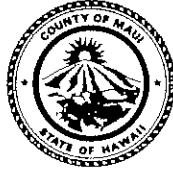


CHARMAINE TAVARES
Mayor




BRIAN T. MOTO
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August 12, 2009

MEMORANDUM

T O: Jo Anne Johnson, Chair
Economic Development, Agriculture, and Recreation
Committee

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

SUBJECT: PROHIBITION OF GENETICALLY ENGINEERED KALO (TARO)
(EAR-12)

The purpose of this memorandum is to respond to your memorandum, dated July 28, 2009, requesting that Corporation Counsel "clarify under what authority the County of Maui may establish a prohibition of genetically engineered kalo."

Hawaii Revised Statutes ("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.¹ The legal authority of the County of Maui to prohibit genetically engineered kalo in Maui County is, therefore, dependent upon the particular enabling statute or other law being exercised.

As noted in your memorandum, HRS Section 46-1.5(13) grants each county "the power to enact ordinances deemed necessary to

¹ See Memorandum to Michael J. Molina, Council Vice Chair, from Jeffrey T. Ueoka (Apr. 15, 2009) (discussing various statutory grants of authority that could serve as the basis for an ordinance or ordinances regulating aspects of the aquarium reef fish collector industry).

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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".

At present, no state statutes prohibit counties from adopting ordinances banning or restricting activities relating to genetically engineered taro (kalo). House Bill No. 1226, H.D. 1, introduced in the 2009 Regular Session of the State Legislature, included provisions that would have prohibited state administrative regulatory actions, and preempted county regulatory actions, banning or restricting the genetic modification of plant organisms. However, House Bill No. 1226, H.D. 1, was not enacted into law.²

Three federal agencies regulate genetically modified organisms ("GMOs"): the Environmental Protection Agency ("EPA"), the United States Department of Agriculture ("USDA"), and the Food and Drug Administration ("FDA"). Pursuant to the Plant Protection Act, 7 U.S.C. § 7701, the USDA's Animal and Plant Health Inspection Service ("APHIS") regulates, through the issuance of permits, the field testing, interstate movement, and importation of GMOs.³ The Plant Protection Act generally preempts states and municipalities from regulating the movement of GMOs in foreign or interstate commerce, but does not prohibit states or municipalities from imposing restrictions on GMOs not in such commerce.⁴

² Senate Bill No. 709, S.D. 2, H.D. 1, and House Bill No. 1663, H.D. 1, S.D. 2, proposed bans on the development, testing, propagation, release, importation, planting, and growing of genetically engineered taro (kalo) in the State of Hawaii. Neither bill was enacted.

³ See U.S. Department of Agriculture, Animal and Plant Health Inspection Service, BRS Factsheet (Feb. 2006). To our knowledge, no one is engaged in the development or propagation of genetically engineered taro (kalo) in Maui County, nor has any individual applied for or been issued an APHIS permit to develop or propagate genetically engineered taro (kalo) in Maui County. We do not opine as to the application of the subject bill to such a permittee (should one ever arise), given the hypothetical nature of the issue at this time.

⁴ 7 U.S.C. § 7756.

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The County of Hawaii has an ordinance making it "unlawful for any person to test, propagate, cultivate, raise, plant, grow, introduce or release genetically engineered (transgenic) or recombinant DNA taro (kalo)."⁵ We are also aware of three counties and one city in California that have adopted ordinances prohibiting the propagation, cultivation, raising, or growing of GMOs.⁶ As of the date of this memorandum, none of these ordinances have been determined to be illegal or unconstitutional.

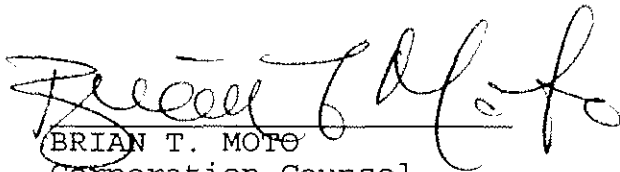
We have already signed the subject bill "as to form and legality" to indicate that, in our opinion, the bill satisfies a minimal threshold of legality and that the Council has sufficient authority to adopt the proposed legislation. Our approval as to form and legality is not, however, a statement or endorsement as to the cost, practicality, feasibility, necessity, or efficacy of any proposed scheme of regulation.

JTU:lk

cc: Webpage

Cheryl Okuma, Director, Department of Environmental Management
Sheri Morrison, Managing Director

APPROVED FOR TRANSMITTAL:



BRIAN T. MOTO
Corporation Counsel

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⁵ Section 14-92, Hawaii County Code

⁶ See Chapter 6.92, Marin County Code ("Prohibition of Growing of Genetically Modified Organisms"); Chapter 10A.15, Mendocino County Code ("Prohibition on the Propagation, Cultivation, Raising and Growing of Genetically Modified Organisms in Mendocino County"); Chapter 10.5, City of Arcata Municipal Code ("Genetically Engineered Organisms"); Chapter 8.25, Trinity County Code ("Genetically Engineered Organisms").