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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

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

STATEMENT OF POSITION BY PETITIONERS IN DOCKET NO. DR 20-70 REGARDING THE OFFICE OF PLANNING'S RESPONSE TO PETITIONERS' AND THE COUNTY OF HAWAI'I'S PETITIONS FOR DECLARATORY ORDER FILED JUNE 18, 2020

CERTIFICATE OF SERVICE

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

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REPLY BY PETITIONERS IN DOCKET NO. DR 20-70 TO THE OFFICE OF PLANNING'S RESPONSE TO PETITIONERS' AND THE COUNTY OF HAWAII'S PETITIONS FOR DECLARATORY ORDER

Petitioners Linda K. Rosehill, *et al.* ("**Petitioners**") reply to the Office of Planning's ("**OP**") Response ("**Response**") to Petitioners' and the County of Hawai'i's ("**County**") Petitions for Declaratory Order (together, the "**Petitions**").

I. INTRODUCTION

Although OP spends its brief arguing that Agricultural land cannot be used for "short-term transient vacation rentals," that is not the question before the State Land Use Commission (the "**LUC**") or a question that the LUC can answer in a vacuum. For starters, the phrases "short-term" and "transient vacation" rentals do not have a uniform or fixed meaning. On the contrary, each county and the State define the terms differently:

- Kaua'i defines "Transient Vacation Rental" as "a dwelling unit which is provided to transient occupants for compensation or fees, including club fees, or as part of interval ownership involving persons unrelated by blood, **with a duration of occupancy of one hundred eighty (180) days or less**." Kaua'i County Code § 8-1.5 (emphasis added).

- Honolulu defines "Transient vacation unit" as "a dwelling unit or lodging unit which is provided for compensation to transient occupants **for less than 30 days**, other than a bed and breakfast home." Revised Ordinances of Honolulu § 21-10.1 (emphasis added).

- Maui defines "Short-term rental home" as "a residential use in which overnight accommodations are provided to guests for compensation, for periods of **less than one hundred eighty days, in no more than two single-family dwelling units, or one single-family dwelling unit and one accessory dwelling unit**, excluding bed and breakfast homes. **Each short-term rental home shall include bedrooms, one kitchen, and living areas**. Each lot containing a short-term rental home shall include no more than two single-family dwelling units, or one single-family dwelling unit and one accessory dwelling unit, used for short-term rental

home use, with **no more than a total of six bedrooms for short-term rental home use** . . . ." Maui County Code § 19.04.040 (emphasis added).

- Hawai'i 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 ("**HCC**") § 25-1-5 (emphasis added)

- The State defines "Transient vacation rentals" as "**rentals in a multi-unit building to visitors** over the course of one or more years, **with the duration of occupancy less than thirty days** for the transient occupant." Hawai'i Revised Statutes ("**HRS**") § 514E-1.

Given these varied and factually specific definitions, it is impossible to declare that at all times and in all circumstances rentals of less than 30 days, less than 31 days, less than 180 days or less than 181 days are illegal in the State Agricultural District. Of course, specific facts might show that a particular use of a particular property is unlawful in the District. On the Petitions, however, there are no specific facts before the LUC. The question before the LUC is one of universal application: at all times and in all ways, does HRS Chapter 205 prohibit renting a farm dwelling for less than 31 days? This is the question before the LUC because the County of Hawai'i (the "**County**") defends its retroactive regulation of land use on the ground that HRS Chapter 205 has prohibited renting property in the Agricultural District for less than 31 days since the legislature adopted the definition of "farm dwelling" as of June 5, 1976.

In response to that question, we have walked through each part of the State's definition of "farm dwelling" and each part of the County's definition of "short-term vacation rental." As we have explained, and no pleading has disputed, Chapter 205 did not require "the owner or operator . . . [to] reside on the building site." *See* HCC

§ 25-1-5. Chapter 205 did not regulate the number of "bedrooms" in a "farm dwelling." *See id.* And Chapter 205 did not prohibit renting a "farm dwelling" for "a period of thirty consecutive days or less." *See id.* On these limited facts, the LUC must grant the Rosehill Petition and deny the County's Petition.

Despite conceding that Chapter 205 does not "expressly" regulate the number of days that a "farm dwelling" may be rented, OP urges a different result. Response at 8 ("[T]he definition of 'farm dwelling' **does not expressly prohibit rentals of 30 days or less** . . . .") (emphasis added). OP's concession should be the end of the discussion because, "[i]nasmuch as the statute's language is plain, clear, and unambiguous, our inquiry regarding its interpretation should be at an end." *See State v. Yamada*, 99 Hawai'i 542, 553, 57 P.3d 467, 478 (2002). Undaunted by the lack of authority, however, OP argues that a dwelling cannot possibly be used as a farm dwelling if it is rented for less than 31 days. Response at 4-5. Chapter 205 did not say that. The LUC rules do not say that. And common sense does not tolerate it.

Under OP's reasoning, a tenant farmer in the following situations would be an illegal use:

- Where the owner and the tenant farmer have a written month-to-month lease;

- Where the owner and the tenant farmer do not have a written rental agreement because state law treats the absence of a rental agreement as a month-to-month lease;[1] and
- Where the tenant farmer who has stayed past his term because state law converts all rental agreements to month-to-month after the end of their respective terms.[2]

According to OP, it would not matter that the actual use of the dwelling meets the written definition of "farm dwelling" because the dwelling is located on and used in connection with a farm or the tenant farmer receives income from agricultural activity. *See* 1976 Haw. Sess. L. Act 199, § 1. Instead, the tenant farmer in all of these situations would be engaged in an illegal use simply because *no one* may rent a farm dwelling for less than 31 days. In taking this stand on the hill of 31 days, the OP violates every rule of statutory construction and the limitations of the LUC's jurisdiction and ends up at an absurd result.

II. OP CONCEDES THAT THERE IS AN "ABSENCE OF AN EXPRESS PROHIBITION ON RENTING FOR 30 DAYS OR LESS."

OP does not deny that farm dwellings could be "leased" or rented as of June 5, 1976. 1976 Haw. Sess. L. Act 199, § 1. OP admits that there is an "**[a]bsence of**

[1] HRS § 521-22 ("The landlord and tenant may agree in writing to any period as the term of the rental agreement. In the absence of such agreement, the tenancy shall be month to month or, in the case of boarders, week to week.").

[2] HRS § 521-71 ("Should the landlord fail to commence summary possession proceedings within the first sixty days of the holdover, in the absence of a rental agreement, a month-to-month tenancy at the monthly rent stipulated in the previous rental agreement shall prevail beginning at the end of the first sixty days of holdover.").

[a]n [e]xpress [p]rohibition on [r]enting for 30 [d]ays or [l]ess" in the definition of "farm dwelling." Response at 6 (emphasis added); *see also id.* at 8. Since the law does not include an *express* prohibition on renting for 30 days or less, OP argues for an *implied* prohibition. The argument immediately falters because the LUC is bound by the language of the statute, *see Yamada*, 99 Hawai'i at 553, 57 P.3d at 478, and because the LUC cannot "extend" Chapter 205 "**by implication**," *see Foster Vill. Cmty. Ass'n v. Hess*, 4 Haw. App. 463, 469-70, 667 P.2d 850, 854 (App. 1983) (emphasis added).

Ignoring the rules of statutory construction and the LUC's jurisdiction, OP maintains that rentals of 30 days or less are prohibited because they were not expressly permitted. Response at 6-7. It is true that the legislature did not set a minimum rental period. So what? The definition of "farm dwelling" does not expressly permit rentals of 32 days, 32 months or 32 years. OP would apparently find that all of these rental periods are illegal because they were not expressly permitted in the statute. The result is absurd because OP detaches its analysis from the text of the statute. The length of a rental is not a "use." The length of a rental is a contractual arrangement. Under the statute, it matters how a dwelling is used. It does not matter how long a particular person uses the dwelling.

Moving from one analytical fallacy to another, OP argues that applying the statue as written will take us down a slippery slope. According to OP, failing to impose a minimum rental period means "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**. *Id.* at 7.

This is silly. Under the statute, a "farm dwelling" is "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. A nuclear power plan could not be a "farm dwelling" because it is not "a single-family dwelling." To avoid absurd results, we do not need to graft new provisions onto old laws. We simply need to follow the law.

Under the law, we all agree that a "single-family dwelling" is allowed in the Agricultural District only if it is a "farm dwelling." The dispute is over what makes a "single-family dwelling" a "farm dwelling." We resolve that dispute by remaining faithful to the statute. The legislature chose not to include minimum rental period when it defined "farm dwelling." Accordingly, a "single-family dwelling" *could be* a "farm dwelling" regardless of whether it is rented for 30 days, 30 months or 30 years. OP tries to resolve the dispute by making up new requirements. Making up new requirements is always the wrong way to go. *See, e.g.*, *Foster Vill. Cmty. Ass'n*, 4 Haw. App. at 469-70, 667 P.2d at 854 ("Zoning laws and ordinances are strictly construed, as they are in derogation of the common law, and their provisions may not be extended by implication.").

III. HAVING CONCEDED THE ABSENCE OF AN EXPRESS PROHIBITION, OP RESORTS TO HYPOTHETICALS.

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). OP concedes a dwelling qualifies as a "farm dwelling" if "either" clause is satisfied. *See* Response at 4 ("[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.") (emphasis added).

The first clause recognizes that a "dwelling" is a "farm dwelling" if it is "located on and used in connection with a farm . . . ." 1976 Haw. Sess. L. Act 199, § 1. OP does not claim that the first clause regulates the duration of rentals. Rather than address the plain language of the first clause, OP focuses on a "plain reading" of *the County Ordinance*. Response at 3.

OP contends, "A plain reading of [the County Ordinance's] **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." Response at 3; *see also id.* at 4 ("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 not for bona fide agricultural use."). The analysis takes every wrong turn.

First, LUC 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." Hawai'i Administrative Rules ("**HAR**") § 15-15-98; *see also* HRS § 91-8. The County Ordinance is not a "statutory provision or of any rule or order of the commission."

Thus, the Commission cannot "issue a declaratory order as to the applicability" of the County Ordinance.

Second, the mere title of a county ordinance cannot bear the weight OP places upon it. "The title of an act cannot be used to extend or to restrain any positive provisions contained in the body of the act. It is only when the meaning of these is doubtful that resort may be had to the title, and even then it has little weight." *Johnson & Johnson, Inc. v. G.E.M. Sundries Co.*, 43 Haw. 103 (1959) (quotations omitted).

Third, OP's argument presents a hypothetical situation. There are certainly circumstances in which the use of a dwelling that has been rented for a period of *less than 31 days* is not allowed as a matter of State law. There are certainly circumstances in which the use of a dwelling that has been rented for a period of *31 days or more* is not allowed as a matter of State law. These circumstances are not before the LUC. The only fact before the LUC is that the County prohibited the rental of "dwellings" for periods of less than 31 days. On that fact, it is impossible to conclude that, at all times and in all situations, a farm dwelling rented for less than 31 days is not used in connection with a farm.

Finally, the County chose its label and its definition of "short-term vacation rental." Every owner who does not live on the property, who has a dwelling with five or fewer bedrooms and who could conceivably rent the dwelling for less than 31 days was forced to apply for a County permit. HCC 25-4-16.1(a) (requiring "a short-term vacation rental nonconforming use certificate in order to continue to operate.").

If labels controlled, the County could call wind farms a "power plant," require a permit and claim that "power plants" are not allowed in the Agricultural District. We would ignore the County's label and explore whether Chapter 205 allows the use as a "wind energy facility." *See* HRS § 205-4.5(a)(15).

OP employs the same suppositional reasons in its analysis of the second clause of the "farm dwelling" definition. 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. According to OP, "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." Response at 5 (emphasis added). Again, this contention presents a hypothetical situation. 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. Since the Commission cannot declare that a family occupying a farm with a renal term of less than 31 days will never receive income from agricultural activity, the Commission cannot accept OP's construction of the statute.

IV. THE PLAIN LANGUAGE OF THE STATUTE IS DETERMINATIVE, NOT OP'S NOTIONS OF SOUND PUBLIC POLICY.

OP does not contend that the text of the statute is ambiguous. Nevertheless ignoring the text of Chapter 205, OP offers unsubstantiated factual allegations:

> STVRs are known to pose health and safety risks 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.

Response at 4.

OP offers no factual support for those assertions. *See id.* Nor do those assertions have anything to do with the issue before the LUC. Saying that "short-term vacation rentals" are bad public policy does not override the text of Chapter 205 as of June 5, 1976. "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). 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 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.

V. OP CANNOT RELY ON SUBSEQUENT LEGISLATIVE HISTORY.

Similar to the County, OP relies on subsequent legislative history stated in HRS § 205-2(d)(7) (added in 1991) and HRS § 205-2(d)(12) (added in 2012). Response at 4, 5. These amendments are addressed at length in Petitioner's response to the County's Petition. As we explained, neither amendment prohibits rentals of less than 31

days or is relevant to the interpretation of the definition of "farm dwelling" as of June 5, 1976.

VI. WE CAN TELL THE DIFFERENCE BETWEEN A SINGLE-FAMILY DWELLING AND A HOTEL.

OP relies on HAR § 15-15-03, which defines "dwelling" 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." Response at 4. OP contends, "[T]he exclusion of hotels and motels as a 'dwelling' suggests that a farm dwelling is not intended for transient accommodations." *Id.* at 5 (emphasis added).

There are two problems with the effort. First, the definition does not speak to how long "a building designed or used exclusively for single family residential occupancy" may be rented. Rather, the definition of "dwelling" refers to the nature of the structure, namely, one intended for a single family as opposed to one with multiple living units, such as a multi-family unit, a hotel or a motel, and one that is permanently attached to the realty as opposed to a house trailer or mobile home. Nothing in the definition is inconsistent with renting a "dwelling" for less than 31 days.

On the contrary, the Hawai'i Supreme Court has interpreted the term "single-family dwelling" in a restrictive covenant simply to "prohibit[] [the defendants] from building **more than one residential structure** on the lot and from using that structure to house more than one family." *Collins v. Goetsch*, 59 Haw. 481, 485, 583 P.2d 353, 357 (1978) (emphasis added). In other words, "more than one single **unit** family residence [is] prohibited." *See id.* (emphasis added). The court did not hold

that a single-family home stops being a single family home if it is rented for less than 31 days, as the Landlord-Tenant Code specifically contemplates. Other courts have expressly rejected the notion that a "single-family dwelling" restriction prohibits renting the dwelling for shorter terms. *See Lowden v. Bosley*, 909 A.2d 261, 262 (Md. 2006) (covenant providing that dwellings be used for "single family residential purposes only" "does not prohibit the short-term rental to a single family of a home").

Second, OP's argument again tries to impose a restriction "by implication." Specifically, OP relies on the definition to "suggest" that the definition of "farm dwelling" did not allow rentals of less than 31 days. The statute simply "may not be extended by implication." *See Foster Vill.*, 4 Haw. App. at 469-70, 667 P.2d at 854.

VII. WHETHER CHAPTER 205 REGULATED RENTALS *BEFORE* JUNE 4, 1976, IS NOT BEFORE THE LUC.

OP parts ways with the County and asserts that, even before the passage of the "farm dwelling" amendment on June 4, 1976, short-term rentals were not allowed in the State Agricultural District. Response at 7-8. The "farm dwelling" amendment provided that "farm dwellings" were allowed and provided a definition of "farm dwelling." According to OP, prior to this amendment, "it appears that single family dwellings may be built on lots existing before June 4, 1976, without the need for any agricultural activity." Response at 8. OP then asserts, "[T]here 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." *Id.*

OP's argument is a distraction. The issue before the LUC is whether, as of June 5, 1976, Chapter 205 regulated the duration as to which a farm dwelling could be rented. That is the only question because the County only prohibits rentals of less than 31 days for lots created on or after June 5, 1976. The LUC does not need to concern itself with the question of whether prior to June 5, 1976, Chapter 205 regulated the duration of rentals within the Agricultural District.

In any event, OP's argument is wrong. Although it claims that the statute did not allow short-term rentals before June 5, 1976, OP does not examine the actual text of Chapter 205 before the 1976 amendment. Prior to the amendment, the statute allowed "dwellings" within the Agricultural District, rather than "farm dwellings." *See* 1963 Haw. Sess. L. Act 205, § 2. There was no provision prohibiting rentals of such "dwellings" or regulating the duration of rentals.

VIII. CONCLUSION

The question before the LUC is one of statutory interpretation turning on the meaning of "farm dwelling" as of June 5, 1976. It is undisputed that, at that time, the statute contemplated leasing and that there was an "absence of an express prohibition on renting for 30 days or less." *See* Response at 6. Such a prohibition cannot be read into Chapter 205 "by implication" in support of a desire to instantaneously eliminate of a use. *See Foster Vill. Cmty. Ass'n*, 4 Haw. App. at 469-70, 667 P.2d at 854. We 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." *Seki*, 133 Hawai'i at 408, 328 P.3d at 417.

The LUC should not feel pressured to go along with an expedient, quick fix. The constitution demands that phasing out can't happen overnight. *See Cradduck v. Yakima County*, 271 P.3d 289, 296 (Wash. Ct. App. 2012) ("it would be unconstitutional to subject nonconforming uses to immediate termination"); *cf. 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").

Petitioners respectfully ask that Rosehill Petition be granted and that the County's Petition be denied.

DATED: Honolulu, Hawai'i, June 22, 2020.

CADES SCHUTTE
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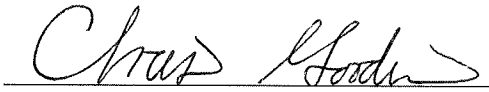

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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAIʻI

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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 will be served on the below-named parties by e-mail and U.S. Mail, postage prepaid:

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DATED: Honolulu, Hawai'i, June 22, 2020.

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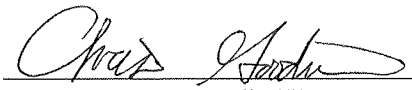

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