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; ET AL. Appellants, vs. STATE OF HAWAI'I, LAND USE COMMISSION; and COUNTY OF HAWAI'I, Appellees.	CIVIL NO.: 3CCV-21-0000178 (Agency Appeal) FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER REVERSING THE STATE OF HAWAI'I LAND USE COMMISSION'S CONSOLIDATED DECLARATORY ORDER **ORAL ARGUMENT:** Date: January 10, 2022 Time: 1:30 p.m. Judge: Honorable Wendy M. DeWeese

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER REVERSING THE STATE OF HAWAI'I LAND USE COMMISSION'S CONSOLIDATED DECLARATORY ORDER

On January 10, 2022, oral arguments were heard on this consolidated administrative agency appeal before the Honorable Judge Wendy M. DeWeese, judge presiding. This appeal was filed pursuant to Hawaii Revised Statutes ("HRS") Chapter 91 by Appellants Linda K. Rosehill, etc., et al. ("Appellants" or "Rosehill Petitioners") of

Appellee State of Hawai'i, Land Use Commission's ("the LUC" or "the Commission") May 20, 2021 *Consolidated Declaratory Order Denying Rosehill, et al. in Docket No. DR20-70 and Granting County of Hawai'i in Docket No.20-69* ("Consolidated Order"), which granted the relief requested by Appellee County of Hawai'i ("County") and denied the relief requested by the Rosehill Petitioners. At the oral arguments, Calvert Chipchase, Esq. was present in person on behalf of Appellants; Deputy Attorney General Julie H. China appeared on behalf of the Commission remotely via Zoom video conferencing; and Deputy Corporation Counsel Mark D. Disher appeared on behalf of the County remotely via Zoom video conferencing. No other appearances were made.

The Court has thoroughly and carefully reviewed the Record on Appeal ("ROA"), considered the briefs filed by the parties, and heard the arguments of the parties at oral argument. Based thereon, the Court makes and enters the following Findings of Fact, Conclusions of Law, and Order Reversing the State of Hawai'i Land Use Commission's Consolidated Declaratory Order.

FINDINGS OF FACT

The Court makes the following Findings of Fact. If it should be determined that any of these Findings of Fact should have been set forth as Conclusions of Law, then they shall be construed as such.

I. BACKGROUND

1. This consolidated agency appeal arises out of a dispute between the County and the Rosehill Petitioners regarding the interpretation of certain provisions of HRS Chapter 205 and the Hawai'i Administrative Rule ("HAR") which govern the State Land Use Agricultural District ("Agricultural District") when read in conjunction with a

recent local zoning ordinance which regulates short-term vacation rentals within the County of Hawai'i.

2. On April 1, 2019, County of Hawai'i Ordinance No. 18-114[1] ("Ordinance 18-114" or "the Ordinance"), which regulates short-term vacation rentals within the County of Hawai'i, went into effect. ROA at R00044-59. Ordinance 18-114 requires owners or operators of short-term vacation rentals to register with the County. HCC § 25-4-16(b); ROA at R00002-3. According to the Ordinance, new short-term vacation rentals may only be registered within certain zoning districts, but owners of short-term vacation rentals that existed outside of a permitted zoning district prior to the effective date of April 1, 2019 were allowed a 180-day window in which to obtain non-conforming use certificates for their short-term vacation rentals. HCC § 25-4-16(a) and 16.1(a); ROA at R00002-3. However, the Ordinance outright prohibits the registration of new short-term vacation rentals in the zoned Agricultural District and restricts the issuance of non-conforming use certificates in the Agricultural District only to single-family dwellings on lots existing before June 4, 1976. HCC § 25-4-16(a)(1)(A) and 16.1(e); ROA at R00048. Ordinance 18-114 defines a '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.

HCC § 25-1-5; ROA at R00049.

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[1] The Ordinance was passed as Bill No. 108 and codified by adding Sections 25-4-16 through 16.3 and amending sections of Chapter 25, articles 1, 2, 4, and 5 of the Hawai'i County Code ("HCC" or "Code").

3. In implementing Ordinance 18-114, the County of Hawai'i Planning Department ("County Planning Department") promulgated and adopted Rule 23-3 of its Rules of Practice and Procedure ("Rule 23") such that "[a]ny 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." ROA at R00061.

4. Following the effective date of Ordinance 18-114, the Rosehill Petitioners, all of whom own land within the Agricultural District, applied to the County Planning Department for non-conforming use certificates to operate dwellings located on their properties as short-term vacation rentals. ROA at R00003; 22; 25-33. The Planning Department denied the Rosehill Petitioner's applications for non-conforming use certificates on the grounds that HRS Chapter 205 prohibits the use of farm dwellings as short-term vacation rentals within the Agricultural District. ROA at R00003; R00308-9. The Rosehill Petitioners then appealed the denial to the County Board of Appeals, whereupon both parties agreed to petition the LUC for guidance on the interpretation of the relevant provisions of HRS Chapter 205. ROA at R00017.

II. LAND USE COMMISSION PROCEEDINGS

a. County of Hawaii's Petition

2. On May 19, 2020, the County filed *County of Hawaii's Petition for Declaratory Order* ("County Petition") in LUC Docket No. DR 20-69 seeking,

> [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.

ROA at R00002. In the County's Petition, the County argues that the applicable statutes and administrative rule require that: "a) a 'farm dwelling' is exclusively occupied by a single family that owns the property in fee or leasehold from which the family obtains income from agricultural activities... and b) 'farm dwellings' may not be used as short-term vacation rentals." ROA at R00005-10.

3. The County based its Petition on the following factual situation. The enactment of Ordinance 18-114 on April 1, 2019 resulted in a change to the law regulating short-term vacation rentals within the County. ROA at R00002. Since then, the County's implementation of Ordinance 18-114 and Planning Department Rule 23 have been challenged. ROA at R00002-3. Specifically, the County alleges that it has denied a number of applicants who sought non-conforming use certificates for short-term vacation rentals operated on lots created after June 4, 1976 in the Agricultural District; those applicants submitted proof to the County that they were using properties that they owned or operated as short-term vacation rentals prior to April 1, 2019, when Ordinance 18-114 went into effect. ROA at R00003. Following the denial of these applications, some of the applicants appealed the denials to the County's Board of Appeals. Id. The County's Petition identifies the appellants at the County Board of Appeals as the Rosehill Petitioners—the Appellants on this appeal. ROA at R00003-4.

b. Rosehill Petition

1. On May 22, 2020, the Rosehill Petitioners filed *Petition for Declaratory Order and Incorporated Memoranda* ("Rosehill's Petition") in LUC Docket No. DR 20-70 seeking,

> [A] declaratory ruling from the LUC to clarify and affirm that the rental of farm dwellings for period of 30 days or less was not prohibited in the State Agricultural District as of June 4, 1976.

ROA at R00020-1.

2. The Rosehill Petitioners base their Petition on the following factual situation. On April 1, 2019, Ordinance 18-114, which bars every owner of land within the Agricultural District from renting any dwelling for a period of thirty (30) days or less, unless the lot was created before June 4, 1976, went into effect. ROA at R00015. The Rosehill Petitioners own parcels of land situated within the Agricultural District that were created after June 4, 1976. ROA at R00022; 25-33. Before April 1, 2019, Petitioners had rented the farm dwellings located on their agricultural lots for periods of thirty (30) days or less, and they wish to continue to use those dwellings for rentals of thirty (30) days or less in the future. ROA at R00022; R00016. The Rosehill Petitioners have challenged the County's implementation of Ordinance 18-114 before the County Board of Appeals. ROA at R00017.

c. <u>Questions to the LUC</u>

1. Although both the County and Rosehill Petitioners sought declaratory orders from the LUC specifically for the interpretation of relevant provisions of HRS Chapter 205 and the HAR, and not for an interpretation of the language of Ordinance 18-114, the questions presented by both parties clearly relate to the passage of the Ordinance, which defines "short-term vacation rentals" within the County of Hawai'i.

2. Based on the factual allegations in both Petitions, there exists an active dispute between the County and the Rosehill Petitioners regarding the interpretation of provisions of HRS Chapter 205 and the HAR, particularly with respect to the permitted

uses of a "farm dwelling," when read in conjunction with the language of Ordinance 18-114. The County takes the position that, pursuant to HRS §§ 205-2 and 205-4.5 and HAR § 15-15-25, "farm dwellings" may not be used as "short-term vacation rentals." ROA at R00003. The Rosehill Petitioners contend that HRS Chapter 205 does not regulate the particular elements of a short-term vacation rental as defined in the Ordinance—specifically, they argue that HRS Chapter 205 does not regulate the length of lease agreements, and therefore does not limit owners' ability to rent their properties for periods of thirty (30) consecutive days or less. ROA at R00015.

3. The LUC took up the Petitions at a series of three Commission meetings on June 25, 2020, July 23, 2020, and August 13, 2020.

d. LUC Meetings and the Consolidation of the Petitions

1. Prior to the June 25, 2020 meeting, the County and the Rosehill Petitioners filed a *Stipulation to Consolidate* their separate petitions for declaratory order on June 12, 2020. ROA at R00075.

2. On June 18, 2020, the State of Hawai'i Office of Planning ("OP") filed *Office of Planning's Response to Petitioners' and County of Hawaii's Petitions for Declaratory Order*. ROA at R00119.

3. On June 19, 2020 and June 23, 2020, the Rosehill Petitioners filed, respectively, a Position Statement regarding the County's Petition and a Position Statement regarding the OP's response to the two Petitions. See ROA at R00129; R00174.

4. At the June 25, 2020 meeting held via Zoom video-conferencing, 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 OP. The Commission heard arguments by the parties, as well as public testimony on the Petitions.

5. Also at the June 25, 2020 meeting, the Commission determined that the Stipulation was sufficient to consolidate the two Petitions. ROA at R00299-300.

6. On July 10, 2020, the County submitted *County of Hawai'i's Supplemental Submission*; on July 17, 2020, the OP filed *Office of Planning's Supplemental Response to County's and Petitioner Rosehill et. al.'s Petitions for Declaratory Order*. ROA at R00415; R00549.

7. On July 21, 2020 and July 23, 2020, the Rosehill Petitioners filed, respectively, Responses to the supplemental submissions of the County and OP. ROA at R00559; R00633.

8. On July 23, 2020, the LUC held the second of three meetings via Zoom video-conferencing. At the meeting, the Commission heard further argument from Mr. Mukai and received testimony from Mr. Yee.

9. On August 10, 2020, the County filed its Second Supplemental Submission; On August 12, 2020, the Rosehill Petitioners filed a Response to the County's Second Supplemental Submission. ROA at R00882; R00894.

10. On August 13, 2020, the LUC held the last of three meetings at which further testimony and arguments regarding the consolidated Petitions were heard. At

the conclusion of this meeting, the LUC unanimously voted to deny Appellants' Petition and grant the County's Petition. ROA at R01088-89.

11. On May 20, 2021, the LUC issued the Consolidated Order that is the subject of this appeal. The Consolidated Order set forth the procedural history of the consolidated Petitions, the LUC's findings of facts and conclusions of law, and the order granting the County's Petition and denying Appellant's Petition. ROA at R01095-1126.

III. APPEAL TO THE CIRCUIT COURT

1. Appellants filed a Notice of Appeal to the Circuit Court on June 18, 2021 and a First Amended Statement of the Case on July 6, 2021. Dkt. Nos. 1; 15.

2. On September 7, 2021, Appellants filed their Opening Brief. Dkt. No. 37. On appeal, Appellants argue three primary points of error: (1) the LUC's denial of the Rosehill Petition as speculative was arbitrary and capricious and constituted an abuse of discretion, (2) the LUC's granting of the County Petition is wrong as a matter of law, and (3) the LUC's factual findings are clearly erroneous. See Dkt. No. 37.

3. The County filed its Answering Brief on October 15, 2021. Dkt. No. 40.

4. The Commission filed its Answering Brief on October 18, 2021. Dkt. No. 42.

5. Appellants filed a Reply Brief on November 1, 2021. Dkt. No. 49.

6. Oral arguments were held before this Court in person and via Zoom video conferencing on January 10, 2022.

CONCLUSIONS OF LAW

The Court makes the following Conclusions of Law. If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be construed as such.

I. JURISDICTION

1. The Court has personal jurisdiction over the parties.

2. The County and the Rosehill Petitioners are interested person pursuant to HRS § 91-8 and HAR § 15-15-98(a) and therefore had standing to bring their Petitions before the Commission and to bring this appeal.

3. Orders disposing of petitions for declaratory rulings under HRS § 91-8 are appealable to the Circuit Court pursuant to the Hawaii Administrative Procedures Act, HRS Chapter 91. See Lingle v. Hawaii Gov't Emps. Ass'n, AFSCME, Loc. 152, AFL-CIO, 107 Haw. 178, 111 P.3d 587 (2005). Therefore, this Court has subject matter jurisdiction over this appeal and the appeal is properly before the Court pursuant to HRS § 91-14.

4. Appellant's appeal is timely. HRS § 91-14(b). Dkt. No. 1.

5. Venue is proper in this Court.

II. STANDARD OF REVIEW

1. The standard of review of an administrative agency's decision is set forth in HRS § 91-14:

> (g) Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

HRS § 91-14(g).

2. Section 91-14 of the HRS applies both to contested cases and declaratory rulings. "Circuit courts have jurisdiction, pursuant to HRS § 91–14, to review orders disposing of petitions for declaratory rulings." AlohaCare v. Ito, 126 Haw. 326, 344, 271 P.3d 621, 639 (2012).

3. In interpreting this statute, the Supreme Court has stated that "conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects are reviewable under subsection (3); findings of fact are reviewable under subsection (5); and an agency's exercise of discretion is reviewable under subsection (6)." Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Haw. 217, 229 (1998).

4. Under HRS § 91–14(g), an administrative agency's findings of fact are reviewable for clear error, while its conclusions of law are reviewable *de novo*. Medeiros v. Hawaii County Planning Comm'n, 8 Haw. App. 183, 797 P.2d 59 (1990). An administrative agency's findings of fact will not be set aside on appeal unless they are shown to be clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or the appellate court, upon a thorough examination of the record, is left with a definite and firm conviction that a mistake has been made. Topliss v. Plan. Comm'n, 9 Haw. App. 377, 383, 842 P.2d 648, 653 (1993). An agency's decision carries

a presumption of validity and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences. Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Haw. 217, 229 (1998).

5. An agency's refusal to issue a declaratory ruling is a discretionary determination that should not be disturbed unless there has been an abuse of that discretion. Citizens Against Reckless Development, 114 Haw. 184, 194, 159 P.3d, 143, 153 (2007).

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

Id. (citation omitted).

III. APPLICABLE LAW

a. Declaratory Ruling

1. Both the County and Rosehill Petitioners sought a declaratory ruling pursuant to HAR Chapter 15. Section 91-8 of the HRS, as implemented by HAR §§ 15-15-98 through 15-15-104.1, authorizes the Commission to issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the Commission to a specific factual situation.

2. HAR § 15-15-98(a) provides:

(a) On petition of any interested person, the commission may issue a declaratory order as to the applicability of any statutory provision or of any rule or order of the commission to a specific factual situation. ...

3. As to the issuance or denial of a declaratory ruling, HAR § 15-15-100 further provides, in relevant part:

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

(1) Deny the petition where:

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

...

(2) Issue a declaratory order on the matters contained in the petition; or

(3) Set the petition for hearing before the commission or a hearings officer in accordance with this subchapter. The procedures set forth in subchapter 7 shall be applicable.

4. If the Commission issues a declaratory order on the matters contained in the petition, the ruling must apply only to the facts set forth in the petition. HAR § 15-15-104 provides:

An order disposing of a petition shall apply only to the factual situation described in the petition or set forth in the order. It shall not be applicable to different fact situations or where additional facts not considered in the order exist. The order shall have the same force and effect as other orders issued by the commission.

The Hawai'i Supreme Court has stated that "the declaratory ruling procedure is intended to allow an individual to seek an advance determination of how some law or some order applies to his or her circumstances." Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City & Cty. of Honolulu, 114 Haw. 184, 197, 159 P.3d 143, 156 (2007). "We therefore presume that the legislature acted intentionally when it chose the term 'applicability' to denote a special type of procedure, whereby an interested party could

seek agency advice as to how a statute, agency rule, or order would apply to particular circumstances not yet determined." Id.

b. Statutory Interpretation

1. When interpreting statutes, Hawai'i courts follow standard rules of statutory construction.

> Under general principles of statutory construction, courts give words their ordinary meaning unless something in the statute requires a different interpretation. Thus, the fundamental starting point of statutory interpretation is the language of the statute itself. Where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning.

Priceline.com, Inc. v. Dir. of Tax'n, 144 Haw. 72, 87, 436 P.3d 1155, 1170 (2019) (internal citations and quotations omitted). "[C]ourt[s] may resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning of certain terms **not statutorily defined**. Nuuanu Valley Ass'n v. City & Cty. of Honolulu, 119 Haw. 90, 98, 194 P.3d 531, 539 (2008), as corrected (Nov. 25, 2008) (emphasis added).

c. HRS Chapter 205

1. 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).

2. On June 4, 1976, HRS Chapter 205 was amended to state in part that "farm dwellings" are a permissible use in the 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).

d. Ordinance 18-114

1. The Petitions filed in this matter concern Ordinance 18-114 enacted by the County of Hawai'i, which became effective April 1, 2019. The Ordinance provided the following definition of a short-term vacation rental:

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

"Short-term vacation rental" means a dwelling unit of which the owner or operator does not reside on the building site, that has no more than five bedrooms for rent on the building site and is rented for a period of thirty consecutive days or less. This definition does not include the short-term use of an owner's primary residence as defined under section 121 of the Internal Revenue Code.

2. The Ordinance describes where short-term vacation rentals would be allowed:

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

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

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

(A) V, CG, and CV districts;

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

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

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

3. In order to be considered a lawful short-term vacation rental, the Ordinance requires registration of all short-term vacation rentals with the County Planning Department, including registering preexisting rentals prior to the deadline set forth in the Ordinance.

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

(1) Short-term vacation rentals in existence on or before April 1, 2019, shall register with the director and pay a

one-time fee of $500. The registration form and associated fee shall be submitted to the planning department no later than September 30, 2019.

(2) Any new short-term vacation rental established in a zoning district after April 1, 2019, where such use is permissible pursuant to this section, shall register with the director and pay a one-time fee of $500 prior to use of such rental.

...

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

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

Section 25-4-16.1. Short-term vacation rental nonconforming use certificate.

(a) Nonconforming use certificate. In addition to registering pursuant to 25-4-16(b)(1), the owner of any short-term vacation rental which operated outside of a permitted zoning district prior to April 1, 2019, shall obtain a short-term vacation rental nonconforming use certificate in order to continue to operate. This certificate must be renewed annually. Applications for nonconforming use certificates must be submitted to the director no later than September 30, 2019.

(b) Evidence of prior use.

(1) The applicant seeking a short-term vacation rental nonconforming use certificate shall have the burden of proof in establishing that the property was in use prior to April 1, 2019, and that the dwelling has been issued final approvals by the building division for building, electrical, and plumbing permits. Evidence of such use prior to April 1, 2019, may include tax documents for the relevant time period or other reliable information.

(c) Issuance of initial nonconforming use certificate.

(1) The director shall determine whether to issue a short-term vacation rental nonconforming use certificate for a short-term vacation rental based on the evidence submitted and other pertinent information.

(2) Issuance of an initial nonconforming use certificate may be denied if the director verifies any of the following:

(A) The applicant has violated pertinent laws, such as not securing and finalizing necessary building permits for the dwelling;

...

5. The Ordinance prohibited the issuance of non-conforming use certificates in the Agriculture District unless the lot existed before June 4, 1976:

> (e) Agricultural Lands. 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.

IV. DISCUSSION

a. The LUC abused its discretion when it denied the Rosehill Petition on the grounds that it was "speculative or purely hypothetical."

1. The Commission abused its discretion when it denied the Rosehill Petition as speculative while granting the County's 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 as to the applicability of any statutory provision or of any rule or order

of the agency." HRS § 91-8. Section 15-15-98(a), HAR, provides, "[o]n 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." (emphasis added). Section 15-15-100, HAR, further instructs the Commission to either issue a declaratory order on the matters contained in the petition; set the petition for a hearing; or to deny the petition for declaratory order on the grounds that "[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..." (or on the other grounds listed under subsection (a)(1)). HAR § 15-15-100(a)(1)(A).

6. The plain language of HAR § 15-15-100, therefore, leaves the issue of whether to grant, deny, or set a petition for hearing to the sound discretion of the Commission. See Citizens Against Reckless Development, 114 Haw. 184, 194, 159 P.3d, 143, 153 (2007).

7. Nevertheless, 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.

8. Here, because the County and Rosehill Petitioners both presented similar questions to the LUC in their Petitions, the Commission agreed to consolidate the Petitions. The facts set forth in both Petitions are therefore also consolidated, and they apply to both Petitions.

9. The factual situation as set forth in the Petitions is undisputed. Following the passage of Ordinance 18-114 and County Planning Department Rule 23, the Rosehill Petitioners applied to the County Planning Department for non-conforming use certificates for dwellings that they own within the Agricultural District. All lots owned by the Rosehill Petitioners were created after June 4, 1976. The Rosehill Petitioners additionally provided proof to the County that, prior to the passage of the Ordinance, they had rented out their dwellings for less than thirty (30) days. The Rosehill Petitioners wish to continue renting out their dwellings for less than thirty (30) days. The County Planning Department denied the Rosehill Petitioners' applications on the grounds that short-term vacation rentals are not a permitted use purusant to HRS Chapter 205. The Rosehill Petitioners appealed the denial of their non-conforming use certificate applications to the Board of Appeals, whereupon the Rosehill Petitioners and the County both agreed to stay proceeding and seek guidance from the LUC regarding how to interpret Chapter 205 in light of the passage of the County's new zoning ordinance.

10. While the determination of whether sufficient facts exist in a petition such that granting the petition would be warranted is one that is generally within the discretion of the Commission, in this case, the Commission has used the exact same set of facts from the Consolidated Petitions and arrived at two contradictory conclusions as to whether those facts are sufficient to support the issuance of a declaratory order.

11. Specifically, the LUC found that "the ROSEHILL PETITIONERS did not present to the Commission a specific factual situation on which the Commission could issue the declaratory order they requested," and the Commission concluded that the Rosehill Petition was "speculative" and on that basis "exercise[d] its discretion" to deny

the relief requested. Consolidated Order at ¶ 74-75; 85. In contrast, the Commission found that "the County of Hawaii has met its burden to demonstrate it is entitled to the relief requested by the County of Hawai'i." Id. at ¶ 84.

12. In the Consolidated Order, the Commission does not furnish any findings of fact or conclusions of law explaining how the County has met its burden of establishing that it has presented the Commission with a "specific factual situtation," yet the Commission nevertheless granted the County's request. There is an absence of justification in the Consolidated Order for the LUC's decision to grant the County's Petition where, on the same facts, the LUC denied the Rosehill Petition as speculative.

13. Under these circumstances, where the questions presented to the Commission in the Petitions are similar and are premised on the same specific factual situation, the LUC's denial of the Rosehill Petition on the grounds that it is "speculative or purely hypothetical" is arbitrary and constitutes an unwarranted abuse of discretion.

14. Additionally, the LUC's conclusion that the Rosehill Petition was speculative was based up erroneous findings of fact. The Commission's finding that "the ROSEHILL PETITIONERS did not present the Commission [with] a specific factual situation" was clearly erroneous. Id. at ¶ 74. The Commission's findings stated that 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 [D]istrict"; that they "have not submitted a sufficient record demonstrating that their use or intended use of their subject properties are 'farm dwellings' or related to agriculture"; and that their "actual use of their dwelling is essential because it provides the facts and

basis upon which to apply the requested interpretation of the 'farm dwelling' definition." Id. ¶ 72-73; 77.

15. These findings are clearly erroneous. Whether Appellants' dwellings, which are situated on lots within the Agricultural District, are "farm dwellings" was not at issue on the questions presented in the Petitions; the specific facts set forth in the Petitions were not in dispute. See e.g. ROA at R00776 – 7; R00831; R1023-24; R01029.

16. The factual situation as set forth in both Petitions is not speculative or hypothetical. The County passed a zoning ordinance expressly banning short-term vacation rentals in the Agricultural District. The Rosehill Petitioners rent, and want to continue renting, their dwellings for thirty (30) days or less. ROA at R00022. The Rosehill Petitioners submitted proof to the County that they were using properties that they owned or operated as short-term vacation rentals, as defined by the Ordinance, prior to April 1, 2019. ROA at R00003. An appeal is currently pending before the Board of Appeals with respect to this controversy, because the parties disagree as to the application of Chapter 205 to this situation.

17. Based on the foregoing, the LUC's findings in the Consolidated Order that state or suggest that the Rosehill Petitioners failed to present the Commission with a specific "factual situation" are clearly erroneous.

b. The LUC committed plain error when it granted the County's Petition for an order that HRS §§ 205-2 and 205-4.5 and HAR § 15-15-25 prohibit the use of "farm dwellings" as short-term vacation rentals.

3. 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 or parties. See HAR § 15-15-98(a).

4. HRS Chapter 205 applies to properties within the Agricultural District. See HRS §§ 205-2 and 205-4.5.

5. The question presented by the County's Petition was whether "farm dwellings" could be used as short-term vacation rentals pursuant to HRS Chapter 205. More specifically, the County's Petition presented the question of whether the County's definition of short-term vacation rental stated in Ordinance 18-114 conflicts with the uses set forth in HRS Chapter 205, such that any dwelling unit that meets the County's definition of a "short-term vacation rental" cannot, as a matter of law, be a "farm dwelling." See ROA at R00005. The County contends, "[t]he respective definitions and uses for farm dwellings and short-term vacation rentals irreconcilably conflict and show that short-term vacation rental use is incompatible with being a farm dwelling." Id.

6. The provisions of the Ordinance at issue in the Petitions refer to HRS Chapter 205 as of June 4, 1976. Specifically, Ordinance 18-114 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 questions presented by the Petitions is the one in effect as of June 4, 1976.

7. In reading the County's Petition, this Court interprets "short-term vacation rentals" to refer specifically to the statutory definition set forth by the County in the Ordinance, and not to an ordinary definition of a vacation rental or vacation use. Courts

will only look to the plain, ordinary meaning of certain terms in a statute if those terms are not statutorily defined. See Nuuanu Valley Ass'n v. City & Cty. of Honolulu, 119 Haw. 90, 98, 194 P.3d 531, 539 (2008), as corrected (Nov. 25, 2008).

8. To determine the question presented by the County, the Commission sought to "evaluate[] side by side" the "county zoning provision and the State Land Use law." ROA 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," as defined by Ordinance 18-114, could never be a "farm dwelling" as defined by HRS Chapter 205. ROA at R01126.

9. 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 Haw. 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)).

10. The language of HRS §§ 205-2 and 205-4.5 is plain and unambiguous.

11. A comparison of Ordinance 18-114 with HRS Chapter 205 as of June 4, 1976 reveals that a dwelling may simultaneously meet the definition of a "farm dwelling" pursuant to HRS Chapter 205 and the County's definition of "short-term vacation rental."

12. 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." HRS § 205-2.

13. 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." Ordinance 18-114. This definition has three specific factual elements, 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." Id. Whether an occupant of a short-term vacation rental is "on vacation," or using the property for "vacation purposes," in the ordinary use of that word is not a specific factual element of the statutory definition of "short-term vacation rental."

14. 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; Ordinance 18-114. On the contrary, HRS Chapter 205 specifically contemplated leases. 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).

15. 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; Ordinance 18-114.

16. 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 (30) consecutive days or less. See id.

17. 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.

18. 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.

19. 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 Haw. 201, 225, 166 P.3d 961, 985 (2007).

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

21. 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.

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

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

24. As neither the plain language of HRS § 205-2 nor § 205-4.5 regulated any of the three specific factual elements of a short-term vacation rental as of June 4, 1976, the County's interpretation of State law, as contemplated in the language of the Ordinance, is incorrect.

25. This analysis of the statutory language is in accord with the statements made by OP and the County on the record at the LUC meetings. Neither OP nor the County claimed that HRS Chapter 205 regulated how long a farm dwelling may be rented. The County expressly conceded that Chapter 205 does not prohibit a farm dwelling from being rented for a period of thirty (30) consecutive days or less. See ROA at R00301; R00287; R00288. OP 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." ROA 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, OP further stated that "the definition of 'farm dwelling' does not expressly prohibit rentals of 30 days or less," ROA at R00288, and that "a renter for 30 days or less that farms the land may be allowed under the definition of 'farm dwelling.'" ROA at R00287; 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.

26. The Commission's reliance on Save Sunset Beach Coalition to grant the County Petition was erroneous. Save Sunset Beach Coal. v. City & Cty. of Honolulu, 102 Haw. 465, 482, 78 P.3d 1 (2003). The questions before the Commission were not whether Ordinance 18-114 is more restrictive than State law. The questions before the Commission involved whether the Ordinance duplicates State law by prohibiting a use as a matter of County law that had been prohibited in the Agricultural District as a matter of State law since June 4, 1976.

27. Deference does not save the LUC's decision. To grant agency deference, in its interpretations of rules and statutes, Appellees must first show an ambiguity in the statute with "broad and indefinite meaning." See In re Water Use Permit Applications, 94 Haw. 97, 144, 9 P.3d 409, 456 (2000). Appellees do not argue that the relevant provisions of HRS Chapter 205 are ambiguous. Moreover, the text of the statute *is* unambiguous. Thus, there is no uncertainty that would result in an interpretation requiring deference.

28. 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 plain language. See Keliipuleole v. Wilson, 85 Haw. 217, 222, 941 P.2d 300, 305 (1997). The language of HRS Chapter 205 is plain and unambiguous. Where a statute is plain and unambiguous, the inquiry is at an end. State v. Yamada, 99 Haw. 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.

29. In this respect, this case is different than Curtis v. Board of Appeals, County of Hawaii, 90 Haw. 384, 396, 978 P.2d 822, 834 (1999), which is cited by both the LUC and the County. Dkt. No. 42 at 14, 25; Dkt. No. 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 Haw. 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.

30. Based on the basic principles of statutory interpretation, Appellees may not "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 Haw. 262, 271, 978 P.2d 700, 709 (1999) (quotations omitted).

31. Finally, the Commission committed an error of law pursuant to HAR § 15-15-104 when it granted the County's Petition. Consolidated Order ¶ 79. A declaratory ruling cannot be applicable to different fact situations, or where additional facts not considered in the order may exist. See HAR § 15-15-104. The LUC erred when it granted the County's Petition, because, as noted above, a rental of a dwelling within the Agricultural District for less than thirty (30) days could be allowed under the definition of a farm dwelling depending on the actual use. See e.g. R00287; R00293-94.

32. For the foregoing reasons, the Commission's conclusion that a "short-term vacation rental" as defined in Ordinance 18-114 could never be a "farm dwelling" as defined by HRS Chapter 205 constituted an error of law. Moreover, a plain reading of

HRS §§ 205-2 and 205-4.5 reveals that no provision of HRS Chapter 205 regulates the period for which a farm dwelling may be rented. Accordingly, the Commission erred in granting the County's Petition; the Commission should have denied the County's Petition and granted the Rosehill Petition on the merits.

33. Finally, this Court's ruling on this appeal is limited to the narrow questions contained in the parties' requests for declaratory orders regarding whether the language of HRS Chapter 205 restricted the three factual elements that constitute a short-term vacation rental pursuant to Ordinance 18-114 as of June 4, 1976. On a plain reading of HRS Chapter 205, the passage of the Ordinance clearly created more restrictions on the use of 'farm dwellings' in the Agricultural District within the County of Hawai'i, including with respect to the length of rental periods. However, the question of whether the County's zoning ordinance constitutes an unconstitutional taking, as argued by Appellants, was not a question that was properly before the LUC on the Rosehill Petition, nor is it a question that is before the Court on this consolidated appeal. The Court therefore will not address this argument.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of law,

IT IS HEREBY ORDERED AND ADJUDGED that the Land Use Commission's *Consolidated Declaratory Order Denying Rosehill, et al. in Docket No. DR20-70 and Granting County of Hawai'i in Docket No.20-69*, dated May 20, 2021, is REVERSED; the County's Petition is hereby DENIED and the Rosehill Petition is hereby GRANTED.

Pursuant to Rule 58, Hawai'i Rules of Civil Procedure, a final judgment shall enter in favor of all Appellants and against all Appellees.

Dated: Kailua-Kona, Hawai'i 5/2/23.

JUDGE OF THE ABOVE-ENTITLED COURT