



LATE \*Testimony submitted late may not be considered by the Committee for decision making purposes.



Hawai'i Convention Center  
1801 Kalākaua Avenue, Honolulu, Hawai'i 96815  
kelepona tel 808 973 2255  
kelepa'i fax 808 973 2253  
kahua pa'a web hawaii tourismauthority.org

Governor

**John De Fries**  
*President and Chief Executive Officer*

Statement of  
**JOHN DE FRIES**  
Hawai'i Tourism Authority  
before the  
**COMMITTEE ON TOURISM**

February 2, 2023  
10:00 a.m.  
State Capitol Conference Room 423 & Videoconference

In consideration of  
**HOUSE BILL NO. 1238**  
**RELATING TO TRANSIENT ACCOMMODATIONS HOSTING PLATFORMS**

---

Aloha Chair Quinlan, Vice Chair Hussey-Burdick, and members of the Committee on Tourism,

The Hawai'i Tourism Authority (HTA) appreciates the opportunity to offer comments in support of the intent of HB1238, which is to allow the counties to regulate transient accommodation hosting platforms.

While the number of visitors to Hawai'i has increased over the years, there have been no major increases to the number of traditional units which include hotel, condo hotel and timeshare units in the past decade. From 2009 to 2019, the state experienced an increase in visitor arrivals from 6 million to over 10 million, a 59.5% increase in arrivals without a corresponding increase in accommodations. We believe these additional visitors likely stayed in non-traditional units, including short-term vacation rentals.

Our community-driven Destination Management Action Plans across Hawai'i clearly articulate a desire to manage visitor accommodations – specifically, taking steps to limit and regulate short-term vacation rentals in neighborhoods and other sensitive areas in our communities. We are supportive of state and county efforts to advance that priority, and we support the intent of this measure to provide counties the tools needed to effectively regulate short-term vacation rentals through the hosting platforms that provide booking services.

HTA has worked closely with the counties in their efforts to manage short-term vacation rentals, and we will continue to do so. We appreciate this opportunity to provide these comments in support of the intent of HB1238. Mahalo.



February 2, 2023

TO: Chair Sean Quinlan  
Members of the House Committee on Tourism

FR: Alex April  
Airbnb Public Policy, Hawaii

**RE: HB1238 RELATING TO TRANSIENT ACCOMMODATIONS HOSTING PLATFORMS -  
COMMENTS**

---

Mahalo for the opportunity to comment on HB1238, related to county zoning. We are grateful for the partnership developed between the State of Hawai'i and localities over the last several years on short-term rental policies that support the local tourism industry; and provide housing opportunities for transient workers, students, and other state guests.

In the event that counties rely on HB1238, there could be a number of unintended consequences:

1. **Impact on County Revenue: If counties use the language of HB 1238 to effectively prohibit rentals under 180 days, they could see a negative impact on tax revenue.** In Maui County, transient vacation rentals or "TVRs" are the largest source of property tax revenue for the County and provide for the largest contributions to affordable housing in Maui. It was reported that for fiscal year 2022-2023, TVRs in Maui County will raise \$160 million in real property tax revenue representing 37% (\$12.1 million) of total real property tax revenue. That \$12.1 million in real property tax revenue will be contributed to Maui's Affordable Housing Fund.
2. **Increased Prices for Existing Inventory: Reducing the availability of rentals under 180 days would also significantly increase the prices of any remaining accommodations, and will have other adverse effects on the State's economy.** Not only will this impact the ability of low and moderate-income families to visit Hawai'i, but it will also limit residents who need short-term housing during periods of transition, part-time students, traveling nurses, and other non-permanent island residents who participate in key sectors of Hawai'i's economy. Higher prices will also have ripple effects on the State's economy. Short-term rentals and their hosts, guests, and transitional residents support a number of local small businesses; everything from housekeeping and landscaping to restaurants and local markets benefit from a robust tourism and short-term rental market.

Mahalo for the consideration of our comments.



KOBAYASHI SUGITA & GODA, LLP  
Attorneys at Law

Bert T. Kobayashi, Jr.\*  
Alan M. Goda\*  
  
John R. Aube\*  
Charles W. Gall\*  
Neal T. Gota  
Charles D. Hunter  
Robert K. Ichikawa\*  
Christopher T. Kobayashi\*  
Jonathan A. Kobayashi  
Jan M. L. Y. Kutsunai\*  
David M. Louie\*  
Nicholas R. Monlux  
Jonathan S. Moore  
Aaron R. Mun  
Bruce A. Nakamura\*

Kenneth M. Nakasone\*  
Gregory M. Sato\*  
Jesse W. Schiel\*  
Craig K. Shikuma\*  
Lex R. Smith\*  
Joseph A. Stewart\*  
Brian D. Tongg  
David B. Tongg\*  
Caycie K. G. Wong  
  
\*A Law Corporation  
  
Of Counsel:  
Kenneth Y. Sugita\*  
Wendell H. Fuji\*  
Clifford K. Higa\*  
Burt T. Lau\*  
John F. Lezak\*  
Larry L. Myers\*  
David Y. Suzuki\*  
Maria Y. Wang

Kaylee K. Correa  
Sianha M. Gualano  
Austin H. Jim On  
Stephen G. K. Kaneshiro  
Travis Y. Kuwahara  
Ryan D. Louie  
Chelsea C. Maja

February 1, 2023

HOUSE COMMITTEE ON TOURISM  
Rep. Sean Quinlan, Chair, Rep. Natalia Hussey-Burdick, Vice Chair

HEARING DATE: Tuesday, February 2, 2023  
TIME: 10:00 a.m.  
PLACE: Conference Room 423

Re: TESTIMONY ON BEHALF OF AIRBNB OPPOSING  
HOUSE BILL NO. 1238

Dear Chair Quinlan, Vice Chair Hussey-Burdick and Committee Members:

We write on behalf of our client, Airbnb, in opposition to House Bill No. 1238 (“**HB 1238**”). We are concerned that this bill is flawed in that it is vague and has the potential to result in substantial legal issues going forward. While the proposed language of HB 1238 simply states that the counties in Hawai‘i may regulate hosting platforms for transient accommodation operators in the respective counties, such a vague delegation could conflict with constitutional rights as well as existing state statutes. As discussed more fully below, the internet platforms are generally protected from regulations as a result of the preemption of federal law pursuant to Section 230 of the Communications Decency Act. Additionally, the uses of residential real property are protected under the Constitutions of both Hawai‘i and the United States. As such, it is likely that the delegation of authority proposed herein will result in actions which could have significant legal challenges in the courts.

Further, laws passed pursuant to this section could also impact existing state statutes that address rentals, including Section 46-4 of the Hawaii Revised Statutes (“**HRS**”), as well as Chapter 521, the Residential Landlord-Tenant Code. To the extent that the proposed change is intended to facilitate additional governmental actions that lead to a deprivation of vested rights of existing, residential homeowners, they would likely result in substantial litigation.

The State of Hawaii has an obligation to pass laws that are consistent with and effectuate the protections of the Hawai‘i State Constitution. For these reasons, we would recommend that the Committee hold this bill.

**A. Hosting platforms are covered by the Communication Decency Act.**

Although a state or local government 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).

Here, where there is an absolute delegation of authority without limitation. We are concerned that this could result in governmental action that does not comply with Section 230 of the CDA.

**B. HB 1238 could also potentially result in conflicts with existing statutes, including the Residential Landlord-Tenant Code, which would create unintended consequences.**

One of the unintended consequences of the proposed language in HB 1238 is that it would arguably lead to governmental actions which conflict with existing provisions in State law, such as Section 46-4 and Chapter 521, the Residential Landlord-Tenant Code.

Specifically, Section 46-4(a) protects property rights of residential homeowners that are vested in owners by the Hawai'i and United States Constitutions. Specifically, the language of Section 46-4(a) makes clear that existing uses which were permissible at the time of the enactment of the statute shall not be impacted by subsequent governmental act, providing:

Neither this section nor any ordinance enacted pursuant to this section shall prohibit the continued lawful use of any building or premises for any . . . purpose for which the building or premises is used at the time this section or the ordinance takes effect.

The effect of this provision was to provide that a county is precluded from passing a law that discontinues any previously lawful use of any property.<sup>1</sup> Additionally, the statute limited counties' passing of zoning ordinances that provided for the elimination of nonconforming uses or for the amortization or phasing out of nonconforming uses solely to commercial, industrial, resort, and apartment-zoned areas only. The statute further confirms that, "In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single-family or duplex) or agricultural uses."<sup>2</sup> This statutory protection is vitally important in protecting the rights of residential owners and preexisting nonconforming uses. This is particularly true as such protection has its foundation in principles arising from protections in both the United States and Hawai'i constitutions. The Fifth Amendment to the United States Constitution provides, in part, "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Similarly, the Hawai'i Constitution states, "Private property shall not be taken or damaged for public use without just compensation." Haw. Const. art. I, § 20. Of significance, the Hawai'i Constitution has broader protection as it contemplates not just takings, but also "damage" to property interests.<sup>3</sup> As such, the Hawai'i Supreme Court

---

<sup>1</sup> The only exception was an allowance for changes in commercial, industrial, resort, and apartment-zoned areas: "[A] zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued, or for the amortization or phasing out of nonconforming uses or signs over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only. In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single-family or duplex) or agricultural uses." Haw. Rev. Stat. § 46-4(a).

<sup>2</sup> Haw. Rev. Stat. § 46-4.

<sup>3</sup> See, e.g., *Cnty. of Hawaii v. C & J Coupe Family Ltd. P'ship*, 119 Hawaii 352, 382, 198 P.3d 615, 645 (2008).

HOUSE COMMITTEE ON TOURISM

Rep. Sean Quinlan, Chair, Rep. Natalia Hussey-Burdick, Vice Chair

February 1, 2023

Page 4

has stated, “When applying the Hawai‘i Constitution, Hawai‘i courts may interpret it to afford greater protection than provided by the U.S. Constitution.”<sup>4</sup>

Both Hawai‘i and federal litigation have recognized the principle that preexisting uses of land are protected. “Under the United States and Hawai‘i Constitutions, ‘preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate.’”<sup>5</sup> Even preexisting nonconforming uses are protected from subsequent restrictive zoning regulations.<sup>6</sup> As the Hawai‘i Intermediate Court of Appeals has recently stated, “The statutory protection of lawfully existing uses and structures ‘prior to the effective date of a zoning restriction is grounded in constitutional law.’”<sup>7</sup>

The Ninth Circuit has similarly recognized that the right to continue a preexisting lawful use is constitutional in nature. “A provision permitting continuance of a nonconforming use is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses.”<sup>8</sup>

Recent litigation in Hawai‘i over ordinances designed to restrict the duration of rentals has also resulted in the Hawai‘i Federal District Court’s recognizing that residential owners have such vested rights and that limitations would likely violate constitutional takings principles.<sup>9</sup>

To the extent that the proposed changes in HB 1238 impact these vested rights, it is highly likely that there would be property rights impacted and inevitable litigation arising from such acts.

Another example of a potential conflict would be to compare the potential limitations that may be enacted with the language of HRS §§ 521-22, which sets forth the applicable term of permissible rental agreements for residential dwellings in the State of Hawai‘i and provides, “The landlord and tenant may agree in writing to any period as the term of the rental agreement. In the absence of such agreement, the tenancy shall be month to month or, in the case of boarders, week to week.” To the extent that subsequent ordinances which contradict this provision are enforced,

---

<sup>4</sup> *Id.* (citing *Hawaii Hous. Auth. v. Lyman*, 68 Haw. 55, 704 P.2d 888 (1985)).

<sup>5</sup> *Ferris Trust v. Planning Comm’n of Kaua‘i*, 138 Hawaii 307, 312, 378 P.3d 1023, 1028 (Ct. App. 2016) (internal citations omitted).

<sup>6</sup> *Young v. Planning Comm’n*, 89 Hawaii 400, 410, 974 P.2d 40, 50 (1999) (internal citations omitted)

<sup>7</sup> *Ferris Trust*, 138 Hawaii at 312, 378 P.3d at 1028 (internal citations omitted); *Waikiki Marketplace v. Zoning Bd. Of Appeals*, 86 Hawaii 343, 353, 949 P.2d 183, 193 (Ct. App. 1997) (citing the due process clauses of the United States and Hawai‘i Constitutions).

<sup>8</sup> *League to Save Lake Tahoe v. Crystal Enterprises*, 685 F.2d 1142, 1145 (9th Cir. 1982).

<sup>9</sup> *Hawaii Legal Short-Term Rental All. v. City & Cnty. of Honolulu*, No. 22-CV-247-DKW-RT, 2022 WL 7471692, at \*10 (D. Haw. Oct. 13, 2022) (“In the present case, 30–89-day rentals in non-Resort districts are a vested property right protected by takings principles.”)

there will be questions about enforcement, including whether a landlord is potentially subject to penalties for having a month-to-month tenancy or whether tenants' rights are now limited in that tenants would be automatically bound to longer-term tenancies consistent with the then-proscribed zoning regulation for the property. Such conflicts would likely result in significant questions about their enforceability and inevitably lead to litigation to resolve such issues.

**C. Conclusion and recommendation**

It is a fundamental principle that the Hawai'i State Legislature has a duty to pass laws that are consistent with and effectuate the protections of the Hawai'i State Constitution.<sup>10</sup> Passage of this bill, which could result in governmental actions that courts have already indicated will likely lead to further action impacting the protections of the CDA, Constitutionally-protected takings, or which could create conflicts with existing statutes, would not be consistent with the Legislature's obligations to make sound decisions consistent with constitutional principles. Enabling such governmental actions could result in substantial litigation which will be time-consuming, costly, and harmful to Hawai'i's residential landowners.

For the reasons set forth herein, we have significant concerns about the proposed changes in HB 1238 and would strongly recommend that the Committee hold this bill.

Very truly yours,



DAVID M. LOUIE, ESQ.

for

KOBAYASHI SUGITA & GODA, LLP

---

<sup>10</sup> “[E]very enactment of the Legislature is presumptively constitutional.” *Schwab v. Ariyoshi*, 58 Haw. 25, 31, 564 P.2d 135, 139 (1977) (citing *State v. Kahalewai*, 56 Haw. 481, 541 P.2d 1020 (1975)); cf. *League of Women Voters of Honolulu v. State*, 150 Hawaii 182, 194, 499 P.3d 382, 394 (2021) (“[I]f the Legislature could alter the meaning of the Hawai'i Constitution through its own rules of procedure, theoretically, there would be no need to go through the formality of amending the Hawai'i Constitution. See *Mason's Manual [of Legislative Procedure]* (2010 ed.) § 12, ¶ 1 (‘A legislative body cannot make a rule which evades or avoids the effect of a rule prescribed by the constitution governing it, and it cannot do by indirection what it cannot directly do.’).”).