

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

June 18, 2014

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

I. **CALL TO ORDER:** Vice Chair Borge called the meeting to order at 9:30 a.m. with a quorum present.

MEMBERS PRESENT:

- Anthony Borge
- Craig Takamine
- Barbara Bennett
- Kyoko Kimura
- Mark Ritchie

ABSENT MEMBERS:

- Howard Lum
- Harris Nakamoto

STAFF: DBEDT
Dori Palcovich

Office of the Attorney General
Margaret Ahn

II. APPROVAL OF MAY 21, 2014 MINUTES

Ms. Kimura made a motion to accept the May 21, 2014 minutes, as amended. Second Vice Chair Bennett seconded the motion, and the Board members unanimously agreed.

Vice Chair Anthony Borge introduced himself, noting that the prior chair, Ms. Chu Lan Shubert-Kwock, recently resigned from this Board.

Due to the attendance of staff members from the County of Kauai, as well as Kauai-island testifiers, Vice Chair Borge changed the order of the agenda; the meeting began with Section IV., New Business, Subsection A.

III. OLD BUSINESS

A. Discussion and Action on the Small Business Statement After Public Hearing on Proposed Amendments promulgated by Department of Land and Natural Resources (DLNR) for Hawaii Administrative Rules (HAR) – Title 13 Chapter 231, Operations of Boats, Small Boat Harbors, and Permits; Chapter 251 Waikiki and Kaanapali Ocean Waters; Chapter 253 Registration and Permit Fees, and Chapter 256 Section 3 Commercial Operator Permit Requirements

Mr. Ed Underwood, Administrator from DLNR’s Division of Boating and Ocean Recreation, explained that the proposed rules are “after” the public hearing; the rule promulgating process took approximately five years. The rules pertain to commercial activity in State waters, as there are currently no rules in Hawaii that regulate commercial water activity. Due to the multiple commercial activities currently in State waters, such as kayaking, jet skiing, and others, these rules are meant to address those activities.

Mr. Underwood stated that the three biggest issues addressed with the business community came from: 1) the Waikiki beach operators and the commercial catamaran operators whose concern was that seven operators had exclusive use of Waikiki beach, have paid only \$8.50 a year in fees since territorial days, and have never paid comparable fees with others. After much negotiating with these operators, their attorneys, and the Board of Land and Natural Resources (BLNR), these operators were in agreement with the proposal from DLNR; 2) the Waikiki "beach boys," whose concern was about the renewability of the operator permits that are currently in place; and 3) Hawaii Island businesses whose concerns were with the commercial launch ramp permit, which will be limited to two permits. Based on these concerns, DLNR made an amendment to the rules. All permits that a commercial operator has currently in place, they may keep, transfer or sell them; however, if by attrition those permits come back to DLNR, the permits would be terminated.

Mr. Takamine heard from some of the Big Island businesses who requested meetings with DLNR that meetings were never held; as a result, the businesses were unable to comment and provide feedback prior to the public hearing. This is largely because at the public hearings, only comments are made; no questions are answered by DLNR. Vice Chair Borge added that while rules are necessary to govern regulations, there must also be dialogue with the business community. Mr. Underwood replied that he believes DLNR has been completely open to the community and that the "same cast of characters" discussing the same concerns have occurred. He stated that he has provided his personal telephone number, is attentive to all comments he receives about the rules, and makes sure the rules are physically posted at the harbors and on DLNR's website. He also stated that he read Mr. Gaffney's testimony that was submitted to this Board, and that he previously responded in writing as well as at the hearing to every question and every concern that was posed. Further, he believes that these rules have been vetted so much that he does not know how much more DLNR can do with the rules.

Mr. Takamine also heard that a mandatory advisory board was to be created by law but the small businesses were not aware of the creation of an advisory board. Mr. Underwood stated that there is an ocean recreation management taskforce/board made up of three individuals; they met once and never met again. Also, Senator Baker advised DLNR to form an advisory board in Lahaina, Maui; this board met once and has never met again despite requests from DLNR to meet. He further stated that if there is an area where an advisory board needs to be set up, DLNR is willing to assist by providing staff. Due to Mr. Takamine's reservations that DLNR did not hear all the small businesses commentary about the rules, he believes the rules should be deferred until such time that all the small businesses have been heard. Mr. Underwood replied that the BLNR has approved these rules and have gone to the Governor for his signature.

Mr. Takamine recommended that a memo be sent to the Governor to not adopt the proposed rules due to the concerns of the Island of Hawaii small businesses; Ms. Kimura seconded the motion. Mr. Takamine, Vice Chair Borge, and Ms. Kimura voted in favor of the motion, Second Vice Chair Bennett and Mr. Ritchie were opposed to the motion. As a result, no action was taken.

B. Discussion and Action on Small Business Statement after Public Hearing on Proposed New Rules, Repeal, and Amendments promulgated by Department of Labor and Industrial Relations (DLIR) for HAR Title 12, Subtitle 8, Part 11 in Chapters 230.1, 232.1, 234.1, 229, 240-1, 230, 231, 232, 233, 234, 235, 236, 237, 238, and 239

Ms. Leana Ka'apana, Branch Supervisor at DLIR, and elevator inspector, Mr. Dennis Mendoza discussed the proposed rules after public hearing. Ms. Ka'apana stated that she assisted with amending the rules, and that there was no negative testimony at the public hearing. Vice Chair Borge noted that this Board reviewed these rules at length prior to the public hearing, and there appears to be nothing to negatively impact the small businesses as the majority of the amendments relate to the monitoring and the policing of the commercial elevators, escalators, and dumbwaiters.

Second Vice Chair Bennett made a motion to approve the rules to proceed to public hearing. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

IV. NEW BUSINESS

A. Discussion and on Action Proposed New Rules promulgated by the Office of Economic Development, County of Kauai, for Rules and Regulations governing Section 22, Article 23 of the Kauai County Code, pertaining to Pesticides and Genetically Modified Organisms

Vice Chair Borge stated that Second Vice Chair and Discussion Leader, Barbara Bennett, will lead the discussion of this rule.

Mr. Alfred Castillo, Jr., County Attorney from Kauai, and Mr. George Costa, Director of the Office of Economic Development (OED) at the County of Kauai, discussed the history and background of the proposed rules. The promulgation of these new rules stem from the enactment of the 2013 Ordinance 960, which is codified as Section 22, Article 23 of the Kauai County Code. Prior to passing this ordinance, there were several community meetings held to discuss the proposal, and after the ordinance passed, there were additional meetings that had less attendance. Most of the feedback received from the community was helpful and assisted OED in promulgating and finalizing the proposed rules.

The proposed rules have three basic objectives: 1) they require large commercial agricultural entities which have utilized five pounds or 15 gallons of a single restricted use pesticide in the prior calendar year to disclose their pesticide usage; 2) the commercial agricultural entities are required to create buffer zones to protect specified groups from exposure to pesticides; and 3) they require all commercial agricultural entities to file annual reports disclosing the growth of genetically modified organisms (GMO's).

Mr. George Costa stated that the proposed rules will have an adverse effect on small business because the small businesses are required to file an annual report every year with OED to disclose the usage of pesticides. He explained that civil fines for failure to file the annual reports on GMO activity are set at the lowest dollar amount permitted under Article 22, Section 23. The fines do not involve any discretion by OED in the rulemaking process but the OED Director is granted the authority to waive or reduce fines on the small businesses.

Mr. Wayne Katayama, testifying as an individual, who is also president of Kauai Coffee Co., and a farmer whose farm is not GMO, explained that the rules, as written, support Ordinance 960, but he believes the rules put a burden on emerging businesses. A major concern of the ordinance involves pesticide buffer zones which requires no crops to be grown within a 500 foot buffer zone of certain real property facilities. Another issue is the establishment of an emergency hotline. Mr. Jerry Ornellas, president of Kauai County Farm Bureau, stated that, presently, farming is generally "not good" in regards to the economic climate. Further, the ordinance and the proposed rules will cause a severe economic disadvantage for the rest of the farms due to the regulatory burden, and he noted that businesses in other Hawaii counties are not subject to comply with the same burdensome rules.

Dr. Cindy Goldstein, Governor Affairs Manager at DuPont Pioneer, stated that the impact of the rules and the ordinance will negatively impact her company's seed work by reducing the seed production activity, which will result in an economic multiplier affect across the small business community. The proposed rules also create instability for the agricultural business, in general. Mr. Mike Faye, president of Kikiaola Construction, Inc., believes that the law is flawed, as written.

Vice Chair Borge commented that in regards to GMO, in the flora business, this has been going on for quite some time. If Ordinance 960 was passed fifty years ago, when the regulations were few, it would have shut down Hawaii's sugar companies. But this Board must look at how these rules impact small business. In hearing the testimonies today, there is a negative impact, not only to the farming industry but with many other businesses both directly and indirectly. As a result, homework is needed to determine specifically what and how negatively these rules impact small business. Mr. Ritchie concurred, and noted that because it is not specifically known how these rules will impact small business, the more specific the County is, the easier it will be for small businesses to understand the impacts. Thus, this Board should relay the highest and most prevalent impacts these rules would have on the small business community. As such, and in fairness to avoid getting caught up in the potential health issues of GMO's, the main issues should be fully discussed within the County of Kauai and the small business community with the intent for clarification and potential modification. Mr. Ritchie concluded that the main small business issues include the pesticide buffer zones, which essentially result in land becoming less economical, the medical/emergency hotline, civil fines, and the business and economic uncertainty created by these rules that will lead to less land investment and planning for future use.

Mr. Ritchie made a motion to proceed to public hearing with a memorandum to the Mayor stating that this Board has concerns with the administrative rules in the following specific areas that affect the small business community: 1) pesticide buffer zones, 2) the establishment of an emergency/medical hotline, 3) proposed civil fines for failure to file mandated annual reports, and 4) the business and economic uncertainty created by these rules leading to less land investment and planning for future use. Vice Chair Takamine seconded the motion, and the Board members unanimously agreed.

Second Vice Chair Bennett thanked all those who attended the meeting in regards to these rules.

B. Discussion and Action on Proposed Amendments promulgated by DLNR for HAR Title 13 Chapter 60.8 Ha'ena Community-Based Subsistence Fishing Area, Kauai

Mr. Frazer McGilvray, Administrator at DOH's Division of Aquatic Resources and Mr. David Sukoda, Marine Law Fellow, explained that the proposed new rules will establish within the Ha'ena Community-Based Subsistence Fishing Area the following: 1) limits on fishing and harvesting gear and methods, 2) restrictions on fishing and harvesting for commercial purposes, 3) daily take and possession limits for certain species, and 4) a "no entry" sub-zone. The regulations are currently insufficient to ensure the sustainability of marine resources in Ha'ena.

Mr. Takamine questioned whether or not these rules had a small business impact and whether meetings were held with the affected small business community. Mr. McGilvray responded that these rules are attempting to bring the area in-line with a community-based subsistence. Ms. Emma Anders added that the commercial fishers who were consulted about being unable to harvest marine life within this area for commercial purposes were supportive of the proposed rules, largely because the fishers commercial harvest from adjacent areas more often than from within the proposed community-based area, and that healthy fish populations within this designated area will result in more fish in the adjacent areas. It was noted that the "catch" refers to "any" commercial catch whether it is commercial fishers or aquarium users.

As the rules were expected to have little impact on small business, Mr. Takamine made a motion to approve the rules to proceed to public hearing. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

C. Discussion and Action on Proposed Amendments promulgated by Department of Health (DOH) for HAR Title 11 Chapter 62, Wastewater Systems

Ms. Sina Pruder, from DOH's Environmental Management Division, explained that there are two major requirements connected with the rule's proposed amendments: 1) when a wastewater system serves a building it must be upgraded, and 2) upon transfer of the ownership of any building served by an existing cesspool, the owner is required to replace the cesspool with a new wastewater system other than a cesspool. It was noted that EPA is recommending that these requirements are made but not mandating they are made. Small business impact pertains to when a commercial property owner upgrades its wastewater system based on proposed expansion or addition to its building and those buildings that are connected to septic tank systems or wastewater treatment plants.

Mr. Takamine stated that the added cost to upgrade the wastewater system may severely affect the buyers' capacity to renovate, which will ultimately hurt small business contractors. Vice Chair Borge noted that while these rules should be moved to public hearing, this Board has concerns when residential homes are resold as there would be an impact to small business. However, it will be important for this Board to see what, if any, comments are made at the public hearing. Mr. Ritchie noted that a property owner would not have to remediate unless the property was sold or transferred.

Mr. Takamine made a motion to move the rules to go to public hearing noting that this Board has a concern with mandating cesspool conversions with the resale of property. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

V. ADMINISTRATIVE MATTERS

A. Action and Voting of Board Chair, pursuant to Section 201M-5 (c), Hawaii Revised Statutes, and Election of Vice Chair

At the recommendation of the Office of Information Practices, the members re-voted for the Board's Chair and Vice Chair from the last meeting.

Second Vice Chair Bennett made a motion to nominate Mr. Borge as Chair, and Mr. Ritchie seconded the motion. The motion unanimously passed.

Second Vice Chair Bennett made a motion to nominate Mr. Takamine as Vice Chair, and Ms. Kimura seconded the motion. The motion unanimously passed.

B. Discussion and Action on the Creation of an Investigative Task Force for Fact-Finding Purposes regarding the Sustainability of this Board and the Possibility of Transferring this Board to Another Suitable State Department

Chair Borge stated that due to this past year's legislative session in regards to the bill that attempted to repeal this Board, it has prompted him to take a pro-active approach regarding this Board's sustainability. He would like to do fact-finding and advocating in order to see if this Board has outside support. In doing so, he spoke with Mr. Tim Lyons from the Hawaii Business League, and will be speaking with the Hawaii Chamber of Commerce. He believes an investigative taskforce will assist this Board with outreach to the various chambers and business associations as to whether this Board is valued, and/or if the Board should move forward. He noted that funding would be essential for the sustainability to this Board if the businesses believe a small business board is important.

Second Vice Chair Bennett explained that she and Chair Borge met with DBEDT Director Richard Lim in May; Deputy Director Evans was also in attendance. The meeting was eye opening and very valuable. Director Lim recommended that this Board take the path of going to the Department of Commerce and Consumer Affairs (DCCA) because DCCA has funds available for this Board to fulfill its mission. At this meeting, it was mentioned that DBEDT had previously attempted to transfer this Board twice to DCCA through legislative means, but DCCA had responded by indicating there is a conflict with a regulatory board being in a regulatory agency.

Deputy Attorney General Ahn stated that a motion would be for this Board to create an investigative taskforce and naming the taskforce members, which must be fewer than the quorum number (five), it would state the task, with the taskforce then meeting outside of the Sunshine Law. Further, the findings and recommendations would be brought back to the whole Board during a public meeting, and at a subsequent meeting, the Board can vote on it.

Ms. Kimura made a motion that an investigative taskforce be formed to fully explore the sustainability of this Board and the possibility of transferring this Board to another State agency, such as DCCA, with the members of the investigative committee to include Mr. Borge, Mr. Takamine, and Ms. Bennett. Vice Chair Takamine seconded the motion, and the Board members unanimously agreed.

C. Review of Board Member Discussion Leader Assignments for the State Departments and Counties' Administrative Rule Review

This agenda item was deferred until the next Board meeting.

VI. NEXT MEETING – Scheduled for Wednesday, July 16, 2014, 250 South Hotel Street, Honolulu, HI, Room 436.

VII. ADJOURNMENT – Ms. Kimura made a motion to adjourn the meeting. Second Vice Chair Bennett seconded the motion; the meeting adjourned at 1:00 p.m.