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August 30, 2013

Via Email (mtrask@Kaua`i.gov)
and U.S. Mail

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Re: County of Kaua`i Bill No. 2491 - Requested Legal Analysis of Issues Set Forth in August 8, 2013 Email

Dear Mr. Trask:

This letter responds to your request for legal analysis of several issues related to County of Kaua`i Bill No. 2491 ("Bill 2491"), which were set forth in your August 8, 2013 email to counsel. Although this letter discusses in general the legal issues identified in your email[1] and the potential impact of Bill 2491 on all of the companies growing genetically modified ("GM") crops on Kaua`i (the "Seed Companies"), we are writing only on behalf of our clients, Syngenta and DuPont Pioneer.

The issues are addressed in further detail in the following order:

(1) Pre-emption of Bill 2491 by State and Federal laws and the United States and Hawai`i Constitutions is addressed in Sections I and II, below, at pages 1 – 16. Bill 2491 is pre-empted under the allocation of legislative authority set forth in the Hawai`i Constitution and conflicts with the Hawai`i Pesticide Law under Haw. Rev. Stat. ("HRS")

[1] Please note that this letter focuses on the legal issues identified in your email – it does not seek to analyze or address all of the legal issues and flaws of Bill 2491.

Chapter 149A, which provides a comprehensive regulatory scheme to regulate pesticide use, sale, distribution, licensing, and registration at the State level. Furthermore, Bill 2491 is preempted by various Federal laws governing the regulation of GM plant products and biotechnology and by the Supremacy Clause and Foreign and Interstate Commerce Clauses of the United States Constitution.

(2) Whether the agricultural operations sought to be regulated by Bill 2491 constitute a public nuisance under HRS Chapter 46 is addressed in Section III, below, at pages 17-20. The GM agricultural operations sought to be regulated by Bill 2491 are not a public nuisance under HRS Chapter 46. The Right to Farm Act, under HRS Chapter 165, prohibits the County from designating farming operations as a nuisance and, therefore, bars Bill 2491.

(3) The applicability of Hawai`i State Constitution, Article XI, Section 5, to Bill 2491 is addressed in Section IV, below, at pages 21-25. Bill 2491 is unconstitutional because the Hawai`i Constitution vests power in the Hawai`i Legislature to enact laws over State lands and the Kaua`i County is exceeding its authority under HRS Chapter 46. Even assuming Bill 2491 were constitutional, which it is not, the Bill constitutes impermissible special legislation by targeting the Seed Companies. The related issues on the applicable general laws in Hawai`i pertaining to State lands and the requirements for Environmental Impact Statements ("EIS") are further discussed on pages 2-6, 10, and 26-29.

(4) The applicability of HRS Chapter 343 and Haw. Admin. Rule ("HAR") Chapter 11-200, relating to Environmental Impact Statements, to Bill 2491 is addressed in Section V, below, at pages 26-29. HRS Chapter 343 and HAR Chapter 11-200 apply to agency actions that involve the use of County money and State lands. For this reason, if the Kaua`i County enacts Bill 2491, it must conduct an EIS before implementing any part of the Bill. In contrast, the Seed Companies' ongoing operations do not trigger the need for any environmental assessment.

(5) Whether the purpose of Bill 2491 constitutes a reasonable exercise of police power is addressed in Section VI, below, at pages 29-33. Bill 2491 is not a reasonable exercise of the County's police power because it violates the Equal Protection Clause and Substantive Due Process under the Hawai`i State Constitution and the United States Constitution.

I. Bill 2491 is Pre-empted by State Laws and the Hawai`i Constitution

The entire text of Bill 2491 is pre-empted under the allocation of legislative authority set forth in the Hawai`i Constitution, which vests the power to protect and preserve agriculture and farming at the State level. Specifically, the state Constitution directs the state legislature (but not the counties) to enact legislation of statewide application to protect and preserve agricultural and farming resources. These "general laws" include the Right to Farm Act, the State Planning Act, the Agribusiness Development Corporation statute, and, relatedly, the Hawai`i Pesticides Law.

The Constitution also provides that legislative power over State-owned lands, including agricultural use of State-owned lands, must be exercised only through general laws. Because the counties may legislate on functions of statewide interest and concern *only if* given specific authority by the legislature, the County Council cannot constitutionally enact Bill 2491, given that the legislature has not granted specific authority to the counties over agriculture and farming operations.

The counties' authority to legislate is limited by the supremacy provisions of the state Constitution. Article VIII of the Hawai`i Constitution pertains to local government. Article VIII, section 1 of the Constitution provides,

> The legislature shall create counties, and may create other political subdivisions within the State, and provide for the government thereof. Each political subdivision shall have and exercise such powers **as shall be conferred under general laws**. (Emphasis added).

The term "general laws" has been defined by the Hawai`i Supreme Court to denote laws that apply uniformly throughout all political subdivisions of the State, including the counties. *Bulgo v. County of Maui,* 50 Haw. 51, 58, 430 P.2d 321, 326 (1967).

Article VIII, section 6 of the Constitution further states, "This article shall not limit the power of the legislature to enact laws of statewide concern." The Hawai`i Supreme Court has stated that this section "was originally promulgated by the 1950 Constitutional Convention to make clear that the powers conferred upon the counties in article VIII did not restrict any of the powers of the legislature on state matters." *Richardson v. City & County of Honolulu*, 76 Hawai`i 46, 66, 868 P.2d 1193, 1213 (1994) (quotation marks and citation omitted); *see also, City & County of Honolulu v. Ariyoshi,* 67 Haw. 412, 416, 689 P.2d 757, 761 (1984) ("In order to give effect to section 6, the power of the legislature to enact laws of statewide concern cannot be diminished.").

In turn, the legislature codified the constitutional supremacy principles in HRS § 50-15, which states,

> Notwithstanding the provisions of this chapter, **there is expressly reserved to the state legislature the power to enact all laws of general application throughout the State on matters of concern and interest** and laws relating to the fiscal powers of the counties, and **neither a charter nor ordinances adopted under a charter shall be in conflict therewith.**

(Emphasis added).

The Supreme Court of Hawai`i has stated,

> From [our] review of the history of the adoption of the constitutional provision at hand, it is clear that the state legislature may enact general laws concerning state matters. Provisions of a charter or ordinance of a political subdivision of the state will be held superior to legislative enactments **only if the charter provisions relate to a county government's executive, legislative or administrative structure and organization.**

Konno v. County of Hawai`i, 85 Haw. 61, 76, 937 P.2d 397, 412 (1997) (citation omitted) (emphasis removed and added). Therefore, the Supreme Court has held,

> **if an ordinance truly conflicts with Hawai'i statutory law that is of statewide concern, then it is necessarily invalid** because it violates article VIII, section 6 of the Hawai'i Constitution and HRS §§ 50-15-the state's supremacy provisions. A law of general application throughout the state is a law of statewide concern within the meaning of article VIII, section 6 of the Hawai'i Constitution.

Save Sunset Beach Coalition v. City & County of Honolulu, 102 Hawai`i 465, 481, 78 P.3d 1, 17 (2003) (citations and internal punctuation omitted; bold added).[2]

Moreover, "on functions of statewide interest and concern, the general rule is that if the counties are not given specific authority to take over the function, the counties cannot thwart the State from performing its duty." *Kunimoto v. Kawakami*, 56 Haw. 582, 585, 545 P.2d 684, 686 (1976) (citations omitted). Therefore, a county must be granted specific authority to legislate in a given area, or else face a pre-emption challenge.

Lastly, the general powers and limitations of the counties are prescribed by HRS § 46-1.5. This statute, which explicitly limits the counties' power "[s]ubject to general law," provides,

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[2] Thus, in *Save Sunset Beach*, the Hawai'i Supreme Court held that the City & County of Honolulu could not pass a zoning ordinance that would conflict with the land use requirements of HRS Chapter 205 for agricultural lands.

> While the counties are empowered to enact zoning ordinances, HRS chapter 205 clearly limits the permissible uses allowed within an agricultural district. HRS § 205-4.5(b) states that "[u]ses not expressly permitted in subsection (a) *shall be prohibited,* except the uses permitted as provided in sections 205-6 and 205-8[.]" (Emphasis added.) Thus, any use permitted by a country designation not expressly permitted in HRS § 205-4.5(a) or by virtue of HRS §§ 205-6 or 205-8 (2001) conflicts with the statutory regime.

Save Sunset Beach, 102 Hawai`i at 482, 78 P.3d at 18 (footnote omitted).

> 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.**

HRS § 46-1.5(13) (emphasis added). As explained by the Supreme Court, HRS § 46-1.5 was enacted by the legislature in 1988 as part of Act 263, whose purpose was

> to repeal the special or local statutes setting forth the powers of particular counties, and to replace these provisions with grants of general powers which would have uniform operation in all counties of the State ... so that all counties [would] have similar general powers or limitations that supersede currently unnecessary provisions.

Richardson, 76 Hawai`i at 60, 868 P.2d at 1207 (citation omitted). "Key to that reorganization was the promulgation of HRS § 46–1.5, which, in effect, enumerated the general powers of the county governments, '**subject to general [*i.e.*, state] law**.'" *Id.* (emphasis added).

The Hawai`i Supreme Court applied these constitutional supremacy principles to Haw. Rev. Stat. § 46-1.5(13) in *Richardson v. City & County of Honolulu, supra*. In *Richardson*, the Supreme Court of Hawai`i stated that "a municipal ordinance may be pre-empted 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) if it conflicts with state law." *Richardson*, 76 Hawai`i at 62, 868 P.2d at 1209 (emphasis added). The court said that, "it is clear that HRS § 46–1.5(13) was intended to be **a provision mandating the pre-emption of any ordinance** that either conflicted with the intent of a state statute or legislated in an area already staked out by the legislature for exclusive and statewide statutory treatment." *Id.* (emphasis added).

"A test to determine whether an ordinance conflicts with a statute is whether it prohibits what the statute permits or permits what the state prohibits." *Waikiki Resort Hotel, Inc. v. City & County of Honolulu*, 63 Haw. 222, 241, 624 P.2d 1353, 1366 (1981). "A conflict exists if the local ordinance 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'" *State v. Ewing*, 81 Hawai`i 156, 161, 914 P.2d 549, 554 (App. 1996), quoting *Richardson*, 76 Hawai`i at 61, 868 P.2d at 1208.

Hawai`i courts have pre-empted a host of county ordinances following these principles. *See In re Application of Anamizu*, 52 Haw. 550, 553, 481 P.2d 116, 118 (1971) (holding city ordinance mandating certification of electrical contractors was pre-empted by state statute governing licensing of *all* contractors in state); *Kunimoto*, 56 Haw. at 585, 545 P.2d at 686 (holding county general plan yielded to State's eminent domain action to expand university campus); *Citizens Utilities Co. v. County of Kaua`i*, 72 Haw. 285, 289, 814 P.2d 398, 400 (1991)

(holding county ordinance regulating height of utility poles was pre-empted by state statute conferring general supervisory power over utilities to Public Utilities Commission ("PUC") and specific PUC regulations providing minimum utility pole height requirements).[3]

It is significant that the pre-emption analysis applicable to county ordinances under the Hawai`i Constitution and Hawai`i law is materially different from the pre-emption analysis of county laws under federal law. *See* discussion of federal pre-emption in Section II, *infra*. Therefore, the principles of federal pre-emption cannot be mechanically applied to county pre-emption under Hawai`i state law.

Guided by these principles of constitutional supremacy, the pesticides portions of Bill 2491 are pre-empted by State law. First, the Hawai`i Pesticides Law is a comprehensive regulatory scheme that regulates the use, sale, and distribution of pesticides at the State level. Second, Bill 2491 conflicts with the Hawai`i Pesticides Law by duplicating or contradicting the use and reporting requirements provided under State law.

A. The Hawai`i Pesticides Law is a Comprehensive Regulatory Scheme

The Hawai`i Pesticides Law, HRS Chapter 149A, pre-empts Bill 2491 because it is a general State law that sets forth a comprehensive scheme to regulate pesticide use, sale, distribution, licensing and registration at the State level.

The Hawai`i Pesticides Law and its administrative rules (codified under HAR Chapter 4-66) evince a comprehensive and uniform scheme for the regulation of pesticides throughout the State. The Law and its rules contain provisions for pesticide use (HRS §§ 149A-31, -32.5); sale

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[3] Courts in other jurisdictions agree with the standard prescribed by the Hawai`i Supreme Court. *See Town of Salisbury v. New England Power Co.*, 437 A.2d 281 (N.H. 1981) ("Local legislation is repugnant to State law when an ordinance or bylaw either expressly contradicts a statute or else runs counter to the legislative intent underlying a statutory scheme"); *Pesticide Public Policy Foundation v. Village of Wauconda, Ill.*, 622 F.Supp. 423, 428 (D.C. Ill. 1985) ("As applied to state action versus local action, pre-emption means that where the legislature has adopted a scheme for regulation of a given subject, local legislative control over such phases of the subject as are covered by state regulation ceases"); *Village of Lacona v. State, Dept. of Agr. and Markets*, 51 A.D.3d 1319, 1320-1321 (N.Y.A.D. 3 Dept. 2008) ("Where the state enacts a comprehensive regulatory scheme that implicitly occupies a field such as pesticide use and control, it must supersede any local regulation pursuant to the pre-emption doctrine"); *People ex rel. Deukmejian v. County of Mendocino*, 683 P.2d 1150, 1155 (Cal. 1984) ("Local legislation in conflict with general law is void. **Conflicts exist if the ordinance duplicates, . . . contradicts, . . . or enters an area fully occupied by general law, either expressly or by legislative implication**. . . . If the subject matter or field of the legislation has been fully occupied by the state, there is no room for supplementary or complementary local legislation, even if the subject were otherwise one properly characterized as a 'municipal affair'") (emphasis added).

and distribution (HRS § 149A-11); licensing and registration (HRS §§ 149A-13, -14; HAR §§ 4-66-33 to 4-66-37); labeling (HRS § 149A-15; HAR §§ 4-66-4 to 4-66-30); warning signage (HRS § 149A-15.5); coloration (HRS§ 149A-16; HAR § 4-66-42.1); permitting and recording of sales (HRS § 149A-17); and enforcement and inspection (HRS §§ 149A-21, -36; HAR § 4-66-43).

Bill 2491 purports to regulate the use of "restricted" and "experimental" pesticides, yet the Hawai`i Pesticides Law already regulates the permitted and prohibited use of pesticides in the State. *See* HRS §§ 149A-31;[4] *see also,* HAR §§ 4-66-45 to -51 (rules governing experimental use). Notably, HRS §§ 149A-31(2) provides that no person shall

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[4] HRS §§ 149A-31 provides:

> **Prohibited acts.** No person shall:
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> (1) Use any pesticide in a manner inconsistent with its label, except that it shall not be unlawful to:
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> (A) Apply a pesticide at any dosage, concentration, or frequency less than that specified on the label or labeling; provided that the efficacy of the pesticide is maintained and further provided that, when a pesticide is applied by a commercial applicator, the deviation from the label recommendations must be with the consent of the purchaser of the pesticide application services;
>
> (B) Apply a pesticide against any target pest not specified in the labeling if the application is to a crop, animal, or site specified on the label or labeling; provided that the label or labeling does not specifically prohibit the use on pests other than those listed on the label or labeling;
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> (C) Employ any method of application not prohibited by the labeling;
>
> (D) Mix a pesticide or pesticides with a fertilizer when such mixture is not prohibited by the label or labeling; or
>
> (E) Use in a manner determined by rule not to be an unlawful act;
>
> (2) Use, store, transport, or discard any pesticide or pesticide container in any manner which would have unreasonable adverse effects on the environment;
>
> (3) Use or apply restricted use pesticides unless the person is a certified pesticide applicator or under the direct supervision of a certified pesticide applicator with a valid certificate issued pursuant to rules adopted under section 149A-33(1); provided that it shall be prohibited to use or apply a restricted use pesticide for structural pest control uses for a fee or trading of services, unless the

> [u]se, store, transport, or discard any pesticide or pesticide container in any manner which would have unreasonable adverse effects on the environment[.][5]

Likewise, "notwithstanding any law, rule or executive order to the contrary," HRS §§ 149A-32.5 empowers the chairperson of the Board of Agriculture to "suspend, cancel or restrict" pesticide use under the following circumstances:

> **§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.

Clearly, existing State law comprehensively regulates the use of pesticides. The pesticide use provisions of Bill 2491 would invade the province that State law has already staked out.

The Hawai`i Pesticides Law centralizes the regulation of pesticides in the Board of Agriculture. HRS § 149A-19.[6] HRS § 149A-22 states that the "board shall have authority to

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> user or applicator is a pest control operator or is employed by a pest control operator licensed under chapter 460J;
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> (4) Use or apply pesticides in any manner that has been suspended, canceled, or restricted pursuant to section 149A-32.5;
>
> (5) Falsify any record or report required to be made or maintained by rules adopted pursuant to this chapter; or
>
> (6) Fill with water, through a hose, pipe, or other similar transmission system, any tank, implement, apparatus, or equipment used to disperse pesticides, unless the tank, implement, apparatus, equipment, hose, pipe, or other similar transmission system is equipped with an air gap or a reduced-pressure principle backflow device meeting the requirements under section 340E-2 and the rules adopted thereunder.

[5] "Unreasonable adverse effects on the environment" means "any unreasonable risk to humans or the environment, taking into account the economic, social, and environmental costs and benefits of the use of the pesticide." HRS § 149A-2.

[6] HRS §149A-19 states:

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 local needs** and issuance of experimental use permits." (Emphasis added). In addition, the Hawai`i Pesticides Law vests the Hawai`i Department of Agriculture with authority to regulate pesticides. "The department [of agriculture] shall have the authority to carry out and effectuate the purpose of this chapter by rules[.]" HRS § 149A-33.

Tellingly, the Hawai`i Pesticides Law does not have a provision "giving specific authority" to the different counties to promulgate their own laws regarding pesticide use.

Determination; rules; uniformity. (a) The board, 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.

(b) 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.

(c) 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.

Kunimoto, 56 Haw. at 585, 545 P.2d at 686. In fact, in order to ensure that the counties have a say in the rules promulgated by the Hawai`i Department of Agriculture, Haw. Rev. Stat. § 26-16(a)(3) requires that the ten-member Board of Agriculture include a representative from Kaua`i. As of 2013, the County of Kaua`i member to the Board of Agriculture is Jerry Ornellas.

Given the absence of any authority from the legislature to the counties to regulate pesticides, Bill 2491 would "thwart the State from performing its duty" under the Hawai`i Pesticides Law. *Id.* at 585, 545 P.2d at 686. For these reasons, all the pesticide provisions of Bill 2491 are void as beyond the authority of the County under State law.

B. Bill 2491 Conflicts with the Hawai`i Pesticides Law

The pesticides provisions of Bill 2491 conflict with the Hawai`i Pesticides Law. For example, Bill 2491 requires the disclosure and reporting of pesticide use. Bill 2491 § 22-22.4(a). Bill 2491 also prohibits certain open air testing of experimental pesticides and establishes buffer zones. Bill 2491 §§ 22-22.5,-22.6. However, these provisions conflict with the existing reporting and use requirements in the Hawai`i Pesticides Law.

Bill 2491 would conflict with the Hawai`i Pesticides Law, which already has reporting requirements. HRS § 149A-15.5 states that the HDOA shall adopt rules

> to require the posting of pesticide warning signs containing but not limited to the following information: (1) [t]he proper handling, storage, and disposal of all pesticides sold; (2) [e]mergency telephone numbers to call in case of poisoning from the pesticides; and (3) [a]ny other related information the department deems helpful and appropriate for consumers. The department may also adopt any other rules pursuant to chapter 91 necessary to effectuate this section, including rules and placement of warning signs.

HRS § 149A-15.5; *see also* HAR § 4-66-53 (dealers' records and reports).

Moreover, in 2013, the legislature passed Act 105, which amends the Hawai`i Pesticides Law to require the HDOA to "publish on its website the public information contained in all restricted use pesticide records, reports, or forms submitted to the department[.]"[7] The statute

[7] Act 105 provides in pertinent part:

> § 149A-__ Pesticide use; posting online.
>
> (a) The department shall publish on its website the public information contained in all restricted use pesticide records, reports, or forms submitted to the department, except those records, reports, or forms required by the department for restricted use pesticides used for structural pest control; provided that the department shall not post information on its website protected by section 92F-13.

states that, "The purpose of this Act is 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 a study of other states' reporting requirements for certain pesticides." Act 105, 2013 Haw. Sess. L.[8]

Bill 2491 further contradicts the Hawai`i Pesticides Law's requirements by mandating "[p]ublic posting of signs in the area in which pesticides are to be applied a minimum of seventy-two (72) hours prior to, during, and seventy-two (72) hours after the application of any pesticide," and by mandating specified disclosures of pesticide use to owners, lessees, and occupiers of adjacent property and to the public. Bill 2491 § 22-22.4(a)(1), (a)(2), & (a)(3). Thus, Bill 2491 is a "local ordinance [which] duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *Ewing*, 81 Hawai`i at 161, 914 P.2d at 554 (internal quotation marks omitted).

Similarly, as described above, the Hawai`i Pesticides Law and its administrative rules include provisions governing prohibited use of pesticides. *See* HRS § 149A-31 (prohibited uses); HAR §§ 4-66-45 to -51 (experimental use). Bill 2491's prohibitions on open air testing of experimental pesticides and use of pesticides in the 500-foot buffer zone conflict with existing state requirements. *See* Bill 2491 §§ 22-22.5, -22.6.

Courts in other jurisdictions have struck down similar conflicting municipal ordinances. *See, e.g., DeAngelo Bros. Inc. v. Carbon County*, 2001 WL 1861376, 54 Pa. D. & C. 4th 364, 372 (Pa. Com. Pl. 2001) (holding ordinance enacted to protect the public safety banning pesticide use conflicted with the state pesticide law); *Town of Salisbury v. New England Power Co.*, 437 A.2d 281, 281-82 (N.H. 1981) (holding local town ordinance restricting the use of chemical defoliants was pre-empted by state law where state statute regulating chemical sprays specifically established a "State agency that is empowered and commanded to regulate the use of pesticides"); *Pesticide Public Policy Foundation v. Village of Wauconda, Ill.*, 622 F.Supp. 423,

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> (b) The department may prepare any forms necessary to meet the requirements of this section. In addition to any other administrative requirements, the department may also require the persons or entities filing pesticide records, reports, or forms to furnish an additional form that shall be suitable for posting online in response to requests pursuant to chapter 92F or title 5 United States Code section 552; provided that the additional form shall not require the disclosure of information protected by section 92F–13 [of the Uniform Information Practices Act].

[8] The list of restricted use pesticides includes some products that are approved for general use throughout the mainland. However, Hawai`i authorities--after their own review--have placed them on the restricted list, thus demonstrating that they are exercising their regulatory oversight powers.

427-30 (D. Ill. 1985) (holding ordinance which required users of pesticides to register and obtain permit from the village was pre-empted where legislative intent behind state pesticide statute was to create a comprehensive regulatory scheme and a desire to achieve state-wide uniformity).

Based on the foregoing, Bill 2491 is pre-empted by the Hawai`i Pesticides Law and the powers conferred upon the HDOA to regulate the use and registration of pesticides in the State of Hawai`i.[9]

II. The Provisions of Bill 2491 Relating to GM Crops Are Pre-empted by Federal Laws and the United States Constitution

Bill 2491 is preempted by several federal statutes and regulations governing genetically modified organisms ("GMOs") and by the United States Constitution under the Supremacy Clause. An analysis of the federal pre-emption of Bill 2491 further requires a preliminary overview of the factual, statutory, and regulatory background of GMOs.

A. Factual Background on GMOs in Kaua`i

As part of the integrated seed production process to meet the demands for GM corn and soybean seed, the seed companies conduct year-round plant nursery operations on Kaua`i for production of GM corn and soybean seed that involve several stages of research and development. U.S. farmers depend upon the seed companies' research and development pipeline to supply a continuing source of new GM hybrid and varietal seed to maintain and maximize yield from their corn and soybean operations in the face of distinctive and widely varied regional growing conditions, including evolving pest pressures and changes in weather conditions.

Production of commercial hybrid corn seed is a complex process that takes place in stages commonly occurring in multiple locations. The seed sold to growers for the commercial corn crop is produced by crossing two parent lines of seed that contain all of the genetics and traits desired in the new corn hybrid. The development of the two parent lines of the hybrid results from a multi-generation seed research and development production process that is characterized by a number of distinct stages. These include both the generation of new, elite genetic combinations and the development of new transgenic traits. The elite genetic inbred combinations are created from making plant x plant crosses and selecting the best progeny over numerous generations of testing and evaluation. Kaua`i nurseries play a key role in the development of these new elite genetic combinations. New trait events are developed in the laboratory and integrated into the corn chromosomes. Following this, there is a series of plant crosses made to incorporate the selected trait into elite maize inbreds. These crosses are made

[9] Proponents of Bill 2491 will likely argue against state pre-emption citing an amicus brief submitted by Hawai`i and other states in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991). The assertion has no merit; the brief only argued for **State's** power, and since then Hawai`i has not enacted any law delegating regulatory powers over pesticides to the Counties. To the contrary, the State continues to comprehensively regulate and oversee this area.

most often in multi-cycle per year nurseries, such as those in Kaua`i. The new trait is evaluated for performance, efficacy, and for the ability to meet all of the federally regulated criteria prior to being introduced into the marketplace. Kaua`i nurseries play key roles in the development of new genetics, new traits, and the generation of both research and parent seed (seed used to produce hybrid seed sold to, and grown by, farmers). In most cases, seven generations of seed production are required to move from research and development to the commercial seed. Production of commercial soybean seed is a similarly complex process requiring approximately 11 generations of seed to produce commercial varieties.

Kaua`i provides a crucial link in the commercial seed business where there is continuous demand for new and improved seed to maintain and improve farm yield. The only way to produce a generation of seed is by planting it, cultivating it through the growing season, and harvesting the seed for replanting. Thus, only one generation of seed can be produced per growing season. (In the U.S. Midwest region there is only one generation per year.) That generation is then replanted to produce the seed to grow the next generation. Kaua`i provides the invaluable opportunity to produce 3 to 4 generations of seed every year in the United States as compared with the single generation that can be produced on the U.S. mainland. The role it plays in expediting new seed variety availability is crucial to the U.S. and international markets for corn and soybean.

B. Statutory and Regulatory Background on GMOs

The introduction of GM plant products into commerce has been closely regulated by the Federal Government since the mid-1980s under the provisions of the "Coordinated Framework for Regulation of Biotechnology" (51 Fed. Reg. 23,302 (June 26, 1986)). The purpose of the Coordinated Framework is "to develop a coherent and sensible regulatory process, one based on the best available scientific facts and intended to minimize uncertainties, delays, overlaps and inconsistencies," and to encourage progress in biotechnology given "the tremendous potential of biotechnology to contribute to the nation's economy in the near term, and to fulfill society's needs and alleviate its problems in the longer term." 49 Fed. Reg. 50,856 (Dec. 31, 1984). The Coordinated Framework is premised in part on the conclusions of the National Research Council that "organisms that have been genetically modified are not per se of inherently greater risk than unmodified organisms." 57 Fed. Reg. 6753, 6755 (Feb. 27, 1992).

Pursuant to the Coordinated Framework, three federal agencies—the Food and Drug Administration ("FDA"), the Environmental Protection Agency ("EPA"), and the Department of Agriculture's Animal and Plant Health Inspection Service ("APHIS")—conduct a science-based risk assessment review of new genetically-engineered crop varieties prior to general introduction into commerce. FDA reviews the safety of food for humans and feed for animals under the Federal Food, Drug and Cosmetic Act ("FFDCA"), 21 U.S.C. §§ 301 et seq. EPA examines potential health and environmental impacts of associated pesticide use under the FFDCA and the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 et seq. APHIS examines whether the crop presents a plant pest risk under the Plant Protection Act ("PPA"), 7 U.S.C. §§ 7701 et seq. As part of the Coordinated Framework, the agencies comply with the

requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., and the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., as appropriate, in conducting their risk assessment reviews.

The PPA prohibits the movement in interstate commerce of any plant pest unless authorized under general or specific permits and in accordance with regulations issued by the Secretary of Agriculture. 7 U.S.C. § 7711(a). APHIS has promulgated regulations to implement the PPA and the Coordinated Framework, codified at 7 C.F.R. Part 340, "Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests." These regulations control the introduction into interstate commerce, whether by importation, interstate movement, or release into the environment, of organisms and products altered or produced through genetic engineering that are plant pests or that APHIS has reason to believe are plant pests. Under the regulations, such genetically engineered organisms and products are classified as "regulated articles." 7 C.F.R. § 340.1. The introduction into interstate commerce of regulated articles is prohibited under 7 C.F.R. Part 340 in the absence of authorization by APHIS.

APHIS conducts a pre-authorization NEPA review process. 7 C.F.R. Part 372. States are provided with copies of notifications and permits prior to authorization and an opportunity to comment on any state specific issues. 7 C.F.R. 340.3(d). Additional conditions requested by States are routinely included in the final authorizations.

The regulations also establish a petition process for deregulation of a new GM plant. A petitioner may request that APHIS remove a GM crop from regulation if it is unlikely to pose a plant pest risk. 7 C.F.R. § 340.6. APHIS will grant such deregulated status if it determines that a GM crop is "unlikely to pose a greater plant pest risk than the unmodified organism from which it was derived." 7 C.F.R. § 340.6(c)(4). In the past 20 years, following FDA and EPA reviews, APHIS has granted unconditional deregulated status to more than 75 GM crop varieties, the vast majority of which are corn and soybean crop varieties.

Planting and cultivation on Kaua`i of GM seeds that are regulated articles are authorized under valid APHIS notifications and/or permits that are identified on the APHIS website. These notifications and/or permits have been reviewed by the State of Hawai`i, and conditions requested by the State are included in the authorizations. Planting and cultivation of deregulated GM seed also occurs on Kaua`i.

C. Federal Pre-emption Under the United States Constitution

Under the Supremacy Clause, the United States Congress has the power to pre-empt state and local laws. U.S. Const. art. VI, cl. 2. Congress may do so expressly, or the intent to pre-empt may be inferred from the structure and purpose of the federal enactment. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm.*, 461 U.S. 190, 203-204 (1983). Federal law can impliedly pre-empt local ordinances that either regulate in a field of regulation reserved for the Federal government or that conflict with Federal regulation. *See*

English v. General Electric Co., 496 U.S. 72, 79 (1990); *United States v. Manning*, 527 F.3d 828, 836 (9th Cir. 2008). A conflict may arise because it is impossible to comply with both federal and state law or because state law stands "as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *see Young v. Coloma-Agaran*, 340 F.3d 1053, 1055-1056 (9th Cir. 2003). A state or local ban on activities that are licensed under Federal law is an actual conflict with the Federal licensing scheme and pre-empted under the Supremacy Clause. *Young v. Coloma-Agaran*, 340 F.3d at 1057. The PPA contains an express pre-emption provision that addresses state and local regulation of both foreign commerce and interstate commerce. 7 U.S.C. § 7756.

1. Express Pre-emption of Regulation of Foreign Commerce

As to foreign commerce, under 7 U.S.C. § 7756(a), "no State or political subdivision of a State may regulate in foreign commerce any article, . . . plant, . . . plant pest, . . . or plant product in order to control a plant pest . . ., to eradicate a plant pest, . . . or prevent the introduction or dissemination of a . . . plant pest." Some of the GM seed used in seed production activities on Kaua`i is grown in one or more foreign countries. Also, some of the GM seed produced on Kaua`i is shipped to one or more foreign countries. By imposing an immediate and indefinite moratorium on new or increased experimental use and commercial production of GMOs and prohibiting open air testing or use of experimental GMOs effective January 1, 2014, for the duration of the indefinite moratorium, the proposed ordinance would significantly disrupt seed production and associated import and export of GM seed, thereby regulating foreign commerce in plant pests, or articles that are or have been treated as presumptive plant pests, in order to control a plant pest, eradicate a plant pest, or prevent the introduction or dissemination of a plant pest. The proposed ordinance is therefore expressly pre-empted by 7 U.S.C. § 7756(a)(1).

2. Express Pre-emption of Regulation of Interstate Commerce

As to interstate commerce, 7 U.S.C. § 7756(b)(1) states "no State or political subdivision of a State may regulate the movement in interstate commerce of any article, . . . plant, . . . plant pest, . . . or plant product in order to control a plant pest . . ., eradicate a plant pest . . ., or prevent the introduction or dissemination of a . . . plant pest, . . . if the Secretary has issued a regulation or order to prevent the dissemination of the . . . plant pest . . . within the United States" unless such regulation meets the specified conditions for exceptions to this prohibition. There are two relevant exceptions, but Bill 2491 is not permitted under either one. The first statutory exception allows a political subdivision of a State to " impose prohibitions or restrictions upon the movement in interstate commerce of articles, . . . plants, . . . plant pests, . . . or plant products that are consistent with and do not exceed the regulations or orders issued by the Secretary." 7 U.S.C. § 7756(b)(2)(A). Obviously, Bill 2491 does not meet this test. The second statutory exception allows a political subdivision of a State to impose "prohibitions and restrictions . . . in addition to" to those imposed by the Secretary but only if the political subdivision demonstrates to the Secretary that there is a "special need for the additional prohibitions or restrictions based

on sound scientific data and a thorough risk assessment." 7 U.S.C. § 7756(b)(2)(B). Kaua`i has made no effort to satisfy this requirement. Since neither exception applies, Bill 2491 is pre-empted.

3. Implied Pre-emption of Regulation of the Introduction of GMOs on Kaua`i

a. Field Pre-emption

Through the Coordinated Framework and federal regulatory authority under the PPA, the FFDCA, and FIFRA, the Federal government has occupied the field of regulation of the introduction of GMOs in interstate commerce to the exclusion of states and local governments. The proposed ordinance would attempt to enter the regulatory field occupied by the Federal government by regulating the introduction of GMOs on Kaua`i for the stated purpose to "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 Kaua`i . . . ." Bill 2491 § 22-22.2. These are the same risks evaluated by the federal agencies before making decisions to license research and commercial use of GMOs. The purpose and effect of the proposed ordinance 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. Therefore, because the Federal government has occupied the field of regulation of GMOs for that purpose, all the provisions of the proposed ordinance regulating the introduction of GM seed crops on Kaua`i would be impliedly pre-empted under the Supremacy Cause. *See United States v. Manning*, 527 F.3d at 836-839, *citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Development Comm.*, 461 U.S. at 213 (when Federal government completely occupies a field of regulation or an identifiable portion of it, "the test of pre-emption is whether 'the matter on which the State asserts the right to act is in any way regulated by'" federal law, *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947)).

b. Conflict Pre-emption

Alternatively, all the provisions of the proposed ordinance that would restrict activities that are permitted under the APHIS authorizations would be impliedly pre-empted because they conflict with the Federal regulatory scheme. APHIS has authorized the seed companies' releases either by the notice procedure or by permits pursuant to 7 C.F.R. §§ 340.3, 340.4. Bill 2491 effectively negates those Federal authorizations by prohibiting open air testing or use of experimental GMOs effective January 1, 2014, and could significantly limit those authorizations by imposing an immediate and indefinite moratorium on new or increased experimental use of GMOs permitted under APHIS authorizations. Since Bill 2491 prohibits the seed companies from carrying out activities authorized by Federal law, it is impliedly pre-empted with respect to regulated articles because it is in direct conflict with Federal licenses. *See Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 281, 283 (1977); *Young v. Coloma-Agaran*, 340 F.3d at 1057.

The same is true with respect to GM plants that have been granted deregulated status. Deregulation reflects a binding determination that use of a GM plant presents no different or greater risk than use of the conventional version and constitutes a Federal license to use a deregulated plant in the same manner as, and as freely as, the conventional version. *See Ursack, Inc. v. Sierra Interagency Black Bear Group*, 639 F.3d 949, 961 (9th Cir. 2011) (agency approval grants a "license" when "the absence of agency approval [would] prevent[] the purported licensee from engaging in a specific activity . . . ."); *Air North America v. DOT*, 937 F.2d 1427, 1437 (9th Cir. 1991) (federal certificate to provide air transportation is a "license" even "if not itself sufficient to allow [the airline] to fly . . . ."). Imposing an immediate and indefinite moratorium on new or increased commercial use or cultivation of deregulated GMOs is inconsistent with the Federal license that a deregulated plant can be used in the same manner as a conventional version of the same plant. Bill 2491 is, therefore, impliedly pre-empted with respect to deregulated GMOs *See Douglas v. Seacoast Products, Inc., supra; Young v. Coloma-Agaran, supra.*

Further, the proposed ordinance's requirement to disclose the locations where GMOs are being grown or developed would hinder the federally permitted program for conducting research and development of GMOs because it would increase the risk of vandalism and misappropriation of the Seed Companies' valuable trade secrets. *See Center for Food Safety v. Johanns*, No. 06-17319, 310 Fed.Appx. 964 (9th Cir., Feb. 2, 2009) (affirming district court's decision to seal pinpoint locations for genetic engineering field trials based on "the risk of vandalism to the field and the possibility that trade secrets would be stolen" should the locations be disclosed in litigation). The disclosure provision would therefore be impliedly pre-empted because it would stand as an obstacle to achieving the objectives of the Federal regulatory scheme. *See Perez v. Campbell,* 402 U.S. 637, 652 (1971); *Nevada v. Watkins*, 914 F.2d 1545, 1561 (9th Cir. 1990).

III. The GMO Agricultural Operations Sought to be Regulated by Bill 2491 are Not Public Nuisances Under HRS Chapter 46

A. Farming Operations Involving GMOs and Pesticides are Not a Public Nuisance Under HRS § 46-17

The County may not regulate farming operations as a "public nuisance" under HRS §46-17 because such operations are covered by the specific provisions of the Right to Farm Act, which prohibit any public official from designating farming operations a nuisance.

Although HRS § 46-17[10] provides that the council of a county "may adopt and provide for the enforcement of ordinances regulating or prohibiting noise, smoke, dust, vibration, or

[10] HRS § 46-17 provides:

> **Regulation of certain public nuisances.** 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,

odors which constitute a public nuisance," a county may not constitutionally adopt an ordinance which regulates activities under the Right to Farm Act, HRS Chapter 165 ("Farm Act"), or conflicts with the Farm Act. This is because the Farm Act was promulgated based on the State's responsibility under the Hawai`i Constitution to promote and protect agricultural lands and diversified agriculture. Hawai'i Constitution, article XI, § 3. Specifically, the Farm Act preserves agricultural resources in the State "by limiting the circumstances under which farming operations may be deemed a nuisance." Haw. Rev. Stat. § 165-1.[11]

Therefore, even if farming operations of the commercial agriculture entities ("CAEs") are deemed a "public nuisance," the Right to Farm Act provides that farming operations are presumptively NOT a nuisance or otherwise actionable. The reason being that some off-site impacts are unavoidable and liability may only be imposed if the impacts can be proven to result

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> 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.

[11] Under the Farm Act, a "nuisance" is defined as "any interference with reasonable use and enjoyment of land, including but not limited to smoke, odors, dust, noise, or vibration." As such, a "nuisance" under the Farm Act includes a "public nuisance" as provided for under HRS § 46-17. The Supreme Court of Hawai`i, in defining a "public nuisance," has stated that,

> A nuisance, to be a public nuisance, must be in a public place, or where the public frequently congregate, or where members of the public are likely to come within the range of its influence; for, if the act or use of property be in a remote and unfrequented locality, it will not, unless malum in se, be a public nuisance . . . 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 is a public nuisance.

Littleton v. State, 66 Haw. 55, 67, 656 P.2d 1336, 1344-45 (1982).

from the farmer's failure to use "generally accepted agricultural and management practices." Moreover, the County Council nevertheless may not enact an ordinance such as Bill 2491 under HRS § 46-17 because the Hawai`i Constitution specifically vests responsibility over agriculture to the State government.

The Hawai`i Constitution states that, "The **State** shall conserve and **protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.** HAW. CONST. Art. XI, § 3 (emphasis added). Moreover, the Constitution provides that, "**The legislature shall provide standards and criteria to accomplish the foregoing.**" *Id.* (emphasis added). Along with the Farm Act, the legislature has passed the Hawai`i State Planning Act, HRS Chapter 226, and portions of HRS Chapter 205 to effectuate the constitutional provision. *See* Comment, Avoiding the Next Hokuli'a: The Debate over Hawai`i's Agricultural Subdivisions, 27 U. Haw. L. Rev. 441, 462 (2005) ("Unlike many other states, Hawai`i manages its agricultural lands at the state level."). Given that the Farm Act effectuates the State's obligation to promote and preserve farming under Article XI, section 3 of the state Constitution, it pre-empts HRS § 46-17.

In addition, because the Farm Act is a more specific statute that bars regulation of farming operations as a nuisance, the more general provisions of HRS § 46-17, which allow such regulation must fall. The Hawai`i Supreme Court has held that, "'where there is a plainly irreconcilable conflict between a general and a specific statute concerning the same subject matter, the specific will be favored.'" *Richardson*, 76 Haw. at 55, 868 P.2d at 1202 (citation omitted). The Right to Farm Act specifically forbids a public official (including a county council member) from designating farming operations as a nuisance where such operations are conducted "with generally accepted agricultural and management practices." In contrast, HRS § 46-17 appears to give the counties the power to legislate against public nuisances. Given that the Farm Act and HRS § 46-17 irreconcilably conflict, the Right to Farm Act is favored because it is the more specific and remedial statute.

B. The Right to Farm Act Bars Bill 2491's GMO and Pesticide Provisions

The Right to Farm Act essentially bars County Council members from designating farming operations a nuisance, and therefore eviscerates the enforceability of Bill 2491.

The Farm Act has three key provisions which impair the County Council's ability to pass Bill 2491. First, the Farm Act directs that, "[n]o court, official, public servant, or public employee shall declare any farming operation[12] a nuisance for any reason if the farming operation has been conducted in a manner consistent with generally accepted agricultural and

[12] Under the Farm Act, farming operations includes "[a]gricultural-based commercial operations;" "[n]oises, odors, dust, and fumes emanating from a commercial agricultural ... facility or pursuit;" "[g]round and aerial seeding and spraying;" and "[t]he application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides[.]" HRS § 165-2.

management practices." HRS § 165-4. Accordingly, members of the county council, as an "official," "public servant", or "public employee," cannot declare any farming operation, including those run by CAEs, a "nuisance" if the farming operation has been conducted "in a manner consistent with generally accepted agricultural and management practices."[13]

Second, the Farm Act provides that, "There shall be a rebuttable presumption that a farming operation does not constitute a nuisance." HRS § 165-4. Therefore, the County Council must overcome the rebuttable presumption with strong and well founded facts to be established in court that the farming operations of the CAEs do not constitute a nuisance before Bill 2491 can be lawfully adopted. The express purpose of the Farm Act is to preserve agricultural resources "by limiting the circumstances under which farming operations may be deemed a nuisance." HRS § 165-1.[14] Further, the Farm Act "is remedial in nature and shall be liberally construed to effectuate its purposes." *Id.* § 165-6. Therefore, any county ordinance seeking to regulate farming operations based on being a nuisance, whether public or not, faces a high, if not insurmountable, hurdle.

Third, the Farm Act provides that, "nothing in this chapter shall in any way restrict or impede **the authority of the State** to protect the public health, safety, and welfare." HRS § 165-2. The absence of similar language insulating the ability of a *county government's* authority to protect public health, safety and welfare implies that, under the canons of statutory construction, the Farm Act does restrict or impede a county's ability to pass public health, safety or welfare ordinances, as Bill 2491 purports to be.

As the court in *Township of Franklin v. Hollander*, 769 A.2d 427 (N.J. Super. A.D. 2001), noted,

> Local ordinances pose a much more serious threat than do state laws to the effective operation of the right-to-farm statutes. The shift in local political power

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[13] On June 14, 2013, the legislature passed Act 106, S.B. No. 326, A Bill for an Act Relating to Agriculture. Act 106 established a task force "to identify and develop good agricultural practices and preventative measure guidelines in the food supply system to improve the overall safety of locally grown food" which "is a significant concern for residents in Hawai`i and the United States." Act 106 at § 2(a). Further, **"[i]n addressing good agricultural practices and preventative measures from farm to wholesaler, one vital component to address is integrated pest management**. Safe practices on farms cannot be addressed without addressing the proper use of pesticides. A good integrated pest management system incorporates proper sanitation practices, physical barriers, bio-control, and use of pesticides when necessary." *Id.* at § 1 (emphasis added).

[14] The legislative history states, "The purpose of this bill is to protect the right to continue farming operations in the State of Hawai`i by limiting the circumstances under which agricultural operations may be considered a nuisance." Conf. Com. Rep. 16-82 on H.B. No. 2377-82.

> occurring when suburbanites move into an agricultural district often leads to the passage of local ordinances limiting various farm activities. . . . **Insulation from such ordinances is an important component of an effective right-to-farm statute**. A state legislature that defers to the local government in this manner effectively nullifies its policy choice of preferring agricultural activities over other conflicting land uses. . . . **[T]he value of an explicit pre-emption of local statutes and ordinances lies in its ability to discourage local governments from passing limiting regulations and to give the farmer a sense of security against attempted limitations of his/her operations**.

769 A.2d at 433, *quoting* Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New ground in the Preservation of Farmland,* 45 U. Pitt. L. Rev. 289, 322-23 (1984) (emphasis added). Likewise, the Farm Act insulates farming operations from attack by local ordinances such as Bill 2491. For these reasons, the entire proposed ordinance is barred by the Farm Act.

IV. To the Extent, Bill No. 2491Applies to Farming Operations on State Land, it is Unconstitutional under Hawai`i Constitution Article XI, Section 5

Bill No. 2491 is unconstitutional under Article XI, Section 5 because (1) the Hawai`i Legislature has nearly exclusive authority to enact laws pertaining to State lands[15] and the Kaua`i County is exceeding its authority under HRS § 46-1.5(13),[16] and (2) Bill No. 2491 is pre-empted by other State laws.

But, even if Bill No. 2491 were within the County's authority (which it is not), it would be deemed prohibited "special legislation", not general law, because it is targeted at a handful of companies without any reasonable justification. Specifically, as explained below, Bill No. 2491 unlawfully singles out and discriminates against agricultural companies farming genetically modified crops and, therefore, deprives those farmers of equal protection and substantive due process by restricting their plantings and pesticide usage and imposing discriminatory onerous requirements that are not reasonably related to any governmental interest

A. Article XI, Section 5 of the Hawai`i Constitution Vests Power in the Hawai`i Legislature to Enact Laws over State Lands and Kaua`i County Would Exceed its Limited Authority Under HRS Chapter 46 Were It to Adopt Bill 2491

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[15] Much of the land utilized by the Seed Companies on Kaua`i is State land.

[16] The exception in Haw. Rev. Stat. ("HRS") §46-17, which allows the Counties to "adopt and provide for the enforcement of ordinances regulating or prohibiting noise, smoke, dust, vibration, or odors which constitute a public nuisance," has no relevance, since Bill No. 2491 is not aimed at any of those types of problems. Although it mentions "dust," the targets of the Bill are only pesticides and GM materials. *See* Section III *supra,* at 17-19.

In your email, you inquired"[h]ow would Bill No. 2491 apply to those agricultural operations that are being conducted on State land or DHHL land if leg[islative] power over them shall be exercised only by general laws." In other words, the threshold question is whether Kaua`i County can legislatively control uses of State lands through the proposed ordinance. This is an important question because "[t]hough each political subdivision has the power to frame and adopt its own charter, the provisions in [county law] must be limited to the self-government of the political subdivision and the provisions must further be within such limits and procedure as is prescribed by general law." *See Kunimoto v. Kawakami*, 56 Haw. 582, 585-86, 545 P.2d 684, 686 (Haw. 1976) (citing Haw.Const. Art. VII, Sec. 2).

Bill No. 2491 refers to HRS § 46-1.5(13) to justify the proposed ordinance. *See* Bill at § 22-11.2. HRS § 46-1.5(13) states that, "[s]ubject to general law," the Counties 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 expressed or implied intent that the statute shall be exclusive or uniform throughout the State.

(Emphasis added). And, HRS § 46-4 provides that the "**zoning power granted [to the county] shall be exercised by ordinance** which may relate to . . . **[t]he areas within which agriculture**, forestry, industry trade, and business **may be conducted**." (Emphasis added).

Article XI of the Hawai`i Constitution pertains to "Conservation, Control and Development of Resources." Section 5 of that Article relates to "General Laws Required; Exceptions," and states:

> **The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws**, except in respect to transfers to or for the use of the State, or a political subdivision, or any department or agency thereof.

(Emphasis added). Article III, Section 1 of the Hawai`i Constitution clarifies that "Legislative Powers" is vested in the Hawai`i State Legislature:

> **The legislative power of the State shall be vested in a legislature**, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

(Emphasis added).

There are no Hawai`i cases that address whether the Counties can enact ordinances pertaining to the use of State land in light of Article XI, Section 5.[17] However, there is an Attorney General Opinion which says they cannot. Opinion 86-3 concluded that H.R.S. § 46-4 does not give Counties any authority over State land:

> **State properties and public projects are immune from the counties' zoning and planning laws. Therefore, a . . . lessee of state property . . . also enjoys immunity from county regulation.**

(Emphasis added).[18]

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[17] Pre-statehood case law made clear that the Counties could not regulate development of Territorial lands without explicit statutory authority. *See Hilo Meat Co. v. Antone*, 23 Haw. 675 (1917) (holding the Territory was not presumed to waive its right to regulate its own property by ceding to the counties the right to enact police power ordinances regulating property within their limits). Territorial-era cases have no direct impact after the adoption of the 1979 Constitution and HRS Chapter 46.

[18] Opinion 86-3 provides that in the leases the State may require compliance with County ordinances. However, there is no reason to believe that the County's power to "zone" extends to effectively precluding the use of state land for the intended purposes. Rather, although each county has the power to enact zoning ordinances, the county cannot enact an ordinance that is "inconsistent with, or tending to defeat, the intent of any state statute". *See* HRS §§ 46-1.5(13) and 205-5. Moreover, Kaua`i County cannot enact a zoning ordinance that would defeat the intended agricultural classification and purpose of the State lands, which would be contrary to the other applicable state statutes. *See e.g., Kepo'o v. Watson,* 87 Hawai`i 91,101, 952 P.2d 379, 389 (1998) (stating that **"[z]oning laws affirmatively dictate how the land may be used** and would therefore require [the Department of Hawaiian Homelands] to use Hawaiian home lands [which are recognized as State lands] **in a manner consistent with the relevant zoning classification"**) (citing to Attorney General Opinion No. 72-12, which concluded that county zoning ordinances did not apply to Hawaiian home land that are needed for homesteading purposes)(emphasis added). *See also Kepoo v. Kane,* 106 Hawai`i 270, 292 fn. 40, 103 P.3d 939, 962 fn. 40 (2005) (interpreting the term "state lands" under HRS Chapter 343 and HAR Chapter 11-200 as including Hawaiian homelands).

Under HRS § 205–5(b), "[w]ithin agricultural districts, uses compatible to the activities described in Section 205–2 as determined by the [Land Use Commission] shall be permitted". HRS §§ 205-2 and 205-4.5 then further recognize that the permissible uses of lands in the "agricultural district" include the "[c]ultivation of crops, including crops for bioenergy, flowers, vegetables, foliage, fruits, forage, and timber." The Seed Companies' use of the agricultural land for crops is permitted and Bill 2491 is an unlawful zoning restriction on that use.

Here, there is no doubt that the State knows the Seed Companies are growing GM crops, and it has no objection to the use of its lands for that purpose. The State's support for the Seed Companies' ongoing operations is consistent with the fact that (as discussed at 12-14), the Federal government has reviewed pre-use studies and determined that use of the GMO crops and pesticides on Kaua`i are safe.

Although Bill No. 2491 purports to be a police power ordinance, insofar as it establishes use restrictions, creates setbacks, and imposes site-specific use restrictions, it is more properly viewed as a zoning bill because it limits land use in the same way that typical zoning ordinances impose street and side-yard setbacks. Those provisions cannot apply to activities on State land (which includes land owned by the Department of Hawaiian Home Lands).[19]

The County's powers under HRS § 46-1.5(13) are also limited. That section "mandat[es] the pre-emption of any ordinance that either conflicts with the intent of a state statute or legislates in an area already staked out by the legislature for exclusive and statewide statutory treatment." *Pacific Int'l Servs. Corp. v. Hurip*, 76 Hawai`i 209, 215, 873 P.2d 88, 94 (1994) (citing *Richardson v. City and County of Honolulu*, 76 Hawai`i 46, 60, 868 P.2d 1193, 1207 (1994)). In its simplest form, the test is whether an ordinance "prohibits what [a] statute permits or permits what the statute prohibits.") *See Ewing*, 81 Hawai`i at 161, 914 P.2d at 554. And, as discussed above (*see* Section I, *supra,* at 5-11), Bill No. 2491 conflicts with existing statutes related to the Hawai`i Pesticides Law under HRS Chapter 149A, the Hawai`i Right to Farm Act under HRS Chapter 165, and the State Planning Act under HRS Chapter 226.

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[19] Superficially, all zoning laws can be justified under the rubric that they are intended to "protect health, life, and property, and to preserve the order and security." But, imposing buffer zones and setbacks are common zoning and planning techniques, and those aspects of Bill No. 2491 are inconsistent with the County's limited authority under HRS § 46-4; under the contrary view, the exception would swallow the rule.

This characterization of the Bill as involving zoning powers is supported by H.R.S. § 205-5(b), which concerns zoning powers. It provides:

> (b) Within agricultural districts, uses [involving the cultivation of crops, among other things] shall be permitted; provided that accessory agricultural uses and services . . . may be further defined by each county by zoning ordinance.

This grant of limited authority over "accessory uses" and "services" is inconsistent with the County's efforts to assert broader powers to restrict lawful agricultural activities.

B. Assuming Bill 2491 Were Constitutional and Not Pre-empted by State or Federal Law, It Would Constitute Impermissible Special Legislation Because It is Targeted Against the Seed Companies and Imposes A Limited Duration, Non-Emergency Moratorium On Their Operations

The constitutional provision that requires legislative power over State lands be exercised only through "general laws" was intended to protect against the dangers inherent in special legislation intended to favor a specific individual, class, or entity. *See Sierra Club v. Department of Transportation of State of Hawai'i,* 120 Hawai'i 181, 200-05, 202 P.3d 1226, 1245-50 (2009) (*"Sierra Club"*). In that case, the Legislature passed a bill authorizing use of State lands to facilitate the immediate operation of a private company's large capacity vessels for inter-island ferry service. *Id.* at 191, 202 P.3d at 1236. The Hawai`i Supreme Court held that the resulting statute was not "general law," but special legislation that violated Article XI, Section 5 of the Hawai`i Constitution. The Court reached this result because the bill, subject to automatic repeal in twenty-one months or upon the approval of an Environmental Impact Statement (EIS), created an illusory class of "large capacity ferry vessel companies," when it actually benefitted only one entity. *Id.* at 200-05, 202 P.3d at 1245-50.

As explained in *Sierra Club*, the phrase "general law," as used in Article XI, was first interpreted by the Hawai`i Supreme Court in *Bulgo v. County of Maui*, 50 Haw. 51, 430 P.2d 321 (1967). In *Bulgo*, the Court held that an act, which provided for special elections, and at the time of enactment was only applicable to one county, was not a special law because it applied uniformly to all counties:

> In its broadest sense, **the term 'general laws,'** as used in Article VII, Section 1, of the State constitution, **denotes laws which apply uniformly throughout all political subdivisions of the State. But a law may apply to less than all of the political subdivisions and still be a general law, if it applies uniformly to a class of political subdivisions**, which, considering the purpose of the legislation, are distinguished by sufficiently significant characteristics to make them a class by themselves.

Id. at 58-59 (internal citations omitted; emphasis added).

In *Sierra Club*, the Hawai`i Supreme Court found the Colorado Supreme Court's decision in *People v. Canister*, 110 P.3d 380 (Colo. 2005) provided the best test for distinguishing between special and general laws. *Id.* at 203-04, 202 P.3d at 1248-49. *Canister* outlined a two-step test for deciding whether laws are special or general. 110 P.3d. at 383. The first step requires determining "whether the classification adopted by the legislature is a real or potential class, or whether it is logically and factually limited to a class of one and thus illusory." *Id.* If the law creates an illusory class it is prohibited special legislation. *Id.* If the law creates a genuine class, the second step of the analysis requires determining whether the class affected is reasonably related to the law's purported purposes. *Id.*

Here, Bill 2491 broadly defines the term "commercial agricultural entity" to include any "**firm, corporation, association, partnership, or organized group of persons**, whether incorporated or not, that is **engaged in growing, developing, cultivating, or producing agricultural products**." Bill No. 2491 at §22-22.2. However, in reality, since the moratorium will (1) take immediate effect, (2) impact only the existing GM seed companies,[20] and (3) last only through the approval of a proposed EIS, the Bill is improper "special legislation." Bill 2491 effectively singles out a known, small group of farm operators without good cause and it applies only for a limited period, as in *Sierra Club*.[21]

V. The applicability of HRS Chapter 343 and HAR Chapter 11-200 on Environmental Impact Statements to Bill 2491

The purpose of HRS Chapter 343 and HAR Chap. 11-200 relating to environmental impact statements ("EIS") is "to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations." HRS § 343-1. *See also* HAR §11-200-1. With certain exceptions not relevant here, the statute and the regulations apply to "agency"[22] "actions"[23] that involve the use of County money and State land.

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[20] While purporting to be aimed broadly at protecting the environment, the Bill is under-inclusive in ways that betray the intention to affect only the seed companies. For example, the prohibitions against spraying in certain areas apply to all types of pesticides, but those restrictions apply only to farmers that use certain quantities of regulated or experimental pesticides. Another farmer who buys smaller quantities of restricted pesticides is free to spray those supplies and unlimited amounts of general use pesticides in close to schools and homes and in other setback areas, even though the alleged environmental concerns and risks are identical.

[21] This inquiry does not entail any evaluation as to whether the County's regulatory goals are pre-empted or otherwise improper; it only addresses the reasonableness of the "class" affected. Unlike federal courts, Hawai`i courts closely review whether the purported bases for legislation are pretextual; typically, the assessment is based upon evidence in the record, not unsupported, theoretical justifications. *See, e.g., Sierra Club*, 120 Hawai`i 181, 202 P.3d 1226 (striking down legislation due to absence of evidence "in the record" that it was not "special legislation"). *See also Silva v. City & County of Honolulu,* 165 P.3d 247 (2007) (rational basis review is made "on the record").

[22] An "agency" is an executive branch entity of the state or county governments. HRS § 343-2.

[23] An "action" is "any program or project to be initiated by any agency or applicant." HRS § 343-2.

In your email, you also inquired (1) whether existing farming and agricultural operations on State lands are exempt from any EIS requirements; (2) how Kaua`i County can "conduct an EIS for an activity that the State most likely exempts from the EIS requirements." These questions are easily answered, but they are not dispositive because (as explained below) the important question is whether the County can implement any part of Bill 2491—including the moratorium—without first doing an EIS, even if it has authority to regulate the use of State lands (which it does not).

The first answer is that the Seed Companies' ongoing operations do not trigger any need for an environmental assessment. The statutory triggers for an EIS include "actions" that involve the "use of state or county lands" or the "use of state or county funds". HRS § 343-5 and HAR § 11-200-5.[24] However, for an "action" to trigger an environmental assessment, it must not yet have been initiated. *See* HRS §343-2 and HAR § 11-200-2 (defining "action" as "any program or project **to be initiated** by any agency or applicant") (emphasis added). Therefore, exempted classes of actions include, for example, pre-existing operations and facilities under HAR § 11-200-8(A)(1) ("**Operations**, repairs, or maintenance of **existing structures, facilities**, equipment, or topographical features involving **negligible or no expansion or change of use beyond that previously existing**.") (Emphasis added). For this reason, no EIS can be required for ongoing farming operations, regardless of whether one should have been undertaken when the leases were first entered for State lands.[25]

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[24] "Use of State lands includes any use (title, lease, permit, easement, licenses, etc.) or entitlement to those lands." HAR § 11-200-5(c). Although there is no case law or administrative guidance on this issue, it would seem that the Bill No. 2491 may entail "use" insofar as it purports to require the State's lessees to take large portions of the leased property out of productive use and "use" the land for unproductive buffer zones.

[25] Leasing State land is an "action" that triggers an environmental review under Chapter 343. *See Kepo`o v. Kane,* 106 Haw. 270, 292 (2005). But, Hawai`i law imposes a very short limitations period for challenging actions undertaken without a required environmental assessment. HRS §343-7 provides:

> (a) Any judicial proceeding, the subject of which is the lack of assessment required [by law], shall be initiated within one hundred twenty days of the agency's decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that a statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty days after the proposed action is started. . . .

Thus, if any environmental review of GMO and pesticide usage on the State leased lands was necessary at the time of leasing, the deadlines for challenging the scope and results of any review passed years ago.

The answer to the second question is no, unless Bill 2491 is seen as triggering "use" of State land for setback areas. The authority of the Environmental Council is limited by the terms of HRS Chapter 343. Its role as a regulator—as opposed to its role as a distributor and repository of environmental review documents and notices—is limited to state actions. It has no oversight over County-specific activities. Therefore, there is no reason to believe the Environmental Council would review any submissions from the County that relate to actions that do not trigger the Environmental Council's own obligations under HRS Chapter 343. [26]

In addition, there is unquestionably a trigger that compels the County to comply with Chapter 343. Specifically, when adopted, Bill No. 2491 will most certainly will require the County to expend substantial sums on creating and enforcing an extensive administrative licensing scheme that will clearly have significant economic and environmental impact on the island by making it much harder—if not impossible—to sustain large scale agriculture, which has been central to the economy of Kaua`i for more than a century.

The problem with Bill No. 2491 is that, through the imposition of a pre-assessment moratorium, the County is putting the cart before the horse. Environmental assessments must precede—not follow—agency action, except in emergencies declared by the Governor.[27] However, the County seeks to regulate first and assess later. This it cannot do. The EIS required under Bill No. 2491 is "to determine and evaluate significant effects of the production, propagation, or development of genetically modified organisms with the County of Kaua`i . . . " Bill No. 2491 §22-22.8. Before County agencies can expend funds imposing the moratorium and creating and implementing a licensing scheme, the County must conduct the assessment. *See* HRS § 343-5(b) ("[w]henever an agency (including the County) proposes an action," it "shall prepare an environmental assessment for the action at the earliest practicable time to determine whether an environmental impact statement is likely to be required").[28]

In this regard, HRS § 343-5(h) is important. It provides:

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[26] Under Chapter 343, the Environmental Council is not required to review or approve a County's environmental assessments or impact statements if the action involves only County lands and/or County funds. In those circumstances, the Environmental Council has only recordkeeping functions; the Mayor is (as stated in Bill No. 2491) the "approving authority." Unlike private applicants, a county agency has no authority to seek advice or recommendations from the Environmental Council. *But see* HAR 11-200-23(d) (private applicant may seek recommendations before agency action).

[27] *See* HAR 11-200-8(F).

[28] As noted above, under HRS Chapter 343, triggering "actions" involve executive branch agencies, not legislative bodies. The passing of legislation, alone, does not trigger an EIS. Rather, it is the anticipated enforcement action on the part of the executive branch that does so.

> (h) Whenever an action is subject to both the National Environmental Policy Act of 1969 (Public Law 91-190) and the requirements of this chapter, the office and agencies shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements. Such cooperation, to the fullest extent possible, shall include joint environmental impact statements with concurrent public review and processing at both levels of government. Where federal law has environmental impact statement requirements in addition to but not in conflict with this chapter, the office and agencies shall cooperate in fulfilling these requirements so that one document shall comply with all applicable laws.

Here, as explained in the section on pre-emption (*see* Section II at 12-14), federal authorities have extensively analyzed the potential environmental and health effects of all the GMOs used on Kaua`i and found no reasons to forbid them. The County—and the State—had opportunities to participate in those analyses. Having disregarded those opportunities, the County cannot now disregard the resulting analyses which provide no support for the moratorium and use restrictions in Bill 2491.

Even if the Kaua`i County claims that the proposed ordinance will improve the environment, an EA or EIS is still required because among the "significant effects on the environment" to be considered under HAR § 11-200-12 is whether the proposed action **"[c]urtails the range of beneficial uses of the environment**" and **"[s]ubstantially affects the economic welfare** . . . of the community of State." (Emphasis added) *See, e.g., County Sanitation District of Los Angeles County v. County of Kern*, 27 Cal.Rptr.3d 28, 50-51 (Cal. 2005) (holding that the county was required to prepare an environmental impact statement before heightening treatment standards for use of sludge on land located within the county, and failure to do so violated the California Environmental Quality Act, rendering it unconstitutional and an invalid exercise of police power).

It is undisputed that the Seed Companies—and their operations on State land—will be adversely affected by the proposed ordinance, even though those operations are important to the vitality of the Kaua`i economy, provide employment opportunities, and are developing crops with the use technology to benefit the entire community. Since there is no declared emergency, the County cannot harm these operations—through limits on the use of State land and the expenditure of its funds—without first conducting an EIS.

VI. Bill 2491 is an Unconstitutional Exercise of Police Powers

Police power 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) (finding traffic statute "reasonably related to the preservation of public health, safety, morals or general welfare of the public and … well within the legitimate exercise of the police power"). So long as an ordinance is reasonably

related to stated public safety, health, and welfare objectives, it properly falls within the scope of the police power. *See* HRS § 46-1.5(13).[29] In seeking "to establish provisions governing the use of pesticides and genetically modified organisms (GMOs)"[30], in order "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 Kaua`i," Bill 2491 ostensibly relates to public health and general welfare.

However, a municipality's police power is not absolute; rather, it is subject to Constitutional limitations. *W.H. Greenwell, Ltd. v. Dep't of Land and Nat. Res.*, 50 Haw. 207, 209, 436 P.2d 527, 528-29 (1968) (analyzing DLNR regulations for potential equal protection and eminent domain violations); *Nebbia v. People of New York*, 291 U.S. 502, 525, 54 S.Ct. 505, 510 (1934) ("The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained"); *Dobbins v. Los Angeles*, 195 U.S.223, 237, 25 S.Ct. 18, 20-21 (1904) (although states have the power to protect public morals, health and safety, "if, by their necessary operation, its regulations ... amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.")

In order for an ordinance to pass Constitutional muster, courts first ascertain the purpose or objective that the government sought to achieve in enacting the ordinance, [31] then must

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[29] HRS 46-1.5(13) states: 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.

[30] Bill 2491 at § 22-22.1(a) ("Findings"); *see also id.*, at § 22-22.2 ("Purpose").

[31] In this regard, it is important to recognize that the Hawai`i Supreme Court has made clear that a court is to examine the actual purposes and effects of a law. These assessments must be based upon evidence in the record, not unsupported, theoretical justifications. *See, e.g., Sierra Club v. Department of Transportation*, 202 P.3d 1226 (2009) (striking down legislation due to absence of evidence "in the record" that it was not "special legislation"). *See also Silva v. City & County of Honolulu*, 165 P.3d 247 (2007) (rational basis review is made "on the record"); *Burlington Northern Railroad Co. v. Department of Public Services*, 763 F.2d 1106, 1109 (9th Cir.1985) (the standard for judging the constitutionality of a statute ... which regulates economic activity, is the same under the due process, equal protection or commerce clauses. Legislation will be upheld if it bears a rational relationship to a legitimate state interest).

examine the means chosen to accomplish that purpose, to determine whether the means bears a reasonable relationship to the purpose. *Hasegawa v. Maui Pineapple Co.*, 52 Haw. 327, 330, 475 P.2d 679, 681 (1970) (statute requiring private employers to compensate employees for jury and public board service violated equal protection clause and amounted to a taking of private property for a public use without just compensation).

Bill 2491 fails to clear two hurdles:(1) the pre-emptive impact of state and federal law (discussed in Sections I and II, *supra*), and (2) the need to tie police power-based legislation reasonably to legislative evidence regarding the health impacts of GM crops and pesticides. These are significant problems since (as discussed elsewhere) there are pre-emptive state and federal laws controlling both the farming of GM crops and the use of federally-approved pesticides and much of Bill 2491 is contradicted by fact and based upon misinformation and fear-mongering.

1. Bill 2491 is Not a Reasonable Exercise of the County's Police Power Because it Violates the Equal Protection Clause and Substantive Due Process

"There is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary." *Hasegawa*, 52 Haw. at 329-30, 475 P.2d at 681.

The stated purpose of Bill 2491 is "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 Kaua`i by governing the use of pesticides and genetically modified organisms… ".[32] To achieve that purpose, Bill 2491 imposes, among other things, mandatory pesticide disclosure requirements on certain commercial agricultural entities (§ 22-22.4), creates pesticide buffer zones banning use of all pesticides in certain designated areas (§ 22-22.5), and prohibits open air testing of experimental pesticides (§ 22-22.6).

The minimum amount of pesticide usage that triggers the mandatory disclosure requirement and buffer zone restriction differs depending upon the type of pesticide used (i.e., restricted vs. experimental). *See* Bill 2491 at §§ 22-22.4(a), 22-22.5(a). As such, Bill 2491 classifies commercial agriculture entities based upon the type of pesticide used, and imposes differing disclosure requirements and buffer zone restrictions on each:

- Entities that purchase or use restricted use pesticides are not required to make disclosures or observe buffer zone restrictions unless they purchase or use in excess of five pounds or fifteen gallons, and

- Entities that purchase or use *any amount* experimental use pesticides are required to make disclosures of *all* pesticide usage (general, restricted or experimental) and observe buffer zone restrictions, while

[32] Bill 2491 at § 22-22.2 ("Purpose"). *See also id.* at § 22-22.1(a) ("Findings").

> • Entities that purchase or use general use pesticides are not subject to *any* disclosure requirements or buffer zone restrictions, regardless of how much they use or whether they use the pesticides properly or not.

The classification of pesticide users and additional burdens imposed upon users of experimental pesticides bear no reasonable relationship to Bill 2491's stated purpose. The Proposed Ordinance notes that "[p]esticide-laden dust and drift from **both restricted use pesticides and general use pesticides** is inevitable and results in long-term exposure to toxic chemicals harmful to County of Kaua`i residents ..." Bill 2491 at § 22022.1(a)(9) (emphasis added). The Bill makes **no** findings regarding whether or how general, restricted use and experimental use pesticides have, or might have, different impacts on health, welfare and safety. *See* § 22-22.1 at (a)(2), (a)(7) through (a)(9). And, importantly, the Proposed Ordinance makes **no particularized findings whatsoever** regarding any alleged harms related to restricted and experimental use pesticides, instead, the Bill *presumes* such finding and imposes significant restrictions on users of such products.

The labels alone are not enough to establish any reasonable basis for the distinctions embodied in Bill 2491 because the label restrictions are dictated by the EPA under FIFRA. *See* FIFRA, 7 USC § 136(c). There is no evidence to suggest that properly used "restricted" and "experimental" pesticides pose any danger to the public. Nor is there any evidence that Seed Companies misuse such pesticides. And, although there is no evidence of any dangers associated with general use pesticides, Bill 2491 arbitrarily purports to regulate its use by commercial agriculture entities to the extent those entities also use restricted and experimental use pesticides. It thus ignores, among other things, the daily household use of many such products.

In the absence of evidence establishing particularized risks associated with restricted and experimental pesticides *per se*, there is "nothing that would reasonably justify" the decision to treat users of those pesticides differently. And, even if there were such evidence, it would not justify singling out the Seed Companies (which are the only entities affected) to restrict use of general pesticides. *See Hasegawa*, 52 Haw. at 332-33 ("The State has not demonstrated any special benefit to private employers that would justify [a] class distinction. Absent such a showing there is no rational basis for singling out this one group ... to achieve the legislative purpose"). *Cf. Ewing*, 81 Hawai`i 156, 914 P.2d 549 (County ordinance prohibiting use of device for reproducing sound in or on any public property or any motor vehicle on public way if sound produced is audible at distance of 30 feet from device was within police power where legislative findings in support of ordinance indicated that excessive noise created significant threat to public health, safety, and welfare).

By imposing entirely different rules on entities that use "restricted" and "experimental" pesticides in the absence of any evidence justifying the distinctions, Bill 2491 wrongly "works an invidious class distinction in violation of the equal protection clauses of both the Hawai`i and Federal Constitutions." *Hasegawa*, 52 Haw. at 333.

The same sort of equal protection problem occurs when the County seeks to use its police power to regulate GM crops more strictly than it regulates non-GM crops. There is utterly no

evidence to support distinguishing GM crops, which have been grown on Kaua`i for decades after being approved by the federal government (as described more fully in the discussion on pre-emption), from conventional crops. Federal approvals—which have been issued for all GM crops planted on Kaua`i—reflect a scientific judgment that the GM crops pose no greater health or environmental concerns than non-GM crops. The National Academy of Sciences has found on multiple occasions that GM organisms do not possess any unique hazards or risks as compared with non-GM organisms. *See* Committee on Genetically Modified Pest-Protected Plants, Genetically Modified Pest-Protected Plants (National Academy Press 2000) (affirming findings of 1987 National Academy report finding that GMOs do not pose unique harms as compared to non-GMOs). Similarly, the National Research Council concluded that "organisms that have been genetically modified are not per se of inherently greater risk than unmodified organisms." 57 Fed. Reg. 6753, 6755 (Feb. 27, 1992). For Kaua`i to treat GM and non GM crops differently based upon unsupported health and welfare allegations directly contradicted by findings from federal agencies is the kind of baseless restriction on productive economic activity that substantive due process forbids. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 105 S.Ct. 3249 (1985) (striking ordinance requiring special permit for group homes for the mentally retarded where city was unable to articulate how the classification was rationally related to any claimed governmental purpose, but rather rested on an irrational prejudice); *Kaneohe Bay Cruises, Inc. v. Hirata*, 75 Haw. 250, 261, 861 P.2d 1, 7 (1993) (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S. Ct. 3049 (1984)) (courts "determine whether the legislature could reasonably conceive that those conclusions-the legislative facts-are true").

Large scale commercial farming activities have been conducted on Kaua`i for more than a century. Farming activities involving GMO have been conducted for more than three decades. Throughout that time, agriculture has been a significant source of economic activity and the people of Kaua`i have thrived. Imposing restrictions based upon fear, in the face of established science, is unreasonable, irrational and arbitrary. When the products being used have passed state and federal reviews, there is no rational basis for Kaua`i to enact contrary legislation.

CONCLUSION

Thank you giving us the opportunity to respond to your questions and to provide guidance on these important issues. If you have additional questions, or if you wish to discuss any of our responses, please let us know.

As you have read, Bill 2491 is deeply and fatally flawed. We have limited our comments to the issues you posed; there are other legal problems with the Bill and we will address them at the appropriate time, if needed. We hope that will not be necessary, for the flaws outlined above should dissuade the Council from pursuing this further.

Very truly yours,

MARGERY S. BRONSTER
For DuPont Pioneer

PAUL ALSTON
For Syngenta

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