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BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of:

Linda K. Rosehill, Trustee of the Linda K. Rosehill Revocable Trust dated August 29, 1989, as amended; Thomas B. and Rea A. Wartman; Mark A. Dahlman; Mark B. Chesebro and Caroline Mitchel, Trustees of the First Amendment and Restatement of the 1999 Mark Brendan Chesebro and Caroline Mitchel Revocable Trust U/D/T dated January 6, 1999; Somtida S. Salim, Trustee of the Somtida Salim Living Trust dated February 15, 2007; Todd M. Moses; Psalms 133 LLC; John T. Fenton, Trustee of the John T. Fenton Revocable Trust dated February 27, 2014; Frances T. Fenton, Trustee of the Frances T. Fenton Revocable Trust dated February 27, 2014; Donald J. K. and Stacey S. Olgado; Dirk and Laura Bellamy Hain, Trustees of the Bellamy-Hain Family Trust dated September 13, 2017; Peter A. Gunawan; Janti Sutedja; Neil Almstead; Doyle Land Partnership; James T. Kelnhofer; Charles E. and Nancy E. Rosebrook; Michael Cory and Eugenia Maston; Paul T. and Delayne

Docket No. DR20-70

**PETITION FOR DECLARATORY
ORDER AND INCORPORATED
MEMORANDA**

VERIFICATION OF PETITION

EXHIBITS 1 - 2

CERTIFICATE OF SERVICE

M. Jennings, Trustees of the Jennings
Family Revocable Trust dated January
5, 2010; Maggholm Properties LLC;
Nettleton S. and Diane E. Payne, III

PETITION FOR DECLARATORY ORDER

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	NAME, ADDRESS AND TELEPHONE NUMBER OF PETITIONERS	6
III.	STATEMENT OF PETITIONERS' INTEREST, INCLUDING REASONS FOR SUBMISSION OF THE PETITION.....	7
IV.	DESIGNATION OF THE SPECIFIC PROVISION, RULE OR ORDER IN QUESTION	8
V.	STATEMENT OF RELEVANT FACTS AND ISSUES RAISED OR CONTROVERSY OR UNCERTAINTY INVOLVED	11
	A. Relevant Facts.	11
	B. Issue Presented.....	20
	C. Bill 108 and Rule 23.	20
VI.	STATEMENT OF THE PETITIONERS' INTERPRETATION OF THE STATUTE, RULE OR ORDER OR THE POSITION OR CONTENTION WITH RESPECT THERETO	21
VII.	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONERS' POSITION OR CONTENTION	21
	A. The LUC Has Jurisdiction.....	21
	B. Rentals of 30 Days or Less Were Not Prohibited as of June 4, 1976.	21
	1. The definition of "farm dwelling" contained two alternative clauses and a single-family dwelling qualifies as a farm dwelling if it meets either clause.	22
	2. The first clause in the definition of "farm dwelling" did not prohibit rentals of 30 days or less.	24
	3. Alternatively, the second clause in the definition of "farm dwelling" did not prohibit rentals of 30 days or less.	26
VIII.	NAMES OF OTHER POTENTIAL PARTIES.....	26
IX.	WHETHER THE PETITION FOR DECLARATORY RULING RELATES TO ANY DOCKET FOR DISTRICT BOUNDARY AMENDMENT OR SPECIAL PERMIT	26
X.	CONCLUSION	27

I. INTRODUCTION

The County of Hawai'i (the "**County**") has usurped the responsibility of the State Land Use Commission (the "**LUC**" or "**Commission**") by attempting to interpret and enforce the State Land Use Law, Hawai'i Revised Statutes ("**HRS**") Chapter 205. On April 1, 2019, the County amended the Hawai'i County Code ("**HCC**") to bar every owner of land within the State Agricultural District from renting any dwelling for a period of 30 consecutive days or less, unless the lot was created before June 4, 1976. HCC §§ 25-1-5, 25-4-16.1(e).

The County reached back to June 4, 1976 because, on that date, the State law was amended to delineate certain permissible uses within the State Agricultural District. 1976 Sess. Laws of Hawai'i, Act 199 § 1. Among other things, the amendment authorized "farm dwellings," meaning "a single-family dwelling located on and used in connection with a farm **or** where agricultural activity provides income to the family occupying the dwelling." *Id.* (emphasis added). The County has interpreted this amendment to mean, as a matter of law, that a "dwelling" cannot be a "farm dwelling" if it is rented for a period of 30 days or less.¹

Contrary to the County's understanding of Chapter 205, the laws governing the State Agricultural District do not regulate the length of rental agreements. Before April 1, 2019, the County also did not regulate whether dwellings in the State

¹ The Code defines a "dwelling" as a "short term vacation rental" if "the owner or operator does not reside on the building site," it "has no more than five bedrooms for rent on the building site" and it "is rented for a period of thirty consecutive days or less." HCC § 25-1-5. The Code prohibits short-term vacation rentals in the State Agricultural District unless the lot was created before June 4, 1976. *Id.* § 25-4-16.1(e).

Agricultural District could be rented for periods of 30 days or less.² Before April 1, 2019, Petitioners had rented their dwellings in the State Agricultural District for periods of 30 days or less. Rather than prospectively regulate its zoning districts, the County has retroactively declared, as a matter of State law, that those rental terms have been unlawful since June 4, 1976.

Instantaneously eliminating an existing land use raises issues of a constitutional dimension. “Under the United States and Hawai‘i Constitutions, preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate.” *See Robert D. Ferris Tr. v. Planning Comm’n of Cty. of Kauai*, 138 Hawai‘i 307, 312-13, 378 P.3d 1023, 1028-29 (App. 2016) (quotations omitted). Accordingly, existing lawful uses cannot be declared unlawful as of the date of a new ordinance. *E.g., Cradduck v. Yakima County*, 271 P.3d 289, 296 (Wash. Ct. App. 2012) (“While it would be unconstitutional to subject nonconforming uses to immediate termination, it is a valid exercise of police power to terminate nonconforming uses that have been abandoned or by providing a reasonable amortization period.”) (quotations omitted). Rather, regulators must “amortize,” or phase out, uses over time. *E.g., Hawai‘i Administrative Rules (“HAR”) § 15-15-29* (regulating non-conforming uses). A fortiori, regulators cannot reach back in time and declare that an existing use was always unlawful. *See Hussein v. Vill. of Germantown Bd. of Zoning Appeals*, 800 N.W.2d 551, 554 (Wis. Ct. App. 2011)

² The County allows not only “farm dwellings,” as does Chapter 205, but also “single-family dwellings” within the County Agricultural District. *See* HCC § 25-5-77 (“One single-family dwelling or one farm dwelling shall be permitted on any building site in the A district.”) (emphasis added).

“Legal nonconforming uses are protected because of concerns that retroactive application of zoning ordinances would be unconstitutional.”).

Trying to do what the Constitution forbids, the County has attempted to assert that the use has been illegal as a matter of State law since June 4, 1976. Petitioners have challenged the County’s actions in administrative proceedings before the County Planning Commission. By agreement with the County, those proceedings have been stayed so that Petitioners and the County may obtain guidance from the Commission. The Commission’s guidance is important because only the Commission “may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission to a specific factual situation.” HAR § 15-15-98; *see also* HRS § 91-8. Accordingly, we are before the Commission on Petitioners’ and the County’s dueling petitions to interpret Chapter 205.

The issue before the Commission is whether, as of June 4, 1976, Chapter 205 regulated the minimum rental period for “farm dwellings.” At that time, Chapter 205 defined “farm dwelling” as “a single-family dwelling” (1) “located on and used in connection with a farm” (the “**first clause**”) “or where agricultural activity provides income to the family occupying the dwelling” (the “**second clause**”). 1976 Haw. Sess. L., Act 199 § 1 (emphasis added). This definition is codified in HRS § 205-4.5(a)(4).³

³ Today, the definition is largely the same as it was in 1976. The only change is that the definition now includes a dependent clause regarding State agricultural parks. *See* HRS § 205-4.5(a)(4) (“‘Farm dwelling’, as used in this paragraph, means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks

By using the disjunctive “or,” a dwelling is a “farm dwelling” if either “alternative” clause is satisfied. *See State v. Sorenson*, 44 Haw. 601, 604, 359 P.2d 289, 291 (1961). In other words, “the word ‘or’ in its ordinary use and also in accurate meaning is a disjunctive particle. It marks an alternative and not a conjunctive. It indicates one or the other of two or several persons, things or situations and not a combination of them.” *Correa v. W.A. Ramsay, Ltd.*, 32 Haw. 735, 740 (Terr. 1933) (quotations omitted).

It is clear that farm dwellings may be rented because Chapter 205 specifically contemplates that property within the State Agricultural District may be “lease[d].” *See* HRS § 205-4.5(b) (“Any . . . lease . . . covering any land within the agricultural subdivision shall expressly contain the restriction on uses”). A “lease” is “[a] contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usu. rent. The lease term can be for life, for a fixed period, or for a period terminable at will.” LEASE, *Black’s Law Dictionary* (11th ed. 2019). In the context of real property, to “lease” and “rent” are synonymous. *See Turner v. First Nat. Bank*, 234 S.W. 928, 928 (Tex. Civ. App. 1921) (“The verb ‘rent’ means ‘to let out; to lease; as to rent one’s house.’ Those definitions are given, in substance, by all the standard dictionaries.”). In other words, the owner does not have to be the occupant.

developed by the State, or where agricultural activity provides income to the family occupying the dwelling”). The LUC’s Rules define “farm dwelling” consistent with the 1976 definition. *See* HAR § 15-15-03 (“‘Farm dwelling’ means a single-family dwelling located on and used in connection with a farm or where agricultural activity provides income to the family occupying the dwelling.”).

The only question is how long the renter has to stay. As recounted above, under the first clause of the definition of “farm dwelling,” a single-family dwelling is a “farm dwelling” as long as it is located on and used in connection with a farm. There is nothing in the definition about who may occupy the dwelling or how long the occupation must be. Alternatively, under the second clause, a single-family home is a “farm dwelling” if “agricultural activity provides income to the family occupying the dwelling.” In describing the occupants of the dwelling as “the family” rather than “the owner,” the second clause implicitly confirms the ability to rent the dwelling. The “family” that is “occupying the dwelling” could receive income from agricultural activity for a day, a week, a month or a year. Under each clause, Chapter 205 did not, and does not, prohibit rentals or regulate the length of any rental.

The Commission must follow the plain language of Chapter 205. As the Hawai‘i Supreme Court has observed, “[w]e cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts. . . . Even where the Court is convinced in its own mind that the Legislature really meant and intended something not expressed by the phraseology of the Act, it has no authority to depart from the plain meaning of the language used.” *State v. Dudoit*, 90 Hawai‘i 262, 271, 978 P.2d 700, 709 (1999) (quotations omitted). Equally relevant here, any ambiguity in the statutory language must be resolved in favor of the free use of property as a common law right. *See Foster Vill. Cmty. Ass’n v. Hess*,

4 Haw. App. 463, 469-70, 667 P.2d 850, 854 (App. 1983) (“Ambiguities in a zoning regulation should not be resolved in further derogation of common-law rights.”).

As of June 4, 1976, the plain language of Chapter 205 did not dictate how long a “farm dwelling” must be rented in order to qualify as a “farm dwelling”. The Commission’s only duty here is to declare what the law said.

II. NAME, ADDRESS AND TELEPHONE NUMBER OF PETITIONERS

Petitioners are the following:

- Linda K. Rosehill, Trustee of the Linda K. Rosehill Revocable Trust dated August 29, 1989, as amended (TMK 3-6-4-031: 002);
- Thomas B. and Rea A. Wartman (TMK 3-5-9-010: 018);
- Mark A. Dahlman (TMK 3-5-9-012: 021);
- Mark B. Chesebro and Caroline Mitchel, Trustees of the First Amendment and Restatement of the 1999 Mark Brendan Chesebro and Caroline Mitchel Revocable Trust U/D/T dated January 6, 1999 (TMK 3-5-9-011: 008-0001);
- Somtida S. Salim, Trustee of the Somtida Salim Living Trust dated February 15, 2007 (TMK 3-5-9-006-037);
- Todd M. Moses (TMK 3-5-9-011: 085);
- Psalms 133 LLC (TMK 3-5-9-012: 038);
- John T. Fenton, Trustee of the John T. Fenton Revocable Trust dated February 27, 2014 (TMK 3-5-9-013: 065);
- Frances T. Fenton, Trustee of the Frances T. Fenton Revocable Trust dated February 27, 2014;
- Donald J. K. and Stacey S. Olgado (TMK 3-5-9-011: 026);
- Dirk and Laura Bellamy Hain, Trustees of the Bellamy-Hain Family Trust dated September 13, 2017 (TMK 3-7-5-016: 068);
- Peter A. Gunawan and Janti Sutedja (TMK 3-7-3-007: 068);

- Neil Almstead (TMK 3-5-9-012: 033);
- Doyle Land Partnership (TMK 3-7-4-007: 104);
- James T. Kelnhofer (TMK 3-5-9-010: 015); and
- Charles E. and Nancy E. Rosebrook (TMK 3-7-3-007: 070)
- Michael Cory and Eugenia Maston (TMK 3-5-9-006:022:0001)
- Paul T. and Delayne M. Jennings, Trustees of the Jennings Family Revocable Trust dated January 5, 2010 (TMK 3-5-9-011:059);
- Maggholm Properties LLC (TMK 3-8-2-009:079); and
- Nettleton S. and Diane E. Payne, III (TMK 3-6-2-009:002:0002).

Petitioners respectfully request that all correspondence and communications in regard to this Petition be addressed to, and served upon, the undersigned counsel at:

Roy A. Vitousek
 Calvert G. Chipchase
 Christopher T. Goodin
 Cades Schutte LLP
 1000 Bishop Street, Suite 1200
 Honolulu, HI 96813-4216
 Tel.: (808) 521-9200

In connection with the filing of this Petition, Petitioners have authorized the undersigned counsel to act on their behalf with respect to this matter.

III. STATEMENT OF PETITIONERS' INTEREST, INCLUDING REASONS FOR SUBMISSION OF THE PETITION

Petitioners respectfully request a declaratory ruling from the LUC to clarify and affirm that the rental of farm dwellings for periods of 30 days or less was not prohibited in the State Agricultural District as of June 4, 1976.

Petitioners each own dwellings on land classified as Agricultural under the statewide land use classification. Petitioners' respective dwellings are located on lots that were created on or after June 4, 1976. Petitioners have previously used, and wish in future to use, those dwellings for rentals of 30 days or less. Accordingly, Petitioners each have an interest sufficient to submit this Petition.

IV. DESIGNATION OF THE SPECIFIC PROVISION, RULE OR ORDER IN QUESTION

Under HAR § 5-15-98(a), “[o]n petition of an interested person, the commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission.” Thus, the LUC has jurisdiction to interpret the applicability and meaning of HRS § 205-4.5. *See id.*; *see also* HRS § 91-8 (“Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.”).

As of June 4, 1976,⁴ Hawai‘i law (now codified in revised but substantially similar form at HRS § 205-4.5(a)) provided, *inter alia*, as follows:

Permissible uses within the agricultural districts. (a) Within the agricultural district all lands with soil classified by the Land Study Bureau’s Detailed Land Classification as Overall (Master) Productivity Rating Class A or B shall be restricted to the following permitted uses:

...

⁴ Act 199, H.B. No. 3262-76 (enacted and took effect on June 4, 1976).

(4) **Farm dwellings**, employee housing, farm buildings, or activity or uses related to farming and animal husbandry. Farm dwelling as used herein shall mean a single-family dwelling located on and used in connection with a farm or where agricultural activity provides income to the family occupying the dwelling;

On June 4, 1976,⁵ the law (now codified in a slightly modified form at HRS

§ 205-4.5(b) and (c)) further provided as follows:

(b) Uses not express permitted [in the above section (a)] shall be prohibited, except the uses permitted as provided in section 205-6 and section 205-8, and construction of single-family dwellings on lots existing before the effective date of this Act. Any other law to the contrary notwithstanding no subdivision of land within the agricultural district with soil classified by the Land Study Bureau's Detailed Land Classification as Overall (Master) Productivity Rating Class A or B shall be approved by a county unless the said A and B lands within the subdivision shall be made subject to the restriction on uses as prescribed in this section and to the condition that the uses shall be primarily in pursuit of an agricultural activity.

. . . .

(c) Within the agricultural district all lands, with soil classified by the Land Study Bureau's Detailed Land Classification as Overall (Master) Productivity Rating Class C, D, E, or U shall be restricted to the uses permitted for agricultural districts as set forth in section 205-5(b).

In its current form, and in pertinent part, HRS § 205-4.5 provides:

(a) Within the agricultural district, all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B and for solar energy facilities, class B or C, shall be restricted to the following permitted uses:

. . .

(4) Farm dwellings, employee housing, farm buildings, or activities or uses related to farming and animal husbandry. "**Farm dwelling**", as used in this paragraph, means 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;

⁵ Act 199, H.B. No. 3262-76 (enacted and took effect on June 4, 1976).

....
(b) Uses not expressly permitted in subsection (a) shall be prohibited, except the uses permitted as provided in sections 205-6 and 205-8, and construction of single-family dwellings on lots existing before June 4, 1976. Any other law to the contrary notwithstanding, no subdivision of land within the agricultural district with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be approved by a county unless those A and B lands within the subdivision are made subject to the restriction on uses as prescribed in this section and to the condition that the uses shall be primarily in pursuit of an agricultural activity.

....
(c) Within the agricultural district, all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U shall be restricted to the uses permitted for agricultural districts as set forth in section 205-5(b).

As of June 4, 1976, HRS § 205-2(c) set forth the permissible uses on all agricultural lands, including, *inter alia*, the following:

(c) Rural districts shall include activities or uses as characterized by low density residential lots of not more than one dwelling house per one-half acre, except as provided by county ordinance pursuant to section 46-4(c), in areas where "city-like" concentration of people, structures, streets, and urban level of services are absent, and where small farms are intermixed with low density residential lots except that within a subdivision, as defined in section 484-1, the commission for good cause may allow one lot of less than one-half acre, but not less than eighteen thousand five hundred square feet, or an equivalent residential density, within a rural subdivision and permit the construction of one dwelling on such lot; provided that all other dwellings in the subdivision shall have a minimum lot size of one-half acre or 21,780 square feet. Such petition for variance may be processed under the special permit procedure. These districts may include contiguous areas which are not suited to low density residential lots or small farms by reason of topography, soils, and other related characteristics. Rural districts shall also include golf courses, golf driving ranges, and golf-related facilities.

As of June 4, 1976, HRS § 205-2(d) further provided, *inter alia*, as follows:

(d) Agricultural districts shall include:

(1) Activities or uses as characterized by the cultivation of crops, crops for bioenergy, orchards, forage, and forestry;

(2) Farming activities or uses related to animal husbandry and game and fish propagation;

...

(7) Bona fide agricultural services and uses that support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, regardless of whether conducted on the same premises as the agricultural activities to which they are accessory, *including farm dwellings as defined in section 205-4.5(a)(4)*, employee housing, farm buildings, mills, storage facilities, processing facilities, photovoltaic, biogas, and other small-scale renewable energy systems producing energy solely for use in the agricultural activities of the fee or leasehold owner of the property, agricultural-energy facilities as defined in section 205-4.5(a)(17), vehicle and equipment storage areas, and plantation community subdivisions as defined in section 205-4.5(a)(12);

Per HAR § 15-15-01, the purpose of the rules was and is as follows:

This chapter governs the practice and procedure before the land use commission, and shall be construed to secure the just and efficient determination of every proceeding. This chapter shall be liberally construed to preserve, protect, and encourage the development and preservation of lands in the State for those uses to which they are best suited in the interest of public health and welfare of the people of the State of Hawai‘i.

V. STATEMENT OF RELEVANT FACTS AND ISSUES RAISED OR CONTROVERSY OR UNCERTAINTY INVOLVED

A. Relevant Facts.

Petitioners own parcels of land situated within the State Agricultural District (“**agricultural land**”) in the County. Prior to April 1, 2019, the properties were rented out for periods of 30 days or less.

DOYLE LAND PARTNERSHIP

Petitioner Doyle Land Partnership (“**Petitioner Doyle**”) is the fee owner of the property located at 74-4910 Hao Kuni Place, Unit 6, Kailua Kona, HI 96740 and

identified by Tax Map Key No. 3-7-4-007:104 (“**Doyle Property**”). The Doyle Property is 1.0860 acres, located within the State Agricultural District and designated as A-1a under the County zoning code.

Subdivision No. 7905 was approved by the Hawai‘i County Planning Director on March 3, 2005 creating the Doyle Property.

MARK CHESEBRO AND CAROLINE MITCHEL TRUST

Petitioner Mark Chesebro and Caroline Mitchel Trust (“**Petitioner Chesebro**”) is the fee owner of the property located at 59-540 Pueo Place A, Kamuela, HI 96743 and identified by Tax Map Key No. 3-5-9-011:008:0001 (“**Chesebro Property**”). The Chesebro Property is 3.1050 acres, located within the State Agricultural District and designated as A-3a under the County zoning code.

The Chesebro Property was created after June 4, 1976. Subdivision No. 5184-r was approved by the County Planning Director on December 13, 1993 creating the Chesebro Property.

CHARLES E. ROSEBROOK AND NANCY ELLEN ROSEBROOK

Petitioners Charles E. Rosebrook and Nancy Ellen Rosebrook (together “**Petitioner Rosebrook**”) are the fee owners of the property located at 73-1451 Kukuna Street, Kailua Kona, HI 96740 and identified by Tax Map Key No. 3-7-3-007:070 (“**Rosebrook Property**”). The Rosebrook Property is 2.0800 acres, located within the State Agricultural District and designated as FA-2a under the County zoning code.

The Rosebrook Property was created after June 4, 1976. Subdivision No. 04-000073-r was approved by the Hawai'i County Planning Director on December 8, 2005 creating the Rosebrook Property.

NEIL GREGORY ALMSTEAD AND ZHENG YANG ALMSTEAD

Petitioners Neil Gregory Almstead and Zheng Yang Almstead (together "**Petitioner Almstead**") are the fee owners of the property located at 59-340 Olomana Road, Kamuela, HI 96743 and identified by Tax Map Key No. 3-5-9-012:033 ("**Almstead Property**"). The Almstead Property is 3.0840 acres, located within the State Agricultural District and designated as A-3a under the County zoning code.

The Almstead Property was created after June 4, 1976. Subdivision No. 5184-r was approved by the County Planning Director on December 13, 1993 creating the Almstead Property.

MARK ALLAN DAHLMAN

Petitioner Mark Allan Dahlman ("**Petitioner Dahlman**") is the fee owner of the property located at 59-317 Puamale Place, Kamuela, HI 96743 and identified by Tax Map Key No. 3-5-9-012:021 ("**Dahlman Property**"). The Dahlman Property is 3.2730 acres, located within the State Agricultural District and designated as A-3a under the County zoning code.

The Dahlman Property was created after June 4, 1976. Subdivision No. 5184-r was approved by the County Planning Director on December 13, 1993 creating the Dahlman Property.

JOHN T. FENTON TRUST AND FRANCES FENTON TRUST

Petitioners John T. Fenton Trust and Frances Fenton Trust (together “**Petitioner Fenton**”) are the fee owners of the property located at 59-206 Ka Nani Drive, Kamuela, HI 96743 and identified by Tax Map Key No. 3-5-9-013:065 (“**Fenton Property**”). The Fenton Property is 3.2690 acres, located within the State Agricultural District and designated as A-3a under the County zoning code.

The Fenton Property was created after June 4, 1976. Subdivision No. 5184-r was approved by the County Planning Director on December 13, 1993 creating the Fenton Property.

MAGGHOLM PROPERTIES LLC

Petitioner Maggholm Properties LLC (“**Petitioner Maggholm**”) is the fee owner of the property located at 82-929 Manini Street, Captain Cook, HI 96704 and identified by Tax Map Key No. 3-8-2-009:079 (“**Maggholm Property**”). The Maggholm Property is 1.0000 acres, located within the State Agricultural District and designated as A-1a under the County zoning code.

The Maggholm Property was created after June 4, 1976. Subdivision No. 4153-r was approved by the County Planning Director on July 17, 1978 creating the Maggholm Property.

BELLAMY-HAIN FAMILY TRUST

Petitioner Bellamy-Hain Family Trust (“**Petitioner Bellamy-Hain**”) is the fee owner of the property located at 75-648 Mahi Iulani Place, Kailua Kona, HI 96740 and identified by Tax Map Key No. 3-7-5-016:068 (“**Bellamy-Hain Property**”). The

Bellamy-Hain Property is 1.0000 acres, located within the State Agricultural District and designated as A-1a under the County zoning code.

The Bellamy-Hain Property was created after June 4, 1976. Subdivision No. 6700 was approved by the County Planning Director on March 5, 1996 creating the Bellamy-Hain Property.

JENNINGS FAMILY TRUST

Petitioner Jennings Family Trust ("**Petitioner Jennings**") is the fee owner of the property located at 59-576 Kaala Road, Kamuela, HI 96743 and identified by Tax Map Key No. 3-5-9-011:059 ("**Jennings Property**"). The Jennings Property is 3.0720 acres, located within the State Agricultural District and designated as A-3a under the County zoning code.

The Jennings Property was created after June 4, 1976. Subdivision No. 5184 was approved by the County Planning Director on November 30, 1984 creating the Jennings Property.

JAMES THOMAS KELNHOFER

Petitioner James Thomas Kelnhofer ("**Petitioner Kelnhofer**") is the fee owner of the property located at 59-1177 Kamakani Loop, Kamuela, HI 96743 and identified by Tax Map Key No. 3-5-9-010:014 ("**Kelnhofer Property**"). The Kelnhofer Property is 11.7450 acres, located within the State Agricultural District and designated as A-10a under the County zoning code.

The Kelnhofer Property was created after June 4, 1976. Subdivision No. 5184 was approved by the County Planning Director on November 30, 1984 creating the Kelnhofer Property.

MICHAEL CORY MASTON AND EUGENIA MASTON

Petitioners Michael Cory Maston and Eugenia Maston (collectively “**Petitioner Maston**”) are the fee owners of the property located at 59-296 Makau Place Unit 1, Kamuela, HI 96743 and identified by Tax Map Key No. 3-5-9-006:022:0001 (“**Maston Property**”). The Maston Property is 3.789 acres, located within the State Agricultural District and designated as A-3a under the County zoning code.

The Maston Property was created after June 4, 1976. Subdivision No. 5684 was approved by the County Planning Director on September 14, 1988 creating the Maston Property.

TODD MICHAEL MOSES

Petitioner Todd Michael Moses (“**Petitioner Moses**”) is the fee owner of the property located at 59-128 Olomana Road, Kamuela, HI 96743 and identified by Tax Map Key No. 3-5-9-011:085 (“**Moses Property**”). The Moses Property is 3.2150 acres, located within the State Agricultural District and designated as A-3a under the County zoning code.

The Moses Property was created after June 4, 1976. Subdivision No. 5184 was approved by the County Planning Director on November 30, 1984 creating the Moses Property.

LINDA K. ROSEHILL TRUST

Petitioner Linda K. Rosehill ("**Petitioner Rosehill**") is the fee owner of the property located at 64-735 Mamalahoa Highway, Kamuela, HI 96743 and identified by Tax Map Key No. 3-6-4-031:002 ("**Rosehill Property**"). The Rosehill Property is 1.0106 acres, located within the State Agricultural District and designated as A-1a under the County zoning code.

The Rosehill Property was created after June 4, 1976. Subdivision No. 6617 was approved by the County Planning Director on August 8, 1995 creating the Rosehill Property.

SOMTIDA SALIM TRUST

Petitioner Somtida Salim Trust ("**Petitioner Salim**") is the fee owner of the property located at 59-346 Hookela Place, Kamuela, HI 96743 and identified by Tax Map Key No. 3-5-9-006:037 ("**Salim Property**"). The Salim Property is 3.0000 acres located, within the State Agricultural District and designated as A-3a under the County zoning code.

The Salim Property was created after June 4, 1976. Subdivision No. 6394-r was approved by the County Planning Director on September 30, 1994 creating the Salim Property.

THOMAS BRUCE WARTMAN AND REA ALICE WARTMAN

Petitioners Thomas Bruce Wartman and Rea Alice Wartman (together "**Petitioner Wartman**") are the fee owners of the property located at 59-1058 Kohala Ranch Road, Kamuela, HI 96743 and identified by Tax Map Key No. 3-5-9-

010:018 (**Wartman Property**). The Wartman Property is 12.1110 acres, located within the State Agricultural District and designated as A-10a under the County zoning code.

The Wartman Property was created after June 4, 1976. Subdivision No. 5184 was approved by the County Planning Director on November 30, 1984 creating the Wartman Property.

NETTLETON S. PAYNE III AND DIANE ELIZABETH PAYNE

Petitioners Nettleton S. Payne and Diane Elizabeth Payne (**Petitioner Payne**) are the fee owners of the property located at 62-2145 A Ouli Street 2, Kamuela, HI 96743 and identified by Tax Map Key No. 3-6-2-009:002:0002 (**Payne Property**). The Payne Property is 5.9770 acres, located within the State Agricultural District and designated as A-5a under the County zoning code.

The Payne Property was created after June 4, 1976. Subdivision No. 5238 was approved by the County Planning Director on April 25, 1985 creating the Payne Property.

PSALMS 133 LLC

Petitioner Psalms 133 LLC (**Petitioner Psalms**) is the fee owner of the property located at 59-326 Pualele Place, Kamuela, HI 96743 and identified by Tax Map Key No. 3-5-9-012: 038 (**Psalms Property**). The Psalms Property is 3.0020 acres, located within the State Agricultural District and designated as A-3a under the County zoning code.

The Psalms Property was created after June 4, 1976. Subdivision No. 5184-r was approved by the County Planning Director on December 13, 1993 creating the Psalms Property.

PETER A. GUNAWAN AND JANTI SUTEDJA

Petitioners Peter A. Gunawan and Janti Sutedja (together “**Petitioner Gunawan**”) are the fee owners of the property located at 73-1425 Kukuna Street, Kailua Kona, HI 96740 and identified by Tax Map Key No. 3-7-3-007: 068 (“**Gunawan Property**”). The Gunawan Property is 2.0500 acres, located within the State Agricultural District and designated as FA-2a under the County zoning code.

The Gunawan Property was created after June 4, 1976. Subdivision No. 04-000073-r was approved by the County Planning Director on December 8, 2005 creating the Gunawan Property.

DONALD J. K. AND STACEY S. OLGADO TRUST

Petitioner Donald J. K. Olgado and Stacey S. Olgado Trust (“**Olgado Trust**”) is the fee owner of the property located at 59-611 Kaala Road, Kamuela, HI 96743 and identified by Tax Map Key No. 3-5-9-011:026 (“**Olgado Property**”). The Olgado Property is 3.2980 acres, located within the State Agricultural District and designated as A-3a under the County zoning code.

The Olgado Property was created after June 4, 1976. Subdivision No. 5184 was approved by the County Planning Director on November 30, 1984 creating the Olgado Property.

B. Issue Presented.

Whether, as of June 4, 1976, Chapter 205 regulated the minimum rental period of “farm dwellings.” This issue calls upon the Commission to interpret HRS § 205-4.5(a)(4) and other pertinent State statutes and rules as they existed on June 4, 1976.

C. Bill 108 and Rule 23.

In 2018, the County passed Bill 108, titled An Ordinance Amending Chapter 25, Article 1, Article 2, Article 4, and Article 5, of the Hawai‘i County Code 1983 (2016 Edition, As Amended), Relating to Short-Term Vacation Rentals, Ordinance 2018-114 (“**Bill 108**”), a copy of which is attached as Exhibit 1. Bill 108 took effect on April 1, 2019 and prohibits the rental of dwelling units for 30 days or less within the State Agricultural District if the lot “lot [was] created on or after June 4, 1976.”

Pursuant to Bill 108, Mayor Harry Kim adopted Rule 23 in April 2019. Relevant to this Petition, Rule 23-3 provides that “[a]ny dwelling being operated as a Short-Term Vacation Rental on a lot created on or after June 4, 1976 in the State Land Use Agricultural District is excluded from being registered as a Short-Term Vacation Rental.” Rule 23-3, a copy of which is attached as Exhibit 2. The County Planning Department (“**Planning Department**”) is charged with administering the provisions and requirements of Bill 108 and Rule 23.

**VI. STATEMENT OF THE PETITIONERS' INTERPRETATION OF THE
STATUTE, RULE OR ORDER OR THE POSITION OR CONTENTION
WITH RESPECT THERETO**

As set out below, nothing in HRS § 205-4.5(a)(4) or the other pertinent State statutes and rules, as they existed on June 4, 1976, regulated the rental period of farm dwellings in the State Agricultural District.

**VII. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
PETITIONERS' POSITION OR CONTENTION**

A. The LUC Has Jurisdiction.

Petitioners are before the Commission on a petition for declaratory order. The LUC has jurisdiction over this matter. *See* HRS § 91-8; HAR § 15-15-98. Under the Commission's Rules, "the commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission to a specific factual situation." HAR § 15-15-98; *see also* HRS § 91-8.

B. Rentals of 30 Days or Less Were Not Prohibited as of June 4, 1976.

The relevant statutory provision is the definition of "farm dwelling" as of June 4, 1976, because the County Code purports to regulate the rental use of lots within the State Agricultural District if those lots were created after June 1, 1976.⁶ The definition of "farm dwelling" as of June 1, 1976, is set out below:

⁶ Act 199, H.B. No. 3262-76 (enacted and took effect on June 4, 1976).

Permissible uses within the agricultural districts. (a) Within the agricultural district all lands with soil classified by the Land Study Bureau's Detailed Land Classification as Overall (Master) Productivity Rating Class A or B[7] shall be restricted to the following permitted uses:

...

(4) **Farm dwellings**, employee housing, farm buildings, or activity or uses related to farming and animal husbandry. Farm dwelling as used herein shall mean a **single-family dwelling located on and used in connection with a farm or where agricultural activity provides income to the family occupying the dwelling**;

1. *The definition of "farm dwelling" contained two alternative clauses, and a single-family dwelling qualifies as a farm dwelling if it meets either clause.*

The LUC's rules define a "[s]ingle-family dwelling" as "a dwelling occupied exclusively by one family." HAR § 15-15-03. As set out above, "farm dwelling" is "a single-family dwelling" (1) that is "located on and used in connection with a farm" (the first clause) "or" (2) "where agricultural activity provides income to the family occupying the dwelling."

We apply settled rules of statutory interpretation. Under those rules, we "are bound, if rational and practicable, to give effect to all parts of a statute, and . . . no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." *State v. Kalani*, 108 Hawai'i 279, 283-84, 118 P.3d 1222, 1226-27 (2005). "Neither the courts nor the administrative agencies are empowered to rewrite statutes to suit their notions of sound public policy where the legislature

⁷ "Pursuant to section 15-15-25(b) of the [LUC Rules], HRS § 205-4.5(a) applies to agricultural lands with soil classifications of C, D, E, and U." *T-Mobile USA, Inc. v. Cty. of Hawai'i Planning Comm'n*, 106 Hawai'i 343, 348, 104 P.3d 930, 935 (2005).

has clearly and unambiguously spoken.” *Asato v. Procurement Policy Bd.*, 132 Hawai‘i 333, 350, 322 P.3d 228, 245 (2014) (quotations and brackets omitted). Nor may courts or agencies “change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts.” *Seki ex rel. Louie v. Hawaii Gov’t Employees Ass’n, AFSCME Local No. 152, AFL-CIO*, 133 Hawai‘i 385, 408, 328 P.3d 394, 417 (2014). “Even when the court is convinced in its own mind that the [l]egislature really meant and intended something not expressed by the phraseology of the [a]ct, it has no authority to depart from the plain meaning of the language used.” *Id.* at 406-07, 328 P.3d 394, 415-16. To the extent a statute is ambiguous, the statute must be interpreted in favor of the free use of property. *See Foster Vill. Cmty. Ass’n*, 4 Haw. App. at 469-70, 667 P.2d at 854 (“Ambiguities in a zoning regulation should not be resolved in further derogation of common-law rights.”) (citing *County of Maui v. Puamana Management Corp.*, 2 Haw. App. 352, 631 P.2d 1215 (1981)).

Here, “or” in the definition of “farm dwelling” means that any “single-family” home that meets either part of the definition of a “farm dwelling” is a permitted use in the State Agricultural District. *See Sorenson*, 44 Haw. at 604, 359 P.2d at 291 (under assault statute requiring there be “intent to maim or disfigure another,” offense could be consummated “either with intent to maim or with intent to disfigure”) (quotations omitted).

2. *The first clause in the definition of “farm dwelling” did not prohibit rentals of 30 days or less.*

Under the first clause, a single-family dwelling qualifies as a “farm dwelling” if it is “located on and used in connection with a farm.” By its terms, that condition contains no provision regulating rentals, much less prescribing a minimum rental period.⁸ Requiring a dwelling to be “located on and used in connection with a farm” does not dictate how long or short the dwelling may be rented. The dwelling could be located on and used in connection with a farm regardless of whether the family occupying the dwelling is there for a day, a month or a year. Because the definition of “farm dwelling” did not regulate the duration of rentals, “it is not for [the LUC] to incorporate into [the definition] HRS chapter [205] a prohibition against [renting for 30 days or less] that [did] not otherwise exist.” *See Seki*, 133 Hawai‘i 385, 408, 328 P.3d 394, 417 (2014) (“Thus, it is not for this court to incorporate into HRS chapter 87 a prohibition against fraud, collusion, embezzlement or bad faith that does not otherwise exist.”); *Rundgren v. Bank of New York Mellon*, No. CIV 10-00252 JMS/LEK, 2010 WL 4066878, at *4 (D. Haw. Oct. 14, 2010) (applying these rules of statutory interpretation to conclude that foreclosure statute did not prohibit lender from requiring the successful bidder at the foreclosure auction to pay the full amount of the bid within 21 days after the auction).

⁸ The definition of “farm dwelling” in Chapter 205, as of June 4, 1976, did not prohibit rentals of 30 days or less. In the years that followed, the legislature passed provisions regulating lease terms for other uses. *See* HRS § 205-4.5 (providing that, in plantation community subdivisions, “[t]he employee housing units not owned by their occupants shall be rented or leased at affordable rates for agricultural workers”). Thus, when the legislature intends to regulate lease terms, it says so expressly. The rental term for “farm dwellings” remains unregulated.

In a similar context, courts have held that land use covenants requiring that a use be “residential” do not restrict how long or short the properties may be rented. *See Santa Monica Beach Prop. Owners Ass’n, Inc. v. Acord*, 219 So. 3d 111, 114 (Fla. App. 2017) (“[I]n determining whether short-term vacation rentals are residential uses of . . . property, the critical issue is whether the renters are using the property for ordinary living purposes such as sleeping and eating, not the duration of the rental[.]”); *Wilkinson v. Chiwawa Communities Ass’n*, 327 P.3d 614, 620 (Wash. 2014) (“If a vacation renter uses a home ‘for the purposes of eating, sleeping, and other residential purposes,’ this use is residential, not commercial, no matter how short the rental duration.”); *Lowden v. Bosley*, 909 A.2d 261, 267 (Md. App. 2006) (“transitory or temporary nature of such use does not defeat the residential status”; “receipt of rental income in no way detracts from the *use* of the properties as *residences* by the tenants” (emphasis in original)); *Mason Family Trust v. DeVaney*, 207 P.3d 1176, 1178 (N.M. App. 2009) (“In the present case, the property must be used for ‘dwelling purposes only.’ In the context of a residential subdivision, we interpret a dwelling purpose to be use as a house or abode, and once a proper use has been established, we do not attach any requirement of permanency or length of stay.”).

In accord with these courts and Chapter 205 as it existed on June 4, 1976, the Commission should declare that the first clause in the “farm dwelling” definition did not impose a minimum rental period. Nothing more is required to resolve the Petition.

3. *Alternatively, the second clause in the definition of “farm dwelling” did not prohibit rentals of 30 days or less.*

The plain language of the second clause does not speak to how long the family must occupy a dwelling. All that the second clause requires is that the family receive income from agricultural activity. The family living in the dwelling could receive such income for a day, a week, a month or a year and still satisfy the second clause.

VIII. NAMES OF OTHER POTENTIAL PARTIES

The following are identified as potential parties. These entities will be served by Petitioners at the time of filing this Petition:

- County of Hawai‘i and the County of Hawai‘i Planning Department
- The State of Hawai‘i and the State of Hawai‘i Office of Planning
- Jennifer Greggor and Mark Sablik (identified as potential parties in the LUC petition bearing Docket No. DR 20-68, filed herein on February 13, 2020).

IX. WHETHER THE PETITION FOR DECLARATORY RULING RELATES TO ANY DOCKET FOR DISTRICT BOUNDARY AMENDMENT OR SPECIAL PERMIT

The Petition relates to the Petition filed by the County in Docket No. DR20-69. The Petition may relate to Docket No. DR20-68 as noted above. The Petition does not relate to any other known LUC docket.

X. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Commission grant the declaratory relief requested herein.

DATED: Honolulu, Hawai'i, May 21, 2020.

CADES SCHUTTE
A Limited Liability Law Partnership

A handwritten signature in black ink, appearing to read "Roy A. Vitousek III", written over a horizontal line.

ROY A. VITOUSEK III
CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN
Attorneys for Petitioners

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of:

Linda K. Rosehill, Trustee of the Linda K. Rosehill Revocable Trust dated August 29, 1989, as amended; Thomas B. and Rea A. Wartman; Mark A. Dahlman; Mark B. Chesebro and Caroline Mitchel, Trustees of the First Amendment and Restatement of the 1999 Mark Brendan Chesebro and Caroline Mitchel Revocable Trust U/D/T dated January 6, 1999; Somtida S. Salim, Trustee of the Somtida Salim Living Trust dated February 15, 2007; Todd M. Moses; Psalms 133 LLC; John T. Fenton, Trustee of the John T. Fenton Revocable Trust dated February 27, 2014; Frances T. Fenton, Trustee of the Frances T. Fenton Revocable Trust dated February 27, 2014; Donald J. K. and Stacey S. Olgado; Dirk and Laura Bellamy Hain, Trustees of the Bellamy-Hain Family Trust dated September 13, 2017; Peter A. Gunawan; Janti Sutedja; Neil Almstead; Doyle Land Partnership; James T. Kelnhofer; Charles E. and Nancy E. Rosebrook; Michael Cory and Eugenia Maston; Paul T. and Delayne M. Jennings, Trustees of the Jennings Family Revocable Trust dated January 5, 2010; Maggholm Properties LLC; Nettleton S. and Diane E. Payne, III

Docket No. DR20-70

VERIFICATION OF PETITION

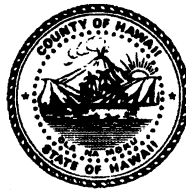
VERIFICATION OF PETITION

Calvert G. Chipchase, being first duly sworn on oath, deposes and says that I am attorney for the above-captioned Petitioners, and as such am authorized to make this verification on behalf of Petitioners. I have read the foregoing Petition and accompanying Memorandum and have full knowledge of the contents thereof, and the same are true to the best of my knowledge and belief.

DATED: Honolulu, Hawai'i, May 21, 2020.

A handwritten signature in black ink, appearing to read 'Calvert Chipchase', written over a horizontal line.

CALVERT G. CHIPCHASE

BILL NO. 108
(DRAFT 7)ORDINANCE NO. 18 114

AN ORDINANCE AMENDING CHAPTER 25, ARTICLE 1, ARTICLE 2, ARTICLE 4, AND ARTICLE 5, OF THE HAWAI'I COUNTY CODE 1983 (2016 EDITION, AS AMENDED), RELATING TO SHORT-TERM VACATION RENTALS.

BE IT ORDAINED BY THE COUNCIL OF THE COUNTY OF HAWAI'I:

SECTION 1. Findings and Purpose. The short-term rental of residential units, as an alternative to traditional resort and hotel accommodations, is an emerging trend in the visitor industry that continues to grow in popularity.

The purpose of this ordinance is to manage the impacts of these short-term vacation rentals by: 1) defining where this use will be allowed; 2) establishing provisions and standards to regulate this use; and 3) providing an avenue for an existing use deemed to be improper by this ordinance, to apply for a nonconforming use certificate that would allow them to continue to operate in a non-permitted district.

SECTION 2. Chapter 25, article 4, division 1, of the Hawai'i County Code 1983 (2016 Edition, as amended), is amended by adding the following new sections to be appropriately designated and to read as follows:

"Section 25-4- . Short-term vacation rentals.

(a) Short-term vacation rentals; where permitted, specific prohibitions.

(1) Short-term vacation rentals shall be permitted in the:

(A) V, CG, and CV districts;

(B) Residential and commercial zoning districts, situated in the General Plan Resort and Resort Node areas; and

(C) RM district, for multiple family dwellings within a condominium property regime as defined and governed by chapters 514A or 514B, Hawai'i Revised Statutes.

(2) Private covenants prohibiting use of any unit as a short-term vacation rental shall not be invalidated by this chapter.

(b) Registration of all short-term vacation rentals.

(1) Short-term vacation rentals in existence on or before the effective date of this ordinance shall register with the director and pay a one-time fee of \$500. The registration form and associated fee shall be submitted to the planning department no later than one hundred eighty days after the effective date of this ordinance.

- (2) Any new short-term vacation rental established in a zoning district after the effective date of this ordinance, where such use is permissible pursuant to this section, shall register with the director and pay a one-time fee of \$500 prior to use of such rental.
- (3) Short-term vacation rentals shall only be established within a dwelling that has been issued final approvals by the building division for building, electrical, and plumbing permits.
- (4) Owners of short-term vacation rentals shall register by submitting a form to the planning department in a format prescribed by the director.
The registration form, at a minimum, shall require:
 - (A) Verification that State of Hawai'i general excise tax and transient accommodations tax licenses are in effect and verification that County property taxes are paid in full;
 - (B) Certification that the requisite amount of parking pursuant to section 25-4-51, is available;
 - (C) Submittal of a site plan showing the location of the rooms for rent and requisite parking; and
 - (D) Verification that notification letters from nonconforming use applicants have been sent to all owners and lessees of record of all lots of which any portion is within three hundred feet of any point along the perimeter boundary of the short-term vacation rental property. The notification letter shall provide detailed information about the short-term vacation rental operation including: number of units being rented; maximum number of guests permitted; number and location of required parking spaces; and instructions on how to submit complaints to the planning department about the subject rental operation.
- (5) Owners of short-term vacation rentals shall notify the director when a short-term vacation rental establishment permanently ceases to operate for any reason.
- (6) Upon change in ownership, the new owner shall notify the director forthwith of the change in ownership and provide contact information for the reachable person. Registration shall automatically continue, subject to termination by the new owner.
- (7) Any short-term vacation rental that has not lawfully registered within the deadlines set forth in this section shall be considered an unpermitted use and subject to the penalties set forth in this chapter until such time as proper registration and compliance with applicable requirements of this section are obtained.

(c) Standards.

All short-term vacation rentals shall be subject to the following standards:

- (1) The owner or reachable person shall reside in the County of Hawai'i and shall be reachable by guests, neighbors, and County agencies on a twenty-four hour, seven days-per-week basis. The owner shall notify the planning department of any changes to their contact information forthwith.
- (2) Good neighbor policy. The owner or reachable person shall be responsible to ensure that activities taking place within the short-term vacation rental conform to the character of the existing neighborhood in which the rental is located. At a minimum, the following shall be prominently displayed within the dwelling unit and recited in the rental agreement signed by the tenant:
 - (A) Quiet hours shall be from 9:00 p.m. to 8:00 a.m., during which time the noise from the short-term vacation rental shall not unreasonably disturb adjacent neighbors.
 - (B) Sound that is audible beyond the property boundaries during non-quiet hours shall not be more excessive than would be otherwise associated with a residential area.
 - (C) Guest vehicles shall be parked in the designated onsite parking area.
- (3) All print and internet advertising of short-term vacation rentals, including listings with a rental service or real estate firm, shall include the registration or nonconforming use certificate number.
- (4) A copy of the registration as well as the reachable person's name and phone number, shall be displayed on the back of the front door of the sleeping quarters.
- (5) Off-street parking shall meet the requirements set forth in section 25-4-51 and applicable parking standards in this chapter.
- (6) Any commercial signage that advertises a short-term vacation rental shall comply with the requirements of section 22-2.6 and chapter 3 of this Code.

(d) Complaints and public information.

The director shall:

- (1) Receive and track complaints regarding short-term vacation rentals;
- (2) Provide information about rules, policies, and procedures pertaining to short-term vacation rentals to property owners, managers, neighbors, and the general public; and
- (3) Maintain a list of all short-term vacation rentals that have registered or received a nonconforming use certificate.

(e) Director duties in event of emergency.

In the event of a declared emergency, natural or manmade, where a significant number of nonconforming short-term vacation rentals are permanently lost within any given judicial district, the director shall assess the effect of such loss upon the affected district and if deemed necessary, initiate legislative and administrative opportunities to restore such loss in short-term vacation rental capacity within the district of origin.

Section 25-4- .1. Short-term vacation rental nonconforming use certificate.

- (a) Nonconforming use certificate. In addition to registering pursuant to 25-4- (b)(1), the owner of any short-term vacation rental which operated outside of a permitted zoning district prior to the effective date of this ordinance, shall obtain a short-term vacation rental nonconforming use certificate in order to continue to operate. This certificate must be renewed annually. Applications for nonconforming use certificates must be submitted to the director no later than one hundred eighty days after the effective date of this ordinance.
- (b) Evidence of prior use.
- (1) The applicant seeking a short-term vacation rental nonconforming use certificate shall have the burden of proof in establishing that the property was in use prior to the effective date of this ordinance and that the dwelling has been issued final approvals by the building division for building, electrical, and plumbing permits. Evidence of such use prior to the effective date of this ordinance may include tax documents for the relevant time period or other reliable information.
- (c) Issuance of initial nonconforming use certificate.
- (1) The director shall determine whether to issue a short-term vacation rental nonconforming use certificate for a short-term vacation rental based on the evidence submitted and other pertinent information.
- (2) Issuance of an initial nonconforming use certificate may be denied if the director verifies any of the following:
- (A) The applicant has violated pertinent laws, such as not securing and finalizing necessary building permits for the dwelling;
- (B) The owner is delinquent in payment of State of Hawai'i general excise tax, transient accommodations tax, or County property taxes, fees, fines, or penalties assessed in relation to the short-term vacation rental; or
- (C) Evidence of non-responsive management, such as issuance of a notice of violation, police reports, or verified neighbor complaints of noise or other disturbances relating to the short-term rental operations.
- (d) Annual renewal.
- (1) Nonconforming use certificates must be renewed every year on or before the expiration date indicated on the certificate.
- (2) At the time of renewal the applicant shall pay a renewal fee of \$250 to the director of finance.
- (3) Renewal of a nonconforming use certificate shall be denied if the director finds that the short-term vacation rental use has been abandoned pursuant to section 25-4-62.
- (4) Renewal of a nonconforming use certificate may be denied if the director verifies any of the following:
- (A) Any of the criteria for denial in section 25-4- .1.(c)(2);
- (B) The owner or reachable person has not been reachable; or

- (C) The renewal request and renewal fee were not received on or before the expiration date indicated on the certificate.
- (e) Agricultural lands. In the State land use agricultural district, a short-term vacation rental nonconforming use certificate may only be issued for single-family dwellings on lots existing before June 4, 1976.
- (f) Notice of denial of a nonconforming use certificate and appeal.
- (1) Notice of a decision by the director to deny the initial issuance or renewal of a nonconforming use certificate shall be transmitted in writing to the property owner.
- (2) Within thirty days after the receipt of a notice of denial, the owner may appeal to the board of appeals as provided by section 6-9.2, County Charter and sections 25-2-20 through 25-2-24.
- (g) Display. Current short-term vacation rental nonconforming use certificates shall be displayed in a conspicuous place on the premises that is readily visible to an inspector. In the event that a single address is associated with numerous nonconforming use certificates, a listing of all units at that address holding current certificates may be displayed in a conspicuous, readily visible common area instead.

Section 25-4- .2. Prima facie evidence; short-term vacation rentals.

Advertising of any sort that offers a property as a short-term vacation rental shall constitute prima facie evidence that a short-term vacation rental is operating on that property. The burden of proof shall be on the owner or operator to establish either that the property is not being used as a short-term vacation rental or that it is being used for such purpose legally.

Section 25-4- .3 Short-term vacation rental enforcement account.

- (a) Pursuant to section 10-12, Hawai'i County Charter, a special fund to be known as the "short-term vacation rental enforcement fund" is created. This fund shall be administered by the director.
- (b) The purpose of the fund is to support efforts to enforce the County's short-term vacation rental law.
- (c) This account shall be funded by all fees and fines collected in connection with the administration and enforcement of the County's short-term vacation rental law.
- (d) The funds in this account shall be utilized to pay for expenses that facilitate enforcement of the County's short-term vacation rental enforcement law."

SECTION 3. Chapter 25, article 1, section 25-1-5, of the Hawai‘i County Code 1983 (2016 Edition, as amended), is amended by adding new definitions to be appropriately inserted and to read as follows:

““Reachable” means being able to:

- (1) Respond via telephone to a request from a guest, neighbor, or County agency within one hour of receiving that request; and
- (2) Be physically present at the short-term vacation rental within three hours of receiving a call from a guest, neighbor, or County agency, when that guest, neighbor, or County agency requests the presence of the reachable person.”

““Short-term vacation rental” means 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. This definition does not include the short-term use of an owner’s primary residence as defined under section 121 of the Internal Revenue Code.”

SECTION 4. Chapter 25, article 2, division 3, section 25-2-30, of the Hawai‘i County Code 1983 (2016 Edition, as amended), is amended to read as follows:

“Section 25-2-30. Violations.

Any approval or permit issued pursuant to the provisions of this chapter shall comply with all applicable requirements of this chapter. Failure to comply with any provision of this chapter, any rule adopted pursuant to this chapter, or with conditions imposed as part of any approval [or], permit, [including variances] or variance from the provisions of this chapter, shall constitute a violation of this chapter.”

SECTION 5. Chapter 25, article 5, division 1, section 25-5-3, of the Hawai‘i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows:

“(a) The following uses shall be permitted in the RS district:

- (1) Adult day care homes.
- (2) Cemeteries and mausoleums, as permitted under chapter 6, article 1 of this Code.
- (3) Community buildings, as permitted under section 25-4-11.
- (4) Crop production.
- (5) Dwellings, single-family.
- (6) Family child care homes.
- (7) Group living facilities.
- (8) Home occupations, as permitted under section 25-4-13.
- (9) Meeting facilities.
- (10) Model homes, as permitted under section 25-4-8.

- (11) Neighborhood parks, playgrounds, tennis courts, swimming pools, and similar neighborhood recreational areas and uses.
- (12) Public uses and structures, as permitted under section 25-4-11.
- (13) Short-term vacation rentals situated in the general plan resort and resort node areas.
- (14) Temporary real estate offices, as permitted under section 25-4-8.
- ~~[(14)]~~(15) Utility substations, as permitted under section 25-4-11.”

SECTION 6. Chapter 25, article 5, division 2, section 25-5-22, of the Hawai‘i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows:

“(a) The following uses shall be permitted in the RD district:

- (1) Adult day care homes.
- (2) Bed and breakfast establishments as permitted under section 25-4-7.
- (3) Cemeteries and mausoleums, as permitted under chapter 6, article 1 of this Code.
- (4) Community buildings, as permitted under section 25-4-11.
- (5) Crop production.
- (6) Dwellings, double-family or duplex.
- (7) Dwellings, single-family.
- (8) Family child care homes.
- (9) Group living facilities.
- (10) Home occupations, as permitted under section 25-4-13.
- (11) Meeting facilities.
- (12) Model homes, as permitted under section 25-4-8.
- (13) Neighborhood parks, playgrounds, tennis courts, swimming pools, and similar neighborhood recreational areas and uses.
- (14) Public uses and structures, as permitted under section 25-4-11.
- (15) Short-term vacation rentals situated in the general plan resort and resort node areas.
- (16) Temporary real estate offices, as permitted under section 25-4-8.
- ~~[(16)]~~(17) Utility substations, as permitted under section 25-4-11.”

SECTION 7. Chapter 25, article 5, division 3, section 25-5-32, of the Hawai‘i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows:

“(a) The following uses shall be permitted in the RM district:

- (1) Adult day care homes.
- (2) Bed and breakfast establishments, as permitted under section 25-4-7.
- (3) Boarding facilities, rooming, or lodging houses.
- (4) Cemeteries and mausoleums, as permitted under chapter 6, article 1 of this Code.

- (5) Commercial or personal service uses, on a small scale, as approved by the director, provided that the total gross floor area does not exceed one thousand two hundred square feet and a maximum of five employees.
- (6) Community buildings, as permitted under section 25-4-11.
- (7) Crop production.
- (8) Dwellings, double-family or duplex.
- (9) Dwellings, multiple-family.
- (10) Dwellings, single-family.
- (11) Family child care homes.
- (12) Group living facilities.
- (13) Home occupations, as permitted under section 25-4-13.
- (14) Meeting facilities.
- (15) Model homes, as permitted under section 25-4-8.
- (16) Neighborhood parks, playgrounds, tennis courts, swimming pools, and similar neighborhood recreational areas and uses.
- (17) Public uses and structures, as permitted under section 25-4-11.
- (18) Short-term vacation rentals situated in any of the following:
 - (A) General plan resort and resort node areas.
 - (B) Outside the general plan resort and resort node areas, in multiple family dwellings within a condominium property regime as defined and governed by chapters 514A or 514B, Hawai'i Revised Statutes.
- (19) Temporary real estate offices, as permitted under section 25-4-8.
- ~~[(19)]~~(20) Time share units situated in any of the following:
 - (A) Areas designated as resort under the general plan land use pattern allocation guide (LUPAG) map.
 - (B) Areas determined by the director to be within resort areas identified by the general plan land use element, except for retreat resort areas.
 - (C) Areas determined for such use by the council, by resolution.
- ~~[(20)]~~(21) Utility substations, as permitted under section 25-4-11."

SECTION 8. Chapter 25, article 5, division 4, section 25-5-42, of the Hawai'i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows:

- “(a) The following uses shall be permitted in the RCX district:
- (1) Adult day care homes.
 - (2) Bed and breakfast establishments, as permitted under section 25-4-7.
 - (3) Boarding facilities, rooming, or lodging houses.
 - (4) Cemeteries and mausoleums, as permitted under chapter 6, article 1 of this Code.
 - (5) Churches, temples and synagogues.
 - (6) Commercial or personal service uses, on a small scale, as approved by the director.
 - (7) Community buildings, as permitted under section 25-4-11.
 - (8) Convenience stores.

- (9) Crop production.
- (10) Day care centers.
- (11) Dwellings, double-family or duplex.
- (12) Dwellings, multiple-family.
- (13) Dwellings, single-family.
- (14) Family child care homes.
- (15) Group living facilities.
- (16) Home occupations, as permitted under section 25-4-13.
- (17) Medical clinics.
- (18) Meeting facilities.
- (19) Model homes, as permitted under section 25-4-8.
- (20) Neighborhood parks, playgrounds, tennis courts, swimming pools, and similar neighborhood recreational areas and uses.
- (21) Public uses and structures, as permitted under section 25-4-11.
- (22) Restaurants.
- (23) Schools.
- (24) Short-term vacation rentals situated in the general plan resort and resort node areas.
- (25) Utility substations, as permitted under section 25-4-11.”

SECTION 9. Chapter 25, article 5, division 9, section 25-5-92, of the Hawai‘i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows:

- “(a) The following uses shall be permitted in the V district:
- (1) Adult day care homes.
 - (2) Amusement and recreational facilities, indoor.
 - (3) Art galleries, museums.
 - (4) Automobile service stations.
 - (5) Bars, night clubs and cabarets.
 - (6) Bed and breakfast establishments, as permitted under section 25-4-7.
 - (7) Business services.
 - (8) Cemeteries and mausoleums, as permitted under chapter 6, article 1 of this Code.
 - (9) Churches, temples, and synagogues.
 - (10) Commercial parking lots and garages.
 - (11) Community buildings, as permitted under section 25-4-11.
 - (12) Day care centers.
 - (13) Dwellings, double-family or duplex.
 - (14) Dwellings, multiple-family.
 - (15) Dwellings, single-family.
 - (16) Family child care homes.
 - (17) Financial institutions.
 - (18) Group living facilities.
 - (19) Home occupations, as permitted under section 25-4-13.

- (20) Hotels.
- (21) Lodges.
- (22) Medical clinics.
- (23) Meeting facilities.
- (24) Major outdoor amusement and recreation facilities.
- (25) Model homes, as permitted under section 25-4-8.
- (26) Parks, playgrounds, tennis courts, swimming pools, and other similar open area recreational facilities.
- (27) Personal services.
- (28) Photography studios.
- (29) Public uses and structures, as permitted under section 25-4-11.
- (30) Restaurants.
- (31) Retail establishments.
- (32) Short-term vacation rentals.
- (33) Telecommunication antennas, as permitted under section 25-4-12.
- ~~[(33)]~~(34) Temporary real estate offices, as permitted under section 25-4-8.
- ~~[(34)]~~(35) Theaters.
- ~~[(35)]~~(36) Time share units.
- ~~[(36)]~~(37) Utility substations, as permitted under ~~[Section]~~ section 25-4-11.
- ~~[(37)]~~ (38) Visitor information centers.”

SECTION 10. Chapter 25, article 5, division 10, section 25-5-102, of the Hawai‘i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows:

- “(a) The following uses shall be permitted in the CN district:
- (1) Adult day care homes.
 - (2) Automobile service stations.
 - (3) Bed and breakfast establishments, as permitted under section 25-4-7.
 - (4) Boarding facilities, rooming, or lodging houses, provided that the maximum density shall be one thousand two hundred fifty square feet of land area per rentable unit or dwelling unit.
 - (5) Business services.
 - (6) Cemeteries and mausoleums, as permitted under chapter 6, article 1 of this Code.
 - (7) Churches, temples and synagogues.
 - (8) Community buildings, as permitted under section 25-4-11.
 - (9) Convenience stores.
 - (10) Crematoriums, funeral homes, funeral services, and mortuaries.
 - (11) Crop production.
 - (12) Day care centers.
 - (13) Dwellings, double-family or duplex, provided that the maximum density shall be one thousand two hundred fifty square feet of land area per rentable unit or dwelling unit.

- (14) Dwellings, multiple-family, provided that the maximum density shall be one thousand two hundred fifty square feet of land area per rentable unit or dwelling unit.
- (15) Dwellings, single-family.
- (16) Family child care homes.
- (17) Farmers markets. When the vending activity in a farmers market involves more than just the sale of local fresh and/or raw produce, plant life, fish and local homegrown and homemade products for more than two days a week, the director, at the time of plan approval, shall restrict the hours of use, maintenance and operations and may require improvements as determined appropriate to ensure its compatibility with the existing character of the surrounding area.
- (18) Financial institutions.
- (19) Group living facilities.
- (20) Home occupations, as permitted under section 25-4-13.
- (21) Medical clinics.
- (22) Meeting facilities.
- (23) Model homes, as permitted under section 25-4-8.
- (24) Museums.
- (25) Neighborhood parks, playgrounds, tennis courts, swimming pools, and similar neighborhood recreational areas and uses.
- (26) Offices.
- (27) Personal services.
- (28) Photography studios.
- (29) Public uses and structures, as permitted under section 25-4-11.
- (30) Repair establishments, minor.
- (31) Restaurants.
- (32) Retail establishments.
- (33) Schools.
- (34) Short-term vacation rentals situated in the general plan resort and resort node areas.
- (35) Telecommunication antennas, as permitted under section 25-4-12.
- ~~[(35)]~~(36) Theaters.
- ~~[(36)]~~(37) Utility substations as permitted under section 25-4-11.”

SECTION 11. Chapter 25, article 5, division 11, section 25-5-112, of the Hawai‘i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows:

“(a) The following uses shall be permitted uses in the CG district:

- (1) Adult day care homes.
- (2) Amusement and recreation facilities, indoor.
- (3) Art galleries, museums.
- (4) Art studios.
- (5) Automobile service stations.
- (6) Automobile sales and rentals.

- (7) Bars, nightclubs and cabarets.
- (8) Bed and breakfast establishments, as permitted under section 25-4-7.
- (9) Boarding facilities, rooming, or lodging houses, provided that the maximum density shall be one thousand two hundred fifty square feet of land area per rentable unit or dwelling unit.
- (10) Broadcasting stations.
- (11) Business services.
- (12) Car washing, provided that if it is mechanized, sound attenuated structures or sound attenuated walls shall be erected and maintained on the property lines.
- (13) Catering establishments.
- (14) Cemeteries and mausoleums, as permitted under chapter 6, article 1 of this Code.
- (15) Churches, temples and synagogues.
- (16) Cleaning plants using only nonflammable hydrocarbons in a sealed unit as the cleansing agent.
- (17) Commercial parking lots and garages.
- (18) Community buildings, as permitted under section 25-4-11.
- (19) Convenience stores.
- (20) Crematoriums, funeral homes, funeral services, and mortuaries.
- (21) Crop production.
- (22) Day care centers.
- (23) Display rooms for products sold elsewhere.
- (24) Dwellings, double-family or duplex, provided that the maximum density shall be one thousand two hundred fifty square feet of land area per rentable unit or dwelling unit.
- (25) Dwellings, multiple-family, provided that the maximum density shall be one thousand two hundred fifty square feet of land area per rentable unit or dwelling unit.
- (26) Dwellings, single-family.
- (27) Equipment sales and rental yards, and other yards where retail products are displayed in the open.
- (28) Family child care homes.
- (29) Farmers markets. When the vending activity in a farmers market involves more than just the sale of local fresh and/or raw produce, plant life, fish and local homegrown and homemade products for more than two days a week, the director, at the time of plan approval, shall restrict the hours of use, maintenance and operations and may require improvements as determined appropriate to ensure its compatibility with the existing character of the surrounding area.
- (30) Financial institutions.
- (31) Group living facilities.
- (32) Home occupations, as permitted under section 25-4-13.
- (33) Hospitals, sanitariums, old age, convalescent, nursing and rest homes and other similar uses.
- (34) Hotels.
- (35) Ice storage and dispensing facilities.

- (36) Laboratories, medical and research.
- (37) Laundries.
- (38) Light manufacturing, processing and packaging, where the only retail sales outlet for products produced is on the premises where produced.
- (39) Medical clinics.
- (40) Meeting facilities.
- (41) Model homes, as permitted under section 25-4-8.
- (42) Neighborhood parks, playgrounds, tennis courts, swimming pools, and similar neighborhood recreational areas and uses.
- (43) Offices.
- (44) Personal services.
- (45) Photography studios.
- (46) Public uses and structures, as permitted under section 25-4-11.
- (47) Printing shops, cartographing and duplicating processes such as blueprinting or photostating shops.
- (48) Repair establishments, minor.
- (49) Restaurants.
- (50) Retail establishments.
- (51) Schools.
- (52) Short-term vacation rentals.
- ~~[(52)]~~(53) Telecommunication antennas, as permitted under section 25-4-12.
- ~~[(53)]~~(54) Theaters.
- ~~[(54)]~~(55) Time share units.
- ~~[(55)]~~(56) Utility substations, as permitted under section 25-4-11.
- ~~[(56)]~~(57) Veterinary establishments.”

SECTION 12. Chapter 25, article 5, division 12, section 25-5-122, of the Hawai‘i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows:

- “(a) The following uses shall be permitted in the CV district:
- (1) Adult day care homes.
 - (2) Amusement and recreation facilities, indoor.
 - (3) Art galleries, museums.
 - (4) Automobile sales and rentals.
 - (5) Automobile service stations.
 - (6) Bars.
 - (7) Bed and breakfast establishments, as permitted under section 25-4-7.
 - (8) Boarding facilities, rooming, or lodging houses, provided that the maximum density shall be one thousand two hundred fifty square feet of land area per rentable unit or dwelling unit.
 - (9) Business services.
 - (10) Cemeteries and mausoleums, as permitted under chapter 6, article 1 of this Code.
 - (11) Churches, temples and synagogues.

- (12) Commercial parking lots and garages.
- (13) Community buildings, as permitted under section 25-4-11.
- (14) Convenience stores.
- (15) Crematoriums, funeral homes, funeral services, and mortuaries.
- (16) Crop production.
- (17) Day care centers.
- (18) Dwellings, double-family or duplex, provided that the maximum density shall be one thousand two hundred fifty square feet of land area per rentable unit or dwelling unit.
- (19) Dwellings, multiple-family, provided that the maximum density shall be one thousand two hundred fifty square feet of land area per rentable unit or dwelling unit.
- (20) Dwellings, single-family.
- (21) Family child care homes.
- (22) Farmers markets. When the vending activity in a farmers market involves more than just the sale of local fresh and/or raw produce, plant life, fish and local homegrown and homemade products for more than two days a week, the director, at the time of plan approval, shall restrict the hours of use, maintenance and operations and may require improvements as determined appropriate to ensure its compatibility with the existing character of the surrounding area.
- (23) Financial institutions.
- (24) Group living facilities.
- (25) Home occupations, as permitted under section 25-4-13.
- (26) Hospitals, sanitariums, old age, convalescent, nursing and rest homes and other similar uses.
- (27) Hotels, when the design and use conform to the character of the area, as approved by the director.
- (28) Laboratories, medical and research.
- (29) Lodges.
- (30) Manufacturing, processing and packaging light and general, except for concrete or asphalt products, where the products are distributed to retail establishments located in the immediate community, as approved by the director.
- (31) Medical clinics.
- (32) Meeting facilities.
- (33) Model homes, as permitted under section 25-4-8.
- (34) Neighborhood parks, playgrounds, tennis courts, swimming pools, and similar neighborhood recreational areas and uses.
- (35) Offices.
- (36) Personal services.
- (37) Photography studios.
- (38) Public uses and structures, as permitted under section 25-4-11.
- (39) Publishing plants for newspapers, books and magazines, printing shops, cartographing, and duplicating processes such as blueprinting or photostating shops, which are designed to primarily serve the local area.
- (40) Repair establishments, major, when there are not more than five employees, as approved by the director.

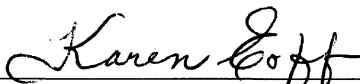
- (41) Repair establishments, minor.
- (42) Restaurants.
- (43) Retail establishments.
- (44) Schools.
- (45) Short-term vacation rentals.
- (46) Telecommunication antennas, as permitted under section 25-4-12.
- ~~[(46)]~~(47) Temporary real estate offices, as permitted under section 25-4-8.
- ~~[(47)]~~(48) Theaters.
- ~~[(48)]~~(49) Utility substations, as permitted under section 25-4-11.

SECTION 13. Material to be repealed is bracketed and stricken. New material is underscored. In printing this ordinance, the brackets, bracketed and stricken material, and underscoring need not be included.

SECTION 14. Severability. If any provision of this ordinance, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the ordinance that can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are severable.

SECTION 15. This ordinance shall take effect on April 1, 2019.

INTRODUCED BY:



COUNCIL MEMBER, COUNTY OF HAWAI'I

Kona, Hawai'i
Date of Introduction: November 2, 2018
Date of 1st Reading: November 2, 2018
Date of 2nd Reading: November 20, 2018
Effective Date: April 1, 2019

REFERENCE Comm. 739.389

OFFICE OF THE COUNTY CLERK
County of Hawai'i
Kona Hawai'i

COUNTY CLERK
COUNTY OF HAWAII

2018 DEC -6 AM 9:00

(Draft 6)

Introduced By: Karen Eoff/Dru Mamo Kanuha
Date Introduced: November 2, 2018
First Reading: November 2, 2018
Published: November 10, 2018

REMARKS: _____

Second Reading: November 20, 2018
To Mayor: November 29, 2018
Returned: December 6, 2018
Effective: April 1, 2019
Published: December 15, 2018

REMARKS: _____

ROLL CALL VOTE				
	AYES	NOES	ABS	EX
Chung	X			
David	X			
Eoff	X			
Kanuha	X			
Lee Loy			X	
O'Hara		X		
Poindexter	X			
Richards			X	
Ruggles			X	
	5	1	3	0

(Draft 7)

ROLL CALL VOTE				
	AYES	NOES	ABS	EX
Chung	X			
David	X			
Eoff	X			
Kanuha				
Lee Loy	X			
O'Hara		X		
Poindexter	X			
Richards	X			
Ruggles			X	
	6	1	1	0

I DO HEREBY CERTIFY that the foregoing BILL was adopted by the County Council published as indicated above.

Approved/Disapproved this 5th day
of December, 20 18.

Harry Keim
MAYOR, COUNTY OF HAWAII

Tolani K. Poindexter

COUNCIL CHAIRPERSON

Justin
COUNTY CLERK

Bill No.: 108 (Draft 7)
Reference: C-739.389/PC-74
Ord No.: 18 114

COUNTY OF HAWAII
PLANNING DEPARTMENT

RULES OF PRACTICE AND PROCEDURE

RULE 23. SHORT-TERM VACATION RENTALS

I. GENERAL PROVISIONS

23-1 Authority

Pursuant to the authority conferred upon the Director by Chapter 25, Hawai'i County Code or any amendments thereto, the rules hereinafter contained are established to regulate Short-Term Vacation Rentals (STVR).

23-2 Purpose

The purpose of this Rule is to establish procedures for the processing of STVRs and manage their impacts.

23-3 Definitions

For the purpose of this Rule, unless it is plainly evident from the content that a different meaning is intended, certain words and phrases used herein are defined as follows:

"Affected owners and lessees" means those property owners and/or lessees of record of any lots of which any portion is within three hundred feet of any point of the boundary of a lot where a Nonconforming Use Certificate is being sought.

"Department" means the County of Hawai'i Planning Department.

"Director" means the Director of the Planning Department.

"Dwelling" means a building or part thereof designed for or used for residential occupancy or both and containing one or more dwelling units, and includes double-family dwelling or duplex, mobile dwelling, multiple-family dwelling and single-family dwelling.

"Dwelling unit" means one or more rooms designed for or containing or used as the complete facilities for the cooking, sleeping and living area of a single-family only and occupied by no more than one family and containing a single kitchen.

"Family" means an individual or two or more persons related by blood, state-sanctioned adoption, foster parentage, guardianship or marriage, or a group of not more than five unrelated persons (excluding servants), occupying a dwelling unit.

"HCC" means the Hawai'i County Code.

"New Short-Term Vacation Rental" means a Short-Term Vacation Rental established after April 1, 2019.

"Permitted Zoning Districts" means the following zoning districts designated in HCC Chapter 25: 1) Resort (V); 2) General Commercial (CG); 3) Village Commercial (CV); 4) Residential and Commercial Zoning Districts, situated in the General Plan Resort and Resort Node areas;

and, 5) Multiple-Family Residential (RM) for multiple family dwellings within a condominium property regime as defined and governed by Chapters 514A or 514B, Hawai'i Revised Statutes.

"Pre-existing Short-Term Vacation Rental" means a Short-Term Vacation Rental established on or before April 1, 2019, which is operating in compliance with all applicable governmental laws, ordinances, codes, and/or regulations. Any dwelling being operated as a Short-Term Vacation Rental on a lot created on or after June 4, 1976 in the State Land Use Agricultural District is excluded from being registered as a Short-Term Vacation Rental.

"Reachable" means an individual who is able to:

- (1) Respond via telephone to a request from a guest, neighbor, or County agency within one hour of receiving that request; and
- (2) Be physically present at the Short-Term Vacation Rental within three hours of receiving a call from a guest, neighbor, or County agency, when that guest, neighbor, or County agency requests the presence of the reachable person.

"Short-Term Vacation Rental" (STVR) means 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.

"Verified complaint" means any complaint filed on a complaint form prepared by the Department pursuant to Rule 9 of the Planning Department Rules of Practice and Procedure or forwarded to the Department and verified as a Zoning Code violation by the Director.

II. ELIGIBILITY

23-4 Zoning Districts

- (a) A dwelling may be used as a STVR upon obtaining a STVR registration in the Permitted Zoning Districts.
- (b) Pre-existing STVRs outside of the Permitted Zoning Districts may continue to operate as STVRs by registering the STVR and obtaining a Nonconforming Use Certificate (NUC).

23-5 Standards

All STVRs shall be subject to the following standards:

- (a) The owner or reachable person shall reside in the County of Hawai'i and shall be reachable by guests, neighbors, and County agencies on a twenty-four hour, seven days-per-week basis. The Department shall be notified within five (5) days of any changes in the owner or reachable person's contact information.
- (b) The owner or reachable person shall be responsible to ensure that activities taking place within the STVR conform to the character of the existing neighborhood in which the rental is located.
- (c) Display Requirements.
 - (1) The following shall be prominently displayed within the dwelling unit and recited in the STVR rental agreement between the owner and person(s) renting the STVR:

- (A) Quiet hours shall be from 9:00 p.m. to 8:00 a.m., during which time the noise from the STVR shall not unreasonably disturb adjacent neighbors.
 - (B) Sound that is audible beyond the property boundaries during non-quiet hours shall not be more excessive than would be otherwise associated with a residential area.
 - (C) Guest vehicles shall be parked in the designated onsite parking area.
 - (D) The STVR shall not be used for commercial purposes.
- (2) A copy of the STVR Registration, and the owner or reachable person's name and phone number, shall be displayed on the back of the front door of all sleeping quarters.
 - (3) Current NUC shall be displayed in a conspicuous place on the STVR's premises that is readily visible to an inspector. In the event that a single address is associated with numerous NUCs, a listing of all units at that address holding current certificates may be displayed in a conspicuous, readily visible common area instead.
- (d) All print and internet advertising of STVRs, including listings with a rental service or real estate firm, shall include the STVR Registration Number. The NUC Number shall also be included, if one has been issued.
 - (e) Any property with a dwelling being used as a STVR shall be in compliance with all applicable laws, including but not limited to having obtained all necessary final permits and/or approvals from the County of Hawai'i Department of Public Works-Building Division for all necessary building, electrical, and plumbing permits.
 - (f) All guest parking for STVRs shall be off-street and shall meet the requirements set forth in HCC Sections 25-4-50 through 25-4-54 and applicable parking standards in HCC Chapter 25. If there is any doubt as to the requirements for off-street parking for a STVR, the Director shall determine the required number of parking spaces.
 - (g) Any commercial signage that advertises a STVR shall comply with the requirements of HCC Section 22-2.6 and HCC Chapter 3.
 - (h) Owners of STVRs shall notify the Director in writing within thirty (30) days when such use permanently ceases for any reason.
 - (i) Upon a change in ownership for a STVR, the new owner shall notify the Director in writing within thirty (30) days of the change in ownership and provide:
 - (1) Name and contact information of the new owner;
 - (2) Copy of the conveyance document;
 - (3) Notarized STVR Affidavit of Compliance;
 - (4) Name and contact information of the reachable person;
 - (5) Copy of STVR Registration Number;
 - (6) Copy of NUC, if one has been issued;

- (7) STVR street address;
- (8) STVR tax map key number; and
- (9) Any other information deemed relevant and requested by the Director.
- (j) Failure to comply with any of the preceding standards, or any conditions provided with STVR Registration or a NUC shall constitute a violation of HCC Chapter 25.

III. STVR REGISTRATION

23-6 Within Permitted Zoning Districts

STVRs within Permitted Zoning Districts shall conform to the following requirements to continue or commence operations:

- (a) Pre-existing STVRs under this subsection must submit a STVR Registration form no later than September 28, 2019.
- (b) New STVRs under this subsection may obtain a STVR Registration at any time; however, the property may not be operated as a STVR until the STVR Registration has been issued.
- (c) Any STVR under this section that has not lawfully registered within the deadlines set forth herein shall be considered an unpermitted use and subject to the penalties set forth in HCC Chapter 25.

23-7 Outside of Permitted Zoning Districts

STVRs outside of the Permitted Zoning Districts shall conform to the following requirements to continue being operated as STVRs:

- (a) Pre-existing STVRs under this section shall submit a STVR Registration Form and a NUC Application no later than September 28, 2019.
- (b) No new STVR can obtain a Registration under this section.
- (c) Any STVR under this section that has not lawfully registered within the deadlines set forth herein shall be considered an unpermitted use and subject to the penalties set forth in HCC Chapter 25.

IV. STVR REGISTRATION AND NUC APPLICATION PROCESS

23-8 General Provisions

- (a) Unless otherwise specified, Sections 23-8 through 23-13 of this Rule shall provide the processing procedures for obtaining STVR Registrations, NUC, and NUC Renewals.
- (b) The Director shall publish, on a semi-monthly basis, a list of all NUC Applications accepted under this Rule in at least two newspapers of general circulation in the County. Such list shall include:
 - (1) Name of the applicant;
 - (2) Name of the property owner;
 - (3) Tax map key number of the property;
 - (4) The land area; and
 - (5) STVR street address, if available.

- (c) STVR Registration Forms and/or NUC Applications filed with the Director pursuant to this Rule shall be reviewed by the Director for completeness within fifteen (15) days from the date that the STVR Registration Form and/or NUC Application was filed by the applicant. During the fifteen (15) day period, the Director shall either determine that the STVR Registration Form and/or NUC Application was complete and accept the STVR Registration Form and/or NUC Application as of the date that the STVR Registration Form and/or NUC Application was filed by the applicant, or determine that the STVR Registration Form and/or NUC Application is defective.
- (d) Once a STVR Registration Form and/or NUC Application is accepted, the Department may request a site inspection to verify that the STVR is located within a legal dwelling and complies with HCC Chapter 25, any rule adopted thereunder, or any permit or variance issued pursuant thereto.

23-9 Incomplete STVR Registration Form/NUC Application

- (a) The Director shall neither accept nor process any STVR Registration Form and/or NUC Application filed pursuant to this Rule that is deemed incomplete as to form or content. An incomplete STVR Registration Form and/or NUC Application shall be returned to the applicant with a written explanation of its deficiencies. A written determination as to whether or not the STVR Registration Form and/or NUC Application is complete or incomplete shall be made within fifteen (15) days upon receipt of the STVR Registration Form and/or NUC Application.
- (b) Any STVR Registration Form and/or NUC Application that is rejected as defective may be refiled together with a copy of the deficiency notice and the required additional information. The resubmitted STVR Registration Form and/or NUC Application shall be accepted as complete as of the date of resubmittal, provided that all required additional information has been submitted.

23-10 Decision

- (a) Unless indicated otherwise, the Director shall, within ninety (90) days after the filing of a complete STVR Registration Form and/or NUC Application or within a longer period as may be agreed to by the applicant, approve or deny the request. Any conditions imposed by the Director shall bear a reasonable relationship to the approval granted.
- (b) If a decision is not rendered within the ninety (90) day review period, the STVR Registration and/or NUC Application shall be deemed approved.
- (c) Decisions by the Director to approve or deny a STVR Registration Form and/or NUC Application shall be based on information provided by the applicant, and other information of which the Department is aware. Should additional information of a substantive nature become available after a decision has been rendered, the Director reserves the right to reverse or amend the original determination.
- (d) At a minimum, an approval for a STVR Registration and/or NUC shall include the following:
 - (1) Name and address of the landowner or lessee;
 - (2) STVR tax map key number;
 - (3) State Land Use district classification, County zoning district, and General Plan designation;
 - (4) STVR Standards, as listed in Section 23-5 of this Rule;

- (5) A condition requiring verification of compliance with STVR display requirements outlined in Section 23-5(c) of this Rule; and
 - (6) Expiration date of the NUC, if applicable.
- (e) The Director may attach appropriate performance conditions on an approved STVR Registration and/or NUC if the conditions are reasonably designed to mitigate adverse impacts to the neighborhood in which the STVR is situated.

23-11 STVR Registration

- (a) A person desiring to commence or continue operation of a STVR that satisfies the eligibility requirements under this Rule, shall submit a STVR Registration Form to the Director for approval.
- (b) One (1) STVR Registration Form shall be submitted for each lot or unit identified by a tax map key for which STVR Registration is sought.
- (c) A person seeking a STVR Registration pursuant to this Section shall provide the following documents to the Department:
 - (1) A completed STVR Registration Form;
 - (2) Written landowners' authorization, if applicable;
 - (3) A non-refundable filing and processing fee of five hundred dollars (\$500). Payments by check shall be made payable to the Director of Finance.
 - (4) Documentation establishing that all permits from the County of Hawai'i Department of Public Works-Building Division for all necessary building, electrical, and plumbing permits were granted final approval;
 - (5) Current State of Hawai'i General Excise and Transient Accommodations Tax licenses;
 - (6) County of Hawai'i Real Property Tax Clearance Certificate;
 - (7) A site plan, drawn to scale, on 11" x 17" paper, identifying:
 - (A) All property boundaries, dimensions, and setbacks;
 - (B) Location of existing and proposed structures, driveway access, swimming pools, ancillary structures, eaves, and overhangs shall be clearly identified and labeled;
 - (C) Designated parking spaces for the STVR in compliance with HCC Sections 25-4-50 through 25-4-54;
 - (D) Reference points such as roadways, shoreline, etc.; and
 - (E) Table indicating total square footages of each of the structures on the property.
 - (8) A floor plan, drawn to scale, on 11" x 17" paper, identifying the location and use of all rooms in the STVR. The number of bedrooms should coincide with that which was approved by the Department of Public Works' Building Division;
 - (9) Notarized STVR Affidavit of Compliance;
 - (10) Reachable person's name and contact information; and
 - (11) Any other or additional relevant information that may be requested by the

Director to facilitate processing.

23-12 Nonconforming Use Certificate

- (a) NUCs shall be issued in accordance with the procedures herein in Rule 23-12.
- (b) One (1) NUC Application shall be submitted for each lot or unit identified by a tax map key for which a NUC is sought.
- (c) Applicants who seek to obtain a NUC shall submit to the Department:
 - (1) A completed STVR Registration Form with associated documents and filing fee, pursuant to Section 23-11 (c) of this Rule;
 - (2) Evidence that establishes STVR use on the subject property prior to April 1, 2019. The evidence must be of such quality to demonstrate to the satisfaction of the Director that the dwelling unit was being used as a STVR prior to April 1, 2019 as an ongoing and lawful enterprise. Such evidence may include copies of:
 - (A) Tax documents for the relevant time period; or
 - (B) Other information which the Director finds to be reliable that provides clear evidence of STVR operations during the relevant time period, including but not limited to, verifiable business receipts, guest registers, etc.;
 - (3) First Notice Requirements for NUC Applicants:
 - (A) A list of the names, mailing addresses, and tax map key numbers of all affected owners and lessees. For the purpose of this Rule, notification to a condominium association may be substituted for notification of the individual condominium owners and lessees that the association represents.
 - (B) A copy of the first notice to be sent to the affected owners and lessees. The first notice shall include:
 - (i) Name of the applicant;
 - (ii) Nature of the use sought;
 - (iii) STVR's street address and tax map key number;
 - (iv) Date the NUC Application was filed with the Director;
 - (v) Number of bedrooms being rented;
 - (vi) Maximum number of guests permitted;
 - (vii) Number and location of off-street parking spaces; and
 - (viii) Instructions on how to submit comments to the Director about the subject rental operation.
 - (C) Proof of service or of good faith efforts to serve notice of the NUC Application on affected owners and lessees. Such proof may consist of certified mail receipts, affidavits, declarations, or the like.
 - (4) Second Notice Requirement for NUC Applicants

- (A) Upon receipt and acceptance of a properly filed and completed NUC Application, the Director shall officially acknowledge receipt of the NUC Application and set a date for administrative action on the NUC Application.
 - (B) Within ten (10) days of receiving the acknowledgment communication from the Director, the applicant shall:
 - (i) Serve a second notice of the NUC Application to all affected owners and lessees;
 - (ii) Provide to the Director a copy of the second notification letter; and
 - (iii) Provide proof of service or of good faith efforts to serve notice of the NUC Application to affected owners and lessees. Such proof may consist of certified mail receipts, affidavits, declarations, or the like.
 - (C) The second notice shall include:
 - (i) Name of the applicant;
 - (ii) Nature of the use sought;
 - (iii) STVR's street address and tax map key number;
 - (iv) Date the NUC Application was filed with the Director;
 - (v) Number of bedrooms being rented;
 - (vi) Maximum number of guests permitted;
 - (vii) Number and location of off-street parking spaces;
 - (viii) The date on which the administrative action by the Director will be taken on the NUC Application;
 - (ix) The date by which comments must be received by the Director, which shall not exceed thirty (30) days from the date of the second notice; and
 - (x) Instructions on how to submit comments to the Director about the subject rental operation.
 - (D) Failure to meet the second notice requirement within the time limits specified herein will render the NUC Application invalid.
- (5) Any other or additional information relevant to the NUC Application that may be requested by the Director to facilitate processing of the NUC Application.
- (d) Issuance of a NUC may be denied if the Director verifies any of the following:
- (1) The applicant has violated pertinent laws, such as, but not limited to, not securing and finalizing necessary building, electrical, and plumbing permits for the dwelling from the Department of Public Works-Building Division;

- (2) The owner is delinquent in the payment of State of Hawai'i General Excise Tax, Transient Accommodations Tax, or County property taxes, fees, fines, or penalties assessed in relation to the STVR; or
 - (3) Evidence of non-responsive management, such as issuance of a notice of violation, police reports, or verified neighbor complaints of noise or other disturbances relating to the STVR operations.
- (e) Notice of denial of a NUC and appeal.
- (1) Notice of a decision by the Director to deny the issuance of a NUC shall be transmitted in writing to the property owner.
 - (2) Within thirty (30) days after the receipt of a notice of denial, the owner may appeal to the board of appeals as provided by the Hawai'i County Charter, Section 6-9.2 and HCC Sections 25-2-20 through 25-2-24.

23-13 Nonconforming Use Certificate Renewal

- (a) NUCs must be renewed every year on or before the expiration date indicated on the Certificate.
- (b) One (1) NUC Renewal Application shall be submitted for each NUC issued.
- (c) NUC Renewal Applications shall be accepted at the Department no earlier than ninety (90) days and no later than fifteen (15) days prior to a NUC's expiration date.
- (d) The Department will not issue reminder notices for upcoming expiration dates.
- (e) Late NUC Renewal Applications will not be accepted; failure to file a NUC Renewal Application by the NUC's expiration date will be considered voluntary forfeiture of the Certificate, rendering the Certificate ineligible for renewal.
- (f) At the time of renewal, the applicant shall submit to the Department:
 - (1) A completed NUC Renewal Application, indicating any changes to the owner or reachable person's contact information;
 - (2) Written landowners' authorization, if applicable.
 - (3) A non-refundable filing and processing fee of two hundred fifty dollars (\$250). Payments by check shall be made payable to the Director of Finance;
 - (4) Notarized STVR Affidavit of Compliance;
 - (5) County of Hawai'i Real Property Tax Clearance Certificate;
 - (6) Proof that State of Hawai'i General Excise and Transient Accommodations taxes are paid in full;
 - (7) Proof of STVR use within the previous twelve (12) months. Failure to meet this condition will result in automatic denial of the NUC Renewal Application; and
 - (8) Any other or additional information relevant to this NUC Renewal Application that

may be requested by the Director to facilitate processing of this request.

- (g) Renewal of a NUC may be denied if the Director verifies any of the following:
 - (1) The applicant has violated pertinent laws, such as, but not limited to, not securing and finalizing necessary building, electrical, and plumbing permits for the dwelling from the Department of Public Works-Building Division;
 - (2) The owner is delinquent in payment of State of Hawai'i General Excise Tax, Transient Accommodations Tax, or County property taxes, fees, fines or penalties;
 - (3) Evidence of nonresponsive management, such as issuance of a notice of violation, police reports, or verified neighbor complaints of noise or other disturbances relating to the STVR operations;
 - (4) The owner or reachable person has not been reachable;
 - (5) The renewal request and renewal fee were not received on or before the expiration date indicated on the Certificate;
 - (6) Any other verified complaints of such number and/or nature as to establish a continuing infringement upon the health, safety, or welfare of the neighborhood or area;
 - (7) Evidence that the conditions of approval have been violated; or
 - (8) The owner or applicant has provided false or misleading information to the Department.
- (h) Renewal of a NUC shall be denied if the Director finds that the STVR use has been abandoned pursuant to HCC Section 25-4-62.
- (i) Notice of denial of a NUC and appeal.
 - (1) Notice of a decision by the Director to deny the renewal of a NUC shall be transmitted in writing to the property owner.
 - (2) Within thirty (30) days after the receipt of a notice of denial, the owner may appeal to the board of appeals as provided by the Hawai'i County Charter, Section 6-9.2 and HCC Sections 25-2-20 through 25-2-24.

23-14 Appeals

A person "aggrieved", as defined by HCC Section 25-2-20(b), by the Director's approval or denial of a request for STVR registration, or approval or denial of an application for a NUC or NUC Renewal may appeal to the Board of Appeals in accordance with its rules within thirty (30) days of the Director's decision.

23-15 Amendments

- (a) The owner or applicant may apply in writing with the Director for any modification to the STVR Registration, and if applicable, the NUC. An application for an amendment shall state the condition(s) to be amended and the reasons for the request.
- (b) Within forty-five (45) days from the date of receipt of the request or a longer time as

may be agreed to by the owner or applicant, the Director shall either approve or deny the request.

- (c) If the Director fails to act within the prescribed time, the request shall be considered as having been denied.

V. COMPLIANCE

23-16 **Enforcement**

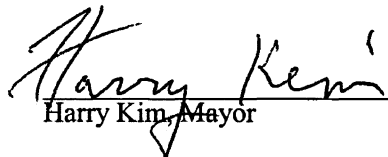
- (a) STVRs in violation of HCC Chapter 25, any rule adopted thereunder, or any permit or variance issued pursuant thereto, shall be subject to enforcement pursuant to HCC Section 25-2-35.
- (b) The Director shall catalog any complaints on STVR properties relating to the violation of HCC Chapter 25, this Rule, or any permit issued therefrom.
- (c) Unresolved violations shall be considered by the Director in approving or denying a STVR Registration, NUC, or NUC Renewal.
- (d) Civil fines for violations of this Rule shall comply with HCC Section 25-2-35 and Planning Department Rules of Practice and Procedure, Rule 9.
- (e) Advertising of any sort that offers a property as a STVR shall constitute prima facie evidence that a STVR is operating on that property. The burden of proof shall be on the owner or operator to establish either that the property is not being used as a STVR or that it is being used for such purpose legally.

Dated this 9th day of April, 2019.


By Michael Yee, Planning Director

DATE OF PUBLIC HEARING: April 2, 2019


APPROVED:


Harry Kim, Mayor

APR 09 2019

Date

APPROVED AS TO FORM AND LEGALITY:


CORPORATION COUNSEL

April 8, 2019
Date

I hereby certify that the forgoing rule was received and filed in my office

this 9th day of April, 2019.


COUNTY CLERK

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of:

Linda K. Rosehill, Trustee of the Linda K. Rosehill Revocable Trust dated August 29, 1989, as amended; Thomas B. and Rea A. Wartman; Mark A. Dahlman; Mark B. Chesebro and Caroline Mitchel, Trustees of the First Amendment and Restatement of the 1999 Mark Brendan Chesebro and Caroline Mitchel Revocable Trust U/D/T dated January 6, 1999; Somtida S. Salim, Trustee of the Somtida Salim Living Trust dated February 15, 2007; Todd M. Moses; Psalms 133 LLC; John T. Fenton, Trustee of the John T. Fenton Revocable Trust dated February 27, 2014; Frances T. Fenton, Trustee of the Frances T. Fenton Revocable Trust dated February 27, 2014; Donald J. K. and Stacey S. Olgado; Dirk and Laura Bellamy Hain, Trustees of the Bellamy-Hain Family Trust dated September 13, 2017; Peter A. Gunawan; Janti Sutedja; Neil Almstead; Doyle Land Partnership; James T. Kelnhofer; Charles E. and Nancy E. Rosebrook; Michael Cory and Eugenia Maston; Paul T. and Delayne M. Jennings, Trustees of the Jennings Family Revocable Trust dated January 5, 2010; Maggholm Properties LLC; Nettleton S. and Diane E. Payne, III

Docket No. DR20-70

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was duly served on this date on the below-named parties by U.S. Mail, postage prepaid:

JOSEPH K. KAMELAMELA
Corporation Counsel
JOHN S. MUKAI
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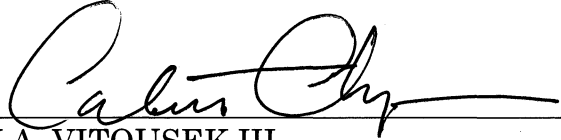
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Deputy Attorney General
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Honolulu, HI 96813
State of Hawaii & Office of Planning

DATED: Honolulu, Hawai'i, May 21, 2020.

CADES SCHUTTE
A Limited Liability Law Partnership

A handwritten signature in black ink, appearing to read "Roy A. Vitousek III", written over a horizontal line.

ROY A. VITOUSEK III
CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN
Attorneys for Petitioners