

LAND USE COMMISSION
STATE OF HAWAI'I

Hearing held on August 13, 2020
Commencing at 9:03 a.m.

Held via ZOOM by Interactive Conference Technology

VII. Call to Order

VIII. Continued Hearing and Action (If Necessary)
A17-804 Hawaiian Memorial Life Plan, Ltd
(O'ahu) Petition for District Boundary
Amendment

IX. Continued Hearing and Action
DR20-69 County of Hawaii and DR20-70 Linda
Rosehill, et al

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

IX. Adjournment

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BEFORE: Jean Marie McManus, CSR #156

1 APPEARANCES:

2 JONATHAN SCHEUER, Chair (Oahu)
NANCY CABRAL, Vice Chair (Big Island)
3 EDMUND ACZON, Vice Chair (Oahu)
GARY OKUDA (Oahu)
4 LEE OHIGASHI (Maui)
ARNOLD WONG (Oahu)
5 DAWN CHANG (Oahu)
DAN GIOVANNI (Kauai)

6
7 STAFF:

8 CINDY YOUNG, ESQ.
Deputy Attorney General

9 DANIEL ORODENKER, Executive Officer
RILEY HAKODA, Chief Clerk
10 SCOTT DERRICKSON, AICP/Planner

11 DAWN APUNA, ESQ.
Deputy Attorney General
12 State of Hawaii, Office of Planning

13 JOHN MUKAI, ESQ.
DIANA MELLON-LACEY, ESQ.
14 Deputy Corporation Counsel
MICHAEL YEE, Planning Director
15 APRIL SURPRENANT, Acting Deputy Planning Department
Attorneys for County of Hawai'i

16 CALVIN CHIPCHASE, ESQ.
17 CHRISTOPHER GOODIN, ESQ.
Attorney for Linda Rosehill, et al

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PROCEEDINGS:	PAGE
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1 CHAIRPERSON SCHEUER: Aloha mai kakou.
2 Good morning.

3 This is the August 23, 2020 Land Use
4 Commission meeting, which is being held using
5 interactive conference technology linking
6 videoconference participants and other interested
7 individuals of the public via "ZOOM" internet
8 conferencing program. We're doing this in order to
9 comply with State and County official operational
10 directives during the Covid-19 endemic.

11 For all meeting participants, we would like
12 to stress to everyone the importance of speaking
13 slowly, clearly, and directly into the microphone.
14 Before speaking, please state your name and identify
15 yourself for the record.

16 Also please be aware that all meeting
17 participants are being recorded on the digital record
18 of this ZOOM meeting. Your continued participation
19 is your implied consent to be part of the public
20 record of this event. If you do not wish to be part
21 of the public record, please exit the meeting now.

22 This "ZOOM" conferencing technology allows
23 the Parties and each participating Commissioner
24 individual remote access to the meeting proceedings
25 via their personal digital devices.

1 Also please note that due to matters
2 entirely outside of our control, occasional
3 disruptions to connectivity may occur for one or more
4 members of the meeting at any given time. If such
5 disruptions occur, please let us know and be patient
6 as we try to restore audio-visual signals to
7 effectively conduct business during the pandemic.

8 My name is Jonathan Likeke Scheuer. I
9 currently serve as the LUC Chair. Along with me,
10 Commissioners Aczon, Chang, Okuda and Wong, the LUC
11 Executive Officer Daniel Orodener, LUC Chief Planner
12 Scott Derrickson, Chief Clerk Riley Hakoda, and our
13 Deputy Attorney General, Cindy Young, and our Court
14 Reporter Jean McManus is on Oahu.

15 Our Hawaii Island Commissioner Cabral is
16 unable to attend the meeting and may join us later.

17 Commissioner Ohigashi is on Maui and
18 Commissioner Giovanni is on Kauai. Currently we have
19 eight seated Commissioners of a possible nine, and
20 seven attending this meeting.

21 Our next agenda item are the continued
22 proceedings on the consolidated Declaratory Orders,
23 DR20-69 County of Hawai'i, and DR20-70 Rosehill, et
24 al.

25 Will the petitioning parties for the Docket

1 please identify yourselves for the record and
2 remember to unmute yourself.

3 MR. MUKAI: Good morning, John Mukai,
4 Deputy Corporation Counsel on behalf of the County of
5 Hawai'i.

6 Also present is Deputy Corporation Counsel
7 Diana Mellon-Lacey and Michael Yee, Director, and
8 Deputy Director April Surprenant.

9 CHAIRPERSON SCHEUER: Good morning, Mr.
10 Mukai. Thank you.

11 MR. CHIPCHASE: Good morning, Chair,
12 Commissioners and everyone, Cal Chipchase and Chris
13 Goodin for the Rosehill Petition.

14 COMMISSIONER SCHEUER: Thank you very much,
15 Cal.

16 Let me update the record.

17 At previous meetings on this matter, on
18 June 25, 2020, the Commission had taken public
19 testimony and heard initial arguments from the
20 Petitioners. The Commission requested further
21 information from the Parties, and on July 23, 2020,
22 Petitioner, County of Hawai'i, presented and
23 concluded its additional arguments to this case.

24 Petitioner Rosehill, et al, was then
25 instructed to present its case at this meeting due to

1 time constraints.

2 On August 4, 2020, the Commission mailed
3 the August 12-13, 2020 Notice of Agenda to the
4 Parties to the Statewide, O'ahu and Hawai'i regular
5 and email mailings lists.

6 On August 10th, 2020, the Commission
7 received Petitioner Rosehill's response in Docket
8 DR20-70 to the County of Hawai'i's argument during
9 the meeting on July 24th, 2020. As well as the
10 County of Hawai'i's Second Supplemental Submission.

11 Two days ago, August 11th, the Commission
12 received the Petitioners' in Docket DR20-70 Response
13 to County of Hawai'i's Second Supplemental Submission
14 filed on August 10th.

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

22 We need to keep in mind that this is a
23 Request for Declaratory Ruling, that means the
24 Commission is being asked to interpret the statute,
25 rule or document, and not to make a determination on

1 a factual dispute. While certain facts may be
2 important in making an interpretation of law, in this
3 type of proceeding the facts really are not in
4 dispute. The Commission is taking the basic facts as
5 undisputed.

6 What we are here to decide is the very
7 limited issues presented by the Petitioner County of
8 Hawai'i and Petitioner Rosehill.

9 Therefore, this is not, nor can it be, a
10 contested case hearing where evidence is presented
11 with witnesses and cross-examination. I would remind
12 everyone of that fact. Again, the facts are not in
13 dispute. The application of law to accepted facts is
14 being heard today.

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

21 As mentioned earlier, public testimony for
22 this docket concluded on June 25, 2020, the County of
23 Hawai'i provided additional information on July 23,
24 2020, and Petitioner Rosehill, et al., will provide
25 its presentation today.

1 Let me go over our procedures for this
2 docket.

3 First, I will recognize any written public
4 testimony that has been submitted in this matter. I
5 will read those out for the Commission, and they have
6 been posted to our website.

7 The representatives for Rosehill, et al,
8 will then be given as much time as they reasonable
9 need to complete their case.

10 After that, the Commissioners will be
11 provided the opportunity -- the Petitioners will be
12 provided opportunity for final arguments, and the
13 Commissioners will be given the opportunity to ask
14 questions of the Petitioners or anyone who has
15 testified and is available.

16 Upon completion of the testimony and
17 questions, the Commission will come to a decision.

18 Are there any questions from the Parties,
19 the Declarants, on our procedures for today?

20 MR. CHIPCHASE: No, Chair.

21 MR. MUKAI: No, Chair, John Mukai.

22 CHAIRPERSON SCHEUER: I will also note for
23 the Parties and public that from time to time,
24 approximately once per hour, I will call for
25 ten-minute breaks.

1 I will now recognize written testimony that
2 has been received on this matter.

3 On July 6th we received public testimony
4 from Linda Voloshen Spencer.

5 On July 28th from Mark Gordon.

6 On July 31st from Dana Heltz.

7 On August 6th from Steve Lopez.

8 On August 10th from the County of Kauai;
9 and on August 10th also from the County of Maui.

10 Mr. Clerk, has any other written testimony
11 been received by the Commission?

12 CHIEF CLERK: Chair, this is Riley. No
13 further testimony has been received, to my knowledge.

14 CHAIRPERSON SCHEUER: Cal, it's your floor.
15 Can you give us a sense of how long you intend to
16 take?

17 MR. CHIPCHASE: Yes, Chair, it should be
18 under 30 minutes.

19 CHAIRPERSON SCHEUER: Please proceed.

20 MR. CHIPCHASE: Thank you, Chair. I have,
21 as we did the last time, as we usually do, a screen
22 to share with you. We will put that up now.

23 While it's challenging to not be before you
24 in person, I do appreciate that we can still have
25 this kind of dialogue where we can look face-to-face

1 and look at the slide we put up on the screen, we
2 mean them to be helpful, and I hope that they are.

3 As the Chair mentioned, we are here for the
4 continued meeting. At the end of the meeting --
5 Chris is telling me to hold on -- Chair, Mr. Goodin
6 has asked me to just pause for one minute

7 CHAIRPERSON SCHEUER: You listen to Mr.
8 Goodin.

9 MR. CHIPCHASE: I believe at a prior
10 hearing you ordered me to be nice to him.

11 My sincere apologies, Chris has asked us if
12 we can take take a three-minute break.

13 CHAIRPERSON SCHEUER: Three-minute break.

14 MR. CHIPCHASE: Apparently there's trouble
15 putting it up on the screen.

16 (Recess taken.)

17 CHAIRPERSON SCHEUER: Let us call us back
18 in. We're back on the record.

19 MR. CHIPCHASE: Thank you, Chair. I
20 appreciate everyone's patience. Technology is
21 awesome except when it isn't.

22 As I was saying, we're here for the
23 continued meeting on the Petitions, and this is the
24 third time we have had opportunity to speak with each
25 other.

1 The Commission held meetings on the 25th of
2 June and on July 23rd, and at the end of the meeting
3 on June 25th, the Commission asked the parties for a
4 number of things.

5 One of those things was Commissioner Okuda
6 proposed that the parties submit Findings of Fact,
7 and Conclusions of Law to provide a structure for the
8 Commission's decision on these Petitions.

9 Commissioner Ohigashi invited the parties
10 to submit briefing on any matter that they selected;
11 and Commissioner Chang asked, as you heard from the
12 Chair, you can consider particular statute.

13 Commissioner Chang asked for that statute, that's
14 Chapter 205 as it existed, or as it was in effect on
15 June 4th, 1976.

16 We provided all of those things. We
17 provided Findings of Fact, Conclusions of Law that we
18 believe provide appropriate structure for the
19 Commission's decision.

20 We provided briefing on additional issues
21 following the June 25th hearing, and we provided a
22 copy of the statute.

23 We also, as the Chair read out, had an
24 opportunity to respond to the County's comments on
25 July 23rd in response, the additional briefing filed

1 by both the County and the Office of Planning.

2 So although in that two-month time we have
3 met, and we've had an opportunity to submit
4 additional written materials, this is the first
5 opportunity that we've had to talk, and you've had an
6 opportunity to ask me questions since your meeting on
7 June 25th.

8 Since it has been almost a couple of months
9 since we spoke, what I wanted to do today is to begin
10 by taking us back to the basics. Not to repeat what
11 we testified to or what is in our papers, but to
12 bring us back to why we're here and what these
13 Petitions are really about.

14 I would also like to talk about some of the
15 important takeaways, what we see as important
16 takeaways from the June 25th and July 23rd meetings.

17 And then I will frame your decision through
18 our slides, and my comments with you today around our
19 findings and conclusions that we submitted.

20 So if you notice between the materials and
21 FOF or COL reference on the screen, that relates to a
22 particular Finding of Fact or a particular Conclusion
23 of Law that we presented in our papers.

24 And then finally I want to talk about your
25 decision today, but not only the actual decision the

1 effect, the effect of granting one or both or either,
2 I would say, Petitions that are before you.

3 So the most basic things the Chair has
4 mentioned in these meetings now is we are here on a
5 Petition for Declaratory Ruling. That's the decision
6 you have to make.

7 And under those rules, under the
8 Commission's rules, a Petition for Declaratory Ruling
9 provides that on petition of any interested person,
10 the Commission may issue a Declaratory Order as the
11 applicability of any statutory provision, or of any
12 rule or order of the Commission to a specific factual
13 situation.

14 So under this rule, the starting point is
15 always the petitions themselves. What have the
16 Petitioners asked the Commission to do? Asked the
17 Commission to rule on?

18 And here, as the Chair noted, only two
19 Petitioners, County of Hawai'i, and my client the
20 Rosehill Petitioners. And so that's where we start.

21 From there, we look at what the agreed
22 facts are, as the Chair said, the stipulated facts,
23 the facts that are not in dispute, and then what is
24 the applicable law.

25 As we consider those things, I wanted to

1 take a step back and talk a little bit about how we
2 got here, why the County and my clients, the Rosehill
3 Petitioners, are actually before the Land Use
4 Commission on these Petitions.

5 The idea for these Petitions arose in
6 discussions with the County's prior counsel. So we
7 were in proceedings before the Hawaii Planning
8 Commission. And in dialogue with the County's former
9 corporation counsel, the deputy who is representing
10 the County in this matter, he mentioned that he
11 intended to Petition LUC for Declaratory Ruling as to
12 what he perceives or may be a conflict between the
13 definition of "short-term vacation rental" in the
14 County code and Chapter 205.

15 We discussed that, and I said that I'd also
16 considered Petitioning the Commission for Declaratory
17 Order on the same issue to determine whether the
18 Chapter 205 as of June 4th, 1976, prohibited the use
19 that the County has now regulated through its staff
20 submission.

21 CHAIRPERSON SCHEUER: Can I ask you to
22 speak slightly louder or slightly closer to your
23 microphone and slightly slower?

24 MR. CHIPCHASE: I will try to do both,
25 Chair.

1 CHAIRPERSON SCHEUER: Thank you.

2 This is an unusual thing for technology,
3 because I don't think anyone in your entire life has
4 ever said, Cal, please project more.

5 MR. CHIPCHASE: That is actually true. And
6 if I may digress for a moment. Usually when I'm
7 home, my 17-year old daughter will shut the window
8 that's closest to our neighbor's house, because she
9 feels I speak too loudly, and that the neighbors can
10 hear our entire conversation.

11 So that is a new one for me, Chair, but I
12 appreciate the interruption; and if any Commissioner
13 or any person on the Commission or the other parties
14 can't hear me, please do interrupt, because I don't
15 want to have anything lost or in any way confuse
16 anyone.

17 As I was saying, Chair and members, as we
18 talked about this, the Corp Counsel and I, we
19 specifically discussed what facts should be presented
20 to the Commission, whether it was necessary to
21 present issues related to any particular property or
22 any particular use, and we both agreed that it was
23 not, that we were here really just having the
24 Commission apply its law, 205 to the County code, and
25 that the County code was the facts, the specific

1 elements of the definition of short-term vacation
2 rental are the facts, and that there was no need for
3 any particular information about any particular
4 property because that's not why we're here. We are
5 not here on a contested case. We're not here on an
6 enforcement matter. We're here asking the Commission
7 to interpret its law and apply it to the very
8 specific facts of the County's definition.

9 And so when you look at the Petitions,
10 that's exactly what the parties actually did. Here I
11 put up the County's Petition. And the County, in its
12 Petition, asks for a Declaratory Order that farm
13 dwellings may not be used as short-term vacation
14 rentals pursuant to HRS 205-2 and 205-4.5, and HAR
15 Section 15-15-25, because the respective definitions
16 and uses for farm dwelling and short-term vacation
17 rentals are reconcilably in conflict.

18 And so the County's Petition did exactly
19 what the County's counsel and I discussed the
20 County's Petition should do, namely, ask the
21 Commission to compare these definitions and determine
22 whether the definitions, definition of farm dwelling,
23 definition of short-term vacation rental reconcilably
24 conflict.

25 That's exactly what we did too. We did

1 exactly what we said I would do when I was speaking
2 with County's counsel. We petitioned or we framed
3 our question as: As of June 4th, 1976, the plain
4 language of Chapter 205 did not dictate how long a
5 farm dwelling must be rented in order to qualify as a
6 farm dwelling.

7 So we focused on the very specific element
8 of the County's definition that we believe is
9 actually an issue of duration, how long the farm
10 dwelling may be rented, and ask the Commission to
11 rule on that specific issue.

12 When OP filed its initial papers, it took
13 exactly the same approach as both Petitioners have
14 taken, so I put OP's statement to you, or testimony
15 to you up on the screen.

16 And in that testimony, OP explained that
17 you need to evaluate both definitions and determine
18 whether there is a conflict, as OP puts it, i.e.,
19 farm dwelling may be rented for 30 days or less,
20 focusing specifically on duration, which is what we
21 have specifically focused on, focusing on the
22 definition, not labels, not generalities, but the
23 definition, which is exactly what both parties have
24 pointed you to.

25 And all of that is important because, as

1 the Chair has said now each time that we have met on
2 these Petitions, we're here on a Petition for
3 Declaratory Ruling, and that means that the
4 Commission is applying the law to undisputed facts.
5 The Commission is not in a contested case where it
6 makes factual determinations or where it reaches
7 outside beyond what the written Petitions have placed
8 before the Commission.

9 The undisputed facts here, undisputed facts
10 before the Commission are simply the specific
11 definition of short-term vacation rental in the
12 County code. What those elements are.

13 I took the time to go back to that, because
14 what I have seen since those initial filings and
15 since that initial meeting on June 25th is a lot of
16 misdirection from the County, and to an extent from
17 OP as well.

18 Both OP and the County have since then
19 tried to make this proceeding about many things that
20 it is not. They talked about the specific uses of
21 the Petitioners. They talked about whether
22 Petitioners' lots were always legal; talked about
23 whether there is any farming activity going on on
24 Petitioners' lots.

25 They talked about not definitions, but

1 terms in general declaring broadly to whatever it
2 might mean that short-term vacation rental uses are
3 inconsistent with the Ag District.

4 The Petitions before you are not about any
5 of those things. The Petitions before you are about
6 exactly what the Petitioners presented to you in
7 their Petitions. Does this definition, the County's
8 definition, conflict with this definition, the State
9 definition of "farm dwelling" as of June 4th, 1976.
10 All that matters is that undisputed fact, the fact of
11 the County's definition.

12 And so we've put that back up on the
13 screen. As I say, this is what the Petitioners have
14 actually put before the Commission, no other facts.
15 No other issues. No other matters. As the County
16 phrases it, do these definitions conflict? As we
17 phrased it, did Chapter 205 regulate the duration of
18 any rental of a farm dwelling as of June 4th, 1976?
19 That's all that is before the Commission

20 And as I said, we have presented it exactly
21 as OP has presented it to you. Everything else you
22 heard about, everything else after June 25th, the
23 prior meeting on July 23rd and subsequent papers does
24 not matter. None of that is before the Commission
25 and none of that is before the Commission because I

1 and the prior counsel for County specifically agreed
2 on what we would present to the Commission for
3 decision.

4 So those are the facts, undisputed fact is
5 the County's definition of short-term vacation
6 rental.

7 That brings us to the law. The law that
8 you apply to that sole undisputed fact. That is a
9 statutory provision in HRS 205 as of June 4th, 1976.
10 And specifically, the definition of "farm dwelling".

11 We have focused on, and the Commission
12 needs to focus on that date, because that is the date
13 that the County picked. The County picked June 4th,
14 1976 as its regulatory date.

15 According to the County, the County's
16 belief, rentals of less than 31 days in the Ag
17 District are fine, they're okay if the lot was
18 created before June 4th, 1976.

19 According to the County, the County's
20 belief, and the reason it framed its ordinance the
21 way it did, rentals of less than 31 days in the Ag
22 District are illegal if the lot was created after
23 June 4th, 1976. That is everything.

24 It all comes down to that date, was the lot
25 created before or after June 4th, 1976? And is the

1 rental more or less than 31 days? Nothing else
2 matters in the County's regulation.

3 So we have the statutory definition of
4 "farm dwelling" as of June 4th, 1976, applied to the
5 factual elements of the definition of "short-term
6 vacation rental" found in the County Code Ordinance
7 2018-114, and the question presented by the Petition
8 in different forms, but it's the same question: Do
9 these conflict? Can you have a farm dwelling rented
10 for less than 31 days? That's it. That's
11 everything.

12 What this is not about is farming. Nothing
13 in the County code deals with the use of the property
14 or with who is using the property.

15 And so we put up on the screen a couple of
16 those points. It is quite clear from the testimony
17 that has been given under oath by the County, that
18 the County is not regulating to ensure that dwellings
19 are used in connection with a farm, or that the
20 occupants receive income from agricultural activity.

21 The County specifically told you on
22 June 25th, quote: There's nothing that disallows a
23 person from simply having a residence on an
24 agricultural-zoned property.

25 In colloquies with Commissioners Chang and

1 Okuda, in particular, the County made very clear that
2 even if you came to the County and said I will never
3 do agriculture on my property, the County would still
4 consider your dwelling to be a farm dwelling.

5 In the July 23rd hearing the County went
6 even farther in response to questioning, and said
7 even if you come in and tell me I'm going to build a
8 McMansion, and there will never be farming on my lot,
9 the County will still consider it a farm dwelling.

10 That's the County's position.

11 Nothing before you in the County's code or
12 the questions on these Petitions have anything at all
13 to do with farming or the use of the property or who
14 is occupying the property.

15 By the same token, these Petitions and the
16 County code are not about vacationers or vacationing.
17 As the County made very clear in its testimony to
18 you, renting a farm dwelling located on State
19 Agricultural District, or within the State
20 Agricultural District for residential or vacation
21 purposes is fine as long as the rental is 31 days or
22 more, by their definition as we put up on the screen.

23 It is not a short-term vacation rental as
24 long as it is for 31 days or more. Who is using it,
25 why it's being used, entirely irrelevant to the

1 County. The only thing that matters is that number,
2 31 days.

3 At the same time, and for the same reason,
4 in colloquy with Commissioner Wong at the June 25th
5 meeting, the County made clear that even if the
6 tenant, the person renting the farm dwelling, was a
7 farmer who was going to farm the property, that
8 rental would be illegal, would be considered a
9 short-term vacation rental, even though it's a farmer
10 who's farming the property, if the tenancy, the
11 rental period is less than 31 days.

12 So as we put up on the screen, that
13 colloquy shows in the example the farmer is clearly
14 using the dwelling in connection with the farm, but
15 it doesn't matter to the County. The guy who comes
16 on to grow papayas is out of luck. It's an illegal
17 use if his tenancy is month-to-month if it is less
18 than 31 days. So the papaya farmer is out of luck,
19 and Commissioner Wong is never going to get his
20 papayas unless the guy rents for 31 days or more.

21 Everything comes down to that number.
22 Absolutely everything.

23 And so we put up on the screen a table
24 showing different scenarios. As you can see, as you
25 go through the table, the use does not matter to the

1 County. The use does not determine legality. The
2 use does not control at all. In the County's mind,
3 everything comes down to duration, nothing but
4 duration matters.

5 A rental for any reason, 31 days or more
6 residential vacation, farming, whatever, is fine. A
7 rental of less than 31 days for farming or any other
8 purpose is illegal. That's all that matters to the
9 County.

10 This fact was made abundantly clear in
11 colloquy between Commissioner Chang and Director Yee.
12 In that colloquy, Director Yee made clear that the
13 only fact that makes a short-term vacation rental a
14 short-term vacation rental, the deciding factor, is
15 it's less than 31 days. That's it.

16 How the property is used does not factor
17 into the analysis at all, 31 days or more is fine;
18 less than 31 days is not fine.

19 So since the only question, the only issue
20 is duration under the County code, the only thing the
21 Commission needs to answer is whether a farm dwelling
22 can be rented for 31 days or less and still be a farm
23 dwelling.

24 I'll say that again. The only thing the
25 Commission needs to answer is whether a farm dwelling

1 may be rented for less than 31 days and still be a
2 farm dwelling.

3 These proceedings, Commissioners, have
4 already answered that question. During the hearing
5 before the Commission the County expressly conceded
6 there is no prohibition on farm dwellings being
7 rented for 30 days or less. That's everything. The
8 County has conceded, that's the only issue before
9 you.

10 OP has said the same thing. In testimony
11 on June 25th, 2020, OP said, and I'll quote:

12 A renter for 30 days or less that farms the
13 land may be allowed under the definition of farm
14 dwelling. That's the only issue. If you can rent a
15 farm dwelling for less than 31 days on a
16 month-to-month or whatever term that our
17 landlord-tenant code would allow, and still be a farm
18 dwelling, that resolves the entire disputed issue.
19 There is no other issue before the Commission,
20 because there is no other issues in those undisputed
21 facts, undisputed facts of the County code.

22 This was made clear in OP's Supplemental
23 Response as well. So a farm dwelling can be rented
24 for less than 31 days and it is still a farm
25 dwelling.

1 The County and OP have conceded this point,
2 I assume, for lots of reasons, but including among
3 them that the statute is perfectly clear. So the law
4 that we apply is Chapter 205 as of June 4th, 1976.

5 Let's walk through that statute.

6 Section 205-2 discussing districting and
7 classification of lands is a general use provision.
8 It's a general use provision. It generally lists the
9 uses that are allowed in the Ag District, including
10 farming as well accessory uses such as dwelling.
11 There's nothing in that general use provision about
12 the duration of rentals of farm dwelling. It simply
13 allows it as a general matter.

14 Section 205-4.5 deals with the specific
15 permissible uses within the Ag District. So we go
16 from the general in 205-2, it's like a funnel. We
17 narrow that down to the specific. And the specific
18 is 205-4.5. And under 205-4.5 farm dwellings are
19 specifically an allowed use.

20 If we keep moving along that funnel, the
21 general of 205-2 to the more specific of 205-4.5, to
22 the very specific. It's the definition of "farm
23 dwelling". What does that mean?

24 Under the definition of "farm dwelling" in
25 Chapter 205 as of June 4, 1976. Farm dwelling, as

1 used herein, shall mean a single-family dwelling
2 located on, and used in connection with the farm or
3 where agricultural activity provides income to the
4 family occupying the dwelling.

5 There are two clauses in that. The
6 dwelling is either used in connection with a farm, or
7 the family receives income from agricultural
8 activity. Neither clause concerns the duration of
9 any rental. That's our law.

10 We turn to applying it to the specific
11 facts, those things that the Commission will do when
12 it writes its decision.

13 The County's definition has three specific
14 factual elements. The first element is that the
15 dwelling is one in which the owner/operator does not
16 reside on the building site. The owner doesn't live
17 there.

18 The other is that the dwelling has no more
19 than five bedrooms. There's a cap on the number of
20 bedrooms in the County's definition.

21 Element three, we come to what is really at
22 issue. If the dwelling is rented for periods of 30
23 consecutive days or less. It is rented for less than
24 31 days. That's it. There's nothing in there about
25 who is occupying the dwelling, transient, vacationer,

1 farmer, and there is nothing about how the dwelling
2 is used, residential, vacation, farming purposes in
3 connection with a farm consistent with Chapter 205.

4 Nothing in the elements of the County's
5 definition addresses any of those things. So we
6 apply the law to the actual elements, the only facts
7 that are before the Commission.

8 Well, element one, the owner doesn't reside
9 on the dwelling site. We apply that, or look at that
10 through the lens of Chapter 205. Nothing in the
11 definition of "farm dwelling" requires the owner to
12 reside on the building site. Does not have to live
13 there. Can still be a farm dwelling even if the
14 owner rents it out, does not otherwise live there.

15 And so the County has conceded this
16 specific point. As we put up on the screen in this
17 testimony before the Commission, on June 25th the
18 County specifically agreed that the owner of a farm
19 dwelling does not need to reside in the farm
20 dwelling. It's still a farm dwelling even if the
21 owner doesn't live there.

22 And that fact is specifically on
23 contemplated by statute. Chapter 205 specifically
24 contemplates a farm dwelling may be leased

25 So we turn to the second element. The farm

1 dwelling under the County code, or the dwelling, I
2 should say, has no more than five bedrooms. That's
3 the County's factual requirement. We apply the code.
4 We apply Chapter 205, I should say, to that specific
5 factual element, and we see that nothing in the
6 definition of farm dwelling, or anywhere else in
7 Chapter 205 regulates how many bedrooms a farm
8 dwelling has, no minimum, no maximum, could be one,
9 two, 1000 in theory under the Chapter 205. It's
10 simply not addressed, and no party has argued
11 otherwise.

12 So then we come to the one element of the
13 County code that has been discussed in detail in
14 these proceedings. The third element of the County
15 code, the third thing that makes any dwelling a
16 short-term vacation rental is that it is rented for a
17 period of 30 consecutive days or less.

18 We apply Chapter 205 as of June 4th, 1976,
19 to that element, and we see that nothing in the
20 definition of "farm dwelling" regulates how long a
21 farm dwelling may be rented. It does not set a
22 minimum rental period. It just isn't there.

23 The language of the statute is plain. It
24 does not prohibit rentals of 31 days, less than
25 31 days. You can rent a dwelling on a farm dwelling

1 on a month-to-month lease, or for a period of less
2 than 31 days, and it is still a farm dwelling.

3 And, again, that is all you're being asked
4 to declare on these Petitions.

5 So let's talk about the consequences of --
6 if I may pause in my presentation. I was told on the
7 screen that my internet connection is unstable, so if
8 I seem unstable to you, please let me know.

9 The County's Petition, granting the County
10 Petition would mean that a farm dwelling cannot be
11 rented for less than 31 days. That is the effect of
12 granting the County's Petition, because that is how
13 the County has defined short-term rental, and the
14 only thing before the Commission is the County's
15 definition.

16 With respect, you cannot make that
17 declaration, because it is utterly inconsistent with
18 Chapter 205, and because every party before you, plus
19 OP, have said that the code, the Chapter 205 does not
20 prohibit rentals of less than 31 days.

21 So everyone before you have said that, no,
22 Chapter 205 does not prohibit the thing that the
23 County has prohibited. And it's plain under the law
24 that, in fact, Chapter 205 does not prohibit rentals
25 of less than 31 days.

1 So we put our table back up on the screen.
2 This is the effect of granting the County's Petition.
3 This is the outcome that the County has urged you to
4 reach, despite its concession that we have now
5 converted what we care about under Chapter 205 from
6 the actual definition that's used in connection with
7 a farm, or that the family who occupies the dwelling
8 receives income from agricultural activities to a
9 durational test. Is it more or less than 31 days?

10 You've also set a statewide rule based on a
11 specific County code. As we talked about in our
12 briefing, and as we talked about in our meeting on
13 June 25th, "short term" does not have a fixed meaning
14 in the State. County defines "short term" as less
15 than 31 days. Honolulu defines "short term" as less
16 than 30 days. Kauai is less than 180 days; and on
17 Maui it's 179 days or less.

18 The other counties, in particular Maui,
19 also specifically defines transient, something Hawaii
20 County code does not do. So you would be setting a
21 statewide rule, even though each County has
22 approached this issue differently, and in some cases,
23 in particular Kauai County, very surgically looking
24 at the particular uses on the property to determine
25 whether they comply with Chapter 205. Hawaii County

1 has approached it with a wonderbust (phonetic), just
2 a hammer saying 31 days, okay, we don't care about
3 anything else; less than 31 days, not okay. And we
4 don't care about anything else.

5 It would be improper to set a statewide
6 rule based on one County's very blunt approach to
7 this issue.

8 So then what happens if you grant our
9 Petition. The only thing you would say is the thing
10 that every party before you, plus OP, have already
11 conceded, have already told you, that as of June 4th,
12 1976, the plain language of Chapter 205 did not
13 dictate how long a farm dwelling must be rented in
14 order to qualify as a farm dwelling.

15 That is as far as your ruling would go. It
16 does not approve vacation rentals, whatever that may
17 mean to whatever particular County. It does not
18 approve short-term rentals, whatever that may mean to
19 whatever particular County.

20 It does not approve vacation uses in
21 general. You are not approving any use of any
22 particular property. None of that is before you.
23 You're simply declaring what is indisputably the law,
24 and what every party, plus OP, before you has said is
25 the law.

1 From there is the question of enforcement.
2 Is a question of actually looking at the uses to
3 determine whether they meet the definition in Chapter
4 205 of a "farm dwelling". If you look at Kauai's
5 testimony, that's the approach that Kauai takes.
6 That is what you do. You look at it on a
7 case-by-case, use-by-use basis. And it is an
8 enforcement matter.

9 So similar to Kauai, the County, rather
10 than its blunt instrument that frankly violates the
11 landlord/tenant code, because it prohibits a farmer
12 from having a month-to-month lease. Rather than that
13 blunt instrument, would have to actually do
14 enforcement, would have to actually determine whether
15 a dwelling is being used in connection with a farm,
16 or whether agricultural activity provides income to
17 the family who occupies the dwelling. That's the
18 consequence.

19 We can't depart from the statute, Chapter
20 205 as of June 4th, 1976. We can't depart from the
21 facts before the Commission. Simply the County code
22 2018-114. Looking at that law, looking at the code,
23 and under the testimony that you have already
24 received from the County and from OP, the only
25 outcome is that the Rosehill Petition should be

1 granted and the County's Petition should be denied.

2 Thank you, Commissioners.

3 CHAIRPERSON SCHEUER: Thank you very much,
4 Cal.

5 Are there questions for Mr. Chipchase from
6 the Commissioners? Commissioner Okuda followed by
7 Commissioner Wong.

8 COMMISSIONER OKUDA: Thank you, Mr. Chair.

9 Thank you, Mr. Chipchase, for your
10 presentation

11 Can I ask you this first question, and this
12 deals with our administrative rule that deals with
13 when we may issue a declaratory ruling, and that's
14 HAR Section 15-15-98(a).

15 And that says: On Petition of any
16 interested person, the Commission may issue a
17 declaratory order as to the applicability of any
18 statutory provision or of any rule or order of the
19 Commission to a specific factual situation.

20 I think you also quoted that in one of your
21 slides that you shared with us.

22 Did I accurately state that provision of
23 the Administrative Rules?

24 MR. CHIPCHASE: Commissioner, you broke up
25 at the end. You have that technology metallic voice,

1 but I think I understand the question, and if I
2 understand it correctly, you correctly quoted the
3 rule, Commissioner.

4 COMMISSIONER OKUDA: Okay. Would we be
5 clearly erroneous -- let me back up a bit here.

6 Is the standard about whether or not we
7 have to issue or not issue a declaratory order, is
8 that an abuse of discretion standard on appeal?

9 In other words, we might think that you
10 might have a good point, but we're going to exercise
11 our discretion, you know, based on good cause in the
12 record, and not issue, you know, a declaratory order,
13 would the standard on appeal to decide where the
14 appellate court would decide whether we are correct
15 or not, would that be under what's considered an
16 abuse of discretion standard?

17 MR. CHIPCHASE: And so I do believe that
18 "may", as used in the context of this rule, is
19 permissive, rather than a mandatory declaration.

20 Sometimes "may" can be mandatory. I don't
21 believe that's an appropriate construction of that
22 rule. So to that extent, I agree with you.

23 I don't know that I would see it as abuse
24 of discretion standard. It would have elements. I
25 believe it's an arbitrary capricious standard would

1 be the correct standard to apply to that.

2 And I would go further and say that when
3 the law is clear, it's always arbitrary and
4 capricious, or to use your phrase, an abuse of
5 discretion not to answer the Petition.

6 In other words, I agree with you that there
7 is discretion, but that discretion is not unlimited.
8 And where the law is clear, I do not believe that
9 discretion can be properly exercised to refuse -- to
10 refuse to rule on the Petition.

11 COMMISSIONER OKUDA: Now, I understand that
12 your assertion that you and the County have
13 stipulated to the presentation of certain things to
14 be considered the factual basis.

15 But is it within the Land Use Commission's
16 discretion to decide that, no, there's actually
17 possibly more potential facts which would probably
18 educate us better in making a decision, but since
19 these additional facts or situations have not been
20 presented to us, we would exercise our discretion and
21 not make a decision at this time.

22 Would that be a proper approach?

23 MR. CHIPCHASE: No, Commissioner, I do not
24 believe that would be a proper approach.

25 As the Chair instructed at the beginning of

1 each of these meetings, and as I think is clear from
2 the concept of a declaratory order, you are only
3 looking at the stipulated facts, essentially the
4 facts that have been presented to you rather than
5 reaching beyond the Petition.

6 And if the parties to these Petitions agree
7 on those facts, we agree that this is the code, and
8 we do, and we agree that that's the factual basis
9 that we request your ruling, and we do. And you're
10 to make a termination based on stipulated facts, and
11 you are, then I believe it would be an abuse of
12 discretion, or in your phraseology, was abuse of
13 discretion; mine is arbitrary and capricious.

14 I do believe it would violate that standard
15 or your future rule on the basis that there might be
16 or there are some other extraneous facts that are not
17 presented in the Petitions.

18 The facts that are presented in the
19 Petition go directly to the questions that you've
20 been asked to answer. And so since the facts that
21 have been presented, the County code specifically and
22 completely relate to the narrow question before you,
23 I don't believe it would be appropriate to refuse to
24 rule on the Petitions because there might be some
25 other extraneous facts out there. We stipulated to

1 them, and they are the only facts that go to the
2 narrow question you've been asked to rule on.

3 COMMISSIONER OKUDA: But isn't it true that
4 the Land Use Commission retains the discretion to
5 decide that a party or parties that are requesting a
6 declaratory order have not met their burden to
7 present the specific factual situation, as that term
8 is used in HAR Section 15-15-98(a), that we could, in
9 our judgment, make a determination that the
10 Petitioners have not met their burden to present the
11 specific factual situation required by the rule?

12 MR. CHIPCHASE: As an abstract matter,
13 Commissioner, I would agree with you, in the
14 abstract, that is a possible scenario.

15 In this specific scenario, I don't believe
16 it's the possible outcome, because the facts that
17 have been presented to you are the only ones relevant
18 to the question.

19 So if you had a question before you that
20 required other factual information, possibly, but the
21 question before you whether phrased by the County or
22 phrased by my clients, the Rosehill Petitioners, do
23 not require any other facts. They only require the
24 County code, and the County code, the substance of it
25 have been stipulated to and presented equally in the

1 same way by both parties.

2 So where all of the facts before you are
3 all of the facts that you need to answer the only
4 questions before you, it would not be appropriate
5 exercise of Commission's discretion to say we need
6 additional facts also, even though they won't relate
7 to, or could not relate to the question you've been
8 asked to answer.

9 COMMISSIONER OKUDA: Okay. I hear and I
10 understand your argument. Let me ask a slightly
11 different question.

12 Is it true or not true that if a question
13 being presented is speculative, that the Commission
14 would have discretion to deny the Petition or deny
15 the request for a declaratory ruling?

16 CHAIRPERSON SCHEUER: I'm going to
17 interject before you answer, noting that Commissioner
18 Cabral has joined the meeting.

19 (Vice Chair Cabral present.)

20 MR. CHIPCHASE: And so, Commissioner, my
21 answer will be unsatisfactory, but I would like the
22 colloquy, and if you could help me understand what
23 you mean by "speculative", I might be better able to
24 give you a better answer.

25 As I understand that, and certainly invite

1 and want more dialogue on this topic, as I would
2 understand speculative, there's something uncertain,
3 unclear about the facts that have been presented to
4 you, or the question you've been asked to answer.
5 It's a hypothetical, I suppose, is how I would see
6 it.

7 And if the question were purely
8 hypothetical, maybe there would be some discretion to
9 deny it, but that's not our case. Our case is
10 entirely concrete. The County has adopted an
11 ordinance. The terms of the ordinance are fixed and
12 clear. Both parties have presented that ordinance to
13 you, and both parties have presented the same
14 question related to that ordinance just phrased in
15 different ways. We focused on duration; the County
16 focused on the ordinance as a whole, but it's the
17 same question.

18 But in this particular instance, since
19 there is an existing law, since that law is in
20 effect, and since the terms of that law are clear in
21 the County code, there wouldn't be anything
22 hypothetical, or to put it as you have, speculative.

23 But if I misunderstood what you meant by
24 "speculative", I would love the opportunity to
25 continue the discussion.

1 COMMISSIONER OGATA: Well, let me ask the
2 followup question.

3 Is it true or not true that the County
4 ordinance, as written, might be considered valid in
5 its application, using your standards of validity, if
6 it was applied one way, for example, to allow -- if
7 it allowed persons who qualified for agricultural use
8 to occupy the property, and perhaps a different
9 approach or a different ruling, if in fact the County
10 denied persons who were engaged in agricultural use
11 to occupy the property, for lack of a better term,
12 let's call it for a short-term duration using your
13 description of the term.

14 In other words, it's the application of the
15 ordinance that determines, for lack of a better term,
16 its legality or illegality?

17 MR. CHIPCHASE: That is a great question,
18 and I think a great topic. I think it goes beyond
19 what is actually before you, but I would like to
20 address it.

21 So a statute or ordinance, any law can be
22 invalid on its face or as applied. It doesn't have
23 to only be in the application that the illegality
24 arises. It can arise on its face. And there's many
25 examples of that in courts, and courts around the

1 country including U.S. Supreme Court.

2 So as a basic matter, a statute or
3 ordinance rule, any action of the government can be
4 valid on its face, or in a particular application as
5 to whether the County might consider, or might
6 actually apply its ordinance unevenhandedly, in other
7 words, not in the way written. So that it doesn't
8 making calls as to whether a particular use is
9 consistent with 205, or a particular use is
10 inconsistent with 205. That is what I would call a
11 truly hypothetical or speculative issue.

12 The County code is plain on its face, and
13 it does not invite room for that kind of discretion.

14 And so whether the County nevertheless
15 wants to exercise that discretion is an entirely
16 hypothetical matter. In my view, the County could
17 not exercise that discretion because the County code
18 is plain.

19 So in attempting to exercise that
20 discretion, the County would be violating its own
21 ordinance. It would be engaging in illegal activity.
22 And I believe that that would actually go farther,
23 and would end up running afoul of equal protection
24 clause, because you would have selective enforcement
25 issues associated with it.

1 When the law is plain, and the County
2 chooses whom to apply it to, whom to apply the law,
3 where to enforce it, you violate the equal
4 protection. You have to enforce all laws
5 evenhandedly. And this law is plain on its face. It
6 does not allow the County that kind of discretion.

7 So with respect, my answer would be, it
8 would be no.

9 COMMISSIONER OKUDA: Yeah, but isn't it
10 true that the Land Use Commission is really an
11 adjudicatory body of limited jurisdiction? In other
12 words, one of the things that the Land Use Commission
13 is not charged with is determinations of
14 constitutionality or unconstitutionality? Or put it
15 more bluntly, if that was really an issue, wouldn't a
16 better place for you to bring that action, and the
17 court that would clearly have jurisdiction over it
18 would be the federal district court?

19 MR. CHIPCHASE: You're absolutely correct
20 with respect to the Commission's -- the limitations.
21 I might not describe the Commission as purely an
22 adjudicatory body, I think it has other functions,
23 but I would agree that it's not declaring County
24 Codes unconstitutional or constitutional. That's not
25 your function, which is exactly why neither party has

1 presented that question to the Commission. You are
2 not here to decide whether this is a valid or invalid
3 provision. You're not here to decide whether it
4 violates the US Constitution, or any of the statutory
5 provisions. That's not what is before you in the
6 least.

7 Your call is simply did Chapter 205, as of
8 the date the County picked, regulate the minimum
9 rental period of farm dwelling? That's it. That's
10 as far as it goes. And the consequences from a
11 constitutional/unconstitutional standpoint are in no
12 way before the Commission. That's not being
13 presented to you or being asked of you by either
14 party in any way or form.

15 COMMISSIONER OKUDA: Let me read you -- and
16 this is changing topic a bit -- let me read from HAR
17 Section a 15-15-100(a)(1)(A), and I'll ask you after
18 I read that section whether or not what I read was an
19 accurate statement of that section and of the law.

20 CHAIRPERSON SCHEUER: Commissioner Okuda,
21 if I may, before you continue, trying to manage the
22 timing of the meeting. About -- after this question
23 and Cal's response, how much more do you have?

24 COMMISSIONER OKUDA: Two more questions,
25 maybe ten minutes.

1 CHAIRPERSON SCHEUER: Would it be okay if
2 we take a break now?

3 COMMISSIONER OKUDA: Yeah, this is an
4 appropriate time.

5 CHAIRPERSON SCHEUER: It's 10:02. Let's
6 reconvene at 10:12 a.m., followed by Commissioners
7 Wong and Chang.

8 (Recess taken.)

9 CHAIRPERSON SCHEUER: Let's come back to
10 order. And we were in colloquy between Commissioner
11 Okuda and Mr. Chipchase.

12 Mr. Okuda was asking, was going to cite
13 some administrative rules and ask Mr. Chipchase
14 whether he had correctly stated the law.

15 COMMISSIONER OKUDA: Thank you, Mr. Chair.

16 Mr. Chipchase, let me quote from HAR
17 15-15-100(a)(1)(A), and after I quote that section, I
18 will ask you whether I accurately stated that section
19 and accurately stated the law.

20 Section 15-15-100, consideration of
21 petition for declaratory order:

22 (a) The Commission, within 90 days after
23 submission of a petition for declaratory order shall:
24 (1) deny the petition where: (A) the question is
25 speculative or purely hypothetical and does not

1 involve an existing situation, or one which may
2 reasonably be expected to occur in the near future.

3 Did I accurately quote that section of the
4 administrative rules?

5 MR. CHIPCHASE: Yes, Commissioner.

6 COMMISSIONER OKUDA: We touched on this at
7 one of the earlier hearings, and just like you
8 putting a reminder up by using the PowerPoint slides,
9 I thought maybe I would ask this question again just
10 so that we have some context here.

11 Is it true or not true that in Hawaii's
12 land use system, the Land Use Commission makes
13 certain decisions, but within, for example, the
14 Agricultural District, the counties have authority to
15 basically issue their own regulations or zoning
16 regulation or requirements?

17 MR. CHIPCHASE: To an extent, and with lots
18 of exceptions, I would say yes.

19 COMMISSIONER OKUDA: Let me quote you
20 something from the case Save Sunset Beach Coalition
21 versus City and County of Honolulu, 102 Hawaii
22 Reports 465 at page 482, the Pacific 3rd citation is
23 78 Pacific 3d, page 1 at page 18, and I'll ask you
24 when I'm finished whether I accurately stated the law
25 or the section from that case.

1 In Hawaii's land use system, the
2 legislature's statutory districts constitute more of
3 a general scheme, and presumably by delegating
4 authority to zone to the counties, the legislature
5 intended that specific zoning be enacted at the
6 county level.

7 Did I accurately state the law -- yeah, did
8 I accurately state the law?

9 MR. CHIPCHASE: I don't have that --
10 Obayashi case is, I think is what you're going on.
11 You're in and out. I think you said Save Sunset
12 Beach, which I always know as the Obayashi case, and
13 I don't have it in front of me, so I couldn't tell
14 you whether you quoted it correctly, but as a general
15 proposition, that is a correct statement of the law.

16 COMMISSIONER OKUDA: So, in other words,
17 with respect to what takes place within the
18 Agricultural District, the County of Hawaii can make
19 its own ordinances, provided that those ordinances do
20 not conflict with State law?

21 MR. CHIPCHASE: As a general proposition,
22 that's true. I would say it can conflict with a
23 bunch of other things too, and there are other
24 limitations on the County's powers.

25 Zoning Enabling Act is 464, that requires

1 that all zoning be done either pursuant to a
2 comprehensive long-range plan, has a bunch of other
3 requirements.

4 So excepting that there are lots of
5 exceptions to that statement, it is generally true.

6 COMMISSIONER OKUDA: What case or other
7 legal authority can you point to which indicates that
8 the Land Use Commission can override a legislative
9 decision made by the Hawaii County Council as far as
10 what type of rules, albeit might be more strict rules
11 than the Land Use Commission has, with respect to
12 protection of agricultural lands or agricultural
13 uses?

14 In other words, what authority can you
15 point to us that shows that we, as the Land Use
16 Commission, have the authority to override a
17 legislative decision made by the County of Hawai'i?

18 MR. CHIPCHASE: What I would say,
19 Commissioner, is I'm not aware of any authority, and
20 I didn't look for any, because that's not what is
21 before you. That's not what we have asked you to do.
22 The County hasn't asked you to validate their
23 ordinance on the other side, so neither party is
24 asking the Commission to weigh in to that kind of
25 question. Neither party is asking the Commission to

1 weigh in to: Can the County regulate ag land in this
2 way? Neither party is asking the Commission to
3 declare Ordinance 2018-114 good or bad, up or down,
4 legal or illegal. Neither party has presented those
5 kinds of questions to the Commission.

6 So with respect, the law you've asked me to
7 find, I have no idea, because I have not looked for
8 it, and I haven't looked for it because it has
9 nothing to do with the issues that are before the
10 Commission on either Petition.

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

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

18 All you're doing is applying the law to
19 this specific factual situation that both sides, the
20 County and we have asked you to apply the law to.
21 That does not in any way override the County Council.
22 It doesn't invalidate the County Council's ordinance.
23 It simply answers the question that both parties have
24 presented to you. Can you rent an ag dwelling for
25 less than 31 days and it still be an dwelling?

1 That's it. That's all either party is asking you to
2 declare, and that's as far as your decision goes.

3 COMMISSIONER OKUDA: What case authority or
4 statutory authority can you point to which indicates
5 that the County Council could not draw what amounts
6 to a "bright line" in the sand with respect to
7 protection of agricultural uses?

8 In other words, what authority indicates or
9 shows that the County Council, in exercising its
10 legislative powers, could not simply say, look, we're
11 going to make a bright line as far as protection of
12 agricultural lands, and so we are going to just say
13 that if an occupancy is less than a certain period of
14 time, because that type of occupancy may be more
15 likely than not to be nonagricultural use, we're just
16 going to prohibit it?

17 MR. CHIPCHASE: And so if you'll allow me a
18 little leeway, I'll answer your question first, but I
19 think it dovetails into a couple of related points
20 that follow from your premise that I would like to
21 address.

22 I would say quite simply, although this is
23 not remotely the issue before the Commission, I want
24 to make that clear that no one is asking the
25 Commission to make this kind of declaration. It is

1 not an issue before you in any way, nor to determine
2 the scope of the County's powers in any way. Those
3 things are not before the Commission.

4 So I regard our discussion or colloquy as
5 really an academic one, because it has nothing to do
6 with the issues that are actually before you. But I
7 would say, Commissioner, that the supremacy clause of
8 the Hawaii Constitution makes very clear that,
9 although there is concurrent jurisdiction as
10 recognized in the Obayashi case for the regulation of
11 ag lands and lots of other things, ultimately State
12 law controls. So if the County did something
13 obvious, like say you can't have farm dwellings, we
14 declare there is no farm dwellings within the State
15 Agricultural District flat out. Or we declare some
16 other use that is expressly allowed by 205, like we
17 declare you can't farm in the Agricultural District,
18 we just don't allow it.

19 That would be wildly illegal, it would
20 plainly violate the supremacy clause, because the
21 State has said this use is okay. You can't simply
22 declare a permissible use under State law,
23 impermissible under County law. Obayashi doesn't go
24 that far. Obayashi recognizes that the more
25 restrictive of the two control, but it does not

1 address and could not address the situation where the
2 County outlaws something that Chapter 205 expressly
3 allows. That would violate the supremacy clause, and
4 we could find a ton of cases on them.

5 The related points that are sort of
6 embedded in your premise are these.

7 The first is that the County is doing
8 anything protective of agricultural lands. It flatly
9 is not. That is not the purpose at all. It's not in
10 the ordinance remotely, as we have gone through, it's
11 simply a durational regulation. And it has the
12 effect of declaring illegal a farmer farming on its
13 land or a tenant farmer farming on someone else's
14 land under a lease that is less than 31 days. That
15 is not protective of agricultural. And the ordinance
16 itself does not at all consider the use of the
17 property or who is using the property.

18 So maybe the County could do something
19 protective of agricultural land, that is not what the
20 County did.

21 The second point that is embedded in your
22 premise is the timing of that regulation. Could the
23 County today say we adopt a law effective August 13th
24 forward regulating, prescribing and prohibiting a
25 particular use in the Agricultural District, maybe,

1 depending on what it's doing. That's definitely
2 possible, that prospective regulation.

3 What the County has done here is gone
4 backwards and say any law that was created a mere
5 43 years ago, 43 years before our effective date,
6 prohibits a rental of less than 31 days. We are
7 doing it retroactively. There's no grandfathering.
8 There's no lawful nonconforming use. You couldn't
9 have done it for 43 years before we told you you
10 couldn't do it. That's entirely impermissible for a
11 County to reach backwards in time and regulate in any
12 circumstance. Nobody can do that. All laws operate
13 prospectively.

14 Putting that together, and coming back to
15 the question that is actually before the Commission,
16 that's why we focused on June 4th, 1976, because
17 that's the County's regulation date. It isn't
18 April 20, 2019. Their regulation date is June 4th,
19 1976.

20 So we focused on Chapter 205 as of that
21 date. And we have come before the Commission, both
22 parties, using the narrow jurisdictional authority,
23 narrow, but real, right? And when you have
24 jurisdiction, there is an obligation to exercise it.
25 It's narrow, but it exists. The narrow

1 jurisdictional authority to declare the application
2 of the law, Chapter 205, to a specific set of
3 undisputed facts.

4 Here 2018-114 of the County ordinance, and
5 the only question would be in that narrow set of law
6 and facts, is did the law, 205, as of June 4th, 1976,
7 regulate or prohibit the rental of farm dwellings for
8 less than 31 days? Nothing else in any way is before
9 you, the County's authority, the validity of the
10 ordinance, or any of those other questions. They
11 aren't presented in the Petitions and they're not
12 saying that either party has asked the LUC to answer.

13 COMMISSIONER OKUDA: Not to belabor this
14 point, but even though you state that it's not
15 presented in the Petition, isn't it true that all
16 these other points are still directly related to the
17 matters that you brought, or issues that flow from
18 this Petition that you brought?

19 MR. CHIPCHASE: I would agree that some of
20 them bear some relationship, I wouldn't agree all of
21 them. There's a number that don't. For example, the
22 County's power to regulate generally ag land is not
23 related in any way to Petitions or to any issues that
24 might flow.

25 But as to those things have some

1 connection, and obviously there is some connection
2 because both parties agreed to come before the
3 Commission on these Petitions, Petitions that look
4 like the ones that were filed. They recognized that
5 the Commission's input and role, its jurisdiction has
6 some relevance to the broader issues between the
7 parties, no question.

8 But that doesn't change the limited nature
9 of the Commission's jurisdiction, or the limited
10 nature of the question that has been presented to the
11 Commission, or finally, the effect of the
12 Commission's decision.

13 It is simply declaring that the law did not
14 regulate rentals of less than 31 days, and the
15 decision itself goes no further than that and that
16 decision is squarely within the Commission's
17 jurisdiction.

18 COMMISSIONER OKUDA: But if there are these
19 issues that seem to be more than just potential
20 issues, what legal prejudice would your client suffer
21 if we exercise our discretion, not grant your
22 Petition, and simply leave it to you to bring this up
23 either in the circuit court or in the federal
24 district court. What's the legal prejudice to your
25 client by leaving your client to deal with these, you

1 know, deal with these issues so that we don't have
2 any piecemeal litigation or piecemeal decisions?

3 And if you have this big beef, beef it out
4 at federal district court.

5 MR. CHIPCHASE: And so I appreciate that
6 question, too. And let me address it in a couple of
7 ways.

8 The first is that, you know, the prejudice
9 in a punt, I guess, I would say, if you wanted to
10 pass on ruling on either Petition, is embedded in the
11 LUC's jurisdiction. You pointed us to 15-15-100, and
12 as you quoted, it contains the word "shall". So
13 within X period of days, the Commission shall do
14 these things.

15 One of the things that it can do, one of
16 the options under "shall" is to deny, or not grant,
17 rather. If I were to quote it, deny the petition,
18 and you looked at Subsection (a). So if we look at
19 the structure of that rule, we have a "shall", you
20 have to do one of the options set out before you.
21 You don't have any other choice in the matter.

22 One of the options is deny the petition.
23 And the one you focused on is Subsection (a), and
24 that gives you a specific basis on which you shall
25 deny the petition where it is purely hypothetical,

1 it's speculative, or purely hypothetical, and -- so
2 there are two parts to it, speculative or
3 hypothetical -- and there is a conjunction there, so
4 you have to meet that too, does not involve an
5 existing situation or one which may reasonably be
6 expected to occur in the near future. Right?

7 So you're ability to deny is expressly
8 circumscribed, and in this example, by that text.
9 You have to have -- to deny on that basis, those
10 things would have to exist. Have to be speculative
11 or purely hypothetical, and that second clause would
12 need to be met.

13 With respect, that is plainly not the
14 situation here. There is nothing speculative or
15 purely hypothetical at all, and that second clause
16 doesn't exist, the situation is already on the
17 ground. It is an existing situation. So you can't
18 meet that second clause.

19 And so like any party coming before an
20 agency that is tasked with having a jurisdictional
21 obligation, responsibility, my clients are entitled
22 to the exercise of the LUC's authority within the
23 scope of its jurisdiction, and not to have that
24 jurisdiction punted or passed for any reason other
25 than as expressly set out in the rules.

1 And with respect, this situation is not one
2 in which the rules allow the Commission to pass on
3 the exercise of jurisdiction. It does not meet those
4 criteria for passing.

5 So I think when a party invests the time,
6 the money pursuing a ruling that is squarely within
7 the body jurisdiction, the body decides not to issue
8 it for reasons that are not contained in its
9 governing rulings, that is prejudicial to them and to
10 the efforts that they've invested.

11 In terms of peak litigation, I wouldn't
12 qualify or describe this effort as that at all.
13 Rather, it was an effort that both sides, both the
14 County and my clients thought was appropriate prior
15 to engaging in further litigation to have this one
16 narrow question answered by the body that is tasked
17 with answering this one narrow question.

18 COMMISSIONER OKUDA: I'm going to ask one
19 final question regarding whether or not a statement
20 made in an earlier declaratory order, which the Land
21 Use Commission issued back in 1994, I know it seems
22 like ancient history.

23 My question is going to be whether or not,
24 notwithstanding the fact that the order was issued on
25 the 1994 docket, whether or not you believe that that

1 is still an accurate and valid statement of the law.

2 But before I ask that question, let me just
3 say something about punting, okay?

4 Let me assure you, Mr. Chipchase, I'm
5 listening to what you're saying. I haven't made any
6 decision up about anything on anything yet, okay?

7 But I don't necessarily view respecting the
8 legislative decisions of the County Council of the
9 County of Hawai'i necessarily as something negative.
10 In fact, I think many of us -- and I know you're of
11 the same mind -- we all try to be very careful to be
12 sure that we do not view legal proceedings as
13 reflecting an entity called the State of Oahu.

14 Sometimes those of us in Honolulu, we have
15 to be careful not to think of Hawaii as the State of
16 Oahu.

17 But my final question is this, and let me
18 quote from the Declaratory Order entered in this case
19 in the matter of the Petition of John, J-o-h-n,
20 Godfrey, G-o-d-f-r-e-y. That's Docket DR94-17. It's
21 Conclusion of Law No. 5 found at page 17. And that
22 Conclusion of Law stated, and I quote:

23 Chapter 205 Hawaii Revised Statutes does
24 not authorize residential dwellings as a permissible
25 use within an Agricultural Use District unless the

1 dwelling is related to an agricultural activity or is
2 a, quote, farm dwelling, close quote.

3 That's the quotation from Conclusion of Law
4 No. 5 at page 17 of that Declaratory Order.

5 Do you believe that that is still an
6 accurate statement of the law as of today?

7 MR. CHIPCHASE: Commissioner, through the
8 magic of technology and the good work of Chris
9 Goodin, I was able to read along with you. I believe
10 that is both an accurate statement of law, and you
11 correctly quoted the Conclusion of Law.

12 And I would add, just into our colloquy
13 about punting and respecting the authority of the
14 County or County Legislature, I entirely agree with
15 you. So my point is simply that, as we have said,
16 nothing in what either party, and the County is
17 before you asking for a Declaratory Ruling too. And
18 so it's difficult for the County to say, in my view,
19 this would be an inappropriate exercise of the LUC's
20 authority when the County is asking you, coming
21 before you for a ruling on exactly the same issue.

22 So the County is here with me saying,
23 please, rule on this issue. We just see the outcome
24 differently, notwithstanding the County's admission.

25 So I don't see any treading, or on the

1 authorities of the County, this County or any other
2 County by coming before the Land Use Commission.

3 And as to punting, all I mean by that is
4 that is the very narrow basis on which LUC may
5 decline the issue of ruling.

6 And to the question of prejudice, we would
7 view it as prejudicial if the LUC declined to rule
8 for any reason other than those stated in its rules.

9 COMMISSIONER OKUDA: Thank you, Mr.
10 Chipchase.

11 Thank you, Mr. Chair. I have no further
12 questions.

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

15 Commissioner Wong followed by Commissioner
16 Chang.

17 COMMISSIONER WONG: Thank you, Chair.

18 Thank you, Mr. Chipchase.

19 The question I have is, you know, I'm just
20 a simple guy and, you know, your long explanation and
21 everything with Mr. Okuda was very eloquent at best,
22 but very confusing to me.

23 So can you say in one sentence, without
24 commas, parenthesis, you know, anything, what are you
25 asking for?

1 MR. CHIPCHASE: Whenever Commissioner Wong
2 begins with, he's just a simple guy, I know I'm in
3 trouble, because that is not true. So I know
4 something bad is coming at me, but that wasn't too
5 bad.

6 Commissioner Wong, all we are asking for is
7 a declaration as of June 4th, 1976, Chapter 205 did
8 not prohibit renting a farm dwelling for less than
9 31 days.

10 COMMISSIONER WONG: Mr. Chipchase, I want
11 to thank you for that one sentence. I'm going to ask
12 the same thing to the County.

13 I just wanted to make sure everyone is
14 asking the same questions in my own ideas, I'm
15 thinking. So that's all. Thank you. Thank you,
16 Chair.

17 MR. CHIPCHASE: You're welcome.

18 CHAIRPERSON SCHEUER: Thank you.

19 Commissioner Chang.

20 COMMISSIONER CHANG: Thank you, Mr. Chair.

21 First of all, Mr. Chipchase, I always
22 appreciate your zealous advocacy on behalf of your
23 client. You're always prepared and are very
24 responsive on your feet. So I appreciate that.

25 My questions are going to be rather simple.

1 Would you agree that the issue that the Land Use
2 Commission -- oops, did we lose it?

3 MR. CHIPCHASE: I'm here, Commissioner.
4 Mr. Goodin, who I always am nice to, seems to have
5 lost me, but I can see you.

6 CHAIRPERSON SCHEUER: We are all here.
7 We're still going.

8 COMMISSIONER CHANG: Okay. Something
9 happened to my screen.

10 Let me just ask you this question then.
11 The issue before the Land Use Commission is the Land
12 Use Commission's interpretation of Chapter 205.

13 We're not -- right? You would agree with
14 that?

15 MR. CHIPCHASE: A specific portion of 205,
16 yes.

17 COMMISSIONER CHANG: And that the County is
18 preemptive from adopting any rule or ordinance, that
19 is inconsistent with the Land Use Commission's --
20 with the State law, Chapter 205?

21 MR. CHIPCHASE, I actually view that
22 question as very nuance, or the answer to that
23 question is very nuance. I could not say in all
24 circumstances there can't an inconsistency, and I'll
25 give you an example of that so you understand what I

1 mean by "nuance".

2 There are certain uses, outdoor recreation,
3 or open-area outdoor recreation that are allowed as a
4 matter of right under Chapter 205. In general, the
5 Counties impose some permitting requirements for some
6 uses. For example, ziplining is a use that is
7 considered allowed as a matter of right under 205,
8 but most Counties impose some permitting
9 requirements, they don't prohibit it, but require
10 some approval.

11 In general, that -- whether that's
12 permissible has not been tested by the courts. In
13 general, it doesn't seem to contravene Obayashi, and
14 so I just offer that as a nuance approach to it.

15 But as a blanket matter what you said is
16 true, as a general statement, it's true.

17 COMMISSIONER CHANG: Meeting 205-2(d), you
18 put that up on the screen, and you said it describes
19 general use.

20 But the chapter does have a mandatory
21 "shall". And you just agreed with Commissioner
22 Okuda's reading of the declaratory ruling in Godfrey,
23 where it did say that the use has to be related to
24 agricultural activity. But you would agree with
25 that?

1 MR. CHIPCHASE: Related in a broad sense,
2 it has to meet the statutory definition of farm
3 dwelling.

4 COMMISSIONER CHANG: And farm dwelling, if
5 we look at both what you agreed to in the Godfrey
6 decision as well as 205A-2(d) has to be related to
7 agricultural activity?

8 MR. CHIPCHASE: The specific relationship
9 is either in connection with a farm or the family who
10 occupies the dwelling receives income from
11 agricultural activity. So that would be the specific
12 relationship.

13 COMMISSIONER CHANG: Very good. Very good.
14 Okay, actually you have answered my
15 question. Thank you very much.

16 CHAIRPERSON SCHEUER: Thank you,
17 Commissioner Chang. Commissioner Ohigashi.

18 COMMISSIONER OHIGASHI: I'm even more
19 simple than Arnold, but I want to ask you this.

20 You mention a state -- that we would be
21 adopting a statewide rule. Can you expand on that or
22 explain to me further how that happens, or who is
23 that happening in connection to this matter?

24 MR. CHIPCHASE: Absolutely, Commissioner.

25 You broke up at the end of that but I think

1 I understand what you're asking me. If I get it
2 wrong, I know you will not hesitate to tell me.

3 Granting the County's Petition would have,
4 in fact -- in effect, I should say -- impose a
5 statewide rule. And the way it would do that is
6 this.

7 The County has defined "short term"
8 idiosyncratic. No other county defines "short term"
9 the way the County of Hawaii does. So the County of
10 Hawaii it is short term if the lease is less than
11 31 days. And it does not matter who the tenant is or
12 what the tenant is doing. No other County has done
13 that. It is entirely idiosyncratic to the County of
14 Hawaii.

15 If you grant the County's Petition, you're
16 in fact declaring that a farm dwelling may not be
17 rented for less than 31 days. That is the effect of
18 the fact of granting the County's Petition, because
19 that is how the County has defined "short term".

20 So if you grant the County's Petition, you
21 are imposing that idiosyncratic rule, black/white, up
22 or down, 31 days or not statewide, because Chapter
23 205 has Statewide effect.

24 COMMISSIONER OHIGASHI: So we would be
25 conducting rulemaking if we granted the declaration,

1 is that what your position is?

2 MR. CHIPCHASE: No. No, not at all. Not
3 rulemaking, Commissioner. That is a completely
4 different process both under your rules and under the
5 statute. You would be interpreting Chapter 205
6 declaring the application of Chapter 205 to a
7 specific set of facts. Those specific set of facts,
8 all of that "short term" means less than 31 days.

9 And so in declaring that to these specific
10 set of facts you have interpreted Chapter 205
11 existing rules, existing law to mean that no farm
12 dwelling may be rented for less than 31 days.

13 COMMISSIONER OHIGASHI: So by that token,
14 would adoption of your Petition or your version of
15 your Petition invalidate County's like Kauai's 30-day
16 or 31 day time limits?

17 MR. CHIPCHASE: No, Commissioner. No, for
18 a couple of reasons, if I may.

19 One is that no other County approaches it
20 the way the County of Hawaii does. Kauai does
21 something entirely different. Maui does something
22 entirely different. Oahu does something slightly
23 different. Maui and Kauai are completely different
24 in their regulatory structure.

25 And so in granting our Petition, which is

1 simply that Chapter 205, as of a particular date, did
2 not require rentals to be at least 31 days, as a
3 practical matter, has no effect anywhere else. But
4 beyond that, as a legal matter, all it is, is a
5 negative declaration, right? It is not an approval
6 of any use. It is not an invalidation of any use or
7 of any law, it's simply a declaration. State law on
8 this date did not set a minimum rental period.
9 That's as far as it goes.

10 So both as to practical and the legal, it
11 has no effect beyond that declaration.

12 COMMISSIONER OHIGASHI: My next question
13 would be:

14 Are you saying that only that portion that
15 sets a time, the date, 1976 -- I didn't write it
16 down -- but only the time, the retroactive
17 application order statement that it goes back to
18 1974, only that portion is not -- is being contested
19 by your Petition?

20 MR. CHIPCHASE: You broke up for me again a
21 little bit, but I think I caught the gist of it,
22 maybe not every word, but I think I got the gist of
23 it.

24 What I would say in response is to take a
25 minor step back as I talked about to Commissioner

1 Okuda. We're not contesting or asking the Commission
2 to invalidate or declare invalid any portion of any
3 law, County or otherwise. That's not at all before
4 the Commission.

5 As for the date, we have looked back to, or
6 we have focused on June 4th, 1976, because that's the
7 date that the County selected.

8 So in the County's mind, County's
9 understanding of Chapter 205 is this. Before June
10 4th, 1976, State law allowed renting dwellings on ag
11 land for less than 31 days. After, or as of
12 June 4th, 1976, State law did not allow renting
13 dwellings on ag land for less than 31 days. That's
14 the County's understanding.

15 The entire factual situation, based on that
16 standing is before you. So the entire factual
17 situation are all of the elements of 2018-114,
18 bedrooms, owner/occupant and duration.

19 We have focused on duration, because that's
20 the only matter in dispute. The only point where
21 there has been any argument that the County's
22 Petition, the County's approach should be approved or
23 granted.

24 So as to bedrooms, nobody is arguing State
25 law regulates bedrooms. As to if owner/occupant,

1 nobody is arguing that the owner can rent the
2 property. The only thing we have argued about is
3 duration. And in the course of these proceedings,
4 both the County and OP have conceded that Chapter 205
5 does not regulate duration.

6 And so the declaration that we're asking
7 ask you for, in our mind, after those concessions is
8 entirely uncontroversial in my one sentence to
9 Commissioner Wong, Chapter 205 did not require farm
10 dwellings to be rented for 31 days or more is
11 entirely consistent with what the County has told you
12 and what OP has told you. So at this point it
13 shouldn't be a controversial ruling.

14 COMMISSIONER OHIGASHI: Thank you for the
15 long explanation.

16 But my question was really -- maybe you
17 didn't get it, because it broke up. But I'm just
18 trying to break it up.

19 My understanding is that you've conceded
20 that they can make stricter rules within the
21 Agricultural District, and we all understand that.
22 The 30 days, so 31-day or 30-day rule, the 31-day
23 rule that they have applied, your Declaration, your
24 Petition seems to be concerned only with that portion
25 that relates back to 1976.

1 MR. CHIPCHASE: Yes.

2 COMMISSIONER OHIGASHI: 1976, but you don't
3 disagree that they could put a 31-day definition in
4 that in controlling STVRs in agricultural areas?

5 MR. CHIPCHASE: You mean going forward?

6 COMMISSIONER OHIGASHI: Yeah.

7 MR. CHIPCHASE: We have not contested that,
8 because that's not a question before the Commission,
9 or something that the Commission could rule on.

10 COMMISSIONER OHIGASHI: So our only
11 question is whether that 30 days or are 31 days
12 relates back to June 6th -- June 4th, 1976, which I'm
13 not sure whether or not what we can issue a
14 declaratory ruling on that particular issue.

15 I'm only -- I'm just trying to break it
16 down so I understand it. It seems to me that if
17 everybody agrees that the 30 days -- because every
18 County has done it, set limits, 31 days, 180 days,
19 and it doesn't sound like you've yet conceded that
20 the 31 days is applicable.

21 Your question that puts it before the Land
22 Use Commission is the June 4th, 1976 provision that
23 you've interpreted to relate to a Land Use
24 Commission, the day that the Land Use Commission
25 would be -- or let me put it this way.

1 Your relationship is that June 4th, 1976,
2 that's your concern, is that right?

3 MR. CHIPCHASE: Yes. I think the answer is
4 yes. I did have some trouble following you again,
5 and I'm sorry for the technological limitation.

6 I think the answer is yes, and it's simply
7 declaring the law as of that date. It's not
8 declaring what the County can or can't do on that
9 date or after that date, it's just declaring the law
10 as of that date.

11 COMMISSIONER OHIGASHI: Okay. No further
12 questions.

13 CHAIRPERSON SCHEUER: Thank you,
14 Commissioner.

15 Commissioners, are there further questions
16 for Mr. Chipchase at this time? I have a series of
17 questions, but I want to defer to my fellow
18 Commissioners. Any hands?

19 There will be one last bite at the apple
20 after closing arguments.

21 I have four questions for you, Mr.
22 Chipchase.

23 How many of your clients are full-time
24 residents of the State of Hawaii?

25 MR. CHIPCHASE: I do not know the answer to

1 that, Chair.

2 CHAIRPERSON SCHEUER: Do you have an
3 estimate?

4 MR. CHIPCHASE: I do not. I couldn't even
5 speculate. I don't know. I haven't asked.

6 CHAIRPERSON SCHEUER: How many of your
7 clients receive any of their income from farming on
8 the parcels in question?

9 MR. CHIPCHASE: I do not know, Chair. I
10 have not asked.

11 CHAIRPERSON SCHEUER: One of your clients
12 is Psalm 133, LLC.

13 MR. CHIPCHASE: I believe that is among our
14 client group, yes.

15 CHAIRPERSON SCHEUER: Do you know what the
16 first line is of the Psalm 133?

17 MR. CHIPCHASE: I feel like I'm about to
18 find out, Chair.

19 CHAIRPERSON SCHEUER: How very good and
20 pleasant it is when kindred lives together in unity.

21 Can I at least infer from the name of that
22 LLC that perhaps those clients live on this property
23 full-time and farm, or is that an unfair assumption?

24 MR. CHIPCHASE: It would be just, for me,
25 it would be a disservice one way or the other,

1 because I don't know.

2 CHAIRPERSON SCHEUER: My fourth and final
3 question.

4 If I understood the core of your main
5 Petition, it's that the definition of "farm dwelling"
6 in 205-4.5 does not specifically state a length of
7 time which the farm dwelling may be rented.

8 Is that essentially the core of your and
9 the County's ordinance restricts this?

10 MR. CHIPCHASE: I would say does not
11 regulate or set a minimum period, rather than
12 specifically state. But in substance that reflects
13 what we have asked the Commission to declare.

14 CHAIRPERSON SCHEUER: But I guess the
15 problem I have with your argument, in terms of
16 legislative drafting, Section 4.5 is a list of
17 affirmative allowed uses. I'm not sure why the
18 legislature would include in a list of affirmative
19 allowed uses, what is by the way, not allowed.

20 It just would be implied that when they say
21 "farm dwelling", they're not talking about STVRs, or
22 they would have said we also will allow units for
23 transient vacation rental. That's the problem I'm
24 having with your argument.

25 MR. CHIPCHASE: So let me try to address

1 that problem, Chair, because I think it is an
2 important problem to have and to work through.

3 And so if I may, it reflects a dichotomy or
4 an inconsistency between how the County has
5 approached regulation and how 205 approaches
6 regulation.

7 Chapter 205, as you pointed out correctly,
8 focuses on use, how the property's being used. The
9 County has focused on duration, how long someone is
10 there. How long a lease is. Not on use.

11 CHAIRPERSON SCHEUER: If I may, if I
12 understand your arguments correctly, it is clear that
13 if you are staying for the weekend, you're not
14 farming in any meaningful common sense of the word
15 that regular people would understand.

16 I'm going to Kona for the weekend to farm,
17 is not something people say. And so it is about --

18 MR. CHIPCHASE: Yes, Chair. It's not about
19 use, Chair, it's not. You can have a month-to-month
20 tenancy under the State landlord/tenant code that is
21 exactly what it purports to be, month-to-month. So
22 30 days on any month that is less than 31 days. That
23 use, that duration would be considered a short-term
24 rental under the County code, and it would not matter
25 whether that month-to-month lease was issued to a

1 farmer who is farming the property for 15 years but
2 simply on a month-to-month lease.

3 It would still literally be, under the
4 County code, a short-term rental, and nothing else
5 would matter.

6 So the County, unlike Kauai, and unlike
7 Maui, have not approached it from a use perspective.
8 They've approached it -- this County has approached
9 it purely from a durational perspective.

10 And so that with respect is the way the
11 County has done it. It is not about use. It is only
12 about duration.

13 Now, that does take us outside of the
14 questions that are before the Land Use Commission.
15 The only question before the Land Use Commission on
16 either Petition is: Is there an inconsistency
17 between these definition?

18 And the only component of those definitions
19 that has been argued is this durational component,
20 does Chapter 205-4.5 impose a minimum rental period
21 for the rental of any farm dwelling? It still needs
22 to be a farm dwelling, because Chapter 205-4.5, as
23 you said, focuses on use.

24 The question is simply how long does a
25 person have to be a tenant conducting what

1 indisputably has to be a farm dwelling use under the
2 code, and that's the only question, because of the
3 way the County has approached this issue.

4 If they had approached it a different way,
5 we wouldn't be before you, or at least we wouldn't be
6 before you on Petitions addressing that issue.

7 CHAIRPERSON SCHEUER: Your hypothetical
8 farmer who has a 30-day or month-to-month lease of an
9 agricultural land now being prohibited -- I mean, the
10 remedy for that actual farmer would be to simply get
11 a 32-day agreement, right? It's a kind of thing
12 that's available to him to keep farming that no
13 vacationer would ever want to engage in.

14 MR. CHIPCHASE: Well, I think, Chair,
15 you've hit upon another problem with the way the
16 County approached it. And we are far afield of the
17 issue that's before you, but I understand the issue
18 is interesting.

19 CHAIRPERSON SCHEUER: If I'm far afield, I
20 apologize, but I'm trying to go to the core of your
21 written Petition that says it's all about what's in
22 4.5.

23 MR. CHIPCHASE: Correct, Chair.

24 And nothing in Chapter 205-4.5 as of June
25 4th, 1976 would require a farmer to have a minimum

1 lease period of 32-days. And indeed, the
2 landlord/tenant code would be in conflict, because it
3 says you can have a lease of any period, and
4 including month-to-month, if it falls to a
5 month-to-month in a number of circumstances,
6 including after the tenancy has expired, or there is
7 no written rental agreement.

8 So to impose that requirement would create
9 a conflict between these two code provisions.

10 The reason I say far afield is because that
11 does get into hypothetical and into statute
12 situations that are not before the Commission. The
13 only thing before the Commission on a factual basis
14 is the way the County has chosen to define "short
15 term" in its code. And the only disputed element of
16 that is duration.

17 And I say disputed with air quotes. They
18 don't show as well on the screen as they might in
19 person. I say disputed as to duration because the
20 County has already conceded that Chapter 205 does not
21 set a minimum rental period.

22 So that's as far as any declaration from
23 this body goes. It doesn't get into the other issues
24 that you raised as possibility.

25 CHAIRPERSON SCHEUER: I don't have anything

1 further. Commissioners, anything more for Mr.
2 Chipchase at this time?

3 Commissioner Chang.

4 COMMISSIONER CHANG: Thank you, Mr. Chair.

5 This is just a followup in the Chair's
6 questioning, Mr. Chipchase.

7 Since, in his line of questioning about
8 what your clients are doing or not, and we will --
9 and you have no idea, and you never asked the
10 questions. So we would agree that those facts are
11 really not an issue.

12 But if -- but those facts may become an
13 issue when the County decides to enforce. So if
14 there is a determination by the Land Use Commission
15 defining, because you would agree that the Land Use
16 Commission has the authority to define what are
17 permissible uses within Agricultural Zoned Land.

18 Would you agree?

19 MR. CHIPCHASE: I would not agree that the
20 Commission could define those uses in any way that is
21 inconsistent with the statute or the rules.

22 COMMISSIONER CHANG: I should have been
23 clearer about that. So long as our interpretation is
24 consistent with the statute, that that is really what
25 is before us, is the Commission has the jurisdiction

1 and the authority to define State law, Chapter
2 205-4(a), to define farm dwelling, right? You would
3 agree?

4 MR. CHIPCHASE: No. I wouldn't agree,
5 Commissioner. I would have to say, you have the
6 authority to declare the application of that
7 definition of "farm dwelling" to a specific set of
8 facts. That's where I think you have jurisdiction,
9 not to declare abstractly, because the legislature
10 has already declared what "farm dwelling" means. You
11 could apply that definition to a specific set of
12 facts. And here those facts arise from the
13 ordinance.

14 COMMISSIONER CHANG: So who has the
15 authority to interpret 205A-4(a) if it is not the
16 Land Use Commission?

17 MR. CHIPCHASE: Well, interpret and declare
18 I would view differently. You have the authority to
19 interpret the law and to declare it as to a specific
20 set of facts, not to declare it in the abstract or
21 declare what it means in any way that differs from
22 what is set out in the code.

23 So I think we're on the same page more or
24 less. I'm trying to be very careful in how I explain
25 it, because I think there are a number of nuances

1 that go along with these terms.

2 COMMISSIONER CHANG: And I do appreciate
3 always your caution on how expansive or how narrow.

4 But you would agree that it is the Land Use
5 Commission who is responsible for whether it's
6 declaring or interpreting State law Chapter 205?

7 MR. CHIPCHASE: As to a specific set of
8 facts. So if we come back to my colloquy with
9 Commissioner Okuda, Chapter 100, you can't declare
10 expansively, hypothetically, or to situations that
11 are not before you, you can only declare it only as
12 to a specific set of facts. And so that's why both
13 parties have stipulated the only fact before you is
14 2018-114 County ordinance.

15 COMMISSIONER CHANG: And if the Land Use
16 Commission declares that "farm dwelling" must be
17 related to an agricultural activity, then it would be
18 up to the counties to adopt appropriate rules,
19 ordinances that are consistent with that. And if
20 they determine -- let me withdraw that.

21 So it would be at the point in time when
22 the County enforces their ordinance or their rule
23 that they would look at your clients' individual
24 application.

25 So if your clients are not doing any

1 activity that's related to an agricultural activity,
2 would you agree that it would be within the
3 jurisdiction or authority of the County to deny your
4 clients, or to find your client in violation of their
5 rule or ordinance?

6 MR. CHIPCHASE: If the county had --
7 enforcing on a prospective basis going forward, I
8 would agree the county on a going-forward basis would
9 be responsible for enforcement on a case-to-case
10 basis, and look at each use and determine whether
11 those uses met the definition of "farm dwelling" on a
12 going-forward basis. I think I understood that to be
13 the question, and to that extent, I agree.

14 COMMISSIONER CHANG: You've answered my
15 question. Thank you.

16 CHAIRPERSON SCHEUER: We have Commissioner
17 Okuda going -- and Commissioner Cabral would also
18 like to also ask some questions.

19 Process-wise, I apologize to my fellow
20 Commissioners and the parties, I should have shared
21 my intentions yesterday. My hope is that we could
22 take an early lunch today. Take a lunch break after
23 this set of questioning -- and then for about
24 45 minutes, and resume during the normal lunchtime
25 hour with this.

1 So maybe go for another ten minutes or so
2 to 11:20, start up again at noon. Is there anybody
3 who has to be here that has a problem with that
4 schedule?

5 MR. MUKAI: No, chair.

6 COMMISSIONER CHANG: Chair, this is
7 Commissioner Chang. My only restriction, I do need
8 to leave by 3:00 o'clock today.

9 CHAIRPERSON SCHEUER: I suspect that we
10 will not be able to get done before lunch, but we
11 will be able to get done before that deadline.

12 With that, let's take up Commissioner
13 Okuda, Commissioner Cabral, and if nothing further
14 from the Commission, we will then take our lunch
15 break.

16 COMMISSIONER OKUDA: Thank you, Mr. Chair.

17 A followup question to your responses from
18 the Chair.

19 If you don't know what your clients really
20 do with respect to occupancy, isn't it now in fact
21 speculative about whether or not your clients even
22 have standing to bring this Petition?

23 MR. CHIPCHASE: No, Chair, because -- no,
24 Commissioner, didn't mean to promote you Commissioner
25 Okuda.

1 No, it's not speculative, because as we set
2 out factually in the Petition, and it's undisputed,
3 my clients have a desire to rent dwellings within the
4 Agricultural District for terms of less than 31 days.
5 And so that is the only element of standing
6 necessary.

7 The only connection, the interest I guess I
8 should say, the only interest necessary to convey
9 standing, because the only declaration before you is
10 whether Chapter 205 prohibited rentals of less of
11 31 days as of June 4th, 1976.

12 COMMISSIONER OKUDA: Thank you. No further
13 questions.

14 CHAIRPERSON SCHEUER: Thank you,
15 Commissioner Okuda. Commissioner Cabral.

16 VICE CHAIR CABRAL: Thank you. My
17 apologies for missing some of the opening statements
18 this morning. But what I wanted to kind of question
19 is since everything seems to be -- Mr. Chipchase
20 seems to say everything matters because it doesn't
21 matter what you're doing on the land as long as --
22 once you're allowed to be less than 30 days.

23 So I've got a problem with that, because
24 isn't the premise of zoning is that then the
25 government can somehow decide where activities are?

1 So can -- and I have a lot of acreage out there that
2 I rent out, et cetera, that's Ag zoned. So if
3 somebody is less than 30 days, based on Mr.
4 Chipchase's statement just a few minutes ago, I could
5 go ahead and rent it to someone who could put a bar
6 up; they could put up a concession stand; they could
7 put a 7-11 in there as long as the lease is less than
8 31 days. I think I'm getting so spun around with all
9 of this.

10 So, Mr. Chipchase, are you really saying
11 less than 31 days is all that matters, and what they
12 do on the land doesn't matter once it's less than
13 31 days?

14 MR. CHIPCHASE: Let me try to unspin you,
15 is the best --

16 VICE CHAIR CABRAL: I'm sorry, I'm simpler
17 than Arnold.

18 MR. CHIPCHASE: I know when any
19 Commissioner tells me that, that I'm in trouble, but
20 I'll try to unpack it.

21 So the use, the structure is still an ag
22 dwelling, and that has particular meaning under 205
23 and under County code. And so we're not dealing
24 with, you know, commercial or other kinds of uses, we
25 are dealing with uses that occur in a dwelling.

1 And if we take a step back, what the County
2 has consistently told you in these proceedings is
3 that it regards a purely residential use, no farming
4 at all, regards to purely residential use as still
5 meeting the definition of "farm dwelling". So you
6 can have just a residence with no agricultural
7 activity in the County and they will still call it a
8 "farm dwelling". That's been abundantly clear over
9 these three hearings now.

10 What the County has done is to say, if
11 you're renting that dwelling, that single-family
12 home, to someone for less than 31 days, then it's an
13 illegal short-term rental.

14 If you rent it for 31 days or more, we
15 don't care whether it's for farming, for residential,
16 for vacationing. We simply don't regulate it. You
17 can use it for any of those purposes. 7/11, a
18 commercial and industrial use you can't put a cement
19 plant, batching plant on there for lots of other
20 reasons in other parts of the code.

21 But for the dwelling use, if it is less
22 than 31 days, it doesn't matter why you're using it.
23 You can be a farmer farming it, and the County would
24 say that's illegal. If you're 31 days or more,
25 doesn't matter why you're using it, could be a

1 farmer, resident, vacationer, the County would say
2 it's legal.

3 That's the line the County has drawn on
4 purely duration. And what we've asked, to come back
5 to my one-liner to Commissioner Wong, all that we
6 have asked is that the Commission declare, as of June
7 4th, 1976, Chapter 205 did not set a minimum rental
8 period.

9 Chapter 205 did require that the dwelling
10 be a single-family dwelling. Chapter 205 did require
11 that that single-family dwelling be a farm dwelling,
12 and a farm dwelling must be either used in connection
13 with a farm, or the family that occupies it must
14 derive income from agricultural activity.

15 All of those things are part of 205, and
16 none of those things change with a declaration here
17 today. None of those other things are before the
18 Commission. The only question is, within that
19 definition of farm dwelling, within those
20 requirements for use, does the law also require a
21 minimum rental period? That's it. That's the only
22 thing before the Commission.

23 Did that help at all?

24 VICE CHAIR CABRAL: No. In my opinion,
25 you've negated yourself by that, because you've said

1 that this whole thing over and over again, and I read
2 all your papers last night that have come in in the
3 last several days eloquently put, but the problem I
4 keep having is that it's the use that matters. And
5 the fact that it is 31 days more or less is not the
6 fact that a vacation rental has been like a hotel.
7 So if on Ag land we have 100-room, quote, residence,
8 because people live there the weekend they come in
9 and rent, so if I'm living, that's wherever I sleep
10 tonight is wherever I live. So I can understand
11 that.

12 But that's my problem is that I think the
13 County has enormous problems that need to be cleaned
14 up. I live with this all the time in Hawaii County,
15 and I think the government officials on State and
16 County level need to figure out a way to clean up
17 this mess with zoning and Ag zoning and farm
18 dwellings and the Band-Aid they put on it to get
19 around things, in my opinion.

20 But I still do not see that a vacation,
21 short-term vacation rental for a short-term period
22 where transient accommodation taxes are due in any
23 way, shape or form is connected to being a farm
24 dwelling. So I still have a problem with that
25 connecting piece to "farm dwelling".

1 But I don't think we are going to figure
2 out a way to connect those. So I thank you very
3 much.

4 CHAIRPERSON SCHEUER: Thank you,
5 Commissioner Cabral. I want to assess where we are
6 in our proceedings. And I want to note, to be
7 completely clear, my intention is that Commissioner
8 Cabral will be able to continue on these proceedings
9 and deliberate on these proceedings.

10 I would like Mr. Chipchase, you or Mr.
11 Goodin, to share your PowerPoint with the LUC staff
12 and Hawaii County parties, so Ms. Cabral can review
13 it over lunch.

14 MR. CHIPCHASE: Yes, Chair. We will do
15 that right now.

16 CHAIRPERSON SCHEUER: Is there any more
17 questioning of the parties at this time? If there's
18 not, then we will go onto lunch break. When we
19 resume from lunch, we will hear closing arguments
20 from Hawaii County and anything further Mr. Chipchase
21 has to add, and then proceed to questioning of all
22 the parties or all the individuals and organizations
23 who provided testimony are available, including, if
24 possible, OP. Is that fine, folks?

25 MR. MUKAI: Chair, quick question. I was

1 wondering whether the Commission has received the
2 City and County of Honolulu's submission dated
3 August 11, 2020, regarding --

4 CHAIRPERSON SCHEUER: There were a number
5 of materials which were not -- not a number of
6 materials, at least two pieces of testimony including
7 the City and County's testimony has been received by
8 the Commission. It was not posted to the website
9 because it was not within 48 hours of the hearing.

10 MR. MUKAI: Thank you.

11 Also my understanding was that the Office
12 of Planning was going to chime in. Is that still
13 happening?

14 CHAIRPERSON SCHEUER: Office of Planning is
15 not a party to these proceedings, but they are
16 available to be questioned as a public witness. And
17 certainly one of the Commissioners can ask the Office
18 of Planning to state their position.

19 MR. MUKAI: Thank you.

20 CHAIRPERSON SCHEUER: Anything further,
21 folks? If not, let's resume at 12:15.

22 VICE CHAIR CABRAL: And I'll stay on to
23 watch my PowerPoint.

24 CHAIRPERSON SCHEUER: Nancy, the PowerPoint
25 will be emailed to you.

1 VICE CHAIR CABRAL: Thank you very much.

2 CHAIRPERSON SCHEUER: Thank you. We're in
3 recess.

4 (Noon recess taken.)

5 CHAIRPERSON SCHEUER: I think we're ready
6 to go and it's right on time.

7 We're resuming our proceedings. And I
8 believe we are now at the portion of the proceedings
9 where we would hear closing arguments from Hawaii
10 County.

11 MR. MUKAI: Thank you, Chair.

12 Again, for the record, John Mukai, Deputy
13 Corporation Counsel.

14 The Rosehill Petitioners in this case argue
15 in their submission that, quote, the use of the
16 dwelling does not matter to the County. We would
17 simply disagree.

18 The County's entire Petition seeks to have
19 this Commission declare that short-term vacation
20 rentals are not a permissible use for farm dwellings
21 pursuant to Hawaii Revised Statutes Sections 205-2,
22 205-4.5, and Section 15-15-103 of the Hawaii
23 Administrative Rules.

24 This has nothing to with the County code or
25 interpretation of the County Code. The County wants

1 direction in working towards aligning with HRS
2 Section 205, and firmly believes, along with the
3 other County jurisdictions, that a farm dwelling must
4 be used in connection with a farm and have
5 agricultural use attached.

6 The County has determined that short-term
7 vacation rentals are not an allowed use based
8 specifically on the law. HRS Section 205-4.5(a)
9 provides two permissible use for human habitation,
10 (a)(4), a farm dwelling used in connection with a
11 farm where agricultural activity provides income to
12 the family occupying the dwelling; (b)(14)
13 agricultural tourism, which would be activities which
14 provides for overnight accommodations which requires
15 agricultural activity as well as a separate and
16 distinct process from the short-term vacation rental
17 process.

18 In this case, the Rosehill Petitioners are
19 not farming their land. They're not occupying these
20 farm dwellings or deriving their income from
21 agricultural activities.

22 The only way to qualify for a short-term
23 vacation rental is to not live on the property. Now,
24 I know the Chair asked Mr. Chipchase for some
25 information, and we took a look at the real property

1 tax records, and the mailing addresses for 19 of the
2 Petitioners, has one in Honolulu and one in Hawaii.
3 The rest are all out of state or out of the country.

4 The County of Hawaii has never argued about
5 the duration of the farm dwellings being rented for
6 30 days or less, or whether the owner of a farm
7 dwelling needs to reside in the dwelling, but the use
8 of the farm dwelling is essential in determining
9 whether the Rosehill Petitioners may use their farm
10 dwellings as short-term vacation rentals.

11 The County requests that the State Land Use
12 Commission uphold what we believe is the intent of
13 our State Land Use law by finding in favor of the
14 County of Hawaii and declaring that a short-term
15 vacation rental is not a permissible use of a farm
16 dwelling in the State Land Use Agricultural District.

17 Thank you.

18 CHAIRPERSON SCHEUER: Thank you very much,
19 Mr. Mukai.

20 Commissioners, questions? Commissioner
21 Cabral followed by Commissioner Wong.

22 VICE CHAIR CABRAL: Thank you very much.

23 I want to follow up exactly on your
24 statements you just made so I get absolute
25 clarification.

1 From what I'm hearing you say -- and let me
2 know if that's correct or incorrect -- is it possible
3 that I could have agriculturally-zoned property, have
4 a residential house on it that I do operate as a
5 short-term vacation rental because, in addition to
6 the visitor staying there, part of their activities
7 of being there would be -- or the party, not
8 necessarily a visitor -- could be that there would be
9 horse riding activities as part of the stay, or that
10 they would participate in some kind of organic
11 gardening-type activities, or produce a crop or
12 participate in some way, shape or form in some kind
13 of agriculture, clearly agricultural activity on that
14 land that they are staying on.

15 Would that be one allowance for a
16 short-term vacation rental, or that they could be
17 short term on the land, if they were to be -- like, I
18 hire people to come through once a year to pick all
19 my crops, or to do some kind of clearly -- I think
20 one of the letters we got, or something said like you
21 come in and once a year you pick pineapple, and you
22 stay on the land for possibly less than 30 days.

23 Would those be acceptable activities on
24 agriculturally-zoned property that one could be
25 possibly defined as short-term vacation rental?

1 MR. MUKAI: I think, Commissioner Cabral,
2 in that case where you would bring someone in, I
3 think you would be paying them to harvest your crops,
4 right? So I think it's a little different.

5 VICE CHAIR CABRAL: That is correct.

6 MR. MUKAI: With the other examples you
7 gave, we would submit that we don't believe that
8 would be a short-term vacation rental, but it would
9 be agricultural tourism or getting special permits.

10 VICE CHAIR CABRAL: So my first scenario
11 where they can come in and stay a week, and part of
12 that week is they get to ride the horses. They plant
13 some type of -- I'm thinking organic because it would
14 be small time -- but some kind of crop or something,
15 that is the experience that's offered and marketed
16 with that vacation experience.

17 Would that be considered a permitted use
18 because it involves agriculture activities?

19 MR. MUKAI: Again, we would submit that
20 that would be covered by ag tourism because they
21 would be paying to come in and have -- do that
22 activity pursuant to the ag tourism statute.

23 VICE CHAIR CABRAL: Okay, I see what you're
24 saying. Thank you very much.

25 CHAIRPERSON SCHEUER: Thank you,

1 Commissioner Cabral.

2 Commissioner Wong followed by Commissioner
3 Chang.

4 COMMISSIONER WONG: Thank you, Chair.

5 I just have one question again for the
6 County. In one sentence what are you asking us to
7 do?

8 MR. MUKAI: The County wants this Land Use
9 Commission to find in favor of the County of Hawaii
10 by declaring that a short-term vacation rental is not
11 a permissible use of a farm dwelling in the State
12 Land Use Agricultural District.

13 COMMISSIONER WONG: Thank you for that
14 statement.

15 I have another question for you.

16 Mr. Chipchase was talking about a date,
17 1976. So how does that relate to your DR?

18 MR. MUKAI: Commissioner, I think that's
19 when the definition of "farm dwelling" was
20 established. So that's why at that point in time the
21 County believed that short-term vacation rentals
22 could not be used on farm-dwelling units in
23 Agricultural District.

24 COMMISSIONER WONG: So if it seems like
25 there's some connections with the two DR's but

1 somehow different in a sense that one is dealing with
2 date, and one is dealing with yes or no. Or am I
3 mistaken?

4 MR. MUKAI: I think the County's position
5 deals specifically with the use, that the use of the
6 short-term vacation rentals is not permitted in the
7 Agricultural District on a farm dwelling.

8 COMMISSIONER WONG: Okay, that's it. Thank
9 you County. Thank you, Chair.

10 CHAIRPERSON SCHEUER: Thank you,
11 Commissioner Wong.

12 Commissioner Chang followed by
13 Commissioners Ohigashi and Aczon.

14 COMMISSIONER CHANG: Thank you very much,
15 Mr. Mukai, for your testimony.

16 Explain the County's position. And I know
17 this has been kind of an evolving process.

18 So I just really want to be very clear that
19 the County's position -- and when you refer to
20 short-term vacation rental in your responses, you're
21 using that as a term of art as you have defined under
22 your own rules; is that correct?

23 MR. MUKAI: That's correct.

24 COMMISSIONER CHANG: So in that instance
25 it's like the owner/operator doesn't reside in the

1 building, there's no more than five bedrooms, and is
2 rented for a period of 30 consecutive days or less.

3 When you say "short-term vacation rentals",
4 that's what you mean?

5 MR. MUKAI: Yes, Chair -- I mean, yes,
6 Commissioner.

7 COMMISSIONER CHANG: And now what I'm
8 hearing you say is that the use of the land is
9 essential to determining whether the landowner is in
10 compliance with 205-4.5, that's the County's
11 position, is that use is important, is critical?

12 MR. MUKAI: Yes, that's the County's
13 position, Commissioner.

14 COMMISSIONER CHANG: So when other
15 Commissioners in the previous asked about -- I think
16 it was Commissioner Wong -- about the McMansion, but
17 Commissioner Okuda's questioning about I have no
18 intention to farm or conduct any agricultural
19 activities, it is now the County's position that you
20 are clarifying that -- and I don't want to put words
21 in your mouth -- but are you now saying that the use
22 and the intention of the owner is important for
23 purposes of fitting within the definition of
24 205-4.5(a)(4)?

25 MR. MUKAI: Commissioner, I'll have Michael

1 Yee, Planning Director, address this point.

2 CHAIRPERSON SCHEUER: You're still under
3 oath.

4 MICHAEL YEE

5 Was previously called as a witness by and on behalf
6 of the County of Hawaii, was previously sworn to tell
7 the truth, was examined and testified as follows:

8 EXAMINATION

9 MR. YEE: Yes. Michael Lee, Planning
10 Director for Hawaii County.

11 In the line of questioning previously, the
12 question was whether or not we would issue approval
13 for a farm dwelling unit, if we clearly didn't know
14 they were going to, let's say, farm.

15 The line of questioning also did not
16 continue to when would we issue a violation if a use
17 was on that same property. And also that use of
18 occupying just as a single-family dwelling, or as a
19 single family in a farm dwelling unit if you're
20 occupying it, it doesn't negate from having to do
21 farming activity.

22 So that's the question which is -- we see
23 as a vacation rental full time, 24/7, as being
24 inconsistent.

25 So to say somehow like it's not important

1 to us, that's also the line of question didn't go in
2 as far as why would we then, when we issue a second
3 dwelling unit, why we ask for sales records for
4 farming activity.

5 The line of questioning didn't go toward
6 when do we issue violations for uses that aren't
7 permitted within farm-dwelling units.

8 So to somehow say it doesn't matter to us,
9 is inaccurate also, because it really does matter to
10 us that you can certainly live on your property, but
11 we also like to see agricultural activity.

12 COMMISSIONER CHANG: Okay. And today you
13 have an opportunity to clarify. Perhaps the
14 Commissioners didn't give you an opportunity to fully
15 expand on your question.

16 So now it's my understanding that the
17 County of Hawaii is saying that a farm dwelling -- to
18 be a farm dwelling, or to have a residence on
19 agriculturally-zoned land, it has to be a farm
20 dwelling where it is located, or used in connection
21 with a farm, or where the agricultural activity
22 provides income to the family occupying the dwelling;
23 is that correct?

24 MR. MUKAI: That is correct.

25 COMMISSIONER CHANG: And it also -- is it

1 also correct that the County's position is that the
2 activity has to be related to agricultural purposes?

3 MR. MUKAI: Yes, that is correct.

4 COMMISSIONER CHANG: That's very helpful.

5 And then you have this exception for
6 agricultural tourism, which is -- which goes more
7 towards duration, short-term uses, but again, it has
8 to be consistent with its agriculturally-related
9 activity. Is that correct?

10 MR. YEE: Correct. So I do want to just
11 also say, when you throw out a bunch of scenarios,
12 it's difficult, because as Planning Director, we go
13 case by case. So when you come in and state some
14 kind of use, it could be a vacation rental, it could
15 be a special permit, it could be ag tourism.

16 To just throw out scenarios sometimes is
17 difficult because there has to be a complete package
18 to it that's telling us what's going on. So just
19 want to provide that information.

20 COMMISSIONER CHANG: And I appreciate that.
21 I think, and I will only speak on my behalf, I think
22 at times the County, when you refer to short-term
23 vacation, it's very clear in your mind you're looking
24 at the definition of your short-term vacation rental
25 under your rules, and it meets those requirements.

1 And sometimes, in my mind, when I was asking
2 questions, I was thinking more of sort of a generic
3 situation where someone is not conducting
4 agricultural activities, but they're using it for
5 something less than the duration.

6 So you clarified for me what your County's
7 position is. It has to be related to agricultural
8 uses. And it could be less than 30 days, and that
9 would fit under your agricultural tourism?

10 MR. YEE: That is correct.

11 COMMISSIONER CHANG: Okay. That's what I
12 heard you say.

13 Can I ask, why does the County -- and you
14 may have already answered this, Mr. Mukai -- select
15 June 4th, 1976?

16 MR. MUKAI: Because that's the date when
17 the definition of "farm dwelling" was established.

18 COMMISSIONER CHANG: But you aren't saying
19 that anything that happened after June 4th, 1976,
20 short-term vacation rentals would be permissible?
21 You aren't saying that, are you?

22 MR. MUKAI: No, we're saying the County's
23 position is that they're not permissible uses after
24 1976.

25 COMMISSIONER CHANG: So you're essentially

1 saying they have never been a permissible use under
2 your own County ordinance?

3 MR. MUKAI: That's correct, and the State
4 statute.

5 COMMISSIONER CHANG: To be honest, I don't
6 even know if the term short-term vacation rental even
7 existed in 1976.

8 So what I'm hearing the County say is that,
9 in your position, is that short-term vacation
10 rentals, as you have defined it, was never a
11 permissible use on agriculturally-zoned land?

12 MR. MUKAI: That's correct.

13 COMMISSIONER CHANG: So there would never
14 be a grandfathered situation, it just was never
15 permissible?

16 MR. MUKAI: Correct.

17 COMMISSIONER CHANG: Do you know -- this is
18 kind of a factual question -- do you know whether any
19 of the Petitioners under the Rosehill Petition ever
20 applied to the County for a nonconforming use
21 certificate for short-term vacation rental?

22 MR. MUKAI: Commissioner, are you asking
23 whether they applied for a short-term vacation
24 rental?

25 COMMISSIONER CHANG: Yes. In your Petition

1 you said you have -- you received some applications
2 for short-term vacation rentals on ag lands. I was
3 just wondering whether any of the Petitioners
4 applied?

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

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

11 MR. MUKAI: That's correct, Commissioner.

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

17 MR. MUKAI: No, no.

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

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

24 Part of the reason why we're here today in
25 front of all of you is because they were denied, and

1 why Mr. Chipchase and the Rosehill Petitioners have
2 filed a Counter-Petition to the LUC is because they
3 applied for their short-term vacation rental and were
4 denied under the County rules and code.

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

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

12 And by definition of a farm dwelling does
13 not explicitly allow for short-term vacation rentals,
14 or the like; and 205-4.5(b) also says uses not
15 expressly permitted in Subsection (a) shall be
16 prohibited.

17 COMMISSIONER CHANG: I'm not -- I've not
18 seen the application that they submitted to the
19 County, and you may have.

20 So did all of their applications say that
21 they are the owner or operator, and they don't reside
22 in the house?

23 CHAIRPERSON SCHEUER: Commissioner Chang,
24 I'm just throwing up a yellow caution flag in terms
25 of how many facts we are trying to get through versus

1 the acceptance of the matter here.

2 COMMISSIONER CHANG: I'm not sure.

3 CHAIRPERSON SCHEUER: Please continue.

4 COMMISSIONER CHANG: I just want to make
5 sure, because this is contrary to what we heard from
6 Petitioner's counsel.

7 So they don't reside on the property, and
8 that they don't have more than five bedrooms on the
9 house, do you have a checklist that says that?

10 MS. SURPRENANT: We would have to go back
11 and relook physically at the bedrooms. And I
12 appreciate the line of questioning.

13 In order to try to qualify, which the
14 Petitioners did try to qualify for an STVR, being
15 that they applied for a short-term vacation rental,
16 part of that statute says that they do not and cannot
17 reside on the property.

18 So we would presume that whether they live
19 there today or not, that they were planning to not
20 live there if they were to be issued a short-term
21 vacation rental permit, but they were not issued
22 those permits.

23 COMMISSIONER CHANG: So I am assuming that
24 there's a self-declaration, they know what is
25 required under short-term vacation rentals, and

1 therefore, they submitted the application, okay.

2 MS. SURPRENANT: There is an affidavit
3 that's part of the application that specifically
4 outlines that they be in accordance with the laws and
5 rules and regulation, et cetera, et cetera.

6 COMMISSIONER CHANG: All right. You have
7 answered my questions. Thank you very much.

8 CHAIRPERSON SCHEUER: Thank you very much,
9 Commissioner Chang.

10 We have Commissioners Ohigashi, then Aczon,
11 then Giovanni and Okuda.

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

15 MR. MUKAI: Yes, that's correct.

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

19 MR. MUKAI: Yes.

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

23 MR. MUKAI: The provisions in the code
24 require a lot of things. Exactly what is it you want
25 us to take a look at?

1 COMMISSIONER OHIGASHI: Operator doesn't
2 reside in the building, no more than five bedrooms to
3 rent. So your STVR, is the owner doesn't reside on
4 the building, right?

5 MS. SURPRENANT: Yes, sir, that's correct.
6 This is April Surprenant again.

7 So the County's definition of a short-term
8 vacation rental means a dwelling unit of which the
9 owner or operator does not reside on the building
10 site, that has no more than five bedrooms for rent on
11 the building site, and it's rented for a period of 30
12 consecutive days or less.

13 And further, it says this definition does
14 not include short-term vacation rentals of an owner's
15 primary residence as defined under a different
16 section of the Internal Revenue Code.

17 So those are the three items that I think
18 you were referring to that Mr. Chipchase had slides
19 on.

20 COMMISSIONER OHIGASHI: And your question
21 is, it's not the 30 days question, or anything like
22 that, your question is merely is this: Is your
23 ordinance consistent with 205-4.5(a)(4) which does
24 not include vacation rentals or the use of property
25 for vacation purposes that's not related to

1 agricultural use?

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

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

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

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

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

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

20 MR. MUKAI: All of the lots, they're
21 considered farm dwellings on the agriculturally-zoned
22 property. So it needs to be, we believe, connected
23 with agriculture activities. I don't know how else
24 --

25 COMMISSIONER OHIGASHI: What I'm trying to

1 get at is this. Of one -- I think the question is
2 whether or not a farm dwelling can be used as a
3 rental for the purposes of vacationing people, short
4 term for nonagricultural, nonagricultural purposes,
5 that's the central argument that you're trying to
6 make.

7 The second part about it is, is that how
8 the County is going to enforce that, that rule? And
9 they're going to enforce it by saying, well --

10 MR. MUKAI: I think the important -- I'm
11 sorry, I'm sorry.

12 COMMISSIONER OHIGASHI: That's my question.
13 My question is, if we grant what you say, then
14 whether or not you're defining it as STVRs or
15 whatever, it is clear from -- if we decide you cannot
16 do these vacation rentals because they have no
17 agricultural purposes, you cannot use these for that,
18 if we say that, what you want, then technically there
19 is no need to render an opinion or make a ruling on
20 whether or not one, two and three of your ordinance
21 applies. Is that right?

22 MR. MUKAI: Yeah. Again, we are not asking
23 to interpret the code with regard to enforcement,
24 that's the Planning Department's problem, and they
25 are going to be dealing with it. And they are

1 dealing with it.

2 COMMISSIONER OHIGASHI: I'm trying to get a
3 grasp on this, what is in our kuleana, and what is in
4 you guys' kuleana.

5 If we're not going to wrestle with the
6 ordinance or terms of the ordinances, and we just
7 find, yeah, you cannot have vacation rentals is
8 inconsistent with the definition in 205-4.5(a)(4),
9 then it's up you to guys to fight whether or not in
10 another forum, whether or not that these -- the
11 County ordinances can be enforced or not enforced, or
12 should be interpreted or beyond the constitutional
13 bounds; isn't that right?

14 MR. MUKAI: Yeah, that's correct.

15 COMMISSIONER OHIGASHI: No further
16 questions.

17 CHAIRPERSON SCHEUER: Thank you very much,
18 Commissioner Ohigashi.

19 Commissioner Aczon followed by Giovanni,
20 then Okuda.

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

1 my own way.

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

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

9 MR. MUKAI: I think, Commissioner, you're
10 talking about the definition as set forth in the
11 Hawaii County code; and yes, we do agree with the
12 definition as set forth in the Hawaii County code
13 with regard -- and definition of a short-term
14 vacation rentals.

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

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

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

22 MR. MUKAI: Yes, because they are part of
23 the Hawaii County code definition of a short-term
24 vacation rental.

25 VICE CHAIR ACZON: Okay, that's what I

1 thought. Okay, thank you.

2 CHAIRPERSON SCHEUER: Thank you,
3 Commissioner Aczon.

4 I note that the County chats with people,
5 whereas the Rosehill Petitioners have colloquies.

6 Commissioner Giovanni.

7 COMMISSIONER GIOVANNI: Thank you, Chair.

8 So I have been following this rather
9 longish legal discussion as an engineer, but I'll try
10 my best to ask the questions that I understand to the
11 County.

12 First, I just want to clarify in the
13 lexicon that "short term" is equivalent to transient
14 as expressed in the ordinances of other counties,
15 would you agree with that?

16 MR. MUKAI: Commissioner, you broke up.
17 Could you please repeat the question?

18 COMMISSIONER GIOVANNI: The question is
19 just clarification. In your lexicon you refer to
20 "short-term vacation rentals" and in the lexicon of
21 other County Planning Departments they refer to
22 transient vacation rentals.

23 We're talking about the same thing; is that
24 correct?

25 MR. MUKAI: Generally, yes, Commissioner.

1 COMMISSIONER GIOVANNI: I do very much
2 appreciate the testimony that's been presented in
3 writing by the other Counties, the Planning
4 Departments of other Counties, and I'm just going to
5 refer to some excerpts directly from the one from the
6 Department of Planning of County of Kauai.

7 And this is their interpretation of HRS
8 205-4.5(a)(4) is that the farm dwelling would have to
9 be used in connection with a farm or where
10 agricultural activity provides income to the family
11 occupying the dwelling.

12 I just want to ask, is that consistent with
13 your interpretation in Hawaii County?

14 MR. MUKAI: For farm dwelling, yes.

15 COMMISSIONER GIOVANNI: Yes, for a farm
16 dwelling.

17 MR. MUKAI: Yes.

18 COMMISSIONER GIOVANNI: The root of my
19 question is the following.

20 In Kauai County and in other counties there
21 is a process by which you can get an exception under
22 205-6 for a nonconforming use for a farm dwelling as
23 a TVR in which you can apply for a special permit for
24 that expressed purpose.

25 Is there something equivalent to that in

1 Hawaii County?

2 MR. MUKAI: Yes, and in fact, these
3 Petitioners could do the same thing.

4 COMMISSIONER GIOVANNI: So in other words,
5 what you're saying is that they don't automatically
6 get a permissible use as a farm dwelling under
7 205-4.5(a)(4), yet if they want to pursue that as a
8 permissible use, they can get an exception to that
9 under 205-6 by going through that process, and that
10 is established today; is that correct?

11 MR. MUKAI: In that case, it would be a
12 nonconforming use and we would require a special
13 permit.

14 COMMISSIONER GIOVANNI: Yes, that's what
15 I'm asking, and you confirmed it. Thank you very
16 much. No further questions.

17 CHAIRPERSON SCHEUER: Thank you very much,
18 Commissioner Giovanni. Commissioner Okuda.

19 COMMISSIONER OKUDA: Thank you, Mr. Chair.
20 And I promise my fellow Commissioners I'll try not to
21 be a wonk.

22 But if I can ask you this, Mr. Mukai, since
23 the little exchange we had on the transcript was
24 featured semi-prominently by Mr. Chipchase in his
25 submittal, so let me reask the question again.

1 If I came to the County of Hawaii for a
2 permit for the first structure on a piece of property
3 which is within the Agricultural District, and I told
4 you face -- or to the face of whatever person County
5 employee that was taking in my permit application --
6 and I said unequivocally, no ifs, ands, or buts, I am
7 not going to do any agriculture. I'm not going to
8 farm. And I have many reasons why I'm not going to
9 farm, but I promise you, under penalty of perjury or
10 under penalty of law, there will be no farming
11 activity; there will be no agriculture. I'm just
12 going to live in the dwelling forever and ever and
13 ever.

14 Will you still give me a permit to build my
15 dwelling on that piece of property which is within
16 the Agricultural District on the Land Use Commission
17 maps?

18 MR. MUKAI: We don't issue building
19 permits, but with regard to the farm dwelling, it is
20 a farm dwelling on agriculturally zoned -- on an
21 agriculturally-zoned district and, of course, the
22 Planning Department in the County of Hawaii as well
23 as all the other counties would want, and I would
24 guess it would necessitate that agricultural
25 activities be performed.

1 COMMISSIONER OKUDA: Go ahead. I didn't
2 mean to cut you off.

3 MR. MUKAI: That it be agricultural
4 activities be performed on the farm dwelling.

5 COMMISSIONER OKUDA: But whichever
6 department or division of the County of Hawaii, I'm
7 telling the appropriate division or department or
8 appropriate employee that would have to issue me the
9 discretionary permit for me to build the dwelling on
10 the property. I'm telling, you know, the County
11 employee, I am not going to have any agriculture.
12 I'm not going to farm. It can be your wish that, you
13 know, I hope in the future, Mr. Okuda, you'll
14 reconsider, but I'm telling you I'm not going to
15 farm, and, in fact, I'm thinking of going to see my
16 lawyer to put a deed restriction in there that says
17 there will be no farming, because I hate farming.

18 Will you still issue the permit which
19 allows me to build that?

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

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

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

7 But we don't have anything in place that
8 requires active current agricultural activity before
9 building a farm dwelling. That does not mean that
10 the first dwelling on a parcel in the State Land Use
11 Ag District is not a farm dwelling. It is.

12 By definition of 205, the only provision
13 for a dwelling within the farm Agricultural District
14 as a permitted use is a farm dwelling. I hope that
15 answers your question.

16 COMMISSIONER OKUDA: Well --

17 MS. SURPRENANT: And we would have you sign
18 a farm-dwelling agreement. You would have to agree
19 that this is the land that you're building a house on
20 and that this is what it requires.

21 COMMISSIONER OKUDA: So in other words,
22 you're telling me, even though I tell you these
23 things orally, I will have to make a written
24 representation that the dwelling to be constructed
25 will comply with the requirements of 205, or other

1 applicable portions of the law, which require
2 agricultural use. Is that what you're saying?

3 MS. SURPRENANT: Yes, sir, that is correct.

4 But we could not force you to buy a tractor
5 or put a hoe in your hand to actively work the land.
6 We could not force you to do that given the laws that
7 are in place. But the building that you build on
8 State Land Use Ag is by definition a farm dwelling.

9 COMMISSIONER OKUDA: I might slightly
10 disagree with that, because I think even your
11 County's presentation has been use is crucial, use is
12 the controlling factor. You might not be able to
13 force me to buy a tractor or actually farm, but if I
14 make a statement to a government official in certain
15 circumstances, it is true I could be prosecuted at
16 minimum for, I think it's called an unsworn
17 falsification to a government official.

18 In any event, you've answered my question.
19 Thank you very much.

20 Thank you, Chair.

21 CHAIRPERSON SCHEUER: Thank you very much,
22 Commissioner Okuda, and all of the Commissioners for
23 excellent questions. Are there further questions
24 right now for the County, Commissioners?

25 Commissioner Ohigashi.

1 COMMISSIONER OHIGASHI: I just wanted to
2 follow up on that.

3 If they sign the agreement, and they fail
4 to farm the operation, fail to materialize, I've seen
5 it on Maui that they aren't given the agricultural
6 tax rates or agricultural rates that the County
7 provides for agricultural use.

8 Is that similar to what happens in the Big
9 Island?

10 MS. SURPRENANT: Yes, sir, that is correct.

11 COMMISSIONER OHIGASHI: I don't have any
12 further questions then.

13 CHAIRPERSON SCHEUER: Anything further,
14 Commissioners?

15 Even though we have heard a lot from you
16 today, Mr. Chipchase, you have an opportunity to
17 offer your closing. I'm assuming it will not be as
18 long as your main argument.

19 MR. CHIPCHASE: This is what happens when I
20 don't have Mr. Goodin with me.

21 CHAIRPERSON SCHEUER: I told you to be nice
22 to him.

23 MR. CHIPCHASE: And I always have been.
24 Not only a binding order but a continuing one. So,
25 Chair, I appreciate the opportunity to chat further

1 with you and the other Commissioners on this issues.

2 And I know as we come to the end, we're
3 nearing the end of a long hearing that has certainly
4 spanned three hearing days over a couple of months
5 and a lot of filings.

6 And so the first thing I want to say really
7 is that I recognize how much time all of this takes.
8 And I recognize that the effort that the
9 Commissioners put into understanding the issues to
10 making the reasonable decision, and it's reflective
11 of the questions that you've asked me and that you've
12 asked the County.

13 And I also recognize that this is a
14 difficult and a sensitive issue for the Commission,
15 and in general, because of the nature of a short-term
16 vacation use, and the concerns that are associated
17 with those, particularly on ag land.

18 So I recognize that it's all something that
19 each Commissioner struggles with as they approach the
20 respective Petitions.

21 I had some remarks prepared to close,
22 because I really think you can break this down into
23 four slides, and I will try to do that in a moment.

24 I am compelled to say that I am very
25 surprised by a lot of what the County said in

1 response to questions from the Commission. And my
2 surprise is in part because the statements are
3 contrary to things that have been said throughout
4 these proceedings, and it's not as I look at these
5 quotations that we set out in our papers and slides,
6 it's not a further clarification, it's an utter
7 departure from a lot of what had been said, among
8 other things, quite clearly expressed to the
9 Commission that if we remember how this discussion
10 began with Dr. Bell, Dr. Bell does not farm. He may
11 never farm on his property. He has never expressed
12 any intention to farm.

13 If you recall he said all those things on
14 the first day. The question to the County was is his
15 dwelling still a farm dwelling. His answer
16 unequivocally, yes. Not, well, no, but we would have
17 to enforce it. Not, well, no, but we didn't know
18 that when he erected this building. It was
19 unequivocally, yes, it is still a farm dwelling even
20 though he would never farm and had no intention of
21 ever farming.

22 That's the truth of the County's position,
23 that a purely residential use is still considered a
24 farm dwelling on ag land within the County of Hawaii.
25 And it's replete in the transcript.

1 If there is any doubt in any Commission's
2 mind, I encourage you not to take my excerpts at face
3 value, go back and read the transcripts. That is the
4 County's position through and through.

5 The second thing that very much surprised
6 me was the assertion that the County's code did not
7 matter. That is the question, was a short-term
8 vacation rental allowed. But very quickly in the
9 questioning from Commissioner Chang, it was apparent
10 that when the County says "short-term vacation
11 rental", it means short-term vacation rental as it
12 has defined in the code. That every time you hear
13 the County say "short-term vacation rental", it means
14 its definition of short-term vacation.

15 The County was quite clear about that on
16 further questioning.

17 And as we heard in the questioning of
18 Commissioner Ohigashi later, that definition includes
19 three specific elements: Owner/occupant, five
20 bedrooms or less, 31 days or less, that is everything
21 that this comes down to. That is all a short-term
22 rental means. It does not mean anything other than
23 those three elements.

24 So when you hear the County's request is to
25 declare that short-term vacation rentals have not

1 been allowed on ag land since June 4th, 1976, they
2 mean a property on which the owner does not live,
3 that has five or fewer bedrooms, and that it's rented
4 for less than 31 days. That's all it means.

5 And as we have seen throughout these
6 proceedings in response to questioning, if the lease
7 is 31 days or more, it is permitted, it is not
8 considered short-term vacation, not prohibited under
9 County code. If it is less than 31-days, does not
10 matter why the tenant is using the property, it's
11 still prohibited as a short-term vacation rental
12 under the County code. The transcripts are replete
13 with those statements. We put some up on the screen
14 earlier today.

15 The third thing that surprised me is that
16 the County said that a rental of less than 30 days
17 for ag purposes, or with an ag connection, would be
18 considered ag tourism, but the County code does not
19 allow any overnight accommodation for ag tourism. So
20 in fact, that could not be the use. It would be
21 considered a short-term vacation rental, whatever the
22 purpose, whatever the use is, as long as it is less
23 than 31 days.

24 And the fourth and final thing that
25 surprised me is the intonation in response to

1 questions from Commissioner Chang that this
2 short-term vacation rental use, as the County has
3 defined it, County views that as having always been
4 unlawful on ag land.

5 That's not true. The County code
6 specifically allows lots created before June 4th,
7 1976, to obtain a nonconforming use certificate to
8 continue a short-term vacation rental use, a rental
9 of less than 31 days. The only reason that these
10 lots, the Petitioners' lots did not qualify is
11 because they were created after June 4th, 1976. Had
12 nothing to do with anything else.

13 That is the County's black and white, up or
14 down, was it operated before June 4, 1976? If yes,
15 you can obtain nonconforming use certificate, and
16 continue a short-term vacation use on ag land,
17 meaning less than 31 days.

18 If your lot was created after that date,
19 you cannot obtain a permit nonconforming use
20 certificate.

21 So I have to bring us back to where we
22 started. And I have to say that I don't believe
23 anything that the County said was about my clients or
24 about our uses, is inconsistent with anything that we
25 said from the beginning in response to Commissioner

1 Chang's question or Commissioner Okuda's questions,
2 rather said quite directly, my clients have engaged
3 in and intend to engaged in rentals of less than 31
4 days.

5 In order to do that, they had to comply for
6 nonconforming use certificate. County code says
7 rentals less than 31 days, you're a short-term
8 vacation rental, that's it. If you want to engage in
9 that use on ag land you had to apply for
10 nonconforming use certificates. They don't ask you
11 what are you doing with the property? How it's been
12 used? Do you have a farm? None of that.

13 Are you renting it for less than 31 days?
14 If so, you area a short-term rental, and you to apply
15 for the nonconforming use certificate.

16 If I am able to do this real quick. With
17 those points made, I would like to come back to what
18 is actually before the Commission, because much of
19 this is not -- I'm sorry, I do have one brief other
20 thing to say.

21 Commissioner Giovanni, I thought your
22 question is short term equivalent to transient in
23 other Counties? The answer is no. It's not
24 generally, or sort of, it's absolutely not.

25 The other counties define those terms very

1 differently, and Maui County in particular -- Kauai
2 County I'm less familiar with -- but Maui County in
3 particular actually has a definition of "transient"
4 that says you live somewhere else, this is not your
5 principal place of residence.

6 There's nothing like that in Hawaii Code.
7 The dates are different. The terms are different.
8 The conditions are different. They're not similar at
9 all to the other counties. Kauai has taken a much
10 more thoughtful approach; I think, Maui has as well.

11 So with respect to Mr. Mukai, they're not
12 the same; they're not equivalent in any way.

13 Okay. Coming back to what is actually
14 before the Commission. If -- now that Mr. Goodin has
15 joined me, I'll ask him to put up on the screen just
16 the four slides I would like to share with you in my
17 closing comments.

18 Yes, Chair?

19 CHAIRPERSON SCHEUER: I have to -- somebody
20 has inadvertently started screen sharing earlier, so
21 I disabled that option to all panelists. I will need
22 enable it.

23 I will also note there is a member of the
24 audience who has their hands up, but I would note
25 that we're not taking any public testimony at this

1 time. Public witness testimony was taken earlier.

2 Mr. Goodin, you may continue.

3 MR. CHIPCHASE: Thank you.

4 So this gets back to if I were here, and
5 this is the date that Commissioner Chang talked
6 about, Commissioner Ohigashi talked about, and
7 briefly talked about in my closing and Mr. Mukai's
8 closing.

9 This is why we focused on the date. This
10 is what the County has said. The County understood
11 that a short-term use on lots created after June 4th,
12 1976, was not lawful in a farm dwelling.

13 The County understands that before June
14 4th, 1967, a short-term use is lawful on the Ag
15 District. The phrase "short-term vacation rental",
16 as used in the County Petition, the question that is
17 put before you is its own definition. No other
18 definition. No abstract meaning. No label that
19 lacks concrete specificity.

20 In that definition -- and we put it back up
21 on the screen. I know Commissioner Aczon had asked
22 did I get the elements right. Yes, you did,
23 Commissioner, these are the elements of it.

24 There is nothing in any of those elements
25 that deals with use. The County said use matters,

1 use matters. It does not. Not under this
2 definition. It is 30 days, no good more than
3 30 days, fine. And it does not matter for purposes
4 of this definition how the property is used. It's
5 all about the date.

6 So the same question before you is: Does
7 that duration matter under State law? That's it.
8 That's the only question before you. Does the
9 duration matter? And everyone has already agreed
10 that the answer is no. Definition of farm dwelling
11 in the State code does not now, and never has, cared
12 about the date, cared about how long that property is
13 rented. Only cares about how it's used. Nothing
14 else matters, and nothing else is before the
15 Commission.

16 So that leads to a very, very narrow
17 declaration. As of June 4th, 1976, the plain
18 language Chapter 205, does not dictate how long a
19 farm dwelling must be rented in order to qualify as a
20 farm dwelling. That's it. That in essence is the
21 only question that either side has put before you.
22 The County phrases it in terms of was short-term
23 vacation rental allowed.

24 But remember, in response to Commissioner
25 Chang's questioning when County says that term, it

1 means that term as it defined it, that term as it
2 defined it is only concerned about duration.

3 So that is the only question before you.
4 Your consideration of issues doesn't go beyond that.
5 Your jurisdiction doesn't go beyond the Petition, and
6 the Petitions do not go beyond this very narrow
7 question.

8 Thank you, Chair. Thank you all,
9 Commissioners.

10 CHAIRPERSON SCHEUER: Thank you very much.
11 Mr. Chipchase. We are just about at a full hour
12 after lunch. We have time. I would prefer to take a
13 --

14 Commissioner Ohigashi, excuse me.

15 COMMISSIONER OHIGASHI: I was just going to
16 ask for a break.

17 CHAIRPERSON SCHEUER: Okay. We will -- a
18 good Chair anticipates the needs of his Commission
19 members.

20 It's 1:16. I'd like to break until 1:26,
21 and we will conclude the questions from the
22 Commissioners for any of the parties of the public
23 witness is still available, and then we will move to
24 deliberation.

25 (Recess taken.)

1 CHAIRPERSON SCHEUER: I think we're ready
2 to go. We're back on the record.

3 And, Commissioners, this is an opportunity
4 to ask questions of the parties, or of any of the
5 witnesses, including the Office of Planning.

6 Commissioner Chang, followed by
7 Commissioner Okuda, followed by Commissioner Wong.

8 COMMISSIONER CHANG: Thank you very much,
9 Mr. Chair. And thank you again, Mr. Chipchase.

10 Yes, the closing arguments have been very
11 instructive, clarifying various positions.

12 So let me just ask you to make sure that I
13 have a very clear understanding, and you would agree
14 with me as to what the narrow issue before LUC is.

15 Would you agree that LUC has jurisdiction
16 to issue the Declaratory Order only on HRS
17 205-4.5(a)(4), essentially definition of a "farm
18 dwelling"?

19 MR. CHIPCHASE: Yes.

20 COMMISSIONER CHANG: And would you agree
21 that the definition of a "farm dwelling" doesn't have
22 anything do with duration?

23 MR. CHIPCHASE: Yes.

24 COMMISSIONER CHANG: And would you agree
25 that the LUC is not being asked, nor does it have the

1 authority in this hearing to determine the validity
2 of the County Ordinance?

3 MR. CHIPCHASE: Yes.

4 COMMISSIONER CHANG: And would you agree
5 that 205-4.5(a)(4) does require a farm dwelling:
6 One, located on and used in connection with a farm;
7 or two, where an ag activity provides income to the
8 family occupying the dwelling?

9 MR. CHIPCHASE: Yes.

10 COMMISSIONER CHANG: And would you agree
11 that in addition to that definition, that the use
12 must be related to an agricultural activity?

13 MR. CHIPCHASE: I would not agree that
14 that's an additional element. I would agree to the
15 extent that's an element that is encompassed in the
16 definition.

17 COMMISSIONER CHANG: That serves my purpose
18 as well.

19 And you argued in your papers that there's
20 potentially a taking, could be a taking if your
21 client -- if the -- oh, I guess the date was 1976,
22 and you are, as I understand it, arguing that there's
23 a grandfather clause that your clients were
24 grandfathered, and that they're permitted to do
25 short-term vacation rentals as defined by the County;

1 and if they're not permitted to do that, that that
2 may be a taking in violation of the constitution.

3 Is that your argument?

4 MR. CHIPCHASE: No, Commissioner.

5 Something was certainly lost between my
6 mind and my paper when I typed that out, because
7 that's not our argument.

8 Let me try to unpack it, and I'll be --
9 Jonathan, Chair, is going to say not brief enough --
10 but I'll try to be brief.

11 CHAIRPERSON SCHEUER: I will.

12 MR. CHIPCHASE: Yeah, thank you.

13 We described the impact of the County's
14 retroactive regulation reaching back to 1976 for its
15 effective date, rather than doing what every other
16 County did, which is regulate prospectively from this
17 day we adopt the ordinance form. Hawaii County went
18 backwards.

19 We describe the effect of that for the
20 Commission merely to provide context as to why that
21 date was so important; why the County selected that
22 date. But it is the constitutional issue surrounding
23 that retrospective look, don't have anything do with
24 the question that the Commission is being asked to
25 decide. So that discussion is just contextual as to

1 why that date matters and what the County did being
2 so different from the way the other counties had
3 approached regulation of ag land.

4 For purposes of just making sure that
5 everybody understands how we see that effect, it's
6 not a taking issue. I think Commissioner Okuda and I
7 had a great discussion, a great chat about this on
8 June 25th. It's about a taking issue, it's a due
9 process issue because laws have perspective
10 application. They don't have retrospective
11 application. And, in fact, the County here does.

12 But for purposes of this body, and the
13 question before this body on the Petitions, all of
14 that is merely contextual, rather than things that we
15 ask this body to rule on.

16 COMMISSIONER CHANG: That's helpful to
17 understand.

18 So is it fair to say that if -- that for
19 purposes of 205A 4.1 -- 4.5(a)(4) that it always
20 required that the farm dwelling be related to
21 agricultural purposes?

22 MR. CHIPCHASE: I would say it would be
23 fair to say that since June 4th, 1976, farm dwelling
24 has been defined as either being used in connection
25 with a farm, or occupied by a family that derives

1 income from agricultural activity.

2 It's only been since that date. And as we
3 talked about in our earlier discussion, I'm
4 uncomfortable defining it in ways that go beyond the
5 text of the definition, but I think that the
6 definition encompasses that concept.

7 COMMISSIONER CHANG: Again, that's
8 consistent with my understanding as well.

9 My final question to you is: How have your
10 clients been prejudiced, if any -- or have your
11 clients been prejudiced to date by -- let me think
12 about that question -- oh, well, would you agree that
13 on -- oh, you know what, I'm going to withdraw that.

14 You have answered the questions and
15 clarified for me the scope, at least in my mind, of
16 this Declaratory Petition and what is before us at
17 this time. So thank you.

18 MR. CHIPCHASE: You're welcome,
19 Commissioner.

20 CHAIRPERSON SCHEUER: Thank you,
21 Commissioner Chang.

22 Commissioner Wong followed by Commissioner
23 Okuda.

24 COMMISSIONER WONG: Thank you, Chair.

25 My question is going to go to OP, some of

1 their documents that they filed with us, the
2 testimony. Thank you.

3 This is regarding your supplemental
4 response to County and Petitioner's dec orders.

5 So you stated in that testimony that the
6 Petitioner's question is speculative and does not
7 provide specific factual situations upon which the
8 Commission can make a declaratory ruling, and
9 therefore, must be denied under HAR 15-15-98(a), so
10 can you explain that to me, please?

11 MS. APUNA: Sure, Commissioner, thank you.

12 I think that Petitioner's have very
13 narrowly defined the question, so much so that they
14 have left out certain facts that are pertinent to the
15 Commission answering or determining the answer to
16 this Declaratory Petition.

17 For example, whether the farm dwelling is
18 used in connection with the farm, or is it used
19 simply for a short-term vacation rental, or a
20 resident as a transient accommodation.

21 So I think those facts would help the
22 Commission determine whether a short-term vacation
23 rental, or at least a shorter term rental could be
24 applied to a farm dwelling.

25 COMMISSIONER WONG: So when you stated

1 Petitioner, is that the County or is that Mr.
2 Chipchase's client?

3 MS. APUNA: That would be specific to
4 Petitioner Rosehill, et al.

5 COMMISSIONER WONG: So the question is,
6 because there's, you know, I know there's two DRs in
7 front of us.

8 In the County's DR, so you're saying that
9 they're relevant and it has some facts, and it's not
10 hypothetical, and all that; is that correct?

11 MS. APUNA: That's correct.

12 COMMISSIONER WONG: And that you're saying
13 that the County's statements and their DR, that no
14 short-term vacation rentals are allowed on ag land;
15 is that correct?

16 MS. APUNA: As farm dwelling ag land,
17 correct.

18 COMMISSIONER WONG: And so you're stating
19 also that the Rosehill, et al, that DR should be
20 denied or thrown out, or is that what you're saying?

21 MS. APUNA: I think that the County's
22 question is a proper question, and it's a question --
23 because the Commission can alter it. It can look at
24 what is a farm dwelling under HRS 205 and determine
25 whether it is consistent or whether an STVR, as

1 defined by the County, is consistent with the farm
2 dwelling definition.

3 So I think that is a proper question.
4 Whereas, Petitioner Rosehill's question, they are
5 very, very narrowly asking you to say, look at the
6 definition of farm dwelling and tell me if there's a
7 prohibition on a rental term, which there is not. If
8 you read it, there is simply no prohibition, that
9 that is not the full story, and the full story is
10 about the uses that are involved, the STVR use and
11 the farm dwelling use. They are not compatible.
12 It's either one or the other.

13 So a farm dwelling can only be used in
14 connection with a farm, but if you have a short-term
15 vacation rental use, which is not -- does not have
16 any connection to use with the farm or agricultural
17 use, then it cannot be used as a farm dwelling or in
18 a farm dwelling.

19 COMMISSIONER WONG: That's it. Thank you,
20 OP. Thank you, Chair.

21 CHAIRPERSON SCHEUER: Thank you very much,
22 Commissioner Wong.

23 Commissioner Okuda.

24 COMMISSIONER OKUDA: Thank you, Mr. Chair.

25 Actually, Commissioner Wong asked most of

1 the questions that I had intended to ask towards the
2 Office of Planning. But if I can just ask then a
3 summary question.

4 So, Ms. Apuna, after listening to all this
5 additional argument that was plead since the filing
6 of the Office of Planning's last submittals, does the
7 Office of Planning have a recommendation to the Land
8 Use Commission on what a recommended decision would
9 be?

10 MS. APUNA: I think OP's recommended
11 decision would be to deny Petitioner Rosehill's
12 Petition, and to accept the County's Petition as
13 stating that a farm dwelling may not be used as a
14 short-term vacation rental.

15 I could also expand a little bit more about
16 some of the issues that have come up since we did
17 submit our --

18 COMMISSIONER OKUDA: That was actually
19 going to be my next question, if there was something
20 additional which, you know, has come up during the
21 interim which is not reflected in your proceedings.
22 So could you please proceed further with what you're
23 about to state?

24 MS. APUNA: Thank you, Commissioner Okuda.
25 So the issue before this Commission is

1 simple, but it has been twisted and complicated by
2 extraneous information and misleading argument.

3 The basic question is whether a farm
4 dwelling may be used as short-term vacation rental or
5 STVR. To answer it, it may not, and there are at
6 least four reasons proving this.

7 First, the farm dwelling use and a STVR use
8 are not compatible uses. A farm dwelling defined
9 under HRS 205-4.5(a)(4) as a single-family dwelling
10 that either must be located on and used in
11 connections with a farm, or where agricultural
12 activity provides income to the family occupying the
13 dwelling.

14 A STVR use is basically a transient
15 accommodation effectively for vacation or tourist
16 use, which has no connection to a farm and is not
17 accessory to an agricultural use, and does not meet
18 either of the requirements of the farm dwelling
19 definition. A STVR use would therefore improperly
20 displace the required agricultural use of a farm
21 dwelling.

22 Secondly, a STVR is not a permitted use of
23 a farm dwelling in the Agricultural District under
24 HRS Chapter 205. HRS 205-2(d) and 205-4.5(a)
25 expressly lists the permitted uses in the

1 Agricultural District as a matter of law.

2 Importantly, if a use is not listed, it is
3 prohibited. STVRs are not listed permitted uses of a
4 farm dwelling under HRS 205, and therefore, are
5 prohibited.

6 Thirdly, residential use of a farm dwelling
7 without any connection to an agricultural use has
8 never been allowed in the agricultural District. The
9 law has always required that a farm dwelling be used
10 in connection with a farm or accessory to an
11 agricultural use, and certainly not for STVR uses.
12 The date June 4th, 1976 is therefore irrelevant.

13 In 1961, Act 187 established the State Land
14 Use classification system, including the
15 Agricultural, Urban and Conservation District.

16 In 1962, the Attorney General opined that
17 single-family dwelling units situated in the
18 Agricultural District could not be sustained if they
19 operated to defeat or frustrate the purposes and
20 intent of the legislature. The Attorney General
21 stated:

22 A single-family dwelling is a place of
23 residence situated on land classified as
24 agricultural, but which is not with accessory to or
25 used in connection with a primary agricultural

1 activity. It is in effect the uses of land solely
2 for residential purposes, where the land has been
3 designated as agricultural.

4 Clearly Land Use Commission cannot allow
5 lands classified as agricultural for residential
6 purposes if in so doing the essential character of
7 the area is changed from Agricultural to Urban. To
8 do so would render the district boundaries
9 meaningless and defeat the purpose of Act 187.

10 Notably, various public testimony received
11 in this matter, STVRs have adversely changed the
12 character of the Agricultural District with excessive
13 noise, light pollution, inconsiderate large groups of
14 renters, and additional traffic. STVRs are therefore
15 impermissibly injecting Urban character to uses in
16 the Agricultural District thereby defeating the
17 purposes of the State Land Use System.

18 Fourthly, even if the Commission somehow
19 determined that the HRS 205-4.5(a)(4) definition of
20 "farm dwelling" does allow use as a STVR, the
21 counties are fully empowered to more restrictively
22 regulate farm dwellings such that they may not be
23 used as STVRs.

24 HRS 205-5(b) states:

25 Within Agricultural Districts, uses

1 compatible to the activities described in section
2 205-2 as determined by the Commission shall be
3 permitted: Provided that accessory agricultural uses
4 and services described in Sections 205-2 and 205-4.5
5 may be further defined by each county by zoning
6 ordinance.

7 Therefore, even if the "farm dwelling"
8 definition is found to not prohibit their use as
9 STVRs, the County's ordinance prohibiting the use of
10 farm dwellings as STVRs has the overriding full force
11 and effect of law. So clearly:

12 (1) a STVR is an incompatible use of a farm
13 dwelling;

14 (2) a STVR is not a permitted use as a farm
15 dwelling under HRS 205;

16 (3) purely residential uses, with no
17 connection to agricultural use, such as STVR use,
18 have never been allowed in the Agricultural District
19 and;

20 (4) the counties are empowered to more
21 restrictively regulate farm dwellings to not be used
22 as STVRs.

23 Therefore, a farm dwelling cannot be used
24 as a STVR.

25 The Commission should not be deterred from

1 this clear and simple determination by certain
2 distractions that have arisen during these
3 proceedings:

4 First, there appear to be issues of the
5 County's ability to enforce farm dwelling use
6 restrictions, which is not uncommon among all the
7 counties or even other jurisdictions charged with
8 enforcing land use restrictions. But the County's
9 ability to enforce is completely irrelevant to the
10 question of whether a farm dwelling may be used as a
11 STVR. The Commission need only be focused on the
12 actual land use restriction rather than its
13 enforcement.

14 The County has stated for the record its
15 position that, consistent with HRS 205-2(d)(7) and
16 205-4.5(a)(4), a farm dwelling must be used in
17 connection with agriculture.

18 Secondly, the Rosehill Petitioners argue
19 that the issue is not about the farm dwelling and
20 STVR uses, but about the lack of express prohibition
21 on rentals of 30 days or less within the definition
22 of "farm dwelling". This is the red herring.
23 Petitioners are redirecting the Commission's
24 attention away from examining the use of the farm
25 dwelling as a STVR to hyper-focus the attention on a

1 narrow and inconsequential detail.

2 An express 30-day rental prohibition is
3 inconsequential because, again, the statute is a
4 permissible statute, not a prohibitive statute.
5 Petitioners erroneously interpret the statute as not
6 prohibiting STVRs as farm dwellings, and therefore,
7 believe they are allowed, Rather, since STVRs are not
8 expressly permitted under the statute, STVRs are
9 prohibited.

10 Additionally, Petitioners are arguing that
11 the County's STVR ordinance has nothing to do with
12 farming, which is absolutely correct. That's because
13 it's a STVR ordinance. Yet, Petitioners are pointing
14 to the STVR ordinance to define the uses of the
15 Agricultural District, when it should look at the Ag
16 ordinances and statutes to determine the correct use
17 of a farm dwelling.

18 As controversial and time-consuming these
19 distractions have been, they are extraneous and
20 irrelevant here. The Commission must set these
21 distractions aside and focus on whether a farm
22 dwelling may be used as a STVR.

23 Finally, Commissioner Wong asked if you
24 have one papaya tree, one donkey, or one horse on
25 your property in Ag District, would that be

1 considered agricultural use for purposes of a farm
2 dwelling?

3 The agricultural use must be commercial and
4 not for personal consumption and use only. So you
5 can have a papaya tree, donkey or horse, but they
6 must be part of a commercial agricultural use. You
7 can't simply eat your papayas or ride your donkey or
8 horse.

9 This was determined under a Land Use
10 Commission Declaratory Order, DR83-8, which was made
11 upon the Commission's own motion, and stated that in
12 1983, Senate Bill 993 purported to amend HRS 205-4.5
13 to permit the raising of crops for both commercial
14 and personal use. Governor George Ariyoshi vetoed
15 the bill as an expression of the State's policy that
16 the agricultural activity must be commercial to be a
17 permitted use on lands in the Agricultural District.

18 In its ruling the Commission declared that
19 a single-family dwelling can be defined as a farm
20 dwelling only if the dwelling is used in connection
21 with a farm where agricultural activity provides
22 income to the family occupying the dwelling, and that
23 a single-family dwelling, which use is accessory to
24 an agricultural activity for personal conception and
25 use only is not permissible within the Agricultural

1 District.

2 I'm sure you asked that question,
3 Commissioner Wong, because it's ridiculous to think
4 we would allow someone to merely plant a papaya tree
5 to qualify to have a farm dwelling in the
6 Agricultural District. It would create a huge
7 loophole through which people could circumvent the
8 land use law to establish a residential dwelling in
9 the Agricultural District without legitimate
10 agricultural activity or use.

11 The matter before this Commission today is
12 another attempt to create a loophole by Petitioners
13 construing the statute to allow a STVR use of a farm
14 dwelling, with no agricultural connection in the
15 Agricultural District. In 1961 the legislature
16 declared that:

17 Inadequate controls has caused many of
18 Hawaii's limited and valuable lands to be used for
19 purposes that may have a short-term gain to a few,
20 but result in a long-term loss to the income and
21 growth potential of our economy...scattered
22 subdivisions with expensive, yet reduced, public
23 services; [and] the shifting of prime agricultural
24 lands into non-revenue producing residential uses.

25 Whether it's one papaya tree, an ag

1 subdivision, or STVR, these are all attempts to
2 subvert the spirit and intent of the State Land Use
3 law for the short-term gain of a few.

4 Like those Commissions before you, you have
5 the opportunity and the responsibility to protect the
6 Agricultural District by rejecting and invalidating
7 Petitioners' loophole and declaring that a farm
8 dwelling may not be used as a STVR.

9 That's my summary. Thank you.

10 COMMISSIONER OKUDA: Ms. Apuna, if I may
11 ask this question which I posed to the County of
12 Hawaii.

13 If I came to a government official, and I
14 own a piece of property within Agricultural District,
15 and I told the government official I want a permit to
16 allow me to put up a dwelling, a dwelling unit, which
17 I will live in there, but I'm telling you, I'm not
18 going to grow anything, even for private consumption.
19 There is not going to be any agriculture here,
20 because when I was growing up I used to go to Hakalau
21 and pick orchids on my uncle's orchid farm, and after
22 that, I want nothing to do with agriculture. So
23 there is going to be absolutely no agriculture.

24 Should the government official issue me the
25 permit to allow me to build my dwelling unit when

1 I've made it absolutely clear I'm not going to engage
2 in any agriculture come hell, high water or anything
3 else?

4 MS. APUNA: No, because that would be in
5 violation of HRS 205-4.5(a)(4) as not -- a farm
6 dwelling not in connection with any agricultural use.

7 COMMISSIONER OKUDA: Just so that the
8 record is clear, I had read portions of the
9 Declaratory Order, which was issued in the Docket
10 DR94-17. That was in the matter of the Petition of
11 John Godfrey that was Conclusion of Law No. 5. Let
12 me read it again, then I will ask you whether or not
13 what I read, which is a quote from the Declaratory
14 Order, is still an accurate and good statement of the
15 law. And I quote:

16 Chapter 205 Hawaii Revised Statutes does
17 not authorize residential dwellings as a permissible
18 use within an Agricultural Use District, unless the
19 dwelling is related to an agricultural activity, or
20 is a, quote, "farm dwelling", close quote.

21 Is that an accurate statement of the
22 current state of the law on that matter?

23 THE WITNESS: Yes, I believe it is. It's
24 consistent with the statute, and it's consistent with
25 the Attorney General's opinion in 1962, as well as

1 the legislature's declaration.

2 COMMISSIONER OKUDA: Thank you very much,
3 Ms. Apuna. Thank you, Mr. Chair. No further
4 questions.

5 CHAIRPERSON SCHEUER: Thank you very much,
6 Commissioner Okuda.

7 Commissioners, are there further questions
8 for the County, Mr. Chipchase, or any of the public
9 witnesses?

10 Commissioner Cabral.

11 VICE CHAIR CABRAL: Thank you. I have a
12 question for the County based on what we've been
13 hearing.

14 The properties that -- the Rosehill
15 property that is the subject of this, when they got
16 their building permit to build their house, the
17 structure on it, that is less than five bedrooms, et
18 cetera, did they in fact sign, or did the party who
19 built it prior to their ownership, sign that your
20 County Declaration declaring that it was going to be
21 permissible under your agricultural rules and
22 regulations?

23 MS. SURPRENANT: Aloha, April Surprenant.

24 It would take some research to find that
25 out, and we don't know the answer to that question

1 right now.

2 VICE CHAIR CABRAL: But from what we have
3 heard, you would not have issued them a permit on
4 agriculture, a building permit, that's the other
5 department, building department.

6 In hearing though from what you said they
7 should not have been issued a building permit unless
8 they were willing to sign that Declaratory statement.

9 Is that your understanding?

10 MS. SURPRENANT: That is our understanding,
11 but again, we don't issue building permits.

12 VICE CHAIR CABRAL: I understand that,
13 thank you. Okay.

14 CHAIRPERSON SCHEUER: Commissioner Cabral.

15 VICE CHAIR CABRAL: I'm finished. Thank
16 you.

17 CHAIRPERSON SCHEUER: Anything further,
18 Commissioners?

19 Commissioner Okuda, were you -- okay.
20 You're making the same gestures as you sometimes make
21 to put your virtual hand up.

22 COMMISSIONER OKUDA: Just moving around in
23 my chair, Mr. Chair, sorry.

24 CHAIRPERSON SCHEUER: So if there is --
25 sorry, 20 seconds.

1 (Discussion held off the record.)

2 Thank you.

3 So for all the parties and for the audience
4 who is listening, attendees in "ZOOM" meeting, this
5 hearing is in response to two requests for
6 Declaratory Ruling. As such, the decision of the
7 Commission will be made on the written briefs on file
8 and posted to our website. This is not an
9 evidentiary hearing.

10 Any oral presentation made today and any
11 public testimony will be taken into account in the
12 Commission's decision-making process.

13 According to our Administrative Rules, in
14 particular Section 15-15-100, after 90 days after the
15 receipt of the Petition for Declaratory Order, the
16 Commission shall either deny the Petition in writing,
17 stating the reasons for the denial; issue a
18 Declaratory Order, or set the matter for hearing as
19 provided in 15-15-103 of the Commissions rules.

20 In addition, Section 15-15-102 provides the
21 Commission for good cause may refuse to issue a
22 Declaratory Order by giving specific reasons. Those
23 reasons may include, in other words, the Commission
24 may so refuse under four conditions.

25 One, the question is speculative or purely

1 hypothetical, does not involve existing facts or
2 facts that cannot be expected to exist in the near
3 future.

4 Two, the Petitioners' interest is not of
5 the type that would give the Petitioner standing to
6 maintain an action that the Petitioner were to seek
7 judicial relief.

8 Three, the issuance of the declaratory
9 order may affect the interests of the Commission in a
10 litigation that is pending or may reasonably be
11 expected to arise; or

12 Four, the matter is not within the
13 jurisdiction of the Commission.

14 So having heard the final closing arguments
15 of the Petitioners, we will now enter formal
16 deliberations on this matter.

17 I'll note for parties and public, during
18 our deliberations I will not entertain any additional
19 input from the parties or the public unless those
20 individuals are specifically requested to do so by
21 me.

22 If called upon, I would then ask that any
23 comments be limited specifically to the questions at
24 hand.

25 Commissioners, let me confirm that each of

1 you have reviewed the record and are prepared to
2 deliberate on the subject docket. After I call your
3 name, would you please signify with either an "aye"
4 or "nay" that you are prepared to deliberate on this
5 matter.

6 Commissioner Aczon?

7 VICE CHAIR ACZON: Aye.

8 CHAIRPERSON SCHEUER: Commissioner Cabral?

9 VICE CHAIR CABRAL: Yes.

10 CHAIRPERSON SCHEUER: Commissioner
11 Giovanni?

12 COMMISSIONER GIOVANNI: Aye.

13 CHAIRPERSON SCHEUER: Commissioner
14 Ohigashi?

15 COMMISSIONER OHIGASHI: Aye.

16 CHAIRPERSON SCHEUER: Commissioner Okuda?

17 COMMISSIONER OKUDA: Yes.

18 SCHEUER: Commissioner Wong?

19 COMMISSIONER WONG: Aye.

20 CHAIRPERSON SCHEUER: Commissioner Chang?

21 COMMISSIONER CHANG: Aye.

22 CHAIRPERSON SCHEUER: And I am also
23 prepared to deliberate on this matter.

24 So I've laid out the options. We can
25 decline to rule on this matter, or I can entertain a

1 motion with regard to whether or not "farm dwelling"
2 as defined in Chapter 205 Hawaii Revised Statutes may
3 be used for short-term vacation rentals under
4 Sections 205-2 and 205-4.5 and/or whether the rental
5 of farm dwellings for periods of 30 days or less was
6 prohibited in the State Agricultural District as of
7 June 4th, 1967 under Chapter 205.

8 Commissioners, what is your pleasure?

9 Commissioner Okuda.

10 COMMISSIONER OKUDA: Thank you, Mr. Chair.

11 I would like to make a motion which may deviate
12 slightly from what you laid out, but I believe it
13 still covers the substance of what you presented.

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

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

21 CHAIRPERSON SCHEUER: A motion has been
22 made by Commissioner Okuda.

23 VICE CHAIR CABRAL: I would like to second
24 that.

25 CHAIRPERSON SCHEUER: Commissioners, we

1 have a motion in front of us as stated by
2 Commissioner Okuda.

3 Commissioner Okuda, why don't you go ahead
4 and repeat and clarify the reasons for your
5 supporting your motion.

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

8 I believe the record demonstrates that the
9 County of Hawaii has met its burden under
10 administrative rules and statutes to obtain the
11 relief that it is requesting in the Declaratory Order
12 that it is requesting, and for the reasons that I
13 will explain, I do not believe that Petitioner
14 Rosehill has met that burden.

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

23 And so I have made the motion that the
24 denial is without prejudice so that Petitioners
25 Rosehill can consider if there's a basis to actually

1 bring additional matters up to the Land Use
2 Commission; but specifically, I do not believe
3 Petitioners Rosehill have met the requirements to
4 demonstrate a specific factual situation as required
5 by HAR Section 15-15-98(a), and that the items or
6 relief and circumstances thereof that Petitioners
7 Rosehill were raising demonstrate that the question
8 that they were raising at this point in time and on
9 this record is speculative, hypothetical, and frankly
10 on this record, we cannot adequately determine
11 whether or not it involves an existing situation, or
12 one that can reasonably be expected to occur in the
13 future as required by HAR 15-15-100(a)(1)(A).

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

1 Again, I quoted from the Docket order in
2 DR94-17 in the matter of the Petition of John Godfrey
3 where the Land Use Commission held in Conclusion No.
4 5, and I quote, Chapter 205 Hawaii Revised Statute
5 does not authorize residential dwelling as a
6 permissible use within an Agricultural Use District
7 unless the dwelling is related to an agricultural
8 activity, or is a, quote, "farm dwelling", close
9 quote.

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

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

23 And the dwelling is not a farm dwelling and
24 is not permissible on land which is designated
25 agriculture as a farm dwelling if you actually don't

1 have that use.

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

7 Now, with respect to the ordinance passed
8 by the County of Hawaii, the Hawaii Supreme Court in
9 the same Sunset Beach Coalition versus City and
10 County of Honolulu case found at 102 Hawaii Reports
11 465, the Pacific 3d citation is 78, Pacific 3d, page
12 1, makes clear that there's basically a dual system
13 of use regulation when it comes to
14 agriculturally-districted property. And basically
15 the decision-makers look at the State requirements,
16 and the County requirements, and as the supreme court
17 said in the Save Sunset Beach Coalition case, which I
18 believe was referred to as the Obayashi case, and
19 this is found 102 Hawaii at page 482 or 78 Pacific 3d
20 at page 18, and I quote:

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

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

1 So there is no prohibition in the case law
2 which would prevent the County of Hawaii in
3 exercising its legislative judgment to issue this
4 ordinance in its discretion and legislative process
5 as authorized by statute and the Hawaii State
6 Constitution in determining further management
7 methods or further management actions to protect in
8 its view agricultural land in the County of Hawaii.

9 And I specifically asked the question about
10 what authority there is for the Land Use Commission
11 to second guess an otherwise lawful on-its-face
12 legislative decision by the County of Hawaii council.

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

20 So for those reasons and -- for those
21 reasons, and much of the discussion that has already
22 taken place, and the questions going back and forth,
23 I ask that my motion be granted or supported, meaning
24 that the Petition filed by the County of Hawaii be
25 approved; and the Petition by the Rosehill

1 Petitioners be denied without prejudice.

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

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

17 Frankly speaking, a resort use of
18 agricultural property, the construction of what I
19 described as a Gary Okuda McMansion, it does not move
20 this community towards agricultural self-sufficiency.
21 It doesn't move us towards protecting our food
22 resources. And it's certainly not consistent with
23 the statute.

24 So for those reasons, and other good
25 reasons in the record, I ask that my motion be

1 supported. Thank you.

2 CHAIRPERSON SCHEUER: No problem. Thank
3 you, Commissioner Okuda.

4 I will note and remind the Commissioners we
5 have 47 minutes until we have to adjourn for the day.
6 Commissioner Cabral, as the seconder -- Commissioner
7 Cabral is on audio, but was having some video
8 connectivity issues.

9 Are you prepared to speak to the motion,
10 Commissioner? Or we can wait to go to you. You're
11 on mute as well. She was trying to find a better
12 location.

13 Commissioner Chang.

14 COMMISSIONER CHANG: Commissioner Okuda,
15 you had me ten minutes ago, but I'm not sure -- I
16 support the motion to grant the County's Petition.
17 What I'm unclear about is, "without prejudice",
18 you're going to deny Petitioner Rosehill without
19 prejudice.

20 It's unclear to me what set of facts are
21 you -- do you think that they could come forward with
22 that would be within the jurisdiction of the Land Use
23 Commission, and not a matter of enforcement by the
24 County? I'm not real clear about the "without
25 prejudice".

1 COMMISSIONER OKUDA: Mr. Chair, can I
2 respond?

3 CHAIRPERSON SCHEUER: Please.

4 COMMISSIONER OKUDA: I made the motion to
5 deny without prejudice more out of abundance of
6 caution. I don't know what facts they can present at
7 this point in time. And, yeah, it's not our
8 responsibility, I think, to force people to present a
9 case, although Mr. Chipchase very well presented the
10 case. It's just that if there is something which
11 they believe the record, you know, shows something
12 different, I would be willing to listen to it.

13 However, just so that, you know, my point
14 is clear, if this motion is granted, you know, it
15 doesn't mean that a later petition brought by
16 Petitioner Rosehill or anyone else can relitigate
17 this issue that has been decided. This, I believe,
18 would be not only res judicata, but it would be a
19 statement of law which would be precedent that the
20 Land Use Commission would have to follow until
21 reversed, you know, long after we are off the
22 Commission. So I don't know whether that helps or
23 not.

24 CHAIRPERSON SCHEUER: Commissioner Chang?

25 COMMISSIONER CHANG: And, I guess,

1 Commissioner Okuda, I guess that's my quandary is the
2 "without prejudice" seems to leave open, and there's
3 an expectation that we may come back and revisit, or
4 that Petitioner Rosehill may come back and reopen.

5 That's normally how I understand "without
6 prejudice" is that they can come back. That's my
7 only concern.

8 CHAIRPERSON SCHEUER: If I may at this
9 point ask Mr. Orodener, as deeply experienced with
10 our procedures, to clarify that even if the motion
11 was made to simply deny the petition, there is
12 nothing that is going to prevent the Petitioners from
13 coming forward with a slightly different petition
14 with additional facts in a little while. Is that
15 correct, Mr. Orodener?

16 EXECUTIVE OFFICER: That's correct, Chair.

17 CHAIRPERSON SCHEUER: So functionally,
18 while the movant has phrased it "without prejudice",
19 even in my mind if you simply phrased it as granting
20 County's Petition and denying Rosehill's Petition, it
21 would essentially be without prejudice for them to
22 come back (indecipherable).

23 COMMISSIONER OKUDA: Mr. Chair, if it -- I
24 didn't mean "without prejudice" to be an impediment.
25 So I'm willing to, if the second would be willing to,

1 I'm willing to modify my motion to delete the term
2 "without prejudice".

3 CHAIRPERSON SCHEUER: Ms. Cabral?

4 VICE CHAIR CABRAL: Yes, I'm willing to
5 accept that change.

6 CHAIRPERSON SCHEUER: The motion now is
7 simply to grant the County's Petition and deny the
8 Rosehill Petition.

9 Commissioner Cabral, would you like to
10 speak to your second?

11 VICE CHAIR CABRAL: Yes. I'm in favor of
12 that motion, and although Commissioner Okuda is so
13 much more eloquent and legal, a very major common
14 sense way, I feel the intent and the practicality of
15 zoning needs to be enforced, and the use of the land
16 is what is paramount here. And that we need to
17 respect that intent, and therefore, I'm willing to
18 second that motion.

19 CHAIRPERSON SCHEUER: Thank you,
20 Commissioner Cabral.

21 Commissioners, we are in this deliberation.
22 We have a motion before us.

23 Commissioner Giovanni.

24 COMMISSIONER GIOVANNI: Just a second here.
25 Thank you, Chair.

1 I'm going to vote in favor of the motion,
2 and I thank my fellow Commissioners for taking me on
3 a merry-go-round of legal issues that I could never
4 anticipate.

5 But what really brought it all home to me
6 was the testimony today, or the answering of
7 questions today by Ms. Apuna from OP, who I think
8 summed up her position very well, and it's consistent
9 with the motion that's before us now, her
10 recommendation is consistent with the motion.

11 I want to thank Ms. Apuna for that
12 presentation of her views today, but I'm in favor of
13 the motion. Thank you.

14 CHAIRPERSON SCHEUER: Thank you,
15 Commissioner Giovanni.

16 Commissioner Cabral, we're picking up your
17 audio.

18 Commissioners, we're in deliberation.

19 Commissioner Chang.

20 COMMISSIONER CHANG: Thank you very much,
21 Mr. Chair. And I, like Commissioner Cabral,
22 Commissioner Okuda was extremely eloquent in
23 summarizing that the Land Use Commission's role in
24 looking at overall land use planning and protecting
25 the integrity of agricultural land.

1 And in my mind this is a very important
2 issue. Clearly the other counties also agreed with
3 that in the sense that we received testimony from all
4 of the other counties. I think that this
5 demonstrates the desire to have LUC define "farm
6 dwelling" and the intention of agricultural land,
7 that there has to be activities that are related to
8 the agricultural, or the farm dwelling has to be
9 related to the agricultural activities.

10 So with that clarification and statement, I
11 am inclined to support this motion. Thank you very
12 much.

13 And I do want to say, I thank all of the
14 parties for this long process and clarifying, getting
15 us to this point. I think the last two hours have
16 been extremely enlightening to clarify the issues.
17 So thank you very much.

18 CHAIRPERSON SCHEUER: Thank you,
19 Commissioner Chang.

20 Commissioners Wong, Ohigashi or Aczon, do
21 you wish to speak to the motion? No.

22 The Chair -- I will say that I will support
23 the motion. I have a lot of respect, huge amount of
24 respect for Mr. Chipchase as an attorney and as a
25 person, and his ability to argue and present cases.

1 I take this vote partly in the context of
2 like, you know, today's headline we have 355 new
3 COVID cases. We're living in the midst of this
4 pandemic. And sitting on the Land Use Commission is,
5 for me, part of the really core governmental duty to
6 help take care of people. And make sure that we're
7 fulfilling our statutes and making sure to interpret
8 our statutes in the way in which they were intended
9 to interpret.

10 To me it's very clear that transient
11 vacation rentals are not farm dwelling uses. So I'm
12 pleased to support the County's motion.

13 If there's nothing further, Mr. Orodener,
14 I would like you to do a roll call vote of the
15 Commission.

16 EXECUTIVE OFFICER: Thank you, Chair. The
17 motion is one: For the Commission to deny Petitioner
18 Rosehill's Petition for relief; and two, grant the
19 County's Petition for relief.

20 Commissioner Okuda?

21 COMMISSIONER OKUDA: Yes.

22 EXECUTIVE OFFICER: Commissioner Cabral?

23 VICE CHAIR CABRAL: Yes.

24 EXECUTIVE OFFICER: Commissioner Giovanni?

25 COMMISSIONER GIOVANNI: Aye.

1 EXECUTIVE OFFICER: Commissioner Aczon?

2 VICE CHAIR ACZON: Yes.

3 EXECUTIVE OFFICER: Commissioner Ohigashi?

4 COMMISSIONER OHIGASHI: Aye.

5 EXECUTIVE OFFICER: Commissioner Chang?

6 COMMISSIONER CHANG: Yes.

7 EXECUTIVE OFFICER: Commissioner Wong?

8 COMMISSIONER WONG: Aye.

9 EXECUTIVE OFFICER: Chair Scheuer?

10 CHAIRPERSON SCHEUER: Aye.

11 EXECUTIVE OFFICER: Thank you, Mr. Chair,
12 the motion passes unanimously with eight affirmative
13 votes.

14 CHAIRPERSON SCHEUER: The hearings on this
15 matter are concluded. A written order or orders in
16 this combined Petition will be forthcoming.

17 Is there any further business, Mr.
18 Orodenker?

19 EXECUTIVE OFFICER: No, there is not, Mr.
20 Chair.

21 CHAIRPERSON SCHEUER: Seeing no further
22 business, I wish everybody well, submit my thanks and
23 declare this meeting adjourned.

24 (The proceedings adjourned at 2:24 p.m.)

25

CERTIFICATE

1 STATE OF HAWAII)
2) SS.
3 COUNTY OF HONOLULU)

4 I, JEAN MARIE McMANUS, do hereby certify:

5 That on August 13, 2020, at 9:03 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 13th day of August, 2020, in
16 Honolulu, Hawaii.

17
18
19 /s/ Jean Marie McManus
20 JEAN MARIE McMANUS, CSR #156
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