HOLLY T. SHIKADA 4017
Attorney General of Hawai‘i

LINDA L.W. CHOW 4756
DANIEL A. MORRIS 4815
JULIE H. CHINA 6256
Deputy Attorneys General
Department of the Attorney
General, State of Hawai‘i
465 South King Street, Room 300
Honolulu, Hawai‘i 96813
Telephone: (808) 587-2992
Email: julie.h.china@hawaii.gov

Attorneys for Appellee
State of Hawai‘i Land Use Commission

Electronically Filed
THIRD CIRCUIT
3CCV-21-0000178
28-FEB-2022
02:21 PM
Dkt. 62 PORD

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI‘I

LINDA K. ROSEHILL, Trustee of the Linda K. Rosehill Revocable Trust dated August 29, 1989, as amended; 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; 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; CHARLES E. and NANCY E. ROSEBROOK; MICHAEL CORY and EUGENIA MASTON; PAUL T. and	CIVIL NO. 3CCV-21-0000178 (Agency Appeal) Docket Nos. DR 20-69 & DR 20-70 **[PROPOSED]** DECISION AND ORDER AFFIRMING THE LAND USE COMMISSION'S CONSOLIDATED ORDER DENYING ROSEHILL, ET AL. IN DOCKET NO. DR 20-70 AND GRANTING COUNTY OF HAWAI‘I IN DOCKET NO. DR 20-69, DATED MAY 20, 2021 JUDGE: HON. WENDY M. DEWEESE HEARING DATE: JANUARY 10, 2022

DELAYNE M. JENNINGS, Trustees of the Jennings Family Revocable Trust dated January 5, 2010; MAGGHOLM PROPERTIES LLC; NETTLETON S. and DIANE E. PAYNE, III,	)
Appellants,	)
v.	)
STATE OF HAWAI‘I, LAND USE COMMSSION; and COUNTY OF HAWAI‘I,	)
Appellees.	)

HOLLY T. SHIKADA 4017
Attorney General of Hawai‘i

LINDA L.W. CHOW 4756
DANIEL A. MORRIS 4815
JULIE H. CHINA 6256
Deputy Attorneys General
Department of the Attorney
General, State of Hawai‘i
465 South King Street, Room 300
Honolulu, Hawai‘i 96813
Telephone: (808) 587-2992
Email: julie.h.china@hawaii.gov

Attorneys for Appellee
State of Hawai‘i Land Use Commission

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI‘I

LINDA K. ROSEHILL, Trustee of the Linda K. Rosehill Revocable Trust dated August 29, 1989, as amended; 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; 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; CHARLES E. and NANCY E. ROSEBROOK; MICHAEL CORY and EUGENIA MASTON; PAUL T. and	CIVIL NO. 3CCV-21-0000178 (Agency Appeal) Docket Nos. DR 20-69 & DR 20-70 DECISION AND ORDER AFFIRMING THE LAND USE COMMISSION'S CONSOLIDATED ORDER DENYING ROSEHILL, ET AL. IN DOCKET NO. DR 20-70 AND GRANTING COUNTY OF HAWAI‘I IN DOCKET NO. DR 20-69, DATED MAY 20, 2021 JUDGE: HON. WENDY M. DEWEESE HEARING DATE: JANUARY 10, 2022

DELAYNE M. JENNINGS, Trustees of the Jennings Family Revocable Trust dated January 5, 2010; MAGGHOLM PROPERTIES LLC; NETTLETON S. and DIANE E. PAYNE, III,	)
Appellants,	)
v.	)
STATE OF HAWAI‘I, LAND USE COMMSSION; and COUNTY OF HAWAI‘I,	)
Appellees.	)

DECISION AND ORDER AFFIRMING THE LAND USE COMMISSION'S CONSOLIDATED ORDER DENYING ROSEHILL, ET AL. IN DOCKET NO. DR 20-70 AND GRANTING COUNTY OF HAWAI'I IN DOCKET NO. DR 20-69, DATED MAY 20, 2021

I. INTRODUCTION

This case is an appeal of the May 20, 2021, State of Hawai'i Land Use Commission (the "**LUC**" or "**Commission**"), Consolidated Order Denying Rosehill, et al. in Docket No. DR 20-70 and Granting County of Hawai'i in Docket No. 20-69. Appellants filed their notice of appeal on June 18, 2020. Briefing was completed on November 1, 2021, and oral arguments were heard on January 3, 2022. Calvert G. Chipchase, Esq. and Christopher T. Goodin, Esq. appeared for Appellants[1], Mark D. Disher, Esq. appeared for Appellee County of Hawai'i (the "**County**"), and Deputy Attorney General Julie H. China, Esq. appeared for Appellee LUC.

Based on the record on appeal, the briefs submitted, arguments of counsel, and applicable law, the Court finds as follows:

II. PROCEEDINGS BEFORE THE LUC AND ON APPEAL TO THIS COURT

1. On May 19, 2020, the County filed a Petition for Declaratory Order (LUC Case No. DR 20-69) seeking an order that "'farm dwellings' may not be used as short term vacation rentals pursuant to [Hawaii Revised Statutes ("**HRS**")] §§ 205-2 and 205-4.5 and Hawaii Administrative Rules ("**HAR**") § 15-15-25." Doc. No. 1 at R00002. According to the County,

[1] "**Appellants**" means Appellants Petitioners Linda K. Rosehill, Trustee of the Linda K. Rosehill Revocable Trust dated August 29, 1989, as amended; 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; 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, 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; and Nettleton S. and Diane E. Payne, III.

the statutes and administrative rule require that: "a) a 'farm dwelling' is exclusively occupied by a single family that owns the property in fee or leasehold from which the family obtains income from agricultural activities[;] and b) 'farm dwellings' may not be used as short-term vacation rentals." Doc. No. 1 at R00005.

2. Appellants filed a Petition for Declaratory Order (LUC Case No. DR 20-70) on May 22, 2020, seeking a declaratory order that "[a]s of June 4, 1976, the plain language of [HRS] Chapter 205 did not dictate how long a 'farm dwelling' must be rented in order to qualify as a 'farm dwelling.'" Doc. No. 2 at R00020. Appellants claimed that "[t]he [County] has usurped the responsibility of the [LUC] by attempting to interpret and enforce the State Land Use Law, Chapter 205." Doc. No. 2 at R00015. The alleged usurpation took place on April 1, 2019, the effective date of Hawai'i County Ordinance 2018-114 ("**Bill 108**"), when the County amended the Hawai'i County Code ("**HCC**") to bar rentals of dwellings within the State Agricultural District for a period of 30 consecutive days or less, unless the lot was created before June 4, 1976. *Id*.

3. Appellants alleged the following facts in support of their Petition: a) Appellants own land classified as Agricultural under the statewide land use classification system, Doc. No. 2 at R00025-33; b) Appellants' lots were created after June 4, 1976, Doc. No. 2 at R00025-33; and c) prior to the passage of Bill 108, Appellants had rented their land for periods of 30 days or less. Doc. No. 2 at R00025. Although not asserted as a fact by Appellants, the Petition also states that Appellants "each own dwellings on land classified as Agricultural under the statewide land use classification." Doc. No. 2 at R00022.

4. The County and Appellants filed a Stipulation to consolidate their separate Petitions for Declaratory Order on June 12, 2020. Doc. No. 3 at R00075.

5. The State of Hawai‘i Office of Planning (the "**OP**") filed a response to the two Petitions on June 18, 2020. Doc. No. 7 at R00119. The OP: a) agreed with the County that a "farm dwelling" may not be used as a Short-Term Vacation Rental ("**STVR**") in the State Agricultural District; b) disagreed with Appellants that State law must explicitly prohibit a minimum rental period in order to prohibit the rental of an STVR "farm dwelling"; and c) disagreed with the County that a "farm dwelling" existing prior to June 4, 1976, is grandfathered and may operate as a nonconforming STVR. Doc. No. 7 at R00120.

6. Appellants filed a Statement of Position regarding the County's Petition on June 19, 2020. Doc. No. 8 at R00129. According to Appellants, as of June 5, 1976, HRS Chapter 205 does not prohibit "farm dwellings" from being rented for less than 31 days. Doc. No. 8 at R00134.

7. On June 23, 2020, Appellants filed a Statement of Position regarding the OP's response to the two Petitions. Doc. No. 13 at R00174. Appellants claimed that "Chapter 205 did not prohibit renting a 'farm dwelling' for 'a period of thirty consecutive days or less.'" Doc. No. 13 at R00179.

8. LUC meetings were held on the Petitions on June 25, July 23, and August 13, 2020, via video-conferencing technology. Doc. No. 15 at R00197; Doc. No. 23 at R00645; and Doc. No. 34 at R00920. After the June 25, 2020, meeting, the Commission determined that the Stipulation was sufficient to consolidate the two Petitions. Doc. No. 15 at R00299-300.

9. The County filed a Supplemental Submission on July 10, 2020. Doc. No. 17 at R00411. The County claimed that the issue is not as stated by Appellants, but whether "'farm dwellings' as described in HRS § 205-2(d)(7) and § 205-4.5(a)(4) cannot be used for overnight accommodations as [STVR]." Doc. No.17 at R00413.

10. On July 10, 2020, Appellants filed their Proposed Findings of Fact, Conclusions of Law, and Decision and Order. Doc. No. 18 at R00420.

11. On July 17, 2020, the OP filed a Supplemental Response to the two Petitions. Doc. No. 20 at R00549. The OP stated that the question presented for a declaratory order must apply to a specific factual situation and could not be speculative or purely hypothetical. Doc. No. 20 at R00550. The OP concluded that Appellants did not present facts related to the actual use of their dwellings. Doc. No. 20 at R00551. On the other hand, the OP concluded that the County's Petition involves a specific factual situation because it "describes the specific factual situation as involving [Appellants] who sought and were denied non-conforming use certificates by the County for their STVRs, appealed the denials to the County's Board of Appeals, and now argue that a STVR is a permissible use of a 'farm dwelling' on lots created after June 4, 1976 in the State Land Use Agricultural District." Doc. No. 20 at R00550-51.

12. On July 21, 2020, Appellants filed a Response to the County's Supplemental Submission. Doc. No. 21 at R00559. Appellants claimed that "duration is plainly the only 'issue herein.'" Doc. No. 21 at R00564. Appellants pointed out an inconsistency between the County's position and its testimony in these proceedings because Bill 108 "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." Doc. No. 21 at R00560-62. Conversely, they claim that under Bill 108, no-one, not even a farmer, can rent a farm dwelling for less than 31 days. Doc. No. 21 at R00564-65.

13. On July 23, 2020, Appellants filed a Response to the OP's Supplemental Response to the County and Appellants. Doc. No. 22 at 633. In their response, Appellants

asserted that either both Petitions are speculative or neither is speculative. Doc. No. 22 at R00637.

14. On August 10, 2020, Appellants filed a Response to a County statement made during the LUC meeting on July 24, 2020. Doc. No. 28 at R00808. Appellants pointed out that the County had agreed that a mansion with no agricultural activity is still a farm dwelling. Doc. No. 28 at R00811.

15. On August 10, 2020, the County filed a Second Supplemental Submission. Doc. No. 29 at R00882. In this submission, the County affirmed that "farm dwellings must be used in connection with agriculture." Doc. No. 29 at R00884. The County stated that any use of a farm dwelling for vacation rentals is governed exclusively by the agricultural tourism statute, HRS § 205-2(d)(11) and (12), and HCC §§ 25-2-74 and 25-4-15 which are distinguishable from Bill 108.[2] *Id.*

16. Members of the public submitted written testimony. Doc. No. 5 at R00087; Doc. No. 6 at R00089; Doc. No. 9 at R00154; Doc. No. 10 at R00155; Doc. No. 11 at R00157; Doc. No. 14 at R00194; Doc. No. 16 at R00408; Doc. No. 24 at R00798; Doc. No. 25 at R00799; Doc. No. 27 at R00807; and Doc. No. 33 at R00904. Notably, the County of Maui, the County of Kauai, and the City and County of Honolulu submitted written testimony in support of the County of Hawai'i's Petition. Doc. No. 30 at R00888; Doc. No. 31 at R00891; and Doc. No. 33 at R00907. This testimony is helpful because it shows how the other three counties have, consistent with HRS chapter 205, exercised their legislative right to regulate STVR in the Agricultural District.

[2] HCC does not, in fact, allow overnight stays in connection with agricultural tourism. *See* HCC 25-4-15(d)(2) (agricultural tourism hours are from 8 a.m. to 6 p.m. daily).

17. The County of Maui and the County of Kauai ordinances apply to transient or vacation rentals of one hundred eighty (180) days or less. Maui County described how Bed and Breakfast Homes (which have an on-site owner/proprietor) and Short-Term Rental Homes (which are not required to have an on-site owner, proprietor, or manager) are permitted in the Agricultural District under Maui County law. However, both types of rentals require an agricultural connection and a State Special Permit pursuant to HRS § 205-6 because, as stated by Maui County, "[o]nce [the dwelling] becomes used for vacation rental purposes, it is no longer considered to be a farm dwelling under HRS 205[.]" Doc. No. 30 at R00889.

18. The County of Kauai testimony described its Transient Vacation Rental law. Doc. No. 31 at R00891. According to Kauai County, "Transient Vacation Rentals are not Farm Dwellings, and [they] are not an outright permissible use on agricultural lands." Doc. No. 31 at R00892. It affirmed that no applicant for a non-conforming use certificate for a Transient Vacation Rental has been able to meet the definition of a "farm dwelling" under HRS § 205-4.5(a)(4) because they cannot prove that their activity is "connected to the farm or farming operations on the property" or that "agricultural activity provide[s] income to the occupants of the dwelling."[3] Doc. No. 31 at R00892.

19. The City and County of Honolulu testimony opined that HRS chapter 205 does not allow short-term vacation units. Doc. No. 33 at R00907. A Honolulu ordinance enacted in 1989 required units used for STVR to apply for a nonconforming use certificate. This was not offered to, and nonconforming use certificates were never issued to, dwellings in the Agricultural District. In the Agricultural District, the City allows the occupancy of farm dwellings for less than 30 days if the residents are on the premises for agricultural pursuits. For example, this

[3] In this order, all references to "agricultural connection" or "connection to agriculture" mean the alternate two-part definition of "farm dwelling" set forth in HRS § 205-4.5(a)(4).

provision has historically applied to seasonal workers for pineapple harvesting. The consistent thread running throughout all of the counties' ordinances is that a use related to agriculture is a necessary component for the use of a farm dwelling in the Agricultural District.

20. Appellants filed a Response to the County's Second Supplemental Submission on August 12, 2020. Doc. No. 32 at R00894. Appellants asserted that the County had conceded that nothing in the definition of "farm dwelling" prohibits rentals of less than 31 days. Doc. No. 32 at R00898.

21. The LUC issued a Consolidated Declaratory Order ("**Order**") denying Appellants' Petition and granting the County's Petition on May 20, 2021. Doc. No. 36 at R01095. The Commission **denied** Appellants' Petition on the grounds that "the [Appellants] did not present a record sufficient to demonstrate that any of their proposed uses fell within the definition of a 'farm dwelling' or uses permitted in an agricultural district, or that the [Appellants] are entitled to the relief they requested." Doc. No. 36 at R01119. The Commission **granted** the County's petition on the grounds that "[t]o the extent that the Hawaii County Council has exercised its legislative judgment to regulate STVR to protect and preserve agricultural land in a manner more restrictive than that provided by the Land Use Commission, the County Ordinance controls and must be followed." Doc. No. 36 at R01120.

22. Appellants filed a Notice of Appeal on June 18, 2021, and a First Amended Statement of the Case on July 6, 2021. JEFS Docket Nos. 1, 15. Appellants "ask the Court to conclude, as a matter of law, that the definition of "farm dwelling" as of June 4, 1976, did not prohibit rentals of less than 31 days." JEFS Docket No. 37 at 6.

23. Appellants filed their Opening Brief on September 7, 2021. JEFS Docket No. 37. On appeal, Appellants claim that when looking at the Hawai‘i County Ordinance, "the only thing that matters is duration – that the rental is for less than 31 days."[4] JEFS Docket No. 37 at 1.

24. The County filed its Answering Brief in opposition to the Opening Brief on October 15, 2021. JEFS Docket No. 40.

24. The LUC filed its Answering Brief in opposition to the Opening Brief on October 18, 2021. JEFS Docket No. 42.

25. Appellants filed a Reply Brief on November 1, 2021. JEFS Docket No. 49.

26. Oral argument was held before this Court, in person and by video-conference technology, on January 10, 2022.

III. STANDARD OF REVIEW

1. The standard of review of an administrative agency's decision is set forth in HRS § 91-14. An agency's "conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects are reviewable under subsection (3); findings of fact are reviewable under subsection (5); and an agency's exercise of discretion is reviewable under subsection (6)." *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Hawai‘i 217, 229, 953 P.2d 1315, 1327 (1998) (citation omitted). Furthermore, an "agency's decision carries

[4] Although briefly mentioned in their introductory section, (*see* JEFS Docket No. 37 at 2-3), no constitutional due process implications have been asserted by Appellants in this appeal and none exist because a connection to agriculture has always been required for a dwelling to be a farm dwelling under State law. Appellants know or should have known about the restricted use of their dwellings because all deeds or other instruments of conveyance are required to contain the restriction on uses and the condition that the encumbrance shall run with the land until the land is reclassified to another district. *See* HRS § 205-4.5(b). Rule 28(b)(7) of the Hawaii Rules of Appellate Procedure requires "[t]he argument, containing the contentions of the appellant on the points presented and the reasons therefore, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived." If there was an attempt at claiming a due process violation, this claim has been waived by Appellants' failure to argue the point in their Opening Brief.

a presumption of validity, and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences." *Korean Buddhist Temple*, 87 Hawai‘i at 229, 953 P.2d at 1327.

2. Under HRS § 91-14 (g)(5), the appropriate standard of review is whether the findings of fact are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Korean Buddhist Temple,* 87 Hawai‘i at 229, 953 P.2d at 1327 (citations omitted). Such a review requires that:

> [a]n administrative agency's findings of fact will not be set aside on appeal unless they are shown to be clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or the appellate court, upon a thorough examination of the record, is left with a definite and firm conviction that a mistake has been made.

Topliss v. Planning Comm'n, 9 Haw.App. 377, 383, 842 P.2d 648, 653 (1993).

3. Administrative conclusions of law are reviewed under the *de novo* standard inasmuch as they are not binding on an appellate court. *Everson v. State*, 122 Hawai‘i 402, 406-07, 228 P.3d 282, 286-87 (2010). "Where both mixed questions of fact and law are presented, deference will be given to the agency's expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency." *Dole Hawaii Div.-Castle & Cooke, Inc. v. Ramil*, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990).

4. "**An agency's interpretation of its own rules is generally entitled to deference** unless 'plainly erroneous or inconsistent with the underlying legislative purpose.'" *Kilikila 'O Haleakala v. Bd. of Land and Natural Resources*, 138 Hawai‘i 383, 396, 382 P.3d 195, 208 (2016) (emphasis added).

5. **An agency's refusal to issue a declaratory ruling is a discretionary determination** that should not be disturbed unless there has been an abuse of that discretion**.**

Citizens Against Reckless Development, 114 Hawai'i 184, 194, 159 P.3d, 143, 153 (2007).

> The standard of review for administrative agencies ... consists of two parts: first, an analysis of whether the legislature empowered the agency with discretion to make a particular determination; and second, if the agency's determination was within its realm of discretion, whether the agency abused that discretion (or whether the agency's action was otherwise "arbitrary, or capricious, or characterized by ... [a] clearly unwarranted exercise of discretion," HRS § 91–14(g)(6)). If an agency determination is not within its realm of discretion (as defined by the legislature), then the agency's determination is not entitled to the deferential "abuse of discretion" standard of review. If, however, the agency acts within its realm of discretion, then its determination will not be overturned unless the agency has abused its discretion.

Id. (citation omitted).

IV. STATEMENT OF JURISDICTION

Appellants' Petition for Declaratory Order was denied by the LUC on May 20, 2021. Doc. No. 36 at R01095. Orders disposing of petitions for declaratory rulings under HRS § 91–8 are appealable to the circuit court pursuant to HRS § 91–14. *Lingle v. Hawaii Gov't Emps. Ass'n, AFSCME, Loc. 152, AFL-CIO*, 107 Hawai'i 178, 186, 111 P.3d 587, 595 (2005). Appellants filed a timely appeal on June 18, 2021. JEFS Docket No. 1. The appeal is properly before this Court pursuant to HRS § 91-14. HAR § 15-15-104.

V. DISCUSSION

A. A Farm Dwelling In The State Agricultural District Cannot Be Used As A Short-Term Vacation Rental

i. The State Agricultural District Was Created In Order To Preserve Prime Agricultural Lands From Urbanization

1. The LUC was statutorily established in 1961 to address the issue of uncontrolled urban sprawl:

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

1961 Haw. Sess. Laws Act 187, § 1. The purpose of House Bill 1279[5] was to "protect and encourage the development of land in the State for those uses for which they are best suited, the power to zone should be exercised by the State and the methods of real property assessment should encourage rather than penalize those who would develop these uses." S. Stand. Comm. Rep. No. 1054, in 1961 Senate Journal, at 1027. **Act 187 focused on the best utilization of the development potential of land in the State by** "[c]onserv[ing] forests, water resources and land, particularly to **preserve the prime agricultural lands from unnecessary urbanization**[.]" Hse. Stand. Comm. Rep. No. 395, 1961 House Journal, at 855-56 (emphasis added).

2. All land in Hawai'i is divided and categorized into four land use districts, Urban, Agricultural, Conservation, and Rural. HRS § 205-2; HAR § 15-15-17. In establishing the boundaries of State Agricultural Districts, the greatest protection was "given to those lands with a high capacity for intensive cultivation[.]" HRS § 205-2(a)(3). Four standards apply to lands in Agricultural Districts and all were created with agriculture in mind:

> (1) It shall include lands with a high capacity for agricultural production;
> (2) It may include lands with significant potential for grazing or for other agricultural uses;

[5] H.B. 1279 was enacted as 1961 Haw. Sess. Laws Act 187 (later codified as chapter 98H, Rev. L. of Haw. (RLH) 1955 (Supp. 1961), the precursor to HRS Chapter 205).

> (3) It may include lands surrounded by or contiguous to agricultural lands or which are not suited to agricultural and ancillary activities by reason of topography, soils, and other related characteristics; and
> (4) It shall include all lands designated important agricultural lands pursuant to part III of chapter 205, HRS.

HAR § 15-15-19.

ii. The Statute Does Not Contemplate Short-Term Vacation Rentals of "Farm Dwellings"

3. On appeal, Appellants "ask the Court to conclude, as a matter of law, that the definition of 'farm dwelling' as of June 4, 1976, did not prohibit rentals of less than 31 days." JEFS Docket No. 37 at 6. They claim that the only material element is whether a lease can be for less than 31 days. JEFS Docket No. 37 at 16, 21. Appellants claim that the discussion ends there because the statute unambiguously provides no time limit in the definition of a "farm dwelling." JEFS Docket No. 37 at 19–20.

4. When interpreting statutes, Hawai'i courts follow standard rules of statutory construction. *See, e.g., Korean Buddhist Temple*, 87 Hawai'i at 229, 953 P.2d at 1327.

> **When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature**, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
>
> When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists....
>
> In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1–15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.

> **This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it ... to discover its true meaning." HRS § 1–15(2) (1993).** "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called upon in aid to explain what is doubtful in another." HRS § 1–16 (1993).

Korean Buddhist Temple, 87 Hawai'i at 229-30, 953 P.2d at 1327-28 (citations omitted) (emphasis added).

5. The statute provides that a "farm dwelling" is a single-family dwelling either: (1) "located on and used in connection with a farm"; or (2) "where agricultural activity provides income to the family occupying the dwelling[.]" HRS § 205-4.5(a)(4). Under the first part of the definition, a person can occupy the farm dwelling while farming the land or raising livestock on the property where the farm dwelling is located. Under the second part of the definition, the occupant must still have an agricultural connection, but this time, the agricultural activity (and the income it provides) can be separate from the property where the farm dwelling is located. Doc. No. 37 at R01116-17.

6. The only permissible uses of land in the Agricultural District are those listed in HRS §§ 205-2, 205-4.5 and HAR § 15-15-25. HRS § 205-4.5(b); HAR §15-15-23 ("Except as otherwise provided in this chapter, uses not expressly permitted are prohibited"). The fact that HRS chapter 205 does not refer to "farm dwellings" in the context of prohibiting rentals of less than 31 days does not mean that short-term rentals are, therefore, allowed. The old adage, "the absence of evidence is not evidence of absence" applies in these circumstances.

7. Looking next to the administrative rules promulgated pursuant to HRS chapter 205, "'Single-family dwelling' means a dwelling occupied exclusively by one family." HAR § 15-15-03. The term "dwelling" is defined as "a building designed or used exclusively for single family residential occupancy, but not including house trailer, multi-family unit, mobile home,

hotel, or motel." HAR § 15-15-03 (emphasis added). Excluding hotels and motels from the definition of "dwelling" suggests that no form of transient accommodation was contemplated as an allowable use of a "farm dwelling." In order to best serve both the legislative objectives of protecting and conserving prime agricultural lands from unnecessary urbanization, the permissible uses of a "farm dwelling" in the Agricultural District excludes transient accommodations.

8. Hawai‘i appellate courts have taken a cautious approach when determining permissible uses within the Agricultural District so as not to frustrate "the state land use law's basic objective of protection and rational development." *Curtis v. Board of Appeals, County of Hawaii*, 90 Hawai‘i 384, 396, 978 P.2d 822, 834 (1999). *Curtis* contemplated whether cellular telephone towers were permissible in the Agricultural District under HRS § 205-4.5(a)(7) which permits "communications equipment buildings" and "utility lines." The Court ruled that absent express indication in HRS § 205-4.5(7), cellular telephone towers unreasonably expanded the intended scope of the term "utility lines."

9. Neither the LUC statute nor its administrative rule contemplate short-term rentals of "farm dwelling" within the four corners of the law.

iii. The Legislature Did Not Intend "Farm Dwellings" To Be Used For Short Term Vacation Rentals

10. We look next to legislative intent for guidance. Appellants claim that we need to look at the version of Chapter 205 in effect on June 4, 1976, because the County Planning Department Rule of Practice and Procedure Rule ("***DPP* Rule**") 23-3 excludes dwellings on lots created after June 4, 1976, from being used as short-term vacation rentals.[6] JEFS Docket No. 37

[6] DPP Rule 23-3 states, "Any dwelling being operated as a [STVR] on a lot created on or after June 4, 1976 in the State Land Use Agricultural District is excluded from being registered as a [STVR]."

at 28. Since both the County and Appellants focus on June 4, 1976, we look to the 1976 Legislative Session for guidance. The legislative history of the "farm dwelling" statute sheds light on the County's use of that date for their ordinance. While prospectively restricting the use of single-family dwellings in the Agricultural District to "farm dwellings," the Legislature grandfathered single-family dwellings on lots created before 1976 as a permitted use in the Agricultural District. 1976 Haw. Sess. Laws Act 199.

11. The "farm dwelling" statute was enacted in 1976 pursuant to Act 199. 1976 Haw. Sess. Laws Act 199. The purpose of Act 199 was "to provide additional protection to parcels of prime agricultural land within the agricultural district[.]" S. Conf. Comm. Rep. No. 2-76, in 1976 Senate Journal, at 836. At that time, the Legislature was concerned about the division of the Agricultural District into increasingly smaller parcels so that agricultural land was effectively being taken out of farm production.

> After careful consideration, **your Committee finds there is a danger that agricultural subdivisions may be approved by the counties, and thus, put agricultural lands to uses other than for an agricultural pursuit.** Inasmuch as the purpose of the agricultural district classification is to restrict the uses of the land to agricultural purposes, the purpose could be frustrated in the development of urban type residential communities in the guise of agricultural subdivisions.
>
> **To avoid possible abuse within the agricultural district, this bill more clearly defines the uses permissible within the agricultural district.**

Id. (emphasis added). The legislature clearly intended for this statute to only allow dwellings with an agricultural connection in the Agricultural District.

12. Representative Richard Kawakami offered a floor amendment to the bill which, among other things, allowed the "construction of single-family dwellings on lots within any subdivision in agricultural districts approved by the county before the effective date of this Act."

Statement of Representative Kawakami, 1976 House Journal, at 480. According to Representative Kawakami, "in essence, what this does is grandfather in existing agricultural subdivisions." *Id.* at 481. Representative Kawakami made the following statement, which although lengthy, is relevant to this Court's review of the LUC Order:

> The economic importance of agriculture, the imminent pressures of land development, and the prospect of urban sprawl were factors behind the establishment of land use laws. **Within an agricultural district, we define certain permitted uses. These uses include growing of crops, raising livestock, grazing, farm buildings, public buildings necessary for agricultural practices, utility lines, some open-type recreation, and other uses necessary for conducting agricultural activities. The administration of permitted uses within agricultural districts was left to the counties which, by ordinance, could set more restrictive regulations if they so desired.** Mr. Speaker, we have laws, we have regulations and we have county ordinances which govern the uses of agricultural lands. But, today, we have agricultural subdivisions within agricultural districts which can only be viewed as a subterfuge of the spirit and intent of our land use laws. What has been happening, Mr. Speaker, is that landowners have found it difficult to get land reclassified from agriculture to urban. Therefore, they have taken advantage of county zoning provisions and, under the pretext of agricultural subdivisions, have been subdividing prime agricultural lands into two-acre sites for residential sites. In practice, these agricultural subdivisions are not only circumventing county zoning provisions but are being offered at prices very few can afford and becoming, in fact, agricultural estates. . . . **Originally, the intent of the agricultural subdivision provision was to aid farmers in conveying lands to their children. Thus, if a farmer wished to subdivide his land so that his child could have a piece of property to build a home and work the land, this provision allows him to do so. The intent of the provisions was not to encourage residential development in agriculturally zoned areas. For this to happen is a clear transgression of legislative intent.**

Statement of Representative Kawakami, 1976 House Journal, at 533 (emphasis added). Act 199 became effective on June 4, 1976, and with it, "Uses not expressly permitted in subsection (a)

shall be prohibited, except … construction of single-family dwellings on lots existing before June 4, 1976." HRS § 205-4.5(b).

iv. The Legislature Never Intended A "Farm Dwelling" To Be Used As A STVR Because Another Part Of The Statute Specifically Allows Short-Term Accommodation For Agricultural Tourism

13. We "are bound, if rational and practicable, to give effect to all parts of a statute, and … no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to all and preserve all words of the statute." *State v. Kalani*, 108 Hawai'i 279, 283-84, 118 P.3d 1222, 1226-27 (2005).

> In certain situations, such reasoning may control, based on the rule of construction that "[w]here [the legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion."

In re Water Use Permit Applications, 94 Haw. 97, 151, 9 P.3d 409, 463 (2000) (citations omitted).

14. In 2012, HRS §§ 205-2(d) and 205-4.5(a) were amended to permit agricultural tourism with overnight accommodations.

> Agricultural tourism activities, including overnight accommodations of twenty-one days or less, for any one stay within a county; provided that this paragraph shall apply only to a county that includes at least three islands and has adopted ordinances regulating agricultural tourism activities pursuant to section 205-5; provided further that the agricultural tourism activities coexist with a bona fide agricultural activity. For the purposes of this paragraph, 'bona fide agricultural activity' means a farming operation as defined in section 165-2.

HRS §§ 205-2(d)(12) and 205-4.5(a)(14); 2012 Haw. Sess. Laws Act 329, at 1111. The purpose and intent of this law was to "authorize short-term rentals in the agricultural districts." S. Stand.

Comm. Rep. No. 2295, in 2012 Senate Journal, at 940. This bill raised concerns that "allowing short-term rentals may increase land values in agricultural districts and may contribute to the loss of agricultural lands to higher-value, non-agricultural leases." *Id.* Representative Cynthia Thielen submitted testimony from the City and County of Honolulu:

> By itself, **SB 2341 has the potential to transform most of the agricultural district, particularly the scenic regions, into a vacation rental district**. **The profit margins of agricultural uses simply cannot compete with the profit margins of tourism. Allowing tourism and vacation rentals as a primary use on agricultural lands will affect the valuation of these lands.** Agricultural property will be valued for the new "highest and best use," primarily vacation rental and tourism, not the farming potential. This will increase agricultural property values, and subsequently the property taxes, of bonafide farmers and retired farmers, and increase the sale and lease prices for agricultural lands to the point where they may no longer [be] affordable for farmers to buy or rent. Permitting tourism including vacation rentals as the primary use on the most productive lands in the agricultural district establishes a precedent for the State. Once that precedent is set, it is only a matter of time before proponents argue to extend it state wide[.]

Statement of Representative Thielen, Conf. Comm. Rep. No. 67-12, 2012 Senate Journal, at 861 (emphasis added). Ultimately, despite the Governor's concerns that the term "bona fide agricultural activity" was too broad and could allow unintended urbanization of agricultural lands, Act 329 passed into law without the Governor's signature to "allow agricultural land owners an opportunity to supplement their income from agricultural operations with additional income from tourist accommodations." Gov. Msg. No. 1446 (2012). At this time, agricultural tourism with overnight accommodations is not permitted in the County of Hawai'i. [7]

[7] The 2012 amendment only applies to a county that includes at least three islands and has adopted ordinances regulating agricultural tourism activities, Maui County. HRS § 205-2(d)(14) and HRS § 205-4.5(a)(14); *see* Maui County Code Chapter 19.65, Short Term Rental Homes (Ordinance No. 4315, Bill No. 43 (2016)). On Maui, a short-term rental of a dwelling in the Agricultural District is only allowed as an accessory use, which is

15. The Court must look at HRS §§ 205-2 and 205-4.5 in their entirety. The agricultural tourism subsection of the statutes explicitly permit STVR for agricultural tourism purposes while the subsection relating to "farm dwellings" does not. *See* HRS § 205-2(d)(7), (12); HRS § 205-4.5(a)(4), (14). Short-term vacation rentals were never an intended use of a "farm dwelling."

16. Ultimately, the "reason and spirit" of the state land use law and the objectives which guided the Legislature to determine whether STVR are a permissible use of Agricultural District lands, should also guide the Court. *See Curtis*, 90 Hawai'i at 395, 978 P.2d at 833 (citing HRS § 1-15(2)). A "farm dwelling" in the Agricultural District cannot be rented as a STVR because that use is not consistent with the Legislature's requirement that all dwellings in the Agricultural District after 1976 have an agricultural connection.

v. Past LUC Decisions Are Consistent With The Statute And Legislative Intent In Ruling That A "Farm Dwelling" In The Agricultural District Must Have An Agricultural Connection

17. The LUC's prior decisions are consistent with the Legislative intent that farm dwellings in the Agricultural District require an agricultural connection. In *Petition of John Godfrey*, LUC Docket No. DR94-17, COL 5 at p.17-18 (December 6, 1994), the County rezoned 10.469 acres of land from Ag-3a to Ag-1a pursuant to County Ordinance No. 86-98 in 1986. [8] Doc. No. 36 at R01107-08; *See* Doc. No. 34 at R00979-80 (Appellant agreed that the *Godfrey* case was an accurate statement of the law.). In 1990, the County Planning Department approved subdivision of the property into ten one-acre lots. In 1992, the County Planning Department approved ohana dwelling permits for the construction of two single-family dwellings on each

---

"incidental or subordinate to" the "permitted principal use" and requires an approved farm plan. Maui County Code § 19.30A.050.B.

[8] Available at: https://luc.hawaii.gov/wp-content/uploads/2014/01/DR94-17-Declaratory-Order.pdf

one-acre lot. After the single-family dwellings had been constructed, an adjoining landowner filed a petition for a declaratory ruling "that a dwelling situated on land located in the State Agricultural Land Use District must be a 'farm dwelling' and, further, that the ohana dwelling law does not eliminate that 'farm dwelling' requirement." The LUC determined that,

> [a]ny county ordinance, rule, or law that authorizes any residential dwelling as a permissible use within an agricultural use district is preempted by State law, unless the dwelling is related to an agricultural activity or is a "farm dwelling".

LUC Docket No. DR94-17 at Conclusion of Law 5. The LUC declared that the ohana dwelling law … does not eliminate the requirement that the two single-family dwelling units must be a 'farm dwelling' or related to an agricultural activity." LUC Docket No. DR94-19 at Declaratory Order.

18. In another relevant case, the LUC, upon its own motion, considered whether the farm dwelling/agricultural connection could be for personal consumption or if commercial production was required. Doc. No. 36 at R01117. *See Declaratory Ruling to determine whether a single family dwelling may be established within the State Land Use Agricultural District if the agricultural activity proposed to be conducted by the family occupying the dwelling is* for *personal consumption and use only*, LUC Docket No. DR83-8 (September 8, 1983).[9] The LUC declared that:

> Based on the above, the Land Use Commission rules that a single-family dwelling can be defined as a farm dwelling only if the dwelling is used in connection with a farm where agricultural activity provides income to the family occupying the dwelling[10]

[9] Available at: https://luc.hawaii.gov/wp-content/uploads/2014/01/DR83-8-Use-in-an-Agricultural-District.pdf

[10] In 1983, the year of this LUC ruling, section 3-3(4) State Land Use Regulations had a definition identical to HRS § 4.5(a)(4) except that it did not have an "or" between "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" as stated in HRS § 4.5(a)(4).

> and that a single-family dwelling, which use is accessory to **an agricultural activity for personal consumption and use only, is not permissible within the Land Use Agricultural District. This ruling is applicable to all lands located within the State Land Use Agricultural District**.

(Emphasis added). The use of a "farm dwelling" for residential use without any connection to commercial agriculture is not permitted in the Agricultural District.

19. Consistent with its past decisions, the LUC in this case found that:

> 60. To this end, unless the dwelling is in fact a 'farm dwelling', namely, a 'single-family dwelling located on and **used in connection with a farm**,' the dwelling is not a 'farm dwelling and is not permissible on land which is designated Agriculture as a 'farm dwelling.'"

Doc. No. 36 at R01115.

vi. The County's Petition For A Declaratory Order Was Properly Granted By the LUC

20. The County sought a ruling that "farm dwellings" may not be used as a STVR.

Doc. No. 1 at R00002, R00005.

> MR. MUKAI: The County of Hawaii has never argued about the duration of the farm dwellings being rented for 30 days or less, or whether the owner of a farm dwelling needs to reside in the dwelling, but the use of the farm dwelling is essential in determining whether [Appellants] may use their farm dwellings as short-term vacation rentals. **The County requests that the State Land Use Commission uphold what we believe is the intent of our State Land Use law by finding in favor of the County of Hawaii and declaring that a short-term vacation rental is not a permissible use of a farm dwelling in the State Land Use Agricultural District.**

ROA 34 at R01013 (emphasis added).

21. Appellants countered by stating that the County ordinance cannot outlaw something that HRS chapter 205 expressly allows. Doc. No. 34 at R00972.

22. The authority to zone is conferred by the legislature on the counties. *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 483, 777 P.2d 244, 246 (1989). Counties may zone according to HRS § 46-4 subject to HRS chapter 205. *See* HRS § 205-5(a) ("Except as herein provided, the powers granted to counties under section 46-4 shall govern the zoning within the districts, other than in conservation districts.").

23. HRS § 205-5(b) states:

> **Within agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in sections 205-2 and 205-4.5 may be further defined by each county by zoning ordinance.** Each county shall 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 as defined in section 165-2.

24. County law can be more restrictive than State law. "In Hawai'i's land use system the legislature's statutory districts constitute more of a general scheme, and, presumably, by delegating authority to zone to the counties, the legislature intended that specific zoning be enacted at the county level. ... Because the uses allowed in county zoning, are prohibited from conflicting with the uses allowed in a State agriculture district, only a more restricted use as between the two is authorized." *See Save Sunset Beach Coalition v. City & County of Honolulu*, 102 Hawai'i 465, 482, 78 P.3d 1, 18 (2003). "By adopting a dual land use designation approach, the legislature envisioned that the counties would enact zoning ordinances that were somewhat different from, but not inconsistent with, the statutes." *Id*.

25. Any conflict between State statutes and County zoning ordinances is resolved in favor of the State statutes, by virtue of the supremacy provisions in Article VIII, section 6 of the

Hawai‘i Constitution and HRS § 50-15. *Save Sunset Beach Coalition*, 102 Hawai‘i at 481, 78 P.3d at 17.

26. An STVR is regulated by county ordinances and rules. Hawai‘i County passed Bill 108 in 2019. Rule 23-3 prohibits STVR use of dwellings on Agricultural District lots created after June 4, 1976, the date when the "farm dwelling" statute was enacted.

27. Consistent with the statutory definition of a "farm dwelling," counties can enact ordinances to more restrictively regulate their rental. A "short term vacation rental" is defined by the County's ordinances as one where:

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

HCC § 21-1-5.[11]

28. Under the County ordinance, STVR are only permitted in the County of Hawai‘i in areas that have sufficient roads and public utilities to accommodate visitors, tourists, and transient guests such as the resort-hotel district, the general commercial district, the village commercial district, the multiple-family residential district, and General Plan Resort and Resort Node areas. HCC § 25-4-16(a)(1); HCC § 25-5-90.

29. The three other Hawai‘i Counties have also adopted ordinances to address STVR. All Counties require an agricultural connection in order to comply with HRS chapter 205. Maui County requires an agricultural connection and a State Special Permit pursuant to HRS § 205-6. In Kauai County, no applicant for a non-conforming use certificate has been able to show that their dwelling is a "farm dwellings" under HRS § 205-4.5(a)(4). The City and County of Honolulu has not offered or issued any nonconforming use certificate to a dwelling in the

[11] Bill 108 has been codified at HCC chapter 25, articles 1, 2, 4, and 5.

Agricultural District. All Counties appear to agree that an agriculture connection is a necessary component in order to use a dwelling in the Agricultural District.

30. The LUC made the following findings:

> 62. The farm dwelling use and a STVR use are not compatible uses.
>
> 63. In the present proceedings, no facts were submitted which would contradict the conclusion that a STVR use is basically a transient accommodation effectively for vacation or tourist use, which has no connection to a farm and is not accessory to an agricultural use, and does not meet either of the requirements of the farm dwelling definition. A STVR use would therefore improperly displace the required agricultural use of a farm dwelling.
>
> 64. A STVR is not a permitted use of a farm dwelling in the Agricultural District under HRS chapter 205. HRS §§205-2(d) and 205-4.5(a) expressly lists the permitted uses in the Agricultural District as a matter of law. If a use is not listed, it is prohibited. STVRs are not listed permitted uses of a farm dwelling under HRS chapter 205, and therefore, are prohibited.
>
> 65. Residential use of a farm dwelling without any connection to an agricultural use has never been allowed in the [A]gricultural District. The law has always required that a farm dwelling be used in connection with a farm or accessory to an agricultural use.
>
> 68. A STVR is an incompatible use of a farm dwelling.
>
> 69. A STVR is not a permitted use as a farm dwelling under HRS chapter 205.
>
> 86. For the reasons stated above and other good cause shown in the record, the Commission finds that the COUNTY OF HAWAI‘I has met its burden under the law and the Land Use Commission therefore GRANTS the relief requested by the COUNTY OF HAWAI‘I.

Doc. No. 36 at R01116-17, R01121.

31. There is no conflict between the County ordinance and the LUC statute. The Court defers to the Commission's interpretation of its own statute, and the LUC Order granting the County's Petition is affirmed.

vi. Appellants' Petition For A Declaratory Order Was Properly Denied By the LUC

32. Appellants' Petition differs from the County's Petition. Appellants sought a declaratory order regarding whether "farm dwellings" in the Agricultural District could be rented for less than 31 days. JEFS Docket No. 37 at 6. 48. Appellants themselves distinguish their Petition from the County's Petition by stating that this case is not about the labels "short term vacation rental" and "farm dwelling." Doc. No. 15 at R00348. They call "farm dwelling" a "meaningless label." Doc. No. 32 at R00900. Appellants claim that "[w]e have never asked the Commission to declare that our farm dwellings or any farm dwellings may be used as STVRs." Doc. No. 22 at R00638.

33. The two Petitions are different and the Commission could grant one Petition while denying the other.

34. The Hawai‘i Supreme Court has stated that "the declaratory ruling procedure is intended to allow an individual to seek an advance determination of **how some law or some order applies to his or her circumstances**." *Citizens Against Reckless Development*, 114 Hawai‘i at 198, 159 P.3d at 157 (emphasis added). "We therefore presume that the legislature acted intentionally when it chose the term 'applicability' to denote a special type of procedure, whereby an interested party could seek agency advice as to how a statute, agency rule, or order would apply to particular circumstances not yet determined." *Id.*, 114 Hawai‘i at 197-98, 159 P.3d at 156-57 (citation omitted).

35. HRS § 91-8, which governs declaratory ruling procedures, states that "[e]ach agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition." HAR § 15-15-98, the LUC administrative rule, states that "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**." (Emphasis added).

36. HAR § 15-15-100 provides several reasons for denying a petition for a declaratory order including where "[t]he question is speculative or purely hypothetical[.]" HAR § 15-15-100(1)(A).

> The legislative history of Section 91-8 also shows that the legislature envisioned that agency decisions disregarding **whether to issue a declaratory ruling would involve the use of discretion**. A report of the House Standing Committee on the bill would become HRS chapter 91 said this with regard to the declaratory ruling section: This section would require each agency to adopt rules governing the issuance of declaratory orders. These rules, however, could provide for the agency having some discretionary power to refuse to make a declaratory ruling. Hse. Stand. Com. Rep. No. 8, in 1961 House Journal, at 659.

Citizens Against Reckless Development, 114 Hawai'i at 195 fn. 9, 159 P.3d at154 fn. 9 (emphasis added).

37. Appellants claim that it does not matter how their property is actually being used or whether their use is even legal under State law because this is not one of the three requirements of the County ordinance. ROA 15 at R00346; HCC §21-1-5. This is not a correct statement of the law as Appellants must comply with **both** State and County laws.

38. Appellants raise the hypothetical of a farmer not being able to rent a farm for less than 30 days. Doc. No. 34 at R00972. But this hypothetical and others posited by Appellants are

not their own facts. The Court cannot issue a declaratory ruling based on a hypothetical situation. HAR § 15-15-100(1)(A).

39. Appellants raise another hypothetical about the proposed use of a power plant in the Agricultural District. Doc. No. 15 at R00348-49.

> MR. CHIPCHASE: The Commission wouldn't stop at the label, well, you're right, power plants aren't allowed, so you lose. The Commission would look at the substance, how does the county define power plants? And if you look at the definition and saw that a power plant to the county is simply a wind farm, then you would say, no, that use is allowed under Chapter 205. It's right there. And you say on a case by case basis we can determine what a wind farm is.

Doc. No. 15 at R00349. In this hypothetical, it appears as if Appellants agree that facts matter. If it had been provided sufficient facts, the Commission could have determined, on a case-by-case basis, whether Appellants' dwellings are "farm dwellings" and how their use has been affected by Bill 108.

40. Instead of providing any facts about the agricultural-related, or other, uses of their dwellings in the Agricultural District, Appellants claim that their dwellings are "farm dwellings" because the County has "acknowledged," "admitted," and "conceded" that they are "farm dwellings." *See* JEFS Docket No. 37 at 3, 9, 10 fn.3, 16, 23 fn. 6, 26, 27. Indeed, some confusion involving the definition of "farm dwelling" is attributable to the County's nomenclature of calling all dwellings in the Agricultural District "farm dwellings." During the hearings before the Commission, the County Planning Director stated that even if he was told that the intention was to build a house to live in and not engage in any agriculture, that the County would consider that dwelling a farm dwelling:

> [LUC] COMMISSIONER GARY OKUDA: So even if I tell you straight up-front that there will be no agricultural activity, you will still grant me the permit to build the dwelling?

> [COUNTY PLANNING DIRECTOR] MR. [MICHAEL] YEE: It's still going to be a farm dwelling unit.

ROA 23 at R00781. The County Deputy Planning Director testified that the County had to assume that a first dwelling on a property would be a legal farm dwelling when issuing a building permit. This is her testimony:

> [DEPUTY PLANNING DIRECTOR] MS. [APRIL] SURPRENANT: But we don't have anything in place that requires active current agricultural activity before building a farm dwelling. That does not mean that the first dwelling on a parcel in the State Land Use Ag District is not a farm dwelling. It is. By definition of 205, the only provision for a dwelling within the farm Agricultural District as a permitted use is a farm dwelling.

Doc. No. 34 at R01038.

41. The County's use of the term "farm dwelling" in connection with the issuance of a County building permit, does not mean that the dwelling meets requirements of a "farm dwelling" under HRS chapter 205 because the County does not know how a dwelling will be used until after it is constructed and the only legally permissible dwelling in the Agricultural District is a "farm dwelling."

42. In denying Appellants' Petition, the Commission made the following rulings:

> 72. Appellants have not presented a sufficient record that their use or intended use is permitted in the Agricultural District.
>
> 73. They have not presented a sufficient record that their use of their properties are "farm dwellings" or related to agriculture.
>
> 74. [Appellants] did not present to the Commission a specific factual situation on which the Commission could issue the declaratory order they requested.
>
> 77. Whether the occupants are renters farming the land or whether there is agricultural activity providing income to the renters, or whether the renters are instead vacationers or tourists who are not engaged in and do not derive income from farming on the premises

> are some of the "specific factual situations" which must be presented in the record before the Land Use Commission could grant the [Appellants] the relief they requested.
>
> 78. Without limiting the foregoing, the [Appellants] did not present a record sufficient to demonstrate that any of their proposed uses fell within the definition of a "farm dwelling" or uses permitted in an agricultural district, or that [Appellants] are entitled to the relief requested.
>
> 79. Without a "specific factual situation" presented to the Commission, [Appellants] are putting forth a speculative or purely hypothetical scenario "which does not involve an existing situation or one which may reasonably be expected to occur in the near future. Therefore, the [Appellants'] request for relief should be denied, leaving only the County's question of whether a farm dwelling may be used as a STVR for the Commission's consideration.
>
> 85. For the reasons stated above and for other good cause shown, the Commission finds that the [Appellants'] petition was speculative, and the Land Use Commission therefore exercises its discretion and DENIES the relief requested by the [Appellants].

Doc. No. 36 at R01118-21.

43. Appellants have not shown that their dwellings are "farm dwellings" pursuant to HRS § 205-4.5(a)(4). The LUC properly denied Appellants' Petition, the Court finds no abuse of discretion, and the Order denying Appellants' Petition is affirmed.

C. The County's Request For Modification Of The LUC Order Is Denied

In their answering brief, the County asks for a modification of the Order to state that it does not apply to "farm dwellings" prior to June 4, 1976. JEFS at 40, pages 29-32. Appellants did not appeal the LUC Order and this issue is not properly before the Court. The County's request is denied.

D. None of Appellants' Other Arguments Warrant Reversal

All other arguments not expressly addressed herein have been considered and the Court finds, based upon a review of the record on appeal and the LUC Order, and applying the standards of review set forth above, that such arguments do not warrant reversal of the Order under the standards set forth under HRS § 91-14(g).

VI. CONCLUSION

Based on the foregoing, it is hereby ORDERED, ADJUDGED AND DECREED that the LUC's Consolidated Declaratory Order denying Appellants' Petition and granting the County's Petition, dated May 20, 2021, is AFFIRMED.

DATED: Kona, Hawai'i, _____.

_____
JUDGE OF THE ABOVE-ENTITLED COURT

NOTICE OF ELECTRONIC FILING

Electronically Filed
THIRD CIRCUIT
3CCV-21-0000178
28-FEB-2022
02:21 PM
Dkt. 63 NEF

An electronic filing was submitted in Case Number 3CCV-21-0000178. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID:	3CCV-21-0000178
Title:	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 HRS 205-2 and 205-4.5 and HAR 15-15-25
Filing Date / Time:	MONDAY, FEBRUARY 28, 2022 02:21:50 PM
Filing Parties:	Julie China
	Daniel Morris
	Linda Chow
Case Type:	Circuit Court Civil
Lead Document(s):	62-Proposed Order
Supporting Document(s):	
Document Name:	62-[Proposed] Decision and Order Affirming the Land Use Commission's Consolidated Order Denying Rosehill, et al. in Docket No. DR 20-70 and Granting County of Hawai'i in Docket No. DR 20-69, Dated May 20, 2021

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai`i Electronic Filing and Service Rules.

This notification is being electronically mailed to:

Recorded Proceeding 3rd Circuit *(ldb3HAppeals@courts.hawaii.gov)*
Mark Damian Disher *(Mark.disher@hawaiicounty.gov)*
Julie H. China *(julie.h.china@hawaii.gov)*
Linda L.W. Chow *(linda.l.chow@hawaii.gov)*
Lauren Katherine Chun *(lauren.k.chun@hawaii.gov)*
Daniel A. Morris *(daniel.a.morris@hawaii.gov)*
Jean Kent Campbell *(jeank.campbell@hawaiicounty.gov)*

Lerisa Loretta Heroldt *(lerisa.heroldt@hawaiicounty.gov)*
Dawn Emi Takeuchi-Apuna *(dawn.t.apuna@hawaii.gov)*
Molly Anne Lyonie Olds *(molds@cades.com)*
Christopher Tanega Goodin *(cgoodin@cades.com)*
Calvert Graham Chipchase *(cchipchase@cades.com)*
Roy A. Vitousek *(rvitousek@cades.com)*
The following parties need to be conventionally served:
Mary Alice Evans
Director, Office of Planning