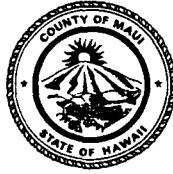


ALAN M. ARAKAWA
Mayor



BRIAN T. MOTO
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL

COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 270-7740
FAX: (808) 270-7152

December 9, 2005

MEMO TO: Dain P. Kane
Councilmember

FROM: Traci Fujita Villarosa *TFV*
First Deputy Corporation Counsel

SUBJECT: Real Property Taxation of Transient Rentals
(PAF 05-031)

OFFICE OF THE
CORPORATION COUNSEL

05 DEC -9 4:12

Introduction; Question posed.

The purpose of this memorandum is to respond to your memorandum, dated October 12, 2005, requesting legal advice. You asked whether the County is able to legally require property management companies, or other businesses, to report information on rental units, including information on whether a particular unit is being utilized as a transient rental unit. You asked that we examine whether this authority exists pursuant to Section 46-1.5, Hawaii Revised Statutes ("HRS"), Chapter 445, HRS, or other law.

Analysis and discussion.

A. Chapter 445, HRS.

Section 46-1.5, HRS, sets forth the general powers and limitations of the counties. Section 46-1.5(7), HRS, states: "Each county shall have the power to exercise regulatory powers over business activity as are assigned to them by chapter 445 or other general law."

Chapter 445, HRS, provides for county licensing of certain businesses under the terms and conditions set forth in Chapter 445, HRS. Chapter 445, HRS, does not specifically reference property management companies among the businesses subject to licensing under the Chapter.

Section 445-15(4), HRS, provides:

Each council has the power by ordinance:

MEMO TO: Dain P. Kane
Councilmember
DATE: December 9, 2005
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...
(4) To adopt rules not inconsistent with law concerning the conduct of the business of all persons licensed under this chapter, as deemed necessary for the public health, safety, or welfare. (Emphasis added.)

Prior to approval of Act 35 (2001 Session Laws of Hawaii) ("Act 35") in 2001, Part III of Chapter 445 provided for the licensing of a lodging or tenement house, group home, group residence, group living arrangement, hotel, or boarding house.¹ Act 35 eliminated the requirement of a county business license for the operation of such businesses, and repealed the annual license fee associated with such business operations.²

Inasmuch as Chapter 445, HRS, as amended, no longer provides for county licensing of lodging or tenement houses, group homes, group residences, group living arrangements, hotels, and boarding houses, Section 445-15(4), HRS, no longer serves as authority for the adoption of county ordinances regulating such businesses.

B. Sections 46-1.5(13), (20), HRS.

Section 46-1.5, HRS, states, in pertinent part:

Subject to general law, each county shall have the following powers and shall be subject to the following liabilities and limitations:

...
(13) Each county shall have the power to enact ordinances deemed necessary to protect health, life, and property, and to preserve the order and security of the county and its inhabitants on any subject or matter not inconsistent with, or tending to defeat, the intent of any state

¹ §§ 1, 4, Act 35.

² § 7, Act 35. Act 35 retained, however, the requirement that operators of a lodging or tenement house, group home, group residence, group living arrangement, hotel, or boarding house obtain "a clearance from the appropriate county agency responsible for ensuring compliance with county building and zoning codes setting forth that an agent of the agency has examined the building or buildings, proposed to be used for such purposes, with a description sufficient to identify and locate the same; and that the same are in compliance with the building and zoning codes." § 445-94(b), HRS.

MEMO TO: Dain P. Kane
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DATE: December 9, 2005
Page 3

statute, provided also that the statute does not disclose an express or implied intent that the statute shall be exclusive or uniform throughout the State.

...
(20) Each county shall have the power to regulate the renting, subletting, and rental conditions of property for places of abode by ordinance.

Your memorandum of October 12, 2005 did not include a draft of a specific legislative proposal. Therefore, our advice is general in nature and subject to refinement based upon the particulars of any bill that may be proposed and any relevant facts that may pertain thereto.

In general, if an otherwise valid local ordinance conflicts with state law it is preempted by such law and void. The Hawai'i Supreme Court, in reviewing issues of preemption, uses an approach that has been characterized as a "comprehensive statutory scheme" test.³ In summary, under this test (at least as applied in the context of Section 46-1.5(13), HRS), the Court considers whether the county ordinance at issue (1) covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or (2) conflicts with state law.⁴

We are not aware of any statutes or state administrative rules that cover the subject matter referenced in your memorandum (i.e., an ordinance requiring property management companies, or other businesses, to report information on rental units), nor are we aware of any statutes or state administrative rules that would conflict with such a proposal. Therefore, we do not believe that the subject matter has been preempted.

We found no cases or opinions expounding on County powers under Section 46-1.5(20), HRS, pertaining to regulation of the renting, subletting, and rental conditions of property for places of abode by ordinance.

In conclusion, subject to the discussion above, we believe

³Richardson v. City and County of Honolulu, 76 Hawai'i 46, 60-61, 868 P.2d 1193, 1207-08 (1994).

⁴Id. at 62. See also Citizens Utilities Co. v. County of Kauai, 72 Haw. 285, 814 P.2d 398 (1991); In re Application of Anamizu, 52 Haw. 550, 481 P.2d 116 (1971).

MEMO TO: Dain P. Kane
Councilmember
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that Section 46-1.5(20), HRS, pertaining to the power to regulate the renting, subletting, and rental conditions of property for places of abode, and, possibly, Section 46-1.5(13), HRS, pertaining to the power to enact ordinances deemed necessary⁵ to protect health, life, and property and to preserve the order and security of the county, could provide a basis for an ordinance of the type described in your memorandum.

We express no opinion as to any administrative or compliance issues that may be associated with adoption of such an ordinance.

C. Other comments.

We understand that Council would like the County to have the authority to obtain information on transient rentals from a source other than property owners. One possible means for the County to obtain this information is through County grants to the Maui Visitors Bureau ("MVB").⁶

Under its "Accommodations" link on the MVB website, the MVB lists numerous Bed & Breakfasts/Inns, Condominiums, Directories & Guides, Hostels, Hotels & Resorts, Management Companies, Reservations & Booking Services, and Vacation Rentals, Homes & Cottages. A copy of these listings is attached hereto as Exhibit "1".

Among its other options, the Council may consider adding a budget proviso requiring the MVB, as a condition of receipt of County grant funds, to submit to the County information on transient rental properties being advertised through MVB.

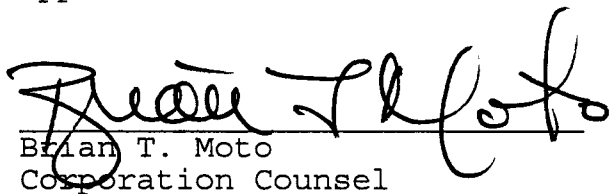
⁵ The determination of such necessity is an exercise of legislative fact finding. No record or information regarding the regulation of "rental units" was submitted with the memorandum requesting legal advice. Accordingly, we offer no opinion as to the existence or non-existence of the public health, safety, or welfare concerns that may be associated with the rental of units, including those used as "transient rental units".

⁶ The County appropriated a grant in the amount of \$3.5 million to the MVB in the Fiscal Year 2006 Budget Ordinance. § 3.B.8.b(16), Ordinance No. 3289, Bill No. 45, Draft 1, as amended (2005).

MEMO TO: Dain P. Kane
Councilmember
DATE: December 9, 2005
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cc: Michele White, Legal Assistant
Cindy Y. Young, Deputy Corporation Counsel
James A. Giroux, Deputy Corporation Counsel

Approved for Transmittal:


Brian T. Moto
Corporation Counsel

S:\ALL\Advisory\TFV\transientrentals.wpd



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Kapalua Golf Villas

Kapalua Golf Villas

Kapalua Villas

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Romantic, oceanfront, vacation rental, B&B, secluded, private spectacular views.

Dolphin's Paradise

Beautiful beach location; heart of Kihei. Fully furnished with kitchens.

Fabulous Homes - Maui Luxury Rentals

Top-of-the-line private luxury beach houses and estates.

Haiku Lani Maui Vacation Rental Cottage

Cool, Cozy, Quiet Cottage. Peaceful, Garden Setting. Rural, Haiku, Maui.

Haiku Oceanview Cottage

N. Shore romantic hideway, oceanview luxury home with private Jacuzzi.

Hale Pukalani Vacation Rentals

Vacation rental of luxury upcountry cottage.

Hana Accommodations and Plantation Houses

Beautiful cottages and homes on the spectacular Hana Maui Coast and on the West End of Molokai. Very reasonably priced with personal attention.

Hana Maui Vacation Rentals

Locally owned and operated on the eastern slopes of Haleakala.

Hana Oceanfront Cottages

Located at Hamoa Beach. Hana's newest and pristine vacation rentals!

Hana Sunrise House

The Hana Sunrise House is a luxurious vacation accommodation in Hana, Maui, Hawaii, totally private and fully equipped.

Hawaii Bound Inc.

Accommodation moderate & luxury. Beachfront pools at affordable prices.

Ho'omahana

Located on the world famous Kaanapali Beach, The Whaler is the long-standing first choice for quality and convenience.

Huelo Point Flower Farm

Exquisite Oceanfront Estate. Spectacular Views, Beautiful Homes. Pool. Hot tubs

Kahana Nui Villas

Maui's most luxurious beachfront vacation homes/estates.

Kaleialoha Rentals

1 bedroom oceanfront condos-free parking and telephone

Kapalua Sunset

Wholly-owned, private individual's vacation rental condo in the Kapalua Bay Villas, Kapalua, Maui. HVCB certified Loea Level.

Kealia Resort

Kealia Resort is located on scenic Maalaea Bay, just 20 minutes from Kahului airport. This central location places you within easy reach of Maui's recreational facilities, businesses, sightseeing centers and restaurants. Come and enjoy swimming, dee

Kihei Bay Vista

The Kihei Bay Vista, located across from Kulehulepo Beach in north Kihei, features a swimming pool, hot tub, gas barbecues, and putting green. With only 60 condos, this low rise resort is ideal for a quiet, peaceful vacation.

Kihei Beach Resort

We are conveniently located in the island's sunniest town, Kihei (pronounced key-hey), just 20 minutes from both the Kahului Airport, and the old whaling town of Lahaina.

Kihei Maui Vacations

Your key to quality accommodations and superior service since 1983.

Luuwai's Makena Landing

Enjoy incredible views and breathtaking sunsets in the relaxing atmosphere of this unique Maui vacation rental located in Makena, Maui, Hawaii.

Ma'alaea Banyans - Maui Oceanfront Condo

E Komo Mai (eh-ko-mo-my) means 'Welcome' in the Hawaiian language. The aloha spirit is alive and well in Ma'alaea (Mah-ah-lie-ah), which is a tiny village centrally nestled on an isthmus between two dormant volcanoes.

Mahina Surf

Beautiful oceanfront low rise condos with lush tropical grounds

Maui Beachfront Rentals

Vacation rental management company representing owners of resort condominiums & deluxe homes on Maui. Full services include room, car and island activities. 6th NIGHT FREE! 15% COMMISSION TO TRAVEL AGENTS!

Maui Dream Cottages

Enjoy the real Hawaii for \$490 per week!

Maui Dream Inn

Affordable accommodations, Continental breakfast, centrally located in Old Wailuku Town.

Maui Resort Vacations

Beautiful condos at remarkable rates.

Maui Tradewinds

Luxurious oceanview retreat offering privacy in an unspoiled tropical paradise.

Maui Vacation Discounts

\$54/day (Daily/Weekly/Monthly) Rates available. Charming private studio and 1-bedroom units. Full kitchens, beach side locations in Kihei Maui.

Maui Vacation Properties

Maui condos, private homes and cottages. Mid-range to luxurious.

MauiAlohaCondos.com

Vacation Rental

MauiLodging.com

Welcome to Maui Lodging, your complete lodging

and real estate source for Maui, Hawaii.

MauiMonth.com

5 accommodations, spectacular views, and an exquisite location overlooking the Hawaiian islands of Lanai and Molokai. Just 10 minutes from golfing at Kapalua, the shopping and dining in both Kaanapali and Lahaina, and your choice of gorgeous beach

MauiParadise.net

Owner Direct Maui Kamaole Luxury Vacation Rental
Maui condos - Kihei

Menehune Shores

One-bedroom oceanfront condos on beach. Heated pool, full ocean views, complete kitchen. Sleeps four.

My Waii Beach Cottage on Maui

Ocean and Beachfront cottage

Olinda Country Cottages

OLINDA COUNTRY COTTAGES & INN, BED AND BREAKFAST on the island of Maui, Hawaii, is located on the side of Mount Haleakala, Maui's spectacular dormant volcano.

Peace of Maui

Maui's most affordable vacation rentals. Clean, quiet and comfortable. Great views, close to beaches and shopping. Now offering room and car packages from \$35 per person on weekly rate.

RSVP Maui

Located in the heart of Kihei, a brand new vacation rental designed to meet all your vacation needs!

Sunsets In Paradise

Luxury, oceanfront, vacation condo rental.

The Inn at Mama's Fish House

Northshore Vacation Homes on the beach in romantic Kuau Cove adjacent to Mama's Fish House.

The Waterfall Estate - Cliffside at Huelo

Vacation rental of luxury home with stunning ocean, waterfall and mountain views. The private, peaceful and spiritual setting is perfect for honeymoons. Also available for weddings.

Tropical Villa Vacations

Ultimate Luxury Beach & Ocean Front Estates, Villas

& Private Vacation Homes

Villa Blue Dolphin

Aloha and Welcome to Villa Blue Dolphin, a spiritual retreat nestled among beautiful Plumeria trees on the south side of the precious island of Maui.

Wai-Ola Vacation Paradise

Elegant 5,000 sq. ft. home, conveniently located between Lahaina Town & Kaanapali.

We Love Islands

Rainbows, Sunsets and A Secluded Beach

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