HLU Committee

From: County Clerk
Sent: Monday, July 21, 2025 8:33 AM
To: HLU Committee
Subject: Fw: Bill 9 Written Testimony

From: Anon <anon9496n@gmail.com>
Sent: Monday, July 21, 2025 1:31 AM
To: Tamara A. Paltin <Tamara.Paltin@mauicounty.us>; Alice L. Lee <Alice.Lee@mauicounty.us>; Yukilei Sugimura <Yukilei.Sugimura@mauicounty.us>; Tasha A. Kama <Tasha.Kama@mauicounty.us>; Thomas M. Cook <Thomas.Cook@mauicounty.us>; Gabe Johnson <Gabe.Johnson@mauicounty.us>; Keani N. Rawlins <Keani.Rawlins@mauicounty.us>; Shane M. Sinenci <Shane.Sinenci@mauicounty.us>; Nohe M. Uu-Hodgins <Nohe.Uu-Hodgins@mauicounty.us>
Cc: County Clerk <County.Clerk@mauicounty.us>; gwk@hawaiilawyer.com <gwk@hawaiilawyer.com>; las@hawaiilawyer.com <las@hawaiilawyer.com>; jcz@hawaiilawyer.com <jcz@hawaiilawyer.com>; tmk@hawaiilawyer.com <tmk@hawaiilawyer.com>
Subject: Bill 9 Written Testimony

Aloha Councilmember Paltin and Fellow Council
Members,

Please enter this entire email exchange into Bill 9 written testimony.

Mahalo for your prompt, albeit cursory, reply to my inquiry regarding Bill 9 and the County's position on the phase-out of lawful, residentially-zoned short-term rentals.

However, your statement—"Residential uses are not restricted in residential zones by law and the process we are going through now and the phase out period for transient uses is considered the due process"—is not only simplistic and reductionist, but also reveals a concerning disregard for constitutional protections, vested property rights, and well-settled land use jurisprudence.

I must emphasize that simply declaring that the legislative process is "due process" is not only insultingly superficial, but also patently erroneous under constitutional law. Such a blanket assertion ignores decades of 5th and 14th Amendment jurisprudence, which require far more than the mere passage of legislation to satisfy procedural and substantive due process protections. The U.S. Supreme Court has consistently held that when a property interest is at stake—particularly one involving a previously lawful, investment-backed use of land—procedural safeguards must be individualized, notice must be adequate, and a fair hearing is required. (Mathews v. Eldridge, 424 U.S. 319 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972)).

Further, the County's categorical distinction between "residential" and "transient" uses oversimplifies the nuanced and fact-sensitive inquiry of whether short-term occupancy constitutes a residential use under zoning laws. Courts have often recognized that occupancy for transient or short durations can still fall within the ambit of "residential use" if the structure remains a dwelling unit and is not converted to commercial uses. I suggest your office review cases such as City of Santa Monica v. Gonzales, 43 Cal. App. 5th 129 (2019), and City of Houston v. Airbnb, Inc., 2022 WL 1303250 (Tex. App. Apr. 28, 2022), which illustrate judicial resistance to municipal overreach that fails to distinguish between lawful residential uses and prohibited commercial operations.

Moreover, the County appears to willfully ignore the Vested Rights Doctrine enshrined in HRS § 46-4 and Hawaii appellate jurisprudence, including Ka Pa'akai o Ka 'Aina v. Land Use Comm'n, 94 Haw. 31, 7 P.3d 1068 (2000), which require the government to respect existing property uses that were lawful when commenced, especially when substantial reliance and investments have been made. The County's notion that a "phase-out period" somehow extinguishes those vested rights is not only legally dubious but exposes the County to Takings Clause liability under both the Hawaii Constitution (Art. I, Sec. 20) and the Fifth Amendment. Notably, the U.S. Supreme Court has made clear that economic regulation that interferes with distinct investment-backed expectations may constitute a regulatory taking (Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)).

To cavalierly dismiss such constitutional concerns with a generic claim that "due process" is satisfied by the mere passage of an ordinance is both legally irresponsible and frankly, an insult to the intelligence of stakeholders who have conducted serious due diligence on these issues—perhaps more so than your office has evidenced to date.

Accordingly, I demand:

1. A legally substantiated clarification of the County's definition of "residential use," including:
    - Whether the County concedes that owner-occupied or partially rented homes for less than 180 days constitute "residential use."
    - The specific legal authority the County relies upon for its definition in the context of Bill 9.
2. The County's legal analysis and justification for how the phase-out process under Bill 9 complies with:
    - Procedural Due Process under the 14th Amendment and Article I, Section 5 of the Hawaii Constitution.
    - Substantive Due Process standards for deprivation of lawful property use.
    - Takings Clause analysis under both federal and state constitutional frameworks.
    - HRS § 46-4 limitations on County zoning power to regulate lawful preexisting uses.
3. Disclosure of the process, if any, by which the County will recognize and accommodate vested rights, nonconforming use status, or equitable estoppel defenses for existing property owners operating STRs in residential zones.

Failure to provide such a comprehensive response will only reinforce the perception that the County is intentionally disregarding constitutional constraints and invites legal challenges that will inevitably expose the County to protracted litigation, injunctive relief, and substantial liability for regulatory takings. I suggest that your office consult with qualified land use counsel, as well as constitutional scholars, before issuing such dismissive and legally impoverished statements in response to serious inquiries. We are not operating in a legal vacuum, and the Federal Courts for the District of Hawaii and the Ninth Circuit Court of Appeals are well-equipped to remedy such overreaches should the County continue down this path.

I await a substantive, legally coherent response within 10 business days. Absent that, I will interpret your silence or deflection as confirmation of the County's legally vulnerable position, which I and others are prepared to contest through all available administrative, judicial, and legislative channels.

Regards,
Anonymous

On Wed, Jul 16, 2025 at 4:57 PM Tamara A. Paltin <Tamara.Paltin@mauicounty.us> wrote:

> Aloha e Anonymous,
> Mahalo for reaching out. Residential uses are not restricted in residential zones by law and the process we are going through now and the phase out period for transient uses is considered the due process.

Mahalo,
Tamara

From: Anon <anon9496n@gmail.com>
Sent: Tuesday, July 15, 2025 1:51 PM
To: Alice L. Lee <Alice.Lee@mauicounty.us>; Tamara A. Paltin <Tamara.Paltin@mauicounty.us>; noheau.levasa@mauicounty.us <noheau.levasa@mauicounty.us>; Thomas M. Cook <Thomas.Cook@mauicounty.us>; Keani N. Rawlins <Keani.Rawlins@mauicounty.us>; yuki.ley@mauicounty.us <yuki.ley@mauicounty.us>; Tasha A. Kama <Tasha.Kama@mauicounty.us>; Shane M. Sinenci <Shane.Sinenci@mauicounty.us>; Gabe Johnson <Gabe.Johnson@mauicounty.us>
Subject: Bill 9: Dangerous Precedent for ALL Maui Property Owners

Dear Council Members,
I write to urge caution as you consider Bill 9, particularly in light of the deeply flawed authority presumed under SB 2919 (Act 139, SLH 2024), which is being invoked to justify the mass elimination of legally vested short-term rental (STR) rights in Maui's apartment districts.
The County is treading on constitutionally dangerous ground. The reasoning behind Bill 9 — that the mayor, through zoning, can unilaterally wipe out vested property uses — is a precedent that could devastate any homeowner or property investor on Maui.

Imagine This:

Suppose that, emboldened by SB 2919, the County enacts a hypothetical "Bill 47," which states:

> "To achieve the County's housing goals, all single-family residences in select neighborhoods shall be rezoned to multi-family affordable rental housing. Effective January 2026, no property may be occupied by its owner unless it is converted to a rental unit for long-term tenants, in line with the County's affordability mandates."

By the same mechanism being used to justify Bill 9, this fictional Bill 47 would be perfectly legal — after all, it's just zoning, right? The mayor, under SB 2919, would have precedent to declare, without legislative debate or individualized due process, that:

- Families must vacate their own homes.
- Private residences must be converted into affordable rentals.
- Any non-compliant property is subject to fines, liens, or even forfeiture.

The Slippery Precedent You Are Voting On

Does this sound absurd? Unthinkable? Yet that is precisely the slippery precedent you set by allowing Bill 9 to proceed under SB 2919's authority. If the County can take away a vested STR right — which was specifically protected by the Minatoya Opinion and codified into decades of accepted practice — what prevents this zoning power from:

- Stripping residential owners of the right to occupy their own home?
- Banning other lawful property uses on political or ideological whims?

Constitutional Violations

This is not just a policy disagreement — this is a violation of constitutional protections:

- The Takings Clause protects against deprivation of property uses without just compensation.
- Due Process mandates notice, hearings, and individualized rights before a government strips away established property rights.
- Separation of Powers dictates that zoning powers belong to legislative bodies — not unilaterally to an executive mayor emboldened by a vague, untested statute like SB 2919.

A Better Path Forward

We must be vigilant stewards of property rights. Maui County should not risk invalidating its own governance by resting major property decisions on a law (SB 2919) that:

- Has never been tested in court.
- Grants unconstitutional overreach to the mayor.
- Could enable future leaders to weaponize zoning against anyone — even against families in single-family homes.

I urge the Council to reject Bill 9 not just for its immediate harm to 7,000 vested STR owners, but to protect the constitutional rights of all Maui property owners — before the fictional becomes the reality. Thank you for your attention to this critical issue.

HLU Committee

From: Albert Perez <director.mauitomorrow@gmail.com>
Sent: Monday, July 21, 2025 12:28 PM
To: HLU Committee; Tasha A. Kama; Nohe M. Uu-Hodgins; Alice L. Lee; Thomas M. Cook; Keani N. Rawlins; Tamara A. Paltin; Gabe Johnson; Shane M. Sinenci; Yukilei Sugimura
Subject: Bill 9: response to recent testimony
Attachments: mtf takings opinion reply.pdf

Aloha Chair Kama and members of the HLU Committee,

Attached please find a letter from Lance Collins, following up on his legal opinion of 6/30/2025, This latest letter was written in response to two identical testimonies (one from Cheryl Vohaska and another from "anon9496n@gmail.com") that were submitted as rebuttal of his first legal opinion.

Mahalo for the time and care that you are devoting to this important bill.

Albert

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Albert Perez
Executive Director
Maui Tomorrow Foundation
www.mauitomorrow.org

LAW OFFICE OF
LANCE D COLLINS
A LAW CORPORATION

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July 15, 2025

Maui Tomorrow Foundation
P.O. Box 880390
Pukalani, HI 96788

Re: Response to Cheryl Vohaska "Critical Errors" Document

Dear Maui Tomorrow,

At your request, I am responding to arguments in the document titled, "Critical Errors: Lance D. Collins Testimony on Bill 9 – Rebuttal" authored by Cheryl Vohaska. Vohaska's document addresses my letter to you dated June 30, 2025. The arguments in the document have also appeared in other persons' testimonies to the Maui County Council. The below addresses Vohaska's five main criticisms.

Vohaska's first criticism is that my letter failed to cite or apply HRS § 46-4(a). However, Vohaska incorrectly relied on a version of HRS § 46-4(a), which was amended under Act 17 (2024) (and that I cited). The current, applicable version of HRS § 46-6(a) provides in relevant part:

> Neither this section nor any ordinance enacted pursuant to this section shall prohibit the continued lawful use of any building or premises for any trade, industrial, residential, agricultural, or other purpose for which the building or premises is used at the time this section or the ordinance takes effect; **provided that a zoning ordinance may provide for elimination of nonconforming uses as the uses are discontinued, or for the amortization or phasing out of nonconforming uses or signs over a reasonable period of time in commercial, industrial, resort, and apartment zoned areas only.** In no event shall the amortization or phasing out of nonconforming uses apply to any existing building or premises used for residential (single-family or duplex) or agricultural uses; provided that **uses that include the furnishing or offering of transient accommodations shall not be considered residential or agricultural uses and may be phased out or amortized in any zoning district by county zoning regulations**; provided further that a zoning ordinance may provide that transient accommodations may be furnished to a transient for a period of less than one hundred eighty consecutive days. Nothing in this section shall affect or impair the powers and duties of the director of transportation as set forth in chapter 262.
> For purposes of this subsection, "transient accommodations" has the same meaning as defined in section 237D-1. "Transient accommodations" includes uses that require the payment of transient accommodations taxes.

(emphases added). As amended, HRS § 46-4 authorizes counties to prohibit transient accommodations so long as nonconforming uses are lawfully terminated. This change in statute was

in response to the Honolulu federal district court striking down a Honolulu ordinance in *Hawaii Legal Short-Term Rental All. v. City & Cnty. of Honolulu*, 709 F. Supp. 3d 1141 (D. Haw. 2023). Act 17(2024) statutorily abrogated the prior version of HRS § 46-4 that Vohaska incorrected cites. My letter correctly reflects this updated statutory authority, and Vohaska's reliance on outdated statutory language constitutes a fundamental legal error.

Second, Vohaska argues that my letter did not address the legality of properties included in the 2001 Minatoya Opinion. That assertion is incorrect. My letter directly discusses the legal doctrine of vested rights in the context of the Minatoya Opinion and cites relevant Hawai'i appellate decisions. It explains that while vested rights may arise in certain circumstances, they do not render property uses immune from future regulation. Under longstanding precedent, legislatures have authority to impose new regulatory constraints and may phase out nonconforming uses through amortization if the phase-out is reasonable and serves a legitimate public purpose. Vohaska's assertion that vested rights are absolute and unassailable misstates the law.

Vohaska's third criticism concerns the application of the three-part test from *Penn Central Transportation Co. v. New York City*. My letter accurately sets out the three factors courts consider—economic impact, investment-backed expectations, and the character of the governmental action—and applies them consistent with how courts have interpreted them. It correctly notes that the continued ability to use property for long-term rentals or personal occupancy weighs against a finding of economic deprivation sufficient to establish a taking. The analysis reflects judicial trends that treat investment-backed expectations in light of regulatory history and recognize the state's broad zoning authority. Courts generally require something approaching a total economic deprivation before they will find a regulatory taking, and my letter's reasoning reflects that standard. Vohaska's position places unwarranted weight on hardship experienced by particular owners without recognizing how narrowly the courts apply this test. Individual hardship alone does not demonstrate a constitutional taking.

Fourth, Vohaska contends that the letter improperly treats amortization as a "cure-all" for due process and takings claims. The letter does not claim amortization is universally dispositive. Rather, it points out that amortization is a lawful and longstanding zoning tool used to phase out nonconforming uses over time. The argument that the absence of a Hawai'i case explicitly upholding Act 17 (2024) invalidates its use is misguided. Laws passed by the legislature are presumed

constitutional, and the burden lies with the challenger to show otherwise. As the Hawai'i Supreme Court stated in *Schwab v. Ariyoshi*, 58 Haw. 25, 31, 564 P.2d 135, 139 (1977), "[e]very enactment of the legislature is presumptively constitutional," and the "party challenging the statute has the burden of showing unconstitutionality." Because Act 17 (2024) expressly authorizes counties to prohibit transient accommodations with a lawful termination process, Bill 9 proposes to do what is permitted within the framework the legislature has established through Act 17 (2024).

Fifth, Vohaska claims my letter includes misleading or incomplete citations, but she then herself cites HRS § 46-4 without recognizing that she is quoting an abrogated version of the law. As explained, Act 17 (2024) amended the statute to allow counties to do exactly what Bill 9 proposes. The principle underlying Vohaska's objection would effectively prevent future legislative bodies from revisiting or modifying land use decisions made by their predecessors, even when circumstances change or the public interest requires action. That position contradicts foundational democratic principles and norms. Courts have consistently held that one legislative body cannot bind the hands of its successors. As the Nebraska Supreme Court stated in *State ex rel. Peterson v. Ebke*, 930 N.W.2d 551, 564 (Neb. 2019), "[a]ny current legislative body represents the people who elected it and should have power equal to its predecessor. The will of the past electorate should not control the future electorate and its representatives." Other courts agree. *See Graphic Packaging Corp. v. Hegar*, 538 S.W.3d 89, 104 (Tex. 2017) ("one legislature cannot prevent future legislatures from amending or repealing a statute"), and *Neu v. Miami Herald Pub. Co.*, 462 So. 2d 821, 824 (Fla. 1985) ("A legislature may not bind the hands of future legislatures by prohibiting amendments to statutory law").

In summary, Vohaska's document mischaracterizes both the contents of my original letter and the current state of the law. It relies on abrogated statutory provisions, overstates the scope of vested rights, and misapplies constitutional standards. The original letter accurately reflects the legal authority and judicial doctrines relevant to Bill 9 and its potential implementation.

Very truly yours,
LAW OFFICE OF LANCE D COLLINS

LANCE D COLLINS