

REQUEST FOR LEGAL SERVICES

D a t e: November 22, 2022

F r o m: Shane M. Sinenci, Chair

Agriculture and Public Trust Committee

TRANSMITTAL

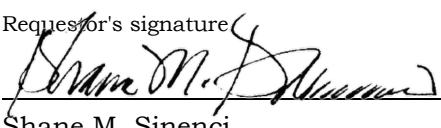
Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Richelle M. Thomson, Esq.

Subject: BILL 160, CD1 (2022), RELATING TO KULA AGRICULTURAL PARK PHASE I EXPANSION AREA (APT-67)

Background Data: Please see the attached bill. Please submit response to apt.committee@mauicounty.us with reference to APT-67.

Work Requested: ☒ FOR APPROVAL AS TO FORM AND LEGALITY

☐ OTHER:

Requestor's signature  Shane M. Sinenci	Contact Person <u>Paige Greco or Richard E. Mitchell</u> (Telephone Extension: <u>7660 or 7662, respectively</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): November 23, 2022

REASON: For posting on December 2, 2022, Council meeting agenda.

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)

apt:ltr:067acc01:pmg

Attachment

ORDINANCE NO. _____

BILL NO. 160,CD1 (2022)

A BILL FOR AN ORDINANCE AMENDING CHAPTER 22.04A, MAUI COUNTY
CODE, RELATING TO KULA AGRICULTURAL PARK PHASE I EXPANSION
AREA

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

SECTION 1. The purpose of this Ordinance is to implement organic standards and regulations to the Kula Agricultural Park that will allow local farmers increased access to labor and land resources to support production, processing, distribution, and consumption of local food to comply with the Organic Foods Production Act.

SECTION 2. Section 22.04A.050, Maui County Code, is amended by adding a new definition to be appropriately inserted and to read as follows:

““Kula agricultural park phase I expansion area” means the approximately two hundred sixty acres of land owned by the County that borders Omaopio and Pulehu roads in Kula.”

SECTION 3. Section 22.04A.070, Maui County Code, is amended to read as follows:

“22.04A.070 Kula agricultural park committee. A. There is established a Kula agricultural park committee, administratively attached to the department of agriculture and consisting of the following ~~[nine]~~ eleven members:

1. One representative: agricultural lending or banking community.
2. One representative: Maui County farm bureau.
3. One representative: agricultural trade organization.

4. One representative: tenant of the Kula agricultural park.
5. One representative: College of Tropical Agriculture and Human Resources, University of ~~[Hawaii]~~ Hawai'i at ~~[Manoa]~~ Mānoa.
6. Director.
7. One council member.
8. ~~[Two representatives]~~ One representative: general public.
9. One representative: GoFarm Hawai'i, farm apprentice mentoring program, or a comparable farmer-education program.
10. One representative: Maui County chapter of Hawaii Farmers Union United.
11. One representative: tenant of the Kula agricultural park phase I expansion area.

No more than three committee members may hold a financial interest in a lot within the Kula agricultural park.

B. The council member must be appointed by the council for a term concurrent with the council member's term of office. The director's term is concurrent with the director's term of office. The remaining ~~[seven]~~ ten members of the committee must be nominated by the mayor, approved by the council, and serve staggered terms of five years.

C. ~~[Five]~~ Six members are a quorum of the committee.

D. The affirmative vote of ~~[five]~~ six or more members of the committee is necessary to take any action.

E. The committee is advisory and must make recommendations to the director, mayor, and council on matters pertaining to the Kula agricultural park and on the design of future agricultural parks."

SECTION 4. Section 22.04A.080, Maui County Code, is amended to read as follows:

"22.04A.080 Notice of lot availability. A. A notice that applications are available for a lot and the date, place, and time an application may be obtained ~~[shall]~~ must be published ~~[County-wide in accordance with section 1-28.5, Hawaii Revised Statutes. The publication shall be made once in each of two consecutive weeks. A notice shall also be posted in the County building for a period of two consecutive weeks.]~~ in media outlets with general circulation within the County, at least five times. Media outlets include newspaper, radio, and social media platforms. Notice must also be sent to Maui County chapters of Hawaii Farmers Union United, Maui County

farm bureau, GoFarm Hawai‘i, and farm apprentice mentoring program.

B. The notices [shall] must identify a deadline for submitting an application[, which]. The date [shall] must not be less than sixty nor more than one hundred eighty calendar days after the date of the last publication or posting.

C. The notices [shall] must also include the proposed base annual rent for each lot. Rent greater than the minimum may be assessed based on any fixed improvements on the lot, [provided] except [that such] the rent [shall] may not be greater than the [current] prevailing market rental rates for comparable properties.”

SECTION 5. Section 22.04A.081, Maui County Code, is amended to read as follows:

“22.04A.081 Limitations on applicants. A person who holds [one of the following interests] a financial interest in one or more lots within the agricultural park is not eligible to apply for a lease of a lot, sublease of a portion of a lot, sublease for a portion of the term of a lease, or the assignment of a lease[: (i) a financial interest in five or more lots within the Kula agricultural park, which shall include any financial interest in an entity or entities that hold a financial interest in five or more lots within the Kula agricultural park; or (ii) a financial interest in sixty or more acres within the Kula agricultural park, which shall include any financial interest in an entity or entities that hold a financial interest in sixty or more acres within the Kula agricultural park] unless there is no other interested applicant at the time the lot lease, sublease, or assignment is made publicly available.”

SECTION 6. Section 22.04A.082, Maui County Code, is amended to read as follows:

“22.04A.082 Application form. The application for a lease of a lot, sublease of a portion of a lot, sublease for a portion of the term of a lease, or the assignment of a lease [shall] must be made on a form provided by the office and [shall] contain the following information:

1. Applicant information.
 - a. Name of applicant.
 - b. Applicant’s business address.
 - c. Applicant’s email address.

- d. Applicant's telephone number.
- e. Business entity applicants [shall] must also provide the following:
 - i. Name and percentage of interest held by each shareholder, partner, or member of the entity.
 - ii. Name, mailing address, email address, and telephone number of a contact person.
 - iii. If incorporated, a copy of the articles of incorporation, date of incorporation, purpose of the corporation, and names of all directors and officers.
 - iv. If a limited liability company, a copy of the articles of organization.
 - v. If a limited partnership or limited liability partnership, a copy of the certificate of limited partnership.
 - vi. If a general partnership, a copy of the registration statement filed with the state.
- [f. Federal and state tax clearance certificates dated within six months of the application date.]
- 2. Agricultural property.
 - a. Lot number and tax map key number of any lot being leased in the agricultural park.
 - b. List of any interest held in any lots within the Kula agricultural park or interest in any entity that holds an interest in a lot within the Kula agricultural park.
 - c. List of any other property being farmed by applicant.
- 3. Agricultural experience.
 - a. Years as owner and operator of a farm.
 - b. Years as operator or manager of a farm.
 - c. Years as a farm worker.
 - d. Percentage of income derived from farm operations.
 - e. Narrative describing role in farm operations.
- 4. Agricultural education. A description of education received and any supporting documentation.
- 5. Displacement.
 - a. If applicable, reasons for displacement.
 - i. Reasons for displacement, may include: non-renewal of a rental agreement; land rendered inadequate for economic operation because of loss attributable to condemnation, withdrawal, or natural disaster; and urban encroachment or change in zoning.
 - ii. All reasons for displacement must be beyond the applicant's control. The voluntary sale or

surrender of a farm [shall] does not qualify as displacement.

b. Period of time that the area was [utilized] used for farm purposes by the applicant.

c. Number of acres lost by displacement.

d. Percentage of total farmable acres lost.

e. Amount or projected amount of total income lost.

f. Percentage or projected percentage of total annual income lost.

6. Farm plan.

a. Crop types.

b. Detailed five-year planting plan.

c. Soil and water conservation practices to be implemented.

d. Weed, pest, and disease control plan.

e. Crop waste and farming waste disposition plan.

f. For Kula agricultural park phase I expansion area applicants, the farm plan must illustrate the applicant's soil and pest management plan in accordance with section 22.04A.100(S).

7. Marketing plan[.] for

[a. Anticipated] anticipated customers.

[b. Methods to be employed to market agricultural products.

8. Financial statements.

a. Sources and anticipated uses of capital.

b. Projected income statements.

c. Balance sheets.

d. Projected cash flow statement on a monthly basis for a minimum of the first two years of the lease, sublease, or assignment.

e. Federal and state tax returns for the two years immediately preceding the application date.]”

SECTION 7. Section 22.04A.084, Maui County Code, is amended to read as follows:

“22.04A.084 Evaluation and scoring of application for the lease of a lot. Members of the committee [shall] must individually evaluate and score each application. The committee may request that an applicant make a presentation to the committee and be available to answer questions. Each member [shall] must follow the following criteria when scoring the applications:

1. Agricultural property. Each applicant [shall] must receive between zero and ten points depending on the size, number

and suitability of agricultural properties being farmed by the applicant. Applicants who hold no financial interest in any agricultural property [shall] must receive ten points.

2. Agricultural experience. Each applicant [shall] must receive between zero and five points, with applicants with greater agricultural experience receiving more points.

3. Agricultural education. Each applicant [shall] must receive between zero and five points, with applicants with greater agricultural education receiving more points.

4. Displacement. Each applicant [shall] must receive between zero and ten points for hardship due to displacement.

5. Farm plan. Each applicant [shall] must receive between zero and twenty points based on the merits of the applicant's farm plan.

[6. Marketing plan. Each applicant shall receive between zero and twenty points based on the merits of the applicant's marketing plan.

7. Financial statements. Each applicant shall receive between zero and twenty points based on the merits of the applicant's financial statements.]”

SECTION 8. Section 22.04A.085, Maui County Code, is amended to read as follows:

“22.04A.085 Applicant selection for lease of a lot. A. The committee [shall] must determine each applicant’s total score by adding the scores assigned to each applicant by the individual committee members. Food for local consumption must be given priority over non-food crops or crops for export. The applicants with the highest total scores [shall] must be recommended by the committee to the director to receive a lease.

B. In the event of a tie [of points], an applicant [shall] must be selected by the committee for recommendation as follows:

1. The director [shall] must place each of the applicant names receiving identical scores in a separate sealed envelope.

2. The sealed envelopes [shall] must be placed in a container [that shall be] brought to the next available committee meeting.

3. The chair [shall] must designate a committee member to draw an envelope from the container.

4. The envelope [shall] must be opened by the chair, and the name of the applicant selected [shall] must be read into the public record.

C. The committee [shall] must make a recommendation to the director on its selections. The committee [shall] must provide all documents, written findings, conclusions and recommendations, and any proposed conditions or qualifications to the director.

D. The director [shall] must review the recommended application, [as well as those] documents, written findings, conclusions and recommendations, and any proposed conditions or qualifications provided by the committee.

E. The director [shall] will deny, approve, or approve with conditions the recommended application within thirty calendar days after the recommendation by the committee is made.

F. The director [shall] must notify the applicant of the director's decision by certified mail within fourteen calendar days after making a decision on the application.

G. If more than one lot becomes available at the same time, the applicant with the highest score [pursuant to] in accordance with section 22.04A.084 [shall select] selects a lot first, followed by the next highest scorer, and so on. In the event of a tie, lots [shall] must be selected in the order applicants were drawn [pursuant to] in accordance with subsection B. Except as otherwise specified in this chapter, lot selection [shall] must take place at a place, date, and time determined by the director. Applicants must be present in person for lot selection. An authorized agent may represent the applicant with prior approval by the director. An applicant [shall] must waive the right to select a lot if the applicant or the applicant's authorized representative is not present when the drawing for lot selection begins. The director [shall] must assign a lot to any absent applicants after the lot selection ends. The director may reserve lots during any lot selection procedure for matters such as pending administrative appeals, litigation, or other matters beyond the County's control. The director [shall] must assign a reserved lot to an applicant who prevails in an administrative appeal or legal proceeding.

H. Upon fulfillment of all prospective lessee's duties and completion of lot selection, if any, the director [shall] must tender a lease for execution to prospective lessees by certified mail. In the event a prospective lessee fails to execute the lease within thirty calendar days after receipt [thereof], the director's tender of the lease [shall] must be [deemed] withdrawn.

I. If a prospective lessee fails to execute the lease within the time permitted, a new qualified applicant [shall] must be selected in accordance with this section from those qualified applicants who received a score [pursuant to] in accordance with section 22.04A.084, but did not receive a lot award. If there are no [such] qualified applicants, the office [shall] must provide notice of lot

availability and proceed with the application and evaluation process again in accordance with this chapter.

J. The department must maintain a waitlist of prospective lessees, sublessees, and assignees. Everyone on the waitlist must be notified when a lot is up for lease or when a lessee wants to sublease or assign a lot. Priority for new leases, subleases, and assignees must be given to those on the waitlist.

SECTION 9. Section 22.04A.100, Maui County Code, is amended to read as follows:

“22.04A.100 Conditions and restrictions in leases. In addition to the standard County lease provisions, each agricultural park lease [shall] must contain the following provisions:

A. A lease term of fifty years.

B. The lease rental rate to be paid quarterly by the first of January, April, July, and October, [provided] except that the lessee may pre-pay rent without penalty.

C. The general agricultural use or uses to which the land is to be employed.

D. A provision that the lessee [shall] must remain current in payment of all taxes, rents, or other obligations to the United States, the State, or any of its political subdivisions, including the County.

E. A provision that the lessee [shall] must pay or cause to be paid, when due, the amount of all taxes, rate assessments, and other outgoings of every description as to which [said] the demised premises or any part [thereof] of the premises, or any improvements [thereon] on the premises, or the County or lessee [in] with respect [thereof] to the premises, may be assessed or become liable by authority of law during the term of the lease; [provided, however,] except that [with respect to] for any government assessment that may be payable in installments, the lessee [shall] may be required to pay only [such] the installments, together with interest, as [shall] they become due and payable during the term.

F. A provision that the lessee may sublease[, with director’s approval, one time only] once for a period not to exceed five consecutive years, the whole or any portion of the demised premises to a sublessee, [provided] except that the sublease agreement [shall] must be year-to-year and approved by the director, after approval by the committee, and [provided further] that the sublessee cannot hold any financial interest in [five] one or more lots[;] or sixty or more acres[;] in the agricultural park at any time.

G. A provision that a lessee may assign the lease, after approval by the committee, for the remainder of the lease term to a

person, [provided] except [that such] the assignee cannot hold any financial interest in [five] one or more lots or sixty or more acres in the agricultural park at any time.

H. A provision that the lessee may mortgage or create a security interest in the demised premises or any portion [thereof] of the premises with the director's approval, [provided] except that in the case of default the leasehold interest may only be foreclosed via judicial action [pursuant to] under chapter 667, Hawaii Revised Statutes, and [provided further that such] the leasehold interest [shall] must be transferred via assignment of lease for the remainder of the lease term only.

I. A provision that the lessee may sell capital improvements at [anytime] any time with director approval during the lease term and within a ninety-day period after expiration or termination of the lease.

J. The lessee must [utilize] use the land for agricultural and related purposes in accordance with the following schedule:

1. Not less than [fifty] 50 percent of useable agricultural land within the first two years of the lease term and the remainder within the first five years.

2. The above [utilization] use schedules [shall] must be made a part of the plan of development and [utilization] use that must be submitted to the County.

K. A provision that the lessee [shall] must keep the demised premises and improvements [thereon] in a strictly clean, sanitary, and orderly condition.

L. A provision that the lessee [shall] must not commit, suffer, or permit to be committed any waste, nuisance, strip, or unlawful, improper, or offensive use of the demised premises [or any part thereof].

M. A provision that the lessee [shall] must not engage in any activity that may result in soil erosion, except in accordance with chapter 20.08 [of this code].

N. A provision that the lessee [shall utilize] must use best management practices at all times.

O. A provision that the lessee [shall] must comply with all requirements of County, state, and federal authorities, and observe all County rules, regulations, and ordinances and state and federal statutes pertaining to the premises[, now in force or that may hereinafter be in force].

P. A provision that the lessee [shall] must permit the County and its agents to enter the demised premises and examine [the] its [state of and] condition [thereof] at all reasonable times during the term of the lease.

Q. A provision that, to the extent permitted by law, the lessee [shall] must indemnify, release, defend, and hold the County

harmless from and against any claim or demand for loss, liability, or damage that arises from the lessee's action, omission, or use of the property and that [such] the provision [shall remain] remains valid and binding against lessee notwithstanding expiration or termination of the lease.

R. A provision that the lessee fully understands that any water made available to the demised premises [shall] must be for agricultural purposes only and not for human consumption, and [provided further] that the lessee [shall] must post signs adequate to provide notice to anyone entering upon the lot that the water is not for human consumption.

S. A provision [that failure to comply with all provisions of the lease shall be cause for termination of the lease] that only the following pesticides and fertilizers are allowed for use on lots in the Kula agricultural park phase I expansion area:

1. Pesticides and fertilizers listed as “allowed” on the National List of Allowed and Prohibited Substances as listed in title 7 Code of Federal Regulations 205.601, 205.603, 205.605, and 205.606.

2. “Minimum risk pesticides” exempt from registration under the Federal Insecticide, Fungicide, and Rodenticide Act, as provided in title 40 Code of Federal Regulations section 152.25(f).

3. The following, when used in compliance with manufacturer specifications:

a. Disinfectants, germicides, bactericides, miticides, and virucides.

b. Insect repellents, and rat and rodent extermination products.

c. General use paints, stains, and wood preservatives, and sealants.

d. Citric acid.

T. A provision that Kula agricultural park phase I expansion area tenants must submit annually to the committee a report of all inputs—such as fertilizer, pesticides, and soil amendments—on farms for the year, including date and product used, to ensure compliance with the provision required by subsection S.

U. A provision that failure to comply with all provisions of the lease is cause for termination of the lease.

V. Before any lease is executed, the prospective lessee must give security against damage and to ensure compliance with the lease by deposit of an amount equal to two months’ rental cost. In lieu of the deposit, the director of finance may accept good and sufficient bond for the amount, naming the County as obligee, the

prospective lessee as principal, and a surety company authorized to do business in this State as surety.

W. Financial statements. Upon completing the second year of operation, the tenant must provide the following information:

1. Sources and uses of capital.
2. Income statements.
3. Balance sheets.
4. Cash flow statement on a monthly basis for the first two years of the lease, sublease, or assignment.
5. Federal and state tax returns for the first two years of operation. The tax return for the second year of operation must be provided within thirty days of filing with the Internal Revenue Service."

SECTION 10. Material to be repealed is bracketed. New material is underscored. In printing this bill, the County Clerk need not include the brackets, the bracketed material, or the underscoring.

SECTION 11. This Ordinance takes effect on January 2, 2023.

APPROVED AS TO FORM AND LEGALITY:

Department of the Corporation Counsel
County of Maui

apt:misc:067abill02:pmg

INTRODUCED BY:

A handwritten signature in black ink, consisting of a stylized 'G' followed by a horizontal line and a small flourish.

GABE JOHNSON