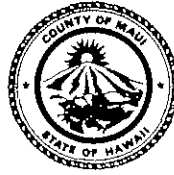


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April 15, 2009

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 "J. Ueoka", is written over the printed name of Jeffrey T. Ueoka.

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, transplanted, 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 Honolulu-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.

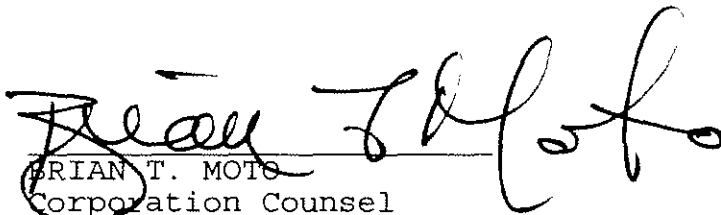
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4. Regulatory power over activities in or on County parks, parking lots, and rights-of-way.

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. MOTO
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).