

IEM Committee

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Sent: Friday, June 02, 2017 4:43 PM
To: pat.wong@co.maui.hi.us; corpcoun@mauicounty.gov
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Subject: Moratorium on Exporting Sand and the Maui Inland Sand Resource Quantification Study: Meeting - Monday, June 5, 2017
Attachments: 2017-06-02 Ltr to Pat Wong, Esq..pdf

Dear Mr. Wong,

Attached hereto is a letter *dated June 2, 2017* from Attorney Kugle in regards to the above-referenced matter. Original to follow by mail.

Should you have any questions, do not hesitate to contact our office. Thank you.

Sincerely,

Rochelle Panoke

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DAMON KEY LEONG KUPCHAK HASTERT

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June 2, 2017

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Re: MORATORIUM ON EXPORTING SAND AND THE
MAUI INLAND SAND RESOURCE
QUANTIFICATION STUDY
Meeting: Monday, June 5, 2017

Dear Mr. Wong:

We represent Maui Lani Partners ("Maui Lani") and are writing in connection to the Infrastructure and Environmental Committee for the Council for the County of Maui's inquiry regarding a possible moratorium on excavation of sand ("Moratorium") and the Maui Inland Resource Quantification Study. Enactment of this Moratorium is likely to infringe on the right to freely contract and constitutes a taking of property without just compensation, as well as an unconstitutional interference with Maui Lani's vested rights.

The United States Constitution prohibits laws that impair contracts. U.S. Const., art. I, § 10, cl. 1. In determining whether unconstitutional impairment of contract has occurred, the Hawaii Supreme Court has provided the "following three criteria: (1) whether the state law operated as a substantial impairment of a contractual relationship; (2) whether the state law was designed to promote a significant and legitimate public purpose; and (3) whether the state law was a reasonable and narrowly-drawn means of promoting the significant and legitimate public purpose." *Applications of Herrick*, 82 Haw. 329, 340, 922 P.2d 942, 953 (1996)

In this case, the enactment of this proposed ordinance will constitute a "substantial impairment" of a contractual relationship. "This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Id.*

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(internal quotations omitted). “To determine whether the impairment complained of is ‘substantial,’ [t]he legitimate expectations of the contracting parties must be examined.” *Id.* (internal quotations omitted). Other factors that a court must consider include “the severity of the impairment [and] the extent to which the subject matter has been regulated in the past.” *Id.* (internal quotations omitted). This proposed moratorium would be a substantial impairment on Maui Lani’s contractual relations (and the contracts of many other entities involved in development and construction in Maui County), because Maui Lani has contracts for the excavation and stockpile of sand and soil and this moratorium would prohibit Maui Lani from fulfilling its contracts. The District Court or Puerto Rico addressed the issue of whether prohibiting the removal of sand from property could constitute a constitutional infringement on the right to contract. *Suarez Cestero v. Pagan Rosa*, 198 F. Supp. 2d 73 (D.P.R. 2002). In that case, the developer had a contract with a sand removal company and the acts of government officials to prevent the performance of that contract were considered constitutional violations. That same analysis is relevant here. There is no question that a moratorium would infringe on the rights of Maui Lani, and any other party who has a contractual relationship for sand excavation within Maui County. Therefore, it is evident there would be a substantial impairment on the right to contract.

The second and third constitutional impairment inquiries can be taken together. Specifically, a court must determine whether the law was designed to promote a significant and legitimate public purpose and whether the law was a reasonable and narrowly-drawn means of promoting the significant and legitimate public purpose. In this case, the purported public purpose is to “preserve and protect the health and safety of Maui’s sensitive environment from mining inland sand” and to “preserve, maintain and avoid disturbance of Hawaiian historical, cultural or archaeological sites and unmarked human burial sites.” See Request for Legal Services, page 2, attached hereto as Exhibit “A.” It is unclear whether this moratorium is even necessary. The study that the County is relying on is 11 years old. According to the study, the remaining life span of the sand was 5-6 years. This demonstrates that the study that is being relied upon is inaccurate and this moratorium does not constitute a legitimate public purpose. Furthermore, the purpose of the study was for the management of concrete sand resources so that Maui would have a continued source of sand for excavation, which is contrary to the purpose of the proposed Moratorium. Finally, there are existing laws which fulfill the stated purposes, such as Maui’s grading ordinance and Haw. Rev. Stat. Ch. 6E. All of Maui Lani’s grading is occurring pursuant to valid grading permits and in

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compliance with the archeological provisions of Chapter 6E. In fact, to the extent the Moratorium is intended to preserve, maintain and protect historical, archeological or burial sites, it is pre-empted by Chapter 6E.

Even assuming a valid public purpose, the moratorium must be reasonable and narrowly drawn. The proposed moratorium prohibits *all* mining, extraction, stockpiling or excavation of inland sand, based on an 11-year old study, which by its own findings, has proven to be inaccurate. Nonetheless, the County is seeking the extreme remedy of a moratorium. In addition, the County intends an across the board moratorium, citing protection of Hawaiian historical, cultural or archaeological sites and unmarked remains, where there is no evidence that these activities will result in the damage to these things. This overly-broad bill would apply to the small lot owner wanting to grade his/her house pad, swimming pool, retaining walls, and fence posts; Government project such as the DLNR Maui Offices, Kaunoa Senior Center grading for PV, and the future County Kahului Water Tank site; and affordable housing project, residential subdivisions, and bus transportation facilities. Preventing any grading for these activities is a drastic and broad solution to an unfounded and narrow issue.

Therefore, in analyzing these three factors, it is evident that the enactment of this bill would result in the County violating the constitutionally protected right to contract, and this moratorium would be struck down and the County held liable for violating constitutional rights.

Next, the enactment of this bill would result in a taking of property without compensation. “To succeed on a takings claim, a claimant must first establish “a vested interest protectable under the Fifth Amendment.” *Kepoo v. Kane*, 106 Haw. 270, 294, 103 P.3d 939, 963 (2005). In this case, Maui Lani has a protected property right in the sand and soil its property, as well as the grading permits and other entitlements allowing excavation and development. The Supreme Court has held that sand and gravel were not “valuable minerals” within the meaning of the mineral reservation provision in favor of the United States in the Pittman Underground Water Act of 1919 and therefore are not owned by the government. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 124 S. Ct. 1587 (2004). Furthermore, while there is a state mineral reservation Haw. Rev. Stat. § 182-1, “minerals” expressly excludes “sand, rock, gravel, and other materials suitable for use and used in general construction.” This too confirms that sand and

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soil are valuable private property rights. This moratorium seeks to restrict a landowner's right to use the sand on its land as it sees fit. A moratorium on the excavation or removal of sand deposits on private property will be a taking of property without just compensation in violation of the Fifth Amendment.

Moreover, application of the moratorium to existing projects and grading permits will result in an interference with vested property rights. "The United States and Hawai'i Constitutions both provide that no person shall be deprived of property without due process of law. *Waikiki Marketplace v. Zon. Bd. Of Appeals*, 86 Hawai'i 343, 353, 949 P.2d 183, 193 (App. 1997). "Therefore, due process principles protect a property owner from having his or her vested property rights interfered with ... and preexisting lawful uses of property are general considered to be vested rights that zoning ordinances may not abridge." *Id.* The Court held that a County zoning decision that prohibited a previously lawful use would constitute an interference with constitutional vested rights. In Maui Lani's case, Grading Permit No. G2014-0191 was properly issued by the County of Maui, Department of Public Works ("Public Works") to Maui Lani for grading work at the parcel. Grading is defined under the Maui County Code ("MCC"), Chapter 20.08.020 as "the temporary storage of soil, sand, gravel, rock, or any similar material and excavation or fill or any combination thereof." The same section defines excavation as "any act by which soil, sand, gravel, rock or any similar material is cut into, dug, uncovered, removed, displayed, relocated, or bulldozed." The work authorized under Maui Lani's current grading permit, which remains valid and in effect, falls squarely within the grading definition. The grading work and permits are consistent with proposed plans for a residential subdivision in Phase 9 and a related extension of the Maui Lani Parkway – a mandate of the County of Maui. As you can see, the grading work and permit and proposed use meet the intent of the applicable zoning district. Thus, any moratorium would restrict the vested property rights of Maui Lani and the County should be estopped from enforcing this zoning ordinance against Maui Lani.

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