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August 14, 2007

Kauai County Council
c/o Council Services Division
4396 Rice Street, Room 206
Lihue, Kauai, HI 96766

Re: Kauai County Bill 2204

Honorable Chairman Asing and members of the Kauai County Council:

As you know, we represent a number of owners of property on the North Shore of Kauai within the Agricultural District. On June 25, 2007, we submitted on their behalf, and at the request of the Kauai Board of Realtors, a letter raising a number of concerns relating to Bill 2204, and we submitted a follow-up letter on July 17, 2007, addressing several issues raised at the Kauai County Council Planning Committee's June 27, 2007 meeting. This letter is intended to address amendments to Bill No. 2204 that have been circulated since we submitted our previous correspondence, and specifically refers to the most recent version of Bill No. 2204, dated August 6, 2007.

We agree in principle with prospectively regulating new transient vacation rentals and stopping the proliferation of new vacation rentals outside of the Visitor Destination Areas, including within the Agricultural District. However, we believe regulation of vacation rentals should be done in a manner that is legal and does not interfere with the property rights of owners of existing vacation rental uses. For that reason, in our June 25 letter we requested that Bill No. 2204 be amended to grandfather existing single-family vacation rentals on agricultural land as nonconforming uses, and explained why it would be improper and illegal for such existing vacation rentals not to be grandfathered. We are dismayed to see that the recent amendments to the bill fail to address our concerns and we sincerely hope, and respectfully request, that you will reconsider that request, as well as address the additional concerns raised in this letter.

A. The Recent Amendments to Bill No. 2204 Fail to Grandfather Existing Vacation Rentals in the Agricultural District as Required Under State Law.

The amended version of Bill No. 2204 does not rectify the problems in the previous version of the bill that we brought to the Council's attention in our previous letters. All of the reasons set forth in our June 25, 2007, and July 17, 2007, letters as to why existing single-

family vacation rentals within the Agricultural District should be grandfathered under Bill No. 2004 continue to apply, as do the concerns set forth in the letters dated March 7, 2007, and March 13, 2007, submitted to the Council by Jonathan J. Chun of Belles, Graham, Proudfoot & Wilson. The discussion below explains why the amended version of Bill No. 2204 fails to cure the defects in the previous version and elaborates further as to why it would be improper for the bill to fail to grandfather existing single-family vacation rentals within the Agricultural District.

1. Bill No. 2204 essentially prohibits existing vacation rentals in the Agricultural District by requiring a discretionary permit with eligibility requirements that are virtually impossible to meet.

In addition to the requirements imposed on other existing single-family vacation rentals, Bill No. 2204, as amended, only allows existing single-family vacation rentals to continue operating in the Agricultural District if the property owner obtains a special use permit (except for single-family residences constructed prior to 1976), which is a discretionary permit that must be approved by the County Planning Commission. The Planning Commission may only approve a special use permit if it makes certain findings, requiring the vacation rental to meet criteria which are so onerous that virtually no existing single-family vacation rental within the agricultural district will be eligible to continue operating. The criteria include a requirement that either more than half of an applicant's household income comes from farming operations on the same property as the vacation rental, or more than 90 percent of the property is being used for farming purposes.

It is extremely unlikely that in today's economy any vacation rental property owners would be able to satisfy the criterion of more than half of a household's income coming from farming operations on the same property. The alternative requirement of 90 percent farming use also would be virtually impossible to meet, especially on agriculturally zoned land that does not have Class A or B soils and which is generally unsuitable or marginally suitable for farming. As we explained in our June 25, 2007, letter, only a minority of lands within the Agricultural District (approximately one quarter) are classified as Class A or B. Adrienne Iwamoto Suarez, *Avoiding the Next Hokuli'a: The Debate over Hawaii's Agricultural Subdivisions*, 27 Hawaii L. Rev. 441, 444 (2005).

These standards are more onerous than those under state law, because – as we also explained in our June 25 letter - even the farm dwelling requirement applicable to Class A and B agricultural lands does not specify the amount of agricultural income or the percentage of property required to be used for farming purposes and fewer restrictions apply to Class C, D, E, and U lands. The County is essentially imposing upon the owners and operators of existing vacation rentals in the Agricultural District a new, extremely burdensome standard for the amount of agricultural income or agricultural use needed within the Agricultural District – a standard that has never previously applied and which the County does not appear to be applying to properties within the Agricultural District that do not have vacation rentals - without giving due consideration to the necessity to protect their vested rights through grandfathering provisions.

2. The Amended Version of Bill No. 2204 Violates Hawaii Revised Statutes Section 46-4.

The special use permit requirement, the eligibility criteria for issuance of a special use permit, and the nonconforming use permit requirement all violate Hawaii Revised Statutes ("HRS") Section 46-4, which provides that newly enacted zoning ordinances shall not prohibit the continued lawful use of any building or premises for any trade, industrial, residential, or other purpose for which the building or premises is used at the time the ordinance takes effect. Bill No. 2204 requires the operator of an existing single-family vacation rental, whether or not within the agricultural district, to demonstrate possession of a State general excise tax license and a transient accommodations tax license in order to obtain a nonconforming use permit, and requires operators of vacation rentals within the Agricultural District additionally to demonstrate that they annually file a Schedule F as part of their federal tax return in order to obtain a special use permit.

The Hawaii Court of Appeals has held that the term "lawful use" for purposes of HRS Section 46-4 does *not* refer to compliance with "building codes or other legal requirements that may be applicable to the construction or operation of a structure." *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals*, 86 Haw. 343, 356 (Haw. Ct. App. 1997). For that reason, the March 13, 2007, letter from Jonathan Chun explained the payment or lack of payment of the state GET, TAT, or any federal tax is irrelevant to determining whether a lawful use is allowed to continue under HRS Section 46-4. Moreover, filing a Schedule F is not required under Chapter 205 in order to demonstrate compliance with the farm dwelling requirement or any other requirement related to land uses within the Agricultural District. Therefore, demonstrating that a Schedule F has been filed is irrelevant in determining compliance with the requirements of Chapter 205, and requiring such a demonstration essentially creates a new regulatory standard that has not been previously applied in determining whether properties within the Agricultural District comply with Chapter 205, and which the County does not appear to be applying for purposes of determining Chapter 205 compliance for properties in the Agricultural District without vacation rental uses. Consequently, Bill No. 2204 contradicts HRS Section 46-4 by imposing the requirements to demonstrate filing of a Schedule F and possession of tax licenses.

We do, however, recognize the County's need to require that property owners demonstrate that they had a valid vacation rental in operation before the effective date of the ordinance. One possible way of accomplishing this would be to include provisions in Bill No. 2204 that provides an opportunity for such property owners to meet a burden to prove the operation of an existing vacation rental by using evidence reasonably satisfactory to the Planning Director in his or her good faith judgment, which may include possession of a State general excise tax license or a transient accommodations tax license.

Property owners should not be required to demonstrate filing of a Schedule F because, in addition to the reasons discussed above, it is irrelevant to determining whether or not a vacation rental was in operation prior to the effective date of the ordinance. Property owners still have a valid, vested right to operate, even if they have not filed a Schedule F.

3. Existing single-family vacation rentals must be grandfathered because the State and County have given no notice that such uses are not permitted within the Agricultural District

As we explained in our letter dated June 25, 2007, State law does not expressly prohibit single-family vacation rental uses within the Agricultural District, as HRS Chapter 205 is silent with respect to vacation rentals. Thus, State law currently permits vacation rental uses in the Agricultural District or, at worst, is ambiguous as to whether or not vacation rental uses are permitted. Similarly, prior to the introduction of this proposed ordinance, the County has not indicated that vacation rental uses are prohibited within the Agricultural District, except perhaps in certain special situations that may exist within the Shoreline Management Area. To the contrary, the only guidance the County has provided as to the legality of single-family residential uses consists of the 2000 memorandum opinion by former Deputy County Attorney Kobayashi, which stated clearly and without qualification that vacation rentals are not illegal outside of the Visitor Destination Areas, and the subsequent April 2005 memorandum by former County Attorney Nakazawa expressly declining to overturn that prior opinion. A large number of landowners of property within the Agricultural District on Kauai understandably have made substantial investments in existing single-family vacation rentals, relying directly or indirectly in good faith upon these documents. Bill No. 2204, as amended, fails to acknowledge that it is inequitable to prohibit such existing uses where the County has failed to give property owners any notice or indication that it considered such uses to be prohibited.

The failure of the County and State to provide any notice to property owners of any purported prohibition against vacation rentals in the Agricultural District implicates constitutional due process concerns under the doctrine of vagueness. The vagueness doctrine is based on notions of fair notice or warning. *Smith v. Goguen*, 415 U.S. 566, 572 (1974). The United States Supreme Court has explained the vagueness doctrine as follows:

"[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Id. at 573, fn 8 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (alteration in original). Under the vagueness doctrine, "a law that is so indefinite as to be unintelligible is not a law that may be used to govern people's conduct." *Almar Trucking, Inc. v. Bonanza Trucking Co.*, 154 N.W.2d 573, 574 (Mich. Ct. App. 1967). Accordingly, zoning regulations must be reasonably precise and reasonably adequate and sufficient to guide government decision-makers and to provide those affected by their decisions notice of their rights and obligations. *Ghent v. Planning Comm'n*, 594 A.2d 5, 8 (Conn. 1991).

State law does not address whether or not single-family vacation rentals are permitted within the Agricultural District and, therefore, either currently permits such uses or, at worst, is so indefinite as to be unintelligible on this issue. Similarly, the existing County Comprehensive Zoning Ordinance ("CZO") has not provided any adequate or sufficient notice to property owners that such uses are impermissible. All of the existing regulations governing transient vacation rentals under both State law and the CZO only apply to rentals in multi-unit buildings. HRS § 514E-1; Kauai County Code § 8-1.5.

Additionally, under State law, the County is responsible for enforcing violations of the HRS Chapter 205 requirements for uses within the agricultural district. HRS § 205-12. The only guidance on single-family vacation rentals that the County has provided, consisting of the opinion from Deputy County Attorney Kobayashi and subsequent memorandum from County Attorney Nakazawa, reasonably appeared to indicate that single-family vacation rentals are not illegal in the Agricultural District and elsewhere. Thus, neither the State nor the County has given landowners any reasonably precise, reasonably adequate or sufficient notice that existing single-family vacation rentals within the agricultural district are not lawful uses of property within the Agricultural District. To the contrary, the County has expressly indicated in the Kobayashi opinion and subsequent memorandum from County Attorney Nakazawa that single-family vacation rentals in areas outside of the Visitor Destination Areas (including by implication the Agricultural District) are not illegal.

Rather than penalizing property owners for any purported prohibition of which they were not given notice, the principles underlying the constitutional doctrine of vagueness mandate that the County amend Bill No. 2204 to allow existing vacation rental uses within the Agricultural District to continue to operate. In addition to the vagueness doctrine, such an amendment is also necessary due to the vested rights doctrine discussed in detail in our June 25, 2007, letter.

B. If Existing Vacation Rental Uses in the Agricultural District Are Not Grandfathered, Bill No. 2204 Should Be Amended to Include a Temporary Moratorium on Penalties

For the reasons described in this letter and our previous letters, there are many potential legal claims that could be raised if Bill No. 2204 is not amended to grandfather in existing single-family vacation rental uses within the Agricultural District. Given the likelihood of litigation, the Council may wish to consider structuring Bill No. 2204 so that owners of existing vacation rentals will not face penalties such as monetary fines and misdemeanor citations until the legality of the bill is adjudicated in court. Otherwise, the County may face large damage claims from owners of vacation rentals, including owners who have already entered into contracts for reservations several months or even more than a year into the future. A temporary moratorium on enforcement also could be used to grandfather vacation rentals within the Agricultural District while the County completes a study to determine the location of important agricultural lands, and could be structured so that no vested rights for new vacation rentals could be obtained during the period the study is being conducted or until the study is finished and appropriate changes to Bill No. 2204 have been made based on its results.

C. Request for Copy of Email from Anthony Ching Referenced During the August 1, 2007, Kauai County Council Planning Committee Meeting.

During the August 1, 2007, Kauai County Council Planning Committee meeting, JoAnn Yukimura referred to an email from Anthony Ching, Executive Officer of the State of Hawaii Land Use Commission. Under the Uniform Information Practices Act, HRS Ch. 92F-2, there is a general policy of access to government records and that the formation and conduct of public policy - the discussions, deliberations, decisions, and action of government agencies - shall be conducted as openly as possible. We hereby request a copy of the email from Anthony Ching for our review.

D. Conclusion

In conclusion, the amendments to Bill No. 2204 fail to address or cure any of the problems with the proposed bill that we have pointed out in our previous correspondence. We continue to request that the Council amend Bill No. 2204 to grandfather existing vacation rentals in the Agricultural District, without requiring discretionary permits or satisfaction of onerous findings requirements. Amending Bill No. 2204 in this manner is necessary to avoid substantial harm to landowners who have operated existing vacation rentals within the Agricultural District in good faith reliance upon memoranda from the County Attorney's office and upon the lack of any prohibition of such uses under existing State law and County ordinances.

Amending Bill No. 2204 to grandfather existing vacation rentals within the Agricultural District is also necessary to avoid the various legal problems with its enactment and enforcement that we have described in this letter and in our prior correspondence. Amending the bill in this manner would recognize the vested rights of property owners, while at the same time allowing the County to prospectively address the primary concerns that have led the County to consider the bill: preventing the proliferation of new vacation rental uses and preserving affordable housing opportunities and the character of the island. We believe that the County has the existing legal authority and capacity to address any problems related to noise, parking, and other specific neighborhood concerns related to any particular existing vacation rental use, and that these problems are best addressed by the County directly on an individual basis rather than through a blanket prohibition on existing vacation rentals within the Agricultural District that disregards the valid, vested rights of their owners to continue operating as a nonconforming use.

Thank you very much for considering our requests and for your attention to these issues, which affect a significant number of property owners on Kauai.

Very truly yours,



Dennis M. Lombardi
Lauren R. Sharkey