

## MINUTES

### PLANNING COMMITTEE

June 27, 2007

A meeting of the Planning Committee of the Council of the County of Kaua'i, State of Hawai'i, was called to order by Councilmember JoAnn A. Yukimura, Chair, at the Historic County Building, Room 201, Lihu'e, Kaua'i, on Wednesday, June 27, 2007, at 3:20 p.m., after which the following members answered the call of the roll:

Honorable Jay Furfaro  
Honorable Ron Kouchi  
Honorable Mel Rapozo  
Honorable JoAnn A. Yukimura  
Honorable Bill "Kaipo" Asing, Ex-Officio Member  
Honorable Tim Bynum, Ex-Officio Member

EXCUSED: Honorable Shaylene Iseri-Carvalho

The Committee proceeded on its agenda items as shown out of order in the following:

**Bill No. 2204**      A BILL FOR AN ORDINANCE TO AMEND CHAPTER 8 OF THE KAUA'I COUNTY CODE 1987, AS AMENDED, RELATING TO THE COMPREHENSIVE ZONING ORDINANCE (Transient Vacation Rental and Bed and Breakfast operations)  
[This item was deferred.]

JOANN A. YUKIMURA, PLANNING COMMITTEE CHAIR: We are going to have a presentation by Council Chair Asing. I think I am going to... after the presentation, open it up for anybody who wants to testify and go home and then we will go into executive session. For those of you who want to come back and watch the public session after that, that will be fine too. I don't have to suspend the rules for an ex-officio member. Council Chair, you have the floor and can we give him our attention please. Thank you.

BILL "KAIPO" ASING, EX-OFFICIO MEMBER: I will be making a... hopefully, a short presentation, so bear with me please and my apologies if my back is to all of you there because I will be up front and my back will be to you, so my apologies for that. Let me just start and before I start, let me just say that... am I on? Let me just say that some of the information that I will be presenting today is a repetition of what I did two (2) weeks ago. There is a reason for it and I want to make some emphasis and at the end, you will understand why I am repeating some of the information that I did two (2) weeks ago. With that, why don't we just start.

This is the Mahuiki planning document and Hawai'i Supreme Court filing for... on the bottom portion here, the Planning Department of the County of Kaua'i and Alex Ferreira, defendants and we were the people filing the Claim Against the County. Okay, I am going to read to you excerpts from the decision. The Hawai'i Supreme Court decision was rendered in 1982, December. Let me read you some excerpts from the decision. Where commission that had been delegated authority to pass on applications for special management area, use permits under the coastal zoned management act, exercised such authority inconsistently with the guidelines and restraints, the grant of the permit could not stand. The real property involved in this controversy consists of approximately 5.277 acres of undeveloped lands subject to use regulation under the CZMA and situated in Hā'ena Kaua'i for which Hā'ena limited a California Limited Partnership sought permission from the Planning Commission to develop as a combined condominium apartment and single family residence project consisting of 17 condominium units and four (4) single family dwellings. The evaluation and relevant part read: The proposed development consist of some alternations of existing land, (inaudible) and vegetation and in our opinion, due to the density of use will cause some impact to the scenic and environmental character of the area. Consideration must be given to the height and bulk of buildings and proximity to the shoreline. In this case, all proposed structures are to be one story with gable style roofs and any (inaudible)... this development with certain modifications may not create substantial adverse environmental impact to the character of Hā'ena. I might add that, that statement came in a report from the Planning Director. The cumulative impact of such individual development could, however, be substantial enough to adversely affect the environmental character of Hā'ena. This cumulative impact could be lessened if: 1) the property owners on their own initiative do not build to the maximum density allowed and utilize the dwelling units primarily for permanent residence or beach type homes that are not commercial or resort type in nature. Based on the foregoing findings and evaluation, it is concluded that for the SMA use permit in itself, the subject project with certain modifications could meet the criteria for the granting of a special management area use permit. It is also concluded that the cumulative impact of such individual developments could, however, be substantial enough to adversely affect the environmental character of Hā'ena. The density of the development and the nature of the use, visitor oriented resort/residential function are the main factors that are judged to cause the more significant affects to the environment of Hā'ena. The Planning Commission, however, made no finding that the development would not have a substantial adverse, environmental or ecological effect or the adverse effect was clearly outweighed by public, health and safety prior to the approval.

When Dr. Ferreira's application for a special management area use permit was approved, the Planning Commission has the authority charged with the responsibility of enforcing the policy of the CZMA on Kaua'i was subject to the scriptures of H.R.S. 205A-26 which in relevant part provided that no development shall be approved unless the authority has first found: (A) that the development will not have any substantial adverse, environmental or ecological affect except as such adverse affect is clearly outweighed by public health and safety... that the

development is consistent with the findings and the policies set forth in this park.

This is the Supreme Court saying this now. This is their words. We have combed the record in vain for findings by the Commission that the development proposed by Dr. Ferreira would have no substantial adverse, environmental or ecological affect or the adverse affect would be clearly outweighed by public safety and the development was consistent with the findings and policy as set forth in H.R.S. Chapter 205A. We discover instead, serious misgivings on the part of the Commission members about the proposals compatibility with a policy to preserve and protect the environment and resources of the coastal zone. Furthermore, their misapprehensions regarding the relationship of County zoning ordinances and the CZMA are patent.

This is now a statement by one of the Commissioners prior to his vote for approval of the project. The statement of Commission member and I am not going to get there, unfortunately, this is one of those decision where there is really no solutions to the problem. We've had many comments pros and cons and in this application, I hate to see an area as beautiful as Hā'ena being slowly eroded and destroyed. This is another Commissioner prior to his vote for approval and this is his statement. The statement of Commission member in pertinent part reads: Unfortunately, and this is the saddest part. Our ordinance permits the use of catering to short term visitors and in the residential district. I want to emphasize this part. Here is a Commissioner who is saying this: Unfortunately, and this is the saddest part. Our ordinance permits the use of catering to short term visitors in the residential district. That is, in my opinion, an erroneous statement. In the sensitive environment of Hā'ena, this function which is more of a resort type use is highly out of character and pretend that in the long run, highly detrimental. I am sure that past decision makers in their deliberation and subsequent decision to upzone the land did not intend that it eventually be used as a resort visitor destination area.

This is the last portion of the statement excerpt from the Supreme Court ruling. I am going to read it now. The author's observation in this regard is as follows: permits required under this act supercede all others including any permits required from State agencies such as the Land Use Commission in conservation/agricultural districts along the coast. The 1995 shoreline protection legislation for the first time supercedes State controls in an important area of environmental concern. This is the final order. The order of dismissal and the summary judgment entered by the Circuit Court vacated and the case is remanded for proceedings consistent with this opinion. The statement that I read to you earlier is from Daniel R. Mandelker who is the professor of law at the Washington State University and I am not going to read his background here. He is the country's leading scholars. He teaches law school and he is the author of a popular law case books... get down, including the... a firm by invitations to lecture throughout the world including the prestigious... lecture at Cambridge University, so what the Supreme Court did was, they took Professor Mandelker's opinion and put it in the Supreme Court ruling as they felt that it was relevant and should be

included in their ruling. I won't go through this special management area rules and regulations. We all know that, that is Chapter 205 and these are some of the comments in the area about the development changing density, etc., so we can forego that.

Now I want to reference a Committee report 37-80 which reflects the Senate Bill 1516. Now, this Senate bill here that was passed in 1980 is the bill that mandated the counties to regulate timesharing... the purpose of this bill is to regulate timesharing in the State of Hawai'i. That is this report here and I want to read to you some of the statements made in this report because this report is a report by both the House and Senate members in... and the end result is the conference Committee report. That is what this is.

Ms. Yukimura: Mr. Chair, can I just interrupt for a sec?

Chair Asing: Sure.

Ms. Yukimura: You are bringing us to some additional insights because much of this, as you said, is repetition.

Chair Asing: Yes.

Ms. Yukimura: Okay, thank you.

Chair Asing: Thank you. We can forego this one here. The County authority: This mandate will be particularly helpful in efforts to clarify hotel resort and transient vacation rental areas. The counties do not presently zone for less traditional forms of transient vacation accommodations and should address this in the near future. It is telling the counties, go ahead and get your act together and put clear areas where timesharing and vacation rental should occur. It is the clear intention of your conferees that timesharing and transient vacation rental use are identical uses of land without regard to ownership and both uses of land should be addressed in the co-equal manner by counties. Your conferees further note that County land use decisions are not based on ownership, but on the use of the land in question. As such, timesharing and transient vacation rental should either be permitted or prohibited on an equal basis within an area deemed appropriate by the County. Your Committee further notes several areas of non-enforcement of their own zoning ordinances by some of the counties. In this regard, it is not the present character of the neighborhood, but its intended use. Again, intended use by the County that is also important. The Legislature intends by this act... the Legislature intends by this act that the counties will be guided by the notion that timesharing and transient vacation rentals should not be permitted where lifestyles of the permanent residents will be disrupted in an unreasonable manner. I am going to read that again. The Legislature intends by this act that the counties will be guided by the notion that timesharing and transient vacation rentals should not be permitted where the lifestyles of the permanent residents will be disrupted in an unreasonable manner. Any zoning code is only as good as its enforcement by the

County.

In its review of timesharing and transient vacation rentals, your conferees concluded that several of the counties have not used their zoning authority on these less formal and traditional types of transient vacation accommodations. The problems have caused... the problems caused by this shortcoming in the County zoning ordinances are clearly demonstrated in the case of County versus Maui and the Puamana Management Corporation and I won't read that civil number which is presently on appeal to the Supreme Court. Your conferees elected not to prejudge where is an appropriate area. Timesharing and transient vacation rentals should be allowed or prohibited, but to leave that decision to each County as a logical part of its zoning or designation functions, your Committee expects that the counties will act expeditiously to clarify the propriety of these uses under zoning ordinances.

Now, you want to go back to that? That was the conference report that made reference to what this act should do. With that, let me read some portions of it. This is now what 186, Section 4, County authority. The several counties shall by amendment of these ordinances limit the location of timeshare units, timeshare plans and other transient vacation rental within such areas as deemed appropriate. Geographic limitations, except as provided in this section, timeshare units, timeshare plans and transient vacation rentals are prohibited. Existing timeshare units, timeshare plans and timeshare vacation rentals are not impaired by the provisions of this section. Timeshare units, timeshare plans and transient vacation rentals are allowed in: (A) hotels or (B) where designated for hotel use, resort use or transient vacation rentals pursuant to County authority under Section 46-4, H.R.S. or where the County by its legislative process designates hotel, transient vacation rental or resort use. Authority of the director... the director and the several counties may adopt rules and forms pursuant to Chapter 91 to effectuate the purpose of this Chapter and to implement its provisions. Now, that was Bill 186 and Act 186 told the County to go ahead and do your vacation rentals and timeshare bill and set some guidelines. So this now, is a Policy Committee report by the Policy Committee. Now, in the... this was 1982 and in 1982, we had both a Planning Committee and a Policy Committee. The way it was worked, it passed through the Planning Committee first, we took it from the Planning Committee and passed onto the Policy Committee. So what you have here now, is after passage from the Planning Committee, it went to the Policy Committee. The Policy Committee is now ready to make the final draft. I want to read that final to you. The major changes in draft 2 are as follows: first, the visitor destination maps have been modified to do more precisely define visitor destination areas where timesharing and transient vacation rentals will be permitted. Additional areas are including in the Po'ipū and Wailua/Kapa'a and the new Līhu'e map has been added. Also, a single family residential area in the Wailua/Kapa'a area has been deleted. I am going to read that again. Also, a single family residential area in the Wailua/Kapa'a area has been deleted. Draft 2 is based on input received at the public hearing and other testimony and reflects a workable method allowing resort type timesharing and transient vacation rentals without infringing on the peace and quiet of residential areas. I want to read that again... reflects a workable

method allowing resort type timesharing and transient vacation rental without infringing on the peace and quiet of residential areas. I want to leave that on and Harry... Now let me, again, go back to the left hand screen. In the left hand screen, let's see now, where are we? Also, a single family residential area in the Wailua/Kapa'a area has been deleted. This is the map of the Wailua/Kapa'a area. What you see in brown here is the timeshare... I am sorry, VDA destination areas. In other words, we can start from this point here. This is the Kahalani area and that is a VDA area. This is the Kaua'i Resort hotel area and that is a VDA area. That is Coco Palms area and that is also a VDA area and this whole area here which is the all the hotels here, the Sheraton is in this area here, so all of this is VDA. There is a small area here and I believe that this is the... what is it called, Kapa'a Shores and that is also a VDA. Now, I want to make note that this area in blue here... this is residential and if you look at that, they... we, because I happen to be on the Council at that particular time. We took this out, so what you have is you have a single family residential area here that was originally marked as VDA, but instead, we took it out. Why did we take it out? Because we did not want to have an effect on the single family residential area and that is the reason we took that out. So when you use that logic, if you are taking it out, that means you don't want visitor... transient vacation rentals there, so by taking that out and if you are going to now say, ah, but that is single family, so I can put visitor destination area in there. No, you can't, we took it out, so the rationale somehow is missing. Something is wrong because we are saying, no, we don't want this residential area here to have transient vacation rentals or timeshare, either or, so we take it out and that is an important part that probably people were not aware of.

Okay, where are we now. This is the final bill. What I just read to you was the report from the Policy Committee and now we are going to do the final bill. I don't think we need to go through this. Okay, let me just do this. I want to do the same thing that I did the last time. On the bottom here is the Supreme Court decision. The Supreme Court decision is that this is Ferreira subdivision here is not allowed, so that came from here. Now, the rules and ruling that the Supreme Court used, came from here, Chapter 205 which is the SMA rules. So you are saying that, here is the rules to say, no, you cannot do that. Here is the Supreme Court decision that says, no, you cannot do that. Now, if you take any one of these here, what you have is the conference committee report that reflects the possible effects of neighborhoods that is transferred into Act 186. You also have the County Council's final action which is transferred over down to the final ordinance of Bill 811. So what you are really saying is that this is saying, no to the Ferreira subdivision. This is doing the same thing. It means the same thing. This one is doing the same thing, so if you take all of this and you say that is the effect from here to here which is transferred to the ordinance which we passed, then what you are really saying, in my opinion, is that Supreme Court decision is also... do you want to put that arrow on. You are going to start from there. You want to start from there. In my opinion, it is saying no to this Act 186... Act 186 is saying no to this and the conference report is saying no to this and the SMA is saying no to this if... only if was in the SMA, but if it is single family residential outside the SMA, then this would come into effect to say no to that.

With that, what was I going to do? Okay, with that, I am saying that all of these... change the tape. We are going to have a one, two (2) minute recess. We need to change the tape.

Ms. Yukimura: We need to stay in place. Let's just have the lights for a minute or two (2) please.

There being no objections, the Committee recessed at 3:56 p.m.

The meeting was called back to order at 3:59 p.m., and proceeded as follows:

Ms. Yukimura: Are you ready Chair?

Chair Asing: I want to show you now... in the last presentation that I made, I showed you some slides regarding the Hanalei/Kīlauea/Hā'ena County area and the Hanalei conservation area. This is what it looks like and I... for some who might not have seen the presentation that I made two (2) weeks ago, this happens to be Hanalei. That is Hanalei pier over there and this is the entire Hanalei Bay here. That is the roadway coming down into... I am sorry, that is the river. That is the Hanalei River flowing back this way and going back into the ocean there. Okay, with that, I'd like to show you... go ahead. This is just the number of lots that is present in the Hanalei area. You can show the next one. This in blue here is all of the properties in blue are the properties that have buildings on them. If you notice some of these vacant areas here where there is no buildings and the rest in blue are all with buildings. This is the vacation rentals and I am going to... do you want to put that top portion right there. Okay, what I want to do is tell you that this is pre-1983 and the reason I say this is, if, an example, we used 186 and used the passage of our Ordinance 436 and enforced that ordinance and there would be from that period on no more vacation rentals allowed. Here is what would have happened. This is 65 vacation rentals that are shown here. The rental units that would have existed... that, did, in fact exist in 1983, okay. I want to show you the difference between... in 1983, this is what we had, okay. Now, I want you to look at the right screen and this is what we have today. Now, let me show you the numbers. See the numbers here. The numbers here are, today, we have 124 vacation rentals. If we had stopped and used the ordinance, this is what we would have today because we would have stopped it. So from 65, we have increased to 124 or a 93% increase since 1983, so that is what this is intended to do.

With that, let's do Kīlauea. This is the Kīlauea area and these are all the ag lots. That section right there is the town area, so in this particular map, the intent of this map is to show the ag parcels, that is what this is, ag parcels. It has nothing to do with the town core there is R-4, R-6, etc., but only the ag parcels, so we just do the vacation rentals. If you notice, you can put the figures on top there. If we had stopped it at that particular time, this is what we would have. We would have had three (3) vacation rentals during that period time and, today, we have 18 vacation rentals. Now, don't be misled and these are all the vacation rentals and they are

not exact. We just took the numbers and put the coloring on different lots, so they are not the actual lots where the vacation rental are, and, of course, I explained the last time to you that these ag lots number 214, but you can take those 214 and CPR. We used the number of... the number 3, so if you multiply that 3 x 215, you get over 600 ag lots that could be gotten and we just worked out a ratio, so this is what it came to. So what you are really comparing is approximately 18 versus (inaudible). Let's go to...

These are the lots in Hā'ena and the ones in blue are the lots that have units on and this would be in 1983. This is the Hā'ena area. This is Camp Naue is right there, the YMCA camp and you notice that angle there, that is the Conservation District boundary. From this point north is the Conservation District, so we are looking at the area from around Camp Naue back this way and we get to this area here... this is the point that you enter the Hā'ena area. Okay, do you want to put then numbers there? Okay, this is the number of vacation... no, this is pre-1982 (change side of tape). Okay, is this better, very good. Here is the numbers. So this the 32 that would have existed in 1983 and these are all the units. As I explained the last time, these are quite accurate. I would say that we are in the high 90% accuracy on exactly where the units are and you will notice... see this parcel right here next to Camp Naue... this is the so-called Dr. Ferreira property and you will notice that you do not see a vacation rental in this area because this is pre-1983. So if we had stopped it then, there would have been any vacation rental in this area here. Do you... Harry, do... here is the today, so there is a difference between 60 vacation rentals here and as I explained, 1, 2, 3, 4 units in that area there. So if we had stopped it in late 1982, what we are calling pre-1983, then these here would not have come on board. So all I am trying to do is show the difference between the 60 that we have today and the 32 that we had back then. And we show the last slide which is in the Conservation District.

Okay, this is the Conservation District in Hā'ena. Remember that beveled type line. Camp Naue is there and this is going north, so we would have had six (6) vacation rentals in the Hā'ena Conservation District as compared to the right side screen, we now... today, we have, I would say, a minimum of 21. The 21 that we have here is what we know is existing there. There may be a few others, but we did not go that far. We got some information from the DLNR, so we are... we can verify that the ones that we have shown here are, in fact, visitor vacation rentals. That ends it, so thank you very much. I think we can shut everything down.

Ms. Yukimura: Thank you. We will now take public testimony and then go into executive session. The amendments that I am proposing are almost ready, but I am going to keep them until after the executive session because there may be some changes. So the rules are now suspended.

There being no objections, the rules were suspended.

Ms. Yukimura: I see some hands. Mr. Pleas, Mr. Mickens and anybody else? Maybe we can sign people up. Jimmy or Lianne, can you turn the light on?

Thank you. Please state your name for the record.

BRUCE PLEAS: Bruce Pleas for the record. Since the floor amendments have changed over time, the latest one that I received was June 12, so that is the reference you will have to use for my public testimony on this. Also, too, it is a shame that we don't have the further amendments to comment on, but will exist. It seems to change all the time anyway.

Ms. Yukimura: We try to respond to public input.

Mr. Pleas: Yes, this is generalities I am going on.

Ms. Yukimura: As well as attorney input.

Mr. Pleas: Your definitions. You have transient vacation rentals means a single family or a multi-family dwelling unit and go on... that is the change you have at this point. What I would like to put forward is because you have single family or multi-family...

Ms. Yukimura: Maybe we will wait a minute until we reveal all these incredible maps.

Mr. Pleas: And if Kaipo feels so inclined... Chairman Asing, I think a Kekaha map is needed because it goes from an under 5 to 50 during this time period. Back to where I was. The definition of transient vacation rentals means the single family or multi-family dwelling, this is what the change is to. This, again, will run into problems because it is not defining condominium... it is not a definition. There is still going to be blank holes... you have a Blaine Kobayashi decision that says you didn't cover this. What I found was a short term vacation rentals zoning amendment from Encinitas, California is short term vacation rental shall mean the rental of any structure or any portion of any structure for occupancy for dwelling, lodging or sleeping purposes. What this is, is any structure you are putting a blanket across the board where a lawyer cannot find a loophole and say this doesn't mean this structure. Any structure, so, therefore, it means single family, multi-family, resort condominium, fractionalized housing, you name it, it is covered. This is a very important part in a definition I believe should be put in here, so we don't end up in this problem again. Visitor destination areas... I say this every time and I will say it again. VDA are those areas of Waimea. Please include Waimea. It is a VDA area. It has been now for five (5) years going on six (6). It is an update that should be done. Okay, we do to... this is where we have... Section 3, where is it... 8-3.1 and then you have 8-3.3 which has some changes, but you go to Section 4 which is 8-3.4 is omitted. This is omitting the uses and structures in residential districts to require a use permit. Is it the intent of this bill to delete the... requires the use permit section. I believe it should be instead of Section 4, it should be changed to Section 5.

Ms. Yukimura: No, we are just removing a Section of the bill and not the

CZO.

Mr. Pleas: But you are amending to... okay, as long as you feel that it will still be there, I just have a question...

Mr. Kouchi: Renumbering the bill.

Mr. Pleas: Yes, it should be renumbered to 5, not as it is in here deleted. In Section 5, this will be Section 8-4.3, generally permitted resort uses and structures. At the bottom, you have added number 22, transient vacation rentals. This should have the same wording as you have further on. For transient vacation rentals, it should read, transient vacation rentals provided that they are located within the designated VDA areas established in Article 17 of this Chapter. You should be consistent with your addition throughout this document because that is how it reads for neighborhood commercial, general commercial. I believe and I just have one more... this is Section 8-17.10, non-conforming use certificate for single family vacation rentals... this goes down to C4... that on the effective date of this ordinance, there were no outstanding violations of State or County land use or Planning laws including the Comprehensive Zoning Ordinance, I would ask to add SMA and, then you go to and shoreline setback laws. I think SMA should be represented in there directly because that is one of the contentions that we have seen that the transient vacation rentals and SMA areas and the permitting, so I would just like to see that specifically put in there, so it is not passed over or it is not lawyer out as not being mentioned in there. Thank you.

Ms. Yukimura: Thank you very much. Those are very specific and helpful comments. Any questions of Mr. Pleas? Okay, I have one. I am not sure I understood your point about the definitions of single family transient vacation rental. What is it exactly that you are recommending?

Mr. Pleas: It is for the transient vacation rental definition.

Ms. Yukimura: And what are you recommending?

Mr. Pleas: I am recommending that it be changed as Encinitas to say, show me the rental of any structure or any portion of any structure. In other words, you are not defining it as single family or multi-family dwelling units only. You are saying, any structure. So what that covers broadly is any structure because in the Blaine Kobayashi decision, you had multi-family as... you did not say single family that it was alright. It is a black hole... it doesn't mean anything, so if you go any structure, you are covering in two (2) words, any structure.

Ms. Yukimura: Do you have the wording from Encinitas?

Mr. Pleas: Yes, I do.

Ms. Yukimura: Can we take a look at that? Thank you very much. And

the reason... I just want to say that the reason we didn't describe transient vacation rentals as a permitted use with all the other wording is because we assumed and maybe that assumption is not correct that all the resort areas are in VDAs.

Mr. Pleas: All the resort areas are not in VDAs.

Ms. Yukimura: Do you know where that is?

Mr. Pleas: Kapalawai.

Ms. Yukimura: I just thought...

Mr. Pleas: We went through this before. Waimea Plantation Cottages is in VDA and, also, I believe, there are... Chairman Asing came up with one or two (2) other ones that were not because you have to be specific in this and also consistent.

Ms. Yukimura: Alright, very good. Thank you very much. Any other questions? If not, Mr. Mickens, followed by Jonathan Chun.

GLENN MICKENS: Thank you JoAnn. I have... the testimony, you have a copy of it and it is from my good friend Ray Chuan. Ray is doing well, but he is still not quite capable of getting (inaudible). He sends along his hellos, alohas. I just want to say, Kaipo, thanks for your presentation. I thought it was outstanding. I can appreciate all the hard work you did with that thing. It is very good, excellent. Here is Ray's testimony. First of all, I want to thank Chair Asing and the staff of the Council. Remember, he hasn't seen this, so he is thanking prior to this time... presentation of the history of the facts and specific actions of the State Supreme Court and State and County agencies in dealing with the use of residential property for business. The clarity and specificity of Chair Asing's presentation last week put the spot light on the suspiciously (inaudible)... this County appears to face in dealing with the commercial use of residential property. The mechanisms of the Planning Director further complicated or should I say, (inaudible), by the Planning Commission and further muddled by some members of the Council render whatever comes out and adopted by the Council to be impossible to enforce especially with the almost total lack of enforcement mechanism and manpower. So what has essentially been a see no evil practice will become an open door practice in dealing with the commercial use of residential property at up to \$14,000 a week and many more charging at least \$2,000 a week. That is no longer the situation often advanced by apologist that with the shortage of housing and ever rising property tax, many homeowners are forced to vacation rent in order to hang onto their properties. Furthermore, the (inaudible) attitude is apparently in practice on this island than elsewhere in the State. Apparently, none of our County officials are aware of the existence and practice of the State Office with the acronym RICO which spells out here in Hawai'i (Regulated Industries Complaints Office). The existence and operation of RICO is apparently not known or reported by the press on this island, but is actively practiced in O'ahu. The operation of the State RICO is

apparently quite similar to that of the DLNR which showed its bags last month by posting notices and over a dozen high class vacation rentals in the Conservation District ordering them to cease operation by June 30 or face a fine of \$2,000 per day beyond that date. The *Garden Island* apparently shedding its usual hesitancy actually reported the incident thus putting some pressure, presumably on the County officials that our island is under the same State rules exercised by other islands. However, this enforcement action by the DLNR apparently did not disturb the dominance of Kaua'i County officials who, with the exception of Council Chair Asing have continued to operate as usual with the bill to deal with the vacation rental business. Time to wake up Kaua'i County officials. Ray Chuan. Thank you JoAnn.

Ms. Yukimura: Thank you. Any questions? I guess not. Our next speaker is Jonathan Chun followed by David Brittin.

JONATHAN CHUN: Thank you Councilmember Yukimura and members of the Committee. Thank you Chairman Asing, that was really interesting and a lot of work that went into. In fact, there is a lot of good information and I think it is good information that was presented. One thing I think would be interesting with the numbers that you showed... during the same numbers, yes, it did show an increase in the number of TVRs in those areas. I think, probably, if you looked at the numbers, you would also see an increase in single family dwellings in the same area. It would be interesting to compare what the relative mix between TVRs and residential at the same time. I think you have those numbers, but that would be interesting information to put in there also just for the Council's use. But I would like to just comment on a couple points made by the Chair in his presentation. One, in terms... the Supreme Court, I think Lorna from our office already commented on that, so I am not going to even comment on that part. On the State law regarding timeshares, I think I would agree with the Chair on that. The State law and timeshare does definitely give the County the authority to address this issue, TVRs within this County boundary and I think the position of my client, the Kaua'i Board of Realtors is just that. Yes, it is something that can be addressed, it should be addressed and addressed... you can determine where you want to see that. Our position is from the Kaua'i Board of Realtors that, be careful, though, when you address that you need to recognize the fact that there are people who have been... in doing transient vacation rentals and they have certain rights under the State law that have to basically have to be recognized. So I don't think we quiver with the fact that the State law gives you the right to regulate transient vacation rentals today.

I think we will note... in terms of your presentation regarding the VDA maps, that was an issue that the County Council struggled with when they first did that. Yes, of course, in the Kapa'a area, they decided to take out a residential area from the proposed VDA from that draft, but in certain other areas in the VDA, they didn't decide to include residential areas within the VDA. Specifically, Princeville has numerous areas that are residential... single family residents in there, so does the Po'ipū area which are still in the VDA. So it wasn't an across the board decision

by the Council at that time. They are all residential areas... shouldn't have any kind of visitor destination units. I think what really is interesting to note, though, is on the presentation on the VDA and the maps, the County, when they first did the VDA ordinance specifically decided to limit what they defined as transient vacation rentals as multi-family units. I think that was one thing that was driving their decision is where to put multi-family transient vacation rentals and a way to allow them and that was the point that Mr. Kobayashi and the County Attorney made in regards in their previous opinions. They want to make sure that when we talk about the VDA maps, that is only multi-family at that point in time. Thank you for your time.

Ms. Yukimura: Thank you. Just a minute. I think there might be some questions. Any questions of Mr. Chun? If not, I want to thank you for some of the wording that you proposed and I think you have seen that we've incorporated some of it.

Mr. Chun: I just got back from vacation, so I haven't seen anything yet, but thank you. I mean, we did try to make some valid...

Ms. Yukimura: I actually called your office to talk to you in more detail about the grandfather clause on existing timeshare and multi-family transient vacation rental because now that we are including single family, we had to change the reference and you helped us do that.

Mr. Chun: Yes, I think I did make a comment on how to word that a little bit clearer.

Ms. Yukimura: And all I wanted to ask you and I will ask you now is, in changing the wording, we are not changing the substance in anyway of that grandfather provision, right?

Mr. Chun: Let me read it again because I am not quite sure what came out. I know I made suggested changes and I know you wrote a revised one. I told my clients I would take a look at this afternoon. I got back Monday morning and I had a trial first thing Monday, so I really haven't had time to see anything since I left.

Ms. Yukimura: Okay, and then I want to ask you regarding agricultural lands because I want to make sure that I understood your position correctly. I understood you to say that on Class A and B lands, there is a real question as to whether vacation rentals are permitted uses.

Mr. Chun: On Class... the question... let's look at just Class A and B lands. The problem with Class A and B lands and what it meant by farm dwelling is really how much farming activity is going to be required by these homeowners to qualify as a farm dwelling. I mean, I don't disagree with the language that is in the current law that somebody who is on Class A and B land after that statute passed, what

was required to sign a farm dwelling agreement. That is in the law. In fact, a lot of times, the farm dwelling agreements were signed. The big issue at that point in time is what is a farm? How much crops do I have to grow? How much money do I have to take in? What qualifies as a farm in there? That question has been always pending even since the adoption of that statute. The individual landowners even with taking out the TVR issue... an individual landowner who just have homes in there signed farm dwelling agreements... they don't know how much lettuce or green onions or mangoes do I have to grow in order to comply with the law. That is always going to be there and that has been the problem with the law to begin with.

Ms. Yukimura: Okay, but how do you qualify vacation rental as a farm dwelling?

Mr. Chun: A vacation rental is just an additional use over and above a place that somebody has to live. So the real question of a farm dwelling is not whether you are renting it out or another room or something else, the question is, is that... is there a legitimate farm on the property? If...

Ms. Yukimura: And if so, if there is, then a vacation rental is a farm dwelling?

Mr. Chun: That doesn't happen automatically because they... that is the first question and you have to address the first... how much is the farm. If you get pass that one, then you have to look at the second part of the definition of farm dwelling. It has to be used in conjunction with a farm and that is the other thing, then the question is, how is a TVR on a legitimate farm... how is that used in conjunction with a legitimate farm? So, I mean, it is really factual driven and you have to ask the owner those questions.

Ms. Yukimura: So it is not an outright conclusion that any dwelling unit on an ag parcel that is a vacation rental is a permitted use.

Mr. Chun: I have never said that. I have always said that you... I have always said that you need to ask on a case by case basis which... what are you doing on ag land as a farm dwelling. You need to get that kind of information, but it is real dangerous on both sides to go on the extremes. You are all illegal and it is very dangerous on the extreme to say that you are all legal. So you really have to have... it is a factual driven issue in terms of what are you doing on that property at this time.

Ms. Yukimura: Isn't it a reasonable position to say that in order for a vacation rental to be a permitted use on Class A and B lands, you really need a special use permit?

Mr. Chun: No, not necessarily because a special use permit is needed in regards to recognize certain unusual uses, so it is farm dwelling, it is not an unusual use. So that is why I say, the real key goes back to, is it a farm dwelling?

Because if it is a farm dwelling, then there is no special use permit required.

Ms. Yukimura: Well, when you look at the intention of the ag law and when you know which I think a lot of people don't know, but the planners know, the ag economist know that one of the purposes of the ag law was to... both at the County and State level... not encourage the disbursal of residential uses in ag lands because they effectively sometimes obviate real ag uses. One, by giving a competitive use that ag uses cannot keep up with. And, two, by conflicts between ag uses and residential uses, I just got somebody complaining about smell of goats and machinery running at night and we know that when that happens, it is the beginning of the end often for farmers unless there is a right to farm law.

Mr. Chun: Which luckily passed.

Ms. Yukimura: Which luckily passed and I don't know, you may have voted on it, but...

Mr. Chun: I am thinking.

Ms. Yukimura: But, you know, there is still a question whether the protections are enough, so I mean, at least what I knew of Land Use planning and of the origins of our ag law, there is a recognition that residential use much less vacation rental use which is commercial and resort non-farm use can be very conflicting with ag use.

Mr. Chun: Yes, early on when the farm dwelling language in 205 first came out, what you talk about is true that they were concerned about residential use... just residential use and not commercial. They were concerned about residential use impacting farms and having farm land divided up basically for solely for residential use and that is why they put in the farm dwelling requirement. But, again, I go back... the farm dwelling requirement wasn't only aimed at (inaudible) commercial rentals, it was aimed at residential use, so whatever we say in regards to TVRs and whether it is farm dwelling or not is directly applicable to whether or not a residential use on farm dwelling is also violative of 205.

Ms. Yukimura: That is only if you say that residential use equals commercial vacation rental use with no real distinction and I would argue that vacation rental use is far more intensive than a residential use.

Mr. Chun: And I am not arguing that. I am just saying that when 205 was amended to do farm dwelling, their concern was residential use. It didn't even talk about commercial.

Ms. Yukimura: And that is why I am saying, if residential use was of concern. Commercial vacation rental use would be of greater concern I would think. I mean, look at what it does.

Mr. Chun: I am not saying it doesn't, what I am saying is, be careful when we start defining a farm dwelling and only using that definition for rentals, but not using the same definition for residence. That is not consistent what 205 was intended. 205 was intended to limit residential uses also on ag land.

Ms. Yukimura: Okay, and then there is this explicit prohibition against overnight accommodations in the ag tourism section of the State statute 205 which, to me, if you don't even allow overnight accommodations under ag tourism, how could you allow it under, you know, ordinary agricultural circumstances.

Mr. Chun: And that particular statute when the amendment was made to recognize... if somebody wants to come in and do really a pure and simple ag tourism kind of... like build a motel or build a hotel for visitors to visit their farm, that is what was intended. Again, I go back... what we are dealing with this one is TVRs in single family residences and it goes back... the main issue as we go back is whether or not that single family resident qualifies as a farm dwelling and, again, that is factually driven. You know, I don't disagree with you in terms of if you are doing a non-farming dwelling situation and you are doing only in regards to being your rental, then you potentially run an issue with the 205 amendment about overnight accommodations.

Ms. Yukimura: But it requires... the ag tourism law requires that it be an accessory use on a working farm or farming operation, so it is not talking about a non-farm situation.

Mr. Chun: The definition of farm dwelling, yes, it has to be... the residential has to...

Ms. Yukimura: Ag tourism. This is about the ag tourism ordinance.

Mr. Chun: Right, and...

Ms. Yukimura: So it says, provided ag tourism activity shall not be permissible in the absence of a bonafide farming operation. There is just over and over and over again, the requirement of a connection to a bonafide farming operation.

Mr. Chun: Right.

Ms. Yukimura: And then, there is on top of that an explicit prohibition against overnight accommodations and it doesn't say where it is multi-family or it is multiple units. It says overnight accommodations. I mean, that is a vacation rental.

Mr. Chun: And going back. The real issue when you look at this is you have to find out what is a farm and what is legitimate farming operation. How much is enough to be a farm.

Ms. Yukimura: But Mr. Chun, even if you have a farm, it says that you shall not have overnight accommodations.

Mr. Chun: There is a dispute in terms of that particular interpretation of that provision because the intent really was... if somebody is going to be doing a total visitor kind of destination... the situation they were looking at was if somebody was going to do a hotel or a group of hotels or visitor units on a farm, that is what they wanted to do. That is how they wanted to limit. Again, I don't believe that interpretation what you are seeing was what was intended at that time. Again, the first thing that I would really encourage the Council to look at is recognize the fact that you have to get the facts to determine whether a farm is actually... is existing on the ag land or not.

Ms. Yukimura: That is at least a minimum prerequisite.

Mr. Chun: Right, and we will agree with that.

Ms. Yukimura: And so...

Mr. Chun: Now after you reach that, how many nights are available and (inaudible) limitation... that becomes another issue.

Ms. Yukimura: But there are no nights available. It says overnight accommodations shall not be permitted. Now, the language doesn't indicate the distinctions you are making and I don't know, you may have some access to, you know, some legislative history that shows that although what I am learning is that interpretation first begins with the words in the ordinance.

Mr. Chun: And like I said, and the real issue and I am not bringing this out to argue that you said that you can't stop this future. You have to remember that even when that was done, there is still the issue of whether the existing people and that is all that I am talking about right now. The existing operators are legitimately having some farm operation in there whether you should stop them or not from continuing. Even in that law, if you use your interpretation, if existing people were doing overnight accommodations for more than one night or using (inaudible). If they were doing that before the law was passed on 205, 205 would have recognized under actions of 205 sections that those grandfathered use should continue and that is (inaudible).

Ms. Yukimura: That was 1976 when 205 was passed?

Mr. Chun: I am talking about the ag tourism which was more recent than that.

Ms. Yukimura: It was more recent, but you still have the farm dwelling

requirement before that.

Mr. Chun: Right. I am just saying that you have to recognize grandfathered issues.

Ms. Yukimura: Right, okay, Councilmember Kouchi?

Mr. Kouchi: I was curious if you have been tracking any of the letters to the forum or if you have been requesting and receiving the testimony that we have been getting from the public on this issue.

Mr. Chun: No, I haven't Councilmember Kouchi.

Mr. Kouchi: I only ask that because a lot of the letters in the forum and a lot of the e-mails and mail that I have received from people advocating the TVR activity in ag land are specifically saying that we need to offer an alternative to hotels and resort to have this resort activity occur in that rural setting. So by their own definition, they are defining themselves as alternative accommodations, but specifically like a hotel, but not at a hotel.

Mr. Chun: Yes.

Mr. Kouchi: And so, you know, it just seem contradictory to me to make one argument and also make the other and then they were asking us to, in fact, pursue adopting the ag plan... ag tourism plan, I guess, (inaudible) to them that it prohibited overnight accommodations because in their mind and their testimony, they feel that it is important to offer an alternative accommodation to a traditional hotel in multi-family zone.

Mr. Chun: No, I haven't read those comments and I haven't been asked to opine on that issue and that really is a policy issue that is before the Council (inaudible).

Mr. Kouchi: I am just saying, a lot of them are defining themselves as an alternative hotel.

Mr. Chun: Yes.

Mr. Kouchi: Not an ag... an ancillary ag farm dwelling unit that has people who are there to work the farm.

Mr. Chun: Right.

Mr. Kouchi: You know, they are running away from the hotel.

Mr. Chun: Right, they are basically admitting that there were not in ag and we just want to do hotel kind of operation and that is the kind of situation where

the County should have a procedure to determine whether or not there is farm operations or not because there are some who are like that and there are some who actually are trying to do some farming.

Mr. Kouchi: Maybe not understanding the whole legal doctrine, we are just going to pull all of those letters that we have (inaudible) affidavits if you will by their own hand and signature.

Mr. Chun: That could be a possibility also.

Ms. Yukimura: Any other questions? Councilmember Bynum?

Mr. Bynum: I think this debate is interesting because we keep going around in circles, but if I understand what you are saying correctly today regarding ag land, the intent of... the intent you said was to control residential use on ag land.

Mr. Chun: When 205 was amended to require farm dwellings on A and B land, the concern raised by the Legislature and it is also in the Committee Reports is that they were concerned that ag land was to be divided up just solely for residential uses. It had nothing to do with renting or whatever, they were just concerned with residences using farm land and not farming and basically that is what it was.

Mr. Bynum: So it hasn't worked very well has it?

Mr. Chun: Yes, I will be the first to admit it. It hasn't worked well and one of the reasons why, it really was a struggle as to what is a farm. How much is enough and really no one has stepped forward and started defining that. Other than... the County, in their tax side, they were one of the few jurisdictions to actually step forward on that. But that only impacted the taxes and the exemption, but that gives you an idea of the breadth of the problem. It is not just residential uses, it impact taxes, so the Council, I don't know what year they did that, but they started to actually set forth what they meant by ag.

Ms. Yukimura: And this is what we would have to do when we do our ag... the designation of ag lands of importance to the State.

Mr. Chun: Yes.

Ms. Yukimura: And start saying how we are going to regulate this and this is what counties like Montgomery County and others in the mainland, United States, where they are succeeding in preserving ag land or doing and we need to look at those examples.

Mr. Chun: Yes.

Ms. Yukimura: And I interrupted you. Go ahead.

Mr. Bynum: Yes, and I know what was one of the things that I thought was dramatic about the Council Chair's presentation today is, those two (2) maps of Kilauea up there. Look what has happened since 1982... look at the blue. How much ag land around Kilauea is now has buildings or residence on it. So I hear you saying that the problem is this definition and that it has to be dealt with on a case by case and determine the facts. Who determines those facts?

Mr. Chun: Right now would be the Planning Department would be the logical choice for existing departments. The Council could designate another department or another officer in its discretion, but my feeling and I think in my proposed draft was designated to the Planning Department because that is a logical choice to designate them.

Mr. Bynum: So they are going to have to determine whether bonafide agriculture is occurring not only for TVR's, but for residence on ag land as well.

Mr. Chun: Yes, I mean... it would impact first of all the TVRs because they are the ones that are required to get the non-conforming use permit, but they would... and the reason why I said Planning would be the ideal one because then they would know exactly if there are other issues involving farm dwellings because they are the ones that administer the farm dwelling agreement whether that definition would also fit and be applied to regular residences too. It would be consistent. In other words, that is what I am looking for, consistency. Make the law and the whole situation consistent with each other.

Ms. Yukimura: Okay.

Mr. Bynum: So in essence, Planning would have to develop this definition and these regulations and, so people who had TVRs on ag land would have an additional level of determination.

Mr. Chun: I would agree with... that would require the Planning Department, if the Council decides to go that route to develop within their own selves rules and definition that they would want to follow and they are authorized to do that now.

Mr. Bynum: I am asking these questions in the context of... there are other legal opinions that says, that disagrees with you. That says that any TVRs on ag land are currently illegal, have always been illegal, but this would not involve the 205-6 provision for a special permit?

Mr. Chun: Not directly. My feelings is still the same. If you have a legitimate farm dwelling, okay, and that is the first part is that key. If you have a farm dwelling, can a farm dwelling be used as TVRs, okay? Now, if you have the farm dwelling and if the Planning Department in its determination feels that is enough and the TVR is accessory to a farm, then at that point in time... a special

use permit really isn't required because the special use permit is only required for activities not allowed under 205 and farm dwellings are allowed under 205.

Mr. Bynum: I understand your position. Unfortunately, there is contrary...

Mr. Chun: When you have lawyers involved, you always have contrary opinions.

Ms. Yukimura: It is a big stretch to call a vacation rental a farm dwelling. It is a big stretch, especially when you look at the underlying purpose of ag laws... that was worried about just residential and a commercial use of that kind of vacation rental is upping the ante even more in terms of drawing away. I mean, look at all those subdivisions in Kīlauea and the momentum for that was residential/commercial rather than ag. That is the problem with all our ag subdivisions. Everybody is saying, where the agriculture.

Mr. Chun: I understand. You also have to note that, I think, in a lot of these things in Kīlauea, they are not A and B land either.

Ms. Yukimura: I think many are but...

Mr. Chun: I think some are. When you look at the ag designation areas for that, not all of Kīlauea are A or B land. Some of them are actually C and lower.

Ms. Yukimura: Okay. Alright, Council Chair, you had a question or did you finish?

Mr. Bynum: Yes, thank you.

Chair Asing: I guess I don't have too much of a question, but I have a few comments in response to some of these statements that you made. You know, I am going to read you again. The Legislature intends by this act that the counties will be guided by the notion that timesharing and transient vacation rental should not be permitted where the lifestyles of the permanent residents will be disrupting in an unreasonable manner. So I want to read that to you.

Mr. Chun: Uh huh.

Chair Asing: I also want to read to you Article 7 in the CZO. Agricultural Districts, Section 8-7.1, purpose is to protect the agricultural potential of lands within the County of Kaua'i to ensure a resource base adequate to meet the needs and activities of the present and future.

Mr. Chun: Uh huh.

Chair Asing: To assure a reasonable relationship between the availability of agricultural lands for various agricultural purposes and uses and the feasibility of those uses. Now, having said all that, one of the reasons I did those maps there is, Jonathan, I would hate to see the day that that top map is all pink. All vacation rentals, you know, and we are heading in that direction. Now, the three (3) that you note here, again, we did some ratios. On the top portion, that figure there represents 18 lots (change tape)... because that is what the Stoke's report is. I could color 60 lots, you know, and that could be real, but the reason I didn't do that is that I do know that these lots... some of them are large and they can be cut up and CPR'd, so that is why we use the ratio and we cut it down. We said, there is 215 approximately and you multiply that by 3 and that is the reason I am showing that there are 18. But the real number in Kīlauea is 60, so all I am trying to do is... one of the reasons for my doing all of these maps and Bruce, you know, I didn't do Kekaha, you know, I didn't do Kapa'a, you know, there are a lot of areas that I didn't do, but my intent here was to first start off in Hā'ena, Hanalei to show that oceanfront type which is the Kekaha and some Hanapēpē area and then I wanted to make sure that I include agriculture. So that is the reason I did Kīlauea because you can take Kīlauea and use that in Kalāheo and Lāwa'i and Wailua Homestead, etc., but this is to give you an idea, so these maps were designed to do that to give you an idea. You know, I just hate to us lose something that we don't want to have down the line some time and it is going to be sad. The Legislature recognized that.

Mr. Chun: Right.

Chair Asing: The Council recognized that and we've passed laws and there are interpretations that are different. My reading of all the things that I have been able to get a hold of and do research... I see intended legislation... legislative intent and there is, in all of these documents, legislative intent and it even mentions that in these documents. So the intent is always there and perhaps maybe the language is not as explicit as it should be, so I... you know, I understand what you are saying Jonathan, but I want to express to you my concerns and what I look for in the future. I don't want to destroy and maybe it is the wrong word, destroy, but, you know, the rural character and lifestyle of the community. I don't want to lose that, you know. It is something that I think, you know, we should cherish and work toward. Thank you.

Mr. Chun: And the Kaua'i Board of Realtors, we don't disagree with what you are saying. In fact, the Kaua'i Board of Realtors has stated that the Council should adopt a policy and an ordinance to regulate all future TVRs. We are not opposed to that because like I said, we don't dispute the fact that there has been a growth. I think the point that the Kaua'i Board of Realtors wanted to make... as people who have... doing it, should be... legitimate grandfathered people should be allowed to continue. All future people or proposed uses in the future should be regulated and subject to this Council's ordinance. That is all that we are saying. It just recognize existing uses, legitimate existing uses.

Ms. Yukimura: Yes, and you are saying that the determination of whether a use is legitimate is not across the board that is any vacation rental on any ag land, but you are saying that it is a case by case determination.

Mr. Chun: It really should be on a cas... on ag land especially, it is real factually driven, so the safest recommendation that we would have is, do it on a case by case. Be fair to everybody one way or the other and just do it on a case by case.

Ms. Yukimura: I appreciate the integrity. Thank you. Any other questions? If not, the next speaker is David Brittin followed by James Bray. Could you state your name for the record and for our captioner who is...

DAVID BRITTIN: For the record, David Brittin. Good evening Councilmembers, Chairman Asing. My name is David Brittin and I represent several landowners on the northshore of Kaua'i who have existing transient vacation rentals under the single family transient vacation rentals on ag land. We joined in the Kaua'i Board of Realtors and we have sent you a letter that I hope you all have received and had a chance to look at. We feel that the current version of Bill No. 2204 is legally (inaudible) in several respects, but most importantly in that it does not grandfather in current existing uses that are legitimate. We would agree with the Board of Realtors that any transient vacation rental would have to be a legitimate transient vacation rental to qualify as a non-conforming use. We feel that many of these clients of ours have vested rights they have acquired because the County has allowed these uses to go on for a long period of time. They indicated in the Kobayashi memorandum that vacation rentals outside of the VDA areas are not illegal. People have expended large amounts of money in the good faith (inaudible) alliance on this and to take it away now would create a possibility of expensive litigation regarding each and every landowner who has vested rights or can raise the defense of (inaudible) against the County. We feel that a more reasonable approach would be to grandfather in legitimate non-conforming uses on ag lands and we would ask you to revise the bill accordingly.

Ms. Yukimura: Thank you. Any questions of Mr. Brittin?  
Councilmember Rapozo?

Mr. Rapozo: I am sorry, what is your first name?

Mr. Brittin: David.

Mr. Rapozo: David, thank you for coming up. I had a question when you say the County allowed the vacation rentals to continue to operate on ag land, where are you basing that the County allowed it to happen, to continue?

Mr. Brittin: Well, the County has not enforced the zoning regulations against many of the people on ag lands and the Kobayashi memorandum specifically says that all vacation rentals not in single family vacation rentals in the

non-VDA areas are not illegal and this creates a good faith for reliance on people to go out and to engage in this sort of activity.

Mr. Rapozo: Even though the State is quite clear that there are no overnight or no vacation rentals to be on ag.

Mr. Brittin: There is nothing in Chapter 205 that explicitly says that you can't have a vacation rental on ag land and I would...

Mr. Rapozo: You are relying on the Kobayashi opinion basically that it is...

Mr. Brittin: I am also relying on the plain language of Chapter 205 in response to Councilwoman... in 205B(2), it says, requirements and restrictions for accessory facility connected with the farming operation including gift shops and restaurants provided that overnight accommodations shall not be permitted. I read that to say, in the accessory facility, so if you have a legitimate farm that you occasionally rent out as a transient vacation rental, you can't then go in and put a gift shop and put a couple of units above gift shop for overnight accommodations, but you can rent out the farm.

Mr. Rapozo: Are you an attorney?

Mr. Brittin: I am.

Mr. Rapozo: Just checking. Oh, so you are on the recent memo that we got. The one that we just got yesterday?

Mr. Brittin: In place of (inaudible).

Mr. Rapozo: Okay, thank you. I did read that. I didn't just recognize the name. Thank you.

Ms. Yukimura: Other questions? So Mr. Brittin, so you are representing the realtors too? The Board of Realtors?

Mr. Brittin: We don't represent the realtors, but we were asked by the Board of Realtors to submit this letter along with our clients.

Ms. Yukimura: And who are you representing?

Mr. Brittin: We represent several landowners on the northshore.

Ms. Yukimura: And you are not going to say who they are?

Mr. Brittin: No, I am not.

Ms. Yukimura: Okay, and did you write this opinion?

Mr. Brittin: I wrote pieces of the opinion. I did not write the entire...

Ms. Yukimura: Okay, Blaine Kobayashi's decision mentioned nothing about ag... the State ag law, so are you saying that if there was an incompetent or incomplete decision or opinion that that would release people from following the law?

Mr. Brittin: We, the Hawai'i Supreme Court in the Waianae model hotel case says that the good faith reliance includes an incorrect opinion by a County official and it is in our memo and I will refer you to that. So if the County official acts within the ambit of their duties and in good faith, then people may rely on that to create the defense of equitable estoppel... I believe that Mr. Kobayashi was acting within the ambit of his duties and there is nothing in the memo that would indicate that he was acting at anything other than good faith, so I believe the people can rely on that memorandum.

Ms. Yukimura: And that would then be a really great or very important reason not to release County Attorney opinions to the public, right?

Mr. Brittin: Well, I think the members of the public have a right to the opinion of the County Attorney.

Ms. Yukimura: Well, but, you know, if it is not a competent opinion, we might really have liability problems based on your position.

Mr. Brittin: Well, other than that, I think you need to vet your County Attorney a little better.

Ms. Yukimura: Well, we also have to watch our... we are a trustee position in with the County, so we have to really watch the liability issues if what you are saying is correct.

Mr. Brittin: I do think it would be an unfortunate situation if members of the community were not allowed access to the opinions of the County Attorney who is the official charged with interpreting the law.

Ms. Yukimura: Okay, thank you. Any other questions?

Mr. Furfaro: Again, your interpretation on the accessory use in ag areas specifically as it talks about amenities, gift shops and so forth. Your interpretation is, if you're selling coffee mugs out of a gift shop on your property because you are raising coffee and the intent of that verbiage was to not allow you to put a two (2) bedroom unit over the gift shop that sells the coffee mugs.

Mr. Brittin: Correct.

Mr. Furfaro: That is your interpretation?

Mr. Brittin: That is my interpretation, yes.

Mr. Furfaro: Thank you.

Ms. Yukimura: Any other questions? If not, thank you very much. Next speaker is James Bray.

JAMES BRAY: My name is James Bray and since we weren't given the amendments today, I am just going to speak on what I know of the premise that you approached this bill as.

Ms. Yukimura: Sure.

Mr. Bray: I am sure that everyone in this room loves Kaua'i or they wouldn't take time to be here. I would like to think that each one of us want to do what is best for the residents of this island in the long run. I believe that there is a big disconnect between the premise described in Bill No. 2204 and the effect it will have should it be adopted. My concern is for the economic future of the residents of Kaua'i. Supply and demand and world market will drive the price of real estate here. The prices will eventually outpace the ability of residents to support themselves given the limited wages available on the island. I'd like to see all residents should they choose to or need to be able to participate in the tourist industry, the number one income producer worldwide. If residents are prohibited to from participating in this income stream, the primary income producer of the State, how will they support and maintain their properties given the increased values in taxes in the future. Previous County Attorney Blaine Kobayashi's opinion as well as current opinions from attorneys agree that it is currently legal to short term rent my property on Kaua'i. This current bill seeks to take that property right away from me and the residents and supposedly, in exchange for more local neighborhoods. I would not like to give up my legal right to short term rent my property in exchange for this empty promise. I was told I was naïve about politics by an older gentlemen when we were discussing issues. He told me that often times, what is represented is not what is being done. He said follow the money, it will show why action has taken place, who benefits. In this case, the hotel industry benefits from less competition while residents will be legally prohibited from participating in the major industry of the State. I oppose this Bill No. 2204 as there is no answer to the premise that it was created under. I oppose this Bill as a taking of property rights. What will happen to the future generations or of residents if they are prohibited from participating in tourism? My answer is that existing residents, people that are here now, will be priced out of their homes and that is all that I have. I wrote that this morning because I was expecting a Bill to read.

Ms. Yukimura: Okay, thank you very much. Any questions?

Councilmember Furfaro?

Mr. Furfaro: Yes, you know, when we started to look at this bill, it was to... as a desire in the General Plan to regulate vacation rentals which, in fact, was after this group of 36 people went around the island and participated in public hearings and so forth. Not to terminate it, but to regulate it and I think it is fair of me to say that probably after Ms. Guslander, I, myself, probably have the most years in the visitor industry service on the island as a hotel manager, subsequently retired. But I am very concerned about your documentation because when I served on the stakeholders committee, a very similar statement was made that there was a belief that this was a conspiracy of hotel operators to short cut those vacation rentals, so that they could enjoy more occupancy. And you are entitled to your commentary, but I just wanted to say, I filed my expense reports according to the campaign regulations and you can take a look at it. The fact of the matter is, it is the desire of the community to regulate vacation rentals. It is not a conspiracy to the best of my knowledge anything or anyone from the hotel industry that implies this is something they want to control. I want to make that very clear. The current industry that you have probably benefits the most from first time visitors that stay on our island in a hotel and declare that they want to be returned visitors and they want to have an alternative experience.

Mr. Bray: That is true.

Mr. Furfaro: So that is very true. I just need to make sure that I clarify that portion in your testimony. Unfortunately, I told Councilwoman Yukimura that I would step down from the stakeholders group when that statement was made because I really, really have great aloha for this island and I did not want to cause any conflict that any group of realtors or current industry people from the vacation rental saw where the conflict of having somebody from the visitor industry, the hotel industry in particular on that stakeholders group. Yet, at the same time, you need to draw on and I will point out again after a 33 year career in senior management positions here, I certainly have a lot to offer about managing the visitor industry as well.

Mr. Bray: I am not doubting your knowledge.

Mr. Furfaro: And, soon, we will be presenting a strategic plan for the visitor industry here at the Council, so that the community can participate. I really needed to make that statement that I do not believe and I have never had a conversation with any of my colleagues when I was active in the visitor industry that said, hey, let's find a way to eliminate some of this inventory because it means more occupancy for us. Quite the opposite... the vacation rental industry enjoys the benefit of repeat visitors who first stay in hotels and find the very high qualities that we have in our island home to become repeat visitors and then they stay in vacation rentals. Thank you very much for giving me that time.

Mr. Bray: I agree. Once they see the Garden Island, then they want to get

out into it.

Mr. Furfaro: Thank you very much.

Ms. Yukimura: Other questions of Mr. Bray? Councilmember Bynum? Wait, I want to say something. Yes, if as you said in your opening statement that you feel everybody is trying to find the best for the community.

Mr. Bray: I believe this.

Ms. Yukimura: I think your statement that this thing has been motivated by hotel interest is...

Mr. Bray: I said that they benefit the greatest.

Ms. Yukimura: I don't know if that is true. I think that there are some people in the community who say that the community would benefit the greatest, but that is a matter of discussion and debate.

Mr. Bray: I think that is economics.

Mr. Furfaro: May I add something Councilwoman?

Ms. Yukimura: Yes.

Mr. Furfaro: I do want to say that the hotel, the true hotels today, we will never see another one on our island because of the nature of interval ownership and timeshare and you can see it in the conversion of current inventory in the economic categories. The Beach Boy, the Islander Inn, there is a bigger financial opportunity in the sale of interval ownership than there is in operating a traditional hotel. It is a very sad statement of the state of the industry right now because everything that the true hotel years that I have worked for Tatibouets, Guslanders, the Bob Holden, they are all about hospitality and I think there is a very good part in your opening statement. You know, we are all working together to make it work, but they are clearly in a very challenging position right now to operate a single standing hotel. Thank you Councilwoman for giving me a few moments.

Ms. Yukimura: So if we extend your logic of your position, are you saying then that everyone in the community should be allowed to have a bed and breakfast, that it is their right to do that?

Mr. Bray: I am. I think everybody should be able to participate in it otherwise the residents that exist now are going to be priced out of their homes, but by taxes raising, the values raising, people will buy them out.

Ms. Yukimura: They might be taxed out of their homes anyway even if they have bed and breakfast or if they vacation rental.

Mr. Bray: It is an income stream.

Ms. Yukimura: It is an income stream, but there is a lot of income streams and there are some wider dynamics of... I mean, if you are trying to solve the affordable housing problem by letting everybody have a bed and breakfast, that is not going to do it, you know. First of all, you know, it is a lot of hard work to do a bed and breakfast and a lot of intrusion on one's life, but the... you know, that is not going to stop people from coming to buy the property and especially if the ag land has very minimal ag restrictions on them and can be used for country estates, you are going to have people come in and the prices are going to keep going up.

Mr. Bray: They will keep going up anyway. It is predicted to double in five (5) years isn't it by the Bank of Hawai'i economist?

Ms. Yukimura: Well, we will see about that, but what I am saying is, I don't think what you are proposing as a solution to allowing people to stay here is... I mean, I think that may be true of certain situations, but if you extrapolate it where everything is basically a commodity of land use and not addressing various functions in terms of what is needed on this island.

Mr. Bray: You say in your premise that you want to preserve the rural character and the nature.

Ms. Yukimura: We have to do a caption break. Why don't we take a 10 minute break and then we will continue the discussion, so please come back.

There being no objections, the Committee recessed at 5:19 p.m.

The meeting was called back to order at 5:40 p.m., and proceeded as follows:

Ms. Yukimura: I don't even remember where we were Mr. Bray, so if you...

Mr. Kouchi: We thank him for his testimony.

There being no objections, the rules were suspended.

Ms. Yukimura: Unless you want to say anything else.

Mr. Bray: I would just like to see the local diversity be maintained somehow. I know there is a lot of people who don't participate in this economy as well as they could and they have property that they may lose if they are not able to participate by the rise in taxes and values. I canvassed specifically Hawaiian families on the northshore about the vacation rental issue myself because I hadn't had their feedback and they all blame the vacation rental industry for their high taxes and prices going up. I believe it is a misunderstanding, but those people do

need help to maintain their property. They need to participate in this economy and the biggest economy in the State is the tourism. They are in jeopardy of losing their properties.

Ms. Yukimura: Yes, but you told me that their properties are vacant, so they can't even take advantage of this vacation rental right. All they can do is sell it to, you know, some wealthy person probably from off-island who is going to then build and vacation rental and how is that going to help them?

Mr. Bray: The premise of your bill says that you are going to take these things out of vacation rental, so that people will have a place to stay.

Ms. Yukimura: No, it doesn't say that.

Mr. Bray: But you are going to try to affect the economy then?

Ms. Yukimura: No, it just says that there should be a balance and what you call diversity that the whole, you know, coastline wouldn't just become all vacation rental, but it actually would be maintained some for residential, non-commercial and that is part of the diversity. Okay, you know, you have been here I think at every meeting and you are a self-employed person. The commitment and the sacrifice to just be here and participate is extraordinary and I respect and appreciate that.

Mr. Bray: Well, I am in fear of losing my property myself that is why I am participating.

Ms. Yukimura: But I think we determine that you are a bed and breakfast which this bill isn't even addressing.

Mr. Bray: Not yet.

Ms. Yukimura: Yes, what you and I talked about is how we might address bed and breakfast in a way that might allow you to continue. I mean, there is a 50/50 chance of going either way. I mean, you don't know until I produce a bill for you, but you can't say that it won't until you see what the result is. I would ask that you not conclude that.

Mr. Bray: Well, I am trying to express myself as a layman. I read all the stuff and come to my own conclusions which may be inaccurate because I am no lawyer, but this bill scares me and I am saying that.

Ms. Yukimura: Okay, and you said that you did try to go knowing that bed and breakfast require a use permit. You did try to go to Planning Department to ask for a use permit and they turned you down because they said that you are agriculture.

Mr. Bray: Right, and they gave no designation between any ag... they said that all ag is the same.

Ms. Yukimura: Well, I mean one of the issues is being able to really make sure what Class A and B lands are and where they are, but, yes, you are telling us that Planning Department's policy is a flat... if you are ag land, no vacation rental.

Mr. Bray: Correct.

Ms. Yukimura: Right, and a bed and breakfast policy could change if it can fit into the law in the way the State law in ways that we are actually trying with some of the amendments I am proposing and maybe with some of the discussion that there was with Jonathan Chun, but it does hinge on defining farming operations and that is a tricky and very difficult thing that can't be done just off the top of our heads. I mean, we need to look at other jurisdictions where they have successfully defined agriculture or farming and that is why I keep talking about an ag planning process that would actually help us do that.

Mr. Bray: And how will we come to that? Would residents be able to participate in that?

Ms. Yukimura: They absolutely would, but we have been asking the Planning Department to give us that planning process. That is an administrative function that the Council does not perform. We are the legislative body and the Planning is an administrative function done by the Planning Department.

Mr. Bray: Ian said that he had a draft last meeting, two (2) weeks ago. Did you guys get a draft from what his position was?

Ms. Yukimura: And I don't even see Mr. Aiu here, but hopefully he is in the audience somewhere. That is part of our problem. We have gotten very little support and I will say it publicly from the Planning Department in terms of any input. We have been asking them for two (2) months and they have... we have to call them out and call them back, whereas, we have seen other Department Heads when they have a bill before them, they are here, they talk to us before we come into session and all of that, but anyway, no, we haven't received it.

Mr. Bray: I am just trying to learn. I learn something new every time I come down here.

Ms. Yukimura: Well, good for you. Thank you. Okay, I am going to interrupt... well, let me see, is there anyone else who wishes to testify? Ms. Elmore, would you indulge us, the County Attorney has to leave and we need to have this Executive Session before he leaves. Are you planning to stay around until the end? If you need to testify, we will let you testify.

BARBARA ELMORE: No, I will just wait.

Ms. Yukimura: Thank you very much, so I am going to interrupt this session and I am going to ask the County Attorney to... I am going to recess my Committee and ask the Chairman of the Committee of the Whole to convene his Committee, so that we can go into Executive Session.

There being no objections, the Committee recessed at 5:46 p.m.

The meeting was called back to order at 7:36 p.m., and proceeded as follows:

Ms. Yukimura: Thank you everyone for your patience and perseverance. We did not finish all the Executive Session business regarding vacation rentals. As a result, we have scheduled another Executive Session for next week's meeting. Because it is the 4<sup>th</sup> of July next week, we are going to the 11<sup>th</sup>, so that will be the next vacation rental Executive Session and the issue will come up in Committee on the 19<sup>th</sup> of July, so we will be deferring this matter in Committee tonight and I was holding the amendments, so that I could add on whatever I could after the Executive Session, but I will probably try another version for tomorrow or sometime by Friday, so people can look at it and then there will probably be another set after we complete our Executive Session on the 11<sup>th</sup>. So with that, I would like to suspend the rules and thank and welcome Ms. Elmore to come speak because she deferred her talk, so that we could go into Executive Session and if there is anyone else who wishes to speak, this will be the time after Ms. Elmore.

There being no objections, the rules were suspended.

BARBARA ELMORE: Thank you. Barbara Elmore. To me it seems to me that the reason the CZO addressed VDA areas only as multi-family vacation rentals was because they were thinking of timeshares and timeshares are always in multi-family buildings, so I don't understand why this bill has to change the wording to include single family vacation rentals. Twice tonight I heard people refer to the Blaine Kobayashi decision again and it is not a decision, it is an opinion. The attorney David Brittin, I think was his name, says what they are doing is okay because the County allowed them to do it. So now it is the County's fault that they are misusing ag lands and then I heard people blaming the hotels and implying that the Council is being paid off by the hotel industry, so it is just one excuse gets shot down and they come up with another one, but I am confused by the language that this bill is a bill to regulate vacation rentals because, to me, before you regulate anything, you must first decide whether they have a right to operate legally before and then you regulate them. I don't think it is regulation when you grandfather in new vacation rentals that have sprung up all over the place since 1982 or when the CZO was passed. If you do the limited amount of grandfathering which would be those that were in existence before the CZO. I think you should use the Internal Revenue Service records to prove they had income from vacation rentals instead of just the fact, well, this lot existed then and this building was on this lot then, so grandfather me in. I don't know how you are proving, you know, which ones met

that cut off and which ones didn't. I don't know who... is this from Stokes or... the dates of the early vacation rentals. He is employed by the Board of Realtors also, so I don't know how reliable his data is, but um... you hear all these people saying, let's work together on this, but the minute you pass a bill that they don't like, they are going to be suing you and I think you might as well be prepared for that. Let's all work together, but by George if you don't do it my way, get ready for a lawsuit. The question came up about what is a farm and my understanding is that anybody can buy ag land and I don't think there is a law that says, once you buy it, you have to farm on it. It just says that you can't do certain other things on it, so I think you can buy ag land, you can tell me if I am wrong, live there, you could even go to a job everyday and come home as long as you are not running a business on that land or the other things that are prohibited. So to me, it is easy to figure out what a farm is, you know, it is land that is zoned for farming and maybe you are just drawing a few... have a few fruit trees for your own family, but as long as you are not running a business there, I think it would still be ag land and maybe I am all wrong, but I don't think it matters how much lettuce you grow on it as long as you don't violate the law. I know you don't have time to... I don't see why we should grandfather something that doesn't belong in residential neighborhoods or ag lands. A business with customers coming in and out does not belong in a residential neighborhood and if you grandfather these new vacation rentals, it is a reward for them. I remember reading... a little over two (2) years ago, I wrote a letter to the editor to the paper based on something I saw on the Internet and it said, on their website, there was a couple who admitted that they recently moved to Kaua'i and they were advertising a four (4) bedroom home that sleeps 12 and can be split into two (2) separate vacation rentals as well as another home that they have just completed that contains three (3) other suites as vacation rentals. The total capacity in their vacation rentals is 22 guests, so if you multiply that by 52 weeks, they are bringing in 1,144 people every year in and out of their homes. I don't know, you know, I know you have to go by the law, but I just think that common sense and just basic sensitivity to either what people expected when they wrote the CZO. I don't think they expected this, I really don't.

So I am waiting for the bell to go off, so I will just look at my notes. I object to allowing vacation rentals in neighborhood commercial districts because to me, a neighborhood commercial district should be a convenience for the people that live there... maybe a little store or something that is allowed in neighborhood commercial, but not a business that brings in all these new customers every week from off-island. Are you calling my time?

Ms. Yukimura: Yes, the three (3) minutes are up. Are you done?

Ms. Elmore: Well, I object to any language in the bill that allows non-conforming use certificates to legalize these people. A blanket... it looks to me as though that there is just going to be a blanket granting of these non-conforming use certificates without any public hearings or without going to the Planning Commission.

Ms. Yukimura: It can be appealed to the Planning Commission.

Ms. Elmore: Appealed, but the hearing itself (inaudible).

Ms. Yukimura: There is no hearing, you are right.

Ms. Elmore: I noticed recently that there is a news report that said, now the same number of cars in Hawai'i as people and if we keep going with this rate, there will be just as many vacation rentals and I know that there is about half and half now. Half family homes and half vacation rentals. I wish I was Jonathan Chun again.

Ms. Yukimura: Can you summarize?

Ms. Elmore: I just think the fact that to some people the CZO may have been unclear is no excuse to throw out your logic and your common sense and your sense about what is right and wrong and your better judgment as to what Kaua'i should be. If they sue, let them sue. We will take up a collection or something to help to defend that suit. When they talk tonight about losing their property... oh, we may lose our property if we can't keep vacation renting. You know, in life, people make mistakes and some people go bankrupt everyday because they took on more than they could handle or they lose their business and things happen. The government shouldn't guarantee these people the income they want just because they want it. If have to sell, they will still make a nice profit, so I just hate to see the County cave into them. Thank you.

Ms. Yukimura: Thank you. Is there anyone else who wishes to testify? If not, the meeting will come back to order.

The meeting was called back to order, and proceeded as follows:

Ms. Yukimura: Is there any discussion at this time? If not, we will schedule the Executive Session. It was actually referred to the next Council meeting in the Committee of the Whole, so that will happen and then the Chair would entertain now a motion to defer.

Upon motion duly made by Councilmember Rapozo, seconded by Councilmember Furfaro, and unanimously carried, Bill No. 2204 was deferred.

Minutes of the May 16, 2007 Planning Committee Meeting.

Upon motion duly made by Councilmember Rapozo, seconded by Councilmember Furfaro, and unanimously carried, Minutes of the May 16, 2007 Planning Committee meeting was approved.

**Bill No. 2226, Draft 1** A BILL FOR AN ORDINANCE ESTABLISHING A NEW ARTICLE 27, CHAPTER 8, KAUAI COUNTY CODE 1987, RELATING TO SHORELINE SETBACK AND COASTAL PROTECTION (Planning Commission recommendation)  
**[This item was deferred.]**

Ms. Yukimura: I want acknowledge our staff person Aida Okasaki who worked both on vacation rental amendments and shoreline setback amendments, but the Chair will be recommending that we defer this matter for more work on the amendments, so it will come up on the 19<sup>th</sup>.

Upon motion duly made by Councilmember Furfaro, seconded by Councilmember Rapozo, and unanimously carried, Bill No. 2226, Draft 1 was deferred.

**Bill No. 2221** A BILL FOR AN ORDINANCE TO AMEND CHAPTER 9, KAUAI COUNTY CODE 1987, RELATING TO STREET REQUIREMENTS FOR SUBDIVISIONS (Traffic calming elements)  
**[This item was deferred.]**

Ms. Yukimura: We have received a letter from the Administration asking us to defer this item. It looks like we are going to have a lot on the agenda just in Planning on the 19<sup>th</sup>. The Chair entertains a motion to defer.

Upon motion duly made by Councilmember Furfaro, seconded by Councilmember Rapozo, and unanimously carried, Bill No. 2221 was deferred.

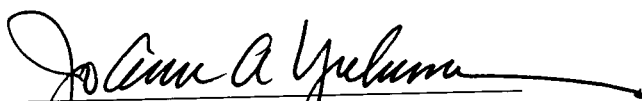
There being no further business, the meeting was adjourned at 7:48 p.m.

Respectfully submitted,



Lisa Ishibashi  
Council Services Assistant

APPROVED at the Committee Meeting held on August 1, 2007:



JOANN A. YUKIMURA  
Chair, Planning Committee Chair

