

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

May 20, 2015

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

- I. **CALL TO ORDER:** Chair Borge called the meeting to order at 9:31 a.m., with a quorum present.

MEMBERS PRESENT:

- Anthony Borge
- Harris Nakamoto
- Kyoko Kimura
- Robert Cundiff
- Nancy Atmospera-Walch
- Phillip Kasper
- Garth Yamanaka
- Mark Ritchie

ABSENT MEMBERS:

- Barbara Bennett

STAFF: DBEDT

Dori Palcovich

Office of the Attorney General

Margaret Ahn

II. APPROVAL OF APRIL 15, 2015 MINUTES

Chair Borge acknowledged and welcomed the new members on this Board; he is looking forward to working with everyone. Members and staff introduced themselves and explained where they work and their roles.

Mr. Nakamoto made a motion to accept the April 15, 2015 minutes, as presented. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

III. OLD BUSINESS

- A. Discussion and Action on Proposed Amendments to Hawaii Administrative Rules (HAR) Title 16 Chapter 95, Pharmacists and Pharmacies, and the Small Business Statement after Public Hearing promulgated by the DCCA

Discussion leader, Ms. Kimura, explained that this Board reviewed the proposed amendments prior to public hearing and they are now back in front of this Board after the public hearing. The amendments were mostly housekeeping measures, and there was no opposition to the rule changes at the public hearing.

Ms. Kimura made a motion to support the adoption of the rule amendments. Mr. Nakamoto seconded the motion, and the Board members unanimously agreed.

IV. NEW BUSINESS

A. Discussion and Action on Proposed Amendments to HAR Title 13 Chapter 146, Hawaii State Park System, Section 6, Fees, promulgated by DLNR

Messrs. Dan Quinn, Administrator, Curt Cottrell, Assistant Administrator, and Stephen Soares, Property Manager from DLNR's Division of State Parks, explained the purpose of the amendments and its underlying effect on small business. Mr. Mark Ritchie, discussion leader, stated that the changes represent proposed fees, but since most of the fees are already in effect, the department is cleaning up the rules to reflect the fees.

It was noted that Hawaii is a little behind because many parks in the United States typically charge entry fees. Since Hawaii began charging fees, it has resulted in reinvigorating the department's income stream by forming partnerships with the main tour guide companies, which collectively generate about \$700,000 per year; (DLNR generates approximately \$1.5 million per year from this partnership). The entry fees have resulted in the lowering of car break-ins at state parks because there are now finances to pay for people to "man" the park entrances. The fees were set by the Board of Land and Natural Resources and approved in 2009 and 2010; fees have not been raised in some of the parks such as Wailoa River State Park. Small business impact by the fees are tour operators (i.e., PUC carriers) and taxi companies. Generally, however, when taxi cabs have tourists, the drivers will drop the passengers off at the front of the parks to avoid paying an entrance fee.

When promulgating the rules, DLNR met with all the tour providers and transportation carriers regarding the fees; (it was noted that the fees are passed onto the tour providers who in turn pass the fees onto the passengers). In regards to the fee process, DLNR sends out a "soft bid" proposal to determine who would like to run the operations for a one-year permit, then it goes out on a five-year basis. The bidders are generally local small businesses and they bid for a percentage of the fees, which will vary from park to park. This process appears to be working very well as the tour operators have been consistently bidding.

Regarding the camping and lodging benefit to small business, an online operator handles the reservations, collects the camping and lodging fees, and earns a percentage of that revenue (this is part of the total \$700,000). Each park is different in regards to its time schedule; for example, the Nuuanu Pali Lookout is open from 4:00 a.m. until 8:00 p.m., (whereas the contract shows 9:00 to 5:00), and Diamond Head State Park is open twelve hours.

Chair Borge commended DLNR for collaborating with the stakeholders and putting together a reasonable fee schedule. He added that Hawaii's natural beauty has been a challenge to market and receive revenue from it. Security, especially, has been an on-going challenge for DLNR, but the resulting rules appear to be an acceptable solution to all those involved, including residents and small businesses.

Mr. Ritchie make a motion to proceed to public hearing. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on Proposed New Rules, Real Property Tax Classification Rules, 12, under Section 5A-6.4 of the Kauai County Code of 1987, as amended, promulgated by Department of Finance, County of Kauai

Discussion leader, Mr. Harris Nakamoto, stated that this is a proposed new rule. Mr. Steven Hunt, County of Kauai Real Property Tax Manager, explained that the rules reflect a change in regulations which took place in an ordinance approximately three years ago; at that time, it changed the property classification from zoning to one based on “actual use” of the property. This change was a response to the growing concern of Kauai residents regarding vacation rentals. He noted that the 30-day notice for the public hearing was being published this week with an expected June 23rd public hearing date.

Since the initial ordinance was passed, one class of property was removed, apartment classification was replaced with vacation rental, and two classes were added. Also added to the regulations is “commercialized home use,” which are properties that are owner occupied, but not used as a residence.

In regards to any impact that the proposed rules may have on small business, it was explained that any small business that owns land subject to real property taxes or pays property taxes subject to a lease could be affected by the proposed rules due to either a tax increase or tax decrease based upon the use of the property. A majority of the homes are residential in nature and classified as homestead followed by residential, vacation rentals, and commercialized hotels. Kauai County is the only county, to date, that has based its property classification on use. The biggest challenge with these regulations is in regards to its compliance as uses of property may change; however, use surveys are distributed to all the improved properties and are self-reported. It was noted that “home swapping” is not being monitored, and time shares are under hotel and resort classifications.

Mr. Nakamoto made a motion for the proposal to proceed to public hearing. Mr. Cundiff seconded the motion, and the Board members unanimously agreed.

C. Discussion of Proposed Increase in Commercial Ocean Recreation Activities (CORA) Permit Fees by the County of Maui Budget & Finance Department

Chair Borge explained that three representatives from CORA, (i.e., permittees that have permits issued by Maui’s Department of Parks and Recreation that have access to the island’s beach parks), approached this Board for assistance in a proposed six-fold increase in permit fees by the County’s Finance Department. This is a hefty and sizeable increase that was not specifically communicated with the stakeholders prior to the initial discussion and approval at the May 4, 2015 meeting of the City Council. Chair Borge stated that in reviewing the County’s website, he was able to find that CORA permit fees are classified under Ordinance 31.43 enacted in 2003, which is intended to assist in maintaining the parks; there are a total of 118 CORA permittees.

One of the CORA permittees, Ms. Patti Cadiz, owner of HST Windsurfing, Surfing, SUP and Kitesurfing School, stated that her permit fees will be increased from \$4,500 to approximately \$27,000 if this proposal is passed, which will be devastating to her small business. Thus, Ms. Cadiz requested from this Board a letter to the Maui City Council requesting that any action on the proposed increase be deferred until a dialogue with the stakeholders has taken place in order to establish a more reasonable fee increase. It was noted that CORA members' attempts to speak with the individual council members about the increase have mostly been to no avail.

Mr. Kasper noted that, in his opinion, an inference that the County of Maui needs the increased fee money for "enforcement" is indefensible. This is because, by nature, if a permittee sees someone who is unauthorized to utilize a beach park, that permittee would generally call the police; thus, no one is happier to enforce the restrictions better than the permit holders. He also stated that he read in the local Maui newspaper that Mr. Mike White, Chair of the Maui County Counsel, in his opinion, made an unfair comparison in an article regarding the CORA fee increase and the concessioners at Kaanapali Beach Park. He explained that Mr. White is the general manager of the Kaanapali hotels, which has a commercial kiosk where concessioners have full access to the beach, are given a building, allowed storage, have marketing access to the retail public, and make use of cabanas where they rent and generate income due to their location on the beach; thus, comparing this operation with the operations of CORA permittees is simply unfair. He believes this Board should do whatever it can to weigh-in on assisting the CORA permittees.

Mr. Cundiff noted that the increase is difficult to comprehend due to the lack of knowing the purpose behind it, what the County is attempting to address, and what outcome is expected. Based upon the information received by the CORA members, there does not appear to be sufficient information brought forth to justify the reasons and purpose of imposing a permit fee six times its current rate. Mr. Nakamoto added that this increase is clearly a threat on the small businesses. It was explained, however, that if the rules are promulgated via ordinance rather than administrative rule, this Board would lack sufficient authority.

Chair Borge made a motion to send a letter to the Maui City Council requesting that action on the proposed increase in the CORA permit fees be deferred until communication between the stakeholders, businesses, the public, and all those affected by the increase are contacted for feedback to discuss the purpose of the increase and its expected outcome; further, if the proposed increase in the permit fees will be promulgated by administrative rule, that the County of Maui follow Chapter 201M, HRS, and submit the rules and a small business impact statement to this Board. Mr. Nakamoto seconded the motion, and the Board members unanimously agreed.

It was requested that copies of the correspondence be sent to Maui Mayor Arakawa and all of the Maui State legislators.

V. LEGISLATIVE MATTERS

A. Status on House Bill 774 HD1, "Relating to Small Business"

Chair Borge explained that House Bill 774 HD1 is one of two funding bills that this Board received legislative assistance on in an attempt to help fund the Board; as presently there are no funds allocated for the Board's outreach or operating expenses. Both bills went through the legislative process, however, the Senate bill was deferred. The House bill moved forward until the last week of the session but it did not pass in conference committee; this is despite asking for the bare minimum of \$50,000 for clerical and operating support. He pointed out that the bills carry-over to the next legislative session so it can be brought up again next year. He added that DBEDT Director Luis Salaveria was active and very supportive of this Board and the bill.

Chair Borge expressed that this Board needs to engage in the process of requesting that the bill(s) be re-heard in the next legislative session at an early stage in an attempt to bring the State legislators "on board." He believes it was a great learning experience and that if this Board put more effort into it and sought assistance from the legislators to champion the board's cause earlier that the bill would have passed. He added that during one of the hearings, a legislator asked if the Board's statute might need to be reviewed and updated. He believes this is a good suggestion and something the Board should work towards prior to the next legislative session.

VI. ADMINISTRATIVE MATTERS

A. Board's Attorney to Advise Board Members of its Powers and Duties regarding reviewing Administrative Rules pursuant to Chapter 201M, HRS. Also, Board's Attorney will Advise Board Members of Public Agency and Meetings Records (Sunshine Law), Chapter 92, HRS, and Code of Ethics, Chapter 84, HRS

Deputy Attorney General Ahn stated that rule drafting falls under Chapter 91, Chapter 201M, and the Governor's Administrative Directive 09-01. In addition to preparing administrative rules, agencies take the rules to public hearing and then adopt the rules; both require the Governor's approvals under Chapter 91.

Before the agencies receive approval from the Governor to go to public hearing, they determine whether there is small business impact; if there is, they must submit a small business impact statement to this Board. Thus, under Chapter 201M, this Board is authorized to review administrative rules for small business impact. However, Chapter 201M has no requirement that the Governor must wait until he hears from this Board to proceed to public hearing. After public hearing, the agencies submit a small business statement to this Board outlining the testimony received at the public hearing. It was noted that the members do not review statutes, which are laws passed by the state and county legislators and are generally broader than administrative rules; state and county agencies have the authority to promulgate administrative rules based on the statutes. If a person from the public states they did not receive a notice of the meeting or of a public hearing, there are several ways in which the public may

view posted notices for public meetings or request that they be mailed to them by the agencies.

Under Chapter 201M, small businesses can also ask this Board to look at a rule that affects them. This is under a (petition) process where a small business will first approach the agency that promulgated a rule and request that the agency review it. If the agency decides no changes are required, the small business will come to this Board for review; this Board then responds back to the promulgating agency.

In regards to Sunshine Law, Chapter 92, the issue that comes up most frequently is that there should be no official business discussed outside of a board meeting; this includes telephone and email communications. A common mistake is when staff sends an email to the members and a member responds by replying to "all." It is important not to reply to "all" when the information has to do with official Board business. Official Board business can be discussed with DBEDT staff and with one other board member (only two members), as long as there is no commitment to vote.

There can also not be any "serial" communications such as when an email is sent from one board member to another board member to another board member, etc. There are also times that individual members may receive emails or communication from the public. To be safe, members may consider the communication to be testimony and should send it to DBEDT staff who will distribute it accordingly. If a member willfully violates Sunshine Law it is a criminal misdemeanor. Violations may result in voiding the Board's action, awarding attorneys' fees and costs, and being removed as a board member.

Under the Ethics Code, Board members are considered State employees. The "conflict of interest" section states that a member cannot take official action in which they have a substantial financial interest. Financial interest is defined as ownership, directorship, officer-ship in a business, a creditor interest, debtor interest, or an interest in real or personal property or employment; this includes the interests of a spouse and dependent children. Therefore, when a rule is being reviewed and a member has a financial interest in it, it is incumbent to raise this before a meeting, if possible. This is so that in the event the members need to recuse themselves from deliberating, the Board will know whether a quorum may be lost.

Official action is not just voting on an item but discussing and voicing one's opinion and recommending for or against an agenda item. If a member has a financial interest in a rule, they may very objectively ask questions that do not indicate their position. In response to an inquiry regarding gifts, Deputy Attorney General Ahn stated that small tokens of "aloha" are fine in regards to thanking a public worker as long as it is not perceived that the giver is seeking any special treatment by the gift. A Board member may directly contact the Ethics Commission, Deputy Attorney General Ahn or DBEDT staff if there is any doubt about a potential conflict. If a member voted on an item and it was later found that a conflict existed with that member, the action may be voided.

B. Action and Voting of Board Chair, pursuant to Section 201M-5(c), HRS, and Election of Vice Chair and Second Vice Chair

Mr. Cundiff made a motion to nominate Mr. Anthony Borge as Chair, and Ms. Atmospera-Walch seconded the motion. Mr. Borge abstained from voting, and the remaining seven members voted in favor; the motion passed.

Mr. Nakamoto made a motion to nominate Ms. Barbara Bennett as Vice Chair, and Mr. Borge seconded the motion. Mr. Nakamoto and Mr. Borge voted in favor of the motion, and the six remaining members abstained; the motion did not pass. Ms. Kimura made a motion to nominate Mr. Harris Nakamoto as Vice Chair, and Mr. Ritchie seconded the motion. Mr. Nakamoto abstained from voting, and the remaining seven members voted in favor; the motion passed.

Mr. Ritchie made a motion to nominate Ms. Barbara Bennett as Second Vice Chair, and Mr. Nakamoto seconded the motion; the motion unanimously passed.

Chair Borge explained that board members are assigned as discussion leaders to specific agency rules that come before this Board. The discussion leaders engage the agencies and take charge of the discussion regarding the rule proposals. Generally, the members will be assigned to those agencies the members feel most comfortable with. He asked DBEDT staff to send the members a copy of the current discussion leader listing so they can decide what agencies they would like to be assigned to for discussion at next month's board meeting. In response to Mr. Nakamoto's request, DBEDT staff will add the designated discussion leader's name onto the monthly agendas; this information will not be included on the posted agendas.

VII. NEXT MEETING – The next meeting is scheduled for Wednesday, June 24, 2015, in Conference Room 436, 250 South Hotel Street, Honolulu, Hawaii, at 9:30 p.m.

Chair Borge noted that the day and time of the board meetings can be changed if necessary.

VIII. ADJOURNMENT – Ms. Kimura made a motion to adjourn the meeting and Vice Chair Nakamoto seconded the motion; the meeting adjourned at 11:35 a.m.