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TRANSMITTAL

DATE: May 15, 2020

TO: State Land Use Commission
P.O. Box 2359
Honolulu, Hawai'i 96804

FROM: Liza Osorio, Legal Technician I to
John Mukai, Deputy Corporation Counsel

RE: DR 20-69 – Petition for Declaratory Order; Memorandum of Authorities; Certificate of Service

2020 MAY 19 A 10:

COPIES/ITEMS	*DATE*	*DESCRIPTION*
Original and (1) copy	05-15-20	COUNTY OF HAWAI'I'S PETITION FOR DECLARATORY ORDER; MEMORANDUM OF AUTHORITIES; CERTIFICATE OF SERVICE

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- ☒ Filing with the LUC

REMARKS: Enclosed for filing is an original and one copy of the above referenced document. Should you have any questions with regard to the enclosed please do not hesitate to contact our office. Thank you.

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2020 MAY 19 A 10:51
LAND USE COMMISSION
STATE OF HAWAII

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of COUNTY OF HAWAI'I, for a Declaratory Order that "Farm Dwellings" May Not Be Operated As Short-Term Vacation Rentals Under Hawai'i Revised Statutes §§ 205-2 and 205-4.5, and Hawai'i Administrative Rules § 15-15-25	DOCKET NO. DR 20-69 COUNTY OF HAWAI'I'S PETITION FOR DECLARATORY ORDER; MEMORANDUM OF AUTHORITIES; CERTIFICATE OF SERVICE

COUNTY OF HAWAI'I'S PETITION FOR DECLARATORY ORDER

The County of Hawai'i ("County"), by and through its undersigned attorneys, hereby petitions the State Land Use Commission for a Declaratory Order that "farm dwellings" may not be used as short-term vacation rentals pursuant to Hawai'i Revised Statutes ("HRS") §§ 205-2 and 205-4.5, and Hawai'i Administrative Rules ("HAR") § 15-15-25. The County brings this Petition pursuant to HAR § 15-15-98, inter alia.

The County has an immediate interest in the State Land Use Commission ruling on this Petition because the County recently passed and has been challenged in implementing a law (Bill 108) regulating short-term vacation rentals within the County. Bill 108 and the County Planning Department's Rule 23 (promulgated to implement the Bill) require owners or operators of short-

term vacation rentals to register with the County. New short-term vacation rentals may only be registered within certain permitted districts; however, owners of lawfully existing short-term vacation rentals in all districts were allowed register non-conforming use certificates for short-term vacation rentals. Bill 108 and Rule 23 both prohibit the issuance of non-conforming use certificates to short-term vacation rentals operating on lots created after June 4, 1976 in the State Land Use Agricultural District based on the County's understanding that any such existing operations were not lawful in "farm dwellings" pursuant to HRS Chapter 205.

The County denied a number of applicants who sought non-conforming use certificates for short-term vacation rentals operated on lots created after June 4, 1976 in the State Land Use Agricultural District. Those applicants submitted proof to the County that they were using properties that they owned or operated as short-term vacation rentals prior to April 1, 2019. Some of these applicants have appealed the denials to the County's Board of Appeals, arguing that a short-term vacation rental is a permissible use of a "farm dwelling" on lots created after June 4, 1976 in the State Land Use Agricultural District.

The County interprets HRS §§ 205-2 and 205-4.5, and HAR § 15-15-25 as requiring: a) a "farm dwelling" to be exclusively occupied by a single family which obtains income from agricultural activities on a farm that the same family owns in fee or leasehold, and b) that "farm dwellings" may not be used as short-term vacation rentals.

This interpretation will be further explained in the Memorandum of Authorities included herein.

The other potential parties to this matter are: (a) Appellants at the Board of Appeal (i) Calvert G. Chipchase, Esq. and Nicholas McLean, Esq., representing Doyle Land Partnership, Mark Chesebro and Caroline Mitchel Trust, Charles Rosebrook and Nancy Ellen Rosebrook, Michael Cory Maston and Eugenia Matson, Somtida Salim Trust, Thomas Bruce Wartman and

Rea Alice Wartman, James Thomas Kelnhofer, Neil Gregory Almstead and Zheng Yang Almstead, Jennings Family Trust, Nettleton S. Payne III and Diane Elizabeth Payne, Bellamy-Hain Family Trust, Linda K. Rosehill Trust, Todd Michael Moses, John T. Fenton Trust and Frances Fenton Trust, Mark Allan Dahlman, Maggholm Properties LLC, Psalms 133 LLC, Peter A. Gunawan and Janti Sutedja, and Donald J.K and Stacey S. Olgado Trust; and ii) Jennifer Greggor and Mark Sablik, and (b) the State Office of Planning.

This Petition is not related to any commission docket for district boundary amendment or special permit.

Dated: Hilo, Hawai'i, May 15, 2020.

COUNTY OF HAWAI'I,

By _____
JOHN S. MUKAI
Deputy Corporation Counsel
Its attorney

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of COUNTY OF HAWAI'I, for a Declaratory Order that "Farm Dwellings" May Not Be Operated As Short-Term Vacation Rentals Under Hawai'i Revised Statutes §§ 205-2 and 205-4.5, and Hawai'i Administrative Rules § 15-15-25	DOCKET NO. DR 20-69 MEMORANDUM OF AUTHORITIES

MEMORANDUM OF AUTHORITIES

This memorandum of authorities explains why: a) a "farm dwelling" is exclusively occupied by a single family that owns property in fee or leasehold from which the family obtains income from agricultural activities, and b) "farm dwellings" may not be used as short-term vacation rentals.

HRS Chapter 205 does not allow for a farm dwelling in the State Land Use Agricultural District to be used as a short-term vacation rental. The Legislature did not intend to allow for short-term vacation rental use within the Agricultural District under the auspices of being a farm dwelling. The respective definitions and uses for farm dwellings and short-term vacation rentals irreconcilably conflict and show that short-term vacation rental use is incompatible with being a farm dwelling.

A. A "Farm Dwelling" Is Exclusively Occupied By A Single Family Which Holds the Property in Fee or Leasehold and Obtains Income From Agricultural Activities

In determining whether short-term vacation rentals are permitted as "farm dwellings" under HRS Chapter 205, it is appropriate to look to the reason and spirit underlying the State land use law. See Curtis v. Board of Appeals, County of Hawaii, 90 Hawai'i 384, 396, 978 P.2d 822, 834 (1999) (analyzing whether cellular telephone towers are permitted as "utility lines" pursuant to HRS § 205-4.5(a)(7)). The "overarching purpose of the state land use law is to

'protect and conserve' natural resources and foster 'intelligent,' 'effective,' and 'orderly' land allocation and development." Id. In other words, the Legislature intended to "stage the allocation of land for development in an orderly plan, and to redress the problem of inadequate controls (which) have caused many of Hawaii's limited and valuable lands to be used for purposes that may have a short-term gain to a few but result in a long-term loss to the income and growth potential of our economy." Neighborhood Board No. 24 (Waianae Coast) v. State Land Use Commission, 64 Haw. 265, 272, 639 P.2d 1097, 1103 (1982).

Accordingly, HRS § 205-2 places all lands in the State into four land use districts, one of which is the agricultural district. Agricultural lands are clearly protected, as there is a constitutional mandate to "conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands." Hawai'i State Constitution, Art. XI, Sec. 3. Following that mandate, "HRS chapter 205 clearly limits the permissible uses allowed within an agricultural district. HRS § 205-4.5(b) states that uses not expressly permitted in subsection (a) shall be prohibited, except the uses permitted as provided in sections 205-6[1] and 205-8." Save Sunset Beach Coalition v. City and County of Honolulu, 102 Hawai'i 465, 482, 78 P.3d 1, 18 (2003).

"Farm dwellings" are listed as a permitted use in the State Land Use Agricultural District. HRS § 205-4.5(a)(4). A farm dwelling is allowed for as a "bona fide" agricultural service and use in the State Land Use Agricultural District which supports and is accessory to a fee or leasehold owner's agricultural activities. HRS § 205-2(d)(7).[2]

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[1] HRS § 205-6 allows the County Planning Commission to permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified in exceptional situations that do not contravene the general purpose of the agricultural district to promote the effectiveness and objectives of HRS Chapter 205. Save Sunset Beach Coalition, 102 Hawai'i at 482, 78 P.3d at 18. The County interprets HRS Chapter 205 to allow certain short-term overnight accommodations under appropriate circumstances with a Special Permit.

[2] Examples of agricultural activities include the "care and production of livestock and livestock products, poultry and poultry products, apiary products, and plant and animal production for nonfood uses; the planting, cultivating,

As an agricultural service and use that supports and is accessory to a fee or leasehold owner's agricultural activities, a "farm dwelling" is defined as "a single-family dwelling located on **and** used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling." HRS § 205-4.5(a)(4)(emphasis added). A "single-family dwelling" is a "dwelling occupied exclusively by one family." HAR § 15-15-03.

In sum, a "farm dwelling" is exclusively occupied by single family which obtains income from a fee or leasehold owner's agricultural activities[3]. See HRS §§ 205-2(d)(7), 205-4.5(a)(4), HAR § 15-15-03. Logically, the single family exclusively occupying the farm dwelling will also be a fee or leaseholder owner of the farm creating the income from agricultural activities: how else could this family obtain income from the fee or leaseholder owner's agricultural activities?[4]

The intended use and purpose of a farm dwelling is to support and be accessory to the agricultural activities from which the single family exclusively occupying that dwelling obtains income. Accordingly, the farm creating income from agricultural activities will usually be on the same property as the farm dwelling, but may not be such as clusters of farm dwellings in an agricultural park laid out by the State. See HRS §§ 205-2(d)(7) (allowing for bona fide agricultural services and uses regardless of whether conducted on the same premises as the

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harvesting, and processing of crops; and the farming or ranching of any plant or animal species in a controlled salt, brackish, or freshwater environment." HRS § 165-2 (referred to in HRS §§ 205-2(d)(11) and (12) and 205-4.5(a)(13), (14), and (19) to define "farming operations" and "bona fide agricultural activity").

[3] Lessees of farm dwellings in agricultural parks laid out by the State also need to derive the major portion of their income from their agricultural or aquacultural activities on the premises. See HRS § 166-6(a).

[4] Employee housing is allowed as separate and distinct form of housing in the Agricultural District. See HRS §§ 205-2(d)(7); 205-4.5(a)(4).

agricultural activities to which they are accessory); 205-4.5(a)(4). Properties disposed of for agricultural parks that may include farm dwellings are only to be disposed of for agricultural or aquacultural purposes for a minimum of fifteen years. See HRS § 166-6(a). Under any circumstances, the purpose of a farm dwelling is to be used in connection with a farm: to support and be accessory to agricultural activities which provide income to the exclusive occupants of the farm dwelling who are also the owners or leaseholders of a farm.

B. Farm Dwellings May Not Be Used as Short-Term Vacation Rentals

In contrast to a farm dwelling, a "short-term vacation rental" is "a dwelling unit of which the owner or operator does not reside on the building site, that has no more than five bedrooms for rent on the building site, and is rented for a period of thirty consecutive days or less." HCC § 25-1-5.

By definition, the owner or operator of a short-term vacation rental does not exclusively occupy the unit as a single family or even live onsite. Rather, the owner or operator must reside off-site and temporarily rents the use of the unit to others. This irreconcilably conflicts with a farm dwelling that a single family exclusively occupies while obtaining income from agricultural activities on a farm that the family owns in fee or leasehold.

If the requirements for exclusive occupancy are ignored and the people who rent a short-term vacation rental are viewed as temporarily occupying the unit, those short-term renters do not obtain income from agricultural activity. The renters pay the owners or operators of a short-term vacation rental to temporarily occupy the unit, which does not provide any evident income from agricultural activity to the renters. These renters do not own a fee or leasehold interest in the property (or else they would not rent the property), or any farm as required for the occupants of a farm dwelling.

Another form of overnight accommodations allowed in the State Land Use Agricultural District separate and distinct from farm dwellings are short-term (twenty-one days or less) overnight accommodations as agricultural tourism activities which coexist with a bona fide agricultural activity. HRS § 205-2(d)(12). These short-term overnight accommodations are clearly distinct from a farm dwelling exclusively occupied by a single family which obtains income from agricultural activities on a farm that the family owns or leases. These types of agricultural tourism activities are only allowed in counties with at least three islands, which does not include this County. HRS § 205-2(d)(12). The provision for these types of agricultural tourism short-term overnight accommodations further demonstrates that the Legislature did not intend to allow for the short-term vacation rentals at issue in farm dwellings.

The uses of farm dwellings and short-term vacation rentals are also clearly distinct. A farm dwelling is used in connection with a farm: in support of and accessory to a farm or "farming operation": "a commercial agricultural, silvicultural, or aquacultural facility or pursuit." HRS §§ 165-2, 205-2, 205-4.5. Farm dwellings are included as a permitted use on a list of activities or uses related to farming and animal husbandry. HRS § 205-4.5(a)(4). While a farm dwelling's primary purpose is to be a bona fide agricultural service and use which supports and is accessory to agricultural activities, the purpose and use of a short-term vacation rental is to provide transient accommodations: to be temporarily rented for periods of thirty days or less. In and of itself, the rental of a short-term vacation rental is its use, and such a unit is not being used in connection with a farm with agricultural activities from which the unit's occupants obtain income.

In Curtis, the Court found that allowing all cellular telephone towers as "utility lines" in the State Land Use Agricultural District under HRS § 205-4.5(a)(7) "unreasonably expands the intended scope of this term and frustrates the state land use law's basic objectives of protection

and rational development." 90 Haw. at 396, 978 P.2d at 834. Including short-term vacation rentals in the definition of farm dwelling would similarly unreasonably expand the intend scope of the term "farm dwelling" and frustrate the basic objectives of protection and rational development underlying State Land Use Law.

The County accordingly requests the State Land Use Commission to rule that farm dwellings may not be used as short-term vacation rentals pursuant to HRS §§ 205-2 and 205-4.5, and HAR § 15-15-25.

Dated: Hilo, Hawai'i, May 15, 2020.

COUNTY OF HAWAI'I,

By _____
JOHN S. MUKAI
Deputy Corporation Counsel
Its attorney

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In the Matter of the Petition of COUNTY OF HAWAI'I, for a Declaratory Order that "Farm Dwellings" May Not Be Operated As Short-Term Vacation Rentals Under Hawai'i Revised Statutes §§ 205-2 and 205-4.5, and Hawai'i Administrative Rules § 15-15-25	DOCKET NO. DR 20-69 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by mailing the same, postage prepaid, on May 15, 2020:

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Dated: Hilo, Hawai'i, May 15, 2020.

COUNTY OF HAWAI'I

By _____
JOHN S. MUKAI
Deputy Corporation Counsel
Its attorney