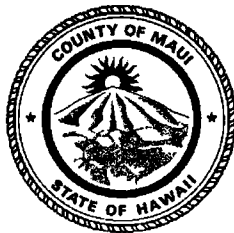


ALAN M. ARAKAWA
Mayor




PATRICK K. WONG
Corporation Counsel

EDWARD S. KUSHI
First Deputy

LYDIA A. TODA
Risk Management Officer
Tel. No. (808) 270-7535
Fax No. (808) 270-1761

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET, 3RD FLOOR
WAILUKU, MAUI, HAWAII 96793
EMAIL: CORPCOUN@MAUICOUNTY.GOV
TELEPHONE: (808) 270-7740
FACSIMILE: (808) 270-7152

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

FROM: David A. Galazin 
Deputy Corporation Counsel

DATE: November 10, 2016

SUBJECT: **PLASTIC BAG REDUCTION – PROPOSED REVISIONS TO
COUNTY CODE (IEM-56)**

The purpose of this memorandum is to respond to and comment on your proposed "BILL FOR AN ORDINANCE AMENDING CHAPTER 20.18, MAUI COUNTY CODE, RELATING TO PLASTIC BAG REDUCTION," a copy of which is attached hereto as Exhibit "A," transmitted by you to the County Council's Infrastructure and Environmental Management ("IEM") Committee on October 25, 2016. This item was subsequently discussed by the IEM Committee at its meeting on October 31, 2016. No legislative action was taken at that time, and the matter was instead referred to the upcoming IEM Committee meeting scheduled to be held November 14, 2016.

Section 1 of the proposed bill contains four stated goals, as follows:

1. Simplify and strengthen the definitions of "Plastic bag" and "Reusable bag";
2. Exempt plastic bags used for specified purposes from the plastic bag prohibition;
3. Repeal the requirement for annual reporting by the Department of Environmental Management [that is supposed to be transmitted by the Director of Environmental Management to the County Council on or before September 1 of each year, assessing the estimated increase of

- business customers using recyclable paper bags or reusable bags for the prior reporting period] starting in 2018; and
4. Prohibit businesses from providing prohibited plastic bags to customers at *any time*, not just at the point of sale. (Emphasis added.)

This Office has had a chance to review the proposed revisions to the Maui County Code, along with relevant data provided by the Department of Environmental Management, Solid Waste Division (“DEM/SWD”), and offers the following comments.

1. Changing the definitions of “plastic bag” and “reusable bag,” as proposed, could lead to contradictory interpretations and unwanted results.

Currently, in Section 20.18.020 of the Maui County Code (MCC), one of the main distinctions between a prohibited bag and an allowable bag is based on whether or not the bag is “specifically designed and manufactured for multiple re-use” – regardless of the source material from which it is made. The proposed revised bill, however, would lump nonbiodegradable and noncompostable plastic bags into one prohibited category, eliminating the design and manufacturing element altogether, but allowing reusable bags made of cloth “or other washable fabric” (which exists in the current definition of MCC 20.18.020 already), provided that the bag has “handles,” which would be a new qualifier to that definition.¹

The issue with this proposed change is that it could potentially render the entire section void for vagueness. Given the advent of renewable technologies, especially those that seek new ways to repurpose recycled plastic products, there are already a number of companies that make reusable bags out of nonbiodegradable plastic.² Under the new definitions of the revised, proposed bill, a bag that is clearly designed, manufactured and marketed as a reusable bag would nonetheless be captured under the definition of “plastic bag” and thus prohibited by MCC 20.18.040(A) if it were made from nonbiodegradable plastics. If a reasonable person cannot determine from the plain language of an ordinance what conduct is permissible and what is prohibited, that ordinance could be subject to legal challenge. In addition, the proposed added requirement that a reusable bag be equipped with “handles” also may pose similar needless ambiguities, as some reusable bags may be equipped with drawstrings, cross-body straps, or worn as backpacks, instead of having handles.³

¹ See Exhibit “A” Sections 2 and 3.

² See, e.g.: <https://www.chicobag.com/t-what-is-repete> (last visited November 9, 2016)

³ *Id.*

This Office presumes that the intent behind the proposed changes to Chapter 20.18 MCC is to further reduce the number of nonbiodegradable and noncompostable plastic bags within Maui County, even those that may be thick enough to currently qualify as “made of durable material” pursuant to MCC 20.18.020 and DEM/SWD’s administrative rules, and not to discourage innovative approaches to creating truly reusable bags. To that end, at a minimum, we suggest retention of the phrase: “and is not specifically designed and manufactured for multiple re-use” within the definition of “plastic bag,” and deletion of the phrase: “with handles” from the definition of “reusable bag.” An alternate option for the latter might also be to expand the proposed amendment to the definition of “reusable bag” to read: “with handles or straps for ease of transport...”

2. **Exempting certain types of plastic bags by ordinance is duplicative of DEM/SWD’s current administrative rules; unnecessarily constrains a subset of bags that was meant to be flexible in order to accommodate unforeseen circumstances; and would be undercut by removal of any reference to the point of sale itself.**

Ordinance No. 3587, which originally established Chapter 20.18 MCC, mandated that the Director of Environmental Management adopt administrative rules in order to implement the operation and enforcement of the ordinance itself. A public hearing was held on August 17, 2010, regarding the proposed rules, some of which were modified in response to both oral and written testimony received at the hearing, prior to their final adoption on January 11, 2011. A copy of the final rules, Chapter 17-105, is attached as Exhibit “B” hereto for your reference. Section 17-105-4 repeats the general prohibition that prevents businesses from providing plastic bags to their customers *at the point of sale for the purpose of transporting* groceries or other goods. (Emphasis added.) After drafting various iterations of the ordinance and eliciting feedback from businesses, consumers, and purveyors of plastic bags, however, it became clear that there were a variety of instances in which plastic bags served a vital function that had nothing to do with their use as a means of mere conveyance, and were most often provided at a location inside a store other than at the point of sale. Thus, Section 17-105-5, entitled, “Permissible bags,” was included to address such situations in the most flexible way possible. Accordingly, this memorandum will attempted to illustrate how the ten categories proposed for inclusion as the new MCC 10.18.125 in Section 4 of your bill are mostly, if not entirely, covered under Section 17-105-5 of the rules.

- (1) Loose items, such as fruits, vegetables, nuts, ground coffee, grains, candies, or small hardware items, inside a business by customers. **[All of these would be covered by Section 17-105-5(2), with the possible exception of hardware items.]**
- (2) Frozen foods, meat, fish, flowers, potted plants, or other items to contain dampness. **[All of these would be covered by Section 17-105-5(1).]**
- (3) Protect or transport prepared foods, beverages, or bakery goods. **[All of these would be covered by Section 17-105-5(1).]**
- (4) Contain prescription medications provided by pharmacists. **[Specifically covered by Section 17-105-5(4).]**
- (5) Protection of a newspaper to a subscriber. **[Covered by Section 17-105-5(1) – protection of property (the newspaper), and also not provided at the point of sale.]**
- (6) Items hung on a door handle. **[See answer to #5, above.]**
- (7) Hold laundry, dry cleaning, or garments, including bags provided by hotels to guests to contain wet or dirty clothing. **[Garment bags specifically covered by Section 17-105-5(3); the ancillary activities could possibly include garment cleaning services provided by a hotel or fall under the catchall of “protection of property” afforded in Section 17-105-5(1).]**
- (8) Packages containing multiple bags intended for garbage, pet waste, or yard waste. **[Not provided at the point of sale; neither provided for the purposes of transporting groceries or other goods – therefore, would not fall within the prohibitions provided in Chapter 20.18 MCC, as it is currently written.]**
- (9) Contain live animals, such as fish or insects sold in pet stores. **[Covered under “protection of property” per Section 17-105-5(1).]**
- (10) Transport of chemical pesticides, drain-cleaning chemicals, or other caustic chemicals. **[Covered under “protection of property” per Section 17-105-5(1).]**

It is further noted that there are two distinctions between what already exists within the administrative rules regarding “permissible” bags and what has been proposed as a new section for the County Code. The first is that the list of allowable bags already described in the existing rules are largely illustrative – meaning that there is built-in flexibility when considering something that was not explicitly considered during the drafting process (such as bags for fish sold in pet shops), but which is similar enough to an existing category to easily allow accommodation where it is clearly warranted. When a list is codified in an ordinance, however, without language such as, “including, but not limited to,” then courts generally view such lists to be exclusive. If something is *not* on the list, then its omission is deemed to be an intentional act on the part of the legislative body. The second is that administrative rules, by their very nature,

Elle Cochran, Chair
Infrastructure and Environmental Management Committee
November 10, 2016
Page 5

are designed to flesh out legislative framework: in essence, to adapt more quickly to changing circumstances than is generally permitted through the legislative process. The differences between the legislative and the rulemaking processes is precisely why such details are often crafted at the administrative level. This is not to suggest that the Council has in any way abrogated its authority over the matter, but is rather an example of how legislative bodies enact laws, and executive agencies are supposed to use their expertise to see that those laws are implemented as envisioned by the legislators.

CONCLUSION:

Whether or not the Council wishes to amend the Director's mandatory reporting requirements is a policy decision, and as such, beyond the scope of this document. To the extent possible, however, we hope that the information contained in this memorandum will serve to illuminate and help guide the IEM Committee as it further deliberates the matter. This Office will also be available to answer any other related questions, as they may arise.

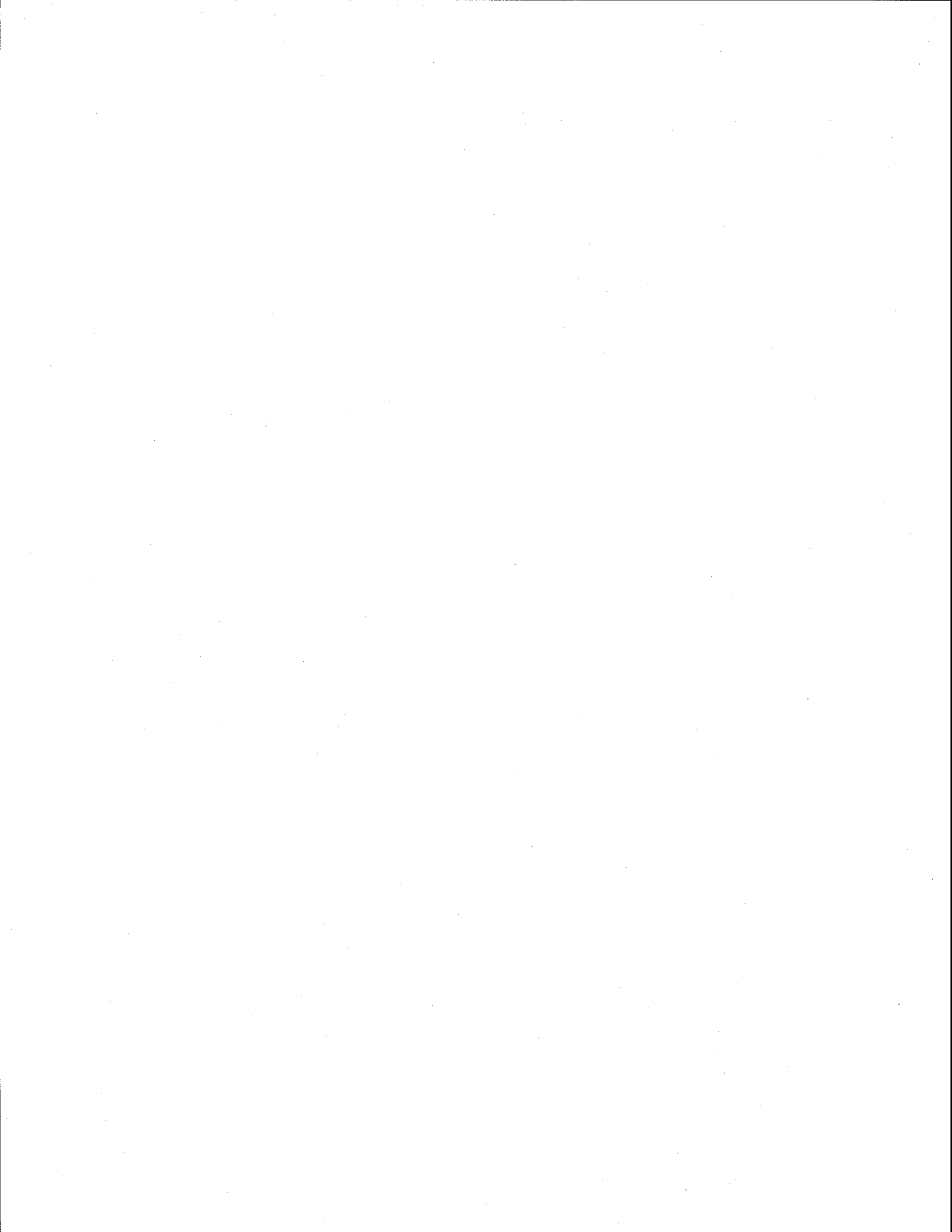
APPROVED FOR TRANSMITTAL:



EDWARD S. KUSHI, JR.
First Deputy Corporation Counsel

Attachments

cc: Stewart Stant, Director, Department of Environmental Management
David M. Raatz, Office of Council Services
Richelle Thomson, Deputy Corporation Counsel



October 25, 2016

MEMO TO: IEM-56 File

F R O M: Elle Cochran, Chair *ec*
Infrastructure and Environmental Management Committee

SUBJECT: **TRANSMITTAL OF INFORMATIONAL DOCUMENT RELATING TO
PLASTIC BAG REDUCTION (IEM-56)**

The attached document pertains to Item 56 on your Committee's agenda.

iem:ltr:056amc01:ske

Attachment

ORDINANCE NO. _____

BILL NO. _____ (2016)

A BILL FOR AN ORDINANCE AMENDING CHAPTER 20.18, MAUI COUNTY
CODE, RELATING TO PLASTIC BAG REDUCTION

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

SECTION 1. The purpose of this Ordinance is to improve the Plastic Bag Reduction Ordinance, including through the following means: (1) simplify and strengthen the definitions of "Plastic bag" and "Reusable bag"; (2) exempt plastic bags used for specified purposes from the plastic bag prohibition; (3) repeal the requirement for annual reporting by the Department of Environmental Management starting in 2018; and (4) prohibit businesses from providing prohibited plastic bags to their customers at any time, not just at the point of sale.

SECTION 2. Section 20.18.020, Maui County Code, is amended by amending the definition of "Plastic bag" to read as follows:

"Plastic bag" means a bag that is made from nonbiodegradable or noncompostable plastic [or compostable plastic, and is not specifically designed and manufactured for multiple re-use].

SECTION 3. Section 20.18.020, Maui County Code, is amended by amending the definition of "Reusable bag" to read as follows:

"Reusable bag" means a bag with handles that is specifically designed and manufactured for multiple re-use and [is (1)] made of cloth or other washable fabric [, or (2) made of durable material suitable for reuse]."

SECTION 4. Chapter 20.18, Maui County Code, is amended by adding a new section to be appropriately designated and to read as follows:

"20.18.125. Applicability. This chapter does not apply to a plastic bag used for any of the following purposes: (1) to package loose items, such as fruits, vegetables, nuts, ground coffee, grains, candies, or small hardware items, inside a business by customers; (2) to contain or wrap frozen foods, meat, fish, flowers, potted plants, or other items to contain dampness; (3) to protect or transport prepared foods, beverages, or bakery goods; (4) to contain prescription medications provided by pharmacists; (5) to deliver a newspaper to a subscriber of the newspaper; (6) to hold items and hung on a door handle; (7) to hold laundry, dry cleaning, or garments, including bags provided by hotels to guests to contain wet or dirty clothing; (8) to be sold in packages containing multiple bags intended for garbage, pet waste, or yard waste; (9) to contain live animals, such as fish or insects sold in pet stores; or (10) to transport chemical pesticides, drain-cleaning chemicals, or other caustic chemicals."

SECTION 5. Section 20.18.030, Maui County Code, is amended by amending subsection (B) to read as follows:

"B. [On] For the years 2011-2017, on or before September 1 of each year, the director shall submit to the council a report assessing the estimated increase in the number of business customers using recyclable paper bags or reusable bags."

SECTION 6. Section 20.18.040, Maui County Code, is amended to read as follows:

"A. Businesses are prohibited from providing plastic bags to their customers [at the point of sale] for the purpose of transporting groceries or other goods.

B. Nothing in this chapter shall preclude a business from making reusable bags or recyclable paper bags available for sale or without charge to its customer [at the point of sale] for the purpose of transporting groceries or other goods."

SECTION 7. Material to be repealed is bracketed. New material is underscored. In printing this bill, the County Clerk need not include the brackets, the bracketed material, or the underscoring.

SECTION 8. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM AND LEGALITY:

Department of the Corporation Counsel
County of Maui

iem:misc:056abill01:ske

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Adoption of Chapter 17-105
Rules Relating to Plastic Bag Reduction

SUMMARY

1. Chapter 17-105, entitled "Rules Relating to Plastic Bag Reduction", is adopted to read as follows:

"TITLE MC-17

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

SUBTITLE 01

DIRECTOR OF THE DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

CHAPTER 105

RULES RELATING TO PLASTIC BAG REDUCTION

Subchapter 1 General Provisions

§17-105-1 Title
§17-105-2 Purpose
§17-105-3 Definitions

Subchapter 2 Plastic Bag Restrictions

§17-105-4 Prohibition
§17-105-5 Permissible bags
§17-105-6 Reusable bags and paper bags

Subchapter 3 Enforcement

§17-105-7 Notice of violation and order
§17-105-8 Judicial enforcement of order
§17-105-9 Administrative fines
§17-105-10 Collection of unpaid civil fines
§17-105-11 Joint and several assessment
§17-105-12 Other legal remedies

SUBCHAPTER 1

GENERAL PROVISIONS

§17-105-1 Title. The rules of this chapter shall be known as the "Rules Relating to Plastic Bag Reduction". [Eff 1/12/11] (Auth: HRS §§46-1.5(24), 46-4; Charter §8-15.3(1); MCC §§19.530.030, 20.18.030) (Imp: HRS §46-1.5(24); MCC §19.530.030)

§17-105-2 Purpose. These rules shall govern administrative procedures and enforcement of chapter 20.18, Maui County Code. [Eff 1/21/11] (Auth: HRS §§46-1.5(24), 46-4; Charter §8-15.3(1); MCC §§19.530.030, 20.18.030) (Imp: HRS §46-1.5(24); MCC §19.530.030)

§17-105-3 Definitions. For the purpose of these rules, unless it is plainly evident from the context that a different meaning is intended, the words and phrases used herein are defined as follows:

"Board" means the board of variances and appeals.

"Business" means any commercial enterprise or establishment, including sole proprietorships, joint ventures, partnerships, and corporations, or any other legally cognizable entity, whether for profit or not for profit, and includes all employees of the business or any independent contractors associated with the business.

"Continuing violation" means any violation that continues beyond the time for correction as set forth in any order of the director.

"Days" means calendar days unless otherwise specified.

"Department" means the department of environmental management.

"Director" means the director of the department of environmental management or the director's designated representatives.

"Notice of violation and order" means a document signed by the director, identifying a violation, specifying corrective action and assessing a fine, as

provided by section 19.530.030, Maui County Code, and these rules.

"Plastic bag" means a bag that is made from noncompostable plastic or compostable plastic, and is not specifically designed and manufactured for multiple re-use.

"Prescription drug" means the same as defined in section 461-1, Hawaii Revised Statutes, as amended.

"Repeat violation" means a violation resulting in issuance of a notice of violation and order to a business within a five-year period from the date of a previous violation by the business.

"Reusable bag" means a bag that is specifically designed and manufactured for multiple re-use and is:

- (1) Made of cloth or other washable fabric, or
- (2) Made of durable material suitable for reuse.

"Violation" means providing or offering to provide plastic bags to business customers at the point of sale for the purpose of transporting groceries or other goods.

"Violator" means any business that is responsible for the violation. [Eff 1/21/11] (Auth: HRS §46-1.5(24); Charter §8-15.3(1); MCC §§19.530.030, 20.18.030.A) (Imp: HRS §46-1.5(24); MCC §20.18.020)

SUBCHAPTER 2

PLASTIC BAG RESTRICTIONS

§17-105-4 Prohibition. Businesses are prohibited from providing plastic bags to their customers at the point of sale for the purpose of transporting groceries or other goods. [Eff 1/21/11] (Auth: HRS §46-1.5(24); Charter §8-15.3(1); MCC §§19.530.030, 20.18.030) (Imp: HRS §46-1.5(24); MCC §§19.530.030, 20.18.040.A)

§17-105-5 Permissible bags. The following types of plastic bags, provided other than at the point of sale and not for the purpose of transporting groceries or other goods, shall not be subject to the prohibition set forth in §17-105-4:

- (1) Bags without handles, designed and used solely for protection of food products, protection of property, or for preventing contamination, including, but not limited to, bags for: raw meat, poultry, seafood, and unpackaged bakery items.
- (2) Bags without handles, designed and used solely for self-service packing of non-prepackaged food items sold in bulk, including, but not limited to, bags for: fruits, vegetables, nuts, grains, cereal, flour, rice, and candy.
- (3) Bags designed and used solely for protecting garments, when provided by a garment cleaning business.
- (4) Bags used for dispensing prescription drugs that are not provided in any other container or receptacle. [Eff 1/21/11] (Auth: HRS §46-1.5(24); Charter §8-15.3(1); MCC §§19.530.030, 20.18.030) (Imp: HRS §46-1.5(24); MCC §§19.530.030, 20.18.040)

§17-105-6 Reusable bags and paper bags. (a)
Businesses may make reusable bags and paper bags available for sale or without charge to customers at the point of sale for the purpose of transporting groceries or other goods.

(b) The director may determine that a bag made from plastic is specifically designed and manufactured for multiple re-use if the bag has handles and is at least 3.0 mils thick. [Eff 1/21/11] (Auth: HRS §46-1.5(24); Charter §8-15.3(1); MCC §§19.530.030, 20.18.030) (Imp: HRS §46-1.5(24); MCC §§ 19.530.030, 20.18.040.B)

105-6

SUBCHAPTER 3

ENFORCEMENT

§17-105-7 Notice of violation and order. (a)

The director shall determine whether a business is providing plastic bags to its customers at the point of sale for the purpose of transporting groceries or other goods.

(b) If the director determines that a business is providing plastic bags to its customers at the point of sale for the purpose of transporting groceries or other goods, the director may issue a notice of violation and order after one written warning.

(c) The director shall serve the notice of violation and order upon the business or any authorized agent of the business. Service shall be in person or by certified mail, return receipt requested. For purposes of these rules, service of the notice of violation and order shall be deemed complete either upon personal delivery or upon mailing.

(d) A notice of violation and order shall state the date of the notice, the name and address of the violator, provision of law violated, a brief description of the violation, the location of the violation, including tax map key number or street address, and date of the violation. The order may require that the violator stop further violation, pay a fine before a certain date, and pay an additional fine for each day the violation continues beyond a certain date.

(e) The order shall state that the order shall become final thirty days after service of the order unless an appeal is properly filed with the board.

(f) A business may appeal a notice of violation and order issued pursuant to this section by filing with the board a notice of appeal no later than thirty days from the date of service of the notice of violation and order, in accordance with the board's rules of practice and procedure. The order shall become final if an appeal is not properly filed within thirty days from the date of service. [Eff 1/21/11]
(Auth: HRS §46-1.5(24); Charter §8-15.3(1); MCC §§

19.530.030, 20.18.030) (Imp: HRS §46-1.5(24); MCC §19.530.030)

§17-105-8 Judicial enforcement of order. The director may institute a civil action in any court of competent jurisdiction for the enforcement of any notice of violation and order. Where a civil action has been instituted to enforce a civil fine imposed by an order, the director need only show that the notice of violation and order was served, that a civil fine was imposed, the amount of the civil fine imposed, and that the fine imposed has not been appealed in a timely manner nor paid. [Eff 1/21/11] (Auth: HRS §46-1.5(24); Charter §8-15.3(1); MCC §§19.530.030, 20.18.030) (Imp: HRS §46-1.5(24); MCC §19.530.030)

§17-105-9 Administrative fines. (a) In addition to correcting a violation, the violator shall pay to the County a civil fine in the amount of \$500.

(b) Fines assessed for a violation shall be payable whether a violation is corrected before or after the order becomes final.

(c) When a violation is not corrected and continues beyond the deadline established in the order or as extended by the director, the violator shall be assessed a daily fine of \$500 for each day during which the violation continues.

(d) In the case of a continuing violation, the daily fine shall be doubled on the first day of each thirty-day period after the end of the time to take corrective action, up to a maximum amount of \$1,000 per day.

(e) In the case of a repeat violation, the initial civil fine shall be \$1,000.

(f) The director may waive the daily fines prescribed under subsections (c) and (d), in whole or in part, after receiving a request for a waiver and considering the following:

- (1) The nature and egregiousness of the violation;
- (2) The duration of the violation;
- (3) The number of recurring and other similar violations;

- (4) Any effort taken by the violator to correct the violation;
- (5) The degree of involvement in causing or continuing the violation;
- (6) Reasons for any delay in the correction of the violation; and
- (7) Other extenuating circumstances. [Eff 1/21/11] (Auth: HRS §46-1.5(24); Charter §8-15.3(1); MCC §§19.530.030, 20.18.030) (Imp: HRS §46-1.5(24); MCC §19.530.030)

§17-105-10 Collection of unpaid civil fines. In addition to any other procedures for the collection of civil fines available to the County by law or rules of the court, the County may add unpaid civil fines for violations of this chapter to any County taxes, fees, or charges except for residential water or sewer charges. [Eff 1/21/11] (Auth: HRS §46-1.5(24); Charter §8-15.3(1); MCC §§19.530.030, 20.18.030) (Imp: HRS §46-1.5(24); MCC §19.530.030)

§17-105-11 Joint and several assessment. The penalties in these rules may be assessed against all violators, jointly or severally, and the director may proceed against such persons as the director may choose. [Eff 1/21/11] (Auth: HRS §46-1.5(24); Charter §8-15.3(1); MCC §§19.530.030, 20.18.030) (Imp: HRS §46-1.5(24); MCC §19.530.030)

§17-105-12 Other legal remedies. The enforcement provisions of this chapter are in addition to remedies provided by the Maui County Code and other law, and do not preclude other civil or criminal penalties or injunctive relief." [Eff 1/21/11] (Auth: HRS §46-1.5(24); Charter §8-15.3(1); MCC §§19.530.030, 20.18.030) (Imp: HRS §46-1.5(24); MCC §19.530.030)

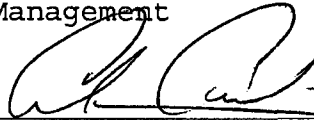
2. Chapter 17-105, Rules Relating to Plastic Bag Reduction, shall take effect ten days after filing with the Office of the County Clerk.

ADOPTED THIS 11th DAY OF January,
20 11, at Wailuku, Maui, Hawaii.

COUNTY OF MAUI



KYLE K. GINOZA
Director of Environmental
Management



ALAN M. ARAKAWA
Mayor
County of Maui

Approved this 1 day of
JANUARY 20 11.

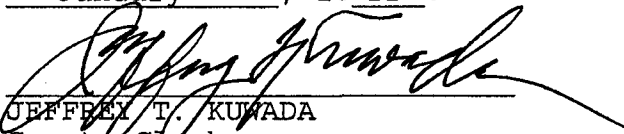
APPROVED AS TO FORM
AND LEGALITY:



DAVID A. GALAZIN
Deputy Corporation Counsel
County of Maui

S:\ALL\DAG\RULES\EM\PlasticBag 17-105 ram V2.wpd

Received this 11th day of
January, 20 11.



JEFFREY T. KUWADA
County Clerk
County of Maui

105-10

CERTIFICATION

I, KYLE K. GINOZA, Director of Environmental Management, County of Maui, do hereby certify:

1. That the foregoing is a full, true and correct copy of the Rules Relating to Plastic Bag Reduction, drafted in Ramseyer format pursuant to Section 91-4.1, Hawaii Revised Statutes, which were adopted on the 11th day of January, 20 11, following a public hearing that closed on the 17th day of August, 20 10, and which were filed with the Office of the County Clerk.

2. That the notice of public hearing on the foregoing Rules, which notice included the substance of such Rules, was published in The Maui News on July 16, 20 10.



KYLE K. GINOZA
Director of Environmental
Management