

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

January 25, 2017

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

- I. **CALL TO ORDER:** Chair Borge called the meeting to order at 10:01 a.m., with a quorum present.

MEMBERS PRESENT:

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

ABSENT MEMBERS:

- None

STAFF: DBEDT

Dori Palcovich

Office of the Attorney General

Dawn Apuna

II. APPROVAL OF DECEMBER 14, 2016 MINUTES

Mr. Cundiff made a motion to accept the December 14, 2016 minutes, as presented. Vice Chair Nakamoto 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 HAR Title 15, Chapter 210, Rules, Regulations, Charges and Fees for Parks, promulgated by Hawaii Community Development Authority (HCDA) / Department of Business, Economic Development and Tourism (DBEDT)

Discussion leader, Mr. Ritchie, stated that HCDA Asset Manager, Ms. Lindsey Doi, was unavailable to attend the meeting today but would be available via telephone if there were any questions. He explained that the rules went to public hearing with no businesses objecting to the amendments; a few testified about the homelessness situation in Kakaako where the development was occurring. The amendments are comparable to fees that are the same or less than fees charged at other state parks.

Mr. Ritchie made a motion for the amendments to proceed to the Governor for adoption. Ms. Atmospera-Walch seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on the Small Business Statement After Public Hearing and Proposed Amendments to HAR Title 3, Chapter 181.1, International Energy Conservation Code, promulgated by Department of Accounting and General Services (DAGS)

Mr. Howard Wiig, Energy Analyst at DBEDT's Energy Division, explained that because the codes go through a three-year cycle, these amendments are the 2015 version, and incorporates a brand new code called "tropical climate." This code is endemic only to Hawaii for Hawaii-type architecture and allows for a reduction in energy use in homes by approximately 48%.

Mr. Wiig noted that when a trade or business brought up a concern during the rule-drafting process, the code was revised to incorporate the concerns into the rules. During the public hearing, there were six testimonies, all in favor of the proposed 2015 energy code.

Mr. Ritchie made a motion for the amendments to proceed to the Governor for adoption. Vice Chair Nakamoto seconded the motion, and the Board members unanimously agreed.

C. Discussion and Action on the Small Business Statement After Public Hearing and Proposed Amendments to HAR Title 3, Chapter 182.1, State Electrical Code, promulgated by DAGS

Mr. Lloyd Rogers, Administrative Specialist, stated that the proposed amendments represent the 2014 version of the electrical codes. Although input was given at the public hearings, no changes to the proposed rule amendments were made.

Chair Borge noted that the biggest item in the amendments was the portable generator; Mr. Rogers responded that the cost of the generators was discussed with the stakeholders but did not seem to bring about any issues or concerns. He added that the Building Code Council, a volunteer group that created the rule amendments, has been struggling without any administrative assistance despite several requests.

Mr. Cundiff made a motion for the amendments to proceed to the Governor for adoption. Vice Chair Nakamoto seconded the motion, and the Board members unanimously agreed.

IV. NEW BUSINESS

A. Discussion and Action on Proposed Amendments to Title 13, Subtitle 7, Water Resources, promulgated by Department of Land and Natural Resources (DLNR)

Discussion leader, Mr. Ritchie, explained that the pre-public hearing rule amendments are essentially catching up with the statute, which was enacted in 2004. The statute increased the maximum fine amounts from \$1,000 to \$5,000 per day, which applies to all three chapters, 167, 168, and 169.

Ms. Lenore Ohye, Hydrologic Planning Program Manager, from DLNR's Division of Water Resource Management, explained that the fines are negotiable, and every business that is fined also receives a hearing with alternative fines imposed depending on the circumstances.

1. Chapter 167, Rules of Practice and Procedure for the Commission on Water Resource Management

Mr. Ritchie made a motion for the amendments regarding the increase in fines to proceed to public hearing. Mr. Cundiff seconded the motion, and the Board members unanimously agreed.

2. Chapter 168, Water Use, Wells, and Stream Diversion Works

Mr. Roy Hardy, Hydrologic Program Manager, stated that the proposal is to increase the permit application filing fee for well construction and pump installation permits from \$25 to \$300; the fees are long overdue and have never been increased since the rules inception in 1987. In order to process the permits, there is a long, intensive checklist to complete for compliance, which is both analyzed and shepherded by DLNR, and the new permit fees do not include enforcement costs. It was clarified that about 150 permits are processed annually, with the Big Island processing the most of those permits.

Mr. Ritchie made a motion for the amendments regarding the increase in fees and fines to proceed to public hearing. Mr. Cundiff seconded the motion, and the Board members unanimously agreed.

3. Chapter 169, Protection of Instream Uses of Water

Mr. Ritchie made a motion for the amendments regarding the increase in fines to proceed to public hearing. Mr. Cundiff seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on Proposed HAR Title 4, Chapter 161, Hawaii-Grown Industrial Hemp, promulgated by Department of Agriculture (DoAg)

Discussion leader, Mr. Robert Cundiff, explained that due to the subject matter, it was a good idea to bring DoAg representatives to the meeting today to understand the background and reasoning for the regulation of this new rule.

Ms. Jeri Kahana, Quality Assurance Division Administrator, explained that the rules were drafted due to the enactment of Act 228, SLH 2016, which established the proposed industrial hemp pilot program. The rules allow cultivation of industrial hemp and distribution within Hawaii through limited activities for academic and agricultural purposes. In order to distribute hemp, this pilot program must be in place and the hemp's THC level must be controlled at a certain level. The more THC the product has, the more of a "drug" it becomes; without the THC, hemp has both nutritional and fiber value.

Ms. Shelley Choy, also from DoAg's Quality Assurance Division, explained that the purpose of the pilot program is to see if hemp can actually be grown in Hawaii considering its tropical climate; and if it can be grown in Hawaii, to see if this program would qualify and be feasible as a permanent, commercial/agricultural program.

In regards to the promulgation of the rules, DoAg has been dealing with all small businesses, such as organic farmers, as a lot of farming products use hemp; however, it is not known yet how many licensees there will be. Chair Borge believed this was an emerging industry and Mr. Cundiff added that there is great potential to stimulate new business under specific and balanced regulations.

Mr. Cundiff made a motion for the proposed new rules to proceed to the Governor for public hearing. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

C. Discussion and Action on Proposed HAR Title 11, Chapter 103, Licensure and Certification Fees for Health Care Facilities and Agencies, promulgated by Department of Health (DOH)

Discussion leader and Vice Chair Nakamoto introduced Mr. Keith Ridley, Chief of DOH's Office of Health Care Assurance, who explained the background of the rules and that the purpose of the rules is to implement licensing fees for State health care facilities; currently there are no fees. DOH does both licensing for the State of Hawaii and certifications on behalf of the federal government for Medicare and Medicaid for the institutional facilities.

The fees were established by reviewing the division's general fund costs. The adoption of the rules will allow DOH to recover the growing costs of conducting onsite survey inspections, perform complaint investigations on Hawaii's health care facilities, and assist in modernizing DOH's internal health care assurance division.

Approximately \$325,000 a year is expected from the proposed fees. Two-thirds of the fees will be collected from institutional facilities such as hospitals and one-third will be collected from non-institutional facilities, which are in all likelihood small businesses such as adult residential care home facilities. The adult residential care home facilities, assisted living facilities, hospices, etc., would pay approximately \$200 a year; for example, if the facility had a five-bed home, it would be charged \$.20 per bed/per day, which DOH considers reasonable.

In response to a question as to how Hawaii ranks in terms of the overall care of nursing facilities with other states, Mr. Ridley stated that the Medicare website has a "Nursing Home Compare" site which is a five-star rating system that compares medical facilities of different states. Hawaii has the highest percentage of five stars over any other state with skilled nursing facilities. Chair Borge suggested that meaningful information for the justification fees to the smaller businesses might be done in order to see the pay-out of and benefits derived from the proposed fees.

Ms. Terry Brusehoff, President of Hawaii Health Care, supported the fees, which she believes are nominal. She is the owner of a staffing agency and a home health care agency, and explained that she was surprised fees were never charged, especially for the home health care agency.

Vice Chair Nakamoto made a motion to send the amendments to the Governor for public hearing, and Mr. Ritchie seconded the motion. With the exception of Ms. Atmospera-Walch who recused herself due to a potential conflict of interest, all remaining members voted in favor of the motion; the motion passed.

D. Discussion and Action on Proposed Amendments to Title 8, Subtitle 1, Liquor Commission, promulgated by the Department of Liquor Control, County of Maui, as follows:

1. Chapter 101, Rules Governing the Manufacture and Sale of Intoxicating Liquor of the County of Maui

Mr. Glenn Mukai, Director of the Department of Liquor Control, County of Maui, via telephone communication, stated that a small business committee was formed, which included small business owners and a variety of other businesses, to review the proposed amendments; he added that most of the changes were a direct result of section 281, HRS. During the promulgation of the rules, any proposed changes that had concerns were not included in the final proposal; only those changes that were 100% agreed upon were placed in the proposal; he noted that the language in Honolulu Liquor Control's administrative rules are the same.

Chair Borge indicated there are concerns with section 8-101-28, "Special conditions for class 4, retail dealer's licenses," where the age of the person receiving liquor must be verified. Director Mukai confirmed that when liquor is purchased on the Internet, the business (i.e., the store's delivery person) must verify that the person who is receiving the liquor at home is twenty-one years of age or older and not intoxicated or under the influence. There is no restriction on the amount of time the liquor is to be delivered and it is up to the retailer as to whether or not it wants to deliver the liquor. Mr. Ritchie stated that this provision appears to disadvantage a State of Hawaii retailer over a retailer on the mainland.

Chair Borge also voiced concerns with section 8-101-89, "Posting of license," which requires all premises to post a sign in or about the premises containing and notifying all customers and other persons of the possible sanctions that may be imposed for operating a vehicle under the influence of an intoxicant. Director Mukai responded that this wording was also taken from the State's Statute, section 281, HRS.

Chair Borge commended Director Mukai for having a good cross-section of business members on its small business committee that helped with the proposed rule changes, and that it will be interesting to see what the feedback will be from the public hearing, which is scheduled for February 8, 2017. It was also stated that these rule proposals are subject to interpretation, and may potentially be self-serving to the committee's members.

Mr. Ritchie made a motion to proceed to public hearing with reservations due to concerns about possible interstate trade disadvantages to Hawaii small businesses based on the interpretation of the rules, and that the Board will look forward to public input and input from small business at the public hearing as well as the small business statement after public hearing. Vice Chair Nakamoto seconded the motion, and the Board members unanimously agreed.

2. Chapter 102, Rules Governing Administrative Practices and Procedures of the Liquor Commission and Liquor Control Adjudication Board of the County of Maui

Discussion leader and Second Vice Chair Kimura explained that this chapter has only minor changes that would not have an impact on small business.

Vice Chair Nakamoto made a motion that the amendments of Chapter 102 proceed to public hearing. Mr. Cundiff seconded the motion, and the Board members unanimously agreed.

V. LEGISLATIVE MATTERS

A. Discussion and Action on the Delegation of Authority to Board Member(s) and/or Staff to Submit and/or Testify on behalf of the Board during the 2017 Hawaii State Legislative Session

Under Section 92-7(d), HRS, Mr. Cundiff made a motion to add the following five bills onto the agenda. Ms. Atmospera-Walch seconded the motion and the Board members agreed, which resulted in a two-thirds vote of the total number of Board members.

1. HB75, "Relating to the Small Business Regulatory Flexibility Act"

This measure was introduced by House Representative Scott Saiki; it has passed first reading and is moving forward. The bill will be opposed because, although the length of time the agencies must submit a small business impact statement to this Board is extended, the timing is unfavorable and causes concern that there will be insufficient time for the Board to review the impact statement prior to the rules' adoption. The impact statement would be submitted "after" the public hearing and just before it is sent to the Lieutenant Governor's Office, which is also after the Governor signed off on it.

2. HB587, "Relating to Small Business"

Provides \$50,000 in funding for the Board; sponsored by the Chamber of Commerce of Hawaii.

3. HB1042, "Relating to the Small Business Regulatory Flexibility Act"

This is an Administration bill that makes housekeeping changes to the Board's statute.

4. SB762, “Relating to the Small Business Regulatory Review Board”

Provides \$50,000 in funding for this Board; sponsored by the Chamber of Commerce of Hawaii.

5. SB908, “Relating to the Small Business Regulatory Flexibility Act”

This is an Administration bill that makes housekeeping changes to the Board’s statute.

Vice Chair Nakamoto made a motion to delegate authority to Chair Borge to submit and testify on the above measures on behalf of this Board during the 2017 Hawaii State Legislative Session. Mr. Yamanaka seconded the motion, and the Board members unanimously agreed.

VI. ADMINISTRATIVE MATTERS

B. Update on the Board’s Upcoming Advocacy Activities and Programs in Accordance with the Board’s Powers under Section 201M-5, Hawaii Revised Statutes

1. Business in Hawaii

Mr. Reg Baker has, again, asked this Board if members would be available for a follow-up appearance on the “Business in Hawaii” show, scheduled for June 8th at 2:00 p.m.

2. Wisconsin Small Business Regulatory Review Board

A meeting will be scheduled for Chair Borge and DBEDT’s staff, along with Mr. Ritchie to hear about Wisconsin’s small business regulatory review board and suggestions about outreach efforts.

3. June Board Meeting

The June 21st board meeting has been rescheduled to June 28th, same time, same place.

VII. NEXT MEETING – The next meeting is scheduled for Wednesday, February 15, 2017, in Conference Room 436, 250 South Hotel Street, Honolulu, Hawaii, at 10:00 a.m.

VIII. ADJOURNMENT – Mr. Cundiff made a motion to adjourn the meeting and Vice Chair Nakamoto seconded the motion; the meeting adjourned at 12:39 p.m.