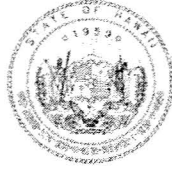


LINDA LINGLE
Governor



SANDRA LEE KUNIMOTO
Chairperson, Board of Agriculture

DUANE K. OKAMOTO
Deputy to the Chairperson

State of Hawaii
DEPARTMENT OF AGRICULTURE
1428 South King Street
Honolulu, Hawaii 96814-2512

**TESTIMONY OF SANDRA LEE KUNIMOTO
CHAIRPERSON, BOARD OF AGRICULTURE**

**BEFORE THE HOUSE COMMITTEES ON
AGRICULTURE AND WATER, LAND, AND OCEAN AFFAIRS
FRIDAY, MARCH 6, 2009
9:00 a.m.
Room 312**

**HOUSE CONCURRENT RESOLUTION NO. 79
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 PROHIBITED UNDER
CHAPTER 205, HAWAII REVISED STATUTES.**

Chairpersons Tsuji and Ito and Members of the Committees:

Thank you for the opportunity to testify on House Concurrent Resolution No. 79. The Department of Agriculture offers comments. We are dismayed that the direction of this resolution is to give equal status to the promotion and utility of alternative visitor accommodations with the primary permissible use of agricultural land which is the cultivation of crops and other agriculture. Alternative visitor accommodations in the State Agricultural District, if left unregulated, may encourage the spread of "fake farms" or "gentlemen's estates" resulting in higher agricultural land prices and making the establishment of new farms less likely, they may increase the possibility of nuisance complaints from owners and renters of transient vacation rentals about bona fide agricultural production in the vicinity, and they may negatively affect the counties efforts to identify important agricultural lands pursuant to Chapter 205. We strongly support the counties efforts to regulate the establishment of transient vacation rentals on Agricultural District lands, and that the Special Permit (Section 205-6, HRS) remain the vehicle by which these uses may be approved. We defer to the Department of the Attorney General as to the priority they assign to this resolution.

CASE LOMBARDI & PETTIT

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Bruce C. Bigelow (1946-2001)

March 5, 2009

The Honorable Clift Tsuji, Chair
and Members of the Committee on
Agriculture
House of Representatives
State Capitol
Honolulu, HI 96813

The Honorable Ken Ito, Chair
and Members of the Committee on Water,
Land, & Ocean Resources
House of Representatives
State Capitol
Honolulu, HI 96813

Re: House Concurrent Resolution No. 79

Dear Chair Tsuji, Chair Ito and Members of the Committees on Agriculture and Water, Land & Ocean Resources:

We write to you on behalf of several landowners who own single-family and farm dwellings in the State Land Use Agricultural district who have operated vacation rentals on the North Shore of Kauai.

We appreciate the opportunity to testify in strong support of House Concurrent Resolution No. 79 and offer comments. We believe a legal opinion from the Attorney General is needed to clarify the issue of whether single-family and farm dwelling transient vacation rentals (TVRs) are *per se* prohibited in the Agricultural district, and whether State law requires lawfully existing TVRs in the Agricultural district to be grandfathered in when a county adopts new restrictions on TVRs. This issue is important because many owners of properties within the Agricultural district have relied upon TVRs in order to support the agricultural uses of their properties, particularly given that many properties in the Agricultural district have soil conditions that make it infeasible to conduct agricultural activities without another source of income.

The absence of clarity on this issue has led to a multiplicity of opinions on the legality of TVRs in the Agricultural district. Certain Kauai County Council members have taken the most extreme position and declared that under State law all TVRs in the Agricultural district are illegal, and therefore the County could not grandfather existing TVRs with respect to Kauai County Ordinance 864, which prohibits transient vacation rentals outside of the Visitor Destination Areas on Kauai.

Ordinance 864 effectively prohibits the grandfathering of transient vacation rentals on lands in the Agricultural district outside of the Visitor Destination Areas on Kauai. Existing vacation rentals on other lands were grandfathered pursuant to Hawaii Revised Statutes ("HRS") § 46-4. The Kauai County Council discussed grandfathering of single-family TVRs on Agricultural lands. However, no grandfathering provision for such uses was included in the

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and Members of the Committee on Agriculture
The Honorable Ken Ito, Chair
and Members of the Committee on Water, Land, & Ocean Resources
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ordinance, because certain Kauai County Council members claimed that State law was clear that single-family TVRs on Agricultural lands were prohibited under HRS Chapter 205, with two extremely limited exceptions. The first exception allowed grandfathering of such uses if the property owner had previously obtained a special use permit.¹ The second exception applied only to TVRs that existed prior to the enactment of HRS Chapter 205 in 1976.

Additionally, in response to an informal inquiry by one of the Kauai County Council members, the former Land Use Commission ("LUC") Executive Officer, referring to Section 205-5(b), stated in an email that "Chapter 205 HRS clearly prohibits overnight accommodations (such as offered by vacation rentals) in the SLU Agricultural District". In his email, the Executive Officer, who does not express the opinion of the LUC and who is not a voting member of the LUC, did not rely upon any LUC rulings or case law, but instead relied upon 205-5(b)(2). However, this email makes no mention that HRS, Sec. 205-5(b)(2) was only enacted in the 2006 Haw. Sess. Laws, Act 250, effective June 29, 2006, and therefore does not affect uses existing prior to that date, which HRS Section 46-4 mandates must be grandfathered in under Section 205-5(b)(2). The Executive Officer's email also does not mention that 205-5(b)(2) relates to the regulation of agricultural tourism activities (not single-family TVRs). Furthermore, Section 205-5(b)(2) only applies to agricultural tourism activities where counties have specifically adopted ordinances to regulate agricultural tourism, and the County of Kauai has not done so.

Further, the controversy of TVRs on agricultural land is ongoing. There currently is an amendment to Ordinance 864 before the Kauai Planning Commission, therefore confirmation that HRS Chapter 205 does not *per se* prohibit single-family TVRs on Agricultural lands is necessary to address continuing assertions that TVRs on agricultural lands should not be grandfathered in.

Based on the foregoing, an opinion from the Attorney General is needed to clarify that HRS Chapter 205 does not *per se* prohibit single-family TVRs on Agricultural lands, and that lawfully existing TVRs must, under State law, be grandfathered in.

Nothing in Chapter 205, which sets forth the permissible uses in the Agricultural district, expressly prohibits vacation rental uses in the Agricultural district. HRS § 205-4.5(a) sets forth the permissible uses on lands rated A/B. Among the permitted uses is a "farm dwelling", which is defined as "(4) . . . a single-family dwelling located on and used in connection with the farm, including clusters of single-family farm dwellings as permitted within agricultural parks developed by the State, or where agricultural activities provide income to the family occupying the dwelling." This provision does not require that the farm dwelling unit be exclusively used for farm purposes, nor does it state that rental of such a building is prohibited.

¹ We understand that Kauai County has never previously required or issued a special use permit for TVRs, so this effectively prohibits any grandfathering of TVRs established after 1976.

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Furthermore, with respect to lands that are not rated A/B, which comprise approximately 75% of the agricultural lands in Hawaii,² HRS § 205-5(b) applies. HRS § 205-5(b) provides that "uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted." (Emphasis added) HRS § 205-2 contains eleven enumerated uses, including cultivation of crops, farming activities related to animal husbandry, aquaculture and wind generated energy. Vacation rental uses in structures that otherwise comply with Chapter 205 can easily be seen as "compatible" with the uses listed in HRS § 205-2. There does not appear to be any case law, declaratory or authoritative order or ruling prohibiting single-family TVRs on Agricultural lands.

Especially in these difficult economic times, there should be an increased sensitivity to supporting agricultural activities, instead of hindering the ability of agricultural landowners to utilize their lands. Vacation rentals in the Agricultural district can provide much-needed income to families who struggle to maintain agricultural activities on their properties. This supports the long-term goals of achieving sustainability and agricultural use of their land. Without income from TVRs, owners with agricultural activities may be forced to substantially reduce agricultural activities or possibly forced off their land and required to sell their properties to purchasers with no interest in maintaining agricultural uses. Whether lands comply with Chapter 205 should be determined based upon the totality of the facts and circumstances of the specific use of an owner's property, which is consistent with how the LUC has addressed compliance with Chapter 205 in other circumstances,³ and not based on an assumption that TVRs are *per se* prohibited on agricultural lands.

In addition, Act 186, Session Laws of Hawaii 1980, which authorized the counties to restrict timeshares and transient vacation rentals, defined "transient vacation rentals" as "rentals in a multi-unit building to visitors over the course of one or more years, with the duration of occupancy less than thirty days for the transient occupant". (Emphasis added). Therefore, Act 186 did not authorize restrictions on single-family TVRs. Similarly, prior to Ordinance 864, the Kauai County Code defined TVRs as those in multi-unit buildings and did not impose restrictions on single-family TVRs. Relying on this, many agricultural land owners operated single-family TVRs for years, paying state and county taxes, and this use has never been expressly prohibited by the Kauai County Code or HRS Chapter 205. Accordingly, pursuant to HRS Sec. 46-4, grandfathering of lawfully existing TVRs is required, with respect to any ordinances prohibiting single-family and farm dwelling transient vacation rental uses in state agricultural districts. Failing to provide grandfathering as required under HRS Sec. 46-4, also raises questions as to constitutional issues, such as deprivation of landowners' vested rights and violations of their due process and equal protection rights.

² See Adrienne Iwamoto Suarez, *Avoiding the Next Hokuli'a: The Debate over Hawai'i's Agricultural Subdivisions*, 27 Hawaii L. Rev. 441, 444 (2005).

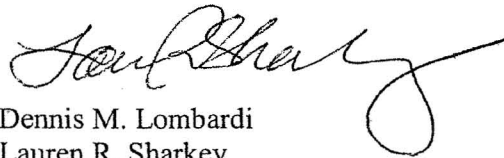
³ See generally, In the matter of the Petition of Kuleana Ku'ikahi, LLC, DR04-30 (April 10, 2006).

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We urge you to pass House Concurrent Resolution 79 to request an opinion from the Attorney General to clarify that such vacation rental uses in the Agricultural district are not prohibited under State law.

Very truly yours,

CASE LOMBARDI & PETTIT

A handwritten signature in cursive script, appearing to read "Dennis M. Lombardi", written in black ink.

Dennis M. Lombardi
Lauren R. Sharkey

LRS:kkg

wooley1-Christopher

From: mailinglist@capitol.hawaii.gov
Sent: Tuesday, March 03, 2009 7:37 PM
To: AGRtestimony
Cc: zelei7ke@yahoo.com
Subject: Testimony for HCR79 on 3/6/2009 9:00:00 AM

Testimony for AGR/WLO 3/6/2009 9:00:00 AM HCR79

Conference room: 312
Testifier position: comments only
Testifier will be present: No
Submitted by: Zelei Abordo
Organization: Individual
Address: Honolulu. HI
Phone: 808.
E-mail: zelei7ke@yahoo.com
Submitted on: 3/3/2009

Comments:

When you have to draft a bill to ask the AG's office to give an opinion on something that is against the law is amazing to me. You are talking about businesses being conducted in residential areas at the expense of law abiding residents. What you should be doing is demanding that the AG's office enforce the laws, instead of looking for loopholes to find a way around the law because your belief system requires that tourism is important enough to break the laws.

wooley1-Christopher

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 04, 2009 11:43 AM
To: AGRtestimony
Cc: Wehms2@AOL.com
Subject: Testimony for HCR79 on 3/6/2009 9:00:00 AM

Testimony for AGR/WLO 3/6/2009 9:00:00 AM HCR79

Conference room: 312
Testifier position: support
Testifier will be present: No
Submitted by: Alan R. Wehmer
Organization: Individual
Address: Kaneohe, Hawaii
Phone: hm cell
E-mail: Wehms2@AOL.com
Submitted on: 3/4/2009

Comments:

To The Honorable Chairman and Members of the Committee

Unfortunately, I am having a surgical procedure done this morning and am unable to be with you in person. Please accept and consider my testimony in support of HCR 79

I was born on a farm. My ultimate desire is to return to the 'aina which I hope to accomplish in the near future. Due to the high cost of Ag-land in Hawaii now, I need to be able to supplement my projected farm income by taking in visitors from time to time so that my farming ventures will be viable.

I firmly believe that having visitors in an agricultural environment is an ideal solution to the concerns put forth by many of the people opposed to B & B's and short-term rentals. I truly enjoy showing/educating relatives, friends and other visitors about the beauty of our Islands whenever they visit. I believe having visitors in an agricultural setting would be a wonderful "tool" to teach them further about the role of agriculture in the development of the Hawaii we enjoy today.

So, I need your help in allowing me to produce locally grown crops to aid in keeping Hawaii less dependent on Mainland and other imported products. It appears that HCR 79 will be a step toward accomplishing this goal.

Mahalo for your assistance in this matter.

Sincerely,
Alan R. Wehmer
home
cell