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

F R O M: Richelle M. Thomson
Deputy Corporation Counsel

D A T E: December 5, 2016

SUBJECT: Polystyrene Disposable Food Service Containers (IEM-5)

This memorandum is response to your request of December 1, 2016, that the Department of Corporation Counsel comment on Section 20.26.050.A of the proposed new Chapter 20.26, Maui County Code, "Polystyrene Food Service Containers" (hereafter "ordinance"), which presently exempts "polystyrene food service containers for foods prepared and packaged entirely outside of the County but sold within the County," as follows:

1. Does the exemption raise Commerce Clause concerns?

2. Would there be any apparent constitutional or legal concerns should the exemption be removed?

Short Answers:

1. Yes. Both the ordinance as a whole and removal of the exemption implicate interstate commerce. Although this office has no information as to the drafter's intent regarding inclusion of this exemption, two conclusions may be drawn:

a. The exemption applies to polystyrene containers for "foods prepared and packaged ... outside of the County," regardless of who packages the foods. An example is pre-packaged saimin noodle soup.

b. The apparent intent of the exemption is to exclude application of the ordinance to persons located or activities occurring outside the County or outside the State of Hawaii.

2. Yes.

As was noted during the discussion on the proposed ordinance during the November 28, 2016, meeting of the Infrastructure and Environmental Management Committee, removal of the exemption may render portions of the ordinance ambiguous and also may result in difficulty in enforcement. For example, if food packaged (in another county or out of state) in a polystyrene container is offered for consumption within Maui County, would the County enforce only against the on-island "Food provider" or the person who initially packaged the item? How would the original seller of the polystyrene-packaged item be put on notice that the item was intended for sale in Maui County? For some pre-packaged foods, the item may change hands multiple times prior to import to the County.

For analysis of the Commerce Clause issues, we respectfully present the following information, which is by no means exhaustive, but is rather intended to provide general guidance on the issue of removal of the exemption. The U.S. Constitution requires that "Congress shall have power ... to regulate commerce ... among the several states."[1] Although couched in terms of a grant of power to Congress, the clause has been interpreted by the judicial system to imply a limit on state and local municipality powers. This "negative" or "dormant" aspect of the Commerce Clause "...prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[2] As a threshold matter, this office concludes that the removal of the exemption for "Polystyrene food service containers for foods prepared and packaged entirely outside of the County but sold within the County" from the proposed ordinance does require analysis of potential Commerce Clause implications as removal of this exemption causes the ordinance to apply to persons outside the County who package prepared foods for sale within the County, i.e., the ordinance may affect interstate commerce. Next, we turn to whether, if the exclusion is removed, the ordinance would likely withstand a Commerce Clause-based legal challenge.

The U.S. Court of Appeals for the Seventh Circuit offered an instructive analysis of the line of Commerce Clause cases in Nat'l Paint & Coatings Ass'n v. City of Chicago[3], a case involving a challenge to a Chicago ordinance banning spray paint within city limits (with the goal of reducing graffiti).

> State and local laws affecting commerce may be put into one of three categories. The first category comprises laws that explicitly discriminate against interstate commerce. Chicago might, for example, forbid the sale of spray paint manufactured outside Illinois. Such laws are treated as all but *per se* unconstitutional.[4] Chicago's law does not fall into this category, however; it bans all spray paint without regard to source.
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> The second category comprises laws that appear to be neutral among states but that bear more heavily on interstate commerce than on local commerce. One state's law setting a 55-foot limit for trailers when all nearby states permit 65-foot trailers bears more heavily on vehicles from other states, which are limited in the places they may travel, while in-state vehicles may move freely to other states.[5] When the effect is powerful, acting as an embargo on interstate commerce without hindering intrastate sales, the Court treats it as equivalent to a statute discriminating in terms.[6]
>
> If the first category may be called disparate treatment, and the second disparate impact, the third category comprises laws that affect commerce without any reallocation among jurisdictions — that do not give local firms any competitive advantage over those located elsewhere.[7]

The analysis does not end there. The third subset, those regulations that appear on their face to apply to both intrastate and interstate equally (such as the proposed Maui County ordinance with removal of the exemption), are further scrutinized. The U.S. Supreme Court has set forth the standard for determining the validity of such local regulations: "Evenhanded local regulation to effectuate a legitimate local public interest is valid unless pre-empted by federal action, or unduly burdensome on maritime activities or interstate commerce ... ."[8]

In general, local governments have the power to enact regulations to protect the health and safety of persons and property within their jurisdiction.[9] There are, however, limitations on this authority. Maui County may not adopt local laws that are (1) inconsistent with the Hawaii Constitution or a general Hawaii state law, or (2) preempted by state or federal law.[10] Our initial research has not

indicated that the proposed ordinance is inconsistent with Hawaii's Constitution or general laws; nor is there an indication to date that the Hawaii Legislature or U.S. Congress has preempted regulation in this area.

Regarding whether the polystyrene food service container ban is an exercise of "legitimate local public interest," your office has informed us that polystyrene food service containers are a health and environmental hazard, contributing to the potential death of marine animals and avian populations through ingestion, and further that polystyrene is a suspected human carcinogen. For the protection of the environment and the health and safety of the human and animal populations, polystyrene food service containers should be banned from use or sale within the County. This office has not been provided with the scientific studies or expert opinions upon which these conclusions are based; therefore, we offer no opinion on the validity of the public health and environmental protection bases of the proposed ordinance. For the purposes of this memo, we presume these to be legitimate and reliable statements supporting the determination that the ordinance furthers a "legitimate local public interest."

Turning to whether a local regulation is "unduly burdensome" on interstate commerce, the Supreme Court in Pike v. Bruce Church, Inc.[11] set forth a test requiring the comparison of the competing interests of the local regulation and unrestricted interstate commerce:

> If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities ... .[12]

Pike involved a challenge to an Arizona law requiring cantaloupes grown within the state to be packaged within the state. The law was challenged by an Arizona cantaloupe grower whose packing facilities were located in California. To comply with the in-state packaging requirement, this grower would have to construct a new packing facility in Arizona. The court found that the nature of the state's interest (to promote the reputation of Arizona cantaloupe growers) did not justify the burden placed on interstate commerce.[13]

In general, however, the U.S. Supreme Court has been reluctant to strike down local regulations that serve safety and public welfare purposes because of their impact on interstate commerce.[14] In Minnesota v. Clover Leaf Creamery Co.,[15] the Supreme Court addressed the Commerce Clause implications of a Minnesota law banning the use of plastic jug milk containers. The Minnesota

law was intended to benefit the state's solid waste management goals, reduce energy waste, and address depletion of natural resources.[16]

The law was challenged as unconstitutional on the ground that it placed an undue burden on interstate commerce. After finding that the comparative test in Pike was applicable, the Court found that the Minnesota statute did regulate evenhandedly and was not a disguised form of state protectionism.[17] The Court then went on to find that the incidental burden imposed on interstate commerce by the regulation was not clearly excessive in relation to the putative local benefits.[18]

Other examples of local regulations banning certain goods or activities have been found to be consistent with the Commerce Clause, as long as the regulation serves a valid purpose and the importance of that purpose outweighs the burden placed on interstate commerce. In Kidd v. Pearson and Mugler v. Kansas, the Supreme Court upheld a state's right to ban the manufacture and import of alcoholic beverages.[19] In Proctor and Gamble Co. v. Chicago,[20] for which the Supreme Court declined certification, a Chicago ordinance banned the use of phosphate-based detergents within the city limits, based on reliable scientific studies showing that phosphate-based detergent promoted the growth of algae in the city's drinking water system.[21] After establishing that the elimination of algae was a valid purpose, and that the ordinance legitimately served that purpose, the court discussed at length the alleged impacts the ordinance had on interstate commerce, concluding that none of the impacts were unduly burdensome, at least not to the extent that they outweighed the city's interest in eliminating algae from its water supply.

In Proctor and Gamble, Clover Leaf Creamery, Kidd, and Mugler, the regulations sought to address the purported harmful effects of certain products (phosphate-based detergents, plastic milk jugs, alcoholic beverages). Compare these results with Philadelphia v. New Jersey, where a New Jersey law banning the import of solid or liquid waste originating or collected outside the state was struck down as violative of the Commerce Clause. The Court found that although the *purpose* behind the New Jersey statute — to protect New Jersey's environment by slowing the flow of wastes into the state's landfills — was valid, the means used to carry out this purpose were protectionist and violative of the Commerce Clause.[22]

In conclusion, both the ordinance itself, and specifically removal of the exemption implicate the Commerce Clause. However, the ordinance should survive Commerce Clause scrutiny provided that 1.) a valid, science-based public purpose underlies the ordinance and the Council's record supports this

finding, and 2.) the incidental burden placed on interstate commerce is not excessive.

This office offers two additional comments on the proposed ordinance:

First, Section 20.26.040.C prohibits any person from selling or offering for sale polystyrene food service containers within the County; however, exemptions under Section 20.26.050.E and F are provided for certain types of foods or food service providers.

If a Maui County entity or person is granted an exemption, but is unable to purchase polystyrene food containers due to the ban on sale of such items within the County, this may trigger an Equal Protection claim (the Fourteenth Amendment to the U.S. Constitution requires that states guarantee the same rights, privileges, and protections to all citizens). Food providers from outside the County (selling food within the County) presumably could both apply for an exemption and procure the polystyrene products outside the County. The ordinance should be revised to make clear that sale of polystyrene food service containers to exempt entities is not prohibited. This still may not alleviate the practical difficulty for exempt Maui County-based persons.

Second, the definition of "Food provider" appears initially to apply to all persons; however, the listing of examples reflects only commercial enterprises. A possible revision would be to shorten the definition as follows: "'Food provider' means any entity or person providing prepared food for consumption within the County." If clarification is needed, this can be accomplished via administrative rules.

APPROVED FOR TRANSMITTAL:

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[1] U.S. Const. art 1 §8, cl. 3.
[2] New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273 (1988).
[3] Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1131–32 (7th Cir. 1995)

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[4] C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994); West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994)
[5] Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 101 S.Ct. 1309, 67 L.Ed.2d 580 (1981)
[6] Daniel A. Farber & Robert E. Hudec, Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause, 47 Vand.L.Rev. 1401, 1411-18 (1994).
[7] Nat'l Paint & Coatings Ass'n v. City of Chicago citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 107 S.Ct. 1637, 95 L.Ed.2d 67 (1987) fit into this category, for which, we have held, the normal rational-basis standard is the governing rule. As Exxon remarks, "[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." 437 U.S. at 126, 98 S.Ct. at 2214 *1132 (emphasis added). Unless the law discriminates against interstate commerce expressly or in practical effect, there is no reason to require special justification. See also J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection, 857 F.2d 913, 919-21 (3d Cir.1988); Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 406 (3d Cir.1987).
[8] Huron Portland Cement Co. v City of Detroit, 362 U.S. 440, 443 (1960).
[9] Section 46-1.5(13), Hawaii Revised Statutes.
[10] The St. Thomas-St. John Hotel & Tourism Assoc., Inc. v. Government of the U.S. Virgin Islands, 218 F.3d 232, 238 (3d Cir. 2000); also see, Queen Anne's Conservation Inc. v. County Com'rs of Queen Anne's County, 382 Md. 306, 855 A.2d 325 (2004).
[11] Pike v Bruce Church, Inc., 397 U.S. 137, 142 [1970]
[12] Id.
[13] Id. at 145.
[14] "It is difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers and people using the highway" (Brotherhood of Locomotive Firemen Enginemen v Chicago, Rock Island Pacific Railroad Co., 393 U.S. 129, 140 (1968) [state may require minimum crews on freight trains]; American Can Co. v. Oregon Liquor Control Commission, 517 P.2d 691 [Ore, 1973] [Oregon "Bottle Bill" banning pull-top cans].
[15] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).
[16] Minn Stat § 116F.21 [1978]; see 449 U.S. at 458.
[17] Clover Leaf Creamery Co., Id. at 471.
[18] Id. at 472.
[19] Kidd v Pearson, 128 U.S. 1 (1888); Mugler v. Kansas, 123 U.S. 623 (1887).
[20] Proctor and Gamble Co. v Chicago, 509 F.2d 69 (1975) [7th Cir], cert den 421 U.S. 978 (1975)
[21] Id. at 73.
[22] Philadelphia v. New Jersey, 437 U.S. 617, 627. For more information, see Schoenberger, Ilan A., Attorney General of New York, "US CONST, ART I, § 8 cl 3; N Y CONST, ART IX, § 2(c); MUNICIPAL HOME RULE LAW, § 10(1)(ii) and (ii)(a)(12)." Feb. 9, 1989.