

## IEM Committee

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**From:** Kamaile Maldonado <kamailem@oha.org>  
**Sent:** Wednesday, June 21, 2017 4:50 PM  
**To:** IEM Committee  
**Cc:** Elle Cochran  
**Subject:** OHA Comments on IEM-33  
**Attachments:** IEM-33 CC 17-214 Sand Moratorium IEM Maui Council 062217 Testimony Final.pdf

Aloha mai,

Please find attached OHA's written comments on IEM-33 for the hearing tomorrow, June 22, at 9am.

Mahalo,

**Kamaile M. Maldonado**

*'Aho Pueo Kulekele Aupuni (Policy Advocate)*

Ka Paia Kū (Advocacy) | **Office of Hawaiian Affairs**

560 N. Nimitz Hwy, Suite 200 | Honolulu, HI 96817

☎: (808) 594-1759 📠: (808) 594-1825 ✉: [kamailem@oha.org](mailto:kamailem@oha.org)



Testimony of Kamana`opono Crabbe, Ph.D  
Ka Pouhana, Chief Executive Officer

County of Maui  
Committee on Infrastructure and Environmental Management  
Agenda Item 1

ITEM-33, MORATORIUM ON EXPORTING SAND, THE MAUI INLAND SAND RESOURCE  
QUANTIFICATION STUDY AND SAND MINING REGULATION.

June 22, 2017

9:00 a.m.

Council Chamber

The Administration of the Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on Agenda Item 1, proposing changes to the Maui County zoning code to more specifically regulate “sand mining” activities. OHA believes that this agenda item presents a critical opportunity to consider underlying and long-standing issues regarding the appropriateness of sand mining in Central Maui. **While we believe that the resolution merits further discussion, analysis, and action by the Committee and County Council, we also urge further examination of potential outstanding compliance issues with recent sand mining activities in the Wailuku-Kahului Project District 1 (Maui Lani or Maui Lani district).**

We understand that this resolution is intended to address longstanding concerns over inland sand mining, including deep cultural concerns associated with the desecration of sacred sites and the unearthing of Native Hawaiian iwi kūpuna, as well as the appropriateness of depleting a valuable natural resource. Native Hawaiians’ strong traditions of burying their deceased in inland sand, including at Pu`uone which underlies and is adjacent to various Maui Lani parcels, make Central Maui’s sand dunes particularly sacred to many Maui `ohana; accordingly, many have long voiced their opposition to sand mining in the region. Much concern has also been raised over the controversial extraction and transportation of sand from Central Maui’s inland dunes to other locations on Maui and to O`ahu. OHA therefore appreciates the efforts of this Committee in responding to these long-standing concerns, and urges the Committee to continue to work on addressing this very important issue through legislation and other means.

Based on various recent changes to drafts of this bill, we understand that it is a work in progress, and we appreciate the efforts of the Committee in giving the proposed legislation its full and thorough consideration. In the hope of furthering the discussions regarding this matter, OHA has identified several outstanding county compliance issues with the most recent sand mining activities in Maui Lani, including in the “Phase IX” area,

which may illustrate additional ways to address some of the aforementioned sand mining concerns both immediately and in the long-term.

**Sand mining activities are not a permitted use in the Maui Lani district and may therefore violate the Maui County zoning code.**

The sand mining activities that have and may continue to occur in Maui Lani appear to already constitute an impermissible land use under the Maui County Code (MCC). The industrial-scale commercial sand mining in Maui Lani, including the approximately 320,000 tons of sand planned for “excavation” in Phase IX, can only be considered as constituting “Resource extraction.” “Resource extraction,” meanwhile, is a specifically regulated use under the county zoning code, and is only allowed in the agricultural district, subject to special use permit requirements.<sup>1</sup> Sand mining or resource extraction is not a permissible principal, accessory, or special use in Maui Lani.<sup>2</sup> Accordingly, and as reflected in the Department of Planning’s Notice of Warning of Violation to Maui Lani Partners, dated April 28, 2017 and May 1, 2017, sand mining operations in Maui Lani most likely constitute a violation of the county zoning code.

We understand that Maui Lani Partners’ counsel has suggested that the most recent sand mining activities in Maui Lani have been carried out for the purpose of clearing parcels for residential development, a permissible use under the zoning code. However, the historical and recent industrial-scale sand mining in Maui Lani belies any assertion that it has been necessary for or ancillary to residential development purposes, and has clearly risen to the level of a “resource extraction” land use explicitly subject to regulation under the zoning code. The grading permit application for Phase IX, for example, indicated Maui Lani Partners’ plan to “excavate” an 8.9 acre area to a depth of 45 feet, involving the mining of nearly 215,000 cubic yards or approximately 320,000 tons of sand. The \$30 million reportedly made by Maui Lani sand extractor Honolulu Construction & Draying Co., Ltd. (HC&D) from the Honolulu Rail Project in 2016, using sand sourced from Maui Lani, also illustrates how its most recent industrial-scale sand extraction activities were not necessarily to prepare parcels for residential development, but to profit from sand mining. Again, sand mining in Maui Lani, including in Phase IX, has and continues to constitute a primary and principle land use in violation of the county zoning code.

**A grading permit for Maui Lani Phase IX cannot authorize a land use prohibited by the zoning code.**

OHA further understands that counsel for Maui Lani Partners has suggested that a recent grading permit issued to Maui Lani Partners grants a “vested” property right to conduct sand mining in Phase IX, notwithstanding county zoning ordinances. However, standard grading permit terms and conditions expressly refute such an interpretation. For

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<sup>1</sup> MCC § 19.30A.060.A.10.

<sup>2</sup> See MCC § 19.78.

example, express general provisions in county grading permits state that permits “shall only be taken to mean that provisions of County Code Chapter 20.08 (soil erosion and sediment control) will be complied with,” and that “other permits or approvals may be required to do the work proposed”; these provisions make clear that a grading permit does not absolve a permittee’s compliance with zoning and other laws.<sup>3</sup> Accordingly, Maui Lani’s grading permit, which is only intended to minimize environmental and public safety impacts from earth moving activities, cannot be interpreted to authorize sand mining in contravention of the zoning code. Interpreting a Maui County grading permit to supersede county zoning laws in such a way may also invite future attempts to end-run zoning code permitting and significantly, public hearing requirements.

**Maui Lani Partners’ grading permit for Phase IX may be subject to suspension or revocation due to incorrect information.**

To the extent that Maui Lani Partners continues to rely on its recent grading permit for Phase IX to justify its sand mining operations, OHA notes that the permit itself may be subject to suspension or revocation.

MCC 20.08.120 states that “the director [of public works] may . . . suspend or revoke a [grading and grubbing] permit . . . whenever the permit has been issued on the basis of incorrect information supplied by the permittee or whenever the grubbing, stockpiling or grading is not being performed in accordance with the terms and provisions of the permit.”

A copy of Maui Lani Partners’ December 2014 grading and grubbing permit application for Phase IX reveals that the applicant indicated “No” to the question “Are there known burials, cemeteries, or other historic sites on the property?” Subsequent to the issuance of the grading permit, there were several “inadvertent” discoveries of human burials as reported to the Maui-Lāna’i Island Burial Council.

While there may be debate as to whether Maui Lani Partners knew or should have known that burials would be discovered in the application area,<sup>4</sup> it is now clear that the information regarding the non-presence of burials, as provided by the grading and grubbing permit application, was incorrect. Accordingly, the Maui County Director of Public Works appears to have the authority to suspend or revoke the grading permit issued

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<sup>3</sup> See <http://kivanet10g.co.maui.hi.us/kivanet/2/permit/summary/index.cfm?pid=502767&jur=MAUI>.

<sup>4</sup> In 2006, the County’s inland sand study noted the discovery of more than 50 individual burial sites within a 22 acre area and stated that “[o]n the island of Maui, there is a high probability of iwi [Native Hawaiian skeletal remains] being buried in sand dunes. MAUI INLAND SAND RESOURCE QUANTIFICATION STUDY (2006). In July 2014, an archeological monitoring plan was completed, which took into consideration parcels throughout Maui Lani and reported on a number of known and previously discovered Native Hawaiian burials and other historic sites, which included discovery of Native Hawaiian skeletal remains on two nearby parcels in the years 1996 and 1998. R.M. TOWILL CORPORATION, AN ARCHAEOLOGICAL MONITORING PLAN FOR THE PROPOSED CENTRAL MAUI REGIONAL PARK, WAILUKU AND WAIKAPU AHUPUA’A, WAILUKU DISTRICT ISLAND OF MAUI, (2014).

to Maui Lani Partners, based on the incorrect information provided by the applicant. At the very least, having new and correct information about known burials should result in greater protective measures in a new or modified permit's terms and conditions, especially for activities involving excavating, processing, and permanently removing sand that may contain the remains of our ancestors.

**Further investigation of compliance issues with regards to iwi kūpuna is ongoing.**

Lastly, ensuring the integrity and enforcement of state and county policies protecting iwi kūpuna is of critical importance to OHA and our beneficiaries. Therefore, in the coming weeks, we will continue to investigate the discovery of burials within Maui Lani, including with regards to whether historic preservation laws and conditions have been fully complied with and enforced. We will be glad to share any findings in this regard with the Committee and Maui County Council members upon request.

Mahalo for the opportunity to comment on this matter.