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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

**RESPONSE BY PETITIONERS IN
DOCKET NO. DR 20-70 TO THE
COUNTY OF HAWAII'S
SUPPLEMENTAL SUBMISSION
FILED JULY 10, 2020**

**DECLARATION OF CALVERT G.
CHIPCHASE**

EXHIBIT 1

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

**RESPONSE BY PETITIONERS IN DOCKET NO. DR 20-70
TO THE COUNTY OF HAWAII'S SUPPLEMENTAL SUBMISSION
FILED JULY 10, 2020**

Petitioners Linda K. Rosehill, *et al.* (the “**Rosehill Petitioners**”) respond to the County of Hawai‘i’s (the “**County**”) Supplemental Submission filed July 10, 2020 (the “**County Submission**”). As the County’s Submission reveals, the County will say anything to defend Ordinance No. 2018-114. In most of what it says, the County stands at odds with Hawai‘i Revised Statutes (“**HRS**”) chapter 205.

For example, during the hearing before the Land Use Commission (the “**Commission**”) on June 25, 2020, the County took the extreme view that “nothing . . . disallows [a person] **from simply having a residence on an Agricultural Zoned property.**” Ex. 1 (6/25/20 transcript) at 108:15-24 (Mukai) (emphasis add-

ed).¹ This position is obviously incorrect. As of June 4, 1976, HRS chapter 205 required any “farm dwelling” to be “located on and used in connection with a farm” or the family occupying the “farm dwelling” to receive income from agricultural activity. 1976 Haw. Sess. L. Act 199, § 1.

In its Submission, the County takes the opposite extreme view and asserts that a farm dwelling’s “use must be agriculture related and shall be framed as agricultural use.” County Submission at 4. This position is obviously incorrect. Again, on June 4, 1976, HRS chapter 205 required a “farm dwelling” to be “located on and used in connection with a farm” or for the family occupying the “farm dwelling” to receive income from agricultural activity. 1976 Haw. Sess. L. Act 199, § 1.

In a similarly tectonic shift, the County’s Petition informed the Commission that it must compare the definition of “short term vacation rentals” in Ordinance No. 2018-114 with the definition of “farm dwelling” in HRS chapter 205. *See* County Petition Mem. at 1 (“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.”). The definition in

¹ The County expressed the same view in the colloquy with Commission Okuda. *See* Ex. 1 (6/25/20 transcript) 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).

Ordinance No. 2018-114 only applies to rentals of less than 31 days. During the hearing before the Commission, the County conceded, “[T]here’s **no prohibition [in chapter 205] on farm dwellings being rented for 30 days or less.**” Ex. 1 (6/25/20 transcript) at 105:4-6 (Mukai) (emphasis added). Thus, there is no conflict between the definition in Ordinance No. 2018-114 and the definition of “farm dwelling” in HRS chapter 205.

To avoid this ineluctable conclusion, the County’s Submission claims that “[t]he **duration** of farm dwellings being rented for thirty (30) days or less is **simply not an issue herein.**” County Submission at 3 (emphasis added). Despite telling the Commission that it needed to compare the definition of “short term vacation rentals” in Ordinance No. 2018-114 with the definition of “farm dwelling” in HRS chapter 205 and then conceding that the definitions do not conflict, the County claims that the rental period is not at issue. With due respect to the County, that statement is nonsense.

Cutting through the doubletalk, County Ordinance No. 2018-114 **allows** anyone to rent a “farm dwelling” located in the State Agricultural District for residential or vacation purposes as long as the lease is for 31 days or more. *See* Ordinance No. 2018-114; 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, County Ordinance No. 2018-114 **prohibits** a farmer from renting a “farm dwelling” located in the State Agricultural District under a month-to-month lease even though he or she plans to use the dwelling in connection with a farm or to derive income from agricultural activity. *Id.* at 129:11-130:5 (“[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: ‘. . . **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.”) (emphasis added).

As the Commission can see, duration is plainly the only “issue herein.” The question before the Commission is whether, as of June 4, 1976, chapter 205 prohibited renting a “farm dwelling” for less than 31 days. The obvious and irrefutable answer to that question is “no.”

DISCUSSION

I. These Petitions Are About the Duration of the Rentals.

Duration is **the only** issue presented in these Petitions. The Rosehill Petition requests 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. The County Petition asserts that “[t]he 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). The Office of Planning (“OP”) frames the issue the same way: “**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.**” Ex. 1 (6/25/20 transcript) at 89:4-23 (emphasis added).

Ordinance No. 2018-114 makes a dwelling that “is rented” for any purpose “for a period of **thirty consecutive days or less**” a “short-term vacation rental.” (Emphasis added.) Consistent with its definition, County asserts that any “farm dwelling” rented for “less than 3[1] days” is “**by definition**” a “short-term vacation

rental” and is not permitted even if it is rented to a farmer. *See* Ex. 1 (6/25/20 transcript) at 124:17-125:10 (Director Yee) (emphasis added). Thus, the duration of the rental is precisely the issue.

II. Chapter 205 Did Not Prohibit Rentals of Less than 31 Days.

Chapter 205 is clear. As the County concedes, “[T]here’s **no prohibition** [in chapter 205] on farm dwellings being rented for 30 days or less.” Ex. 1 (6/25/20 transcript) at 105:4-6 (Mukai) (emphasis added); *accord* Ex. 1 (6/25/20 transcript) at 92:5-7 (Apuna) (“[T]he definition of ‘farm dwelling’ **does not expressly prohibit rentals** of 30 days or less”) (emphasis added)). OP agrees that renting a farm dwelling for 30 days or less does not transform the dwelling into a “short term vacation rental.” Ex. 1 (6/25/20 transcript) at 91:1-6 (Apuna) (“[A] renter for 30 days or less that farms the land may be allowed under the definition of ‘farm dwelling.’”). These concessions answer the only question before the Commission. Since there is “no prohibition [in chapter 205] on farm dwellings being rented for 30 days or less,” the Rosehill Petition should be granted.

III. The County Cannot Rewrite Its Petition or the Definition of “Short-term Vacation Rental.”

According to its Submission, the County asks for a declaration that farm dwellings cannot be used as “overnight accommodations.” County Submission at 3. That is **not** what the County Petition requests. The County Petition asks for a declaration “that ‘farm dwellings’ may not be used as short-term vacation rentals pursuant to Hawai‘i Revised Statutes (‘HRS’) §§ 205-2 and 205-4.5, and Hawai‘i Administrative Rules (‘HAR’) § 15-15-25,” County Petition at 1, because “[t]he 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.

County Ordinance No. 2018-114 prohibits rentals of “a period of **thirty consecutive days or less.**” (Emphasis added.) Not a single word in the Ordinance prohibits “**overnight accommodations.**”² County Submission at 3 (emphasis added). On the contrary, the County admittedly allows “overnight accommodations” in “farm dwellings” as long as those accommodations last 31 nights or more. Ex. 1 (6/25/20 transcript) at 115:21-117:17 (Mukai); *id.* at 118:7-13 (Yee).

IV. The County Improperly Mashes the Separate Standards for “Farm Dwelling” into a Single Definition.

The County asserts, “There can be no **isolation** of portions of HRS § 205-4.5 and expand it to make an argument that somehow Short-Term Vacation Rentals are a permissible use in a ‘farm dwelling’ on lots created after June 4, 1976.” County Submission at 4 (emphasis added). After cautioning against segmentation, the County engages in conflation and outright distortion by asserting that the definition of “farm dwelling” requires “that a family unit occupies [the dwelling] while **obtaining income** from agricultural activities **on a farm** that the family **owns in fee or leasehold.**” *Id.* (emphasis added). Chapter 205 does not say anything of the sort.

² Similarly, the County argues, “By its very description, a Short-Term Vacation Rental is not used in connection with a farm with agricultural supporting activities from which the unit’s occupants obtain income.” County Submission at 6. As we have discussed, labels are meaningless. The County urged the Commission to compare the “definitions” in its Ordinance and chapter 205. The County’s definition of “short-term vacation rental” does not say anything about “use in connection with a farm” or the source of the “occupant’s income.” See County Ordinance No. 2018-114.

The definition of “farm dwelling” in chapter 205 is stated in two clauses connected by the disjunctive term “or.” Specifically, “[f]arm 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.” 1976 Haw. Sess. L. Act 199, § 1 (emphasis added). If either clause is satisfied, the dwelling is a “farm dwelling.” Recognizing that the clauses are separate is not an exercise in “isolation”; it is a plain reading of the statutory text. *See State v. Sorenson*, 44 Haw. 601, 604, 359 P.2d 289, 291 (1961) (“[T]he common usage of the word ‘or’ is as a disjunctive, indicating an alternative.”). OP agrees with our reading of the definition. *See* OP Response at 4 (“[A] ‘farm dwelling’ is either a single-family dwelling: (1) located on and used in connection with a farm; **or** (2) where agricultural activity provides income to the family occupying the dwelling.”) (emphasis added).

V. The County Has Already Admitted that the Owner of a Farm Dwelling Does Not Need to Occupy It.

The County contends that “the definitions and uses for ‘farm dwellings’ and Short-Term Vacation Rentals are in conflict, as a STVR, by its very definition in HCC Section 25-1-5, the owner or operator does not exclusively occupy the unit as a single family or even live on site.” County Submission at 4 (emphasis omitted).

As the County admitted during the June 25 meeting, however, “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) (emphasis added). That admission is consistent with chapter 205. As of June 4, 1976, chapter 205 did not require “the owner or operator”

of a farm dwelling to “reside on the building site.” *See* 1976 Haw. Sess. L. Act 199, § 1. Again, OP agrees with our reading of the definition. *Cf.* Ex. 1 (6/25/20 transcript) at 91:1-6 (Apuna) (“[A] renter for 30 days or less that farms the land may be allowed under the definition of ‘farm dwelling’.”).

VI. The Petitions Do Not Concern “Hotel” Use.

Throwing out anything in the hope that something will stick, the County asserts that a “short-term vacation rental” “is the equivalent of a resort or hotel accommodation, providing lodging for visitors or transients for the purposes of tourism or vacation.” County Submission at 4. The County knows that this statement is neither true nor relevant.

First, as noted above, the County asserted during the June 25 meeting that a “farm dwelling” rented for “less than 30 days” is “by definition” a “short-term vacation rental” and is not permitted **even if the dwelling is rented to a farmer.** Ex. 1 (6/25/20 transcript) at 124:17-125:10 (Director Yee). To the County, it does not matter that the person renting a dwelling is using it “in connection with a farm” or is receiving “income” from “agricultural activity.” *See* 1976 Haw. Sess. L. Act 199, § 1. The “only fact” that “makes [a dwelling] a short-term vacation rental” is that “[the County’s] ordinance [has] defined short-term vacation rentals as less than 3[1] days.” *See* Ex. 1 (6/25/20 transcript) at 124:17-125:10 (Yee responding to Commissioner Chang). Thus, Ordinance No. 2018-114 and these Petitions are “only” about duration.

Second, a farm dwelling rented for less than 31 days is not equivalent to a “hotel.” Under the County Code, a “hotel” is a “a building or group of buildings

containing six or more rooms or suites which provides transient lodging accommodations, **meals, entertainment, and various personal services for compensation . . .**” Hawai‘i County Code § 25-1-5 (emphasis added).

Third, the only “specific factual situation” before the Commission is set forth in the elements of the County’s definition of “short-term vacation rental.” See HAR § 15-15-98(a) (“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.”).

Finally, the Petitions do not ask the Commission to declare that “hotels” were allowed in the State Agricultural District on June 4, 1976, or to condemn “hotels” within the State 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 No. 2018-114. The question under these definitions is whether chapter 205 prohibited renting a “farm dwelling” for less than 31 days.

VII. The County Cannot Use a Rule to Change a Statute.

Grasping for any straw, the County picks up Hawai‘i Administrative Rules (“**HAR**”) § 15-15-25. County Submission at 5. This rule provides:

(a) Permissible uses within the agricultural district on land with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be those uses set forth in section 205-4.5, HRS.

(b) Permissible uses within the agricultural district on land with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class of C, D, E, and U shall be those uses as set forth in sections 205-2, 205-4.5, and 205-5, HRS, and also uses compatible to the activities described in 205-2(d), HRS.

HAR § 15-15-25.

The Rule was promulgated in 1986. The County definition invokes chapter 205 as of June 4, 1976. No conception of statutory interpretation takes guidance from a rule that was adopted 10 years after the relevant statute was enacted. *See Gillan v. Gov't Employees Ins. Co.*, 119 Hawai'i 109, 114, 194 P.3d 1071, 1076 (2008) (“This court generally reviews questions of statutory interpretation *de novo* . . .”).

In any event, the Rule does not say anything helpful. The Rule expressly permits the uses set forth in HRS § 205-4.5. *See* HAR § 15-15-25. As of June 4, 1976, section 205-4.5 expressly allowed “farm dwellings.” Thus, the Rule merely points us back to statute. Under the statute, the only question before the Commission is whether, as of June 4, 1976, chapter 205 regulated the minimum rental period of “farm dwellings.”

VIII. The County’s Reliance on Subsequent Legislative History Is Improper.

Looking past chapter 205 as of June 4, 1976, the County invokes subsequent legislative history. *See* County Submission at 4-5. As with the prior efforts to use subsequent legislative history, the present effort is improper.

A. The County’s authority to regulate prospectively is not at issue.

To the extent the County invokes subsequent legislative history to demonstrate its authority to **regulate prospectively** under chapter 205, the County’s authority is beside the point. The issue before the Commission is whether the “farm dwelling” definition **as of June 4, 1976**, regulated the duration of rentals.

The County picked that date. The County did not regulate short-term rentals on a going-forward basis using its current authority. Instead, the County reached back in time to prohibit short-term vacation rentals on lots created on or after June 4, 1976, based on its assertion that the definition of “farm dwelling” prohibited rentals of less than 31 days. *See* County Petition at 2 (“Bill 108 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.”) (emphasis added). Thus, the issue is whether chapter 205 regulated the duration of rentals as of June 4, 1976.

B. The County fails to explain why subsequent legislative history may be considered.

To the extent that the County relies on subsequent legislative history to **interpret** chapter 205 as of June 4, 1976, its reliance is misplaced. As we explained in our response to the County Petition, the resort to legislative history is improper because the County does not contend that the definition of “farm dwelling” is ambiguous. “Inasmuch as the statute’s language is plain, clear, and unambiguous, **our inquiry regarding its interpretation should be at an end.**” *State v. Yamada*, 99 Hawai‘i 542, 553, 57 P.3d 467, 478 (2002) (emphasis added). Indeed, “we are not at liberty to rely upon legislative history in interpreting the statute, even if the history may show that the legislature really meant and intended something not expressed by the phraseology of the statute.” *State v. Mainaupo*, 117 Hawai‘i 235,

251, 178 P.3d 1, 17 (2008) (quotations and brackets omitted). Reliance on subsequent legislative history is especially problematic and must be approached with “extreme caution,” *First Ins. Co. of Hawai‘i v. Dayoan*, 124 Hawai‘i 426, 433, 246 P.3d 358, 365 (2010), because “the views of a subsequent [legislature] form a hazardous basis for inferring the intent of an earlier one,” *United States v. Price*, 361 U.S. 304, 313 (1960).

All of these rules were laid out in our response to the County Petition. The County does not argue otherwise in its Submission.

C. The cited subsequent legislative history is not helpful.

The subsequent legislative history cited by the County does not help it. First, the County cites HRS § 205-2(d)(12) as the “one option for overnight accommodations (twenty-one days or less)” County Submission at 5. The County previously cited this provision in its Petition, and we addressed it in our Response. In brief, the provision for “overnight accommodations” (specific to Maui) was added in 2012. If the amendment in 2012 were probative of anything relevant to the Petitions, it would be that the specific allowance for “overnight accommodations” of less than 21 days suggests that “overnight accommodations” of 22 days or more are not subject to regulation. Since the County prohibits “rentals” of less than 31 days, we would conclude that the County Code is at odds with State law.

While this history only shows that Rosehill Petition is right, the 36-year gap between the adoption of the definition of “farm dwelling” in one part of chapter 205 in 1976 and the amendment of an unrelated provision of the statute in 2012 is too wide. With more than a generation between legislation, we are left simply to shrug

and say that the subsequent legislative history does not illuminate the intentions of the earlier legislature. Indeed, that is the only possible response under settled rules of statutory interpretation. *See First Ins. Co. of Hawai'i*, 124 Hawai'i at 433, 246 P.3d at 365.

Second, the County quotes a provision in HRS § 205-5(b). The current version of the provision contemplates the agricultural uses provided by HRS §§ 205-2 and -4.5. The current version also requires the counties to adopt “ordinances setting forth procedures and requirements, including provisions for enforcement, penalties, and administrative oversight, for the review and permitting of agricultural tourism uses and activities as an accessory use on a working farm, or farming operation” HRS § 205-5(b). This provision was added in 2006—three decades too late for our purposes. 2006 Haw. Sess. L. Act 250, § 3. Equally important, nothing in the provision regulates the duration of any lease or rental of a “farm dwelling” as expressly allowed by HRS § 205-4.5.

Third, the County relies on a 1983 committee report suggesting that there should be “faithful adherence to present . . . statutory protection and promotion of agriculture” to “prevent such inappropriate and excessive conversion of agriculture land to other uses.”³ County Submission at 6 (quoting Conf. Comm. Rpt. No. 43 in

³ This statement was not about “farm dwellings.” It was an admonition against redistricting: “[F]aithful adherence to present state constitutional provisions for agricultural land classification or zoning, statutory protection and promotion of agriculture, and regulatory identification of important agricultural land will substantially prevent such inappropriate and excessive conversion of agricultural land to other uses.” *Save Sunset Beach Coal. v. City & County of Honolulu*, 102 Hawai'i

1983 House Journal, at 800). The County’s invocation of the “protection and promotion of agriculture” is ironic considering that the County allows purely residential uses with the State Agricultural District. *E.g.*, Ex. 1 (6/25/20 transcript) at 108:15-24 (Mukai).

Irony aside, general statements in subsequent legislative history do not override clear and specific definitions in prior statutory enactments. “[W]e are not at liberty to rely upon legislative history in interpreting the statute, even if the history may show that the legislature really meant and intended something not expressed by the phraseology of the statute.” *Mainaupo*, 117 Hawai‘i at 251, 178 P.3d at 17 (quotations and brackets omitted).

In any event, “faithful adherence” to the statute allows “farm dwellings.” Faithful adherence to the definition of “farm dwelling” does not impose a minimum rental period.

Finally, the County has already admitted that chapter 205 does not regulate the duration of rentals. Ex. 1 (6/25/20 transcript) at 105:4-6 (Mukai). The County is correct. And zoning laws “may not be extended by implication.” *See Foster Vill. Cmty. Ass’n*, 4 Haw. App. at 469-70, 667 P.2d at 854.

IX. When All Else Fails, the County Turns to Speculation.

The County speculates, “If the Rosehill Petitioners were previously using the **farm dwelling** for anything other than that as **defined by HRS §205-2 and §205-4.5**, then it was not a lawful use in the State Land Use Agricultural district just

465, 476, 78 P.3d 1, 12 (2003) (quoting Conf. Comm. Rpt. No. 43, in 1983 House Journal, at 800).

because they got away with it.” County Submission at 6 (emphasis added). None of the Rosehill Petitioners admit to “previously using the[ir] farm dwelling[s] for anything other than that as defined by HRS §205-2 and §205-4.5.” The specific uses of particular properties are not before the Commission or relevant to the ruling on the Petitions. The only specific factual situation before the Commission is set forth in the elements of the County’s definition of “short-term vacation rental” in Ordinance No. 2018-114.

CONCLUSION

We are before the Commission on Petitions for declaratory orders. As presented in the Petitions, the Commission has been called upon to compare the definition of “farm dwelling” in chapter 205 with the definition of “short-term vacation rental” in Ordinance No. 18-114. The parties have briefed the comparison. The parties have made presentations to the Commission. The parties have answered the Commission’s questions. The parties have submitted further briefing.

This crucible has produced important admissions. As the County concedes, “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). OP agrees 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.

Those admissions resolve the Petitions. The Commission should rule that as of June 4, 1976, chapter 205 did not prohibit rentals of “farm dwellings” for less than

31 days. In making this declaration, the Commission should grant the Rosehill Petition and deny the County Petition. Nothing more is required.

DATED: Honolulu, Hawai'i, July 20, 2020.

CADES SCHUTTE
A Limited Liability Law Partnership

A handwritten signature in cursive script, appearing to read "Calvert G. Chipchase", written in black ink. The signature is positioned above a horizontal line.

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

BEFORE THE LAND USE COMMISSION
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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

Properties LLC; Nettleton S. and Diane
E. Payne, III

DECLARATION OF CALVERT G. CHIPCHASE

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

1. I am one of the attorneys for Petitioners Linda K. Rosehill, *et al.* in this matter, and I 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.

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

DATED: Honolulu, Hawai'i, July 20, 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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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. Orodener?

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

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; Sontida S. Salim, Trustee of the Sontida 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 20, 2020.

CADES SCHUTTE
A Limited Liability Law Partnership

A handwritten signature in cursive script, appearing to read "Calvert G. Chipchase", with a horizontal line extending to the right from the end of the signature.

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