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TRANSMITTAL

DATE: July 9, 2020

TO: State Land Use Commission
P.O. Box 2359
Honolulu, Hawaii 96804

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

RE: DR 20-69 & DR 20-70 – Petition for Declaratory Order; Memorandum of
Authorities; Certificate of Service

<i>COPIES/ITEMS</i>	<i>DATE</i>	<i>DESCRIPTION</i>
Original and (1) copy	07-09-20	COUNTY OF HAWAII'S SUPPLEMENTAL SUBMISSION; CERTIFICATE OF SERVICE

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

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Attorneys for COUNTY OF HAWAI'I



BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI'I

In the Matter of the Petition of

COUNTY OF HAWA'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
204-4.5, and Hawai'i Administrative Rules §
15-15-25

DOCKET NOS. DR 20-69 &
DR 20-70

COUNTY OF HAWAI'I'S SUPPLEMENTAL
SUBMISSION; CERTIFICATE OF SERVICE

In the Matter of the Petition of:

Linda K. Rosehill, Trustee of the Linda K.
Rosehill 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
Matson; 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

The County of Hawaii ("County"), by and through its undersigned attorneys, hereby
submits its supplemental submission in support of its Petition for Declaratory Order dated May
19, 2020.

Dated: Hilo, Hawai'i, July 9, 2020

COUNTY OF HAWAI'I

By 
JOHN S. MUKAI
Deputy Corporation Counsel
Its attorney

I. ARGUMENT

The Rosehill petitioners state that “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 duration of the farm dwellings being rented for thirty (30) days or less is simply not an issue herein.

The County’s petition specifically asks that the Land Use Commission declare that “farm dwellings” as described in HRS § 205-2(d)(7) and § 205-4.5(a)(4) cannot be used for overnight accommodations as Short-Term Vacation Rentals (STVR). The **use** of the farm dwelling shall be framed in terms of agricultural use in connection with HRS § 205-2(d) and HRS § 205-4.5.

There are certain uses permitted in agricultural districts under HRS § 205-2(d)(1)-(16). Uses that are not expressly permitted are prohibited, but individuals are eligible to apply for a special permit under HRS § 205-6. HRS § 205-2(d) (7) specifically references “farm dwellings as defined in section 205-4.5(a)(4)...” HRS § 205-4.5(a)(4) defines “farm dwellings” as follows:

(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. (emphasis added)

HRS § 205-4.5(a) lists the twenty-three (23) 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 and 205-8, and construction of single-family dwellings on lots existing before June 4, 1976...”

The Rosehill Petitioners note that the owner of a farm dwelling does not need to reside in the dwelling. However, its use must be agriculture related and shall be framed as agriculture use. The Hawaii Administrative Rules (“HAR”) § 15-15-03 also defines “farm dwelling” 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.” There can be no isolation of portions of HRS § 205-4.5 and expand it to make an argument that somehow Short-Term Vacation Rentals are a permissible use in a “farm dwelling” on lots created after June 4, 1976.

As set forth in the County’s petition, the **definitions** and **uses** for “farm dwellings” and Short-Term Vacation Rentals are in conflict, as a STVR, by its very definition in HCC Section 25-1-5, the owner or operator does not exclusively occupy the unit as a single family or even live on site. The STVR owner must reside off-site and temporarily rents the use of the unit to tourists or transients. This is in direct contrast to a “farm dwelling”, that a family unit occupies while obtaining income from agricultural activities on a farm that the family owns in fee or leasehold.

With regard to the **uses** of “farm dwellings” and STVR’s, they are very distinct. A “farm dwelling” is used in connection with a farm. Its use needs to be in support of and an accessory to a farm or “farming operation” particularly in an agricultural district. A farm dwelling’s purpose is to be a bona-fide agricultural service and use which supports and is an accessory to agricultural activities. The purpose of a Short-Term Vacation Rental is to provide transient overnight accommodations that will be temporarily rented for periods of 30 days or less by vacationers. It is the equivalent of a resort or hotel accommodation, providing lodging for visitors or transients for the purposes of tourism or vacation. This is further evidenced in the Hawaii County Code Section 25-4-16 Short-Term Vacation Rentals, which specifically limits their operations to resort and commercial districts as follows:

- (a) Short-term vacation rentals; where permitted, specific prohibitions.
 - (1) Short-term vacation rentals; where permitted, specific prohibitions.
 - (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, Hawaii Revised Statutes.
 - (2) Private covenants prohibiting use of any unit as a short-term vacation rental shall not be invalidated by this chapter.

The Rosehill Petitioners claim that the HAR §15-15-25 was not adopted until 1986 is without merit. 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 and 205-8, and construction of single-family dwellings on lots existing before June 4, 1976...” HRS §205-5 **Zoning** specifically defines what activities are permitted as agricultural uses and services under §205-2 and §205-4.5.

The State Land Use Agricultural District allows one option for overnight accommodations (twenty-one days or less), which is under the provisions of agricultural tourism and must co-exist with a bona fide agricultural activity pursuant to HRS § 205-2(d)(12). Further, HRS §205-5(b) provides as follows:

(b) Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in sections 205-2 and 205-4.5 may be further defined by each county by zoning ordinance. Each county shall adopt ordinances setting forth procedures and requirements, including provisions for enforcement, penalties, and administrative oversight, for the review and permitting of agricultural tourism uses as an accessory use on a working farm, or farming operation as defined in section 165-2. Ordinances shall include but not be limited to:

- (1) Requirements for access to a farm, including road width, road surface, and parking;
- (2) Requirements and restrictions for accessory facilities connected with the farming operation, including gift shops and restaurants;

- (3) Activities that may be offered by the farming operation for visitors;
- (4) Days and hours of operation; and
- (5) Automatic termination of the accessory use upon the cessation of the farming operation.

Neither the HRS nor the Hawaii County Code allows for short term rentals in the State Land Use Agriculture District unless it relates directly to and is in connection with agricultural tourism and agricultural activities, which sets forth a separate process under the HRS § 205-2(d)(11) and (12) and Hawaii County Code § 25-2-75 and § 25-4-15. These short-term overnight accommodations pursuant to agricultural tourism are separate and distinct from a Short-Term Vacation Rental.

The Hawaii legislature noted that “faithful adherence to present state constitutional provisions for agricultural land classification or zoning, statutory protection and promotion of agriculture, and regulatory identification of important agricultural land will substantially prevent such inappropriate and excessive conversion of agricultural land to other uses.” (Conf. Comm. Rpt. No. 43 in 1983 House Journal, at 800). If the Rosehill Petitioners were previously using the farm dwelling for anything other than that as defined by HRS §205-2 and §205-4.5, then it was not a lawful use in the State Land Use Agricultural district just because they got away with it. The Rosehill Petitioners should not be allowed to continue their unlawful use of their Short-Term Vacation Rentals.

By its very description, a Short-Term Vacation Rental is not used in connection with a farm with agricultural supporting activities from which the unit’s occupants obtain income. If this Commission allows farm dwellings to be used as Short-Term Vacation Rentals, the entire State will be affected. The County would urge that such a ruling would frustrate the “state land use law’s basic objective of protection and rational development.” Curtis v. Bd. of Appeals, County of Hawaii, 90 Haw. 384, 396, 978 P.2d 822, 834 (1999).

II. CONCLUSION

The County accordingly requests that the State Land Use Commission rule that farm dwellings may not be used as Short-Term Vacation Rentals pursuant to HRS §§ 205-2 and 205-4.5, and Hawaii Administrative Rules § 15-15-25.

Dated: Hilo, Hawai'i, July 9, 2020

COUNTY OF HAWAII

By 

JOHN S. MUKAI
Deputy Corporation Counsel
Its attorney

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of

COUNTY OF HAWAII, for a Declaratory Order that "Farm Dwellings" May Not Be Operated as Short Term Vacation Rentals Under Hawaii's Revised Statutes §§ 205-2 and 204-4.5, and Hawaii's Administrative Rules § 15-15-25

DOCKET NO. 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 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 Matson; 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

I hereby certify that a copy of the foregoing was served upon the following by mailing the same, postage prepaid, on July 9, 2020:


Mary Alice Evans, Director
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Dated: Hilo, Hawai'i, July 9, 2020.

COUNTY OF HAWAI'I

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JOHN S. MUKAI
Deputy Corporation Counsel
Its attorney