

BOARD OF APPEALS  
COUNTY OF HAWAI'I

HEARING TRANSCRIPT  
JULY 10, 2009

A regularly advertised hearing on the appeal of **MARYE LYNN GILMORE (BOA 09-000076)** was called to order at 10:05 a.m. in the County of Hawai'i, Aupuni Center Conference Room, 101 Pauahi Street, Hilo, Hawai'i, with Chairman Joel Gimpel presiding.

PRESENT: Joel Gimpel  
David Drury  
Karen Maedo  
Kim Tavares

Renee Schoen, Counsel to the Board  
Alice Kawaha, Staff to the Board

ABSENT & EXCUSED: Peter Hendricks  
Charlene Hart

And two people from the public in attendance

**PETITIONER: MARYE LYNN GILMORE (BOA 09-000076)** - Appeal of Decision by the Planning Director dated March 4, 2009, relating to Determination of Pre-Existing Lots. The subject properties consist of approximately 43,595 square feet and is located at the corner of Lotus Blossom and Sea Breeze Parkway, Hawaiian Ocean View Estates, Ka`ū, Hawai`i, TMK: (3) 9-2-12:11 and 73.

GIMPEL: The next item on the agenda is New Business. It's petitioner Marye Lynn Gilmore, Board of Appeals 09-000076, which is the appeal of decision by the Planning Director dated March 4, 2009 relating to determination of Pre-Existing Lots. The subject properties consist of approximately 43,595 square feet and is located at the corner of Lotus Blossom and Sea Breeze Parkway in Hawaiian Ocean View Estates, Ka`ū, Hawai`i, tax map key number is (3) 9-2-12:11 and 73. They are two half acre lots involved. Are the parties here? You are?

PARKS: Hi. My name is Kim Parks. I work at Prudential Orchid Isle Properties. I am representing them as a realtor with the sale of the lot, but they're not able to be here physically due to their health conditions and unable to travel.

GIMPEL: Okay. So you are representing, you've been authorized to represent the appellants.

PARKS: On their behalf, yes.

GIMPEL: Okay, thank you.

SELF: Amy Self, Deputy Corporation Counsel representing the Planning Director. And on my immediate left is Daryn Arai, a planner at the Planning Department who will be my witness.

GIMPEL: All right, thank you. All right, Ms. Parks, you want to make an opening statement on this, on this matter?

PARKS: Sure, yes.

GIMPEL: Go ahead, thank you.

PARKS: On behalf of Marye Lynn Gilmore and Betty Greene, both who own 21,780 square foot lots in Hawaiian Ocean View Estates, they're requesting your Board to please recognize their lots as being pre-existing this way since the time of their purchase in 1963 and 1969, I'm sorry, one of them was 1964. And they've owned it ever since, never did sell it. And they are now listing to sell but are told that the lots are not legally recognized as the 21,000 square foot parcels. So we are here today on that note to see if there's a way to either grant an exception for them or other recourse as to what we can do to resolve this issue that has been on-going for them for 45 years. And they're just shocked because they had not known this up until just recently with my research on the lots.

GIMPEL: Thank you. Ms. Self?

SELF: I'll have to say that this is one of the saddest cases that's probably ever come before the Board. And the Planning Director wants nothing more than to help the parties resolve this but, unfortunately, she's bound by State law. This is an issue of not whether there are two lots. There is only one lot. The evidence will show that there is only one lot. The evidence will show that every document that was recorded refers to File Plan 692. If you look at the map that's provided in the record on appeal, it shows a one-acre lot. It's unfortunate that whoever drew up the deeds and the land descriptions decided to take it upon themselves to subdivide a one-acre lot without legal authority to do so. But what's being asked for is not a determination of whether there are two lots or not but requesting a variance. But the problem with the variance is that the Planning Director is not authorized to grant a variance in this situation because State law -. This is County-designated ag land and State Land Use designated ag land, and the State law says that the minimum lot size for any agricultural use shall not be less than one acre. So it isn't even an issue that the Director can address. So although it is sad, I had discussed earlier with their representative that there are possibly other options that they could explore.

But we would ask that the Board dismiss this case because if you ruled in favor of the appellant then it would go to Circuit Court, because you would be making a ruling in violation of State law. And so we would not be able to let that stand, we would have to appeal to Circuit Court. So we're asking that it be dismissed. Thank you.

PARKS: I'd like to just comment.

GIMPEL: Okay.

PARKS: I just briefly did speak to the owner, one of the owners, prior to stepping into the hearing to ask her, you know, what would she like to do if it wouldn't, you know, look positive in their favor as to the request, just to give her a heads up. And, you know, I'm not in any way an attorney. I'm doing this on behalf of just helping for my good nature. But she requests that, you know, she wants to pursue it some way through an avenue because she feels that, you know, if the County tax people recognized the two deeds and split it on the tax book for these years, and they paid County tax assessments or taxes for each parcel and they're both assessed separately for these years, you know, she's like how can one entity of the County operate in a certain manner and the other entity be able to do this in another manner. And it's, you know, I guess she wanted me to bring that up because it's not, she feels if there's the law to follow with the one entity how come the other department as well is not consistent and it's allowed this way. And then, you know, that's what she has asked me to express on her behalf.

GIMPEL: I understand. Are there any questions by the Board of any of the people involved here?

TAVARES: I have a question.

GIMPEL: Kim, go ahead.

TAVARES: I notice the list of property owners around that property with your paperwork but was there a mailout to those people as well?

PARKS: Yes.

TAVARES: Three hundred feet around the property, and you got nothing back from anybody there?

PARKS: She did the proof of service.

ARAI: Microphone, please.

PARKS: She got the proof of services completed and mailed. And I did actually receive some calls from a couple of the owners who did respond to the notice; and then she also received at least a call or two. But out of the, I think 15 or 16 total, we did get response through phone calls. So we know they are received. And they themselves were shocked and said hopefully they'll recognize their lots.

TAVARES: Okay, thank you.

MAEDO: May I ask a question?

GIMPEL: Sure, Karen.

MAEDO: You know, I read through this but evidently I missed it. Would you know if lots around them what the taxes are? Did the tax office just split or did they get rated a higher rating cause they're smaller lots? You know what I mean? I'm asking if they're paying half the cost of the one acre or more than half the cost of the one acre?

PARKS: Yeah, good question. Well, their assessments are based on 15,000 and 18,000 this year for '09. Last year it was 20 and 18. And their taxes are roughly under 100, 80 to a 100, roughly. And I'd say that's pretty average with a regular acre lot, too.

MAEDO: So it doesn't appear to you that they are paying more -?

PARKS: More, no.

MAEDO: In taxes simply because -?

PARKS: Yes.

MAEDO: Okay. Thank you.

GIMPEL: I have a couple of questions. Who drew up the deeds?

PARKS: From the records that I've had from the Bureau of Conveyances that are recorded, it shows that it was, in fact, the developer. His name was Crawford and that's probably the -.

GIMPEL: So he's the one who deeded them?

PARKS: Correct.

GIMPEL: And those deeds then were recorded?

PARKS: Recorded at the Bureau of Conveyances.

GIMPEL: In the Bureau of Conveyances. Which is a County office?

SELF: No, it's State.

PARKS: State, State.

GIMPEL: No, it's a State office.

MAEDO: State office.

GIMPEL: So the State office recorded the deeds, which they were entitled to do because there were no, no building on it yet, no residence yet. So for all they know it's a half

acre and somebody got a half acre. And now as I recall in the documents that they were conveyed in joint tenancy with right of survivorship, is that correct?

PARKS: Correct on one of the documents.

GIMPEL: On the one.

PARKS: For the parcel that is owned by Betty -.

GIMPEL: Well, that's the only deed that we have, I think, isn't it? No, no, we have both deeds, yes.

HART: Both, we have both.

PARKS: There are two. There's one for Marye Stumph; and she's the other owner for Parcel 11.

GIMPEL: Yes.

PARKS: She held title in her own name alone, no severity.

GIMPEL: Okay. So the deed to the petitioner here is for joint tenancy with right of survivorship for both, for her lot only, for the half acre, correct?

PARKS: For the petitioner, it's Marye Stumph or Gilmore. She actually held title alone in her parcel.

GIMPEL: For her parcel.

PARKS: And she after recorded a trust.

GIMPEL: Yes.

PARKS: And it's held in trust.

GIMPEL: Yes.

PARKS: And then the other lot which is owned by Betty and Howard Greene were held joint tenants. Howard Greene passed -.

GIMPEL: As, between them, yeah, but -. Okay, so -.

PARKS: Yes. So she now, the wife Betty, is the owner of his half.

GIMPEL: Okay, okay. So if you put the two lots together, they are separate owners, clearly?

PARKS: Yes.

GIMPEL: Clearly separate ownerships -.

PARKS: Per the deeds.

GIMPEL: Of the two lots. And the issue is State law -. Now nothing in these documents that we have received indicated that there was a State law problem; and that's why I'm quite interested in that. You say that the State law which governs the use of these lands as well cause they're one-acre ag lands prohibits, because they're ag lands prohibits a residence on less than one acre?

SELF: Correct, because they were never officially subdivided. The only agency that has the authority to subdivide, of course, is the Planning Department.

GIMPEL: Yes.

SELF: I think at one point the State was doing it and then they turned it over to the Department so that counties -.

ARAI: The tax maps.

SELF: Oh, the tax maps, the tax maps used to be done by the State and later was turned over to the counties.

GIMPEL: Okay.

SELF: But the problem is, I think what you're referring to before, if I may go back, the land purchase contract, it was originally purchased as Howard Greene and his wife Betty Greene and Marye Stumph as joint tenants with a right of survivorship.

GIMPEL: Right.

SELF: So that's the reason -.

GIMPEL: That was for the one acre.

SELF: For the one acre, that's how it was purchased. So then the developer, I assume it was the developer who drew up the deeds -.

GIMPEL: Deeds, giving them each half.

SELF: And made this land description here that's not accurate. It's so used to, even until just recently the Bureau, you can record anything. I mean they're assuming that it has been through the proper channels. So this got recorded and it got on now the Tax Office. I don't

know how Finance, Real Property Tax runs their office, but I'm sure that they don't, they're not a title company so they don't go back and look through all -. They go by what somebody provides them. Cause all they want to do is get, collect the property tax. That's their only interest, this real property tax. So when they see two deeds, one with a couple of joint, owned by joint tenancy, another a single woman, they go by these deeds and they -.

GIMPEL: They assess the property as a half acre.

SELF: Tax, assess the property tax, correct.

GIMPEL: Yeah, I see that. And I'm trying, getting to understand the problem better now that I'm familiar with, made familiar with the State law application here. You're right, this is a tragic situation.

SELF: It is very tragic.

GIMPEL: This is a tragic situation.

SELF: And I think the problem started with the developer creating, he took it upon himself to subdivide the lot; and I would guess that he probably knew what he was doing.

GIMPEL: Well, yeah, and -.

SELF: And he has since passed, right? He has passed away.

GIMPEL: And from the documents I understood that the purchasers originally wanted to get out of the contract completely and he said, no, you can't do that but I'll sell you half and then we'll split it; and then they went along with it. And whether there's a cause of action against the developer, whether it's worth anything, I wouldn't want to render my opinion on that.

SELF: But there are other options. I mean -.

GIMPEL: There may be other options. Let me ask this, would the petitioner be willing to listen to other options that might get her off and then satisfy her concerns at this point?

PARKS: I would hope so. I can't speak for them both but we could present options and see if it would be a way for them to consider rectifying what happened for them, and see if it would work to clear it up. I mean I can't speak on their, I mean I can't make their decision but we could help them to see another way.

GIMPEL: Yeah, I understand that. And -.

PARKS: I know she's upset because she's thinking how could -.

GIMPEL: I'd be upset too. I think we'd all be upset. I think the County has indicated that it is quite upset. The concern here as I understand it is that State law would preclude putting a residence on a half-acre lot in ag land here, State designated ag land.

SELF: Well, that's correct because to deal with that they would have to deal with the LUC, the Land Use Commission, because we can't change the designation for State land.

GIMPEL: So would one possible course of action be to have the petitioner go directly to the Land Use Commission?

SELF: That's an option.

GIMPEL: That is one option. Because it -

PARKS: Okay.

SELF: I don't know that it would happen but -

GIMPEL: Well, yeah, I understand. But the concern here is that the Planning Director cannot legally allow it; and we can't force the Planning Director to allow it as you've heard. Then that would just bring it right up to the Circuit Court. So perhaps one option would be to go to the Land Use Commission. And there are other options that I think your petitioner might want to consider. And that would be, one, possibly to each, one of the other owners to buy the other out, then consolidate the lots and put up a house.

SELF: I just spoke with Daryn and I guess for property that's under 15 acres the Planning Department processes it instead of the LUC. So they could actually process the application to change the zoning, the State Land Use zoning and the County zoning, and it will go to the County Council.

GIMPEL: Okay, so the option then is to go to the, come to the Planning Department, ask for a rezoning to allow the construction on a half acre?

SELF: Yes, well, to rezone to, I guess it would be .5.

ARAI: State Land Use Boundary Amendment, Ag to Urban, and the County rezoning at the same time from Ag to -

SELF: You want to swear in Daryn and let him speak?

GIMPEL: Would you give your name.

ARAI: Daryn Arai.

GIMPEL: Do you promise to tell the whole truth, nothing but the truth?

ARAI: Absolutely.

GIMPEL: Thank you.

ARAI: Thank you.

GIMPEL: Proceed with your question.

SELF: Okay, Mr. Arai, could you explain to the Board how the process would work? Because she's going to have to change the State Land Use designation and the County Land Use designation.

ARAI: Because the property is one acre in size, State Law does allow the counties to be able to amend the State Land Use District Boundary from the Agricultural District, which requires one acre, to a Rural district classification which could allow lots as small as half acre, which would then accommodate her request. Should she be successful in getting that amendment she could then request a change of zone, which is a County zoning designation from Agricultural 1 acre to something like Residential Agricultural half acre. So the zoning would then match the State Land Use designation. Because the County would then be responsible for processing two applications we can run them concurrently. So not two separate hearings, but we can run it concurrently.

GIMPEL: Okay. You follow?

PARKS: Yes.

GIMPEL: I follow. Board, you follow?

MEMBERS: Yes.

GIMPEL: Okay. I think that would be, personally speaking, I can't speak for the Board at this point, I think that would be one good way to go. In other words, wind up with a rezoning to allow construction of a residence on each half acre. This is what would be the end result. Yes.

ARAI: Something to consider, while it is always an option it is something that's going to have to be reviewed by our office and ultimately approved by the Hawai'i County Council. Now our position has always been that, you know, we are not really keen on spot zoning just to address one specific concern. We're talking about a subdivision that has in the neighborhood of how many lots in Hawaiian Ocean View? It's something like 8,000 lots. Now if you designate one specific lot to a half acre minimum lot size, you're basically saying to the County that is the proper land use designation for this area. So we will then look at the cumulative impact of going half acre for all of Hawaiian Ocean View Estates.

GIMPEL: Only if you receive the applications for that, No. 1; and then 2, the particular circumstances here would dictate against, I think, just going ahead and blindly saying,

well, this is precedent for everything else, because it isn't. You have particular circumstances where the developer, in my opinion, cheated these two people.

ARAI: In those unique and special circumstances the normal procedure is typically a variance which would allow for certain specific considerations when you're -.

GIMPEL: But you can't grant a variance because of State Law, I understand that. So I would hope that members of the County Council would feel as disturbed about this whole situation as people here and would grant, would allow this. I would hope. I can't guarantee it, obviously, and nobody here can, and the caution is there. The fallback would be perhaps as I suggested earlier to have one of the people buy the other out and just keep it as one acre.

SELF: That would probably be the best option. Because the other problem is even if she were able to get the zoning then you had to go through the subdivision process. So that means road, probably going have to have road, water, I don't even know if she meets the water requirement, Rule 22.

GIMPEL: You got 60 inches?

PARKS: I don't think so in total, no.

SELF: So there could be all kinds of problems for trying to go that route. But -.

GIMPEL: Well, but only for two lots. I think -. Doesn't that rule only apply when there's a larger subdivision, like 8 lots or something like that?

ARAI: No. For water variances a maximum of six lots would be considered. So this could be, if it's a two-lot subdivision we could consider it. But I think you're correct that the minimum rainfall level is at a much higher elevation. So they may not even make that minimum requirement.

GIMPEL: Yeah, so you have that problem. So may want to -. You have the pros and the cons of each thing that you can, I think, bring back to your people.

PARKS: Yes.

GIMPEL: Okay. Do you have any other questions?

PARKS: One more thing. While I was talking to my lady before I stepped in here, she had talked directly with one of the clerks in your office at the County Planning Department prior to doing the appeal paperwork. Because the first initial paperwork I delivered for her was all the documents to ask, you know, if they would recognize it, but we didn't get through the appeal until after. Her conversation that she told me before this was John Holmes I believe was the gentleman had told her that prior to, he said prior to 1988 it was allowed, that you could build on a half-acre lot. So I don't know where that came from because I wasn't involved in the conversation. I don't have proof of the information. But she asked me to say that cause she's

not here. So I'm just saying it, I don't know what it means to anybody, but I'm just following her request.

GIMPEL: Mr. Arai, you have any information on that?

ARAI: Well, I haven't spoken to Mr. Holmes specifically about this but I'm going to take a wild stab at it. I believe he may be referring to an ohana. This subdivision was created in 1963. In 1963 State Law for agricultural lands did allow the construction of a single family dwelling. And then our Ohana Law basically says on a piece of land where only one single family dwelling is allowed you could apply for an ohana. And that is why like Paradise Park and all these subdivisions you may wonder why you see two homes on them. There was a point in time up to 1992 maybe, somewhere around there, where we did issue ohana approvals. And then there was a Declaratory Ruling. Mr. Gimpel, you may be aware of that, a Crazy Horse thing in North Kona, that led to a Declaratory Ruling by the State Land Use Commission. And they said County you shouldn't have been doing this, it violates State Law. So we stopped the issuance of ohanas. So I suspect that you could, if you were to have applied back in those days you could have gotten an ohana. The fact is you never did so now you can't do it.

PARKS: Okay.

GIMPEL: All right. Anything else? Any other questions from the Board? Any discussion? Can I have a motion from a member of the Board, please, on this matter, assuming that everything is, that you've said what you need to say. So do we have a motion, please.

TAVARES: What was -? Not defer it.

GIMPEL: Well, it's either to grant the appeal or to deny the appeal on the basis -.

TAVARES: Yeah, okay. Well, I'll make a motion to deny the appeal based on State law which more or less says that that's what we have to do or, well, let's see, based on the State law that disallows residential building on half acre ag lots.

GIMPEL: Can I make a suggestion regarding the motion -?

TAVARES: Sure.

GIMPEL: To say that, merely indicate that the Director's denial of the petition for a variance, request for a variance was pursuant to State law and not illegal, not in violation of any requirement. Okay?

TAVARES: Okay.

SCHOEN: Mr. Chair, if I may just -?

GIMPEL: Sure, go ahead.

SCHOEN: Clarify on your motion.

GIMPEL: Yes.

SCHOEN: I'd ask the Board to reference its Rule 8-15. And so I think your motion would be more entitled or phrased as the Director's decision did not violate the Code or other applicable law, was not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or was not arbitrary, or capricious, or characterized by an abuse of discretion or clearly the unwarranted exercise of discretion. I know that's a mouthful but that's what -.

GIMPEL: Does that satisfy what you want to say?

TAVARES: Works for me.

GIMPEL: All right. Do I have a second?

HART: I second.

GIMPEL: All right, any discussion? Would you call the roll, Alice.

KAWAHA: Ms. Tavares?

TAVARES: Aye.

KAWAHA: Ms. Hart?

HART: Aye.

KAWAHA: Ms. Maedo?

MAEDO: Aye.

KAWAHA: Chair Gimpel?

GIMPEL: Aye.

KAWAHA: Chair, there are four ayes. Motion is carried.

GIMPEL: All right. Thank you. This matter is concluded. Let me emphasize that we fully sympathize with the appellant, with your client, but we believe that there are other avenues that should be pursued. Okay?

PARKS: I thank you for your time today. I appreciate it.

TAVARES: You're welcome.

GIMPEL: All right, well, thank you. Thank you. I'm sorry, I forgot. Would you prepare the order.

SELF: I know, I know.

GIMPEL: Thank you, then.

The discussion ended at 10:34 a.m.

Respectfully submitted,

Sharon M. Nomura, Secretary