# Evaluating Applications: TVRs on Ag Lands

# 1.0 State Law and Plans

# 1.1 Chapter 205, HRS, Land Use Commission

§205-2 Districting and classification of lands.

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- (d) Agricultural districts shall include:
  - the agricultural services and uses that support the agricultural activities of the fee or leasehold owner of the property and accessory to any of the above activities, regardless of whether conducted on the same premises as the agricultural activities to which they are accessory, including farm dwelling as defined in section 205-4.5(a)(4), employee housing, farm buildings, mills, storage facilities, processing facilities, agricultural-energy facilities as defined in section 205-4.5(a)(16), vehicle and equipment storage areas, roadside stands for the sale of products grown on the premises, and plantation community subdivisions as defined in section 205-4.5(a)(12);

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(11) Agricultural tourism conducted on a working farm, or a farming operation as defined in section 165-2, for the enjoyment, education, or involvement of visitors; provided that the agricultural tourism activity is accessory and secondary to the principal agricultural use and does not interfere with surrounding farm operations; and provided further that this paragraph shall apply only to a county that has adopted ordinances regulating agricultural tourism under section 205-2;

- 1. Did the County adopt a zoning ordinance in compliance with the above?
- 2. Is this agricultural tourism? Will the County require an environmental assessment under Chapter 343?

# §205-4.5 Permissible uses within the agricultural districts.

(a) Within the agricultural district, <u>all lands with soil</u> classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B shall be restricted to the following permitted uses:

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(4) Farm dwellings, employee housing, farm buildings, or activities or uses related to farming and animal husbandry. "Farm dwelling", as used in this paragraph, means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling;

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(10) Buildings and uses, including mills, storage, and processing facilities, maintenance facilities, and vehicle and equipment storage areas that are normally considered directly accessory to the above-mentioned uses and are permitted under section 205-2(d).

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(b) Uses not expressly permitted in subsection (a) shall be prohibited, except the uses permitted as provided in sections 205-6 and 205-8, and construction of single-family dwellings on lots existing before June 4, 1976. [Emphasis added]

- 1. Does the application meet the "farm dwelling" definition? Is there a signed farm dwelling agreement?
- 2. Does "bona fide" farming exist on the parcel? Is the TVR use "ancillary" to the farming operation?
- 3. How does this transient vacation rental comply with the farm dwelling agreement?
- 4. Will people and/or corporations who violated the farm dwelling agreement be rewarded?

#### §205-5 Zoning.

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- (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 205-4.5 may be further defined by each county by zoning ordinance. Each county shall adopt ordinances setting forth procedures and requirements, including provisions for enforcement, penalties, and administrative oversight, for the review and permitting of agricultural tourism uses and activities as an accessory use on a working farm, or farming operation as defined in section 165-2; provided that agricultural tourism activities shall not be permissible in the absence of a bona fide farming operation. Ordinances shall include but not be limited to:
- (1) Requirements for access to a farm, including road width, road surface, and parking;
- (2) Requirements and restrictions for accessory facilities connected with the farming operation, including gift shops and restaurants; provided that overnight accommodations shall not be permitted;
- (3) Activities that may be offered by the farming operation for visitors;
- (4) Days and hours of operation; and
- (5) <u>Automatic termination of the accessory use</u> upon the cessation of the farming operation.

Each county may require an environmental assessment under chapter 343 as a condition to any agricultural tourism use and activity. Other uses may be allowed by special permits issued pursuant to this chapter.

- 1. Has an agricultural tourism ordinance been adopted by the County?
- 2. Can the County allow agricultural tourism if an ordinance was <u>not</u> adopted?
- 3. Overnight stays shall not be permitted with agricultural tourism permits.
- 4. Does the County have a definition for "accessory use" on agricultural lands?
- 5. The State Attorney General opinion [See Section 1.4] states that "we believe that counties cannot allow…a TVR on agricultural lands under section 205-5(b)."
- 6. With respect to Section 205-2(d)(7) above, the AG opinion states that "Because a B&B and a TVR are not similar to any of the listed items, they are not bona fide agricultural services or accessory agricultural uses, and counties may not allow them on agricultural lands under section 205-5(b)." In addition, the AG opinion states, "...we are not aware of any justification by which a county may allow a B&B or a TVR on agricultural lands as a permissible use under section 205-2(d), 205-4.5(a), or 205-5(b)."
- \$205-6 Special permit. (a) Subject to this section, the county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired. Each county may establish the appropriate fee for processing the special permit petition. Copies of the special permit petition shall be forwarded to the land use commission, the office of planning, and the department of agriculture for their review and comment.
- (b) The planning commission, upon consultation with the central coordinating agency, except in counties where the planning commission is advisory only in which case the central coordinating agency, shall establish by rule or regulation, the time within which the hearing and action on petition for special permit shall occur. The county planning commission shall notify the land use commission and such persons and agencies that may have an interest in the subject matter of the time and place of the hearing.

- 1. Is this TVR use "unusual or reasonable"? PC needs to document that the use <u>is</u> or <u>is not</u> an "unusual or reasonable" within the Ag District.
- 2. Did the PC notify the LUC about these agenda items?
- 3. Did the LUC provide comments or make a ruling on the compatibility of TVR use on AG land? (i.e., find that the TVR was compatible with other agricultural use or activity?)

# 1.2 Chapter 226, HRS, Hawai'i State Planning Act

#### §226-7 Objectives and policies for the economy--agriculture.

- (a) Planning for the State's economy with regard to agriculture shall be directed towards achievement of the following objectives:
  - (1) Viability of Hawaii's sugar and pineapple industries.
  - (2) Growth and development of diversified agriculture throughout the State.
  - (3) An agriculture industry that continues to constitute a dynamic and essential component of Hawaii's strategic, economic, and social well-being.
- (b) To achieve the agriculture objectives, it shall be the policy of this State to:
  - (1) Establish a clear direction for Hawaii's agriculture through stakeholder commitment and advocacy.
  - (2) Encourage agriculture by making best use of natural resources.

## **COMMENTS**

1. Does this TVR application meet the above objectives? Explain how.

# 1.3 Department of Business, Economic Development, and Tourism, Chapter 15-15, Hawai'i Administrative Rules

#### \$15-15-03 Definitions.

As used in this chapter:

"Accessory building or use" means a subordinate building or use which is incidental to and customary with a permitted use of the land. [Emphasis added]

#### **COMMENTS**

- 1. Does this application meet the "accessory" building definition?
- 2. Is the TVR an accessory unit which is "incidental" or "subordinate" to the agricultural building or use?
- 3. How much income was reported from Ag products (money made off agricultural products) vs. the TVR rental income? Was the TVR rental income "subordinate" to the agricultural products income?
- 4. Did the "farm" operation file a Schedule F on their annual income tax return?

# 1.4 Attorney General Opinion, August 19, 2009<sup>1</sup>

See Opinion for answers to the questions asked the Attorney General's office:

- 1. May a county allow a Bed & Breakfast or Transient Vacation Rental on a working farm or operation that is conducting agricultural tourism allowed by a county ordinance enacted pursuant to section 205-5(b)(2), even though section 205-5(b)(2) specifically prohibits overnight accommodations?
- 2. May a county allow a B&B or TVR within a single-family dwelling on an agricultural lot existing prior to June 4, 1976, or within a <u>farm dwelling</u>, or other structure on an agricultural lot created after June 4, 1976, if there is no agricultural use or activity?
- 3. Are counties, prior to issuing Special Permits in the Agricultural District, required to assess and consider the <u>cumulative potential impacts</u> to the farms, agricultural activities, and agricultural resources of the area and region where these uses are proposed?

<sup>&</sup>lt;sup>1</sup> State of Hawai'i, Department of the Attorney General, August 19, 2009: Request for Legal Opinion on Bed and Breakfast and/or Transient Vacation Rentals Operating in the Agricultural District.

4. What criteria and standards are necessary to determine whether a use or activity is an "<u>unusual and reasonable use</u>" and that the "...use would promote the effectiveness and objectives of this chapter," particularly sections 205-2 and 205-4.5? [Emphasis added]

## **COMMENT**

- 1. Did the Commission study the above AG Opinion in preparation for this Public Hearing?
- 2. Has the County assessed the cumulative impacts on TVRs to the farms, agricultural activities, and agricultural resources?

# **2.0 County**

#### 2.1 General Plan

The General Plan states:

#### 5.2 AGRICULTURAL LANDS

## 5.2.1 Policy

(b) The <u>primary intent</u> of the Agriculture designation is to conserve land and water resources.

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(e) The <u>secondary intent</u> of the Agriculture designation is to provide an opportunity for <u>Kaua'i citizens to reside</u> in an agricultural community. [Emphasis added]

## **COMMENT**

1. The Commission should document how this TVR application on Ag lands meets the above General Plan policies.

According to the General Plan:<sup>2</sup>

Agricultural subdivisions have a higher operational cost per unit for county services, such as fire protection, water supply, and refuse collection. Conversely, property

<sup>&</sup>lt;sup>2</sup> General Plan, Page 5-5, Section 5.2.2 Rationale for Policy: Extension of County Services at Increased Cost and Lower Revenue.

tax rates and water rate revenues are lower per acre of area served.

Agricultural subdivisions will also result in higher longterm costs per unit for repair and replacement of roads, water supply, and other County facilities... In effect, agricultural subdivisions extend County liability over a broader area.

## **COMMENTS**

- 1. If approved, will these properties continue to be taxed at Ag rate?
- 2. If no, will non-Ag lands taxpayers continue <u>subsidizing</u> TVRs on Ag lands? Will these resort Ag lands now be taxed at the commercial tax rate?

# 2.2 Farm Dwelling Agreement

#### **COMMENTS**

- 1. Did this TVR on Ag land applicant have a signed Farm Dwelling Agreement?
- 2. If so, are they in compliance with that Agreement?
- 3. If they were in violation of the Agreement, did the County carry out the Agreement condition that the applicant was subject to a citation and fine pursuant to Chapter 205, Section 13, HRS, as amended?

# 2.3 Comprehensive Zoning Ordinance

- Article 2, DESIGNATION OF DISTRICTS, METHODS AND EFFECT OF ESTABLISHMENT OF DISTRICTS, AND ZONING MAPS.
- Section 8-2.2 Method And Effect of Establishment of Districts.
  - (d) Upon adoption of any district as part of the "Zoning Map", the land thus defined shall become subject to the specific regulations for all of the districts in which it is located and to the provisions of this chapter and except as otherwise provided:
    - (1) No building, structure or portion thereof shall be erected, or altered, nor shall any structure, land or premises be used except in the manner indicated and only for the uses permitted in the districts in which

the building , structure, land or premises is located.

[Emphasis added]

#### **COMMENT**

1. If the land is zoned Ag, and the structure is a single-family or a farm dwelling, how can it be legally used as a commercial transient vacation rental?

## Article 7, AGRICULTURE DISTRICTS

# Section 8-7.1 Purpose

- (a) To protect the agriculture potential of lands within the County of Kaua'i to insure a resource base adequate to meet the needs and activities of the present and future.
- (b) To assure a reasonable relationship between the availability of agricultural lands for various agriculture uses and the feasibility of those uses.
- (c) To limit and control the dispersal of residential and urban use within agriculture lands. [Emphasis added]

## **COMMENTS**

- 1. What process/procedure/criteria will the Planning Commission use to evaluate the cumulative impacts, and limit and control the number of TVRs on Ag lands?
- 2. If the Commission evaluates and decides on these applications individually, how can the <u>cumulative impacts</u> be evaluated?
- 3. Shouldn't there have been a process in place <u>prior</u> to considering these TVR on Ag lands applications to evaluate the cumulative impacts?
- 4. Did the applicant previously apply, was denied, and subsequently kept operating illegally?
- 5. If the TVR on agricultural land is approved, will the PC document and justify that approval of the subject TVR does not contravene the general purposes of the agricultural district?

# 2.4 County Infrastructure Requirements

## **COMMENTS**

- 1. Does the proposed application for the TVR <u>structure and use</u> meet all the County rules, regulations and codes such as those related to fire, police, water, infrastructure, flood, hurricane, tsunami, etc.?
- 2. Are the ADA Standards met?

# 3.0 One Relevant Court Decision

# 3.1 Neighborhood Board No. 24 (Waianae Coast) v. State Land Use Commission<sup>3</sup>

Five organizations composed of residents brought action in which they challenged the grant of special permit for construction of amusement park on 103 acres of land within agricultural district. The Circuit Court upheld the issuance of the permit, the organizations appealed, and the Supreme Court held that the proposed use of land for amusement park was not an "unusual and reasonable" use which would qualify for a special permit.

HRS § 205-6 allows the county planning commission and the LUC to issue special permits for "certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified," "but only when the use would promote the effectiveness and objectives of [HRS ch. 205]." Whether a particular use is "unusual and reasonable" is determined by applying the five guidelines set forth in the Land Use District Regulations § 5-2 to the proposed project. § 5-2 requires the following:

- 1) Such use shall not be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations.
- 2) That the desired use would not adversely affect surrounding property.
- 3) Such use would not unreasonable burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, and police and fire protection.

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<sup>&</sup>lt;sup>3</sup> 64 Haw. 265, 639, P2d 1097. January 22, 1982.

- 4) Unusual conditions, trends and needs have arisen since the district boundaries and regulations were established.
- 5) That the land upon which the proposed use is sought is unsuited for the used permitted within the District. [Emphasis added]

- 1. Prior to a Commission decision on any TVR application on Ag lands, any "unusual and reasonable" uses should be studied and well-documented.
- 2. Did the TVR on Ag land application meet all five of the above guidelines?
- 3. Did you read and study the above court case and its relationship to a particular TVR on Ag lands application?
- 4. Is a district boundary amendment petition more appropriate since applications for TVRs on Ag lands are frequently Resort uses, and more suited to Visitor Destination Areas?
- 5. Is a transient vacation rental (i.e., commercial use) spot zoning?

Prepared by Barbara Robeson for Protect Our Neighborhood Ohana July 9, 2011