

DISSENTING OPINION OF ACOBA, J.

I agree with the determination of the Circuit Court of the Third Circuit (the court) that the subject Charter Amendment (Amendment) should be prospectively applied with the first term of the four-term limit to begin following the election subsequent to the adoption of the Amendment. Term limits provisions not in existence but only ratified by voters in the same general election in which incumbents are elected should apply to the next election cycle. To hold otherwise wrongfully gives the term limits provision retrospective effect. See Taniguchi v. Ass'n of Apt. Owners of King Manor, Inc., 114 Hawai'i 37, 48, 155 P.3d 1138, 1149 (2007) (holding that "all statutes are to be construed as having only a prospective operation unless the purpose and intention of the legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used" (internal quotation marks and citations omitted)). Inasmuch as the majority holds otherwise, I respectfully dissent.

I.

A.

Defendant-Appellee James Arakaki (Arakaki) served consecutive terms on the Hawai'i County Council in 1992-1994 and 1994-1996.

On January 25, 1995, the Hawai'i County Council adopted Ordinance 95-20 entitled, "An Ordinance to Initiate a Charter Amendment to Section 3-2, Article III of the Hawai'i County

Charter Relating to Composition and Terms of the Hawai'i County Council." The proposed Amendment, with the material to be added underscored, read:

Section 3-2. Composition and Terms. There shall be a county council composed of nine members. One member shall be elected from each of nine districts. The terms of the council members shall be two years and shall begin at twelve o'clock meridian on the first Monday of December after their election. The terms of the council members shall not exceed four consecutive two year terms. Candidates shall be nominated and elected in accordance with the election laws of the state.

According to the majority, Arakaki filed his nomination papers on July 23, 1996, prior to the nomination filing deadline to run for the 1996-1998 term.<sup>1</sup> The Hawai'i County Council general election was on November 5, 1996.

The proposed Amendment was apparently placed on the ballot on November 5, 1996. On November 5, 1996, Arakaki was re-elected to serve a two-year term on the Hawai'i County Council, commencing on the first Monday of December 1996. On this same date, the proposed Amendment was approved by the voters.

On November 25, 1996, the Hawai'i County Clerk certified the results of the vote on the Amendment. Pursuant to the 1996 election, Arakaki served a term from 1996-1998.

On July 22, 1998, the Hawai'i County Council adopted Ordinance 98-78, which declared that the Amendment had previously become effective at "twelve o'clock meridian on the first Monday of December, 1996," i.e., at the commencement of terms of persons

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<sup>1</sup> None of the parties state the exact date on which Arakaki filed his nomination papers to run in the 1996 election. However, in the Stipulation of Facts filed in the court, they agreed that it was before the filing deadline.

elected in same November 5, 1996 election in which the Amendment had been voted on. (Emphasis added.)

Arakaki was subsequently re-elected to serve two-year terms for 1998-2000, 2000-2002, and 2002-2004. On July 19, 2004, Arakaki filed papers to run for the Hawai'i County Council 2004-2006 term, which started on December 6, 2004.

On July 27, 2004, Plaintiffs-Appellants Edward Clark, Ollie Fulks, and Matthew Binder [collectively, Appellants] filed a Complaint for Declaratory Judgment and Other Relief (Complaint), contesting Arakaki's eligibility as a candidate in the 2004 election. They claimed that Arakaki had "served at least four (4) consecutive terms as a member of the Hawai'i County Council, since December of 1996, and is thereby barred from seeking re-election and/or from serving on the Hawai'i County Council." (Emphasis added.) Under this claim, Arakaki's election for the 2004-2006 term would be his fifth consecutive term and, thus, prohibited under the Amendment.

The court identified three possible applications of the Amendment:

1. The Amendment was immediately effective upon its adoption<sup>2</sup> so as to preclude anyone who had already served four consecutive terms from office. If a fourth consecutive term was

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<sup>2</sup> Although the court did not state explicitly when it concluded that the Amendment had been adopted, it appears that the court considered November 5, 1996 to be the date of adoption, based on its oral ruling that it agreed that the Amendment "became effective when it was adopted on [sic] the general election."

served as a result of the 1996 election, that individual was precluded from serving any more terms.

2. If an incumbent was first elected in 1994, the 1994-1996 term was considered the first term. If elected for the first time during the same election as the 1996 Charter Amendment, the 1996 election would be the first term.

3. The first term under the Amendment would begin in the election following 1996, held in 1998, without respect to how many terms had been previously served.

The court concluded that the third option, which was also the construction given the Amendment by Arakaki and Defendant-Appellee County of Hawai'i (County) [collectively, Appellees], was the correct interpretation. The court concluded that:

[I]n viewing all of these [options] and balancing these conflicting interests[, it] would find that the most consistent reading of the term limits would require that the [third] alternative, i.e., that the first term to be counted against . . . a four-term limit [would] begin[] in 1998[,] would best serve the interests of those-those competing interests that [the court] indicated [above].

(Emphasis added.) Thus, the court concluded that the Amendment was "prospective and only went into effect in 1998." (Emphasis added.) Relatedly, in its November 10, 2004 "Final Judgment and Order Regarding Plaintiff's [sic] Motion for Summary Judgment," the court explained that

[t]o apply the [Amendment] to the election of 1996 council members raises issues of retroactive application. The [Amendment] contained no express provision as to its operative date and as such[,]. . . as a matter of law . . .

the [Amendment] shall be prospectively applied with the operative election being the 1998 election.

(Emphasis added.)

B.

However, the majority believes the term beginning in December 1996 resulting from the 1996 election should be the first term to count towards the four-term limit. Majority opinion at 23 (holding that "the Amendment became effective on November 25, 1996," the date upon which it was "'ratified' by a majority of the electors voting on the amendment'" (citing Hawai'i Revised Statutes (HRS) §§ 50-11 (Supp. 1996), 11-155 to -156). With all due respect, I believe, as the court had concluded, that the Amendment must be prospectively applied. Logically, that would mean the Amendment must apply to persons elected after its adoption, i.e., effective with the December 1998 term following the 1996 adoption of the Amendment and not, as the majority would hold, persons elected contemporaneously with the 1996 Amendment.

II.

First, in my view, the Amendment must be applied prospectively beginning with the 1998-2000 term because pursuant to HRS § 1-3 (Supp. 1996), "[n]o law has any retrospective operation, unless otherwise expressed or obviously intended." This court has defined what is "prospective" and "retrospective" law. In Taniguchi, "prospective" is defined as "effective or operative in the future." 114 Hawai'i at 47, 155 P.3d at 1148

(internal quotation marks, citation and brackets omitted). On the other hand, "retrospective" or "retroactive" is defined as "extending in scope or effect to matters that have occurred in the past." Id. (internal quotation marks and citation omitted).

"When interpreting a municipal ordinance, we apply the same rules of construction that we apply to statutes." Weinberg v. City & County of Honolulu, 82 Hawai'i 317, 322, 922 P.2d 371, 376 (1996) (quoting Bishop Square Assocs. v. City & County of Honolulu, 76 Hawai'i 232, 234, 873 P.2d 770, 772 (1994)) (internal quotation marks omitted). It is "well settled that all statutes are to be construed as having only a prospective operation unless the purpose and intention of the legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used." Taniguchi, 114 Hawai'i at 48, 155 P.3d at 1149 (emphasis added) (internal quotation marks and citations omitted). This court has concluded that "[t]he common law rule disfavors retroactive application of laws. This rule is codified in HRS § 1-3 (1993), which provides that '[n]o law has any retrospective operation, unless otherwise expressed or obviously intended.'" Id. (quoting In re Medeiros Testamentary Trust & Life Ins. Trust, 105 Hawai'i 284, 293, 96 P.3d 1098, 1107 (2004)); see also Graham Constr. Supply Inc. v. Schrader, 63 Haw. 540, 546, 632 P.2d 649, 653 (1981).

In the instant case, the Amendment did not on its face "expressly declare or necessarily imply a retrospective

operation." Taniquchi, 114 Hawai'i at 48, 155 P.3d at 1149 (quoting Robinson v. Bailey 28 Haw. 462, 464 (1925)) (internal quotation marks, brackets, and citation omitted). The "Public Notice of Proposed Amendments to the Hawai'i County Charter" did not expressly contain an effective date of the Amendment.<sup>3</sup> Similarly, as the County argued, "[n]either does the legislative history of that ordinance [95-20] reflect any discussion concerning when the proposed [Amendment] would take effect or when it would become operative." The County further asserted that the "official explanation to voters [of the amendment] in the November 5, 1996 election failed to mention any date upon which the [Amendment] would take operative effect," except it

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<sup>3</sup> The Public Notice contained the following explanations of the proposed Amendment, stating in relevant part:

DIGEST OF PROPOSAL 1[:]

This proposal would limit the term of council members so that no council member may be elected for more than four consecutive two year terms. If this proposal is passed, a council member may only be elected for four straight terms, thus serving a total of eight years in a row. A council member may be elected for more than four terms as long as the terms are not consecutive.

BALLOT QUESTION 1[:]

Council Terms. Should the term of council members be limited so that their terms may not exceed four consecutive two year terms?

PRESENT PROVISION:

Presently Section 3-2 of the Hawai'i County Charter provides that council members are elected for two year terms with no limit on the number of terms that a council member may serve.

PROPOSED AMENDMENT:

If approved, the County Charter would be amended to provide that the term of a council member will be limited to four consecutive two year terms or a total of eight years in a row. This amendment does not prevent a member from serving more than four terms as long as the terms are not consecutive.

indicated the Amendment would be effective in the future. See also Appendix C to County's Answering Brief, entitled "Public Notice of Proposed Amendments" (noting that under the "Proposed Amendment" section of Proposal 1, if the Amendment is approved, the "term of a council member will be limited"). "Will" is listed as "a future-tense verb [of shall]." Black's Law Dictionary 1407 (8th ed. 2004) (emphasis added). "Shall" is defined as "[h]as a duty to; more broadly, is required to. . . . This is the mandatory sense that drafters typically intend and that courts typically uphold." Id. The language of the public notice and the absence of an effective date precluded retrospective application of the Amendment to include Arakaki's 1996 election in counting four consecutive terms.

III.

Because there was no evidence of an intent to give the Amendment retrospective effect, the court correctly concluded that it must be prospectively applied. Prospective application of the Amendment meant it would apply to the 1998-2000 term, -- i.e., to those elected in the election following the 1996 election in which the Amendment was adopted -- not to those elected in the same 1996 election. Holding otherwise gives the Amendment retrospective effect because it "extend[s the Amendment] in scope or effect to matters[, i.e., the election process for the 1996-1998 term,] that . . . occurred in the past."

IV.

Accordingly, whether the Amendment became effective on November 5, 1996, the date of the election, or on November 25, 1996, the date of ratification, it could not justifiably cover Arakaki's election because his election process began before the Amendment was voted on. Thus, during the period of Arakaki's candidacy, there was no term limits provision in effect for members of the Hawai'i County Council, none of the candidates were subject to such a provision, and the electorate was not informed that candidates in the 1996 election would be governed by that provision. Until the election was had on November 5, 1996 and/or certified on November 25, 1996, it was pure speculation as to whether the voters would approve the Amendment and, hence, whether term limits would ever apply to restrict eligibility for those offices up for election in 1996.

Consequently, the majority incorrectly dismisses Arakaki's contention that the Amendment should not apply to his 1996-1998 term because it "was not part of the 'election laws of the state' when [he] filed his nomination papers for the council seat in 1996." The Amendment was not the law in effect when Arakaki filed his nomination papers, campaigned for office, submitted himself to the voters for consideration of the 1996-1998 term, and was voted into office. Hence, applying the Amendment to his 1996 election would, in fact, give the Amendment retrospective effect. On this ground, Arakaki's position is decisive.

The majority posits that its application of the Amendment to the 1996 term "does not implicate the nomination process prior to the 1996 election or the 1996 election results."<sup>4</sup> Majority opinion at 26 n.9. To the contrary, the majority's approach manifestly implicates the 1996 nomination process and elections results inasmuch as it directly subjected the candidates who ran in the 1996 election to term limits conditions not in place at the time of the election process. To assert otherwise flies in the face of the nomination, campaign, and election process which preceded adoption of the Amendment. Hence, the majority gives the Amendment the force and effect of law retrospectively to "matters that . . . occurred in the past." Taniguchi, 114 Hawai'i at 48, 155 P.3d at 1149.

In other words, at the time candidates wishing to serve on the Hawai'i County Council for the 1996-1998 term had to file their nomination papers, there were no eligibility restrictions based on the number of consecutive terms a candidate had already served or on election to the 1996-1998 term. The Amendment imposing such term limits was not adopted until, at the earliest,

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<sup>4</sup> The majority attempts to bolster this position by arguing that Arakaki was aware that his eligibility for office could be impacted as a result of the 1996 election because "[he] was an elected member of the Hawai'i County Council at all times relevant to this case" who "participated in all three readings of [the Amendment]" such that "[he] knew (1) of [the Amendment's] existence, (2) that it would be submitted to the county electorate for its approval in the 1996 election, and, (3) if approved by the county electorate and the results certified by the county clerk, that it would be effective on the date of its certification." Majority opinion at 26 n.9.

Respectfully, Arakaki's knowledge is not material to this appeal. Even assuming that he was aware of the proposed Amendment and that it would be submitted to the county electorate in the 1996 election, he had no way of knowing whether it would be approved or if the results would be certified.

the close of polls on November 5, 1996, or on November 25, the date of ratification. See discussion infra. Thus, if the Amendment is applied to the 1996-1998 term, its effect extends back to the nomination filing, ostensibly July 23, 1996, despite the fact that the 1996-1998 term did not begin until the first Monday of December after the election. Plainly, that would be an improper retroactive application of the Amendment, affecting the candidates and the electorate without any prior notice that the 1996 term was in fact subject to such a limitation.

Additionally, the position advocated by the majority creates uncertainty in the electoral process that could have a chilling effect on candidates' decisions to run for office. Allowing restrictions that were not in effect before or throughout the entire election process for the 1996-1998 term to be applied to service of that term simply because the restriction was deemed adopted before the term of office started (but not before the election for that term) violates legal principles disfavoring retroactive application. The approach adopted by the majority could inhibit vigorous political participation in the future and places similar elections under a cloud of uncertainty.<sup>5</sup>

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<sup>5</sup> If a potential candidate is aware that an amendment has been proposed, which, if passed, would render him or her ineligible to hold office, that person may be reluctant to compete for that office. That, in turn, would unduly infringe on the constitutional right to vote for the candidate of one's choice. Hayes v. Gill, 52 Haw. 251, 267, 473 P.2d 872, 882 (1970) ("The right to run for elective office and right to vote for candidates running for such office uphold a fundamental principle of our representative democracy which is, in Alexander Hamilton's words, quoted by Mr. Chief Justice Warren, 'that the people should choose whom they please to govern them.'" (Quoting Powell (continued...))

V.

Second, I believe the Amendment could not be enforced as of November 5, 1996, the date of the election, because the vote had yet to be certified. The majority apparently agrees. Majority opinion at 23 (citing HRS § 50-11,<sup>6</sup> to the effect that the Amendment "became effective on November 25, 1996, which is the day that the Amendment was 'ratified' by a 'majority of the electors voting on the amendment'"). According to the majority, ratification is defined as "an 'adoption or enactment, [especially] where the act is the last in a series of necessary steps or consents. In this sense, ratification' includes 'a formal approval of a constitutional amendment.'" Id. at 20 (quoting Black's Law Dictionary at 1289) (emphases added) (brackets and ellipses omitted). Applying this definition to the facts here, the majority agrees "the last in a series of necessary steps," id., and the "formal approval" was the certification by the Hawai'i County Clerk and State Chief Elections Officer on November 25, 1996, that a "majority of the

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<sup>5</sup>(...continued)  
v. McCormack, 395 U.S. 486, 547 (1969).)).

<sup>6</sup> HRS § 50-11 reads:

Every charter established under this chapter shall provide means by which the charter may be amended or revised. The provisions for amendment and revision must provide for approval of all amendments and revisions by referendum to the electors of the county. The amendment or revision shall be considered ratified if a majority of the electors voting on the amendment or revision cast their ballots in favor of adoption.

(Emphasis added.) This statute was cited only by the majority. Neither party cited this statute in their briefs.

electors voting on the amendment . . . cast their ballots in favor of adoption." HRS § 50-11.

A.

1.

The majority, like Appellants, relies on this court's conclusion in In re Marques, 37 Haw. 260, 268 (1945), that "an Act of the legislature" with "no implication or expression therein that the Act itself should be postponed, . . . takes effect upon approval[.]" Majority opinion at 22 (quoting In re Marques, 37 Haw. at 268). Based on In re Marques, Appellants argue that the Amendment was effective on the date of approval by voters at the November 5, 1996 general election, stating, "It is the black-letter law that amendments to charters 'take effect from the date of their approval by the people.'" (Quoting 2A Eugene McQuillin, The Law of Municipal Corporations, § 9:30 (3d ed. 2006).) Appellants further assert that "[a] presumption arises that an amendment is effective on the date of the vote." (Citing Druggan v. Anderson, 269 U.S. 36, 39 (1925).)<sup>7</sup> However, the effective date of the amendment says nothing about whether the effect given the amendment would be retrospective or not in any given case.

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<sup>7</sup> Arakaki and the County did not directly address this argument, but instead, contend that the Amendment itself was void due to the lack of an effective date. However, insofar as this argument is premised on Hawai'i County Charter §15-3, which applies only to amendments proposed pursuant to a mandatory charter review, this argument cannot be supported.

Furthermore, In re Marques did not concern the retroactive application of a statute. The Act being construed in that case had an effective date of June 1, 1939, which was expressly or impliedly applicable to only some of the provisions. In re Marques, 37 Haw. at 267-68 (footnotes omitted). The other provisions had no express effective date. Id. at 268. This court held that the provisions which were expressly or impliedly delayed would go into effect on June 1, 1939, and the other provisions would become effective when the governor signed the Act. Id. It is manifest that In re Marques is distinguishable. In that case the governor's signature was not subject to a certification requirement, the law-adoption process being distinctly dissimilar between a law adopted by the legislature and one adopted directly by the people and in In re Marques the question of retroactive application was not in issue.

2.

Moreover, HRS § 50-11 only indicates that "if a majority of the electors . . . cast their ballots in favor," then by a vote of the majority the amendment is adopted. The provision does not indicate when the amendment is to become effective. The term "if" is defined as, inter alia, "in the event that," or "on the condition that." Merriam Webster's Collegiate Dictionary 576 (10th ed. 1994). Accordingly, giving "if" its ordinary meaning, the relevant portion of HRS § 50-11 reads in effect that "[t]he amendment or revision shall be

considered ratified [in the event that] a majority of the electors voting on the amendment or revision cast their ballots in favor of adoption." Ratification or "formal approval" in the statute does not refer to when the Amendment became effective, but under what circumstances, i.e., a majority vote, the council's proposal can be considered adopted by the people. Consequently, only "in the event that" a majority of the electors vote in favor of the proposition, would the Amendment proposal pass under HRS § 50-11.

B.

In that connection then, the majority also apparently agrees that it was not until the results of the election were certified that the Amendment became official. This is manifest from the statutorily mandated text of the certification itself. Pursuant to HRS § 11-156 (1993),<sup>8</sup>

The . . . county clerk in county elections shall issue certificates of results where a question has been voted upon. . . . The certificate of election shall be substantially in the following form:

. . . . .

CERTIFICATE OF RESULTS

I, . . . . ., chief election officer (county clerk) of Hawai'i (county), do hereby certify that . . . . . (question) was on the . . . . . day of . . . . . 19. . . . ., duly adopted (rejected) by a majority of the votes cast.

. . . . .  
Chief Election Officer (County Clerk)

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<sup>8</sup> HRS § 11-156 is applicable to the election at issue here pursuant to Hawai'i County Charter § 13-27 (1991), entitled "County Election," which provides, in pertinent part, that "[c]ounty elections shall be conducted in accordance with the election laws of the state insofar as applicable."

(Emphases added.) The word "shall" is generally interpreted as a command, rather than a suggestion or direction.

As used in statutes, contracts, or the like, [shall] is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means "must" and is inconsistent with a concept of discretion.

Leslie v. Bd. of Appeals of County of Hawaii, 109 Hawai'i 384, 393, 126 P.3d 1071, 1080 (2006) (quoting Black's Law Dictionary 1375 (6th ed. 1990)) (emphasis omitted). Accordingly, HRS § 11-156 mandates that, after the election, the county clerk is required to certify the results of the vote on a charter amendment. Until the Certificate of Results is issued, the effect of such amendment is not established. Consequently, in the instant case, where the results of the election were not certified until November 25, 1996, it cannot be concluded that the Amendment adopting term limits for members of the County Council although voted on on November 5, 1996, applied to those elected to office on the same date, November 5, 1996, as of that date.

Similarly, regarding elections, the Hawai'i Legislature recognizes that an election is not complete and candidates for public office are not officially declared as being elected until the results of an election are certified. Cf. Rose v. Trask, 27 Haw. 596, 596-97 (Terr. 1923) (under the Territorial election law, Municipal Act § 1695 pertaining to election contests, "if the court shall decide which candidate or candidates have been

elected[, ] a copy of such judgment shall be served on the city and county clerk, who shall sign and deliver to such candidate, or candidates[, ] certificates of election, and the same shall be conclusive of the right of the candidate or candidates to the office" (emphasis added)). According to HRS § 11-155 (1993),

[o]n receipt of certified tabulations from the election officials concerned, the chief election officer or county clerk in county elections shall compile, certify, and release the election results after the expiration of the time for bringing an election contest. . . . The position on the question receiving the appropriate majority of the votes cast shall be reflected in a certificate of results issued pursuant to section 11-156.

(Emphases added.) Thus, the adoption or rejection of a proposed charter amendment is not made official until the County Clerk has "compile[d], certif[ied], and release[d]" the election results, indicating which "position on the question receiv[ed] the appropriate majority of votes cast . . . ."

Relatedly, HRS § 11-156 mandates that "[t]he chief election officer or county clerk shall issue certificates of results where a question has been voted upon." In that connection, HRS § 11-155 requires that "a certificate of results declaring the results of the election as of election day shall be issued pursuant to section 11-156." The purpose of this provision is to "clarify when the results of an election are effective and to provide for the issuance of a 'certificate of results' when a question is voted upon." Hse. Conf. Comm. Rep. No. 54-86, in 1986 House Journal, at 941. By providing for a Certificate of Results related to questions or propositions

submitted to the electors, the legislature has clarified that the adoption or rejection of such questions is not definitively confirmed until the votes are tabulated and the results certified by the County Clerk. See HRS § 11-156.

In this case, the results of the election were certified by the County Clerk and the State of Hawai'i Chief Elections Officer on November 25, 1996. Only then, pursuant to HRS §§ 11-155 and -156, was the adoption of the Amendment made official. Therefore, the Amendment could not have been enforced on November 5, 1996 with respect to Arakaki's 1996 election because the adoption process was not complete on November 5, 1996, but was subject to certification as "the last in a series of necessary steps." Black's Law Dictionary at 1229.

VI.

In light of the forgoing, the Amendment should be applied prospectively, effective as of the 1998 term. Term limits ratified by voters in the same general election in which incumbents are elected should apply to the next election cycle. To hold otherwise, as in Arakaki's case, wrongfully gives the Amendment retrospective effect. Elections are not officially complete until results are certified. Thus, the Amendment should not apply to candidates who are running in the same election in which the Amendment is voted upon. Therefore, contrary to the majority, I would affirm the court's holding.

