BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

IN THE MATTER OF Requesting the Issuance of a Declaratory Order that the Number of Dwellings Allowed on Properties in the State Rural District can be More than One-Half Acre if Allowed	DOCKET NO. DR 21-71 ORDER DENYING PETITION FOR DECLARATORY ORDER

ORDER DENYING PETITION FOR DECLARATORY ORDER
AND
CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT THIS IS A TRUE AND CORRECT COPY OF THE DOCUMENT ON FILE IN THE OFFICE OF THE STATE LAND USE COMMISSION, HONOLULU, HAWAI'I.

Date Jun 30, 2022

BY _____
DANIEL E. ORODENKER
Executive Officer

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

IN THE MATTER OF The issuance of a declaratory order that the number of dwellings allowed on properties in the Rural District can be more than one-half acre if allowed	DOCKET NO. DR 21-71 ORDER DENYING PETITION FOR DECLARATORY ORDER

ORDER DENYING PETITION FOR DECLARATORY ORDER
AND
CERTIFICATE OF SERVICE

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BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

IN THE MATTER OF ANDREW GRIER Requesting the Issuance of a Declaratory Order that the Number of Dwellings Allowed on Properties in the State Rural District can be More than One-Half Acre if Allowed	DOCKET NO. DR21-71 ORDER DENYING PETITION FOR DECLARATORY ORDER

ORDER DENYING PETITION FOR DECLARATORY ORDER

On February 11, 2021, Andrew Grier ("Petitioner"), through his attorney James W. Geiger Esq., filed a Petition For Declaratory Order ("Petition"); Verification of Petition, Appendices 1–3, and Certificate of Service pursuant to Hawai'i Revised Statutes ("HRS") §91-8, and Hawai'i Administrative Rules ("HAR"), §15-15-98 *et seq*.

Petitioner requested a determination whether HRS Chapters 205 and 46 restrict a county's ability to provide for greater density of housing units within the Rural District from the State of Hawai'i Land Use Commission ("Commission") or that the number of dwellings allowed on properties in the Rural District can be more than one per one-half acre if allowed by county Zoning.

Petitioner sought an interpretation of the statutes and ordinances regarding certain lands

consisting of approximately 2.02 acres of Tax Map Key No. (2) 2-7-016:009, situated at Ha'ikū, Island and County of Maui ("Petition Area"), in the State Land Use Rural District.

Specifically, Petitioner sought a ruling that would find:

1) That the Commission follow the plain language of the statutory sections HRS§§ 205-5(c), 205-2(c) and 46-4(c); and by following the plain language, find that the property is within the State Rural District which is zoned RU-0.5 by the County of Maui and which County adopted an ordinance allowing for accessory dwellings on property within the Rural District that can have one single family dwelling for each one-half acre of area, plus one accessory dwelling if the lot is under 7,500 square feet or two accessory dwellings if the lot is over 7,500 square feet.
2) That the language and the legislative history is clear.

This Commission having heard and examined the testimony and evidence presented by Petitioners, the State Office of Planning and Sustainable Development ("OPSD") and the County of Maui ("County"); and the filings and public testimony submitted via electronic mail; at its meeting on April 14, 2021 via ZOOM virtual meeting technology, hereby makes the following findings of fact, conclusions of law, and decision and order:

FINDINGS OF FACT

Procedural History

1. On February 11, 2021, Andrew Grier ("Petitioner"), through his attorney James W. Geiger, Esq., filed a Petition for Declaratory Order, Verification of Petition Appendices 1–3, and Certificate of Service.

2. On February 11, 2021, the Commission received Petitioner's filing fee with cashier's check for $1000.

3. On February 26, 2021, the County of Maui ("County") filed its Response and Appendices "A"- D".

4. On April 1, 2021, the Commission mailed an agenda and hearing notice for a meeting on April 14-15, 2021 to the Petitioner; County of Maui, OPSD and the Statewide and County of Maui email and mailing lists.

5. On April 6, 2021, the Commission received OPSD's Response to Petition for Declaratory Order.

6. On April 14, 2021, the Commission met via ZOOM interactive virtual technology, to consider the Petition pursuant to HAR §15-15-100. James W. Geiger, Esq., and Andrew Grier appeared on behalf of Petitioner.

7. OPSD and County were present at the proceeding. Bryan Yee, Esq. appeared on behalf of OPSD with OPSD representatives Rodney Funakoshi and Aaron Setogawa. Kristin Tarnstrom, Esq. appeared on behalf of the County with County representatives Michele McLean and Jordan Hart.

8. There were no Commissioner disclosures.

9. There was no written or oral public testimony.

Description of the Property

10. The Property consists of approximately 2.02 acres of Tax Map Key No. (2) 2-7-016:009, situated at Ha'ikū, Island and County of Maui and is zoned RU-0.5 by the County of Maui.

11. The Property is situated completely within the State Land Use Rural District.

12. The Property is owned by Petitioner Andrew Grier whose mailing address is 1811 Haʻikū Road, Haʻikū, Maui, Hawaiʻi, 96708.

13. Section 19.29.030, Maui County Code (MCC) permits one single-family dwelling per parcel that is less than 7,500 square feet and two accessory dwellings per parcel that are more than 7,500 square feet.

14. Grier sought approval of four single-family dwelling permits and one accessory dwelling permit from the County of Maui.

15. The Planning Department of the County of Maui would issue only four permits for the parcel, based on an interpretation that HRS§§ 205-5(c), 205-2(c) and 46-4(c) limit the number of dwellings on properties within the State Rural District to one per one-half acre, regardless of an existing ordinance that authorizes accessory dwellings on such properties.

16. Grier submitted his Petition seeking a declaratory ruling that HRS§§ 205-5(c), 205-2(c) and 46-4(c) do not restrict a county's ability to provide for greater density in the State Rural District than one dwelling per one-half acre.

Description of the Request

17. Petitioner filed the Petition pursuant the statutes HRS§§ 205-5(c), 205-2(c) and 46-4(c):

Section 205-5(c), HRS, provides:

> "Unless authorized by special permit issued pursuant to this chapter, only the following uses be permitted within rural districts:
>
> (1) Low density residential uses;
>
> (2) Agricultural uses;
>
> (3) Golf courses, golf driving ranges, and golf-related activities;

(4) Public, quasi-public, and public utility facilities; and,

(5) Geothermal resources exploration and geothermal resources development, as defined under section 182-1.

In addition, the minimum lot size for any low density residential use shall be one-half acre and there shall be but one dwelling house per one-half acre, except as provided for in section 205-2."

Section 205-2(c), HRS, provides:

"Rural districts shall include activities or uses as characterized by low density residential lots or not more than one dwelling house per on-half acre, except as provided by county ordinance pursuant to section 46-4(c), in areas where "city-like" concentration of people, structures, streets, and urban level of services are absent, and where small farms are intermixed with low density residential lots except that within a subdivision, as defined in section 484-1, the commission for good cause may allow one lot of less than one-half acre, but not less than eighteen thousand five hundred square feet, or an equivalent residential density, within a rural subdivision and permit the construction of one dwelling on such lot;..."

Section 46-4(c), HRS provides:

"Each county may adopt reasonable standards to allow the construction of two single-family dwelling units on any lot where a residential dwelling unit is permitted."

18. Petitioner filed a declaratory judgement action in the Second Judicial Circuit seeking an interpretation of the statutes and ordinance.

19. The County of Maui took the position that the Circuit Court was not the appropriate venue for the determination and that the State of Hawai`i Land Use Commission ("LUC") was the body that should determine the issue.

20. The parties (Grier and County of Maui) agreed to stay the declaratory judgement action to allow the LUC the opportunity to provide input on the issue presented.

21. The Petitioner presents a single issue for determination: whether HRS §§205-5(c), 205-2(c) and 46-4(c) restrict a county's ability to provide for greater density in the State Rural District than one dwelling per one-half acre.

22. Petitioner argues that HRS § 205-5(c) allows one dwelling house per one-half acre except as provided in §205-2(c), and that §205-2(c) in turn, allows one dwelling house per one-half acre except as provided by county ordinance in §46-4(c). Section 46-4(c), in turn, authorizes counties to adopt standards allowing construction of two single-family dwelling units on any lot.

23. Petitioner contends that the plain language meaning of the statutes is that one dwelling house per one-half acre is permitted in the State Rural District unless a county adopts a standard allowing construction of more dwelling units on a lot within the State Rural District; and that an interpretation to limit density to one dwelling house per one-half acre within the State Rural District could be supported if a county had no standard allowing construction of more than two dwelling units on a lot within the State Rural District.

24. Petitioner further contends that Section 19.29.030 MCC, allows one single-family dwelling per on half-acre on RU-0.5 zoned property, together with accessory dwellings pursuant to Section 19.35.050 MCC. Section 19.35.050, MCC, allows one accessory dwelling on any lot that is less than 7,500 square feet and two accessory dwellings on any lot that is more than 7,500 square feet. Both sections, adopted as Ordinance 4936, clearly state a standard allowing two dwelling units on Rural zoned lots of up to 7,500 square feet and allowing three dwelling units on Rural zoned lots of more than 7,500 square feet.

25. Petitioner deduces that based on the plain language of the statutes, the interpretation must be that a county is not precluded from adopting ordinances that provide for greater density of housing on properties within the State Rural District and that stated another way, the statutes allow a county to adopt ordinances allowing for greater density in the State Rural District than one dwelling unit per one-half acre.

26. Petitioner also argues that while the review of the Petition could stop with the plain reading of the statutes, the legislative history confirms that the legislature intended to allow counties to provide for increased density within the State Rural District, and that HRS §46-4(c), was initially adopted as Act 229 in 1981. [The 1981 House Journal at pp. 441-442]. The purpose of Act 229, called the 'ohana zoning statute, was to permit construction of two dwelling units on residential lots which can reasonably accommodate the increase in density. The 1981 Senate Journal 923 (Conference Committee Report 41 on S.B. 55). The statute stated in relevant part:

> (c) Neither this section nor any law, county ordinance, or rule shall prohibit the construction of two single-family dwelling units on any lot where a residential dwelling unit is permitted, provided:
>
> 1. All applicable county requirements, not inconsistent with the intent of this subsection, are met, including building height, setback, maximum lot coverage, parking and floor area requirements; and
> 2. The county determines that public facilities are adequate to service the additional dwelling units permitted by this subsection.
>
> This subsection shall not apply to lots developed under planned unit development, cluster development, or similar provisions which allow the aggregate number of dwelling units for the development to exceed the density otherwise allowed in the zoning district.
>
> Each county shall establish a review and permit procedure necessary for the purposes of this subsection.

Act 229, 1981 House Journal at pp. 441-442.

27. In 1988, HRS §46-4(c) was amended to address the building of dwelling units in areas where private covenants against increased density existed. [House Standing Committee Report 9-88, 1988 House Journal at p.852].

> "The purpose of this bill is to permit the counties to adopt reasonable standards to administer the 'ohana zoning mandate in accordance with planning and zoning policies, and to provide specific requirements for 'ohana zoning permits which must be met by the counties and the person applying for the permit." [House Standing Committee Report 786-88, 1988 House Journal at p. 1117].

28. As applicable to this Petition, HRS §46-4(c) was amended to state:

> "Each county shall adopt reasonable standards to allow the construction of two single-family dwelling units on any lot where a residential dwelling unit is permitted;..." [Act 252, 1988 House Journal at. P. 447].

29. The statute was amended again in 1989. In discussing the amendment, the Senate and House Conference Committee Report stated:

> The purpose of this bill is to broaden the authority of the counties to regulate 'ohana zoning.
>
> "Currently, Section 46-4(c), Hawai'i Revised Statutes, requires the counties to adopt reasonable standards to all the construction of two single-family dwelling units on any lot where a residential dwelling unit is permitted, provided that county requirements are met and public facilities are adequate to service the additional units.
>
> This bill would allow, rather than require, the counties to adopt ohana zoning and would give the counties the authority to determine whether ohana units would have a negative impact on the neighborhood where they are proposed." [Conference Committee Report 33 on SB NO. 1128, 1989 House Journal at p. 770].

30. The statute, as amended in 1989, stated in part:

    a. "Each county may adopt reasonable standards to allow the construction of two single-family dwelling units on any lot where a residential dwelling is permitted;..." [Act313, 1989 House Journal at p. 687

31. Petitioner argued that the legislative intent of HRS §46-4(c) was clear. Each county was authorized to adopt a standard that would allow construction of multiple dwelling units on any lot where a residential dwelling was permitted, and the only restriction imposed on the counties was that the standard be reasonable.

32. Petitioner's position was that the reasonableness of Maui County's ordinance was not before the Commission; but rather the issue before the Commission was whether the statutes restrict a county from adopting an ordinance that allows for greater density of housing in the State Rural District; and that based on the legislative history, the answer is no.

33. It was also Petitioner's position that an argument may be made that a county ordinance allowing for increased density must give way to HRS §§205-5(c) and 205-2(c) under the supremacy provisions of Article VIII, Section 6 of the Hawai'i Constitution and that such argument misses the mark.

34. Petitioner further argued that a similar issue was raised in Sunset Beach Coalition v. City and County of Honolulu, 102 Haw. 465, 78 P.3d at 17 (2003). In Sunset Beach, the City and County of Honolulu acted to grant a development plan amendment, approve a special management area permit, and to rezone lands in connection with a development of about 1,143 acres on property that was classified as agricultural by the State. The actions were appealed, among other reasons, on the grounds that the rezoning of the lands allowed uses beyond those permitted in the State Agricultural

District. The Supreme Court noted that if an ordinance conflicted with a statute of statewide concern, the ordinance would be invalid under Article VIII, Section 8 of the Hawai'i Constitution and HRS §50-15 [Id. At 481, 78 P.3d at 17]. While HRS Chapter 205 was recognized as a statute of statewide concern, the validity of the ordinance was not determined since the developer stated that it would comply with HRS Chapter 205 and the City and County stated it would enforce HRS Chapter 205 [Id. At 483, 78 P.3d at 19].

35. Petitioner contended that there was a difference between the statutes reviewed in Sunset Beach and the statutes in this action. Sunset Beach focused on HRS §§205-4.6 and 205-6, neither of which included a provision that a county may adopt reasonable standards concerning additional dwelling units on a parcel, and that conversely, HRS §46-4(c) specifically provided that authority when it states "Each county may adopt reasonable standards to allow construction..." Petitioner further contends, in this matter, both the plain language of the statute and the legislative history reflect the decision of the Legislature to authorize a county to take action. To the extent that there might be a conflict between the statutes and an ordinance, a county is authorized to act.

36. Petitioner concluded that for several years, Maui County interpreted the statutes and its ordinance as allowing up to two accessory dwellings for rural designated property in addition to the one single family dwelling per one-half acre density. For unknown reasons, the County of Maui changed its interpretation to limit the number of dwellings to one per one-half acre, regardless of whether the dwelling was designated as a primary use or an accessory one, rendering the first phrase in HRS

§46-4(c) meaningless; and that the interpretation is against the plain language of the statute, against the legislative history of the statute, and not supportable under a supremacy argument.

37. The Maui County Department of Planning ("County") agreed with the nature of the issue presented as stated by Petitioner, "[w]hether HRS §§205-5(c), 205-2(c), and 46-4(c) restrict a county's ability to provide for greater density in the Rural district than one dwelling per one-half acre."

38. The County had consistently interpreted HRS Chapters 205 and 46 to limit the number of allowable dwellings in State Rural districts to one per half-acre, except where HRS §46-4(c) applies. The County's position was that HRS §46-4(c) only applied in circumstances where the lot size was less than one-acre, and HRS §§205-2(c) and 205-5(c) would only otherwise allow one dwelling. Petitioner's property was 2.02 acres, and therefore it was the County's position that the State Rural district governing statutes allow for a maximum of four dwelling units on Petitioner's lot.

39. The County agreed that there were no material facts in dispute, and that the issue presented was solely one of interpretation of the Commission's related statutes.

40. The County agreed with Petitioner's identification of the applicable statutes and codes in this action. The parties diverged on the proper interpretation of these statutes, the intent of the legislature in passing them, and what their "plain language" stated.

41. The Planning Department also fully supported resolving this issue before the Commission for the sake of clarity and finality, and agreed that the Commission had authority to answer the issue presented under HRS §91-7 and Land Use Commission Rules HAR §15-15-98, et seq. *See* Id., Appx 1.

42. The County asserted the following:

- The State Rural district statutes, HRS §§205-2 and -5, do not limit the number of houses by lot, but rather by acres within a lot, basing the maximum dwelling units purely by acreage. They require that there "shall be but one dwelling house per one-half acre," and they make this a general requirement but-for the narrow exception carved out in HRS §46-4(c).
- HRS § 46-4(c) does relate to lots, and it is a general statute that does not explicitly apply only to State Rural districts. HRS §46-4(c), allows a county to make appropriate rules and standards to allow two single family dwellings on a lot when only one residential dwelling would otherwise be allowed. This provision only pertains to instances where only one residential dwelling is allowed by rule, and in those cases HRS 46-4(c) carves out an exception so the one home may have an 'ohana or additional dwelling unit. It does not apply to circumstances where more than one dwelling unit is allowed on a lot.
- HRS §46-4(c) plainly states that counties may allow "the construction of two single-family dwelling units on any lot where a residential dwelling unit is permitted." For example, where "a residential dwelling unit" is allowed, the County can make it into two. The use of the phrase "a residential dwelling unit" identifies one residential dwelling unit: the language is phrased in the singular, and is specific and unequivocal. It also is the only way to construe the context of the first part of this provision. The statute specifically limits the number of additional dwelling units a County can allow, by precisely stating they may allow the "construction of two single family dwelling units".

- Legislative history supports County's interpretation. HRS §46-4(c), referred to as 'ohana zoning, originally passed in 1981. The original bill stated that it could not be pre-empted by "any other law, county ordinance, or rule," which would include HRS §§205-2 and 205-5. The 1989 bill removed the mandatory requirement that could not be superseded, to "allow, rather than require the counties to adopt 'ohana zoning. Therefore, the language in HRS §§205-2 and 205-5 was altered to include the exception language that now exists. In correcting the language of HRS §§205-2 and 205-5, the Senate Committee noted that "the purpose of this bill is to permit second dwelling units in rural districts pursuant to county " 'ohana zoning ordinances."[1] All of the legislative history demonstrates that the intent of the legislature was to allow an additional home on those lots where only one was allowed, including in State Rural districts.
- HRS §46-4(c) would only apply in instances where only one dwelling is allowed, it is only relevant in State Rural districts when the lot size is less than one acre. For a State Rural lot that was only one half-acre in size, HRS §§205-5 and 205-2 would allow only one dwelling unit. Since only one dwelling unit is allowed, the exception allowed under HRS §46-4 is applicable, and along with applicable County Code provisions, the lot would also be allowed to have one additional dwelling unit. As the lots grow in half-acre increments, they are allowed additional dwellings under HRS §§205-5 and -2, and because they are already allowed more than one dwelling, HRS §46-4(c) is not relevant. For example, on a

[1] HRS § 46-4(c) (1989), Act 5, S.B. 1556 and Senate Journal 1989, Standing Committee Reports, p. 1047, SCRep. 622 on S.B. no. 1128

one-acre lot, HRS §205-2 would allow two dwelling units, and since there are already two dwelling units allowed on the lot, HRS §46-4 does not apply. Under these circumstances, the County Code would allow either two single-family dwellings, or one single-family dwelling and an 'ohana unit, depending on the preference of the owner. As you move up in size, for a 1.5-acre lot, HRS §§205-5 and -2 would allow three dwelling units total, and therefore again HRS §46-4(c) does not apply. Under the County Code, the County would allow either three single-family homes; two single family homes and one 'ohana; or one single-family home and two 'ohana, depending on the preference of the lot owner.

- Petitioner Grier owns a property of 2.02 acres in a State Rural, and County-zoned RU-0.5 district, where all the above statutes apply. Under the County's interpretation and based on his 2.02 acres of land, he would be allowed no more than four dwelling units under HRS §205. Since the statute already allows more than one dwelling unit on his lot, HRS §46-4(c) does not apply any exception.
- Petitioner alleges he was granted building permits for three single-family dwellings in compliance with County zoning. When Petitioner applied for a fourth dwelling, along with an accessory unit, he states he was given preliminary approval for both. However, at some point prior to the final building permit being issued, the Planning Department identified that Petitioner could only have one additional dwelling on his land. It is undisputed that Petitioner was not granted any final approval on a fifth building permit, prior to the Department realizing any mistake.

- The County has consistently enforced the interpretation addressed above as it pertains to State Rural districts. The County Ordinance that Petitioner relied upon to create a right to two additional dwelling units, was only passed in December 2018. The County gave multiple presentations on the ordinance to community groups and other organizations, noting that it would have limited applicability in the State Rural district.
- The County may not supersede the requirements embodied in the State land use regulations. The County's interpretation of the statutes and codes is not premised upon the "supremacy" of State Law, i.e., that there is a conflict of law and the State's must be supreme. The County and State laws are not in conflict. The County Code recognizes and adopts the requirements of HRS Chapter 205 therein.
- HRS §§205-2, 205-5, and 46-4(c), allow the counties to permit two dwelling units where one is already allowed on lots less than an acre in size. On lots an acre or larger, the HRS §46-4(c) exception does not apply, and HRS §§205-2 and 205-5 require the counties to allow only one house per one-half acre.

43. OPSD concurred with Maui County's position based upon a plain reading of the statutes that "...the State Rural district governing statutes mandate a maximum of four dwelling units on the Petitioner's lot."

44. OPSD argued that:
    - Under the appropriate facts and if the appropriate county ordinances are in place, under HRS Chapter 205, a county may permit one dwelling per one-half acre of lot area, but no additional accessory or 'ohana dwelling need be permitted if more

than one dwelling had already been permitted for that lot pursuant to HRS §46-4(c).

- HRS Chapter 205 does restrict a county's ability to exceed density and use standards set in HRS Chapter 205 and HAR Chapter 15, subject to the provisions of HRS §46-4(c).
- The counties zoning and standards for lands within the State Rural District are limited by State statute, and county ordinances must comply with the minimum standards and permissible uses set forth in HRS Chapter 205.
- OPSD referred to the language of HRS §46-4(c) and pointed out that nothing in the exception allowed more than one additional dwelling on the same lot of the single-family dwelling.
- OPSD referred to HAR §15-15-23, that specifically allows county ordinances or regulations of uses to be more restrictive than set forth by rule or statute. Counties may lower the density or further restrict the uses within the State Rural District.
- HRS Chapter 205 sets the maximum density at one residential unit per one-half acre, except as provided in HRS §46-4(c). The County interprets HRS §46-4(c) as allowing one additional 'ohana residential unit only if there is no other additional dwelling on the lot. In Grier's case, the property is a two-acre lot, zoned by the County as RU-0.5, allowing one single-family dwelling per one-half acre. Petitioner was issued four dwelling permits by the County based on allowable State Rural District density and underlying County zoning at the same density; one dwelling unit per one-half acre. The County's position is that HRS

§46-4(c) does not allow additional 'ohana units because there are already multiple dwellings on the same lot.

- As long as the underlying county zoning is not more restrictive, under HRS §§205-2 and 46-4(c), the number of dwellings in the State Rural District can only exceed one per one half-acre when the lot size is between one-half acre and one acre; and, there is no more than one dwelling unit on the lot.
- The County's interpretation of HRS §46-4(c) is well within the County's authority to adopt reasonable standards by which to manage the impacts of increased density in areas where infrastructure may not be adequate.
- OPSD further argued that the Commission should also clarify that the additional 'ohana provision under HRS §46-4(c) does not apply to a lot where more than one residential dwelling exists on the lot.

RULING ON PROPOSED FINDINGS OF FACT

Any conclusion of law herein improperly designated as a finding of fact should be deemed or construed as a conclusion of law; any finding of fact herein improperly designated as a conclusion of law should be deemed or construed as a finding of fact.

CONCLUSIONS OF LAW

Jurisdiction

1. HRS §91-8 allows any interested person to petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of an agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure

for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.

2. Petitioners are interested persons pursuant to HRS §91-8 and HAR §15-15-98(a), and thus have standing to bring this Petition before the Commission.

3. The Commission has jurisdiction to issue this declaratory order. HRS§ 91-8, as implemented by the Commission's administrative rules HAR §§15-15-98 through 15-15-104.1, authorize the Commission to issue a declaratory order "as to the applicability of any statutory provision or of any rule or order of the Commission to a specific factual situation." The Commission's statutes, the applicability of which are put at issue in this Petition, are those sections of HRS Chapter 205 that govern the authority to reclassify land and to govern the permitted uses on State Rural District lands.

4. HAR §15-15-98(c) allows the Commission to issue a declaratory order "...without notice of hearing" to terminate a controversy or to remove uncertainty. The Commission concluded that based on the facts presented at the meeting, the pleadings filed together with the exhibits by the Petitioner, OPSD, and the County, the opportunity of Petitioner, OPSD, and the County to present their views, and the fact that the Petitioner had not requested a hearing pursuant to HAR §15-15-103, a hearing is not necessary before issuing a declaratory order in this matter.

5. HAR §15-15-100(a)(1)(D) provides that the Commission can deny the petition where "the petition requests a ruling on a statutory provision not administered by the commission or the matter is not otherwise within the jurisdiction of the commission."

6. The Commission relied on this authority to determine that the declaratory ruling process was proper. Without limiting the foregoing, the Commission concluded that the declaratory ruling procedure could be invoked by the Petitioner in this matter.

> Based on the text and structure of the statute, its legislative history, and relevant caselaw, we agree with Wal–Mart that the declaratory ruling procedure was not intended to be utilized to seek review of agency determinations that have already been made and which have not been timely appealed.
>
> HRS §91–8, entitled "Declaratory rulings by agencies," provides that:
>
> Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. Each agency shall adopt rules prescribing the form of the petitions and the procedure for their submission, consideration, and prompt disposition. Orders disposing of petitions in such cases shall have the same status as other agency orders.
>
> HRS §91–8 (emphasis added).
>
> As both the title ("Declaratory rulings by agencies") and the pertinent text ("a declaratory order as to the applicability [of a statute, agency rule, or order]") make clear, the declaratory ruling procedure of HRS §91–8 is meant to provide a means of seeking a determination of whether and in what way some statute, agency rule, or order, applies to the factual situation raised by an interested person. It was not intended to allow review of concrete agency decisions for which other means of review are available. Reading HRS §91–8 in a common sense fashion, and bearing in mind the plain meaning of the term "applicability," it cannot seriously be maintained that the procedure was intended to review already-made agency decisions. For such decisions, like the DPP Director's issuance of the CUP to Wal–Mart, the agency has already spoken as to the "applicability" of the relevant law to the factual circumstances at hand—implicitly or explicitly it has found the relevant legal requirements to be met. There is no longer a question of how the relevant laws, in this case the LUO, "apply."

Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City & Cty. of Honolulu, 114 Haw. 184, 196–97, 159 P.3d 143, 155–56 (Hawai'i 2007).

7. The LUC has asserted its jurisdiction under questions involving interpretations of HRS §§205-4.5 and 205-6 in the past.

8. Under HRS Chapter 205, a county may permit one dwelling per one-half acre of lot area, but no additional accessory or 'ohana dwelling need be permitted if more than one dwelling had already been permitted for that lot pursuant to HRS §46-4(c).

9. HRS Chapter 205 does restrict a county's ability to exceed density and use standards set in HRS Chapter 205 and HAR Chapter 15, subject to the provisions of HRS §46-4(c).

10. The counties' zoning and standards for lands within the State Rural District are limited by State statute, and county ordinances must comply with the minimum standards and permissible uses set forth in HRS Chapter 205.

11. The language of HRS §46-4(c) has nothing in the exception which allows more than one additional dwelling on the same lot of the single-family dwelling.

12. HAR §15-15-23 specifically allows county ordinances or regulations of uses to be more restrictive than set forth by rule or statute. Counties may lower the density or further restrict the uses within the State Rural District.

13. HRS Chapter 205 sets the maximum density at one residential unit per one-half acre, except as provided in HRS §46-4(c). HRS §46-4(c) allows one additional 'ohana residential unit if the lot is already limited to only one unit and only if there is no other additional dwelling on the lot. HRS §46-4(c) does not allow additional 'ohana units

where there are already multiple dwellings on the same lot.

14. Under HRS §§205-2 and 46-4(c), the number of dwellings in the State Rural District can only exceed one per one half-acre when the lot size is between one-half acre and one acre; and there is no more than one dwelling unit on the lot.

15. HRS §46-4(c) gives the counties authority to adopt reasonable standards by which to manage the impacts of increased density in areas where infrastructure may not be adequate.

16. The additional 'ohana dwelling provision under HRS §46-4(c) does not apply to a lot where more than one residential dwelling already exists on the lot.

RULING REGARDING REQUEST FOR DECLARATORY ORDER

The Commission has duly considered the Petition and the written and oral arguments presented by Petitioners, the pleadings filed by OPSD and the County, as well as any public comments received. At the meeting conducted via ZOOM virtual meeting technology on April 14, 2021 from various locations in Hawai'i, a motion was considered by the Commission to deny the declaratory relief as requested by Petitioner. The motion having received the affirmative votes required by HAR §15-15-13, the Commission granted the motion and finds good cause to deny the declaratory relief requested by Petitioner based on a plain reading of HRS §§205-5(c), 205-2(c) and 46-4(c). The number of dwellings in the State Rural District can only exceed one per one half-acre when the lot size is between one-half acre and one acre and there is no more than one dwelling unit on the lot; and the additional 'ohana dwelling provision under HRS §46-4(c) does not apply to a lot where more than one residential dwelling already exists on the lot.

This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu, O'ahu, Hawai'i, this _____, day of June, 2022, per motion on April 14, 2021.

LAND USE COMMISSION

STATE OF HAWAI'I

APPROVED AS TO FORM

Deputy Attorney General

By _____
JONATHAN LIKEKE SCHEUER
Chairperson and Commissioner

Filed and effective on:

Jun 30, 2022

Certified by:

DANIEL E. ORODENKER
Executive Officer

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

IN THE MATTER OF

Requesting the Issuance of a Declaratory Order that the Number of Dwellings Allowed on Properties in the State Rural District can be More than One-Half Acre if Allowed

DOCKET NO. DR 21-71

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that an ORDER DENYING PETITION FOR DECLARATORY ORDER was served upon the following by either hand delivery or depositing the same in the U.S. Postal Service by regular or certified mail as noted:

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Dated: Honolulu, Hawai'i, Jun 30, 2022

DANIEL E. ORODENKER
Executive Officer