

CASE LOMBARDI & PETTIT

A LAW CORPORATION

Daniel H. Case
James M. Cribley
Stacey W.E. Foy
Esther S. Han
Gregory M. Hansen
Michael L. Lam
Dennis M. Lombardi†
† A Law Corporation

Michael R. Marsh
Ted N. Pettit, Ph.D.
Lauren R. Sharkey
Mark G. Valencia
Nancy J. Youngren
John D. Zalewski

PACIFIC GUARDIAN CENTER, MAUKA TOWER
737 BISHOP STREET, SUITE 2600
HONOLULU, HAWAII 96813-3283

TELEPHONE: (808) 547-5400
FACSIMILE: (808) 523-1888
E-mail: info@caselombardi.com
<http://www.caselombardi.com>

David G. Brittin
Michael G. Kozak
Malia S. Lee
Sandy S. Ma
Alexis M. McGinness
Margaret E. Parks

Of Counsel
Frederick W. Rohlifing III
Gary L. Wixom

Bruce C. Bigelow (1946-2001)

June 25, 2007

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

Re: Effects of Bill No. 2204 on Existing Vacation Rentals in the Agricultural District

Honorable Chairman Asing and members of the Kauai County Council:

We represent a number of landowners on the North Shore of Kauai who own properties with existing vacation rental uses within the agricultural district. We are writing on behalf of those owners, and at the request of the Kauai Board of Realtors, to express our serious concerns regarding the legality of the currently proposed version of Bill No. 2204, which would restrict transient vacation rentals throughout Kauai, and its potential to inflict significant hardships on our client and a large number of other landowners who currently operate vacation rentals in good faith under the existing County of Kauai (“County”) and State of Hawaii (“State”) ordinances and statutes.

While we applaud the purposes of Bill No. 2204 to maintain the availability of affordable housing for Kauai residents, to preserve the character of the community, and to regulate vacation rentals, the proposed bill has serious legal and constitutional defects, which are explained in more detail below. These defects, resulting from the lack of a “grandfathering” provision for existing vacation rentals in the agricultural district, could lead to severe financial consequences for the owners and operators of such vacation rentals, many of whom have been operating such uses for years relying upon the understanding that this is a lawful use. This understanding is rooted in the fact, among others, that Hawaii Revised Statutes (“HRS”) Chapter 205 does not expressly prohibit transient vacation rentals in the agricultural district and there has been no indication that farm dwelling uses exclude vacation rental uses. Since zoning ordinances must be strictly construed to protect the rights of property owners and the County has expressly indicated that it permits vacation rentals in non-Visitor Destination Areas, use of a dwelling unit within the agricultural district is not currently illegal where the unit otherwise meets the requirements of HRS Chapter 205 and applicable County ordinances.

In many, or even most instances, it would be impossible for agriculture to be viable as an exclusive use without a vacation rental or some other source of income due to the high tax and

other payments to which most owners of current vacation rentals on agricultural property would continue to be subject. In addition, variations in soil conditions and parcel size mean that the amount of agricultural use that is appropriate or even feasible differs widely from property to property within the agricultural district. In many cases, these property characteristics prevent agriculture from being economically viable as an exclusive use without supplemental income from vacation rentals or some other source, even though a property may have agricultural zoning. In reality, existing vacation rentals are in many cases subsidizing other agricultural activities on agriculturally zoned land at this time. As approximately 48 percent of Hawaii is within the agricultural district (and a similar percentage is within the conservation district)¹, Bill No. 2204 could affect an extremely large number of property owners in Kauai.

We are not requesting that the effort to adopt restrictions on transient vacation rentals be abandoned in its entirety, as there are legitimate problems related to the regulation and further proliferation of vacation rentals. However, we are requesting that Bill No. 2204 be amended to apply prospectively only to future new uses of vacation rentals, and to include a provision “grandfathering” current vacation rental uses within the agricultural district as non-conforming uses. Amending the bill in this manner, so that existing vacation rentals within the agricultural district are not treated differently than those in other districts, would avoid serious harm to the owners and operators of these existing rentals and their employees, as well as avoid many of the legal problems discussed below, while still serving to fulfill the primary purposes of the bill by preventing the proliferation of new vacation rental uses and regulating existing vacation rentals.

I. SUMMARY

Bill No. 2204 will inflict serious hardship on a large number of property owners who have invested in existing vacation rentals and agricultural lands with the understanding that these long-standing and widespread uses of agricultural district properties are currently legal, as well as on their employees and the businesses that vacation rentals help support. Bill No. 2204 should be revised to grandfather existing vacation rentals within the agricultural district as nonconforming uses for the following reasons:

- Contrary to the position that has been expressed by the drafters of Bill No. 2204, HRS Chapter 205 does not make vacation rentals illegal within the agricultural district. Voting against the currently proposed version of Bill No. 2204 or amending the bill to grandfather existing vacation rentals in the agricultural district supports a more valid interpretation of Chapter 205 and more adequately ensures the County’s actions are consistent with State law, thereby protecting the County from legal liability, than would a vote in favor of the bill as currently written.

¹ Norman Cheng, *Is Agricultural Land in Hawai’i ‘Ripe’ for a Takings Analysis?*, 24 Hawaii L. Rev. 121, 121 (2001)

- State law does not expressly prohibit vacation rental units within the agricultural district. The definition of a “farm dwelling” does not require the exclusive use of a dwelling for agricultural purposes, and can easily be satisfied by a dwelling that is also used as a vacation rental.
- Bill No. 2204 makes no distinction between lands within the agricultural district with soils classified Class A or B and those classified as less productive lands, which make up approximately three-quarters of the land in the agricultural district.
- The County’s only official position regarding vacation rentals is set forth in a 2000 memorandum opinion by former Deputy County Attorney Kobayashi, which states clearly and without qualification that vacation rentals are not illegal outside of the Visitor Destination Areas. Despite ample opportunity to repudiate this position or to qualify it by stating that it does not apply to vacation rentals in the agricultural district, the County has never done so. To the contrary, in April 2005, former County Attorney Nakazawa reaffirmed the Kobayashi opinion, stating in a subsequent memorandum to the County that the County Attorney’s office was unable to overturn that prior opinion. Thus, property owners who have invested in existing vacation rentals within the agricultural district have reasonably relied upon the Kobayashi decision’s assurance that such uses are currently legal and the County’s subsequent actions and inactions.
- The County’s General Plan also appears to indicate that vacation rentals are permitted within the agricultural district, and includes a policy stating that “vacation rentals should be allowed.” Bill No. 2204 conflicts with this policy and with a General Plan implementation action calling for Comprehensive Zoning Ordinance (“CZO”) amendments to permit existing, nonconforming vacation rentals.
- Owners of existing vacation rentals within the agricultural district have a vested right to continue such uses on their properties as a nonconforming use, because vacation rentals are lawful uses under State law, or at least are not clearly prohibited and the County has acquiesced to the operation of these uses for years and, in some cases, decades. Bill No. 2204 impermissibly fails to recognize and preserve this vested right, and fails to meet the related requirement under State law that nonconforming uses must be allowed to continue after a change in the law occurs. The State and County have had actual, or at least constructive, knowledge of the existence of vacation rentals in agricultural districts, have shared in the benefits of vacation rentals through tax revenues, and have acquiesced in such vacation rentals. Therefore, even if the vacation rentals in the agricultural district were unlawful (which we do not believe to be the case), the

owners of vacation rentals in the agricultural district nevertheless have vested property rights that the State and County are obligated to recognize and protect. This position is supported by case law discussed below which have held under equitable principles that vested property rights have existed under situations in which the rental activities that occurred were clearly unlawful, but occurred in good faith and where the government involved acquiesced to the activities over a period of time.

- The County will not be able to enforce the restrictions of Bill No. 2204 against many owners of existing vacation rentals in the agricultural district, who will be able to raise the defense of equitable estoppel. Many such property owners have made substantial expenditures in purchasing land and improving their properties in good faith reliance upon existing law and the County's official assurances, in the form of Deputy County Kobayashi's opinion, a subsequent memorandum from County Attorney Nakazawa, and the Kauai General Plan. Therefore, these property owners would be able to meet all the required elements for the defense of equitable estoppel, making Bill No. 2204 difficult to enforce and potentially generating lengthy and expensive litigation.
- The doctrine of laches could also create enforcement problems. Even if vacation rentals were currently illegal in the agricultural district, the County's long delay in enforcing violations of any such prohibition has been unreasonable and enforcement at this time would greatly prejudice owners of existing vacation rentals.
- Prohibiting existing vacation rental uses in the agricultural district would result in an unconstitutional taking of private property, which would require compensation for lost revenues to each property owner who successfully claims a taking has occurred, resulting in potentially enormous financial liability for the County.
- The prohibition in Bill No. 2204 against existing vacation rental uses in the agricultural district could lead to substantive due process claims because this arbitrary restriction unconstitutionally deprives owners of such uses of their property without due process of law.
- Bill No. 2204 also could lead to other constitutional challenges by property owners, including claims of equal protection and commerce clause violations, and interference with contracts.
- All of the above problems could potentially be avoided by what seems to be a more legal and rational approach of amending Bill No. 2204 to grandfather existing vacation rentals in the agricultural district as nonconforming uses, while

effectively declaring a moratorium on future vacation rentals in the agricultural district. This could be done while the County determines which lands should be designated important agricultural lands and which should more properly be treated as rural or given some other designation, as previously requested by the State. This approach would still enable Bill No. 2204 to effectively advance its goals of regulating and stopping the proliferation of vacation rentals, while protecting the rights of property owners who have reasonably made large investments in existing vacation rentals (and in agricultural lands and agricultural activities on the reasonable assumption that vacation rentals can subsidize and supplement such activities), and who otherwise would face severe hardships.

II. BILL NO. 2204 SHOULD BE AMENDED TO GRANDFATHER EXISTING VACATION RENTALS IN THE AGRICULTURAL DISTRICT

A. Existing Vacation Rentals Within the Agricultural District Should Be Allowed as a Nonconforming Use Because They Are Currently Lawful.

The current version of Bill No. 2204 raises serious legal problems and issues of fairness because it fails to grandfather existing vacation rentals within the agricultural district as nonconforming uses. As explained in more detail below, existing State law appears to allow such uses within the agricultural district. At the very worst, such uses are not clearly prohibited by statute and there does not appear to be any precedent in case law, State of Hawaii Land Use Commission (“LUC”) decisions, or elsewhere interpreting the statutory restrictions imposed on the agricultural district to prohibit vacation rentals. Moreover, the County has previously expressed positions indicating that vacation rentals are either legal uses within these areas or at least are not clearly prohibited. Owners of vacation rentals in the agricultural district have acted in good faith based on the reasonable understanding that, in light of the applicable statute, and prior County interpretation and enforcement of that statute, such uses are not prohibited and should not be penalized.

1. Bill No. 2204 fails to account for distinctions between soil classifications in the agricultural districts and uses allowed within each soil classification.

The treatment of existing vacation rental uses under Bill No. 2204 fails to account for an important distinction in HRS Chapter 205 between the most productive or “prime” agricultural lands within the agricultural district (i.e., lands with soils classified Class A or B), and marginal lands (i.e., lands with soils classified Class C, D, E or U) which are generally unsuitable for farming. The proposed bill also fails to distinguish those parcels that may have a combination of Class A or B lands along with Class C, D, E, or U lands. The explicit language of HRS Section 205-4.5 states that the farm dwelling requirement only applies to Class A and Class B lands. HRS § 205-4.5(a). However, the majority of land that is zoned within the agricultural district are marginal lands with soils classified as Class C, D, E or U.

Of the 1.9 million acres in the district, only one quarter are classified as A or B (prime) lands. In fact, the agricultural district is regarded as a “catch-all” district; lands not easily classified as urban, conservation, or agriculture are put into the agricultural district by default.

Adrienne Iwamoto Suarez, *Avoiding the Next Hokuli'a: The Debate over Hawai'i's Agricultural Subdivisions*, 27 Hawaii L. Rev. 441, 444 (2005). (internal quotations deleted).

With respect to the other three-quarters of the lands in the agricultural district, HRS Section 204-4.5(c) provides that lands with soils rated Class C, D, E or U “shall be restricted to the uses permitted for agricultural districts as set forth in section 205-5(b).” HRS Section 205-5(b) provides that “[w]ithin agricultural districts, uses *compatible* to the activities described in section 205-2 as determined by the [LUC] shall be permitted; provided that accessory agricultural uses and services . . . may be further defined by each county by zoning ordinance.” HRS § 205-5(b) (emphasis added). HRS Section 205-2(d) lists several uses that agricultural districts “shall include,” but HRS Sections 205-5(b) and 205-2(d) do not specify that these uses are exclusive. To the contrary, HRS Sections 204-4.5(c) and 205-5(b) read together expressly permit other uses that are compatible to agricultural activities within lands rated Class C, D, E or U, as determined by the LUC. *See* LUC Declaratory Order, *In the Matter of the Petition of the Sierra Club & David Kimo Frankel* at 12 (Oct. 25, 2000). The LUC also recognizes that a different degree of agricultural activity may be acceptable on lands with less potential productivity, as it permits a broader range of uses on Class E lands than are permitted on Class A and B lands. LUC Decision & Order, *In the Matter of the Petition of Kuleana Ku'ikahi, LLC* (Apr. 10, 2006) at 28. Because HRS Chapter 205 provides for other uses of agricultural lands which are compatible to agricultural activities and there has been no indication that vacation rental uses cannot be compatible with agricultural activities, the current version of Bill No. 2204 incorrectly assumes that vacation rentals are illegal on agricultural lands.

Vacation rentals can be compatible with agricultural uses, as they do not interfere with agricultural uses and do not irretrievably convert agricultural lands to other uses (e.g., by paving over agricultural lands for urbanization). Indeed, agricultural uses coexist with vacation rental uses on many properties in the agricultural district. Therefore, vacation rentals do not interfere with the purposes of HRS Chapter 205 to preserve agriculture and protect agricultural lands from urbanization. Moreover, as mentioned above, HRS Section 205-2(d)(10) explicitly acknowledges that many areas within the agricultural district are not suited to agricultural activities. In many instances, vacation rental uses are *necessary* to allow the owner of a property to use more marginal agriculturally zoned lands effectively for agriculture to the extent possible, because agriculture alone cannot fully support the owner due to the current high cost economic environment and the limited viability and capacity of some agriculturally zoned lands.

B. Nothing in Chapter 205 expressly prohibits a farm dwelling from being used as a vacation rental in an agricultural district.

Nothing in Chapter 205 requires that a farm dwelling must be used exclusively for agricultural purposes. It is worth noting that the definition of a “dwelling” under the County’s CZO essentially comprises a standard of design and function, rather than a standard to regulate the duration of stay. In other words, exclusive use by a permanent occupant is not a requirement for dwellings allowed as a permitted use under the CZO. There is no reason that the definition of a “farm dwelling” under HRS Section 205-4.5 cannot be interpreted in a similar manner to allow vacation rentals, provided that either the dwelling is used in connection with a farm or the dwelling has occupants that receive income from agricultural activity.

Nothing in HRS Chapter 205 explicitly states that a farm dwelling cannot be used as a vacation rental. Thus, vacation rental uses appear to be lawful if the rented dwelling otherwise meets the requirement of a farm dwelling use within the agricultural district. Chapter 205 does not clearly prohibit these uses, and does not give notice to property owners that such uses are illegal. Given the long-standing widespread use of vacation rental properties throughout the agricultural district and the lack of notice regarding any purported prohibition against vacation rental use, it is reasonable for property owners to have assumed that such uses were not prohibited, and to have made large investments in reliance on that assumption.

1. Bill No. 2204 draws a distinction with respect to vacation rentals in other districts that is not found in State law.

HRS Chapter 205 does not make any distinction with respect to expressly permitting or prohibiting transient vacation rentals within the rural, urban, and agricultural districts. *See, e.g.*, HRS §§ 205-2(b)-(c), 205-4.5, 205-5(c). Thus, there does not appear to be any basis for the differing treatment of existing vacation rentals in the agricultural district in Bill No. 2204. HRS Chapter 205 does not distinguish other State land use districts from the agricultural district in terms of specifying whether or not an otherwise permitted residence may be used as a vacation rental. The lack of a prohibition against vacation rentals in the Chapter 205 provisions for the agricultural district is similar to Chapter 205 provisions for other, non-agricultural districts. The distinction in Bill No. 2204 with respect to vacation rentals is not based upon any distinction found in HRS Chapter 205.

2. The farm use or agricultural activity requirement for farm dwellings does not preclude transient vacation rentals.

Although HRS Section 205-4.5 requires that a “farm dwelling” within Class A and B lands in the agricultural district must either be “located on and used in connection with a farm” or be occupied by a family that receives income from agricultural activity, it is important to note that Section 205-4.5 does *not* require a specified amount of agricultural use or a specified amount or percentage of agricultural income.

Had the State legislature intended to include such threshold requirements, it easily could have drafted Section 205-4.5 to do so. However, “[t]here is no legislative history on HRS section 205-4.5’s farm dwelling requirement that defines how much land must be put into, or how much income must be derived from, agricultural production.” See Suarez, *supra*, at 459-60. The Legislature has not provided any clarification as to how the definition of a farm dwelling applies to vacation rentals or otherwise. *Id.* at 458.

Furthermore, nothing in the farm dwelling definition expressly precludes vacation rentals. It is quite possible for the owner of a vacation rental to devote a portion or even the vast majority of the property on which the rental is located to agricultural uses, or to receive agricultural income and occupy the vacation rental for even a significant amount of time each year. For example, in a decision that did not involve vacation rentals, the LUC determined that an agricultural subdivision within which various owners had prepared farm plans did not violate the farm dwelling requirement. LUC Decision & Order, *In the Matter of the Petition of Kuleana Ku’ikahi, LLC* (Apr. 10, 2006) The LUC tends to look at the totality of the circumstances related to the use of a particular property. For example, in the *Kuleana Ku’ikahi* decision, the LUC looked very specifically at the existing or planned farm uses on each parcel within an agricultural subdivision. Some of the circumstances that should be taken into account are the potential productivity of the soil on a given property, as “[a]gricultural districts include areas that are not used, *or are not suited to*, agricultural and ancillary activities by reason of topography, soils, and other related characteristics.” HRS § 205-2(d)(10) (emphasis added). The size of a particular parcel may also affect the types of agricultural activities that can viably be undertaken. Certain agricultural activities may be much less viable within a property that has been subdivided into one- or five-acre parcels than on larger properties.

Thus, the scope and extent of agricultural activities or the amount of agricultural income that may be appropriate in connection with a particular vacation rental within the agricultural district could vary widely based on variations in the character of the particular property within which the rental is located. Many vacation rentals likely could meet the farm dwelling requirement, including vacation rentals with uses similar to those described in *Kukeana Ku’ikahi*. The scope of use and amount of income may vary widely, but many vacation rentals are operated in conjunction with other agricultural activities that are similar to those described in *Kukeana Ku’ikahi*. In many other instances, more limited agricultural activities could be the only such activities that are viable and appropriate. Furthermore, in many cases, vacation rental income enhances the property owners’ chances of engaging in desirable agricultural activities, remaining on their agricultural land, and preserving more of the open space and agricultural nature of small agricultural lots throughout the County and State, which is consistent with the goals of HRS Section 205 and the Hawaii Constitution.

It would be absurd to interpret HRS Section 205-4.5, which is silent on the issue, as treating residences that clearly would meet the definition of a farm dwelling if occupied by a permanent resident differently than residences that have all of the same agricultural uses or

agricultural income connected to them, but are also used as vacation rentals. A rational, sensible, and practicable interpretation of a statute is preferred to an unreasonable interpretation, since “[t]he legislature is presumed not to intend an absurd result.” *Kim v. H K Builders, Inc.*, 88 Haw. 264, 270 (1998) (quoting *State v. Arceo*, 84 Haw. 1, 19 (1996)). However, Bill No. 2204 leads to inequitable and untenable results by failing to recognize that vacation rentals can, and often do, comply with the farm dwelling requirement as well as the other less restrictive provisions of Chapter 205, as applicable, and it should be revised to conform to a more rational interpretation of the statute.

3. The County’s CZO, memoranda from the County Attorney’s office and the County General Plan have suggested that vacation rentals in the agricultural district are not illegal.

The County’s CZO and several documents issued by the County have indicated that vacation rentals in the agricultural district are legal or, at worst, are not clearly prohibited under State law. Each of these documents is discussed in further detail below.

a. The CZO Allows Single-Family Dwellings in the County Agricultural and Open Districts and Does Not Prohibit Short- or Long-Term Rentals.

The County’s CZO provisions governing generally permitted uses and structures on lands that are zoned within the County’s agriculture (A) and open (O) districts permit “single family detached dwellings in both the A and O districts. CZO §§ 8-7.2, 8-8.2. Nothing in the CZO prohibits rental of these dwellings, whether for long-term or short-term periods. Thus, there is nothing in the current CZO provisions that prohibits the use of single-family residential dwellings in the agricultural district as vacation rentals.

b. The Kobayashi Opinion.

The most significant County document that property owners have relied upon in operating existing vacation rentals within the agricultural district is an opinion memorandum issued by former Deputy County Attorney Blaine J. Kobayashi on July 11, 2000, regarding the legality of vacation rentals (the “Kobayashi Opinion”) in response to inquiries from former Councilmember Swain. The Kobayashi Opinion clearly states that single-family (as opposed to multi-unit) vacation rentals outside the Visitor Destination Areas (“VDAs”) “are not illegal.” Kobayashi Opinion, p.1 (emphasis in original). Even though the Kobayashi Opinion easily could have qualified the blanket statement that vacation rentals are not illegal in non-VDA areas by treating vacation rentals in agricultural districts differently than those in other districts, it did not do so. Thus, property owners have reasonably understood the Kobayashi Opinion to mean that there is no current prohibition on vacation rentals within the agricultural district.

In addition, the Kobayashi Opinion expressly relies upon the “widely accepted and frequently repeated and applied rule . . . that ‘zoning ordinances are in derogation of the common law and operate to deprive an owner of property of a use thereof which would otherwise be lawful, and should be strictly construed in favor of the property owner.’” Kobayashi Opinion, p.1 (quoting Anderson’s, *American Law of Zoning* § 18.4 and citing *State v. Lum*, 8 Haw. App. 406, 410 (1991)). Thus, a property owner possesses a right “‘freely to use his property unless the limitations upon such use are clearly articulated.’” Kobayashi Opinion, p. 1 (quoting Anderson’s, *American Law of Zoning* § 18.4). As discussed above, HRS Section 205-4.5 does not include any clear statement that farm dwellings must be used exclusively for agricultural purposes or that vacation rentals are a prohibited use of a single-family dwelling within the agricultural district. Thus, the principles of strict construction of interpreting zoning restrictions cited in the Kobayashi Opinion further support the conclusion that HRS Chapter 205 does not prohibit vacation rentals in the agricultural district.

c. County Attorney Response to Kobayashi Opinion.

More recently, in response to inquiries from Councilmember Yukimara regarding single-family vacation rentals, former County Attorney Lani D.H. Nakazawa issued a memorandum dated April 27, 2005, indicating that the County Attorney’s office was continuing to review the issue of vacation rentals and “is unable at this time to overturn the [Kobayashi Opinion].” In addition, former County Attorney Nakazawa’s response stated, “[a]s to your request for the legality of single-family vacation rentals in the agricultural district, we will be meeting with the Planning Department in the near future on that issue.”

Thus, former County Attorney Nakazawa’s response indicated to property owners that vacation rentals within the agricultural district were either legal pursuant to the Kobayashi Opinion or, at the very least, that the County Attorney did not know whether such uses were illegal. If the legality of vacation rentals in the agricultural district was unclear (at worst) to the County Attorney, and the County Attorney was unable to overturn the Kobayashi Opinion, it could hardly be expected that property owners would not reasonably believe such uses to be legal and act in reliance upon that belief, at least until clearly notified otherwise by the County. This is even more the case because County Attorney Nakazawa’s response indicated that the appropriate way to address issues related to the legality of single family vacation rentals would be by amending the CZO, rather than by reversing the Kobayashi Opinion. An amendment to the CZO should operate prospectively only, as property owners and their advisors would reasonably assume that former County Attorney Nakazawa’s response contemplated that all vested property rights, including those associated with vacation rentals, would be protected as nonconforming uses.

d. County General Plan.

The Kauai 2000 General Plan (the “General Plan”) also includes several discussions, policies, and implementation actions that can be reasonably read as either indicating that

vacation rentals within the agricultural district are legal or, at worst, that they are not clearly prohibited. For instance, the General Plan notes that the CZO “is silent on single-family vacation rentals” (as opposed to vacation rentals in multi-unit buildings), and states that there is a “lack of clear regulations” for these and other alternative visitor accommodations. (General Plan at 4-13). The General Plan also indicates that “[w]hile [the Planning Department] has not adopted a formal interpretation” as to whether use permits are required “in areas zoned for residential, agriculture², and open space,” it “has generally not required use permits for vacation rentals.” *Id.*

Moreover, several General Plan policies and implementation actions mention regulation of vacation rentals in a manner that appears to contemplate that these uses are allowed within the agricultural district but should be regulated to some extent:

- General Plan Policy 4.2.8.2(b) provides that “[t]he County shall enact clear standards and permit processes for regulating alternative visitor accommodation structures and operations in Residential, *Agriculture*, Open, and Resort zoning districts.” (General Plan at 4-17) (emphasis added).
- Policy 4.2.8.2(c)(1) provides that “. . . vacation rentals *should be allowed* with development standards and a use permit requiring administrative review, and opportunity for public input.” (General Plan at 4-17) (emphasis added).
- Implementation Action 4.2.9.2(a) states that “[t]he Planning Department shall prepare amendments to the [CZO] setting development standards and permit processes for regulating alternative visitor accommodation structures and operations in Residential, *Agriculture*, Open, and Resort zoning districts.” (General Plan at 4-19).
- Implementation Action 4.2.9.2(b) provides that “[t]he Planning Department shall prepare CZO amendments to facilitate the permitting of existing, nonconforming alternative visitor accommodations.” (General Plan at 4-19).

These policies and implementation actions not only appear to encourage the County to allow existing and future vacation rentals and other alternative visitor accommodations in general, but also appear to contemplate that these uses currently are and should continue to be allowed within agricultural districts, although they should be made subject to new regulations.

² This General Plan reference to areas zoned “agriculture” and several others in the subsequent discussion of General Plan language, policies, and implementation actions related to vacation rentals in such areas technically appear to refer to the County’s agricultural zoning, rather than the State agricultural district. However, as the General Plan explains elsewhere, areas zoned agriculture by the County “also generally lie within the State Agriculture Land Use District.” (General Plan at 5-14). Thus, the General Plan language regarding the legality of vacation rentals within the County agricultural districts implicitly applies to the question of their legality within the State agricultural district.

Finally, Implementation Action 4.2.9.2(d) specifically addresses alternative visitor accommodations within the State agricultural district, by providing that “[t]he Planning Department shall consult with the State Office of Planning to interpret existing State statutes with regard to permitting alternative visitor accommodations within the State Agricultural District under a Special Use Permit. *If necessary*, the County shall propose an amendment to HRS Ch. 205.” (General Plan at 4-20) (emphasis added). This Implementation Action clearly contemplates that the County would take action to permit vacation rentals and other alternative visitor accommodations in the agricultural district. The statement that proposing an amendment to Chapter 205 may be necessary is open to a range of interpretation, but at a minimum the use of the phrase “if necessary” suggests that it may *not* be necessary to amend Chapter 205 in order to permit vacation rentals within the agricultural district.

Thus, viewed least favorably to owners of existing vacation rentals, Implementation Action 4.2.9.2(d) at most suggests that at the time the General Plan was adopted, it was unclear to the County whether or not vacation rentals were allowed under State law. However, what is clear from the General Plan is that the County was to (“shall” is often the actual word used in the General Plan) enact clear standards and permit processes and allow vacation rentals subject to such standards and processes, and that the way to address regulation of vacation rentals would be by amending the CZO. Any owner or prospective owner of land on Kauai could reasonably conclude, based on the General Plan language, that a single-family vacation rental was legal, including a vacation rental within the agricultural district and that even, “[i]f necessary, the County [would] propose an amendment to HRS Ch. 205,” in order to clarify and perpetuate vacation rentals within agriculturally (and other) zoned districts.

e. The County has not adopted a position contrary to the Kobayashi Opinion.

As mentioned above, the Kobayashi Opinion easily could have distinguished between agricultural and non-agricultural districts in determining the legality of vacation rentals in non-VDA areas, but did not do so. Instead, it simply stated that such uses are not illegal, a statement that categorically applies to all districts. The County at any time could have adopted a different position by rescinding the Kobayashi Opinion or issuing further guidance indicating that vacation rentals are not legal within agricultural districts, but it has not done so.

To the contrary, when presented with distinct opportunities to repudiate the Kobayashi Opinion or to adopt a position that vacation rentals in the agricultural district are illegal, the County has declined to do so. Former County Attorney Nakazawa’s April 2005 memorandum expressly declined to overturn the Kobayashi Opinion or to state that vacation rentals in the agricultural district are illegal. Thus, the Kobayashi Opinion and subsequent supporting documents have continued to be the only official published sources of guidance to property owners regarding the legality of vacation rentals within the agricultural district, and the Kobayashi Opinion states without qualification that vacation rentals “are not illegal.” Kobayashi Opinion, p.1 (emphasis in original).

C. Owners of Existing Vacation Rental Units Have Vested Rights to Continue Such Uses as Non-Conforming Uses.

The current version of Bill No. 2204 would impermissibly deny the owners of existing vacation rentals in the agricultural district their vested right to continue operating these uses. The owners of existing vacation rental units have a vested right to continue such uses on their properties as a nonconforming use, because as discussed above vacation rentals are lawful uses within the agricultural district, or at the very least are not clearly prohibited uses. The current version of Bill No. 2204 fails to recognize this vested right and fails to meet the related requirement under State law that nonconforming uses must be allowed to continue operating after a change in law occurs.

1. Owners of Existing Vacation Rental Units Have Acquired Vested Rights.

A vested right essentially is a right to proceed with land use activity which cannot be taken away by an intervening change in the law or government regulation. *Allen v. City & County of Honolulu*, 58 Haw. 432, 435 (1977); *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n*, 17 Cal. 3d 785, 793 (Cal. 1976). Vested rights are a form of property "grounded upon the constitutional principle that property may not be taken without due process of law." *Urban Renewal Agency v. Cal. Coastal Zone Conserv. Comm'n*, 15 Cal. 3d 577, 583 (Cal. 1975); *Aries Dev. Co v. Cal. Coastal Zone Conserv. Comm'n*, 48 Cal. App. 3d 534 (Cal. Ct. App. 1975). See also *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawaii*, 27 Hawaii L. Rev. 17 (2004).

As explained above, vacation rentals currently are not prohibited within the agricultural district. This situation is similar to that in *South Lyme Property Owners Association, Inc. v. Town of Old Lyme*, 121 F. Supp. 2d 195 (D. Conn. 2000). In that case, the court held that property owners who lived year-round in dwellings located in an area subsequently zoned for seasonal use only had a vested property right to the year-round nonconforming use, which was entitled to constitutional protection. *Id.* at 205-06. In that case, nothing in the prior ordinance expressly permitted or prohibited year-round use of the dwellings, just as nothing in Chapter 205 expressly permits or prohibits use of a farm dwelling as a vacation rental.

However, even if it is unclear that vacation rentals currently are lawful, courts have recognized vested rights where governmental agencies have tacitly allowed uses that property owners believed in good faith to be legal for a lengthy period of time. See, e.g., *Sheedy v. Zoning Bd. of Adjustment*, 187 A.2d 907 (Pa. 1963); *Knake v. Zoning Hearing Bd.*, 459 A.2d 1331 (Pa. Commw. Ct. 1983).

There is no question that vacation rental uses within the agricultural district have been tacitly allowed by both the State and County governments for a long period of time. To our knowledge, no enforcement actions have been brought against, or notices of illegality given to,

owners or operators of existing vacation rental units in the agricultural district, despite an increasing amount of vacation rental uses in the agricultural district over the past couple decades. Moreover, as described above, the Kobayashi Opinion indicates that vacation rentals are legal outside of VDA areas and does not qualify this statement by limiting it to non-agricultural districts only. Former County Attorney Nakazawa's response to the Kobayashi Opinion has affirmed that the County has continued to rely upon the Kobayashi Opinion. Thus, the County Attorney's office has actively issued documents that property owners have reasonably interpreted as suggesting that vacation rentals are allowed in the agricultural district, while making no suggestions to the contrary.

The State and County governments have received and accepted taxes for earnings from vacation rental units on properties within the agricultural district, but do not appear to have taken any action to halt these uses or to give notice to land owners in the agricultural district that vacation rental uses are prohibited. The State and County have not only been put on notice of the existence of the vacation rentals within the agricultural district, the State and County have both shared in the benefits of vacation rentals through tax revenues, thereby adding to the reasonable belief of, and reliance by, property owners that vacation rentals in the agricultural district are acceptable and legal in the eyes of the State and County.

This situation is closely analogous to situations where courts have held that a local government's tacit approval of a use has created a vested right to continue such use as a non-conforming use. For instance, in *Sheedy*, a couple purchased a five-unit multiple family dwelling in 1952, believing in good faith, but incorrectly, that the dwelling had been used for multi-family uses since prior to 1933, when the property had become subject to a zoning ordinance restricting it to single-family detached dwellings. 187 A.2d at 908. The local Zoning Board of Adjustment took no action to challenge or stop the continued multi-family use until 1958, when it issued the couple an order to correct the alleged violation and denied their request for a variance. The Pennsylvania Supreme Court held that the Board's decision was an abuse of its discretion and explained that "[e]ven if the present use arose only in 1935 and not in 1933, it would be inequitable and unjust to refuse the grant of a variance." *Sheedy*, 187 A.2d at 909. The court further determined that an "unnecessary and unique hardship undoubtedly exist[ed]." *Sheedy*, 187 A.2d at 909.

Similarly, *Knake* involved a four-unit structure purchased by the appellee in 1937, at which time it was located in a zoning district limiting residences to one or two-family dwellings. 459 A.2d at 1332. In 1948, the appellee added a fifth unit, and the five-family use continued until 1981, when the appellee was cited for a zoning violation. The court held that the appellee was entitled to continue the use, despite the violation of existing zoning regulations. *Knake*, 459 A.2d at 1333. The court explained that the appellee believed in good faith that the use was lawful at the time he purchased the property, the local government had actual knowledge of the illegal use since at least 1958, and the appellee expended considerable money on repairs to the building based on the issuance of building permits. *Knake*, 459 A.2d at 1333. Therefore, he

demonstrated detrimental reliance on the municipality's acquiescence in the five-family use. *Knake*, 459 A.2d at 1333.

The uses in *Sheedy* and *Knake* were far more difficult to justify than existing vacation rental uses within the agricultural district, as the uses in both of those cases were clearly not permitted under the zoning that applied when the uses began. As indicated above, nothing in HRS Chapter 205 clearly indicates that vacation rental uses on properties within the agricultural district are illegal, and a reasonable interpretation of HRS Sections 205-4.5, 205-5(b), 205-5(d), and Chapter 205 read in its entirety leads to the conclusion that such uses are currently lawful. However, even if such uses were illegal, owners of existing vacation rentals within the agricultural district nevertheless would have a vested right to continue these uses for the same reasons as the property owners in the *Sheedy* and *Knake* decisions. The property owners have believed in good faith that such use was not illegal, due to the lack of a prohibition against such use, the County's acquiescence and its affirmative actions in issuing the Kobayashi Opinion and subsequent memoranda reaffirming that decision, and the common nature of vacation rental uses within the agricultural district. Finally, many, if not all, property owners have detrimentally relied on this acquiescence by purchasing and/or improving their properties with the reasonable expectation that vacation rentals would be one of many legally permitted uses. Thus, it would be inequitable and unjust for the County to deny the vested rights of property owners by refusing to allow existing vacation rentals to continue to operate as nonconforming uses.

2. State and Local Law Require Vacation Rental Units to Continue to Operate as Non-Conforming Uses.

Undoubtedly in order to ensure that zoning regulations are applied in a manner consistent with constitutionally established vested rights in property, the Hawaii Legislature has enacted HRS Section 46-4, which provides:

Neither this section nor any ordinance enacted pursuant to this section shall prohibit the continued lawful use of any building or premises for any trade, industrial, residential, agricultural, or other purposes for which the building or premises is used at the time this section or the ordinance takes effect; provided that a zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued, or for the amortization or phasing out of nonconforming uses . . . over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only. In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single-family or duplex) or agricultural uses . . .

As explained above, vacation rental uses are not prohibited within the agricultural district, and the failure of the current version of Bill No. 2204 to allow existing vacation rentals

to continue operating as nonconforming uses violates the express provisions of HRS Section 46-4.

D. Equitable Estoppel Will Create Serious Enforcement Problems.

If the Council enacts the current version of Bill No. 2204, which does not allow the continued operation of existing vacation rentals in the agricultural district as a nonconforming use, the County will have great difficulty enforcing its restrictions against owners of existing vacation rentals, as the defense of equitable estoppel will be available to such owners. The doctrines of vested rights and equitable estoppel are theoretically distinct, but courts tend to reach the same results when applying these doctrines to identical factual situations. *Allen v. City & County of Honolulu*, 58 Haw. 432, 435 (1977). Equitable estoppel, which is closely related to the doctrine of vested rights, focuses on whether it would be inequitable to allow the government to repudiate its prior conduct.

An equitable estoppel defense applies where a party (a) makes substantial expenditures (b) in good faith reliance upon existing law and official assurances of some form that zoning requirements for the proposed land use are met; and (c) a subsequent change in the law prohibits the party from continuing development or an existing land use. *Life of the Land, Inc. v. City Council*, 61 Haw. 390, 453 (1980); *Allen*, 58 Haw. at 436. Most or all property owners operating existing vacation rentals within the agricultural district meet all of these elements.

First, property owners operating existing vacation rentals in the agricultural district generally have made substantial expenditures. Many such owners purchased their properties at high land costs. In addition to the initial down payments, many owners must continue to make high mortgage payments and pay substantial property tax bills. Moreover, vacation rental property owners must make substantial expenditures in either the initial construction or renovation of the rental units, as well as continued upkeep, in order to ensure that the rental units are attractive.

Second, the Kobayashi Opinion, the subsequent memorandum from former County Attorney Nakazawa, which indicates that the County continues to accept the position set forth in the Kobayashi Opinion, and the County General Plan all constitute official assurances that vacation rentals are legal uses within areas outside of VDAs, a large number of which are within the agricultural district. Importantly, under State law, the County officer or agency charged with administration of the County's zoning laws is responsible for enforcing violations of the HRS Chapter 205 requirements for uses within the agricultural district. (HRS § 205-12). Understandably, property owners have relied upon these assurances in good faith when making substantial investments in their properties, especially since property owners must look to the County to enforce the provisions of HRS Chapter 205.

Furthermore, the Hawaii Supreme Court has interpreted the good faith requirement such that the government official providing assurances that applicable zoning requirements are met

need not even be correct. *Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu*, 55 Haw. 40, 44 (1973). In *Waianae*, an amendment to the Comprehensive Zoning Code would have prevented the development of an apartment/hotel in rural Oahu. *Id.* A grandfathering provision allowed a building permit to be issued if an application had been submitted prior to the amendment's effective date. *Id.* at 41. However, the grandfathering provision stated that the exemption from the amended zoning ordinance no longer would apply if the planning department requested changes to the application and the developer failed to make the changes within 14 days. *Id.* A planning department official granted the developer's request for an extension of time beyond the 14-day period to submit revisions to the building permit application. *Id.* at 42. The developer made the requested changes within the extended period and was issued a building permit. *Id.* A group of neighbors filed suit against the City seeking to invalidate the permit as untimely filed. The Hawaii Supreme Court rejected their challenge, holding that the developer had relied on the building permit in good faith, and stating that "an act of [an administrative] official, done in good faith and within the ambit of his duty, upon an erroneous and debatable interpretation of an ordinance, is no more than an irregularity, and the validity of such act may not be questioned after expenditures have been made and contractual obligations have been incurred in reliance thereon in good faith." *Id.* at 44.

The Hawaii Supreme Court further explained that the portion of the grandfathering provision requiring applicants to make plan changes within 14 days "did not specifically authorize" government officials to grant extensions to that period, but "neither did it specifically prohibit such agency from granting any extension." *Id.* at 45. In addition, the court explained that since it was conceivable that a situation could occur where requested corrections were so extensive that it would not be possible to comply within 14 days, it was arguable that the grandfathering provision could reasonably be construed to provide an official with implied authority to grant an extension of time reasonably necessary to comply with requested changes. *Id.* HRS Chapter 205 is similar to the grandfathering provision at issue in *Waianae*, as it neither specifically authorizes vacation rentals within the agricultural district, nor specifically prohibits such uses. Thus, HRS Chapter 205 could reasonably be construed as implying that vacation rentals are authorized within the agricultural district.

Therefore, even if the Kobayashi Opinion is incorrect or debatable as to whether vacation rentals are permitted within the agricultural district, property owners would be entitled to rely on the Kobayashi Opinion because former County Attorney Kobayashi was clearly acting within the ambit of his duties in stating that vacation rentals are not illegal and there is nothing to indicate that he was acting other than in good faith. For the same reasons, vacation owners would also be entitled to rely on former County Attorney Nakazawa's more recent April 27, 2005, memorandum.

Finally, Bill No. 2204, if enacted by the Council in its current form, would constitute a change in the law that would deprive these property owners of the ability to continue their existing vacation rental uses.

Thus, many, or even most, owners of existing vacation rentals within the agricultural district will be able to satisfy all of the elements for an equitable estoppel defense, making enforcement of restrictions on these uses extremely difficult and costly to the County. As the Hawaii Supreme Court explained in *Allen*, “once the City is estopped from enforcing the new zoning, if it still feels the development must be halted, it must look to its powers of eminent domain.” 58 Haw. at 439. The reasoning in *Allen* is directly applicable to the proposed County action to prohibit existing vacation rental uses in the agricultural district. This difficulty can be avoided, while still achieving the primary goals of Bill No. 2204, by amending the bill to allow existing vacation rental uses to continue to operate as nonconforming uses.

E. The Doctrine of Laches Potentially Will Create Enforcement Problems.

In addition to the defense of equitable estoppel, many owners of existing vacation rentals could raise the defense of laches to bar enforcement of the prohibition against such uses, if they are not allowed as a nonconforming use. The doctrine of laches acts to bar a court from considering an equitable action on the basis that “it is more equitable to defendants and important to society to promote claimant diligence, discourage delay and prevent the enforcement of stale claims.” *Adair v. Hustace*, 64 Haw. 314, 321 (1982). The two elements required for laches to apply are (a) a delay by the plaintiff in bringing its claim that has been unreasonable under the circumstances, and (b) the delay must have resulted in prejudice to the defendant. *Id.*

As explained above, the assumption in Bill No. 2204 that vacation rentals in the agricultural district are currently illegal is not a correct interpretation of HRS Chapter 205. However, even if that interpretation were correct, owners of existing vacation rentals may be able to successfully bar enforcement actions under the doctrine of laches because both required elements in many instances could be met. First, the County has significantly and unreasonably delayed bringing enforcement actions against the owners of vacation rentals in the agricultural district, many of whom have been operating these uses for several years or even decades, despite having reason to know of the existence of these uses. *See Adair*, 64 Haw. at 322. Second, the delay clearly will have prejudiced the property owners, who have made substantial expenditures related to the vacation rental uses and would be faced with loss of land value and revenue and, at least in some cases, could be faced with mortgage foreclosures if prohibited from continuing to operate these uses.

F. The Current Version of Bill No. 2204 Is Not Consistent with the Kauai General Plan.

The current version of Bill No. 2204 also is legally deficient because it is inconsistent with the General Plan policies and implementation actions encouraging vacation rentals and other alternative visitor accommodations, which are described in detail above in Section II(A)(5)(d). More specifically, Bill No. 2204 conflicts with explicit provisions of Implementation Action 4.2.9.2(b), which calls for the preparation of CZO amendments to

facilitate the permitting of existing, nonconforming alternative visitor accommodations, as it does not allow existing, nonconforming vacation rentals within the agricultural district. It also directly conflicts with Policy 4.2.8.2(c)(1), which provides that vacation rentals “should be allowed,” and with Policy 4.2.8.2(b), which contemplates a permitting system for alternative visitor accommodations in the County’s Agriculture zoning district.

G. Prohibiting Existing Vacation Rental Uses Would Result in Unconstitutional Takings of Private Property.

The prohibition against existing vacation rental uses within the agricultural district contemplated by Bill No. 2204 would in many instances result in takings of private property without compensation in violation of the federal and State constitutions. Such unconstitutional takings would expose the County to litigation and liability for large sums of money in compensation to property owners. An unconstitutional taking can occur when a governmental regulation goes “too far” based in part on the resulting economic impact. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). As explained below, an unconstitutional taking of a given owner’s property would result from implementation of Bill No. 2204 if either (a) the prohibition against existing vacation rentals denies an owner of all economically beneficial uses of his or her property; or (b) a weighing of the economic impact of the regulation, its interference with investment-backed expectations, and the character of the governmental action indicates that justice and fairness require compensation.

1. An unconstitutional taking would result if the loss of an existing vacation rental use would deprive an owner of all economically viable use of his or her property.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), the United States Supreme Court held that a taking occurs when regulations deprive land of “all economically beneficial use.” The case involved two beachfront lots purchased for \$975,000, with the buyer intending to build a single-family home on each lot. Subsequently, the state adopted a beach protection statute that prevented the property owner from constructing any permanent habitable structures on the lots.

Similar to *Lucas*, the prohibition against existing vacation rentals would deprive many owners of such rentals all economically viable use of their properties because they would be forced to rely solely upon income from agricultural uses. In many instances, the owners would not be able to afford to continue to live on their land and continue such other agricultural uses. Moreover, high labor and marketing costs, and generally lower returns to agricultural producers have generally made agriculture in Hawaii much less economically viable than it had been in previous decades. See Norman Cheng, *Is Agricultural Land in Hawai’i ‘Ripe’ for a Takings Analysis?*, 24 Hawaii L. Rev. 121 (2001). In this context, where many property owners would be forced to foreclose on their mortgages or lose money on large property investments, replacing

vacation rental uses solely with other agricultural uses would deprive the owners of all economically viable use of their properties, resulting in a taking under *Lucas*.

A recent law review article has suggested that the LUC's failure to reclassify property zoned in the agricultural district, in and of itself, could result in an impermissible taking due to the deprivation of all economically beneficial use of certain lands. Cheng, *supra*. The article explains that in order to support such a takings claim, a property owner would need to demonstrate that agriculture is no longer an economically beneficial use for the parcel, citing to studies showing that the agriculture industry is no longer profitable. Cheng, *supra*, at 141. "In addition, based on the high cost of labor and marketing and the need for affordable housing, [the owner] could argue that by keeping the land classified as agricultural, the State is effectively rendering the property worthless." *Id*.

It is quite possible that a large amount of the land within the agricultural district is not economically viable to farm, especially since approximately 75 percent of agricultural district lands are not designated Class A or B. The potential economic deprivation effected by Bill No. 2204 on owners of existing vacation rentals within the agricultural district is much more severe than the mere failure to reclassify lands zoned agricultural to other districts. Again, this is due to the large investments vacation rental owners have made in acquiring properties, and in many cases in building new dwellings or renovating and upgrading existing dwellings, as well as the high mortgage and tax payments and other related debts that are often involved in the ownership of such properties.

2. An unconstitutional taking could result even if a property owner is not deprived of all economically viable use.

Even if the owner of an existing vacation rental in the agricultural district is not deprived of all economically viable use under *Lucas*, an unconstitutional taking also could result if "justice and fairness" require compensation based on the particular circumstances of a given property. *Penn Cent. Transp. Co. v. N.Y. City*, 438 U.S. 104 (1978). In *Penn Central*, the United States Supreme Court explained that in determining whether compensation is required, three factors are particularly significant and must be weighed: (1) "[t]he economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." 438 U.S. at 124.

In this case, Bill No. 2204 will have a tremendous economic impact on owners of existing vacation rentals within the agricultural district. In many cases, as indicated in the above discussion of deprivation of all economically beneficial uses, property owners have made substantial expenditures that comprise investment-backed expectations with which the regulation will interfere. Finally, the character of the governmental action at issue does not justify failing to compensate owners of existing vacation rentals for their economic losses. As explained above, it is not clear that the agricultural uses that would remain after applying the prohibition against

existing rental uses would be economically viable enough to survive, and the purposes of Bill No. 2204 can be substantially advanced by prospectively restricting future new vacation rental uses without the economic impact that would result from prohibiting existing uses.

3. Bill No. 2204 could subject the County to liability for takings claims even if existing vacation rental uses in agricultural districts are currently illegal.

Even if the existing vacation rental uses were currently illegal, the enactment of Bill No. 2204 without grandfathering these uses still could subject the County to liability for takings claims under the United States Supreme Court's decision in *Palazzolo v. Rhode Island*. 533 U.S. 606 (2001). In *Palazzolo*, the court held that a property owner's acquisition of property after the enactment of the regulation that he alleged constituted a taking did not bar his ability to bring a takings claim. *Id.* at 626-30. The Court explained that some regulatory enactments "are unreasonable and do not become less so through passage of time or title." *Id.* at 627. Thus, even if the assumption in Bill No. 2204 that the farm dwelling requirement precludes vacation rental in the agricultural district are currently illegal were correct, owners of existing vacation rentals who stand to lose significant property value and revenue due to the lack of a grandfathering provision potentially could recover damages from the County, especially given the State's and County's acquiescence in and benefiting from the prior vacation rentals on properties in the agricultural district.

4. Successful takings claims could result in enormous financial costs to the County.

In addition to the expense of litigating the numerous takings claims that potentially could be brought by owners of existing vacation rentals in the agricultural district if the Council enacts the current version of Bill No. 2204, the County could be exposed to huge financial liability for any successful claims, as it would need to compensate each property owner for the taking. The damages awarded to the property owners could be calculated based on a "cost approach," which estimates the cost of reproducing an existing developed property. In this case, this should be based on the cost of purchasing a replacement vacation rental unit in an area where such uses are not prohibited. Alternatively, the calculation could be based on a "capitalization" approach, which estimates the net earning capacity of the property. Using either approach, the potential damages that the County would need to pay could be enormous, as the cost of a replacement vacation rental may be very high and vacation rentals can generate significant revenue for property owners.

Furthermore, if the County enacts Bill No. 2204 and is later overturned, the County could be liable to vacation rental owners for a temporary taking for the length of time vacation rental owners were prohibited from renting their property. *See e.g., Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1988).

H. Prohibiting Existing Vacation Rental Uses Could Result in an Unconstitutional Deprivation of Property Without Due Process.

In addition to potential unconstitutional takings, the prohibition against existing vacation rental uses in the agricultural district under Bill No. 2204 could also result in substantive due process claims, based on deprivation of property without due process of law. A substantive due process violation may occur when “a regulation that fails to serve any legitimate government objective may be so arbitrary or irrational that it runs afoul of the *Due Process Clause*.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005).

The prohibition against existing vacation rental uses within the agricultural district comprises just such an arbitrary regulation because it fails to serve any legitimate government interest. Because many properties with existing vacation rentals within the agricultural district were purchased at substantial land prices and owners will be reluctant to sell without returning at least a similar price to what they paid for their units, the prohibition on such uses would have little or no effect on the provision of affordable housing opportunities. Additionally, as explained above, because *exclusive* agricultural use of most of these properties will not be economically viable and is not intended by HRS Chapter 205, especially with respect to lands with marginal soils, the prohibition would fail to serve any interest in long-term preservation of agricultural productivity.

I. The Prohibition Against Existing Vacation Rentals Could Result in Other Constitutional and Civil Rights Violations.

Restricting existing vacation rentals in the agricultural district could also lead to other constitutional challenges, including claims of equal protection and commerce clause violations, and interference with contracts. In addition, 42 United States Code section 1983 allows suits against local government when federal rights are infringed on by persons acting under color of state law. A vacation rental owner who prevailed under such a claim may also recover attorneys and experts fees and costs. 42 U.S.C. § 1983 (2003). The County’s exposure to such claims, and associated taxpayer expenses, easily could be greatly lessened and probably avoided by applying the restriction prospectively only and grandfathering existing vacation rental uses.

III. CONCLUSION

The proposed restriction against existing vacation rental uses within the agricultural district is extremely problematic in many respects; these include the unjust and unfair economic consequences that are likely to flow to landowners with existing vacation rental uses, the potential enforcement problems related to vested rights and equitable estoppel, and the potential for litigation against the County and liability for uncompensated takings and violations of the due process clause and other constitutional provisions.

In light of these potential problems with the current version of Bill No. 2204, we strongly believe that grandfathering existing vacation rentals in the agricultural district as nonconforming uses in the same manner as other districts would be a far better approach. Bill No. 2204 could easily avoid the problems described above through revisions that would prohibit vacation rentals prospectively only and, perhaps, could more carefully account for the different levels of productivity on various agricultural district lands due to the variety of soil classifications and parcel sizes within this district. With such revisions in place, the bill could solve the problem of stopping proliferation on a prospective basis, as well as regulating existing vacation rentals, while avoiding litigation against the County, including potentially large takings claims.

This approach would accommodate and balance the interests of those in the community who want to severely restrict or stop vacation rental uses and the interests of current owners of existing vacation rentals who began operating in good faith and in reliance upon existing law, including the Kobayashi Opinion. The nonconforming use provisions of the revised bill could also provide that the vacation rental use shall no longer be permitted should such use be abandoned at any point in the future so that ultimately, the number of vacation rentals would atrophy over time.

We also recommend that a comprehensive approach to addressing important agricultural lands should be undertaken before the County makes a final determination regarding vacation rentals in the agricultural district. A moratorium on vacation rentals in the agricultural district with grandfathering of existing such uses would work well and would allow the County to complete its determination of important agricultural lands in a more comprehensive and thorough manner, while regulating existing vacation rentals, stopping the creation of new vacation rentals, and minimizing the risk of unnecessary harm to those property owners with existing vacation rentals that have acted in good faith.

For all of these reasons, we respectfully urge the Council to consider revising the bill to grandfather existing vacation rentals in the agricultural district as nonconforming uses, rather than enacting overbroad legislation that is likely to cause severe economic damage to owners of existing vacation rentals and their employees.

Very truly yours,

CASE LOMBARDI & PETTIT

Dennis M. Lombardi
Lauren R. Sharkey

Kauai County Council
c/o Council Services Division
June 25, 2007
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cc: Jonathan Chun, Esq.
Louie Abrams