

BOARD OF APPEALS
COUNTY OF HAWAII

HEARING TRANSCRIPT
JANUARY 16, 2009

A regularly advertised hearing on the petition of **JAMES S. AND NANCY J. PHILLIPS TRUST (BOA 08-000071)** was called to order at 10:27 a.m. in the West Hawai'i Mayor's Office, Conference Room, 75-5706 Kuakini Highway, Suite 103, Kailua-Kona, Hawai'i with Chairman Joel Gimpel presiding.

PRESENT: Joel Gimpel
David Drury
Peter Hendricks
Karen Maedo
Kim Tavares

ABSENT AND EXCUSED: Charlene Hart

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

Klaus Conventz representing Petitioner
Chris Domino representing the Department of Public Works
Brooks Bancroft, Counsel to the Department of Public Works

And one person from the public in attendance.

PETITIONERS: JAMES S. AND NANCY J. PHILLIPS TRUST (BOA 08-000071) - Petition for Variance to Section 504(a) & (b), Section 1711 and Table No. 5-A, Part III, relating to projections (eaves) requirements of the Uniform Building Code. The subject property consists of approximately 14,500 square feet and is located at Lanikepu Place, Lalamilo House Lots, Waimea, South Kohala, Hawai'i, Tax Map Key: (3) 6-6-4:90.

GIMPEL: The forth case today is the James S. and Nancy J. Phillips Trust case, BOA 08-000071. And this is a petition for variance to Section 504(a) and (b), Section 1711 and Table No. 5-A, Part III, relating to projections (eaves) requirements of the Uniform Building Code. The subject property consists of approximately 14,500 square feet and is located at Lanikepu Place, Lalamilo House Lots, Waimea, South Kohala, Hawai'i. The Tax Map Key is (3) 6-6-4:90. And we have the parties present. Would you please introduce yourself, Mr. Conventz?

CONVENTZ: Klaus Conventz for the petitioner.

BANCROFT: Good morning, Mr. Chair and Board Members. I'm Deputy Corporation Counsel, Brooks Bancroft. And with me is Chris Domino from the Department of Public Works, Building Division.

GIMPEL: Okay. Mr. Conventz, could you make your opening? Let's have opening statements, and then see where we go from there. Thank you.

CONVENTZ: Good morning. James and Nancy Phillips are the owners of the two adjoining parcels, 90 and 96, and also a leftover parcel between Parcel 90 and the gulch itself. They received a final inspection on the subject two-story building in 1976. And actually, the Building Division found a note that a building inspector at that time had doubted the setback, and thereafter it was satisfied and given the building permit. And now the Phillips family is preparing for the kids to have clear property, and applied for a variance from the Zoning Code, which was approved, but certainly, due to the violation of Sections 504 and 1711, opposed by the Building Division. They have to leave that up to the jurisdiction of the Board, either to remove the place or, no, actually to get a variance; they have another option to remove the place or to file later on that corner in question, which would either they have to do the entire one-story addition or it looks really ugly on that corner, and therefore, since this is a very small violation and also there is no possible structure in the back at all -. And the purpose and intent of the 504 and 1711 is the fire protection between structures, which is on the boundary three and three, or combination of six between the house and gulch, six feet, or a courtyard, six feet – that is why the front is not an issue, and the boundary is actually considered the centerline of the road. In the rear it is usually the purpose and intent of the Code, it is expected that there is another line of houses, and which can never be accomplished because that is the gulch. And at its narrowest point it's 70 feet, and the closest possible building could be about, considering the 30 feet for the 5-A rear yard setback on the opposing side, there would be at least 100 feet or more. Thank you.

GIMPEL: Thank you. Brooks?

BANCROFT: Thank you, Mr. Chair. The Building Division in this case does oppose the variance request. The purpose of the applicable provisions of the Building Code in this case is basically to prevent fire hazards, prevent or eliminate fire hazards. Contrary to what the petitioner is claiming both today and in the petition, there still would exist a fire hazard, if the variance was issued. The petition contains a number of statements, which make assumptions without any kind of support whatsoever. For instance, on Page 5 of the petition at the very top, Subsection b, it says that "(t)he subject dwelling does not adjoin any structures to its northerly boundary, and there is no opportunity ever to erect any structures on adjoining neighbors land to the north." But that just isn't true because the petitioners don't own the adjoining parcel of land, so there is no saying what could happen in the future; someone could come in, they could subdivide the land and could erect a structure even if that particular portion of that parcel is small. So there is no saying if in the future if there is a structure erected, at that point it could be a fire hazard. Also at the very bottom of the page, it says, "With a consolidation of subject parcel with part of parcel 58, the code would be satisfied. The setback would be sufficient." Once again, we are not dealing with the issue of whether or not these two parcels are going to be consolidated; they are not consolidated, so there is no telling what's going to happen in the future.

So based on those facts, we would submit that under the Board of Appeals Rule 7-8 the petitioner hasn't met the required criteria for issuance of a variance. Specifically under Subsection (3) it says, "the variance will be consistent with the intent and purpose of the particular chapter of the Code and will not be injurious to persons or property or create additional fire hazards," I don't think that the petitioner has shown or will be able to show that this particular variance will eliminate the potential fire hazards.

GIMPEL: Thank you. Are there any questions to the parties by Members of the Board? All right. Mr. Conventz, do you have any witnesses to call?

CONVENTZ: No, sir.

GIMPEL: No witnesses. Do you have any witnesses to call, Mr. Bancroft?

BANCROFT: Maybe if I could just ask Mr. Domino briefly why he believes it's -.

GIMPEL: Let's -. Can we introduce the witness and swear him in, please?

BANCROFT: Sure.

GIMPEL: Would you use the microphone and -.

DOMINO: Name is Chris Domino, Building Plans Examiner at the Kona Building Department.

GIMPEL: All right. Do you swear to tell the truth, the whole truth, and nothing but the truth?

DOMINO: Yes.

GIMPEL: Thank you.

BANCROFT: Mr. Domino, could you just explain briefly why it's important in this particular case to enforce the Building Code provisions and what the potential hazards are if it's not enforced?

DOMINO: Well, the Code states that in this type of occupancy, private dwellings, that the minimum setback between structures is three feet to adjoining property lines; and that is to prevent fires from jumping from structures to structures. Therefore, the Building Department feels that the Code should be enforced, and that the structure should be required to meet the fire ratings at the Code's minimum restrictions.

BANCROFT: No further questions, Mr. Chair.

GIMPEL: Are there any questions of the witness by Members of the Board? Let me ask one. I have a question. You say the minimum is three feet; the structure must be three feet away from the property line. Is that correct? In order to prevent spread of a fire from structure to structure. What about the spread of a fire from structure to vegetation?

DOMINO: The intent of the Code really doesn't state structure to vegetation; it's between structures.

GIMPEL: So it has to be between structures. Now, before we continue even further, I would like to have it admitted into evidence the materials submitted by the appellant here with his application. Is there any objection to that?

BANCROFT: No objection.

GIMPEL: Okay, so those materials are in evidence. Now, looking at those materials, there is a map showing the existing -. And do you have a copy of that in front of you?

DOMINO: Yes, I do.

GIMPEL: All right. On the left side of the plat there are apparently a number of areas where the – it's been highlighted on mine in yellow – where the setback is insufficient. Could you point those out to me where the setback is insufficient, and how much of the setback, the extent of the insufficiency, if you could?

DOMINO: It would be the top left corner of the structure.

GIMPEL: Yup.

DOMINO: And it is -.

GIMPEL: That's the two-story residence in the plat.

DOMINO: Correct.

GIMPEL: Okay.

DOMINO: And it is insufficient by the minimum Code requirements of a little over a foot and half.

GIMPEL: Is that the upper left-hand corner of that?

DOMINO: Correct.

GIMPEL: That's the foot and half part. And then what about the side of the structure that looks like, it's on the south-west side of it? Is that insufficient there as well?

DOMINO: Not for the Building Code, but apparently by the Zoning Code the minimum setback is ten feet and they are within the ten feet. But the Building Code states three feet.

GIMPEL: Okay. Your concern is the Building Code and the fire hazard. And the upper left-hand little corner there is a foot and half instead of three feet. Is that correct?

DOMINO: Correct.

GIMPEL: Thank you. Any questions?

HENDRICKS: I have a question. Mr. Domino, the rear set for a lot of this size – this is 0.8 acre – would seem to be a little more than -. Is that three feet, Building Code?

DOMINO: Building Code is three feet.

HENDRICKS: Wow. Okay. I know there is a gulch in the back; I'm somewhat familiar with that area, but I didn't realize it was just three feet. Thank you.

GIMPEL: All right. Any other questions? I have a question of Mr. Conventz. Mr. Conventz, the area that seems to be the concern of the Building Department is the little area that appears to border on the Lanikepu Gulch.

CONVENTZ: Yes, sir.

GIMPEL: And your position is that nothing can be constructed there.

CONVENTZ: Yes, sir.

GIMPEL: Why?

CONVENTZ: First of all, between the actual gulch and on the southerly slope of the gulch contains Lot No. 58, which has three owners, and among other reasons, the Phillips own 1/3 of the land, and its wasteland. And it's so skinny that I oppose the counsel's point that actually there could be a structure; there cannot be because of the any zoning, the minimum side yard and front yard setback, if they apply, would actually be exceeding the buildable area, or it would be zero or it would be minus. So there cannot be a structure. And all attempts were made to consolidate, but there is no action because it's wasteland; it's no good. And then comes the gulch.

GIMPEL: Thank you. Any questions? Mr. Drury?

DRURY: Would it be difficult in any technical way to consolidate with this Lot 58? Would there be any obstacles to consolidating with it?

CONVENTZ: Yes, there are. They attempted it, sir. And one of the people on record cannot be found at all. There was one that did not react. And that is unfortunate, but that's the case because there is no value, so no one really cares about it.

HENDRICKS: Mr. Chairman?

GIMPEL: Yes, go ahead.

HENDRICKS: Just for clarification, I understand that there was a building permit, the structure was built to code, there was a final inspection and approval. Did I hear that there was a notation of question on the boundary itself at some point in time? That being the rear boundary.

DOMINO: I have a document here that is from the building inspector at the time, dated March 8, 1976, which I believe is when this structure in question was being built. And one of the comments that the building inspector had on his disapproved inspection notice was "Install markings on boundary to enable us to check setback requirements. Call for re-inspection prior to pouring your foundation." So the building inspector at the time may have had some, was conscience of approving the foundations at the time and he questioned the owner.

HENDRICKS: Thank you. Can you tell from the document whether the same inspector came out for preliminary or final, or were they different people, or -? I know in '70s we didn't have very many inspectors, so maybe they were the same person. I just, point of interest.

DOMINO: The only thing that I can record is that there was the same inspector for the foundation inspection and for the framing.

HENDRICKS: Okay, thank you.

GIMPEL: And according to the documents in the case, apparently the final inspection was on August 31, 1976. Do you have the findings of that?

DOMINO: I just have a notation on the building permit application itself with the date that you mentioned, August 31, 1976. I don't have the inspection slip approving the house; I just have a record -.

GIMPEL: We can assume that was approved because it was built.

DOMINO: Correct.

TAVARES: I don't know if we can assume that.

GIMPEL: I don't think you can assume otherwise. Okay. It was built, and now we come in for -, okay. Any other questions?

DRURY: One clarification.

GIMPEL: Mr. Drury?

DRURY: On Page 5, b. "The subject dwelling does not adjoin any structures to its northerly boundary, and there is no opportunity ever to erect any structures" That paragraph refers to Parcel 58, or is it something else?

CONVENTZ: To 58, and there is, in continuation to gulch itself.

DRURY: Okay. And I'm looking now at the plat map, and I can see Parcel 58 just to the north of the subject property and there is another parcel just to the left of it, or west, as far as I can tell. Waiting until people to find it. So just one thing I wanted to clarify - we've talked about Parcel 58 to the north - the parcel to the left of it, which also is at that corner, is that a concern to the either side?

CONVENTZ: No.

DRURY: And the reason as to why, Mr. Domino?

DOMINO: The parcel directly to left of it, the subject residence meets the building code minimum requirements, to the left.

DRURY: And there is no question of any extruding into that lot.

CONVENTZ: No, no.

DRURY: So that the problem with the going over is strictly with relation to Parcel 58.

CONVENTZ: That is correct.

DOMINO: Correct.

DRURY: Okay.

DOMINO: I'd just like to add that the Building Code states property lines, as far as setback, the intent is to protect structures from structure, but the Building Code does state that the setback is taken from property lines. And you know, to give the respect to the other owners to the property in the back, whether it's buildable or not, I think that the owners could consolidate or sell to other people to the left of the property not necessarily to the Phillips; and therefore they could be in a violation.

DRURY: How far is the structure from the lot line of that property to the left that could conceivably be developed? I'm just trying to get -. How far is the structure that we are talking about from the lot line of this lot to the left? I'm trying to get an idea of how much of actual danger there is of another building being located close to the -.

DOMINO: Directly to the left of that property it is, per this larger plat plan, 9.7 feet.

GIMPEL: So that exceeds the three feet that's required by the Building Department.

DOMINO: Correct.

GIMPEL: Okay. So although it might violate the Zoning Code, that isn't the issue here; right now they are concerned about the Building Code. Okay. Any other questions, comments?

TAVARES: I guess I still have a question about the setback on the north side of the property. That's not an issue that large chunk of the building being in the setback. That's not -?

DOMINO: That is a Planning setback. But the Building Code setback minimum is three feet. A lot of times the Planning setback is more stringent than the Building Code.

TAVARES: Right. Okay, thank you.

GIMPEL: Any other questions? Mr. Drury, go ahead.

DRURY: Do you concur that, given the zoning of Lot 58, that it would in practical terms be impossible to develop anything on that lot?

BANCROFT: I wouldn't concede that it would be impossible; I would say it would be unlikely at minimum, I guess.

DRURY: And why would it be unlikely as opposed to be impossible?

BANCROFT: Based on the reasons that the petitioner has stated – because of the size of the parcel and also the required setbacks within that parcel if something were to be built.

DRURY: Okay. So in that sense would it be impossible?

BANCROFT: It would be unlikely.

DRURY: Okay.

BANCROFT: I mean, we've been talking about a residence being built; it could be other structures on the property that could be built that wouldn't interfere with the requirements of the setback to something else. So it's not just a residence that we are concerned with; it's also the possibility of a separate or different kind of structure being built on the parcel.

DRURY: Okay.

GIMPEL: Anybody else?

GIMPEL: I'll entertain a motion regarding this petition. If nothing else, for discussion purposes.

DRURY: All right, for discussion purposes I will move that the appeal be granted.

GIMPEL: Do I hear a second?

HENDRICKS: Second.

GIMPEL: Thank you. Motion is made, seconded, to grant the appeal. Mr. Drury, comments?

DRURY: It's not an easy one in the sense that it's not quite a de minimus violation although it's a fairly small one. I realize that the Building Department has to do its job. It does seem that there is the unusual circumstance that the relevant piece of property adjoining the subject property seems to be undevelopable. There is the possibility of some kind of structure being within the fire distance; it seems unlikely. So my thinking is if it really is not going to cause a practical problem, we salute the Building Department for being careful about things, but maybe the remedy would be much more severe than the actual danger that averts. That's my thinking.

GIMPEL: Further comments? I'm drawn attention to the standards for granting such a variance, and (1), we have to find that "(t)here are special circumstances or conditions applying to the land or building for which the variance is sought, which circumstances or conditions are peculiar to such land or building and do not apply generally to lands or buildings in the neighborhood or surrounding property, and that the circumstances or conditions are such that the

strict application of the provisions of the Code would deprive the petitioner of the reasonable use of the land or building; and (2) The granting of the variance is necessary for the reasonable use of the land or building and that the variance granted is the minimum variance that will accomplish this purpose; and (3) The granting of the variance will be consistent with the intent and purpose of the particular chapter of the Code and will not be injurious to persons or property or create additional fire hazards, and will not otherwise be detrimental to the public welfare, taking into account the character, use, and type of occupancy and construction of adjoining buildings on adjoining lots, and the building or land involved.” So those are the three basic things that we have to find, apply in order to grant this variance, okay? Given that, any further discussion? Mr. Hendricks?

HENDRICKS: Just a comment. I understand that there is much better coordination among all the departments, particularly Planning and Building. I remember back in the '70s when there was a sort of disconnect sometimes. So that's one of the things that biases me toward this decision. But I also understand we have ways to go and mistakes are made and I'm impressed with the ability of the Building Department to come up with the notations of particular events in this building process. So it's sort of a Solomon and the baby decision. Anyway, just a couple of comments primarily to compliment the departments on the progress made in the last few years.

GIMPEL: Thank you. With that, I'll make my comment. I think that this case warrants the granting of the variance; I think that the conditions in our Rule are met. Number one, this building permit was granted; that could be called a special or unusual circumstance. Certainly, to deny the variance would require the order to remove that part of the residence that exceeds, or intrudes upon the three-foot setback required by the Building Department, and the setback, as it is, is the de minimus; the violation is de minimus. I think it's necessarily, therefore, for the reasonable use of the building, and I think it will be consistent with the intent and purpose of the Code in that it is not injurious to the adjoining property, or building on the adjoining property. I don't think it creates an additional fire hazard that we need to be concerned about at this point. But I do agree with Mr. Hendricks that I think the Building Department has done a careful job on this now, and I applaud them on that. So with that, can we call the roll? Thank you.

KAWAHA: Mr. Drury?

DRURY: Yes.

KAWAHA: Mr. Hendricks?

HENDRICKS: Aye.

KAWAHA: Ms. Maedo?

MAEDO: Aye.

KAWAHA: Ms. Tavares?

TAVARES: No.

KAWAHA: Chair Gimpel?

GIMPEL: Aye.

KAWAHA: Chair, there are four ayes and one no. Motion is carried.

GIMPEL: Thank you. Thank you and thank you. Very nice. All right. Next on the agenda -. Oh, would you please submit a Findings of Fact, Conclusions of Law on this, Mr. Conventz, so that we can take care -.

CONVENTZ: Yes, which is the first one I do, actually. Since they have a particular style, usually I've got to receive proposed Findings by Corporation Counsel. I hope that there are no questions of my legal capabilities.

GIMPEL: Well, you can submit it to us and then we can take a look at it, and I'm sure counsel will have comments on it.

CONVENTZ: Yeah.

BANCROFT: That's fine.

GIMPEL: Thank you. All right. And submit it to us in time so that we can take care of this at our meeting in Hilo, which is going to be when?

KAWAHA: On February 13th. However -.

GIMPEL: February 13th, so we need it two weeks before that.

SCHOEN: Actually, Mr. Chair, the rule provides that he should submit it within 30 days.

GIMPEL: Within thirty days? Okay, within 30 days. The sooner the better. If we can get through with this in Hilo, fine, if not, we can do it here. Thank you.

KAWAHA: Chair Gimpel, the agenda already went out for next month.

GIMPEL: Okay, so it will be -.

KAWAHA: In March.

GIMPEL: March. Okay. All right.

The discussion ended at 10:56 a.m.

Respectfully submitted,

Noriko Sauer, West Hawai`i Secretary