

June 29, 2022, Committee meeting

CLIMATE ACTION, RESILIENCE, AND ENVIRONMENT COMMITTEE
Amendment Summary Form

Legislation: Bill 91 (2022).

Proposer: Kelly Takaya King, Chair
Climate Action, Resilience, and Environment Committee

Kelly T. King

Description: Based on a review of the planning commissions' comments and input from wetlands experts in the public, I will be substituting a proposed CD1 version of Bill 91 (2022), that incorporates technical revisions and clarifies the following:

- The bill's intent.
- Permitted uses.
- The deadline for the Planning Director to prepare a wetlands map.
- That wetland boundaries must be determined by the presence of two or more of the three wetland indicators listed in the 1987 U.S. Army Corps of Engineers Wetland Delineation Manual and the 2012 Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Hawai'i and Pacific Islands Region.

Motion: Move to substitute Bill 91 (2022) with the attached proposed CD1 version.

Attachment: Proposed CD1 version of Bill 91 (2022), incorporating proposed amendments referenced above.

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COUNTY CLERK

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ORDINANCE NO. _____

BILL NO. _____ (2022)

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 and protect sensitive ecosystems and the natural environment, mitigate climate change, and work toward building environmental resilience by establishing a policy 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 requirements for wetlands restoration and protection prior to this Ordinance.

A Maui County policy is necessary because the Clean Water Act does not regulate certain isolated wetlands or reflect County-specific goals for protecting and enhancing environmental resilience by preserving environmentally sensitive ecosystems, such as wetlands.

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

““Protective buffer” means an area that surrounds wetlands and is established to avoid significant negative physical or chemical impacts to wetlands.”

““Wetland” means those areas that are currently or were prior to any human-caused alteration (e.g., filling, introduction of invasive plants) 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 estuarine systems; flowing, intermittent, or ephemeral streams and associated drainages; and similar areas; but does not include agricultural ditches or reservoirs.”

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, including protective buffers, on any real property for the purpose of restoring or protecting a wetland on the property. The wetlands overlay district overlays the base or underlying zoning district so that any parcel of land in the wetlands overlay district will also be in another zoning district. Land within a wetlands overlay district is subject to the

requirements established in this chapter and restrictions and requirements established by other applicable ordinances and regulations of the County.

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 identify, restore, and protect wetlands beyond what is required by the Clean Water Act, Coastal Zone Management Act, or any other law to protect environmentally sensitive ecosystems and their services, including flood control, water quality enhancement, species protection, and climate adaptation and mitigation benefits. All discretionary permits issued by the County must be consistent with this policy.

19.47.030. Report. A. A qualified scientific professional, under the direction of the 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 outline ecosystem values, determine any potential impacts to wetlands, provide how wetlands will be maintained and even enhanced, recommend protective buffers to wetlands, and include information and conclusions on 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 prior impact of any excessive siltation resulting from surface runoff from construction sites and lack of erosion control on steep slopes.

6. The prior impact of pollution by garbage, litter, and refuse.

7. The prior impact of a reduction in the flow of watercourses due to destruction of wetlands.

8. Any potential significant adverse impact on natural drainage patterns, the destruction of important habitat or the discharge of toxic substances.

9. Measures to ensure that wetland functions and habitat are maintained and, where possible, enhanced to increase the potential for survival of rare and endangered flora and fauna.

10. Identification of public lands in or adjacent to the wetland so that they can be identified for maintenance and possible hazard mitigation.

11. Proposed protective buffers, with a minimum requirement of fifty feet based on the report's assessment of wetland functions, valuation, and the need for protection.

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 sufficient to fulfill the purpose of this chapter.

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

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 consistent with the intent of this chapter.

D. Uses permitted in the base or underlying zoning district that are not inconsistent with the intent of this chapter and are consistent with the conclusions of the report required by section 19.47.030.

E. Traditional plant cultivation.

F. Restoration and management activities, including removal of invasive species, restoration of previously altered or impacted hydrology, and planting of native and beneficial noninvasive vegetation.

G. Exercising those rights customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian islands prior to 1778, as protected by article XII, section 7, of the Hawaii State Constitution.

H. Agriculture, recreation, education, public open space, and other compatible uses that would not degrade ecosystem functions and productivity.

19.47.050. Prohibited uses. When a protected buffer is identified, any use that creates significant negative physical or chemical impacts to wetlands is prohibited in the wetlands overlay district.

19.47.060. Mapping. A. Within one hundred eighty days after the effective date of the ordinance establishing this chapter, the planning director must prepare, or cause to be prepared, and transmit to the planning commissions, council, conservation planning committee, and director of public works a map that shows the approximate location of wetlands throughout the County and likely migration areas reflected by passive flooding data. The landward extent (i.e., the boundary) of wetlands must be determined by the presence of two or more of the three wetland indicators listed in the 1987 U.S. Army Corps of Engineers Wetland Delineation Manual and the 2012 Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Hawai'i and Pacific Islands Region. These indicators include an abundance of hydrophytic vegetation, the presence of hydric soils, and evidence of hydrology. For flowing systems, the landward extent must extend to the ordinary high-water mark, determined using the 2005 U.S. Army Corps of Engineers Regulatory Guidance Letter on the Determination of Ordinary High Water Mark Identification.

B. The map must be updated and made publicly available at least annually and whenever the council or director initiates a change in zoning to established wetlands overlay districts. These updates will include delineations and site-specific reports created to support proposed activities or development as detailed in the report required by section 19.47.030.

C. The 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 may advise the mayor to authorize the County to acquire real property containing wetlands either by negotiated acquisition under chapter 3.44 or by eminent domain, or to seek execution of a conservation easement to restore or protect wetlands including in the following areas:

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.

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 one of the six wetlands classifications:

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.

vi. Human-made: Loko i'a (Hawaiian fish ponds), Lo'i kalo (Hawaiian wetland taro field), 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 or stabilization.

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.]

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] a longer period [as may have been] if 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 comply with or 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 or grubbing permit unless the council by resolution grants an exception to this section for wetland restoration.

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 within one hundred eighty days after the

effective date of this Ordinance. This Ordinance takes effect upon the adoption of administrative rules by the Department of Planning.

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INTRODUCED BY:

Kelly T. King

KELLY TAKAYA KING