

REQUEST FOR LEGAL SERVICES

Date: September 5, 2017
From: Elle Cochran, Chair
Infrastructure and Environmental Management Committee

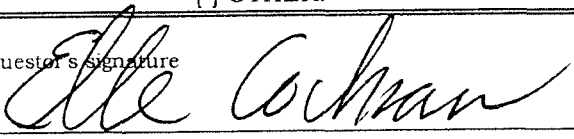
TRANSMITTAL

Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Richelle Thomson, Esq.

Subject: MORATORIUM ON EXPORTING SAND, THE MAUI INLAND SAND RESOURCE QUANTIFICATION STUDY AND SAND MINING REGULATION (IEM-33)

Background Data: Please replace the attached version of the proposed ordinance with the version submitted to you on August 31, 2017. A copy of the bill comparing your suggested revisions of August 7, 2017, against the most recent version, is submitted electronically with this request. Please review and approve proposed ordinance. An original, signed copy of the ordinance is required.

Work Requested: ☒ [x] FOR APPROVAL AS TO FORM AND LEGALITY
☐ [] OTHER:

Requestor's signature  Elle Cochran, Councilmember	Contact Person <u>Gary Saldana or Mimi DesJardins</u> (Telephone Extension: 7137 or 7886)
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☐ [] ROUTINE (WITHIN 15 WORKING DAYS) ☒ [x] RUSH (WITHIN 5 WORKING DAYS)
☐ [] PRIORITY (WITHIN 10 WORKING DAYS) ☐ [] URGENT (WITHIN 3 WORKING DAYS)

☒ [x] SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): September 8, 2017
REASON: For posting on the IEM meeting of September 12, 2017.

FOR CORPORATION COUNSEL'S RESPONSE

ASSIGNED TO: RMT	ASSIGNMENT NO. 2017-0092	BY: kku
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TO REQUESTOR: ☐ [] APPROVED ☐ [] DISAPPROVED ☒ [x] 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):
please see attached memo.

DEPARTMENT OF THE CORPORATION COUNSEL

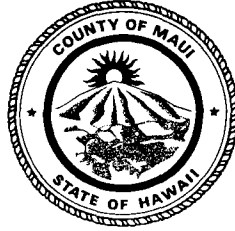
Date 9/13/2017

By RDM (Rev. 7/03)

Iem:ltr:033acc06:mzd

Attachment

ALAN M. ARAKAWA
Mayor




PATRICK K. WONG
Corporation Counsel

EDWARD S. KUSHI
First Deputy

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DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
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MEMO TO: Elle Cochran, Chair
Infrastructure and Environmental Management Committee

FROM: Richelle M. Thomson 
Deputy Corporation Counsel

DATE: September 13, 2017

SUBJECT: A bill for an ordinance establishing a new chapter 20.40,
Maui County Code, declaring a moratorium on sand mining
(IEM-33)

This memorandum is in response to your request of September 5, 2017, that the Department of Corporation Counsel review and approve the above-identified draft ordinance, which is attached for reference.

Following review of the proposed ordinance, we are unable to approve as to form and legality, and offer the following comments:

1. Based on the presentation and materials distributed at the September 12, 2017, committee meeting (canceled due to lack of quorum), a map is intended to be incorporated in a subsequent draft of the ordinance so that the geographic area subject to the moratorium is clearly identified.
2. The title of the proposed ordinance includes "sand mining"; however, the current proposed definition of sand mining may be read to include activities typically understood to be grading or other more minor earth-disturbing activities. For clarity and public notice purposes, it is recommended to retitle the ordinance to include "grading" if that remains the intent.

3. The Department of Public Works may provide information on pending grading permits within the proposed moratorium area. Legal issues relating to a moratorium on issuance of grading permits should be discussed in executive session.
4. Mining (aka “resource extraction”) is generally governed within zoning codes across the country. Currently, this activity is only allowed outright in the County’s restricted industrial zone and in open space zoned land only on Lanai. In the agriculture and heavy industrial zones, resource extraction requires a special use permit approved by a planning commission or the State Land Use Commission.

Clarifying or strengthening the definition of “resource extraction” in Chapter 19.04, Maui County Code (“MCC”), remains our recommendation and still appears to be within the stated purposes of the proposed ordinance. Additionally, the committee may wish to request that the Planning Department provide information on the uses allowed in those zones and the extent to which those zones exist in the proposed moratorium area, and whether any “resource extraction” permits exist or are currently being processed for land located within this area.

5. The definition of “Central Maui inland sand” is proposed to be “inland sand deposits on vacant land, sand dunes, historical, cultural and environmentally sensitive areas ...” within certain geographic boundaries. This definition is vague in that the underlined terms should be defined, e.g., does “vacant” land mean land without any structures? Is land used for agriculture considered “vacant”? How is a determination made that land is historically, culturally, and environmentally sensitive? Does the moratorium apply to land that does not meet all of the terms (should “and” be changed to “or”)? Again, each of these terms should be defined so that the regulation is clear.

Alternatively, the committee may consider returning to the definition in previous drafts of the proposed ordinance, which in essence was that inland sand is “sand” (defined in 20.08, MCC) located in a particular geographic area.

An additional consideration is that the proposed definitions of “Central Maui inland sand,” with the qualifications, and “Sand mining” create ambiguity. Sand mining involves removing sand from its “original, natural location,” which may be interpreted as sand that has not been previously disturbed through grading, mining, or past earth-disturbing

activities, including agricultural usage. This may be intended to be considered “vacant,” but that should be clarified.

6. As a general comment on 20.40.040.C, which excludes “sand mining” (grading) so long as any excavated/graded sand remains on the same lot: The moratorium may impact activities on smaller-sized lots more than it would on larger-sized lots.
7. As an additional general comment on preservation of archaeological, cultural, or historic sites with the goal of preventing all development or disturbance of these areas, the following options may be considered: acquisition of such land areas by negotiating a fee purchase or via condemnation, acquisition of conservation easements or facilitating their acquisition by a land trust, or re-zoning to open space 1 (Chapter 19.07, MCC). The current draft ordinance includes language somewhat related to these preservation goals, but the primary task identified as underlying the moratorium is development of regulations relating to mining. In other words, regulating mining and limiting that activity to certain zoning districts and protecting important sites from all development should be addressed through separate regulation or other pathways, if that becomes the direction of the committee.

ORDINANCE NO. _____

BILL NO. _____ (2017)

A BILL FOR AN ORDINANCE ESTABLISHING A NEW CHAPTER 20.40, MAUI
COUNTY CODE, DECLARING A MORATORIUM ON SAND MINING

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

SECTION 1. Title 20, Maui County Code, is amended by adding a new
chapter to be appropriately designated and to read as follows:

“Chapter 20.40

**MORATORIUM ON SAND MINING OF
CENTRAL MAUI INLAND SAND**

Sections:

- 20.40.010 Purpose.
- 20.40.020 Definitions.
- 20.40.030 Moratorium on sand mining of Central Maui inland
sand.
- 20.40.040 Exceptions.
- 20.40.050 Penalty.
- 20.40.060 Administrative rules.
- 20.40.070 Administrative enforcement.
- 20.40.080 Adjustment by director.
- 20.40.090 Term.

20.40.010 Purpose. The purpose of this chapter is to declare a moratorium on mining of Central Maui inland sand to conduct further analysis required to establish regulations for mining inland sand to protect Maui’s environment and limited natural resources and prevent the disturbance of Hawaiian historical, cultural, or archaeological sites, and unmarked human burial sites. The Maui Inland Sand Resource Quantification Study (2006) found the remaining inland sand inventory is limited to approximately 970,000 tons. Given the finite nature of this important natural resource, it is necessary to limit and regulate the mining of inland

sand until such time as an ordinance regulating the mining, extracting, excavating, or stockpiling of inland sand is adopted.

20.40.020 Definitions. Whenever used in this chapter, the following words shall have the meaning indicated:

“Central Maui inland sand” means inland sand deposits on vacant land, sand dunes, historical, cultural and environmentally sensitive areas that start downwind of the mouth of Waihee River, continues generally parallel along the Waiehu coastline to the stockpile at Paukukalo, to the extension of Pu’unene Avenue at the coastline, then continues south on Pu’unene Avenue to the intersection of Mokulele Highway and follows Mokulele Highway to North Kihei Road, to Honoapiilani Highway, to Main Street, to Kahikili Highway, and back to Waihee River. The map entitled “Moratorium on Sand Mining” dated _____ delineates the affected areas of the moratorium and shall be on file in the Office of the County Clerk with certified copies being place on file in the Departments of Planning and Public Works and shall be deemed to be incorporated herein by reference.

“Inland sand” means “sand”, as defined in Section 20.08.020 of this code, located inland (mauka) from the “shoreline area”, as defined in Section 205A-41, Hawaii Revised Statutes.

“Lot” shall have the same meaning as set forth in section 19.04.040 of this code.

“Sand mining” means activities related to the extraction or removal of sand from its original, natural location.

20.40.030 Moratorium on sand mining of Central Maui inland sand. No person shall conduct sand mining of Central Maui inland sand notwithstanding the provisions in title 19 and chapter 20.08 of this code.

20.40.040 Exceptions. Sand mining of Central Maui inland sand shall be permitted during the term of the moratorium as follows, provided that an exception pursuant to this section does not obviate the need to obtain other permits or approvals:

A. Mining of Central Maui inland sand for purposes of rebuilding or enhancing the protective capacity and environmental quality of coastal dunes, as defined in section 20.08.020 of this title.

B. Mining of Central Maui inland sand used for activities such as land management for agriculture, landscaping, and related uses as described in subsection 20.08.030(C) of this title within the same lot.

C. Excavation or grading of Central Maui inland sand directly related to on-site construction for purposes other than

mining or quarrying, where no such sand is transported outside the same lot.

D. Activities required to comply with County, State, or Federal regulations.

E. The limited exclusions described in section 20.08.031 of this title.

20.40.050 Penalty. Any person who violates any provision of this chapter shall upon conviction, be guilty of a petty misdemeanor subject to fine up to \$1,000 or imprisonment for not more than one-year, or both. Each day of each violation shall constitute a separate offense.

20.40.060 Administrative rules. The director of public works may adopt administrative rules to implement this chapter, pursuant to chapter 91, Hawaii Revised Statutes.

20.40.070 Administrative enforcement. The director of public works shall enforce this chapter pursuant to section 19.530.030 of this code, relating to administrative enforcement.

20.40.080 Adjustment by director. The director may, subject to council approval by resolution, authorize a reduction, adjustment, or waiver of any provision of this chapter

20.40.090 Term. The ordinance codified in this chapter shall automatically expire _____, unless reenacted by the council as provided by law."

SECTION 2. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM AND LEGALITY:

Department of the Corporation Counsel
County of Maui

iem:misc:033abill06:mzd

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sand until such time as an ordinance regulating the mining, extracting, excavating, or stockpiling of inland sand is adopted.

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"Inland sand" means "sand," as defined in ~~Chapter~~Section 20.08.020 of this code, located inland (mauka) from the "shoreline area," as defined in Section 205A-41, Hawaii Revised Statutes.

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C. Excavation or grading of Central Maui inland sand directly related to on-site construction for purposes other than mining or quarrying, where no such sand is transported outside the same lot.

D. Activities required to comply with County, State, or Federal regulations.

~~E. Emergency operations, as described in subsection 20.08.030.A of this code.~~

~~FE.~~ The limited exclusions described in section 20.08.031 of this title.

20.40.050 Penalty. Any person who violates any provision of this chapter shall upon conviction, be guilty of a petty misdemeanor subject to fine up to \$1,000 or imprisonment for not more than one-year, or both. Each day of each violation shall constitute a separate offense.

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APPROVED AS TO FORM AND LEGALITY:

Department of the Corporation Counsel
County of Maui

iem:misc:033abill03_Corp Counsel 8-7-
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