

**TESTIMONY**  
**HCR 348 HD1**  
**LATE**

BELLES GRAHAM PROUDFOOT **LATE TESTIMONY**  
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April 20, 2008

**Via Facsimile And Email Only**

Senator Clayton Hee, Chair  
Committee on Water and Land  
State Capitol, Conference Room 016  
Honolulu, Hawaii 96813

**Hearing date: Monday, April 21, 2008, 9:30 a.m.  
Conference Room 016**

Re: HCR 348 REQUESTING THE ATTORNEY GENERAL TO  
REVIEW AND SUBMIT A LEGAL OPINION REGARDING  
WHETHER VACATION RENTAL USES IN SINGLE-  
FAMILY DWELLINGS AND FARM DWELLINGS IN  
STATE AGRICULTURAL DISTRICTS ARE NOT  
PROHIBITED UNDER CHAPTER 205, HAWAII REVISED  
STATUTES.

Dear Chair Hee, Vice Chair Kokubun and Members:

My name is Jonathan Chun and I am an attorney in the law firm of Belles, Graham, Proudfoot Wilson & Chun. Our firm has been retained by the Kauai Board of Realtors to assist them in insuring that the existing legal rights of their members are recognized and preserved. I am offering testimony in support of House Concurrent Resolution 348, HD1 Requesting The Attorney General To Review And Submit A Legal Opinion Regarding Whether Vacation Rental Uses In Single-Family Dwellings And Farm Dwellings And Farm Dwellings In State Agricultural Districts Are Not Prohibited Under Chapter 205, Hawaii Revised Statutes, with certain suggested amendments.

HCR 348, HD1, requests the Attorney General to offer an opinion whether vacation rentals are allowed within the State Agricultural District. While this question needs to be answered, it is our concern that if the Attorney General's opinion is in the negative the opinion should also clearly state when this legal interpretation became effective and address the grandfather rights of owners of lands within the Agricultural District prior to this legal

conclusion. It has always been the position of the Kauai Board of Realtors that vacation rentals within a "farm dwelling" on lands that are being used as a "farm" is proper under HRS Chapter 205. The problem is there has never been a clear definition of what constitutes a "farm." In other words how much does a person need to grow, sell, plant, or raise in order to qualify as a farm under HRS Chapter 205? Without knowing how much "farming" is required under the law, people who purchased land within the Agricultural District were left to their own interpretation as to how much agriculture was enough. Even people who wanted to become full time farmers found that because of a lack of a viable market for their product, sufficient water supply, or marginal "Agricultural" land, other sources of income were needed in order to support themselves and their families.

Even if there was a clear definition and standard as to how much "farming" was enough in order to be considered a "farm dwelling" the Attorney General's Office must consider that this "farm dwelling" requirement is only applicable to those lands with productivity rating classes of A or B. See HRS Section 205-4.5(a) and Act 199, 1976 Haw. Sess. Laws 370. Lands that had productivity rating of C, D, E or U could be used for "dwellings" subject to county zoning ordinances. See HRS Section 205-4.5(c) and Act 205, 1963 Haw. Sess. Laws 317. There are many homes and vacation rentals that are on lands with these lower productivity ratings. Kauai's Comprehensive Zoning Code (which was initially adopted in 1972) allowed single-family detached dwellings as a permitted use and structure within the Agriculture District, separate and apart from accessory structures and uses. Even today HRS Section 205-4.5(c) does not expressly apply the farm dwelling requirement to lands classified as C, D, E or U but, only requires uses within those land classifications to be "compatible with the activities described in [HRS] section 205-2" as "determined" by the State Land Use Commission or those "further defined by each county zoning ordinance."<sup>1</sup> It is within this framework of overlapping and ambiguous laws that owners of lands within the State Agricultural District find themselves.

Recently the counties have been trying to attack people who are using their land for vacation rentals as being the cause for the decline of agriculture within the State. This has no basis in reality. These landowners are being made the scapegoat for a situation they did not cause and which the government aided by either ignoring the situation or not bringing clarity to the existing laws. While the existing push is to blame owners of property within the State Agricultural District who use their property for vacation rentals, the rationale being applied to these owners also equally apply to owners who are just living on their property, with minimal agricultural activity. In other words if an owner using the property for a vacation rental does not have "enough" agricultural use or farming activity under HRS Chapter 205 then it follows that the owner also does not have enough agricultural use or farming activity to support the existence of just a single family residence. HRS Chapter 205 cannot be applied to discriminate between vacation rental owners and home owners.

While arguments can be made that recent legislation might have prohibited "overnight accommodations" within the State Agricultural District, this legislation only became

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<sup>1</sup> Originally "dwellings" were expressly allowed uses under HRS Section 205-2 but was changed to "farm dwellings" sometime in the early 1990s. Even if this changes is used to resolve the question whether TVR uses are allowed within the State Agricultural District or not there still exists the grandfather issue of single family dwelling uses on C, D, E or U lands that were occurring prior to this change to HRS Section 205-2.

effective recently and, only relates to what the counties can allow under an "agricultural tourism" ordinance. The counties are taking this recent legislation to mean that prior use of a dwelling unit for vacation rental purposes within the State Agricultural District was also prohibited. This interpretation is questionable since it does not recognize a landowner's existing "grandfather" rights.<sup>2</sup> On behalf of the Kauai Board of Realtors I urge the committee to pass HCR 348, HD 1 with an amendment requesting the Attorney General to address the issue of any "grandfather" rights existing owners have in regards to their prior use of their land. I thank you for your kind consideration of this matter.

Sincerely,

BELLES GRAHAM PROUDFOOT  
WILSON & CHUN, LLP



Jonathan J. Chun

JJC:so

cc: Kauai Board of Realtors

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<sup>2</sup> See HRS Section 205-8 and related constitutional cases.

**FAX TRANSMISSION****LATE TESTIMONY**

Dated: April 19, 2008 ..... One (1) page total

Re: Testimony in Support of Proposed House Concurrent Resolution HCR 348, HD 1

From: Bruce and Cynthia Fehring, 20+ year Kauai residents, farmers, and alternative visitor accommodation owners/operators Fax 808-828-0894 E-mail: fehring@aloha.net

To: The Senate, State of Hawaii 24th Legislature, 2008  
Attention: Senator Clayton Hee, Chair, and Committee Members  
Transmitted to Fax # 1-800-586-6659

Hearing Date/Time: Monday, April 21, 2008, 9:30 AM

Location: Conference Room 016, State Capitol, 415 South Beretania Street

Thank you for hearing this important proposed resolution.

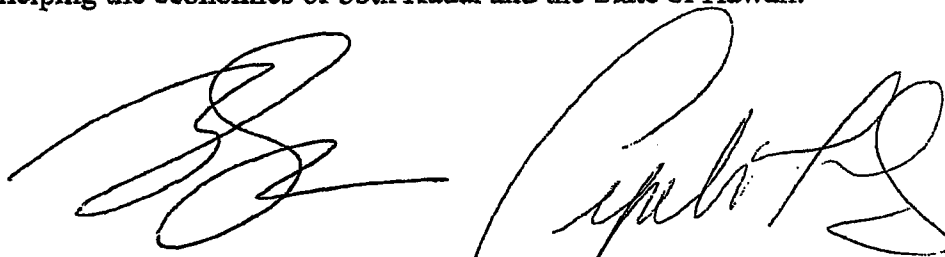
As members of an important class of residents involved in diversified, sustainable agriculture (tropical fruits, CSA/market gardens/Hardwoods), we are distraught with recent actions on the part of the Kauai County Council (by way of Bill # 2204, resulting in Ordinance #864) which states that "Pursuant to HRS 205, no non-conforming use certificate shall be issued for any single family transient vacation rental located on land designated "Agricultural" by State Law, unless (1) it was built prior to June 4, 1976 or (2) the applicant has a special use permit under HRS 205.6 which specifically permits a vacation rental and the permit was secured prior to the enactment of this ordinance."

Our concern is based on the following:

- ▶ Our 2 legally built cottages were constructed prior to the date when the State Law was revised to prohibit overnight accommodations. We have paid both GE and TA taxes since Day One.
- ▶ We rely on the income from these rentals to pay the lion's share of the carrying cost of our property (mortgages, taxes, insurance, etc) so that we are able to farm our acreage, instead of having to leave the farm to obtain outside employment to cover our day-to-day expenses.
- ▶ Providing guests with accommodations on a working farm is revered the world over as agricultural tourism, for both enabling small farmers to stay in operation and providing guests with a unique and beneficial experience, as well as providing employment for support staff and services..
- ▶ Those travelers who seek out alternative accommodations such as our own are not likely, in the event they can no longer be accommodated, to switch to a hotel/resort setting. They will simply find another destination where agricultural tourism and affordable alternative accommodations are encouraged. The net loss to our tourism industry will be incalculable, both in terms of trickle down, stay-on-Kauai dollars but on the diversity of our visitors themselves. Our guests are more likely to support local agriculture, to recycle, and to be more earth-friendly in general.
- ▶ Long term rental of our cottages, the legality of which on land zoned agricultural is questionable itself, would not cover our costs sufficiently to allow us to continue to farm. Also, we like to be able to keep dates available for visits from our families and friends.

Please do whatever you can to support passage of this resolution. In doing so, you will be supporting small farmers like ourselves and helping the economies of both Kauai and the State of Hawaii.

Mahalo nui,  
Bruce and Cyndee Fehring



# LATE TESTIMONY

Testimony Senate Sergeant-At-Arms Office via facsimile: 586-6659  
CPH Committee Hearing at 9:45 am on 4/21/08; Conference Room 16

(Date)

Senator Russell S. Kokubun, Chair  
Senator David Y. Ige, Vice Chair  
Committee On Commerce, Consumer Protection and Affordable Housing

RE: HCR 125, HD1 REQUESTING THE AUDITOR TO EXAMINE UPCOMING  
CONDOMINIUM LEASEHOLD EXPIRATIONS AND THEIR IMPACT ON THE  
AVAILABILITY OF REPLACEMENT AND AFFORDABLE HOUSING FOR  
HAWAII RESIDENTS

Dear Chairman Kokubun, Vice Chairman Ige and Members of the Committee:

My name is Jeanine Ed Greenwood and I am [position] leasehold apt. owners

I am testifying in support of HCR 125, HD1 which requests the auditor to examine the issue of upcoming condominium and co-operative housing project lease expirations and its potential impact on the availability of replacement and affordable housing.

The recent expiration and reversion of the residential leases at The Kailuan resulted in the families being evicted and forced to find alternative housing against their will. This is just the tip of the iceberg since over the next 30 years, over 8,000 leasehold condominium units could revert back to the fee owner, leaving thousands of individuals and their families without a place to live -- many of whom are elderly residents.

It is critical that the state legislature consider leasehold conversion and/or lease extensions as a means to address the expiration of condominium leases. A study by the Auditor represents an important first step to address both this important issue and possible solutions.

Thank you.

[Name] Jeanine Greenwood  
Edward E. Greenwood

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AVAILABILITY OF REPLACEMENT AND AFFORDABLE HOUSING FOR  
HAWAII RESIDENTS

Dear Chairman Kokuhun, Vice Chairman Ige and Members of the Committee:

My name is Michael Greenwood and I am [position]. Family member of leasehold owner.

I am testifying in support of HCR 125, HD1 which requests the auditor to examine the issue of upcoming condominium and co-operative housing project lease expirations and its potential impact on the availability of replacement and affordable housing.

The recent expiration and reversion of the residential leases at The Kailuan resulted in the families being evicted and forced to find alternative housing against their will. This is just the tip of the iceberg since over the next 30 years, over 8,000 leasehold condominium units could revert back to the fee owner, leaving thousands of individuals and their families without a place to live -- many of whom are elderly residents.

It is critical that the state legislature consider leasehold conversion and/or lease extensions as a means to address the expiration of condominium leases. A study by the Auditor represents an important first step to address both this important issue and possible solutions.

Thank you.

[Name] 

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CONDOMINIUM LEASEHOLD EXPIRATIONS AND THEIR IMPACT ON THE  
AVAILABILITY OF REPLACEMENT AND AFFORDABLE HOUSING FOR  
HAWAII RESIDENTS

Dear Chairman Kokubun, Vice Chairman Ige and Members of the Committee:

My name is Petty Schmallen and I am [position]. *Leasehold owner*

I am testifying in support of HCR 125, HD1 which requests the auditor to examine the issue of upcoming condominium and co-operative housing project lease expirations and its potential impact on the availability of replacement and affordable housing.

The recent expiration and reversion of the residential leases at The Kailuan resulted in the families being evicted and forced to find alternative housing against their will. This is just the tip of the iceberg since over the next 30 years, over 8,000 leasehold condominium units could revert back to the fee owner, leaving thousands of individuals and their families without a place to live -- many of whom are elderly residents.

It is critical that the state legislature consider leasehold conversion and/or lease extensions as a means to address the expiration of condominium leases. A study by the Auditor represents an important first step to address both this important issue and possible solutions.

Thank you.

[Name] *Petty Schmallen*



**TESTIMONY**  
**HCR 348 HD1**  
**LATE**  
**(END)**