

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

August 15, 2007

No. 1 Capitol District Building – Conference Room 410

I. **CALL TO ORDER:** Chair Woods called the meeting to order at 10:35 a.m., with a quorum present.

MEMBERS PRESENT:

- Lynne Woods
- Sharon L. Pang
- Dorvin Leis
- Donald Dymond
- Richard Schnitzler
- Charles Au
- Peter Yukimura

ABSENT MEMBERS:

Michael Yee
Bruce Bucky

STAFF:

DBEDT

Dori Palcovich
Steven Bretschneider
Thomas Smyth
Ilene Deutsch

Office of the Attorney General

Margaret Ahn

GUESTS:

Richard Kuitunen, Asset Manager, Hawaii Community Development Authority (HCDA)
Teney Takahashi, Interim Executive Director, HCDA
Reg White, Owner and Vice President, Paradise Cruise, Ltd. / Kewalo Ocean Activities (KOA) member
Mike DeRego, President, Inter-island Sport Fishing, KOA member
Gary Dill, Professional Fisherman, KOA member
Frank Mento, Vice President, Kahala Catamarans, KOA member
Brian Ho, Attorney
Barbra Pleadwell, Owner, Hastings & Pleadwell
Kayleen Polichetti, Account Executive, Hastings & Pleadwell
Shari Wong, Deputy Attorney General, Department of the Attorney General
Dianne Okumura, Consultant
Terri Byers, Branch Chief, Office of Health Care Assurance, Department of Health (DOH)
Paul Effler, M.D., DOH
Glenn Wasserman, M.D., Chief, Communicable Disease Division, DOH
Peter Whitarcar, Chief, STD/AIDS Prevention Branch, Communicable Disease Division, DOH
Jeri Kahana, Branch Chief, Commodities Branch, Quality Assurance Division, Department of Agriculture
Amy Tousman, Dietitian, Hawaii Dietetic Association
Chin Nyeon Lee, Dairy Specialist, University of Hawaii
Mae Isonaga, Dietitian, Hawaii Dietetic Association
Larry Okinaga, Partner, Carlsmith Ball, LP
Tim Lui-Kwan, Partner, Carlsmith Ball, LP
Morgan Barrett, Deputy Director of Health, DOH

WORKING LUNCH AS THE MEETING PROGRESSED

II. **APPROVAL OF MINUTES:** Minutes of the July 16, 2007 Board meeting were approved as presented.

III. OLD BUSINESS

- A. Review and discussion of post public hearing statement of HAR Chapters 15-211, 15-212, 15-213, and 15-214, "Relating to Rules for Kewalo Basin" (DBEDT/HCDA) – Mr. Richard Kuitunen, Asset Manager at HCDA, introduced Mr. Teney Takahashi as HCDA's Interim Executive Director. Mr. Kuitunen explained that the post public hearing statements included two changes to the rules because of the comments made at the public hearing. One change relates to the dollar amount of the permit premium transfer fees, which has

been reduced to zero. HCDA believes that the reporting requirements under the rules should be retained to secure a better understanding of the transfers and valuations that occur before it considers any amendment to assess fees for the sale of state property. The other change relates to the proposed ticket booth rate of \$250 which has been reduced to \$125 for booths up to 35 square feet and from \$8.00 to \$2.00 per square foot for larger booths. He indicated that the legal issues that were brought up by the Kewalo Ocean Activities (KOA) members would be addressed at a meeting at the Attorney General's Office. The outcome of that meeting may dictate whether or not the proposed rules will be presented to the HCDA Board for approval of adoption. Mr. Kuitunen distributed a handout regarding the Kewalo Basin timeline and a matrix summary of rule comments received and revisions made.

Mr. Gary Dill, a professional fisherman and KOA member explained that the small business impact statement provided by HCDA is inefficient. He stated that it does not convey any real information on negative impacts and parts of it convey false claims and exaggerations. He provided several specific reasons and requested that this Board find the impact statement unacceptable. Mr. Reg White, owner and vice president of Paradise Cruise, Ltd., and a KOA member, discussed the history and safety of Kewalo Basin. He explained that the Kewalo Basin entrance channel is difficult to negotiate and it takes skill to maneuver it unlike the Ala Wai entrance channel which is much easier to travel. Because of this, he further explained that the mixed use provision in the rules regarding Kewalo Basin would result in a very dangerous situation for boaters. He also stated that the reciprocity provision is not effective because it must be executed prior to the implementation of the rules.

Mr. Frank Mento, vice president of Kahala Catamarans and a KOA member, explained that KOA is opposed to the proposed draft Revocable Permit because of various terms in the permit. Also he thought it would be a mirror-image of the Department of Transportation's permit, but it is not. He stated that it appears to be a lease document but called a permit. He is also opposed to the reciprocity provision. Mr. Mike DeRego, president of Inter-island Sport Fishing and a KOA member expressed his concerns, reiterating the other testifiers' issues. Mr. Brian Ho, an attorney representing X-Treme Parasail, Diamond Head Parasail, Diamond Head Parasail & Water Sports, and Honolulu Screamer. All of these companies are KOA members but he is at this meeting as a representative of the individual companies. He explained that KOA has filed a lawsuit so his comments are independent of what happens with the legal process. He believes that both sides have made tremendous efforts to reach a compromise and that the rules are as close as they could be to getting a compromise. He stated that his clients' costs will increase tremendously. The booth rent will go up 738% and 378%, respectively, and the slip rents will also increase.

After a series of questions and answers, Chair Woods asked each member to voice their opinions and perceptions on the proposed rules; this is in spite of the pending lawsuit by KOA which may end up with the Board's opinion becoming a mute point. It was noted that HCDA and KOA are diametrically at odds with each other and there was a huge gap on the basic premises. It was stressed that the parties should continue negotiations. Overall, Chair Woods explained that this is a very complex decision for the Board to make. However, it is this Board's responsibility and purview to take a stand for small business.

Chair Woods explained that the KOA members are the victims of a bureaucratic shuffle. Although there are real issues with the proposed rules, the current users should also need to understand that sometimes the cost of business goes up and sometimes it has to be passed onto the clients. The lack of experience in HCDA running the harbor is very clear, and because of that, some of the proposed rules are just not appropriate. There is concern about the permit moorage which has become a multi-page lease, and appears to be poorly thought-out and presented. The users that have been paying for their slips are now going to be expected to pay for expenses that should have been made a long time ago, which makes no sense because the users should not be responsible. The safety issue is also a concern if the slips are going to be rented out to those who are not experienced in using Kewalo Basin given foul weather conditions. Because the proposed rules will be incumbent upon the users to build a ticket booth as well as pay rent for the same booth to HCDA is puzzling to the Board. Regardless as to whether or not there is a lawsuit, this Board still needs to do its job. It is therefore Chair Woods' opinion that the Board recommend to the Governor that the rules, as presented, not be signed and that more experienced people be brought to the table to help with the management of the harbor. Because it is clear that this Board knows what business impact is, it was suggested that one of the members be included in the discussions of these rules. Based on Chair Woods comments, Mr. Leis recommended that the Governor not adopt these proposed rules as presented; the Board unanimously agreed. It was noted that a copy of the memorandum to HCDA will be sent to the Governor with an explanation of the Board's reasons.

- B. Review and discussion of post public hearing statement of HAR 16-24, “Money Transmitters” (DCCA) – Chair Woods indicated that no one from the DCCA is present to discuss these post public hearing statements. However, there have been no changes since the Board first reviewed and supported these rules prior to public hearing. Mr. Au recommended that these rules proceed to the Governor for adoption; the Board unanimously agreed.
- C. Review and discussion of post public hearing statement of HAR 11-104.1, “Management of Infectious Waste” (DOH) – Ms. Terri Byers, Branch Chief of the Office of Health Care Assurance at DOH, explained that there were no written or oral testimonies at the public hearing; only one person was in attendance to witness the proceeding. Ms. Dianne Okumura, consultant for DOH, explained that due to the need to amend the regulations to include language of Act 12, the department had reviewed the rules in its totality. Components of the regulations were amended to adhere to current standards and practices for treatment and disposal of infectious waste consistent with various agencies, Center for Disease Control and Prevention, Environmental Protection Agency, Clinical Laboratory Standards Institute for Clinical Laboratory Waste Management and the Occupational Safety and Health Administration. No changes have been made to these rules since this Board initially reviewed them prior to public hearing. Vice Chair Pang indicated that the rule amendments were straight forward and that she was satisfied with them. She recommended that the proposed rules proceed to the Governor for adoption; the Board unanimously concurred.
- D. Review and discuss final Milk Survey – Chair Woods explained that this presentation was a follow-up to previous discussions and rule reviews relating to increased milk prices at the dairy farm level and how it can be confusing to have price controls. Dr. Chin Nyeen Lee, Dairy Specialist at the University of Hawaii, explained that the Department of Agriculture funded the milk study. He discussed and covered a brief history and trends of the Hawaii milk industry, milk sheds, quotas, milk classes, pasteurization, imports, prices and quality. There are about nine million cows in the United States with approximately 183 million pounds of milk produced annually. About 25 pounds of milk per capita is consumed per annum. He explained that class 1 milk is the milk that we drink, class 2 milk is yogurt, sour cream, cottage cheese and the soft cheeses, class 3 milk is the aged cheeses and aged cheddars, and class 4 is high-bacterial milk. Dr. Lee conveyed several interesting facts including the fact that milk consumption has remained stable, and that all organic milk is pasteurized.

IV. NEW BUSINESS

- A. Review and discussion of HAR Chapter 11-79, “Licensing of Dietitians” (DOH) – Ms. Dianne Okumura, a consultant for DOH, explained that the adoption of the proposed rules will provide the department with a framework for implementing the Dietitian Licensure Program, under Chapter 448B. The proposed regulations are new and define licensure requirements, collection of fees, establishment of a Dietitian Licensure Special Fund, and procedures for the revocation, suspension, denial and the imposition of fines for violation of the rules. It was explained that the overall operations, functions, activities and inter-relationships of the department will not be affected by the adoption of these rules. Ms. Okumura introduced a few dietitians that answered a series of questions regarding education and licensing. Vice Chair Pang recommended that the proposed rule amendments proceed to public hearing; the Board unanimously agreed. Chair Woods requested that the Office of Health Care Assurance specifically notify all entities affected by these rules of the public hearing.
- B. Review and discussion of HAR Chapter 11-156, “Communicable Diseases” (DOH) – Dr. Glenn Wasserman, Chief of DOH’s Communicable Disease Division, and Mr. Peter Whitar, Chief of STD/AIDS Prevention Branch explained that the proposed rule changes fall under three distinct areas: 1) changes concerning infectious disease reporting, 2) changes concerning sexually transmitted infections reporting, and 3) changes concerning named HIV reporting. It was noted that Hawaii was one of the last states to require HIV reporting. Vice Chair Pang stated that because health care personnel is so aware of privacy and people are coming forward to self check themselves who may be exposed to something, the issue of confidentiality was important. She further stated that if something is found, they would like their privacy, in the form of a release form. A guideline for confidentiality of HIV and AIDS was distributed; the guidelines are followed very closely. It was explained that some changes in the algorithms may pose a business impact as it will cost a few hundred dollars to change the requested information in the rules. Vice Chair Pang recommended that the proposed rule changes proceed to public hearing; the Board unanimously agreed.

- C. Review and discussion of HAR Chapter 5-11, “Notaries Public” (AG) – Ms. Shari Wong, Deputy Attorney General from the Department of the Attorney General, explained that this proposal includes repealing the old set of rules regulating notaries under the Revised Laws of Hawaii and updating and implementing them into the new set of rules. Mr. Dymond stated that the rules clarify and bring the regulations up to current practices. He also stated that the fees were reasonable and not out of line or onerous. Mr. Dymond recommended that the proposed rules proceed to public hearing; the Board unanimously agreed.
- D. Discussion of Maui Marine Tour Operators – Chair Woods explained that this Board has been approached by the Maui’s marine tour operators regarding the Island of Maui introducing a new set of rules for permits to operate commercial businesses on the beaches. A state-wide business activity association that was started on Maui has emailed Chair Woods regarding this issue. These permits involve companies that provide lessons such as SCUBA and surfing lessons. At one point in time when Maui refused to provide any permits they began to self-police, which was successful for some time. However, local residents began to complain particularly on week-ends when they did not have use of the beaches. Instead of enforcing the existing rules, Maui decided to execute a whole new set of rules. The businesses are very upset, which is the reason they approached this Board. The businesses and the County are now meeting every day and are in the process of compiling “workable” rules. The activities owner association relayed to Chair Woods that the County was extremely flexible; therefore, she recommended that this Board not intervene at this point in time. She has a call into the Mayor of Maui to make sure that she understands the rule review process and that the proposed County rules are required to come to this Board.
- E. Discussion of nomination of prospective Board member – Vice Chair Pang referred Ms. Lucy Lee Jones, a PhD in psychology and from the Island of Hawaii, as a prospective member to this Board. Vice Chair Pang stated that she is an intelligent, well-respected individual who has a vast background. She is a professor, a pastor, a home-maker, a writer, worked with charter boats, and she does everything very well. It was discussed as to whether Ms. Jones has enough “business experience and range” to qualify as a Board member. It was also discussed as to whether Ms. Jones is qualified because she teaches at two state schools. The recommendation to nominate Ms. Jones as a Board member is deferred until next month in order to resolve these two issues.

V. REPORT FROM HASTINGS & PLEADWELL

- A. Final review and update on the Small Business Bill of Rights brochure – Mr. Steve Bretschneider provided the members with the “final” version of the Small Business Bill of Rights brochure, indicating that it should be easy and inexpensive to reproduce. He mentioned that Director Liu’s commentary and picture were added to the back of the brochure. Ms. Ahn stated that three State agencies had concerns with rights 6 and 7 because they are not true legal rights. She provided the members with recommended wording for right 7. The members wanted to keep right 6 the same, but agreed to change 7. The members also recommended that “Hawaii’s Business Advocate” be included on the front of the brochure and that the paper be a heavier bond.
- B. Update on Outreach Plan – Ms. Kayleen Polichetti, Account Executive from Hastings & Pleadwell, discussed the recent media outreach of this Board, and the *PBN* coverage which includes the editorial and the letter to the editor. She also discussed the requests for speaking engagements. She will begin bookings on the neighbor islands for members’ speaking engagements. She distributed a proposed presentation and requested that each member review it and get back to her with comments. A training session will be scheduled for next month to go over the specifics of the presentation. Ms. Polichetti also announced that the *Honolulu Advertiser* was planning to do a piece on Chair Woods for the newspaper’s Leadership Corner. She recommended that each member get a professional picture taken.

VI. ANNUAL PLAN – Update on the following Projects:

- A. Speakers’ Bureau – Discussed in Update on Outreach Plan.
- B. Agency Letters/201M-7 Project – Nothing was discussed.
- C. Legislative Project – Nothing was discussed.
- D. Regulatory Alert Project – Nothing was discussed

VII. CHAIR REPORT – Update on Certified Nurse Aides - Chair Woods explained that there has been a tremendous amount of confusion regarding the regulation and certification of nurse aides. To straighten out the confusion, Ms. Terri Byers, Branch Chief of the Office of Health Care Assurance at DOH, discussed the history and current status of House Bill 71, “Relating to Nurse Aides.” This bill was passed and signed by the Governor during the past legislation session. The bill establishes certification procedures for Type II nurse aides employed in state-licensed health care settings and Medicare or Medicaid facilities. Currently, there is no state or federal law that requires CNA’s to work in these care settings. However, federal law dictates that CNA’s working in certified nursing facilities must complete certain training processes. For example, CNA’s must pass a State-approved program or requirements for in-service training. The State of Hawaii never had a system in which they could ensure that the CNA’s in Type II settings are certified. Therefore, the new regulations regarding Type II settings will allow CNA’s that want to maintain their certified status to do so, on a volunteer basis. The regulations state that to be eligible, a CNA must work for one day within a two-year period as a nurse aide with a registered nurse attesting that the nurse aide has the skills. The regulations also state that a nurse aide must pass a state-approved competency, efficiency evaluation. Ms. Byers noted that although not mandatory, it is more of a matter of pride for these CNA’s to keep up with their certification.

Chair Woods also stated that this Board received a request from a small business owner from Maui regarding short-term vacation rentals. She explained that bed and breakfast facilities have rules that govern them; short-term vacation rentals do not. In almost every case, the vacation rentals are in the wrong zone. She noted that there have been two attempts over the last two years to develop an ordinance and each time it has been shelved. This is because the general community is very upset about having short-term vacation rentals in their communities. Up until now, there has been no political will to develop an ordinance. The current Maui mayor has been closing them down and fined the owners with great regularity. The bottom line is that there are people wanting to establish short-term vacation rentals and there are no ordinances and no rules that govern them. Mr. Schnitzler recommended that a letter be sent to the small business owner indicating that the issue at hand is not within the purview of this Board, and given that this Board is to review new or existing rules, that they be encouraged to address the issue with Maui’s County Council; the Board unanimously agreed. Chair Woods explained that if County Counsel wrote an ordinance to pass short-term vacation rentals, the County administration would develop the rules and then the proposed rules would come to this Board.

Chair Woods announced that Dorvin Leis, Michael Yee and Donald Dymond’s terms on this Board expires in June 2008. She requested that each member notify her as to whether or not they will plan to continue on as members.

It was noted that Ms. Gina Mangieri provided a thirty second spot on Channel 2 highlighting this Board and announcing the newly voted Board members.

VIII. DISCUSSION LEADER’S REPORT – Nothing was discussed.

IX. NEXT MEETING: Wed., Sept., 19, 2007, No 1 Capitol Building, 250 South Hotel Street, Conference Rm. 410.

X. ADJOURNMENT – Chair Woods adjourned the meeting at 2:10 p.m.