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MEMO TO: Elle Cochran, Chair  
Infrastructure and Environmental Management Committee

FROM: Richelle M. Thomson  
Deputy Corporation Counsel 

DATE: June 27, 2017

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

This memorandum is in response to your request dated June 23, 2017, requesting an opinion on whether establishing a moratorium on sand mining may be accomplished by ordinance or resolution.

Section 4-1, Maui County Charter ("Charter"), states: "Every legislative act of the council shall be by ordinance, unless otherwise provided for herein. Other acts of the council may be by resolution." A plain reading of this section concludes that all legislative acts must be by way of ordinance, and only if the Charter or the Maui County Code ("Code") so authorizes, by way of resolution. Upon review of the Charter and Maui County Code, resource extraction/mining and grading are regulated by Titles 19 and 20, and there is no provision in the Charter or Code allowing for amendments to these titles to be accomplished via resolution.

Regarding emergency situations, Section 4-2.6 of the Charter states that the Council may waive requirements of Section 4-2 upon a finding of "public calamity"; however, this power to waive relates only to the procedural requirements for proposed ordinances and resolutions, and not whether a particular matter may be regulated during a "public calamity" via ordinance or resolution.

Elle Cochran, Chair  
Infrastructure and Environmental Management Committee  
June 27, 2017  
Moratorium and Regulation of Sand Mining (IEM-33)  
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Your request attached Ordinance No. 2636 ("Interim Restrictions on Agricultural Subdivisions"), which the Council adopted in 1998. This moratorium addressed the concern that agricultural subdivisions permitted by Title 18, Maui County Code, resulted in development that was rural or residential in character, causing adverse impacts to agricultural areas. The term of the moratorium was based on the time required to complete legislation to address the issue.

Likewise, Ordinance No. 2878 (attached for your consideration) was approved in 2000, establishing a moratorium on issuance of building permits related to cell towers in the interim zoning district. Among the stated purposes for the moratorium was the length of time necessary for review, deliberations, and public hearings on the proposed legislation by the three planning commissions.

APPROVED FOR TRANSMITTAL:



EDWARD S. KUSHI, JR.  
First Deputy Corporation Counsel  
LF2017-0092

ORDINANCE NO. 2878

BILL NO. 41 (2000)  
Draft 1

ESTABLISHING A MORATORIUM ON THE  
ISSUANCE OF BUILDING PERMITS FOR THE  
CONSTRUCTION OF SPECIFIED UTILITY FACILITIES,  
INCLUDING CELLULAR-TELEPHONE TOWERS,  
IN THE INTERIM ZONING DISTRICT

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

SECTION 1. The Council's Planning Committee is considering a proposed bill to provide that, within Interim Zoning districts (established under Chapter 19.02, Maui County Code), major utility facilities as defined in Section 19.04.040 of the Maui County Code, or minor utility facilities which by their appearance, noise, size, traffic generation, or other characteristics have potential adverse impacts upon the social, cultural, economic, environmental, and ecological character and quality of the area, shall be permitted only by special use permit pursuant to Section 19.510.070 of the Maui County Code.

The Council believes that approvals for the construction and placement of wireless telecommunication towers should be subject to appropriate governmental review and public comment, as is now the case in other zoning districts, before they are permitted within Interim Zoning districts. The Council is aware that the necessary legislation will require extensive review, deliberations, and public hearings by the Council's Planning Committee, the Lana'i Planning Commission, the Maui Planning Commission, and the Moloka'i Planning Commission and that such legislation cannot be enacted in time to

effectively respond to the rapidly growing concern about the placement of telecommunication towers within Interim Zoning districts, many of which are residential areas, without notification to interested members of the public or meaningful review by government officials.

The Council believes that the proliferation of wireless telecommunication towers within residential and other areas in Interim Zoning districts, may not be compatible with existing and potential uses of such areas. Such proliferation may result in a threat to surrounding property values, area character, aesthetic values, public health, safety, and welfare. The Council intends that wireless telecommunication towers be designed and installed in ways that minimize such effects.

The Council additionally believes that such proliferation may contravene the following stated purposes of the Interim Zoning Ordinance, pursuant to Section 19.02.020:

- A. To encourage the most appropriate use of land;
- B. To conserve and stabilize the value of property;
- C. To prevent certain uses that will be detrimental to existing uses; and
- D. To promote the health, safety and the general welfare of the respective districts.

SECTION 2. Chapter 16.26A, Maui County Code, is amended by amending Section 16.26A.303 pertaining to wireless telecommunication towers, to read as follows:

**"16.26A.303 Subsection 303(f) added.** Chapter 3 of the Uniform Building Code is amended by adding thereto a new subsection 303(f), to be designated and to read as follows:

**(f) Wireless telecommunication towers and related facilities.**  
**No wireless telecommunication tower shall be placed, constructed or modified, unless it complies with the requirements of this code and the use of the premises conforms to and is consistent with the community general**



plan, community plans, land use ordinances, and other laws relating to the use of land. For purposes of this code, a "telecommunication tower" means a self-supporting lattice, guyed, or monopole structure which is designed or intended to support wireless telecommunication antenna and related facilities, including wireless antenna towers constructed for the location of transmission or related equipment to be used in the provision of commercial mobile radio services.

**16.26A.303(g) Subsection 303(g) added.** Chapter 3 of the Uniform Building Code is amended by adding thereto a new subsection 303(g), to be designated and to read as follows:

**(g) Moratorium on the issuance of building permits for wireless telecommunication towers, in the interim zoning district.**

1. Except as specifically provided for in this section, the issuance of building permits for wireless telecommunication towers is hereby prohibited in the interim zoning district, as defined by chapter 19.02, Maui County Code, for a six-month moratorium period.

2. Applications for building permits and site plan approvals to construct or place wireless telecommunication towers within the interim district, shall provide information required under section 19.500.050(B) (building permits) and section 19.510.010(D) (content of application) of the Maui County Code.

3. Applications for telecommunication site plan approvals for the placement of wireless telecommunication towers within the interim district shall be processed in the same manner and under the same criteria that a special use permit is processed under other zoning districts as provided under sections 19.510.010, 19.510.020, and 19.510.070 of the Maui County Code.

4. In order to comply with the requirements of section 47 U.S.C. §332(c)(7) of the Telecommunications Act of 1996:

a. There shall be no unreasonable discrimination among providers of functionally equivalent services.

b. Applications for building permits and site plan approvals for a wireless telecommunication tower shall be acted upon within a reasonable period of time after said applications are duly filed.

c. No building permit or application for a wireless telecommunications site plan approval shall be denied on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Federal Communication Commission's regulations concerning such emissions.

d. Any decision to approve or deny a request to place, construct or modify a wireless telecommunications tower shall be in writing and supported by evidence contained in a written record.

5. This moratorium shall not apply to the maintenance or repair of any existing telecommunication tower, and the repair, maintenance and replacement of antenna or related telecommunication facilities."

SECTION 3. New material is underscored. In printing this bill, the County Clerk need not include the underscoring.

SECTION 4. If any clause or part of this ordinance shall be held invalid by any court of competent jurisdiction, the remainder of this ordinance shall not be affected thereby, but shall remain in full force and effect.

SECTION 5. This ordinance shall take effect upon its approval, shall be effective for six months from its effective date, and shall expire at that time unless further extended.

APPROVED AS TO FORM  
AND LEGALITY:

  
JAMES B. TAKAYESU  
Corporation Counsel  
County of Maui  
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I, DARYL T. YAMAMOTO, County Clerk of the County of Maui, State of Hawaii, DO HEREBY CERTIFY that the foregoing BILL NO. 41 (2000), Draft 1, was passed on Second and Final Reading by the Council of the County of Maui, State of Hawaii, on the 16th day of June, 2000, by the following vote:

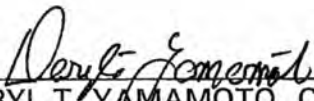
AYES: Councilmembers Dain P. Kane, Michael A. Davis, J. Kalani English, John Wayne Enriques, G. Riki Hokama, Dennis Y. Nakamura, and Chair Patrick S. Kawano.

NOES: None.

EXCUSED: Councilmembers Wayne K. Nishiki and Charmaine Tavares.

I FURTHER CERTIFY that on the 16th day of June, 2000, said BILL NO. 41 (2000), Draft 1, was presented to the Mayor of the County of Maui for his approval or otherwise; that on the 21st day of June, 2000, the Mayor returned said BILL NO. 41 (2000), Draft 1, without his signature; therefore, pursuant to Section 4-3 of the Charter of the County of Maui, said BILL NO. 41 (2000), Draft 1, was designated as ORDINANCE NO. 2878 of the County of Maui.

DATED at Wailuku, Maui, Hawaii, this 3rd day of July, 2000.

  
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DARYL T. YAMAMOTO, COUNTY CLERK  
COUNTY OF MAUI, STATE OF HAWAII

Passed First Reading: June 2, 2000.

Effective Date of Ordinance: June 30, 2000.