai, he was registered to vote in Lahaina, he lives and works on Maui, and does not have a physical presence on Lanai.[1]

1. Kahoohalahala, A Registered Lahaina Voter, Attempted To Register On Lanai Without A Fixed Habitation Or Physical Presence

In 2006, Kahoohalahala swore under oath that his "one residence" is Lahaina, Maui, meaning that Lahaina is where his "habitation is fixed," and is where "whenever [he] is absent, [he] has the intention to return." *See* Haw. Rev. Stat. § 11-13(1) (1993). To change residency from Lahaina, he must have both the intention to acquire a new residence on Lanai, and a "physical presence" there. *Id.* § 11-13(4). Kahoohalahala has not lived on Lanai for years, and Haw. Rev. Stat. § 11-25(a) (1993) gives "[a]ny registered voter" standing to challenge another's registration. Consequently, when he purported to register to vote as a Lanai resident in 2008, twelve Lanai voters asked Roy T. Hiraga, the Clerk of the County of Maui (Clerk) – who is charged by the statute with investigation of invalid voter registrations – to determine Kahoohalahala is not a Lanai resident. The Clerk, however, rejected as irrelevant evidence Kahoohalahala does not live on Lanai and had no physical presence there. Instead, the Clerk concluded that Kahoohalahala's professed intent to return to Lanai, standing alone, was enough to qualify him as a Lanai resident under section 11-13.

The "person ruled against" by the Clerk may appeal to the Board, and one of the Lanai registered voters did so. *See* Haw. Rev. Stat. § 11-26(b) (1993). The Board reversed the Clerk after considering Kahoohalahala's 2006 Lahaina registration, evidence from Lanai residents that Kahoohalahala did not live on Lanai, testimony from Kahoohalahala's lone witness who acknowledged

[1]This brief answers both the Opening Brief filed by Appellant Solomon P. Kahoohalahala and the Opening Brief filed by Appellant Roy T. Hiraga, Clerk of the County of Maui. Also, section 11-52 provides "[w]hen the appeal is perfected, the court shall hear the appeal as soon thereafter as may be reasonable." Haw. Rev. Stat. § 11-52 (1993). Kahoohalahala has already received two extensions of time to file his Opening Brief, and no further extensions to file his Reply should be granted if sought.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

that he lived in Lahaina with his wife and worked at Maui Community College, and after Kahoohalahala refused to testify regarding where he lives. The Board held Kahoohalahala's subjective state of mind, without proof of physical presence on Lanai was insufficient for a valid Lanai registration under section 11-13, and that "[f]or the purposes of this 2008 election, Kahoohalahala is a resident of Lahaina, Maui, Hawaii."

Kahoohalahala's appeal of the Board's decision challenges the sufficiency of the evidence and the standing of the Lanai voter who challenged his registration. The Clerk appealed separately, asserting the Board considered irrelevant evidence, and that the Board incorrectly concluded the challenger met the burden of proof. Neither Kahoohalahala nor the Clerk dispute Kahoohalahala registered to vote in Lahaina in 2006.

2. Questions Presented

Physical presence. When a voter registers in Lahaina, he attests that Lahaina is the location of his "fixed habitation" and the place "he intends to return." In order to gain a "new residence" the voter must have both a "physical presence" there and an intent to make the new location his residence. The first question is whether the Board was clearly erroneous when it found Kahoohalahala registered as a resident of Lahaina in 2006, and lives and works there, and that he lacks a physical presence on Lanai.

Standing. Chapter 11 allows "any registered voter" to challenge another's registration with the Clerk "for any cause," and "the person ruled against" by the Clerk may appeal to the Board. The Board only ruled that Kahoohalahala is not a resident of Lanai for registration purposes. The second question is whether in these circumstances, the voter who challenged Kahoohalahala's residency had standing and whether the Board exceeded its jurisdiction in ruling on that issue.

B. STATEMENT OF FACTS

1. Kahoohalahala Registered In Lahaina, And Lives And Works On Maui

In 2006, Kahoohalahala registered to vote in Lahaina, Maui. By registering on Maui, he was attesting under section 11-13 that his "one residence" was Lahaina. Record ®.). at 218 (Kahoohalahala registration, attached as App. 1); R. at 147 (Findings of Fact, Conclusions of Law and Decision (Nov. 1, 2008) (App. 2) ¶ 8 ("On or about July 10, 2006, Mr. Kahoohalahala changed his residence from Lana'i to 124-A Fleming Road, Lahaina, Maui, Hawai'i 96761."). *See also* Haw. Admin. R. § 2-51-

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

20(a)(5) (2000) (voter must swear under oath "to the truth of the information given in the affidavit"); *id.* § 2-51-20(b)(3) (registration form to include "statement notifying applicants of the penalty for falsifying information on the voter registration form or for falsifying the self-subscribing oath"). Kahoohalahala lives in Lahaina. R. at 148-149. He is an employee of Maui Community College, R. at 147, and his wife is vice principal at Lahainaluna High School, in Lahaina. R. at 148.

2. Kahoohalahala Attempted To Register To Vote As A Lanai Resident

The Maui Charter allocates the nine seats on the Maui County Council by district, and the Lanai residency area has one seat. Maui Charter § 3-1 (2003). To run for the Lanai seat and to serve, a person must be a registered voter and a Lanai resident. *Id.* § 3-3. On July 15, 2008, Kahoohalahala attempted to register to vote as a Lanai resident and "filed an affidavit of voter registration with the belief and understanding that I am a legal resident of Lanai because of my permanent residence at 444 Fraser Avenue." R. at 123.

3. Lanai Resident Voters Objected

Lanai is a small island, with only 3,193 residents as of 2000. *See 2007 State of Hawaii Data Book* at Table 1.05.[2] The residents of Lanai City see each other often and know whether someone actually lives down the street. *See, e.g.,* R. at 254, 256, 268. In September and October 2008, twelve registered voters residing in the Lanai residency area submitted letters to the Clerk challenging Kahoohalahala's Lanai voter registration: "[g]enerally the writers of the Complaint Letters allege that candidate Sol P. Kahoohalahala does not reside in the Lanai residency area." R. at 3 (Clerk's Ruling (Oct. 10, 2008), attached as App. 3); R. at 146, 148. *See* Haw. Rev. Stat. § 11-25(a) (1993) (giving standing to "any voter" to challenge another's voter registration). Each of the letters asserted that as residents of the small community of Lanai City, the writers had personal knowledge Kahoohalahala "does not reside in the Lanai residency area." R. at 181. The Lanai residents did not have an attorney, and the Clerk had the duty to independently investigate the allegations and make a determination of Kahoohalahala's residency. Haw. Rev. Stat. § 11-25(a) (1993) ("The clerk shall, as soon as possible, investigate and rule on the challenge."). The Clerk notified Kahoohalahala that he had "received two written challenges to your voter registration pursuant to Section 11-25, Hawaii Revised Statutes. The

[2]This court may take judicial notice of the size and population of Lanai pursuant to Haw. R. Evid. 201, and Appellee requests the court do so. *See Hustace v. Kapuni*, 6 Haw. App. 241, 250 n.17, 718 P.2d 1109, 1115 n.17 (1986) ("[W]e take judicial notice of the fact [as noted in the Data Book] that Molokai is a small island whose population in 1980 was 6,049[.]").

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

challenge alleges that you do not reside on the Island of Lanai." R. at 23. The Clerk requested Kahoohalaha "respond to the challenge allegation, i.e. that [he] do[es] not reside at 444 Fraser Avenue." R. at 23.

4. Despite No Evidence Of "Habitation" Or "Physical Presence," The Clerk Determined Kahoohalaha Is A Lanai Resident Solely Because Of His "State Of Mind"

In response, Kahoohalahala objected on solely legal grounds and while he asserted that he "resides" on Lanai (a legal conclusion), he pointedly never claimed he actually lives on Lanai.

First, he argued the challenges were not to his voter registration under sections 11-13 and 11-25, but to his nomination papers under Haw. Rev. Stat. § 12-8 (1993). R. at 34-35. The Clerk rejected the argument, and consistent with his jurisdiction considered the Lanai residents' claims that Kahoohalaha did not reside on Lanai as challenges to his Lanai voter registration, and not to his candidacy. R. at 4 ("The Complaint Letters challenge Mr. Kahoohalahala's residency based upon two separate statutory grounds, namely, section 12-8, Hawaii Revised statutes ("HRS") and section 11-25, HRS.").

Second, Kahoohalahala avoided discussing his actual residence and 2006 Lahaina voter registration, claiming his "actual residency" was not relevant under section 11-13's standards, only his "legal residency." R. at 31 ("[T]here seems to be a notion in each of the complaints that 'actual residency' is a determination for 'legal residency.' This is not found in Haw. Rev. Stat. 11-13[.]"). To support that argument, Kahoohalahala submitted two affidavits, his own and one from his brother, Gaylien. R. at 37-39. His affidavit did not claim he actually lives on Lanai, and was phrased very deliberately: he claimed his "*residence is fixed* at 444 Fraser Avenue, Lanai City and whenever [he is] absent from the island of Lanai, [he] intend[s] to return," and that it is his "*belief and understanding* that [he is] a *legal resident* of Lana'i." R. at 38 (emphasis added); *id.* at 216. Notably, while Kahoohalahala's affidavit speaks of his intent to return to Lanai, the residency standard in section 11-13(1) also requires a fixed "habitation," a term notably missing from Kahoohalaha's affidavit: "[t]he residence of a person *is that place in which the person's habitation is fixed*, and to which, whenever the person is absent, the person has the intention to return." Haw. Rev. Stat. § 11-13(1) (1993) (emphasis added). Nor did Kahoohalahala address his 2006 Lahaina registration. Similarly, his brother made only conclusory assertions that Kahoohalahala "presently *resides* at 444 Fraser Avenue [and that he] *resided* there since the beginning of July, 2008," that his return to Lanai was "welcomed," and that Kahoohalahala discussed with him his intent to return to Lanai. R. at 37. Again absent was any

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

assertion regarding where Kahoohalahala lives, the location of his fixed habitation or where he maintains a physical presence, or any mention of his 2006 Lahaina registration.

On October 10, 2008, the Clerk concluded Kahoohalahala qualified as a Lanai resident because (1) "physical presence or absence from a particular place is not the deciding factor in determining the residence of an individual;" and (2) "one's *state of mind* determines one's place of residence." R. at 3-7 (Clerk's Decision (Oct. 10, 2008) at 4, attached as App. 3) (emphasis original) (citing Haw. Rev. Stat. § 11-13 (1993); Att'y Gen. Op. 86-10, 1986 WL 80018 (Mar. 21, 1986)). The Clerk explained further:

> It is clear from the quoted portions of his sworn affidavit that Kahoohalahala intends to reside on the island of Lanai.
>
> The Office of Clerk, County of Maui, has conducted an examination of Kahoohalahala's voter registration history and confirms that, *with the exception of the period from July 2006 to July 2008*, Kahoohalahala's residence address of record has always been on Lanai.

R. at 185 (emphasis added). The Clerk did not determine where Kahoohalahala's "habitation is fixed" or where he has a physical presence, and did not consider it relevant where he actually lives. Additionally, while the Clerk acknowledged that for two years Kahoohalahala's "residence address of record" was elsewhere (presumably Lahaina), he did not consider that fact dispositive, or even relevant. Each of the twelve Lanai residents who challenged Kahoohalahala's residency were notified of the Clerk's decision regarding "the voter registration status of Kahoohalahala," and informed of their right to appeal to the Board pursuant to Haw. Rev. Stat. § 11-26(b) (1993). R. at 40-51.

On October 21, 2008, Kahoohalahala asked the Supreme Court to issue a writ of mandamus compelling the Clerk to issue a writ of mandamus compelling the Clerk to vacate the ruling on the registration challenges. R. at 72-86. Kahoohalahala argued the challenges were challenges to his candidacy or qualifications, and argued the Clerk had no jurisdiction. The Court denied the writ:

> The October 10, 2008 ruling [by the Clerk] was not tantamount to a judgment in a primary election contest given pursuant to HRS § 11-173-5(b) (1993), but was a ruling only on a challenge to nomination papers and *on a person's voter registration status*. Jurisdiction to render such ruling was with [the Clerk] pursuant to HRS §§ 12-8(b) (1993) and 11-25(a) (1993).

Solomon P. Kahoohalahala v. Roy T. Hiraga, County Clerk, County of Maui, No. 29415 (Haw., Oct. 21, 2008) (a copy is attached as App. 4).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

C. PROCEEDINGS IN THE AGENCY BELOW

1. Lanai Voter Appealed *Pro Se*

The Board has jurisdiction to hear appeals by "the person ruled against," and one of the twelve Lanai residents, Michael P. Dupree (Dupree), timely filed an appeal, again without the assistance of an attorney. R. at 40, 52. The appeal stated he was appealing the Clerk's determination of Kahoohalahala's registration:

> I ask that you please uphold the challenge to Sol Kahoohalahala['s] true residency and help the residents of Lanai to take a step forward and not allow this dishonest man to represent our island on the Maui County Council. He misrepresent[ed] himself *on his voter registration*, his nomination papers and his sworn affidavit. . . .

R. at 52, 54 (emphasis added).

After denying several procedural motions filed by Kahoohalahala's attorneys, R. at 140-44, the Board heard testimony in support of the appeal from Ron McOmber, a long-time Lanai resident, and Dupree. Mr. McOmber stated:

> I've lived on Lanai for thirty nine years, I've known Sol for those thirty nine years, sometimes he lived down there and sometimes [] he doesn't. What I'm saying is now for the[] past probably ten years he has not physically lived on Lanai, [] that's addressing the[] problem of him living on Lanai, he has not lived there.
>
> . . .
>
> . . . I live there, and it's a very small island, not very many things go on [sic] Lanai that people don't know, and the population of the island is very rare of who comes and who goes, who lives, who isn't. It's kind of a [] melting pot and there is no indication that I can find anywhere from anybody that Sol has moved back there and lived there for the last, at least, ten years.
>
> . . .
>
> . . . So this is common knowledge throughout Lanai, I don't know what else to say about it. . . And unless you folks live on a small island like this, you'll never understand how quick this stuff goes through the island and how everybody knows how everybody else is living on that island.

R. at 268-69. Mr. McOmber stated he "ha[d] not seen [Kahoohalahala] come back[.]" *Id.*

Dupree – also a long-time Lanai resident – testified that based on his personal knowledge of his small island, Kahoohalahala's "actual residence hasn't been on the island [of Lanai] for a long time[.]" R. at 255. He also testified that "what I believe is that he has his fixed residence, in Lahaina, it's been

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

for a long period of time," that Kahoohalahala is a "prominent individual," and "it's hard to be invisible." R. at 255. The Board also considered the evidence before the Clerk, including the letters submitted by the other 11 Lanai residents.

2. Kahoohalahala Refused To Testify Himself, But His Sole Witness Confirmed He Lives And Works On Maui

The Board wanted to ask Kahoohalahala "some questions for clarification," but he refused to testify. R. at 287-288. Instead, Kahoohalahala called as a witness Ellen Pelisero, a long-time acquaintance, who testified that he is a "lecturer . . . at Maui Community College" and does not have a "commuter pass." R. at 285. She further testified that Kahoohalahala resides with his wife in Lahaina while working at the College. R. 285-286.

3. The Board Determined Kahoohalahala "Is A Resident Of Lahaina, Maui, Hawaii" For Purposes Of Registration

On November 1, 2008, the Board overruled the Clerk and determined "[f]or the purposes of this 2008 election, Kahoohalahala is a resident of Lahaina, Maui, Hawaii." R. at 153. The Board expressly acknowledged Dupree's right to appeal and made clear its decision related to voter registration, noting "[i]n the event of an appeal of this decision, Kahoohalahala shall be allowed to vote 'provided that the ballot is placed in a sealed envelope to be later counted or rejected in accordance with the ruling on appeal,'" R. at 153 (citing Haw. Rev. Stat. § 11-25(c) (1993)).

II.
STANDARD OF REVIEW

The Board's determination that Kahoohalaha is not a Lanai resident is entitled to a presumption of validity:

> In order to preserve the function of administrative agencies in discharging their delegated duties and the function of this court in reviewing agency determinations, *a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears the heavy burden of making a convincing showing that it is invalid* because it is unjust and unreasonable in its consequences.

Keliipuleole v. Wilson, 85 Haw. 217, 226, 941 P.2d 300, 309 (1997) (emphasis added) (citations omitted). "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

made." *In re Guardianship of Carlsmith*, 113 Haw. 211, 223, 151 P.3d 692, 704 (2006) (quoting *Child Support Enforcement Agency v. Roe*, 96 Haw. 1, 11, 25 P.3d 60, 70 (2001)). While the Board's Conclusions of Law are reviewed *de novo*, "[w]here both mixed questions of fact and law are presented, deference will be given to the agency's expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency." *Peroutka v. Cronin*, 117 Haw. 323, 326, 179 P.3d 1050, 1053 (2008).

III.
ARGUMENT

A. A LANAI STATE OF MIND CANNOT OVERCOME LAHAINA REGISTRATION

1. In 2006, Kahoohalahala Declared His "One Residence" Is Lahaina

A person can have only a single residence for registration purposes, and it is not disputed that in 2006, Kahoohalaha registered to vote as a resident of Lahaina. R. at 218 (App. 1). Section 11-13 sets forth the standards to determine residency for registration purposes:

> **Rules for determining residency.** For the purpose of this title, *there can be only one residence for an individual*, but in determining residency, a person may treat oneself separate from the person's spouse. The following rules shall determine residency for election purposes only:
>
> (1) The residence of a person is that place in which the person's *habitation is fixed, and* to which, whenever the person is absent, the person has the intention to return;
>
> (2) A person does not gain residence in any precinct *into which the person comes* without the present intention of establishing the person's permanent dwelling place within such precinct;
>
> (3) If a person resides with the person's family in one place, and does business in another, the former is the person's place of residence; but any person having a family, who establishes the person's dwelling place other than with the person's family, with the intention of remaining there shall be considered a resident where the person has established such dwelling place;
>
> (4) *The mere intention to acquire a new residence without physical presence at such place, does not establish residency*, neither does mere physical presence without the concurrent

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

> present intention to establish such place as the person's residence;
>
> (5) A person does not gain or lose a residence solely by reason of the person's presence or absence while employed in the service of the United States or of this State, or while a student of an institution of learning, or while kept in an institution or asylum, or while confined in a prison;
>
> (6) No member of the armed forces of the United States, the member's spouse or the member's dependent is a resident of this State solely by reason of being stationed in the State;
>
> (7) A person loses the person's residence in this State if the person votes in an election held in another state by absentee ballot or in person.
>
> In case of question, final determination of residence shall be made by the clerk, subject to appeal to the board of registration under part III of this chapter.

Haw. Rev. Stat. § 11-13 (1993) (emphasis added). *See also* Haw. Admin. R. § 2-51-25(a)(1) (2000) ("The residence of a person is that place in which the person's habitation is fixed, where the person intends to remain, and when absent intends to return[.]"). A copy of the applicable rules regarding residency and procedures for challenges and appeals promulgated by the Office of Elections to administer chapter 11, Haw. Admin. R. § 2-51-1, *et seq.* (2000), is attached as App. 5.

The statute and rules provide three principles relevant to this appeal: (1) a voter can have only one residence; (2) that residence is where the voter's habitation is fixed, where she intends to remain, *and* where she intends to return if absent; and (3) if the voter desires a new residence, the voter must have both a physical presence and an intention to remain in the new location. The plain statutory language belies Kahoohalahala's and the Clerk's claim that intent is the sole relevant factor in a residency determination.

By registering as a voter in Lahaina in 2006, Kahoohalahala attested that his "one residence" is Lahaina. *See* Haw. Rev. Stat. § 11-13 (1993). *See also* Haw. Admin. R. § 2-51-20(a)(5) (2000) (voter registration affidavit under oath); *id.* § 2-51-20(b)(3) (registration form includes notification of penalties for false information or oath). He also attested that Lahaina is where his "habitation is fixed, and to which, whenever [he] is absent, [he] has the intention to return." Haw. Rev. Stat. § 11-13(1) (1993). He

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

also attested that Lahaina is where he intended to establish his "permanent dwelling place," *id.* § 11-13(2), and where he intends to remain. Haw. Admin. R. § 2-51-25(a)(1) (2000).

Thus, Kahoohalahala's 2006 Lahaina registration rebuts his present claim that his "permanent residence" is Lanai, "and that he 'retained [his] residence on Lana'i except for a brief period in which [he] was in the service of the State of Hawa'i with the Kaho'olawe Island Reserve Commission.'" R. at 38. The Board was not clearly erroneous when it concluded he didn't: by registering in Lahaina, Kahoohalahala affirmatively proclaimed he was *only* a Lahaina resident. Haw. Rev. Stat. § 11-13(1) (1993). By registering in Lahaina, he also demonstrated his "present intention of establishing [his] permanent dwelling place" there and thereby "gained residence" in Lahaina pursuant to section 11-13(2). Neither Kahoohalahala nor the Clerk disputed that he had registered in Lahaina, and the Record contains substantial evidence to support the Board's finding that Kahoohalahala is a Lahaina resident. *Carlsmith*, 113 Haw. at 223, 151 P.3d at 704 (finding of fact not clearly erroneous unless "record lacks substantial evidence to support the finding"). Both Kahoohalahala and the Clerk acknowledge his 2006 Lahaina registration, but ignore its consequences under section 11-13(1).

2. To Change His Lahaina Residence To Lanai, Kahoohalahala Needed Physical Presence On Lanai, Not Simply A Statement He Intends To "Remain" There

Having established his sole residency as Lahaina in 2006 pursuant to section 11-13(1), Kahoohalahala was required to conform to section 11-13(4) in order to change that residency. Under that statute, if he wanted to "acquire a new residence" and register as a voter in some place other than Lahaina, he needed both "physical presence in such place," *and* a "concurrent present intention" to make the new place his residence. Haw. Rev. Stat. § 11-13(4) (1993) ("The mere intention to acquire a new residence without physical presence at such place, does not establish residency[.]"). This dual requirement must be read along with subsection (2) which states that a "person does not gain residence in any precinct *into which the person comes* without the present intention of establishing the person's permanent dwelling place within such precinct." Haw. Rev. Stat. § 11-13(2) (1993) (emphasis added). The use of the term "into which the person comes" further reflects a requirement of physical presence in the new location. These two subsections must be read together. Haw. Rev. Stat. § 1-16 (1993) ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another."). *See also Kaho'ohanohano v. Dep't of Human Services*, 117 Haw. 262, 288, 178 P.3d 538, 564 (2008) (same).

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

Although Kahoohalahala stated he intends or has always intended to return to Lanai and his statements are as a practical matter immune from challenge, the Board concluded that merely invoking magic words is not enough. The statute also requires physical presence as the key objective element when a voter seeks to change residence. Haw. Rev. Stat. § 11-13. *See also Powell v. Powell*, 40 Haw. 625, 629-30 (Terr. 1954) ("in order to acquire the new domicile there must be residence or bodily presence in the new location and an intention to remain; act and intent must concur"). There was no evidence that Kahoohalahala physically abandoned his Lahaina residency. He lives there with his wife, and works on Maui. He does not own or rent a home on Lanai. He has not been seen regularly on Lanai as would be reasonably expected on a person whose principal "habitation" is "fixed" there, or who has a "physical presence" there. The Board correctly concluded "[o]ther than Kaho'ohalahala's self-proclaimed intention, which was corroborated by his brother, and a witness testifying as to his veracity, no evidence was presented regarding his abandonment of his residency in Lahaina and his permanent relocation to Lanai." R. at 149. *See Carlsmith*, 113 Haw. at 223, 151 P.3d at 704 (finding of fact not clearly erroneous unless "record lacks substantial evidence to support the finding"). The Board's evaluation of the evidence – or lack thereof – is entitled to deference. *Keliipuleole v. Wilson*, 85 Haw. 217, 226, 941 P.2d 300, 309 (1997) (factual determinations reviewed under clearly erroneous standard).

It makes sense that the legislature included both subjective and objective elements when a voter seeks to register in a new location. A registrant's stated "intention" to return or remain somewhere is entirely subjective and therefore cannot be realistically evaluated because the oath must be accepted at face value. *See* Haw. Rev. Stat. § 11-15(c) (1993) (self-subscribed oath is entitled to prima facie acceptance); *State v. Albano*, 67 Haw. 398, 405, 688 P.2d 1152, 1157 (1984) (a registrar "is expressly permitted, in the absence of a challenge by a qualified voter, to accept, as prima facie evidence, the allegations of residence by an applicant in his affidavit"). The physical presence element by contrast, is amenable to extrinsic proof and thus is the only realistic check against registration fraud because the possibility of contradiction by objective evidence may restrain a voter from simply cherry picking where he chooses to register merely by declaring he intends to remain or return there. In amending section 11-13, the legislature intended to "replace prior law which suggested that one could be a resident of two precincts and opt to vote in one or the other precinct, and to make the residency requirements for elections clearer." Att'y. Gen. Op. 86-10 (Mar. 21, 1986) (citing 1970 Haw. Sen. J. 1375; 1969 Haw.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

House J. 852). The legislative amendment would be defeated if registrants are required to declare only where they intend to be, and ignored where they are. The former can't be challenged, the latter can.

The Clerk, however, disregarded subsection (4)'s two requirements and only focused on Kahoohalahala's statements he intended to return to Lanai as the sole dispositive criteria for residency. In other words, once Kahoohalahala said "I intend to return to Lanai," the Clerk's legal conclusion treated the physical presence requirement in section 11-13(4) as mere surplusage. Ignoring the language of the statute, the Clerk relied upon an advisory opinion by the attorney general. *See* Clerk's Br. at 14, 15, 22 (citing Att'y Gen. Op. 86-10, 1986 WL 80018 (Mar. 21, 1986)). Sole reliance on subjective wishful thinking, however, ignores the statutory requirement of fixed habitation in section 11-13(1) to establish residency, dwelling in section 11-13(2) to gain residency, and physical presence in section 11-13(4) to change residency. Courts and agencies are required to "'reject' [an interpretation of a statute] if it 'renders any part of the statutory language a nullity.'" *County of Hawaii v. C & J Coupe Family Ltd. P'ship*, 119 Haw. 352, 362, 198 P.3d 615, 625 (2008) (quoting *City & County of Honolulu v. Hsiung*, 109 Haw. 159, 173, 124 P.3d 434, 448 (2005)). The Clerk's Brief maintains this argument, asking this Court to focus solely on intent, while ignoring the statutory requirements of "habitation," dwelling," and "physical presence."[3]

The attorney general advisory opinion relied upon by the Clerk – but not Kahoohalahala – provides little guidance in the case at bar since it involved completely different facts. The attorney general was asked to analyze the situation where a state representative temporarily moved out of his district while his house in the district was being remodeled. The attorney general opined that what matters to establish residency is where "his habitation is fixed," where he intends to return, and where "his present 'permanent dwelling place' is." Att'y Gen. Op. 86-10, 1986 WL 80018 (Mar. 21, 1986) at *2. Although the attorney general's opinion stated that "[u]nder section 11-13, one's state of mind determines one's place of residence," *id.*, this statement does not stand alone as the Clerk argues, but must be read in context of the facts underlying the opinion: it was a given that the representative had a habitation, dwelling, and a physical presence in two places, one temporary and one permanent. In that instance, it is the person's intent that governs which of these residences is deemed his permanent

[3]Rather than exhibiting a concern that the process contemplated by chapter 11 was followed, by focusing only on a registrant's stated intent the Clerk's Brief seems more concerned with ease of administration. It would certainly make the Clerk's job easier if this Court were to hold that he did not have any duty to investigate claims that a voter did not have a habitation, dwelling, or physical presence in the place he claims to reside, and the Clerk could simply rely upon a subjective statement of intent as he did in this case.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

residence, and which is deemed temporary. It would be a much different situation if the representative were to register in the district where he was living while his house was being remodeled (and thus declared this to be his "one residence"), yet he attempted to register in the other. In any event, even if the attorney general's opinion is read as the Clerk suggests, opinions are merely advisory and are not binding on courts; legal opinion letters are not precedent. *Taniguchi v. Ass'n of Apartment Owners of King Manor, Inc.*, 114 Haw. 37, 47, 155 P.3d 1138, 1148 (2007). The Board correctly rejected Kahoohalahala and the Clerk's incorrect interpretation of section 11-13.

3. The Board Considered Evidence Of Kahoohalahala's Physical Presence In Lahaina And Lack Of Presence On Lanai, And Its Determination He Resides In Lahaina Is Not Clearly Erroneous

The Board correctly considered evidence of Kahoohalahala's physical presence in Lahaina, and lack of physical presence on Lanai under section 11-13(4), and the Board's consideration of that evidence is entitled to a presumption of validity. Kahoohalahala and the Clerk bear a "heavy burden of making a convincing showing that it is invalid." *Keliipuleole*, 85 Haw. at 226, 941 P.2d at 309. The Board hearing was not a contested case, but the Board's rules of procedures incorporate similar liberal evidentiary rules. *See* Haw. Rev. Stat. § 11-43(c) (1993) (challenges and appeals under sections 11-25 and 11-26 are exempt from contested case hearings, but shall be administered by rules); Haw. Admin. R. § 2-51-43(h) (2000) ("rules of evidence as specified in HRS § 91-10 shall be applicable" to Board proceedings). Under this standard, the Board was entitled to liberally accept "any oral or documentary evidence" on relevant issues. Haw. Rev. Stat. § 91-10(1) – (2) (Supp. 2008); *See also Cazimero v. Kohala Sugar Co.*, 54 Haw. 479, 483, 510 P.2d 89, 92 (1973) (agencies must admit any and all evidence, limited only by considerations of relevancy, materiality, and repetition); *Price v. Zoning Bd. of Appeals*, 77 Haw. 168, 176 & n.8, 883 P.2d 629, 637 & n.8 (1994) ("The rules of evidence governing administrative hearings are considerably more relaxed than those governing judicial proceedings.").

The Board should consider evidence freely, in order to encourage maximum citizen participation in the election process, particularly where, as here, the challenging voters acted without counsel. There was more than sufficient evidence in the record before the Board that Kahoohalahala was not physically present or residing on Lanai. *Carlsmith*, 113 Haw. at 223, 151 P.3d at 704 (fact determination not clearly erroneous unless "record lacks substantial evidence to support the finding"). The Board did not, as both Kahoohalahala and the Clerk suggest, "ignore evidence that corroborated Kaho'ohalahala's avowed intention." Kahoohalahala Br. at 27-28 (citing *In re Hurley*, 30 Haw. 887 (Terr. 1929)); Clerk Br. at

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

20-21. Indeed, the Board accepted Kahoohalahala's proclamations of his intent; as a practical matter, it had no choice. *See Albano*, 67 Haw. at 405, 688 P.2d at 1157 (registrar must take all unchallenged allegations in registration as prima facie evidence). What is critical is that Kahoohalahala and the Clerk offered no evidence other than his state of mind. R. at 149 ("no evidence was presented regarding his abandonment of his residency in Lahaina and his permanent relocation to Lanai.").

In contrast, the Board considered evidence of Kahoohalahala's physical presence in Lahaina, and reviewed the Clerk's determination (which included all of the complaint letters), Kahoohalahala's 2006 Lahaina registration, live testimony by Dupree and McOmber, and Kahoohalahala's own witness who testified Kahoohalahala lives and works on Maui. It was proper for the Board to consider all direct and circumstantial evidence of Kahoohalahala's physical presence. *Loui v. Board of Medical Examiners*, 78 Haw. 21, 31, 998 P.2d 705, 715 (1995) ("[A]s long as evidence . . . [w]as relevant as defined by HRE Rule 401, it was proper for the Board to admit [it]."). Consequently, the Board properly rejected the Clerk's argument that evidence Kahoohalahala does not work, live or own a car on Lanai and had not been seen on the island is irrelevant. This type of evidence is relevant because it tends to make the fact he does not have a fixed habitation, dwelling, or a physical presence on Lanai more, rather than less, probable. *See* Haw. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Kahoohalahala , however, argues the Board's findings are clearly erroneous because "Dupree failed to adequately prove" Kahoohalahala resides on Maui. Kahoohalahala Br. at 23-28. Kahoohalahala's burden is a "heavy" one. *Keliipuleole*, 85 Haw. at 226, 941 P.2d at 309 (overcoming presumption of validity of agency actions is a "heavy burden of making a convincing showing"). He completely ignores the fact and consequences of his 2006 Lahaina registration. Nor does he point to a lack of evidence. He does not claim that evidence should have been excluded or that he was prevented from introducing evidence. *See, e.g., Carlsmith*, 113 Haw. at 223, 151 P.3d at 704 (finding of fact only clearly erroneous when the record is devoid of substantial evidence to support it). For example, he asserts that "much of the theories surrounding Kahoohalahala's residency stemmed from 'second hand information,'" but ignores the "general rule that is that hearsay evidence is admissible in agency proceedings." *Price*, 77 Haw. at 176 & n.8, 883 P.2d at 637 & n.8. He merely asserts the Board *weighed* the evidence wrongly. In those cases where there is evidence to support a finding, the reviewing court should defer to the agency which heard the witnesses and evaluated their demeanor, and reviewed the

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

evidence. *Igawa v. Koa House Rest.*, 97 Haw. 402, 410, 38 P.3d 570, 578 (2001) ("courts decline to consider the weight of the evidence to ascertain whether it weighs in favor of the administrative findings, or to review the agency's findings of fact by passing upon the credibility of witnesses or conflicts in testimony") (citations omitted)

Kahoohalahala asserts the "record establishes that when Kahoohalahala registered to vote in the Lanai precinct for the 2008 election, he had a fixed dwelling place on Lanai and whenever he was off island, he intended to return to Lanai." Kahoohalahala Br. at 25. Not exactly. In the affidavits he relied upon before the Board, he never used the terms "dwelling" or "habitation," and did not introduce any substantial evidence to show he lived on Lanai. Instead, he very carefully (these affidavits were executed under penalty of perjury, after all) either made conclusory statements, avoided the critical facts, or used other terms. For example, his affidavit asserted he was "born and raised on the island of Lana'i," R. at 38 (not disputed, but irrelevant.); that he "retained [his] residence on Lana'i except for a brief period in which [he] was in the service of the State," *id.* (ignoring his 2006 Lahaina residency registration); and that "he filed his affidavit of voter registration as a Lanai resident and voted in the primary election "'with the *belief and understanding* that [he is] a legal resident of Lana'i.'" Kahoohalahala Br. at 4 (quoting R. at 38) (emphasis added). The affidavit of his brother, Gaylien, merely restated the legal conclusion that Kahoohalahala was a Lanai "resident," but did not plainly state that he has a dwelling place there, or, in simpler terms, that he "lives on Lanai." Even if his claim that he has "resided [on Lanai] since the beginning of July, 2008," R. at 37, is accepted, the Board was required to apply the presumption in Haw. Admin. R. § 2-51-25(a)(2)(C) (2000), which provides that when a person "has more than one residence . . . [i]f a person has not physically resided at any one residence within the year immediately preceding the election, there shall be a rebuttable presumption that the residence in which the person has not resided is not the person's residence." The election was in November 2008, which means even if 100% of what Kahoohalahala claimed is accepted and all other evidence is disregarded, the burden shifted to Kahoohalahala to prove that Lahaina was not his residence. *Id.* § 2-51-25(c) ("For purposes of this section, a rebuttable presumption is a presumption considered true unless proven false by evidence to the contrary.").

"I have a *belief and understanding* that I am a legal Lanai resident" is a long way from Kahoohalahala's present claim that the evidence in the record before the Board showed he indisputably "had a fixed dwelling place on Lanai." Kahoohalahala Br. at 25 (emphasis added). In any event, even if there was *some* evidence of Kahoohalahala's presence on Lanai, the Board – and not an appellate

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

court – has the responsibility for evaluating its veracity and assigning it the appropriate weight. *Igawa*, 97 Haw. at 410, 38 P.3d at 578.

Kahoohalahala argues it is not relevant for purposes of establishing a dwelling, habitation, or physical presence on Lanai whether he owns a home or car or business there and has not been seen there with the possible exceptions of a few instances over the years. No single item is dispositive of course, but each certainly is relevant. Combine that with Kahoohalahala's 2006 Lahaina registration and his own witness testifying that he lives with his wife in Lahaina and works on Maui, and it cannot be said the Board was clearly erroneous when – after weighing that evidence, evaluating the credibility of witnesses, and taking into account Kahoohalahala's refusal to say where he lives – it found as a matter of fact that his physical presence is in Lahaina and not on Lanai. *See id.* The Clerk makes substantially the same challenges to the weight of the evidence as Kahoohalahala, *see* Clerk's Br. at 21-23, and those claims should be rejected on the same grounds.

4. Working For The State Did Not Maintain Lanai Residency After Kahoohalahala Registered As A Lahaina Resident

Kahoohalahala does not dispute he lives in Lahaina, and has for some time. Indeed, the sole witness called by Kahoohalahala testified he lives and works on Maui. Kahoohalahala has pointedly remained silent on the question of whether he has a fixed habitation, dwelling, or physical presence on Lanai, and his statements and those of his brother also carefully avoid simply saying he "lives at 444 Frasier Avenue, Lanai City, Hawaii." Rather, he argues that his 2006 Lahaina residency "was attributed to his employment with the State" and was irrelevant under section 11-13 because he works at Maui Community College, and his presence on Maui and absence from Lanai is "solely by reason of [being] employed in the service of . . . this State." Haw. Rev. Stat. § 11-13(5) (1993). His living in Lahaina, he argues, is irrelevant because he is working for the state, and therefore he is not subject to the requirement in section 11-13(4) of physical presence on Lanai when he attempted to register as a Lanai resident in 2008, since he was not "acquir[ing] a new residence." In essence, he argues his pre-2006 Lanai residency remains unbroken.

This argument might be more convincing had he not registered to vote in Lahaina, and thereby affirmed his "one residence" was Lahaina, that his fixed habitation was Lahaina, and that his physical presence was in Lahaina. Once he declared that he resided in Lahaina, any earlier Lanai residence was abandoned. It does not matter where he was born, where he was raised, or where or for whom he worked before or after registering as a resident of Lahaina. Indeed, if Kahoohalahala's argument that he never

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

legally left Lanai is accepted, two questions remain: (1) how could he have truthfully registered as a Lahaina resident in 2006 when section 11-23 provides a voter may have "only one residence," and (2) if he was "always" a Lanai resident, why did he attempt to change registration and re-register as a Lanai resident in 2008? *See* Haw. Rev. Stat. § 11-18 (1993) ("registered voter who changes residence from one precinct to another prior to any election shall notify the clerk and change the registration to the proper precinct by the appropriate registration deadline").

In sum, Kahoohalahala claims that he is entitled to register as a resident of Lanai while he continues to live in Lahaina because he has a Lanai state of mind. Kahoohalahala Br. at 24. But what Kahoohalahala fails to acknowledge is that in 2006 he had a self-proclaimed *Lahaina* state of mind.

B. "ANY REGISTERED VOTER" MAY CHALLENGE RESIDENCY "FOR ANY CAUSE," AND THE "PERSON RULED AGAINST" MAY APPEAL TO THE BOARD

1. Liberal Standing And Jurisdiction

Section 11-25(a) is a liberal grant of standing and jurisdiction, allowing "any registered voter" to institute a challenge. Once a challenge is received, the Clerk must notify the challenged voter and must conduct an investigation:

> **Challenge by voters; grounds; procedure.** (a) Challenging prior to election day. *Any registered voter* may challenge the right of a person to be or to remain registered as a voter *in any precinct for any cause* not previously decided by the board of registration or the supreme court in respect to the same person; provided that in an election of members of the board of trustees of the office of Hawaiian affairs the voter making the challenge must be registered to vote in that election. The challenge shall be in writing, setting forth the grounds upon which it is based, and be signed by the person making the challenge. The challenge shall be delivered to the clerk who shall forthwith serve notice thereof on the person challenged. *The clerk shall, as soon as possible, investigate and rule on the challenge.*

Haw. Rev. Stat. § 11-25(a) (1993) (emphasis added). *See also* Haw. Admin. R. § 2-51-40 (2000) (same). Dupree was among the twelve Lanai voters who challenged Kahoohalahala's residency. The Lanai voters were not represented by an attorney but their challenges made the necessary two points under section 11-25: (1) they are voters, and (2) Kahoohalahala is not a resident of Lanai. Specifically, Dupree's challenge stated:

> Sol is from Lanai and has family here *but he doesn't live here*. He doesn't own a home here. He doesn't own or manage a business, or work for a business on Lanai. he doesn't farm on Lanai. He hasn't campaigned on Lanai. He hasn't held a rally here on Lanai. He hasn't campaigned door to door. This is a small town and he is a prominent individual. *If he*

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

> *lived here we would see him shopping here, going to the post office, filling up his tank, commuting down to catch Expeditions [the Maui ferry], and we don't see him doing that.* He placed fourth out of five candidates in voting returns for Lanai residents.

R. at 1 (emphasis added).

2. The Clerk And The Board Understood Their Duties

The challenges were sufficiently specific and the Clerk understood what relief they requested. He correctly noted the challenges "[g]enerally . . . alleged that Kaho'ohalahala does not reside in the Lanai residency area." R. at 181. That is all section 11-25 required to give Dupree and the other Lanai voters standing, and to confer upon the Clerk jurisdiction to investigate and make a determination of Kahoohalahala's residency, which he did. Kahoohalahala cannot claim he did not have notice of the substance of the challenges since the Clerk understood what they sought and served notice on Kahoohalahala, requesting that he "respond to the challenge allegation, i.e. that [he] do[es] not reside at 444 Fraser Avenue." R. at 201. *See Perry v. Planning Comm'n*, 62 Haw. 666, 685, 619 P.2d 95, 108 (1980) ("Pleadings in administrative proceedings are not judged by the standards applied to an indictment at common law. It is sufficient if the respondent 'understood the issue' and 'was afforded full opportunity' to justify its conduct during the course of the litigation.") (quoting *Aloha Airlines, Inc. v. Civil Aeronautics Bd.*, 598 F.2d 250, 262 (D.C. Cir. 1979)).

After the Clerk ruled against the challengers, he notified them of his decision regarding "the voter registration status of Kahoohalahala," and informed them of their right to appeal to the Board pursuant to section 11-26(b). R. at 40-51. That statute confers standing on "the person ruled against," and gives the Board jurisdiction:

> **Appeal from ruling on challenge; or failure of clerk to act.**
> . . . .
>
> (b) *In cases where the clerk rules on a challenge, prior to election day,* or refuses to register an applicant, or refuses to change the register under section 11-22, *the person ruled against may appeal from the ruling to the board of registration of the person's county.* The appeal shall be brought within ten days of service of the adverse decision. Service of the decision shall be made personally or by registered mail, which shall be deemed complete upon deposit in the mails, postage prepaid, and addressed to the aggrieved person's last known address. If an appeal from a decision on a challenge prior to election day is brought, both the challenger and the challenged voter may be parties to the appeal.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

Haw. Rev. Stat. § 11-26(b) (1993) (emphasis added). Dupree timely filed an appeal, again without the assistance of an attorney. R. at 40, 52. Both Dupree and Kahoohalahala were parties to the appeal. *Id.*; Haw. Admin. R. § 2-51-42(e) (2000) ("If an appeal is brought, both the challenger and the challenged voter shall be parties to the appeal."). Dupree stated he was appealing the Clerk's determination of Kahoohalahala's registration:

> I ask that you please *uphold the challenge to Sol Kahoohalahala['s] true residency* and help the residents of Lanai to take a step forward and not allow this dishonest man to represent our island on the Maui County Council. *He misrepresent[ed] himself on his voter registration*, his nomination papers and his sworn affidavit. . . .

R. at 52, 54 (emphasis added). The notice of appeal provided notice to Kahoohalaha, the Clerk, and the Board that Dupree was asking the Board to review the Clerk's determination Kahoohalahala was a Lanai voter. *Perry*, 62 Haw. at 685, 619 P.2d at 108. "Thus, 'the question on review is not the adequacy of the . . . pleading but is the fairness of the whole procedure.'" *Id.* (citing *Aloha Airlines*, 598 F.2d at 262 (quoting 2 Kenneth C. Davis, *Administrative Law Treatise* § 8.04, at 525 (1958))). The Board's Findings of Fact and its Decision reflect it plainly understood the relief Dupree requested, and its own jurisdiction to determine Kahoohalahala illegally registered as a Lanai resident.

First, the Board found that "Mr. Phoenix Dupree . . . filed a challenge of Mr. Kaho'ohalahala's right to be or to remain registered as a voter of the Lanai District/Precinct 13/07." R. at 146 (App. 2) (Finding of Fact No. 3). The Board also found that "Mr. Dupree contends that while Mr. Kaho'ohalahala is from Lanai and has family on Lanai, he in fact is not a resident of Lanai." R. at 146 (App. 2 (Finding of Fact No. 4). These factual findings are not clearly erroneous because they are supported by evidence in the record, namely Dupree's filings with the Clerk and the Board. *See Keliipuleole v. Wilson*, 85 Haw. 217, 226, 941 P.2d 300, 309 (1997) (factual findings accepted unless clearly erroneous). Kahoohalahala incorrectly asserts "*[n]othing* in the record supports the Board." Kahoohalahala Br. at 22 (emphasis added). However, both Dupree's challenge (R. at 1), and his appeal (R. at 52) reflect that he had standing and sought the appropriate relief, even if he asked for additional relief. The Board's findings regarding the evidence in the Record is entitled to deference.

Second, regardless of what relief Dupree sought, the Board only ruled that Kahoohalahala is a Lahaina resident for purposes of voter registration. The key portion of the Board's decision which demonstrates it adhered to its jurisdiction is the first two paragraphs:

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

DECISION

> Based upon the foregoing findings of fact and conclusion of law, the Board sustains Mr. Dupree's appeal of the County Clerk's October 10, 2008, determination and the County Clerk's decision is hereby overruled. For purposes of this 2008 election, Mr. Kahoohalahala is a resident of Lahaina, Maui, Hawai'i.
>
> In the event of an appeal of this decision, Mr. Kahoohalahala shall be allowed to vote "provided that the ballot is placed in a sealed envelop to be later counter or rejected in accordance with the ruling on appeal." See Haw. Rev. Stat. § 11-25(c).

R. at 153. The second paragraph by which the Board sequestered Kahoohalahala's ballot – the remedy for an invalid registration under section 11-25 – reflects the Board did not, as Kahoohalahala and the Clerk claim, improperly decide whether Kahoohalahala was a qualified candidate, was validly elected, or is eligible to occupy the Lanai resident seat on the County Council pursuant to the Maui Charter. *See* Haw. Rev. Stat. § 11-25(c) (1993) ("If an appeal is taken to the board of registration, the challenged voter shall be allowed to vote; provided that ballot is placed in a sealed envelope to be later counted or rejected in accordance with the ruling on appeal.").

Kahoohalahala also asserts that the fact "[t]he Board's decision referred to the Maui County Charter in its conclusions of law" shows that the Board decided issues related to his election, candidacy, or qualifications. Kahoohalahala Br. at 22 (referring to Conclusion of Law 2 and 3, R. at 150). However, the Charter did not provide the rule of decision, the Board did not "base its decisions" on the Charter as Kahoohalahala claims. Kahoohalahala Br. at 22-23The Board's Charter citations are simply background. Kahoohalahala does not point to any place in the Board's Conclusions of Law or Decision where it applies the Charter to the facts of the case. The Board only sequestered Kahoohalahala's ballot, reflecting that it limited its ruling to the proper issue. Kahoohalahala makes a classic "straw man" argument: he claims the Board made decisions it did not make ("The Board acted outside its statutory authorization." Kahoohalahala Br. at 23), then asserts its decision was therefore wrong.

3. Challenger's Motive Irrelevant

Kahoohalahala and the Clerk, however, ignore what the Board actually did, and instead focus on the challengers' alleged intent. They assert all of the challenge letters "advanced a single claim: that Kahoohalahala was an ineligible candidate for the Lanai seat on the Maui County Council" and the

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

"entire proceeding was intended to disqualify Kahoohalahala's candidacy." Kahoohalahala Br. at 22. This argument fails for two reasons.

First, Kahoohalahala made – and lost – the same argument in his earlier mandamus action in the Supreme Court. *See Solomon P. Kahoohalahala v. Roy T. Hiraga, County Clerk, County of Maui*, No. 29415 (Haw., Oct. 21, 2008) (App. 4). Kahoohalahala asked the Supreme Court to command the Clerk vacate the October 10, 2008 ruling on the registration challenges. R. at 72-86. As in the present case, Kahoohalahala characterized the challenges as challenges to his candidacy, and argued the Clerk had no jurisdiction to decide that issue. Kahoohalahala claimed "[n]one of the complaint[s] in the Underlying Action challenge Petitioner's voter registration, but rather challenge the validity of his nomination papers or his right to be on the ballot on the general/second special election on November 4, 2008." R. at 76. The Supreme Court rejected the argument:

> The October 10, 2008 ruling [by the Clerk] *was not tantamount to a judgment in a primary election contest* given pursuant to HRS § 11-173-5(b) (1993), but was a ruling only on a challenge to nomination papers *and on a person's voter registration status*. Jurisdiction to render such ruling was with [the Clerk] pursuant to HRS §§ 12-8(b) (1993) and 11-25(a) (1993).

Kahoohalahala v. Hiraga, No. 29415 (Haw., Oct. 21, 2008) (emphasis added). Kahoohalahala is barred from relitigating the jurisdictional issue, which he already lost in the Supreme Court. *See Tortorello v. Tortorello*, 113 Haw. 432, 439, 153 P.3d 1117, 1124 (2007) ("res judicata, or claim preclusion, is a doctrine 'that limit[s] a litigant to one opportunity to litigate aspects of the case to prevent inconsistent results and a multiplicity of suite and to promote finality and judicial economy.'") (quoting *Bremer v. Weeks*, 104 Haw. 43, 53, 85 P.3d 150, 160 (2004)).

Second, a voter's motivation for bringing a challenge with the Clerk or taking an appeal to the Board is not relevant under sections 11-25 and 11-26. Neither the statutes nor the rules deprive a challenger of standing depending on her "intent." *See* Haw. Admin. R. § 2-51-41 (2000) ("a challenge may be brought *for any cause or upon any grounds* not previously decided by the board of registration or the supreme court in respect to the person challenged.") (emphasis added). A challenger's ultimate goal or reason for bringing the challenge is irrelevant. Nor is the "form or substance of the perfecting instrument" important, "but whether the instrument was filed in a genuine attempt to invoke appellate jurisdiction." *Walker v. Blue Water Garden Apartments*, 776 S.W.2d 578, 581 (Tex. 1989) (court concluded that party's affidavit was a "plain effort to invoke the jurisdiction of the county court and was

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

sufficient to do so" because it "alleges facts from which may readily be inferred the implicit conclusion" the party requested). This is so because it is the appellate reviewer – whether a court or a Board – which has the responsibility for determining whether it has subject matter, not the parties. "It is well-settled that *courts must determine as a threshold matter whether they have jurisdiction* to decide the issues presented." *Hawaii Medical Ass'n v. Hawaiii Medical Service Ass'n, Inc.*, 113 Haw. 77, 94, 148 P.3d 1179, 1196 (2006) (emphasis added). *See also Kernan v. Tanaka*, 75 Haw. 1, 15, 856 P.2d 1207, 1215 (1993) ("Preliminarily, we reiterate the well-settled principle that appellate courts have an *independent obligation to insure they have jurisdiction* to hear and determine each case.") (emphasis added). This independent obligation exists regardless of what words an appellant uses in her notice of appeal because ultimately, properly invoking appellate jurisdiction is a matter of procedure, not intent. *See, e.g., Hoopulapula v. Bd. of Land and Natural Resources*, 112 Haw. 28, 30, 143 P.3d 1230, 1241 (2006) (circuit court had appellate jurisdiction over agency decision under chapter 91 if agency held a contested case).

Dupree appealed to the Board *pro se*, and his notice of appeal should be construed "liberally and not technically" because Kahoohalahala had "fair notice," which he does not dispute. *See Perry*, 62 Haw. at 685, 619 P.2d at 108 ("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.' *That the same, if not more lenient standard, also governs administrative pleadings is indisputable.*") (emphasis added) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). *Cf. Au v. Au*, 63 Haw. 210, 221, 626 P.2d 173, 181 (1981) ("[T]he Rules of Civil Procedure were not meant to be a game of skill where one misstep by counsel would be decisive to the outcome."). This rationale is even more pronounced in residency challenges and Board appeals under sections 11-25 and 11-26. The legislature granted broad standing ("any registered voter," "the person ruled against"), established minimum notice requirements (challenge must be in writing, set forth the grounds on which it is based, and be signed) and charged the Clerk with an affirmative duty to investigate. These statutory elements reflect an intent to broaden citizen participation in questions of public importance, such as insuring claims of residence by voters are truthful. Consequently, the *pro se* "pleadings" in these cases should be construed as broadly as possible to effectuate that intent, and not in the narrow fashion Kahoohalahala and the Clerk advance.

Further, even if Dupree's "pleadings" – if narrowly construed – may have requested more relief from the Clerk or the Board than technically permitted – that did not divest him of standing, or the Clerk

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

or the Board of jurisdiction: he is a voter, he challenged Kahoohalahala's residency, and the Clerk and the Board both understood what they had the authority to determine, and did not go further. *See, e.g., County of Hawaii v. C & J Coupe Family Ltd. P'ship*, 119 Haw. 352, 374 n. 24, 198 P.3d 615, 637 n.24 (2008) (appellant sought "reversal" of judgment, but Supreme Court "vacated" judgment). While both Kahoohalahala and the Clerk assert the Board exceeded its authority by examining issues beyond whether Kahoohalahala is a Lahaina resident for voter registration purposes, neither points to anything in its Decision which shows the Board actually did so.

4. Residence "For Election Purposes" Includes Voter Registration

Both Kahoohalahala and the Clerk claim the Board's use of the phrases "for election purposes" and "for the purposes of this 2008 election," reveal the Board considered this an "election contest." Kahoohalahala Br. at 17; Clerk's Br. at 12-14. However, the Board's use of the word "election" did not transform its decision from one regarding Kahoohalahala's residency for registration purposes into a decision about an election contest. The language used by the Board is taken straight from the statute which Kahoohalahala and the Clerk agree is the governing standard for registration challenges regarding residency:

> For the purpose of this title, there can be only one residence for an individual, but in determining residency, a person may treat oneself separate from the person's spouse. The following rules shall determine residency *for election purposes* only:

Haw. Rev. Stat. § 11-13 (1993) (emphasis added). *See also* Haw. Admin. R. § 2-51-25(a) (2000) ("In addition to the rules for determining residency provided in HRS § 11-13, the following shall also be applicable in determining the residence of a person *for election purposes*[.]") (emphasis added). *See also Citizens for Equitable & Responsible Gov't v. County of Hawaii*, 108 Haw. 318, 324, 120 P.3d 217, 223 (2005) ("We observe further that the exclusion of identifiable nonresidents from the population base is consistent with the rules for determining 'residency' *for election purposes* under Hawaii's state election law, Hawaii Revised Statutes (HRS) chapter 11.") (emphasis added). Thus, it should be no surprise – and certainly it is not error – for the Board to reference the express language of statute which provides the standards for determining residency for registration purposes in its decision about a voter's residency for registration purposes.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=c0e4471c-1679-4f50-9a90-37405342bedf

IV.
CONCLUSION

The Board's Findings Of Fact are not clearly erroneous. The Board was entitled to weigh the evidence, measure the credibility of testimony and witnesses, and take into account Kahoohalahala's failure to testify, and its findings are entitled to deference. The Board correctly considered Kahoohalahala's 2006 Lahaina registration and evidence of his habitation, dwelling, and physical presence in Lahaina, and lack of the same on Lanai. Dupree had standing to challenge Kahoohalahala's registration, and to invoke the jurisdiction of the Board.

The November 1, 2008 Findings of Fact, Conclusions Of Law And Decision by the Board should be affirmed.

DATED: Honolulu, Hawaii, June 8, 2009.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT

KENNETH R. KUPCHAK
ROBERT H. THOMAS
CHRISTI-ANNE H. KUDO CHOCK

Attorneys for Appellant-Appellee
MICHAEL P. DUPREE