

Testimony by Suzanne Young, CEO
Honolulu Board of REALTORS®

Honolulu City Council
Thursday, January 20th, 2022
Honolulu Hale

RE: Proposed CD1 to Bill 41 (2021) - in opposition with comments

Aloha Chair Elefante and Councilmembers:

Thank you for the opportunity to provide testimony on this bill. The Honolulu Board of REALTORS® (HBR) on behalf of our over 7,000 members and its City Affairs Committee **opposes the proposed CD1 to Bill 41 (2021)**. While we appreciate the time and effort that DPP and the Councilmembers put into crafting this legislation related to short-term rentals, we recommend that this proposed bill be rejected, and the effort be put into enforcing the current Ordinance 19-18.

We firmly believe that all Hawaii residents have a right to access affordable, safe, and sustainable housing options and that these options are in short supply. We are glad to see amendments were made to clarify areas that are allowed to legally operate B&Bs and TVUs such as the Kuilima, Gold Coast, and other areas in the resort mixed use precinct. In addition, we believe in equitable property tax rates and that properties should be taxed based on their assigned classification. We would support adding back that amendment to this measure.

With that being said, we **oppose** amending the definition of Bed & Breakfast Home and Transient Vacation Unit from 30 days to 90 days. **We recommend that the short-term rental definition remain 30 days and the focus be on enforcing units that do not comply with the 30-day minimum rental requirement as per current regulations.** To allow for easier enforcement for DPP, we recommend that the ability to advertise nightly and weekly rates be removed, and we also support registrations as a means to streamline enforcement for DPP. These would eliminate continued illegal activities and assist the DPP in their enforcement. See court stipulation in attached exhibit A.

Ordinance 19-18 was created after many months of collaboration from key stake holders, city administration, and the community; and an agreement was made on a fair approach to manage legal short-term rentals and increase enforcement on illegal short-term rentals in Honolulu. However, the administrative rules to empower DPP to implement the Ordinance were never finalized and put into effect, thus we believe the administration should focus on implementing Ordinance 19-18 and allowing it time to show its effectiveness before adopting a completely new ordinance for short-term rentals.

Again, HBR recommends that the City Council reject this current proposed bill and urge the DPP and City Administration to focus on enforcing the current ordinance 19-18. HBR is committed to be a part of the solution and promote a model that creates opportunities for local families and investors, while preserving and protecting our limited resources of accessible housing and livable communities. We look forward to working with the DPP, City Council, Administration, and the community to continue this dialogue. Thank you for your consideration, and the opportunity to provide additional comments on this critical measure.

Exhibit A

Of Counsel:
DAMON KEY LEONG KUPCHAK HASTERT
Attorneys at Law
A Law Corporation

GREGORY W. KUGLE 6502-0
gwk@hawaiilawyer.com

MATTHEW T. EVANS 9002-0
mte@hawaiilawyer.com

LOREN A. SEEHASE 10414-0
las@hawaiilawyer.com

VERONICA A. NORDYKE 10609-0
van@hawaiilawyer.com

1003 Bishop Street, Suite 1600
Honolulu, HI 96813

www.hawaiilawyer.com

Telephone: (808) 531-8031

Facsimile: (808) 533-2242

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KOKUA COALITION, a Hawaii non-)
profit corporation, dba HAWAII)
VACATION RENTAL OWNERS)
ASSOCIATION,)

Plaintiff,)

vs.)

DEPARTMENT OF PLANNING AND)
PERMITTING OF THE CITY AND)
COUNTY OF HONOLULU; CITY)
AND COUNTY OF HONOLULU;)
KATHY SOKUGAWA IN HER)
OFFICIAL CAPACITY AS ACTING)
DIRECTOR OF THE DEPARTMENT)
OF PLANNING AND PERMITTING,)

Defendants.)

CIVIL NO. 19-00414-DKW-RT

STIPULATION AND ORDER RE
THE WITHDRAWAL OF
PLAINTIFF’S MOTION FOR
TEMPORARY RESTRAINING
ORDER AND DISMISSAL OF
PLAINTIFF’S COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF WITHOUT
PREJUDICE; EXHIBIT “A”

**STIPULATION AND ORDER RE THE WITHDRAWAL OF
PLAINTIFF’S MOTION FOR TEMPORARY RESTRAINING ORDER
AND DISMISSAL OF PLAINTIFF’S COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF WITHOUT PREJUDICE**

WHEREAS, the City and County of Honolulu (“City”) enacted Ordinance 19-18, Relating to Short-Term Vacation Rentals on June 25, 2019; and

WHEREAS, portions of Ordinance 19-18 (i.e., Sections 1-4, 7-8, 14-16 and portions of Sections 9 and 13) take effect on August 1, 2019 and the remaining portions of Ordinance 19-18 (i.e., Sections 5-6, 10-12, 17 and portions of Sections 9 and 13) take effect on October 1, 2020; and

WHEREAS, Plaintiff KOKUA COALITION, a Hawaii non-profit corporation, d.b.a. HAWAII VACATION RENTAL OWNERS ASSOCIATION (“Plaintiff”) filed its *Complaint for Declaratory and Injunctive Relief* in the above-captioned matter on August 1, 2019 [Dkt. 1] (“Complaint”); and

WHEREAS, Plaintiff’s Complaint sought, among other things, a judgment declaring Ordinance 19-18 unlawful and an injunction prohibiting the City from enforcing Ordinance 19-18 against Plaintiffs and those similarly situated; and

WHEREAS, Plaintiff filed its Motion for Temporary Restraining Order [Dkt. 2] (“TRO Motion”) on August 1, 2019; and

WHEREAS, Plaintiff’s TRO Motion sought, among other things, a Temporary Restraining Order enjoining the City, the Department of Planning and

Permitting (“DPP”) and Acting DPP Director Kathy Sokugawa (“Director”) (and collectively “Defendants”) from enforcing Ordinance 19-18; and

WHEREAS, on August 2, 2019, the Court conducted a status conference with counsel for Plaintiff and counsel for Defendants, set a briefing and hearing schedule for the TRO Motion, and directed the parties to schedule a conference with Magistrate Judge Rom Trader to occur after the hearing of the TRO Motion; and

WHEREAS, on August 9, 2019, the Defendants filed their Memorandum in Opposition to the TRO Motion (“Opposition”), which included the Declaration of Director Sokugawa and Exhibit 6 (a document updated on August 8, 2019 entitled “New Ordinance on Short-Term Rentals”) [Dkt. 12]; and

WHEREAS, Director Sokugawa’s Declaration clarified and corrected DPP’s understanding and position on portions of Ordinance 19-18; and

WHEREAS, Plaintiff filed its Reply Memorandum in Support of the TRO Motion (“Reply”) [Dkt. 13] on August 13, 2019; and

WHEREAS, on August 15, 2019, the Court held a hearing regarding the TRO Motion and expressed its belief that the pleadings filed by Plaintiff and Defendant narrowed the disputed issues raised by the TRO Motion and ordered the parties to proceed with the conference with Magistrate Judge Trader; and

WHEREAS, Plaintiff and Defendant conducted a conference with Magistrate Judge Rom Trader on August 20, 2019, for the purpose of formalizing the issues

resolved by the TRO Motion and addressing a procedure to address unresolved issues; and

WHEREAS, Plaintiff and Defendant wish to resolve this matter pursuant to the terms and conditions hereof in order to avoid the uncertainty, cost, and risks of litigation;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between Plaintiff KOKUA COALITION d.b.a. HAWAII VACATION RENTAL OWNER'S ASSOCIATION ("Plaintiff") and Defendants CITY AND COUNTY OF HONOLULU ("City"), the City DEPARTMENT OF PLANNING AND PERMITTING ("DPP"), and KATHY SOKUGAWA in her official capacity Acting Director of DPP ("Director") (collectively "Defendants" or "the City"), by and through their respective counsel, that:

1. Ordinance 19-18 does not require a renter to physically occupy a rental property for any minimum length of time. The Settlement Agreement and Release filed by Plaintiff and the City in *Kokua Coalition v. Department of Planning and Permitting, et. al.*, Case 1:16-cv-000387-DKW-RLP, at paragraphs 8-10, attached as Exhibit "A" and affirmed and incorporated herein, continues to describe a legal long-term rental under Ordinance 19-18. Ordinance 19-18 does not impose new restrictions on legal long-term rentals.

2. The advertising restrictions of Ordinance 19-18 apply to illegal short-term rentals, not legal long-term rentals. Ordinance 19-18 does not prohibit the

advertising, soliciting, offering or providing of a legal long-term rental (i.e., a rental of at least 30 consecutive days). Advertising, soliciting, offering or providing a legal long-term rental, including advertisements, solicitations, and offers stating daily rates, and/or less than monthly rates, and/or a minimum stay of less than 30 days does not cause a dwelling unit that is rented for thirty days or more to be a “transient vacation unit” or “bed and breakfast home” within the meaning of Ordinance 19-18 if such advertisement, solicitation, or offer states that the minimum rental period for the rental property is thirty days. However, rental agreements, advertisements, solicitations and offers to rent property violate Ordinance 19-18 if the price paid for the rental is determined, in whole or in part, by an anticipated or agreed upon occupancy of the property for less than thirty days.

3. Notwithstanding anything in Ordinance 19-18, there is no violation of Ordinance 19-18, and a dwelling unit or lodging unit will not be classified as a “transient vacation unit” or “bed and breakfast home,” provided that the dwelling unit or lodging unit is actually rented only for 30 days or longer at a time, and provided further that 1) the owner and/or operator has not limited the actual occupancy of the premises to a period less than the full stated rental period, and 2) the owner and/or operator has not conditioned the right to occupy the premises for the full stated rental period on the payment of additional consideration.

4. DPP shall not impose a civil fine or penalty on any person for violating Ordinance 19-18 without issuing a “Notice of Violation” and a “Notice of Order” or

a “Notice of Violation and Order” as required by § 21-2.150-2 of the Revised Ordinances of Honolulu, 1990 (*as amended*) (“ROH”).

5. An enforcement order (i.e., a “Notice of Violation,” “Notice of Order” or “Notice of Violation and Order”) issued to a person for violating Ordinance 19-18 may be appealed to the City and County of Honolulu Zoning Board of Appeals in accordance with ROH § 21-1.40, § 6-1516 of the Revised Charter of Honolulu (1973) (2017 Edition) and the Rules of the Zoning Board of Appeals.

6. DPP may post guidance documents on its website to provide the public with information regarding Ordinance 19-18. However, such guidance documents shall not determine or affect the legal rights of individuals under Ordinance 19-18 or the procedures available to individuals under Ordinance 19-18.

7. DPP shall not treat guidance documents on its website as administrative rules, regulations or legal authorities unless they are duly adopted as administrative rules pursuant to the requirements of Haw. Rev. Stat. Ch. 91.

8. DPP shall not enforce guidance documents posted on its website or impose penalties for violations of such guidance documents unless such guidance documents are duly adopted as administrative rules pursuant to the requirements of Haw. Rev. Stat. Ch. 91.

9. DPP construes Ordinance 19-18, Section 9, Subsections (3)(J) and (3)(L) as allowing up to fifty percent (50%) of the units in a multi-family dwelling to be used as bed and breakfast homes, without any required distance between units

used as bed and breakfast homes or other buildings used for bed and breakfast homes (i.e., multifamily dwelling buildings or dwelling units).

10. Ordinance 19-18, Section 5, amends the Land Use Ordinance by, *inter alia*, enacting ROH § 21-2A.30, which requires hosting platforms to “report to the director on a monthly basis [...] (1) [t]he names of persons responsible for [listings]; (2) [t]he address of each listing; (3) [t]he transient accommodations tax identification number of the owner or operator of the bed and breakfast home or transient vacation unit; (4) [t]he length of stay for each listing; and (5) [t]he price paid for each stay” (“reporting requirements”). Plaintiff alleges its members and others similarly situated have constitutionally and statutorily protected interests that would be violated by the reporting requirements of ROH § 21-2A.30. DPP acknowledges that other municipalities have been enjoined from enforcing ordinances with similar requirements and is aware of the opinions and orders issued by federal courts in *Airbnb, Inc. v. City of N.Y.*, 373 F. Supp. 3d 467 (S.D.N.Y. 2019); *Airbnb, Inc. v. City of Bos.*, No. 18-12358-LTS, 2019 U.S. Dist. LEXIS 74823 (D. Mass. May 3, 2019); *Homeaway.com, Inc. v. City of Portland*, No. 17-CV-0091, 2017 U.S. Dist. (D. Or. Mar. 20, 2017) and *Patel v. City of L.A.*, 738 F.3d 1058 (9th Cir. 2013) aff’d by *City of L.A. v. Patel*, 135 S. Ct. 2443, 192 L.Ed.2d 435 (2015). Based on its understanding of the current state of the law and its interests in avoiding unnecessary litigation, DPP does not currently intend to enforce ROH § 21-2A.30 by penalizing hosting platforms that fail to comply with ROH § 21-2A.30.

11. DPP shall not commence the enforcement of ROH § 21-2A.30 nor require hosting platforms to comply with the reporting requirements without providing Plaintiffs' undersigned counsel with at least sixty days prior written notice of its intent to begin enforcing ROH § 21-2A.30, which is deemed sufficient time by the parties for Plaintiff to seek injunctive relief from the Court, and the Court shall retain jurisdiction to adjudicate a dispute concerning ROH § 21-2A.30, should Plaintiff so move, if and when DPP deems such enforcement appropriate.

12. Plaintiff's Complaint challenges the fines available under Ordinance 19-18. Plaintiff reserves all rights to challenge the fines and does not waive any rights with respect to that claim.

13. This Stipulation and Order shall not limit the authority of the City and County of Honolulu to enact, amend, or repeal any ordinance.

14. Plaintiffs' TRO Motion is hereby withdrawn, without prejudice. This Stipulation and Order shall not bar or otherwise preclude Plaintiff from filing a new complaint and/or motion for the same or similar relief.

15. Plaintiffs' Complaint is hereby dismissed without prejudice, provided however this Court shall retain jurisdiction to resolve any disputes by the parties arising under or out of this Stipulation and Order. The dismissal of Plaintiff's Complaint shall not bar or otherwise preclude Plaintiff from renewing and/or reasserting the claims raised by Plaintiff's Complaint and TRO Motion.

16. Each party is to bear its own costs and attorneys' fees associated with this matter.

17. There are no remaining claims and/or parties.

ORDER

Based on the agreement of the parties and good cause appearing therefor, the STIPULATION AND ORDER FOR WITHDRAWAL OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND DISMISSAL OF PLAINTIFF'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF WITHOUT PREJUDICE is hereby APPROVED and incorporated into this Order. NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

1. The foregoing provisions are incorporated into this Court's Order;
2. Plaintiff's TRO Motion is withdrawn, without prejudice;
3. Plaintiff's Complaint is dismissed, without prejudice, with the Court retaining jurisdiction as provided herein;
4. There are no remaining claims and/or parties;
5. Each side shall bear its own costs and attorneys' fees.

DATED: Honolulu, Hawai'i, October 1, 2019.

DAMON KEY LEONG KUPCHAK HASTERT

/s/ Gregory W. Kugle

Gregory W. Kugle
Matthew T. Evans
Loren A. Seehase
Veronica A. Nordyke
Attorneys for Plaintiff
KOKUA COALITION

/s/ Brad T. Saito _____

Paul S. Aoki

Brad T. Saito

Attorneys for Defendants

DEPARTMENT OF PLANNING AND
PERMITTING OF THE CITY AND COUNTY OF
HONOLULU, KATHY SOKUGAWA

APPROVED AND SO ORDERED:

Dated: October 4, 2019 at Honolulu, Hawaii.




Derrick K. Watson
United States District Judge

Kokua Coalition, et al. v. Department of Planning and Permitting, et al.; Civil No. 19-00414 DKW-RT; STIPULATION AND ORDER RE THE WITHDRAWAL OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND DISMISSAL OF PLAINTIFF'S COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF WITHOUT PREJUDICE; EXHIBIT "A"