



STATE OF HAWAII
DEPARTMENT OF TAXATION
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HONOLULU, HAWAII 96813
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To: The Honorable Sylvia Luke, Chair
and Members of the House Committee on Finance

Date: Wednesday, April 03, 2019
Time: 2:00 P.M.
Place: Conference Room 308, State Capitol

From: Linda Chu Takayama, Director
Department of Taxation

Re: S.B. 1292, S.D. 2, H.D. 2, Relating to Transient Accommodations

The Department of Taxation (Department) supports S.B. 1292, S.D. 2, H.D. 2, and offers the following comments regarding the tax provisions for the Committee's consideration.

The following is a summary of key tax provisions of S.B. 1292, S.D. 2, H.D. 2, which are each effective upon approval:

Definitions and Fines

- Defines “booking service” and “hosting platform”;
- Repeals the misdemeanor for operating a transient accommodation without a transient accommodations tax (TAT) license;
- Imposes civil fines for operating a transient accommodation without a TAT license; and
- Clarifies that posting an advertisement for the furnishing of a transient accommodation is engaging in business; and
- Adds a new subsection to section 237D-4.5, Hawaii Revised Statutes (HRS), which imposes a civil penalty for entering into an agreement to furnish transient accommodations at noncommissioned negotiated contract rates prior to registering for a TAT license.

Mandatory Duties as Tax Collection Agent

- A hosting platform that collects fees for booking services must register as a tax collection agent on behalf of its operators and plan managers;
- Each tax collection agent will be required to report, collect, and pay general excise tax (GET) and TAT on behalf of its operators and plan managers for transient accommodations booked directly through the tax collection agent;
- Tax collection agents shall be personally liable for the taxes imposed by chapters 237 and 237D, HRS;

- The tax collection agent's operators and plan managers will be deemed to be licensed under chapters 237 and 237D, HRS;
- The tax collection agent must provide the following information for each operator and plan manager in a cover sheet with each annual return filed with the Department: name, address, social security or federal employer identification number; and income apportioned by county; and
- The tax collection agent must notify its operators and plan managers that the reporting and remittance of Hawaii income tax is the responsibility of each operator and plan manager.

Data sharing

- Requires the Department to provide to the counties information sufficient to enable them to meaningfully enforce their land use ordinances and rules.

The Department supports this measure because it believes the bill will enhance TAT and GET enforcement by requiring these taxes to be paid by one entity rather than individually by each operator and plan manager. The Department also believes that the proposed civil fines for engaging in business without registering for a TAT license will support the Department's enforcement efforts.

The Department believes the tax collection agent provisions contained in Part IV of this bill should apply to all participants in the short-term rental industry that are collecting rent on behalf of their operators and plan managers. For this reason, the Department suggests amending the definitions of "booking service" and "hosting platform" in Part II of the bill and revising the language in subsection (a) of the proposed new sections in chapter 237 and 237D, HRS, contained in Part IV of the bill.

The Department recommends the definitions of "booking service" and "hosting platform" be amended to read as follows:

"Booking service" means any reservation or payment service provided by a person or entity that facilitates a transient accommodation transaction between an operator and a prospective transient or occupant~~[, and for which the person or entity collects or receives, directly or indirectly, through an agent or intermediary, a fee in connection with the reservation or payment services provided for the transient accommodation transaction].~~"

"Hosting platform" means a person or entity that participates in the transient accommodations business by providing~~[, and collecting or receiving a fee for,]~~ booking services through which an operator may offer a transient accommodation and collecting rent directly or indirectly on behalf of an operator or plan manager. Hosting platforms usually, though not necessarily, provide booking services through an online platform that allows an operator to

advertise the transient accommodations through a website provided by the hosting platform and the hosting platform conducts a transaction by which potential renters arrange, use, or pay [~~whether the renter pays rent directly to the operator or to the hosting platform.~~]."

The Department recommends that subsection (a) of the proposed new sections to chapter 237 and 237D, HRS, contained in Part IV of the bill to read as follows:

"(a) [A] All hosting [platform]platforms [~~that collects fees for booking services~~] shall register as a tax collection agent on behalf of all of [~~its~~] their operators and plan managers.

A tax collection agent shall be issued a separate license under this chapter with respect to taxes due under this chapter on behalf of its operators and plan managers in its capacity as a tax collection agent and, if applicable, with respect to any taxes payable under this chapter for its own business activities."

Additionally, the Department believes the personal liability provision of the bill should be amended. The Department recommends amending the provisions in the bill in chapters 237 and 237D, HRS, that provide for personal liability to read as follows:

(c) If a tax collection agent fails to pay the tax as required under subsection (b), the tax collection agent shall be liable to pay to the state any unpaid portion of the amount of tax that was required to be paid under subsection (b). [~~A tax collection agent shall be personally liable for the taxes imposed by this chapter that are due and collected on behalf of operators and plan managers, if taxes are collected, but not reported or paid, together with penalties and interest as provided by law. If the tax collection agent is an entity, the personal liability under this subsection shall apply to any officer, member, manager, or other person who has control or supervision over amounts collected to pay the taxes or who is charged with the responsibility for the filing of returns of the payment of taxes.~~]

Finally, the Department requests that if this bill is moved forward, it be amended so that all parts apply no sooner than January 1, 2020. This will allow the Department sufficient time to make the necessary form and computer system changes.

Thank you for the opportunity to provide testimony in support of this measure.



Hawai'i Convention Center
1801 Kalākaua Avenue, Honolulu, Hawai'i 96815
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David Y. Ige
Governor

Chris Tatum
President and Chief Executive Officer

Statement of
CHRIS TATUM

Hawai'i Tourism Authority
before the
HOUSE COMMITTEE ON FINANCE

Wednesday, April 3, 2019
2:00 PM
State Capitol, Conference Room #308

In consideration of
SENATE BILL NO 1292 SD2 HD2
RELATING TO TRANSIENT ACCOMMODATIONS.

Chair Luke, Vice Chair Cullen and members of the Committee on Finance, the Hawai'i Tourism Authority (HTA) **supports SB 1292 SD2 HD2**, which will assist in the collection of Transient Accommodations Tax (TAT) and will provide a mechanism to address non-compliant transient accommodations throughout the state.

The Hawai'i Tourism Authority supports efforts at both the state and county level to address the proliferation of illegal, non-compliant, and potentially unsafe transient vacation rentals throughout our community. We continue to reaffirm our position towards illegal vacation rentals through the support of measures, such as this one, which will further help to ensure that the quality of life for Hawai'i's residents is protected by providing additional oversight of these types of accommodations.

Thank you for the opportunity to offer testimony in **support** of this measure.

Council Chair
Kelly T. King

Vice-Chair
Keani N.W. Rawlins-Fernandez

Presiding Officer Pro Tempore
Tasha Kama

Councilmembers
Riki Hokama
Alice L. Lee
Michael J. Molina
Tamara Paltin
Shane M. Sinenci
Yuki Lei K. Sugimura



Director of Council Services
Maria E. Zielinski

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.MauiCounty.us

April 2, 2019

TO: The Honorable Sylvia Luke, Chair
House Committee on Finance

FROM: Kelly T. King
Council Chair *Kelly T. King*

SUBJECT: **HEARING OF APRIL 3, 2019; TESTIMONY IN SUPPORT OF SB 1292, SD2, HD2, RELATING TO TRANSIENT ACCOMMODATIONS**

Thank you for the opportunity to testify in **support** of this important measure. The purpose of this measure is to: 1) add definitions to the TAT law and amend the definition of "transient accommodations" to include additional forms of transient accommodations; 2) make any person who fails to register with the State Department of Taxation subject to a citation process and monetary fines; and 3) require hosting platforms that collect fees for booking services to register as collection agents for the GET and TAT.

The Maui County Council has not had the opportunity to take a formal position on this measure. Therefore, I am providing this testimony in my capacity as an individual member of the Maui County Council.

I support this measure for the following reasons:

1. The proliferation of thousands of illegal transient accommodation rentals has decreased the State's housing supply and resulted in over \$100 million in general excise tax and transient accommodation tax going uncollected.
2. Requiring hosting platforms to register as collection agents will help facilitate the collection of accrued tax revenue.
3. In addition, I respectfully suggest the Legislature consider imposing tougher regulations or expressly authorize the counties to do so. A mere citation process, with monetary fines, may not be enough to deter people from furnishing transient accommodations illegally, especially if operators can afford to pay the fines with their revenue.

The Honorable Sylvia Luke
April 2, 2019
Page 2

4. Providing the counties with additional funding from TAT revenue for the purpose of enforcing transient accommodation regulations should also be considered to further efforts to eliminate illegal short-term rentals.

For the foregoing reasons, I **support** this measure.

ocs:proj:legis:19legis:19testimony:sb1292_sd2_hd2_paf19-164a_jgk

MICHAEL P. VICTORINO
MAYOR

MICHELE CHOUTEAU MCLEAN, AICP
DIRECTOR

JORDAN E. HART
DEPUTY DIRECTOR



DEPARTMENT OF PLANNING
COUNTY OF MAUI
ONE MAIN PLAZA, 2200 MAIN STREET, SUITE 315
WAILUKU, MAUI, HAWAII 96793

April 2, 2019

TESTIMONY OF MICHELE CHOUTEAU MCLEAN, AICP
PLANNING DIRECTOR
COUNTY OF MAUI

BEFORE THE HOUSE COMMITTEE ON FINANCE

Wednesday, April 3, 2:00 P.M.
Conference Room 308

SB 1292, SD2, HD2 RELATING TO TRANSIENT ACCOMMODATIONS.

Rep. Sylvia Luke, Chair
Rep. Ty J.K. Cullen, Vice Chair
Honorable Members of the House Committee on Finance

Thank you for this opportunity to testify in **STRONG SUPPORT** of SB1292, SD2, HD2.

This bill ensures fair tax collection and land use compliance for transient accommodations. It accomplishes two critical goals that the State Department of Taxation and the respective county planning departments have been pursuing: requiring “hosting platforms” to be accountable for the payment of applicable state taxes and mandating that sufficient information is provided to the counties for enforcement purposes. These are distinct but nonetheless related objectives that HD2 would achieve.

This is important to the counties for two reasons. The first is so that we can enforce illegal operations, which is of huge concern to the majority of Maui County’s residents. Many illegal operators employ tricky, underhanded, and technically sophisticated tactics to successfully avoid enforcement. To enforce, all we need is an advertisement, such as a website or listing on a hosting platform, and the physical location of the transient accommodation.

The second reason – and this does not get enough attention – is that it is important to know where these operations are for emergency purposes. A recent training session on Emergency Management procedures included Kauai County’s discussion of its April 2018 flooding and how many visitors were impacted. These visitors did not know where to go, what to do, or how to get help, and certainly did not get the local

Rep. Sylvia Luke, Chair
Rep. Ty J.K. Cullen, Vice Chair
April 2, 2019
Page 2

alerts. Most residents know these things or have ohana to help them. Kauai County personnel had a difficult time finding these visitors and making sure they were all safe because the vacation rentals were not permitted. Maui County's permit requirements have either an onsite operator or a local manager who is available 24/7, as well as other safeguards, but these do not apply to the illegal operations.

In order for this bill to most effectively assist the counties in enforcement, I respectfully request two revisions:

At the **bottom of page 7**, please add a new subsection:

"(3) The county permit or registration number for any transient accommodation in a county that requires a permit or provides registration."

On **page 15, line 17** and **page 20, line 2** please add the following underlined text:

"regulations, including the physical location, such as the tax map key number, for the transient accommodation."

Thank you for this opportunity to offer my support of the passage of SB1292, SD2, HD2. The counties need to be able to regulate vacation rentals for the sake of our residents and our visitors. Your sincere efforts in this regard are truly appreciated.

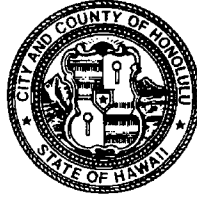
Sincerely,

Michele Chouteau McLean, AICP
Department of Planning
County of Maui

DEPARTMENT OF PLANNING AND PERMITTING
CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET, 7TH FLOOR • HONOLULU, HAWAII 96813
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KIRK CALDWELL
MAYOR



KATHY K. SOKUGAWA
ACTING DIRECTOR

TIMOTHY F. T. HIU
DEPUTY DIRECTOR

EUGENE H. TAKAHASHI
DEPUTY DIRECTOR

April 3, 2019

The Honorable Sylvia Luke, Chair
and Members of the Committee on Finance
Hawaii House of Representatives
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Luke and Committee Members:

**Subject: Senate Bill No. 1292, SD 2, HD 2
Relating to Transient Accommodations**

The Department of Planning and Permitting (DPP) **supports, with comments**, Senate Bill No. 1292, SD 2, HD 2, which amends the definition of transient accommodations and requires hosting platforms that collect fees for booking services to register as tax collection agents.

The department understands the desire to collect transient accommodations tax and general excise tax on those short-term operations, many of which have skirted this obligation. As such, we do not object to requiring hosting platforms to become tax collection agents.

We do **support** the following provisions of the Bill:

1. Assigns the State Department of Taxation new responsibilities in administering tax obligations of transient accommodation operators and managers. We welcome this additional regulatory oversight, including the imposition of progressive fines for violations.
2. Makes it clear that the counties can adopt and enforce their own regulations related to short-term rentals.
3. Adopts regulations for the advertising of transient accommodations.

The HD 2 version allows for sharing of data by the Department of Taxation to “enable each county to provide for meaningful enforcement of its land use ordinances, rules or regulations.” However, the Bill only states that the DoTax director “shall provide each county the minimal amount of data necessary,” and it is unclear who (State or City) will determine the type of information to be provided, or how much data will be given. We ask that, at minimum, the counties be provided with the names, addresses, total number of rooms available, and number of nights stayed per booking, for each operator. In addition, county clearance should be a

The Honorable Sylvia Luke, Chair
and Members of the Committee on Finance
Hawaii House of Representatives
Senate Bill No. 1292, SD 2, HD 1
April 3, 2019
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prerequisite to obtaining a certificate from the DoTax. This could be as simple as furnishing the county registration number, and will greatly aid in our enforcement program.

As you may know, the Honolulu City Council is actively reviewing an updated regulatory framework for short-term rentals. We drafted our proposal to balance the needs of our residential neighborhoods to keep them residential in character, and at the same time, recognize the need to diversify our visitor accommodation industry. Our bill offers the public more transparency, and requires more accountability from the operators of short-term rentals. We also seek to create new property tax classifications, so not only can the City realize more revenue from these higher valued properties, but doing so will not allow them to elevate the property values of their neighboring properties that are in long-term use. We are hopeful that an ordinance will be adopted very soon.

Thank you for the opportunity to testify.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kathy Sokugawa", written in a cursive style.

Kathy Sokugawa
Acting Director

TAX FOUNDATION OF HAWAII

126 Queen Street, Suite 304

Honolulu, Hawaii 96813 Tel. 536-4587

SUBJECT: GENERAL EXCISE, TRANSIENT ACCOMMODATIONS, Transient Accommodations Brokers as Tax Collection Agents

BILL NUMBER: SB 1292, HD-2

INTRODUCED BY: House Committees on Consumer Protection & Commerce and Judiciary

EXECUTIVE SUMMARY: Adds definitions to the TAT law. Amends the definition of "transient accommodations" to include additional forms of transient accommodations. Makes any person who fails to register with DOTAX subject to a citation process and monetary fines. Requires hosting platforms that collect fees for booking services to register as collection agents on behalf of its operators and plan manager for GET and TAT.

SYNOPSIS:

Part I is the preamble.

Part II: Definitions

Adds the following definitions to section 237D-1, HRS:

“Booking service” means any advertising, reservation, or payment service provided by a person or entity that facilitates a transient accommodation transaction between an operator and a prospective transient or occupant, and for which the person or entity collects or receives, directly or indirectly, through an agent or intermediary, a fee in connection with the advertising, reservation, or payment services provided for the transient accommodation transaction.

“Hosting platform” means a person or entity that participates in the transient accommodations business by providing, and collecting or receiving a fee for, booking services through which an operator may offer a transient accommodation. Hosting platforms usually, though not necessarily, provide booking services through an online platform that allows an operator to advertise the transient accommodations through a website provided by the hosting platform and the hosting platform conducts a transaction by which potential renters arrange, use, pay, whether the renter pays rent directly to the operator or to the hosting platform.”

Adds to the definition of “transient accommodations” that the term includes “transient accommodations units”, “transient vacation rentals”, “transient vacation units”, transient vacation use”, or any similar term that may be defined by county ordinance to mean a room, apartment, house, condominium, beach house, hotel room, suite, or similar living accommodation rented to a transient person for less than one hundred eighty consecutive days in exchange for payment in cash, goods, or services.

Part III: Citation Process and Monetary Fines

Amends HRS section 237D-4 and 237D-4.5 to make a person who fails to register prior to engaging or continuing in the business of furnishing transient accommodations, which includes posting any advertisement for the furnishing of a transient accommodation, subject to a citation process and monetary fines; and to make any person who enters into an agreement to furnish transient accommodations without registering with DOTAX subject to a citation and monetary fines.

Repeals existing HRS section 237-4(g) which now provides for criminal penalties against noncompliant taxpayers or officers of noncompliant entities.

Part IV: Hosting Platform Transparency and Data Sharing

Adds new sections to chapters 237 and 237D, HRS, providing that a hosting platform that collects fees for booking services shall register as a tax collection agent on behalf of all of its operators and plan managers.

Provides that a tax collection agent shall be issued a separate license under this chapter with respect to taxes due under this chapter on behalf of its operators and plan managers in its capacity as a tax collection agent.

Provides that in addition to its own responsibilities under the GET and TAT laws, a tax collection agent shall report, collect, and pay over the taxes due under this chapter on behalf of all of its operators and plan managers to or for whom booking services are provided; provided that the tax collection agent's obligation to report, collect, and pay taxes on behalf of all of its operators and plan managers shall apply solely to transient accommodations in the State for which booking services were provided by the tax collection agent.

Provides that a tax collection agent shall be personally liable for the taxes imposed by this chapter that are due and collected on behalf of operators and plan managers, if taxes are collected, but not reported or paid, together with penalties and interest as provided by law. If the tax collection agent is an entity, the personal liability applies to any officer, member, manager, or other person who has control or supervision over amounts collected to pay the taxes or who is charged with the responsibility for the filing of returns or the payment of taxes.

Provides that a tax collection agent's operators and plan managers shall be deemed licensed as to the business activity conducted directly through the tax collection agent from the date of registration. Licensure and payment requirements apply directly to the operators and plan managers for any other business activity.

Provides that a tax collection agent's annual returns shall include a cover sheet reporting the following information for each operator and plan manager on whose behalf the tax collection agent is required to report, collect, and pay over taxes due under this chapter:

- (1) Name;
- (2) Address;

- (3) Social security or federal employer identification number; and
- (4) Income apportioned by county.

Provides that before collecting any fee for booking services, a tax collection agent shall notify each of its operators or plan managers that the reporting and remittance of Hawaii income tax is the responsibility of each operator and plan manager.

Provides that nothing in this section shall be construed to preempt or prohibit the authority of any county or political subdivision of the State, to adopt, monitor, and enforce local land use ordinances, rules, or regulations, nor to transfer the authority to monitor and enforce these ordinances, rules, or regulations away from the counties.

Provides that the director of taxation shall provide to each county the minimal amount of data necessary to enable each county to provide for meaningful enforcement of its land use ordinances, rules, or regulations.

EFFECTIVE DATE: Upon approval.

STAFF COMMENTS: These comments are principally addressed to Part IV.

Act 143, SLH 1998, amended HRS section 237-9 to allow multi-level marketing companies to act as agents to collect and pay over GET on behalf of their independent entrepreneurs. At the time, it was considered beneficial for the marketing companies to collect and pay over tax as opposed to having the Department of Taxation chase down a myriad of independent owners with varying degrees of tax compliance among them.

This bill presents an opportunity for the same logic and policy considerations to apply to transient vacation rental (TVR) activity operating through transient accommodation brokers such as AirBnB, Flipkey, Homeaway, and VRBO, except that the stakes may be a little higher because TAT as well as GET is being collected. This bill would appear to be necessary or desirable to enhance the Department's collection ability given the limited resources available for all of state government including the Department.

TVR activity is a business and the dollars earned in that business are subject to Hawaii state taxes. Specifically, General Excise Tax (GET) and Transient Accommodations Tax (TAT) both apply, so those hosts that are in this business need to register appropriately and pay these taxes. But alas, not everyone does. So, the bill proposes to require the broker to register with the Department of Taxation and to remit the GET and TAT to the State on behalf of the hosts. Once registered, any time a host earns money on the broker's platform, the broker will pay the taxes and will pay over the balance to the host. The concept is like withholding, with which those of us who receive a paycheck are quite familiar: we work for an employer, the employer pays us our wages, but the employer deducts some taxes and pays them to the Department of Taxation and IRS.

A similar measure, HB 1850 (2016), passed three years ago but was vetoed by Governor Ige. The principal objection concerns county-level restrictions on property use. Some TVR activity violates county zoning laws. Some counties, as well as neighboring residents, see withholding as

described in this bill as enabling hosts to hide illegal activities from county law enforcement. Some people have gone further. They blame TVR hosts for wrecking the sanctity of neighborhoods with an unending stream of tourists or for yanking housing units off the market in the name of greed, resulting in stratospheric housing prices that are yet another crippling blow to hardworking families struggling to make ends meet. Then, they turn to the brokers and demand that the brokers stop encouraging and facilitating such illegal, anti-societal, and morally depraved activity.

Ultimate responsibility as to both State tax and county zoning laws rests with the owners of the accommodations, not the broker. Owners may be in varying degrees of compliance with the zoning laws just as they are in varying degrees of compliance with the tax laws. The broker is not in an efficient position to police the former, but effectively can do something about the latter because money from the transient guests flows through the broker's system.

One of the key provisions for which technical change is necessary is the personal liability provision, subsection (c) of the new sections. We recommend that personal liability not be established except for a **willful** failure to pay over the amount collected, as in section 237-41.5, HRS. This can be accomplished by replacing the last sentence of subsection (c) with: "If the tax collection agent is an entity, the personal liability under this subsection shall apply to any officer, member, manager, or other person who wilfully fails to pay or to cause to be paid any taxes due from the taxpayer pursuant to this chapter."

Digested 4/1/2019



MAUI
CHAMBER OF COMMERCE
VOICE OF BUSINESS

**HEARING BEFORE THE HOUSE COMMITTEE ON FINANCE
HAWAII STATE CAPITOL, HOUSE CONFERENCE ROOM 308
WEDNESDAY, APRIL 3, 2019 AT 2:00 P.M.**

To The Honorable Sylvia Luke, Chair;
The Honorable Ty J.K. Cullen, Vice Chair; and
Members of the Committee on Finance;

**TESTIMONY IN SUPPORT OF SB 1292 SD2 HD2
RELATING TO TRANSIENT ACCOMMODATIONS**

Aloha, my name is Pamela Tumpap and I am the President of the Maui Chamber of Commerce, with approximately 650 members. I am writing share our support of SB 1292.

We support a level playing field and a fair and equitable marketplace. All accommodations should be required to pay the transient accommodations tax and general excise tax. Therefore, we support this bill to amend the definition of “transient accommodations” to include transient vacation rentals and other forms of transient accommodations. We also appreciate the additional requirements for hosting platforms to ensure transient accommodations are compliant and appropriate taxation is collected in our state.

We appreciate the opportunity to testify on this matter and ask that this bill be passed.

Sincerely,

Pamela Tumpap

Pamela Tumpap
President

To advance and promote a healthy economic environment for business, advocating for a responsive government and quality education, while preserving Maui’s unique community characteristics.



Maui Hotel & Lodging

ASSOCIATION

Testimony of

Lisa H. Paulson

Executive Director

Maui Hotel & Lodging Association

on

SB1292 SD2 HD2

Relating To Transient Accommodations

COMMITTEE ON FINANCE

Wednesday, April 3, 2019, 2:00 pm

Conference Room 308

Dear Chair Luke, Vice Chair Cullen and Members of the Committee,

The Maui Hotel & Lodging Association (MHLA) is the legislative arm of the visitor industry. Our membership includes 195 property and allied business members in Maui County – all of whom have an interest in the visitor industry. Collectively, MHLA's membership employs over 25,000 residents and represents over 19,000 rooms. The visitor industry is the economic driver for Maui County. We are the largest employer of residents on the Island - directly employing approximately 40% of all residents (indirectly, the percentage increases to 75%).

MHLA **strongly supports SB1292 SD2 HD2**, which adds definitions to the TAT Law. Amends the definition of "transient accommodations" to include additional forms of transient accommodations. Makes any person who fails to register with DOTAX subject to a citation process and monetary fines. Requires hosting platforms that collect fees for booking services to register as collection agents on behalf of its operators and plan managers for the GET and TAT.

MHLA is in strong support of this measure and any sound legislation that seeks to establish a fair, level playing field to ensure transparency, enforcement, and accountability among the online transient vacation rentals (TVRs) and traditional bricks-and-mortar lodgings. There are more than 23,000 alternative accommodations in the Hawaiian Islands competing with hotels, resorts, timeshares, and bed-and-breakfasts, with many them likely avoiding the 10.25 percent transient accommodations and general excise taxes.

As the Legislature and administration approve funding to expand our inventory of affordable housing, we as a community have been unable to successfully address the impact of proliferating TVRs on the availability of rental property. By removing housing from the rental market, TVRs are only compounding such problems as a shortage of affordable housing, high real estate prices, purchases of housing units by non-residents, and already-high rents.

This issue is not about the hospitality industry versus the TVRs. Rather, this is a community issue in which illegal rentals in neighborhoods across the state are adversely affecting the quality of life for residents.

Thank you for the opportunity to testify.



April 1, 2019

Representative Sylvia Luke, Chair
House Finance Committee
Hawaii State Legislature

Testimony in Support of Bill 1292 SD2 HD2 related to Transient Accommodations

Dear Chair Luke and Members of the House Committee on Finance,

The Kohala Coast Resort Association strongly supports this measure and any sound legislation that seeks to establish a fair, level playing field to ensure transparency, enforcement, and accountability among the online transient vacation rentals (TVRs) and traditional lodgings.

According to the Hawaii Tourism Authority's most recent Visitor Plant Inventory, there are an estimated 13,396 rooms rented as TVR units on Hawaii Island, compared to 6,110 hotel rooms. All of our members have been required to pay the hotel/resort property tax rate (\$11.55 per \$1000 valuation) to the County of Hawaii, as well 10.25% in TAT and 4.25% in GET to the State of Hawaii. Unfortunately, those property taxes, TAT and GET collections have not been fairly and equitably enforced with the owners of TVRs.

The Hawaii Attorney General revealed in a court filing on February 4, 2019, that a single online TVR service, Airbnb, admitted that its hosts have not all paid taxes. Airbnb also testified before lawmakers that it would have generated more than \$41 million in new revenue for the state in two years had it been allowed to collect and remit taxes from about 16,000 operators, who represent just a fraction of the total TVR units in the islands according to HTA's study.

Hawaii County recently enacted Bill 108, which will regulate some aspects of TVRs on our island. We look forward to seeing that bill implemented later this month. We encourage you to also provide for the enforcement, transparency and equitability in the accommodations sector, by supporting SB1292 SD2 HD2.

KCRA is a collection of master-planned resorts and hotels situated north of the airport which represents more than 3,500 hotel and timeshare accommodations and an equal number of resort residential units. This is approximately 35 percent of the accommodations available on the Island of Hawai'i. KCRA member properties annually pay more than \$20 million in TAT and \$20 million in GET.

Sincerely,

A handwritten signature in black ink that reads "Stephanie P. Donoho". The signature is written in a cursive, flowing style.

Stephanie Donoho
Administrative Director



House of Representative
The Twenty-Eighth Legislature
Regular Session of 2016

To: Rep. Sylvia Luke, Chair
Rep. Ty J.K. Cullen, Vice Chair

Date: April 3, 2019

Place: Conference Room 308
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

RE: **SB 1292 SD2 HD2, Relating to Transient Occupancy**

Chair Luke, Vice Chair Cullen and Members of the Committee of Finance:

RBOAA is generally **supportive** of SB 1292 SD2 HD2 as a reasonable approach to resolving issues that have been pending for several years.

Our concern with this Bill is that it **requires a platform to register** as a tax collection agent rather than allowing them to register. While the dominate platforms of Expedia (HomeAway/VRBO) and AirBnB have these capabilities and intend to voluntarily register, it would substantially limit entry into the market by other advertising platforms who may not have the capabilities of tax collection functions.

If all advertising platforms would be required to additionally offer tax collection functions this would be a new regulated industry and be **subject to a Sunrise Review**.

Thank you for the opportunity to testify on this measure.

Sincerely,

Alicia Humiston
President,
Rentals by Owner Awareness Association



KELLEY COSGROVE
GENERAL MANAGER

kelley.cosgrove@fairmont.com

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April 3, 2019

Representative Sylvia Luke, Chair
House Finance Committee
Hawaii State Legislature

Testimony in Support of Bill 1292 SD2 HD2 related to Transient Accommodations

Dear Chair Luke and Members of the House Committee on Finance,

The Fairmont Orchid strongly supports this measure and any sound legislation that seeks to establish a fair, level playing field to ensure transparency, enforcement, and accountability among the online transient vacation rentals (TVRs) and traditional lodgings.

According to the Hawaii Tourism Authority's most recent Visitor Plant Inventory, there are an estimated 13,396 rooms rented as TVR units on Hawaii Island, compared to 6,110 hotel rooms. All of our members have been required to pay the hotel/resort property tax rate (\$11.55 per \$1000 valuation) to the County of Hawaii, as well 10.25% in TAT and 4.25% in GET to the State of Hawaii. Unfortunately, those property taxes, TAT and GET collections have not been fairly and equitably enforced with the owners of TVRs.

The Hawaii Attorney General revealed in a court filing on February 4, 2019, that a single online TVR service, Airbnb, admitted that its hosts have not all paid taxes. Airbnb also testified before lawmakers that it would have generated more than \$41 million in new revenue for the state in two years had it been allowed to collect and remit taxes from about 16,000 operators, who represent just a fraction of the total TVR units in the islands according to HTA's study.

Hawaii County recently enacted Bill 108, which will regulate some aspects of TVRs on our island. We look forward to seeing that bill implemented later this month. We encourage you to also provide for the enforcement, transparency and equitability in the accommodations sector, by supporting SB1292 SD2 HD2.

Fairmont Orchid Hawaii is a 32-acre oceanfront luxury AAA Four Diamond resort located on the Kohala Coast of Hawaii with 540 rooms, white sand lagoon, and offers spa, golf, tennis, six restaurants, extensive meeting and event facilities, and year-round children's program.

Sincerely,



April 2, 2019

House Committee on Finance

Rep. Sylvia Luke, Chair; Rep. Ty J.K. Cullen, Vice Chair

April 3, 2019, 2:00 P.M.

Conference Room 308

TESTIMONY IN OPPOSITION TO SB 1292, SD2, HD2

Dear Chair, Vice-Chair, and Members of the Committee:

On behalf of Airbnb, I want to take the opportunity to share our concerns regarding SB1292, SD2, HD2. Airbnb is committed to helping the state solve the long-standing problem of efficiently and accurately collecting taxes from the short-term rental industry in Hawaii. Airbnb collects and remits taxes on behalf of hosts in more than 400 jurisdictions globally, generating more than \$1 billion in hotel and tourist taxes to date, helping cities, states, and our host community around the globe. Our experience in tax collection and remittance can greatly benefit Hawaii by streamlining compliance for the state and removing burdens from hard-working Hawaii residents who share their homes. We are committed to being a good partner to the state and support the legislature's effort to allow short-term rental platforms to collect and remit taxes on behalf of their users.

Airbnb's Objections To SB1292, SD2, HD2:

Violation of Federal Laws - The bill requires platforms, as a condition of collecting and remitting taxes, to turn over personally identifiable information for people using the platform. This is deeply problematic for a number of reasons. This disclosure may conflict with two federal laws - the Communications Decency Act (CDA) and the Stored Communications Act (SCA) in a number of ways. The SCA governs "access to stored communications and records."¹ In order to comply with the SCA, entities like Airbnb that provide users the ability to "send or receive wire or electronic communications" and that

¹ *United States v. Steiger*, 318 F.3d 1039, 1047 (11th Cir. 2003).

store such communications cannot disclose user data without the appropriate process.² The SCA requires that governmental entities use an administrative subpoena to obtain basic user information (such as name, address, telephone number, and so forth), and get a court order to obtain any information more detailed than that (such as detailed rental activity).³ Testimony from Airbnb’s legal counsel, David Louie, provides a detailed analysis of the bill’s legal flaws.

Data Privacy - Even if this provision did not conflict with federal law, it is wholly unnecessary to ensure accurate tax collection. Indeed, in the dozens of states where Airbnb collects transient occupancy taxes pursuant to voluntary collection agreements (VCAs), Airbnb provides, upon audit, anonymized, transaction-level detail for each booking made through the platform. SB1292, SD2, HD2 requires platforms like Airbnb to turn over personally identifiable information such as a host’s name, address, social security and federal employer identification number. This is unnecessary and undermines the privacy of hundreds of Hawaii residents. Anonymized data is sufficient for both reporting and audit purposes because occupancy taxes are transaction taxes -- i.e., user personally identifiable information neither triggers tax nor is it necessary in order to collect the tax.

Hosting Platform as Tax Collection Agent - Under this section, “A hosting platform that collects fees for booking services shall register as a tax collection agent on behalf of all its operators and plan managers.” However, another clause states “Before collecting any fee for booking services, a tax collection agent shall notify each of its operators or plan managers that the reporting and remittance of Hawaii income tax is the responsibility of each operator and plan manager.” This requirement conflicts with the previous clause in the chapter. We urge the committee to clarify the goal of this clause to avoid confusion on the part of hosting platforms and operators. Additionally, the narrow definition of hosting platforms fails to capture all of the industry, unfairly targeting some companies to the exclusion of others, when from both a competitive standpoint and to maximize tax revenue, the state should be including all participants in this market.

Tax Collection Agent Liability - RE: “A tax collection agent shall be personally liable for the taxes imposed by this chapter that are due and collected on behalf of operators and plan managers, if taxes are collected, but not reported or paid, together with penalties and interest as provided by law. If the tax collection agent is an entity, the personal liability under this subsection shall apply to any officer, member, manager, or

² 18 U.S.C. §§ 2510(15), 2711(1)–(2).

³ See *id.* §§ 2702(a)(3), 2703(c); *United States v. Davis*, 785 F.3d 498, 505–06 (11th Cir. 2015) (en banc).

other person who has control or supervision over amounts collected to pay the taxes or who is charged with the responsibility for the filing of returns or the payment of taxes.” We urge the committee to revise this provision. To hold an individual officer, manager, or supervisor of a tax collection entity personally liable for the taxes imposed by this chapter goes too far.

Registration - The process by which SB1292, SD2, HD2 requires hosting platforms to comply with a registration mechanism is unclear as currently drafted. For example, under “hosting platforms” SB1292, SD2, HD2 states, “A tax collection agent shall be issued a separate certificate of registration under this chapter with respect to taxes due on behalf of its operators and plan managers in its capacity as a tax collection agent and, if applicable, with respect to any taxes payable under this chapter for its own business activities.” In addition to hosting platforms, under “237D-4.5 Certificate of registration for transient accommodations broker, travel agency, and tour packager” there remains an additional requirement for “transient accommodations brokers” to obtain a certificate of registration. We urge the committee to clarify the proposed registration process, including the rationale for various and potentially duplicative registration requirements in SB1292, SD2, HD2. As it currently stands, the registration requirements are confusing and it is unclear who would need to comply and at which junctures.

Data For Land Use Enforcement: RE: “The director shall provide to each county the minimal amount of data necessary to enable each county to provide for meaningful enforcement of its land use ordinances, rules, or regulations.” This is highly problematic for a couple reasons.

- SB 1292, SD2, HD2 explicitly states, “All returns and other information provided by a tax collection agent shall be confidential, and disclosure thereof shall be prohibited as provided in section 237-34.” It is completely contradictory to state this bill will protect the tax information of hundreds of Hawaii residents only to then turn over private host data to county agencies for “enforcement of its land use ordinances, rules, or regulations”. The residents of Hawaii deserve a straightforward tax collection bill, not one that jeopardizes their private data.
- Additionally, on March 18, 2019, the Planning Committee of the Honolulu City Council adopted Bill 89 CD1 which also puts in place regulations for both TVUs and B&B homes and establishes local enforcement and registration measures. Further, the purpose of any tax bill should be to help ensure the assessment, collection and payment of taxes, not to use confidential tax information to facilitate the Department of Taxation’s

enforcement of county land use laws. Tax payment does not impact a user's county land use liability. Taxpayer information is confidential under state law for important policy and privacy reasons, and should not be used to enforce county land use laws.

In conclusion, due to the potential conflict with federal laws, the requirement to turn over personally identifiable information of our host community, a confusing registration process, and the potential for private tax information to be used against hosts by county enforcement purposes, we cannot support this bill as drafted. We remain willing to work with the state to develop a path to allow us to collect and remit taxes on behalf of our hosts. Mahalo and we hope the committee will take our feedback into consideration.

Regards,

A handwritten signature in black ink, appearing to read "Matt Middlebrook", with a long horizontal flourish extending to the right.

Matt Middlebrook
Head of Public Policy, Hawaii

NetChoice *Promoting Convenience, Choice, and Commerce on The Net*

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April 2, 2019

Rep. Sylvia Luke, Chair
Committee on Finance
Hawaii House of Representatives

RE: **Opposition to SB 1292 – Limited Residential Lodging and exposing Hawaiian privacy**

Dear Chair Luke and members of the committee,

We ask that you not move forward with SB 1292.

Government efforts to force Short-term Rental (STR) platforms to disclose data to the government and/or impose platform liability requirements on STR platforms efforts are unconstitutional on several privacy protecting fronts, including the 4th Amendment.

We outline the legal problems with such an approach below and welcome further conversation on the matter. We do, however, agree with reasonable requirements for STR hosts and regularly advocate for such requirements.

Benefits to your constituents of short-term rentals

STR services provide necessary income to many of your constituents. Over 52 percent of hosts nationwide live in low-to-moderate income households. More than 48 percent of the income hosts earn through certain short-term rental services is used to cover household expenses.

Consider, for example, families coming from across the country for graduation ceremonies at University of Hawaii. STR services allow constituents to earn income by sharing their homes.

The presence of STR services also brings new money into areas under-served by hotels. Historically, travelers are not likely to encounter businesses in these under-served parts of Hawaii. Conversely, guests who stay in under-served areas via STR services, bring income to nearby restaurants, grocery stores, and businesses.

Unconstitutionality of the SB 1292's imposition of liability on STR platforms

The internet is an open resource that enables people from all parts of Hawaii to freely communicate with one another and pursue their goals. While some nations discourage user-generated content, the United States created a fertile ground for business models that have transformed the world.

Moreover, this openness is bolstered by Section 230 of the federal Communications Decency Act, which says platforms can't be held strictly liable for content posted *by others*.

SB 1292 ignores this federal law as it forces STR platforms to monitor listings.

Such an attempt by Hawaii to impose monitoring liability on STR platforms will likely see court actions, injunction, and invalidation of the law by the court.

SB 1292's forced disclosure of STR platform records illegally exposes the privacy of Hawaii residents to government employees and potentially law enforcement

The 4th Amendment of the US Constitution protects Hawaii citizens from unlawful search and seizure and is a core privacy protection.

But SB 1292's forced disclosure of STR platform records ignores this privacy protection and instead requires platforms to disclose records and information about hosts to government employees and potentially law enforcement. And this disclosure does not require the state's employees to first obtain a warrant.

Required disclosure of STR platform's stored names and addresses of Hawaii residents to government employees and potentially law enforcement.

This could not only expose the operating procedures and income of businesses but also expose the privacy of Hawaii residents using the platform and people staying in Hawaiian homes.

New York City attempted this same effort and is currently facing a likely injunction as it has seen opposition from industry and privacy groups from across the country.

In NetChoice's amicus brief against the City of New York, we outlined the unconstitutionality of forced disclosure of STR platform records:

The home has long been afforded particular protection under the Fourth Amendment. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 37–38 (2001). As the Supreme Court reiterated in *Kyllo v. United States*, the Fourth Amendment protects individuals from government intrusion inside the walls of the home. *See id.* (citing *Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987); *Silverman v. United States*, 365 U.S. 505, 512 (1961)) (finding that heat lamps undetectable in plain view were “intimate details because they were details of the home” that should be protected under the Fourth Amendment). New York City's Local Law 146 forces short-term rental services to disclose how and when hosts choose to invite guests into their own homes, and this type of activity is among the “details of the home” that the Fourth Amendment maintains as private.

...

By forcing short-term rental services like Airbnb to disclose rental records, New York City violates privacy rights enshrined in federal law. The Federal Stored Communications Act (SCA) and Electronic Communications Privacy Act (ECPA) were passed specifically to prevent the type of warrantless search the City seeks to undertake with the ordinance in question.

The US Supreme Court and the Hotel industry say that mandated disclosure is unconstitutional. When the city of Los Angeles demanded a hotel's proprietary business records, the hotel industry fought back in court – ultimately winning at the US Supreme Court in a decision written by Justice Sotomayor in *Los Angeles v Patel*, 135 S. Ct. 2443 (2015).

In its opinion the US Supreme Court said:

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” It further provides that “no Warrants shall issue, but upon probable cause.” Based on this constitutional text, the Court has repeatedly held that “searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are per se unreasonable . . . subject only to a few specifically established and well- delineated exceptions.”¹

The Respondent hotel operator said in its brief:

The Fourth Amendment generally requires a warrant to address the Founders’ fundamental “concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.” *Arizona v. Gant*, 556 U.S. 332, 345 (2009). The warrant requirement “interpose[s] a neutral magistrate between the citizen and the law enforcement officer.” *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667 (1989). In addition, by requiring that the warrant “particularly describe[] the place to be searched, and the persons or things to be seized,” the Fourth Amendment seeks to safeguard against “exploratory rummaging in [that] person’s belongings,” including her papers. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (plurality). In combination, these requirements ensure that the decision whether, and how, to invade a person’s privacy is not made by officers in the field “engaged in the often competitive enterprise of ferreting out crime.” *Johnson v. United States*, 333 U.S. 10, 14 (1948); see also *United States v. U.S. Dist. Court*, 407 U.S. 297, 317 (1972).

In an amicus brief from the Asian American Hotel Operators Association, the hotel industry argued:

“The City should not be able to destroy the hoteliers’ property or interest in this information merely by requiring that some of it be collected.”

To protect this court ruling, we could see the hotel industry opposing such requirements on STR platforms to disclose business records. And if such a requirement is passed, Hawaii would likely see a similar court outcome.

[SB 1292’s forced disclosure of records by a STR platform violates federal privacy laws](#)

The Federal Stored Communications Act (SCA) was designed to prevent the voluntary or compelled disclosure of stored communications to the government. This precluded disclosure covers federal, state, city, and other municipal governments.

The SCA states:

(a) Prohibitions. — Except as provided in subsection (b) or (c)—

(2) a person or entity providing remote computing service to the public shall not knowingly divulge to any person or entity the contents of any communication which is carried or maintained on that service—²

[unless complying with the following provisions for disclosure to a governmental entity]

Contents of Wire or Electronic Communications in a Remote Computing Service.—

(1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection—

¹ *Los Angeles v Patel*, 135 S. Ct. 2443 (2015).

² 18 U.S.C. § 2702(a)

(A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction; or

(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity—

(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or

(ii) obtains a court order for such disclosure under subsection (d) of this section;

except that delayed notice may be given pursuant to section 2705 of this title.³

As is clear from the SCA, either a warrant, administrative subpoena, or court order is required prior to compelled disclosure of stored communications by a “remote computing service.” Note also, that the 6th Cir in *United States v. Warshak*⁴ ruled that a warrant is required for government mandated disclosure of contents – not an administrative subpoena.

And for purposes of the SCA, names of hosts, lengths of stays, addresses, or any other information generated by users of the service and stored by HomeAway or Airbnb is covered by SCA.

The Congressional records for SCA state the purpose of the SCA is specifically to prevent governmentally forced disclosures such as mandating disclosure of host or visitor records kept by an STR platform. In particular, the SCA’s congressional record states:

“In the absence of market discipline, there is no presumption that the government will strike an appropriate balance between disclosure and confidentiality. And the enormous power of the government makes the potential consequences of its snooping far more ominous than those of . . . a private individual or firm.’ Posner, *Privacy in the Supreme Court*, 1979 Sup. Ct. Rev. 173, 176 (1979).

...

if Congress does not act to protect the privacy of our citizens, we may see the gradual erosion of a precious right. Privacy cannot be left to depend solely on physical protection, or it will gradually erode as technology advances. Additional legal protection is necessary to ensure the continued vitality of the Fourth Amendment.”⁵

Clearly the express language of the SCA and the legislative intent preclude any forced disclosure of records kept by an STR platform.

[Privacy invasion of Hawaii residents from the SB 1292’s forced disclosure of STR platform records](#)
Legal arguments aside, mandating STR platforms disclose data to the government grants virtually any Hawaii public employee access to private information of Hawaii residents. As you can imagine, this provides an easily abused resource of information about your constituents and guests staying in the state.

³ 18 U.S.C. § 2703(b).

⁴ *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010).

⁵ Congressional Record of Electronic Communications Act, Pub.L. 99–508 (1986).

Rather than advance SB 1292, which imposes all these burdens and unintended consequences, we instead encourage you to look to reasonable regulations that have proven beneficial in other jurisdictions.

We've seen high compliance rates when localities create reasonable registration and regulation for STRs. A thoughtful approach to home-sharing by creating a registration process would benefit all Hawaiians. We welcome the opportunity to work with you on reasonable regulations that allow all to prosper.

Sincerely,

Carl Szabo

Vice President and General Counsel, NetChoice

NetChoice is a trade association of e-Commerce and online businesses. www.netchoice.org



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April 2, 2019

HOUSE COMMITTEE ON FINANCE
Rep. Sylvia Luke, Chair, Rep. Ty J.K. Cullen, Vice Chair

HEARING DATE: Wednesday, April 3, 2019
TIME: 2:00 p.m.
PLACE: Conference Room 308

Re: LETTER ON BEHALF OF AIRBNB OPPOSING
SENATE BILL NO. 1292 SD2 HD2.

Dear Representatives:

We write on behalf of our client, Airbnb, in opposition to Senate Bill No. 1292 SD2 HD2 (“*SB1292 SD2 HD2*”). Although we support SB1292 SD2 HD2’s improvements over prior versions of this bill, and its intent to permit hosting platforms to act as tax collection agents, which would further tax collection purposes, these purposes cannot overcome the fact that SB1292 SD2 HD2 still impermissibly violates federal law and runs afoul of other constitutional protections.

SB1292 SD2 HD2 contains problematic language that would render it invalid, unworkable, and unenforceable. The current language of SB1292 SD2 HD2 violates the federal Communications Decency Act, 47 U.S.C. § 230 (“*Section 230*”) and may violate the Stored Communications Act, 18 U.S.C. Chapter 121 §§ 2701-2712 (the “*SCA*”). Section 230 and the SCA are two laws which provide vital protections that ensure a free and open internet. SB1292 SD2 HD2 is therefore preempted by at least Section 230 and would thus be unenforceable if passed.

Section 230 of the Communications Decency Act

Although a state may regulate in various areas, it must do so in a manner that does not conflict with federal law. Section 230 is considered the cornerstone of the legal framework that has allowed the internet to thrive, and it “protects websites from liability for material posted on the website by someone else.” *Doe v. Internet Brands, Inc.*, No 12-56638, 2016 WL 3067995, at

*3 (9th Cir. May 31, 2016). It does so through two key provisions. First, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Second, “[n]o liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* at § 230(e)(3). As the United States District Court for the District of Hawaii observed, “so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.” *Sulla v. Horowitz*, No. CIV. 12-00449 SOM, 2012 WL 4758163, at *2 (D. Haw. Oct. 4, 2012) (quoting *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003)).

Accordingly, courts across the country have regularly found that Section 230 preempts state laws that attempt to hold websites liable for third-party content. *See e.g., Backpage.com, LLC v. McKenna*, 881 F.Supp.2d 1262, 1273 (W.D. Wash. 2012). Section 230 also protects websites from being forced to screen or otherwise verify third-party content. *See, e.g., Doe v. Friendfinder Network, Inc.*, 540 F.Supp.2d 288, 295 (D.N.H. 2008) (Section 230 “bars the plaintiff’s claims that the defendants acted wrongfully by ... failing to verify that the profile corresponded to the submitter’s true identity.”); *Doe v. MySpace, Inc.*, 474 F.Supp.2d 843, 850 (W.D. Tex. 2007) (finding that Section 230 barred claims that MySpace was liable for policies relating to age verification); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1180 (9th Cir. 2008) (“webhosts are immune from liability for ... efforts to verify the truth of” third-party statements posted on the website); *Prickett v. InfoUSA, Inc.*, 561 F.Supp.2d 646, 651 (E.D. Tex. 2006) (“The Plaintiffs are presumably alleging that ... the Defendant is liable for failing to verify the accuracy of the content. Any such claim by the Plaintiffs necessarily treats the Defendant as ‘publisher’ of the content and is therefore barred by § 230.”); *Mazur v. eBay Inc.*, No. CIV 07-3967 MHP, 2008 WL 618998, at *9 (N.D. Cal. Mar. 4, 2008).

The Stored Communications Act

In 1986, Congress enacted the SCA, 18 U.S.C. Chapter 121 §§ 2701-2712, to give persons using internet platforms statutory protection, similar to the Fourth Amendment of the U.S. Constitution, against access by the government to stored electronic private information held by those internet platforms without due process such as a search warrant. Orin S. Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1209-13 (2004). The SCA limits the government’s ability to compel internet platforms to disclose information in their possession about their users and limits the internet platform’s ability to voluntarily disclose information about their users to the government, absent a subpoena, warrant, or court order. The SCA contains both criminal and civil penalties for violations. Numerous courts have held that the SCA applies to internet platforms and websites. *See e.g., Brown Jordan Int’l Inc. v. Carmicle*, 846 F.3d 1167 (11th Cir. 2017); *Crispin v. Christian Audiger, Inc.*, 717 F.Supp.2d (C.D. Cal. 2010); *Campbell v. Facebook, Inc.*, 315 F.R.D. 250 (N.D. Cal. 2016).

In a recent example, a federal judge restricted the city of Portland from enforcing some of its lodgings tax regulations against HomeAway, a vacation rental website. *Homeaway.com, Inc. v. City of Portland*, Civ. No. 3:17-cv-00091-PK, (D. OR. Mar. 27, 2011). That case involved regulations by the city of Portland which required HomeAway to provide information to the city – including customer names, listings, and rental addresses, and potentially lengths and prices of stays arranged through its website – without a subpoena or other legal process. U.S. District Judge Michael W. Mosman ruled that significant portions of the regulations would violate the SCA. *See* http://www.oregonlive.com/portland/index.ssf/2017/03/post_588.html.

SB1292 SD2 HD2 impermissibly violates Section 230

SB1292 SD2 HD2 violates Section 230 because it seeks to make hosting platforms responsible for the content and veracity of information provided by its users in advertisements. At the core of Section 230's protections is the idea that hosting platforms cannot be held responsible for the content users provide and cannot be required to verify such information. SB1292 SD2 HD2 violates these federal protections by seeking to penalize hosting platforms for the content users provide and for not verifying the accuracy of that content. First, the existing law (Act 204) incorporated into SB1292 SD2 HD2 makes hosting platforms responsible for the content included in advertisements prepared by users. The current language of §§ 237D-4(c) and (d) of Part III states:

(c) Any advertisement, including an online advertisement, for any transient accommodation or resort time share vacation interest, plan, or unit shall conspicuously provide:

(1) The registration identification number or an electronic link to the registration identification number of the operator or plan manager issued pursuant to this section; and

(2) The local contact's name, phone number, and electronic mail address, provided that this paragraph shall be considered satisfied if this information is provided to the transient or occupant prior to the furnishing of the transient accommodation or resort time share vacation unit.

(d) Failure to meet the requirements of subsection (c) shall be unlawful. *The department may issue citations to any person, including operator, plan managers, and transient accommodations brokers, who violates subsection (c) [and the citation also includes] a monetary fine... (Emphasis added.)*

Sections 237D-4(c) and (d) make hosting platforms, serving as transient accommodations brokers, require users to include certain content in every advertisement or otherwise face a financial penalty. *See Internet Brands, Inc.*, No 12-56638, 2016 WL 3067995, at *3 (noting that Section 230 “protects websites from liability for material posted on the website by someone else”).

In addition to making hosting platforms responsible for the content of the required information in advertisements, these sections further require hosting platforms to ensure that the information provided by their users is *correct*. See *Fair Hous. Council of San Fernando Valley*, 521 F.3d at 1180 (“webhosts are immune from liability for ... efforts to verify the truth of” third-party statements posted on the website); *Prickett*, 561 F.Supp.2d at 651 (noting that claims treating hosting platforms “as ‘publisher’ of the content” is barred by § 230.”); *Horowitz*, No. CIV. 12-00449 SOM, 2012 WL 4758163, at *2 (“so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity”).

Hosting platforms do not lose Section 230’s protections just because they serve as transient accommodations brokers. Courts have noted that state and local legislatures – whose laws are equally subject to Section 230 preemption – may not “creative[ly]” draft ordinances to “work around” Section 230 and accomplish prohibited ends in a law that would preempted if enacted directly. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (noting that “[p]ermitt[ing] the evasion of Section 230 would undermine the ‘congressional recognition that the Internet ... ‘ha[s] flourished ... with a minimum of government regulation.’” (quoting 47 U.S.C. § 230(a)(4))). Further, two recent Supreme Court decisions have held that states may not “evade pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute’s intended operation and effect.” *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 636 (2013); see *National Meat Ass’n v. Harris*, 565 U.S. 452, 464 (2012). In short, because §§ 237D-4(c) and (d) hold hosting platforms, serving as transient accommodations brokers, accountable for the content and veracity of information provided by their users, these provisions clearly violate Section 230.

SB1292 SD2 HD2 creates problems under the SCA

SB1292 SD2 HD2 could violate the SCA by requiring that hosting platforms make a number of disclosures of private information to the state without a subpoena or other legal process. Sections §§ 237-__(f) and 237D-__(f) of Sections 5 and 6 of Part IV provide that:

(f) A tax collection agent shall file periodic returns in accordance with section 237-30 [237D-6] and annual returns in accordance with section 237-33 [237D-8.6]. Each annual return required under section 237-33 [237D-8.6] shall be accompanied by a cover sheet, in a form prescribed by the department, that includes the following information for each operator and plan manager on whose behalf the tax collection agent is required to report, collect, and pay over taxes due under this chapter:

(1) Name;

(2) Address;

- (3) Social security or federal employer identification number; and
- (4) Income apportioned by county.

These provisions may violate the SCA. Without a subpoena or other form of due process, SB1292 SD2 HD2 requires hosting platforms to disclose their users' private tax information. The SCA prohibits hosting platforms from disclosing some of the information required under SB1292 SD2 HD2 without due process, such as a subpoena. Such a requirement creates concerns under the SCA.

On top of the potential SCA violations, these provisions may also violate the protections to privacy afforded by the Fourth Amendment of the U.S. Constitution and Article I, Section 7 of the Hawaii Constitution by requiring hosting platforms to turn over personal information of their users to the government without due process. Article I, section 7 of the Hawaii Constitution “expressly guarantees the right to privacy [and] protects people from unreasonable government intrusions into their legitimate expectations of privacy.” *State v. Navas*, 81 Haw. 113, 122, 913 P.2d 39, 48 (1996) (noting that Article I, section 7 of the Hawaii Constitution “provides Hawaii’s citizens greater protection against unreasonable searches and seizure than the United States Constitution”). Further, the Fourth Amendment¹ of the U.S. Constitution protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]”

The right to privacy in both state and federal law protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]” The U.S. Supreme Court has held that “searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge are *per se* unreasonable ... subject only to a few specifically established and well-delineated exceptions.” *City of Los Angeles, Calif. v. Patel*, 135 S.Ct. 2443, 2452 (2015). Here, §§ 237-__ (f) and 237D-__ (f) of Sections 5 and 6 of Part IV require hosting platforms such as Airbnb to provide private information of their users to the state without due process. Thus, these provisions of SB1292 SD2 HD2 may violate the constitutional right to privacy and would thus be unenforceable.

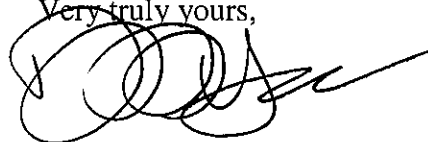
¹ Because Article I, Section 7 of the Hawaii State Constitution largely tracks the language of the Fourth Amendment, and because Article I, Section 7 affords even greater protections than the Fourth Amendment, discussions of the Fourth Amendment is also applicable to Article I, Section 7 of the Hawaii State Constitution. See *State v. Curtis*, 139 Hawaii 486, 497, 394 P.3d 716, 727 (2017) (“We have often recognized broader protections ‘[i]n the area of searches and seizures under article I, section 7’ than our federal counterparts”).

April 2, 2019
Page 6

Conclusion

For the foregoing reasons, the problematic language of SB1292 SD2 HD2 renders it invalid. We therefore urge that SB1292 SD2 HD2 be held. Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read 'D. Louie', with a long horizontal flourish extending to the right.

DAVID M. LOUIE

for

KOBAYASHI, SUGITA & GODA, LLP



April 3, 2019

House of Representatives Committee on Finance
The Honorable Sylvia Luke, Chair
The Honorable Ty J.K. Cullen, Vice Chair

RE: SB 1292, SD2, HD2, Relating to Transient Accommodations

Dear Chairwoman Luke and distinguished members of the House of Representatives Committees on Finance:

On behalf of Expedia Group – the globe-leading travel technology platform that empowers travel and tourism throughout Hawai‘i – I’d like to thank you for the opportunity to comment on SB 1292, SD 2, HD 2. Consistent with our commitment to collaborate with the State of Hawai‘i to create reasonable regulations for its important vacation rental ecosystem, we’d like to share insight into the current proposal before the legislature and the broader need for comprehensive policies governing the state’s long-standing vacation rental industry.

I. SB 1292, SD2, HD2 is Flawed

Expedia Group welcomes the opportunity to engage with the state on ways to encourage and enhance tax compliance. Therefore, we generally support the tax collection and remittance provisions in SB 1292, SD 2, HD2. However, we cannot support the bill in its current form. The bill includes provisions that violate law and that will not withstand judicial scrutiny. It also includes provisions that are simply bad policy that will harm the state’s economy and drive some vacation rental property owners “underground” to avoid onerous regulation.

A. Forced Disclosure of Confidential Information Without Any Legal Process Violates the Stored Communications Act.

The provisions of the bill requiring hosting platforms to disclose confidential information in “annual returns” are improper. *See* bill at Part IV, Sections 5 and 6. Federal law requires Expedia Group and its affiliates to keep confidential the personal information of homeowners and travelers who use their websites. Specifically, the Stored Communications Act (“SCA”) prescribes the rules that must be followed before a company can disclose information to a governmental entity. Congress passed the SCA to protect user privacy, particularly from government requests for private, personal information. “The Act reflects Congress’s judgment that users have a legitimate interest in the confidentiality of communications in electronic storage” *Theofel v. Farey-Jones*, 359 F.3d 1066, 1072–73 (9th Cir. 2004).

The SCA limits the forms of process a government entity may use to obtain information from HomeAway or VRBO, depending on the type of information sought. To obtain even the most basic user information, like user name and contact information, the government must use an administrative, grand jury, or trial subpoena. 18 U.S.C. § 2703(c)(2). It cannot get that information upon request or by passing a law that requires platforms to hand it over.¹

¹ A federal appellate court has stated that it is “abundantly clear” that the SCA applies to “even a list of customers.” *Telecomms. Regulatory Bd. Of P.R. v. VTIA-The Wireless Ass’n*, 752 F.3d 60, 67 (1st Cir. 2014).

This issue has been decided by a federal court. There, the court held that the SCA barred Portland's attempt to obtain user information from hosting platforms without first obtaining an appropriate subpoena or court order. Portland's law required platforms to disclose to the city's taxing authority "all physical addresses of transient lodging occupancy locations within Portland city limits and the related contact information, including the name and mailing address of the general manager, agent, owner, host or other responsible person for the location." *HomeAway.com, Inc. v. City of Portland*, 2017 WL 2213154, at *4 (D. Or. 2017) (noting the court ruled from the bench during oral argument and halted enforcement of Portland City Code Section 6.04.040(B)).

Here, the bill similarly seeks user information without any legal process. And it puts HomeAway in an impossible situation. Follow the SCA, and risk penalties from Hawaii. Or hand over the information required by this bill and expose itself to lawsuits from users because the SCA allows individuals whose information is provided to a governmental entity in violation of the statute's requirements to sue for damages. 18 U.S.C. § 2707.

B. Forced Disclosure of Confidential Information Violates the U.S. and Hawai'i Constitutions

In addition to the SCA violations, the provisions of the bill noted above also violate the U.S. and Hawai'i Constitutions. It is well-established that constitutional privacy protections extend to electronic communications and protect against government searches. The U.S. Supreme Court has warned against allowing technological advances to "erode the privacy guaranteed by the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 34 (2001); *see also Marshall v. Barlow's Inc.*, 436 U.S. 307, 311 (1978) (Fourth Amendment protects business property no less than residential property).

The court has held that "searches conducted outside the judicial process, without prior approval by a judge or a magistrate judge are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2452 (2015) (municipal code provision requiring hotel operators to provide guests' information to police is facially unconstitutional). Here, the bill requires forced disclosure of confidential user information without any legal process and therefore violates the U.S. and Hawai'i Constitutions. Indeed, a federal court in New York recently enjoined a New York City ordinance that required platforms to turn over customer and transactional information. *Airbnb, Inc. v. City of New York*, 18 Civ. 7712 (PAE) and 18 Civ. 7742 (PAE), (S.D. N.Y. Jan. 3, 2019). The court had "little difficulty" holding that the ordinance "is a search or seizure within the Fourth Amendment." In so holding, the court discussed an expansive line of authority that "ma[de] clear that the compelled production from home-sharing platforms of user records is an event that implicates the Fourth Amendment."

C. Disclosing Confidential Tax Information for Non-Tax Related Purposes Is Improper

The bill requires the Director to provide each county with data necessary to enable the counties to enforce of their land use ordinances, rules, or regulations. *See* bill at Part IV, Sections 5 and 6. This provision is unworkably ambiguous and violates Hawai'i's taxpayer confidentiality law, in addition to the laws discussed above. First, terms like "minimal" and "meaningful" are open to varying interpretations and do not provide clear standards for either the regulators or the regulated parties. Second, the disclosure violates the Taxpayer Bill of Rights, which provides important protections: "Taxpayers have a right to be assured that their dealings with the Department of Taxation will be kept confidential. Taxpayers have a right to be assured that their tax returns and tax return information will not be disclosed, except as provided by law." The statutory exceptions to that principle are not at issue here. Rather, they reinforce that disclosures are allowed "for tax purposes only" to "the taxpayer, the taxpayer's authorized agent, or

persons with a material interest in the return.” The Counties and enforcement of land use laws do not qualify.

D. There Is No Basis to Impose Personal Liability

Expedia Group strongly objects to the provisions of the bill imposing personal liability on any officer, member, manager, or other persons responsible for the filing of returns or the payment of taxes. *See* bill at Part IV, Sections 5 and 6. The issue of a third party’s personal liability in connection with tax liability has already been addressed by the Legislature. *See* Hawai`i Revised Statutes (“HRS”) § 237-41.5. Specifically, the Legislature refused to establish personal liability on such third parties unless they committed a willful act (defined as a voluntary, intentional violation of a known legal duty). *Id.* There is no reason to create a different rule here. As such, any imposition of personal liability should be similarly dependent upon a willful act.

II. Expedia Group’s Proposal

As an alternative to SB 1292, SD2, HD2, and to demonstrate our commitment to the State of Hawai‘i, we provide below adapted best practices from across the country that would create a regulatory scheme that both regulates the industry in reasonable ways and assures full compliance with tax laws.

We believe that these best practices will assist in maintaining a healthy vacation rental industry and Hawai‘i’s tourism-driven economy.

The key features are as follows:

1. Address the flaws in pending legislation relating to vacation rentals.
2. Provide industry-wide regulation of hosting platforms at the state level.
3. Provide comprehensive tools to assist in compliance with tax laws.
 - a. Platforms will create a mandatory field for owners to enter their transient accommodations tax (“TAT”) number, in the same format as issued by the State of Hawai‘i;
 - b. Platforms will display the TAT numbers on all new and existing property listings;
 - c. Platforms will remove any existing listing that does not display a TAT number, and will prohibit any new listings that do not display a TAT number;
 - d. If the State determines that any TAT numbers are invalid, either because the number is incorrect or has expired, it can notify the platform, and the platform will remove the listing from its platforms within 10 business days of receiving notice from the State;
 - e. To allow the State to determine the validity of the TAT numbers supplied by the owners, platforms will send to the State, on a quarterly basis, a list that matches URLs of every vacation rental listing on its site together with the TAT number for that listing; and

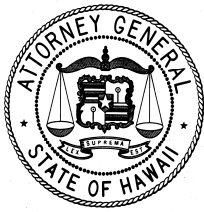
- f. To provide the State with visibility into the amount of vacation rental activity occurring within its borders, platforms will send to the State, on a quarterly basis, aggregated data of (1) the total number of vacation rental listings on their sites during the previous quarter, and (2) the total number of nights booked in vacation rentals through their sites during the previous quarter.

The vacation rental industry plays a vital role in Hawai'i's broader tourism-driven economy. We recognize and support the State's efforts to collect all taxes owed and would like to work with the state and local governments to modernize the regulations of this important economic sector.

Thank you for the opportunity to provide comments on SB 1292, SD2, HD2 and please reach out with any additional questions.

Mahalo,

Amanda Pedigo
Vice President, Government and Corporate Affairs
Expedia Group
APedigo@ExpediaGroup.com



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019**

LATE

ON THE FOLLOWING MEASURE:

S.B. NO. 1292, S.D. 2, H.D. 2, RELATING TO TRANSIENT ACCOMMODATIONS.

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

DATE: Wednesday, April 3, 2019

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): Clare E. Connors, Attorney General, or
Mary Bahng Yokota, Deputy Attorney General

Chair Luke and Members of the Committee:

The Department of the Attorney General provides the following comments:

This bill (1) amends the definition of “transient accommodations” to include terms the counties may have defined; (2) subjects those who fail to be registered as required under sections 237D-4 and 237D-4.5, Hawaii Revised Statutes (HRS), to a citation process and monetary fines; (3) requires hosting platforms that collect fees for booking services to register as tax collection agents on behalf of their operators and plan managers for purposes of general excise and transient accommodations taxes; and (4) requires the Director of Taxation to provide each county the minimal amount of data necessary to enable each county to provide for meaningful enforcement of its land use ordinances, rules, or regulations (Disclosure Requirement). Our comments relate to the Disclosure Requirement.

1. The Disclosure Requirement does not appear to be consistent with existing nondisclosure statutes. Under section 237-34, HRS, disclosure of general excise tax returns and return information is unlawful except as provided by the statute. Under section 237D-13, HRS, disclosure of transient accommodations tax returns and return information is unlawful except as provided by the statute. Section 231-18, HRS, provides for additional exceptions to the nondisclosure statutes. The counties in their capacities as the enforcers of land use ordinances, rules, or regulations do not appear to fall within any of the exceptions. If it is the intent of the bill to create an exception, we

recommend that the sentence on page 15, lines 14-17, and page 19, line 20, through page 20, line 2, be amended to provide that the disclosure shall be made “notwithstanding the provisions of any law making it unlawful for any person, officer, or employee of the State to make known information imparted by any tax return or permit any tax return to be seen or examined by any person.”

2. The Director of Taxation is required to provide to each county the “minimal amount of data necessary to enable each county to provide for meaningful enforcement of its land use ordinances, rules, or regulations,” but it is unclear how such “minimal amount of data” is to be identified and what information could be disclosed. We recommend clarification. Upon clarification, we may be better able to evaluate potential legal challenges to the Disclosure Requirement, if any.

We thank you for the opportunity to submit our comments.



HAWAI'I LODGING & TOURISM
ASSOCIATION

LATE

Testimony of

Mufi Hannemann
President & CEO
Hawaii Lodging & Tourism Association

House Committee on Finance
Senate Bill 1292 SD2 HD2: Relating to Transient Accommodations

Chair Luke, and members of the Committee:

Mahalo for the opportunity to offer this testimony on behalf of the Hawai'i Lodging & Tourism Association, the largest private sector visitor industry organization in the state with 700 members, 170 of which are hotels managing 51,000 rooms and nearly 40,000 employees.

The HLTA supports this measure and any sound legislation that seeks to establish a fair and level playing field between the online transient vacation rental (TVR) market and traditional brick-and-mortar lodgings.

There are an estimated 23,000 alternative accommodations in the Hawaiian Islands competing with hotels, resorts, timeshares, and bed-and-breakfasts, except that the majority of them are most likely avoiding proper tax registrations and county zoning laws, and are skirting our 10.25 percent Transient Accommodations Tax and the 4.0-4.5 percent General Excise Tax.

The Hawaii Attorney General revealed in a court filing on February 4, 2019, that a single online TVR service, Airbnb, admitted that its hosts have not all paid taxes. Airbnb also testified before lawmakers that it would have generated more than \$41 million in new revenue for the state in two years had it been allowed to collect and remit taxes from about 16,000 operators, who represent a fraction of the total in the islands. An HTA report from December 2016 stated that vacation rentals, if regulated, would have brought in an estimated \$135.7 million in transient accommodations taxes for the year 2018. The report further stated that TAT revenues from TVRs would grow to \$172.4 million by 2022.

As the Legislature and administration approve funding to expand our inventory of affordable housing, we as a community have been unable to successfully address the impact of proliferating TVRs on the availability of rental property. According to the Hawai'i Appleseed Center for Law and Economic Justice's TVR study, nine out of ten units are being rented as entire homes, as opposed to single rooms. Additionally, the report suggests roughly half the hosts are non-residents. By removing housing from the rental market, TVRs are only compounding such problems as a shortage of affordable housing, high real estate prices, purchases of housing units by non-residents, and already-high rents.

This issue is not about the hospitality industry versus the TVRs. Rather, this is a community issue in which illegal rentals in neighborhoods across the state are adversely affecting the quality of life for residents.

The counties of Kaua'i, Maui, and Hawai'i have all enacted ordinances regulating some aspect of TVRs. In addition to the movement of their neighbor island counterparts, the Honolulu City Council is also

progressing measures that take a hard look at regulating the transient vacation rental market and inserting strong land use and enforcement language.

This bill will help us achieve a level playing field in regards to collecting proper taxes owed from the transient vacation rental market, and assisting the counties by providing pertinent information in their enforcement of local land use ordinances, rules, and regulations. For these reasons we support this measure and ask that you pass it out of committee.

Thank you.



DEPARTMENT OF PLANNING
THE COUNTY OF KAUA'I

DEREK S. K. KAWAKAMI, MAYOR
MICHAEL A. DAHLIG, MANAGING DIRECTOR

KA'ĀINA S. HULL
DIRECTOR

JODI A. HIGUCHI SAYEGUSA
DEPUTY DIRECTOR

Testimony of Ka'āina Hull
Planning Director, County of Kaua'i

Before the
House Committee on Finance

April 3, 2019; 2:00 pm
Conference Room 308

In consideration of
Senate Bill 1292 SD2 HD2
Relating to Transient Accommodations

LATE

Honorable Chair Sylvia Luke and Members of the Committee:

The County of Kaua'i, Department of Planning submits its comments on SB1292 SD2 HD2.

Currently, Kaua'i has approximately 4,500 unique listings for vacation rentals advertised across numerous third party hosting sites. Although a large number of these listings are located within Kaua'i's Visitor Destination Areas where transient accommodations are outright permitted, we anticipate approximately 800 to 1,200 of these units to be illegally located outside of our Visitor Destination Areas where those uses are prohibited. Reasons for prohibiting transient accommodations outside of the Visitor Destination Areas are two-fold:

1. To address the proliferation of resort uses within our residential neighborhoods; and
2. To address Kaua'i's housing inventory crisis. Although a recent study demonstrated that approximately 1 in every 20 homes in the State is a vacation rental, 1 in every 7 homes is a vacation rental on the island of Kaua'i.

To this end, our Zoning Enforcement Division has primarily focused its resources on monitoring and shutting down illegal vacation rental operators. While our enforcement team has been successful in shutting down several hundred vacation rentals over the past few years, our efforts have been stymied by the overwhelming

wave of illegal vacation rentals that advertise and book business through third party hosting platforms.

The Department appreciates the amendments in SB1292 SD2 HD2 to provide “each county the minimal amount of data necessary to enable each county to provide for meaningful enforcement of its land use ordinances, rules, or regulations.” However, previous iterations of SB 1292 sought to implement the following additional important purposes: (1) required records “be made available upon lawful request to enforcement authorities, for greater transparency and data sharing purposes;” (2) create a law that made it “unlawful for a hosting platform to provide, and collect a fee for, booking services regarding transient accommodations that are not lawfully . . . permitted under applicable county ordinance;” and (3) required transient accommodations operators or plan managers “to remove a transient accommodation advertisement upon notice that the property is not in compliance with state law or county ordinance.” These necessary tools were stripped from SB 1292 SD2 HD1 and has not been restored in SB1292 SD2 HD2.

The County of Kaua‘i is aware of the 9th Circuit Court of Appeals decision in HomeAway.com, Inc. v. City of Santa Monica that was filed on March 13, 2019, which upheld several obligations of hosting platforms, including: (1) “disclosing certain listings and booking information regularly;” (2) “refraining from completing any booking transaction for properties not licensed and listed on the registry;” and (3) “refraining from collecting or receiving a fee for facilitating or providing services ancillary to a vacation rental or unregistered home-share.” These obligations are similar to those initially imposed in previous iterations of SB 1292 and are necessary to further the Department of Planning’s enforcement priorities.

Alternatively, SB 1292 SD2 HD1 could explicitly provide the counties with the authority under HRS Chapter 237D or HRS §46-1.5(7) to create ordinances to require hosting platforms to disclose certain listings and booking information regularly; refrain from completing any booking transaction for properties not compliant with county land use laws; and refrain from collecting or receiving a fee for facilitating or providing services ancillary to a vacation rental or unregistered home-share. Possible enabling language could read as follows:

The counties shall have the power to regulate the business activity or booking transactions of hosting platforms not in conformance with county laws.

As the 9th Circuit stated in HomeAway.com, Inc. v. City of Santa Monica, “[l]ike their brick-and-mortar counterparts, internet companies must also comply with any number of local regulations concerning, for example, employment, tax, or zoning.” Thus, these important obligations are required to prevent “a lawless no-man’s-land

on the Internet” at the expense of preserving our housing stock and quality and character of our residential neighborhoods for future generations to come.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ka'aina Hull', written over a horizontal line.

Ka'aina Hull
Director of Planning, County of Kaua'i

LATE



April 3, 2019

Representative Sylvia Luke, Chair
Representative Ty J.K Cullen, Vice Chair
House Committee on Finance

Comments in Strong Support of SB 1292, SD2, HD2 Relating to Transient Accommodations (Adds definitions to the Transient Accommodations Tax [TAT] Law. Amends the definition of "transient accommodations" to include additional forms of transient accommodations. Makes any person who fails to register with the Department of Taxation [DOTAX] subject to a citation process and monetary fines. Requires hosting platforms that collect fees for booking services to register as collection agents on behalf of its operators and plan managers for the General Excise Tax [GET] and TAT.)

FIN Hrg: Wednesday, April 3, 2019 at 2:00 p.m. in Conf. Rm. 308

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers, resort operators and utility companies. LURF's mission is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources, and public health and safety.

LURF appreciates the opportunity to provide comments in **strong support of SB 1292, SD2, HD2.**

SB 1292, SD2, HD2. This bill (1) Adds definitions to the TAT Law; (2) Amends the definition of "transient accommodations" to include additional forms of transient accommodations; (3) Makes any person who fails to register with DOTAX subject to a citation process and monetary fines; (4) Requires hosting platforms that collect fees for booking services to register as collection agents on behalf of its operators and plan managers for the GET and TAT.

LURF's Position. LURF and its members support the purpose of this measure, which is to:

1. Amend the definition of "transient accommodations" to include other forms of transient accommodations and other terms that the counties may have defined;
2. Make any person who fails to register prior to engaging or continuing in the business of furnishing transient accommodations, which includes posting any advertisement for furnishing a transient accommodation, subject to a citation process and monetary fines, rather than a misdemeanor;
3. Make any person who enters into an agreement to furnish transient accommodations without registering subject to a citation process and monetary fines; and
4. Require a hosting platform that collects fees for booking services to register as a tax collection agent on behalf of its operators and plan managers for purposes of general excise taxes and transient accommodations taxes.

LURF further understands that this SB 1292, SD2, HD2 is not intended to preempt or otherwise limit the authority of counties to adopt, monitor, and enforce local land use regulations, and that this bill is not intended to transfer the authority to monitor and enforce such regulations away from the counties.

For these reasons, LURF is in **strong support of SB 1292, SD2, HD2**, and respectfully urges your favorable consideration.

Thank you for the opportunity to provide comments relating to this measure.