



BILL NO. 113
(DRAFT 3)

ORDINANCE NO. _____

AN ORDINANCE AMENDING CHAPTER 14 OF THE HAWAI‘I COUNTY CODE 1983 (2005 EDITION, AS AMENDED), BY ADDING A NEW ARTICLE RELATING TO GENETICALLY ENGINEERED CROPS AND PLANTS.

BE IT ORDAINED BY THE COUNCIL OF THE COUNTY OF HAWAI‘I:

SECTION 1. Findings.

- (1) The public trust doctrine is memorialized in the Hawai‘i State Constitution, Article XI, Section 1 “Conservation and Development of Resources,” and in the Charter of the County of Hawai‘i, Article XIII, Section 13-29 “Conservation of Natural and Cultural Resources.” Pursuant to the public trust doctrine, our natural resources, including land and water, are entrusted to our care for the benefit of both current and future generations. The county government in its trustee capacity is subject to the precautionary principle and therefore must exercise a higher level of scrutiny in establishing reasonable measures and making appropriate assessments in order to avoid harmful impacts to our public trust resources. The Council therefore recognizes the right of the people and their government to guard against the intrusion of potential contaminants and prevent the contamination of non-genetically engineered crops, plants and lands by genetically engineered crops and plants without having to first wait for definitive science. As the United States Supreme Court made clear in *Maine vs. Taylor* (1986), the government is not required “to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences.” In this context the precautionary principle requires that if a new technology poses threats of harm to human or environmental health, the burden of proof is on the promoter of the technology to demonstrate that the technology is safe, not on the public or governments to demonstrate that the technology is unsafe;
- (2) The Council finds that policies relating to agricultural practices are most appropriate to be determined by each county of the State of Hawai‘i given the island-by-island variation in customary and generally accepted agricultural practices and opportunities, the variation in topography and land ownership patterns, and in light of the natural geographic ocean barriers that allow for these distinctions.
- (3) The Council finds that optimizing a local agricultural policy that promotes non-genetically engineered crops and seeds along with eco-friendly agricultural practices affords the County of Hawai‘i a unique economic opportunity to capture a niche market for non-genetically engineered produce, seeds, and meats. Optimizing this opportunity is consistent with the Hawai‘i County General Plan (Economic policies 2.2(h)): “Promote and develop the island of Hawai‘i into a unique scientific and cultural model, where economic gains are in balance with social and physical amenities. Development should

be reviewed on the basis of total impact on the residents of the County, not only in terms of immediate short run economic benefits.”

- (4) The Council finds it is important to protect the rights of farmers engaged in non-genetically engineered crop cultivation from the uncontrolled spread of genetically engineered organisms and associated pesticides.
- (5) The Council finds that an expanded exemption for genetically engineered papaya is reasonable and appropriate because the genetic modification of papaya over the past decade has become so pervasive across this island that restricting cultivation of genetically engineered papaya would be near impossible at this time, the likelihood of genetically engineered cross pollination of papaya is reduced given the customary controlled manner of propagation, and in light of the substantial investment in controlled testing of this one crop over the past decade as the means of choice to address certain papaya diseases.

SECTION 2. Authority. The Council finds that its authority to impose restrictions on the cultivation, propagation, development, and testing of genetically engineered crops and plants to protect public and private property as well as surface waters, vulnerable watersheds, and our Island’s coastal waters, is granted to it by:

- (1) The Hawai‘i Revised Statutes, Section 46-1.5(13), which 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.”;
- (2) The Hawai‘i State Constitution, Article XI, Section 9 “Environmental Rights,” which states: “Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.”

SECTION 3. Chapter 14 of the Hawai‘i County Code 1983 (2005 Edition, as amended) is amended by adding a new article to be appropriately designated and to read as follows:

“Article __. Restriction of Genetically Engineered Crops and Plants.

Section 14-__. Purpose.

The purpose of this article is to protect Hawai‘i Island’s non-genetically modified agricultural crops and plants from genetically modified organism cross pollination and to preserve Hawai‘i Island’s unique and vulnerable ecosystem while promoting the cultural heritage of indigenous agricultural practices. The prohibition of open air cultivation, propagation, development, or testing of genetically engineered crops and plants is intended to prevent the transfer and uncontrolled spread of genetically engineered organisms on to private property, public lands, and waterways.

Section 14-__. **Definitions.**

As used in this article, unless otherwise specified:

“Genetically engineered” means an organism that has been modified at the molecular or cellular level by means that are not possible under natural conditions or processes. Such means include recombinant DNA and RNA techniques, cell fusion, microencapsulation, macroencapsulation gene deletion and doubling, introducing a foreign gene, and changing the position of genes. Such organisms are sometimes referred to as “genetically modified organisms” or “transgenic organisms.” Genetically engineered or genetically modified crops and plants include crops and plants for human consumption or for any other purpose. Genetic engineering does not include modification that consists exclusively of breeding, conjugation, fermentation, hybridization, in vitro fertilization, or tissue culture.

“Open air” means a location or facility that is not enclosed in a greenhouse or in another completely enclosed structure so as to prevent the uncontrolled spread of genetically engineered organisms.

“Person” includes natural persons, partnerships, joint ventures, societies, associations, clubs, trustees, trusts, or corporations or any officer, agent, employee, or any other personal representative thereof, in any capacity, acting either for himself, his heirs, or for any other person under personal appointment pursuant to law.

“Plant pestilence” means a virulent plant disease or infestation that is causing substantial harm to one or more crops or plants.

“Register” or “Registration” means registration by persons engaged in the cultivation, propagation, development, or indoor testing of genetically engineered crops or plants. Registration shall include: the tax map key and the council district of the property or properties; a detailed description of the location on the property where genetically engineered crops or plants are being cultivated, propagated, developed, or tested, which description shall include the size of the location and scope of usage; the name of the owner of the property or properties; the lessee or any other party in control of the genetically engineered plant or crop operation or usage; the type of genetically modified organism or transgenic manipulation used; the produce or products involved; the type, frequency, and customary amount of pesticides, inclusive of herbicides and insecticides, used; a description of any containment procedures employed; and relevant contact information.

Section 14-__. **Prohibition.**

No person shall knowingly engage in the open air cultivation, propagation, development, or testing of genetically engineered crops or plants.

Section 14-__. **Exemptions.**

The following persons shall be exempt from the provisions of this article:

- (1) Persons engaged in the open air cultivation, propagation, or development of genetically engineered crops or plants, other than genetically engineered papaya, but only in those specific locations where genetically engineered crops or plants have been customarily open air cultivated, propagated, or developed by that person prior to the effective date of this article, provided

- that those specific locations or facilities are registered within ninety days of the effective date of this article; and
- (2) Any person engaged in the open air cultivation, propagation, or development of genetically engineered papaya, whether prior or subsequent to the effective date of this article, provided that each location or facility wherein open air cultivation, propagation, or development of genetically engineered papaya occurs or will occur is registered as provided in this article.

Notwithstanding any other provision of law, these exemptions shall not allow for open air testing of genetically engineered organisms of any kind.

Section 14-___. Emergency exemption.

- (a) A person who is engaged in the cultivation, propagation, or development of a non-genetically engineered crop or plant that is being harmed by a plant pestilence as defined in this article may apply to the council for an emergency exemption from the provisions of this article to use a genetically engineered remedy. The council may grant an emergency exemption by way of resolution, provided the council makes an affirmative finding that:
 - 1) The cited plant pestilence is causing substantial harm to that person's crop or plant;
 - 2) There is no other available alternative solution; and
 - 3) All available measures will be undertaken to insure that non-genetically engineered crops and plants, as well as neighboring properties and any water sources, will be protected from contamination or any other potentially adverse effects that may be caused by the genetically engineered organism or associated pesticides.
- (b) Any exemption granted pursuant to subsection (a) shall include reasonable restrictions and conditions, including, but not limited to, full compliance with the registration requirements of this article and that the exemption shall expire on a certain day occurring within five years from the date of its issuance. Prior to expiration of the exemption, the council may adopt a resolution to extend the exemption for a specified period of time.

Section 14-___. Registration.

- (a) All persons engaged in any form of cultivation, propagation, development, or indoor testing of genetically engineered crops or plants of any kind shall register annually beginning within ninety days of the effective date of this article, and shall pay an annual registration fee of \$100 per location, payable to the director of finance. All contiguous land shall be treated as a single location. The director of the department of research and development, or the director's authorized representative(s), shall administer the registration provision of this section.
- (b) All persons engaged in non-commercial cultivation or propagation of genetically engineered papaya, in any stage or form, shall be exempt from this section. This registration exemption does not exempt persons engaged in research, development, or testing of genetically engineered papaya.

- (c) Pursuant to section 92F-13 of the Hawai'i Revised Statutes, information such as the name of the registrant and the exact location of the genetically engineered crops or plants may be withheld from the public to the extent that disclosure of that detailed information would otherwise frustrate the ability of the County to obtain accurate information.

Section 14-__. **Penalties.**

Any person who violates any provision of this article shall be guilty of a violation, and upon conviction thereof, shall be sentenced to a fine of up to \$1,000 for each separate violation. The person shall be deemed to be guilty of a separate offense for each and every day a violation of this article is committed, continued, or permitted for each location. To the extent permitted by law, the person found in violation of this article shall also be responsible for all costs of investigation and testing, as well as for court costs, including but not limited to witness fees and witness expenses.

Section 14__. **Declaratory and injunctive relief.**

A court of competent jurisdiction may hear proceedings for declaratory relief or injunctive relief, or both, for violations or potential violations of this article. To the extent permitted by law, the person found in violation of this article shall be responsible for all costs of investigation and testing, as well as for court costs, including, but not limited to, attorney's fees, witness fees, and witness expenses.

Section 14__. **Cumulative remedies.**

The provisions of this article are cumulative. Nothing in this article shall affect any other remedy or relief that may be available to any adversely affected person or to the County or other governmental entity.

SECTION 4. If any provision of this ordinance, or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end, the provisions of this ordinance are declared to be severable.

SECTION 5. This ordinance shall take effect upon approval.

INTRODUCED BY:


COUNCIL MEMBER, COUNTY OF HAWAI'I

_____, Hawai'i
Date of Introduction:
Date of 1st Reading:
Date of 2nd Reading:
Effective Date: