ELIZABETH A. STRANCE 4715
Corporation Counsel

MARK D. DISHER 8987
JEAN CAMPBELL 7424
Deputies Corporation Counsel
Office of the Corporation Counsel
County of Hawai'i
101 Aupuni Street, Suite 325
Hilo, Hawai'i 96720
Telephone: (808) 961-8251
Facsimile: (808) 961-8622
E-mail: mark.disher@hawaiicounty.gov

Attorneys for Appellee
COUNTY OF HAWAI'I

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 EUGINIA MASTON; PAUL T. and DELAYNE M. JENNINGS, Trustees of the Jennings Family Revocable Trust dated

CIVIL NO.: 3CCV-21-0000178
(Agency Appeal)

APPELLEE COUNTY OF HAWAI'I'S *PROPOSED* FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER; CERTIFICATE OF SERVICE

ORAL ARGUMENT:

Date: January 10, 2022
Time: 1:30 p.m.
Judge: Honorable Wendy M. DeWeese

January 5, 2010; MAGGHOLM PROPERTIES LLC; NETTLETON S. and DIANE E. PAYNE III,

Appellants,

vs.

STATE OF HAWAI‘I, LAND USE COMMISSION; and COUNTY OF HAWAI‘I,

Appellees.

APPELLEE COUNTY OF HAWAI'I'S *PROPOSED* FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

Appellee COUNTY OF HAWAI'I hereby submits its proposed Findings of Fact, Conclusions of Law, Decision and Order in the above-captioned matter.

DATED: Hilo, Hawai‘i, February 28, 2022.

COUNTY OF HAWAI‘I, Appellee

By /s/ Mark D. Disher
MARK D. DISHER
Deputy Corporation Counsel
Its Attorney

ELIZABETH A. STRANCE 4715
Corporation Counsel

MARK D. DISHER 8987
JEAN CAMPBELL 7424
Deputies Corporation Counsel
Office of the Corporation Counsel
County of Hawai‘i
101 Aupuni Street, Suite 325
Hilo, Hawai‘i 96720
Telephone: (808) 961-8251
Facsimile: (808) 961-8622
E-mail: mark.disher@hawaiicounty.gov

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STATE OF HAWAI'I, LAND USE COMMISSION; and COUNTY OF HAWAI'I,

Appellees.

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

On January 10, 2022, *Oral Arguments* duly came on for hearing in the above-entitled Court, the Honorable Judge Wendy M. DeWeese presiding. Present via Zoom were Deputy Corporation Counsel Mark D. Disher representing Appellee the COUNTY OF HAWAI'I, and Deputy Attorney General Julie H. China represented the Land Use Commission, and present in person was Calvert Chipchase, representing Appellants LINDA K. ROSEHILL, *et al*. No other appearances were made.

Having reviewed the pleadings and the files and records herein, and being fully informed in the premises and finding good cause appearing therefor, the Court makes the following Findings of Fact, Conclusions of Law, Decision and Order:

I. INTRODUCTION

This is an agency appeal from the State of Hawai'i, Land Use Commission's (hereinafter "LUC" or "Commission") Consolidated Declaratory Order dated May 20, 2021. This matter was a consolidation of Petitioners Linda K. Rosehill, et al's., ("Appellants") Petition for Declaratory Order and Incorporated Memoranda, filed May 22, 2020, under LUC Docket No. DR 20-70; and

Petitioner County of Hawai‘i’s (“County”) Petition for Declaratory Order, filed May 19, 2020, under LUC Docket No. DR 20-69.

II. FINDINGS OF FACT

To the extent that any of the following Findings of Fact shall be determined to be a Conclusion of Law, they shall be deemed as such:

1. The County petitioned the Land Use Commission in LUC Docket No. DR 20-69 for a Declaratory Order 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 (*see* ROA at R00001-11).

2. Appellants petitioned the Land Use Commission in LUC Docket No. DR 20-70 (*see* ROA at R00012-74) to declare the County’s amendment of its Code which prohibited a “short term vacation rental” on agricultural land invalid.

3. Prior to the respective petitions being filed the County recently passed Ordinance No. 18-114 (“Bill 108”) regulating short-term vacation rentals within the County. As indicated in the County’s Petition:

> Bill 108 and the County Planning Department’s Rule 23 (promulgated to implement the Bill) require owners or operators of short-term vacation rentals to register with the County. New short-term vacation rentals may only be registered within certain districts; however, owners of lawfully existing short-term vacation rentals in all districts were allowed to register non-conforming use certificates for short-term vacation rentals. 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 Agriculture District based on the County’s understanding that any such existing operations were not lawful in “farm dwellings” pursuant to HRS Chapter 205.

See ROA at R00002-3.

4. Appellants' petition to the LUC also raised a question related to the County's new ordinance related to STVRs (Bill 108), particularly regarding the duration element under the definition of STVR as it relates to the definition of "farm dwelling" in HRS §205-4.5. *See* ROA at R00017.

5. The reason for the consolidation was that both petitions were clearly related to STVRs as defined and regulated under the Hawai'i County Code ("HCC") after passage of Bill 108 and particularly the use of STVRs on State Agriculture Land ("agriculture land") as it relates to "farm dwellings" as defined under HRS §205-4.5. *See also* HCC §§ 25-1-5 and 25-4-16.1

6. Both petitions requested a declaratory order related to their individual questions before the LUC regarding applicability of HRS Chapter 205 after June 4, 1976. The reason for this was clear as the term "farm dwelling" was first defined under state law under HRS §205-4.5 at that time. *See* ROA at R00002-3, R00015-17, and R00034.

7. Appellants' Petition to the LUC posed the question "whether, as of June 4, 1976, Chapter 205 regulated the minimum rental period for 'farm dwellings.'" *See* ROA R00017.

8. The "Introduction" to Appellants' Petition indicated that prior to "April 1, 2019, [Appellants] had rented their dwellings in the State Agriculture District for periods of 30 days or less." *See* ROA at R00016.

9. The County's request posed to the LUC in its Petition for Declaratory Order was "that 'farm dwellings' may not be used as short-term vacation rentals pursuant to [HRS] §§ 205-2 and 205-4.5, and Hawai'i Administrative Rules ("HAR") §15-15-25." *See* ROA at R00002.

10. The State of Hawai'i's Office of Planning ("OP") filed its *Office of Planning's Response to Petitioners' and County of Hawaii's Petitions for Declaratory Relief* on June 18, 2020. *See* ROA at R00119-128.

11. The OP's position was clear, that "a STVR fails to meet either prong of HRS §205-4.5(a)(4), and therefore is not permitted as a 'farm dwelling' in the Agricultural District." *See* ROA at R00123.

12. The OP pointed out that the only time a permitted use of an STVR would be allowed under the law was for "agricultural tourism activities, including overnight accommodations of twenty-one days or less" with the requirements that this activity "coexist with a bona fide agricultural activity" and "limited to counties that include three or more islands". *See* ROA at R000123; *see also* HRS §§ 205-2(d)(12) and 205-4.5(a)(14).

13. The OP asserted that HRS §§ 205-2 and 205-4.5 "affirmatively list the permitted uses in the Agricultural District such that all uses not listed are prohibited." *See* ROA at R00124.

14. Appellants filed their response to the County's Petition entitled *Petitioners in Docket No. DR 20-70's Statement of Position Regarding Petition in Docket No. DR 20-69* dated June 18, 2020 ("Appellants' First Response"). *See* ROA at R00129-153.

15. In Appellants First Response, Appellants reiterated their question to the LUC "ask[ing] the Commission to answer the narrow question of whether, as of June 5, 1976, the farm dwellings may be rented for periods of less than 31 days." *See* ROA at R00134.

16. Appellants filed their response to OP's First Response entitled *Statement of Position by Petitioners in Docket No. DR 20-70 Regarding the Office of Planning's Response to Petitioners' and the County of Hawaii's Petitions for Declaratory Order Filed June 18, 2020,* filed on June 23, 2020 ("Appellants' Second Response"). *See* ROA at R00174-193.

17. Appellants' Second Response pointed out to the LUC that the issue whether or not HRS Chapter 205 regulated rentals before June 4, 1976, was not currently before the LUC to determine. *See* ROA at R00188-189.

18. On June 25, 2020, the LUC held the first of three hearings that heard testimony and arguments regarding the consolidated cases under LUC Docket Nos. DR 20-69 and DR 20-70.

19. Deputy Corporation Counsel John Mukai ("DCC Mukai"), representing the County, argued to the LUC that the County was focused on the use of the properties as allowed under HRS §205, not the duration of any lease or rent. He stated: "The County agrees that there is no prohibition on 'farm dwellings' being rented for 30 days or less. But as pointed out in our Petition, it has to be framed in terms of agricultural use in connection with [HRS Chapter 205]…" *See* ROA at R00301.

20. Appellants' counsel, Calvin Chipchase ("Mr. Chipchase") reiterated Appellants' question to the LUC as: "The question before the Commission is quite simply whether as of June 5, 1976, Chapter 205 regulated the duration of rentals of a farm dwelling; whether it regulated how long a farm dwelling had to be rented to be a farm dwelling." *See* ROA at R00344.

21. Mr. Chipchase further summed up Appellants' position by stating:

> So, we get to the question on June 5th, 1976, what did the State law say. That's the only thing I'm asking the Commission to do. I'm not asking the Commission to say short term rentals are okay, a particular use is okay, a particular property is okay. None of that. Only what the law said, plain language of the law, on a particular date.

See ROA at R00396.

22. The LUC hearing was continued to July 23, 2020. *See* ROA at R00405 and R00540.

23. The County filed its *County of Hawai'i's Supplemental Submission* on July 10, 2020 ("County's First Supplemental Submission"). *See* ROA at R00411-419.

24. In County's First Supplemental Submission, the County emphasized that actual use of the property was the crux of County's Petition to the LUC when stating:

> The County's petition specifically asks that the Land Use Commission declare that "farm dwellings" as described in HRS §205-2(d) and §205-4.5(a)(4) cannot be used for overnight accommodations as [STVR]. The use of the farm dwelling shall be framed in terms of agricultural use in connection with HRS §205-2(d) and HRS §205-4.5.

See ROA at R00413. Further, County's First Supplemental Submission makes clear that even short-term rentals for purposes of "agricultural tourism" are not allowed under both State and County laws. *See* ROA at R00415-416.

25. OP filed its *Office of Planning's Supplemental Response to County's and Petitioner Rosehill et. al.'s Petitions for Declaratory Order* dated July 17, 2020 (OP's Supplemental Response). *See* ROA at R00549-558.

26. OP's Supplemental Response pointed out the lack of a "specific factual situation" raised by Appellants for the LUC to be able to make a declaratory ruling. *See* ROA at R00550 (citing HAR §§ 15-15-98(a) and 15-15-100(a)(1)(A)).

27. OP argued that residential or STVR use was never a permitted lawful use on agriculture land, even prior to June 4, 1976. OP based this opinion on the legislative intent of the law though acknowledged that prior to the change in the law in 1976 (which first defined "farm dwelling" as a permitted use on agriculture land) there remained a permitted use of "single-family dwelling units". *See generally* ROA at R00553-556.

28. Appellants filed their *Response by Petitioners in Docket No. DR 20-70 to the County of Hawaii's Supplemental Submission Filed July 10, 2020*, on July 21, 2020 ("Appellants' Third Response) *See* ROA at R00559-631.

29. Appellants filed their *Response by Petitioners in Docket No. DR 20-70 to the Office of Planning's Supplemental Response to County's and Petitioner Rosehill et. al.'s Petitions for Declaratory Order Filed July 17, 2020*, on July 23, 2020 (Appellants' Fourth Response"). *See* ROA at R00633-644.

30. On July 23, 2020, the LUC held the second of three hearings that heard testimony and arguments regarding the consolidated cases under LUC Docket Nos. DR 20-69 and DR 20-70.

31. At this hearing, DCC Mukai stressed that the crux of the County's question before the LUC was regarding actual use and not duration as argued by Appellants. Specifically, DCC Mukai stated:

> The County is not arguing about the duration of the farm dwellings being rented for 30 days or less, or whether the owner of the farm dwelling not needing to reside in the dwelling, but the use, we would stress the use of the farm dwelling is essential in determining whether the [Appellants] may use their farm dwellings as vacation rentals.

See ROA at R00775. DCC Mukai further argued the cross purposes of STVRs and "farm dwellings" as:

> A farm dwelling's purpose is to be a bona fide agricultural service and use which supports and is an accessory to agriculture activities.
>
> The purpose of a short-term vacation rental is to grow transient accommodations or housing that will be temporarily rented for a period of 30 days or less.

See ROA at R00776.

32. Additionally, DCC Mukai directly pointed out Appellants' lack of facts when he stated:

> If the [Appellants] are able and willing to provide facts demonstrating or acknowledging that their dwellings meet all of the STVR elements, and at least one of the farm dwelling options, then the Commission could

> determine that [Appellants] were operating their farm dwellings as STVRs pursuant to HRS §205-4.5(a)(4).
>
> We can assume that the [Appellants] meet the three elements of the STVR rental, but the [Appellants] failed to demonstrate that their farm dwellings are either located on and used in connection with a farm or are located where agricultural activity provides income to the family occupying the farm dwelling.

See ROA at $00776-777.

33. Appellants filed a response to the County's arguments at the July 23, 2020, LUC hearing, entitled *Petitioners' Response in Docket No. DR 20-70 to the County of Hawaii's Argument During the Meeting on July 24, 2020* on August 10, 2020 ("Appellants' Fifth Response"). *See ROA* R00808-880.

34. The County filed its *County of Hawai'i's Second Supplemental Submission* on July 10, 2020 ("County's Second Supplemental Submission"). *See* ROA at R00882-887.

35. The County's Second Supplemental Submission pointed out that the only time a "farm dwelling" could possibly be used as a STVR for agricultural tourism purposes would be found under HRS §205-2(d)(11) and HCC §§ 25-2-75 and 25-4-15. *See* ROA at R00884. These instances would be limited to twenty-one days or less and the property "must co-exist with a bona fide agricultural activity pursuant to HRS §205-2(d)(12)." *See* ROA at R00884.

36. Appellants filed *Response by Petitioners in Docket No. DR 20-70 to the County of Hawaii's Second Supplemental Submission filed August 10, 2020*, on August 12, 2020 ("Appellants' Sixth Response"). *See* ROA at R00894-903.

37. On August 13, 2020, the LUC held the third of three hearings, and heard testimony and arguments regarding the consolidated cases under LUC Docket Nos. DR 20-69 and DR 20-70.

38. At the hearing, discussion was held concerning the significance of the June 4, 1976, date which changed HRS Chapter 205 to include "farm dwelling" as a defined term. *See* ROA at R00940-941.

39. Much of the discussion was the definition of "farm dwelling" under HRS Chapter 205 as it relates to the actual use of a property to be considered a "farm dwelling" and that a "farm dwelling" must be related to agricultural activity. *See* ROA at R00984-985.

40. The County's position regarding actual use was summed up by DCC Mukai when he stated: "The County's entire petition seeks to have this Commission declare that short-term vacation rentals are not a permissible use for farm dwellings pursuant to [HRS §§ 205-2 and 205-4.5] and [HAR §15-15-103]." *See* ROA at R01011.

41. When asked by Commissioner Arnold Wong ("Commissioner Wong"), Mr. Chipchase summed up Appellants' question that they requested the LUC to answer as: "Commissioner Wong, all we are asking for is a declaration as of June 4th, 1976, Chapter 205 did not prohibit renting a farm dwelling for less than 31 days." *See* ROA at R00982.

42. When asked about the June 4, 1976, significance, DCC Mukai stated the County's position that after that date, after "farm dwelling" was defined to include use related to agriculture activities, use as a STVR would not be permitted on agricultural land. *See* ROA at R01016, and R01022-1023.

43. OP indicated they believed residential and/or STVRs were never allowed on agriculture land based on legislative intent. *See* ROA at R01061.

44. When the LUC, through Chairperson Jonathan Scheuer ("Chair Scheuer"), attempted to elicit additional facts about the Appellants' properties, specifically the actual use of

their properties from Mr. Chipchase, he indicated he did not know if any of the Appellants' received any income from farming on the properties. *See* ROA at R00993.

45. The Acting Deputy Director of Planning Department for the County of Hawai'i, April Surprenant ("Dep. Director Surprenant") testified that (1) all the Appellants have applied with the County for non-conforming use certificates for STVRs on their respective properties, (2) all of Appellants' properties were created after June 4, 1976, and (3) all of Appellants' properties were denied by the County due to being on agriculture land. *See* ROA at R01024-1025.

46. At the conclusion of the hearing, the LUC unanimously voted to deny Appellants' petition and grant the County's petition. *See* ROA at R01088-1089.

47. As articulated by Commissioner Gary Okuda ("Commissioner Okuda"), Appellants' petition was determined to be "speculative, hypothetical, and frankly on this record, we cannot adequately determine whether or not it involves an existing situation, or one that can reasonably be expected to occur in the future as required by HAR §15-15-100(a)(1)(A)." *See* ROA R01077.

48. Commissioner Okuda goes on to state "that the actual use of the property determines whether or not the use is lawful and permissible under the statute." *See* ROA at R01077. Commissioner Okuda also warns that:

> [T]here's simply not enough facts or evidence presented in this record to allow us to make a declaratory ruling with respect to the matters being raised by Petitioner Rosehill's request for relief, and in fact, there is a danger. I believe that if we attempted to make such a ruling on an incomplete record, the ruling itself may actually lead to unlawful or improper results or consequences.

See ROA at R01078.

49. After the August 13, 2020, hearing, the LUC provided a written order: *Consolidated Order Denying Rosehill, et al. in Docket No. DR20-70 and Granting County of Hawaii in Docket*

No. [DR 20-69] ("LUC Order"). *See* ROA at R01095-1126. The LUC Order outlined the procedural history of the consolidated cases, relief requested, standard of review and applicable law, and ultimate findings, conclusion of law and ruling.

50. The LUC denied Appellants' petition and granted the County's petition, finding that the Appellants' petition was insufficient, particularly that Appellants "have not submitted a sufficient record or provided a specific factual situation on which the LUC could issue a declaratory order." *See* ROA at R01118.

51. The LUC also determined that Appellants' "actual use of their dwellings is essential because it provides the facts and basis upon which to apply the requested interpretation of the 'farm dwelling' definition." *See* ROA at R01119 ¶77.

52. The LUC also found that the County had met its burden and was entitled to the relief requested and that "[n]one of the elements of the 'STVR' directly align with those of the 'farm dwelling'." *See* ROA at R01120-1121.

53. The LUC further found that STVRs would "never been allowed" in agriculture lands, including the time period prior to June 4, 1976. *See* ROA, ¶65 at R01116 and ¶70 at R01117.

54. Appellants appealed the LUC Order and filed *Appellants' Opening Brief* in 3CCV-21-0000178 on September 7, 2021, ("Appellants' Appeal).

55. Appellants' Appeal argues that the LUC's denial of their petition was "[e]rroneous, [a]rbitrary, [c]apricous and an [a]buse of [d]iscretion." *See generally* Appellants' Appeal.

56. Appellants' Appeal also references the significance of the June 4, 1976 date and found that at least one of the LUC Order's findings in ¶65 was erroneous as "[i]t addresses an issue that was not properly before the Commission." *See* Appellants' Appeal at 30.

57. Based on the record on appeal, the Appellants have not provided sufficient facts regarding the actual use of the properties in question, in which the LUC, or this Court, could provide the relief requested.

III. STANDARD OF REVIEW AND APPLICABLE LAW

A. Agency Appeal

1. An appeal of an agency decision by the Circuit Court is pursuant to HRS § 91-14(g) which states:

> (g) Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary, or capricious, or characterized by the abuse of discretion or clearly unwarranted exercise of discretion.

HRS § 91-14(g). As such:

> Conclusions of law are reviewed de novo, pursuant to subsections (1), (2), and (4); questions regarding procedural defects are reviewable under subsection (3); findings of fact (FOF) are reviewable under the clearly erroneous standard, pursuant to subsection (5), and an agency's exercise of discretion is reviewed under the arbitrary and capricious standard, pursuant to subsection (6).

Unite Here! Local 5 v. Depart. of Planning and Permitting, 145 Haw. 453, 464; 454 P.3d 394, 405 (2019) (hereinafter "*Local 5*") (citing *Kauai Springs, Inc. v. Planning Comm'n of Cty. of Kaua'i*, 133 Haw. 141, 164; 324 P.3d 951, 974 (2014).

For this Court to review an abuse of discretion of an agency determination there must be a two-part inquiry as noted by the Hawai'i Supreme Court:

> When determining whether an agency abused its discretion pursuant to HRS §91-14(g)(6), the court must first "determine whether the agency determination under review was the type of agency action within the boundaries of the agency's delegated authority." If the determination was within the agency's realm of discretion, then the court must analyze whether the agency abused that discretion. If the determination was not within the agency's discretion, then it is not entitled to the deferential abuse of discretion standard of review.

Local 5, 145 Haw. at 464-5; 454 P.3d at 405-6 (citing *Kolio v. Hawai'i Pub. Hous. Auth.*, 135 Haw. 267, 271; 349 P.3d 374, 378 (2015) (additional citations omitted).

B. <u>Jurisdiction</u>

2. HRS §91-8 allows any interested person to petition an agency for a declaratory order as to the applicability of any statutory provision or any rule or order of an agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

3. Petitioners County of Hawai'i and Rosehill, et al. are interested persons pursuant to HRS §91-8 and HAR §15-15-98(a), and thus have standing to bring their petitions before the Commission.

4. The Commission has jurisdiction to issue its declaratory order. HRS §91-8, as implemented by the Commission's administrative rules, HAR §§ 15-15-98 through 15-15-104.1, authorize the Commission to 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." The Commission's statutes, the applicability of which are put at issue in these petitions, are those sections of HRS Chapter 205 that govern the authority to reclassify land and to govern the permitted uses on State Conservation District lands.

5. HAR §15-15-98(c) allows the Commission to issue a declaratory order "…without notice of hearing" to terminate a controversy or to remove uncertainty. The commission concludes that based on the facts presented at the meeting, the testimony of public witnesses, the pleadings filed, together with the exhibits, the opportunity of Petitioners to present their view, and the fact that neither Petitioner requested a hearing pursuant to HAR §15-15-103, a hearing is not necessary before issuing a declaratory order in this matter.

6. HAR §1515-100(a)(1)(A) provides that the Commission can deny a petition where "the question is speculative or purely hypothetical and does not involve an existing situation or one which may reasonably be expected to occur in the near future;".

C. <u>Jurisdiction to Identity Uses in the State Agricultural District</u>.

7. HRS §205-4.5(a) provides that:

> …within the agricultural district, all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B and for solar energy facilities, class B or C, shall be restricted to the following permitted uses:…

8. HRS §205-4.5(b) provides that:

> …uses not expressly permitted in subsection (a) shall be prohibited, except the uses permitted as provided in sections 205-6 and 205-8, and construction of single-family dwellings on lots existing before June 4, 1976. Any other law to the contrary notwithstanding, no subdivision of land within the agricultural district with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be approved by a county unless those A and B lands within the subdivision are made subject to the restriction on uses as prescribed in this section and

to the condition that the uses shall be primarily in pursuit of an agricultural activity.

Any deed, lease, agreement or sale, mortgage, or other instrument of conveyance covering any land within the agricultural subdivision shall expressly contain the restrictions on uses and the conditions shall be encumbrances running with the land until such time that the land is reclassified to a land use district other than agricultural district.

9. HRS §205-5(a) provides what government entities have authority over within each of the land use districts:

> Except as herein provided, the powers granted to counties under section 46-4 shall govern the zoning within the districts, other than in conservation districts. Conservation districts shall be governed by the department of land and natural resources pursuant to chapter 183C.

10. HRS §205-5(b) addresses the dual nature of jurisdiction over uses within the agricultural district:

> 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. Ordinances shall include but not be limited to:
>
> (1) Requirements for access to a farm, including road width, road surface, and parking;
>
> (2) Requirements and restrictions for accessory facilities connected with the farming operation, including gift shops and restaurants;
>
> (3) Activities that may be offered by the farming operation for visitors;
>
> (4) Days and hours of operation; and
>
> (5) Automatic termination of the accessory use upon the cessation of the farming operation.

D. <u>Jurisdiction to Enforce Uses in the State Agricultural District</u>.

11. HRS §205-12 addresses enforcement responsibility:

> The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations.

12. HRS §205-15 addresses any conflicts created:

> Except as specifically provided by this chapter and the rules adopted hereto, neither the authority for the administration of chapter 183C nor the authority vested in the counties under section 46-4 shall be affected.

E. <u>The State and The Counties Have Concurrent Jurisdiction Over Land in The Agricultural District</u>.

13. The Legislature has authorized zoning powers to the counties, pursuant to the Zoning Enabling Act. As described by the Hawai‘i Supreme Court:

> The counties of our state derive their zoning powers from HRS §46-4(a) (Supp.1988), referred to as the Zoning Enabling Act. It states in pertinent part:
>
> Zoning in all counties shall be accomplished within the framework of a long range, comprehensive general plan prepared or being prepared to guide the overall future development of the county. Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner.
> ….
>
> The powers granted herein shall be liberally construed in favor of the county exercising them, and in such a manner as to promote the orderly development of each county or city and county in accord with a long range, comprehensive, general plan, and to insure the greatest benefit for the State as a whole.

Kaiser Hawai‘i Kai Dev. Co. v. City & Cty. of Honolulu, 70 Haw. 480, 483-84; 777 P.2d 244, 246 (1989).

14. The Hawai‘i Supreme Court further explained:

> The language of the Zoning Enabling Act clearly indicates the legislature’s emphasis on comprehensive planning for reasoned and orderly land use

> development. This emphasis on planning was reiterated in the statement of policy adopted as part of the legislation enacting the Zoning Enabling Act. There, the legislature stated:
>
> The pressure of a rapidly increasing population in the Territory of Hawai‘i requires an orderly economic growth within the various counties and the conservation and development of all natural resources. Adequate controls must be established, maintained, and enforced by responsible agencies of government to reduce waste and put all of our limited land area, and the resources found thereon, to their most beneficial use. [¶] It is the intent and purpose of the legislature, by means of zoning ordinances and regulations enacted by or under this act, and in accord with a long range, comprehensive general plan, to promote the health, safety, convenience, order, welfare, and prosperity of the present and future inhabitants of the Territory.
>
> § 1, Act 234, 1957 Session Laws of Hawai‘i.

Kaiser Hawai‘i Kai Dev. Co. v. City & Cty. of Honolulu, 70 Haw. 480, 484; 777 P.2d 244, 246-47 (1989).

15. Hawai‘i's system of land use regulation is a dual system, administered concurrently by the LUC and the respective county. The Hawai‘i Supreme Court explained:

> 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. We believe that the "consistency doctrine" enunciated in *Gatri* is somewhat instructive in the instant case. Because the uses allowed in county zoning, are prohibited from conflicting with the uses allowed in a State agricultural district, only a more restricted use as between the two is authorized. 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.

Save Sunset Beach Coal. v. City & Cty. of Honolulu, 102 Haw. 465, 482; 78 P.3d 1, 18 (2003).

16. Because of the foregoing, the county zoning provision and the State Land Use law must be evaluated side by side, and "only a more restricted use as between the two [county zoning and State Land Use law, HRS chapter 205] is authorized". *Save Sunset Beach Coal. v. City & Cty. of Honolulu,* 102 Haw. 465, 482; 78 P.3d 1, 18 (2003).

17. Accord: Declaratory Order, *In the Matter of the Petition of JOHN GODFREY,* Docket No. DR 94-17. Col 5 at p.17-18 ("[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.").

F. Statutory Interpretation

18. "The interpretation of a statute[, ordinance, or charter] is a question of law reviewable de novo." *Local 5*, 145 Haw. at 465; 454 P.3d at 406 (citing *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Haw. 217, 229; 953 P.2d 1315, 1327 (1998) (hereinafter "*Sullivan*") (alterations in original).

> 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, "the 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 the legislative history as an interpretive tool.

Local 5, 145 Haw. at 465; 454 P.3d at 406 (citing *Sullivan*, at 229-30; 953 P.2d at 1327-28 (additional citations omitted).

As to construction of administrative rules the Hawai‘i Supreme Court stated that:

> The general principles of construction which apply to statutes also apply to the administrative rules. As in statutory construction, courts look first at an administrative rule's language. If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning.

Local 5, 145 Haw. at 465; 454 P.3d at 406 (citing *Citizens Against Reckless Development v. Zoning Bd. of Appeals of City and County of Honolulu*, 114 Haw. 184, 194; 159 P.3d 143, 153 (2007) (hereinafter "*CARD*").

G. <u>The Law Regarding Statutory Interpretation</u>.

19. The Hawai'i Supreme Court stated the following with respect to the interpretation of a statute:

> Statutory interpretation is "a question of law reviewable de novo." *State v. Levi*, 102 Haw. 282, 285; 75 P.3d 1173, 1176 (2003) (quoting *State v. Arceo*, 84 Haw. 1, 10; 928 P.2d 843, 852 (1996)). This court's statutory construction is guided by established rules:
>
> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.
>
> *Peterson v. Hawai'i Elec. Light Co., Inc.,* 85 Haw. 322, 327-28; 944 P.2d 1265, 1270-71 (1997), superseded on other grounds by HRS §269-15.5 (Supp.1999) (block quotation format, brackets, citations, and quotation marks omitted).
>
> In the event of ambiguity in a statute, "the 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." *Id.* (quoting HRS §1-15(1) (1993)). Moreover, the courts may resort to extrinsic aids in determining legislative intent, such as legislative history, or the reason and spirit of the law. See: HRS §1-15(2) (1993).
>
> *Del Monte Fresh Produce (Hawai'i), Inc. v. Int'l Longshore & Warehouse Union, Local 142, AFL-CIO,* 112 Haw. 489,499; 146 P.3d 1066, 1076 (2006).

20. With respect to the deference which should be accorded to an administrative agency, the Hawai'i Supreme Court has stated the rule that under HRS §91-14(g)(6) and

administrative agency's exercise of discretion will not be disturbed unless, … "[a]rbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Paul's Electrical Serv., Inc. v. Befitel,* 104 Haw. 412, 417; 91 P.3d 494, 499 (2004). The Court went on further to say:

> Administrative agencies are created by the legislature, and the legislature determines the bounds of the agency's authority. Thus, before we can determine whether an agency abused its discretion pursuant to HRS §91-14(g)(6), we must determine whether the agency determination under review was the type of agency action within the boundaries of the agency's delegated authority.
>
> To the extent that the legislature has authorized an administrative agency to define the parameters of a particular statute, that agency's interpretation should be accorded deference.
>
> *Paul's Electrical Serv., Inc. v. Befitel,* 104 Haw. 412, 417; 91 P.3d 494, 499 (2004) (internal citation omitted).

Thus, when reviewing an agency's determination, this court has stated:

> The standard of review for decisions of administrative agencies therefore 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.

H. <u>A Specific Factual Situation Must Be Presented to Support A Request For A Declaratory Order</u>.

21. The LUC may issue a Declaratory Order if presented with a specific factual situation. HAR §15-15-98(a) provides:

(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.

22. A petition which presents a speculative question does not support the issuance of a declaratory order. HAR §15-15-100(a)(1)(A) provides:

Consideration of petition for declaratory order.

(a) The Commission, within ninety days after submission of a petition for declaratory order, shall:

(1) Deny the petition where:

(A) The question is speculative or purely hypothetical and does not involve an existing situation or one which may reasonable be expected to occur in the near future; or…

I. Within An Agricultural Use District, A Dwelling Must Be Related to An Agricultural Activity or Is A "Farm Dwelling".

23. HRS §205-5 states:

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

(b) 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. Ordinances shall include but not be limited to:

(1) Requirements for access to a farm, including road width, road surface, and parking;

(2) Requirements and restrictions for accessory facilities connected with the farming operation, including gift shops and restaurants;

(3) Activities that may be offered by the farming operation for visitors;

(4) Days and hours of operation; and

(5) Automatic termination of the accessory use upon the cessation of the farming operation.

24. HRS §205-2(d) provides:

(d) Agricultural districts shall include:

(1) Activities or uses as characterized by the cultivation of crops, crops for bioenergy, orchards, forage, and forestry;

(2) Farming activities or uses related to animal husbandry and game and fish propagation;

(3) Aquaculture, which means the production of aquatic plant and animal life within ponds and other bodies of water;

(4) Wind-generated energy production for public, private, and commercial use;

(5) Biofuel production, as described in section 205-4.5(a)(16), for public, private, and commercial use;

(6) Solar energy facilities; provided that:

(A) This paragraph shall apply only to land with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class B, C, D, or E; and

(B) Solar energy facilities placed within land with soil classified as overall productivity rating class B or C shall not occupy more than ten percent of the acreage of the parcel, or twenty acres of land, whichever is lesser, unless a special use permit is granted pursuant to section 205-6;

(7) Bona fide agricultural services and uses that support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, regardless of whether conducted on the same premises as the agricultural activities to which they are accessory, including farm dwelling as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, photovoltaic, biogas, and other small-scale renewable energy systems producing energy solely for use in the agricultural activities of the fee or leasehold owner of the property, agricultural-energy facilities as defined in section 205-4.5(a)(17), vehicle and equipment storage areas, and plantation community subdivisions as defined in section 205-4.5(a)(12);

(8) Wind machines and wind farms;

(9) Small-scale meteorological, air quality, noise, and other scientific and environmental data collection and monitoring facilities occupying less than one-half acre of land; provided that these facilities shall not be used as or equipped for use as living quarters or dwellings;

(10) Agricultural parks;

(11) Agricultural tourism conducted on a working farm, or a farming operation as defined in section 165-2, for the enjoyment, education, or involvement of visitors; provided that the agricultural tourism activity is accessory and secondary to the principal agricultural use and does not interfere with surrounding farm operations; and provided further that this paragraph shall apply only to a county that has adopted ordinances regulating agricultural tourism under section 205-5;

(12) 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;

(13) Open area recreational facilities;

(14) Geothermal resources exploration and geothermal resources development, as defined under section 182-1;

(15) Agricultural-based commercial operations registered in Hawaii, including:

(A) A roadside stand that is not an enclosed structure, owned and operated by a producer for the display and sale of agricultural products grown in Hawaii and value-added products that were produced using agricultural products grown in Hawaii;

(B) Retail activities in an enclosed structure owned and operated by a producer for the display and sale of agricultural products grown in Hawaii, value-added products that were produced using agricultural products grown in Hawaii, logo items related to the producer's agricultural operations, and other food items;

(C) A retail food establishment owned and operated by a producer and permitted under chapter 11-50, Hawaii Administrative Rules, that prepares and serves food at retail using products grown in Hawaii and value-added products that were produced using agricultural products grown in Hawaii;

(D) A farmers' market, which is an outdoor market limited to producers selling agricultural products grown in Hawaii and value-added products that were produced using agricultural products grown in Hawaii; and

(E) A food hub, which is a facility that may contain a commercial kitchen and provides for the storage, processing, distribution, and sale of agricultural products grown in Hawaii and value-added products that were produced using agricultural products grown in Hawaii.

The owner of an agricultural-based commercial operation shall certify, upon request or an officer or agent charged with enforcement of this chapter under section 205-12, that the

> agricultural products displayed or sold by the operation meet the requirements of this paragraph; and
>
> (16) Hydroelectric facilities as described in section 205-4.5(a)(23).
>
> Agricultural districts shall not include golf courses and golf driving ranges, except as provided in section 205-4.5(d). Agricultural districts include areas that are not used for, or that are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.

25. The LUC previously held that Chapter 205, Hawai‘i Revised Statutes, does not authorize residential dwelling as a permissible use within an agricultural use district, unless the dwelling is related to an agricultural activity or is a "farm dwelling." Declaratory Order, *In the Matter of the Petition of JOHN GODFREY,* Docket No. DR 94-17. Col 5 at p.17.

J. <u>The Provisions of County of Hawai‘i, Ordinance No. 18-114</u>.

26. The Petitions filed in this matter concern Ordinance No. 18-114 enacted by the County of Hawai‘i in 2018. The Council of the County of Hawai‘i made the following Findings when it adopted Ordinance No. 18-114:

> SECTION 1. Findings and Purpose. The short-term rental of residential units, as an alternative to traditional resort and hotel accommodations, is an emerging trend in the visitor industry that continues to grow in popularity.
>
> The purpose of this ordinance is to manage the impacts of these short-term vacation rentals by: 1) defining where this use will be allowed; 2) establishing provisions and standards to regulate this use; and 3) providing an avenue for an existing use deemed to be improper by this ordinance, to apply for a nonconforming use certificate that would allow them to continue to operate in a non-permitted district.

27. The Ordinance provided the following definition of a short-term vacation rental ("STVR"):

> SECTION 3. Chapter 25, article 1, section 25-1-5, of the Hawai‘i County Code 1983 (2016 Edition, as amended), is amended by adding new definitions to be appropriately inserted and to read as follows:

***

"Short-term vacation rental" means 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. This definition does not include the short-term use of an owner's primary residence as defined under section 121 of the Internal Revenue Code.

28. The Ordinance describes where Short-term vacation rentals would be allowed.

Section 25-4-16. Short-term vacation rentals.

(a) Short-term vacation rentals; where permitted, specific prohibitions.

(1) Short-term vacation rentals shall be permitted in the:

(A) V, CG, and CV districts;

(B) Residential and commercial zoning districts, situated in the General Plan Resort and Resort Node areas; and

(C) RM district, for multiple family dwellings within a condominium property regime as defined and governed by chapters 514A or 514B, Hawai‘i Revised Statutes.

(2) Private covenants prohibiting use of any unit as a short-term vacation rental shall not be invalidated by this chapter.

29. The Ordinance required registration of all STVRs.

(b) Registration of all short-term vacation rentals.

(1) Short-term vacation rentals in existence on or before April 1, 2019, shall register with the director and pay a one-time fee of $500. The registration form and associated fee shall be submitted to the planning department no later than September 30, 2019.

(2) Any new short-term vacation rental established in a zoning district after April 1, 2019, where such use is permissible

pursuant to this section, shall register with the director and pay a one-time fee of $500 prior to use of such rental.

(3) Short-term vacation rentals shall only be established within a dwelling that has been issued final approvals by the building division for building, electrical, and plumbing permits.

(4) Owners of short-term vacation rentals shall register by submitting a form to the planning department in a format prescribed by the director. The registration form, at a minimum, shall require:

(A) Verification that State of Hawai‘i general excise tax and transient accommodations tax licenses are in effect and verification that County property taxes are paid in full;

(B) Certification that the requisite amount of parking pursuant to section 25-4-51, is available;

(C) Submittal of a site plan showing the location of the rooms for rent and requisite parking; and

(D) Verification that notification letters from nonconforming use applicants have been sent to all owners and lessees of record of all lots of which any portion is within three hundred feet of any point along the perimeter boundary of the short-term vacation rental property. The notification letter shall provide detailed information about the short-term vacation rental operation including: number and location of required parking spaces; and instructions on how to submit complaints to the planning department about the subject rental operation.

(5) Owners of short-term vacation rentals shall notify the director when a short-term vacation rental establishment permanently ceases to operate for any reason.

(6) Upon change in ownership, the new owner shall notify the director forthwith of the change in ownership and provide contact information for the reachable person. Registration shall automatically continue, subject to termination by the new owner.

(7) Any short-term vacation rental that has not lawfully registered within the deadlines set forth in this section shall be considered an unpermitted use and subject to the penalties set forth in this chapter until such time as proper registration and compliance with applicable requirements of this section are obtained.

30. The Ordinance included provisions for issuance of nonconforming use certificates. The Ordinance stated:

> Section 25-4-16.1. Short-term vacation rental nonconforming use certificate.
>
> (a) Nonconforming use certificate. In addition to registering pursuant to 25-4-16(b)(1), the owner of any short-term vacation rental which operated outside of a permitted zoning district prior to April 1, 2019, shall obtain a short-term vacation rental nonconforming use certificate in order to continue to operate. This certificate must be renewed annually. Applications for nonconforming use certificates must be submitted to the director no later than September 30, 2019.
>
> (b) Evidence of prior use.
>
> (1) The applicant seeking a short-term vacation rental nonconforming use certificate shall have the burden of proof in establishing that the property was in use prior to April 1, 2019, and that the dwelling has been issued final approvals by the building division for building, electrical, and plumbing permits. Evidence of such use prior to April 1, 2019, may include tax documents for the relevant time period or other reliable information.
>
> (c) Issuance of initial nonconforming use certificate.
>
> (1) The director shall determine whether to issue a short-term vacation rental nonconforming use certificate for a short-term vacation rental based on the evidence submitted and other pertinent information.
>
> (2) Issuance of an initial nonconforming use certificate may be denied if the director verifies any of the following:
>
> (A) The applicant has violated pertinent laws, such as not securing and finalizing necessary building permits for the dwelling;

(B) The owner is delinquent in payment of State of Hawai‘i general excise tax, transient accommodations tax, or County property taxes, fees, fines, or penalties assessed in relation to the short-term vacation rental; or

(C) Evidence of non-responsive management, such as issuance of a notice of violation, police reports, or verified neighbor complaints of noise or other disturbances relating to the short-term rental operations.

31. The Ordinance also specifically provided that STVR would be allowed: in RS districts ("SECTION 5. Chapter 25, article 5, division 1, section 25-5-3, of the Hawai‘i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows: '(a) The following uses shall be permitted in the RS district: *** (13) Short-term vacation rentals situated in the general plan resort and resort node areas'"); in RD districts ("SECTION 6. Chapter 25, article 5, division 2, section 25-5-22, of the Hawai‘i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows: '(a) The following uses shall be permitted in the RD district: *** (15) Short-term vacation rentals situated in the general plan resort and resort node areas'"); in RM districts ("SECTION 7. Chapter 25, article 5, division 3, section 25-5-32, of the Hawai‘i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows: '(a) The following uses shall be permitted in the RM district: *** (18) Short-term vacation rentals situated in any of the following: (A) General plan resort and resort node areas. (B) Outside the general plan resort and resort node areas, in multiple family dwellings within a condominium property regime as defined and governed by chapters 514A or 514B, Hawai‘i Revised Statutes.'"); in RCX districts ("SECTION 8. Chapter 25, article 5, division 4, section 25-5-42, of the Hawaii County Code 1983 (2016 Edition, as amended), is amended by amending subsection

(a) to read as follows: '(a) The Following uses shall be permitted in the RCX district: *** (24) Short-term vacation rentals situated in the general plan resort and resort node areas'"); in V districts ("SECTION 9. Chapter 25, article 5, division 9, section 25-5-92, of the Hawai'i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows '(a) The following uses shall be permitted in the V district: *** (32) Short-term vacation rentals'"); in CN districts ("SECTION 10. Chapter 25, article 5, division 10, section 25-5-102, of the Hawaii County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows: '(a) The following uses shall be permitted in the CN district: *** (34) Short-term vacation rentals situated in the general plan resort and resort node areas'"); in CG districts ("SECTION 11. Chapter 25, article 5, division 11, section 25-5-112, of the Hawai'i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows: '(a) The following uses shall be permitted uses in the CG district: *** (52) Short-term vacation rentals'"); and in CV districts ("SECTION 12. Chapter 25, article 5, division 12, section 25-5-122, of the Hawai'i County Code 1983 (2016 Edition, as amended), is amended by amending subsection (a) to read as follows: '(a) The following uses shall be permitted in the CV district: *** (45) Short-term vacation rentals'").

IV. CONCLUSIONS OF LAW

To the extent that any of the following Conclusions of Law shall be determined to be or include Findings of Fact, they shall be deemed as such.

A. In Evaluating the Provisions of County of Hawai'i, Ordinance No. 18-114, the Land Use Commission Recognizes That the State and the Counties Have Concurrent Jurisdiction Over Land in the Agricultural District.

1. Hawai'i's system of land use regulation is a dual system, administered concurrently by the LUC and the respective county. *Save Sunset Beach Coal. v. City & Cty. of*

Honolulu, 102 Haw. 465, 482; 78 P.3d 1, 18 (2003). Due to the foregoing, the county zoning provision and the State Land Use law must be evaluated side by side, and "only a more restricted use as between the [county zoning and State Land Use law, H.R.S. Chapter 205] is authorized". *Save Sunset Beach Coal. v. City & Cty. of Honolulu,* 102 Haw. 465, 482; 78 P.3d 1, 18 (2003).

2. To the extent that the Hawai'i 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. *Save Sunset Beach Coal. v. City & Cty. of Honolulu*, 102 Haw. 465,482; 78 P.3d a, 18 (2003).

3. In any event, with respect to property designated Agriculture, unless the actual use of the property is authorized by HRS §205-4.5, that actual use is impermissible, it violates the law, and it is illegal.

4. Within the Agricultural District, the Counties may not permit the use of property if that use is not permitted by HRS Chapter 205.

5. 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".

6. A "farm dwelling" may not be used as a short-term vacation rental ("STVR").

7. The "farm dwelling" use and a STVR use are not compatible uses. Since June 4, 1976, a "farm dwelling", as defined under HRS §205-4.5(a)(4), is a single-family dwelling that either must be located on and used in connections with a farm, or where agricultural activity provides income to the family occupying the dwelling.

8. In the present case before the Court, 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."

9. 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 list 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.

10. Residential use of a "farm dwelling" without any connection to an agricultural use has not been allowed in the Agricultural District since June 4, 1976. The law has always required that a "farm dwelling" be used in connection with a farm or accessory to an agricultural use.

11. A dwelling in the Agricultural District must be used in connection with a farm where agricultural activity provides income to the persons occupying the dwelling. In *In the Matter of ~ 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*, DR83-8, the Land Use Commission held 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 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.

DR83-8, at 3.

12. The Land Use Commission explained that subsequent history supported its ruling.

> 8. Senate Bill No. 993 (1983) purported to amend Section 205-4.5 to permit the raising of crops for both commercial and personal use. Governor Ariyoshi's veto of this bill is an expression of the State's policy that the agricultural activity must be commercial to be a permitted use on lands in the Agricultural District having an A or B soil productivity rating.

DR83-8, at 3.

13. A STVR is an incompatible use of a "farm dwelling".

14. A STVR is not a permitted use as a "farm dwelling" under HRS Chapter 205.

15. Purely residential uses, with no connection to agricultural use, such as STVR use, is not allowed in the Agricultural District after June 4, 1976.

16. The counties are empowered to regulate farm dwellings more restrictively to not be used as STVRs.

B. <u>The Insufficiency of The Rosehill Petition</u>.

17. The Rosehill Petitioners/Appellants have not submitted a sufficient record demonstrating that their use or the intended use of their subject properties are uses permitted in an Agricultural District by HRS Chapter 204, including HRS §§ 205-2(d) and 205-4.5(a).

18. The Rosehill Petitioners/Appellants have not submitted a sufficient record demonstrating that their use or intended use of their subject properties are "farm dwellings" or related to agriculture.

19. The Rosehill Petitioners/Appellants did not present to the Commission a specific factual situation on which the Commission could issue the declaratory order they requested.

20. The Rosehill Petitioners/Appellants were required to set forth a proper question for the Commission to consider and make a declaratory ruling on. HAR §15-15-98(a) states, "[o]n petition of any interested person, the [C]omission may issue a declaratory order as to the

applicability of any statutory provision or of any rule or order of the [C]omission to a specific factual situation." In considering a petition for declaratory order, the Commission may deny the petition where "[t]he question is speculative or purely hypothetical and does not involve an existing situation or one which may reasonably be expected to occur in the near future." HAR §15-15-100(a)(1)(A). Additionally, "[a]n order disposing of a petition shall apply only to the factual situation described in the petition or set forth in the order. It shall not be applicable to different fact situations or where additional facts not considered in the order exist."

21. The Rosehill Petitioners'/Appellants' Petition for Declaratory Order asks the Commission to compare the County's definition of a "STVR" with the definition of "farm dwelling" under HRS §205-5.4(a)(4), to determine whether the definition of "farm dwelling" regulated the rental period of a farm dwelling. No specific situation was presented. The Rosehill Petitioners'/Appellants' question is very narrow and limited to a strict reading of the statute and County ordinance relative to rental timeframe without considering the Rosehill Petitioners' actual use of their dwellings.

22. The Rosehill Petitioners'/Appellants' actual use of their dwellings is essential because it provides the facts and basis upon which to apply the requested interpretation of the "farm dwelling" definition. The Rosehill Petitioners'/Appellants' question is not a "specific factual situation" upon which this Commission can apply the definition of "farm dwelling" because relevant facts and circumstances were not provided. 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 make a finding as to the relief requested by the Rosehill Petitioners/Appellants.

23. Without limiting the foregoing, the Rosehill Petitioners/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 Rosehill Petitioners/Appellants are entitled to the relief they requested.

C. <u>The County of Hawai'i is Entitled to the Relief It Requested</u>.

24. Without a "specific factual situation" presented to the Commission, the Rosehill Petitioners/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 Rosehill Petitioners'/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.

25. The elements of a "STVR" as defined by the County's ordinances are:

(1) The owner or operator doesn't 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.

26. The elements of a "farm dwelling" under HRS §205-4.5(a)(4) are, 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.

27. None of the elements of the "STVR" directly align with those of the "farm dwelling".

28. To the extent that the Hawai‘i 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. *Save Sunset Beach Coal. v. City & Cty. of Honolulu,* 102 Haw. 465, 482; 78 P.3d 1, 18 (2003).

29. The County has met its burden to demonstrate it is entitled to the relief requested.

30. For the reasons stated above and other good cause shown in the record, the Commission finds that the Rosehill Petitioners/Appellants petition was speculative, and the Land Use Commission therefore exercises its discretion and DENIES the relief requested by the Rosehill Petitioners/Appellants.

31. For the reasons stated above and other good cause shown in the record, the Commission finds that the County has met its burden under the law and the Land Use Commission therefore GRANTS the relief requested by the County.

V. DECISION AND ORDER

Having considered the complete record of the Land Use Commission's original proceedings on the Petitions and the written and oral arguments presented by the parties in this agency appeal proceeding, and good cause existing, this Court hereby affirms and adopts the Consolidated Order of the LAND USE COMMISSION, STATE OF HAWAI'I dated May 20, 2021, wherein Petitioners LINDA K. ROSEHILL, et al.'s Petition for Declaratory Order and Incorporated Memoranda, filed May 22, 2020, in (DR 20-70), was DENIED and Petitioner

COUNTY OF HAWAI'I'S Petition for Declaratory Order, filed May 19, 2020, in (DR 20-69), was GRANTED.

DATED: Kailua-Kona, Hawai‘i, _____.

_____
JUDGE OF THE ABOVE-ENTITLED MATTER

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 EUGINIA 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,

Appellants,

vs.

STATE OF HAWAI‘I, LAND USE COMMISSION; and COUNTY OF HAWAI‘I,

Appellees.

CIVIL NO.: 3CCV-21-0000178
(Agency Appeal)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the forgoing document was served on the parties below at their respective addresses by the method noted below on February 28, 2022:

Served by depositing the same in the United States mail, postage prepaid:

Mary Alice Evans
Director, Office of Planning
PO Box 2359
Honolulu, Hawai‘i 96804

Served electronically through the JEFS filing system:

Roy A. Vitousek, III, Esq. rvitousek@cades.com
Calvert G. Chipchase, Esq. cchipchase@cades.com
Christopher T. Goodin, Esq. cgoodin@cades.com
Molly A. Olds, Esq. molds@cades.com
1000 Bishop Street, Suite 1200
Honolulu, Hawai‘i 96813
Attorneys for Appellants

Dawn Takeuchi-Apuna, Esq. dawn.t.apuna@hawaii.gov
Deputy Attorney General
425 Queen Street
Honolulu, Hawai‘i 96813
Attorney for the State of Hawaii & Office of Planning

Daniel A. Morris, Esq. daniel.a.morris@hawaii.gov
Linda L.W. Chow, Esq. linda.l.chow@hawaii.gov
Lauren K. Chun, Esq. lauren.k.chun@hawaii.gov
Deputy Attorneys General
465 South King Street, Room 300
Honolulu, Hawai‘i 96813
Attorneys for Appellee State of Hawai‘i, Land Use Commission

Dated: Hilo, Hawai‘i, February 28, 2022.

COUNTY OF HAWAI‘I, Appellee

By /s/ Mark D. Disher
MARK D. DISHER
Deputy Corporation Counsel
Its Attorney

NOTICE OF ELECTRONIC FILING

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 02:38:04 PM
Filing Parties: Department of the Corporation Counsel
Case Type: Circuit Court Civil
Lead Document(s): 64-Prop Find Facts, Cncl of Law
Supporting Document(s):
Document Name: 64-APPELLEE COUNTY OF HAWAI'I'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER; CERTIFICATE OF SERVICE

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
