

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

April 18, 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
- David De Luz, Jr.
- Bruce Bucky
- Peter Yukimura
- Howard West
- Chu Lan Shubert-Kwock

ABSENT MEMBERS:

- Charles Au
- Richard Schnitzler

STAFF:

DBEDT

Mary Alice Evans
Dori Palcovich

Office of the Attorney General

Margaret Ahn

II. APPROVAL OF MARCH 21, 2012 MINUTES

Mr. De Luz, Jr., made a motion to accept the March 21, 2012 minutes, as amended. Mr. Bucky seconded the motion, and the Board members unanimously agreed.

III. OLD BUSINESS

A. Small Business Statement After Public Hearing for amendments to HAR Title 16 Chapter 88, "Relating to Naturopaths" (Department of Commerce and Consumer Affairs (DCCA))

Chair Pang stated that DCCA submitted its small business statement after public hearing and that no one from the agency will be attending the meeting. Discussion leader, Ms. Shubert-Kwock had no comments to make.

Mr. West recommended that the proposed amendments proceed to the Governor for adoption. Ms. Shubert-Kwock seconded, and the Board members unanimously agreed.

IV. NEW BUSINESS

A. Correspondence from Hawaii Association of Public Accountants, dated March 8, 2012, "Board of Public Accountancy Meeting on March 2, 2012, and Draft Hawaii Administrative Rules for Act 66 of 2010"

Prior to hearing Mr.'s Robert's testimony, Chair Pang explained that the Board of Public Accountancy submitted a letter, dated April 18, 2012, in response to Mr. Roberts' March 2, 2012 letter; she requested that the members and Mr. Roberts first read this letter.

Mr. John Roberts, President of Hawaii Association of Public Accountants (HAPA), introduced Ms. Marilyn Niwao, an attorney and certified public accountant, who was also representing HAPA. Mr. Roberts explained that HAPA's overriding issue is that the State Board of Accountancy does not appear to understand that the definition of a "firm" is not a firm that is a national or international firm with headquarters located in Paris or Chicago. The definition of "firm" in the rules and in the legislation for which it is intended is "the office doing work in Hawaii." In addition, Ms. Niwao explained that HAPA wants a level playing field in regards to "peer reviews."

It was explained that there are two purposes for the wording of "firm" in the Hawaii Revised Statutes. The first purpose is to help ensure that the CPA services provided to Hawaii's consumers are of high quality for the protection of Hawaii's consumers and Hawaii's public at large; it is widely accepted that peer reviews help accomplish this objective. The second purpose is to help ensure a level playing field for Hawaii-based and non-Hawaii-based CPA firms doing business in Hawaii. However, the time and money required for a peer review represents a significant burden on a CPA firm. HAPA believes that the Board of Public Accountancy's draft administrative rules create an unfair advantage for non-Hawaii-based CPA firms doing business in Hawaii by subjecting them to only a partial quality control inspection, known as "peer review – lite" of their Hawaii operations and work product, while Hawaii-based firms must undergo a full quality control inspection of their quality control procedures and Hawaii work product. The resulting effect is discrimination against local Hawaii firms and favors foreign and multi-state firms.

Mr. De Luz, Jr., stated that without reading the current rules, based on Act 66, it appears that the Board of Accountancy may have purview on the definition of firm. He added that only the law can define "firm," not the rules. As a result, this Board does not have any say in the law. Further, Mr. De Luz, Jr., stated that the proposed rules need to be in front of this Board in order to understand if there are any conflicts. Deputy Attorney General Ahn noted that it is up to the Board of Accountancy to decide whether the proposed rules are ready for public release or not. However, Mr. Roberts stated that it is HAPA's intent to avoid a repetition of what occurred in 2011 with the last proposed rule amendment when it was rushed through the approval process by the Board of Accountancy.

Mr. De Luz, Jr., recommended that a memorandum by this Board be sent to the Board of Accountancy requesting the draft rules adopted on March 2, 2012, along with the small business impact statement, be submitted to this Board and to HAPA prior to going to public hearing. Mr. Yukimura seconded, and the Board members unanimously agreed.

**B. Hawaii Administrative Rules, Title 11 Chapter 281, "Underground Storage Tank Program"
(Department of Health (DOH))**

Mr. Steven Chang, Chief of the Environmental Management Division's Solid and Hazardous Waste Branch, explained that this branch is responsible for all solid waste generated within the State. The branch works to prevent releases, or threats of releases of petroleum, hazardous substances, and pollutants or contaminants into the environment through enforcement of environmental laws and regulations. It also oversees underground storage tanks relating to gas stations, emergency generators of cell phone towers and hospitals, and others.

Mr. Chang stated that there are currently 787 facilities with underground storage tanks (UST's). Unfortunately, underground storage tanks fail and leak, simply through the years of operations, causing releases into the ground. Between 1992 and 2011, there have been 2,038 reported releases of leaking storage tanks. To date, only 155 of those leaking UST's are in need of clean-up; in addition, there have been only 13 "new" releases, to date. He also stated that the greatest potential threat from leaking UST's in the United States is contamination of groundwater. Hawaii has been relatively fortunate because most of the emergency generators are not located very close to the drinking water systems; there is also very little evidence of contamination in the water. One of the greatest threats, however, has to do with releases of gasoline getting into the ground from gasoline service stations.

Mr. Chang stated there are three components identified as mandated revisions to all State programs: 1) delivery prohibition; 2) operator training; and 3) secondary containment. The delivery prohibition requires State agencies to prohibit delivery, deposit, or acceptance of deposit to UST's with equipment and/or operational violations. The training component requires states to develop and implement operator training requirements that meet EPA (Environmental Protection Agency) guidelines. The EPA-mandated secondary containment component requires that any new or replaced UST must have secondary containment and must be monitored for leaks. Currently, existing old tanks are being replaced with "double-wall" tanks in order to assist in locating leaks in a timely fashion. In addition, any new motor fuel dispenser systems must have under-dispenser containment that will prevent leaks from the dispenser from reaching soil and groundwater.

Overall, the proposed amendments will entail: 1) tanks and tank systems 30 years or older, or of unknown age, to be provided with secondary containment; 2) permits for "all" regulated tanks; 3) a third party certification of an individual that maintains and/or services release detection equipment; 4) updating Tier 1 Action Levels for soil and groundwater; 5) revising UST notification, permit applicable and certification forms; and 6) removing Appendix 9, "Field Citation Penalty Amounts."

A financial concern regarding small businesses is the requirement that tanks and tank systems 30 years or older must have secondary containment; about 24 Hawaii small businesses are required to adhere to this requirement. Older tanks and tank systems have the highest risk of having a release to the environment as there has been increasing evidence that the material of fiberglass tanks and systems are being compromised by additives like ethanol. Even with existing technology and regulations, slow releases can occur without sounding any alarms as most releases are not identified until the tank is removed. It is estimated that it will cost a business \$100,000 to \$300,000 to replace the 10,000 gallon fuel tanks. Thus, the State plans to create an outreach program to help these owners and operators to come into compliance over the next three years with limited invasion by taking only one tank out-of-service at a time and replacing it with a double fiberglass wall tank that has a 30-year warranty.

Mr. Chang stated that there are four inspectors who inspect the tanks once every 18 months to two years. DOH continuously works with the owners to make sure they have the proper equipment and are trained properly. Discussion leader, Mr. West noted that everything that was done by the DOH was as a result of the 2005 Energy Policy Act. He

believed that the proposed rule amendments, as written, were very well done. He noted that the 30-year tank rule is unprecedented as it is not a requirement in the Energy Policy Act, but he believes it is warranted. Deputy Attorney General Wade Hargrove indicated that the rules are not more stringent than the Federal EPA requirements. There are, however, some changes that are more stringent than the EPA requirements but they are State-specific and not part of EPA requirements. Thus, the EPA allows the State, at its discretion, to increase some of the requirements.

Mr. West recommended that the proposed rule amendments proceed to public hearing but that the agency need only provide this Board with a small business statement after public hearing and need not come back to this Board after public hearing. Mr. Bucky seconded, and the Board members unanimously agreed.

C. Hawaii Administrative Rules, Title 15 Subtitle 5, Chapter 26, "Aloha Tower Development Corporation" (Department of Transportation)

Chair Pang explained that this rule proposal involves the transfer of rules from the Department of Business, Economic Development and Tourism to the Department of Transportation. Mr. Gregg Kinkley, Deputy Attorney General, stated that the proposed rules essentially reflect the modernization of housekeeping.

Mr. De Luz, Jr., recommended that the proposed amendments proceed to public hearing. Mr. Yukimura seconded, and the Board members unanimously agreed.

D. Hawaii Administrative Rules, Title 19, Subtitle 2, Chapter 38.1, "On-Demand Taxi Service at Public Airports," requested by Ms. Dale Evans, President of Charley's Taxi for the Department of Transportation's review and update of administrative rules and regulations for small business taxicab users

Chair Pang welcomed Ms. Dale Evans, President of Charley's Taxi, who has had a small business issue with the taxi industry at the Honolulu Airport for a long period of time. Her issue relates to administrative rules with both the State's Department of Transportation (DOT) and with the City and County of Honolulu's Taxi Licensing Division, which is under the Department of Customer Services. Ms. Evans introduced Mr. Noel Trainor, owner of Trainor Consulting, noting that she and Mr. Trainor worked on several projects together regarding the tourism/hotel industry.

Ms. Evans explained that there are over 4,000 airports in the United States, of which, 31 charge taxicab drivers' per-trip fees for on-demand pick-up privileges. It is Ms. Evans' understanding that the Honolulu International Airport (HIA) is the only airport that is not allowed, by law, to pass on the airport fee to customers. Thus, because the City and County of Honolulu does not allow the taxicab drivers to pass on the fee, the taxicab drivers must absorb the fee; the average pick-up fee is \$2.26.

There are presently 1,600 taxicab drivers in Honolulu, licensed by the City; they are all independent licensed small businesses. Between 1990 and 2010, Oahu's population increased by 17%, from 858,534 in 1990 to 953,207 in 2010. Honolulu's licensed taxicabs decreased by .007 from 1620 to 1609 in 2010; as a result, there are more customers to

fewer taxicab drivers in Honolulu. In regards to the HIA fee, except for limousines, the per capita fee per taxicab passenger of \$3.13 is five times greater than by motor coach, \$0.65, with twelve times the seats, 65 versus 4 in a taxicab. However, taxicabs pay 4 times per capita more than motor coaches; a 65-passenger motor coach pays \$29.30 in fees to the airport.

Ms. Evans explained that HIA has three basic problems; the first problem is supply. Customers experience long waits for taxicabs during high peaks, nights, and holiday weekends; only one-third of the industry is currently registered with the on-demand system. In 1994, two-thirds of Honolulu's licensed taxicabs were registered with the on-demand system. The second problem relates to the standards of taxicab service. The age and condition of the existing taxicabs serving airport travelers are mediocre, at best. Professionalism is wanting, as driver morale could be better. The third problem is competition. The fees are cost-prohibitive, partially due to lower meter rates.

Ms. Evans' explained that there are 5 different fees levied at HIA by DOT that taxicab drivers are prohibited from passing onto their customers; 1) the on-demand trip fee, which is a flat pick-up fee is \$5 except for a "short trip" fee of \$3.00 that requires the driver to return to the airport within approximately 30 minutes; 2) the pre-arranged pick-up fee of 7%; this is based on the amount of the taxicab fare. For example, on a \$33 fare to Waikiki, the pre-arranged pick-up fee amounts to \$2.31; 3) the minimum parking fee for the HIA garage. After the first 15 minutes, which is \$1 for the next 15 minutes plus \$2 each 30 minutes for the next hour, and \$2 each hour, thereafter; 4) when the drivers pick up a passenger, there is a "greeter's fee" which is variable, as it depends on the cost of the lei (regular, superior or deluxe); and 5) the State levies parking fees at Nuuanu Pali lookout, which is \$10 for 1-7 passenger vehicles to look at the view for about 8 minutes. These fees are imposed by the State but the County gets the cost.

Based on these factors, Ms. Evans is requesting this Board assist her business in attempting to convince the State that the issues at the airport need to be resolved, and to assist her with the administrative rules at the City and County. Since the early 1990's, on a regular basis, Ms. Evans' requests to the City Council to consider re-reviewing the rules and to be fair to the taxicab drivers have been denied. It was noted that when the fees were raised by \$1 a few months ago, the industry was not provided notice; Ms. Evans was not aware of the increase until the drivers went on strike.

Mr. De Luz, Jr., questioned whether the fee being charged by DOT is a tariff or a fee. If it is a tariff, it comes outside of the purview of the County, and thus, it should be able to be passed onto the passengers. He indicated that this Board will work with Ms. Evans and with the County and the City Council; on a separate matter the Board will work with the State's DOT, as well. Chair Pang requested that Board member, Mr. Bucky, contact DOT because the rules are out-of-date and should be brought up to current standards; Mr. De Luz, Jr., suggested that the Chief of the Airports Division be contacted first.

Mr. De Luz, Jr., recommended that a letter of support be sent to the Department of Motor Vehicles, the City Council, and the Mayor of Honolulu endorsing that the airport fee is charged on the meter. Ms. Shubert-Kwock seconded, and the Board members unanimously agreed.

V. LEGISLATIVE MATTERS

A. Status on House Concurrent Resolution 119, “Urging the Governor to properly support the Small Business Regulatory Review Board of the Department of Business, Economic Development and Tourism in assisting Hawaii’s Small Business”

Chair Pang indicated that this resolution did not pass to the House Finance Committee.

B. Status on Senate Bill 2739 SD2, HD1 “Relating to the Small Business Regulatory Review Board”

Chair Pang stated that this measure authorizes the Board to require an agency to conduct another public hearing on a rule change when the rulemaking agency declines to make changes requested at the first hearing and agency’s small business statement, submitted after the hearing, indicates inconsistency with its earlier determination or does not address the public’s concerns. Deputy Attorney General Ahn indicated that the last time this Board reviewed this measure it had taken no vote on it. Subsequently, when Chair Pang and Mr. West submitted testimony at the last hearing, it was not disclosed in their written testimony that they were not acting on behalf of the Board; thus, it was suggested that the Board ratify the testimony of Ms. Pang and Mr. West.

Mr. Yukimura recommended that this Board ratify the testimonies of Ms. Pang and Mr. West from the April 3, 2012 legislative hearing on Senate Bill 2739, SD2, HD1. Mr. De Luz, Jr., seconded, and the Board members unanimously agreed.

Chair Pang explained that this measure is now being heard in conference, which is scheduled at 2:30 p.m., on April 19th. Prior to that, it was unanimously passed by the House in the Finance Committee; however, there was opposition to the measure in the Senate. Conference conferees on the House side are Representatives McKelvey and Choy as co-chairs, and members Yamashita and Marumoto. On the Senate side, the conference conferees are Senators Fukunaga as Chair, Keith-Agaran and Espero as co-chairs, and members Wakai and Slom.

Deputy Director Evans stated that proposed amendments to this measure were submitted to the legislature. The changes include reducing the number of board members from 11 to 9, and that nominations to fill vacancies be appointed from a list of nominees submitted by the Senate President, House Speaker and by the Governor. Other changes include the directors of the department of economic development and tourism and commerce and consumer affairs or their designated representatives would serve as ex-officio voting members of the board, and that one board member representative, rather than two, would come from each county.

Mr. De Luz, Jr., recommended that this Board support Senate Bill 2739 SD2, HD1, in conference as it is currently stated. Mr. Yukimura seconded, and the Board members unanimously agreed. In addition, Ms. Shubert-Kwock recommended that this Board empower the Chair, or a representative appointed by the Chair, to testify on this bill if comments are required during the conference committee hearings. Mr. De Luz, Jr., seconded, and the Board unanimously agreed.

C. Governor’s Message No. 521, “Submitting for Consideration and Confirmation to the Small Business Regulatory Review Board, Gubernatorial Nominee, Howard West”

Chair Pang indicated that on April 11, 2012, a hearing was held to nominate Mr. West to this Board; confirmation was being held today (April 18th).

D. Governor’s Message No. 520, “Submitting for Consideration and Confirmation to the Small Business Regulatory Review Board, Gubernatorial Nominee, Chu Lan Shubert-Kwock”

Chair Pang indicated that on April 11, 2012, a hearing was held to nominate Ms. Shubert-Kwock to this Board; confirmation was being held today (April 18th).

E. Review and discussion of the following bills pursuant to request from Mr. Mike Marion of Waikiki-Getaway:

Chair Pang expressed the need to discuss the following bills regarding small vacation rental businesses in response to this Board receiving correspondence from Mr. Mike Marion at Waikiki-Getaway. She stated that the bills are targeting owners of condominiums and vacation rentals who do not live in Hawaii, as the bills are proposing to enhance the collection of transient accommodations tax from out-of-state property owners. Thus, because the legislation, as written, applies only to out-of-state or off-island property owners, it appears to be discriminatory. The bills also address that one owner of multiple units can only work with one client with multiple properties, as the bills require any out-of-state property owner to hire a management company/real estate broker to manage the vacation rentals.

1. House Bill 1706, HD1 SD1, “Relating to Condominiums” – requires owners of residential units who reside on a different island than the unit or out-of-state to provide the managing agent or resident manager of the condominium project with contact information of a rental agent located in the State who is responsible for the management of the unit. It was noted that this bill had been gutted with other non-related verbiage.

2. House Bill 2078, HD2 SD2, “Relating to Taxation”

This measure requires any nonresident owner who operates a transient accommodation located in the nonresident owner’s private residence to employ a real estate broker or salesperson; requires any nonresident owner who operates a transient accommodation located in the nonresident owner’s private residence in a condominium hotel to employ a condominium hotel operator.

3. Senate Bill 2947, SD2 HD2, “Relating to Taxation”

This measure requires all advertisements and solicitations for transient accommodations to display the registration identification number or the website address containing the registration identification number

Ms. Alicia Hopkins, President of the Rental by Owner Awareness Association (RBOAA), stated that RBOAA is a Hawaii-based, non-profit corporation that objects to these bills,

which are now going to conference. Specifically, RBOAA objects to displaying tax identification numbers on the advertisements, as the Department of Taxation has a link on its site where anyone can obtain information by typing in the appropriate tax number. While the RBOAA is amenable to the language of the tenant/landlord code as written, the legislation has changed the language, making it very confusing. RBOAA also opposes to the requirement for posting on-island contact information in advertisements as there is no reason for a person who has no contract with an owner to require this information. Ms. Hopkins stated that RBOAA would like to arrive at a resolution that would accomplish the goal of collecting the transient accommodation taxes without destroying the businesses that pay them.

Mr. De Luz, Jr., recommended that the Chair, or her designee, contact the representatives of the conference committee hearing for House Bill 2078, HD2, SD2, and Senate Bill 2947, SD2, HD2, entitled "Relating to Taxation," to request that the bills be deferred this year and to establish a working group to address some of the key concerns, as it is this Board's understanding that the main purpose of the bills is to collect taxes, which the Board does not disagree. Mr. Yukimura seconded the motion, and the Board unanimously agreed.

Chair Pang designated Ms. Shubert-Kwock as the designee. Mr. De Luz, Jr., clarified that the Board supports the understanding and intent of paying taxes but that a better system should be established to create a flexible system that can be appropriately managed whether or not an owner lives in Hawaii.

VI. BOARD ADMINISTRATIVE MATTERS

A. Update and report from Board members on discussions of outreach with the small business community and State agencies regarding the Board's duties under Chapter 201M, HRS

Chair Pang indicated that she is continually reaching out to different people in the community and attending various fundraisers; she has also gone to the State Capitol.

B. Update and discussion of recruiting potential new Board members, pursuant to Section 201M-5, HRS

Chair Pang stated that she has met with different representatives and senators and individuals within the community in different industries, as well as some of the chambers of commerce, in an attempt to get a handle on people who are either actively in business or retired who might be potential candidates as members in the fields where this Board is lacking or weak. Ms. Shubert-Kwock noted that the Board is in need of two members from Maui and one from Kauai. In questioning what areas of expertise are needed, it was noted that the Board could use a member in the medical and construction industries. Deputy Attorney General Ahn indicated that the statute requires a member to be either a current or former officer of a business. Ms. Shubert-Kwock approached State Representative Joe Souki for suggestions of board members; she will follow-up with him and send letters to some of the agencies she is familiar with.

- VII. ANNOUNCEMENTS** – Chair Pang announced that Second Vice Chair Richard Schnitzler resigned from this Board, effective immediately. It was a difficult decision for him because he enjoyed volunteering on this Board, but his business demands have taken a precedent. Mr. De Luz, Jr., will pass the word on that a board member, particularly from the west side of the island of Hawaii, is needed.
- VIII. NEXT MEETING** – Wednesday, May16, 2012, 250 South Hotel Street, Honolulu, HI, Room 436.
- IX. ADJOURNMENT** – The meeting adjourned at 2:30 p.m.