

COUNCIL OF THE COUNTY OF MAUI
CLIMATE ACTION, RESILIENCE, AND
ENVIRONMENT COMMITTEE

June 18, 2021

Committee
Report No. 21-39

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Climate Action, Resilience, and Environment Committee, having met on May 19, 2021, and reconvened on May 25, 2021, makes reference to County Communication 21-232, from Councilmember Kelly Takaya King, transmitting a proposed bill entitled “AMENDING THE BUILDING CODE TO ADD CHAPTER 40 RELATING TO A MORATORIUM ON BUILDING PERMITS FOR VISITOR ACCOMMODATIONS.”

The purpose of the proposed bill is to temporarily maintain the status quo in the development of hotels and other visitor accommodations in South Maui and West Maui until the respective community plans for the areas are updated or two years have passed, whichever is sooner, because of environmental and other impacts.

By correspondence dated May 11, 2021, the Chair of your Committee transmitted to the Department of the Corporation Counsel a revised proposed bill incorporating technical revisions.

At its meeting of May 19, 2021, the Chair of your Committee noted the Maui Island Plan includes a policy calling for a daily visitor population not to exceed one-third 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, impacting the quality of life for residents.

The Chair of your Committee also referenced Resolution 21-18, “EXPRESSING SUPPORT FOR SUSTAINABLE TOURISM, EMPHASIZING QUALITY OVER QUANTITY,” in which the Council resolved that “it values sustainable and strategically managed tourism—rather than an increasing

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quantity of tourists—to promote economic well-being, enhanced quality of life for residents, preservation of natural and cultural resources, and high-quality experiences for visitors.” The Council also agreed to “continue to build upon policies and create incentives to ensure the County’s natural and cultural resources will be protected and enjoyed for generations to come.”

Your Committee notes the Hawai’i Tourism Authority found residents view tourism as having increasingly negative impacts. HTA’s “Destination Management Action Plan for Maui,” dated March 2021, acknowledged this trend and set a goal to “rebuild, redefine and reset the direction of tourism.”

The Chair of your Committee also referenced a *Maui News* article, dated April 30, 2021, which reported that for the first time since the onset of COVID-19, Maui visitor arrivals topped March 2020 levels, with tourism volume quickly returning to pre-pandemic numbers.

Your Committee received a presentation from Dick Mayer, former Vice-Chair of the Maui General Plan Advisory Committee, former member of the Maui Planning Commission, and retired professor of economics and geography at the University of Hawaii Maui College. Professor Mayer’s presentation included tourism statistics, population trends, and an analysis of the bill’s support of the Hawai’i State Constitution and Maui Island Plan.

Your Committee noted the County has a history of establishing various types of development moratoria, including through Ordinances 737 (1972), 747 (1972), 1997 (1991), 2878 (2000), 4804 (2018), 4871 (2018), and 5125 (2020).

Your Committee also received information and analysis from the Department of the Corporation Counsel, Office of the Mayor, Department of Planning, and Department of Public Works.

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The Environmental Coordinator from the Office of the Mayor provided comments on the revised proposed bill and acknowledged your Committee's innovative approach to rethinking tourism.

The Director of Public Works and the Planning Director provided information on the handful of pending projects that would be foreseeably subject to the bill.

At its meeting of May 25, 2021, Michael Williams, Chair of the Cost of Government Commission and President of Maui Tomorrow Foundation, addressed issues brought up by the hotel industry during public testimony on illegal vacation rentals. Mr. Williams said the Commission ultimately found the Department of Planning's enforcement procedures were effective, and the problem was proliferation of legal Short-Term Rental Homes.

The Planning Director informed your Committee that community plans have provisions with the force and effect of law, noting if there were strong community plan language to restrict hotel and resort development, development-related permits could be denied on that basis.

Following these discussions, your Committee further revised the bill, as recommended by the Environmental Coordinator, to clarify that the moratorium is intended to stop the increase of carbon-emissions levels instead of lower them.

In addition, your Committee further clarified its inapplicability to building permit applications for renovations or repairs at existing accommodations that do not increase capacity.

Your Committee notes that states and municipalities have long been afforded substantial discretion by courts in establishing development moratoria.

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Your Committee was provided a copy of correspondence dated January 9, 1998, from the Department of the Corporation Counsel, to the Land Use Committee (1997-1999 Council term), which noted, "The most common means to maintain the status quo and stop further development under a land use system that is undergoing improvements." It further stated, "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."

Your Committee notes later court rulings have strengthened the constitutional basis for development moratoria.

The United States Supreme Court recognized development moratoria are an "essential tool" of land-use planning in the case of Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002). The Court determined "a moratorium on development imposed during the process of devising a comprehensive land-use plan" would not necessarily constitute a "taking" of property requiring compensation under the Constitution. Declining to adopt a "categorical" constitutional standard that could "create added pressure on decisionmakers to reach a quick resolution of land-use questions," the Court endorsed the validity of "reasonable" moratoria, such as those commonly used in "good faith" by states and municipalities to "maintain the status quo pending study and governmental decision making."

Your Committee further notes the U.S. Court of Appeals with jurisdiction over Hawaii held that a moratorium ordinance enacted by a municipality in the State of Washington satisfied the applicable constitutional standards. In Samson v. City of Bainbridge Island, 683 F.3d 1051 (9th Cir. 2012), the court noted moratorium ordinances are presumed valid. To establish a violation of the Due Process Clause, plaintiffs have an "exceedingly high burden" to show a development moratorium is "clearly arbitrary and unreasonable." The court found the City had "reasonable justification," without "pretext," to establish a

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shoreline-development moratorium and to maintain the “status quo” pending the enactment of permanent policies: “In light of the city's intention in 2001 to revise its Shoreline Master Program, the policy choice of a development moratorium seems not just nonarbitrary, but positively sensible.”

Some members of your Committee questioned whether a development moratorium would effectively further the County's goals, as expressed in the bill itself and other policy documents, and whether it would have negative economic effects at a time when recovery from the pandemic is critical.

A majority of your Committee, however, concluded limited development moratorium established under the bill would be an appropriate way to allow the County to consider means of advancing the quality-over-quantity goal for tourism.

Your Committee also acknowledged the moratorium's scope is intentionally limited in geography, duration, and type of development, with further legislative action necessary to achieve comprehensive, permanent policy for the County.

Your Committee voted to recommend passage of the revised proposed bill, as further amended.

Your Committee notes the revised proposed bill furthers the following elements of the Maui County General Plan:

- “Support a visitor industry that respects the resident culture and the environment.” (Objective, Countywide Policy Plan)
- “Support the renovation and enhancement of existing visitor facilities.” (Policies, Countywide Policy Plan)

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- “Comprehensively manage future visitor-unit expansion.” (Objective, Maui Island Plan)
- “Mitigate the impact of tourism on the host culture, natural environment, and resident lifestyles.” (Policies, Maui Island Plan)
- “Strengthen planning and management for the visitor industry to protect resident quality of life and enhance the visitor experience.” (Objective, Maui Island Plan)
- “Develop programs and/or regulations to: (1) Allow for the development of small, locally-owned inns and B&Bs in the commercial cores of Maui’s country towns and business districts if permitted, and as defined in the community plans; (2) Cap the number and type of visitor accommodations that can be permitted; and (3) Manage the number and type of visitor accommodations that can be permitted.” (Action, Maui Island Plan)
- “Upon adoption of this plan, allow no further development unless infrastructure, public facilities, and services needed to service new development are available prior to or concurrent with the impacts of new development.” (Objectives and Policies, Kihei-Makena Community Plan)
- “Limit hotel uses to those areas presently planned for hotel use, and limit hotel development until adequate public facilities and services are established to meet existing needs.” (Objectives and Policies, Kihei-Makena Community Plan)
- “Limit visitor facilities to the existing planned resorts of Kaanapali and Kapalua as designated on the land use map and coordinate future growth with development of adequate infrastructure capacity and housing for employees.” (Objectives and Policies, West Maui Community Plan)

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- “Encourage the renovation and improvement of existing visitor facilities without a substantial increase in the room count.” (Objectives and Policies, West Maui Community Plan)

Your Committee voted 4-2 to recommend passage of the revised proposed bill on first reading. Committee Chair King, Vice-Chair Sinenci, and members Johnson and Molina voted “aye.” Committee members Lee and Sugimura voted “no.” Committee member Paltin recused herself from voting pending an opinion from the Board of Ethics.

Your Committee is in receipt of a revised proposed bill, entitled “A BILL FOR AN ORDINANCE AMENDING THE BUILDING CODE TO ADD CHAPTER 40 RELATING TO A MORATORIUM ON BUILDING PERMITS FOR VISITOR ACCOMMODATIONS,” incorporating your Committee’s recommended revisions and nonsubstantive revisions.

Your Climate Action, Resilience, and Environment Committee RECOMMENDS that Bill 60 (2021), as revised herein and attached hereto, entitled “A BILL FOR AN ORDINANCE AMENDING THE BUILDING CODE TO ADD CHAPTER 40 RELATING TO A MORATORIUM ON BUILDING PERMITS FOR VISITOR ACCOMMODATIONS,” be PASSED ON FIRST READING and be ORDERED TO PRINT.”

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This report is submitted in accordance with Rule 8 of the Rules of the Council.

Kelly T. King

KELLY TAKAYA KING, Chair

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ORDINANCE NO. _____

BILL NO. _____ (2021)

A BILL FOR AN ORDINANCE AMENDING THE BUILDING CODE TO ADD
CHAPTER 40 RELATING TO A MORATORIUM ON BUILDING PERMITS FOR
VISITOR ACCOMMODATIONS

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

SECTION 1. **Findings and purpose.** The Council finds that visitor accommodation development and the related increase in tourism cause negative impacts on the environment. The Council also finds that - to preserve the County's environment, mitigate climate change, and work toward resilience - building permits for new hotels, resorts, timeshares, short-term rental homes, bed and breakfast homes, and transient vacation rental units must be limited for an interim period. The purpose of the moratorium established by this Ordinance is to stop the increase of carbon-emissions levels, mitigate climate-change impacts, and limit the rate of global warming by pausing visitor accommodation development and the related increase in tourism. The pause will prevent additional air, noise, light, land, and water pollution until the County updates the West Maui and South Maui community plans.

In addition, the Council finds that the Maui Island Plan includes a policy calling for a daily visitor population not to exceed one-third of the resident population. With a daily visitor census of nearly 70,000 and resident population of well under 150,000 in 2019, Maui dramatically exceeded the desired

visitor-resident ratio. The Council further finds that a large percentage of the island's transient accommodations are in West Maui and South Maui, and the community plans for both areas are at various stages of comprehensive updates for the first time in more than 20 years. Under Chapter 2.80B, Maui County Code, each community plan sets out "the desired sequence, patterns, and characteristics of future development." In addition, the Council finds construction moratoria are well-established tools to temporarily and appropriately preserve the status quo, as seen, for example, in Maui County Ordinances 1997 (1991) and 5125 (2020); City and County of Honolulu Ordinance 18-6 (2018), and City of Asheville, North Carolina, Ordinance 4766 (2019).

This Ordinance is also intended to temporarily maintain the status quo by establishing a moratorium on building permits for visitor accommodation development in West Maui and South Maui until both community plans are updated. The Council believes interim restrictions on new visitor accommodations would allow the County time to implement critical plan action items relating to visitor industry impact on the County's environment and provide the County with clear policy direction for day-to-day decision making to mitigate climate change and work toward resilience.

SECTION 2. Title 16, Maui County Code, is amended by adding a new chapter, to be designated and to read as follows:

"16.26B.4000 Chapter 40 added. The International Building Code is amended by adding a new chapter to read as follows:

CHAPTER 40

MORATORIUM ON BUILDING PERMITS FOR VISITOR ACCOMMODATIONS

Sections:

- 4000.1 Purpose.
- 4000.2 Applicability.
- 4000.3 Definitions.
- 4000.4 Prohibition on building permits for visitor accommodation development in West Maui and South Maui.
- 4000.5 Exceptions.
- 4000.6 Automatic repeal.

4000.1 Purpose. The council finds that visitor accommodation development and the related increase in tourism has negative impacts on the environment. The council also finds that - to preserve the County's environment, mitigate climate change, and work toward resilience - building permits for new hotels, resorts, timeshares, short-term rental homes, bed and breakfast homes, and transient vacation rental units must be limited for an interim period. The purpose of this chapter is to stop the increase of carbon-emissions levels, mitigate climate-change impacts, and limit the rate of global warming by pausing visitor accommodation development and the related increase in tourism. This pause will prevent additional air, noise, light, land, and water pollution until the County updates the West Maui and South Maui community plans. This chapter is also intended to temporarily maintain the status quo in West Maui and South Maui until their respective community plans are updated.

4000.2 Applicability. This chapter applies to applications for building permits for visitor accommodation development in West Maui and South Maui, subject to the exceptions in section 4000.5.

4000.3 Definitions. Whenever used in this chapter, unless the context otherwise requires:

"Development" means the construction of any new units expressly designated to be used for visitor accommodations.

"Visitor accommodations" means any transient accommodations, including hotels, resorts, timeshares, short-term rental homes, bed and breakfast homes, and transient vacation rental units.

“South Maui” means the Kihei-Makena community plan area, with geographic boundaries established by ordinance 2641 (1998).

“West Maui” means the West Maui community plan area, with geographic boundaries established by ordinance 2476 (1996).

4000.4 Prohibition on building permits for visitor accommodation development in West Maui and South Maui. No building permit applications for visitor accommodation development in West Maui or South Maui may be accepted.

4000.5 Exceptions. A. This chapter does not apply to any development that has received its last discretionary approval prior to the effective date of the ordinance establishing the chapter.

B. This chapter does not apply to West Maui upon the effective date of the ordinance approving the West Maui community plan update.

C. This chapter does not apply to South Maui upon the effective date of the ordinance approving the South Maui community plan update.

D. This chapter does not apply to building permit applications for renovations or repairs at existing visitor accommodations that do not increase capacity.

E. The council may authorize exceptions from this chapter by resolution upon request by the director of public works.

4000.6 Automatic repeal. The chapter will be automatically repealed two years from the effective date of the ordinance establishing this chapter.”

SECTION 3. This Ordinance takes effect upon its approval.

APPROVED AS TO FORM AND LEGALITY:

Department of the Corporation Counsel
County of Maui

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