

March 13, 2007

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

Ms. JoAnn Yukimura, Committee Chair
Zoning Committee
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 Committee Chair Yukimura:

At the hearing on the above bill, Committee Chair Yukimura submitted an amended version of Bill No. 2204 for the committee's consideration. Committee Chair Yukimura also noted that the committee was in receipt of my letter dated March 7, 2007, and requested the County Attorney's office to review it. During the hearing Committee Chair Yukimura cited as support for her proposal the U. S. Supreme Court case of City of New Orleans v. Dukes, 427 U.S. 297, 49 L.Ed. 2d 511 (1975). While I was not certain as to the exact holding of the case, I indicated to Committee Chair Yukimura that Dukes did not involve a question of property rights, but merely involved the constitutionality of an ordinance that created a distinction between classes of commercial or economic licenses. I indicated that in such situations the Supreme Court has not been as strict on the government's actions as compared to restrictions that impacted a recognized property right or interest. Following the hearing I was able to obtain a copy of the Supreme Court's decision in Dukes and my review supports my initial statements that it is inapplicable to the current situation.

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In City of New Orleans v. Dukes, 427 U.S. 297, 49 L.Ed. 2d 511 (1975) the Supreme Court was faced with a question whether the City of New Orleans' ordinance which only allowed licensees who have been operating food carts for eight or more years to continue to operate within the French Quarter of the City. A food vendor which was not covered by this "grandfather" clause filed an action against the City on the basis that the ordinance denied him the equal protection of the law under the Fourteenth Amendment. The trial court ruled in favor of the City, but the Fifth Circuit Court of Appeal overturned the trial court and ruled that there was no rational basis between the distinction that were created by the City and the objective sought to be accomplished. The Supreme Court reversed the Fifth Circuit Court of Appeal's decision and held that a rational basis did exist to support the City's ordinance and stated:

When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations ... Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to the legitimate state interest.

427 U.S. at 303, 49 L.Ed. 2d at 516-517 (citation omitted).

This holding by the Supreme Court, however, is not controlling and, for the most part, irrelevant to our inquiry whether the suspect provisions in proposed Bill No. 2204, as amended, are proper. As the County Attorney's office is aware, there are a number of arguments in which a person might decide to attack the objectionable provisions contained in Bill No. 2204, as amended. The first argument is that proposed Bill No. 2204, as amended, is in violation of HRS Section 46-4 which requires the County to allow legal nonconforming uses to continue. This argument, which the Kauai Board of Realtors and the Hawaii Association of Realtors have emphasized in its review of Bill No. 2204, as amended, contends that the County has no authority to use its zoning powers to prohibit the continued operation of legally existing uses. The chief issue in this situation is whether the existing use was legally in operation at the time the zoning ordinance was adopted. Under this inquiry it is irrelevant whether the proposed zoning ordinance is rationally based or not. It is the contention of the Kauai Board of Realtors and the Hawaii Association of Realtors that existing transient vacation rentals in single family

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dwellings in Residential, Open, and Agricultural Districts¹ are valid nonconforming uses and must be allowed to continue despite the adoption of the new restrictions in Bill No. 2204, as amended. This position is supported by the previous opinion issued by the County Attorney's Office dated July 11, 2000, and the Hawaii Court of Appeals case in Waikiki Marketplace Inv. Co. v. Chair of Zoning Board of Appeals, 86 Haw. 343, 949 P.2d 183 (Haw. Ct. App. 1997). Furthermore, we also note that the County's own consultant at the public hearing acknowledged that the concerns raised by the Kauai Board of Realtors and the Hawaii Association of Realtors were valid and, eventually, the zoning amendments that were passed out by the Planning Commission did not contain the one year requirement for existing transient vacation rentals in single family dwellings.

In addition to the issue whether Bill No. 2204, as amended, is in violation of HRS Section 46-4, other arguments exist that could question the validity of Bill No. 2204, as amended. These arguments include the contention that Bill No. 2204, as amended, violates a landowners' "vested rights" under Hawaii law, constitutes an unconstitutional "takings" under the 5th Amendment, and/or violates a person's equal protection rights under the 14th Amendment.² Of these arguments, the contention that Bill No. 2204, as amended, is in violation of the 14th Amendment is the least pressing of the constitutional arguments available to the landowner.

Under Hawaii law the County may be estopped from denying a landowner the right to use his property in a manner that was previously allowed by the government or from taking away from a landowner certain vested property rights. See generally County of Kauai v. Pacific Standard Life Ins. Co., 65 Haw. 318, (1982); Life of the Land v. City Council, 61 Haw. 390, 606 P.2d 866 (1980). Bill No. 2204, as amended, potentially violates these two well established legal principles by prohibiting property owners who have lawfully relied, in good faith, on previous government permits and actions to construct and operate a transient vacation rental in their single family dwelling. Bill No. 2204, as amended, unilaterally places a minimum one year time requirement in order for a single family dwelling to continue to be used as a transient vacation rental. The application of this one year standard would prohibit an owner who started planning for and building his single family dwelling (and incurring the financial obligations required to accomplish this project) before the hearing on Bill No. 2204, as amended, from renting the dwelling as a transient vacation rental. While the County might argue that the owner should have been aware of the pending legislation, the County should be aware that the proposal submitted to the Council did not contain any such restriction as to existing transient

¹ It is recognized that transient vacation rentals in State Conservation Districts, without a valid conservation district use permit may be an issue, but need not be addressed in Bill No. 2204 since the County has no jurisdiction over property within the State Conservation District.

² See this Office's letter dated May 23, 2006 to Ian Costa commenting on ZA-2006-7 which discusses some of these other theories.

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vacation rentals. In this situation the property owner could make a valid claim that the County should be prohibited from enforcing the Bill No. 2204, as amended, under either the zoning estoppel or vested rights theory.

Secondly, landowners could also argue that Bill No. 2204, as amended, constitutes an unconstitutional taking of their property without compensation in violation of the 5th Amendment. Under this theory, Bill No. 2204, as amended, could be held to be an unconstitutional "taking" of a landowner's property rights, without compensation if: 1) it is determined to be either a physical taking or appropriation of a person's property, see Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L.Ed. 2d 868 (1982), 2) deprives a person of all economically beneficial use of the person's property, see Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 120 L.Ed.2d 798 (1992), or 3) the regulation so interferes with a landowner's investment-backed expectations and the character of the government's action is such that it would constitute an unjust taking without compensation, see Penn Central Transp. Co. v. New York City, 438 U.S. 104, 57 L.Ed. 2d 631 (1978).

The Kauai Board of Realtors and the Hawaii Association of Realtors encourages the County Council to carefully consider these issues when it considers Bill No. 2204, as amended. My clients recognize the Council's desire to address the perceived issues surrounding transient vacation rentals in non-VDA, but it also needs to consider and respect the legally recognized property rights of existing transient vacation rental owners. Thank you for your kind attention and consideration to the thoughts and opinions contained in this letter.

Sincerely,

BELLES GRAHAM
PROUDFOOT & WILSON, LLP

Jonathan J. Chun

JJC:so
cc: Ms. Karen Ono, Executive Officer
Kauai Board of Realtors
Ms. Ann Descheme, Executive Vice President
Hawaii Association of Realtors
Pitluck, Kido, Stone & Aipa, LLP