



General background on moratorium ordinances

CARE-50

May 19, 2021

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Kelly Takaya King, Chair
CARE Committee

RECEIVED AT CARE MEETING ON 5/19/21
OCS (Committee Chair)

History of Maui County moratorium ordinances

ORDINANCES 737 (1972), 747 (1972), 1997 (1991), 2878 (2000),
4804 (2018), 4871 (2018), 5125 (2020)

Ordinance 737 (1972)

- ▶ **Policy:** Temporarily maintain status quo on the construction of servants' quarters or guest cottages.
- ▶ **Temporarily prohibited County actions:** Approving construction.
- ▶ **Justification:** Wait for the Wailuku-Kahului General Plan Study, which may include amendments to the zoning ordinance based on density rather than lot size within residential districts.
- ▶ **Exemptions:** None.
- ▶ **Expiration:** December 31, 1972 (approximately five months)

Ordinance 747 (1972)

- ▶ **Policy:** Temporarily maintain status quo on the construction of servants' quarters or guest cottages.
- ▶ **Temporarily prohibited County actions:** Approving construction.
- ▶ **Justification:** Wait for the Wailuku-Kahului General Plan Study, which may include amendments to the zoning ordinance based on density rather than lot size within residential districts.
- ▶ **Exemptions:** None.
- ▶ **Expiration:** June 30, 1973 (approximately six months)

Ordinance 1997 (1991)

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- ▶ **Policy:** Temporarily maintain status quo on the construction of hotel units in Kihei-Makena and West Maui community plan areas.
- ▶ **Temporarily prohibited County actions:** Processing or issuing of permits for hotel development.
- ▶ **Justification:** Wait for the Kihei-Makena and West Maui community plan updates, which may include limits on the construction of hotel units.
- ▶ **Exemptions:** Permits in process or approved; certain older hotels for limited expansion.
- ▶ **Expiration:** December 31, 1992 (approximately one year, nine months) or upon enactment of various long-range plans.

Ordinance 2878 (2000)

- ▶ **Policy:** Temporarily maintain status quo on cell towers in Interim Zoning District.
- ▶ **Temporarily prohibited County actions:** Approving cell towers.
- ▶ **Justification:** Wait for permanent standards to be reviewed by the planning commissions and the Council.
- ▶ **Exemptions:** Maintenance or repair of cell towers.
- ▶ **Expiration:** December 30, 2000 (approximately six months).

Ordinance 4804 (2018)

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- ▶ **Policy:** Temporarily maintain status quo on mining of Central Maui inland sand.
- ▶ **Temporarily prohibited County actions:** Approving sand mining.
- ▶ **Justification:** Wait for permanent standards to be reviewed by the Council.
- ▶ **Exemptions:** Upon Council approval by resolution.
- ▶ **Expiration:** July 19, 2018 (approximately six months).

Ordinance 4871 (2018)

- ▶ **Policy:** Temporarily maintain status quo on mining of Central Maui inland sand.
- ▶ **Temporarily prohibited County actions:** Approving sand mining.
- ▶ **Justification:** Wait for permanent standards to be reviewed by the Council.
- ▶ **Exemptions:** Upon Council approval by resolution.
- ▶ **Expiration:** December 31, 2018 (approximately six months).

Ordinance 5125 (2020)

- ▶ **Policy:** Temporarily maintain status quo on transient accommodations on Lana`i.
- ▶ **Temporarily prohibited County actions:** Issuing building permits or zoning permits for transient accommodations.
- ▶ **Justification:** Wait for permanent standards to be reviewed by the Council.
- ▶ **Exemptions:** None.
- ▶ **Expiration:** September 26, 2021 (approximately one year) or upon enactment of permanent standards.

Recent moratorium ordinances in other jurisdictions

Honolulu Ordinance 18-6 (2018)

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- ▶ **Policy:** Temporarily maintain status quo on “monster homes” on O`ahu.
- ▶ **Temporarily prohibited City actions:** Issuing building permits for “monster homes.”
- ▶ **Justification:** Wait for permanent standards to be reviewed by the Council.
- ▶ **Exemptions:** Various discretionary approvals.
- ▶ **Expiration:** March 13, 2020 (approximately two years).

City of Whittier, CA Ordinance 3075 (2018)

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- ▶ **Policy:** Temporarily maintain status quo on hotels and motels in the City.
- ▶ **Temporarily prohibited City actions:** Issuing development entitlements and permits for hotels and motels.
- ▶ **Justification:** Wait for permanent standards to be reviewed by the Council.
- ▶ **Exemptions:** Hotels and motels that have received all discretionary approvals.
- ▶ **Expiration:** May 31, 2019 (approximately 11 months).

City of Asheville, N.C. Ordinance 4766 (2019)

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- ▶ **Policy:** Temporarily maintain status quo on hotel development.
- ▶ **Temporarily prohibited City actions:** Issuing approvals for hotels.
- ▶ **Justification:** City “needs to develop a set of review criteria to account for the negative impacts of proposed hotel development.”
- ▶ **Exemptions:** None.
- ▶ **Expiration:** September 24, 2020 (approximately one year).

City of Bainbridge Island, WA

Ordinances 2018-02 & 2020-24

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- ▶ **Policy:** Temporarily maintain status quo on hotels and motels in the City.
- ▶ **Temporarily prohibited City actions:** Issuing development approvals for the shoreline area.
- ▶ **Justification:** Wait for permanent standards to be reviewed by the Council.
- ▶ **Exemptions:** Mixed-use development, affordable housing, government facilities.
- ▶ **Expiration:** April 3, 2021 (approximately three years and three months).

Legal framework for moratorium ordinances

U.S. Supreme Court's Tahoe-Sierra decision

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In 2002, the U.S. Supreme Court endorsed a “good faith,” 32-month development moratorium as a reasonable means of maintaining the status quo while long-range plans and permanent policies were being considered, as reported by Law Professor Patricia E. Salkin:

“On April 23, 2002, the U.S. Supreme Court handed local governments a major victory in continuing efforts to plan for smart growth, in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency. Recognizing that locally enacted moratoria, or temporary delays in the issuance of building permits pending further study, are an essential tool of successful development, the High Court said, “To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.”

Source: Patricia E. Salkin, Zoning and Land Use Planning, 31 Real Est. L.J. 83 (2002)

Guidance in American Bar Association article

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After the U.S. Supreme Court's decision in the Tahoe case, an American Bar Association article outlined elements of “defensible moratoria,” including the following:

- *Limited in time—the defensible moratorium will be for no longer than is necessary to protect the public's interest. Some may see the adoption of a moratorium as a failure of planning; however, the moratorium itself must be planned, in its adoption, in the actions taken during its effective period, and in the implementation of new policies and regulations once the moratorium has been terminated.*
- *Limited in physical dimension—the defensible moratorium will use the smallest physical area of restriction to limit unintended consequences and adverse impacts beyond those necessary to carry out the objectives of the moratorium.*
- *Available local relief—finally, to the extent possible, a defensible and well-constructed moratorium will expressly provide alternatives or exceptions from coverage that may minimize the impact of the moratorium upon affected landowners. A defensible moratorium will not impose upon private property owners unnecessarily, and when it does, local procedures should provide an effective escape hatch for a landowner to get out from under the coverage of the moratorium. Maintaining the flexibility to avoid protracted and expensive litigation is in the best interest of regulators and property owners alike.*

Source: “DEFENSIBLE MORATORIA: THE LAW BEFORE AND AFTER THE TAHOE-SIERRA DECISION,” SL005 ALI-ABA 1003, 1046-47

Corporation Counsel advice

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The Department of the Corporation Counsel has consistently advised that moratorium ordinances are among the Council's policy-making tools.

Former Deputy Corporation Counsel Kelly A. Cairns advised then-Land Use Committee Chair Sol P. Kaho`ohalahala, on January 9, 1998, when a moratorium on agricultural subdivisions was being considered:

“The most common means to maintain status quo and stop further development under a land use system that is undergoing improvements is through the enactment of an ordinance imposing a moratorium on the approval of development applications.”

“Courts have generally upheld the authority of a government body to impose a moratorium by ordinance so long as there are valid reasons justifying the ordinance, it is imposed without discrimination and is in place for a reasonable length of time.”

Corporation Counsel advice (continued)

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The Department of the Corporation Counsel further advised:

“A reasonable length of time for the moratorium may vary depending on the circumstances.” Courts have found two years to be a reasonable amount of time.

“A legitimate purpose for imposing a moratorium is to avert a ‘race of diligence’ by developers to obtain necessary land use approvals under the old system before new legislation passes.”

Supreme Court of Hawai`i

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In Hawai`i, developers secure vested rights after getting approval in “the last discretionary action” by the government. To avoid violating vested rights, moratoria should not apply when a developer has received a final discretionary approval.

Source: Kauai County v. Pacific Standard Life Insurance Co., 65 Hawai`i 318, 329 (1982)

Supreme Court of Hawai'i (continued)

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The Supreme Court of the State of Hawai'i reviewed an ordinance imposing a moratorium on the acceptance of building permits in certain zoning districts on O`ahu in Life of the Land v. City and County of Honolulu, 61 Hawai'i 390 (1980).

The Court expressed its general approval of such interim-control measures.

Additional information

Policy in proposed bill

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- ▶ Building permits for new hotels, resorts, timeshares, short-term rental homes, bed and breakfast homes, and transient vacation rental units would be limited for an interim period.
- ▶ Current proposal includes West Maui and South Maui only, until their respective community plan processes are complete.
- ▶ Otherwise, automatic repeal after two years.

Exemptions

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- ▶ West Maui, upon approving community plan via ordinance.
- ▶ South Maui, upon approving community plan via ordinance.
- ▶ Any development that has received its last discretionary approval prior to the effective date of the ordinance.
- ▶ Council may authorize exemptions via resolution upon request by the Director of Public Works.

Pre-pandemic tourism statistics

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- ▶ Maui Island Plan includes a policy calling for a daily visitor population not to exceed 1/3 of the resident population.
- ▶ With a daily visitor census of nearly 70,000 and resident population of under 150,000 in 2019, Maui Island dramatically exceeded the desired visitor-resident ratio.