

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

March 19, 2014

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

- I. **CALL TO ORDER:** Chair Shubert-Kwock called the meeting to order at 9:30 a.m., with a quorum present.

MEMBERS PRESENT:

- Chu Lan Shubert-Kwock
- Leslie Mullens
- Barbara Bennett
- Howard Lum
- Kyoko Kimura
- Craig Takamine
- Harris Nakamoto
- Mark Ritchie

ABSENT MEMBERS:

- Anthony Borge

STAFF: DBEDT
Dori Palcovich

Office of the Attorney General
Margaret Ahn

II. INTRODUCTION OF NEW BOARD MEMBER

Chair Shubert-Kwock introduced and welcomed Mr. Harris Nakamoto as this Board's newest member who is a health expert; in turn, each board member introduced themselves to Mr. Nakamoto. Mr. Mark Ritchie was also introduced as this Board's newest DBEDT representative.

III. APPROVAL OF FEBRUARY 19, 2014 MINUTES

Second Vice Chair Mullens made a motion to accept the February 19, 2014 minutes, as presented. Mr. Takamine seconded the motion, and the Board members unanimously agreed.

IV. OLD BUSINESS

A. Discussion and Action on the Small Business Statement After Public Hearing for Proposed Amendments Promulgated by the Liquor Commission of the City and County of Honolulu in Section 3-80-1.1 Definitions through Section 3-85-91.12 Licenses Under Safekeeping

Prior to hearing from Ms. Anna Hirai, Acting Administrator of the Liquor Commission at the City and County of Honolulu, Chair Shubert-Kwock explained that a testifier believed there was a conflict of interest with her administering and voting on these rules. She explained that after consulting with the appropriate ethics commissions and the deputy attorney general, it was determined that no conflict exists.

Ms. Hirai recapped the history of the rules, explaining that changes have not been made in five years; (there will be another rule amendment hearing on additional rules sometime this year). A public hearing was held on December 12, 2013, with testimony received on sixteen of the proposed twenty-two amendments; three individuals provided oral testimony and two submitted written testimony. Subsequent to the public hearing, the Liquor Commission made one revision to "Transfer of Corporate stock; Notification regarding Limited Partners, Limited Liability Company Managers or Members."

Chair Shubert-Kwock confirmed and clarified some of the Commission's proposed amendments including stacking, architectural requirements/alteration of licensed premises, and transfer of managers' licenses. Ms. Hirai explained why this Board's prior recommendation to amend the recorking section was not accepted by the Commission and clarified the proper recorking requirements. The members thanked Ms. Hirai for her hard work and presentation on the proposed rules.

Testifier, Mr. Bill Comerford, spokesman for the Hawaii Bar Owners Association (HBOA), commended Ms. Hirai for her involvement with unifying the rules to a comprehensive level; he believed that the majority of the proposed amendments are within reason. His three main concerns, however, with the Commission's proposal are: 1) Section 3-81-20, General Right of Inspection; 2) Section 3-84-78.01, Conduct of Employees, and 3) Section 3-82-38.25, Restrictions or Conditions on Licenses.

Under General Right of Inspection, Mr. Comerford requested the rules stay within the defined limits of the law in regards to examining the books and records; also, cameras and camera recordings should not be inspected without request and consent. Under Conduct of Employees, he requested the rules not limit the ability of a restaurant's staff to control the "room," which he believes, is an unrealistic request. By putting this provision into the rules, he believes it makes every well-intended action subject to legal consequences by law enforcement or lawsuit; it also fails the intent of the law to subdue inappropriate actions of the patrons. Ms. Kimura expressed concern about the language of this provision, and suggested that additional language be included to allow employees to take action in order to keep the licensees' premises safe.

In regards to Mr. Comerford's concerns on the general right of inspection, Ms. Hirai stated that licensees have a better and clearer idea as to what occurs; it is also added in other protections of confidentiality and privacy concerns. In regards to the conduct of employees, the licensees must abide by the law, and the rule properly interprets the responsibilities of a licensee. Also, the Commission is reluctant to define a specific category of employee such as bouncers or doormen.

Under Restrictions or Conditions on Licenses, Mr. Comerford posed concern that the restrictions may result in certain classes of licenses not being operable within expected hours, and would result in limited operations that are unsustainable, unsellable and not leasable with the restrictions. Regarding this rule, Ms. Hirai explained that only the Commission has the authority to impose restrictions. When a restriction is imposed on a license, the restriction is not necessarily imposed forever as the licensees have the ability, even in the context of a transfer, to go back to the Commission and appeal or request a lifting or modification of the restriction, as the Commission has the ability to hear or waive a rule for good cause.

Ms. Hirai also explained the Commission always requests specific language from businesses when there are requests for changes to the rules in order to fully understand the request. Regarding the stacking provision, Ms. Hirai stated that setting a specific time limit would be different for different classes of establishments, so there would be an inconsistency within the law if a time limit was created. .

Ms. Bennett made a motion to approve the rules to proceed to the Mayor of the City and County of Honolulu for adoption. Mr. Takamine seconded the motion, with seven Board members supporting, and Ms. Kimura opposing the motion.

B. Discussion and Action on the Small Business Statement After Public Hearing for Proposed New Rules Promulgated by the Liquor Commission of the City and County of Honolulu in Section 3-81.20 General Right of Inspection, Section 3-82-38.26 Bottle Service for On-Premise Consumption, Section 3-82-41.3 Management or Operating Agreements, and Section 3-84-73.1 Quality of Liquor

See discussion in Section IV. Old Business, Subsection A.

Ms. Bennett made a motion to approve the rules to proceed to the Mayor of the City and County of Honolulu for adoption. Mr. Takamine seconded the motion, with seven Board members supporting, and Ms. Kimura opposing the motion.

C. Discussion and Action on the Small Business Statement After Public Hearing for Proposed Amendments Promulgated by the Department of Agriculture for Hawaii Administrative Rules (HAR) Title 4 Chapter 143 Standards for Coffee

Ms. Jeri Kahana, Administrator at DoAg's Quality Assurance Division explained that these rules have been in the promulgating process over the past two years. She discussed with the members information from the small business statement after public hearing, which was held on October 11, 2013.

Mr. Takamine thought it important to designate Ka'u coffee as "One Hundred Percent Ka'u / Hawaii Island Prime Coffee" because Ka'u coffee is highly regarded in the world; Ms. Kahana responded that Ka'u is a recognized, designated geographic region for coffee. She explained there is a grade standard and a geographic region and Ka'u has an identified region whereas, Kona has a designated grade and a region for coffee; Ka'u does not. She added that Ka'u coffee can be labeled "Hawaii Island, extra fancy 100% Ka'u Coffee," but it cannot be designated as "Ka'u extra fancy, one hundred percent Ka'u coffee." If another grade standard was added, there would be nearly 50 different grade standards. Scientifically, there is no method to determine if the coffee is actually from a specific region. All of the grade standards are exactly identical; the only difference is the geographic prefix in front of the label, which seems to cause a lot of confusion.

In response to recordkeeping concerns regarding an undue burden on the small coffee farmers, Ms. Kahana stated that her division is currently working closely with the Attorney General's Office on this issue. The recordkeeping information pertains to where the coffee is

being transported, who is carrying it, etc. If an investigation is required, there would be proper documentation and information to follow-up with.

Ms. Bennett made a motion to approve the proposed amended rules to go to the Governor for adoption. Second Vice Chair Mullens seconded the motion, and the Board members unanimously agreed.

V. NEW BUSINESS

A. Discussion and Action on Proposed New Rules Promulgated by the County of Kauai's Planning Commission in the Kauai County Code, Chapter 8, Article 17, Relating to Transient Vacation Rentals

Ms. Bennett introduced Mr. Dee Crowell, Deputy Director of the Kauai Planning Commission, who explained that the proposed rules concern the approval of land use permits throughout the County of Kauai. This proposal outlines the violations and enforcement of the rules, zoning compliance notice requirements, and includes a schedule of fines. Small business owners apply for land use permits for construction purposes and may be directly involved in land use development and construction contracting.

In regards to whether or not there is any unreasonable or undue burden on small business, it was stated that registered small businesses that comply with the rules and pay taxes on vacation property rentals are being impacted by those businesses that are unregistered and operating without proper licenses. Ms. Bennett explained that a vacation rental proprietor must show on-line what they are representing and promising to consumers; if they do not provide the renters with what was actually promised, renters will complain directly to the Kauai Visitors Bureau.

Second Vice Chair Mullens made a motion to recommend to the Kauai Planning Commission that the proposed rules be passed on to public hearing. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on Proposed New Rules Promulgated by the County of Kauai's Planning Commission in the Kauai County Code, Chapter 8, Interpretive Administrative Zoning Ordinance Rules and Regulations Relating to Chapters 8, 9, and 10

Mr. Crowell explained that this rule proposal is categorized into two efforts: 1) recodification of previous interpretive rules to the Comprehensive Zoning Ordinance, and 2) introduction of additional interpretive rules. The amendments directly relate to small business matters involving food trucks, minor food processing, and film production. It was stated that the proposed rules should not have a detrimental impact on small businesses as the rules involve the implementation of a county law, and streamline current procedures under the existing law. Mr. Crowell defined "kitchen" as stated under the Comprehensive Zoning Ordinance, and noted that it has been found that there have been abuses creating structures considered "dwelling, multiple family" from those previously permitted as "dwelling, single family detached."

Second Vice Chair Mullens made a motion to recommend to the Kauai Planning Commission that the proposed rules be passed on to public hearing. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

C. Discussion and Action on Proposed New Rules Promulgated by the County of Kauai's Planning Commission in the Kauai County Code, Chapter 8, Processing and Review of Use Permits Concerning the Construction and Operation of Fruit and Vegetable Stands in the Agriculture and Open Zoning Districts

Mr. Dee Crowell also explained that over the years, fruit and vegetable stands have been set up all over the island; as such, the County of Kauai has created these rules, which pertain to the processing and review of use permits for fruit and vegetable stands. Specifically, the rules prevent a proliferation of fruit and vegetable stands throughout agricultural lands and establishes restrictions on the size and operations of the stands. These rules should, also, not have a negative impact on small businesses as the rules involve the implementation of a county law, and streamline current procedures under the existing law. Mr. Crowell defined "kitchen" as stated under the Comprehensive Zoning

Second Vice Chair Mullens made a motion to recommend to the Kauai Planning Commission that the proposed rules be passed on to public hearing. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

D. Discussion and Action on Proposed Amendments Promulgated by Department of Commerce and Consumer Affairs on HAR Title 16 Chapter 99, Relating to Real Estate Brokers and Salespersons

Chair Shubert-Kwock stated that she is a licensed real estate broker, and after consulting with the Hawaii Ethics Commission and the Attorney General's Office, she is recusing herself from discussing and voting on this matter due to a potential conflict of interest. Ms. Kimura stated that she has a real estate license, and as this would impose a potential financial conflict of interest, she too recused herself from discussing and voting on this matter. As a result of these two members recusing themselves, Deputy Attorney General Ahn explained that the rules may be discussed by the other four members but there is an insufficient amount of members to take any action.

Mr. Miles Ino, Executive Officer, briefly discussed the history of these rules and the purpose for the proposed changes, which in part, relate to changes in the Hawaii Revised Statutes since 2001. Upon hearing from Mr. Ino, Chair Shubert-Kwock believed this Board was not adequately representing the small business real estate community, and would like to extend an invitation to the Hawaii Association of Realtors and Honolulu Board of Realtors for input. In reply, Mr. Ino stated he will plan to return to the Board's next meeting. Therefore, this line item is deferred until the next Board meeting.

E. Discussion and Action on Proposed Amendments Promulgated by Department of Land and Natural Resources (DLNR) in HAR Title 13 Section 233-26, Charges for Parking; and HAR Title 13 Section 256-16 Thrill Craft Operations; General Provisions

Second Vice Chair Mullens stated that the proposed rules are self-explanatory, and she read a portion of the small business impact statement that stated, "We do not expect any impact to businesses regarding the amendment to the thrill craft education rule." She noted that the section on Charges for Parking, will enable DLNR to establish parking fees in areas where Counties, such as Maui, do not charge or have established vehicle public parking rates. She explained that DLNR is offering different options in regards to parking. For example, a business owner who has a moored vessel may obtain a monthly parking pass for \$25, and an employee may obtain a monthly parking pass for \$90, or in the alternative, park in a designated area, if available, for \$30 per month for a covered stall, or \$20 per month for an open stall.

Amendments to the Thrill Craft Operations section will clarify that, "all persons holding or receiving a certificate of completion for the rule's education requirement on the operation of thrill craft are exempt from the education requirement, regarding the operation of power driven vessels." DLNR was not imposing fees associated with the thrill craft education rule amendment.

Second Vice Chair Mullens stated that in reading over the supporting documentation, DLNR did not involve the small businesses in the development of the rule amendments because the parking fee rule is a clarification on how parking rates will be established and commercial thrill craft operators are already currently required to provide education through the Hawaii Administrative Rules. Chair Shubert-Kwock wondered if the registered small businesses, impacted by the rules, were contacted for any input to the rule amendments; Ms. Kimura added that one small business is exempt from paying the fees and another is not.

During the discussion, Second Vice Chair Mullens apologized to Chair Shubert-Kwock and questioned what she should do for her because she was feeling a really, hostile, disrespectful time during their discussion. Chair Shubert-Kwock responded that she wanted to correct Second Vice Chair Mullens as her response was not hostile, but was simply the way she talks. Second Vice Chair Mullens stated that she may be the only one perceiving the response that way. Chair Shubert-Kwock noted that it was very unfortunate that she felt that way, and clarified that her response was not hostile, but that she did not hear Second Vice Chair Mullens explain the impacted small businesses were not included in the rule-making process.

Second Vice Chair Mullens made a motion for the rules to move forward to public hearing, and Mr. Ritchie seconded the motion. Second Vice Chair Mullens, Ms. Bennett, Ms. Kimura, Mr. Takamine, and Mr. Ritchie approved the motion, Chair Shubert-Kwock opposed the motion, and Mr. Lum and Mr. Nakamoto were absent. The motion passed.

F. Discussion and Action on Proposed New Chapter Promulgated by Office of the Lieutenant Governor on HAR Title 2 Chapter 15, Time Share Board Commissioners of Deeds

Chair Shubert-Kwock removed this item from the agenda due to the rules not having small business impact and hearing that no one from the public would be testifying; Ms. Palcovich added that she did not have time to screen the rules.

G. Discussion and Action on Proposed Amendments Promulgated by Department of Agriculture (DoAg) for HAR Title 4 Chapter 60 Milk Control Rules

Mr. Grant Tomita, Milk Control Specialist from DoAg's Quality Assurance Division, discussed the history and purpose of the Milk rules. Hawaii's milk distribution comes from local dairies, 20%, and dairies outside Hawaii, 80%. The proposed amendments will allow the milk producers to petition the DoAg to grant a waiver that would permit them to sell or buy milk for less than the minimum price as currently prescribed by the existing rules. This is to allow the milk producers to make competitive, business decisions that will permit milk operations to succeed and grow by arriving at milk prices that are competitive with the mainland market.

Second Vice Chair Mullens complimented Mr. Tomita on the thorough small business impact statement, appreciated that the small businesses were involved in the development of the proposed rules, and found that the amendments will directly benefit the dairy producers. It was noted that there are currently two major dairies on the Big Island, plus a small dairy operating under the name of Naked Cow Dairy, located in Waianae, that does not process "fluid" milk, but produces cheese and cheese spreads. There is also a possible new dairy to begin operations in the near future.

Chair Shubert-Kwock made a motion to send the amended rules to the Governor to move on to public hearing. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

VI. LEGISLATIVE MATTERS

A. Update on Senate Bill 2487 SD1, Relating to the Small Business Regulatory Flexibility Act

Chair Shubert-Kwock updated the members of the changes made to this measure by the House Committee on Economic Development & Business, which removed the 2019 sunset date that was added by the Senate. The new version also includes, "the department of business, economic development, and tourism shall provide sufficient financial and administrative support reasonably necessary for the board to conduct small business regulatory review activities." She noted that there will be another hearing on this measure that may have more changes, and will be heard in Representative McKelvey's Committee on Consumer Protection & Commerce.

In regards to communication on this measure, Deputy Attorney General Ahn stated that it was brought to her attention that a number of emails by members of this Board were disseminated to "all" of the members. She explained that this is a clear and absolute violation of the Sunshine Law, and one that was discussed with this Board before. Willful violations of the Sunshine Law are a misdemeanor, where a member can be summarily

removed from a board. She warned the board members not to do this again.

She explained that when emails are sent to members from DBEDT staff, a member must never, in turn, reply to “all” the members. If a member would like to send out information to the whole board, it should be sent to DBEDT staff, and if necessary, it will be forwarded to the Attorney General’s Office for review. She clarified, however, that two board members can communicate board business with “one” other member, but it cannot be “serial” or disseminated to other members one at a time.

B. Update on Governor’s Message No. 503, Submitting for Consideration and Confirmation to the Small Business Regulatory Review Board, Gubernatorial Nominee Harris Nakamoto, for a term to expire June 30, 2015

No updates on this measure.

VII. ADMINISTRATIVE MATTERS

A. Update on Board’s Fiscal Year 2015 Supplemental Budget Request

Chair Shubert-Kwock updated the members on the Board’s budget request, stating that upon providing the House Finance Committee with explanations to the Committee’s questions, it passed on to the Senate Ways & Means Committee. The House’s version came back with a proposal of \$28,000 for an Office Assistant II, and \$14,000 for operating costs. She noted that the Council on Revenues lowered the budget forecast and DBEDT Director Lim testified as to “no changes” to DBEDT’s total budget proposal during the recent House budget hearing.

B. Discussion and Action on Proposal to Revise the Small Business Impact Statement

Chair Shubert-Kwock conveyed that Ms. Palcovich and Deputy Attorney General Ahn are working on revising the small business impact statement at the recommendation of Second Vice Chair Mullens. This agenda item will be deferred until a final draft version can be provided to the members.

C. Chair’s Report – Exhibit A

Chair Shubert-Kwock discussed the activities outlined in the Chair’s report.

VIII. NEXT MEETING - Scheduled for Wednesday, April 16, 2014, 250 South Hotel Street, Honolulu, HI, Conference Room 436, at 9:30 a.m.

IX. ADJOURNMENT – Ms. Bennett made a motion to adjourn the meeting. Ms. Kimura seconded the motion, and the meeting adjourned at 1:26 p.m.