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March 7, 2007

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Re: Bill No. 2204, 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 Ms. Ono, Ms. Descheme and Gentlemen:

We have been asked to provide comments to the above bill relating to the proposed regulation of transient vacation rentals and bed and breakfast operations within the County of Kauai. We note that a considerable amount of work and effort has gone into this bill since its inception as Zoning Amendment ZA-2006-7. Our review, however, indicates that some significant issues still must be addressed in this proposed bill that would impact its validity.

As we outlined in our previous letter, the County's zoning powers are expressly limited by state law. Hawaii Revised Statutes ("HRS") Section 46-4, expressly states:

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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 purpose 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 or signs 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 defined by the Hawaii Court of Appeals, the term "lawful use" as used in HRS Section 46-4 refers to those uses and structures that were lawful under the previous zoning code and not the building or other legal requirements. See Waikiki Marketplace Inv. Co. v. Chair of Zoning Board of Appeals, 86 Haw. 343, 949 P.2d 183 (Haw. Ct. App. 1997). The County Attorney's Office in this matter has expressly opined that transient vacation rentals in single family dwellings (and also by definition all bed and breakfast operations) are allowed uses under the CZO and not illegal. See Memorandum dated July 11, 2000, from Deputy County Attorney Blaine J. Kobayashi, Esq. to Council member Billy Swain.

The proposed Bill potentially violates HRS Section 46-4 by: 1) requiring an existing transient vacation rental or bed and breakfast operation to be in operation at least one year prior to the effective date of the ordinance; 2) conditioning the issuance of a nonconforming certificate to the payment of prior taxes and "other permits"; and 3) allowing only one existing transient vacation rental or bed and breakfast operation per lot of record.

The one year requirement is expressly intended to prohibit otherwise valid legal uses from continuing to operate for no other reason than not being in operation for more than one year. HRS Section 46-4 clearly states that a county ordinance cannot "prohibit the continued lawful use of any building or premises for any trade ... residential ... or other purposes for which the building or premises is used at the time ... the ordinance takes effect." (emphasis added).

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Thus, if a use is lawful **at the time the ordinance takes effect** it is entitled to continue to operate after the ordinance is passed as a nonconforming use.¹

In addition to not providing for the continued use of lawful transient vacation rentals and bed and breakfast operations, the proposed Ordinance also potentially violates HRS Section 46-4 by requiring the payment of GET, TAT, federal tax returns and "other permits" as proof they were lawfully operating. As stated by the Hawaii Court of Appeals in Waikiki Marketplace Inv. Co. v. Chair of Zoning Board of Appeals, 86 Haw. 343, 356, 949 P.2d 183 (Haw. Ct. App. 1997) "we conclude that the terms "lawful use" and "previously lawful," as used in HRS § 46-4 and the LUO, refer to compliance with previous zoning laws, not the building codes or other legal requirements that may be applicable to the construction or operation of a structure." Thus the payment or lack of payment of the State GET, TAT or any federal tax is irrelevant to the determination whether a lawful use is allowed to be continued under HRS Section 46-4. Decisions reached by courts in other jurisdictions agree with this conclusion. See Dempsey v. Newport Board of Adjustments, 941 S.W.2d 483 (Ky App. 1997); Van Sant v. City of Everett, 69 Wash. App. 641, 849 P.2d 1276 (1993); Hooper v. St. Paul, 353 N.W.2d 138, 141 (Minn. 1984); Derby Ref. Co. v. Chelsea, 407 Mass. 703, 711, 555 N.E.2d 534, 539 (1990); Trailer City, Inc. v. Board of Adj., 218 N.W.2d 645, 648 (Iowa 1974); Board of Selectmen v. Monson, 355 Mass. 715, 716, 247 N.E.2d 364, 365 (1969); Mellow v. Board of Adj., 565 A.2d 947, 955 (Del. Super. Ct. 1988), aff'd, 567 A.2d 422 (Del. 1989).

In Dempsey v. Newport Board of Adjustments, 941 S.W.2d 483 (Ky App. 1997) the City of Newport denied an application for an occupational license to continue to operate a nonconforming automotive parts and repair garage. The City denied this license on the basis that the prior owner had not applied for and received an occupational license to cover his previous operation and therefore was not a legal nonconforming use which may be continued. The Kentucky Court of Appeals reversed the trial court's decision affirming the City's action stating:

While a nonconforming use may be deemed to be undesirable by a portion of the community, it nonetheless constitutes a legitimate, vested property right and clearly enjoys broad constitutional protection ... Vested property rights are not easily lost or voided.

...

¹ Article 23 of the County of Kauai Comprehensive Zoning Code expressly recognizes and allows all nonconforming uses that existed as of the date of the ordinance to continue to operate.

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As the Appellant has noted, courts have repeatedly considered and concluded that business licensing, business and occupational tax regulations, or building permits are matters separate and apart from land use planning and are not per se determinative of the continuance of a nonconforming use.

941 S.W.2d at 485 (citations omitted)(emphasis added).

Similarly in Van Sant v. City of Everett, 69 Wash. App. 641, 849 P.2d 1276 (1993) the City's hearing examiner denied the landowner's request for nonconforming use permit on the basis that the previous owner did not have a business license, did not register the business with the state, and that there were numerous other building code violations on the structure. The owner appealed the City's decision on the basis that the City improperly placed the burden of proof on him and the evidence did not show he had voluntarily abandoned the nonconforming use. The Washington Court of Appeals reversed the City's decision reasoning that the City had improperly placed the burden of proof on the property owner and erred when it relied on the lack of tax records and other permits as being determinative that a nonconforming use should be discontinued. As the court reasoned:

The City asserts that the record of proceedings does not establish that the hearing examiner improperly placed the burden of proof on the permit applicant. We disagree.

The City is correct that the initial burden of proving the existence of a nonconforming use is on the land user making the assertion ... However, once a nonconforming use is established, the burden shifts to the party claiming abandonment or discontinuance of the nonconforming use to prove such. "Whether abandonment has occurred is a question of fact as to which the municipality has the burden of proof ... This burden is not an easy one.

69 Wash. App. at 647-48, 849 P.2d at 1279-80 (citations omitted). In explaining why the burden on the City is so high, the Van Sant court stated "[n]onconforming uses are vested property rights which are protected ... Protected property rights cannot be lost or voided easily. There is properly a high burden of proof that must be met by the City before Van Sant loses what was a vested property right." Id. at 649, 849 P.2d at 1280 (citations omitted).

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As to the City's argument that the landowner's use was not a "legal" nonconforming use since there was no evidence the owner paid taxes or obtained a business license for the premises the court stated:

Courts have repeatedly found that licensing and other regulations *unrelated* to land use approval, whether business licensing, business and occupation tax regulations, or building permits, are not per se determinative of the continuance of a nonconforming use. In Hooper v. St Paul ... the Minnesota Supreme Court reversed a trial court's determination that a nonconforming use was lost, in part, because the property owners failed to get a building permit for a carriage house. The court held that '[v]iolations of ordinances unrelated to the land use planning do not render the type of use unlawful.' ...

Id. at 651-52, 849 P.2d at 1282 (citations omitted). Based on Hawaii case law and the case law from other jurisdictions it is very likely that proposed Bill 2204, in its present form, could be struck down.

Finally, we note that proposed Bill 2204 is also potentially defective in that it would automatically discontinue a number of existing transient vacation rentals or bed and breakfast operations that are on condominium projects or on ADUs. It is likely that there are transient vacation rentals or bed and breakfast operations located on condominiums, ADUs or large lots that contain more than one single family dwelling. In fact, during the Stakeholder's meeting a local family representative stated that he currently runs two vacation rentals on his family's property. His family does not want to sell the property, but needs the income in order to pay his taxes and expenses. The limitation on only one transient vacation rental or bed and breakfast operation on a single lot of record would cause him to stop renting one of his units on a short term basis. As the County is aware, condominium projects are located on a single lot of record. Within this condominium project could potentially be two or more units, all or some of which might be used for transient vacation or bed and breakfast operations by the owners. The same situation can occur on lots that have both an ADU and a main dwelling unit. In that case the owner could be renting out the ADU as a transient vacation rental and use the main house for a bed and breakfast operation. Large lots with multiple dwelling units would also be subject to the same restriction. As explained above, the clear wording of HRS Section 46-4 would, on its face, prohibit the County from unilaterally stopping these previous lawful uses of an owner's property.

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The above comments constitute our office's major concern with proposed Bill 2204. There are, however, other issues that should also be considered by the County in reviewing the bill. For example, Bill 2204 requires existing bed and breakfast operations to serve only one meal (breakfast) to its guest. There is no definition as to what constitutes "breakfast" or when this "breakfast" is to be served. Even if there was a definition a question arises as to the County's interest in having a breakfast served as opposed to a "lunch" or "dinner." Secondly, enforcing this provision would be an administrative nightmare to the County if it had to send its inspectors out to the operation to confirm whether "breakfast" was actually served. These questions could lead to a determination that the proposed condition is arbitrary and capricious. More bothersome is the discussion that Bill 2204 should include a provision terminating nonconforming uses if the property is sold or transferred. It has been consistently held that the continuation of a nonconforming use does not depend on ownership of the land but is a right which attaches to the land itself. See 1 R. Anderson, American Law of Zoning Section 6.40 (4th Ed. 1996) where the authors recognize:

The right to maintain a nonconforming use does not depend upon ownership or tenancy of the land upon which the use is situated. The right attaches to the land itself; it is not personal to the current owner or tenant. Accordingly, a change in the ownership or tenancy of a nonconforming business or structure does not affect the right to continue the nonconforming use.

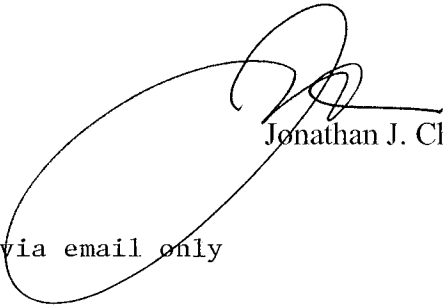
Courts have consistently recognized this principle and have set aside governmental actions seeking to terminate nonconforming uses following the sale or transfer of the property. See Budget Inn of Daphne v. City of Daphne, 789 So. 2d 154 (Ala 2000); Town of Lyons v. McClellan, 867 P.2d 159 (Colo. App. 1993). See also authorities cited in 4 Rathkopf's The Law of Zoning and Planning Section 51.03 (1994); 83 Am Jur.2d Zoning Zoning and Planning Section 656 (1992). Based on these authorities it would be unwise for the County to provide for the termination of a nonconforming use upon the sale or transfer of the property. Pursuant to HRS Section 46-4 the County may provide for the elimination or amortization of nonconforming uses, but such authority does not apply to existing residential or agricultural uses. As stated in HRS Section 46-4 "[i]n 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." Any attempt to terminate existing nonconforming transient vacation rentals or bed and breakfast operations would potentially run afoul of this limitation to the County's zoning powers.

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I trust these comments and observations will be helpful to you in your discussions with the County of Kauai regarding proposed Bill No. 2204. Please feel free to call me if you have any questions concerning this matter.

Sincerely,

BELLES GRAHAM
PROUDFOOT & WILSON, LLP



Jonathan J. Chun

JJC:so

cc: Mr. Louis Abrams, via email only