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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In the Matter of the Petition of

COUNTY OF HAWAI'I, for a Declaratory Order that "Farm Dwellings" May Not Be Operated As Short-Term Vacation Rentals Under Hawai'i Revised Statutes §§ 205-2 and 205-4.5, and Hawai'i Administrative Rules § 15-15-25

In the Matter of the Petition of:

Linda K. Rosehill, Trustee of the Linda K. Rosehill Revocable Trust dated August 29, 1989, as amended; Thomas B. and Rea A. Wartman; Mark A. Dahlman; Mark B. Chesebro and Caroline Mitchel, Trustees of the First Amendment and Restatement of the 1999 Mark Brendan Chesebro and Caroline Mitchel Revocable Trust U/D/T dated January 6, 1999; Somtida S. Salim, Trustee of the Somtida Salim Living Trust dated February 15, 2007; Todd M. Moses; Psalms 133 LLC; John T. Fenton, Trustee of the John T. Fenton Revocable Trust dated 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 HAWAI'I'S SECOND SUPPLEMENTAL SUBMISSION FILED AUGUST 10, 2020

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 HAWAI'I'S SECOND SUPPLEMENTAL SUBMISSION FILED AUGUST 10, 2020

Petitioners Linda K. Rosehill, *et al.* (the "**Rosehill Petitioners**") respond to the County of Hawai'i's (the "**County**") Second Supplemental Submission filed on August 10, 2020 (the "**County Submission**").

The County Submission again shows that the County cannot defend its position. With nothing substantive to say, the County relies on obfuscation and misdirection. At each blind turn, the County makes arguments that have no connection to the Petitions, the County Ordinance or the points that the County has previously made in writing and under oath in the meetings before the Commission.

First, the County states, "[U]nder Hawaii law, farm dwellings must be used in connection with agriculture." County Submission at 3. In a generic sense, this is partly true. Since June 4, 1976, "farm dwelling" has been defined as "a single-family dwelling located on and used in connection with a farm **or** where agricultural activity provides income to the family occupying the dwelling." 1976 Haw. Sess. L. Act 199, § 1 (emphasis added).

It is entirely true that whether any or all of the Rosehill Petitioners' existing "dwellings" in the Agricultural District are "used in connection with a farm" has nothing to do with the Petitions. The Petitions only concern the County's idiosyncratic definition of "short-term." *See* Rosehill Petition at 20; County Petition Mem. at 1. To the County, 31 days separates a permitted "farm dwelling" from an unpermitted regular "dwelling." *E.g.*, 6/25/20 transcript 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).

It is also entirely true that the County does not care whether a dwelling is "used in connection with a farm." To the County, a dwelling is a "farm dwelling" even if it has **no** connection to agriculture as long as it is rented for at least 31 days. *See, e.g.*, 7/23/20 transcript 136:12-24 ("COMMISSIONER OKUDA: 'My question to you, I was telling you up-front, I have no intention on conducting any farm activity. I'm going to build my **McMansion** on the property. **I'm not going to farm**. **There's not going to be any agricultural activity**. Will you still allow me to build my mansion when I'm telling you absolutely not, there will be no agricultural activity? And when -- let me clarify, when I say will you let me build, I'm asking, what is the County's position?' MR. YEE: '**I'm still going to say that it's still a farm dwelling unit**.'") (emphasis added). On the other hand, the County considers a dwelling that rented on a month-to-month lease to a farmer who is actively farming the land

to be an illegal "short-term rental." To the County, the "connection with agriculture" is irrelevant. *See* 6/25/20 transcript at 124:17-125:10 (Yee affirming that, if a dwelling is advertised "**a farm dwelling for use less than 30 days**," then, "**by [the County's] definition it's a short-term vacation rental**.") (emphasis added); 6/25/20 transcript at 129:11-130:5 (Suprenant affirming that a farmer could not rent his property to "a farmer from Connecticut for 29 days" even if the farmer from Connecticut was "going to plant some papaya trees," because a duration of less than 31 days would still be "a short-term vacation rental.").

Second, the County asserts that "a scenario where vacation rentals are allowed on agriculturally zoned property[] is exclusively governed by agricultural tourism." County Submission at 3. The County cannot actually mean what it has written because the County Code **expressly allows** "short-term vacation rentals" on lots created before June 4, 1976. *See* Hawai'i County Code § 25-4-16.1(e). For this reason, the limited question before the Commission is whether the HRS Chapter 205, as of June 4, 1976, required farm dwellings to be rented for at least 31 days.

Third, as we have explained, the County cannot turn to the **current** provisions of Chapter 205 when it chose to **reach back in time** to June 4, 1976. The County could have regulated **prospectively**. The County chose to regulate **retroactively**. Since the County chose to regulate retroactively, we only care about the law as of June 4, 1976. The agricultural tourism provision, which was added in 2006—three

decades after the retroactive date that the County selected—does not matter.[1] 2006 Haw. Sess. L. Act 250, § 3.

Fourth, the County contends, "[T]he Rosehill Petition[er]s have consistently ignored the use of a farm dwelling . . . ." County Submission at 4. This contention is wildly untrue. We have paid very close attention to the definition of "farm dwelling." *See* Rosehill Petition at 22-26. Nothing in the definition of "farm dwelling" prohibits rentals of less than 31 days. The County has expressly conceded this point. *See* 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.").

Fifth, the County asserts that Rosehill Petitioners "have ignored details of Petitioners['] use in their submissions and argument . . . ." This assertion is disingenuous. Nothing in the County's Petition "details Petitioners use." Neither Petition details specific uses because the County and Petitioners cooperatively discussed the issues and **mutually agreed** to petition the Commission for a ruling as to whether HRS Chapter 205 has, since June 4, 1976, prohibited the use that the County began regulating in 2019. For this reason, the County Petition phrases the issue before the Commission as whether the "**definitions** and uses for farm dwellings and short-term vacation rentals irreconcilably conflict and show that short-

[1] Even if a provision adopted 2006 held some sway in understanding the legislative intent a full generation earlier, nothing in the provision would change the outcome of the Petitions because nothing in the provision regulates the duration of any lease or rental of a "farm dwelling." The County does not argue otherwise in its most recent Submission. Rooting around decades of legislation for some reference to "tourism" is meaningless when the County chose the stark measure of 31 days to demarcate permitted and unpermitted uses.

term vacation rental use is incompatible with being a farm dwelling." County Petition Mem. at 1 (emphasis added). The County can hardly complain that Petitioners do not focus on their particular "uses" when the County does not focus on those uses and when both sides agreed not to focus on the uses when they filed the Petitions.

The parties agreed not to litigate particular uses because they are not relevant to the limited question presented in this proceeding. The County Code prohibits rentals of less than 31 days on lots in the State Agricultural District that were created on or after June 4, 1976. This regulation is the only relevant fact. To that very limited fact, we apply the law as of June 4, 1976.

Sixth, the County asserts, "[T]here is no evidence that [the Rosehill Petitioners'] operation of farm dwellings as STVRs were ever legal." This argument is a different spin on the previous point. The County does not assert that the Rosehill Petitioners' uses "were ever illegal." Those facts are not before the Commission because those facts do not matter in this proceeding. The County agreed that the narrow issue before the Commission could be framed and submitted without detailed factual presentations. Accordingly, the County filed its Petition without a detailed factual presentation. The Rosehill Petitioners did likewise. Faced with the obvious answer that Chapter 205 did not prohibit renting a "farm dwelling" for less than 31 days, the County is trying to flip the script and make these Petitions about something else entirely.

Finally, the County claims "Hawaii law has always mandated that a farm dwelling be used in connection with a farm, which by definition is counter to purpose and

intent of Short Term Vacation Rental." County Submission at 4. With this argument, we come back to meaningless labels. Chapter 205 defines "farm dwelling" as "a single-family dwelling located on and used in connection with a farm or where agricultural activity provides income to the family occupying the dwelling." 1976 Haw. Sess. L. Act 199, § 1. County Code defines "Short Term Vacation Rental" as "a dwelling unit of which the owner or operator does not reside on the building site, that has no more than five bedrooms for rent on the building site, and is rented for a period of thirty consecutive days or less." County Ordinance 2018-114. Ask the County which parts of these definitions—the actual definitions and not the labels—conflict. The County's response will be telling.

The County's Petition should be denied and the Rosehill Petition granted.

DATED: Honolulu, Hawai'i, August 11, 2020.

CADES SCHUTTE
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BEFORE THE LAND USE COMMISSION

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In the Matter of the Petition of COUNTY OF HAWAIʻI, for a Declaratory Order that "Farm Dwellings" May Not Be Operated As Short-Term Vacation Rentals Under Hawai'i Revised Statutes §§ 205-2 and 205-4.5, and Hawai'i Administrative Rules § 15-15-25	Docket Nos. DR 20-69 & DR 20-70 **CERTIFICATE OF SERVICE**
In the Matter of the Petition of: Linda K. Rosehill, Trustee of the Linda K. Rosehill Revocable Trust dated August 29, 1989, as amended; Thomas B. and Rea A. Wartman; Mark A. Dahlman; Mark B. Chesebro and Caroline Mitchel, Trustees of the First Amendment and Restatement of the 1999 Mark Brendan Chesebro and Caroline Mitchel Revocable Trust U/D/T dated January 6, 1999; Somtida S. Salim, Trustee of the Somtida Salim Living Trust dated February 15, 2007; Todd M. Moses; Psalms 133 LLC; John T. Fenton, Trustee of the John T. Fenton Revocable Trust dated February 27, 2014; Frances T. Fenton, Trustee of the Frances T. Fenton Revocable Trust dated February 27, 2014; Donald J. K. and Stacey S. Olgado; Dirk and Laura Bellamy Hain, Trustees of the Bellamy-Hain Family Trust dated September 13, 2017; Peter A. Gunawan; Janti Sutedja; Neil Almstead; Doyle Land Partnership; James T. Kelnhofer; Charles E. and Nancy E. Rosebrook; Michael Cory and Eugenia Maston; Paul T. and Delayne M. Jennings, Trustees of the Jennings Family Revocable Trust dated January 5, 2010; Maggholm	

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

CERTIFICATE OF SERVICE

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

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DATED: Honolulu, Hawai‘i, August 11, 2020.

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