

App. No. _____

In the
Supreme Court of the United States

Hoku Lele, LLC; Donn Eisele,

Applicants,

v.

City and County of Honolulu,

Respondent.

ON APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A
WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

APPLICANTS' APPLICATION TO EXTEND TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI

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**PETITIONER’S APPLICATION TO EXTEND TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI**

**To the Honorable Elena Kagan, as Circuit Justice for the United States
Court of Appeals for the Ninth Circuit:**

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, Applicants Hoku Lele, LLC and Donn Eisele respectfully request that the time to file a petition for a writ of certiorari in this case be extended for thirty days to Monday, July 8, 2019. Applicant may be asking this Court to review an opinion (App. 1) and judgment (App. 2) by the Hawaii Intermediate Court of Appeals entered on November 13, 2018 and denied discretionary review by the Supreme Court of the State of Hawaii on March 12, 2019. *See* App. 3. Absent an extension of time, the petition would be due on June 7, 2019. Petitioner is filing this application at least ten days before that date. *See* Rule 13.5 of the Supreme Court Rules. This Court has jurisdiction under 28 U.S.C. § 1257 to review this case.

Background

The Intermediate Court of Appeals of Hawaii held that Applicants' right to maintain and rebuild its homes pursuant to building permits which Respondent had issued nearly fifty years earlier was property for purposes of the due process clause and could not be revoked. App. 1. But the court also held that there was no due process violation even though Respondent's Department of Permitting and Planning had summarily determined that the building permits were "unlawful" and "not legally established." *Id.* The Hawaii Supreme Court declined discretionary review. App. 3.

1. Henry J. Kaiser built the Kaiser Hawaiian Village Hotel in Waikiki in the 1950s, now known as the Hilton Hawaiian Village. In 1963, Respondent issued two building permits which allowed relocation of four bungalows from the resort to what later became Applicants' property in rural Oahu. Pursuant to the permits, the bungalows were transported to the 1.05 acre parcel, which had no minimum lot size requirement.

2. But after relocation, Respondent rezoned the property to permit only one dwelling per acre. At least two times between 1963 until 2005, Respondent confirmed that the structures were lawful nonconforming dwellings. Applicants purchased the property in order to renovate and rehabilitate the bungalows, after first confirming that Respondent had issued the appropriate building permits.

3. But in 2005, after an official told Applicants they could not proceed without a "zoning confirmation," they submitted an application to Respondent to confirm the zoning requirements. In response, Respondent informed them that the buildings were unlawful, "because they were constructed (relocated onto the property) contrary to the underlying zoning district regulations in effect in 1963, despite obtaining the necessary permits." Thus, instead of being deemed legal nonconforming uses, the Applicants' buildings were summarily ruled to be illegal.

4. The trial court dismissed Applicants' complaint for lack of jurisdiction, but the Hawaii Intermediate Court of Appeals reversed. *Hoku Lele, LLC v. City and Cnty. of Honolulu*, 129 Haw. 164, 164-69, 296 P.3d 1072, 1072-77 (Haw. App. 2013).

But on remand for a merits determination, the trial court granted Respondent summary judgment, concluding that the remedy it sought—money damages, and not an injunction—is not an available remedy for violations of the Hawaii Constitution. The court also concluded that Applicants lacked a protected property interest.

5. The court of appeals affirmed, but first concluded that Applicants possessed constitutional “property,” the building permits. App. 1. at 10. But the court also concluded Applicants did not lose anything—and thus there was no due process violation—for two reasons. First, the court held that Respondent’s declaration that the buildings were “unlawful” and “not legally established” did not, as Applicants asserted, did not affect in any way the legality of the buildings and their nonconforming use status. 1. at 12 (“A Response to a zoning verification request is, therefore, in effect advisory.”). Second, if the structures were declared illegal, Applicants could have sought a variance. *Id.* at 14-15. Because it held that Respondent had not violated Applicants’ due process rights, it did not address the related question of whether damages are an available remedy.

6. The Hawaii Supreme Court denied discretionary review on March 12, 2019. App. 3.

7. A petition for certiorari to this Court is due to be filed not later than June 7, 2019.

Opinions Below

1. The Intermediate Court of Appeals of Hawaii issued its opinion on September 21, 2018. App. 1.

2. The same court issued the judgment on appeal on November 13, 2018. App. 2

2. The Supreme Court of Hawaii declined discretionary review on March 12, 2019, by issuing an order rejecting application for certiorari. App. 3.

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1257.

Reasons for Granting an Extension of Time

The time to file a petition for a writ of certiorari should be extended for thirty days, for several reasons:

1. The forthcoming petition—if one is to be filed—will present important federal constitutional questions about due process and property under *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) and *Mathews v. Eldridge*, 424 U.S. 319 (1976), that this Court should consider. Once a court concludes that someone possesses “property” (which the Hawaii court of appeals did here), it cannot stop there but must determine how much process is required to protect that interest from arbitrary deprivation.

2. Additional time is necessary and warranted for appellate counsel to review the record in the case (Applicants filed their original complaint in October 2007, more than 12 year ago), research case law and federal and state constitutional law, determine if the issues are significant enough to warrant a petition for certiorari to this Court, and if so, to prepare a clear and concise petition for this Court’s review.

3. Counsel for Respondent does not oppose this request for an extension of time.

Conclusion

For the foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended thirty days to and including July 8, 2019.

Respectfully submitted,



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