

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

September 21, 2016

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

- I. **CALL TO ORDER:** Chair Borge called the meeting to order at 1:00 p.m., with a quorum present.

MEMBERS PRESENT:

- Anthony Borge
- Barbara Bennett
- Kyoko Kimura
- Robert Cundiff
- Garth Yamanaka
- Carl Nakasago

ABSENT MEMBERS:

- Harris Nakamoto
- Nancy Atmospera-Walch

STAFF: DBEDT
Dori Palcovich

Office of the Attorney General
Margaret Ahn

II. APPROVAL OF AUGUST 17, 2016 MINUTES

Chair Borge introduced Mr. Carl Nakasago, who was in attendance today as the Board's designated ex officio voting member, in place of Mr. Ritchie today.

Mr. Cundiff made a motion to accept the August 17, 2016 minutes, as presented. Ms. Kimura 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 12, Subtitle 8, Part 11, Elevators and Related Systems, promulgated by Department of Labor and Industrial Relations (DLIR), as follows:

1. Chapter 229, General, Administrative, and Legal Provisions; and
2. Chapter 230.1, Elevators, Escalators, Dumbwaiters, Moving Walls, and Material Lifts and Dumbwaiters with Automatic Transfer Devices

Discussion leader Ms. Kimura indicated that these chapters were first heard over a year ago. After the public hearing, all testimony supported the proposed amendments. Mr. William Kunstman, Assistant to the DLIR Director, added that DLIR began the process quite some

time ago by working with the stakeholders; DLIR agreed to some of the suggestions and were incorporated into the final draft rules. He also added that the rule changes, overall, are very good for small business. Ms. Kimura's only concern was that the process took so long; Chair Borge thanked DLIR for collaborating with the stakeholders in the formulation of the rule-making process.

Second Vice Chair Bennett made a motion to move the amendments to the Governor for adoption. Ms. Kimura 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 4, Chapter 138, Hawaii-Grown Cacao and Hawaii Chocolate Products, promulgated by DoAg

Discussion Leader, Mr. Cundiff stated that these are post-hearing rules. The purpose of the new rules was to create standards for the cacao and chocolate products, which the industry had requested. At the public hearing, nineteen people attended and six provided written testimony in support of the amendments.

Mr. Cundiff made a motion to move the amendments to the Governor for adoption. Mr. Yamanaka seconded the motion, and the Board members unanimously agreed.

IV. NEW BUSINESS

A. Discussion and Action on Proposed Amendments to Rules of the Liquor Commission, City and County of Honolulu, Title 3, Subtitle 6, promulgated by the Liquor Commission, City and County of Honolulu:

1. Chapter 80, General Provisions
2. Chapter 82, Licenses and Permits, General Provisions
3. Chapter 83, Procedure for Obtaining License
4. Chapter 84, Duties of and Supervision over Licensee
5. Chapter 86, General Violations and Prosecutions

Ms. Anna Hirai, Assistant Administrator at the City and County of Honolulu Liquor Commission, explained that the rule amendments will be the first of three large proposals that will run through the next year and a half. The Liquor Commission would like to go to public hearing regarding this proposal on November 3, 2016.

The current amendments are intended to focus on new or modified liquor license classes that were made effective through statutory amendments from 2009 to 2015. They entail the deletion of class 7 vessel license, modifications made to class 13 caterer license, addition of class 16 winery license, addition of class 17 BYOB license, and addition of class 18 tour/cruise vessel license as well as several housekeeping measures, including the repeal of the "stacking" rule. Ms. Hirai noted that a focus group, comprised of license class representatives, attorneys and other consultants, convened by the Liquor Commission, reviewed the rule amendments and proposed eleven language changes, all of which were included in the amendments.

Ms. Hirai stated that if a business wants to have BYOB from 6:00 a.m. to midnight, they may do so without a license. However, a license would be required if a business wanted to extend the BYOB after midnight even though the license may be made to an unlicensed premise; it is not expected that many businesses would be applying for this. In regards to “catering” changes, in the past, it was required that the business was a restaurant, hotel and condo/hotel; however, this has been changed to allow caterers without “bricks and mortar” to be provided a type B liquor license. Second Vice Chair Bennett acknowledged that Ms. Hirai did a very good job in presenting the proposed rules.

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

B. Discussion and Action on Proposed Amendments to HAR Title 11, Chapter 50, Food Safety Code, promulgated by Department of Health (DOH)

Mr. Lance Wong, Food Safety Program Supervisor and Ms. Ember Vuong from DOH, along with Deputy Attorney General Wade Hargrove explained that amendments pertain to a routine revamping of the rules. The main impact, which would affect approximately 90% of the small businesses, is the requirement for a basic food service certification by a person in charge. This entails taking a two-hour class, which is offered by the State for free, either in person or on-line. The total expense to a small business might range from \$10 to \$15 per person when taking the class by a private vendor. The class includes basic knowledge of hand-washing, cooking temperatures, cleaning, and sanitizing. There is a one-year grace period to allow food establishments to research the courses that would work best.

Another change has to do with DOH serving food establishments with red cards, or placards, i.e., notice closure. Presently, establishments are served with a red card and a written notice showing that the establishment is suspended, with a 24-hour notice of a hearing. The proposed red card represents both notice of closure/suspension and notice for requesting a hearing within 48 hours. In addition, a change to the “embargo” section is designed to provide more clarity with respect to the actual process for seizing, marking, and detaining food for a period of time while DOH either continues its investigation or makes arrangements with the owner for the establishment’s “destruction.” It was noted that DOH is in communication with the Hawaii Restaurant Association, which is in support of the proposed amendments.

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

C. Discussion and Action on Proposed Amendments to HAR Title 15, Chapter 210, Rules, Regulations, Charges and Fees for Public Parks, promulgated by Hawaii Development Authority (HCDA) / Department of Business, Economic Development, and Tourism (DBEDT)

Mr. Deepak Neupane, Director of Planning and Development at HCDA, provided the members with the chronology of the park rules, which began in June 2005. He also summarized the proposed changes, which are necessary to address the changing environment in the parks at Kakaako Makai, and encompasses 45 acres of land. He also

addressed issues that did not exist or were left unclear when amendments were last made in 2007.

The changes include an increased graduated fine for penalties, prohibition of unleashed animals (except in designated dog parks), clarification on park closures for maintenance work, addition of abandoned property disposal, removal notice of storage, reclamation and other procedures, elimination of temporary concession permits, changes to group use and special use permits, changes to security deposits for park permits, and changes to usage fee schedule for park permits.

The fee increases are expected to offset the \$1 million park maintenance costs and to balance usage so the majority of the park is reserved for unpermitted use by the general public. The fee structure reflects HCDA's experience in managing events in the parks since 2007 and is based on the demand and impact on public facilities; it is also consistent with the City and County of Honolulu's fee structure for similar facilities. Input from small businesses was limited to feedback received from the businesses that are surrounded by the park and are affected by park activities. Chair Borge stated that HCDA's revenue projections are relatively low, and do not appear to be a major detriment to small business.

Mr. Cundiff made a motion to support the amendments for public hearing. Mr. Yamanaka seconded the motion, and the Board members unanimously agreed.

D. Discussion and Action on Proposed Amendments to HAR Title 15, Chapter 218, Kakaako Reserved Housing Rules, promulgated by HCDA / DBEDT

Mr. Deepak Neupane, Director of Planning and Development at HCDA, stated that a taskforce was formed to analyze and recommend changes to the reserved housing program to the HCDA Board. The amendments are expected to clarify existing provisions, amend provisions to assist in providing for additional reserved housing units, reduce the maximum qualifying household incomes, increase regulatory terms for rental units, and provide for and regulate buyback provisions for workforce housing. The requirement for providing Reserved Housing Units is 20% of total number of units in a multi-family residential development of ten or more units.

In regards to small business, there is no expected adverse effect with the exception of developers and landowners who might develop or redevelop residential projects in the Kakaako Community Development District. The direct impact may include revenue loss as a result of providing low-to-moderate residential units as opposed to market-to-luxury residential units.

Mr. Cundiff made a motion to support the amendments to go to public hearing. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

E. Discussion and Action on Proposed Amendments to HAR Title 4, Chapter 71, Non-Domestic Animal Import Rules, promulgated by Department of Agriculture (DoAg)

Mr. Keevin Minami, Land Vertebrate Specialist from DoAg's Plant Quarantine Branch, introduced Mr. Christopher Kishimoto, Entomologist and Mr. John Ueshiro, Aquatic

Specialist, also from DoAg's Plant Quarantine Branch. Mr. Minami stated that on November 24, 2015 and January 26, 2016, the Board of Agriculture approved the proposed rule amendments and summarized these changes, as follows:

Section 4-71-1, Objectives – includes animal and public health and safety among the bases for restricting or prohibiting import of non-domesticated animals;

Section 4-71-2, Definitions – establishes a definition for “dangerous wild animals” and identifies specific species as “dangerous wild animals;”

Section 4-71-3, Permits:

- a. Deletes “dangerous wild animals” from the animals allowed for import under short-term permit for performance or exhibition, except that dangerous wild animals may be imported for commercial filming for television or movies, subject to permit conditions adequate to address any associated risk;
- b. Clarifies that violation of permit conditions may result in citation or in cancellation of permit, or both;

Section 4-71-4.1, Maximum time period for permit approvals: clarifies that short-term special permits, as well as short-term permits for certain animals, not just performing animals, must be processed within 120 days;

Section 4-71-6.5, Permitted Introductions:

- a. Allows government agencies to import animals on the List of Conditionally Approved Animals;
- b. Clarifies that, in addition to universities and government agencies, other institutions may import restricted list animals for research, and that universities and government agencies may import restricted list animals for medical and scientific purposes as well as research, as determined by the Board;
- c. Clarifies that permits may be approved by the chairperson, as well as by the chief or Board, as specified by rules;
- d. Provides that animals on the List of Restricted Animals (Part B) may be imported for use by government agencies, as well as for currently allowed purposes (i.e., private and commercial use, including zoological parks, or aquaculture production);
- e. Clarifies that site approval is required prior to issuance of any permit issued for import of animals on the restricted lists and unlisted animals;
- f. Clarifies that the transfer or sale of unlisted animals under permit may be allowed provided the proposed transferee can satisfy conditions for transfer and obtain a permit for possession;
- g. Deletes Nile tilapia, *Oreochromis niloticus* from the List of Restricted Animals and adds this fish to the List of Restricted Animals to allow import for aquaculture production;
- h. Deletes house crickets, *Acheta domesticus*, from the List of Restricted Animals and adds this insect to the List of Restricted Animals to allow import as feed for insectivorous amphibians, reptiles, and birds;

Section 4-71-7, Bond for certain animals: Deletes the word “performing” to expand the bond requirement to any animal used in a circus, carnival, or for commercial filming, as appropriate, including unlisted animals that are permitted entry under short-term special permit.

Chair Borge stated that testimonies would be limited to three minutes and noted that this Board’s purview, which is advisory in scope, is to review the impact on small business. Mr. Cundiff added that one of the primary criteria used in the DoAg’s rule changes pertains to the health and safety of the public.

Mr. Matt Jisa, a concerned citizen, testified in support of the amendments as he hopes Hawaii will prohibit dangerous wild animal acts. He was witness to the shooting of “Tyke” the female elephant that escaped from a circus in Honolulu twenty years ago, has partaken in a recent documentary on Netflix, “Tyke Elephant Outlaw,” and stated that the Tyke incident is proof positive that performing animal acts can go deathly wrong. He added that it would not be worth the risk if this type of incident occurred in an animal show or on a movie set.

Ms. Pamela Burns, President & CEO of Hawaiian Humane Society, who also submitted written testimony, testified in strong support of the amendments. She stated that wild animals are not predictable, and the DoAg referred to this fact in the small business impact statement, explaining that changes are “a public risk issue and not just a public and animal welfare issue.” She urged this Board to move the proposed rule changes to public hearing.

Ms. Cathy Goeggel, President of Animal Rights Hawaii, has participated in the process of the amendments for the past two years, and testified in support of the amendments. She believes E.K. Fernandez is not a small business and referred to a 2014 article in hawaiiibusiness.com that states Linda Fernandez, President and CEO of Fun Factory, Inc., expanded the companies’ indoor entertainment business, which includes other related businesses, and operates multiple locations throughout the state and on the mainland. She noted that E.K. Fernandez has shown up to 1,000 team members during a “high” season. In addition, as E.K. Fernandez produces between 17 and 26 events a year, and because the only event uses exotic animals is the 50th State Fair, she believes it is disingenuous for E.K. Fernandez to be referred as a small business, or claim that the rule amendments will cause financial ruin.

Mr. Scott Fernandez, President of E.K. Fernandez Shows, Inc., stated that the company is a stand-alone business and discussed its history which dates back to 113 years. He explained that Fun Factory is a separate corporation and none of the people working in Fun Factory or Jungle Fun work at E.K. Fernandez. For the past 100 years, the company has brought dangerous and wild animals into Hawaii without incident. Its operations have been reduced from 26 weeks per year to approximately 18 weeks due to the expense of running this type of business. He stated the company has less than 25 employees but hires casual labor, i.e., “spot help” or “seasonal help;” an example would be hiring neighbor island help for a four-day stint at the county fairs.

Mr. Fernandez noted, however, that 1,000 team members help E.K. Fernandez at the 50th State Fair each year. They include small businesses, non-profits and volunteers from non-profits, independent contractors, circus performers, petting zoo employees, food vendors,

advertising professionals, off-duty police officers, safety inspectors, fuel companies, courier companies, around-the-clock security personnel other than HPD, fencing contractors, restaurant repair and supply companies, marketing consultants, music performers, Hawaii Stars competitors, stage and lighting companies, trucking and shipping companies, comfort-stage providers, Aloha Stadium attendants, first-aid attendants, and many others.

He further noted that although the 50th State Fair is the company's biggest revenue-generating event. During this past year, revenues were down over a million dollars, or thirty percent, with a reduction in attendance of 42,000 people. This is expected to result in an overall decline in revenues by more than ten percent; he believes this is a direct "cause and effect" of government regulation.

Ms. Donna Smith, Executive Vice President of Fernandez Events, LLC, read testimony from Mr. Avery Chumbley, President of Maui Alliance, a non-profit community-based organization responsible for organizing and running the annual Maui Fair. Mr. Chumbley writes, in part, that if this ban goes into effect and E.K. Fernandez is prohibited from including wild animal shows as part of its statewide fairs, this would have a significant negative impact to the overall sustainability of the business and in turn have a devastating impact to the underserved neighbor islands. Ms. Smith also stated that one of her responsibilities at E.K. Fernandez is to complete permit applications for DoAg when requesting the import of the wild animals. These permits are returned with certain conditions that impose strict safeguards and protocols on the public and the animals.

Ms. Jessica Wooley, in attendance today for the United States Humane Society on behalf of President Ms. Inga Gibson who provided written testimony, believes E.K. Fernandez is not a small business, and stated that even if it was, it is one small business. She believes if there are any negative changes to the affected businesses, those businesses need to look internally because the public does not like wild animal shows anymore and there are many animals not prohibited in the proposed amendments that are more in-line with the kind of entertainment the public wants. She believes the rule changes will not impact any small business but will only benefit the people of Hawaii and that it is time to protect the public's health, the environment, and to look out for the welfare of the animals. She also thanks Governor Ige and DoAg Chair Enright for taking action on this important issue.

Ms. Jessica Cole, a motion picture industry professional from Hawaii, stated that banning animals from import for use in motion pictures would cause a huge exponential economic impact to Hawaii's entertainment industry as CGI (computer-generated imagery) cannot replace real animals, at this time. She is the first point of contact in Hawaii for major motion pictures with budgets up to \$230 million; she is approached three or four times a year for various animals in film. If Hawaii was not friendly to bringing in animals for filming, it could potentially lose millions of dollars in revenues, which would have a devastating economical and financial impact on small business.

Ms. Cole also stated that when animals are used during the filming of movies, Hawaii is regulated by the American Humane Association (AHA), and anytime there is an animal on set, AHA is involved from start to finish; thus, the industry is highly regulated and uses an extremely safe approach to working with animals in film. Second Vice Chair Bennett stated that the film industry is very important to Kauai and has built a wonderful reputation in film

regarding the island's location, scenery, and its beauty. It was clarified that the proposed amendments exempt the importation of animals for filming purposes.

Dr. Tyler Ralston, a clinical psychologist speaking as a private citizen, strongly supports the rule changes and stated he also witnessed the shooting of Tyke the elephant. He believes that some of the information that was relayed previously was inaccurate and relayed an incident in Hilo of an escaped seal lion that was found four days after its escape on the rocks in Oahu at the time Rose Fernandez was running E.K. Fernandez. During this same time, a number of African lions escaped, but were subsequently found. He noted that Governor Ige publicly said that he will no longer allow permits to be issued for these type of wild animals and supported the proposed rule changes. Overall, he stated that animal circuses are behind the times, not progressive, and negatively impact the State's image. .

Upon hearing from the testifiers, Chair Borge stated that while empathizing with the testifiers in support of protecting the animals and of the public's safety, which is first and foremost, the small business impact is much greater than represented today due to the ancillary small businesses that will be impacted by the rule amendments. He believed that if and when certain animals are not wanted in the circus, the people will "vote" by either buying or not buying tickets to the venues.

Chair Borge suggested that while the amendments regarding the crickets and tilapia should proceed to public hearing, the amendments relating to the non-domestic dangerous wild animals regarding circuses and entertainment should be separated from the full measure. However, Mr. Jonathan Ho, DoAg's Plant Quarantine Branch Manager, explained that the dangerous and wild animal segment of the rules are "tied together" with other animals, such as the tilapia and crickets which may have positive, little, or no impact on small business.

Mr. Cundiff appreciated everyone's attendance at the meeting and those who provided testimony in the various aspects of their opinions, businesses and interests. He stressed that the rule is in front of this Board because DoAg identified the potential for small business impact; however, it is not this Board's purview to pass judgment as to whether or not there is cruelty to animals. This board's purview, which is advisory, is to understand what the rule change is and whether or not it has a negative impact on small business. He added that DoAg did not identify E.K. Fernandez by name or title, but did identify that there is a potential impact to small businesses; thus, the Board is not here today to say whether E.K. Fernandez is a large or a small business.

Further, Mr. Cundiff stated that other than the testimony received and heard at today's meeting, only through DoAg's public hearings would the actual impact to small businesses be brought forth by banning wild and dangerous animals. And, until the true impact of Hawaii's small businesses is known, including the impact to E.K. Fernandez, will this Board be able to understand the overall effect of the amendments.

Mr. Cundiff made a motion to recommend that the proposed amendments move forward to public hearing but with reservations on the sections of the rules regarding the banning of wild, undomesticated animals into the State due to the Board's concerns over the rules' impact on Hawaii's small business.

In addition, Mr. Cundiff recommended that the rule amendments proceed to public hearing because the impact on small business needs to be assessed further through the public hearings, and he clarified that the motion's reservations do not apply to the portions of the rules regarding tilapia and crickets as there was no indication that these portions of the rules negatively affect small business. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

V. ADMINISTRATIVE MATTERS

A. Discussion and Training on Board Member I-pads

DBEDT staff stated that the initial purpose of the I-pads would be for the members to download the agendas, minutes, and attached documents from the Board's website until DBEDT staff becomes familiar with uploading the documents onto the "cloud." Mr. Nakasago stated that he will assist the Board by working with the DBEDT's IT staff.

B. Update on Proposed Amendments to Chapter 201M, HRS

The members reviewed the proposed amendments to Chapter 201M, HRS, for submission to the 2017 legislature. Chair Borge noted that after last month's meeting when the Board approved the proposed changes to Chapter 201M, HRS, DBEDT director changed the board's recommendation under section 201M-5, HRS. Three more board members were added for nomination by the governor, (thereby increasing the Board's total number of proposed members from eleven to twelve), and the proposal for the Board to nominate two board members was deleted.

Upon discussion, the members preferred the original proposal which was to increase total membership to eleven, two nominations by the Board, two by the Governor, three by the Senate President, and three nominations by the House Speaker, as well as the Director of DBEDT, as the ex officio voting member.

C. Discussion and Action on the Board's Budget Proposal for Fiscal 2017 and 2018

Chair Borge stated that the Board's budget request is the same as it has been over the past few years, \$28,000 for a clerical assistant and \$25,000 for travel, training, etc. Mr. Nagasako stated that DBEDT's budget package will be submitted to the Budget and Finance Department at the end of the week, and after various appeals the proposal would proceed to the governor.

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

Ms. Palcovich announced that this Board is now on Facebook and has one following on Twitter. The members asked to be tagged onto Facebook.

As there have been no requests, to date, from the Board's regulatory review card, it was requested that a press release be sent out announcing its creation.

E. Discussion on Changing the Dates of the Board Meetings

It was discussed and decided that beginning January 2017, the board meetings will start at 10:00 a.m., rather than 1:00 p.m.

- VI. **NEXT MEETING** – The next meeting is scheduled for Wednesday, October 19, 2016, in Conference Room 436, 250 South Hotel Street, Honolulu, Hawaii, at 1:00 p.m.
- VII. **ADJOURNMENT** – The meeting adjourned at 4:15 p.m.