

# Received A Notice of Violation or Order For A Transient Vacation Rental?

## Take A Closer Look At The Evidence And Fine Being Levied Against You Because It May Be Unenforceable.

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If you, or anyone you know is facing a Notice of Violation (“NOV”) or Notice of Order (“NOO”) for an alleged transient vacation rental, or any other Land Use Ordinance (“LUO”) violation, you should pay attention to a recent decision by the Hawaii Intermediate Court of Appeals (“ICA”), because it clarifies that (1) the alleged violation must be grounded in reliable, probative, and substantial evidence, (2) a violation occurs only during the period that the prohibited use occurs, and (3) in determining a fine Department of Planning and Permitting (“DPP”) must exercise discretion within the parameters set forth in DPP’s administrative rules. This ruling applies to every county’s zoning enforcement and is not limited to Honolulu.

In *Leland H. Dao v. Zoning Board of Appeals*, CAAP-15-0000565 (Jan. 31, 2019), the ICA considered the sufficiency of DPP’s evidence and the magnitude of DPP’s fines levied against a homeowner (“Dao”) for violating Hawaii’s land use laws by impermissibly renting out his property as a transient vacation rental.

The factual context of the case involves two appeals from two alleged violations. The first appeal arose from DPP’s issuance of a NOV and NOO based upon an unidentified telephone complainant and a DPP Inspector’s conversation with an unidentified individual who stated that he was renting the Property for three days (“Violation #1”). The second appeal arose from DPP’s issuance of a NOV and NOO based upon *inter alia* a complaint brought by an identifiable individual (a neighbor), a DPP Inspector’s discussions with identifiable individuals staying at the property, discrepancies between those individuals and the names of individuals listed on rental agreements, and overlap of timing in rental agreements (“Violation #2”). The fines for each violation were calculated as an initial fine of \$1,000, plus \$1,000 per day until the violation was corrected, for a total fine for Violation #2 of \$62,000. The Zoning Board of Appeals (“ZBA”) and Circuit Court upheld DPP’s decisions, and Dao appealed to the ICA.

The ICA vacated Violation #1 in its entirety, and vacated Violation #2 in part and remanded it back to the ZBA for further proceedings. In doing so, the ICA keys in on three important legal and practical matters (1) the evidentiary requirements that DPP must establish in order to validly issue a NOV or NOO, (2) measurement of the term of an LUO violation, and (3) the parameters that DPP must follow when levying a fine for the alleged violation. Each is discussed in turn below.

### Evidentiary Requirements for Issuance of A NOV or NOO

The ICA held that Violation #1 was clearly erroneous because of a lack of substantial evidence, whereas Violation #2 was not. In delineating between the two, the ICA set forth the evidentiary requirements that DPP must meet in order to validly issue a NOV or NOO. Specifically, the ICA provided the following:

[I]f an agency’s factual determination that a violation occurred and is continuing is not grounded in **reliable, probative, and substantial evidence**, including any reasonable inferences that may be drawn from that evidence, then the agency’s decision may be determined to be clearly erroneous and therefore unjust and unreasonable in its consequences, warranting reversal or modification.

*Dao* at 34 (emphasis added). In other words, DPP must base a NOO or NOV in “reliable, probative, and substantial evidence” or risk reversal or modification. The takeaway being, take a close look at DPP’s basis for an alleged NOV or NOO – if DPP cannot back up its allegations with substantial evidence, it may be unenforceable.

## Term of the Violation

Second, the ICA held that

the LUO's prohibition of transient vacation rentals in residential districts is violated when, and **only during the period that, the prohibited use occurs.**

...

Thus, for a determination that a violation of the LUO occurred for a continuous period of time to be upheld, there must be "credible evidence of a sufficient quality and probative value to enable a person of reasonable caution to support a conclusion" that the violation occurred throughout that period of time.

*Dao* at 40 (emphasis added). The ICA further noted that, a series of violations, such as those described for Violation #2, could result in the issuance of multiple orders for recurring violations based upon similar evidence. *Dao* at 40, fn 26. The takeaway being, DPP cannot fine you every day until the violation is corrected unless there is credible evidence to support such a conclusion that the violation persisted throughout that period of time. For vacation rentals, which are by their nature transitory, there may be times where the use of the property is not in violation of the LUO. With that said, this doesn't mean you won't be penalized for continuing such use; be aware that if you continue to violate the LUO after receiving an NOV, DPP may issue multiple NOOs for reoccurring violations, which as discussed below, results in increased fines.

## The Fines

Last, the ICA discussed the manner in which DPP must issue fines. The ICA provided that, "notwithstanding the discretion vested in the Director to determine an appropriate fine for a violation of the LUO, discretion must be exercised within the parameters stated in the DPP's administrative rules." *Dao* at 41. Specifically, the ICA pointed to DPP's Rules of Practice and Procedure § 10-3, which discusses administrative fines and sets forth a Schedule of Civil Fines and a Fine Schedule for Recurring Violations, which increases the amount of the fine for each subsequent violation. In the case at hand, the ICA concluded that the fine against *Dao* appeared inconsistent with the fine schedules and thus should be recalculated. Here, the takeaway is to compare any fine levied against you to ensure that it tracks the DPP's fine schedules. If it doesn't, you may be able to argue for a lower fine and we can assist with that.

## Conclusion

While we don't endorse illegal use of one's property, if you happen to find yourself facing a NOV and/or NOO for an alleged transient vacation rental, or another land use violation, you should take a look at the basis for the NOV and/or NOO to first make sure that the county zoning agency has met threshold evidentiary requirements to establish the alleged violation. If no, the violation may be unenforceable. If yes, check to see that the length of the violation and amount of the fines levied are in line with administrative rules. If no to either, the violation may again be unenforceable.

We have decades of experience defending property rights. If you have concerns of questions about an NOV or NOO you've received, we may be able to help.



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