

REQUEST FOR LEGAL SERVICES

RECEIVED

By Dept. of the Corporation Counsel at 3:06 pm, Dec 17, 2021

Date: December 17, 2021

From: Michael J. Molina, Chair

Government Relations, Ethics, and Transparency Committee

TRANSMITTAL

Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Daniel Kunkel, Corporation Counsel

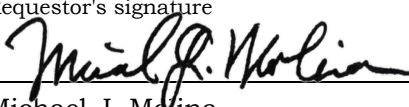
Subject: BICYCLE-TOUR PUBLIC SAFETY AND RELATED LITIGATION CONCERNS

(GREAT-44)

Background Data: Please see the attached bill. Please submit response to great.committee@mauicounty.us with reference to GREAT-44.

Work Requested: ☒ [X] FOR APPROVAL AS TO FORM AND LEGALITY

☐ [] OTHER:

Requestor's signature  Michael J. Molina	Contact Person Shelly Espeleta (Telephone Extension: 7134)
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☐ [] ROUTINE (WITHIN 15 WORKING DAYS)

☐ [] RUSH (WITHIN 5 WORKING DAYS)

☒ [X] PRIORITY (WITHIN 10 WORKING DAYS)

☐ [] URGENT (WITHIN 3 WORKING DAYS)

☐ [] SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): _____

REASON: _____

FOR CORPORATION COUNSEL'S RESPONSE

ASSIGNED TO: DJK	ASSIGNMENT NO. 2021-0013	BY: jcm
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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 my revised version of the proposed legislation, dated 1-12-2022, which I approve as to form and legalilty.

DEPARTMENT OF THE CORPORATION COUNSEL

Date January 12, 2022

By /s/ Daniel J. Kunkel

(Rev. 7/03)

great:ltr:044acc04:ske

Attachment

ORDINANCE NO. _____

BILL NO. _____ (2022)

A BILL FOR AN ORDINANCE AMENDING CHAPTER 5.22, MAUI COUNTY
CODE, RELATING TO BICYCLE TOUR BUSINESSES

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

SECTION 1. Chapter 5.22, Maui County Code, is amended to read as
follows:

“Chapter 5.22

BICYCLE TOUR BUSINESS

Sections:

<u>5.22.005</u>	<u>Applicability and scope.</u>
<u>5.22.010</u>	<u>Definitions.</u>
<u>5.22.020</u>	<u>Unlicensed bicycle tour business prohibited[-];</u> <u>application for permit.</u>
<u>5.22.025</u>	<u>Commercial bicycle tours operating in the Makawao-</u> <u>Pukalani-Kula and Pā‘ia-Ha‘ikū community plan areas.</u>
<u>5.22.030</u>	<u>[Term of permit.] Permit term; suspension; revocation.</u>
<u>5.22.040</u>	<u>Nontransferable.</u>
<u>5.22.050</u>	<u>Inspection of permit.</u>
<u>5.22.060</u>	<u>[Unlawful bicycle tour operations—penalty—forfeiture.]</u> <u>Violation; penalty.</u>
<u>5.22.061</u>	<u>Prima facie evidence.</u>
<u>5.22.062</u>	<u>Citations.</u>
<u>5.22.065</u>	<u>Appeals.</u>
<u>5.22.070</u>	<u>Other requirements.</u>
<u>5.22.080</u>	<u>Rules.</u>

5.22.005 Applicability and scope. A. This chapter applies
to bicycle tour businesses operated on County property.

B. If any provision of this chapter conflicts with any other
ordinance or statute, the stricter provision will govern.

5.22.010 Definitions. [For the purpose of] As used in this chapter, unless [it is plainly evident from] the context [that a different meaning is intended, certain terms and words are defined as follows:] otherwise requires:

“Application” means a form provided by the department that must be submitted to initiate a new permit request, amendment, or renewal of an unexpired permit.

“Authorized agent” means an executive director or officer of a corporation, or a general partner of a general or limited partnership, or an active member of an unincorporated group or organization, who provides the director with notarized written authority in order to represent a corporation, partnership, group, or organization.

“Bicycle” means: (1) [every] A [vehicle] device propelled solely by human power upon which any person may ride, having two tandem wheels sixteen inches in diameter or greater, and including any [vehicle] device generally recognized as a bicycle though equipped with two front or two rear wheels[.]; or (2) A low-speed electric bicycle, as defined under title 15 United States Code section 2085.

“Bicycle tour” includes guided bicycle tours and unguided bicycle tours.

“Business” means any [commercial] enterprise or establishment, [which includes, but is not limited to,] including sole proprietorships, joint ventures, partnerships, fraternal organizations, clubs, and corporations, whether for profit or nonprofit.

“Business location” means a permanent, fixed place of business not including a place that consists solely of a post office box, that is identifiable by a tax map key number and street address in the County.

“Commercial” means an act in which a person receives a benefit, or a promise to receive a benefit, by providing goods or services to another person.

“County property” means any highways, right-of-way, easement, or other real estate owned or controlled by the County.

“Department” means the department of finance.

“Director” means the director of finance [of the County].

“Guided bicycle tour” means a bicycle tour accompanied or led by an employee or agent of the bicycle tour business throughout the tour, usually in conjunction with a business vehicle.

“Highway” means the entire width between the boundary lines of every County street when any part [thereof] is open to the use of the public for purposes of either vehicular or pedestrian travel.

“Notification” means either actual notice to the applicant [for license] or permit holder, or written communication through

registered or certified mail, return receipt requested. If service by registered or certified mail is not made because of inability to deliver or refusal by the addressee to accept same, the director may give notice by publishing once in a newspaper of general circulation [on the island of Maui.] in the County. [The director shall be entitled to rely on the names and addresses provided by the applicant and it is the applicant's obligation to notify the director of any changes in same.] Notification [shall be] is considered [given] complete upon evidence of receipt of such letter or completion of publication [of such notice as the case may be].

"Person" means and includes any individual, firm, society, organization, or corporation.

"Tour" means a group organized for the traveling from place to place for enjoyment, pleasure, or sightseeing.

"Unguided commercial bicycle tour" means a bicycle tour that is not led or accompanied by guide throughout the ride, in which transportation to or from the route is provided or arranged by the bicycle tour business.

5.22.020 Unlicensed bicycle tour business prohibited[-]; application for permit. A. It is unlawful for any business or person to conduct a commercial bicycle tour on County property without first obtaining a bicycle tour business permit issued by the director in accordance with this chapter.

B. The application [shall] must be in writing, properly verified under oath and filed with the director, and [shall set forth and] include the following:

1. The applicant's name, [place of residence,] mailing address, business location address, email address, and telephone number [of the applicant;].

2. The names, [and] addresses, email addresses, and phone numbers of all [corporations, partnerships, associations, person or persons for whom the applicant is acting;] authorized agents for the applicant.

3. A description of the [areas, locations, or routes to be utilized for the proposed bicycle tour business;] proposed schedule; maximum number of participants per tour group; whether the tours are guided or unguided; and routes, including community plan areas.

4. [A description and the] The registration numbers of all motor vehicles and bicycles to be used by the business[;].

5. A description of any structure[,] or [other] personal property to be used in conjunction with the bicycle tour business[;].

6. Any other information [which may be] required by [rules adopted by] the director [to enforce the requirements and rules of this chapter; and].

7. An application fee as [set forth] indicated in the annual budget ordinance.

8. State and federal tax clearance certificates.

C. [No permit shall be issued to a bicycle tour business, unless the bicycle tour business:] All permits are subject to the following conditions:

[1. Obtains, pays for, and keeps in force throughout the term of the bicycle tour business permit, comprehensive liability insurance issued (1) by an insurance company authorized to do business in the State of Hawaii (“admitted carrier”), or (2) through a general insurance agent or broker licensed in the State of Hawaii, if the company is not authorized to do business in the State of Hawaii (“non-admitted carrier”). The insurance carrier shall be rated no less than “A-” as established by “AM Best” or “Standard & Poor” ratings. The insurance policy, as evidenced by issuance of a policy endorsement, shall name the County, its officers, employees, and agents, as an additional insured. The insurance policy shall contain the following minimum requirements:

a. No less than a combined single limit (“CSL”) of liability coverage of \$3,000,000;

b. No erosion of limit by payment of defense costs;

c. An annual aggregate limit of not less than \$3,000,000;

d. A duty to defend the County, its officers, employees, and agents, against any loss, liability, claims, and demands for injury or damage, including, but not limited to, claims for property damage, personal injury, or wrongful death, arising out of, or in connection with, in whole or in part, the activities of the bicycle tour business, the design and maintenance of roadways, and the County's permit review and approval process; and

e. The insurance policy naming the County, its officers, employees, and agents, as an additional insured shall be on a primary basis and not excess of any other insurance policy furnished or available to the County.]

1. The permit holder must procure and maintain during the term of the permit a commercial general liability policy with the following minimum limits and coverages placed

with an insurance carrier authorized to do business in the State of Hawai'i with a minimum AM Best rating of A-VII.

a. The commercial general liability policy must be written on an occurrence form, and defense costs must be outside the limits of liability and must not erode or dilute the required limits of liability provided by the policy, and must provide the following coverages:

i. Bodily injury and property damage on a combined single limit.

ii. Independent contractors.

iii. Blanket contractual liability.

iv. Personal injury.

v. Employees named as additional insureds.

vi. Severability of interest.

b. The commercial general liability policy must have the following limits of liability:

i. A primary commercial general liability policy with \$2,000,000 per occurrence and \$3,000,000 annual aggregate, which insurance must include a duty to defend the County if the County is sued as a result of the bicycle tour business's operations.

ii. An umbrella policy written on a "following form" basis with \$2,000,000 per occurrence and \$3,000,000 annual aggregate.

c. The bicycle tour business's policies must be endorsed to respond on a primary basis, and any policies procured by the County must be noncontributory and excess of the bicycle tour business's insurance policies.

d. The County and its officers and employees must be named as an additional insured under the bicycle tour business with a duty to defend the County from any claims arising from bicycle tour operations.

e. The permit effective date may be nonconcurrent with the bicycle tour business insurance policy's effective date. If the required insurance coverage expires during the permit term, then the permit holder must immediately deliver a renewed certificate of insurance evidencing the required coverage and limits are still in full force and effect. Any insurance coverage procured by the permit holder that is not renewed or allowed to lapse will be deemed a material breach of the terms of the permit. The permit

holder must immediately provide written notice to the County if any of the required policies are canceled, nonrenewed, or terminated. The [bicycle tour company shall] permit holder must furnish the County with a [copy of the insurance policy] certificate of insurance and the required endorsements verifying such insurance coverage upon the issuance of the bicycle tour business permit. [If the scheduled expiration date of a current insurance policy is earlier than the expiration of the bicycle tour business permit, the bicycle tour business shall, upon renewal of the insurance policy, provide the County with a copy of the renewed insurance policy certificate and required endorsements. The insurance policy shall expressly state that the coverage provided under such policy shall not be canceled or terminated, unless the carrier has first given the County at least thirty calendar days prior written notice of the intended cancellation or termination.] The bicycle tour business is prohibited from conducting bicycle tours on County property during any period in which the required insurance is not in effect.

2. [Executes] The permit holder must execute an indemnification agreement with the County requiring the [bicycle tour business] permit holder to indemnify, defend, and hold the County, its officers, employees, and agents, harmless against any and all damages, claims, actions, demands, and proceedings for property damage, personal injury, or wrongful death arising, [loss sustained,] in whole or in part, [as the result of] from the activities of the bicycle tour business over and above those losses covered by the bicycle tour business' general liability insurance coverage, including claims regarding design and maintenance of roadways and the County's permit review and approval process.

D. [Review of Application.] Within [three] five business days [(excluding weekends or holidays) upon] of [a] receipt of [an] a complete application, the director [shall] must submit a copy of the application to the department of police. Within twenty [working] business days from the receipt [thereof], the department of police [shall] must indicate whether the applicant has received any citations within the past year and submit to the director a written report with any recommendations or special conditions [which] that may be necessary or desirable. If the department of police does not submit a report within twenty business days, it is deemed to have submitted a report with no comments on the application. Upon

request from the department of police, the director may grant the department additional time to review the application. [An application shall be approved or denied within thirty working days from the receipt thereof.]

E. [Issuance or Denial of Permit—Appeal.] The director [shall issue the permit, upon payment of any required fee, with or without special conditions or requirements as may be appropriate. If the director refuses to issue the permit the director shall notify the applicant in writing of the director's decision.] may issue the permit, upon payment of any required fee, with or without special conditions or requirements in accordance with this chapter or administrative rules. The director must issue or deny the permit within thirty business days of the director's receipt of the department of police's report. If the director denies the permit, the director must notify the applicant in writing of the decision and the reasons for the denial. If the director does not issue or deny the permit within thirty business days of the director's receipt of the department of police's report, the application will be deemed denied. The director may approve the issuance of a permit upon determining that:

1. The proposed use for the requested bicycle tour, route, or hours of operation is in the best interest of the general public.

2. A scheduling conflict does not exist with another permitted commercial bicycle tour.

3. In previously operating a bicycle tour business, the applicant has not:

a. received a citation within the previous year related to or associated with a commercial bicycle tour;

b. conducted a commercial bicycle tour without a valid permit; or

c. violated any applicable federal, state, or county laws or regulations.

F. An applicant must notify the director within five business days of a change to any information required to be included in the application after the application is submitted for approval or after the permit has been issued. Failure to comply may result in denial, suspension, or revocation of the permit.

5.22.025 Commercial bicycle tours operating in the Makawao-Pukalani-Kula and Pā'ia-Ha'ikū community plan areas. A. It is unlawful for any business to conduct unguided commercial bicycle tours in the Makawao-Pukalani-Kula and Pā'ia-Ha'ikū community plan areas.

B. No more than six guided commercial bicycle tours are allowed to operate each day in each community plan area.

C. No more than ten bicycle riders per guided commercial bicycle tour are allowed, excluding employee guides.

D. Employee guides must ride at the front and back of tour groups.

E. Guided commercial bicycle tours may only be conducted between 9:00 a.m. and 1:00 p.m.

F. Each commercial bicycle tour business is limited to one guided bicycle tour per two hours in each community plan area.

G. Permit holders must require riders to sign the bike pono pledge, which states: "I will bike pono, with awareness of my surroundings, attention to my bike speed, and upmost safety for myself and cars to share the roads."

5.22.030 [Term of permit.] Permit term; suspension; revocation. A. Any permit issued [pursuant to] in accordance with this chapter [shall,] will, unless suspended or revoked, continue for one year from the date of issuance[.], and expires automatically, without notice to the permit holder, on the date specified on the permit.

B. The director may suspend or revoke any permit issued in accordance with this chapter if the permit holder has violated any rule, ordinance, or statute related to commercial bicycle tours.

5.22.040 Nontransferable. No permit issued under this chapter [shall be] is transferable, and each permit [shall authorize] authorizes only the named [permit] permittee and no other person or business.

5.22.050 Inspection of permit. Any person or business issued a permit under this chapter must at all times keep the permit in a prominent place, convenient for inspection, while engaging in commercial bicycle tour activities. [Any person failing to comply with the requirement of this section will be fined not less than \$20 nor more than \$100.] All permit numbers must be legibly displayed on a bicycle tour business's electronic and print advertising.

5.22.060 [Unlawful bicycle tour operations—penalty—forfeiture.] Violation; penalty. A. Any [business or] person who [engages in bicycle tour activities without first obtaining a permit issued in conformity with] violates [this chapter] sections 5.22.020(A), 5.22.025, and 5.22.050 [will be ordered to discontinue the bicycle tour business and fined not less than \$200 nor more than \$1,000.] will be guilty of a petty misdemeanor and subject to a fine, imprisonment up to thirty days, or both.

B. Any person who violates section 5.22.020(A) will be fined not less than \$1,000, imprisonment up to thirty days, or both.

C. Any person who violates section 5.22.025 will be fined not less than \$500 for a first offense and not less than \$1,000 for any subsequent offense within twelve months, imprisonment up to thirty days, or both.

D. Any person who violates section 5.22.050 will be fined not less than \$20 nor more than \$100, imprisonment up to thirty days, or both.

5.22.061 Prima facie evidence. Advertising that offers commercial bicycle tours will constitute prima facie evidence of the operation of a commercial bicycle tour business and is subject to enforcement if not legally permitted to operate under section 5.22.020.

5.22.062 Citations. A. Police officers, park security officers, and other authorized personnel may issue citations for violations of this chapter.

B. The content and form of the citation will be as adopted or prescribed by the administrative judge of the district courts of the second circuit and will be designed to include all necessary information to make the citation valid within the laws of the State. In every case when a citation is issued, the original of the citation will be given to the violator.

C. Every citation must be consecutively numbered, and each copy will bear the number of its respective original.

5.22.065 Appeals. Any person aggrieved by a decision or order of the director may file an appeal with the director. On appeal, the director may reverse or modify any decision of the director in the whole or in part, provided that the director finds that the decision or order was:

A. Based on a clearly erroneous finding of material fact or erroneous application of the law;

B. Arbitrary and capricious in its application; or

C. A clearly unwarranted abuse of discretion.

5.22.070 Other requirements. Any and all other permits and licenses necessary to conduct a bicycle tour [shall] must be secured by the person or business conducting the tour. A granting of a license [hereunder shall] under this chapter does not relieve the applicant of the responsibility of complying with the laws of the federal, State, and County governments applicable to the applicant's business.

5.22.080 Rules. The director may adopt rules to implement this chapter.”

SECTION 2. 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 3. This Ordinance takes effect upon approval.

APPROVED AS TO FORM AND LEGALITY:

/s/ Daniel J. Kunkel

DANIEL J. KUNKEL
Deputy Corporation Counsel
County of Maui
great:misc:044abill05:ske
LF2021-0013 GREAT-44 2022-01-12 ord amd ch. 5.22