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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of

COUNTY OF HAWAI'I, for a Declaratory Order that "Farm Dwellings" May Not Be Operated As Short-Term Vacation Rentals Under Hawai'i Revised Statutes §§ 205-2 and 205-4.5, and Hawai'i Administrative Rules § 15-15-25

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

Docket Nos. DR 20-69 & DR 20-70

PETITIONERS IN DOCKET NO. DR 20-70'S STATEMENT OF POSITION REGARDING PETITION IN DOCKET NO. DR 20-69

CERTIFICATE OF SERVICE

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

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PETITIONERS IN DOCKET NO. DR 20-70'S STATEMENT OF POSITION REGARDING PETITION IN DOCKET NO. DR 20-69

This consolidated proceeding involves dueling petitions regarding a definition in Hawai'i Revised Statutes ("**HRS**") Chapter 205. In Land Use Commission ("**LUC**" or "**Commission**") Docket No. 20-70, Petitioners Linda K. Rosehill, *et al.* (collectively, "**Petitioners**") detailed their position in their Petition for Declaratory Order and Incorporated Memoranda filed on May 22, 2020 (the "**Rosehill Petition**"). In this Statement of Position, Petitioners address the County of Hawai'i's (the "**County**") competing Petition for Declaratory Order filed in LUC Docket No. 20-69 (the "**County Petition**").

We are before the LUC because the County amended its zoning code to instantaneously eliminate a land use—specifically, the rental of dwellings for periods of thirty days or less on lots created on or after June 5, 1976. Phasing out a use overnight is unconstitutional, because property owners have the "right . . . to the continued existence of uses and structures which lawfully existed prior to the effective date of a zoning restriction," and that right "is grounded in constitutional law." *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals of City & County of Honolulu*, 86 Hawai'i 343, 353, 949 P.2d 183, 193 (Ct. App. 1997). Specifically, "[t]he United States and Hawai'i Constitutions both provide that no person shall be deprived of property without due process of law. Therefore, due process principles protect a property owner from having his or her vested property rights interfered with, and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate." *Id.* at 353-

54, 949 P.2d at 193-94 (citations and quotations omitted); *see also 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) (interpreting county ordinance to allow any "owner, operator, or proprietor" to apply for nonconforming use certificate, rather than requiring applicant to hold a 75% ownership interest, based on proposition that court "must interpret a statute to avoid violating constitutional provisions").

This constitutional obstacle stands in the way of the County's overnight elimination of renting property for less than 31 days. In an effort to circumvent this obstacle, the County asks the LUC to adopt the terms of the County's zoning ordinance as a matter of State law as it existed in 1976. To accomplish this trick, the County claims that *County* Ordinance 2018-114 enforces *State* Land Use Law. According to the County, for more than 44 years, Hawai'i Revised Statutes ("**HRS**") Chapter 205 ("**Chapter 205**") has prohibited renting a dwelling in the State Agricultural District for a period of less than 31 days. The County picks June 5, 1976, as the relevant date, because on June 4, 1976, Chapter 205 was amended to allow "farm dwellings" and provide a definition of that term. The effort is too cute by half.

Chapter 205 expressly contemplates the lease of farm dwellings. Chapter 205 does not regulate the duration of those leases. The role of the Commission in this consolidated matter extends no further than declaring these truths. There are no specific facts to consider. The Commission cannot adopt or bless the definition of "short-term vacation rental" expressed in Ordinance 2018-114. The Commission

cannot "change the language of [Chapter 205], 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). As a zoning law, Chapter 205 "may not be extended by implication." *See Foster Vill. Cmty. Ass'n v. Hess*, 4 Haw. App. 463, 469-70, 667 P.2d 850, 854 (App. 1983). The only question before the Commission is whether, as of June 5, 1976, Chapter 205 prohibited leases (the same thing as rentals) of farm dwellings for a period of less than 31 days. The answer to that question is "no."

I. QUESTION PRESENTED

The Commission has jurisdiction to "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." Hawai'i Administrative Rules ("**HAR**") § 15-15-98; *see also* HRS § 91-8. The Rosehill Petition asks the Commission to answer the narrow question of whether, as of June 5, 1976, the farm dwellings may be rented for periods of less than 31 days. There is no dispute that as of June 5, 1976, Chapter 205 did not prohibit the rental of farm dwellings.[1] So the only question is whether as of June 5, 1976, Chapter 205 regulated the minimum rental period of farm dwellings. Rosehill Petition at 20.

[1] *See* 1976 Haw. Sess. L. Act 199, § 1 ("Any deed, lease, agreement of sale, mortgage or other instrument of conveyance covering any land within the agricultural subdivision shall expressly contain the restriction on uses and the condition as prescribed in this section which restriction and condition shall be encumbrances running with the land until such time that the land is reclassified to a land use district other than agricultural district.").

The County wants the LUC to adopt the County's regulation of "short-term vacation rentals" as a matter of State law. The County 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. Using this definition to imply the conclusion, the County presents the question as "whether short-term vacation rentals are permitted as 'farm dwellings' under HRS Chapter 205 . . . ." County Petition Mem. at 1; *see also* County Petition at 1 (requesting declaratory order "that 'farm dwellings' may not be used as short-term vacation rentals"); *id.* at 6 (same). According to the County, "[t]he respective definitions and uses for farm dwellings and short-term vacation rentals irreconcilability conflict . . . ." *Id.* at 1.

The County's request is untethered to Chapter 205 and the Commission's jurisdiction. To take up the County's question, the Commission has to adopt the County's complicated definition of "short-term vacation rental," wade into hypothetical factual situations and broadly address irrelevant matters, such as how many bedrooms a farm dwelling may have. The County ordinance is not a "statutory provision[,]. . . rule or order of the commission," and therefore, the Commission cannot determine its "applicability . . . to a specific factual situation." *See* HAR § 15-15-98.

Separating the wheat from the chafe, we are left with the only proper question before the Commission: whether Chapter 205 as of June 5, 1976, regulated the duration of rentals. The short answer is that it did not.

II. ANALYSIS

A. The Text of Chapter 205 Controls.

The County starts out on the wrong foot by beginning its statutory analysis with "the reason and spirit" of the statute. County Petition Mem. at 1. The Hawai'i Supreme Court was critical of this approach in the case of *In re Doe*, 90 Hawai'i 246, 251, 978 P.2d 684, 689 (1999). As in that case, "[t]he [County] begins its interpretation of [Chapter 205] not with the statute's plain language, but by **leapfrogging** into an examination of the purposes behind [the statute]." *See id.* (emphasis added).

The "fundamental starting point" of our statutory analysis is the text of the statute, and where the text is clear we end with the text as well. *See Seki*, 133 Hawai'i at 400, 328 P.3d at 409. As the Hawai'i Supreme Court has explained,

> [T]he **fundamental starting point** for statutory interpretation is the **language of the statute itself**. Where the statutory language is **plain and unambiguous**, our **sole duty** is to give effect to its plain and obvious meaning. Moreover, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the **intention** of the legislature, which is to be obtained primarily from the **language contained in the statute itself**.

Id. (quotations and some brackets omitted; emphasis added).

"Neither the courts nor the administrative agencies are empowered to rewrite statutes to suit their notions of sound public policy where the legislature 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). Neither courts nor agencies may "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*, 133 Hawai'i at 408, 328 P.3d at 417. "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.

In its Petition, the County concedes that the language of Chapter 205 is "clear[]." We agree. On June 5, 1976, Chapter 205 clearly did not regulate the duration of rentals. Even if the language were ambiguous, however, the ambiguity would not help the County because ambiguous language in zoning laws is construed 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."). Zoning laws "may not be extended by implication." *Id.* Their restrictions must be clear. *See id.*

B. The County Conflates the Two Disjunctive Clauses in the Definition of "Farm Dwelling."

As of June 5, 1976, Chapter 205 defined "farm dwelling" as "a single-family dwelling" "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).[2]

The County Petition does not address these two clauses separately. Instead, the County reads the definition as though the clauses were stated in the conjunctive "and" rather than the disjunctive "or." Specifically, after reviewing the definition of "farm dwelling," the County asserts that, "[i]n sum, a 'farm dwelling' is exclusively occupied by single family which obtains income from a fee or leasehold owner's agricultural activities." *See* County Petition Mem. at 3 (emphasis added). Contrary to the County's summation, the "income" language is found in the second clause, not the first. This error is seen throughout the County Petition. *See id.* at 4 ("Under any circumstances, the purpose of a farm dwelling is to be used in connection with a farm: to support and be accessory to agricultural activities which provide income to the exclusive occupants of the farm dwelling who are also the owners or leaseholders of a farm."); *id.* ("those short-term renters do not obtain income from agricultural activity"); *id.* at 5 ("In and of itself, the rental of a short-term vacation rental is its use, and such a unit is not being used in connection with a farm with agricultural activities from which the unit's occupants obtain income.").

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[2] 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 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 County's reading of the definition runs afoul of settled rules of statutory interpretation. The two clauses are connected by the disjunctive word "or." "[T]he common usage of the word 'or' is as a disjunctive, indicating an alternative." *State v. Sorenson*, 44 Haw. 601, 604, 359 P.2d 289, 291 (1961). "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. at 740. "**It usually connects words or phrases of different meanings permitting a choice of either**." *State v. Sorenson*, 44 Haw. 601, 604, 359 P.2d 289, 291 (1961) (emphasis added). Thus, because the "farm dwelling" definition contained two clauses stated in the disjunctive ("or"), the definition was met if *either* clause was satisfied.

The LUC is "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). By essentially ignoring the first clause, the County's argument offends the rules of statutory interpretation.

1. The first clause did not prohibit rentals of 30 days or less.

The first clause defined "farm dwelling" as "a single-family dwelling . . . located on and used in connection with a farm . . . ." 1976 Haw. Sess. L. Act 199, § 1.[3] By its terms, the first clause contains no provision regulating rentals, much less prescribing a minimum rental period. Requiring a dwelling to be "located on and

[3] "The phrase 'in connection with' is generally interpreted broadly and defined as 'related to,' 'linked to,' or 'associated with.'" *Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd. P'ship*, 115 Hawai'i 201, 225, 166 P.3d 961, 985 (2007).

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 at 408, 328 P.3d at 417.

As a result of its misreading of the "farm dwelling" definition, the County does not address the first clause by itself, separate from the second clause. *See* County Petition. The County does not explain why the first clause requires the family to "obtain[] income from agricultural activities on a farm . . . ." County's Petition at 2. To conclude that the first clause had an "income" requirement would render the inclusion of the separate second clause "superfluous, void, or insignificant" in violation of rules of statutory interpretation discussed. *See Kalani*, 108 Hawai'i at 283-84, 118 P.3d at 1226-27. All the first clause requires is that the dwelling be located on and used in connection with a farm. It does not regulate the duration of rentals.

2. The second clause did not prohibit rentals of 30 days or less.

The second clause defined "farm dwelling" as "a single-family dwelling . . . where agricultural activity provides income to the family occupying the dwelling." 1976 Haw. Sess. L. Act 199, § 1. Although the County heavily relies on this "income" clause, the clause does not impose a minimum rental period. The plain language of the clause does not speak to how long the family is occupying the dwelling. All that

the second clause requires is that the family receive income from agricultural activity. The family so residing could receive such income for a day, a week, a month or a year and still satisfy the second clause.

According to the County's Petition, if the family is renting the dwelling for 30 days or less, the family "**logically**" is not be receiving income from agricultural activity. County Petition Mem. at 3 (emphasis added). This presents a hypothetical factual question. There is no way for the Commission to declare that at all times and in all situations a family occupying a farm dwelling for less than 31 days never receives income from agricultural activity. The plain language of the second clause simply does not regulate the length of the occupancy. The County cannot "extend" the terms of the second clause to include a minimum rental period "by implication." *See Foster Vill. Cmty. Ass'n*, 4 Haw. App. at 469-70, 667 P.2d at 854.

C. The Owner of a Farm Dwelling Does Not Need to Reside in the Dwelling.

In the County's definition of short-term vacation rental, the owner does not live in the dwelling. County Petition Mem. at 4. Trying to defend its Ordinance rather than interpret state law, he County argues that a having non-resident owner "irreconcilably conflicts with a farm dwelling . . . ." *Id.* It is hard to see the County's view. The owner of a farm dwelling does not have to reside in the farm dwelling. Nothing in the "farm dwelling" definition suggests otherwise. On the contrary, Chapter 205 expressly contemplates leases.

Furthermore, if the owner lives in the dwelling, the dwelling would not constitute a short-term vacation rental under the County Ordinance. It is puzzling

to contemplate that the meaning of "farm dwelling" should turn on whether the owner renting the dwelling is there for 31 days or not. In any event, whether an owner lives in a particular dwelling is a specific factual question that is not before the LUC and has nothing to do with HRS Chapter 205.

D. A "Farm Dwelling" May Be Leased, and a Lease Is the Same as a Rental.

There is no dispute that "farm dwellings" may be "leased." Indeed, Act 199 expressly contemplated that there could be "lease[s]" of land in the State Agricultural District. 1976 Haw. Sess. L. Act 199, § 1; *see also supra* note 1. The County appears to draw a distinction between "leasing" and "renting." Specifically, the County contends that "renters do not own a fee or leasehold interest in the property (or else they would not rent the property), or any farm as required for the occupants of a farm dwelling." County Petition Mem. at 4. The County does not go on to explain how "leasing" and "renting" differ, however. The County does not explain the difference because the two terms are effectively synonymous.

In ascertaining the meaning of the term "lease," which is "not statutorily defined," we "may resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning . . . ." *See State v. Pacquing*, 139 Hawai'i 302, 312, 389 P.3d 897, 907 (2016). As a noun, 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**." LEASE, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). The term "lease" describes the interest in land, not the duration of the interest. "The lease term can be for life, for a fixed period, or for a

period terminable at will." *Id.* A lease of thirty days or less is no less of a lease estate than a lease for a year or more. *See Pensacola Scrap Processors, Inc. v. State Rd. Dept.*, 188 So. 2d 38, 43 (Fla. Dist. Ct. App. 1966) ("The fact that rent is paid on a month to month basis thereby restricting the leasehold estate to a term of not more than one month at the option of the lessor differs from a one year tenancy at will only in the matter of degree, but not in kind. If a tenancy at will for a period of one year constitutes a leasehold estate of which the lessee is an owner in a constitutional sense, the same rule must be applied to a tenant at will whose term is limited to one month at a time."). Consistent with these basic definitions, the Hawai'i Residential Landlord-Tenant Code provides, "**The landlord and tenant may agree in writing to any period as the term of the rental agreement**." HRS § 521-22 (emphasis added).

As a noun, "rent" is the consideration paid under a lease. *See* LEASE, Black's Law Dictionary (11th ed. 2019). As a verb, "rent" is synonymous with "lease." *See id.*; *Turner*, 234 S.W. at 928 ("The word 'rent' has a well-defined significance. The substantive means compensation which the owner of land receives for its use by another. **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.") (emphasis added). Consistent with these definitions, our Residential Landlord-Tenant Code defines the agreement between landlord and tenant a "**rental agreement**." *See* HRS § 521-8 (defining "rental agreement" as "all agreements, written or oral, which establish or modify the terms, conditions, rules, regulations,

or any other provisions concerning the use and occupancy of a dwelling unit and premises") (emphasis added).

"Leasing" and "renting" are the same things. The County's effort to distinguish the two creates a distinction without a difference. What matters is that the "farm dwelling" definition did not regulate the duration of leasing or renting.

E. The County's Definition Regulates the Number of Bedrooms.

Recall that the County's defines "short-term vacation rental" as "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." Hawai'i County Code § 25-1-5 (emphasis added). Consider this definition in light of the County request that the Commission declare "that 'farm dwellings' may not be used as short-term vacation rentals." County Petition at 1. Putting these points together, the County asks the Commission to count bedrooms when deciding whether a "dwelling" is a "farm dwelling" or a "short-term vacation rental." These kinds of specific facts are not before the LUC. In any event, as of June 5, 1976, Chapter 205 did not regulate the number of bedrooms in a farm dwelling or the number of bedrooms that could be rented in a farm dwelling any more than it regulated the duration of any rental of a farm dwelling.

F. The County's Resort to Subsequent Legislative History Is Unavailing.

Rather than focus on the definition of "farm dwelling" as of June 5, 1976, the County looks to later amendments to Chapter 205. This is subsequent legislative history. The resort to legislative history is improper because the County does not

contend that the definition of "farm dwelling" is ambiguous. "Inasmuch as the statute's language is plain, clear, and unambiguous, **our inquiry regarding its interpretation should be at an end**." *State v. Yamada*, 99 Hawai'i 542, 553, 57 P.3d 467, 478 (2002) (emphasis added). Indeed, "we are not at liberty to rely upon legislative history in interpreting the statute, even if the history may show that the legislature really meant and intended something not expressed by the phraseology of the statute." *State v. Mainaaupo*, 117 Hawai'i 235, 251, 178 P.3d 1, 17 (2008) (quotations and brackets omitted). Reliance on subsequent legislative history is especially problematic and must be approached with "extreme caution," *First Ins. Co. of Hawai'i v. Dayoan*, 124 Hawai'i 426, 433, 246 P.3d 358, 365 (2010), because "the views of a subsequent [legislature] form a hazardous basis for inferring the intent of an earlier one," *United States v. Price*, 361 U.S. 304, 313 (1960).

Putting aside that the LUC should not rely on legislatively history and, in particular subsequent legislative history, the subsequent amendments cited by the County do not support the County's position. First, the County argues that "[a] farm dwelling is allowed for as a 'bona fide' agricultural service and use in the State Land Use Agricultural District which supports and is accessory to a fee or leasehold owner's agricultural activities." County Petition Mem. at 2 (citing HRS § 205-2(d)(7)). This argument relies on statutory language added in 1991. In that year, Chapter 205 was amended to state that the permissible uses within the agricultural district included "bona fide agricultural services and uses which support **the agricultural activities of the fee or leasehold owner of the property** and

accessory to any of the above activities, **whether or not conducted on the same premises as the agricultural activities to which they are accessory**, including but not limited to farm dwellings as defined in section 205-4.5(a)(4) . . . ." 1991 Haw. Sess. L. Act 281, § 2 (emphasis added). Section 1 explained that "the purpose of this Act is to provide that accessory agricultural uses, such as mills, storage and processing facilities, and maintenance facilities, may be conducted within the agricultural districts **whether or not the direct agricultural uses are conducted on the same premises**." *Id.* § 1 (emphasis added). Similar to the definition of "farm dwelling," this 1991 amendment did not regulate the duration of any lease or rental of a farm dwelling. If anything, the amendment expressly contemplated that farm dwellings may be "lease[d]." *See id.* § 2.

Second, the County argues that "[t]he provision for . . . agricultural tourism short-term overnight accommodations further demonstrates that the Legislature did not intend to allow for the short-term vacation rentals at issue in farm dwellings." County Petition Mem. at 5. The County refers to a provision in HRS § 205-2(d)(12), which was added in 2012. Under this section,

> [a]gricultural tourism activities, including overnight accommodations of twenty-one days or less, for any one stay within a county; provided that this paragraph shall apply only to a county that includes at least three islands and has adopted ordinances regulating agricultural tourism activities pursuant to section 205-5; provided further that the agricultural tourism activities coexist with a bona fide agricultural activity. For the purposes of this paragraph, "bona fide agricultural activity" means a farming operation as defined in section 165-2; . . . .

2012 Haw. Sess. L. Act 329, § 3.[4] The provision allows "overnight accommodations" to "coexist with a bona fide agricultural activity," "mean[ing] a farming operation," in Maui County because Maui County is the only county with "at least three islands." *See id.*

Building on an amendment adopted nearly 40 years after the statute that is the subject of the Petition, the County argues in permitting "overnight accommodations" to "coexist[] with a bona fide agricultural activity" on Maui, the legislature impliedly recognized that the law previously did not allow the "short-term" rental of farm dwellings. The County's reasoning is irredeemably presumptive, circular and retroactive. To follow the County's train of thought, we must presume "overnight accommodations" in Chapter 205 means exactly the same thing as the County's definition of "short-term vacation rentals," give weight to the fact that the legislature authorized these "overnight accommodations" on Maui in 2012 and circularly conclude, therefore, that in 1976 the legislature must have intended to exclude "short-term vacation rentals" as defined by the County in 2019. This wild ride is enough to cause motion sickness.

The analysis is easily demolished. Zoning laws "may not be extended by implication." *See Foster Vill. Cmty. Ass'n*, 4 Haw. App. at 469-70, 667 P.2d at 854.

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[4] The current language of the provision allows "[a]gricultural tourism activities, including overnight accommodations of twenty-one days or less, for any one stay within a county; provided that this paragraph shall apply only to a county that includes at least three islands and has adopted ordinances regulating agricultural tourism activities pursuant to section 205-5; provided further that the agricultural tourism activities coexist with a bona fide agricultural activity. For the purposes of this paragraph, "bona fide agricultural activity" means a farming operation as defined in section 165-2; . . . ." HRS § 205-2(d)(12).

Subsequent legislative history is "hazardous." *Cipollone*, 505 U.S. at 520. And the definition of "overnight accommodation" was neither included in the statute in 1976 nor synonymous with the definition of "short-term rental" when the County adopted it in 2019. "[W]here [the legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposefully in the disparate inclusion or exclusion." *In re Water Use Permit Applications*, 94 Hawai'i 97, 151 (2000). Where amendments are were not made in "the **same Act**," but in **different Acts** adopted decades apart, and we are comparing a term in one Act—"overnight accommodation"—with a term in a County ordinance adopted seven years later—"short-term vacation rental," the subsequent history and the maximum *expressio unius est exclusio alterius* offer no guidance.[5]

G. The County's Reliance on *Curtis* Is Misplaced.

The County Petition ends its argument with an invocation of *Curtis v. Bd. of Appeals, County of Hawai'i*, 90 Hawai'i 384, 978 P.2d 822 (1999). County Petition Mem. at 1, 5-6. According to the County,

> [i]n *Curtis*, the Court found that allowing all cellular telephone towers as "utility lines" in the State Land Use Agricultural District under HRS § 205-4.5(a)(7) "unreasonably expands the intended scope of this term and frustrates the state land use law's basic objectives of protection and rational development." 90 Haw. at 396, 978 P.2d at 834. Including short-term vacation rentals in the definition of farm dwelling would similarly unreasonably

[5] "[T]he maxim *expressio unius est exclusio alterius* is nothing but an aid to interpretation, and as an aid it is pretty weak when applied to acts of [the legislature] enacted at widely separated times." *Moreno Rios v. United States*, 256 F.2d 68, 71 (1st Cir. 1958). This "fact weighing heavily against application of the maxim . . . ." *See Abdullah v. Am. Airlines, Inc.*, 969 F. Supp. 337, 349 (D.V.I. 1997).

> expand the intend scope of the term "farm dwelling" and frustrate the basic objectives of protection and rational development underlying State Land Use Law.

County Petition Mem. at 5-6.

The County puts the cart before the horse and then forgets about the horse. In *Curtis*, the Hawai'i Supreme Court only consulted the purpose of the statute set forth in legislative history after concluding that it was "not so clear" whether "utility lines" allowed as of right under HRS § 205-4.5(a)(7) included "cellular phone towers." This lack of clarity prompted the court to "look to the 'reason and spirit' of state land use law" found in legislative history, specifically a standing committee report. *Curtis*, 90 Hawai'i at 396, 978 P.2d at 834.

In a later case summarizing *Curtis*, the court explained, "With respect to whether the tower fell within the term 'utility lines' as employed in HRS § 205-4.5(a)(7), this court observed that '[t]he meaning of "utility lines," however, is not so clear.' This court, **therefore**, turned to the 'reason and spirit' of the state land use law," specifically in the legislative history. *T-Mobile USA, Inc. v. County of Hawaii Planning Comm'n*, 106 Hawai'i 343, 349, 104 P.3d 930, 936 (2005) (emphasis added). As the court continued, because the term at issue—"communications equipment building"—was "plain and unambiguous," "**we are not at liberty to look beyond the statute's plain and obvious meaning**." *Id.* (emphasis added).

The County rightly denies that the definition of "farm dwelling" is ambiguous. Accordingly, "we are not at liberty to look beyond the statute's plain and obvious meaning." *See id.* But even if we reviewed the standing committee report quoted in *Curtis*, nothing would suggest that the legislature intended to regulate the duration

of rentals of "farm dwellings." Renting a "farm dwelling" for thirty days or less does not make the dwelling any less of a "farm dwelling," provided that one of the two clauses in the "farm dwelling" definition is satisfied. In other words, a "farm dwelling" rented for thirty days or less is still "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." 1976 Haw. Sess. L. Act 199, § 1 (emphasis added). Whether a particular dwelling meets either clause in the definition is a factual question. This factual question is not before the Commission.

III. CONCLUSION

Petitioners respectfully request that the Commission deny the County Petition and grant the Rosehill Petition. The only issue is whether, as of June 5, 1976, Chapter 205 prohibited the rental (lease) of farm dwellings for less than 31 days. The answer to that question is "no." The rest of the discussion is noise about hypothetical situations that are not before the Commission.

DATED: Honolulu, Hawai'i, June 18, 2020.

CADES SCHUTTE
A Limited Liability Law Partnership

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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAIʻI

In the Matter of the Petition of COUNTY OF HAWAIʻI, for a Declaratory Order that "Farm Dwellings" May Not Be Operated As Short-Term Vacation Rentals Under Hawai'i Revised Statutes §§ 205-2 and 205-4.5, and Hawai'i Administrative Rules § 15-15-25	Docket Nos. DR 20-69 & DR 20-70 **CERTIFICATE OF SERVICE**
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

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 e-mail and U.S. Mail, postage prepaid:

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