

## Small Business Regulatory Review Board

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### MINUTES OF REGULAR MEETING

September 23, 2009

Conference Room 410 - No. 1 Capitol Building, Honolulu, HI

I. **CALL TO ORDER:** Chair Woods called the meeting to order at 10:33 a.m., with a quorum present.

**MEMBERS PRESENT:**

- Lynne Woods
- Charles Au
- Richard Schnitzler
- Sharon L. Pang
- Dorvin Leis
- Donald Dymond
- David S. De Luz, Jr.

**ABSENT MEMBERS:**

- Peter Yukimura
- Bruce Bucky

**STAFF:**      DBEDT                              Office of the Attorney General  
Theodore E. Liu                      Margaret Ahn  
Steve Bretschneider  
Dori Palcovich

### WORKING LUNCH AS THE MEETING PROGRESSED

II. **APPROVAL OF JULY 15, 2009 MINUTES**

Mr. Leis recommended that the July 15, 2009 minutes be approved as presented, Mr. De Luz, Jr., seconded and the Board members unanimously agreed.

III. **OLD BUSINESS**

- A. Review and discussion of post public hearing statement of HAR Chapter 11-81, "Smoking in Public Places" (DOH) – Chair Woods explained that these post public hearing statements are deferred until the next board meeting due to changes that DOH will be making to the rules as a result of the recent public hearing. Mr. Michael Zehner provided written testimony and Mr. Bill Comerford provided three key points regarding the rules; he requested that this Board consider the Small Business Bill of Rights when addressing the "final" rules for adoption.
- B. Review and discussion of post public hearing statement of HAR Chapter 16-169, "Actuarial Opinion and Memorandum" (DCCA) – Chair Woods explained that there is no one from DCCA to present the post public hearing statement. She indicated that the public hearing was held on September 9, 2009, no testimony was received and no changes were proposed. Vice Chair Au recommended that the proposed rules be forwarded to the Governor for final approval, Mr. De Luz, Jr., seconded and the Board members unanimously agreed.
- C. Review and discussion of post public hearing statement of HAR Chapter 16-12, "Medicare Supplement Insurance Minimum Standards" (DCCA) – Chair Woods explained that there is no one from DCCA to present the post public hearing statement. She indicated that the public hearing was held on September 14, 2009, no testimony was received and no changes were proposed to the revised proposed rules. Upon hearing this, Mr. De Luz, Jr., recommended that the proposed rules proceed to the Governor for adoption, Mr. Dymond seconded and the Board members unanimously agreed.
- D. Update of responses to 201M-7 Periodic Evaluation Report - Chair Woods reminded the members that the State departments responded to the Board's request regarding complaints and citations that were received by small businesses as they relate to the rules, pursuant to Section 201M-7, HRS. She

requested that upon reviewing the responses, the members contact Ms. Palcovich if they want to recommend any rules for review.

#### **IV. NEW BUSINESS**

- A.** Review and discussion of amendments to HAR Chapter 15-311 “Rental Housing Trust Fund Program,” 15-312 “Hula Mae Multi-Family Rental Housing Program,” 15-313 “Low-Income Housing Tax Credit Program,” 15-180 “Rental Housing Trust Fund Program,” and 15-168 “Low-Income Housing Tax Credit Program” (DBEDT/HHFDC) – Ms. Mavis Masaki and Mr. Darren Ueki from DBEDT’s Hawaii Housing Finance and Development Corporation (HHFDC) explained that the existing rules are several years old and require revisions to incorporate statutory changes to the rental housing trust fund program, which supersedes the existing rules. The proposed rules also incorporate additional applications procedure, selection criteria, and compliance monitoring and enforcement provisions from the rental housing trust fund program procedural manual. In summary, changes to the rules include repealing all referencing to the defunct rental housing trust fund commission throughout the rules, conforming to the list of program preferences to various sections of the rules, imposing program fees, and adding program compliance monitoring requirements that are currently part of the rental housing trust fund procedural manual. Any small business impact would pertain to the developers working with HHFDC; however, because the procedures are already in existence, the incorporation of the procedures in the rules is essentially a formality. Upon review, Second Vice Chair Schnitzler recommended that the rules proceed to public hearing, Vice Chair Au seconded and the Board members unanimously agreed.
- B.** Review and discussion of amendments to HAR Chapter 13-146, “Hawaii State Park System” (DLNR) – Board of Land and Natural Resources Chairperson Laura Thielen thanked the members for hearing DLNR’s testimony in support of the proposed rule amendments. Chairperson Thielen introduced Mr. Curt Cottrell of DLNR’s State Parks Division who explained that during the last legislative session, DLNR proposed a bill to the legislature known as “Recreational Renaissance,” where over a five-year period DLNR would issue bonds and build \$240 million in capital improvement facilities that are beyond repair in the State parks, small boat harbors, hiking trails, boat ramps, and piers. While the Governor supported the plan, the bill stalled in conference committee and ultimately never passed, thereby, temporarily stopping DLNR from performing any new capital improvements. It was noted that these public recreational areas continue to fall into disrepair and are in poor condition; examples include broken toilets in need of replacement, unsafe exposed re-bars on broken down picnic tables, deteriorating cabins, and the lack of piers. As the State’s facilities are too important to close or to let slide further into decline, Plan B, “Back to Basics” was presented.

Mr. Cottrell explained that Plan B focuses on two major goals: 1) Within two years, generate \$8 million annually in new, non-taxpayer revenue to support routine and scheduled repair maintenance, and improve operations in State parks, harbors, hiking trails, boat ramps, and piers; and 2) Within five years, generate an additional \$12 million annually in new, non-taxpayer revenue from urban and industrial land leases to support debt service on capital improvements in State parks, harbors, hiking trails, boat ramps and piers. Mr. Cottrell explained that \$4 million is anticipated from State parks’ and trails’ parking and entry fees at the eight, high visitor destination parks as well as new and existing urban land leases and rents/special use permits. It was explained that entry fees for Diamond Head will be \$5.00 per vehicle - \$10.00 per 1-7 passenger commercial vans, \$20.00 per 7+ passenger commercial vans, and \$40.00 per 25+ passenger commercial buses. As the Land Board is the entity to set the fees, there is no need to go to a public hearing for fee increases. The special use permit will be park specific but transferable; it may also be revocable. After a series of questions, Second Vice Chair Schnitzler recommended that the proposed rules proceed to public hearing, Mr. Leis seconded, and the Board members unanimously agreed.

- C.** Review and discussion of amendments to HAR Chapter 13-233 and 234, “Small Boat Harbors,” and HAR Chapter 241, “Boating” (DLNR) – Chairperson Laura Thielen introduced Mr. Edward Underwood of DLNR’s Division of Boating and Ocean Recreation (DOBOR), who explained that the boating program has two primary focuses: 1) Management of the State’s boat harbors, and 2) Management of the off-shore recreation management areas; this includes Waikiki and Ka’anapali beaches. The small boat harbors program accounts for approximately forty-five percent of the total revenue and eighty-one percent of the expenses. Off-shore recreation management program accounts for approximately fifty-five percent of the revenue and approximately nineteen percent of the expenses. Thus, in order to deal with the disparity between the two programs, DOBOR is proposing to amend the mooring fees according to the

existing Hawaii Revised Statutes. The increased mooring fees will be used for repair and maintenance of Hawaii's small boat harbors. Once fully implemented, boating fee increases will collect approximately \$3.6 million per year from all moorings in the State. All revenues from mooring fees will be used to fix-up the harbors and mooring areas. DOBOR will also generate new revenue from leases on the "fast lands" surrounding the harbors. The revenue generated from leases, fuel taxes and non-mooring fees, including a portion of the urban and industrial land rents, will support repair, maintenance, and operations of stand-alone boat ramps, piers, and ocean recreation areas statewide. Mr. Underwood indicated that in order to break-even, mooring fees are needed to be raised by \$3.47 per foot. The mooring fees will be set by categories to be determined by DOBOR and will increase annually by an amount equal to the consumer price index increase, if any. This is provided, however, that the pricing schedule include existing mooring holders with an annual increase of twenty percent per year (which equates to roughly seventy cents (\$0.70), and will apply to all new mooring applicants and transient slips on or after the effective date of the proposed rule amendments. Mr. De Luz, Jr., indicated that the proposed rules indicate a twenty percent increase rather than twenty percent of the total increased amount; Chairperson Thielen will re-visit this section of the rules for clarification. After a series of questions, Second Vice Chair Schnitzler recommended that the proposed rules proceed to public hearing, Mr. Leis seconded and the Board members unanimously agreed.

- D. Review and discussion of amendments to HAR Chapter 13-121, "Hunting," repeal of HAR Chapter 13-125, Wildlife Sanctuaries," and adoption of new HAR Chapter 13-126, "Wildlife Sanctuaries" (DLNR) - Chairperson Laura Thielen introduced Mr. Scott Fretz of DLNR's Forestry and Wildlife Division. Mr. Fretz stated that the proposed rule amendments are straight-forward. One of the changes, which relates to the hunting rules, allows DLNR to regulate activity within shooting ranges for safety; these changes create a new opportunity where none currently existed. These amendments have no apparent small business impact but a benefit to the small business community. The second rule change reflects a major revision to the wildlife sanctuary rules; wildlife sanctuaries are one of the most sensitive native habitats in the State. As the existing rules are over thirty-years old, Mr. Fretz indicated that they are not adequate to deal with the increasing level of human use in some of the sanctuaries. The proposed amendments require permission for any advertisements, commercial filming, photography, or videotaping within the wildlife sanctuary. The amendments also prohibit commercial activity within wildlife sanctuaries without a written permit, contract, license, lease, or concession from the Board of Land and Natural Resources or authorized representative. Upon review, Second Vice Chair Schnitzler recommended that the proposed rules proceed to public hearing, Mr. Leis seconded and the Board members unanimously agreed.
- E. Review and discussion of HAR Chapter 18-231, "Administration of Taxes" (DoTax) – Ms. Johnnel Nakamura and Mr. Joseph Tichy from the Department of Taxation (DoTax) explained that the proposal consists of new rules, representing four separate tax penalties in accordance with Act 166, Session Laws of Hawaii, 2009. Among other items, Act 166 has adopted penalties that are assessable against taxpayers, tax practitioners and tax shelter promoters patterned after federal tax penalties in the Internal Revenue Code, Title 26 US Code. Additionally, Act 166 added Section 231-10.6, HRS, which requires DoTax to adopt administrative rules providing guidance, which includes references to federal law and regulations before the penalties may be imposed. Specifically, the proposed rules are intended to carry out the statutory mandates by setting forth detailed guidance for taxpayers and tax practitioners in the interpretation and application of the following penalties; specifically: 1) Penalty for the understatement of tax liability by a tax return preparer; 2) Penalty for substantial understatement or misstatement of tax; 3) Penalty for promoting abusive tax shelters; and 4) Penalty for erroneous refund claims. After much discussion, Mr. De Luz, Jr., recommended that the proposed rules proceed to public hearing, Second Vice Chair Schnitzler seconded, Vice Chair Au abstained from voting, and the remaining Board members, which constituted a quorum, agreed.
- F. Review and discussion of amendments to HAR Chapter 11-453, "Hawaii Emergency Planning and Community Right-to-Know" (DOH) – Mr. Harold Lau, Planner and Ms. Sharon Leonida from DOH's Hazardous Evaluation and Emergency Response Division explained that while they were previously in front of this Board, presently they are proposing an additional change to the rules which includes a one-stop business concept to encourage businesses to research information on-line. Specifically, the proposed rules include an additional section entitled "electronic business," which is intended to authorize and promote the development of electronic business. Mr. Leis recommended that the proposed amendments proceed to public hearing, Ms. Pang seconded and the Board members unanimously agreed.

- G.** Review and discussion of amendments to HAR Chapter 2-71, “Agency Procedures and Fees for Processing Government Record Requests,” and proposed HAR Chapter 2-72, “Administrative Appeal Procedures” (LG) – Ms. Linden Joesting, Staff Attorney from the Office of Information Practices (OIP), stated that the proposed administrative rules will be domiciled in the Lieutenant Governor’s Office. She explained that OIP provides advice to the Counties and State agencies as well as to the general public regarding Sunshine Law and Uniform Information Practices law; the latter relates to the accessibility of State government records. Subtitle 7, HAR Chapter 2-71, “Agency Procedures and Fees for Processing Government Record Requests” reflects a change in the law; specifically, a modification to the definition of “business day.” Subtitle 7, HAR Chapter 2-72, “Administrative Appeal Procedures” reflects new administrative rules that will establish procedures for: 1) Filing an administrative appeal with OIP; and 2) Processing and decision of an appeal. The impact on small business relates to businesses approaching OIP and requesting access to business records; i.e., procurement contracts relating to why one contract was approved over another.

Ms. Joesting noted that because OIP is anticipating that the new Governor’s Administrative Directive may have a bearing on the rule review process, she was not asking the Board to approve the rules for public hearing. She was, however, asking assistance from the Board regarding Section 2-72-12, “Timing of Appeal to OIP; Content of Appeal.” Specifically, she wanted to know whether the timeframes noted were adequate or too long. The proposed rules provide, “An appellant under this chapter shall submit a written request with the director within the following time limit, whichever is applicable: (1) No later than one hundred twenty (120) days after the receipt of the agency’s final written denial of access, or final written partial grant of access to a government record, or OIP’s determination that an agency’s failure to respond is the same as a denial under chapter 92F, HRS.”

When she questioned the members as to what specific business groups OIP may approach in regards to reviewing these rules, it was suggested that these rules be put on the Board’s RegAlert. Chair Woods explained that the Board might get a good response from the partnered business organizations if such an Alert went out. It was suggested that because there is no specific timeframe noted in the rules for OIP to respond to a request that Ms. Joesting bring this issue back to her office for discussion. The members suggested thirty (30) days for reconsideration and thirty (30) days to one hundred twenty (120) days for an appeal. Upon discussion, Second Vice Chair Schnitzler recommended that the items regarding OIP’s timing of an appeal be utilized under the Board’s RegAlert, Mr. Dymond seconded and the Board members unanimously agreed. Chair Woods requested that Ms. Joesting craft the wording of the RegAlert prior to Ms. Palcovich distributing it.

- H.** Review and discussion of amendments to HAR Chapter 17-1722.2, “Basic Health Hawaii” and HAR Chapter 17-1728, “QUEST-Net” (DHS) – Chair Woods explained that these rules will be deferred until the next Board meeting.
- I.** Review and discussion of amendments to HAR Chapter 13-74, “License and Permit Provisions and Fees for Fishing, Fish, and Fish Products, and HAR Chapter 13-94, “Bottom Fish Management” (DLNR) – Mr. Francis Oishi, Program Manager with Aquatic Resources Division, explained that DLNR is proposing to amend two rule chapters; he provided background information on the reason for the changes. He stated that some years ago, the federal government adopted new regulations for managing fish stocks due to the overfishing of certain stocks. The federal government, which has jurisdiction over fishing outside a three-nautical mile radius of the Hawaiian coastal areas, decided that it would manage the fish stocks by establishing an annual quota for certain fish. The State of Hawaii, which has seven different species of bottom fish, shares its jurisdiction with the federal government; scientists have determined that roughly fifty percent (50%) of Hawaii’s bottom fish is in federal waters. Once the federal government determined that bottom fish were experiencing over-fishing conditions, i.e., greater than what is sustainable, it decided that the State of Hawaii and the federal government should corroborate together and create rules that are consistent with one another. As a result, during this past legislative session, a law was passed mandating that the State of Hawaii and the federal government develop a regiment for managing the fish stock; the law also provides for the repeal of the restrictions should the stock recover. In addition to changes outlined in the law, amendments to HAR Chapter 13-74 include the addition of definitions for bottom fish fishing activity, fishing reports by trip, and a requirement that commercial bottom fishers report bottom fish catches by trip and other non-bottom fish species by monthly report.

Mr. Oishi explained that amendments to HAR Chapter 13-94 are needed for consistency with the federal fisheries regulations and State statutes regarding the shared jurisdiction over bottom fish resources. Rule changes include the closing of the fishing season: 1) Whenever a federal closure, due to the attainment of the annual quota, is declared; 2) At the prohibition of sales during a closed season; 3) For consistency with federal non-commercial daily bag limit regulations; and 4) For the exemption of imported bottom fish from the Northwestern Hawaii Islands. Amendments entail the descriptions for affected species, the daily bag limit for recreation fishers, the deletion of the requirement for evaluating the effectiveness of closed areas, the changes to the requirement for identifying bottom fishing vessels to be performed annually, and the addition of exemptions for possession or sale of imported bottom fish or for bottom fish caught in the Northwestern Hawaiian Islands federal waters.

After a series of questions and answers, Second Vice Chair Schnitzler recommended that the aforementioned proposed amendments proceed to public hearing, Mr. Leis seconded and the Board members unanimously agreed.

## **V. REPORT FROM CHAIR, BOARD MEMBERS AND ANNOUNCEMENTS**

### **A. Update and discussion of Sept., 21, 2009 Legislative Informational Briefing**

- i. Chair Woods stated that Vice Chair Au, Ms. Pang, and Ms. Palcovich attended the legislative informational briefing. The briefing entailed justification by DBEDT for the elimination of certain positions. Chair Woods submitted written testimony and both Vice Chair Au and Ms. Pang provided oral testimony as small business owners. Vice Chair Au indicated that he left the information briefing without any conclusory information.
- ii. A discussion of having Board meetings via video-conferencing ensued. Chair Woods stated that there is a possibility of using the Kauai Chamber of Commerce's facility for video-conferencing. Mr. De Luz, Jr., conveyed scheduling challenges with Hawaii's facilities. Overall, it was determined that because video-conferencing equipment is not dependable, the Board will not utilize video-conferencing at this point in time. Instead, the Board will meet every other month with the caveat that the rules the members review only include those with small business impact; all rules without business impact will not be included on the agenda.
- iii. DBEDT Director Liu thanked the members for the opportunity to speak to them as he wanted to brief and update them on the status of this Board post-legislative session. He also thanked the members for serving on the Board, noting that this Board is extremely important. He mentioned that a new Governor's Administrative Directive will be coming out soon that incorporates recommendations of the processes that this Board has put into practice in relation to when new and proposed rules and regulations are submitted for rule review.

Director Liu explained that there has been an unprecedented State revenue decline exhibiting poor economic conditions. He noted that there has already been executive action taken to close \$2 billion of a \$3 billion State budget deficit. Revenue deficit is general fund driven; as such, State departments and agencies that are special or federal funded are not targeted in the first round of lay-offs. As a result, the State needed to focus reductions and lay-offs on the remaining State departments with programs and positions that are funded by general funds, of which DBEDT is one. With the cost of \$2 billion in program reductions already made, labor costs were necessary to close the State budget shortfall. In June of this year, Governor Lingle announced a labor cost-reduction plan with three furlough days per month for all State workers. However, the public sector unions opposed the Governor's furlough plan and sued in court, thereby obtaining a temporary restraining order to stop the furloughs. While the Administration is continuing labor negotiations, it leaves the Administration with no alternative but to implement lay-offs as well as more potential program reductions in the near future. As a result, DBEDT was forced to target forty (40) general funded positions for elimination; i.e., reduction-in-force (RIF).

He further explained that the RIF process is separate from this Board's situation. The idea that this Board be transferred and attached to the Department of Commerce and Consumer Affairs (DCCA) was initially discussed by DBEDT as it was DBEDT's intent to move and transfer general funds for this Board's operations and the Business Advocate's position over to DCCA. The legislature, however, proposed to transfer this Board by zeroing out funds from DBEDT and to change the funding structure to special-funded from general-funded. DCCA opposed the transfer of this Board

during the legislative session and the Governor vetoed SB387, which would have statutorily transferred this Board to DCCA. At the same time, the House budget bill (HB200) was passed with the Business Advocate position being transferred to DCCA, changing the means of funding for the position from general to special funds. He explained that the State's Budget and Finance Department (B & F) contends that the result of these two bills (House Bill 200 and Senate Bill 387) is that this Board statutorily stays at DBEDT, along with the Business Advocate position. However, based on this scenario, there are no monies to move back because no monies were transferred – they were zeroed out. Despite this, Director Liu indicated that DBEDT will continue to support this Board by finding some way of funding its operations.

The Business Advocate position, however, has remained an issue because its funding got zeroed out at DBEDT when the position was transferred back as a specially-funded position. He added that in government when a position is specially-funded, it can only be funded by special funds. However, while DBEDT has attempted to find monies to fund this position, there are no special funds available. Director Liu stated that he and DCCA Director Riefurth, along with B & F and the attorneys general, attempted to find funding for both this Board and the position. However, it was determined that there was a "lack of nexus" between of this Board's functions and the existing special funds at DCCA; thus, the final conclusion was that no funding exists at DCCA to fund the Business Advocate position. Director Liu explained that this is a "classic RIF" or "lay off" because there is a position and no funding. He noted that he offered to "give" DCCA the position but it could not be done due to a conflict with the Business Advocate's civil service-structure position and DCCA's exempt-structure positions. Therefore, while the Business Advocate position is now part of the RIF process, he assured the members that there is no implication with the cutting of this position that this Board will also be cut. As this Board is part of DBEDT's statutory mandate, he intends to carry forth its mandate by utilizing the remaining staff in force.

Chair Woods questioned whether there is some way this Board may approach the legislature for funding from the general funds or to move the Board to another department; Director Liu answered affirmatively. He cautioned that any requests for additional funds in the budget for the next fiscal year will likely be very difficult to get approved.

**B. Discussion of future board meetings and of vacant Board positions**

- i. Chair Woods informed the members that Mr. Yee has resigned as a Board member because his workload has grown to the point where he needs to supervise the process of his expanding business. Without Mr. Yee's expertise, the Board is missing a member with environmental/health background; Mr. Au indicated that he knew someone with such background whom he will contact. There are now two vacant positions on the Board, one from Kauai and one from Oahu. She also noted that Messrs. Bucky and Schnitzler's terms are ending in June 2010. A prior Board member, Ms. Jeanette Otsuka Chang, was mentioned as being a potential member; Ms. Palcovich will contact her. Mr. De Luz, Jr., will contact someone from the visitor/tourism industry as well.

**IX. NEXT MEETING** – Wednesday, November 18, 2009, 250 South Hotel Street, Honolulu, Room 410

**X. ADJOURNMENT** – Mr. Leis recommended adjourning the meeting at 1:40 p.m., Second Vice Chair Schnitzler seconded and the Board members unanimously agreed.