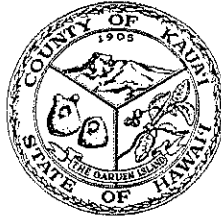


Bernard P. Carvalho, Jr.
Mayor



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October 31, 2013

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

Re: Bill 2491, Draft 2

Dear Chair Furfaro and Councilmembers:

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

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

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

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

First, I want to make clear that I agree fully with the general intent of this bill. I believe there should be pre- and post-disclosure of pesticide use, and that buffer zones of some meaningful kind should be established in conjunction with disclosure. I also believe that the study as proposed is the most important piece of this legislation, as it can better guide us to the best decisions relating to buffer zones and other needed protections.

However, one of the issues with Bill 2491 as it stands today is that it does not directly address pesticide buffer zones. Instead criminalizes the growing of any kinds of crops on agricultural land regardless of whether or not pesticides are used on said crops. It also contains other legal flaws, which I will address in this communication. The bottom line is, I cannot in good conscience support this measure.

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

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

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

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

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

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

- Existing federal and state law appears to impliedly pre-empt the county from enacting its own pesticide laws. Implied pre-emption is the principle that federal or state law can supersede or supplant state or local law, if the local law stands as an obstacle to accomplishing the full purpose and objectives of the overriding superior law. In this case, the State of Hawai'i Department of Agriculture has been given authority by the federal government to regulate pesticides. Our attorneys explain that the state pesticide law is a complex and comprehensive regulatory framework that "indicates a purpose to occupy an entire field of regulation," thereby pre-empting a local authority from enacting such laws. In the opinion, our attorneys state that "a reviewing court would likely find that Bill No. 2491 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature under the Hawai'i Pesticides Law."

- Bill No. 2491 will also likely be challenged as an invalid exercise of the County's police power, an invalid exercise of the County's ability to regulate public nuisances, and/or a violation of the Hawai'i Right to Farm Act's prohibition against any public official "declaring" such farming operations a nuisance. The Right to Farm Act states "[no] court, official, public servant, or public employee shall declare any farming operation a nuisance for any reason if the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices. There shall be a rebuttable presumption that a farming operation does not constitute a nuisance."

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

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

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

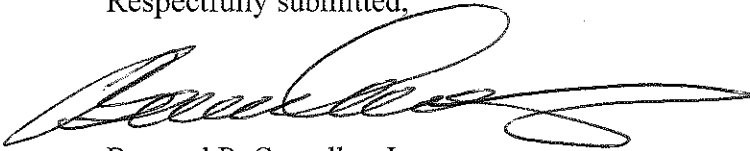
In the interest of finding that common ground, I would like the council to know that it is my intention to support the resolution calling for an environmental public health impact study (EPHIS). We would like to begin working with the council as soon as possible to identify funds that can be used to get the EPHIS joint fact finding study group underway.

Additionally, the State Department of Agriculture has been working with the five companies that would be impacted by this bill on voluntary pesticide disclosure and buffer zone guidelines. We anticipate an announcement of the product of their efforts in two to three weeks. Governor Abercrombie has informed me that he will be seeking funding for additional inspectors that could service Kauai

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

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

Respectfully submitted,



Bernard P. Carvalho, Jr.
Mayor

cc: Al Castillo, County Attorney

att: Office of the County Attorney's Written Legal Review/Opinion Regarding Proposed Draft Bill 2491 as amended (Tracking No. 13-1250), dated October 24, 2013