

LAND USE COMMISSION  
STATE OF HAWAI'I

Hearing held on June 25, 2020  
Commencing at 9:00 a.m.

Held via ZOOM by Interactive Conference Technology  
and  
YouTube Streaming Video link

IIV. Call to Order

VIII. STATUS REPORT

A99-729 Newton Family Limited Partnership (nka  
Hawaiian Islands Land Trust)

IX. ACTION

A18-806 Barry Trust (Hawai'i)

\* Consider Petitioner's Motion for Issuance  
of Negative Declaration or Finding of No  
Significant Impact

X. ACTION

A18-805 Church (Hawai'i)

\* Consider Petitioner's Motion that the Land  
Use Commission Issue a Finding of No  
Significant Impact

XI. ACTION

DR20-69 County of Hawaii and DR20-70 Linda  
Rosehill, et al

\* Consider Petitioners County of Hawaii's  
and Linda Rosehill, et al's Stipulation to  
Consolidate Order

\* Consider Petitioners County of Hawaii's  
and Linda Rosehill, et al's Petitions for  
Declaratory Orders regarding Short Term  
Vacation Rentals as Farm Dwellings

V. Adjournment

BEFORE: Jean Marie McManus, CSR #156

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APPEARANCES:

JONATHAN SCHEUER, Chair (Oahu)  
NANCY CABRAL, Vice Chair (Big Island)  
EDMUND ACZON (Oahu)  
GARY OKUDA (Oahu)  
LEE OHIGASHI (Maui)  
ARNOLD WONG (Oahu)  
DAWN CHANG (Oahu)

STAFF:

LINDA CHOW, ESQ.  
Deputy Attorney General  
  
DANIEL ORODENKER, Executive Officer  
SCOTT DERRICKSON, AICP/Planner  
  
DAWN APUNA, ESQ.  
Deputy Attorney General  
State of Hawaii, Office of Planning  
  
JOHN MUKAI, ESQ.  
DIANA MELLON-LACEY, ESQ.  
Deputy Corporation Counsel  
MICHAEL LEE, Planning Director  
APRIL SURPRENANT  
Acting Deputy Planning Department  
County of Hawai'i  
  
CALVIN CHIPCHASE, ESQ.  
Attorney for Linda Rosehill, et al

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1                   CHAIRPERSON SCHEUER: Aloha mai  
2 kakou, good morning. This is the June 25th,  
3 continuation of the June 24th to 25th, 2020 Land Use  
4 Commission meeting, and it's being held by  
5 interactive conference technology linking  
6 videoconference participants and other interested  
7 individuals of the public via a "ZOOM" internet  
8 conferencing program in order to comply with State  
9 and County official operational directives during the  
10 current pandemic.

11                   Members of the public are viewing the  
12 meeting either via the "ZOOM" webinar platform or via  
13 the YouTube streaming video that is connected to this  
14 meeting.

15                   For all meeting participants, please be  
16 aware that unlike in-person meetings where our court  
17 reporter can easily state that she cannot hear or ask  
18 for a repeat in these meetings, she's unable to at  
19 times or at times difficult for her to do this. And  
20 so I'd like to stress for everyone the importance of  
21 speaking slowly, clearly, directly into your  
22 microphone. And also before speaking, please state  
23 your name for the record.

24                   Please also be aware for all meeting  
25 participants that this is being recorded on the

1 digital record of the "ZOOM" meeting as well as on  
2 YouTube, and your continued participation is your  
3 implied consent to be part of the public record for  
4 this event. If you do not wish to be part of this  
5 record, you should leave the meeting now.

6 The "ZOOM" conferencing technology allows  
7 the Parties for each docket item and each  
8 participating Commissioner individual remote access  
9 to meeting proceedings via their personal digital  
10 devices.

11 Myself, Jonathan Scheuer, the LUC Chair,  
12 Commissioners Aczon, Chang, Okuda and Wong, LUC  
13 Executive Officer, Daniel Orodener, LUC Chief  
14 Planner, Scott Derrickson, our Deputy Attorney  
15 General, Linda Chow, and the Court Reporter, Jean  
16 McManus, are all on Oahu.

17 Commissioner Cabral is on Hawaii Island.  
18 Commissioner Ohigashi is on Maui. Commissioner  
19 Giovanni from Kauai is excused from this meeting. We  
20 currently have eight seated Commissioners, of which  
21 seven are participating in this meeting.

22 For all the dockets for today, I'm going to  
23 briefly run over our procedures. If there's anybody  
24 who desires to give public testimony on these  
25 matters, I will ask them -- I will admit them into

1 the meeting room. I will ask them to identify  
2 themselves or the person or the organization giving  
3 testimony.

4 I will swear them in. I will offer them  
5 two minutes to give their testimony. At which time,  
6 the Commissioners and the parties for that docket may  
7 ask questions of them and then they will be removed  
8 from the virtual witness box back into attend -- to  
9 becoming an attendee.

10 After all registered testifiers complete  
11 their testimonies and general audience members  
12 complete their testimony, I will give all Parties the  
13 opportunity to admit exhibits into the record.

14 And after the admission of exhibits, the  
15 Petitioner in each -- presents their (audio  
16 difficulty) -- right now for our procedures for  
17 today. Seeing none.

18 A99-729

19 Our next agenda item is a Status Report on  
20 Docket No. A99-729 The Newton Family Limited  
21 Partnership, now known as the Hawaiian Islands Land  
22 Trust.

23 Will the Parties for Docket No. A -- (audio  
24 difficulty)

25 COURT REPORTER: Jonathan, this is Jean.

1 I'm not hearing you right now.

2 CHAIRPERSON SCHEUER: Okay. At which point  
3 did you stop hearing me?

4 COURT REPORTER: Hold on. I got as far as  
5 the Hawaiian Islands Land Trust parties for docket  
6 number, and that's as far as I heard you.

7 CHAIRPERSON SCHEUER: The parties for  
8 Docket -- (audio difficulty.)

9 COURT REPORTER: No. I'm still having  
10 trouble hearing you.

11 VICE CHAIR CABRAL: This is (audio  
12 difficulty.) It's blocked, too. I just have a  
13 frozen screen of your face, and I stopped hearing you  
14 at the same time.

15 CHAIRPERSON SCHEUER: One minute. One  
16 minute recess, please.

17 (Recess taken.)

18 CHAIRPERSON SCHEUER: We are back on the  
19 record. Can you hear me?

20 COURT REPORTER: Yes, I can.

21 CHAIRPERSON SCHEUER: Okay. I have no idea  
22 what happened. I apologize.

23 In any case, Ms. Kaakua, can you please  
24 identify yourself for the record?

25 MS. KAAKUA: Aloha, everyone. This is

1 Laura Kaakua from Hawaiian Islands Land Trust.

2 CHAIRPERSON SCHEUER: Because I also serve  
3 on the board of the Hawaiian Islands Land Trust, I  
4 will recuse myself from this item. I will leave the  
5 meeting and ask to be readmitted when we move onto  
6 the next item, and I will have to hand the chairing  
7 of this meeting over to the First Vice Chair, Nancy  
8 Cabral.

9 ACTING CHAIR CABRAL: Okay. Well, thank  
10 you for the surprise.

11 Okay. I have basic paperwork here, but I  
12 apologize for not having all of the details. So  
13 Laura Kaakua is going to be our testifier at this  
14 point, is that my understanding?

15 THE WITNESS: Yes. Vice Chair, I just have  
16 a relatively short status update to share with the  
17 Commission.

18 ACTING CHAIR CABRAL: Okay.

19 THE WITNESS: And I do have a short, only  
20 five slide PowerPoint presentation to help share that  
21 update, if it is possible to share screen, possible  
22 and appropriate to share screen.

23 ACTING CHAIR CABRAL: Okay. And all of the  
24 parties that are present have already been  
25 introduced, I may have missed some of that, with all



1 of the logging in details, so if you're -- if that's  
2 acceptable --

3 COMMISSIONER WONG: Chair?

4 ACTING CHAIR CABRAL: Yes.

5 COMMISSIONER WONG: This is Commissioner  
6 Wong.

7 VICE CHAIR CABRAL: Yes, Commissioner, I  
8 see you now.

9 COMMISSIONER WONG: Could you go over the  
10 record and a reminder for the public about this just  
11 is, you know, update.

12 ACTING CHAIR CABRAL: Let me see what I --  
13 you know, I got this information pretty nearly about  
14 two seconds ago.

15 COURT REPORTER: Nancy, this is Jean.

16 ACTING CHAIR CABRAL: Yes.

17 COURT REPORTER: Yeah, I have not gotten  
18 appearances of the parties. That wasn't on the  
19 record.

20 ACTING CHAIR CABRAL: Okay. I don't think  
21 I have either. All I have is the opening -- the  
22 Chair's opening statement, which I think Commissioner  
23 Scheuer just read. He talked about digital. This is  
24 all operational.

25 So I think that's where we have to be. We

1 have to introduce all of the parties so -- correct?

2 We have our Land Use Commission members  
3 present that I see on the screen are Commissioner  
4 Chang, Commissioner Aczon, Commissioner Ohigashi,  
5 Commissioner Okuda, and staff, Commissioner Wong, and  
6 then I have our Executive Director Orodenker and then  
7 Ms. Apuna. I see you're here.

8 Do you have anyone else that's present with  
9 you that you would want to notify us as being  
10 present?

11 MS. APUNA: No, Vice Chair, it's just me.  
12 Thank you.

13 ACTING CHAIR CABRAL: Okay. Okay, thank  
14 you. And then Hawaii -- then Derek Simon, you are  
15 here representing what parties?

16 MR. SIMON: Chair Cabral, I'm on the next  
17 agenda item. I'm not sure if the Commission prefers  
18 that I mute my video at this time, but I'm a panelist  
19 on the next docket.

20 (Inaudible.)

21 ACTING CHAIR CABRAL: Okay. Well, help me  
22 there. The next one being that--

23 EXECUTIVE OFFICER: Madam Chair, could we  
24 take a two-minute recess?

25 ACTING CHAIR CABRAL: That would be an

1 excellent idea. Thank you.

2 (Recess taken.)

3 ACTING CHAIR CABRAL: Commissioner Wong, I  
4 would like to appoint you as the Chair for this  
5 docket.

6 ACTING CHAIR WONG: Okay. Thank you,  
7 Chair. This is Commissioner Wong speaking.

8 I'm going to start from the beginning just  
9 to make sure we have everything on the record.

10 The next agenda item is Status Report on  
11 Docket No. A99-729 Newton Family Limited Partnership  
12 known as Hawaiian Islands Land Trust.

13 Will the parties for Docket No. A99-729  
14 please identify themselves for the record.

15 You may need to enable your audio, and once  
16 I acknowledge you, please mute yourself back off.  
17 Thank you.

18 Laura?

19 MS. KAAKUA: Aloha, Commissioner Wong and  
20 Commissioners, this is Laura Kaakua. I'm the Chief  
21 Executive Officer for Hawaiian Islands Land Trust.

22 ACTING CHAIR WONG: Thank you. Is there  
23 anyone else?

24 Okay. If not, let me update the record.

25 On May 7, 2019, the Commission met using

1 interactive conferencing technology for a Status  
2 Report on Docket No. A99-729 Newton Family Limited  
3 Partnership known as Hawaiian Islands Land Trust.

4 From May 15, 2019, the Commission received  
5 a copy of correspondence from County of Hawaii to  
6 Hawaiian Islands Land Trust regarding the change of  
7 zone ordinance.

8 On June 17th, 2020, the Commission mailed  
9 the June 24th and 25th, 2020 Notice of Agenda to the  
10 Parties, to the Statewide, Oahu and Hawaii regular  
11 and email mailing list.

12 For the members of the public, please be  
13 reminded that the Commission will not be considering  
14 the merits of the A99-729 Newton Family Limited  
15 Partnership Petition, but rather the Commission is  
16 interested in learning about the current state of  
17 activities related to this docket including  
18 compliance with conditions.

19 I will now recognize the written public  
20 testimony submitted in this matter identifying the  
21 person or organization submitting the testimony.

22 Is there any -- okay. So I was informed by  
23 the staff that there is no public testimony on this  
24 agenda item.

25 Okay. Next, I will be calling on any

1 individuals who have registered to provide virtual  
2 testimony on this agenda item. I'll ask them to  
3 raise their hand using the "ZOOM feature", and then  
4 I'll acknowledge them, bring them in, swear them in,  
5 and then let them testify, and then we'll -- if  
6 there's any questions, we'll allow them. And then  
7 after that, we'll send them back out.

8           Okay. And I see we have one individual,  
9 Mr. Ken Church, who has raised their hand.

10           Can we please let Mr. Church in?

11           Let me ask the questions first.

12           MR. CHURCH: Hello.

13           ACTING CHAIR WONG: Hi, Mr. Church --

14           MR. CHURCH: Yes, the link that I was given  
15 put me in the audience.

16           ACTING CHAIR WONG: Yes. This is for the  
17 Newton Land Trust. Are you interested in testifying  
18 on this item?

19           MR. CHURCH: No, I just wanted to be sure  
20 that when my name came up, I was in the panel.

21           ACTING CHAIR WONG: Yes. You'll be brought  
22 up when your docket is heard, so we are just holding  
23 right now for anyone who wants to do any testimony on  
24 the Newton Land Trust.

25           So we'll put you back into the waiting

1 room, is that okay, Mr. Church?

2 MR. CHURCH: Thank you for the  
3 clarification.

4 ACTING CHAIR WONG: You're welcome, sir.

5 Okay. Is there anyone else willing -- want  
6 to testify on this issue, please raise your hand now.  
7 One -- okay, going once, going twice. Okay, seeing  
8 none, public testimony is closed. Okay.

9 Now, let's go to the next part. Okay.  
10 Let's start up. Next I will call for a Status Report  
11 from the new owner, Hawaiian Islands Land Trust.

12 Ms. Kaakua, will you please present your  
13 Status Report. Please, unmute yourself.

14 MS. KAAKUA: Thank you, Commissioner.  
15 Commissioner, would it be okay to share a short  
16 PowerPoint presentation to help with the visuals for  
17 a Status Report?

18 ACTING CHAIR WONG: Sure. Are you going to  
19 share a screen?

20 MS. KAAKUA: Yes, I can do that; I'll bring  
21 it up in just a second.

22 And just by way of introduction, since it's  
23 been a year since I've been before you all, the  
24 Newton Family Partnership donated this Kukua forest  
25 property to Hawaiian Islands Land Trust, and Hawaiian

1 Islands Land Trust is Hawaii's statewide land trust.  
2 That's both a Hawaii 501(c)(3) nonprofit as well as a  
3 nationally accredited land trust. And our mission is  
4 to protect and steward lands that sustain Hawaii and  
5 to perpetuate Hawaiian values by connecting people  
6 back to aina.

7           And so over the years we've protected over  
8 21,000 acres, and that's in six preserves which we  
9 own and steward along with the community surrounding  
10 those preserves as well as in 52 conservation  
11 easements that we hold over private lands to protect  
12 Conservation values on those lands.

13           And this Kukua forest property, we've had  
14 much discussion with our board of directors and staff  
15 about this forest, and have taken a year to learn  
16 about the forest, its health, threats to the native  
17 species, and what the community of Hilo would like to  
18 see.

19           And I'll go into this, a short presentation  
20 now, if I can share screen.

21           Are you able to see this okay?

22           ACTING CHAIR WONG: Yeah. Do you want me  
23 to hold screen if possible, please?

24           MS. KAAKUA: Okay. Okay. So this is just  
25 our status update on Kukua forest. Kukuau is the

1 name of the ahupua'a which this property is in. This  
2 is the large parcel which is in large part native  
3 forest, and you can see the split here between land  
4 use designations with the makai portion being in  
5 Agricultural designation and mauka portion being in  
6 Conservation designation.

7 My understanding is that the Newton family  
8 has plans for some development on the property, and  
9 conditions were put on that would be appropriate for  
10 a development scenario. And so what this land was  
11 donated to Hawaiian Islands Land Trust. We have a  
12 very different mission which is to protect and  
13 steward the lands that sustain us with a special  
14 focus on cultural lands, native ecosystems and lands  
15 that sustain our island, so we had to understand what  
16 was here before we could understand how to best  
17 steward it.

18 So this is an image that shows the  
19 different species within this property. And so there  
20 are ohia and koa, which are really the pillars of the  
21 native forest throughout the property, but there are  
22 non-native species encroaching on the property on  
23 both sides, both the makai section closest to  
24 residential development as well as the mauka side of  
25 the property.



1           And so some of this can be seen just by  
2 looking at the aerial imagery. The bright green lots  
3 are typically uluhe patches which are -- kind of form  
4 this mat of native ferns. And then you see koa and  
5 ohia stands and strawberry guava and clidemia and  
6 other pretty nasty invasive species encroaching in  
7 from both sides.

8           And so we know that if we do not actively  
9 manage this forested property, the invasive species  
10 will continue to expand their territory and push the  
11 native koa, uluhe, ohia, and other native species  
12 out.

13           And so from our experience in land  
14 stewardship, we really need to actively manage the  
15 property in order to care for it appropriately.

16           And this is an image showing the different  
17 rain levels. And so the back section of this  
18 property really does get a huge amount of rain, and  
19 even the makai section of the property has a lot of  
20 rain as well, and so we want to keep as much of that  
21 rain as we can on this land. And not have it, you  
22 know, run voraciously down through Hilo.

23           And we know that with the native ground  
24 cover and the native forest, that is really what  
25 serves to retain water, whereas when we have stands

1 of strawberry guava and clidemia there, also coming  
2 with that is invasive pig ungulates.

3 And so over time, if this property isn't  
4 managed actively, those species will creep in and  
5 more sediment runoff will happen because there's  
6 going to be more areas of land exposed. And with the  
7 heavy rains in this area, it will wash down into the  
8 residential community and through the water system,  
9 eventually out to the ocean.

10 And so our -- I'm just going to stop my  
11 share here.

12 But our work thus far has been to  
13 understand the landscape that we've inherited through  
14 donation from the Newton family. And at this point,  
15 it wouldn't be enough to just say that the land is  
16 protected, and kind of call it a Conservation win and  
17 revert the land back to Conservation designation,  
18 because forest management activities within the  
19 Conservation District generally require a permit from  
20 the Department of Land and Natural Resources, and the  
21 permit usually triggers the need for an environmental  
22 assessment or even an environmental impact statement,  
23 and both of those processes would negate our ability  
24 to manage this area in the short-term.

25 What we want to do is try to take action to

1 start management of the forest to prevent the fast  
2 spread of strawberry guava on the makai section as  
3 soon as possible, and so the agricultural  
4 designation, though originally intended to assist in  
5 a family development plan, it actually really helps  
6 us to achieve true conservation that benefits the  
7 native forest, because it gives us flexibility to  
8 work within that landscape

9 So what we're preparing for now is a  
10 request to amend land use conditions and our plans  
11 are to be before you again in August with that actual  
12 request.

13 ACTING CHAIR WONG: Okay, thank you. Is  
14 that it?

15 MS. KAAKUA: That's all, mahalo.

16 ACTING CHAIR WONG: Okay. Thank you.

17 County, do you have any questions? You've  
18 got to unmute yourself.

19 COURT REPORTER: And please identify  
20 yourself.

21 ACTING CHAIR WONG: Yes, please.

22 MS. MELLON-LACEY: Okay. Can you hear me  
23 now?

24 ACTING CHAIR WONG: Yes.

25 MS. MELLON-LACEY: This is Diana

1 Mellon-Lacy, Deputy Corporation Counsel. With me is  
2 Deputy Corporation Counsel John Mukai and April  
3 Surprenant from the Planning Department.

4 At this time, I don't believe we have any  
5 comments. Correct? No. Thank you.

6 ACTING CHAIR WONG: Thank you. You can  
7 mute yourself again?

8 OP, do you have any questions? Also  
9 please identify yourself.

10 MS. APUNA: This is Dawn Apuna, Deputy  
11 Attorney General. No questions. Thank you.

12 ACTING CHAIR WONG: Thank you.

13 Commissioners, are there any questions?  
14 Commissioner Okuda has raised hands. Commissioner,  
15 you can --

16 COMMISSIONER OKUDA: Thank you very much,  
17 Ms. Kaakua.

18 Just a background question. Is the  
19 Hawaiian Islands Land Trust the only accredited land  
20 trust operating in the State of Hawaii?

21 THE WITNESS: No, we are not. So there may  
22 be more, but to my understanding, there's two  
23 national land trusts, so the transfer of public land  
24 is a national land trust that does operate within  
25 Hawaii, and they are accredited. And the Nature

1 Conservancy, which is another national land trust  
2 that operates within Hawaii.

3 I believe the Nature Conservancy is also  
4 accredited, though I'm not positive on that. But I  
5 believe we are the only nationally accredited Hawaii  
6 non-profit land trust.

7 COMMISSIONER OKUDA: And under the statute,  
8 only an accredited land trust may hold a Conservation  
9 Easement which is provided by statute. Is my  
10 understanding correct?

11 THE WITNESS: I don't think that it's a  
12 requirement under Hawaii statute that the land trust  
13 actually be nationally accredited. So there are land  
14 trusts in Hawaii that hold conservation easements  
15 that are not accredited land trust.

16 COMMISSIONER OKUDA: Okay. Thank you very  
17 much.

18 And just, you know, of course, we would  
19 make whatever decision on any future filings based on  
20 the evidence that's presented at that point in time.

21 But without prejudging anything, I think  
22 your method of doing conservation, using the existing  
23 agricultural designation to avoid unnecessary steps  
24 and unnecessary cost, it seems to me on its face a  
25 very, very smart way of approaching it. So thank you

1 very much for your testimony.

2 MS. KAAKUA: Thank you.

3 ACTING CHAIR WONG: Thank you, Commissioner  
4 Okuda. Commissioner Okuda, could you lower your  
5 hand, please? Thank you.

6 Commissioner Chang?

7 COMMISSIONER CHANG: It's more of a  
8 comment.

9 Laura, I greatly appreciate the work done  
10 by Hawaiian Islands Land Trust that you put into it  
11 over the last year to understand this land and give  
12 us an idea of its condition and how you are preparing  
13 to steward it.

14 So thank you so much for the timely report,  
15 and I look forward to having you come back in August  
16 with some conditions and recommendations. Thank you  
17 so much.

18 MS. KAAKUA: Mahalo.

19 ACTING CHAIR WONG: Thank you, Commissioner  
20 Chang.

21 Is there any other Commissioners that want  
22 to ask a question? Okay. If not, I thank you for  
23 your Status Report. It was a great Status Report,  
24 and we hope to see you soon to update this docket.  
25 And thank you again, and we're going to take a brief

1 recess to let the Chair back in, so we're in recess.

2 (Recess taken.)

3 CHAIRPERSON SCHEUER: We will go back on  
4 record.

5 We are now going to Docket No. A18 --

6 COURT REPORTER: Chair, I'm not getting you  
7 again. I got as far as we are now going to Docket  
8 No., and that's as far as I got, and it went blank.

9 CHAIRPERSON SCHEUER: Unfortunately, I  
10 don't know if there is -- there is nothing I can do  
11 on my side. I have changed nothing about my computer  
12 connection.

13 COURT REPORTER: Well, I'll do the best I  
14 can.

15 CHAIRPERSON SCHEUER: Okay. And there is a  
16 script and a recording as well.

17 VICE CHAIR CABRAL: This is Nancy. I'm  
18 losing you at the same time also, so I don't know  
19 what that is. Your face freezes, lovely as it is,  
20 and then the sound completely cuts off. So something  
21 is going on. I'm with you, Jean.

22 COURT REPORTER: Thank you.

23 CHAIRPERSON SCHEUER: For the record of  
24 these proceedings, my wife and son have been banded  
25 from computer and Wi-Fi use for the entirety of these

1 LUC proceedings, so I know that it's not that. That  
2 is their contribution to the service of the State of  
3 Hawaii. We will try again.

4 A18-806

5 Our next agenda item is a Hearing and  
6 Action meeting on Docket No. A18-806, Kevin M. Barry  
7 and Monica S. Barry, Trustees of the Barry Family  
8 Trust to Consider the Petitioner's Motion for  
9 Issuance of Negative Declaration or Finding of No  
10 Significant Impact for a Final Environmental  
11 Assessment to Amend the Land Use District Boundary of  
12 Certain Lands Situated at Kea'au, Puna, County and  
13 State of Hawai'i, consisting of .51 acres from the  
14 Conservation District to the Agricultural District,  
15 Tax Map Key No. (3) 1-5-059, lot 59.

16 Will the parties on this docket please  
17 identify themselves for the record, beginning with  
18 the Petitioner?

19 MR. SIMON: Good morning, Chair,  
20 Commissioners, Derek Simon appearing on behalf of  
21 Kevin and Monica Barry, the Trustees of the Barry  
22 family trust.

23 CHAIRPERSON SCHEUER: Thank you, Mr. Simon.  
24 County?

25 MS. MELLON-LACEY: Deputy Corporation



1 Counsel, Diana Mellon-Lacey, and I'm here with April  
2 Surprenant from the Planning Department, and Deputy  
3 Corporation Counsel John Makai.

4 CHAIRPERSON SCHEUER: Aloha and mahalo.

5 Office of Planning?

6 MS. APUNA: Good morning, Chair, members of  
7 the Commission, Dawn Apuna, Deputy Attorney General  
8 on behalf of the Office of Planning.

9 CHAIRPERSON SCHEUER: The audio has frozen.  
10 Everybody's audio has frozen.

11 Okay. Let me update the record.

12 Can people hear me? Okay.

13 On August 29th, 2019, the Commission met  
14 using interactive conferencing technology for an  
15 action meeting on this docket to consider the  
16 Petitioner's Motion for Issuance of an Anticipated  
17 Negative Declaration or Anticipated Finding of No  
18 Significant Impact or FONSI.

19 On October 11, 2019, the Commission mailed  
20 a letter to the Office of Environmental Quality  
21 Control transmitting the determination of an  
22 Anticipated Finding of No Significant Impact, as well  
23 as the Petitioner's Draft EA for publication and the  
24 public comment period.

25 On December 16, 2019, the Commission

1 received OP's comments on the DEA and FONSI.

2 On June 17th of 2020, the Commission mailed  
3 the June 24th and 25th Notice of Agenda to the  
4 Parties and to the Statewide, Oahu and Hawaii regular  
5 and email mailing lists.

6 On May 27th, prior to the agenda being  
7 sent, the Commission received the Petitioner's Motion  
8 for Issuance of a Negative Declaration or Finding of  
9 No Significant Impact; a Memorandum in Support of  
10 Motion as well as Exhibit 1.

11 I want to confirm with Mr. Derrickson that  
12 no public testimony has been received on this matter.

13 MR. DERRICKSON: Yes, that's correct,  
14 Chair.

15 CHAIRPERSON SCHEUER: Thank you very much.

16 Commissioners, are there any disclosures?  
17 Seeing none. Are there any individuals who are in  
18 the (audio difficulty) -- by publically in this  
19 matter who have not (audio difficulty) --

20 COURT REPORTER: I'm losing you again,  
21 Jonathan. Sorry, I'm losing you. I got as far as,  
22 "Seeing none, are there any individuals who are in  
23 the -- "

24 CHAIRPERSON SCHEUER: I will repeat.

25 COURT REPORTER: Thank you.

1                   CHAIRPERSON SCHEUER: Are there any  
2 individuals who are attendees (audio difficulties.)

3                   COURT REPORTER: Just not getting it.  
4 You're frozen. Not getting that, Jonathan, you're  
5 frozen.

6                   CHAIRPERSON SCHEUER: Ms. McManus, I hear  
7 you.

8                   COURT REPORTER: Okay, didn't know.

9                   CHAIRPERSON SCHEUER: So the meeting is  
10 being recorded. We're doing the best that we can.

11                   For a third time, in case people did not  
12 hear it, is there anybody who is attending this  
13 meeting, attending in meeting function who wishes to  
14 testify on this matter, use the "raise your hand"  
15 function on "ZOOM".

16                   I do not see anybody raising their hand.  
17 And no public testimony -- will be -- (audio  
18 difficulties).

19                   With that said, Mr. Simon, would you care  
20 to make your presentation?

21                   MR. SIMON: Thank you, Mr. Chair,  
22 Commissioners.

23                   My clients are extremely appreciative of  
24 all the efforts that were made to hold these hearings  
25 during these very unusual times, and I know it takes

1 a lot of time and resources to get everybody here on  
2 the same page, so we're very appreciative of that.

3 As the Chair mentioned in his introduction  
4 of the docket item, this EA is filed in connection  
5 with a pending District Boundary Petition, because  
6 we're reclassifying out of the Conservation District,  
7 one of the content requirements for that Petition is  
8 either a Finding of No Significant Impact or an  
9 accepted Environmental Impact Statement.

10 This is likely the third or fourth  
11 iteration that staff has seen of this EA which is  
12 including preliminary copies that were provided.  
13 They were extremely helpful throughout this process,  
14 especially Scott Derrickson and Riley Hakoda, so I  
15 want to say a special thank you to them.

16 The copy of the Final EA you have before  
17 you shows the revisions that were made in a redline  
18 format. As you will see, there is very, very minor  
19 revisions and essentially very few substantive  
20 revisions.

21 You know, as a part of the earlier  
22 consultation process, we reached out to 37 total  
23 agencies and parties, nine county agencies, 15-plus  
24 State agencies, nine of the neighboring landowners of  
25 the utility company serving -- servicing power, and

1 three organizations, and frankly, received very  
2 minimal comments from any of those parties who are  
3 also directly notified of the publication of the  
4 Draft EA.

5 No comments received or were particularly  
6 negative or -- and none contradicted any of the  
7 findings in the EA or any of the technical studies  
8 that were appended to the EA.

9 As explained in greater detail in our past  
10 filings on the Final EA and in the EA itself, because  
11 this is -- the Barrys are seeking to reclassify that  
12 Ag District to build a farm dwelling consistent with  
13 surrounding neighborhood and uses in the area.

14 We do believe there is a sufficient record  
15 for the Commission to vote and approve the motion and  
16 issue the FONSI or findings No Significant Impact and  
17 allow the Barrys to proceed with publication of the  
18 Final EA through the Environmental Bulletin.

19 No threatened or endangered plant or animal  
20 species were found on the Petition Area. There's  
21 some common, native plant, such as naupaka, most of  
22 which will not be disturbed.

23 No archaeological resources found within  
24 the Petition Area. None have been recorded nearby.  
25 There's been a total of 22 prior surveys in Hawaiian

1 Paradise Park, for a total of 22 acres, all reported  
2 negative findings.

3           There is no anticipated cultural impacts in  
4 part from the lack of, you know, historical or  
5 archaeological resources on the Petition Area.  
6 There's currently no public or private access going  
7 through the Petition Area. It's quite overgrown at  
8 the moment. Access will in no way be impeded by the  
9 project. The shoreline will be -- remain open -- by  
10 the public and others exercising traditional  
11 practices, including, you know, subsistence, fishing  
12 and gathering.

13           One issue we spent extra time addressing  
14 was for the coastal hazards associated with this  
15 park, really associated with development on the  
16 coastline anywhere with a certain focus on this area  
17 of the Big Island that, you know, concluded there's  
18 really no undue restraints imposed by those  
19 conditions on the development of the project that's  
20 been proposed in the EA and in the Petition.

21           And there's really no other anticipated  
22 impacts, cumulative secondary, none to use water.  
23 There'll be a slight positive socioeconomic impacts  
24 from either the construction activities, the added  
25 increase in tax basin, you know, as an addition of

1 the single homes aren't anticipated to, you know,  
2 stress any public utilities or roadways or anything  
3 like that.

4 So with that in mind, again, we do believe  
5 there's a sufficient record before the Commission to  
6 vote and approve the issuance of the FONSI and allow  
7 for publication of the Final EA. And I'll leave it  
8 at that and welcome any questions from the  
9 Commissioners.

10 CHAIRPERSON SCHEUER: Thank you very much,  
11 Mr. Simon. (Audio difficulties.)

12 Questions, County of Hawaii? Please say so  
13 "yes" or "no".

14 MS. MELLON-LACEY: Yes. We're unsure of  
15 the question, because it broke up.

16 CHAIRPERSON SCHEUER: Does the County have  
17 any questions for the Petitioner on their  
18 presentation?

19 MS. MELLON-LACEY: Oh, no. No questions.  
20 Thank you.

21 MS. APUNA: No questions

22 CHAIRPERSON SCHEUER: Commissioners, are  
23 there questions? If so, raise your hand.  
24 Commissioners, no? Okay.

25 Are there any comments, just to be sure,

1 any comments in general from the County of Hawaii on  
2 this docket?

3 MS. MELLON-LACEY: The County supports the  
4 finding of the FONSI and feels that it is warranted  
5 and given the land use in the surrounding properties.

6 CHAIRPERSON SCHEUER: Do the Commissioners  
7 have any questions for the County? Seeing none --  
8 Oh, Commissioner Cabral?

9 VICE CHAIR CABRAL: I'm sorry. Mine is not  
10 a question for the County, but just a comment, when  
11 you're ready.

12 CHAIRPERSON SCHEUER: Okay. We'll go  
13 through any questions for the County and then any  
14 comments from the Office of Planning.

15 MS. APUNA: Office of Planning does not  
16 object to Petitioner's motion.

17 CHAIRPERSON SCHEUER: That said, then,  
18 Commissioner Cabral, you wanted to make a comment at  
19 this time.

20 VICE CHAIR CABRAL: That I am familiar with  
21 the general area of this property, not the property  
22 or the circumstances personally, but I would -- I  
23 don't see any reason for it to not move ahead as  
24 requested.

25 I'm not clear why it became Conservation



1 land, but I have no problem with it being changed.  
2 That's all my comment.

3 CHAIRPERSON SCHEUER: Okay. Thank you.

4 So, Commissioners -- and, again, I  
5 apologize for the unknown cause of audio problems.

6 I will entertain a motion that the LUC  
7 accepts or does not accept the Final Environmental  
8 Assessment and further authorizes the LUC Executive  
9 Officer to notify the OEQC and the Parties that the  
10 LUC has accepted or not accepted the FEA.

11 The motion should state the reasons for  
12 acceptance or nonacceptance.

13 VICE CHAIR CABRAL: This is Nancy, and I  
14 would make that motion as you so eloquently worded  
15 and the reason for the acceptance is that I'm not  
16 aware of any problems with this request or any  
17 adverse situation that would occur with us proceeding  
18 as requested.

19 COMMISSIONER WONG: Chair?

20 CHAIRPERSON SCHEUER: Commissioner Wong.

21 COMMISSIONER WONG: I would like to second  
22 Commissioner Cabral's motion, but I would like to add  
23 a -- just to clarify something, just to make sure  
24 that the motion also allows the LUC staff to provide  
25 any necessary documents for the filing of the OEQC.

1           CHAIRPERSON SCHEUER: Is the movant, Nancy,  
2 are you willing to make that change to your motion?

3           VICE CHAIR CABRAL: Yes. Absolutely would  
4 accept that change.

5           CHAIRPERSON SCHEUER: Okay.

6           COMMISSIONER WONG: To Nancy's motion.

7           CHAIRPERSON SCHEUER: Commissioners, we  
8 have a motion in front of us for acceptance and the  
9 finding of No Significant Impacts on the Barry  
10 matter.

11           Is there any furthers discussion on the  
12 motion?

13           COMMISSIONER WONG: Chair?

14           CHAIRPERSON SCHEUER: Commissioner Wong.

15           COMMISSIONER WONG: I wanted to say that  
16 reviewing the only -- the document itself, it's very  
17 well-organized covering any -- if there was any  
18 potential environmental impacts and proposed  
19 mitigation measures and that this project, just the  
20 -- the Environmental Assessment is to me very well  
21 done, so I just -- that's why I'm seconding -- I  
22 mean, I'm supporting this motion.

23           CHAIRPERSON SCHEUER: Thank you,  
24 Commissioner Wong.

25           Are there any further comments? If there

1 are none, Mr. Orodener, please roll call the  
2 Commission.

3 EXECUTIVE OFFICER: Thank you, Mr. Chair.

4 The motion is for acceptance and to make a  
5 finding of no significant impact.

6 Commissioner Cabral?

7 VICE CHAIR CABRAL: Yes.

8 EXECUTIVE OFFICER: Commissioner Wong?

9 COMMISSIONER WONG: Yes.

10 EXECUTIVE OFFICER: Commissioner Aczon?

11 VICE CHAIR ACZON: Yes.

12 EXECUTIVE OFFICER: Commissioner Chang?

13 COMMISSIONER CHANG: Yes.

14 EXECUTIVE OFFICER: Commissioner Okuda?

15 COMMISSIONER OKUDA: Yes.

16 EXECUTIVE OFFICER: Commissioner Ohigashi?

17 COMMISSIONER OHIGASHI: Yes.

18 EXECUTIVE OFFICER: Commissioner Giovanni

19 is absent.

20 Chair Scheuer?

21 CHAIRPERSON SCHEUER: Yes.

22 EXECUTIVE OFFICER: Thank you, Mr. Chair,  
23 the motion passes unanimously.

24 CHAIRPERSON SCHEUER: Okay.

25 MR. SIMON: Chair, if I could make one last

1 comment.

2 CHAIRPERSON SCHEUER: Mr. Simon.

3 MR. SIMON: I've drafted a --  
4 (indecipherable) -- but to the extent that Exhibit 1  
5 attached to the Motion is not already in the record,  
6 I ask -- just ask that it be moved into the record.

7 CHAIRPERSON SCHEUER: It will be so  
8 ordered, thank you. Thank you very much, Mr. Simon.

9 (Petitioner's Exhibit 1 was received into  
10 evidence.)

11 MR. SIMON: Thank you all very much.

12 CHAIRPERSON SCHEUER: Okay. Commissioners,  
13 because of the unknown cause of -- nothing has  
14 changed at my house that I know of on my internet  
15 connection, but it is clearly unstable. I'm thinking  
16 what might be in our best service is if we can  
17 quickly move though the next agenda item, the Church  
18 item. We would then take an early, approximately  
19 45-minute break for lunch. I will physically try to  
20 relocate to the Land Use Commission office downtown,  
21 and then we would take up the final Declaratory  
22 Ruling Order.

23 So if we can get through in the next  
24 15 minutes, we would break at 10:15, resume at  
25 11:00 A.M. Is that acceptable?

1           Okay. We will try that.

2           A18-805:

3           Right now we're going to move onto Docket  
4 No. A18-805 Church and Hildal.

5           I need the LUC staff to admit the  
6 Churches into the meeting.

7           MR. DERRICKSON: They've been promoted to  
8 panelist.

9           CHAIRPERSON SCHEUER: Thank you.

10          Mr. Church, are you able to turn on your  
11 video?

12          MR. CHURCH: I thought it was on. Let me  
13 see. Oh, yeah.

14          I have a suggestion for the Chair. We have  
15 a modem in our house through which our computer goes  
16 and our cell phones and everything else seems to use  
17 that. And if someone's on the cell phone, they might  
18 not be on their computer, but it begins to reduce  
19 your band width. That may be your problem.

20          Anyway, I'll turn on my video.

21          CHAIRPERSON SCHEUER: There we are. We can  
22 now see you. Thank you, Mr. Church.

23          Can you please just once again identify  
24 yourself for the record?

25          You're muted, Mr. Church.

1 MR. CHURCH: I'm Ken Church.

2 CHAIRPERSON SCHEUER: County of Hawaii?

3 MS. MELLON-LACEY: Deputy Corporation  
4 Counsel, Diana Mellon-Lacey; also Deputy Corporation  
5 Counsel John Mukai is present and April Suprenant  
6 from the Planning Department.

7 CHAIRPERSON SCHEUER: Thank you very much.  
8 Office of Planning?

9 MS. APUNA: Good morning, Deputy Attorney  
10 General, Dawn Apuna on behalf of the Office of  
11 Planning.

12 CHAIRPERSON SCHEUER: Let me update the  
13 record on this docket.

14 On March 28, 2019, the Commission met and  
15 determined that the Commission should be the  
16 accepting authority pursuant to Chapter 343 HRS. We  
17 denied the Petitioner's Request to Accept an Existing  
18 Environmental Assessment and Finding of No  
19 Significant Impact. The Commission also determined  
20 that it agreed the Petitioner's Draft EA warrants an  
21 Anticipated Finding of No Significant Impact in  
22 Support of its Petition.

23 On April 9th, 2019, the Commission received  
24 the Petitioner's EA with Exhibits 1 through 24, and a  
25 hard copy and CD digital file.

1           On April 26th the Commission -- of 2019,  
2 the Commission received the Petitioner's  
3 correspondence requesting clarification of when the  
4 Petition would complete and Petitioner's email  
5 regarding a need to correct the March 28, 2019  
6 minutes.

7           On April 30th of 2019, the Commission  
8 mailed, first, an order determining whether the Land  
9 Use Commission agreed that the Petitioner's Draft EA  
10 warranted an anticipated FONSI as well as an order  
11 determining whether the LUC agreed the Petitioner's  
12 Draft EA warranted a FONSI.

13           And on the same day, the Commission mailed  
14 a letter to the OEQC regarding the DEA and  
15 anticipated FONSI, as well as the notice -- (audio  
16 difficulties).

17           On May 3rd, 2019, the Commission received  
18 the Petitioner's correspondence regarding the Order  
19 Caption.

20           On May 29, 2019, the Commission received  
21 the Petitioner's correspondence regarding County  
22 comments on the DEA.

23           On June 18th, 2019, the Commission mailed  
24 errata caption correction sheets to the Parties.

25           On September 10th, 2019, the Commission

1 received a Motion that the LUC adopt a second order  
2 for the issuance of an Anticipated Negative  
3 Declaration or anticipated FONSI.

4 On December 10th, 2019, the Commission  
5 mailed a transmittal letter to the Office of  
6 Environmental Quality Control.

7 On January 31st, the Commission received  
8 OP's comment letter.

9 On March 30th of this year, the Commission  
10 mailed the LUC meeting agenda to the Parties and  
11 Statewide email, Hawaii and Maui mailing lists.

12 And on June 12th, the Commission received  
13 from the Petitioner -- items.

14 One signed paper original of the proposed  
15 FONSI.

16 One paper copy of the proposed FONSI.

17 One digital copy of the FONSI -- (audio  
18 difficulties) --

19 -- Determination of a District Boundary.

20 On June 17th -- (audio difficulties) -- of  
21 Agenda to the Parties to the Statewide, Oahu and  
22 Hawai'i regular and email mailing lists.

23 Mr. Derrickson, has anybody submitted  
24 written testimony on this matter?

25 Commissioner Wong?



1           COMMISSIONER WONG: Chair, can I go back to  
2 your statement just to make sure it's on the record,  
3 because you froze. So I believe --

4           CHAIRPERSON SCHEUER: Please.

5           COMMISSIONER WONG: On May 3rd, you stated  
6 Notice and Agenda of the May 7th LUC meeting to the  
7 Parties, Statewide and Hawaii mailing lists regarding  
8 actions to correct the March 28, 2019 minutes. I  
9 think we missed that part.

10          CHAIRPERSON SCHEUER: Okay.

11          COMMISSIONER WONG: We missed another part  
12 when you were talking about on June 12th, 2020, the  
13 Commission received the Petitioner's -- we missed the  
14 part I think that you stated:

15                 One signed paper original of Motion for  
16 Issuance of FONSI. And also the Certificate of  
17 Service.

18                 And then the last part I think you stated,  
19 I just wanted to reconfirm is:

20                 On June 17, 2020, the Commission mailed the  
21 June 24th-25th, 2020 Notice of Agenda to the Parties,  
22 to the Statewide, Oahu and Hawaii regular and email  
23 mailing lists.

24                 I think that's the only thing that we --  
25 was kind of scrambled.

1           CHAIRPERSON SCHEUER: Thank you,  
2 Commissioner Wong.

3           COMMISSIONER WONG: Okay. And I also have  
4 a -- after we -- I would like to state something for  
5 the record, Chair, if I may. Oh, no, not for this.

6           CHAIRPERSON SCHEUER: Please proceed.

7           COMMISSIONER WONG: It's the next one,  
8 sorry, Chair. You can keep on going.

9           CHAIRPERSON SCHEUER: Okay. Thank you.

10           I was -- (audio difficulty) -- is that  
11 correct?

12           Mr. Derrickson?

13           MR. DERRICKSON: Yes, Chair, staff confirms  
14 that there was no written public testimony received  
15 for this docket.

16           CHAIRPERSON SCHEUER: Thank you. Has  
17 anyone registered -- (audio difficulty).

18           MR. DERRICKSON: Not to our knowledge, no.

19           CHAIRPERSON SCHEUER: -- (audio  
20 difficulty).

21           -- who is meeting as a "ZOOM" attendee who  
22 wishes to testify on this docket? If so, raise your  
23 hand, using the raise your hand -- (audio  
24 difficulty).

25           Was that audio received?

1           COMMISSIONER WONG: Please restate that  
2 again, Chair.

3           CHAIRPERSON SCHEUER: Is there anyone who  
4 is attending this meeting as a "ZOOM" attendee who  
5 wishes to provide testimony? If so, raise your hand  
6 using the raise-your-hand function.

7           Was that -- confirming that was heard,  
8 Commissioner Wong?

9           COMMISSIONER WONG: Confirm, Chair.

10          CHAIRPERSON SCHEUER: I see nobody has  
11 raised their hands. So there will be no public  
12 testimony on this docket.

13          Mr. Church, do you care to make your -- any  
14 presentation?

15          You are muted, Mr. Church. You are still  
16 muted, Mr. Church.

17          MR. CHURCH: How is that?

18          CHAIRPERSON SCHEUER: That's better.

19          MR. CHURCH: Can you hear me?

20          CHAIRPERSON SCHEUER: Yes.

21          MR. CHURCH: I have two parts to my opening  
22 remarks. The first one is two pages, so -- and  
23 they're double spaced.

24          I first want to thank the Commissioners for  
25 continuing to hear matters regarding our property.

1 We recognize that the Commissioners serve the  
2 community unpaid and sacrifice a lot of personal and  
3 family time in order to serve us. We appreciate. I  
4 greatly respect the commitment that you volunteer  
5 because I also served as a volunteer board member for  
6 a large regional hospital for over ten years.

7 My wife, Joni, and I purchased our property  
8 in 2014. It was a beautiful gently sloped grassy  
9 former sugarcane field with deep fertile soils. We  
10 are a retired couple looking for a meaningful purpose  
11 in our retirement years. I grew up on a farm, and  
12 I've always enjoyed the family farm agricultural  
13 lifestyle.

14 We believed that we would be able to use  
15 the property for agricultural use. We knew that it  
16 appeared to be zoned Conservation, but we also knew  
17 that it was prime agricultural land which had been in  
18 sugarcane production since the 1850s. We also knew  
19 that agriculture use of the property had continued  
20 despite its apparent Conservation zoning in the '60s  
21 and that DLNR's rules had somehow allowed such use  
22 without any formal permit issued by the DLNR.

23 We very quickly encountered significant  
24 resistant by the DLNR to all of our planned land uses  
25 and particularly agricultural uses, and that is why

1 we are here again today.

2 We currently have three unresolved matters  
3 before the Commission. Number one, Petition A18-805  
4 which was submitted approximately two years ago.

5 Number two, a proposed FONSI which appears  
6 on today's docket.

7 And Number three, a request for  
8 determination by the Commission regarding the correct  
9 location of the State Land Use District Boundary in  
10 the area of our property.

11 As a preliminary matter, we are aware that  
12 normally matters set before the Commission are posted  
13 on the LUC's website for public consideration. We  
14 have noted that the title of the three matters which  
15 I just referred are posted but only the proposed  
16 FONSI's text exists. Neither the original petition  
17 nor the request for a boundary interpretation are  
18 posted.

19 We had expected that our request for a  
20 boundary determination would also be dealt with by  
21 the Commission today, and if we find that request  
22 results favorable, we believe that the proposed FONSI  
23 is no longer relevant.

24 Our request that the Commission determine  
25 the correct location of the SLUD boundary in the area

1 of our property is founded in HAR 15-15-22(f) which  
2 states, quote, whenever subsections A, B, C, D or E  
3 cannot resolve an uncertainty concerning the location  
4 of any district line, the Commission, upon written  
5 application or upon its own motion, shall determine  
6 the location of those district lines, end of quote.

7 The text of our request document describes  
8 our belief that uncertainty remains. We do accept  
9 that the proposed FONSI is in a public record, and we  
10 are prepared to proceed in that matter also today.  
11 Before proceeding with the proposed FONSI, we ask  
12 that the Commission issue a final determination  
13 regarding our request for a boundary determination.  
14 And if not, why not, and when, as this may be the  
15 most efficient way to deal with our matters. And  
16 that's the end of my opening remark.

17 CHAIRPERSON SCHEUER: Thank you, Mr.  
18 Church.

19 Are there questions for Mr. Church from the  
20 County?

21 MS. MELLON-LACEY: No questions.

22 CHAIRPERSON SCHEUER: Thank you.

23 Office of Planning?

24 MS. APUNA: No questions.

25 CHAIRPERSON SCHEUER: Commissioners?

1           And before there are any questions, I will  
2 just mention for everyone's information that an  
3 employee of Spectrum showed up in my driveway a  
4 moment ago and told my wife, oh, by the way, we're  
5 doing some work. You might have problems today.  
6 This was the forewarning they gave us.

7           Commissioners, do you have questions for  
8 Mr. Church?

9           Ms. Cabral.

10           VICE CHAIR CABRAL: Yeah, thank you. I  
11 think I'm getting confused. Is Mr. Church asking for  
12 action from us different than what was originally on  
13 our agenda to take action on, is what I'm hearing  
14 from him here, I mean?

15           CHAIRPERSON SCHEUER: So Mr. Church can  
16 clarify his request, but I will clarify too that the  
17 only items that we can take action on are agendized  
18 items.

19           VICE CHAIR CABRAL: Okay. Okay. Well,  
20 thank you. That's what I thought, so I'd like to  
21 make sure we just focus on information on the agenda  
22 items so we can move forward and not -- so it might  
23 be more efficient to expand our reach. Thank you.

24           CHAIRPERSON SCHEUER: Commissioner Okuda?

25           COMMISSIONER OKUDA: Thank you, Chair.

1           This is not so much a question but a  
2 comment. If you think the comment is not proper at  
3 this point in time, I'll withhold the comment.

4           CHAIRPERSON SCHEUER: Comments might be  
5 better made during deliberation if there is a motion.

6           COMMISSIONER OKUDA: Thank you, Chair.

7           CHAIRPERSON SCHEUER: Commissioners, are  
8 there any questions for Mr. Church? Seeing none.

9           Will the County of Hawaii please provide  
10 their comments on this matter?

11          MS. MELLON-LACEY: The County has no  
12 objections to the EA or the FONSI finding.

13          CHAIRPERSON SCHEUER: Thank you.

14          Commissioners, any questions for the  
15 County?

16          Commissioner Okuda? No.

17          Okay. No questions from the County.

18          Ms. Apuna?

19          MS. APUNA: Office of Planning has no  
20 objections to Petitioner's motion.

21          CHAIRPERSON SCHEUER: Okay. Mr. Church, do  
22 you have any final comments or questions?

23          MR. CHURCH: I did ask, requested that  
24 these two questions been asked and answered.

25          I'll first say that both the proposed FONSI



1 and the request were submitted in the same package on  
2 the same day. And I don't understand why the request  
3 also won't be heard.

4 I did -- in that regard, I also asked why  
5 the text of the Petition has yet to show up on the  
6 LUC's website. It seems to me that if you're  
7 inviting public comments on anything regarding that  
8 whether it be EA or the FONSI people ought to be able  
9 to read the text of the Petition as-is the case for  
10 the Barrys.

11 For example, their EA hadn't been  
12 determined yet, and their FONSI hadn't been  
13 determined yet and their Petition showed up.

14 So I don't understand why ours didn't. And  
15 also for the request, the text is also not up, nor is  
16 it apparently going to be heard today. And I  
17 basically am asking why? And if not, when will I --  
18 these matters be heard?

19 That's all before I go to my opening  
20 remarks regarding the FONSI.

21 CHAIRPERSON SCHEUER: Sorry, can you repeat  
22 your last sentence? I don't understand what you  
23 were -- what you said.

24 MR. CHURCH: I said, I asked the two  
25 questions, and then I said I'm prepared to move ahead

1 with my opening statement on the FONSI.

2 CHAIRPERSON SCHEUER: You have not made  
3 your opening statement on the FONSI or you --

4 You're muted.

5 MR. CHURCH: I have not yet made my opening  
6 statement on the FONSI. It's short.

7 CHAIRPERSON SCHEUER: Mr. Church, just to  
8 be clear, as I stated, our agenda item as was  
9 published today, is published for today's meeting,  
10 is -- was to Consider the Acceptance of your Final  
11 Environmental Assessment.

12 So when I asked for your comments at the  
13 beginning, they were comments on the EA and the  
14 FONSI. If you have additional comments you wish to  
15 make, you should make them now.

16 MR. CHURCH: The FONSI is basically a  
17 reprint of the EA with modifications that have been  
18 noted on the first page of the FONSI. Basically,  
19 strike through was used for words that didn't --  
20 like, for example, Draft EA, I struck through, and I  
21 double underlined any added text which -- so  
22 basically the word "Draft EA" was struck through, and  
23 the double underline text was added "proposed FONSI".

24 Generally, that's pretty much all the  
25 changes to the original EA. I will add that there

1 was -- no letters of comment have been received by  
2 us, and there's none posted on the LUC's website  
3 regarding the proposed FONSI.

4 CHAIRPERSON SCHEUER: Okay. Thank you, Mr.  
5 Church. This is your last chance to comment on  
6 anything regarding this agenda item, understood?

7 MR. CHURCH: Correct.

8 CHAIRPERSON SCHEUER: Okay. I will ask Mr.  
9 Orodenker, our Executive Officer, to explain why the  
10 boundary item request was not on this agenda.

11 EXECUTIVE OFFICER: Thank you, Mr. Chair.

12 Mr. Church has been informed that under the  
13 process for boundary interpretations, they are  
14 ministerial; they are not a matter for the Commission  
15 on the drafting tech. And most of those -- because  
16 they're a factual matter, the boundaries are what the  
17 boundaries are.

18 If there is a boundary determination  
19 request, there is a process that needs -- Mr. Church  
20 needs to follow to apply for a boundary  
21 interpretation if that's what he's asking for. And  
22 that's why it wasn't agendized for the Commission,  
23 because it's not a matter before the Commission.  
24 It's a matter in front of staff and the drafting  
25 tech.

1           CHAIRPERSON SCHEUER: Thank you, Mr.  
2 Orodenker.

3           Commissioners, do you have any final  
4 questions for Mr. Church?

5           Commissioner Cabral.

6           VICE CHAIR CABRAL: I'm concerned. I'm not  
7 quite sure this is a question, might be more for  
8 staff than Mr. Church, but it appears that Mr. Church  
9 is indicating that he feels that the process isn't  
10 being followed as he feels it should be. And I  
11 appreciate Executive Director Orodenker's  
12 explanation, but I would -- I know that we have  
13 procedures that we're mandated to follow, and I can  
14 appreciate that the attorneys who deal with us are  
15 familiar with those. And that Mr. Church is, in  
16 fact, himself, the Petitioner, dealing with this, but  
17 should it be such that maybe we should consider  
18 delaying any action on this matter until Mr. Church's  
19 clarification is clearly made with Mr. Church as to  
20 what's on the agenda, and why it is or isn't on the  
21 agenda so that there's no follow-up objections later  
22 on?

23           I just want to make sure everything is  
24 clear in his mind, or maybe he can then have time to  
25 consult with an attorney who understands these

1 matters to get it clarified.

2 CHAIRPERSON SCHEUER: Okay. I'm going to  
3 assume that was a question for Mr. Orodenker.

4 VICE CHAIR CABRAL: Yes.

5 EXECUTIVE OFFICER: Thank you, Mr. Chair.

6 Mr. Church has been sent the information  
7 necessary to complete -- on the process necessary to  
8 complete a boundary determination. I mean, it's up  
9 to the Commission on whether they want -- they want  
10 to defer this, but nothing is going to change. We  
11 are in constant contact with Mr. Church.

12 MS. CHOW: Chair, may I add something to  
13 that?

14 CHAIRPERSON SCHEUER: Deputy AG Chow.

15 MS. CHOW: So under the applicable LUC  
16 Rules, 15-15-22, subsection (d) that says the  
17 Executive Officer may use all applicable Commission  
18 records in determining district boundaries.

19 So it appears from your rules that the  
20 initial determination of district boundaries is done  
21 by the Executive Officer. And then only under  
22 subsection (f) whenever subsections (a) (b) (c) (d)  
23 or (e), cannot result in uncertainty concerning the  
24 location of any district line, then Commission, upon  
25 written application, shall determine the location of

1 those district lines.

2           You know, I think the process is that the  
3 Executive Director and the staff makes any initial  
4 determination of where the district boundary lines  
5 are, or an interpretation, and only if there is  
6 continued uncertainty with that then come back to the  
7 Commission -- or comes to the Commission.

8           CHAIRPERSON SCHEUER: Thank you, Ms. Chow,  
9 for that response to Commissioner Cabral's comments.

10           So just to confirm where we have been. Mr.  
11 Church was given an opportunity to present. He  
12 provided a general set of comments as well as  
13 specific comments on his FONSI, the item that's in  
14 front of us now.

15           We've asked internal questions of our  
16 staff. I believe that we are now done with the  
17 presentations on this matter, and we are actually now  
18 prepared to consider -- I will consider a motion on  
19 the agenda item on whether or not the LUC accepts or  
20 does not accept the FEA, and whether that motion  
21 would actually further authorize the LUC's Executive  
22 Officer to notify the Office of Environmental Quality  
23 Control and the Parties that the LUC has made a  
24 decision on this matter.

25           Any motion, whether it is to accept, deny

1 or defer should state the reasons for that motion.

2 COMMISSIONER WONG: Chair?

3 CHAIRPERSON SCHEUER: Commissioner Wong.

4 COMMISSIONER WONG: I would like to make a  
5 motion.

6 CHAIRPERSON SCHEUER: Please.

7 COMMISSIONER WONG: In the matter of Docket  
8 No. A18-805 Church, Mr. Church, the Petitioner, has  
9 provided all the relevant information covering the  
10 potential environmental impact of proposed mitigation  
11 measures for this project.

12 I believe that we should accept the finding  
13 of no significant impacts as warranted by HRS Chapter  
14 343 and HAR 11-200.1-13(b), and direct the Executive  
15 Officer to file Notice of the Commission's actions  
16 together with the FEA to the Department of Health  
17 Office of Environmental Quality Control, direct the  
18 Petitioner to work with the LUC staff to provide all  
19 the necessary documents for filing of the OEQC.

20 That's it.

21 CHAIRPERSON SCHEUER: Thank you for the  
22 motion, Commissioner Wong. Is there a second?

23 COMMISSIONER OHIGASHI: I'll second it.

24 CHAIRPERSON SCHEUER: Commissioner Ohigashi  
25 has seconded the motion.

1           We are in discussion, Commissioners.

2           COMMISSIONER WONG: Chair?

3           CHAIRPERSON SCHEUER: Commissioner Wong.

4           COMMISSIONER WONG: Thank you. I just  
5 wanted to say, Mr. Church, reviewing your -- as a lay  
6 person and not someone who's paid to do EA's, it was  
7 a very (inaudible) EA for a lay person. And that's  
8 why I want to make the motion to accept a finding of  
9 no significant impact.

10           So I just wanted to say you did a very good  
11 job, and that's why I'm supporting this -- I'm making  
12 this motion.

13           CHAIRPERSON SCHEUER: Thank you,  
14 Commissioner Wong.

15           Commissioners, we're in discussion on the  
16 motion. Is there any further discussion on the  
17 motion before us, Commissioners?

18           If there is none, a motion has been made by  
19 Commissioner Wong and seconded by Commissioner  
20 Ohigashi.

21           Mr. Orodener, please poll the Commission.

22           EXECUTIVE OFFICER: Thank you, Mr. Chair.  
23 The motion is to accept a Finding of No Significant  
24 Impact and direct The Executive Officer to  
25 (indecipherable.)



1 Commissioner Wong?

2 COMMISSIONER WONG: Aye.

3 EXECUTIVE OFFICER: Commissioner Ohigashi?

4 COMMISSIONER OHIGASHI: Yes.

5 EXECUTIVE OFFICER: Commissioner Cabral?

6 VICE CHAIR CABRAL: Yes.

7 EXECUTIVE OFFICER: Commissioner Aczon?

8 VICE CHAIR ACZON: Yes.

9 EXECUTIVE OFFICER: Commissioner Chang?

10 COMMISSIONER CHANG: Yes.

11 EXECUTIVE OFFICER: Commissioner Giovanni

12 is absent.

13 Commissioner Okuda?

14 COMMISSIONER OKUDA: Yes.

15 EXECUTIVE OFFICER: Chair Scheuer?

16 CHAIRPERSON SCHEUER: Yes.

17 EXECUTIVE OFFICER: Thank you, Mr. Chair.

18 The motion passes unanimously.

19 CHAIRPERSON SCHEUER: Thank you very much.

20 Thank you, Mr. Church. I hope this provides some  
21 level of satisfaction to your long quest to be able  
22 to farm your property.

23 We are now going to go into recess. It is  
24 10:26 A.M. Due to the actions of my internet  
25 provider not announcing they are doing work on my

1 system, we will adjourn until 11:15 A.M. when I will  
2 physically relocate to the Land Use Commission  
3 offices for the continuance of this matter taking up  
4 Declaratory Order DR20-69 and DR 20-70 County of  
5 Hawaii and Rosehill, et al.

6 With that we are adjourned for the moment  
7 in recess.

8 (Recess taken.)

9 DR20-69 DR20-70

10 CHAIRPERSON SCHEUER: Good morning.

11 The next agenda items are both requests for  
12 Declaratory Orders DR20-69 County of Hawaii, and  
13 DR20-70 Rosehill, et al.

14 Before we begin, I would like to take a  
15 moment to explain what these proceedings are about  
16 today, and how certain things have to be handled to  
17 be sure that we are in compliance with Subchapters 5  
18 and 14 of our rules as well as all of the relevant  
19 statutory requirements with regard to public  
20 meetings.

21 First, please keep in mind this is a  
22 request for Declaratory Ruling. That means the  
23 Commission is being asked to interpret a statute,  
24 rule or document and not to make a determination on a  
25 factual dispute.

1           While certain facts may be important to  
2 making an interpretation of law, in this type of  
3 proceeding the facts are not really in dispute. The  
4 Commission is taking the basic facts as undisputed.  
5 What we are here to decide is the very limited issues  
6 presented by the Petitioner County of Hawaii and  
7 Petitioner Rosehill, et al.

8           Because of that this is not, nor can it be,  
9 a contested case hearing where evidence is presented  
10 and witnesses are provided and cross-examination is  
11 allowed.

12           I will remind everyone of that. Again, the  
13 facts are not in dispute. The application of law to  
14 accepted facts is what we are focused on.

15           Second, I would like to impress upon  
16 everyone that under Subchapter 14 of our rules, the  
17 only true parties are the Declarants or Petitioners  
18 (County of Hawaii and Rosehill, et al.) Everyone  
19 else, including the Office of Planning, are in effect  
20 "public witnesses".

21           After the witness has completed their  
22 testimony, the County of Hawaii, Rosehill, et al, and  
23 the Commissioners will be given the opportunity to  
24 ask questions.

25           Also after all public witnesses have had a

1 chance to speak, including Office of Planning, the  
2 representatives for County of Hawaii, as well as  
3 Rosehill, et al, will be given as much time as they  
4 need to present their cases.

5 After that, the Commissioners will again be  
6 given the opportunity to ask questions of the  
7 Petitioners or anyone who has testified.

8 Upon completion of all testimony and  
9 questions, the Commission will deliberate and  
10 hopefully come to a decision.

11 The petitioning parties in both of these  
12 dockets have filed a Stipulation to Consolidate  
13 Order. The Commission will first hear and take  
14 action on that request before hearing either of the  
15 separate requests for declaratory order.

16 Will the Petitioning parties for Docket No.  
17 DR20-69 and DR20-70 please identify yourself for the  
18 record and make sure to enable your audio.

19 MR. MUKAI: Good morning, John Mukai,  
20 Deputy Corporation Counsel on behalf of the  
21 Department of Planning, County of Hawaii.

22 Also present is Deputy Corporation Counsel  
23 Diana Mellon-Lacey. Also Planning Director Michael  
24 Yee, and April Suprenant who is the Acting Deputy  
25 Director of Planning for the County of Hawaii.

1           CHAIRPERSON SCHEUER: Thank you very much.

2           MR. CHIPCHASE: Good morning, Chair,  
3 Commissioners, Cal Chipchase for Petitioner Linda K.  
4 Rosehill and the other Petitioners, with me off  
5 camera is Chris Goodin.

6           CHAIRPERSON SCHEUER: Thank you very much.

7           Let me now update the record. On May 19th  
8 of this year, the Commission received the County of  
9 Hawaii's Petition for Declaratory Order, Memorandum  
10 of Authorities which we describe as DR20-69.

11           On May 22nd, we received Petitioner  
12 Rosehill, et al's Petition and incorporated  
13 Memorandum, Verification of Petition, and Exhibits 1  
14 through 2, which we describe as DR20-70.

15           On June 11th, the Commission received a  
16 Stipulation to Consolidate signed by the  
17 representatives of Hawai'i County and Rosehill, et  
18 al.

19           On June 17th, the Commission mailed the  
20 June 24th and 25th Notice of Agenda to the Parties,  
21 Statewide, Oahu and Hawaii regular and email mailing  
22 lists.

23           On June 18th, the Commission received  
24 Office of Planning's Response to Petitioner's and  
25 County of Hawai'i's Petition for Declaratory Order.

1           On June 19, the Commission received  
2 Rosehill, et al., Statement of Position Regarding the  
3 Petition in Docket No. DR20-69.

4           On June 23rd, the Commission received  
5 Rosehill, et al., Statement of Position Regarding  
6 Petition in Docket No. DR20-70 Regarding OP's  
7 Response to Petitioner's and the County of Hawai'i's  
8 Petitions for Declaratory Order filed June 18, 2020.

9           Between June 17th and June 22nd, the  
10 Commission received written public testimony from  
11 Steven Bell, Peter Eising, and Lynn Krieger.

12           I will now recognize the written testimony  
13 submitted in this matter. Is there any further  
14 testimony, Mr. Derrickson?

15           MR. DERRICKSON: There has been no further  
16 public testimony submitted.

17           CHAIRPERSON SCHEUER: I will next go over  
18 our procedures for the docket.

19           First, I will give an opportunity for the  
20 Petitioner to comment on the Commission's policy  
21 governing reimbursement of hearing expenses.

22           Then I will call on any individuals  
23 desiring to give public testimony via ZOOM to  
24 identify themselves using the raise-hand feature.  
25 All such individuals will be called upon in turn, and

1 I'll be working with Mr. Derrickson on those.

2 I will swear you in to a virtual witness  
3 box. You'll have two minutes to give testimony.  
4 After completion of any testimony, I will call for  
5 any questions on the testimony. After that I will  
6 call for the Petitioners to make their presentations.

7 Are there any questions on our procedures  
8 for today? County of Hawaii, or Mr. Chipchase, any  
9 questions for you?

10 MR. MUKAI: No questions from County of  
11 Hawaii.

12 MR. CHIPCHASE: No, Chair.

13 CHAIRPERSON SCHEUER: Commissioners, are  
14 there any disclosures to be made?

15 Commissioner Wong.

16 COMMISSIONER WONG: I would like to  
17 disclose approximately 13 to 15 years ago I worked  
18 with Ms. Linda Rosehill in a firm, and she was my  
19 direct supervisor. And after that I left the firm  
20 and at this point in time I have no monetary issues  
21 with her. I don't get anything from her. And I  
22 think I can be fair and objective to this issue.

23 CHAIRPERSON SCHEUER: Thank you.

24 Does either County of Hawaii or Mr.  
25 Chipchase object to the continued participation of

1 Commissioner Wong in this hearing?

2 MR. MUKAI: County of Hawaii has no  
3 objection, based on Mr. Wong's disclosure.

4 MR. CHIPCHASE: No objection, Chair.

5 CHAIRPERSON SCHEUER: Commissioners, any  
6 further disclosures?

7 I will note for the record that in addition  
8 to professionally interacting with Ms. Rosehill, Mr.  
9 Randy Vitousek, who is one of the captioned attorneys  
10 for the Rosehill Petitioners, has recently joined a  
11 board which I am on as well, but I have no financial  
12 relationship or other kind of relationship in this  
13 matter. And I believe I can continue to participate  
14 in this matter fairly and impartially.

15 With that said, I will ask the County and  
16 Mr. Chipchase the same question.

17 MR. MUKAI: County of Hawaii has no  
18 objection.

19 MR. CHIPCHASE: No objection, Chair.

20 CHAIRPERSON SCHEUER: Thank you very much.

21 So both County of Hawaii and Mr. Chipchase,  
22 have you reviewed HAR 15-15-45.1 with regard to  
23 hearing expenses, reimbursement, and are you prepared  
24 to share your client's position with respect to the  
25 same? County first.



1 MR. MUKAI: County has no position.  
2 There's really no hearing expenses other than time.

3 MR. CHIPCHASE: To answer your question,  
4 Chair, yes, we reviewed; yes, we accept; no  
5 objections to it.

6 CHAIRPERSON SCHEUER: Thank you very much.

7 I will now repeat for the record, public  
8 testimony on this matter was received by Stephen  
9 Bell, Peter Eising, and Lynn Krieger. Their  
10 testimonies are posted to the LUC website.

11 At this time I will ask anybody who has  
12 entered the meeting via "ZOOM" to use the raise-hand  
13 function if you wish to provide public testimony on  
14 this matter.

15 We have a member of the public, Mr. Eising  
16 is being promoted into the panel. Mr. Bell, has also  
17 raised his hand. I will get to you next.

18 When you come into the room, please unmute  
19 yourself and turn on your camera.

20 Good morning. Can you hear me and can you  
21 test your audio, please?

22 THE WITNESS: This Pete Eising. Can you  
23 hear me?

24 CHAIRPERSON SCHEUER: Yes, we can hear you  
25 now. I'm going to swear you in and allow you to have

1 two minutes for testimony.

2 Do you swear or affirm the testimony you're  
3 about to give is the truth?

4 THE WITNESS: I do, sir.

5 CHAIRPERSON SCHEUER: Thank you. Please  
6 proceed stating your name for the record and giving  
7 your testimony.

8 PETER EISING

9 Was called as a witness by and on behalf of the  
10 Public, was sworn to tell the truth, was examined and  
11 testified as follows:

12 DIRECT EXAMINATION

13 THE WITNESS: My name is Peter W. Eising.  
14 We've lived at Kohala Ranch for the past 20-years  
15 where we have owned and operated the largest  
16 grapefruit growing operation, farm that is, in the  
17 State. We have 290 grapefruit trees, and we produce  
18 and sell between 15,000 and 20,000 -- 30,000 pounds  
19 of grapefruit a year. So we're a sizeable operation  
20 and we are on Kohala Ranch.

21 I have a lot of respect for the Cade  
22 Schutte law firm, and Mr. Vitousek, however, in this  
23 case when they try to say that Short-term vacation  
24 Rentals that are advertised and operated as  
25 resort-style enterprises that they are somehow farm

1 dwelling. It seems to me that they are facing an  
2 impossible challenge.

3 Short-term vacation rentals and farm  
4 dwellings are totally different. In that regard,  
5 farm dwellings are clearly defined in Hawaii  
6 statutes, and my two written submittals speak to  
7 this. I don't want to be repetitive, so I will leave  
8 it at that, and should the Commissioners have  
9 questions for me, I'm available.

10 CHAIRPERSON SCHEUER: Thank you very much,  
11 Mr. Eising.

12 First, I'll offer the Petitioner to ask  
13 questions of you and then the Commission.

14 Does the County have any questions for the  
15 witness?

16 MR. MUKAI: No questions from the County of  
17 Hawaii.

18 CHAIRPERSON SCHEUER: Rosehill, et al.?

19 MR. CHIPCHASE: No questions, Chair.

20 CHAIRPERSON SCHEUER: Commissioners?

21 COMMISSIONER WONG: Chair.

22 CHAIRPERSON SCHEUER: Commissioner Wong.

23 COMMISSIONER WONG: Thank you, Chair.

24 Mr. Eising, you know, the covenant for the  
25 Kohala Ranch that you said in your testimony, when

1 was that enacted?

2 THE WITNESS: I can't give an exact date,  
3 but it's been within the last year.

4 COMMISSIONER WONG: So you don't know if  
5 that -- because you said that the short-term vacation  
6 rentals are not allowed on the Kohala Ranch Estate,  
7 correct?

8 THE WITNESS: There even is a fine of \$5000  
9 for each time that one is discovered advertising that  
10 shows that they are trying to rent.

11 COMMISSIONER WONG: So when you have that  
12 property, your property and other people's properties  
13 on the Kohala Ranch site, when you bought the  
14 property -- or did you know about that short-term  
15 vacation rental issue, that it was not allowed?

16 THE WITNESS: I bought the property  
17 20 years ago and it never was a factor.

18 COMMISSIONER WONG: And when, do you know,  
19 it became a factor? Recently or --

20 THE WITNESS: Within the last couple of  
21 years, because there's been an increase substantially  
22 of short-term vacation rentals in the ranch. I think  
23 there are over 30 of them now. And it becomes of  
24 concern to the board and the community.

25 COMMISSIONER WONG: I'm going to just go

1 off topic little bit.

2 But you're a farmer, correct?

3 THE WITNESS: Yes, sir.

4 COMMISSIONER WONG: So you do farm on that  
5 property?

6 THE WITNESS: I do, yes.

7 COMMISSIONER WONG: And your neighbors also  
8 farm on that property that are not vacation rentals,  
9 correct?

10 THE WITNESS: Some do. Some have animals.  
11 Some have other means to be considered agricultural.  
12 And you can tell the ones that are agricultural by  
13 also the X factor, because there is a tax benefit for  
14 having agriculture on your property.

15 COMMISSIONER WONG: So you just said there  
16 is tax benefit. Is that the property tax?

17 THE WITNESS: Yes.

18 COMMISSIONER WONG: Thank you, Mr. Eising,  
19 that's very enlightening.

20 THE WITNESS: Thank you.

21 CHAIRPERSON SCHEUER: Commissioners, any  
22 further questions for Mr. Eising?

23 Commissioner Chang.

24 COMMISSIONER CHANG: Thank you, Mr. Eising.  
25 This is Commissioner Chang. I just have a few

1 questions.

2           How long have you been farming the  
3 grapefruits on this particular property?

4           THE WITNESS: Twenty years.

5           COMMISSIONER CHANG: Are you aware of the  
6 Petitioners' properties within the Kohala -- is it  
7 Kohala Ranch?

8           THE WITNESS: I'm aware of some of them.  
9 And there is one that's relatively adjacent, actually  
10 within 300 yards of one of our properties.

11           COMMISSIONER CHANG: The properties that  
12 you are personally aware of that are owned by the  
13 Petitioners, any one of the Petitioners, can you  
14 identify what kind of farming activities occur on  
15 there?

16           THE WITNESS: None.

17           COMMISSIONER CHANG: How large is your  
18 property?

19           THE WITNESS: We have three properties,  
20 each one of them is about three-and-a-half acres.

21           COMMISSIONER CHANG: And on your three  
22 properties --

23           THE WITNESS: The property that is of  
24 concern is a property that has a very nice house, a  
25 pool, basketball court, five bedrooms. They

1 advertise on the internet for -- basically their  
2 earning comes from renting to people from outside.

3 COMMISSIONER CHANG: Mr. Eising, you said  
4 you have three properties.

5 THE WITNESS: Three lots adjacent.

6 COMMISSIONER CHANG: And on your three  
7 lots, are you growing grapefruit on all three lots?

8 THE WITNESS: We're growing grapefruit on  
9 two of them, the other one we have beehives to  
10 support the propagation of the trees. This is all  
11 considered agricultural.

12 COMMISSIONER CHANG: Thank you so much, Mr.  
13 Eising. I have no other further questions, Mr.  
14 Chair.

15 THE WITNESS: Thank you.

16 CHAIRPERSON SCHEUER: Thank you very much,  
17 Commissioner Chang.

18 Commissioners, further questions for Mr.  
19 Eising? If not, thank you very much for your  
20 testimony, and thank you very much for your  
21 production of food for local consumption.

22 THE WITNESS: Thank you for giving me the  
23 opportunity.

24 CHAIRPERSON SCHEUER: You're welcome.

25 Our next testifier, Mr. Derrickson.

1 MR. DERRICKSON: Stephen Bell.

2 CHAIRPERSON SCHEUER: Our next testifier is  
3 Stephen Bell, who will be admitted into the room.

4 MR. DERRICKSON: Ask him to start his video  
5 and unmute himself.

6 CHAIRPERSON SCHEUER: Okay.

7 Mr. Bell, you're muted. If you could  
8 unmute yourself, please. There we go.

9 THE WITNESS: Can you hear me now?

10 CHAIRPERSON SCHEUER: We can hear you now.

11 Do you swear or affirm the testimony you're  
12 about to give is the truth?

13 THE WITNESS: Yes, I do.

14 CHAIRPERSON SCHEUER: Please proceed.

15 THE WITNESS: I have a quick question as to  
16 procedure. It was my understanding that I would have  
17 three minutes according to the website. My testimony  
18 comes in about two minutes and 40 seconds.

19 Will that be acceptable?

20 CHAIRPERSON SCHEUER: Yes, it will. Thank  
21 you for the clarification.

22 THE WITNESS: May I proceed?

23 CHAIRPERSON SCHEUER: Yes.

24 STEPHEN BELL

25 Was called as a witness by and on behalf of the



1 Public, was sworn to tell the truth, was examined and  
2 testified as follows:

3 DIRECT EXAMINATION

4 THE WITNESS: Good morning. My name is  
5 Stephen Bell, and I reside on Kohala Ranch, built my  
6 home here, because Kohala Ranch is Agricultural  
7 District and I wanted to live and retire in a quieter  
8 rural residential community.

9 The issue before the Commission today is  
10 simple, are short-term vacation rentals a permitted  
11 use as a farm dwelling in the State Agricultural  
12 District?

13 So let me briefly explain why no one who  
14 has ever been to our Kohala Ranch community could say  
15 with a straight face that these vacation rentals are  
16 farm dwellings. They are, in fact, luxury villas  
17 that are being operated as unregulated resort-style  
18 commercial enterprises in the Ag Zoned District.

19 I can unequivocally state that these  
20 properties are not farm dwellings, and there is no  
21 agricultural activity occurring.

22 I refer you to the exhibits which I  
23 previously submitted in which the STVR owners and the  
24 Petitioners themselves on their own websites clearly  
25 advertise their properties as resort-style vacation

1 rentals and not farm dwellings.

2 I do not see how you can be both STVR and a  
3 farm dwelling at the same time since they are  
4 mutually exclusive.

5 The attorneys for the Petitioner Rosehill,  
6 et al., are making it very bizarre and various  
7 arguments that these rental properties are actually  
8 farm dwellings, and thus, can be rented out to  
9 vacation renters.

10 This is nothing but a specious attempt to  
11 camouflage illegal STVR's as farm dwellings in order  
12 to allow them to continue to operate in the  
13 Agricultural Zoned District.

14 What is going on here is that these  
15 off-island STVR owners are using vacation renters to  
16 generate income to pay for their Hawaii properties  
17 and enrich themselves to the detriment of our  
18 community.

19 Because these properties cater to transient  
20 vacation renters, we and our community of Kohala  
21 Ranch have been repeatedly subjected to excessive  
22 noise and light pollution emanating from these homes  
23 by groups of transient renters who are usually in  
24 party mode, and have no consideration for the  
25 neighbors or the norms of our residential community.

1           In conclusion, I agree with the analysis  
2 submitted by the State Office of Planning, and I have  
3 always understood that short-term vacation rentals  
4 were never permitted in what was supposed to be a  
5 quiet, rural Agricultural District.

6           I respectfully request that you uphold HRS  
7 205 as it was originally intended.

8           Thank you for your consideration.

9           CHAIRPERSON SCHEUER: Thank you, Mr. Bell.  
10 You are indeed at precisely three minutes.

11          CHAIRPERSON SCHEUER: County of Hawaii.

12          MR. MUKAI: No questions.

13          MR. CHIPCHASE: No questions, Chair.

14          CHAIRPERSON SCHEUER: Commissioners?  
15 Commissioner Wong.

16          COMMISSIONER WONG: Hello, Mr. Bell.

17                 So the previous testifier, Mr. Eising,  
18 stated that the covenants for the Kohala Ranch was  
19 done last year for short-term vacation rentals; is  
20 that correct?

21                 THE WITNESS: Let me add some  
22 clarification. It's not the Kohala Ranch CC&Rs, but  
23 the Kohala Ranch rules. There was a rule that was  
24 enacted by the board of the Community Association  
25 which essentially states -- I don't have that right

1 in front of me now -- but it was submitted I believe  
2 by Mr. Eising in an exhibit, that the community  
3 association is following the lead of the County of  
4 Hawaii that these activities are illegal in the Ag  
5 Zoned District. And they will now be assessing fines  
6 for this sort of activity as prima facie evidence.  
7 They have the advertising that these STVR owners are  
8 putting out to advertise their short-term vacation  
9 rentals.

10 This was enacted, I believe, January 23rd.  
11 It was at the last or the second to last board  
12 meeting of the Kohala Ranch Community Association. I  
13 am not on the board, I am just a simple homeowner on  
14 Kohala Ranch.

15 COMMISSIONER WONG: Another question is,  
16 are you a farmer?

17 THE WITNESS: No, I am not. I purchased my  
18 lot in 2005 in Kohala Ranch with the intention of  
19 building my retirement home, which I finished  
20 construction on in 2009.

21 As I stated in my testimony, I specifically  
22 chose Kohala Ranch because it was in the Agricultural  
23 District, and I wanted -- I've always been under the  
24 impression that under HRS 205 short-term vacation  
25 rental activity was not a permitted use.

1           At the time that I purchased my lot, it was  
2 under Ag -- well, the whole of Kohala Ranch is still  
3 under Ag zoning. I had had a tax break for about  
4 four years until I finished my house and we fenced  
5 the property off so it was no longer accessible for  
6 cattle grazing. So I'm paying a residential rate,  
7 and I am not a farmer at the time, but I have 3.25  
8 acres of land.

9           I am just newly retired. I now live  
10 full-time here as of about three months ago. And I  
11 may very well decide to take up farming at some point  
12 in time.

13           COMMISSIONER WONG: So you answered a part  
14 of my question about the tax issue.

15           So do you know neighbors who does have  
16 short-term vacation rentals, what their tax rates?

17           THE WITNESS: I do not know that.

18           COMMISSIONER WONG: The only other thing  
19 is, Mr. Eising's testimony showed some rates of  
20 renting their short-term vacation rentals; is that  
21 correct?

22           THE WITNESS: Yes.

23           COMMISSIONER WONG: So these people don't  
24 have any farm hands on there, or they don't even  
25 sell, let's say, grapefruits or tomatoes or anything

1 on their land at all?

2 THE WITNESS: Absolutely not. These are  
3 strictly vacation rentals. These are off-island  
4 owners. The only time there is any activity there is  
5 when the transient vacation renters are occupying the  
6 properties, and when the landscape or the pool  
7 person, et cetera, is on the property. Otherwise  
8 there is no agricultural activity at all.

9 COMMISSIONER WONG: Mr. Bell, you used the  
10 term "prima facie". Are you an attorney?

11 THE WITNESS: No, I'm not. I'm a  
12 physician.

13 COMMISSIONER WONG: You can answer this, or  
14 don't need to, say you don't know, do you believe  
15 that these units your neighbors who have short-term  
16 vacation rentals should be grandfathered in, yes or  
17 no?

18 THE WITNESS: No. I absolutely do not.  
19 When I first purchased my lot, and four years later  
20 in 2009 when I built my home, this was not an issue.

21 Since that time, or even in more recent  
22 times, probably in the last two or three years, maybe  
23 a little longer, since the internet has become so  
24 available for advertising vacation rentals, Air B and  
25 Bs, et cetera, et cetera, we have seen what were

1 previously residential homes had gotten sold. And  
2 immediately upon sale, these were turned into  
3 short-term vacation rentals strictly as an income  
4 generated type of enterprise.

5 So these were for the most part by and  
6 large not in existence when I first both purchased my  
7 lot in 2005 and finished my home in 2009.

8 There may have been an occasional one here  
9 and there, but since that time I now have at least  
10 three of these, three of the Petitioners in DR20-70  
11 are very close proximity to my home. So I get  
12 bombarded from all sides.

13 COMMISSIONER WONG: Thank you for your  
14 testimony. No further questions, thank you.

15 CHAIRPERSON SCHEUER: Commissioner Chang.

16 COMMISSIONER CHANG: Thank you, Mr. Bell,  
17 for your testimony.

18 When you purchased your home, was there a  
19 requirement that you had to do farming or  
20 agricultural use?

21 THE WITNESS: To my knowledge there was  
22 not. It was an -- Kohala Ranch is an Agricultural  
23 Zoned District where there is farming. When I  
24 purchased my lot in 2005, we had cattle grazing in  
25 the ranch, and cattle would roam on my property.

1           When I built my home, I fenced the property  
2 off, but it is still in the Agricultural District. I  
3 do pay residential property taxes, but the community  
4 of Kohala Ranch itself is in the Agricultural  
5 District. Many people have active agricultural farm  
6 businesses, some are -- some have sheep, cattle on  
7 their lot.

8           As I said, I have just recently -- I'm  
9 retired. So I'm trying to figure out what I'm going  
10 to be doing for the rest of my life. Farming may  
11 very well come into play here at some point.

12           COMMISSIONER CHANG: I just want to  
13 clarify.

14           So, Mr. Bell, your objection is not that  
15 they're not doing agriculture, because you're not  
16 doing agriculture either, it is that they are renting  
17 it out as short term rentals; is that correct?

18           THE WITNESS: That is essentially correct,  
19 that they are operating short-term vacation rentals  
20 in an Agricultural Zoned District, and for those of  
21 us who have been living here for several years now,  
22 this is all relatively new, or at least the  
23 proliferation of these short-term vacation rentals is  
24 relatively new in the last few years, particularly  
25 the last two, three years.



1 I'm sorry, I've lost my --

2 COMMISSIONER CHANG: One final question.

3 Are a majority of the lots within Kohala  
4 Ranch, are they doing agriculture? Are they doing  
5 farming? I mean, Mr. Eising, he's doing grapefruit.  
6 Are the majority of people in the Kohala Ranch doing  
7 farming?

8 THE WITNESS: I really cannot give you an  
9 honest opinion on that. Many do. It's somewhat  
10 uncomplicated in that -- I really don't know. Some  
11 do farming. Some people have sheep. Some have, you  
12 know, cows. Some do beehives, et cetera, but I  
13 personally have not, you know, gone around the entire  
14 3,000 or 4,000 acre ranch and examined everyone's  
15 property, so I don't know.

16 COMMISSIONER CHANG: Thank you very much,  
17 Mr. Bell.

18 Mr. Chair, I have no further questions.

19 CHAIRPERSON SCHEUER: Thank you,  
20 Commissioner Chang.

21 Commissioner Okuda.

22 COMMISSIONER OKUDA: Dr. Bell, thank you  
23 very much for your testimony.

24 At any time did anyone tell you that Hawaii  
25 law, and specifically HRS Section 205-4.5 has like a

1 laundry list of permitted or permissible uses within  
2 the Agricultural District?

3 THE WITNESS: Yes. In fact, I have had  
4 that list for as long as I have had my home here. So  
5 that has been in my possession. I have it.

6 COMMISSIONER OKUDA: So since you've had  
7 that, you've read that list; is that correct?

8 THE WITNESS: Yes, I have.

9 COMMISSIONER OKUDA: Would you agree with  
10 me -- I'm not asking you for an opinion as a lawyer,  
11 because I recognize that you're a physician as you  
12 testified to, but would you agree that that list,  
13 which lists the permissible uses within the  
14 Agricultural District, does not allow people to  
15 simply have a residence on the property unless there  
16 is active agriculture or active farming taking place  
17 on the property?

18 THE WITNESS: I don't know how to answer  
19 that question. I'm not an attorney and I would have  
20 to probably defer that one to an attorney.

21 I believe the question before the  
22 Commission is whether short-term vacation rental  
23 activity is a permitted use, and it's my  
24 understanding that HRS 205 does not allow short-term  
25 vacation rentals to be operated in the Ag Zoned

1 District.

2 COMMISSIONER OKUDA: And that's the issue  
3 that we're having to look at, but I'm just trying to  
4 find out whether or not you agree or disagree with  
5 the fact that when you look at 205-4.5, the statute  
6 requires active farming. I understand your response.

7 Thank you very much for your testimony.

8 THE WITNESS: Thank you.

9 CHAIRPERSON SCHEUER: Are there further  
10 questions, Commissioners?

11 If not, Mr. Bell, are you aware that a  
12 ranch bordering Department of Hawaiian Home Lands  
13 homestead at Kawaihae, the Kailapa Community?

14 THE WITNESS: Yes, I am.

15 CHAIRPERSON SCHEUER: Are you aware that  
16 Kohala Ranch provides water to the homesteaders at  
17 Kawaihae?

18 THE WITNESS: It's the Kohala Ranch Water  
19 Company which is not Kohala Ranch. That is a  
20 separate entity. That is owned by Mr. Robert Acree.  
21 It's called Kohala Ranch Water Company, but it has  
22 nothing to do with the community association of  
23 Kohala Ranch.

24 But Mr. Acree's water company provides  
25 water for several communities in the vicinity, one of

1 which is Kohala Ranch where I live. It also, I  
2 believe, supplies water for Kohala Estate, Kohala by  
3 the Sea, and the Hawaiian Homestead subdivision that  
4 you refer to, but it has nothing to do with Kohala  
5 Ranch itself.

6 CHAIRPERSON SCHEUER: But it provides this  
7 water to you and to your subdivision as well as to  
8 Kailapa?

9 THE WITNESS: Yes, but to my knowledge --  
10 yes, it does provide also to Kailapa.

11 CHAIRPERSON SCHEUER: Okay. What I was  
12 going to ask was that -- are you aware that the water  
13 company can cease to deliver service of water to  
14 Department of Hawaiian Home Lands with two years  
15 warning.

16 THE WITNESS: I don't know that.

17 CHAIRPERSON SCHEUER: Did you -- would you  
18 have thoughts on -- because that is actually the  
19 case, that is they can cease to provide water to  
20 Department of Hawaiian Home Lands as long as they  
21 give two years' notice.

22 Would you see, from a justice perspective,  
23 any concerns with water being provided to transient  
24 vacation rentals but not to Hawaiian Homesteads?

25 THE WITNESS: I'm not really sure how to

1 answer this question. I think any individual, as a  
2 matter of justice, who is legally residing in a  
3 property that is supplied by a water company, ought  
4 to receive water.

5 I'm just a lay person. I don't have  
6 anything else to really say about that.

7 CHAIRPERSON SCHEUER: Thank you.

8 Is there anything further for Mr. Bell,  
9 Commissioners? If not, thank you for your testimony.

10 THE WITNESS: Thank you very much. I  
11 appreciate it.

12 CHAIRPERSON SCHEUER: Next, I'm going to  
13 call on the Office of Planning, who in this docket,  
14 is being considered -- these two dockets -- being  
15 considered as a public testifier.

16 DAWN APUNA

17 Was called as a witness by and on behalf of the  
18 public, was not sworn to tell the truth, was examined  
19 and testified as follows:

20 DIRECT EXAMINATION

21 THE WITNESS: Mr. Chair, Deputy Attorney  
22 General Dawn Apuna on behalf of the Office of  
23 Planning.

24 First, we agree with the County that a farm  
25 dwelling may not be used as a short-term vacation

1 rental.

2           Very simply, a farm dwelling may not be  
3 used as a short-term vacation rental, because a  
4 short-term vacation rental does not fit within the  
5 definition of a "farm dwelling".

6           A short-term vacation dwelling or unit  
7 rented for transient accommodations for tourists,  
8 vacationers, or visitors rather than for long-term or  
9 permanent residence.

10           We've noted that a short-term vacation  
11 rental differs from a hotel or motel in that it is  
12 generally a residential dwelling that lacks onsite  
13 management to oversee guests, and is generally  
14 located outside of resort or hotel zoned areas.

15           Short-term vacation rentals are known to  
16 reduce the availability of permanent housing, drive  
17 up rents, and negatively impact the character and  
18 quality of neighborhoods.

19           Also short-term vacation rentals are  
20 different from long-term residential uses in that  
21 they are known to create negative impacts in  
22 residentially zoned areas. The Commission should  
23 therefore be wary of allowing short-term vacation  
24 rentals in nonresidentially zoned areas such as in  
25 the Agricultural District.

1           In contrast to a short-term vacation  
2 rental, a "farm dwelling" is either a single-family  
3 dwelling: (1) located on and used in connection with  
4 a farm; or (2) where agricultural activity provides  
5 income to the family occupying the dwelling. HRS  
6 Section 205-4.5(a)4. "Farm dwellings" are further  
7 qualified as "bona fide agricultural services and  
8 uses that supports the agricultural activities of the  
9 fee or leasehold owner of the property and accessory  
10 to" the agricultural uses.

11           HRS Section 205-2(d)(7). As an "accessory  
12 building or use", a farm dwelling must also be "a  
13 subordinate building or use which is incidental to  
14 and customary with a permitted use of the land."

15           HAR 15-15-03. The term "dwelling" is  
16 defined as "a building designed or used exclusively  
17 for single-family residential occupancy, but not  
18 including house trailer, multi-family unit, mobile  
19 home, hotel, or motel." HAR Section 15-15-03.

20           The use of a "farm dwelling" would  
21 therefore be used by a person or persons that occupy  
22 the farm dwelling to cultivate the land or raise  
23 livestock upon the property on which the farm  
24 dwelling sits. The occupants of a farm dwelling  
25 would have a direct connection or supporting role to

1 the farm or agricultural use of the property. A farm  
2 dwelling used as a short-term vacation rental lacks  
3 the connection with the agricultural use of the  
4 property because the occupant's use and purpose of  
5 their occupancy is for vacation/tourism lodging, and  
6 not for bona fide agricultural use. Also the  
7 exclusion of hotels and motels as a "dwelling"  
8 suggests that a farm dwelling is not intended for  
9 transient accommodations.

10 Alternatively, the rental of a farm  
11 dwelling to a vacationer or tourist who would also  
12 receive income from the agricultural activity of the  
13 farm would not be reasonable given the short duration  
14 of stay and purpose for occupying the dwelling. For  
15 these reasons, a short-term vacation rental does not  
16 fit within the definition of a "farm dwelling".

17 Regarding the Rosehill, et al., Petition  
18 and arguments.

19 First, Petitioner's reading of the  
20 definition of "farm dwellings" is so narrow that it  
21 completely neglects the basic elements of the  
22 definition, its statutory context, and the obvious  
23 meaning of a short-term vacation rental.

24 This State land use classification system  
25 is exactly that. It's a complete system, not pieces



1 to be broken off to be used in isolation of all else.  
2 You can't look solely at the definition of "farm  
3 dwelling" in order to determine the use of a  
4 short-term vacation rental. The State land use  
5 classification system, statutory interpretation in  
6 general, and common sense, requires that you look at  
7 the complete definition of "farm dwelling" and  
8 relevant language under HRS Section 205-2(d)(7), the  
9 definition of short-term vacation rental as provided  
10 in the Hawaii County Code, and the basic meaning of  
11 both terms. You must evaluate both definitions  
12 against each other to determine whether a farm  
13 dwelling may be used as a short-term vacation rental,  
14 i.e., that it may be rented for 30 days or less.

15           When you properly look at the definition of  
16 "farm dwelling" - which is a single-family dwelling  
17 located on and used in connection with a farm, or,  
18 where agricultural activity provides income to the  
19 family occupying the dwelling - and the meaning of a  
20 short-term vacation rental, which is a transient  
21 accommodation generally used by vacationers or  
22 tourists, you must conclude that they clearly are not  
23 the same or compatible uses.

24           Secondly, HAR 15-15-104 states, "On  
25 petition of any interested person, the commission may

1 issue a declaratory order as to the applicability of  
2 any statutory provision or of any rule or order of  
3 the commission to a specific factual situation."

4 Repeatedly, the Rosehill Petitioners state  
5 the issue presented is very narrow and limited to  
6 "whether, as of June 4, 1976, Chapter 205 regulated  
7 the minimum rental period of "farm dwellings". This  
8 is not fact specific.

9 All that Petitioners state is that they  
10 have been renting their single-family dwellings in  
11 the Agricultural District for 30 days or less. We  
12 can assume they are being rented as short-term  
13 vacation rentals because they are disputing the  
14 County's short-term vacation rental ordinance, but  
15 oddly they never provide the Commission with the  
16 actual use of their farm dwellings by the renters.

17 This is not a "specific factual situation"  
18 upon which this Commission can apply the definition  
19 of "farm dwelling" because it turns in either  
20 direction depending upon these additional, critical  
21 facts. Are the renters farming the land, or is there  
22 agricultural activity providing income to renters?  
23 Or are the renters vacationers or tourists?  
24 Petitioners don't say. These are necessary details  
25 to assist you, the Commission, in your decision.

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

7           As a result, Petitioners are putting forth  
8 a speculative or purely hypothetical scenario which  
9 does not involve an existing situation or one which  
10 may reasonably be expected to occur in the near  
11 future because it lacks these important details.  
12 This is a ground for denial of the Petition for  
13 Declaratory Order pursuant to HAR Section  
14 15-15-100(a)(1)(A).

15           HAR 15-15-104 states: "An order disposing  
16 of a petition shall apply only to the factual  
17 situation described in the petition or set forth in  
18 the order. It shall not be applicable to different  
19 fact situations or where additional facts not  
20 considered in the order exist." Thus, even with a  
21 favorable ruling Petitioner, such a ruling cannot be  
22 applied before the County because it will require  
23 additional facts.

24           Consequently, Petitioner's Petition fails  
25 to set forth a question, the resolution of which will

1 resolve the controversy before the County Planning  
2 Commission.

3           Based on the foregoing, the Commission  
4 should grant the County's Petition, and deny the  
5 Rosehill Petition in that even though the definition  
6 of "farm dwelling" does not expressly prohibit  
7 rentals of 30 days or less, farm dwellings may not be  
8 used for 30 days or less as a short-term vacation  
9 rental, and because Petitioner fails to provide the  
10 Commission with a specific enough factual situation  
11 upon which a declaratory ruling can be made.

12           CHAIRPERSON SCHEUER: Thank you, Ms. Apuna.  
13 Commissioners, are there questions for Ms. Apuna?

14           COMMISSIONER WONG: Chair.

15           CHAIRPERSON SCHEUER: Commissioner Wong.

16           COMMISSIONER WONG: Ms. Apuna, question.  
17 If you know, answer; if you don't, just say you don't  
18 know.

19           Do you know that the short-term vacation  
20 rentals are paying general excise or TAT?

21           MS. APUNA: Do I know if these specific  
22 Petitioners are paying TAT?

23           COMMISSIONER WONG: Or general excise tax  
24 for their rentals, vacation rentals?

25           MS. APUNA: I would not know specifically

1 if Petitioners, whether they are or not, but I think  
2 generally they are subject to State tax.

3 COMMISSIONER WONG: So the other question I  
4 have is Mr. Bill, the former guy testified before  
5 you, the witness, stated he's not a farmer but he  
6 lives on-site. So that's okay for Ag District,  
7 correct?

8 MS. APUNA: It's not. It's an interesting  
9 question. I think it's how you enforce it. I think  
10 people, they are on agricultural properties but as  
11 far as how the County is able to enforce and make  
12 sure that that owner or tenant is actually farming  
13 the land is a question of being able to see that  
14 that's happening.

15 But I think generally the Ag District  
16 would -- the intent is to have people farming the  
17 land.

18 COMMISSIONER WONG: So the other question I  
19 have is, for Ag District, you have to be farming such  
20 as someone does grapefruit or, you know, raising  
21 goats or doing something agriculture, correct?

22 MS. APUNA: Correct.

23 COMMISSIONER WONG: So let's say I live on  
24 an ag lot and I just grow one papaya tree. Would  
25 that be considered agricultural?

1 MS. APUNA: Potentially, I don't think  
2 there's specific standard as far as how much should  
3 qualify as agricultural.

4 COMMISSIONER WONG: So I could just keep  
5 like one horse or even a donkey on, let's say, one  
6 acre property, and say it's ag property?

7 MS. APUNA: I can't answer that. I would  
8 have to look further at the statute.

9 COMMISSIONER WONG: That's all. No further  
10 questions. Thank you.

11 CHAIRPERSON SCHEUER: Thank you,  
12 Commissioner Wong.

13 Commissioner Ohigashi.

14 COMMISSIONER OHIGASHI: Ms. Apuna, I have a  
15 question. I think it came out of your (audio  
16 difficulty).

17 If you recall, 15-15-23, HAR, says that  
18 except as provided in HAR and chapter -- that uses  
19 not expressly permitted are prohibited. And you go  
20 onto say that this rule identifies those uses in  
21 205A-2 and 205A-4.55.

22 So my question is really this. Is it your  
23 position that we've already declared that uses that  
24 are not expressly placed in that (audio difficulty).

25 MS. APUNA: I missed a couple words that

1 you said. You're asking if uses not expressly  
2 permitted are prohibited?

3 COMMISSIONER OHIGASHI: What I'm saying is  
4 it your position that using this particular rule,  
5 that we have already declared or already stated for  
6 the record that uses that are not specifically listed  
7 are prohibited?

8 MS. APUNA: Yes. I think that's correct.

9 COMMISSIONER OHIGASHI: I just wanted to  
10 know, thank you.

11 CHAIRPERSON SCHEUER: Thank you,  
12 Commissioner Ohigashi.

13 Commissioner Cabral.

14 VICE CHAIR CABRAL: Thank you. Thank you,  
15 Ms. Apuna, for your comments.

16 I'm here on the Big Island, and I've got to  
17 tell you that the entire definition and use of  
18 agriculturally zoned land is a huge issue because a  
19 massive amount of our land is in fact inside that  
20 zoning and on various sites, including very small  
21 parcels, less than one acre all the way to larger  
22 parcels. I myself live on agriculturally zoned land,  
23 but I have horses, cows, sheep and wild pigs, of  
24 course, and we do eat them -- not the horses.

25 Anyway, but my question is, and I think we

1 need to be really clear. I'm afraid that to get into  
2 the definition of whether use as a single-family  
3 dwelling complies, because I think it's a huge legal  
4 issue that's never been clarified. In selling real  
5 estate it comes up all the time.

6 So my question is going back to the  
7 focusing on the use of it as a vacation rental,  
8 because of this land has been, by all evidence, has  
9 no agricultural activities on it. It is considered  
10 not agriculturally used even when it's short term or  
11 long term rental.

12 By your definition, would you consider that  
13 in the event an activity on a property has, let's  
14 say, has horses, has a garden, has agricultural type  
15 activities going on, and then if, in the event that  
16 people came and rented it on a short term basis for  
17 the agricultural experience of grooming a horse,  
18 riding a horse, planting vegetables or fruit or  
19 something, would you consider, by your readings of  
20 this, that that would be a permitted usage in  
21 Agriculturally Zoned land in the event that occupant  
22 of the house is only there for a short time, but that  
23 the activity is in fact agriculture? That's my  
24 question, thank you.

25 MS. APUNA: Thank you, Commissioner Cabral.



1           I think that if you can show the connection  
2 between the user and the renter as being a bona fide  
3 agricultural use for service, that they are  
4 supporting the agricultural use of the property, then  
5 that potentially they could stay there for less than  
6 30 days arguably.

7           COMMISSIONER CABRAL: Thank you. Because  
8 I've had people over here ask me that very question  
9 on ag lands. I understand it's very confusing.  
10 Thank you.

11           CHAIRPERSON SCHEUER: Thank you,  
12 Commissioner Cabral.

13           Commissioner Okuda, followed by  
14 Commissioner Chang.

15           COMMISSIONER OKUDA: Thank you very much,  
16 Ms. Apuna, for your testimony.

17           Would you agree then that the starting  
18 point of any analysis is to determine whether or not  
19 the use, and possibly on a case by case basis,  
20 complies with the legal standards including HRS  
21 205-4.5, which is the statute which lists permissible  
22 uses within the Agricultural District, it's a fact  
23 intensive or fact specific sometimes evaluation or  
24 analysis?

25           MS. APUNA: Yes.

1                   COMMISSIONER OKUDA:   Okay.

2                   And so there might be a situation where, as  
3 you pointed out, what might be considered by people  
4 in a general vernacular, short term may be  
5 permissible or it might not be permissible.  It  
6 depends on the specific facts of the specific  
7 situation.  Is that a fair statement?

8                   MS. APUNA:   Yes.

9                   COMMISSIONER OKUDA:  Thank you.  I wanted  
10 to make sure I understood you.

11                   And this is not intended to be a strict  
12 question or anything, I just want to get your read  
13 and maybe later on Mr. Chipchase and the County's  
14 response to it.

15                   In preparing for this hearing, and I  
16 actually try to prepare, I came across this case  
17 which seems to suggest that land use regulation is  
18 basically a dual system, the State Land Use  
19 Commission can set district boundaries which has  
20 certain requirements, but within those boundaries,  
21 except for the Conservation District, which as we  
22 know from the Mauna Kea case, is within the exclusive  
23 jurisdiction for management of the Board of Land and  
24 Natural Resources, but within the other districts the  
25 Counties themselves have the authority to fashion

1 their own requirements within those districts.

2 Is that a fair statement to your  
3 understanding?

4 MS. APUNA: That's correct.

5 COMMISSIONER OKUDA: And just so that, if  
6 any of the other counsel have different view, the  
7 case I was looking at Save Sunset Beach Coalition  
8 versus City and County of Honolulu, that's found at  
9 102 Hawaii Reports 465; the Pacific 3d citation is 78  
10 Pacific 3d, number one, that's a 2003 case, and  
11 specifically at paragraph -- excuse me, page 482. If  
12 you don't mind, if you can bear with me, if I can  
13 just read about three sentences from that section.

14 And my question is going to be, does that,  
15 what I read, number one, is that an accurate  
16 statement of the law; and number two, if it is an  
17 accurate statement of the law, does that indicate  
18 that the County, in this case, has the legal right  
19 and ability to enact whatever type of regulation it  
20 has with respect to short term rentals within the  
21 Agricultural Zone?

22 And let me start with what the Hawaii  
23 Supreme Court said: In Hawaii's land use system, the  
24 legislature's statutory districts constitute more of  
25 a general scheme, and presumably by delegating

1 authority to zone to the counties, the legislature  
2 intended that specific zoning be enacted at the  
3 County level. We believe that the, quote,  
4 consistency doctrine, close quote, enunciated in  
5 Atri, A-t-r-i, is somewhat instructive in the instant  
6 case, because the uses allowed in country -- and I  
7 believe that's a misspelling in the opinion, spelled  
8 C-O-U-N-T-R-Y, but I believe it should have said  
9 County, C-O-U-N-T-Y, zoning, are prohibited from  
10 conflicting with the uses allowed in a State  
11 Agricultural District, only a more restricted use as  
12 between the two is authorized. By adopting a dual  
13 land use designation approach, the legislature  
14 envisioned that the counties would enact zoning  
15 ordinances that were somewhat different from, but not  
16 inconsistent with the statutes. And that's the  
17 ending part of the quote.

18 Does that sound like an accurate statement  
19 of the law?

20 MS. APUNA: Yes, that the counties can  
21 further restrict, or at least be consistent with, or  
22 further restrict the uses as provided under statute.

23 COMMISSIONER OKUDA: So in other words, to  
24 evaluate whether or not a county's statute or  
25 regulation should be upheld or not upheld, of course,

1 first we have to get over the hurdle whether or not  
2 the issue is really appropriate for a declaratory  
3 petition or declaratory ruling petition, but assuming  
4 we get over that hurdle, the issue then is, which  
5 approach is stricter? And if the county has a  
6 stricter approach, it can be upheld as being  
7 consistent with the holding in the Sunset Beach  
8 coalition versus City and County of Honolulu case.

9 Would that be a fair statement?

10 MS. APUNA: Yes.

11 COMMISSIONER OKUDA: Thank you, Chair, I  
12 have no further questions.

13 CHAIRPERSON SCHEUER: Thank you very much,  
14 Commissioner Okuda.

15 The case you cited, incidentally, refers to  
16 county zoning, which was you called "country zoning",  
17 so I don't think it was a typographical error by the  
18 State Supreme Court.

19 Commissioner Chang.

20 COMMISSIONER CHANG: Thank you very much,  
21 Ms. Apuna, for your testimony. I just have a few  
22 questions. Sort of following the line of  
23 Commissioner Okuda.

24 First, let me ask you this. And this is  
25 asking for a legal opinion. Would you agree that the

1 Land Use Commission has a legal authority to  
2 interpret Hawaii Revised Statutes 205-4.5?

3 MS. APUNA: Yes.

4 COMMISSIONER CHANG: Do you agree that the  
5 County and the Petitioner in this case both  
6 stipulating to the declaratory action before the Land  
7 Use Commission also concur with that interpretation  
8 that the Land Use Commission has the authority to  
9 interpret 205A-4.5?

10 MS. APUNA: Yes.

11 COMMISSIONER CHANG: And I suspect this  
12 matter is probably going to get appealed. So would  
13 you agree that on appeal the appellate court would,  
14 in general, in the absence of arbitrary  
15 capriciousness, give deference to the administrative  
16 agencies' interpretation of its own laws?

17 MS. APUNA: Yes.

18 COMMISSIONER CHANG: I don't have any  
19 further questions. Thank you very much.

20 CHAIRPERSON SCHEUER: Commissioner Chang,  
21 thank you.

22 Commissioners, are there further questions  
23 for the testifier? Seeing none.

24 Mr. Derrickson, is there anybody who is a  
25 public attendee who is raising their hands who wishes

1 to testify on this matter?

2 MR. DERRICKSON: No, Chair, I don't see  
3 anyone currently raising their hand.

4 CHAIRPERSON SCHEUER: Seeing no further  
5 public testimony on this matter, and that we have  
6 been going for an hour and five minutes, I'm going to  
7 propose taking a five-minute recess, and then we will  
8 continue on the agenda past the public testimony.

9 Recess for five minutes.

10 (Recess taken.)

11 CHAIRPERSON SCHEUER: Okay, we're back on  
12 the record.

13 Parties, there is no more public testimony  
14 on this matter, so I will now hear from the  
15 Petitioners, first will be County and then the  
16 Rosehill Petitioners on their stipulation to  
17 consolidate. First, County.

18 MR. MUKAI: The County agrees and has in  
19 fact signed the stipulation to consolidate the two  
20 matters.

21 CHAIRPERSON SCHEUER: Thank you very much.  
22 Commissioners, any questions for the  
23 County? Seeing none.

24 Mr. Chipchase on behalf of Rosehill  
25 Petitioners.

1           MR. CHIPCHASE: We believe consolidation is  
2 appropriate for reasons set out in the Petition and  
3 as that's been done in this hearing, the  
4 consolidation we believe is the most efficient and  
5 cleanest way to approach this issue.

6           So we respectfully ask that the stipulation  
7 for consolidation be approved and granted.

8           CHAIRPERSON SCHEUER: Thank you very much.  
9 Sorry, one brief moment.

10           Commissioners, do you have any comments or  
11 questions before we take a vote on the stipulation to  
12 accept the Stipulation to Consolidate?

13           Mr. Orodenker, do we need a motion to that  
14 effect?

15           EXECUTIVE OFFICER: I don't believe so, Mr.  
16 Chair, since it's stipulated.

17           CHAIRPERSON SCHEUER: Okay, so it's so  
18 stipulated.

19           So then we can go on and, County, you can  
20 start with presenting your main case.

21           MR. MUKAI: Thank you, Mr. Chair, and  
22 Commissioners.

23           In this case the Rosehill Petitioners state  
24 that, quote, the only question before the Commission  
25 is whether as of June 5th, 1976, Chapter 205



1 prohibited leases, in parenthesis, the same thing as  
2 rentals of farm dwellings for a period of less than  
3 31 days.

4           The County agrees that there's no  
5 prohibition on farm dwellings being rented for  
6 30 days or less. But as we pointed out in our  
7 Petition, it has to be framed in terms of  
8 agricultural use in connection with HRS 205, Section  
9 2(d)(7) which specifically defines farm dwellings,  
10 and farm dwellings as defined in HRS 205-4.5 (a)(4)  
11 notes that within the Agricultural District for farm  
12 dwelling, which is defined specifically in Section 4.

13           We're here to determine whether the renting  
14 of a dwelling as an STVR to an outside party, I mean,  
15 we're here to determine whether it's a permitted use  
16 in this matter.

17           The Rosehill Petitioners note that the  
18 owner of a farm dwelling does not need to reside in  
19 the dwelling. Again, the County agrees. However, it  
20 must be agriculturally related and has to be framed  
21 in terms of agricultural use.

22           The Hawaii Administrative Rules Section  
23 15-15-03 defines a farm dwelling as a single-family  
24 dwelling located on and used in connection with a  
25 farm where agricultural activity provides income to

1 the family occupying the dwelling.

2 So you simply cannot isolate portions of  
3 HRS 205-4.5 and expand it to make an argument that  
4 somehow short-term vacation rentals are a permissible  
5 use of a farm dwelling on lots created after June 4,  
6 1976.

7 And as we set forth in our Petition, the  
8 definitions and uses for farm dwellings and  
9 short-term vacation rentals are in conflict, as a  
10 STVR, by its very definition in Hawaii County Code  
11 Section 25-1.5, which notes that the owner or  
12 operator does not exclusively occupy the unit as a  
13 single family or even live on-site.

14 The STVR owner must reside offsite and  
15 temporarily rent the use of the unit to others.

16 We would submit that this is in contrast to  
17 a farm dwelling that a family unit occupies while  
18 obtaining income from agricultural activities on a  
19 farm that the family owns in fee or leasehold.

20 With regard to the uses of farm dwellings,  
21 an STVR's they're very distinct. A farm dwelling by  
22 its very nature is used in connection with a farm,  
23 why else would you call it a farm dwelling. It needs  
24 to be used in support of, and an accessory to a  
25 farming operation. And a farm dwelling's purpose is

1 to be a bona fide agricultural service and use which  
2 supports and an accessory to agricultural activities.

3 The purpose of a short-term vacation rental  
4 is to provide transient transient accommodations or  
5 housing that will be temporarily rented for a period  
6 of 30 days or less.

7 I apologize, but yesterday in the afternoon  
8 I emailed to all the Parties and the Land Use  
9 Commission two exhibits that I hope are in your  
10 possession today.

11 One would be -- and I apologize, because I  
12 just ran across this -- but the first exhibit and if  
13 none of you have it, we will make it available, we  
14 will provided it as soon as this hearing is  
15 completed.

16 But the first one is what is called a Farm  
17 Dwelling Notice, and this has to be filed with the  
18 County of Hawaii Planning Department. The  
19 residential use on the farm dwelling is not  
20 prohibited but they must file this document. And in  
21 fact, someone like Mr. Bell who testified earlier, we  
22 would submit that his --

23 CHAIRPERSON SCHEUER: County, one moment.

24 I want to confirm with the parties that  
25 indeed this was received.

1           First all, Rosehill, et al., Cal, did you  
2 receive this?

3           CHIPCHASE: Yes, Chair, we did.

4           CHAIRPERSON SCHEUER: Okay. And I'm aware  
5 that at very late last night, the Administrative  
6 Officer for the Land Use Commission received your  
7 email, but I don't know that those were transmitted  
8 due to the late hour to the Commissioners themselves.  
9 Mr. Orodener?

10          MR. MUKAI: Again, I apologize for the  
11 submission yesterday afternoon, but we'll make sure  
12 that all Commissioners have the two exhibits.

13          CHAIRPERSON SCHEUER: Thank you. You can  
14 continue with your oral.

15          MR. MUKAI: So with regard to this first  
16 exhibit, we would submit that I think there was an  
17 inquiry with one of the Commissioners as to whether  
18 Mr. Bell's property or his residence, why can't he  
19 just live there and not perform farming activities?  
20 He has to file this Farm Dwelling Notice with the  
21 County, and his residence is considered a farm  
22 dwelling. And there's nothing that disallows him  
23 from simply having a residence on an Agricultural  
24 Zoned property.

25                 The second exhibit that I transmitted for

1 the Commissioners' review would just simply be an  
2 additional Farm Dwelling Application Agreement. And  
3 we would point out that on this Notice a Farm  
4 Dwelling does, in fact, reference Section 205-4.5  
5 Section (a)(4) as a single-family dwelling located on  
6 and used in conjunction with a farm.

7 And by the very description, we would  
8 submit that a short-term vacation rental is simply  
9 not used in connection with a farm, with agricultural  
10 supporting activities, from which the unit's  
11 occupants are paying income.

12 So as such, and we would submit that the  
13 County of Hawaii respectfully request that the  
14 Commission rule that farm dwelling may not be used as  
15 short-term vacation rentals pursuant to HRS 205-2 and  
16 205-4.5, and also sections 15-15-03 of the Hawaii  
17 Administrative Rules.

18 CHAIRPERSON SCHEUER: Thank you very much.

19 Is that it for now?

20 MR. MUKAI: Yes, Mr. Chair.

21 CHAIRPERSON SCHEUER: Commissioners,  
22 questions for the County of Hawaii?

23 Commissioner Okuda, followed by  
24 Commissioner Chang.

25 COMMISSIONER OKUDA: Thank you very much,

1 Mr. Chair.

2 Question to the County and anyone on the  
3 County's table or room can answer this question.

4 So is it the County of Hawaii's position  
5 that a residence may be constructed and lived in on  
6 land that's within the Land Use Agricultural  
7 District, even if there's no agriculture taking place  
8 on that parcel of property?

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

11 Yes, that is correct.

12 COMMISSIONER OKUDA: So in other words, the  
13 County of Hawaii sees no violation of HRS Section  
14 205-4.5, if I were to build a very large mansion, you  
15 know, square footage the largest that the County  
16 would allow under its applicable zoning code, and if  
17 I told you flat out, by the way, I'm not going to do  
18 any agriculture, and if I see anybody in my family  
19 trying to grow anything, I'm going to cement over  
20 with my cement truck. And that in your view would be  
21 permissible under HRS 205-4.5?

22 MR. YEE: Michael Yee, again.

23 I would just state again that we allow  
24 people to build a residence on agricultural land, and  
25 it is a farm dwelling.

1 CHAIRPERSON SCHEUER: Sorry, I think I  
2 actually have to swear you in procedurally, Mr. Yee.

3 Do you swear or affirm the testimony you're  
4 going to give is the truth?

5 MR. YEE: I do.

6 CHAIRPERSON SCHEUER: Thank you.

7 MICHAEL YEE

8 Was called as a witness by and on behalf of the  
9 County, was sworn to tell the truth, was examined and  
10 testified as follows:

11 EXAMINATION

12 COMMISSIONER OKUDA: Thank you, Chair.

13 So in other words, Mr. Yee, even if I tell  
14 you and, in fact, I tell you in writing that my  
15 intention is I do not intend to engage in any  
16 agriculture. All I intend to do is build a house to  
17 live in. The County of Hawaii would consider that  
18 consistent with HRS 205-4.5?

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

21 CHAIRPERSON SCHEUER: We cannot see you.  
22 Identifying yourself before speaking is very  
23 important, for the record.

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

1 dwelling.

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

4 MR. YES: Correct.

5 COMMISSIONER OKUDA: Thank you, Mr. Chair.  
6 No further questions.

7 CHAIRPERSON SCHEUER: Thank you,  
8 Commissioner Okuda.

9 Commissioner Chang.

10 COMMISSIONER CHANG: Thank you very much,  
11 Chair.

12 To the County of Hawaii, I just want to  
13 follow up. So how do you tax agricultural property  
14 that has a farm dwelling on it? Is it taxed  
15 agriculture? Is it taxed residential? How do you  
16 tax it?

17 MR. MUKAI: On behalf of County, John  
18 Mukai. We don't tax. This department does not tax.  
19 So I don't think anyone in the room can answer this  
20 question now. I apologize for that.

21 COMMISSIONER CHANG: Okay. That's  
22 unfortunate.

23 Let me ask you this question. Can you  
24 confirm that the Petitioner's applied to the Hawaii  
25 County to certify their property as short-term



1 vacation rentals?

2 MR. MUKAI: Could you please repeat the  
3 question?

4 COMMISSIONER CHANG: I want to confirm with  
5 the County that the Petitioners filed with the Hawaii  
6 County to seek a certification to use their property  
7 as short-term vacation rentals.

8 MR. MUKAI: Yes, we did. They submitted  
9 their applications and it was denied.

10 CHAIRPERSON SCHEUER: Is that Mr. Mukai?

11 MR. MUKAI: Yes, I apologize, John Mukai,  
12 County of Hawaii.

13 COMMISSIONER CHANG: Mr. Mukai, can you  
14 just confirm also that the application did not say it  
15 was a farm dwelling, if you know?

16 MR. MUKAI: What they did was apply for a  
17 short-term vacation rental. It was nothing along the  
18 lines of we're applying to be a farm dwelling.

19 Again, this was John Mukai, County of  
20 Hawaii.

21 COMMISSIONER CHANG: The next question, if  
22 you know, did you know how these properties are being  
23 advertised, if you know?

24 MR. YEE: This is Michael Yee from the  
25 County.

1           You know, I don't know specifically, but  
2 there are a lot of online platforms that are used  
3 quite regularly for most vacation rentals in Hawaii.

4           COMMISSIONER CHANG: And this is going to  
5 be a question for Mr. Yee, a legal one, similar to  
6 what I asked the Office of Planning.

7           Is it your legal opinion that the Land Use  
8 Commission has the authority to interpret Hawaii  
9 Revised Statutes 205-4.5?

10          MR. MUKAI: John Mukai for County of  
11 Hawaii. Yes.

12          COMMISSIONER CHANG: I have no other  
13 questions. Thank you.

14          CHAIRPERSON SCHEUER: Commissioner  
15 Ohigashi.

16          COMMISSIONER OHIGASHI: The form that you  
17 indicated that they would sign, that Mr. Bell would  
18 sign, would be a farm dwelling kind of agreement, or  
19 is that what you're talking about?

20          MR. MUKAI: Yes, Commissioner. It would be  
21 called a Farm Dwelling Notice.

22                 This is John Mukai again.

23                 If he would submit to the County what's  
24 called a Farm Dwelling Notice, and his residence  
25 would be considered a farm dwelling.

1           COMMISSIONER OHIGASHI: Was there any --  
2 the Petitioners that Mr. Chipchase represent, did any  
3 of them sign that agreement?

4           MR. MUKAI: Not to my knowledge.

5           COMMISSIONER OHIGASHI: So your records  
6 would show no -- none of the members of his -- who he  
7 is representing, has signed that agreement?

8           MR. YEE: Michael Yee. We would have to go  
9 into each file to confirm that the Farm Dwelling  
10 Notice was signed by each property.

11           COMMISSIONER OHIGASHI: I probably won't be  
12 here when you -- when Mr. Chipchase comes up, so I  
13 won't be able to ask him that question. Thank you.

14           CHAIRPERSON SCHEUER: Thank you,  
15 Commissioner Ohigashi.

16           Commission Okuda.

17           COMMISSIONER OKUDA: Thank you, Mr. Chair.

18           And anyone at the County can answer this  
19 question. This is a followup to the last series of  
20 questions.

21           So can you tell me then if the County is  
22 not requiring active farming to allow a person to  
23 build a residence on Agriculturally Districted  
24 property, what then is the real difference between a  
25 short-term rental of renters who come onto the

1 property, who are not going to be engaged in any type  
2 of farm activity, and the person who lives in the  
3 house that they built, which you say you will  
4 approve, even if that person is not also engaged in  
5 farming?

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

8 MR. MUKAI: John Mukai for the County.

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

14 COMMISSIONER OKUDA: Well, may I ask this  
15 question then.

16 If I came into the County and said I was  
17 going to build a residence on Agriculturally  
18 Districted and zoned land, and I told you in writing,  
19 and by the way I don't plan to live there. I plan to  
20 rent it out to somebody for, let's say, longer than  
21 30 or 40-days.

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

24 MR. MUKAI: My understanding -- John  
25 Mukai -- longer periods of rental would be allowed

1 under Ag.

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

7 MR. MUKAI: Yes, yes.

8 COMMISSIONER OKUDA: Thank you. No further  
9 questions, Mr. Chair.

10 CHAIRPERSON SCHEUER: Thank you very much,  
11 Commissioner Okuda.

12 Commissioner Wong.

13 COMMISSIONER WONG: Thank you, Chair.

14 Sorry, I got to get this straight. So  
15 let's say I'm Mr. Bell. I have a piece of property.  
16 I am not -- it's zoned Ag, and I would say -- I would  
17 tell my friends, hey, come use my house for 29 days,  
18 and just give me a dollar. That would -- that'd be  
19 okay? Is that how we're seeing it?

20 MR. MUKAI: I think we're talking  
21 specifically in this case about a short-term vacation  
22 rental permit, which is -- I think that's not really  
23 the situation that we're dealing with here.

24 COMMISSIONER WONG: The question I have is,  
25 if Mr. Chipchase's clients didn't turn in that

1 short-term vacation rental form, or whatever, to the  
2 County, and they just rented it out, that would be  
3 okay?

4 MR. MUKAI: So having a short-term vacation  
5 rental without a permit, yes, that would not be  
6 legal.

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

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

14 COMMISSIONER WONG: Sorry, local boy is a  
15 little confused on this issue now.

16 Because I'm trying to get my head around  
17 this one. So you're saying as long as I turn in this  
18 form to say I'm having a short-term vacation rental,  
19 and on Ag land, that it won't be allowed; but if I'm  
20 a farmer who's renting out my property to someone  
21 that's not going to do farming, it's okay?

22 MR. MUKAI: April.

23 MS. SURPRENANT: Aloha, this is April --  
24 (audio difficulty.)

25 CHAIRPERSON SCHEUER: Hold on. First of

1 all, I'm having some audio issues with you, and then  
2 I also have to swear you in.

3 Do you swear or affirm the testimony you're  
4 about to give is the truth?

5 THE WITNESS: I do.

6 APRIL SURPRENANT

7 Was called as a witness by and on behalf of the  
8 County was sworn to tell the truth, was examined and  
9 testified as follows:

10 EXAMINATION

11 MS. SURPRENANT: April Surprenant,  
12 Acting Deputy Planning Director for Planning.

13 So the permit that we are talking about,  
14 specifically with the Rosehill Petition, has to do  
15 with nonconforming uses. So in the law in the  
16 County's zoning code, short-term vacation rentals are  
17 only allowed in certain zones, Ag is not one of them.  
18 However, when the law was brought into play, we  
19 allowed for some nonconforming uses that were already  
20 in operation under very clear parameters in the law.

21 And so if people who met those parameters  
22 and they included all of the information that was  
23 needed by the timeframe that was required, and they  
24 met all of those conditions as spelled out in our  
25 code, then we issued them a nonconforming use

1 vacation rental permit.

2 That is not the case for the Rosehill group  
3 of Petitions. They did not meet the parameters of  
4 the law. And specifically, it's related to the post  
5 '76 agricultural lot.

6 And so that's why we're before the  
7 Commission today to request a Declaratory Ruling on  
8 whether or not the use of short-term vacation rentals  
9 is allowed in your opinion on State Land Use Ag land.

10 COMMISSIONER WONG: So I'm just going to  
11 really narrow my focus on short-term vacation rentals  
12 so that this is my thought. If I was a farmer and I  
13 say, hey, Jonathan, Chair, Jonathan, why don't you  
14 come and farm for 29 days on my lot and just plant  
15 this papaya tree. That would be okay, correct?

16 That's all I'm asking.

17 MS. SURPRENANT: If it's being advertised  
18 and used as a vacation rental, that would not be  
19 allowed unless you had a nonconforming -- on Ag  
20 land -- a nonconforming use permit in order to do  
21 that on Ag land.

22 COMMISSIONER WONG: Thank you, Chair. No  
23 other questions.

24 CHAIRPERSON SCHEUER: Thank you very much,  
25 Commissioner Wong. Commissioners, further questions?



1 Commissioner Okuda.

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

4 Anyone in the County's room can answer this  
5 question.

6 You know, in reading the submissions, it  
7 seemed like one of the arguments in favor of the  
8 County's position was that short-term vacation  
9 rentals have a negative impact or effect on bona fide  
10 agriculture taking place in an Agricultural District.

11 But if the County is not requiring that  
12 there's actual agriculture taking place when you  
13 grant permits to build the main residence, aren't  
14 you, in fact, contributing to driving up the cost of  
15 agricultural land to the detriment of bona fide  
16 farmers who need land if we're going to have real  
17 farming in this State?

18 MS. SURPRENANT: This is April Surprenant  
19 again, Acting Deputy Planning Director.

20 No, I don't think that we are contributing  
21 to what you're speaking of. Our code allows for a  
22 dwelling to be built on agricultural land. For  
23 example, however, if someone wanted to build an  
24 additional dwelling on agricultural land, they do  
25 have to show extensive information about how the land

1 is being used for agriculture; and why and how they  
2 require additional farm dwellings in order to be  
3 productive, in order to facilitate productive farm  
4 use of that land.

5 COMMISSIONER OKUDA: Final question.

6 What case or legal authority states that it  
7 is permissible to allow residential use of land  
8 that's in an Agricultural District if there is no  
9 actual agriculture taking place on that land?

10 What's the legal authority case or  
11 otherwise that says that?

12 CHAIRPERSON SCHEUER: One moment. I'm  
13 going reflect for the record that Commissioner  
14 Ohigashi has left the meeting.

15 Please note. Continue.

16 COMMISSIONER OKUDA: Thank you, Chair.

17 That is my question. What is the legal  
18 authority? Either give me a case citation or  
19 statutory citation that states it is permissible to  
20 have residential use on property that's zoned  
21 agriculture, even if there's no agriculture taking  
22 place.

23 MR. MUKAI: We are looking up the zoning  
24 code right now, so it might take a minute or two. I  
25 apologize.

1           COMMISSIONER OKUDA: Let me be more  
2 specific.

3           What in the State law, either State law or  
4 appellate cases, because this is really a question of  
5 the requirements of Chapter 205-4.5 where does it say  
6 it is permissible to have residential use of  
7 agricultural land without modified or actual  
8 agriculture taking place.

9           MS. CHOW: Looks like the County got lost  
10 for a little bit.

11          MS. SURPRENANT: April, we're still here  
12 verbally.

13          COMMISSIONER OKUDA: I don't want to take  
14 up any time. The parties can supplement the record  
15 if necessary.

16          MR. MUKAI: This is John Mukai. I would  
17 again direct the Commission to HRS 205-4.5, Section  
18 4, which specifically talks about farm dwellings and  
19 uses in connection with the farm, including clusters  
20 of single-family farm dwellings permitted within  
21 agricultural parks developed by the State, or where  
22 agricultural activity provides income to the family  
23 occupying the dwelling.

24          Again, we would point out to the Commission  
25 that the exhibit we submitted yesterday, the

1 residence is considered a farm dwelling on the  
2 agricultural land.

3 CHAIRPERSON SCHEUER: Just noting for the  
4 record that we have yet to receive the exhibit as  
5 Commissioners. Commissioner Chang.

6 COMMISSIONER CHANG: County, I'm going to  
7 go down the same line of questioning. Mr. Chipchase  
8 may not even have to say anything.

9 So I'm trying to understand, because I  
10 think the Office of Planning provided their  
11 testimony -- well, provided their position. And I  
12 think that it joined in the County's position. And  
13 as I understood the Office of Planning's position is  
14 that you have to look at the zoning, and it's  
15 agriculturally zoned, Agricultural District, so it  
16 has to be in support of ag use.

17 So the question I have for the County, if  
18 the Petitioner filed this Farm Dwelling Notice, and  
19 not as a short-term vacation rental, and they  
20 advertise it as a farm dwelling for use less than  
21 30 days, 29 days, that would be a permissible use  
22 under the County's interpretation?

23 MR. YEE: Michael Yee, Planning Director of  
24 Hawaii County. If they're renting less than 30 days,  
25 by definition it's a short-term vacation rental, and

1 so if they're not in a permitted area or have a  
2 permit, then it's not.

3 COMMISSIONER CHANG: What happens if they  
4 have, let's say they've got, you know -- if the fact  
5 that they are renting it for less than 30 days, that  
6 is what makes it a short-term vacation rental? Is  
7 that the only fact?

8 MR. YEE: Michael Yee.

9 Within our ordinance we have defined  
10 short-term vacation rentals as less than 30 days.

11 COMMISSIONER CHANG: And they have to be in  
12 a Resort Zoned area?

13 MR. MUKAI: Correct, only in certain  
14 districts. And that was John Mukai, sorry.

15 COMMISSIONER CHANG: But you are taking a  
16 different position from Office of Planning.

17 The farm dwelling or the residential use  
18 does not have to be in support of agriculture. Your  
19 interpretation is that it can be a residence, no  
20 agricultural use on the property, it's in  
21 Agricultural District, but it's not -- the County's  
22 interpretation is it does not have to be related to  
23 agricultural use.

24 MR. MUKAI: Our zoning code allows it.

25 COMMISSIONER CHANG: If the Land Use

1 Commission decided, based upon this Petition, that  
2 our interpretation is that it has to be associated  
3 with agricultural use, how does that affect the  
4 County of Hawaii? Because your laws can be stricter  
5 but it cannot be more liberal.

6 MR. YEE: Well, I think the impact --  
7 Michael Yee.

8 There would be a serious impact of trying  
9 to have first, farm dwelling unit, which are  
10 residences, have to show agricultural activity before  
11 the owner could build the residence. If we went  
12 around through the State of Hawaii having to require  
13 folks to start agricultural activity, and then say,  
14 hey, it's okay for you to build your residence there  
15 on this property, it would be very difficult to  
16 administer that way.

17 To a certain extent, I think we certainly  
18 have many owners who buy property, ag land, who have  
19 every intention of wanting farming, but they're going  
20 to build the residence first and then start  
21 agriculture down the road.

22 COMMISSIONER CHANG: Wouldn't you also  
23 agree that there are many owners who purchase  
24 agricultural lands and put on a dwelling not with the  
25 intention of farming, so that they are taking away

1 valuable farming land from true agricultural  
2 purposes? That if you wanted to put a residence,  
3 that you could put it up in an Urban area or a Rural  
4 area?

5 MR. MUKAI: I guess there's no prohibition  
6 from outsiders coming in and buying property. It  
7 happens. And it's happening a lot.

8 COMMISSIONER CHANG: Okay. I've got no  
9 further questions. Thank you.

10 CHAIRPERSON SCHEUER: That last response  
11 was Mr. Mukai?

12 COMMISSIONER CHANG: Yes, that was.

13 MR. MUKAI: Yes, and I apologize again.

14 CHAIRPERSON SCHEUER: No, we're all trying  
15 to deal with an unusual set of circumstances.

16 Commissioners, are there further questions  
17 for the County?

18 Commissioner Wong.

19 COMMISSIONER WONG: Chair, I need to -- can  
20 I ask the County questions afterwards -- I'm still  
21 trying to get this under my head -- later down the  
22 line after Mr. Chipchase presents?

23 CHAIRPERSON SCHEUER: It certainly occurs  
24 to me that given the consolidated proceedings, and  
25 given what we will undoubtedly learn from Mr.

1 Chipchase's presentation, that we will want to ask  
2 further questions of the County, and perhaps after  
3 the County's response, further questions from Mr.  
4 Chipchase.

5 Is that acceptable to both parties?

6 MR. MUKAI: That's fine.

7 MR. CHIPCHASE: Certainly, Chair.

8 CHAIRPERSON SCHEUER: Thank you.

9 Did you have something further,  
10 Commissioner Wong?

11 COMMISSIONER WONG: The other question for  
12 the County for now is, let's say the dwelling was  
13 built legally and was initially for farming, then  
14 wanted to do a short-term vacation rental, how would  
15 you stop them? Would you tell them to tear down the  
16 entire house? I mean, how would you stop them  
17 besides fines?

18 MS. SURPRENANT: April Surprenant.

19 So, again, short-term vacation rentals are  
20 not allowed on ag land, and so if they were found to  
21 do that, which we are putting things in place to help  
22 fine those individuals who are trying to do  
23 short-term vacation rentals, advertising short-term  
24 vacation rentals without the required permit, in  
25 order to enforce this legislation, which is similar



1 to what other counties are doing within the State,  
2 they may get away with it for a time until they're  
3 caught, so then they would receive fines and be  
4 required to stop even renting as a short-term  
5 vacation rental, but they would obviously be able to  
6 maintain their residence and could use the land for  
7 agricultural purposes.

8 COMMISSIONER WONG: So going onto that  
9 issue, again, I think I asked this question, I just  
10 want it reaffirmed.

11 So let's say I am a farmer. I built the  
12 property legally. And I'm going to rent it out to a  
13 farmer from Connecticut for 29 days, and he's going  
14 to plant some papaya trees. That would be legal?

15 MS. SURPRENANT: April Suprenant.

16 Generally speaking, no. However, the  
17 primary way that we will identify those individuals  
18 who are trying to rent as short-term vacation  
19 rentals, we are putting those mechanisms in place to  
20 enforce that law.

21 COMMISSIONER WONG: I just wanted to make  
22 sure, because let's say I'm not renting as short term  
23 but renting it as a farming experience on Hawaii.

24 So, you know, it's a different statement.  
25 (Inaudible).

1 MS. SURPRENANT: It's still a short-term  
2 vacation rental. If you're bringing people in to  
3 stay on the property for a short period of time and  
4 the owner is not residing there, it's still  
5 considered a short-term vacation rental. It's  
6 possible that there are some activities on ag land  
7 that could qualify under the State statutes and under  
8 the county zoning code that may qualify to be able to  
9 apply for a special permit, but obviously that's not  
10 before us today.

11 COMMISSIONER WONG: So let me take it a  
12 little step further.

13 Let's say I have this -- I want to say a  
14 mansion, but I have a six bedroom house on property,  
15 and I am a farmer on-site, and I bring someone in,  
16 and I'm still living there, would that be okay?

17 MS. SURPRENANT: April Surprenant.

18 Under our definition of short-term vacation  
19 rental, that does not qualify, the short term  
20 vacation rental, so it's not prohibited. If the  
21 owner is living on the premises, then that does not  
22 fall under our statute for short-term vacation  
23 rental.

24 COMMISSIONER WONG: No other questions for  
25 now, Chair. Thank you.

1 CHAIRPERSON SCHEUER: Thank you.

2 Commissioners? Commission Cabral.

3 VICE CHAIR CABRAL: Thank you. This line  
4 of questioning and answers brings up more questions  
5 to me.

6 My understanding of it is really not what  
7 the structure of the building looks like, or what it  
8 was originally permitted as or originally used as,  
9 but really what the current usage is, i.e., if I were  
10 to go out there and it's zoned agriculture, but the  
11 usage I wanted to put on it was to put a 7-11-type  
12 store in it, that is clearly retail, that is an  
13 unpermitted use.

14 I guess my question is to Hawaii County and  
15 probably to April, are we talking sort of a similar  
16 kind of question, it's not a permitted use, I can't  
17 put the 7-11 in my agriculturally zoned house, even  
18 though when I built the house it was okay to have it  
19 as a house to live in?

20 Trying to clarify. I know it's very  
21 complicated and it's very important. Over here it's  
22 a big thing. I keep wanting to focus on what is the  
23 usage of the property, not how did the property get  
24 to that usage, but what is the current usage?

25 So 7-11 is not permitted on Agricultural

1 zoned land on any island, is that correct, April?

2 I mean, am I in the right direction, or am  
3 I confused?

4 MS. SURPRENANT: Thank you for asking that  
5 question. Yes, that is exactly what we're talking  
6 about.

7 No, 7-11 would not be permitted use.

8 And to further answer the last  
9 Commissioner's question about someone coming to stay  
10 even though there's someone living there is likely  
11 that that could fall under the definition of, let's  
12 say, a bed and breakfast, and you would therefore on  
13 ag land require a special permit.

14 COMMISSIONER CABRAL: Thank you for the  
15 clarification. I know it's a very complex issue, and  
16 it's greatly important over here. I handle about 100  
17 rentals, long-term rentals on Agriculturally zoned  
18 land, so I'm very involved in this.

19 I would disclose that this could have  
20 ramifications to my financial future, depending on  
21 where we go with this. None of mine are vacation  
22 rentals at all, not with my knowledge. Thank you.

23 MS. SURPRENANT: Thank you, Nancy.

24 CHAIRPERSON SCHEUER: Hold on. Given  
25 Commissioner Cabral's statement of disclosure that

1 she has a possible financial interest in the outcome  
2 of this matter, I'm first going to ask Commissioner  
3 Cabral to further clarify how she may or may not have  
4 a financial interest in the manner in which the Land  
5 Use Commission makes this decision.

6 VICE CHAIR CABRAL: I actually don't think  
7 I have a financial interest in it. My company, Dalum  
8 Rentals and Management, handles about 550 rental  
9 houses or properties in East Hawaii. And about 33  
10 condominium or subdivision homeowners associations  
11 and about 280 commercial locations, and 4 HUD  
12 projects, Housing and Urban Development subsidized  
13 low-income housing projects.

14 I do not handle any vacation rentals. I've  
15 had agents in the past who handled them and who had  
16 their sells license with me, but I do not have any  
17 that we handle as a company, nor do I think any of my  
18 agents, because I don't allow them to handle rentals  
19 as sells agent, because I am also the owner of  
20 Caldwell Banker Dalum Properties.

21 So I don't believe in this direct question  
22 I have. What I would consider to be a concern is,  
23 that I see the line of questioning going to, okay, is  
24 it really legal that a residential house, it's  
25 Agriculturally zoned land, always been Agriculturally

1 zoned land, it's one acre. In some cases it's 20,000  
2 square feet, but zoned Ag over here. But they are --  
3 I handle it as a rental, purely as a rental with no  
4 agricultural activity.

5 That would be only if this got crazy and  
6 went in that direction.

7 CHAIRPERSON SCHEUER: Commissioner Cabral,  
8 if I may. So then the only question in front of us  
9 right now is ruling on the Declaratory Order,  
10 Petitions from the Rosehill Petitioners and the  
11 County, which specifically have to do with the  
12 operation of short-term vacation rentals on  
13 Agriculturally zoned land.

14 And I understood you said that you do not  
15 personally own or your company does not manage any  
16 such properties; is that correct?

17 VICE CHAIR CABRAL: Correct.

18 CHAIRPERSON SCHEUER: With that I think  
19 that I'm going to clarify for the record. You don't  
20 actually have a financial conflict with what is being  
21 decided here now.

22 VICE CHAIR CABRAL: Correct, with this  
23 question I do not feel like I have a financial  
24 conflict to the question.

25 CHAIRPERSON SCHEUER: Then I will ask both

1 parties to confirm that they are fine with Ms.  
2 Cabral's continued deliberations on this matter.

3 MR. MUKAI: John Mukai, County of Hawaii,  
4 no objection.

5 CHAIRPERSON SCHEUER: Thank you.

6 MR. CHIPCHASE: No, objection, Chair.

7 CHAIRPERSON SCHEUER: Thank you.

8 With that I would like to take a ten-minute  
9 recess before we continue with any questioning of the  
10 County and move on to the presentation of Mr.  
11 Chipchase.

12 It is 1:18 P.M. Let's reconvene at  
13 1:28 P.M.

14 (Recess taken.)

15 CHAIRPERSON SCHEUER: On the record. We  
16 are continuing questions for the County's  
17 presentation.

18 Commissioners, further questions for the  
19 County? If not, I had -- Commissioner Chang.

20 COMMISSIONER CHANG: I'm sorry, Chair.  
21 This won't take very long. One is a procedural  
22 question.

23 You had indicated that you were going to  
24 hear from Mr. Chipchase and then perhaps bring the  
25 County back. Is it also possible to bring the Office

1 of Planning back on?

2 CHAIRPERSON SCHEUER: We can recall a  
3 witness, that's correct.

4 COMMISSIONER CHANG: So my final question  
5 to the County is, because I know, Mr. Mukai, you said  
6 you don't know what kind of taxes the Petitioners are  
7 paying. But is it your understanding that real  
8 property taxes are different whether your residence  
9 is on Agriculture zoned land or whether it's on Urban  
10 zoned lands?

11 MR. MUKAI: John Mukai. I would imagine  
12 so. It's just that I don't know how real property  
13 tax does their assessment and tax collections. I  
14 apologize.

15 COMMISSIONER CHANG: And you probably can't  
16 answer the question about why would taxes be lower on  
17 Agricultural lands than on Urban lands even if it's  
18 for a residence?

19 MR. MUKAI: We can't answer questions.  
20 This would be more directed to the real property tax  
21 office.

22 COMMISSIONER CHANG: All right. I have no  
23 further questions.

24 CHAIRPERSON SCHEUER: Last response was  
25 from you, Mr. Mukai; is that correct?



1 MR. MUKAI: Yes, and again, I apologize.

2 CHAIRPERSON SCHEUER: It's okay. We are  
3 all trying to figure out how to do business during a  
4 pandemic, so we should ask for great grace and expect  
5 it.

6 CHAIRPERSON SCHEUER: Before I recognize  
7 Commissioner Cabral, I've seen your hand. I know you  
8 want to speak. Because Commissioner Chang asked us  
9 about procedures that we're in, I want to make sure  
10 that all of us understand where we're at.

11 According to the Commission's  
12 administrative rules, specifically 15-15-100, within  
13 90 days after receipt of a Petition for Declaratory  
14 Order we either deny the Petition in writing, stating  
15 the reasons for denial; issue a Declaratory order, or  
16 set the matter for hearing as provided in 15-15-103  
17 of the Commission's rules.

18 In addition, Section 15-15-102 of the  
19 Commission's rules provides that the Commission can  
20 for good cause refuse to issue a Declaratory Order by  
21 giving specific reasons.

22 So my intention with the time we have  
23 available today is to absolutely hear from Mr.  
24 Chipchase, perhaps have some further questioning of  
25 the public witness Office of Planning, as well as

1 further questioning of the County.

2 But we can either act to grant or deny  
3 today, or we can decide, as a Commission, to schedule  
4 this for a hearing, if there is further questions  
5 necessary.

6 With that said, Commissioner Cabral.

7 VICE CHAIR CABRAL: Just to try and provide  
8 information. I actually pulled up the new rates for  
9 Hawaii County residential, so when you're actually  
10 having it as residential use you pay \$11.10 for the  
11 per thousand dollars of assessed value for the first  
12 2 million, and more if your house is worth more than  
13 2 million. And if you're Agriculturally zoned, it's  
14 \$9.35, and hotel and resort \$11.55. If you're an  
15 owner/occupant and you declare that, it's \$6.15 per  
16 \$1000.

17 So there are differences in the tax rate  
18 between plain residential, which means it could be a  
19 rental versus agriculture \$9.35 versus  
20 owner/occupant, they're different rates.

21 Hopefully that helps you.

22 CHAIRPERSON SCHEUER: Commissioners, any  
23 further questions? If not, I have a couple questions  
24 for the County.

25 Following up on the questions from

1 Commissioner Wong, first of all.

2 I have understood the County's statements  
3 to be that you believe that under the ordinance which  
4 was recently passed regulating short-term vacation  
5 rentals, the short-term vacation rentals are not  
6 authorized in the Agricultural District, but with a  
7 special permit. You believe that bed and breakfast  
8 may be authorized in the Agricultural District?

9 MS. SURPRENANT: That is possible, yes.  
10 April Suprenant, Deputy Director.

11 CHAIRPERSON SCHEUER: And your response  
12 was?

13 MS. SURPRENANT: Yes.

14 CHAIRPERSON SCHEUER: And is that because  
15 Chapter 205 specifically allows for bed and breakfast  
16 as an acceptable use in the Agricultural District?

17 MS. SURPRENANT: I think that is listed  
18 under the provisions for special permit.

19 CHAIRPERSON SCHEUER: My second question  
20 has to do with the County's take on the Office of  
21 Plannings's brief, specifically on page 7 of the  
22 Office of Planning's brief they note -- and summarize  
23 the County's position that farm dwellings existing  
24 prior to June 4th, 1976, may continue to operate a  
25 short-term vacation rentals as a nonconforming use.

1 That OP summarizes the County's position as that, and  
2 OP disagrees.

3 And the crux of OP's disagreement, if I  
4 understand correctly, is that short-term vacation  
5 rentals were somehow allowed as a use in the  
6 Agricultural District prior to that date.

7 What is the County's response?

8 MR. MUKAI: My understanding is that --  
9 John Mukai.

10 My understanding is that it was based on  
11 the definition of farm dwelling under Section 205.  
12 And certain uses were grandfathered in.

13 Now, whether or not the Office of Planning  
14 disagrees or not, we don't think that is before you,  
15 and I do not believe it is any part of the relief  
16 sought in this particular matter.

17 CHAIRPERSON SCHEUER: Thank you, Mr. Mukai.

18 MR. MUKAI: Again, John Mukai.

19 Perhaps Ms. Apuna could comment on that.

20 CHAIRPERSON SCHEUER: I'll call up Ms.

21 Apuna later when the Commissioners have questions for  
22 her. If there's nothing further for the County now,  
23 I sincerely want to give Mr. Chipchase a chance to  
24 present his case.

25 Is there anything further from the County

1 at this time, Commissioners? If not, Mr. Chipchase,  
2 can you begin by sharing just a sense of how long you  
3 might want to take, at least on this first bite?

4 MR. CHIPCHASE: Absolutely, Chair.

5 Cal Chipchase for Petitioners Linda K.  
6 Rosehill and the other individual Petitioners.

7 My presentation, or at least my initial  
8 comments to the Commission are under 30 minutes.  
9 They were under 20 before we began today. They have  
10 grown. In that growth I will try to answer some of  
11 the questions that came up along the way, but that's  
12 about how long I will take.

13 CHAIRPERSON SCHEUER: Okay. Thank you very  
14 much for that overview. Please proceed, Mr.  
15 Chipchase.

16 MR. CHIPCHASE: Thank you, Chair. I will  
17 also add that we have a brief PowerPoint presentation  
18 today which I'll put up on the screen, and hopefully  
19 you'll be able to see it and me, if technology works  
20 as it should; if not, you'll see one of us.

21 The PowerPoint will be provided to the  
22 Commission so that everybody has a hard copy and it's  
23 part of the record. Other than that, we have no  
24 additional exhibits, and stand on the papers that we  
25 filed.

1           What I wanted to talk about today with you,  
2 and you've gotten into the merits quite deeply in  
3 your questioning of both public witnesses and the  
4 County. But I want to talk a little bit about who we  
5 are, who the Petitioners are; how we got here; why  
6 this is a question before the LUC.

7           I want to talk about what this case is  
8 about, but I also want to talk about what it's not  
9 about, what isn't before the Commission. What  
10 doesn't matter for purposes of the Commission's  
11 decision.

12           I'm going to take you through what we  
13 believe to be an appropriate analysis of the question  
14 that is before the Commission, and then conclude with  
15 the outcome that we believe is not only appropriate,  
16 but is consistent with State law.

17           In terms of who the Petitioners are, they  
18 are owners of lots within the Agricultural District.  
19 Those lots are located in Kailua-Kona, Kamuela and  
20 Captain Cook. All their lots were created before  
21 June 5th, 1976. And we will talk about why that date  
22 is important.

23           Commissioner Chang had asked earlier  
24 whether any or all of the Petitioners had signed a  
25 Farm Dwelling Notice. I did ask that question of my

1 clients coming -- as it came up today. I don't have  
2 an answer for you. But it doesn't really matter,  
3 that's not a question that is before the Commission.  
4 It doesn't affect the answer to the question that is  
5 before the Commission, as the Chair said at the  
6 beginning. And I'll emphasize that more later.

7           We're really dealing with the question of  
8 interpretation of State law. And so to answer  
9 Commissioner Chang's question as to the other two  
10 witnesses, I do agree that the LUC has jurisdiction  
11 and authority to interpret and apply Chapter 205,  
12 specifically here as we'll see, the question is  
13 Chapter 205 as it existed on June 15th, 1976.

14           I would part with the other counsel in this  
15 case in saying that courts defer to the agencies'  
16 interpretation generally. They only defer if the  
17 statute is ambiguous. Here there is no ambiguity in  
18 the relevant portions of the statute. No party, none  
19 of the Petitioners or the County have claimed there's  
20 an ambiguity. OP as a public witness has not said  
21 there's an ambiguity, and there is none.

22           We can read the words and understand what  
23 they mean. It's not susceptible to two reasonable or  
24 conflicting interpretations which would be the  
25 standard. It's ultimately a question of law,

1 interpretation of statute, and the LUC is able to do  
2 that under its authority.

3 I will say that while the -- I can't answer  
4 the question of whether the Farm Dwelling Notice was  
5 signed by my clients. There is no dispute that all  
6 of the homes that are on that, the dwellings that are  
7 on the lots, were lawfully constructed as a matter of  
8 State and County law. Nobody has come in and said  
9 otherwise.

10 Again, that's not a fact that is critical  
11 or even relevant to the Commission's answer to the  
12 question of law, but I wanted to provide that  
13 background, because some questions had come up around  
14 it.

15 I will also say and offer to everyone, and,  
16 to the court reporter, we are dealing with  
17 technology, and technology, as we have seen today, is  
18 uneven. So if I can't be heard clearly; if I speak  
19 too quickly for this medium, please let me know  
20 before anybody's frustrated or isn't able to  
21 understand what I'm trying to say. I'm happy to  
22 adjust it as necessary.

23 CHAIRPERSON SCHEUER: Thank you very much  
24 for that.

25 MR. CHIPCHASE: You're welcome, Chair.



1           So after hearing a little bit about who we  
2 are, let me talk about how we got here. Why we're up  
3 before the LUC.

4           And the reason is quite simply because the  
5 County of Hawaii changed its land use regulation, and  
6 as a general matter that would not be a question for  
7 LUC. The County regulating land is not something  
8 that normally comes up as an issue for the State to  
9 the LUC. And that's because land can be regulated to  
10 a certain extent.

11           And as Commissioner Okuda pointed out in  
12 the Obayashi, State Sunset Beach, but it's commonly  
13 known as the Obayashi case, did say -- Justice Akoba  
14 held quite clearly that the more restrictive  
15 provision in the Agricultural District controls.

16           So the County can't regulate less than or  
17 restrict less than State law provides, but it can  
18 restrict more. So you have County laws that restrict  
19 Agricultural activities in different ways that  
20 Chapter 205 might. The big difference is those are  
21 all perspective, forward looking.

22           So if I'm using a property today, and my  
23 use is lawful, the County can say, you know what, as  
24 of tomorrow nobody else can start this use in this  
25 area. And you, existing use, can't expand the use,

1 you can't grow it. But the County can't tell me I  
2 can't continue the use. The County can't say it was  
3 lawful on Monday, it's unlawful on Tuesday. That  
4 would be widely unconstitutional.

5           Instead, we would say that the property  
6 owner, the user, has a vested right to continue the  
7 use of the property as it was. We would call it a  
8 lawful nonconforming use, or we would say that the  
9 use it grandfathered, because these descriptions  
10 operate prospectively.

11           Certainly the County could not do what it  
12 has done here, and that is to say your use is not  
13 only unlawful prospectively, but it was actually  
14 unlawful for 40 years, and you just didn't know it.

15           So I'll put that in context of an example.  
16 You're operating a dairy farm on land. And that use  
17 is lawful today. The County tomorrow can say no new  
18 dairy farms. We've revised our zoning code. We're  
19 not allowing new dairy farms in this area.

20           It can even say you existing farm can't  
21 grow your operation. Can't have more acreage. Can't  
22 milk your cows. There's some limitation about what  
23 you can do, fixed by what you were doing. That's  
24 generally okay.

25           What it can't do is say on Monday your

1 dairy farm was okay, but on Tuesday your dairy farm  
2 is not. It can't simply declare a use, an existing  
3 lawful use unlawful. And it certainly can't go back  
4 in time and say for 40 years it turns out your dairy  
5 farm was unlawful, you just didn't know. That's  
6 exactly what the County is trying to do here.

7           And the way it's trying to get around the  
8 constitution, and the reason the LUC comes into play,  
9 is because the County has said your use was always  
10 unlawful; and it was unlawful as a matter of State  
11 law, and it was unlawful as a matter of State law on  
12 June 5th, 1976, when the State adopted the definition  
13 of farm dwelling.

14           That's the reason the County picked that  
15 date, is to say, this use that we're now no longer  
16 allowing you to engage in was actually illegal  
17 43 years before we got around to telling you you  
18 couldn't engage in it.

19           So the County is using State law to justify  
20 the retroactive application of a change in County  
21 zoning. That's the issue, and that's why we're  
22 before the LUC.

23           And to the point of whether other counties  
24 do this, no. I have not seen any other county reach  
25 back in time and say that our law does not

1 grandfather you in. You do not get to continue this  
2 use that you were engaged in, because for 43 years it  
3 was illegal as matter of State law.

4 All the counties have different regulations  
5 of the Agricultural District to some extent, nobody  
6 that I've ever seen or ever worked on has reached  
7 back in time the way the County of Hawaii has done  
8 that. And so that takes us to why we're here. What  
9 is the question before the Commission.

10 The question before the Commission is quite  
11 simply whether as of June 5th, 1976, Chapter 205  
12 regulated the duration of rentals of a farm dwelling;  
13 whether it regulated how long a farm dwelling had to  
14 be rented to be a farm dwelling. Did it impose a  
15 minimum rental period? That's the question and  
16 that's the question because, as I said, that's the  
17 date that the County is relying on.

18 This is not a factual question, other than  
19 the fact that the ordinance and what the ordinance  
20 says, that matters very much. We haven't heard in  
21 detail what it says. We've heard labels, and I'll  
22 talk about that too. But what the ordinance says  
23 matters very much; the other facts do not.

24 The ultimate question is one of law, and  
25 all of the briefs that you've seen and the bulk of

1 the argument that you've heard today focuses on that  
2 law. And so, although Commissioner Ohigashi has  
3 left, I will respond to a point that he made, and if  
4 there are further questions later, I'm happy to  
5 elaborate.

6 But he referenced HAR 15-15-23. That was a  
7 adopted in 1986. So it was adopted ten years after  
8 the date that the County relies on. And so it's not  
9 something that is relevant to the question that is  
10 before the committee. The County chose the date.  
11 The County chose June 5th, 1976 as its trigger date.  
12 So anything that happened in the law after that  
13 doesn't matter.

14 The rule that Commissioner Ohigashi cited  
15 wouldn't matter for other reasons too, but we don't  
16 need to get into them because it's obviously after  
17 the date that the County has selected.

18 The question that's before the LUC is not  
19 one that asks the LUC to declare the County law  
20 invalid, that's not something that the Commission  
21 could do, and we certainly haven't asked the  
22 Commission to that.

23 It's quite simply, what was the law for  
24 this specific use, farm dwelling, as of a particular  
25 date. So let's turn to that and what this case is

1 actually about, which is legal definition.

2           The details matter, and in this case, this  
3 declaratory case, the details are the definition.  
4 And so the effective April 1, 2019, the County  
5 prohibited what it's labeled as short-term vacation  
6 rentals on lots created on or after June 5th, 1976.  
7 Not a prospective regulation, again, a retroactive  
8 regulation.

9           This definition of what the County has  
10 labeled short-term vacation rentals has three parts.  
11 The first part is that the owner doesn't reside  
12 there.

13           The second part is that the dwelling  
14 doesn't have more than five bedrooms to rent.

15           And the third is that the dwelling is  
16 rented for a period of 31 days.

17           That's what makes a use a short-term  
18 vacation rental in the County's mind, just those  
19 three factors. Nothing else. Nothing considering,  
20 as we will see, how the property is actually used.

21           As I said, the County picked June 5th,  
22 1976, because that's the date that the legislature  
23 enacted or was effective, put into place the  
24 definition of farm dwelling. That's when it was  
25 added to Chapter 205. According to the County, since

1 that date Chapter 205 has prohibited rentals of less  
2 than 31 days.

3 In your discussion with both County and  
4 Office of Planning, there's a lot of inconsistent  
5 things said, both of them at different times said,  
6 oh, sure, a rental of less than 31 days would be  
7 okay, as long as it's connected to agricultural  
8 activity, that would be fine. But with that  
9 concession, the case over. That's the only question  
10 to answer by the Land Use Commission is: Did the law  
11 on that date prohibit rentals of 31 days? Both have  
12 said no, as long as it's connected to agricultural  
13 activity.

14 The County later said, yes, it would still  
15 be illegal, but not an accurate portrayal of law, and  
16 it's inconsistent with statements that were earlier  
17 made.

18 So that's really what this case is about.  
19 And just to touch on OP's brief point about, is that  
20 a question the LUC can address? Absolutely. As  
21 every party has conceded to Commissioner Chang's  
22 question, the LUC has jurisdiction to interpret and  
23 apply the law. We've asked for that. The County has  
24 asked for that.

25 The fact, as I said, is what the County

1 ordinance says. And certainly the LUC can interpret  
2 the law as it applies to that fact.

3 Let me talk a little bit about what this  
4 case is not about. And you've heard a lot about what  
5 it's not about already from the other parties, but  
6 it's not about labels. Anyone can label any use any  
7 way they want to, and here as you've heard from the  
8 County today quite strongly, farm dwelling and  
9 short-term vacation rental by their terms, by their  
10 labels, are simply incompatible. They can't  
11 co-exist.

12 Well, a label doesn't matter. The question  
13 is how do you define it? As we set out in our  
14 papers, all the counties in the State define short  
15 term different ways. On Oahu short term is less than  
16 30 days. On Maui it's less than 180 days. On Kauai  
17 it's less than 181 days, and as we have seen on the  
18 Big Island, it's now less than 31 days.

19 Short term is just a label. What matters  
20 is how it's defined, right? That's the key part, not  
21 what you call it.

22 So we put in our papers an example of that.  
23 The County could label wind farms as power plants.  
24 They generate power from a specific location. We  
25 regulate power plants and we don't allow them on



1 agricultural land, not allowed under Chapter 205.

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

11           In the same way, you can't look at the  
12 label "vacation dwelling" and "farm dwelling". You  
13 have to actually look at how those terms are defined.  
14 You also have to consider if you're interpreting and  
15 applying State law, so Statewide, right?

16           So what you do, how you interpret Chapter  
17 205 is the same for every county. What you say 205  
18 means is the same for every county. It doesn't turn  
19 on each county's individual definition of short-term  
20 rental. You don't say Chapter 205 means this on the  
21 Big Island, because they define it for 31 days. But  
22 this on Oahu because they define it as 30 days. And  
23 it means this on Kauai because it's 80 days, and  
24 something different on Maui because it's 181 -- I got  
25 those backwards, Kauai is 181, Maui is 100 days.

1           You wouldn't have different definitions of  
2 farm dwelling for each county, you have one  
3 definition. And because you're the State Land Use  
4 Commission, you're interpreting and applying Chapter  
5 205, which is a State law.

6           And so the Hawaii Supreme Court, as we put  
7 out in our papers, has been quite clear. The titles  
8 don't matter. What you title an ordinance, or in  
9 their case, the statute, doesn't matter; what you  
10 label something doesn't matter. It's the substance  
11 that is important.

12           So we need to look at the substance of what  
13 the County is regulating and not what the County has  
14 called it to determine the right answer in this case.

15           The second thing that this is not about is  
16 specific uses. So what individuals are doing on  
17 their property; how individuals are using their  
18 property. And it's not about specific cases, because  
19 the question before the LUC is one of interpretation  
20 of a law, right? It's a legal question interpreting  
21 a law that arises only because of the factual  
22 circumstances of what the County has done, not  
23 because of any individual use.

24           So to Dr. Bell earlier, any individual use  
25 might not be a farm dwelling under State law, because

1 of how the property is used. If it's not used in  
2 connection with a farm, or doesn't provide income to  
3 the family occupying, the farm doesn't provide income  
4 to the family occupying the dwelling, it wouldn't be  
5 a farm dwelling. But that's a question of  
6 enforcement, not a question of interpretation.

7 We're here on a question of interpretation,  
8 not a question of enforcement, not a question of  
9 interpretation.

10 We are here on a question of  
11 interpretation, not a question of enforcement, not  
12 dealing with specific uses whether they're  
13 petitioners or Mr. Bell, those aren't the questions  
14 that are before the body.

15 The last thing this case is not about, and  
16 it harkens back to my first point and that is, it's  
17 not about vacation rentals. No one is asking the  
18 Commission to say vacation rentals, however, they  
19 might be defined -- and I use that term generically,  
20 because as we've have seen, the definitions vary.

21 No one is asking the Commission to say that  
22 vacation rentals are allowed on state ag land.  
23 Certainly not to get to the specific part of the  
24 question. Not to say that as of June 5th, 1976,  
25 vacation rentals were allowed on state ag land. That

1 is not question before the Commission.

2 To be sure, as I said, the County, and to  
3 some extent OP have tried to make that the question,  
4 but it's not. Again, that's just a label. And  
5 unless you dig into the definitions, you don't know  
6 what that label means. And so what we've seen today  
7 is that term, "vacation rental" actually defined  
8 additional labels that have nothing to do with either  
9 the ordinance or Chapter 205.

10 The way Ms. Apuna described vacation  
11 rental, that's not what the County ordinance says.  
12 There's nothing -- those words aren't found in the  
13 County's definition of short-term vacation rental.

14 The same thing for the County. The County  
15 described it when it departed from the code, those  
16 words aren't in the County code. That's now how the  
17 County defines short-term vacation rental. Those are  
18 hypothetical speculations about how a property is  
19 used or what's occurring on the property. They're  
20 not the definition. And because they're not the  
21 definition, they're not the things that are actually  
22 before the LUC today, they don't matter.

23 So it's not about vacation rentals. It is  
24 about definition, those matter.

25 So let's take those definitions and really

1 look at them piece by piece and see what the State  
2 law was as of June 5th, 1976.

3 So, as I said, there are three parts to the  
4 County's definition, three things really that make a  
5 dwelling a short-term vacation rental.

6 First is that the owner does not occupy the  
7 dwelling.

8 Second is that the dwelling has five or  
9 fewer bedrooms.

10 The third is that a tenant occupies the  
11 dwelling for less than 31 days.

12 That's it. Then it's a short-term rental,  
13 nothing more. Nothing about how the property is  
14 being used, just those factors. So let's take them  
15 one at time.

16 First one, the owner doesn't occupy the  
17 dwelling. So then we ask, does Chapter 205, as of  
18 June 5th, 1976, require that the owner occupy the  
19 dwelling to make it a farm dwelling? And we see that  
20 the answer is no. The answer is clearly no. There  
21 is nothing in the State statute that requires it.

22 And, indeed, OP does not argue to the  
23 contrary, and further indeed today the County  
24 conceded that, yes, an owner does not need to occupy  
25 the dwelling for it to be a farm dwelling, it can be

1 rented. And that's what State statute expressly  
2 says, right? The State statute, as of that date,  
3 expressly contemplates leases. Leases are the same  
4 thing as a rental. Nobody argues otherwise.

5 So the first part of the County's  
6 definition of short-term vacation rental is not  
7 inconsistent with a farm dwelling. The owner does  
8 not have to occupy.

9 So we move onto the second part.

10 The second part is the number of bedrooms.  
11 The County defines short-term vacation rental as  
12 having five or fewer bedrooms to rent. So we go  
13 through the same exercise. We look at the State  
14 definition of farm dwelling, and we ask ourselves,  
15 okay, well, does the State definition as it existed  
16 on June 5th, 1976, care how many bedrooms a farm  
17 dwelling has? No, it doesn't.

18 There is nothing in the State definition  
19 that cares one way or another. Could have one  
20 bedroom, it could have six bedrooms. It doesn't  
21 matter for purposes of State definition.

22 Again, we look and we say, okay, the way  
23 the County has defined short-term vacation rental, at  
24 least as to bedrooms, is not inconsistent with a farm  
25 dwelling. You can have a farm dwelling with fewer

1 than five bedrooms. So we're okay so far. They line  
2 up. There's no conflict.

3 So we come to the last part, the duration  
4 of the rental. And as you can see, as we put up on  
5 the screen, the County defines short term as a period  
6 of 30 consecutive days or less. Again, different  
7 from all the other counties, but prospectively no  
8 problem, the County can define things however it  
9 wants to. Since the County is trying to do this  
10 retroactively, we have to look and say, okay, how did  
11 the State define "short term"? How did the State  
12 define farm dwelling? Did it impose a minimum rental  
13 period?

14 Eschewing labels, eschewing generalities,  
15 looking at what the statute actually says. And in  
16 their papers the County and OP took the position that  
17 in all circumstance, in all ways, you could never  
18 have a rental of a farm dwelling less than 31 days  
19 and still be a farm dwelling.

20 Under questioning by the Commission today,  
21 both caved on that point. Both acknowledged there  
22 are circumstances in which you have a rental of less  
23 than 31 days and it still be a farm dwelling as a  
24 matter of State law.

25 That, again, is the end of the discussion.

1 That's the entirety of the Petition for Declaratory  
2 Relief. The answer is, no, State law did not  
3 regulate or prescribe a minimum rental period. And  
4 we can see quite clearly for three reasons that  
5 that's the right answer.

6 The first is that the statute does not  
7 expressly set a durational minimum. It just doesn't.  
8 We have up on the screen concessions from OP's brief,  
9 and you heard it again today. There's nothing in the  
10 statute that sets a minimum period.

11 If we look at the definition, the approach  
12 the State has taken is to focus on use, how that  
13 dwelling is used. That's the difference between a  
14 single-family dwelling and a farm dwelling, as a  
15 matter of State law. Not how long a particular  
16 occupant uses it, but how the dwelling is used. And  
17 that's the difference structurally between how the  
18 County approached short-term vacation rentals, and  
19 how the State approached farm dwellings.

20 When we look at the County's definition, we  
21 see the word "vacation" doesn't appear anywhere  
22 except in the title, right? Except in the definition  
23 itself. The County definition does not look at the  
24 use, does not ask is the person staying there for  
25 less than 31 days on vacation, or are they a tenant



1 farmer or are they a resident, or are they doing  
2 something else?

3 The County's definition doesn't care how  
4 the property is used, it just cares how long it's  
5 used. The State definition is completely the  
6 opposite. It does not care how long it's used, it  
7 cares expressly how it's used. And so there is no  
8 durational limitation in the State statute.

9 A farm dwelling is simply a single-family  
10 dwelling. A single-family dwelling describes the  
11 type of structure, one living unit.

12 That one living unit must be used in one of  
13 two alternative ways. The first is located on and  
14 used in connection with the farm. The second is that  
15 the family occupying the dwelling, the family using  
16 the dwelling, must derive income from an agricultural  
17 activity. That's it. Focused entirely on the use.

18 The dwelling located on and used in  
19 connection with the farm, or the family occupying the  
20 dwelling and receiving agricultural income could be  
21 there for a month, a year, ten years, 100 years, if  
22 we could live so long, and it wouldn't matter. The  
23 statute doesn't care about the use.

24 The interpretation rules, as set out in our  
25 papers, and we see some up on the screen, tell us

1 quite clearly that when the text is plain, we're  
2 bound by the text. The discussion ends. The statute  
3 said what it said on June 5th, 1976, that's the end  
4 of the discussion.

5 To get around that, get around the plain  
6 language, OP and County rely on implication,  
7 acknowledge, okay, doesn't actually say that. We're  
8 going to imply a minimum rental period. And today  
9 you heard it all over the map. It actually might not  
10 be a minimum period depending on how it's used.

11 Well, the County code says a minimum rental  
12 period, and they justify that by implication, not by  
13 expression.

14 Two issues with that, of course, the first  
15 is you can't simply add words to a statute that  
16 aren't there. You can't make a statute do more than  
17 it does. That's just not sound construction or any  
18 defensible construction.

19 The second is, because we are dealing with  
20 the zoning law, because we're dealing with something  
21 that restricts or limits the use of property, it's a  
22 zoning law. And because it's a zoning law, the court  
23 or ICA, and we put in our papers and it's up on the  
24 screen, has expressly held you can't extend the  
25 restrictions by implication. They're either

1 expressly in there or they're not, and that's the end  
2 of discussion.

3           The third reason that the plain language of  
4 the statute controls, and that the right answer is  
5 the plain language of the statute did not regulate  
6 minimum rental periods, is because a contrary reading  
7 leads to an absurd result.

8           You would have to say that at all times and  
9 in all ways, Chapter 205 on June 5th, 1976,  
10 prohibited the rental of any farm dwelling for less  
11 than 31 days. If you go down that path, then you  
12 lead to an absurd result as we will see. If you go  
13 down the correct analytical path, which is to say it  
14 did not, June 5th, 1976 did not prescribe a minimum  
15 rental period. You end up with a very clean  
16 analysis.

17           We've illustrated that analysis through the  
18 magic of PowerPoint. You start with the fact of a  
19 single-family dwelling. You have one, okay. You're  
20 on the right track.

21           The second question, is it used in  
22 connection with the farm? If that answer is, yes,  
23 that's the end of the discussion, the use was lawful  
24 on June 5th, 1976.

25           You get to the third consideration, you

1 have a month-to-month lease for any of the reasons  
2 set out in landlord-tenant code. And by the way,  
3 that's an important consideration here, is the  
4 landlord-tenant code expressly authorizes leases of  
5 any terms.

6           And in two circumstances makes leases month  
7 to month. The first is if you don't have a written  
8 lease, it's automatically month-to-month lease.

9           The second is if your rental term ends, the  
10 State law, the landlord-tenant code converts it into  
11 month-to-month lease.

12           So in this situation, we have something  
13 like that. You have a single-family dwelling, it's  
14 used in connection with of a farm. You have a  
15 month-to-month lease for any of the good reasons the  
16 State landlord-tenant code says you can, no problem,  
17 it's still a farm dwelling.

18           If we look at the alternative language of  
19 the definition of farm dwelling, we get to the same  
20 outcome. You have a single-family dwelling.  
21 Agricultural activity provides income to the family  
22 occupying the dwelling. You have a month-to-month  
23 lease for any of the many reasons the State law says  
24 you can. No problem, it's still a farm dwelling,  
25 because you've met the definition in Chapter 205.

1           And this will be true for all counties,  
2 right? It's State law, it's a uniform ruling. It  
3 applies in all counties, regardless of how they  
4 define short term.

5           But if you go down the County's rabbit hole  
6 and start introducing duration as relevant to the  
7 State definition, you end up in an absurd result.

8           You take the same basic facts. You have a  
9 single-family dwelling. It's used in connection with  
10 the farm. And if you stop there, Chapter 205 says  
11 that's a farm dwelling all day long. That's all  
12 Chapter 205 looks at. You introduce a month-to-month  
13 lease and now the County and OP would say that's not  
14 a farm dwelling, that suddenly becomes a short-term  
15 vacation rental, because, we, the County, chose to  
16 define it that way. Again, we've heard different  
17 things today, but this is what their written  
18 arguments were.

19           CHAIRPERSON SCHEUER: Mr. Chipchase.

20           MR. CHIPCHASE: Yes.

21           CHAIRPERSON SCHEUER: It's been about a  
22 half hour, exactly a half hour. How much more do you  
23 have right now?

24           MR. CHIPCHASE: Five minutes, Chair.

25           CHAIRPERSON SCHEUER: Thank you.

1           MR. CHIPCHASE: But I promise to be as  
2 fast -- I'll stick to five. Tell me when I'm up.

3           That result would only hold on the Big  
4 Island, because on Oahu we define short-term rental  
5 is 30 days. So on Oahu it would still be okay as a  
6 matter of State law, the Big Island not. You can't  
7 have that kind of absurd result.

8           And you see the same thing if we look at  
9 the alternative definition. If we say, a  
10 single-family dwelling here in the agricultural  
11 activity provides income, but again, because it's a  
12 month-to-month lease, the County would say all of a  
13 sudden you don't have a farm dwelling, at least for  
14 purposes of the Big Island.

15           It's an absurd result. You can't have that  
16 outcome, because that's not what the statute says,  
17 and you can't have an outcome that's different  
18 retroactively in different counties.

19           Going forward, the County could say we have  
20 a minimum rental period. Okay, right? That's a case  
21 for another day. The question here is going  
22 backwards. Couldn't do that.

23           The question then, the issue you come back  
24 to, putting absurd outcomes aside, is as of June 5th,  
25 1976, did Chapter 205 regulate the minimum duration

1 of rentals? And the answer, according to the  
2 statute, is no. That's not a fact specific question.

3 It doesn't depend upon what the County  
4 calls a short-term rental. Doesn't depend upon what  
5 any other county calls a short-term rental. It's not  
6 dependent upon a specific use of a particular  
7 property, because those facts are not before the  
8 Commission.

9 It's simply a question of interpretation,  
10 enforcement, making sure that the lands are used  
11 appropriately. It's a case-by-case basis. It's not  
12 a question of policy. This isn't a question of  
13 whether short-term vacation rentals are good or bad.

14 That's not a question the LUC can weigh  
15 into. The LUC can interpret its statute, and the  
16 interpretation of its statute on that date is clear.

17 What OP and County would have you do is  
18 legislate. They would have you expand the definition  
19 of "farm dwelling" to include terms that are not in  
20 it. This is what, as we put up on the screen, what  
21 the statute would have to say for you to agree with  
22 the County and OP's position. It simply did not say  
23 that on June 5th, 1976, and it doesn't say that  
24 today. This body can interpret the law. But it  
25 can't add words to the law, can't expand its

1 restriction and make it something other than it is.

2 This is true even if we feel like the  
3 legislature wanted to do something different, wanted  
4 to be more restrictive, wanted to adopt or would  
5 adopt a particular provision. It doesn't matter.  
6 When the text is clear, we stop, and that's as true  
7 for the LUC as it is for courts.

8 And so in conclusion -- and I think I made  
9 my five minutes, Chair, I hope.

10 It's not a question of whether rentals are  
11 good or bad, whether short-term vacation rentals,  
12 however you define them, are good or bad. It's not  
13 about a particular use, whether a particular use is  
14 lawful as a short-term rental or something else.  
15 It's a question of statutory interpretation. We  
16 can't rewrite the statutes. We can't say whether  
17 they're good or bad. We have to apply the law as  
18 written.

19 No one says that law is ambiguous.  
20 Unambiguously, the law as written did not regulate  
21 the duration of rentals.

22 So in response to this consolidated  
23 proceeding, the correct outcome, Chair,  
24 Commissioners, is to grant the Rosehill Petition and  
25 deny the County's position. Thank you.



1           CHAIRPERSON SCHEUER: Thank you very much,  
2 Mr. Chipchase. And, yes, that was under five  
3 minutes, that last part.

4           Commissioners, temperature check. Do you  
5 want a break before we get into what I'm sure will be  
6 extensive discussions?

7           COMMISSIONER WONG: I would like that,  
8 Chair.

9           CHAIRPERSON SCHEUER: Commissioner Wong is  
10 suggesting a break is in order. It is 2:14. If we  
11 can reassemble in ten minutes at 2:24, then we will  
12 get into questioning. Thank you. We're in recess.

13           (Recess taken.)

14           CHAIRPERSON SCHEUER: Commissioner Ohigashi  
15 joined us towards the end of Cal Chipchase's  
16 presentation. We have seven Commissioners.

17           We have the County and we have Mr.  
18 Chipchase. Office of planning? Yes, there you are.  
19 Great. Court reporter, you can hear us?

20           COURT REPORTER: I can hear you, thank you.

21           CHAIRPERSON SCHEUER: It is 2:25. We are  
22 back on the record. I think I slightly misspoke  
23 because perhaps I didn't interpret it or think about  
24 the day was going well enough.

25           We actually have four possibilities in

1 front of us today. We can deny the Petition. We can  
2 accept obviously one or deny the other. We can  
3 accept them, we can send the matter to hearing, or we  
4 can actually continue this hearing.

5 I'm advised by Mr. Derrickson that the  
6 90-day deadline for making decisions from the hearing  
7 date is August 17th. We are scheduled to be in Hilo  
8 in July, late July. It is possible that if we are  
9 not able to make a decision today, or disinclined to  
10 make a decision today, we could indicate our desire  
11 to continue these proceedings.

12 I would note that for -- because of Mr.  
13 Ohigashi's required absence, that if we did continue  
14 the proceedings, that would give him the opportunity  
15 to review the transcript of the small portion that he  
16 missed, and be eligible quite clearly to fully  
17 deliberate and make decisions on this matter.

18 So procedurally that's where we're at. We  
19 have a little more time and attention that we can pay  
20 to this now, and I want to open it up for questions  
21 from the Commissioners for Mr. Chipchase.

22 COMMISSIONER WONG: Chair.

23 CHAIRPERSON SCHEUER: Commissioner Wong.

24 COMMISSIONER WONG: This is more a  
25 procedural question that's following up with you.

1           So if we -- Commissioner Ohigashi -- we  
2 push it down the road and let Commissioner Ohigashi  
3 review the transcript, can we ask all parties to  
4 provide more information before the next hearing?

5           CHAIRPERSON SCHEUER: I believe that's the  
6 case, but I'll actually ask Ms. Chow to just opine.  
7 Could we direct the parties for additional briefs?

8           MS. CHOW: I believe so, yes.

9           COMMISSIONER WONG: Thank you, Chair.

10          CHAIRPERSON SCHEUER: Thank you,  
11 Commissioner Wong.

12          Commissioners, questions for Mr. Chipchase?  
13 Commissioner Okuda, followed by  
14 Commissioner Cabral.

15          COMMISSIONER OKUDA: Thank you, Chair. I  
16 volunteered since nobody seemed to initially  
17 volunteer.

18          Mr. Chipchase, if I understand your  
19 presentation correctly, you are viewing whether or  
20 not a dwelling is authorized or okay based on its  
21 use; is that correct?

22          MR. CHIPCHASE: Use as described in Chapter  
23 205.

24          COMMISSIONER OKUDA: Right, as described in  
25 Chapter 205. And specifically it's 205-4.5, is that

1 correct?

2 MR. CHIPCHASE: I don't recall if that was  
3 the specific statutory enumeration on June 5th, 1976,  
4 but I'm sure we're talking about the same provision,  
5 definition of farm dwelling.

6 COMMISSIONER OKUDA: Okay.

7 And with respect to the definition of what  
8 is a permitted or permissible farm dwelling, you  
9 explained to us it's basically a two-element test or  
10 two-evaluation test where you look for one of two  
11 things; is that correct?

12 MR. CHIPCHASE: That is correct.

13 COMMISSIONER OKUDA: One thing is whether  
14 or not the dwelling is used in connection with the  
15 farm; or number two, whether or not the agricultural  
16 activity provides income for the occupant of the  
17 dwelling; is that correct?

18 MR. CHIPCHASE: True, clearly alternatives.

19 COMMISSIONER OKUDA: So if I were to tell  
20 you, and let's say you were the County of Hawaii  
21 permitting official, and I told you, Mr. Chipchase, I  
22 have a parcel of property that is within the  
23 Agricultural District, and I'm telling you this under  
24 oath, in fact, I'm giving a written statement under  
25 oath, and I'm telling you to your face I want to

1 build a dwelling, but number one, I'm not going to  
2 use it in connection with a farm, there will be  
3 absolutely no agriculture taking place on the  
4 property; and number two, I'm a retiree, so I get my  
5 income from my retirement, which is unconnected to  
6 any agricultural activity. And I'm telling you I  
7 worked long and hard enough in my life, so I don't  
8 intend to get any income from any agricultural  
9 activity.

10           Would that initial dwelling be lawful under  
11 HRS Section 205-4.5 as a farm dwelling?

12           MR. CHIPCHASE: If you'll give me a little  
13 bit of room, I would like to answer your very clear  
14 yes or no question with a bit of a longer  
15 explanation. Then if you are not happy about that,  
16 then I'll come and hopefully be more direct.

17           But hopefully you understand why I take a  
18 more circuitous route. And it's not simply because  
19 the idea of putting on the County's hat is so  
20 antithetical to me, I'm just not sure how to do that.

21           But that's not the reason. It's actually  
22 that the question is complicated by two factors. The  
23 first is that the County, as we heard today, would  
24 require the proponent of the building permit to sign  
25 that farm dwelling affidavit.

1           And so if they refused to sign that,  
2 effectively making the representations that you've  
3 stated, then I presume the County would deny the  
4 building permit because they refused to sign the  
5 document.

6           Now, if they sign the document and made  
7 that statement, we heard the County say they would  
8 still grant the building permit, right, because they  
9 signed the document and they don't care that the  
10 owner has said it's not going to be used for  
11 agriculture.

12           So then, let me come back to the second  
13 part of your question, which is really not so much  
14 focused on whether the structure is lawful, because  
15 under the State law, a farm dwelling is a  
16 single-family dwelling. We describe that as a single  
17 unit. A unit for one's family. So the structure  
18 could be perfectly lawful, but it's the use.

19           And to get to what I think you're really  
20 asking is the use, and if the use doesn't meet either  
21 part of that definition, then under State law it's  
22 not a farm dwelling, and therefore, would not be  
23 allowed as a matter of State law.

24           COMMISSIONER OKUDA: So the only thing you  
25 had in front of you to make the decision as the

1 permitting officer, the only thing you had was the  
2 statute, HRS section 205-4.5, and I told you those  
3 things, number one, I don't intend to use this  
4 dwelling that I want to construct in connection with  
5 a farm; and number two, I'm not going to get any  
6 income from agricultural activity.

7           Would my use of that dwelling be permitted  
8 or lawful under that statute?

9           MR. CHIPCHASE: No.

10           COMMISSIONER OKUDA: I think your answer  
11 would be no.

12           MR. CHIPCHASE: Correct.

13           COMMISSIONER OKUDA: Let me ask you this.  
14 Switching gears just slightly.

15           You raise certain constitutional issues  
16 about vested rights. But isn't it true that a right  
17 is vested and protected by the constitution, federal  
18 and state, only if the use that you're attempting to  
19 vest was lawful at the time?

20           MR. CHIPCHASE: Absolutely, which is why  
21 the date is so critical, right? Because the County  
22 has said as of June 5th, 1976, this use was unlawful.  
23 A rental of less of than 31 days, right? Eschewing  
24 labels. That's what it's about, a rental of less  
25 than 31 days.

1           And unless you declare, as a matter of  
2 state law for all counties, that as of that date, the  
3 code or the statute prohibited a rental of less than  
4 31 days. And unless you declare, as matter of State  
5 law for all counties that as of that date the code or  
6 statute prohibited a rental of less than 31 days,  
7 then the use was lawful on that date, and vested  
8 rights would apply.

9           COMMISSIONER OKUDA: But rights are vested  
10 only if it's lawfully exercised right, correct?

11           MR. CHIPCHASE: Sure.

12           COMMISSIONER OKUDA: And my final question  
13 goes to that case that I cited earlier Save Sunset  
14 Beach Coalition versus City and County of Honolulu  
15 102 Hawaii Reports 465, and specifically at the  
16 quotation that I read at 487.

17           Did you consider the quotation I read to be  
18 an accurate statement of the law?

19           MR. CHIPCHASE: Other than I agree with  
20 Commissioner Scheuer that there wasn't a typo, but  
21 other than that I absolutely agree that that's a  
22 correct statement of the law.

23           COMMISSIONER OKUDA: Going back and  
24 rereading the case, I think both you and Dr. Scheuer  
25 are correct that I was mistaken that there was a



1 typo.

2           So do you agree that, in fact, you could  
3 have a situation where the County zoning requirements  
4 may be actually stricter than the State requirements,  
5 and the County stricter requirements should be  
6 enforced?

7           MR. CHIPCHASE: Yes, prospectively,  
8 absolutely. And you see that in different county  
9 ordinances. If we look at the different counties'  
10 regulations of ag land, you do see differences that  
11 are stricter in some cases by requiring additional  
12 permits.

13           I've never seen a county disallow a use  
14 that is expressly allowed by statute. I don't think  
15 you can do that. But I think you can allow, or you  
16 can require additional permitting or approvals by the  
17 county to make a use lawful that the State would say  
18 is lawful as a matter of right.

19           But, again, only prospectively. I do not  
20 agree that the County could retroactively say, we, in  
21 our case, believe that short term rentals, rentals of  
22 less than 31 days, are inappropriate for agricultural  
23 land. I don't believe they can apply that as of June  
24 5th, 1976. I agree they could have applied it as of  
25 April 1, 2019 forward.

1           COMMISSIONER OKUDA:   Just so I'm clear.  
2   What case do you cite to which so holds, just so that  
3   I'm really clear about the authority on which you  
4   base that statement?

5           MR. CHIPCHASE:   For the retroactive  
6   regulation of land use is illegal?

7           COMMISSIONER OKUDA:   Yes.

8           MR. CHIPCHASE:   It's extensive in our  
9   briefing.  If you give Mr. Goodin a couple of  
10  minutes, he will come up with a citation and he will  
11  be back to you.

12          COMMISSIONER OKUDA:   No, no, if it's in  
13  your brief, I read through that.

14                   Let me ask you this then.

15                   What's the difference then between what you  
16  are stating as far as the unconstitutionality of what  
17  you're describing as retroactive regulation, and the  
18  rule that I think the -- and you did put one of the  
19  cases up on the PowerPoint, but I was looking at a  
20  more recent case which is Leone, that's L-E-O-N-E,  
21  versus County of Maui, that's 129 Hawaii -- I'm  
22  sorry, 128 Hawaii 183, that's a 2012 intermediate  
23  court of appeals case where it seemed like the test  
24  really was, number one, has the regulatory agency  
25  taken away all economic value of the property; or

1 number two, was there a physical invasion of the  
2 property, no matter how minimal that invasion was?

3 I mean, isn't that the controlling case and  
4 not the cases that you cited?

5 MR. CHIPCHASE: No, Commissioner, not even  
6 close, actually.

7 So the Leone case, and the test that you  
8 articulated is a taking case. So in regulatory  
9 taking parlance, you have a taking of property if the  
10 regulation denies all economically viable use, or has  
11 such an economic impact, interferes with distinct  
12 investment-backed expectations, lacks sufficient  
13 justification that we call it a taking anyway.

14 So you've got total taking and partial  
15 taking, then physical taking. All of that comes to  
16 us from three U.S. Supreme Court cases:

17 Lucas against South Carolina Coastal  
18 Commission, which dealt with total taking.

19 Penn Central Transportation Company from  
20 the '70s that dealt with partial taking, regulations  
21 that leave some economically viable use, but still go  
22 too far, in the words of an older case.

23 And physical taking, which comes from  
24 Loretto v. Teleprompter. We also had a case here,  
25 Kaiser Etna, which involved a physical invasion.

1           That's one protection under the Fifth  
2 Amendment, the taking clause.

3           Entirely separate from the Fifth  
4 Amendment's protections as takings or the due process  
5 protections, which are found both in the Fifteenth  
6 and the Fourteenth Amendment, as well as the Hawaii  
7 Constitution.

8           In the prohibition on retroactively  
9 applying a land use regulation is a due process  
10 violation, not a takings violation.

11           COMMISSIONER OKUDA: So you are not arguing  
12 a taking violation in this matter before us, correct?

13           MR. CHIPCHASE: That's true. And, in fact,  
14 I'm not even asking the Commission to rule the County  
15 ordinance unconstitutional, that's not your purview  
16 and that's not my point.

17           My point is that the County's retroactive  
18 regulation saying April 19, 2019 -- April 1st, 2019,  
19 rentals of less than 31 days were unlawful as of  
20 June 5th, 1976. That backwards reach is blatantly  
21 unconstitutional, but the County tries to defend it  
22 by saying on that date, State law didn't allow the  
23 use anyway. And that's why it's so critical that we  
24 focus on what the State law said as of June 5th,  
25 1976.

1           Because if the State law did not say that  
2 you cannot rent a farm dwelling for less than 31  
3 days, then the County cannot reach back in time and  
4 declare those uses illegal. It can only do that  
5 going forward.

6           COMMISSIONER OKUDA: My final question to  
7 Mr. Chipchase is: What is the harm to you? Or what  
8 response would you have to a suggestion that maybe we  
9 should just deny both Petitions, because these  
10 Petitions seem to raise issues which possibly are  
11 beyond the scope of our authority?

12           MR. CHIPCHASE: Harm in the essence of  
13 wasted time, of course, would be one. But I don't  
14 mean that in any sense of frustration. What I would  
15 say is that to me that would be an inappropriate  
16 result because the question to the LUC is quite  
17 clearly within your jurisdiction. You have the  
18 jurisdiction to interpret and apply Chapter 205.  
19 It's in your rules, and it's part of your  
20 responsibility.

21           You do that in this form, in this  
22 Declaratory Petition form, and as the Chair explained  
23 in the beginning, on these kinds of petitions, the  
24 facts may be very limited, and they aren't factual  
25 questions that are presented to you. They aren't

1 factual findings. There aren't witnesses in the  
2 sense of evidence matter, it's not a contested case.  
3 It's a legal question. And this body absolutely has  
4 the jurisdiction and the responsibility to interpret  
5 Chapter 205 pursuant to these Petitions.

6 And so I believe they're properly brought,  
7 and that it would be improper to refuse to decide it.

8 COMMISSIONER OKUDA: Well, just a slight  
9 segue, and I promise this absolutely will be my last  
10 question.

11 But don't you think that the response of  
12 the County as far as how it is applying 205-4.5 as  
13 far as what it considers a farm dwelling that, you  
14 know, they possibly do not follow your two-prong  
15 evaluation test, that now raises questions about  
16 whether or not they made a rational distinction or a  
17 proper distinction between applications of the -- of  
18 their, for lack of a better term, their vacation  
19 rental ordinance and the way they're handling general  
20 permits?

21 And maybe this is something you all should  
22 flesh out in a full-on proceeding in circuit court.  
23 I think it will go to the appellate courts after  
24 that.

25 MR. CHIPCHASE: Commissioner, I appreciate

1 that question, and I think it's thoughtful. What I  
2 would say in response to that is two things.

3 One, that there may be a time and a place  
4 for litigation over this or over questions, and once  
5 you've raised our questions for court, not for the  
6 LUC to decide. But that's not what's before this  
7 body, and guessing about what other litigation may  
8 ensue or what other questions should be answered is  
9 really outside the purview of the Petitions. The  
10 LUC, in my view, respectfully should stick to the  
11 Petitions that are before it to answer the narrow  
12 questions that are before it.

13 The other part that I would advocate for is  
14 that we try to avoid constitutional questions,  
15 generally in the legal system, if we can, if we can  
16 interpret the law in such a way to avoid a  
17 constitutional question or constitutional crisis, we  
18 do that.

19 Here there is obviously an opportunity to  
20 avoid the constitutional question by declaring what  
21 the law was on June 5th, 1976, the plain meaning of  
22 farm dwelling. And the LUC, if it exercises that  
23 responsibility and makes that declaration, has an  
24 opportunity potentially to avoid litigation of the  
25 kind that you've mentioned.

1 COMMISSIONER OKUDA: Thank you very much.

2 CHAIRPERSON SCHEUER: Thank you very much,  
3 Commissioner Okuda.

4 Commissioner Chang, followed by  
5 Commissioner Cabral.

6 COMMISSIONER CHANG: Thank you, Mr. Chair.

7 Mr. Chipchase, you're a very -- I  
8 appreciate your arguments, let me put it that way. I  
9 always appreciate your arguments.

10 I would agree with you that the question is  
11 properly the before the Land Use Commission. And I  
12 agree with you that it is really a very limited  
13 question of the definition of "farm dwelling".

14 And would you agree -- and I would also  
15 agree that the definition of "farm dwelling" has  
16 nothing to do with the duration.

17 But would you agree that while the County  
18 cannot say that it was unlawful under State law back  
19 in 1976, the Land Use Commission, through the  
20 definition of farm dwelling, could say that it was  
21 unlawful going back to 1976?

22 MR. CHIPCHASE: You could interpret the  
23 law, and if your interpretation of the law was to say  
24 this use, this duration was not allowed as of a  
25 certain date, that would not be retrospective, you're



1 declaring it as of a certain date in response to the  
2 Petition.

3           So in the same way that I agree with you  
4 that the Commission has the power to declare that the  
5 definition of "farm dwelling" has nothing to do with  
6 duration, the Commission could in response say the  
7 opposite. If you could ground it texturally in the  
8 statute and say it does have to do with duration.  
9 With respect I would disagree because it's not in  
10 there, but in terms of your power, absolutely.

11           What you couldn't do, I think, is reach out  
12 and declare that short-term vacation rentals aren't  
13 lawful in the Agricultural District, because that is  
14 a label that is subject to multiple definitions.

15           All we have before us is the County's  
16 definition. And we've been through the parts of  
17 that, and the only one that we come down to fighting  
18 about with the County is the duration.

19           So with respect I would say that is the  
20 only question before you.

21           COMMISSIONER CHANG: And I guess for me I  
22 don't even have to address the question of duration.  
23 I don't even think that that is relevant before us to  
24 determine what is the definition of farm dwelling.

25           And could you -- would you also agree that

1 the County cannot be more liberal in its  
2 interpretation of State law, while it can be more  
3 conservative and restrictive, it cannot be more  
4 liberal?

5 MR. CHIPCHASE: Yes.

6 COMMISSIONER CHANG: Would you also agree  
7 that when -- that under statutory construction, it is  
8 appropriate under the principle of pari materia to  
9 construe the statute and context of each other?

10 So I look at 205-2, 2(d) in particular,  
11 district and classification of lands. And it  
12 specifically (d) talks about agricultural districts,  
13 it really looks at describing the types of districts.  
14 It goes from Urban, Rural, Agricultural, and  
15 Conservation.

16 And under the description of Agricultural  
17 Districts, it says: Agricultural districts shall  
18 include activities or uses as characterized by the  
19 cultivation of crops, orchards, forestry, farming  
20 activities or uses related to animal husbandry,  
21 aquaculture and game and fish propagation.

22 I mean, you can read this on your own, but  
23 it's clearly -- it's related to some kind of  
24 agricultural use.

25 So when I look at the overarching framework

1 of the appropriate uses under these various districts  
2 and then I look at the definition of 205-4.5, and  
3 everybody agrees that LUC has the authority to  
4 interpret that statute.

5 And so when I look at farm dwelling, it  
6 says farm dwellings, employee housing, farm buildings  
7 are typical uses related to farming and animal  
8 husbandry.

9 Then it describes farm dwellings as used in  
10 this paragraph means -- so that when I apply the  
11 rules of statutory construction, it is clear in my  
12 mind that farm dwellings relate to farming or  
13 agricultural activities that are consistent with the  
14 overarching principles or purposes of the  
15 districting, of the various districts.

16 So while we may disagree on the definition  
17 of farm dwelling, what I hear from you is that, one,  
18 the Land Use Commission has the jurisdiction to  
19 define "farm dwelling", to define the State statute.

20 The Land Use Commission can go back to look  
21 at 1976 and what was the intent. What was the  
22 legislative intent of that definition, and we could  
23 apply statutory construction to look at the  
24 overarching principles of these various districts.

25 But the Land Use Commission has the

1 authority to make that determination. And that's  
2 totally separate and apart from the County, any of  
3 the counties, because as you've described, they all  
4 have different definitions of vacation rentals.

5 And in my mind, I don't even get to  
6 vacation rentals. I am at the point of just defining  
7 "farm dwellings". And there may be an issue with the  
8 County, but you agree that it is Land Use  
9 Commission's authority, and you described it very  
10 clearly, that that is the issue here.

11 And as Commissioner Okuda was asking  
12 questions, you felt there was enough for the Land Use  
13 Commission to make that determination.

14 I just want to confirm that with you.

15 MR. CHIPCHASE: Yeah, I appreciate that. I  
16 appreciate the thoroughness of the question,  
17 different parts.

18 I think I would have to say, at least so  
19 far as I understand you, and if I don't, it's totally  
20 my fault, that I agree in part and disagree in part.

21 If I may break that down and try to take it  
22 into parts that help us work through this.

23 The first question is looking at other  
24 parts of the statute. Obviously, that is an element  
25 of statutory construction. But I would say two

1 things about that. One is, looking at the different  
2 parts of the statute only matters if you're looking  
3 at the law as it existed on June 5th, 1976. If you  
4 are looking at the law after June 5th, 1976, then no,  
5 that's not construing a statute and pari materia.  
6 That's subsequent legislative history, and that is a  
7 completely inappropriate basis for decision in this  
8 case.

9           You have to look at the law as it existed,  
10 the date that it's relevant. And the County selected  
11 the relevant date. If the County had selected today,  
12 then you'd look at the law as it exists today. The  
13 County selected June 5th, 1976.

14           So we look at the date that the County has  
15 chosen, and then you only look at the law as it  
16 existed on that date.

17           The second thing that I would say is that  
18 when you're construing a statute as a whole, that's  
19 appropriate. But you have to apply all the rules of  
20 statutory construction, not just some of them. And  
21 among the rules that you apply, or that when you're  
22 faced with general statements and specific  
23 statements, the specific statements control.

24           So a general statement of policy, or what  
25 we believe to be appropriate uses, is a general

1 statement. It doesn't control the specific  
2 enumerated elements or activities that the State law  
3 allows.

4 For example, someone comes in and say I can  
5 do this because it's involving what is generally  
6 described in 205-2, but it's not specifically listed  
7 in 205-4.5. So you never let the general control  
8 over the specific.

9 And I would say further, when you are  
10 looking at the specific, you look at how those terms  
11 are defined. And if they're defined in the statute,  
12 then you are bound by that definition. You can't  
13 expand a statutory definition.

14 If a term is not defined, you can apply the  
15 plain language of it, and that's set out in our  
16 interpretative statutes, Section 1-, et cetera. But  
17 you have to start with and stick to the statutory  
18 definition.

19 COMMISSIONER CHANG: (Indecipherable.)

20 MR. CUPCHASE: No, I was going to finish,  
21 but I'm happy to take a break and respond to you.

22 COMMISSIONER CHANG: So are you saying that  
23 205-2(d) was not an in existence in 1976?

24 MR. CHIPCHASE: No, no. I'm simply  
25 cautioning that I don't know whether you were reading

1 from the version as it existed in 1976, or a or more  
2 recent version of the statute. So I just don't know  
3 one way or another. And so I was just cautioning  
4 that we have to read the statute that existed on the  
5 relevant date, that's all.

6 COMMISSIONER CHANG: Okay. And you would  
7 agree that you have to make sure -- I mean, part of  
8 the principle of pari materia is to ensure uniformity  
9 and consistency in the application and interpretation  
10 of the statute, right?

11 MR. CHIPCHASE: I don't know if that's  
12 specifically part of in pari materia, it's more that  
13 you're construing things as a whole, but that takes  
14 me to another rule of statutory construction, and I  
15 want to make sure we all understand, and that is you  
16 can't read one part of a statute to contradict or  
17 invalidate another part of the statute.

18 So if a statute -- in our case, we don't  
19 have to do a hypothetical, because we're dealing with  
20 farm dwellings. If the statute says this is a farm  
21 dwelling, then that is a farm dwelling. There's  
22 nothing else in the statute that can alter or change  
23 that.

24 And more to our discussion, I think, the  
25 LUC doesn't have the power to change that. You can't

1 change that definition in any way. You can't add to  
2 it. You can't detract from it. You can't modify it.  
3 It is what it is. It says what it says. You have a  
4 power to declare that, but in declaring it, it  
5 doesn't give you the power to expand or to change it.

6 And I think that's a particular focus in  
7 this case, because nor does the LUC have the power to  
8 declare something that was not presented to it in the  
9 Petition. In other words, you don't have the power  
10 to reach out beyond the Petition and answer a  
11 question you would like to answer, rather than the  
12 question that's before you.

13 COMMISSIONER CHANG: I'm sorry. What is  
14 the question that's not before us that I'm raising?

15 MR. CHIPCHASE: I'm not sure. I got a  
16 little concerned about that when you said that the  
17 duration doesn't matter, we don't have to get to  
18 duration, when duration is the thing that matters.  
19 It's the only thing that matters.

20 COMMISSIONER CHANG: No, but if -- isn't  
21 the only thing that matters for LUC, because, you're  
22 right, we interpret the statute 205-4.5. And there's  
23 nothing in 205-4.5 that says "duration", we're only  
24 defining "farm dwelling".

25 MR. CHIPCHASE: So that would be an



1 appropriate declaration, that statement from the LUC.  
2 So we are on the same page there.

3           And the last point that I wanted to make  
4 and then I'm happy to follow up with any other  
5 questions you have, of course, is that while you are  
6 looking for legislative intent, it's important that  
7 the starting point for legislative intent is the  
8 test. And if the test is unambiguous, we stop there.  
9 We don't look elsewhere for intent, because intent is  
10 presented in the form of text.

11           So we cited a number of cases for that  
12 proposition, Hawaii Supreme Court cases in our  
13 papers. I could go through them, but I don't think  
14 that's necessary. At the end of the day the text  
15 controls.

16           COMMISSIONER CHANG: And I don't dispute  
17 your analysis of statutory construction, although I  
18 do differ that I think *pari materia* is relevant when  
19 you're looking at how do you ensure uniformity and  
20 consistency in some predictability in interpretation  
21 of the statute.

22           So I am certain that we may disagree on the  
23 outcome, but I think we agree the authority of Land  
24 Use Commission, I think we agree on what the issue  
25 and the question is before Land Use Commission.

1           We may just disagree on the interpretation.  
2       So I think with that being said, Mr. Chair, I don't  
3       have any other questions.

4           MR. CHIPCHASE:  If I may just -- it's  
5       phrased more as a comment.

6           With respect, if we did agree on the  
7       principles of statutory interpretation, and since we  
8       both agree that "duration" is not in the definition,  
9       we couldn't disagree on the outcome.

10          If we agreed on all the principles, text is  
11       plain, and you and I read the text the same way, then  
12       our outcome is the same.

13          COMMISSIONER CHANG:  I would agree with  
14       you, our outcome should be the same.  You're right,  
15       should be the same.

16          Thank you so much.

17          MR. CHIPCHASE:  You're welcome.

18          CHAIRPERSON SCHEUER:  Commissioner Cabral.

19          VICE CHAIR CABRAL:  Thank you all for your  
20       information and especially my fellow Commissioners  
21       Okuda and Chang.  You hit on some of my questions but  
22       I won't be nearly as eloquent in my questioning.

23          I'm just a lay person here, so my questions  
24       really have to do with -- a whole lot of your  
25       presentation, Mr. Chipchase, was, of course, as

1 always eloquent, but it's really so focused on  
2 timeframe, and yet I do see it does not appear from  
3 my limited reading of 205-4.5 that the timeframe is  
4 really relevant.

5 So I can appreciate that, but I'm more  
6 concerned about the use and then more recently you  
7 referenced something about intent, so I'm sure that  
8 must have some legal meaning.

9 But the use of it is to be a dwelling, and  
10 a dwelling -- I don't know that a dwelling is -- let  
11 me ask you a question. Maybe this will help answer  
12 my question.

13 If the people who are staying, come to stay  
14 in this property that you are asking for, petitioning  
15 for, the actual property. When they come and stay  
16 there, if they were not able to stay there for the  
17 three days or the five days or the two weeks that  
18 they stay there, where else would they end up  
19 staying? Do you have any idea where they would have  
20 to stay?

21 MR. CHIPCHASE: You know, Commissioner, I  
22 hate to say it, I can't answer the first question  
23 you've asked me, but I have no idea. I have no idea,  
24 those would be extremely specific facts, and we don't  
25 have those facts.

1           VICE CHAIR CABRAL: Because what I'm trying  
2 to say is, I think when we look at a farm dwelling,  
3 first off, it's a dwelling, which means usually a  
4 person dwells in it, they live in it. The people  
5 that come to use it on short-term basis that you're  
6 asking permission that they be allowed to do it,  
7 although time doesn't matter, they actually live  
8 somewhere else. Is that correct?

9           They don't move in for three days to two  
10 weeks. So dwelling-wise like whether it's guests,  
11 they can stay a long time, so it's not the timeframe,  
12 the fact that they dwell there or they don't dwell  
13 there.

14           My concern is, all your reference is on  
15 time, but my concern is usage. So one, they really  
16 don't really dwell there, and the second one would be  
17 at no point have I seen anything in your presentation  
18 that would represent that they had any type of  
19 activity that would be related to agriculture or  
20 farm. It's a farm dwelling, and they would derive or  
21 do something that had to do with a farm activity.  
22 And at no point did I see anything in your  
23 presentation that would say there was any kind of  
24 farm activity in their usage of that dwelling. Am I  
25 missing something?

1           MR. CHIPCHASE: With respect, yes. And but  
2 not what you're asking me. What you're asking me is  
3 correct, but what I think I didn't do a good job of  
4 communicating to you in my papers, in my  
5 presentation, is that those kinds of specific  
6 questions is a particular property, a farm dwelling,  
7 are not before the Commission. This is not a  
8 petition asking to allow X use on X property.

9           This is a Petition asking the LUC to  
10 interpret the law as of a certain date.

11           And the reason that we focused on that  
12 date, June 5th, 1976, and the reason we focused on  
13 31 days, was because that's the county code. So read  
14 literally and, again, the County and OP hedged on it  
15 a number of times today, but read literally, the  
16 County would define a short-term rental as a farm, a  
17 tenant farm on a farm using the dwelling in  
18 connection with the farm and deriving income from the  
19 farm, if than tenant is on a month-to-month lease.

20           So month-to-month lease, the County  
21 literally in its definition would say that is an  
22 unlawful use of agriculture lands.

23           That is why we focused so much on the  
24 duration, because the County focuses on the duration.  
25 The County definition does not consider the things

1 that you talked about. Is there actual farming going  
2 on? How are they using it? Where do they actually  
3 live?

4 The County didn't talk about anything of  
5 those things when it defined short-term vacation  
6 rentals. So since we are here in the construct of  
7 the County definition, we don't look at those things,  
8 we don't talk about those things. They aren't part  
9 of my presentation or anyone's presentation or the  
10 facts before this body.

11 All we're looking at is the County law.  
12 What are its elements of short-term vacation rental.  
13 And do those elements duplicate State law as it  
14 existed on June 5th, 1976. That's really the only  
15 question before this body. That's why we focused so  
16 much on.

17 The things that you're talking about really  
18 go to enforcement of a particular use. A particular  
19 use might be unlawful, but that illegality has  
20 nothing to do with how long a person is living there.  
21 A tenant farmer on a month-to-month is a perfectly  
22 lawful use of State land. Another use that may be a  
23 ten-year use could be a perfectly unlawful use of  
24 State land. The timeframe wouldn't matter.

25 And that's really the only question that is

1 up before you is on June 5th, 1976, did the duration  
2 matter? In my view, the answer is no.

3 COMMISSIONER CABRAL: So you're really sort  
4 of saying that you understand, you're the Petitioner  
5 and asking for us to say that it's okay. You know  
6 that what they're doing is not allowed under the law  
7 for farm dwellings, but you're saying it's okay  
8 because other people have done it, and that's because  
9 it doesn't matter whether it's there for five days or  
10 five years, it's okay even though you know that it  
11 doesn't comply, but you want us then to give you  
12 permission to have that be allowed?

13 MR. CHIPCHASE: Not at all. I've done a  
14 terrible job, Commissioners.

15 COMMISSIONER CABRAL: I'm not a lawyer,  
16 remember.

17 MR. CHIPCHASE: So I appreciate even this  
18 colloquy, and ultimately it's my fault. I've done a  
19 terrible job. That's not at all what I'm saying, not  
20 in the least.

21 As a matter of candor, I have no idea how  
22 these particular properties are used. I don't know,  
23 because that doesn't matter. I'm not asking you to  
24 bless any particular use. I'm not asking you to say  
25 any use on a particular property is okay. I'm

1 certainly not asking you to say, because this guy  
2 does it, tell me I can do it.

3           None of that is why I'm here, what our  
4 Petitions are about.

5           Our Petitions are only about the County  
6 deciding that you can't rent Agricultural land for  
7 less than 31 days. That's it. The County has  
8 decided you can't rent an agricultural property for  
9 less than 31 days.

10           The County can do that going forward, from  
11 today forward. But what it's done is to say you  
12 can't rent it for 31 days today backwards. So we get  
13 to the question on June 5th, 1976, what did the State  
14 law say.

15           That's the only thing I'm asking the  
16 Commission to do. I'm not asking the Commission to  
17 say short term rentals are okay, a particular use is  
18 okay, a particular property is okay. None of that.  
19 Only what the law said, plain language of the law, on  
20 a particular date.

21           And you mentioned that I had said intent.  
22 True, the intent we are looking at is legislative  
23 intent. What did the legislature intend when it  
24 adopted the definition of farm dwelling? We get  
25 that -- because we can't go and poll the legislature.



1 Even if we do could, it wouldn't matter, what they  
2 individually thought doesn't matter. When we say  
3 intent, we mean the collective intent. And when we  
4 talk about the collective intent of the legislature,  
5 we look at the plain language of the law. The law  
6 tells us what the collective intent of the  
7 legislature was. And here in the definition of "farm  
8 dwelling" the collective intent of the legislature,  
9 in my view, was not to impose a minimum rental  
10 period.

11 COMMISSIONER CABRAL: Okay. I can  
12 appreciate that might be the case. I have to say  
13 that I would assume that the intent of the  
14 legislature -- and everybody would say that you are  
15 not going to have a hotel operation on a farm  
16 property.

17 So I guess I'm looking at it for what the  
18 usage is as opposed to the timeframe.

19 MR. CHIPCHASE: No.

20 COMMISSIONER CABRAL: Thank you very much.

21 MR. CHIPCHASE: Let me answer that, because  
22 I think that's a great question, Commissioner.  
23 You're right. So what we would do is this. We would  
24 say what is the definition of "farm dwelling", right?  
25 Farm dwelling says single-family dwelling. What is a

1 a single-family dwelling? It means a unit for one  
2 family. So right in the definition we know the  
3 legislature did not authorize hotels, it authorized  
4 single-family dwellings, as long as they're used in  
5 connection with the farm, or the family that occupies  
6 them receives income from the farm.

7 So we totally agree on subject of a hotel.  
8 It's got to be a single-family home.

9 VICE CHAIR CABRAL: Okay. Thank you.

10 MR. CHIPCHASE: You're welcome.

11 CHAIRPERSON SCHEUER: Commissioners, we can  
12 have further questions for Mr. Chipchase at this time  
13 or, as I mentioned before, we can decide that it  
14 might be beyond our time and perhaps remaining energy  
15 and attention to come to a decision on this matter  
16 today, in which case we have our July 23rd hearing  
17 data available where we could continue these  
18 discussions. Gary Okuda.

19 COMMISSIONER OKUDA: Thank you, Mr. Chair.

20 I would make a suggestion that we continue  
21 this hearing, and during the interim we request that  
22 the parties submit proposed Findings of Fact,  
23 Conclusions of Law and/or their proposed form of  
24 Decision and Order. And I would also in addition --  
25 let me clarify that.

1           So no further briefing or explanation would  
2 be required, because all of that would and should be  
3 contained in the proposed Findings of Fact,  
4 Conclusions of Law, and whatever the form of Decision  
5 and Order that each party submits.

6           I would also ask that the parties provide  
7 us a copy of HRS 205-4.3, which was in effect on the  
8 relevant date that has been discussed in the various  
9 filings. Or if that was not the specific section, if  
10 they could provide us a copy of that.

11           I only requested that because for whatever  
12 reason my West Law subscription, I'm having  
13 difficulty getting an earlier version, but that would  
14 be my suggestion, because then it would allow  
15 Commissioner Ohigashi to be able to review the  
16 transcript for the portion that he was not present.

17           CHAIRPERSON SCHEUER: I would also note for  
18 the record of these proceedings that I did at -- let  
19 me get you the exact time -- at 1:32 P.M. our  
20 Administrative Officer Riley Hakoda successfully  
21 forwarded to us the County's exhibits. So we now  
22 have those in our possession, but obviously have not  
23 a had a full chance to review those as individuals.

24           So there is a suggestion from Commissioner  
25 Okuda. I just want to sort of, before we take any

1 action or move -- I move to defer -- sort of a  
2 temperature check on where we're at.

3 Commissioner Cabral, were you raising your  
4 hand? No.

5 COMMISSIONER WONG: Chair.

6 CHAIRPERSON SCHEUER: Commissioner Ohigashi  
7 and then Wong.

8 COMMISSIONER OHIGASHI: I would appreciate  
9 additional time, but I'm like Gary, Commissioner  
10 Okuda. I think you have to remain -- you have to  
11 have the hearing remain open, and the parties may  
12 file some explanation or additional documents or  
13 additional briefing, you know, that may be necessary  
14 to support their proposed findings.

15 I'm not sure whether or not Hawaii County  
16 -- I'm kind of confident (indecipherable) -- I think  
17 that if you are going to have the hearing continue,  
18 which I would appreciate, that perhaps you cannot  
19 foreclose public witnesses from filing additional  
20 positions or statements or documents.

21 So I kind of hesitating in trying to limit  
22 any additional filings.

23 CHAIRPERSON SCHEUER: Commissioner  
24 Ohigashi, if I may just -- I really appreciate your  
25 comments. I just want to clarify one word that you

1 used. You asked for the hearing to continue. But  
2 really under the DR procedures, we are not yet in a  
3 hearing, right?

4 COMMISSIONER OHIGASHI: Right. I mean I'm  
5 asking for the proceeding to continue.

6 CHAIRPERSON SCHEUER: Thank you. I just  
7 wanted to clarify that small bit of your excellent  
8 commentary.

9 Commissioners, we are in discussion about  
10 how to proceed.

11 COMMISSIONER WONG: Chair.

12 CHAIRPERSON SCHEUER: Commissioner Wong.

13 COMMISSIONER WONG: I totally agree, kind  
14 of share with Commissioner Ohigashi and Commissioner  
15 Okuda, but the only thing I would like to know is,  
16 when we continue this hearing, we get to ask more  
17 questions after we get additional information?

18 CHAIRPERSON SCHEUER: That would be  
19 correct.

20 COMMISSIONER WONG: Okay. So I agree with  
21 both Commissioners.

22 CHAIRPERSON SCHEUER: I'm not -- you know,  
23 again, procedurally, Commissioners, we could accept  
24 one of the Petitions and deny the other. Basically  
25 make a ruling on it. We could schedule it for

1 hearing, or we can simply continue the discussion  
2 going forward -- (indecipherable) July 23rd.

3 Commissioner Chang.

4 COMMISSIONER CHANG: Thank you, Mr. Chair.

5 I am, because this is a legal question and  
6 it's not a factual question, I am less inclined to  
7 have Findings of Fact, but I would like to hear -- I  
8 would like Office of Planning, they're not a party or  
9 petitioner, but I would like them to weigh in. I  
10 think there are a lot of issues that were raised in  
11 our discussion today, legal issues.

12 So I guess I'm not inclined -- well, I  
13 would like to leave open briefing and not  
14 foreclose -- not to foreclose. Again, to me this is  
15 a legal question, it's not a factual one.

16 So I would like to hear what the parties  
17 from County, Mr. Chipchase and Ms. Apuna representing  
18 OP. I think we raised some issues today, and I would  
19 like to see some additional briefing. That's just my  
20 inclination.

21 CHAIRPERSON SCHEUER: This is helpful to  
22 have the inclination of the Commissioners.

23 Commissioner Aczon, do you have thoughts?

24 VICE CHAIR ACZON: I fully agree with the  
25 Commissioners on continuing these proceedings. Kind

1 of trying to get Findings of Fact, as you know, this  
2 is not a hearing yet, we just got a discussion,  
3 although discussions that we had is not really facts,  
4 it's more there's a lot of disagreement on the facts.

5 So although I agree with continuing these  
6 proceedings, like Commissioner Chang, I kind of  
7 hesitate to ask the parties to provide Findings of  
8 Facts, Conclusions of Law.

9 CHAIRPERSON SCHEUER: Commissioner Okuda,  
10 do you want to respond to the number of responses to  
11 your suggestion?

12 COMMISSIONER OKUDA: Yes, thank you.

13 I didn't mean to say that we would actually  
14 adopt all Findings of Fact, or some Findings of Fact.  
15 I just wanted to use this as a framework for the  
16 parties to present to us. If they thought there were  
17 facts, what the facts are, you know, in some type of  
18 form.

19 So I'm not at all suggesting that in the  
20 end we have to issue Findings of Fact, it's basically  
21 to have them present to us the form of what they  
22 believe the decision should be in the end and the  
23 supporting materials. When I say materials, either  
24 the legal standards or if they believe there are  
25 certain factual statements.

1           Like, for example, a factual statement is  
2 this is what the county ordinance states. You know,  
3 things like that.

4           So I don't mean to suggest that we're  
5 engaged in an evidentiary type of determination, so  
6 I'm using those terms kind of broadly. It's  
7 basically, present us what they believe the Land Use  
8 Commission should issue out in the end if each party,  
9 you know, so prevailed, and then we can sort through  
10 that and hopefully that will help narrow what we have  
11 to look at.

12           CHAIRPERSON SCHEUER: Anything further,  
13 Commissioners or staff to the Commission? If not I'm  
14 going to --

15           COMMISSIONER WONG: Just one thing.

16           CHAIRPERSON SCHEUER: Commissioner Wong.

17           COMMISSIONER WONG: Just one thing I wanted  
18 to state that I believe Commissioner Giovanni will be  
19 available on the date, so we may want to ask the  
20 staff to clue him in.

21           CHAIRPERSON SCHEUER: Yes.

22           So if there's nothing further,  
23 Commissioners, it's my assessment, based on our  
24 discussions, and based due to the procedural issues  
25 that we are facing with the participation of



1 Commissioners Ohigashi and Giovanni, that we're not  
2 ready to consider formal deliberations on these two  
3 DR's that have been combined into a single  
4 proceeding, but rather we should continue our  
5 discussions on this matter to what is tentatively  
6 going to be our July 23rd hearing.

7 That hearing will be noticed in the normal  
8 way and notification of parties. We are not giving  
9 any specific directions to either the County of  
10 Hawaii, to Mr. Chipchase and his clients, or to  
11 Office of Planning on what they may brief on, because  
12 the matter continues to be open. You may continue to  
13 brief as you see fit in this matter.

14 With that said, I would encourage,  
15 especially given the late filing by the County, would  
16 be of great service to the Commission that if we meet  
17 on July 23rd on this matter, that the briefs be  
18 delivered to us by July 9th.

19 Does that work for County and Rosehill  
20 Petitioners?

21 MR. MUKAI: That's fine. County of Hawaii,  
22 John Mukai. Yes.

23 CHAIRPERSON SCHEUER: Thank you, Mr. Mukai.

24 VICE CHAIR ACZON: Do we need a motion?

25 CHAIRPERSON SCHEUER: I don't believe I

1 need one, Commission Aczon.

2 Mr. Chipchase.

3 MR. CHIPCHASE: Not at all, Chair. I was  
4 just going to confirm, the schedule is fine and I am  
5 available on July 23rd.

6 CHAIRPERSON SCHEUER: Thank you for that.

7 With that all being said, I declare this  
8 meeting in recess until it is appropriately agenda'd  
9 as previously discussed.

10 (The proceedings recessed at 3:22 P.M.)

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## CERTIFICATE

1 STATE OF HAWAII )  
2 ) SS.  
3 COUNTY OF HONOLULU )

4 I, JEAN MARIE McMANUS, do hereby certify:

5 That on June 25, 2020 at 9:02 a.m., the  
6 proceedings contained herein was taken down by me in  
7 machine shorthand and was thereafter reduced to  
8 typewriting under my supervision; that the foregoing  
9 represents, to the best of my ability, a true and  
10 correct copy of the proceedings had in the foregoing  
11 matter.

12 I further certify that I am not of counsel for  
13 any of the parties hereto, nor in any way interested  
14 in the outcome of the cause named in this caption.

15 Dated this 25th day of June, 2020, in Honolulu,  
16 Hawaii.

17  
18  
19 /s/ Jean Marie McManus  
20 JEAN MARIE McMANUS, CSR #156  
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