

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

February 21, 2007

No. 1 Capitol District Building 250 South Hotel Street – Conference Room 410

I. **CALL TO ORDER:** Chair Woods called the meeting to order at 10:32 a.m., with a quorum present.

MEMBERS PRESENT:

- Lynne Woods
- Sharon L. Pang
- Michael Yee
- Donald Dymond
- Charles Au
- Richard Schnitzler
- Dorvin Leis
- Bruce Bucky

ABSENT MEMBERS:

- George Handgis
- Peter Yukimura

STAFF:

DBEDT

Dori Palcovich

Mike Norris

Office of the Attorney General

Margaret Ahn

GUESTS:

Gary Ruby, Regulations Analyst, Division of Financial Institutions, Department of Commerce and Consumer Affairs (DCCA)
D. B. Griffin, III, Commissioner, Division of Financial Institutions, DCCA
Francis Oishi, Program Manager, Aquatic Resources Division, Department of Land and Natural Resources (DLNR)
Brian Kau, Administrator and Chief Engineer, Agricultural Resource Management Division, Department of Agriculture (DOA)
Randy Teruya, Agricultural Resource Management Division, DOA
Clifford Inn, Division of Boating and Ocean Recreation, DLNR
Alan Matsunami, Program Specialist, Med-QUEST Division, Department of Human Services (DHS)
Darryl Shutter, Branch Chief, State Health Planning and Development Agency, Department of Health (DOH)
Pauline Sato, Coordinator, Malama Hawaii
Mark Fox, Representative, The Nature Conservancy
Frank Farmer, Fisherman
Carl Jellings, Fisherman
James "Kimo" Mills, Fisherman
Denis Pang, Fisherman
Phil Feliciano, Owner, Cruiser Phil's Maui Bicycle Tour Association
Cheryl Thuro, Owner, Maui Mountain Cruisers
Corinne Knotson, Representative, The Nature Conservancy
Tony Costa, Private Citizen, Hawaii Nearshore Fisherman
Terrence George, Vice President & Executive Director, Harold K.L. Castle Foundation
Tim Lyons, Executive Director, Hawaii Business League

WORKING LUNCH AS THE MEETING PROGRESSED

II. **APPROVAL OF MINUTES:** Minutes of the January 24, 2007 Board meeting were approved as presented.

III. OLD BUSINESS

- A. Review and discussion of post public hearing statement of HAR Chapter 13-75, "Possession and Use of Certain Fish Gear" (DLNR) – Mr. Francis Oishi, Program Manager at DLNR's Aquatic Resources Division, stated that nine statewide public hearings were held from July 18, 2006 to July 20, 2006 with more than 500 people attending and 192 testifying; roughly one-half of the testifiers favored the proposed changes and one-half did not. An additional 1,047 people provided written testimony, 850 were in the form of one or two form letters, and were in favor of the proposed rule changes. Also received were

petitions, 280 signatures from Fair Catch Youth were in favor of the changes, and 400 from Molokai, 1,300 from Anahola, Kauai, and 1,300 from Tamashira Market were in opposition of the changes. In addition, a nonprofit campaign looking to restore Hawaii's coral reefs commissioned a telephone survey of Hawaii's residents and found 76% or 1,022 residents polled supported the changes to the lay net rules. Various requests were made from persons identified as either commercial fishermen or who have an association with commercial fishermen, which included "proposed net lengths are not long enough; there is no basis for banning multi-panel nets, and the banning of lay nets in certain coastal areas, in streams and stream mouths, and at night will affect net fishing operations." Despite these requests, DLNR chose to proceed with the rule amendments without the recommendations largely because the changes were a "start" to improving the rules with additional efforts to be continually refined for the benefit of the resources of the community.

Following a period of questions and answers, several individuals, nonprofit organizations and small business owners presented testimony in both support and opposition of this proposal. Upon reviewing these rules and hearing all of the testimony, Mr. Au recommended that the proposed rule amendments proceed to the Governor for adoption; because four members were in support and two were in opposition, the Board was unable to provide a final recommendation due to the lack of a majority of all the members to which the Board is entitled.

- B. Review and discussion of **post public hearing statement** of HAR Chapter 17-1728.1, "QUEST-Adult Coverage Expansion" (DHS) – Deferred until the March Board meeting.
- C. Review and discussion of **post public hearing statement** of HAR Chapter 17-1737, "Scope and Content for the Fee for Service Medical Assistance Program" (DHS) – Deferred until the March Board meeting.
- D. Discussion and follow-up of Certified Nurse Aides (CNA) – Vice Chair Pang explained that currently there are certified nurse aides bills in the legislature; provisions in the bills would ensure that the State certify certain groups of certified nurse aides via the current federal ruling. Mr. Tim Lyons, Executive Director of Hawaii Business League explained that the entire certification program was being run by federal funds for the Medicare/Medicaid programs; however, there were nurses in the program that had nothing to do with Medicare/Medicaid. In theory, the current bills include two separate sections for certified nurse aides, one for Medicare and Medicaid and one for State certified and licensed facilities; the latter would include care homes, foster homes and day cares; the House bill requires certification of certain people whereas the Senate bill enables certification, a permissive activity.

Vice Chair Pang referred to a letter sent to this Board from Mr. Robert Nogami of Manoa Senior Care regarding his concerns over the potential lack of recertification of CNAs in adult residential care homes. Also, a representative from the day care home industry expressed that she has 80 beds in the Kaimuki and Manoa areas and was very pleased that her facilities would now be included in the recertification of nurse aides because initially her facilities were not. Vice Chair Pang recommended that this Board submit testimony in support of the two companion bills relating to certification of nurse aides; the Board unanimously agreed. Chair Woods requested that Mr. Lyons notify this Board of any changes to these bills during the legislative session.

- E. Update on the Small Business "Bill of Rights" brochure – Deferred until the March Board meeting.

IV. NEW BUSINESS

- A. Review and discussion of HAR Chapter 17-1724-10, "Earned Income from Self-Employment" (DHS) – Deferred until the March Board meeting.
- B. Review and discussion of HAR Chapter 4-158, "Non-Agricultural Park Lands Program Rules" (DOA) – Mr. Brian Kau, Administrator and Chief Engineer at DOA's Agricultural Resource Management Division, explained that the proposed rules will affect agri-businesses leasing State of Hawaii lands, which are currently managed by DLNR but identified for transfer to DOA's non-Agricultural Park Program. The proposed rules have built-in accommodations for various possible economic circumstances the lessees may experience in order to cause the least business disruptions possible. The transfer of these lands and leases to this program will provide a level of stability many of these agri-businesses do not currently enjoy. The rules include a \$30 processing fee for documents and fines for violations; fines for violations start at \$100 per day but not more than \$2,500 for the first violation and up to \$1,000 per day or for the

third and subsequent violations. After much discussion, Mr. Schnitzler recommended that the proposed rules proceed to public hearing; the Board unanimously agreed.

- C. Review and discussion of proposed new Chapter 16-24, "Money Transmitters" (DCCA) – Mr. Gary Ruby, Regulations Analyst, and Mr. D. B. Griffin, Commissioner of DCCA's Division of Financial Institutions, explained that the proposed rules will implement Hawaii's newly enacted Money Transmitters Act under HRS Chapter 489D, which sets forth procedures regarding the conduct of money transmission services. Specifically, it establishes the public nature of applications, and describes the supporting documents and other records submitted to by money transmitters. The small businesses that will be directly affected by these rules are businesses applying for a license as a money transmitter as well as authorized delegates of licensed money transmitters. The regulation of money transmitters is expected to enhance consumer protection for all members of the general public when conducting business with money transmitters in Hawaii. It will also materially contribute to federal efforts to combat money laundering and terrorist related financing. Upon review, Mr. Au recommended that the proposed new rules proceed to public hearing; the Board unanimously agreed. Chair Woods requested that any associations that are related to money transmitters be notified of the upcoming hearing.
- D. Review and discussion of HAR Chapter 13-256, "Subchapter 10 East Hawaii Island Ocean Recreation Management Area" (DLNR) – Mr. Clifford Inn from DLNR's Division of Boating and Outdoor Recreation explained that the proposed rule change modifies the boundaries of the Personal Watercraft (PWC) zone in Hilo Bay by increasing Zone A to border the Outrigger Canoe Subzone and the water's edge along the bay front. The proposed change will also modify the ingress and egress zone for PWC users and establish a start and end date for the Outrigger Canoe Club season, during which additional PWC zone rules are in place. The rule change is endorsed by East Hawaii PWC owners and operators as the existing zone is perceived to be too limiting in size, too close in proximity to the Hilo breakwater, and too far away from shore for riders. Overall, the rule change would reduce user conflicts among PWC operators vying for space in the existing PWC zone and increase the recovery and survival rate of PWC operators in distress by moving the permitted zone closer to shore and therefore closer to emergency assistance. Mr. Inn noted that a working group of concerned citizens, paddling organizations, PWC operators, members of the fishing and surfing community and small business owners was convened in 2001 to solicit input, with many of their recommendations incorporated into these amendments. Mr. Schnitzler recommended that the proposed rules proceed to public hearing; the Board unanimously agreed.
- E. Update and discussion on Legislation – Chair Woods stated that the Board was getting positive support for the bill that appropriates funds for the Board's administrative assistant position; Senator Baker who is president of Ways and Means has asked that Chair Woods set up some time to meet with her. Chair Woods also received positive feedback from the House level on leaving this Board in DBEDT, as opposed to being transferred to the Ombudsman's Office, and Representative Yamashita relayed to Chair Woods that this Board would be the legislature's tool to protect small business. In the Regulatory Flexibility Act bill, Senator Fukunaga recommended adding a few provisions for the Ombudsman's Office to be provided various reports and memoranda from this Board.
- F. Discussion of Maui Bicycle Tour Association Regulations – Chair Woods explained that the Maui Bicycle Tour Association approached her with a request to have all of the rules and regulations, on the State and County levels that govern their industry reviewed by this Board. There are currently House and Senate bills in the legislature giving the County authorization to impose regulation on both guided and unguided bicycle tour businesses on state and county highways. This request was generated by a new ordinance in Maui to impose a substantially higher liability to indemnify the County guided bicycle tours. Chair Woods recently met with Maui County Council and a few legislators on behalf of this Board regarding a petition by this community relating to these issues. Mr. Phil Feliciano, owner of Cruiser Phil's Maui Bicycle Tour Association explained that he and his cousin, Ms. Cheryl Thuro, owner of Maui Mountain Cruisers, both of whom own guided downhill bicycle tours in Maui, are concerned because the Maui County Counsel has signed an ordinance increasing the required liability insurance from one million dollars a year to three million dollars regarding guided bicycle companies, and asked for the Board's support in this matter. Mr. Schnitzler recommended that this Board address Mr. Feliciano's concerns and to research what the business impact is and what the level playing field is regarding the Maui downhill bicycle industry; the board unanimously agreed.

V. UPDATE AND OUTCOME OF STRATEGIC PLAN

- A. Update of strategic planning session** – In regards to the date and facilitator of the upcoming strategic planning session, Chair Woods asked the members if they preferred to proceed with the current bid process or utilize a facilitator contracted with DBEDT and to look for another date. The members recommended that due to date conflicts, that the strategic planning session be kept on March 7, 2007, and that the DBEDT-contracted facilitator not be used. .

VI. BOARD RULE REQUEST

- A. Recommendation of HAR Chapter 11-186, “Hawaii State Health Planning and Development Agency Certificate of Need” (DOH)** – Chair Woods requested these rules be brought forth in front of the Board because they have an enormous impact on small business. It is her observation that the rules appear dictatorial, and that decisions regarding these rules are made on flawed data. She believes that these rules were developed to support a state-wide system and to control and regulate competition against the state-wide system, and was surprised that the rules have not been locally challenged in a court of law. She also believes the rules are anti-economic development and that they deny citizens of Hawaii access of their choice to medical care. It was her opinion that the rules be either totally reviewed, revised or even eliminated, but felt any recommendations to these rules should belong to a task force. Vice Chair Pang believed that the hospitals in Hawaii were not necessarily competing in the “quality of care,” and that the Hawaii residences are limited to what the current facilities offer and what can be provided. She stated that the Certificate of Need closes Hawaii’s medical response to the community in providing good health care; and also felt that there should be a study or task force to review the rules.

Much discussion ensued among the members and it was believed that the overall process regarding certificate of need rules are outdated. Chair Woods stated that regardless as to whether there is legislature currently being proposed, that a task force be formed to review these rules, identify the issues that need to be addressed and make recommendations on how to change them and bring them up to date. Mr. Darryl Shutter, Branch Chief at DOH’s State Health Planning and Development Agency, explained that decisions of the rules are based on the criteria set forth in the rules under Section 11-186-15. Therefore, his recommendation to the members was to begin with the “criteria” section of the rules to amend or to add provisions. Mr. Yee indicated that the review process of these rules appears to be very complex and questioned whether the members of this Board would have the ability to understand such complexity. Chair Woods stated that the members would reach out to professionals familiar with these rules if necessary. Upon hearing Mr. Shutter’s suggestions, Chair Woods recommended that a task be formed to consist of Ms. Woods, Ms. Pang, and Mr. Schnitzler to review these rules as noted above; the Board unanimously agreed. Chair Woods mentioned to Mr. Shutter that he may be asked to participate in reviewing of these rules.

- VII. REPORT FROM CHAIR AND BOARD MEMBERS** – Upon review, Vice Chair Pang recommended that the Board approve the Governor’s proposed Administrative Directive as presented; the Board unanimously approved.

VIII. REPORT FROM COMMITTEES – Nothing was presented.

- IX. ANOUNCEMENTS** – Chair Woods and Ms. Palcovich were invited by the Federal Small Business Administration to attend a conference in Kansas City, Missouri, on small business regulatory review boards. The purpose of the conference is to explore state tools and methodologies developed to successfully implement state regulatory flexibility laws. Key topics include exploring the importance of a partnership between the small business community and state agencies to conduct outreach and gather information for effective rule development and to explore effective oversight of regulatory flexibility compliance. Although the conference would be no cost, there would be a cost for airfare and hotel.

- X. NEXT MEETINGS** – Strategic Planning Session – Wednesday, March 7, 2007, The Pacific Club, 1451 Queen Emma Street, Honolulu; Regularly scheduled meeting – Wednesday, March 21, 2007, No. 1 Capitol District Building, Room 410.

- XI. ADJOURNMENT** – Chair Woods adjourned the meeting at 2:20 p.m.