

REQUEST FOR LEGAL SERVICES

D a t e: September 27, 2023

F r o m: Yuki Lei K. Sugimura, Chair

Budget, Finance, and Economic Development Committee

TRANSMITTAL

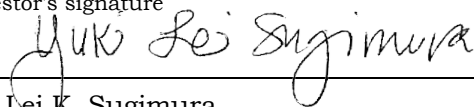
Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Michael J. Hopper, Esq.

Subject: BILL 86, CD1 (2023), RELATING TO MAUI WILDFIRES DEBRIS REMOVAL
(BFED-34)

Background Data: Please see the attached bill, which includes several non-substantive drafting corrections. Please submit your response to bfed.committee@mauicounty.us, referencing BFED-34.

Work Requested: ☒ FOR APPROVAL AS TO FORM AND LEGALITY

☐ OTHER:

Requestor's signature  Yuki Lei K. Sugimura	Contact Person <u>James Krueger</u> (Telephone Extension: <u>7761</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): September 28, 2023

REASON: For Council agenda posting on September 29, 2023.

FOR CORPORATION COUNSEL'S RESPONSE

ASSIGNED TO:	ASSIGNMENT NO.	BY:
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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 _____

By _____

(Rev. 7/03)

bfed:ltr:034acc01:jgk

Attachment

ORDINANCE NO. _____

BILL NO. 86, CD1 (2023)

A BILL FOR AN ORDINANCE RELATING TO
MAUI WILDFIRES DEBRIS REMOVAL

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

SECTION 1. Findings and declarations.

A. Under section 46-1.5(13), Hawaii Revised Statutes, each county has “the power to enact ordinances deemed necessary to protect health, life, and property, and to preserve the order and security of the county and its inhabitants”; in addition, section 46-17, Hawaii Revised Statutes, says that “the council of any county may adopt and provide for the enforcement of ordinances regulating or prohibiting noise, smoke, dust, vibration, or odors which constitute a public nuisance.”

B. Beginning on and after August 8, 2023, several large wildfires have burned thousands of acres on Maui island in Lahaina, Kula, and Olinda, resulting in the death of an unconfirmed number of people and the destruction of over two thousand two hundred structures.

C. Acting Governor Sylvia Luke’s proclamation relating to wildfires declared a state of emergency in the counties of Maui and Hawai‘i on August 8, 2023. Governor Josh Green, M.D. issued the seventh proclamation relating to wildfires on September 8, 2023. Among other actions, the governor declared in the seventh proclamation that disaster-generated debris on private property in impacted areas constitutes an immediate threat to life, public health, and safety and to the economic recovery of the community at large.

D. Maui County Mayor Richard T. Bissen, Jr.’s emergency proclamation declared a state of emergency for the County of Maui on August 8, 2023. Mayor Bissen issued a third emergency proclamation relating to wildfires on August 15, 2023.

E. In destroying private structures, the Maui wildfires have created an accumulation of fire debris, much of which has been determined to be contaminated with heavy metals and asbestos.

F. The potential for widespread toxic exposures and threats to public health and the environment exist in the aftermath of a major fire disaster. Debris and ash from residential structure fires contain hazardous substances that may lead to acute and chronic health problems and may have serious environmental impacts.

G. The combustion of building materials such as siding, roofing tiles, and insulation results in dangerous ash that may contain asbestos, heavy metals, and other hazardous materials. Household hazardous waste such as paint, gasoline, cleaning products, pesticides, and other chemicals that have burned in the fire may also produce hazardous materials.

H. Exposure to hazardous substances may lead to acute and chronic health problems and may cause long-term public health and environmental impacts.

I. Uncontrolled hazardous materials and debris pose significant threats to public health through inhalation of dust particles and contamination of drinking water supplies and wastewater collection and treatment facilities; improper handling of hazardous materials can expose workers to toxic materials and improper transport; and disposal of fire debris can spread hazardous substances throughout the community.

J. Dead and dying trees damaged by the Maui wildfires and at risk of falling may threaten the health, safety, and welfare of workers conducting debris removal, residents of the affected properties, and the general public if the trees are at risk of falling onto a public right of way or public infrastructure.

K. There is an urgent need to mitigate the harm to public health and the environment from the improper disturbance, removal, transport, and disposal of hazardous waste, fire debris, and hazard trees resulting from the Maui wildfires; to create and implement clear standards and procedures for removal of fire debris; and to facilitate coordinated, prompt, and effective mitigation of the risks to public health and the environment from the health hazards generated by the Maui wildfires. The County is acting under its authority under the Maui County code and in coordination with the United States government and the State of Hawaii and under all lawful county authority and authority conveyed, at present and in the future, to remediate the harms done to the community.

SECTION 2. Definitions. For the purposes of this ordinance, the following terms have the following definitions:

“Alternative program” means the requirements for inspections, cleanup, and disposal of structural debris established by the County for property owners who opt out of or are disqualified from the government program.

“Council” means the Maui County Council.

“County” means the County of Maui.

“County building official” means the director of public works.

“Designated department” means the department or departments of the County of Maui designated by the mayor to administer the applicable sections of this ordinance or their designees. The mayor may assign a different department or departments to administer each section of this ordinance.

“Eligible parcel” means a parcel that is an improved public property.

“Fire debris” means structural debris and hazard trees.

“Government program” means the fire debris cleanup program operated by the United States government including the Federal Emergency Management Agency and the United States Army Corps of Engineers, in conjunction with the County and other state and federal agencies.

“Hazard trees” mean wildfire-damaged trees that have been so damaged by the fires that their structural integrity is compromised, and they pose an immediate threat of falling onto work crews or obstructing their access to the debris clearance site or of falling onto a public right of way or a public improved property.

“Maui wildfires” means those fires occurring on or about August 8, 2023, and continuing through August 2023, causing extensive property damage and loss of life in the Kula, Olinda, and Lahaina regions.

“Phase I” means the household hazardous waste cleanup performed by the United States Environmental Protection Agency on certain properties impacted by the Maui wildfires.

“Phase II” means the ash and debris cleanup work performed under the government program or the alternative program.

“Private action” means the removal of fire debris from private property damaged by the Maui wildfires by persons disqualified from or opting out of the government program and participating in the alternative program.

“Qualifying structure” means a structure of one hundred twenty square feet or greater.

“Re-entry” means the official authorization of access to properties within the burn zones.

“Removal of fire debris” includes all cleanup of debris from structures and hazard trees resulting from the Maui wildfires, including removal, transport, and disposal of fire debris, but it does not include the removal of personal property from residential sites unless the removal of personal property involves cleanup and the removal of ash from the property.

“Right-of-entry permit” means the right-of-entry permit for debris and hazard tree removal on private property approved by the County of Maui for use in the cleanup after the Maui wildfires.

“Structural debris” means the wildfire-generated debris, including burned or partially burned structures of one hundred twenty square feet or greater, ash, concrete foundations, contaminated soil, vehicles, trailers, waste, or other debris from the property, including any destroyed structures, structures that pose an immediate threat to the general public, or structures where there is an imminent threat of collapse of the structure as determined by the director of public works.

SECTION 3. Duration.

This ordinance will remain in effect until the latter of the cleanup of all fire debris on all fire-damaged properties from the Maui wildfires or the completion of all enforcement matters related to this ordinance, if any.

SECTION 4. Prohibition on removal of structural debris from private property.

Any removal of structural debris caused by the Maui wildfires from private property is prohibited except under the requirements of the table below. For the purposes of this section, the prohibition refers to the removal, transport, and disposal of structural debris, but it does not include the removal of personal property from residential or commercial sites unless the removal of personal property involves cleanup and the removal of ash or other structural debris from the property.

	No structure on burned property	Non-qualifying structures	Qualifying structures
Prior to completion of Phase I cleanup	Owner may remove debris	Debris removal prohibited	Debris removal prohibited
Prior to completion of Phase II cleanup	Owner may remove debris	Owner may remove debris with approval of the designated department	Government or alternative program contractors only may remove debris
Following Phase II cleanup	Owner may remove debris	Owner may remove debris with approval of the designated department	Owner may remove remaining debris not removed during Phase II with certificate from the designated department

For the purposes of this section, the requirement to enter into the government program or the alternative program applies only to properties that contained a qualifying structure under the government program. The requirement does not apply to properties that only contained non-qualifying structures, including sheds, canopies, carports, well houses, greenhouses, chicken coops or fencing. Whether fire debris is derived from a qualifying or non-qualifying structure must be determined by the county building official, or his or her designee, in consultation with the United States government and the State of Hawaii.

SECTION 5. Removal of structural debris and hazard trees through the government program.

A. The government program will remove fire debris at no out-of-pocket cost to the owner. Because federal law prohibits an owner from receiving insurance proceeds for fire debris removal if the same work is performed by the government, an owner will be required to provide any insurance proceeds for debris or hazard tree removal to the government to avoid duplication of benefits. If an owner does not participate in the government program and there is fire debris on their property, the owner is required to remove the fire debris at their own cost.

B. To participate in the government program, owners must complete and submit a right-of-entry permit. The right-of-entry permit will function as the sole permit and authorization for participation in the government program. Notwithstanding any contrary provision in the Maui County code, no County approvals or permits for the removal of fire debris are required for properties participating in the government program, other than the right-of-entry permit. The designated department must administer the collection of the right-of-entry permit in conjunction with appropriate federal, state, and county agencies and contractors. The right-of-entry permit must be submitted to the designated department by the deadline as provided by the designated department. The deadline must be at least one month after completion of re-entry for the Lahaina wildfire disaster area. The designated department may designate staff to review and sign right-of-entry permits. The designated department may extend this deadline as necessary and appropriate to facilitate the cleanup, avoid undue hardship; to protect public health and safety; and to the extent any extensions are approved by the government program.

C. Any property owner who executes a right-of-entry permit in a form approved by the County before the effective date of this ordinance will be considered enrolled in the government program.

D. If a property contains fire debris, and the owner of the property does not participate in the government program or the alternative program, the County will enforce this ordinance and charge the owner with any administrative and abatement costs related to the enforcement as described below. The costs of the alternative program are paid by the property owner.

SECTION 6. Owner's removal of fire debris through the alternative program.

A. The designated department may administer the alternative program consistent with the requirements reviewed and approved by applicable federal, state, and county agencies. The designated department is authorized to adopt the requirements of the alternative program as administrative rules under chapter 91, Hawaii Revised Statutes, to the extent required.

B. Property owners who are not eligible for the government program or who elect not to participate in the government program for the removal of the fire debris on their properties must comply with the requirements of the alternative program. Under the alternative program, before any fire debris is removed from a property, the owner must submit an application, as adopted by the designated department, to the designated department. Work may not begin until the designated department approves the application. The work performed under the alternative program must conform to all requisite guidelines as adopted by the designated department.

C. The designated department may establish an end date or deadline by which properties in the alternative program must be cleaned up. Upon the completion of the removal of fire debris under the alternative program, the property owner must submit to the designated department documentation that demonstrates the removal of fire debris was completed in compliance with applicable standards and requirements as established by the designated department.

D. The designated department may establish an end date or deadline by which property owners who are not participating in the government program must submit an alternative program application to the designated department under this ordinance. The deadline must be at least one month after completion of re-entry for the Lahaina wildfire disaster area. Properties that have fire debris from structures damaged or destroyed in the Maui wildfires or hazard trees damaged or destroyed in the Maui wildfires that have not submitted an application for the alternative program by that date are declared a public nuisance and health hazard and will be subject to nuisance abatement under this ordinance.

E. The designated department may extend deadlines under the alternative program as necessary and appropriate to facilitate the cleanup, avoid undue hardship, and protect public health and safety.

F. Notwithstanding any contrary provision in the Maui County code, no building permit for demolition is required for private

fire debris removal work for which the alternative program has issued an approval to allow work to proceed.

SECTION 7. Hold on building permits.

No new building permits under the Maui County code may be issued until structural debris cleanup is completed on the affected property and completion is confirmed to the county building official, either through the government program or the alternative program, as applicable. Any issued building permit to repair or reconstruct a fire-damaged structure or private infrastructure will be held in abeyance and not acted upon until structural debris cleanup is completed on the affected property and completion is confirmed to the county building official, either through the government program or the alternative program, as applicable.

SECTION 8. Enforcement.

A. The designated department may set a deadline for filing an acceptable application for the alternative program.

B. Properties that have fire debris from the Maui wildfires and that have not submitted an approved right-of-entry permit for the government program or application for the alternative program by the deadline set by the designated department are declared a public nuisance and health hazard, and these properties may be abated under this ordinance.

C. The designated department may set deadlines for the completion of work in the alternative program. Properties that have fire debris from the Maui wildfires after the deadline set by the designated department are declared a public nuisance and health hazard, and these properties may be abated under this ordinance.

D. The council's intent is to facilitate orderly remediation of a large-scale disaster. Nothing in these deadlines may limit the authority of the County to abate hazards more quickly where required by exigent circumstances. Nothing in this ordinance or in these deadlines may limit the authority of the County to take enforcement action through other remedies under the Maui County code or laws of the State of Hawaii or the United States.

E. The designated department may issue a notice of violation and order to any property owner or person in violation of this ordinance or in violation of the terms of their permit approval, including failure to remove fire debris as required by this ordinance, by serving the person by mail or personal delivery or posting the

notice of violation and order in a conspicuous place on the property where the violation is occurring or occurred, as follows:

1. Contents of the notice of violation. The notice must include at least the following information:

- a. Date of the notice.
- b. The name and address of the person noticed.
- c. The provision of this ordinance or of the permit that has been violated.
- d. The nature of the violation.
- e. The location and date of the violation.

2. Contents of the order.

a. The order must require the person to do one or more of the following:

- i. Cease and desist from the violation.
- ii. Correct the violation at the person's own expense before a date specified in the order.
- iii. Pay a civil fine not to exceed \$1,000 in the manner, at the place, and before the date specified in the order.
- iv. Pay a civil fine not to exceed \$1,000 per day for each day in which the violation persists, in the manner and at the time and place specified in the order..

3. The order must advise the person that the order will become final unless an appeal is filed with the board of variances and appeals within thirty days after the date of its mailing, delivery, or posting.

4. Effects of order; right to appeal. The provisions of the order issued by the designated department will become final unless an appeal is filed with the board of variances and appeals within the thirty-day period. However, an appeal to the board of variances and appeals may not stay any provision of the order.

5. Collection of unpaid civil fines. In addition to any other procedures for the collection of civil fines available to the County by law or rules of the court, the County may add unpaid civil fines as here defined to any county taxes, fees, or charges except for residential water or sewer charges.

6. Judicial enforcement of order. The designated department may institute a civil action in any court of competent jurisdiction for the enforcement of any order issued under this section, including an order to authorize the County to remove the fire debris from the property and charge costs to the owner, or any other injunctive relief to mitigate any on-going damage or threat to public health. Where the civil action

has been instituted to enforce the civil fine imposed by the order, the designated department need only show that the notice of violation and order were served, that a civil fine was imposed, the amount of the civil fine imposed, and that the fine imposed has not been appealed in a prompt manner nor paid.

F. Summary abatement. In addition to any other enforcement procedures provided by law, if the designated department finds that the property constitutes an immediate threat to public health or safety, the designated department may summarily abate the nuisance upon satisfaction of the summary abatement procedures set forth below, as applicable.

1. Pre-abatement notice and order. Unless emergency conditions preclude doing so, the designated department may issue a summary abatement notice and order with the property owner as listed in the most recent county real property tax records. A summary of the notice and order must be posted in a conspicuous location on the property to be abated at least ten days prior to the summary abatement action.

2. Appeal and waiver. The property owner or any person or entity having a legal interest in the property may submit a written appeal of the designated department's order to the designated department by mail or personal delivery no later than fifteen days from the date the designated department mailed or delivered the notice and order. The written appeal must state the basis for the appeal. The designated department will review the appeal, if the appeal is prompt, and must issue a written decision no later than ten days after receipt. The designated department's decision on the appeal may uphold, rescind, or modify the determination of the notice and order. The designated department's decision on the appeal will be final. A copy of the designated department's determination must be delivered promptly upon its issuance to the appellant by mail or personal delivery to the address listed on the last equalized tax roll or other address provided by the appellant. Failure to appeal within the time prescribed will constitute as a waiver of the right to contest the summary abatement.

3. Post-abatement notice. After the summary abatement is completed, the designated department must promptly deliver to the property owner by mail or personal delivery a post-abatement notice indicating:

- a. The action taken by the County;
- b. The reasons for the actions;

c. The costs of the abatement and a request that the costs be paid by the property owner to the County within sixty days; and

d. That a lien will be recorded against the property if the property owner fails to pay the requested abatement costs within sixty days.

G. Judicial enforcement action. The Department of the Corporation Counsel may initiate judicial enforcement of a violation of any provision of this ordinance.

SECTION 9. This ordinance takes effect on its approval.

APPROVED AS TO FORM AND LEGALITY:

MICHAEL J. HOPPER
Department of the Corporation Counsel
County of Maui

bfed:misc:034abill01:jgk

BFED Committee

From: BFED Committee
Sent: Wednesday, September 27, 2023 2:18 PM
To: CorpCounselRFLS@co.maui.hi.us
Cc: BFED Committee
Subject: OCS - re: revised bill on BILL 86, CD1 (2023), RELATING TO MAUI WILDFIRES DEBRIS REMOVAL (BFED 34)
Attachments: 034acc01 YLS-signed.pdf; 034abill01 with revision marks.docx