File
(Tamura)

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ADDRESS REPLY TO
"THE ATTORNEY GENERAL OF HAWAII"
AND REFER TO
INITIALS AND NUMBER

RYT:ai

CABLE ADDRESS:
ATTGEN

BERT T. KOBAYASHI
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STATE OF HAWAII
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January 19, 1967

RECEIVED
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State of Hawaii
LAND USE COMMISSION

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

Dear Myron:

Re: Tamura v. Land Use Commission
C. A. No. 1261, Third Circuit

The attached decision of Judge Monden in the above-entitled matter may be of interest to you.

Sincerely,

Roy Y. Takeyama

ROY Y. TAKEYAMA
Deputy Attorney General

Enc.

copy of decision to Walton Hong. 1-11-71

COPY

C. A. NO. 1261

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

LAND USE COMMISSION,
State of Hawaii,

Appellee.

DECISION

C. A. NO. 1261

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

LAND USE COMMISSION,
State of Hawaii,

Appellee.

DECISION

This is an appeal from the decision of the Land Use Commission of the State of Hawaii denying Appellant's request for special permit to subdivide 1.96 acres of land into four residential lots located in the Panaewa Houselots Subdivision, Waiakea, South Hilo, Hawaii. This parcel of land is situated at the corner of Lama Street and Kalo Street and is identified in the Tax Map under Tax Key 2-2-52-8. Kalo Street is paved and Lama Street is unpaved.

At the hearing of this matter a legal issue was raised whether this matter of appeal should be limited to the review of the record before the Land Use Commission or a hearing by trial de novo.

The Court permitted the Appellant to submit testimony, in addition to the record before the Land Use Commission, on condition that if the law does not grant the Appellant the right to a trial de novo, the Court will entertain a motion to strike the testimony of the witnesses, or will strike the same on its own motion.

The general rule on this subject is expressed in 2 Am. Jur. 2d, Sec. 702, p. 603, wherein it is stated that a mere provision for appeal does not entitle a party to a trial de novo on the ground of constitutional limitation upon the judicial powers of the court in review of action of administrative agencies.

Section 6C-14, R. L. H. 1955, relative to judicial review of contested cases under the Hawaii Administrative Procedure provides:

> "The review shall be conducted by the court without a jury and shall be confined to the record, except that in the cases where a trial de novo . . . is provided by law . . ." (Emphasis added)

In Cunningham v. Civil Service Comm'n, County of Hawaii, 48 Haw. 278, in the footnote, the court pointed out that "a review before a circuit court on appeal from a decision of a civil service commission is on the record." [Section 6C-14 (f), R. L. H. 1955 (as enacted by Act 103, S. L. 1961].

Accordingly, since the law does not grant the Appellant a trial de novo, this Court will limit itself to review of the records submitted to the Court.

It appears that the State of Hawaii on November 20, 1958, sold this parcel of land (Lot 63, Panaewa Houselot) by public auction to P. W. Pereira and his wife, and in March 1962 (Appellant's Ex. 6) the Pereiras transferred this parcel to Mr. James Tamura, the Appellant herein; that prior to purchasing the Pereiras' interest, Mr. Tamura and three other parties agreed to subdivide said parcel among themselves. They were assured by Governmental Agencies that subdivision of this Lot is permissible; that Mr. Tamura completed the construction of a residence on said Lot, and Land Patent (Grant) No. S-14,183 was issued to JAMES JITSUO TAMURA by the Department of Land and Natural Resources, State of Hawaii, on April 24, 1964 (Appellant's Exhibit 5).

Thereafter Mr. Tamura, to fulfill his agreement with the three other parties, applied to the Hawaii County Planning and Traffic Commission for a special permit to subdivide the land into 4 residential lots, and on June 15, 1964, the Hawaii County Planning and Traffic Commission denied the special permit requested by Mr. Tamura, and, from this denial, the Appellant appealed to the Third Circuit Court, C.A. No. 1059. The records show that on June 30, 1965, Judge Felix of this Court rendered a decision in favor of the Appellant and on August 2, 1965, rendered a Judgment ordering the Hawaii County Planning and Traffic Commission to recommend to the Land Use Commission the granting of a special permit to authorize James Tamura to subdivide the parcel of land. The Hawaii County Planning and Traffic Commission recommended approval by the Land Use Commission but, after a hearing thereof, the Land Use Commission refused to follow the recommendation of the Hawaii County Planning and Traffic Commission.

From the action of the Land Use Commission denying the Appellant the right to subdivide, the Appellant filed a notice of appeal to this Court.

The Land Patent issued by the State Department of Land and Natural Resources provided that the land conveyed shall be used for residence purposes only for a period of 10 years from the date of issuance of the patent. It further provided that the patentee may subdivide said land, provided it conforms with the minimum specification and standard established by the Hawaii County Planning and Traffic Commission, however each lot to contain an area of not less than 10,000 square feet, and that the owner of the (subdivided) lots shall within 5 years construct a single-family dwelling containing a floor area of not less than 850 square feet, exclusive of garages and open lanai.

Did the action of the Land Use Commission denying the Plaintiff's request for permit to subdivide the land into four lots impair the obligation of contract? It is well settled that the constitutional prohibition against impairing the obligation of contract is not an absolute one and is not to be read with legal exactness like a mathematical formula. They do not prevent a proper exercise by the State of its police power by enacting regulation reasonably necessary to secure the general welfare of the community, even though contracts may be affected, since such matter cannot be placed by contract beyond the power of the State to regulate and control them.

> "The reservation of essential attributes of sovereign power is read into contracts as a postulate of the legal order. All contracts are made with reference to the possible exercise of the police power of the government and with the possibility of such legislation as an implied term of the law thereof; and whether made by the state itself, by municipal corporations, or by individuals or private corporations, they cannot extend to defeat legitimate government authority,

but are subject to be interfered with, or otherwise affected by, subsequent statutes enacted in a bona fide and appropriate exercise of the police power, and do not, by reason of the contracts clause of the constitution, enjoy any immunity from such legislation, regardless of whether the legislative action affects contracts incidentally, or directly or indirectly. x x x

"This rule is not only reasonable, but necessary, since a rule to the contrary would enable individuals, by their contracts, to deprive the state of its sovereign power to enact laws for the public welfare. x x x" 16 C.J.S. Sec. 281, p. 1284.

In City of El Paso v. Simmons, 85 S. Ct. 577 (1965), State of Texas obligated itself by contract to sell the land involved, subject to payment of one fortieth of purchase price in cash and 1/40th of the principal annually, balance due at unnamed date with annual rate of 3% payable each year. The Texas statutes state that upon failure to pay interest when due, purchaser's right under contract should be forfeited to the State; that even after forfeiture the original claim could be reinstated upon written request by paying full amount of interest due up to the date of reinstatement, provided no rights of third party may have intervened.

In 1941 the provisions of the Texas statute as to reinstatement were modified by adding "unless exercised within 5 years from the date of forfeiture." The court held(at pages 583 - 584) that -

"The decisions 'put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula,'

as Chief Justice Hughes said in Home Building & Loan Assn v. Blaisdell, 290 U.S. 398 x x x. The Blaisdell opinion, which amounted to a comprehensive restatement of the principles underlying the application of the Contract Clause, makes it quite clear that '[n]ot only is the constitutional provision qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." Stephenson v. Binford, 287 U.S. 251, 276, 53 S.Ct. 181, 189, 77 L.Ed. 288. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. * * * This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court.' 290 U.S., at 434-435, 54 S.Ct., at 238-239. Moreover, the 'economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts.' Id., at 437, 54 S.Ct., at 239. The State has the 'sovereign right * * to protect the * * * general welfare of the people * * *. Once we are in this domain of the reserve power of a State we must respect the "wide discretion on the part of the legislature in determining what is and what is not necessary."' x x x"

Act 187, S. L. H. 1961, in creating the Land Use Commission, in Section defines the purpose of the Act. It recognizes that inadequate control have caused Hawaii's limited and valuable lands to be used for purposes that may have a short-term gain for a few but result in a long-term loss to the income and growth potential of our economy; the Legislature finds it necessary to exercise its zoning powers to preserve, protect and encourage the development of the lands in the State for those uses to which they are best suited for the public welfare.

In view of the Simmons case above mentioned, I find that there was no impairment of the obligation of contract.

Appellant contends that under the provisions of Section 5, Act 187, S. L. of Hawaii 1961, the State Land Use Commission was required to classify the lot in question for urban use.

Section 5, Act 187, S.L.H. 1961, provides in part as follows:

> "These temporary districts shall be determined so far as practicable and reasonable to maintain existing uses and only permit changes in use that are already in progress until the district boundaries are adopted in final form." (Emphasis added.)

The Legislature by the above provision did not prevent the Hawaii County Planning and Traffic Commission and the Land Use Commission, in the exercise of their discretion and in the interest of public welfare, to classify said land as agricultural, based on existing use of property at that time. The records show that at the time the property was classified

as agricultural, the properties in the Panaewa Subdivision were used for residential purpose as well as for the agricultural, to wit: anthurium culture, coffee, papaya, macadamia nut and pasture.

The fact that Temporary District shall be determined to maintain existing uses "so far as practicable and reasonable", indicates discretion to be exercised by the Land Use Commission. It is only where the Commission's action is clearly arbitrary and unreasonable, and it abused its discretion that this Court may set it aside; Section 1 of Act 187, supra. Section 1, the Legislature in its findings and declaration of purpose, intended as one of its purposes to correct the economic loss resulting from "Scattered subdivisions with expensive, yet reduced, public services;" and "failure to utilize fully multiple-purpose lands." Lot 63, while it is not a prime agricultural land, comes within the purview of multiple-purpose land.

In view of the declaration of purpose contained in the Enabling Act, the Court cannot, without more evidence, find that the act of the Land Use Commission was illegal and void.

While the Land Patent definitely limits the use of the land for residence purpose only, it does not prevent the incidental use for growing flowers and fruit trees. The fact that the lots sold contain on the average of over 2 acres in size indicates incidental use was not foreclosed. Moreover, it has been held the fact, that the interim zoning ordinance placed land in one classification, did not estop the Land Use Commission from subsequently changing said reclassification. Price v. Schwafel, 206 P.2d 683.

The records show that at the time the Appellant purchased the property from the Pereiras, Lot 63 was already zoned as agricultural district. (Temporary District April 1962.) Before the Appellant constructed his home he knew or should have known that the Land Use Commission had placed the property in Agricultural District.

Moreover, the records further show that the Land Use Commission, before classifying or placing the Panaewa Subdivision, relied on the comprehensive study made by the University of Hawaii; held public hearing on the Island of Hawaii; and also relied on the reports of the Land Use Commission investigation staff.

Where there are two existing uses, residential and agricultural, of the land at the time the temporary district is set up, the fact that the Land Use Commission selected one existing use over the other, is not ipso facto arbitrary or unreasonable.

> "The mere fact that property has been purchased or leased with the intention to use it for a purpose allowable under the existing zoning regulations or that plans have been made and expenses incurred in a preliminary preparations for such use have been held not to prevent the application to it of a subsequent amendment prohibiting its use for such purpose." See 138 A.L.R., Anno. - Rezoning, page 501.

In Smith et al v. Juillerat et al., 161 OS 424 (1954), the court said:

> "Where no substantial nonconforming use is made of property, even though such use is contem-

plated and money is expended in preliminary work to that end, a property owner acquires no vested right to such use and is deprived of none by the operation of a valid zoning ordinance denying the right to proceed with his intended use of the property."

The theory of vested rights as relating to rezoning is only to such rights the owner of the property may possess not to have his property rezoned after he has started construction. Eggebeen v. Sonnenburg, 138 A.L.R. 495; Keller v. City of Council Bluffs, Iowa, 51 A.L.R.2d 25.

Zoning is a matter within legislative discretion and if the facts do not show the bounds of that discretion have been exceeded the court must hold that the action of the legislative body is valid and to be affirmed. Eggebeen v. Sonnenburg, supra.

Nothing is more universally recognized than the right which inheres in a State to conserve, protect and develop its resources for the people's general welfare and prosperity.

In Aquino v. Tobringer, 298 F.2d 674 (1961) (on pages 674-675), the court said:

"Scope of judicial review of alleged hardship in individual zoning cases is narrow; court may not substitute its judgment for that of zoning commission even for reasons which appear persuasive and action of zoning authorities is not to be declared unconstitutional unless court is convinced it is clearly arbitrary and unreasonable, having no substantial relation to general welfare; if question is fairly debatable, zoning stands."

In Vol. 2, Second Edition, Law of Zoning by Metzenbaum, Ch. X-1, page 1401, it is stated:

"FAIRLY DEBATABLE" ZONING WILL NOT BE STRICKEN DOWN

"The question of reasonableness having been 'fairly debatable', the regulation was correctly held valid. The prominent case of Board of County Com's of Anne Arunden County v. Snyder, 186 Md 342; 46 Atl (2) 689 (1946), as the result of Judge Henderson's valuable contribution, accurately set forth in syllabus 3, that:

'A county zoning regulation restricting area to residential and farm use was not arbitrary and unreasonable, but at most presented a fairly debatable question and hence was valid.'"

The minutes of the public hearing held before LOT 63 was placed in Temporary Agricultural District and in Permanent Agricultural District were not made part of the record on this appeal, hence this Court cannot properly decide whether the action of the Land Use Commission in placing LOT 63 in the Agricultural District was arbitrary and unreasonable; especially, where as in this case, there is no showing that the landowners in this zone made any protest at a public hearing or that the Land Use Commission did not consider their views in making their ultimate decision. The burden of proving arbitrariness in this case rests with the Appellants.

In Zahn v. Bd of Public Works, 274 U.S. 325, the city council placed plaintiffs' property in a restricted zone. The evidence showed that the entire neighborhood, at the time of the passage of the zoning ordinance, was largely umimproved, but in the course of rapid development. The court on page 328 said:

"The Common Council of the city, upon these and other facts, concluded that the public welfare would be promoted by constituting the area, including the property of plaintiffs in error, a zone 'B' district; and it is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable. The most that can be said is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question. (Citations omitted)"

In Thomas v. Bedford (11 N.Y.2d 428) 98 ALR2d 219, at pages 223-224, the court said:

"In any area of even moderate density, comprehensive and balanced zoning is essential to the health, safety and welfare of the community x x x. The task of achieving this goal devolves upon the local legislative body, and its 'judgment must be allowed to control' if the classification is 'fairly debatable'. x x x. In other words, the courts may not interfere unless the local body's determination is arbitrary, and 'the burden of establishing such arbitrariness is imposed upon him who asserts it.' x x x.

"These principles apply with equal force to rezoning, where there is presented the additional problem of adjusting a durable and uniform zoning pattern to altered conditions, whether local or

county. As we wrote in the Rodgers case (302 NY 115, 121, 96 NE2d 731, 733), 'While stability and regularity are undebtedly essential to the operation of zoning plans, zoning is by no means static. Changed or changing conditions call for changed plans, and persons who own property in a particular zone or use district enjoy no eternally vested right to that classification if the public interest demands otherwise. Accordingly, the power of a village to amend its basic zoning ordinance in such a way as reasonably to promote the general welfare cannot be questioned.'

"In the present case, the plaintiffs take the position that the town enacted a comprehensive zoning ordinance in 1946 which fully met, and still meets, the needs of the community and that it may not be amended without a showing of need, based on financial considerations or arising from changed conditions. At the same time, they declare that they have no general objection to an RO classification as such, but only to the fact that it has been placed in the portion of the town selected. What the plaintiffs are attempting to do, it seems clear, is to reverse the presumption that the ordinance is valid and place upon the town officials the burden of proving that they acted reasonably. The town, of course, is not required to establish a need for rezoning; the burden of proving arbitrariness rests upon the plaintiffs." (Emphasis added.)

In 58 Am. Jur. 935, ZONING, § 21, Reasonableness, page 953, it is said:

"The modern tendency, x x x, is to uphold zoning regulations which formerly would have been rejected as arbitrary or oppressive, and in many cases objections to the validity of zoning restrictions on the ground that they are unreasonable, arbitrary, or oppressive have been overruled. x x x"

In view of the foregoing and the record of this case, this Court finds that (1) the Appellant failed to sustain the burden of showing that the action of the Land Use Commission was arbitrary and unreasonable.

I further find that (2) there was no impairment of the obligation of contract, nor a denial of vested right in this case.

I THEREFORE SUSTAIN THE ACTION OF THE LAND USE COMMISSION.

DATED at Hilo, Hawaii, January 16, 1967.

T. Moulton

JUDGE

THIRD CIRCUIT COURT SEAL STATE OF HAWAII

I hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the Clerk of the Third Circuit Court of the State of Hawaii, at Hilo. JAN 17 1967

Clerk, Third Circuit Court, State of Hawaii