Mayor vetoes Bill 2491

LĪHU'E – Mayor Bernard P. Carvalho, Jr. has vetoed Bill 2491, Relating to Pesticides and Genetically Modified Organisms, which was passed by the County Council on October 16.

“I have always said I agree with the intent of this bill to provide for pesticide use disclosure, create meaningful buffer zones and conduct a study on the health and environmental issues relating to pesticide use on Kaua‘i,” stated the Mayor. “However, I believe strongly that this bill is legally flawed. That being the case, I had no choice but to veto.”

The Mayor has released the opinion on 2491 drafted by the Office of the County Attorney, which was delivered to him on October 24.

“Since receiving the opinion I’ve spent hours and hours understanding the points raised and questioning our attorneys on the legal issues,” he said. “While I believe a veto is necessary, we can and will find legal means to address these important health and safety issues.”

(more)
In his veto message, the mayor urges the council to move forward quickly on funding the joint fact finding study group, which is the first step toward conducting an environmental public health impact study (EPHIS). The study could be recommended via a resolution that is slated for next week’s council agenda. He also describes actions being taken by the Governor and the State Department of Agriculture to address buffer zones and pesticide use notification.

“I truly believe in my heart that Kaua‘i can accomplish anything through cooperation, collaboration, and by working together in the spirit of aloha,” said the mayor. “This does not invalidate the hard work that has gone into the crafting of 2491. We are moving forward and we will continue to move forward with or without the bill.”

The full text of the mayor’s message, along with the attorney’s opinion can be found on the county’s website: www.kauai.gov.

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October 31, 2013

Honorable Jay Furfaro, Chair
And Members of the Kaua‘i County Council
4396 Rice Street
Līhu‘e, Hawaii 96766

Re: Bill 2491, Draft 2

Dear Chair Furfaro and Councilmembers:

Aloha! Your deliberations on the referenced bill have been closely followed by me and members of my administration. Along with you, we have listened through hours of testimony, pored over volumes of emails, letters, studies, legal citations and data, and have engaged in numerous discussions with a wide range of stakeholders over the issues related to Bill 2491.

Public and private outcry for me to either pass the bill or veto the bill has been continuous since the council’s vote to approve the bill in the early morning hours of October 16. Since the measure was delivered to me for action the following day, I have engaged in more due diligence and more than a fair amount of soul searching. In addition, a comprehensive legal review of the bill as amended has taken place.

Today I have come to a decision. My decision is to veto Bill 2491.

I do not make this decision lightly, and I know that it will be controversial. However, I believe it is the right thing to do given the circumstances before me.

First, I want to make clear that I agree fully with the general intent of this bill. I believe there should be pre- and post-disclosure of pesticide use, and that buffer zones of some meaningful kind should be established in conjunction with disclosure. I also believe that the study as proposed is the most important piece of this legislation, as it can better guide us to the best decisions relating to buffer zones and other needed protections.
However, one of the issues with Bill 2491 as it stands today is that it does not directly address pesticide buffer zones. Instead criminalizes the growing of any kinds of crops on agricultural land regardless of whether or not pesticides are used on said crops. It also contains other legal flaws, which I will address in this communication. The bottom line is, I cannot in good conscience support this measure.

As I have said all along, I truly believe that we could have accomplished these goals faster and in a legally sound manner by working cooperatively with the state, which has clear legal authority over buffer zones and pesticide disclosure. A deferral would have given us time to make something happen through the current regulatory framework, and I still believe that could have been accomplished in a timely manner.

Based on the legal opinion provided to me by the county attorney, it is evident that Kaua‘i does not currently have the legal authority to enact most of what is contained in 2491.

While there are those who think that legal concerns should not prevent me from allowing Bill 2491 to become law, I cannot escape the fact that I am the chief executive officer of the County of Kaua‘i. As such, I have taken an oath of office to uphold the laws of the County of Kaua‘i, the State of Hawai‘i and the United States of America. Therefore, it would be a dereliction of duty for me to allow the bill to become law when its legality is so questionable.

Let me be clear: the opinion speaks not to whether 2491 is good for our community or bad for our community; rather, it speaks to whether or not this bill is legally defensible.

There is much to agree on within Bill 2491, but we must follow a correct and legal path toward reaching our goal of protecting the health and safety of our community. I do not believe 2491 is the correct and legal path, and therefore I believe it is my responsibility to veto the bill.

Permit me to briefly summarize the legal points that are most troubling:

- Existing federal and state law appears to impliedly pre-empt the county from enacting its own pesticide laws. Implied pre-emption is the principle that federal or state law can supersede or supplant state or local law, if the local law stands as an obstacle to accomplishing the full purpose and objectives of the overriding superior law. In this case, the State of Hawai‘i Department of Agriculture has been given authority by the federal government to regulate pesticides. Our attorneys explain that the state pesticide law is a complex and comprehensive regulatory framework that “indicates a purpose to occupy an entire field of regulation,” thereby pre-empting a local authority from enacting such laws. In the opinion, our attorneys state that “a reviewing court would likely find that Bill No. 2491 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature under the Hawai‘i Pesticides Law.”
• Bill No. 2491 will also likely be challenged as an invalid exercise of the County’s police power, an invalid exercise of the County’s ability to regulate public nuisances, and/or a violation of the Hawai‘i Right to Farm Act’s prohibition against any public official “declaring” such farming operations a nuisance. The Right to Farm Act states “[n]o court, official, public servant, or public employee shall declare any farming operation a nuisance for any reason if the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices. There shall be a rebuttable presumption that a farming operation does not constitute a nuisance.”

These legal arguments and others have been discussed during the council proceedings, and are underscored by numerous instances of case law across the country, with two in particular originating from Hawai‘i: In re Application of Anamizu (City and County of Honolulu) and Citizens Utilities Co. v. County of Kaua‘i.

A third legal issue has surfaced with the council’s decision to move implementation and enforcement from the Department of Public Works to the Office of Economic Development (OED). The County’s Charter, like the United States Constitution and the State of Hawai‘i Constitution, contemplates a separation of power, with each branch having its own functions. The council has legislative power. The mayor has executive power. OED is an agency within the executive branch with the mission to “create economic opportunities”; it is not a regulatory agency. With this bill, the council would be in violation of the Charter by assigning new functions to OED. Charter Section 6.02, specifically says that the mayor may assign new functions to existing agencies. The council’s invasion into the executive branch with this bill not only runs contrary to the Charter, it also highlights the separation of power’s purpose as a safeguard, given that OED is not equipped to manage the bill’s requirements.

What I’ve presented is just a cursory view of the main legal questions that have led me to decide that I must veto this bill. In order to be fully transparent, I am releasing the county attorney’s opinion in its entirety. Our community is deeply divided over 2491 and we can’t allow that to continue. It is my hope that after reviewing the opinion, the reasons for this action will be clear, and we can then focus on finding common ground and moving forward.

In the interest of finding that common ground, I would like the council to know that it is my intention to support the resolution calling for an environmental public health impact study (EPHIS). We would like to begin working with the council as soon as possible to identify funds that can be used to get the EPHIS joint fact finding study group underway.
Additionally, the State Department of Agriculture has been working with the five companies that would be impacted by this bill on voluntary pesticide disclosure and buffer zone guidelines. We anticipate an announcement of the product of their efforts in two to three weeks. Governor Abercrombie has informed me that he will be seeking funding for additional inspectors that could service Kauai.

These efforts are positive steps forward in realizing the goals of the bill, until the EPHIS is complete and its recommendations can be adopted by the appropriate parties.

In conclusion, I would like to state that, despite this veto, I absolutely believe that the spirit of 2491 will be implemented on Kaua’i in accordance with applicable federal, state and county laws and regulations. It would be my preference to achieve the goal through cooperation and understanding, instead of through adversarial legal action. That is the true Kaua’i way, and would be an accomplishment worthy of all of our sincere effort.

Respectfully submitted,

[Signature]

Bernard P. Carvalho, Jr.
Mayor

cc: Al Castillo, County Attorney

COUNTY OF KAUA’I

OFFICE OF THE COUNTY ATTORNEY

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October 24, 2013

TO: Bernard P. Carvalho, Jr., Mayor

FROM: Mauna Kea Trask, Deputy County Attorney

SUBJECT: Memorandum Requesting Copy of Office of the County Attorney’s Written
Legal Review/Opinion Regarding Proposed Draft Bill No. 2491 as
amended (Tracking No. 13-1250)

Request

In your memorandum dated October 14, 2013 you requested:

(1) Legal advice pertaining to the legality of Bill No. 2491 in its current form;

(2) What, if any, legal issues arise in the assignment of the regulatory
requirements of Bill No. 2491 to OED?.

This office defines “legality” similarly to “legal sufficiency” in that it is taken to
mean the proposed bill contains all the requisites necessary to create a valid bill or
ordinance. A finding of “legality” does not mean that a judge cannot or will not declare
the ordinance void or illegal as a judge may interpret the relevant statutes, case law
and/or facts, differently from the interpretation given by this office today or the ordinance
may be applied unconstitutionally or in a manner that may render it susceptible to
challenge. Conversely a finding of “illegality” does not mean a reviewing court will not
apply the law differently and or evaluate the facts and circumstances in such a way as
to render the ordinance legal.

This opinion is based on the current state of the law and the facts and
circumstances as known to the County Attorney’s Office at the time of rendering this
opinion. If the facts or circumstances as understood and or the law should change said
changes may affect the advice and conclusions contained herein.
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I. Introduction

In order to provide a factually accurate context to the instant Bill, the Office of the County Attorney has conducted extensive legal and historical research on agriculture in Hawai‘i and its regulation. The following is a summary of both the historical context of the agricultural industry in Hawai‘i and current Federal and State regulatory scheme pertaining to pesticides and GMO products in the United States and the State of Hawai‘i:

a. Agriculture in Hawai‘i and Regulation Thereof.

Historical Overview of Agriculture in Hawai‘i.

The history and development of agriculture in Hawai‘i can basically be understood as progressing through six general stages. The first was pre-contact agriculture, followed by; provision of provender for seafaring vessels; sandalwood; support for the whaling industry; large plantation agriculture; and presently, scientific agriculture. Although very different from one another, each one of these agricultural stages was important to the Hawaiian economy and each had a substantial effect on the history of the Hawaiian Islands and its people.

Pre-contact agriculture was the basis of Hawaiian society and was regulated under the “kapu” system. Because there was no need for the development of a currency based economy and without the western concept of land ownership the agricultural industry supported the indigenous political structure. In the Hawaiian Islands agriculture was conducted differently on lands where there were streams of water and on dry lands. On lands supplied with running water agriculture was easy and could be carried on at all times. Malo, David, Hawaiian Antiquities “Moʻolelo Hawai‘i”, 1838. Pg. 204, ch. 39, paragraph 2. On the “kula” lands, such lands as were dry and inaccessible to water except from irrigation, farming was a laborious occupation and called for great patience being attached with many drawbacks. On some of these were grubs, or caterpillars, or blight, hauoki (frost), or kahe (freshets), or the sun was too scorching, besides which there were many other hindrances.” Malo, David, Hawaiian Antiquities “Moʻolelo Hawai‘i”, 1838. Pg. 204, ch. 39, paragraph 3. Pre-contact agriculture lasted approximately 1,028 years from 750 AD to 1778.

From approximately 1778 to 1800 Hawaiian agriculture supported the native population as well as provided provender for seafaring vessels. The publishing of the official account of Captain Cook’s last expedition in 1784 marked Hawai‘i’s entrance into foreign commerce and the foreign marketplace. Fur traders stopping in the islands on their way from the American North West to China wrote in 1792 about what a happy discovery Hawai‘i was as they were able to restock their ships with provender and refresh their crew with island hospitality. E. Joesting, A Pictorial History of Hawai‘i, Bishop Museum Press, 1969. As in Cook’s time, the early traders could purchase provender for trinkets. But the Hawaiians learned fast: by 1800 every foreigner was complaining about the high cost of living in the islands.” E. Joesting, id.
The next agricultural development came with the establishment of the sandalwood industry. Beginning with a rocky start in 1791 sandalwood quickly became the largest industry in Hawaii. Once traders distinguished true Hawaii sandalwood they found an eager market for it. In 1805-1807 Canton imported approximately 119,970 lbs. of sandalwood, from 1811 – 1812 Canton imported 2,537,498.80 lbs. O.A. Bushnell, *A Pictorial History of Hawaii*, Bishop Museum Press, 1969. The best years of the sandalwood trade were between 1810 – 1818. Understanding the value of the product, Kamehameha I put a Kapu on the trees and made trading in sandalwood a royal monopoly. O.A. Bushnell, *Id.* After Kamehameha's death in 1819, Liholiho, Kamehameha II, permitted the high chiefs to share in the sandalwood trade. The eager chiefs conserved neither trees nor people and as a result whole villages of commoners were driven into the mountains to cut sandalwood and to carry the logs to the seashore. Within a few years both resources were depleted: thousands of commoners were dead from exposure, famine, and disease; and the "golden trees" were almost exterminated. By 1830 good sandalwood was difficult to find; by 1844 the scrawny remnants were no longer marketable." O.A. Bushnell, *Id.*

During the sandalwood years the whaling industry also thrived in the islands. From 1830 to 1844 the time it took a whaling ship to take its catch increased from 2 years to three to four years. Whalers would break up the long voyage by stopping over in Hawaii two times a year as they followed the whale pods to northern and southern waters. This bi-annual pit stop had a "healthy" effect upon the kingdom's economy." New businesses were established for supplying the whaler's needs; a corps of carpenters, blacksmiths, and sail makers were attracted to the ports. Agriculture was stimulated and cattle ranches were started. O.A. Bushnell, *Id.*

In 1835, with the leasing of a thousand acres of land in Koloa Kauai by Kauikeaouli (Kamehameha III) to Ladd and Company, the plantation agricultural industry began. Nothing could overstate the effect that large plantation agricultural had on Hawaii and its people. At the time Ladd and Company claimed that their Koloa experiment was the most important cause of the constitution of 1840, the first constitution of Hawaii. By 1847 eleven plantations across the kingdom exported almost 300 tons of raw sugar compared to the 4 tons in 1835.

In 1855, Alexander Liholiho, Kamehameha IV, in a plan to stem the cataclysmic decrease of the Hawaiian population, asked the Hawaii legislature to support his plan to reinvigorate the Hawaiian population by encouraging commerce and agriculture, improving harbors and roads, building better schools to better prepare the healthy for life in the modern world, and establishing hospitals to care for the sick. By 1864 plantations had become so successful that there were not enough Hawaiian workers to work them. Thus with the support of Kamehameha IV, in 1865 the first wave of 522 Chinese contract laborers came to Hawaii to work the plantations.

By the late 1800s plantation agriculture was the most powerful economic and political force in Hawaii and it was these precise business interests, with the support of the U.S. military, that illegally overthrew the independent nation of Hawaii in 1893. Pub.L. 103–150, 107 Stat. 1510, S.J.Res. 19, enacted November 23, 1993. These
same plantation magnates formed the new Republic of Hawaii which shortly became a territory of the U.S. via the passage of the Newlands Resolution in 1898. By the turn of the century sugar was still king in Hawaii. However, other crops like pineapple and coffee were also thriving. So, with hope farmers attempted numerous other ways to add to the islands economy. O.A. Bushnell, Id. Indefatigably they tried to produce exportable rubber, sisal, tobacco, copra, and exotic fruits. O.A. Bushnell, Id. Inevitably hit by high labor costs, bad weather, foreign competition, or hordes of pests, both animal and vegetable, they failed. O.A. Bushnell, Id. Sugar companies or the waiting jungle took over their plantations. In 1934, with the passage of the Jones-Costigan act, Hawaii's agricultural exports were subject to new deal quotas imposed by the U.S. Congress. This depression era legislation applied federal control to agricultural production and had a negative impact both on business and Hawaii's perception as being treated as second class citizens even as a U.S. territory. O.A. Bushnell, Id. The Jones-Costigan act coupled with the effect of the Massie case arguably lead to the establishment of Hawaii as the fiftieth state in 1959.

Throughout the mid 1900s agriculture dominated the Hawaii economy. However, even then further expansion was expected to slow because of increasing land costs, even on relatively un-crowded neighbor islands; themed to import expensive high protein feed for cattle and poultry, the reluctance of the population to forsake cities for farms; unreliable and costly inter-island transportation facilities and always the bane of the farmers existence, fluctuation in price. O.A. Bushnell, Id. In order to combat these factors the agricultural industry in Hawaii looked to science to keep the industry viable. By the 1970s Hawaii agriculture was considered the most scientifically advanced in the world. O.A. Bushnell, Id. Utilizing geneticists, physiologists, plant pathologist etc., Hawaii agriculture was able to maintain its viability in the face of increasing competition from domestic and foreign producers, and rising costs of land, machines and labor at home. O.A. Bushnell, Id. However, by the late 1980s the large plantation era in Hawaii agriculture was past. In an effort to anticipate what agriculture would look like in the future Hawaiian planters back then looked to the benefits of science. "Farms of the future," they said, "probably will be less numerous, but bigger, more mechanized, and more scientific." O.A. Bushnell, Id.

Today Hawaii's agriculture industry is "economically" dominated by large scientifically based agricultural research farming operations. This agricultural industry takes advantage of the Hawaiian climate and its many growing cycles and is now very profitable in the islands. Although the popular support of science based agricultural has retracted over the past twenty years, it is in arguable that the state of the present agriculture industry was anticipated to occur in Hawaii and was expected to be the specific form of agriculture in Hawaii at this time.

Regulation of Agriculture in Hawaii.

A viable and robust agricultural industry in Hawaii has been legally declared to be in the best interest of the public and support thereof is established public policy. See Hawaii State Constitution Article 11, section 3, Agricultural Lands; H.R.S. 226-7,
Objectives and policies for the economy—agriculture; and the Hawai‘i Right to Farm Act, H.R.S. 165-3 Declaration of public purpose.

Because of the strong policies and legal support for agricultural pursuits in Hawai‘i, both primary and accessory agricultural uses and developments that pertain to the planting, cultivating, harvesting, and processing of crops; and the farming or ranching of any plant or animal species are generally allowed on agriculturally zoned lands without any required permit both at the state and county levels. This is reflected in HRS chapter 205 and the County of Kaua‘i Zoning Ordinance ("CZO").

The County regulates uses and developments of agricultural land via its' zoning power as stated in HRS 46-4. According to HRS 46-4, “zoning in [Kaua‘i] means the establishment of districts of such number, shape, and area, and the adoption of regulations for each district to carry out the purposes of [HRS 46-4].” In establishing or regulating the districts, the statute states, “full consideration shall be given to all available data as to soil classification and physical use capabilities of the land to allow and encourage the most beneficial use of the land consonant with good zoning practices”. See HRS 46-4. It should be stated that according to Ordinance 935, section 8-2.3 both intensive agriculture and orchards and nurseries are generally permitted uses within agriculture zoned lands. Furthermore under HRS 205-2 (d) (1) agricultural districts shall include: activities or uses as characterized by the cultivation of crops, crops for bioenergy, orchards, forage, and forestry.” Currently no laws in the State or County exist that prohibit either the growing of crops or the conducting of other agricultural pursuits within agriculturally zoned lands.

What this means is that there are no restrictions on the growing of crops with or without the use of pesticides, herbicides, or fungicides. The definition of agricultural activity is broad in scope and does not create a distinction between crops on which pesticides, herbicides, or fungicides can be used. As such, under the current zoning laws in the State of Hawai‘i, agricultural land can be used for agricultural activities, regardless of pesticides, herbicides, or fungicides. Buffer zones on the planting of crops would impose the kind of restriction that would conflict with valid, traditional laws, and the stated goal of having a viable and robust agricultural industry in Hawai‘i.

b. Regulation of Pesticides

In the United States, the Federal Environmental Protection Agency (EPA) and the states (in the State of Hawai‘i, the State Department of Agriculture) regulate pesticides via registration, licensing and use statutes. Both the EPA and the states receive their authority to regulate pesticides under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Additionally, under the Federal Food Drug and Cosmetic Act (FFDCA), EPA establishes tolerances (maximum legally permissible levels) for pesticide residues in food. Under the Endangered Species Act (ESA), the EPA protects endangered and threatened plants and animals (listed species) and the habitats upon which they depend. The ESA requires the EPA to ensure that any action they authorize, fund, or carry out, will not likely jeopardize the continued existence of any
listed species, or destroy or adversely modify any critical habitat for those species. EPA's Endangered Species Protection Program (ESPP) helps promote the recovery of listed species. The ESPP is a program designed to determine whether pesticide use in a certain geographic area may affect any listed species. If limitations on pesticide use are necessary to protect listed species in that area, the information is relayed through Endangered Species Protection Bulletins.

Federal law requires, before selling or distributing a pesticide in the United States, that a person or company must obtain registration, or license, from EPA. Before registering a new pesticide or new use for a registered pesticide, the EPA must first ensure that the pesticide, when used according to label directions, can be used with a reasonable certainty of no harm to human health and without posing unreasonable risks to the environment. To make such determinations, the EPA requires more than 100 different scientific studies and tests from applicants. Where pesticides may be used on food or feed crops, the EPA also sets tolerances (maximum pesticide residue levels) for the amount of the pesticide that can legally remain in or on foods.

States have authority under Section 24(c) of FIFRA to add uses to pesticides based on special local needs. States may not register new active ingredients under Section 24(c). Other federal agencies or an authorized state official may request that the EPA allow the use of an unregistered active ingredient or an additional use for a registered pesticide to respond to emergency conditions under Section 18 of FIFRA for a specific period of time. The EPA may approve or disapprove this request. The Section 18 database includes records for all Section 18 Emergency Exemptions received by the EPA.

The Pesticide Registration Improvement Act (PRIA) of 2003 establishes pesticide registration service fees for registration actions in three pesticide program divisions: Antimicrobials, Biopesticides and Pollution Prevention, and the Registration Divisions.

The process that the EPA follows to register pesticides revolves around the protection of human health and the environment. The EPA has several programs in which pesticides are reviewed to meet such health and safety standards, including re-registration, tolerance reassessment, registration review, and special review. In 2006, the EPA initiated a new program called registration review to reevaluate all pesticides on a regular cycle. The program's goal is to review each pesticide's active ingredient every 15 years to make sure that as the ability to assess risks to human health and the environment evolves and as policies and practices change, all pesticide products in the marketplace can still be used safely.

The Federal Food, Drug, and Cosmetics Act (FFDCA) as amended by the Food Quality Protection Act of 1996 (FQPA) called for reassessing existing tolerances (maximum limits for pesticide residues in food) and tolerance exemptions to ensure that they meet the safety standard of the law. The EPA integrated re-registration and tolerance reassessment to accomplish the goals of both programs most effectively. The law required the EPA to give priority to the review of those pesticides that appear to pose the greatest risk to public health, and to reassess nearly 10,000 tolerances. The
EPA had completed more than 99% of tolerance reassessments by the end of 2006. The EPA may initiate the Pesticide Special Review process when it discovers that the use of a registered pesticide may result in unreasonable adverse effects on people or the environment. Unlike the re-registration and registration review processes, the special review process usually involves intensive review of only a few or just one potential risk concern. The review involves evaluating existing data, acquiring new information and/or studies, assessing the identified risk, and determining appropriate risk reduction measures.

States may be delegated primary enforcement responsibility for pesticide use violations under FIFRA. The states have this authority when they have adopted and are implementing pesticide use regulations or when they have entered into a cooperative agreement with the EPA for specific pesticide enforcement. Due to the implementation of HRS Chapter 149A the State of Hawai‘i has primary enforcement authority of pesticide regulation under FIFRA.

In the State of Hawai‘i, the state Department of Agriculture (DOA) is the state agency with the authority to regulate pesticides under HRS Chapters 141 and 149A. Under the authority of HRS Chapter 149A the DOA regulates Pesticide Licensing and Sales, Pesticide Use, and provides for Violations, Warning Notice, and Penalties pertaining to non-compliance with HRS 149A. HRS Chapter 149A also creates an advisory committee composed of but not limited to the chairperson, or the chairperson’s designated representative, who shall head the committee and one representative each from the Department of Health, Department of Land and Natural Resources, University of Hawai‘i College of Tropical Agriculture and Human Resources, sugar industry, pineapple industry, Hawai‘i Farm Bureau Federation, pesticide industry, structural pest control industry, an environmental organization, a citizen group, and a landscape professional. The advisory committee shall advise and assist the departments in developing or revising laws and rules to carry out and effectuate the purposes of HRS Chapter 149A and in advising the departments in pesticide problems.

In July, 2013, HRS § 149A was amended to include a new section regarding restricted use pesticide reporting to the Hawai‘i State DOA. See Act 105, H.B. No. 673. The purpose of the Act is to address the potential public health and environmental issues related to pesticides by requiring: the online publishing of certain restricted use pesticide records, reports, or forms; and a study of other states' reporting requirements for certain pesticides. The new section also requires the legislative reference bureau to conduct a study on pesticides that includes: whether other states impose any type of reporting requirements on pesticides that do not fall within the definition of a restricted use pesticide; and if so, the details of the reporting requirement and any other relevant information, to the extent ascertainable. There is no language in HRS Chapter 149A expressly prohibiting the various Hawai‘i counties from regulating pesticides, nor is there any express language in HRS Chapter 149A granting counties the authority to regulate pesticides.

Pursuant to the authority of HRS Chapter 149A-33 the DOA has promulgated Administrative Rules under Title 4, subtitle 6, Chapter 66. Pursuant to HAR § 4-66-1
the objectives of these administrative rules are to, “implement the requirements of Chapter 149A which provides for the registration, licensing, certification, record keeping usage, and other activities related to the safe and efficacious use of pesticides.” Pursuant to HAR § 4-66-3 the head of the Division of Plant Industry, Hawai‘i State DOA, or any officer or employee to whom authority has been duly delegated is authorized to administer and enforce the provisions of the HARs. Therefore, the counties are not expressly prohibited, nor are they expressly authorized to regulate pesticides under the current set of administrative rules.

c. Regulation of “Genetically Modified Organisms”

Regulation of GMO crops in the United States at the Federal level is divided among three regulatory agencies: the EPA, the Food and Drug Administration (FDA), and the U.S. Department of Agriculture (USDA).

The FDA is responsible for regulating the safety of GM crops that are eaten by humans or animals. In 1992, the FDA issued Policy Statement 22984 (“Statement 22984”) regarding “[f]ood for human consumption and animal drugs, feeds, and related products: Foods derived from new plant varieties.” Statement 22984 was a clarification of the FDA’s interpretation of the FFDCA, with respect to new technologies to produce foods, and reflected FDA’s current judgment based on new plant varieties then under development in agricultural research. The FDA promulgated Statement 22984 to ensure that relevant scientific, safety, and regulatory issues are resolved prior to the introduction of such products into the market place. In Statement 22984 the term “genetic modification” (GM) means the alteration of the genotype of a plant using any technique, new or traditional. The FDA chose to use the term “modification” in a broad context to mean the alteration in the composition of food that results from adding, deleting, or changing hereditary traits, irrespective of the method. For this reason the FDA considers the term “Genetic Engineering” (GE) to be the more precise term to describe plants that have been modified using modern bio-technologies compared to those modified through traditional means.

According to the policy established in 1992, FDA considers most GM crops as “substantially equivalent” to non-GM crops. In such cases, GM crops are designated as “Generally Recognized as Safe” under the FFDCA and do not require pre-market approval. If, however, the insertion of a transgene into a food crop results in the expression of foreign proteins that differ significantly in structure, function, or quality from natural plant proteins and are potentially harmful to human health, the FDA reserves the authority to apply more stringent provisions of FFDCA requiring the mandatory pre-market approval of food additives, whether or not they are the products of biotechnology.

In 1997, the FDA established a voluntary consultation process with GM crop developers to review the determination of “substantial equivalence” before the crop is marketed, such as assessing the toxicity and allergenicity of the gene product and the plant itself. If the data in the food-safety assessment are satisfactory, the FDA notifies the developer that marketing of the crop may proceed.
The EPA also regulates biopesticides, including Bt toxins, under the FIFRA. If a crop is genetically engineered to carry a gene for a Bt toxin, EPA requires the developer to conduct a food-safety analysis to ensure that the foreign protein is not allergenic and verify that the toxin is safe for the environment.

The USDA’s Animal and Plant Health Inspection Services (APHIS) regulates GM crops under the Plant Protection Act of 2000. The Act defines “plant pests” as organisms that cause disease, injury, or damage to plants or plant products, including viruses, bacteria, fungi, and parasitic plants. GM plants are regulated under the Plant Protection Act if they were created through gene transfer with Agrobacterium tumefaciens, which is considered a plant pest, or if they incorporate DNA from a plant pest (such as a terminator gene).

The USDA regulates GM plants either under a permit or a notification process. For simple field trials of a Bt crop, such as Bt corn, the notification process is used, which is usually a formality. The company gives APHIS notice of the trial and agrees to follow certain rules, and USDA usually signs off. In contrast, field trials of GM crops that entail a higher risk, such as those that are highly outcrossing or that remain in the ground for a long time, require a permit. For field trials of GM crops that produce pharmaceutical or industrial chemicals, a permit is always required. The permitting process is more or less extensive, requiring either an Environmental Assessment or an Environmental Impact Statement.

When a company decides that it wants to commercialize a GM crop and produce seed for farmers to grow, it can petition APHIS for deregulated status. This process requires submitting risk-assessment data to demonstrate that the crop does not pose a plant-pest risk. The relevant data must be made public and include susceptibility to disease and insect pests, weediness, effects on non-target organisms and beneficial organisms, and the risk of gene flow to wild or weedy relatives. After the 2000 ProdiGene incident, USDA adopted the policy that pharma crops entail inherent risks and hence require a higher level of scrutiny than other GM crops. As a result, pharma crops are not eligible for deregulated status but must remain under permit even at the commercial stage.

According to the Plant Protection Act of 2000 7 U.S.C. § 7701, et seq. (PPA), the U.S. Congress has found that the detection, control, eradication, suppression, prevention, or retardation of the spread of plant pests or noxious weeds is necessary for the protection of the agriculture, environment, and economy of the United States. Furthermore, Congress has found that biological control is often a desirable, low-risk means of ridding crops and other plants of plant pests and noxious weeds, and its use should be facilitate by the Department of Agriculture, other Federal Agencies and states whenever feasible. The PPA provides that the Secretary of the Department of Agriculture may issue regulations “to prevent the introduction of plant pests into the United States or the dissemination of plant pests within the United States.” 7 U. S. C. §7711(a). Pursuant to that grant of authority, APHIS promulgated regulations that presume genetically engineered plants to be “plant pests”—and thus “regulated articles”
under the PPA—until APHIS determines otherwise. However, any person may petition APHIS for a determination that a regulated article does not present a plant pest risk and therefore should not be subject to the applicable regulations. APHIS may grant such a petition in whole or in part.

In the State of Hawai‘i, the state Department of Health regulates food and food safety under HRS Chapter 328. Currently, there are no Hawai‘i state laws pertaining to GM, GE, or GMO products.

II. Legal Issues

The Office of the County Attorney has determined that the following legal issues will generally apply to the bill in its current form; (1) compliance with County Charter requirements pertaining to bills/ordinances; (2) whether or not the County generally has the authority to enact police power regulations and to regulate nuisances; (3) if the County does have the general power to regulate under the police power and nuisances, whether the specific draft bill is a valid exercise of said powers specifically as they pertain to this bill in its current form; and (4) whether or not the draft bill is preempted by federal or state law.

Some of the individual sections of the draft bill contain nuanced issues that specifically pertain to that section and will be discussed individually regarding said sections.

a. Compliance with Charter Requirements of Bills/Ordinances.

Bill No. 2491 seeks to use the County’s police power and its authority to regulate public nuisances in order to address public concerns pertaining to the agricultural activities of large GMO companies located on Kaua‘i.

Pursuant to the Kaua‘i County Charter section 4.02 B., “every ordinance shall embrace but one subject, which shall be expressed in its title.” Pursuant to Kaua‘i County Charter section 4.02 C., “[n]o bill shall be so amended as to change its original purpose. Every bill, as amended, shall be in writing before final passage.” This rule is in accord with other, similar jurisdictions. According to American Jurisprudence,¹ the law on the “one subject rule” is as follows:

The rule in some jurisdictions is that a municipal ordinance must contain only a single subject.² The term "subject" as used in such provisions is given a broad and extended meaning to allow the legislative municipal body full scope to include in one act all matters having a logical or natural connection. If all parts of an act relate directly or indirectly to the general subject of the act, it is not open to

¹ American Jurisprudence is an encyclopedia of United States law, produced by West.
the objection of plurality. An ordinance violates this proscription only when it contains subjects which are so dissimilar as to have no legitimate connection.

A statute and a city charter providing that an ordinance or resolution cannot contain more than one subject, which is to be expressed in the title, has been held inapplicable to a proposed ordinance and, thus, could invalidate an ordinance proposed by initiative petition only after it was passed by the electorate, such that the one-subject rule did not provide a basis for invalidating the initiative petition.

56 Am. Jur. 2d, Municipal Corporations, Etc., § 290. It may be stated as a general proposition that the expression of subject in the title of an ordinance is sufficient if it calls attention to the general subject of the legislation. It is not necessary that the title refer to details within the general subject, nor those which may be reasonably considered as appropriately incident thereto, and the title is sufficient if it is germane to the one controlling subject of the ordinance. The crucial test of sufficiency of title is generally found in the answer to the question: Does the title tend to mislead or deceive the people or the municipal board as to the purpose or effect of the legislation, or to conceal or obscure the same? If it does, then the ordinance is void; if not, it is valid. Territory v. Dondero, 21 Haw. 19, 1912 WL 1627 Haw.Terr. 1912, citing 28 Cyc. 379, 380.

In the Furubayashi case the court held: "It is sufficient if the title of an ordinance fairly indicates to the ordinary mind the general subject of the act, is comprehensive enough to reasonably cover all its provisions, and is not calculated to mislead; but an act which contains provisions neither suggested by the title, nor germane to the subject expressed therein, is, to that extent void." Territory v. Furubayashi, 20 Haw. 559. (1911).

b. General Authority to Enact relating to County’s Police Power and Regulation of Nuisances

i. Police Power

“The ‘police power’ is the power of a government body to impose laws and regulations or enact ordinances that are reasonably related to the protection or promotion of the public health, safety, or welfare.” 56 Am. Jur. 2d 369. "In exercising its police power, a local legislative body has broad discretion and power.” While the police power has limits, it is very broad, both in determining what the public welfare requires and fashioning legislation to meet the need.” 56 Am Jur. 2d 370, citing Blue

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4 State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 264 Kan. 293, 955 P.2d 1136 (1998); ACI Plastics, Inc. v. City of St. Louis, 724 S.W.2d 513 (Mo.1987).
6 For purposes of this opinion, all citations to American Jurisprudence 2d Edition shall be to the particular section known as "Municipal Corporations, Etc." unless otherwise noted.

Although broad, "[m]unicipalities' statutory police powers are strictly construed." Any doubt concerning the existence of a particular police power is resolved against the municipality. To determine what police power a municipality is granted by the legislature, the court looks to the plain, ordinary, and popular meaning of the statutory language.” 56 Am. Jur. 2d 373, citing Welsh v. Centerville Tp., 1999 SD 73, 595 N.W.2d 622 (S.D. 1999).

"The police power, while broad, is subject to constitutional limits." Even though a municipality has broad authority when it acts under its police powers, it exceeds this authority if it violates any direct or positive mandate of the constitution.” 56 Am. Jur. 2d 374, citing Ventenbergs v. City of Seattle, 163 Wash. 2d 92, 178 P.3d 960 (2008). “The police power does not lessen the protections contained in the United States Constitution, nor does it authorize ordinances that render state constitutional provisions nugatory.” Id., citing Trinen v. City and County of Denver, 53 P.3d 754 (Colo. App. 2002).

ii. Hawai‘i Law on the Police Power

In Hawai‘i no constitutional provision provides that the counties have any explicit powers relating to legislating on public health safety and welfare or “police power”, only that the counties, “shall have and exercise such powers as shall be conferred under general laws.” Hawai‘i Constitution Article 8 Section 1.

The Hawai‘i State Legislature has conferred under general laws the authority to legislate pursuant to the police power with very clear qualifications. HRS § 46-1.5, general powers and limitation of the counties, [s]ubject to general law, each county shall have the following powers and shall be subject to the following liabilities and limitations:

(13) Each county shall have the power to enact ordinances deemed necessary to protect health, life, and property, and to preserve the order and security of the county and its inhabitants on any subject or matter not inconsistent with, or tending to defeat, the intent of any state statute where the statute does not disclose an express or implied intent that the statute shall be exclusive or uniform throughout the State.

Under the Kaua‘i County Charter Section 2.01. Powers. To promote the general welfare and the safety, health, peace, good order, comfort and morals of its inhabitants, the county shall have and may exercise all powers necessary for local self-government, and any additional powers and authority which may hereafter be granted to it, except as restricted by laws of this State. Section 2.01 also recites the same qualifications as stated in HRS 46-1.5 (13), which is essentially a prohibition when preemption or conflict occurs.

So long as the ordinance is related to public safety, health and welfare, the ordinance falls within scope of police power of state. State v. Ewing, 914 P.2d 549, 81 Hawai‘i 156 (1996). The police power of the State is broad and extends to the public safety, health, and welfare. See State v. Lee, 55 Haw. 505, 513, 523 P.2d 315, 319 (1974) (holding statutes “reasonably related to the preservation of public health, safety, morals or general welfare of the public” are within the State’s legitimate exercise of the police power); see also State v. Lee, 51 Haw. 516, 465 P.2d 573 (1970); State v. Diamond Motors, Inc., 50 Haw. 33, 429 P.2d 825 (1967). So long as the ordinance is related to these objectives, the ordinance would fall within the scope of the police power.

iii. General Law on Nuisances

“A municipality may exercise its police power by adopting ordinances to declare and prevent nuisances.”13 “Anything that is detrimental to health or that threatens danger to the persons or property within a municipality may be retarded and dealt with by the municipal authorities as a nuisance.”14 A municipality may “provide criminal penalties for their violation.” City of Virginia Beach v. Murphy, 239 Va. 353, 389 S.E.2d 462 (1990). “Abatement of nuisances, as a means to promote the public health, safety, and welfare, is a valid goal of the municipal police power.”15 “That power is often specifically given to municipalities by their charters or by state law.”16

“The focus of an ordinance dealing with nuisances, such as junkyards, is on the health, safety, and welfare of the general public, and thus such an ordinance is distinguishable from zoning ordinances, which allow preexisting nonconforming uses, or are subject to different due process requirements.”17 “However, a municipality does not have the authority, under its police power, to punish conduct that is a private nuisance.” Murphy, 239 Va. 353, 389 S.E.2d 462.

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15 56 Am. Jur. 2d 392, citing (Gosnell v. City of Troy, Ill., 59 F.3d 654 (7th Cir. 1995); Rental Property Owners Ass'n of Kent County v. City of Grand Rapids, 455 Mich. 246, 566 N.W.2d 514 (1997).
A local legislative body may enact an ordinance declaring that previously lawful activity will thereafter be deemed a nuisance; such legislation will be upheld against a constitutional challenge if it comes within the police power in the sense that it has a real and substantial relation to the public health, safety, morals, or general welfare of the public, and is neither unreasonable nor arbitrary. Litva v. Richmond, 172 Ohio App. 3d 349, 2007-Ohio-3499, 874 N.E.2d 1243 (7th Dist. Jefferson County 2007).

iv. Hawai‘i Law on Nuisance

The State Legislature has specifically granted the County of Kaua‘i to regulate smoke, dust, vibration, or odors which constitute a public nuisance pursuant to HRS §46-17. Section 46-17, “Regulation of certain public nuisances,” provides:

Any provision of law to the contrary notwithstanding, the council of any county may adopt and provide for the enforcement of ordinances regulating or prohibiting noise, smoke, dust, vibration, or odors which constitute a public nuisance. No such ordinance shall be held invalid on the ground that it covers any subject or matter embraced within any statute or rule of the State; provided that in any case of conflict between a statute or rule and an ordinance, the law affording the most protection to the public shall apply, with the exception that:

(1) An ordinance shall not be effective to the extent that it is inconsistent with any permit for agricultural burning granted by the department of health under authority of chapter 342B, or to the extent that it prohibits, subjects to fine or injunction, or declares to be a public nuisance any agricultural burning conducted in accordance with such a permit; and

(2) An ordinance shall not be effective to the extent that it is inconsistent with any noise rule adopted by the department of health under authority of chapter 342F. [L 1974, c 158, §2; am L 1978, c 120, §1; am L 1994, c 5, §1; am L 1999, c 265, §2]

Id. “Nuisances are classified into public nuisances and private nuisances, or sometimes as both public and private. The latter are sometimes called mixed nuisances.” Territory v. Shuji Fujiiwara, 32 Haw. 428 (1935).

“Public nuisance is created where acts or series of acts produce common injury or is subversive of public order, decency, or morals, or constitute obstruction of public rights, or affects rights enjoyed by citizens, notwithstanding number, as part of public.” Marsland v. Pang, 5 Haw. App. 463, 701 P.2d 175 cert. denied, 67 Haw. 686, 744 P.2d 781 (1985). “A nuisance is not a public nuisance unless it is in a public place, a place where the public frequently congregates, or a place where members of the public are likely to come within the range of its influence.” Littleton v. State, 66 Haw. 55, 656 P.2d 1336 (1982).
"If the act or use of property is in a remote and unfrequented locality, it will not, unless malum in se, be a public nuisance, but if the nuisance affects a place where the public has a legal right to go, and where the members thereof frequently congregate, or where they are likely to come within its influence, it will be a public nuisance." Littleton v. State, 66 Haw. 55, 656 P.2d 1336 (1982).

According to Black's Law Dictionary 959 (6th ed. 1990) malum in se is defined as:

an act that is "wrong in itself," in its very nature being illegal because it violates the natural, moral or public principles of a civilized society. In criminal law it is one of the collection of crimes which are traditional and not just created by statute, which are "malum prohibitum." Example: murder, rape, burglary, and robbery are malum in se, while violations of the Securities and Exchange Act or most "white collar crimes" are malum prohibitum.

c. Validity

i. Generally

Generally, jurisdictions around the country agree "that local government units have only such powers as are granted to them by the state, either in their charters or in general laws, and an ordinance enacted without authority is void and without effect."19 "Indeed, a municipality is powerless to enact ordinances except as authorized by statute, and ordinances not in conformity with the municipality's enabling statute will be deemed void." White Deer Tp. v. Napp, 985 A.2d 745 (Pa. 2009). "In addition, a municipality cannot adopt ordinances or resolutions which infringe the spirit of state law, expressly contradict a statute, or are contrary to the legislative intent underlying a statutory scheme." 56 Am. Jur. 2d 302, citing Id. at §§ 315 to 317.

"In determining the validity of a local ordinance, the inquiry is twofold: whether the local government had the power to enact the ordinance; and, if so, whether the ordinance is consistent with the constitution and general law of the state."20 "Motivation does not play any role in analyzing whether a municipal ordinance exceeds a municipality's home rule powers under the state constitution." Mendenhall v. Akron, 117 Ohio St. 3d 33, 2008-Ohio-270, 881 N.E.2d 255 (2008).


In determining validity, we must also consider reasonableness. “A municipal ordinance must be reasonable; that is, it must be fair, general and impartial in operation”\textsuperscript{21}, and must achieve legitimate governmental objectives.”\textsuperscript{22} "Municipalities may rely, in part, on appeal to common sense, in enacting an ordinance.” Com. v. Jameson, 215 S.W.3d 9 (Ky. 2006). “Sufficient clarity required of an ordinance in order to be enforceable is a criterion of reasonableness.”\textsuperscript{23} “Furthermore, a municipal ordinance may not be arbitrary.”\textsuperscript{24} "[e]ven if the city ordinance's ban on phosphate in commercial fertilizers had an effect on interstate commerce, the ordinance had a rational basis, as required by the Commerce Clause, since the ordinance was designed to improve the water quality of the area's lakes and rivers,”\textsuperscript{25} and must be reasonably related to some manifest evil.” Lighthouse Shores, Inc. v. Town of Islip, 41 N.Y.2d 7, 390 N.Y.S.2d 827, 359 N.E.2d 337 (1976) (noting that such evil needs only to be reasonably apprehended); Homes Unlimited, Inc. v. City of Seattle, 90 Wash. 2d 154, 579 P.2d 1331 (1978). “As long as the municipal ordinance is reasonable, that is, it is not arbitrary, the existence of a more reasonable ordinance is irrelevant.” 56 Am. Jur. 2d 303, citing New Jersey Shore Builders Ass'n v. Township of Jackson, 199 N.J. 38, 970 A.2d 992 (2009).

“The validity of a city's attempt to exercise police power by the enactment of municipal ordinances for the protection of public health, safety, morals, and public welfare depends upon whether such ordinances are clearly arbitrary and unreasonable having no substantial relation to public health, safety, morals, or public welfare.” 56 Am. Jur. 2d 303, citing City of Minot v. Central Ave. News, Inc., 308 N.W.2d 851 (N.D. 1981); Downing v. Cook, 69 Ohio St. 2d 149, 23 Ohio Op. 3d 186, 431 N.E.2d 995 (1982). “Where reasonable minds may differ as to whether a particular ordinance has a substantial relationship to the protection of the general health, safety or welfare of the public, there exists an issue of fact which would authorize the passage of the ordinance, and the ordinance must stand.” Id., citing Price v. City of Junction, Tex., 711 F.2d 582 (5th Cir. 1983).

With the above considerations in mind, we must next consider reasonableness in the context of penalties. “Whether a penalty prescribed for the violation of an ordinance is so unreasonable as to render it void depends upon its relation to the seriousness of the offense interdicted. Ordinances have been held void where such penalties are

\textsuperscript{24} 56 Am. Jur. 2d 303, citing Four County (NW) Regional Solid Waste Management Dist. Bd. v. Sunray Services, Inc., 334 Ark. 118, 971 S.W.2d 255 (1998) (an enactment by a local government is not arbitrary if there is any reasonable basis for the enactment); City of Duluth v. Sarette, 283 N.W.2d 533 (Minn. 1979); John v. State, 577 S.W.2d 483 (Tex. Crim. App. 1979); Hart Health Studio v. Salt Lake County, 577 P.2d 116 (Utah 1978); Crop Life America, Inc. v. City of Madison, 373 F. Supp. 2d 905 (W.D. Wis. 2005), order amended, 2006 WL 1467501 (W.D. Wis. 2005) and aff'd, 432 F.3d 732 (7th Cir. 2005)
excessive in view of the offenses which they seek to punish. In other cases, municipal ordinances have been upheld as valid over the objection that the penalties prescribed were so unreasonable as to render them void. Id., citing Guerin v. City of Little Rock, 203 Ark. 103, 155 S.W.2d 719 (1941); Melconian v. City of Grand Rapids, 218 Mich. 397, 188 N.W. 521 (1922).

In addition to being reasonable, "ordinances must be general in their nature and impartial in their operation, in order to be valid." All in all, they must not be discriminatory in favor of one person or class of persons over others. and must operate equally upon all persons who come or live within the corporate limits, as well as for their equal benefit and protection. Nevertheless, an ordinance cannot be declared invalid merely because it works a hardship in a particular case; as long as they affect all similarly situated persons equally." 56 Am. Jur. 2d 305, citing Bizzell v. Board of Aldermen of City of Goldsboro, 192 N.C. 348, 135 S.E. 50, 49 A.L.R. 755 (1926); Shinn v. Oklahoma City, 59 Okla. Crim. 433, 61 P.2d 1126 (1936).

Despite all of the above considerations, "[a]n ordinance which fulfills the requirements of certainty and definiteness still may be deemed constitutionally infirm if its prohibition is overbroad, restricting constitutionally protected conduct." Also, "the fact that an unconstitutional ordinance is limited in geographical scope does not make it any less an abridgement of guaranteed constitutional rights." Boraas v. Village of Belle Terre, 476 F.2d 806 (2d Cir. 1973), judgment rev'd on other grounds, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974).

"Generally, a municipal ordinance must be framed in terms sufficiently clear, definite, and certain so that an average person after reading it will understand when he or she is violating its provisions." While certainty is necessary in order for an ordinance to meet the test of reasonableness, an ordinance which is susceptible of

31 Id., citing City of Louisville v. Fischer Packing Co., 520 S.W.2d 744 (Ky. 1975); von Tiling v. City of Portland, 268 A.2d 888 (Me. 1970)
34 56 Am. Jur. 2d 303.
any reasonable construction which will sustain it will not be declared void for uncertainty.⁵⁶ "Thus, a mere failure to define a phrase in an ordinance does not by itself render the ordinance defective." 56 Am. Jur. 2d 308, citing American Legion, Field Allen Post No. 148 v. Town of Windham, 502 A.2d 484 (Me. 1985).

The test when an ordinance is challenged on the ground of vagueness is whether its language can be understood by a person of normal understanding.⁵⁷ "Vagueness in the constitutional sense is not mere uncertainty, but means that persons of ordinary intelligence are obliged to guess as to what conduct the ordinance proscribes.⁵⁸ "In determining whether an ordinance is void for vagueness, the inquiry must be made in regard to whether the ordinance gives a fair warning to those persons potentially subject to it and whether the ordinance adequately guards against arbitrary and discriminatory enforcement."⁵⁹

"The standard by which it is determined whether an ordinance is vague is whether the ordinance gives a person of average intelligence a fair warning of a prohibited act in definite language." 56 Am. Jur. 2d 309, citing Trice v. City of Pine Bluff, 279 Ark. 125, 549 S.W.2d 179 (1983). "In scrutinizing an ordinance for vagueness the court focuses on the words of the ordinance itself, to extrapolate its allowable meaning." Id., citing Washington Mobilization Committee v. Cullineane, 566 F.2d 107 (D.C. Cir. 1977). "In determining whether a civil or criminal ordinance is sufficiently clear that persons affected can determine what the law requires of them, the same rules of construction apply as would apply to the interpretation of a statute."⁶⁰ "Only a reasonable certainty is required,"⁶¹ and a vagueness challenge may be met by a resort to the common and generally accepted meaning of the statutory language itself, if such meaning is discernible."⁶² "The fact that "marginal" factual situations may arise under an ordinance does not, in itself, render the enactment vague." Id., citing City of St. Petersburg v. Waller, 261 So. 2d 151 (Fla. 1972).

Revisiting the concept of penalties, "[t]he penalty or punishment imposed by an ordinance must be certain and definite, and an ordinance will be declared invalid where the penalty it prescribes is not certain."⁶³ "Nevertheless, as a general rule, it is deemed proper for penal ordinances to leave a margin for the discretion of the court within

⁵⁷ 56 Am. Jur. 2d 309, citing State v. Harris, 309 Minn. 395, 244 N.W.2d 733 (1976); Bitts, Inc. v. City of Seattle, 88 Wash. 2d 395, 544 P.2d 1242 (1976).
certain specified limits.” 56 Am. Jur. 310, citing Arnett v. Cardwell, 135 Ky. 14, 121 S.W. 964 (1909). “An ordinance which does not fix a maximum penalty, although it prescribes a minimum, and thus leaves to the court the power in its discretion to impose any penalty in excess of the minimum, is void for uncertainty.” 43

Although there are instances in which an ordinance may be partially or wholly void, “[g]enerally, the partial invalidity of an ordinance does not necessarily make the remaining provisions of the ordinance ineffective.” 44 “An invalid portion of a statute or an ordinance will result in the entire statute or ordinance being void only when it is such an integral portion of the entire statute or ordinance that the enacting body would have only enacted the legislation as a whole.” 56 Am. Jur. 2d 313, citing Kittery Retail Ventures, LLC v. Town of Kittery, 2004 ME 65, 856 A.2d 1183 (Me. 2004). “However, whether a partial invalidation is appropriate depends on the intent of the city in passing the ordinance and whether the balance of the ordinance can function independently.” 45 “In this regard, a separability provision—that is, a provision in an ordinance that the invalidity of a part of the ordinance shall not affect the remainder—ordinarily indicates an intention of the municipal legislative body that if a part of the ordinance is held invalid this shall not affect the enforceability of the rest of the ordinance.” Id., citing Mealey v. City of Laramie, 472 P.2d 787 (Wyo. 1970).

ii. Validity of Police Power Regulations

“Cities and other local government bodies have broad police powers to enact ordinances to regulate and restrict the activities of its citizens in the interest of their health, safety, and welfare.” 46 “A municipality’s power to pass ordinances to promote the health, safety, morals, or general welfare of the public is broad and not subject to precise definition; however, it must bear a real and substantial relation to the health, safety, morals, or general welfare of the public.” 47

“When passing or amending ordinances in the area of health, human services, police protection, or public safety, municipal bodies are historically accorded wide latitude concerning the evidence on which they rely in making a discretionary decision, including studies from other sources, 48 and the presumption is that the municipality’s action in this regard is based on adequate factual support.” 49

43 Id., citing Sconyers v. Town of Coffee Springs, 230 Ala. 12, 160 So. 552 (1934); Arnett v. Cardwell, 135 Ky. 14, 121 S.W. 964 (1909).
45 Id., citing Desert Outdoor Advertising, Inc. v. City of Moreno Valley, 103 F.3d 814 (9th Cir. 1996).
Related to public health, "municipalities may, in the exercise of their police power, enact ordinances to protect public health."50 "Among the police powers of municipal government, the authority to promote and safeguard public health is a high priority."51 "An ordinance is related to health and welfare, rather than a zoning ordinance, where its primary purpose is to regulate for health concerns, rather than to provide for uniform development of real estate." 56 Am. Jur. 2d 387, citing City of Green Ridge v. Kreisel, 25 S.W.3d 559 (Mo. Ct. App. W.D. 2000). "Ordinances to preserve the public health are liberally construed; the authorities go to great lengths in enumerating the implied powers of municipalities to enact laws to protect the community from infectious and contagious diseases, bad water, nuisances injurious to health, and noxious odors and gases." Id., citing Penn-Dixie Cement Corp. v. City of Kingsport, 189 Tenn. 450, 225 S.W.2d 270 (1949).

"Municipalities must exercise the police power in a reasonable manner,"52 "[t]o pass constitutional muster, all laws enacted pursuant to the police power must be reasonable and not arbitrary."53 "A local police power ordinance is a reasonable regulation if it fairly relates to the health, safety, morals, or general welfare of the public."54

"The analysis of whether a government action is a legitimate exercise of the police power first focuses on whether the goal of the action is within the police power and then on whether the means of achieving that goal are reasonable." City of Concord v. Stafford, 173 N.C. App. 201, 618 S.E.2d 276 (2005). "The ordinance must bear a reasonable relationship to the interest sought to be protected, and the means adopted must constitute a reasonable method to accomplish it."55 "Once the government objective is determined to be legitimate, the exercise of municipal police power need only be reasonable."56 "A police regulation is valid unless it clearly appears that it is unreasonable."57

Beyond that described above, there are further considerations of whether exercise of a municipality’s police power is valid. "To be a valid exercise of a
municipality's police power, the object must be a proper subject of regulation,\textsuperscript{58} and the ordinance must have a real and substantial, or rational,\textsuperscript{59} relation to its purpose.\textsuperscript{60} "An ordinance is not authorized, if there is not any plausible, reasonable, and substantial connection between its provisions and the supposed evils to be suppressed." 56 Am. Jur. 2d 381, citing Urban Imperial Bldg. & Rental Corp. v. Akron, 139 Ohio App. 3d 221, 743 N.E.2d 478 (9th Dist. Summit County 2000).

"A police regulation is valid unless it clearly appears that it does not bear a real and substantial relation to the health, safety, morals, or general welfare of the public.\textsuperscript{61} "A city's attempted regulation, which does not have a clear and present relation to public safety, or imposed where the threat to the public health and safety is remote, may be voided." 56 Am. Jur. 2d 381, citing City of Springfield v. Hashman, 332 Ill. App. 3d 748, 266 Ill. Dec. 321, 774 N.E.2d 427 (4th Dist. 2002).

"Municipal police regulations must also operate in a manner that is not arbitrary\textsuperscript{62}, vague,\textsuperscript{63} discriminatory,\textsuperscript{64} oppressive, or fraudulent. 56 Am. Jur. 2d 381, citing Wright v. Woodridge Lake Sewer Dist., 218 Conn. 144, 588 A.2d 176 (1991).

"Legislation under the police power is under a constitutional limitation that it not be unreasonable, arbitrary, or capricious, and that the means selected have a real and substantial relation to the object to be attained.\textsuperscript{65}

"The police power is an inherent reserved power to subject individual rights to reasonable regulation for the general welfare,\textsuperscript{66} and the fact that an exercise of police power impinges on a private interest does not restrict a reasonable regulation.\textsuperscript{67} "However, it is obviously subordinate to the equal protection and other guarantees of

\textsuperscript{64} Id., citing City of Alliance v. Carbone, 181 Ohio App. 3d 500, 2009-Ohio-1197, 909 N.E.2d 688 (5th Dist. Stark County 2009); Neece v. City of Johnson City, 767 S.W.2d 638 (Tenn. 1989).
\textsuperscript{65} Id., citing New Jersey Shore Builders Ass'n v. Township of Jackson, 199 N.J. 38, 970 A.2d 992 (2009).
\textsuperscript{67} Id., citing Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Government, 131 S.W.3d 745 (Ky. 2004).
the federal and state constitutions, and may not be used to violate a fundamental constitutional right. The standard for evaluating ordinances claimed to be violative of due process or equal protection is whether a rational basis exists for the police power exercised or the classification established by the ordinance. Autotronic Systems, Inc. v. City of Coeur D'Alene, 527 F.2d 106 (9th Cir. 1975).

"A government purpose to control or prevent certain activities that may be constitutionally subject to regulation under the police power may not be achieved by unnecessarily broad means that invade the area of protected freedoms and broadly stifle fundamental personal liberties, when the end can be more narrowly achieved." Accordingly, local police power enactments may not interfere with private rights beyond the necessities of the situation.

"Any interference with the protected rights of the citizens of a municipality must bear a reasonable relationship to the public need served" and not unduly restrict the citizens' constitutional rights. "The police power does not justify interference with a citizen's constitutional rights that is entirely out of proportion to any benefit to the public." To sustain an encroachment on an individual's liberty by a municipal ordinance, there must be an obvious and real connection between the ordinance and its purpose to protect the public welfare, and the municipality must not be able to use a less restrictive means to serve the intended purpose." 56 Am. Jur. 2d 382, citing Priddy v. City of Tulsa, 1994 OK CR 63, 882 P.2d 81 (Okla. Crim. App. 1994).

"The police power may be properly used to regulate the use of private property." "All private property is subject to the police power, and its use may be regulated in the interest of the public health, safety, or welfare."

"A local government has considerable latitude in regulating property rights in ways that may adversely affect the owners." "The police power may be loosely

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70 Id., citing Trinen v. City and County of Denver, 53 P.3d 754 (Colo. App. 2002).
74 Id., citing City of Baton Rouge v. Williams, 661 So. 2d 445 (La. 1995).
described as the power to prevent persons from conducting themselves or using their property to the detriment of the general welfare." 78 "However, a municipality may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable on the use of private property or pursuit of useful activities." 79

"Compensation is required when property is actually taken from the owner and put to a public use, even if that use may enhance the public health, morals, or safety." Hudson v. City of Shawnee, 246 Kan. 395, 790 P.2d 933 (1990); Sezlik v. City of McKinney, 198 S.W.3d 884 (Tex. App. Dallas 2006). See also Am. Jur. 2d, Eminent Domain § 11 (as to when regulation constitutes a taking).

"When asked to review the legality of an ordinance, a court's function is to determine whether the ordinance is within the municipality's conferred discretionary powers and a reasonable use of the police power." 80 Questions that are presented to the court are: whether a particular ordinance is a proper exercise of the municipal police power, 81 whether the facts of a particular situation warrant the assertion of the police power, 82 and whether the attempted regulations have a proper and rational relationship to the objects of the police power—the public health, safety, morals, or welfare—and have for their aim the protection and preservation of those objects. 83

"Thus, the rational basis test is proper for determining the validity of an ordinance that was enacted pursuant to the police power." 84 To uphold a regulatory municipal ordinance that was enacted under the general powers enumerated by a charter, the court must find that the ordinance tends, in some degree, to prevent some offense or preserve the public health, morals, safety, or welfare." City of Chicago v. Kautz, 313 Ill. 196, 144 N.E. 805, 35 A.L.R. 1050 (1924).

"Once a local legislative body identifies a problem and enacts legislation to protect and promote the general welfare of its citizens, that legislation is presumed to be a valid exercise of the police power." 85 "Municipal ordinances are presumed to be constitutional if any rational consideration supports their enactment. If any rational

motive exists for the exercise of the police power, the motive for its exercise is not a proper subject of inquiry. "Thus, a party challenging the constitutionality of an ordinance must prove that it is not debatable that it has any substantial relationship to public health, safety or general welfare." 56 Am. Jur. 2d 420, citing State v. Reineke, 702 N.W.2d 308 (Minn. Ct. App. 2005). "Such an ordinance will be declared invalid only when it plainly appears that it does not tend, in any applicable degree, to promote those ends and that the power to legislate has been exercised arbitrarily." Id., citing Square Lake Hills Condominium Ass'n v. Bloomfield Tp., 437 Mich. 310, 471 N.W.2d 321 (1991).

"The courts may review whether the exercise of municipal police power passes the test of reasonableness." "The test of the validity of a city's exercise of police power is reasonableness." "Municipal ordinances and regulations must be reasonable, and their reasonableness is a judicial question." "Courts will not interfere with the enforcement of municipal regulations designed for the protection of the health, welfare, and safety of citizens, unless they are determined to be unreasonable." Denene, Inc. v. City of Charleston, 359 S.C. 85, 596 S.E.2d 917 (2004). "A presumption of reasonableness attaches to such ordinances," "although that presumption is overcome if unreasonable is apparent on the face of the ordinance or by extrinsic evidence that clearly establishes its unreasonableness." "A court will not hold a municipal ordinance invalid unless it is clear that the ordinance is unreasonable." "The party challenging the ordinance has the burden to show that it is unreasonable." "The test for determining whether a local police ordinance is reasonable requires that the court assess the existence of a rational relationship between the exercise of the police power and the public health, safety, morals, or general welfare in a given case." "In determining this question, all the existing circumstances or contemporaneous conditions, the objects sought to be obtained, and the necessity for the adoption of the ordinance are considered."
In Hawaii the police power, "is not plenary and that one of its limitations is that the regulations and inhibitions imposed must be reasonably necessary to the public welfare and not inconsistent with fundamental rights that are common to all." Territory v. Anduha, 31 Haw. 459, affirmed 48 F.2d 171 (1930). Finding that a statute making, "[a]ll loitering, loafing or idling on the streets and highways of a city, even though habitual, is not necessarily detrimental to the public welfare nor is it under all circumstances an interference with travel upon them."

iii. Validity of Nuisance Laws

"Within the meaning of a city's statutory authority to define and abate nuisances, a 'nuisance' means something that unreasonably interferes with another's enjoyment of his or her property and causes damage to it."96 "A municipality may declare what constitutes a nuisance and pass ordinances to prevent and abate it under a broad statutory grant of authority that allows municipalities to define, prevent, and abate nuisances."97

"An ordinance that governs nuisances must give fair warning by specifying the conduct prohibited and be sufficiently general to address the essential problem under varied circumstances." 56 Am. Jur. 2d 393, citing Price v. City of Lakewood, 818 P.2d 763 (Colo. 1991). "Municipalities may consider all of the circumstances surrounding a situation to determine whether it is a nuisance." Id., citing Moreland v. Cheney, 267 Ga. 469, 479 S.E.2d 745 (1997). "A municipality has the power to declare anything a nuisance, which is either a nuisance per se, or a nuisance at common law or by statute. A municipality also has the authority to regulate as a nuisance anything that could be an honest difference of opinion, if, in the municipal authorities' opinion, such a thing constitutes a nuisance."98 "However, the power to determine what is a nuisance and abate it is not arbitrary."99 "As with all exercises of the police power, the determination of nuisances is subject to constitutional guarantees,"100 "and a municipality may not declare what is not a nuisance in fact to be a nuisance."101 "A lawful use by an individual of one's own property may not be made a nuisance per se by a municipal ordinance; the most that the municipal authorities may do is suppress those uses that are nuisances per se, or upon inquiry are found to be nuisances per accidents." Id., citing City of New Orleans v. Lenfant, 126 La. 455, 52 So. 575 (1910).

"Laws and regulations enacted to resolve a problem of legitimate local concern

100 Id., citing City of Milwaukee v. Milbrew, Inc., 240 Wis. 527, 3 N.W.2d 386, 141 A.L.R. 277 (1942).
will not be invalidated on equal protection grounds, unless those laws place excessive and unwarranted burdens on protected classes of persons. 102 "To challenge an ordinance on equal protection grounds, the plaintiff bears the burden of showing that the classification is arbitrary and cannot serve a legitimate governmental goal." 56 Am. Jur. 2d 394, citing Curto v. City of Harper Woods, 954 F.2d 1237 (6th Cir. 1992).

In Hawai‘i, the validity of nuisance laws is treated as follows:

The suppression of nuisances injurious to the public health or morality is among the most important duties of government. The state, in the exercise of its police power, has authority to abate nuisances, and under this power, and subject to constitutional limitations, the legislature has authority to declare what shall be deemed nuisances and to provide for their suppression. Since “nuisance” is a term which does not have a fixed content, either at common law or at the present time, compelling reasons of policy require that the responsibility for establishing those standards of public morality, the violation of which is to constitute nuisances within equity jurisdiction, be left to the legislature.


From very early times until now, Hawai‘i has had numerous statutes providing for abatement of particular activities amounting to nuisances. Nevertheless, the Supreme Court, in Akwai v. Royal Ins. Co., 14 Haw. 533 (1902), held that under the statute authorizing the territorial board of health to abate nuisances, the board was not authorized to destroy that which was not a nuisance or make or declare that to be a nuisance which was not in fact a nuisance.

d. Preemption

i. Federal Preemption.

Federal law may preempt state law in one of three ways: (1) express preemption, which arises when there is an explicit federal statutory command that state law be displaced; (2) field preemption, which results when federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it; and (3) conflict preemption, which arises when a state law makes it impossible to comply with both state and federal law or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. 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). By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field

102 56 Am. Jur. 394, citing Interstate Towing Ass'n, Inc. v. City of Cincinnati, Ohio, 6 F.3d 1154 (6th Cir. 1993).
pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation. English v. General Electric Co., 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). [F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws. Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985).

ii. State Preemption

“A municipality may not enact or adopt bylaws or ordinances which are inconsistent with state law,”103 “or which infringe the spirit of state law.”104 “Municipal ordinances are inferior to the laws of the state and must not conflict with any controlling provision of a state statute.”105 Also, municipal ordinances will be invalidated when they are in contravention of the charter.”106 or a state statute.107 Where a local ordinance conflicts with state law, the ordinance must yield.”108 In other words, in cases of conflict between local and state enactments, the state statute must prevail. Queen Anne’s Conservation, Inc. v. County Com’rs Of Queen Anne’s County, 382 Md. 306, 855 A.2d 325 (2004).

“There is a conflict between a municipal ordinance and a state statute when the ordinance cannot coexist with the state statute.”109 “For a conflict to exist between a state statute and a municipal ordinance, both must contain either express or implied conditions that are inconsistent or irreconcilable with each other; if either is silent where the other speaks, there can be no conflict between them; and thus, where no conflict exists, both laws stand.” 56 Am. Jur. 2d 315, citing Alabama Recycling Ass’n, Inc. v. City of Montgomery, 24 So. 3d 1085 (Ala. 2009); Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008).

105 Id., citing Phantom of Brevard, Inc. v. Brevard County, 3 So. 3d 309 (Fla. 2008).
109 Id., citing Phantom of Brevard, Inc. v. Brevard County, 3 So. 3d 309 (Fla. 2008) (also stating that the test for a conflict between a local ordinance and a state statute is whether to comply with one provision, a violation of the other is required); Salt Lake City v. Newman, 2006 UT 69, 148 P.3d 931 (Utah 2006); West Lewinsville Heights Citizens Ass’n v. Board of Sup’rs of Fairfax County, 270 Va. 259, 618 S.E.2d 311 (2005) (stating that the fact that a county or municipal ordinance enlarges on a statute’s provisions does not create a conflict with the statute unless the statute limits the requirements for all cases to its own terms); State v. Kirwin, 165 Wash. 2d 818, 203 P.3d 1044 (2009).
“A local regulation is repugnant to state law when it expressly contradicts a statute, it is contrary to the legislative intent underlying the statutory scheme, or intrudes into an area where the state has a more substantial interest than the municipality.” A local ordinance also may be invalid because it conflicts with a state regulation where the state regulation has the force and effect of law.” Dail v. York County, 259 Va. 577, 528 S.E.2d 447 (2000).

“A local ordinance is preempted by a state statute only to the extent that the two are in conflict. Where an ordinance is not preempted by state law, the ordinance is valid if there is no conflict with state law.” Municipal legislation is preempted if it expressly contradicts state law or if it runs counter to the legislative intent underlying a statutory scheme. “A state statute preempts a municipal ordinance when either the language in the ordinance contradicts the language in the statute or when the Legislature has intended to thoroughly occupy the field.” Thayer v. Town of Tilton, 151 N.H. 483, 861 A.2d 800 (2004).

“A conflict between state law and a local ordinance exists if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.” Local legislation is "duplicative" of general law, for purposes of state preemption, where it is coextensive therewith. Additionally, for purposes of preemption, a local ordinance contradicts state law when it is inimical to or cannot be reconciled with state law.” O’Connell v. City of Stockton, 41 Cal. 4th 1061, 63 Cal. Rptr. 3d 67, 162 P.3d 583, 33 A.L.R.6th 661 (2007). “In fact, "conflict preemption" occurs when the ordinance hinders the accomplishment of the statute’s purpose or when the ordinance conflicts with the statute such that compliance with both is impossible.” “Conflict preemption’ acts to preempt any local law that contradicts or

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112 56 Am. Jur. 2d 316, citing Action Apartment Ass'n, Inc. v. City of Santa Monica, 41 Cal. 4th 1232, 63 Cal. Rptr. 3d 398, 163 P.3d 89 (2007) (stating that if otherwise valid local legislation conflicts with state law, it is preempted by such law and is void).


116 Id., citing Action Apartment Ass'n, Inc. v. City of Santa Monica, 41 Cal. 4th 1232, 63 Cal. Rptr. 3d 398, 163 P.3d 89 (2007).

117 Id., citing Viacom Outdoor, Inc. v. City of Arcata, 140 Cal. App. 4th 230, 44 Cal. Rptr. 3d 300 (1st Dist. 2006).

contravenes state law."  

"Local legislation is contradictory to a general law, and therefore preempted, when it is inimical thereto."

"Local legislation enters an area that is "fully occupied" by a general law, for purposes of determining whether it is preempted by state law, where:

1. the legislature has expressly manifested its intent to "fully occupy" the area;

2. the legislature has impliedly intended to "fully occupy" the area because the subject matter has been so fully and completely covered by state law as to clearly indicate it has become an exclusive matter of state concern;

3. the subject matter has been partially covered by state law couched in such terms as to indicate a paramount state concern which will not tolerate further or additional local action;

4. or the subject matter has been partially covered by state law and the subject is of such a nature that the adverse effect of the local ordinance on transient citizens of the state outweighs the possible benefit to the locality.

56. Am. Jur. 2d 316, citing Viacom Outdoor, Inc. v. City of Arcata, 140 Cal. App. 4th 230, 44 Cal. Rptr. 3d 300 (1st Dist. 2006). "The preemption of a municipal ordinance by a state statute may be established where the state law is expressly preemptive, by examination of the legislative history, by the pervasiveness of the state regulatory scheme, or where the nature of the subject matter regulated demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest."

"Where a legislative enactment, either expressly or impliedly, is intended to be exclusive in a field, preemption will be found, but the legislative intent to supersede local powers must be clearly present."  

"Whenever the legal question of priority of statutes and ordinances is presented, it must be resolved by a thorough analysis of the statute that purportedly gives the government entity priority over local regulations. In this context, the term "priority" is legally synonymous with the term "immunity" because if a government entity has priority over local regulations, it may also be described as being immune from local regulations."  


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120 Id., citing Action Apartment Ass'n, Inc. v. City of Santa Monica, 41 Cal. 4th 1232, 63 Cal. Rptr. 3d 398 163 P.3d 89 (2007) (stating that absent a clear indication of preemptive intent from the Legislature, the courts presume that local regulation in an area over which the local government traditionally has exercised control is not preempted by state law).
"The determination of whether state legislation impliedly preempts local enactments involves assessing whether the state regulations have so thoroughly and pervasively covered a subject as to completely occupy the field, and whether the subject requires a uniform statewide treatment."123 "For an implied preemption of a municipal ordinance to occur based on conflict with state law, the conflict must be obvious, unavoidable, and not a matter of reasonable debate."124 "To qualify for the "conflict" branch of implied preemption, a local law must be irreconcilable with state law; and in order to be irreconcilable so as to trigger implied preemption, the conflict between the local ordinance and state statute must be resolvable and short of choosing one enactment over the other."125 "The theory of the "conflict" branch of implied preemption is that even though an ordinance may not be expressly preempted by the legislature, the ordinance cannot exist harmoniously with a state statute because the ordinance is diametrically in opposition to it.126

"The rule denying legislative power to a local body when the state has preempted the field is a rule of necessity based upon the need to prevent dual regulation that would result in uncertainty and confusion."127 "Under the doctrine of preemption, the key consideration is not whether the legislature and the municipality have both entered the same field, but whether in so doing, state law and municipal ordinance have clashed."128 "State preemption by reason of an operational conflict can arise when effecting a local interest would materially impede or destroy the state interest, and under those circumstances, the local regulations may be partially or totally preempted to the extent that they conflict with the state interest."129 If an otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. 56 Am. Jur. 2d 316, citing Cal. Const. art. 11, § 7 City of Los Angeles v. County of Kern, 214 Cal. App. 4th 394, 154 Cal. Rptr. 3d 122 (5th Dist. 2013).

"General laws that seek to accomplish an objective of a statewide concern may prevail over conflicting local regulations even if they impinge to a limited extent upon some phase of local control."130 Put another way, "[]local legislation that conflicts with general law is preempted and void."131

124 Id., citing City of Davenport v. Seymour, 755 N.W.2d 533 (Iowa 2008) (stating that the courts that apply the conflict-preemption analysis are to interpret the state law in such a manner as to render it harmonious with the ordinance).
125 Id.
126 Id.
128 Id., citing Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255 (R.I. 1999) (a municipal ordinance is preempted if it conflicts with a state statute on the same subject).
129 Id., citing Board of County Com'r's, La Plata County v. Bowen/Edwards Associates, Inc., 830 P.2d 1045 (Colo. 1992); Collins v. City of Hazlehurst, 709 So. 2d 406 (Miss. 1997).
130 Id., citing Neville v. County of Sonoma, 206 Cal. App. 4th 61, 141 Cal. Rptr. 3d 570 (1st Dist. 2012), as modified, (June 6, 2012).
"For purposes of determining whether the local enactment is preempted, the legislative intent to preclude local action must be clear."\textsuperscript{132} A comprehensive statutory scheme does not automatically result in preemption, because it could nonetheless authorize additional municipal regulation.\textsuperscript{133} "Where the State has wholly occupied the field of a subject to the exclusion of any local regulation, it is of no consequence that a municipality's regulation coincides with or is complementary to the state law; a municipality is precluded from enacting any regulation related to the subject preempted." \textit{Law v. City of Sioux Falls}, 2011 SD 63, 804 N.W.2d 428 (S.D. 2011).

"The states' courts vary considerably when reviewing municipalities' penalties that differ from state penalties. The courts have ruled in some circumstances that ordinances that prohibit the same conduct as a state statute may provide different penalties without being in conflict with the statute.\textsuperscript{134} "In other situations however, the courts have ruled that penalties established by state law cannot be set aside by local ordinances.\textsuperscript{135} "For instance, a city ordinance that fixed minimum fines and appearance bonds for fifty three enumerated misdemeanors was deemed invalid because the penalty exceeded the city's statutory authority to fix the penalty for offenses defined and punishable by state law.\textsuperscript{136} "Likewise, a city, by a local ordinance, could not impose criminal penalties for solicitation to commit sodomy that was four times greater than allowed by the state statute for the same violation." \textit{56 Am. Jur. 2d 317, citing Pierce v. Com.}, 777 S.W.2d 926 (Ky. 1989).

"A city ordinance cannot increase either the minimum or maximum penalty that has been authorized by state law for the same criminal conduct without evidence of legislative acquiescence." \textit{56 Am. Jur. 2d 317, citing City of Portland v. Dollarhide}, 300 Or. 490, 714 P.2d 220 (1986). "Also, an ordinance cannot impose criminal penalties on conduct that has been essentially decriminalized by the state." \textit{Id., citing Thomas v. State}, 614 So. 2d 468 (Fla. 1993).

1. Preemption by State Statute

"When the state chooses to regulate and act under its police power, its laws predominate over local laws or ordinances."\textsuperscript{137} "Thus, a municipality may be foreclosed from exercising a police power that it would otherwise have if the state has sufficiently

\textsuperscript{132} \textit{56 Am. Jur. 2d 316, citing St. George Greek Orthodox Cathedral of Western Massachusetts, Inc. v. Fire Dept. of Springfield}, 462 Mass. 120, 2012 WL 1537939 (2012).
\textsuperscript{133} \textit{Id., citing Forsberg v. Kearsarge Regional School Dist.}, 999 A.2d 278 (N.H. 2010).
\textsuperscript{136} \textit{Id., citing Wright v. Burton}, 279 Ark. 1, 648 S.W.2d 794 (1983).
\textsuperscript{137} \textit{56 Am. Jur. 2d 375, citing Clark v. City of Draper}, 168 F.3d 1185 (10th Cir. 1999) (regarding a Utah city ordinance).
acted in a particular field."¹³⁸ "Also, municipalities may not adopt ordinances under the police power that are inconsistent with state law."¹³⁹ "A local ordinance enacted in the exercise of the police power must give way if it conflicts with a general law."¹⁴⁰ "In addition, a county or city may make and enforce within its limits all police, sanitary, and other ordinances and regulations that are not in conflict with general laws."¹⁴¹ "A "general law," for this purpose, is part of a statewide and comprehensive enactment; must apply to and operate uniformly throughout the state; establishes police, sanitary, or similar regulations, rather than only granting or limiting the legislative power of a municipal corporation to establish regulations under the police power; and prescribes a rule of conduct on citizens, generally." ⁵⁶ Am. Jur. 2d 375, citing Ohioans for Concealed Carry, Inc. v. Clyde, 120 Ohio St. 3d 96, 2008-Ohio-4605, 896 N.E.2d 967 (2008).

"A local law is invalid if it enters a field fully occupied by state law or if it conflicts with state law."¹⁴² "Thus, a local exercise of the police power is preempted if the nature of regulated subject matter calls for a uniform state regulatory scheme."¹⁴³ "On the other hand, a municipality's police powers are not preempted where a state statute is not so broad or detailed as to preclude all local regulation automatically, the legislature did not express a need for a statewide uniform standard, and the local law furthers the state's policy,"¹⁴⁴ "the ordinance only includes mere differences in detail or imposes additional regulation,"¹⁴⁵ "a statute authorizes local regulation in an area also covered by state statutes,"¹⁴⁶ "or the state statute provides that it is not intended to preclude the right to adopt more restrictive ordinances."¹⁴⁷

"A local ordinance may be invalid because it conflicts with a state administrative regulation, if the state regulation has the force and effect of law."¹⁴⁸ "Even when a non-home-rule unit of government is convened the authority to regulate in a particular field, it may not adopt an ordinance that infringes upon the spirit of the state law or is repugnant

¹³⁹ Id., citing City of Delligwood v. Twyford, 912 S.W.2d 58 (Mo. 1995).
¹⁴¹ Id., citing Rental Housing Ass'n of Northern Alameda County v. City of Oakland, 171 Cal. App. 4th 741, 90 Cal. Rptr. 3d 181 (1st Dist. 2009), review denied, (June 10, 2009).
¹⁴⁴ Id., citing Vatore v. Commissioner of Consumer Affairs of City of New York, 83 N.Y.2d 645, 612 N.Y.S.2d 357, 634 N.E.2d 958 (1994) (local law restricting cigarette vending machines to taverns not preempted by a state statute restricting them to four types of locations).
¹⁴⁶ Id., citing Heesman Corp. v. City of Lakewood, 118 Wash. App. 341, 75 P.3d 1003 (Div. 2 2003).
to the general policy of the state; an ordinance enacted under those powers that conflicts with the spirit and purpose of a state statute is preempted by the statute. 149 The mere fact that the General Assembly has enacted legislation in a field does not lead to the presumption that the state has precluded all local enactments in that field; rather, the General Assembly must clearly evidence its intent to preempt.” Hoffman Min. Co., Inc. v. Zoning Hearing Bd. of Adams Tp., Cambria County, 32 A.3d 587 (Pa. 2011).

2. Express or Implied Preemption

“Preemption of local regulations enacted under the police power by a state statute may be either express or implied.”150 “Express preemption occurs when the state legislature specifically prohibits local action in an area.”151 “Implied preemption occurs when an ordinance prohibits an act permitted by a statute, or permits an act prohibited by a statute; such an ordinance is inconsistent with state law and thus preempted by it.”152 “The doctrine of implied preemption of a local ordinance by state law typically applies in instances where, despite the lack of specific language preempting local regulation, the state has acted in an area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation.”153 “or that the legislature did not intend that it be supplemented by local regulations.”154 “Determining whether state legislation implicitly preempts local enactments accordingly involves assessing whether the state regulations so thoroughly and pervasively cover the subject as to occupy the field completely, and whether the subject requires uniform statewide treatment.”155 “However, it is also said that municipal regulation under the police power is not preempted, absent a clear indication of a legislative intent to limit local government action.”156 “Under this view, courts may not speculate on legislative intent to find preemption of municipal action, even in a highly regulated field, but there must be persuasive concrete evidence of an intent to preempt the field in the language

151 Id., citing Goodell v. Humboldt County, 575 N.W.2d 466 (Iowa 1998).
153 Id., citing Idaho Dairymen’s Ass’n, Inc. v. Gooding County, — P.3d —, 2010 WL 337939 (Idaho 2010).
actually used in the statute.” City of Davenport, 755 N.W.2d at 533. “Conversely, an
expressed legislative intent to allow local regulation, or an express recognition of local
regulation, is convincing evidence that a state legislative scheme was not intended to
occupy a field within the local police power.” Viacom Outdoor, Inc. v. City of Arcata, 140
Cal. App. 4th 230, 44 Cal. Rptr. 3d 300 (1st Dist. 2006).

“Implied-field preemption occurs when the legislature has so covered a subject
by statute as to demonstrate a legislative intent that regulation in the field is preempted
by state law; but, extensive regulation in a certain field is not enough.” The
existence of an express preemption clause does not preclude an implied preemption
analysis, even though it may support the inference that no implied preemption exists.

3. Lack of Conflict

“A local legislative body, in the exercise of its police powers, may forbid an act
when state legislation is silent on the subject; there is no conflict between a state statute
and a local ordinance when there is no statute dealing with the same subject matter.”
“Conflict between a municipal ordinance and state law may be found when state law
affirmatively or specifically permits an activity, rather than when it is silent.”
“Also, a measure enacted pursuant to the police power is not preempted if there is not an
irreconcilable or direct conflict or an inconsistency with state law on the subject. This
includes where a municipal regulation is in addition to one under state law, goes further in a prohibition, complements a state law, or imposes higher standards.”
“A municipal ordinance does not conflict with state law, unless the

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(Pa. 2011).
160 56 Am. Jur. 2d 377, citing New Mexicans for Free Enterprise v. The City of Santa Fe, 138 N.M. 785,
2006-NMCA-007, 126 F.3d 1149 (Ct. App. 2005).
(smoking regulations); Lawson v. City of Pasco, 144 Wash. App. 203, 181 P.3d 896 (Div. 3 2008),
162 Id., citing (USA Cash #1, Inc. v. City of Saginaw, 285 Mich. App. 262, 776 N.W.2d 346 (2009)).
regard to a District of Columbia ordinance); City of Wichita v. Basgall, 257 Kan. 631, 894 P.2d 876, 10
(2008).
165 Id., citing Bauer v. Waste Management of Connecticut, Inc., 234 Conn. 221, 662 A.2d 1179 (1995);
166 Id., citing Jackson County v. State, Dept. of Natural Resources, 2006 WI 96, 293 Wis. 2d 497, 717
N.W.2d 713 (2006).
167 Id., citing Greater New Haven Property Owners Ass'n v. City of New Haven, 288 Conn. 181, 951 A.2d
551 (2008).
ordinance permits an act the general law prohibits, or vice versa,"168 or where the state does not have an overriding interest that requires that it retain exclusive control."169

"Absent a clear manifestation of legislative intent to preempt a field of regulation, a municipality may enact an ordinance that neither conflicts with state legislation nor is itself unreasonable.” Corey v. Town of Merrimack, 140 N.H. 426, 666 A.2d 1359 (1995). “In some jurisdictions, local ordinances that address a different subject matter than a state statute are consistent with the statute unless the state explicitly provides that localities may not further regulate in a given area; silence on the part of the state does not give rise to an inference that the state has prohibited its localities from enacting ordinances further regulating an area.”170 “Even where a field is one of statewide concern, this does not automatically void a local regulation.”171

“While there is no conflict where a municipal ordinance does nothing more than prohibit the same conduct prohibited by a state statute,”172 it has also been said that when a local ordinance is identical to a state statute, it is clear that the field sought to be covered by the ordinance has already been occupied by state law, and thus the local ordinance is preempted.173 “When a court considers preemption claims, it is obligated to harmonize, to the extent it legally can be done, state and municipal enactments on the identical subject.” Butler County Dairy, L.L.C. v. Butler County, 285 Neb. 408, 827 N.W.2d 267 (2013).

4. Ordinances Imposing Criminal Penalties

“In some jurisdictions, a municipality may enact ordinances relating to the safety and security of its citizens, and impose fines,”174 “penalties,”175 “forfeitures,”176 “and

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169 Id., citing Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982) (village gun control ordinance).


171 Id., citing DeRosa Landfill Co. v. City of Oak Creek, 200 Wis. 2d 642, 547 N.W.2d 770 (1996).


imprisonment if they are violated."™ "Some ordinances have also been upheld as being an exercise of the police power, rather than a municipality's power of self-government."™ "In other jurisdictions, because municipalities cannot create crimes, they may not impose either a fine or imprisonment as a sanction for a violation of a municipal ordinance." 56 Am. Jur. 2d 378, citing State v. Thierfelder, 174 Wis. 2d 213, 495 N.W.2d 669 (1993). "Preemption may result from a statute indicating that the legislature has determined by implication that it intended to preempt the regulation of the criminal aspects of a field of the law,"™ a criminal code that contains a specific declaration that municipal ordinances dealing with areas of criminal law covered by it are preempted,"™ or a state constitutional provision that the power of voters to enact and amend municipal charters is subject to state criminal laws." State v. Tyler, 168 Or. App. 600, 7 P.3d 624 (2000).

“A municipality may not, under the claim of its police power, make criminal those activities that are normally deemed innocent,"™ “or not criminal under state law."™ “Similarly, a municipality may not adopt an ordinance if its effect nullifies state statutes dealing with the same misdemeanor."™ “On the other hand, a municipal ordinance establishing an offense is not preempted by a statute, where the ordinance merely enlarges on the statute’s provisions and does not prohibit activity that the statute specifically allows.”™

iii. Preemption in Hawai'i

In Hawai'i, the law of preemption and the test to determine whether preemption exists has previously been addressed. Richardson v. City and County of Honolulu, 868 P.2d 1193 (1994) articulates the test by which a municipal ordinance is preempted in Hawai'i. Under Richardson, “a municipal ordinance may be preempted pursuant to HRS § 46-1.5(13) if (1) it covers the same subject matter embraced within a

184 Id., citing State v. S.L.S., 777 So. 2d 318 ( Ala. Crim. App. 2000) (ordinance prohibiting making any false, fictitious, or fraudulent statement or representation in a matter within the jurisdiction of a city department or agency).
comprehensive state statutory scheme disclosing an express or implied intent to be
exclusive and uniform throughout the state or (2) it conflicts with state law.

The Hawai‘i Supreme Court has employed an approach to the issue of
preemption of county ordinances by state statutory law, which might best be
characterized as a “comprehensive statutory scheme” test. In the case In re Application
of Anamizu, 52 Haw. 550, 481 P.2d 116 (1971), [the court] considered whether a city
ordinance mandating the certification of electrical contractors by a municipal agency
was preempted by a state statutory scheme that governed the licensing of all building
contractors. Applying HRS § 70–105 (the precursor to HRS § 46–1.5(13)), the court
held that the city ordinance was preempted by the state statutory scheme, noting that
“the critical determination to be made” under HRS § 70–105 was whether the statutory
scheme at issue “indicated a legislative intention to be the exclusive legislation
applicable to contractors.” Anamizu, 52 Haw. at 553, 481 P.2d at 118. Because the
legislation “established a comprehensive statutory scheme for regulating the contracting
business within the [s]tate,” the court ruled that the state’s grant of permission to a
contractor “to pursue his occupation throughout the [s]tate” could “not be circumscribed
by local authorities through the enactment of additional qualifying regulations.” Id. at
554–55, 481 P.2d at 118–19 (emphasis added). “To hold otherwise,” we said, “would
be to allow the intercity flow of contracting services to be impaired, thereby severely
diluting the value of a uniform state licensing system.” Id. at 555, 481 P.2d at 119.

In Anamizu, 52 Haw. 550, 481 P.2d 116 (1971) the court found preemption due
to two issues presented in that case. First, the state statute in question created a global
(i.e., “comprehensive”) mechanism for regulating the licensing of the entire universe of
building contractors within the state; by contrast, the city ordinance undertook to
regulate only electrical contractors—a discrete galaxy within, or a subset of, that
universe. Second, the city ordinance at issue in Anamizu imposed “qualifying
regulations” upon electrical contractors for municipal certification that were “additiona”
to those required for state licensure.

In Citizens Utilities Co. v. County of Kauai, 72 Haw. 285, 814 P.2d 398 (1991),
the court held that a county ordinance regulating the height of utility poles was
preempted by the combination of HRS § 269–6 (1985), which conferred upon the State
Public Utilities Commission (PUC) the power of “general supervision ... over all public
utilities,” and a specific regulation of the PUC that governed, inter alia, the minimum
requirements for utility pole height, Id. at 288–89, 814 P.2d at 400. In doing so, the
court applied the Anamizu test to HRS § 46–1.5(13) (the successor to HRS § 70–105)
and declared that “a municipal ordinance, which covers the same subject matter
embraced within a [s]tate statute is invalid if the statute discloses an express or implied
intent that the same shall be exclusive, or uniform in application throughout the [s]tate.”
Id. at 289, 814 P.2d at 400. Analogously to Anamizu the state law at issue in Citizens
Utilities governed a substantive “universe,” i.e., global regulation of public utilities,
whereas the relevant county ordinance addressed only a “galaxy” thereof—utility pole
regulation.
However, Hawai‘i courts have also found no state preemption in other cases. See Pacific Intern. Services Corp. v. Huii, 873 P.2d 88, 76 Hawai‘i 209 (1994), (finding that city financial responsibility law, requiring car rental company’s insurance policy to cover vehicles driven with customer’s permission, did not conflict with no-fault law provision prescribing minimum coverage to be afforded insured in no-fault policy); Richardson v. City and County of Honolulu, 868 P.2d 1193 (1994), (finding that ordinance providing mechanism for transfer of fee simple interest of leasehold property from condominium lessors to condominium lessees did not conflict with state statutes governing eminent domain proceedings; state statutory scheme was not “comprehensive”, and ordinance covered subject matter not addressed in state statutes); HRS 46-1.5 (13), 46-61, 46-62; Territory v. Hop Kee, 21 Haw. 206 (1912), (ordinance providing for protection of meat, fish, and seafood from dust, dirt, contact of, and contamination by, flies and other insects and from promiscuous handling and other contamination was not void as in conflict with regulation of territorial board of health, where municipal act provided that no ordinance should be held invalid on ground that it covered a subject embraced in statute of territory, even though the two conflicted).

III. Specific Challenges Pertaining to Bill No. 2491 in its current form.

In an effort to present the relevant legal issues as clearly and coherently as possible the Office of the County Attorney will first present the general authority of the County to promulgate the Bill according to form and the general authority of the County to regulate under its police power and its power to regulate public nuisances. Then the County Attorney’s Office will address the specific challenges facing each individual section of Bill No. 2491 in its current form. Although the four aforementioned issues generally pertain to all sections, certain individual sections contain specific challenges that do not apply generally. The Office of the County Attorney will discuss these challenges in depth under each section.

a. Compliance with County Charter Requirements Pertaining to Bills and Ordinances.

Section 4.02 B of the Charter of the County of Kaua‘i mandates that every ordinance shall embrace but “one subject”, which shall be expressed in its “title”. The term "subject" as used in such provisions is given a broad and extended meaning to allow the legislative municipal body full scope to include in one act all matters having a logical or natural connection. If all parts of an act relate directly or indirectly to the general subject of the act, it is not open to the objection of plurality. Tanner v. City of Boulder, 158 Colo. 173, 405 P.2d 939 (1965).

The title of Bill No. 2491 is, “Pesticides and Genetically Modified Organisms.” The expression of subject in the title of an ordinance is sufficient if it calls attention to the general subject of the legislation. It is not necessary that the title refer to details within the general subject, nor those which may be reasonably considered as appropriately incident thereto, and the title is sufficient if it is germane to the one controlling subject of the ordinance. The crucial test of sufficiency of title is generally found in the answer to this question: Does the title tend to mislead or deceive the
people or the municipal board as to the purpose or effect of the legislation, or to conceal or obscure the same? If it does, then the ordinance is void; if not, it is valid. Territory v. Dondero, 21 Haw. 19, 1912 WL 1627 Haw.Terr. 1912, citing 28 Cyc. 379, 380. According to the information as understood by the County Attorney's Office, the bill's title does not, "tend to mislead or deceive the people or the municipal board as to the purpose or effect of the legislation, or to conceal or obscure the same", as the title clearly indicates that it pertaining to both pesticides and GMOs.

According to the law,"[i]t is sufficient if the title of an ordinance fairly indicates to the ordinary mind the general subject of the act, is comprehensive enough to reasonably cover all its provisions, and is not calculated to mislead; but an act which contains provisions neither suggested by the title, nor germane to the subject expressed therein, is, to that extent void." Territory v. Furubayashi, 20 Haw. 559. (1911). Likewise, the County Attorney's Office asserts that the title of the ordinance "fairly indicates to the ordinary mind the general subject of the act, is comprehensive enough to reasonably cover all its provisions, and is not calculated to mislead."

The County Attorney's Office opines that the "general subject of the act", of Bill No. 2491 is stated in the bill's purpose section which is codified as sec. 22-22.2. As state in sec. 22-22.2 the purpose of the bill is to, "inform the public and protect the public from any direct, indirect, or cumulative negative impacts on the health and natural environment of the people and place of the County of Kaui'i, by governing the use of pesticides and genetically modified organisms," and assessing penalties for violation of the bill and any rules promulgated thereby. The bill in its current form strives to accomplish this goal by requiring disclosure of the possession, and or use of pesticides and GMOs and creating buffer zones where crops cannot be grown on agricultural lands. These regulations apply to commercial agricultural entities that purchase or use established "threshold" amounts of pesticides and or intentionally or knowingly possesses GMO products. According to the County Attorney's understanding the use of pesticides and GMOs by the entities sought to be regulated by Bill No. 2491 go hand in hand. According to statements made during public hearings and via written testimony submitted to the Council, both by proponents and opponents of Bill No. 2491, the use and or possession of pesticides and GMOs by these entities appear to have both a "logical" or "natural connection". It appears that all parts of the bill relate directly or indirectly to the general subject of the act as stated above, and therefore it does not appear that the bill is open to the objection of plurality.

It does not appear that Bill No. 2491 contains subjects which are, "so dissimilar as to have no legitimate connection." Therefore, the bill does not appear to violate the tenets as described in State ex rel. Tomasic v. Unified Government of Wyandotte County/Kansas City, Kan., 264 Kan. 293, 955 P.2d 1136 (1998); ACI Plastics, Inc. v. City of St. Louis, 724 S.W.2d 513 (Mo. 1987).

Section 4.02 (C) of the County Charter states that no bill shall be so amended as to change its original purpose, and that, every bill, as amended, shall be in writing before final passage. The County Attorney's Office finds that although the bill has been amended from its original form, said amendments have not changed the bill's "original
purpose”. The original purpose of the bill was to regulate the use of pesticides and the possession of GMOs and the amended bill has retained this character.

b. Whether the County Has the General Authority to Enact Police Power Regulations and to Regulate Nuisances

i. Police Power

Although no Hawai‘i constitutional provision provides that the counties have any explicit powers relating to legislating on public health safety and welfare or “police power”; the Hawai‘i State Legislature has conferred onto the County of Kaua‘i the authority to legislate pursuant to the police power, “on any subject or matter not inconsistent with, or tending to defeat, the intent of any state statute where the statute does not disclose an express or implied intent that the statute shall be exclusive or uniform throughout the State.”

Under the Kaua‘i County Charter Section 2.01. Powers. The County has the power to legislate in order to, “promote the general welfare and the safety, health, peace, good order, comfort and morals of its inhabitants, the county shall have and may exercise all powers necessary for local self-government, and any additional powers and authority which may hereafter be granted to it, except as restricted by laws of this State.”

The County Attorney’s Office asserts that the County has the general authority to enact laws under the police power.

ii. Nuisance

The Hawai‘i State Legislature has specifically granted the County of Kaua‘i the power to regulate “smoke, dust, vibration, or odors which constitute a public nuisance” pursuant to HRS 46-17 (emphasis added). As it pertains to Bill No. 2491, the public nuisances sought to be regulated would appear to be those related to dust or odors emanating from “farming operations” as defined under HRS 165-2.

In Hawai‘i, nuisances are classified into public nuisances and private nuisances, or sometimes as both public and private. The latter are sometimes called mixed nuisances. Territory v. Shuji Fujiiwara, 33 Haw. 428 (1935). A “public nuisance” is created where acts or series of acts produce common injury or is subversive of public order, decency, or morals, or constitute obstruction of public rights, or affects rights enjoyed by citizens, notwithstanding number, as part of public. Marsland v. Pang, 701 P.2d 175, 5 Haw. App. 463, cert. denied 744 P.2d 781, 67 Haw. 686 (1985). A nuisance is not a public nuisance unless it is in a public place, a place where the public frequently congregates, or a place where members of the public are likely to come within the range of its influence. Littleton v. State, 656 P.2d 1336, 66 Haw. 55 (1982). If the act or use of property is in a remote and unfrequented locality, it will not, unless malum in se, be a public nuisance, but if the nuisance affects a place where the public has a legal right to go, and where the members thereof frequently congregate, or where they are likely to
come within its influence, it will be a public nuisance. Littleton v. State, 656 P.2d 1336, 66 Haw. 55 (1982).

The County Attorney’s Office asserts that the County of Kaua’i has the clear authority to regulate public nuisances generally, but not private nuisances. Case law clearly states that, “a municipality does not have the authority, under its police power, to punish conduct that is a private nuisance”. City of Virginia Beach v. Murphy, 239 Va. 353, 389 S.E.2d 462 (1990). While the authority to declare and regulate public nuisances is clear any inquiry as to whether or not the specific activities sought to be regulated by Bill No. 2491 is in fact a “public nuisance” versus a “private nuisance” is dependent on specific facts and circumstances.

Although a municipality has the power to declare anything a nuisance, which is either a nuisance per se, or a nuisance at common law or by statute; a municipality also has the authority to regulate as a nuisance anything about which there could be an honest difference of opinion, if, in the municipal authorities’ opinion, such a thing constitutes a nuisance. McCarthy v. Kunicki, 355 Ill. App. 3d 957, 291 Ill. Dec. 502, 823 N.E.2d 1088 (1st Dist. 2005). However, this right is not unqualified. As the power to regulate public nuisances falls under the police power it is subject to the preemption doctrine. While municipalities have police power to regulate in the interest of public health safety and welfare, they cannot invoke that power to accomplish what is otherwise preempted. Minnesota Agricultural Aircraft Assoc. v. Township of Mantrap, 498 N.W.2d 40 (1993) (held that ordinance was preempted by state statute governing pesticides).

The ability for the County to regulate the types of public nuisances sought to be addressed by Bill No. 2491 will be challenged by opponents of the bill pursuant to the tenets of HRS Chapter 165, Hawai‘i Right to Farm Act. The purpose of the Right to Farm Act (“the Act”) is to, “reduce the loss to the State of its agricultural resources by limiting the circumstances under which farming operations may be deemed to be a nuisance”. Under the Act, “the preservation and promotion of farming is declared to be in the public purpose and deserving of public support.” HRS 165-4. Right to Farm, states that, “[n]o court, official, public servant, or public employee shall declare any farming operation a nuisance for any reason if the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices. There shall be a rebuttable presumption that a farming operation does not constitute a nuisance.”

Under HRS 165-2, “Farming operation” means a, “commercial agricultural, silvicultural, or aquacultural facility or pursuit conducted, in whole or in part, including the care and production of livestock and livestock products, poultry and poultry products, apiary products, and plant and animal production for nonfood uses; the planting, cultivating, harvesting, and processing of crops; and the farming or ranching of any plant or animal species in a controlled salt, brackish, or freshwater environment. “Farming operation” includes but shall not be limited to: (1) Agricultural-based commercial operations as described in section 205-2(d)(15); (2) Noises, odors, dust, and fumes emanating from a commercial agricultural or an aquacultural facility or
pursuit; (3) Operation of machinery and irrigation pumps; (4) Ground and aerial seeding and spraying; (5) The application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and (6) The employment and use of labor. A farming operation that conducts processing operations or salt, brackish, or freshwater aquaculture operations on land that is zoned for industrial, commercial, or other nonagricultural use shall not, by reason of that zoning, fall beyond the scope of this definition; provided that those processing operations form an integral part of operations that otherwise meet the requirements of this definition."

Although the applicability of HRS Chapter 165 to the issue of the County council’s treatment of pesticides and GMOs is disputed, the County Attorney’s office asserts that the provisions of HRS Chapter 165 would in fact apply to prevent the tenets of Bill No. 2491 from “declaring” the subject farming operations, including pesticide use and propagation of GMO products and the dust and odors associated therewith to be a nuisance. This is because, as stated in the Marsland case, “since “nuisance” is a term which does not have a fixed content, either at common law or at the present time, compelling reasons of policy require that the responsibility for establishing those standards of public morality, the violation of which is to constitute nuisances within equity jurisdiction, be left to the legislature.” Marsland v. Pang, 701 P.2d 175, 5 Haw.App. 463, certiorari denied 744 P.2d 781, 67 Haw. 686 (1985), citing 58 Am.Jur.2d, supra, § 14 (footnotes omitted) (emphasis added).

Through the enactment of HRS chapter 165 the Hawai‘i State legislature has basically stated that farming operations are not nuisances. By regulating farming operations as nuisances and under such legal authority the County is adopting a contradictory policy to what the State legislature has adopted. The County will thus be hard pressed to argue that they can treat farming operations as nuisances and rely on nuisance law to regulate what the State legislature has clearly stated is not a nuisance.

c. State and Federal Preemption Issues Applicable to Bill No. 2491

In evaluating the application of the various levels of the preemption doctrine, both State and Federal, the County Attorney’s Office has looked to case law for ultimate guidance. Statutory law regarding application of preemption issues appears to be rather simple. However, the difficulties and nuances pertaining thereto arise when these principles are actually applied to specific fact patterns. “Cases involving issues of supremacy of law ... are difficult to apply from one subject to another because of the different regulatory structures governing, for example, foods, drugs, poisons, hazardous substances, and wastes.” Fairview Park v. Barefoot Grass and Lawn, 115 Ohio App.3d 306, 309 (1996). Because the specific questions presented by Bill No. 2491 have not yet been answered by any Hawai‘i court, the County Attorney’s Office analyzed case law from across the country in order to advise the Mayor on this matter. While these cases are not binding precedent, their analysis is persuasive in providing the best advice possible.
In this section, the County Attorney’s Office will first address the general application of the “occupying the field” preemption doctrine as applied to Bill No. 2491’s treatment of Pesticide, Genetically Modified Organisms and land use laws whether express or implied. Occupying the field preemption, however, is only one aspect of the larger doctrine of preemption. The law is clear that a municipal ordinance may be preempted pursuant to the preemption doctrine or the supremacy clause if it conflicts with the law of a superior authority. The Office of the County Attorney will analyze any section specific “conflict preemption” issues in subsequent portions of this opinion.

i. General Preemption Issues Pertaining to Pesticide Portions of Bill No. 2491

The United States Supreme Court has clearly stated that, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not expressly supercede local regulation of use of pesticides; express authorization to the State to regulate pesticides could more plausibly be read as authorizing allocation of regulatory authority to absolute discretion of states themselves. Such discretion might include options of specific redelegation or leaving local regulation in hands of local authorities under existing state laws. FIFRA, §24(a), 7 U.S.C.A. § 136V(a). Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 111 S.Ct. 2476 (1991). Given the U.S. Supreme Court’s holding in Mortier it is obvious that FIFRA would not preempt the Council from enacting Bill No. 2491. However, given that the Supreme Court has stated that FIFRA expressly authorizes allocation of regulatory authority to absolute discretion of states themselves, the operative question with regard to the tenets of Bill No. 2491’s regulation of pesticide use is: whether the State has preempted the County from enacting Pesticide regulations under the Hawai‘i Pesticides Law, H.R.S. § 149A and its administrative rules title 4 chapter 66.

H.R.S. Chapter 149A, Hawai‘i Pesticides Law, is divided into six (6) different parts. Parts one and six are entitled general provisions and miscellaneous provisions, respectively. Part 2 of 149A addresses pesticide licensing and sale. Part 3 addresses pesticide use. Part 4 addresses violations, warning notices, and penalties. Part 5 provides for an advisory committee regarding pesticide regulations. Although not codified presently, with the recent passage of Act 105, 2013, the Hawai‘i State Pesticide law now covers disclosures relating to restricted-use pesticides as well. It is apparent from its text that the Hawai‘i Pesticides Law does not expressly preempt the counties of Hawai‘i from regulating Pesticides.

The Hawai‘i Pesticide Law is a complex regulatory law that integrates both industry and scientific standards within its text. In reviewing the law for evidence of implied preemption the County Attorney’s Office has analyzed the following sections:

Section 149A-3 Delegation of duties. All authority vested in the board or chairperson by virtue of this chapter may with like force and effect be exercised by those employees of the department as the board or chairperson may from time to time designate for the purpose.
Section 149A-11 Prohibited acts. (a) Except as otherwise exempted in section 149A-12, it shall be unlawful for any person to distribute, solicit, sell, offer for sale, hold for sale, transport, deliver for transportation, or receive and having so received, deliver or offer to deliver to any person in intrastate commerce or between points within this State through any point outside this State [any pesticide unless that person complies with licensing and labeling requirements and restrictions as required under State law.]

Section 149A-31 Prohibited acts. No person shall: (1) Use any pesticide in a manner inconsistent with its label, with some limited exceptions. Under the Hawai‘i Pesticides Law, the State Board of Agriculture and the State Department of Agriculture are the governmental agencies that determine the labeling requirements and use restrictions as to Pesticide labeling and usage.

Section 149A-19 Determination; rules; uniformity. (a) The Board of Agriculture, after having afforded interested and affected parties an opportunity to be heard and, in instances in which human health is affected, after consultation with the director of health, shall adopt rules to: (1) Determine the pesticides that are highly toxic to humans, designate pesticides as restricted use or nonrestricted use, and establish a system of control over the distribution and use of certain pesticides and devices purchased by the consuming public; (2) Determine standards of coloring for pesticides, and subject pesticides to the requirements of section 149A-16; (3) Establish procedures, conditions, and fees for the issuance of licenses for sale of restricted use pesticides; (4) Establish fees for the licensing of pesticides within the limitations of section 149A-13(b); (5) Establish procedures for the licensing of pesticides; (6) Establish procedures for the registration of pesticides under provisions of section 24(c), FIFRA; (7) Establish procedures for the disposal of pesticides; and (8) Establish procedures to issue experimental use permits under provisions of section 5 of FIFRA.

Section 149A-19 (b) [states that] the board, after public hearing, shall make and adopt appropriate rules for carrying out this chapter, including rules providing for the collection and examination of samples of pesticides or devices.

Section 149A-19 (c), [explains that] the board, after public hearing, shall adopt rules applicable to and in conformity with the primary standards established by this chapter or as prescribed by FIFRA with respect to pesticides.

Section 149A-21, Enforcement. (a) If it appears that a pesticide or device fails to comply with this chapter, the department may refer
the facts with a copy of the results of the analysis or the examination of the pesticide product or device to the appropriate governmental agency for prosecution. A warning notice shall be issued before prosecution proceedings are initiated.

Section 149A-22, Authority. (a) The board [of Agriculture] shall have authority to adopt rules, as necessary, consistent with section 5(f) and section 24(c) of FIFRA, to develop and implement state programs for registration of pesticides for special local needs and issuance of experimental use permits.

Section 149A-23, Cooperation. The department [of Agriculture] may cooperate or enter into agreements with any other agency of the State or any agency of the federal government for the purpose of carrying out this chapter and securing uniformity of rules.

Section 149A-32.5, Cancellation or suspension of pesticide uses. Notwithstanding any law, rule, or executive order to the contrary, the chairperson of the board of agriculture, in consultation with the advisory committee on pesticides and also with the approval of the director of health, shall suspend, cancel, or restrict the use of certain pesticides or specific uses of certain pesticides when the usage is determined to have unreasonable adverse effects on the environment. In addition to other circumstances which may require a determination as to whether unreasonable adverse effects exist, a determination shall be made: (1) When residues of the pesticides are detected in drinking water; or (2) When a use under special local needs registration involves a pesticide for which any use has been suspended or canceled by the EPA.\[^{185}\]

H.R.S. Chp. 149A, §§ 3, 11, 19, 21-23, 31, 32.5. Section 149A-33 authorizes the Department of Agriculture to carry out and effectuate the purpose of chapter 149A by rules, including but not limited to the following:

(1) To establish fees, procedures, conditions, and standards to certify persons for the use of restricted use pesticides under section 4 of FIFRA;

(2) To establish limitations and conditions for the application of pesticides by aircraft, power rigs, mist blowers, and other equipment;

\[^{185}\] It should be noted that the counties are not mentioned in this section.
(3) To establish, as necessary, specific standards and guidelines which specify those conditions which constitute unreasonable adverse effects on the environment;

(4) To establish, as necessary, record keeping requirements for pesticide use by applicators; and

(5) To establish, as necessary, procedures for the issuance of guidelines to specify those conditions that constitute use of a pesticide in a manner inconsistent with its label.

Section 149A-35 Cooperation. The department of agriculture is authorized and empowered to cooperate with and enter into agreements with any agency of the State, the federal government, or any other agency for the purpose of carrying out this chapter. The University of Hawaii cooperative extension service and other educational agencies shall provide educational programs aimed at assisting users and prospective users of pesticides and shall solicit the aid of the department in providing technical assistance and advice on the authorized use of pesticides.

Section 149A-36 Authority to inspect. The department or any authorized representative or employee of the department may enter upon any public or private property, according to law at any reasonable time to examine and inspect application methods and equipment, to examine and collect samples of plants, soil, and other materials, and to perform any other duty for the purpose of carrying out and effectuating the purposes of this chapter.

Section 149A-37 Exemptions.

(a) Exemption from this chapter may be granted by the department to the University of Hawaii and other state and federal agencies for experimental or research work directed toward obtaining knowledge of the characteristics and proper usage of unspecified or experimental pesticides. Research and experimental work conducted by private agencies with adequate research facilities may also be similarly exempted upon approval by the department. Approval shall be in writing stating the specific exemptions and conditions.

(b) Any pesticide exempted by the Administrator of the EPA pursuant to Title 7, United States Code, section 136w(b), shall be exempt from this chapter, if the pesticide product meets the terms and conditions of the EPA's exemption, except for pesticides that the department has determined by rule may cause unreasonable adverse effects on the environment.
In evaluating whether state pesticide laws preempt local ordinances, extra-jurisdictional courts have looked to the language of the statutes themselves. These courts have found that, "[w]here a state law indicates a purpose to occupy an entire field of regulation, local regulations are pre-empted regardless of whether their terms conflict with provisions of the state statute or only duplicate them." *Ames v. Smoot*, 98 A.D.2d 216, 219, 471 N.Y. S2d 128 (1983). Courts that have found implied preemption to be present, look to specific criteria for guidance, including: (1) laws of state-wide application; (2) establishment of a system of pesticide regulation, including designation of restricted use pesticides and a scheme for the testing and certification of pesticide applicators; (3) laws that expressly assert a need for uniformity; (4) laws that effectuate the desired result and ensure uniformity by specifically vesting jurisdiction related to pesticide matters in a specific agency; (5) whether the ordinance stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature; and (6) whether the ordinance conflicts with the state law, either because of conflicting policies or operational effect—put another way, does the ordinance forbid what the legislature has permitted? *Ames*, 98 A.D.2d at 219; *Fairview Park v. Barefoot Grass and Lawn*, 115 Ohio App.3d 306 (1996); *Synagro-WWT, Inc. v. Rush Tp., Penn.* 204 F.Supp.2d 827 (M.D. Pa. 2002); and *Village of Lacona v. State Dept. of Ag. and Markets*, 51 A.D.3d 1319 (N.Y. 2008).

The Hawai‘i Pesticide Law is clearly a law of Statewide application. Under section 149A-11 and 149A-31, as listed above, it is unlawful for any person to distribute, solicit, sell, offer for sale, hold for sale, transport, deliver for transportation, or receive and having so received, deliver or offer to deliver to any person in intrastate commerce or between points within this State through any point outside this State, or use [any pesticide] unless that person complies with licensing and labeling requirements and use restrictions as required under State law. In effect, no pesticide can enter into or be used in this State without Department of Agriculture approval.

The Hawai‘i Pesticide Law, through both statutory enactments as well as administrative rules establishes a system of pesticide regulation, including designation of restricted use pesticides and a scheme for the testing and certification of pesticide applicators. Under the Hawai‘i Administrative Rules, specifically under section 4-66-32.1, the Department of Agriculture has the authority to evaluate pesticide uses. Similarly, section 4-66-56 applies to certification of restricted use pesticide applicators; § 4-66-57 illustrates the general standards for the certification of pesticide applicators; § 4-66-58 illustrates the specific standards for certification of pesticide applicators; § 4-66-60 presents the certification procedures for pesticide applicators; and § 4-66-61 places conditions on the use of restricted use pesticides. Taken together, it is clear that the Hawai‘i Pesticide Law establishes a system of pesticide regulation, including designation of restricted use pesticides and a scheme for the testing and certification of pesticide applicators.
The Hawai'i Pesticide Law expressly asserts a need for uniformity. Section 149A-19, Determination; rules; uniformity; section 149A-22, Authority; and section 149A-23, Cooperation, all evidence and assert a need for statewide uniformity of rules.

The Hawai'i Pesticide Law effectuates the desired result and ensures uniformity by specifically vesting jurisdiction related to pesticide matters in the Hawai'i Board of Agriculture and/or the State Department of Agriculture. Hawai'i Revised Statutes sections; 149A-3, Delegation of duties; 149A-19, Determination, rules, uniformity; 149A-21, Enforcement; 149A-22, Authority; 149A-23, Cooperation; 149A-32.5, Cancellation or suspension of pesticide uses; 149A-33, Rules; 149A-35, Cooperation; 149A-37, Exemptions; when read together appear to effectuate and ensure uniformity throughout the state related to pesticide matters.

Finally, the County Attorney’s Office opines that a reviewing court would likely find that Bill No. 2491 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature under the Hawai'i Pesticides Law. Some sections of Bill No. 2491, discussed more in detail below, clearly conflict with the Hawai'i State Pesticide law by prohibiting what the State otherwise allows. Other sections would frustrate the uniformity and state-wide application of the law via circumscription by the County through the enactment of additional qualifying regulations. Such an outcome is contrary to the holding of In re Application of Anamizu 52 Haw. 550, 481 P.2d 116 (1971). “To hold otherwise,” the Anamizu court said, “would be to allow the intercity flow of contracting services to be impaired, thereby severely diluting the value of a uniform state licensing system.” Id. at 555.

For the reasons stated above the County Attorney’s Office is of the opinion that, to the extent that the current bill still regulates pesticides, a reviewing court would likely find the Hawai'i Pesticides law impliedly preempts the County from enacting any and all portions of Bill No. 2491 relating to Pesticides, and or the tenets of the bill actually conflict with the Hawai'i Pesticide Law.

ii. General Preemption Issues Pertaining to Portions of Bill No. 2491 Addressing Genetically Modified Organisms

To the extent that Bill No. 2491 regulates GMO products, the County will face express preemption challenges under the Plant Protection Act, 7 U.S.C. § 7756(a), and its prohibition of regulation by municipalities of plants and/or plant pests in the stream of foreign commerce. As stated above, GM plants are regulated under the Plant Protection Act if they were created through gene transfer with Agrobacterium tumefaciens, (which is considered a plant pest), or if they incorporate DNA from a plant pest (such as a terminator gene). Any and all crops currently grown under the auspices of the PPA that are within the stream of foreign or interstate commerce will be protected by the preemption doctrine.

Bill No. 2491 will also face express preemption challenges under the Plant Protection Act, 7 U.S.C. § 7756(b), and its prohibition of regulation by municipalities of plants and/or plant pests in the stream of interstate commerce. Opponents to Bill No.
2491 will claim that the bill is preempted because it improperly regulates plants and or plant pests within the stream of interstate commerce. Opponents to the bill will assert that the tenets of the bill are not consistent with and in fact exceed the regulations or orders issued by the federal Secretary of Agriculture pursuant to 7 U.S.C. § 7756(b)(2)(A); that the County has not demonstrated to the federal Secretary of Agriculture that there is a "special need for the additional prohibitions or restrictions based on sound scientific data and a thorough risk assessment" pursuant to 7 U.S.C. § 7756(b)(2)(B).

Opponents of the bill will also claim that through the Coordinated Framework and federal authority under the PPA, the FFDCA, and FIFRA, the Federal government has occupied the field of regulation of the introduction of GMOs in interstate and foreign commerce to the exclusion of states and local governments. They will, therefore, assert that the bill is preempted because the purpose and effect of the bill is to substitute the County's regulatory assessment of appropriate protections for human health and the environment for the judgments of the federal agencies entrusted with that responsibility under federal law. They may further argue that, because the Federal government has occupied the field of regulation of GMOs for that purpose, any and all the provisions of the proposed ordinance regulating the introduction of GMO seed crops on Kaua'i would be impliedly preempted under the Supremacy clause. U.S. v. Manning, 527 F.3d 828, 836-839 (9th Cir. 2008), citing Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 213 (1983), quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947).

At this time, the County Attorney's Office is not aware of a case that definitively addresses these specific legal claims pertaining to preemption. However, the County Attorney's advice is that it is plausible that a reviewing court will find that Bill No. 2491 is preempted by federal law.

d. Challenges Facing Bill No. 2491: Section 22-22.3, Definitions

Because Bill No. 2491 is attempting to involve the County in areas that are already being regulated by both Federal and State agencies the meaning of the words used are very important. The County Attorney's Office recognizes that semantics is a critical area of the law and that legal issues are frequently decided based upon the specific terms used and how they are applied. For this reason the County Attorney's Office asserts that any and all words or phrases contained in Sec. 22-22.3 that are also currently used either by the County or other governmental regulatory agencies should have consistency of meaning and usage. This consistency will avoid challenges based upon vagueness and or arbitrariness.

A majority of the words or phrases defined by Sec. 22-22.3 are consistent with the definitions used in County, State and Federal regulations, specifically FIFRA, HRS Chapter 149A and HRS Chapter 343. However, some words or phrases are not defined consistently with parallel or superior regulatory statutes and/or create new definitions that do not exist in superior regulatory statutes. The County Attorney's Office
recommends that said words or phrases either be changed to reflect consistency of definition with existing regulations or be discarded.

Section 22-22.3 uses the term “Genetically modified organism” to describe what the FDA more precisely defines as “Genetically Engineered”. The terms; “Experimental genetically modified organisms”, “Genetically modified”, and “Genetically modified organism” should be amended from variations of GMO to variations of GE in order to achieve consistency in multi-governmental regulation, i.e. replace the aforementioned terms with the following: “Experimental genetically engineered organisms.” “Genetically engineered,” and “Genetically engineered organism.”

A similar concern is raised by the definition of “general use pesticide” under Sec. 22-22.3. No Federal or State agency defines “general use pesticide” independently of other types of pesticide. Instead, both Federal and State agencies use the same definition of pesticides generally and then treat their specific classifications as “general use”, “restricted use”, and or “experimental use.” This determination is made by virtue of the specific permitted use contained on its label instead of by virtue of the chemical itself. If the County is going to get involved in the regulation of pesticides, the County Attorney’s Office asserts that semantic consistency be utilized so as to avoid challenges based upon vagueness or arbitrary and capricious enforcement.

e. Challenges Facing Bill No. 2491: Section 22-22.4, Mandatory Disclosure of Pesticides, and Genetically Modified Organisms

i. Pesticides

Bill No. 2491 sec. 22-22.4 (a) mandates all commercial agricultural entities that annually purchase or use in excess of five (5) pounds or fifteen (15) gallons of restricted use pesticides, any amount of any experimental pesticides, or both, during any calendar year to disclose the use of all pesticides of any kind during the following calendar year. The Bill further defines what the disclosure requirements include.

The first challenge the County will face pertains to the privilege to refuse to disclose and to prevent other persons from disclosing a trade secret pursuant to Hawai‘i Rules of Evidence (HRE) Rule 508. Pursuant to HRE Rule 501, except as otherwise required by the Constitution of the United States, the Constitution of the State of Hawai‘i, or provided by Act of Congress or Hawai‘i statute, and except as provided in those rules or in other rules adopted by the Supreme Court of the State of Hawai‘i, no person has a privilege to: (1) Refuse to be a witness; (2) Refuse to disclose any matter; (3) Refuse to produce any object or writing; or (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Pursuant to HRE Rule 508, Trade secrets:

[a] person has a privilege, which may be claimed by the person or the person’s agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the
person, if allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the judge shall take such protective measure as the interests of the holder of the privilege and of the parties and the furtherance of justice may require.

Id. An in-depth analysis of the issue is difficult, however, because Rule 508 is qualified. Pursuant to Rule 508 the privilege fails when the assertion of it will, “tend to conceal fraud or otherwise work injustice.” According to the commentary on the Rule, “Hawai‘i courts have not addressed the issue at the appellate level.” The lack of appellate court guidance regarding the privileges pertaining to trade secrets makes it difficult to assess the likely outcome of such a challenge. However, the County Attorney’s Office asserts that any requirement of disclosure of information regarding chemical pesticides used by what is understood to be chemical pesticide corporations will be challenged primarily by an assertion of trade secret privilege.

The second challenge faced by the disclosure provisions contained in Section 22-22.4 (a) is state level preemption. Regarding federal law, the U.S. Supreme Court opined in Mortier, supra, that FIFRA did not expressly supersede local regulation of the use of pesticides. Instead the express authorization to States to regulate pesticides under FIFRA section 24(a) could more plausibly be read as authorizing allocation of regulatory authority to the absolute discretion of the states themselves. This would include options of specific redelegation or leaving local regulation of pesticides in the hands of local authorities under existing state laws. Case law across the nation on this subject has consistently stated that Mortier, does not stand for the principle that municipalities are authorized to regulate pesticide but rather that the ability of municipalities to regulate pesticide matters rests with the individual states themselves.

Under Hawai‘i Law, “a municipal ordinance may be preempted pursuant to HRS § 46–1.5(13) if (1) it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or (2) it conflicts with state law.” Richardson v. City and County of Honolulu, 868 P.2d 1193 (Haw. 1994). The Hawai‘i Supreme Court has employed an approach to the issue of preemption of county ordinances by state statutory law, which might best be characterized as a “comprehensive statutory scheme” test. In Anamizu, the court found preemption due to two issues presented in that case. 52 Haw. at 554. First, the state statute in question created a global (i.e., “comprehensive”) mechanism for regulating the licensing of the entire universe of building contractors within the state. By contrast, the city ordinance undertook to regulate only electrical contractors—a discrete galaxy within, or a subset of, that universe. Second, the city ordinance at issue in Anamizu imposed “qualifying regulations” upon electrical contractors for municipal certification that were “additional” to those required for state licensure.

In Citizens Utilities Co. v. County of Kauai, 72 Haw. 285, 814 P.2d 398 (1991), the court held that a county ordinance regulating the height of utility poles was preempted by the combination of HRS § 269–6 (1985). The State which conferred
upon the State Public Utilities Commission (PUC) the power of "general supervision ... over all public utilities," and a specific regulation of the PUC that governed, inter alia, the minimum requirements for utility pole height, Id. at 288–89, 814 P.2d at 400. In doing so, the court applied the Anamizu test to HRS § 48–1.5(13) (the successor to HRS § 70–105) and declared that "a municipal ordinance, which covers the same subject matter embraced within a [s]tate statute is invalid if the statute discloses an express or implied intent that the same shall be exclusive, or uniform in application throughout the [s]tate." Id. at 289, 814 P.2d at 400. Analogously to Anamizu the state law at issue in Citizens Utilities governed a substantive "universe," i.e., global regulation of public utilities, whereas the relevant county ordinance addressed only a "galaxy" thereof—utility pole regulation.

On June 14, 2013 Act 105, HB 673, was signed into law by Governor Abercrombie. The purpose of Act 105 was to add a new section to HRS 149A in order to better address the potential public health and environmental issues related to pesticides by requiring: the online publishing of certain restricted use pesticide records, reports, or forms; and for the legislative reference bureau to conduct a study of other states' reporting requirements on pesticides that do not fall within the definition of a restricted use pesticide.

In reviewing HRS Chapter 149A and the attendant HARs it appears to the County Attorney's Office that the Hawai‘i pesticide law is a comprehensive state statutory scheme disclosing an implied intent to be exclusive and uniform throughout the state irrespective of the fact that nowhere in the law are counties expressly prohibited from regulating pesticides. This is because HRS Chapter 149A governs Pesticide Licensing and Sale, Pesticide Use, Violations, Warning Notice, and Penalties, creates an Advisory Committee pertaining to pesticides, Disclosure of restricted use pesticides and contains other general and miscellaneous provisions. Like Anamizu, supra, the bill at issue imposes disclosure regulations that are "additional" to those required for state licensure.

ii. Genetically Modified Organisms

Similarly to the challenges facing mandatory of disclosure of pesticide use, Sec. 22-22.4 (b) will primarily face challenges based upon the assertion of the trade secret privilege pursuant to HRE Rule 508. Sec. 22-22.4 (b) specifically requires all commercial agricultural entities that intentionally or knowingly possess any genetically modified organism to disclose the presence of said genetically modified organism or organisms. Disclosure is specifically mandated to include, "a general description of each genetically modified organism, a general description of the geographic location including at minimum the Tax Map Key and ahu pu‘a a where each genetically modified organism is being grown or developed, and dates that each genetically modified organism was initially introduced to the land in question."

It is difficult to assess the extent of what may be claimed to be trade secrets by a bio-tech company like DuPont-Pioneer or Syngenta. As stated supra, HRE Rule 508 provides commentary that is illustrative of the matter given that the issue has not been
addressed by Hawai’i appellate courts. In the commentary the Rule notes that Hawai’i Rules of Civil Procedure (HRCP) Rule 26(c) (7) provides qualified protection against disclosure of trade secrets during pre-trial discovery, investing the court with discretion to order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." If treated similarly by the courts at the circuit or appellate levels it is likely that the bio-tech companies will assert that the information being sought to be disclosed by Sec. 22-22.4 (b) constitutes a "trade secret or other confidential research, development, or commercial information."

Sec. 22-22.4 (b) will also face federal and state preemption challenges. The FDA has authority under the Federal Food, Drug, and Cosmetic (FD&C or the Act) Act to ensure the safety of all domestic and imported foods for man or other animals in the United States market, except meat, poultry and egg products which are regulated by the United States Department of Agriculture (USDA). The FDA also monitors foods to enforce the tolerances set by EPA for pesticides. Bioengineered foods and food ingredients (including food additives) must adhere to the same standards of safety under the Act that apply to their conventional counterparts. This means that these products must be as safe as the traditional foods in the market. The FDA has broad authority to initiate regulatory action if a product fails to meet the safety standards of the Act. The FDA relies primarily on two sections of the Act to ensure the safety of foods and food ingredients:

(1) The adulteration provisions of section 402(a)(1). Under this section, the FDA has the power to remove a food from the market (or sanction those marketing the food) if the food poses a risk to public health. It is important to note that the Act places a legal duty on developers to ensure that the foods they market to consumers are safe and comply with all legal requirements.

(2) The food additive provisions (section 409). Under this section, substances that are intentionally added to food are food additives, unless the substance is generally recognized as safe (GRAS) or is otherwise exempt (e.g., a pesticide, the safety of which is overseen by EPA).

The FD&C Act requires premarket approval of any food additive -- regardless of the technique used to add it to food. Thus, substances introduced into food are either (1) new food additives that require premarket approval by the FDA or (2) GRAS, and are exempt from the requirement for premarket review, for example, where there is a long history of safe use in food. Generally, whole foods, such as fruits, vegetables, and grains, are not subject to premarket approval because they have been used in food for lengthy periods of time.

Under FDA policy on foods derived from new plant varieties, a substance that would be a food additive if it were added during traditional food manufacture is also treated as a food additive if it is introduced into food through genetic modification of a food crop. For example, a novel sweetener bioengineered into food would likely require premarket approval. Generally, under agency policy, substances intentionally
introduced into food that would be reviewed as food additives include those that have unusual chemical functions, have unknown toxicity, or would be new major dietary components of the food.

There exists a lot of difficulty in evaluating the current state of the regulation of GMO products due to the rapid changing of the legal landscape at the federal level and therefore it is difficult to address and predict any court rulings regarding the application of the Supremacy Clause, Commerce Clause, or the federal preemption doctrine. For example, recently Congress has passed what has been popularly termed the “Monsanto Protection Act,” which was section 735 of a fiscal budget signed on March 26, 2013 by President Obama. This law has ignited a firestorm of criticism, with media channels claiming that it favors special interests like Monsanto Company and gives the executive branch the green light to disregard the judiciary.

According to Michele Simon, a public health lawyer, the provision "would require the U.S. Department of Agriculture [USDA] to essentially ignore any court ruling that would otherwise halt the planting of new genetically-engineered crops." Others maintain Section 735 simply gives the USDA authority to issue temporary permits to farmers to continue to plant or sell a genetically-modified crop notwithstanding a court injunction so long as the agency has found the crop is safe for the environment and health. The agency also has discretion to deny a temporary license, relying on the final sentence in Section 735, which reaffirms "the Secretary's authority under section 411, 412 and 414 of the Plant Protection Act."

Some within the legal community assert that Section 735 is a "rider" that is only in effect through the duration of the appropriations law, which initially expired on September 30, 2013. However, it is the County Attorney's Office understanding that the Monsanto Protection act was recently extended via another spending bill and is currently set to expire in December of 2013. Such potentially dynamic changes in this area of the law make it exceedingly difficult to opine on such matters. Nonetheless, the County Attorney's Office remains confident that federal preemption challenges or variations thereof will be mounted against the County due to the mandatory disclosure portions of sec. 22-22.4 (b).

**f. Challenges Facing Bill No. 2491: Section 22-22.5, Pesticide Buffer Zones**

Section 22-22.5 (a) states that it shall be mandatory for all commercial agricultural entities that purchased or used in excess of five (5) pounds or fifteen (15) gallons of any single restricted use pesticide during the prior calendar year to restrict the growing of crops, except ground cover to which no pesticide is applied, and thereby restrict the application of all pesticides in the following areas as stated.

The primary challenge that Section 22-22.5 will face will be a validity challenge under the County's general police power. As stated supra, in determining the validity of a local ordinance, the inquiry is twofold: whether the local government had the power to enact the ordinance; and, if so, whether the ordinance is consistent with the constitution.

It has been established that the County of Kaua‘i does have the general power to enact ordinances on the police power and specifically to exercise the zoning power in lands zoned agricultural. However, as applied to a specific bill or ordinance, a municipal law must be reasonable; that is, it must be fair, general and impartial in operation and must achieve legitimate governmental objectives. 186 "Municipalities may rely, in part, or appeal to common sense, in enacting an ordinance." 187 A municipal ordinance may not be arbitrary. 188 The test for determining whether a local police ordinance is reasonable requires that the court assess the existence of a rational relationship between the exercise of the police power and the public health, safety, morals, or general welfare in a given case. 189 In determining this question, all the existing circumstances or contemporaneous conditions, the objects sought to be obtained, and the necessity for the adoption of the ordinance are considered. 190

The County Attorney’s Office anticipates that any challenges to Sec. 22-22.5 will assert that it is unreasonable for the County to require that commercial agricultural entities that buy certain quantities of restricted use and experimental pesticides will be prohibited from growing “crops” in certain areas whether or not pesticides are used. Courts may question such a requirement given that it does not clearly appear that such restriction requirements manifest, “a rational relationship between the exercise of the police power and the public health, safety, morals, or general welfare” in this case. 191 This is because courts, in determining this question, will analyze all the existing circumstances or contemporaneous conditions, the objects sought to be obtained, and the necessity for the adoption of the ordinance. 192 The pertinent question in the analysis then becomes what is the rational relationship between prohibiting commercial agricultural entities who buy certain amounts of restricted use pesticides from growing any crops on lands specifically designated for the growing of crops? If the County is unable to address such questions a court will find Sec. 22-22.5 (a) an invalid use of the police power.

188 Four County (NW) Regional Solid Waste Management Dist. Bd. v. Sunray Services, Inc., 334 Ark. 118, 971 S.W.2d 255 (1998) (an enactment by a local government is not arbitrary if there is any reasonable basis for the enactment); City of Duluth v. Sarette, 283 N.W.2d 533 (Minn. 1979); John v. State, 577 S.W.2d 483 (Tex. Crim. App. 1979); Harts Health Studio v. Salt Lake County, 577 P.2d 116 (Utah 1978).
The second challenge that Sec. 22-22.5 will face will be state level preemption. As stated supra, under Hawai'i Law, "a municipal ordinance may be preempted pursuant to HRS § 46–1.5(13) if (1) it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or (2) it conflicts with state law." Richardson v. City and County of Honolulu, 868 P.2d 1193 (1994). The Hawai'i Supreme Court has employed an approach to the issue of preemption of county ordinances by state statutory law, which might best be characterized as a "comprehensive statutory scheme" test. In Anamizu, 52 Haw. 550, 481 P.2d 116 (1971) the court found preemption due to two issues presented in that case. First, the state statute in question created a global (i.e., "comprehensive") mechanism for regulating the licensing of the entire universe of building contractors within the state; by contrast, the city ordinance undertook to regulate only electrical contractors—a discrete galaxy within, or a subset of, that universe. Second, the city ordinance at issue in Anamizu imposed "qualifying regulations" upon electrical contractors for municipal certification that were "additional" to those required for state licensure.

In Citizens Utilities Co. v. County of Kauai, 72 Haw. 285, 814 P.2d 398 (1991), [the court] held that a county ordinance regulating the height of utility poles was preempted by the combination of HRS § 269–6 (1985), which conferred upon the State Public Utilities Commission (PUC) the power of "general supervision ... over all public utilities," and a specific regulation of the PUC that governed, inter alia, the minimum requirements for utility pole height. Id. at 288–89, 814 P.2d at 400. In doing so, the court applied the Anamizu test to HRS § 46–1.5(13) (the successor to HRS § 70–105) and declared that "a municipal ordinance, which covers the same subject matter embraced within a [s]tate statute is invalid if the statute discloses an express or implied intent that the same shall be exclusive, or uniform in application throughout the [s]tate." Id. at 289, 814 P.2d at 400. Analogously to Anamizu the state law at issue in Citizens Utilities governed a substantive "universe," i.e., global regulation of public utilities, whereas the relevant county ordinance addressed only a "galaxy" thereof—utility pole regulation.

Both State and County law already clearly allow, and arguably encourage, the growing of crops anywhere within lands zoned for agricultural use. This generally permitted use is allowable without further licenses, permits or permission from any sovereign entity. The bill's attempt to restrict the alleged negative health impacts of pesticides by prohibiting the simple growing of crops will likely be found to be in conflict with state law and the state wide policy of supporting agriculture on agricultural lands.

Sec. 22-22.5 also contains a public nuisance type conflict provision which provides that in case of a conflict the more restrictive provisions would apply. Again, as stated supra, the County Attorney's Office opines that HRS Chapter 165 prohibits the County from "declaring" farming operations, including those specific operations proscribed by this section, a nuisance. Likewise any authority of the Bill based upon the ability to declare and regulate nuisances relating to farming operations would like wise be held to be violative of the Right to Farm Act.
g. Challenges Facing Bill No. 2491: Section 22-22.6, Environmental and Public Health Impacts Study (EPHIS)

No laws prohibit or preempt the County from conducting an Environmental and Public Health Impact Study (EPHIS) as described in the bill. However, there may be a separation of powers issue that is raised because it appears that the Council may try to direct how the study will be conducted via resolution. As described below this may be a violation of the doctrine of separation of powers.

According to the bill the County of Kaua‘i shall complete an EPHIS, “as determined by resolution”. Akahane v. Fasi, 58 Haw. 74, 65 P.2d 552 (1977), held that the executive branch of the city and county of Honolulu was primarily responsible to initially proceed and conduct in-depth studies relating to city planning, and thus, where city council never made or submitted a request to executive branch for in-depth study concerning development plan and where city council did not make any resolution to executive branch accompanied by proper appropriation requesting the desired study, city council was without authority to employ independent contractor to make the desired study.

Therefore under Akahane Council must first pass a resolution, accompanied by proper appropriation, requesting that the executive branch of the County to conduct the desired study. If no: the County council will likely be found to not have the authority to employ independent contractor to make the desired study.

However, Akahane may be distinguishable from the instant issues regarding GMO and pesticides because in Akahane the court found that there was no doubt that, “the study in question would be helpful to the city council in determining whether and what revisions or amendments to the existing general plan or development plan should be made[,]” and that, “[t]he Charter clearly [gave] the city council the power to initiate legislation designed to revise and amend an existing general plan or development plan.” In the instant issue that Kaua‘i County Charter does not clearly give the council the power to regulate pesticides or GMO. So further analysis may be required. Furthermore, because said resolution has not been discussed yet, the subject resolution may in fact comply with the requirements of Akahane. At this point the issue has been raised but without seeing the actual resolution no conclusions may be made.

Further challenges facing the County under Sec. 22-2.6 pertain to challenges of implementation. The bill currently describes the EPHIS as comprising a two-step process. The first is a 12 month scopeing process convened and facilitated by a professional consultant. The second part mandates that the EPHIS itself be completed within 18 months. The County Attorney’s office does not believe that these timelines have any practical basis but instead reflect the desire of the Council.

Given the high level of divisiveness of the bill it is likely that the overall process will take more than the mandated 30 months. Given other similar citizens advisory groups that the County Attorney has had experience working for it is likely that the process of determining who will sit on and participate in the Joint Fact Finding Group alone will take months to complete and getting the participants to agree on the scope
and design of the study will take even longer. Furthermore it is unknown how long the scientific portion of the study will take and how much an actual scientific study of the pertinent issues as determined by the design and scoping group will cost. This is because the scope and design of the study is yet to be determined. However, it is understood that such a study would be in depth and involve highly technical environmental analysis of scientific, social, and economic impacts of what amounts to adverse effects to the environment of the commercial agricultural industry in general.

h. Challenges Facing Bill No. 2491: Section 22-22.7, Penalties, and Section 22-22.8, Rulemaking

Sec. 22-22.7 and Sec. 22-22.8 are attendant sections of the Bill that prescribe penalties for violation of the preceding section of Bill No. 2491 and authorize the Office of Economic Development of the County of Kaua‘i to engage in HRS Chapter 91 rule making proceedings to effectuate said preceding sections of Bill No. 2491. Given the County Attorney’s analysis of the preceding sections if a court finds that the tenets of Bill No. 2491 are invalid or otherwise preempted, Sections 22-22.7 and 22-22.8 will likewise be set aside as they result from said sections.

i. Challenges Facing Bill No. 2491: Application of Kaua‘i County Charter Section 6.02

One of the single biggest changes of the bill between its first reading and its final passage was the reassignment of the responsibilities under the bill from the Department of Public Works to the Office of Economic Development (“OED”). For the reasons stated below Council’s unilateral assignment of new functions to OED via the bill without first being recommended by the Mayor appears to violate charter section 6.02 specifically and the legal doctrine of separation of powers in general.

Although the formal creation of the United States and the incorporation of Hawai‘i into that Union differ in time by more than 150 years, they both follow the same guiding principles of government. The Founding Fathers developed the concepts and ideals which form the basis of our unified government through philosophical and practical debate, most notably in the period prior to the effective date of our current Constitution: March 4, 1789.

In the years preceding the official replacement of the Articles of Confederation by the Constitution, displeasure with the Articles stirred significant discussion regarding the “correct” form of Government. *The Federalist* was one of the best sources for these discussions. Penned by Alexander Hamilton, James Madison, and John Jay, *The Federalist*, now known as *The Federalist Papers*, is a series of 85 articles and essays which promoted discourse and the ratification of the Constitution. *The Federalist* broached many topics popular toward the end of the 18th Century which still have application today.

In one of the more famous essays, entitled *The Federalist No. 10: the Utility of the Union as a Safeguard against Domestic Faction and Insurrection*, James Madison
reasoned that a republican form of democracy could best protect the people of the United States from unbridled power and tyranny. In No. 10, Madison discusses the concept we now refer to as federalism and, essentially, the need for the powers of a government to be separated so as to protect the people from the passions of individuals. In so doing, Madison explained:

No man is allowed to be a judge in his own case, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?

_The Federalist, No. 10._ While _The Federalist, No. 10_, explains the dangers of unchecked power, the Papers in their entirety lay the groundwork for a separation of powers complimented by a series of checks and balances. See, e.g., _The Federalist No. 78_ (Hamilton paves the way for the process of Judicial Review: federal courts reviewing federal legislation or executive acts); _The Federalist No. 39_ (Madison presents a clear discussion of what is now known as the principle of Federalism); _The Federalist No. 51_ (Madison calls for checks and balances in government). Through the dissemination of ideas, literature such as _The Federalist_, and much discourse, the Congressional Congress adopted the Constitution on September 17, 1787, the states ratified it, and the Constitution replaced the Articles of Confederation on March 4, 1789.

Under the constitutional separation of powers, no branch of government “may exercise any power that is not explicitly bestowed by the constitution or that is not essential to the exercise thereof.” 16A Am. Jur. 2d Constitutional Law § 239; citing _Washington v. Commissioner of Correction_, 287 Conn. 792, (2008). “Although the purpose of the separation of powers doctrine is to create a system of checks and balances so that each branch maintains its integrity and independence, the three branches need not be entirely separate and distinct.” _Id., citing In re J.D._, 172 Ohio App. 3d 288 (10th Dist. 2007). While such blending of powers may occur to some, minor extent, “the purpose of the doctrine is to define the core powers of the three branches of government and prevent unwarranted infringement by one upon another’s core powers.” _Id._ Thus, we have a separate legislative, judicial, and executive branch, each with its own set of powers and limited overlap.

The reason for a three-branch, or tripartite, governmental system is to prevent the commingling of powers within the same hands. While the legislature may be responsible for crafting laws, they are confined to that role and should not be responsible for enforcing the laws, or judging their application. “The Doctrine [of separation of powers] is premised on the belief that too much power in the hands on one governmental branch invites corruption and tyranny, and thus, the doctrine prevents one branch of government from aggrandizing itself or encroaching upon the fundamental functions of another.” 16A Am. Jur. 2d Constitutional Law § 239, citing
State v. Baxter, 686 N.W. 2d 846 (Minn. Ct. App. 2004); in re Detention of Savala, 147 Wash. App. 798 (Div. 3, 1998). The goal is to avoid the aggregation of "unchecked power which might lead to oppression and despotism." Id., citing Bullet Hole Inc. v. Dunbar, 335 N.J. Super. 562 (App. Div. 2000). This concept of Federalism, and more specifically, of the separation of powers among three branches of government has modern application here in Hawai‘i.

There have been numerous constitutions for Hawai‘i, as a kingdom, a territory, and as a state. The people of the State of Hawai‘i adopted the modern constitution on June 27, 1959, and it went into effect on August 21, 1959, upon the presidential proclamation admitting Hawai‘i to the Union. H.I. Const., intro. The 1959 constitution has been revised a number of times, most notably in 1978, when the Constitutional Convention adopted several amendments.

The Constitution for the State of Hawai‘i, explicitly adopts the Constitution of the United States of America "on behalf of the people of the State of Hawai‘i. " H.I. Const., preamble. By adopting the Federal Constitution, the people of the State of Hawai‘i implicitly accept the tenets of separation of powers and the system of checks and balances. Taking the implicit acceptance of these doctrines one step further, the Constitution for the State of Hawai‘i explicitly provides for a separate legislative, executive, and judicial branch of government. See H.I. Const., Art. IV, § 3.1 (defining the legislative power), id. at Art. V, §§ 5.1, 5.5 (establishing the Executive Branch and defining its powers, respectively), id. at Art. VI, §§ 6.1-6.2 (defining powers and structure of judicial branch). With this tripartite system in mind, both the Constitution for the State of Hawai‘i and the Hawai‘i Revised Statutes allow for local municipalities to govern themselves in accordance with the rule and laws of the United States and the State of Hawai‘i.

Article VIII of the Constitution of the State of Hawai‘i is entitled "Local Government: Creation; Powers of Political Subdivisions." H.I. Const., Art. VIII. Article VIII, § 1 explains that the "legislature shall create counties," while § 2 provides that each political subdivision "shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law." Id. at §§ 1, 2. Similarly, the Hawai‘i State Legislature enacted HRS § 46-1.5(1) which explains that, "[e]ach county shall have the power to frame and adopt a charter for its own self-government that shall establish the county executive, administrative, and legislative structure and organization...." Id. It is vital to note that both the Constitution and the Revised Statutes explicitly list the separate branches of the local government: legislative, executive, and administrative – judicial is provided for separately. Going beyond simply specifying that there are different and independent branches of local government, the Constitution of the State of Hawai‘i provides that "[c]harter provisions with respect to a political subdivision’s executive, legislative and administrative structure and organization shall be superior to statutory provisions...." H.I. Const. Art. VIII, § 2. Thus, the county charter is of the utmost importance.

the Charter became the law of the land, proudly proclaiming that "[t]he people of the county of Kaua'i are and shall continue to be a body politic and corporate in perpetuity under the name of 'county of Kaua'i'..." This body politic made a conscious decision to follow the structure and design of many other political entities before it, adopting a legislature in the form of a Council and a separate executive/administrative branch headed by the Mayor.

One way to look at the governance of a city or county as a municipal corporation is cogently explained as follows:

Unless additional powers are conferred by statute or by the state constitution, a municipal corporation created by charter derives all its powers from the charter under which it acts as a body corporate and politic.

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The city is a miniature state, the council is its legislature, the charter its constitution. In other words, the city charter [or county charter] represents the supreme law of the city, subject only to conflicting provisions in the state and federal constitutions, or to preemptive state or federal law. The charter supersedes all municipal laws, ordinances, rules or regulations that are inconsistent with its provisions.

2A McQuillin Mun. Corp. § 9:3 (3d ed.) (internal citations omitted), citing Paulsen v. City of Portland, 149 U.S. 30 (1893); see also DeVita v. County of Napa, 9 Cal. 4th 763 (1995). Put another way, the County Charter is the law of the land. The only action which may be taken by actors within the Government of the County is that which the Charter expressly provides.193

The Charter is very specific in the powers afforded the different branches of the County government. Article III, § 3.01 entitled "County Council," states that the "legislative power of the county shall be vested in and exercised by the county council, except as otherwise provided by this charter." Fortunately, the Charter otherwise provides very specific limitations on the power of the Council in § 3.18, mandating that "[t]he council and its members shall not interfere with the administrative processes delegated to the mayor." The drafters of the Charter clearly laid out the duties of the executive branch in general, and the mayor in particular.

193 "...the powers of the municipal corporation are derived from the charter or act of incorporation. Consequently the municipality's officers may only perform those duties which are prescribed in those documents or as made applicable by legislative act or which may be implied or which are indispensable to enable the municipal corporation to perform the purposes of its creation. In the discharge of their duties the officers cannot go beyond the law, nor delegate powers involving the exercise of judgment and discretion." Am. Jur. 2d. Public Officers and Employees § 226, citing Lockyer v. City and County of San Francisco, 33 Cal. 4th 1265 (2004); City of Weslaco, Tex. V. Porter, 56 F.2d 6 (C.C.A. 5th Cir. 1932); Ex parte Guerrero, 69 Cal. 38 (1886).
Article VI of the Charter, “Executive Branch,” plainly states that “[t]he executive power of the county shall be vested in and exercised by the executive branch, which shall be headed by the mayor.” Id. at § 6.01. Article VII of the Charter, “Mayor,” expounds on the mayor’s powers: “[t]he mayor shall be the chief executive officer of the county.” § 7.05. Among the powers listed in Section 7.05 is the power to “exercise direct supervision over all departments and coordinate all administrative activities and see that they are honestly, efficiently, and lawfully conducted.” Id. Thus, we have two distinct branches of the County government, Constitution of the State of Hawai‘i providing the third (judicial).

Based on the above, it seems clear that there are two distinct branches of County government with two, distinct sets of power at odds due to the Council’s passing of Bill No. 2491, Draft 2 as adopted by the Council on October 17, 2013. At the outset, the Council leaves no doubt that it submits to the governance of the State Constitution (Art. 22, § 22-22.1(a)) and the Hawai‘i Revised Statutes. (Art. 22, § 22-22.1(d)). By definition then, the Council would also have to agree that it supports the tripartite system of Government which the State of Hawai‘i officially adopted in 1959, along with its separation of powers and system of checks and balances. The Council could not very well say in one breath, “pursuant to the Constitution of this State,” or “based on the laws of this land as enacted by the State Legislature,” and then in the next breath disregard both. But, by appearances, the Council is doing just that.

The Council of the County of Kauai passed Bill No. 2491, Draft 2, (“the Bill”) on October 17, 2013. The purpose of the Bill “is to establish provisions to inform the public, and protect the public from any direct, indirect, or cumulative negative impacts on the health and the natural environment of the people and place of the County of Kauai....” Art. 22, § 22-22.2. In essence, the Bill requires that commercial agricultural entities using particular types of pesticides in excess of listed amounts make certain disclosures. Id. at § 22-22.4(1). The Bill further requires the use of “buffer zones” in specific instances, pursuant to Section 22-22.5 of the Bill. At issue here are the duties and demands which the Council makes of the Office of Economic Development through the Bill.

Section 22-22.4, “Mandatory Disclosure of Pesticides, and Genetically Modified Organisms,” explains in sub-section three (“Pesticide Post-Application Weekly Public Disclosure”) that “[e]ach commercial agricultural entity shall submit all public disclosure reports to the County of Kauai Office of Economic Development (OED)...” and further requires that “[a]ll public disclosure reports shall be posted online, and available for viewing and download by any interested persons. OED shall develop a standardized reporting form.” Id. The Bill also requires that any commercial agricultural entity that intentionally possesses any genetically modified organism to disclose said possession, and that “[d]irect notification to OED and DOA documenting such disclosure shall occur no later than sixty (60) days following the end of each calendar year....” Art. 22, § 22-22.4(b)(1). Lastly, the Bill mandates as follows:
Sec. 22-22.8 Rulemaking

In order to effectuate all provisions of this Article, the Office of Economic Development may engage in any rulemaking it deems necessary or proper, utilizing the provisions of Hawaii Revised Statutes Chapter 91. In so doing, OED is authorized to collaborate with the State of Hawaii Department of Agriculture.

Art. 22, § 22-22.8. By enacting the Bill inclusive of the above provisions, the Council, which is the legislative branch of the County government, is infringing on the enumerated powers of the Executive and Administrative branches of the County government.

The Office of Economic Development ("OED") is one of several offices of which the Mayor has oversight. Section 2-1.5 of the Kauai County Code states that "[t]here shall be an office of Economic Development as provided by law." Id. OED's mission is as follows:

The Office of Economic Development works, in partnership with the community, to create economic opportunities towards the development of a healthy, stable and balanced economy for the residents of the County of Kauai.

The Office of Economic Development (OED), as a government entity, interfaces with business and community leaders as well as other government programs to enhance Kauai's economic development activities. OED is responsible to provide technical and financial support, as feasible, for both large and small business establishments or existing and emerging new industries which offer full employment for Kauai's residents.

County of Kauai: Office of Economic Development, http://www.kauai.gov/default.aspx?tabid=59, (last accessed October 21, 2013). The Office of Economic Development also lists its goals as the following:

- Foster and strengthen a well-qualified labor force consistent with local industry direction and workforce needs.

- Expand and strengthen well-balanced visitor industry promotions and businesses aligned with enhancing island-wide product development projects.

- Increase support and collaboration to ensure the continual growth and expansion of Kauai's agricultural project.

- Increase advocacy and coordination efforts for energy efficiency projects, energy emergency preparedness programs, and increase use of renewable resources.

- Increase high level film location productions and expand business development efforts to secure a major film studio complex on Kauai.
- Improve the facilitation of coordinated research, market analysis, and compilation of local industry/community-related data and statistics to support business and community development.

Id. None of the above goals, nor OED’s mission statement relate in any way to regulating the disclosure of pesticide use, the monitoring of pesticide use, or rulemaking related to disclosures of pesticide use or possession of GMO products. The functions which the Council has allocated to OED do not fall within any explicit or implied duty of the Office. The Council has, therefore, assigned a new function to OED.

The power to create departments and agencies resides with the Mayor under the executive branch of the County government. Article VI, “Executive Branch,” Section 6.02, “Organization,” provides as follows:

Except as otherwise provided, within six months after the effective date of this charter, the mayor shall recommend and the council shall by ordinance adopt an administrative code providing for a complete plan of administrative organization of the executive agencies of the county government consistent with the provisions of this charter. Upon recommendation of the mayor, the council may, by vote of five members, change, abolish, combine or re-arrange the executive agencies of the county government.

New functions may be assigned by the mayor to existing agencies, but to the extent that this is not practicable, the council by a vote of five members may upon the recommendation of the mayor create additional departments.

Id. Considering that the six month window discussed in the first paragraph has long since passed, the important provision for the issue at hand lies in the second paragraph. Referencing existing agencies, the Charter explicitly states that it is the Mayor which may assign new functions. Through the provisions of the Bill, Council has impermissibly usurped the power of the Executive branch of the County, and specifically the powers of the Mayor as defined in the Charter. 3 McQuillen Mun. Corp. § 12:73; Am. Jur. 2d, Municipal Corporations § 203 (“The powers and duties of the mayor or chief executive194 rest almost entirely upon the proper construction of the charter and the ordinances or bylaws and municipal regulations passed in pursuance of such authority”), citing City of Brighton v. Gibson, 501 So. 2d 1239 (Ala. Civ. App. 1987); Mullins v. Henderson, 75 Cal. App. 2d 117 (1st Dist. 1946); Brown v. Fair Political Practices Com., 84 Cal. App. 4th 137 (1st Dist. 2000). The present situation is quite similar to that which the Supreme Court of Hawai‘i dealt examined in City Council of the City and County of Honolulu v. Fasi, 52 Haw. 3 (1970).

In Fasi, the court dealt with a complaint which the city council filed in the First Circuit Court. The Council was suing the mayor and sought a judgment mandating the

\[194\] Universally the mayor is the chief executive officer of the city and, except as otherwise provided, charters nearly always declare that he or she shall have and exercise all the executive powers of the municipality. 3 McQuillen Mun. Corp. § 12:73, citing Brown v. Fair Political Practices Com., 84 Cal. App. 4th 137 (1st Dist. 2000)
defendants comply with a newly passed resolution ("the Resolution"). 52 Haw. At 3-4. The goal of the Resolution was to require the director of finance to take certain actions. Although the court held that there were two issues which required attention, the pertinent issue here is: whether the director of finance, as part of the executive branch, was required to complete the obligations set forth in the Resolution. Id. at 4.

The Supreme Court of Hawai‘i held that the council had ignored the concept of separation of powers and, therefore, the requirements of the Resolution were invalid. Prior to so holding, the court performed a full analysis of the issues.195 Fasi, 52 Haw. at 8-9. In its analysis, the court referred to a recent application of the timeless statement of Justice Holmes in Towne v. Eisner, 245 U.S. 418, 425 (1918):

A word is not a crystal, transparent and uncharged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Fasi, 52 Haw. at 5, citing In re Application of Eklund, 51 Haw. 568 (1970). The court cited the wisdom of Justice Holmes to support the following premise regarding city and county charters:

The charter has as its basic scheme a clear and definite separation of the legislative power and the executive power of the city and county, vesting the former in the legislative branch represented by the council and the latter in the executive branch headed by the mayor. Under the separation of powers so provided, each branch is coordinate with the other, and neither may exercise the power vested in the other.

Fasi, 52 Haw. at 5. In this regard, the court continued that there is not a "wall of separation between the powers which allows those powers to go unchecked. Id. at 6. Rather, the separation merely serves as a safeguard "against improvident legislative or executive action."196 Id. at 6. The Fasi court crystallized the application of separation of powers to municipal corporations, and sheds light on the situation at hand.

By assigning specific, new powers to the Office of Economic Development, the Council has assigned new functions to an existing office. Those new functions are listed above, and include creating rulemaking per Section 22-22.8 of the Bill. Assigning new powers to an existing office is a power specifically reserved for the Mayor. Thus, the Council is in violation of Section 6.02 of the Charter. The Council is also in violation of Section 3.18 of the Charter, which clearly states that "[t]he council and its members shall not interfere with the administrative processes delegated to the mayor." There can be no argument that: Council is in compliance with the terms of the Charter of the

195 Because Resolution No. 436 provides for the exercise by the council of executive power which is inconsistent with the principle of separation of powers, we hold that it does not establish the kind of policy which the director of finance is required to follow under section 5-403(k).” Fasi, 52 Haw. at 8-9 (internal citations omitted).

196 As examples, the Fasi court states that the Mayor’s veto power does not allow him to legislate, and, conversely, the council cannot take the power of the executive.
County of Kauai, with the tenets of the State laws, the State Constitution, the Federal Constitution, or the basic ideals of federalism and checks and balances which support our entire system of government. Some might argue that the Council’s delegation of powers to the Office of Economic Development has no real effect on the basics of the American institution that is the democratic republic - that such a statement is little more than an *argumentum ad absurdium*. But such a statement would be false.

The County government in general and the system in Kauai in particular, are of the utmost importance. Given the decentralized nature of the County unit of government, it is much more important that the County unit function properly as a full, governmental entity; proper roles filled and boundaries of power respected. *Am. Jur. 2d, Municipal Corporations, Etc.* § 2, *citing* Fairlie, *Local Government in Counties, Towns and Villages*, ch IV, pp. 62, 63. Related to cities and counties as municipal corporations, treatises and courts agree that:

[i]f the city [or county] is to be regarded at all times as a mere creature and agent of the state in government – the settled doctrine – to carry out the fundamental of our political system, namely, the separation of powers into the executive, legislative and judicial, it would seem to follow logically that the functions of the officer should be restricted to the powers of the department in which he serves.

2A McQuillin Mun. Corp. § 9:11 (3d ed.); see also *Fasi*, 52 Haw. 3 (1970) (under charter legislative branch city and county government as coordinate with executive branch and neither to exercise the power of other). Our Charter follows in form and substance, mandating that the Council respect its given role, and the mayor do the same. Councils’ overstepping its bounds of power and impermissibly adopting the role of the Mayor and the Executive/Administrative branch of government will lead to the Bill being held unconstitutional if challenged on those grounds.
IV. Conclusion

Based on the foregoing, the County Attorney’s Office concludes that there are many legal challenges facing Bill No. 2491. While there is no Hawai‘i case law directly interpreting the above-listed issues, there is extensive statutory and case law demonstrating a strong likelihood that a reviewing court would declare Bill No. 2491 preempted by superior State or federal statutes. Bill No. 2491 may also be an invalid exercise of the police power, and/or violate HRS Chapter 165’s proscription against an official “declaring” such farming operations a nuisance. We may also face a challenge given Council’s unilateral assignment of new functions to OED without initiation by the Mayor, in violation of the Charter.

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