

January 3, 2008

Mr. Kaipo Asing, Chair
Kauai County Council
c/o Council Services Division
4396 Rice Street, Room 206
Lihue, Kauai, Hawaii 96766

Re: Bill No. 2204, as amended, Kauai County Council
A Bill For An Ordinance To Amend Chapter 8
Of the Kauai County Code 1987, As Amended
Relating To the Comprehensive Zoning Ordinance

Dear Chair Asing and Members:

At the committee hearing regarding the above bill on December 10, 2007, it was indicated that an amendment to the above bill might be submitted that would require the phasing out of all single family dwelling transient vacation rentals ("TVRs") that are not within a designated Visitor Destination Area ("VDA") within eighteen months. As indicated in our letter dated August 27, 2007, we feel that HRS § 46-4 prohibits the County Council from exercising its zoning authority to phase out legitimate nonconforming residential or agricultural uses. HRS § 46-4 expressly states that "**in no event shall such amortization or phasing out** of nonconforming uses **apply to any existing buildings or premises used for residential** (single family or duplex) or **agricultural** uses." (emphasis added). Based on this provision it would be unlikely that any phase out of existing single family dwelling TVRs outside of a VDA will be enforceable.

While it may be argued that the rental of a home is not a "residential" use, these arguments have generally not been successful if the language in the ordinances defining residential uses does not expressly forbid such rental. For example, in County of Maui v. Puamana Management Corporation, 2 Haw. App. 352 (1981) the County of Maui attempted to stop the short term rental of single family homes on the basis that such rentals are not allowed in a residential zoned area. As the Court noted "it would appear that appellant's position is that **unless the renter of a unit in a residential area manifests an intent to make that unit his permanent home**, the act of renting to him violates the ordinance. **That position is, on its face, absurd.**" 2 Haw. App. at 355 (emphasis added). The Puamana court reviewed the language of the existing Maui zoning ordinance and found that the ordinance limited only the design of the buildings or structures and not its use.

Mr. Kaipo Asing, Chair
Page 2
January 3, 2008

Based on this review the court stated it was "**unwilling to hold**, as appellant urges, **that the continuous and collective rental of units for a period of one week or longer** with provisions for maid and housekeeping services **violates the residential zoning of the premises in question** under the ordinances as drawn. Like the court below, we are unwilling to say that an individual apartment owner could not so use his property and see no real difference between one apartment owner so using his property and a number of apartment owners banding together collectively to so use their properties." 2 Haw. App. at 358 (emphasis added).

This decision is consistent with other decisions around the country. See generally Brown v. Sandy City, 957 P.2d 207 (Utah Ct. App. 1998); City of Portland v. Carriage Inn, 67 Or. App. 44, 676 P.2d 943 (Or. Ct. App. 1984). In Sandy City the city administratively determined that single family dwellings in residential districts could not be rented for periods of less than 30 days. Two homeowners appealed this determination and the Utah Court of Appeals reversed the trial court's decision. In reaching its decision the court noted that the ordinance in question only requires that a "single-family dwelling located in the two residential zones at issue be used as a building for occupancy by either related people or no more than four unrelated people operating as a household." Furthermore, the court also noted that the parties "agree that the Code never places an express durational limit on the use of any property." 676 P.2d at 211. In trying to defend its decision the city argued that unless short term leases are expressly permitted by the ordinance it is prohibited. The court held that this argument was "untenable" stating:

The Code specifically permits use of a dwelling unit for occupancy by a single family. Thus, if a single family occupies a home, the structure is being used as permitted. However, Sandy contends that, because the Code does not specifically permit occupancy by a single *tenant family for less than thirty days*, occupancy by a single *tenant family for less than thirty days* is proscribed by the ordinance. We are not willing to import such a restriction. The Code does not limit the permitted use by referencing the type of estate the occupying family holds in the property or the duration of the occupancy. Thus, it is irrelevant what type of estate, if any estate at all, the occupying family has in the dwelling, i.e., whether the family holds a fee simple estate, a leasehold estate, a license, or no legal interest in the dwelling. It is equally irrelevant whether the occupying family stays for one year or ten days. The only relevant inquiry is whether the dwelling is being used for occupancy by a single family; if it is, the ordinance has not been violated.

957 P.2d at 211. Finally, the city argued that allowing short term rentals in existing residential areas was contrary to the purpose of the residential zones. The court while recognizing that the short term

rentals may disrupt the residential environment of a neighborhood the city, by failing to prohibit short term leases in its ordinance, "has implicitly determined that such practices are conducive to a residential environment." Id. at 212. The court concluded that it "will not find a violation of law simply because [the permitted use may appear] inconsistent with the general intent statement when [the use] is in compliance with the substantive provisions of the ordinance." Id.

Similarly in City of Portland v. Carriage Inn, 67 Or. App. 44, 676 P.2d 943 (Or. Ct. App. 1984) the city attempted to enjoin an apartment building owner from renting out his units for "transient occupancy." The lower court dismissed the city's action and the court of appeals affirmed the dismissal. In reaching its decision the court noted that "an apartment dwelling is defined primarily in terms of design or structure. It is a building comprised of three or more dwelling units in which each dwelling unit contains all of the facilities necessary for one or more persons to live independently" and rejected the city's argument that it should, by inference, adopt the dictionary's definition of residential which would imply living in a place for some time. 676 P.2d at 944. The court reasoned that "the only conclusion to be drawn from the foregoing examples [of the definitions within the ordinance] is that 'residential' was intended to differentiate those uses involving living arrangements for persons from other types of uses such as commercial, manufacturing and farming, rather than to distinguish long-term from short-term occupancy." 676 P.2d at 945.

The language contained in the CZO are similar to the ordinances reviewed in Puamana, Sandy City and City of Portland in that the allowed uses are only defined based on the design or use of the building and not the duration of the occupancy. For example, single family detached dwellings are expressly allowed in residential zones. Under the CZO a single family detached dwelling is defined as "a building consisting of only one (1) dwelling unit designed for or occupied exclusively by one (1) family" (emphasis added). A dwelling unit is defined in the CZO as "any building or any portion thereof which is designed or intended for occupancy by one (1) family or persons living together or by a person living alone and providing complete living facilities, within the unit for sleeping, recreation, eating and sanitary facilities, including installed equipment for only one (1) kitchen." (emphasis added). The only restriction contained in the CZO relating to the occupancy of a building relates to transient vacation rentals in multi-unit buildings for occupancies of less than thirty days. This restriction limits TVRs in multi-unit buildings to either hotels in resort or commercial districts or to resort or residential districts within a VDA. Short term rentals in single family dwelling units are currently not restricted.

Finally, the general law regarding the use of private property does not distinguish between short term and long term rental of property for residential use. See generally Lowden v. Bosley, 3965 Md. 58, 909 A.2d 261 (Md 2006); Pinehaven Planning Board v. Brooks, 138 Idaho 826, 70 P.3d 664 (2003). In Lowden the owners of vacation homes sought to enjoin their neighbors from engaging in short term rentals on the basis that the private covenants restrict the use of the property to only "single family residential purposes" and not commercial. The trial court ruled that

the covenants did not prohibit the short term rental of the homes and the Maryland Supreme Court affirmed the decision reasoning:

The crux of the Lowdens' argument is that a homeowner's use of his or her home 'primarily to make money' by renting it does not constitute a "'residential' use,' even though the tenant uses the home as a residence for a short term ... The Lowdens assert that "'residential' use' excludes 'rentals.' ... According to the Lowdens, the defendant-homeowners are engaged in 'the commercial or business use of renting.' ...

...When the owner of a permanent home rents the home to a family, and that family, as tenant, resides in the home, there obviously is no violation of the Declaration. While the owner may be receiving rental income, the use of the property is unquestionably 'residential.' The fact that the owner receives rental income is not, in any way, inconsistent with the property being *used* as a residence. The Lowdens by focusing entirely upon the owner's receipt of rental income, ignore the residential use by the tenant.

'Residential use,' without more, has been consistently interpreted as meaning that the use of the property is for living purposes, or a dwelling, or a place of abode. ... The word 'residential' has been applied to apartment buildings, fraternity houses, hotels, and bed-and-breakfasts, because such structures are used for habitation purposes. ... The transitory or temporary nature of such use does not defeat the residential status.

The Lowdens, as well as some of the out-of-state cases on which they rely, seem to view the owner's receipt of income from a residential tenant as inconsistent with 'residential' use. There is no inconsistency. The owners' receipt of rental income in no way detracts from the *use* of the properties as *residences* by the tenants. There are many residential uses of property which also provides a commercial benefit to certain persons.

909 A.2d at 266-267 (citations omitted)(emphasis original). Similarly the Idaho Supreme Court in Pinehaven Planning Board v. Brooks, 138 Idaho 826, 70 P.3d 664 (2003) also ruled that a private covenant prohibiting commercial ventures or businesses on residential lots did not prohibit the short term rental of a house stating:

Mr. Kaipo Asing, Chair
Page 5
January 3, 2008

Renting the property for residential purposes, whether short or long-term, does not fit within these prohibitions. The only building on the Brooks' property remains a single-family dwelling and renting this dwelling to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood.

70 P.3d at 668.

As can be seen from the above authorities, the mere short term rental of a house does not change the character of its use from residential to commercial. If the short term rental of a house is still considered residential, then the County is prohibited from phasing out such existing uses pursuant to HRS §46-4. Please feel free to call me if you have any questions regarding this matter.

Sincerely,

BELLES GRAHAM PROUDFOOT
WILSON & CHUN, LLP

Jonathan J. Chun

JJC:so

cc: Ms. Karen Ono, Executive Officer
Kauai Board of Realtors
Ms. Denise Motohiro
Hawaii Association of Realtors
Pitluck, Kido, Stone & Aipa, LLP