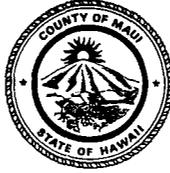


JAMES "KIMO" APANA
Mayor



JAMES B. TAKAYESU
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL

COUNTY OF MAUI

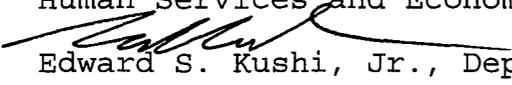
200 SOUTH HIGH STREET

WAILUKU, MAUI, HAWAII 96793

TELEPHONE: (808) 270-7740 FAX (808) 270-7152

August 9, 2002

MEMO TO: Honorable Robert Carroll, Chair
Human Services and Economic Development Committee

F R O M:  Edward S. Kushi, Jr., Deputy Corporation Counsel

SUBJECT: **BILL TO PROHIBIT THE EXHIBITION OF CAPTIVE CETACEANS**
(HSED - 16)

Per your request, we submit this memorandum to supplement our memorandum of September 25, 2001, which memo stated our preliminary opinion regarding the proposed ordinance.

Upon further review and research, we are of the opinion that although the proposed ordinance would not be preempted by the Hawaii state cruelty to animals statute, Section 711-1109, HRS, the ordinance prohibiting the exhibition of cetaceans would be preempted by the federal Marine Mammal Protection Act, 16 U.S.C. 1361, et seq.

NO STATE PREEMPTION

We opine that, but for the existence of the federal Marine Mammal Protection Act, the proposed ordinance would not be preempted by the existing Hawaii state statute dealing with cruelty to animals, specifically, Section 711-1109, HRS. Notwithstanding this position, we initially note that we do not agree with your September 27, 2001 memo's inference that the 100+ year Missouri case of City of St. Louis v. Schoenbusch, 8 S.W. 791 (1888), is controlling law, albeit cited in McQuillan.

Our Hawaii Supreme Court in the more recent case of Pacific International Services Corporation v. Hurip, 76 Hawai'i 209, 873 P.2d 88 (1994), thoroughly reviewed the area of state preemption of municipal ordinances, and ruled:

"If otherwise valid local legislation *conflicts* with state law, it is preempted by such law and is void. A conflict exists if the local legislation *duplicates*,

Honorable Robert Carroll
August 9, 2002
Page 2

contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." Pacific, supra, at page 215.

"A test to determine whether an ordinance conflicts with a statute is whether it prohibits what the statute permits or permits what the statute prohibits." Pacific, supra, at page 215, citing Waikiki Resort Hotel, Inc. v. City and County of Honolulu, 63 Haw. 222, 624 P.2d 1353 (1981).

To our knowledge, there is no state statute nor statewide statutory scheme dealing with or covering the exhibition of captive cetaceans; however, cetaceans, captive or not, are covered under the aforementioned cruelty to animals state statute, Section 711-1109, HRS. Accordingly, the subject ordinance has not "entered an area fully occupied by general law."

The subject ordinance does not duplicate the cruelty to animals state statute, Section 711-1109, HRS. The subject ordinance proscribes exhibition of cetaceans, while the state statute proscribes cruelty to said mammals. Even if, *arguendo*, the underlying basis for the subject ordinance was to prevent cruelty to captive cetaceans, Section 711-1109(2), HRS, specifically exempts otherwise cruel and inhumane actions resulting from "...accepted veterinary practices and to activities carried on for scientific research governed by standards of accepted educational or medicinal practices." Accordingly, if there exists disputed evidence and/or data regarding accepted veterinary, scientific, educational and/or medicinal practice as concerns and applied to captive cetaceans, these animals would have no protection.

Lastly, the proposed ordinance does not contradict the state statute. Local legislation is "contradictory" to general law when it is inimical thereto. Pacific, supra, at page 215. "A municipal ordinance is 'inimical to' a state statute when it 'prohibits what the statute commands or commands what the statute prohibits.'"; Pacific, supra, footnote 9, at page 215; or when the ordinance prohibits what the statute permits or permits what the statute prohibits; Waikiki Resort Hotel, Inc., supra. Here, the subject ordinance does not permit what the state statute prohibits (cruelty to animals), and does not prohibit what the state statute commands (public exhibitions of marine mammals are not commanded under state statute).

FEDERAL PREEMPTION

The Marine Mammal Protection Act of 1972, 16 U.S.C. 1371, et. seq. ("MMPA"), establishes a comprehensive federal program covering

marine mammals in the wild, as well as in captivity. The MMPA establishes a total moratorium on the taking and importing of marine mammals, subject to certain specified exceptions including the issuance of permits to take or import pursuant to 16 U.S.C. 1374. Taking or importation permits may be issued by the Secretary of the Interior for purposes of (1) scientific research, (2) public display, (3) enhancing the survival or recovery of marine mammals, or (4) photography for educational or commercial purposes. Specific to public display permits, 16 U.S.C. 1374(c)(2) states, in relevant part:

"(A) A permit may be issued to take or import a marine mammal for the purpose of public display only to a person which the Secretary determines-

(i) offers a program for education or conservation purposes that is based on professionally recognized standards of the public display community;

(ii) is registered or holds a license issued under 7 U.S.C. 2131 *et seq*; and

(iii) maintains facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis and that access to such facilities is not limited or restricted other than by charging of an admission fee.

(B) A permit under this paragraph shall grant to the person to which it is issued the right, without obtaining any additional permit or authorization under this chapter, to-

(i) take, import, purchase, offer to purchase, possess, or transport the marine mammal that is the subject of the permit; and

(ii) sell, export, or otherwise transfer possession of the marine mammal, or offer to sell, export, or otherwise transfer possession of the marine mammal -

(I) for the purpose of public display, to a person that meets the requirements of clauses (i), (ii), and (iii) of subparagraph (A);"

. . .

Progeny of marine mammals which are born in captivity are also required to be registered with the federal agency administering the MMPA Section 1374(c)(8). Further, any permit issued pursuant to Section 1374 must be in the possession of the permit holder at all times. Section 1374(f).

The Congressional intent to preempt the field of concerning marine mammals is found in 16 U.S.C. 1379(a), which states:

Honorable Robert Carroll
August 9, 2002
Page 4

"(a) State enforcement of State laws or regulations prohibited without transfer to State of management authority by Secretary.

No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as 'management authority') to the State under subsection (b) (1) of this section.

(b) Findings prerequisite to transfer of authority; State program; implementation.

(1) Subject to paragraph (2) and subsection (f) of this section, the Secretary shall transfer management authority for a species of marine mammal to a State if the Secretary finds, after notice and opportunity for public comment, that the State has developed and will implement a program for the conservation and management of the species."

. . .

The MMPA "...establishes plenary federal authority for the conservation of marine mammals and preempts entirely state laws pertaining to their taking." Mountain State Legal Foundation v. Hodel, 799 F.2d 1423, at page 1427 (US Ct. of App., 10th Cir., 1986). "Where dominant federal interests or comprehensive federal regulation are involved, preemption is more readily presumed than if the area is one where such interests are peripheral or such regulation is unusual or fragmented." People of Togiak v. United States, 470 F.Supp. 423, at page 428 (USDC, Dist. of Columbia, 1979), citing Rice v. Sante Fe Elevator Corp., 331 U.S. 218 (1947). When federal law preempt, it occupies the field to the exclusion of State and local regulations, pursuant to the Supremacy Clause of the Constitution, Art. VI, cl. 2. Togiak, *supra*, footnote 4. In invalidating a state statute that prohibited the importation of sealskins, the court in Fouke Co. v. Mandel, 386 F.Supp. 1341, at page 1360-61 (USDC, Maryland, 1974), stated:

"The Congress has created a permit system for taking and importation in order to implement the protection of marine mammals after determining that a flat ban served that purpose less well. If the Maryland statute permitted broad scale importation of marine mammals, it would surely be invalid. Since Congress has determined that both prohibition of, and permission for, importation are tools for accomplishing the MMPA's purpose, the field occupied by the Maryland statute is also preempted by the MMPA. By imposing such an importation ban with respect

to seals, the Maryland statute is inconsistent with the MMPA.

Because the Maryland Act frustrates the operation of and conflicts with a treaty and two federal laws, this Court, pursuant to the Supremacy Clause, hereby declares 6 Md. Ann. Code art. 66C, § 125A unconstitutional."

Based on the above, we believe that the proposed ordinance prohibiting the mere public exhibition of marine mammals, whether or not admission is charged, would not withstand a federal constitutional challenge, and would be deemed preempted by the federal MMPA.

SPECIFIC QUESTIONS POSED RE HSED-16

1. Would the passage of the bill in its current form create any liability risk for the County ?

In Fouke Company v. Mandel, supra, the Court in addressing standing in the context of an action for declaratory judgment, found that the plaintiff had shown sufficient economic injury, even though he had not been prosecuted. The Court noted that so long as the Maryland statute inhibited retailers from selling seal skin products, the injury to Fouke is definite and concrete. Id at 1353. In Fouke, the Plaintiffs were not seeking monetary damages but only a judicial determination that the statute prohibiting the importation of seal skin into Maryland was invalid under the supremacy clause.

Since enactment of the proposed ordinance is a legislative act, absolute legislative immunity would be available to the Council members. However, it is possible that a plaintiff could attempt to pursue a Section 1983 action against the County as a result of the enactment or enforcement of the proposed ordinance. At this time, we do not wish to speculate as to whether such a lawsuit would be filed or the extent of liability, if any, that the County would face in such proceedings.

2. Can you please confirm my understanding that the Council may pass a bill notwithstanding the Corporation Counsel's approval as to form and legality ?

Yes. There exists no legal requirement that our department approve a proposed ordinance as to "form and legality" as a condition precedent to the Council's authority to enact an ordinance. By contrast, Section 9-18 of the Charter of the County of Maui specifically requires:

Honorable Robert Carroll
August 9, 2002
Page 6

". . . [b]efore execution, all written contracts to which the county is a party shall be approved by the corporation counsel as to form and legality."

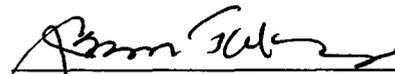
The absence of a similar provision as it relates to legislative action clearly indicates that no such requirement exists.

3. Can you please indicate whether your legal analysis of the draft bill would be different if it imposed non-criminal penalties ?

The previously cited case law indicate that the analysis relating to federal preemption would not differ whether the state or local laws were criminal in nature. See Fouke Company v. Mandel, supra (invalidating a criminal statute prohibiting importation of seal skins into Maryland), Toqiak v United States, supra (invalidating both a federal administrative regulation that transferred to the State of Alaska power to regulate the hunting of marine mammals and state regulations adopted pursuant to that transfer of authority.

Call if further discussion and/or clarification is needed.

APPROVED FOR TRANSMITTAL:



JAMES B. TAKAYESU
Corporation Counsel

S:\ALL\ESK\COUNCIL\Memos\cetacean memo to carroll 4.wpd

cc: Richard Bissen, Director, Prosecuting Attorney's Office