TAMURA, JAMES J. SP-65-19

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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
ATTORNEY GENERAL

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

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.

D E C I S I O N

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.

D E C I S I O N

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. Monden

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

C. A. No. 1383

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

RALPH E. ALLISON, et al.,	)
	)
Appellants,	)
	)
vs.	)
	)
STATE LAND USE COMMISSION,	)
	)
Appellee.	)

DECISION

9-17-68 Sent Xerox copy to all Commissioners
3-17-69 " " " " " "

PLANNING AND TRAFFIC COMMISSION
County of Hawaii

June 23, 1964

Mr. James Tamura
88 Lama Street
Hilo, Hawaii

Dear MR. TAMURA:

The Planning and Traffic Commission at a duly advertised public hearing on May 18, 1964 in the Board of Supervisors Conference Room discussed your request for a Special Permit from Section 98H-5 of Act 205, Land Use Regulation of the State of Hawaii to allow the subdivision of Lot 63, Panaewa House Lots into 4 lots for home sites.

The Commission voted to deny the Special Permit as it was determined beyond a reasonable doubt that public interest and general welfare will not be served nor will the above request be in accord with the purpose and intent of the Land Use Law as set forth in Section 98H-5 thereof because of the following findings:

1. The land in question is presently zoned by the State Land Use Commission as Agricultural District;

2. The subdivision of a land in the Agricultural District for a residential lot 21,320 square feet in size is not considered unusual and reasonable use of agricultural land as set forth under Section 98-H-6 of Act 205;

3. The lot in question can be utilized for the uses permitted in the Agricultural District as indicated under Section 98 H-2;

4. The lot sizes in the general vicinity are predominantly in excess of 1.5 acres and generally around 2.73 acres;

5. The applicant may request for the amendment to district boundaries under Section 98 H-4 of Act 205 in order that the parcel may be resubdivided to conforming size.

A denial by the Commission of the desired use shall be appealable to the Circuit Court in which the land is situated and shall be made pursuant to the Hawaii Rules of Civil Procedure.

Please do not hesitate to call or write us should there be further questions on this matter.

Yours very truly,

PLANNING AND TRAFFIC COMMISSION

Edgar A. Hamasu
Director

EAH:

Applicant: JAMES TAMURA

REQUEST: This is a request for a Special Permit under Act 205, State zoning law which allows unusual and reasonable uses within the agricultural and/or rural zone districts. The request is to subdivide a 1.96 acres parcel into 4 lots, all in excess of 21,318 square feet, in an agricultural zone.

LOCATION: This parcel of land is located in Panaewa, Waiakea, South Hilo, Hawaii, as Lot 63, TMK 2-2-48-80, and fronting on Lama Street approximately 800 feet makai from the Olaa-Hilo road. The lot is approximately 4½ miles from the Hilo Post Office, 5 miles from Hilo High School and 1¼ miles from Waiakea Waena School.

ADJACENT LAND USE: Adjacent lands are predominantly large residential lots ranging in sizes from 1.81 Ac. to 2.73 Ac. in land area. The recently subdivided additional increment of the Panaewa House Lots by the State is also this general size.

UTILITIES: An 8" water line is existing on Lama Street. Cesspool shall be used for disposal of sewage. Electricity and telephone are available.

PLAN FOR HILO: A Plan for the Metropolitan Area of Hilo, prepared by Belt, Collins & Associates, and adopted by the Planning & Traffic Commission on January 10, 1964, outlines this area as a Residential Agriculture Use. The proposed zoning plan is for 3-acre lot sizes.

CONDITIONS:

RECOMMENDATION

The request is not unusual but rather common and contrary with the intent and purpose of Section 98 H-6 of Act 205. Applicant should be advised to apply with the State Land Use Commission for a change of zone boundary in conformance with "Section 98 H-9 of Act 205."

COUNTY PLANNING COMMISSION
County of Hawaii
Hilo, Hawaii

October 22, 1965

The County Planning Commission met in regular session at 1:12 p.m., in the Conference Room of the County Board of Supervisors, with Vice Chairman Walter W. Kimura presiding.

PRESENT: Walter W. Kimura
John T. Freitas
Hiroo Furuya
Kenneth Griffin
Isamu Hokama
Masayoshi Onodera
Robert J. Santos
Edward Toriano
Cirilo E. Valera
Raymond H. Sucfuji
Philip I. Yoshimura
Harold E. Oba

ABSENT: William J. Bonk
Robert M. Yamada

Robert Wagner
Jack Kobayashi
Fred Hayashi
Jack Bryan, Honolulu Star-Bulletin
Don Miller, Honolulu Advertiser

MINUTES — The minutes of the meeting held on September 24, 1965, were approved as circulated on a motion of Mr. Griffin, second of Mr. Toriano, and carried.

SUBDIVISION COMMITTEE REPORT — On a motion of Mr. Griffin and second of Mr. Toriano, the Commission voted to approve the report of the Subdivision Committee of October 12 with the withdrawal of Item No. 13 and deferred action on Item No. 2 until the arrival of the subdivider.

DISPOSITION ON APPEAL
LAND USE COMMISSION
SPECIAL PERMIT
JAMES J. TAMURA — The disposition on the decision rendered by Judge Felix was next considered regarding James Tamura's appeal from the decision of the Planning Commission denying a special permit under the regulations of the State Land Use Commission to subdivide 1.96-acre parcel into 4 lots in an Agricultural District.

The Acting Director explained that this case was appealed to the Third Circuit Court. The Court rendered a decision that the Court finds under the facts of the law that the then Planning and Traffic Commission should have granted a special permit allowing or authorizing the subdivision on the basis that the State in selling the land included conditions for the subdivision of said land. Therefore, the Court reviewed the case from a different standpoint than the Planning Commission.

The Acting Director further stated that the decision says that the Planning Commission should have allowed the subdivision, and the Commission can either

reaffirm its previous action or approve it, and forward it to the Land Use Commission for ratification. All matters denied by the Planning Commission becomes final. If approved by the Planning Commission, it must be sent to the Land Use Commission for approval. The State Land Use Commission is informed of the matter. The Attorney General's Office has the decision of the Court and is awaiting the Planning Commission's decision.

Mr. Griffin stated that he would like to be excused from voting but he would like the opportunity to speak on the matter. He mentioned that his company was involved in the original sale. At the time this property was sold to Mr. Tamura, there were three other people who wanted to go into this. The provisions in the Land Patent allowed further subdivision. They went to the Planning Commission and talked with the former Director, Mr. Kasamoto, and was informed that they could subdivide under the existing Ordinance into 7,500 square-foot lots. They talked to the Board of Water Supply and was informed that they would put in a waterline to the second increment of the Panaewa House Lots. The problem of the people involved was that they have signed an agreement among themselves to purchase the lot and allow one of them to build the house. Then came the Land Use Commission Law which zoned the area Agricultural. If the Commission allows this, they should allow the others. Every case should be looked at on its own merit. In this case, there was no subterfuge and no run-around. This transaction took place before the Land Use Law and this was their intent in the very first place. This is the reason why the Court asked that the Commission approve this. Mr. Griffin asked that the Commission approve it and send it along to the Land Use Commission for their disposition.

The Acting Director pointed out that the staff disagrees with the decision of the Court, but the County Attorney feels that the Court reviewed it in the proper light. He then read Section 98H-6 of Act 205 under Special Permit. "The county planning commission and the zoning board of appeals of the City and County of Honolulu may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use his land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which his land is located or the zoning board of appeals in the case of the City and County of Honolulu for permission to use his land in the manner desired." The Section itself pertains to use of the land and that the staff contends that a subdivision is not use of the land. The staff reviewed it in the light of what the law allows. The State should not adopt an ordinance such as this Land Use Law that would prohibit what was originally allowed in the sale of State lands.

Mr. Griffin added that the crux of the whole matter was the intent, which was originally to split the parcel into 4 lots. This is not something that happened after the Land Use Law was passed. It was something that they had looked into. The answers were given to them allowing subdivision at the time the lot was bought.

The staff reported that there are others awaiting the outcome of this case. The staff further reported that in reviewing the State subdivision applications with the Commission, this particular parcel was never brought before the Commission for final approval of said subdivision by the State. So here again, there is a discrepancy. The owners who bought this land are owners in common with the State. The staff in conferring with the County Attorney on this matter learned that the ownership is now supreme after so many years. The Commission should have stopped the sales of the land. Since the subdivision is now recognized, the question would be moot to bring up this matter at the present time.

Mr. Santos suggested that more time be given prior to disposition so that the members will have more time to read over the Court's decision and familiarize themselves on the whole case.

The staff recommended immediate action on the case since it has been held up for so long. The staff disagrees on the decision of the Court in this case but recommended that the application be approved on the basis of the Court's decision and that it be forwarded to the Land Use Commission for them to take up on the State level. For the Planning Commission to deny the application at this time would only end up in the same Court.

Mr. Hokama moved to recommend approval on the special permit to allow subdivision into 4 lots of a 1.96-acre parcel and forward to the Land Use Commission. The motion was seconded by Mr. Furuya.

The votes were recorded as follows: All ayes with the exception of Mr. Griffin, who abstained.

PUBLIC HEARING — The meeting was recessed at 1:35 p.m., to conduct a public hearing on the request of Kohala Sugar Company for a variance to allow the development and construction of an additional office space for the Kohala Credit Union within the Kohala Sugar Agricultural Office Building, situated in Hawi, North Kohala.

The meeting was reconvened at 1:40 p.m.

2. HOLUALOA 4TH, NORTH KONA
ROBERT M. YAMADA
TMK: 7-7-04

Final plan approval of the proposed "Kona Sea View Lots," Increment 2, being a portion of R. P. 7289, L. C. Aw. 7228, Holualoa 4th, North Kona, Hawaii, into 42 lots all over 7,500 square feet.

The representative appeared to request that the Commission consider a 16-foot County standard pavement instead of the 20-foot County standard pavement as required by the Committee at last month's meeting.

The staff reported that this subdivision involves four increments; however, the subdivider applied for preliminary approval for Increment I only. At that time, the ordinance required a 16-foot pavement. Subsequently, the ordinance has been amended to require 20-foot pavement. The consensus of the members was that since the entire tract was not granted preliminary approval, the subdivider should be required to construct roadways to the 20-foot standards.

The representative also stated that this entire tract of land has been sold under an agreement of sale and that the entire layout of the road construction has been based on a 16-foot pavement which would impose a hardship on the subdivider who has quoted construction cost on the 16-foot pavement but who would be required to construct to 20-foot pavement should the Commission require this.

However, since the whole tract of land was not approved for preliminary approval, it was the consensus of the members that the subdivider should not have taken it upon himself to assume that the entire tract would be required the 16-foot pavement.

LAND USE COMMISSION
STATE OF HAWAII

Certified copy sent to Mr. Abe

IN THE MATTER OF THE PETITION)
FOR SPECIAL PERMIT BY JAMES)
J. TAMURA, HAWAII SP-65-19)

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION

The above Petition for a Special Permit involving a residential subdivision within an Agricultural District of the State Land Use District Boundaries, having come on for hearing, and the Land Use Commission having duly considered the evidence now finds and concludes as follows:

FINDINGS OF FACT

1. That the Petition encompasses 1.96 acres of land, which is in the Agricultural District and which is located in the Panaewa Houselot Subdivision, Waiakea, South Hilo, Hawaii (TMK 2-2-52: 8).

2. That the Petitioner proposes to subdivide and develop the 1.96 acres of land into four residential lots.

3. That the Hawaii County Planning Commission, after duly considering the evidence received during a public hearing, denied the Special Permit.

4. That James J. Tamura had appealed the decision of the Hawaii County Planning Commission.

5. That Judge A. M. Felix of the Third Circuit Court, State of Hawaii, rendered a decision which mandated the Hawaii County Planning Commission to recommend approval of the Special Permit to the State Land Use Commission.

6. That James J. Tamura was issued a transfer document on May 14, 1962 for title to the subject land which was purchased from the State initially by Patrick Walter Pereira and Edith Rachel Pereira.

7. That on March 13, 1964, a Land Patent was granted to James J. Tamura by the Department of Land and Natural Resources for the subject land.

8. That the Patent for the subject lands contained the same conditions applicable to the Special Sale Agreement dated November 20, 1958, by which the State Department of Land and Natural Resources originally conveyed the subject land to Patrick Walter Pereira and Edith Rachel Pereira. That the following

two paragraphs are part of the Land Patent granted to Mr. Tamura:

a. "That should the patentee or any assignee of his, desire to subdivide said lot, or any portion thereof, each subdivision shall conform with the minimum of specifications and standards established by the Hawaii Traffic and Planning Commission, excepting that said lot and each additional lot created as a result of said subdivision, shall contain an area of at least 10,000 square feet, or the minimum area required by said Planning Commission, whichever is greater, and the owner of each lot as subdivided shall be required within the period of 5 years next following the date of such subdivision or resubdivision, to construct on each lot so created a single-family dwelling of new materials or masonry, and containing a floor area of not less than 850 square feet, exclusive of garage and open lanai."

b. "That the land hereby conveyed shall be used for residence purposes only for a period of 10 years from the date of issuance of this Land Patent Grant."

9. That the subject parcel contains a single residence constructed by James J. Tamura.

10. That the subject parcel is served by a cinder road (Lama Street) and a paved road (Kalo Street).

11. That the general land use of the area is rural or agricultural in nature.

12. That the building density along Lama Street and along the south side of Makalika Street is approximately 2.7 acres per dwelling unit.

13. That the lots in the area are generally overgrown with wild growth although clearings occur aroumd the residences.

14. That a coffee orchard, lychee orchard, a macadamia nut orchard, and a few small gardens are found in the area, although the lands are predominantly overgwown with wild growth.

15. That electrical, telephone, and water services are available in the area.

16. That the soils in the area of the subject land are known as the Olaa or Ohia soil material, consisting of young lava with a thin covering of volcanic ash occurring in very wet regions on the Island of Hawaii.

17. That this land type is difficult to cultivate and pastures are of very poor quality. That, however, some areas at lower elevations are being developed for macadamia nuts, coffee and pastures.

18. That the County Plan for development of the area designates a residential-agricultural use for small operations such as poultry, floriculture, or truck gardening, with minimum lot sizes of 1 acre.

19. That considerable acreage, estimated at approximately 2,400 acres, are vacant or not used for urban purposes within the Urban District boundary in the Hilo area, and that the subject land is located approximately ½ mile from the closest urban boundary.

20. That although the population of Hilo has not changed drastically from 1950 to 1963, it is prominently indicated that the population has declined, and that recent trends also indicate a decline in population from a 1960 total of 25,966 to a 1964 total of 25,370.

21. That the Land Study Bureau of the University of Hawaii has found, as indicated in its report "Urban Development on the Island of Hawaii, 1946-1963", that development of lots platted in the Hilo area over the subject period, has been at a slow rate of approximately 36%.

That the temporary district boundaries made effective on April 21, 1962, classified the subject land within the Agricultural District.

22. That the final district boundaries made effective August 23, 1964, classified the subject land within the Agricultural District.

23. That an application for Special Permit to subdivide the subject land was first made on May 1, 1964, approximately two years after the temporary district boundaries classified subject land within the Agricultural District.

24. That the subject land was not used for urban purposes until February 17, 1964.

CONCLUSIONS OF LAW

1. That the Petitioner has failed to prove that the proposed subdivision is "unusual and reasonable" within an Agricultural District in accordance with Section 2.24 of the State Land Use District Regulations, and 98-H6, Revised Laws of Hawaii, 1955, as amended.

2. That other undeveloped lands already districted for residential purposes are better located to centers of trading and employment facilities and more easily serviced by public agencies than the land under consideration, thus alleviating any evidence of urban pressures in the area under petition.

3. That to include land under consideration as a permitted residential use would contribute towards scattered urban type development.

4. That the proposed subdivision will be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations, in that scattered urban uses will result.

5. That the proposed subdivision will adversely affect the surrounding property, in that the existing roads would be over-taxed and deteriorate by nature of its cinder construction.

6. That the proposed subdivision would burden public agencies to provide adequate roads.

7. That unusual conditions, trends and needs have not arisen since the district boundaries and regulations were established.

8. That the land upon which the proposed subdivision is sought is suited for certain agricultural uses.

9. That the proposed subdivision will substantially alter and change the essential rural character of the land by introducing higher density residential use.

10. That the proposed subdivision would not make the highest and best use of the land involved for the public welfare.

11. That the specifications in the land patent require conformance with the minimum specifications and standards established by the Land Use Law and Regulations at the time the request for subdivision is initiated by the landowner.

DECISION

Based on the evidence presented and the findings of facts and conclusions of law, it is the decision of the Land Use Commission that the Petition for a

Special Permit to subdivide the 1.96 acre parcel of land owned by James J. Tamura (Tax Map Key 2-2-52: 8) be denied.

Dated: January 19, 1966, Honolulu, Hawaii.

STATE LAND USE COMMISSION

By Myron B. Thompson
MYRON B. THOMPSON

CERTIFICATION:

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

George S. Moriguchi
GEORGE S. MORIGUCHI
Executive Officer
Land Use Commission

APPROVED AS TO FORM AND LEGALITY:

Roy Y Takeyama
ROY TAKEYAMA
Deputy Attorney General

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

C. A. NO. 1261

JAMES J. TAMURA,
Appellant,

vs.

LAND USE COMMISSION,
STATE OF HAWAII,
Appellee

CERTIFIED RECORD ON APPEAL

BERT T. KOBAYASHI
Attorney General

ROY Y. TAKEYAMA
Deputy Attorney General

State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii

Attorneys for Appellee

IN THE CIRCUIT OF THE THIRD CIRCUIT

STATE OF HAWAII

C. A. NO. 1261

JAMES J. TAMURA,
Appellant,

vs.

LAND USE COMMISSION,
STATE OF HAWAII,
Appellee

CERTIFIED RECORD ON APPEAL

I, MYRON B. THOMPSON, Chairman of the State Land Use Commission, hereby certify that all of the reports, maps, transcripts, and documents listed below are the designation and counter-designation of certified record on appeal in the above-entitled-matter:

1. Appellant's application for Special Permit filed on May 1, 1964; transcript of the minutes of the Planning Commission, County of Hawaii, held on October 22, 1965; and the data and recommendation from the Planning Commission, County of Hawaii.

2. Transcript of the public hearing held on December 17, 1965, and the decision of the Land Use Commission.

3. Staff report of the Planning Commission, County of Hawaii.

4. Notice of Appeal filed in the above entitled Court and Cause (previously filed).

5. The Statement of the Case filed by Appellant in this Court and Cause (previously filed).

6. Designation of Contents of Record on Appeal (previously filed).

7. Staff report, dated December 17, 1965, maps (marked Exhibit A, B, and C), and the report entitled "Urban Development on the Island of Hawaii, 1946-1963" by the Land Study Bureau of the University of Hawaii, as submitted by the Land Use Commission staff.

8. Findings of Facts, Conclusions of Law and Decision of the Land Use Commission.

9. Answer to Statement of Case (previously filed).

10. Counter-Designation of Record on Appeal (previously filed).

IN WITNESS WHEREOF I have hereunto set my hand at Honolulu, Hawaii, this 20th day of January, 1966.

MYRON B. THOMPSON, Chairman
State Land Use Commission

C. A. 1261

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

LAND USE COMMISSION,
State of Hawaii,

Appellee.

NOTICE OF APPEAL TO CIRCUIT COURT

KAZUHISA ABE
Professional Bldg.
163 Kalakaua Street
Hilo, Hawaii

Attorney for Appellant.

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

LAND USE COMMISSION,
State of Hawaii,

Appellee.

NOTICE OF APPEAL TO CIRCUIT COURT

Notice is hereby given that JAMES J. TAMURA, Appellant above named, pursuant to Section 98H-6, Revised Laws of Hawaii 1955, as amended, hereby appeals to the Circuit Court of the Third Judicial Circuit from the decision of the LAND USE COMMISSION, State of Hawaii, entered on the 17th day of December, 1965.

Dated this 20th day of December, 1965.

Kazuhisa Abe
Attorney for Appellant

Professional Bldg.
163 Kalakaua Street
Hilo, Hawaii

C. A. No. 1214

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

LAND USE COMMISSION,
State of Hawaii,

Appellee.

STATEMENT OF THE CASE

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

and

ORDER FOR CERTIFICATION AND
TRANSMISSION OF RECORD

KAZUHISA ABE
Professional Bldg.
163 Kalakaua Street
Hilo, Hawaii

Attorney for Appellant.

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

LAND USE COMMISSION,
State of Hawaii,

Appellee.

STATEMENT OF THE CASE

In accordance with Rule 72(e), Hawaii Rules of Civil Procedure, Appellant makes the following statement of the case and prayer for relief:

1. That pursuant to Section 98H-6, Revised Laws of Hawaii, 1955, JAMES TAMURA filed an application for a special permit to subdivide Lot 63, Panaewa House Lots, described in Land Patent (Grant) No. S-14,183, into four lots.

2. That this Appeal arises out of an Application for a Special Permit; and that this Appeal concerns the decision of the Land Use Commission of the State of Hawaii denying special permit.

3. That Appellant contends that the decision of the Land Use Commission, State of Hawaii, is contrary to the facts and the law.

WHEREFORE, Appellant prays:

1. That the decision of the Land Use Commission, State of Hawaii, in the above entitled case be reversed and set aside.

2. That this Honorable Court enter judgment for Appellant, thereby subdividing Lot 63 of the Panaewa House-Lots into four lots.

3. For such other and further relief as to this Court may be deemed just.

Dated this 27th day of December, 1965.

JAMES J. TAMURA, Appellant

By _____

His Attorney
Professional Bldg.
163 Kalakaua Street
Hilo, Hawaii

KAZUHISA

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

LAND USE COMMISSION,
State of Hawaii,

Appellee.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 72(d)(2), Appellant does hereby specify the papers desired filed in this Court and Cause in connection with the Appeal:

1. (a) Appellant's Application for Special Permit filed on May 1, 1964; (b) Transcript of the minutes of the Planning Commission, County of Hawaii, held on October 22, 1965; and the (c) [illegible] and Recommendation from the Planning Commission, County of Hawaii.

2. (a) Transcript of the public hearing held on December 17, 1965.; and the (b) decision of the Land Use Commission.

3. Such other documents and exhibits filed in connection with said Application for Special Permit.

4. The Notice of Appeal filed in the above-entitled Court and Cause.

5. The Statement of the Case filed by Appellant and that of Appellee (if filed) in this Court and Cause.

6. This Designation of Contents of Record on Appeal together with any Counter-Designation filed pursuant to Rule 72(d)(3), Hawaii Rules of Civil Procedure.

Dated at Hilo, Hawaii, this 6th day of December, 1965.

KAZUHISA ABE
Attorney for Appellant

PROFESSIONAL BLDG.
163 Kalakaua Street
Hilo, Hawaii

ORDER FOR CERTIFICATION AND
TRANSMISSION OF RECORD

STATE OF HAWAII:

TO: LAND USE COMMISSION
STATE OF HAWAII

Pursuant to Rule 72(d)(2) of the Hawaii Rules of Civil Procedure, you are hereby ordered to certify and transmit to this Court, within fifteen (15) days of the date of this Order, or within such further time as may be allowed by the Court, the foregoing record on Appeal.

Dated at Hilo, Hawaii, this 21st day of December, 1965.

THOMAS KAIDA
Clerk, Circuit Court, Third Circuit
State of Hawaii

THIRD CIRCUIT COURT
SEAL
STATE OF HAWAII

I do 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 DEC 21 1965

Clerk, Third Circuit Court, State of Hawaii

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

C. A. NO. 1261

JAMES J. TAMURA,
Appellant,

vs.

LAND USE COMMISSION,
STATE OF HAWAII,
Appellee

CERTIFIED RECORD ON APPEAL

BERT T. KOBAYASHI
Attorney General

ROY Y. TAKEYAMA
Deputy Attorney General

State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii

Attorneys for Appellee

IN THE CIRCUIT OF THE THIRD CIRCUIT

STATE OF HAWAII

C. A. NO. 1261

JAMES J. TAMURA,
Appellant,

vs.

LAND USE COMMISSION,
STATE OF HAWAII,
Appellee

CERTIFIED RECORD ON APPEAL

I, MYRON B. THOMPSON, Chairman of the State Land Use Commission, hereby certify that all of the reports, maps, transcripts, and documents listed below are the designation and counter-designation of certified record on appeal in the above-entitled-matter:

1. Appellant's application for Special Permit filed on May 1, 1964; transcript of the minutes of the Planning Commission, County of Hawaii, held on October 22, 1965; and the data and recommendation from the Planning Commission, County of Hawaii.

2. Transcript of the public hearing held on December 17, 1965, and the decision of the Land Use Commission.

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4. Notice of Appeal filed in the above entitled Court and Cause (previously filed).

5. The Statement of the Case filed by Appellant in this Court and Cause (previously filed).

6. Designation of Contents of Record on Appeal (previously filed).

7. Staff report, dated December 17, 1965, maps (marked Exhibit A, B, and C), and the report entitled "Urban Development on the Island of Hawaii, 1946-1963" by the Land Study Bureau of the University of Hawaii, as submitted by the Land Use Commission staff.

8. Findings of Facts, Conclusions of Law and Decision of the Land Use Commission.

9. Answer to Statement of Case (previously filed).

10. Counter-Designation of Record on Appeal (previously filed).

IN WITNESS WHEREOF I have hereunto set my hand at Honolulu, Hawaii, this 20th day of January, 1966.

Myron B. Thompson

MYRON B. THOMPSON, Chairman
State Land Use Commission

Subscribed and sworn to before
me this 20th day of January, 1966

Daniel S. Enchegoyen, Jr.

Notary Public, First Judicial Circuit
State of Hawaii

My commission expires 10/29/69

COUNTY OF HAWAII

PLANNING AND TRAFFIC COMMISSION

FOR OFFICIAL USE ONLY

Date petition and fee received by Commission May 1, 1964

Date petition is scheduled for public hearing May 18, 1964

Date Commission took action and its ruling June 15, 1964

APPLICATION FOR SPECIAL PERMIT

~~XIX~~ (We) hereby request approval for a Special Permit to use certain property located at Panaewa Houselots, South Hilo, Hawaii in accordance with provisions of Section 98H-6, Act 205, SLH 1963 for the following described purpose.

To subdivide the mentioned parcel into four lots.

Description of Property: The parcel is a corner lot on Lama Street, Panaewa Houselots.

The parcel presently has a dwelling situated on it.
TMK: 2-2-52-8

Petitioner's interest in subject property: Owner of record.

Petitioner's reason(s) for requesting special permit:
NOTE: The applicant must show that all of the following conditions exist: 1) that there are unusual or exceptional circumstances applying to the subject property, building or use which do not generally apply to surrounding property or improvements in the same zone district; 2) that the unusual or exceptional circumstances which apply to the subject property, building or use are reasonable and proper and will not be materially detrimental to public health, safety, morals and general welfare; nor will it be injurious to improvements or property rights related to property in the surrounding area; 3) that the strict enforcement of the zoning regulation would result in practical difficulties and unnecessary hardship inconsistent with the intent and purpose of Act 205; and 4) that the granting of a special permit will not be contrary to the objectives of the Master Plan or Plans of the State and/or County Government.

At the time of sale in 1962 the County Planning Commission, the State Land Department, and the County Board of Water Supply informed the Buyers that subdivision of the property was possible as soon as the planned water system was installed.

The application will be accompanied with a deposit of $30.00 dollars to cover publication and administrative costs and a map of the area proposed for change.

Signature (SGD) JAMES TAMURA

Address 88 Lama St., Hilo 96217

Telephone

This space for official use

The property is situated in a(n) _____ District.

REMARKS:

COUNTY PLANNING COMMISSION
County of Hawaii
Hilo, Hawaii

October 22, 1965

The County Planning Commission met in regular session at 1:12 p.m., in the Conference Room of the County Board of Supervisors, with Vice Chairman Walter W. Kimura presiding.

PRESENT: Walter W. Kimura
John T. Freitas
Hiroo Furuya
Kenneth Griffin
Isamu Hokama
Masayoshi Onodera
Robert J. Santos
Edward Toriano
Cirilo E. Valera
Raymond H. Suefuji
Philip I. Yoshimura
Harold E. Oba

ABSENT: William J. Bonk
Robert M. Yamada

Robert Wagner
Jack Kobayashi
Fred Hayashi
Jack Bryan, Honolulu Star-Bulletin
Don Miller, Honolulu Advertiser

MINUTES — The minutes of the meeting held on September 24, 1965, were approved as circulated on a motion of Mr. Griffin, second of Mr. Toriano, and carried.

SUBDIVISION COMMITTEE REPORT — On a motion of Mr. Griffin and second of Mr. Toriano, the Commission voted to approve the report of the Subdivision Committee of October 12 with the withdrawal of Item No. 13 and deferred action on Item No. 2 until the arrival of the subdivider.

DISPOSITION ON APPEAL
LAND USE COMMISSION
SPECIAL PERMIT
JAMES J. TAMURA — The disposition on the decision rendered by Judge Felix was next considered regarding James Tamura's appeal from the decision of the Planning Commission denying a special permit under the regulations of the State Land Use Commission to subdivide 1.96-acre parcel into 4 lots in an Agricultural District.

The Acting Director explained that this case was appealed to the Third Circuit Court. The Court rendered a decision that the Court finds under the facts of the law that the then Planning and Traffic Commission should have granted a special permit allowing or authorizing the subdivision on the basis that the State in selling the land included conditions for the subdivision of said land. Therefore, the Court reviewed the case from a different standpoint than the Planning Commission.

The Acting Director further stated that the decision says that the Planning Commission should have allowed the subdivision, and the Commission can either

reaffirm its previous action or approve it, and forward it to the Land Use Commission for ratification. All matters denied by the Planning Commission becomes final. If approved by the Planning Commission, it must be sent to the Land Use Commission for approval. The State Land Use Commission is informed of the matter. The Attorney General's Office has the decision of the Court and is awaiting the Planning Commission's decision.

Mr. Griffin stated that he would like to be excused from voting but he would like the opportunity to speak on the matter. He mentioned that his company was involved in the original sale. At the time this property was sold to Mr. Tamura, there were three other people who wanted to go into this. The provisions in the Land Patent allowed further subdivision. They went to the Planning Commission and talked with the former Director, Mr. Kasamoto, and was informed that they could subdivide under the existing Ordinance into 7,500 square-foot lots. They talked to the Board of Water Supply and was informed that they would put in a waterline to the second increment of the Panaewa House Lots. The problem of the people involved was that they have signed an agreement among themselves to purchase the lot and allow one of them to build the house. Then came the Land Use Commission Law which zoned the area Agricultural. If the Commission allows this, they should allow the others. Every case should be looked at on its own merit. In this case, there was no subterfuge and no run-around. This transaction took place before the Land Use Law and this was their intent in the very first place. This is the reason why the Court asked that the Commission approve this. Mr. Griffin asked that the Commission approve it and send it along to the Land Use Commission for their disposition.

The Acting Director pointed out that the staff disagrees with the decision of the Court, but the County Attorney feels that the Court reviewed it in the proper light. He then read Section 98H-6 of Act 205 under Special Permit. "The county planning commission and the zoning board of appeals of the City and County of Honolulu may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use his land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which his land is located or the zoning board of appeals in the case of the City and County of Honolulu for permission to use his land in the manner desired." The Section itself pertains to use of the land and that the staff contends that a subdivision is not use of the land. The staff reviewed it in the light of what the law allows. The State should not adopt an ordinance such as this Land Use Law that would prohibit what was originally allowed in the sale of State lands.

Mr. Griffin added that the crux of the whole matter was the intent, which was originally to split the parcel into 4 lots. This is not something that happened after the Land Use Law was passed. It was something that they had looked into. The answers were given to them allowing subdivision at the time the lot was bought.

The staff reported that there are others awaiting the outcome of this case. The staff further reported that in reviewing the State subdivision applications with the Commission, this particular parcel was never brought before the Commission for final approval of said subdivision by the State. So here again, there is a discrepancy. The owners who bought this land are owners in common with the State. The staff in conferring with the County Attorney on this matter learned that the ownership is now supreme after so many years. The Commission should have stopped the sales of the land. Since the subdivision is now recognized, the question would be moot to bring up this matter at the present time.

Mr. Santos suggested that more time be given prior to disposition so that the members will have more time to read over the Court's decision and familiarize themselves on the whole case.

The staff recommended immediate action on the case since it has been held up for so long. The staff disagrees on the decision of the Court in this case but recommended that the application be approved on the basis of the Court's decision and that it be forwarded to the Land Use Commission for them to take up on the State level. For the Planning Commission to deny the application at this time would only end up in the same Court.

Mr. Hokama moved to recommend approval on the special permit to allow subdivision into 4 lots of a 1.96-acre parcel and forward to the Land Use Commission. The motion was seconded by Mr. Furuya.

The votes were recorded as follows: All ayes with the exception of Mr. Griffin, who abstained.

PUBLIC HEARING — The meeting was recessed at 1:35 p.m., to conduct a public hearing on the request of Kohala Sugar Company for a variance to allow the development and construction of an additional office space for the Kohala Credit Union within the Kohala Sugar Agricultural Office Building, situated in Hawi, North Kohala.

The meeting was reconvened at 1:40 p.m.

2. HOLUALOA 4TH, NORTH KONA
ROBERT H. YAMADA
TMK: 7-7-04

Final plan approval of the proposed "Kona Sea View Lots," Increment 2, being a portion of R. P. 7289, L. C. Aw. 7228, Holualoa 4th, North Kona, Hawaii, into 42 lots all over 7,500 square feet.

The representative appeared to request that the Commission consider a 16-foot County standard pavement instead of the 20-foot County standard pavement as required by the Committee at last month's meeting.

The staff reported that this subdivision involves four increments; however, the subdivider applied for preliminary approval for Increment I only. At that time, the ordinance required a 16-foot pavement. Subsequently, the ordinance has been amended to require 20-foot pavement. The consensus of the members was that since the entire tract was not granted preliminary approval, the subdivider should be required to construct roadways to the 20-foot standards.

The representative also stated that this entire tract of land has been sold under an agreement of sale and that the entire layout of the road construction has been based on a 16-foot pavement which would impose a hardship on the subdivider who has quoted construction cost on the 16-foot pavement but who would be required to construct to 20-foot pavement should the Commission require this.

However, since the whole tract of land was not approved for preliminary approval, it was the consensus of the members that the subdivider should not have taken it upon himself to assume that the entire tract would be required the 16-foot pavement.

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

File

Memorandum

From Roy Y. Takeyama Date November 10, 1966

To Land Use Commission File No. 65-210 RYT:py

Subject Tamura v. Land Use Commission, C. A. No. 1261

HAW'N PRINTING

The attached memorandum is for your information and files.

ROY Y. TAKEYAMA
Deputy Attorney General

Attachment

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.	APPEAL FROM DECISION OF THE LAND USE COMMISSION, STATE OF HAWAII

MEMORANDUM

BERT T. KOBAYASHI
Attorney General
State of Hawaii

ROY Y. TAKEYAMA
Deputy Attorney General

Iolani Palace Grounds
Honolulu, Hawaii 96813

Attorneys for Appellee

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.	APPEAL FROM DECISION OF THE LAND USE COMMISSION, STATE OF HAWAII

MEMORANDUM

I. QUESTION ON SCOPE OF REVIEW

Section 98H-6, Revised Laws of Hawaii 1955, as amended, provides in part that:

> ". . .Within forty-five days after receipt of the county agency's decision, the commission shall act to approve or deny. A denial either by the county agency or by the commission, as the case may be, of the desired use shall be appealable to the circuit court of the circuit in which the land is situated and shall be made pursuant to the Hawaii rules of civil procedure."

Appellant contends that the above section affords him a trial de novo.

We disagree.

In 8A McQuillin, Municipal Corporations, § 25.336, it is stated that:

> "In most jurisdictions there is not a trial de novo on a judicial review of, or appeal from, the decision of a zoning board as to permits, variances, nonconforming uses, etc."

In People v. Walker, 26 N.E.2d 952 (N.Y. 1940), the building inspector refused to grant a permit to construct a building with a setback of only 6 feet when the zoning ordinance required a 10-foot setback.

The owner appealed to the Zoning Board of Appeals for a 4-foot variance on grounds of unnecessary hardship and practical difficulty. After hearing the appeal, the Zoning Board upheld the decision of the building inspector and denied the variance. The owner petitioned the Special Term of the Supreme Court to review the decision of the Zoning Board. The parties then stipulated that the issues be heard and determined by an official referee who proceeded to hear the case de novo. The referee ordered that the building permit be granted and the decision of the Zoning Board be reversed.

From that order an appeal was taken to the appellate division which reversed the order of the referee and confirmed the decision of the Zoning Board. The owner then sought a reversal of the order of the appellate division.

The New York Court of Appeals, in affirming the decision of the appellate division, stated that:

> ". . . Neither expressly nor by necessary implication may the Special Term hear, try and determine the issue de novo without regard to the proceedings had, testimony taken, or decision of the Board of Appeals."

The Court, in quoting from People v. Connell, 177 N.E. 313 (N. Y.), a similar case involving denial of a

variance further stated that:[1]

> ". . . Although authorized to take testimony, the power of the Special Term was limited by the statute to reverse or affirm, wholly or partly, or to modify the decision brought up for review. No authority was conferred to try the issue of a right to a variance of the zoning ordinance de novo or to substitute its judgment on the merits for that of the board." (Emphasis added.)

A case more directly in point on whether a right to appeal entitles an appellant to have a trial de novo is School District v. Callahan, 135 A.L.R. 1081 (Wis. 1941). In that case, the State Superintendent of Public Instruction directed the consolidation of certain school districts.[2]

Appellant appealed the Superintendent's order and argued, among other things, that the trial court erred in refusing appellant a trial de novo.[3] The Court rejected appellant's argument by stating that:

> ". . . The term 'appeal,' as used in sec. 40.30 (6), Stats., without specifying the nature of the proceedings thereon, does not imply a trial de novo. In authorizing an appeal to a court from an administrative officer's determination, the term is used

---

1/ The ordinance involved in the Connell case, relative to review of the decision of the Board of Standards and Appeals by the Special Term of the Supreme Court, is the same as in People v. Walker.

2/ Section 40.30(1), Wisconsin Statutes 1939, authorizes the State Superintendent to consolidate districts with valuations of less than $100,000.

3/ Section 40.30(6) provided that:

> "An appeal may be taken from any decision of the said superintendent within thirty days from date of said decision to the circuit court of any county affected." (Emphasis added.)

> in the restricted sense that the court is 'to exercise its appropriate judicial power in respect to acts done by the [administrative tribunal] in excess of [its] power, or in the unlawful abuse of that power.' Moynihan's Appeal, 75 Conn. 358, 53 A. 903, 904; Board of Finance, etc., v. First Nat. Bank, 71 Ind. App. 290, 124 N.E. 768. If the Legislature intended to provide, as appellants claim, for a trial by the court of all matters involved in the propriety of the superintendent's orders, so that the court's power would be as broad as that of the superintendent in ordering the consolidation (instead of intending but such a review of the questions of jurisdiction and abuse of power as could be had on certiorari, which was held proper to review the superintendent's order on an appeal from a town board's order, -- State ex rel. Foster v. Graham, 60 Wis. 395, 19 N.W. 359), then the provision authorizing the appeal would be in violation of the rule that prohibits the exercise of legislative, executive or administrative functions by the courts. As we said in United Shoe Workers, etc., v. Wisconsin Labor Relations Board, 227 Wis. 569, 574, 575, 279 N.W. 37, 40, 'While there has been a departure in many ways from the doctrine of the separation of powers, it has not yet been held that a court can exercise the powers conferred upon an administrative agency and substitute its judgment for the judgment of the administrative agency. This is so clear that it requires neither argument nor citation of authority to support it.'"

In the instant case, Section 98H-6 merely provides that the Land Use Commission's decision "shall be appealable" to the circuit court in which the land is situated. We do not think that the foregoing language evinces legislative intent to grant appellant a trial de novo. Even if it did, such a provision would be subject to attack on grounds that the courts cannot exercise legislative and executive functions. 4/

4/ In 2 Am.Jur.2d, § 702, 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.

The scope of review, in a situation where the action of an agency is an exercise of delegated legislative or quasi-legislative power, is different and in some respects more limited than where the action is quasi-judicial. It is stated in 8A McQuillin, Municipal Corporations, § 25.334 that:

> "Judicial power to review administrative action in zoning cases embraces that minimum judicial power of review of all administrative action, inherent in courts under the doctrine of separation of powers, and it embraces beyond this such power of judicial review as is provided for by statute. But the extent of review and inquiry in particular cases depends, of course, upon issues of fact and applicable law properly brought before the court. As frequently observed by the courts, the decision in each zoning case depends on its own facts. In other words, the scope of judicial review and inquiry is limited to whether the determination of a zoning board is unreasonable, arbitrary or an abuse of discretion on the facts or is in legal error. And the reviewing court is required to consider the evidence most favorable to the decision of the zoning authorities. . . ." (Emphasis added.)

In Application of Graham, 158 N.Y.S.2d 97 (1956), the Zoning Board of Appeals denied petitioner a variance to permit erection of a gasoline station in a residential district. The petitioner appealed the decision to the court and argued, among other things, that he was entitled to a trial de novo. The court remanded the case, for the Zoning Board failed to give reasons for its decision and since it made no findings of fact, but rejected appellant's contention that it had a right to introduce supplementary evidence before the court and stated that:

> "'The power is to be used cautiously, with extreme care where there appears to be a probability that the effect of the additional testimony, if it

> is received, will be to show the ruling complained of to be wrong; and, when the whole case comes to be decided upon the new testimony and the old, the court, even then, is not to put itself in the position of the board, is not to substitute its own discretion for that of the administrative agency established by the statute in a situation where the exercise of discretion is possible. . . .'" (p. 100) (Emphasis added.) See also 8A McQuillin, Municipal Corporations, § 25.337.

In 2 Am.Jur.2d, Administrative Law, § 612, it is stated that:

> "The cases are legion which stress the fact that the function of the court, or judicial review of the action of administrative agencies, is limited in scope and the range of issues open to review is narrow, being limited to judicial questions, even though the statute provides for review on the law and the facts or a trial de novo, or for a suit to test the validity of rules, regulations, or orders. The scope of review is not the same as upon review by an appellate court of a judgment of a lower court. . . ." (p. 452)

In the instant situation, the Land Use Commission, hereinafter referred to as the "Commission," has exercised its delegated quasi-legislative zoning function in denying appellant the special permit. The scope of review therefore must be minimal and limited accordingly.

The court cannot substitute its judgment for that of the Commission; nor put itself in the position of the Commission. The review should be on the record and inquiry limited to whether the order of the Commission was unreasonable, arbitrary, capricious, abuse of discretion or is in legal error.[5/]

5/ Section 6C-14 relative to judicial review of contested cases under the Hawaii Administrative Procedure Act provides that ". . . the review shall be conducted by the Court without a jury and shall be confined to the record, except that in the case where a trial de novo . . . is provided by law. . . ." (Emphasis added.)

Since the law does not grant appellant a trial de novo, the review should be limited to the records submitted to this Court, unless appellant can show alleged irregularities in procedure before the Commission not shown in the record.

The record is replete with evidence that supports the Commission's decision. No substantial evidence have been introduced by the appellant to indicate that the Commission's actions were unreasonable, arbitrary or capricious. The burden is on the appellant to prove that the Commission erred. Having failed to do this, this Court must affirm the decision of the Commission in the light of evidence submitted.

Section 98A-6 provides that certain "unusual and reasonable uses" may be permitted within an Agricultural District. The Commission, by Rule 2.24 established standards in determining "unusual and reasonable" uses. Upon hearing the cause, it found that appellant failed to meet the standards (See Findings of Facts and Conclusions of Law) set forth in Rule 2.24.

The appellant introduced little or no evidence to support the contention that the proposed use is unusual and reasonable. His main argument was that the land should have been zoned Urban rather than Agricultural since the land was sold for residential use and further because of the provisions in the Land Patent Award. This argument, even if it were valid, does not meet the test of "unusual and reasonable" use as required under Rule 2.24.

Moreover, the Hawaii County Planning & Traffic Commission and the Commission have both concluded that subdivision of land for residential use is not "unusual and reasonable" within an Agricultural District.

In the light of the lack of evidence supporting

appellant's contention and in the light of the findings made by the Commission, this Court has no recourse but to affirm the decision of the Commission.

II. QUESTION ON IMPAIRMENT OF CONTRACT

Appellant contends that by the terms in Land Patent Award No. S-14,183, he has the right to subdivide his land into four lots to be used for residential purposes.

Pertinent provisions in the above-mentioned instrument[6] provide that:

> "(a) That should the Patentee, or any assignee of his, desire to subdivide said lot or any portion thereof, each subdivision shall conform with the minimum specifications and standards established by the Hawaii Traffic and Planning Commission, excepting that said lot and each additional lot created as a result of said subdivision shall contain an area of at least 10,000 square feet, or the minimum area required by said Planning Commission, whichever is the greater, ...
>
> * * * * *
>
> "(e) That the land hereby conveyed shall be used for residence purposes only for a period of ten (10) years from the date of issuance of this Land Patent Grant . . . ."

Appellant contends that the State is bound by the above provisions so that any action to the contrary is impairing his rights.

We think that appellant's argument is without merit.

The Land Use Commission is a public agency vested with authority to zone all lands within the State (Section 98H). Pursuant to such delegated power, it placed appellant's land within the Agricultural District, prohibiting him from subdividing his land into smaller lots. By this action, he contends that the State has impaired its obligations.

6/ Similar provisions appear in the Special Sale Agreement and Conditions of Sale Instrument.

On this point, Bassett on Zoning (Ch. 9, pp. 184-187) states that:

> "Contracts have no place in a zoning plan. Zoning, if accomplished at all, must be accomplished under the police power. It is a form of regulation for community welfare. Contracts between property owners or between a municipality and a property owner should not enter into the enforcement of zoning regulations. * * * The municipal authorities enforcing the zoning regulations have nothing whatever to do with private restrictions. Zoning regulations and private restrictions do not affect each other. * * * It is obvious that the zoning and the private restrictions are unrelated. One is based on the police power, the other on a contract. The municipality enforces the former by refusing a building permit or ousting a nonconforming use. A neighbor having privity of title enforces the latter by injunction or an action for damages. * * * Courts in trying a zoning case will ordinarily exclude evidence of private restrictions, and in trying a private restriction case will exclude evidence of the zoning. This is done on the grounds of immateriality." (Emphasis added.)

In In Re Michener's Appeal, 115 A.2d 367 (Pa. 1955) the Board of Adjustment refused to grant a variance to plaintiff Michener to build a store on a lot zoned as "C" Residential. He appealed the ruling to the Court of Common Pleas which dismissed the appeal stating that the hardship did not grow out of the zoning ordinance but was because of restriction in the deed which prohibited the erection of a store.

The Court affirmed the action of the Board of Adjustment in denying the variance but stated that:

> "The reason thus assigned for the court's decision was not a valid one. Zoning laws are enacted under the police power in the interest of public health, safety and welfare; they have no concern whatever with building or use restrictions contained in instruments of title and which are created merely by private contracts."

The Court further stated that:

> "The fact that there were building restrictions in the deeds was wholly irrelevant in the appeal before the court on the question whether a variance should have been granted by the Board under the zoning ordinance. . . . Accordingly it has been uniformly held that any consideration of building restrictions placed upon the property by private contract has no place in the proceedings under the zoning laws for a building permit or a variance. . . ."

In Reichelderfer v. Quinn, et al., 287 U.S. 315 (1932), Congress directed the District Commissioners to erect a fire engine house on land purchased previously for park purposes. Adjacent landowners objected, among other things, that a fire engine house is not permitted within an area zoned for park purposes. The Supreme Court rejected that argument and stated that:

> ". . . zoning regulations are not contracts by the government and may be modified by Congress. . . ." (p. 323)

In Haskell v. Gunson, 137 A.2d 223 (Pa. 1958), involving enforcement of a restrictive covenant,[7/] the Court clearly pointed out the difference between a zoning regulation and a covenant and stated that:

> ". . . It is to be observed, however, in this respect that a gulf of difference separates a zoning regulation from a covenant restriction. What a covenantor specifically demands of the person to whom he sells his property has nothing to do with what the community, through municipal regulation, exacts of every property owner."

Similarly, in the instant case, whatever contractual agreement made by the Department of Land and

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7/ Restriction in the instrument of conveyance prohibited the defendant from using building for a dentist office.

Natural Resources with the appellant, if any, relative to the use of the land in question, should not restrict the zoning power vested in the Commission. To give effect to such restrictions would defeat the objectives sought under the Land Use Law.

Moreover, we fail to see in what manner appellant's rights would be impaired. He is presently using the land for residential purposes as specified in the Land Patent Grant. The Commission is not prohibiting him from using the land for his residence. The Commission is, however, restricting him from subdividing his land into smaller lots to be sold or given to others for residential uses.

We contend that the appellant did not have a vested right to subdivide the land. The provision in the Land Patent Award provides that should he "desire to subdivide said lot" it shall conform to the minimum specifications and standards established by Hawaii County or 10,000 sq. ft., whichever is greater.

We think that this provision should be construed to mean that he may subdivide the land provided he meets zoning requirements in effect at the time he subdivides the land.

Said land was districted Agricultural by the Commission when he proposed to subdivide the land and is presently districted the same. Thus, under the Land Use Regulations, appellant is prohibited from subdividing the land.

Appellant argues that by the provision in the Land Patent Award, he can only use the land for residential purposes so that the action of the Commission in zoning the land Agricultural, is inconsistent.

We do not think so.

The present Chairman of the Department of Land and Natural Resources (see page 6 of the Land Use Commission's minutes dated 12/17/65) has stated that said provision does not prohibit appellant from using the land for agricultural uses and that the provision was inserted to restrict appellant from using the land for higher uses only.

The record indicates that most of the lots in the stated subdivision are being used for residential and agricultural uses. The State has never demanded these landowners to use the land only for residential purposes. This fact indicates that it is the State's intent to restrict the use of the land for higher uses only and will permit agricultural uses.

Appellant further argues that such landowners who have not already constructed residences are prohibited from doing so presently, since the land is zoned Agricultural.

This is erroneous. Rule 2.19 of the Land Use Regulations allows landowners to construct single-family dwellings within an Agricultural District provided that it is a lot of record at the time the Land Use Regulations went into effect.

The record indicates that these landowners have lots of record so they can build single family residences even though their lands are in the Agricultural District.

III. QUESTION ON IMPROPER DISTRICTING AND RELIANCE

Appellant argues that the Commission erred when it zoned the land Agricultural rather than Urban. He cites Section 5 of Act 187, Session Laws of Hawaii 1961, which provides in part that:

> "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."

We cannot agree that residential use was "already in progress" to justify placing appellant's land in the Temporary Urban District.

The Temporary Urban District Boundaries were adopted on April 21, 1962. He purchased the land from the Pereiras after said date and started to clear the land to construct his residence soon thereafter. Thus, he cannot validly contend that urban use was "already in progress" requiring the Commission to place his land in the Urban District.

What appellant may be contending is that since the lots in the subdivision have already been sold for residential uses, they should be zoned Urban even though no buildings are constructed.

We cannot agree with him for we interpret the term "already in progress" to mean substantial improvement before requiring the Commission to zone it Urban.

There are many subdivisions in the County of Hawaii which have been sold but are not improved. Many

are situated in areas where the Commission feels is not proper for urban growth. The Panaewa subdivision is one of them.

To recognize subdivisions which were approved prior to the enactment of the Land Use Law, by placing them in the Urban District, would mean tacit approval on the part of the Commission that these subdivisions are properly planned. The Commission, rather than compounding the error, rightfully recognized these subdivisions by placing them in the Agricultural District as nonconforming subdivisions.

Thus, in the instant case, the appellant can construct a residence on his lot even though it is in the Agricultural District. He is, however, prohibited from subdividing his lot to further intensify Urban uses.

We feel that appellant's entire argument relative to improper districting is improper and irrelevant in this proceeding. Appellant seeks special permit approval here and not a boundary change. He should have sought the latter avenue if he is seeking a boundary change.

The Commission, even if it is sympathetic and agrees with the appellant that his land was improperly zoned, is without authority to grant the permit. The Commission cannot grant special permits as a means to correct errors of judgment in zoning laws[8/] or to give them

8/ Zahodiakin Engineering Corp. v. Zoning Ordinance Bd. of Adjustment of City of Summit, 82 A.2d 493 (N.J. 1951).

effect as amending zoning boundaries[9] or to change the zoning scheme in essentials.[10]

On this specific point, we refer the Court to cases cited in Attorney General Opinion No. 63-37, which we incorporate herein and make a part of this memorandum, which discusses the limitation of the special permit procedure.

Appellant further contends that he has been damaged for he relied upon the provisions of the Land Patent Award, which purportedly gave him a vested right to subdivide the land.

His argument is without merit.

Appellant purchased the land in question from the Pereiras on May 14, 1962. (See Transfer Document.) At that time, the land was already zoned Agricultural under the Temporary District Boundaries.[11]

We contend that appellant knew or should have known that the land was in the Agricultural District.

Prior to the adoption of the Temporary District Boundaries for Hawaii County, public hearings were held on March 8, 1962 at 7:30 p.m. at the County Board Room in Hilo, and on March 9, 1962 at 10:30 a.m. at Kamuela

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9/ Essick v. City of Los Angeles, 213 P.2d 492 (Cal. 1950).

10/ Bray v. Beyer, 166 S.W.2d 290 (Ky. 1942).

11/ Adopted by the Commission on April 21, 1962.

and at 7:30 p.m. at Konawaena School. At the hearings, the proposed Temporary District Boundaries, which included appellant's land in the Agricultural District, were displayed and discussed. As required under the Land Use Law, these hearings were duly advertised in the local newspaper and in the Honolulu newspapers.

Appellant, having been apprised by public media and having been given ample opportunity to present his objections at the hearings, cannot validly claim now that he is entitled to subdivide the land.

If this Court supports appellant's contentions, it would be tantamount to restricting the zoning powers vested in the Commission merely because of restrictions contained in instruments of conveyance executed by a public agency which had no zoning powers; and further, because appellant was not aware of the Land Use District Boundaries. We hardly think that this Court would agree to such a conclusion.

DATED: Honolulu, Hawaii, November 10, 1966.

Respectfully submitted,

Roy Y. Takeyama

ROY Y. TAKEYAMA
Deputy Attorney General

STATE OF HAWAII

DEPARTMENT OF THE ATTORNEY GENERAL

Honolulu, Hawaii

August 27, 1963

RYT:hmm
OP. 63-37

Mr. Frederick K. F. Lee
Planning Director
City and County of Honolulu
Honolulu Hale Annex
Honolulu 13, Hawaii

Dear Mr. Lee:

Your letter dated July 17, 1963, requests clarification and guidance relative to an application for a special permit filed with the Zoning Board of Appeals in accordance with Chapter 98H, Revised Laws of Hawaii 1955, as amended by Act 205, Session Laws of Hawaii 1963. Your question is whether a request entailing a change in use of approximately 240 acres of land,[1] situated in an agricultural district, which is proposed to be used for commercial, industrial and residential uses, is a proper subject for a special permit application.

We answer the question in the negative. We are of the opinion that authorization of the proposed use should properly be sought by amendment to the temporary boundaries rather than by petition for a special permit.

1/ The petition, as submitted, involves approximately 340 acres of land. It is our understanding, however, that approximately 100 acres are to be used for a private golf course. If such be the case, only 240 acres are involved herein, for a private golf course is a permissible use within an agricultural district.

Chapter 98H, as amended, provides two methods whereby property might be put to a use for a purpose not presently allowed as a permissible use. Under section 98H-4 the affected landowner may petition the Land Use Commission "for a change in the boundary of any district, interim or permanent." Under section 98H-6 he may petition the county planning commission or the zoning board of appeals, as the case may be, for a special permit to put the land to uses other than those for which it is classified (except in conservation districts).

In the instant case, the affected landowner filed a special permit petition with the Zoning Board of Appeals for change in use of approximately 240 acres of land situate in an agricultural district, to be used for commercial, industrial and residential uses. The question we face is whether it is a proper subject for a special permit petition when such a large area is involved and for such contemplated uses.

The instant case is similar to Hante v. Zoning Board of Review of City of Cranston, 91 A.2d 33 (R.I. 1952). In that case, the Rhode Island Supreme Court reversed the Zoning Board of Review that had granted an application for an exception to the zoning ordinance to permit use of approximately 100,000 square feet of land located in a residential district for a supermarket and parking lot. The court held that the zoning board had abused its discretion and authority in granting the exception.

In reversing the zoning board, the court relied mainly upon the following reasons: (1) that the exception applied for was not in harmony with the general purposes and intent of the enabling statute; and (2) that, considering the large area involved, the granting of said exception would amount to amending the district boundary under the guise of an exception.

Let us consider the first reason. The enabling statute clearly distinguished between the grant of authority to amend the zoning ordinance and the grant of power to the zoning board to allow certain exceptions. The city council, within limits set forth in the enabling act, passed an ordinance giving the zoning board the power to grant exceptions. It provided:

> " . . . When in its judgment the public convenience and welfare will be substantially served and the appropriate use of neighboring property will not be substantially or permanently injured, the board of review may in a specific case, after public notice and hearing and subject to appropriate conditions and safeguards, authorize special exceptions to the regulations herein established as follows:
>
> [enumerating various exceptions]
>
> "(8) In any district any use or building deemed by the said board to be in harmony with the character of the neighborhood and appropriate to the uses or buildings authorized in such district . . . "

The ordinance, read literally and separately from the enabling statute, appears to give the zoning board unlimited discretionary power in granting exceptions. However, the court held that such was not the intent of the legislature.

> "Obviously these subparagraphs, if read literally and separately from other provisions of the ordinance and statute, purport to give an almost unlimited discretion to the board in a great variety of cases. But in our judgment they must be read in connection with the enabling statute, G.L. 1938, chap. 342. <u>That statute clearly distinguishes between power granted to the council as provided in §2 thereof to amend an ordinance by substantially changing a zoning line and the power given to a zoning board to grant an exception in a proper case under the ordinance within the limitations as specified in §8 of that statute</u>." (91 A.2d at 37) (Emphasis added)

The court further stated that:

> "<u>The enabling statute provides in §2 for a proper procedure to amend an ordinance and to make substantial changes in the lines of a zone</u>.

> This power is delegated to and is reserved for the city council. The board is not authorized by any language of the statute requiring the creation of a zoning board of review to substitute its discretion in all cases to achieve what is reserved for appropriate action by the council." (Emphasis added)

As stated earlier, Chapter 98H distinguishes between changing of district boundaries and granting of special permits. The power to change district boundaries is similar to the powers vested in the city council or similar body to make zoning changes. It is vested in the Land Use Commission, and such redistricting may be effected only upon the affirmative vote of at least two-thirds of the Commission. The power to grant special permits, on the other hand, is closely akin to the power granted to a zoning board or similar body to grant variances, exceptions and special uses. It is vested in the zoning board and the Land Use Commission, and a majority vote of both agencies is required.

Moreover, the criteria for amendment of district boundaries differ from those for granting of special permits. (Compare section 98H-4 with section 98H-6.)

It is clear that the Legislature did not intend the two remedies to be identical or that either would interchangeably be applicable to the same set of circumstances. The court in the Yamba case had this to say on this point:

> " . . . If the zoning board may have the power to grant such an exception as is involved here, there would seem to be no need to seek the council's approval of an amendment of zoning lines or to have recourse at any time to an application for a variance. Apparently the board assumed that it had such a broad power. But we are of the opinion that in this regard it misconceived the true purpose and intent of the statute in relation to the power to grant an exception." (pp. 37-38) (Emphasis added)

The second reason relied on by the court in the Harte case goes to the substance of the problem we are confronted with in the instant case, i.e. whether this is actually a redistricting petition in the guise of a special permit application. In the Harte case, the landowner owned lots 68 and 129 consisting of 116,053 square feet of land in a residential district. He sought a change in use of approximately 100,000 square feet to build a supermarket and a parking lot. The facts indicated that the surrounding neighborhood, with the exception of one nonconforming use, consisted of one-family dwelling houses and lots platted for that purpose. The court refused to affirm the order of the zoning board which had approved the exception, stating on page 38:

> " . . . The decision is so extensive that it would transform the larger part of lot 129 and all of the still larger lot 68 together having an area of more than 100,000 square feet or the equivalent of 20 average house lots, from a restricted residence district into a business zone for a supermarket and a parking lot for 200 cars. Indeed this is not so much extending a business use as it is introducing a new business into a strictly residential zone . . . Such a result . . . certainly is so extensive in effect as to amount to amending the ordinance under the guise of granting an exception for a substantial change in the zoning line." (Emphasis added)

The court continued:

> "In our judgment such language did not contemplate that applications for an exception would become a routine alternative method to provide extensive changes in zones that were fixed by the council . . . " (Emphasis added)

In Bray v. Beyer, 166 S.W.2d 290 (Ky. 1942), the Board of Adjustment of the City Planning and Zoning Commission of Paducah, Kentucky, excepted certain lands zoned as residential from the restrictions of the zoning ordinances. The landowner Beyer intended to use such lands for business

purposes (service station). The Kentucky appellate court reversed the decision of the circuit court which had affirmed the granting of the variance, stating:

> " . . . if the Board of Adjustment may grant special exceptions or authorize variances, such as the one in the present case, it may eventually destroy the restrictions imposed by the zoning ordinance and, in effect, amend or repeal the ordinance.
>
> . . .
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> " . . . the power of authorizing special exceptions to and variations from the general provisions of the zoning law is designed to be exercised only under exceptional circumstances and not for the purpose of amending the law or changing its scheme in essential particulars such as making changes in boundary lines of districts or authorizing the erection of a building forbidden by the zoning law to be erected." (166 S.W.2d at 292-293)

In Van Meter v. W. P. Wilcox Oil & Gas Co., 41 P. 2d 904 (Okla. 1935), application for permission to locate, drill and operate a second oil and gas well on an unplatted tract of land comprising 5.5 acres located within U-7 oil and gas drilling zone was filed by Wilcox Oil & Gas Co. The zoning ordinance provided that only one well to 5 acres of unplatted land was permissible. The building superintendent, Van Meter, refused to grant a permit; thereupon the landowner filed a petition for an exception with the Board of Adjustment, which also refused to grant a permit. The petitioner then appealed to the district court which reversed the order of the Board of Adjustment and mandated the Board to grant the permit. From that judgment, Van Meter, the building superintendent, appealed. The Supreme Court of Oklahoma reversed the lower court and remanded the case with directions to deny the permit, stating:

> " . . . The board of adjustment cannot have unconfined and unrestrained freedom of action. It is not at liberty to depart from the comprehensive plan embodied in the ordinance and it

> cannot, under the guise of exceptions and variances, modify, amend, repeal, or nullify the ordinance by establishing new zone lines and creating different rules for the drilling of oil and gas wells and thereby essentially change and substantially derogate from the fundamental character, intent, and true purpose of the zoning law . . . "
> (41 P.2d at 909) (Emphasis added)

In Allan v. Zoning Board of Review of City of Warwick, 89 A.2d 364 (R.I. 1952), the landowner sought an exception or variance from the provisions of the zoning ordinance in order to permit him to erect an addition to his real estate office situated in a residential zone. The zoning board granted the variance on grounds that the area in which the land is situate had become unsuitable for residential purposes and that denial of application would result in undue hardship to him. The court reversed the order of the zoning board, stating:

> " . . . It appears therefrom that the board based such decision largely upon its own expressed opinion that the entire area upon which the lots in question are situated, although zoned for residential purposes, is no longer suitable for such purposes and, inferentially, that in reality it should be zoned for business. The board seeks to bring about that result in the instant case by granting a variance from the present zoning law. It thus votes by indirection to do for the westerly side of Post Road what amounted to an attempt to amend the ordinance, which is clearly beyond the powers expressly delegated to it. Such a change can be brought about only by the body authorized to enact and amend the ordinance, . . . "
> (89 A.2d at 365) (Emphasis added)

Similarly, in the instant case, the granting of a special permit involving such a large area to authorize a use not otherwise allowed in the district would be tantamount to amending the district boundary under the guise of a special permit. The request for change in use covers approximately 240 acres of land. Said area is districted

as an agricultural zone and almost all of the land is being used for agricultural purposes. It is contiguous with Waipio Acres, a small urban community, but not contiguous with Wahiawa, a major urban community.2/

Further facts indicate that petitioner also filed a request to amend the temporary boundary with the Land Use Commission. Said boundary change encompasses approximately 2,000 acres of land. The same 240 acres involved in the special permit petition are also included in the request for boundary change. The map submitted with the special permit petition indicates that the petitioner intends to develop the entire 2,000 acres into a satellite city at Waipio.3/ This strengthens the observation that the true intent here is a change of district boundary.

Variances and special permits are intended to permit amelioration of the strict letter of the law in individual cases.4/ The fundamental purpose of variances is to afford a safety valve against individual hardships and

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2/ It is approximately 2 miles from the southern rim of Wahiawa to the northern rim of the proposed satellite city of Waipio.

3/ See page 3, Special Permit Petition of Oceanic Properties, Inc., and Dole Corporation, wherein it is stated:

> " . . . the desired uses are in accord with the planned development by Oceanic Properties, Inc. of the said satellite city at Waipio, which will ultimately occupy the area designated on Exhibit A." (Emphasis added)
>
> Exhibit A is a map submitted by the same petitioners to the Land Use Commission requesting a boundary change for approximately 2,000 acres of land.

4/ Leichton v. Minneapolis, Minn., 16 F. Supp. 101.

to provide relief against unnecessary and unjust invasions of the right of private property, and to provide a flexibility of procedure necessary to the protection of constitutional rights.5/

The zoning board or a similar body vested with the power to grant variances should not use variances as a means to correct errors of judgment in zoning laws;6/ or to give them effect as amending zoning ordinances;7/ or to change the zoning scheme in essentials.8/ Furthermore, variances should not be granted if they do not comply with the spirit9/ or the general purpose and intent of the enabling statute.10/ As well-stated by the North Carolina Supreme Court in Lee v. Board of Adjustment:11/

5/ McQuillin, Municipal Corporations, Sec.25.160 relating to zoning, page 370.

6/ V. F. Zahodiakin Engineering Corp. v. Zoning Ordinance Board of Adjustment of City of Summit, 82 A.2d 493 (N.J. 1951).

7/ Essick v. City of Los Angeles, 213 P.2d 492 (Cal. 1950).

8/ Bray v. Beyer, 166 S.W.2d 290 (Ky. 1942).

9/ Application of Shadid, 238 P.2d 794 (Okla.1951).

10/ Sitgreaves v. Board of Adjustment of Town of Nutley, 54 A.2d 451 (N.J. 1947); Bassett, Zoning, p. 128.

11/ 37 S.E.2d 128 (N.C. 1946).

> " . . . the determination, variation or application must be 'in harmony with their general purpose and intent and in accordance with general or specific rules therein contained' . . . 'so that the spirit of the ordinance shall be observed, public safety and welfare secured and substantial justice done.'
>
> . . .
>
> " The board cannot disregard the provisions of the statute or its regulations. It can merely 'vary' them to prevent injustice when the strict letter of the provisions would work 'unnecessary hardships.'" (Citing authorities)

The court further stated that:

> "[illegible] must harmonize with the spirit and purpose of the ordinance, Bassett, Zoning, 161, no variance is lawful which does practically what a change of map would accomplish. The holding that the privilege to erect a nonconforming building or a building for a nonconforming use may not be pursued under the guise of a variance stands. Bassett, Zoning, 201. Action to that effect is in direct conflict with the general purpose and intent of the ordinance and does violence to its spirit." (37 S.E.2d at 132-133) (Emphasis added)

Special permit petitions are intended to allow certain "unusual and reasonable" uses within agricultural and rural districts. Its purpose is to provide a landowner relief in exceptional situations, that would not change the essential character of the district nor be inconsistent therewith, and is basically analogous to a variance. Its function is not to effectuate a boundary change or create a new district. Such powers are legally vested in the Land Use Commission, to be exercised under different procedures and different criteria.

On the basis of the foregoing, we are of the opinion that the subject request may be a proper subject for change in the temporary boundaries, but not for a special permit.12/

Very truly yours,

/s/ Roy Y. Takeyama

ROY Y. TAKEYAMA
Deputy Attorney General

APPROVED:

/s/ Bert T. Kobayashi

BERT T. KOBAYASHI
Attorney General

cc: Director, Land Use Commission

12/ However, petitioner cannot be prohibited from filing said permit application with the Zoning Board of Appeals, nor can he be denied the right to a public hearing to be heard on behalf of his petition.

STATE OF HAWAII
LAND USE COMMISSION

Minutes of Meeting

Molokai Community Center
Kaunakakai, Moloaki

September 13, 1968 - 2:30 p.m.

Commissioners Present: C. E. S. Burns, Jr., Chairman
Wilbert Choi
Shelley Mark
Alexander Napier
Goro Inaba
Leslie Wung
Shiro Nishimura
Keigo Murakami

Commissioners Absent: Sunao Kido

Staff Present: Ramon Duran, Executive Officer
Ah Sung Leong, Planner
George Pai, Legal Counsel
Dora Horikawa, Stenographer

Chairman Burns swore in persons planning to testify before the Commission.

HEARING

PETITION BY MOLOKAI RANCH, LTD. (A68-192) TO RECLASSIFY 6,800 ACRES FROM AGRICULTURAL TO URBAN AT THE WEST END OF MOLOKAI

Prior to the presentation of the staff report, Mr. Duran pointed out on the map the property under discussion and the other land uses on the Island of Molokai.

It was recommended by staff that an area sufficient to accommodate a 10-year growth, 1,460 acres, be rezoned to the Urban District. However, it was further recommended that the consultants be requested to review and comment on this application before final action is taken by the Commission. (See copy of report on file.)

Chairman Burns noted that the Maui Planning Commission had recommended approval of the petition and wondered what the County's responsibilities were in terms of supplying water, etc., to the project.

See pg. 8

people, close to urban amenities, free from floods, and abuts an Urban District. (See copy of report on file.)

It was brought out that petitioners' plan involved approximately 35 lots for residential homes with a density of 2 acres per dwelling unit. Furthermore, since a golf course was also being created in the area surrounding the subdivision, which is a permitted use in the Agricultural District, the area in question automatically will be taken out of agricultural use. In this respect, Mr. Duran raised the question of the reasonableness of permitting golf courses in an Agricultural District by the Land Use Commission regulations.

Commissioner Murakami moved to approve the petition as recommended by staff, which was seconded by Commissioner Choi. The Commissioners were polled as follows:

Ayes: Commissioners Choi, Napier, Mark, Inaba, Nishimura, and Murakami

Nays: Commissioner Wung

Abstain: Chairman Burns

The motion was carried.

APPLICATION BY HISAO AND MATSUI FUJII (SP68-57) FOR A SPECIAL PERMIT TO OPERATE A RESTAURANT AND BAR AT OLOWALU, LAHAINA, MAUI

Mr. Leong presented staff report recommending approval of the special permit as conditioned by the Maui County Planning Commission and also that the alterations be completed within one year. (See copy of report on file.)

Commissioner Wung moved to approve the special permit request, as recommended by staff, seconded by Commissioner Choi and the motion was carried by 7 ayes. Commissioner Napier voted Kanalua.

DECISION IN THE THIRD CIRCUIT COURT - ALLISON, ET AL VS. LAND USE COMMISSION

Mr. Duran adivsed that Mr. George Pai, legal counsel, received a court decision by the Third Circuit Court, Ralph Allison, et al versus the Land Use Commission, dated September 3, 1968, reversing the decision of the Commission.

Mr. George Moriguchi, Executive Officer of the Land Use Commission at the time of the decision, briefly reviewed the background of the case.

A special permit request by James Tamura (SP65-19) in May of 1964 to subdivide his one-acre lot in an Agricultural District at Panaewa Houselots into 4 parcels had been denied by the Land Use Commission. Petitioner took the case to court, and the judge directed that the Hawaii Planning Commission request a favorable ruling from the Land Use Commission. The subsequent denial by the Land Use Commission was upheld by the Third Circuit Court.

A new petition by Ralph E. Allison, et al was filed with the Land Use Commission, requesting a rural or urban districting for the Panaewa Houselots. The Commission ruled that this was not proper and denied the request. Thereafter, the petitioners took the case to court which resulted in the present decision by Judge Ogata, reversing the decision of the Land Use Commission.

Mr. Pai expressed his opinion that the conditions of the sale under which these people purchased the land from the then Territory of Hawaii weighed heavily in the Judge's decision. Mr. Moriguchi stated that Judge Monden ruled this was not valid and sustained the Land Use Commission's action.

In the present decision, Judge Ogata was placing the case solely on the physical characteristic of the land without any consideration for the need for this type of development. Mr. Moriguchi quoted a passage in the decision which read "while this court must not sit as a zoning commission and it should not substitute and replace its judgment for that of the Commission, such salient physical features and land qualities would overwhelmingly indicate that the area is deserving of at least a rural district boundary". It was Mr. Moriguchi's impression that although Judge Ogata mentioned that the Territory of Hawaii sold the land for houselots, he did not use it as a basis for his decision.

Mr. Pai reiterated his impression that the conditions of sale by the territorial government in 1958 restricting the use to residential purposes weighed heavily in Judge Ogata's decision. He added that although a prior action by a State agency does not bind the Land Use Commission in its zoning powers, this was a technical point and the courts did not rule on technicalities but on the justice and merits of the case.

Chairman Burns raised the question of the alternative left to the Commission. Mr. Pai advised that there were 30 days in

which an appeal could be filed with the Supreme Court and the decision was up to the Commission. He added that he disagreed with the Judge's decision insofar as the ruling was based on the rationale that the land was usable for rural and not agricultural purposes.

Chairman Burns observed that if the Supreme Court rules in favor of the appellants, this could result in other similar court decisions.

Mr. Pai felt that the result of this court decision would not create a binding precedent.

Mr. Duran wondered whether the court could ignore the fact that the Commission had based its decision on need according to the mandates of the Land Use Law and for the court to determine that the Land Use Commission had acted in a capricious and arbitrary manner, could set a precedent, and reverse the Commission's decision in other similar situations.

Mr. Duran advised that legal counsel could, within 30 days, indicate to the court of the Commission's intent to appeal and work up a brief in the meantime. Mr. Moriguchi suggested that Mr. Duran, Mr. Pai and he could review the matter in detail and report back to the Commission.

Chairman Burns agreed that the matter will be held in abeyance until a recommendation could be prepared on a course of action.

Since there was no further business, the meeting was adjourned.

May 22, 1967

MEMORANDUM

TO: The Honorable John A. Burns
Governor of Hawaii

FROM: George S. Moriguchi for Shelley M. Mark

SUBJECT: House Bill 842, authorizing a suit against the State of Hawaii by James Tamura

The primary contention of the bill is:

1. That James Tamura may have been misled by the State into believing that the subject land could be subdivided into houselots.

2. That misrepresentations concerning the use to which the land could be put may have been made by the State officers and the grant to James Tamura may have been inconsistent with the zoning for the property.

It should be noted that both the Planning & Traffic Commission of the County of Hawaii and the State Land Use Commission denied James Tamura's request for a special permit to subdivide his property. Although the denial by the County Planning & Traffic Commission was overruled by the Third Circuit Court, the subsequent denial by the State Land Use Commission was upheld by the Third Circuit Court.

It appears that the decision rendered by the Third Circuit Court in upholding the action of the Land Use Commission has adequately refuted the contentions indicated in the bill. A few excerpts from the decision rendered by the Court are as follows:

1. "Before the appellant constructed his home, he knew or should have known that the Land Use Commission had placed the property in the Agricultural district."

2. "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."

3. "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 lot sold contained on the average of over two acres in size indicates incidental use was not foreclosed."

4. "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 regulations 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."

Committee reports on House Bill 842 from the Senate and the House cite the chronological events of Mr. Tamura's request to subdivide his lands. However, these reports do not give any indication relative to the basis for endorsing the bill. The reports merely indicate that the committees feel that Mr. James Tamura should be given the right to sue the State of Hawaii in order to adjudicate this matter. In light of the data indicated above, we do not recommend favorably on this bill.

RECEIPT FOR BILL

Delivery of the bill hereon identified, to the Governor of Hawaii by the Clerk of the House of the Legislature in which the same originated is hereby acknowledged on the day and hour noted hereon.

SENATE BILL NO.

HOUSE BILL NO. 842

FOR THE GOVERNOR OF HAWAII:

by Helen Basener

Date and Time of Receipt

1967 MAY 13 AM 11 24

Subject: Authorizing suit against the State of Hawaii by James Tamura for claimed damages caused by the granting to him of land to be used for residential purposes which land was zoned for agricultural purposes by the Land Use Commission

Referred to:
Attorney General
Budget & Finance
Land & Natural Resources
Land Use Commission

Due Date for Departmental Report: May 22

Due Date for Governor's Action: June 13

Action Taken:

Date:

H. B. NO. 842

A B I L L F O R A N A C T

AUTHORIZING SUIT AGAINST THE STATE OF HAWAII BY JAMES TAMURA FOR CLAIMED DAMAGES CAUSED BY THE GRANTING TO HIM OF LAND TO BE USED FOR RESIDENTIAL PURPOSES WHICH LAND WAS ZONED FOR AGRICULTURAL PURPOSES BY THE LAND USE COMMISSION.

WHEREAS, James Jitsuo Tamura purchased Lot 63, Panaewa House Lots, consisting of 1.96 acres at Waiakea, South Hilo, Hawaii, designated as tax key number 2-2-52-8, by transfer from P. W. Pereira in March, 1962; and

WHEREAS, James Jitsuo Tamura was issued Grant No. S-14,183 for such land by the Department of Land and Natural Resources on April 24, 1964; and

WHEREAS, James Jitsuo Tamura in taking such land may have been misled by the State, its officers, employees, or agents into believing that the subject land could be subdivided into houselots; and

WHEREAS, Grant No. S-14,183 requires the subject land to be used for residential purposes for a period of ten years from the date of issuance of the grant; and

WHEREAS, the land in question was temporarily zoned for agricultural purposes on April 21, 1962 and permanently so zoned on August 23, 1964 and is presently so zoned by the Land Use Commission; and

WHEREAS, misrepresentations concerning the use to which the land could be put may have been made by state officers, employees, or agents and the grant to James Jitsuo Tamura may have been inconsistent with the zoning for the property whereby he may have suffered damages; now, therefore,

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. James Jitsuo Tamura is hereby authorized to sue the State of Hawaii in an appropriate state court to recover damages which are allegedly due to misrepresentations or a contract inconsistent with zoning made or given by the State or its officers, employees or agents or due to the requirements of Grant No. S-14,183 that the land comprised of 1.96 acres and designated as tax key number 2-2-52-8 be used for residential purposes notwithstanding the fact that the subject land is zoned for agricultural purposes by the land use commission. For the purpose of this Act and the adjudication of any such claim, the immunity of the State to suit is hereby waived, and said James Jitsuo Tamura may proceed against the State as in the case of any other defendant, subject to the same procedures and defenses, except for the defense of immunity from suit or of the statute of limitations, the provisions of which are hereby expressly waived; provided that nothing contained herein shall be construed as an admission of liability on the part of the State.

SECTION 2. The claimant James Jitsuo Tamura shall commence the action authorized by this Act in an appropriate state court within two years from the effective date of this Act.

SECTION 3. This Act shall take effect upon its approval.

APPROVED this day of , 1967

GOVERNOR OF THE STATE OF HAWAII

STATE OF HAWAII
LAND USE COMMISSION

Minutes of Meeting

County Board of Supervisors Chambers
Wailuku, Maui

April 14, 1966 - 2:25 P.M.

Commissioners Present: Myron B. Thompson, Chairman
C. E. S. Burns
Robert Wenkam
Shelley Mark
Jim P. Ferry
Leslie Wung
Goro Inaba
Charles Ota
Shiro Nishimura

Staff Present: George S. Moriguchi, Executive Officer
Roy Takeyama, Legal Counsel
Ah Sung Leong, Draftsman
Dora Horikawa, Stenographer

A short prayer by Chairman Thompson was followed by the usual introduction of Commissioners and staff members, swearing in of persons testifying during the hearing, and a brief explanation of the procedures to be followed.

PETITION OF ALEXANDER AND BALDWIN, INC. (A65-106), TO AMEND THE URBAN DISTRICT BOUNDARY AT KAHULUI, MAUI, identifiable by Tax Map Key 3-8-07: 02

Staff recommendation was for favorable consideration of the petition since adequate proof had been submitted of the need for urbanization of an additional 12 acres, and the lands were suitable for development for urban purposes.

Commissioner Wenkam asked whether petitioner had entertained the idea of revising the urban line more approximate with the master plan for Maui, and Mr. Moriguchi replied that this had been done, that the petitioner had closely followed the master plan.

Mr. Richard Cox of Alexander and Baldwin stated that the staff had adequately covered the pertinent points. He submitted an additional map showing how the proposed area would tie in with the other developments, pointing out the various existing uses.

Mr. Cox solicited comments from the Commissioners with respect to Alexander and Baldwin's desire to proceed with construction of the 32.5 acres of the 10th increment presently in an Urban District.

Commissioner Ferry advised that this matter would fall under the jurisdiction of the County, inasmuch as it involved urban lands, and that it would not be prudent for the Commissioners to make any comments.

Since there was no further testimony, the hearing was closed.

PETITION OF HONOKAI DEVELOPERS (A65-101), TO AMEND THE URBAN DISTRICT BOUNDARY AT HONOULIULI, OAHU, identifiable by Tax Map Key 9-1-15: 8

Staff memorandum presented by Mr. Moriguchi (see copy on file) maintained the original recommendation made at the time of the public hearing for denial of the petition, since the petitioner had not served to prove that additional urban lands were required, and on confirmation of the fact that sufficient urban lands were available.

Commenting on the hardship factor, Commissioner Burns wondered when the project was started and how much money had been expended. The only expense incurred to date was for the sewage treatment plant, Mr. Moriguchi advised, which was installed around 1962 to serve the existing subdivision in addition to the subject area in anticipation of receiving approval.

Chairman Thompson pointed to the statement in the staff memo referring to the availability of sufficient urban lands in this area. Mr. Moriguchi replied that this was a direct quote taken from the City Planning Commission's recommendation which reads as follows: "Although there are sufficient lands for urban purposes in the Ewa District (i.e. Makakilo City) this is the only fee simple residential subdivision in the immediate area."

Mr. Vincent Yano of Honokai Developers presented additional testimony in support of the petition. At the time the developers submitted the 50-acre plan to the City Planning Commission, the whole area was zoned Rural Protective. Subsequently, the Land Use Commission reclassified it in the Agricultural District. The sewage treatment plant was a City Planning Commission requirement even before the developers could proceed with Unit 1-A. Mr. Yano stressed that he certainly did not mean to imply that they "gambled" $170,000 for a sewage plant to take care of the entire 50-acre subdivision. They were mandated by the City to submit detailed subdivision plans for the entire area before tentative approval could be granted. Although the City did grant tentative approval for the entire subdivision, the developers were advised to seek actual approval on an increment basis at the time their plans materialized. This was the reason they did not have approval for the subject parcel under petition.

Commissioner Ferry felt that the amount of $170,000 for the sewage plant was in line with expenditures required to serve the needs of 250 lots.

Chairman Thompson raised the question of flooding in the 1-A increment resulting from an over-flow of the stream following a big rain. Mr. Yano replied that this was handled by adequate drainage.

Referring to the slow rate of sales in the 1-A increment, Commissioner Ferry submitted that during the latter part of 1959 to the middle of 1961, there was a depressed real estate market, and that some weight should be given this factor

since petitioner was granted approval in 1960. Secondly, the growth of the leeward area has only begun, primarily due to the investment that the government has begun making. One of the stifling growth factors was the lack of proper access, and this was being resolved by construction of better highways. With the projection of 1,185,000 people for 1980 for Oahu alone, it was easy to conceive that a good portion of the increase in population would locate in the leeward area.

Commissioner Ferry continued that staff was not presenting a true picture by drawing comparisons such as that described in page 2, item 4, of the memorandum. Other factors that should be considered in making such comparisons would be the availability of financing, the promotional budget, the number of developed lots, etc.

Commissioner Ferry confirmed that the H-I highway would be completed within the next 10 years.

Commissioner Nishimura observed that the amount of urban lands submitted as being available in the general area was deceiving, in that much of this land was owned by the federal government. Mr. Moriguchi commented that the federal government did develop its own residential subdivisions. He also pointed out that Makakilo is available with a potential for 25,000 persons.

Pursuing the matter a little further, Commissioner Ferry commented that facilities for an additional 25,000 persons in the Makakilo area were hardly sufficient to meet the needs of the 450,000 additional residents anticipated for the Island of Oahu by 1980.

Commissioner Wenkam pointed to the fact that this Commission had previously turned down reclassification of Fort Barrette which had the same potential as the subject area under consideration. To argue for approval of this petition on the basis of population expansion, he felt, was invalid since this would only accommodate such a small percentage of the needs. He felt that the proposed urban reclassification in the Makaha area, on which the Commission will be acting on today, would more than adequately meet the requirements of the population growth within the leeward area.

Commissioner Wenkam continued that he was arguing against this petition because it was typical of the scattering of developments which, to some extent, was responsible for bringing about the establishment of the Land Use Commission. To condone the continuation of this subdivision merely because it had already been started, was akin to agreeing that two wrongs make a right. This was an undesirable projection of an urban area into the center of an Agricultural District and open spaces, and did not contribute to a well-planned and well-organized community.

Mr. Moriguchi submitted that the Commission had denied any number of requests involving indigent citizens wishing to subdivide agricultural lands, even though hardship had been advanced as the major factor. Therefore, in order to be consistent, this fact should be given due consideration.

In addition, a study made by Harlan Bartholomew had recommended keeping the subject area in agriculture and this Commission had seen fit to accept this recommendation and had modified the urban line to its present location.

Commissioner Ota commented that petitioner's lands were not in productive use and some improvements had already been installed. Also, this was one of the few fee simple lands available in the rural area on Oahu.

Commissioner Ferry wondered whether any of the petitions turned down in the past on the neighbor islands abutted an urban area, and Mr. Moriguchi replied that they did not.

Commissioner Ferry then asked if a similar situation had occurred on the neighbor island with all things being equal, would there be much reason to deny extension of an Urban District. Chairman Thompson requested that the discussion be confined to the subject petition without making references to precedents set. Also, circumstances differed on the neighbor islands and on Oahu.

Commissioner Wenkam referred to the hardship factor presented by the petitioner and commented that Fort Barette had also suffered similar difficulties.

Commissioner Ferry replied, as a matter of clarification, that there was a major difference between Fort Barette and the Honokai development. At the time of purchase, Fort Barette had already been zoned agricultural, whereas petitioners had received approval for the subdivision in 1960 and committed their investments.

Commissioner Ferry moved that the application be approved since sufficient justification had been presented by the petitioner for a boundary change from an Agricultural District to an Urban District, seconded by Commissioner Nishimura. The Commissioners were polled as follows:

Ayes: Commissioners Inaba, Ota, Burns, Nishimura, Ferry.

Nays: Commissioners Wung, Wenkam, Mark, Chairman Thompson.

The motion was not carried.

PETITION OF CAPITAL INVESTMENT CO., LTD. (A65-100), TO AMEND THE URBAN DISTRICT BOUNDARY AT MAKAHA, OAHU, identifiable by Tax Map Key 8-4-02

Mr. Moriguchi presented the staff memorandum recommending a modified urban-conservation line, involving 1,370 acres (see copy on file). The modifications and the recommended urban boundaries were pointed out in detail on the map.

Commissioner Burns questioned whether staff's recommendation for approval included the 20% slopes.

Mr. Moriguchi conceded that it did--that denial of the 20% slopes would restrict the development to such an extent that it would be economically difficult for the developers to proceed with their plans. It was also pointed out that staff had recommended urbanization of the remaining Class E lands since most of the prime agricultural lands had already been absorbed in the plans.

In reply to Commissioner Ota's request, Mr. Moriguchi pointed out the proposed uses on the map such as the resort complex, commercial areas, open spaces, residential area, etc. There were provisions for a total of 5,400 dwelling units

if the petition as requested by Capital Investment Co. were approved.

Mr. Moriguchi advised that the modified urban-conservation line was discussed with the petitioner and agreed upon, although petitioner did point out the fact that the City and County had planned on allowing construction on lands over 30% slopes.

Commissioner Wenkam stated that the beauty of the islands was largely dependent upon keeping the hillsides free of developments. However, he felt that construction on slopes up to 30% in this instance was feasible due to the vastness of the area and the tremendous open spaces which allowed for greater flexibility, and that he supported the staff's recommendations.

Commissioner Ota expressed bewilderment over staff's inconsistency in recommending denial of the Honokai petition, acted on earlier, for 32 acres adjacent to an Urban District on grounds that sufficient urban lands were available; and then to recommend approval of this petition involving thousands of acres.

Mr. Moriguchi replied that staff recognized this very point might be brought up. Staff had viewed the Makaha petition from the standpoint of the overall general plan for the island, and the State General Plan's proposal for this area was for a major resort complex, based on future tourist expansion. The petitioner had submitted substantial data along this line. The Honokai petition was for an isolated appendage to an Urban District that should not have been there in the first place, and the State General Plan did not include this area for urban purposes.

Referring back to the statement made earlier by staff, Commissioner Ferry agreed that economic hardship was involved if construction were disallowed on the gentle slopes. However, one could not deny that staff was arguing from the economic standpoint. Yet, in the Honokai petition, the economics involved did not warrant staff's consideration. Commissioner Ferry wondered how this could be rationalized.

It was stressed by staff that economics was not the basis for recommending approval of the Capital Investment petition--that if sufficient justification of need for the complex had not been submitted by the petitioner, staff would have argued against the proposal.

Chairman Thompson agreed that the question raised by Commissioner Ferry required clarification, with respect to the rationale for the Honokai petition. He advised that there were 24 hours in which to reconsider the Honokai petition, but for the moment discussion should be confined to the subject petition.

Commissioner Ferry stated that he was completely in favor of the proposed subdivision by Capital Investment Co. On the basis of 5 persons per unit, the 5,400 units would accommodate 27,000 persons, which would take care of only a fraction of the projected population increase by 1980.

Commissioner Wenkam moved that petition be approved as recommended by staff, which was seconded by Commissioner Ferry. The Commissioners were polled as follows:

Ayes: Commissioners Burns, Ferry, Inaba, Mark, Nishimura, Wenkam, Chairman Thompson.

Nays: Commissioners Ota and Wung

The motion was carried.

Chairman Thompson called for a 5-minute recess.

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The meeting was resumed at 3:45 p.m.

RECONSIDERATION OF THE HONOKAI DEVELOPERS' PETITION (A65-101)

Chairman Thompson announced that a reconsideration of the Honokai petition was in order based on the conflicting rationale presented on this and the Makaha petition. It was also pointed out that whatever the decision was during this reconsideration, it would be absolutely final.

To enable Chairman Thompson to make the move for reconsideration, Vice-Chairman Burns was requested to chair this portion of the meeting.

Commissioner Thompson moved to reconsider the Honokai petition, which was seconded by Commissioner Ferry. The motion was carried by the following votes;

Ayes: Commissioners Wung, Inaba, Ota, Nishimura, Ferry, Thompson, Chairman Pro-tempore Burns

Nays: Commissioners Wenkam and Mark

The floor was opened for discussion.

Commissioner Wenkam commented that population increase should not be the only consideration for justification of boundary change. Emphasis should also be placed on proper planning, proper location, community services available in keeping with an orderly community.

In answer to Commissioner Thompson's query, Mr. Moriguchi advised that the H-I Highway ended at Barbers Point and cut off before the Honokai development. Completion date for the H-I Highway, according to the Bureau of Public Roads, was set for 1972, and 1974 for the whole defense highway system.

Commissioner Wenkam suggested that perhaps the petitioner could come in and apply for boundary change when the highway system was completed and as the need arose.

Commissioner Ferry argued that if this Commission were to operate as a functional body, it was necessary to look 10 years into the future. He added that the Department of Transportation has moved with acceleration on the road construction project to alleviate the inadequacy of the highway system in the leeward area.

Commissioner Ota submitted that equal emphasis should be placed on good planning and conservation of prime agricultural land. He stated that the Makaha petition involved prime agricultural lands with easy accessibility to water. The Honokai lands involved rocky, uneven terrain, without access to water, with absolutely no agricultural value. He stressed that one of the main purposes of the Commission was the conservation of prime agricultural lands. Yet, the Makaha petition was approved for boundary change while the Honokai development was denied.

Commissioner Ferry remarked that an argument in favor of granting the Honokai petition was the existence of facilities and that this would constitute a normal extension of an existing Urban District.

Referring to the existing facilities, Mr. Moriguchi pointed out that when the petitioners were mandated by the County to install the sewage treatment plant, they had not received approval for the subject parcel. Therefore, the plant could have been built on an increment basis, but instead the petitioners chose to "gamble" in anticipation of receiving approval for the whole development. By the very action of this Commission in pulling the urban line back, they recognized that urbanization of this parcel would constitute spot zoning. In addition, marginal lands did not necessarily have to be reclassified into an urban zone.

Commissioner Thompson wondered what strain it would place on the county and state if this development were approved. Mr. Moriguchi informed that bus services for the children, fire and police protection will need to be provided.

Commissioner Ferry agreed with staff that land that is not in productive agricultural use need not necessarily be put into urban. However, the reason the Puna area, where small lot sizes were zoned agricultural, fell into this category was that there was no physical development on those lots. He contended that had there been a multitude of homesexisting on the lots, this Commission would have seen fit to zone this area as urban. He continued that the Honokai development presented an entirely different situation, in that homes were already existing in the first unit and families were living there.

Mr. Moriguchi argued that this was merely conjecture, that even if there had been homes in the Puna area, this was no assurance that the Commission would have zoned it in the Urban District. The criteria for urbanization was not to extend an already existing urban use but rather on the basis of whether this constitutes a good Urban District and is contiguous with facilities ordinarily related to a community. He reiterated that Harlan Bartholomew had concurred with staff's findings.

In reply to Commissioner Thompson's comment that when the Land Use Commission classified the subject area in the Agricultural District, they did not have knowledge of the population expansion, Mr. Moriguchi stated that this should not lead to urbanization anywhere, that instead it should follow a well-developed plan.

Commissioner Ferry moved that the Honokai Developer's petition be granted because ample proof had been submitted, seconded by Commissioner Nishimura. Commissioner Wenkam argued that he did not believe proof had been provided for need of subject parcel, that there were sufficient urban lands in the Waianae area.

The Commissioners were polled as follows:

Ayes: Commissioners Inaba, Ota, Nishimura, Ferry, Thompson, Chairman Pro-tempore Burns.

Nays: Commissioners Wung, Wenkam, Mark.

The motion was carried.

PETITION OF BERNICE P. BISHOP ESTATE (KAPAKAHI RIDGE) A65-97, TO AMEND THE URBAN DISTRICT AT WAIALAE-IKI, OAHU, identifiable by Tax Map Key 3-5-19: 13 and 3-5-24: portion of parcel 1

Staff memorandum, presented by Mr. Moriguchi (see copy on file), recommended denial of the original petition in its entirety and advised the petitioners to come in with an entirely new petition submitted in accordance with the latest plans of the Trustees of the Bishop Estate.

Commissioner Inaba moved to deny the original petition in its entirety on the basis of staff's recommendation which was seconded by Commissioner Wenkam.

Mr. Takeyama, legal counsel, advised that a request for amendment had been made by the petitioner and it was in order to act on this matter before moving on staff's recommendation.

Chairman Thompson reminded the members that the Land Use Commission, in the past, had made it its practice not to extend a boundary for a petition; however, had exercised its prerogative to bring it down. The Makaha petition was the only exception, but it was pointed out that this was done at the time of the hearing.

Mr. Takeyama stated that the petitioner was within his legal rights to come in and request for an amendment to the petition, in this case involving 12 plus acres. The Commission could vote to either deny or approve the request for amendment, and act on the petition separately. In reply to Chairman Thompson's question, Mr. Takeyama advised that there was nothing in the rules and regulations to prohibit the Commission from granting the request for amendment.

Mr. Takeyama continued that approval of the amendment did not remove the necessity for another public hearing. If the request is approved the petitioners would have to come in with a new petition which would be duly advertised. This would put into motion the proceedings for a new hearing. However, if the request for amendment to the petition is denied, the Commission would be acting on the original petition as submitted by the petitioners. If it followed that the Commission voted for denial of the original petition, the petitioners would have to submit substantial grounds of change in condition before they can attempt to file another petition for the subject parcel.

Commissioner Inaba moved to deny petitioner's request for amendment to the original petition, seconded by Commissioner Nishimura. The motion was passed with the following votes:

Ayes: Commissioners Inaba, Mark, Nishimura, Wenkam, Wung.

Nays: Chairman Thompson, Commissioner Burns.

Excused: Commissioner Ota

Chairman Thompson then announced that the Commission was now in a position to act on the original petition as submitted.

Commissioner Nishimura moved that the petition be denied as recommended by staff, seconded by Commissioner Wenkam. The Commissioners were polled as follows:

Ayes: Commissioners Wenkam, Inaba, Wung, Nishimura, Mark, Chairman Thompson.

Nays: Commissioner Burns.

Excused: Commissioner Ota

LALAMILO HOUSE LOTS

Mr. Moriguchi reviewed that during the previous meeting on March 25, 1966 at Kona, staff had been instructed by the Commission to investigate whether there might be substantiating evidence to indicate Commission's intent when the permanent boundaries were established for the subject area. However, staff was not able to locate any concrete evidence in this respect. Therefore, it was the staff's recommendation that this Commission, on its motion, initiate a boundary change for the subject area, along with the Honokaa lands, sometime in the future.

Following a brief discussion, Commissioner Wung moved that the Commission initiate a boundary change for the Lalamilo House Lot area, which was seconded by Commissioner Nishimura, and the motion was passed unanimously.

NEXT MEETING DATE AND PLACE

Tentative meeting schedule was presented by staff. It was pointed out that this was to inform the Commissioners of tentative dates and to give them an opportunity to voice their preferences.

Staff-recommended date of May 13, 1966 for the next meeting was changed to May 6, 1966 to be held in Hilo. The action items were eliminated.

SENATE RESOLUTION NO. 97

Chairman Thompson referred to Senate Resolution No. 97, a certified copy of which had been distributed to each Commissioner. This involved a request for the State Land Use Commission and the Department of Planning and Economic Development to study the feasibility of the arrangements for the conveyance of lands in rural or agricultural districts as outlined and to report their findings and recommendations to the Legislature not later than 20 days preceding the convening of the 1967 session of the Legislature.

Chairman Thompson expressed concern over the fact that the already limited staff time would be taxed with this additional responsibility. However, it was determined that staff would find time to complete its findings before the next Legislature.

LETTER FROM MAUI COUNTY ATTORNEY GENERAL (KAANAPALI BATCHING PLANT)

Chairman Thompson referred to a letter received from Mr. Kase Higa, Maui County Attorney, regarding the application for a special permit by Pioneer Mill Company involving a concrete batching plant at Kaanapali, Maui. In effect, the letter suggested that no further action be taken in this matter, but that the County Attorney would be willing to pursue this matter further if the Commission felt strongly enough and if the legal counsel could find adequate legal grounds.

Commissioner Burns advised that, as an officer of Pioneer Mill Company, he would have to abstain from making any comments.

Chairman Thompson wondered how it was possible that Pioneer Mill Company had not consulted with its attorneys prior to negotiating with the Kahului Railroad Company.

Commissioner Burns thought that this might have merely been a letter of agreement between the two firms; whereas, had it been funneled through the legal office, they might have checked into the matter of proper zoning for such an installation.

Commissioner Wung moved to accept the letter from the Maui County Attorney and take no further action on this matter. Commissioner Wenkam seconded the motion and it was passed unanimously. Commissioner Burns abstained from voting.

ALLISON PETITION

A point for clarification was brought up by Mr. Moriguchi on the Allison petition. He wondered whether the Allison petition was acceptable as submitted despite the absence of signatures of a few of the landowners involved in the petition.

Mr. Takeyama, legal counsel, suggested that the Land Use Commission, on its own motion, could initiate petition for those people who did not sign the petition so that the whole area might be considered as one contiguous parcel. He further advised that this action would not imply that the Commission was in favor of the petition, but was merely to clear the way for a public hearing. If this is not done, Mr. Takeyama advised that the Commission could not consider those 3 or 4 parcels on which there was no request for boundary change, at the time of the hearing.

Mr. Moriguchi stated that the request from the petitioners was for reclassification of the entire area, in response to Chairman Thompson's question.

Mr. Takeyama further clarified his earlier suggestion with the statement that it was specifically provided in the law that the Land Use Commission could, on its own motion, initiate a boundary change. This provision was set up to enable the Land Use Commission to open up other lands.

Commissioner Wenkam felt that a broad discussion on the reasonableness, the moral implications, etc., should precede any motion by the Commission.

Chairman Thompson stated that the motion was merely to expedite and facilitate proceedings for the hearing, and that interested parties could voice their feelings at the time of the hearing.

Commissioner Inaba moved that the Land Use Commission initiate a boundary change for those people who did not sign the Allison petition, which was seconded by Commissioner Ota. The motion was carried with the following votes:

Ayes: Commissioners Inaba, Ota, Burns, Nishimura, Chairman Thompson.

Nays: Commissioners Wung, Wenkam, Mark

LITIGATION

Mr. Takeyama, legal counsel, advised that he was meeting with Judge Felix in Hilo tomorrow to discuss the case of Tamura vs. Land Use Commission. He was also appearing in court next week on the motion to dismiss appeal of the Nuuanu Valley Community Association.

ADOPTION OF MINUTES

Minutes of the meetings of October 1, 1965 and October 2, 1965 were adopted as circulated.

The meeting was adjourned at 5:10 p.m.

File

Land Use Comm

C. A. No. 1261

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAKUNA, Appellant, vs. LAND USE COMMISSION, State of Hawaii, Appellee.	APPEAL FROM DECISION OF THE LAND USE COMMISSION, STATE OF HAWAII

MOTION TO DISMISS

and

[illegible]

I hereby certify that I served a copy of the [illegible], Attorney [illegible] depositing the same [illegible] at Honolulu, [illegible] postage prepaid [illegible]

[illegible] General

[illegible]
Attorney [illegible]
State [illegible]

[illegible]
Deputy [illegible]

Suite [illegible]
Honolulu, Hawaii 96813

Attorneys for Appellee

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.	APPEAL FROM DECISION OF THE LAND USE COMMISSION, STATE OF HAWAII

MOTION TO DISQUALIFY

Comes now BERT T. KOBAYASHI, Attorney General of the State of Hawaii, by ROY T. TAKEYAMA, Deputy Attorney General, and moves that the Honorable Albert M. Felix, Circuit Court Judge of the Third Circuit, State of Hawaii, be disqualified from sitting in the above-entitled case for the reason that he will be reviewing his own decision and judgment which is prohibited by Section 213-3, Revised Laws of Hawaii 1955, as amended, relative to disqualification of judges.

Dated: Honolulu, Hawaii, April [illegible], 1966.

BERT T. KOBAYASHI, Attorney General, State of Hawaii

By /s/ Roy T. Takeyama
ROY T. TAKEYAMA
Deputy Attorney General

Attorneys for Appellee

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.	APPEAL FROM DECISION OF THE LAND USE COMMISSION, STATE OF HAWAII

NOTICE OF MOTION

TO: [redacted]
Professional Building
133 Kalakaua Street
Hilo, Hawaii

Attorney for Appellant

Please take notice that the Motion to Disqualify herein will be presented before the Honorable Albert M. Felix, in his courtroom, at 10:30 a.m. on Friday, April 15, 1966, or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawaii, April 13, 1966.

/s/ [redacted] Miyama

[redacted]
Deputy Attorney General
State of Hawaii

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.	APPEAL FROM DECISION OF THE LAND USE COMMISSION, STATE OF HAWAII

MEMORANDUM

BERT T. KOBAYASHI
Attorney General
State of Hawaii

ROY Y. TAKEYAMA
Deputy Attorney General

Iolani Palace Grounds
Honolulu, Hawaii 96813

Attorneys for Appellee

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.	APPEAL FROM DECISION OF THE LAND USE COMMISSION, STATE OF HAWAII

MEMORANDUM

The instant appeal is similar in every respect to the case of Tamura v. Planning & Traffic Commission, County of Hawaii (C.A. 1059) except for the appellee. In that case, the appellee was the Planning and Traffic Commission of the County of Hawaii. Here, it is the State Land Use Commission. The petitioner is the same. The factual issues and questions of law are the same.

The presiding judge in that case ruled in favor of the appellant and ordered the appellee to recommend approval of the special permit to the State Land Use Commission. Said Commission, upon hearing the cause, denied the special permit. From this decision, the appellant appeals.

Section 213-3, Revised Laws of Hawaii 1955, as amended, relative to disqualification of judges, provides in part that:

" . . . nor shall any person sit as a judge in any case in which he has been of counsel or on an appeal from any decision or judgment rendered by him." (Emphasis added.)

We think that the above law prohibits the same judge from hearing this appeal for it would be tantamount to reviewing his own decision.

In 48 C.J.S., Judges, § 73, it is stated that:

" . . . it has been announced as a general rule that disqualifying statutes should be construed liberally . . . "

In Bruner v. Brewer, 20 Haw. 617 (1911), Justice DeBolt, who was then a judge of the circuit court, ordered certain issues be referred to arbitrators as agreed upon by the parties. Based on the agreement reached by the arbitrators, final judgment was entered by another judge.

Appellant appealed the judgment. Justice DeBolt then raised the question of his disqualification since he was the circuit court judge when the action was initiated.

The court disqualified him on the ground that he would be reviewing a decision rendered by him even though he did not render the final judgment.

The foregoing case illustrates the point that disqualification statutes should be construed liberally.

Thus, this Court should construe Section 213-3 liberally based on the facts and circumstances of this appeal.

DATED: Honolulu, Hawaii, April 14, 1966.

Respectfully submitted,

/s/ Roy Y. Takeyama

ROY Y. TAKEYAMA
Deputy Attorney General
State of Hawaii

L. U. C. COPY

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

C. A. NO. 1261

JAMES J. TAMURA,
Appellant,

vs.

LAND USE COMMISSION,
STATE OF HAWAII,
Appellee

CERTIFIED RECORD ON APPEAL

BERT T. KOBAYASHI
Attorney General

ROY Y. TAKEYAMA
Deputy Attorney General

State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii

Attorneys for Appellee

IN THE CIRCUIT OF THE THIRD CIRCUIT

STATE OF HAWAII

C. A. NO. 1261

JAMES J. TAMURA,
Appellant,

vs.

LAND USE COMMISSION,
STATE OF HAWAII,
Appellee

CERTIFIED RECORD ON APPEAL

I, MYRON B. THOMPSON, Chairman of the State Land Use Commission, hereby certify that all of the reports, maps, transcripts, and documents listed below are the designation and counter-designation of certified record on appeal in the above-entitled-matter:

1. Appellant's application for Special Permit filed on May 1, 1964; transcript of the minutes of the Planning Commission, County of Hawaii, held on October 22, 1965; and the data and recommendation from the Planning Commission, County of Hawaii.

2. Transcript of the public hearing held on December 17, 1965, and the decision of the Land Use Commission.

3. Staff report of the Planning Commission, County of Hawaii.

4. Notice of Appeal filed in the above entitled Court and Cause (previously filed).

5. The Statement of the Case filed by Appellant in this Court and Cause (previously filed).

6. Designation of Contents of Record on Appeal (previously filed).

7. Staff report, dated December 17, 1965, maps (marked* Exhibit A, B, and C), and the report entitled "Urban Development on the Island of Hawaii, 1946-1963" by the Land Study Bureau of the University of Hawaii, as submitted by the Land Use Commission staff.

* { Ex. A = Hilo District Map (L.U.C.)
  Ex. C = Map of TMK 2-2-52 showing existing Land use } full size
  Ex B = " " " 2-2-48 " " " "

8. Findings of Facts, Conclusions of Law and Decision of the Land Use Commission.

9. Answer to Statement of Case (previously filed).

10. Counter-Designation of Record on Appeal (previously filed).

IN WITNESS WHEREOF I have hereunto set my hand at Honolulu, Hawaii, this 20th day of January, 1966.

Myron B. Thompson

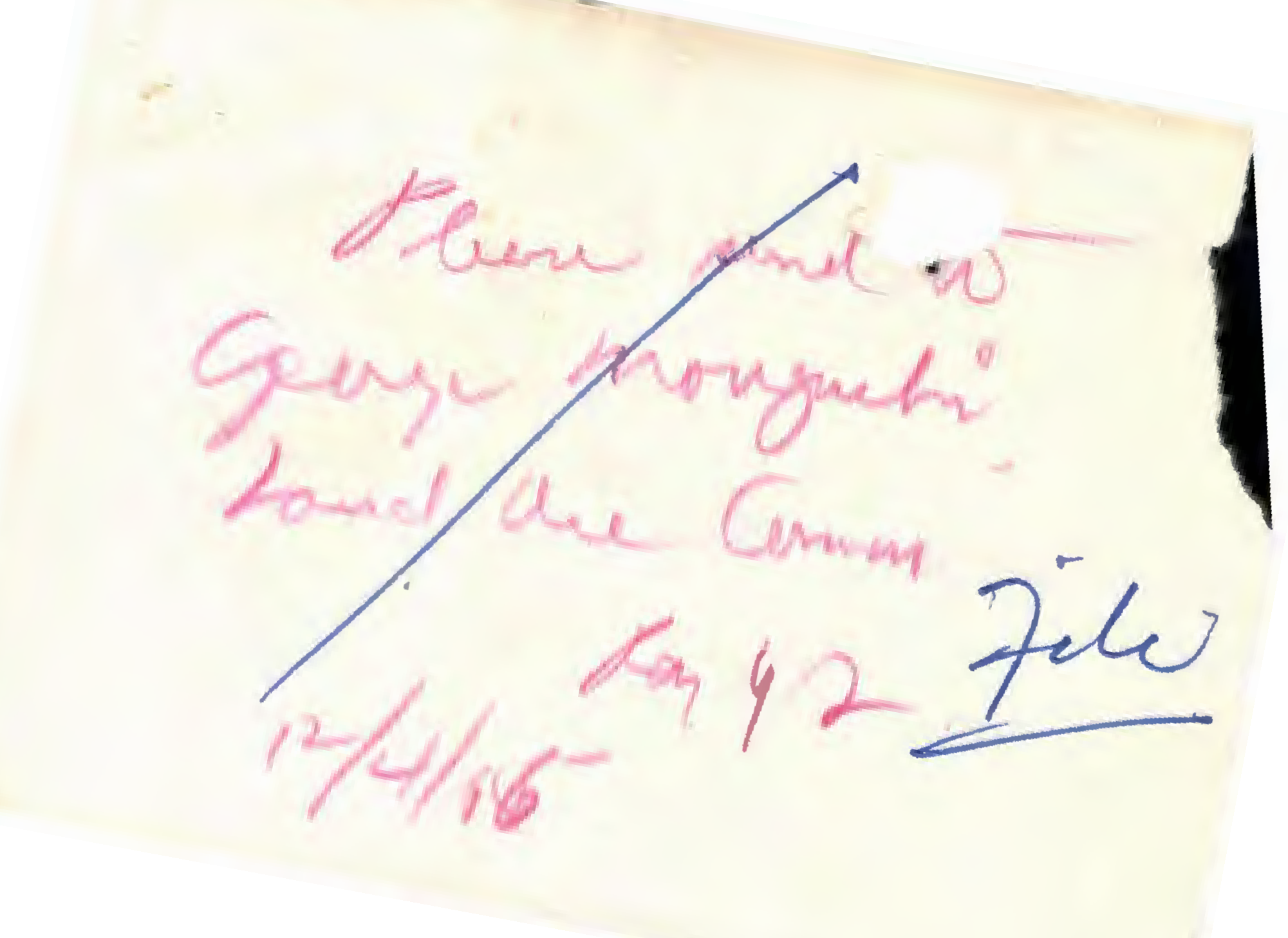
MYRON B. THOMPSON, Chairman
State Land Use Commission

Subscribed and sworn to before
me this 20th day of January, 1966

Daniel Ruggero, Jr.

Notary Public, First Judicial Circuit
State of Hawaii

My commission expires 10/29/69



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.	APPEAL FROM DECISION OF THE LAND USE COMMISSION, STATE OF HAWAII

Filed 2:00 P. M.
THIRD CIRCUIT COURT
DEC 30 1965
CLERK OF COURT
Marion S. Victor

COUNTER-DESIGNATION OF CONTENTS OF RECORD ON APPEAL

RECEIVED
JAN 5 1966 2:45 p.m.
State of Hawaii
LAND USE COMMISSION

BERT T. KOBAYASHI
Attorney General

ROY Y. TAKEYAMA
Deputy Attorney General

State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii 96813

Attorneys for Appellee

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.	APPEAL FROM DECISION OF THE LAND USE COMMISSION, STATE OF HAWAII

COUNTER-DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 72(d)(3) of the Hawaii Rules of Civil Procedure, Appellee hereby designates the following additional papers in connection with the above-entitled appeal:

1. Staff report, maps, exhibits and other papers submitted by the Land Use Commission staff.

2. Findings of Facts, Conclusions of Law and Decision of the Land Use Commission.

3. Answer to Statement of Case.

Dated at Honolulu, Hawaii, this 29th day of December, 1965.

STATE LAND USE COMMISSION, Appellee

By BERT T. KOBAYASHI
Attorney General

By Roy Y. Takeyama
Roy Y. Takeyama
Deputy Attorney General

LAND USE COMMISSION
STATE OF HAWAII

certified copy sent to Mr. Abe

IN THE MATTER OF THE PETITION)
FOR SPECIAL PERMIT BY JAMES)
J. TAMURA, HAWAII SP-65-19)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

The above Petition for a Special Permit involving a residential subdivision within an Agricultural District of the State Land Use District Boundaries, having come on for hearing, and the Land Use Commission having duly considered the evidence now finds and concludes as follows:

FINDINGS OF FACT

1. That the Petition encompasses 1.96 acres of land, which is in the Agricultural District and which is located in the Panaewa Houselot Subdivision, Waiakea, South Hilo, Hawaii (TMK 2-2-52: 8).

2. That the Petitioner proposes to subdivide and develop the 1.96 acres of land into four residential lots.

3. That the Hawaii County Planning Commission, after duly considering the evidence received during a public hearing, denied the Special Permit.

4. That James J. Tamura had appealed the decision of the Hawaii County Planning Commission.

5. That Judge A. M. Felix of the Third Circuit Court, State of Hawaii, rendered a decision which mandated the Hawaii County Planning Commission to recommend approval of the Special Permit to the State Land Use Commission.

6. That James J. Tamura was issued a transfer document on May 14, 1962 for title to the subject land which was purchased from the State initially by Patrick Walter Pereira and Edith Rachel Pereira.

7. That on March 13, 1964, a Land Patent was granted to James J. Tamura by the Department of Land and Natural Resources for the subject land.

8. That the Patent for the subject lands contained the same conditions applicable to the Special Sale Agreement dated November 20, 1958, by which the State Department of Land and Natural Resources originally conveyed the subject land to Patrick Walter Pereira and Edith Rachel Pereira. That the following

two paragraphs are part of the Land Patent granted to Mr. Tamura:

a. "That should the patentee or any assignee of his, desire to subdivide said lot, or any portion thereof, each subdivision shall conform with the minimum of specifications and standards established by the Hawaii Traffic and Planning Commission, excepting that said lot and each additional lot created as a result of said subdivision, shall contain an area of at least 10,000 square feet, or the minimum area required by said Planning Commission, whichever is greater, and the owner of each lot as subdivided shall be required within the period of 5 years next following the date of such subdivision or resubdivision, to construct on each lot so created a single-family dwelling of new materials or masonry, and containing a floor area of not less than 850 square feet, exclusive of garage and open lanai."

b. "That the land hereby conveyed shall be used for residence purposes only for a period of 10 years from the date of issuance of this Land Patent Grant."

9. That the subject parcel contains a single residence constructed by James J. Tamura.

10. That the subject parcel is served by a cinder road (Lama Street) and a paved road (Kalo Street).

11. That the general land use of the area is rural or agricultural in nature.

12. That the building density along Lama Street and along the south side of Makalika Street is approximately 2.7 acres per dwelling unit.

13. That the lots in the area are generally overgrown with wild growth although clearings occur around the residences.

14. That a coffee orchard, lychee orchard, a macadamia nut orchard, and a few small gardens are found in the area, although the lands are predominantly overgrown with wild growth.

15. That electrical, telephone, and water services are available in the area.

16. That the soils in the area of the subject land are known as the Olaa or Ohia soil material, consisting of young lava with a thin covering of volcanic ash occurring in very wet regions on the Island of Hawaii.

17. That this land type is difficult to cultivate and pastures are of very poor quality. That, however, some areas at lower elevations are being developed for macadamia nuts, coffee and pastures.

18. That the County Plan for development of the area designates a residential-agricultural use for small operations such as poultry, floriculture, or truck gardening, with minimum lot sizes of 1 acre.

19. That considerable acreage, estimated at approximately 2,400 acres, are vacant or not used for urban purposes within the Urban District boundary in the Hilo area, and that the subject land is located approximately ½ mile from the closest urban boundary.

20. That although the population of Hilo has not changed drastically from 1950 to 1963, it is prominently indicated that the population has declined, and that recent trends also indicate a decline in population from a 1960 total of 25,966 to a 1964 total of 25,370.

21. That the Land Study Bureau of the University of Hawaii has found, as indicated in its report "Urban Development on the Island of Hawaii, 1946-1963", that development of lots platted in the Hilo area over the subject period, has been at a slow rate of approximately 36%.

That the temporary district boundaries made effective on April 21, 1962, classified the subject land within the Agricultural District.

22. That the final district boundaries made effective August 23, 1964, classified the subject land within the Agricultural District.

23. That an application for Special Permit to subdivide the subject land was first made on May 1, 1964, approximately two years after the temporary district boundaries classified subject land within the Agricultural District.

24. That the subject land was not used for urban purposes until February 17, 1964.

CONCLUSIONS OF LAW

1. That the Petitioner has failed to prove that the proposed subdivision is "unusual and reasonable" within an Agricultural District in accordance with Section 2.24 of the State Land Use District Regulations, and 98-H6, Revised Laws of Hawaii, 1955, as amended.

2. That other undeveloped lands already districted for residential purposes are better located to centers of trading and employment facilities and more easily serviced by public agencies than the land under consideration, thus alleviating any evidence of urban pressures in the area under petition.

3. That to include land under consideration as a permitted residential use would contribute towards scattered urban type development.

4. That the proposed subdivision will be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations, in that scattered urban uses will result.

5. That the proposed subdivision will adversely affect the surrounding property, in that the existing roads would be over-taxed and deteriorate by nature of its cinder construction.

6. That the proposed subdivision would burden public agencies to provide adequate roads.

7. That unusual conditions, trends and needs have not arisen since the district boundaries and regulations were established.

8. That the land upon which the proposed subdivision is sought is suited for certain agricultural uses.

9. That the proposed subdivision will substantially alter and change the essential rural character of the land by introducing higher density residential use.

10. That the proposed subdivision would not make the highest and best use of the land involved for the public welfare.

11. That the specifications in the land patent require conformance with the minimum specifications and standards established by the Land Use Law and Regulations at the time the request for subdivision is initiated by the landowner.

DECISION

Based on the evidence presented and the findings of facts and conclusions of law, it is the decision of the Land Use Commission that the Petition for a

Special Permit to subdivide the 1.96 acre parcel of land owned by James J. Tamura (Tax Map Key 2-2-52: 8) be denied.

Dated: January 19, 1966, Honolulu, Hawaii.

STATE LAND USE COMMISSION

By Myron B. Thompson
MYRON B. THOMPSON

CERTIFICATION:

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office.

George S. Moriguchi
GEORGE S. MORIGUCHI
Executive Officer
Land Use Commission

APPROVED AS TO FORM AND LEGALITY:

Roy Y Takeyama
ROY TAKEYAMA
Deputy Attorney General

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.

ANSWER TO STATEMENT OF CASE

BERT T. KOBAYASHI
Attorney General

ROY Y. TAKEYAMA
Deputy Attorney General

State of Hawaii
Iolani Palace Grounds
Honolulu, Hawaii 96813

Attorneys for Appellee

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.

ANSWER TO STATEMENT OF CASE

Comes now the Appellee, the LAND USE COMMISSION, by Bert T. Kobayashi, Attorney General of the State of Hawaii, and Roy Y. Takeyama, Deputy Attorney General, its attorneys, and in answer to Appellant's Statement of the Case, alleges as follows:

FIRST DEFENSE

The Statement of the Case fails to state a claim upon which relief can be granted.

SECOND DEFENSE

1. Appellee admits the allegations contained in paragraphs 1 and 2.

2. Appellee denies the allegations contained in paragraph 3.

WHEREFORE, the Appellee prays that upon hearing the case the appeal be dismissed.

DATED: Honolulu, Hawaii, January 13th, 1966.

LAND USE COMMISSION, Appellee

By BERT T. KOBAYASHI
Attorney General

By Roy Y. Takeyama
Roy Y. Takeyama
Deputy Attorney General

C. A. 1261

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

LAND USE COMMISSION,
State of Hawaii,

Appellee.

NOTICE OF APPEAL TO CIRCUIT COURT

KAZUHISA ABE
Professional Bldg.
163 Kalakaua Street
Hilo, Hawaii

Attorney for Appellant.

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

LAND USE COMMISSION,
State of Hawaii,

Appellee.

NOTICE OF APPEAL TO CIRCUIT COURT

Notice is hereby given that JAMES J. TAMURA, Appellant above named, pursuant to Section 98H-6, Revised Laws of Hawaii 1955, as amended, hereby appeals to the Circuit Court of the Third Judicial Circuit from the decision of the LAND USE COMMISSION, State of Hawaii, entered on the 17th day of December, 1965.

Dated this 20th day of December, 1965.

Kazuhisa Abe
Attorney for Appellant

Professional Bldg.
163 Kalakaua Street
Hilo, Hawaii

C. A. No. 1264

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

LAND USE COMMISSION,
State of Hawaii,

Appellee.

STATEMENT OF THE CASE

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

and

ORDER FOR CERTIFICATION AND
TRANSMISSION OF RECORD

KAZUHISA ABE
Professional Bldg.
163 Kalakaua Street
Hilo, Hawaii

Attorney for Appellant.

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA, Appellant, vs. LAND USE COMMISSION, State of Hawaii, Appellee.	RECEIVED DEC 27 1985 3:30 p.m. State of Hawaii LAND USE COMMISSION

STATEMENT OF THE CASE

In accordance with Rule 72(e), Hawaii Rules of Civil Procedure, Appellant makes the following statement of the case and prayer for relief:

1. That pursuant to Section 98H-6, Revised Laws of Hawaii, 1955, JAMES TAMURA filed an application for a special permit to subdivide Lot 63, Panaewa House Lots, described in Land Patent (Grant) No. S-14,183, into four lots.

2. That this Appeal arises out of an Application for a Special Permit; and that this Appeal concerns the decision of the Land Use Commission of the State of Hawaii denying special permit.

3. That Appellant contends that the decision of the Land Use Commission, State of Hawaii, is contrary to the facts and the law.

WHEREFORE, Appellant prays:

1. That the decision of the Land Use Commission, State of Hawaii, in the above entitled case be reversed and set aside.

2. That this Honorable Court enter judgment for Appellant, thereby subdividing Lot 63 of the Panaewa House-Lots into four lots.

3. For such other and further relief as to this Court may be deemed just.

Dated this 20th day of December, 1965.

JAMES J. TAMURA, Appellant

By _____
His Attorney
Professional Bldg.
163 Kalakaua Street
Hilo, Hawaii

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

LAND USE COMMISSION, State of Hawaii,

Appellee.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to Rule 72(d)(2), Appellant does hereby specify the papers desired filed in this Court and Cause in connection with the Appeal:

1. Appellant's Application for Special Permit filed on May 1, 1964; transcript of the minutes of the Planning Commission, County of Hawaii, held on October 22, 1965; and the data and recommendation from the Planning Commission, County of Hawaii.

2. Transcript of the public hearing held on December 17, 1965.; and the decision of the Land Use Commission.

3. Such other documents and exhibits filed in connection with said Application for Special Permit.

4. The Notice of Appeal filed in the above-entitled Court and Cause.

5. The Statement of the Case filed by Appellant and that of Appellee (if filed) in this Court and Cause.

6. This Designation of Contents of Record on Appeal together with any Counter-Designation filed pursuant to Rule 72(d)(3), Hawaii Rules of Civil Procedure.

Lot No.	Area - Sq. Ft. (More or Less)	Upset Price
44	34,286	1234.00
45	40,499	939.00
46	49,645	749.00
47	43,901	991.00
48	41,094	950.00
49	42,239	844.00
53	43,802	876.00
57	43,560	676.00
58	43,564	653.00

LOT PURCHASE RESTRICTION: One lot only to purchaser. Spouse of any purchaser prohibited from purchasing another lot.

BUILDING REQUIREMENT AND RESTRICTION: A single-family dwelling of new materials or masonry containing a floor area of not less than 850 square feet, exclusive of garage and open lanai, must be constructed within three (3) years from date of sale. Accessory buildings permitted. However, all structures must meet certain specifications.

RESTRICTIVE USE: Residence purposes only for ten (10) years next following the issuance of Land Patent Grant or Deed.

METHOD OF PAYMENT: Minimum of twenty percent (20%) of purchase price; balance in twenty (20) equal quarterly installments at four percent (4%) interest per annum.

SUBDIVISION: Subdivision of lot permitted with certain lot size and building requirements.

ITEM 2. HOUSE LOT

Lot 8-A, Waiakea Camp Site, Waiakea Homesteads, Second Series, Waiakea, South Hilo, Hawaii, containing an area of 1.15 acres. See Government Survey Map Carton 161 and Tax Map Key 2-4-07.

UPSET PRICE: $575.00. Bid price payable in full at sale.

BUILDING REQUIREMENT AND RESTRICTION: A single-family dwelling of new materials or masonry, costing not less than $6,000.00, must be constructed within three (3) years from date of sale. No quonset hut or dwelling of similar design or construction will be permitted.

RESTRICTION USE: Residence purposes for ten (10) years next following the issuance of Land Patent Grant or Deed.

ITEM 3. RIGHTS RELATING TO PAYMENT OF DAMAGES IN EXERCISE OF RESERVED MINERAL AND MINING RIGHTS

Sale of so much of the rights relating to minerals and mining heretofore reserved to the Territory, affecting approximately 55.273 acres of the lands of Lalamilo, Keoniki and Kauniho, Ilis of the Government (Crown) Land of Waimea, South Kohala, Hawaii, T.H., as shown on Government Survey Map C.S.F. No. 12,691, the extent and effect of such sale being to convey the right to require of the Territory and persons authorized by it, prior to entry, occupation and use of the surface of said land, compensation for destruction of or damage or injury to permanent improvements placed upon said land caused by such entry, occupation and use of the surface thereof. (Tax Map Keys 6-6-04:2 and 6-5-01:10)

UPSET PRICE: $5,000.00

METHOD OF PAYMENT: Minimum of twenty percent (20%) of purchase price; balance in thirty-two (32) equal quarterly installments

at four percent (4%) interest per annum.

ITEM 4. HOUSE LOTS

Twenty house lots situated at Panaewa, Waiakea, South Hilo, Hawaii, varying in size from 1.81 acres to 2.73 acres, as shown on Government Survey Maps HTS Plat 922 and Carton 230 and Hawaii Tax Map Key 2-2-48.

Lot No.	Area - Acres (More or Less)	Upset Price
23	2.72	$2[illegible]00.00
24	2.73	2050.00
25	2.73	2050.00
26	2.73	2050.00
27	1.81	1400.00
29	1.96	1500.00
30	2.73	2050.00
31	2.73	2050.00
32	2.73	2050.00
33	2.72	2200.00
44	2.42	1850.00
56	2.72	2200.00
57	2.73	2050.00
58	2.73	2050.00
59	2.73	2050.00
60	2.73	2050.00
61	1.81	1400.00
63	1.96	1500.00
64	2.73	2050.00
65	2.49	1900.00

LOT PURCHASE RESTRICTION: One lot only to purchaser. Spouse of any purchaser prohibited from purchasing another lot.

BUILDING REQUIREMENT AND RESTRICTION: A single-family dwelling of new materials or masonry containing a floor area of not less than 550 square feet, exclusive of garage and open lanai, must be constructed within five (5) years from date of sale. Accessory buildings permitted. However, all structures must meet certain specifications.

RESTRICTIVE USE: Residence purposes only for ten (10) years next following the issuance of Land Patent Grant or Deed.

METHOD OF PAYMENT: Minimum of twenty percent (20%) of purchase price; balance in twenty (20) equal quarterly installments at four percent (4%) interest per annum.

SUBDIVISION: Subdivision of lot permitted with certain lot size and building requirements.

further condition stipulated in Sp. Sale Agreement + Land Patent

B. PAYMENT REQUIRED ON DATE OF SALE: To be in Cash or Certified or Cashier's check.

C. CONDITIONS OF SALE INSTRUMENT: For details of above and general provisions and conditions of sale, see Conditions of Sale Instrument.

DONE at the Office of the Commissioner of Public Lands, Territorial Office Building, Honolulu, Hawaii, this 16th day of September, 1958.

James L. Hustace

FRANK W. HUSTACE, JR.
Commissioner of Public Lands

HILO TRIBUNE-HERALD:
Sept. 19, Oct. 11,
Nov. 1 and Nov. 16, 1958

JJD:ft

OFFICE OF THE
OMMISSIONER OF PUBLIC LANDS
TERRITORIAL OFFICE BUILDING

INDIVIDUAL REPORT OF AUCTION SALE OF TERR. GOVT. LOTS
(Land or Lease)

Held NOVEMBER 20, 1958 (Date) At HILO, HAWAII (Place)

App. Bk.	L. B.	Old Lease	Ad. Bk.	New Lease	Ex. Or.	Deed	Rev. Pmt.
25:36	No. 3463 Date 8/29/58		24:11	S.S.A. 4940			

Item	Description and Location	Acres	Square Feet
4	(Hselot) Lot 63, Panaewa House Lots, Waiakea, S. Hilo, Hawaii	1.96	

HIGHEST AMOUNT BID: $ 1,530.00 **ADVERTISED UPSET PRICE** $ 1,500.00
~~RENTAL~~

BID BY: Walter P. Perreira (Name) 16-C Puuhina St. (Address) 3974 (Telephone)

BID FOR: PATRICK WALTER PEREIRA, (Name) 16-C Puuhina Street Hilo, Hawaii 3974 (Telephone)
also known as WALTER PATRICK PERREIRA
and EDITH RACHEL BORGES PEREIRA

PATRICK WALTER PEREIRA (Full Name)	EDITH RACHEL BORGES PEREIRA (Full Name)
x (Citizen) x (By Birth) (By Naturalization)	x (Citizen) x (By Birth) (By Naturalization)
March 14, 1923 (Date of Birth) male (Male or Female)	April 25, 1922 (Date of Birth) female (Male or Female)
Kukuau, Hilo, Hawaii (Place of Birth)	Honolulu, T.H. (Place of Birth)
Std. Certificate of Birth Reg.No.8720 (Certificate Data)	Affidavit attached. (Certificate Data)
x (Married) (Unmarried) (Widowed) (Divorced)	x (Married) (Unmarried) (Widowed) (Divorced)
Edith Rachel Borges Pereira (Spouse's Name in Full)	Patrick Walter Pereira (Spouse's Name in Full)

x
(Tenants by the Entirety) (Joint Tenants) (Tenants in Common)

PAYMENTS:

Purchase Price	20% (Installments)	$ 306.00
Rent ____ months from ____ to ____		$
Advertising in Newspaper		$ 5.
Document Fee		$ 5.00
Description and Map		$ 15.00
Others		$
TOTAL		341.75

Receipt No. 10523

REMARKS:

Runner-up: Ralph Nishioka
Address: 1167 Mililani St.,Hilo
Amount: $1,525.00

Submitted by: [signature] for *Sub-Land Agent 1st Dist.*

FORM 16-B-1 (Revised 1955)
SPECIAL SALE AGREEMENT
FOR OTHER THAN HOMESTEAD
PURPOSES

OFFICE OF THE
COMMISSIONER OF PUBLIC LANDS
TERRITORIAL OFFICE BUILDING
TERRITORY OF HAWAII

App. Bk. 25:36
L. B. 3463, Aug. 29, 1958
Ad. Bk. 24:11

SPECIAL SALE AGREEMENT No. 4140

THIS AGREEMENT, made this 20th day of November, 19 58, by and between the TERRITORY OF HAWAII, by its Commissioner of Public Lands, hereinafter called the "TERRITORY", and PATRICK WALTER PEREIRA, also known as WALTER PATRICK PEREIRA and EDITH RACHEL BORGES PEREIRA, husband & wife,

whose residence and post office address is 16-C Puuhina Street, Hilo, Hawaii

Territory of Hawaii, hereinafter called the "PURCHASER",

WITNESSETH THAT:

WHEREAS, on November 20, 19 58, pursuant to the provisions of the Hawaiian Organic Act and the Revised Laws of Hawaii 1945, as amended, certain land hereinafter more particularly described, situate at Panaewa, Waiakea, South Hilo, Hawaii,

said Territory, and being Lot 65, Panaewa House Lots,
was offered for sale at public auction on terms and conditions in this agreement set forth; and

WHEREAS, at such sale, said Purchaser bid the sum of ONE THOUSAND FIVE HUNDRED THIRTY AND NO/100 DOLLARS ($ 1,530.00), becoming thereby the highest qualified bidder therefor, and entitled to purchase said land under this agreement of sale; and

WHEREAS, said Purchaser has deposited with the Commissioner of Public Lands of the Territory, hereinafter called the "COMMISSIONER", the sum of THREE HUNDRED AND SIX AND NO/100 DOLLARS ($ 306.00), to be applied by said Commissioner as a down payment upon the execution hereof;

NOW, THEREFORE, the Territory agrees to sell to the Purchaser and the Purchaser agrees to buy from the Territory all of the land described in Schedule "A" hereof, upon the terms and conditions contained in this agreement and in Schedule "B", hereto attached and made a part hereof:

1. The Purchaser promises to pay to the Commissioner, for and on behalf of the Territory, as and for the purchase price of said land, the sum of ONE THOUSAND FIVE HUNDRED THIRTY AND NO/100 DOLLARS ($1,530.00), as follows:

(a) the sum of THREE HUNDRED AND SIX AND NO/100 DOLLARS ($ 306.00), as a down payment, the receipt whereof is hereby acknowledged, and (b) the balance in twenty quarterly equal ~~xxxxxx~~ installments, payable on the 20th day of Feb., May, Aug. & Nov. of each and every year until paid, first payment to be made on February 20, 19 59; *provided, however,* the Purchaser shall have the right to make payment of ~~xxxx~~ any part of the principal on quarterly installment payment dates only Payment of all of remaining balance may be made at any time

The Purchaser further promises to pay to the Commissioner, interest at the rate of four per cent (4%) per annum, computed upon the then outstanding principal balance due the Commissioner, at the time specified for each installment payment of principal

SCHEDULE "A"

LOT 63

PANAEWA HOUSE LOTS

Panaewa, Waiakea, South Hilo, Hawaii

Being portion of the Government (Crown) Land of Waiakea.

Beginning at the east corner of this lot, the north corner of Lot 66 of Panaewa House Lots, and on the southwest side of Government Road (50.00 feet wide), the coordinates of said point of beginning referred to Government Survey Triangulation Station "HALAI" being 18339.70 feet South and 13126.67 feet East, as shown on Government Survey Registered Map H.T.S. Plat 922. Thence running by azimuths measured clockwise from True South:-

1. 71° 00' 318.84 feet along Lot 66 of Panaewa House Lots;

2. 161° 00' 269.14 feet along Lot 64 of Panaewa House Lots to a 1-inch pipe;

3. 251° 00' 268.84 feet along the south side of Government Road (50.00 feet wide);

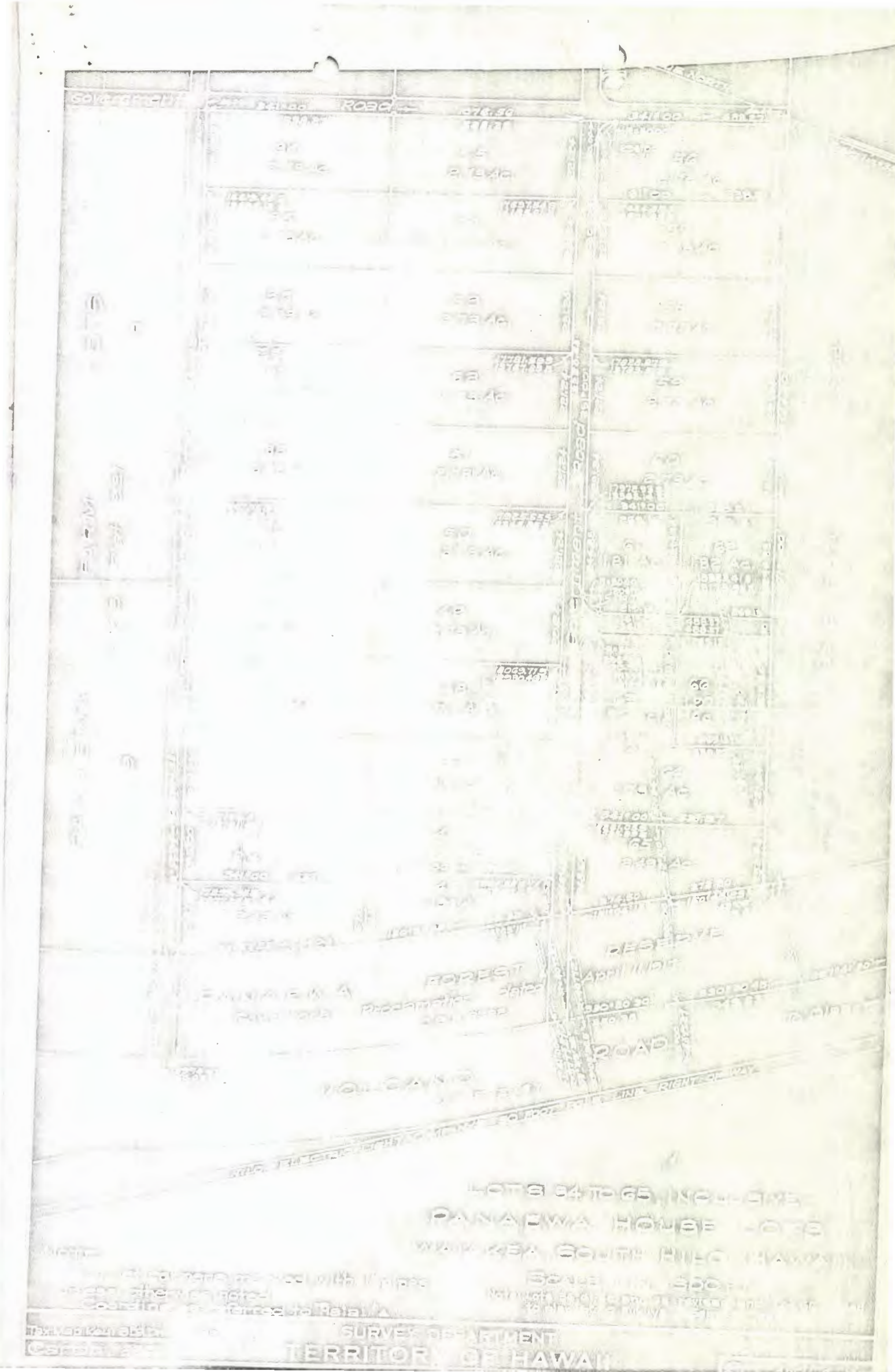
4. Thence along the south side of Government Road (50.00 feet wide), on a curve to the right having a radius of 50.00 feet, the chord azimuth and distance being: 296° 00' 70.71 feet;

5. 341° 00' 219.14 feet along the southwest side of Government Road (50.00 feet wide), to the point of beginning and containing an AREA OF 1.96 ACRES.

RESERVING to the Territory of Hawaii, its successors and assigns, in perpetuity, all rights to ground but not to surface waters which are or may be appurtenant to the hereinabove described land or the ownership thereof.

RESERVING ALSO to the Territory of Hawaii, its successors and assigns, in perpetuity, all minerals in, on or under the land and the right, on its own behalf or through persons authorized by it, to prospect for, mine, and remove minerals and to occupy and use so much of the surface of the land as may be required for all purposes reasonably extending to the mining and removal of such minerals by any means whatsoever, conditioned upon the payment, prior to any exercise of such right, of compensation for destruction of or damage or injury, caused by the exercise of such right to occupy and use said land, to permanent improvements placed upon the land.

"Minerals" within the meaning of such reservation shall mean any or all oil, gas, coal, phosphate, sodium, sulfur, iron, titanium, gold, silver, bauxite, bauxitic clay, diaspore, boehmite, laterite, gibbsite, alumina, all ores of aluminum and, without limitation thereon, all other mineral substances and ore deposits, whether solid, gaseous or liquid, in, on or under the land; provided, that "minerals" shall not include sand, rock, gravel, and other similar materials when used in road or building construction.



SCHEDULE "B"

1. IT IS AGREED that the Purchaser shall, at his own cost and expense, within five (5) November 20, 1958 years after the date of this agreement complete the erection of a ~~building~~ single-family dwelling of new materials or masonry upon said land for residence purposes in full compliance with all applicable laws, ordinances, rules and regulations and containing a floor area of not less than 850 sq. ft., exclusive of garage & open lanai. ~~in the aggregate~~ Such building shall be well and substantially built and shall be finished in a good, thorough and workmanlike manner. In the event that the Purchaser shall, in order to comply with such building requirement, find it necessary to secure a loan from a lending agency so as to finance the erection or construction of said building, and such lending agency shall require of said Purchaser a mortgage of the land described herein as security for such loan, such loan to be effected upon the issuance of a deed or a Land Patent or both, whichever is therein deemed applicable by the Commissioner, then and in such event the Commissioner may issue to said Purchaser, subject to the conditions hereafter set forth, upon a request therefor being made in writing, such deed or Land Patent or both covering said land. The conditions upon which such deed or Land Patent or both may issue shall be as follows:

a. That all of the terms, covenants and conditions of this agreement shall have been performed by the Purchaser (excepting such building requirement) including, without prejudice to the generality of the foregoing, the payment of all sums of money provided for in paragraphs 1 and 2 hereof; and

b. That the Purchaser and lending agency shall have agreed with the Commissioner and with each other that all moneys to be loaned to said Purchaser by said lending agency for which the land described in Schedule "A" hereof shall be held as security, shall be retained by said lending agency and by it placed in a special account, from which account disbursements shall be made by it directly to the contractor in such amounts, at such times and upon such conditions as shall be provided for in a suitable building contract covering the erection or construction of said building; and

c. That the Purchaser shall have entered into a suitable contract with a reputable contractor providing for the erection or construction of said building to be completed within the period required by this agreement, and said contractor shall have executed in favor of said Purchaser and said lending agency, or either of them, and the Territory of Hawaii, a performance and payment bond conditioned upon terms satisfactory to the Commissioner; and

d. That the Purchaser shall have performed such other conditions and shall have executed such other documents as the Commissioner shall, in his discretion, deem necessary to insure the *bona fide* performance by the Purchaser of said building requirement within the time prescribed therefor in this agreement.

2. IT IS ALSO AGREED that the Commissioner of Public Lands reserves the right, for good cause, to grant to any purchaser an extension of time to meet the building requirement, and if such extension is granted, it shall be for only such period of time and under such conditions as may be established by the Commissioner; provided, however, that the granting of an extension to any one purchaser shall not be considered as a grant of an extension to any or all other purchasers, or as a waiver of the building time requirement except to the extent to which it may be expressly extended.

3. PURSUANT TO the conditions incorporated in the Notice of Sale dated September 16, 1958 (Ad. Bk. 24:11), it is understood and agreed that:

(a) No quonset hut or dwelling of similar design or construction will be permitted for the dwelling required.

(b) Should the purchaser, or any assignee of his, desire to subdivide said lot or any portion thereof, each subdivision shall conform with the minimum specifications and standards established by the Hawaii Traffic and Planning Commission, excepting that said lot and each additional lot created as a result of said subdivision shall contain an area of at least 10,000 square feet, or the minimum area required by said Planning Commission, whichever is the greater, and the owner of each lot as subdivided shall be required within a period of five (5) years next following the date of such subdivision or re-subdivision to construct on each lot so created a single-family dwelling meeting the requirements above-mentioned with respect to materials and minimum floor area. The foregoing construction requirements shall not be construed, however, to relieve the purchaser of the necessity for the erection of a dwelling on the premises within a period of five (5) years from the date of sale as hereinabove provided.

Some not to apply to patent

(c) No more than one dwelling shall be constructed on said lot, or if the same be subdivided, no more than one dwelling on each lot created as a result of said subdivision; provided, however, that accessory buildings, so long as they do not comprise dwelling units and so long as the same are erected in conformity with a plot plan and are of a character and design suitable to the area, will be permitted.

(d) A 25-foot building setback line from the roadway is provided for on this lot.

and repossess said land, with or without legal process, and retain all payments of principal and interest made by the Purchaser hereunder as liquidated damages and as and for an agreed rent for the use and possession of said land.

12. The acceptance by the Commissioner of any payment of principal or interest as the same shall become due shall not be considered a waiver of the right of the Commissioner, in the name of the Territory, to pursue any remedy or right for breach of or for cancellation of this agreement.

13. It is understood and agreed that the Purchaser under this agreement is not acquiring any private right in any public street, park or other area designated or shown in any schedule attached hereto as being public property, nor any right to have any or all such areas improved; *provided, however,* that nothing herein contained shall serve to prejudice such rights as the law may confer upon said Purchaser in common with others as an abutter on any public street.

14. As used herein, "land" shall mean the land described in Schedule "A" hereof, and all improvements whether now or hereafter erected thereon; "Governor" shall mean the Governor of the Territory of Hawaii, his successors in office and any other officer or officers who may succeed to his powers or duties; "Commissioner" shall mean the Commissioner of Public Lands of the Territory of Hawaii, his successors in office and any other officer or officers who may succeed to his powers or duties; "Purchaser" shall mean said Purchaser, his heirs and those who shall lawfully hold under him; the use of any gender shall include all genders, and if there be more than one purchaser, then the singular shall signify the plural, and this agreement shall bind said purchasers, and each of them, jointly and severally, and any documents issued pursuant hereto and all right, title and interest of said purchasers hereunder shall be held by them as tenants by the entirety.

As used hereinabove in Condition Nos. 2, 3, 7, 10 and 14 the document or documents conveying to the Purchaser all of the land covered by this Agreement is or are to be a Land Patent.

IN WITNESS WHEREOF, the parties hereto have executed these presents as of the day and year first above written

TERRITORY OF HAWAII

By _____
Its Commissioner of Public Lands

Purchaser

Honolulu, T. H., Aug. 12, 19__

I consent to the sale of the land herein mentioned upon the terms and conditions therein set forth.

_____
ACTING Governor of the Territory of Hawaii

Approved as to Form:

_____
Attorney General

TERRITORY OF HAWAII
COUNTY OF Hawaii } ss.
(City and)

On this 4th day of August, A. D. 1959, before me personally appeared PATRICK WALTER PEREIRA and EDITH RACHEL BORGES PEREIRA known to me to be the persons described in and who executed the foregoing instrument and acknowledged to me that they executed the same as their free act and deed.

_____
Notary Public, 1st Judicial Circuit, Territory of Hawaii.

My Commission Expires Jan. 21, 1962.

Written by vk

Checked by _____

1778

RECEIVED
NOV 5 1965
State of Hawaii
LAND USE COMMISSION

COUNTY PLANNING COMMISSION
COUNTY OF HAWAII
HILO, HAWAII

November 5, 1965

Mr. George S. Moriguchi
Executive Officer
Land Use Commission
426 S. Queen Street
Honolulu, Hawaii 96813

Dear Mr. Moriguchi:

Re: Special Permit Request of James J. Tamura

The County Planning Commission, at its regular meeting of October 22, 1965, voted to recommend approval of the special permit request to allow subdivision into four lots of a 1.96-acre parcel being Lot 63, Panaewa House Lots, Waiakea, South Hilo, on the basis of the decision rendered by Judge Felix.

Enclosed for your information are the minutes of the said meeting.

Yours very truly,

COUNTY PLANNING COMMISSION

Raymond H. Suefuji
Acting Director

lat

Enclosure

COUNTY PLANNING COMMISSION
County of Hawaii
Hilo, Hawaii

October 22, 1965

The County Planning Commission met in regular session at 1:12 p.m., in the Conference Room of the County Board of Supervisors, with Vice Chairman Walter W. Kimura presiding.

PRESENT: Walter W. Kimura
John T. Freitas
Hiroo Furuya
Kenneth Griffin
Isamu Hokama
Masayoshi Onodera
Robert J. Santos
Edward Toriano
Cirilo E. Valera
Raymond H. Suefuji
Philip I. Yoshimura
Harold E. Oba

staff members

ABSENT: William J. Bonk
Robert M. Yamada

Robert Wagner - subdivision
Jack Kobayashi - variance
Fred Hayashi - circulation plan
Jack Bryan, Honolulu Star-Bulletin
Don Miller, Honolulu Advertiser

MINUTES — The minutes of the meeting held on September 24, 1965 were approved as circulated on a motion of Mr. Griffin, second of Mr. Toriano, and carried.

SUBDIVISION COMMITTEE REPORT — On a motion of Mr. Griffin and second of Mr. Toriano, the Commission voted to approve the report of the Subdivision Committee of October 12 with the withdrawal of Item No. 13 and deferred action on Item No. 2 until the arrival of the subdivider.

DISPOSITION ON APPEAL
LAND USE COMMISSION
SPECIAL PERMIT
JAMES J. TAMURA

The disposition on the decision rendered by Judge Felix was next considered regarding James Tamura's appeal from the decision of the Planning Commission denying a special permit under the regulations of the State Land Use Commission to subdivide 1.96-acre parcel into 4 lots in an Agricultural District.

The Acting Director explained that this case was appealed to the Third Circuit Court. The Court rendered a decision that the Court finds under the facts of the law that the then Planning and Traffic Commission should have granted a special permit allowing or authorizing the subdivision on the basis that the State in selling the land included conditions for the subdivision of said land. Therefore, the Court reviewed the case from a different standpoint than the Planning Commission.

The Acting Director further stated that the decision says that the Planning Commission should have allowed the subdivision, and the Commission can either

reaffirm its previous action or approve it, and forward it to the Land Use Commission for ratification. All matters denied by the Planning Commission becomes final. If approved by the Planning Commission, it must be sent to the Land Use Commission for approval. The State Land Use Commission is informed of the matter. The Attorney General's Office has the decision of the Court and is awaiting the Planning Commission's decision.

Mr. Griffin stated that he would like to be excused from voting but he would like the opportunity to speak on the matter. He mentioned that his company was involved in the original sale. At the time this property was sold to Mr. Tamura, there were three other people who wanted to go into this. The provisions in the Land Patent allowed further subdivision. They went to the Planning Commission and talked with the former Director, Mr. Krsamoto, and was informed that they could subdivide under the existing Ordinance into 7,500 square-foot lots. They talked to the Board of Water Supply and was informed that they would put in a waterline to the second increment of the Panaewa House Lots. The problem of the people involved was that they have signed an agreement among themselves to purchase the lot and allow one of them to build the house. Then came the Land Use Commission Law which zoned the area Agricultural. If the Commission allows this, they should allow the others. Every case should be looked at on its own merit. In this case, there was no subterfuge and no run-around. This transaction took place before the Land Use Law and this was their intent in the very first place. This is the reason why the Court asked that the Commission approve this. Mr. Griffin asked that the Commission approve it and send it along to the Land Use Commission for their disposition.

The Acting Director pointed out that the staff disagrees with the decision of the Court, but the County Attorney feels that the Court reviewed it in the proper light. He then read Section 98H-6 of Act 205 under Special Permit. "The county planning commission and the zoning board of appeals of the City and County of Honolulu may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use his land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which his land is located or the zoning board of appeals in the case of the City and County of Honolulu for permission to use his land in the manner desired." The Section itself pertains to use of the land and that the staff contends that a subdivision is not use of the land. The staff reviewed it in the light of what the law allows. The State should not adopt an ordinance such as this Land Use Law that would prohibit what was originally allowed in the sale of State lands.

Mr. Griffin added that the crux of the whole matter was the intent, which was originally to split the parcel into 4 lots. This is not something that happened after the Land Use Law was passed. It was something that they had looked into. The answers were given to them allowing subdivision at the time the lot was bought.

The staff reported that there are others awaiting the outcome of this case. The staff further reported that in reviewing the State subdivision applications with the Commission, this particular parcel was never brought before the Commission for final approval of said subdivision by the State. So here again, there is a discrepancy. The owners who bought this land are owners in common with the State. The staff in conferring with the County Attorney on this matter learned that the ownership is now supreme after so many years. The Commission should have stopped the sales of the land. Since the subdivision is now recognized, the question would be moot to bring up this matter at the present time.

Mr. Santos suggested that more time be given prior to disposition so that the members will have more time to read over the Court's decision and familiarize themselves on the whole case.

The staff recommended immediate action on the case since it has been held up for so long. The staff disagrees on the decision of the Court in this case but recommended that the application be approved on the basis of the Court's decision and that it be forwarded to the Land Use Commission for them to take up on the State level. For the Planning Commission to deny the application at this time would only end up in the same Court.

Mr. Hokama moved to recommend approval on the special permit to allow subdivision into 4 lots of a 1.96-acre parcel and forward to the Land Use Commission. The motion was seconded by Mr. Furuya.

The votes were recorded as follows: All ayes with the exception of Mr. Griffin, who abstained.

PUBLIC HEARING — The meeting was recessed at 1:35 p.m., to conduct a public hearing on the request of Kohala Sugar Company for a variance to allow the development and construction of an additional office space for the Kohala Credit Union within the Kohala Sugar Agricultural Office Building, situated in Hawi, North Kohala.

The meeting was reconvened at 1:40 p.m.

2. HOLUALOA 4TH, NORTH KONA
ROBERT M. YAMADA
TMK: 7-7-04

Final plan approval of the proposed "Kona Sea View Lots," Increment 2, being a portion of R. P. 7289, L. C. Aw. 7229, Holualoa 4th, North Kona, Hawaii, into 42 lots all over 7,500 square feet.

The representative appeared to request that the Commission consider a 16-foot County standard pavement instead of the 20-foot County standard pavement as required by the Committee at last month's meeting.

The staff reported that this subdivision involves four increments; however, the subdivider applied for preliminary approval for Increment I only. At that time, the ordinance required a 16-foot pavement. Subsequently, the ordinance has been amended to require 20-foot pavement. The consensus of the members was that since the entire tract was not granted preliminary approval, the subdivider should be required to construct roadways to the 20-foot standards.

The representative also stated that this entire tract of land has been sold under an agreement of sale and that the entire layout of the road construction has been based on a 16-foot pavement which would impose a hardship on the subdivider who has quoted construction cost on the 16-foot pavement but who would be required to construct to 20-foot pavement should the Commission require this.

However, since the whole tract of land was not approved for preliminary approval, it was the consensus of the members that the subdivider should not have taken it upon himself to assume that the entire tract would be required the 16-foot pavement.

The staff reported that the basis on which the staff recommended a 20-foot pavement is because the first increment only received preliminary approval and the second, third, and fourth increments did not come before the Commission for preliminary approval; therefore, the second increment is now before the Commission. The standards now in effect by the ordinance should be imposed on the remaining increments. The record showed that the applicant filed for the first increment and said that there will be other increments. The subdivision filing fee was filed only for the first increment. A long time ago (5½ years ago) when the subdivision first came before the Commission, they applied for the entire tract of land and subsequently it became null and void. The subdivider again came before the Commission for reapplication at which time he applied only for the first increment.

PUBLIC HEARING — The meeting was recessed at 1:47 p.m., to conduct a public hearing on the request of Jack Nakayashi for a variance to allow the development and construction of a 24-unit apartment complex in an area containing 64,221 square feet, makai of the Keauhou Beach Road, situated in Holualoa 2nd, North Kona.

The meeting was reconvened at 1:50 p.m.

SUBDIVISION CONTINUED
OF ROBERT H. YAMADA — It was moved by Mr. Santos, seconded by Mr. Nakama, and carried that the Subdivision Committee's recommendation be adopted to require the subdivider to construct the roadways in increment 2 according to the ordinance standards which would be a 20-foot pavement.

The meeting was recessed at 1:55 p.m.

PUBLIC HEARING — The meeting was reconvened at 2:03 p.m., and recessed to conduct the following public hearings:

1. Request of Herbert K. Slate for a variance to allow the development and construction of a 35-unit condominium hotel-apartment building on a lot containing 19,400 square feet makai of Alii Drive, situated in Puapuaa 2nd, North Kona.

2. Request of Haru Mitsumoto for a variance to allow the development and construction of an ice plant storage shed on a lot containing 2.96 acres on the mauka side of Kuakini Highway-Holualoa Road junction, situated in Hienaloli 1st, North Kona.

The meeting was reconvened at 2:23 p.m.

LAND USE COMMISSION
REZONING REQUEST
HONOKAA SUGAR CO. — The Land Use Commission requested comments and recommendations on the application by Honokaa Sugar Company for amendment of the Land Use District Boundaries from Agricultural to Urban District on a portion of TMK 4-5-10-21 (approximately 8 acres) and TMK 4-5-01-3 & 10 (approximately 1½ acres).

The 8-acre parcel is located on the mauka side of Camp 8 subdivision in Honokaa town and is adjacent to the Catholic Church property and across from the Honokaa Hospital. The parcel in question is close to the present urban boundary and the applicant is contemplating possible subdivision for residential purposes. The existing subdivision, church, and hospital, although an integral part of Honokaa town, are in an Agricultural rather than Urban District and should be included within an Urban District, according to the applicant.

The 14-acre parcel is zoned for industrial use by the County zoning ordinance. When the State Land Use regulations came into effect, this portion was deleted from the Urban District. In this instance, because the County has adopted the General Plan of the area and the zoning of Honokaa town has already been established six years ago, the Commission should recognize the County zone boundaries by endorsing this application in order to enable the applicant to proceed with its plans for a residential subdivision.

In conjunction with the foregoing problem where the County ordinance has established zoning for a higher use than agriculture, the Commission should initiate change of zone boundaries with the State Land Use Commission.

The staff recommended approval of the applicant's request on the basis of the following findings:

1. The Commission finds the present Agricultural designation unreasonable for the hospital area, Camp 8 Subdivision, and the Catholic Church property as the said areas are presently urbanized.

2. If the boundary change is granted for the above areas, the approximate 8-acre parcel will be contiguous to an Urban District. This parcel at present is in gulch and forest land which has no agricultural potential and is presently zoned as Residential Zone A which allows residential use on minimum lots of 15,000 square feet of land.

3. The approximate 14-acre parcel was created as a remnant cane land between the old Government Road to Honokaa town and the new highway. At both ends of the parcel are oil storage yards for two oil companies. The present zoning of the parcel is Industrial Use; however, the Honokaa Sugar Company plans to request for rezoning of the central portion of the parcel to residential in the event that the State Land Use Commission grants approval of this request.

4. The conditions and trends of development have so changed that the proposed classification is inevitable as the present classification is unreasonable in the sense that the Urban District boundaries only designates the area within Honokaa town which are developed and gives no room for urban expansion.

5. Both of the parcels are adaptable for residential use as they are contiguous to residential developments and command good location as far as proximity to the urban center and aesthetics (choice view lots) are concerned.

Mr. Santos moved that the recommendation of the Committee be adopted for amendment of the Land Use District Boundaries from Agricultural to Urban Districts on the two parcels and inclusion of the hospital site, Camp 8 Subdivision, and the Catholic Church property. The motion was seconded by Mr. Valera and unanimously carried.

George S. Moriguchi
xxxxxxxxxxxxxxxx

August 11, 1965

Mr. Kazuhisa Abe
Attorney-at-law
Professional Building
163 Kalakaua Street
Hilo, Hawaii

Dear Mr. Abe:

We appreciate your thoughtfulness in sending us a copy of the decision and judgment on C. A. No. 1059, Third Circuit Court. Apparently, this will involve the Land Use Commission in its administration of the State Land Use Laws.

Thank you.

Very truly yours,

GEORGE S. MORIGUCHI
Executive Officer

cc: Chairman Thompson
Legal Counsel, AG's Office

1658

PHONES: { OFFICE 3418
RESIDENCE 3818

KAZUHISA ABE
ATTORNEY-AT-LAW
PROFESSIONAL BUILDING
163 KALAKAUA STREET - HILO, HAWAII

August 3, 1965

Mr. George Moriguchi,
Executive Officer
Land Use Commission
State of Hawaii
Honolulu, Hawaii

Dear Mr. Moriguchi:

For your information, I am herewith enclosing a certified copy of the decision and also a judgment of the Third Circuit Court.

Yours very truly,

Kazuhisa Abe

KA:eh

Enclosures

Dated at Hilo, Hawaii, this 20th day of December, 1965.

KAZUHISA ABE
Attorney for Appellant

Kazuhisa Abe

PROFESSIONAL BLDG.
163 Kalakaua Street
Hilo, Hawaii

ORDER FOR CERTIFICATION AND
TRANSMISSION OF RECORD

RECEIVED
DEC 27 1965 3:30 p.m.
State of Hawaii
LAND USE COMMISSION

STATE OF HAWAII:

TO: LAND USE COMMISSION
STATE OF HAWAII

Pursuant to Rule 72(d)(2) of the Hawaii Rules of Civil Procedure, you are hereby ordered to certify and transmit to this Court, within fifteen (15) days of the date of this Order, or within such further time as may be allowed by the Court, the foregoing record on Appeal.

Dated at Hilo, Hawaii, this 21st day of December, 1965.

TERRY KAIDE
Clerk, Circuit Court, Third Circuit
State of Hawaii

THIRD CIRCUIT COURT
SEAL
STATE OF HAWAII

I do 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 DEC 2 1 1965

Terry Kaide
Clerk, Third Circuit Court, State of Hawaii

File

Tamura, James S.P.

Zoning Pet. A64-73

- L.U.C. temp. zoning
- Hilo pop. declined from 25,966 in '60 to 25,370 in '64.
- Present typical urban density
- Nearly 9000 acres in Urban – Hilo
- Per cap. costs of govt high in Hilo
- Other undeveloped lands not in urban better protected and more easily serviced

★ No protests during hearings

~~Roads – Util~~

Agricultural use now underway

~~Coffee, macadamia nut~~, citrus

~~Tree ferns, anthuriums~~

County Zoning?

Fire Station – Kaumalani Rice St.

~~Rainfall – ± 130" annually~~

Tamura checked property covenants on Sec 61 Transfer Doc. May 19, 1962

★ ~~Basis of~~ Petitioner's request

~~"Prior commitment~~

"No leases according to L.U. laws + reg.

~~County bases for denial~~

Lots platted + developed LSB

3 units/ac gross

600 ac.
1800 units × 4 = 7200

2400 ac
- 600 " (ind) 0.75 Ac/unit = 4 persons/0.75 ac
1800 Ac

3 | 1800
600 Ac

600/0.75 × 4 = 3200/3
9600

Tamura, Jones Chronology

11-20-58 State sold lot to P. W. Pereira

1 - 62 Tamura et al start clearing

5-14-62 Lot transferred to Tamura

~~1-62~~

3-13-64 Land Patent granted Tamura

5-18-64 County held Public Hearing

6-15-64 County denies special permit

7-30-65 Judge Felix's ~~judgement~~ decision rendered

8-2-65 " " judgement "

10-22-65 Hawaii County Planning Comm. recommended approval to L.U.C.

11-5-65 L.U.C. received data from Hawaii County

12-17-65 L.U.C. denied petition

Sen. Abe Hits Land Board Vote

12-18-65 Advertiser

Senate President Kazuhisa Abe yesterday accused the State Land Use Commission of not following the intent of the Legislature in interpreting the State Land Use Law.

When the commission acted unfavorable on the request of his client, the Big Island attorney threatened the commission with court action and stalked from the chambers.

Democrat Abe represented James J. Tamura in a petition for a special permit to subdivide 1.96 acres of land in South Hilo.

The land is presently zoned agricultural.

December 21, 1965

Mr. Raymond Suefuji
Acting Director
Planning Commission
Hilo Armory
Hilo, Hawaii

Dear Mr. Suefuji:

At its meeting on December 17, 1965, the Land Use Commission voted to deny the grant of a special permit to Mr. James J. Tamura to subdivide into four lots a 1.96 acre parcel of land described as Lot 63, Panaewa House Lots, Waiakea, South Hilo, Tax Map Key 2-2-52: 8.

Enclosed for your information is a copy of the Commission's staff report which formed the basis for the Commission's action.

Very truly yours,

GEORGE S. MORIGUCHI
Executive Officer

cc: Chairman Thompson
Mr. James Tamura
Mr. Kazuhisa Abe

STATE OF HAWAII
LAND USE COMMISSION

Minutes of Public Hearing and Meeting

Land Use Commission Hearing Room
Honolulu, Hawaii

December 17, 1965
1:30 P.M.

Commissioners Present:	Myron B. Thompson, Chairman
	C. E. S. Burns
	Goro Inaba
	Leslie Wung
	Charles Ota
	Shiro Nishimura
	Robert Wenkam
	Jim P. Ferry
	Shelley Mark
Staff Present:	George S. Moriguchi, Executive Officer
	Roy Miyamoto, Legal Counsel
	Ah Sung Leong, Draftsman
	Dora Horikawa, Stenographer

JAMES J. TAMURA (SP65-19), SPECIAL PERMIT TO SUBDIVIDE 1.96 ACRES OF LAND INTO FOUR RESIDENTIAL LOTS, LOCATED IN THE PANAEWA HOUSELOT SUBDIVISION, WAIAKEA, SOUTH HILO, HAWAII, IDENTIFIED BY TAX MAP KEY 2-2-52: 8.

Mr. George Moriguchi, Executive Officer, State Land Use Commission, presented the staff report in which it was recommended that the petitioner's request for a special permit be denied on the basis of the evaluation conducted using the guidelines set up by the Rules and Regulations of the Land Use Commission, and because the proposed use was not unusual or reasonable (see report on file).

The following testimony was presented by Mr. Kazuhisa Abe, attorney for the petitioner:

"My name is Kazuhisa Abe, the attorney for James J. Tamura. I'm sure that all of you here know what the intent of the Legislature was when it enacted Act 187, Session Laws 1961, especially Section V. Section V reads as follows: 'These temporary districts shall be determined so far as practicable and reasonable to maintain existing uses.' Prior to the enactment of 1965, the Territory of Hawaii had determined these lots in the Panaewa Subdivision to be residential urban lots. Under that law, it is our contention that these lots in the Panaewa Subdivision should have been classified urban. But the Land Use Commission did not see fit to do so. They went ahead and, though the patent, the condition of sales agreement, and everywhere it is indicated that these lots in the Panaewa Subdivision are sold for residential purposes only, it went ahead and classified these lots in the Agricultural District, which is contrary to Section V of the Act 187. I'm sure that in the County of Hawaii, agricultural lots had to be 3-acre lots. None

of these lots are 3 acres. It has been reported by the staff members that these lots are useful. What can these lots support? Except probably anthurium culture and, gentlemen, you know that anthurium is not grown because of the soil or the soil condition. It is because of what is put on the land that exists. How can you gentlemen say that these are prime agricultural land? Your staff members talk about scatteration. This is part of the City of Hilo. It's within the city boundaries and it is unreasonable to say that even at the present time, if a person wants to raise anthuriums, coffee, macadamia nuts on these lots, an application has to be made to the Board of Land and Natural Resources for a permit to use these particular lots for agricultural purposes. In the light of these circumstances, can you say that these lots were intended for residential purposes as indicated in the conditions of sales agreement and the land patent? I for one cannot see permitting residences to be built on these lots, permitting subdivision of these two lots into residential lots, in any way, is contrary to the Land Use Law, State of Hawaii! It is unfortunate that cases like this brings about the clamor for repeal of the Land Use Law. I say gentlemen, the Land Use Commission did not follow the intent of the Legislature when they classified these lands into agricultural lots--zone, because I say from the very first instance these lots were to be considered as residential lots. Now, I believe if the Land Use Commission, contrary to the decision of the Judge of the Third Circuit Court, denies this request, the State of Hawaii as successor to the Territory of Hawaii would be subject to probably a suit for breach of covenante if a suit could be brought against the government. Unfortunately, no such suit may be brought against the State of Hawaii without permission. Because if you will go over some of the records, you will note in the first instance, before these lots were offered to the public, the notice before the notice, the condition of sales agreement, distinctly said that subdivision of these lots would be permitted. That is stated in black and white. Now, gentlemen, if you are a prospective bidder, would you tend to bid higher where you had a right to subdivide these lots, where the lots had been advertised for residential purposes only? I'm sure a person would bid more than he would bid otherwise because of the right to subdivide. You, an arm of the government, the same government where the Land Department has stated that these are residential lots, the land patent distinctly said these lots are for residences only, and you come along at a later date, after the patents are issued, the sales agreement executed, and say that these lots even sold for residential purposes only are no longer residential lots but agricultural lots, which, as I have indicated, is contrary to Section V of the Land Use Act, Act 187 of the Session Laws of 1961. In all decency, in fair play, can you say that these lots should have been classified as agricultural lots? These are not prime agricultural lots. Coffee was planted on 5-10 acre lots--it was a failure. These lots are not agricultural lots. These are what we call aa lots. Only thing that can be grown so far to date is macadamia nuts, probably papaia, but papaia because of the climatic condition, the high elevation, would not be successful because Mr. Matsumoto, within a distance of one mile, planted papaia. He has given up papaia. Some of you from Hawaii know that. How can you say that these lots are prime agricultural lots? Is is for you to say that because of the construction of one of the streets that serve this lot is of cinder construction that subdividing of this lot into four lots would bring about faster deterioration of the cinder road? May I remind you, if this lot is subdivided, only one of the lots would be served by this so-called cinder road. I respectfully request, in fairness and to uphold the Territory of Hawaii when it sold these lots as residential purposes only, it had already zoned this area for residential purposes, and to quote Section V again of Act 187, Session Laws of 1961, I feel that the Land Use Commission was duty bound to classify this particular

subdivision, the Panaewa Lot Subdivision into residential or urban district, for the reason that the government, the Territory of Hawaii, prior to the enactment of the Land Use Act had already classified these lots in the said subdivision as residential lots. If there are any questions, I would be very happy to answer them."

Thompson: Senator, what was the actual use of the land in 1958?

Abe: 1958? This particular lot? There was no use because the original purchaser from the then Territory of Hawaii had not built a home. But one of the conditions or covenant of the agreement was that a residence could be built on the premises within 5 years. And subsequent thereto, when Mr. Tamura purchased this lot, after entering into an agreement with the three other parties, he went ahead and fulfilled this covenant and the patent was issued to Mr. Tamura. Immediately after the issuing of the patent, he applied for the right to subdivide this lot into four parcels. And as reported by the staff, prior to the purchasing of this lot by Mr. Tamura, Mr. Tamura did not wish to buy lot containing 1.96, he wanted to buy approximately half-an-acre. But because of the reasonableness of 1.96 acres, he went ahead, got three of his friends to agree to purchase one-half acre apiece. Of course, the land patent had to be taken under one name, Mr. Tamura, as testified in court. There are four persons. They were going to draw lots to see which person got which lot, but inasmuch as Mr. Tamura was going ahead to build a house, he was given the first choice and he selected the corner where his home is. And the three other parties drew lots to determine who would get what lot. There's no intent on the part of these parties to speculate. They wanted these lots for house lots. These parties were in the lower than average income group. They were finding means of buying lots as cheap as possible.

Contrary to the report given as to number of residences built prior to 1963, I would like to point out to this Commission that after 1963 tremendous amount of residences had been built. For your information, I would ask you to check that the building permits which have been issued in 63, 64, and 65. 63 and 64 were record years. Building permits ran over 10 million dollars--first time in the history of the County of Hawaii. I, for one, wonder where people get all the money to build the residences that are coming up. For example, I just completed a home in the Kaumana Terrace Subdivision, which subdivision was opened in 1959. Up to 1962-1963 there were very few homes. But at the present time, out of the 141 lots sold, there are 80 lot residences and many of these residences are built on two lots, and I would say that more than 80% of the lots have been used for residences already. You could go to Kaumana Gardens, some of the subdivisions in Waiakea where you see many residences coming up. Therefore, I feel that the recommendation of the staff, that just because there are 3,000 lots, only 1,000 something have been used up to 1963, has any merit in this case because after 1963 there was considerable construction.

Thompson: Senator, how large was this subdivision when it was sold?

Abe: Panaewa? I'm not sure. It's a territorial subdivision. Some of the lots went from 1.96. The largest lot I think was 2.73 or something of that nature.

Burns: About how many of the lots are now occupied? (Mr. Moriguchi pointed out the area on the map.)

Nishimura: How many miles from the urban?

Moriguchi: About 4½ miles from the airport.

Nishimura: No, from the urban.....

Moriguchi: That's a distance of about ½ mile.

Nishimura: One question I would like to ask the Senator here. You have stated that the intent of the Land and Natural Resources was that they may be able to subdivide into 10,000 square foot lots, subject to the approval of the Hawaii Planning Commission. But under the recommendation of the Hawaii Planning Commission, they have denied this petition.

Abe: Yes, because their feeling is that because of the fact that this area has been zoned or classified in the Agricultural District. My contention is that in the first place this area should not have been zoned in agriculture because the government had already zoned this for residential purposes. The land patent, the condition of sales agreement, all said that these lots in this subdivision would be sold strictly for residential purposes. And as I indicated, even at this present time, if a person wants to use a lot in this subdivision for agricultural purposes, he has to go to the Board of Land and Natural Resources for permit to use it for agricultural purposes. I'm sure that Mr. Ferry can verify that. That's a fact.

Nishimura: That has been a past law. It doesn't apply today.

Abe: It does apply--oh yes. Because the condition of the patent is there. They have not denied but you have to apply.

Ferry: Just a matter of enforcement.

Wenkam: But it is a minimum requirement, not a maximum requirement, and where there seems to be a county or state law or regulation prevailing, that other requirements enter into it that override this. I'm curious as to why you speak of the County's ruling only in terms of technicalities when the County General Plan itself calls for development of the area as a residential-agricultural use involving small operations such as poultry farm or truck gardening with minimum size lots of one acre. Is it true that the County General Plan calls for one-acre size lots in this area?

Abe: Yes, I believe so, but that was brought about because of your placing that area in agriculture.

Wenkam: Well, I think the County General Plan was developed independent of our boundary.

Abe: Right, but I for one cannot see why it is not in the urban area. As you can see, it's a continuation of the urban area and within the city limits of Hilo.

Wenkam: This raises up the other point though. The fact that it is not being utilized for prime agricultural purposes does not seem to me automatically therefor that it must be urban. In this particular circumstance, I am curious as to the desires of the other property owners in the area. This is a very low density residential use here.

Abe: All right, There's a petition being circulated. Everyone of the lot owners except five has signed it.

Burns: Petitioning for urbanization?

Abe: Yes.

Wenkam: This raises a very important point, then. My interpretation of Act 187, Section V, is that the uses that were intended are the non-conforming uses existing at the time on the particular land. No reference is made to prior commitments. It's the non-conforming use that exist at the time, at the time we zoned the land.

Abe: No, if this area is zoned for residential purposes only, what does residential purpose mean? Urban area.

Wenkam: It's a particular type of use that is existing at the time.

Abe: Isn't the urban area for residential purposes only? It's not agricultural.

Wenkam: Admitted, there are other uses....

Abe: What uses? Because the then Territory said you must use these premises only for residential purposes.

Wenkam: Bur there are low-density residential purposes, maybe such as in our rural district, such as occur in our agricultural district. Does this mean then that--the implications of this would imply that people who bought the Hawaiian Paradise Park are deserving of urban use too.

Abe: At that time, prior to that time, such as these temporary districts shall be determined so far as practicable and reasonable to maintain existing uses.

Thompson: This is why I raised the question, Senator, what the existing use was at that time.

Abe: Not this property at that time, but its use was restricted to residential purposes.

Ferry: I don't have the legal background. However, the intent of the Territory in drafting the conditions of sale in 1958 and, again I'm only working on the assumption as you are, it simply means that the residence requirements imposed on the sale of these lots was to preclude any commercial activity taking place, and not necessarily exclude agricultural endeavor. If you review the issuance of patents and previous sales made by the Territory, as well as the State, you will note that much reference is given to conversion of property to commercial use when it is sold for residential purposes. This is why you would have, under your interpretation, a restrictive use for residents.

Abe: This is what the word says: "Shall be used for residential purposes only from date of sale for a period of 10 years next following the issuance of the land patent or deed."

Ferry: Not to the exclusion of agricultural uses. But to the exclusion of commercial uses.

Abe: It doesn't say agricultural. It doesn't even provide in there saying that agricultural uses may be permitted.

Wung: In other words all those people are semi.....

Abe: Semi------That's right, they might be violating the law--not the law but the covenant. They might be subject to--------

Ferry: It's a matter of interpretation as well as enforcement.

Abe: We want urbanization. Even a rural district. That's all right. We have no objection. What I'm trying to say is it is not a prime agricultural property. The intent of the Legislature was to reserve prime agricultural land for agricultural uses. We didn't want, for example, some part of good sugar land to be urbanized. That was the original intent.

Wenkam: Mr. Abe, there is another aspect too; that is to prevent scatterization of urban use area.

Abe: That was never.....

Wenkam: It's in the preamble to 187, to hold the urban use areas into certain areas to provide orderly and proper growth of urban facilities. And this is, in a sense, scatterization.

Abe: Let me argue on that point. The fact that you permit one lot to be divided into half-acre lots would not bring about scatterization, because all the utilities are in. Like it or not, whether the roads serve one house, ten houses, the streets are going to be paved. This is wrong? We have been appropriating monies to resurface these roads session after session because, I don't blame Mr. Ferry. These lots should have been served with paved streets before it was offered to the public for sale. We are in a way penalizing the taxpayers. The lot purchasers at that time should have paid for the improvement to the street. The fact that some of our department heads failed to see this

point, went ahead and subdivided lots, sold the lots without getting back the improvement cost, does not take away an obligation, responsibility on the part of your government to go ahead and serve these people in this subdivision with paved streets. Lama Street which is not paved, I believe, would be paved in the next five years. There's no danger of scatteration here. All the utilities and schools are there.

Thompson: Senator Abe, you mentioned that you might be interested, or the people in the area might be interested in a rural designation. Would you consider this a Rural District?

Abe: I for one feel it should be urban. It's within the city limits of Hilo. But I'm sure the people there would be satisfied with a rural classification.

Thompson: You feel that the use of the land is more nearly rural than urban?

Wung: Mr. Chairman, maybe I can answer that. I am very well aware of this area. In fact when we drew the maps, Mr. Ferry talked me from putting it in the rural but I think if anything is rural, this is it.

Ferry: I'll reiterate my position why. We're talking about this immediate vicinity. I presume we're going to confine our discussion to this. You must agree as to what is best for the County because whatever is good for the County reflects on the State as a whole. If these lots were submitted for subdivision, you would have an endless stream of deadend streets, going nowhere, because that's the only conceivable way it could be developed under its present state of ownership. And that's why I objected to the rural zoning.

Abe: The Planning Commission of the County of Hawaii has always indicated where we went ahead and subdivided 50 acres, 40 acres or the like, to bring out streets to the next property. When a person comes to subdivide this, the Planning Commission can insist, for example, that the street be put here. It's up to the Planning and Traffic Commission or the Planning Commission of the County of Hawaii to get an orderly subdivision in this area. I have represented subdividers, I have been engaged in subdivision, and the Planning Commission of Hawaii has always insisted that if we are subdividing this area, if we put our streets here--of course we don't want to go through the whole lot--but they have insisted that we put the street right to this boundary so in case the owners of the next lot want to subdivide they just connect and there will be a straight subdivision. And therefore if that is the thing that the County wants, they can do it by insisting that when they come for subdivision plans, subject to their approval, owner of say lot 34 comes in, subdivides his lot into half-acre lots, 2.75 acre lot into five lots, they can provide to have streets. And that will do away with these flag lots, the situation you have in Waikiki.

Ferry: Now, if your argument were to hold water there, then the County should make a strong pitch as to this land of rural nature. But they say it is agricultural, just as we believe it is.

Abe: They're saying it's agricultural because you have classified it as agricultural. They say they can't do anything contrary to your wishes.

Thompson: Senator Abe, you're quite correct. You're here in terms of this permit and although we've digressed a bit.....

Nishimura: Mr. Chairman, if a request of this nature is granted, then it would be a precedent, right?

Thompson: Right.

Wenkam: I feel these arguments are very valid with respect to a rural or urban zoning in the area, but I disagree completely how they apply to a special permit for one lot. Contrary to the intent of the law itself, to grant one lot in the middle of an agricultural area a high density urban use--the proper procedure would seem to me that the consideration be given to the zoning in that area.

Thompson: For our consideration today, let us confine it to the request of this special permit.

Wenkam: That's what I'm arguing.

Abe: The reason I'm here to represent Mr. Tamura they're in a pickle. If the three other persons can't build a house, I don't know how he's going to pay the three others for the money they paid.

Thompson: Are there any other questions?

Wenkam: You mentioned that the majority of the owners have signed the petition for change of boundary.

Abe: I think you'll be receiving one soon.

Moriguchi: I have discussed this with Mr. Allison, who represents the group there. We have 56 signatures and will be in with the money, if it is not already in, for the petition for boundary change for the entire area.

Nishimura: How many lots are these?

Moriguchi: 56 lots--just about the entire area. They came in and asked initially for urban or even rural.

Wenkam: Would it be possible to defer action on this special permit, pending our consideration of the petition?

Abe: I feel that in fairness to these persons, they've been hanging on a rope since 1963. Something should be done because as I said they had never intended to speculate and, as Mr. Tamura said, because of this agreement he had he could not borrow money from financial institution. He had to borrow from his family and friends and still now

he cannot get a loan from the financial institution. The four parcels of land to be subdivided don't belong to him.

Thompson: So you're pleading for a decision today?

Abe: Yes.

Thompson: Is there any other discussion? If not, the Chair will entertain a motion.

Ota: I have a question to ask before we take action on this. Under the Hawaii County Subdivision Ordinance, is there a minimum frontage per lot?

Moriguchi: Yes, I believe the minimum lot width is 60 feet, depending on what the area is zoned for.

Inaba: What is the frontage on this lot?

Moriguchi: 260 feet on Lama Street and 219 feet on Kalo Street.

Ferry: Mr. Chairman, I so move that we accept staff's recommendation and deny this permit.

Nishimura: I second the motion.

Moriguchi:

Commissioner Wung.	Commissioner Wung: No.
Commissioner Inaba.	Commissioner Inaba: No.
Commissioner Ota.	Commissioner Ota: No.
Commissioner Wenkam.	Commissioner Wenkam: Aye.
Commissioner Burns.	Commissioner Burns: Aye
Commissioner Nishimura.	Commissioner Nishimura: Aye
Commissioner Mark.	Commissioner Mark: Aye
Commissioner Ferry.	Commissioner Ferry: Aye
Chairman Thompson	Chairman Thompson: Aye

Six ayes and three noes. Motion is carried.

Abe: There will be another court order.

STATE OF HAWAII
LAND USE COMMISSION

LUC HEARING ROOM
HONOLULU, HAWAII

1:30 P.M.
December 17, 1965

STAFF REPORT

Hawaii SP65-19 - JAMES J. TAMURA

Background

A request for a special permit initiated by James J. Tamura has been referred to the Land Use Commission by the Hawaii County Planning Commission. The petition involves a request to subdivide 1.96 acres of land into four residential lots located in the Panaewa Houselot Subdivision, Waiakea, South Hilo, Hawaii. The existing parcel is located off Lama Street at the corner of Kalo Street, and is identified by Tax Map Key 2-2-52: 8.

A brief chronological history of the parcel involved is as follows:

November 20, 1958 - The Territory of Hawaii sold the parcel by public auction to P. W. Pereira.

May 14, 1962 - Transfer document issued to James Tamura for subject parcel.

February 17, 1964 - Construction of residence completed by James Tamura.

March 13, 1964 - Land patent granted to James Tamura by Department of Land and Natural Resources.

May 18, 1964 - A public hearing was held by the Hawaii County Planning Commission on a special permit request by James Tamura involving the subdivision of the subject parcel into four residential lots.

June 15, 1964 - The Hawaii County Planning Commission denied the special permit requested by James Tamura.

July 30, 1965 - Judge A. M. Felix, Third Circuit Court, State of Hawaii, rendered a favorable decision on the appeal of James Tamura, relating to the denial of the special permit by the Hawaii

County Planning Commission.

August 2, 1965 - Judge A. M. Felix rendered a judgment ordering the Hawaii County Planning Commission to recommend to the Land Use Commission the granting of a special permit to authorize James Tamura to subdivide the subject parcel.

October 22, 1965 - The Hawaii County Planning Commission voted to recommend approval of the special permit request by James Tamura on the basis of Judge Felix's judgment.

November 5, 1965 - The data and recommendation from the Hawaii County Planning Commission were received by the Land Use Commission.

The petitioners have submitted that they had investigated the permissibility of subdividing the subject parcel early in 1962 before purchasing the lot from the original owner. They also cite that the land patent specifically provides for subdivision of these lots into a minimum area of 10,000 square feet or whatever the Planning and Traffic Commission decides it should be according to the zoning. Specific paragraphs from the land patent were quoted as follows:

"That should the patentee, or any assignee of his, desire to subdivide said lot or any portion thereof, each subdivision shall conform with the minimums of specifications and standards established by the Hawaii Traffic and Planning Commission, excepting that said lot and each additional lot created as a result of said subdivision, shall contain an area of at least 10,000 square feet, or the minimum area required by said Planning Commission, whichever is the greater, and the owner of each lot as subdivided shall be required within the period of five years next following the date of such subdivision or re-subdivision to construct on each lot so created a single-family dwelling of new

materials or masonry, and containing a floor area of not less than 850 square feet, exclusive of garage and open lanai."

The following paragraph was also quoted from the land patent:

"That the land hereby conveyed shall be used for residence purposes only for a period of 10 years from the date of issuance of this land patent grant."

The petitioners also submit that they have entered into an agreement involving James Tamura, Mr. and Mrs. Sadao Oshiro, Mr. and Mrs. Richard Shiigi, and Mr. and Mrs. Tetsuo Nakada, whereby the subject parcel would be subdivided into four lots for each of the parties to the agreement. However, this agreement among the parties is not part of the transfer document or land patent grant for the parcel issued to James Tamura by the Department of Land and Natural Resources.

The petitioner has based his request for a special permit solely upon the data above. The Hawaii County Planning Commission, in initially denying the special permit, based their decision on their opinion that the public interest and general welfare would not be served, and that the request will not be in accord with the purpose and intent of the Land Use Law. They also reasoned as follows:

1. The land in question is presently zoned by the State Land Use Commission as an Agricultural District.
2. The subdivision of land in the Agricultural District for a residential lot of 21,220 square feet in size is not considered an unusual and reasonable use of agricultural lands as set forth under Section 98H-6 of Act 205, SLH 1963.
3. That the lot in question can be utilized for the uses permitted in the Agricultural District as indicated under Section 98H-2, SLH 1963.
4. The lot sizes in the general vicinity are predominantly in excess of the 1.5 acres and generally around 2.73 acres.
5. The applicant may request for amendment to district boundaries under

Section 98H-4 of Act 205, SLH 1963, in order that the parcel may be re-subdivided to conforming size.

Existing Land Uses and Conditions

The subject parcel contains a single residence built by James Tamura and is served by a cinder road (Lama Street) and a paved road (Kalo Street). The general land use of the area is rural or agricultural in nature as indicated by a residential or building density of approximately 2.7 acres per dwelling unit along Lama Street and along the south side of Makalika Street. The lots in the area are generally overgrown with wild growth although clearings occur around the residences. A coffee orchard, a lichee orchard, a macadamia nut orchard, and a few small gardens are found in the area, although the lands are predominantly overgrown by wild growth.

Electrical, telephone, and water services are available. However, Lama Street, which is one of the main access roads to the area, consists of cinder construction and in only fair condition. Average annual rainfall in the area approximates 130 inches.

Soils in the area of the subject lands are known as the Olaa or Ohia soil material consisting of young lava with a thin covering of volcanic ash occurring in very wet regions on the islands of Hawaii. More than half of the land surface is occupied by bare bedrock outcrop with the rest consisting of a thin covering of volcanic ash that extends into cracks and crevices in the rough, broken, underlying aa lava. Some parts of this unit are forested and others are pastured, while in a few places sugar cane was once grown by hand labor, but these have been abandoned. This land type is difficult to cultivate, and pastures are of very poor quality. However, some areas at lower elevations are being developed for macadamia nuts, coffee, and pastures.

The County plan for development of the area designates a residential-agricultural use involving small operations such as poultry, floriculture, or truck

gardening, with minimum lot sizes of one acre. However, the present zoning ordinance of the County would permit 7,500 square foot lots.

Analysis

The Land Use Commission may permit certain "unusual and reasonable" uses within Agricultural and Rural Districts, other than those for which the district is classified. On the basis of the guide lines established therefor, the consensus of the staff is as follows:

1. Such use will be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations in that scattered urban uses will result.
2. That the proposed use will adversely affect the surrounding property, in that the existing roads would be overtaxed and deteriorate by nature of its cinder construction.
3. That the proposed use would burden public agencies to provide adequate roads.
4. Unusual conditions, trends and needs have not arisen since the district boundaries and regulations were established.
5. The land upon which the proposed use is sought is suited for the uses permitted within the Agricultural District.
6. The proposed use will substantially alter and change the essential rural character of the land by introducing higher density residential use.
7. The proposed use will not make the highest and best use of the land involved for the public welfare.

In addition to the evaluation using the guidelines established by the Land Use Commission for special permits, it is noted that considerable acreage estimated at approximately 2,400 acres are vacant or not used for urban purposes within the Urban District boundary in the Hilo area. This acreage involves large tracts only

and do not involve the smaller tracts within the present Urban Districts which also contain areas that are vacant or not presently used for urban purposes.

Although the population of Hilo has not changed drastically from 1950 to 1963, it is prominently indicated that the population has declined. Recent trends also indicate a decline in population from a 1960 total of 25,966 to a 1964 total of 25,370.

Development of subdivided single-family residential lots in the Hilo area has been extremely low over many years, with only approximately 36 per cent of all lots platted for single-family use developed up to 1963. During the 17-year period from 1946 to 1963, 3,715* lots have been platted in the Hilo area (Tax Zone 2) with only 1,346 lots or approximately 36 per cent having been developed up to 1963, indicating that residential lands are available.

The petitioner's sole basis for requesting the special permit involves the covenants imposed by the State in selling the parcel. However, it should be noted that these covenants require conformance with the minimum specifications and standards established by the Hawaii Traffic and Planning Commission, and this would be presumed to be the standards and specifications applicable at the time a subdivision is initiated. The petitioner requested a special permit to subdivide in May, 1964, during which time the subject lands were under the Land Use Commission Agricultural District, with the Hawaii County standards and specifications for Agricultural Districts applicable, as set forth by Section 98H-5(b), Act 205, SLH 1963. Therefore, subdivision into 21,200 residential lots would not be permitted.

The petitioner presumes that the covenants and conditions applicable at the time of original purchase from the State would be applicable forever. Specifically, they submit that since the Land Use Law was not in effect in 1958 during

*Urban Development on the Island of Hawaii, 1946-1963
Land Study Bureau, University of Hawaii

the initial sale by the then Territory of Hawaii, and the Hawaii County Traffic and Planning Commission, at that time, permitted 7,500 square foot lots, they are now and forever endowed with the right to subdivide accordingly. However, many precedents involving changes of ordinances pertaining to rights to develop, lead the staff to disagree with the petitioner. For example, building ordinances for the City and County of Honolulu of several years ago would have permitted a land owner in certain districts to provide parking spaces for apartment units on the basis of one parking space per four apartment units. However, if he were to start development today, this same land owner would be required to provide parking spaces at a higher ratio (one space for each unit), although he had purchased the land during the period that permitted a lower ratio. The point to be noted is that the land owner is governed by the ordinances in effect at the time he proposes to perform a certain act and not by the ordinances that were in effect at the time he first purchased his lands.

Recommendation

On the basis of the evaluation conducted, which finds that the proposed use is not unusual or reasonable, using the guidelines set up by the Rules and Regulations of the Land Use Commission and on the basis of the further analysis indicated above, it is the staff's recommendation that the petitioner's request for a special permit be denied.

December 7, 1965

Mr. James J. Tamura
Panaewa House Lots
Waiakoa, South Hilo, Hawaii

Dear Mr. Tamura:

The Land Use Commission next meets at 1:30 p.m. in the hearing room of the Land Use Commission at 426 Queen Street, Honolulu, Hawaii on December 17, 1965.

At that time your application for a special permit will be reviewed.

Although there is no requirement for you to be present, should you wish to attend, please feel free to do so.

Very truly yours,

GEORGE S. MORIGUCHI
Executive Officer

cc: Chairman Thompson
Planning Comm., Hawaii

STATE OF HAWAII

Land Patent No. S-14,183

(Grant)

Issued On

SALE AT PUBLIC AUCTION ON TIME PAYMENTS
ON NOVEMBER 20, 1958

By THIS PATENT the State of Hawaii, in conformity with the laws of the State of Hawaii relating to public lands and pursuant to the approval by the Board of Land and Natural Resources on March 13, 1964,

makes known to all men that it does this day grant and confirm unto

JAMES JITSUO TAMURA,
whose wife is Jane Sueme Hayashi Tamura,

for the consideration of ONE THOUSAND FIVE HUNDRED THIRTY AND 00/100 DOLLARS ($1,530.00),

all of the land situate at PANAEWA, WAIAKEA, in the District of SOUTH HILO, Island of HAWAII, STATE OF HAWAII, bounded and described as follows:

(REVISED SEPTEMBER 1958)

LOT 63

PANAEWA HOUSE LOTS

Being portion of the Government (Crown) Land of Waiakea.

BEGINNING at the east corner of this lot, the north corner of Lot 66 of Panaewa House Lots, and on the southwest side of Government Road (50.00 feet wide), the coordinates of said point of beginning referred to Government Survey Triangulation Station "HALAI" being 18339.70 feet South and 13126.67 feet East, as shown on Government Survey Registered Map H.T.S. Plat 922, thence running by azimuths measured clockwise from True South:-

1. 71° 00' 318.84 feet along Lot 66 of Panaewa House Lots;

2. 161° 00' 269.14 feet along Lot 64 of Panaewa House Lots to a 1-inch pipe;

3. 251° 00' 268.84 feet along the south side of Government Road (50.00 feet wide);

Many instances where law or ordinance changed where owners permitted one use but restricted later.

Such as:

County Zoning changes

Waikiki Floor Area Ratio

Apt parking requirements

Bldg codes

others?

4. Thence along the south side of Government Road (50.00 feet wide), on a curve to the right having a radius of 50.00 feet, the chord azimuth and distance being: 296° 00' 70.71 feet;

5. 341° 00' 219.14 feet along the southwest side of Government Road (50.00 feet wide), to the point of beginning.

AREA 1.96 ACRES

RESERVING to the State of Hawaii, its successors and assigns, in perpetuity, all rights to ground but not to surface waters which are or may be appurtenant to the herein described land or the ownership thereof.

RESERVING ALSO to the State of Hawaii, its successors and assigns, in perpetuity, all minerals in, on or under the land and the right, on its own behalf or through persons authorized by it, to prospect for, mine and remove minerals and to occupy and use so much of the surface of the land as may be required for all purposes reasonably extending to the mining and removal of such minerals by any means whatsoever, conditioned upon the payment, prior to any exercise of such right, of compensation for destruction, damage or injury, caused by the exercise of such right to occupy and use said land, of or to permanent improvements placed upon the land.

"Minerals" within the meaning of such reservation shall mean any or all oil, gas, coal, phosphate, sodium, sulfur, iron, titanium, gold, silver, bauxite, bauxitic clay, diaspore, boehmite, laterite, gibbsite, alumina, all ores of aluminum and, without limitation thereon, all other mineral substances and ore deposits, whether solid, gaseous or liquid, in, on or under the land; provided, that "minerals" shall not include sand, rock, gravel, and other similar materials when used in road or building construction.

THIS PATENT is subject to the following conditions, as contained in Special Sale Agreement No. 4140, dated November 20, 1958:

(a) That should the Patentee, or any assignee of his, desire to subdivide said lot or any portion thereof, each subdivision shall conform with the minimum specifications and standards established by the Hawaii Traffic and Planning Commission, excepting that said lot and each additional lot created as a result of said subdivision shall contain an area of at least 10,000 square feet, or the minimum area required by said Planning Commission, whichever is the greater, and the owner of each lot as subdivided shall be required within a period of five (5) years next following the date of such subdivision or re-subdivision to construct on each lot so created a single-family dwelling of new materials or masonry and containing a floor area of not less than 850 square feet, exclusive of garage and open lanai.

(b) That no more than one dwelling shall be constructed on each subdivided lot; provided, however, that accessory buildings, so long as they do not comprise

dwelling units and so long as the same are erected in conformity with a plot plan and are of a character and design suitable to the area, will be permitted.

(c) That no structure shall be constructed or erected within twenty-five (25) feet from the roadway;

(d) That no quonset hut or dwelling of similar design or construction will be permitted.

(e) That the land hereby conveyed shall be used for residence purposes only for a period of ten (10) years from the date of issuance of this Land Patent Grant. In the event of violation of the foregoing provision, said land shall forthwith be forfeited and resume the status of government land and may be recovered by the State of Hawaii or its successors in an appropriate action or proceeding.

Implies

Not now prevented from res. use in Subd.

TO HAVE AND TO HOLD the above granted land unto the said

JAMES JITSUO TAMURA,

his heirs and assigns forever, subject, however, to the reservations and conditions herein set forth.

***IN WITNESS WHEREOF**, the State of Hawaii has caused the Seal of the Department of Land and Natural Resources to be hereunto affixed and this Patent to be duly executed by ~~its Director of Land and Natural Resources~~ the Chairman and Member of the Board of Land and Natural Resources and countersigned by a duly authorized member of the Board of Land and Natural Resources this* 24th *day of* April *A. D. 19*64

STATE OF HAWAII

By ~~Chairman and~~ Member
Board of Land and
Natural Resources

Countersigned as authorized by the Board of Land and Natural Resources

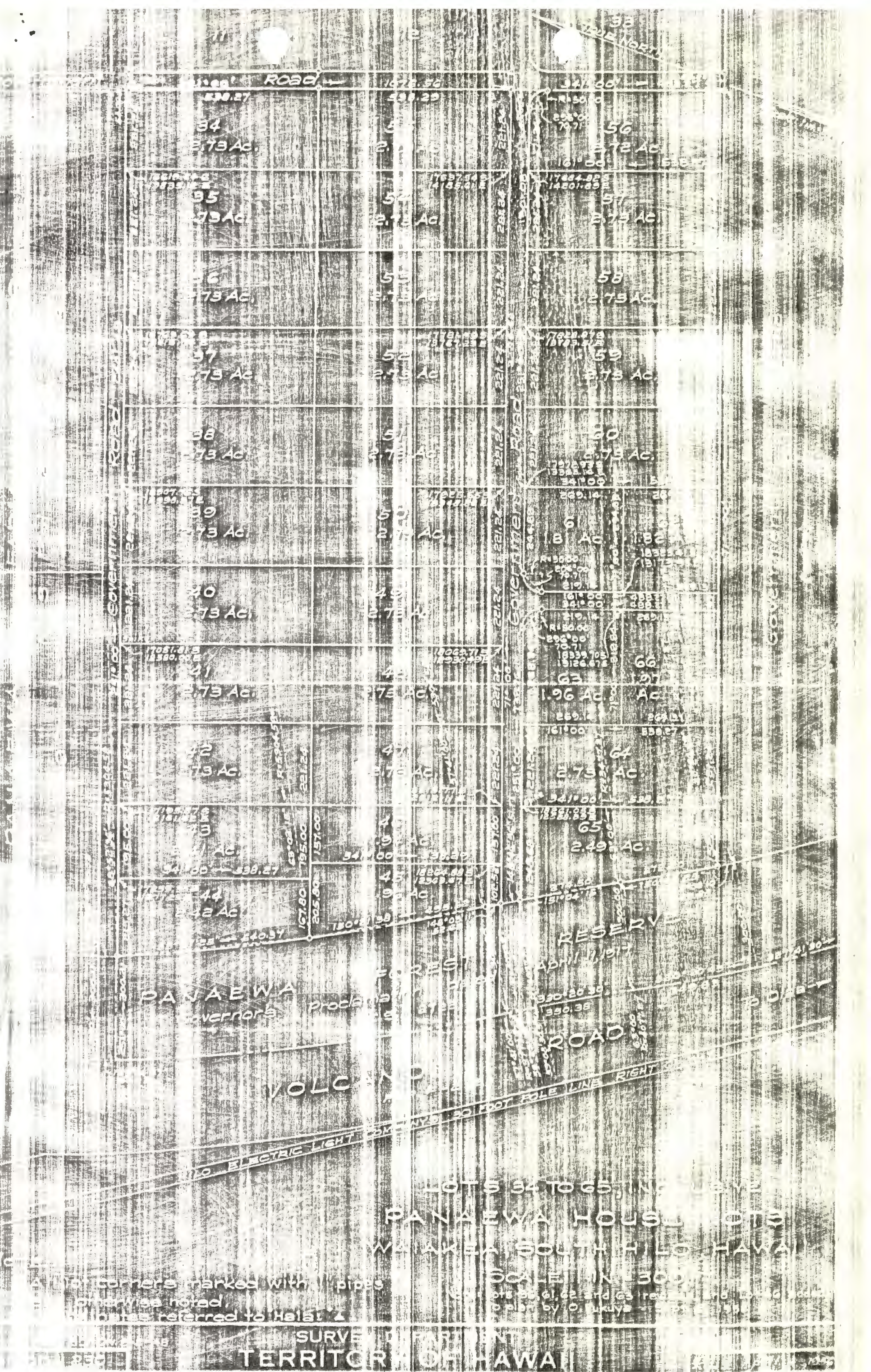
Member, Board of Land and Natural Resources.

Written by mh

Checked by

Approved as to form:

Deputy *Attorney General.*
Dated: 4-21-64



Road
34
2.73 Ac.
56
57
2.73 Ac.
58
2.73 Ac.
59
60
ROAD
61
63
1.96 Ac.
64
65
2.49 Ac.
66
40
41
42
44
RESERV
PANAEWA
ROAD
SURVEY
TERRITORY

Copy from Spec. Sale Agreement # 54140

File

RECEIVED

AUG 6 9 38 AM 1965

DEPT., OF LAND & NATURAL RESOURCES STATE OF HAWAII

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

CABLE ADDRESS:
ATTGEN

BERT T. KOBAYASHI
ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
HONOLULU

August 5, 1965

MEMORANDUM

To: Mr. Jim P. Ferry, Chairman, Board of Land and Natural Resources

From: Francis M. Izumi, Deputy Attorney General

Subject: Land Patent Grant No. S-14,183 issued to James Jitsuo Tamura, covering Lot 63, Panaewa House Lots

This is in reference to Land Patent No. S-14,183, dated April 24, 1964, issued to James Jitsuo Tamura, and covering Lot 63, Panaewa House Lots, at Panaewa, Waiakea, Hawaii, comprising 1.96 acres, the same being the property which was recently the subject of dispute in the Third Circuit Court relative to the subdivision thereof.

1958?

The property was originally sold at public auction on November [illegible], 1950 to Patrick Walter Pereira, aka Walter Patrick Pereira and Edith Rachel Borges Pereira, husband and wife, under Agreement of Sale No. 4140, and subsequently transferred to Tamura under transfer document approved May 14, 1962.

The Patent provides that the property is limited to residential use for a period of ten (10) years from the date of issuance of patent. (Or fifteen (15) years from the date of sale, whichever is sooner. Sec. 103A-59, R.L.H. 1955, as amended.)

The pertinent provision of the said Patent is as follows:

"(a) That should the Patentee, or any assignee of his, desire to subdivide said lot or any portion thereof, each subdivision shall conform with the minimum specifications and standards established by the Hawaii Traffic and Planning Commission, excepting that said lot and each additional lot created as a result of said subdivision shall contain an area of at least 10,000 square feet, or the minimum area required by said Planning Commission, whichever is the greater, and the owner of each lot as

> subdivided shall be required within a period of five (5) years next following the date of such subdivision or re-subdivision to construct on each lot so created a single-family dwelling of new materials or masonry and containing a floor area of not less than 850 square feet, exclusive of garage and open lanai."

It is also noted that the restriction against transfer of the property except with the written consent of the Board (and the Governor), as provided in the above-mentioned Agreement of Sale, is no longer applicable inasmuch as the patent has already been issued.

Accordingly, the only interest the State would have in connection with this matter is to see that the above-quoted provision of the patent is complied with, should the property hereafter be subdivided. I have so informed Jim Detor.

If there are any questions, let me know.

FRANCIS M. IZUMI
Deputy Attorney General

FMI:bys

Pages applicable to Tamura
1, 2, 5 + 6

LAND AUCTION

NOTICE OF SALE OF [illegible] GOVERNMENT LOTS AND CERTAIN REAL PROPERTY INTERESTS ON THE ISLAND OF HAWAII

PUBLIC NOTICE is hereby given that on Tuesday, November 18, 1958 at 9:00 o'clock A.M., and on Thursday, November 20, 1958 at 9:00 o'clock A.M., or as soon thereafter as the Commissioner of Public Lands or his representative may deem necessary, at the Office of the Subland Agent in the Hilo Land Office Building at 1660 Kamehameha Avenue, Hilo, County and Island of Hawaii, there will be sold at public auction to the highest bidders, pursuant to the provisions of Section 73 of the Hawaiian Organic Act and of the Revised Laws of Hawaii 1955, as amended, relating to public lands, and with the approval of the Land Board, certain public lands (lots and certain rights) on the Island of Hawaii, as hereinbelow set forth.

Items 1, 2 and 3 as detailed below will be sold on Tuesday, November 18, 1958. Item 4, together with any unsold lots or real property interests covered by Items 1, 2 and 3, will be sold on Thursday, November 20, 1958.

Said auction may be postponed or continued from time to time by public announcement by the Commissioner or his representative, at the time and place previously set, to such other time and place as then shall be announced.

The sale is subject to reservations, exceptions, restrictions, building and improvement requirements and conditions not specifically or in detail recited in this Notice, the details of which may be examined in Conditions of Sale Instrument,

together with maps and descriptions, and the forms of Special Sale Agreement and Deed or Patent which will be used. (subject to necessary modifications to conform to results of sale), in the Office of the Commissioner of Public Lands in Honolulu and at the Offices of the Subland Agents in Hilo, Hawaii; Wailuku, Maui; and Lihue, Kauai. All of the foregoing are incorporated by reference in this Notice of Sale. In case of conflict, the provisions contained in the forms of the Deed or Patent, Special Sale Agreement, Conditions of Sale Instrument and Notice of Sale shall control, in the order listed.

A. LOTS AND REAL PROPERTY INTERESTS TO BE SOLD; LOCATION; AREA; QUALITY; UPSET PRICE.

ITEM 1. HOUSE LOTS

Eighteen of the Lalamilo House Lots, Second Series, Waimea, South Kohala, Hawaii. See Government Survey Maps HTS Plat 416 and Carton 65 and Hawaii Tax Map Keys 6-6-04; 6-6-01; 6-5-01.

Lot No.	Area - Sq. Ft. (More or Less)	Upset Price
*24	43,560	$1106.00
*28	43,560	1034.00
*30	43,560	1023.00
*32	43,560	868.00
*34	43,560	861.00
*35	43,558	854.00
*37	43,560	843.00
42	33,474	1377.00
43	30,163	1414.00

* Lots subject to telephone line easement.

C. A. No. 1059

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

PLANNING AND TRAFFIC COMMISSION, County of Hawaii,

Appellee.

JUDGMENT

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

PLANNING AND TRAFFIC COMMISSION, County of Hawaii,

Appellee.

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED that the PLANNING COMMISSION [formerly Planning and Traffic Commission] of the County of Hawaii recommend to the Land Use Commission of the State of Hawaii the granting of a special permit to authorize JAMES J. TAMURA to subdivide Lot 63 of the Panaewa Subdivision, situated at Waiakea, District of South Hilo, County and State of Hawaii, as shown on Government Survey Maps HDS Plat 922 and Carton 230, into four lots as shown on subdivision map submitted with the application.

Dated at Hilo, Hawaii, this 2nd day of August, 1965.

A. M. Felix

JUDGE

THIRD CIRCUIT COURT SEAL STATE OF HAWAII

I do 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. AUG 2 1965

Clerk, Third Circuit Court, State of Hawaii

C. A. No. 1059

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA,

Appellant,

vs.

PLANNING AND TRAFFIC COMMISSION, County of Hawaii,

Appellee.

DECISION

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES J. TAMURA, Appellant, vs. PLANNING AND TRAFFIC COMMISSION, County of Hawaii, Appellee.	)

TMK = 2-2-52:8

DECISION

This case came up for hearing on appeal from a decision of the Planning and Traffic Commission of the County of Hawaii denying special permit pursuant to Section 98H-6, Revised Laws of Hawaii 1955.

From the evidence and testimony adduced at the hearing on June 18, 1965, it appears that the premises in question, Lot 63, situated at Panaewa, Waiakea, District of South Hilo, containing an area of 1.96 Acres, as shown on Government Survey Maps HDS Plat 922 and Carton 230 was advertised by a Notice of Sale of the Territorial Government in the Hilo Tribune Herald on September 19th, October 11th, November 1st and November 16th, 1958. Said notice indicated that the lots in the Panaewa Subdivision were restricted to "residence purposes only for ten years next following the issuance of Land Patent Grant or deed." The notice also stated "subdivision of lot permitted with certain lot size and building requirements".

The Conditions of Sale Instrument, Special Sales Agreement No. 4140 and Land Patent (Grant) No. S-14183, issued

in connection with the premises in question, provides that the lot "shall be used for residential purposes only from date of sale for a period of ten years next following the issuance of the Land Patent or deed. Subdivision requirement shall likewise continue for period of ten years next following such issuance."

It is also provided in the aforementioned instruments that each purchaser of the lot in said subdivision shall build five years from date of sale construct a single family dwelling of new materials or masonary on said lot, to contain a floor area of not less than 850 square feet, exclusive of garage and open lanai and also "that no purchaser shall be permitted to construct more than one dwelling on said lot, or if the same be subdivided, more than one dwelling on each lot created as a result of said subdivision."

It is further provided "should the purchaser, or any assignee of his, desire to subdivide said lot or any portion thereof, each subdivision shall conform with the minimum specifications and standards established by the Hawaii Traffic and Planning Commission, excepting that said lot and each additional lot created as a result of said subdivision shall contain an area of at least 10,000 square feet, or the minimum area required by said Planning Commission, whichever is the greater, and the owner of each lot as subdivided shall be required within a period of five years next following the date of such subdivision or resubdivision to construct on each lot so created a single family dwelling meeting the requirements above mentioned with respect to materials and minimum floor area."

The right under the Special Sales Agreement No. 4140 was assigned by Patrick Walter Pereira and Edith Rachel Borges

Pereira to James Jitsuo Tamura by transfer dated March 28, 1962 and approved by the Board of Land and Natural Resources of the State of Hawaii. Evidence shows that before the transfer was executed by the Pereiras, James Jitsuo Tamura, Tetsuo Nakada, Sadao Oshiro and Richard Katsuya Shiigi, through their agent, made contact with all the Government agencies to find out whether said Lot 63 could be subdivided into four separate lots and after being assured that said Lot 63 could be subdivided into four separate lots they agreed among themselves to purchase said Lot 63 in the name of James Jitsuo Tamura. Subsequent thereto, after a subdivision map had been prepared, the four parties on the 16th day of October, 1962 executed an agreement whereby each of them agreed to take a lot shown on said subdivision map.

After much difficulty in obtaining financing, James Jitsuo Tamura constructed a dwelling on said Lot 63 and was issued Land Patent Grant No. S-14183 on the 24th day of April, 1964. Within ten days after the receipt of said Land Patent on May 1st, 1964 James Jitsuo Tamura made application for special permit with the Planning and Traffic Commission of the County of Hawaii to subdivide said Lot 63 into four separate lots as had been agreed among themselves. After the assignment of the rights of Special Sales Agreement No. 4140 to the plaintiffs and after starting construction of a residence (i.e. prerequisite to obtaining the Land Patent Grant) but prior to issuance of said Land Patent Grant No. S-14183 on the 24th day of April, 1964, the Planning and Traffic Commission on January 10, 1964 adopted the Master Plan prepared by Belt, Collins and Associates changing the zoning of this property from residential to an agricultural district

providing for a minimum lot area of 1.96 acres per lot. While the plaintiff was complying with the terms and conditions of the Special Sales Agreement the Planning Commission by its action of changing the zoning to an agricultural district prevented the plaintiff from obtaining the uses of the land which he was permitted under the Special Sales Agreement No. 4140 but still making him liable for full compliance of all the conditions set forth in said Sales Agreement. Primarily because of this change of zoning to an agricultural district the Planning and Traffic Commission after hearing denied the application for a special permit on June 23rd, 1964.

The Notice of Public Sale and the Conditions of Sale Instrument gave notice to the prospective bidders of these lots in the subdivision of certain covenants and conditions. The successful bidders were expected and will be required to perform or meet these conditions. On the other hand the successful bidders were also informed of his right to subdivide his lot by meeting "the minimum specifications and standards established by the Hawaii Traffic and Planning Commission, excepting that said lot and each additional lot created as a result of said subdivision shall contain an area of at least 10,000 square feet, or the minimum area required by said Planning Commission, whichever is the greater."

It should be assumed that because of the covenants or conditions as to right of purchaser to subdivide, a purchaser may have been willing to pay the price he had bid at the public auction. The State definitely expects a purchaser of a lot to live up to the conditions and it should

be stated that a purchaser has the right to expect the State to live up to the covenant or condition contained in the Notice, Conditions of Sale Instrument, Agreement of Sale and Land Patent granting a purchaser the right to subdivide the lot purchased by him upon meeting certain conditions.

As stated above the Notice, Conditions of Sale Instrument, Agreement of Sale and Land Patent required said Lot 63 to "be used for residential purposes only from date of sale for a period of ten years next following the issuance of the Land Patent or deed. Subdivision requirement shall likewise continue for a period of ten years next following such issuance." In other words this lot was sold only to be used strictly for residential purposes for ten years.

It should be noted that the second sentence of Section 5, Act 187, Session Laws, 1961 [the original Land Use Law] reads, "These temporary districts shall be determined so far as practicable and reasonable to maintain existing uses ...". There is no doubt that by said sentence the Legislature in enacting Act 187 intended the Land Use Commission to place land which had been put into urban [residential] use prior to enactment of said Act to be continued in an urban district, and, accordingly, it would seem that the Land Use Commission in classifying the lots in the Panaewa Subdivision, should have classified said lots in an Urban District.

The Court finds that under the facts and the law the Planning and Traffic Commission of the County of Hawaii should have granted the special permit allowing or authorizing subdivision of Lot 63 into four lots.

LET JUDGMENT ENTER ACCORDINGLY.

Dated at Hilo, Hawaii, this 30th day of July, 1965.

THIRD CIRCUIT COURT SEAL STATE OF HAWAII

I do 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. JUL 30 1965

Clerk, Third Circuit Court, State of Hawaii

A. M. Felix
JUDGE

PLANNING AND TRAFFIC COMMISSION
County of Hawaii

June 23, 1964

Mr. James Tamura
88 Lama Street
Hilo, Hawaii

Dear MR. TAMURA:

The Planning and Traffic Commission at a duly advertised public hearing on May 18, 1964 in the Board of Supervisors Conference Room discussed your request for a Special Permit from Section 98H-5 of Act 205, Land Use Regulation of the State of Hawaii to allow the subdivision of Lot 63, Panaewa House Lots into 4 lots for home sites.

The Commission voted to deny the Special Permit as it was determined beyond a reasonable doubt that public interest and general welfare will not be served nor will the above request be in accord with the purpose and intent of the Land Use Law as set forth in Section 98H-5 thereof because of the following findings:

1. The land in question is presently zoned by the State Land Use Commission as Agricultural District;

2. The subdivision of a land in the Agricultural District for a residential lot 21,320 square feet in size is not considered unusual and reasonable use of agricultural land as set forth under Section 98-H-6 of Act 205;

3. The lot in question can be utilized for the uses permitted in the Agricultural District as indicated under Section 98 H-2;

4. The lot sizes in the general vicinity are predominantly in excess of 1.5 acres and generally around 2.73 acres;

5. The applicant may request for the amendment to district boundaries under Section 98 H-4 of Act 205 in order that the parcel may be resubdivided to conforming size.

A denial by the Commission of the desired use shall be appealable to the Circuit Court in which the land is situated and shall be made pursuant to the Hawaii Rules of Civil Procedure.

Please do not hesitate to call or write us should there be further questions on this matter.

Yours very truly,

PLANNING AND TRAFFIC COMMISSION

Edgar A. Hamasu
Director

PLANNING AND TRAFFIC COMMISSION
County of Hawaii
June 15, 196[illegible]

The Planning and Traffic Commission met in regular session at [illegible] p.m., in the conference room of the County Board of Supervisors, with Chairman Robert M. Yamada presiding.

PRESENT: Robert M. Yamada
Seiji Aoyagi
Marion Baker
Maxine Carlsmith
John T. Freitas
[illegible]
Walter M. [illegible]
Norman Holder
Herbert C. Ferreira
Rufus S. Spalding, Jr.
Edgar A. [illegible]

ABSENT: John Albanese
Kiyoshi Matsushita
Robert J. Santos
William Stearns

[illegible]
Clifford Victorino, Police Department
[illegible] Ota, Chairman, Zone Advisory Committee

Jack Bryan
Walt Southward
William [illegible], D. B. Dev. Co., Ltd.
Benjamin [illegible], " " " "
Masanori [illegible], [illegible] Inaba Subdivision
Yoshio Inaba, " " "

MINUTES — The minutes of the meeting held on May [illegible], 196[illegible], were approved as circulated on a motion of Mr. Spalding, second of Mrs. Baker, and carried.

TRAFFIC COMMITTEE REPORT — It was moved by Mr. Ferreira, seconded by Mrs. Carlsmith and carried that Item Nos. 1 to 9 inclusive of the Traffic Committee report be approved as reported for the unfinished business.

Mr. Ferreira moved to accept Item No. 10 of the Traffic Committee report. The motion was seconded by Mr. Holden, and carried.

ZONING COMMITTEE REPORT — On a motion of Mrs. Carlsmith and seconded by Mr. Spalding, the Commission voted to accept Item No. 1 of the Zoning Committee report.

It was moved by Mrs. Carlsmith, seconded by Mr. Spalding, and carried to defer Item Nos. 2 to 5 inclusive of the Zoning Committee report for next month's meeting.

shop in an abandoned commercial building, Hilo, South Kona.

The staff report recommends approval for the proposed use with additional conditions on the requirement of a diagonal parking instead of right angle parking and increasing the lot size to 7,500 square feet. - The requested use is to occupy a portion of an existing wooden structure originally used for commercial purposes. All the public utilities such as water, electricity, and telephone are available. The Master Plan of Kona prepared by Harland Bartholomew and Associates, proposes the area for medium density urban development. Several other commercial activities are existing in the immediate vicinity.

It was moved by Mr. Mulder, seconded by Mrs. Fukuda, and carried that the special permit be recommended for approval by the Land Use Commission, subject to the following conditions:

1. Diagonal parking shall be provided in place of the right angle parking as shown on the plot plan as submitted.

2. Minimum lot size for the purpose of lease, sale, or rent is 7,500 square feet.

6-15-64

LAND USE COMMISSION
SPECIAL PERMIT
JAMES TAMURA

The request of James Tamura was considered for a special permit to allow the subdivision of Lot 63, Panaewa House Lots, South Hilo.

The staff report recommends disapproval of the request as a special permit. There has to be an exceptional circumstance to be considered as a special privilege case. There was a question whether a private agreement would supersede the zoning law.

On a motion of Mr. Freitas and second of Mrs. Fukuda, the Commission voted to deny the special permit as it was determined beyond a reasonable doubt that public interest and general welfare will not be served nor will the request be in accord with the purpose and intent of the Land Use Law Section 98 H-6 of the following findings:

1. The land in question is presently zoned by the State Land Use Commission as Agricultural District;

2. The subdivision of a land in the Agricultural District for a residential lot 23,220 square feet in size is not considered unusual and reasonable use of agricultural land as set forth under Section 98 H-6 of Act 205;

3. The lot in question can be utilized for the uses permitted in the Agricultural District as indicated under Section 98 H-7;

4. The lot sizes in the general vicinity are predominantly in excess of 1.5 acres and generally around 2.72 acres;

5. The applicant may request for the amendment to district boundaries under Section 98 H-4 of Act 205 in order that the parcel may be resubdivided to conforming size.

(Mr. Ferreira refrained from voting.)

INTERIM ZONING
VARIANCE REQUEST
HAYASHI ENTERPRISE, INC.

After a duly held public hearing on the request of Kenichi Hayashi Enterprise, Inc., for a variance to allow the development an

PLANNING AND TRAFFIC COMMISSION
County of Hawaii
May 18, 1964

The Planning and Traffic Commission met in regular session at 1:47 p.m., in the Conference Room of the County Board of Supervisors, with Chairman Robert M. Yamada presiding.

PRESENT: Robert M. Yamada
Seiji Aoyagi
Marion Baker
Maxine Carlsmith
John T. Freitas
Nobuko Fukuda
Walter W. Kimura
Herman Mulder
Robert J. Santos
Rufus P. Spalding, Jr.
Edgar A. Hamasu
Raymond H. Suefuji

ABSENT: John Alconera
Miyoshi Matsushita
Herbert J. Perreira
William Stearns

Helene H. Hale
Guy Paul, Police Department

Ronald Lindsey
Mrs. Noboru Muneno
John Ushijima
Francis Brown
Charles L. Murray
Kaoru Sunada

MINUTES: The minutes of the meeting held on April 20, 1964, were approved as circulated on a motion of Mr. Spalding, second of Mr. Mulder and carried.

The following transcripts of public hearings held on March 16, 1964, were approved as circulated on a motion of Mr. Spalding, second of Mr. Kimura, and carried:

Public Hearings: Masaru Doi - Variance
Hawaiian Agricultural Co. - Variance
Kau Development - Variance
Harry Chun-Akana - Rezoning

The following were discussed:

Christine K. Lindsey Subdivision - water pipeline completion.
Noboru Muneno - appeal for reconsideration on interim zoning variance request.
Lei Hala Developers, Inc. - question on rezoning or variance request to erect 45-unit apartment in a Class B Residential District.
Antone Freitas - Land Use Commission special permit request
Kaoru Sunada Subdivision

LAND USE COMMISSION
SPECIAL PERMIT
JAMES TAMURA

A public hearing was held on the request of James Tamura for a special permit to allow the subdivision of Lot 63, Panaewa Home Lots, South Hilo.

Action was deferred until next month's meeting. Act 205 (LUC law) prohibits the Commission to act on such petition earlier than 15 days after the said public hearing.

INTERIM ZONING
VARIANCE REQUEST
KID McKOY, JR.

After a duly held public hearing on the request of Kid McCoy, Jr., for a variance to allow the development and construction of a 300-unit hotel, shopping center complex, golf course, and other recreational facilities, Puas, North Kona, it was moved by Mr. Mulder, seconded by Mr. Santos, and carried that the variance be granted on the basis of the following conditions:

1. The proposed development be developed substantially as shown in the plot plan with an 18-hole golf course inter-mixed with one family unit cottages extending mauka.

2. Access to said site be provided by a service road - limited access.

3. Parking shall be provided on the basis of one parking space per rentable unit up to 15 units and one parking space per two units thereafter; density of the hotel structure shall be 1250 square feet per rentable unit.

4. The 300-unit hotel, restaurant, and shopping plaza shall be under construction within one year, or the variance will become null and void.

ADOPTION
RESOLUTION NO. 46

Mrs. Fukuda moved for adoption of Planning and Traffic Commission Resolution No. 46, creating Industrial Zone from a portion of Agricultural Zone 2 in Waiakea, South Hilo.

The motion was seconded by Mrs. Carlsmith, and carried.

ADOPTION
RESOLUTION NO. 47

On a motion of Mrs. Carlsmith and second of Mrs. Fukuda, the Commission voted to adopt the Planning and Traffic Commission Resolution No. 47, creating Residential Zone D from Residential Zone C in Lanakila Heights, South Hilo, Hawaii.

VARIANCE REQUEST
LEI HALA DEVELOPERS, INC.

A letter was received on the request of Lei Hala Developers, Inc., for a variance to erect a 45-unit, 2-bedroom, 3-story apartment within the Lei Hala Tract Subdivision in a Class B Residential District.

A representative attended the meeting to request consideration of the application which was not filed properly with the required filing fee, plot plan, and proposed development plans. He further wanted to know whether it should be filed as a rezoning request.

The staff will handle administratively on the request.

PLANNING AND TRAFFIC COMMISSION
County of Hawaii
May 18, 1964

A regularly advertised public hearing, on the application of James Tamura was called to order at 3:45 p.m., in the Conference Room of the County Board of Supervisors, by Chairman Robert M. Yamada.

PRESENT: Robert M. Yamada
Seiji Aoyagi
Marion Baker
Maxine Carlsmith
John T. Freitas
Nobuko Fukuda
Walter W. Kimura
Herman Mulder
Robert J. Santos
Rufus P. Spalding, Jr.
Edgar A. Hamasu
Raymond H. Suefuji

Helene H. Hale

Cyril Kanemitsu
and approximately 5 persons in public attendance

ABSENT: John Alconcra
Miyoshi Matsushita
Herbert J. Perreira
William Stearns

NOTICE OF PUBLIC HEARING

Special Permit: Panaewa, South Hilo, Hawaii

NOTICE IS HEREBY GIVEN of a public hearing to be held in the Board of Supervisors Conference Room, Hilo, Hawaii, State of Hawaii, at 3:45 p.m., May 18, 1964, on the application of James Tamura, Owner, for a Special Permit from the State Land Use regulation in accordance with the provision of Section 98, H-6 of Act 205 of the State of Hawaii 1963.

The public hearing is for the purpose of allowing a subdivision of Lot 63, Panaewa House Lot, South Hilo, Hawaii as shown on drawings filed with this office. The proposed subdivision is for the purpose of creating 4 lots for homesites, and covered by Tax Map Key: 2-2-52-8, and containing an area of 1.96 acres.

Map showing the location and boundary of the proposed Special Permit is on file in the office of the Planning and Traffic Commission in the Hilo Armory Building on Shipman Street and is open to inspection during office hours.

All protests to the proposed Special Permit should be filed with the Planning and Traffic Commission in writing before that date or in person at the public hearing.

PLANNING AND TRAFFIC COMMISSION
OF THE COUNTY OF HAWAII
ROBERT M. YAMADA, CHAIRMAN
BY: EDGAR A. HAMASU, DIRECTOR

(Hawaii Tribune Herald: May 8 and 16, 1964)

YAMADA: "A public hearing is called on the request of James Tamura for a special permit to allow the subdivision of Lot 63, Panaewa House Lot, South Hilo."

"Mr. Hamasu, Will you give the background."

HAMASU: "This is a request for special permit to subdivide 1.96 acres into four lots all in excess of 21,318 square feet in an Agricultural Zone. Act 205, State Zoning Law, allows unusual and reasonable uses within the Agricultural or Rural Zone Districts. This parcel of land is located in Panaewa, Waiakea, South Hilo, Hawaii, described as Lot 63, Tax Map Key 2-2-48-80 and fronting on Lama Street, approximately 800 feet makai from the Olaa-Hilo Road. The lot is approximately 4½ miles from Hilo Post Office, 5 miles from Hilo High School, and 1¼ mile from Waiakea Waena School. Adjacent lands are predominantly large, residential lots ranging in size from 1.81 acres to 2.73 acres in land area. The recently subdivided additional increment of Panaewa House Lots by the State is also of this general size. The Board of Water Supply had indicated that an 8-inch water line is existing on Lama Street. Cesspool shall be used for disposal of sewer. Electricity and telephone are also available. The Master Plan of Hilo, prepared by Belt Collins and Associates and adopted by the Planning and Traffic Commission on January 10, 1964, outlines this area as a residential-agricultural use. The proposed zoning plan is for three-acre lot size. The residential-agricultural use under the Development Plan and the Zoning Ordinances proposes similar character as that of the State Land Use Law set forth in the Rural District. The only difference between the Rural Zone District of the State Land Use Commission which requires a minimum lot area of one-half acre and the County residential-agricultural use district is the minimum lot area of one acre. However, as you know, the Board of Supervisors have not enacted the new Zoning Ordinance. This is the requirement set forth in the new Zoning Ordinance.

YAMADA: "Would the applicant in the audience like to be heard?"

CYRIL KANEMITSU: "Yes, Mr. Chairman and members of the Commission. May the record show that Cyril Kanemitsu of the law firm of Doi and Kanemitsu as representing not only the applicant here but also representing Mr. and Mrs. Sadao Oshiro, Mr. and Mrs. Richard Shiigi, and Mr. and Mrs. Tetsuo Nakada along with Mr. and Mrs. James J. Tamura. This, I believe, is one of its hardship case where the individuals here using ingenuity and also from the State by themselves made an adequate research into the matter before jumping into the fire so to speak; but since the passage of the Land Use Law, the whole thing has back-fired and the hearing resulted.

"May I briefly review what has happened. This lot was originally sold by public auction in 1958, I believe, and it was a Mr. Walter Perreira who paid on this particular parcel. Now, subsequently, he put up this parcel for resale and at that time, this was either at the end of 1959 or very beginning of January 1962, Mr. and Mrs. James Tamura were the original parties who were approached to purchase this lot. They wanted residential house lots. They did not want two full acres so what they did was to approach the three other people, the Shiigis, Nakadas, and Oshiros. Inquiry was made at the Board of Land and Natural Resources, and there was no question here about a subdivision. In fact in the Land Patent, it specifically provides for a subdivision of these lots into a minimum area of 10,000 square feet or whatever the Planning and Traffic Commission decides it should be according to the zoning. You know at the time they purchased, there was no requirement by the Planning and Traffic Commission so the 10,000 square feet would have prevailed as the Director told you this is half an acre for each lot. They further inquired with the Planning and Traffic Commission at that time as to whether or not it would be feasible if the area would be subdivided in the manner as they have

requested right now. Planning and Traffic Commission told them legally it would be all right at this particular time; it was at the end of 1961 or the beginning of 1962. They checked with the Board of Water Supply and they told them that the water line must first go in but they expected the water line to go in shortly. So, everything was all right. An agreement was drafted among these four families wherein all of them contributed towards the payment for this two-acre parcel. The whole plan was drafted and made out, and each one assigned a lot, but they had no money to begin construction immediately. Only Mr. Tamura constructed his home, pending payment for the complete lot Land Patent and they were getting ready to subdivide eventually into their own home before the whole matter was deferred. I would like to submit this agreement for your perusal which was drafted by Senator Kazuhisa Abe, dated October 16, 1962. Now, these people are ready to construct. They are not going to sell out the land. They are going to build homes for themselves. No speculation or anything like that. The whole idea was that these people wanted this particular parcel and subdivide in the said manner. In view of all the circumstances, I believe, the Land Use Commission is contemplating, I understand, changing this whole area into half an acre lots--changing from Agricultural to Rural. Mr. Director is this forthcoming shortly?"

HAMASU: "I believe this request was held in a public hearing presented by the Land Use Commission."

KANEMITSU: "In any event, I feel this case presented a tremendous hardship case. These people are employed at Hawaii Equipment Company and Hawaii Trucking Company. Their salaries are not great. They want to own their homes. However, this is one method they could own their own homes. But now, the laws prevent them from going ahead. I urge that this Commission approve the request."

YAMADA: "Isn't there a stipulation or a restriction in the original purchase agreement from the State as far as subdividing this property? I think it would be going beyond the authority of this Commission."

KANEMITSU: "Yes. 'That should the Patentee, or any assignee of his, desire to subdivide said lot or any portion thereof, each subdivision shall conform with the minimum specifications and standards established by the Hawaii Traffic and Planning Commission, excepting that said lot and each additional lot created as a result of said subdivision shall contain an area of at least 10,000 square feet, or the minimum area required by said Planning Commission, whichever is the greater, and the owner of each lot as subdivided shall be required within a period of five years next following the date of such subdivision or resubdivision to construct on each lot so created a single-family dwelling of new materials or masonry and containing a floor area of not less than 850 square feet, exclusive of garage and open lanai.' I mean it specifically says in here that if they are contemplating to do it, it should be all right and that they checked with the Board of Land and Natural Resources."

YAMADA: "I don't know whether you are familiar or not Cyril, but County is responsible to the front area. They are restricted aren't they?"

KANEMITSU: "Yes. But, that is a different requirement there. Those were farm lots. These are house lots. 'That the land hereby conveyed shall be used for residence purposes only for a period of ten years from the date of issuance of this Land Patent Grant.' Now, what you are speaking of Mr. Chairman, I believe, where a farm lot is sold and you want to subdivide. That, this is from the very beginning was a residential lot."

YAMADA: "I have an understanding that this area was supposed to be residential-agricultural lots at the time of sale. I suppose I got the wrong information. This will surely set the precedent for the whole Panaewa Forest Subdivision."

KANEMITSU: "Mr. Chairman, that may be so if at the time of purchase such an agreement like this where four people went in there with the idea of living there and if there was such an idea (pause)."

YAMADA: "No, I am not thinking like that."

HELEN H. HALE: "Is this area zoned now?"

HAMASU: "It is zoned by the State Land Use Commission."

HALE: "You are given authority?"

HAMASU: "The Commission holds a public hearing, makes the recommendation, and forwards it to the Land Use Commission."

HALE: "The Land Use Commisdion has the final say."

HAMASU: "Yes."

KANEMITSU: "There is a requirement here that once you subdivide, you have to construct the home in the minimum of time. Now, they have to pay for the lot, and once they paid for the lot, then they could start thinking about building."

NOBUKO FUKUDA: "May I ask you a question. There is a document filed by the parties? This is not an agreement with the government; this is just within the parties."

KANEMITSU: "No. I am showing the hardship that this agreement was entered into at the time when legally and able they could have done this."

FUKUDA: "This is not binding to any government body?"

KANEMITSU: "No."

FUKUDA: "Is there something about a statement reading that the Patent, should be a legal term in there, in case there is a rezoning taking place and we don't want to hold the rezoning of this area--there is not a commitment that we must grant a variance? This would be a rezoning safeguard."

KANEMITSU: "Oh no, no. This would be a restriction placed thereupon by the State Board of Land and Natural Resources."

FUKUDA: "This is something that would take place when that would become necessary?"

KANEMITSU: "When they zoned the land that this would be for residential purposes for ten years. They are further saying that the minimum lot requirement shall be either 10,000 square feet or depending upon how your Commission (pause)."

FUKUDA: "This is a legal safeguard."

YAMADA: "Mrs. Fukuda, the question is whether the Commission won't be violating even if we do grant it. The question would be whether we are going to set a precedent when we do grant it."

FUKUDA: "I was under the impression that we could possibly do this but I question there is no guarantee that the subdivision was allowed."

KANEMITSU: "Mrs. Fukuda, may I point this out. Under the circumstances existing at the time, there would have been absolutely no objection to have this subdivision being processed through the Planning and Traffic Commission. It would have been an automatic thing."

FUKUDA: "There was an error on the part of the party for not continuing with this for a long time."

Lower court in session

KANEMITSU: "They did not know that the Land Use Law would come in. The Greenbelt Law upset everything here."

HALE: "Are you saying previously that the Planning and Traffic Commission permitted that they would go along with a 10,000 square-foot lot?"

KANEMITSU: "The Planning and Traffic Commission had no minimum lot requirement here."

HALE: "Because it wasn't zoned."

KANEMITSU: "Wasn't zoned. So, the 10,000 square feet was stipulated here."

HALE: "Does this include under the city limits in Hilo?"

KANEMITSU: "I believe so, I'm not sure."

HAMASU: "It comes under the Development Plan for Hilo and Puna."

HALE: "This is an interesting point you bring up because that is not the zoning ordinance on the previous one we acted on. Now, you are supposed to have Hilo zoned and same thing as outside of Hilo."

RAYMOND SUEFUJI: "It is within the city limits of Hilo where they could subdivide to minimum requirement of 7,500 square feet."

HALE: "This was zoned then."

SUEFUJI: "It is under the holding zone--Agricultural Zone 2."

See County staff Rpt

YAMADA: "Is it under the Master Plan as Residential-Agricultural?"

HAMASU: "Under the Master Plan, this would come under Residential-Agricultural with a minimum of one acre which the lot in question is 1.96 acres."

KANEMITSU: "The lot size vary in this particular area from 2.73, 1.81, and most of the lots are 2.83. I think the corner lots close to the road are much smaller."

YAMADA: "I think this is the area where there is road on two sides of the lots."

KANEMITSU: "That is correct."

YAMADA: "Is there any question you would like to impose on Mr. Kanemitsu?

"Is there anyone else that would like to speak in behalf of the applicant. No one.

"If not, is there anyone that would like to oppose the application for a special permit? No one.

"This will end the public hearing."

KANEMITSU: "Thank you very much."

The hearing was adjourned at 4:07 p.m.

Respectfully submitted,

/s/ LEI A. TSUJI

(Mrs.) Lei A. Tsuji, Secretary

A T T E S T:

/s/ ROBERT M. YAMADA

Robert M. Yamada, Chairman
Planning and Traffic Commission

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COUNTY OF HAWAII

PLANNING AND TRAFFIC COMMISSION

FOR OFFICIAL USE ONLY

Date petition and fee received by Commission — May 1, 1964

Date petition is scheduled for public hearing — May 18, 1964

Date Commission took action and its ruling — June 15, 1964

APPLICATION FOR SPECIAL PERMIT

~~XXX~~ (We) hereby request approval for a Special Permit to use certain property located at Panaewa Houselots, South Hilo, Hawaii in accordance with provisions of Section 98H-6, Act 205, SLH 1963 for the following described purpose.

To subdivide the mentioned parcel into four lots.

Description of Property: **The parcel is a corner lot on Lama Street, Panaewa Houselots.**

The parcel presently has a dwelling situated on it.

TMK: 2-2-52-8

Petitioner's interest in subject property: **Owner of record.**

Petitioner's reason(s) for requesting special permit:

NOTE: The applicant must show that all of the following conditions exist: 1) that there are unusual or exceptional circumstances applying to the subject property, building or use which do not generally apply to surrounding property or improvements in the same zone district; 2) that the unusual or exceptional circumstances which apply to the subject property, building or use are reasonable and proper and will not be materially detrimental to public health, safety, morals and general welfare; nor will it be injurious to improvements or property rights related to property in the surrounding area; 3) that the strict enforcement of the zoning regulation would result in practical difficulties and unnecessary hardship inconsistent with the intent and purpose of Act 205; and 4) that the granting of a special permit will not be contrary to the objectives of the Master Plan or Plans of the State and/or County Government.

At the time of sale in 1962 the County Planning Commission, the State Land Department, and the County Board of Water Supply informed the Buyers that subdivision of the property was possible as soon as the planned water system was installed.

The application will be accompanied with a deposit of **$30.00** dollars to cover publication and administrative costs and a map of the area proposed for change.

Signature (SGD) JAMES TAMURA

Address 88 Lama St., Hilo

Telephone 56217

This space for official use

The property is situated in a(n) _____ District.

REMARKS:

Applicant: JAMES TAMURA

REQUEST: This is a request for a Special Permit under Act 205, State zoning law which allows unusual and reasonable uses within the agricultural and/or rural zone districts. The request is to subdivide a 1.96 acres parcel into 4 lots, all in excess of 21,318 square feet, in an agricultural zone.

LOCATION: This parcel of land is located in Panaewa, Waiakea, South Hilo, Hawaii, as Lot 63, TMK 2-2-48-80, and fronting on Lama Street approximately 800 feet makai from the Olaa-Hilo road. The lot is approximately 4½ miles from the Hilo Post Office, 5 miles from Hilo High School and 1½ miles from Waiakea Waena School.

ADJACENT LAND USE: Adjacent lands are predominantly large residential lots ranging in sizes from 1.81 Ac. to 2.73 Ac. in land area. The recently subdivided additional increment of the Panaewa House Lots by the State is also this general size.

UTILITIES: An 8" water line is existing on Lama Street. Cesspool shall be used for disposal of sewage. Electricity and telephone are available.

PLAN FOR HILO: A Plan for the Metropolitan Area of Hilo, prepared by Belt, Collins & Associates, and adopted by the Planning & Traffic Commission on January 10, 1964, outlines this area as a Residential Agriculture Use. The proposed zoning plan is for 3-acre lot sizes.

CONDITIONS:

RECOMMENDATION

The request is not unusual but rather common and contrary with the intent and purpose of Section 98 H-6 of Act 205. Applicant should be advised to apply with the State Land Use Commission for a change of zone boundary in conformance with "Section 98 H-9 of Act 205."

MACADAMIA

CITRUS

COFFEE

LICHEE

LICHEE

MACADAMIA

N

ANA

GARDEN

Tamura S.P.
OVERLAY TO
TMK 2-2-52 - Hawaii

Exhibit C
orig sent to 3d Cir Ct