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Governor

John De Fries
President and Chief Executive Officer

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

LATE

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

February 1, 2023
 9:30 a.m.
 State Capitol Conference Room 312 & Videoconference

In consideration of
HOUSE BILL NO. 84
RELATING TO COUNTIES

Aloha Chair Hashimoto, Vice Chair Aiu, and members of the Committee on Housing,

The Hawai'i Tourism Authority (HTA) appreciates the opportunity to offer comments in support of the intent of HB84, which makes explicit the counties' authority to manage short-term vacation rentals.

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

Our community-driven Destination Management Action Plans across Hawai'i clearly articulate a desire to manage visitor accommodations – specifically, taking steps to limit and regulate short-term vacation rentals in neighborhoods and other sensitive areas in our communities. We are supportive of state and county efforts to advance that priority, and we support the intent of this measure to make explicit the counties' authority to consider and implement management actions of short-term vacation rentals.

HTA stands ready to assist the counties in their efforts to manage short-term vacation rentals, and we appreciate this opportunity to provide these comments in support of the intent of HB84. Mahalo.



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January 31, 2023

HOUSE COMMITTEE ON HOUSING
Rep. Troy Hashimoto, Chair, Rep. Micah Aiu, Vice Chair

HEARING DATE: Wednesday, February 1, 2023
TIME: 9:30 a.m.
PLACE: Conference Room 312

Re: TESTIMONY ON BEHALF OF AIRBNB OPPOSING
HOUSE BILL NO. 84

Dear Chair Hashimoto, Vice Chair Aiu and Committee Members:

We write on behalf of our client, Airbnb, in opposition to House Bill No. 84 (“**HB 84**”). We are concerned that this bill is flawed and has the potential to result in substantial legal issues. The stated purpose of the proposed amendment in HB 84 is to enable the Counties to eliminate or amortize land uses and structures that are used for residential or agricultural purposes. Although this may appear to be an innocuous delegation of authority, the proposed changes could conflict with constitutional rights as well as existing state statutes. As discussed more fully below, such changes would potentially cause numerous unintended consequences. Furthermore, to the extent that these changes ultimately lead to a deprivation of vested rights of existing, residential homeowners, they would likely result in substantial litigation. For these reasons, we would strongly urge that the Committee not pass this bill.

A. Short-Term Rentals Are a Fundamental Residential Use.

As touched on above, HB 84 would amend provisions of Section 46-4(a) of the Hawai‘i Revised Statutes (“HRS”) to “make explicit the counties’ authority to enact ordinances allowing for the amortization, or phasing out, of permitted, nonconforming, or otherwise allowed short-term rentals in any zoning classification.” See Haw. H.B. No. 84, § 1. Specifically, immediately following Section 46-4’s prohibition against the amortization of existing lawful uses in residential-zoned districts, H.B. No. 84 would add that a county may nevertheless, “provide for the

amortization or phasing out of permitted, nonconforming, or otherwise allowed short—term rentals over a reasonable period of time in an area of any zoning classification.” *Id.*, § 2.

H.B. No. 84’s differentiation between rentals of 180 days or less and other residential uses raises significant legal concerns. It would allow Counties to adopt zoning ordinances going forward that could unreasonably interfere with the right to use and enjoy one’s property by unduly restricting the owner’s ability to offer their residential property for periods of less than 180 days.

At a high level, the duration of use of a residential dwelling does not change the fundamental nature of such use. As recently recognized by the Hawai‘i Federal District Court in *Hawai‘i Legal Short-Term Rental All. v. City & Cnty. of Honolulu, et. al*, “appellate courts of at least nineteen states have decided that even rental stays of less than 30 days—nightly, weekend, or weeklong stays—constitute *residential uses* or purposes.”¹ Similarly, other courts have recently recognized that a “[a] ‘residential building’ is used for human habitation without regard to length of occupancy” and “[i]t is possible to reside somewhere for a night, a week, or a lifetime.”²

As a fundamental residential use, property owners in Hawai‘i have, for decades, relied on the protections enshrined in Section 46-4 to offer short-term rentals to their guests. And these fundamental protections—which, as described below, are “grounded” in the Hawai‘i and United States Constitutions—should not be dismissed or undermined. To do so would not only implicate important constitutional protections, it would potentially drive significant litigation around the State.

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

As currently enacted, Section 46-4(a) of the Hawai‘i Revised Statutes (“HRS”) protects property rights of residential homeowners that are vested in owners by the Hawai‘i and United States Constitutions.

Specifically, the language of Section 46-4(a) makes clear that existing uses which were permissible at the time of the enactment of the statute shall not be impacted by subsequent governmental act, providing:

Neither this section nor any ordinance enacted pursuant to this section shall prohibit the continued lawful use of any building or

¹ See *Hawai‘i Legal Short-Term Rental All. v. City & Cnty. of Honolulu, et. al*, No. 22-CV-247-DKW-RT, 2022 WL 7471692 at *16 (D. Haw. Oct. 13, 2022) (emphasis added).

² *Keen v. City of Manhattan Beach*, 292 Cal. Rptr. 3d 366, 370 (2022).

premises for any . . . purpose for which the building or premises is used at the time this section or the ordinance takes effect.

The effect of this provision was to provide that a county was precluded from passing a law that discontinues any previously lawful use of any property.³ Additionally, the statute limited counties' passing of zoning ordinances that provided for the elimination of nonconforming uses or for the amortization or phasing out of nonconforming uses solely to commercial, industrial, resort, and apartment-zoned areas only. The statute further confirms that, "In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single-family or duplex) or agricultural uses."⁴

In looking at the intent of Section 46-4, it is important to look to the history of its passage. The Legislature noted property owners' protections arising from the Hawai'i and Federal Takings Clauses and passed the language that would limit the counties' ability to adopt zoning ordinances that "prohibit the continuance of the lawful use of any building or premises for any trade, industry, residential, agricultural or other purpose for which such building or premises is used at the time . . . such ordinance takes effect."⁵

In 1980, the Legislature amended Section 46-4 and added the above-cited language to prohibit the counties from phasing out "any existing building or premises used for residential or agricultural purposes."⁶ As the 1980 House Journal confirms, this amendment was intended "to restrict the areas where the counties are allowed to amortize or phase out non-conforming uses to non-residentially zoned areas."⁷

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

³ The only exception was an allowance for changes in commercial, industrial, resort, and apartment-zoned areas: "[A] zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued, or for the amortization or phasing out of nonconforming uses or signs over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only. In no event shall such amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single-family or duplex) or agricultural uses." Haw. Rev. Stat. § 46-4(a).

⁴ Haw. Rev. Stat. § 46-4.

⁵ Act 234, Hawai'i Session Laws 1957, § 6.

⁶ 1979 Hawai'i Senate Journal (Special Committee Reports) at 1235.

⁷ 1980 Hawai'i House Journal (Standing Committee Reports) at 1676–77 (noting the amendment "restricts the counties from amortizing or phasing out existing buildings or premises used for residential or agricultural purposes.").

C. HB 84 could impair existing vested rights in violation of existing State and federal constitutional protections.

As noted, one of the fundamental purposes of HRS § 46-4 is to protect the uses that lawfully existed prior to the effective date of a zoning restriction. Such protection has its foundation in principles arising from protections in both the United States and Hawai‘i constitutions. The Fifth Amendment to the United States Constitution provides, in part, “[N]or shall private property be taken for public use, without just compensation.” U.S. Const. amend. V. Similarly, the Hawai‘i Constitution states, “Private property shall not be taken or damaged for public use without just compensation.” Haw. Const. art. I, § 20. Of significance, the Hawai‘i Constitution has broader protection as it contemplates not just takings, but also “damage” to property interests.⁸ As such, the Hawai‘i Supreme Court has stated, “When applying the Hawai‘i Constitution, Hawai‘i courts may interpret it to afford greater protection than provided by the U.S. Constitution.”⁹

Both Hawai‘i and federal litigation has recognized the principle that preexisting uses of land are protected. “Under the United States and Hawai‘i Constitutions, ‘preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate.’”¹⁰ Even preexisting nonconforming uses are protected from subsequent restrictive zoning regulations.¹¹ As the Hawai‘i Intermediate Court of Appeals has recently stated, “The statutory protection of lawfully existing uses and structures ‘prior to the effective date of a zoning restriction is grounded in constitutional law.’”¹²

The Ninth Circuit has similarly recognized that the right to continue a preexisting lawful use is constitutional in nature. “A provision permitting continuance of a nonconforming use is ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses.”¹³

⁸ See, e.g., *Cnty. of Hawaii v. C & J Coupe Family Ltd. P’ship*, 119 Hawaii 352, 382, 198 P.3d 615, 645 (2008).

⁹ *Id.* (citing *Hawaii Hous. Auth. v. Lyman*, 68 Haw. 55, 704 P.2d 888 (1985)).

¹⁰ *Ferris Trust v. Planning Comm’n of Kaua‘i*, 138 Hawaii 307, 312, 378 P.3d 1023, 1028 (Ct. App. 2016) (internal citations omitted).

¹¹ *Young v. Planning Comm’n*, 89 Hawaii 400, 410, 974 P.2d 40, 50 (1999) (internal citations omitted)

¹² *Ferris Trust*, 138 Hawaii at 312, 378 P.3d at 1028 (internal citations omitted); *Waikiki Marketplace v. Zoning Bd. Of Appeals*, 86 Hawaii 343, 353, 949 P.2d 183, 193 (Ct. App. 1997) (citing the due process clauses of the United States and Hawai‘i Constitutions).

¹³ *League to Save Lake Tahoe v. Crystal Enterprises*, 685 F.2d 1142, 1145 (9th Cir. 1982).

Recent litigation in Hawai‘i over ordinances designed to restrict the duration of rentals has also resulted in the Hawai‘i Federal District Court’s recognizing that residential owners have such vested rights and that limitations would likely violate constitutional takings principles.¹⁴

It is axiomatic that the Hawai‘i State Legislature has a duty to pass laws that are consistent with and effectuate the protections of the Hawai‘i State Constitution.¹⁵ Passage of this bill, which courts have already indicated will likely lead to further action impacting vested rights and could be in violation of takings principles, would not be consistent with the Legislature’s obligations to make sound decisions consistent with constitutional principles. Amending HRS § 46-4 through HB 84 would not change the underlying constitutional protections that the statute codifies. Such a change could, thus, result in substantial litigation which will be time-consuming, costly, and harmful to Hawai‘i’s residential landowners.

D. HB 84 potentially conflicts with existing statutes, including the Residential Landlord-Tenant Code, which would create unintended consequences.

One of the unintended consequences of the proposed language in HB 84 is that it would arguably lead to governmental actions which conflict with existing provisions in State law, such as Chapter 521, the Residential Landlord-Tenant Code. An example of such a conflict would be to compare the language of HB 84 with that of HRS §§ 521-22, which set forth the applicable term of permissible rental agreements for residential dwellings in the State of Hawai‘i and provides, “The landlord and tenant may agree in writing to any period as the term of the rental agreement. In the absence of such agreement, the tenancy shall be month to month or, in the case of boarders, week to week.”

To the extent that subsequent ordinances which contradict this provision are enforced, there will be questions about enforcement, including whether a landlord is potentially subject to penalties for having a month-to-month tenancy or whether tenants’ rights are now limited in that tenants would be automatically bound to longer-term tenancies consistent with the then-proscribed zoning regulation for the property. While it appears that HB 84 seeks to regulate transient vacation rentals, subsequent zoning changes may adversely affect legitimate existing residential uses, such as persons traveling to Hawai‘i for work, military families in transition, and persons traveling for

¹⁴ *Hawaii Legal Short-Term Rental All. v. City & Cnty. of Honolulu*, No. 22-CV-247-DKW-RT, 2022 WL 7471692, at *10 (D. Haw. Oct. 13, 2022) (“In the present case, 30–89-day rentals in non-Resort districts are a vested property right protected by takings principles.”)

¹⁵ “[E]very enactment of the Legislature is presumptively constitutional.” *Schwab v. Ariyoshi*, 58 Haw. 25, 31, 564 P.2d 135, 139 (1977) (citing *State v. Kahalewai*, 56 Haw. 481, 541 P.2d 1020 (1975)); cf. *League of Women Voters of Honolulu v. State*, 150 Hawaii 182, 194, 499 P.3d 382, 394 (2021) (“[I]f the Legislature could alter the meaning of the Hawai‘i Constitution through its own rules of procedure, theoretically, there would be no need to go through the formality of amending the Hawai‘i Constitution. See *Mason’s Manual [of Legislative Procedure]* (2010 ed.) § 12, ¶ 1 (‘A legislative body cannot make a rule which evades or avoids the effect of a rule prescribed by the constitution governing it, and it cannot do by indirection what it cannot directly do.’).”)

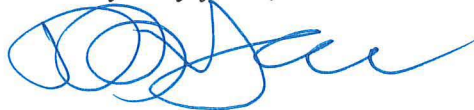
medical care. Such conflicts would likely result in significant questions about their enforceability and inevitably lead to litigation to resolve such issues.

It should be noted that the Hawai‘i State Constitution and HRS § 50-15 expressly provide that “any conflict between the State provisions [in HRS § 46-4] and the county zoning ordinances is resolved in favor of the State statutes, by virtue of the supremacy provisions in article VIII, section 6 of the Hawai‘i Constitution and HRS § 50-15.”¹⁶ As such, to the extent that a County ordinance is in conflict with a State statute, the State statute would control.

E. Conclusion

For the reasons set forth herein, we have significant concerns about the proposed changes in HB 84 and would strongly recommend that the Committee hold this bill.

Very truly yours,



DAVID M. LOUIE, ESQ.

for

KOBAYASHI SUGITA & GODA, LLP

¹⁶ *Save Sunset Beach Coal. v. City & Cty. of Honolulu*, 102 Hawaii 465, 481, 78 P.3d 1, 17 (2003) (“Thus, if an ordinance truly conflicts with Hawai‘i statutory law that is of statewide concern, then it is necessarily invalid because it violates article VIII, section 6 of the Hawai‘i Constitution and HRS §§ 50-15—the state’s supremacy provisions.” *Id.* (quoting *Richardson v. City & County of Honolulu*, 76 Hawaii 46, 66, 868 P.2d 1193, 1213 (1994))).



LATE

Chair Troy N. Hashimoto
Hawaii State Legislature
Committee on Housing

February 1, 2023 at 9:30AM
Via Videoconference
Conference Room 312
State Capitol
415 South Beretania Street

TESTIMONY ON HB 84, RELATING TO COUNTIES - COMMENTS

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

Mahalo for the opportunity to comment on HB 84, related to county zoning. We are grateful for the partnership developed between the State of Hawai'i and localities over the last several years on short-term rental policies that support the local tourism industry; and provide housing opportunities for transient workers, students, and other state guests.

In the event that counties rely on HB 84, there could be a number of unintended consequences:

1. **Impact on County Revenue: If counties use the language of HB 84 to effectively prohibit rentals under 180 days, they could see a negative impact on tax revenue.** In Maui County, transient vacation rentals or "TVRs" are the largest source of property tax revenue for the County and provide for the largest contributions to affordable housing in Maui. It was reported that for fiscal year 2022-2023, TVRs in Maui County will raise \$160 million in real property tax revenue representing 37% (\$12.1 million) of total real property tax revenue. That \$12.1 million in real property tax revenue will be contributed to Maui's Affordable Housing Fund.
2. **Increased Prices for Existing Inventory: Reducing the availability of rentals under 180 days would also significantly increase the prices of any remaining accommodations, and will have other adverse effects on the State's economy.** Not only will this impact the ability of low and moderate-income families to visit Hawai'i, but it will also limit residents who need short-term housing during periods of transition, part-time students, traveling nurses, and other non-permanent island residents who participate in key sectors of Hawai'i's economy. Higher prices will also have ripple effects on the State's economy. Short-term rentals and their hosts, guests, and

transitional residents support a number of local small businesses; everything from housekeeping and landscaping to restaurants and local markets benefit from a robust tourism and short-term rental market.

Mahalo for the consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alex April', written in a cursive style.

Alex April
Airbnb Public Policy, Hawaii

Testimony Submitted to the House Committee on Housing
in **Strong Support of HB 84** Relating to Counties

Hearing: Tuesday, February 1, 2023, 9:30 am, House Conference Room 312

January 30, 2023

Aloha Chair Hashimoto, Vice-Chair Aiu and Honorable Committee Members,

I strongly urge you to approve HB 84.

I live in Hanalei, Kauai. Hanalei is not designated as a "Visitor Destination Area." Hanalei's housing stock is intended to be used for residential purposes. Hanalei's housing stock is not supposed to be used for tourist/transient vacation rentals, which are resort uses, not residential uses. But due to long-ago misinterpretations of Kauai's Comprehensive Zoning Ordinance, over the years more than 40% of Hanalei's housing has been converted to transient vacation rental/resort uses.

In order to restore the residential nature of the community, the non-residential/resort uses of Hanalei's residential housing stock need to be reduced or phased out.

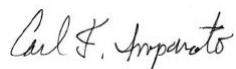
HRS 46-4 quite appropriately intends to protect non-conforming residential uses. But it defies credibility to believe that it was the intent of HRS 46-4's drafters that the wording of HRS 46-4 should enable transient/resort uses to be given the "no amortization/no phase out" status that HRS 46-4 affords to truly residential uses.

Nonetheless, it is claimed by some that HRS 46-4, due to supposed ambiguity over the meaning of "residential use," prohibits the counties from enacting policies to amortize or phase out transient vacation rentals, which are in reality resort uses. The resulting disagreement over the meaning of HRS 46-4 has hamstrung the County of Kauai's ability to deal with the problem of non-conforming resort uses in Hanalei and other residential neighborhoods.

It is very important for the viability of Hanalei's existence as a residential community that the County of Kauai not be prevented from enacting fair and reasonable policies to protect and restore residential communities like Hanalei.

HB 84 would clarify HRS 46-4 and thereby enable the County of Kauai to move forward. I therefore respectfully ask that you approve HB 84.

Thank you for considering this testimony.



Carl Imperato
PO Box 1102
Hanalei, HI 96714

808-826-1856

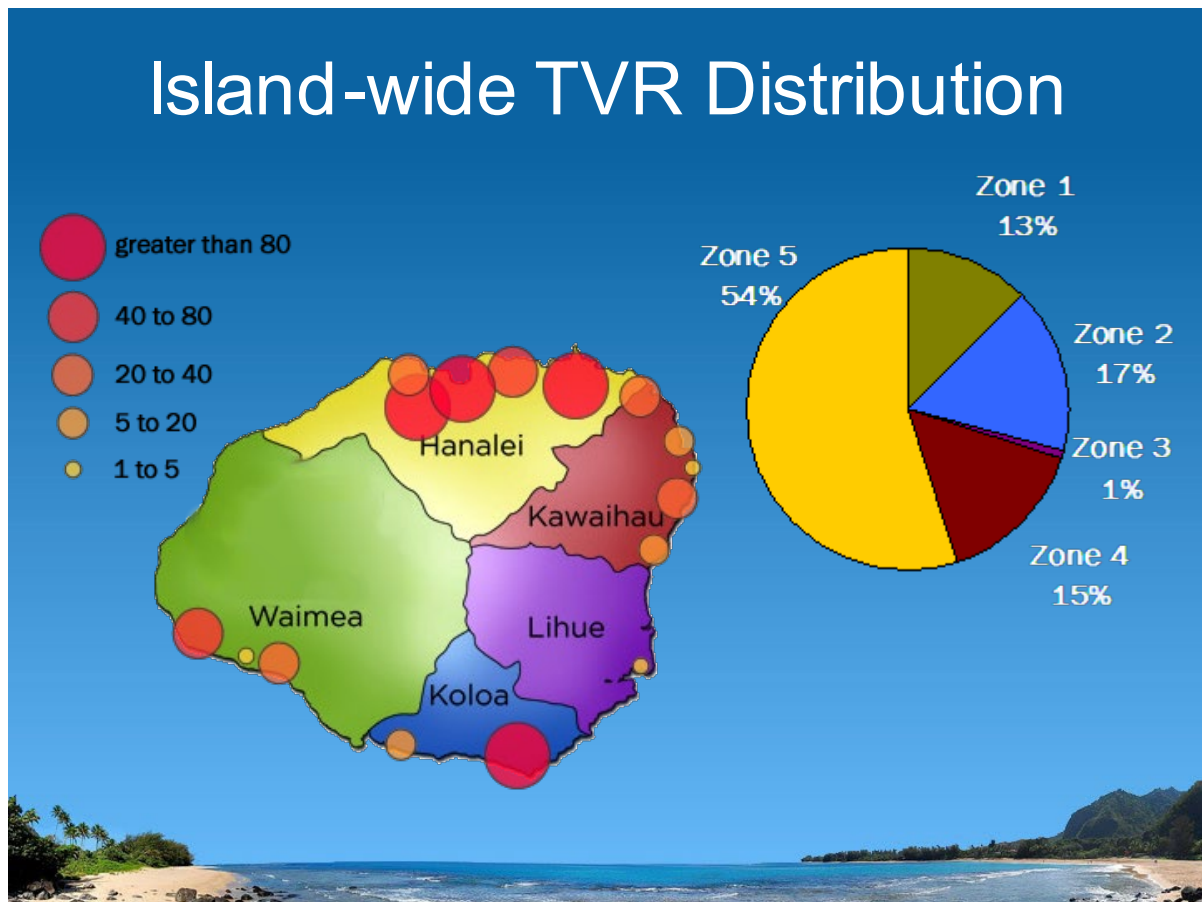
carl.imparato@juno.com

Testimony Submitted to the House Committee on Housing
in **Strong Support of HB 84** Relating to Counties
Hearing: Tuesday, February 1, 2023, 9:30 am,
House Conference Room 312

January 30, 2023

Aloha Chair Hashimoto, Vice-Chair Aiu and Honorable Committee Members,

As a resident of Wainiha I strongly urge you to approve HB 84. The largest concentration of Transient Vacation Rentals (TVR) operating outside of the Visitor Destination Area (VDA) on Kauai is in the residential, flood and tsunami evacuation zones on the island's North Shore. Access to the Hanalei District is limited by seven historic one lane bridges traversing the Historic Route #560 corridor through high hazard areas experiencing coastal erosion, inundation and prone to severe storm events. The flood events of April 2018 resulted in eighteen (18) landslides, isolating neighborhoods and vulnerable residents and dramatically demonstrating the designation of these areas as "hazardous". Four hundred and seventy-three (473) visitors from the Wainiha/Hā'ena area were evacuated by helicopter. An uncounted number were evacuated by boats operated by citizens and the Hawaii National Guard. The expansion of the VDA in contravention of Kauai's zoning laws in this area clearly puts residents, tourists and rescuers in harm's way.



The following critical factors should be considered in supporting the amortization or phasing out of permitted, nonconforming, or otherwise allowed short—term rentals over a reasonable period of time in an area of any zoning classification.

- Safety and welfare of residents and visitors
- Recurring coastal hazards
- Overlapping coastal hazards
- Flood hazards
- Tsunami hazards
- Lack of evacuation routes
- Lack of infrastructure
- Lack of essential emergency services, fire, police, ambulance
- Lack of food and water services
- Lack of capacity
- Lack of disclosure warnings and associated liability
- Lack of wastewater capacity
- Lack of adequate setbacks to fast rising rivers and associated hazards
- Lack of adequate setbacks along dynamic shores especially in non-conforming structures
- Resort units in residential areas without the infrastructure, capacity and zoning are a public nuisance

Please support HB 84 to allow Amortization of TVR rentals to protect the safety of visitors and residents.

Mahalo,

Caren Diamond
Post Office Box 536
Hanalei, Hawai'i 96714
(808) 652-0780



HB-84

Submitted on: 1/30/2023 10:44:56 PM

Testimony for HSG on 2/1/2023 9:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Kathleen M Pahinui	Individual	Support	Written Testimony Only

Comments:

Aloha Committee Chair Hasimoto and COmmittee Members -

I support HB 84 - mahalo for supporting county efforts to reign in illegal TVUs and to support housing for residents.

Mahalo,

Kathleen M Pahinui

HB-84

Submitted on: 1/31/2023 9:16:29 AM

Testimony for HSG on 2/1/2023 9:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Stuart Simmons	Individual	Support	Written Testimony Only

Comments:

I strongly support the intent of HB84

Specifically, Counties should have the ability to legislate the orderly development and use of residential-zoned land resources within their jurisdictions. Short-term rentals (less than 180 days) are NOT a residential land use and as such, the counties should have the ability to restrict them in residential zoning and phase them out over a reasonable period of time.

All of the Counties are facing a critical housing shortage and converting non-conforming short-term rentals to long-term rentals or permanent housing for residents is a prudent and reasonable strategy.

Stu Simmons

Oahu