

**SAVE O'AHU'S NEIGHBORHOODS  
OPPOSES COUNCIL BILLS 08-6 and 08-7**

November 4, 2008

*This is a work in progress. Contact [sonhawaii@hawaii.rr.com](mailto:sonhawaii@hawaii.rr.com) for the latest update*

**Save O'ahu's Neighborhoods (SONHawai'i) was formed in 2005 to stop and turn back the infiltration of our residential neighborhoods with hotel rooms. It is an all-volunteer organization.**

OUR POSITIONS ON COUNCIL BILLS 08-6 and 08-7 organized into these major categories:

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## **COMMON TO BOTH COUNCIL AND DPP VERSIONS**

### **Planning and Zoning Down the Slippery Slope**

Once this financially lucrative industry is legally entrenched in more neighborhoods, there will be political pressure to expand other tourism attractions in those neighborhoods – such as has already happened on the North Shore and Kailua. Resident service providers such as print shops, hardware stores, and the like have been priced out in favor of import stores, pricy restaurants, fancy ice-cream shops, and other tourism-oriented businesses. One reason given by advocates as a need to expand B&Bs is that the market is there. Well, the market is also there for home furniture factories, neighborhood home auto repair shops, and neighborhood home dentist offices. Why can't any of these businesses open in residential neighborhoods – at least they provide services for those in the neighborhood? Why is it only the hotel room industry that is granted this exception?

New B&Bs (even the above-board Mom & Pop follow-the-rules legitimate B&Bs) will market their neighborhood as a tourist destination with touristy attractions – if not already there, they will be created through market forces. Once the resort use is established, as planners often say, “zoning follows use.”

Adoption of either bill is effectively ‘random spot zoning’ through serendipitous permit granting based only on who decides to apply. This completely undermines the purpose of our zoning laws, the primary purpose of which is to establish property rights and give property owners in an area a degree of confidence in the character of their neighborhood.

### **Alter the Character of the Neighborhood**

As then-chair of the North Shore Neighborhood Board, Kathleen Pahinui testified at the board's 2005 Special Meeting to consider B&B permitting: “I don't want to feel like a monkey in a cage in my own front yard. Our residential neighborhoods are for those who live and work here, not for the amusement of those who visit.”

B&Bs adversely alter the character of a residential neighborhood – oriented to resort transience instead of that suited to permanent long-term living. A Hawaii Circuit Court Judge acknowledged this concern in a case involving a B & B by saying, “...the public interest clearly supports the granting of injunction relief. Roth's bed and breakfast and illegal rental activities alter the character of a residential community. Since 2003, many short-term visitors to Roth's home drive through the common driveway at all hours of the day, disturbing Cummings. On one occasion, a man climbed onto Cumming's back deck past 10:00 pm, seeking to enter her house, on the assumption that her home was Roth's bed and breakfast.” (Cummings v. Roth, Civ. No. 04-1-0836, 7/31/2006.) A California Appeals Court Judge put it this way: “such rentals undoubtedly effect the essential character of a neighborhood and the stability of a community. Short-term tenants have little interest in public affairs or in the welfare of the citizenry. They do not participate in

local government, coach little league, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally they are here today and gone tomorrow – without engaging in the sort of activities that weld and strengthen a community.” (Ewing v. Carmel, 286 Cal Rptr 382 (1991))

There is no demonstrable net benefit to residential communities from an allowance of more B&Bs. There is only the prospect of damage to neighborhoods.

The DPP, in its proposal to legalize B&Bs in residential areas, raised the red flag of community damage when it said, “**It is clear that the addition of bed and breakfast homes could affect neighborhoods significantly...**” (Sec. 1, Findings and Purpose: 187 Proposal, DPP Version B). Why would we risk affecting neighborhoods with these impacts when it is clear by past experience and resource inadequacy that the city is unable to enforce the so-called “safeguards” to mitigate such impacts?

When zoning is left to private mini-governments, their choice is clear. Nearly all of O'ahu's hundreds of condominium associations and co-ops forbid short-term rentals because they know the mix does not work. The few that allow short-term rentals were sold with that understanding and typically include a legitimate hotel operation with insurance, security, and professional management.

### **Proliferation into New Areas**

A new permitting process will encourage this new use to move into all areas of O'ahu, especially any with historic, scenic, remote, or other attractive features. We already know that Wai'anae, Mākaha, Mokulē'ia, Hale'iwa, North Shore, Kawela Bay, Kahalu'u, Kāneohe, Kailua, Waimānalo, Hawai'i Kai, Kāhala, and Waikīkī have suffered varying degrees of change caused by proliferation of short-term rentals. News is spreading fast as to how the Internet and lack of enforcement are allowing this industry to flourish. But it has flourished primarily because these shoreline communities represent what O'ahu was already famous for – its beaches and ocean activities.

But with mass permitting, operators in other areas will work to attract visitors. Those that readily come to mind include **Mānoa, Tantalus, Nu'uaniu, Pūpūkea, Ha'ikū, Maunawili, Waimānalo-Mauka, 'Ewa Beach, Portlock, Black Point, Mariner's Ridge, all coastline areas, all of the valleys, and all of the 'Heights'**. (Apologies if we missed anyone).

### **The Market is Huge**

No one doubts that vacationers and other visitors like to enjoy the tranquility of our residential neighborhoods – they are here by the hundreds and it's mostly illegal. O'ahuans have no obligation to give up their property rights and neighborhoods for the visitor industry. Open the gates through permitting, high profits, the Internet, and lack of enforcement - then there will be enough visitors to pack thousands of B&Bs. The industry is only limited now because it is “**prohibited**” and there is some threat of enforcement.

## **Owner Resident not Required**

Neither bill requires the owner of the property to be involved. The owner or lessee can hire an 'operator' to manage the B&B.

Bill 6 – “The owner, operator or proprietor of a bed and breakfast home shall be a fulltime resident in the detached dwelling used as the bed and breakfast home.”

Bill 7 – “The operator shall reside in the bed and breakfast home for the duration of the Permit.”

Neither bill provides adequate specification for residency, such as voting registration address, driver's license address, income tax address, how much time they actually spend there, and the like.

As with some currently illegal TVU chains, one owner has several short-term rental properties, each with a hired 'operator' or the like living in a room or separate garage or other structure. Under either bill, this scenario would qualify the property for a B&B permit.

## **Not Just Tourists**

This new B&B use will not be limited to tourists. B&Bs can operate more cheaply than the high-overhead hotels and will attract business travelers and the like into every neighborhood.

## **Try to Stop One**

Both versions include processes for neighbors within so many feet to prevent a B&B. These processes are so burdensome and impossible to utilize that not one B&B will ever be stopped this way, even if 100% of the neighbors disagree. Our culture dictates that we don't take public positions against our neighbors.

We entrust the government to protect our 'real' property rights – that is one of its basic legitimate functions. We should not have to run around conducting neighborhood campaigns for education and resistance when it is the government's duty to protect our property rights.

## **“GUEST SCREENING”? Guess Again**

During public meetings and official forums, the proponents of B&B permitting claim that careful “screening” of their guests will prevent less-than-courteous paying overnight guests from interrupting the fabric of our residential neighborhoods. This is not only impossible for B&B operators to achieve, but illegal to even attempt.

During a recent Hawaii Civil Rights Commission 'sting' operation on O'ahu, a legal B&B operator (holding a valid Certificate) was fined \$10,000 under HRS Public Accommodation Section 368-3. Section 12-46-7 of Hawaii Administrative Rules. Public accommodation is defined in Sections 489-1 and 489-2. Because it uses the words "of any kind" and when it lists inn, hotel, motel "or other establishments" the law is expanded to be interpreted broadly.

*Barb, don't understand this about exemptions*

The law, which has the exemption (with the renting of up to four rooms in your home by an individual if the individual resides there in) is covered in Section 515-3. It does not specifically list short term rental or bed and breakfast. It just says rental.

### **Neighborhood Board Approval – Not Required anywhere**

The administration version (08-6) only requires the 'applicant' to write their neighborhood board or community association and request to make a presentation. There is no requirement for the board or association to approve of the project, or even to allow the presentation. Also, there is no requirement for the DPP Director to consider the board's findings.

The council version (08-7) does not mention neighborhood boards.

### **Hotel Jobs**

As visitors choose B&Bs over hotel rooms, O'ahu's traditional hotel industry will suffer further and jobs will be lost. UNITE HERE! Local 5 Hawaii submitted testimony to the Planning Commission opposing the passage of 05-187 (now Bills 08-6 and 08-7). ILWU Local 142 submitted written testimony to the Council opposing Bill 08-6 CD1.

The main reason the traditional hotel owners/operators are not opposing these bills is that they plan to get into the package tour business of hotel/B&B/TVU package options – a few nights in their Waikīkī hotel, then a few nights in B&Bs in different neighborhoods. The hotel chain will handle all bookings, collections, cleaning, bills, and taxes. Earlier references to this new direction on one local hotel chain website has since disappeared.

Union jobs at the hotels will move to the very-difficult-to-organize neighborhood homes. Union workers will find affordable rental housing in an island wide market more difficult to find when the B&B conversions take rental housing off the market.

### **Just the Start**

From the Administration's cover letter for Bill 6 – "The DPP also believes that new B&B homes should be limited to residential districts, in this first expansion of the use, because of potential, significant impacts on agricultural lands . . . ." This means two things: 1) The City ultimately intends to expand B&Bs into other zoning districts, and 2) Agricultural lands are more important than our neighborhoods – that somehow it is all

right to inflict "potential, significant impacts on" our residential neighborhoods, but not farmland.

### **Neighborhood Watch, HPD, Crime**

HPD has asked neighborhoods to work in conjunction with them in order to deter crime. With the addition of so many strangers in our neighborhood, it would be nearly impossible to self-police, putting additional pressure on HPD and other first responders. Crime against visitors in residential neighborhoods is prevalent. In a July, 2006 KITV news story, HPD detective John McCarthy said "They're perfect for the criminal. They're here on vacation; they let their guard down. They have valuables. What more can a crook ask for?" Why invite more break-in artists into our neighborhoods?

### **Civil Defense**

The Civil Defense is working with the hotels on a plan regarding disaster preparedness. Each hotel is coming up with a plan on how they will "take care of" their visitors in a time of disaster. This includes, food, transportation to airport, etc. Once these tourists are sprawled into residential neighborhoods, who is responsible for their care in time of disaster? How will they be identified, fed, transferred to the airport? Additionally, Oahu's shelters are only capable of sheltering 35% of evacuees in time of need. Who will fund the additional shelters for these tourists in residential areas?

### **Burden the Infrastructure**

B & Bs add population that needs to be serviced by public infrastructure, infrastructure that has not been planned to accommodate the excess demand. Unlike most residents, the B&B visitor will be highly seasonal – so the infrastructure must be re-sized for a greater peak capacity than that currently required for family homes or long-term rentals.

### **Legal Problems for City**

City Liability – Insurance agents have confirmed that having paying guests violates the terms of the regular homeowner's policy – and that the paying **guests** (and their guests) **are not covered** in the case of fire, burglary, injury, death, storm damage, and the like. Victims of these calamities will sue the City for damages because the City issued a 'permit' for a lodging service without determining the suitability of the premises or operation. Bills 6 and 7 include no (or inadequate) requirements for lodging standards, insurance, cleanliness, or safety. Even if such requirements were made, how would the DPP fit the role as health inspector or the like? *A 'permit' carries very different expectations than the current 'nonconforming use' certificate.*

### **Public Opinion (informed)**

is solidly against any proliferation of *any kind of short-term rentals* in residentially zoned neighborhoods – as evidenced by the unanimous or near-unanimous votes of **six** Neighborhood Boards, the Planning Commission (unanimous), the Waimānalo Beach

Lots Assn, and the Lanikai Assn. Their resolutions and motions specifically cite B&Bs, not just TVUs, as undesirable – there is no confusion in their findings and intent. The Honolulu Planning Commission heard hours of on-point testimony from over a hundred people, including several land use and zoning experts. ***Not a single Neighborhood Board or community association supports more B&Bs.***

Cities, towns, and villages across the United States and the developed world are rethinking their earlier acceptance of B&Bs. Some are banning them outright. Other municipalities, having already legalized (or otherwise allowed them to operate), are now caught in a legal bind and unable to turn their neighborhoods back into neighborhoods. Honolulu must not make this mistake. Look at the Kaua'i mess. Let's not 'Hurry up and do the wrong thing.'

## **ADA**

Who is going to inspect all these units for ADA compliance? How will the City notify the health department of application and coordinate inspection prior to issuing a permit? A lot of these "units/bedrooms" are on the second floor of homes and must be in compliance. Again, a ***'permit' carries very different expectations than the current 'nonconforming use.'***

## **B&B vs TVU vs TVR vs STR**

There is a good reason why so **many operators of currently-illegal TVUs are openly lobbying for permits for B&Bs.** They know that once the ban is lifted and permitting begins, they will put on their sheep's clothing long enough to get a B&B permit, then go back to TVU operation. New TVUs will spring up everywhere with a B&B 'permit'. With the permit in place and the in-out traffic established, they know that there is no way for neighbors or the DPP to prove how many rooms are rented, how many guests are staying, whether or not the 'operator' lives there, etc. With thousands of such operations, and the Director without enough specific proof to revoke their permit or refuse renewal, B&Bs and TVUs will take over our neighborhoods. Operators will cloak their 'permitted' B&B (operating as a TVU) with high walls, gates, and No Trespassing signs – as some illegals are now doing in Waimanalo, making enforcement very difficult. The DPP is unlikely to go through the trouble of getting a search warrant if they are denied access to the property.

## **Cart Before the Horse – Enforcement First**

Most recognize that the DPP's enforcement tools are less than perfect. Neither bill offers any funding or tools for improved B&B or TVU enforcement, such as promised in Council Chair Marshall's June, 2005 Report. The DPP is having success at enforcement, but not enough – and not efficiently enough. Their tools are largely for physical zoning violations, rather than activity zoning violations. Change is needed – but the change must be based on carefully thought-out and tested enforcement techniques – that are proven to work. To legalize thousands of B&Bs and then hope that enforcement can keep up is

unwise – and most of us who have studied the situation in-depth, and have observed enforcement efforts, know it will not work. The DPP will be overwhelmed, there will be a political crisis, and O'ahu's neighborhoods will end up looking like Kaua'i where whole villages have converted to tourism at the expense of local people in need of housing. Let's put the horse back in front to perfect and test enforcement tools, then later *consider* very limited expansion of the B&B industry in areas zoned for such use.

### **Where to Live?**

Under any scenario resulting from passage of either bill, the price and availability of rental housing will be affected. The worst case, and most likely scenario is that thousands of whole house vacation rentals will operate with a B&B permit and all those houses will be removed from the family housing market – houses that would have been for sale or rent. Recent sales always drive the prices and all housing prices and rents will rise as a result, as will property tax valuations.

Under both bills any house with a B&B permit, even if rarely used, can no longer offer rental rooms long-term – even while the B&B is empty.

### **Words on Paper**

The advocates, the opponents, the Council, and the Administration are not what are important here. After ten-plus years, most of us will be out of the picture. What will be left are the words in the Revised Ordinances of Honolulu. The real estate industry, attorneys, travel agents, hotel operators, tour organizers, and others will find ways to exploit either of these bills to their advantage. Once they are physically, financially, legally, and politically entrenched – our residential neighborhoods will be gone.

### **Property Rights**

One of the basic functions of government is the protection of our 'real' (estate) property rights. After going through hundreds of years of history, tradition, and precedent we expect the government to establish and protect those property rights and the rules associated with them. We grant each other exclusive use and tenancy of a property through mutual agreement of protection. To force others (through government action) to recognize one's property rights, the rest of us have the reasonable expectation that the owner will use the property in a manner we have concurred with through the law. Properties border each other, and the activities on one property affect the use, attractiveness, and value of the adjoining and nearby properties. These expectations should not be trampled on by the very government expected to protect them. ***B&Bs are not such an exceptional need as to warrant the suspension of their neighbor's property rights.***

**PARTICULAR TO COUNCIL VERSION (BILL 08-7)**

### **Not the Same as a 'Home Occupation'**

B & Bs are visitor accommodation businesses, mini-motels, which by definition are incompatible with residential areas. They are unlike "Home Occupations" in that home occupations occur inside a residential home as an accessory use. With B & Bs, the *business is the home* and the property is marketed and used as a transient visitor accommodation. Also, they are different from a home occupation in that they embrace additional people in the home for overnight stays. A home occupation cannot even have employees on a daytime basis. B&B clients come and go at all hours and numbers.

The proposal behind Bill 7 is a strange animal – its head is "zoning" but its body is "regulated activities." (Chap 41). A desire for uniformity and clarity in laws should dictate that it be either one or the other. Logically it should all be zoning since it starts with amending the LUO and then regulates a "home occupation," a zoning creation. Also, it would be administered by the DPP, the planning & zoning agency of the City & County.

### **Basis for Need**

In Barbara Marshall's June 2005 District 3 Report, she baits us with "Such permits would require a substantial annual fee to provide for additional enforcement." Yet in the bill, the amount of the fee is left blank. Assuming that the fee is \$200 per year and 1,000 new 'permits' are issued generating \$200,000 per year – about enough to hire two new full time inspectors. There is no way that the two inspectors could keep track of 1,000 new businesses with all the neighbor complaints. And in the bill, there is no language requiring the revenues to be generated from the fees to be spent on enforcement – it will likely go to the general fund with no new enforcement hired.

### **Voting Scheme**

It will be absolutely impossible to get 50% of the neighbors to oppose, regardless of how much they oppose a B&B. A much more reasonable approach would be for the applicant to obtain 2/3 or more approval and prohibit if an adjoining neighbor objects.

### **No Density Limits**

There are no density limits defined in the Council bill (08-7). Although the Director has some discretion in allowing permitting, once an applicant has satisfied the physical and legal requirements, the Director will be unable to refuse a permit. Refusing a valid application, which has satisfied the same criteria as another accepted application, will lead the denied applicant to sue for equal treatment. The density will be whatever the market will bear, without regard to the neighborhood or neighbors.

**PARTICULAR TO DPP VERSION (BILL 08-6 CD1)**

## Try to Stop One

~~The only way neighbors can stop a new 'permit' is to get 51%+ of the property owners/lessees within 300 feet to sign an affidavit opposing.~~ Oops, CD1 eliminated any options for the neighbors except to write the Director or HOPE for a public hearing. ....

## Only One per 500 Feet, Until ....

The bill promises to limit B&Bs to one per 500 ft but in the case of multiple applicants within 500 ft, it gives *no criteria for the DPP Director to decide which applicant gets the 'permit'*. First applied-first granted cannot work because the process is partly official, partly unofficial with outside quasi-official parties involved. A short analysis of 08-6 exposes the loopholes.

Start with the 'Preapplication' process under SECTION 2 subsection (b) item (5). This subsection also applies to antennas, meeting facilities, etc. – none of which have the same 500' exclusion rule. Here are the preapplication steps:

- A) Make written request to Neighborhood Board or any 'community association' to present the 'project'. *The Board or Association does not have to approve the application or make any recommendations.*
- B) Provide written notice of presentation to adjoining neighbors only (no specifics given as to form or timeliness).
- C) If the Neighborhood Board or Community Association fails to respond with an opportunity to make the presentation within sixty days, this preapplication process is waived.

Now, suppose that two, three, or any number of 'preapplicants' within 500' of each other all send letters to their neighborhood board and the board neglects to respond to one and not the others, or the meeting ends with some presenting and some not, or one of an infinite number other possible scenarios occur, who is the first to satisfy the preapplication process? The whole preapplication process is beyond the control of the DPP, whose Director must decide which competing applicant gets the 'permit'.

Again, this section of law was constructed around other uses that have no exclusionary rule and does not take it into account this important distinction.

CD1 states: SECTION 12. a. The director of planning and permitting *may*, by rules adopted under HRS Chapter 91, provide procedures for the establishment of the order of processing of applications for a conditional use permit (minor) for a bed and breakfast home by lottery or other method of random selection.

The misleading word here, intentionally misleading, is *may*, which leaves the process completely up to the director. If the council wanted the director to use a lottery, they would have used the word *shall*. The sponsors of CD1 want us to think now that a lottery

will be used. However, the most likely scenario will be that this language will be substituted on Third Reading with language that gives preference to current illegal operators, which is what happened in the 1989 B&B law.

The current DPP procedure for exclusionary rules such as the 500 ft rule is usually determined by first-come first served. This is a *random* process the director *may* adopt.

Here is what will happen, sooner or later – and perhaps sooner by design for those wishing to eliminate any density restriction:

1. Two owners within 500 ft will start the 'preapplication process' through the same, or adjoining, neighborhood boards. Owner A starts first, even if by only one day, by writing a letter to their neighborhood board requesting to be placed on the agenda for the next Regular Meeting. Owner B writes the same or some following day and gets on for the same neighborhood board meeting. This letter was their first official expression (under the law) of intent to seek a CUP.
2. The board schedules Owner A on the agenda first, Owner B follows with their presentation. The board takes, or does not take, action for or against either project. There are limitless possible scenarios here.
3. The next day, Owner A and Owner B proceed to the DPP to submit their application. Owner B arrives first and submits, receiving a time/date stamped receipt. Owner A arrives a few minutes later to submit their application, which is also time/date stamped.
4. The Director accepts the application of Owner B and denies the application of Owner A. Or, the Director 'accepts' both applications and later denies the application of Owner A, explaining that they are within 500 ft and the DPP received application B first.
5. Owner A hires an attorney who successfully files for an injunction to prevent the Director from issuing the CUP to Owner B – based on the fact that Owner A initiated the process before Owner B and proceeded with alacrity to the DPP after completing the preapplication process. Owner A's attorney makes the case to the judge that the application process unfairly discriminates against applicants who follow the speed limit, have to wait for the bus or HandiVan, etc.
6. Owner B hires an attorney to file for an order to force the Director to grant the CUP to owner B, having satisfied all stated criteria – the court agrees.
7. The Director goes to the Corporation Counsel for defense and advice. The Corporation Counsel, knowing that the law is vague and defending it would be time consuming and futile, advises the Director to issue CUPs to both Owners A and B. The Director issues both.

8. The Director and the overburdened DPP 'overlook' the 500 ft exclusionary rule in future applications because it was proven legally indefensible and too much trouble and work to enforce – a precedent had already been set.
9. Applicants within 500 ft of already-issued CUPs apply in unlimited numbers – each motivated by the prospect of making good money.

There are an unlimited number of variations on the above, all stemming from the same cause and leading to the same result. The poorly conceived law, lack of resources and willpower in the DPP and Corp Counsel, plus the huge monetary incentives to the owners, real estate attorneys and real estate professionals will bring down the 500 ft exclusionary rule sooner than later.

### **Hundreds of Public Hearings?**

Bill 08-6 gives the DPP Director the option to hold a public hearing for input on the permit application. This will create a lot of work for the DPP staff, and is unlikely to happen often. Couple this fact with the fifteen-day opposition time limit and there will be little public input to the permitting process.

Screening