

BEFORE THE ZONING BOARD OF APPEALS

CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Appeal)	CASE NO. 2006/ZBA-22
)	
of)	
JUDITH ANN PAVEY, KALI K. WATSON)	FINDINGS OF FACT, CONCLUSIONS
TRUST, MICHAEL D. WILSON,)	OF LAW, AND DECISION AND ORDER
DOUGLAS A. CROSIER, JEAN K.)	
CROSIER, FDT, LLC, FRANKLIN)	
TOKIOKA, MICHAEL F. SCHWINN and)	
VIEN N. SCHWINN)	
57-421 Honokawela Drive – Kawela)	
Tax Map Key: 5-7-003: 037)	
)	
From Action of the Director of Planning)	
and Permitting dated February 13, 2006)	
(Notice of Order No. 2005/NOO-367))	
)	

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECISION AND ORDER**

This matter came on for hearing in the Human Resources Conference Room of the City and County of Honolulu on May 17, 2007 and June 14, 2007 (the “Hearing”). JUDITH ANN PAVEY, Esq., appearing on behalf of JUDITH ANN PAVEY, KALI K. WATSON TRUST, MICHAEL D. WILSON, DOUGLAS A. CROSIER, JEAN K. CROSIER, FDT, LLC, FRANKLIN TOKIOKA, MICHAEL F. SCHWINN and VIEN N. SCHWINN (hereinafter “Petitioners”), and DUANE W. H. PANG, Deputy Corporation Counsel, appeared on behalf of HENRY ENG, FAICP, Director of the Department of Planning and Permitting, City and County of Honolulu (hereinafter “Director”).

The Zoning Board of Appeals (hereafter "ZBA"), having reviewed the Petition appealing the action of the Director (hereafter "Petition"), Position Statements, exhibits and other documentary evidence presented by the parties; having considered the entire record and files herein; and having heard testimony and considered the arguments of the parties, makes the following Findings of Fact, Conclusions of Law, and Decision and Order:

FINDINGS OF FACT

1. Petitioners JUDITH ANN PAVEY, KALI K. WATSON TRUST, MICHAEL D. WILSON, DOUGLAS A. CROSIER, JEAN K. CROSIER, FDT, LLC, FRANKLIN TOKIOKA, MICHAEL F. SCHWINN and VIEN N. SCHWINN are owners of the property located at 57-421 Honokawela Drive, Kahuku, Hawaii 96731 (hereinafter "subject property").
2. The subject property is zoned R-5 Residential District with a single family dwelling.
3. Transient Vacation Unit (hereinafter "TVU") activities are not permitted in residential districts unless the Department of Planning and Permitting (hereinafter "DPP") has issued a nonconforming use certificate ("NUC"). LUO § 21-4.110-1 and § 21-4.110-2. The subject property does not have a NUC.
4. An inspection by DPP on August 14, 2006 revealed that a person named Ashley Nackley and her family were occupying the property.
5. Petitioners were contacted and Petitioners produced a rental agreement that indicates that the agreement is for a thirty (30) day occupancy. The rental

agreement further indicates that Ms Nackley and her family would arrive on August 12, 2006 and depart on August 25, 2006.

6. Further inspection on August 28, 2006 revealed that one of Petitioner's nieces was occupying the subject property. Petitioners' niece informed the inspector that she would be occupying the dwelling through September 4, 2006.

7. On September 07, 2006, Notice of Violation No. 2006/NOV-09-036 (HC) was issued to Petitioners for "the dwelling on this residential zoned property is being used as a transient vacation unit. A nonconforming use certificate was not obtained for the transient vacation unit." in violation of "ROH 1990, as amended, Chapter 21 Section 21-3-3.70-1 & 21-4.110-1".

8. On November 15, 2006, Notice of Order No. 2006/NOO-355 was issued to Petitioners.

9. On December 8, 2006, Petitioners filed a timely appeal challenging Notice of Order No. 2006/NOO-355.

10. The issue before the ZBA is:

WAS THE DIRECTOR'S ACTION BASED ON AN ERRONEOUS FINDING OF A MATERIAL FACT, OR ARBITRARY AND CAPRICIOUS, OR DID HE MANIFESTLY ABUSED HIS DISCRETION WHEN HE DETERMINED THAT ALLOWING FAMILY TO OCCUPY THE DWELLING WITHIN THE SAME THIRTY DAY PERIOD THAT IT IS BEING RENTED TO OTHERS WHO HAVE VACATED THE PROPERTY WAS A VIOLATION OF THE LAND USE ORDINANCE?

CONCLUSIONS OF LAW

1. The ZBA has jurisdiction over this appeal under ROH Section 21-1.40.
2. The Hearing was properly conducted in accordance with the Rules of the Zoning Board of Appeals and Hawaii Revised Statutes Chapter 91.
3. The applicable standard of review, set forth in RCH Section 6-1516, provides:

An appeal shall be sustained only if the board finds that the director's action was based on an erroneous finding of a material fact, or that the director had acted in an arbitrary or capricious manner or had manifestly abused discretion. (Emphasis added.)

4. Rule 22-8(a) of the ZBA Rules provides that the ZBA shall sustain an appeal if the board finds that:

- (1) The director's action was based on an erroneous finding of a material fact; or
- (2) The director acted in an arbitrary or capricious manner or had manifestly abused his/her discretion.

Under the "arbitrary or capricious" standard, an action by an administrative agency may not be set aside if it is rational and based on consideration of relevant factors and the reviewing body is not to substitute its judgment for that of the agency.

See Motor Vehicles Mfs. Ass'n of U.S. v. State Farm Mutual Auto Ins. Co., 463 U.S. 29 (1983). Under this standard, the reviewing body is not to substitute its judgment for that of the agency. Id. "In order to preserve the function of administrative agencies in discharging their delegated duties . . . , a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears 'the heavy burden of making a convincing showing that it is invalid

because it is unjust and unreasonable in its consequences.” In the Matter of the Application of Puhi Sewer & Water Company, Inc., 83 Hawai‘i 132, 137, 925 P.2d 302, 307 (1996) (citations omitted).

5. The ZBA must also defer to the Director’s interpretation of the DPP’s rules where it is consistent with the statute, Keanini v. Akiba, 93 Hawai‘i 75, 79, 996 P.2d 280, 284 (App. 2000), and a longstanding and uniform practical construction given by the Director is entitled much weight in the case of doubt. Keller v. Thompson, 56 Haw. 183, 190, 532 P.2d 664, 670 (1975).

6. Petitioner have failed to satisfy their burden of proof in the instant appeal and have not presented any reliable evidence as required under Section 5-1516 of the Charter to justify overturning the Director’s decision.

7. Based upon the record in this case, including the testimonial and documentary evidence presented, the ZBA concludes that the Director did not act in an arbitrary or capricious manner, nor did he manifestly abuse his discretion or base his decision on an erroneous finding of material fact when he determined that Petitioners violated ROH 1990, as amended, Chapter 21 Section 21-3-3.70-1 & 21-4.110-1 when they permitted family members to occupy the subject property during the same thirty day time period that it was being rented to others who have vacated the property.

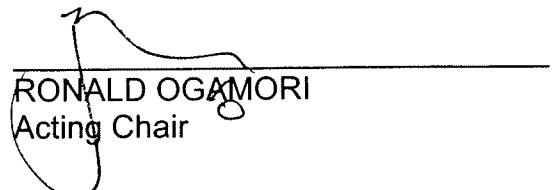
DECISION AND ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the ZBA hereby AFFIRMS the Director’s Decision and DENIES Petitioners’ appeal filed August 2, 2006.

DATED: Honolulu, Hawaii,

OCTOBER 4, 2007

ZONING BOARD OF APPEALS OF THE
CITY AND COUNTY OF HONOLULU


RONALD OGAMORI
Acting Chair

CASE NO. 2006/ZBA-22, IN THE MATTER OF THE APPEAL OF JUDITH ANN
PAVEY, KALI K. WATSON TRUST, MICHAEL D. WILSON, DOUGLAS A.
CROSIER, JEAN K. CROSIER, FDT, LLC, FRANKLIN TOKIOKA, MICHAEL F.
SCHWINN and VIEN N. SCHWINN, 57-421 HONOKAWELA DRIVE – KAWELA,
TAX MAP KEY: 5-7-003: 037 – Findings of Fact, Conclusions of Law, and
Decision and Order

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Attorney for Director of the
Department of Planning and Permitting

CITY & COUNTY OF HONOLULU

BEFORE THE ZONING BOARD OF APPEALS

CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Appeal) CASE NO. 2006/ZBA-22
of)
JUDITH ANN PAVEY, KALI K. WATSON) DIRECTOR OF THE DEPARTMENT OF
TRUST, MICHAEL D. WILSON,) PLANNING AND PERMITTING'S
DOUGLAS A. CROSIER, JEAN K.) POSITION STATEMENT; EXHIBITS A-E;
CROSIER, FDT, LLC, FRANKLIN) CERTIFICATE OF SERVICE
TOKIOKA, MICHAEL F. SCHWINN and)
VIEN N. SCHWINN)
57-421 Honokawela Drive – Kawela)
Tax Map Key: 5-7-003: 037)
From Action of the Director of Planning)
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(Notice of Order No. 2005/NOO-367))
)

**DIRECTOR OF THE DEPARTMENT OF PLANNING
AND PERMITTING'S POSITION STATEMENT**

COMES NOW HENRY ENG, DIRECTOR OF THE DEPARTMENT OF
PLANNING AND PERMITTING (the "Director"), by and through his attorney,

DUANE W. H. PANG, Deputy Corporation Counsel, City and County of Honolulu, and hereby submits this Position Statement.

I. INTRODUCTION

This matter arises out of an appeal by Petitioners JUDITH ANN PAVEY, KALI K. WATSON TRUST, MICHAEL D. WILSON, DOUGLAS A. CROSIER, JEAN K. CROSIER, FDT, LLC, FRANKLIN TOKIOKA, MICHAEL F. SCHWINN and VIEN N. SCHWINN (hereinafter "Petitioners") of an issuance of a Notice of Violation (hereinafter "NOV") and subsequently a Notice of Order (hereinafter "NOO").

The NOV was issued to Petitioners on September 7, 2006 on the basis that Petitioners are conducting an illegal Transient Vacation Unit (hereinafter "TVU") on a residential zoned lot without a Nonconforming Use Certificate (hereinafter "NUC"). Exhibit A. The NOO was issued on November 15, 2006 (Exhibit B), and DPP verified that the violation was corrected on November 17, 2006.

The property that is the subject of the NOV and NOO is located at 57-421 Honokawela Drive, Kahuku, Hawaii 96731. The subject property is zoned R-5 Residential District with a single family dwelling. TVU activities are not permitted in residential districts unless the DPP has issued a nonconforming use certificate. LUO §21-4.110-1 and §21-4.110-2. This property does not have a NUC.

An inspection by DPP on August 14, 2006 revealed that a person named Ashley Nackley and her family were occupying the property. Petitioners were contacted and Petitioners produced a rental agreement that indicates that the agreement is for a thirty (30) day occupancy. The rental agreement further indicates that Ms Nackley and her

family would arrive on August 12, 2006 and depart on August 25, 2006. Exhibit C.

Copies of Ms. Nackley's payment were also provided to DPP. Exhibit D.

Further inspection on August 28, 2006 revealed that Ms. Pavey's niece was occupying the subject property. Ms. Pavey's niece informed the inspector that she would be occupying the dwelling through September 4, 2006.

II. ISSUES PRESENTED

Under the Land Use Ordinance, a TVU is defined as:

"Transient vacation unit" means a dwelling unit or lodging unit which is provided for compensation to transient occupants for less than 30 days, other than a bed and breakfast home. For purposes of this definition, compensation includes, but is not limited to, monetary payment, services or labor of employees.

Petitioners properly obtained an agreement from Ms. Nackley to occupy the dwelling for the minimum thirty (30) days¹, thus complying with the LUO. However, the Director's interpretation of the TVU restriction is that no other persons may occupy the dwelling within the same thirty (30) days including family and friends regardless of the Nackley's leaving before the thirty (30) days is completed.

Thus, the only issue before the ZBA is :

WAS THE DIRECTOR'S ACTION BASED ON AN ERRONEOUS FINDING OF A MATERIAL FACT, OR ARBITRARY AND CAPRICIOUS, OR DID HE MANIFESTLY ABUSED HIS DISCRETION WHEN HE DETERMINED THAT ALLOWING FAMILY OR FRIENDS TO OCCUPY THE DWELLING WITHIN THE SAME THIRTY DAY PERIOD THAT IT IS BEING RENTED TO OTHERS WAS A VIOLATION OF THE LAND USE ORDINANCE?

¹ The Director's interpretation is that the LUO does not require that the renters actually occupy the dwelling for the full thirty days, only that there is an agreement for thirty days.

III. STANDARD OF REVIEW

With respect to appeals before the Zoning Board of Appeals, Section 6-1516, Revised Charter of the City and County of Honolulu 1973 (2000 Edition) ("RCH"), provides:

An appeal shall be sustained only if the board finds that the director's action was based on an erroneous finding of a material fact, or that the director had acted in an arbitrary and capricious manner or had manifestly abused discretion.

Accordingly, the ZBA may sustain Petitioner's appeal only if it finds that the decision of the Director was based on an erroneous finding of a material fact, or that he had acted in an arbitrary or capricious manner or had manifestly abused discretion in reaching his decision.

As the Hawai'i Supreme Court recently held in In re Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409 (2000), with regard to similar standards of review found in the Hawai'i Administrative Procedures Act (Hawai'i Revised Statutes chapter 91):

[Findings of fact] are reviewable under the clearly erroneous standard to determine if the agency decision was clearly erroneous in view of reliable, probative, and substantial evidence on the whole record.

A [conclusion of law] that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case. When mixed questions of law and fact are presented, an appellate court must give deference to the agency's expertise and experience in the particular field. The court should not substitute its own judgment for that of the agency.

In re Water Use Permit Applications, 94 Hawai'i 97, 118-19, 9 P.3d 409, 430-31 (2000).

Under the clearly erroneous standard, a reviewing court will not disturb agency findings unless it is left with a "definite and firm conviction that a mistake has been

made." Aio v. Hamada, 66 Haw. 401, 406, 664 P.2d 727, 731 (1983). Review is further qualified by the principle that decisions of administrative bodies acting within their sphere of expertise are accorded a presumption of validity. Price v. Zoning Bd. of Appeals, 77 Hawai'i 168, 883 P.2d 629 (1994); Foster Village Community Ass'n v. Hess, 4 Haw. App. 463, 667 P.2d 850 (1983); Southern Foods Group, L.P. v. State, Dep't of Educ., 89 Hawai'i 443, 453, 974 P.2d 1033, 1043 (1999) (citing In re Hawaii Elec. Light Co., 60 Haw. 625, 630, 594 P.2d 612, 617 (1979)).

An agency's decision carries a presumption of validity. The party seeking to reverse the agency's decision "has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in the consequences." Hardin v. Akiba, 84 Hawai'i 305, 310, 933 P.2d 1339, 1344 (1997).

Indeed, the Director's discretionary decisions will be reversed only if they amount to an abuse of discretion. RCH § 6-1516 (acts in arbitrary or capricious manner or manifestly abuses discretion); Smith v. State, Dept. of Labor & Indus. Relations, 80 Hawai'i 150, 153, 907 P.2d 101, 104 (1995). An "abuse of discretion" is frequently held to be synonymous with an action that is "arbitrary or capricious." See Tucson Public Schs., Dist. No. 1 v. Green, 495 P.2d 861, 864 (Ariz. Ct. App. 1972).

Under the "arbitrary or capricious" standard, action by the agency may not be set aside if it is rational and based on consideration of relevant factors. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). Where there is room for two opinions, an action is not arbitrary or capricious when the agency exercised its authority honestly and upon due consideration. Bayshore Sewerage Co. v. Department of Envtl. Protection, 299 A.2d 751, 759 (N.J. Sup. Ct. Ch. Div. 1973).

IV. DISCUSSION

A. THE DIRECTOR'S ACTION WAS NOT BASED ON AN ERRONEOUS FINDING OF A MATERIAL FACT, OR ARBITRARY AND CAPRICIOUS, OR DID HE MANIFESTLY ABUSED HIS DISCRETION WHEN HE DETERMINED THAT ALLOWING FAMILY OR FRIENDS TO OCCUPY THE DWELLING WITHIN THE SAME THIRTY DAY PERIOD THAT IT IS BEING RENTED TO OTHERS WAS A VIOLATION OF THE LAND USE ORDINANCE

The Director interprets the LUO to preclude the occupancy of a residential dwelling for less than thirty days when the property owner is receiving some sort of compensation. Because Petitioners choose to receive compensation from others for occupancy of their property, they must comply with the minimum thirty days. Thus, the LUO allows a land owner to rent their property for thirty (30) day blocks, and theoretically, may rent their property to separate individuals or party twelve times per year. The Director further interprets the LUO as not requiring that those renting for thirty (30) days be required to actually occupy the dwelling for the full thirty (30) days. Because there is no way of forcing a person or party to stay the full thirty (30) days, the Director's interpretation is that no other person or party occupy the property for that same thirty day.

B. SIMILAR ORDINANCES PRECLUDING TRANSIENT USE IN RESIDENTIAL ZONED AREAS HAVE PREVIOUSLY BEEN UPHELD AS VALID USE OF POLICE POWER

Constitutional challenges to the preclusion of transient uses in residential zoned areas have been upheld. In a similar ordinance passed by the City of Carmel-By-The-Sea, the California Supreme Court determined that the restriction of transient uses within residential zoned areas is a valid use of a municipality's police power. Ewing v. City of Carmel-By-The-Sea, 234 Cal.App.3d 157, 286 Cal.Rptr. 382 (1991). The

Carmel ordinance precluded "transient commercial uses" within residential areas. It further defined "transient commercial uses" as "the commercial use, by any person, of Residential Property for bed and breakfast, hostel, hotel, inn, lodging, motel, resort or other transient lodging uses where the term of occupancy, possession or tenancy of the property by the person entitled to such occupancy, possession or tenancy is for less than thirty (30) consecutive calendar days."

The California Court relying on Euclid v. Ambler Co., 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114 (1926), stated:

Blessed with unparalleled geography, climate, beauty, and charm, Carmel naturally attracts numerous short-term visitors. Again, it stands to reason that Carmel would wish to preserve an enclave of single-family homes as the heart and soul of the city. We believe that this reason alone is "sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." Citing, Euclid v. Ambler Co., *supra*, 272 U.S. at p. 395 [71 L.Ed. at p. 314].)

Ewing, at 1591-1592.

Similarly, the California Court clearly determined that the Carmel ordinance would not be deemed a Unconstitutional taking as the property owners have numerous other alternatives that use of their property other than that of "transient commercial use":

Ordinance No. 89-17 leaves plaintiffs with several economically viable uses of their property. Plaintiffs may live in their homes permanently or occasionally. They may rent their homes for remuneration for at least 30 days. They may allow others to use their homes, without remuneration, for any length of time. They may sell their homes or otherwise encumber them. The only thing they may not do, under the terms of Ordinance No. 89-17, is operate their homes as "bed and breakfast, hostel, hotel, inn, lodging, motel, resort or other transient lodging" The intrusion into plaintiffs' bundle of ownership rights- "the extent of the diminution," in Justice Holmes's words-is minimal and far outweighed by the public interest in enhancing and maintaining permanent residential areas.

Ewing, at 1592.

In this particular case, Petitioners chose to rent their property for thirty days. The mere fact the renters chose not to stay the full thirty days does not make their self imposed restriction on their property void. The Petitioners must abide by their choice to receive money gain from their property. The Director's interpretation of the LUO is clearly not unreasonable as it was Petitioners who chose to restrict their use of their own property.

V. WITNESS LIST

1. COLIN ISHIKAWA, Housing Zoning Code Inspector. Will testify as to DPP's policies and procedures regarding issuance of Notice of Violations and Notice of Orders. Mr. Ishikawa will further testify as to the Department's policies and procedures regarding Transient Vacation Units.

2. TODD LABANG, Housing and Zoning Code Inspector. Will testify as to his inspection of the subject property.

3. Elizabeth Chinn, Planner, Department of Planning and Permitting. Ms. Chinn will testify as to the policies and procedures of the Department regarding Transient Vacation Units.

VI. EXHIBITS

- A. Notice of Violation No. 2006/NOV-09-036 (HC) dated September 07, 2006
- B. Notice of Order No. 2006/NOO-355 dated November 15, 2006
- C. Guest Agreement
- D. Copies of Checks
- E. Inspector's Notes

VII. **CONCLUSION**

Based upon the above-mentioned facts and evidence and arguments to be presented at the hearing before the ZBA, the Director respectfully requests that the Director's decision to issue Notice of Order No. 2006/NOO-355 dated November 15, 2006 be sustained and Petitioner's appeal be denied.

DATED: Honolulu, Hawaii, May 10, 2007

Respectfully submitted,



DUANE W. H. PANG
Deputy Corporation Counsel
Attorney for Director of the
Department of Planning and
Permitting