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IN THE SUPREME COURT OF THE STATE OF HAWAII

RICHARD NELSON III, KALIKO CHUN,
JAMES AKIONA, SR., SHERILYN ADAMS,
KELII IOANE, JR. and CHARLES AIPIA.

Plaintiffs-Appellees/Cross-Appellants-
Respondents,

vs.

HAWAIIAN HOMES COMMISSION, THE
DEPARTMENT OF HAWAIIAN HOME
LANDS, JOBIE MASAGATANI, in her
official capacity as Chair of the Hawaiian
Homes Commission, WILLIAM K.
RICHARDSON, MICHAEL P. KAHIKINA,
DOREEN NAPUA GOMES, GENE ROSS
DAVIS, WALLACE A. ISHIBASHI, DAVID
B. KAAPU and WREN WESCOATT, in their
official capacities as members of the Hawaiian
Homes Commission,

Defendants-Appellees/Cross-
Appellees-Petitioners

and

WESLEY MACHIDA, in his official capacity
as the State Director of Finance and the
STATE OF HAWAII,

Defendants-Appellants/Cross-
Appellees-Respondents.

CIVIL NO. 07-1-1663 (JHC)

**PETITION FOR TRANSFER OF
APPEAL FROM THE INTERMEDIATE
COURT OF APPEALS OF THE STATE
OF HAWAII TO THE SUPREME
COURT OF THE STATE OF HAWAII;
CERTIFICATE OF SERVICE**

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**PETITION FOR TRANSFER OF APPEAL FROM THE INTERMEDIATE
COURT OF APPEALS OF THE STATE OF HAWAI'I TO THE SUPREME
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CERTIFICATE OF SERVICE

**PETITION FOR TRANSFER OF APPEAL FROM THE INTERMEDIATE
COURT OF APPEALS OF THE STATE OF HAWAII TO
THE SUPREME COURT OF THE STATE OF HAWAII**

COME NOW, Defendants-Appellees/Cross-Appellees-Petitioners HAWAIIAN HOMES COMMISSION, THE DEPARTMENT OF HAWAIIAN HOME LANDS, JOBIE MASAGATANI, in her official capacity as Chair of the Hawaiian Homes Commission, WILLIAM K. RICHARDSON, MICHAEL P. KAHIKINA, DOREEN NAPUA GOMES, GENE ROSS DAVIS, WALLACE A. ISHIBASHI, DAVID B. KAAPU and WREN WESCOATT, in their official capacities as members of the Hawaiian Homes Commission (“Petitioners”) by and through their attorneys, WATANABE ING LLP, and hereby petition this Court for a transfer of the appeal currently before the Intermediate Court of Appeals of the State of Hawaii (“ICA”) in CAAP 16-0000496 (the “Appeal”) to be heard before the Supreme Court of Hawaii. This Petition is brought pursuant to Hawai’i Revised Statutes section 602-5 and Rule 40.2 of the Hawai’i Rules of Appellate Procedure.

I. STATEMENT OF PRIOR PROCEEDINGS

A. In 2007, Plaintiffs-Appellees/Cross-Appellants-Respondents RICHARD NELSON III, KALIKO CHUN, JAMES AKIONA, SR., SHERILYN ADAMS, KELII IOANE, JR. and CHARLES AIPIA (“Plaintiffs”) filed a complaint against Petitioners and Defendants-Appellants/Cross-Appellees-Respondents WESLEY MACHIDA, in his official capacity as the State Director of Finance and the STATE OF HAWAII (“State Defendants”) in the Circuit Court of the First Circuit of the State of Hawaii, in Civil No. 07-1-1663-08 (the “Trial Court Proceeding”). ICA 87 at PDF 498-99.

B. Summary judgment was granted in favor of Petitioners and State Defendants and against Plaintiffs. Plaintiffs appealed and this Court issued its decision in Nelson v. Hawaiian

Homes Commission, 127 Hawai'i 185, 277 P.3d 279 (2012) (“Nelson I”), ordering the Circuit Court to determine on remand, (a) whether the State Defendants violated their constitutional duty to provide sufficient sums to the Department of Hawaiian Home Lands (“DHHL”) for its administrative and operating budget, and (b) whether Petitioners breached their fiduciary duties by failing to seek from the legislature all of the funding to which the DHHL was constitutionally entitled. ICA 87 at PDF 499.

C. The matter proceeded to a non-jury trial before the Circuit Court from June 29, through July 9, 2015. ICA 87 at PDF 498-99. The Circuit Court concluded that counts 3 and 4 of the first amended complaint had been previously dismissed, leaving counts 1 and 2 for decision. ICA 87 at PDF 525.

D. On November 27, 2015, the Circuit Court issued its Findings of Fact, Conclusions of Law and Order (the “November 2015 Order”). ICA 87 at PDF 498.

E. The Circuit Court entered a final judgment on December 11, 2015. ICA 87 at PDF 540.

F. The State Defendants then moved for reconsideration (“Motion for Reconsideration”). ICA 87 at PDF 540.

G. The Circuit Court granted in part and denied in part the Motion for Reconsideration. ICA 91 at PDF 15.

H. The Circuit Court modified paragraphs 3 and 5 of the November 2015 Order and on March 8, 2015, entered its Order Amending Order Issued November 27, 2015 (“Amended Order”). ICA 91 at PDF 663.

I. The Circuit Court entered a First Amended Final Judgment on May 31, 2016 (the “Amended Judgment”) in favor of Plaintiffs and against the State Defendants on Count I and in favor of Plaintiffs and against Petitioners on Count 2. ICA 92 at PDF 683.

J. The State Defendants appealed from both judgments and all relevant orders. ICA 91 at PDF 538.

K. The Plaintiffs filed a limited cross-appeal from the March 2016 order granting the State Defendants motion for reconsideration in part and denying it in part. ICA 91 at PDF 676.

L. Plaintiffs filed their opening brief on November 2, 2016.

M. The State Defendants filed their opening brief on November 17, 2016.

N. Petitioners filed their Answering Brief on January 26, 2017.

O. Plaintiffs filed their Answering Brief on January 26, 2017.

II. STATEMENT OF FACTS

As stated in Nelson I, the Hawaiian Homes Commission Act of 1921 (“HHCA”) was enacted to set aside 203,500 acres of ceded lands to serve as homesteads for native Hawaiians. “One purpose of the HCCA was to ‘save’ the native Hawaiian race by ‘tak[ing] [native Hawaiians] back to the lands and giv[ing] them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.’” Nelson I, 127 Hawai’i at 188, 277 P.3d at 282. As a condition to its admission to the union, the federal government conveyed the 203,500 acres of ceded lands to the State of Hawaii and required the State to adopt the HHCA as part of its constitution. Nelson I, 127 Hawai’i at 189, 277 P.3d at 283. In doing so, the State became responsible for the administration of the ceded lands for the benefit of the native Hawaiian people. To this end, Article XII, Section 1 of the Constitution of the State of Hawai’i, as amended in 1979 following the 1978 Constitutional Convention, provides in relevant part that

“[t]he legislature shall make sufficient sums available for . . . the administration and operating budget of the department of Hawaiian home lands . . .” Haw. Const. Art. XII § 1.

As determined by the Circuit Court, the State Legislature has since 1978, consistently failed to allocate sufficient funds for the administration and operation of the DHHL. ICA 87 at 513. Meanwhile, DHHL’s administrative and operating expenses, which “include recurring costs of operating, supporting and maintaining authorized programs, including costs for personnel salaries and wages, employee fringe benefits, lease payments, supplies, materials, equipment, motor vehicles, rent, building expenses, utilities, communications, advertising, general office expenses, travel, insurance, legal fees, consultants and other professional fees, and repair and maintenance,” have only increased since 1978. ICA 87 at PDF 508.

The Circuit Court found in particular that “DHHL suffers from a lack of funding and staffing, which adversely affects beneficiaries of the Hawaiian Home Lands Trust” and “[i]f DHHL received sufficient general funds for its administrative and operating expenses from the State, DHHL would be able to use its special funds and trust funds to provide financial assistance to low-income beneficiaries to help them acquire homestead lots.” ICA 87 at PDF 509. It found that the “DHHL has had to rely on its own funds to pay for its administrative and operating expenses,” and that “[t]he use of special funds and trust funds to cover DHHL’s administrative and operating costs results in less money available to DHHL for land development, loans and other activities that assist the beneficiaries of the Hawaiian Home Lands Trust.” ICA 87 at PDF 517.

III. POINTS OF ERROR

The State Defendants have identified generally three points of error as stated in their Opening Brief filed herein on November 17, 2016 (“State Defendants’ Opening Brief”). Said points of error can be summarized as follows:

1. The Circuit Court erred in its construction of Article XII, section 1 of the Hawai’i Constitution. In particular, the State Defendants argue that the Circuit Court’s construction of the term “administration and operating budget” as including “all of DHHL’s administrative and operating expenses, including ‘actual administrative and operating expenses,’ ‘programmatic costs,’ and ‘operating costs’ as that term is defined in section 37-62, Hawai’i Revised Statutes” was erroneous “because annually DHHL prepares at least two, and arguably as many as six budgets (one for each of its funding sources).” State Defendants’ Opening Brief at 12. The State Defendants also argue that the Circuit Court erred in concluding that “all of DHHL’s administration and operating budget must be funded by general funds” inasmuch as there may be federal funds available and DHHL has authority to pay particular operating expenses “with funds other than receipts from DHHL’s general leasing and other dispositions of ‘available land’”. Id. Finally, the State Defendants took exception to the Circuit Court’s conclusion that “DHHL Defendants have the first and last word as to which expenses and how much funding is needed for its annual administrative and operating expenses, and neither the director of finance, governor, nor the legislature may reduce or eliminate an expense DHHL includes in its administration and operating budget.” Id.

2. The State Defendants argue that “[t]he circuit court erred in finding and concluding and declaring that the State of Hawai’i failed to provide sufficient funds to DHHL for its administrative and operating budget, and rejecting State Defendants’ position that article XII,

section 1 of the Hawai'i Constitution only requires funding for DHHL's administration and operating budget of \$1.3-\$1.6 million (the 1978 Baseline)." Id. at 13.

3. The State Defendants argue that "[t]he circuit court erred in concluding that injunctive relief in favor of Plaintiffs and against State Defendants, particularly the legislature, is appropriate, and enjoining the State Defendants,' particularly the legislature, from violating their constitutional duties and trust responsibilities." Id.

The Plaintiffs raised only one point of error in their Opening Brief filed herein on November 2, 2016 ("Plaintiffs' Opening Brief"): that the Circuit Court erred in granting in part the State Defendants' motion for reconsideration inasmuch as the Circuit Court amended paragraphs 3 and 5 of its November 27, 2015 Order. Plaintiffs argue that the State Defendants should have addressed these issues earlier and in failing to do so, waived them.

Because the State Defendants articulation of the issues on appeal was confusing, Petitioners submitted a Counter Statement of Points on Appeal which states as follows:

- (1) Did the Circuit Court err in determining that "sufficient sum" for DHHL's FY 2016 administrative and operating budget was more than \$28 million?
- (2) Did the Circuit Court err in ordering the State Defendants-Appellants to fulfill their constitutional obligations under Article XII, section 1 of the Hawaii State Constitution to provide DHHL with "sufficient sums" for its FY 2016 administrative and operating budget?

Plaintiffs' Answering Brief basically made three arguments in response to the State Defendants Opening Brief:

- (1) Substantial evidence supports the Circuit Court’s conclusion that DHHL needed more than \$28 million in Fiscal Year 2016 for its administrative and operating budget.
- (2) The Court’s Order does not violate the separation of powers doctrine.
- (3) \$1.6 million (plus inflation) is not sufficient funding for DHHL.

(3) BASIS FOR TRANSFER

A. MANDATORY TRANSFER UNDER HRS § 602-58(a)

Hawai’i Revised Statutes section 602-58(a) states that “[t]he supreme court . . . shall grant an application to transfer any case within the jurisdiction of the intermediate appellate court to the supreme court upon the grounds that the case involves . . . [a] question of imperative or fundamental public importance . . .” Haw. Rev. Stat. § 602-58(a). Section 602-58 does not define “imperative or fundamental public importance,” but cases in which applications for mandatory transfer on this basis have been granted, are illustrative. See Dannenberg v. State County of Kaua’i, 139 Hawai’i 39, 383 P.3d 1177 (Hawaii 2016)(transfer granted in class action case involving health benefits provided to State and county employees); State v. Bortel, 129 Hawai’i 153, 296 P.3d 366 (Hawaii 2013)(unpublished)(mandatory transfer granted on basis that question of whether charge for excessive speeding must set forth state of mind requirements implicated a question of fundamental public importance); Dep’t. of Environmental Services, City and County of Honolulu v. Land Use Com’n, State of Hawaii, 127 Hawai’i 5, 275 P.3d 809 (Hawaii 2012)(mandatory transfer granted on basis that Land Use Commission’s limitation in granting special use permit for landfill was a matter of fundamental public importance); Hawaii State Teachers Ass’n v. Abercrombie, 126 Hawai’i 318, 271 P.3d 613 (Hawaii 2012)(transfer granted where dispute concerning whether state constitutional provision granting public

employees right to unionize permitted Governor to unilaterally impose furloughs was deemed matter of fundamental public importance); Sierra Club v. Dep't of Transportation of the State of Hawaii, 120 Hawai'i 181, 202 P.3d 1226 (Hawaii 2009)(mandatory transfer granted in case involving question of whether environmental assessment was needed for harbor improvements needed to facilitate inter-island ferry project); Nuuanu Valley Ass'n v. City and County of Honolulu, 119 Hawai'i 90, 194 P.3d 531 (Hawaii 2008)(mandatory transfer granted in matter involving Uniform Information Practices Act and Hawaii Environmental Policy Act action against city regarding proposed residential development).

As stated above, the present case is rooted in the set-aside of 203,500 acres of ceded lands to be used as homesteads for the benefit of the native Hawaiian people. Statehood was conditioned in part on the State of Hawaii accepting responsibility for the management of these lands for this purpose, and to that end, the DHHL was formed. The people of this State deemed the function of the DHHL important enough to warrant a constitutional amendment in 1978, mandating that the State Legislature allocate sufficient funds for the administration and operation of the DHHL.

The issues raised and argued in the opening brief, plaintiff's answering brief and petitioners answering brief are matters of fundamental public importance. In summary, the issues relate to what is "sufficient sums" for the Department of Hawaiian Home Lands administrative and operating budget as those words are used in Article XII section 1 of the Hawaii State Constitution, whether the State has fulfilled its constitutional duty set forth in Article XII section 1 to provide sufficient sums to the Department of Hawaiian Homelands for its administrative and operating budget and whether the courts have the power to compel the State of Hawaii to provide sufficient sums to DHHL for its administrative and operating budget.

The State defendants argument that sufficient sum for DHHL's administrative and operating budget is only \$1.3-\$1.6 million adjusted for inflation is contrasted by the court's finding of fact that the sufficient sum was more than \$28 million shows the financial magnitude of the issue. These monies of course are from the State's coffers. The amount of the monetary discrepancy between what the State's defendants believe is a sufficient sum and what the court found to be a sufficient sum alone justifies a determination that this is a matter of fundamental public importance.

Since it is uncontroverted that the State did not provide more than \$28 million for DHHL's administrative and operating budget for fiscal year 2016, the determination of whether the State has complied with its constitutional duty to provide sufficient sums to DHHL for its administrative and operating budget is a matter of fundamental public importance.

Whether the court has the power to compel the State to provide sufficient sums to DHHL for its administrative and operating budget also is a matter of fundamental importance as it addresses the relationship of a duty imposed by the Constitution of the State of Hawaii, the court's ability to determine whether the State has fulfilled its duty and whether the court have the power to compel the State to fulfill its constitutional duty.

B. DISCRETIONARY TRANSFER UNDER HRS § 602-58(b)

While petitioner believes that the issues involved in the appeal of this matter meet the requirements for mandatory transfer under HRS section 602-58 (a), the issues in this case also qualify for a discretionary transfer under HRS section 602-58 (b) which provides that "the Supreme Court... may grant an application to transfer any case within the jurisdiction of the intermediate appellate court to the Supreme Court upon the grounds that the case involves... a question of first impression or a novel legal question..." HRS section 602-58(b).

While this court in Nelson 1 determined that what is a “sufficient sum” as those words are used in Article XII section 1 of the Hawaii State Constitution is justiciable it did not give guidance on the issues raised in the appeal from the circuit courts findings of fact, conclusions of law and order. The meaning of sufficient sums as those words are used in Article XII section 1 of the Hawaii State Constitution, whether the State provided sufficient sums to DHHL for its administrative and operating expenses and whether the court has the power to compel the State to fulfill its constitutional duty to provide sufficient sums to DHHL for its administrative and operating budget are all “novel legal questions”.

DATED: Honolulu, Hawaii, February 9, 2017.

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CERTIFICATE OF SERVICE

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I hereby certify that, on this date a true and correct copy of the foregoing was duly served electronically through CM/ECF upon the following parties:

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