



BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII


In The Matter Of The Petition Of)	DOCKET NO. DR12-46
)	
JAMES SPENCER AND PAMELA V.)	DECLARATORY ORDER
SPENCER)	
)	
For A Declaratory Order Providing)	
That The Operation Of A Pet Boarding)	
Kennel Is A Permissible Use On Certain)	
Land In The Agricultural District)	
_____)	

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,
HAWAII.

By  _____ 6/8/12
Executive Officer Date



LAND USE COMMISSION
STATE OF HAWAII
2012 JUN -8 P 4: 13

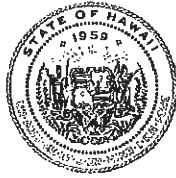
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DECLARATORY ORDER

On March 21, 2012, James Spencer and Pamela V. Spencer ("Petitioners") filed a Petition For Declaratory Order ("Petition"), pursuant to Hawai'i Revised Statutes ("HRS") section 91-8 and Hawai'i Administrative Rules ("HAR") section 15-15-98, requesting the State of Hawai'i Land Use Commission ("Commission") determine that the operation of a pet boarding kennel on their land in the State Land Use Agricultural District to care for domestic animals constitutes or is compatible with "raising livestock" or "animal husbandry," and is therefore a permissible use as of right pursuant to HRS sections 205-4.5(a)(3) and/or 205-2(d)(2).

The Commission considered the Petition at its meeting on May 3, 2012.

Neither Petitioner nor the County of Hawai'i Planning Department ("Planning

Department”) or the State of Hawai`i Office of Planning (“OP”) felt that further hearing was necessary.

The Commission, having heard and examined the evidence, argument of counsel, and the positions of the Planning Department and OP, along with the pleadings filed herein, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

PROCEDURAL MATTERS

1. On March 21, 2012, Petitioners filed the Petition, Verification, and Exhibits “A” through “H.”
2. By letter dated March 22, 2012, the Commission requested that OP and the Planning Department provide comments on the Petition.
3. On April 17, 2012, the Planning Department filed its comments on the Petition.
4. On April 17, 2012, OP filed its comments on the Petition.
5. On April 23, 2012, OP filed a letter clarifying its comments on the Petition.
6. On April 30, 2012, Petitioners filed a Supplemental Memorandum In Support Of Petition For Declaratory Order Filed March 21, 2012.

7. On May 3, 2012, the Commission considered the Petition at its meeting in Honolulu, Hawai`i, pursuant to section 15-15-100, HAR. Roy A. Vitousek III, Esq., and Sean M. Smith, Esq., appeared on behalf of Petitioners. Also present were Bryan C. Yee, Esq., and Rodney Funakoshi on behalf of OP and Ryan Kanakaole, Esq., on behalf of the Planning Department.¹

8. At the meeting, the Commission entered, without objection, Petitioners' Exhibits "A" through "I"² as well as the written comments of OP and the Planning Department on the Petition into the record of this proceeding.

DESCRIPTION OF THE PROPERTY

9. Petitioners are the owners of the subject land in question.

10. The subject land is located at 92-9146 Tree Fern Lane in the Hawaiian Ocean View Estates Subdivision, Kahuku, Ka`u, Hawai`i, and is identified as Tax Map Key: 9-2-25: 47 ("Property").

11. The Property has an area of approximately 43,595 square feet.

12. The Property is located in the State Land Use Agricultural District.

13. The Property is located in the County of Hawai`i's Agricultural A-1a (minimum 1 acre) zoning district.

¹ Both OP and the Planning Department were not parties in the proceeding but provided their positions as representing the interests of the State of Hawai`i and the County of Hawai`i, respectively.

² Petitioners' Exhibit "I" was filed at the meeting and consisted of excerpts from *Webster's Third New International Dictionary of the English Language, Unabridged*; *Black's Law Dictionary, Ninth Edition*; www.dictionary.com/mobile; and Mary Kawena Pukui's and Samuel H. Elbert's *Hawaiian Dictionary*.

14. The University of Hawai'i's Land Study Bureau's Detailed Land Classification System classifies the soils on the Property as overall (master) productivity rating class E, which indicates that it is very poorly suited for agricultural use.

EXISTING USE OF THE PROPERTY

15. Petitioners have been operating a family run pet boarding kennel servicing cats and dogs on the Property for several years, as a commercial activity. Dogs and cats are domestic animals.³

16. There is currently a 3-bedroom, 2-bath dwelling with a living room, dining room, kitchen, covered lanai, utility room, 2-car garage, and water catchment on the Property. There is also a structure onsite that houses the animals.

DESCRIPTION OF THE REQUEST

17. Petitioners seek a determination from the Commission that their pet boarding kennel operation constitutes or is compatible with "raising livestock" or "animal husbandry," and therefore is permitted as of right pursuant to HRS sections 205-4.5(a)(3) and/or 205-2(d)(2).

RULING ON PROPOSED FINDINGS OF FACT

Any of the proposed findings of fact not already ruled upon by the Commission by adoption herein, or rejected by clearly contrary findings of fact herein, are hereby denied and rejected.

³ See *Webster's Third International Dictionary* at p.349 and p.667.

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

1. The Commission has jurisdiction to issue this declaratory order. HRS section 91-8, as implemented by subchapter 14 of the Commission's rules, and HAR sections 15-15-98 through 104 authorize the Commission to issue⁴ declaratory rulings "as to the applicability of any statutory provision or of any rule or order of the agency." The Commission's statutes are those sections of HRS chapter 205 which govern the uses permitted on agricultural lands. Without limitation, these sections include 205-2(d) and 205-4.5 (describing activities and uses permitted in the State Land Use Agricultural District) and 205-5(b) (concerning zoning in the State Land Use Agricultural District).

2. HRS section 205-5(b), authorizes the Commission to determine whether the proposed uses on State Land Use Agricultural District lands with soil classified by the Land Study Bureau's Detailed Land Classification System as overall (master) productivity rating class C, D, E, or U are compatible with agricultural activities and are therefore permitted uses of agricultural lands. ["Within agricultural

⁴ HAR section 15-15-100 authorizes the Commission to issue a declaratory order on the matters contained in the Petition within 90 days after the receipt of a petition for declaratory order.

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.” (emphasis added)].

3. The Commission has asserted its jurisdiction under similar questions in the past.

4. The County of Hawai‘i Zoning Code (Hawai‘i County Code (“HCC”), chapter 25) defines “Kennel” as a commercial establishment in which dogs or domesticated animals are housed, groomed, bred, boarded, trained, or sold, all for a fee or compensation. The term includes animal quarantine stations (HCC section 25-1-5). The Zoning Code further identifies a “Kennel” as a permitted use within the Agricultural (A) zoned district (HCC section 25-5-71).

5. *Webster’s Third International Dictionary*⁵ defines “animal husbandry” as including “a branch of agriculture concerned with the production and care of domestic animals” (at p.85).

6. *Webster’s Third International Dictionary* defines “livestock” as “animals of any kind kept or raised for use or pleasure; *esp*: meat and dairy cattle and draft animals – opposed to *dead stock*[.]”

⁵ *Webster’s Third International Dictionary* was quoted by the court in Linn County v. Hickey, 778 P.2d 509 (Ore. 1989).

7. HAR section 15-15-104 provides that “[a]n order disposing of a petition shall apply only to the factual situation described in the petition or set forth in the order.”

8. Based on the evidence in the record, the Commission concludes that Petitioners’ operation of a pet boarding kennel on their Property constitutes or is compatible with “raising livestock” or “animal husbandry,” and therefore is a permissible use in the State Land Use Agricultural District.⁶

DECLARATORY ORDER

At the Commission’s meeting on the Petition on May 3, 2012, in Honolulu, Hawai‘i, a motion was made and seconded to grant the Petition with the provision that this decision shall be limited to the specific facts at hand. Following discussion by the Commissioners, a vote was taken on this motion. There being a vote tally of 7 ayes, 0 nays, and 2 excused, the motion carried.

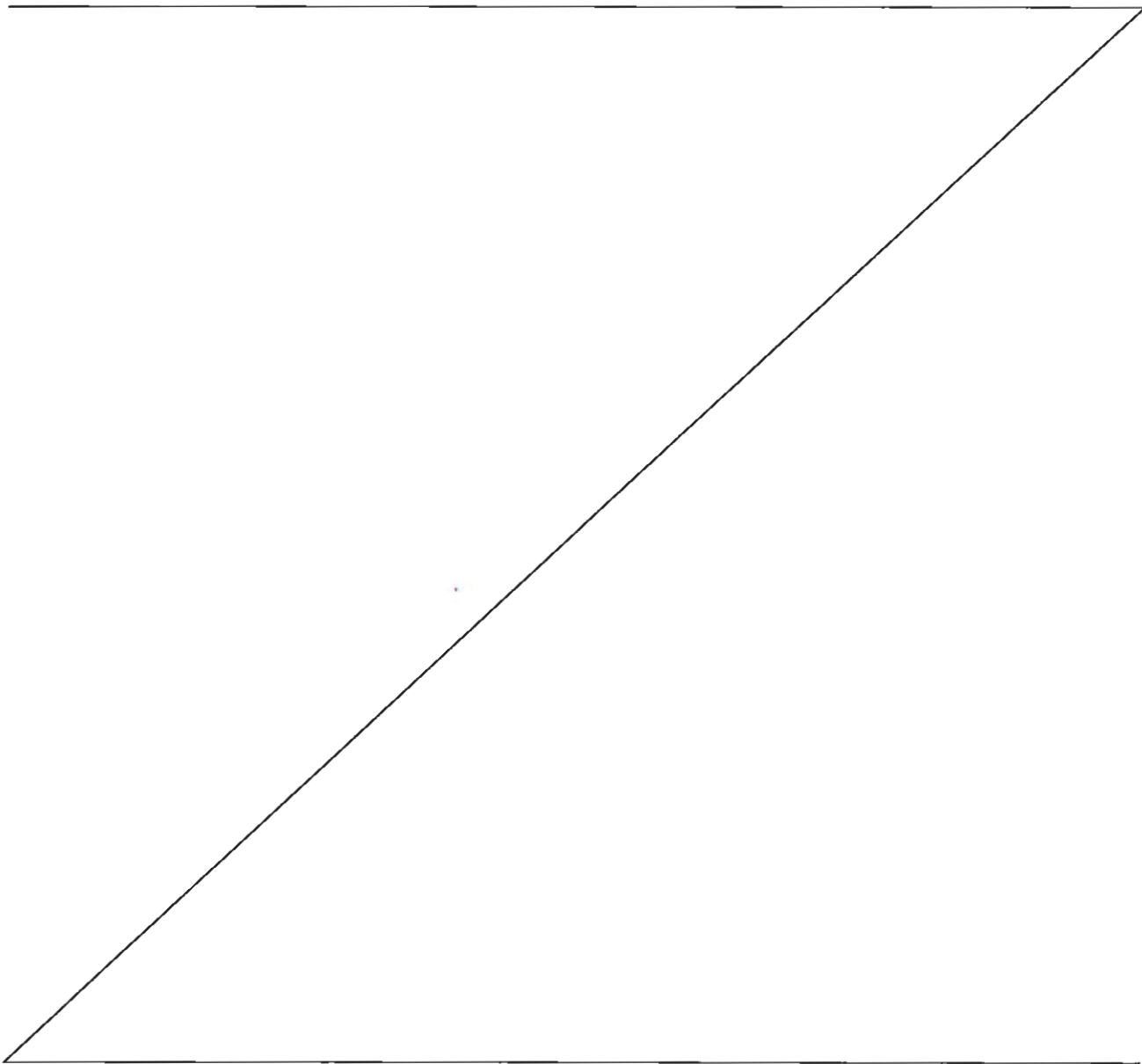
Having duly considered the Petition, the written and oral arguments presented by Petitioners, OP, and the Planning Department, and a motion having been made and seconded at a meeting conducted on May 3, 2012, in Honolulu, Hawai‘i, and the motion having received the affirmative votes required by HAR section 15-15-13, and there being good cause for the motion, the Commission hereby RULES as follows:

⁶ See, e.g., Linn County v. Hickey, 778 P.2d 509 (Ore. 1989); and Harris v. Rootstown Tp. Zoning Bd. of Appeals, 338 N.E.2d 763 (Ohio 1975).

Under the facts as presented to the Commission, Petitioners' operation of a pet boarding kennel on their Property is a permissible use in the State Land Use Agricultural District pursuant to HRS sections 205-2 and 205-4.5.

IT IS FURTHER DECLARED that:

This decision shall apply solely to the factual situation described in the Petition and at hearing on May 3, 2012, pursuant to HAR section 15-15-104, and shall not have precedential effect.



ADOPTION OF ORDER


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

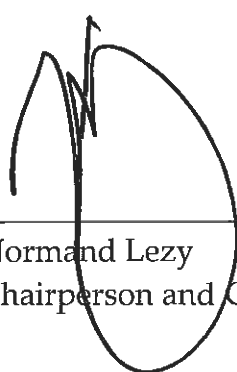
Done at Honolulu, Hawai'i, this 8th, day of June 2012, per motion on May 3, 2012.

LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAII


Deputy Attorney General

By  _____
Normand Lezy
Chairperson and Commissioner

Filed and effective on:

6/8/12

Certified by:


DANIEL ORODENKER
Executive Officer



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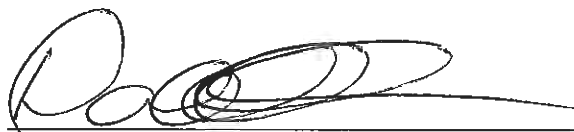
CERTIFICATE OF SERVICE

I hereby certify that a copy of this 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:

	HAND DELIVERED	REGULAR MAIL	CERTIFIED MAIL
Jesse Souki, DIRECTOR Office of Planning 235 S. Beretania Street Rm. 600 Honolulu, Hawai'i 96813	X		

	HAND DELIVERED	REGULAR MAIL	CERTIFIED MAIL
BRYAN YEE, ESQ. Deputy Attorney General Hale Auhau, Third Floor 425 Queen Street Honolulu, Hawai'i 96813		X	
BOBBY JEAN LEITHEAD-TODD Hawai'i County Planning Department 101 Pauahi Street Hilo, Hawai'i 96720		X	
LINCOLN ASHIDA, ESQ. Corporation Counsel County of Hawai'i 101 Aupuni Street, Suite 325 Hilo, Hawai'i 96720-4262		X	
CADES SCHUTTE, LLP ROY A. VITOUSEK III SEAN SMITH 1000 Bishop Street Suite 1200 Honolulu, HI 96813-4216			X

Honolulu, Hawai'i, June 8 , 2012.



DANIEL ORODENKER
Executive Officer