

RECEIVED

By Dept of the Corporation Counsel at 4:40 pm, Oct 11, 2021

REQUEST FOR LEGAL SERVICES

Date: October 8, 2021
From: Michael J. Molina, Chair
Government Relations, Ethics, and Transparency Committee

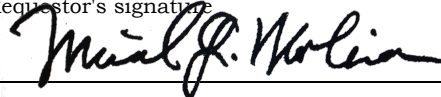
TRANSMITTAL

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: ☒ FOR APPROVAL AS TO FORM AND LEGALITY
☐ OTHER:

Requestor's signature  Michael J. Molina	Contact Person <u>James Forrest</u> (Telephone Extension: <u>7137</u>)
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☐ ROUTINE (WITHIN 15 WORKING DAYS) ☐ RUSH (WITHIN 5 WORKING DAYS)
☐ 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 ☐ 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 memorandum to
Councilmember Molina dated October 29, 2021.

DEPARTMENT OF THE CORPORATION COUNSEL

Date October 29, 2021

By Daniel J. Kunkel

(Rev. 7/03)

great:ltr:044acc03:jbf

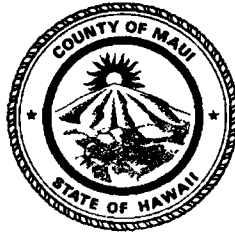
Attachment

MICHAEL P. VICTORINO
Mayor

MOANA M. LUTEY
Corporation Counsel

RICHELLE M. THOMSON
First Deputy

LYDIA A. TODA
Risk Management Officer



DEPARTMENT OF THE CORPORATION COUNSEL
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MEMORANDUM

October 29, 2021

MEMO TO: Councilmember Michael J. Molina, Chair
Government Relations, Ethics, and Transparency Committee

FROM: Daniel J. Kunkel, Deputy Corporation Counsel *Daniel J. Kunkel*
Department of the Corporation Counsel

SUBJECT: **BICYCLE-TOUR PUBLIC SAFETY AND RELATED LITIGATION
CONCERNS (GREAT-44)**

I am responding to your revised October 8, 2021 request for me to review the form and legality of your proposed bill that would amend Maui County Code (MCC) Chapter 5.22 by adding a new section 5.22.090 ("Bicycle tours operating in the Makawao-Pukalani-Kula and Paia-Haiku community plan areas"), and by amending the already existing MCC sections 5.22.050 ("Inspection of permit") and 5.22.060 ("Unlawful bicycle tour operations-penalty-forfeiture").

While reviewing your proposed amendments, we have paid special attention to Hawaii Revised Statutes (HRS) § 46-16.3 (2012), which specifically authorizes the counties to regulate commercial bicycle tours:

§ 46-16.3. Regulation of commercial bicycle tours. Any law to the contrary notwithstanding, the council of any county may adopt and provide for the enforcement of ordinances regulating commercial bicycle tours on state and county highways, including but not limited to ordinances relating to the number of tours, the number of bicycles within a tour, scheduling of tours, physical spacing of tours, rules of the road, health and safety requirements, equipment maintenance, driver and guide qualifications, driver and guide drug testing, accident procedures and reporting, and financial responsibility requirements. Each county shall follow federal

guidelines for commercial bicycle tours that begin from federal or state parks and continue on to state highways.

For the purposes of this section:

“Bicycle tour” includes both guided bicycle tours and unguided bicycle rental operations.

“County highway” has the same meaning as defined in section 264-1.

“State highway” has the same meaning as defined in section 264-1.

HRS) § 46-16.3 (2012).

Multiple attorneys in the Department of Corporation Counsel reviewed your proposal, including First Deputy Corporation Counsel Richelle Thomson, who re-numbered your proposed new section 5.22.090 (“Bicycle tours operating in the Makawao-Pukalani-Kula and Paia-Haiku community plan areas”) as MCC § 5.22.025, and reorganized the order of the subsections therein. Richelle Thomson also suggested deleting one sentence regarding fines in MCC § 5.22.050 in light of her proposed changes to MCC § 5.22.050, which would make any violation of MCC Chapter 5.22 a criminal misdemeanor. These changes would make MCC Chapter 5.22 clearly enforceable by the Maui Police Department, and, thus, we suggest that you ask the Maui Police Department and the Maui Prosecuting Attorney for their comments regarding these changes.

Pursuant to a request by Department of Corporation Counsel Risk Manager Lydia Toda, the requirements for bicycle tour permittees to obtain insurance under subsection E of MCC § 5.22.020 was modified. The purpose in doing so was to update the requirements and ensure that the County of Maui will be adequately protected from liability.

Because MCC Chapter 5.22 has not been amended since 2007, we are suggesting other additional changes for the purpose of updating MCC Chapter 5.22 to further clarify the law, protect the public, ensure enforceability, and clarify the public’s means for seeking redress: MCC § 5.22.005 (“Applicability and scope”), MCC § 5.22.010 (“Definitions”), MCC § 5.22.020 (“Unlicensed bicycle tour business prohibited-application for permit”), MCC § 5.22.030 (“Permit term-Suspension-Revocation”), MCC § 5.22.040 (“Nontransferable”), MCC § 5.22.061 (“Citations”), and MCC § 5.22.065 (“Appeals”). We suggest that you ask the Maui Police Department and the Maui Prosecuting Attorney for their comments regarding these proposed changes.

Please contact me if you have any additional questions.

ORDINANCE NO. _____

BILL NO. _____ (2021)

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 by adding a
new section to be appropriately designated and to read as follows:

**“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 shall govern.”**

SECTION 2. Section 5.22.010, Maui County Code, is amended to read as
follows:

**“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 permit request.**

**“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 [every] a vehicle propelled [solely] by human
power upon which any person may ride, having two tandem wheels,
and including any vehicle generally recognized as a bicycle though
equipped with two front or two rear wheels. “Bicycle” additionally
includes the electronic bicycle, also known as an “e-bike,” which
utilizes an electric motor to assist propulsion but retains the ability
to be pedaled by the rider.**

“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 whereby a person, organization, or entity 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 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.

SECTION 3. Section 5.22.020, Maui County Code, is amended to read as follows:

“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]~~ must 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 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 \$2,000,000.00 per occurrence and \$3,000,000.00 annual aggregate, which insurance shall 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 \$2,000,000.00 per occurrence and \$3,000,000.00 annual aggregate.

c. The bicycle tour business's policies must be endorsed to respond on a primary basis and policies procured by the County must be non-contributory 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 non-concurrent 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 cancelled, non-renewed, 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.] 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 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.] denial of application. 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 shall notify the applicant in writing of the decision, setting forth 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 is deemed denied. The director may deny the issuance of a permit upon determining that:

1. The proposed use for the requested bicycle tour, route, or hours of operation are not in the best interest of the general public.

2. A scheduling conflict exists with another permitted commercial bicycle tour.

3. In previously operating a bicycle tour business, the applicant has:

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.

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."

SECTION 4. Chapter 5.22, Maui County Code, is amended by adding a new section to be appropriately designated and to read as follows:

"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."

SECTION 5. Section 5.22.030, Maui County Code, is amended to read as follows:

“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.”

SECTION 6. Section 5.22.040, Maui County Code, is amended to read as follows:

“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.”

SECTION 7. Section 5.22.050, Maui County Code, is amended to read as follows:

“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.”

SECTION 8. Section 5.22.060, Maui County Code, is amended to read as follows:

“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 [will be ordered to discontinue the bicycle tour business and fined not less than \$200 nor more than \$1,000.], except for section 5.22.050, shall be guilty

of a misdemeanor and, upon conviction, shall be fined \$1,000, or imprisoned not more than one year, or both.

B. Any person who violates section 5.22.050 shall be fined \$250 per day for each day the violation persists.”

SECTION 9. Chapter 5.22, Maui County Code, is amended by adding a new section to be appropriately designated and to read as follows:

“5.22.061 Citations. A. Police officers, park security officers, law enforcement officers, and other authorized department enforcement personnel may issue citations for violations of this chapter.

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

C. Every citation shall be consecutively numbered and each copy shall bear the number of its respective original.”

SECTION 10. Chapter 5.22, Maui County Code, is amended by adding a new section to be appropriately designated and to read as follows:

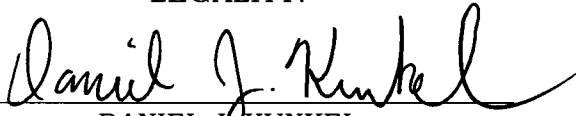
“5.22.065 Appeals. Any person aggrieved by a decision or order of the director may file an appeal with the board of variances and appeals pursuant to chapter 19.520, and the rules of practice and procedure as adopted by the board of variances and appeals. In accordance with the rules of the board of variances and appeals, a contested case hearing must be held on the appeal. The department of finance, through the director, is a party to the proceedings. In accordance with its rules and applicable law, the board of variances and appeals may affirm the decision or order of the director; or it may reverse or modify the decision or order, in whole or in part, provided the board of variances and appeals finds the decision or order is:

1. Based on a clearly erroneous finding of material fact or erroneous application of the law; or
2. Arbitrary and capricious in its application; or
3. A clearly unwarranted abuse of discretion.”

SECTION 11. 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 12. This Ordinance takes effect upon its approval.

APPROVED AS TO FORM AND
LEGALITY:

A handwritten signature in black ink, reading "Daniel J. Kunkel", written over a horizontal line.

DANIEL J. KUNKEL

Deputy Corporation Counsel
County of Maui

great:misc:044abill01:jbf

LF2021-0013

GREAT-44 2021-10-28 Ord Amd Ch. 5.22 Bicycle Tour
Business