

GET Committee

From: Tamara A. Paltin
Sent: Thursday, February 7, 2019 8:31 AM
To: GET Committee
Subject: Fwd: Appointment and Removal of Administrative Heads of Departments (Director of Housing and Human Concerns) (GET-1(9))
Attachments: wender comments annotated 2017 0901.pdf

Get [Outlook for iOS](#)

From: Leina Wender <waiokila@gmail.com>
Sent: Thursday, February 7, 2019 5:25:32 AM
To: Tamara A. Paltin
Subject: Appointment and Removal of Administrative Heads of Departments (Director of Housing and Human Concerns) (GET-1(9))

Dear Councilmember Paltin,

I am writing in opposition to the appointment of William Robert Spence as Director of Housing and Human Concerns. My opposition is based on his actions as Planning Director related to the 2012 passage of the bill amending Title 19, Maui County Code, Relating to Short-Term Vacation Rental Homes and subsequent events. Mr. Spence's actions were the result either of incompetence or of deliberate misinterpretation of the law. In either case, they were so egregious that they render him unfit to hold any high level executive position.

Even though Mr. Spence drafted the proposed bill and was present at meetings of all of the relevant bodies which reviewed it during 2011 and 2012— Maui Planning Commission, Hāna Advisory Committee to the Maui Planning Commission, Planning Committee of the Maui County Council, and the Maui County Council itself—he failed repeatedly to mention that the community plans have the force of law and that the proposed bill was in direct conflict with the Pā'ia-Ha'ikū Community Plan (as well as the Hāna Community Plan and perhaps others). Most often he remained silent; in the few situations where he gave advice, he did not state the law correctly.

Likewise, in the 177 page Memo Report he submitted on May 25, 2011, a lengthy "Analysis" section has only one sentence about community plans, and it is inaccurate: "Though not explicitly stated in the bill, the respective Commissions may consider the county general and community plan policies when reviewing land use commission special use permits." Thus he references the plans as an option ("may") which can be ignored, rather than as legislation having the force of law.

In 2017 Mr. Spence finally acknowledged the conflict, but blamed it on the Council. He admitted that "[T]he community plans have the force and effect of law." He said that the department thought the council was aware of the community plan guidelines when it passed the 2012 bill, but that in retrospect it was "not clear that the County Council was aware of this particular policy." What he didn't say was that

this lack of clarity had been provided by Mr. Spence himself. His solution: change the community plan to accommodate the bill.

The planning commission instructed the planning department to get more community input for this, and the alternative, solution. The president of the Ha'ikū Community Association asked me to speak on a panel with Mr. Spence. I am attaching my comments from this event detailing some of the many meetings in which Mr. Spence, attending in his official capacity, failed to inform or misinformed decision-makers on this issue.

Mr. Spence's gross failure to carry out the responsibilities of his position as planning director in this case, whether negligent or intentional, render him unfit to serve in this important executive position.

Aloha,

Elaine Wender

COMMENTS BY ELAINE WENDER REGARDING ALTERNATIVE PROPOSED BILLS
RELATING TO SHORT-TERM RENTAL HOMES IN THE PĀ'IA-HA'IKŪ
COMMUNITY PLAN AREA

September 1, 2017

On August 24, 2017, the Ha'ikū Community Association held a meeting to discuss the proposals to resolve the conflict between the 1995 Pā'ia-Ha'ikū Community Plan and the ordinance relating to short-term rental homes. I was asked to speak on the panel with the planning director. The following is a slightly edited version of my opening remarks in response to the planning department presentation, and my answers to questions posed by the moderator.

INTRODUCTORY REMARKS

A couple of weeks ago I read a quote by planning director Spence in the Maui News in which he said, "*The community plans have the force and effect of law.*" I was stunned, as I had never heard the director so completely endorse this conclusion, which many of us have advocated for years, and which is factually and legally accurate. My experience has been that the current administration, including the planning department, has considered the plans to be, at best, mild advisory documents with no legal power and at worst, annoying, irrelevant utterances which are wholly ignored.

Mr. Spence was further quoted as saying that the department thought the council was aware of the community plan guidelines when it passed the 2012 bill. But when the department finally got around to reviewing the minutes of those meetings, it was "*not clear that the County Council was aware of this particular policy,*".

Was the council truly unaware, and if so, why? It is the responsibility of the planning department to advise both the planning commission and the county council on planning matters, and the responsibility of corporation counsel to give legal advice.

I was at many of the meetings which considered the bill, and I recalled that while I and others testified before the commission and the council to urge adherence to the community plans, there was almost no reference to them by the planning department or corporation counsel, who were always represented at these meetings. In the few instances where they were referenced, the advice given was inaccurate.

So I went back to look at the record to see if my memory was correct, and I found more to support it than I expected.

But first, let's go back to the creation of language in the community plans relating to vacation rentals. I will speak only of the 1994 Hāna and 1995 Pā'ia-Ha'ikū plans, which were approved by the planning commission and the county council and signed into law by then mayor Linda Lingle. However, the short-term rental homes ordinance conflicts also with other community, county and state plans.

The Pā'ia-Ha'ikū plan has several policies and objectives which relate to vacation rentals. We are concerned tonight with the one which states:

Limit visitor accommodations to owner-occupied "bed and breakfast" establishments that are residential in both scale and character. Any proposed "bed and breakfasts" should not be situated near the shoreline so as to avoid the proliferation of this use and subsequent changes in the character of the region's coast.

The citizens' advisory committee (CAC) which drafted this plan included many talented and even legendary residents, some of whom sadly are no longer with us, such as John Bose, who was the chair, and Jonathan Waxman, who also served on the 1983 CAC. Collectively they spent hundreds of hours listening to public testimony and crafting this document, with no intent other than to produce a plan which would best benefit their community. I recently asked Dana Naone Hall, also a CAC member, whether the section now under discussion was controversial. She said that it was not; that except for one or two CAC members with ties to the construction industry, who were not supportive but did not mount a vigorous opposition, the CAC was united in

strongly endorsing this policy. She added that their interpretation of “*near the shoreline*” included the entire SMA area.

The Hāna Community Plan includes a policy and objective:

Discourage transient rental accommodation uses outside of the Hana urban area.

Both of these policies have been consistently ignored by the planning department, planning commission and county council since the current mayor came into office in 2011.

But this was not always the case.

In 2007 the Maui Vacation Rental Association sued the county because then-mayor Tavares was following the law and not doing their bidding. The lawsuit got tossed out of court. A brief filed by the county quoted from the general plan and the community plans and asserted that they have the force and effect of law and cannot be simply ignored by county officials whose duty it is to enforce them. The brief referenced the language in the Pā‘ia-Ha‘ikū plan, which notes a lack of affordable housing, affecting a broad cross-section of residents, and, quoting, stated that “[t]he housing shortage is exacerbated by the conversion of residential dwellings to short-term rentals which, in turn, negatively affects the character of traditional neighborhoods in the region.” The brief quotes the Hāna Community Plan which says, “the use of existing housing inventory for illegal vacation rentals was cited as a factor which decreases the availability of housing for residents” and it also refers to the provision discouraging “*transient rental accommodation uses outside of the Hana urban area.*”

It is my hope that, since we have a new council and soon will have a new mayor, we may return to the rule of law.

Both of the council members who voted against the bill are still on the council, and we have several new, independent intelligent members. Both the planning director and corporation counsel are appointed by the mayor. But the council council now has the power to retain special counsel as legal representative for any special matter presenting

a real necessity for such employment, and to designate attorneys within the office of council services to serve as legal advisors. They don't have to rely on corporation counsel. I hope that the council will use this power to retain attorneys to review the ordinance regulating short-term rental homes for its compliance with superseding state, county and community laws and plans, and suggest modification or elimination of the ordinance based on that review.

In the meantime, there should be a moratorium on the issuance of any new permits under this ordinance.

For any of this to happen, you will have to get organized. The vacation rental industry is well-organized and has a loud voice. They can afford to take time out to attend daytime meetings; their income is at stake. The problem has always been that their neighbors who are affected often don't have the time or energy to engage, even though their sense of neighborhood and well-being are at stake.

QUESTION ONE

When the current short-term rental homes policy was being proposed and adopted in 2011-2012 was there a discussion about how to resolve the issue that the policy was not in compliance with the language in some of the existing community plans?

I've been researching this question, and have reviewed the minutes of many, but not all, of the relevant meetings.

1. First the council planning committee voted to send the draft bill to the three planning commissions for review and recommendations. At that meeting, both Mr. Spence and corporation counsel offered that they had no comments on the draft. (Planning Committee 2/28/11)
2. Three months later, when the draft bill was sent to the commissions, it was accompanied by a 177 page memo report from Mr. Spence. (Department of Planning 5/25/11)

The 17-page section titled *State and County Policies* did include the provisions of the community plans I have mentioned. This was followed by five pages of *Analysis*, in which there is only one sentence related to the community plans: “*Though not explicitly stated in the bill, the respective Commissions may consider the county general and community plan policies when reviewing land use commission special use permits.*”

The next section, *Community Input*, reports on a meeting with this association, and concludes: “*There was agreement with the Paia-Haiku Community plan policy that prohibits rentals on the shoreline, stating that our shorelines have enough pressures on them already.*” This misstates the actual policy which refers to rentals near, not only on, the shoreline and does not emphasize that compliance with the plan was mandatory..

The next section, *Testimony*, includes a reference to exhibit 25, a 37-page detailed review of the draft bill by Thomas and Susan Luten of Kīhei, which made numerous references to the ways in which the proposal violated state and county laws, including the community plans.

And then there is the *Recommendation* from the planning department. Mr. Spence recommended approval of the draft bill with some amendments, but with no reference to the necessity of adhering to the provisions of the community or other plans, which were, of course, in conflict with the draft bill.

3. Mr. Spence and three staffers, as well as two corp counsels, were present at the Hāna Advisory Committee to the Planning Commission (HAC) meeting where the draft was reviewed. The oral staff presentation made no reference to the Hāna Community Plan. In my testimony I referred to the relevant section, and committee member John Blumer-Buell noted that absolutely nothing was being done to discourage transient rental accommodation uses outside of the Hāna urban area, as the plan required. But none of the six county representatives mentioned the necessity of compliance with the plan. The committee voted unanimously that the bill should apply only to the urban district of Hana. (Hāna Advisory Committee 6/7/11)

4. The next week the draft went to the Maui Planning Commission. I testified as to the Hāna plan and the HAC's recommendation. The lengthy oral staff presentation referred once to the Hāna plan and staff said: **(Planning Commission 6/14/11)**

"So, what they recommended is that they wanted to have it only in the Hana Urban District be eligible for those permits. They're looking at the community plan. That does talk about that."

Neither the Pā'ia-Ha'ikū nor any other community plan was mentioned in the presentation or the powerpoint.

The planning commission's Hāna member commented:

"...when the community plans are redone, each community plan hopefully will address this issue and determine what they want for their area. And that since the community plans are adopted by the Council, it would supersede -- in certain aspects, it might supersede whatever we pass at this time for short-term rentals. And I think that's an appropriate way to go."

Staff replied:

"I did ask our long range division head about that. And he said once the community plans are adopted, you can go in and make the amendments you need in them."

There was no mention of the legal necessity of having the bill conform to the existing plans. They were treated as a slight nuisance which could be done away with the next revision.

The Hāna member did comment:

"If we keep it to the Hana Urban District, that's what the old community plan said, so we're consistent with the existing community plan for Hana."

Both he and Mr. Spence agreed that the HAC felt very, very strongly about this restriction, but the motion to include it in the bill failed.

5. The draft then went back to the council planning committee. Numerous meetings and hearings were held; I again testified regarding conflict with the Hāna plan and others referenced other conflicts. **(Planning Committee 9/12/11)**

At one meeting, the following exchange took place: **(Planning Committee 10/31/11)**

Councilmember Pontanilla: —maybe Corporation Counsel. Has anybody challenged us on the community plans?

Mr. Hopper [Corp. Counsel]: On, on the community plans or on CC&Rs?

Councilmember Pontanilla: Community plans where we say, “no short-term rentals or B&Bs”.

Mr. Hopper: Maybe Planning has a bit more information on that, but I, I think this was in here...

He goes on to talk about CC&Rs, and neither he nor Mr. Spence respond to the question. A few minutes later, the committee is discussing the standard to be used in measuring potential impacts of a vacation rental.

Councilmember Victorino: Real quickly, on the other part, I can see creating any impact greater than those in the existing district and shall conform with the community plan, the existing community plan. Now that really limits a lot of people. Just an idea, Chair.

Chair Couch: Members, any comments on that? Changing character of the neighborhood to community plan.

Councilmember Victorino: Existing community plan.

Chair Couch: Existing community plan.

Councilmember Victorino: Gotta be specific, yeah?

Chair Couch: Right. Well what if the existing community plan says, "no short-term rentals"?

Councilmember Victorino: No short-term rentals. Hey, I don't know, I mean why do we make...

and then the chair recognizes another councilmember, the discussion veers away again, with no comment from Mr. Spence or corporation counsel.

6. At another meeting, Councilmember Pontanilla asked what the existing community plans say about transient vacation rentals as well as B&Bs for their community. Chair Couch called on Mr. Spence, who replied: **(Planning Committee 1/30/12)**

"...The community plans don't have caps in them. I think that's a little specific and sort of treads into the decision, you know, to the legislative body's jurisdiction. What they do and some of the community plans are absolutely silent on vacation rentals and B&Bs, some are much more specific, say Paia-Haiku it just, it just says not on the shoreline to, you know, keep from overusing shoreline resources, the Hana Community Plan, none...but none of them are so specific that they put a cap. They more give qualifications on what could be approved or what couldn't be approved. And we take those things into consideration when any application is submitted to us. We look at how the bed and breakfasts or the vacation rental is situated and then we evaluate the application according to—well, I should say the community plan is one of the things that we take into consideration when evaluating the application."

In fact the Pā'ia-Ha'ikū plan does have a cap on transient vacation rentals; that cap is zero; B&Bs are prohibited not only on, but also near, the shoreline; the stated purpose is to avoid the proliferation of this use and subsequent changes in the character of the region's coast.

And the Hāna plan says to discourage transient rental accommodation uses outside of the Hana urban area.

7. Mr. Spence, staff and Mr. Hopper participated extensively throughout the final committee meeting where the vote was taken to approve the draft. The only mention of community plans was by Jim Smith, who served on your CAC. (Planning Committee 2/27/12)

8. It was then sent to the full council where it was approved with no discussion of the community plans. Councilmembers Cochran and Hokama were in opposition. The ordinance as passed says: (Council first reading 4/19/12; second reading 5/18/12)

Prior to issuing a permit, the department or applicable planning commission shall consider the following:

One of the items listed is *“the applicable community plan.”*

There is no mention of the necessity of complying with the plan.

QUESTION TWO

One of the main reasons given for the present County policy on short-term rental homes is that it was needed to bring regulation to an unregulated activity. From your perspective, has the policy proven effective in regulating short-term rental homes?

There are still a lot of illegal vacation rentals out there, and I know that some of the permitted rentals operate in violation of their permits by renting out more units than their permits allow.

A report prepared by the planning department last year included as testimony a May, 2016 study titled *The Hidden Costs of Hidden Hotels: The Impact of Vacation Rentals in Hawaii* which concluded that despite the attempts at regulation, Maui has more individually advertised vacation rentals than any other island. The Hawai'i Tourism Authority has found that there has been an explosion in use of short-term vacation rentals, which increased by more than 1/3 from 2014 to 2015. The study says the number of individually advertised vacation rentals in Lāhaina/Kapalua is 1 out of 2.8 residences; in Kihei 1 out of 4.3, and in Pā'ia 1 out of 7.2. The study implies that these

are all illegal rentals, but even if not, it means that 14% of the available housing supply in Pā'ia was advertised for vacation rentals.

QUESTION THREE

It appears from the current language in the Pā'ia-Ha'ikū Community Plan that there was a clear intention to discourage or prohibit a proliferation of short-term vacation rentals in the shoreline areas. Does the proposed community plan amendment allowing short-term rental homes in the Pā'ia-Ha'ikū Community Plan area support that intention?

No, it clearly does not.

The existing provision states:

Limit visitor accommodations to owner-occupied "bed and breakfast" establishments that are residential in both scale and character. Any proposed "bed and breakfasts" should not be situated near the shoreline so as to avoid the proliferation of this use and subsequent changes in the character of the region's coast.

In other words, short-term rental homes are completely prohibited anywhere in the plan area. B&Bs are prohibited near the shoreline.

The current proposed amendment allows short-term rental homes everywhere that B&Bs are allowed. It also changes the shoreline language to:

Any proposed bed and breakfasts homes or short-term rental homes should not be situated near the shoreline if the proliferation of this use will result in subsequent changes in the character of the region's coast.

This unwieldy language opens the door to coastal rentals, since who is say where the tipping point of one more rental changes the character of the coast; or, in the alternative,

an applicant could argue that it has already been so changed that one more doesn't matter.

The better course is to amend the ordinance to come into compliance with the community plan, and in the meantime to not grant any new permits. I do understand that it would be unfair to revoke current permits, but I do not understand why they should gain a right to renewal since they have no vested property interest.

QUESTION FOUR

Many have testified that allowing short-term rental homes in single family homes outside of the resort areas can impact the pool of affordable rentals available to local residents. Would you agree or disagree with this position that many have taken? If there are any impacts, does the current short-term rental homes ordinance or the proposed Pā'ia-Ha'ikū Community Plan amendment adequately address them in your opinion?

Yes, I think it has been well-established that this is true. The powerpoint presentation by the planning department in 2011 noted the concerns that they had been hearing, all of which have been come to pass. They included:

A reduction in long term residential housing inventory will result in higher property values and higher rents.

Inflating housing values can cause higher property taxes.

A permitting system will add fuel an already strong off-shore market.

Loss of community and neighborhood character due to high concentration of short-term rental properties.

I expect that most of us know someone who has had to move from an affordable longterm rental because the owner wanted to turn it into a vacation rental, and also know of places which have essentially been turned into resort areas.

The 2011 report to the planning commissions included comments from the real property tax administrator at the department of finance, Scott Teruya, who provided a table evaluating the effect of the proposed number of short-term rentals allowed on long-term residential housing inventory. For the Pā'ia-Ha'ikū area, there were then 48 permitted transient vacation rentals and B&Bs. If an additional 88 short-term rental homes were permitted in Pā'ia-Ha'ikū, (which the ordinance allows), the result would be a loss of 8.1% of rental housing available to residents. Teruya commented that the number of short-term rentals per area was not fair; Pā'ia-Ha'ikū and Hāna would lose the most housing available to residents. He concluded, *"This loss is magnified by the fact that Pā'ia-Ha'ikū and Hāna have the lowest number of owner-occupied and affordable homes."* The planning department commented that it *"shares this concern and is exploring options to lessen the impact of short-term rentals on the residential housing market"*.

Off-shore owners have proliferated; in some months they represent the majority of property purchasers.

The Lutens reviewed county policies and found that short term vacation rentals not only do not promote the primary county objective of protecting neighborhoods and residents, they actually promote the opposite — the fraying of neighborhood relationships, and the disintegration and destruction of the residential community. They concluded that:

Existing County laws and plans mean that in fact and by law, no legislation can permit short term vacation rentals that reduce resident housing stock, that detract from affordable housing for residents, that increase rents for local residents, that diminish the quality of life for neighborhoods, or that are a detriment to the lifestyles of neighbors. These laws require that the County protect neighborhoods from such development and uses, not invite or encourage them. As a result, no permit for such uses can comply with County laws and Plans unless the County makes specific findings that no such negative impact will occur, and actively enforces its laws to revoke any permit where a negative impact does occur.

The Hidden Costs of Hidden Hotels found that

Vacation rentals have a negative impact on affordable housing in two ways:

1) they represent units taken out of the overall housing stock statewide, limiting the supply and driving up prices; and

2) the ability to operate any unit as an illegal vacation rental inflates demand for new construction at the high end of the market, giving developers an incentive to build luxury units to the exclusion of lower-priced units.

The Maui ordinance exacerbates this second impact because although most owners may hold no more than one short-term rental home permit, owners who build homes with assessed market value of \$3.2 million or higher are exempt from this restriction.

The same report quoted testimony before the Honolulu City Council from the organization Keep It Kailua:

Vacation rentals displace 'permanent' neighbors from our neighborhoods and neighbors are the glue that welds a community. Without neighbors in our neighborhoods and communities, our social capital suffers. Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in neighborhood watch programs, coach paddling, 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.

I also want to comment briefly on the impact on agricultural lands. The encroachment of what are really small hotels into the ag district conflicts directly with the many existing state, county and community laws protecting agriculture. The central issue is the integrity of our ag lands. It is not about whether vacation rentals provide economic benefits. So do many other activities, such as gambling, which we have refused to legalize. The expectations of those who have bought or inherited agricultural land that they will live in an active agricultural community should be respected. Becoming more dependent on tourism does not diversify our economy. Compromises were made when the first B&B ordinance was passed, and again when it was expanded. Enough.

So, no, the current ordinance does not address these concerns and the proposed amendment would only make the situation worse.