REALTORS® ASSOCIATION OF MAUI, INC.

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Council Chair Alice Lee
Council of the County of Maui
200 South High Street, 8th Floor
Wailuku, Hawaii 96793

RE: CC 20-246 - Transmitting a proposed bill entitled "A BILL FOR AN ORDINANCE AMENDING CHAPTER 19.12, 19.24, 19.37, MAUI COUNTY CODE, RELATING TO TRANSIENT VACATION RENTALS IN THE APARTMENT DISTRICTS AND INDUSTRIAL DISTRICTS ND DWELLING UNITS IN THE INDUSTRIAL DISTRICTS," and related documents.

Aloha Chair Lee, Vice-Chair Rawlins-Fernandez, and Members of the Council:

I am submitting the following testimony on behalf of the REALTORS Association of Maui (RAM) and the 1,700+ REALTORS and affiliates that we represent. This testimony is in opposition to County Communication 20-246 and the proposed bill attached thereto (hereinafter, the "Bill"). Specifically, we oppose the proposed amendments to 19.12, as well as the deceptive tactics used by the Department of Planning in switching the Bill from what was recommended for approval by the Planning Commissions to this unvetted version presented in CC 20-246.

In truth, I had not anticipated a need to testify regarding this Bill when it was presented to the Planning Commissions, nor after the various Planning Commissions had an opportunity to provide comment. Nevertheless, the need has arisen because the version of the Bill presented to the Council in CC 20-246 is drastically different from the Bill that was recommended for approval by the Planning Commissions. Should this Council choose to adopt the Bill as it was recommended by the Planning Commissions, RAM would support such efforts. However, RAM must strongly oppose the Bill in its current form, and ask that it be sent back to the Planning Commissions for review and comment in its new form, as it is far too different from what they had previously recommended for approval.

To provide more context, I would like to highlight three portions of the bill that were reasonable as recommended by the Planning Commissions, but have been altered drastically to the point of unconscionability. First, Section 1 of the Bill has undergone a fairly substantive change

since it was recommended for approval by the Maui Planning Commission on October 22, 2019. In the October 2019 version, Section 1 began like this:

> SECTION 1. Findings and purpose. The purpose of this ordinance is to prevent the conversion of long-term rental and owner-occupied apartments into transient vacation rental apartments in the apartment, light industrial and heavy industrial districts, by prohibiting transient vacation rentals on properties on which transient vacation rental use had not been conducted in lawfully existing dwelling units prior to the enactment of Ordinances 286 and 1797.

This language is reasonable, and its means of achieving the stated purpose is in line with the vested property rights of condo owners impacted by the "Minatoya Opinion." However, this reasonable language is altered dramatically in the version of the Bill sent to Council in CC 20-246, which appears as follows:

> **SECTION 1. Findings and purpose. The purpose of this ordinance is to prevent the conversion of long-term rental and owner-occupied apartments into transient vacation rental apartments in the apartment, light industrial and heavy industrial districts, by prohibiting transient vacation rentals on properties on which transient vacation rental use had not been conducted in lawfully existing dwelling units as of the effective date of this ordinance.**

The above version presented to Council in CC 20-246 does not time the prohibition on transient vacation rental activity in the Apartment District from the enactment of Ordinance 286 and 1797, as it should, but instead moves the timing to "prohibiting transient vacation rentals on properties on which transient vacation rental use had not been conducted in lawfully existing dwelling units as of the effective date of this ordinance." Such language is not well defined and can be interpreted in such a manner as to strip property owners of a vested property right without due process. This alteration in language is not in line with the recommendations put forth by any of the Planning Commissions, and only serves to muddy the waters surrounding the issue of short-term rentable condominiums in Apartment Districts.

The second, and most egregious, of the changes I would like to highlight occurs in Section 3 of the Bill, which amends Section 19.12.020 of the Maui County Code. The version of the Bill reviewed and recommended by the Maui Planning Commission on October 22, 2019 appeared thusly:

SECTION 3. Section 19.12.020, Maui County Code, is amended to read as follows:

19.12.020 - Permitted uses. Within the A-1 and A-2 districts, the following uses are permitted:

A. Any use permitted in the residential and duplex districts.
B. Apartment houses.
C. Boarding houses, rooming houses, and lodging houses.
D. Bungalow courts.
E. Apartment courts.
F. Townhouses.
G. [Transient vacation rentals in buildings and structures having building permits, special management area use permits, or planned development approval that were lawfully issued by and valid on April 20, 1989. Buildings and structures with such permits and approvals may be reconstructed, and transient vacation rental use shall be permitted, provided that:
   1. The reconstruction conforms to the original building permit plans, special management area use permits, or planned development approval; and
   2. The reconstruction complies with the building code and all other applicable laws in effect at the time of the reconstruction.]

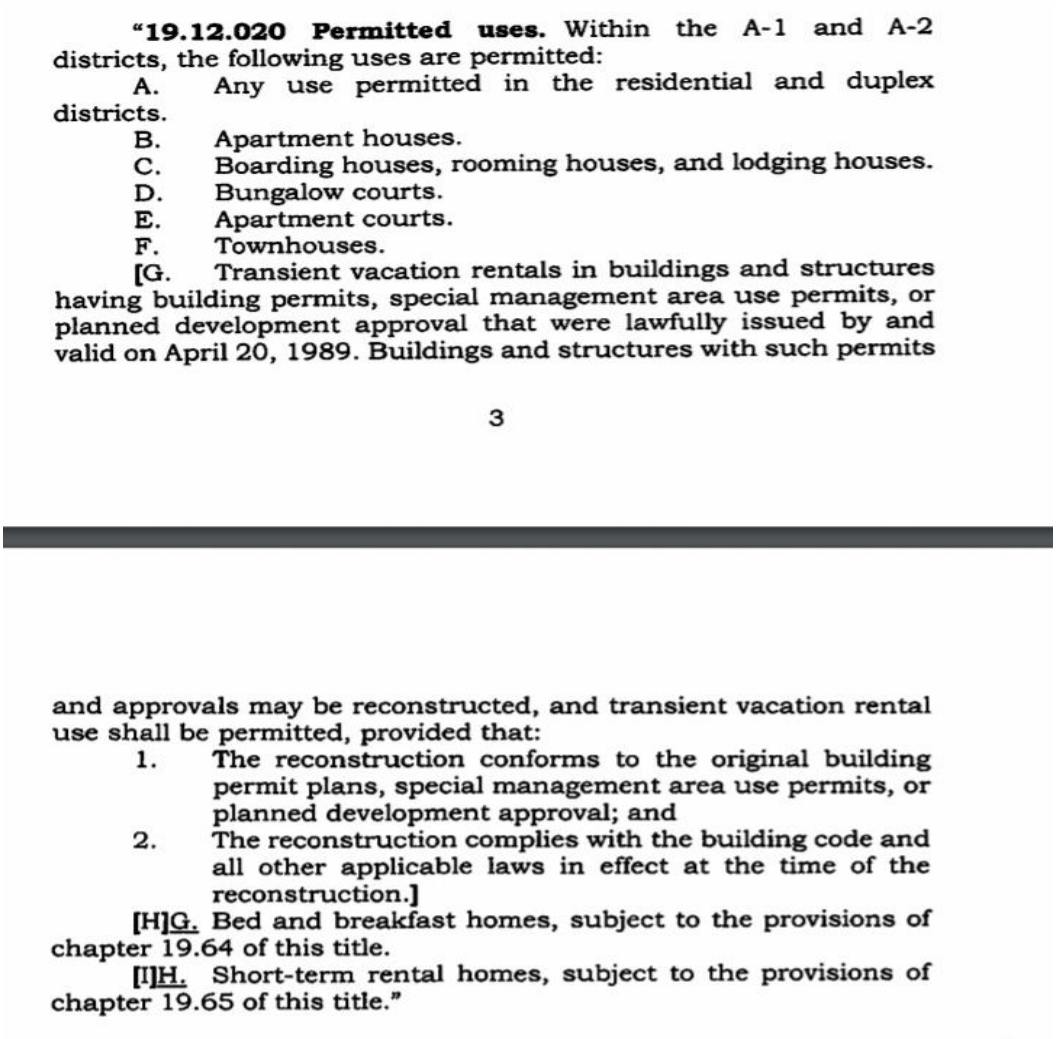
Transient vacation rentals in building and structures meeting all of the following criteria:

1. The building or structure received a building permit, special management area use permit, or planned development approval that was lawfully issued by and was valid, or is otherwise confirmed to have been lawfully existing, on April 20, 1989.
2. Transient vacation rental use was conducted in any lawfully existing dwelling unit within the building or structure prior to April 20, 1989 and has continued in compliance with nonconformity requirements.
3. If any such building or structure is reconstructed, renovated or expanded, then transient vacation rental use is limited to the building envelope as it can be confirmed to have been approved or lawfully existing on April 20, 1989. The number of bedrooms used for transient vacation rental shall not be increased.

H. Bed and breakfast homes, subject to the provisions of chapter 19.64 of this title

As you can see, the Bill recommended for approval by the Planning Commissions removes the current language of Section 19.12.020(G), but replaces it with language that provides more clarity and accomplishes the stated intent of the Bill. This was a commendable approach on the part of the Department of Planning that did not appear to garner any negative feedback from the Planning Commissions. Nevertheless, the Department of Planning pulled that language from the Bill in CC 20-246, which further confuses the vested property rights of owners living in short-term rentable Apartment zoned condominiums under the Minatoya Opinion.

For the purpose of comparison, here are the amendments to Section 19.12.020, which were not recommended for approval by the Planning Commissions, but were still included in the Bill accompanying CC 20-246:



"**19.12.020 Permitted uses.** Within the A-1 and A-2 districts, the following uses are permitted:

A. Any use permitted in the residential and duplex districts.

B. Apartment houses.

C. Boarding houses, rooming houses, and lodging houses.

D. Bungalow courts.

E. Apartment courts.

F. Townhouses.

[G. Transient vacation rentals in buildings and structures having building permits, special management area use permits, or planned development approval that were lawfully issued by and valid on April 20, 1989. Buildings and structures with such permits

3

and approvals may be reconstructed, and transient vacation rental use shall be permitted, provided that:

1. The reconstruction conforms to the original building permit plans, special management area use permits, or planned development approval; and

2. The reconstruction complies with the building code and all other applicable laws in effect at the time of the reconstruction.]

[H]G. Bed and breakfast homes, subject to the provisions of chapter 19.64 of this title.

[I]H. Short-term rental homes, subject to the provisions of chapter 19.65 of this title."

As you can see, this new version of the Bill does not serve to clarify the vested property rights of affected property owners, but instead seems to be setting the groundwork for a broader repeal of the Minatoya Opinion and its subsequent codification. The differences in this section make it alarmingly apparent that the Planning Department pulled a "bait and switch" with the Bill in order to get it past the Planning Commission review. I sincerely hope that it is only a matter of coincidence that it is being transmitted to Council during a global pandemic that is keeping our residents distracted and crippling countless industries that our residents depend on for their livelihoods. However, based on the drastic nature of these changes and the lack of transparency, I cannot make such assumptions.

The third notable difference between the Bill as it was presented to the Planning Commissions and the Bill as it was transmitted in CC 20-246 relates to Section 10. Section 10 of the Bill as it was recommended for approval by the Planning Commissions is as follows:

> SECTION 10. Existing lawful transient vacation rental uses in the Apartment Districts may continue to operate as allowed by Ordinance 4167. The initiation of new transient vacation rentals in the Apartment Districts is prohibited as of the effective date of this ordinance. Building permits for stand-alone apartments or apartment houses in the Light Industrial District submitted within six months of the effective date of this ordinance may be processed and approved pursuant to the zoning restrictions and standards in effect immediately prior to the effective date of this ordinance.

However, the version transmitted to Council on April 7th as part of CC 20-246 reads like this:

> **SECTION 10. Lawful transient vacation rental units in the Apartment Districts in operation as of the effective date of this ordinance may continue to operate as nonconforming uses pursuant to Subsection 19.500.110(C). If any such building or structure is reconstructed, renovated or expanded, then transient vacation rental use is limited to the building envelope as it can be confirmed to have been approved or lawfully existing on April 20, 1989, and the number of bedrooms used for transient vacation rental shall not be increased. The initiation of new transient vacation rentals in the Apartment Districts not in operation as of the effective date of this ordinance are prohibited, notwithstanding Section 11 of Ordinance 1797 (1989).**

The differences between these two paragraphs may seem miniscule, but in practice they change the Bill massively.

The most important difference is in the first sentence, where the language was changed from "Lawful transient vacation rental ***uses*** in the Apartment Districts may continue to operate as allowed by Ordinance 4167;" to " Lawful transient vacation rental ***units*** in the Apartment Districts in operation as of the effective date of this ordinance may continue to operate as nonconforming uses pursuant to Subsection 19.500.110(C)" [emphasis added]. This difference takes this Bill from regulating entire buildings down to regulating individual units within buildings, and it transforms a vested and recognized property right for current owners into a "nonconforming use." Had the

Planning Commissions known that this Bill would be changed so drastically on its way to the Council, it is doubtful they would have recommended it for approval.

In the interest of transparency and good government, I ask that you do not validate the bait and switch that occurred regarding the Bill transmitted to you in County Communication 20-246. If the Department of Planning wanted the Bill in its current form to be presented to Council, they should have allowed that Bill in its current form to be properly vetted by the Planning Commissions. Instead, the Department of Planning had the Planning Commissions recommend a much different version of the Bill for approval, and didn't bother to point out the significant revisions that have since been made in their correspondence dated April 7, 2020. Such a lack of transparency is deceptive, unethical, and unbecoming of a government body in the State of Hawaii.

Nevertheless, if the Council decides to validate such deceptive tactics from the Department of Planning and chooses to pass the Bill along to committee, I implore you to ultimately adopt the language that was actually vetted and recommended for approval by the Planning Commissions before taking any votes. Though I'm sure the Department of Planning had its reasons, it still subverts the integrity of our system when our Planning Commissions and County Council are purposefully misled, and a Bill that was supposedly "recommended for approval" was never even seen by Commissioners. Please do not allow such dubious behavior to become further normalized at a time when we need to be able to trust our government.

Mahalo,

Jason A. Economou
Government Affairs Director