Bill 41 (2021)
Testimony

MISC. COM. 592

ZP

From: CLK Council Info
Sent: Tuesday, November 16, 2021 2:53 PM
Subject: Zoning and Planning Testimony
Attachments: 20211116145308_3_-_Memorandum_on_Impact_of_Bill_41_on_the_Resort_Zone.docx

Written Testimony

Name	Jim Tree
Phone	
Email	ssitree@aol.com
Meeting Date	11-18-2021
Council/PH Committee	Zoning and Planning
Agenda Item	Bill 41 Extension of Time
Your position on the matter	Comment
Representing	Self
Organization	
Written Testimony	In order to assist in making an informed decision on whether additional time should be granted to consider BIll 41 on offer the attached Memorandum that explains some very important issues that should be considered regarding Bill 41. I understand the merits of the issues are not relevant to the consideration of extending time, but what must be considered is relevant to whether an extension is warranted or not. For the purpose of assisting with the extension issue I offer the attached memorandum and request that the merits of the memorandum be considered by the committee at the appropriate time.
Testimony Attachment	20211116145308_3_-_Memorandum_on_Impact_of_Bill_41_on_the_Resort_Zone.docx
Accept Terms and Agreement	1

IP: 192.168.200.67

Memorandum on Impact of Bill 41 on Properties in the Resort Zone
(by Jim Tree)

Introduction

Bill 41 has a noble purpose - "The purpose of this Ordinance is to **protect the City's residential neighborhoods**..." However, Bill 41 makes at least four changes that have nothing to do with the residential neighborhoods and everything to do with the Resort zone. These changes are contrary to the stated purpose, and contrary to established law and vested property rights in the Resort zone. These four changes are:

1. Transient Vacation Units (TVUs) are prohibited in the Resort zone.
2. Condo owners in a condominium hotel **must** place their condo for rent by one central hotel operator.
3. A condo in a condominium hotel may not be used as a primary residence.
4. The owner of a condo in a condominium hotel must pay rent to the central hotel operator to stay in their own condo.

1. Bill 41 Prohibits TVUs in the Resort Zone

Bill 41 overreaches its stated purpose and bans Transient Vacation Units in the Resort Zone. (**See, Bill 41, Master Use Table at p. 19**) Not only have those in opposition to Bill 41 argued that Short Term Rentals (STRs) and TVUs should be allowed in the Resort zone, but Supporters of Bill 41 have come forth in a united voice calling for the City Council to encourage TVUs in the Resort Zone. For example:

Representative Patrick Branco, House District 50. (p. 726) Supporter of Bill 41. "Locating vacation rentals in areas zoned explicitly for tourism is not only the right thing to do; it is the only sensible option."

Hawaii Lodging & Tourism, Mufi Hannemann Supporter of CD 1. (pp. 528-29) Representing more than 50,000 hotel rooms and nearly 40,000 lodging workers. "HLTA's longstanding position has been that legal short-term rental units should be allowed to operate within legal areas such as the Resort Mixed Use Precinct in the Waikiki Special District so long as they pay their fair share of taxes."

Good Neighbor (p. 509) Supporter of Bill 41. Indicated that TVUs should be allowed in the Resort zone, and this should be in Master Use Table 21-3.

Lori Teranishi (p. 430) Supporter. "our visitors should be directed to areas that have been zoned for tourism".

Supporters and those in opposition are in agreement that STRs and TVUs should be allowed in the Resort Zone, in addition, the Land Use Ordinance makes clear the Resort Zone is a place for STRs and TVUs. "**This district is intended primarily to serve the visitor population**..." ROH Sec. 21-3.100.

Historically STRs and TVUs have been allowed in the Resort zone; both prior to Honolulu enacting a Land Use Ordinance (LUO) and since enactment. In 1986 LUO No. 86-96 took effect and permitted STRs of less than 30 days in the Resort zone and districts. Up until Bill 41 STRs and TVUs have been allowed in the Resort zone. Bill 41 would not allow any rentals less than 180 in the Resort zone except for hotels. Bill 41 takes away vested property rights of owners of property in the Resort zone and does so without a stated government purpose for doing so. In order to not be an illegal taking the government must provide compelling reasons why the change is necessary and narrowly tailer the remedy. Further, the stated purpose of Bill 41 is thwarted by prohibiting STRs and TVUs in all but hotels in the Resort zone. The Resort zone is the place to serve the visitor population. Elimination of TVUs in the Resort zone will put added pressure on the residential areas, frustrating the purpose of Bill 41. This illegal taking of a vested property right should not be entertained.

Since there is no dispute that TVUs should be allowed in the Resort zone, then why are they prohibited in Bill 41? This makes no sense. Bill 41 adds many stiff conditions to TVUs, (see, Sec. 21-5.730, et. seq.). There is a level of passionate debate of whether these conditions should or should not be placed on TVUs in the residential neighborhoods, but no one is advocating they be placed on TVUs in the Resort zone. The only request is that STRs and TVUs in the Resort zone be required to pay the Resort-Hotel property tax, and TAT/GE taxes, but this is already required. Placing additional restrictions on TVUs in the Resort zone would put them at a severe disadvantage to hotels, which are not subject to these additional restrictions. Placing a $5,000 registration fee and $2,500 renewal fee, in addition to property taxes and TAT/GE taxes will put many of the Resort TVUs out of business, placing increased demand for TVUs in the Residential neighborhood. The City Council is encouraged to change Table 21-3 to "P"

(permitted) for TVUs inside the Resort zone. "P/c" should not be the use in the Resort zone as this is contrary to the stated purpose of Bill 41 and will put added demand for STRs and TVUs in the Residential neighborhoods.

2. **Bill 41 requires Condo owners in a condominium hotel to place their condo for rent by one central hotel operator.**

Sec. 21-5.360.1 (p. 23 of Bill 41). "Units in a condominium-hotel must be part of the hotel's inventory, available for rent to the general public."

First, why is this in a Bill dealing with STRs and protecting the Residential neighborhoods? There was no community involvement in drafting this restriction, and no reach out to affected stakeholders. When unrelated provisions are placed in Bills there are often significant adverse, unintended consequences. Such is the case here. The condo hotels on Oahu are primarily non branded, mixed use condo hotels, i.e., owners of individual condos can decide to use the condo as a primary residence, second home, long-term rental, or short-term rental, and can decide to put their condo in the hotel pool, or contract with a local management company, or self-manage their condo. This provision, and the provisions detailed below, change decades of law on how condos in condo hotels can be used, and what does any of this have to do with the purpose of Bill 41? Condo owners have uniformly spoken out against this regulation that would create a monopoly for the hotel operator, but even hotel operators have objected.

Aqua-Aston Hospitality (pp. 552-554). "Moreover, the proposed Section 21-5.360.1 states that "units in condominium hotel must be part of the hotel's room inventory available for rent to the general public." Based on Aqua Aston's experience, it is extremely rare for every unit in a condominium project to be a part of the hotel's room inventory. While a condominium hotel operator will make every effort to offer every owner in the condominium project the opportunity to place his or her unit in the hotel room inventory, there will always be owners who choose to use off-site rental managers to rent their unit as a transient vacation unit ("TVU"), to the extent legally permissible, or use their unit as a residence." (p. 553).

Further, Aqua Aston warns the City that this restriction may trigger Federal securities law violations. "**Finally, we are also concerned that requiring all units in a condominium project operating as a condominium hotel to be**

included in the hotel's inventory and used exclusively as hotel units may trigger a federal securities law issue if the developer failed to register the property as a security." (p. 554, emphasis supplied).

Marriott Vacations Worldwide (pp. 549-551) "Requiring condominium hotel units to be apart of the hotel inventory is impractical and difficult to accomplish. It is rare for every unit in a condominium project to be a part of the hotel's room inventory as some owners use their unit as a residence." (p. 550)

The Resort Group, the master developer of Ko Olina Resort. Submitted to the Planning Commission on 9/7/2021.

"This DPP Bill is drafted in a manner that benefits the hotel industry by reassigning power to major hotel operators by requiring that a hotel operator book the reservations, manage operations and set nightly rates for all TVU units...Finally, it does not allow buildings with TVUs to be mixed-use with long term housing options, which unnecessary impedes on the flexibility of buildings within resort areas and limits long term housing inventory...The Resort Zone at Ko Olina is specifically designed to accommodate visitors in resort communities that are separate from the traditional residential neighborhoods the bill seeks to protect."

Further, giving a monopoly to a central hotel operator will put many local firms out of business.

Kaiula Jack, Founder and Principal Broker of Ali'I Rentals. To Planning Commission. 8/30/2021

"We manage about 150 properties mainly in the Waikiki area and employ 25 local residents that live in our community. The money my company and my staff receive stays on the island unlike large Hotel Companies who are obviously the driving force behind the DPP STR Draft Bill. **If this Bill is passed it will shut down Ali'I Beach Rentals for good and all 25 of us will be out of a job along with THOUSANDS of other local residents that work in the LEGAL STR industry...**This is a time when government should be taking steps to create jobs not delete them with bills that virtually eliminate this particular part of the licensed and regulated real estate industry." (Emphasis in original)

Nerijus Puida. Rental Management Business Owner. To Planning Commission. 8/30/2021

"This bill threatens to wipe out our legal short-term rental management business that we built over the years. We own 5 condos in the Ilikai Apartment Building that falls under the resort-zoned condo hotel category…

"The purpose of this Ordinance is to better protect the City's residential neighborhoods and housing stock from the negative impacts of short-term rentals".

That sounds reasonable…However, after reading the entire bill it is obvious that one of the main purposes of this bill is to place massive and unreasonable restrictions on legal resort-zoned Waikiki condo hotels and TVUs and hand over short-term rentals to the Hotel industry:

1: Sec 21-5.360 Condominium Hotels: "Units in a condominium-hotel must be part of the hotel's room inventory"

This section has nothing to do with protecting residential neighborhoods and housing stock from negative impacts of short-term rentals. The only purpose of this ordinance is to hand over property rights from the owner to the hotel industry.

If this ordinance is passed, all privately-owned condo-hotel units would be forced to go through the hotel pool. Hotels will be able to charge high management fees since all competition is eliminated…and have no fear of losing clients since owners would have no other choice…

For owners like me, who have a sizable mortgage this arrangement will devastating." (Emphasis in original)

Kevin D. Taylor, President and Realtor, Alohana Realty LLC. To Planning Commission. 8/30/2021.

"Please read **Sec. 21-5.360 Hotels and Hotels Units.**

Does this have ANYTHING to do with "approx.. 40,000 vacant homes in residential neighborhoods"? No, it does not…

If you own a unit in the Ilikai…Waikiki Banyan…or Waikiki Sunset…for example:…

You can no longer hire a company like mine to manage your unit for you.

What CAN you do with the unit you own?

A. Give it to the Aqua-Aston front desk. They will put it in their hotel pool. They will pay you less than owners make through my company.

How does that do anything about short term rentals in residential neighborhoods? It doesn't." (emphasis in original)

Lehua Slater, Accountant, Ali'I Beach Rentals, Inc. To Planning Commission. 8/30/2021.

"As a born and raised resident and employee of a family operated vacation rental property management business in Waikiki on the island of O'ahu, I see the multiple and intertwined economic and social benefits of maintaining locally and individually owned short term rentals...For the past 10 years I have been the accountant for a locally owned and operated 100% legal vacation rental business. We currently maintain 150 individually owned condos in Waikiki and have assisted hundreds more throughout the years, many who were locally owned and operated. All within the legal zoned areas of Waikiki only...This ordinance attempts to force our clients to relinquish their property management to a hotel that is not locally owned in effect giving the hotels a monopoly."

3. **A condo in a condominium hotel may not be used as a primary residence.**

Sec. 21-5.360.1. (p. 23) "The use of a condominium-hotel unit as a primary residence or usual place of abode is not allowed."

Mixed use condominium-hotels, where residential living and short-term and long-term rentals, are allowed is how condo hotels have been governed in Hawaii and throughout the U.S. Some branded hotels may prohibit residential living, but this is not because of governmental regulations, but because the developer placed this restriction in the Condominium Declaration or created a CC&R. In such cases, condo purchasers knew of such restrictions prior to purchasing the condo and knew that was the rule of that branded condo hotel. When the government creates such a restriction, long after the owner purchased the condo, with a legal right to use the condo as a primary residence, this is a taking by the government. In this case there has been no showing of why such a taking is linked to a legitimate or compelling reason of the government, therefore, it is likely if passed this provision will be

found to be an unlawful taking. Further, such a provision is in direct opposition to the purpose of Bill 41. When a local family, that uses their condo in a condo hotel as a primary residence is displaced, they will likely need to purchase a primary residence in a residential neighborhood, making less housing available in the Residential neighborhood, creating more demand which will naturally result in less affordable housing. This provision makes no sense. A grandfather clause giving current users a right to use their condo as a primary residence is not the answer. This only pushes delays the added stress on the residential neighborhoods and prohibits parents from passing the family condo to their child. No one has recommended that condo owners should not be able to use their condo as a primary residence, but many have pointed out that it is typical for this to happen in a condo hotel and this right should continue.

Faruq Ahmad (p. 72) "There are residents at the Ilikai Marina who use their units as primary residence…The Commissions' proposal to disallow this is an unreasonable and improper limitation. It will also result in the loss of homes to individuals who currently use it as a primary residence."

Valaree Albertson (p. 84-86) "I know a few full time residents at the Banyan and my understanding is the DPP wants to stop units at the Banyan from being a primary residence – OUCH! Why would they want to displace seniors (or anyone) from the home they own and hold title to. Who is even THINKING this is okay??? I mean really?! Do they even know how condo properties like ours work? And to think I would have to give my home over to a hotel and pay money to stay there – really? You can do that?" (at p. 85, emphasis in original)

Arthur Deffaa (p.87) Owner at Waikiki Sunset. "Owners have the right to decide how to use their units, whether as short-term rentals, long-term rentals, or as primary residences. Bill 41's attempt to limits owners' rights is problematic, impractical, and unacceptable."

Douglas Ng (p. 319) "I am the owner of a condo in the Waikiki Banyan…I do not want it to be part of the hotel's room inventory. I do not want to pay full rental rates if I stay in my own unit. I don't want to lose my right to use my unit as my primary residence in the future if I choose to. I believe the Bill is unconstitutional and unreasonable. It is an overreach of property owners' rights that is unprece[d]ented."

Aqua-Aston Hospitality (pp. 552-554). "[T]here will always be owners who choose to use off-site rental managers to rent their unit as a transient vacation unit

("TVU"), to the extent legally permissible, or use their unit as a residence." (p. 553).

Marriott Vacations Worldwide (pp. 549-551). "It is rare for every unit in a condominium project to be a part of the hotel's room inventory as some owners use their unit as a residence." (p. 550)

The DPP in draft 2 stated the status quo would be preserved and condo owners in condo hotels would continue to be able to use their condo as a primary residence. This is the correct result.

4. **The owner of a condo in a condominium must pay rent to the central hotel operator to stay in their own condo.**

Sec. 21-5.360(c) "Rental rates for all hotel units must be determined by the hotel operator or the manager of the hotel's centralized booking service. Hotels and third party booking services may not provide discounted rental rates to the owners of condominium hotel units or hotel guests arranged for by the owners of condominium hotel units unless the same discounted rates are available to members of the general public that are not condominium hotel unit owners or guests of condominium hotel unit owners."

This proposal requires an owner to pay to a central hotel operator the full advertised rate to stay in the condo the owner owns in fee simple. What governmental purpose would such a provision serve? No one is requesting such a provision, not the condo owners, not those supporting Bill 41, and not the hotel operators.

Marriott Vacations Worldwide (pp. 549-551) "Prohibiting discounted rental rates for the owners of condominium hotel units restricts the owners' usage of the unit and does not further the goal of preserving residential neighborhoods since they are already properly zoned." (p. 549) Marriott recommends removal of this provision. (p. 550)

Aqua-Aston Hospitality (pp. 552-554). "Furthermore, the restriction in Section 21-5.360(c) prohibiting hotels and third-party booking services from providing discounted rental rates to the owners of condominium hotel units or hotel guests arranged for by the owners of condominium hotel units unless the same discounted rates are available to members of the general public is problematic…Prohibiting

discounted rental rates does nothing to further the goal of preserving residential neighborhoods." (p. 553)

Imagine the hypothetical case of an owner that purchased a condo in a condominium hotel in a Resort zone, has a mortgage, pays the Resort-Hotel property tax (four times the residential rate), has expensive HOA fees, utility expenses, has to pay TAT/GE taxes, and prior to passage of Bill 41 hires a local licensed real estate management firm and pays that firm 20% management fee. The couple is barely making expenses but they are gaining equity by their sweat (they paint the unit and make repairs themselves as they cannot yet afford to hire this done.) Then the City Council passes Bill 41. The sole central hotel operator has no competition and operates as a government mandated monopoly. The hotel operator charges 50% management fee. The couple is now significantly underwater and seeks a second mortgage. Painting and repairs need to be made and the couple moves into their own condo for a month to make the repairs, and they receive a bill for rent due at the advertised rate with TAT/GE taxes added. In frustration the couple puts the condo for sale but receives no offers. Their realtor explains prices have dropped by $300,000 and their first and second mortgage are much more than the fair market value. The couple asks why the big drop? With the city's adoption of Bill 41 owners are compelled to place the condo into the hotel operators pool and the hotel operator has just announced they are sorry but because of default by many owners in the project they have to raise their management fee to 65%, replies the realtor. "Is that legal" the couple asks, and the realtor responds, yes, not only is it legal but it is mandatory for you to use this hotel operator and no one else, because of Bill 41. "Do we really have to pay to stay in our own condo to make repairs?" Yes, because of Bill 41. Two months later the project votes to make the entire condo a residential condo to avoid the mandatory 65% management fees, and rental fees to stay in their own condo. Property taxes go from $16,000 per condo (Resort-Hotel rate) to $4,000 per condo (residential rate) and the government loses $3,600,000 property taxes per year from this one 300 unit project. In addition, the government loses $4,599,000 in TAT/GE taxes per year from the project that use to rent condos out at $400 per night with a 70% occupancy level. Multiple defaults occur each month and financing is pulled for that project. Eight months later the project goes under as there are not enough owners paying HOA fees and no financing available for sales. A class action lawsuit is started against the local government for damages of 2 billion dollars from cumulative damages from over 30 condo hotels and thousands of condo

owners due to illegal taking by the government in a Bill that was not "narrowly tailored to serve a compelling state interest". Allegations include the City and County of Honolulu passed Bill 41 dealing with protecting the Residential neighborhood, but in doing so included many unconscionable restrictions against TVUs and condo hotels in the Resort zone that had nothing to do with "protecting the City's residential neighborhoods". These illegal provisions compelled condo owners to enter into illegal monopolies with central hotel operators, a practice that violates Federal security laws. Owners, central hotel operators, and local government are embroiled in litigation over Federal security law violations, antitrust violations, and illegal monopolies. ////end of hypothetical////

Michael A. Lilly (pp. 419-422) former Hawaii Attorney General.

"I have personal experience in winning an inverse condemnation case against the City. Representing Liberty House, I won a claim for inverse condemnation when the City induced the business to set back its new building on King Street for street widening purposes. When the City refused to pay, I sued and recovered at trial an award of $1.5 million in damages against the City, which was upheld by the Hawaii Supreme Court in *Cornuelle v. City and County of Honolulu*, 71 Haw. 652, 795 P.2d 860 (Haw. July 17, 1990. Memorandum Opinion)... We believe the current proposal would have serious negative ramifications for Oahu, especially the loss of major tax and visitor spending revenues as well as families losing their valuable family homes."

Conclusion

Bill 41 is not narrowly tailored to serve a compelling state interest and is therefore likely an illegal taking of valuable property rights. The city's Zoning and Planning Committee and the City Council should quickly remove the restrictions on use of TVUs in the Resort zone and remove all restrictions on condominium hotels in the Resort zone as was voted on by the Planning Commission. The DPP failed to follow the vote of the Planning Commission to introduce a Bill that removes the restrictions imposed in the Resort zone. Instead, Bill 41 contains the most egregious provisions introduced by the DPP, provisions involving the Resort zone that were rejected by the Planning Commission. The City council is considering the wrong draft, a draft that includes many unrelated, unnecessary, and harmful provisions related to serving the visitor population in the Resort zone. The Planning Commission spent more than half of their time in dealing with citizen complaints about unrelated restrictions in the Resort zone, and after hearing much

public testimony on this point concluded the Resort zone should be bifurcated from the Bill. The City should follow this recommendation and quickly adopt a draft that allows TVUs as a Permitted use without conditions in the Resort Zone and should preserve the status quo for condominium hotel operations in the Resort zone and Resort district. This will free up much needed time and resources for the City to consider needed enforcement actions against illegal STRs, and ways to protect the residential neighborhoods from the adverse effects of STRs.

From: CLK Council Info
Sent: Wednesday, November 17, 2021 3:24 PM
Subject: Zoning and Planning Testimony

Written Testimony

Name	Cade Watanabe
Phone	
Email	cwatanabe@5.unitehere.org
Meeting Date	11-17-2021
Council/PH Committee	Zoning and Planning
Agenda Item	Bill 41
Your position on the matter	Support
Representing	Organization
Organization	UNITE HERE Local 5
Written Testimony	Aloha Chair Elefante, UNITE HERE Local 5 would like to register our support in support of the time extension request on Bill 41 regarding Short Term Rentals. Thank you. Cade Watanabe
Testimony Attachment	
Accept Terms and Agreement	1

IP: 192.168.200.67