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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Petition of:)	DOCKET NOS. DR20-69 & DR20-70
)	
COUNTY OF HAWAII, for a Declaratory Order)	OFFICE OF PLANNING’S
that “Farm Dwellings” May Not Be Operated As)	SUPPLEMENTAL RESPONSE TO
Short-Term Vacation Rentals)	COUNTY’S AND PETITIONER
Under Hawaii Revised Statutes §§ 205-2 and)	ROSEHILL ET. AL.’S PETITIONS FOR
205-4.5, and Hawaii Administrative Rules)	DECLARATORY ORDER;
§ 15-15-25)	
_____)	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 SUPPLEMENTAL RESPONSE
 TO COUNTY’S AND PETITIONER ROSEHILL ET. AL.’S
PETITIONS FOR DECLARATORY ORDER**

THE OFFICE OF PLANNING, STATE OF HAWAII (“OP”), provides this supplemental 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 20-70); and Petitioner County of Hawaii’s (“County”) Petition for Declaratory Order, filed May 19, 2020 (DR 20-69).

On June 25, 2020, the Hawaii State Land Use Commission (“Commission”) held a meeting on the subject Petitions, which included presentations by the County and Petitioners, public testimony by various individuals and OP, and questioning by the Commissioners. Near the end of the meeting, Commissioners instructed the County, Petitioners and OP to provide supplemental briefings to clarify issues that arose during the meeting.

This supplemental response elaborates on OP’s position that a farm dwelling may not be used as a short-term vacation rental (“STVR”), and that Petitioners’ Petition for Declaratory Ruling should be denied.

I. Petitioners’ Question Is Speculative and Does Not Provide a Specific Factual Situation Upon Which the Commission Can Make a Declaratory Ruling, and Therefore Must Be Denied

As a preliminary matter, the County and Petitioners must set forth a proper question for the Commission to consider and make a declaratory ruling on. HAR § 15-15-98(a) states, “[o]n petition of any interested person, the [C]ommission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the [C]ommission to a specific factual situation.” (*Emphasis added*). In considering a petition for declaratory order, the Commission may deny the petition where “[t]he question is speculative or purely hypothetical and does not involve an existing situation or one which may reasonably be expected to occur in the near future.” HAR § 15-15-100(a)(1)(A). Additionally, “[a]n order disposing of a petition shall apply only to the factual situation described in the petition or set forth in the order. It shall not be applicable to different fact situations or where additional facts not considered in the order exist.”

The County’s Petition for Declaratory Order asks whether a “farm dwelling” as defined under HRS § 205-4.5(a)(4) may be used as a STVR. This requires the Commission to determine whether a STVR use is consistent with the permitted use of a farm dwelling under State law.

The County describes the specific factual situation as involving Petitioners who sought and were denied non-conforming use certificates by the County for their STVRs, appealed the denials to the County's Board of Appeals, and now argue that a STVR is a permissible use of a "farm dwelling" on lots created after June 4, 1976 in the State Land Use Agricultural District.

Petitioners' Petition for Declaratory Order asks the Commission to compare the County's definition of a "STVR" with the definition of "farm dwelling" under HRS § 205-5.4(a)(4), to determine whether the definition of "farm dwelling" regulated the rental period of a farm dwelling. No specific situation was presented. Petitioners' question is very narrow and limited to a strict reading of the statute and County ordinance relative to rental timeframe without considering the Petitioners' actual use of their dwellings.

The Petitioners' actual use of their dwellings is essential because it provides the facts and basis upon which to apply the requested interpretation of the "farm dwelling" definition. Petitioners' question is not a "specific factual situation" upon which this Commission can apply the definition of "farm dwelling" because relevant facts and circumstances were not provided. Are the renters farming the land or is there agricultural activity providing income to the renters? Or are the renters, vacationers or tourists who are not engaged in and do not derive income from farming on the premises? Petitioners don't say. These are essential facts without which the Commission cannot provide an answer to Petitioners' question.

Without a "specific factual situation" presented to the Commission, Petitioners are putting forth a speculative or purely hypothetical scenario "which does not involve an existing situation or one which may reasonably be expected to occur in the near future." Therefore, Petitioners' question should be denied, leaving only the County's question of whether a farm dwelling may be used as a STVR for the Commission's consideration.

II. Petitioners' Analysis of the Definitions of a "STVR" and "Farm Dwelling" is Incomplete

During their presentation, Petitioners compared the elements of the definitions of a "STVR" and "farm dwelling" to demonstrate that a STVR use is not inconsistent with a farm dwelling use.

The elements of a "STVR" as defined by the County's ordinances are:

- (1) The owner or operator doesn't reside on the building site;
- (2) That has no more than five bedrooms for rent on the building site;
and
- (3) Is rented for a period of thirty consecutive days or less.

The elements of a "farm dwelling" under HRS § 205-4.5(a)(4) are, 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.

Clearly, none of the elements of the "STVR" directly align with those of the "farm dwelling". However, Petitioners argue that because the three STVR elements are not inconsistent with or are not specifically prohibited by any of the elements of the "farm dwelling", then a STVR may be used as a farm dwelling. In particular, Petitioners assert that because the definition of "farm dwelling" does not expressly prohibit the rental of a farm dwelling for 30 days or less, which is the third element of the "STVR" definition, then a farm dwelling may operate as a STVR. Petitioners' analysis stops here.

Petitioners' analysis is flawed because it fails to include and consider the elements of both definitions. For a farm dwelling to be used as a STVR, and for both uses to coexist upon the same dwelling, each element of the "STVR" definition and at least one of the two options of the "farm dwelling" definition must be met. It is not enough that the elements are not

inconsistent. Petitioners are asking the Commission to focus solely on the 30-day rental term element and turn a blind eye to the farm or farm income component of the State law.

If Petitioners were able and willing to provide facts demonstrating or acknowledging that their dwellings meet all of the STVR elements and at least one of the farm dwelling options, then the Commission could determine that Petitioners were properly operating their farm dwellings as STVRs pursuant to HRS § 205-4.5(a)(4). We can assume that Petitioners meet the three elements of the STVR rental, but Petitioners fail to demonstrate that their farm dwellings are either located on and used in connection with a farm, or are located where agricultural activity provides income to the family occupying the farm dwelling. The check list below illustrates Petitioners' incomplete application of or fulfillment of the two definitions.

- (1) The owner/operator doesn't reside on the building site;
 - (2) The building has no more than 5 rooms to rent on the site;
 - (3) The building is rented for 30 consecutive days or less;
- AND**
- (1) The building is located on and used in connection with a farm;
 - or
 - (2) The building is located where agricultural activity provides income to the family occupying the building.

While Petitioners have argued repeatedly that the use of the farm dwelling is irrelevant to this declaratory ruling and have omitted details on the use from their question, such determination is essential to whether Petitioners may use their farm dwellings as STVRs. Therefore, without such essential facts, Petitioners' question is incomplete and the Commission cannot consider or practically apply Petitioners' statutory interpretation.

III. STVRs Were Never Allowed in the State Agricultural District as A Matter of Law

Petitioners assert that over the past 43 years, Petitioners have legally operated their farm dwellings. And, the County's STVR ordinance established in 2019, improperly "reaches back" to say that Petitioners' operation of their farm dwellings were always illegal as a matter of law.

First, Petitioners fail to set forth any evidence that the operation of their farm dwellings as STVRs were ever legal as a matter of law. There is no county certification, affidavit, recorded deed, or other legal authority before this Commission to establish that Petitioners have lawfully operated their farm dwellings as STVRs for the past 43 years. Although they won't affirmatively admit it, Petitioners also have never denied that their farm dwellings are operated as STVRs, and more importantly, that their farm dwellings have operated without any connection to an agricultural use, in compliance with option (1) or (2) of HRS § 205-4.5(a)(4).

And, even if the County has not been effective in its enforcement of HRS § 205-4.5(a)(4), i.e., to identify and prosecute owners/operators of farm dwellings operating as STVRs, the law has always required that a farm dwelling be used in connection with a farm, and not for just residential uses or STVR uses. The inability of the County to enforce these statutory provisions does not render the law invalid nor does it render the violators of the law in compliance or not subject to the law.

From its inception and through its evolution until today, the Hawaii State Land Use classification system never permitted single-family dwellings in the Agricultural District without a connection to agricultural use. In 1961, the State Land Use Commission was established by the Legislature upon the specific findings that:

Inadequate controls have caused many of Hawaii's limited and valuable lands to be used for purposes that may have a short-term gain to a few but result in a long-term loss to the income and growth potential of our economy... Scattered subdivisions with expensive, yet reduced, public services; the shifting of prime agricultural lands into nonrevenue producing residential uses when other lands are available that could serve adequately the urban needs... these are evidences of the need for public concern and action.

Therefore, the Legislature finds that in order to preserve, protect and encourage the development of the lands in the State for those uses to which they are best suited for the public welfare and to create a complementary assessment basis according to the

contribution of the lands in those uses to which they are best suited, the power to zone should be exercised by the State...

Section 1 of Act 187 (Session Laws of 1961).

Act 187 (Session Laws of 1961) directed the Commission to prepare use classification maps and district regulations within 18 months of the Act's passage for the three major land use classes – urban, agricultural, and conservation – with rural added in 1963. “Agriculture” was defined as “the raising of livestock or the growing of crops, flowers, foliage, or other products.” “District” was defined as “an area of land zoned by the commission for urban, agricultural or conservation use as provided in this Act [187].” The Commission was required to set standards for determining the boundaries of each class of districts, provided that “in establishment of the boundaries for agriculture districts the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation.”

To maintain the existing agricultural uses at the time, prior to final adoption of boundaries and regulations, the Commission was authorized to establish interim boundaries and regulations. The Hawaii State Zoning Interim Regulations, adopted April 4, 1962 (“Interim Regulations”), enumerated nine permitted uses in the Agricultural District, including subsection 2.1(b)(2) “single-family dwelling units” and subsection 2.1(b)(9) “buildings and uses normally considered directly accessory to the above permitted uses.” The Attorney General opined that subsection 2.1(b)(2) of the Interim Regulations permitting lands situated in agricultural districts to be used as “single-family dwelling units” “cannot be sustained if it operates to defeat or frustrate the purposes and intent of the legislature as expressed in section 1 of Act 187.” *Hawaii Attorney General Opinion No. 62-38*. The Attorney General distinguished a single-family dwelling unit from a traditional farmhouse as follows:

[A] single-family dwelling unit is a place of residence situated on land classified as agricultural but which is not accessory to or used in connection with a primary agricultural activity. It is in effect the

uses of land solely for residential purposes where the land has been designated as agricultural. Clearly the Land Use Commission cannot allow lands classified as agricultural for residential purposes if in so doing, the essential character of the area is changed from agricultural to urban. To do so would render the district boundaries meaningless and defeat the purpose of Act 187.

Hawaii Attorney General Opinion No. 62-38. Consequently, all subsequent iterations of the State Land Use statutes did not adopt or include “single-family dwellings” as a permitted use in the Agricultural District. In 1963, the Legislature further specified the permitted uses of the Agricultural District as including:

[A]ctivities or uses as characterized by the cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry, and game and fish propagation; services and uses accessory to the above activities including but not limited to living quarters or dwellings, mills, storage facilities, processing facilities, and roadside stands for the sale of products grown on the premises; and open area recreational facilities.

Section 2, Act 205, Session Laws of 1963.

In 1976, the definition of “farm dwelling” was adopted into HRS, as currently written. Thus, from 1961 until today, a farm dwelling could only be operated in connection with a farm, and not simply for residential use. Even though STVRs are a more recent form of residential use that was not contemplated by legislators in 1961, 1963, or 1976, it is a residential use that is unconnected to the agricultural use of the property. Moreover, public testimony at the June 25, 2020 Commission meeting characterized STVRs as having greater negative impacts in the Agricultural District than simply residential uses. Accordingly, it is incumbent on the Commission to protect the Agricultural District by upholding the purpose and intent of the State Land Use Law by declaring that a STVR is not a permitted use of a farm dwelling in the Agricultural District.

IV. 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 such that a farm dwelling may not be used as a STVR.

DATED: Honolulu, Hawaii, July 17, 2020.

Mary Alice Evans

MARY ALICE EVANS
Director for the OFFICE OF PLANNING,
STATE OF HAWAII

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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:

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Dated: Honolulu, Hawaii, July 17, 2020.

Mary Alice Evans

MARY ALICE EVANS
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STATE OF HAWAII