# Technical Note: Why “May Opt-In” and Broad Rulemaking Weaken Takeout BYO Rights

Two versions of takeout BYO language are currently under consideration. Zero Waste Ithaca’s proposed amendment uses "shall not refuse" language paired with case-specific safety conditions. The draft circulated by Assemblymember Kelles’ office in February 2026 uses an opt-in structure under which establishments "may" choose to allow takeout BYO. This note explains why that structural difference matters for statewide implementation and enforceability.

A takeout BYO framework should be clear and enforceable in the statute itself. The current ZWI proposal already includes two targeted safeguards: (1) case-specific refusal for reasonable food safety or operational feasibility concerns, and (2) good-faith liability protection for establishments that accept reusable containers. Given those safeguards, an additional “may opt-in” structure for takeout BYO is unnecessary and overbroad.

## Why “may” matters

“May” is permissive. If the law says an establishment may opt to allow takeout BYO, refusal is not a violation. A business can simply choose not to participate.

By contrast, language such as “shall not refuse,” paired with defined safety conditions, establishes takeout BYO as a statewide norm rather than a voluntary exception.

## Why opt-in is unnecessary and overbroad

Where the statute already allows refusal based on reasonable food safety or operational feasibility concerns, it already protects legitimate risk-management needs. An opt-in structure is not a targeted safety safeguard. It gives establishments a categorical ability to refuse takeout BYO for any reason or no reason at all.

That is a much broader power than a case-specific refusal standard. It shifts takeout BYO away from a clear statewide authorization and back into discretionary participation.

## Why liability concerns do not justify opt-in

The current draft already includes liability protection for good-faith compliance. That addresses another common concern directly.

The stronger structure is therefore straightforward: clear statewide authorization, narrow case-specific refusal, and good-faith liability protection, without an added opt-in layer that weakens enforceability.

## Why broad rulemaking adds implementation risk

Broad “implementing regulations” language can shift the real policy decision into a later administrative process. That creates another point where timelines, stakeholder pressure, or added conditions can delay or narrow the effect of the statute.

This matters especially because New York already has a known retail barrier in 1 NYCRR § 271-8.3(e), a provision that has been cited as a basis for refusing customer-supplied containers in retail food contexts. A stronger approach is to direct targeted code alignment to remove that barrier, rather than rely on open-ended rulemaking that could delay or dilute implementation.

## Why optional rights produce optional notice

If the underlying right is discretionary, the signage requirement has no teeth where businesses decline to participate — producing exactly the information gap that mirrors the access gap.

## Combined effect

Together, “may opt-in” and broad rulemaking produce a weaker structure:

- takeout BYO remains optional rather than a default lawful practice
- implementation can be delayed or narrowed in rulemaking
- public access becomes uneven and difficult to enforce statewide

## Preferred structure

A stronger approach is to establish takeout BYO as a clear statewide authorization in statute under defined conditions, such as reasonable visual inspection and no-contact transfer.

Nothing in this approach requires an establishment to fill an obviously unsafe or infeasible container. It preserves case-specific judgment while removing the blanket ability to refuse takeout BYO as a category.

The statute should also:

- allow case-specific refusal only for reasonable food safety or operational feasibility concerns
- provide liability protection for good-faith compliance
- direct targeted coordination with the NYS Department of Agriculture and Markets to remove the known retail barrier in 1 NYCRR § 271-8.3(e)
- include explicit anti-backsliding language stating that any resulting regulation or code provision may not be more restrictive than the statute

In the alternative draft circulated by the Kelles office, if § 7, the rulemaking authority section, is retained, anti-backsliding language should appear there as an explicit limit on agency authority. Zero Waste Ithaca’s proposed amendment addresses this directly in proposed § 4, the coordination section, by stating that any resulting regulation or code provision shall not be more restrictive than the statute.