

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

March 19, 2008

No. 1 Capitol District Building – Conference Room 410

I. **CALL TO ORDER:** Second Vice Chair Yee called the meeting to order at 10:30 a.m., with a quorum present.

MEMBERS PRESENT:

- Michael Yee
- Sharon Pang
- Peter Yukimura
- Donald Dymond
- Richard Schnitzler
- Bruce Bucky
- Dorvin Leis
- Charles Au

ABSENT MEMBERS:

- Lynne Woods

STAFF:	<u>DBEDT</u> Dori Palcovich Pearl Imada-Iboshi Ilene Deutsch	<u>Office of the Attorney General</u> Margaret Ahn
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GUESTS:

- Winston Lum, Administrative Assistant, State Fire Council, Department of Labor and Industrial Relations
- Greg Howeth, Vice President, Ocean Tourism Coalition
- Patricia Cadiz, Hawaiian Sailboarding Techniques, Commercial Ocean and Recreational Activities (CORA) Operator
- David Cadiz, Hawaiian Sailboarding Techniques, CORA Operator
- Martin Kirk, Kite Boarding School of Maui
- Brian Yesland, Keli's Kayak Tours
- Tamara Horcajo, Director, Department of Parks & Recreation, County of Maui
- Marian Feenstra, County of Maui
- Mary Kielty, County of Maui
- Jeffrey Ueoka, County of Maui
- Thomas Vendotta, Hoisting Machines Operator's Advisory Board
- Bill Comerford, Hawaii Bar Owners Association
- Tim Lyons, Executive Director, Hawaii Business League
- Suzanne Dorn, Action Sports Maui
- David Dorn, Action Sports Maui
- Anna Hirai, Assistant Administrator, Liquor Commission, City & County of Honolulu
- Jim Houghton, President, Bombay's of Amsterdam Inc.
- Susan Kern, Deputy Attorney General, Attorney General's Office
- Joe Cordova, Administrator, Department of Vocational Rehabilitation & Services for the Blind Division, Department of Human Services (DHS)
- David Eveland, Administrator, Services for the Blind Branch, DHS

WORKING LUNCH AS THE MEETING PROGRESSED

II. **APPROVAL OF MINUTES:** Minutes of the February 11, 2008 board meeting were approved as presented.

III. **OLD BUSINESS**

- A. Review and discussion of post public hearing statement of proposed amendments to Rules of the Liquor Commission of the City and County of Honolulu – Ms. Anna Hirai, Assistant Administrator of the Honolulu County Liquor Commission, stated that after receiving approval from this Board to hold a public hearing, notice was published in *The Star Bulletin* and an email was sent to 1,400 licensees. Public hearing occurred on February 26th with approximately forty people attending; eleven people presented

oral testimony and ten people provided written testimony. It was noted that due to the amount of public interest in the proposed rules, an additional meeting was held on March 6th with thirty people attending and providing testimony; decision making was done by the Liquor Commission at that time. Ms. Hirai explained that copies of the revised rules were presented at this meeting, and it was unanimously voted to approve the proposed rule package. The Liquor Commission hopes to have two proposed license fee rules placed on the Budget Committee's April 2nd agenda. Upon the expected approval of the license fee rules, they will be included with the additional proposed amended rules and forwarded to the Mayor for approval. The Liquor Commission is expecting to have the final rules in place by the beginning of May. Second Vice Chair Yee announced that Mr. Dymond is recused from voting and making any recommendations on this agenda item due to a conflict of interest as he is a licensee, however, he is able to make objective statements or ask objective questions.

Upon a series of questions and answers, the following was discussed. The purpose of the two proposed license fee rules establish the basic annual license fee and the maximum fee for condo-hotel license class as well as the cleanup of obsolete, extraneous language; these rules do not raise, increase, or modify the existing maximum fee levels or license fees. The rules also provide a change in the deductible amount, which is an annually-calculated amount that licensees are allowed to offset their annual gross liquor sales and is applied across the board to all licensees. Depending on the amount of the gross liquor sales reported will depend on whether the licensee will owe additional fees. The ending fund balance in the Liquor Commission special fund plus revenues collected from licensees and other sources cannot exceed twenty percent of the budget.

It was also noted that Corporation Council would not permit the Liquor Commission to waive a specific rule provision unless that rule had a specific waiver clause built into it. The provision would give licensees the ability to initiate a change or waiver. She noted that if the Waiver provision is problematic to the licensees, Corporation Council may consider withdrawing this provision. In addition, it was discussed that while Chapter 91 requires a judicial review, the process that a business would go through for judicial review may take years without recourse. In regards to the "Fine Monies" provision, it was indicated that fine monies are principally used for licensees, their employees and educational purposes. Mr. Dymond stated that based on these rules, if funds are set up for educational outreach such as in high schools, those funds should come from State or County funds, not from "fine monies." The law is quite clear that the educational programs should be limited to the licensees and their employees only and to assume any other way is to go beyond what the legislature had intended. Ms. Hirai noted that any purchase of law enforcement equipment, for example such as tasers, would have to go through the Liquor Commission's budget. She added that approximately \$200,000 in fine monies was collected over the past three to five years.

Mr. Bill Comberford, representing the Hawaii Bar Owners Association, who is also the owner of three Irish bars in Honolulu, stated that most of the changes are positive, but a few of the proposed rules cause some concern from small businesses. He distributed his written testimony and discussed the following concerns. Section 3-82-38.25 "Restrictions or Conditions on Licenses" is very restrictive and subject to interpretation." Specifically, subsection (a) presents the problem that the activities are not defined and do not conform to the state law this was taken from. Subsection (b) allows the action to be initiated by the Administrator rather than from the public. Mr. Comberford noted that this is a concern as it appears that the Commission has its own agenda; further, the Commission has not responded to a public petition from the business community. Finally, the Hawaii Bar Owners Association members believe that any business restricted, conditioned or revoked will have a very hard time transferring the business and a restriction, once imposed, is likely to remain on the property; this is perceived as a burden upon the licensee that can severely impede any sale.

Upon review, Second Vice Chair Yee provided the members a few options, to approve the rules to go to the Mayor for adoption, or to defer recommendation to the Mayor and form an investigative taskforce to more closely review the rules as there remain concerns from the business community. Mr. Schnitzler recommended that the rules not be presented to the Mayor for adoption and to create a taskforce, consisting of Chair Woods and Messrs. Au and Schnitzler to review the specific rule sections that are contentious by the business community; the Board unanimously agreed. Ms. Ahn indicated that at the next board meeting, the taskforce will present its findings and recommendations to the Board, and at the following meeting, the Board may vote on any recommendations

IV. NEW BUSINESS

- A. Review and discussion of proposed Chapter 102, Title 10, "Rules of Practice and Procedure for Commercial Ocean Recreational Activity Permits" (Maui County) – Second Vice Chair Yee thanked the Maui County representatives for attending today's meeting and being "pioneers" as this is the first time Maui County has attended a meeting with this Board. Ms. Tamara Horcajo, Director of Maui's Department of Parks & Recreation thanked the members for the opportunity to come to this meeting and to gather input for the County's proposed administrative rules for commercial ocean recreational activities (CORA). She explained that the rules are required by Ordinance Chapter 1304 Article 10 of the Maui Code. The commission of this Code is to fairly and effectively regulate commercial ocean recreational activity and to ensure that Maui County beach parks and other County properties are utilized for the County's maximum recreational, environmental and economic benefits. She explained that City Council required that a study be performed on the impact of the activities; this study is available online. The proposed rules apply only to commercial activities in or on twenty of Maui's beach parks, eleven in the Kihei-Makena area, seven in the west/central area, one in the central area, and one in the Lahaina area. Permits are revocable and are for one year. These rules will allow the current permit holders to be grandfathered in where currently there are no restrictions on the number of parks or activities per permit. Student/instructor ratios will also be established and the number of permits allowed in each of the beach parks will be established. In addition, the rules will prohibit activity during specific days of the week; for example, the proposed rules prohibit commercial activity on Sundays and federal holidays.

Ms. Horcajo indicated that six meetings were held with the existing permit holders, two representatives from each of the commercial groups, i.e., kayaking, SCUBA, windsurfing, etc., in an attempt to understand the sports specific activities. She is expecting to receive additional input from the permit holders and is also working with the Maui Hotel Association as to what types of commercial activities are provided through the hotels. She stated that the draft rules were sent to and are awaiting a response from the Department of Land and Natural Resources (DLNR) regarding a concern that became known prior to drafting the rules regarding a State Executive Order on one third of Maui's park properties as to the condition of Executive Order. Upon hearing from DLNR, the County will determine what course of action to take with the commercial permits. Another unknown concern prior to drafting these rules relates to the zoning that was placed on County's accesses so there may be some conditions that may affect Maui County permitting the beach. Responses from the Planning Department regarding the shoreline management provisions are also being awaited on. Overall, she believes these rules will have a long-term benefit on Maui's community in terms of the regulations and the difference between commercial activity and purely public recreational use of the beach parks.

A series of questions and answers directed to Ms. Horcajo by the board members ensued and revealed the following information. Permits, prior to 2003, were previously handled by the Maui Department of Finance and were given a "license to operate." In 2003, when this activity moved to the Maui Parks Department, the standard was carried out from the Department of Finance. There are currently 57 companies holding permits and paying \$500 a year per permit; this permit allows the business owner to select three park activities within those parks. County Council has the authority every year to change the permit fee; the new rules provide that the annual permit fees will be set by County Ordinance. The proposed rules have followed, expanded and changed the Ordinance's mandate; for example, previously there were no capacities for student/instructor ratios whereas the proposed rules provide for such ratios. In most cases, if it is a State operated park, concession guidelines are used, which is a "request for proposal" where the highest bidder is awarded the contract. Maui County has opted not to take this route; rather than having one business for each beach park, multiple companies would be allowed to operate in the parks. The proposed rules will provide that permits are non-transferrable. Each operator will be required to have a permit to operate at one specific park but Maui County will attempt to work with the operators so the operators will have a "back-up" park to use in the event of weather conditions.

Ms. Horcajo indicated that the students/instructor ratio was misleading and so the language regarding the ratios will be changed. The intent of the ratios is not to limit the number of instructors but to limit the number of people on the beach parks. If the instructors have an industry standard, the County will utilize that industry standard as the appropriate ratio. Each permit will require a separate permit fee. Five park rangers have recently been hired and are currently being trained to enforce the regulations of the beach parks. She further indicated that complaints in 2003 caused the County Council to create the Ordinance to require regulation and it is hoped that the commercial operators will work together with the County to

come to a mutual agreement as to which operators would be situated in certain beach parks. New operators are not allowed into the system at this point in time. The Ordinance sets up a fund, which hasn't yet been utilized, but as soon as the proposed rules are adopted, all of the proceeds from the permit fees as well as any citations or penalty fees will go into the fund to provide for salaries, equipment and improvements of the beach parks. Pursuant to the Ordinance, annual reporting is required and it will give the County an idea as to which beach parks are busier than others. Ms. Horcajo acknowledged that the proposed rules are a work-in-progress as there will be another draft prior to public hearing; she hopes that the rules will be reasonable for everyone involved.

Paraphrased testimony follows:

Ms. Patricia Cadiz from Hawaiian Sailboarding Techniques, a family-run business that was started twenty-three years ago, explained that her family enjoys their work and would like to continue. She read to the members mandates from the law, quoting from the CORA study. She believes this study acknowledges the positive benefits of the park and contributions to the park's community, but that the document itself seems to be a "forced attrition." One of her biggest concern with the proposed rules relates to the various restrictions on the beach parks, particularly Kanaha Beach Park, which combined with the proposed instructor/student ratios limits the number of groups; there are currently no set ratios as each business self-governs. She also believes if the proposed rules were adopted as presented, that her business will be unable to survive. In terms of community clean-up, Ms. Cadiz indicated that every year an organized group of high school students come to the beach park and in return for cleaning up the beaches receives windsurfing and kite-surfing lessons.

Mr. Brian Yesland, Kelii's Kayak Tours in Maui, a snorkel and surf operation, reiterated the concerns of Ms. Cadiz, conveying that with the County's proposal of instituting various "caps," and "limits," the businesses would be greatly and negatively impacted as some companies will get out of business and others would operate at a much reduced level. Currently, his company is allowed to operate out of six beach parks, three parks are used on a consistent basis but under the proposed rules, the proposed limits would force his company to choose to operate in only one park. This would mean that his business would be cut by about two thirds, resulting in letting go six to seven employees.

Mr. David Dorn is the owner of Action Sports Maui and has been under the auspices of the CORA program for twelve years. Mr. Dorn discussed the history and background of CORA and explained he came into the system under the Department of Finance. At that time, there was a required \$50 annual fee, proof of insurance and basic park guidelines to be followed. He explained that he has been a certified instructor of water sports for twenty five years, is an examiner, an instructor/trainer in surfing, windsurfing and kite surfing and performs a majority of State training of lifeguards. He provides a quality service which has grown to meet the demand of his services, however, with the implementation of the proposed rules, the majority of CORA operators will be put out of business; he has no reason to believe that the rules, as presented, will have any further modifications.

Mr. Martin Kirk, owner of Kite Boarding School of Maui, explained that the people testifying today are not CORA businesses first, they are Maui residents first and somewhere down the line they are CORA businesses and they want to stay viable. He explained that, on average, there are currently about 165 days a year up to a maximum of 200 days a year that the operators can actually teach due to weather and wind conditions. With the rules proposing only two instructors per commercial activity, it would result in approximately 80 days of teaching opportunity. The reduced time will impede upon paying commercial rent, liability insurance and other operating expenses. He requested that the members review his written testimony and stated that there are solutions and that the small business beach park operators need to be heard.

Mr. Greg Howeth, a Maui County commercial operator, explained that he was testifying on behalf of the Ocean Tourism Coalition (OTC) of which he is the Vice President. He discussed the history of when Maui County initially created rules in 1996 to regulate commercial activities on the beach parks. Those rules were instituted under an Ordinance with the Finance Department until 2002-2003 with little problems. During this time, Maui has grown exponentially, and since there have been user conflicts and perceptions that abuses in the beach parks were done by commercial operations and so a CORA study was commissioned. This study cost between \$175,000 and \$200,000 to come up with recommendations to address the problems and perceptions. The study found that many of the problems were not commercial operations but overall public use of the facilities. He explained that there were a series of

recommendations that were made, but that the current rules do not reflect the suggestions of the CORA study.

Mr. Howeth stated that OTC is requesting from this Board that the administrative rule procedures be followed and to hold Maui County accountable for following those rule-making procedures as there appears to be some confusion as to exactly what the County's responsibility is in terms of reporting to this Board. In short, he requested that the County follow the law in the reporting requirements. Second Vice Chair Yee explained that with the Maui County representatives actually attending this meeting today shows the County is following the rule process. The County will also come back to this Board after the public hearing. In the meantime, the Board is hopeful that there will be additional communication between the County and the CORA community.

Vice Chair Pang stated that because there are many unanswered questions, the proposed rules are not ready to proceed to public hearing. She also stated that there is a big gap with CORA and that the members need an opportunity to have participation and discussion in developing rules that are fair and workable. She would like this Board to see another draft and to have all the parties involved come together before the rules go to public hearing; she believes that this Board should come to the table one more time before the rules go to public hearing. Mr. Schnitzler concurred and indicated that there appears to be too many unanswered questions before the rules can go to public hearing.

Second Vice Chair Yee stated that balance is needed in terms of sharing the State's precious resources as well as promoting and encouraging small business, which are both vital to the sustainable to the people of Hawaii, along with compromise. It is most vital that this Board encourage the testifiers and the Maui representatives to maintain an open communication as that is where the best public confidence is gained. Ms. Horcajo explained that based on the input received and the anticipated amount of changes; it is believed that there will be a third draft. Although a date for public hearing has yet been scheduled, Maui County would like to schedule a public hearing as soon as possible. If there is in fact a third draft, Second Vice Chair Yee suggested that there be ample time for review.

After much discussion, Mr. Au recommended that the proposed rules proceed to public hearing and Dymond seconded; two votes were in favor and five opposed, therefore, the motion did not pass. Mr. Bucky suggested that all parties involved go back to the drawing board to see if any further details can be worked out and report back to this Board. Mr. Au stated that in his opinion the small business owners do not like the restrictiveness of the proposed rules but suggested that an attempt be made to clarify and explain how the restrictiveness was arrived at. He also stated that businesses will be going out of business if these rules, as presented, are adopted. He believed it would be very important to understand more about the study that was performed as it relates to historic information. Mr. Bucky recommended that a request to the County of Maui be extended for this Board to review a third draft of the proposed rules, with a third draft comparing the present draft, and a separate summary showing the discussions and concerns of all parties involved and an agreeable consensus of the proposal; the Board unanimously agreed.

- B. Review and discussion of proposed amendments to the Rules of Water System Standards of the Board of Water Supply (County of Kauai) – Mr. Yukimura had met with the Board of Water Supply's Acting Manager who indicated that the provision in the rule was going to sunset in June 2008 so they wanted it part of the regulation. If water to the developer's location was not up to county code in terms of required pressure or gallons, the developer has the option to work the County Fire Chief and come up with a mitigating solution. Mr. Yukimura recommended that the rule proceed to public hearing, the Board unanimously agreed.
- C. Review and discussion of proposed HAR Chapter 12-48.7, "Relating to Hoisting Machine Operators" (DLIR) – It was noted that a representative from the Department of Labor and Industrial Relations was not present at the meeting. Thus, after some discussion, because clarification pertaining to "on the job training" was needed, this item has been deferred until the next Board meeting when an invitation will be extended to a representative to answer questions.
- D. Review and discussion of repeal of HAR Chapter 12-45.1, and adoption of proposed HAR chapter 12-45.2, "State Fire Code" (DLIR) – Mr. Winston Lum, Administrative Assistant to the State Fire Council, stated that instead of a Fire Marshall, Hawaii has in its place a State Fire Council, comprised of the four County Fire Chiefs. He explained that the proposed rules update the Uniform State Fire Code from 1997 to 2006 which aligns it with the Hawaii State Building Code, and includes the Electrical, Plumbing, and Energy

Decision Codes. He further explained that the County codes must be at least up to State code and that the proposed model code must be adopted by each County. Mr. Yukimura recommended that the proposed rule proceed to public hearing; the Board unanimously agreed.

- E. Review and discussion of proposed draft HAR 17-403 regarding Blind Vending Statute, Section 102-14 (DHS) – Ms. Susan Kern, Deputy Attorney General, explained that the State is responsible for offering vending facilities to blind vendors; there are currently thirty-seven licensed blind vendors registered in the State. These blind vendors are independent business people and the State provides them with management assistance. Each vendor runs their own facilities, file their own inventory and provide the State with profit and loss statements. The blind vending program is a joint Federal/State program. The income from the vending machines is placed in a revolving account and used to administer the program and to provide health insurance and retirement benefits for the members. Currently, DHS is attempting to work closer with other agencies in order to increase the number of blind vending facilities. The purpose of the proposed rules is to assure that priority be given to registered blind or visually-handicapped persons in the operation of vending facilities. The proposed rule changes include a new provision where blind vendors would not have to pay maintenance fees, the establishment of an Arbitration Board, and the adding of the term “leased” property to the rules. Vice Chair Pang indicated that these rules are quite unique, and noted that many questions were answered to understand the purpose of the rules, such as where the funding comes from, whether the vending facilities are self-sustaining versus whether funds are taken from the private sector, and that the facilities have their own reserve. Ms. Kern stated that the rules are approximately three months away to proceed to public hearing. Upon review, it was noted that Ms. Palcovich will draft a letter on behalf of Director Liu acknowledging the outcome of the communication with this Board.

V. **LEGISLATIVE BUSINESS**

A. Review and status of legislative bills, including:

1. HB 2257 and HB 2258, “Relating to Public Accountancy” – Deferred until the next Board meeting.
2. HB 2736, HD1, “Relating to the Small Business Bill of Rights” – Mr. Schnitzler reported that there had been testimony for and against this Bill. There had been opposition to Right #12, “The right to request information relating to administrative actions of state agencies from the Office of the Ombudsman in accordance to Chapter 96, HRS.” The decision was made to take it out after meeting with DCCA Director Lawrence Reifurth. Another concern was with Right #9, “The right to be notified, in writing, at least thirty days prior to any adverse action by any state agency because of a violation of civil law, except where the violation has health, safety, or environmental impact, or may result in economic loss, unless that notice would allow possible destruction of evidence, continued unlawful practice, or flight.” While Director Reifurth opposed that words “adverse action,” the taskforce recommended changing the wording to “specific findings;” the taskforce is awaiting Director Reifurth’s response.
3. HB 2781, HD2, “Relating to Small Business” –Ms. Palcovich reported that Senator Carol Fukunaga passed the bill with the mandate that this Board will be tasked with creating a taskforce to work with the agencies to create acceptable provisions in the small business impact statement. It was noted that the agencies should not have to check on all states and counties rules and that the intent of the bill is that it would not exceed existing State of Hawaii standards or Federal standards.
4. HB 2686, HD1, “Relating to Administrative Procedure” – There has been no movement since March 6th; the bill passed first reading in the Senate and it is sitting. This bill pertains to before public hearing where there is a lot of activity with small businesses assisting with drafting of the rules; there is a lot of opposition to this bill.

VI. **Report from Vice Chair and Board Members:** Nothing was discussed.

VII. **Report from Committees:** Nothing was discussed.

VIII. **Announcements** – Nothing was discussed.

- IX. NEXT MEETING** - Wednesday, April 16, 2008, No. 1 Capitol Building, 250 South Hotel Street, Conference Room 410.
- X. ADJOURNMENT** – Second Vice Chair Yee adjourned the meeting at 2:16 p.m.