

HLU Committee

From: Martin Thompson <mt@thompsonlaw.net>
Sent: Tuesday, July 22, 2025 11:27 AM
To: HLU Committee
Cc: Tasha A. Kama; Nohe M. Uu-Hodgins; Thomas M. Cook; Gabe Johnson; Alice L. Lee; Tamara A. Paltin; Keani N. Rawlins; Shane M. Sinenci; Yukilei Sugimura
Subject: RE: Evaluating the Planning Department's July 2, 2025 response to the Planning Commission's request that our Maui Eldorado Resort property be excluded from Bill 9
Attachments: LT LUC Committee - July 22 2025.pdf

To: Maui County Housing and Land Use Committee Members

Aloha,

I am the president of the Maui Eldorado Association of Apartment Owners.

Attached is my July 22, 2025 letter to your Committee which addresses the disconnect between the Planning Commission's request that our Maui Eldorado Resort property be excluded from Bill 9, and the Planning Department's recommendation not to do so, and instead to require our hotel status to be re-evaluated in a separate public hearing as part a rezoning process.

Kindly advise if you have any questions or comments.

Mahalo for your time.

Martin Thompson
President
Maui Eldorado AOA
Tel: (604) 351-0558
E-mail: mt@thompsonlaw.net





July 22, 2025

To: The Housing and Land Use Committee

By e-mail to: HLU.committee@mauicounty.us;

And to: Tasha Kama (tasha.kama@mauicounty.us), Alice Lee (alice.lee@mauicounty.us),

Nohelani U'u-Hodgins (nohe.uu-hodgins@mauicounty.us), Tom Cook (thomas.cook@mauicounty.us), Gabe Johnson (gabe.johnson@mauicounty.us), Tamara Paltin (tamara.paltin@mauicounty.us), Keani Rawlins-Fernandez, (keani.rawlins@mauicounty.us), Shane Sinenci (shane.sinenci@mauicounty.us), and Yuki Lei Sugimura (yukilei.sugimura@mauicounty.us)

Re: Planning Department (the “**Department**”) letter dated July 2, 2025 to Mayor Bissen and HLU Committee Chair Tasha Kama regarding the request by the Planning Commission (the “**Commission**”) to exclude from Bill 9, the 5 properties with a zoning or community plan designation in addition to their Apartment zoning designation (the “**Department’s July 2, 2025 Letter**”)

I am the president of the Maui Eldorado Resort Association of Apartment Owners.

As previously advised, our property is one of the 2 apartment zoned properties which the Commission requested to be excluded from Bill 9 because of their designation as “Resort/Hotels” in the West Maui Community Plan (the “**A-2 Resort/Hotel Properties**”).

I wish to address the disconnect between the Commission’s request that the two A-2 Resort/Hotel Properties be excluded from Bill 9, and the Department’s recommendation not to do so, and instead to require their hotel status to be evaluated in separate public hearings as part a rezoning process.

The key issues are as follows:

1. **Rezoning and change in permitted use are non-issues.** There is no requirement for rezoning or change in permitted use for the following reasons:
 - (a) *The Commission’s recommended “exclusion” from the proposed TVR ban only impacts the scope of the ban, not the existing zoning or permitted use.* Implementing the Commission’s request to “exclude” the two A-2 Resort/Hotel Properties from the Bill 9 TVR ban simply means the current A-2 zoning (and its existing TVR permitted use) would remain in effect for the two A-2 Resort/Hotel Properties even if a TVR ban is enacted, so no rezoning or change in permitted use is required. The Commission’s “exclusion” means only that the TVR ban legislation would simply need to exclude the two A-2 Resort/Hotel Properties from the ban.

- (b) ***Existing Community Plan and Zoning designations, and permitted uses, are in sync.*** For the reasons specified in Sub-sections 2(c) and (d) inclusive in our June 27, 2025 letter to the HLU Committee, Community Plan and Zoning designations are expressly stated to be “most” compatible, and the permitted uses for both include transient vacation rentals, so no rezoning or change in permitted use is required for their compatibility.
- (c) ***The Department agrees no rezoning is required to implement the TVR ban.*** The Department agrees in Section 4(b) of the Department’s July 2, 2025 Letter that the two A-2 Resort/Hotel Properties could be excluded from the Bill 9 TVR ban as requested by the Commission without any rezoning, and has even recommended a simple one sentence change to the existing A-2 zoning to implement the exclusion requested by the Commission without any required rezoning or permitted use change. The Department’s suggested solution for implementing the Commission’s request is, in substance, the same as the solution we recommended in our June 27, 2025 letter to the HLU Committee.

2. The Department’s reason for recommending rezoning has already been satisfied, and does not need to be duplicated.

- (a) ***The Commission’s justification for requesting the A-2 Resort/Hotel Properties be “excluded” from the proposed TVR ban.*** The reason given by the Commission at the conclusion of its Bill 9 public hearings on July 23, 2024 to justify its request that the two A-2 Resort/Hotel Properties be “excluded” from Bill 9, was that it had previously conducted extensive public hearings for the 2022 West Maui Community Plan update, which resulted in the assessment of the two A-2 Resort/Hotel Properties and their designation as bona fide “Resort/Hotels” in the 2022 West Maui Community Plan. Accordingly, the Commission should not be required to duplicate that process.
- (b) ***The Department’s objective for recommending rezoning (even though it admits rezoning is not required) has already been satisfied.*** Even though the Department agrees rezoning is not required to exclude the 2 A-2 Resort/Hotel Properties from the proposed TVR ban (see Section 1(c) above), it still recommends that each of the two A-2 Resort/Hotel Properties should be required to apply to be rezoned in order to trigger a public hearing to evaluate their suitability as a hotel (Section 4(a) of the Department’s July 2, 2025 Letter). However, the Department has failed to address the Commission’s reason (stated in Section 2(a) above) why a second public hearing for that purpose is not required.

3. Council has already approved the two A-2 Resort/Hotel Properties as bona fide hotels. On December 17, 2021, Council approved the 2022 West Maui Community Plan update, which included the designation of the two A-2 Resort/Hotels as “Resort/Hotel”, and their permitted use as “primarily intended to serve visitors, including transient accommodations”. The Department has also failed to address why would it be necessary to require Council to approve each of the two A-2 Resort/Hotels as hotels a second time.

The unprecedented scope of the proposed Bill 9 has created a daunting challenge for the HLU Committee and Council, and I commend the HLU Committee for the time and effort it has taken to understand why the Commission requested that our property be excluded from Bill 9, and for its diligence in requesting and assessing the appropriateness of the Department’s response thereto.

If you have any questions or comments, kindly contact me.

Mahalo.

ASSOCIATION OF APARTMENT
OWNERS OF MAUI ELDORADO



By: _____

Martin Thompson

President

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HLU Committee

From: Roxanne L. Berg <rlb@ksqlaw.com>
Sent: Tuesday, July 22, 2025 11:41 AM
To: HLU Committee
Cc: David M. Louie; Joseph A. Stewart; Lana DeCambra; corpcoun@mauicounty.gov
Subject: Airbnb Testimony on Bill 9 (2025)
Attachments: 2025-07-22 Airbnb Further Testimony as to Maui Bill 9 (2025).pdf

You don't often get email from rlb@ksqlaw.com. [Learn why this is important](#)

Dear Maui County Council,

On behalf of Airbnb, please see attached written testimony of David M. Louie and Joseph A. Stewart regarding Bill No. 9 (2025), Amending Chapters 19.12, 19.32, and 19.37, Maui County Code, Relating to Transient Vacation Rentals in Apartment Districts (HLU-4).

Messrs. Louie and Stewart will testify remotely via Teams link provided in the Agenda for remote oral testimonies (<http://tinyurl.com/HLU-Committee>).

Thank you.

Roxanne L. Berg | Legal Assistant
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July 22, 2025

MAUI COUNTY COUNCIL
Housing and Land Use Committee
Tasha Kama, Chair
Nohelani U‘u-Hodgins, Vice Chair

HEARING DATE: July 23, 2025
TIME: 9:00 a.m.

Re: FURTHER TESTIMONY ON BEHALF OF AIRBNB
OPPOSING THE PROPOSED BILL 9 (2025), AMENDING
CHAPTERS 19.12, 19.32, AND 19.37, MAUI COUNTY CODE,
RELATING TO TRANSIENT VACATION RENTALS IN
APARTMENT DISTRICTS (HLU-4)

Dear Chair Kama, Vice Chair U‘u-Hodgins, and Committee Members:

We write on behalf of our client, Airbnb, in opposition to the proposed BILL 9 (2025), AMENDING CHAPTERS 19.12, 19.32, AND 19.37, MAUI COUNTY CODE, RELATING TO TRANSIENT VACATION RENTALS IN APARTMENT DISTRICTS (HLU-4) (“**Bill 9**”). As you are aware, we previously submitted testimony in advance of the Committee’s June 9, 2025 hearing. We have attached a copy of our prior testimony as Exhibit A.

In my prior testimony, I addressed several Hawaii cases that recognized the existence of a homeowner’s right to continue lawful residential uses of their property, which arises from both the United States and Hawai‘i Constitutions. That prior testimony reflects the current state of the law in Hawaii.

This letter provides additional testimony about some other Hawaii cases that address short term rental (“**STR**”) issues and explains why reliance on any of these other decisions is not advisable. We also note that the County faces potentially ruinous financial risks if it passes Bill 9 and faces takings lawsuits seeking just compensation from owners of more than 6,000 properties in apartment-zoned districts impacted by the bill.

A. Additional Hawai‘i Case Law Does Not Support The Passage Of Bill 9.

One additional case that might be considered is the U.S. District Court’s decision in *AOAO Maalaea Yacht Marina v. Department of Planning for the County of Maui*, No. CV 22-000162 JAO-RT, 2023 WL 4305183 (D. Haw. June 30, 2023). However, this decision does not address the merits of whether the County can avoid takings claims when regulating STRs or transient vacation rentals (“TVRs”). The *AOAO* decision only held that the plaintiff association there was not a proper party to bring monetary taking claims on behalf of its individual unit owner members. It did **not** hold that the individual owners themselves could not bring such claims. Instead, the court acknowledged that taking claims, due process claims and injunctive relief claims could be brought by owners, but merely abstained from deciding them until the state law claims were addressed in state court.

Another important difference between the *AOAO* case and Bill 9 is that in *AOAO*, the parties “hotly dispute[d]” whether it was ever legal for owners in M-1 light districts to use their condominiums as TVRs.¹ Here, there is no dispute that the more than 6,000 properties affected by Bill 9 are in A-1 and A-2 zones, where they are legally authorized to operate as TVRs under current law. As Maui’s Planning Director recognized, “[short-term rentals], in one form or another, have been permitted within Apartment Districts since 1960.”² The specific apartments targeted by Bill 9 have long been permitted to operate as short-term rentals “by right.”³ Consequently, the owners challenging Bill 9 would have the ability to analogize their injuries consistent with the federal court’s decision in *Hawaii Legal Short-Term Rental Alliance v. City and County of Honolulu*, 2022 WL 7471692 (D. Haw. Oct. 13, 2022), where the U.S. District Court preliminarily enjoined a Honolulu ordinance banning intermediate-term rentals because “it was *undisputed* ... that residential property owners on O‘ahu [had] long been able to lawfully rent their properties to tenants for a minimum of 30 days.”⁴

¹ *Id.* at *9. Prior to the 2020 amendment, MCC section 19.24.020 provided that all permitted uses in business districts B-1 to B-3 were allowed within M-1 zoned properties. *Id.* at *2. Plaintiff argued that TVRs (permitted in B-3 districts) were allowed in M-1 light districts and noted that owners’ properties were on the Minatoya List. *Id.* at *8. The County argued that TVR use was never permitted in M-1 light districts and the properties were erroneously included on the Minatoya List, which addresses TVR use in apartment-zoned districts, then dropped from the list. *Id.*

² Memorandum from Kate L. K. Blystone, Planning Director to Maui Planning Commission, Molokai Planning Commission, and Lanai Planning Commission regarding An Ordinance Amending Chapters 19.12, 19.32 and 19.37 Relating to Transient Vacation Rentals in Apartment Districts, at 10 (Jun. 25, 2024).

³ *Id.*

⁴ *See AOAO*, 2023 WL 4305183 at *9 (distinguishing *Hawai‘i Legal Short Term Rental Alliance*).

Therefore, any analysis of the *AOAO* case must recognize that that case will not preclude claims by landowners. In defending such claims, the County would need to overcome the Hawai‘i law that preexisting lawful uses of property *cannot be eliminated* by subsequent zoning ordinances. Property owners have a “right ... to the continued existence of uses and structures which lawfully existed prior to the effective date of a zoning restriction.”⁵ “[P]reexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate.”⁶

Similarly, the federal District Court’s opinions in *Thinh Tran v. Dep’t of Planning for Cnty. of Maui*, No. CV 19-00654 JAO-RT, 2020 WL 3146584, at *2 (D. Haw. June 12, 2020) and *Maui Vacation Rental Ass’n, Inc. v. Maui Cnty. Planning Dep’t*, 501 F.Supp.3d 948, 952 (D. Haw. 2020) do not provide support for the County’s ability to eliminate previously lawful uses of residential properties. As in *AOAO*, the courts in both *Thinh Tran* and *MVR* did not dismiss the federal due process claims, but merely stayed them pending the resolution of the state claims in state court. Further, when the state claims originally raised in *Thinh Tran* recently were reviewed by the Intermediate Court of Appeals of the State of Hawaii, it is important to note that the court did not make any decision as to the merits of the plaintiffs’ taking claims, but merely noted that the plaintiffs would need to have sought, and been denied, a nonconforming use certificate as a prerequisite to bringing damages claims.⁷

The Hawaii Supreme Court’s decision in *Rosehill Tr. of Linda K. Rosehill Revocable Tr. dated August 29, 1989 v. State*, 155 Hawai‘i 41, 59, 556 P.3d 387, 405 (2024) also does not provide support for the County’s elimination of previously lawful residential uses in residential zoned areas as that case was limited to the issue of whether farm dwellings may be used as short-term vacation rentals under HRS chapter 205.

As discussed above, these other recent STR cases do not provide support for the County to take the actions contemplated in Bill 9. The bottom line is that the County will likely face a number of lawsuits that will likely be successful as the interests of individual owners are protected by the Hawai‘i and United States Constitutions.

B. Elimination Of STRs Would Result In Substantial Takings Claims Against The County.

If adopted, Bill 9 will expose the County to substantial and potentially catastrophic financial claims by owners bringing individual takings claims against the County under the U.S.

⁵ *Waikiki Marketplace Inv. Co. v. Chair of the Zoning Bd. of Appeals of City and Cty. of Honolulu*, 86 Haw. 343, 353, 949 P.2d 183, 193 (Ct. App. 1997).

⁶ *Robert D. Ferris Trust v. Planning Com’n of Cnty. of Kauai*, 138 Haw. 307, 312 (Haw. Ct. App. 2016); *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals of City & Cnty. of Honolulu*, 86 Haw. 183, 193-94 (Haw. Ct. App. 1997).

⁷ *Tran v. Dep’t of Planning for Cnty. of Maui*, 155 Hawai‘i 470, 566 P.3d 374 (Ct. App. 2025).

and Hawai‘i Constitutions. It is important to note that the fact that owners can still lease properties on a long-term basis does not preclude such a claim. The “duration of an appropriation ... bears only on the amount of compensation,” not whether a taking has occurred.⁸ Because the proposed TVR Bill effects a per se taking, property owners are automatically entitled to compensation for the value of property taken under both the U.S. and Hawai‘i constitutions.⁹

In the alternative, Bill 9 would likely effect a regulatory taking under the factors set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The *Penn Central* factors balance (1) “[t]he economic impact of the regulation on the claimant;” (2) “the extent to which the regulation has interfered with distinct investment-backed expectations;” and (3) “the character of the governmental action.”¹⁰

Bill 9 will cause significant damage to owners’ property values and deprive them of income from TVRs on which many rely to pay their mortgages, condominium fees, and maintenance costs, as well as for income and retirement savings. Bill 9 interferes with property owners’ reasonable expectation that their properties can be used as TVRs, which is based on decades of lawful nonconforming use and the County’s express assurances. These considerations demonstrate that Bill 9 effects a regulatory taking.¹¹

Notably, and as mentioned in our prior testimony: the Hawai‘i Constitution is broader than the U.S. Constitution insofar as it prohibits not just takings, but also “damage” to private property without just compensation. Haw. Const. art. I, § 20; *see also Honolulu v. Victoria Ward, Ltd.*, 153 Haw. 462, 493, 541 P.3d 1225, 1256 (2023) (takings clause amended “to provide remedies for property owners whose property lost value or usefulness although no physical taking was executed”).¹² Bill 9 would cause regulated property owners to “los[e] value [and] usefulness” in their properties, which is cognizable as a taking under Hawai‘i’s broader Takings Clause, even if that same loss were somehow not also cognizable as a federal taking.

⁸ *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 153 (2021).

⁹ *See, e.g., Sheetz v. Cnty. of El Dorado, Cal.*, 601 U.S. 267, 274 (2025).

¹⁰ 438 U.S. at 124.

¹¹ *DW Aina Le’a Dev., LLC v. Land Use Comm’n*, 716 F. Supp. 3d 961, 965 (D. Haw. 2024) is not to the contrary. In that case, the U.S. District Court granted summary judgment to the State on plaintiff developer’s temporary regulatory takings claim, strongly suggesting that the developer lacked standing to sue, but noting that, even if it had standing, its claim failed on the merits because the developer failed to present admissible evidence to create a triable issue on the *Penn Central* factors. Here, there is no dispute that property owners would have standing to sue, and the evidence clearly supports a regulatory taking.

¹² *See also City & Cnty. of Honolulu v. Mkt. Place, Ltd.*, 55 Haw. 226, 231, 517 P.2d 7, 13 (1973) (the “damage” additions serves to “add to the class of those entitled to indemnification individuals whose property, although not technically ‘taken,’ is nonetheless injured by a government use elsewhere in a way that society as a whole, and not the individual property owner, ought to bear the costs”); *cf. Reardon v. City & Cnty. of San Francisco*, 66 Cal. 492, 501, 6 P. 317, 322-23 (1885) (“There is no reason why th[e] word [damaged] should be construed in any other than its ordinary and popular sense. It embraces *more than the taking*. . . . If the word ‘damaged’ only embraced physical invasions of property, the right secured by this word would add nothing to the guaranty as it formerly stood.”).

C. The Proposed Amortization Period Does Not Cure Bill 9’s Violation Of Vested Rights Or Unconstitutional Taking.

As we have previously explained, amortization does not prevent the violation of vested rights or the “taking” of property when a preexisting lawful use is eliminated—it only delays the injury. Importantly, amortization is no substitute for the payment of just compensation.

While not specifically addressed in Hawai‘i, high courts of other states have recognized that statutes purporting to amortize vested rights to preexisting uses of property are unconstitutional.¹³ There is a very distinct possibility that the federal courts and the Supreme Court of the State of Hawai‘i will reach the same result, particularly in light of *Ferris Trust v. Planning Commission of County Of Kauai*, 378 P.3d 1023, 1028 (Ct. App. 2016), which reiterated that “preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances *may not abrogate*.”¹⁴

For example, in *Pennsylvania Northwestern Distributors. v. Zoning Hearing Board.*, 526 Pa. 186 (Pa. 1991), the Pennsylvania Supreme Court held that “[a] lawful nonconforming use establishes in the property owner a vested property right which cannot be abrogated or destroyed, unless it is a nuisance, it is abandoned, or it is extinguished by eminent domain.”¹⁵ It further held that “the amortization and discontinuance of a lawful pre-existing nonconforming use is *per se* confiscatory and violative of the Pennsylvania Constitution.”¹⁶ Likewise, in *Hoffmann v. Kinealy*, 389 S.W.2d 745 (Mo. 1965), the Missouri Supreme Court reversed an appellate court decision affirming the denial of landowners’ application for a certificate of occupancy for a preexisting nonconforming use of lots to store lumber, agreeing with landowners that the zoning ordinances, which included a six-year amortization period, effected an unconstitutional taking. The court stated that “the right to continue a lawful nonconforming use” is a “vested right,” which cannot be terminated “immediately,” and amortization cannot “validate a taking *presently* unconstitutional by the simple expedient of *postponing* such taking for a ‘reasonable’ time.”¹⁷ These cases demonstrate that amortization does not cure the fundamental problems Bill 9 poses.

¹³ See, e.g., *James v. City of Greenville*, 227 S.C. 565, 583, 88 S.E.2d 661, 670 (1955); *City of Akron v. Chapman*, 160 Ohio St. 382, 388, 116 N.E.2d 697, 700 (1953).

¹⁴ That other courts in other jurisdictions have reached a contrary conclusion (see, e.g., *Nickell v. Montgomery Cnty., Md.*, 878 F.2d 379 (4th Cir. 1989)) will not override controlling Hawai‘i precedent establishing clear protection of vested property rights, as in *Ferris*.

¹⁵ *Pennsylvania Northwestern Distributors. v. Zoning Hearing Board.*, 526 Pa. 186, 192 (Pa. 1991).

¹⁶ *Id.* at 195.

¹⁷ *Id.* at 754.

D. Potential Financial Impacts of Successful Takings Claims

As discussed, there is a strong potential that the County would face takings claims seeking damages in the event that Bill 9 were passed. When I served as Attorney General of the State of Hawaii, I always felt that it was important to consider the risks of the potential litigation that a government agency could face. Similarly, it is only prudent for the County Council to ask itself and its attorneys what the financial risk is to the County of successful takings claim lawsuits.

One simple approach (but certainly not the only approach) to calculating the potential damages to the County could be to look at diminution of value that the impacted owners would face.¹⁸ The Economic Research Organization at the University of Hawai'i ("UHERO") study estimates that the average appraised value of Apartment-zoned TVRs is \$971,500.¹⁹ Further, UHERO estimates that the curtailment of transient vacation rentals could result in a potential drop in condominium prices as high as forty (40) percent, i.e., \$388,600 per owner.²⁰ There are more than 6,000 properties in apartment-zoned districts impacted by the Bill 9. Thus, just using the UHERO report estimates, the potential diminution of value experienced by the impacted owners could be more than \$2.3 billion. It would be imprudent for the County to believe that it has a zero risk of being held liable in litigation. If the County even considers that it has a 50% risk of losing, the potential risk assessment for damages would be \$1.15 billion. The County should carefully consider whether it is prudent to face this potentially disastrous financial consequence of passing Bill 9.

E. Conclusion

As discussed herein and in my prior testimony, Bill 9 implicates fundamental property rights that have been recognized by the Hawaii and United States courts. Passage of such a bill invites years of legal challenges that threaten to embroil the County in litigation and detract from the County's objectives of increasing housing availability and affordability. Further, the potential cost costs of such litigation in terms of the potential damages that could be awarded could potentially be in the billions of dollars. This would be in addition to the other economic losses that would likely occur in the event Bill 9 were passed, including the loss in gross domestic product and tax revenue.

¹⁸ Diminution in value may not fully reflect the compensation individual property owners may be entitled as a result of Bill 9. The County's actual potential liability for takings claims and other claims seeking monetary damages could be significantly higher.

¹⁹ The Economic Research Organization at the University of Hawai'i, "An Economic Analysis of the Proposal to Phase Out Transient Vacation Rentals in Maui County Apartment Districts" ("UHERO Report"), at 3 (Mar. 31, 2025).

²⁰ *Id.* at 1.

Maui County Council and Corporation Counsel
July 22, 2025
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For all of the reasons set forth above, we continue to urge the Council to reject Bill 9 and to pursue a better solution for moving forward, together, to address housing challenges facing Maui.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Louie", written over a horizontal line.

DAVID M. LOUIE
JOSEPH A. STEWART
for
KOBAYASHI SUGITA & GODA, LLP

Enclosure: Exhibit A
cc: Maui Corporation Counsel

EXHIBIT A



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June 6, 2025

MAUI COUNTY COUNCIL
Housing and Land Use Committee
Tasha Kama, Chair
Nohelani U‘u-Hodgins, Vice Chair

HEARING DATE: June 9, 2025
TIME: 10:00 pm

Re: TESTIMONY ON BEHALF OF AIRBNB OPPOSING
THE PROPOSED BILL 9 (2025), AMENDING
CHAPTERS 19.12, 19.32, AND 19.37, MAUI COUNTY
CODE, RELATING TO TRANSIENT VACATION
RENTALS IN APARTMENT DISTRICTS (HLU-4)

Dear Chair Kama, Vice Chair U‘u-Hodgins, and Committee Members:

We write on behalf of our client, Airbnb, in opposition to the proposed BILL 9 (2025), AMENDING CHAPTERS 19.12, 19.32, AND 19.37, MAUI COUNTY CODE, RELATING TO TRANSIENT VACATION RENTALS IN APARTMENT DISTRICTS (HLU-4) (“TVR Bill”).

The TVR Bill effectively eliminates short-term rentals in apartment-zoned districts in Maui. This is despite the fact that short-term rentals have been lawful, residential uses in these districts for decades. While we are encouraged by the Mayor’s proposal to extend the time period for this action from the original six months/one year to five years, the proposed action still violates U.S. and Hawai‘i law.

Specifically, the TVR Bill violates the well-established rights under the United States and State of Hawai‘i Constitutions of property owners—including many Maui residents who depend on income from TVRs to pay their mortgages, provide for their families, and fund their retirements. The TVR Bill will also have far-reaching—and potentially catastrophic—consequences for individuals and small businesses that depend on economic activity TVRs generate, in addition to negatively impacting the environment, and, in turn, the health and well-being of all Maui residents.

The TVR Bill would also invite years of lawsuits from property owners who have lawfully used their property as short-term rentals for decades and who have incurred substantial expenses to support such activity. Protracted litigation would be costly to the County—and should challengers prevail, the County could be required to pay property owners millions of dollars to compensate them for the taking of their properties and damages resulting from the ban.

As discussed more fully below, both the State of Hawai‘i and federal courts of Hawai‘i have explicitly recognized the vested rights of apartment owners to use their homes for short-term rentals as a residential use. Consequently, there is a substantial likelihood that the TVR Bill will ultimately be deemed unconstitutional. Furthermore, the bill would eliminate a major source of tax revenue that supports affordable housing and divert funds that could address Maui’s housing challenges to pay litigation expenses—an unnecessary and unfortunate outcome.

For these reasons, we strongly urge that the Council not move forward the TVR Bill.

A. The Proposed TVR Bill Eliminates the Vested Rights of Maui Property Owners.

The proposed TVR Bill seeks to eliminate short-term rentals that have been lawful in Maui for over half a century. As Maui’s Planning Director has recognized, “[short-term rentals], in one form or another, have been permitted within Apartment Districts since 1960.”¹ The specific apartments targeted by the TVR Bill, moreover, have for years been permitted to operate as short-term rentals “by right.”² The TVR Bill’s proposed elimination of these short-term rentals—and this right—plainly violates Hawai‘i law.

The law is clear and unequivocal: preexisting lawful uses of property *cannot be eliminated* by subsequent zoning ordinances. Property owners have a “right . . . to the continued existence of uses and structures which lawfully existed prior to the effective date of a zoning restriction.”³ “[P]reexisting lawful uses of property are generally considered to be vested rights that zoning

¹ Memorandum from Kate L. K. Blystone, Planning Director to Maui Planning Commission, Molokai Planning Commission, and Lanai Planning Commission regarding An Ordinance Amending Chapters 19.12, 19.32 and 19.37 Relating to Transient Vacation Rentals in Apartment Districts, at 10 (Jun. 25, 2024).

² *Id.*

³ *Waikiki Marketplace Inv. Co. v. Chair of the Zoning Bd. of Appeals of City and Cty. of Honolulu*, 86 Haw. 343, 353, 949 P.2d 183, 193 (Ct. App. 1997).

ordinances may not abrogate.”⁴ This rule is deeply rooted in Hawai‘i law, is constitutional in nature,⁵ and does not depend on the text of Hawai‘i’s Zoning Enabling Act, Section 46-4(a).

In 1997, the Hawai‘i Intermediate Court of Appeals concluded that Honolulu could not fine a property owner for maintaining a nonconforming addition that was lawful at the time the addition was constructed.⁶ The appellate court explained that “the right of a property owner to the continued existence of uses and structures which lawfully existed prior to the effective date of a zoning restriction is grounded in *constitutional* law.”⁷ Requiring the owner “to remove the addition and pay daily fines,” the court reasoned, “would constitute an interference with [the owner’s] vested property rights, in violation of the due process clauses of the federal and state constitutions.”⁸

In 2016, the Hawai‘i Intermediate Court of Appeals affirmed these principles, this time in the context of short-term rentals. The appellate court rejected Kaua‘i’s interpretation of an ordinance that permitted only individuals who owned a seventy-five-percent-or-greater interest in their property to apply for short-term rental nonconforming use certificates.⁹ The court reasoned that such an interpretation would raise “serious constitutional questions” because “persons with less than a seventy-five percent ownership interest [in their property] may have vested rights to pre-existing lawful uses.”¹⁰ Those vested rights, in turn, the court explained, cannot be abrogated by zoning law.¹¹

More recently, in 2022, the United States District Court for the District of Hawai‘i considered the constitutionality of a Honolulu ordinance that banned short-term rentals of less than 90 days. The federal court reasoned that homeowners in Honolulu had “a vested property right” in using their homes for short-term rental, because the homeowners had been doing so for years in reliance on existing law.¹²

⁴ *Robert D. Ferris Trust v. Planning Com’n of Cnty. of Kauai*, 138 Haw. 307, 312 (Haw. Ct. App. 2016); *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals of City & Cnty. of Honolulu*, 86 Haw. 183, 193-94 (Haw. Ct. App. 1997).

⁵ *Id.*

⁶ *Waikiki Marketplace*, 86 Haw. at 193.

⁷ *Id.* (emphasis added).

⁸ *Id.* at 194.

⁹ *Ferris Trust*, 138 Haw. at 313.

¹⁰ *Id.*

¹¹ *Id.* at 312.

¹² *Hawaii Legal Short-Term Rental Alliance v. City and Cnty. of Honolulu*, 2022 WL 7471692, at *10 (D. Haw. Oct. 13, 2022).

And again last year courts in Hawai‘i expressly recognized property owners’ vested right to “the preexisting lawful use of [a] [p]roperty as a nonconforming TVR”¹³ and acknowledged property owners’ “vested right” to operate a TVR as a lawful, non-confirming use.¹⁴

Apartment owners in Maui who lawfully use their apartments for short-term rentals have a vested right in that preexisting use. Under state and federal law, Maui may not abrogate that vested right. The recent changes to Hawai‘i Revised Statutes, Section 46-4(a) referenced in the TVR Bill¹⁵, purporting to remove statutory protections for homeowners who use their homes for short-term rentals, do not change the analysis. As the courts have found, the statutory protections of Section 46-4 derive from constitutional law.¹⁶ Even if the statutory protections can be removed, the constitutional foundation remains, and the TVR Bill violates those constitutional protections.

B. The Proposed TVR Bill Causes an Unconstitutional Taking of Property Under the United States and Hawai‘i Constitutions.

The TVR Bill also implicates constitutional protections of apartment owners. The Fifth Amendment to the United States Constitution prohibits “private property [from] be[ing] taken for public use, without just compensation.” U.S. Const. amend. V. The Hawai‘i Constitution too states that “[p]rivate property shall not be taken or damaged for public use without just compensation.” Haw. Const. art. I, § 20. Because the Hawai‘i Constitution prohibits not just takings, but also mere “damage” to property interests, provides even broader protection than its federal counterpart. By preventing apartment owners from using their apartments for short-term rentals, the proposed TVR Bill effects an unconstitutional taking of private property under federal and state law.

A *per se* taking occurs whenever government interference with property effects “a direct government appropriation or physical invasion of private property.”¹⁷ When the government “appropriates for the enjoyment of third parties” “a fundamental element of the [owners’] property right,”¹⁸ or “otherwise interfere[s] with [such fundamental] right[s],” “[t]hat sort of intrusion on property rights is a *per se* taking” that automatically “trigger[s]” the “right to compensation.”¹⁹

¹³ *Rigotti v. Planning Dep’t of the Cnty. of Kauai*, 155 Haw. 181 (Ct. App. 2024) (unpublished).

¹⁴ *Kendrick v. Plan. Dep’t of the Cnty. of Kaua’i*, 155 Haw. 230, 240 (Ct. App. 2024).

¹⁵ TVR Bill, Section 7.A.

¹⁶ *Campos v. Planning Comm’n*, 153 Haw. 386, 393 (Haw. App. Ct. 2023); *Ferris Trust*, 138 Haw. at 312; *Waikiki Marketplace*, 86 Haw. at 353.

¹⁷ *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

¹⁸ *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021).

¹⁹ *Sheetz v. Cnty. of El Dorado, Cal.*, 601 U.S. 267, 274 (2025).

The TVR Bill prohibits property owners from leasing their properties on a short-term basis. But a fundamental element of property ownership is the right to lease for a duration of the owner's choosing.²⁰ The proposed ordinance also violates owners' right to include persons of their choosing (here, short-term lessees) on their property. The right to include is a corollary of the right to exclude, a recognized fundamental right.²¹ "[T]he right to exclude must encompass . . . the owner's right to include others."²² Because the proposed TVR Bill effects a *per se* taking, property owners are automatically entitled to compensation for the value of property taken.²³

In 2022, the United States District Court for the District of Hawai'i entered a preliminary injunction, preventing Honolulu from enforcing similar legislation, for this exact reason.²⁴ The Hawai'i Federal District Court explained that property owners have a vested property right, for purposes of the federal Takings Clause, in using their homes for short-term rentals.²⁵ In finding this right, the court pointed to, among other things, the fact that property owners had relied on Honolulu regulations, decisions, and agreements that had long permitted such use.²⁶ The court then explained that "there is no question" that the attempted ban constitutes a taking because it outlaws existing short-term rentals "without providing any process to compensate or accommodate nonconforming uses."²⁷ In entering a preliminary injunction, the court blocked Honolulu from enforcing the ordinance.

The same is true here, and the same result will likely follow. Banning TVRs will have a swift—and dramatic—impact on owners. Property owners (including several Maui residents) testified before the Planning Commission that the ban will eliminate TVR income on which they rely to pay their mortgages, provide for their families, or fund their retirements. It will also destroy the value of their properties. UHERO projects that condominium prices will decline by 20-40

²⁰ See *Terrace v. Thompson*, 263 U.S. 197, 215 (1923); *Zatari v. City of Austin*, 615 S.W.3d 172, 190 (Tex. App. 2019) (observing "[t]he ability to lease property is a fundamental privilege of property ownership," and recognizing plaintiffs' "settled interest in their right to lease their property short term").

²¹ See, e.g., *Union Carbide Corp. v. Alexander*, 679 S.W.2d 938, 940 (Tenn. 1984) (explaining that the fundamental "rights associated with the ownership of property" include the core rights and their corollaries—i.e., "the right to refuse to do any of the[m]")

²² Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 742-43 (1998)

²³ See, e.g., *Sheetz*, 601 U.S. at 274. The TVR Bill also effects a regulatory taking under the *Penn Central* factors. See 438 U.S. at 124 (considering the "(1) economic impact of the regulation [on the property owner], (2) its interference with reasonable investment-backed expectations, and (3) the character of the government action" to determine whether a taking has occurred).

²⁴ *Hawaii Legal Short-Term Rental Alliance*, 2022 WL 7471692, at *9-11.

²⁵ *Id.* at 10.

²⁶ *Id.* at 10 n. 23.

²⁷ *Id.* at 10.

percent after the TVR Bill takes effect.²⁸ The proposed ordinance interferes with owners' reasonable expectations—supported by decades of lawful use and the County's express assurances—that they would be able to continue using their properties as TVRs—expectations on which they based significant decisions about their lives and livelihoods. The County's action, which will impose severe consequences on property owners, effects a taking for which property owners must be compensated.²⁹

C. The Proposed TVR Bill Violates the Law in Several Other Ways

The proposed TVR Bill is likely unlawful for numerous other reasons. As one additional example, the proposed TVR Bill violates principles of zoning estoppel, which prevents municipalities from repudiating prior zoning decisions on which property owners have relied. As the Hawai'i Supreme Court has explained:

[T]he doctrine of zoning estoppel is based on a change of position on the part of a [property owner] by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project.³⁰

Apartment owners in Maui for years have relied on the official assurances from their government that their preexisting lawful uses are protected. If enacted, and when challenged in court, Maui will be estopped from repudiating these assurances.

The TVR Bill also implicates property owners' substantive due process rights by arbitrarily and unreasonably impairing their vested rights, in violation of due process principles.³¹ Specifically, it arbitrarily eliminates property owners' right to lease their properties for any period less than 180-days, without any reasonable justification.³² Importantly, the TVR Bill will likely not survive the heightened scrutiny courts apply to evaluate laws that burden fundamental rights.³³

²⁸ The Economic Research Organization at the University of Hawai'i, "An Economic Analysis of the Proposal to Phase Out Transient Vacation Rentals in Maui County Apartment Districts" ("UHERO Report"), at 1 (Mar. 31, 2025).

²⁹ See *DW Aina Le'a Dev., LLC v. Land Use Comm'n*, 716 F. Supp. 3d 961, 975 (D. Haw. 2024), *aff'd*, 2025 WL 546356 (9th Cir. Feb. 19, 2025).

³⁰ *Life of the Land, Inc. v. City Council of City & Cnty. of Honolulu*, 606 P.2d 866, 902 (1980); see also *Pacific Standard*, 653 P.2d at 744 (quoting same).

³¹ See *Waikiki*, 86 Haw. at 353-54, 949 P.2d at 193-94.

³² See *United Prop. Owners Assoc. v. Belmar*, 447 A.2d 933, 937 (N.J. Super. Ct. App. Div. 1982), *cert. den.* 453 A.2d 880 (1982) ("[T]ime limitations imposed on renting residential property are impermissibly arbitrary and constitute an unreasonable restraint on the use of private property.").

³³ *Nagle v. Bd. of Ed.*, 63 Haw. 389, 403, 629 P.2d 109, 119 (1981).

It is not narrowly tailored to serve the County's interest in promoting affordable housing and undermines this goal by eliminating TVRs, which represent the largest source of property tax revenue for the County and provide the largest contributions to affordable housing development in Maui.³⁴

Further, apartment owners affected by the TVR Bill are likely to have various other legal claims based on their individual circumstances.

D. Consideration of the Proposed TVR Bill is Premature

The current deliberation on the elimination of existing lawful uses, based on the record before the Council, is premature and lacks a comprehensive foundation. Such an approach may lead to legal challenges. Before enacting any restrictions, it is crucial for the County to thoroughly evaluate, among others, the following considerations:

1. **Absence of Compensation for Loss.** When the government eliminates a valid use, it generally must compensate those who are impacted for such loss. The TVR Bill does not make any consideration of compensation. We recommend that the Council convene an analysis to determine the compensation it will be required to pay for the taking prior to consideration of the TVR Bill.
2. **Economic Impacts on the County.** The Economic Research Organization at the University of Hawai'i (UHERO)'s recent study projects that the TVR Bill will result in a **\$900 million** annual decline in total visitor spending and the loss of roughly **1,900** jobs in accommodations, food services, arts, entertainment, and retail trade, and cause Maui's real GDP to contract by **4 percent**.³⁵ UHERO estimates that property tax revenues will fall by up to \$60 million annually by 2029, due to declining property values and changes in tax class, and General Excise Tax and Transient Accommodations Tax revenues will fall by 10 and 8 percent (respectively), resulting in an additional \$15 million of annual losses.³⁶ Airbnb submits that this is likely

³⁴ Jen Russo, Short Term Rentals are the Biggest Revenue Source for Maui County Real Property Tax FY22-23, MAUI VACATION RENTAL ASSOCIATION (May 22, 2022), available at <https://mvra.net/news/12800076>.

³⁵ The Economic Research Organization at the University of Hawai'i, "An Economic Analysis of the Proposal to Phase Out Transient Vacation Rentals in Maui County Apartment Districts" ("UHERO Report"), at 1-2 (Mar. 31, 2025).

³⁶ *Id.* at 1. A report by Kloninger & Sims Consulting LLC reached similar conclusions. According to that report, visitors staying in TVRs contributed approximately \$2.2 billion to Maui's economy in 2023 alone, generating \$33.7 million in county Transient Accommodations Tax and \$11.8 million in county General Excise Tax revenues—a total of \$45.5 million. The elimination of Maui's TVRs would result in a \$128.3 million to \$280.9 million decline in county tax collections.

a conservative estimate of the actual impacts to the County. The proposed TVR Bill does not consider how to address that loss or consider the fact that such revenue loss to the County could, in fact, be used by the County to increase the amount of affordable housing that is available to working families. This should be more fully vetted prior to any decision on the TVR Bill.

3. **The County Must Consider Potential Environmental Impacts.** TVRs provide a sustainable and environmentally friendly alternative, consuming fewer resources than resorts, hotels, or motels.³⁷ The County has not yet evaluated the adverse environmental consequences or aim to minimize these impacts. We strongly recommend that the County undertake a complete analysis of the potential environmental impacts of the TVR Bill before its consideration.

As we summarized above, the TVR Bill impedes fundamental rights and is subject to heightened scrutiny. However, the failure to fully examine, study, and consider these issues makes it questionable as to whether the TVR Bill even meets the standard of rational basis review. We would submit that it would be premature to pass the TVR Bill without explicitly considering these issues.

E. Conclusion

In conclusion, the County stands at a critical juncture. It can either choose to proceed with eliminating individuals' vested rights to use their residential properties, thereby inviting substantial litigation, or it can opt to explore collaborative solutions to Maui's housing challenges. By working with apartment owners and leveraging the tax revenue generated from TVRs, the County can develop housing that better meets the needs of Maui's workforce.

It is also imperative the Council enact laws that align with and uphold the protections guaranteed by the Hawai'i and federal Constitutions. The passage of the TVR Bill, as currently proposed, would contravene these constitutional protections. Such a legislative change is likely to trigger extensive litigation, which could ultimately nullify the TVR Bill. While the goals of increasing housing availability and affordability are important objectives, imposing unlawful and ineffective restrictions on short-term rentals is not a viable solution.

³⁷ For example: A 2018 analysis using a "Cleantech" model found that when guests stay at a TVR, significantly less energy and water is used, greenhouse gas emissions are lower, and waste is reduced, compared to hotel stays. See Airbnb, "How the Airbnb Community Supports Environmentally-Friendly Travel Worldwide" (Apr. 19, 2018), available at <https://news.airbnb.com/how-the-airbnb-community-supports-environmentally-friendly-travel-worldwide>.

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For the reasons set forth herein, we have significant concerns about the proposal and urge the County to not move forward with the TVR Bill.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Louie", with a stylized, cursive flourish at the end.

David M. Louie
for
KOBAYASHI SUGITA & GODA, LLP