

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

August 16, 2017

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

- I. **CALL TO ORDER:** Chair Borge called the meeting to order at 10:04 a.m., with a quorum present.

MEMBERS PRESENT:

- Anthony Borge, Chair
- Robert Cundiff, Vice Chair
- Garth Yamanaka, 2nd Vice Chair
- Kyoko Kimura
- Harris Nakamoto
- Mark Ritchie

ABSENT MEMBERS:

- Nancy Atmospera-Walch

STAFF: DBEDT
Dori Palcovich

Office of the Attorney General
Dawn Apuna
Jennifer Waihee-Polk

II. **APPROVAL OF JULY 19, 2017 MINUTES**

Mr. Nakamoto made a motion to accept the July 19, 2017 minutes, as presented. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

III. **OLD BUSINESS**

- A. Discussion and Action on the Small Business Statement After Public Hearing and Proposed Amendments to Title 8, Chapter 101, Rules Governing the Manufacture and Sale of Intoxicating Liquor Control, County of Maui, promulgated by the Department of Liquor Control, County of Maui

Discussion leader Ms. Kimura explained that the amendments were reviewed at a prior board meeting and before the “second” public hearing that resulted from the many public complaints and concerns. In particular, concerns included the change in hours that licensed premises may be opened and the requirement that the non-profit board members will be subject to criminal background checks.

The proposal to open 24-hours has subsequently been reduced back to 11 hours. Ms. Kimura added that this Board will review additional amendments at the September 20th meeting on Class 10, Special License applications.

Ms. Kimura made a motion to move the amendments to the Mayor for adoption.
Mr. Nakamoto seconded the motion, and the Board members unanimously agreed.

IV. NEW BUSINESS

A. Discussion and Action on Proposed Amendments to HAR Title 12, Chapter 15, Hawaii Workers' Compensation Medical Fee Schedule and Exhibit A, "Workers Compensation Supplemental Medical Fee Schedule," promulgated by Department of Labor and Industrial Relations (DLIR)

Ms. JoAnn Vidinar, Administrator at DLIR's Disability Compensation Division, discussed the proposed rule changes and the medical fee schedule, indicating that the prior proposal from last year was postponed due to the adverse comments made at the public hearing. The current proposal is expected to take effect January 1, 2018, and includes new codes based on a recent survey of the prevailing workers' compensation charges.

Small business impact includes a change/increase in premium costs for workers' compensation and no fault insurance coverages; however, this may likely be passed down to consumers. The impact to the changes of the Workers' Compensation Supplemental Medical Fee Schedule will result in a 0.9% increase (or \$2,000) for systems costs and 1.5% increase in no-fault personal injury protection rates.

Discussion leader Ms. Kimura noted that the Hawaii Chapter of the American Physical Therapy Association submitted testimony in support of the proposed rule amendments. On behalf of Mr. Greg Casilion from Kauai, Mr. Ishihara provided oral testimony in favor of the proposed changes adding that DLIR's efforts to make additional changes to the medical fee schedule was appreciated. Mr. Norman Kawakami, President of CHART Rehabilitation of Hawaii, Inc., also supported DLIR's recommended changes.

Ms. Kimura made a motion for the proposed amendments to move to public hearing.
Mr. Nakamoto seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on Proposed Amendments to HAR Title 19, Chapter 44, Rules Relating to Service and Procedures, Charges, Tools and Fees, promulgated by Department of Transportation (DOT)

Ms. Dreanalee Kalili, Revenue Enhancement Manager at DOT Harbors, discussed the current \$450 million project that will construct a new cargo yard. While this is expected to alleviate congestion in the harbor system, because DOT Harbors is one-hundred percent self-funded, use-fee rates must be raised to finance this and other projects that are part of the Harbors Modernization Plan.

Proposed changes reflect an increase in dockage, cruise passengers, and port entry fees. Dockage and port entry fees will increase by 20% effective July 1, 2019; 15% effective July 1, 2020; and 5% effective July 1, 2021; ships longer than 900 feet will be subject to higher rates. Cruise passenger fees will be adjusted from \$75 per passenger to \$15 in Honolulu Harbor and \$8 per passenger in all other harbors, effective July 1, 2018.

The State Legislature has instructed DOT Harbors to use \$5.4 million CIP appropriations of its self-funded funds for cruise terminal improvements across the harbor system which will include a covered walkway, Wi-Fi, artwork, etc. Ms. Kalili stated that she will be back in front of this Board at year-end to discuss a proposal for the development of concession rules.

In regards to the impact on small business, Chair Borge explained that although the larger businesses are directly affected by the increased fees, ultimately, the fees will be passed onto the “small businesses” who will have to absorb, at least, a portion of the increases. However, it is also recognized that the ports are in need of improvement and modernization. Ms. Kalili responded that it is very difficult to accurately complete the Board’s small business impact statement because it is unknown exactly how much of the fee increases will trickle down to the small businesses.

Vice Chair Cundiff stated that as stakeholders, small businesses should add a voice to the changes in the rules. While it is difficult to determine exactly what the downstream impact on the smaller businesses would be, it is important that these businesses are included in the rule-review process. Therefore, organizations such as the Chamber of Commerce of Hawaii, Small Business Administration and others should be notified and included in the process of reviewing proposed rule amendments. Mr. Ritchie added that Ms. Kalili is welcome to discuss DOT’s rule amendments at one of DBEDT’s export training programs; Chair Borge asked that Ms. Kalili provide a presentation to the building industry.

Mr. Yamanaka inquired as to whether DBEDT’s Research and Economic Analysis Division (READ) can run data for this Board regarding how much the additional fees would affect and bring in every dollar of revenue from the general excise tax; staff will research this with READ and get back to the Board.

Discussion leader Ms. Kimura made a motion to move the proposed amendments to public hearing and that the Department of Transportation’s Harbors Division make an effort to engage the Hawaii small businesses that may be impacted by the proposed fee increases through the outreach of business organizations and trade associations such as the Chamber of Commerce of Hawaii. Mr. Nakamoto seconded the motion, and the Board members unanimously agreed.

C. Discussion and Action on Testimony, dated August 3, 2017, from Mr. Rick Gaffney, President, Hawaii Fishing & Boating Association regarding Proposed Amendments to HAR Title 13, Subtitle 11, Ocean Recreation and Coastal Areas, as follows, promulgated by Department of Land and Natural Resources (DLNR)

- I. Small Boat Harbors
 - Chapter 230, General Provisions
 - Chapter 231, Operations of Boats, Small Boat Harbors, and Permits
 - Chapter 232, Sanitation and Fire Safety
 - Chapter 233, Motor Vehicle and Parking Rules
 - Chapter 235, Offshore Mooring Rules and Areas

- II. Boating

- Chapter 240, General Provisions
 - Chapter 242, Accidents, Reports, Fines, Enforcement and Records
 - Chapter 243, Vessel Equipment Requirements
 - Chapter 244, Rules of the Road; Local and Special Rules
 - Chapter 245, Waterway Marking Systems
- III. Ocean Waters, Navigable Streams & Beaches
- Chapter 250, General Provisions
 - Chapter 251, Commercial Activities on State Ocean Waters, Navigable Streams, and Beaches
 - Chapter 253, Registration and Permit Fees
 - Chapter 254, Local Ocean Waters
 - Chapter 255, Waikiki Beach
 - Chapter 256, Ocean Recreation Management Rules

Mr. Ed Underwood, Administrator at DLNR's Division of Boating and Ocean Recreation (DOBOR), introduced Mr. Todd Tashima, DOBOR's new Legal Fellow. Mr. Underwood provided the members with background information, stating that because DOBOR has received many complaints in the past about flawed and/or insufficient information on proposed rule amendments, outreach efforts have greatly increased and improved.

For example, Mr. Underwood explained that advance notice of the proposed amendments is now provided to Ocean Tourism Coalition and others. He stated that testifier, Mr. Rick Gaffney, received a proposed rule package a year in advance; at that time, DOBOR included into the rules recommendations that were made by Mr. Gaffney.

While it was acknowledged that this Board does not address concerns regarding Chapter 91, HRS, Mr. Underwood stated that Chapter 91 was strictly followed, and although the law only requires an agency to have one public hearing, five (5) hearings were held on the proposed rule changes.

Six-hundred fifty (650) comments were received during and after the public hearings, with 99% of the comments opposing the predator rules on feral cats. In addition, as comments are still coming into DOBOR, the rules have yet been finalized for the Board of Land and Natural Resources' (BLNR's) review. It is expected that the final rules will be presented to BLNR on or around September 25th or 28th.

Regarding the proposed deletion of DOBOR creating an advisory council, it was explained that because this would trigger the requirement of Sunshine Law, it is cumbersome and time consuming. Mr. Underwood explained that while DOBOR wants to encourage business groups to meet and discuss the rule amendments, it also wants to avoid the Sunshine Law requirement.

Vice Chair Cundiff stated that it looks as if DOBOR is doing a good job at making the rules clearer. This Board, however, would appreciate DOBOR continuing with its due diligence and review Mr. Gaffney's testimony regarding his concerns by making sure that the definitions are in compliance with international law and federal standards as this Board does not know if the definitions are correct or not.

In addition, although this Board understands DOBOR's concerns regarding the requirement of Sunshine Law, the members would like DOBOR to create an avenue of accessibility and open communication with regards to those businesses affected by the rule changes.

Mr. Underwood stated that although the public hearings are finished, DOBOR has left the "comment" period open and will continue to receive testimony and comments until it is found that the information is no longer substantive. In reference to Mr. Gaffney's concerns regarding the "definition section," Mr. Underwood said DOBOR will review and address Mr. Gaffney's comments and continue to work with him on any proposed rule changes he may have. He added that many of the definitions had been amended to be consistent with the federal rules, such as the "dive flag" definition.

Mr. Ritchie made a motion to send Mr. Gaffney a letter explaining that his concerns were discussed with Administrator Ed Underwood, requesting that DOBOR continue in its due diligence with amending Title 13, Subtitle 11, Parts I., II, II, Hawaii Administrative Rules, and that Mr. Underwood review Mr. Gaffney's testimony to assure that the rule definitions are reasonable and in compliance with international law and federal standards. Further, in regards to Mr. Gaffney's concern with the removal of the advisory council, it was requested that DOBOR create an avenue of accessibility and open communication with the businesses affected by the amendments, such as those in the Chamber of Commerce of Hawaii and Hawaii Fishing & Boating Association. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

V. ADMINISTRATIVE MATTERS

A. Discussion and Action on the Board's Nominations of Proposed Board Members for Submission to the Governor under Section 201M-5(b)(3), HRS, including Ms. Mary Albitz

Mr. Ritchie stated that based on his limited knowledge of Ms. Albitz, who is a small business consultant, he believes she would have the knowledge-base to be qualified as a member of this Board.

Mr. Nakamoto made a motion to send Ms. Albitz's nomination to the Governor as a member of this Board, with a request to expedite the nominating process. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on Proposed Amendments to Chapter 201M, HRS for the 2018 Hawaii Legislative Session

Chair Borge explained that the proposed changes to the Board's statute, which will be part of DBEDT's administrative package, clarify the intent of this Board's powers. The changes under Section 201M-5(a), HRS are as follows:

- 1) Replaces "ordinances" with "rules" when making recommendations to county council or the mayor; and
- 2) Adds that the Board may consider requests from small business owners for review of any rule that is "proposed" and "amended" in addition to adopted rules.

Vice Chair Cundiff made a motion to accept the proposed changes to Section 201M-5(a), HRS, as follows: 1) replace “ordinances” with “rules” when making recommendations to county council or the mayor, and 2) clarify the intent of the SBRRB’s powers by adding that the Board may consider any request from small business owners for review of any rule that is “proposed” and “amended” in addition to adopted rules. Mr. Nakamoto seconded the motion, and the Board members unanimously agreed.

C. Discussion on the Board’s “2008 Chapter 201M-7, Report”

Chair Borge explained that at the time the 2008 “201M-7 Report” was created, the board members made several recommendations that would justify some follow-through; particularly in regards to small business impact.

Further discussion on this 2008 report is deferred until later.

Also discussed was Mr. Denver S. Coon’s 2014 report submitted to William S. Richardson School of Law, entitled “The Need for Modernizing Hawaii’s Informal Rulemaking Procedure.” Chair Borge explained that the State of Hawaii’s rule-making process has been in existence since 1959 and is archaic as the public hearings come too late in the process. Mr. Coon’s paper focuses on statutorily changing the rule-making process; Deputy Attorney General Apuna remarked that due to the time and cost involved, the State is unwilling to make any changes to the existing process.

Chair Borge would like to review and address the existing rule-making process so that stakeholders can get involved earlier rather than at the tail-end of the process. He added that although having public hearings is a great idea, very few small businesses come out to testify. He would like this Board to begin a dialogue with the legislators about this in the 2018 Legislature. DBEDT staff will review other states’ rule-review processes in order to provide suggestions and alternatives, especially those that may not include a statutory change to Chapter 91, HRS.

Deputy Attorney General Apuna added that many of the states have taken their procedures from the “Model State Administrative Procedure Act.” She suggested that tallying the number of agencies that currently perform outreach to the small business community during the rule-review process would be helpful to know for this Board’s potential plight in proposing changes to the process.

D. Update on Upgrading the Board’s Website

Chair Borge questioned the members as to whether they were interested in requesting a written proposal from Hawaii Information Consortium (HIC), the agency that discussed the implementation of a new website at the last board meeting. He believes that having a user-friendly website for the small business community will enhance the Board’s directive.

Vice Chair Cundiff added that it will not cost anything for a proposal and it will help back-up the monetary request from DBEDT, which is \$15,000. Mr. Ritchie suggested that the Board

provide HIC with a “needs analysis” so they will come back with a proposal that lines up with the Board’s request.

Mr. Nakamoto made a motion to request a written proposal from Hawaii Information Consortium for implementing a new website and monthly service charges for this Board. Vice Chair Cundiff seconded the motion, and the Board members unanimously agreed.

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

Chair Borge noted that this Board is required to provide DBEDT with a list of its 2017 accomplishments for submission to the State Legislature for the 2018 session. Staff is in the process of preparing a list of accomplishments including the Board’s outreach efforts; i.e., participating in Reg Baker’s “Thinktech of Hawaii” show and attending the Maui Small Business conference, as well as the Board’s monthly review of administrative rules.

Also announced was due to Mr. Reg Baker’s attendance at the June 28th Board meeting when Ms. Anna Hirai, Assistant Administrator at the City and County of Honolulu Liquor Commission attended the meeting and discussed small businesses concerns with getting IRS tax clearances for liquor license renewals and applications in Hawaii, Mr. Baker will be providing testimony on behalf of Hawaii’s liquor commissions at the August 28th SBA Fairness Board Meeting in Washington D.C. The members were reminded that Mr. Baker is a member on the U.S. Small Business Administration’s Region IX Regulatory Fairness Board and represents the voice of small business on federal regulatory issues.

VI. NEXT MEETING – The next meeting is scheduled for Wednesday, September 20, 2017, in Conference Room 436, 250 South Hotel Street, Honolulu, Hawaii at 10:00 a.m.

VII. ADJOURNMENT – Mr. Ritchie made a motion to adjourn the meeting and Ms. Kimura seconded the motion; the meeting adjourned at 12:08 p.m.