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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 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

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

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

APPELLANT ROSEHILL ET AL.'S SUBMISSION OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

[PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DECLARATION OF CHRISTOPHER T. GOODIN

EXHIBIT 1

CERTIFICATE OF SERVICE

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

Appellants,

v.

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

Appellees.

APPELLANT'S SUBMISSION OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Petitioners/Appellants Linda K. Rosehill, Trustee of the Linda K. Rosehill Revocable Trust dated August 29, 1989, as amended; 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; Nettleton S. and Diane E. Payne, III (collectively, the "**Appellants**") submit their proposed Findings of Fact, Conclusions of Law, and Order reversing the Consolidated Declaratory Order Denying the Petition of Rosehill, *et al.* and Granting the Petition of the County of Hawai'i filed May 20, 2021, by the State of Hawai'i Land Use Commission in Docket Nos. DR 20-69 and DR-70. Attached as Exhibit 1 is a true

and correct copy of the transcript of the hearing that was held in this matter on January 10, 2022.

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

CADES SCHUTTE
A Limited Liability Law Partnership

/s/ Christopher T. Goodin
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Attorneys for Appellants

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 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

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

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

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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

Appellants,

v.

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

Appellees.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On June 18, 2021, Rosehill Petitioners/Appellants[1] timely filed a Notice of Appeal from the Consolidated Declaratory Order Denying the Petition of Rosehill, *et al.* and Granting the Petition of the County of Hawai'i filed May 20, 2021, by the State of Hawai'i Land Use Commission in Docket Nos. DR 20-69 and DR-70 (the "**Consolidated Order**"). Based on the record and the arguments presented during the hearing on January 10, 2022, the Court makes the following Findings of Fact, Conclusions of Law and Order. Where appropriate, findings of fact shall operate as conclusions of law, and conclusions of law shall operate as findings of fact.

[1] The Rosehill Petitioners are Appellants Linda K. Rosehill, Trustee of the Linda K. Rosehill Revocable Trust dated August 29, 1989, as amended; 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.

I. FINDINGS OF FACT

1. This case is an agency appeal from the Consolidated Order of Appellee State of Hawai‘i Land Use Commission (the "**Commission**" or "**LUC**") granting Petitioner/Appellee County of Hawai‘i's (the "**County**") Petition for Declaratory Order and denying Rosehill Petitioners/Appellants' Petition for Declaratory Order.

A. County Ordinance 2018-114 and Rule 23-3.

2. Prior to April 1, 2019, the County did not regulate how long a dwelling in the State Land Use Agricultural District ("**State Agricultural District**") could be rented.

3. On April 1, 2019, the County amended the Hawai‘i County Code ("**HCC**" or "**Code**") though County Ordinance 2018-114 ("**County Ordinance 2018-114**") to bar every owner of land within the State Agricultural District from renting any dwelling for a period of 30 consecutive days or less, unless the lot was created before June 4, 1976. *See* Docket No. 2 at R00048 ("In the State land use agricultural district, a short-term vacation rental nonconforming use certificate may only be issued for single-family dwellings on lots existing before June 4, 1976."); *id.* at R00061 ("Any dwelling being operated as a Short-Term Vacation Rental on a lot created on or after June 4, 1976 in the State Land Use Agricultural District is excluded from being registered as a Short-Term Vacation Rental.").

4. County Ordinance 2018-114 defines a "dwelling" as a "short term vacation rental" if (1) "the owner or operator does not reside on the building site," (2) it "has no more than five bedrooms for rent on the building site" and (3) it "is rented for a period of thirty consecutive days or less." County Ordinance 2018-114. Within the State Agricultural District on Hawai‘i Island, renting any dwelling that meets this definition is prohibited.

5. This definition has three "specific factual" elements, *see* Hawai‘i Administrative Rules ("**HAR**") § 15-15-98(a), namely that (1) the dwelling is one in "which the owner or operator does not reside on the building site"; (2) the dwelling "has no more

than five bedrooms for rent on the building site"; and (3) the dwelling "is rented for a period of thirty consecutive days or less." County Ordinance 2018-114.

6. County Ordinance 2018-114 does not define or regulate "vacation" or "tourist" uses. In other words, whether an occupant of a "short-term vacation rental" is "on vacation" or using the dwelling for another purpose, such as farming, is not a "specific factual" element of the definition of "short-term vacation rental."

B. County Interpretation of State Law.

7. County Ordinance 2018-114 did not grandfather or provide an amortization period for properties being rented for 30 days or less prior to the enactment of the ordinance. Instead, it eliminated such uses in the State Agricultural District overnight.

8. A zoning ordinance may not immediately outlaw an existing lawful use. *See Robert D. Ferris Tr. v. Planning Comm'n of Cnty. of Kauai*, 138 Hawai'i 307, 312-13, 378 P.3d 1023, 1028-29 (App. 2016) ("Under the United States and Hawai'i Constitutions, preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate." (quotations omitted)). Accordingly, existing lawful uses cannot be declared unlawful as of the date of a new ordinance. *E.g.*, *Cradduck v. Yakima County*, 271 P.3d 289, 296 (Wash. Ct. App. 2012) ("While it would be unconstitutional to subject nonconforming uses to immediate termination, it is a valid exercise of police power to terminate nonconforming uses that have been abandoned or by providing a reasonable amortization period.") (quotations omitted). Rather, existing lawful uses must be "amortized" or phased out uses over time. *E.g.*, HAR § 15-15-29 (regulating non-conforming uses).

9. In apparent recognition of this limitation, the County created a limited exception to County Ordinance 2018-114. Consistent with the exception in Ordinance 2018-114, the County Planning Department adopted Rule of Practice and Procedure 23-3 in April 2019. The rule provides, "Any dwelling being operated as a Short-Term Vacation Rental on a lot created on or after June 4, 1976, in the State Land Use

Agricultural District is excluded from being registered as a Short-Term Vacation Rental." Docket No. 2 at R00060.

10. This exception relies on an interpretation of State law as it existed on June 4, 1976—the date chosen by the County. Under the exception, an owner of land within in the State Agricultural District may register with the County to continue renting its dwelling for 30 days or less if the dwelling is on a lot that was created prior to June 4, 1976.

11. This exception is based on the County's interpretation of Hawai'i Revised Statutes ("**HRS**") Chapter 205 as of June 4, 1976. The County selected June 4, 1976, because, on that date, the State law was amended to delineate certain permissible uses within the State Agricultural District. *See* 1976 Sess. Laws of Hawai'i, Act 199 § 1. Among other things, the amendment authorized "farm dwellings" within the State Agricultural District.

12. According to the County, County Ordinance 2018-114 merely duplicates State law because it prohibits a use—the rental of a dwelling in the State Agricultural District for 30 days or less—that was already prohibited by HRS Chapter 205 as of June 4, 1976. *See* Docket No. 1 at R00002.

13. Appellants dispute the County's interpretation of State law. In particular, Appellants contend that as of June 4, 1976, State law did not prohibit renting "farm dwellings" for 30 days or less. *E.g.*, Docket No. 1 at R00015, R00017-18.

C. Appellants' Lots.

14. Appellants each own dwellings on land classified as Agricultural under the statewide land use classification. Docket No. 2 at R00022.

15. Appellants' respective dwellings are located on lots that were created on or after June 4, 1976. *Id.* at R00025-33.

16. Prior to April 1, 2019, the Appellants used their dwellings for rentals of less than 31 days. *Id.*

17. The County conceded that Appellants' dwellings are farm dwellings. *Id.* at R01023-24. Nevertheless, that concession does not affect the court's determination.

D. County Proceedings.

18. Appellants challenged the County's actions in administrative proceedings before the County Board of Appeals. Docket No. 2 at R00017. By agreement with the County, those proceedings were stayed to allow the parties to seek guidance from the Commission regarding the County's statutory interpretation of HRS Chapter 205 as it existed as of June 4, 1976. *Id.*

E. Questions Presented by the Cross-Petitions to the LUC

19. On May 19, 2020, the County petitioned the Commission pursuant to HAR § 15-15-99 for a declaratory order "that 'farm dwellings' may not be used as short-term vacation rentals pursuant to HRS §§ 205-2 and 205-4.5, and [HAR] § 15-15-25." Docket No. 1 at R00002. The County Petition for Declaratory Order was assigned Docket No. DR 20-69 ("**County Petition**").

20. The County sought this declaratory order "because the County recently passed and has been challenged in implementing a law ([County Ordinance 2018-114]) regulating short-term vacation rentals within the County." *Id.* That ordinance prohibits "short-term vacation" rentals on lots created on or after June 4, 1976, within the State Agricultural District. *See* County Ordinance 2018-114. According to the County, County Ordinance 2018-114 "prohibit[ed] . . . short-term vacation rentals [as defined by County Ordinance 2018-114 from] operating on lots created after June 4, 1976 in the State Land Use Agricultural District based on the County's understanding that any such existing operations were not lawful in 'farm dwellings' pursuant to HRS Chapter 205." Docket No. 1 at R00003.

21. On May 22, 2020, the Commission received a Petition for Declaratory Order and Incorporated Memorandum in Docket No. DR20-70 (the "**Rosehill Petition**") filed by the Appellants pursuant to HAR § 15-15-99. The Appellants asked for a declaratory order that "[a]s of June 4, 1976, the plain language of Chapter 205 did not dictate how long a 'farm dwelling' must be rented in order to qualify as a 'farm dwelling." Docket No. 2 at R00020. The Rosehill Petition was accompanied by a Verification of Petition. *Id.* at R00043. Although the Rosehill Petition focused on the specific

factual element of rental duration, the Rosehill Petition addressed all specific factual elements in the County's definition "short-term vacation rental." *See generally id.*

22. Together, the Petitions sought "a declaratory order as to the applicability" of Chapter 205 as of June 4, 1976, to the "specific factual situation" presented by the County's definition of "short-term vacation rental." *See* HAR § 15-15-98(a).

23. The Petitions presented this question based on the specific factual situation presented by the County's enactment of County Ordinance 2018-114 and promulgation of Rule 23-3.

24. The Commission was not asked by the County Petition or the Rosehill Petition to consider whether the use of a structure on a particular property qualifies as a "farm dwelling" under Chapter 205. *See generally* Docket No. 1; Docket No. 2.

25. The only element of the County's definition of "short-term vacation rental" at issue was the rental of a dwelling for 30 days or less.

26. The parties agreed that HRS Chapter 205, as of June 4, 1976, did not require the owner of a farm dwelling to live on site or limit the number of bedrooms to no more than five. HCC § 25-1-5 (providing the three elements of a "short-term vacation rental" as (1) "the owner or operator does not reside on the building site," (2) it "has no more than five bedrooms for rent on the building site" and (3) it "is rented for a period of thirty consecutive days or less").

27. On June 12, 2020, the Appellants and the County filed a Stipulation to Consolidate their separate Petitions. Docket No. 3 at R00075.

28. On June 18, 2020, the State of Hawai'i Office of Planning and Sustainable Development ("**OPSD**") filed a response to the Petitions. Docket No. 7 at R00119. OPSD stated in its written filing that there is an "[a]bsence of [a]n [e]xpress [p]rohibition on [r]enting for 30 [d]ays or [l]ess" in the definition of "farm dwelling." *Id.* at R00124, R00126.

29. On June 19, 2020, Appellants filed a Statement of Position regarding the County Petition. Docket No. 8.

30. On June 23, 2020, Appellants filed a Statement of Position regarding OPSD's response to the Petitions. Docket No. 13.

31. During the meeting held on June 25, 2020, the Commission approved the parties' Stipulation to Consolidate the two proceedings.

F. HRS Chapter 205 as of June 4, 1976.

32. As of June 4, 1976, HRS Chapter 205 stated in part as follows:

> **Sec. 205-2 Districting and classification of lands.** There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts.
>
> . . . .
>
> Agricultural districts shall include activities or uses as characterized by the cultivation of crops, **orchards**, forage, and forestry; **farming activities or uses related to animal husbandry**, and game and fish propagation; **services and uses accessory to the above activities including but not limited to** living quarters or **dwellings**, mills, storage facilities, processing facilities, and road side stands for the sale of products grown on the premises; agricultural parks and open area recreational facilities.

1975 Haw. Sess. L. Act 193, § 3 (emphasis added).

33. On June 4, 1976, Chapter 205 was amended to state in part as follows:

> **Sec. 205-[4.5] Permissible uses within the agricultural districts.** (a) 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 shall be restricted to the following permitted uses:
>
> . . . .
>
> (4) Farm dwellings, employee housing, farm buildings, or activity or uses related to farming and animal husbandry;
>
> Farm dwelling as used herein shall mean a single-family dwelling located on and used in connection with a farm **or** where agricultural activity provides income to the family occupying the dwelling.
>
> (b) Uses not expressly permitted in this section 205-[4.5](a) shall be prohibited, except the uses permitted as provided in section 205-6 and section 205-8, and

> construction of single-family dwellings on lots existing before the effective date of this Act. . . .
>
> Any deed, **lease**, agreement of sale, mortgage or other instrument of conveyance covering any land within the agricultural subdivision shall expressly contain the restriction on uses and the condition as prescribed in this section which restriction and condition shall be encumbrances running with the land until such time that the land is reclassified to a land use district other than agricultural district.

1976 Haw. Sess. L. Act 199, § 1 (emphasis added).

G. June 25, 2020 Hearing Before the LUC.

34. On June 25, 2020, at its Zoom Webinar Virtual Meeting, the Commission considered the Petitions. John Mukai, Esq., Diana Mellon-Lacey, Esq., Planning Director Michael Yee and Acting Deputy Director of Planning April Surprenant appeared on behalf of the County. Calvert G. Chipchase, Esq. and Christopher T. Goodin, Esq. appeared on behalf of the Appellants. Also present at the proceeding was Dawn Apuna, Esq. on behalf of OPSD.

35. The facts were not in dispute. At the beginning of the meeting, LUC Chair Scheuer explained "what these proceedings are about" as follows:

> First, please keep in mind this is a request for Declaratory Ruling. That means the Commission is being asked to interpret a statute, rule or document and not to make a determination on a factual dispute.
>
> While certain facts may be important to making an interpretation of law, in this type of proceeding the facts are not really in dispute. The Commission is taking the basic facts as undisputed. What we are here to decide is the very limited issues presented by the Petitioner County of Hawaii and Petitioner Rosehill, et al.
>
> . . . .
>
> I will remind everyone of that. **Again, the facts are not in dispute**. The application of law to accepted facts is what we are focused on.

Docket No. 15 at R00254 (emphasis added).

36. The Commission heard public testimony on the Petition from Peter Eising, Dr. Stephen Bell and Ms. Apuna.

37. Dr. Bell testified against the Rosehill Petition. He testified that he built his "retirement home" on property within Kohala Ranch. *Id.* at R00272-73. He testified that when he purchased his home, there was no requirement that he had to do any farming or agriculture. *Id.* at R00275. He affirmed that his "objection is not that [the Rosehill Petitioners are] not doing agriculture, because [he is] not doing agriculture either, it is that they are renting it out as short term rentals . . . ." *Id.* at R00276. When asked whether a majority of lots within Kohala Ranch are engaging in agricultural uses, Mr. Bell said he "cannot give . . . an honest opinion on that" because he "really [does not] know." *Id.* at R00277.

38. On behalf of OPSD, Ms. Apuna testified in favor the County Petition and against the Rosehill Petition. In her testimony, Ms. Apuna conceded that the analysis "**must[] evaluate both definitions** [of 'farm dwelling' and 'short-term vacation rental'] against each other to determine whether a farm dwelling may be used as a short-term vacation rental, *i.e.*, that it may be rented for 30 days or less." *Id.* at R00285 (emphasis added).

39. Ms. Apuna further conceded that "a renter for 30 days or less that farms the land may be allowed under the definition of 'farm dwelling'":

> For example, **a renter for 30 days or less that farms the land may be allowed under the definition of "farm dwelling".** But a renter for 30 days or less who does not farm the land, but is merely renting as a vacationer would be prohibited under the definition of "farm dwelling".

Id. at R00287 (emphasis added).

40. Ms. Apuna further conceded that "**the definition of 'farm dwelling' does not expressly prohibit rentals of 30 days or less** . . . ." *Id.* at R00288 (emphasis added).

41. In response to questioning by Commissioner Wong, Ms. Apuna confirmed that "grow[ing] one papaya tree" on an "ag lot" could "[p]otentially" qualify as an agricultural use. *Id.* at R00289-90.

42. In response to questioning by Vice Chair Cabral, Ms. Apuna conceded that "arguably" a "short term" "rent[al]" "for less than 30 days" "would be a permitted

usage in Agriculturally Zoned land" in the context of a "agricultural experience" for the renter. *Id.* at R00292-93.

43. In response to questioning by Commissioner Okuda, Ms. Apuna conceded that, depending on the "specific facts of the specific situation," "**short term may be permissible or might not be permissible**." *Id.* at R00294 (emphasis added).

44. In response to questioning by Commissioner Chang, Ms. Apuna agreed that the Commission has "legal authority to interpret [HRS §] 205-4.5." *Id.* at R00297-98.

45. The Commission heard argument by Mr. Mukai and Mr. Chipchase. County Planning Director Michael Yee and County Acting Deputy Director of Planning April Surprenant also responded to questions from the Commissioners.

46. For the County, Mr. Mukai conceded that "there's no prohibition on farm dwellings being rented for 30 days or less" in HRS Chapter 205:

> In this case the Rosehill Petitioners state that, quote, the only question before the Commission is whether as of June 5th, 1976, Chapter 205 prohibited **leases**, in parenthesis, the same thing as rentals of farm dwellings for a period of less than 31 days.
>
> **The County agrees that there's no prohibition on farm dwellings being rented for 30 days or less.**

Id. at R00301 (emphasis added).

47. For the County, Mr. Mukai further conceded that "the County agrees" that "the owner of a farm dwelling does not need to reside in the dwelling." *Id.* at R00301.

48. For the County, Mr. Mukai asserted that "there's nothing that disallows [a person] from simply having a residence on an Agricultural Zoned property" without "performing farming activities . . . ." *Id.* at R00304 (emphasis added) ("And there's nothing that disallows him from simply having a residence on an Agricultural Zoned property.")

49. In response to questioning by Commissioner Okuda, Director Yee asserted that "a residence may be constructed and lived in on land that's within the Land Use Agricultural District even if there's no agriculture taking place on that parcel of property":

[COMMISSIONER OKUDA:] So is it the County of Hawaii's position that a residence may be constructed and lived in on land that's within the Land Use Agricultural District, **even if there's no agriculture taking place on that parcel of property**?

MR. YEE: For the record, Michael Yee, Planning Director.

Yes, that is correct.

. . . .

[COMMISSIONER OKUDA:] So in other words, Mr. Yee, **even if I tell you and, in fact, I tell you in writing that my intention is I do not intend to engage in any agriculture. All I intend to do is build a house to live in. The County of Hawaii would consider that consistent with HRS 205-4.5?**

MR. YEE: **Yes, and we would consider it a farm dwelling.**

. . . .

MR. YEE: Michael Yee, **yes. They could build a residence and we would consider it a farm dwelling.**

COMMISSIONER OKUDA: **Even if there was no farming going on?**

MR. YES: **Correct.**

Id. at R00306-07.

50. In response to questioning by Commissioner Okuda, Mr. Mukai conceded that there would be no "violation of any land use ordinance or law" for "longer periods of rental" if they are "longer than 30 . . . days" and that "the County's objection is not that there's no agricultural use regarding the short-term vacation rentals, it's just that it's a short-term vacation rental":

[COMMISSIONER OKUDA:] So can you tell me then **if the County is not requiring active farming to allow a person to build a residence on Agriculturally Districted property, what then is the real difference between a short-term rental of renters who come onto the property, who are not going to be engaged in any type of farm activity, and the person who lives in the house that they built, which you say you will approve, even if that person is not also engaged in farming?**

I mean, what is the rational difference between the two?

MR. MUKAI: John Mukai for the County.

First, the short-term vacation rental, it's in a resort-type zoning area. And, again, the renting of the dwelling as an STVR to an outsider is not a permitted use, and STVRs cannot be used as a farm dwelling.

. . . . .

[COMMISSIONER OKUDA:] If I came into the County and said I was going to build a residence on Agriculturally Districted and zoned land, and I told you in writing, and by the way I don't plan to live there. **I plan to rent it out to somebody for, let's say, longer than 30 or 40-days.**

Would you consider me being in violation of any land use ordinance or law?

MR. MUKAI: My understanding -- John Mukai -- **longer periods of rental would be allowed under Ag.**

COMMISSIONER OKUDA: So in other words, **the County's objection is not that there's no agricultural use regarding the short-term vacation rentals, it's just that it's a short-term vacation rental; correct?**

MR. MUKAI: **Yes, yes.**

Id. at R00311 (emphasis added).

51. In response to questioning by Commissioner Wong, Mr. Mukai agreed that "rent[ing] . . . for 31 days[] is okay," because "[b]y [County] definition it's not a short-term vacation rental":

COMMISSIONER WONG: I'm trying to figure this out. You said that if we -- okay, so let's say, again, taking Mr. Bell, let's say **I have a property zoned Ag and I rent it to the Chair for 31 days, is that okay? And it's not a short-term vacation.**

MR. MUKAI: **By definition it's not a short-term vacation rental.**

Id. at R00314 (emphasis added).

52. In response to questioning by Commissioner Chang, Director Yee confirmed that if a dwelling is advertised as "a farm dwelling for use less than 30 days," "by

definition it's a short-term vacation rental" even if the unit otherwise meets the definition of "farm dwelling" under HRS Chapter 205:

> [COMMISSIONER CHANG:] So the question I have for the County, if the Petitioner filed this Farm Dwelling Notice, and not as a short-term vacation rental, and **they advertise it as a farm dwelling for use less than 30 days, 29 days, that would be a permissible use under the County's interpretation**?
>
> MR. YEE: Michael Yee, Planning Director of Hawaii County. **If they're renting less than 30 days, by definition it's a short-term vacation rental, and so if they're not in a permitted area or have a permit, then it's not.**
>
> COMMISSIONER CHANG: What happens if they have, let's say they've got, you know -- if **the fact that they are renting it for less than 30 days, that is what makes it a short-term vacation rental? Is that the only fact?**
>
> MR. YEE: Michael Yee.
>
> **Within our ordinance we have defined short-term vacation rentals as less than 30 days.**

Id. at R00320-21 (emphasis added).

53. In response to questioning by Commissioner Wong, Deputy Director Surprenant confirmed that a farmer **could not** rent his property to "a farmer from Connecticut for 29 days" even if the farmer from Connecticut was "going to plant some papaya trees," because it would still be "a short-term vacation rental":

> [COMMISSIONER WONG:] So let's say I am a farmer. I built the property legally. And **I'm going to rent it out to a farmer from Connecticut for 29 days, and he's going to plant some papaya trees. That would be legal?**
>
> MS. SURPRENANT: April Su[r]prenant.
>
> **Generally speaking, no.** . . .
>
> COMMISSIONER WONG: I just wanted to make sure, because let's say **I'm not renting as short term** but renting it as a **farming experience on Hawaii**.
>
> . . . .

MS. SURPRENANT: **It's still a short-term vacation rental. If you're bringing people in to stay on the property for a short period of time and the owner is not residing there, it's still considered a short-term vacation rental.**

Id. at R00325-26 (emphasis added).

54. At the conclusion of the meeting, the Commission recessed the meeting and continued the matter to the Commission's meeting on July 23, 2020.

H. July 23, 2020 Hearing Before the LUC.

55. On July 23, 2020, at its Zoom Webinar Virtual Meeting, the Commission heard argument from Mr. Mukai and received testimony from Mr. Yee.

56. The facts were not in dispute. Instead, the Commission was "being asked to interpret a statute, rule or document and not to make a determination on a factual dispute." *See* Docket No. 23 at R00769-70. This point was explained to the Commission for a second time by LUC Chair Scheuer. *Id.*

57. In response to questioning by Commissioner Okuda, Director Yee admitted that the County would allow construction of a "McMansion" in the State Agricultural District even if the owner of the property told the County that it would not be used for any agricultural activity:

COMMISSIONER OKUDA: My question to you, **I was telling you upfront, I have no intention on conducting any farm activity. I'm going to build my McMansion on the property. I'm not going to farm. There's not going to be any agricultural activity. Will you still allow me to build my mansion when I'm telling you absolutely not, there will be no agricultural activity?**

And when -- let me clarify, when I say will you let me build, I'm asking, what is the County's position?

MR. YEE: **I'm still going to say that it's still a farm dwelling unit.** And people right now have to sign a Farm Dwelling Agreement with us on that unit.

And although they may say that they're going to not perform agricultural activities, it doesn't necessarily take away from residing in that house.

COMMISSIONER 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?**

MR. YEE: **It's still going to be a farm dwelling unit.**

Id. at R00780-81 (emphasis added).

58. In response to questioning by Commissioner Chang, Director Yee explained that a dwelling could be a farm dwelling even if there is no agricultural activity on the property for fifteen years:

COMMISSIONER CHANG: What if there is no illegal use, but **there's still no farming, no agricultural use five years, 10 years, 15 years**, but there is no other illegal activity, **but there is a dwelling on it, but they never use it for agricultural purposes**?

MR. YEE: **I'll keep going back that it's still a farm dwelling unit though**.

Id. at R00784-85.

I. August 13, 2020 Hearing.

59. On August 13, 2020, at its Zoom Webinar Virtual Meeting, the Commission heard argument from Mr. Chipchase and Mr. Mukai and testimony from Director Yee. The Commission also held deliberations regarding the Petitions.

60. The facts were not in dispute. Instead, the Commission was "being asked to interpret a statute, rule or document and not to make a determination on a factual dispute." *Id.* at R00926. This point was explained to the Commission for a third time by LUC Chair Scheuer. *See* Docket No. 34 at R00926-27.

61. Commissioner Okuda asked Mr. Chipchase whether granting the Rosehill Petition would invalidate the County Council's decision:

COMMISSIONER OKUDA: But isn't it true that if we grant the relief that you are requesting by your Petition, we in effect are at least partially overriding the decision of the County of Hawai'i's County Council?

MR. CHIPCHASE: No, Commissioner. I would not say that's correct at all.

Id. at R00969.

62. Commissioner Okuda questioned whether there would be legal prejudice to the Rosehill Petitions if the Commission exercised its discretion to deny the Rosehill Petition, because the Appellants could simply go to court. *Id.* at R00975-76. Counsel for Appellants responded that there would be prejudice "in a punt." *Id.* at R00976. That is, the Commission has a jurisdictional obligation to exercise its authority and determine the applicability of HRS Chapter 205 to the specific factual situation presented by the enactment of County Ordinance 2018-114. *See id.* Counsel explained that the specific factual situation presented by the Rosehill Petition is squarely within the Commission's authority, and failure to exercise that authority would be prejudicial to Appellants and the efforts they have invested. *See id.* at R00978.

63. Commissioner Chang asked Mr. Mukai to clarify what the County means by "short-term vacation rental":

> COMMISSIONER CHANG: Thank you very much, Mr. Mukai, for your testimony.
>
> Explain the County's position. And I know this has been kind of an evolving process.
>
> **So I just really want to be very clear that the County's position -- and when you refer to short-term vacation rental in your responses, you're using that as a term of art as you have defined under your own rules; is that correct?**
>
> MR. MUKAI: **That's correct.**

Id. at R01017 (emphasis added).

64. In response to questioning by Commissioner Chang, Deputy Director Surprenant admitted that the County considers all dwellings on the Appellants' properties to be farm dwellings:

> COMMISSIONER CHANG: Do you know -- this is kind of a factual question -- do you know whether any of the Petitioners under the Rosehill Petition ever applied to the County for a nonconforming use certificate for short-term vacation rental?
>
> MR. MUKAI: Commissioner, are you asking whether they applied for a short-term vacation rental?

COMMISSIONER CHANG: Yes. In your Petition you said you have -- you received some applications for short-term vacation rentals on ag lands. I was just wondering whether any of the Petitioners applied?

MR. MUKAI: All of them have applied, Commissioner.

COMMISSIONER CHANG: So there is an admission by the Petitioners that their activity falls within the definition of your short-term vacation rental?

MR. MUKAI: That's correct, Commissioner.

COMMISSIONER CHANG: So they may not have shared those factual implications with their counsel but their application that they submitted to you all falls within the definition of short-term vacation rental?

MR. MUKAI: No, no.

MS. SURPRENANT: This is April Surprenant, Deputy Planning Director.

So all of the Petitioners have applied for short-term vacation rentals with the County and have been denied because they did not fit the parameters of the code in our County code.

Part of the reason why we're here today in front of all of you is because they were denied, and why Mr. Chipchase and the Rosehill Petitioners have filed a Counter-Petition to the LUC is because they applied for their short-term vacation rental and were denied under the County rules and code.

COMMISSIONER CHANG: And they were denied because they're on ag-zoned property, right?

MS. SURPRENANT: That is correct. That is correct. **They are all on ag property and parcels that were created after June 4th, 1976, therefore, we consider all of their dwelling units on their property to be farm dwellings**.

Id. at R01023-24 (emphasis added).

65. During the proceeding before the Commission, the County did not attempt to correct or clarify this statement. *See* Docket 34 at R01025; *cf. id.* at R01037-38.

66. In response to questioning by Commissioner Ohigashi, the Deputy Director confirmed that the County's definition of short-term vacation rental has three elements:

COMMISSIONER OHIGASHI: I'm assuming that the ordinance was passed properly and signed by the mayor or --

MR. MUKAI: Yes, that's correct.

COMMISSIONER OHIGASHI: And it contained essentially three subjects, right, three requirements, three standards?

MR. MUKAI: Yes.

COMMISSIONER OHIGASHI: Why don't you go over that for me again, those three. I just want to be sure I'm looking at it correctly.

. . . .

MS. SURPRENANT: Yes, sir, that's correct.

This is April Surprenant again.

So the County's definition of a 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 it's rented for a period of **30 consecutive days or less**.

Id. at R01027-28 (emphasis added).

67. In response to questioning by Commissioner Ohigashi, Mr. Mukai stated that the County was not asking the Commission to interpret the County's ordinance and that **all of the lots are farm dwellings**:

COMMISSIONER OHIGASHI: And your question is, it's not the 30 days question, or anything like that, your question is merely is this: Is your ordinance consistent with [HRS §] 205-4.5(a)(4) which does not include vacation rentals or the use of property for vacation purposes that's not related to agricultural use?

MR. MUKAI: Commissioner, John Mukai. **We're not asking you to interpret our ordinance**, but whether or not this vacation rental is a permissible use of a farm dwelling in the State Land Use Agricultural District.

COMMISSIONER OHIGASHI: If we say that a vacation rental is not a proper use in an Agricultural District, would that mean that your ordinance wouldn't even apply?

MR. MUKAI: It would apply. It's just that it wouldn't apply to farm-dwelling units in agriculturally-zoned districts.

COMMISSIONER OHIGASHI: So the question then turns is that the argument is whether or not it's a farm dwelling?

MR. MUKAI: No, I don't think so.

COMMISSIONER OHIGASHI: If it is not a farm dwelling, then it wouldn't apply, you say?

MR. MUKAI: **All of the lots, they're considered farm dwellings on the agriculturally-zoned property.** So it needs to be, we believe, connected with agriculture activities.

Id. at R01028-29 (emphasis added).

68. In response to questioning by Commissioner Aczon, Mr. Mukai agreed that the County's ordinance has three elements:

VICE CHAIR ACZON: Good afternoon, Mr. Mukai. You probably touched on this one already, based on several ways of questioning by Commissioners. I apologize if I'm kind of duplicating it, but I just want to kind of put it in my own way.

You know, beginning of Mr. Chipchase presentation, he mentioned about this three elements -- unfortunately I don't have the PowerPoint, but I kind of remember about this -- **three elements** that he mentioned.

Do you agree with that or not? And if not, why?

MR. MUKAI: I think, Commissioner, you're talking about the definition as set forth in the Hawai'i County code; and **yes, we do agree with the definition as set forth in the Hawai'i County code with regard -- and definition of a short-term vacation rentals**.

VICE CHAIR ACZON: That's the three elements that was on the presentation.

MR. MUKAI: And I think those are the three elements that we chatted with Commissioner Ohigashi about it.

VICE CHAIR ACZON: **So you agree on those elements that was mentioned?**

MR. MUKAI: **Yes, because they are part of the Hawai'i County code definition of a short-term vacation rental.**

Id. at R01023-24 (emphasis added).

69. In response to questioning by Commissioner Okuda, Deputy Director Surprenant confirmed that the first dwelling on a lot within the State Agricultural District is a farm dwelling:

COMMISSIONER OKUDA: But whichever department or division of the County of Hawai'i, I'm telling the appropriate division or department or appropriate employee that would have to issue me the discretionary permit for me to build the dwelling on the property. I'm telling, you know, the County employee, I am not going to have any agriculture. I'm not going to farm. It can be your wish that, you know, I hope in the future, Mr. Okuda, you'll reconsider, but I'm telling you I'm not going to farm, and, in fact, I'm thinking of going to see my lawyer to put a deed restriction in there that says there will be no farming, because I hate farming. Will you still issue the permit which allows me to build that?

MS. SURPRENANT: Aloha, this is April Surprenant, Deputy Director.

So there's a lot of different ways to come at that specific question. There are not specific things that require active farm activity prior to a landowner building a farm dwelling.

You could not, under state law, you could you not under state law file a deed restriction stating that no ag activity could happen within the State Land Use Ag, because that would be counter to the 205 statute. So we would not -- if we were signing off, we would not sign off on that.

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. I hope that answers your question.

Id. at R01037-38 (emphasis added).

70. During deliberations, Commissioner Okuda made the following motion:

COMMISSIONER OKUDA: Thank you, Mr. Chair. I would like to make a motion which may deviate slightly from what you laid out, but I believe it still covers the substance of what you presented.

I move that, number one, the Commission deny without prejudice Petitioner Rosehill's Petition for relief;

And number two, the Land Use Commission grant the County's Petition for relief. And if there is a second, and if there is deliberations, I will go through the reasons why I'm making those motions.

Id. at R01075.

71. The motion was seconded by Commissioner Cabral. *Id.*

72. Commissioner Okuda explained the reasons for the motion. Importantly, Commissioner Okuda explained his belief that on the cross-petitions for declaratory orders, the Rosehill Petitioner's question was speculative and the County's question was not:

COMMISSIONER OKUDA: Thank you very much, Mr. Chair.

I believe the record demonstrates that the County of Hawai'i has met its burden under administrative rules and statutes to obtain the relief that it is requesting in the Declaratory Order that it is requesting, and for the reasons that I will explain, I do not believe that Petitioner Rosehill has met that burden.

However, because, as I will try to explain a bit without taking up too much time, there are these additional facts which seem to be, or may or may not exist outside of the record, we are confined to reviewing, you know, this case, and making a decision based on the specific record that's presented, and not necessarily representations of things which exist outside.

And so I have made the motion that the denial is without prejudice so that Petitioners Rosehill can consider if there's a basis to actually bring additional matters up to the Land Use Commission; but specifically, **I do not believe Petitioners Rosehill have met the requirements to demonstrate a specific factual situation as required by HAR Section 15-15-98(a)**, and that the items or relief and circumstances thereof that Petitioners Rosehill were raising demonstrate that the question that they were raising at this point in time and on this record is **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).

And the reason why, you know, I come to that conclusion, just with respect to the initial requirement about whether or not the Rosehill Petitioners have met the initial gatekeeping function of being able to raise their issue as a declaratory situation where we can issue a declaratory order, is the fact that the statute and the case law make clear, and also prior existing declaratory rulings and orders issued by the Land Use Commission, that the **actual use** of the property determines whether or not the use is lawful and permissible under the statute.

Again, I quoted from the Docket order in DR94-17 in the matter of the Petition of John Godfrey where the Land Use Commission held in Conclusion No. 5, and I quote, Chapter 205 Hawaii Revised Statute 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, quote, "farm dwelling", close quote.

And there'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.

I would also note the fact that the case law and the prior orders of the Land Use Commission make clear that a, quote, "farm dwelling", close quote, is a, quote, "single-family dwelling located on and used in connection with a farm", close quote.

And the dwelling is not a farm dwelling and is not permissible on land which is designated agriculture as a farm dwelling if you actually don't have that use.

And so the record is simply not sufficient as presented by Petitioner Rosehill at this point in time to make that, to give them any type of declaratory relief where that is the standard of what constitutes a farm dwelling.

Now, with respect to the ordinance passed by the County of Hawai'i, the Hawai'i Supreme Court in the same *Sunset Beach Coalition versus City and County of Honolulu* case found at 102 Hawai'i Reports 465, the Pacific 3d citation is 78, Pacific 3d, page 1, makes clear that there's basically a dual system of use regulation when it comes to agriculturally-districted property. And basically the decision-makers look at the State requirements, and the County requirements, and as the supreme court said in the *Save Sunset Beach*

Coalition case, which I believe was referred to as the Obayashi case, and this is found 102 Hawai'i at page 482 or 78 Pacific 3d at page 18, and I quote:

Only a more restricted use as between the [County zoning] and the [State Land Use law HRS Chapter 205], is authorized.

And I put in bracket, County zoning and State Land Use law HRS Chapter 205.

So there is no prohibition in the case law which would prevent the County of Hawai'i in exercising its legislative judgment to issue this ordinance in its discretion and legislative process as authorized by statute and the Hawaii State Constitution in determining further management methods or further management actions to protect in its view agricultural land in the County of Hawai'i.

And I specifically asked the question about what authority there is for the Land Use Commission to **second guess** an otherwise lawful on-its-face legislative decision by the County of Hawai'i council.

And lacking any real clear authority that allows Land Use Commission to be the body to essentially second guess the County Council, I believe **we should decline that opportunity**, especially in light of the Hawai'i Supreme Court's decision in Sunset Beach Coalition versus City and County of Honolulu.

So for those reasons and -- for those reasons, and much of the discussion that has already taken place, and the questions going back and forth, I ask that my motion be granted or supported, meaning that the Petition filed by the County of Hawai'i be approved; and the Petition by the Rosehill Petitioners be denied without prejudice.

If I can say one last thing. I do agree with the historic and legal description presented by the Office of Planning about the importance of protecting agricultural land. I believe this decision, if adopted by the Land Use Commission, satisfies the public policy why we must protect agricultural land.

It's easy to say we want to be self-sufficient as the Hawai'i Constitution requires government agencies to strive for in this community, but we're not going to have self-sustaining agriculture unless we do the things the legislature requires us as government agencies to protect the actual bona fide agricultural use of agriculturally zoned or Agriculturally Districted property.

Frankly speaking, a **resort use** of agricultural property, the construction of what I described as a **Gary Okuda McMansion**, it does not move this

> community towards agricultural self-sufficiency. It doesn't move us towards protecting our food resources. And it's certainly not consistent with the statute.
>
> So for those reasons, and other good reasons in the record, I ask that my motion be supported. Thank you.

Id. at R01076-82 (emphasis added).

73. Commissioner Okuda amended the motion to remove the phrase "without prejudice" concerning the denial of the Rosehill Petition, and Commissioner Cabral approved the amendment. *Id.* at R01083-84.

74. The motion carried with affirmative votes from Commissioner Okuda, Commissioner Cabral, Commissioner Giovanni, Commissioner Aczon, Commissioner Ohigashi, Commissioner Chang, Commissioner Wong and Chairperson Scheuer. *Id.* at R01088-89.

75. On May 20, 2021, the Commission entered a written order granting the County Petition on the merits and denying the Rosehill Petition as speculative.

J. Appeal.

76. Appellants timely appealed on June 18, 2021.

77. The Court heard Appellants' appeal on January 10, 2022. Calvert G. Chipchase, Esq. appeared for Appellants. Mark D. Disher, Esq. appeared for the County. Julie H. China, Esq. appeared for the Commission.

78. During the hearing, counsel for the Commission made two principal arguments with respect to Appellants' dwellings. First, counsel argued that Appellants were required to present facts regarding whether their dwellings are "farm dwellings." *See* 1/11/2022 transcript at 22:4-5. Second, in response to an inquiry from the Court, counsel argued that the County could "not have conceded" the fact that the Appellants' dwellings are "farm dwellings." *See id.* at 28:23-24. Instead, per the Commission's counsel, the County could only concede regarding the applicability of a county ordinance. *See id.* at 28:17-19.

79. Citing HRS § 205-12, counsel for Appellants disagreed with the contention that the County is unable to concede as a matter of fact that the Appellants' dwellings

are farm dwellings. *See id.* at 49:23 to 50:5. HRS § 205-12 delegates authority to enforce the provisions of HRS Chapter 205 to the respective counties.

80. Counsel for the County further argued as follows:

> Mr. Michael Yee, he was Director of Planning at the time and testified for the LUC. He did help clarify this kind of labeling of farm dwellings for the first dwellings that's built on these properties.
>
> On page R00322 of the record on appeal, he's pretty clear. He states that there will be a serious impact of trying to have first farm dwelling unit, which are residences, to have to show agricultural activity before the owner could build the residence.
>
> If we went around through the State of Hawaii having to require folks to start agricultural activity and then say, hey, it's okay for you to build your residence there on the property, it would be very difficult to administer that way.
>
> I mean, so basically it's that the first house, it's like the chicken or the egg, do you have to have the farm already actively doing some kind of agricultural activity before you can even put up your house? So basically that was clarified.
>
> And it was also testified throughout the proceedings that when people are buying these properties, there are notices that this is agricultural land and farming is required. So these are all ahead of time. What is required? What is to be a farm dwelling?

1/11/2022 transcript at 34:2-20.

81. Arguments by counsel on appeal are not evidence and cannot change or correct statements made on the record before the Commission. *See Leis Fam. Ltd. P'ship v. Silversword Eng'g*, 126 Hawai'i 532, 534, 273 P.3d 1218, 1220 (Ct. App. 2012) (explaining it is "[a]xiomatic" that "argument of counsel . . . is not evidence").

II. CONCLUSIONS OF LAW

82. Under HRS § 91-14(g), a court should reverse an agency's decision if the substantial rights of the appellant 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 abuse of discretion or clearly unwarranted exercise of discretion.

A. The Commission's Grant of the County Petition Was Wrong as a Matter of Law.

83. A petition for declaratory order concerns "the applicability of any statutory provision or of any rule or order of the commission to a specific factual situation." HAR § 15-15-98. The facts are taken as presented by the petitioning party. *See* HAR § 15-15-98(a).

84. HRS Chapter 205 applies to properties within the State Agricultural District. *See generally* HRS §§ 205-2, 205-4.5.

85. The question presented by the County Petition was whether the County's definition of "short-term vacation rental" conflicts with HRS Chapter 205 as it existed on June 4, 1976, such that any dwelling unit that meets the County's definition "of short-term vacation rental" cannot, as a matter of law, be a "farm dwelling." *See* Docket No. 1 at R00005. The County contends, "The respective definitions and uses for farm dwellings and short-term vacation rentals irreconcilably conflict and show that short-term vacation rental use is incompatible with being a farm dwelling." *Id.*

86. The provision of the County Ordinance at issue in the County Petition refers to HRS Chapter 205 as of June 4, 1976. Specifically, the County Ordinance restricts "short-term vacation rentals" in the Agricultural District unless a lot was created before June 4, 1976, based on the County's interpretation of the "farm dwelling" definition in Chapter 205 that went into effect on that date. Therefore, the version of HRS Chapter 205 relevant to the question presented by the County Petition is the one in effect as of June 4, 1976.

87. To determine the question presented, the Commission sought to "evaluate[] side by side" the "county zoning provision and the State Land Use law." Docket No. 36 at R01115. In that exercise, the Commission erred as a matter of law by granting the County's Petition and concluding that a "short-term vacation rental" (defined by County Ordinance 2018-114 as a rental for 30 days or less) could never be a "farm dwelling" as defined by HRS Chapter 205. *Id.* at R01126.

88. The rules of statutory interpretation are settled. When interpreting a statute, the "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." *Richardson v. City & Cnty. of Honolulu*, 76 Hawai'i 46, 63, 868 P.2d 1193, 1210 (1994) (citation, quotation marks and brackets omitted). "Where the language of a statute is plain and unambiguous, [the court's] only duty is to give effect to the statute's plain and obvious meaning." *Hawaii Elec. Light Co. v. Dep't of Land & Nat. Res.*, 102 Hawai'i 257, 267, 75 P.3d 160, 170 (2003), *as amended* (Aug. 25, 2003) (citing *Iddings v. Mee-Lee*, 82 Hawai'i 1, 6, 919 P.2d 263, 268 (1996)).

89. The language of HRS §§ 205-2 and 205-4.5 is plain and unambiguous. As of June 4, 1976, HRS Chapter 205 included the following provisions:

> **Sec. 205-2 Districting and classification of lands.** There shall be four major land use districts in which all lands in the State shall be placed: urban, rural, agricultural, and conservation. The land use commission shall group contiguous land areas suitable for inclusion in one of these four major districts.
>
> . . . .
>
> Agricultural districts shall include activities or uses as characterized by the cultivation of crops, **orchards**, forage, and forestry; **farming activities or uses related to animal husbandry**, and game and fish propagation; **services and uses accessory to the above activities including but not limited to** living quarters or **dwellings**, mills, storage facilities, processing facilities, and road side stands for the sale of products grown on the premises; agricultural parks and open area recreational facilities.

1975 Haw. Sess. L. Act 193, § 3 (emphasis added).

90. On June 4, 1976, HRS Chapter 205 was amended to state in part that "farm dwellings" are a permissible use in the State Agricultural District:

> **Sec. 205-[4.5] Permissible uses within the agricultural districts.** (a) 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 shall be restricted to the following permitted uses:
>
> . . . .
>
> (4) **Farm dwellings**, employee housing, farm buildings, or activity or uses related to farming and animal husbandry;
>
> **Farm dwelling as used herein shall mean a single-family dwelling located on and used in connection with a farm or where agricultural activity provides income to the family occupying the dwelling.**
>
> (b) Uses not expressly permitted in this section 205-[4.5](a) shall be prohibited, except the uses permitted as provided in section 205-6 and section 205-8, and construction of single-family dwellings on lots existing before the effective date of this Act. . . .
>
> Any deed, **lease**, agreement of sale, mortgage or other instrument of conveyance covering any land within the agricultural subdivision shall expressly contain the restriction on uses and the condition as prescribed in this section which restriction and condition shall be encumbrances running with the land until such time that the land is reclassified to a land use district other than agricultural district.

1976 Haw. Sess. L. Act 199, § 1 (emphasis added).

91. A comparison of the County zoning provision with HRS Chapter 205 as of June 4, 1976, reveals that a dwelling may simultaneously meet the definition of "farm dwelling" in HRS Chapter 205 and the County's definition of "short term vacation rental."

92. As of June 4, 1976, "farm dwellings" were defined as "a single-family dwelling located on and used in connection with a farm **or** where agricultural activity provides income to the family occupying the dwelling." *Id.*

93. The County defines "short-term vacation rental" as "a dwelling unit of which the owner or operator does not reside on the building site, that has no more

than five bedrooms for rent on the building site, and is rented for a period of thirty consecutive days or less." County Ordinance 2018-114. This definition has three "specific factual" elements, *see* HAR § 15-15-98(a), namely that (1) the dwelling is one in "which the owner or operator does not reside on the building site"; (2) the dwelling "has no more than five bedrooms for rent on the building site"; and (3) the dwelling "is rented for a period of thirty consecutive days or less," County Ordinance 2018-114. Whether an occupant of a "short-term vacation rental" is "on vacation" is not a "specific factual" element of the definition of "short-term vacation rental."

94. With respect to the first specific factual element of the County's definition of "short-term vacation rental," as of June 4, 1976, HRS Chapter 205 did not prohibit a "farm dwelling" from being one in "which the owner or operator does not reside on the building site." *See* 1976 Haw. Sess. L. Act 199, § 1; 1975 Haw. Sess. L. Act 193, § 3; County Ordinance 2018-114. On the contrary, HRS Chapter 205 specifically contemplated "lease[s]." *See* 1976 Haw. Sess. L. Act 199, § 1. A "lease" is the same as a rental. *See* LEASE, Black's Law Dictionary (11th ed. 2019). The County does not claim that HRS Chapter 205 requires the owner or operator to reside on the building site.

95. With respect to the second specific factual element of the County's definition of "short-term vacation rental," as of June 4, 1976, HRS Chapter 205 did not prohibit a "farm dwelling" from having "no more than five bedrooms for rent on the building site." *See* 1976 Haw. Sess. L. Act 199, § 2; 1975 Haw. Sess. L. Act 193, § 3; County Ordinance 2018-114. The County did not dispute that Chapter 205 does not require farm dwellings to have no more than five bedrooms for rent on the building site.

96. With respect to the third specific factual element of the County's definition of "short-term vacation rental," as of June 4, 1976, HRS Chapter 205 did not prohibit a "farm dwelling" from being rented for a period of thirty consecutive days or less. *See* 1976 Haw. Sess. L. Act 199, § 2; 1975 Haw. Sess. L. Act 193, § 3; County Ordinance 2018-114. The County expressly conceded that Chapter 205 does not prohibit a farm

dwelling from being rented for a period of 30 consecutive days or less. *See* Docket No. 15 at R00301; *id.* at R00287; *id.* at R00288.

97. As of June 4, 1976, Chapter 205 defined "farm dwelling" as "a single-family dwelling" "located on and used in connection with a farm" (the "**first clause**") "or where agricultural activity provides income to the family occupying the dwelling" (the "**second clause**"). 1976 Haw. Sess. L. Act 199, § 1 (emphasis added).

98. The two clauses of the "farm dwelling" definition were connected by the disjunctive word "or." Because the "farm dwelling" definition contained two clauses stated in the disjunctive ("or"), the definition was met if either clause was satisfied.

99. The first clause defined "farm dwelling" as "a single-family dwelling . . . located on and used in connection with a farm . . . ." 1976 Haw. Sess. L. Act 199, § 1. "The phrase 'in connection with' is generally interpreted broadly and defined as 'related to,' 'linked to,' or 'associated with.'" *Laeroc Waikiki Parkside, LLC v. K.S.K. (Oahu) Ltd. P'ship*, 115 Hawai'i 201, 225, 166 P.3d 961, 985 (2007).

100. By its terms, the first clause contains no provision prescribing a minimum rental period.

101. Plainly, requiring a dwelling to be "located on and used in connection with a farm" does not dictate how long or short the dwelling may be rented.

102. The second clause defined "farm dwelling" as "a single-family dwelling . . . where agricultural activity provides income to the family occupying the dwelling." 1976 Haw. Sess. L. Act 199, § 1.

103. The plain language of the clause does not speak to how long the family is occupying the dwelling.

104. Indeed, no provision of HRS Chapter 205 regulated the period for which a farm dwelling may be rented.

105. As the plain language of HRS § 205-2 did not regulate how long a "farm dwelling" may be rented as of June 4, 1976, the County's interpretation of State law, as presented in County Ordinance 2018-114, is wrong.

106. As noted above, this analysis of the statutory language is in accord with the statements made by OPSD and the County on the record. Neither OPSD nor the County claimed that HRS Chapter 205 regulated how long a farm dwelling may be rented. OPSD clearly stated in its written filing that there is an "[a]bsence of [a]n [e]xpress [p]rohibition on [r]enting for 30 [d]ays or [l]ess" in the definition of "farm dwelling." Docket No. 7 at R00124, R00126. ("[T]he definition of 'farm dwelling' does not expressly prohibit rentals of 30 days or less . . . ."). During the June 25, 2020 meeting, OPSD further stated that "the definition of 'farm dwelling' does not expressly prohibit rentals of 30 days or less," Docket No. 15. at R00288, and that "a renter for 30 days or less that farms the land may be allowed under the definition of 'farm dwelling,'" *id.* at R00287; *see also id.* at R00292. Similarly, the County stated during the meeting on June 25, 2020, that "there's no prohibition on farm dwellings being rented for 30 days or less." *Id.* at R00301.

107. The Commission's reliance on *Save Sunset Beach Coalition v. City & County of Honolulu*, which provides that the County may zone in a manner more restrictive than provided by State law, is misplaced. 102 Haw. 465, 482, 78 P.3d 1, 18 (2003).

108. The County has been granted the authority to plan and zone by statute. *See* HRS § 46-4. As a general proposition, a County zoning provision may regulate in a more restrictive manner than the State so long as the provision does not "actually conflict" with State law and is otherwise valid. *See Save Sunset Beach Coal.*, 102 Hawai'i at 482, 78 P.3d at 18 (2003) ("Because the uses allowed in country 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.").

109. The County may only be more restrictive prospectively, however. The County may not apply a more restrictive zoning provision retroactively. *See Robert D. Ferris Tr.*, 138 Hawai'i at 312-13, 378 P.3d at 1028-29. Presumably, the County may only apply a zoning provision retroactively if the County zoning provision duplicates what State law already provides.

110. County Ordinance 2018-114 does not merely duplicate State law. Rather, County Ordinance 2018-114 is more restrictive than State law. As of June 4, 1976, HRS Chapter 205 did not regulate the length of time a "farm dwelling" may be rented. County Ordinance 2018-114 prohibits the rental of a "farm dwelling" for 30 days or less unless the lot was created before June 4, 1976. In this way, County Ordinance 2018-114 is more restrictive than State law because it regulates something—the duration of a "farm dwelling" rental—that HRS Chapter 205, as of June 4, 1976, did not regulate.

111. The Commission's reliance on *Save Sunset Beach Coalition* to grant the County Petition was erroneous. 102 Haw. 465, 482, 78 P.3d 1. The questions before the Commission were not whether County Ordinance 2018-114 is more restrictive than State law. The questions before the Commission were whether County Ordinance 2018-114 duplicates State law by prohibiting a use as a matter of County law that had been prohibited in the State Agricultural District as a matter of State law since June 4, 1976.

112. Deference does not save the LUC's decision. To grant agency deference, Appellees must first show an ambiguity in the statute with "broad and indefinite meaning." *See In re Water Use Permit Applications*, 94 Hawai'i 97, 144, 9 P.3d 409, 456 (2000). Appellees do not argue that the statute is ambiguous. Moreover, the text of Chapter 205 is unambiguous. Thus, there is no uncertain interpretation requiring deference.

113. Likewise, the reliance on legislative history urged by the County and the LUC does not save the LUC's decision. Indeed, the Hawai'i Supreme Court has been critical of parties for "leapfrogging into an examination of the legislative history of and intent behind" statutes rather than "starting" with "the language." *See Keliipuleole v. Wilson*, 85 Hawai'i 217, 222, 941 P.2d 300, 305 (1997). The language of the statute is plain and unambiguous. Where a statute is plain and unambiguous, the inquiry is at an end. *State v. Yamada*, 99 Hawai'i 542, 553, 57 P.3d 467, 478 (2002), *as amended* (Dec. 24, 2002) ("Inasmuch as the statute's language is plain, clear, and

unambiguous, our inquiry regarding its interpretation should be at an end."). This Court will not stray from well-settled rules of statutory interpretation by turning to legislative history when Chapter 205 is plain and unambiguous.

114. In this respect, this case is different than *Curtis v. Board of Appeals, County of Hawaii*, 90 Hawai'i 384, 396, 978 P.2d 822, 834 (1999), which is cited by both the LUC and the County. LUC Answering Brief ("**LAB**") at 14, 25; County Answering Brief ("**CAB**") at 21. In that case, the Hawai'i Supreme Court relied on legislative history only after first determining that the statute was ambiguous. *See T-Mobile USA, Inc. v. Cty. of Hawaii Plan. Comm'n*, 106 Hawai'i 343, 349, 104 P.3d 930, 936 (2005) (discussing *Curtis*). The LUC and the County do not contend that the relevant provisions in Chapter 205 are ambiguous.

115. Furthermore, the prior legislative history (preceding the June 4, 1976 amendments) cited by the LUC and the County does not help the LUC or the County. The legislative history discusses the preservation of agricultural lands. *See* S. Conf. Comm. Rep. No. 2-76, in 1976 Senate Journal, at 836. It does not speak to the leasing or rental of farm dwellings or any limitations on the duration of rentals. *See id*. The legislature sought to preserve agricultural lands by adopting the "farm dwelling" definition.

116. The County conceded that Appellants have "farm dwellings." Docket No. 34 at R01025. The only question is whether the "farm dwelling" definition prohibited rentals of 30 days or less—the one relevant factual element of the STVR definition. The prior legislative history simply does not address that question.

117. The subsequent legislative history is not instructive. The LUC and the County cite the "agricultural tourism" provisions enacted in 2012 that allow for "overnight accommodations" in Maui County. The statutory amendments in 2012 affirmatively allowing "overnight accommodations" in Maui County do not demonstrate that the legislature intended in 1976 to prohibit rentals of 30 days or less.

118. In general, reliance on subsequent legislative history is problematic and must be approached with "extreme caution," *First Ins. Co. of Hawai'i v. Dayoan*, 124

Hawai'i 426, 433, 246 P.3d 358, 365 (2010), because "the views of a subsequent [legislature] form a hazardous basis for inferring the intent of an earlier one," *United States v. Price*, 361 U.S. 304, 313 (1960).[2] In this case, the subsequent legislative history that has been cited to the Court is entirely disconnected from the question that is before the Court.

119. If there were an ambiguity in the "farm dwelling" provisions as of June 4, 1976, the tie would break in favor of the landowner. Chapter 205 is a zoning provision, and ambiguities in zoning provisions are construed in favor of the landowner. *Foster Vill. Cmty. Ass'n v. Hess*, 4 Haw. App. 463, 469, 667 P.2d 850, 854 (1983).

120. Neither legislative history nor deference empower Appellees to "change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts." *See State v. Dudoit*, 90 Hawai'i 262, 271, 978 P.2d 700, 709 (1999) (quotations omitted).

121. For these, the Commission erred by concluding that a "short-term vacation rental" (defined by County Ordinance 2018-114 as a rental for less than 31 days) could never be a "farm dwelling" as defined by HRS Chapter 205.

B. The Commission Erred in Denying the Rosehill Petition as Speculative.

122. The Commission erred in denying the Rosehill Petition as speculative while granting the County Petition on the merits. The Hawai'i Supreme Court has explained "that the declaratory ruling procedure is intended to allow an individual to seek an advance determination of how some law or order applies to his or her circumstances." *Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City & Cnty. of Honolulu*, 114 Haw. 184, 198, 159 P.3d 143, 157 (2007) (citation omitted). Pursuant to HRS § 91-8, "[a]ny interested person may petition an agency for a declaratory order

[2] "[T]he maxim *expressio unius est exclusio alterius* is nothing but an aid to interpretation, and as an aid it is pretty weak when applied to acts of [the legislature] enacted at widely separated times." *Moreno Rios v. United States*, 256 F.2d 68, 71 (1st Cir. 1958). This "fact weighing heavily against application of the maxim . . . ." *See Abdullah v. Am. Airlines, Inc.*, 969 F. Supp. 337, 349 (D.V.I. 1997).

as to the applicability of any statutory provision or of any rule or order of the agency." HRS § 91-8. HAR § 15-15-98(a) provides, "On petition of any interested person, the commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission to a specific factual situation." Section 15-15-100(a)(1)(A) further instructs the Commission to deny a petition for declaratory order where "[t]he question is speculative or purely hypothetical and does not involve an existing situation or one which may reasonably be expected to occur in the near future . . . ." HAR § 15-15-100(a)(1)(A).

123. Agencies are bound to treat like cases alike. *See Westar Energy, Inc. v. Fed. Energy Regul. Comm'n*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) ("A fundamental norm of administrative procedure requires an agency to treat like cases alike."). To do otherwise, without a sufficient justification grounded in fact or logic, is arbitrary and capricious. *Id.*

124. Here, the "existing situation" is that the County passed an ordinance banning rentals of 30 days or less on any lot created on or after June 4, 1976. *See* County Ordinance 2018-114.

125. Both Petitions presented a question regarding the applicability of a statutory provision to this existing situation, namely, whether HRS Chapter 205, as of June 4, 1976, prohibited "short-term vacation rentals," as that term is defined by the County, in the State Agricultural District. The County-defined term "short-term vacation rental" has three "specific factual" elements. The only element in dispute between the parties is the durational element, *i.e.,* the rental of a dwelling for 30 days or less. Both parties focused on this element. The County argued that HRS Chapter 205 prohibited the rental of a "farm dwelling" for 30 days or less. *E.g.*, Docket No. 1. Appellants argued that it did not. *E.g.*, Docket No. 2.

126. This question is premised on the same specific factual situation. Indeed, the enactment of County Ordinance 2018-114 and its legal relationship to HRS Chapter 205 provided the Commission with a complete and certain factual situation as set

forth in the specific factual elements of County Ordinance 2018-114's definition of "short-term vacation rental."

127. The Rosehill Petition is not speculative. "Speculative" is variously defined as "involving, based on, or constituting intellectual speculation . . . [or] theoretical rather than demonstrable," *Speculative*, *MERRIAM-WEBSTER*, https://www.merriam-webster.com/dictionary/speculative (last visited September 2, 2021), and "engaged in, expressing, or based on **conjecture** rather than **knowledge**[,]" *Speculative*, *OXFORD DICTIONARIES*, https://www.lexico.com/en/definition/speculative (last visited July 14, 2021) (emphases added). "Conjecture" is "[a]n opinion or conclusion formed **on the basis of incomplete information**." *Conjecture*, *OXFORD DICTIONARIES*, https://www.lexico.com/en/definition/conjecture (last visited July 14, 2021). The specific factual situation presented by the Rosehill Petition did not require the Commission to engage in conjecture.

128. The Rosehill Petitioners rent, and want to continuing renting, their dwellings for 30 days or less. Docket No. 2 at R00022.

129. This case is not about vacation uses generally. This case is about a specific ordinance. The ordinance has three "specific factual" elements. *See* HAR § 15-15-98(a).

130. There is nothing "speculative" or "hypothetical" about those factual elements. *See id.* § 15-15-100(a)(1)(A).

131. Whether or not the Appellants' dwellings are "farm dwellings" was not in dispute.

132. The only "specific factual" element in dispute concerns rentals of 30 days or less.

133. The only question before the Commission was the application of HRS Chapter 205, as of June 4, 1976, to the specific factual situation presented by the County's enactment of County Ordinance 2018-114.

134. The Commission answered this question on the County's Petition.

135. The Commission denied as speculative this question on the Rosehill Petition.

136. As a matter of law, the County's Petition could not be proper if the Rosehill Petition was speculative.

137. Accordingly, the Commission erred in denying the Rosehill Petition as speculative. Based on the analysis set forth above in Section II.B, the Commission should have granted the Rosehill Petition on the merits an denied the County's Petition as incorrect.

C. Findings of Fact in the Commission's Consolidated Order Were Error

138. FOF ¶ 30 states:

> On August 13, 2020, the Commission met via "ZOOM" virtual conferencing technology to continue consideration of Petitioners County of Hawai'i's and Linda Rosehill et al.'s Petitions for Declaratory Orders regarding Short Term Vacation Rentals as Farm Dwellings pursuant to HAR § 15-15-100. Calvert Chipchase, Esq. appeared on behalf of Rosehill et al. and John Mukai, Esq. on behalf of County. In the discussion on the Petition, the Commission also heard comments from Dawn Takeuchi-Apuna, Esq. on behalf of OP. Thereafter, a motion was made and seconded pursuant to HAR § 15-15-l00(a)(1)(C) to deny the Rosehill, et al., Petition without prejudice and grant the County's Petition. Following a discussion by the Commissioners, the Motion was DR20-69 amended to deny the Rosehill, et al., Petition and grant the County's Petition and a vote was taken on the Motion. There being a vote tally of 8 ayes, 0 nays, the motion carried.

Id. 36 at R01100.

139. FOF ¶ 30 is clearly erroneous. It fails to note that County Director Yee and Deputy Director Surprenant provided testimony during the hearing, including testimony that the County considers all dwellings on the Rosehill Petitioners' properties to be farm dwellings.

140. **FOF ¶ 31** states:

> The COUNTY OF HAWAI'I petitioned the Land Use Commission 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.

Id. at R01101.

141. FOF ¶ 31 is clearly erroneous, affected by an error of law, arbitrary, capricious, and characterized by abuse of discretion or clearly unwarranted exercise of discretion. The County Petition contends, "The respective definitions and uses for farm dwellings and short-term vacation rentals irreconcilably conflict and show that short-term vacation rental use is incompatible with being a farm dwelling." Docket No. 1 at R00002.

142. **FOF ¶ 32** states:

> The ROSEHILL PETITIONERS sought to have the Land Use Commission declare invalid the COUNTY OF HAWAI'I's amendment of its Code which prohibited the a "short term vacation rental" on agricultural land.

Docket No. 36 at R01101.

143. FOF ¶ 32 is clearly erroneous, affected by an error of law, arbitrary, capricious, and characterized by abuse of discretion or clearly unwarranted exercise of discretion. Appellants did not ask the Commission to declare invalid the County's amendment of the County Code prohibiting a "short term vacation rental" on agricultural land. On the contrary, counsel for the Rosehill Petitioners expressly confirmed to the Commission that the Rosehill Petition did not ask the Commission to invalidate the County Code. Docket No. 34 at R00964, R00969, R00987-88, R00989.

144. FOF ¶¶ 34-39 erroneously state conclusions of law.

145. FOF ¶ 40 erroneously states a conclusion of law and quotes the current version of HRS § 205-5. The County's ordinance restricts short term rentals, unless a lot was created before June 4, 1976, based on the County's interpretation of the "farm dwelling" definition in Chapter 205 that went into effect on that date. Therefore, the relevant version of Chapter 205 is the one in effect as of June 4, 1976.

146. FOF ¶ 41 erroneously states a conclusion of law and quotes the current version of HRS § 205-2(d). The County's ordinance restricts short term rentals, unless a lot was created before June 4, 1976, based on the County's interpretation of the

"farm dwelling" definition in Chapter 205 that went into effect on that date. Therefore, the relevant version of Chapter 205 is the one in effect as of June 4, 1976.

147. **FOF ¶¶ 42-47** erroneously state conclusions of law on issues that were not before the Commission.

148. **FOF ¶¶ 55-57** erroneously state conclusions of law on issues that were not before the LUC. Whether the County may **prospectively** regulate STVRs was not before the Commission.

149. **FOF ¶ 60** states:

> 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".

Docket No. 36 at R01115.

150. The County conceded that the dwelling units associated with the Rosehill Petition are "farm dwellings." Docket No. 34 at R01023, R01025.

151. FOF ¶ 60 erroneously states a conclusion of law. *See supra* Section II.A.

152. **FOF ¶ 61** states:

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

Docket No. 36 at R01116.

153. FOF ¶ 61 erroneously states a conclusion of law and is clearly erroneous and affected by an error of law. *See supra* Section II.A.

154. **FOF ¶ 62 states:**

> The farm dwelling use and a STVR use are not compatible uses. A farm dwelling defined under HRS § 205-4.5(a)(4) as 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.

Docket 36 at R00981.

155. FOF ¶ 62 erroneously states a conclusion of law and is clearly erroneous and affected by an error of law. *See supra* Section II.A.

156. **FOF ¶ 63** states:

> 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.

Docket No. 36 at R01116.

157. FOF ¶ 63 erroneously states a conclusion of law and is clearly erroneous and affected by an error of law. *See supra* Sections II.A & B. No additional facts were necessary for the Commission to determine whether the definitions of "short-term vacation rentals" and "farm dwellings" duplicated each other such that the rental of a "farm dwelling" for 30 days or less has been prohibited since June 4, 1976. The question before the Commission, as presented by the cross petitions, only required the body to determine whether HRS Chapter 205 prohibited rentals of "farm dwellings" for 30 days or less as of June 4, 1976.

158. **FOF ¶ 64** states:

> 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.

Id. at R01116.

159. FOF ¶ 64 erroneously states a conclusion of law and is clearly erroneous and affected by an error of law. *See supra* Section II.A & B. Renting or leasing is expressly contemplated in Chapter 205, and nothing in the definition of "farm dwelling" as of June 4, 1976 prohibited rentals for less than 31 days. The Commission's conclusion otherwise was error.

160. **FOF ¶ 65** states:

> Residential use of a farm dwelling without any connection to an agricultural use has never been allowed in the agricultural District. The law has always required that a farm dwelling be used in connection with a farm or accessory to an agricultural use.

161. FOF ¶ 65 erroneously states a conclusion of law and is affected by an error of law, arbitrary, capricious and characterized by abuse of discretion or clearly unwarranted exercise of discretion. It addresses an issue that was not properly before the Commission.

162. **FOF ¶ 68** states:

A STVR is an incompatible use of a farm dwelling.

163. FOF ¶ 68 erroneously states a conclusion of law and is clearly erroneous and affected by an error of law. *See supra* Section II.A. Whether "STVRs" generally are a permitted use in the State Agricultural District was not before the Commission. FOF ¶ 69 and 70 are clearly erroneous for the same reasons. *See* Docket No. 36 at R01117 (FOF ¶ 69: "A STVR is not a permitted use as a farm dwelling under HRS chapter 205."); *id.* (FOF ¶ 70: "Purely residential uses, with no connection to agricultural use, such as STVR use, have never been allowed in the Agricultural District."). Various examples were given of how an STVR could satisfy the definition of "farm dwelling" as of June 4, 1976. *E.g.*, Docket No. 36 at R00325-26.

164. **FOF ¶ 71** states:

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

Docket No. 36 at R01118.

165. FOF ¶ 71 erroneously states a conclusion of law and is affected by an error of law, arbitrary, capricious and characterized by abuse of discretion or clearly unwarranted exercise of discretion by addressing an issue that was not before the Commission. By stating that such regulation would be "more restrictive[]," the Commission impliedly concedes that the County ordinance is not merely a duplication of State law.

166. **FOF ¶ 72** states:

> The ROSEHILL PETITIONERS have not submitted a sufficient record demonstrating that their use or 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.S(a).

Docket No. 36 at R01118.

167. FOF ¶ 72 is clearly erroneous, arbitrary, capricious, and characterized by abuse of discretion or unwarranted exercise of discretion. *See supra* Sections II.A & B. The Commission concedes the Appellants have standing. Appellants filed a verified petition with the Commission which presented a question of law premised on a specific factual situation. The Commission changed the question presented by Appellants. Whether Appellants' dwellings are "farm dwellings" was not at issue; the facts were not in dispute. Furthermore, the County conceded that the dwelling units owned by the Appellants are farm dwellings. **FOF ¶¶ 73-75** and **77-79**—which state in various ways that Appellants did not present a specific factual situation—are clearly erroneous, arbitrary, capricious, and characterized by an abuse of discretion for the same reasons. *See* Docket No. 36 at R01118-20 (**FOF ¶ 73**: "The ROSEHILL PETITIONERS have not submitted a sufficient record demonstrating that their use or intended use of their subject properties are "farm dwellings" or related to agriculture." FOF ¶74: "The ROSEHILL PETITIONERS did not present to the Commission a specific factual situation on which the Commission could issue the declaratory order they requested." **FOF ¶ 75**: "The ROSEHILL PETITIONERS were required to set forth a proper question for the Commission to consider and make a declaratory ruling on. . . ." **FOF ¶ 77**: "The ROSEHILL PETITIONERS' 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. . . ." **FOF ¶ 78**: "[T]he ROSEHILL PETITIONERS 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, ..." **FOF ¶ 79**: Without a "specific factual situation" presented to the Commission, the ROSEHILL PETITIONERS 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.' . . .").

168. **FOF ¶ 82** states:

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

Id. at R01120.

169. FOF ¶ 82 is a conclusion of law, clearly erroneous, arbitrary, capricious and characterized by abuse of discretion or unwarranted exercise of discretion for three reasons. *See supra* Section II.A. First, the absence of alignment is very different from saying that Chapter 205 prohibits STVR use as defined by the County Ordinance. Second, this conclusion also ignores the fact that Chapter 205 expressly contemplated leasing and did not impose a minimum rental period. Third, by recognizing that the elements of the County regulation do not "directly align," the Commission impliedly acknowledges that the County regulation is not a duplication of what State law already says.

170. **FOF ¶ 83** states:

> 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. *Sunset Beach Coal. v. City & Cty. of Honolulu*, 102 Hawai'i 465,482, 78 P.3d 1, 18 (Hawai'i 2003).

Docket No. 36 at R01120.

171. FOF ¶ 83 is a conclusion of law and is affected by an error of law by addressing an issue that was not properly before the Commission.

172. **FOF ¶ 84** states:

> The County of Hawai'i has met its burden to demonstrate it is entitled to the relief requested by the County of Hawai'i.

Id. at R01121.

173. FOF ¶ 84 is a conclusion of law and is clearly erroneous, affected by an error of law, arbitrary, capricious and characterized by abuse of discretion or clearly unwarranted exercise of discretion.

174. **FOF ¶ 85** states:

> For the reasons stated above and other good cause shown in the record, the Commission finds that the ROSEHILL petition was speculative, and the Land

> Use Commission therefore exercises its discretion and DENIES the relief requested by the ROSEHILL PETITIONERS.

Id.

175. FOF ¶ 85 is a conclusion of law and is clearly erroneous, affected by an error of law, arbitrary, capricious, and characterized by abuse of discretion or clearly unwarranted exercise of discretion.

176. **FOF ¶ 86** states:

> 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.

Id.

177. FOF ¶ 86 is a conclusion of law and is clearly erroneous, affected by an error of law, arbitrary, capricious, and characterized by abuse of discretion or clearly unwarranted exercise of discretion.

D. The Consolidated Order's Conclusions of Law.

178. The Consolidated Order's **Conclusions of Law** ("**COL**") ¶¶ 6-9 are affected by an error of law because they quote the current version of HRS § 205-5. The County's ordinance restricts short term rentals, unless a lot was created before June 4, 1976, based on the County's interpretation of the "farm dwelling" definition in Chapter 205 that went into effect on that date. Therefore, the relevant version of Chapter 205 is the one in effect as of June 4, 1976.

E. The Consolidated Order's Order Section.

179. The Consolidated Order's order section states:

> Having duly considered the Petition and the written and oral arguments presented by Rosehill, et al. and the County of Hawai'i, as well as the pleadings filed by OP, written and oral public testimony, and a motion having received the affirmative votes required by § 15-15-13, HAR, and there being good cause for the motion, this Commission orders that the Rosehill Petition be DENIED and that the County of Hawai'i's Petition be GRANTED.

180. The order is based on clearly erroneous findings of fact, affected by errors of law, arbitrary, capricious, and characterized by an abuse of discretion or clearly unwarranted exercise of discretion. *See supra* Sections II.A & B.

181. The Consolidated Order has prejudiced the substantial rights of the Appellants.

ORDER

Pursuant to the above findings of fact and conclusions of law, the Court will enter judgment in favor of Appellants and against the Appellees the LUC and the County.

The Consolidated Order granting the County Petition and denying the Rosehill Petition is REVERSED such that the County Petition is DENIED and the Rosehill Petition is GRANTED.

IT IS SO ORDERED.

DATED: Kona, Hawai‘i, _____.

_____
JUDGE OF THE ABOVE-ENTITLED COURT

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Linda K. Rosehill, et al. v. State of Hawaii, et al.; Civil No. 3CCV-21-0000178, Third Circuit Court, State of Hawai‘i; [PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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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 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

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

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

DECLARATION OF CHRISTOPHER T. GOODIN

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

Appellants,

v.

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

Appellees.

DECLARATION OF CHRISTOPHER T. GOODIN

I, Christopher T. Goodin, declare as follows:

1. I am an attorney for the Rosehill Petitioners/Appellants[1] ("**Appellants**") in the above-captioned action. I make this Declaration based on personal knowledge, and am competent to testify to the matters set forth herein.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the transcript of the hearing in this agency appeal before the Honorable Wendy M. DeWeese at the Third Circuit Court, Kona Division on January 10, 2022.

I declare under penalty of perjury that the foregoing statements are true and

[1] The Rosehill Petitioners are Appellants Linda K. Rosehill, Trustee of the Linda K. Rosehill Revocable Trust dated August 29, 1989, as amended; 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.

correct to the best of my knowledge, information and belief.

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

CADES SCHUTTE
A Limited Liability Law Partnership

/s/ Christopher T. Goodin
ROY A. VITOUSEK, III
CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN
MOLLY A. OLDS
Attorneys for Appellants
LINDA K. ROSEHILL, *et al.*

EXHIBIT 1

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

LINDA K. ROSEHILL, trustee of the Linda K. Rosehill Revocable Trust, et al., Appellants, vs. STATE OF HAWAII, LAND USE COMMISSION; and COUNTY OF HAWAII, Appellee(s).	No. 3CCV-21-0000178 Hearing Date: January 10, 2022

TRANSCRIPT OF PROCEEDINGS

on the hearing held before the Honorable Wendy M. DeWeese at the Circuit Court of the Third Circuit Court, Kona Division, commencing at 1:33 p.m.

TRANSCRIBED BY: WENDY L. GRAVES, CSR NO. 460

APPEARANCES:

For the Appellants Calvert G. Chipchase, Esq.
Chris Goodin, Esq. (via Zoom)
Cades Schutte LLP
1000 Bishop Street, 12th Floor
Honolulu, Hawaii 96813

(Appearing via Zoom:)

For the Appellee(s) County of Hawaii	Mark Disher, Dep. County Counsel County of Hawaii County Counsel's office 101 Aupuni Street, Suite 325 Hilo, Hawaii 96720
State of Hawaii Land Use Commission	Julie China, Dep. Atty. General State of Hawai'i Dept. Of the Attorney General 425 Queen Street Honolulu, Hawaii 96813

P R O C E E D I N G S

THE CLERK: All rise. Circuit Court of the Third Circuit Court is reconvened. You may be seated.

Calling from our 1:30 calendar, calling 3CCV-21-178, in the matter of the petition of County of Hawaii, et cetera, versus Linda K. Rosehill, et cetera, et al.

Oral arguments.

THE COURT: Okay. Good afternoon. State your appearances, please.

MR. CHIPCHASE: Yes, your Honor. Cal Chipchase appearing in person and Chris Goodin appearing remotely for the Rosehill petitioners.

THE COURT: Okay.

MR. DISHER: Good afternoon, your Honor. Deputy Corporation Counsel Mark Disher appearing for the County of Hawai'i.

MS. CHINA: Good morning, your Honor. Deputy Attorney General Julie China, appearing for the State of Hawaii Land Use Commission.

THE COURT: Okay.

MR. DISHER: I don't see your co-counsel, Mr. Chipchase. Is he on?

THE CLERK: He was just on. There he is.

THE COURT: All right. Okay. So I have -- I

don't know how long you folks were planning on argue. I have about 90 minutes. So I was going to allow you 20, 25 minutes each.

I can say, I have read pretty much everything that's been submitted. The same arguments were made, have been made over and over. So I feel like I'm pretty -- well, you can figure that out.

I feel like I understand what the issues are. So I guess I would just ask really if I have the volume, if you can just really boil it down to what it is that I need to focus on in the large quantity of transcripts, et cetera, I would appreciate that.

MR. CHIPCHASE: I will do my best to boil, your Honor.

THE COURT: Okay. That sounds good.

MR. CHIPCHASE: And that time should be ample.

Your Honor, in the effort to boil I will try to put things in context. As I thought about this case --

THE COURT: And actually, Mr. Chipchase, you might be better off -- I know it's going to be a little bit weird, but the mic is actually on the other side of that plastic --

MR. CHIPCHASE: Right here?

THE COURT: Yes. Frankly, in light of my thoughts on where this case is likely going, I don't

know if you are comfortable, but you are welcome to stay seated. If you are going to stand, make sure you speak loudly so we get a good record.

MR. CHIPCHASE: Okay. How is that, your Honor?

THE COURT: That's great.

MR. CHIPCHASE: Very good. So in thinking about the context of this petition, both before the LUC and why we're here, and why it's important, it comes down to a couple of things.

The first is that before April 2019, the county did not regulate how long a property had to be rented. There was no minimum rental period in the county. Other counties did impose minimum rental periods and still do.

On O'ahu it's 30 days, on Maui and Kauai you have to be 180 or 181, respectively, but there was nothing on the Big Island.

That changed on April 1, 2019 to impose a 31 day minimum rental period for properties within the agriculture state, agricultural district. And that's fine.

We all agree that the county may regulate more restrictively than the state going forward. Right? Law comes into effect today applying it prospectively is not a problem.

But laws that change allowed uses, here a rental

period, can't be applied retroactively. They can't say a law, a use that was okay in a rental period on Monday are unlawful on Tuesday. It's a due process issue. They can't do that.

And so these laws, typically, when laws change grandfather existing uses. And here the county was no exception, which brings me to my second point.

The county did grandfather existing uses, existing rentals of less than 31 days, but it only did so if the state ag law was created before June 4th, 1976. In other words, it reached back some 43 years and said that if your lot was created after that you weren't grandfathered through this provision. The restriction has changed and the rental period applied to you.

So that takes me to the next thing that I think is critical. The question then becomes does that county law regulating how long property needs to be rented merely duplicate state law on that date, does it accomplish the same thing, or is it more restrictive?

Because if it's more restrictive it can't look back in time like that. It can only look forward. But it merely duplicates it. It's both unnecessary but also not a change in the law. The use was always prohibited.

And so when the county adopted this law, and I began discussions with the County Corporation Counsel,

and we began filing appeals from the denial of nonconforming use certificates for people who were engaged in rentals of less than 31 days, but their lots were created after June 4th, 1976.

The county and I agreed that this really turns on an interpretation of Chapter 205. What did 205 mean on that critical date, that June 4th, 1976 date?

And so we agreed each to petition to the Land Use Commission for an interpretation of the law as it existed on that date.

And in doing so, although we phrased the questions differently, we asked the same questions of the Land Use Commission.

You can see that in the county's answering brief, where they express or confirm what we both looked at, actually, I believe the LUC's answering brief, we both looked at a question of statutory interpretation. How do you interpret Chapter 205?

And so as part of that interpretation, we presented the same facts to the LUC. We presented the county law. The county conceded during argument that all of the units, all of the dwelling units on my client's properties are farm dwellings. The county regards them as farm dwellings.

And we all agreed that prior to the enactment of

this law my clients were renting their farm dwellings for periods of less than 31 days. All the same facts before the LUC, and on a petition for declaratory ruling, you need the same facts, because it doesn't operate as an evidentiary hearing, where they take in disputed evidence and weigh it.

Instead you come forth with the evidence, the LUC accepts it, and they rule as a matter of law. Here the matter of law, the question as a matter of law is the interpretation of Chapter 205, specifically the farm dwelling definition. We both asked the LUC to interpret that.

The general code when it was changed had three parts. It made a use, what the county termed a short term vacation rental. One is that the owner doesn't occupy the site, doesn't live there. Two, that it has five or fewer bedrooms; and three, that it's rented for a period of 31 days or less.

The definition that the county has, both me and the county compared that to the LUC's definition. The LUC's definition of a farm dwelling has two alternative parts. The first is that a farm dwelling is a single family dwelling located on and used in connection with a farm.

The second part is that it's a single family

dwelling where agricultural activity provides income to the family occupying the dwelling.

And really, that's where the statutory analysis stops. That's where the end, we've reached the end of the question of both myself on behalf of my clients and the county put before the LUC. We have the statute. We have the county code.

We can look at both of them and see that nothing in the definition of farm dwelling regulates or describes how many bedrooms a property can have, and indeed the county well conceded that the definition does not regulate how many bedrooms a dwelling can have.

If you look at the second part and see, does the definition of farm dwelling prohibit renting the property? Again, the county conceded that it does not. That an owner does not need to occupy the farm dwelling. It can be rented out.

So we come to the third part. Does that definition that I read to you that you have seen all over the briefs repeated again and again, does it prohibit rentals of less than 31 days?

And again, on a straight statutory analysis, the answer is no, it does not. And that's not only the statutory answer. That's the answer that all parties agreed below, and I will just quote a couple of places,

your Honor.

At Docket 15, Record 301, quote, "The county agrees there is no prohibition on farm dwellings being rented for 30 days or less." It's just not in the statute.

The Office of Planning made the same concession on the record below. The statutory analysis then has been answered. The county law does not merely duplicate state law. It does not merely do the same thing the state law already did as of June 4th, 1976.

It's more restrictive in combining a regulation of the bedrooms, owner occupancy, and the duration. It's doing more than state law did.

THE COURT: Why was the LUC proceeding below -- if it's so straightforward, why did the LUC proceeding sort of turn into this whole let's come up with the most interesting hypothetical we can come up with and see if that's permitted or not permitted, what have you?

It seems like if what you are saying is correct, there were three separate days of hearings on issues that really were kind of meaningless for your analysis. What happened there then?

MR. CHIPCHASE: There is several things. Some are purely prosaic. The LUC ran out of time, the LUC had other docket matters, and so we were only on three

days. We didn't use up all of our time. That's one part of it, it's just a timing thing.

The other part of it is that the commissioners were intensely interested in the questions. So they asked a number of hypotheticals dealing with this. Through those hypotheticals it was conceded on the record that there could be perfectly lawful uses of property on farm dwellings that were for less than 31 days.

You can find this at the transcript page 96, line 12, to page 97 at line 6, and at page 98 at lines 1 through 8, and those are both on the 6/25/2020 transcript.

And so through those questions, those hypotheticals as said those interesting hypotheticals did come out, and they showed the county law has done more, it has done more than state law does, because you could have a use that fits the county definition but is nonetheless a farm dwelling.

And as soon as you have that, you know the county is not merely duplicating the state law. It's doing more.

The third reason, your Honor, that the proceeding below, you know, honestly did, is really that the LUC looked for the answer it wanted to reach rather

than simply applying the law as written.

And the answer it wanted to reach is that short term vacation rentals are incompatible with a farm dwelling.

But that's not the question before them, at least not in the abstract, because each county defines short term vacation rental differently. On Maui, it's 181 days. On Kauai, it's 180. On O'ahu, it's 30. On the Big Island, it's 31.

The statute doesn't mean different things to different people. It can't mean different things on different counties. It's a state statute. It has to mean the same thing for all people and all counties.

And so by beginning with the outcome, we can't be seen as supporting or allowing short term vacation rentals. Not the question before them. The LUC struggled to come up with a justification.

And so as you see in the briefing, it came up with several justifications. One was that the county can regulate more restrictive rules than the LUC can or that state law. That's true. That's the Obayashi decision, by Justice (indiscernible).

But it can't do so retroactively. Going forward there is no excuse, it can be more restrictive. Here that wasn't the question. The question was did this

regulation, this county regulation, merely duplicate state law? And if it did the county is not being more restrictive. It's doing the same thing. By turning to that, in fact, by relying on that idea that the county can be more restrictive the LUC reveals that the county is, in fact, more restrictive. It can't do that moving backwards.

The second thing that the LUC did in straining to find an answer is invert the statutory analysis. We always begin with the plain language of a statute. And the only turn to legislative history, if that plain language is it ambiguous.

But here no party, none of us said that the statute is ambiguous, nor could you. The statute is plain. We all agree. So you never turn to legislative history to find that legislative intent in the plain language of a statute.

The third thing that the LUC did in straining to find an answer is look at or rely on deference to agencies. Agency deference administering statute. But again, the case law is quite clear. You only defer to agencies if the statute is ambiguous. If it's not ambiguous, it's plain. The Court sits in a position of reviewing it and determining its meaning ineligible.

The fourth thing that the LUC did when it

strained to find us the answer that it gave is to look at legislative history that was not only contemporaneous but future. So it looked at 1976 and said that the legislature intended to more closely regulate land in the agricultural district. We agree, it did. It adopted the farm dwelling requirement. That's not the question.

The question is, does that farm dwelling requirement prohibit rentals of less than 31 days. It then looked forward and said, well, decades later the LUC authorized ag tourism -- I'm sorry, the legislature authorized ag tourism in certain circumstances.

We agree, it did. But again, that's not the question before the LUC. The question before the LUC is not whether a tourism use or vacation use. That's the question it answered. That's not the question before it, whether tourism use or vacation use was allowed.

The question was, does the county's definition of a transient vacation rental merely duplicate the state law or prohibit it? And if we were faithful to the statutory analysis, the answer would be no.

You can see the LUC strain to find a different answer in the way it treated the petitions differently. Both petitions, same facts, same central question, with different outcomes.

THE COURT: So the county -- maybe I am misreading it. I don't want to put any words in your mouth, Mr. Disher, but seems to be backing away from your contention, Mr. Chipcase, that the county conceded that your client's properties were farm dwellings.

So just to be devil's advocate. If that is the county's position, and they were just referring to farm dwellings -- there seemed to be some discussion about it, well, that's what they call all of these properties, and they are not really conceding your client's properties fit the definition.

But if there was no concession as to your client's property being farm dwellings, is that fatal to your client's petition?

MR. CHIPCHASE: Not at all, your Honor. It's not at all fatal to our petition, because our petition, just as the county's petition simply asks does this definition conflict or duplicate what was already then state law.

The county didn't come in and produce evidence of every single dwelling that it regulates or would subject to its ordinance and demonstrate whether they were farm dwellings or not under Chapter 205 and whether they would be subject to its new ordinance.

We asked the LUC to interpret or apply state law

to a county statute, a county ordinance. Whether my client's units were farm dwellings, not relevant to that question. But the concession was nonetheless made. It's not a glancing concession.

The docket 34 at 1023 to 1025, the county concedes they are all on property and parcels that were created after June 4th, 1976. Therefore, we consider all of their dwelling units on their properties to be farm dwellings. That's not an accidental concession.

While Mr. Disher may wish it hadn't been made, it was. Even if it wasn't it wouldn't change the outcome here.

The outcome here, as I said, is to treat two identical petitions different, asking the same questions, and yielding completely different results. Not merely granting one and denying the other, agreeing with the county that it does regulate or the state law did regulate uses under 31 days and this (indiscernible) that it did not. Granted the county's petition and denied mine as speculative.

It's impossible to treat those two petitions differently, when they come before the LUC at the same time, asking the same question, interpreting the same law, looking at the same county law, and being based entirely on the same factual record. One can't be

speculative and the other answerable.

In treating the same petitions, the same questions, the same issues different we see that the LUC began with on outcome and then backed into its analysis.

That's the opposite way of where it needed to go. It's the opposite way that we look at these questions.

And so, your Honor, as to the central statutory interpretation question, the LUC erred as a matter of law. That's just not what the statute said then or frankly says today, as to treating the two petitions differently. The LUC was arbitrary and capricious.

We cannot treat the same question with different parties differently. We have to give the same answers.

Happy to answer questions, your Honor, or I will reserve the rest of my time.

THE COURT: Okay. I don't have any questions at this particular moment.

Mr. Disher.

MR. DISHER: Actually, I did speak with Miss China. I believe she was going to go first. I was going to follow.

THE COURT: Okay. Miss China.

MS. CHINA: May it please the Court.

This is an appeal from a Land Use Commission decision in which appellants in the county into separate petitions for declaratory order asked the LUC to interpret an LUC statute.

Now, there is a huge record, and having read the transcripts and filings it can be confusing, but I think that the appeal can be distilled into two distinct points.

First, the LUC properly declined to rule on appellants' petition, and second, the use of a farm dwelling as a short term vacation rental is not permissible in the state planned use agricultural district.

Turning to my first point. The standard of review I think is clear, and that it is that the agency's decision to deny a petition for declaratory order is discretionary, and so is reviewed for abuse of discretion. And for that I cite Citizens against Reckless Development 114 Hawaii 184.

In this appeal, we're applying the same law, yes, that we agree with Mr. Chipchase there. However, this is to different facts. The county sought a declaration that a short term vacation rental is not a permissible use of a farm dwelling in the State land use ag district.

And appellate asked the Court to conclude that the definition of farm dwelling as of June 4th, 1976, did not prohibit rentals of less than 31 days.

Now, both questions involve short term rentals of farm dwellings in the state land use ag district. However, appellants and the county asked their questions based on different factual situations.

The county has been challenged in their implementation of their short term vacation rental ordinance with regard to farm dwellings in the ag district. Frankly, without more facts, it is not clear how the LUC statute even applies to appellant.

THE COURT: But, Miss China, repeatedly throughout the proceedings when I read the transcripts, by way of example, I'm looking at the record page at 344, which is a transcript -- I don't know the day of the particular hearing, but the LUC seemed to constantly reiterate: This is not a factual question. The facts are not in dispute. This is a question of law.

And so, but it seems like at the end of the day the LUC said: We don't have enough facts to decide the Rosehill petition. So I don't understand then those comments, what the LUC meant by those comments.

MS. CHINA: I think they meant that in order to have a declaratory ruling, the Supreme Court has said

that you have got to show that it applies to your circumstance, and the LUC administrative rule, which is 1515-104, it actually also states that a declaratory order applies to the factual situation described in the petition or set forth in the order.

So it's not that the facts are in dispute. It's that we need facts to give you a resolution as to your particular question.

So in this case, appellants' petition involved two issues: The definition of farm dwelling as of June 4th, 1976, and rentals of less than 31 days.

Under the statute, which is HRS Section 205-4.5(A)(4), all dwellings owned by appellants in the ag district must be used in connection with agriculture, and in that we agree with petitioners.

However, there is a two-part test to that, and you have to have either your dwelling located on a farm or agricultural income being provided to the family occupying the farm.

Now, appellants don't dispute that their dwellings in the ag district need to be farm dwellings. At the same time, they refused to inform the LUC of the use or intended use of their dwelling.

Appellants' claims that it does not matter whether or not they are complying with state law. And

in a slick kind of don't ask don't tell move, appellants' attorney stated during the LUC proceedings that he has not asked his clients if their dwellings have any agricultural connection. And, therefore --

THE COURT: But explain to me, though, whether or not the Rosehills are complying with state law affects the question posed by the Rosehills.

It seems like, from what Mr. Chipcase is telling me, it's just he wants the LUC to look at Chapter 205, look at the statute, look at the ordinance that the county passed, and determine whether or not based on the definition of farm dwellings there was any prior restriction on how many days they could be rented out.

How does whether or not his clients are in compliance with the law affect the LUC's ability to answer that question?

MS. CHINA: I think it's because they don't even say that the law applies to them. And we can't -- and the LUC, just as the Court can't just make a decision out of whole cloth without any specific factual admissions. Because if they had said, these are specific facts, how does this law apply to us, then we could have come up with a decision.

And so -- let's see.

So what did appellants tell the LUC? They

claimed that because the plain language of the farm dwelling statute does not contemplate any duration, they stop there and they win. But that's not how it works.

If appellants had no farm dwelling, then they don't show that the statute even applies to them. And then when pushed for facts, they pointed to a statement by the county, as your Honor has raised, that considers farm dwellings in the ag district to be -- I mean, considers dwellings in the farm ag district to be farm dwellings.

Well, that compares apples to oranges, because the county later explained that, you know, they call all first dwellings in the ag district farm dwellings for building permit purposes because they need to issue building permits, and they don't know how it will be used, you know, the dwelling will be used until after it's constructed.

And it's unfortunate -- the LUC thinks it's unfortunate that they use the same term.

However, a single family dwelling permitted by the county DPP is not necessarily a farm dwelling under HRS Chapter 205. It doesn't have the same definition.

And so the LUC declined to issue a dec ruling based on insufficient facts, and this is not a case of indiscretion and it should be affirmed.

Now, the second point that I'd like to raise is that the use of a farm dwelling as a short term vacation rental is not permissible in the land use ag district.

Uses not affirmatively listed in the statute are prohibited. That's what the statute says. A farm dwelling is expressly permitted under the statute. However, the statute also says that a single family residence is expressly prohibited on ag lots created after 1976. So that's how we got the 1976 date.

A dwelling is defined as a building designed or used exclusively for single family residential occupancy but not a hotel or motel. And that's in HAR Section 1515-03. So by excluding hotels and motels from the definition of a dwelling, that illustrates that transient accommodations are not allowable for use as a farm dwelling.

Appellants, you know, they have repeatedly stated that what is legal one day can't be illegal the next. Well, this legal nugget does not apply here, since appellant has never been allowed to rent their dwellings on their ag district lot, which were created after 1976, as short term vacation rentals. And the 2019 Hawaii County ordinance did not change this.

That's another reason why we need to know specifically what is before the -- the facts that were

before the LUC.

Now, appellant --

THE COURT: Hold on. Miss China, what authority are you relying on when you say that short term -- the term of art, short term vacation rentals, has never been permitted?

I mean, because the definition of farm dwellings talks about uses. But when you look at what the county now defines as a short term vacation rental, it doesn't say anything about usage. It talks about the duration of the rental period or the lease period.

So I don't -- I mean, I don't know -- I don't necessarily think that use is the same as lease period, but it seems the two are getting used somewhat interchangeably, because there is this assumption that a short rental period means it's a vacation or it's a tourist, it's somebody who doesn't live here.

So I guess I'm curious, where in Chapter 205 does it talk about the allowable lease period for farm dwellings? If at all.

MS. CHINA: Okay. So what happened was, you know, appellants focused on the fact that HRS 205 does contemplate leases of farm dwellings, and that's HRS Section 205-4.5(F).

However, since Chapter 205 does not refer to

leases in terms of duration, we looked to the legislative intent of whether farm dwellings could be used as a short term vacation rental. Because when it's not clear in a statute, we go to legislative intent.

And, you know, petitioners really, really, really want us not to look at legislative intent, because the legislative intent is absolutely clear that, you know, ag lands, prime ag lands were never intended to be used as vacation -- for vacation use.

So in 1961, the state land use ag district was created, and that was created to protect prime ag land from urbanization. According to the legislature, Act 187 focused on the best utilization of the development potential of land in the state by preserving prime ag land from unnecessary urbanization.

And then the definition of farm dwelling came into being in 1976. It's because the 1961 act was not sufficient to protect ag land. So in Act 199, it created more restriction in the ag district, including the definition of farm dwelling.

And the legislature in passing this act, they said that inasmuch as the purposes 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.

Now, I would direct the Court also to the finding of fact 63 where the LUC stated: In the present proceedings no facts were submitted which would contradict the conclusion that a short term vacation rental use is basically a transient accommodation effectively for vacation or tourist use, which has no connection to a farm, is not, and is not accessory to an agricultural use, and does not meet either of the requirements of the farm dwelling definition. A short term vacation rental use would, therefore, improperly displace the required ag use of a farm dwelling.

THE COURT: Well, what --

MS. CHINA: Now, this interpretation --

THE COURT: What testimony was there before the LUC that a short -- that the statute that we talk about as a short term vacation rental is the type of rental that's only used by vacationers and things like that? Was there testimony from a witness to that effect before the LUC, or is that just an assumption that people were making?

MS. CHINA: I think that was brought up by the county, if I'm not mistaken. I believe that that was something that the county raised in their argument.

And I think, you know, based on, you know, this

decision, I think -- I mean, I think the decision of the LUC should be affirmed.

Briefly before I conclude, I need to respond to something raised in the county's objection to the findings of fact number 65 and 70. I know this is kind of out of the ordinary, but they did make an objection, and it was first raised in their answering brief.

Those findings state that residential use of a farm dwelling has never been allowed in the ag district, and purely residential use with no connection to ag use, as a short term vacation rental use, has never been allowed in the ag district.

So the county wants those statements clarified to state that they do not apply to pre-1976 ag district lots.

Clearly, the county did not timely appeal the LUC order, and this objection is not before the Court. Parties have not had an opportunity to fully brief this argument, all except for the county.

More importantly, the county's concern is not valid since their petition was phrased in terms of both the county's 2019 short term vacation rental ordinance and the definition of farm dwelling, which came into being post-1976.

So I don't think these statements need

clarification, since the LUC order does not apply to ag lots created before 1976.

If the Court has any questions, I'd be happy to answer them. Otherwise, thank you for your time.

THE COURT: Thank you, Miss China.

I do have a question. So Mr. Chipcase argues that the county conceded that his clients' properties were farm dwellings.

If this Court were to find that that concession was made by the county, with that additional piece of evidence, is that the piece of evidence that the LUC would have needed in order to, in your opinion, rule on Mr. Chipchase's petition, or were there additional items that were missing in the LUC's opinion?

MS. CHINA: I do not think -- I do not think that the county could concede that point as to the applicability of a state law. I think they could have conceded that point as to the applicability of a county ordinance. And in addition to that, the county did clarify their statement that it was not a concession.

So I know that the record is quite confusing and muddied, and I think it was done so intentionally. But in any case, I think that the county could not have conceded this.

I mean, why couldn't petitioners, appellants

have conceded this fact on their own? This was for them to state as a fact going forward that their properties were farm dwellings, and they did not say that.

Nowhere in the records do they say, Our properties are farm dwellings and, therefore, this statute applies to us.

THE COURT: But maybe the reason that they did not say that was because, like I said, again, the record at page 770: This is again the LUC speaking, and it talks about, you know, while certain facts may be important to making an interpretation of the law in this type of proceeding, the facts are not really in dispute. The Commission is taking the basic facts as undisputed.

Again, "The facts are not in dispute. The application of law to accept facts is being heard today."

So, I mean, it seems like the LUC kept saying, we're not about the facts, we're not about the facts, the facts are undisputed, and then at the end of the day they say, oh, oops, well, petitioners didn't give us the facts we needed.

So explain to me how that -- because I mean, if this was a court, you know, it's kind of like the party would stand up and say, Hey, you know, you represented that this was not in dispute and, therefore, we didn't

present evidence on this issue, and now you are telling us, Oh, yes, it was in dispute.

So I guess I'm just confused on how the LUC can repeatedly say facts are not in dispute, facts are not in dispute, this is a question of law, and then say, Oh, we didn't have facts sufficient to consider the petitioners -- the Rosehill's petition.

That just bothers me. I will be honest with you about that.

MS. CHINA: Yeah, I understand that. I mean, I think what happened was just as the Court probably has a script before they start a court proceeding, you know, like a trial or something, the LUC has a script of what they say before they start a Dec action proceeding.

So that's what they said, you know, because it's something that in general terms usually, you know, we have sufficient facts. Except it became clear on the first day that we didn't have sufficient facts. And from after that initial statement by the Chair of the LUC it became more and more, Hey, what is your specific situation so that we can issue a ruling?

I think after that it became -- that's when it became a situation. That's when it became a concern.

And for the majority of the hearing, it was such that the Commission kept asking for their circumstances.

And that's why it went on for so long, because all of the questions directed by the Commission after petitioners put on their case were all directed at, Hey, you never said you have a farm dwelling. Is your dwelling a farm dwelling?

And then when the VBP (ph.) witness came up to testify for the county, they started talking about, you know, Hey, when we issued building permits we considered them all farm dwellings because, you know, we don't look at their use because we want to just allow dwellings to be built, and we assume they are going to be farm dwellings.

Well, you know, I think that's a case of enforcement, but that's not a question -- you know, that's not an admission of yes, they are all farm dwellings.

THE COURT: And so, because the Rosehills did file a verified petition and in that petition it states that the petitioners are property owners within the state ag district who prior to April 1, 2019 rented their properties for less than 30 days.

So I mean, if those facts were in the verified petition and that was before the LUC, or does the Court not consider that as part of the factual record before the LUC?

MS. CHINA: I believe those -- they made three affirmative statements, and those are before the Court, and those were before the LUC.

However, stating that they had dwellings in the ag district does not mean that they had farm dwellings, because farm dwellings have a specific definition, and that's what the LUC was getting at in their basically two and a half days of questioning.

And that's why this went on for so long, because it was like extracting teeth. They were trying to get to, Hey, what is your use of this property? You gave us three facts. You gave us no more. We kept asking. We kept asking. You didn't provide anything else. That's why we ultimately had to come to the conclusion that this needed to be denied.

THE COURT: And so do you -- I mean, do you agree or disagree that both of the petitions by the county, as well as by the Rosehills, were asking the LUC to interpret Chapter 205; do you agree or disagree?

MS. CHINA: Yes, I agree.

THE COURT: Okay. And so, but your distinction is that the county sought a declaratory ruling that short term vacation rentals are not permissible in ag land, right?

MS. CHINA: Yes.

THE COURT: And the Rosehills sought a declaratory ruling that the definition of farm dwellings prohibited -- whether or not the definition of farm dwellings prohibited rental periods of 31 days or less. 30 days or less. Sorry.

MS. CHINA: Yes. And that's why we sought the -- some kind of connection, you know, by the Rosehill parties to the definition of farm dwelling, because their question specifically was about farm dwellings, and they did not say anything about farm dwellings, because we kept asking.

THE COURT: Okay. All right. So the way the LUC looked at the record, this is my last question, is that there was no concession by the county as to whether or not the Rosehill's properties were farm dwellings and, therefore, that particular fact was a fact that was missing that prevented the LUC from ruling on the Rosehill's petition?

MS. CHINA: Correct.

THE COURT: Okay. All right. Thank you, Miss China.

Mr. Disher.

MS. CHINA: Thank you.

MR. DISHER: Thank you, your Honor. I did want to bring up one thing to clarify, based on the questions

you had for other counsel.

Mr. Michael Yee, he was Director of Planning at the time and testified for the LUC. He did help clarify this kind of labeling of farm dwellings for the first dwellings that's built on these properties.

On page R00322 of the record on appeal, he's pretty clear. He states that there will be a serious impact of trying to have first farm dwelling unit, which are residences, to have to show agricultural activity before the owner could build the residence.

If we went around through the State of Hawaii having to require folks to start agricultural activity and then say, hey, it's okay for you to build your residence there on the property, it would be very difficult to administer that way.

I mean, so basically it's that the first house, it's like the chicken or the egg, do you have to have the farm already actively doing some kind of agricultural activity before you can even put up your house? So basically that was clarified.

And it was also testified throughout the proceedings that when people are buying these properties, there are notices that this is agricultural land and farming is required. So these are all ahead of time. What is required? What is to be a farm dwelling?

I do feel that it was a bit ironic that one of the early public testimonies was a resident of agricultural district that was not farmed. He admitted it. So this is apparently an enforcement issue, not necessarily a statutory interpretation issue.

So, yes, there appears to be an enforcement issue within the county, but that is not the issue before the Court now.

Now, though both the appellants' and county petitions to the LUC posed questions related to Chapter 205's definition, particularly a farm dwelling, and Hawaii County's definition of short term vacation rentals under the Hawaii County code, what is actually being asked for by both parties are not the same.

These petitions were consolidated. I think both request analysis of the same state law and county ordinance, but they ask the LUC different questions.

The appellants' petition poses that the LUC -- posed to the LUC the question, quote, "Whether as of June 4th, 1976 Chapter 205 regulated the minimum rental period for both farm dwelling," unquote.

Simply put, they are only asking about the duration element of the STVR definition as it applies to farm dwelling definition under Chapter 205.

They do not ask nor address actual or even

proposed uses of these properties in question, which would be required to determine if the dwelling can even be considered farm dwellings.

The county's petition posed to the LUC the question that farm dwellings may not be used as short term vacation rentals pursuant to HRS Sections 205-2 and 205-4.5, and Hawaii Administrative Rule Section 15-15-25.

Here appellants seem to determine to not discuss the actual or even proposed use of their properties in the request and arguments before the LUC. Whereas the county specifically requested that the question regarding use of the properties as it relates to the short term vacation rental definition as compared to the definition of what is a farm dwelling.

As Chapter 205 lists only permitted uses for agricultural districts and constitutes a permissible farm dwelling it would then become apparent that meeting the definition of farm dwelling would come first and foremost before appellants' duration question could even be entertained.

Therefore, actual use of the properties or even proposed use is the important relevant factor for the LUC to determine prior to making any decision regarding the parcels in question in this particular case.

THE COURT: Why did use matter? If this is a purely declaratory ruling that's being requested, where the Rosehills are saying look at the statute, look at the law and tell us, and then take the county ordinance and tell us whether or not there was a limitation on the rental period for farm dwellings prior to the county enacting this ordinance, why does what the Rosehills are actually using their property for matter in that question?

MR. DISHER: It actually matters to even deterrence of the farm dwelling. We have to meet that farm dwelling definition, and that is dependent on deriving income from agricultural activities or in support of agricultural activities ongoing on the property.

So there have been zero evidence or facts or assertions that they are even growing one papaya on this property, let alone deriving any kind of income.

Even Mr. Chipcase was asked directly on, I believe it was a record on appeal R00993, he was asked by the Chairperson Shewer (ph.), "How many of your clients receive any of their income from farming on parcels in question?"

"Mr. Chipcase: I do not know, Chair. I have not asked."

So it's kind of evident that they are avoiding the use issue, but that goes to the heart of the farm dwelling definition, and what is permissible on these properties.

And they try to say, we are conceding, the county is conceding that they are all farm properties. Well, that just sounds like more bureaucratic expediation just to let people build their properties before they get going. I don't see -- I don't recall anywhere in the record where they conceded that these particular properties fit the definition.

THE COURT: I guess my question is, Mr. Disher. If, you know, with the LUC whether they are reading a script or not, constantly making these comments at the opening of every session saying the facts are not in dispute, da-da da-da. How come, you know, the county seemed to be playing fast and loose with this phrase farm dwelling, and then now they are saying, oh, but we were never conceding that it was a farm dwelling.

So how come nobody ever clarified that and said, yes, you know, commissioners we are using this term as a term of art. We are not conceding that the Rosehills' dwellings are farm dwellings. I mean, it seemed that it muddled things up significantly. What's your take on that?

MR. DISHER: I would agree with that, because I was not there either. That could have been clarified. There was an attempt by Mr. Yee to clarify, that that's their position in how they treat these new residences on basically what could be undeveloped property that's jungle and lava rock and who knows what. They let the people build their house first. Otherwise, what, they are going to be in a tent while trying to till the land? I don't know.

They allow it, when you buy these properties, there is notices of what is required on these properties. That they are agricultural districts requiring agricultural activity.

But as the retired doctor testified to early on in the proceedings, people slip through the cracks.

So that is an enforcement issue, not an issue before the Court right now.

THE COURT: Okay.

MR. DISHER: I mean, the facts that were really presented by appellants' petition were actually very few. Basically, that they own these properties, situated in an agricultural district in the County of Hawaii. That's not in dispute. That prior to April 1st, 2019 the appellants' properties were rented out for periods of 30 days or less. That is not in dispute.

Now, whether or not that would have been permissible use, that's a different question.

Another fact, all properties were created and/or approved by the county planning director after June 4, 1976. And -- oh, yeah, the fact that Mr. Chipcase mentioned at the August 13, 2020 hearing was that he doesn't even know if they were receiving any income for agricultural activity. That might be the only additional fact, but that's more of a non, unknown.

Other than that, there is no real other facts presented related to any ongoing agricultural activity on any of these properties.

Now in the multiple filings and hearing dates, yes, this was a long-standing, ongoing process, where there was more than ample opportunity to present any facts that can help their case. This is the Land Use Commission, so use would be important.

Here the county did provide facts, a little bit fuller picture of what it was asking of the LUC. The county in its petition asks, mentioned that, clarified that it passed this short term vacation rental law that permits continued use in agriculture districts for properties that are lawfully existent prior to the new law being passed.

So, basically, if it was prior to June 4th,

1976, you are okay, based on the single family dwelling definition at the time. But post that date, it's not permissible by Chapter 205.

Another fact that was presented by the county in its petition, no such permits would be allowed in agricultural districts established after June 4, 1976, as that's when the farm dwelling definition first came into effect, and that's why that definition is so important, as any activity that would be deemed not in connection with agricultural activities wouldn't fit the definition of (indiscernible).

County of Hawai'i denied the applicants -- denied applicants to continue to operate short term vacation rentals on ag land for properties established after this date of June 4, 1976.

The applicants provided proof that they owned or operated short term vacation rentals prior to April 1st, 2019, and some of these applicants have appealed, including the appellants. So these appellants all applied, were denied, and meet these basic facts that are not in dispute.

There is also no facts related to the use of the parcels at question that was raised except that prior to April 1st, 2019 they were operated as short term vacation rentals. That's the only use that was -- or

facts related to use that could be relevant to our discussion today.

So by the appellants avoiding the issue of actual use or even proposed use of the Rosehill properties the appellants attempt to frame the issue so narrowly that it would necessitate the LUC to speculate as to the question before it.

Throughout the discussion before the LUC there is hypotheticals, such as, okay, what if there was a tenant farmer on a month-to-month lease? Well, that wasn't a fact that was presented before. That was a hypothetical.

Was it there someone renting out a room on a property? Again, that is not before the LUC, as it wasn't presented. These would be speculation. Purely speculation on the part of the LUC to be able to determine.

Now, Hawaii Administrative Rules 15-15-98, Subsection A, states: On petition of any interested person the Commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the Commission to a specific factual situation.

Frankly, I know there was a lot of talk and there was a lot of trees killed to write up all these

briefs, there was no actual factual situation that the LUC could rely on based on what the appellants presented.

THE COURT: So you are saying the Rosehills are not interested persons based on the record that's before the Court?

MR. DISHER: I'm sorry?

THE COURT: Are you saying that the Rosehills --

MR. DISHER: They are.

THE COURT: -- do not meet the definition of an interested person because they haven't shown that their properties are farm dwellings?

MR. DISHER: On petition of any interested person. So I'm not disputing that they are or are not an interested person, but they do need to meet -- they still have to provide a specific factual situation. That's what that administrative rule requires.

THE COURT: Okay. And the county's position is that it did not concede the issue of farm dwelling, so there is no evidence before the Commission -- there was no evidence before the Commission that the Rosehills had farm dwellings?

MR. DISHER: I do not recall seeing where we specifically said these Rosehill properties are farm dwellings under the definition of Chapter 205. I do see

that the county has treated all first residences on ag lots as farm dwellings as a matter of course.

So it's not --

THE COURT: So that's the -- if those are the facts before the LUC, that the county has treated all residences, all dwellings on ag land as farm dwellings, that's not a sufficient factual basis for the LUC to then make a finding on the Rosehills' petition?

MR. DISHER: Because to be a farm dwelling under Chapter 205, there has to be a showing of bona fide agricultural activity. It's ingrained in every part of Chapter 205, even allowing Maui County, which is the only island of three islands to do it's agricultural tourist, it still has to have a requirement of bona fide agricultural activity to even allow that.

So no matter what, use is important, because that is what this is for. That is the purpose of the Land Use Commission. That's the whole purpose of why we are preserving this land for this specific use.

THE COURT: And so if the LUC had said, so -- to the county attorney who was there. So if the LUC had said, does the county concede that the Rosehills' property is a farm dwelling, and the county had said yes, in your opinion, that still wouldn't be enough, because the Rosehills never presented evidence of their

use of their properties?

Or in that scenario would it have been enough for the LUC to make a factual determination of that?

MR. DISHER: As the discussion throughout the hearings was actually largely focused on use and the farm dwelling definition, and the county was not the only one that testified. You also had the State Office of Planning, as well. So it is not like it was a rubber stamp, oh, yeah, we're going to just accept all these properties as farm dwellings and then argue everything else.

What was presented was that these properties were denied because they were prior to April 2019 operating short term vacation rentals. They tried to go for the one-time registration to extend that. However, their properties were after the June 4, 1976, so that means the requirements for those property, you have to fall under the definition of farm dwelling under Chapter 205.

Now, Chapter 205, the definition of farm dwelling is where all these arguments come home, because that is where it requires that there be an actual farming activity going on.

THE COURT: And just to be devil's advocate, if this Court were to you make a finding that the county

had conceded that the Rosehills' properties were farm dwelling at the LUC hearings, so that that is not -- whether or not their farm dwellings is really not in dispute, then is your position still that the Rosehills' petition was properly denied for lack of sufficient facts, or would that change the LUC's -- in your opinion, would that change what the LUC should have done with the Rosehill petition?

MR. DISHER: Even if they accepted the county's concession that the Rosehill properties were farm dwellings, I believe the LUC still would have came to the same result.

They asked specifically of the Rosehill petitioners, what income are you getting from these properties? That itself says that use is important.

So I would say that even if the Court finds that the county made a concession that these particular properties were farm dwellings under the definition of Chapter 205, it would not change the outcome.

This is basically -- their petition is like, I want you to concentrate on this 30 day requirement. Pay no attention to what's behind the curtain. They are just ignoring what is actually going on. They want to say, what's behind that curtain is these small mini resorts, which were testified to by some other members

of the public at the LUC.

That is the concern, that we are not using the land as intended, but 1961 law that first established as well as the changes to tighten up the law in 1976.

THE COURT: And so you agree with the LUC's argument that there is no need for the Court to first find ambiguity before looking to legislative intent? The Court can simply say, well, there is nothing in the statute about this particular issue and, therefore, I can go look at legislative intent?

MR. DISHER: Yeah, I do not disagree. Also, if anything, the statute is pretty clear. It's like here is a list of permitted things. Yeah, we didn't address duration, calls for leases. There is maybe the possibility of a tenant-farmer situation. That just simply wasn't presented as a situation with these properties. That may be allowed to be 30 day rentals or seasonal workers.

There is a lot of situations that could have been presented to the LUC based on an actual factual situation that simply weren't, based on this. And because there wasn't enough, now the LUC would have to hypothesize to answers their question.

THE COURT: You are saying they would have to speculate or hypothesize that the Rosehills were either

earning income off of their property as a farm or that there were -- the second prong being connected to agriculture, whatever the wording of the statute is?

MR. DISHER: Basically they would have to hypothesize or speculate whether or not their properties would fit the definition of a farm dwelling, yes. They are asking for that in their petition. They are asking specifically about the farm dwelling definition, so that's where it's important.

As I stated, they specifically said in their question whether as of June 4, 1976, Chapter 205 regulate the minimum rental period for farm dwellings, in quotes.

THE COURT: And what is the -- well, what's the standard that the Court has to apply, if any, I mean, because it likes one of the things that's at issue here is whether or not -- well, you are saying even though there was a concession to a farm dwelling it still wouldn't change the ruling, right, Mr. Disher, that's what you are saying?

MR. DISHER: That is my position, yes.

THE COURT: And Miss China, you agree with that?

MS. CHINA: Yes, your Honor.

THE COURT: Okay. All right. Because that's because there were not underlying facts presented as to

how the Rosehills were actually using their property?

MR. DISHER: That's correct.

MS. CHINA: Correct.

THE COURT: Okay. All right. Thank you, Mr. Disher.

Mr. Chipcase, you have about five minutes, I think, left on your time.

MR. CHIPCHASE: Thank you kindly, your Honor. I will run through points very fast then.

The first one is the one we ended on, whether there was a concession, and I won't belabor it, because it doesn't ultimately matter.

But the statement by the Acting Deputy Director of Planning is, therefore, we consider all of their dwelling units on their property to be farm dwellings. That concession was never corrected, never changed.

The concession or the discussion that Mr. Disher is referring to is that director's broad statement that a dwelling unit on agricultural land doesn't need to have any agriculture connecting it. That's what he said initially, and that's what he later clarified, well, we can't check these things with building permits.

Not at one point did he ever take back the Deputy Director's statement that our property were farm dwellings. But as I said, well, and I guess I'd add, of

course the county is in a position to make that concession because under Chapter Section 205-12, the county has enforcement authority over state (indiscernible). So the body enforcing it can certainly say whether these are farm dwellings or not.

But as I say, it doesn't really matter, because the question was never for our uses, well, as a matter of state law. The question was always: Did the county merely duplicate state law? Did state law already regulate uses of less than 31 days?

And it's exactly the same question that the county presented. This is from docket 1 at page 5. This is from the county's petition.

Quote, "The respective definitions and uses for farm dwellings in short term vacation rentals irreconcilably conflict and show that short term vacation rental use is incompatible with being a farm dwelling."

So just as Mr. Disher said -- we didn't -- the county invoked the term farm dwelling. Just as Mr. Disher said, our petition, the county's petition looked at Chapter 205. That was the statute to be interpreted.

And just as our petition did, the county's petition used the county law to define short term

vacation rental.

THE COURT: So then do you agree the question is whether or not the county's definition of short term vacation rentals is incompatible with farm dwellings under Chapter 205?

MR. CHIPCHASE: I would say that is absolutely one way to phrase it. A different way to phrase it is did the county simply duplicate state law when it enacted this restriction?

Another way to phrase it is the way we did, focusing on 31 days, because no one disputed that farm dwellings can have 5 or fewer bedrooms and no one disputed that the owner doesn't need to occupy the farm dwelling.

So all we did was focus on the one part of the definition that was actually at issue. The county simply invoked all of them, but then spent all this time arguing the one part of the definition that was in issue, 31 days.

The answer to that question, and it came up quite clearly in the Court's questioning of Ms. China, the Court asked Miss China, who used the phrase, merely duplicates state law, duplicates state law, where in the statute, where in the statute does it regulate duration?

She didn't answer that question. Instead, she

jumped from the text of the statute to the legislative history. And in that legislative history didn't point to a single thing expressing the legislative intent to regulate duration as part of the definition of farm dwelling.

Instead, as the Court pointed out, the state law focuses on use. How is that dwelling used? Well, the county definition focuses on duration and not use. There is nothing in that definition, the county definition, with respect to transient users. It's all merely duration.

The state law is different. The state law actually focuses on a use.

So coming to the point, the legal point, and it is (indiscernible) before this Court, does or did the LUC correctly rule, up or down, right or wrong, that the county definition, not abstractly transient vacation use, but the county's meaning correctly rule that that use is already regulated by Chapter 205?

The answer is no. They are regulating different things and in different ways.

Coming to the second question, which we spent a lot of time on today with respect to the propriety of answering one petition affirmatively and denying the other as speculative, the LUC absolutely may deny a

petition as speculative or for the other reasons stated in the statute and the rules.

What it can't do is treat two petitions consolidated in the same proceeding, asking the same question, raising the same facts, completely differently.

The county did not come forward and show the use of every single property subject to its ordinance, but it still got an answer.

We didn't ask the LUC to say that our uses are lawful. We asked the LUC to tell us, does this statute regulate this thing, the county code now against?

The LUC had every fact necessary to answer our petition, just as it had every fact necessary to answer the county's petition.

And every single day, not just at the beginning, but every single day the Chair read the same statement. The facts are not misleading. The facts are not misleading. The facts are not misleading.

They weren't in dispute. He was right. The LUC had every fact available to answer our petition, just as it had every fact available to answer the county's petition. County code, state law.

Did it conflict? Are they compatible? Do they duplicate each other? Yes or no.

Thank you, your Honor. I appreciate it.

THE COURT: Thank you, Mr. Chipcase.

Okay. So what I'm going to ask you folks to do is submit proposed findings and conclusions of law, and I guess my question would be how much time do you think you would need to do that?

I guess we will start with you, Mr. Chipchase.

MR. CHIPCHASE: Would 30 days be acceptable for the Court?

THE COURT: That works for me. Miss China or Mr. Disher, 30 days?

MS. CHINA: Yes, your Honor. The longer the better right now, as I'm going through some personal matters.

MR. DISHER: I would concur, yeah.

THE COURT: Okay. I don't want to put any -- you know, this is not -- this thing has been going on for awhile. So Miss China, if you need an extra 15, 20 or 30 days, ask for it and I'm okay with it.

I'm not going to be unreasonable in light of everybody else's other lives that they have outside of this courtroom.

So how much time, do you need, Miss China?

MS. CHINA: 45 would be excellent, if that's okay with Mr. Chipcase.

MR. CHIPCHASE: Yes, of course.

MR. DISHER: I'm fine with it.

THE COURT: Okay. So then that puts us sort of to the end of February, basically. Approximately, not counting exactly 45 days. But what if we said February 28th, does that work for everybody?

MR. DISHER: Yes, your Honor. Would you like us too email a Word version, as well, or just file?

THE COURT: No, I think I would like you folks to email your Word versions to the regular fourth division, the scheduling email that you folks have for Division 4.

MR. CHIPCHASE: Yes, your Honor.

THE COURT: And then I will ponder this, so. Okay.

Anything else that we need to take up, Mr. Chipcase?

MR. CHIPCHASE: Nothing for me. Thank you for the time.

THE COURT: Sure. Miss China?

MS. CHINA: Nothing, thank you.

THE COURT: Mr. Disher?

MR. DISHER: No, your Honor. Thank you.

THE COURT: Okay. Thank you all very much.

I will tickle my calendar for the 28th and take

a look. Thank you.

(Hearing concluded at 2:47 p.m.)

STATE OF HAWAII)
) ss.
COUNTY OF HAWAII)

I, WENDY L. GRAVES, a certified court reporter in the State of Hawaii, do hereby certify that the foregoing pages are a true and correct transcription of the proceedings in the above matter.

Dated this 27th day of February, 2022.

_____
Wendy L. Graves, CSR No 460

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 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; NETTLETON S. and DIANE E. PAYNE, III,

Appellants,

v.

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

Appellees.

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

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

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document will be duly served on the following as indicated below:

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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 11:38:26 PM
Filing Parties: Christopher Goodin
Case Type: Circuit Court Civil
Lead Document(s): 68-Proposed Document
Supporting Document(s):
Document Name: 68-APPELLANT ROSEHILL ET AL.'S SUBMISSION OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER; [PROPOSED] FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER]; DECLARATION OF CHRISTOPHER T. GOODIN; EXHIBIT 1; CERTIFICATE OF SERVICE

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