

Small Business Regulatory Review Board

MINUTES OF REGULAR MEETING

October 18, 2006

No. 1 Capitol District Building 250 South Hotel Street – Conference Room 410

I. **CALL TO ORDER:** Chair Woods called the meeting to order at 10:28 a.m., with a quorum present.

MEMBERS PRESENT:

- Lynne Woods
- Sharon L. Pang
- Michael Yee
- Dorvin Leis
- Donald Dymond
- Charles Au
- Richard Schnitzler

ABSENT MEMBERS:

- George Handgis

STAFF:

DBEDT

Dori Palcovich
Mike Norris

Office of the Attorney General

Margaret Ahn

GUESTS:

Linda Cacpal, Licensing Supervising, Department of Taxation (DoTax)
 Joseph Tichy, Rules Specialist, DoTax
 Johnnel Nakamura, Rules Officer, DoTax
 Annette Yamanuha, Taxpayer Services Manager, DoTax
 Karen Hong, Account Executive, Finance Insurance, Ltd.
 Betty Ohigashi, Fiscal Officer, Harbors Division, Department of Transportation (DOT)
 Barry Jim On, President, A. C. C. Hawaii
 Tommy Leong, Account Clerk, Highways Division, DOT
 Les Fukuda, Legislative ACECH, ACECH
 Earl Hoke, Deputy Attorney General, Attorney General's Office
 Gloria Chong, Asset Management Specialist, Hawaii Community Development Authority (HCDA)
 Richard Kuitunen, Asset Manager, HCDA
 Janice Marsters, Principal, Masa, Fujioka & Associates
 Ross Higashi, Field Officer, Airports Division, DOT
 Martinez Jacobs, Staff Officer, Airport Firefighting, Airports Division, DOT
 Lisa Dau, Business Management Officer, Business Management Office, DOT
 Francis Keeno, Deputy Director, Administrative Support Services, DOT

WORKING LUNCH AS THE MEETING PROGRESSED

II. **APPROVAL OF MINUTES:** Vice Chair Pang clarified that her recommendation at last month's Board meeting regarding Section IV. Old Business, "Re-review and discussion of August 14, 2006 facsimile transmittal from Mr. Charles Morita, etc." for a task force was "non-formal industry-specific." She noted that the industry is satisfied with the rules, but that enforcement of the rules is needed. Mr. Au also noted that he received an e-mail from Department of Agriculture indicating that the Agency was moving forward and attempting to resolve any shortcomings. Upon clarification, approval of the September 20, 2006 minutes were approved as presented.

III. OLD BUSINESS

A. Re-review and discussion of September 6, 2006 letter from Karen Hong, Account Executive, Finance Insurance, Ltd., and SB 1843 SD1 HD2 CD 1, "Relating to Procurement," and Governor's Message No. 1050 – Ms. Hong, Account Executive at Finance Insurance, Ltd., explained that, as she stated at last month's Board meeting, most of the State agencies are amenable to omitting the "defend" and "obligation to defend" provisions from the agency's contractual agreements and replace it with "negligence," but that DOT is unilaterally choosing which contract it will keep these provisions in. This is viewed as unfair by the small businesses, and as it is not an insured item, it will ultimately be an extraordinary expense to the

business owners. It was explained that work done ten and twenty years ago is now being brought into court because of this contractual provision; thus, by virtue of working on a project, whether any negligent actions were established or not, a company can be taken into court to “defend.”

Ms. Ahn reminded the members that this concern relates to a contract revision and not an administrative rule and that the authority of this Board is over administrative rules, not contract revisions; therefore, she does not see this as properly placed as an administrative rule. Mr. Dymond suggested that the Board may want to review all existing rules related to this issue, and if there are no rules currently in place, that the Board ask that a rule be established. Mr. Schnitzler indicated that the whole process is inconsistent and that there is no level playing field for all the players. After much discussion, Chair Woods deferred this issue until the November or December Board meeting so that all rules that pertain to this issue are reviewed. She also suggested that the Attorney General, the Director of DOT, Ms. Hong and other impacted small businesses be extended an invitation to discuss this matter further.

IV. NEW BUSINESS

- A. Review and discussion of HAR Chapter 15-210, “Rules, Regulations, Charges, and Fees for Public Parks”** (DBEDT/HCDA) – Mr. Richard Kuitunen, Asset Manger, and Ms. Gloria Chong, Asset Management Specialist, explained that these rules were presented to this Board last year, and at that time, it was discussed that fee schedules were to be established. The proposed amendments, therefore, include a park usage fee schedule, define “abandoned property” and establish new park rules prohibiting various activities such as washing clothing and household items, hanging or laying articles to dry anywhere in the park, parking in unmarked stalls, staking, wading pools, dunking tanks and inflatable pools. The rules enforce three specific parks on Oahu only, Kaka’ako Waterfront, Makai Gateway and Kewalo Basin; a public hearing is expected to be held in January 2007. Vice Chair Pang recommended that the proposed amended rules proceed to public hearing; the Board members unanimously agreed.
- B. Review and discussion of changes to HAR Chapter 18-245, “Cigarette Tax Stamping”** (DoTax) - Mr. Joseph Tichy, Administrative Rules Specialist at DoTax, explained that the rule amendments provide guidance to taxpayers for the issuance and processing of tobacco licenses and permits. The amendments also include timing requirements, fees, taxpayers’ rights and obligations, and the department’s ability to take action on a license or permit that includes suspension, revocation, or declination to renew. He explained that small businesses are required to display their tax permits conspicuously; the biggest impact will be to the lunch wagon businesses and the “mom and pop” stores, though the impact is not expected to be significant. DoTax, along with the assistance of the Attorney General’s Office, have provided small businesses with information about the amendments through a systematic outreach program, including workshops with the tobacco retailers.

Mr. Dymond indicated that he is a tobacco retailer and while he is fine with the tax stamp laws and believes that the State should know where cigarettes are sold, he expressed a concern with enforcement of the rules, and discussed an experience that occurred in his store. Mr. Earl Hoke, Deputy Attorney General from the Attorney General’s Office, apologized for any inconvenience that resulted, and explained the process and standard operating procedures for the enforcement of proper stamping of the tobacco products. He noted that the frequency of enforcement on Oahu is greater than in Molokai, merely because Oahu has more retail tobacco stores as well as more tobacco smokers.

It was noted that there are two components to these rules, taxing and permitting, and DoTax is now passing on the responsibility of receiving illegal tobacco products when previously it was borne by the wholesalers and suppliers. Chair Woods suggested that the consent documents to search a retailer’s merchandise be provided to those attending the public hearing so they can study it and, if necessary, ask questions because essentially, by selling tobacco products, merchants are opening themselves up to inspections. After much discussion over the enforcement and investigative powers of these rules, Mr. Yee recommended that the rule amendments proceed to public hearing and that all merchant and retail associations be notified of the hearing; Mr. Dymond recused himself, and the remaining Board members agreed.

- C. Review and discussion of prospective new Board members** – Vice Chair Pang indicated that although she was not personally familiar with Mr. Peter Yukimura, he was referred to her by a mutual business associate. Mr. Yukimura has a varied business background having opened a number of businesses throughout the years; he is currently in the wholesale distributorship, and has influenced others to start

their businesses. Vice Chair Pang recommended that the Board endorse Mr. Yukimura to be submitted to the Governor as a nominee of this Board; the Board members unanimously agreed.

Chair Woods announced that the Governor's Office recently appointed Mr. Bruce Bucky from Oahu as a new "Interim" member; he will be joining the Board at the November meeting.

V. UPDATE AND OUTCOME OF STRATEGIC PLAN

- A. Update on the Small Business "Bill of Rights" Brochure – Chair Woods stated that Governor Lingle sent the Board a letter and thanked them for putting together and sharing with her a copy of the Small Business "Bill of Rights" brochure. The Governor asked the Attorney General's Office and the Department of Commerce and Consumer Affairs to review the brochure and will get back to the Board when she receives their comments. She concurred with the Board that, in particular, the brochure not establish new "rights" or legal obligations that would result in legal actions or claims against the State. The Office of the Ombudsman also responded and thanked the Board for the opportunity to review the draft brochure, and indicated that the section on the Ombudsman was both accurate and valid for inclusion as written.

VI. 201M-7 Rule Review – Discussion of the following DOT rules:

- A. HAR Chapter 19-6, "Service Charge for Delinquent Accounts at the Department of Transportation" – Mr. Francis Keeno, Deputy Director of Administration Support Services, introduced himself and other representatives from DOT. Vice Chair Pang explained to them that the Board is charged with reviewing existing administrative rules and noted that although since "9-11," new procedures have been put into place at the airports, no new documentation from DOT to amend the DOT rules have been received.

Mr. Keeno explained that the subject rules were promulgated in 1990; the type of accounts that would become delinquent include leases, rents and permits of vendors and tenants, such as duty free shops, lei stands, etc. If the vendors do not pay on time, they are considered "delinquent," and are then assessed \$25.00 per month; there is no intention of raising the amount, at this time. No recommendations were made by the members regarding this rule.

- B. HAR Chapter 19-33, "Control of Hazardous Materials & Waste at Public Airports" – Mr. Martinez Jacobs, Head Firefighter and Staff Officer at the Airport Firefighting Branch in the Airports Division at DOT, indicated that he is a "one man show," overseeing and enforcing the administrative rules and complying with federal regulations. He explained that although the department's main concern is security, despite the changes in the security and enforcement of hazardous materials, the need to immediately amend the rules is not a priority as only various titles and classifications have changed, not storage capacities and distances, which do not pose a security risk. He further explained that it is about a two-year process to change the rules which are impacted by State Fire Code, Federal Regulation 139, and the Transportation Security Administration. Therefore, even though no changes have been made to these rules since they were promulgated in 1987, due to all the factors involved, the Board determined that it will re-visit the rules during the next 201M-7 rule review process.
- C. HAR Chapter 19-37, "Fuel Handling Procedures at Public Airports" – It was noted that these rules were promulgated in 1993, but as stated above in Section B., due to all the factors involved in amending the rules, the Board will re-visit the rules during the next 201M-7 rule review process.
- D. HAR Chapter 19-102, "Fee Schedule for the Issuance of a Permit to Work on State Highways" – Mr. Keeno indicated that the Highways Division has not sent a representative to this meeting, but he would relay any concerns the Board may have back to the division. When questioned whether this rule had any connection to the "defend" clause previously discussed, Mr. Keeno explained that DOT is attempting to accommodate the small business concerns. However, DOT is not willing to eliminate the "defense" clause in all cases, particularly in very large projects, because if something went seriously wrong, the department would want the contracting business to be liable for the work. He stated that the Attorney General's Office wants to protect the State to the fullest extent possible, so it virtually doesn't matter whether the acts or standards are negligent or intentional. Chair Woods asked that Mr. Keeno convey that this issue has been discussed and that the Board will extend an invitation to DOT representatives to attend a future Board meeting for further discussion.

E. HAR Chapter 19-104, "The Movement by Permit of Oversize and Overweight Vehicles" – Mr. Keeno indicated that the Highways Division has not sent a representative to this meeting, but he would relay any concerns the Board may have back to the division. No recommendations were made at this time.

VII. REPORT FROM THE CHAIR – Chair Woods asked that if any members had comments or recommendations to the Department of Health's "Certificate of Need Rules" to let her know, as she is compiling final recommendations to convey at the December Board meeting.

VIII. REPORT FROM COMMITTEES – Update from Marketing Investigative Taskforce – Ms. Palcovich stated that six proposals for bids were submitted and three were sent back with proposals. The Marketing Investigative Taskforce will meet after this Board meeting to discuss the proposals.

IX. REPORT FROM BOARD MEMBERS – Mr. Au reported that DoTax is moving along with the County General Excise tax rules; the post public hearing statements are expected to be reviewed at the November Board meeting.

X. ANNOUNCEMENTS – Chair Woods thanked Vice Chairperson Pang for taking over the September Board meeting while she was away.

XI. NEXT MEETING - Wednesday, November 15, 2006, No. 1 Capitol Building, Conference Room 410.

XII. ADJOURNMENT – Chair Woods adjourned the meeting at 1:17 p.m.