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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 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 dated February 27, 2014; Donald J. K. and Stacey S. Olgado; Dirk

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

SUBMISSION BY PETITIONERS IN DOCKET NO. DR 20-70 OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER (1) DENYING COUNTY OF HAWAII'S PETITION FOR DECLARATORY ORDER IN DOCKET NO. DR 20-69 AND (2) GRANTING PETITION FOR DECLARATORY ORDER IN DOCKET NO. DR 20-70

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER (1) DENYING COUNTY OF HAWAII'S PETITION FOR DECLARATORY ORDER IN DOCKET NO. DR 20-69 AND (2) GRANTING PETITION FOR DECLARATORY ORDER IN DOCKET NO. DR 20-70

DECLARATION OF CALVERT G. CHIPCHASE

EXHIBITS 1 - 4

CERTIFICATE OF SERVICE

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



**SUBMISSION BY PETITIONERS IN DOCKET NO. DR 20-70
OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION AND ORDER (1) DENYING COUNTY OF HAWAII'S
PETITION FOR DECLARATORY ORDER IN DOCKET NO. DR 20-69
AND (2) GRANTING PETITION FOR DECLARATORY ORDER IN
DOCKET NO. DR 20-70**

At the meeting held on June 25, 2020, Commissioner Gary Y. Okuda, Esq. suggested that the parties should submit proposed Findings of Fact, Conclusions of Law and Decision and Order. Although the Commission did not impose this obligation, Petitioners Linda K. Rosehill, *et al.* (the “**Rosehill Petitioners**”) believe that findings and conclusions, whether adopted by the Commission or not, provide a useful structure for our continued discussion of the County of Hawai‘i’s (the “**County**”) Petition for Declaratory Order in Docket No. DR 20-69 (the “**County Petition**”) and the Rosehill Petitioners’ Petition for Declaratory Order in Docket No. DR 20-70 (the “**Rosehill Petition**”). Accordingly, the Rosehill Petitioners submit the attached proposed Findings of Fact, Conclusions of Law and Decision and Order (1) Denying the County Petition and (2) Granting the Rosehill Petition.

As a prelude to the proposed findings and conclusions, the Rosehill Petitioners address various points that were discussed during the prior Commission meeting. For example, the Commission asked about the “specific factual situation” before the Commission and the role of “*in pari materia*” in statutory construction. We address those and other matters below.

Finally, the following documents are attached for the Commission’s reference:

1. A copy of the June 25, 2020 transcript.
2. A copy of Act 199 from the Hawai‘i Session Laws of 1976, which added the “farm dwelling” provision to Chapter 205. This is the operative provision in this proceeding.
3. A copy of Act 193 from the Session Laws of 1975, which amended the “agricultural” use provision in HRS § 205-2. This is the provision referenced by Commissioner Chang during the prior meeting. We discuss it below in Section XIV.
4. A copy of Chapter 205 of the Hawai‘i Revised Statutes taken from the 1976 replacement that includes the Acts of the 1976 Session.

DISCUSSION

I. County Ordinance 2018-114 Is the “Specific Factual Situation” Before the Commission.

Hawai‘i Administrative Rules (“**HAR**”) § 15-15-98(a) provides, “On petition of any interested person, the commission 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.” Under County Ordinance 2018-114, “farm dwellings” on lots within the State Agricultural District that were created on or after June 4, 1976

may not be rented for less than 31 days.¹ Ordinance 2018-114 (including as an element that the dwelling “is rented for a period of thirty consecutive days or less”). The terms of the Ordinance are the extent of the specific factual situation before the Commission.

II. The Petitions Do Not Involve Particular Uses on Any Property.

Commissioner Cabral expressed concern that

what they’re doing is not allowed under the law for farm dwellings, but you’re saying it’s okay because other people have done it, and that’s because it doesn’t matter whether it’s there for five days or five years, it’s okay even though you know that it doesn’t comply, but you want us then to give you permission to have that be allowed?

Ex. 1 (6/25/20 transcript) at 199:3-12. The Petitions do not ask the Commission to authorize or condemn the particular use of a specific property within the State Agricultural District. As noted above, the only specific factual situation at issue is the County’s definition of “short term vacation rental” in Ordinance 2018-114.

III. The Petitions Do Not Concern “Hotel” Uses.

Commissioner Cabral explained, “I would assume that the intent of the legislature—and everybody would say that you are not going to have a hotel operation on a farm property.” Ex. 1 (6/25/20 transcript) at 201:13-16. The Petitions do not ask the Commission to declare that “hotels” were allowed in the Agricultural District or condemn “hotels” within the Agricultural District. The only matter at issue is the application of Chapter 205 as of June 4, 1976, to the County’s definition of “short-term vacation rental” in Ordinance 2018-114.

¹ The County Ordinance also includes as factual elements that “the owner or operator does not reside on the building site” and that the dwelling “has no more than five bedrooms for rent on the building site.” Ordinance 2018-114.

IV. The County Is Not Concerned About Protecting “Farm Dwellings.”

During the prior meeting, it became clear that County is not concerned about ensuring the agricultural use components of the “farm dwelling” definition (“used in connection with” or “provides income to”) are satisfied in the State Agricultural District. On the contrary, the County admitted that it allows single-family dwellings without any agricultural use on lots in the district. *See* Ex. 1 (6/25/20 transcript) at 108:15-24 (Mukai: “[T]here’s **nothing that disallows him from simply having a residence on an Agricultural Zoned property.**”); *id.* at 110:4-11 (“[COMMISSIONER OKUDA:] ‘So is it the County of Hawaii’s position that a residence may be constructed and lived in on land that’s within the Land Use Agricultural District, **even if there’s no agriculture taking place on that parcel of property?**’ MR. YEE: ‘For the record, Michael Yee, Planning Director. **Yes, that is correct.**’”) (emphasis added); *id.* at 111:12-20 (“[COMMISSIONER OKUDA:] ‘So in other words, Mr. Yee, **even if I tell you and, in fact, I tell you in writing that my intention is I do not intend to engage in any agriculture. All I intend to do is build a house to live in. The County of Hawaii would consider that consistent with HRS 205-4.5?**’ MR. YEE: ‘Yes, and we would consider it a farm dwelling.’”) (emphasis added).

V. The County Is Not Concerned About How a “Farm Dwelling” Is Used.

The County conceded it would be fine for a person to vacation in a farm dwelling for 31 days or more. Ex. 1 (6/25/20 transcript) at 115:21-117:17 (“[COMMISSIONER OKUDA:] ‘If I came into the County and said I was going to build a residence on

Agriculturally Districted and zoned land, and I told you in writing, and by the way I don't plan to live there. **I plan to rent it out to somebody for, let's say, longer than 30 or 40-days. Would you consider me being in violation of any land use ordinance or law?** MR. MUKAI: 'My understanding -- John Mukai -- **longer periods of rental would be allowed under Ag.**' COMMISSIONER OKUDA: 'So in other words, **the County's objection is not that there's no agricultural use regarding the short-term vacation rentals, it's just that it's a short-term vacation rental; correct?**' MR. MUKAI: **Yes, yes.**') (emphasis added); *id.* at 118:7-13 ('COMMISSIONER WONG: 'I'm trying to figure this out. You said that if we -- okay, so let's say, again, taking Mr. Bell, let's say **I have a property zoned Ag and I rent it to the Chair for 31 days, is that okay? And it's not a short-term vacation.**' MR. MUKAI: '**By definition it's not a short-term vacation rental.**') (emphasis added). Conversely, an owner could rent the dwelling to a farmer who wants to farm the property under a month-to-month lease, and the County would call that use a "short-term vacation rental." *Id.* at 129:11-130:5 (Surprenant).

VI. The Petitions Are Only About Whether Farm Dwellings May Be Rented for Less than 31 Days.

As the County confirmed, its "objection is **not** that there's **no agricultural** use regarding the short-term vacation rentals, **it's just that it's a short-term vacation rental.**" Ex. 1 (6/25/20 transcript) at 115:21-117:17 (Mukai affirming question from Commissioner Okuda) (emphasis added). When asked whether the "only fact" that "makes it a short-term vacation rental" is that "they are renting it for less than

3[1] days,” Director Yee replied, “Within our ordinance **we have defined short-term vacation rentals as less than 3[1] days.**” Id. at 124:17-125:10 (Yee).

As the discussion with the County makes clear, this case is only about the duration of the rental. Nothing else is before the Commission. Nothing else informs the Commission’s answer to the Petitions. The only question before the Commission is whether, as of June 4, 1976, Chapter 205 prohibited renting a “farm dwelling” for less than 31 days.

VII. “Farm Dwellings” May Be Rented.

Chapter 205 clearly contemplated “lease[s]” or rentals. 1976 Haw. Sess. L. Act 199, § 1. “The County agrees that there’s no prohibition on farm dwellings being rented for 30 days or less.” Ex. 1 (6/25/20 transcript) at 105:4-6 (Mukai) (emphasis added).

VIII. A “Dwelling” Is Still a “Dwelling” when It Is Rented for Less than 31 Days.

Commissioner Cabral asked whether a dwelling that is rented for less than 31 days is still a “dwelling.” Ex. 1 (6/25/20 transcript) at 196:15-16. The answer is yes. “A ‘dwelling’ is ‘a shelter (as a house) in which people live.’ To ‘dwell’ is ‘to remain for a time.’” *Mason Family Tr. v. DeVaney*, 207 P.3d 1176, 1178 (N.M. Ct. App. 2009) (quoting *Merriam-Webster’s Collegiate Dictionary* 361 (10th ed.1996)); see also *State v. Garcia*, 9 Haw. App. 325, 328, 839 P.2d 530, 532 (1992) (explaining that “dwelling” “is defined in *Webster’s New World Dictionary* 436 (2nd Coll. Ed. 1984) as ‘a place to live in; residence; house; abode’”). A “dwelling purpose” simply means “use as a house or abode, and once a proper use has been established, [courts] **do**

not attach any requirement of permanency or length of stay.” *Mason*, 207 P.3d at 1178 (emphasis added); *see also Wilkinson v. Chiwawa Communities Ass’n*, 327 P.3d 614, 620 (Wash. 2014) (holding that where “lots” could be “utilized solely for single family residential use consisting of single residential dwelling,” using the property for “eating, sleeping, or other residential purposes” is permitted “no matter how short the rental duration”).

IX. Under Chapter 205, “Farm Dwellings” May Be Rented for Less than 31 Days.

As OP explained, **“the definition of ‘farm dwelling’ does not expressly prohibit rentals of 30 days or less”** Ex. 1 (6/25/20 transcript) at 92:5-7 (Apuna) (emphasis added). The County agreed “that there’s no prohibition on farm dwellings being rented for 30 days or less.” Ex. 1 (6/25/20 transcript) at 105:4-6 (Mukai).

The County and OP are correct. On June 4, 1976, Chapter 205 defined a “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.” 1976 Haw. Sess. L. Act 199, § 1. The definition does not consider how long the dwelling is rented. Whether the dwelling is rented for 30 days or 30 years is immaterial. As Commissioner Chang correctly observed, “there’s nothing in 205-4.5 that says ‘duration,’” Ex. 1 (6/25/20 transcript) at 192:22-23, and “the definition of ‘farm dwelling’ has nothing to do with the duration,” *id.* at, 184:14-16.

The County’s and OP’s concessions end the discussion.

X. The County Would Prohibit a Tenant Farmer from Renting a Farm Dwelling on a Month-to-Month Lease.

As noted above, notwithstanding the County's concession that under Chapter 205 "there's no prohibition on farm dwellings being rented for 30 days or less," Ex. 1 (6/25/20 transcript) at 105:4-6 (Mukai), the County asserted that, under its Ordinance, a "farm dwelling" rented for "less than 30 days" is "by definition" a "short-term vacation rental" and is not permitted even if it is rented to a farmer. Ex. 1 (6/25/20 transcript) at 124:17-125:10 (Yee responding to questioning by Commissioner Chang). The result is absurd.

XI. On these Petitions, the Commission May Only Consider the Specific Questions and Factual Situation Presented in the Petition.

We are here on petitions for declaratory orders. Therefore, the legal question and the factual record before the Commission are limited to "statutory provision" (Chapter 205 as of June 4, 1976) and the "specific factual situation" presented by the County's definition of "short-term vacation rental."

The limited nature of the issue before the Commission is expressed in the relief sought in the Petitions. The County's Petition asks for order "that 'farm dwellings' may not be used as short-term vacation rentals pursuant to [HRS] §§ 205-2 and 205-4.5, and [HAR] § 15-15-25." County Petition at 1. The County does not ask the Commission to consider "short-term vacation rentals" in the abstract. Rather, the County asks the Commission to consider the factual elements of its definition of "short-term vacation rentals." County Petition Mem. at 1. Similarly, the Rosehill Petitioners ask for a declaratory order that "[a]s of June 4, 1976, the plain language of Chapter 205 did not dictate how long a 'farm dwelling' must be rented in order to

qualify as a ‘farm dwelling.’” Rosehill Petition at 6. OP agrees that the Commission “**must evaluate both definitions against each other to determine whether a farm dwelling may be used as a short-term vacation rental**, i.e., that it may be rented for 30 days or less.” Ex. 1 (6/25/20 transcript) at 89:4-23 (Apuna) (emphasis added).

XII. A Court Will Not Defer to the Commission’s Interpretation of “Farm Dwelling.”

Commissioner Chang inquired whether “on appeal the appellate court would, in general, in the absence of arbitrary capriciousness, give deference to the administrative agencies’ interpretation of its own laws.” Ex. 1 (6/25/20 transcript) at 102:13-16; *id.* at 102:12-16 (“So would you agree that on appeal the appellate court would, in general, in the absence of arbitrary capriciousness, give deference to the administrative agencies’ interpretation of its own laws?”). The answer is no. Courts only defer to an agency where a statute is ambiguous. As the Hawai‘i Supreme Court has explained:

This court generally reviews questions of statutory interpretation *de novo*, but, in the case of ambiguous statutory language, the applicable standard of review regarding an agency’s interpretation of its own governing statute requires this court to defer to the agency’s expertise and to follow the agency’s construction of the statute unless that construction is palpably erroneous.

Gillan v. Gov’t Employees Ins. Co., 119 Hawai‘i 109, 114, 194 P.3d 1071, 1076 (2008) (citations and ellipsis omitted; emphasis added).

Here, the parties and OP agree that the statutory text is plain and unambiguous. Accordingly, no deference will be afforded to the Commission’s interpretation.

XIII. The Doctrine of *In Pari Materia* Does Not Aid the Interpretation of “Farm Dwelling.”

Commissioner Chang asked whether the definition of “farm dwelling” should be read *in pari materia* with the agricultural use provisions of HRS § 205-2. Ex. 1 (6/25/20 transcript) at 186:6-187:15. *In pari materia* is a rule of statutory interpretation. “[L]aws *in pari materia*, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another.” *State v. Putnam*, 93 Hawai‘i 362, 371 n.9, 3 P.3d 1239, 1248 n.9 (2000). (Emphasis added.) For four reasons, the doctrine of *in pari materia* does not aid in understanding the definition of “farm dwelling.”

First, there is nothing “doubtful in” the definition of “farm dwelling.” The rule of *in pari materia* does not apply absent doubt or ambiguity. See *N. Carolina Fisheries Ass’n v. Brown*, 917 F. Supp. 1108, 1118 (E.D. Va. 1996) (“And the doctrine of *in pari materia* is inapplicable where, as here, there is no ambiguity in the statute under consideration. Norman A. Singer, 2A *Sutherland Statutory Construction* § 51.03 (5th ed. 1992 & Supp. 1995).”); cf. *Cariaga v. Del Monte Corp.*, 65 Haw. 404, 409, 652 P.2d 1143, 1147 (1982) (“[A]mbiguity must be construed with reference to the whole system of law of which it is a part and *in pari materia* or with reference to laws upon the same subject matter.”) (citation omitted).

Second, nothing in HRS § 205-2 or the rest of Chapter 205 informs the meaning “farm dwelling.” On June 4, 1976, section 205-2 provided as follows:

Sec. 205-2 Districting and classification of lands. There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group

contiguous land areas suitable for inclusion in one of these four major districts.

....

Agricultural districts shall include activities 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 road side stands for the sale of products grown on the premises; agricultural parks and open area recreational facilities.

1975 Haw. Sess. L. Act 193, § 3 (emphasis added).

This provision does not change the definition of “farm dwelling” in any way. Just as this provision allows “dwellings” “accessory to” “the cultivation of crops, orchards, forage, and forestry; farming activities or uses related to animal husbandry,” *see id.*, the “farm dwelling” provision allows “single-family dwelling[s] 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. The general statement adds nothing to and takes nothing away from the specific definition of “farm dwelling.”

Third, despite the general statement on agricultural use in HRS § 205-2, section 205-4.5 allowed numerous specific uses, including public institutions and buildings, camps, golf courses, and retention of historic sites of interest. This section does not contain an exclusive list of uses. On the contrary, section 205-2 merely provided that the district shall “include” certain uses; it did not state that those are the only uses allowed.

Finally, “a specific statute controls over a general statute concerning a common matter” *See State v. Kamana‘o*, 118 Hawai‘i 210, 211, 188 P.3d 724, 725 (2008). The “farm dwelling” definition is the specific statute governing farm dwellings. This definition controls, and all of the specific uses listed in HRS § 205-4.5 are allowed even if they are not included in the general description of agricultural uses in section 205-2.

XIV. The Commission Does Not Have the Authority to Redefine “Farm Dwelling.”

Chapter 205 specifically defined the term “farm dwelling.” *See* 1976 Haw. Sess. L. Act 199, § 1. Where a statute includes **undefined** terms, courts look to dictionaries and other sources to ascertain the meaning of the terms “**not statutorily defined**.” *See Wells Fargo Bank, N.A. v. Omiya*, 142 Hawai‘i 439, 450, 420 P.3d 370, 381 (2018) (emphasis added). Where, as here, a statute includes a specific definition, that definition **controls**. *See Akai v. Lewis*, 37 Haw. 374, 378 (1946) (“In the interpretation of a statute or ordinance the lawmaking body’s own construction of its language, by means of definitions of the terms employed, **supersedes** the commonly accepted, dictionary, or judicial definition.”) (emphasis added); *State v. Kantner*, 53 Haw. 327, 329, 493 P.2d 306, 308 (1972) (“The legislature has a broad power to define terms for a particular legislative purpose, and the courts, as a general rule of construction, are **bound** to follow legislative definitions of terms rather than commonly accepted dictionary, judicial or scientific definitions.”) (emphasis added).

XV. The Commission’s Interpretation of “Farm Dwelling” Begins and Ends with the Plain Language of the Definition.

Where, as here, a “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). “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.

XVI. HAR § 15-15-23 Has No Bearing on the Petitions.

Commissioner Ohigashi asked whether the Commission has “already declared or already stated for the record that uses that are not specifically listed are prohibited” pursuant to HAR § 15-15-23, Ex. 1 (6/25/20 transcript) at 94:17-95:7. Section 15-15-23 provides, “Except as otherwise provided in this chapter, uses not expressly permitted are prohibited.” This rule was promulgated in 1986—ten years after the “farm dwelling” definition was adopted. Accordingly, the rule has no bearing on the Petitions.

Furthermore, the provisions of “this chapter” (the Commission’s rules) expressly permit the uses set forth in HRS § 205-4.5. *See* HAR § 15-15-25. In turn, HRS § 205-4.5, as of June 4, 1976, expressly allowed farm dwellings. Thus, the rental of farm dwellings was “expressly permitted.” HAR § 15-15-23. What the Commission has not yet declared is simply that, as of June 4, 1976, there was no prohibition on the duration of leases or rentals of farm dwellings. *See* Ex. 1 (6/25/20 transcript) at 92:5-7 (Apuna); *id.* at 105:4-6 (Mukai). That is all the Commission need say in this case.

CONCLUSION

The County’s actions are unprecedented. Instantaneously eliminating a use is unconstitutional. *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) (explaining that 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”). To accomplish what the constitution forbids, the County implores the Commission to declare that as of June 4, 1976, Chapter 205 prohibited renting a “farm dwelling” for less than 31 days. The Commission cannot make this declaration. The only declaration available to the Commission is that Chapter 205 did not set a minimum period for the rental of “farm dwellings.” Accordingly, the Rosehill Petitioners respectfully ask that their Petition be granted and that the County Petition be denied.

DATED: Honolulu, Hawai'i, July 9, 2020.

CADES SCHUTTE
A Limited Liability Law Partnership

A handwritten signature in cursive script, appearing to read "Calvert G. Chipchase", followed by a horizontal line extending to the right.

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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 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 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

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

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER (1)
DENYING COUNTY OF HAWAII’S
PETITION FOR DECLARATORY
ORDER IN DOCKET NO. DR 20-69
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**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND
ORDER (1) DENYING COUNTY OF HAWAII'S PETITION FOR
DECLARATORY ORDER IN DOCKET NO. DR 20-69 AND (2) GRANTING
PETITION FOR DECLARATORY ORDER IN DOCKET NO. DR 20-70**

On May 19, 2020, the County of Hawai'i (the "**County**") petitioned pursuant to Hawai'i Administrative Rules ("**HAR**") § 15-15-99 for a declaratory order "that 'farm dwellings' may not be used as short-term vacation rentals pursuant to [HRS] §§ 205-2 and 205-4.5, and [HAR] § 15-15-25." County Petition for Declaratory Order (the "**County Petition**") at 1. The County Petition was assigned Docket No. DR 20-69.

On May 22, 2020, the Commission received a Petition for Declaratory Order and Incorporated Memorandum in Docket No. DR20-70 (the "**Rosehill Petition**") filed by Petitioners Linda K. Rosehill, *et al.* (collectively, the "**Rosehill Petitioners**") pursuant to HAR § 15-15-99. The Rosehill Petitioners ask for a declaratory order that "[a]s of June 4, 1976, the plain language of Chapter 205 did not dictate how long a 'farm dwelling' must be rented in order to qualify as a 'farm dwelling.'" Rosehill Petition at 6.

During the meeting held on June 25, 2020, the Commission approved the parties' Stipulation to Consolidate the two proceedings.

The Commission, having heard and examined the arguments and evidence presented by the County, the Rosehill Petitioners, the State of Hawai'i Office of

Planning (“OP”) and other public witnesses at its meetings on June 25, 2020, and July 23, 2020, via Zoom Webinar Virtual Meeting, hereby makes the following Findings of Fact, Conclusions of Law and Decision and Order:

FINDINGS OF FACT

A. HRS Chapter 205 as of June 4, 1976.

1. As of June 4, 1976, Hawai‘i Revised Statutes (“HRS”) Chapter 205 (“**Chapter 205**”) stated in part as follows

Sec. 205-2 Districting and classification of lands. There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts.

....

Agricultural districts shall include activities 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 road side stands for the sale of products grown on the premises; agricultural parks and open area recreational facilities.

1975 Haw. Sess. L. Act 193, § 3 (emphasis added).

2. On June 4, 1976, Chapter 205 was amended to state in part as follows:

Sec. 205-[4.5] Permissible uses within the agricultural districts. (a) Within the agricultural district all lands with soil classified by the Land Study Bureau’s Detailed Land Classification as Overall (Master) Productivity Rating Class A or B shall be restricted to the following permitted uses:

....

(4) Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry;

Farm dwelling as used herein shall mean 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.

(b) Uses not expressly permitted in this section 205-[4.5](a) shall be prohibited, except the uses permitted as provided in section 205-6 and section 205-8, and construction of single-family dwellings on lots existing before the effective date of this Act. . . .

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.

1976 Haw. Sess. L. Act 199, § 1 (emphasis added).

B. The Rosehill Petitioners' Lots.

3. The Rosehill Petitioners each own dwellings on land classified as Agricultural under the statewide land use classification. Rosehill Petition at 8.

4. The Rosehill Petitioners' respective dwellings are located on lots that were created on or after June 4, 1976. *Id.*

5. Prior to April 1, 2019, the Rosehill Petitioners used their dwellings for rentals of less than 31 days. *Id.*

C. County Ordinance 2018-114 and Rule 23-3.

6. Prior to April 1, 2019, the County's zoning ordinance did not prohibit the rental of property within the State Agricultural District for periods of less than 31 days.

7. Effective April 1, 2019, County Ordinance 2018-114 prohibited "short-term vacation rentals" on lots created on or after June 4, 1976, within the State Agricul-

tural District.² See Rosehill Petition Ex. 1 (County Ordinance 2018-114); County Petition at 2.

8. The ordinance defined “**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.**” *Id.* (emphasis added).

9. Pursuant to County Ordinance 2018-114, the County Planning Department adopted Rule of Practice and Procedure 23-3 in April 2019. The rule provides, “Any dwelling being operated as a Short-Term Vacation Rental on a lot created on or after June 4, 1976 in the State Land Use Agricultural District is excluded from being registered as a Short-Term Vacation Rental.” Rosehill Petition Ex. 2 (Rule 23-3).

10. According to the County Petition, County Ordinance 2018-114 “and Rule 23 both prohibit the issuance of non-conforming use certificates to short-term vacation rentals operating on lots created after June 4, 1976 in the State Land Use Agricultural District based on the County's understanding that any such existing operations were not lawful in ‘farm dwellings’ pursuant to HRS Chapter 205.” County Petition at 2.

² See County Ordinance 2018-114, § 2 (“In 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.”); County Planning Department Rules of Practice and Procedure Rule 23-3 (“Any dwelling being operated as a Short-Term Vacation Rental on a lot created on or after June 4, 1976 in the State Land Use Agricultural District is excluded from being registered as a Short-Term Vacation Rental.”).

D. County Proceedings.

11. The Rosehill Petitioners challenged the County's actions in administrative proceedings before the County Planning Commission. Rosehill Petition at 3. By agreement with the County, those proceedings have been stayed so that Petitioners and the County may obtain guidance from the Commission. *Id.*

E. Commission Proceedings.

12. On May 19, 2020, the Commission received the County Petition along with a Memorandum of Authorities and Certificate of Service.

13. On May 22, 2020, the Commission received the Rosehill Petition along with a Verification of Petition, Exhibits 1 and 2, and a Certificate of Service.

14. On June 11, 2020, the Commission received a Stipulation to Consolidate; Order (the "**Stipulation to Consolidate**").

15. On June 17, 2020, the Commission mailed a Notification of Land Use Commission Meeting for its meeting scheduled for June 25, 2020, by interactive conference technology on Zoom Webinar Virtual Meeting to the parties and the Statewide, Oahu, and Hawai'i County mailing lists.

16. On June 18, 2020, the Commission received Office of Planning's ("**OP**") Response to Petitioners' and County of Hawaii's Petitions for Declaratory Order (the "**OP Response**").

17. On June 19, 2020, the Commission received the Rosehill Petitioner's Statement of Position Regarding the County Petition.

18. On June 22, 2020, the Commission received a Statement of Position by the Rosehill Petitioners Regarding the OP Response.

19. Between June 17 and June 22, the Commission received written public testimony from Dr. Steven Bell, Peter Eising and Lynn Krieger.

20. On June 24, 2020, the Commission received two documents by email from the County.

21. On June 25, 2020, at its Zoom Webinar Virtual Meeting, the Commission considered the Petitions. John Mukai, Esq., Diana Mellon-Lacey, Esq., Planning Director Michael Yee and Acting Deputy Director of Planning April Surprenant appeared on behalf of the County. Calvert G. Chipchase, Esq. and Christopher T. Goodin, Esq. appeared on behalf of the Rosehill Petitioners. Also present at the proceeding was Dawn Apuna, Esq. on behalf of OP.

22. The Commission heard public testimony on the Petition from Peter Eising, Dr. Stephen Bell and Ms. Apuna.

23. Dr. Bell testified against the Rosehill Petition. He testified that he is not a farmer and that he has built his “retirement home” on his property within Kohala Ranch. Ex. 1 (6/25/20 transcript) at 76:15-20, 77:7-8. He testified that when he purchased his home, there was no requirement that he had to do any farming or agriculture. *Id.* at 79:18-21. He affirmed that his “objection is not that [the Rosehill Petitioners are] not doing agriculture, because [he is] not doing agriculture either, it is that they are renting it out as short term rentals” Ex. 1 (6/25/20 transcript) at 80:14-18. When asked whether a majority of lots within Kohala Ranch are engaging in agricultural uses, Mr. Bell said he “cannot give . . . an honest on that” because he “really [does not] know.” *Id.* at 81:3-9.

24. Ms. Apuna testified in favor the County Petition and against the Rosehill Petition. In her testimony, Ms. Apuna asserted that the analysis “must[] evaluate both definitions [of ‘farm dwelling’ and ‘short-term vacation rental’] against each other to determine whether a farm dwelling may be used as a short-term vacation rental, i.e., that it may be rented for 30 days or less”:

The State land use classification system, statutory interpretation in general, an common sense, requires that you look at the complete definition of “farm dwelling” and relevant language under HRS Section 205-2(d)(7), the definition of short-term vacation rental as provided in the Hawaii County Code, and the basic meaning of both terms. **You must[] evaluate both definitions against each other to determine whether a farm dwelling may be used as a short-term vacation rental, i.e., that it may be rented for 30 days or less.**

When you properly look at the definition of “farm dwelling”—which 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—and the meaning of a short-term vacation rental, **which is a transient accommodation generally used by vacationers or tourists**, you must conclude that they clearly are not the same or compatible uses.

Ex. 1 (6/25/20 transcript) at 89:4-23 (emphasis added).

25. Ms. Apuna further testified that “a renter for 30 days or less that farms the land may be allowed under the definition of ‘farm dwelling’”:

For example, a renter for 30 days or less that farms the land may be allowed under the definition of “farm dwelling”. But a renter for 30 days or less who does not farm the land, but is merely renting as a vacationer would be prohibited under the definition of “farm dwelling”.

Ex. 1 (6/25/20 transcript) at 91:1-6.

26. Ms. Apuna further testified that “the definition of ‘farm dwelling’ does not expressly prohibit rentals of 30 days or less” Ex. 1 (6/25/20 transcript) at 92:5-7.

27. In response to questioning by Commissioner Wong, Ms. Apuna further testified that Dr. Bell's use of his property, where "he's not a farmer but lives on-site" is not "okay." Ex. 1 (6/25/20 transcript) at 93:6-7.

28. Ms. Apuna further confirmed that "grow[ing] one papaya tree" on an "ag lot" could "[p]otentially" qualify as an agricultural use. Ex. 1 (6/25/20) at 93:23-94:1 (questioning by Commissioner Wong).

29. In response to questioning by Vice Chair Cabral, Ms. Apuna agreed that "arguably" a "short term" "rent[al]" "for less than 30 days" "would be a permitted usage in Agriculturally Zoned land" in the context of a "agricultural experience" for the renter:

[VICE CHAIR CABRAL:] By your definition, would you consider that in the event an activity on a property has, let's say, has horses, has a garden, has agricultural type activities going on, and then if, **in the event that people came and rented it on a short term basis for the agricultural experience of grooming a horse, riding a horse, planting vegetables or fruit or something**, would you consider, by your readings of this, that **that would be a permitted usage in Agriculturally Zoned land in the event that occupant of the house is only there for a short time, but that the activity is in fact agriculture?**

MS. APUNA: I think that if you can show the connection between the user and the renter as being a bona fide agricultural use for service, that they are supporting the agricultural use of the property, **then that potentially they could stay there for less than 30 days arguably.**

Ex. 1 (6/25/20 transcript) at 96:12-97:6 (emphasis added).

30. In response to questioning by Commissioner Okuda, Ms. Apuna agreed that, depending on the "specific facts of the specific situation," "short term may be permissible or might not be permissible":

[COMMISSIONER OKUDA:] And so there might be a situation where, as you pointed out, what might be considered by people in a general vernacular,

short term may be permissible or it might not be permissible. It depends on the **specific facts of the specific situation.** Is that a fair statement?

MS. APUNA: **Yes.**

Ex. 1 (6/25/20 transcript) at 98:1-8 (emphasis added).

31. In response to further questioning by Commissioner Chang, Ms. Apuna agreed that the Commission has “legal authority to interpret Hawaii Revised Statutes 205-4.5.” Ex. 1 (6/25/20 transcript) at 101:25-102:2.

32. Following public testimony, Chair Scheuer approved the Stipulation to Consolidate. Ex. 1 (6/25/20 transcript) at 104:17-18.

33. The Commission heard argument by Mr. Mukai and Mr. Chipchase. County Planning Director Michael Yee and County Acting Deputy Director of Planning April Surprenant also responded to questions from the Commissioners.

34. For the County, Mr. Mukai conceded that “there’s no prohibition on farm dwellings being rented for 30 days or less”:

In this case the Rosehill Petitioners state that, quote, the only question before the Commission is whether as of June 5th, 1976, Chapter 205 prohibited leases, in parenthesis, the same thing as rentals of farm dwellings for a period of less than 31 days.

The County agrees that there’s no prohibition on farm dwellings being rented for 30 days or less.

Ex. 1 (6/25/20 transcript) at 105:4-6 (emphasis added).

35. For the County, Mr. Mukai further conceded that “the owner of a farm dwelling does not need to reside in the dwelling”:

The Rosehill Petitioners note that **the owner of a farm dwelling does not need to reside in the dwelling. Again, the County agrees.**

Ex. 1 (6/25/20 transcript) at 105:17-19 (emphasis added).

36. For the County, Mr. Mukai asserted that “there’s nothing that disallows [a person] from simply having a residence on an Agricultural Zoned property” without “performing farming activities”:

[W]e would submit that I think there was an inquiry with one of the Commissioners as to whether Mr. Bell’s property or his residence, why can’t he just live there and not perform farming activities? He has to file this Farm Dwelling Notice with the County, and his residence is considered a farm dwelling. **And there’s nothing that disallows him from simply having a residence on an Agricultural Zoned property.**

Ex. 1 (6/25/20 transcript) at 108:15-24 (emphasis added).

37. In response to questioning by Commissioner Okuda, Director Yee asserted that “a residence may be constructed and lived in on land that’s within the Land Use Agricultural District, even if there’s no agriculture taking place on that parcel of property”:

[COMMISSIONER OKUDA:] So is it the County of Hawaii’s position that a residence may be constructed and lived in on land that’s within the Land Use Agricultural District, **even if there’s no agriculture taking place on that parcel of property?**

MR. YEE: For the record, Michael Yee, Planning Director.

Yes, that is correct.

....

[COMMISSIONER OKUDA:] So in other words, Mr. Yee, **even if I tell you and, in fact, I tell you in writing that my intention is I do not intend to engage in any agriculture. All I intend to do is build a house to live in. The County of Hawaii would consider that consistent with HRS 205-4.5?**

MR. YEE: **Yes, and we would consider it a farm dwelling.**

....

MR. YEE: Michael Yee, **yes. They could build a residence and we would consider it a farm dwelling.**

COMMISSIONER OKUDA: **Even if there was no farming going on?**

MR. YES: **Correct.**

Ex. 1 (6/25/20) 110:4-11, 111:12-20 (emphasis added).

38. In response to questioning by Commissioner Okuda, Mr. Mukai agreed that there would be no “violation of any land use ordinance or law” for “longer periods of rental,” “longer than 30 . . . days” and that “the County’s objection is not that there’s no agricultural use regarding the short-term vacation rentals, it’s just that it’s a short-term vacation rental”:

[COMMISSIONER OKUDA:] So can you tell me then **if the County is not requiring active farming to allow a person to build a residence on Agriculturally Districted property, what then is the real difference between a short-term rental of renters who come onto the property, who are not going to be engaged in any type of farm activity, and the person who lives in the house that they built, which you say you will approve, even if that person is not also engaged in farming?**

I mean, what is the rational difference between the two?

MR. MUKAI: John Mukai for the County.

First, the short-term vacation rental, it’s in a resort-type zoning area. And, again, the renting of the dwelling as an STVR to an outsider is not a permitted use, and STVRs cannot be used as a farm dwelling.

.....

[COMMISSIONER OKUDA:] If I came into the County and said I was going to build a residence on Agriculturally Districted and zoned land, and I told you in writing, and by the way I don’t plan to live there. **I plan to rent it out to somebody for, let’s say, longer than 30 or 40-days.**

Would you consider me being in violation of any land use ordinance or law?

MR. MUKAI: My understanding -- John Mukai -- **longer periods of rental would be allowed under Ag.**

COMMISSIONER OKUDA: So in other words, **the County's objection is not that there's no agricultural use regarding the short-term vacation rentals, it's just that it's a short-term vacation rental; correct?**

MR. MUKAI: **Yes, yes.**

Ex. 1 (6/25/20 transcript) at 115:21-117:17 (emphasis added).

39. In response to questioning by Commissioner Wong, Mr. Mukai agreed that “rent[ing] . . . for 31 days[] is okay,” because “[b]y definition it’s not a short-term vacation rental”:

COMMISSIONER WONG: I’m trying to figure this out. You said that if we -- okay, so let’s say, again, taking Mr. Bell, let’s say **I have a property zoned Ag and I rent it to the Chair for 31 days, is that okay? And it’s not a short-term vacation.**

MR. MUKAI: **By definition it’s not a short-term vacation rental.**

Ex. 1 (6/25/20 transcript) at 118:7-13 (emphasis added).

40. In response to questioning by Commissioner Chang, Director Yee confirmed that if a dwelling is advertised “a farm dwelling for use less than 30 days,” “by definition it’s a short-term vacation rental”:

[COMMISSIONER CHANG:] So the question I have for the County, if the Petitioner filed this Farm Dwelling Notice, and not as a short-term vacation rental, and **they advertise it as a farm dwelling for use less than 30 days, 29 days, that would be a permissible use under the County’s interpretation?**

MR. YEE: Michael Yee, Planning Director of Hawaii County. **If they’re renting less than 30 days, by definition it's a short-term vacation rental, and so if they're not in a permitted area or have a permit, then it’s not.**

COMMISSIONER CHANG: What happens if they have, let's say they've got, you know -- **if the fact that they are renting it for less than 30 days,**

that is what makes it a short-term vacation rental? Is that the only fact?

MR. YEE: Michael Yee.

Within our ordinance we have defined short-term vacation rentals as less than 30 days.

Ex. 1 (6/25/20 transcript) at 124:17-125:10 (emphasis added).

41. In response to questioning by Commissioner Wong, Deputy Director Surprenant confirmed that a farmer **could not** rent his property to “a farmer from Connecticut for 29 days” even if the farmer from Connecticut was “going to plant some papaya trees,” because it would still be “a short-term vacation rental”:

[COMMISSIONER WONG:] So let’s say I am a farmer. I built the property legally. And **I’m going to rent it out to a farmer from Connecticut for 29 days, and he’s going to plant some papaya trees. That would be legal?**

MS. SURPRENANT: April Su[r]prenant.

Generally speaking, no. . . .

COMMISSIONER WONG: I just wanted to make sure, because let’s say **I’m not renting as short term** but renting it as a **farming experience on Hawaii.**

. . . .

MS. SURPRENANT: **It’s still a short-term vacation rental. If you're bringing people in to stay on the property for a short period of time and the owner is not residing there, it’s still considered a short-term vacation rental.**

Ex. 1 (6/25/20 transcript) at 129:11-130:5 (emphasis added).

42. At the conclusion of the meeting, the Commission recessed the meeting and continued the matter to the Commission’s meeting on July 23, 2020.

43. On July [REDACTED], 2020, the Commission mailed a Notification of Land Use Commission Meeting for its meeting scheduled for July 23, 2020, by interactive conference technology on Zoom Webinar Virtual Meeting to the parties and the County and Statewide mailing lists.

44. On July 23, 2020, at its Zoom Webinar Virtual Meeting, the Commission considered the Petitions and voted to deny the County Petition and Grant the Rosehill Petition.

45. Any Conclusions of Law herein improperly designated as a Finding of Fact should be deemed or construed as a Conclusion of Law. Any Finding of Fact herein improperly designated as a Conclusion of Law should be deemed or construed as a Finding of Fact.

CONCLUSIONS OF LAW

A. Jurisdiction.

1. The Commission has jurisdiction over the Petitions pursuant to HAR § 15-15-98(a), which implements HRS § 91-8. Section 15-15-98(a) states, “On petition of any interested person, the commission 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.” HAR § 15-15-98(a).

B. Question Presented.

2. The County Petition seeks a declaratory order “that ‘farm dwellings’ may not be used as short-term vacation rentals pursuant to [HRS] §§ 205-2 and 205-4.5, and [HAR] § 15-15-25.” County Petition at 1. County seeks this declaratory order “because the County recently passed and has been challenged in implementing a

law ([County Ordinance 2018-114]) regulating short-term vacation rentals within the County.” *Id.* That ordinance prohibits “short-term vacation” rentals on lots created on or after June 4, 1976, within the State Agricultural District. *See* County Ordinance 2018-114. According to the County, County Ordinance 2018-114 “prohibit[ed] . . . short-term vacation rentals operating on lots created after June 4, 1976 in the State Land Use Agricultural District based on the County’s understanding that any such existing operations were not lawful in ‘farm dwellings’ pursuant to HRS Chapter 205.” County Petition at 2.

3. The Rosehill Petition asks for a declaratory order that “[a]s of June 4, 1976, the plain language of Chapter 205 did not dictate how long a ‘farm dwelling’ must be rented in order to qualify as a ‘farm dwelling.’” Rosehill Petition at 6.

C. Limited Nature of the Question Before the Commission.

4. Based on the specific arguments presented by the Petitions and in accordance HAR § 15-15-98(a), the Commission has jurisdiction to “issue a declaratory order as to the applicability” of Chapter 205 as of June 4, 1976 to the “specific factual situation” presented by the County’s definition of “short-term vacation rental.” *See* HAR § 15-15-98(a).

5. The term “short-term vacation rental” did not appear in Chapter 205 as of June 4, 1976.

6. The term “short-term vacation rental” does not have a uniform or fixed meaning. Instead, each county and the State define “transient vacation” or “short-

term” rentals differently with rental periods ranging from less than 181 days to less than 30 days.³

7. The Commission is not being asked in the Petitions to consider whether the use of any structure on a particular property qualifies as a “farm dwelling” under Chapter 205. *See* County Petition; Rosehill Petition.

8. This declaratory “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.” HAR § 15-15-104.

³ 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.**” County Ordinance 2018-114.

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.” HRS § 514E-1.

D. Rules of Statutory Interpretation.

9. In analyzing Chapter 205, the Commission is guided by established rules of statutory interpretation.

10. 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.

Seki ex rel. Louie v. Hawaii Gov't Employees Ass'n, AFSCME Local No. 152, AFL-CIO, 133 Hawai'i 385, 400, 328 P.3d 394, 409 (2014) (quotations and some brackets omitted). Where a "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).

11. "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.

12. “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.” *Foster Vill. Cmty. Ass’n v. Hess*, 4 Haw. App. 463, 469, 667 P.2d 850, 854 (1983). HRS Chapter 205 is a “zoning” law. *See Stop H-3 Ass’n v. State Dept. of Transp.*, 68 Haw. 154, 158, 706 P.2d 446, 449–50 (1985) (“The conservation district zoning designation is the most restrictive of the four land use classifications that the state Land Use Commission is authorized to establish under HRS § 205-2 (1976 & Supp.1984).”); ZONING, *Black’s Law Dictionary* (11th ed. 2019) (“The legislative division of a region, esp. a municipality, into separate districts with different regulations within the districts for land use, building size, and the like.”).

E. County Petition.

13. The County contends, “The respective definitions and uses for farm dwellings and short-term vacation rentals irreconcilably conflict and show that short-term vacation rental use is incompatible with being a farm dwelling.” County Petition Mem. at 1.

14. The County 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.” County Ordinance 2018-114.

15. This definition has three “specific factual” elements, *see* HAR § 15-15-98(a), namely that (1) the dwelling is one in “which the owner or operator does not reside on the building site”; (2) the dwelling “has no more than five bedrooms for rent on the building site”; and (3) the dwelling “is rented for a period of thirty consecutive

days or less,” County Ordinance 2018-114. Whether an occupant of a “short-term vacation rental” is “on vacation” is not a “specific factual” element of the definition of “short-term vacation rental.”

16. As of June 4, 1976, Chapter 205 included the following provisions:

Sec. 205-2 Districting and classification of lands. There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts.

....

Agricultural districts shall include activities 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 road side stands for the sale of products grown on the premises; agricultural parks and open area recreational facilities.

1975 Haw. Sess. L. Act 193, § 3 (emphasis added).

17. On June 4, 1976, Chapter 205 was amended to state in part:

Sec. 205-[4.5] Permissible uses within the agricultural districts. (a) Within the agricultural district all lands with soil classified by the Land Study Bureau’s Detailed Land Classification as Overall (Master) Productivity Rating Class A or B shall be restricted to the following permitted uses:

....

(4) **Farm dwellings**, employee housing, farm buildings, or activity or uses related to farming and animal husbandry;

Farm dwelling as used herein shall mean 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.

(b) Uses not expressly permitted in this section 205-[4.5](a) shall be prohibited, except the uses permitted as provided in section 205-6 and section 205-8, and construction of single-family dwellings on lots existing before the effective date of this Act. . . .

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.

1976 Haw. Sess. L. Act 199, § 1 (emphasis added).

18. We compare the specific factual elements of the County’s definition of “short-term vacation rental” to Chapter 205 as of June 4, 1976, to see whether the two “irreconcilably conflict.” *See* County Petition Mem. at 1.

19. With respect to the first specific factual element of the County’s definition of “short-term vacation rental,” as of June 4, 1976, Chapter 205 did not prohibit a “farm dwelling” from being one in “which the owner or operator does not reside on the building site.” *See* 1976 Haw. Sess. L. Act 199, § 1; 1975 Haw. Sess. L. Act 193, § 3; County Ordinance 2018-114. On the contrary, Chapter 205 specifically contemplated “lease[s].” *See* 1976 Haw. Sess. L. Act 199, § 1. A “lease” is the same as a rental. *See* LEASE, Black’s Law Dictionary (11th ed. 2019). During the June 25 meeting, the County conceded “the owner of a farm dwelling does not need to reside in the dwelling.” Ex. 1 (6/25/20 transcript) at 105:17-19 (Mukai).

20. With respect to the second specific factual element of the County’s definition of “short-term vacation rental,” as of June 4, 1976, Chapter 205 did not prohibit a “farm dwelling” from having “no more than five bedrooms for rent on the building site.” *See* 1976 Haw. Sess. L. Act 199, § 2; 1975 Haw. Sess. L. Act 193, § 3; County Ordinance 2018-114. The County did not argue otherwise in its Petition or during the June 25 meeting.

21. With respect to the third specific factual element of the County’s definition of “short-term vacation rental,” as of June 4, 1976, Chapter 205 did not prohibit a “farm dwelling” from being “rented for a period of thirty consecutive days or less.” See 1976 Haw. Sess. L. Act 199, § 2; 1975 Haw. Sess. L. Act 193, § 3; County Ordinance 2018-114.

22. As of June 4, 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).

23. The two clauses of the “farm dwelling” definition 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. 735, 740 (1933). “**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.

24. 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. “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). 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 used in connection with a farm” does not dictate how long or short the dwelling may be rented.

25. 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. The plain language of the clause does not speak to how long the family is occupying the dwelling.

26. No other provision of Chapter 205 regulated the period for which a farm dwelling may be rented.

27. Accordingly, the plain language of HRS § 205-2 did not regulate the duration of rentals of “dwellings.”

28. Consistent with this analysis, OP conceded in its written filing that there is an “[a]bsence of [a]n [e]xpress [p]rohibition on [r]enting for 30 [d]ays or [l]ess” in the definition of “farm dwelling.” OP Response at 6; *see also id.* at 8 (“[T]he definition of ‘farm dwelling’ does not expressly prohibit rentals of 30 days or less . . .”).

29. During the June 25, 2020 meeting, OP further conceded “the definition of ‘farm dwelling’ does not expressly prohibit rentals of 30 days or less,” Ex. 1 (6/25/20 transcript) at 92:5-7, and that “a renter for 30 days or less that farms the land may be allowed under the definition of ‘farm dwelling,’” Ex. 1 (6/25/20 transcript) at 91:1-6 (Apuna); *see also id.* 96:12-97:6 (Apuna).

30. Consistent with this analysis, the County conceded during the meeting on June 25, 2020, that “there’s no prohibition on farm dwellings being rented for 30 days or less.” Ex. 1 (6/25/20 transcript) at 105:4-6 (Mukai).

31. Because Chapter 205 did not regulate the duration of rentals, “it is not for [the LUC] to incorporate into 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.

32. In the County’s definition of “short-term vacation rental,” no specific factual element address whether an occupant is “on vacation” or using the property for another purpose. *See County Ordinance 2018-114*.

33. During the June 25 hearing, the County agreed that it would be permissible for a person to vacation in a farm dwelling for 31 days. Ex. 1 (6/25/20 transcript) at 115:21-117:17, 118:7-13 (Mukai).

34. At the same time, the County asserted that a farmer who rents a dwelling to farm the property for 29 days for the purpose of farming would be classified as a “short-term vacation rental.” 129:11-130:5 (Surprenant). When asked if the “only fact” that “makes it a short-term vacation rental” is that “they are renting it for less than 30 days,” Director Yee confirmed that “[w]ithin our ordinance we have defined short-term vacation rentals as less than 30 days.” *Id.* at 124:17-125:10 (Yee).

35. This result is absurd.

36. As of June 4, 1976, the plain language of Chapter 205 did not dictate how long a “farm dwelling” must be rented in order to qualify as a “farm dwelling.”

37. Given that being “on vacation” is not a specific factual element of the County’s definition of “short-term vacation rental,” the Commission does not decide whether, as of June 4, 1976, Chapter 205 prohibited a “farm dwelling” from being occupied by a person who was “on vacation.”

38. The County Petition also references statutes and rules that were not in effect on June 4, 1976, specifically HRS §§ 205-2(d)(7) and 205-2(d)(12) and HAR § 15-15-25. In its analysis above, the Commission has considered the version of HRS § 205-2 in effect as of June 4, 1976. Even if this subsequent legislative and administrative history is considered, none of the provisions alters the analysis of the plain language of Chapter 205 as of June 4, 1976.

39. Based on the foregoing analysis, the County Petition is denied.

F. Rosehill Petition.

40. The Rosehill Petition asks for a declaratory order that, “[a]s of June 4, 1976, the plain language of Chapter 205 did not dictate how long a ‘farm dwelling’ must be rented in order to qualify as a ‘farm dwelling.’” Rosehill Petition at 6.

41. Based on the foregoing analysis, the Commission declares that as of June 4, 1976, the plain language of Chapter 205 did not dictate how long a “farm dwelling” must be rented in order to qualify as a “farm dwelling.”

42. Accordingly, the Rosehill Petition will be granted.

DECISION AND ORDER

This Commission, having duly considered the County Petition and the Rosehill Petition and the pleadings and arguments of the parties in this proceeding, and a motion having been made at a video meeting on July 23, 2020 and the motion

having received the affirmative votes required by HAR § 15-15-13, and there begin good cause for the motion, HEREBY DENIES the County Petition and GRANTS the Rosehill Petition.

DATED: Honolulu, Hawai'i, _____ per motion on _____.

APPROVED AS TO FORM:

Deputy Attorney General

Filed and Effective on:

Certified by:

DANIEL E. ORODENKER
Executive Officer

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 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

DECLARATION OF CALVERT G. CHIPCHASE

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

DECLARATION OF CALVERT G. CHIPCHASE

I, Calvert G. Chipchase, hereby declare as follows:

1. I am one of the attorneys Petitioners Linda K. Rosehill, *et al.* in this matter and make this declaration based on personal knowledge.

2. Attached hereto as **Exhibit 1** is a true and correct copy of an excerpt of the Transcript of Proceedings in this matter on June 25, 2020, highlighted by counsel.

3. Attached hereto as **Exhibit 2** is a true and correct copy of Act 193 of the 1975 Session Laws of Hawai'i.

4. Attached hereto as **Exhibit 3** is a true and correct copy of Act 199 of the 1976 Session Laws of Hawai'i.

5. Attached hereto as **Exhibit 4** is a true and correct of Chapter 205 of the Hawai'i Revised Statutes taken from the 1976 replacement that includes the Acts of the 1976 Session.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, July 9, 2020.



CALVERT G. CHIPCHASE

LAND USE COMMISSION
STATE OF HAWAI'I

Hearing held on June 25, 2020
Commencing at 9:00 a.m.

Held via ZOOM by Interactive Conference Technology
and
YouTube Streaming Video link

IIV. Call to Order

VIII. STATUS REPORT

A99-729 Newton Family Limited Partnership (nka
Hawaiian Islands Land Trust)

IX. ACTION

A18-805 Barry Trust (Hawai'i)

* Consider Petitioner's Motion for Issuance
of Negative Declaration or Finding of No
Significant Impact

X. ACTION

A18-805 Church (Hawai'i)

* Consider Petitioner's Motion that the Land
Use Commission Issue a Finding of No
Significant Impact

XI. ACTION

DR20-69 County of Hawaii and DR20-70 Linda
Rosehill, et al

* Consider Petitioners County of Hawaii's
and Linda Rosehill, et al's Stipulation to
Consolidate Order

* Consider Petitioners County of Hawaii's
and Linda Rosehill, et al's Petitions for
Declaratory Orders regarding Short Term
Vacation Rentals as Farm Dwellings

V. Adjournment

BEFORE: Jean Marie McManus, CSR #156

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APPEARANCES:

JONATHAN SCHEUER, Chair (Oahu)
NANCY CABRAL, Vice Chair (Big Island)
EDMUND ACZON (Oahu)
GARY OKUDA (Oahu)
LEE OHIGASHI (Maui)
ARNOLD WONG (Oahu)
DAWN CHANG (Oahu)

STAFF:

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Deputy Attorney General

DANIEL ORODENKER, Executive Officer
SCOTT DERRICKSON, AICP/Planner

DAWN APUNA, ESQ.
Deputy Attorney General
State of Hawaii, Office of Planning

JOHN MUKAI, ESQ.
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Deputy Corporation Counsel
APRIL SURPRENANT
Acting Deputy Planning Department
City and County of Honolulu

CALVIN CHIPCHASE, ESQ.
Attorney for Linda Rosehill, et al

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1 answer this question. I think any individual, as a
2 matter of justice, who is legally residing in a
3 property that is supplied by a water company, ought
4 to receive water.

5 I'm just a lay person. I don't have
6 anything else to really say about that.

7 CHAIRPERSON SCHEUER: Thank you.

8 Is there anything further for Mr. Bell,
9 Commissioners? If not, thank you for your testimony.

10 THE WITNESS: Thank you very much. I
11 appreciate it.

12 CHAIRPERSON SCHEUER: Next, I'm going to
13 call on the Office of Planning, who in this docket,
14 is being considered -- these two dockets -- being
15 considered as a public testifier.

16 DAWN APUNA

17 Was called as a witness by and on behalf of the
18 public, was not sworn to tell the truth, was examined
19 and testified as follows:

20 DIRECT EXAMINATION

21 THE WITNESS: Mr. Chair, Deputy Attorney
22 General Dawn Apuna on behalf of the Office of
23 Planning.

24 First, we agree with the County that a farm
25 dwelling may not be used as a short-term vacation

1 rental.

2 Very simply, a farm dwelling may not be
3 used as a short-term vacation rental, because a
4 short-term vacation rental does not fit within the
5 definition of a "farm dwelling".

6 A short-term vacation dwelling or unit
7 rented for transient accommodations for tourists,
8 vacationers, or visitors rather than for long-term or
9 permanent residence.

10 We've noted that a short-term vacation
11 rental differs from a hotel or motel in that it is
12 generally a residential dwelling that lacks onsite
13 management to oversee guests, and is generally
14 located outside of resort or hotel zoned areas.

15 Short-term vacation rentals are known to
16 reduce the availability of permanent housing, drive
17 up rents, and negatively impact the character and
18 quality of neighborhoods.

19 Also short-term vacation rentals are
20 different from long-term residential uses in that
21 they are known to create negative impacts in
22 residentially zoned areas. The Commission should
23 therefore be wary of allowing short-term vacation
24 rentals in nonresidentially zoned areas such as in
25 the Agricultural District.

1 In contrast to a short-term vacation
2 rental, a "farm dwelling" is either a single-family
3 dwelling: (1) located on and used in connection with
4 a farm; or (2) where agricultural activity provides
5 income to the family occupying the dwelling. HRS
6 Section 205-4.5(a)4. "Farm dwellings" are further
7 qualified as "bona fide agricultural services and
8 uses that supports the agricultural activities of the
9 fee or leasehold owner of the property and accessory
10 to" the agricultural uses.

11 HRS Section 205-2(d)(7). As an "accessory
12 building or use", a farm dwelling must also be "a
13 subordinate building or use which is incidental to
14 and customary with a permitted use of the land."

15 HAR 15-15-03. The term "dwelling" is
16 defined as "a building designed or used exclusively
17 for single-family residential occupancy, but not
18 including house trailer, multi-family unit, mobile
19 home, hotel, or motel." HAR Section 15-15-03.

20 The use of a "farm dwelling" would
21 therefore be used by a person or persons that occupy
22 the farm dwelling to cultivate the land or raise
23 livestock upon the property on which the farm
24 dwelling sits. The occupants of a farm dwelling
25 would have a direct connection or supporting role to

1 the farm or agricultural use of the property. A farm
2 dwelling used as a short-term vacation rental lacks
3 the connection with the agricultural use of the
4 property because the occupant's use and purpose of
5 their occupancy is for vacation/tourism lodging, and
6 not for bona fide agricultural use. Also the
7 exclusion of hotels and motels as a "dwelling"
8 suggests that a farm dwelling is not intended for
9 transient accommodations.

10 Alternatively, the rental of a farm
11 dwelling to a vacationer or tourist who would also
12 receive income from the agricultural activity of the
13 farm would not be reasonable given the short duration
14 of stay and purpose for occupying the dwelling. For
15 these reasons, a short-term vacation rental does not
16 fit within the definition of a "farm dwelling".

17 Regarding the Rosehill, et al., Petition
18 and arguments.

19 First, Petitioner's reading of the
20 definition of "farm dwellings" is so narrow that it
21 completely neglects the basic elements of the
22 definition, its statutory context, and the obvious
23 meaning of a short-term vacation rental.

24 This State land use classification system
25 is exactly that. It's a complete system, not pieces

1 to be broken off to be used in isolation of all else.
2 You can't look solely at the definition of "farm
3 dwelling" in order to determine the use of a
4 short-term vacation rental. The State land use
5 classification system, statutory interpretation in
6 general, and common sense, requires that you look at
7 the complete definition of "farm dwelling" and
8 relevant language under HRS Section 205-2(d)(7), the
9 definition of short-term vacation rental as provided
10 in the Hawaii County Code, and the basic meaning of
11 both terms. You must evaluate both definitions
12 against each other to determine whether a farm
13 dwelling may be used as a short-term vacation rental,
14 i.e., that it may be rented for 30 days or less.

15 When you properly look at the definition of
16 "farm dwelling" - which is a single-family dwelling
17 located on and used in connection with a farm, or,
18 where agricultural activity provides income to the
19 family occupying the dwelling - and the meaning of a
20 short-term vacation rental, which is a transient
21 accommodation generally used by vacationers or
22 tourists, you must conclude that they clearly are not
23 the same or compatible uses.

24 Secondly, HAR 15-15-104 states, "On
25 petition of any interested person, the commission may

1 issue a declaratory order as to the applicability of
2 any statutory provision or of any rule or order of
3 the commission to a specific factual situation."

4 Repeatedly, the Rosehill Petitioners state
5 the issue presented is very narrow and limited to
6 "whether, as of June 4, 1976, Chapter 205 regulated
7 the minimum rental period of "farm dwellings". This
8 is not fact specific.

9 All that Petitioners state is that they
10 have been renting their single-family dwellings in
11 the Agricultural District for 30 days or less. We
12 can assume they are being rented as short-term
13 vacation rentals because they are disputing the
14 County's short-term vacation rental ordinance, but
15 oddly they never provide the Commission with the
16 actual use of their farm dwellings by the renters.

17 This is not a "specific factual situation"
18 upon which this Commission can apply the definition
19 of "farm dwelling" because it turns in either
20 direction depending upon these additional, critical
21 facts. Are the renters farming the land, or is there
22 agricultural activity providing income to renters?
23 Or are the renters vacationers or tourists?
24 Petitioners don't say. These are necessary details
25 to assist you, the Commission, in your decision.

1 For example, a renter for 30 days or less
2 that farms the land may be allowed under the
3 definition of "farm dwelling". But a renter for 30
4 days or less who does not farm the land, but is
5 merely renting as a vacationer would be prohibited
6 under the definition of "farm dwelling".

7 As a result, Petitioners are putting forth
8 a speculative or purely hypothetical scenario which
9 does not involve an existing situation or one which
10 may reasonably be expected to occur in the near
11 future because it lacks these important details.
12 This is a ground for denial of the Petition for
13 Declaratory Order pursuant to HAR Section
14 15-15-100(a)(1)(A).

15 HAR 15-15-104 states: "An order disposing
16 of a petition shall apply only to the factual
17 situation described in the petition or set forth in
18 the order. It shall not be applicable to different
19 fact situations or where additional facts not
20 considered in the order exist." Thus, even with a
21 favorable ruling Petitioner, such a ruling cannot be
22 applied before the County because it will require
23 additional facts.

24 Consequently, Petitioner's Petition fails
25 to set forth a question, the resolution of which will

1 resolve the controversy before the County Planning
2 Commission.

3 Based on the foregoing, the Commission
4 should grant the County's Petition, and deny the
5 Rosehill Petition in that even though the definition
6 of "farm dwelling" does not expressly prohibit
7 rentals of 30 days or less, farm dwellings may not be
8 used for 30 days or less as a short-term vacation
9 rental, and because Petitioner fails to provide the
10 Commission with a specific enough factual situation
11 upon which a declaratory ruling can be made.

12 CHAIRPERSON SCHEUER: Thank you, Ms. Apuna.
13 Commissioners, are there questions for Ms. Apuna?

14 COMMISSIONER WONG: Chair.

15 CHAIRPERSON SCHEUER: Commissioner Wong.

16 COMMISSIONER WONG: Ms. Apuna, question.
17 If you know, answer; if you don't, just say you don't
18 know.

19 Do you know that the short-term vacation
20 rentals are paying general excise or TAT?

21 MS. APUNA: Do I know if these specific
22 Petitioners are paying TAT?

23 COMMISSIONER WONG: Or general excise tax
24 for their rentals, vacation rentals?

25 MS. APUNA: I would not know specifically

1 if Petitioners, whether they are or not, but I think
2 generally they are subject to State tax.

3 COMMISSIONER WONG: So the other question I
4 have is Mr. Bill, the former guy testified before
5 you, the witness, stated he's not a farmer but he
6 lives on-site. So that's okay for Ag District,
7 correct?

8 MS. APUNA: It's not. It's an interesting
9 question. I think it's how you enforce it. I think
10 people, they are on agricultural properties but as
11 far as how the County is able to enforce and make
12 sure that that owner or tenant is actually farming
13 the land is a question of being able to see that
14 that's happening.

15 But I think generally the Ag District
16 would -- the intent is to have people farming the
17 land.

18 COMMISSIONER WONG: So the other question I
19 have is, for Ag District, you have to be farming such
20 as someone does grapefruit or, you know, raising
21 goats or doing something agriculture, correct?

22 MS. APUNA: Correct.

23 COMMISSIONER WONG: So let's say I live on
24 an ag lot and I just grow one papaya tree. Would
25 that be considered agricultural?

1 first we have to get over the hurdle whether or not
2 the issue is really appropriate for a declaratory
3 petition or declaratory ruling petition, but assuming
4 we get over that hurdle, the issue then is, which
5 approach is stricter? And if the county has a
6 stricter approach, it can be upheld as being
7 consistent with the holding in the Sunset Beach
8 coalition versus City and County of Honolulu case.

9 Would that be a fair statement?

10 MS. APUNA: Yes.

11 COMMISSIONER OKUDA: Thank you, Chair, I
12 have no further questions.

13 CHAIRPERSON SCHEUER: Thank you very much,
14 Commissioner Okuda.

15 The case you cited, incidentally, refers to
16 county zoning, which was you called "country zoning",
17 so I don't think it was a typographical error by the
18 State Supreme Court.

19 Commissioner Chang.

20 COMMISSIONER CHANG: Thank you very much,
21 Ms. Apuna, for your testimony. I just have a few
22 questions. Sort of following the line of
23 Commissioner Okuda.

24 First, let me ask you this. And this is
25 asking for a legal opinion. Would you agree that the

1 Land Use Commission has a legal authority to
2 interpret Hawaii Revised Statutes 205-4.5?

3 MS. APUNA: Yes.

4 COMMISSIONER CHANG: Do you agree that the
5 County and the Petitioner in this case both
6 stipulating to the declaratory action before the Land
7 Use Commission also concur with that interpretation
8 that the Land Use Commission has the authority to
9 interpret 205A-4.5?

10 MS. APUNA: Yes.

11 COMMISSIONER CHANG: And I suspect this
12 matter is probably going to get appealed. So would
13 you agree that on appeal the appellate court would,
14 in general, in the absence of arbitrary
15 capriciousness, give deference to the administrative
16 agencies' interpretation of its own laws?

17 MS. APUNA: Yes.

18 COMMISSIONER CHANG: I don't have any
19 further questions. Thank you very much.

20 CHAIRPERSON SCHEUER: Commissioner Chang,
21 thank you.

22 Commissioners, are there further questions
23 for the testifier? Seeing none.

24 Mr. Derrickson, is there anybody who is a
25 public attendee who is raising their hands who wishes

1 to testify on this matter?

2 MR. DERRICKSON: No, Chair, I don't see
3 anyone currently raising their hand.

4 CHAIRPERSON SCHEUER: Seeing no further
5 public testimony on this matter, and that we have
6 been going for an hour and five minutes, I'm going to
7 propose taking a five-minute recess, and then we will
8 continue on the agenda past the public testimony.

9 Recess for five minutes.

10 (Recess taken.)

11 CHAIRPERSON SCHEUER: Okay, we're back on
12 the record.

13 Parties, there is no more public testimony
14 on this matter, so I will now hear from the
15 Petitioners, first will be County and then the
16 Rosehill Petitioners on their stipulation to
17 consolidate. First, County.

18 MR. MUKAI: The County agrees and has in
19 fact signed the stipulation to consolidate the two
20 matters.

21 CHAIRPERSON SCHEUER: Thank you very much.
22 Commissioners, any questions for the
23 County? Seeing none.

24 Mr. Chipchase on behalf of Rosehill
25 Petitioners.

1 MR. CHIPCHASE: We believe consolidation is
2 appropriate for reasons set out in the Petition and
3 as that's been done in this hearing, the
4 consolidation we believe is the most efficient and
5 cleanest way to approach this issue.

6 So we respectfully ask that the stipulation
7 for consolidation be approved and granted.

8 CHAIRPERSON SCHEUER: Thank you very much.
9 Sorry, one brief moment.

10 Commissioners, do you have any comments or
11 questions before we take a vote on the stipulation to
12 accept the Stipulation to Consolidate?

13 Mr. Orodenker, do we need a motion to that
14 effect?

15 EXECUTIVE OFFICER: I don't believe so, Mr.
16 Chair, since it's stipulated.

17 CHAIRPERSON SCHEUER: Okay, so it's so
18 stipulated.

19 So then we can go on and, County, you can
20 start with presenting your main case.

21 MR. MUKAI: Thank you, Mr. Chair, and
22 Commissioners.

23 In this case the Rosehill Petitioners state
24 that, quote, the only question before the Commission
25 is whether as of June 5th, 1976, Chapter 205

1 prohibited leases, in parenthesis, the same thing as
2 rentals of farm dwellings for a period of less than
3 31 days.

4 The County agrees that there's no
5 prohibition on farm dwellings being rented for
6 30 days or less. But as we pointed out in our
7 Petition, it has to be framed in terms of
8 agricultural use in connection with HRS 205, Section
9 2(d)(7) which specifically defines farm dwellings,
10 and farm dwellings as defined in HRS 205-4.5 (a)(4)
11 notes that within the Agricultural District for farm
12 dwelling, which is defined specifically in Section 4.

13 We're here to determine whether the renting
14 of a dwelling as an STVR to an outside party, I mean,
15 we're here to determine whether it's a permitted use
16 in this matter.

17 The Rosehill Petitioners note that the
18 owner of a farm dwelling does not need to reside in
19 the dwelling. Again, the County agrees. However, it
20 must be agriculturally related and has to be framed
21 in terms of agricultural use.

22 The Hawaii Administrative Rules Section
23 15-15-03 defines a farm dwelling as a single-family
24 dwelling located on and used in connection with a
25 farm where agricultural activity provides income to

1 to be a bona fide agricultural service and use which
2 supports and an accessory to agricultural activities.

3 The purpose of a short-term vacation rental
4 is to provide transient transient accommodations or
5 housing that will be temporarily rented for a period
6 of 30 days or less.

7 I apologize, but yesterday in the afternoon
8 I emailed to all the Parties and the Land Use
9 Commission two exhibits that I hope are in your
10 possession today.

11 One would be -- and I apologize, because I
12 just ran across this -- but the first exhibit and if
13 none of you have it, we will make it available, we
14 will provided it as soon as this hearing is
15 completed.

16 But the first one is what is called a Farm
17 Dwelling Notice, and this has to be filed with the
18 County of Hawaii Planning Department. The
19 residential use on the farm dwelling is not
20 prohibited but they must file this document. And in
21 fact, someone like Mr. Bell who testified earlier, we
22 would submit that his --

23 CHAIRPERSON SCHEUER: County, one moment.

24 I want to confirm with the parties that
25 indeed this was received.

1 First all, Rosehill, et al., Cal, did you
2 receive this?

3 CHIPCHASE: Yes, Chair, we did.

4 CHAIRPERSON SCHEUER: Okay. And I'm aware
5 that at very late last night, the Administrative
6 Officer for the Land Use Commission received your
7 email, but I don't know that those were transmitted
8 due to the late hour to the Commissioners themselves.
9 Mr. Orodenker?

10 MR. MUKAI: Again, I apologize for the
11 submission yesterday afternoon, but we'll make sure
12 that all Commissioners have the two exhibits.

13 CHAIRPERSON SCHEUER: Thank you. You can
14 continue with your oral.

15 MR. MUKAI: So with regard to this first
16 exhibit, we would submit that I think there was an
17 inquiry with one of the Commissioners as to whether
18 Mr. Bell's property or his residence, why can't he
19 just live there and not perform farming activities?
20 He has to file this Farm Dwelling Notice with the
21 County, and his residence is considered a farm
22 dwelling. And there's nothing that disallows him
23 from simply having a residence on an Agricultural
24 Zoned property.

25 The second exhibit that I transmitted for

1 the Commissioners' review would just simply be an
2 additional Farm Dwelling Application Agreement. And
3 we would point out that on this Notice a Farm
4 Dwelling does, in fact, reference Section 205-4.5
5 Section (a)(4) as a single-family dwelling located on
6 and used in conjunction with a farm.

7 And by the very description, we would
8 submit that a short-term vacation rental is simply
9 not used in connection with a farm, with agricultural
10 supporting activities, from which the unit's
11 occupants are paying income.

12 So as such, and we would submit that the
13 County of Hawaii respectfully request that the
14 Commission rule that farm dwelling may not be used as
15 short-term vacation rentals pursuant to HRS 205-2 and
16 205-4.5, and also sections 15-15-03 of the Hawaii
17 Administrative Rules.

18 CHAIRPERSON SCHEUER: Thank you very much.

19 Is that it for now?

20 MR. MUKAI: Yes, Mr. Chair.

21 CHAIRPERSON SCHEUER: Commissioners,
22 questions for the County of Hawaii?

23 Commissioner Okuda, followed by
24 Commissioner Chang.

25 COMMISSIONER OKUDA: Thank you very much,

1 Mr. Chair.

2 Question to the County and anyone on the
3 County's table or room can answer this question.

4 So is it the County of Hawaii's position
5 that a residence may be constructed and lived in on
6 land that's within the Land Use Agricultural
7 District, even if there's no agriculture taking place
8 on that parcel of property?

9 MR. YEE: For the record, Michael Yee,
10 Planning Director.

11 Yes, that is correct.

12 COMMISSIONER OKUDA: So in other words, the
13 County of Hawaii sees no violation of HRS Section
14 205-4.5, if I were to build a very large mansion, you
15 know, square footage the largest that the County
16 would allow under its applicable zoning code, and if
17 I told you flat out, by the way, I'm not going to do
18 any agriculture, and if I see anybody in my family
19 trying to grow anything, I'm going to cement over
20 with my cement truck. And that in your view would be
21 permissible under HRS 205-4.5?

22 MR. YEE: Michael Yee, again.

23 I would just state again that we allow
24 people to build a residence on agricultural land, and
25 it is a farm dwelling.

1 CHAIRPERSON SCHEUER: Sorry, I think I
2 actually have to swear you in procedurally, Mr. Yee.

3 Do you swear or affirm the testimony you're
4 going to give is the truth?

5 MR. YEE: I do.

6 CHAIRPERSON SCHEUER: Thank you.

7 MICHAEL YEE

8 Was called as a witness by and on behalf of the
9 County, was sworn to tell the truth, was examined and
10 testified as follows:

11 EXAMINATION

12 COMMISSIONER OKUDA: Thank you, Chair.

13 So in other words, Mr. Yee, even if I tell
14 you and, in fact, I tell you in writing that my
15 intention is I do not intend to engage in any
16 agriculture. All I intend to do is build a house to
17 live in. The County of Hawaii would consider that
18 consistent with HRS 205-4.5?

19 MR. YEE: Yes, and we would consider it a
20 farm dwelling.

21 CHAIRPERSON SCHEUER: We cannot see you.
22 Identifying yourself before speaking is very
23 important, for the record.

24 MR. YEE: Michael Yee, yes. They could
25 build a residence and we would consider it a farm

1 dwelling.

2 COMMISSIONER OKUDA: Even if there was no
3 farming going on?

4 MR. YES: Correct.

5 COMMISSIONER OKUDA: Thank you, Mr. Chair.
6 No further questions.

7 CHAIRPERSON SCHEUER: Thank you,
8 Commissioner Okuda.

9 Commissioner Chang.

10 COMMISSIONER CHANG: Thank you very much,
11 Chair.

12 To the County of Hawaii, I just want to
13 follow up. So how do you tax agricultural property
14 that has a farm dwelling on it? Is it taxed
15 agriculture? Is it taxed residential? How do you
16 tax it?

17 MR. MUKAI: On behalf of County, John
18 Mukai. We don't tax. This department does not tax.
19 So I don't think anyone in the room can answer this
20 question now. I apologize for that.

21 COMMISSIONER CHANG: Okay. That's
22 unfortunate.

23 Let me ask you this question. Can you
24 confirm that the Petitioner's applied to the Hawaii
25 County to certify their property as short-term

1 You know, I don't know specifically, but
2 there are a lot of online platforms that are used
3 quite regularly for most vacation rentals in Hawaii.

4 COMMISSIONER CHANG: And this is going to
5 be a question for Mr. Yee, a legal one, similar to
6 what I asked the Office of Planning.

7 Is it your legal opinion that the Land Use
8 Commission has the authority to interpret Hawaii
9 Revised Statutes 205-4.5?

10 MR. MUKAI: John Mukai for County of
11 Hawaii. Yes.

12 COMMISSIONER CHANG: I have no other
13 questions. Thank you.

14 CHAIRPERSON SCHEUER: Commissioner
15 Ohigashi.

16 COMMISSIONER OHIGASHI: The form that you
17 indicated that they would sign, that Mr. Bell would
18 sign, would be a farm dwelling kind of agreement, or
19 is that what you're talking about?

20 MR. MUKAI: Yes, Commissioner. It would be
21 called a Farm Dwelling Notice.

22 This is John Mukai again.

23 If he would submit to the County what's
24 called a Farm Dwelling Notice, and his residence
25 would be considered a farm dwelling.

1 COMMISSIONER OHIGASHI: Was there any --
2 the Petitioners that Mr. Chipchase represent, did any
3 of them sign that agreement?

4 MR. MUKAI: Not to my knowledge.

5 COMMISSIONER OHIGASHI: So your records
6 would show no -- none of the members of his -- who he
7 is representing, has signed that agreement?

8 MR. YEE: Michael Yee. We would have to go
9 into each file to confirm that the Farm Dwelling
10 Notice was signed by each property.

11 COMMISSIONER OHIGASHI: I probably won't be
12 here when you -- when Mr. Chipchase comes up, so I
13 won't be able to ask him that question. Thank you.

14 CHAIRPERSON SCHEUER: Thank you,
15 Commissioner Ohigashi.

16 Commission Okuda.

17 COMMISSIONER OKUDA: Thank you, Mr. Chair.

18 And anyone at the County can answer this
19 question. This is a followup to the last series of
20 questions.

21 So can you tell me then if the County is
22 not requiring active farming to allow a person to
23 build a residence on Agriculturally Districted
24 property, what then is the real difference between a
25 short-term rental of renters who come onto the

1 property, who are not going to be engaged in any type
2 of farm activity, and the person who lives in the
3 house that they built, which you say you will
4 approve, even if that person is not also engaged in
5 farming?

6 I mean, what is the rational difference
7 between the two?

8 MR. MUKAI: John Mukai for the County.

9 First, the short-term vacation rental, it's
10 in a resort-type zoning area. And, again, the
11 renting of the dwelling as an STVR to an outsider is
12 not a permitted use, and STVRs cannot be used as a
13 farm dwelling.

14 COMMISSIONER OKUDA: Well, may I ask this
15 question then.

16 If I came into the County and said I was
17 going to build a residence on Agriculturally
18 Districted and zoned land, and I told you in writing,
19 and by the way I don't plan to live there. I plan to
20 rent it out to somebody for, let's say, longer than
21 30 or 40-days.

22 Would you consider me being in violation of
23 any land use ordinance or law?

24 MR. MUKAI: My understanding -- John
25 Mukai -- longer periods of rental would be allowed

1 under Ag.

2 COMMISSIONER OKUDA: So in other words, the
3 County's objection is not that there's no
4 agricultural use regarding the short-term vacation
5 rentals, it's just that it's a short-term vacation
6 rental; correct?

7 MR. MUKAI: Yes, yes.

8 COMMISSIONER OKUDA: Thank you. No further
9 questions, Mr. Chair.

10 CHAIRPERSON SCHEUER: Thank you very much,
11 Commissioner Okuda.

12 Commissioner Wong.

13 COMMISSIONER WONG: Thank you, Chair.

14 Sorry, I got to get this straight. So
15 let's say I'm Mr. Bell. I have a piece of property.
16 I am not -- it's zoned Ag, and I would say -- I would
17 tell my friends, hey, come use my house for 29 days,
18 and just give me a dollar. That would -- that'd be
19 okay? Is that how we're seeing it?

20 MR. MUKAI: I think we're talking
21 specifically in this case about a short-term vacation
22 rental permit, which is -- I think that's not really
23 the situation that we're dealing with here.

24 COMMISSIONER WONG: The question I have is,
25 if Mr. Chipchase's clients didn't turn in that

1 short-term vacation rental form, or whatever, to the
2 County, and they just rented it out, that would be
3 okay?

4 MR. MUKAI: So having a short-term vacation
5 rental without a permit, yes, that would not be
6 legal.

7 COMMISSIONER WONG: I'm trying to figure
8 this out. You said that if we -- okay, so let's say,
9 again, taking Mr. Bell, let's say I have a property
10 zoned Ag and I rent it to the Chair for 31 days, is
11 that okay? And it's not a short-term vacation.

12 MR. MUKAI: By definition it's not a
13 short-term vacation rental.

14 COMMISSIONER WONG: Sorry, local boy is a
15 little confused on this issue now.

16 Because I'm trying to get my head around
17 this one. So you're saying as long as I turn in this
18 form to say I'm having a short-term vacation rental,
19 and on Ag land, that it won't be allowed; but if I'm
20 a farmer who's renting out my property to someone
21 that's not going to do farming, it's okay?

22 MR. MUKAI: April.

23 MS. SUPRENANT: Aloha, this is April --
24 (audio difficulty.)

25 CHAIRPERSON SCHEUER: Hold on. First of

1 all, I'm having some audio issues with you, and then
2 I also have to swear you in.

3 Do you swear or affirm the testimony you're
4 about to give is the truth?

5 THE WITNESS: I do.

6 APRIL SURPRENANT

7 Was called as a witness by and on behalf of the
8 County was sworn to tell the truth, was examined and
9 testified as follows:

10 EXAMINATION

11 MS. SURPRENANT: April Surprenant,
12 Acting Deputy Planning Director for Planning.

13 So the permit that we are talking about,
14 specifically with the Rosehill Petition, has to do
15 with nonconforming uses. So in the law in the
16 County's zoning code, short-term vacation rentals are
17 only allowed in certain zones, Ag is not one of them.
18 However, when the law was brought into play, we
19 allowed for some nonconforming uses that were already
20 in operation under very clear parameters in the law.

21 And so if people who met those parameters
22 and they included all of the information that was
23 needed by the timeframe that was required, and they
24 met all of those conditions as spelled out in our
25 code, then we issued them a nonconforming use

1 COMMISSIONER OKUDA: Let me be more
2 specific.

3 What in the State law, either State law or
4 appellate cases, because this is really a question of
5 the requirements of Chapter 205-4.5 where does it say
6 it is permissible to have residential use of
7 agricultural land without modified or actual
8 agriculture taking place.

9 MS. CHOW: Looks like the County got lost
10 for a little bit.

11 MS. SURPRENANT: April, we're still here
12 verbally.

13 COMMISSIONER OKUDA: I don't want to take
14 up any time. The parties can supplement the record
15 if necessary.

16 MR. MUKAI: This is John Mukai. I would
17 again direct the Commission to HRS 205-4.5, Section
18 4, which specifically talks about farm dwellings and
19 uses in connection with the farm, including clusters
20 of single-family farm dwellings permitted within
21 agricultural parks developed by the State, or where
22 agricultural activity provides income to the family
23 occupying the dwelling.

24 Again, we would point out to the Commission
25 that the exhibit we submitted yesterday, the

1 residence is considered a farm dwelling on the
2 agricultural land.

3 CHAIRPERSON SCHEUER: Just noting for the
4 record that we have yet to receive the exhibit as
5 Commissioners. Commissioner Chang.

6 COMMISSIONER CHANG: County, I'm going to
7 go down the same line of questioning. Mr. Chipchase
8 may not even have to say anything.

9 So I'm trying to understand, because I
10 think the Office of Planning provided their
11 testimony -- well, provided their position. And I
12 think that it joined in the County's position. And
13 as I understood the Office of Planning's position is
14 that you have to look at the zoning, and it's
15 agriculturally zoned, Agricultural District, so it
16 has to be in support of ag use.

17 So the question I have for the County, if
18 the Petitioner filed this Farm Dwelling Notice, and
19 not as a short-term vacation rental, and they
20 advertise it as a farm dwelling for use less than
21 30 days, 29 days, that would be a permissible use
22 under the County's interpretation?

23 MR. YEE: Michael Yee, Planning Director of
24 Hawaii County. If they're renting less than 30 days,
25 by definition it's a short-term vacation rental, and

1 so if they're not in a permitted area or have a
2 permit, then it's not.

3 COMMISSIONER CHANG: What happens if they
4 have, let's say they've got, you know -- if the fact
5 that they are renting it for less than 30 days, that
6 is what makes it a short-term vacation rental? Is
7 that the only fact?

8 MR. YEE: Michael Yee.

9 Within our ordinance we have defined
10 short-term vacation rentals as less than 30 days.

11 COMMISSIONER CHANG: And they have to be in
12 a Resort Zoned area?

13 MR. MUKAI: Correct, only in certain
14 districts. And that was John Mukai, sorry.

15 COMMISSIONER CHANG: But you are taking a
16 different position from Office of Planning.

17 The farm dwelling or the residential use
18 does not have to be in support of agriculture. Your
19 interpretation is that it can be a residence, no
20 agricultural use on the property, it's in
21 Agricultural District, but it's not -- the County's
22 interpretation is it does not have to be related to
23 agricultural use.

24 MR. MUKAI: Our zoning code allows it.

25 COMMISSIONER CHANG: If the Land Use

1 Commission decided, based upon this Petition, that
2 our interpretation is that it has to be associated
3 with agricultural use, how does that affect the
4 County of Hawaii? Because your laws can be stricter
5 but it cannot be more liberal.

6 MR. YEE: Well, I think the impact --
7 Michael Yee.

8 There would be a serious impact of trying
9 to have first, farm dwelling unit, which are
10 residences, have to show agricultural activity before
11 the owner could build the residence. If we went
12 around through the State of Hawaii having to require
13 folks to start agricultural activity, and then say,
14 hey, it's okay for you to build your residence there
15 on this property, it would be very difficult to
16 administer that way.

17 To a certain extent, I think we certainly
18 have many owners who buy property, ag land, who have
19 every intention of wanting farming, but they're going
20 to build the residence first and then start
21 agriculture down the road.

22 COMMISSIONER CHANG: Wouldn't you also
23 agree that there are many owners who purchase
24 agricultural lands and put on a dwelling not with the
25 intention of farming, so that they are taking away

1 Chipchase's presentation, that we will want to ask
2 further questions of the County, and perhaps after
3 the County's response, further questions from Mr.
4 Chipchase.

5 Is that acceptable to both parties?

6 MR. MUKAI: That's fine.

7 MR. CHIPCHASE: Certainly, Chair.

8 CHAIRPERSON SCHEUER: Thank you.

9 Did you have something further,
10 Commissioner Wong?

11 COMMISSIONER WONG: The other question for
12 the County for now is, let's say the dwelling was
13 built legally and was initially for farming, then
14 wanted to do a short-term vacation rental, how would
15 you stop them? Would you tell them to tear down the
16 entire house? I mean, how would you stop them
17 besides fines?

18 MS. SURPRENANT: April Surprenant.

19 So, again, short-term vacation rentals are
20 not allowed on ag land, and so if they were found to
21 do that, which we are putting things in place to help
22 fine those individuals who are trying to do
23 short-term vacation rentals, advertising short-term
24 vacation rentals without the required permit, in
25 order to enforce this legislation, which is similar

1 to what other counties are doing within the State,
2 they may get away with it for a time until they're
3 caught, so then they would receive fines and be
4 required to stop even renting as a short-term
5 vacation rental, but they would obviously be able to
6 maintain their residence and could use the land for
7 agricultural purposes.

8 COMMISSIONER WONG: So going onto that
9 issue, again, I think I asked this question, I just
10 want it reaffirmed.

11 So let's say I am a farmer. I built the
12 property legally. And I'm going to rent it out to a
13 farmer from Connecticut for 29 days, and he's going
14 to plant some papaya trees. That would be legal?

15 MS. SURPRENANT: April Suprenant.

16 Generally speaking, no. However, the
17 primary way that we will identify those individuals
18 who are trying to rent as short-term vacation
19 rentals, we are putting those mechanisms in place to
20 enforce that law.

21 COMMISSIONER WONG: I just wanted to make
22 sure, because let's say I'm not renting as short term
23 but renting it as a farming experience on Hawaii.

24 So, you know, it's a different statement.
25 (Inaudible).

1 MS. SURPRENANT: It's still a short-term
2 vacation rental. If you're bringing people in to
3 stay on the property for a short period of time and
4 the owner is not residing there, it's still
5 considered a short-term vacation rental. It's
6 possible that there are some activities on ag land
7 that could qualify under the State statutes and under
8 the county zoning code that may qualify to be able to
9 apply for a special permit, but obviously that's not
10 before us today.

11 COMMISSIONER WONG: So let me take it a
12 little step further.

13 Let's say I have this -- I want to say a
14 mansion, but I have a six bedroom house on property,
15 and I am a farmer on-site, and I bring someone in,
16 and I'm still living there, would that be okay?

17 MS. SURPRENANT: April Surprenant.

18 Under our definition of short-term vacation
19 rental, that does not qualify, the short term
20 vacation rental, so it's not prohibited. If the
21 owner is living on the premises, then that does not
22 fall under our statute for short-term vacation
23 rental.

24 COMMISSIONER WONG: No other questions for
25 now, Chair. Thank you.

1 CHAIRPERSON SCHEUER: Thank you.

2 Commissioners? Commission Cabral.

3 VICE CHAIR CABRAL: Thank you. This line
4 of questioning and answers brings up more questions
5 to me.

6 My understanding of it is really not what
7 the structure of the building looks like, or what it
8 was originally permitted as or originally used as,
9 but really what the current usage is, i.e., if I were
10 to go out there and it's zoned agriculture, but the
11 usage I wanted to put on it was to put a 7-11-type
12 store in it, that is clearly retail, that is an
13 unpermitted use.

14 I guess my question is to Hawaii County and
15 probably to April, are we talking sort of a similar
16 kind of question, it's not a permitted use, I can't
17 put the 7-11 in my agriculturally zoned house, even
18 though when I built the house it was okay to have it
19 as a house to live in?

20 Trying to clarify. I know it's very
21 complicated and it's very important. Over here it's
22 a big thing. I keep wanting to focus on what is the
23 usage of the property, not how did the property get
24 to that usage, but what is the current usage?

25 So 7-11 is not permitted on Agricultural

1 declaring it as of a certain date in response to the
2 Petition.

3 So in the same way that I agree with you
4 that the Commission has the power to declare that the
5 definition of "farm dwelling" has nothing to do with
6 duration, the Commission could in response say the
7 opposite. If you could ground it texturally in the
8 statute and say it does have to do with duration.
9 With respect I would disagree because it's not in
10 there, but in terms of your power, absolutely.

11 What you couldn't do, I think, is reach out
12 and declare that short-term vacation rentals aren't
13 lawful in the Agricultural District, because that is
14 a label that is subject to multiple definitions.

15 All we have before us is the County's
16 definition. And we've been through the parts of
17 that, and the only one that we come down to fighting
18 about with the County is the duration.

19 So with respect I would say that is the
20 only question before you.

21 COMMISSIONER CHANG: And I guess for me I
22 don't even have to address the question of duration.
23 I don't even think that that is relevant before us to
24 determine what is the definition of farm dwelling.

25 And could you -- would you also agree that

1 the County cannot be more liberal in its
2 interpretation of State law, while it can be more
3 conservative and restrictive, it cannot be more
4 liberal?

5 MR. CHIPCHASE: Yes.

6 COMMISSIONER CHANG: Would you also agree
7 that when -- that under statutory construction, it is
8 appropriate under the principle of pari materia to
9 construe the statute and context of each other?

10 So I look at 205-2, 2(d) in particular,
11 district and classification of lands. And it
12 specifically (d) talks about agricultural districts,
13 it really looks at describing the types of districts.
14 It goes from Urban, Rural, Agricultural, and
15 Conservation.

16 And under the description of Agricultural
17 Districts, it says: Agricultural districts shall
18 include activities or uses as characterized by the
19 cultivation of crops, orchards, forestry, farming
20 activities or uses related to animal husbandry,
21 aquaculture and game and fish propagation.

22 I mean, you can read this on your own, but
23 it's clearly -- it's related to some kind of
24 agricultural use.

25 So when I look at the overarching framework

1 of the appropriate uses under these various districts
2 and then I look at the definition of 205-4.5, and
3 everybody agrees that LUC has the authority to
4 interpret that statute.

5 And so when I look at farm dwelling, it
6 says farm dwellings, employee housing, farm buildings
7 are typical uses related to farming and animal
8 husbandry.

9 Then it describes farm dwellings as used in
10 this paragraph means -- so that when I apply the
11 rules of statutory construction, it is clear in my
12 mind that farm dwellings relate to farming or
13 agricultural activities that are consistent with the
14 overarching principles or purposes of the
15 districting, of the various districts.

16 So while we may disagree on the definition
17 of farm dwelling, what I hear from you is that, one,
18 the Land Use Commission has the jurisdiction to
19 define "farm dwelling", to define the State statute.

20 The Land Use Commission can go back to look
21 at 1976 and what was the intent. What was the
22 legislative intent of that definition, and we could
23 apply statutory construction to look at the
24 overarching principles of these various districts.

25 But the Land Use Commission has the

1 authority to make that determination. And that's
2 totally separate and apart from the County, any of
3 the counties, because as you've described, they all
4 have different definitions of vacation rentals.

5 And in my mind, I don't even get to
6 vacation rentals. I am at the point of just defining
7 "farm dwellings". And there may be an issue with the
8 County, but you agree that it is Land Use
9 Commission's authority, and you described it very
10 clearly, that that is the issue here.

11 And as Commissioner Okuda was asking
12 questions, you felt there was enough for the Land Use
13 Commission to make that determination.

14 I just want to confirm that with you.

15 MR. CHIPCHASE: Yeah, I appreciate that. I
16 appreciate the thoroughness of the question,
17 different parts.

18 I think I would have to say, at least so
19 far as I understand you, and if I don't, it's totally
20 my fault, that I agree in part and disagree in part.

21 If I may break that down and try to take it
22 into parts that help us work through this.

23 The first question is looking at other
24 parts of the statute. Obviously, that is an element
25 of statutory construction. But I would say two

1 always eloquent, but it's really so focused on
2 timeframe, and yet I do see it does not appear from
3 my limited reading of 205-4.5 that the timeframe is
4 really relevant.

5 So I can appreciate that, but I'm more
6 concerned about the use and then more recently you
7 referenced something about intent, so I'm sure that
8 must have some legal meaning.

9 But the use of it is to be a dwelling, and
10 a dwelling -- I don't know that a dwelling is -- let
11 me ask you a question. Maybe this will help answer
12 my question.

13 If the people who are staying, come to stay
14 in this property that you are asking for, petitioning
15 for, the actual property. When they come and stay
16 there, if they were not able to stay there for the
17 three days or the five days or the two weeks that
18 they stay there, where else would they end up
19 staying? Do you have any idea where they would have
20 to stay?

21 MR. CHIPCHASE: You know, Commissioner, I
22 hate to say it, I can't answer the first question
23 you've asked me, but I have no idea. I have no idea,
24 those would be extremely specific facts, and we don't
25 have those facts.

1 VICE CHAIR CABRAL: Because what I'm trying
2 to say is, I think when we look at a farm dwelling,
3 first off, it's a dwelling, which means usually a
4 person dwells in it, they live in it. The people
5 that come to use it on short-term basis that you're
6 asking permission that they be allowed to do it,
7 although time doesn't matter, they actually live
8 somewhere else. Is that correct?

9 They don't move in for three days to two
10 weeks. So dwelling-wise like whether it's guests,
11 they can stay a long time, so it's not the timeframe,
12 the fact that they dwell there or they don't dwell
13 there.

14 My concern is, all your reference is on
15 time, but my concern is usage. So one, they really
16 don't really dwell there, and the second one would be
17 at no point have I seen anything in your presentation
18 that would represent that they had any type of
19 activity that would be related to agriculture or
20 farm. It's a farm dwelling, and they would derive or
21 do something that had to do with a farm activity.
22 And at no point did I see anything in your
23 presentation that would say there was any kind of
24 farm activity in their usage of that dwelling. Am I
25 missing something?

1 MR. CHIPCHASE: With respect, yes. And but
2 not what you're asking me. What you're asking me is
3 correct, but what I think I didn't do a good job of
4 communicating to you in my papers, in my
5 presentation, is that those kinds of specific
6 questions is a particular property, a farm dwelling,
7 are not before the Commission. This is not a
8 petition asking to allow X use on X property.

9 This is a Petition asking the LUC to
10 interpret the law as of a certain date.

11 And the reason that we focused on that
12 date, June 5th, 1976, and the reason we focused on
13 31 days, was because that's the county code. So read
14 literally and, again, the County and OP hedged on it
15 a number of times today, but read literally, the
16 County would define a short-term rental as a farm, a
17 tenant farm on a farm using the dwelling in
18 connection with the farm and deriving income from the
19 farm, if than tenant is on a month-to-month lease.

20 So month-to-month lease, the County
21 literally in its definition would say that is an
22 unlawful use of agriculture lands.

23 That is why we focused so much on the
24 duration, because the County focuses on the duration.
25 The County definition does not consider the things

1 that you talked about. Is there actual farming going
2 on? How are they using it? Where do they actually
3 live?

4 The County didn't talk about anything of
5 those things when it defined short-term vacation
6 rentals. So since we are here in the construct of
7 the County definition, we don't look at those things,
8 we don't talk about those things. They aren't part
9 of my presentation or anyone's presentation or the
10 facts before this body.

11 All we're looking at is the County law.
12 What are its elements of short-term vacation rental.
13 And do those elements duplicate State law as it
14 existed on June 5th, 1976. That's really the only
15 question before this body. That's why we focused so
16 much on.

17 The things that you're talking about really
18 go to enforcement of a particular use. A particular
19 use might be unlawful, but that illegality has
20 nothing to do with how long a person is living there.
21 A tenant farmer on a month-to-month is a perfectly
22 lawful use of State land. Another use that may be a
23 ten-year use could be a perfectly unlawful use of
24 State land. The timeframe wouldn't matter.

25 And that's really the only question that is

1 up before you is on June 5th, 1976, did the duration
2 matter? In my view, the answer is no.

3 COMMISSIONER CABRAL: So you're really sort
4 of saying that you understand, you're the Petitioner
5 and asking for us to say that it's okay. You know
6 that what they're doing is not allowed under the law
7 for farm dwellings, but you're saying it's okay
8 because other people have done it, and that's because
9 it doesn't matter whether it's there for five days or
10 five years, it's okay even though you know that it
11 doesn't comply, but you want us then to give you
12 permission to have that be allowed?

13 MR. CHIPCHASE: Not at all. I've done a
14 terrible job, Commissioners.

15 COMMISSIONER CABRAL: I'm not a lawyer,
16 remember.

17 MR. CHIPCHASE: So I appreciate even this
18 colloquy, and ultimately it's my fault. I've done a
19 terrible job. That's not at all what I'm saying, not
20 in the least.

21 As a matter of candor, I have no idea how
22 these particular properties are used. I don't know,
23 because that doesn't matter. I'm not asking you to
24 bless any particular use. I'm not asking you to say
25 any use on a particular property is okay. I'm

1 certainly not asking you to say, because this guy
2 does it, tell me I can do it.

3 None of that is why I'm here, what our
4 Petitions are about.

5 Our Petitions are only about the County
6 deciding that you can't rent Agricultural land for
7 less than 31 days. That's it. The County has
8 decided you can't rent an agricultural property for
9 less than 31 days.

10 The County can do that going forward, from
11 today forward. But what it's done is to say you
12 can't rent it for 31 days today backwards. So we get
13 to the question on June 5th, 1976, what did the State
14 law say.

15 That's the only thing I'm asking the
16 Commission to do. I'm not asking the Commission to
17 say short term rentals are okay, a particular use is
18 okay, a particular property is okay. None of that.
19 Only what the law said, plain language of the law, on
20 a particular date.

21 And you mentioned that I had said intent.
22 True, the intent we are looking at is legislative
23 intent. What did the legislature intend when it
24 adopted the definition of farm dwelling? We get
25 that -- because we can't go and poll the legislature.

1 Even if we do could, it wouldn't matter, what they
2 individually thought doesn't matter. When we say
3 intent, we mean the collective intent. And when we
4 talk about the collective intent of the legislature,
5 we look at the plain language of the law. The law
6 tells us what the collective intent of the
7 legislature was. And here in the definition of "farm
8 dwelling" the collective intent of the legislature,
9 in my view, was not to impose a minimum rental
10 period.

11 COMMISSIONER CABRAL: Okay. I can
12 appreciate that might be the case. I have to say
13 that I would assume that the intent of the
14 legislature -- and everybody would say that you are
15 not going to have a hotel operation on a farm
16 property.

17 So I guess I'm looking at it for what the
18 usage is as opposed to the timeframe.

19 MR. CHIPCHASE: No.

20 COMMISSIONER CABRAL: Thank you very much.

21 MR. CHIPCHASE: Let me answer that, because
22 I think that's a great question, Commissioner.
23 You're right. So what we would do is this. We would
24 say what is the definition of "farm dwelling", right?
25 Farm dwelling says single-family dwelling. What is a

1 a single-family dwelling? It means a unit for one
2 family. So right in the definition we know the
3 legislature did not authorize hotels, it authorized
4 single-family dwellings, as long as they're used in
5 connection with the farm, or the family that occupies
6 them receives income from the farm.

7 So we totally agree on subject of a hotel.
8 It's got to be a single-family home.

9 VICE CHAIR CABRAL: Okay. Thank you.

10 MR. CHIPCHASE: You're welcome.

11 CHAIRPERSON SCHEUER: Commissioners, we can
12 have further questions for Mr. Chipchase at this time
13 or, as I mentioned before, we can decide that it
14 might be beyond our time and perhaps remaining energy
15 and attention to come to a decision on this matter
16 today, in which case we have our July 23rd hearing
17 data available where we could continue these
18 discussions. Gary Okuda.

19 COMMISSIONER OKUDA: Thank you, Mr. Chair.

20 I would make a suggestion that we continue
21 this hearing, and during the interim we request that
22 the parties submit proposed Findings of Fact,
23 Conclusions of Law and/or their proposed form of
24 Decision and Order. And I would also in addition --
25 let me clarify that.

CERTIFICATE

1 STATE OF HAWAII)
2) SS.
3 COUNTY OF HONOLULU)

4 I, JEAN MARIE McMANUS, do hereby certify:

5 That on June 25, 2020 at 9:02 a.m., the
6 proceedings contained herein was taken down by me in
7 machine shorthand and was thereafter reduced to
8 typewriting under my supervision; that the foregoing
9 represents, to the best of my ability, a true and
10 correct copy of the proceedings had in the foregoing
11 matter.

12 I further certify that I am not of counsel for
13 any of the parties hereto, nor in any way interested
14 in the outcome of the cause named in this caption.

15 Dated this 25th day of June, 2020, in Honolulu,
16 Hawaii.

17
18
19 /s/ Jean Marie McManus
20 JEAN MARIE McMANUS, CSR #156
21
22
23
24
25

ACT 193

H.B. NO. 1870

A Bill for an Act Relating to the Land Use Commission.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Findings and purpose. The legislature finds that although the purposes of Hawaii's land use law remain as valid today as they were at the time of its enactment in 1961, the procedures through which these purposes must be realized have proved inadequate and unworkable. Under existing procedures the land use commission has been unable to reconcile in an orderly and rational manner the increasingly hostile and conflicting points of view which surround land use decisions. This Act sets forth reforms intended to insure the effective application for an established land use policy through an adversary process in which all interests will have the opportunity to compete in an open and orderly manner. The commission is constituted as a quasi-judicial body and mandated to make impartial decisions based on proven facts and established policies.

SECTION 2. Section 205-1, Hawaii Revised Statutes, is amended to read:

"Sec. 205-1 Establishment of the commission. There shall be a state land use commission, hereinafter called the commission. The commission shall consist of nine members who shall hold no other public office and shall be appointed in the manner and serve for the term set forth in section 26-34. One member shall be appointed from each of the counties and the remainder shall be appointed at large. The commission shall elect its chairman from one of its members. The members shall receive no compensation for their services on the commission, but shall be reimbursed for actual expenses incurred in the performance of their duties. Six affirmative votes shall be necessary for any boundary amendment.

The commission shall be a part of the department of planning and economic development for administration purposes, as provided for in section 26-35.

The commission may engage employees necessary to perform its duties, including administrative personnel and an executive officer. Departments of the state government shall make available to the commission such data, facilities, and personnel as are necessary for it to perform its duties. The commis-

sion may receive and utilize gifts from the federal or other governmental agencies. It shall adopt rules guiding its conduct, maintain a record of its activities, accomplishments, and make recommendations to the governor and to the legislature through the governor."

SECTION 3. Section 205-2, Hawaii Revised Statutes, is amended to read:

"Sec. 205-2 Districting and classification of lands. There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts.

In the establishment of boundaries of urban districts those lands that are now in urban use and a sufficient reserve area for foreseeable urban growth shall be included;

In the establishment of boundaries for rural districts, areas of land composed primarily of small farms mixed with very low density residential lots, which may be shown by a minimum density of not more than one house per one-half acre and a minimum lot size of not less than one-half acre shall be included;

In the establishment of the boundaries of agricultural districts the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation; and

In the establishment of the boundaries of conservation districts, the "forest and water reserve zones" provided in section 183-41 are renamed "conservation districts" and, effective as of July 11, 1961, the boundaries of the forest and water reserve zones theretofore established pursuant to section 183-41, shall constitute the boundaries of the conservation districts; provided that thereafter the power to determine the boundaries of the conservation districts shall be in the commission.

In establishing the boundaries of the districts in each county, the commission shall give consideration to the general plan of the county.

Urban districts shall include activities or uses as provided by ordinances or regulations of the county within which the urban district is situated.

Rural districts shall include activities or uses as characterized by low density residential lots of not more than one dwelling house per one-half acre in areas where "city-like" concentration of people, structures, streets, and urban level of services are absent, and where small farms are intermixed with the low density residential lots. These districts may include contiguous areas which are not suited to low density residential lots or small farms by reason of topography, soils, and other related characteristics.

Agricultural districts shall include activities 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; agricultural parks and open area recreational facilities.

These districts may include areas which are not used for, or which are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

Conservation districts shall include areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach; conserving endemic plants, fish, and wildlife; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; and other related activities; and other permitted uses not detrimental to a multiple use conservation concept."

SECTION 4. Section 205-3, Hawaii Revised Statutes, is amended to read:

"Sec. 205-3 Retention of district boundaries. Land use district boundaries existing as of the effective date of this Act, shall continue in full force and effect subject to amendment as provided in this chapter or order of a court of competent jurisdiction based upon any litigation filed prior to July 1, 1975 or filed within thirty days after service of a certified copy of any final decision and order made as part of the commission's 1974 periodic boundary review, whichever occurs later."

SECTION 5. Section 205-4, Hawaii Revised Statutes, is amended to read:

"Sec. 205-4 Amendments to district boundaries.

(a) Any department or agency of the State including the land use commission, any department or agency of the county in which the land is situated, or any person with a property interest in the land sought to be reclassified, may petition the land use commission for a change in the boundary of a district.

(b) Upon proper filing of a petition pursuant to subsection (a) above, the commission shall, within not less than sixty and not more than one hundred and twenty days, conduct a hearing on the appropriate island in accordance with the provisions of sections 91-9, 91-10, 91-11, 91-12, and 91-13, Hawaii Revised Statutes, as applicable.

(c) Any other provision of law to the contrary notwithstanding, notice of the hearing together with a copy of the petition shall be served on the county planning commission and the county planning department and all persons with a property interest in the land recorded at the department of taxation. In addition, such notice shall be mailed to all persons who have made a timely written request for advance notice of boundary amendment proceedings, and shall be published at least once in a newspaper in the county in which the land sought to be redistricted is situated as well as once in a newspaper of general circulation in the State at least thirty days in advance of the hearing. The notice shall comply with the provisions of section 91-9, shall indicate the time and place that maps showing the proposed district boundary may be inspected, and further shall inform all interested persons of their rights under subsection (d) of this section.

(d) Any other provisions of law to the contrary notwithstanding, agencies and persons may intervene in the proceedings in accordance with this subsection.

(1) The petitioner, the department of planning and economic development and the county planning department shall in every case appear as parties and make recommendations relative to the proposed boundary change.

(2) All departments and agencies of the State and of the county in which the land is situated shall be admitted as parties upon timely application for intervention.

(3) All persons who have some property interest in the land, who lawfully reside on the land, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application for intervention.

(4) All other persons may apply to the commission for leave to intervene as parties. Leave to intervene shall be freely granted, provided that the commission or its hearing officer if one is appointed may deny an application to intervene when in the commission's or hearing officer's sound discretion it appears that: (1) the position of the applicant for intervention concerning the proposed change is substantially the same as the position of a party already admitted to the proceeding; and (2) the admission of additional parties will render the proceedings inefficient and unmanageable. A person whose application to intervene is denied may appeal such denial to the circuit court pursuant to section 91-14.

(5) The commission shall pursuant to chapter 91 adopt rules governing the intervention of agencies and persons under this subsection. Such rules shall without limitation establish: (a) the information to be set forth in any application for intervention; (b) time limits within which such applications shall be filed; and (c) reasonable filing fees to accompany such applications.

(e) Together with other witnesses that the commission may desire to hear at the hearing, it shall allow a representative of a citizen or a community group to testify who indicates a desire to express the views of such citizen or community group concerning the proposed boundary change.

(f) Within a period of not more than ninety and not less than forty-five days after the close of the hearing, unless otherwise ordered by a court, the commission shall, by filing findings of fact and conclusions of law, act to approve the petition, deny the petition, or to modify the petition by imposing conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205- or to assure substantial compliance with representations made by the petitioner in seeking a boundary change. Such conditions, if any, shall run with the land and be recorded in the bureau of conveyances.

(g) No amendment of a land use district boundary shall be approved un-

less the commission finds upon the clear preponderance of the evidence that the proposed boundary is reasonable, not violative of section 205-2 and consistent with the interim policies and criteria established pursuant to section 205- , or any state plan enacted by the legislature which plan shall supersede any interim guidance policies.

(h) Parties to proceedings to amend land use district boundaries may obtain judicial review thereof in the manner set forth in section 91-14, Hawaii Revised Statutes, provided that the court may also reverse or modify a finding of the commission if such finding appears to be contrary to the clear preponderance of evidence.”

SECTION 6. Section 205-7, Hawaii Revised Statutes, is amended to read:

“**Sec. 205-7 Adoption, amendment or repeal of rules.** The land use commission shall adopt, amend or repeal rules relating to matters within its jurisdiction in the manner prescribed in chapter 91.

SECTION 7. Section 205-9, Hawaii Revised Statutes, is repealed.

SECTION 8. Section 205-10, Hawaii Revised Statutes, is repealed.

SECTION 9. Section 205-11, Hawaii Revised Statutes, is repealed.

SECTION 10. Chapter 205, Hawaii Revised Statutes, is amended by adding thereto a new section to be appropriately designated and to read:

“**Sec. 205- Adoption of interim statewide land use guidance policy.** The legislature hereby adopts the following as interim statewide land use guidance policy set forth in this section. Except when the land use commission finds that an injustice or inequity will result, the commission shall observe and comply with these interim statewide land use guidance policies during the period commencing from the effective date of this Act until the effective date of the enactment of the state plan. The state plan shall be a long-range, comprehensive plan and policies which shall serve as a guide for the future long-range development of the State in accordance with chapter , Hawaii Revised Statutes.

INTERIM STATEWIDE LAND USE GUIDANCE POLICY

The interim policies are:

(1) Land use amendments shall be approved only as reasonably necessary to accommodate growth and development, provided there are no significant adverse effects upon agricultural, natural, environmental, recreational, scenic, historic, or other resources of the area.

(2) Lands to be reclassified as an urban district shall have adequate public services and facilities or as can be so provided at reasonable costs to the petitioner.

(3) Maximum use shall be made of existing services and facilities, and scattered urban development shall be avoided.

(4) Urban districts shall be contiguous to an existing urban district or shall constitute all or a part of a self-contained urban center.

(5) Preference shall be given to amendment petitions which will provide permanent employment, or needed housing accessible to existing or proposed employment centers, or assist in providing a balanced housing supply for all economic and social groups.

(6) In establishing the boundaries of the districts in each county, the commission shall give consideration to the general plan of the county.

(7) Insofar as practicable conservation lands shall not be reclassified as urban lands.

(8) The commission is encouraged to reclassify urban lands which are incompatible with the interim statewide land use guidance policy or are not developed in a timely manner.”

SECTION 11. Chapter 205, Hawaii Revised Statutes, is amended by adding thereto a new section to be appropriately designated and to read:

“**Sec. 205- Legal effect of interim statewide land use guidance policy.** The interim statewide land use guidance policy set forth in section 205- shall remain in full force and effect during the period from the effective date of this Act until the effective date of the enactment of the state plan.”

SECTION 12. Chapter 205, Hawaii Revised Statutes, is amended by adding thereto a new section to be appropriately designated and to read:

“**Sec. 205- Compliance with state plan.** Upon enactment of the State plan, no amendment to any land use district boundary nor any other action by the land use commission shall be adopted unless such amendment or other action conforms to the state plan.”

SECTION 13. Statutory material to be repealed is bracketed. New material is underscored. In printing this Act, the revisor of statutes need not include the brackets, the bracketed material, or the underscoring.*

SECTION 14. This Act shall take effect upon its approval.

(Approved June 2, 1975.)

*Edited accordingly.

ACT 199

H.B. NO. 3262-76

A Bill for an Act Relating to Agricultural Lands.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Chapter 205, Hawaii Revised Statutes, is amended by adding a new section to read as follows:

“Sec. 205- Permissible uses within the agricultural districts. (a) Within the agricultural district all lands with soil classified by the Land Study Bureau’s Detailed Land Classification as Overall (Master) Productivity Rating Class A or B shall be restricted to the following permitted uses:

- (1) Cultivation of crops, including but not limited to flowers, vegetables, foliage, fruits, forage and timber;
- (2) Game and fish propagation;
- (3) Raising of livestock, including but not limited to poultry, bees, fish or other animal or aquatic life that are propagated for economic or personal use;
- (4) Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry;
Farm dwelling as used herein shall mean 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.
- (5) Public institutions and buildings which are necessary for agricultural practices;
- (6) Public and private open area types of recreational uses including day camps, picnic grounds, parks and riding stables, but not including dragstrips, airports, drive-in theaters, golf courses, golf driving ranges, country clubs, and overnight camps;
- (7) Public, private, and quasi-public utility lines, and roadways, transformer stations, solid waste transfer stations, and appurtenant small buildings such as booster pumping stations, but not including offices or yards for equipment, material, vehicle storage, repair or maintenance, treatment plants and major storage tanks not ancillary to agricultural practices, or corporation yards or other like structures;
- (8) Retention, restoration, rehabilitation or improvement of buildings or sites of historic or scenic interest;
- (9) Roadside stands for the sale of agricultural products grown on the premises;
- (10) Buildings and uses, including but not limited to mills, storage and processing facilities, maintenance facilities that are normally considered direct accessory to the abovementioned uses; or
- (11) Agricultural parks.

(b) Uses not expressly permitted in this section 205- (a) shall be prohibited, except the uses permitted as provided in section 205-6 and section 205-8, and construction of single-family dwellings on lots existing before the effective date of this Act. Any other law to the contrary notwithstanding no subdivision of land within the agricultural district with soil classified by the Land Study Bureau’s Detailed Land Classification as Overall (Master) Productivity Rating Class A or B shall be approved by a county unless the said A and B lands within the subdivision shall be made subject to the restriction on uses as prescribed in this section and to the condition that the uses shall be primarily in pursuit of an agricultural activity.

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.

If the foregoing requirement of encumbrances running with the land jeopardizes the owner or lessee from obtaining mortgage financing from any of the mortgage lending agencies set forth hereinbelow, and said requirement is the sole reason for failure to obtain mortgage financing, then such requirement of encumbrances shall, insofar as such mortgage financing is so jeopardized, be conditionally waived by the appropriate county enforcement officer; provided that such conditional waiver shall thereafter become effective only in the event that the property is subjected to foreclosure proceedings by the mortgage lender.

The mortgage lending agencies mentioned hereinabove are the Federal Housing Administration, Federal National Mortgage Association, Veterans Administration, Small Business Administration, Farmers Home Administration, Federal Land Bank of Berkeley, Federal Intermediate Credit Bank of Berkeley, Berkeley Bank for Cooperatives, and any other federal, state or private mortgage lending agency qualified to do business in Hawaii, and their respective successors and assigns.

(c) Within the agricultural district all lands, with soil classified by the Land Study Bureau's Detailed Land Classification as Overall (Master) Productivity Rating Class C, D, E, or U shall be restricted to the uses permitted for agricultural districts as set forth in section 205-5(b).

SECTION 2. Sec. 205-12, Hawaii Revised Statutes, is amended to read as follows:

“Sec. 205-12 Enforcement. The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205- and shall report to the commission all violations.”

SECTION 3. Sec. 205-13, Hawaii Revised Statutes, is amended to read as follows:

“Sec. 205-13 Penalty for violation. Any person who violates any provision under section 205- , or any regulation established relating thereto, shall be fined not more than \$5,000, and any person who violates any other provision of this chapter, or any regulation established relating thereto, shall be fined not more than \$1,000.

If any person cited for a violation under this chapter fails to remove such violation within six months of such citation and the violation continues to exist, such person shall be subject to a citation for a new and separate violation. There shall be a fine not more than \$5,000 for any additional violation.

Prior to the issuance of any citation for a violation, the appropriate enforcement officer or agency shall notify the violator and the mortgagee, if any, of such violation, and the violator or the mortgagee, if any, shall have not more than

ACT 199

60 days to cure the violation before citation for a violation is issued.”

SECTION 4. Statutory material to be repealed is bracketed. New material is underscored. In printing this Act the revisor of statutes need not include the brackets, the bracketed material or the underscoring.*

SECTION 5. This Act shall take effect upon its approval.

(Approved June 4, 1976)

*Edited accordingly.

HAWAII REVISED STATUTES

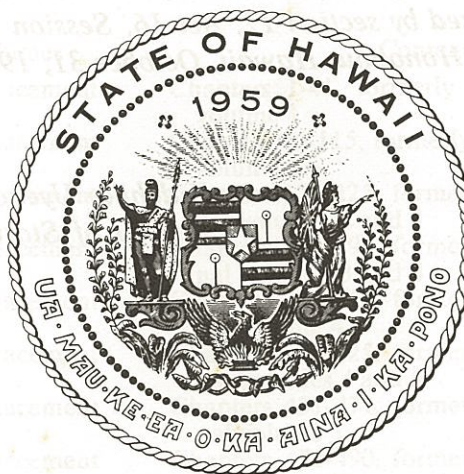
COMPRISING THE STATUTES
OF THE STATE OF HAWAII,
CONSOLIDATED, REVISED, AND ANNOTATED

VOLUME 3

1976 REPLACEMENT

(Including Acts of the 1976 Session)

Titles 10-13, Chapters 121-225



PUBLISHED BY AUTHORITY

Sec. 205-1 PLANNING AND ECONOMIC DEVELOPMENT

CHAPTER 205
LAND USE COMMISSION

Historical note. Prior law: L 1961, c 187.

[PART I. GENERALLY]

SECTION

- 205-1 ESTABLISHMENT OF THE COMMISSION
- 205-2 DISTRICTING AND CLASSIFICATION OF LANDS
- 205-3 RETENTION OF DISTRICT BOUNDARIES
- 205-4 AMENDMENTS TO DISTRICT BOUNDARIES
- [205-4.5] PERMISSIBLE USES WITHIN THE AGRICULTURAL DISTRICTS
- 205-5 ZONING
- 205-6 SPECIAL PERMIT
- 205-7 ADOPTION, AMENDMENT OR REPEAL OF RULES
- 205-8 NONCONFORMING USES
- 205-9 TO 11 REPEALED
- 205-12 ENFORCEMENT
- 205-13 PENALTY FOR VIOLATION
- 205-14 ADJUSTMENTS OF ASSESSING PRACTICES
- 205-15 CONFLICT
- [205-16] COMPLIANCE WITH STATE PLAN
- [205-16.1] ADOPTION OF INTERIM STATEWIDE LAND USE GUIDANCE POLICY
- [205-16.2] LEGAL EFFECT OF INTERIM STATEWIDE LAND USE GUIDANCE POLICY

[PART II.] SHORELINE SETBACKS

- 205-31 DEFINITIONS
- 205-32 DUTIES AND POWERS OF THE COMMISSION AND AGENCY
- 205-33 PROHIBITIONS
- [205-34] SHORELINE SETBACK LINES ESTABLISHED BY COUNTY
- 205-35 FUNCTIONS OF AGENCY
- 205-36 EXEMPTIONS
- 205-37 CONFLICT OF OTHER LAWS

[PART I. GENERALLY]

§205-1 Establishment of the commission. There shall be a state land use commission, hereinafter called the commission. The commission shall consist of nine members who shall hold no other public office and shall be appointed in the manner and serve for the term set forth in section 26-34. One member shall be appointed from each of the counties and the remainder shall be appointed at large. The commission shall elect its chairman from one of its members. The members shall receive no compensation for their services on the commission, but shall be reimbursed for actual expenses incurred in the performance of their duties. Six affirmative votes shall be necessary for any boundary amendment.

The commission shall be a part of the department of planning and economic development for administration purposes, as provided for in section 26-35.

The commission may engage employees necessary to perform its duties, including administrative personnel and an executive officer. The executive officer shall be appointed by the commission and his position shall be exempt from civil service. Departments of the state government shall make available to the commission such data, facilities, and personnel as are necessary for it to perform its duties. The commission may receive and utilize gifts and any funds from the federal or other governmental agencies. It shall adopt rules guiding its conduct, maintain a record of its activities and accomplishments, and make recommenda-

tions to the governor and to the legislature through the governor. [L 1963, c 205, pt of §2; Supp, §98H-1; HRS §205-1; am L 1975, c 193, §2; am L 1976, c 43, §1]

Cross References

Commission placed in department of planning and economic development, see §26-18.
Commissions, generally, see §26-34 and notes following.
Legislative findings and purpose, see L 1961, c 187, §1 and L 1963, c 205, §1.

§205-2 Districting and classification of lands. There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts.

In the establishment of boundaries of urban districts those lands that are now in urban use and a sufficient reserve area for foreseeable urban growth shall be included;

In the establishment of boundaries for rural districts, areas of land composed primarily of small farms mixed with very low density residential lots, which may be shown by a minimum density of not more than one house per one-half acre and a minimum lot size of not less than one-half acre shall be included;

In the establishment of the boundaries of agricultural districts the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation; and

In the establishment of the boundaries of conservation districts, the "forest and water reserve zones" provided in section 183-41 are renamed "conservation districts" and, effective as of July 11, 1961, the boundaries of the forest and water reserve zones theretofore established pursuant to section 183-41, shall constitute the boundaries of the conservation districts; provided that thereafter the power to determine the boundaries of the conservation districts shall be in the commission.

In establishing the boundaries of the districts in each county, the commission shall give consideration to the general plan of the county.

Urban districts shall include activities or uses as provided by ordinances or regulations of the county within which the urban district is situated.

Rural districts shall include activities or uses as characterized by low density residential lots of not more than one dwelling house per one-half acre in areas where "city-like" concentration of people, structures, streets, and urban level of services are absent, and where small farms are intermixed with the low density residential lots. These districts may include contiguous areas which are not suited to low density residential lots or small farms by reason of topography, soils, and other related characteristics.

Agricultural districts shall include activities 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; agricultural parts and open area recreational facilities.

These districts may include areas which are not used for, or which are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

Sec. 205-2 PLANNING AND ECONOMIC DEVELOPMENT

Conservation districts shall include areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness, and beach; conserving endemic plants, fish, and wildlife; preventing floods and soil erosion; forestry; open space areas whose existing openness, natural condition, or present state of use, if retained, would enhance the present or potential value of abutting or surrounding communities, or would maintain or enhance the conservation of natural or scenic resources; areas of value for recreational purposes; and other related activities; and other permitted uses not detrimental to a multiple use conservation concept. [L 1963, c 205, pt of §2; Supp, §98H-2; HRS §205-2; am L 1969, c 182, §5; am L 1975, c 193, §3]

Cross References

Districts, generally, see chapter 4.

Attorney General Opinions

Uses within agricultural districts. Att. Gen. Op. 62-33, 62-38.

Dwellings permissible under this section are further defined by regulations established under §205-7. Att. Gen. Op. 75-8.

§205-3 Retention of district boundaries. Land use district boundaries existing as of [June 2, 1975,] shall continue in full force and effect subject to amendment as provided in this chapter or order of a court of competent jurisdiction based upon any litigation filed prior to July 1, 1975 or filed within thirty days after service of a certified copy of any final decision and order made as part of the commission's 1974 periodic boundary review, whichever occurs later. [L 1963, c 205, pt of §2; Supp, §98H-3; am L 1975, c 193, §4]

Attorney General Opinions

Statute contemplates and authorizes changes in classification as originally proposed and as finally adopted, and to require new notice and hearing whenever there is any change is too burdensome. Att. Gen. Op. 71-2.

§205-4 Amendments to district boundaries. (a) Any department or agency of the State including the land use commission, any department or agency of the county in which the land is situated, or any person with a property interest in the land sought to be reclassified, may petition the land use commission for a change in the boundary of a district.

(b) Upon proper filing of a petition pursuant to subsection (a) above, the commission shall, within not less than sixty and not more than one hundred and eighty days, conduct a hearing on the appropriate island in accordance with the provisions of sections 91-9, 91-10, 91-11, 91-12, and 91-13, as applicable.

(c) Any other provision of law to the contrary notwithstanding, notice of the hearing together with a copy of the petition shall be served on the county planning commission and the county planning department and all persons with a property interest in the land recorded at the department of taxation. In addition, such notice shall be mailed to all persons who have made a timely written request for advance notice of boundary amendment proceedings, and shall be published at least once in a newspaper in the county in which the land sought to be redistricted is situated as well as once in a newspaper of general circulation in the State at least thirty days in advance of the hearing. The notice shall comply with

the provisions of section 91-9, shall indicate the time and place that maps showing the proposed district boundary may be inspected, and further shall inform all interested persons of their rights under subsection [(e)] of this section.

(d) Any other provisions of law to the contrary notwithstanding, prior to hearing of a petition the commission and its staff may view and inspect any land which is the subject of the petition.

(e) Any other provisions of law to the contrary notwithstanding, agencies and persons may intervene in the proceedings in accordance with this subsection.

- (1) The petitioner, the department of planning and economic development and the county planning department shall in every case appear as parties and make recommendations relative to the proposed boundary change.
- (2) All departments and agencies of the State and of the county in which the land is situated shall be admitted as parties upon timely application for intervention.
- (3) All persons who have some property interest in the land, who lawfully reside on the land, or who otherwise can demonstrate that they will be so directly and immediately affected by the proposed change that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application for intervention.
- (4) All other persons may apply to the commission for leave to intervene as parties. Leave to intervene shall be freely granted, provided that the commission or its hearing officer if one is appointed may deny an application to intervene when in the commission's or hearing officer's sound discretion it appears that: (A) the position of the applicant for intervention concerning the proposed change is substantially the same as the position of a party already admitted to the proceeding; and (B) the admission of additional parties will render the proceedings inefficient and unmanageable. A person whose application to intervene is denied may appeal such denial to the circuit court pursuant to section 91-14.
- (5) The commission shall pursuant to chapter 91 adopt rules governing the intervention of agencies and persons under this subsection. Such rules shall without limitation establish: (A) the information to be set forth in any application for intervention; (B) time limits within which such applications shall be filed; and (C) reasonable filing fees to accompany such applications.

(f) Together with other witnesses that the commission may desire to hear at the hearing, it shall allow a representative of a citizen or a community group to testify who indicates a desire to express the view of such citizen or community group concerning the proposed boundary change.

(g) Within a period of not more than one hundred and eighty and not less than forty-five days after the close of the hearing, unless otherwise ordered by a court, the commission shall, by filing findings of fact and conclusions of law, act to approve the petition, deny the petition, or to modify the petition by imposing conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-16.1 or to assure substantial compliance with representations made by the petitioner in seeking a boundary change. Such conditions, if any, shall run with the land and be recorded in the bureau of conveyances.

Sec. 205-4 PLANNING AND ECONOMIC DEVELOPMENT

(h) No amendment of a land use district boundary shall be approved unless the commission finds upon the clear preponderance of the evidence that the proposed boundary is reasonable, not violative of section 205-2 and consistent with the interim policies and criteria established pursuant to section 205-16.1, or any state plan enacted by the legislature which plan shall supersede any interim guidance policies.

(i) Parties to proceedings to amend land use district boundaries may obtain judicial review thereof in the manner set forth in section 91-14, provided that the court may also reverse or modify a finding of the commission if such finding appears to be contrary to the clear preponderance of the evidence. [L 1963, c 205, pt of §2; am L 1965, c 32, §2; Supp, §98H-4; HRS §205-4; am L 1972, c 187, §2; am L 1975, c 193, §5; am L 1976, c 4, §1]

Revision Note

In subsection (c), "[e]" substituted for "(d)" to correct clerical error.

Attorney General Opinions

The commission may be empowered to impose conditions on reclassifications and to impose sanctions for violation of the conditions, and the conditions may be made to run with the land. Att. Gen. Op. 72-8.

Proposal to subdivide agricultural land into agriculturally unfeasible small lots would violate intent of chapter. Att. Gen. Op. 75-8.

Case Notes

Proceeding for amendment to boundaries challenged by adjoining landowner is a contested case within meaning of §91-1(5). 55 H. 538, 524 P.2d 84.

Provision that commission shall render decision within 45 and 90 days after the public hearing is mandatory and decision rendered after the time period is void. 55 H. 538,

524 P.2d 84.

The adoption or amendment of boundaries is not a rule-making process within meaning of §91-1(4). 55 H. 538, 524 P.2d 84.

Person entitled under prior law to petition for change in boundary. 57 H. 84, 549 P.2d 737.

[§205-4.5] Permissible uses within the agricultural districts. (a) Within the agricultural district all lands with soil classified by the Land Study Bureau's Detailed Land Classification as Overall (Master) Productivity Rating Class A or B shall be restricted to the following permitted uses:

- (1) Cultivation of crops, including but not limited to flowers, vegetables, foliage, fruits, forage and timber;
- (2) Game and fish propagation;
- (3) Raising of livestock, including but not limited to poultry, bees, fish or other animal or aquatic life that are propagated for economic or personal use;
- (4) Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry; Farm dwelling as used herein shall mean 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.
- (5) Public institutions and buildings which are necessary for agricultural practices;
- (6) Public and private open area types of recreational uses including day camps, picnic grounds, parks and riding stables, but not including dragstrips, airports, drive-in theaters, golf courses, golf driving ranges, country clubs, and overnight camps;

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- (7) Public, private, and quasi-public utility lines, and roadways, transformer stations, solid waste transfer stations, and appurtenant small buildings such as booster pumping stations, but not including offices or yards for equipment, material, vehicle storage, repair or maintenance, treatment plants and major storage tanks not ancillary to agricultural practices, or corporation yards or other like structures;
- (8) Retention, restoration, rehabilitation or improvement of buildings or sites of historic or scenic interest;
- (9) Roadside stands for the sale of agricultural products grown on the premises;
- (10) Buildings and uses, including but not limited to mills, storage and processing facilities, maintenance facilities that are normally considered direct accessory to the abovementioned uses; or
- (11) Agricultural parks.

(b) Uses not expressly permitted in subsection (a) shall be prohibited, except the uses permitted as provided in section 205-6 and section 205-8, and construction of single-family dwellings on lots existing before [June 4, 1976]. Any other law to the contrary notwithstanding no subdivision of land within the agricultural district with soil classified by the Land Study Bureau's Detailed Land Classification as Overall (Master) Productivity Rating Class A or B shall be approved by a county unless the said A and B lands within the subdivision shall be made subject to the restriction on uses as prescribed in this section and to the condition that the uses shall be primarily in pursuit of an agricultural activity.

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.

If the foregoing requirement of encumbrances running with the land jeopardizes the owner or lessee from obtaining mortgage financing from any of the mortgage lending agencies set forth hereinbelow, and said requirement is the sole reason for failure to obtain mortgage financing, then such requirement of encumbrances shall, insofar as such mortgage financing is so jeopardized, be conditionally waived by the appropriate county enforcement officer; provided that such conditional waiver shall thereafter become effective only in the event that the property is subjected to foreclosure proceedings by the mortgage lender.

The mortgage lending agencies mentioned hereinabove are the Federal Housing Administration, Federal National Mortgage Association, Veterans Administration, Small Business Administration, Farmers Home Administration, Federal Land Bank of Berkeley, Federal Intermediate Credit Bank of Berkeley, Berkeley Bank for Cooperatives, and any other federal, state or private mortgage lending agency qualified to do business in Hawaii, and their respective successors and assigns.

(c) Within the agricultural district all lands, with soil classified by the Land Study Bureau's Detailed Land Classification as Overall (Master) Productivity Rating Class C, D, E, or U shall be restricted to the uses permitted for agricultural districts as set forth in section 205-5(b). [L 1976, c 199, §1]

Sec. 205-5 PLANNING AND ECONOMIC DEVELOPMENT

§205-5 Zoning. (a) Except as herein provided, the powers granted to counties under section 46-4 shall govern the zoning within the districts, other than in conservation districts. Conservation districts shall be governed by the department of land and natural resources pursuant to section 183-41.

(b) Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the land use commission shall be permitted. Other uses may be allowed by special permits issued pursuant to this chapter. The minimum lot size in agricultural districts shall be determined by each county through its zoning ordinance, subdivision ordinance or other lawful means, provided that in no event shall the minimum lot size for any agricultural use be less than one acre.

(c) Unless authorized by special permit issued pursuant to this chapter, only the following uses shall be permitted within rural districts:

- (1) Low density residential uses;
- (2) Agricultural uses; and
- (3) Public, quasi-public, and public utility facilities.

In addition, the minimum lot size for any low density residential use shall be one-half acre and there shall be but one dwelling house per one-half acre. [L 1963, c 205, pt of §2; Supp, §98H-5; HRS §205-5; am L 1969, c 232, §1]

Attorney General Opinions

Minimum lots size in agricultural districts. Att. Gen. Op. 62-33.

Cited in opinion that enforcement of land uses in conservation districts lies with Department of Land and Natural Resources, and not with counties. Att. Gen. Op. 70-22.

§205-6 Special permit. The county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use his land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which his land is located for permission to use his land in the manner desired.

The planning commission shall conduct a hearing within a period of not less than thirty nor more than one hundred twenty days from the receipt of the petition. The planning commission shall notify the land use commission and such persons and agencies that may have an interest in the subject matter of the time and place of the hearing.

The planning commission may under such protective restrictions as may be deemed necessary, permit the desired use, but only when the use would promote the effectiveness and objectives of this chapter. The planning commission shall act on the petition not earlier than fifteen days after the public hearing. A decision in favor of the applicant shall require a majority vote of the total membership of the planning commission, which shall be subject to the approval of the land use commission, provided that the land use commission may impose additional restrictions as may be necessary or appropriate in granting such approval, including the adherence to representations made by the applicant. A copy of the decision together with the findings shall be transmitted to the commission within sixty days after the decision is rendered. Within forty-five days after receipt of the county agency's decision, the commission shall act to approve, approve with modification, or deny the petition. A denial either by the county agency or by the commission, or a modification by the commission, as the case may be, of the

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desired use shall be appealable to the circuit court of the circuit in which the land is situated and shall be made pursuant to the Hawaii Rules of Civil Procedure. [L 1963, c 205, pt of §2; Supp, §98H-6; HRS §205-6; am L 1970, c 136, §1; am L 1976, c 4, §2]

Attorney General Opinions

Special permits cannot be granted to authorize uses which have effect of making boundary change or creating new district. Att. Gen. Op. 63-37.

Authority of Land Use Commission to modify permit approved by county commission discussed. Att. Gen. Op. 68-30.

§205-7 Adoption, amendment or repeal of rules. The land use commission shall adopt, amend or repeal rules relating to matters within its jurisdiction in the manner prescribed in chapter 91. [L 1963, c 205, pt of §2; Supp, §98H-7; HRS §205-7; am L 1975, c 193, §6]

Cross References

Administrative procedure, see chapter 91.

§205-8 Nonconforming uses. The lawful use of land or buildings existing on the date of establishment of any interim agricultural district and rural district in final form may be continued although the use, including lot size, does not conform to this chapter; provided that no nonconforming building shall be replaced, reconstructed, or enlarged or changed to another nonconforming use and no nonconforming use of land shall be expanded or changed to another nonconforming use. In addition, if any nonconforming use of land or building is discontinued or held in abeyance for a period of one year, the further continuation of such use shall be prohibited. [L 1963, c 205, pt of §2; Supp, §98H-8]

§205-9 REPEALED. L 1975, c 193, §7.

§205-10 REPEALED. L 1975, c 193, §8.

§205-11 REPEALED. L 1975, c 193, §9.

§205-12 Enforcement. The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 shall report to the commission all violations. [L 1963, c 205, pt of §2; Supp, §98H-12; HRS §205-12; am L 1976, c 199, §2]

Attorney General Opinions

Counties' responsibility for enforcement includes taking necessary actions against violators; such enforcement covers all land use district classifications and land use district regulations, except those relating to conservation districts. Att. Gen. Op. 70-22.

§205-13 Penalty for violation. Any person who violates any provision under section 205-4.5, or any regulation established relating thereto, shall be fined not more than \$5,000, and any person who violates any other provision of this chapter, or any regulation established relating thereto, shall be fined not more than \$1,000.

Sec. 205-13 PLANNING AND ECONOMIC DEVELOPMENT

If any person cited for a violation under this chapter fails to remove such violation within six months of such citation and the violation continues to exist, such person shall be subject to a citation for a new and separate violation. There shall be a fine of not more than \$5,000 for any additional violation.

Prior to the issuance of any citation for a violation, the appropriate enforcement officer or agency shall notify the violator and the mortgagee, if any, of such violation, and the violator or the mortgagee, if any, shall have not more than sixty days to cure the violation before citation for a violation is issued. [L 1963, c 205, pt of §2; Supp, §98H-13; HRS §205-13; am L 1976, c 199, §3]

§205-14 Adjustments of assessing practices. Upon the adoption of district boundaries, certified copies of the classification maps showing the district boundaries shall be filed with the department of taxation. Thereafter, the department of taxation shall, when making assessments of property within a district, give consideration to the use or uses that may be made thereof as well as the uses to which it is then devoted. [L 1963, c 205, pt of §2; Supp, §98H-14]

§205-15 Conflict. Except as specifically provided by this chapter and the regulations adopted thereto, neither the authority for the administration of the provisions of section 183-41 nor the authority vested in the counties under the provisions of section 46-4 shall be affected. [L 1963, c 205, pt of §2; Supp, §98H-15]

[§205-16] Compliance with state plan. Upon enactment of the state plan, no amendment to any land use district boundary nor any other action by the land use commission shall be adopted unless such amendment or other action conforms to the state plan. [L 1975, c 193, §12]

[§205-16.1] Adoption of interim statewide land use guidance policy. The legislature hereby adopts the following as interim statewide land use guidance policy set forth in this section. Except when the land use commission finds that an injustice or inequity will result, the commission shall observe and comply with these interim statewide land use guidance policies during the period commencing from [June 2, 1975,] until the effective date of the enactment of the state plan. The state plan shall be a long-range, comprehensive plan and policies which shall serve as a guide for the future long-range development of the State in accordance with chapter 225.

INTERIM STATEWIDE LAND USE GUIDANCE POLICY

The interim policies are:

- (1) Land use amendment shall be approved only as reasonably necessary to accommodate growth and development, provided there are no significant adverse effects upon agricultural, natural, environmental, recreational, scenic, historic, or other resources of the area.
- (2) Lands to be reclassified as an urban district shall have adequate public services and facilities or as can be so provided at reasonable costs to the petitioner.
- (3) Maximum use shall be made of existing services and facilities, and scattered urban development shall be avoided.

- (4) Urban districts shall be contiguous to an existing urban district or shall constitute all or a part of a self-contained urban center.
- (5) Preference shall be given to amendment petitions which will provide permanent employment, or needed housing accessible to existing or proposed employment centers, or assist in providing a balanced housing supply for all economic and social groups.
- (6) In establishing the boundaries of the districts in each county, the commission shall give consideration to the general plan of the county.
- (7) Insofar as practicable conservation lands shall not be reclassified as urban lands.
- (8) The commission is encouraged to reclassify urban lands which are incompatible with the interim statewide land use guidance policy or are not developed in a timely manner. [L 1975, c 193, §10]

[§205-16.2] Legal effect of interim statewide land use guidance policy. The interim statewide land use guidance policy set forth in section 205-16.1 shall remain in full force and effect during the period from [June 2, 1975,] until the effective date of the enactment of the state plan. [L 1975, c 193, §11]

[PART II.] SHORELINE SETBACKS

§205-31 Definitions. As used in this part, unless the context otherwise requires:

- (1) "Agency" means the planning department of each county.
- (2) "Shoreline" means the upper reaches of the wash of waves, other than storm and tidal waves, usually evidenced by the edge of vegetation growth, or the upper line of debris left by the wash of waves.
- (3) "Shoreline area" means all of the land area between the shoreline and the shoreline setback line.
- (4) "Shoreline setback line" means that line established by the state land use commission or the county running inland from and parallel to the shoreline at a horizontal plane. [L 1970, c 136, pt of §2; am L 1973, c 107, §1(1)]

Attorney General Opinions

This part does not apply to inland bodies of water like Salt Lake. Att. Gen. Op. 70-28.

§205-32 Duties and powers of the commission and agency. The commission shall establish setbacks along shorelines of not less than twenty feet and not more than forty feet inland from the upper reaches of the wash of waves other than storm and tidal waves. The agency shall promulgate rules and regulations within a period of one year after June 22, 1970, pursuant to chapter 91, and shall enforce the shoreline setbacks and rules and regulations pertaining thereto. [L 1970, c 136, pt of §2; am L 1973, c 107, §1(2)]

Attorney General Opinions

Where a man-made wall seaward of the natural shore is used to create a fishpond, the setback line is to be measured from the natural shoreline not the man-made outer wall. Att. Gen. Op. 70-28.

Sec. 205-33 PLANNING AND ECONOMIC DEVELOPMENT

§205-33 Prohibitions. (a) It shall be unlawful to remove sand, coral, rocks, soil, or other beach compositions for any purpose, except for reasonable domestic, non-commercial use, within the shoreline area or within 1,000 feet seaward of it or in ocean water of 30 or less feet in depth, except that any sand mining operation which has been legally in operation for a period of at least two years immediately prior to June 22, 1970, may be continued for a period not to extend beyond July 1, 1975. However, if during the period prior to July 1, 1975, the sand mining operation is substantially increased, it shall be unlawful to further continue such mining operation. This prohibition shall not apply to the commercial mining of sand or other minerals, or taking of coral or rock in the territorial ocean when such mining or taking is located 1,000 or more feet from the shoreline or in ocean water of 30 or more feet in depth and has the written permission of all governmental agencies having jurisdiction thereof. Anything to the contrary notwithstanding, the prohibition shall not apply to sand mining for experimental purposes to be conducted by the Department of Ocean Engineering, University of Hawaii, in the offshore waters, one-half mile north of Keauhou Bay, provided, however, that such sand mining for experimental purposes shall not commence until written permission is received from all governmental agencies having jurisdiction thereof; provided further that a federal environmental impact statement be prepared and approval received therefor; and provided further that said sand mining for experimental purposes shall be completed on or before April 30, 1977.

(b) Except as otherwise provided in this part no structure or any portion thereof, including but not limited to seawalls, groins, and revetments, shall be permitted within the shoreline area; provided that any lawful nonconforming structure existing on June 22, 1970 shall be permitted; provided further that any structure which is necessary for safety reasons or to protect the property from erosion or wave damages shall be permitted. A structure not conforming to this section but for which a building permit application has been filed on or before June 22, 1970, shall also be permitted as a nonconforming structure, subject to the ordinances and regulations of the particular county.

(c) Any nonconforming structure, including but not limited to residential dwellings, agricultural structures, seawalls, groins, and revetments may be replaced or reconstructed within the shoreline area; provided that no nonconforming structure shall be substantially enlarged or changed to another nonconforming use within the shoreline area. If the use of any nonconforming structure is discontinued or held in abeyance for a period of one year, the further continuation of such use shall be prohibited. [L 1970, c 136, pt of §2; am L 1973, c 107, §1(3); am L 1974, c 79, §1]

[§205-34] Shoreline setback lines established by county. The several counties through ordinances may require that shoreline setback lines be established at a distance greater than that established by the commission. [L 1970, c 136, pt of §2]

§205-35 Functions of agency. (a) The agency shall administer the provisions of this part. It shall review the plans of all applicants who propose any structure, activity, or facility which otherwise would be prohibited by this part.

The agency may require that the plans be supplemented by accurately mapped data showing natural conditions and topography relating to all existing and proposed structures, buildings and facilities.

The agency may also require reasonable changes in the submitted plans in order to obtain optimum compliance practicable.

(b) After reviewing the plans, the agency shall transmit the plans with its recommendations to the county planning commission except in counties where the county planning commission is advisory only in which case to the county council or such body as the council shall by ordinance designate. Such governmental body shall grant a variance for such structure, activity, or facility if, after a hearing pursuant to chapter 91, it finds in writing, based on the record presented either: (1) that such structure, activity, or facility is in the public interest; or (2) that hardship will be caused to the applicant if the proposed structure, activity, or facility is not allowed on that portion of the land within the shoreline area. Any variance granted may be subject to such conditions as will cause the structure, activity, or facility to result in a minimum interference with natural shoreline processes. Such governmental body shall render written approval or disapproval within forty-five days after the hearing on the applicant's plans, unless such period is extended by written agreement between the governmental body and the applicant. [L 1970, c 136, pt of §2; am L 1973, c 107, §1(4); am L 1976, c 64, §1]

§205-36 Exemptions. Tunnels, canals, basins, and ditches, together with associated structures used by public utilities as the term is defined in section 269-1, wharves, docks, piers and other harbor and waterfront improvements and any other maritime facility and water sport recreational facilities may be permitted within the shoreline area; provided that the plans therefor are submitted for review and are approved by the agency after a public hearing has been held and that the appropriate state body has found that the proposed structures will result only in a minimum interference with natural shoreline processes; provided further that any such structure constructed by a governmental body shall be exempt from the provisions of this part except as to the requirement that two public hearings shall be held by the governmental body charged with such construction, once when the project is first conceived and again when the project is substantially designed and planned, but prior to the letting of the contract. Repair, strengthening, reinforcement, and maintenance of fishponds, and improvements for aquaculture farms shall be exempt from this chapter, upon issuance of a permit or waiver of the requirements for same by the board of land and natural resources. [L 1970, c 136, pt of §2; am L 1973, c 107, §1(5); am L 1975, c 27, §3; am L 1976, c 57, §3]

§205-37 Conflict of other laws. In case of a conflict between the requirements of any other state law or county ordinance regarding shoreline setback lines, the more restrictive requirements shall apply in furthering the purposes of this part. Nothing herein contained shall be construed to diminish the jurisdiction of the state department of transportation over wharves, airports, docks, piers, small boat, or other harbors, and any other maritime or water sports recreational facilities to be constructed on state land by the State; provided that such plans are submitted for the review and information of the officer of the respective agency charged with the administration of the county zoning laws, and found not to conflict with any county ordinances, zoning laws, and building code. [L 1970, c 136, pt of §2; am L 1973, c 107, §1(6)]

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

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State of Hawaii & Office of Planning

DATED: Honolulu, Hawai'i, July 9, 2020.

CADES SCHUTTE
A Limited Liability Law Partnership

A handwritten signature in cursive script, appearing to read "Calvert G. Chipchase", written in black ink.

ROY A. VITOUSEK III
CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN
Attorneys for Petitioners