

REQUEST FOR LEGAL SERVICES

Date: September 30, 2021
From: Kelly Takaya King, Chair
Climate Action, Resilience, and Environment Committee

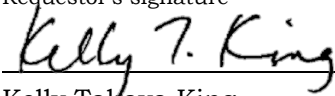
TRANSMITTAL

Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Keola Whittaker, Esq.

Subject: WETLANDS RESTORATION (CARE-55)

Background Data: Please see the attached proposed resolution as recommended by the CARE Committee at its meeting of September 29, 2021. Please submit the response to care.committee@mauicounty.us with a reference to CARE-55.

Work Requested: FOR APPROVAL AS TO FORM AND LEGALITY
 OTHER

Requestor's signature  Kelly Takaya King	Contact Person <u>Nicole Siegel or James Forrest</u> (Telephone Extension: <u>8008 or 7137, 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): October 13, 2021
REASON: For possible posting on the October 22, 2021, Council 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)

care:ltr:055acc01:nas

Attachment

Resolution

No. _____

REFERRING TO THE PLANNING COMMISSIONS
A PROPOSED BILL RELATING TO WETLANDS
RESTORATION AND PROTECTION

WHEREAS, the Council is considering a proposed bill to establish a program for wetlands restoration and protection; and

WHEREAS, the bill would establish a Wetlands Overlay District, similar in form and function to the bill to establish a Wellhead Protection Overlay District, which has long been advocated for by the Department of Planning and is now pending in a Council committee; and

WHEREAS, the bill would also require the Conservation Planning Committee to evaluate wetlands criteria and provide advice on restoring and protecting wetlands through negotiated land acquisition, eminent domain, or conservation easements; and

WHEREAS, Sections 8-8.4 and 8-8.6 of the Revised Charter of the County of Maui (1983) (“Charter”), as amended, require that the appropriate planning commissions review proposed land use ordinances and provide findings and recommendations to the Council; now, therefore,

BE IT RESOLVED by the Council of the County of Maui:

1. That it refers the proposed bill, entitled “A BILL FOR AN ORDINANCE AMENDING TITLES 2, 18, 19, AND 20, MAUI COUNTY CODE, RELATING TO WETLANDS RESTORATION AND PROTECTION,” a copy of which is attached as Exhibit “1,” to the Lānaʻi Planning Commission, Maui Planning Commission, and Molokaʻi Planning Commission for appropriate action, in accordance with Charter Sections 8.8.4 and 8.8.6;
2. That it respectfully requests that the Lānaʻi, Maui, and Molokaʻi Planning Commissions transmit their findings and recommendations to the Council as expeditiously as possible; and

Resolution No. _____

3. That certified copies of this Resolution be transmitted to the Mayor, the Planning Director, the Lānaʻi, Maui, and Molokaʻi Planning Commissions, the Director of Public Works, and the Conservation Planning Committee.

APPROVED AS TO FORM AND LEGALITY

Keola Whittaker
Deputy Corporation Counsel
County of Maui

care:misc:055areso03:nas

ORDINANCE NO. _____

BILL NO. _____ (2021)

A BILL FOR AN ORDINANCE AMENDING TITLES 2, 18, 19, AND 20, MAUI COUNTY CODE, RELATING TO WETLANDS RESTORATION AND PROTECTION

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

SECTION 1. The purpose of this Ordinance is to conserve the natural environment, mitigate climate change, and work toward resilience by establishing a program for wetlands restoration and protection in Titles 2, 18, 19, and 20 of the Maui County Code.

The Council finds that the Maui County General Plan provides the following directives:

- “Restore and protect . . . wetlands . . .” (Countywide Policy Plan, page 46.)
- “Preserve existing wetlands and improve and restore degraded wetlands.” (Maui Island Plan, page 2-31.)
- “Support the protection and restoration of natural systems, such as wetlands and dunes, for flood mitigation and climate change adaptation.” (Moloka‘i Island Community Plan, page 55.)
- “Natural landscape features and environment, such as . . . wetlands, will be protected and restored.” (Lanai Community Plan, page 2-12).

- “Protect all wetland resources . . .” (Kihei-Makena Community Plan, page 21.)

Despite these directives, which were enacted in ordinances from 1998 to 2016, Maui County did not have a program for wetlands restoration and protection prior to this Ordinance.

A Maui County program is necessary because the Clean Water Act does not regulate certain isolated wetlands. Only those wetlands that are adjacent to navigable waters are protected by the Clean Water Act.

The Council’s intent is to protect all wetlands in Maui County, including those that are not adjacent to navigable waters.

This Ordinance amends the following Titles of the Maui County Code:

- Title 2, Administration and Personnel, to require the Conservation Planning Committee to review wetlands for possible acquisition.
- Title 18, Subdivisions, to ensure wetlands are restored and protected in the subdivision process.
- Title 19, Zoning, to update the Comprehensive Zoning Ordinance to establish the Wetlands Overlay District.
- Title 20, Environmental Protection, to require a grading permit in the Wetlands Overlay District.

SECTION 2. Section 19.04.040, Maui County Code, is amended by adding the following definitions:

“Overlay district” means an area where certain additional requirements are superimposed upon a base zoning district or

underlying district and where the requirements of the base or underlying district may or may not be altered.

“Wetland” means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances, do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”

SECTION 3. Article II, Title 19, Maui County Code, is amended by adding a new chapter to be appropriately designated and to read as follows:

“Chapter 19.47

WETLANDS OVERLAY DISTRICT

Sections:

- 19.47.010 Establishment.
- 19.47.020 Policy.
- 19.47.030 Report.
- 19.47.040 Decisions consistent with report.
- 19.47.045 Permitted uses.
- 19.47.050 Prohibited uses.
- 19.47.060 Mapping.
- 19.47.070 Interpretation.

19.47.010. Establishment. The council may establish wetlands overlay district zoning on any property for the purpose of restoring or protecting a wetland on the property.

19.47.020. Policy. It is the policy of the County of Maui that wetlands be restored or protected. The council’s intent is to restore and protect wetlands beyond what is required by the Clean Water Act, Coastal Zone Management Act, or any other law. All discretionary permits issued by the County must be consistent with this policy.

19.47.030. Report. A. The planning director must produce, or cause to be produced, a report on the feasibility and advisability of wetlands restoration or protection on the property prior to approval of any of the following in the wetlands overlay district:

1. Community plan amendment under section 2.80B.110.
2. Subdivision approval under section 18.08.100.

3. Change in zoning under section 19.510.040.
4. Conditional zoning under section 19.510.050.
5. District boundary amendment under chapter 19.68.
6. Special use permit under section 19.510.070.
7. Grading or grubbing permit under chapter 20.08.

B. Any report required by subsection A must be shared with the decision-making officer or agency and any relevant advisory agency. The report must include the following:

1. The ability of the wetland to filter harmful toxins, nutrients, and sediment from surface and stormwater runoff.
2. The ability of the wetland to store floodwaters and reduce the magnitude of flood events.
3. The ability of the wetland to provide valuable habitat for a diverse array of flora and fauna, including any existing rare, threatened, or endangered species.
4. The ability of the wetland to maintain surface-water flow during dry periods.
5. The impact of any excessive siltation resulting from surface runoff from construction sites and lack of erosion control on steep slopes.
6. The impact of pollution by garbage, litter, and refuse.
7. The impact of a reduction in the flow of watercourses due to destruction of wetlands.

19.47.040. Decisions consistent with report. A. The decision-making officer or agency on an application referenced in subsection 19.47.030(A) must make decisions consistent with any report required by subsection 19.47.030(A) and the policy in section 19.47.020 unless the officer or agency reports to the council in writing a need to make a contrary decision.

B. Any ordinance for an approval referenced in section 19.47.030(A) must include the council's finding that either:

1. The property does not include any wetlands for which restoration or protection is feasible or advisable; or
2. The property owner has executed a unilateral agreement, to be recorded with the bureau of conveyances or land court, for adequate wetlands restoration or protection.

19.47.045. Permitted uses. The following uses are permitted in the wetlands overlay districts:

A. Conservation of soil, vegetation, water, fish, and wildlife.

B. Scientific research and educational activities teaching principles of ecology and conservation.

C. General outdoor recreation and leisure activities that are not inconsistent with the intent of this chapter.

D. Uses permitted in the base zoning district that are not inconsistent with the intent of this chapter.

19.47.050. Prohibited uses. The following uses are prohibited in the wetlands overlay district:

A. The placement of new structures or impervious surfaces.

B. Excavation or blasting.

C. Dumping, piling, or disposal of refuse, yard debris, or other material.

D. The development of structures and land uses on wetlands that will contribute to the pollution of surface and ground water by sewerage, toxic substances, or sedimentation.

E. The destruction of, or significant changes to, wetlands that provide flood protection, recharge the groundwater supply, augment stream flow during dry periods, and filter water flowing into ponds and streams.

19.47.060. Mapping. A. The planning director must transmit to the planning commissions, council, conservation planning committee, and director of public works a map that shows the location of wetlands throughout the County.

B. The map must be updated and transmitted at least annually.

C. The planning director must initiate changes to zoning as needed to ensure wetlands depicted in the map are placed in the wetlands overlay district.

19.47.070. Interpretation. A. Nothing in this chapter is intended and may not be interpreted to conflict with State or federal law on the same subject matter.

B. Conflicting provisions of this chapter must be abrogated to the extent of the conflict.

C. The provisions of this chapter must be construed, if possible, to be consistent with and in addition to relevant federal or State regulations and statutes.

D. The provisions of this chapter must be construed liberally in favor of wetlands restoration and protection.”

SECTION 4. Subsection J of Section 2.82.040, Maui County Code, relating to the Conservation Planning Committee, is amended to read as follows:

“J.

1. The committee must assist with and oversee the creation of the countywide greenprint and provide recommendations to the mayor, council, and agencies related to this chapter's purpose.

2. The committee must advise the mayor to authorize the county acquire land containing wetlands, by negotiated acquisition or by eminent domain, or to seek execution of a conservation easement to restore or protect wetlands after evaluating the following criteria for restoration or protection:

a. Areas where water is the primary factor controlling the environment and the associated animal and plant life; where for any duration of time, at a frequency including nonconsecutive years:

i. The water table is at or near the surface and the land is saturated by subsurface water including the water table, subsurface kahawai, or springs; or

ii. The land is covered by water.

b. Areas of marsh, fen, peatland, or water. The waterbody can be:

i. natural or artificial;

ii. permanent, temporary, intermittent, or ephemeral;

iii. static or flowing;

iv. fresh, brackish, or salt;

v. above or below ground; or

vi. groundwater, precipitation, or surface water-driven hydrology.

c. Areas of marine water the depth of which at low tide does not exceed six meters, including fishponds and coral reefs.

d. Areas of riparian zone and floodplain, including flowing, intermittent, or ephemeral streams, and streambeds.

e. Areas of coastal zones adjacent to wetlands, islands, or bodies of marine water deeper than six meters at low tide lying within the wetlands.

f. Areas where hydric soils are present.

g. Areas where there is surface or subsurface water that is hydrologically connected to wetlands.

h. Areas described by the six wetlands classifications including:

i. Marine: coastal wetlands, coastal lagoons, rocky shores, seagrass beds, coral reefs, and anchialine pools;

ii. Estuarine: muliwai, deltas, tidal marshes, mudflats, and mangrove swamps;

iii. Lacustrine: wetlands near natural lakes or ponds;

iv. Riverine: wetlands near rivers, streams, and gulches;

v. Palustrine: marshes, swamps, and bogs; and

vi. Human-made: Loko i'a (Hawaiian fish ponds), Lo'i kalo, shrimp ponds, farm ponds, paddies, and dams.

i. Areas that provide wetland functions including:

i. Conveyance of stormwater;

ii. Flood attenuation and storage;

iii. Sediment attenuation and reduction;

iv. Nutrient and chemical attenuation and reduction;

v. Plant community abundance and diversity;

vi. Fish and wildlife habitat;

vii. Groundwater recharge and discharge;

viii. Shoreline or stream bank anchoring;

and

ix. Carbon sequestration.

j. Areas that formerly had wetland characteristics or functions but have been altered or degraded by channelization, filling, draining, dredging, grading, grubbing, deep ripping, groundwater pumping, hardening of surfaces, or introduction of non-native or aggressive-invasive plant and animal species."

SECTION 5. Section 18.08.100, Maui County Code, is amended to

read as follows:

“18.08.100 Approval. A. [Director's review period.]
Review period.

1. Within thirty days after submission of the preliminary plat of a subdivision to be processed as an affordable housing project, the director [shall] must review the plan and may [give approval of] approve the preliminary plat as submitted, or as it may be modified, or [may disapprove] disapproved, [the same] and [shall] must express [the disapproval and] the reasons [therefor] for the disapproval in writing.

2. Within forty-five days after submission of the preliminary plat of a subdivision for a long-term residential development [which] that is not to be processed as an affordable housing project or after submission of the preliminary plat of a subdivision [which] that is outside of the scope of subsection [18.08.100.A.1] 18.08.100(A)(1), the director [shall] must review the plan and may [give approval of] approve the preliminary plat as submitted, or as it may be modified, or [may disapprove] disapproved, [the same] and [shall] must express [the disapproval and] the reasons [therefor] for the disapproval in writing.

B. The director may also defer consideration of the preliminary plat pending receipt of additional information, in which case the running of time is suspended.

C. Approval of the preliminary plat [shall] must indicate the director's directive to prepare detailed drawings on the plat submitted, [provided] as long as there is no change in the plan of subdivision as shown on the preliminary plat and there is full compliance with all requirements of this chapter. The action of the director with reference to any attached documents describing any conditions [shall] must be noted on two copies of the preliminary plat. One copy [shall] must be returned to the subdivider and the other retained by the director. At such time the director [shall] must stamp the two preliminary plats[;], as follows:

1. “Subdivider authorized to prepare detailed drawings on plat as submitted including corrections noted;”

2. “Recordation with the Bureau of Conveyances, State of Hawaii, or State Department of Taxation, not authorized until approved for recordation at a later date.”

D. If no action (approval, disapproval, modification or deferral) is taken by the director within the review period identified in subsection [18.08.100.A] 18.08.100(A), or such longer period as

may have been agreed upon in writing, the preliminary plat [shall] will be [deemed] automatically approved, and it [shall] must be the duty of the director to endorse [his] approval of the preliminary plat, [upon the face thereof. Such] The director's approval [by the director shall] must not exempt the subdivider from compliance with the mandatory requirements of this [ordinance] chapter.

E. In the wetlands overlay district, the director must make decisions on applications that are consistent with any report required by subsection 19.47.030(A) and the policy in section 19.47.020, unless the director reports to the council in writing a need to make a contrary decision."

SECTION 6. Section 19.06.010, Maui County Code, is amended to read as follows:

"19.06.010 Districts designated. The County [shall be] is divided into the following use zone districts:

- A. Open space districts:
 - 1. OS-1.
 - 2. OS-2.
- B. Residential districts:
 - 1. R-1.
 - 2. R-2.
 - 3. R-3.
- C. R-0 zero lot line residential district.
- D. Two-family districts:
 - 1. D-1.
 - 2. D-2.
- E. Apartment districts:
 - 1. A-1.
 - 2. A-2.
- F. Hotel districts:
 - 1. H-1.
 - 2. H-M.
 - 3. H-2 and hotel.
- G. Business districts:
 - 1. SBR service.
 - 2. B-CT country town.
 - 3. B-1 neighborhood.
 - 4. B-2 community.
 - 5. B-3 central.
 - 6. B-R resort commercial district.
- H. Industrial districts:
 - 1. M-1 light.
 - 2. M-2 heavy.

- 3. M-3 restricted.
- I. Park districts:
 - 1. PK.
 - 2. GC.
- J. Airport district.
- K. Agricultural district.
- L. Rural districts:
 - 1. RU-0.5.
 - 2. RU-1.
 - 3. RU-2.
 - 4. RU-5.
 - 5. RU-10.
 - 6. County rural.
- M. Public/quasi-public districts:
 - 1. P-1.
 - 2. P-2.
- N. Kihei research and technology park district.
- O. Maui research and technology park district.
- P. Napili Bay civic improvement district.
- Q. Urban reserve district.
- R. Interim.
- S. Maui County historic districts.
- T. Project districts.
- U. Wetlands overlay district.

SECTION 7. Section 20.08.040, Maui County Code, is amended to read as follows:

“20.08.040 Permit—Required. Unless otherwise provided in this chapter:

A. [No] A person [shall] must not commence or perform any grading or stockpiling without a grading permit [; and].

B. [No] A person [shall] must not commence or perform any grubbing without a grubbing permit, except where grubbing concerns land for which a grading permit has been issued.

C. [No] A person [shall] must not commence or perform any cut or fill activity on land located within any special management areas, as defined by chapter 205A, Hawaii Revised Statutes, which exceeds fifty cubic yards of material on any one site or exceeds two feet in the vertical height at its highest point, including [but not limited to] single-family residential construction, without a grading permit.

D. A permit or exclusion [pursuant to] under this chapter does not [obviate] eliminate the need to obtain other permits or approvals.

E. A person must not commence or perform any cut or fill activity or grubbing on land located in the wetlands overlay district without a grading permit.”

SECTION 8. Section 20.08.080, Maui County Code, is amended to read as follows:

“20.08.080 Grading and grubbing permit review. Drainage, engineering slope hazard report, and erosion control plans [shall] must be submitted to the applicable soil and water conservation [district(s)] district and to the department of land and natural resources' state historic preservation division for review and comment. Applicants [shall] must provide information sufficient to enable the reviewing agencies to determine that the proposed work will be in conformance with the most current standards on file at the department of public works [of the] soil and water conservation [district(s)] district and will meet the requirements of chapter 6E, Hawaii Revised Statutes, and related administrative rules. Final approval or disapproval [shall] must be made by the County within ten days after receiving the reviewing agencies' comments. In the wetlands overlay district, the director must make decisions consistent with any report required by subsection 19.47.030(A) and the policy in section 19.47.020 unless the director reports to the council in writing a need to make a contrary decision.”

SECTION 9. 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 10. The Department of Planning must adopt administrative rules to implement this Ordinance. This Ordinance takes effect upon the adoption of administrative rules by the Department of Planning.

care:misc:055abill04:jbf/nas