



Hawaii State Legislature
Committee on Water and Land
Rep. Linda Ichiyama, Chair; Rep. Mahina Poepoe, Vice Chair

January 31, 2023 - 9:00AM
Via Videoconference
State Capitol
415 South Beretania Street

TESTIMONY ON HB 109, RELATING TO COUNTY ZONING

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

Mahalo for the opportunity to comment on HB 109, 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 HB 109, there could be a number of unintended consequences:

1. **Impact on County Revenue: If counties use the language of HB 109 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 Hawaii'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.

Sincerely,

A handwritten signature in black ink, appearing to read "Alex April". The signature is fluid and cursive, with the first name "Alex" and the last name "April" clearly distinguishable.

Alex April
Airbnb Public Policy, Hawaii



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January 30, 2023

HOUSE COMMITTEE ON WATER & LAND
Rep. Linda Ichiyama, Chair, Rep. Mahina Poepoe, Vice Chair

HEARING DATE: Tuesday, January 31, 2023
TIME: 9:00 a.m.
PLACE: Conference Room 430

Re: TESTIMONY ON BEHALF OF AIRBNB OPPOSING
HOUSE BILL NO. 109

Dear Chair Ichiyama, Vice Chair Poepoe and Committee Members:

We write on behalf of our client, Airbnb, in opposition to House Bill No. 109 (“**HB 109**”). We are concerned that this bill is flawed and has the potential to result in substantial legal issues. The stated purpose of the proposed amendment in HB 109 is to enable the Counties to eliminate or amortize land uses and structures that are used for residential or agricultural purposes. Although this may appear to be an innocuous delegation of authority, the proposed changes could conflict with constitutional rights as well as existing state statutes. As discussed more fully below, such changes would potentially cause numerous unintended consequences. Furthermore, to the extent that these changes ultimately lead to a deprivation of vested rights of existing, residential homeowners, they would likely result in substantial litigation. For these reasons, we would strongly urge that the Committee not pass this bill.

A. Section 46-4 of the Hawai‘i Revised Statutes reflects the State’s statutory codification of property rights arising from the Hawai‘i and United States Constitutions.

As currently enacted, Section 46-4(a) of the Hawai‘i Revised Statutes (“**HRS**”) 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 was precluded from passing a law that discontinues any previously lawful use of any property.¹ 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."²

In looking at the intent of Section 46-4, it is important to look to the history of its passage. The Legislature noted property owners' protections arising from the Hawai'i and Federal Takings Clauses and passed the language that would limit the counties' ability to adopt zoning ordinances that "prohibit the continuance of the lawful use of any building or premises for any trade, industry, residential, agricultural or other purpose for which such building or premises is used at the time . . . such ordinance takes effect."³

In 1980, the Legislature amended Section 46-4 and added the above-cited language to prohibit the counties from phasing out "any existing building or premises used for residential or agricultural purposes."⁴ As the 1980 House Journal confirms, this amendment was intended "to restrict the areas where the counties are allowed to amortize or phase out non-conforming uses to non-residentially zoned areas."⁵

¹ 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).

² Haw. Rev. Stat. § 46-4.

³ Act 234, Hawai'i Session Laws 1957, § 6.

⁴ 1979 Hawai'i Senate Journal (Special Committee Reports) at 1235.

⁵ 1980 Hawai'i House Journal (Standing Committee Reports) at 1676-77 (noting the amendment "restricts the counties from amortizing or phasing out existing buildings or premises used for residential or agricultural purposes.").

Importantly, all actions of the Hawai‘i State Legislature regarding this statute have recognized the importance of protecting the rights of residential owner and preexisting nonconforming uses.

B. HB 109 could impair existing vested rights in violation of existing State and federal constitutional protections.

As noted, one of the fundamental purposes of HRS § 46-4 is to protect the uses that lawfully existed prior to the effective date of a zoning restriction. 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.⁶ As such, the Hawai‘i Supreme Court 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.”⁷

Both Hawai‘i and federal litigation has 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.’”⁸ Even preexisting nonconforming uses are protected from subsequent restrictive zoning regulations.⁹ 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.’”¹⁰

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.”¹¹

⁶ See, e.g., *Cnty. of Hawaii v. C & J Coupe Family Ltd. P’ship*, 119 Hawaii 352, 382, 198 P.3d 615, 645 (2008).

⁷ *Id.* (citing *Hawaii Hous. Auth. v. Lyman*, 68 Haw. 55, 704 P.2d 888 (1985)).

⁸ *Ferris Trust v. Planning Comm’n of Kaua‘i*, 138 Hawaii 307, 312, 378 P.3d 1023, 1028 (Ct. App. 2016) (internal citations omitted).

⁹ *Young v. Planning Comm’n*, 89 Hawaii 400, 410, 974 P.2d 40, 50 (1999) (internal citations omitted)

¹⁰ *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).

¹¹ *League to Save Lake Tahoe v. Crystal Enterprises*, 685 F.2d 1142, 1145 (9th Cir. 1982).

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.¹²

It is axiomatic 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.¹³ Passage of this bill, which courts have already indicated will likely lead to further action impacting vested rights and could be in violation of takings principles, would not be consistent with the Legislature’s obligations to make sound decisions consistent with constitutional principles. Amending HRS § 46-4 through HB 109 would not change the underlying constitutional protections that the statute codifies. Such a change could, thus, result in substantial litigation which will be time-consuming, costly, and harmful to Hawai‘i’s residential landowners.

A. HB 109 potentially 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 109 is that it would arguably lead to governmental actions which conflict with existing provisions in State law, such as Chapter 521, the Residential Landlord-Tenant Code. An example of such a conflict would be to compare the language of HB 109 with that of HRS §§ 521-22, which set 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, 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. While it appears that HB 109 seeks to regulate transient vacation rentals, subsequent zoning changes may adversely affect legitimate existing residential uses, such as persons traveling to Hawai‘i for work, military families in transition, and persons

¹² *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.”)

¹³ “[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.’).”)


traveling for medical care. Such conflicts would likely result in significant questions about their enforceability and inevitably lead to litigation to resolve such issues.

It should be noted that the Hawai'i State Constitution and HRS § 50-15 expressly provide that "any conflict between the State provisions [in HRS § 46-4] and the county zoning ordinances is resolved in favor of the State statutes, by virtue of the supremacy provisions in article VIII, section 6 of the Hawai'i Constitution and HRS § 50-15."¹⁴ As such, to the extent that a County ordinance is in conflict with a State statute, the State statute would control.

C. Conclusion

For the reasons set forth herein, we have significant concerns about the proposed changes in HB 109 and would strongly recommend that the Committee hold this bill.

Very truly yours,



DAVID M. LOUIE, ESQ.

for

KOBAYASHI SUGITA & GODA, LLP

¹⁴ *Save Sunset Beach Coal. v. City & Cty. of Honolulu*, 102 Hawaii 465, 481, 78 P.3d 1, 17 (2003) ("Thus, if an ordinance truly conflicts with Hawai'i statutory law that is of statewide concern, then it is necessarily invalid because it violates article VIII, section 6 of the Hawai'i Constitution and HRS §§ 50-15—the state's supremacy provisions." *Id.* (quoting *Richardson v. City & County of Honolulu*, 76 Hawaii 46, 66, 868 P.2d 1193, 1213 (1994)).

HB-109

Submitted on: 1/28/2023 3:23:35 PM

Testimony for WAL on 1/31/2023 9:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Gerard Silva	Individual	Oppose	Written Testimony Only

Comments:

This is just Crap . Get ride of this and starte over!!!!