

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

April 18, 2018

Conference Room 436 - No. 1 Capitol District Building, Honolulu, Hawaii

- I. **CALL TO ORDER:** Chair Borge called the meeting to order at 10:13 a.m., with a quorum present.

MEMBERS PRESENT:

- Anthony Borge, Chair
- Robert Cundiff, Vice Chair
- Garth Yamanaka, 2nd Vice Chair
- Kyoko Kimura
- Reg Baker
- Nancy Atmospera-Walch
- Mark Ritchie / Carl Nagasako

ABSENT MEMBERS:

- Harris Nakamoto

STAFF: DBEDT

Dori Palcovich
Arthur Mori

Office of the Attorney General

Jennifer Waihee-Polk

II. **APPROVAL OF MARCH 21, 2018 MINUTES**

Vice Chair Cundiff made a motion to accept the March 21, 2018 minutes, as amended. Second Vice Chair Yamanaka seconded the motion, and the Board members unanimously agreed.

III. **NEW BUSINESS**

- A. Discussion and Action on Proposed Amendments to HAR Title 15 Chapter 218, Kakaako Reserved Housing Rules, promulgated by Department of Business, Economic Development and Tourism / Hawaii Community Development Authority (HCDA)

Discussion leader Mark Ritchie reminded the members that the proposed rule amendments previously came before this board and the board voted to send them to public hearing. The Governor, however, returned the rules back to HCDA recommending that the buy-back period be changed from 30 to 10 years.

Mr. Garrett Kamemoto, HCDA Interim Executive Director, perceives no new small business impact due to the new rule changes. He noted that the Governor was concerned that the original proposed 30-year period would negatively stifle construction development and prevent adequate financing.

Mr. Ritchie made a motion to pass the rules onto the Governor for public hearing. Vice Chair Cundiff seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on Proposed New HAR Title 13 Chapter 60.9, Mo'omomi Community-Based Subsistence Fishing Area, Molokai, promulgated by Department of Land and Natural Resources (DLNR)

Discussion leader Mr. Ritchie stated that the proposed new rules represent a classic over-fishing of resources. Mr. David Sakuda, Program Manager at DLNR's Division of Aquatic Resources, explained that the rules prohibit commercial fishing within the Mo'omomi community-based subsistence fishing area with exceptions for commercial bottom fishing for deep 7 bottom fish and commercial trolling.

Additional changes to the rules were subsequently submitted to the Board, as follows, "it is unlawful for any person to engage in operating a vessel or any other activity that may otherwise disturb the marine environment within the Kawa'aloa Bay Protected Area, except as permitted by federal law."

Business impact relates to the commercial fishers as they will no longer be allowed to commercially fish for nearshore species within the area. The reported value of commercial catch, excluding deep 7 bottom fish and pelagic species, averages \$2,246 per year. Mr. Ritchie added that OHA (Office of Hawaiian Affairs) submitted testimony in strong support of the proposed rules.

Mr. Ritchie made a motion to pass the rules onto the Governor for public hearing. Second Vice Chair Yamanaka seconded the motion, and the Board members unanimously agreed.

C. Discussion and Action on Proposed Amendments to HAR Title 11, Chapter 55, Water Pollution Control, promulgated by Department of Health (DOH)

Mr. Alec Wong, Branch Manager of DOH's Clean Water Branch, explained that most of the rule changes are federal requirements for water pollution permits of NPDES (National Pollutant Discharge Elimination System), as well as housekeeping measures. One of the federal permitting requirements reflect a major change to small business regarding construction activities; there are nearly 1,000 of these permits outstanding, mostly to contractors.

Chair Borge stated the rules are going to public hearing and understands that the timing of the public hearing is critical for the permitting process. Mr. Wong added that the contractors and sub-contractors are fully aware of the permitting changes. Chair Borge appreciates that the Clean Water Branch consistently reaches out to the stakeholders and Vice Chair Cundiff articulated that it appears most of the small businesses would be in support of the rules; Mr. Wong concurred.

Vice Chair Cundiff made a motion to pass the rules onto public hearing. Mr. Reg Baker seconded the motion, and the Board members unanimously agreed.

D. Discussion and Action on Proposed Amendments to HAR Title 19 Chapter 20.1 Commercial Services at Public Airports, promulgated by Department of Transportation (DOT)

Discussion leader Ms. Kimura commented that this Board reviews rules that impact small business and not airport security or consumer protection. Ms. Rosemary Neilson-Nenezich, Operations Manager at DOT Airports Division, and DOT's Deputy Attorney General John Price, explained the rule changes.

Deputy Attorney General Price stated that to pick up passengers at the airports, the rules require businesses; i.e., taxi cab operators, to have either a PUC (Public Utility Commission) license or authorization from an appropriate governmental agency; i.e., City and County of Honolulu. Over a year ago, the City and County of Honolulu recognized a new type of transportation service, Transportation Network Company (TNC). As a result, the rules are being modified to account for this new authorized type of ground transportation for issuance of permits and to serve the public at the airports.

The rule changes are intended to be non-intrusive and non-disruptive to accommodate the TNCs. Trade dress (i.e., logo) will suffice for the TNCs rather than a numbered decal currently being used. In regard to the expense, there is no new change in fees as the 7.0% of revenues that is currently charged is the same for the TNCs as well as the existing pre-arranged ground transportation companies; 3.0% is required at the other state airports. In addition, a \$100 annual fee is required.

Ms. Neilson-Nenezich explained that DOT's pilot program began December 1, 2017 for three months; in the middle of February 2018, it was extended for an additional six months so it can be assessed and to see what, if any, accommodations are needed to be made. To date, many of the issues are operational in nature. However, once the pilot program is over, DOT is unsure as to how the final nature of the program will play out.

The rules are governed state-wide for all the airports. In response to Chair Borge's question about the equality of the playing field in terms of all service operators, Deputy Attorney General Price stated that all operators are required to pay the annual permit fee and a percentage of revenue.

Ms. Neilson-Nenezich clarified that there are two different types of business operators at the airport, one is the on-demand taxi provider, managed by a taxi cab company, which stays in the staging area and waits to be dispatched. The other type of service is the ground transportation provider, which can be a taxi, a limousine service, or a bus company. Uber and Lyft operators are now being treated as "ground transportation" providers versus on-demand taxi providers. There are currently two locations at the Honolulu airport, separate from other pick-up areas, where Uber and Lyft drivers pick up passengers.

Regarding insurance requirements, TNCs have various conditions on the vehicles; for example, when a driver is not working or available for an assignment, the driver is on his/her own personal insurance. When a driver logs into work, Uber or Lyft is required to cover the driver with a blanket policy. As soon as a customer is in the vehicle, the insurance goes up to \$1 million until the passenger is dropped off at the destination.

Testifier, Mr. Robert DeLuz, owner of Robert's Taxi for the past 28 years, does not believe that a level playing field exists. He stated that the state requires that each of Mr. DeLuz's vehicles must have \$300,000 insurance coverage and that each pay the 7% of revenues. He also believes that the parking facilities for taxis is anemic compared to parking for Uber and Lyft drivers, and that while taxis are required to have permits/stickers on their cars, Uber and Lyft drivers are not. Ms. Neilson-Nenezich responded that the parking for Uber and Lyft drivers is different in order to gauge how the system works; the Uber and Lyft drivers utilize about 100 feet on the second level of the airport as well as in the interisland terminal.

Testifier, Ms. Dale Evans, President and CEO of Charlie's Taxi, summarized her written testimony and distributed a supplement handout. While she believes in competition she also believes that DOT has been unfair to local small business taxi drivers, and discussed confusion with the fee payments. Ms. Neilson-Nenezich clarified that the fees are paid by all permittees, i.e., Uber, Lyft and Charlie's Taxi. Deputy Attorney General Price confirmed that Uber, Lyft and the taxi cab operators were paying the exact same fee. He also mentioned that any limitations or mandates by the City and County of Honolulu on what taxi drivers must pay is beyond the scope of the state rules.

Testifier, Ms. Tabitha Choy, Senior Operations Manager for Uber in Hawaii, explained that Uber does not own any vehicles or employ drivers but partners with local independent drivers and taxi cab drivers. She is in support of the proposed amendments in order to enhance the businesses of these drivers. A Lyft consultant stated that Lyft's testimony and its operating systems mirror Uber's; many of the drivers drive for both Uber and Lyft

Uber and Lyft drivers are not regulated by the PUC as are other taxi and limousine drivers. Also, transponders are not required for Uber and Lyft drivers while other drivers are required to have transponders in their vehicles. Ms. Choy explained that this is because Uber has a very robust data system with information down to the latitude/longitude coordinates regarding where the pick-up request came in, where the passenger was picked-up, and where it ended, with the number of trips reported to the state. She added that transponders were likely required because the technology hadn't yet existed in regard to the modern up-to-date technology which makes transponders unnecessary.

Ms. Choy also added that the nature of the Uber drivers is very part-time and somewhat seasonal. In the past month, there have been thousands of independent Uber drivers actively driving. Uber disseminates to the drivers that they should have signs, where to place them and noting that this rule is under enforcement. Regarding insurance, Ms. Choy indicated that as soon as an Uber rider gets into a car, the liability insurance is \$1 million, but that each individual driver needs a \$300,000 liability policy. When a vehicle's "app" is turned, on another policy is in place, which is a little lower than the \$1 million. Uber and Lyft are both open and willing to what the airport deems appropriate and best for its operations about pick-up points at the airport.

Testifier, Arthur Hughes, owner of Island Limo, explained that due to the pilot program, his company is operating at 17% below normal airport gross revenue, and because there is no demand for his service, his company is down from eleven to five drivers and is financially struggling.

Testifier, Kenn Chang, owner of a small taxi cab company, complimented this Board for its questions and interest; he stands by Ms. Evans' and Mr. Hughes' sentiments. He stated that UberX is a \$7 billion international company but is restricted by many countries and believes Uber has disseminated the taxi industry.

Testifier, Bob Toyofuku, who works in governmental affairs for Uber, explained that since 2016, it is mandated by state law that TNC's are insured. Testifier, David Frankle, disagreed with Mr. Toyofuku and believes that DOT is allowing Uber and Lyft to have a lower insurance coverage.

Ms. Neilson-Nenezich confirmed that transponders are installed by the state but under the pilot program Uber and Lyft drivers are not required to install transponders, nor do they have permit/decals, whereas decals are required for all pre-arranged ground transportation. Vice Chair Cundiff stated that the administrative rules, which are written for a class of businesses, should be equal. Chair Borge added that the drivers must operate on the same platform for transponders and permits as well as insurance coverage, and suggested that DOT engage the stakeholders to review these concerns.

Chair Borge made a motion to defer action on this measure so DOT may engage the stakeholders to address concerns in clarifying the transponders and permitting process of the vehicles, and a requirement to maintain adequate insurance. Ms. Atmospera-Walch seconded the motion and the Board members unanimously agreed.

Subsequently, Vice Chair Cundiff made a motion to generate a letter for clarification purposes of the Board's expectations to confirm such items as the director of DOT not requiring additional insurance requirements and that the 7% collection of gross sales is consistent among all groups. Ms. Atmospera-Walch seconded the motion and the Board members unanimously agreed.

E. Discussion and Action on Proposed Repeal of HAR Title 11 Chapter 281, and Adoption of HAR Title 11 Chapter 280.1, Underground Storage Tanks, promulgated by DOH

Ms. Noa Klein, Planner at DOH's Solid & Hazardous Waste Division, explained that this proposal repeals an existing chapter as well as the adopts a new/amended chapter. The State's underground storage tank program, which is part of a federal EPA (Environmental Protection Agency) program, requires state rules to be at least as stringent as the federal rules; the proposal reflects the EPA's changes made in 2015. Ms. Klein provided a brief description of the overall federal mandates and noted that the deadline for adhering to the rules is October 2018.

The one "state-initiated" rule change that impacts small business, not required under the federal program, is to remediate older underground tanks that have single-walled, secondary containment prior to August 2013, within ten years of the adoption of this rule proposal. Of the approximately 400 signal-walled tanks in Hawaii, up to 52 facilities are small businesses that own 150 singled-walled tanks, and includes 12 tanks that are temporarily closed. About 22 of these small businesses will need to replace single-walled tanks only and 30 will need to replace both single-walled tanks and piping.

The average cost to remediate varies widely and depend on a number of items including the number and size of tanks, the amount of piping and location variables. Two local contractors performing this type of remediation work have estimated the cost of removing three 10,000-gallon single-walled tanks and installing three 10,000 gallon tanks with a secondary containment, from \$350,000 to \$750,000. The cost of replacing piping for an average gas station site is estimated at \$25,000 to \$42,000, without remediation costs.

Mr. Ward Hargrove, Deputy Attorney General for DOH, stated that the impacted small businesses are aware of the remediation requirements. He believes that DOH's community outreach to the impacted businesses has been very good. In response to the suggestion posed by Chair Borge about providing tax credits, it was noted that tax credits were considered but DOH is unable at this time to coordinate the funds/credits.

Second Vice Chair Yamanaka made a motion to pass the rules onto public hearing. Mr. Baker seconded the motion, and the Board members unanimously agreed.

IV. LEGISLATIVE MATTERS

A. Update on House Bill 2753, "Relating to the Small Business Regulation Review Board"

Chair Borge announced that this measure died because it was not scheduled for a hearing by the House Judiciary Committee.

B. Update on Governor's Message 675 Submitting for Consideration the Gubernatorial Nomination of Mary Albitz to the Small Business Regulatory Review Board for a term to expire June 20, 2020

This measure was confirmed.

C. Update on Governor's Message 673 and 674 Submitting for Consideration the Gubernatorial Nomination of Will Lydgate to the Small Business Regulatory Review Board for a term to expire June 20, 2018 and June 30, 2022, respectively

These measures were confirmed.

D. Update on Governor's Message 513 and 514 Submitting for Consideration the Gubernatorial Nomination of Reg Baker to the Small Business Regulatory Review Board for a term to expire June 30, 2018 and June 30, 2022, respectively

These measures were confirmed.

E. Update on Senate Bill 2059 "Relating to Public Accountancy"

This measure died. Mr. Baker explained that the way the bill went through was good, but during the process it changed so dramatically that it lost the support from the CPA society.

V. ADMINISTRATIVE MATTERS

A. Discussion and Action on the Board's Investigative Taskforce's Final Recommendation for the Redesign of the existing Website, in accordance with Section 92-2.5(b)(1)(C), HRS

Mr. Baker made a motion to approve the Investigative Taskforce's final recommendation for the redesign of the Board's existing website, of approximately \$18,000 to \$20,000 and an additional monthly maintenance fee. Mr. Yamanaka seconded the motion, and the Board members unanimously agreed.

B. Update on the Board's Upcoming Advocacy Activities and Programs in accordance with the Board's Powers under Section 201M-5, HRS

Chair Borge announced that the Board's 20th anniversary is this year, and solicited suggestions from the members as to how to celebrate. Responses included having the Governor announce a proclamation, and attending various chambers of commerce to promote the Board.

Mr. Baker explained that every year a conformity bill will pass through the legislature that allows for the state taxes to be approved into the federal taxes. However, this is the first time in several years that this will not occur. The state of Hawaii's taxes will be status quo with the 2017 rules while the federal government will be using the new 2018 rules. This is expected to create real issues for small businesses.

VI. NEXT MEETING – The next meeting is scheduled for Wednesday, May 16, 2018, in Conference Room 436, 250 South Hotel Street, Honolulu, Hawaii at 10:00 a.m.

VII. ADJOURNMENT – Vice Chair Cundiff made a motion to adjourn the meeting and Ms. Kimura seconded the motion; the meeting adjourned at 1:32 p.m.