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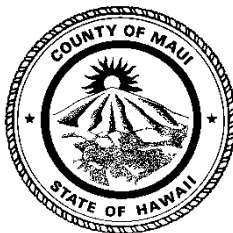
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MEMORANDUM

January 12, 2022

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

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

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

I am responding to your revised December 17, 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, among other things, 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"). In your currently revised proposal, you have also incorporated other suggested revisions.

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).

I have the following two primary suggestions for revisions:

- (1) First, the December 17, 2021 version of the proposed legislation proposes a revision to MCC section 5.22.060 that would make any violation of MCC sections 5.22.020(A), 5.22.025 or 5.22.050 a “petty misdemeanor,” in accordance with Prosecuting Attorney Andrew Martin’s suggestion. However, the final proposed sentence states that the violator would only be “subject to a fine.” In light of the fact that HRS § 706-663 (2014) authorizes a court to sentence a defendant who is guilty of a petty misdemeanor to **imprisonment for a term of thirty days**, in addition to a fine, I suggest amending the final sentence of the proposed amended version of MCC section 5.22.060 so that it provides that the violator would be “subject to a fine, **imprisonment for up to thirty days, or both.**”
- (2) Second, the December 17, 2021 version of the proposed legislation proposes that MCC section 5.22.065 would no longer assign appeals to the board of variances (as we had previously suggested), and, instead, it provides that a person aggrieved by a decision or order of the Director of Finance could appeal to the Director of Finance. However, I am concerned about the final sentence, which provides: “**An appeal may be granted** only if the director finds that the decision or order was, . . . [b]ased on a clearly erroneous finding[,] . . . [a]rbitrary and capricious[,] . . . or . . . [a] clearly unwarranted abuse of discretion.” I do not quote this sentence in its entirety, so please review the exact language for yourself. I quote only a portion of the final sentence, because I am concerned about the language that provides that “[a]n appeal may be granted[,]” because an appellate tribunal **does not “grant” an appeal**. Instead, an appellate tribunal **reviews an appeal**, and then

disposes of it, one way or another, by either affirming it, reversing it, or modifying it. I recommend that the relevant sentence should provide, instead, the following: **“On appeal, the director may reverse or modify any decision or order** of the director, in whole or in part, provided that the director finds that the decision or order was, . . . [b]ased on a clearly erroneous finding[,] . . . [a]rbitrary and capricious[,] . . . or . . . [a] clearly unwarranted abuse of discretion.” In other words, it is the decision or order of the director, rather than the appeal, that would be affirmed, reversed or modified. An appellate tribunal **does not grant an appeal**.

Those are my two primary suggested changes. I otherwise approve of all of your suggested amendments as to form and legality.

Please contact me if you have any additional questions.