

LAND USE COMMISSION
STATE OF HAWAII

2020 JUL 23 A 8:09

Transmittal Memorandum

BY HAND DELIVERY

TO: Riley K. Hakoda
Land Use Commission
Leiopapa A Kamehameha Building
235 S Beretania St., Suite 406
Honolulu, HI 96813

FROM: Calvert G. Chipchase

DATE: July 22, 2020

RE: *In the Matter of the Petition of County of Hawai'i*; Docket No. DR 20-69
and *In the Matter of the Petition of Linda K. Rosehill, et al.*; Docket No.
DR20-70; Land Use Commission

We are sending you the following:

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<input checked="" type="checkbox"/>	--	07/22/2020	Response by Petitioners in Docket No. DR 20-70 to the Office of Planning's Supplemental Response to County's and Petitioner Rosehill et al.'s Petitions for Declaratory Order filed July 17, 2020; Certificate of Service

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Per your request

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LAND USE COMMISSION
STATE OF HAWAII

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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

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

RESPONSE BY PETITIONERS IN DOCKET NO. DR 20-70 TO THE OFFICE OF PLANNING'S SUPPLEMENTAL RESPONSE TO COUNTY'S AND PETITIONER ROSEHILL ET AL.'S PETITIONS FOR DECLARATORY ORDER FILED JULY 17, 2020

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

**RESPONSE BY PETITIONERS IN DOCKET NO. DR 20-70 TO THE
OFFICE OF PLANNING'S SUPPLEMENTAL RESPONSE TO COUNTY'S
AND PETITIONER ROSEHILL ET AL.'S
PETITIONS FOR DECLARATORY ORDER FILED JULY 17, 2020**

Petitioners Linda K. Rosehill, *et al.* (“**Petitioners**”) respond to the Office of Planning’s (“**OP**”) Supplemental Response (“**Supplemental Response**”) to the County of Hawai‘i’s (“**County**”) and Petitioners’ respective Petitions for Declaratory Order (together, the “**Petitions**”) filed April 17, 2020.¹

With genuine respect for OP and the role that it serves, its Supplemental Response abandons the position of objective advisor and becomes partisan. While we do not understand why OP has decided to stand so firmly against answering so simple a question as we have presented, its effort to avoid the answer has forced OP to take indefensible positions.

First, OP argues that the Rosehill Petition should be denied because our request to “compare the County’s definition of ‘STVR’ with the definition of ‘farm dwelling’ under Hawai‘i Revised Statutes (“**HRS**”) § 205-5.4(a)(4), to determine whether the definition of ‘farm dwelling’ regulated the rental period of a farm dwelling” does not present a “specific situation” that the Commission may address under HRS § 15-15-98(a). Supplemental Response at 3.

But comparing the definitions is **exactly** what OP told the Commission to do. According to OP, “**You must[] evaluate both definitions against each other** to determine whether a farm dwelling may be used as a short-term vacation rental,

¹ We apologize for the lateness of this response. We did not receive OP’s public testimony. We became aware of the public testimony on July 22, 2020 when we noticed the link to it on the State of Hawai‘i Land Use Commission’s website.

i.e., that it may be rented for 30 days or less.” Ex. 1 to Submission of Proposed Findings (6/25/20 transcript) at 89:11-14 (Apuna) (emphasis added).

The County said the same thing. According to the County, “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 (emphasis added).

Our Petition cannot be impermissibly speculative when we present precisely the same question that OP and the County have urged you to answer.

Second, OP argues that the County Petition is not “speculative” because that Petition “requires to the Commission to determine whether a[n] STVR use is consistent with the permitted use of a farm dwelling under State law.” OP Supplemental Response at 2.

But “STVR” has no fixed meaning. As we have pointed out, each county and the State define “STVR” differently.² Since “STVR” does not have a fixed meaning,

² 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**

declaring “STVR” use either “permitted” or “unpermitted” is as meaningless as Humpty Dumpty’s use of the word “glory” when he meets Alice.³

Either both “Petitions are “speculative” or neither Petition is “speculative.” Since both Petitions present the specific factual situation of the County’s definition, OP cannot pick which party it prefers and champion on position while decrying the other position as “speculative.”

Third, OP faults us for providing “incomplete” definitions of “STVR” and “farm dwelling.” OP at 4. According to OP, the Commission must mash the two definitions

bedrooms, one kitchen, and living areas. Each lot containing a short-term rental home shall include no more than two single-family dwelling units, or one single-family dwelling unit and one accessory dwelling unit, used for short-term rental home use, with **no more than a total of six bedrooms for short-term rental home use . . .**” Maui County Code § 19.04.040 (emphasis added).

Hawai‘i defines “Short-term vacation rental” as “a dwelling unit of **which the owner or operator does not reside on the building site, that has no more than five bedrooms for rent on the building site, and is rented for a period of thirty consecutive days or less.**” Hawai‘i County Code (“HCC”) § 25-1-5 (emphasis added)

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

³ “There is glory for you,” [said Humpty-Dumpty].

“I don’t know what you mean by ‘glory,’” Alice said.

Humpty Dumpty smiled contemptuously. “Of course you don’t-till I tell you.... When I use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean-neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

Lewis Carroll, *Through the Looking Glass*, in *The Complete Works of Lewis Carroll* 154, 196 (1994).

together to determine whether Petitioners' particular uses are allowed. OP Supplemental Response at 4-5.

Yet, as OP knows, neither Petition asks the Commission to declare any particular use lawful or unlawful. Both Petitions simply ask the Commission to address whether the County's definition in Ordinance 2018-114 is inconsistent at all times and in all circumstances with the definition in Chapter 205 as of June 4, 1976.

In making these arguments, OP says many things that simply are not true. We have listed some of them below:

- OP says, "Petitioners assert that because the definition of 'farm dwelling' does not expressly prohibit the rental of a farm dwelling for 30 days or less, which is the third element of the 'STVR' definition, then a farm dwelling may operate as a[n] STVR." OP Supplemental Response at 4. This is a strawman. We have never asserted anything like that.
- OP says, "We can assume that Petitioners meet the three elements of the STVR rental" OP Supplemental Response at 5. There is no such evidence in the record.
- OP says, "While Petitioners have argued repeatedly that the use of the farm dwelling is irrelevant to this declaratory ruling and have omitted details on the use from their question, such determination is essential to whether Petitioners may use their farm dwellings as STVRs." OP Supplemental Response at 5. This is another strawman. We have never asked the Commission to declare that our farm dwellings or any farm dwellings may be used as STVRs.
- OP spends four pages arguing that "STVRs were never allowed in the State Agricultural District as a matter of law." OP Supplemental Response at 5. Neither party has presented such a question to the Commission. Moreover, the term "STVR" is defined in different ways all over the state. *See supra* note 2. It cannot be impermissibly "speculative" to present a specific element from the specific definition of "STVR" that is at issue here and ask the Commission to declare whether Chapter 205 regulated this specific element on the specific date of June 4, 1976 while at the same time being perfectly proper to ask the Commission to rule on a question that no one has presented and that lacks any briefing or factual foundation.

- OP says, “Petitioners assert that over the past 43 years, Petitioners have legally operated their farm dwellings.” OP Supplemental Response at 5. This materially misunderstands our argument. We have never said anything like that.

Hawai‘i Administrative Rules (“HAR”) 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.” Section 15-15-100(a)(1)(A) provides that the Commission shall deny a petition for declaratory order where “[t]he question is speculative or purely hypothetical and does not involve an existing situation or one which may reasonably be expected to occur in the next future”

The “existing situation” here is that the County passed an ordinance outlawing short-term rentals of less than 31 days on any lot created on or after June 4, 1976, pursuant to Chapter 205. *See* County Ordinance 2018-114.

This is not about vacation uses generally or whatever sweeping subject OP claims. This is about a specific ordinance. The ordinance has three “specific factual” elements. *See* HAR § 15-15-98(a). There is nothing “speculative” or “hypothetical” about those factual elements. *See id.* § 15-15-100(a)(1)(A). The only “specific factual” element in dispute concerns rentals of less than 31 days. The County asserts that as of June 4, 1976, Chapter 205 prohibited such rentals within the Agricultural District. *See* County Petition 2 (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”). The County picked the date because the County believed that as of June 4, 1976, a farm dwelling could only be rented for 31 days or more. *See id.* The only question is whether that is a legally correct statement based on a comparison of the “specific factual” element of the ordinance with the definition of “farm dwelling.”

Comparing the definitions, everyone agrees that Chapter 205 did not prohibit rentals of less than 31 days. The County said so. *See Ex. 1 to Submission of Proposed Findings* (6/25/20 transcript) at 105:4-6 (Mukai) (“The County agrees that there’s no prohibition on farm dwellings being rented for 30 days or less.”). OP repeatedly said so:

- 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 filed 6/18/20 (“**OP Response**”) at 6.
- “[T]he definition of ‘farm dwelling’ does not expressly prohibit rentals of 30 days or less” OP Response at 8.
- “[T]he definition of ‘farm dwelling’ does not expressly prohibit rentals of 30 days or less,” Ex. 1 to Submission of Proposed Findings (6/25/20 transcript) at 92:5-7.
- “[A] renter for 30 days or less that farms the land may be allowed under the definition of ‘farm dwelling,’” Ex. 1 to Submission of Proposed Findings (6/25/20 transcript) at 91:1-6 (Apuna); *see also id.* 96:12-97:6 (Apuna).

The Petitions are limited to this narrow question. Whether any particular dwelling *is* a farm dwelling being rented for less than 31 days is not before the Commission. The County has concluded that a dwelling located on a lot created on or after June 4, 1976 is *never* a farm dwelling if it is rented for less than 31 days.

Both petitions present this question. Until its latest response, the OP urged the Commission to answer this question. Under the Rules, the Commission simply decides the issues presented in the Petitions. The Petitions rise or fall together. There is no intellectually honest way for the Commission to deny our Petition as “speculative” and grant the County Petition.

DATED: Honolulu, Hawai‘i, July 22, 2020.

CADES SCHUTTE
A Limited Liability Law Partnership



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Properties LLC; Nettleton S. and Diane
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document will be served on the below-named parties by e-mail and U.S. Mail, postage prepaid:

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

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