

## Small Business Regulatory Review Board

### MINUTES OF REGULAR MEETING

March 18, 2009

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

I. **CALL TO ORDER:** Chair Woods called the meeting to order at 10:34 a.m., with a quorum present.

**MEMBERS PRESENT:**

- Lynne Woods
- Michael Yee
- Dorvin Leis
- Richard Schnitzler
- Peter Yukimura
- David S. De Luz, Jr.

**ABSENT MEMBERS:**

- Sharon L. Pang
- Donald Dymond
- Charles Au
- Bruce Bucky

<b>STAFF:</b>	<u>DBEDT</u>	<u>Office of the Attorney General</u>
	Dori Palcovich	Margaret Ahn
	Christiane McKinney	

### WORKING LUNCH AS THE MEETING PROGRESSED

II. **APPROVAL OF MINUTES**

Mr. Schnitzler recommended that the January 21, 2009 minutes be approved as presented, Mr. Yukimura seconded, and the Board unanimously agreed.

III. **OLD BUSINESS**

- A. Re-review and discussion of HAR Chapter 11-55, Water Pollution Control" (DOH) – Mr. Alec Wong, Program Manager from DOH's Clean Water Branch, stated that the public hearing has been scheduled for April 27, 2009. The proposed change to the rules is the repeal of the requirement for applicants to submit the National Pollutant Discharge Elimination System permit application or Notice of Intent to the Department of Land and Natural Resources, State Historic Preservation Division. It was noted that because this Board previously reviewed the changes and because a public hearing has been already scheduled, a motion from this Board is not necessary. However, Second Vice Chair Yee recommended that after public hearing, the Agency does not need to come back to this Board for review of HAR Chapter 11-55-38, Mr. DeLuz, Jr., seconded, and the Board unanimously agreed.
- B. Review and discussion of post public hearing statement of HAR Chapter 11-218, "Communication Access Services for Persons who are Deaf, Hard of Hearing, and Deaf-Blind" (DOH) – Ms. Kristine Pagano, Communication Access Specialist, from the Department of Health's Disability and Communication Access Board, provided comments to the members regarding the public hearing process. Ms. Pagano requested that this Board approve the changes to the rule's fee schedule that were made as a result of the public hearing. Those changes include: 1) a two-hour minimum requirement for a job assignment; 2) an increase of \$5.00 per hour for job assignments between the hours of 7:00 p.m. to 7:00 a.m., on state holidays and on week-ends, 3) an increase in the current hourly rate by \$10.00 for all interpreter credential levels; and 4) to establish two tiers to the fee schedule for NIC Advanced and NIC Master credentials. After a series of questions and answers, Mr. Yukimura recommended that the rules as presented proceed to the Governor for adoption, Mr. Schnitzler seconded, and the Board unanimously agreed.
- C. Review and discussion of post public hearing statement of HAR Chapter 13-1, "Rules of Practice and Procedure" (DLNR) – Mr. Yee indicated that there were several public hearings with many comments and testimony. The changes made to the rules after the hearings were for clarification purposes and minor

technical changes, so the Attorney General's office did not require additional public hearings. Upon review, Mr. Yee recommended that the post public hearing statement be sent to the Governor's office for adoption of the rules, Mr. Schnitzler seconded, and the Board members unanimously agreed. Chair Woods stated that the person responsible for composing the public hearing statement did an excellent job.

- D. Review and discussion of post public hearing statement of HAR Chapter 15-150, "Rules Governing Special Management Areas and Shoreline areas within Community Development Districts and Practice and Procedures before the Office of Planning" (DBEDT)** - Mr. Douglas Tom, Planning Program Manager, and Mr. Schichao Li, Planner of DBEDT's Coastal Zone Management Branch, stated that one person showed up at the public hearing. The person who attended the public hearing was a law student who was interested in the process and dynamics of government operations and did not testify on the proposed rules. Upon review of the post public hearing statement, Mr. Schnitzler recommended that the proposed rules proceed to the Governor for adoption, Mr. Yukimura seconded, and the Board unanimously agreed.
- E. Update on legislature** – Chair Woods discussed the following bills that this Board is currently following and reported the status of each:
- i. HB200, HD1, "Relating to the State Budget"
    - This bill appropriates funds for the executive branch for fiscal years 2009, 2010, and 2011; it crossed over on March 17<sup>th</sup> and transferred to the Senate Ways and Means Committee. This bill proposes to transfer a number of divisions out of DBEDT and remove DBEDT's deputy director. While it transfers this Board to DCCA, the administrative staff to this Board is not transferred. Ms. Ahn noted that other agencies that have been proposed to be transferred are meeting with the legislators to work out specific details. Upon much discussion, Mr. De Luz, Jr., recommended that this Board send testimony/correspondence relaying information for clarification of administrative staff that legislatively supports this Board, Second Vice Chair Yee seconded, and the Board unanimously agreed.
  - ii. GM268, "Consideration for confirmation of Sharon Pang to sit on the SBRRB"
    - This bill has been passed on for confirmation.
  - iii. GM280, "Consideration for confirmation of Peter Yukimura to sit on the SBRRB"
    - This bill has been passed on for confirmation.
  - iv. GM422, "Consideration for confirmation of Charles Au to sit on the SBRRB"
    - This bill is deferred pending responses to the Senate's questions.
  - v. HB1428, HD1 and SB1276, SD2, "Relating to Small Business"
    - These two bills are the Board's working group's bills and are moving forward.
  - vi. HB1622, HD1, "Relating to the Small business Regulatory Review Board"
    - This bill is from Representative Kyle Yamashita's bill and it was deferred in February.
  - vii. HB952, HD1, "Relating to Labor"
    - This bill is moving forward.
  - viii. HB1728, HD1, "Relating to Fees"
    - This bill is moving forward.
  - ix. HB814, HD2, "Relating to Nurse Aides"
    - The Board only keeping track of this bill and is not providing testimony.
  - x. HB1148, HD1, "Relating to Public Agency Meetings"
    - This bill is moving forward.
  - xi. HB999, HD1, "Relating to Meetings of Public Agencies"
    - This bill is moving forward.
  - xii. HB949, HD1, "Relating to the Hawaiian Homes Commission Act"
    - This bill is moving forward.
  - xiii. SB1621, SD2 "Relating to Collective Bargaining"

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

- A. Review and discussion of amendments to HAR Chapter 11-54, "Water Quality Standards" (DOH)** – Mr. Alec Wong, Program Manager from DOH's Clean Water Branch, explained that there are two sets of revisions relating to this chapter. The first set of amendments was to correct a typographical error and

conform to the federal requirements as it relates to geometric means of bacteria. The second revision requests adopting the latest Environmental Protection Agency's (EPA's) standards for chlordane and dieldrin. Ms. Linda Koch, Environmental Health Supervisor at DOH's Environmental Planning Office, stated that DOH is proposing to expedite the amendments. Both of the amendments will be proposed at an April public hearing. It was noted that the states may develop its own independent standards as EPA only has provided guidelines, and it has been twenty years since the last recommendation on these types of standards were provided by the EPA. After a series of questions and answers, Second Vice Chair Yee recommended that the proposed rules proceed to public hearing, Mr. Schnitzler seconded, and the Board unanimously agreed.

- B. Review and discussion of amendments to HAR Chapter 11-282, "Deposit Beverage Container Program"**(DOH) – Mr. Karl Motoyama, Supervisor at DOH's Solid and Hazardous Waste Branch, explained that the proposed amendments include a new Subchapter 7, entitled Field Citations, with penalty amounts ranging from \$50 to \$300 per violation; he noted that this new Subchapter is a benefit to the community. The amendments present an alternative administrative settlement process to a costly and timely formal administrative enforcement process and stated that the department is very careful with regards to its enforcement actions. In lieu of a warning letter, a department inspector has the capacity to perform a field citation. The total amount to be collected is not quantifiable; all penalties collected will go into the State Emergency Response Revolving Fund. The revolving fund consists of appropriated moneys by the legislature: 1) as a result of departmental compliance proceedings, 2) from court-ordered awards or judgments, 3) from court-approved or out-of-court settlements, 4) moneys generated by the environmental response tax, and 5) from other sources.

It was indicated that the number of people and businesses recycling has increased over eighty percent; the department's goal is eighty percent. The increase in redemption is an indication of the economy and public's awareness of the recycling program. The department began with thirty redemption centers and now exceeds over one-hundred centers. Mr. Motoyama stated that warning letters and a checklist are issued to all potential offenders of violations; this allows the alleged offender to correct the violation prior to being penalized. The issue of payment was also discussed as there are currently only two forms of listed payment, cashier and personal checks; Mr. De Luz, Jr., mentioned that perhaps a "company" check could be considered. Upon much discussion, Second Vice Chair Yee recommended that the rules proceed to public hearing, Mr. Yukimura seconded, and the Board unanimously agreed.

- C. Review and discussion of amendments to HAR Chapter 3-120, "General Provisions," HAR Chapter 3-121, "Procurement Organization," HAR Chapter 3-125, "Modifications and Terminations of Contracts," HAR Chapter 3-128, "Governmental Relations and Cooperative Purchasing," and HAR Chapter 3-131, "Compliance"** (DAGS) – Ms. Ruth Yamaguchi, Assistant Administrator at the State's Procurement Office, indicated that the changes pertain to proposed procurement rules that State departments and County agencies must follow. She highlighted the specific changes of each rule sections, and indicated that although many of the changes are housekeeping there are also some major changes. Some of those changes include the creation of new sections in regards to "meetings," "rulemaking proceedings and declaratory rulings," and a section that provides the process for the assessment of administrative fines. Two of the changes reflect actual changes in the law; these are within chapters 128 and 131. Mr. Leis questioned the clause regarding final payment to the sub-contractors; Ms. Yamaguchi indicated that the final payment clause states that a percentage is held back until completion of the entire job and all items have been accepted. Thus, if everything is in order and the agency has accepted performance or delivery, the agency has thirty days to pay the general contractor and the general contract has a certain amount of days to pay the sub-contractor. She also indicated that there are additional rules within the State, not necessarily in the procurement rules that require a State agency to pay within thirty days for satisfactory receipt of receipt of goods with an invoice. Mr. Leis recommended that the proposed rules proceed to public hearing, Mr. Yukimura seconded, and the Board unanimously agreed.
- D. Review and discussion of amendments to HAR Chapter 16-71, "Relating to Certified Public Accounts and Public Accounts"** (DCCA) – Chair Woods explained that as Board member Charles Au was unable to attend the meeting today, she reviewed the proposed rules. Ms. Laureen Kai, Executive Officer of DCCA's Board of Public Accountancy, summarized the proposed changes, which are the accumulative result of several years of reviewing and analyzing the rules; thus, as there have not been any changes to these rules since 1997, the changes represent a major overhaul. Changes, among others, include codifying acts that were previously approved by the legislature and already implemented by the Board of Public

Accountancy through policy; such as increasing the educational requirement for examination and licensure to 150 semester hours of college education. Ms. Kai further explained that the financial impact on small business entails a permit fee which a firm must obtain to practice. One component of the fee is that the amount is earmarked for the Compliance Resolution Program located in the Regulated Industries Complaints Office. It is estimated that there are approximately 300 firms that would be required to obtain permits. She noted that the Board of Accountancy is very proud of these rules as it has been quite an effort to promulgate them. After many questions ensued, Mr. Yukimura recommended that the proposed rules proceed to public hearing, Mr. Schnitzler seconded, and the Board unanimously agreed.

- E. Review, discussion and recommendation of correspondence, dated February 10, 2009, from Mr. Ikuo Nakano, Vice Chancellor, IOND University, Tokyo, Japan, regarding Hawaii State Office of Consumer Affairs – The Board members discussed correspondence from Mr. Ikuo Nakano regarding actions taken by the State's Office of Consumer Protections (OCP). Specifically, Mr. Nakano claimed that OCP closed down the initiatives of IOND University (IOND) while it was creating a small post-secondary establishment by the same name in Hawaii. Much discussion ensued as it was questioned whether IOND had any warning from OCP or whether IOND had local representation or affiliation that would be able to provide this Board with background and insight, including a chronological timeframe and circumstances of events that would assist this Board in comprehending Mr. Nakano's claims. It was also suggested that a letter be sent to Mr. Ikuo Nakano, requesting the name of a liaison in Honolulu that would be able to meet with this Board in order to have a clearer understanding of the facts. There was some speculation that the State may have restrictions on international business registrations, and it was mentioned that the Board may need to review the rules that govern Hawaii schools. After much discussion, Mr. Schnitzler recommended that this Board have further communication with IOND, find out who its local liaison is so the members may be able to dialogue with them, and to communicate with OCP so that the members can find out the specific details that led to close of IOND, Mr. Yukimura seconded, and the Board unanimously agreed. Ms. Ahn added that it is the Ombudsman's jurisdiction to investigate complaints regarding government agencies.
- F. Review and discussion of Jan. 5, 2009 letter from Hawaii Smokers Alliance & Hawaii Bar Owners Association, re: proposed Chapter 11-81, "Smoking in Public Places" (DOH) – Mr. Dave Crowley, Co-Chair of the Hawaii Smokers Alliance, read testimony written to this Board from Mr. Bill Comerford, spokesperson for the Hawaii Bar Owner's Association. In summary, the letter stated that the bulk of testimony and support of the smoking ban comes from anti-smokers and not from the general public. The anti-smoker's concern about smoking is "outlandish in its propriety." Further, in their efforts to go around this Board, two bills, SB56/HB886 are currently in the legislature, requirement the enforcement performed by the Liquor Commission. The bills are intended to revoke liquor licenses on the third offense committed by a customer, thereby putting a bar owner out of business. Specifically, SB56, SD1, "Relating to Enforcement of the Smoking Prohibition," allows for the compliance of the smoking restriction law by nightclubs and restaurants a condition of renewal for a liquor license. It also authorizes each county's liquor commission to enforce smoking laws, concurrently with the department of health. Additionally, it increases fines for violation of the smoking restriction law and allows for the avoidance of any administrative rules so they will not be appearing before this board.

Ms. Jolyn Tenn, Co-Chair of Hawaii Smokers Alliance, explained that she was in attendance with Mr. Crowley to answer any questions the Board members may have in reference to Mr. Comerford's correspondence. Chair Woods explained that this Board has a limited venue of power. The Board's recommendation to have the proposed Chapter 11-81, "Smoking in Public Places" to go to public hearing was to hear what the public's concerns are. She also explained that the proposed rules have not yet been signed by the Governor for approval to go to public hearing, and so it is important to understand why. There was some discussion that perhaps one reason was due to circumventing the process in regards to SB56, SD1. Ms. Tenn stated because the bill gives enforcement control over to the Liquor Commission, it would in effect be unfair prosecution which is unconstitutional. Regarding the status of SB56, SD1, the Judiciary Committee passed it through, however, the Liquor Commission submitted testimony in opposition of the bill. In effect, it was noted that the smoker is the violator of the law, but the legislation is being rewritten to make the business owner's the violators. Mr. De Luz, Jr., recommended that this Board submit testimony on the bills to draw the legislators attention that proposed Chapter 11-81 has not yet gone to public hearing and that this Board, which is legislatively responsible for mitigating small business impact, is opposed to business owners held responsible for the enforcement of the smoking violation but should be the smokers themselves, Mr. Schnitzler seconded, and the Board unanimously agreed.

**V. DISCUSSION AND UPDATE OF BOARD'S 2009 GOALS:**

- A. RegAlert Project – Chair Woods explained that the RegAlert project has been well received and effective. After this Board sent out its RegAlert regarding HB952, HD1, “Relating to Labor,” the Hawaii Chamber of Commerce sent out its own “Alert,” requesting input and testimony from its members.

Mr. Yukimura indicated that the Hawaii Japanese Chamber of Commerce would like to be partnered with this Board on the RegAlert project.

- B. Chapter 201M, HRS, Amendments – Chair Woods reported that this topic relates to the two bills currently in the legislature, HB 1428, HD1 and SB 1276, SD2, “Relating to Small Business.” These bills represent the Board’s Working Group modifications to the statute that governs this Board. The bills have been moving forward with no apparent concerns from the legislators.
- i. 201M-3 Small business statement after public hearing – February 6, 2009 letter from Mr. Lawrence M. Reifurth, Director, DCCA – Ms. Ahn stated that the Board’s statute does not require that the Governor to wait for this Board’s recommendation to adopt the rules after public hearing. Chair Woods concurred, stating that when a department submits its post public hearing statement to this Board, it is generally sent concurrently to the Governor. She stated that the only way to stop the Governor adopting a rule before it comes to this Board for review is to change the statute. Much discussion ensued regarding this process, and it was noted that, although previously this Board held up rules, currently this Board seldom holds up any rules to be adopted or to go to public hearing; if the rules are held up, it is because of a very good reason. This Board members will continue to follow this process
- ii. 201M-7 Periodic review; evaluation report – Feb., 13, 2009 letter from Public Utilities Commission – Chair Woods stated that it was her opinion that the head of the Public Utilities Commission (PUC) was challenging this Board’s request to perform a full analysis on a selected few administrative rules. Ms. Ahn indicated that an agency may not exactly know what a “full analysis” means. Chair Woods explained that while the Board requested a review on only a few rules, the PUC Chairman responded to the Board with the Board’s statutory mandates. After much discussion, Mr. De Luz, Jr., recommended that a letter be sent to the Governor requesting why PUC would refuse to review the rules with a copy of the Board’s original request, and Mr. Schnitzler seconded; the Board unanimously agreed.

**VI. REPORT FROM CHAIR:** Nothing was discussed.

**VII. REPORT FROM BOARD MEMBERS:** Mr. De Luz, Jr., explained that he was scheduling a meeting with Mr. Schnitzler to meet with the County of Hawaii’s Research and Development Department to ensure that the County is aware that this Board exists and the need for cooperation in terms of County rule reviews. Mr. Schnitzler stated that it would be an opportunity because there is a new County regime in place. Chair Woods explained that when the Counties write their ordinances, rules are generally included in the ordinances. She noted that Maui County rule writers are the attorneys who consult with the County administration and County counsel, and mentioned that this may be a good point of discussion.

**VIII. ANNOUNCEMENTS:** No announcements were made.

**IX. NEXT MEETING** – Wednesday, April 15, 2009, 250 South Hotel Street, Honolulu, HI, Conference Room 410, 10:30 a.m.

**X. ADJOURNMENT** – Chair Woods adjourned the meeting at 1:30 p.m.