

REQUEST FOR LEGAL SERVICES

Date: November 7, 2022
From: Shane M. Sinenci, Chair
Agriculture and Public Trust Committee

TRANSMITTAL

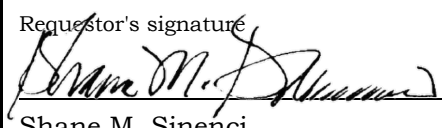
Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Michael Hopper, Esq.

Subject: BILL 154, CD1 (2022) TO ESTABLISH CULTURAL OVERLAY MAP AND CULTURAL SENSITIVITY DESIGNATIONS (APT-66)

Background Data: Please see the attached bill. Please submit response to apt.committee@mauicounty.us with reference to APT-66.

Work Requested: ☒ FOR APPROVAL AS TO FORM AND LEGALITY

☐ OTHER:

Requestor's signature  Shane M. Sinenci	Contact Person <u>Alison Stewart or Kasie Apo Takayama</u> (Telephone Extension: <u>7661 or 7665, 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 9, 2022 at 4:30 p.m.
REASON: For posting on November 18, 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:066acc01:ans

Attachment

ORDINANCE NO. _____

BILL NO. 154, CD1 (2022)

A BILL FOR AN ORDINANCE AMENDING TITLES 2, 16, 18, 19, AND 20, MAUI COUNTY CODE, TO ESTABLISH CULTURAL OVERLAY MAP AND CULTURAL SENSITIVITY DESIGNATIONS

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

SECTION 1: Article II, Title 19, Maui County code, is amended by adding a new chapter to be appropriately designated and to read as follows:

“Chapter 19.46

CULTURAL OVERLAY MAP AND CULTURAL SENSITIVITY DESIGNATIONS

Sections:

- | | |
|-----------|--|
| 19.46.010 | Title and purpose. |
| 19.46.020 | Establishment of cultural overlay map and cultural sensitivity designations. |
| 19.46.030 | Requirements for cultural sensitivity designations. |
| 19.46.040 | Amendments to cultural overlay map. |
| 19.46.050 | Permit review for land with a cultural sensitivity designation. |

19.46.010 Title and purpose. The ordinance codified in this title is known and may be cited as the “Maui County Cultural Overlay Map Ordinance.” This ordinance’s purpose is to establish a cultural overlay map, cultural sensitivity designations, and related review processes. As stated in the Countywide Policy Plan, Maui County government has a responsibility to protect cultural resources. Certain geographically definable areas contain a high density of cultural and archaeological resources that are highly likely to be disturbed if development is allowed in the area. Many of these areas are likely significant and require consideration and careful planning to ensure the past is not erased and the resources

are preserved for the benefit of generations to come. The establishment of a cultural overlay map will alert developers, property owners, and nearby residents that special considerations may be needed to protect cultural assets.

19.46.020 Establishment of cultural overlay map and cultural sensitivity designations. A. The principal archaeologist and geographic information system staff are responsible for creating and updating a cultural overlay map and cultural sensitivity designations. These designations are in addition to, and do not change the zoning of any property.

B. A cultural overlay map must at a minimum display the following information:

1. Cultural sensitivity designations in accordance with subsection 19.46.030(B).

2. Existing data sets including geology, hydrology, soil types, flood zones, wetlands, tsunami zones, bathymetry, topography, environmental zones, land commission awards and land grants, State historic preservation division data on known cultural sites, burials, and burial preserves, provided that sensitive data be publicly shown in approximation, and County data on current and proposed construction.

3. Data sets including the locations of pre- and post-contact events such as: battles, signing of the Mahele, drafting of the Hawaiian Constitution, and other important historical events; mana'o gleaned from Hawaiian language sources including place names and their meaning; traditional knowledge of the environment; traditional forms of oral history; historic maps; and documents, photographs, and audio and video clips relating to specific parcels or areas.

C. Cultural overlay map ordinance. A cultural overlay map must be adopted and updated by ordinance using the following process:

1. Within one year of the effective date of this ordinance, the principal archaeologist must prepare and transmit to the council a proposed ordinance adopting a cultural overlay map. The principal archaeologist must also transmit updated overlay maps and proposed ordinances reflecting newly discovered information on at least an annual basis.

2. The council must review and transmit the proposed ordinance to the appropriate planning commission by resolution in accordance with subsection 19.510.060(A)(1).

3. The planning commission must review the proposed ordinance in accordance with section 19.510.060, including holding a public hearing, and transmit its findings

and recommendations to the council within one hundred and twenty days.

4. The council must also transmit the proposed ordinance to the cultural resources commission, the applicable Island Burial Council, applicable 'Aha Moku Council, office of Hawaiian affairs of the State, and the State historic preservation division, which will have one hundred twenty days to review and provide comments to the council.

5. The council may act on the proposed ordinance after receipt of the recommendations or the expiration of the applicable deadlines specified in this section.

19.46.030 Requirements for cultural sensitivity designations. A. The following criteria must be used to establish cultural sensitivity designations to be included on a cultural overlay map:

1. The area contains or is in close proximity to a known burial site or burial grounds.

2. The area contains or is in close proximity to known cultural resources or archaeological sites.

3. The area is associated with historic events that made contributions to broad patterns of the County's history.

4. The area is associated with an important person from the County's past.

5. The area contains structures that are examples of a particular type, period, or method of construction, or that have high artistic value.

6. The area has potential to reveal further information about the County's pre- or post-contact history as determined by the principal archaeologist or the State historic preservation division.

7. The area has important value to native Hawaiian people or to another ethnic group because of associations with cultural practices or because of associations with traditional beliefs, events, or oral or pictorial accounts that are important to the group's history and cultural identity.

8. The area has religious value in the established traditions of the Hawaiian culture.

9. The area retains components of a traditional lifestyle that are widely recognized as important in maintaining the cultural identity of the community.

10. The area contains the presence of soil types, vegetation, or topography associated with cultural resources, or archaeological eco-indicators warranting additional review.

11. The area contains the presence of historic and existing waterways, wetlands, and back-filled areas.

B. Cultural sensitivity designations must be displayed on a cultural overlay map as follows:

1. Areas that contain four or more of the criteria, or areas with or in proximity to any known burials will receive a high cultural sensitivity designation and will be displayed in red on a cultural overlay map.

2. Areas that contain three of the criteria will receive a medium cultural sensitivity designation and will be displayed in yellow on a cultural overlay map.

3. Areas that contain one or two of the criteria will receive a low sensitivity designation and will be displayed in green on a cultural overlay map.

4. Areas where no cultural resource information is available will not receive a cultural sensitivity designation.

19.46.040 Amendments to cultural overlay map. A cultural overlay map may be amended in accordance with section 19.510.060, in addition to the following processes:

A. As new information is received, the information may be used by the principal archaeologist to propose an amended cultural overlay district map in accordance with subsection 19.46.020(C).

B. Any person who owns property or agency that manages property, or a lineal descendant recognized by the applicable Island Burial Council, may request a draft cultural sensitivity designation update for the property from the principal archaeologist, provided new information has been submitted. If the principal archaeologist agrees that an amendment is warranted, the principal archaeologist must propose an amendment to the cultural overlay map in accordance with subsection 19.46.020(C).

19.46.050 Permit review for land with a cultural sensitivity designation. A. For land with a cultural sensitivity designation on a cultural overlay map, the following permits and approvals are subject to the requirements of this section:

1. Changes in zoning under section 19.510.040.

2. Community plan amendments under section 2.80B.110.

3. District boundary amendments under chapter 19.68.

4. Grading or grubbing permits under chapter 20.08.
5. Special use permits under section 19.510.070.
6. Subdivision approvals under section 18.08.100.
7. Building permits under chapter 16.26B that involve ground-altering activities.
8. Permits for explosives materials under chapter 16.04C.

B. For land with a cultural sensitivity designation, any permit or approval listed in this section must be transmitted to the principal archaeologist for review, and the principal archaeologist may recommend conditions on the permit or approval triggering the review to mitigate potential impacts, including site avoidance. Any recommendation of the principal archaeologist must be transmitted to the applicable department head, the mayor, and the council, unless such transmittal is otherwise part of the review process.

C. For land with a cultural sensitivity designation, the principal archaeologist may transmit, or advise the agency responsible for the application to transmit, the application and project information to the State historic preservation division, cultural resources commission, applicable Island Burial Council, applicable 'Aha Moku Council, office of Hawaiian affairs of the State, and Department of Hawaiian Home Lands as appropriate for review and comment to assist the principal archaeologist in establishing conditions.

D. For land with a high cultural sensitivity designation or that includes criteria listed under subsections 19.46.030(A)(2) or 19.46.030(A)(5), development may not be initiated until a cultural site avoidance plan and, if required, an appropriate mitigation plan is reviewed by the principal archaeologist and approved by the applicable Island Burial Council or cultural resources commission as determined by the principal archaeologist.

E. If historic property is identified after work has commenced under one of the permits or approvals listed in this section, the principal archaeologist must be notified.

F. Onsite monitoring during ground-altering activities by a professional approved by the State historic preservation division and the principal archaeologist may be required as a condition of any permit or approval listed in this section.”

SECTION 2. Section 2.80B.110, Maui County Code, is amended by amending subsection (B) to read as follows:

“B. Applications [shall] must follow the procedures [set out] in sections 19.510.010 and 19.510.020 [of this code, shall], must

include the application fee [as] set [forth] in the County budget, and [shall] must be processed as if prepared by the planning director [pursuant to] in accordance with section 8-8.4 of the charter. An environmental assessment or environmental impact statement prepared in accordance with chapter 343, Hawaii Revised Statutes, [shall] must be submitted along with the application. For land with a cultural sensitivity designation under chapter 19.46, the principal archaeologist may recommend conditions to mitigate any potential impacts before application approval.”

SECTION 3. Section 16.04C.160, Maui County Code, is amended by amending subsection 1.12.8.2 to read as follows:

“**160.1.12.8.2 Explosives materials.** To manufacture, sell, dispose, purchase, store, use, possess, or transport explosives within the jurisdiction. For land with a cultural sensitivity designation under chapter 19.46, the principal archaeologist may recommend permit conditions to mitigate any potential impacts before permit approval. See chapter 65 [of this code].”

SECTION 4. Section 16.26B.105, Maui County Code, is amended by amending subsection (1) to read as follows:

“**105.1 Required.** Any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by this code, or to cause any such work to be done, must first make application to the building official and obtain the required permit. For permits involving ground-altering activities on land with a cultural sensitivity designation under chapter 19.46, the principal archaeologist may recommend permit conditions to mitigate any potential impacts before permit approval.”

SECTION 5. Section 18.08.100, Maui County Code, is amended to add a new subsection (E) to be appropriately inserted and to read as follows:

“**18.08.100 Approval.** A. Director's 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 the preliminary plat as

submitted, or as it may be modified, or may disapprove the same and [shall] must express the disapproval and the reasons [therefor] in writing.

2. Within forty-five days after submission of the preliminary plat of a subdivision for a long-term residential development which is not to be processed as an affordable housing project or after submission of the preliminary plat of a subdivision which is outside of the scope of subsection 18.08.100(A)(1), the director [shall] must review the plan and may give approval of the preliminary plat as submitted, or as it may be modified, or may disapprove the same and [shall] must express the disapproval and the reasons [therefor] 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 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), or such longer period as may have been agreed upon in writing, the preliminary plat [shall be] is deemed approved, and it [shall be] is the director's duty [of the director] to endorse [his] their approval of the preliminary plat [upon the] on its face [thereof]. Such approval by the director [shall] does not exempt the subdivider from compliance with the mandatory requirements of this ordinance.

E. For land with a cultural sensitivity designation under chapter 19.46, the principal archaeologist may recommend conditions to mitigate any potential impacts before approval.

SECTION 6. Section 19.04.040, Maui County Code, is amended by adding new definitions to be appropriately inserted and to read as follows:

“‘Archaeological eco-indicator’ means any organism or physical land feature indicative of an environment or set of environmental conditions relating to cultural resources.”

“‘Historic property’ means any building, structure, object, district, area, or site, including heiau and underwater site, that is over fifty years old.”

SECTION 7. Chapter 19.06, Maui County Code, is amended to add a new section to be appropriately inserted and to read as follows:

“19.06.011 Overlay districts designated. The County has the following countywide overlays and overlay districts in addition to the use zone districts provided in section 19.06.010:

- A. Countywide cultural overlay.
- B. Wetlands overlay districts.”

SECTION 8. Section 19.68.040, Maui County Code, is amended to add a new subsection (D) to be appropriately inserted and to read as follows:

“19.68.040 Action by the county council. A. Upon receipt of the appropriate planning commission's report and recommendations, the county council [shall] must consider the application and may adopt the findings and recommendations, in whole or in part, or otherwise act upon the report and transcript or summary, and, in the council's discretion, hold further hearings and take further evidence and testimony before taking final action.

Final action approving an application [shall] must be by the adoption of an ordinance[; provided, however], except that lands identified by the state as important agricultural lands needed to fulfill the purposes of conserving and protecting agricultural lands, promoting diversified agriculture, increasing agricultural self-sufficiency and assuring the availability of agriculturally suitable lands, [shall] must not be reclassified without meeting the standards and criteria established by the legislature and enactment of an ordinance approving the reclassification of such lands by an affirmative vote of at least two-thirds of the council's membership rather than the usual majority.

B. Prior to the enactment of an ordinance effecting any reclassification/boundary change, the council may impose

conditions upon the applicant's use of the property, fulfillment of such conditions to be prerequisite to the adoption of such ordinance or applicable part. Such conditions [shall] must have already been performed prior to council action on the reclassification/change of boundary or be enforceable by the county after council action. Conditions [shall] must be fulfilled within the time limitation established by the council, or, if no time limitation is established, within a reasonable time. Such conditions, if any, [shall] must run with the land and be recorded in the bureau of conveyances or filed with the assistant registrar of the land court. Conditions [shall] must be imposed only if the council finds such to be necessary to prevent adverse effects upon public health, safety, and welfare, and [shall] must be reasonably conceived to fulfill needs arising directly out of proposed land use in the following respects:

1. Protection of the public from the potentially deleterious effects of the proposed use; or
2. Fulfillment of the need for public service demands created by the proposed use.

Such conditions [shall] must be enforceable by the county, by appropriate action at law or equity, against the parties and their heirs, personal representatives, successors and assigns, and [shall] must run with the land.

C. Within sixty days of the effective date of enactment of an ordinance amending the state land use district boundaries a certified copy of the ordinance and a description and map of the affected property [shall] must be transmitted to the state land use commission and the state department of planning and economic development by the county planning director.

D. For land with a cultural sensitivity designation under chapter 19.46, the principal archaeologist may recommend conditions to mitigate any potential impacts before approval."

SECTION 9. Section 19.510.010, Maui County Code, is amended by amending subsection (D)(9) to read as follows:

"9. Preliminary archaeological and historical data and comments from the department of land and natural resources and office of Hawaiian affairs of the State, and if applicable, a preservation/mitigation plan which has been reviewed and approved by the department of land and natural resources and office of Hawaiian affairs of the State, and the cultural overlay map and cultural sensitivity designations under chapter 19.46 applicable to the property;"

SECTION 10. Section 19.510.040, Maui County Code, is amended by adding a new subsection to be appropriately inserted and to read as follows:

“D. For land with a cultural sensitivity designation under chapter 19.46, the principal archaeologist may recommend conditions to mitigate any potential impacts before approval.”

SECTION 11. Section 19.510.070, Maui County Code, is amended by adding a new subsection to be appropriately inserted and to read as follows:

“F. For land with a cultural sensitivity designation under chapter 19.46, the principal archaeologist may recommend permit conditions to mitigate any potential impacts before permit approval.”

SECTION 12. Section 20.08.031, Maui County Code, is amended to read as follows:

“20.08.031 Limited exclusions. Sections 20.08.040 through 20.08.160 regarding permit applications and requirements do not apply to the following; however, all other provisions of this chapter, including the provision of minimum bmps as required by section 20.08.035, remain applicable to all work performed, and the following exclusions do not affect the applicability of [section] subsection 20.08.040(C) relating to cut or fill activity in special management areas:

A. Subsurface excavations and backfill for buildings and other structures authorized by a valid building permit issued by the land use and codes administration or excavations and backfill for cesspools and septic tanks authorized by the state department of health. This exclusion does not affect the applicability of this chapter to the placing of fill materials obtained from the excavations on other premises.

B. Excavation, fill, or stockpiling that does not alter the general drainage pattern with respect to abutting properties that does not exceed one hundred cubic yards of material on any one site and does not exceed four feet in vertical height at its highest point; except that the slope face may not be steeper in slope and be located a minimum distance from neighboring properties, as enumerated in sections 20.08.170 through 20.08.210. This exception does not apply to land with a cultural sensitivity designation under chapter 19.46.

C. Grubbing that does not alter the general drainage pattern with respect to abutting properties and does not exceed one

acre, except that this exclusion does not apply to land with a cultural sensitivity designation under chapter 19.46.

D. Trenching for underground utilities, involving trenches less than two feet deep and less than fifty cubic yards, provided the trenches are back filled and the surface restored to its preexisting grade and ground cover, except that this exclusion does not apply [in an area determined by the County archaeologist as likely to involve a burial site or historic property, as defined by Hawai'i revised Statutes chapter 6E] to land with a cultural sensitivity designation under chapter 19.46."

SECTION 13. Subsection 20.08.040, Maui County Code, is amended by adding new subsections to be appropriately inserted and to read as follows:

"A. No person [shall] may commence or perform any grading or stockpiling without a grading permit[; and].

B. No person [shall] may commence or perform any grubbing without a grubbing permit, except where grubbing concerns lands for which a grading permit has been issued.

C. No person [shall] may 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. No person may commence the use of explosives materials with ground-altering activities without a grading permit.

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

F. For land with a cultural sensitivity designation under chapter 19.46, the principal archaeologist may recommend permit conditions to mitigate any potential impacts before permit approval."

SECTION 14. Subsection 20.08.080, Maui County Code, is amended to read as follows:

"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, and for land with a cultural sensitivity designation under chapter 19.46, the principal archaeologist may recommend permit conditions to mitigate any potential impacts before permit approval."

SECTION 15. The principal archaeologist may adopt administrative rules to implement this Ordinance.

SECTION 16. 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 17. This Ordinance takes effect on approval. Within one year of the effective date of this Ordinance, and in accordance with subsection 19.46.020(C), the principal archaeologist must transmit a cultural overlay map and proposed ordinance to the Council.

APPROVED AS TO FORM AND LEGALITY:

Department of the Corporation Counsel
County of Maui

apt:misc:066abill02:ans