NO. CAAP 16-0000045

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI'I

RICHARD W. BAKER, Appellant/ Appellant, vs. BRICKWOOD M. GALUTERIA, ABIGAIL L. GALUTERIA, and GLEN TAKAHASHI, City Clerk, City and County of Honolulu, Appellees/ Appellees.	Case No. 15-1 (Agency Appeal) APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER, DATED JANUARY 15, 2016. BOARD OF REGISTRATION, ISLAND OF O'AHU

APPELLANT'S OPENING BRIEF

APPENDIX A

CERTIFICATE OF SERVICE

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APPELLANT'S OPENING BRIEF

Pursuant to Rule 28 of the Hawai'i Rules of Appellate Procedure (HRAP) and Hawaii Revised Statutes (HRS) §§11-51 et seq., Appellant/Appellant RICHARD W. BAKER ("Baker") respectfully submits his Opening Brief.

I. INTRODUCTION

This case arose from the improper voter registrations of Appellees/ Appellees BRICKWOOD M. GALUTERIA and ABIGAIL L. GALUTERIA (collectively, "Galuterias"), the failure of Appellee/ Appellee GLEN TAKAHASHI, in his formal capacity with the Office of the City Clerk ("City Clerk") to properly investigate challenges to the Galuterias' voter registration, and subsequent failures of the Board of Registration, Island of O'ahu ("Board") in upholding the City Clerk's errors on appeal and the Board's significant procedural errors and actions in excess of its authority under HRS chapter 11 and Hawaii Administrative Rules (HAR) chapter 172.

II. STATEMENT OF THE CASE

1. Background on Baker's challenge.

On November 2, 2014, Appellee/ Appellee GLEN TAKAHASHI, in his formal capacity with the Office of the City Clerk ("City Clerk") received Baker's challenge to the voter registration status of Appellees/ Appellees BRICKWOOD M. GALUTERIA and ABIGAIL L. GALUTERIA (collectively, "Galuterias"), which Baker later resent via facsimile on November 3, 2014. Docket No. ("Dkt.") 11 at 7, 25.[1] Baker alleged the Galuterias' voter registration in Senate District 12/ House Precinct 26-06 violated HRS §11-12(a) because they did not reside at 876 Curtis Street, Royal Capitol Plaza (TMK No. (1)2-01-047: 008-162) ("Curtis Street apartment," or "RCP"). Dkt. 11 at 25. Baker provided information indicating the Galuterias' ownership and likely residence at properties located at 3462 Pakui Street in Palolo Valley, and 45-565 Mahinui Street in Kane'ohe, outside of Senate District 12/ House Precinct 26-06. Dkt. 11 at 25-26. Although the City Clerk received Baker's challenge prior to election day, the City Clerk did not attempt to segregate the Galuterias ballots as provided by HRS § 11-25(c), in part because the City Clerk stated he lacked the authority to unseal

1 References in this opening brief cite the JEFS docket number, followed by the page number as seen in an electronic document viewer.

the walk-in ballot boxes. Dkt. 11 at 7, 338, 342.

Approximately a month after Baker submitted his challenge, Brickwood Galuteria executed a one-year "Rental Agreement" with his mother, Juliette Galuteria, for the Curtis Street apartment, with a retroactive start date of November 1, 2014. Dkt. 11 at 199.

The Galuterias' moved into the Pakui Street residence in 2005, on which they took out a mortgage that continued through the proceedings. Dkt. 8, Transcript (Tr.) 11/30/2015 at 154. At that time, the Galuterias applied for and received a partial "homeowner" exemption from their real property taxes on this property as owner occupants from the Real Property Assessment Division of the City and County of Honolulu ("City") through at least the tax year ending June 30, 2016. Dkt. 12 at 412 (FOF No. 5). The Galuterias' claimed property tax exemption raised a rebuttal presumption that the Pakui Street residence was their residence for voter registration purposes. HAR §3-172-25(a)(2)(A) ("When a person has more than one dwelling: If a person maintains a homeowner's property tax exemption on one of the dwellings, there shall be a rebuttable presumption that the dwelling subject to the homeowner's property tax exemption is that person's residence.").

On or about August 30, 2007, the Galuterias alleged they moved to Executive Centre on Bishop Street, in downtown Honolulu. Dkt. 8, Tr. 11/30/2015 at 155. The Bishop Street location had been part of Senate District No. 12. Subsequent to redistricting, in 2011 the Galuterias registered to vote using the Curtis Street address. Id. at 29.

On or about June 15, 2011, the Galuterias alleged they moved into RCP at Curtis Street in Kaka'ako with Juliette Galuteria. Id. at 157, Dkt. 11 at 215. Brickwood Galuteria declared Juliette Galuteria suffered from diabetes, neuropathy, and advancing dementia, and he stayed at RCP several nights a week due to her illnesses. Dkt. 11 at 199. The Galuterias shared a pull-out sofabed in Juliette Galuteria's one-bedroom apartment and all three Galuterias shared the sole closet in the apartment. Dkt. 8, Tr. 12/5/2015 at 123-24. Department of Motor Vehicle ("DMV") records disclosed Abigail Galuteria owned at least two cars, although Brickwood Galuteria testified they shared the single car they parked at RCP. Dkt. 11 at 10, 96, 162-63, 309; Dkt. 8 Tr. 12/5/2015 at 134. The Galuterias updated their voter registration residence to the Curtis Street apartment in April and July of 2012. Dkt. 11 at 342. The City Clerk opined the Galuterias relinquished their Bishop Street voter registration residence by updating their voter registration residence. Dkt. 11 at

342-43.

During the Board's proceedings, Brickwood Galuteria stated they planned to move out from RCP and move to another location in Ala Moana by January 1, 2016. Dkt. 8 Tr. 12/5/2015 at 121: 10-25. Also during the proceedings, Abigail Galuteria admitting she spent sixty percent of her time at the Pakui Street residence. Dkt. 11 at 199.

By letter dated January 5, 2015, the Galuterias counsel wrote to the City Clerk, stating "[t]he Galuterias have every intention of returning to District 12 permanently, consider it their home[.]" Dkt. 11 at 89-90.

By certified mail letter dated February 2, 2015, the City Clerk responded to Baker, stating that its investigations and review of applicable laws led them to determine the Galuterias had sufficiently rebutted a presumption that their residences was anywhere else than the Curtis Street apartment. Dkt. 11 at 7, 14.

2. Proceedings before the Board.

On February 12, 2015, Baker appealed to the Board pursuant to HRS §11-26. The Board represented that it would conduct its proceedings under HAR §3-172-43, titled, "Appeal to the board prior to election day." Dkt. 11 at 2, 36.

On March 13, 2015, the Board issued it notice of prehearing conference to Baker, the Galuterias, and the City Clerk, scheduled for March 24, 2015. Dkt. 11 at 36.

On April 9, 2015, the Board issued a prehearing order based on its prehearing conference. Dkt. 11 at 186. The prehearing order provided deadlines for dispositive motion, but identified no rule authorizing the Board's solicitation of such motions or ability to issue orders on them. Dkt. 11 at 186.

On April 14, 2015, the Galuterias filed a Motion to Dismiss Baker's appeal, but cited no rules permitting their motion. Dkt. 11 at 188.

On May 5, 2015, Baker filed his response to the Galuterias' motion to dismiss. Dkt. 11 at 302. The Galuterias filed a reply memorandum on May 12, 2015, which also failed to identify a rule permitting their submission or a legal standard under which their requested "dismissal" was to be determined. Dkt. 11 at 322-32.

At its May 26, 2015 hearing on the Galuterias' motion to dismiss, the Board received testimony from the Galuterias' counsel concerning facts material to Baker's challenge. Dkt. 8, Tr.

5/26/2015 at 6- 24, 19. The Board conferred amongst themselves and their counsel, and then determined they could not "come to a definitive decision on the issue of mootness at this point" and requested the Clerk provide a statement clarifying issues concerning procedures for absentee walk-in ballots. Dkt. 8, Tr. 5/26/2015 at 26. The Board requested the Galuterias' counsel to clarify the application of HRS § 11-13(2) to "the fact that you're leaving Bishop Street and going to Curtis Street, and Pakui Street as of 2011 is no longer relevant to that, that move." Dkt. 8, Tr. 5/2/2015 at 30. The Board requested that Baker cite to "official Hawaii Report or West Reporter Pacific Third pagination" instead of the slip opinions Baker had referenced. Dkt. 8, Tr. 5/2/2015 at 28, 33.

On June 16, 2015, Baker filed a second response to the Galuterias' motion to dismiss in which he maintained Board rules did not permit the motion or fact-finding conducted at the May 26, 2015 hearing. Dkt. 11 at 354, 357.

On June 23, 2015, the Galuterias filed a motion to strike Baker's second response to the Galuterias' motion to dismiss, filed June 16, 2015, and cited HAR §3-172-43(d) as the basis for their motion. Dkt. 11 at 367-68. HAR §3-172-43 provides in relevant part: "(d) The chairperson of the board shall be the presiding officer and shall be authorized to make any preliminary determinations necessary for the prompt and efficient management of the appeal hearing."

On June 25, 2015, Baker filed his memorandum in opposition to the Galuterias' motion to strike. Dkt. 11 at 408. Baker pointed out that the Galuterias' interpretation of HAR §3-172-43 was incorrect because no rule provided the Board to render summary judgment or other rulings on motions. Dkt. 11 at 409. Further, such interpretation. prohibited by HRS §92-15, which required a majority of the Board "to do business[,]" including ruling on dispositive motions concerning the merits of the case. Dkt. 11 at 409. The Galuterias filed their reply on June 26, 2015. Dkt. 11 at 411.

On October 16, 2015, the Board filed its Order Granting in Part, and Denying, in Part, Appellees' Motion to Strike Appellant Baker's Second Response to Motion to Dismiss and Denying Appellees Brickwood and Abigail Galuterias' Motion to Dismiss ("October 16, 2015 Order"), due to the existence of multiple, genuine issues of material fact. Dkt. 11 at 429. Also on October 16, 2015, the Board noticed a second prehearing conference and its hearing on Baker's challenge. Id. at 434.

By letter dated November 4, 2015, Baker wrote to the Board chair, stating that Board rules

did not provide for a second prehearing conference. Dkt. 12, at 2.

On November 9, 2015, the Board held its second prehearing conference. Dkt. 8, Tr. 11/9/2015, at 37. The chairperson stated the purpose of the "additional prehearing" would be "to work on limiting facts, getting agreement on facts that are not in dispute in order to simply and clarify issues as provided in the regulations, Hawaii Administrative Rule 3-172-43, sub (b), sub (1)." Id. at 40. The Board's response to Baker's November 4, 2015 letter was "we do not see the rules as constraining us from having a second prehearing conference if one is deemed to be warranted[.]" Dkt. 8, Tr. 11/9/2015, at 40.

On November 10, 2015, the Board filed its Second Prehearing Order, instructing the parties to file their witness lists by November 23, 2015. Dkt. 12 at 3-4. Parties filed their respective exhibit and witness lists by November 23, 2015. Dkt. 12 at 16 (City Clerk), 217 (the Galuterias), 351 (Baker). The Board cited no rule or statute authorizing their second prehearing. Dkt. 12 at 3-4

On November 30, 2015, the Board held an evidentiary hearing at which the Board sustained numerous objections to Baker's witnesses, all of whom were longtime residents of Royal Capital Plaza (RCP), the condominium complex located on Curtis Street, at which the Galuterias allegedly lived with Brickwood Galuteria's mother, Juliette Galuteria ("Juliette"). Dkt. 8, Tr. 11/30/2015, at 55-95. The Board further stated it was too late for Baker to subpoena witnesses to establish that the Galuterias had not registered their presence as required by condo rules. Dkt. 8, Tr. 11/30/2015, at 51. Also at the November 30, 2015 hearing, Baker cross examined Brickwood Galuteria (B.G.) and the following colloquy occurred.

> Baker: And who was, as of that time, the time that you moved into Executive Centre, who was living at Pakui Street?
> B.G.: We were living at Pakui Street. We have four units there, we took one unit. . .
> [. . .]
> Baker: So did you maintain an actual secondary residence at Pakui Street even though you had moved into Executive Centre?
> B.G.: What's – how do you define secondary residence?
> Baker: I'm not sure, because you're saying you and your wife retained a unit at Pakui Street.
> B.G.: Oh, we owned the place, that's why.
> Baker: Right, I understand.
> B.G.: And we want to maintain a presence on the property, so as to make sure that the tenants know that – who owns the place, if you will. It's a presence.

Dkt. 8, Tr. 11/30/2015 at 155-57.

On December 5, 2015, the Board continued its evidentiary hearing. Dkt. 8, Tr. 12/5/2015,

at 106. The Board prohibited Baker to reopen proceedings to allow him to call the RCP resident manager, who was waiting to testify. Dkt. 8, Tr. 12/5/2015, at 101, 219.

On January 15, 2016, the Board filed its Findings of Fact, Conclusions of Law, and Decisions and order ("FOFs/ COLs/ Order"), affirming the City Clerk's report and recommendation denying Baker's challenge. Dkt. 12 at 411.

On January 25, 2016, Baker timely filed his notice of appeal with this Court pursuant to HRS §11-51.[2] Dkt. 1.

III. POINTS OF ERROR.

1. Whether the Board abused its discretion and clearly erred by ignoring the Galuterias' lack of abandonment of their home at 3462 Pakui Street in Palolo in applying facts to determine the merits of Baker's voter registration challenge. Dkts. 11 at 177; 12 at 412-40. Baker raised this argument to the City Clerk and then to the Board. Dkt. 11 at 3-4, 177; 304 Dkt. 8 Tr. 12/5/2015 at 224. Baker specifically argued the City Clerk failed to obtain evidence that the Galuterias intended to abandon their Pakui Street home, particularly in light of the Galuterias' admission to spending approximately half of their time there. Dkt. 12 at 351, 409. Baker further argued the Galuterias' voter registration address remained at Pakui Street until it was shown to be changed, and they Galuterias had not done so. Dkt. 12 at 431-32.

   a. The Board reversibly erred by finding "unclear" Baker's reference to the Galuteria's continued presence at the Pakui Street residence and that the Galuterias had abandoned that residence in 2007. Dkt. 12, at 414 (FOF No. 18), 415 (FOF No. 23).
   b. The Board clearly erred by failing to determine the Galuterias had not abandoned their Pakui Street residence in light of the substantial evidence on record; and, further, by failing to determine the Galuterias' voter registration address remained the Pakui Street residence even if they harbored an intent to abandon it. Dkt. 12 at 423.

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2 HRS §11-51, "Appeal from board" provides in relevant part:

> Any affected person, political party, or any of the county clerks, may appeal to the intermediate appellate court, subject to chapter 602, in the manner provided for civil appeals from the circuit court; provided that the appeal is brought no later than 4:30 p.m. on the tenth day after the board serves its written decision, including findings of fact and conclusions of law, upon the appellant. This written decision of the board shall be a final appealable order. The board shall not consider motions for reconsideration...

2. Whether the Board abused its discretion by affirming the City Clerk's decision despite substantial evidence of, and argument against, the City Clerk's violation of statutory procedures for Baker's challenge by failing to timely investigate issues raised by his challenge and failing to segregate the Galuterias ballots before a final decision on the status of the Galuterias' voter registration. Dkt. 8 Tr. 12/5/2015 at 216; Dkt. 7, 11 at 337 (City Clerk's responsive filing on the issue of ballot segregation).

a. Baker raised instances in which county clerks segregated ballots after they were cast the same could have been done in the case of Galuterias' ballots in 2014. Dkt. 8 Tr. 5/26/2015, at 22: 10-16, 25: 5-10. Baker raised this point to the Board. Dkts. 8 Tr. 5/26/2015, at 22: 4-20, 24: 10-20; Dkt. 11 at 177 ("Clerk also failed to investigate in a timely manner the challenge filed before the election, on November 2, 2014"). Baker further argued the City Clerk acted in excess of his authority by failing to adhere to statutory procedures for challenged ballots. Dkt. 11 at 357-60.

b. The Board further reversibly erred by affirming the City Clerk's decision because the City Clerk failed to adhere to procedures for challenges submitted prior to election day and instead deemed Baker's challenge as resubmitted as a post-election challenge under unlawful rules or procedures in excess of lawfully promulgated rules. Dkt. 11 at 7. Baker raised this point to the Board. Dkt. 11 at 177, 357; Dkt. 8 Tr. 5/26/2015, at 22: 4-20, 24: 10-20.

3. Whether the Board decision was based upon unlawful procedure and otherwise prejudiced the rights of the Baker. Dkt. 12 at 416, 423-24. The Board's unlawful procedures consisted in engaging in fact-finding, receiving argument, and delegating or failing to delegate authority to do so to the chairperson, and otherwise proceeding in ways that prejudiced Baker. See Dkt. 11 at 186. Baker raised the absence of rules permitting the Board to address prehearing motions and otherwise engage in factual determinations or hear arguments prior to the evidentiary hearing. Dkt. 11 at 357, 409-10.

4. Whether Board's procedures prior to the evidentiary hearing constituted unlawful procedures and were unlawful rules by reason of not having been promulgated pursuant to HRS §91-3. Baker raised the argument that Board rules did not permit submission of motions to dismiss or for the Board to hold hearings on such motions. Dkt. 12 at 357, 416, 423-24.

Baker's compliance with Rule 28(b)(4)(iii) of the Hawai'i Rules of Appellate Procedure (HRAP) requirements of referencing "where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency" was attenuated by the fact that Baker was not represented by counsel during proceedings before the City Clerk or the Board, whereas the Galuterias were at all times represented by counsel. Dkt. 12 at 415 (FOF No. 27). Baker's objections and efforts to bring points to the attention of the Board are to be interpreted liberally as he was proceeding pro se and were raised during administrative proceedings. See Doe v. Attorney Gen., No. SCWC-13-0005700 at *27 (Haw. 2015) quoting Dupree, 121 Haw. at 314, 219 P.3d at 1101 ("Pleadings prepared by pro se litigants should be interpreted liberally." (citation omitted) and "pleadings in administrative proceedings are to be construed liberally rather than technically."); Perry v. Planning Comm'n, 62 Haw. 666, 685-86, 619 P.2d 95, 108 (1980).

IV. STANDARDS OF REVIEW

A. *Findings of Fact, Conclusions of Law, and Mixed Questions of Law and Fact*

"[F]indings of fact should be reviewed for clear error and conclusions of law should be reviewed under the right/wrong standard[.]" Dupree v. Hiraga, 121 Haw. 297, 311, 219 P.3d 1084, 1098 (2009).

> A conclusion of law that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case.
>
> As a general matter, a finding of fact or a mixed determination of law and 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 made. Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.
>
> Id., 121 Haw. at 312, 219 P.3d at 1099 (citation omitted).

B. *Jurisdiction.*

"The existence of jurisdiction is a question of law that we review de novo under the right/wrong standard." Dupree, 121 Haw. at 312, 219 P.3d at 1099 quoting Captain Andy's Sailing, Inc. v. Dep't of Land and Natural Resources, 113 Haw. 184, 192, 150 P.3d 833, 841 (2006).

C. *Interpretation of a Statute.*

"Interpretation of a statute is a question of law which we review de novo." Dupree, 121 Hawai'i at 312, 219 P.3d at 1099 quoting Kikuchi v. Brown, 110 Haw. 204, 207, 130 P.3d 1069, 1072 (App. 2006).

V. ARGUMENT.

A. The Galuterias did not abandon their Palolo residence

Voters must register only in precincts in which they reside. HRS § 11-12. Further, article III, section 6 of the Hawai'i State Constitution provides:

> No person shall be eligible to serve as a member of the senate unless the person . . . is, prior to filing nomination papers and thereafter continues to be, a qualified voter of the senatorial district from which the person seeks to be elected; except that in the year of the first general election following reapportionment, but prior to the primary election, an incumbent senator may move to a new district without being disqualified from completing the remainder of the incumbent senator's term.

For voter registration purposes, each voter may only have residence, although their spouse may have a separate residence. HRS § 11-13 ("Rules for determining residency"). Under statutory rules for determining residency:

> (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 present intention to establish such place as the person's residence;

HRS § 11-13 (emphases added). Paragraphs 1, 2, and 4 were "particularly instructive" in determining whether a State House representative who moved out of his representative district

during pendency of his home-remodeling construction, which precluded inhabitation of the existing structure, could continue to serve as State representative and seek re-election from that district. Attorney General Opinion No. 86-10 at 1. The City Clerk also relied on Attorney General Opinion No. 86-10, in his February 2, 2015 ruling and prehearing statement to the Board:

> To relinquish one's domicile or residence *there must be an intent to remain permanently at the new place where one is physically present and to simultaneously abandon the previously permanent place of abode*. Acquisition of the new domicile must have been completed and the animus to remain in the new location fixed, before the former domicile can be considered lost. Akata v. Brownell, 125 F. Supp. 6 (D. Hawai'i 1954); Powell v. Powell, 40 Hawai'i 625 (1954); Anderson v. Anderson, 38 Hawai'i 261 (1948); Zumwalt v. Zumwalt, 23 Hawai'i 376 (1916). Residence is not lost by a temporary absence nor by maintenance of a temporary home elsewhere." Id. citing Hurley v. Knudsen, 30 Hawai'i 887 (1929).

Dkt. 11 at 13-14; Dkt. 12 at 11 (original citations reinserted) (italicized emphasis added).[3] HRS § 11-13 requires an intent "to abandon his or her prior residence, since a person can have only one residence under the statute" concurrent with the required intent to "acquire a new residence." Dupree, 121 Haw. at 317, 219 P.3d at 1104 citing HRS § 11-13 ("there can be only one residence for an individual"). The City Clerk, citing authorities requiring a finding that the voter intended to abandon the permanent place of abode, concluded:

> [t]he record in this case reveals several addresses associated with the Galuterias' personal affairs, namely the Curtis Street Address, the Pakui Street Address, and 45-565 Mahinui Road. The Galuterias also have family members currently residing at the Pakui Street Address and continue to conduct some affairs from that location despite having changed residences twice since being last registered to vote at the Pakui Street Address in 2007. . . . Nothing contained in the sworn statements demonstrated any intent to abandon the Curtis Street Address as their residence for voter registration purposes.

Dkt. 11 at 14 (emphasis added). The City Clerk "clearly erred when he erroneously identified the wrong factual circumstances to investigate." Dkt. 12 at 353. The legal question was whether the Galuterias abandoned the Palolo residence and not whether they had abandoned the Curtis Street property. Id. Accordingly, the Board was required to consider "whether the Galuterias abandoned their Palolo residence." Dkt. 8 Tr. 12/5/2015 at 224 (emphasis added). The Board apparently failed to fully comprehend Baker's focus on the Galuterias' continued domicile at the Palolo residence because they found: "[f]or reasons that remain unclear, Baker's complaint has made no reference to

3 This passage was also relied upon by the Board of Registration, County of Maui in a determining whether a voter was improperly registered by reason of his residence (COL No. 12), which was affirmed on appeal in Dupree. Id., 121 Haw. at 310, 219 P.3d at 1097.

the Galuterias' prior residence at Executive Centre [Bishop Street], but rather Baker has contended that the Galuterias never abandoned their Palolo residence." Dkt. 12, at 414 (FOF No. 18).

The Board clearly erred by finding the Galuterias abandoned Palolo in 2007 (FOF No. 23, Dkt. 12 at 415) because the substantial evidence on record demonstrated the Galuterias had not abandoned their Pakui Street home. The Board's findings themselves established the Galuterias had not abandoned their Palolo home: (1) the Galuterias' property tax assessment status reflected their residence at one of their four-rental units at Pakui Street from 2005 until Baker raised this issue in his challenge in late 2014 (FOF Nos. 5 & 23); (2) the Galuterias retained a unit at the Palolo residence to maintain a "presence" there (FOF No. 3); and (3) Brickwood Galuteria stated he "spends 'a great majority' of his time at Palolo" by letter dated December 6, 2014 (FOF No. 38), and Abigail Lehua Galuteria ("Lehua Galuteria" or "Abigail Galuteria" spends about 60% of her time at Palolo (FOF No. 39). Dkt. 12 at 412 (FOF Nos. 3 & 5), 415 (FOF No. 23), 417 (FOF No. 38), 418 (FOF No. 39).

"'Inhabitancy' and 'residence' mean a fixed and permanent abode or dwelling place for the time being, as contradistinguished from a mere temporary locality of existence." Barney v. Oelrichs, 138 U.S. 529, 533 (1891) (citation omitted). "Of course it cannot be known without the gift of prophecy whether a given abode is 'permanent' in the strictest sense. But beyond this, it . . . not merely 'temporary,' or . . . a dwelling for the time being which there is no presently existing intent to give up." District of Columbia v. Murphy, 314 U.S. 441, 451 n.2 (1941); see also D'Elia & Marks Co. v. Lyon, D.C. Mun. App., 31 A.2d 647, 648 (1943) ("A 'residence' must be a 'fixed and permanent abode for the time being and not a mere temporary locality of existence . . . it must be more than a place of mere sojourning or transient visiting.'" (emphasis in original) (assessing residence in an attachment action)).

The Galuterias' property tax assessment and need to maintain their "presence" at the Pakui Street demonstrated this Palolo home to be the seat of their property and thereby their residence. "Residence" means "the place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights." Citizens for Equit. & Resp. Gov't v. County of Hawai'i, 108 Haw. 318, 322, 120 P.3d 217, 222 (2005) (concluding students resided in the county for educational purposes and enlisted military persons involuntarily so resided, and therefore both groups lacked the "intent" required to establish residence) quoting In re Appeal of Irving, 13 Haw.

22, 24 (1900) (steamship employee who regularly docked in Honolulu had not established residence for voting purposes) quoting Chase v. Miller, 41 Pa. 403, 420 (Pa. 1862). The Galuterias' affirmed they lived at their Pakui Street residence after acquiring the Executive Center property in order to maintain a "presence" as landlord – "to make sure that the tenants know that - - who owns the place[.]" Dkt. 8, Tr. 12/5/2015 at 156-160. Baker challenged the Galuterias' voter registration in Precinct 12 because their habitation was not fixed at the Curtis Street property as they were not significantly present at that property and rather retained their presence at the Pakui street residence. Dkt. 12 at 417 (FOF No. 38), 418 (FOF No. 39). Throughout the proceedings, the Galuterias held a unit at the Pakui Street residence, maintained that "presence" of property ownership between purchase of the Pakui Street home, and intended to maintain that presence on January 1, 2016, after the 2014 election. Dkt. 8 Tr. 11/30/2015 at 160: 14-20; 161: 4, 163: 21-23.

"Factors such as where a person sleeps and keeps personal belongings may support presence and intent. . . One element alone is insufficient to establish residency; the elements must form a nexus to fix and determine a residence." Mills v. Bartlett, 377 S.W.2d 636, 637 (Tex. 1964). Voters who registered to vote at their mother/ grandmother's home address, slept in the spare bedroom "occasionally" at that home, did not keep clothing or personal items at the home, and only "sometimes" received mail, could not "seriously argue[] that the homes where each registered to vote is their 'home or fixed place of habitation[.]'" Rivera v. Lopez, No. 13-14-00581-CV, at 21 (Tex. App., 2014) (mem.). Rivera concluded "Even assuming that each voter meets the intent element for residence, their presence at each home is too attenuated to count as habitation." Id. Likewise, in Nomination Petition of Carabello, 516 A.2d 784 (Pa. 1984), a candidate unsuccessfully established residence in a home where his mother and aunt lived and where he visited frequently and maintained a room where he sometimes spent the night, but also owned a residence where his wife and child lived. Carabello held that maintaining a room in a house and sometimes sleeping there did not establish residence. Id.; and see D'Elia, 31 A.2d at 648-49 (defendant "quit" his former residence and established a fixed abode elsewhere where he had taken a year's lease on an expensive apartment, moved furniture from his former residence, and placed the remainder in storage); In re Nomination Petition of Cooper, 643 A.2d 717, 720 (Pa. 1994) (candidate established he abandoned his former residence where he was in the process of divorce proceedings and no evidence was presented that Copper had an intention of returning).

Substantial evidence on record demonstrated the Galuterias' living situation at RCP was temporary. Brickwood Galuteria affirmed the RCP condo was a mere 548 square feet and he slept on a pull-out sofa, which he shared with Lehua Galuteria, in the living room. Dkt. 8, Tr. 12/5/2015 at 123. All three Galuterias shared a single closet. Id., at 124; Dkt. 11 at 287. At the December 5, 2015 hearing, Brickwood Galuteria affirmed he planned to move out of RCP to a "more comfortable" residence at the Moana Pacific in Ala Moana. Dkt. 8 Tr. 12/5/2015 at 121: 10-25. Abigail Galuteria owned at least two cars, although Brickwood Galuteria testified they owned "one car," which was parked in the larger stall of their hanai aunty and not to the one assigned to the RCP apartment. Dkt. 11 at 10, 96, 162-63, 284, 309; Dkt. 8 Tr. 12/5/2015 at 134. Three longtime residents of RCP rarely saw the Galuterias. Dkt. 8, Tr. 11/30/2015 at 57-103. Louise Black ("Black") lived there approximately 18 years, and saw Brickwood Galuteria five times prior to the November 4, 2014 election. Dkt. 8, Tr. 11/30/2015 at 61; Dkt. 12 at 369. Matt Johnson ("Johnson") lived in RCP for seven years, in which time had never seen Brickwood Galuteria. Dkt. 12 at 370. Eva Gallegos ("Gallegos") lived in RCP for eight years, and saw Brickwood Galuteria only three times since 2011 and had never seen Abigail Galuteria. Dkt. 12 at 371. Brickwood admitted to spending less than fifty percent of his time at the Pakui Street home. Dkt. 11 at 12. Abigail Galuteria declared. Abigail Galuteria spent forty percent of her time at the RCP condo and sixty percent at her Pakui Street home; used the Pakui Street address for her motor vehicle and driver's license registrations; and declared her intent to register in the district in which the Pakui Street home was located on or about March 24, 2015. Dkt. 12 at 362; Dkt. 11 at 10, 11, 199; Dkt. 8 Tr. 11/30/2015 at 159. Taken together, these factors clearly demonstrate the Galuterias had not abandoned their Pakui Street home. The Board clearly erred by failing to apply the "abandonment" element of registration status to substantial evidence demonstrating Galuterias' had not abandoned the Pakui Street home.

1. Even if "abandoned," the Pakui Street home remained the Galuterias' residence for voter registration purposes.

The Board's failure to attend to the "abandonment" factor in residency occurred due to a categorical "gap" in defining voters' residences where they abandon a domicile, but have not settled at a final new domicile. Walters v. Weed, 752 P.2d 443, 449 (Cal. 1988) (addressing methods of

establishing the "domicile" of university students for voter registration purposes). Walters weighed the merits of defining as a voter's "domicile" the residence where they intended to live in the future, remained temporarily in the presence, or their former residence, and concluded, "[e]ven if a voter has left his residence with the intention not to return to it, that residence remains his domicile as long as he has not acquired a new one." Id., 752 P.2d at 447. Walters reasoned:

> allowing people who abandon their domiciles to vote in the precincts of their current temporary residences would create a system in which people could vote anywhere they chose, regardless of their ties to the community. Voters who abandon their domiciles could temporarily stay in precincts where their votes would have the greatest impact. We decline to allow such precinct shopping.

Walters, 752 P.2d at 449; relied upon in Attorney Grievance Comm'n of Maryland v. Joseph, 31 A.3d 137, 155 (Md. 2011) ("When a person leaves his or her former domicile with the intention to abandon it, the former domicile is maintained until a new domicile has been acquired by actual residence coupled with the intention to remain"). Accordingly, Baker argued to the Board, "[a] domicile once acquired is presumed to continue until it is shown to have been changed." Dkt. 12 at 431 quoting Mitchell v. United States, 88 U.S. (Wall.) 350, 353 (1874). The test for a domicile is "more rigorous" than for a residence. Martinez v. Bynum, 461 U.S. 321, 331 (1983) ("residence" generally requires both physical presence and an intention to remain whereas "domicile" is one's "true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning") quoting Vlandis v. Kline, 412 U.S. 441, 454 (1973). Hawai'i adheres to the rule that "a domicile once established is presumed to continue, and one alleging that a change has taken place has the burden of proof." Blackburn v. Blackburn, 41 Haw. 37, 41 rehearing denied 41 Haw. 650 (1955) at 654 quoted by Arakaki v. Arakaki, 54 Haw. 60, 62, 502 P.2d 380, 382 (1972) citing Clark, Law of Domestic Relations, 148 (1st ed. 1968) and 1 Beale, The Conflict of Laws § 41A (1st ed. 1935). Hawai'i voter registration rules clarify this burden of proving a "change" as a change in circumstances causing the voter to take up a new domicile. HAR §3-172-25(b) ("Should a person's circumstances change and the person takes up a domicle [*sic*] in another precinct or state, there shall be a rebuttable presumption that the new domicle [*sic*] is that person's residence."). Hawaii's rules for determining residency required establishment of a "domicile," and not a mere residency change, where changed circumstances occur for a voter. Id. The Galuterias, however, did not establish a true, fixed, and permanent home and place of

habitation at the Curtis Street property because they both retained a "presence" at the Pakui Street property and occupied a temporary living situation (e.g., sleeping on a pull-out sofabed, spending significant percentages of their time at actual home elsewhere). Dkt. 12 at 430 (floorplan of the RCP apartment). Although the Galuterias' professed a desire to abandon their established domicile at Pakui Street, they had not yet settled on a new domicile, and the Galuterias' Pakui Street home should have been maintained as their voter registration address. The Galuterias' "intent" to abandon their Pakui Street home and to reside at RCP was to be "determined by [their] acts viewed in their totality." Dkt. 432 quoting Arakaki v. Arakaki, 54 Haw. 60, 62, 502 P.2d 380, 382 (1972). As Baker pointed out, "someone who lives in Palolo, drives to Kaka'ako, then returns to Palolo on the same day, all with the stated intent of making Kaka'ako his or her permanent residence . . . would render the physical presence requirement of the statute an absurdity if he or she were recognized as a Kaka'ako resident." Dkt. 12 at 432. The Board clearly erred and abused its discretion by affirming the City Clerk's decision. Dkt. 12 at 432.

B. The Board clearly erred by finding the Galuterias' ballots could not be isolated and incorrectly interpreted the City Clerk's statutory obligations to do so.

1. The City Clerk failed to act upon Baker's challenge in a timely manner, which prejudiced Baker's procedural rights.

The Clerk's failure to set aside the Galuterias' ballots on or after November 3, 2015, violated the most fundamental principles involving representative democracy. Dkt. 8, Tr. 5/26/2015 at 22: 4-20; Dkt. 11 at 361. HRS § 11-25(a) required the City Clerk to investigate and rule on the challenge as soon as possible. Id. Baker submitted his challenge on November 2, 2014, yet the City Clerk did not issue a decision until February 2, 2015. Dkt. 11 at 7. The four month delay was a condition of possibility for the Galuterias to submit documentation of their "residence" at Curtis Street considered by the City Clerk in his decision. See Dkt. 11 at 309 (describing five documents post-dated from Baker's challenge); see Dkt. 11 at 232-43, 252-61. The City Clerk's failed to act in a timely manner, or at all to enforce HRS §11-25(c) procedures for Baker's challenge prior to the 2014 general election. Dkt. 11 at 7, 338. Contrary to the City Clerk's position that failure to segregate the Galuterias' ballots had "no relevant to the disposition of this voter registration residency challenge," the City Clerk's decision to depart from HRS §11-25(c) procedures continued to affect Baker's

interests in his challenge, appeal to the Board, and post-appeal proceedings. Dkt. 11 at 7, 338. As Baker pointed out to the Board, HRS §11-54, titled "Status pending appeal," provided for handling the ballot of the challenged "voter in accordance with section 11-25(c)" where an appeal has been taken from the Board's decision. Id.; Dkt. 11 at 362. HRS §11-25 provides grounds and procedures for challenges by voters, stating in pertinent part:

> (c) If neither the challenger nor the challenged voter shall appeal the ruling of the clerk or the precinct officials, then the voter shall either be allowed to vote or be prevented from voting in accordance with the ruling. 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. The chief election officer shall adopt rules in accordance with chapter 91 to safeguard the secrecy of the challenged voter's ballot.

Id. (emphasis added). Further, HAR §3-172-103, titled "Challenged voter's ballot; disposition of at counting center," similarly provides for the segregation of challenged ballots in the event of appeal or the existence of an opportunity to appeal.

> (a) The board of registration shall notify the clerk and the counting center manager of the disposition of each challenge immediately after the board makes its decision provided that if an appeal is made to an appellate court, or the opportunity for an appeal exists, pursuant to HRS §11~51, the ballot shall remain in the sealed envelope to be counted or rejected in accordance with the supreme court's ruling.
> (b) If the board rules that a challenged voter is not entitled to vote and the opportunity for appeal to an appellate court has elapsed, pursuant to HRS §11-51, the voted ballot shall remain in the unopened envelope and shall be stored as provided by law.
> (c) If the board rules that a challenged voter is entitled to vote and the opportunity for appeal to an appellate court has elapsed, pursuant to HRS §11-51, the counting center manager shall instruct the ballot preparation team to prepare the ballot for processing. The ballot shall be inserted into the ballot deck of the appropriate precinct using procedures established by the chief election officer. In all cases, the secrecy of the ballot must be preserved. If the secrecy of the ballot cannot be preserved, the challenged ballot shall not be processed except to break a tie vote, as ordered by the appellate court. It shall be disposed of as provided by law.

HAR §3-172-103 quoted in Dkt. 11 at 361. Baker raised to the Board prior examples in which county clerks segregated ballots after they were cast, and the same could have been done in the case of Galuterias' ballots in 2014. Dkt. 8 Tr. 5/26/2015, at 22: 10-16, 25: 5-10. The City Clerk testified that Baker's challenge was received days after the Galuterias voted via absentee ballot and "there's no way to pick out their secret ballot out from the rest of the ballots that are in the ballot boxes . . . the ballots are mixed in with other people from that district that voted, so I wouldn't

know which ballot to pull out regardless. So that's an impossibility in terms of segregating the ballots." Dkt. 8 Tr. 12/5/2015 at 216: 1-23; Dkt. 11 at 337. The City Clerk represented that Baker's proposed alternative procedures would have impacted 2,000 other ballots. Dkt. 11 at 418. However, a total of 184 walk-in ballots were cast for the entire walk-in period for the Galuterias' precinct, and these ballots could have been segregated upon unsealing of the ballot boxes on Election Day. Dkt. 11 at 423.

Ballots have serial numbers and absentee ballots are identified with specific mailing addresses and voters. See HAR §3-172-73(f) (requiring precinct officials to compare ballot serial numbers with the ballot seal control form to determine ballot quantity). The City Clerk stated walk-in absentee ballots do not have any identification mark, numerical code or bar code identifying the individual who cast the ballot after it has been cast. Dkt. 11 at 338. As Baker argued, the inability of the City Clerk to segregate the ballot through use of barcodes or serial numbers did not prohibit segregation of the walk-in ballot box for their precinct containing the Galtuerias' improperly cast ballots, which would be set aside pending the outcome of these procedures. Dkt. 11 at 361. If the City Clerk lacked a mechanism to segregate invalidly cast ballots, an alternative procedure was required to be employed to prevent them from being counted. Dkt. 11 at 361. The box containing votes from the Galuterias' precinct at their walk-in voting location could have been separated and set aside and if such procedure affected the election outcome, the candidate or any thirty registered voters would have an avenue to relief with the Hawai'i Supreme Court. Dkt. 11 at 361. The Board clearly erred by finding the Galuterias' ballots "could not be isolated" and by incorrectly interpreting the City Clerk's obligations under HRS §11-25 and HAR §3-172-103. Dkt. 12 at 414 (FOF No. 16); Dkt. 11 at 361.

2. The City Clerk reversibly erred by acting upon Baker's challenge under unpromulgated rules.

In his February 2, 2015 letter, the City Clerk acknowledged Baker's challenge was filed prior to the general election and HRS §11-25(c) provided for segregation of the challenged voters' ballots. Dkt. 11 at 7. Because the Galuterias had already cast absentee ballots, which "may have rendered [the challenge] moot as a result[,]" the City Clerk decided to proceed on Baker's challenge because it could have been resubmitted after the election. Id. The City Clerk acted unlawfully by failing to

resolve his challenge through duly promulgated procedures pursuant to HAR, chapter 172, and deeming Baker's challenge as resubmitted as a post-election challenge. Dkt. 8 Tr. 5/26/2015, at 22: 4-20, 24: 10-20. Unlawful actions included the City Clerk's failure to segregate the Galuterias' ballots before the Board's decision on the status of the Galuterias' voter registration, consideration of whether the issue was "mooted" by the Galuterias' already-cast ballots or their impact on the outcome of the election; and procedures implemented for Baker's challenge. Dkt. 11 at 338; Dkt. 8 Tr. 12/5/2015 at 216.

Voter registration challenges were governed under separate rules for those placed prior to election day and those placed at the polling place on election day. HAR §§3-172-42; -44. Appeals to the Board from the City Clerk's decisions on challenges are also governed under separate rules and procedures depending on whether they were placed prior to election day (HAR §3-172-43) or on the day of the election (HAR §3-172-45). None of these procedures provide for disregarding a challenge to a voter's participation in a specific election based on whether the vote affected the outcome of that election. Appeals from day-of election challenge decisions, however, provide for segregation of the challenged voters' ballots into utility envelopes. HAR §§3-172-45(b)(3); 3-172-103. The absence of properly promulgated rules for procedures for addressing voter registration challenges prior to election day prejudiced Baker's due process rights. Dkt. 11 at 303, 360.

Under the Hawai'i Administrative Procedures Act (HAPA), HRS Chapter 91, this Court may affirm, remand, reverse, or modify the Board's decision because Baker's substantial rights were prejudiced by a decision made in excess of the Board's statutory authority and upon unlawful procedure. HRS §§91-3, 91-7, 91-14(g). Although the Board's proceedings were exempted from HRS chapter 91 contested case procedures pursuant to HRS §11-43(c), standards of review provided by HRS §91-14(g) apply to the Board's findings, conclusions, and decision. Id. Dupree reviewed a voter registration challenge under standards of review applied in Sierra Club v. Department of Transportation, 115 Haw. 299, 167 P.3d 292 (2007) and Del Monte Fresh Produce (Hawaii), Inc. v. International Longshore & Warehouse Union, 112 Haw. 489, 146 P.3d 1066 (2006), both of which cited standards of review provided by HRS §91-14(g). See Dupree v. Hiraga, 121 Haw. 297, 312, 219 P.3d 1084, 1099 (2009) citing Sierra Club, 115 Haw. at 315, 167 P.3d at 308 quoting Del Monte, 112 Haw. at 499, 146 P.3d at 1076. As in Dupree, the Board's FOFs/ COLs/ Order may be reviewed under HRS §91-14(g), although the Board's procedures were not governed

by HRS chapter 91 contested case procedures.

The City Clerk acted upon unlawful procedure and unpromulgated rules by: imposing a limit of "mootness" to Baker's pre-election day challenge and implementing the post-election day investigations, exclusive of ballot segregation, instead. Dkt. 8 Tr. 5/26/2015, at 22: 10-16, 25: 5-10; Dkt. 11 at 7. The City Clerk's procedures constituted "rules" because they were relied upon in an official determination, interpreted HRS §11-25, and affected procedures on Baker's voter registration challenge. HRS §91-1(4) defined "rule" to mean:

> each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.

Failure to follow statutory procedures for rulemaking results in invalidity of the rule. See HRS §91-3; Tanaka v. Dep't Land & Natural Resources, 117 Haw. 16, 24, 175 P.3d 126, 134 (App. 2007) (failure promulgate rules under HRS chapter 91 meant "rule" adding hunting days could not be given effect); Vega v. Nat'l Union Fire Ins. Co. of Pittsburgh, 67 Haw. 148, 682 P.2d 73 (1984); Aguiar v. Hawaii Housing Authority, 55 Haw. 478, 490 & 493, 522 P.2d 1255, 1263 & 1265 (1974) (amendments to management resolution altering public-housing rents constituted "rules" required to be adopted pursuant to HAPA). A narrow exception has been carved out for agencies to deal with problems on a case-by-case basis adjudicatory matters in several situations:

> [P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be resolved despite the absence of a general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.

In re Hawaiian Elec, Inc., 81 Haw. 459, 468, 918 P.2d 561, 570 (1996) (quoting Security & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 202-03 (1947)), relied upon in Green Party of Haw. v. Nago, No. CAAP-14-0001313, at 1 (Haw. App. 2015) cert. granted, No. SCAP-14-0001313 (Mar. 10, 2016). The City Clerk could reasonably foresee absentee polling places receiving ballots prior to election day in light of rules governing and defining absentee polling places (HAR §§ 3-172-1; 3-174-7); had sufficient experience with absentee voting procedures, which have existed since 1975 (See 1975 Session Laws Haw., Act 36, s 3); and challenges to absentee voters could be captured

within a general rule. The general "problem" of challenges placed after walk-in absentee ballots were cast was neither "specialized" nor "varying in nature[,]" but rather a product of the Office of Elections' own rules. See HAR chapters 172 (providing for voter challenge procedures) & 174 (providing for absentee ballot procedures). The Board reversibly erred by affirming the City Clerk's decision on Baker's challenge, which was obtained through unlawful procedure.

3. The City Clerk's failure to adhere to statutory procedures for Baker's pre-election day challenge was not harmless error.

The Board reversibly erred by failing to enter legal conclusions concerning the City Clerk's failure to adhere to statutory procedures for Baker's challenge and clear errors arising from the City Clerk's failure to act to separate the Galuterias' challenged ballots. Dkt. 12 at 414 (FOF No. 16), 418 (conclusions of law). The City Clerk's failures and omissions in acting on Baker's challenge constituted harm because they defeated the clear statutory design under which votes by challenged voters should not be counted until the challenge and appeal process has been completed to prevent a voter from voting in races they are not entitled to vote in. HRS §§11-25(c), -54; HAR §3-172-103. Allowing the Galuterias ballots to be counted before the process concluded defeated the purpose of the voter registration system. Dkt. 11 at 361. The Board reversibly erred by failing to address the City Clerk's procedural mishandling of Baker's challenge. Dkt. 12 at 416, 418. The City Clerk argued to the Board, "the inability to segregate the Galuterias' ballots may have 'mooted' the issue," but he proceeded with the challenge because Baker could have asserted it later. Dkt. 11 at 339. The City Clerk concluded "the fact that the City Clerk proceeded with his investigation and decision-making did not prejudice Mr. Baker at all" and alleged Baker had not produced evidence of prejudice." Dkt. 11 at 339-40; c.f. Dkt. 11 at 361.

The City Clerk's argument that the issue was mooted in the absence of evidence the Galuterias' ballots "prejudiced or in any way tainted the election." Dkt. 8, 5/26/2015 at 24: 10-12. Likewise, the Board chairperson stated at the hearing on the Galuterias' motion to dismiss, "we know that the . . . votes were cast and the votes cannot be extracted from the mass of votes. There's no indication that the two votes of the Galuterias would have changed the outcome of any vote within District 12 or elsewhere in the state, so we are prepared to move beyond that, unless there's an issue." Dkt. 8, Tr. 5/26/2015, at 14: 3-9. The Board's statement demonstrated two reversible

errors, in addition to failing to ascertain the harm consequent to the City Clerk's inappropriate acts.

First, Baker sought appropriate procedures for his voter registration challenge, and not to challenge the election pursuant to HRS § 11-172. See Dkt. 11 at 3; Taomae v. Lingle, 108 Haw. 245, 250-51, 118 P.3d 1188, 1193-94 (2005) (challenges to the validity of constitutional amendments presented to the voters at a general election were not subject to the standard of establishing that the outcome of the election was affected). The Board applied the wrong standard in determining the issue of whether the City Clerk infringed on Baker's rights to lawful procedure. Second, the Board's rules did not provide for the Board to engage in fact-finding prior to its evidentiary hearing, and HAR §3-172-43(b), which provided informal pre-hearing conferences, specifically prohibited fact-finding or argument.[4] As Baker noted, the practical impact of his challenge to the Galuterias' voter registration status concerned not only the enforcement our electoral system, but the City Clerk's failure to investigate and resolve the challenge in a timely manner further improperly allowed Brickwood Galuteria to continue to claim eligibility for his seat in the Twenty-Eighth Legislature of the State of Hawai'i. Dkt. 11 at 303.

In Hussey v. Say, 133 Haw. 229, 325 P.3d 641 (App. 2014), this Court considered the legislative history of HRS chapter 11 in regard to the issue of whether the county clerk and boards or courts held jurisdiction over *quo warranto* proceedings against elected officials regarding voter qualifications. Id., 133 Haw. at 334, 325 P.3d at 646. This legislative history further bears out a mandate of maintaining accurate voter registrations amidst a dynamic demographic.

HRS chapter 11 was enacted in 1970 as part of Act 26. 1970 Haw. Sess. Laws Act 26, § 2 at

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4 HAR §3-172-43 provides in relevant part:

> (b) The board may hold an informal pre-hearing conference for the purpose of:
>
> (1) Simplifying and clarifying issues;
>
> (2) Making necessary or desirable amendments to the notice of the charges, or its answer, if any;
>
> (3) Obtaining admissions of fact or documents to avoid unnecessary proof; limiting the number of expert witnesses; and
>
> (4) Any other materials that may aid in the reasonable and expeditious disposition of the matter;
>
> Notice and opportunity to participate shall be given to each party and each party's attorney. The entire board or one of its members designated for such purpose shall preside at the conference. No attempt at fact finding or argument shall be permitted. Prejudicial comment or conclusion on any issue being controverted shall not be made or stated at any time by any member or the presiding member of the board. Minutes of the conference shall be kept and agreements shall be concisely noted.

> 17–71. "Due to the initiation of new voting systems, new parties, a rapidly increasing and mobile population, and actions of the 1968 Constitutional Convention," the legislature passed Act 26 to "thorough[ly] revis[e]" State and county election laws. 1970 Haw. Sess. Laws Act 26, § 1 at 17. The committee report stated that provisions included in Act 26 were intended to clarify residency, make voter registration "easier," and "assist[ ]" the county clerk in "keeping registration up to date." H. Stand. Comm. Rep. No. 589, in 1969 House Journal at 852. Specifically, added provisions would allow the county clerk "to gather information on the residency status of voters' names and addresses from public and private sources." Id. The committee report noted, "[b]ecause of a large population and high voter mobility, voter lists, especially that for [O'ahu], are becoming increasingly difficult to maintain accurately. This provision will aid the clerk of Honolulu and the clerks of the neighbor islands, as their populations increase, to continually update their lists." Id. Act 26 amended the Hawaii Revised Statutes by adding chapter 11, which includes HRS §§ 11–23 and 11–25. 1970 Haw. Sess. Laws Act 26, § 2 at 24–25. Under HRS §§ 11–23(a) and 11–25(a), the county clerk is empowered to investigate challenges to a voter's registration. The legislative history of HRS chapter 11 shows the legislature empowered the county clerk to "investigate" and rule upon voter registrations under HRS § 11–25 to "assist" the county clerk in keeping voter registrations up to date. H. Stand. Comm. Rep. No. 589, in 1969 House Journal at 852.

Id. As borne out by its legislative history, HRS chapter 11 intended the City Clerk to ensure accurate lists of voters entitled to vote in an election and his authority to investigate voter registrations was not conditioned on whether a challenged registration would have affected the outcome of the election. Rather, the purpose of voter registration laws is to ensure the integrity of elections. The integrity of elections may be compromised by "district shopping" or other improper means of casting ballots. See supra Part V.A.3 (discussing the Walters case). The Board clearly erred by failing to discern] the City Clerk's failure to comply with HRS chapter 11's statutory mandate of ballot segregation. Dkt. 12 at 414 (FOF No. 16), 418

C. The Board operated under unlawful procedures and in excess of promulgated rules and their statutory authority

The Board was not authorized to receive or render judgment on pre-evidentiary hearing submissions, including Galuteria's motion to dismiss, filed April 14, 2015, joinder to the motion to dismiss by the City Clerk, filed June 9, 2015, or the Galuterias' motion to strike, filed June 23, 2015. Dkt. 11 at 429. Baker raised these errors to the Board. Dkt. 11 at 357, 409-10. By receiving motions and issuing orders on the same, the Board acted in excess of their authority and upon rules not duly promulgated pursuant to HRS § 91-3.

1. The Board's pre-hearing orders and fact-finding were not provided for by HRS chapter 11 or its rules

HRS chapter 11 exempted the Board's quasi-judicial procedures from the HRS chapter 91 regarding contested case hearings and required them to rather be "Administered according to rules adopted by the chief election officer." HRS §11-43(a) & (c). Contested case proceedings include "pleadings, motions, intermediate rulings" and provide for separate findings of fact and conclusions of law for "[e]very decision and order adverse to a party[,]" which implicitly acknowledged potential issuance of multiple decisions and orders. HRS §§91-9(e)(1), 91-12. By contrast, Board procedures solely provide for appeal specifically from the Board's single "written decision, including findings of fact and conclusions of law, upon the appellant. This written decision of the board shall be a final appealable order." HRS §11-51. HRS §11-53 intended for the Board to issue a single written decision and not interlocutory orders, such as the Board's order regarding the Galuterias' motions, filed October 16, 2015. Dkt. 11 at 409. The Board was required to adhere to procedures for challenge-appeals administered under rules adopted by the chief election officer. HRS § 11-43(c). Board appeals' procedures provided for a single evidentiary hearing, an informal pre-hearing conference in which "[n]o attempt at fact finding of argument" was permitted, and "preliminary determinations necessary for the prompt and efficient management of the appeal hearing." HAR §3-172-43(b)(4) & (d). Board rules did not authorize the Board or the chairperson to receive or render interlocutory decisions on motions or pleadings or to engage in preliminary determination of facts. HAR §3-172-43(d); Dkt. 11 at 409.

The Galuterias did not cite any rule authorizing their submission of a motion to dismiss or reply memorandum in support of dismissal. Dkt. 11 at 188, 322. Further, the Galuterias failed to cite HRCP Rule 56 as the basis for their motion to dismiss, which prejudiced Baker's ability to understand the procedural posture of their dismissal request. Dkt. 11 at 409. For instance, Baker devoted a substantial amount of his response to the motion to dismiss, filed June 16, 2015, in argument against the application of HRCP Rule 12(b)(6) as a basis for dismissal. Dkt. 11 at 358, 410. It was not until the Galuterias disclosed otherwise in their motion to strike, filed on June 23, 2015, that Baker learned they were seeking summary judgment. Dkt. 11 at 372 ("Rule 12(b)(6) of the [HRCP] does not provide guidance for the Board. . . . the Board should look to HRCP 56 for guidance). The Board sided with the Galuterias and determined to treat their motion to dismiss as a

motion for summary judgment, and noted " [Baker] has under the law the burden of producing evidence and the burden of proof as to the ultimate issues in his challenge of the residency of [Galuteria]." Dkt 8, Tr. 5/26/2015, at 11: 7-17.

Dismissal of Baker's challenge, summary judgment for the Galuterias, and striking Baker's responsive pleading did not concern merely "preliminary determinations" and rendering judgment on them would not have been strictly "necessary for the prompt and efficient management of the appeal hearing." HAR §3-172-43(d). Dismissal of Baker's challenge or his responsive pleadings, as requested by the Galuterias' motions, would not constitute "preliminary" determinations and would not have been related to management of the hearing. See Hawaiian Envtl. Alliance v. Bd. of Land & Natural Res., 136 Haw. 376, 380, 363 P.3d 224, 228 (2015) (granting a permit prior to the hearing on the matter was not "preliminary" and denied petitioners due process rights to be heard at "a meaningful time and in a meaningful manner") (citing HRS §91-14 and Sandy Beach Def. Fund v. City & Cnty. of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989)); Whitehead v. Nevada Com'n on Judicial Discipline, 893 P.2d 866, 978 (Nev. 1995) (J. Shearing, dissenting) (noting Random House dictionary definition of "preliminary" as: "1. preceding and leading up to the main part, matter, or business; introductory; preparatory; preliminary examinations.").

Granting or denying the Galuterias' motions to dismiss, strike, or obtain summary judgment were not "necessary for the prompt and efficient management of the appeal hearing." HAR §3-172-43(d). References to efficiency and manageability of a hearing concerned procedural concerns such as the admission of intervenors and rearranging agenda items to organize oral testimony. See HAR §13-167-54(b)(2) (State of Hawai'i Commission on Water Resources Management Rules of Practice and Procedure provide additional parties may be denied participation in a contested case hearing where "the addition will render the proceedings inefficient and unmanageable."); HAR §16-99-83(a)(3) ("The [State of Hawai'i Real Estate Commission] may rearrange the items on the agenda for the purpose of providing for the most efficient and convenient presentation of oral testimony"). Similar to other agency rules authorizing hearing officers to manage procedures, HAR §3-172-43(d) authorized the chairperson to make preliminary determinations necessary to prompt and efficient management of the appeal hearing, and not to issue orders on dispositive motions that would foreclose the substantive purpose of the hearing. Id.

The Board's fact-finding for purposes of the Galuterias' motion to dismiss and motion to

strike was not authorized by any rule. HAR §3-172-43(b) provided solely for an "informal prehearing conference" at which fact finding and argument were expressly prohibited. HAR §3-172-43(d) applied to pre-election day challenge appeals and provided: "The chairperson of the board shall be the presiding officer and shall be authorized to make any preliminary determinations necessary for the prompt and efficient management of the appeal hearing." Id. (emphasis added). HAR §3-172-43(d) did not permit summary decision making or fact-finding, and insofar as the Galuterias were construing the rule to permit determinative dispositions solely by the Chairperson, such a construction would contradict HRS §92-15, which required a majority of the Board "to do business[.]" Id.; Dkt. 11 at 410. Put otherwise, notwithstanding that dismissal of the appeal would not have constituted a lawful "preliminary determination" issued for procedural efficiency, the chairperson also alone could not summarily dismiss an appeal pending before the Board under HRS §92-15 and the entire Board was not authorized to make "preliminary determinations" on motions under HAR §3-172-43(d). Notwithstanding their statement that their motions were permitted under HAR §3-172-43(d) and their motion to dismiss sought summary judgment, the Galuterias stated they had "not taken the position, at any time, that the Chairperson can dispose of this motion singlehandedly." Dkt. 11 at 414. HAR §3-172-43(d) did not authorize the Board or the chairperson to receive or render judgment on the Galuterias' motions and the Board exceeded its authority in doing so. The Board itself held authority to call witnesses and receive evidence, as permitted by rule. HRS § 11-43. However, no rule or statute permitted the Board to delegate authority to the chairperson or an other to receive and rule on dispositive motions or conduct other proceedings under which the merits of the appeal challenge or facts in evidence could be determined. Compare HRS §171-6(8) (providing the Board of Land and Natural Resources (BLNR) with authority to delegate to the chairperson duties "lawful or proper for the performance of the functions vested in the board"); HRS §92-16(c) (providing BLNR with authority to delegate responsibility for holding a contested case hearing to a hearing officer); HAR §13-1-32(d) (providing the BLNR may appoint a hearing officer to conduct contested case hearings). In any case, the Board did not delegate authority to determine evidentiary matters to the chairperson.

2. The Board's unlawful procedures prejudiced Baker's substantial rights to a fair hearing on his appeal challenge

The Galuterias contended their motions to dismiss and to strike Baker's filings were permitted for "preliminary determination" under HAR §3-172-43(d). Dkt. 11 at 368 (the Galuterias' motion to strike). The Galuterias conclusorily argued, "The Chairperson, by allowing the parties to file dispositive motions in this matter, indeed promotes the 'prompt and efficient management' of this matter" and alleged Baker had failed to "produce some evidence supporting his assertion that it would be prudent for the Board to continue with his appeal." Dkt. 11 at 374. As the Board correctly determined, Baker had introduced evidence sustaining material issues of fact, including the lack of declarations "attesting to Abigail L. Galuteria's residence at Curtis Street or her intent to remain at the time of Baker's challenge[,]" the most recent rental agreement was predated subsequent to Baker's challenge, the lack of evidence demonstrating "the Galuterias repaid back property taxes on the Pakui Street residence[,]" and the "fundamental basis of the Galuterias' claim of actual residence at the Curtis Street address" was contradicted by declarations indicating Juliette Galuteria was not mentally incapacitated. Dkt. 11 at 433. However, the Board thus engaged in fact finding and applied those findings to substantive issues that were the subject of the Galuterias' motion to dismiss. Dkt. 11 at 188. No rule permitted the Board's fact-finding prior to the evidentiary hearing.

In addition to the lack of notice of the Galuterias' HRCP Rule 56 motion in their "motion to dismiss," the Board's "preliminary determinations" in their October 16, 2015 order and second prehearing conference favored the Galuterias' presentation of rebuttal evidence. Dkt. 11 at 433. At the November 9, 2015 second prehearing conference, the Board instructed the Galuterias; "If you want to provide documentation that Senator Galuteria has been in touch with the City real property tax people with respect to his claimed exemption that he is now reversing, we need something, you know more revelatory . . . if you want to send correspondence, that's fine." Dkt. 8, Tr. 11/9/2015 at 47. By contrast with the Board's specific instructions to the Galuterias, Baker was not apprised of the type and kind of evidence the Board sought, or their assessment of existing submitted evidence, in adjudicating his appeal through either the October 16, 2015 Order or at either of the pre-hearing conferences. First, the Board's hearing on the Galuterias' motions was not permitted by rule. Dkt. 11 at 409. If any rule applied, however, it would have been HAR §3-172-43(b) provisions for a

"informal pre-hearing conference[,]" which prohibited fact-finding or argument and specified: "Prejudicial comment or conclusion on any issue being controverted shall not be made or stated at any time by any member or the presiding member of the board." The Board's decision to allow the Galuterias to submit motions exceeded their authority, was unauthorized by any rule or statute, and prejudiced Baker's substantial rights.

D. The Board acted upon unlawful "rules" not duly promulgated pursuant to HRS §91-3 and should be declared invalid pursuant to HRS §91-7

The Board represented that its second prehearing conference was conducted pursuant to HRS §§ 11-26 and 11-43, and HAR §3-172-43. Dkt. 11 at 434. The Board cited no rule authorizing its October 16, 2015 Order on the Galuterias' motions. Dkt. 11 at 429. As discussed supra Part IV.B.1, HRS chapter 11 and HAR chapter 172 did not authorize the Board's actions. The Board's interpretation and application of statutes and rules, however, constituted "rules" that were required to be promulgated under HRS § 91-3 procedures. Because such rules were not properly promulgated, they were invalid. See HRS § 91-7(b) ("[t]he court shall declare the rule invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures") (quoted in Foytik v. Chandler, 88 Haw. 307, 315, 966 P.2d 619, 627 (1998)); Rose v. Oba, 68 Haw. 422, 425, 717 P.2d 1029, 1031 (1986) ("Rules not promulgated in accordance with the HAPA rule-making requirements are invalid and unenforceable.") citing Burk v. Sunn, 68 Haw. 80, 83, 705 P.2d 17, 20-21 (1985)).

The Board's procedures for challenge appeals were exempted from HRS chapter 91 provisions "regarding contested case hearings," but were required to comply with rules promulgated by the chief election officer. HRS §11-43(c). As evident in the Board's rules, their appeal procedures were not exempted from every provision of HRS chapter 91. See HAR § 3-172-43(h) ("Rules of evidence as specified in HRS §91-10 shall be applicable thereto"). HRS §91-3 rulemaking requirements did not regard contested case hearings and applied to "agencies," which were defined to mean "each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches[.]" HRS §91-1(1) (emphasis added). Therefore, the Board's actions could not have complied with rules

unless and until the Chief Election Officer promulgated rules for their appeal challenge procedures.

HRS §91-3 provides procedures for the adoption, amendment, or repeal of agency rules. Id. Procedures included mandatory thirty-days notice, public hearings, and submission of comment on draft rules, and then publication of final rules. Id. The Chief Election Officer issued no notice, held not public hearings, provided for no comment, nor published draft or final rules concerning the Board's authority to receive and issue orders on interlocutory motions or hold successive prehearings. The Board rather acted under unlawful "rules" concerning the Board's authority to: receive motions and render binding orders on those motions; hold successive prehearing conferences; and identify dispositive facts at the prehearing conferences.

As noted supra Part V.B.2, HRS § 91-1(4) defined "rule" to include "each agency statement of general or particular applicability and future effect that . . . describes the organization, procedure, or practice requirements of any agency" and excluded "regulations concerning only the internal management of an agency[.]" Id. The Board's procedures on registration challenge appeals affected the challenge procedures available to the public and did not concern only the internal management of the Board or Office of Elections. The Board's prehearing order and posture throughout the proceedings described its organization, procedure, and practice requirements. The Board created new proceedings during which a challenge could be disposed of prior to an evidentiary hearing, allowed prejudicial comment, fact-finding, and argument through these new proceedings, and, or alternatively, delegated authority to the chairperson to do so in excess of any rule. Dkt. 11 at 357, 409-10.

The Board and the City Clerk's unpromulgated rules contrast with the situation in Green Party, in which the Intermediate Court of Appeals (ICA) concluded the chief election officer was not required by HRS §11-4 to promulgate rules for ballot delivery, printing, and disposal. Id., No. CAAP-14-0001313 at *19-21. Baker challenged the Cit Clerk's and the Board's actions based on the absence of authority for those acts, and not the chief elections officer's failure to promulgate rules under discretionary authority provided by HRS §11-4, which states in relevant part:

> the chief election officer may make, amend, and repeal such rules and regulations governing elections held under this title, election procedures, and the selection, establishment, use, and operation of all voting systems now in use or to be adopted in the State, and all other similar matters relating thereto as in the chief election officer's judgment shall be necessary to carry out this title.

Id. The Board's interpretation of HRS §§11-26 and 11-43, and HAR §3-172-43, insofar as they served as the basis for the Board's procedures on dispositive motions, additional hearings, and delegations of fact-finding and adjudicatory authorities, constituted "rules" within the meaning of HRS §91-1(4). Dkt. 11 at 434 (specifying the Board's authority to conduct a second prehearing conference and evidentiary hearing). The City Clerk conclusorily contended Baker was not prejudiced by proceedings on his challenge. Dkt. 11 at 339-40.

Green Party's discussion of Pila'a 400, LLC v. Bd. of Land & Natural Resources, 132 Haw. 247, 320 P.3d 912 (2014) was instructive on the issue of whether the quasi-judicial procedures created by the Board during proceedings on Baker's challenge would be "routinely" employed so as future use of such procedures were "clearly foreseeable[.]" Id., No. CAAP-14-0001313 at *18 quoting Pila'a, 132 Haw. at 266-67, 320 P.3d at 931-32. Methods for assessing damage to natural resources during the course of a contested case hearing would be uniquely applied and not foreseeable used in the future. Id. Determination of Pila'a's damage penalty "operate[d] concretely upon" the private parties "in their individual capacity" and the Pila'a court appropriately held this constituted "adjudication" as distinct from rulemaking. See In re Water Use Permit Applications, 94 Haw. 97, 169 9 P.3d 409, 481 (2000) (citations omitted). Board procedures affecting public rights, such as their rights to challenge voter registration and appeal from such challenges, must go through rule-making or contested case procedures. HRS §§ 91-3, -9. Unlike Pila'a, this case concerns the Board's unpromulgated rules for submissions of evidence, argument, and adjudication during its appeal process. See supra Part V.C.1&2. Although developed during the course of its quasi-judicial proceedings, the Board's actions constituted rulemaking and not case-by-case adjudication because its unpromulgated rules "lay[] down new prescriptions to govern the future conduct of those subject to its authority[.]" Shoreline Transp., Inc. v. Robert's Tours & Transp., Inc., 70 Haw. 585, 591, 779 P.2d 868, 872 (1989) (distinguishing between agencies' rulemaking and adjudicatory functions) (citations and internal quotation marks omitted). Procedural rules, by definition, would clearly have a foreseeable future use in Board proceedings on challenge appeals and therefore procedures available to the public. See HRS §11-25(a) ("[a]ny registered voter may challenge the right of a person to be or remain registered as a voter in any precinct for any cause not previously decided by the board of registration or supreme court in respect of the same person"); HRS §11-26 (providing the right of appeal from a challenge decision).

The Board nowhere disclosed its interpretations of HRS §§11-26 and 11-43, and HAR §3-172-43 or other bases for its proceedings on Baker's challenge appeal in excess of those rules, and did not respond to Baker's argument in their FOFs/COLs/Order nor address it at any of their hearings. See Dkt. 12 at 411-24; Dkt. 8 (transcripts). The Board's undisclosed interpretations or de novo procedural developments constituted improper rulemaking because as applied to Baker's challenge appeal, those interpretations effectively amended those statutes and rules to provide for procedures not promulgated by the chief election officer and such amendments affected the voter challenge procedures available to the public. See Green Party, No. CAAP-14-0001313 at *12 interpreting Nuuanu Valley Ass'n v. City &. Cnty. of Honolulu, 119 Haw. 90, 99-100, 194 P.3d 531, 540-41 (2008) ("Nuuanu Valley Ass'n . . . concluded that the [agency's] undocumented 'practice' of publicly disclosing engineering reports only after they had been deemed acceptable constituted improper rule-making because the practice, in effect, amended the rule requiring disclosure and "affects the procedures available to the public and implements, interprets, or prescribes policy or describes the procedure or practice requirements of [the agency].").

Finally, the Board's procedural rules for challenge appeals did not concern only its internal management. C.f. HRS § 91-1(4). The Board's procedures were directed at persons participating in appeal challenges, which could be brought by any registered voter, and were not "clearly directed" at instructing internal staff. Compare Green Party, No. CAAP-14-0001313 at 23 (procedures for counting wrong ballots were directed at election workers and thus concerned internal management); Doe v. Chang, 58 Haw. 94, 564 P.2d 1271 (1977), (an agency's manual of instruction concerning welfare fraud investigations concerned internal management and was not a "rule"); State v. Claunch, 111 Haw. 59, 137 P.3d 373 (App. 2006); State v. Fedak, 9 Haw. App. 98, 825 P.2d 1068 (1992) (police sobriety roadblock procedures were directed towards policemen and therefore concerned internal management); In Interest of Doe, 9 Haw. App. 406, 412, 844 P.2d 679, 682-83 (1992) (field sobriety testing procedures were instructional in nature and directed at police officers). The Board's procedures were not imposed for security of a facility, nor purport to govern a contract executed with a private party. Compare Holdman v. Olim, 59 Haw. 346, 581 P.2d 1164 (1978) (regulation of access to a prison facility imposed for security reasons concerned the internal management of the agency); Emma Ah Ho v. Cobb, 62 Haw. 546, 617 P.2d 1208 (1980) (contract executed between a private party and agency set forth only contractual rights of the parties and therefore concerned the

agency's internal management).

Because the Board's procedures, statutory and rule interpretations, and other policies constituted "rules," they were required to be promulgated pursuant to HRS §91-3 procedures. The Board's unpromulgated rules were therefore invalid and the Board's decision should be vacated because issued upon unlawful procedure. Irving v. Ocean House Builders Dba Nan, Inc., No. CAAP-14-0001059, at *4 (App. 2015) citing Potter v. Hawai'i Newspaper Agency, 89 Haw. 411, 422, 974 P.2d 51, 62 (1999).

VI. CONCLUSION.

Based on the foregoing, Baker respectfully requests this Court:

(1) Declare Baker sustained his burden of demonstrating the Galuterias' had not abandoned their Pakui Street homes and therefore the Galuterias' were improperly registered to vote in the 2014 November General Election;

(2) Declare the Board's conduct of proceedings on Baker's challenge appeal was in excess of the Board's statutory and regulatory authority, and its decision was invalid;

(3) Vacate the Board's Findings of Fact, Conclusions of Law, Decision and Order, filed January 15, 2016 (Dkt. 11 at 411-24); and,

(4) Award Baker reasonable attorney's fees and costs and any other equitable relief deemed appropriate by this Court.

DATED: Honolulu, Hawai'i April 18, 2016

/s/ Lance D. Collins

LAW OFFICE OF LANCE D COLLINS
LANCE D. COLLINS
Attorney for Appellant-Appellant

VI. STATEMENT OF RELATED CASES

Appellant is unaware of any related cases.

APPENDIX A

NUMBER 13-14-00581-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

GUADALUPE "LUPE" RIVERA SR., Appellant,

v.

LETICIA "LETTY" LOPEZ, Appellee.

On appeal from the 370th District Court of Hidalgo County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Longoria
Memorandum Opinion by Justice Perkes

This case is an election contest concerning the District 5 seat on the City Commission of Weslaco. Appellant/cross-appellee Guadalupe Rivera Sr., and appellee/cross-appellant Leticia Lopez appeal the trial court's order voiding the election and ordering a new election. Rivera brings ten issues and Lopez brings four cross-issues. We affirm.

I. BACKGROUND

The City of Weslaco, Hidalgo County, Texas held a general election for the District 5 seat on the Weslaco City Commission. The candidates in the contested election were the incumbent, Guadalupe Rivera Sr. (Rivera), and the challenger, Leticia "Letty" Lopez (Lopez). The margin was extremely close, with the final canvass of the election showing that Rivera received 487 votes and Lopez received 471 votes.

Lopez filed an election contest against Rivera, alleging that illegal votes were counted. After a bench trial, the trial court found in favor of Lopez and concluded that the results of the election as shown by the final canvass was not the true outcome because illegal votes were counted. In support of its judgment, the trial court issued the following findings of fact and conclusions of law,[1] among others:

> **Voters Who Cast Their Votes by Mail**
>
> A2. The Court finds by clear and convincing evidence that the following twelve voters cast their mail in ballots for Contestee Lupe Rivera and the person who delivered the mail-in ballot did not provide his/her signature, nor print his/her name and address on the carrier envelope: Marlen or Marlene Martinez, Andres Martinez, Leonor Hinojosa, Leocadia Ledesma, David Lopez, Emma Oviedo, Noe Saldana, Ruth Saldana, Antonia Zepeda, Eulalio Ibanez, Tiburcio Mata and Oralia Saldana.
>
> A3. The Court finds by clear and convincing evidence that Maria Berrones cast her vote by mail-in ballot, did not testify for whom she voted, but did testify that she gave her ballot to Contestee Lupe Rivera, who filled out her ballot for her and mailed her ballot without signing the carrier envelope and without printing his name and address on the carrier envelope. The Court will find by clear and convincing evidence that Maria Berrones cast her vote for Lupe Rivera.

[1] The trial court entered numerous findings and conclusions in support of its judgment. We have only listed those which are most relevant to this opinion.

A4. The Court finds by clear and convincing evidence that the following seven voters cast their vote by mail-in ballots and the person who delivered the mail-in ballots did not provide his/her signature, did not print his/her name and address on the carrier envelope: Arnulfo Gonzalez, Esteban Martinez Sr., Jose Mendez, Maria Garza Mendez, Francisca Pina, Liboria Pina, and Pedro Zepeda. The Court could not determine by clear and convincing evidence for whom the seven voters of these mail-in ballots cast their votes.

B1. Section 86.051(b) of the Texas Elections Code provides that "[a] person other than the voter who deposits the carrier envelope in the mail or with a common or contract carrier must provide the person's signature, printed name, and residence address on the reverse side of the envelope." Violations of [s]ection 86.051(b) of the Texas Elections Code renders a ballot uncountable under Section 86.006(h) of the Texas Elections Code.

Nonresident Votes

D4. Jose Roberto Sandoval is not a resident of District 5[,] Weslaco, Hidalgo County, Texas and therefore his vote is disallowed and since this Court has found that he cast his vote for Contestee Lupe Rivera, his vote will be deducted from Contestee Lupe Rivera's total vote.

. . . .

D6. Felipa Cuellar, Cassandra Renea Alaniz, and Irma Rivera are not residents of District 5, Weslaco, Hidalgo County, Texas and therefore their votes are disallowed.

Ballots Rejected by the Hidalgo County Ballot Board

E1. Seven mail-in ballots were rejected by the Hidalgo County Ballot Board for the reason that the signatures on the application for mail ballot did not match the signature on the carrier envelope.

E2. The voters of the seven rejected mail-in ballots testified in Court that each voter signed their respective application for a mail in ballot and the carrier envelope and that each voted for Contestee Lupe Rivera, seven votes.

E3. The Court does not find by clear and convincing evidence that the Hidalgo County Ballot Board mistakenly rejected the seven ballots.

E4. Therefore the seven mail-in ballots that were rejected by the Hidalgo County Ballot Board for the reason that the signatures on the application for mail ballot did not match the signature on the carrier envelope will not be counted.

Undervotes

F1. The Court finds by clear and convincing evidence that four voters did not cast a ballot for City Commissioner District 5, Weslaco, Hidalgo County, Texas.

F2. At least eleven undetermined votes were cast in City Commissioner District 5, Weslaco, Hidalgo County, Texas.

F3. Therefore at least seven undetermined votes remain.

. . . .

The trial court found a total of thirty illegally cast votes, with sixteen illegal votes cast for Rivera, three illegal votes cast for Lopez, and eleven illegal votes that could not be attributed to either candidate. The court then deducted the disallowed votes for each candidate and adjusted the final vote count to 471 votes for Rivera and 468 votes for Lopez. Because "illegal votes were counted in a number in excess of the margin of victory," the trial court concluded that it was unable to declare a winner in the election. The court entered a final judgment voiding the contested election and ordering the City of Weslaco to hold a new election for the District 5 seat on the Weslaco City Commission. *See* TEX. ELEC. CODE ANN. § 221.012 (West, Westlaw through 2013 3d C.S.). The trial court entered comprehensive findings of fact and conclusions of law detailing which votes it had excluded from each of the contested categories. This appeal and cross-appeal ensued.

II. ELECTION CONTEST LAW AND STANDARD OF REVIEW

An election contest is a special statutory proceeding that provides a remedy for elections tainted by fraud, illegality, or other irregularity. *Blum v. Lanier*, 997 S.W.2d 259, 262 (Tex. 1999); *see* TEX. ELEC. CODE ANN. §§ 221.003–221.014. Under section 221.003 of the Texas Election Code:

> (a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the election contest, as shown by the final canvass, is not the true outcome because:
>
> (1) illegal votes were counted; or
>
> (2) an election officer or other person officially involved in the administration of the election:
>
> (A) prevented eligible voters from voting;
>
> (B) failed to count legal votes; or
>
> (C) engaged in other fraud or illegal conduct or made a mistake.

TEX. ELEC. CODE ANN. § 221.003.

An election contestant has the burden of proving by clear and convincing evidence that voting irregularities were present and that they materially affected the election's results. *Guerra v. Garza,* 865 S.W.2d 573, 576 (Tex. App.—Corpus Christi 1993, writ dism'd w.o.j.); *Wright v. Bd. of Trustees of Tatum Indep. School Dist.*, 520 S.W.2d 787, 790 (Tex. Civ. App.—Tyler 1975, writ dism'd); *Setliff v. Gorrell*, 466 S.W.2d 74, 78 (Tex. Civ. App.—Amarillo 1971, no writ). Election contestants must allege and prove particularized material irregularities in the conduct of the election and show either 1) that a different and correct result should have been reached by counting or not counting certain specified votes affected by the irregularities, or 2) that the irregularities rendered

impossible a determination of the majority of the voters' true will.[2] *Guerra,* 865 S.W.2d at 576; *Wright*, 520 S.W.2d at 793; *Ware v. Crystal City Indep. School Dist.*, 489 S.W.2d 190, 191–92 (Tex. Civ. App.—San Antonio 1972, writ dism'd).

We review the trial court's judgment in an election contest for abuse of discretion. *McCurry v. Lewis*, 259 S.W.3d 369, 372 (Tex. App.—Amarillo 2008, no pet.). An abuse of discretion occurs when the trial court acts "without reference to any guiding rules and principles." *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985); *McCurry*, 259 S.W.3d at 372. If the trial court acted within its discretion, we cannot reverse the judgment simply because we might have reached a different result. *See Downer,* 701 S.W.2d at 242.

Rivera challenges the trial court's order declaring the election void as an abuse of discretion. Additionally, Rivera raises several evidentiary issues as well as statutory construction and constitutional issues. We apply the appropriate standard of review to each corresponding issue; however, we determine the trial court's ultimate decision to declare the election void under an abuse of discretion standard of review.

III. MAIL-IN BALLOT DISQUALIFICATION

By his sixth issue, which we address first, Rivera complains that the trial court erred in disqualifying mail-in ballots allegedly mailed in violation of section 86.0051(b) of the Texas Elections Code. *See* TEX. ELEC. CODE ANN. § 86.0051(b) (West, Westlaw through

[2] Rivera correctly asserts that Lopez has the burden of proving a negative proposition—that a challenged vote is not legal. *See Royalty v. Nicholson*, 411 S.W.2d 565, 575 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.). Our duty is to determine on what potential basis an uncounted vote may have been legal, then review whether Lopez presented evidence that the vote was illegal. Then, we apply the traditional rule of legal sufficiency review. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Dominguez,* 873 S.W.2d 373, 376 (Tex. 1994) (applying this standard of review to insurance case).

2013 3d C.S.). Specifically Rivera argues: 1) the Legislature did not intend to require ballot exclusion for violations of section 86.0051; and 2) a reading of section 86.006(f) "could only lead this Court to conclude that mere failure by a person, who is dropping off a carrier envelope on behalf of a voter, to sign his name and provide an address, without more, is not enough to fall within the prohibition of Section 86.006(f) and the ballot exclusion provision in Section 86.006(h)."[3]

A. Standard of Review

We review a trial court's conclusions of law de novo. *BMC Software Belg., N.V. v. Marchland*, 83 S.W.3d 789, 794 (Tex. 2002); *Reese v. Duncan*, 80 S.W.3d 650, 655 (Tex. App.—Dallas 2002, no pet.) When reviewing the trial court's legal conclusions, we evaluate them independently, determining whether the trial court correctly drew the legal conclusions from the facts. *See BMC Software*, 83 S.W.3d at 794. Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Mack v. Landry*, 22 S.W.3d 524, 528 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

Our fundamental objective in interpreting a statute is "to determine and give effect to the Legislature's intent." *Am. Zurich Ins. Co. v. Samudio*, 370 S.W.3d 363, 368 (Tex. 2012); *accord Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011). In turn, "[t]he plain

[3] In his statutory construction issue, Rivera also argues that "there are no pleadings on file in this case where Appellee Lopez plead[ed] that persons, who assisted a voter, violated Section 86.006(f) and that those ballots should be excluded under under [sic] Section 86.006(h)." We reject this argument. Lopez's pleadings included sufficient factual allegations that numerous mail-in ballots should not be counted. *See* TEX. R. CIV. P. 47 (West, Westlaw through 2013 3d C.S.); *Torch Operating Co. v. Bartell*, 865 S.W.2d 553, 554 (Tex. App.—Corpus Christi 1993, writ denied) (citing *Colbert v. Dallas Joint Stock Land Bank of Dallas*, 102 S.W.2d 1031, 1033 (Tex. 1937) (holding that pleader need not plead specific statute on which claim is based)).

language of a statute is the surest guide to the Legislature's intent." *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012). "We take the Legislature at its word, and the truest measure of what it intended is what it enacted." *In re Office of Att'y Gen.*, 422 S.W.3d 623, 629 (Tex. 2013). "[U]nambiguous text equals determinative text," and "'[a]t this point, the judge's inquiry is at an end.'" *Id.* (quoting *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652 (Tex. 2006)); *see In re Lee*, 411 S.W.3d 445, 450–451 (Tex. 2013).

B. Applicable Law

The Texas Election Code provides for the completion and delivery of a mail-in ballot to the early voting clerk. The carrier envelope may be transported and delivered to the early voting clerk only by mail or by common or contract carrier. TEX. ELEC. CODE ANN. § 86.006(a). A person other than the voter who deposits the carrier envelope in the mail or with a common or contract carrier must provide the person's signature, printed name, and residence address on the reverse side of the envelope. *Id.* § 86.0051(b). A ballot returned in violation of section 86.006 may not be counted. *Id.* § 86.006(h).

C. Analysis

The trial court concluded that "[v]iolations of [s]ection 86.051(b)[4] of the Texas Elections Code renders a ballot uncountable under [s]ection 86.006(h) of the Texas Elections Code." In order to reach this conclusion, the trial court decided that section 86.006 incorporates section 86.0051(b).

[4] We infer from the language of the trial court's conclusion of law that the correct statutory reference is 86.0051(b). *See* TEX. ELEC. CODE ANN. § 86.0051(b) (West, Westlaw through 2013 3d C.S.).

Rivera argues that section 86.0051 does not provide for ballot exclusion in the event of a violation, whereas section 86.006 does. *See id.* §§ 86.0051, 86.006(h). Rivera further contends that because the Legislature expressly provided ballot exclusion in one section but not another, the Legislature deliberately decided not to mandate ballot exclusion for improper ballot possession under 86.0051(b). In support of his argument, Rivera cites *Jones v. Morales*, 318 S.W.3d 419 (Tex. App.—Amarillo 2010, no pet.). *Jones* involved the question of whether a violation of section 86.010(d) of the Texas Election Code results in ballot exclusion. *See* TEX. ELEC. CODE ANN. §§ 86.010(c)(e); *Jones*, 318 S.W.3d at 435. In concluding that it does not, our sister court held that the Legislature expressly provides for ballot exclusion for violations of subsections (a) or (b) of section 86.010, but did not include such a provision for subsection (d). *See* TEX. ELEC. CODE ANN. §§ 86.010(a)(b)(d); *Jones*, 318 S.W.3d at 435. Rivera urges us to adopt the reason used by the *Jones* court in interpreting section 86.010 and conclude that a violation of section 86.0051 does not render an uncountable ballot under 86.006. We reject this argument because the statute interpreted in *Jones* is different from the statute in this case.

Section 86.006(f)(4) says in relevant part that:

> (f) A person commits an offense if the person knowingly possesses an official ballot or official carrier envelope provided under this code to another. Unless the person possessed the ballot or carrier envelope with intent to defraud the voter or the election authority, this subsection does not apply to a person who, on the date of the offense, was:
>
> . . . .
>
> (4) a person who possesses the carrier envelope in order to deposit the envelope in the mail or with a common or contract carrier and

> who provides the information required by Section 86.0051(b) in accordance with that section;
>
> . . . .

TEX. ELEC. CODE ANN. § 86.006(f)(4). The statute is unambiguous. A plain reading of this statute means that if a person who possesses another's ballot or carrier envelope and fails to provide their signature, printed name, and residence address on the carrier envelope as required by section 86.0051(b), then section 86.006(f) is violated, thereby rendering the ballot uncountable under 86.006(h). *See id.* §§ 86.006(f), (h).

Our review of the election code requires the conclusion that someone who possesses another mail-in ballot must provide the information required by 86.0051(b). Since we conclude the statute is unambiguous, and construe the plain language, we need not consider legislative intent. *See In re Office of Att'y Gen.*, 422 S.W.3d at 629. The trial court correctly disqualified the mail-in ballots handled in violation of the election code. We overrule appellant's sixth issue.

IV. EVIDENTIARY CHALLENGE

In issues one through five, seven and nine, Rivera challenges the legal and factual sufficiency of the evidence that supports the trial court's determination that the challenged votes were invalid.[5]

A. Applicable Law and Standard of Review

1. Legal Sufficiency

[5] We refer to the issues as Rivera numbers them in his brief, but reorganize them in our opinion. *See* TEX. R. APP. P. 44.1.

In conducting a legal sufficiency review under a clear and convincing standard, we "look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true." *In re J.F.C.*, 96 S.W.3d 256, 265–66 (Tex. 2002). We disregard "all evidence that a reasonable factfinder could have disbelieved or found to have been incredible." *Id.* at 266. But, in reviewing legal sufficiency of the evidence under a clear and convincing standard, we cannot disregard contrary evidence that the trier of fact could not ignore. *City of Keller v. Wilson*, 168 S.W.3d 802, 817 (Tex. 2005). When the trial court has acted as fact-finder, the trial court determines the credibility of the witnesses and the weight to be given their testimony. *See id.* at 819; *see also Woods v. Woods*, 193 S.W.3d 720, 726 (Tex. App.—Beaumont 2006, pet. denied). In resolving factual disputes, the trial court may believe one witness and disbelieve others, and it may resolve any inconsistencies in a witness's testimony. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). In making credibility determinations, the trier-of-fact "cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted." *City of Keller*, 168 S.W.3d at 820. Therefore, the trier-of-fact is not "free to believe testimony that is conclusively negated by undisputed facts." *Id.* However, if the trier-of-fact could reasonably believe the testimony of one witness or disbelieve the testimony of another witness, the appellate court "cannot impose [its] own opinions to the contrary." *Id.* at 819.

2. Factual Sufficiency

In conducting a factual sufficiency review, we determine whether the evidence is such that a factfinder could reasonably form a firm belief or conviction about the truth of the plaintiff's allegations. *See In re C.H.,* 89 S.W.3d 17, 25 (Tex. 2002) (citing *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (holding that the clear-and-convincing standard "adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process.")); *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979) (holding that clear and convincing evidence is "that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.").

B. Ballots Rejected by Hidalgo County Ballot Board

By his first issue, Rivera complains that the trial court improperly rejected seven mail-in ballots previously rejected by the Hidalgo County Ballot Board because "the evidence established by clear and convincing evidence that the signatures on the applications and those on the carrier envelopes containing the ballots were in fact the signatures of the voters." We construe Rivera's issue to mean that the evidence was legally sufficient to support a finding that the mail-in ballots should have been accepted. Rivera also argues that Lopez's pleadings are a judicial admission that the ballots were improperly rejected.

1. Early Voting

Voting early by mail requires a voter to apply in writing for a ballot and then mail the completed ballot to the election clerk in an official carrier envelope bearing the

signature of the voter. *Alvarez v. Espinoza*, 844 S.W.2d 238, 244 (Tex. App.—San Antonio 1992, writ dism'd w.o.j.); TEX. ELEC. CODE ANN. § 86.005(c) (West, Westlaw through 2013 3d C.S.). The ballot board may accept a ballot voted early by mail "only if: . . . neither the voter's signature on the ballot application nor the signature on the carrier envelope certificate is determined to have been executed by a person other than the voter, unless signed by a witness. . . ." TEX. ELEC. CODE ANN. § 87.041(b)(2). The law thus requires those who vote early by mail to sign both the application and the carrier envelope. *Alvarez,* 844 S.W.2d at 245.

When a contestant challenges a ballot board's rejection of a ballot, the ballot board is presumed to have acted properly and it is the contestant's burden to show by clear and convincing evidence the board erred.[6] *Jones v. Morales*, 318 S.W.3d 419, 423–24 (Tex. App.—Amarillo 2010, no writ); *see Tiller v. Martinez*, 974 S.W.2d 769, 773–74 (Tex. App.—San Antonio 1998, pet. dism'd w.o.j.) (explaining that when contestant contends election judge rejected votes that should have been accepted, rule has long presumed that each rejected ballot was cast by an illegal voter). Discharging this burden requires the contestant to show that the ballot was properly cast. *Jones*, 318 S.W.3d at 424; *Tiller*, 974 S.W.2d at 774.

The ballot board acts on the basis of the signatures before it. *Jones*, 318 S.W.3d at 424. The Election Code does not require the board to make inquiry of voters whose signatures do not match. *Id.*; *see* TEX. ELEC. CODE ANN. § 87.041. But in an election

[6] Rivera raised this issue in his first amended answer as an "affirmative defense" and again raised this issue during trial. Lopez raised this issue in her second amended petition, but then claimed to have abandoned this pleading ground during trial. Subsequently, Rivera called the witnesses listed in Lopez's second amended petition to testify regarding the improperly rejected mail-in ballots.

contest based on ballots rejected on the ground of signature deficiency, the district court may receive oral testimony from the voter or other witnesses regarding the similarity of the signatures and may compare the signatures. *Id.* The court may rely on its own comparison without the aid of expert testimony. *Id*; *see Tiller,* 974 S.W.2d at 777 (holding that when signatures appear to be different, the trial court need not accept testimony of the voter or other witnesses that the voter made both signatures but may rely on its own comparison to determine whether there is a discrepancy that supports the Board's rejection of the ballot).

2. Analysis

We first address Rivera's judicial admission argument. Rivera claims that Lopez's pleadings, which allege that the Hidalgo County Ballot board improperly rejected the ballots, constitute a judicial admission that seven ballots were improperly rejected.

Assertions of fact, not pleaded in the alternative, in the live pleadings of a party are regarded as formal judicial admissions. *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983) (quotations omitted). The vital feature of a judicial admission is its conclusiveness on the party making it. *Gevinson v. Manhattan Const. Co. of Okla.*, 449 S.W.2d 458, 466 (Tex. 1969) (holding that it is important to consider whether the statement relates to facts peculiarly within declarant's own knowledge or is simply his impression of a transaction or an event as a participant or an observer); *Howard Hughes Med. Inst. v. Neff*, 640 S.W.2d 942, 950 (Tex. App.—Houston [14th Dist.] 1982, write ref'd n.r.e.) (holding that attorney's statement that will had been properly executed was not a judicial admission where it was made on the basis of the mistaken assumption that certain

evidence would support that legal conclusion). However, statements made by a party or his attorney in the course of judicial proceedings which are not based on personal knowledge or are made by mistake or based upon a mistaken belief of the facts are not considered judicial admissions. *Gevinson*, 449 S.W.2d at 460.

We disagree with Rivera's contention because Lopez's pleaded statement about the seven ballots amounts to a legal conclusion and is not based on personal knowledge. Lopez's pleaded statements regarding the previously rejected ballots was an impression of a transaction. *See Gevinson,* 449 S.W.2d at 466. There is no allegation or evidence Lopez was involved in the rejection of the ballots, viewed the ballots, or even observed the ballot board's actions. Thus, Lopez's pleadings do not constitute judicial admissions. *See id.*

We now turn to the Rivera's evidentiary argument and the testimony presented at trial. Overline Alaniz testified on direct examination that he filled out the ballot, signed it, put the ballot in the carrier envelope, signed the carrier envelope, and put the carrier envelope in the mailbox. However, on cross-examination, he acknowledged that the signatures on the ballot and carrier envelope looked different. He explained: "[t]hat's just the way it is. That's the way it is. I mean, because I noticed that I don't sign the same signs when—when I—I'm going through signing. When I sign a couple of things, a couple of signatures, I can see that I—I don't sign the—sign it exactly." The remaining six voters: Bentura Arriaga; Irene Rodriguez; Maria Ramirez; Patricio Ramirez; Francisca Macias; and Norma Gutierrez all testified that the signatures on the ballot and carrier envelope were theirs.

In its findings of fact and conclusions of law, the trial court stated that: "[t]he voters of the seven rejected mail-in ballots testified in Court that each voter signed their respective application for a mail in ballot and the carrier envelope and that each voted for Contestee Lupe Rivera . . . ." The trial court then concluded that it did not find by clear and convincing evidence that the Hidalgo County Ballot Board mistakenly rejected the seven ballots.

Rivera argues that the trial court had no reason to disbelieve the undisputed testimony of the voters regarding their signatures and cast votes. Further, Rivera points out that all seven of the voters appeared through subpoena and none of the voters testified that they knew Rivera personally.

We agree that in the proper circumstances oral testimony and comparison of signatures might refute the Early Voting Ballot Board's decision. But the trial court is not required to accept the testimony of the voter or other witnesses that the voter made both signatures. *See Alvarez*, 844 S.W.3d at 245. The trier of fact may compare signatures and decide their validity without the aid of expert testimony. *See Nass v. Nass*, 149 Tex. 41, 132–33 (1950); *Kennedy v. Upshaw*, 64 Tex. 411, 420 (1885); *Dickerson v. Mack Fin. Corp.*, 452 S.W.2d 552, 557 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.); *See Alvarez*, 844 S.W.3d at 245. The trial court was not required to believe the testimony about the signatures. *See Collora v. Navarro*, 574 S.W.2d 65, 69 (Tex. 1978); *Gevinson,* 449 S.W.2d at 467; *Medrano v. Gleinser*, 769 S.W.2d 687, 689–90 (Tex. App.—Corpus Christi 1989, no writ); *Alvarez*, 844 S.W.2d at 245–46.

Our review of the record shows that none of the challenged sets of signatures are similar enough to compel the conclusion that the same person signed both the application and the envelope, or to override the court's finding that different persons signed them. The evidence is legally and factually sufficient to support the rejection of the six ballots submitted with different signatures on the applications and the carrier envelopes. *See Alvarez*, 844 S.W.2d at 246. We overrule Rivera's first issue.

C. Non-Resident Voting

By issues two and four, which we consider together, Rivera complains that the evidence was legally and factually insufficient to support a finding that four voters were not residents of District 5.

1. Residence

The Election Code provides the following principles for determining a voter's residence:

> (a) In this code, "residence" means domicile, that is, one's home and fixed place of habitation to which he intends to return after any temporary absence.
>
> (b) Residence shall be determined in accordance with the common law rules, as enunciated by the courts of this state, except as otherwise provided by this code.
>
> (c) A person does not lose his residence by leaving his home to go to another place for temporary purposes only.
>
> (d) A person does not acquire a residence in a place to which he has come for temporary purposes only and without the intention of making that place his home.

TEX. ELEC. CODE ANN. § 1.015. The Texas Supreme Court has stated that "volition, intention and action" are "equally pertinent" elements to consider when determining

residency. "Neither bodily presence alone nor intention alone will suffice to create the residence, but when the two coincide at that moment the residence is fixed and determined." *Mills v. Bartlett*, 377 S.W.2d 636, 637 (Tex. 1964). Factors such as where a person sleeps and keeps personal belongings may support presence and intent. *Id.* One element alone is insufficient to establish residency; the elements must form a nexus to fix and determine a residence. *Id.* When a person's statements regarding residence are inconsistent with other evidence showing actual residence, "such statements 'are of slight weight' and cannot establish residence in fact." *In re Graham*, 251 S.W.3d 844, 850 (Tex. App.—Austin 2008, no pet.) (quoting *Texas v. Florida*, 306 U.S. 398, 424 (1939)). On appeal, we are limited to determining whether the trial court's credibility determinations were reasonable. *See City of Keller*, 168 S.W.3d at 819–20; *McDuffee v. Miller*, 327 S.W.3d 808, 820 (Tex. App.—Beaumont 2010, no pet.)

Rivera asserts throughout his brief that Lopez must prove "by clear and convincing evidence that [each voter] did not have the present intention of residing at [the registered address]", i.e. the negative of the present intention of residence. This is incorrect. Lopez's burden is to show by clear and convincing evidence that a voter is not a resident of the district where they registered, and, therefore their vote is not legal. *See* TEX. ELEC. CODE ANN. § 221.003; *Reese*, 80 S.W.3d at 656; *Medrano v. Gleinser*, 796 S.W.2d 687, 688 (Tex. App.—Corpus Christi 1989, no writ). It is not necessary for Lopez to negate present intention in order to disprove residence since each factor standing alone—bodily presence and intent—is insufficient to prove residency. *See Mills,* 377 S.W.2d at 637; *Tovar v. Bd. of Trs. of Somerset Indep. Sch. Dist.,* 994 S.W.2d 756, 762 (Tex. App.—

Corpus Christi 1999, no pet.) (rejecting appellants claim of residency where he lived temporarily outside of the district but maintained an intention to return to his permanent residence in the district); *see also Prince v. Inman*, 280 S.W.2d 779, 781 (Tex. Civ. App.—Beaumont 1955, no writ) (holding appellant's intention to return if job proved unsatisfactory does not have any significance, since it was not a fixed intention, not formed or present intent to return, but was at most intent subject to future contingency).

2. Felipa Cuellar, Cassandra Alaniz, Irma Rivera, and Jose Sandoval

Felipa Cuellar, Cassandra Alaniz, and Irma Rivera registered to vote using the address of a home belonging to Hortencia Cuellar. None of the three voters testified at trial. Instead, Hortencia Cuellar[7], mother of Felipa and grandmother of Cassandra, testified by deposition on direct-examination that she lives in a two-bedroom, one bathroom house. She sleeps in one of the bedrooms, and the other is used for "whenever I have my grandchildren to go to [sic] sleep there." Hortencia stated that her daughter, Felipa, and granddaughter Cassandra sleep at the house "occasionally" and that her brother Raul Rivera, Sr. and his wife Irma Rivera live in a rented home elsewhere. Raul Rivera, Sr. and Irma lived with Hortencia approximately fifteen years ago, but have not lived with her since. Hortencia further testified that no one keeps clothing at her home or stores their personal items in her home and that she does not receive anyone else's mail except her own. On cross-examination, Hortencia stated that Felipa, Cassandra, and Irma consider her house as their home of residence, even though they

[7] Hortencia Cuellar is appellant Rivera's sister.

may rent and live in other places. She then stated that she "sometimes" receives mail for each of the three family members.

Jose Heriberto Sandoval (Eddie) registered to vote using the address 716 N. Padre, Weslaco, Texas. Sandoval did not testify at trial. Instead, appellant Rivera testified regarding Sandoval's residence:

> [Lopez Counsel]: And who is he? Okay. Do you know Eddie [Sandoval] very well?
>
> [Rivera]: Yes, sir, very well. He practically grew up with my—with my son and—and stayed in my house because he was going to the Weslaco School District.
>
> . . . .
>
> [Rivera]: He grew up in my house.
>
> [Lopez Counsel]: I'm sorry?
>
> [Rivera]: He grew up at my home.
>
> [Lopez Counsel]: Until when?
>
> [Rivera]: It's off and on. I—I would say the last time that I saw him was probably four or five months ago, I guess.
>
> [Lopez Counsel]: Okay.
>
> [Rivera]: Or maybe a little bit longer than that.
>
> [Lopez Counsel]: For what—okay. When was the last time you saw Eddie and Lupe, Jr. together?
>
> [Rivera]: In—I couldn't recall. I wouldn't recall right now. I can't remember.

Illiana Guerrero, Lupe Rivera, Jr.'s common-law wife, testified that Sandoval was a childhood friend of Lupe Rivera, Jr. but that she had never seen him at the 716 N. Padre address and did not know where Sandoval lived.

Rivera argues that Hortencia's testimony shows that Felipa, Cassandra, and Irma all rightfully claim her home as their residence. Rivera further argues that because the trial court overruled Lopez's challenge to Raul Rivera, Sr., Irma Rivera's husband who registered to vote using Hortencia's residence, the trial court should have ruled similarly for Irma Rivera.[8] We disagree. Hortencia's testimony shows that despite visiting the home, including overnight visitation, neither Felipa, Cassandra, nor Irma has taken any direct action to establish residence in Hortencia's home. Similarly, appellant's and Illiana's testimonies, taken together, show that while Sandoval may have lived in appellants home in the distant past, he is not living there presently. Moreover, it is reasonably inferred that because of a lapse in communication between appellant and Sandoval, Sandoval has no present intent to return to appellants home.

The evidence is legally and factually sufficient to support the trial court's finding that these four voters are not residents of District 5. It cannot be seriously argued that the homes where each registered to vote is their "home or fixed place of habitation" under section 1.105. *See* TEX. ELEC. CODE ANN. § 1.105. Even assuming that each voter meets the intent element for residence, their presence at each home is too attenuated to count as habitation. *See Mills,* 377 S.W.2d at 637; *State v. Fischer*, 769 S.W.2d 619,

[8] Likewise, Lopez challenges the trial courts determination of Raul Rivera, Sr.'s residency on cross-appeal.

624 (Tex. App.—Corpus Christi 1989, writ dism'd w.o.j) (declining to find residency absent combined volition, intention, and action). We overrule Rivera's second and fourth issues.

D. Undervotes

By his third, fifth, and ninth issues, Rivera claims that the evidence is legally and factually insufficient to support a finding that Felipa Cuellar, Cassandra Alaniz, Irma Rivera, Jose Sandoval, and seven undetermined mail-in ballots[9] voted in the contested election. Specifically, Rivera argues that Lopez failed to prove that the eleven voters were not among the four votes who did not cast a ballot for the city commissioner in the District 5 election.

In the contested election, the official canvass report shows the number of ballots cast from each precinct that did not contain a vote in the District 5 race—the "undervotes." An undervote is a ballot uncounted because of unclear marking by the voter. *See generally Bush v. Gore*, 531 U.S. 98, 102 (2000). In its findings of fact and conclusions of law, the trial court determined that at least eleven undetermined votes were cast in the contested election. The trial court considered the undervotes by reducing the number of undetermined votes from eleven to seven. Since the seven undetermined votes was greater than the adjusted margin of victory—three votes—the trial court was unable to determine a winner in the contested election.

Rivera argues that Lopez must prove by clear and convincing evidence that the illegal votes were cast in the election being contested and cites *Miller v. Hill*, 698 S.W.2d 372, 375 (Tex. App.—Houston [14th Dist.] 1985, writ dism'd w.o.j.) in support of his

[9] We address the legality of the mail-in ballots later in this opinion.

argument. However, *Miller* is distinguishable because the contestant in *Miller* offered no evidence that the allegedly illegal voters voted at all. Here, the record contains the voting history of the each of the four voters and indicates that all of them voted in the contested election.

We disagree with Rivera's argument that Lopez must prove the challenged votes were not among the undervotes. As previously noted, the evidence shows that Lopez presented evidence showing that enough illegal votes were cast in the contested election to declare the election results void. *See* TEX. ELEC. CODE ANN. § 221.009; *Gonzales v. Villarreal*, 251 S.W.3d 763, 782 (Tex. App.—Corpus Christi 2008, pet. dism'd). Moreover, although some of the illegal votes may have been among the undervotes, the trial court considered this possibility and adjusted by reducing the undetermined votes by the number of undervotes. Because the evidence is legally and factually sufficient to support the trial court's decision, we overrule Rivera's third, fifth, and ninth issues.

E. Mail-in Ballots Disqualified by the Trial Court

By his seventh issue, Rivera argues that the trial court erred in disqualifying numerous mail-in ballots which were allegedly mailed in violation of Section 86.0051(b) in that, as to the mail-in ballots disqualified, there is no evidence or insufficient evidence that any "person knowingly possess[ed] an official ballot or official carrier envelope provided to another."

The trial court found that the following twelve voters cast their mail-in ballots for Rivera and the person who delivered the mail-in ballots to be mailed did not provide their signature, name, or address on the carrier envelope: Marlen Martinez, Andres Martinez,

Leonor Hinojosa, Leocadia Ledesma, David Lopez, Emma Oviedo, Noe Saldana, Ruth Saldana, Antonia Zepeda, Eulalio Ibanez, Tiburcio Mata, and Oralia Saldana. The trial court found that Maria Barrones voted by mail-in ballot, did not testify who she voted for, but did testify that she gave her ballot to Rivera, who filled out her ballot for her and mailed her ballot without signing the carrier envelope or printing his name and address on the carrier envelope. The trial court deducted the previously named votes from Rivera's vote total.

The trial court further found that the following seven voters cast their votes by mail and that the person who delivered the mail-in ballots did not provide their signature, name, or address on the carrier envelope: Arnulfo Gonzalez, Esteban Martinez, Sr., Jose Mendez, Maria Garza Mendez, Francisca Pina, Liborio Pina, and Pedro Zepeda Martinez. The trial court could not determine for which candidate the seven voters cast their votes and thus included the seven votes in the "undetermined" category.

Section 86.006(f)(4) of the Texas Elections Code prohibits a person from possessing an official ballot of another. *See* TEX. ELEC. CODE ANN. § 86.006(f)(4). If a person possesses a ballot of another in order to mail the ballot, then that person must provide the information required by section 86.0051(b). *See id.* § 86.0051(b).

With the exception of Jose Mendez,[10] all of the previously listed voters testified that they did not personally mail their ballots. Instead, they gave their ballot to another

[10] Jose Mendez did not testify at trial. However, Maria Mendez testified that Graciela Sanchez took Mendez's and her husband's completed ballots—presumably to mail them. We note that Maria Mendez and Jose Mendez listed the same address on their mail-in ballots and therefore it is a reasonable inference they are husband and wife. *See Johnson v. Buck*, 540 S.W.2d 393, 411 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n. r. e.) (holding that trial judge may draw reasonable inferences and deductions from the evidence, and that his findings may not be disregarded by an appellate court if the record discloses evidence of probative value which, with inferences that may be properly drawn from the evidence, will

person who mailed it for them. Because the person tasked with mailing the ballots necessarily possesses the ballots, the person doing the mailing is required to provide their name, address, and signature on the carrier envelope. *See id.* § 86.0051(b). The record, however, shows that none of the voters' ballots had any name, other than their own, listed on the carrier envelopes. From the record it is clear that the mail-in ballots were intentionally handled by someone other than the voter, presumably for the purpose of mailing the ballot. Even though such possession is presumably innocent, it is still "knowing possession" sufficient to render the ballot uncountable under subsection 86.006(f) and (h). *See id.* §§ 86.006(f), (h); *see also Reese*, 80 S.W.3d at 658 (holding that compliance with section 86.006 is mandatory). The evidence is legally and factually sufficient to support the trial court's ruling. We overrule Rivera's seventh issue.

V. VOTING RIGHTS

By his eighth issue, Rivera complains that the trial court's disqualification of ballots found in violation of section 86.0051(b) of the Texas Elections Code is an unconstitutional deprivation of the right to vote.

It is unclear from his briefing which particular constitutional provision Rivera is asserting, or whether it is the federal or state constitution. To brief a state constitutional issue adequately, appellant must present specific arguments and authorities supporting his contentions. *See* TEX. R. APP. P. 38.1(h); *Brown v. Tex. Bd. of Nurse Examiners,* 194 S.W.3d 721, 723 (Tex. App.—Dallas 2006, no pet.). Because he failed to meet this burden, appellant's constitutional claims are inadequately briefed.

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reasonably support such findings).

Moreover, even if we construe Rivera's issue as properly briefed, it would fail on the merits because Rivera has no standing to address alleged violations of a third party's constitutional rights. Constitutional rights are personal and may not be asserted vicariously. *Broadrick v. Oklahoma,* 413 U.S. 601, 610 (1973) (citing *McGowan v. Maryland*, 366 U.S. 420, 429–430 (1961)). Such a principle reflects the conviction that under our constitutional system, courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. *See Younger v. Harris*, 401 U.S. 37, 52 (1971). Constitutional judgments are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court. None of the voters whose voting rights are allegedly being violated appear as litigants in this case. We overrule Rivera's eighth issue.

VI. ELECTION CONTEST RESULTS

By his tenth issue, Rivera challenges the trial court's ruling that it was unable to declare a winner in the contested election and ordering a new election between Rivera and Lopez. Specifically, Rivera demonstrates the different combination of issues and rulings that would lead our opinion to agree with his advocated position.

We disagree with Rivera and hold that the trial court correctly excluded the seven mail-in ballots previously rejected by the Hidalgo County Ballot Board, correctly disqualified the votes of Felipa Cuellar, Cassandra Alaniz, Irma Rivera, and Jose Sandoval on the basis of residency, and correctly excluded the ballots found in violation of section 86.006.

As we have previously discussed, because the trial court determined that the number of illegal but undetermined votes is greater than the margin of victory, the trial court did not abuse its discretion in declaring the contested election void and ordering a new election.

VII. CROSS-APPEAL

By four issues on cross-appeal, Lopez argues that the evidence was: 1) legally sufficient to prove three additional illegal votes were cast for Rivera; 2) legally insufficient to determine that three voters cast their illegal votes for Lopez; 3) legally sufficient to prove nine additional illegal but undetermined votes were cast; 4) legally sufficient to prove that only one undervote could have been among the undetermined illegal votes. However, even if we add or subtract all of the votes from each category as Lopez urges, the number of undetermined votes will still be greater than the margin of victory.

Sustaining Lopez's first and second issues would give Lopez 471 votes to Rivera's 468 votes, with a margin of victory of three votes with at least ten undetermined illegal votes.[11] Sustaining Lopez's third issue increases the number of undetermined votes to nineteen, while sustaining Lopez's fourth issue further increases the undetermined votes to twenty two.[12]

The Texas Election Code provides that the court hearing an election contest may compel an illegal voter to disclose the candidate for whom they voted. *See* TEX. ELEC.

[11] The undetermined illegal votes would include the three votes that Lopez argues were incorrectly deducted from her final vote tally.

[12] This included deducting the maximum of four undervotes.

CODE ANN. § 221.009(a). However, where the number of illegal votes is equal to or greater than the number of votes necessary to change the outcome of an election, the tribunal may declare the election void without attempting to determine how individual voters voted. *See id.* § 221.009(b). Thus, Lopez's cross-appeal issues, even if sustained, will not create a margin of victory that is greater than the number of undetermined votes.[13] Because these issues are not dispositive of this appeal, we need not address them. *See* TEX. R. APP. P. 47.1; *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993); *see also* TEX. R. CIV. P. 166a(c).

VIII. CONCLUSION

We affirm the order of the trial court declaring the contested election void.

GREGORY T. PERKES
Justice

Delivered and filed the
14th day of May, 2014.

[13] This is true even if the issues are sustained in part and overruled in part.

NO. CAAP 16-0000045

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAI'I

RICHARD W. BAKER, Appellant/ Appellant, vs. BRICKWOOD M. GALUTERIA, ABIGAIL L. GALUTERIA, and GLEN TAKAHASHI, City Clerk, City and County of Honolulu, Appellees/ Appellees.	)	Case No. 15-1 (Agency Appeal) APPEAL FROM THE: FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER, DATED JANUARY 15, 2016. BOARD OF REGISTRATION, ISLAND OF O'AHU

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a copy of foregoing will be served upon all parties at their last known e-mail address through the JEFS protocol or if that is unavailable at their last known address by U.S. Mail, postage pre-paid:

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DATED: Honolulu, Hawai'i

April 18, 2016

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