

HLU Committee

From: David Sharbak <desh53@icloud.com>
Sent: Monday, July 7, 2025 2:46 AM
To: HLU Committee
Subject: Opposition to bill 9

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Dear committee,

This letter from a formal Attorney general makes many strong reason why th Bill 9 conflicts with current law.

MAUI COUNTY COUNCIL

Housing and Land Use Committee

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

In 1997, the Hawaiʻi 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 Hawaiʻi Intermediate Court of Appeals affirmed these principles, this time in the context of short-term rentals. The appellate court rejected Kauaʻi’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 Hawaiʻi 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

And again last year courts in Hawaiʻi 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 Hawaiʻi 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 Hawaiʻi 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 Hawaiʻi 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 Hawaiʻi 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

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 Hawaiʻi entered a preliminary injunction, preventing Honolulu from enforcing similar legislation, for this exact reason.²⁴ The Hawaiʻi 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 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

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 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.

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,

David M. Louie, for Kobayashi Sugita & Goda, LLP

Regards

David sharbak

Papakea Property Owner Papakea A306

HLU Committee

From: County Clerk
Sent: Monday, July 7, 2025 7:57 AM
To: HLU Committee
Subject: Fw: Testimony: Bill 9 Violates HRS §46-4 and Property Rights

From: Anon <anon9496n@gmail.com>
Sent: Thursday, July 3, 2025 6:22 PM
To: County Clerk <County.Clerk@mauicounty.us>
Subject: Testimony: Bill 9 Violates HRS § 46-4 and Property Rights

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TESTIMONY

My testimony is a Rebuttal to a June 30, 2025 Testimony “Analysis on the Validity and Impact of Bill 9” by Lance D. Collins., Esq.

I. INTRODUCTION

This testimony addresses the serious material deficiencies and legal oversights in the June 30, 2025 opinion authored by Lance D. Collins regarding Bill 9, which proposes to eliminate short-term rentals (STRs) in Maui’s Apartment-zoned districts. While Collins offers a general overview of constitutional takings and land use doctrines, the opinion fails to meaningfully analyze the legally vested rights of current STR operators under Hawaii law and mischaracterizes key legal precedents. The testimony below identifies omissions, misstatements, and unsupported conclusions in the Collins opinion and provides a counter-analysis based on statutory protections, constitutional doctrines, and case law.

II. FAILURE TO APPLY HRS § 46-4(a) – STATUTORY PROTECTION FOR LAWFUL USES

Hawai‘i Revised Statutes § 46-4(a) expressly provides:

- Hawaii Legal Short-Term Rental Alliance v. City & County of Honolulu, 709 F. Supp. 3d 1141 (D. Haw. 2023), where the federal court struck down a 90-day minimum rental period in non-resort districts due to this statute.

Collins’ analysis disregards this explicit bar on zoning ordinances retroactively prohibiting lawful existing uses, including STRs established under prior Maui ordinances and confirmed by the County’s own “Minatoya Opinion” in 2001.

III. THE “MINATOYA PROPERTIES” CONFERRED VESTED RIGHTS

The Minatoya Opinion (2001) was not merely informal guidance. It functioned as the legal foundation for:

- Maui County’s recognition of lawful STRs in apartment zones;
- The County’s decision not to require conditional permits for these uses;
- The collection of taxes and fees under STR classifications for more than two decades.

These facts establish:

1. Consistent government action reinforcing the legality of the use;
2. Reasonable investment-backed expectations relied upon by thousands of owners;
3. De facto vested rights under Hawai‘i case law.

Courts have repeatedly held that lawful preexisting uses (not merely approved permits) confer vested rights. See:

- Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals, 86 Hawai‘i 343, 353–54 (App. 1997)
- Allen v. City & County of Honolulu, 58 Haw. 432 (1977)

The Collins opinion acknowledges this principle but falsely implies that vested rights may be abrogated without compensation as long as the County deems the change “reasonable.” This is contrary to both state law and federal due process standards.

IV. MISAPPLICATION OF PENN CENTRAL FRAMEWORK

The Collins analysis recites the three-part Penn Central test but manipulates it to minimize owner protections:

- **Economic Impact:** Collins argues that because long-term rental or personal use is still allowed, there’s no taking. This ignores the fact that many apartment-zoned STRs (especially in Ma’alaea, Kahana, and South Kihei) have fixed costs (\$4,000–6,000+/month) that render long-term use economically unviable. If an owner cannot rent long-term without sustaining a net loss, and cannot short-term rent, the regulation deprives them of all practical use.
- **Investment-Backed Expectations:** Collins asserts that STRs are “heavily regulated,” implying owners should not have expected continued use. However:
 - Maui County explicitly authorized and promoted STR use in these properties for decades;
 - STR owners relied on these assurances to invest, purchase, and maintain units, often with mortgage underwriting based on rental income;
 - Tax classification, zoning maps, and sales disclosures all reflected legally protected STR status.
- **Character of Government Action:** The Collins memo claims Bill 9 is a neutral, public welfare regulation. Yet, it fails to address:
 - The targeted impact on a limited number of properties;
 - The unequal treatment of similarly situated properties outside the apartment district;
 - The absence of factual findings demonstrating STRs are the primary cause of housing unaffordability, rather than state and county failures in infrastructure, permitting, and development incentives.

V. OVERRELIANCE ON AMORTIZATION

While the Collins opinion presents amortization as a cure-all for due process and takings claims, that assertion is deeply flawed:

- Hawaii courts have never held that a reasonable amortization period nullifies vested use protections under HRS § 46-4.
- In the 2023 federal ruling striking down the Honolulu STR ordinance, amortization was irrelevant because the use was protected by statute, not subject to balancing tests.

Further, courts have routinely rejected amortization where:

- The amortization period does not allow recoupment of investment;
- There is no feasible alternate use;
- The ordinance is a targeted economic deprivation of a minority class of property owners.

In *League to Save Lake Tahoe v. Crystal Enterprises*, 685 F.2d 1142 (9th Cir. 1982), the court acknowledged that amortization can be permissible, but not when it functionally extinguishes vested rights without adequate justification or process.

VI. SELECTIVE USE OF CASE LAW AND POLICY

The Collins opinion contains several misleading or incomplete citations:

- *Kendrick v. Planning Dep't of Kauai*, 155 Hawai'i 230 (App. 2024) is cited to suggest legislatures can regulate vested rights. But the decision also reaffirmed that such regulation must be narrowly tailored, serve a legitimate interest, and not violate specific state statutes — like HRS § 46-4.
- *Miller v. Schoene*, 276 U.S. 272 (1928) is invoked for a sweeping public interest justification, but that case involved destruction of diseased trees to protect agriculture — a far cry from eliminating long-standing residential rental uses.

The opinion also fails to analyze Maui County's own zoning history — including Ordinances 1134, 1797, 4167, and 5126 — which explicitly preserved STRs in apartment districts through at least 2020. The County cannot now claim those same uses are “unlawful” or “nonconforming.”

VII. CONCLUSION

The June 30, 2025 legal opinion is incomplete, imbalanced, and inconsistent with Hawai'i statutory law, case law, and the County's own legal history. It fails to account for:

- The statutory prohibition against retroactive prohibition of lawful uses under HRS § 46-4;
- The vested nature of STR rights on the Minatoya list;
- The economic and practical realities of phasing out STRs in high-cost areas;
- The disparate treatment and targeting of a specific class of legal uses.

Bill 9, if adopted without strong grandfathering or opt-in zoning processes, will trigger well-founded legal challenges under both Hawai'i law and the U. S. Constitution.