

From: WRM Mark Marchello <mmarchello@vacation-maui.com >
To: "wearewestmaui@mauicounty.gov" <wearewestmaui@mauicounty.gov>
Date: 2/25/2020 4:31 PM
Subject: Hotel Zoning Revisions
Attachments: 010814 Minatoya Final Opinion.pdf; Testimony_CMPaltin_20200207.pdf

Aloha West Maui CPAC,

Thank you for allowing me to submit testimony.

I just received a copy of Council member Paltin's preliminary draft ordinance to phase out the Minatoya List of short term rentals that support the Maui economy, attached.

The Minatoya letter provided council on the legality of maintaining the existing use of grandfathered short term rentals in apartment zoned properties that were originally built, designed and sold as second home rental properties prior to the change of law in 1989.

I have attached a follow up letter from James Takayesu, Corporate Counsel dated August 14, 2001 further explaining the right of property owners to the continued existence of uses which lawfully existed prior to the effective date of a zoning restriction.

Not only is it illegal to remove these property owners rights it would also be devastating to the Maui economy. These second home properties 8,500+ and the legally permitted short term rental homes 250 rent to the visitors who spend the most money per person in our economy. In stark contrast to the thousands of timeshare properties that have been permitted and built in the past 10 years in West Maui; Westin, Hyatt, Marriott with visitors spending the least amount of money in our economy. If you want less visitors without ruining our economy zone out the timeshares!

However with the possibility of knee jerk legislative changes destroying our economy I recommend rezoning all projects built prior to 1989 that are currently legal for short term rental to Hotel zoning.

Thank you for your consideration.

Mark

Property Manager - Whaler Investment Group, 808-661-3484

Sales – Keller Williams Realty Maui
SurfMauiRealEstate.com 808-283-5296



Mark A. Marchello, R(FB) Mark A. Marchello, Inc.

"If you can dream it you can do it"

Walt Disney

Follow us:



Check out our Car Rental Specials & activities:



CONFIDENTIALITY NOTICE: The information contained in this e-mail transmission and any attachment is confidential and remains the property of Whalers Realty Management Company, Inc. until it is received by the intended recipient. If you are not the intended recipient, please note that use, further transmission or disclosure of this communication is strictly prohibited. If you have received this communication in error, please notify markonmaui@gmail.com as soon as possible, and delete it from your computer without retaining any copies. Thank you for your cooperation.

From: "Jennifer K. Mather" <Jennifer.Mather@mauicounty.us>
To: "wearewestmaui@mauicounty.gov" <wearewestmaui@mauicounty.gov>
CC: "Tamara A. Paltin" <Tamara.Paltin@mauicounty.us>
Date: 2/7/2020 4:15 PM
Subject: TESTIMONY for Meeting of 2/18/2020
Attachments: 2020-02-05_DRAFT_Minatoya Phase Out Bill.pdf

Aloha Chair Nishiki and CPAC Members,

On behalf of Councilmember Paltin, the West Maui District Councilmember and Planning and Sustainable Land Use Committee Chair, please accept this as public comment regarding a **preliminary draft** of an ordinance to phase out the Minatoya List. In previous meetings led by the Long Range Planners and Director McLean, CPAC was introduced to and then discussed the Minatoya List, an aggregate of condominiums in the Apartment District that can operate as short term rentals without a permit. Councilmember Paltin was present at those meetings and heard your concerns. With these comments and concerns in mind, this proposed legislation takes a "now rather than later" approach that will hopefully begin the process toward conforming uses.

Please find, attached, the preliminary draft of the resolution and ordinance. No action will be taken at this time and this public comment is for informational purposes only.

Mahalo,
Jen Mather

MAUI COUNTY COUNCIL
Office of Councilmember Paltin
Executive Assistant
West Maui District
200 S. High Street,
Wailuku, HI 96793

Resolution

No. _____

WHEREAS, the number of visitors to Maui County in recent years has exceeded the limit set by the Maui Island Plan of 1 visitor to 3 residents, and

WHEREAS, there is a housing crisis in Maui County in that there are not enough dwelling units to satisfy the need of residents for decent housing, and

WHEREAS, HRS §46-4 County zoning, Section (a), provides in relevant part: “A zoning ordinance may provide for... phasing out of nonconforming uses... over a reasonable period of time in... apartment zoned areas...”, and

WHEREAS, there are approximately 8,500 dwelling units in apartment zoned areas of Maui County which have been allowed to operate as transient vacation rentals without a permit, a non-conforming use under Maui County Code Chapter 19.12.010 C.: “Buildings and structures within the apartment district shall be occupied on a long term residential basis.”

BE IT RESOLVED, the Maui County Council intends to phase out this nonconforming use by amending Maui County Code section **19.12.020** - Permitted uses G to add a sunset deadline for this non-conforming use by means of the following Bill.

ORDINANCE NO. _____

BILL NO. _____ (2020)

A BILL FOR AN ORDINANCE AMENDING CHAPTER 19.020,
MAUI COUNTY CODE, RELATING TO UNPERMITTED SHORT-TERM
RENTALS IN APARTMENT DISTRICTS

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Maui County Code Section 19.12.020 G is amended by adding a new subsection 3 as follows:

- G. “Transient vacation rentals in buildings and structures having building permits, special management area use permits, or planned development approval that were lawfully issued by and valid on April 20, 1989. Buildings and structures with such permits and approvals may be reconstructed, and transient vacation rental use shall be permitted, provided that:
1. The reconstruction conforms to the original building permit plans, special management area use permits, or planned development approval; and
 2. The reconstruction complies with the building code and all other applicable laws in effect at the time of the reconstruction.
 3. This sub-section G is repealed effective January 15, 2024, and transient vacation rental use shall no longer be permitted thereafter in such buildings and structures unless the owner has complied with Maui County Code section 19.65.030.”

**DEPARTMENT OF THE CORPORATION COUNSEL**

COUNTY OF MAUI

200 SOUTH HIGH STREET

WAILUKU, MAUI, HAWAII 96793

TELEPHONE: (808) 270-7740 FAX (808) 270-7152

August 14, 2001

MEMO TO: Alan M. Arakawa, Chair
Land Use Committee

FROM: James B. Takayesu, Corporation Counsel

SUBJECT: TRANSIENT VACATION RENTALS (LU-8)

This is in response to your letter of August 7, 2001, in which you request that our department provide your committee with the legal basis for the conclusion that "projects with building permits, special management area use permits, or planned development approval lawfully issued and valid on April 20, 1989, are exempt from Ordinance No. 1989 (which deleted transient vacation rentals as permitted uses in the apartment district)... regardless of whether such "projects" were actually used as transient vacation rentals.

In your letter, you reference Section 46-4, Hawaii Revised Statutes, which provides for the continuing validity of nonconforming uses of property after enactment of any new zoning ordinance that would otherwise invalidate the uses. You have specifically asked for clarification as to how the mere granting of permits (without corresponding usage) triggers protections similar to Hawaii Revised Statutes ("HRS") Section 46-4, mandated protection for pre-existing uses.

We first note that the right of a property owner to the continued existence of uses and structures, which lawfully existed prior to the effective date of a zoning restriction, is grounded in constitutional law, and that pre-existing lawful uses of property are generally considered, under due process principles, to be vested rights that zoning ordinances may not abrogate. Waikiki Marketplace v. Zoning Board of Appeals, 86 Hawaii, 343, 353-4 (App 1997.)

Exhibit I-1

37A

In addition, it is a well established rule of statutory construction that "[z]oning laws, being in derogation of the common law, must be given strict construction and not be extended by implication. . . nevertheless should be read according to the natural and obvious import of the language used when there is no manifest legislative intent to the contrary." County of Maui v. Puamana Management Corporation, 2 Haw App. 352, 356 (1981) (County ordinance was drafted in terms inadequate to prohibit short term rentals in residentially zoned, planned unit development) See Waikiki Marketplace v. Zon. Bd. of Appeals, supra, 86 Haw. at 354. In interpreting a zoning ordinance, the legislative intent should be obtained from the language of the statute or ordinance. Moreover, ambiguities in a zoning regulation should not be resolved in further derogation of common-law rights, Foster Village Community Ass'n vs. Hess, 4 Haw App. 463, 469 (1983), (pet pig is legal as an accessory use to a residence.)

In accordance with the foregoing rules of statutory construction, we have concluded that the "grandfather protection" afforded to property owners under Ordinance No. 1797 (1989), which attempted, inter alia, to prospectively prohibit short term rentals in the apartment district, extended on a "project wide basis", irrespective of any pre-existing use, due to the specific language contained in Section 11 of Ordinance No. 1797 (1989) which stated:

SECTION 11. This ordinance shall take effect upon its approval; provided that this ordinance shall not apply to building permits, special management area use permits, or planned development approval which were lawfully issued and valid on the effective date of this ordinance.

It is clear that the language in Section 11, which deviated from the usual, more limited, practice of focusing solely on continuation of pre-existing lawful uses, was a matter of concern to the Director of Planning. By letter dated May 25, 1989, former Planning Director Christopher L. Hart requested clarification from the Corporation Counsel:

Clarification is requested regarding the applicability of this section. Under what conditions can new or existing projects operate as a motel, transient vacation rental or time share.

Does it mean that as long as one of the preceding permits was issued for the project it will be allowed to have motel use and transient vacation rentals upon completion of construction regardless of the motel use, time sharing unit, plan or transient vacation rentals being identified as such during the review of the permit or approval. In most cases, a project is simply identified as an apartment-condominium, however, after construction, the project is marketed as both long-term and short-term rentals which usually involves time sharing.

The natural and obvious import of the language used by the Council in Section 11 of Ordinance No. 1797 (1989) was to not only "grandfather" in the usual pre-existing non-conforming uses, as required by Section 46-4, Hawaii Revised Statutes, but to also extend such protection to projects that had been issued any of the enumerated permits or approvals prior to the effective date of that ordinance. Thus, upon enactment of this ordinance, owners of such units or projects, irrespective of their actual uses, obtained vested rights to lawfully commence or continue to use these properties for transient vacation rentals and time share plans in the apartment district. Hui Malama Aina O Ko'olau v. Pacarro, 4 Haw App. 304, 319-320 (1983); Waikiki Marketplace v. Zoning Board of Repeals, supra, 86 Haw. at 353-4.

Subsequently, in 1991, the County Council enacted Ordinance No. 1989 (1991), which eliminated time share units, time share plans and transient vacation rentals as permitted uses in the apartment district. This ordinance not only amended Section 19.37.010, Maui County Code, and "grandfather" pre-existing uses but also exempted from its operation "certain time share projects that filed a prescribed declaration with the Bureau of Conveyances within sixty (60) days of the effective date of this section."

As a result of the enactments of Ordinance No. 1797 (1989) and Ordinance No. 1989 (1991), time share units, time share plans and transient vacation rentals are currently prohibited in the apartment district except for:

- (a) Preexisting Nonconforming Uses: Existing time share units, time share plans and transient vacation rentals which were operating pursuant to and under law prior to March 4, 1991, (or within sixty (60) days thereafter.)

- (b) Pre-approved Projects: Condominium and apartment type projects that were issued building permits, special management area use permits, or planned development approval which were lawfully issued and valid on April 20, 1989. [The effective date of Ordinance No. 1797 (1989)].

You are further advised that our recent opinion entitled "Short Term Rentals in the Apartment Districts", rescinds the opinion of former Deputy Corporation Counsel John R. Rapacz, dated July 7, 1997.

In his opinion, Mr. Rapacz, citing case law from other jurisdictions, advised that (1) provisions for the continuation of nonconforming uses are strictly construed against continuation of the use, and (2) that use of property must actually be established prior to the adoption of the zoning ordinance to qualify as a nonconforming use.

As previously noted in this opinion, we have cited Hawaii cases for the rules of statutory construction that Hawaii Appellate Courts have utilized in interpreting and applying zoning ordinances and other land use laws. Hawaii cases have not followed the approach used in the cases relied on by Mr. Rapacz.

Most significantly, in Hui Malama Aina O Ko'olau, supra, 4 Haw App. at 319-320, the Hawaii Appellate Court, in construing a "grandfather clause" similar to Section 11 of Ordinance No. 1797, stated:

... unlike the second part of the grandfather clause which requires actual completion of certain improvements by December 1, 1975, nothing in the first part requires the developments to be ongoing or to have completed construction by that deadline. Moreover, by referring to "a building permit, planned development permit, planned unit development permit, or ordinance, or special permit for cluster development", the inference is that the development is still in the planning stages since these permits or ordinances are required prior to actual construction. Therefore, we conclude that the natural and obvious import of the grandfather clause is that requirements of the Hawaii CZM Act are not applicable to any development, existing or planned, for which one of the aforementioned permits was issued or

Alan M. Arakawa
August 14, 2001
Page 5

ordinances was passed prior to December 1,
1975. (Emphasis added.)

Should you have any further questions or require additional information, please do not hesitate to contact us.

JBT:lak

S:\CLERICAL\LAK\JBT\COUNCIL\ArakawaVacRots.vpd