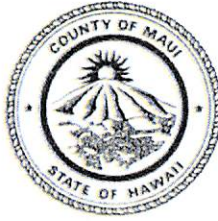


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MEMO TO: Elle Cochran, Chair
Infrastructure and Environmental Management Committee

CC: Mike White, Chair
Maui County Council

FROM: Richelle M. Thomson 
Deputy Corporation Counsel

DATE: November 22, 2017

SUBJECT: A Bill for an Ordinance Establishing a New Chapter 20.40,
Maui County Code, Prohibiting the Sale and Use of SPF
Sunscreen Containing Oxybenzone and Octinoxate (IEM-45)

This memorandum is in response to your request dated November 15, 2017, requesting review and approval of the above-identified proposed ordinance (attached for your reference), which was passed out of the Infrastructure and Environmental Committee ("IEM") on November 13, 2017, which committee voted to recommend approval to the Maui County Council. This memo elaborates on the legal advice provided to the IEM Committee on October 16 and November 13, 2017. This department has not approved the proposed ordinance as to form and legality, and we recommend that the ordinance not be adopted as currently drafted.

The bill prohibits the sale and use of "SPF sunscreen" containing oxybenzone and octinoxate in order to "preserve the health, safety, welfare, and scenic underwater and natural beauty of Maui." These chemicals are believed to cause harm to coral polyps (immature coral) by contributing to coral bleaching and death. The stated purpose of the bill is protection of aquatic life and habitat in the near shore waters.

COUNTY COMMUNICATION NO. 17-473

Public testimony and presentations by two consultants to IEM on November 13, 2017, identified additional potential “public purposes,” including alleged impacts on human health, cultural resources (fishing, pollution of freshwater streams and taro lo’i), and effects on land such as erosion due to loss of the protection offered by coral reefs.

For the purposes of this memo only, we assume the opinions of the two consultants who presented information to the IEM Committee on November 13 to be legitimate and reliable. If challenged, the IEM Committee’s record and any additional record created by Council, will be used to support (or discredit) the studies and opinions relied upon for the legislation.

The Department of the Corporation Counsel has determined that the following legal issues may apply to the proposed ordinance:

1. The County may be preempted from enacting such legislation if this area of law is “fully occupied” by a state (or federal) statutes. Hawaii Revised Statutes (“HRS”) broadly authorizes the State Department of Land and Natural Resources (“DLNR”) to regulate and oversee the near-shore waters.
2. The legislation may face a challenge for legal validity. A court would look to whether the County’s powers, which are derived from the Constitution of the State of Hawaii, Hawaii Revised Statutes, and Charter of the County of Maui (1982), as amended, authorize the proposed regulatory authority.
3. Given that the proposed legislation bans the “sale” of sunscreen containing certain chemicals, the proposed legislation implicates the federal Commerce Clause.
4. This department could find no similar legislation in any other jurisdiction in the United States; therefore, we are unable to provide guidance through case law.
5. The Federal Food & Drug Administration considers sunscreens to be both “over the counter” drugs as well as cosmetics. The two chemicals at issue are FDA-approved for use in sunscreens; if public health is a stated purpose (in a future draft), there is a possibility of federal preemption.
6. The bill prohibits sale and use of products containing these chemicals anywhere on the island (unless prescribed by a doctor), regardless of

whether a person intends to enter the ocean or shower in a beach park (i.e., the ban on use would apply equally to an Upcountry farmer or someone hiking in Haleakala Crater as it would to a snorkeler). This raises the issue of an insufficient nexus between use and possible damage to coral (the stated purpose). Additionally, a court would examine, under a Commerce Clause challenge, whether the ordinance is the “least restrictive means” of achieving the public purposes.

7. Enforcement is anticipated to be an issue, in terms of cost, personnel, and jurisdiction to enforce within state territory (e.g., on beaches or other state land).

Given that the legal issues interconnect, we will address them in broad categories:

1. **State Preemption: Title 12, Hawaii Revised Statutes, pertaining to “Conservation and Resource,” is a law governing aquatic resources that discloses an express or implied intent to be exclusive or uniform throughout the State.**

Article XI, Section 1, of the Hawaii Constitution mandates that the State and its political subdivisions conserve and protect Hawaii’s natural beauty and all natural resources, and promote the development and utilization of these resources in a manner consistent with their conservation. All “public trust resources” are held in trust by the State for the benefit of the people.

Article XI, Section 2, of the Hawaii Constitution requires the legislature to vest in one or more executive boards or commissions powers to manage natural resources owned by the State.

Pursuant to Section 26-15(b), HRS, the State Department of Land and Natural Resources (“DLNR”) “shall manage and administer the public lands of the State and minerals thereon and **all water and coastal areas of the State**, except the commercial harbor areas of the State, including the soil conservation function, the forests and forest reserves, **aquatic life**, wildlife resources, state parks, including historic sites, **and all activities thereon and therein, including, but not limited to, boating, ocean recreation, and coastal areas programs.**” (Emphasis added.)

Title 12 (“Conservation and Resources”), Subtitle 5 (“Aquatic Resources and Wildlife”) and Subtitle 7 (“Enforcement”), Chapter 187A, et seq., HRS, describe DLNR’s authority over and regulation of the marine waters and aquatic life therein. An April 15, 2009, memo from this department, concerning the

County's ability to regulate aquarium reef fish collection is attached for reference.¹ Examples of the State's statutory authority over aquatic resources include:

- Chapter 187A, HRS, "Aquatic Resources," sets forth DLNR's power to "manage and administer the aquatic life and aquatic resources of the State" and to "enforce all laws relating to the protecting, taking, killing ... aquatic life within the State and the waters subject to its jurisdiction." Sections 187A-2(1) and (7), HRS.
- "All marine waters of the State are hereby constituted a marine life conservation area to be administered by [DLNR] subject to this chapter and any other applicable laws not inconsistent herewith or with any rules adopted pursuant hereto." Section 190-1, HRS
- "State marine waters" are defined in Section 190-1.5, HRS, as "extending from the upper reaches of the wash of the waves on shore seaward to the limit of the State's police power and management authority"
- DLNR, through its Division of Aquatic Resources ("DAR") establishes "marine life conservation districts" ("MCLD") under the authority of Chapter 190, HRS.
- The purposes underlying Chapter 195D, HRS, are the protection and perpetuation of indigenous aquatic life, wildlife, and land plants, and their habitats.
- Under Section 195D-5(a), HRS, DLNR is charged with conducting "research on indigenous aquatic life ... and on endangered species and their associated ecosystems, and shall utilize the land acquisition and other authority vested in the department to carry out programs for the conservation, management, and protection of such species and their associated ecosystems." DLNR may enter into agreements with federal agencies, counties, and others related to public lands utilized for conservation, managing, enhancing, or protecting indigenous aquatic life ... and habitat."

Additionally, the proposed ordinance appears to address "water pollution" of "coastal waters," terms defined in and regulated under Chapter 342D, HRS, The Hawaii Department of Health administers Chapter 342D, HRS:

"Coastal waters" means all waters surrounding the islands of the State from the coast of any island to a point three miles seaward from the coast, and, in the case of streams, rivers, and drainage ditches, to a point three miles seaward from their point of discharge into the sea and includes those brackish waters, fresh waters, and salt waters that are subject to the ebb and flow of the tide.

“Water pollution” means:

- (1) Such contamination or other alteration of the physical, chemical, or biological properties of any state waters, including change in temperature, taste, color, turbidity, or odor of the waters, or
- (2) Such discharge of any liquid, gaseous, solid, radioactive, or other substances into any state waters, as will or is likely to create a nuisance or **render such waters unreasonably harmful, detrimental, or injurious to public health, safety, or welfare, including harm, detriment, or injury to public water supplies, fish and aquatic life** and wildlife, recreational purposes and agricultural and industrial research and scientific uses of such waters or as will or is likely to violate any water quality standards, effluent standards, treatment and pretreatment standards, or standards of performance for new sources adopted by the department. (Emphasis added.)

The State and the counties, via the authority delegated under 205A, HRS, the Coastal Zone Management Act, regulate “development” in the coastal zone by way of special management area permits. We do not believe that Chapter 205A, HRS, authorizes the County’s regulation of the introduction of sunscreen chemicals to marine waters via human contact.

As described, existing state laws regulate activities that impact the near-shore waters and aquatic life therein, and give the Department of Land and Natural Resources primary regulatory over these areas. If a preemption challenge were to be brought, court would look to whether these laws are intended to “fully occupy” this field of law.

Article VIII, Section 2, of the Hawaii Constitution, does not grant the counties complete home rule, but only provides limited protection from state legislative control. The county charters are still “subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.” HGEA v. County of Maui, 59 Hawaii 65, 576 P.2d 1029 (1978).

Article VII, Section 5, of the Hawaii State Constitution states, “This article shall not limit the power of the legislature to enact laws of state-wide concern.” Generally on functions of statewide interest, if counties are not given specific authority, they cannot thwart the State.²

Section 50-15, HRS: “Reserved powers. 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.

Article VIII, Section 6 of the Hawaii Constitution (1978) and its implementing statute, HRS §50-15 (1985), are necessarily implicated whenever the issue of “preemption-by-conflict” arises with respect to a county ordinance because the preemption doctrine raises issues regarding the supremacy of state law. If an ordinance truly conflicts with Hawaii statutory law that is of statewide concern, then it is necessarily invalid because it violates Article VIII, Section 6 of the Hawaii 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 Hawaii Constitution. Richardson v. City & County of Honolulu, 76 Haw. 46, 50, 868 P.2d 1193, 1197 (1994)

In Richardson, the Hawaii Supreme Court found that a county ordinance relating to leasehold conversion did not cover the same subject matter embraced within a comprehensive state statutory scheme that disclosed “an express or implied intent to be exclusive and uniform throughout the state,” nor did the ordinance conflict with state constitutional or statutory law on the basis that it enters an area “fully occupied” by state law.

The “test to determine whether an ordinance conflicts with a statute is whether it prohibits what the statute permits or permits what the statute prohibits.” Waikiki Resort Hotel v. City & County of Honolulu, 63 Haw. 222, 241, 624 P.2d 1353, 1366 (1981) (citations omitted).

In Richardson, the Hawaii Supreme Court discussed the preemption of a municipal ordinance by a state statute pursuant to HRS §46-1.5(13) and adopted the following “comprehensive statutory scheme” test:

[A] municipal ordinance may be preempted ... if (1) it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or (2) it conflicts with state law. Id. at 62, 868 P.2d at 1209. A conflict exists if the local ordinance “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.” Id. at 61, 868 P.2d at 1208 (quoting Sherwin-Williams Co. v. City of Los Angeles, 4 Cal.4th 893, 16 Cal.Rptr.2d 215, 217-18, 844 P.2d 534, 536-37 (1993)). Also see, State v. Ewing, 81 Haw. 156, 161, 914 P.2d 549, 554 (Ct. App. 1996)

Counties may exercise only those powers delegated to them by general laws; where the legislature clearly intended to preempt the field of regulation, ordinances attempting to regulate the same subject matter are invalid. In re Anamizu, 52 Haw. 550, 481 P.2d 116 (1971).

In Anamizu, the Hawaii Supreme Court considered whether a city ordinance mandating certification of electrical contractors by a municipal agency was preempted by a state statutory scheme that governed the licensing of all building contractors. In applying HRS §70-105 (precursor to HRS §46-1.5(13)), the court held that the city's ordinance was preempted and the "critical determination" was whether the state statutory scheme indicated "a legislative intention to be the exclusive legislation applicable to contractors." Anamizu, at 553. The Anamizu court found preemption due to two issues: (1) the state statute at issue created a comprehensive mechanism for regulating all building contractors (as opposed to the city's ordinance that sought to regulate just electrical contractors); and (2) the city's regulations imposed "additional" regulations. Id. at 550. See also, Hawaii Gov't Employees' Ass'n, Am. Fed'n of State, County & Mun. Employees, Local 152, AFL-CIO v. Maui, 59 Haw. 65, 79, 576 P.2d 1029, 1038 (1978).

In Syngenta Seeds, Inc. v. County of Kauai, Civ. No. 14-00014 BMK, 2014 WL 4216022 (D.Haw. Aug. 25, 2014), the County of Kauai enacted an ordinance, which (1) regulated pesticides by requiring pre- and post-application reporting and established pesticide buffer zones, and (2) required specific annual reporting of each genetically engineered organism grown. Regarding the ordinance's regulation of pesticides, the Hawaii Supreme Court held that the "statewide constitutional concern for agriculture set out in art. XI § 3 [of the Hawaii State Constitution] and the administrative structures established in the DOA and Department of Health to effectuate the regulation of pesticides[] evidence[] the legislature's intent that state law be both uniform and exclusive." Also see: Hawai'i Floriculture & Nursery Ass'n v. County of Hawaii, Civ. No. 14-00267 BMK, 2014 WL 6685817, at *4 (D. Haw. Nov. 26, 2014), aff'd sub nom. Hawai'i Papaya Indus. Ass'n v. County of Hawaii, 666 Fed.Appx. 631 (9th Cir. 2016).

The Hawaii Supreme Court held that "these statutory provisions, in the context of art. XI § 3, the comprehensive administrative system established under the DOA, and the complete absence of reference to counties or local government therein evidence the legislature's intent that the state scheme for the regulation of specific potentially harmful plants be both uniform and exclusive preempting the imposition of local regulations on this specific issue." Hawai'i Floriculture & Nursery Ass'n v. County of Hawaii, Civ. No. 14-00267 BMK, 2014 WL 6685817,

at *4 (D. Haw. Nov. 26, 2014), aff'd sub nom. Hawai'i Papaya Indus. Ass'n v. County of Hawaii, 666 Fed.Appx. 631 (9th Cir. 2016), citing Syngenta at *9.

The first step of this test is to examine whether the local ordinance in question covers the same subject matter embraced by state law or regulations. See State v. Ewing, 914 P.2d 549, 554 (Haw.Ct.App.1996). Only upon a finding of overlapping subject matter would a court then proceed to analyze the uniformity and exclusivity of a statutory scheme. See Citizens Utils. Co. v. Cnty. of Kauai, 814 P.2d 398, 400 (Haw.1991) (“[A] municipal ordinance, which covers the same subject matter embraced within a State statute is invalid if the statute discloses an express or implied intent that the same shall be exclusive, or uniform in application throughout the State.”) (quoting In re Application of Anamizu, 481 P.2d 116 (Haw.1971)). Hawai'i Floriculture & Nursery Ass'n v. County of Hawaii, Civ. No. 14-00267 BMK, 2014 WL 6685817, at *4.

2. Validity: Whether the proposed ordinance is a valid exercise of the County's "police powers" under Section 46-1.5(13), HRS

In general, local governments have the power to enact regulations to protect the health and safety of persons and property within their jurisdiction. There are, however, limitations on this authority. Maui County may not adopt local laws that are (1) inconsistent with the Hawaii Constitution or a general Hawaii state law, or (2) preempted by state or federal law.³

There is no express provision in the Hawaii constitution relating to the counties' legislating on public health, safety, and welfare – generally referred to as the “police power.” Rather, Article 8, Section 1 of the Hawaii Constitution states that the counties “shall have and exercise such powers as shall be conferred under general laws.” Chapter 46-1.5, HRS, sets out the “general powers and limitations of the counties.”

Pursuant to Section 46-1.5(13), HRS:

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 through the state.

Courts have found that environmental regulations may be enacted by the counties for the purpose of protecting the public safety, health, and welfare.⁴

Provided the ordinance relates to these objectives, the ordinance would fall within the scope of the police power.

3. The prohibition on sale of SPF Sunscreens may face a challenge under the federal Commerce Clause.

Although it is phrased as a regulatory power given to U.S. Congress, the Commerce Clause, U.S.C.A. Const. Art. I, §8, cl. 3, has a “negative” or “dormant” aspect that denies states powers to unjustifiably or unduly burden interstate commerce. The U.S. Supreme Court has set forth the standard for determining the validity of local regulations that appear on their face to apply to both intrastate and interstate equally: “Evenhanded local regulation to effectuate a legitimate local public interest is valid unless pre-empted by federal action, or unduly burdensome on ... interstate commerce” Huron Portland Cement Co. v City of Detroit, 362 U.S. 440, 443 (1960).

The Supreme Court in Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), set forth a test requiring the comparison of the competing interests of the local regulation and unrestricted interstate commerce:

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

In general, the U.S. Supreme Court has been reluctant to strike down local regulations that serve safety and public welfare purposes because of their impact on interstate commerce.⁵ In Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981), the Supreme Court addressed the Commerce Clause implications of a Minnesota law banning the use of plastic jug milk containers. The Minnesota law was intended to benefit the state’s solid waste management goals, reduce energy waste, and address depletion of natural resources.⁶

The law was challenged as unconstitutional on the ground that it placed an undue burden on interstate commerce. After finding that the comparative test in Pike was applicable, the Court found that the Minnesota statute did regulate evenhandedly and was not a disguised form of state protectionism.⁷ The Court then went on to find that the incidental burden imposed on interstate commerce by the regulation was not clearly excessive in relation to the putative local benefits.⁸

Elle Cochran, Chair
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Other examples of local regulations banning certain goods or activities have been found to be consistent with the Commerce Clause, as long as the regulation serves a valid purpose and the importance of that purpose outweighs the burden placed on interstate commerce. In Kidd v. Pearson and Mugler v. Kansas, the Supreme Court upheld a state's right to ban the manufacture and import of alcoholic beverages.⁹ In Proctor and Gamble Co. v. Chicago,¹⁰ for which the Supreme Court declined certification, a Chicago ordinance banned the use of phosphate-based detergents within the city limits, based on reliable scientific studies showing that phosphate-based detergent promoted the growth of algae in the city's drinking water system.¹¹ After establishing that the elimination of algae was a valid purpose, and that the ordinance legitimately served that purpose, the court discussed at length the alleged impacts the ordinance had on interstate commerce, concluding that none of the impacts were unduly burdensome, at least not to the extent that they outweighed the city's interest in eliminating algae from its water supply.

In Proctor and Gamble, Clover Leaf Creamery, Kidd, and Mugler, the regulations sought to address the purported harmful environmental effects of certain products (phosphate-based detergents, plastic milk jugs, alcoholic beverages).

As stated previously, a court, in reviewing Commerce Clause implications, would look to whether the purposes of the legislation (protection of coral) could be accomplished in a manner that is "less burdensome" on interstate commerce than prohibiting the sale of products County-wide.

APPROVED FOR TRANSMITTAL:


PATRICK K. WONG
Corporation Counsel

¹ Some of the legal issues raised herein are also addressed in a comprehensive memorandum regarding Kauai's "GMO" ordinance by Mauna Kea Trask, then-Deputy County Attorney for Kauai County, "Memorandum Requesting Copy of Office of the County Attorney's Written Legal Review/Opinion Regarding Proposed Draft Bill No. 2491 as amended (Tracking No. 13-1250), dated October 24, 2013.

Elle Cochran, Chair

Infrastructure and Environmental Management Committee

Re: Proposed ban on sale and use of SPF sunscreen containing certain chemicals (IEM-45)

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² Kunimoto v. Kawakami, 56 Haw. 582 (1976); Hawaii Gov't Employees' Ass'n, Am. Fed'n of State, County & Mun. Employees, Local 152, AFL-CIO v. Maui, 59 Haw. 65, 72, 576 P.2d 1029, 1034 (1978)

³ The St. Thomas-St. John Hotel & Tourism Assoc., Inc. v. Government of the U.S. Virgin Islands, 218 F.3d 232, 238 (3d Cir. 2000); also see, Queen Anne's Conservation Inc. v. County Com'rs of Queen Anne's County, 382 Md. 306, 855 A.2d 325 (2004).

⁴ No. 14-1, 2014 WL 1102052, at *5 (Hawaii A.G. Mar. 17, 2014), citing State v. Jim, 80 Haw. 168, 907 P.2d 754 (1995)

⁵ "It is difficult at best to say that financial losses should be balanced against the loss of lives and limbs of workers and people using the highway" (Brotherhood of Locomotive Firemen Enginemen v Chicago, Rock Island Pacific Railroad Co., 393 U.S. 129, 140 (1968) [state may require minimum crews on freight trains]; American Can Co. v. Oregon Liquor Control Commission, 517 P.2d 691 [Ore, 1973] [Oregon "Bottle Bill" banning pull-top cans].

⁶ Minn Stat § 116F.21 [1978]; see 449 U.S. at 458.

⁷ Clover Leaf Creamery Co., *Id.* at 471.

⁸ *Id.* at 472. <https://casetext.com/case/minnesota-v-clover-leaf-creamery-co> - p472

⁹ Kidd v Pearson, 128 U.S. 1 (1888); Mugler v. Kansas, 123 U.S. 623 (1887).

¹⁰ Proctor and Gamble Co. v Chicago, 509 F.2d 69 (1975) [7th Cir], cert den 421 U.S. 978 (1975)

¹¹ *Id.* at 73.

ORDINANCE NO. _____

BILL NO. _____ (2017)

A BILL FOR AN ORDINANCE ESTABLISHING A NEW CHAPTER 20.40, MAUI COUNTY CODE, PROHIBITING THE SALE AND USE OF SPF SUNSCREEN CONTAINING OXYBENZONE AND OCTINOXATE

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Oxybenzone and octinoxate have significant impacts on the environment and especially to the marine environment, including: causing mortality in coral planula and gametes, increasing the susceptibility of coral to undergo coral bleaching at temperatures lower than 87.8 degrees Fahrenheit, and causing potential damage to coral and other marine organisms' genomic integrity. These compounds have also been shown to degrade coral physiology and coral reef community integrity which reduce acclimation and resiliency to climate change factors, and degrade coral reefs by inhibiting recruitment. Increased probability of endocrine disruption, either causing demographic feminization in fish or other types of reproductive diseases, has been observed in marine invertebrate species (e.g. *sea urchins*), vertebrate species (e.g. fish such as wrasses, eels, and parrotfish), and mammals (in species similar to the Hawaiian Monk Seal).

Contamination of oxybenzone and octinoxate in Maui coastal waters acts as a pseudo-persistent pollutant, meaning that environmental contamination levels are constantly refreshed and renewed, every day, by swimmers and

beachgoers. Swimming and other water activities mean that these chemicals pollute Maui waters unless actively mitigated.

The Council finds and declares that, to preserve the health, safety, welfare, and scenic underwater and natural beauty of Maui, the sale and use of SPF sunscreen containing oxybenzone and octinoxate must be regulated.

SECTION 2. Title 20, Maui County Code, is amended by adding a new chapter to be appropriately designated and to read as follows:

“Chapter 20.40

PROHIBITED SALE AND USE OF SPF SUNSCREEN CONTAINING OXYBENZONE AND OCTINOXATE

Sections:

- 20.40.010 Purpose.
- 20.40.020 Definitions.
- 20.40.030 Administration.
- 20.40.040 Prohibitions.
- 20.40.050 Exemptions.
- 20.40.060 Violations and penalties.
- 20.40.070 Public information.
- 20.40.080 No conflict with federal or state law.

20.40.010 Purpose. The purpose of this chapter is to promote the health, safety, and welfare of Maui’s coral reefs and marine life, by regulating and limiting the sale and use of SPF sunscreen containing oxybenzone and octinoxate; and encourage the use of alternatives, such as SPF sunscreen containing zinc and titanium, which provide broad spectrum protection from the sun.

20.40.020 Definitions. Whenever used in this chapter, unless the context otherwise requires:

“Business” means any commercial enterprise or establishment, including sole proprietorships, joint ventures, partnerships, corporations, or any other legally cognizable entity, whether for profit or not for profit, and includes all employees of the business, or any independent contractors associated with the business.

“Director” means the director of the department of environmental management, or the director’s authorized representative.

“Octinoxate” is defined as the chemical (RS)-2-Ethylhexyl (2E)-3-(4-methoxyphenyl)prop-2-enoate under the International Union of Pure and Applied Chemistry chemical nomenclature registry, has a chemical abstract service registry number 5466-77-3, and whose synonyms include ethylhexyl methoxycinnamate, octyl methoxycinnamate, Eusolex 2292, and Uvinul MC80, and is intended to be used as protection against ultraviolet light radiation with a spectrum wavelength from 370 nanometers to 220 nanometers in an epidermal sunscreen-protection personal-care product.

“Oxybenzone” is defined as the chemical (2-Hydroxy-4-methoxyphenyl)-phenylmethanone under the International Union of Pure and Applied Chemistry chemical nomenclature registry, has a chemical abstract service registry number 131-57-7, and whose synonyms include benzophenone-3, Escalol 567, Eusolex 4360, KAHSCREEN BZ-3, 4-methoxy-2-hydroxybenzophenone and Milestab 9, and is intended to be used as protection against ultraviolet light radiation with a spectrum wavelength from 370 nanometers to 220 nanometers in an epidermal sunscreen-protection personal-care product.

“Person” means an individual, business, or other entity.

“Prescription drug” means the same as defined in section 328-1, Hawaii Revised Statutes.

“SPF sunscreen” means the same as in 21 C.F.R. 352.3.

20.40.030 Administration. The director shall administer this chapter and adopt administrative rules pursuant to chapter 91, Hawaii Revised Statutes, within 365 days from the date of adoption of this ordinance.

20.40.040 Prohibitions. Except as provided in section 20.40.050 of this chapter:

A. No business shall sell, offer for sale, or distribute for sale, SPF sunscreen containing oxybenzone or octinoxate.

B. SPF sunscreen containing oxybenzone or octinoxate shall not be sold, provided, or offered for use at any county facility, county-authorized concession, county-sponsored or county-permitted event, or county program.

C. No person shall use or apply SPF sunscreen containing oxybenzone or octinoxate, unless the SPF sunscreen is a prescription drug.

20.40.050 Exemptions. This chapter shall not apply to the sale or use of SPF sunscreen containing oxybenzone or octinoxate that are prescription drugs.

20.40.060 Violations and penalties. A. Violations of this chapter shall be subject to the civil penalties and enforcement procedures in section 19.530.030 of this code.

B. Fines collected pursuant to this chapter shall be deposited into the _____.

20.40.070 Public information. Restrictions in this chapter on the sale of SPF sunscreen containing oxybenzone and octinoxate shall be set forth on all application forms for permits relating to county facilities, county-managed concessions, county-sponsored or county-permitted events, and county programs.

20.40.080 No conflict with federal or state law. Nothing in this chapter shall be interpreted or applied to create any requirement or duty in conflict with any federal or state law.”

SECTION 3. This ordinance shall take effect 365 days after its approval.

APPROVED AS TO FORM AND LEGALITY:

Department of the Corporation Counsel
County of Maui

iem:misc:045abill04

CHARMAINE TAVARES
Mayor



BRIAN T. MOTO
Corporation Counsel

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April 15, 2009

MEMORANDUM

T O: Michael J. Molina
Council Vice Chair

F R O M: Jeffrey T. Ueoka
Deputy Corporation Counsel

A handwritten signature in black ink, appearing to read "Jeffrey Ueoka", is written over the printed name of the Deputy Corporation Counsel.

SUBJECT: DECLINE IN REEF FISH POPULATION

I. Introduction and Questions Posed.

The purpose of this memorandum is to respond to your memorandum, dated February 24, 2009, requesting legal advice regarding the following questions:

1. Opine on whether the Council can regulate the operation of aquarium reef fish collector businesses within the County.
2. Does the County have any authority to regulate the taking of reef fish from the oceans along the islands within the County of Maui?

At present, no bill for an ordinance regarding the regulation of aquarium reef fish collector businesses or the taking of reef fish from ocean waters is pending before Council. In the absence of a specific bill or proposal, this memorandum cites and discusses statutes, administrative rules, and rules of statutory construction that would be generally relevant in reviewing any such bill. A complete analysis of the questions posed requires, and is subject to, an examination of the particulars of a specific proposal. We recommend that further legal review and advice be sought from our

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Department if a specific bill is submitted for consideration by the Council.

II. Analysis and Discussion.

- A. A County ordinance is preempted by state statute where the statute discloses an intent, express or implied, to be exclusive or uniform throughout the state, or where the County ordinance conflicts with state law.

Hawaii Revised Statutes ("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. (Emphasis added)

The Hawaii Supreme Court, in interpreting an earlier, though similar, version¹ of HRS § 46-1.5(13) held, in part:

In summary, a municipal ordinance may be preempted pursuant to HRS § 46-1.5(13) if (1) it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be

¹ When the Court rendered its opinion in 1994, HRS § 46-1.5(13) read as follows:

Each county shall have the power to enact ordinances deemed necessary to protect health, life, and property, and 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, provided also that the ordinance does not disclose or express an implied intent that the ordinance shall be exclusive, or uniform throughout the State.

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exclusive and uniform throughout the state or
(2) it conflicts with state law.²

Under HRS § 46-1.5(13), as elucidated by the Hawaii Supreme Court, a County ordinance may be preempted where it either conflicts with state law or covers the same subject matter as a state statute that is intended to be exclusive or uniform throughout the state.

B. Title 12 of the Hawaii Revised Statutes, pertaining to "Conservation and Resources", is a law governing aquatic resources that discloses an express or implied intent to be exclusive or uniform throughout the state.

Title 12, HRS, pertaining to "Conservation and Resources", includes a number of chapters relating to aquatic resources and wildlife.

HRS Chapter 187A, relating to aquatic resources, confers upon the Department of Land and Natural Resources ("DLNR") a number of powers and duties relating to such resources. In particular, HRS § 187A-2 states that DLNR shall:

- (1) Manage and administer the aquatic life and aquatic resources of the State;
...
- (3) Establish, manage, and regulate public fishing areas, artificial reefs, fish aggregating devices, marine life conservation districts, shoreline fishery management areas, refuges, and other areas pursuant to title 12;
...
- (7) Enforce all laws relating to the protecting, taking, killing, propagating, or increasing of aquatic life within the

² Richardson v. City and County of Honolulu, 76 Hawai'i 46, 62, 868 P.2d 1193, 1207 (1994) (holding, in part, that City ordinance providing for condemnation of a lessor's leased fee interest was not preempted by state statutes because ordinance did not address the same subject matter as state statutes and because ordinance did not conflict with state constitution and statutes).

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State and the waters subject to its jurisdiction; and

- (8) Formulate and from time to time recommend to the governor and legislature such additional legislation necessary or desirable to implement the objectives of title 12.

HRS § 187A-1.5 defines "state marine waters" as "extending from the upper reaches of the wash of the waves on shore seaward to the limit of the State's police power and management authority, including the United States territorial sea, notwithstanding any law to the contrary."

Under HRS § 187A-4, the Board of Land and Natural Resources is authorized to appoint an administrator³ of aquatic resources "who shall have charge, direction, and control of all matters relating to aquatic resources management, conservation, and development activities under this title [12], and such other matters as the board may direct."

HRS § 187A-5, authorizes DLNR to adopt administrative rules:

for and concerning the protection and propagation of introduced and transplanted aquatic life, or the conservation and allocation of the natural supply of aquatic life in any area. The rules may include the following:

- (1) Size limits;
- (2) Bag limits;
- (3) Open and closed fishing seasons;
- (4) Specifications and numbers of fishing or taking gear which may be used or possessed; and
- (5) Prescribe and limit the kind and amount of bait that may be used in taking aquatic life, and the conditions for entry into areas for taking aquatic life.

The rules may vary from one county to another and may specify certain days of the week or certain hours of the day in designating open seasons. All rules shall have the force and effect of law....

³ The current administrator of the Aquatic Resources Division is Dan A. Polhemus, Ph.D.

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HRS Chapter 188, pertaining to "Fishing Rights and Regulations", includes provisions relating to the taking of aquatic life for aquarium purposes. In particular, HRS § 188-31 states, in part:

(a) Except as prohibited by law, the department [of land and natural resources], upon receipt of a written application, may issue an aquarium fish permit, not longer than one year in duration, to use fine meshed traps, or fine meshed nets other than throw nets, for the taking of marine or freshwater nongame fish and other aquatic life for aquarium purposes.

(b) Except as prohibited by law, the permits shall be issued only to persons who can satisfy the department that they possess facilities to and can maintain fish and other aquatic life alive and in reasonable health.

(c) It shall be illegal to sell or offer for sale any fish and other aquatic life taken under an aquarium fish permit unless those fish and other aquatic life are sold alive for aquarium purposes.

The department may adopt rules pursuant to chapter 91 for the purpose of this section.

(d) For the purposes of this section:

(1) "Aquarium purposes" means to hold salt water fish, freshwater nongame fish, or other aquatic life alive in a state of captivity as pets, for scientific study, or for public exhibition or display, or for sale for these purposes;...

HRS § 188-31.5 authorizes DLNR to adopt rules "to monitor the aquarium fish catch report and fish dealer's report for export of aquarium fish taken from the waters of the State for aquarium purposes pursuant to section 188-31." HRS § 188-31.5 also requires that "[a] monthly count of the quantities taken of each individual species of aquarium fish exported ... be reported to the board [of land and natural resources]."

HRS Chapter 190, pertaining to "Marine Life Conservation Program", provides for DLNR regulation of the taking of marine life in ocean waters. In particular, HRS § 190-1 states:

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All marine waters of the State⁴ are hereby constituted a marine life conservation area to be administered by the department of land and natural resources subject to this chapter and any other applicable laws not inconsistent herewith or with any rules adopted pursuant hereto. No person shall fish for or take any fish, crustacean, mollusk, live coral, algae or other marine life, or take or alter any rock, coral, sand or other geological feature within any conservation district established pursuant to this chapter except in accordance with section 190-4 and rules adopted by the department pursuant hereto.

HRS § 190-3 grants DLNR the authority to:

adopt rules governing the taking or conservation of fish, crustacean, mollusk, live coral, algae, or other marine life as it determines will further the state policy of conserving, supplementing and increasing the State's marine resources. The rules may prohibit activities that may disturb, degrade, or alter the marine environment, establish open and closed seasons, designate areas in which all or any one or more of certain species of fish or marine life may not be taken, prescribe and limit the methods of fishing, including the type and mesh and other description of nets, traps, and appliances, and otherwise regulate the fishing and taking of marine life either generally throughout the State or in specified districts or areas. The rules shall upon taking effect supersede any state laws inconsistent therewith. (Emphasis added.)

HRS Chapter 195D, pertaining to "Conservation of Aquatic Life, Wildlife, and Land Plants", provides DLNR with further authority to protect and conserve aquatic life. In particular, HRS § 195D-3 states:

(a) The department [of land and natural resources] is authorized to conduct investigations on any species of aquatic life, wildlife, and land plants in order to develop information relating to their biology, ecology,

⁴ HRS § 190-1.5 defines state marine waters in a manner identical to HRS § 187A-1.5: "As used in this chapter, state marine waters shall be defined as extending from the upper reaches of the wash of the waves on shore seaward to the limit of the State's police power and management authority, including the United States territorial sea, notwithstanding any law to the contrary."

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population, status, distribution, habitat needs, and other limiting factors to determine conservation measures necessary for their continued ability to sustain themselves successfully.

(b) The department is authorized to adopt pursuant to chapter 91, rules relating to the taking, possession, transportation, transplantation, importation, exportation, processing, selling, offering for sale, or shipment of any species of aquatic life, wildlife, and land plant for the purpose of conserving the same.

(c) Except as permitted by rules adopted by the department, it shall be unlawful for any person to take, possess, transport, transplant, export, process, sell, offer for sale, or ship any species of aquatic life, wildlife, or land plants deemed by the department to be in need of conservation pursuant to this section.

HRS § 195D-6.5, pertaining to interim rule making, states, part:

(a) The department [of land and natural resources], subject to the provisions of this section, may declare any indigenous species as endangered and establish, implement, and enforce interim rules governing the exportation from the State or the taking, possession, sale, offer for sale, delivery, or transport within the State, by any means whatsoever, of any such endangered species. These rules shall not be subject to chapter 91.

(b) An interim rule may be adopted in the event that the exportation, taking, possession, sale, offer for sale, delivery, or transport of any indigenous species, in the absence of effective rules, creates a significant risk of a local extirpation or species extinction, which is so imminent in nature as to constitute an emergency. No interim rule may be adopted without such finding by the department.

When viewed in totality, the provisions of Title 12, Hawaii Revised Statutes (in particular, HRS Chapters 187A, 188, 190, and 195D), set forth a comprehensive scheme of statutory regulation of aquatic life in state marine waters. Title 12 grants the Board of Land and Natural Resources and DLNR the power and duty to administer and enforce Title 12 provisions, to conserve and manage aquatic resources (including fish collected for aquarium purposes), and to adopt substantive and procedural administrative rules relating to such powers and duties.

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To date, the Hawaii courts have not had occasion to decide whether, or to what extent, counties may adopt ordinances regulating the taking of reef fish from state marine waters. However, in view of the scope and comprehensiveness of Title 12 provisions relating to the conservation and management of aquatic resources in state marine waters, we believe there is a material probability that, if a court were presented with such an issue in a case or controversy, the court would conclude that Title 12 is intended to be exclusive or uniform throughout the state. Therefore, we believe counties are preempted by state statutes from regulating by ordinance the taking of reef fish from state marine waters.⁵

- C. DLNR administrative rules buttress the conclusion that the State has adopted a comprehensive scheme of aquatic resource regulation that is intended to be exclusive and uniform throughout the state and that counties are preempted from adopting ordinances regulating the taking of reef fish.

Pursuant to authority granted under Title 12, HRS, the DLNR has adopted various administrative rules relating to the conservation and management of fish within state marine waters.

For example, Chapter 75, Title 13, Hawaii Administrative Rules ("HAR"), pertaining to "Rules Regulating the Possession and Use of Certain Fishing Gear", generally prohibits the use of nets made of or using netting with a stretched mesh of less than 2 inches, but exempts aquarium fish collectors who have valid aquarium fish permits.⁶ These rules also limit non-commercial aquarium fish collectors to "a combined total of five fish or aquatic life specimens per person per day".⁷

⁵ Bills to further regulate the collection of "aquarium aquatic life" and "ornamental fish" have been submitted for consideration by the State Legislature. See, e.g., H.B. No. 191, 25th Leg., 2009 Reg. Sess. ("Relating to Aquarium Aquatic Life"); H.B. No. 3330, 24th Leg., 2008 Reg. Sess. ("Relating to Fishing"); S.B. No. 3225, S.D.2, 24th Leg., 2008 Reg. Sess. ("Relating to Fishing"). As of the date of this memorandum, none have as yet been enacted.

⁶ HAR § 13-75-14.

⁷ *Id.*

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Chapter 95, Title 13, HAR, pertaining to "Rules Regulating the Taking and Selling of Certain Marine Resources" sets forth "bag limits" for many species of fish caught in State marine waters. The rules set size requirements, impose seasonal restrictions, and limit catches of certain species of aquatic life.

Chapters 30, 31, and 32, Title 13, HAR, provide for Marine Life Conservation Districts ("MLCD") at Manele-Hulopoe, Molokini Shoal, and Honolua-Mokuleia Bay, respectively. Within these MLCDs, activities such as fishing and collecting of aquatic life are prohibited or limited.⁸ Chapters 51, 53, and 56, Title 13, HAR, provide for Marine Fisheries Management Areas ("MFMA") in Kahului Harbor, Manele Harbor, and Kaunakakai Harbor, respectively. Although the MFMA rules are generally not as restrictive as the MLCD rules, the MFMA rules do regulate activities within the MFMA's.⁹

Taken together, the DLNR administrative rules discussed above, along with Title 12, HRS, constitute part of a comprehensive scheme of state regulation of aquatic resources. The rules bolster the conclusion that state regulation of the taking of reef fish is intended to be exclusive and uniform throughout the state, and that counties are preempted from adopting ordinances regulating the taking of reef fish.

- D. The County of Maui may regulate by ordinance the operation of aquarium reef fish collector businesses within the County of Maui provided the ordinance is an exercise of one of the powers granted to counties and does not conflict with state law.

HRS Chapter 46, and other statutory and constitutional provisions, grant the County the power to adopt and enforce ordinances relating to certain subject matters and for certain purposes. The legal authority of the County of Maui to regulate aquarium reef fish collector businesses is therefore dependent upon the particular enabling statute or other law being exercised.

⁸ See, e.g., HAR §§ 13-30-2, 13-30-3, 13-31-3, 13-31-4, 13-32-2, 13-32-3.

⁹ See, e.g., HAR §§ 13-51-2, 13-51-3, 13-53-2, 13-53-3, 13-56-2, 13-56-3.

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In this section, we discuss briefly a number of statutory grants of authority that may serve as the basis for an ordinance or ordinances regulating aspects of the aquarium reef fish collector industry. Because no specific legislative proposals have been introduced or initiated as of this date (and none are described in your memorandum dated February 24, 2009), the following discussion is, of necessity, general in nature. A more thorough legal analysis of issues related to any proposed legislation is subject to, and will be determined by, the precise nature and scope of such legislation. We recommend that our Department be consulted for further legal advice should a specific legislative proposal regarding the regulation of aquarium reef fish collector businesses be considered. We express no opinion as to the cost, practicality, feasibility, or efficacy of any particular form of regulation of reef fish collector businesses.

1. Zoning power.

HRS § 46-4 grants counties the authority to enact zoning ordinances "to promote the orderly development of each county ... in accordance with a long-range, comprehensive general plan to ensure the greatest benefit for the State as a whole." Pursuant to HRS § 46-4 and Title 19, Maui County Code, pertaining to zoning, the County of Maui may adopt ordinances relating to, among other things, the areas within which certain business and trade may be conducted and the areas in which particular uses may be subjected to special restrictions.¹⁰ Therefore, the Council may "regulate" aquarium reef fish collector businesses by adopting a zoning bill designating the districts in which aquarium reef fish collector business may be conducted or specifying those areas in which such business is subject to special restrictions.

2. Power relating to animal control.

HRS § 46-1.5(15) grants counties the authority "to provide for the appointment, powers, duties, and fees of animal control officers." Although Maui County Code provisions relating to animal control¹¹ and impoundment of animals¹² currently pertain to only

¹⁰ HRS § 46-4(a)(1), (4).

¹¹ Chapter 6.04, Maui County Code.

¹² Chapter 6.16, Maui County Code.

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certain types of animals, such as fowl, reptiles, and mammals,¹³ these provisions could be amended to include aquarium reef fish among the animals whose treatment and confinement are regulated, and whose impoundment is authorized in certain circumstances.

3. Regulatory power over business activity.

HRS § 46-1.5(7) states:

Each county shall have the power to exercise regulatory powers over business activity as are assigned to them by chapter 445 or other general law;...

HRS Chapter 445, pertaining to "County Licenses", authorizes the counties to license, and regulate the conduct of, various categories of businesses. Among the businesses enumerated in HRS Chapter 445 are hotels,¹⁴ outdoor advertising devices,¹⁵ and peddlers.¹⁶ Pursuant to this grant of authority, the County of Maui has adopted ordinances to license and regulate certain businesses.¹⁷

HRS Chapter 445 does not list aquarium reef fish collector businesses among the business activities subject to County licensing and registration. However, HRS § 46-1.5(7) provides that counties may regulate business activities as "assigned to them by chapter 445 or other general law." (Emphasis added.) Although no Hawaii case has discussed the meaning and scope of the phrase "or other general law" as used in HRS § 46-1.5(7), we believe that "other general law" would encompass HRS § 46-1.5(13), discussed above, which authorizes counties 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

¹³ See § 6.04.010, Maui County Code (defining "animal" as "any fowl, reptile, or mammal other than a human being"); see also § 6.16.010, Maui County Code (defining "animals" as "cattle, horses, mules, asses, swine, sheep and goats").

¹⁴ HRS Chapter 445, Part III.

¹⁵ HRS Chapter 445, Part IV.

¹⁶ HRS Chapter 445, Part VI.

¹⁷ See, e.g., Chapter 5.08, Maui County Code (pertaining to hotels); Chapter 5.12, Maui County Code (pertaining to vendors).

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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." The phrase "or other general law" could also encompass HRS § 46-1.5(14), which authorizes counties to "[m]ake and enforce within the limits of the county all necessary ordinances covering all: (i) Local police matters; [and] (ii) Matters of sanitation".

Inasmuch as no state statutes currently regulate aquarium reef fish collector businesses, any County ordinance regulating such businesses could not be "inconsistent with, or [tend] to defeat, the intent of any state statute". Moreover, there is no provision in HRS Chapter 445 explicitly prohibiting counties from licensing or otherwise regulating businesses not explicitly enumerated in HRS Chapter 445.¹⁸ Accordingly, pursuant to HRS §§ 46-1.5(7) and 46-1.5(13), and assuming that the Council finds that regulation of aquarium reef fish collector businesses is necessary "to protect health, life, and property, and to preserve the order and security of the county and its inhabitants", the Council may adopt an ordinance regulating such businesses.¹⁹

¹⁸ The County of Maui currently licenses and regulates two types of businesses not mentioned in HRS Chapter 445: bicycle tour businesses; and ocean recreational activity businesses. See Chapters 5.22, 13.04 (Article X), Maui County Code.

¹⁹ HRS § 445-12(a) states:

Where a county requires a license for the conduct of any business, or the performance of any act in this chapter enumerated, that business or act, except upon obtaining a license from the appropriate county, is forbidden.

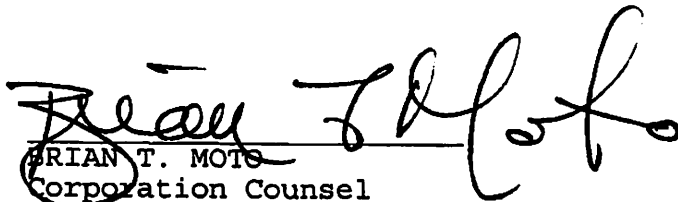
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4. Regulatory power over activities in or on County parks, parking lots, and rights-of-way.

The County of Maui regulates, by ordinance and rules, activities that take place in County parks, ²⁰ parking lots, ²¹ and rights-of-way. ²² To the extent that any of the activities of aquarium reef fish collector businesses take place on or in County parks, parking lots, or rights-of-way, the Council may adopt ordinances regulating such activities.

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APPROVED FOR TRANSMITTAL:


BRIAN T. MOTA
Corporation Counsel

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²⁰ See, e.g., Chapter 13.04, Maui County Code (pertaining to recreational area regulations).

²¹ See, e.g., § 10.76.065, Maui County Code (pertaining to commercial activities in County parking lots).

²² See, e.g., § 5.12.110, Maui County Code (pertaining to unlawful vending on County highways, shoulders, or other County property).