CLARE E. CONNORS 7936
Attorney General of Hawai'i

DAWN T. APUNA 7855
Deputy Attorneys General
Department of the Attorney General
425 Queen Street
Honolulu, Hawai'i 96813
Telephone: (808) 586-1180
Facsimile: (808) 586-1205

Attorneys for OFFICE OF PLANNING,
STATE OF HAWAI'I

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of: COUNTY OF HAWAI'I, for a Declaratory Order that "Farm Dwellings" May Not Be Operated As Short-Term Vacation Rentals Under Hawai'i Revised Statutes §§ 205-2 and 205-4.5, and Hawai'i Administrative Rules § 15-15-25	DOCKET NOS. DR20-69 & DR20-70 OFFICE OF PLANNING'S RESPONSE TO PETITIONERS' AND COUNTY OF HAWAII'S PETITIONS FOR DECLARATORY ORDER; 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, et al.	

OFFICE OF PLANNING'S RESPONSE TO PETITIONERS' AND COUNTY OF HAWAII'S PETITIONS FOR DECLARATORY ORDER

THE OFFICE OF PLANNING, STATE OF HAWAI'I ("OP"), provides this response to Petitioner Linda K. Rosehill, Trustee of the Linda K. Rosehill Revocable Trust dated August 29, 1989, et al.'s ("Petitioners") Petition for Declaratory Order and Incorporated Memoranda, filed

May 22, 2020 (DR 20-68); and Petitioner County of Hawaii's ("County") Petition for Declaratory Order, filed May 19, 2020 (DR 20-69).

Under the particular facts and circumstances of these Petitions: (1) OP agrees with the County that a "farm dwelling" may not be used as a short-term vacation rental ("STVR") in the State Agricultural District ("Agricultural District") pursuant to Hawaii Revised Statutes ("HRS") §§ 205-2(d)(7) and 205-4.5(a)(4); (2) OP disagrees with Petitioners' reading of HRS Chapter 205 that it must explicitly prohibit a minimal rental period in order to prohibit a STVR as a "farm dwelling" in the Agricultural District; and (3) OP disagrees with the County's assertion that a farm dwelling established prior to June 4, 1976, may necessarily be used, or "grandfathered" in, as a STVR.

I. Background

The County recently passed Bill 108 and Planning Department Rule 23 that prohibit STVRs in the Agricultural District on lots created after June 4, 1976. Petitioners, who sought and were denied by the County non-conforming use certificates for STVRs in the Agricultural District, have challenged the prohibition.

The County argues that the respective definitions and intended uses for farm dwellings and STVRs irreconcilably conflict, and therefore, a farm dwelling cannot be used as a STVR. Petitioners argue that because HRS § 205-4.5(a)(4) does not explicitly prohibit the rental of a farm dwelling for 30 days or less, STVRs, which are by County definition "rented for a period of thirty consecutive days or less," are a permitted use of a "farm dwelling" in the Agricultural District.

The statutory provision at issue in these Petitions is HRS § 205-4.5(a)(4), which defines a "farm dwelling" in pertinent part as:

> [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;

II. Discussion

A. An STVR Does Not Fit Within the Definition of a "Farm Dwelling"

A farm dwelling may not be used as a STVR because a STVR does not fit within the definition of a "farm dwelling".

The County defines an STVR 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.

Chapter 25, Article 1, Section 25-1-5, Hawaii County Code 1983 (2016 Edition, as amended). Essentially, a STVR is a dwelling or unit rented for transient accommodations rather than for long-term or permanent residence.

A plain reading of its title alone – "short-term vacation rental" – indicates it is a rental for vacation use, not an agricultural use nor a use accessory to an agricultural use. The "Findings and Purpose" of the County's Bill 108 proclaim that "[t]he 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." An STVR is therefore like a resort or hotel accommodation because it provides lodging for visitors or transients for the purposes of tourism or vacationing.

Notably, a STVR differs from a hotel or motel in that it is generally a residential dwelling that lacks onsite management to oversee guests and is generally located outside of resort/hotel

zoned areas. STVRs are known to pose health and safety risks[1] to local residents and guests, reduce the availability of permanent housing, drive up rents, and negatively impact the character and quality of neighborhoods. The proliferation of illegal short-term rentals has been particularly difficult to control and regulate because their ability to attract and transact business through unregulated online hosting platforms.

In contrast to a STVR, a "farm dwelling" is either a single-family dwelling: (1) located on and used in connection with a farm; or (2) where agricultural activity provides income to the family occupying the dwelling. *HRS § 205-4.5(a)(4).* "Farm dwellings" are further qualified as "bona fide agricultural services and uses that support the agricultural activities of the fee or leasehold owner of the property and accessory to" the agricultural uses. *HRS § 205-2(d)(7).* As an "accessory building or use", a farm dwelling must also be "a subordinate building or use which is incidental to and customary with a permitted use of the land." *HAR § 15-15-03.* The term "dwelling" is defined as "a building designed or used exclusively for single family residential occupancy, but not including house trailer, multi-family unit, mobile home, hotel, or motel." *(Emphases added.) HAR § 15-15-03.*

Based on these parameters, a proper use of a "farm dwelling" under the first prong of HRS § 205-4.5(a)(4) – a single family dwelling located on and used in connection with a farm – would be a person or persons that occupy the farm dwelling to cultivate the land or raise livestock upon the property on which the farm dwelling sits. The occupants of a "farm dwelling" would have a direct connection or supporting role to the farm or agricultural use of the property. A farm dwelling used as a STVR severs the connection with the agricultural use of the property because the occupant's use and purpose of their occupancy is for vacation/tourism lodging, and

[1] The State and counties have had issues during this COVID-19 pandemic with inbound travelers occupying STVRs without properly quarantining.

not for bona fide agricultural use. Moreover, the exclusion of hotels and motels as a "dwelling" suggests that a farm dwelling is not intended for transient accommodations.

Under the second prong of HRS § 205-4.5(a)(4) – a single family dwelling where agricultural activity provides income to the family occupying the dwelling – the rental of a farm dwelling to a vacationer or tourist who would also receive income from the agricultural activity of the farm would hardly be possible given the short duration of stay and purpose for occupying the dwelling.

In sum, a STVR fails to meet either prong of HRS § 205-4.5(a)(4), and therefore is not permitted as a "farm dwelling" in the Agricultural District. To include STVRs within the definition of "farm dwelling" is clearly inconsistent with the intended scope of the term "farm dwelling" and would frustrate "the state land use law's basic objective of protection and rational development." *Curtis v. Board of Appeals, County of Hawaii, 978 P.2d 822, 834, 90 Hawaii 384, 396 (1999).*

A more fitting criterion for permitting farm-dwellings to operate as STVRs may be under HRS §§ 205-2(a)(14) and 205-4.5(d)(12), which allows "agricultural tourism activities, including overnight accommodations of twenty-one days or less." This criterion requires that the activity "coexist with a bona fide agricultural activity" and is subject to county provisions for enforcement, penalties, and oversight, and that counties may require an environmental assessment of the activity. We note that the County of Hawaii is the only county which meets the criteria for permitting agricultural tourism which requires three islands and an agricultural tourism ordinance adopted in conformance with HRS § 205-5. The required coexistence with a bona fide agricultural activity and the heightened regulation required for the agricultural tourism

activity further demonstrates that STVRs are not freely permitted in the Agricultural District under the definition of "farm dwelling".

B. The Absence of An Express Prohibition on Renting for 30 Days or Less Does Not Permit the Rental of a Farm Dwelling for 30 Days or Less

Petitioners argue that because the definition of "farm dwelling" under HRS § 205-4.5(a)(4) does not expressly prohibit the rental of a farm dwelling for 30 days or less, a farm dwelling may therefore be rented for 30 days or less as a STVR. This is an improper reading of the statute.

HRS §§ 205-2 and 205-4.5 affirmatively list the permitted uses in the Agricultural District such that all uses not listed are prohibited. HRS § 205-2(d) states "[a]gricultural districts shall include..." and then lists all sixteen permitted uses in the Agricultural District with soil classified by the land study bureau's detailed land classification of overall productivity rating class C, D, E or U. Similarly, HRS § 205-4.5(a) lists the twenty-three permitted uses in the Agricultural District with soil classified by the land study bureau's detailed land classification of overall productivity rating class A or B. HRS § 205-4.5(b), states that "[u]ses not expressly permitted in subsection [205-4.5](a) shall be prohibited, except the uses permitted as provided in sections 205-6[2] and 205-8[3]."

In interpreting HRS §§ 205-2 and 205-4.5, Hawaii Administrative Rules ("HAR") § 15-15-23 affirms that "[e]xcept as otherwise provided in this [HAR] chapter [15-15], uses not expressly permitted are prohibited." HAR § 15-15-25 cites the permissible uses of HAR Chapter 15-15 as all those uses set forth in HRS §§ 205-2 and 205-4.5.

Based on this reading and interpretation of HRS §§ 205-2 and 205-4.5, which limits the

[2] HRS § 205-6 permits "certain unusual and reasonable uses" within the Agricultural District through the special permit process.
[3] HRS § 205-8 refers to nonconforming uses.

uses in the Agricultural District to only those uses that are expressly listed under HRS §§ 205-2 and 205-4.5, the renting of farm dwellings for 30 days or less would be permitted as a matter of law if the statute expressly permitted farm dwellings to be rented for 30 days or less, which it does not. Petitioners improperly argue the opposite -- that because a use is *not* explicitly prohibited, it is therefore permitted.

Not only is Petitioners reasoning inconsistent with the plain language of the statute, but it would lead to an absurd result. If any and all uses not explicitly prohibited through the definition of "farm dwelling" were permitted, a universe of permitted uses could be allowed as a farm dwelling. For example, one could argue that the definition of "farm dwelling" does not expressly prohibit its use as a nuclear power plant, and therefore a nuclear power plant is a permissible use of a farm dwelling. Petitioners' interpretation and application of HRS §§ 205-2(d)(7) and 205-4.5(a)(4) is an improper and illogical application of the statute. A prohibition of 30 days or less rental within the definition of "farm dwelling" is unnecessary to find that a farm dwelling may not be used as a STVR.

C. <u>OP Disagrees that a STVR is a Nonconforming Use</u>

Under the County's ordinance, "[i]n 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." *§ 25-4-16.1(e), Hawaii County Code 1983 (2016 Edition, as amended).* The County assumes that until June 4, 1976, STVRs were a permitted use in the Agricultural District. And, therefore, farm dwellings that existed prior to June 4, 1976 may continue to operate as STVRs as a nonconforming use. OP disagrees.

The County Code defines "nonconforming use" as "a use lawfully in existence on September 21, 1966 or on the date of any amendment to this chapter, but which does not

conform to the regulations for the zoning district in which it is located." *§ 25-1-5, Hawaii County Code 1983 (2016 Edition, as amended).*

The fact that a lot existed prior to June 4, 1976, is irrelevant to whether a STVR is allowable. Act 199, Session Laws of Hawaii 1976, created § 205-4.5, which, among other provisions, restricts A and B lands in the Agricultural District to certain uses. The purpose of Act 199 was to prevent "the development of urban type residential communities in the guise of agricultural subdivisions." *Conference Committee Report No. 2-76, 1976 Senate Journal 836.* After the bill passed third reading in the House, Representative Richard Kawakami offered a floor amendment which, among other things, allowed the "construction of single-family dwellings on lots within any subdivision in agricultural districts approved by the county before the effective date of this Act." According to Representative Kawakami, "in essence, what this does is grandfather in existing agricultural subdivisions." *Statement of Representative Kawakami, 1976 House Journal 481.* Act 199 became effective on June 4, 1976, and the final wording is consistent with Representative Kawakami's statements.

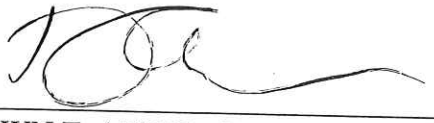
Thus, it appears that single family dwellings may be built on lots existing before June 4, 1976, without the need for any agricultural activity. But there is nothing to suggest that the right to build a single-family dwelling (without the need for agricultural activities) encompasses the right to use that single-family dwelling as a STVR.

III. Conclusion

Based on the foregoing, OP requests that this Commission grant the declaratory relief requested by the County and deny the declaratory relief requested by Petitioners, in that even though the definition of "farm dwelling" does not expressly prohibit rentals of 30 days or less, farm dwellings may not be used for 30 days or less as a STVR.

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

CLARE E. CONNORS
Attorney General of Hawai'i



DAWN T. APUNA, Deputy Attorney General
Counsel for the Office of Planning, State of Hawai'i

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of: COUNTY OF HAWAI'I, for a Declaratory Order that "Farm Dwellings" May Not Be Operated As Short-Term Vacation Rentals Under Hawai'i Revised Statutes §§ 205-2 and 205-4.5, and Hawai'i Administrative Rules § 15-15-25	DOCKET NOS. DR20-69 & DR20-70 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, et al.	

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:

JOHN MUKAI
Office of the Corporation Counsel
101 Aupuni Street, Suite 325
Hilo, HI 96720

MICHAEL YEE
Director, County of Hawaii Planning Department
101 Pauahi Street, Suite 3
Hilo, HI 96720

ROY A. VITOUSEK III
1000 Bishop Street, Suite 1200
Honolulu, HI 96813

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

DAWN T. APUNA, Deputy Attorney General
Counsel for the Office of Planning, State of Hawaii