

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

February 3, 2012

Conference Room 436 - No. 1 Capitol District Building, Honolulu, Hawaii

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

MEMBERS PRESENT:

- Sharon L. Pang
- Charles Au
- Richard Schnitzler
- David De Luz, Jr.
- Bruce Bucky
- Peter Yukimura
- Howard West
- Chu Lan Shubert-Kwock

ABSENT MEMBERS:

- None

STAFF: DBEDT

Mary Alice Evans
Dori Palcovich

Office of the Attorney General

Margaret Ahn

II. APPROVAL OF DECEMBER 7, 2011 MINUTES

Mr. De Luz, Jr., made a motion to accept the December 7, 2011 minutes with amendments. Vice Chair Schnitzler seconded the motion, and the Board members unanimously agreed.

III. BOARD ADMINISTRATIVE MATTERS

- A. Discussion of Board's proposed 201M-7 "Periodic Review; Evaluation Report" for 2012, to the Hawaii State Legislature, which describes the two-year periodic review of board activities required by Section 201M-7, Hawaii Revised Statutes (HRS)

It was explained that this is a statutorily-required report that is due to the State Legislature every other even-numbered year. Although the State agencies were required to respond to this Board's request for rules that impact small business by June 2011 (every other odd-number years), because the request was not sent out, it is essential that a letter to the agencies go out soon. Mr. De Luz, Jr., noted that although the agency letter will be going out significantly later than in the past, this may be viewed as an opportunity to show the agencies that this Board is willing to work with them. After discussing the importance of this report, it was agreed that Deputy Attorney Ahn would assist in reviewing the previously sent letters to the agencies from the Board and work with staff who in turn will submit a draft to the Chair for final approval.

As a result, Mr. De Luz, Jr., recommended that DBEDT staff work with Deputy Attorney Ahn to draft a preliminary letter, that Chair Pang work with staff to get the 201M-7 letters sent out

to the agencies in order to effectively promulgate the rule review process with the understanding that the request to the agencies was to have been sent to the agencies in 2011, and that the agency letters are sent prior to the next Board meeting. Mr. Schnitzler seconded the motion, and the Board members unanimously agreed.

B. Consult with Board's Attorney to advise Board of its powers, duties, and liabilities with regard to the review of administrative rules pursuant to Chapter 201M, Hawaii Revised Statutes (HRS); Administrative Directive No. 09-01; Sunshine Law, Chapter 92, HRS; and the Code of Ethics, Chapter 84, HRS, due to issues raised by State agencies, and discussion of Department of Business, Economic Development and Tourism and Staff Support

A motion was made by Ms. Shubert-Kwock, seconded by Vice Chair Schnitzler and passed unanimously to go into Executive Session under the provisions of Section 92-5, Exceptions, Subsection (a) Paragraph (4). The Board went into Executive Session at 10:40 a.m. The Executive Session ended at 12:00 p.m.

C. Election of Small Business Regulatory Review Board Chairperson pursuant to Section 201M-5(d), HRS

Chair Pang noted that according to this Board's statutes, every year a new Board Chair must be elected. Mr. West recommended that Ms. Sharon L. Pang be nominated as the Chairperson, Mr. De Luz, Jr., seconded the motion, and the Board members unanimously agreed; the vote is effective today.

Second Vice Chair Schnitzler recommended that Mr. Charles Au be nominated as the Vice Chair, Mr. De Luz, Jr., seconded the motion, and the Board members unanimously agreed; the vote is effective today.

Mr. De Luz, Jr., recommended that Mr. Richard Schnitzler be nominated as the Second Vice Chair, Mr. Bucky seconded the motion, and the Board members unanimously agreed; the vote is effective today.

D. Discussion of a future strategic planning session regarding possible dates and topics to discuss

Chair Pang indicated that there has not been a recent strategic planning session because there have been no extra funds. It was noted that Hastings & Pleadwell, a public relations firm that previously worked under contract with the Board, i.e., assisting with a communications plan and public relations, has offered perform follow-up work with the members on a pro bono basis. Mr. De Luz, Jr., will assist DBEDT staff as he knows both Barbara Hastings and Barbra Pleadwell. It was suggested that Hastings & Pleadwell be asked to attend a future board meeting when there is a "light agenda" to assist the Board with its strategic plan.

IV. OLD BUSINESS

A. Review and update of proposed new administrative rules, Title 17, Chapter 1445, "Recertification of Nurse Aides in State-Licensed or State-Certified Health Care Settings" (Department of Human Services (DHS))

Chair Pang explained that this Board had requested that DHS provide the proposed rules to the industry's stakeholders and to Representative John Mizuno for input, and that a representative from DHS attend a subsequent board meeting to update the Board on the stakeholders' and Representative Mizuno's interaction. However, this Board has not heard from DHS as to whether these actions were taken, and no one from DHS was in attendance. The Board perceives this as a missed opportunity to allow the Board to assist with the rule review process. Vice Chair Au stated that, in the past, correspondence was sent to the Governor's office regarding an agency's failure to comply with the Board's request; he further indicated that this should be a standard action of the Board, with a copy of the memorandum sent to the agency.

B. Small Business Statement after Public Hearing on the repeal of Hawaii Administrative Rule, Title 16, Section 71-21, "Experience" – Relating to Certified Public Accountants and Public Accountants (Department of Commerce and Consumer Affairs)

The Board members reviewed the "after public hearing statement" sent by the Agency; no action was taken.

V. NEW BUSINESS

A. Proposed Recompilation of Rules of Practice and Procedure of the Kauai Planning Commission (County of Kauai – Planning Commission)

Mr. Kaaina Hull, Staff Planner, summarized the proposed rules into three separate efforts. The first effort is a re-codification of previous amendments to the Kauai Planning Commission, which were last codified in the 1980's. The re-codification is expected to assist with clarity and accuracy of the regulations.

The second effort accommodates the implementation of Kauai County Ordinance 919, which allows for civil fines for violations of the Comprehensive Zoning Ordinance. This ordinance was adopted by the Council and approved by the Mayor in December of 2011. The ordinance, under Authority of 46-1.5 (24), HRS, provides the Planning Department with the ability to levy civil fines for violations of the Comprehensive Zoning Ordinance. The fines can reach up to \$10,000 per violation, or \$10,000 per day should a violation persist after education and efforts to bring violators into compliance have failed. The amendments also provide the process by which the Planning Commission may hear appeals of these fines, as mandated by State law.

The third effort provides technical changes which have also been incorporated into the re-codification, including requirements concerning digital filings, clarifying intervention standing, and prescribing a consent agenda process to ease commission action. Mr. Yukimura stated that, overall, the proposed amendments were meant to streamline the rules and ordinance, and any effect on small business would be positive. Upon review, Mr. Yukimura recommended that the proposal proceed to public hearing. Mr. West seconded the motion, and the Board members unanimously agreed.

C. Proposed Amendments to HAR Chapter 11-54, "Water Quality Standards" - (Department of Health)

Mr. Alec Wong, Engineer from the Clean Water Branch at DOH, discussed the purpose of the rule amendments for HAR Chapter 11-54, "Water Quality Standards," and HAR Chapter 11-55, "Water Pollution Control." The amendments allow pesticide applications for a National Pollutant Discharge Elimination System (NPDES) permit in state waters and in waters throughout the United States. While this was to take effect November 1, 2011, there are currently no permits available in the State of Hawaii. Mr. Wong explained that changes include updating the State's Concentrated Animal Feeding Operations requirements to be consistent with the United States Environmental Protection Agency requirements, amending the definition of State waters, adding a new general permit and all other incidental language for its implementation to various sections of the rules for the discharges from the application of pesticides to State waters. Many of the changes are intended to be consistent with the federal regulations requiring a NPDES permit application for any discharge from a regulated concentrated animal feeding operation (CAFO), including information specified in 40 CFR Section 122.21, which refers to the Water Keeper Alliance and 2005 Second Circuit Court Decision on CAFOs, and for discharges from the applicant of pesticides to State waters.

Mr. Sean O'Keefe, Director of Environmental Affairs at Alexander and Baldwin, testified as to how the regulations would impact irrigation systems in the watershed areas on Maui; he noted that the Maui irrigation system is becoming infested with weeds as a result of not having the NPDES permit. He explained that Alexander and Baldwin is not the only company in Hawaii being impacted as there are irrigation systems on other islands operated by private entities, cooperatives and the State's Departments of Agriculture and Land and Natural Resources. As maintenance is unable to be done on these irrigation systems without the proposed rules in place, his company is strongly in support of getting the rules through the process as quickly as possible so that the necessary maintenance is resumed. He added that there are some issues within the rules that should be worked on before the rules proceed to public hearing, and noted that the rules are complex and very technical in nature.

Mr. Rob Hauff, Forest Health Coordinator, of the Department of Land and Natural Resources (DLNR), supports the proposed rules so that the agency can, again, use pesticides for a variety of projects throughout the State. DLNR would like to get these rules through as quickly as possible although there are still technical issues that need to be worked out. However, Mr. Hauff believes that DOH has gone beyond the federal standards. For example, the proposed rules allow permits to be issued for applications to Class 1 and Class AA waters, but because there are restrictions and certain criteria that must be met for approvals to be provided, those restrictions are not present for analogous waters in the federal rules. The restrictions are written for a different class of waters that receive a higher level of protection than Class 1 and Class AA waters. As a result, DOH has taken the federal requirements that are applied to this higher class of waters and applied them to a class of water that is not in that category. This will make it very difficult for the stakeholders, to get approval under the general permit for applications. Mr. Hauff also indicated that another example where DOH has gone beyond the federal standard relates to a new definition DOH has included in the rule for "pollutant." He noted that the proposed change of "pollutant" is not consistent with State law or the Clean Water Act, and the existing

definition is already fully consistent with federal law. As a result, there is no apparent need to revise the definition of the term “pollutant.”

Mr. Mark Fox, Director of External Affairs for the Nature Conservancy, stated that the Nature Conservancy’s comments are nearly identical to those already heard; he reiterated that the rules are technical in nature and encouraged that the rules proceed to public hearing. Ms. Janet Ashman, on behalf of the Hawaii Farm Bureau, explained that she was representing both large and small farmers throughout the State. The farmers are very concerned about their irrigation water as they are in need of this water; therefore, this rule is very important to them. Mr. Bill Tam, Deputy Director at the DLNR, also reiterated the testifiers’ comments, noting that there are some very technical, regulatory glitches regarding the state rules versus the federal rules.

Mr. West stated that he appreciated the fact that these are very complicated rules that were put together for implementation in a very short period of time. He reviewed a copy of the proposed rules and is in agreement with the testifiers as the amendments are technical but also substantive. Further, Mr. West believed that the definition of “pollutant” should be changed in the manner in which the testifiers have proposed. Vice Chair Schnitzler stated that it is very important that these rules are approved quickly, not only for agriculture but for just about everything that happens in our islands.

Chair Pang expressed the need for some of the testifiers/key stakeholders, along with the deputy attorney, to meet with DOH to incorporate some of the proposed technical issues. It was questioned whether the recommended changes to the rules would be able to be done in an expeditious manner. Mr. Wong indicated that while he would defer to DOH’s deputy attorney general for assistance with the recommended comments made by the testifiers, he noted that DOH is planning to hold a meeting next to discuss the recommendations by the stakeholders.

Second Vice Chair Schnitzler recommended that Chapter 54, “Water Quality Standards,” and Chapter 55, “Water Pollution Control” proceed to public hearing with the caveat that DOH seriously consider implementing some of the proposed changes recommended by the stakeholders as the recommendations are very sound. Vice Chair Au seconded and the Board members agreed; Mr. De Luz, Jr., recused himself from participating on this agenda item due to a conflict,

D. Proposed amendments to HAR Chapter 11-55, “Water Pollution Control” - (Department of Health)

See Section V. C. above.

VI. LEGISLATIVE MEASURES

A. Discussion of authority to a board member or staff to submit testimony and testify at the State Legislature

Chair Pang opened up the topic of how this Board would like to handle writing testimony and testifying on bills that would be of interest to the Board. Mr. DeLuz, Jr., noted that if

the RegAlert program was in place, this service would help with the process. He also noted that when submitting testimony, it generally needs to be done expeditiously. Vice Chair Au stated that, as in the past, DBEDT staff would determine if a bill would be of interest to the Board, send the bill to the Chair, the Chair would decide if testimony would be sent, staff would draft the testimony, and then submit it to the Chair for approval. Deputy Attorney Ahn stated that this process would take place only after the Board has decided on and votes as to what its position is on a particular bill as well as who would go to the legislative hearing to testify. The Board cannot take any action on a bill unless it is on a Board agenda. Further, although each Board member can testify as an “individual” testifier on a bill, members cannot testify on behalf of this Board unless voted to do so.

Vice Chair Au recommended that the Chair or the Board discussion leader be delegated to review testimony drafted by DBEDT staff. Chair Pang seconded the motion, and Board members unanimously agreed.

VII. ANNOUNCEMENTS - None

VIII. NEXT MEETING – Scheduled for Wednesday, March 21, 2012, 250 South Hotel Street, Honolulu, HI, Room 436.

IX. ADJOURNMENT – The meeting adjourned at 1:46 p.m.