

REQUEST FOR LEGAL SERVICES

RECEIVED
CORPORATION COUNSEL

Date: August 2, 2017
From: Elle Cochran, Chair
Infrastructure and Environmental Management Committee


2017 AUG -2 PM 3: 47

TRANSMITTAL
Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Richelle Thomson, Esq.

Subject: Moratorium on Exporting Sand, The Maui Inland Sand Resource Quantification Study and Sand Mining Regulation (IEM-33)

Background Data: Review and approve proposed ordinance. An original, signed copy of the ordinance is required

Work Requested: FOR APPROVAL AS TO FORM AND LEGALITY
 OTHER:

Requestor's signature  Elle Cochran	Contact Person <u>Gary Saldana</u> (Telephone Extension: <u>7137</u>)
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ROUTINE (WITHIN 15 WORKING DAYS) RUSH (WITHIN 5 WORKING DAYS)
 PRIORITY (WITHIN 10 WORKING DAYS) URGENT (WITHIN 3 WORKING DAYS)

SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): August 8, 2017
REASON: For posting of IEM meeting of August 14, 2017

FOR CORPORATION COUNSEL'S RESPONSE

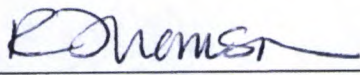
ASSIGNED TO: <u>RMT</u>	ASSIGNMENT NO. <u>2017-0012</u>	BY: <u>TKM</u>
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TO REQUESTOR: APPROVED DISAPPROVED OTHER (SEE COMMENTS BELOW)
 RETURNING--PLEASE EXPAND AND PROVIDE DETAILS REGARDING ITEMS AS NOTED

COMMENTS (NOTE - THIS SECTION NOT TO BE USED FOR LEGAL ADVICE): _____

DEPARTMENT OF THE CORPORATION COUNSEL

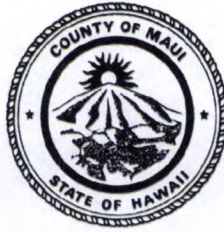
Date 8/7/2017

By 
(Rev. 7/03)

iem:ltr:033acc04:grs

Attachment

ALAN M. ARAKAWA
Mayor



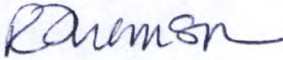
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MEMO TO: Elle Cochran, Chair
Infrastructure and Environmental Management Committee

FROM: Richelle M. Thomson 
Deputy Corporation Counsel

DATE: August 7, 2017

SUBJECT: A bill for an ordinance establishing a new chapter 20.40,
Maui County Code, declaring a moratorium on sand mining
(IEM-33)

This memorandum is response to your request of August 2, 2017, that the Department of Corporation Counsel review and approve the above-identified draft ordinance.

We have reviewed the draft ordinance and provide an attached redlined draft along with the following comments:

1. A map clearly identifying both the geologic areas of Central Maui inland sand deposits as well as geographic identification of major streets and lots/tax map key parcels should be appended to the proposed ordinance to enable the Department of Public Works to accurately identify the area subject to the moratorium. The redlined draft includes a placeholder at the end of the definition of "Central Maui inland sand" for "Exhibit A." The lack of a clear identification of the area subject to the moratorium may render the ordinance vague or ambiguous in its application.

The Long Range Division of the Planning Department and/or the County's GIS staff may be able to assist with mapping this information, using data from a United States Department of Agriculture ("USDA"), Soil

Conservation Service/University of Hawaii Agricultural Experiment Station soil survey for Hawaii published in 1972¹. Additionally, the USDA/National Resources Conservation Service provides a geospatial data gateway/soil survey geographic database².

2. The term "tax map key parcel" should be replaced with "lot" for consistency with the zoning/building codes. The definition of "lot" has been added to the redlined draft.
3. Given the language in the Committee's August 2, 2017, version of the draft ordinance, it appears that mining and some types of grading of lots containing inland sand will not be allowed during the term of the moratorium, except for the activities described in Section 20.40.040. For clarity, the phrase "notwithstanding the provisions in title 19 [the zoning ordinance] and chapter 20.08 [grading]" has been added to Section 20.40.030 of the redlined draft.

We urge the committee to consider modification of the definition of "resource extraction" in Chapter 19.04, which currently includes extraction (mining) of sand. We also again raise the issue of whether a moratorium on sand mining within Title 19 may be appropriate.

4. Assuming that the intent of the Committee's current draft ordinance is to exclude some types of normal grading activities, "limited exclusions" (small scale grading or grubbing activities that do not require a permit) as described in Section 20.08.031, Maui County Code, has been included in Section 20.40.040 of the attached redlined draft.
5. The committee may consider authorizing a variance procedure to address the possibility that there may be lots that can only be developed if sand is removed from within the boundaries of the lot.

The Supreme Court of the State of Hawaii reviewed an ordinance imposing a moratorium on the acceptance of building permits in certain zoning districts on Oahu in Life of the Land v. City and County of Honolulu, 61 Haw. 390 (1980). In addition to prohibiting the acceptance of building permits, the subject ordinance provided that a land developer could seek a variance or modification of the ordinance from the City Council as it applied to a particular project if, in the City Council's discretion, the project was deemed consistent with the pending legislation. Id. at 395. The Committee may consider including a like provision that would provide relief from the moratorium for development applications determined by the Council or by the director to be

consistent with the pending sand mining bill. Alternatively, the Board of Variances and Appeals may be given authority to consider a variance, pursuant to Chapter 19.520, MCC.

6. Given the finite duration of a moratorium, relevant conditions should be included within the ordinance itself. Therefore, substituting “may” for “shall” is recommended in section 20.40.060 (“Administrative rules”).
7. Courts in general will scrutinize the reasons justifying the ordinance, whether it is imposed without discrimination, and whether it is in place for a reasonable amount of time to achieve the purposes or goals of the legislation.

The stated purposes for the sand mining moratorium are to update the 2006 Maui Inland Sand Resource Quantification Study and to develop appropriate regulations. If amendments will be proposed to Title 19, MCC, public hearings before the planning commissions are required. Pursuant to Section 8-8.6.2, Maui County Charter, the planning commissions have 120 days to return their recommendation to the Council. We recommend that the Committee review the length of time required to complete the purposes identified in the moratorium, as well as possibly work with the Department of Public Works on a companion bill to provide funding to complete the update of the 2006 Maui Inland Sand Resource Quantification Study.

Finally, it is anticipated that an executive session may be necessary to discuss questions and issues pertaining to the powers, duties, privileges, immunities, and liabilities of the County, the Council, and the Committee with relation to the proposed ordinance, pursuant to Section 92-5.a.4, Hawaii Revised Statutes, and request inclusion of such session on an upcoming agenda.

¹ “Soil Survey of Islands of Kauai, Oahu, Maui, Molokai, and Lanai, State of Hawaii,” available at https://www.nrcs.usda.gov/Internet/FSE_MANUSCRIPTS/hawaii/islandsHI1972/Five_islands_SS.pdf

² Geospatial Data Gateway/Soil Survey Geographic Database (USDA-NRCS) - <http://datagateway.nrcs.usda.gov/GDGOrder.aspx>

ORDINANCE NO. _____

BILL NO. _____ (2017)

A BILL FOR AN ORDINANCE ESTABLISHING A NEW CHAPTER 20.40, MAUI COUNTY CODE, DECLARING A MORATORIUM ON SAND MINING

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Title 20, Maui County Code, is amended by adding a new

~~Chapter 20.40~~ chapter to be appropriately designated and to read as follows:

“Chapter 20.40

**MORATORIUM ON SAND MINING OF
CENTRAL MAUI INLAND SAND**

Sections:

- 20.40.010 Purpose.
- 20.40.020 Definitions.
- 20.40.030 Moratorium on sand mining.
- 20.40.040 Exceptions.
- 20.40.050 Penalty.
- 20.40.060 Administrative rules.
- 20.40.070 Administrative enforcement.
- 20.40.080 ~~Term.~~

20.40.010 Purpose. The purpose of this chapter is to declare a moratorium on mining of Central Maui inland sand to conduct further analysis; ~~required to~~ establish regulations for mining inland sand to protect Maui’s environment ~~and limited natural resources~~; and prevent the disturbance of Hawaiian historical, cultural, or archaeological sites, and unmarked human burial sites. The Maui Inland Sand Resource Quantification Study (2006) found the remaining inland sand inventory is limited to approximately 970,000 tons. Given the finite nature of this important natural resource, it is necessary to limit and regulate the ~~taking-mining~~ of inland sand until such time as an ordinance regulating the mining, extracting, excavating, or stockpiling of inland sand is adopted.

20.40.020 Definitions. Whenever used in this chapter, the following words shall have the meaning indicated:

“Central Maui inland sand” means inland sand deposits that start downwind of the mouth of Waihee Stream, parallel along the Waiehu coastline, and fan out towards Maalaea generally between Kahekili Highway and Honoapiilani Highway on the west side, and Kuihelani Highway on the east side. Waiko Road demarcates the southerly boundary of the inland sand deposits, though there is a sand layer under the level lands towards Maalaea, **as shown on Exhibit A, attached hereto.**

“Inland sand” means sand, as defined in Chapter 20.08 of this code, located inland (mauka) from the shoreline area, as defined in Section 205A-41, Hawaii Revised Statutes.

“Lot” shall have the same meaning as set forth in section 19.04.040 of this code.

“Sand mining” means activities related to the extraction or removal of sand from its original, natural location.

20.40.030 Moratorium on sand mining of Central Maui inland sand. No ~~individual or entity~~ person shall ~~mine~~ conduct sand mining of Central Maui inland sand notwithstanding the provisions in title 19 and chapter 20.08 of this code.

20.40.040 Exceptions. ~~The following exceptions~~ Sand mining of Central Maui inland sand shall be permitted during the term of the moratorium as follows, provided that an exception pursuant to this section does not obviate the need to obtain other permits or approvals:

A. ~~Sand~~ Mining of Central Maui inland sand ~~extracted and used~~ for purposes of rebuilding or enhancing the protective capacity and environmental quality of coastal dunes, as defined in section 20.08.020 of this title.

B. Mining of Central Maui inland sand used for activities such as land management for agriculture, landscaping, and related uses as described in subsections ~~20.08.030(A) and~~ 20.08.030(C) of this title within the same ~~tax map key~~ parcel lot.

C. Excavation or grading of Central Maui inland sand directly related to on-site construction for purposes other than mining or quarrying, where no such sand is transported outside the same ~~tax map key~~ lot.

D. ~~Any a~~ Activities required to comply with ~~all~~ County, State, ~~and~~ or Federal regulations.

E. Emergency operations, as described in subsection 20.08.030.A of this code.

F. The limited exclusions described in section 20.08.031 of this title.

20.40.050 Penalty. Any person who violates any provision of this chapter shall upon conviction, be guilty of a petty misdemeanor subject to fine up to \$1,000 or imprisonment for not more than one-year, or both. Each day of each violation shall constitute a separate offense.

20.40.060 Administrative rules. The director of public works ~~shall~~ may adopt administrative rules to implement this chapter, pursuant to chapter 91, Hawaii Revised Statutes.

20.40.070 Administrative enforcement. The director of public works shall enforce this chapter pursuant to section 19.530.030 of this code, relating to administrative enforcement.

20.40.080 Term. The ordinance codified in this chapter shall automatically expire _____, unless reenacted by the council as provided by law.”

SECTION 2. This ordinance shall take effect upon its approval; ~~provided two years from the effective date of this ordinance, this ordinance shall be repealed unless reenacted as provided by law; and further provided this ordinance shall be repealed when the council receives an update to the Maui Inland Sand Resource Quantification Study (2006) and passes an ordinance regulating the mining, extracting, excavating, or stockpiling of Central Maui inland sand.~~

APPROVED AS TO FORM AND LEGALITY:

Department of the Corporation Counsel
County of Maui

iem:misc:033abill03:grs