

Testimony - Tawn Keeney
Hawaii County Council meeting 9/17
2nd & Final Reading
Bill 123 Draft 6

Dear esteemed Hawaii County Council members,

To begin, I admire the intention and direction taken by County Council Bill 123 to address the problem of affordable and available housing on our island. The commitment and energy applied to its creation and evolution deserves applause.

Bill 123 does several things. Among them are:

- It changes the name 'Ohana Dwellings' to 'Accessory Dwelling Units'

- It allows construction of 3 Accessory Dwelling Units on Building Sites (Properties) in the Residential Single, Residential Double, Family Agricultural, Residential Agricultural and Agricultural County Zoning Districts

- It allows that one of the 'up to three' ADUs may be a Transient Accommodation Rental

- I specifies that ADUs must comply with County infrastructure, building, sizing, parking, etc. requirements

The Bill is linked here in its 5th Draft:

<https://records.hawaiicounty.gov/weblink/DocView.aspx?dbid=0&id=1084351&page=1&cr=1>

A critical question must be asked in attempting to understand the vision of Bill 123. That question is, "Why did the authors include the Agricultural District in this Bill's design?" Also, the question of why it has been necessary to allow one of the 3 Accessory Dwelling Units available through this Bill to become a Transient Accommodation Rental has not been discussed adequately before Council. However, this is not the concern to be addressed here. Because of the profound impact this Bill, if enacted, would have on our lived environment, and because I have not heard at Council hearings the important question of why the Agricultural District has been included in its application, I fear that this Council has not understood a fundamental ramification of this Bill in its hurried final months approaching ratification.

Bill 123 is possibly a response, or at least a mirror, to State Senate Bill 3202 (they were developed in the same time frame). State Senate Bill 3202 was honed very carefully through contentious hearing after hearing and became Law as Act 46 earlier this year. My impression that County Bill 123 passed virtually unnoticed through its 6 months since inception arises because of the dearth of public testimony as it reaches its final stages, and so few of my civically interested colleagues have been aware of its substance or even existence. Act 46, in prescribing that the Counties allow at least 2 ADUs per building site, applies only to "Residentially zoned lots" in the County Zoning Districts. Act 46 specifically excludes the County Agricultural District from its application. In Act 46, the County Agricultural District and the County 'Rural Districts' FA and RA are specifically excluded. Act 46 states: "Residentially zoned lot" does not include a lot in the county zoning district that is intended for rural, low density residential development, and open space preservation."

So why have the authors of this Bill 123 included the Agricultural District in its application? No explanation has been given other than to say, "Well, the Agricultural District will be protected from this Bill's effect because State Zoning Law also applies to nearly the same area, and the State H.R.S. will not allow the usage prescribed in this Bill 123 County ordinance.". But the question then still remains, "Why was the Agricultural District included in the Hawaii County Bill?" I did not understand the answer until I listened to Chair Kimball's remarks to the Leeward Planning Commission. I believe that the County Council has not understood that

answer because I have perceived no discussion of the profound implications of the answer. Chair Kimball's presentation to the Leeward Commission can be found here:
<https://www.youtube.com/watch?v=xw3NcJTTBPI>

At 2hr 0min 10 sec Chair Kimball is describing adding ADUs as enabled through Bill 123:

"As mentioned, you still cannot build an Ohana Unit on State Land Use Ag lands. So some of our larger subdivisions such as HPP and Hawaiian Beaches, those are actually State Land Use Ag, so you still would not be able to do this (add accessory dwelling units). Now that is something which I hope to be able to remedy with the State, because I think that this is a missed opportunity for us."

At 2hr 7min 44sec she states:

"I did do an analysis just for purposes of argument. If we were to take all of the lots which were 1 acre or less which were in the State Land Use Ag district and we would convert them to Rural, which would allow accessory dwelling units, we are talking about 50,000 lots on this island which would be allowed to develop ADUs. That's a big impact. In my district we have many little plantation communities which are State Land Use Ag which would be ideal to put an accessory dwelling on."

Frequently it has been heard that the intent of the Bill is to increase density in the Urban areas while at the same time protecting the rural and agricultural areas from the effects of rural or suburban 'Sprawl'. This is accomplished because, as pointed out repeatedly by Chair Kimball and Director Kern, State Statute on 'allowed uses' in the Agricultural District will not allow the dispersion of Accessory Dwelling Units into the State Agricultural District. Thereby, though Bill 123 would allow 3 ADUs (with one potentially a TAR) per lot in the County Ag zone, H.R.S. 205 on "Allowed Uses" in the State Ag District would prevent this. The State Agricultural District restrictions will prevent what otherwise likely would become 'suburban sprawl' or 'rural sprawl'.

We had never heard why the Agricultural District was included, until Chair Kimball's presentation to the Leeward Commission. If the Council was aware of this, I must presume that it would have provoked intense discussion. That is the same discussion that might have led the State Legislature to reject the application of its Senate Bill 3202 Accessory Dwelling Unit requirements to the County's agricultural zones and rural zones.

What you are creating here, if Chair Kimball comes to a position of being able to 'remedy' the State's guardrails on 'rural sprawl', is a profound transformation of our rural environment. "We are talking about 50,000 lots", and that does not even include the lots greater than 1 acre which could be transformed.

Listen, maybe that is something which this Council would like to see. I doubt it. But that discussion must take place before decision-making on Bill 123. Maybe there are good reasons. Perhaps there is realization that Oahu's water table is dropping, that they are running out of water, and they need some place to put all those people. But those things need to be brought before this Council prior to its decision.

If the State were to change designation on great swaths of land from Agricultural to Rural, it would be far better for the County to have waited before applying this change of ADU regulation in its County agricultural district. We would then be able to understand and modulate the ramifications of the County's action with a true vision of what the implications would be. With current passage of Bill 123, any subsequent change in State Land Use designation from Agriculture to Rural would lead to massive changes in our built environment with transformation into the rural and suburban 'Sprawl' from which the State Agricultural district rules had been protecting us. I must ask why Chair Kimball's above described 'intentions' have not been discussed at Council.

And I again ask, are there any other reasons which have been proposed for this inclusion of the Agricultural Zoning District in Bill 123, other than her statements above.

I have been an admirer and advocate of Chair Kimball's capabilities and intentions over the years, perhaps as we all have, but progress on Bill 123 must stop until its full ramifications have come under consideration.

I wish to add a note which may be considered a technicality compared to the above problem.

The State Land Use Commission response from its Executive Officer to the Planning Director on Bill 123 as presented to it in February is linked here:

<https://drive.google.com/file/d/1lwXAYEELb3nCENcuCT2ADk1Js33u7cbc/view?usp=sharing>

That response on Feb. 14 states: **"The Land Use Commission Staff is acceptive of Bill No.123 relating to 'Ohana Dwelling Units' , with the understanding that Section 25-6-38 Prohibited Uses states "Accessory Dwelling Units shall not be for use as transient vacation accommodation rentals."** In July, long enough that the Bill's authors may have forgotten the Land Use Commission's above condition, Bill 123 changed 'Prohibited Uses' to 'Permitted Uses' and changed 25-6-38 to read, **"No more than one accessory dwelling unit shall be permitted for use as a transient accommodation rental, provided there are no other transient accommodation rentals on the building site."** This Council must see a letter from the Land Use Commission accepting this Change in 'condition' before passing this Bill. One would presume that such a letter exists, but it must be presented to the Council, demonstrating that existence, because the understanding of the February letter is that the Land Use Commission will not 'accept' the allowance of Accessory Dwelling Units as Transient Accommodation Rentals. My letter to the executive Officer of the Land Use Commission is here.

<https://drive.google.com/file/d/1AB0M6ELpbgVTuKXAmnCJzKgiGnprMWgY/view?usp=sharing>

My letter asks that his acceptance or rejection of this July, Draft 5, reversal on allowance of Transient Accommodation Rentals (as was seemingly rejected in February) be communicated to the Council prior to the final Decision-Making on Sept. 17.

I was subsequently unable to reach the Executive Officer because, as I learned, he was attending a Planning Meeting at Hapuna Beach. By phone I was directed to his colleague who quite patiently listened to my explanation of how the new Draft of Bill 123 seemed to contradict the Executive Officer's acceptance of Bill 123 based on the Bill's prohibition of Transient Accommodation Rentals. After I had finished my explanation (granted that it was possibly inadequate, as I anticipated speaking with someone who had seen my written explanation and was familiar with the issue), the LUC staff to whom I had been referred (press #6) began his response with an emphatic, "That's illegal". His discussion went on, but it left me with the impression that the LUC may possibly have not been notified of the changes made in Draft 5. Clearly, we need to see that presumed existent 'letter of acceptance' before decision-making.

The authors of Bill 123 may retort that the Bill's Section 25-6-31(b) resolves any apparent contradiction with State Law in stating, "Any building site within the State land use agricultural district shall be subject to agricultural requirements for farm dwellings as established by ordinance or by rule of the director, adopted pursuant to Chapter 91, Hawaii Revised Statutes."

In this case a legal issue arises. Can the County pass ordinance, in apparent contradiction with State Law, that says 'Transient Accommodation Rentals can be placed on County Agricultural zoned lands', by the addition of language that State Law must also be followed (which in almost all cases would prohibit this). Again, we ask "Why was the Ag District included in this Bill anyway?"

Let me use an analogy. Can the County pass a Bill under the Title 'Concealed Carry' which states in Section 4, "Fully Automatic Weapons may be carried in a concealed manner in the County of Hawaii." Of course, fully automatic weapons are illegal in the state, but because the Bill states in Section 2: "Notwithstanding any Sections or language of this Bill, the carrying of weapons in this county shall be subject to State Law.", does this Bill allowing automatic

weapons in the County then become acceptable in the eyes of the Law. I will guess that a bill allowing automatic weapons in the County would not be allowed to pass or would face repeal immediately, in spite of declaration that State Law must be followed.

The question regarding County Allowance and State Restriction of TARs on Agricultural land must be understood by written legal opinion before decision is made on this Bill. The Executive Officer of the Land Use Commission probably understands that legal relationship quite well, and so the written decision on Bill 123 Draft 5/6 language and content must be presented to Council before decision-making.

Bill 123's approach to the problem of housing need in Hawaii County, like the comparable Act 46 on the State level, is admirable and is understood to represent an important step toward solution, relying on increasing urban density. It is only by adding that one of the ADUs, even if the only ADU, may be a Transient Accommodation Rental, and that the directives of this bill apply to the Agricultural District, as was excluded from the State's Act 46, that this becomes a failed Bill and must be rejected by the Council. The Planning director's explanation of the necessity of the addition of a Transient Accommodation Rental to the complement of ADUs is questionable, and of little consequence. The protean implications of addition of the County Agricultural District to the Bill against the backdrop interest in potential removal of the State's Agricultural District guardrail against rural and suburban 'Sprawl' demands rejection of Bill 123, if amendment for removal of these two elements is no longer available.

Tawn Keeney MD

Member and recent Chair, Hamakua Community Development Plan Action Committee