ASC
RO

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL

Memorandum

From Walton D. Y. Hong, Deputy Attorney Gen'l Date August 24, 1970

To Ramon Duran, Land Use Commission File No.

Subject Supreme Court Case No. 4986, Gillettes vx. Land Use Commission of the State of Hawaii

HAW'N PRINTING

Rom:

Enclosed for your file and information is a copy of the Appellants Gillettes' Opening Brief filed with the Supreme Court.

Walton D.Y. Hong

NO. 4986

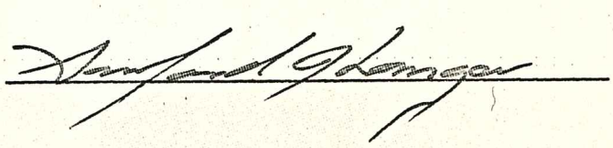
IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER A. D. 1969 TERM

PAUL C. GILLETTE and MARTHA T. GILLETTE, Plaintiffs-Appellants, vs. LAND USE COMMISSION OF THE STATE OF HAWAII, Defendant-Appellee.	APPEAL FROM ORDER GRANTING CROSS-MOTION FOR SUMMARY JUDGMENT ENTERED FEBRUARY 26, 1970, AND FROM SUMMARY JUDGMENT ENTERED MARCH 1, 1970. CIRCUIT COURT OF THE SECOND CIRCUIT HON. S. GEORGE FUKUOKA, JUDGE

OPENING BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

I hereby certify that I served two copies of the within Opening Brief of Plaintiffs-Appellants upon the Attorney for Defendant-Appellee on this 15th day of August, 1970.



SANFORD J. LANGA #808
Wailuku Townhouse Building
Wailuku, Maui, Hawaii 96793
Telephone 244-9169

Attorney for Plaintiffs-Appellants.

SUBJECT INDEX

INDEX TO AUTHORITIES CITED

STATUTES

CASES

STATEMENT OF JURISDICTION

The Second Circuit Court entered judgment for the Defendant on March 3, 1970 (Record. 36-37). Plaintiffs' Notice of Appeal was filed on March 25, 1970 (Record. 38-39). The Supreme Court's jurisdiction is invoked under HRS §602-5 as an appeal from a final judgment of the Circuit Court.

QUESTIONS PRESENTED

Whether the regulations of the LAND USE COMMISSION OF THE STATE OF HAWAII are illegal and void to the extent that they classify in a rural district land which, at the time of enactment of HRS §205-2(l), was in urban classification and was in use as duplex apartment rental property.

STATEMENT OF THE CASE

This case is an action for a declaratory judgment initiated by Plaintiffs in the Second Circuit Court. Plaintiffs own a parcel of land at Kula, Maui, which has been classified as "rural" by Defendant's regulations. Plaintiffs allege that Defendant's regulations are in violation of HRS §205-2(1) and are therefore void.

Plaintiffs acquired their property in July, 1962, at which time the property was in use as a duplex apartment rental property, a use which has continued to the present (Aff. of Paul C. Gillette, Record. p. 16). At and prior to July, 1962, Plaintiffs' property was classified as "urban" by Defendant's regulations. (Answer, paragraph 6, Record. p. 12.)

In 1964 Defendant amended its regulations altering the district boundaries so as to classify Plaintiffs' property as "rural" rather than "urban" (Answer, paragraph 7, Record. p. 12).

Both Plaintiffs and Defendant moved for summary judgment after the pleadings had been filed. The Circuit Court denied Plaintiffs' motion and granted Defendant's motion (Record. p. 34). Although the Order Granting Cross Motion for Summary Judgment (Record. p. 34) and the Summary Judgment (Record. p. 36), are a bit ambiguous in that they don't state just what the Court's judgment was, Plaintiffs will assume for the purposes of this appeal that the Court below held Defendant's regulations to be valid.

SPECIFICATION OF ERRORS

1. The Court below erred in granting Defendant's motion for summary judgment.

2. The Court below erred in denying Plaintiffs' motion for summary judgment.

ARGUMENT

DEFENDANT WAS MANDATED BY HRS §205-2(1) TO INCLUDE PLAINTIFFS' LAND IN AN URBAN ZONE, BECAUSE AT THE TIME THE LAW WAS ENACTED PLAINTIFFS' LAND WAS IN URBAN USE.

The Plaintiffs rely primarily in this appeal on the statutory mandate contained in HRS §205-2(1), which provides as follows:

> ... 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.

This provision was contained in the original Land Use Law (Act 187, SLH 1961, section 3) and was re-enacted in the general revision of the law in 1963 (Act 205, SLH 1963, section 2) as §98H-2(a), RLH 1955.

It is Plaintiffs' contention in this proceeding that their land was in urban use at the time of enactment of the land use law and that therefore their land is by law required to be included in an urban zone. The Defendant disputed in the court below both (1) whether duplex apartment use is an urban use, and (2) whether §205-2(1) required land in urban use to be zoned urban.

As it now stands, Chapter 205 does not contain a statutory definition of "urban use." It therefore is appropriate to look to the ordinary and usual meaning of the phrase to

establish the statutory meaning. (See Bishop Trust Co. v. Burns, 46 Haw 375, 381 P2d 687; In Re Johnson's Taxes, 44 Haw 519, 356 P2d 1028; Mann v. Mau, 38 Haw 421). Looking to its ordinary meaning, the phrase "urban use" is relatively clear and unambiguous and means a use characteristic of cities and towns rather than of farms, ranches, etc.

It is a conceded fact of this case that Plaintiffs' land is, and was when the law was enacted, in duplex apartment rental use (Aff. of Paul C. Gillette, Record. p. 16). Since the conceded use of Plaintiffs' property is one which is characteristic of cities and towns, and not characteristic of farms and other rural areas, Plaintiffs submit that their land is squarely within the statutory mandate.

In the Court below, the Defendant did not seek to contradict the material allegations of the Plaintiffs' affidavit regarding the actual land use, but instead argued to the court that HRS §205-2(1) should be read as requiring land in urban use to be zoned urban only if that land happens to be "characterized by city-like concentrations of people, structures, streets and the like." (Page 4 of Memorandum in Support of [Defendant's] Motion, Record. p. 27); thus denying the benefits of the statute to every small landowner whose land is not large enough to have "city-like concentrations" within it. The only direct statutory support Defendant could find for this proposition was in a portion of Act 187 SLH 1961. As to that statutory authority, Plaintiffs need only point out that the Legislature has repealed the provision Defendant relies on (Act 204, SLH 1963).

Beyond citing the repealed statute, Defendant's only argument for its peculiar reading of HRS §205-2(1) is based on a supposed inconsistency with HRS §205-8. Defendant's argument seemed to be that the plain meaning of §205-2(1) if accepted would render §205-8 meaningless or futile. Defendant's argument, however, was based on a misreading of both sections. The two sections are as follows

> §205-2(1) 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;

> §205-8 Nonconforming uses. 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; provided that no nonconforming building shall be replaced, reconstructed, or enlarged or changed to another nonconforming use and no nonconforming use of land shall be expanded or changed to another nonconforming use. In addition, if any nonconforming use of land or building is discontinued or held in abeyance for a period of one year, the further continuation of such use shall be prohibited.

It is clear from a comparison of the two sections that §205-2(1) is designed to protect landowners in one particular situation against the severe consequences of §205-8. That is, §205-2(1) is a prohibition against the creation of non-conforming use status as to land in urban use when the law was enacted.

As to urban uses that began after 1963, HRS §205-2(1) would not apply, and presumably non-conforming uses may have been properly created by the 1969 re-districting. (The record

in this case would not, of course, show whether or not that happened.) In any event, since Plaintiffs' land was in urban use in 1963 and before, HRS §205-2(1) protected it against becoming a non-conforming use under Defendant's 1964 regulations, and the statutory protection continues under Defendant's current 1969 regulations.

Plaintiffs submit that the Court below erred in granting Defendant's motion for summary judgment and further erred in denying Plaintiffs' motion for summary judgment, and that the judgment below should be reversed with instructions to enter judgment declaring Defendant's regulations illegal and void to the extent that said regulations purport to classify Plaintiffs' land in any classification other than "urban."

Respectfully Submitted

Sanford J. Langa