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CABLE ADDRESS:
ATTGEN

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STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HAWAII STATE CAPITOL
HONOLULU, HAWAII 96813

March 3, 1970

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MAR 4, 1970

State of Hawaii
LAND USE COMMISSION

Mr. Wilburt Choy
Chairman, Land Use Commission
Department of Planning and
Economic Development
State of Hawaii
Honolulu, Hawaii

Re: Second Circuit Civil No. 1198,
Gillettes vs. Land Use Commission
of the State of Hawaii

Dear Mr. Choy:

Please be advised that Judge Fukuoka has ruled
in favor of the Land Use Commission in the above case.

Enclosed for your information are copies of our
Cross-Motion for Summary Judgment, and Judge Fukuoka's
Order Granting Cross-Motion for Summary Judgment. Also
enclosed is a copy of the Summary Judgment Order which I
have prepared for Judge Fukuoka's signature, which upon
the Judge's signing would formally close this portion of
the proceedings.

The plaintiffs will have 30 days from the date
that Judge Fukuoka signs the Summary Judgment Order within
which to appeal, if they should so decide. I will keep you
informed if an appeal should be taken to the Hawaii Supreme
Court.

Yours truly,

Walton D. Y. Hong
Deputy Attorney General

Encs.

cc: Mr. Ramon Duran
Executive Officer
Land Use Commission

Mr. Hong

CIVIL NO. 1198

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

PAUL C. GILLETTE and
 MARTHA T. GILLETTE,

 Plaintiffs,

 vs.

 LAND USE COMMISSION OF THE
 STATE OF HAWAII,

 Defendant.

2ND CIRCUIT COURT
 STATE OF HAWAII
 HONOLULU, HAWAII

 FILED
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 (SGD.) HELEN H. CORREA
 CLERK

CROSS-MOTION FOR SUMMARY JUDGMENT

MEMORANDUM IN SUPPORT OF MOTION

and

NOTICE OF MOTION

I hereby certify that I served a copy of the
 within Cross-Motion, Memorandum & Notice
 on Sanford J. Langa, Esq., Attorney
 for Plaintiffs, by depositing the same in
 the United States Post Office at Honolulu,
 Hawaii, properly addressed and postage prepaid,
 on the 9th day of February, 1970.

BERTRAM T. KANBARA 261
 Attorney General
 State of Hawaii
 and
 WALTON D. Y. HONG 890
 Deputy Attorney General
 State of Hawaii

Walter D. Y. Hong
 Deputy Attorney General

Hawaii State Capitol
 415 South Beretania Street
 Honolulu, Hawaii 96813

Attorneys for Defendant

CIVIL NO. 1198

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

PAUL C. GILLETTE and)
MARTHA T. GILLETTE,)
)
Plaintiffs,)
)
vs.)
)
LAND USE COMMISSION OF THE)
STATE OF HAWAII,)
)
Defendant.)
_____)

CROSS-MOTION FOR SUMMARY JUDGMENT

The Defendant Land Use Commission of the State of Hawaii moves this Honorable Court to grant summary judgment in favor of the Defendant on the grounds that there is no genuine issue as to any material fact and that the Defendant is entitled to a judgment as a matter of law on the theories that:

a. The Plaintiffs' use of the property is a nonconforming use under section 205-8 of the Hawaii Revised Statutes;

b. Section 205-2(1) of the Hawaii Revised Statutes has no application to the instant action; and

c. The property was properly placed in the rural district classification in accordance with Chapter 205 of the Hawaii Revised Statutes and the Land Use Commission Regulations.

This Motion is based on the following Memorandum in Support of Motion, and the files and proceedings of this case.

NOTICE OF MOTION

TO: SANFORD J. LANGA, ESQ.
207 Wailuku Townhouse Building
Wailuku, Maui, Hawaii 96793

Please take notice that the undersigned will bring the foregoing Motion on for hearing before the Honorable Judge S. George Fukuoka, in his Courtroom at Wailuku, Maui, Hawaii, on Thursday, the 19th day of February, 1970, at 9:30 o'clock A.M., or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawaii, February 9, 1970.

Walter D. Y. Hong
WALTON D. Y. HONG
Deputy Attorney General
State of Hawaii

Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Attorney for Defendant

MEMORANDUM IN SUPPORT OF MOTION

- I. The property is a nonconforming use under section 205-8, H.R.S., and section 205-2(1), H.R.S., has no application thereto.

The Defendant Land Use Commission of the State of Hawaii, hereinafter called the "COMMISSION", contends that the Plaintiffs Gillettes', hereinafter called the "GILLETTES", use of the property is a nonconforming use, that the property was not in urban use, that section 205-2(1) of the Hawaii Revised Statutes does not mandate that the property be placed in the urban district, and that to so hold would destroy completely the purpose of the nonconforming use provision of the Land Use Law.

Section 205-8 of the Hawaii Revised Statutes states, in pertinent part, that:

"The lawful use of land or buildings existing on the date of establishment of any interim agricultural district and rural district in final form may be continued although the use, including lot size, does not conform to this chapter; . . ."

Section 2.3(t) of the Land Use Commission Regulations defines nonconforming use as:

". . . the use of a building or structure, or of a parcel of land, lawfully existing at the time of adoption of the State Land Use District Regulations and Boundaries or subsequent amendments made thereto, that does not conform to the State Land Use District Regulations and Boundaries."

The Commission contends that the use of the property is a nonconforming use and that section 205-2(1), H.R.S., has no application to the instant case.

The Gillettes contend that section 205-2(1), H.R.S., mandates that the property be placed in the urban district by reason that a multi-family dwelling, to wit, a duplex, was situated thereon prior to the establishing of the rural district boundaries in final form. The bases for the Gillettes' contention are that only a single-family dwelling is permitted in a rural district under section 2.16 of the Land Use Commission Regulations, that the property was never considered to be in agricultural or conservation use, and that therefore the property must have been in urban use. Therefore, the Gillettes conclude that section 205-2(1), H.R.S., which states in pertinent part, that "In the establishment of boundaries of urban districts those lands that are now in urban use and a sufficient reserve area for foreseeable urban growth shall be included;" mandates that the Commission place the property in the urban district.

An analysis of the Gillettes' contention reveals that their conclusion is based on the premise that if a use does not conform to a rural, agricultural, or conservation use, as defined by Chapter 205 of the Hawaii Revised Statutes and the Land Use Commission Regulations, it must, by the process of elimination, therefore be an urban use.

The Commission contends that such a premise cannot be upheld; to do so would result in the undermining of the purposes of the Land Use Law and would leave the nonconforming use provision meaningless.

At present, there are hundreds of parcels of property throughout the State in rural and agricultural

districts which have uses that are not in conformance with the uses prescribed for their respective districts. There are service stations, grocery stores, motels, and hospitals which have existed prior to the establishing of the rural and agricultural district boundaries in final form. Carried to its logical conclusion, the Gillettes' contention would mean that all of these pre-existing nonrural, nonagricultural, or nonconservation uses must result in the property being placed in an urban district. This would result in spot zoning throughout the State, clearly contrary to the need for logical and uniform development of the lands in the State.

Furthermore, the Gillettes' analysis would leave the nonconforming provision of the Land Use Law, section 205-8 of the Hawaii Revised Statutes, without any meaning whatsoever. The purpose of the nonconforming use provision was to permit continued uses of the property while classifying nonurban districts in final form, where such uses did not conform to the uses prescribed for the district where the property is situated. To hold that any nonrural, nonagricultural, or nonconservation use is therefore an urban use to be placed in an urban district would eliminate the nonconforming use.

However, the Commission acknowledges that section 205-2(1), H.R.S., must be reconciled with section 205-8, H.R.S. To carry the nonconforming use provision without restriction to its logical conclusion would

leave the mandate of section 205-2(1), H.R.S., meaningless, for it would give the Commission the authority to classify any land as rural or agricultural and determine that the uses thereon are nonconforming uses. Thus, the Commission could classify downtown Wailuku as rural and regard all the existing businesses as nonconforming uses.

Therefore, the Commission contends that the term "urban use", as used in section 205-2(1), H.R.S., must be defined as "any and all uses permitted by the counties, either by ordinances or regulations, and which are characterized by city-like concentrations of people, structures, streets and the like." Only in this manner can the apparently conflicting provisions of the Land Use Law, sections 205-2(1) and 205-8, H.R.S., be reconciled in a logical and reasonable manner.

While Chapter 205 of the Hawaii Revised Statutes and the Land Use Commission Regulations do not define "urban use", the Commission's position is not without support. The original Land Use Law, Act 187, S.L.H. 1961, defined "urban" as ". . . areas characterized by 'city-like' concentrations of people, structures, street and other related land uses."

Furthermore, such a definition of "urban use" would afford a logical and reasonable reconciliation of sections 205-2(1) and 205-8 of the Hawaii Revised Statutes. It would prevent arbitrary and possibly capricious classification of

land, under the nonconforming use provision, into a rural or agricultural district where true urban uses exist, such as Wailuku. It would also prevent the undermining of the Land Use Law and the rise of spot zoning under section 205-2(1) where nonrural, nonagricultural and nonconservation uses existed prior to the establishment of nonurban district boundaries in final form.

II. The property was properly placed in the rural district classification in accordance with Chapter 205 of the Hawaii Revised Statutes and the Land Use Commission Regulations.

The Commission contends that the property of the Gillettes under consideration was rightfully placed in the rural district classification in accordance with Chapter 205 of the Hawaii Revised Statutes and the Land Use Commission Regulations.

Section 205-2 of the Hawaii Revised Statutes states that:

"Rural districts shall include activities or uses as characterized by low density residential lots of not more than one dwelling house per one-half acre in areas where 'city-like' concentration of people, structures, streets, and urban level of services are absent, and where small farms are intermixed with the low density residential lots. These districts may include contiguous areas which are not suited to low density residential lots or small farms by reason of topography, soils, and other related characteristics."

Section 2.10 of the Land Use Commission Regulations sets forth the standards for the rural district classification as follows:

"In determining the boundaries for the 'R' Rural District, the following standards shall apply:

(a) Areas consisting of small farms shall be included in this District.

(b) It shall include activities or uses as characterized by low density residential lots of not more [less?] than one-half (1/2) acre and a density of not more than one-single family dwelling per one-half (1/2) acre.

(c) Generally, parcels of land not more than five (5) acres shall be included in this District.

(d) Notwithstanding subsection 'c', above, parcels of land larger than five (5) acres may be included in this District.

(e) It shall include parcels of land where 'city-like' concentration of people, structures, streets and urban level of services are absent.

(f) It may include parcels of land that are not suitable for agricultural uses.

(g) It may include small parcels of land that are contiguous to this District and are not suited to low density residential uses, or for small farm uses.

(h) Parcels of land consisting of small farms need not be included in this District, if it will alter the general characteristics of the area."

The Commission concedes that the use of the Gillettes' property does not meet the density requirements of "(b)", above. However, the Commission contends that, as the existence of a duplex is a nonconforming use under section 205-8, H.R.S., this failure to meet the density requirements does not detract from the fact that the property meets the other standards for a rural district.

as follows:

In determining the boundaries of the Urban District, the following standards shall apply:

Furthermore, the Gillettes' property does not

(a) Areas consisting of small lots, and does not conform to the standards for the urban districts, as set forth in the Land Use Commission Regulations. Section 2.7

of the Land Use Commission Regulations states, in part, that:

"In determining the boundaries for the 'U' Urban District, the following standards shall apply:

(a) It shall include lands characterized by "city-like" concentration of people, structures, streets and other related land uses.

(b) It shall take into consideration the following specific factors:

(1) Proximity to centers of trading and employment facilities.

(2) Economic feasibility and proximity to basic services such as sewers, water, sanitation, schools and playground and police and fire protection.

(c) It shall include sufficient undeveloped urban lands in the immediate area to provide for a 10 year projection of urban growth.

** * * * *

(d) It shall include sufficient reserve areas for urban growth in appropriate locations, based on a 10 year projection. . . ."

The Commission contends that the area is not characterized by "city-like" concentrations of people, structures, streets and other related land uses, is not in close proximity to centers of trading and employment facilities, and is not needed as a reserve area for urban growth, there being sufficient undeveloped urban lands in the immediate area.

The Defendant Land Use Commission of the State of Hawaii therefore concludes that the property was placed

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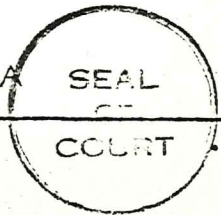
STATE OF HAWAII
 WAILUKU, HAWAII
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 (SGD.) HELEN H. CORREA
 CLERK

ORDER GRANTING CROSS-MOTION
FOR SUMMARY JUDGMENT

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 ATTORNEY GENERAL
 STATE OF HAWAII

I HEREBY CERTIFY that on February 26, 1970, I served a copy of this ORDER GRANTING CROSS-MOTION FOR SUMMARY JUDGMENT by depositing the same in the U. S. Post Office at Wailuku, Maui, Hawaii, postage prepaid and properly addressed, upon SANFORD J. LANGA, ESQ., Attorney at Law, Wailuku Townhouse Bldg., Wailuku, Maui and HON. BERTRAM T. KANBARA, Attorney General, State of Hawaii, Hawaii State Capitol, 415 South Beretania Street, Honolulu, Hawaii 96813.

/sgd/ ETHEL M. MIYAHIRA



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Defendant.

ORDER GRANTING CROSS-MOTION
FOR SUMMARY JUDGMENT

IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment be denied and Defendant's Cross-Motion for Summary Judgment be granted.

DATED: February 26, 1970.

/sgd/ S. GEORGE FUKUOKA
Judge of the Above-Entitled Court



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Defendant.)
_____)

SUMMARY JUDGMENT

BERTRAM T. KANBARA 261
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State of Hawaii

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Hawaii State Capitol
415 South Beretania St.
Honolulu, Hawaii 96813

Attorneys for Defendant

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THE STATE OF HAWAII,)
)
Defendant.)
_____)

SUMMARY JUDGMENT

The cross-motion of the Defendant Land Use Commission of the State of Hawaii for summary judgment pursuant to Rule 56 of the Hawaii Rules of Civil Procedure, having been presented, and the Court being fully advised,

The Court finds that the Defendant is entitled to a summary judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant's cross-motion for summary judgment be granted, and judgment is hereby rendered in favor of the Defendant Land Use Commission of the State of Hawaii.

Dated: Wailuku, Maui, Hawaii, March _____, 1970.

Judge of the Above-Entitled Court