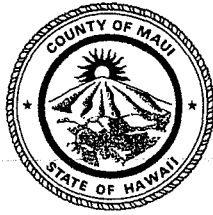


ALAN M. ARAKAWA
Mayor



PATRICK K. WONG
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7740 FAX 270-7152

March 4, 2013

MEMO TO: Council Member Donald G. Couch, Jr.

F R O M: ~~Michael~~ Michael J. Hopper, Deputy Corporation Counsel

SUBJECT: **AGRICULTURAL TOURISM** (PAF 12-196)

You requested an opinion from this office regarding the following:

1. Does Chapter 19.65, MCC, relating to short-term rental homes, fulfill the requirements of Act 329 to allow agricultural tourism activities, including overnight accommodations, in Agricultural Districts?
2. If not, may I please request that your Department, in consultation with the Department of Planning, draft a bill, approved as to form and legality, to permit agricultural tourism activities in Agricultural Districts in the County of Maui?

I understand that the purpose of your request is to determine whether obtaining a short-term rental home permit pursuant to Chapter 19.65, Maui County Code ("MCC"), permits the operation of a short-term rental home ("STRH") as an "agricultural tourism activity" without the necessity of obtaining a special permit pursuant to Section 205-5, Hawaii Revised Statutes ("HRS"). We answer in the negative.

HRS Section 205-2 sets forth the permitted uses in the State Agricultural District. Section 205-2(12), which was added through Act 329 on July 10, 2012, as noted in your request, states that the following is permitted in the State Agricultural District:

- (12) Agricultural tourism activities, including overnight accommodations of twenty-one days or less, for any one stay within a county; provided that this paragraph shall apply only to a county that includes at least three islands and has adopted ordinances regulating

agricultural tourism activities pursuant to section 205-5; provided further that the agricultural tourism activities coexist with a bona fide agricultural activity. For the purposes of this paragraph, "bona fide agricultural activity" means a farming operation as defined in section 165-2¹.

HRS Section 165-2 defines a "farming operation" as follows:

"Farming operation" means a commercial agricultural, silvicultural, or aquacultural facility or pursuit conducted, in whole or in part, including the care and production of livestock and livestock products, poultry and poultry products, apiary products, and plant and animal production for nonfood uses; the planting, cultivating, harvesting, and processing of crops; and the farming or ranching of any plant or animal species in a controlled salt, brackish, or freshwater environment. "Farming operation" includes but shall not be limited to:

(1) Agricultural-based commercial operations as described in section [205-2(d)(15)];

(2) Noises, odors, dust, and fumes emanating from a commercial agricultural or an aquacultural facility or pursuit;

(3) Operation of machinery and irrigation pumps;

(4) Ground and aerial seeding and spraying;

(5) The application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and

(6) The employment and use of labor.

A farming operation that conducts processing operations or salt, brackish, or freshwater aquaculture operations on land that is zoned for industrial, commercial, or other nonagricultural use shall not, by reason of that zoning, fall beyond the scope of this definition; provided that those processing operations form an integral part of operations that otherwise meet the requirements of this definition.²

¹ HRS § 205-2(12).

² HRS § 165-2.

Section 19.30A.060N, MCC, which was adopted by Ordinance 3941 (2012) and became effective on May 23, 2012, lists allowed special uses in the County Agricultural District and states, in pertinent part:

Short-term rental homes, subject to the provisions of chapter 19.65 of this title; provided that, the applicant need not obtain a County special use permit pursuant to section 19.510.070 of this title; and provided further that, if the property containing the short-term rental home is located in the State agricultural district, the applicant shall obtain a State special use permit, pursuant to section 205-6, Hawaii Revised Statutes, in addition to the short-term rental home permit required by chapter 19.65 of this title.³

Based on this language, an applicant for a STRH permit for land located in the County Agricultural and State Agricultural Districts must obtain both a STRH permit **and** a State special use permit, pursuant to HRS § 205-6, prior to STRH operation.

Act 329 allows certain overnight accommodations in the State Agricultural District without a State special use permit under certain circumstances; however, it was enacted nearly two months after Section 19.30A.060N, MCC was adopted. As such, Section 19.30A.060N, MCC does not reflect the amendments to HRS § 205-2 made by Act 329, including the ability to operate overnight accommodations in the State Agricultural District without a special permit, and the requirement that such overnight accommodations coexist with a bona fide agricultural activity.

Section 19.30A.060N, MCC still requires a STRH permit applicant obtain a State special permit for STRH operation in the State Agricultural District, and does not include the requirements in HRS § 205-2(12) for STRH operation without such a permit, including coexistence with a bona fide agricultural activity. It is also questionable whether Ordinance 3941 (2012) qualifies as an "agricultural tourism ordinance" as it focuses solely on STRH use in various districts, and no other uses in agricultural districts.

In order to make Section 19.30A.060N, MCC consistent with HRS § 205-2(12), the former should be amended to allow for STRH operation without a State special use permit if the requirements of HRS § 205-2(12) are fulfilled. I have drafted an ordinance to this end (attached). However, this office is aware that there may be legislative proposals submitted to the State Legislature for the upcoming session to amend the requirements for overnight accommodations in the State Agricultural District. Should those

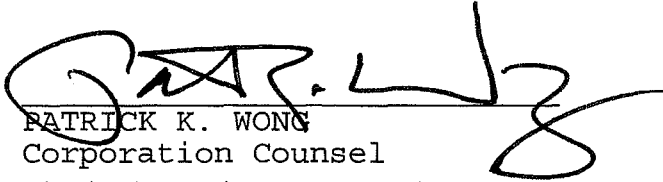
³ Chapter 19.30A.060N, Maui County Code

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requirements change, it may be necessary to further amend the Maui County Code to reflect such requirements.

Should you have any additional questions or concerns, please do not hesitate to contact me.

APPROVED FOR TRANSMITTAL:



PATRICK K. WONG
Corporation Counsel

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ORDINANCE NO. _____

BILL NO. _____ (2013)

A BILL FOR AN ORDINANCE AMENDING TITLE 19, MAUI COUNTY CODE,
RELATING TO SHORT-TERM RENTAL HOMES

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. The purpose of this bill is to establish short-term rental homes as an agricultural tourism activity in the County Agricultural District and to allow short-term rental homes that do not qualify as agricultural tourism activities pursuant to State law to apply for a State special use permit pursuant to section 205-6, Hawaii Revised Statutes.

SECTION 2. Section 19.30A.050, Maui County Code, is amended by amending subsection B to read as follows:

"B. Accessory Uses. Uses that are incidental or subordinate to, or customarily used in conjunction with a permitted principal use, as follows:

1. Two farm dwellings per lot, one of which shall not exceed one thousand square feet of developable area;

2. One farm labor dwelling per five acres of lot area.
On the island of Maui, the owner or lessee of the lot shall meet two of the following three criteria:

a. Provide proof of at least \$35,000 of gross sales of agricultural product(s) per year, for the preceding two consecutive years, for each farm labor dwelling on the lot, as shown by State general excise tax forms and federal form 1040 Schedule F filings;

b. Provide certification by the department of water supply that agricultural water rates are being paid if the subject lot is served by the County water system; or

c. Provide a farm plan that demonstrates the feasibility of commercial agricultural production.

On the islands of [Moloka'i] Molokai and [Lana'i,] Lanai, the owner or lessee of the lot shall meet both of the

criteria provided by subsections 19.30A.050.B.2.a and 19.30A.050.B.2.b];].

3. One agricultural products stand per lot, for the purpose of displaying and selling agricultural products grown and processed on the premises or grown in the County, provided that said stand shall not exceed three hundred square feet, shall be set back at least fifteen feet from roadways, shall have a wall area that is at least fifty percent open, and shall meet the off-street parking requirements for roadside stands provided by section 19.36.010 of this [code,] title, except that paved parking shall not be required; stands that display or sell agricultural products that are not grown on the premises shall be required to obtain a special permit pursuant to chapter 205, [Hawai'i] Hawaii Revised Statutes;

4. Farmer's markets, for the growers and producers of agricultural products to display and sell agricultural products grown and processed in the County; structures shall have a wall area that is at least fifty percent open; markets shall operate only during daylight hours and shall not operate on parcels less than ten acres; the director of public works may impose additional requirements if a building permit is required for any structures; markets that display or sell agricultural products that are not grown on the premises shall be required to obtain a special permit pursuant to chapter 205, [Hawai'i] Hawaii Revised Statutes;

5. Storage, wholesale, and distribution, including barns; greenhouses; storage facilities for agricultural supplies, products, and irrigation water; farmer's cooperatives; and similar structures that are customarily associated with one or more of the permitted principal uses or, for the purpose of this section, are associated with agriculture in the County;

6. Processing of agricultural products, the majority of which are grown in the County; this includes the burning of bagasse as part of an agricultural operation;

7. Energy systems, small-scale;

8. Small-scale animal-keeping;

9. Animal hospitals and animal board facilities; if conducted on the island of [Moloka'i,] Molokai, such uses shall have been approved by the [Moloka'i] Molokai planning commission as conforming to the intent of this chapter;

10. Riding academies; if conducted on the island of [Moloka'i,] Molokai, such uses shall have been approved by the [Moloka'i] Molokai planning commission as conforming to the intent of this chapter;

11. Open land recreation as follows: hiking; noncommercial camping; fishing; hunting; equestrian activities; rodeo arenas; arboretums; greenways; botanical gardens; guided tours that are accessory to principal uses, such as farm or

plantation tours, petting zoos, and garden tours; hang gliding; paragliding; mountain biking; and accessory restroom facilities. If hiking, fishing, hunting, equestrian activities, rodeo arenas, hang gliding, paragliding, or mountain biking, are conducted for commercial purposes on the island of [Moloka'i,] Molokai, such uses shall have been approved by the [Moloka'i] Molokai planning commission as conforming to the intent of this chapter. Open land recreation uses or structures not specifically permitted by this subsection or by subsection 19.30A.060.H shall be prohibited; certain open land recreation uses or structures may also be required to obtain a special permit pursuant to chapter 205, [Hawai'i] Hawaii Revised Statutes;

12. Except on [Moloka'i,] Molokai, bed and breakfast homes permitted under chapter 19.64 of this code that are:

a. Operated in conjunction with a bona fide agricultural operation that produced \$35,000 of gross sales of agricultural products for each of the preceding two years, as shown by State general excise tax forms and federal form 1040 [schedule] Schedule F filings; or

b. In compliance with all of the following criteria, provided that the bed and breakfast home is not subject to a condominium property regime pursuant to chapter 514A, Hawaii Revised Statutes:

i. The lot was created prior to November 1, 2008[.];

ii. The lot is comprised of five acres or less; and

iii. An approved farm plan has been fully implemented and is consistent with chapter 205, Hawaii Revised Statutes; or

c. Located in sites listed on the State of Hawaii Historic Register or the National Register of Historic Places.

13. Parks for public use, not including golf courses and not including commercial uses, except when under the supervision of a government agency in charge of parks and playgrounds; [and]

14. Short-term rental homes, subject to the provisions of chapter 19.65 of this title; provided that the short-term rental home coexists with a bona fide agricultural activity. For the purposes of this paragraph, "bona fide agricultural activity" means a farming operation as defined in section 165-2, Hawaii Revised Statutes; and

15. Other uses that primarily support a permitted principal use; however, such uses shall be approved by the appropriate planning commission as conforming to the intent of this chapter."

Section 19.30A.060, Maui County Code, is amended to read as follows:

"19.30A.060 Special uses. The following uses and structures shall be permitted in the agricultural district if a special use permit, pursuant to section 19.510.070 of this title, has been obtained; except that if a use described in this section also requires a special permit pursuant to chapter 205, Hawaii Revised Statutes, and if the land area of the subject parcel is fifteen acres or less, the [state] State special permit shall fulfill the requirements of this section:

A. Additional farm dwellings beyond those permitted by subsection 19.30A.050.B.1;

B. Farm labor dwellings that do not meet the criteria of subsection 19.30A.050.B.2;

C. Agricultural products stands that do not meet the standards of subsection 19.30A.050.B.3;

D. Farmer's markets that do not meet the standards of subsection 19.30A.050.B.4;

E. Public and quasi-public institutions that are necessary for agricultural practices;

F. Major utility facilities as defined in section 19.04.040 of this title;

G. Telecommunications and broadcasting antenna;

H. Open land recreation uses, structures or facilities which do not meet the criteria of subsection 19.30A.050.B.11, including commercial camping, gun or firing ranges, archery ranges, skeet shooting, paint ball, bungee jumping, skateboarding, roller blading, playing fields, accessory buildings and structures. Certain open land recreation uses or structures may also be required to obtain a special permit pursuant to chapter 205, Hawaii Revised Statutes. The following uses or structures shall be prohibited: airports, heliports, drive-in theaters, country clubs, drag strips, motor sports facilities, golf courses and golf driving ranges;

I. Cemeteries, crematories, and mausoleums;

J. Churches and religious institutions;

K. Mining and resource extraction;

L. Landfills;

M. Solar energy facilities that are greater than fifteen acres; and

N. Short-term rental homes, subject to the provisions of chapter 19.65 of this title[;], that do not qualify as accessory uses under section 19.30A.050.(B)(14); provided that, the applicant need not obtain a County special use permit pursuant to section 19.510.070 of this title; and provided further that, if the property containing the short-term rental home is located in the State agricultural district, the applicant shall obtain a State special use permit, pursuant to section 205-6, Hawaii Revised Statutes, in addition to the short-term rental home permit required by chapter 19.65 of this title."

SECTION 3. Material to be repealed is bracketed. New material is underscored.

In printing this bill, the County Clerk need not include the brackets, the bracketed material, or the underscoring.

SECTION 4. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM
AND LEGALITY:



MICHAEL J. HOPPER
Deputy Corporation Counsel
County of Maui

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