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MEMORANDUM

To: State Land Use Commission

Copy: Corporation Counsel, County of Hawaii
Julie China, Deputy Attorney General

Re: Declaratory Ruling on Short-Term Use of Agriculture Land

Background

In May of 2022, the Kona circuit court judge ruled that the State LUC erred in its declaration pertaining to the county's short-term rental ordinance vis-à-vis the state agriculture district. The judge's decision is incomplete and therefore sends the wrong message to the public and government agencies. Something should be done to correct this situation.

In Kona, my clients currently have agency appeals pending before the county board of appeals that address what the circuit court judge failed to address and that present questions that the parties did not present in their petitions to the State LUC.

Circuit Court Decision

The circuit court judge ruled that the landowners and county had agreed that the facts (not the law) presented by the parties in their petitions are not disputed. The circuit court judge, in her decision, made an analysis of the county's new short-term vacation rental ordinance and what was a permitted use in the State Agriculture District as of June 4, 1976 (the effective date of the legislative amendments pertaining to the use of land having soil class type A and B, Session Law 1976, Chapter 199, codified as section 205-4.5).

In her discussion, the judge OMITTED portions of section 205-4.5(c) pertaining to the use of land having soil class type C, D, E and U (which is the class that is assigned to most agriculture land on Hawaii Island). Subsection (c) of section 205-4.5 states that the use of these latter classes of land (land with soil class C, D, E or U) "shall be restricted to the uses permitted for agricultural purposes as set forth in section 205-5(b). This portion of subsection (c) that the judge omitted was on the books as of June 4, 1976, having being enacted with the rest of Session Law 1976, Act 199. Section 205-5(b) states:

(b) *Within agricultural districts, uses compatible to the activities described In section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in sections 205-2 and 205-4 may be further defined by each county by zoning ordinance.*

In other words, the State LUC has the specific authority (granted by the legislature) to "determine" what uses are "compatible to" the various activities described in section 205-2, such as whether vacation rental activities are "compatible to" the uses set forth in section 205-2. The circuit court judge did not discuss this provision in her decision and held that Chapter 205 on its face does not impose restrictions on the length of leases/licenses or occupancy agreements that one might make. While that may be true, the legislature gave the State LUC the duty and power to answer the question under sections 205-4.5(c) and 205-5(b), if the land class is type C, D, E or U (which it probably is).

The circuit court judge could have said that the State LUC did not address this point (and that the parties did not raise this point in their petitions) and then remand the matter to the State LUC for further proceedings.

Current Law, "Accessory" Activities

Further, if one examines the county's zoning code for agricultural activities and the new short term rental ordinance, the county ordinances are actually "defining" what one might consider to be "accessory" to the uses set forth in section 205-2, such as what is "accessory" to a farm dwelling, etc. In fact, the legislature recently amended section 205-4.5 (definition of "farm dwelling") to shape the scope/extent of activity that might fall within the ambit of a "farm dwelling" as to those things that are "accessory" to the dwelling.[1] This amendment, based on a study, authorizes the county to use its zoning authority under section 205-5(b) to "define" what is "accessory" – e.g., whether the short-term rental use of a dwelling is an "accessory" use.

Consequences

The general public will conclude (and it already has) that throughout the state, land in the agriculture district can be used for short-term contracts, leases, licenses as a matter of state law for vocational rental purposes.

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[1] Since Section 205-5(a) allows the county to use its zoning powers in the agriculture district (to the extent consistent with state laws), one would assume that county ordinances that purport to describe what is and is not "accessory" to such a dwelling must be given due consideration.