

IEM Committee

From: David Arakawa <darakawa@lurf.org>
Sent: Friday, October 27, 2017 5:44 PM
To: IEM Committee
Cc: Wynde Yamamoto
Subject: MAUI - IEM-33 Sand Mining Moratorium - LURF Testimony in Opposition (IEM Mtg 10.30.17)
Attachments: 171027 Maui - Sand Mining Moratorium - LURF Testimony (10.30.17 IEM mtg) (wmy).pdf

Aloha IEM Committee Clerk,

Attached is the testimony of the Land Use Research Foundation of Hawaii (LURF), in including **comments, concerns, opposition and a recommendation of deferral of IEM-33**, which is **on the IEM Committee Agenda for Monday, October 30 2, 2017, at 1:30 p.m.**

Please accept the attached LURF testimony for Maui Council records and distribute to the IEM Committee members.

Feel free to contact me, or my law partner, Wynde Yamamoto, if you have any questions.

Mahalo, Dave

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Via E-Mail

October 27, 2017

Honorable Elle Cochran, Chair
Honorable Don S. Guzman, Vice-Chair,
and Members of the Infrastructure and
Environmental Management Committee
Council of the County of Maui
County of Maui
200 South High Street, 8th Floor
Wailuku, Maui, Hawaii

Comments Regarding Moratorium on Exporting Sand, the Maui Inland Sand Resource Quantification Study and Sand Mining Regulation; Proposed Bill Entitled “A Bill for an Ordinance Establishing a New Chapter 20.40, Maui County Code, Declaring a Moratorium on Sand Mining” (Item IEM-33 on the Committee’s Agenda).

Monday, October 30, 2017, at 1:30 p.m. in the Council Chamber, Kalana O Maui Building, 8th Floor, 200 South High Street, Wailuku, Hawaii 96793

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. LURF’s mission is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii’s significant natural and cultural resources, and public health and safety.

For consideration before this Committee, is the latest iteration of the proposed bill, the purpose of which is to declare a moratorium on mining of Central Maui inland sand.

Background. LURF understands that this proposed bill was originally prompted by concerns relating to the excavation, movement and exportation of inland sand, allegedly without proper permits. Contentions also existed regarding the possible mishandling of ancient ‘oivi encountered during the movement of inland sand.

This bill was initially proposed as a measure to amend the comprehensive zoning ordinance (Title 19, Maui County Code [MCC]) to establish a moratorium on the exporting of sand off-island. Such a zoning measure would be procedurally subject to review by the County's three Planning Commissions, and final approval by the Council, as is proper for all land use-related matters. Decisions, however, were subsequently made by introducers to instead propose further adaptations of the bill as measures intended to protect the environment under Title 20, MCC - "Environmental Protection," reportedly so that the newly drafted versions of the ordinance could move quicker through the review process.

Even further revisions to the measure have now been made in response to legal and practical issues raised by the community, resulting in the current iteration of the proposed ordinance. LURF continues to believe, however, that many of the same fundamental concerns relating to the original measure have continued to be overlooked by proponents of the bill, and have still been left unaddressed, or exacerbated in current version.

LURF's Position. LURF is not in any way opposed to measures intended to protect Maui's environment and natural resources, or to efforts made to respect and preserve native Hawaiian cultural, archeological or burial sites. LURF must, however, strongly caution against efforts made to further special interests by disregarding and circumventing proper requirements and procedures applicable to the enactment of land use laws and ordinances, including moratoria, particularly in cases where the deprivation of constitutional and vested rights of private landowners may be at stake.

With respect to the subject bill proposing to declare a moratorium on mining Central Maui inland sand, LURF has continued to have both procedural and substantive concerns with the measure, and respectfully requests this Committee's consideration of the following issues:

A. Procedural Concerns

- 1. This Moratorium Bill Should Be Properly Introduced as an Amendment to the Zoning Ordinance (Title 19, MCC), and not as an Environmental Protection Measure (Under Title 20, MCC).**

A moratorium is a local law that takes immediate effect to temporarily prohibit a particular activity or process so the locality may study the potential effects of the activity and establish new, permanent regulations of that activity. There are different types of moratoria, review and passage of which are subject to different legal authority and criteria, depending on the balance of interests between the municipality and the other parties involved.

LURF believes the proposed moratorium on mining Central Maui inland sand, despite now being characterized and labeled as an environmental protection measure, is in fact, a **land use moratorium**, the proper authority for which is "**zoning**" and not the **general "police power."**

Due to its interplay with, and potential effect on existing zoning ordinance provisions,¹ as well as the proposed imposition of restrictions upon land use and landowners, the proposed bill involving the mining of sand must be considered a **land use moratorium** which must be appropriately vetted via the process in place for the establishment of zoning laws and regulations. Mere removal of language/terms including “excavating” and “stockpiling” from this latest draft and replacement of the same with generic language such as “removing” does not in and of itself excuse this proposed measure from proper review pursuant to and consistent with zoning laws and processes.

After review of a prior draft of the ordinance, the County’s attorney itself had in fact commented that, “Mining (aka “resource extraction”) is generally governed within zoning codes across the country” and that “[c]larifying or strengthening the definition of ‘resource extraction’ in Chapter 19.04, MCC [the zoning ordinance], remains our recommendation...”² LURF therefore continues to contend that this proposal should be introduced as an amendment to the zoning ordinance (Title 19, MCC) instead of a measure intended to protect the environment under Title 20, MCC.

It is interesting to note that the drafters of this proposed Chapter 20.40, Title 20, MCC, have now deleted prior Section 20.40.070 from this iteration of the ordinance, which expressly acknowledged that administrative enforcement of the new Chapter clearly comes within the purview of Title 19, MCC – Zoning, specifically Section 19.530.030, relating to administrative enforcement. The deletion of said Section leaves the new Chapter void of enforcement rules or regulations unless such administrative rules are newly created and adopted by the director, which is particularly baffling since **expanded penalty provisions** for violations have been added to Section 20.40.040 of this draft. Moreover, this latest version of the bill now expressly states, in any case, that violations may be prosecuted administratively as **zoning violations pursuant to Section 19.530.030**. LURF also believes it makes no sense to provide for the creation and adoption of separate administrative rules to implement this new chapter, since the stated term of this moratorium ordinance has been effectively reduced to six months (unless subsequently reenacted).

Amendments to the zoning ordinance properly require review and consideration by the three County Planning Commissions prior to presentation to the full Council.³ As will be discussed below, LURF believes comprehensive review of the proposed measure is especially vital and mandatory in this case due to the potential violation of landowners’ constitutional and vested rights as a result of the imposition of such moratorium.

¹ See, e.g., definition of “resource extraction” contained in Section 19.04.040, MCC.

² See Memo dated September 13, 2017, from Richelle M. Thomson, Deputy Corporation Counsel, to Elle Cochran, Chair, Infrastructure and Environmental Management Committee.

³ It should be noted that characterization of the proposed moratorium alternately as a “land use” bill rather than a “zoning” bill would still subject the measure to review by the three County Planning Commissions pursuant to Charter, County of Maui, Section 8-8.6, as is proper for the adoption of any land use ordinance.

2. Imposition of Moratoria is Not Necessary and May Not be the Appropriate Mechanism to Resolve the Professed Issue Since Question Exists as to Whether the Proposed Moratorium is Legally Justified.

General Police Power Moratoria vs. Land Use Moratoria

The enactment of temporary restrictions or moratoria on certain activity, including land use, has been held by courts throughout the country to be a valid exercise of local police power only where the restrictions are **reasonable and related to public health, safety or general welfare**.

General Police Power Moratoria

Introducers of this bill propose to have this Committee believe that this measure is suitable for passage as a **general police power moratorium** (the authority for which is the county's general "police power" pursuant to other forms of county laws or ordinances [in this case, environmental protection/preservation of historical, cultural, archaeological and burial sites], and **not zoning**), which are introduced to address situations wherein **immediate health and safety problems** are at issue.⁴

In such case, to justify a municipality's attempt to impose a **police power moratorium to temporarily interfere with the beneficial use of private property**, courts have held that the municipality must establish that:

1. It is acting in response to a **dire necessity**;
2. Its action is reasonably calculated to **alleviate or prevent a crisis condition**; and
3. It is **presently taking steps to rectify the problem**.

As far as LURF is presently aware, proponents of this bill have not produced sufficient (if any) evidence to meet the **emergency/crisis elements** of the above three-prong test which is required to justify the passage of the subject moratorium as a **legitimate general police power moratorium based on threats to health and safety**.

LURF believes there is in fact **no urgency or immediate need for a moratorium** in this case since the entities which had previously been involved in mining Central Maui inland sand have agreed to suspend such sand mining operations.

Land Use Moratoria

With respect to **land use moratoria**, this Committee should be aware that courts have held that interference with the use of private property must be scrutinized through hearing procedures as prescribed by **zoning** laws, and must contain the following key elements in order to be considered legally defensible:

⁴ The asserted purpose of the draft bill is "...to conduct further analysis; establish regulations for mining inland sand to protect Maui's environment, and prevent the disturbance of Hawaiian historical, cultural, or archeological sites, and unmarked human burial sites."

1. a **reasonable time frame** as measured by the action to be accomplished during the term;
2. a **valid public purpose** justifying the moratorium;
3. address a situation where the **burden imposed by the moratorium is being shared substantially by the public at large**;
4. **strict adherence to the procedure for passage/adoption**; and
5. a **time certain when the moratorium will expire**.

No valid public purpose justifying a moratorium presently exists in this case since LURF understands the entities which had previously been involved in mining Central Maui inland sand have suspended their sand mining operations, so that no sand mining is currently being conducted. Imposition of the proposed moratorium would therefore be contrary to any public purpose and would only create negative impacts on the needs of the community.

Also concerning in this instance is the requirement that the burden imposed by the moratorium be shared by the public at large, as opposed to being placed upon a minority of landowners, as it would in this case. LURF believes that when the cost of a benefit is placed entirely upon particular land owners rather than spread throughout the jurisdiction, serious consideration must be given to review and discretion of the moratorium to avoid unconstitutional confiscation of private property.

This concern is particularly troubling now that the current draft ordinance specifically identifies lots and owners to which the moratorium will apply. LURF questions the process and methodology by which the affected areas and lots were determined, which is critical with respect to the imposition of any moratorium, particularly where the burden imposed is made to be shouldered by such a small sector of the public. And what may be so unique about “Central Maui inland sand” which justifies it being made the subject of this moratorium? Does “inland sand” exist anywhere outside of the designated area? If so, why isn’t such Non-Central Maui inland sand, due only to its existence outside of the designated area, considered an equally important natural resource deserving of the same consideration as stated in the Purpose section (Section 20.40.010) of this bill?

LURF must also question the legitimacy and seriousness of the stated purposes of the proposed measure including the reported need to “preserve, and avoid the disturbance of Hawaiian historical, cultural, or archaeological sites and unmarked human burial sites,” since such historical, cultural, archaeological and burial sites do not only exist in sand, and should more properly be protected by measures relevant to and inclusive of other sites and areas.

The County’s Director of Planning has in fact responded to inquiries by this Committee regarding inland sand regulation and the monitoring and enforcement of resource extraction, reporting that the County’s Cultural Resources Commission has not designated any archaeological, historical, cultural or burial preservation sites in Central Maui.⁵ The Director’s response also appeared to confirm that no exigency currently

⁵ See correspondence dated June 30, 2017 from Mr. William Spence, Director, Department of Planning, to Mayor Alan M. Arakawa, For Transmittal to this Committee.

exists with respect to the number of permits processed or pending for resource extraction.

And, in the present case, it is arguable that a reasonable time frame within which the specified action is to be accomplished, as well as a definite term or expiration date of the proposed moratorium has been set. While the two-year term for the moratorium provided for in the last version of the proposed ordinance has now been shortened to six months, the stipulated time period still certainly appears random and even more unreasonable, especially since the necessary funding for the anticipated update to the Maui Inland Sand Resource Quantification Study (2006) has not yet even been made available, and review of said Study is required prior to the Council's subsequent drafting and passage of the ordinance permanently regulating the mining of Central Maui inland sand.

Reduction of the term of the proposed moratorium from two years to six months is therefore meaningless. The arbitrariness of the offered six-month repeal date is exacerbated by language in the draft ordinance allowing for reenactment of the moratorium ordinance by the Council should the stated action not be completed by that time. Therefore, as a legal matter, the measure could likely fail as a lawful land use moratorium since no "real" time certain has been designated within which the indicated action will be accomplished.

In view of these concerns, LURF believes the validity of the subject bill and the proposed moratorium as drafted, even when scrutinized utilizing processes as appropriately prescribed and authorized under zoning laws, would be questionable at best. The measure is simply unwarranted and unnecessary; would set bad precedent; and would likely be subject to legal challenge.

B. Substantive Concerns

1. Constitutional Concerns – The "Takings" Issue.

The law and the courts have established strict rules, both as to the procedural (as discussed above) and the substantive requisites of moratoria. The substantive rules are based upon and embody the general principle **that any enactment affecting private property rights must bear a substantial relation to the public health, safety, or general welfare.**

In the event a land use regulation operates to deprive the owner of beneficial economic use of the property, there exists an issue as to whether that owner may be entitled to monetary compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution. And most significantly, as applied to the proposed moratorium, U.S. courts have recently even considered temporary land use controls such as moratoria, to amount to a deprivation of beneficial use in the property (i.e., a "taking"), potentially entitling landowners to compensation.⁶

⁶ See, e.g., *Agins v. Tiburon*, 24 Cal.3d 266 (Sup. Ct. of Calif., 1979), aff'd on oth. grds., 447 U.S. 255 (1980).

Importantly, what is at stake here is the constitutional and vested rights of private property owners, large and small, which should not be improperly manipulated unless the County can prove a proportionality between the effects of the activity sought to be prohibited and the County's proposed uncompensated taking.⁷ In the absence of such proof, the County may be subject to legal challenge and liability for "just compensation." Such litigation is foreseeable and could likely cost the County substantial sums to defend.

2. The Proposed Moratorium Fails to Clearly Define the Activity Affected and the Manner in Which it is Affected.

Despite additional specification of the geographic area to which this revised version of the moratorium is intended to apply, the provisions of the proposed ordinance remain unclear and overly broad, and fail to provide clear direction with respect to the activity sought to be prohibited and the manner in which such activity would be prohibited as is required for any lawful moratorium.

Definitions of key terms including "sand mining" continue to be reworked to the point of contradicting itself as well as the alleged true intent of the measure. "Sand mining" is now defined in this iteration of the bill as the extraction and removal of sand from a lot regardless of its original, natural location, so that in effect inland sand, even if placed on or transported onto any lot within the designated "Central Maui inland sand" area, cannot be moved outside that lot. LURF believes the vague and confusing definitions and provisions contained in this draft bill will lead to many enforcement issues.

For example, as a practical matter, will the origin of sand on the lots in the designated area/lots now need to be confirmed prior to movement outside any lot, or is all sand existing on the identified lots assumed to be inland sand? The moratorium could also unreasonably preclude any type of movement (not only movement from the original, natural location) of inland sand (originating from, or otherwise placed on a lot), including activity such as landscaping, grading and construction on contiguous/multiple lots. LURF is unable to understand how such regulations can be found to be consistent with, and can actually further the purposes of the bill which are supposedly to protect Maui's environment and limited natural resources, and to prevent the disturbance of Hawaiian historical, cultural, and unmarked human burial sites.

Moreover, the subject moratorium is being proposed to be included into the MCC as a newly added Chapter (20.40) under Title 20. Despite inclusion of additional provisions, the new Chapter 20.40 is still sparsely drafted, containing language which provides minimal direction (contra to what is required to support moratoria), and potentially conflicts with existing ordinance provisions in other titles and chapters of the MCC, thereby easily lending itself to confusion and misinterpretation.

Without any attending provisions, there is a void of detail and direction in Chapter 20.40 required to support this type of overly stringent and unreasonable regulation which

⁷ At issue specifically, is the constitutionally protected private property rights of landowners as well as the vested rights of property owners and others who have heretofore lawfully complied with necessary statutory and regulatory requirements relating to resource extraction, zoning, and land use.

potentially violates landowners' constitutional and vested rights, and amounts to unlawful confiscation of their property. without legal justification.

3. The Proposed Moratorium Would Likely Cause Unintended Negative Consequences.

The local community may suffer hardships due to the imposition of the proposed measure. The proposed moratorium and the inability of individuals or entities to extract or move sand in any amount, for any purpose, may cause hardships for residents, companies, schools, plant nurseries, farms, and other organizations which rely on such activity and/or inland sand for household, business, playground, construction, and agricultural use, as well as for other needs and programs or purposes, many of which serve the community.

Public use and enjoyment of parks, beaches and other recreational and community facilities may also be significantly affected due to the proposed moratorium.

The proposed measure may create disincentive for construction and have other negative economic impact on Maui/the State of Hawaii. At a time when the County and the State are attempting to encourage business expansion in, and attract business operations to Hawaii, the proposed measure would exacerbate inefficiency, increase construction costs, and create a disincentive, having a negative impact on construction and development. Increased construction costs will be passed on to home buyers and will thus increase the price of homes and worsen the affordable housing problem in Maui and the State.

4. Additional Exemptions and/or Variances Should be Considered by Drafters of the Measure to Avoid Unintended Hardships and Consequences.

While exceptions to the proposed moratorium had been included in the previous iteration of the draft ordinance, the entire Exceptions Section (former Section 20.40.040) has been deleted from this version. As expressed in prior testimony, LURF believes that at the very least, exemptions to, or variances from the proposed moratorium should be established and included to allow, for example, activity which may benefit the public, and activity that when completely precluded by the measure, may result in unintended negative consequences (as discussed above), or severe hardship.

Moratoria laws also often contain mechanisms that allow automatic exception, or application for relief from the moratorium. While the current draft of the proposed ordinance does contain a provision allowing adjustment of, or other relief from the moratorium upon approval of a resolution by two-thirds of the members of the County Council, the criteria for qualification of such adjustments now added to the provision practically invalidates the entire provision. Criteria 20.40.060(B), in particular, which requires that the proposed use or project site does not involve or contain Central Maui inland sand, effectively negates the possibility of any real exception, and virtually cancels the opportunity for any meaningful adjustment.

Conclusion

Based on the procedural and substantive concerns articulated above, LURF believes it would be unwarranted and unreasonable for this Committee to support this proposal as presently drafted without thorough review and analysis of currently available facts and information relating to the legality and appropriateness of the imposition of a moratorium for effectuating the alleged purposes of this bill⁸; legitimacy of the present need for a moratorium and the bill's true purpose; clearer articulation of the affected activity and contemplated regulation thereof; and further consideration of the potential unintended consequences of such a moratorium, and must therefore recommend deferral of this proposed measure.

Thank you for the opportunity to provide comments regarding this matter.

⁸ While LURF understands that the alleged purpose of the proposed moratorium is, in part, to allow the conducting of further analysis of the sand mining issue, including an update to the 2006 Maui Inland Sand Resource Quantification Study, sufficient facts and information, as well as **valid need** for the measure must nevertheless **presently exist** to legally support the imposition of a moratorium, particularly in this type of situation where the potential deprivation of constitutional and vested rights is at stake.