

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU

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DIRECTOR

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March 14, 2014

The Honorable Cindy Evans, Chair
and Members of the Committee on Water & Land
State House of Representatives
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Evans and Committee Members:

SUBJECT: Senate Bill No. 2270, SD2
Relating to County Zoning

The Department of Planning and Permitting (DPP) **opposes** Senate Bill No. 2270, SD2, which would allow any property owner to file suit directly in Circuit Court to enforce zoning violations relating to transient vacation rental on a neighboring property that directly affect the property owner.

State law already allows property owners to sue under county land use laws, but only after they've exhausted all administrative relief. This means property owners must wait until the county has had an opportunity to enforce the law before they can go to court to seek an injunction to enforce the law. However, pursuant to HRS 46-4, authority over zoning matters is granted to the counties, not to the public. The Bill would be contrary to HRS 46-4 by allowing any property owner to use the court system to interpret zoning issues.

This Bill would essentially relinquish City authority and enforcement over the Land Use Ordinance (LUO) to people who are not familiar with county zoning laws. This legislation would result in unintended consequences, including frivolous and expensive lawsuits between property owners which, through subpoena action, could involve the county in lengthy, time-consuming, and costly legal battles. In short, allowing private property owners to take enforcement matters into their own hands would frustrate the legal system and the land use process.

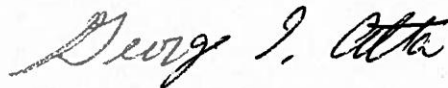
The Honorable Cindy Evans, Chair
and Members of the Committee on Water & Land
State House of Representatives
Hawaii State Capitol
RE: Senate Bill No. 2270, SD2
March 14, 2014
Page 2

The LUO is a complex document. Interpreting what is permissible or not permissible within county zoning codes compounds this already complex process. For example, a complaint received of an alleged illegal transient vacation rental use will include an inspection on site and a full investigation will include interviews with the occupants before a determination is made as to whether a land use violation has occurred. Should this investigative process be bypassed and private property owners were to make conclusions based on their interpretation of an illegal use, the result will likely escalate to counter lawsuits between the neighboring parties.

In summary, the counties already have an administrative process for alleged violations of the LUO. To allow private property owners the ability to bypass this process and go directly to the courts to enforce alleged violations will significantly frustrate the legal system and the land use process. For these reasons, please hold Senate Bill No. 2270, SD2, in Committee.

Thank you for the opportunity to testify.

Very truly yours,

A handwritten signature in cursive script that reads "George I. Atta".

George I. Atta, FAICP
Director

GIA:cl
SB2270SD2-jmf

March 14, 2014

The Honorable Cindy Evans, Chair
House Committee on Water & Land
State Capitol, Room 325
Honolulu, Hawaii 96813

RE: S.B. 2270, S.D.2, Relating to County Zoning

HEARING: Friday, March 14, 2014 at 10:00 a.m.

Aloha Chair Evans, Vice-Chair Lowen, and Members of the Committee:

I am Myoung Oh, Government Affairs Director, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,300 members. HAR **opposes** S.B. 2270, S.D.2 that confers upon a property owner a private right of action and allows the property owner to file suit directly in circuit court to enforce zoning violations relating to a transient vacation rentals on a neighboring property that directly affect the property owner.

In *Pavsek v. Sanvold*, the Intermediate Court of Appeals held that HRS §46-4(a) creates a private right of action for alleged Land Use Ordinance (LUO) zoning violations, but the action is subject to primary jurisdiction, in which the party is required to seek an administrative determination of the claim before proceeding with the suit to obtain judicial enforcement of the LUO.

While amendments were made in Senate Draft 2 to target only zoning violation related transient short-term rentals, S.B. 2270, S.D.2 **still proposes to circumvent administrative remedies and processes.**

HAR believes that the government should be the first line of remedy and the appropriate authority to enforce zoning disputes. County zoning and enforcement should be left with the respective counties, and such disputes should be filed with the appropriate county departments first, so that administrative measures and/or sanctions may be taken.

Mahalo for the opportunity to testify.



March 14, 2014

The Honorable Cindy Evans, Chair
House Committee on Water & Land
State Capitol, Room 425
Honolulu, Hawaii 96813

RE: SB 2270 SD2, RELATING TO COUNTY ZONING.

Aloha Chair Evans, Vice Chair Lowen, and Members of the Committee:

I am Dan Monck, here to testify on behalf of the Hawai'i Association of Vacation Rental Managers ("HAVRM").

This letter is written in **OPPOSITION to SB 2270 SD2**.

SB 2270 SD2 seeks to provide neighboring property owners a "right of action" in the case where this property owner believes that vacation rental activity, taking place in a neighbor's property, is contrary to the zoning of that neighbor's property.

When neighbors have concerns in this regard, they should take them to their County zoning department. This is a core role that these entities play in the administration of island government.

Reviewing the past testimony of this Bill when it was heard in the Senate, the Counties all identify this core role concern, as well as their additional concern, that this Bill could lead to excessive and unnecessary "neighbor vs. neighbor" legal conflict.

Vacation rental activity is properly managed and regulated by the Real Estate Chapter, HRS 467 and the Landlord Tenant Code, HRS-521. Proper enforcement and strengthening of these Statues is the avenue to addressing issues related to vacation rental activity, not undermining county zoning departments.

HAVRM stands ready to work with this committee, and House leadership, to help address any issues they may have concerning vacation rental activity, the impact upon the neighborhoods of our islands caused by operators of these rentals acting contrary to Hawaii law, and how vacation rental activities in Hawaii communities might be improved.

Sincerely yours,

Dan Monck
President
Hawaii Association of Vacation Rental Managers (HAVRM)

lowen2-Nga

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 12, 2014 9:48 PM
To: waltestimony
Cc: jeannine@hawaii.rr.com
Subject: *Submitted testimony for SB2270 on Mar 14, 2014 10:00AM*

SB2270

Submitted on: 3/12/2014

Testimony for WAL on Mar 14, 2014 10:00AM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Jeannine Johnson	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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lowen2-Nga

From: kraz <kraz@hawaii.rr.com>
Sent: Thursday, March 13, 2014 9:16 AM
To: waltestimony
Subject: Testimony in Strong Support of SB2270SD2 WAL 325 Mar 14, 2014 10:00 AM

Testimony in Strong Support of SB2270SD2 March 14, 2014 Hearing before WAL 10AM

I strongly support SB2270SD2 which provides a last chance opportunity for residents to sue in cases where the county has failed to enforce zoning in residential neighborhoods. No citizen should be denied the ability to sue if the county government will not provide resolution. I am sure most resident homeowners would not undertake legal action without first exploring less expensive options. However, in the event that there is no resolution to violations of the LOU, the homeowner should not be denied this avenue of last resort. Please support SB2270SD2 which provides clarification to the intent of HRS46-4.

Thank you.

Barbara Krasniewski
124 Kuulei Road
Kailua, HI 96734
261-8133

lowen2-Nga

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 12, 2014 9:43 PM
To: waltestimony
Cc: mypillbuggy@gmail.com
Subject: Submitted testimony for SB2270 on Mar 14, 2014 10:00AM

SB2270

Submitted on: 3/12/2014

Testimony for WAL on Mar 14, 2014 10:00AM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Marisa Nguyen	Individual	Support	No

Comments: Other than a few who were grandfathered in, transient vacation rentals are illegal. They are illegal because they change neighborhoods from a places with real neighbors whose kids can play together to places with a frequent turnover of strangers--more like a hotel district. Transient vacation rentals are against the law in residential areas, but there is no enforcement of the law. SB2270 is an important recourse for people who want to regain their neighborhoods and fight these illegal, neighborhood-busting, mercenary enterprises. Please support it.

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From: mailinglist@capitol.hawaii.gov
Sent: Thursday, March 13, 2014 8:17 AM
To: waltestimony
Cc: robesonb001@hawaii.rr.com
Subject: Submitted testimony for SB2270 on Mar 14, 2014 10:00AM

SB2270

Submitted on: 3/13/2014

Testimony for WAL on Mar 14, 2014 10:00AM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Barbara Robeson	Individual	Support	No

Comments: I strongly SUPPORT SB 2270. Vacation Rentals have huge negative impacts on our residentially zoned neighborhoods. Out here on the North Shore of Kauai, the population has almost doubled due to these Vacation Rentals. Will our residential communities now be in more danger when an emergency situation occurs?

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House Water and Land Committee - SUPPORT SB2270

TESTIMONY OF of SAVE O'AHU'S NEIGHBORHOODS (SONHawaii'i)

The purpose of SB2270 SD2 is to give the Hawaii Courts the clear intention of already-existing Hawaii State law 46-4.

HRS 46-4 **already gives private right of action** It already clearly reads:

“The council of any county shall prescribe rules, regulations, and administrative procedures and provide personnel it finds necessary to enforce this section and any ordinance enacted in accordance with this section. The ordinances may be enforced by appropriate fines and penalties, civil or criminal, ***or by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances.***”

It is no surprise that the County land use enforcement agencies oppose this clarification. They are the reason it is necessary – especially the Honolulu DPP’s inability (by their own public admission and testimony) or lack of willpower to adequately enforce its Land Use Ordinance.

Even the most cursory analysis debunks their opposition. HRS 46-4 has been on the books for decades and **only one case** by a property owner is known to have arisen out of it. SB2270 simply lets the courts know in no uncertain terms that the law is there as a last resort when county enforcement agencies do not, or cannot, do their job.

Paraphrased from a recent Real Estate Law Journal article:

A lawsuit was filed by a North Shore resident (Pavsek) after the C&C Honolulu failed to enforce its LUO. At issue was whether a state statute, HRS 46-4, creates a so-called "private right action" to sue in court to enforce county land use laws. The state court judge dismissed the lawsuit, finding that he did not have jurisdiction to issue an injunction. On appeal, the ICA ruled that "directly affected" property owners do have a private right to sue under county land use laws. However, that right is subject to the "doctrine of primary jurisdiction" - a legal way of saying that property owners must first demand that the county enforce the laws. In this case, the plaintiffs must first pursue resolution of their claim regarding illegal vacation rentals with the City Department of Planning & Permitting and then the Zoning Board of Appeals, before they can go to court.

The ruling creates a dilemma for property owners who are aggrieved by a county's failure or refusal to enforce its own land use laws. The property owner must first spend its own time and money in an administrative proceeding - and essentially accuse the county of not doing its job before it can go to court to get an injunction to enforce the law. ***End paraphrasing***

Review of the original Pavsek complaint reveals that Pavsek had repeatedly requested the Honolulu DPP to enforce its LUO – without result.

The original legislative intent of 46-4 was clear – give affected parties the right to sue. The ICA has effectively removed that right. SB2270 simply tells the court to follow the intent of long-standing legislation.

The infrequent previous use of this clause in 46-4 shows that the private right to sue is only be used in very egregious violations of the LUO coupled with the City's failure to enforce. Pavsek may be the only case filed to date under 46-4.

Passage of SB2270 will not result in a rash of “neighbor vs. neighbor” lawsuits – as is claimed by the testimony of the counties and the Hawaii Assn of Realtors. Remember that some licensed realtors have been cited for violations of the LUO. One would hope that such a professional industry organization would better spend its time and resources policing its own industry rather than trying to deprive their neighbors of the right to sue.

The opposition's clichéd “Neighbor vs neighbor” and “nuisance lawsuits” is wrong. Lawsuits are expensive to initiate and no neighbor is going to start a lawsuit before exhausting the free enforcement available from their county government. Taking a suit to court where the plaintiff has not already exhausted county enforcement would be starting with two strikes against – it's not going to happen.

SB2270 will direct the courts to give affected property owners an avenue of last resort.

The original Pavsek complaint, the law journal, and the ICA opinion¹ have already been sent as email attachment to each committee member. Please contact me if you desire further copies or supporting information.

Thanks,

Larry Bartley
SONHawaii'I
sonhawaii@hawaii.rr.com
261-0598

lowen2-Nga

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, March 12, 2014 10:49 PM
To: waltestimony
Cc: tinmanmd@gmail.com
Subject: Submitted testimony for SB2270 on Mar 14, 2014 10:00AM

SB2270

Submitted on: 3/12/2014

Testimony for WAL on Mar 14, 2014 10:00AM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Thinh Nguyen	Individual	Support	No

Comments: Please support SB2270. The government has not been good at enforcing the law which prohibits the vast majority of transient vacation rentals in residential neighborhoods. This bill gives a local homeowner one last chance to protect his property from a never-ending trail of strangers moving in and out of the house next door. Support our local residents who make up the fabric of our communities. Support SB2270.

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Submitted by

Shannon Wood, *President*

Windward Ahupua`a Alliance

P.O. Box 6366

Kane`ohe, HI 96744

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Website: <http://www.waa-hawaii.org>; E-mail: info@waa-hawaii.org

COMMITTEE ON WATER AND LAND

Rep. Cindy Evans, Chair

Rep. Nicole Lowen, Vice Chair

8:45 am

Friday, March 14, 2014

Conference Room 325

SB 2270 SD2 - RELATING TO Cn 1998, OUNTY ZOMING
Strongly Oppose

I am Shannon Wood, the co-founder and president of the **Windward Ahupua`a Alliance**, a **501c3** Hawai`i non-profit corporation which was established in July, 2002, to create the **Ko`olau Greenbelt & Heritage Trails System** to restore, protect & provide public access to the *mauka* lands on the Windward side of O`ahu as well as to support locally-owned sustainable economic activities in the more developed areas. Its mandate, however, has greatly expanded over the past eleven-plus years well beyond these important regional issues.

Long before **WAA** was founded, I became actively involved in a number of tourism-related issues including the non-conforming use certificates which were last issued on December 28, 1989. The county ordinance was actually passed and signed into law in late 1986; only those applicants who had been in business prior to the law's signing could apply for a permit.

In late 1994, I was one of the five people who established the **Hawaii Ecotourism Association** which strongly supports alternative accommodations plus providing a wide range of volunteer opportunities.

One of our first actions was to bring the non-conforming use certificate laws up for re-consideration before the **Honolulu City Council**. Over the next fourteen years under two different mayors and well over 20 different **City Council** members, updating the 1986 legislation was considered at least five times, but the proposed ordinances did not pass for a number of reasons - including concerns expressed by a small but highly-vocal group of Kailua (O`ahu) residents who are opposed to visitors coming into their community.

They are the ones who are behind this particular bill. They argue that property owners who run these businesses are illegal even though the owners cannot apply for a permit or license. Thus, they are always illegal.

Please read the **Star-Advertiser** story published yesterday about **City Council Chair** Ernie Martin who plans to introduce companion legislation to allow owners to apply for permits for new vacation rentals here on O`ahu in addition raising the property taxes.

SB 2279 SB2 is not needed. Mahalo.

Council bill would raise taxes on residential vacation homes

By Gordon Y.K. Pang
gordonpang@staradvertiser.com

Honolulu City Council members are looking into whether transient vacation units and bed-and-breakfast homes should be taxed at higher rates. Also, they appear ready to tackle related issues such as allowing for more legal short-term residential vacation rentals while cracking down on illegal ones.

A bill scheduled for its first vote Wednesday would create new property tax classifications for both types of short-term residential vacation rentals, which currently are taxed in the residential category like other single-family homeowners in their neighborhoods.

Council Chairman Ernie Martin, Bill 23's author, said creating the two new tax classes is a step toward tax equity and one of several measures designed to tackle the broader B&B/TVU issue. "Both endeavors are primarily business activities" but pay based on residential rates, he said.

Rates for B&Bs and TVUs are expected to fall between those of residential property owners, who currently pay at a rate of \$3.50 per \$1,000 of assessed value, and hotel/resort owners, who now pay \$12.40 for every \$1,000 of value.

Last year, after strong objections from the vacation rental owners, the Council rejected a plan that would have placed TVUs and B&Bs

in the hotel/resort class.

Martin said he also intends to introduce companion legislation that would allow for new TVUs and B&Bs to operate legally and crack down on the large number of illegal vacation rental homes. The city imposed a moratorium on issuing new nonconforming use certificates for B&Bs and TVUs in 1986, a move that has not stopped what the city estimates to be thousands of illegal short-term rentals from operating.

Councilman Ikaika Anderson, who represents Kailua, where residential vacation rentals are a hot-button issue, has tried in the past to find a middle ground. Anderson said he welcomes a go-slow approach on future legislation to ensure all concerns are addressed. "I do support legislation allowing for additional short-term rentals coupled with very strict and severe enforcement."

The city Department of Planning and Permitting told Martin this week that there are about 48 legal B&Bs and 810 TVUs. With illegal operations, "there are probably triple that amount," Martin said. B&Bs and TVUs are both considered short-term rentals, where visitors stay for fewer than 30 days. The difference is that a property owner must physically occupy a B&B, while no owner needs to be present at a TVU.

Both Angie Larson, former president of the Hawaii

Vacation Rental Owners Association, and Tonic Bille, president of the B&B TVU Association of Oahu, said Martin's plan to create two new tax classes would create new burdens that are likely to drive many legitimate B&B and TVU owners out of business while discouraging illegal ones from ever wanting to become legal.

The idea that most B&Bs and TVUs are raking in cash is a myth, Bille said. "We work hard and are able to just break even at the end of the year," she said. Residential vacation rentals also boost the businesses in the neighborhoods where they operate, and a loss of B&Bs and TVUs would be felt by them as well, she said.

Larson said that establishing the new tax categories without addressing the other issues is putting "the cart before the horse."

Legally operating B&B and TVU owners already pay income and general excise taxes, Larson said, and raising the price of renewing a nonconforming use certificate would provide more certainty than a tax rate that could change from year to year.

Larson said her group supports expanding the number of licenses issued for B&Bs and TVUs as well as stricter action against illegal units. She noted that Mayor Kirk Caldwell has promised both.

See the city's current rules on TVUs and B&Bs at bit.ly/1kgRMNr.