

## Small Business Regulatory Review Board

### MINUTES OF REGULAR MEETING

March 21, 2018

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

- I. **CALL TO ORDER:** Chair Borge called the meeting to order at 10:02 p.m., with a quorum present.

**MEMBERS PRESENT:**

- Anthony Borge, Chair
- Robert Cundiff, Vice Chair
- Garth Yamanaka, 2<sup>nd</sup> Vice Chair
- Harris Nakamoto
- Kyoko Kimura
- Reg Baker
- Mark Ritchie / Carl Nagasako

**ABSENT MEMBERS:**

- Nancy Atmospera-Walch

**STAFF: DBEDT**

Dori Palcovich  
Arthur Mori

**Office of the Attorney General**

Jennifer Waihee-Polk

### II. APPROVAL OF JANUARY 24, 2018 MINUTES

Vice Chair Cundiff made a motion to accept the January 24, 2018 minutes, as presented. Mr. Nakamoto seconded the motion, and the Board members unanimously agreed.

### III. OLD BUSINESS

- A. Discussion and Action on Proposed Amendments and the Small Business Statement After Public Hearing and Proposed Amendments to HAR Title 15, Chapter 37, Solar Water Heater Variance, promulgated by Department of Business, Economic Development and Tourism (DBEDT)

Mr. Dean Masai, Energy Analyst from DBEDT's Energy Division, explained that two testifiers attending the public hearing provided input; neither was a small business. One testifier recommended that DBEDT enforce the intent of the law more strictly; however, Mr. Masai stated that it would be difficult to justify such a change without the express assent of the legislature through further legislative action.

Mr. Ritchie made a motion to pass the rules onto the Governor for adoption. Mr. Nakamoto seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on Proposed Amendments and Small Business Statement After Public Hearing and Proposed Amendments to HAR Title 12 Chapter 22, Wage Determinations and the Administration and Enforcement of Chapter 104, Hawaii Revised Statutes, promulgated by Department of Labor and Industrial Relations (DLIR)

Ms. Pamela Martin, Administrator at DLIR's Wage Standards Division, stated that DLIR has been attempting to amend these rules since 2007. The public hearing occurred on February 16, 2018; two written and one oral testimony were received. One of the written testimonies and the oral comment focused on supporting the inclusion of certain types of work regulated under the law; the testimonies supported the current amendments and past interpretation that DLIR has made through its determination.

Testifier, Mr. Joe Trehern, a private testifier/union member, provided testimony in support of the rule changes, stating that Ms. Martin explained the proposed amendments very well.

Ms. Martin stated that the rule changes will apply to all contractors big and small that choose to work on public work projects. The intent of the law is to provide a level playing field for bidding on these projects so that the bids are won because of experience and expertise, not because a contractor chooses to pay their employees lower wages. Also noted was that training and outreach regarding the rules is provided twice a year and targeted to the small businesses.

Vice Chair Cundiff made a motion to pass the rules onto the Governor for adoption. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

C. Discussion and Action on the Small Business Statement After Public Hearing and Proposed Amendments to HAR Title 12, Chapter 44.1, Testing, Certifying, and Credentialing Individuals Who Perform Maintenance and Testing of Portable Fire Extinguishers, Fire Protection Systems, and Fire Alarm Systems, promulgated by Hawaii State Fire Council (HSFC) / Department of Labor and Industrial Relations (DLIR)

Mr. Lloyd Rogers, HSFC Administrative Specialist, explained that the promulgation of the rule amendments has been a long, tedious process.

At the public hearing, one testifier believed that the training given to his employees surpasses the training required by the State of Hawaii; this belief is not concurred by HSFC for several reasons as the existing training is substantially sufficient. Mr. Nakamoto thanked HSFC for its rigor and thoroughness in the promulgation and process of amending the rules.

Mr. Nakamoto made a motion to pass the amendments onto the Governor for adoption. Vice Chair Cundiff seconded the motion, and the Board members unanimously agreed.

D. Discussion and Action on the Small Business Statement After Public Hearing on HAR Title 18, Chapter 237, General Excise Tax Law, as follows, promulgated by Department of Taxation (DoTax):

1. Amendments to Section 8.6, County Surcharge

Discussion leader, Mr. Baker stated that at the public hearing a concern was raised by the Tax Foundation of Hawaii. In response, Ms. Kristen Sakamoto, Administrative Rules Specialist at DoTax, explained that the Tax Foundation had a legal challenge with the rules due to eliminating the “nexus” standard requirement. However, DoTax’s reason for eliminating this requirement relates to the federal commerce clause which does not apply to activity within the state and not required by Hawaii’s state law.

Mr. Baker made a motion to pass the rules onto the Governor for adoption. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

## 2. Proposed New Section 29.53, Exported Services

Ms. Sakamoto explained that as there are currently no rules for exported services, this proposal will add thirteen new sections; they are intended to clarify how to determine whether gross income is derived from services; i.e., Expedia and Expedia or from contracting.

Due to the massive changes being made to the rules (more than 60 pages) two public hearings were held. Discussion leader Mr. Reg Baker noted that comments at the public hearing from the Tax Foundation of Hawaii were generally supportive of the rules. Ms. Sakamoto added that comments from Priceline and Expedia at the first hearing expressed concern that the rules violated federal law under the Internet Tax Freedom Act; these comments were reiterated at the second public hearing. However, the State’s Deputy Attorney General confirmed that there was no violation and approved the rules “to form.”

Mr. Baker made a motion to pass the rules onto the Governor for adoption. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

## **IV. NEW BUSINES**

### A. Discussion and Action on Proposed Amendments to HAR Title 13, Chapter 104, Rules Regulating Activities Within Forest Reserves, promulgated by Department of Land and Natural Resources

Mr. Ryan Peralta, Forest Management Supervisor at DLNR’s Division of Forestry and Wildlife, explained that the proposed changes provide more opportunity for small businesses, which is referred to in the rules as “commercial harvest,” but that the rules require new permit fees. Overall, the changes are expected to promote a mixed-use management strategy in forest reserves.

Mr. Peralta further explained that personal use of the lands is free, but commercial use permit fees require a charge; funds from the fees go into a special account and used for operating expenses. There is also a salvage permit fee used for example when a tree is cut down and sold; another fee relates to direct resale.

Chair Borge suggested that DLNR engage the small businesses that may be impacted by the rule/fee changes. Ms. Kimura recommended Mr. Peralta contact: HTA (Hawaii Tourism Authority), HVCB (Hawaii Visitors and Convention Bureau), HLTB (Hawaii Lodging and Tourism Association), and Activities & Attractions of Hawaii, Inc.

Mr. Ritchie made a motion to pass the rules onto the Governor for public hearing. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

B. Discussion and Action on Proposed Amendments to HAR Title 4 Chapter 162, Food Safety Certification Costs Grant Program, promulgated by Department of Agriculture (DoAg)

Discussion leader Vice Chair Cundiff explained that these new rules create a grant program that provides the farming community with assistance pay for costs associated with compliance with the U.S. Food and Drug Administration. There are no fees or fines involved in submitting a grant; any costs for the small business farmers may vary depending on their present infrastructure, training, and other food safety practices.

Vice Chair Cundiff made a motion to pass the rules onto the Governor for public hearing. Mr. Ritchie seconded the motion, and the Board members unanimously agreed.

C. Discussion and Action on Proposed Repeal of HAR Title 11, Chapter 200, and Proposed New Chapter 200.1, Environmental Impact Statement Rules, promulgated by Department of Health (DOH)

Mr. Scott Glenn, Director of the Office of Environmental Quality Control, an attached agency of DOH, stated that the proposed rules are premised on statutory changes of Chapter 343, HRS, that go back to 1995/1996 and will reflect today's electronic means. The proposed changes may have an impact on small businesses regarding the new requirement that adds a cost element to the process.

In regard to the businesses that will be impacted by the rules, a list of company-applicants that prepared an EIS (environmental impact statement) from 2012 through 2017 was included in the Board's small business impact statement; the companies include a mix of small businesses as defined by Section 201M-1, HRS.

While the current rules state that a scoping meeting is optional, the federal process requires a public scoping meeting. As DOH believes that requiring a public scoping meeting will better realize Chapter 343, HRS, the proposed changes will standardize the requirement of an EIS preparation notice by revising its definition and standardizing the requirements for content and process at the notice stage, including the requirement of a public scoping meeting.

In addition to making the public scoping meeting mandatory rather than optional, the rules will also require a set portion for oral comments that will be audio recorded and summarized in writing in the draft EIS; this will be retained and made available to the public. Chair Borge noted that streamlining and updating the rules and incorporating the stakeholders is important to Hawaii's environment.

Mr. Nakamoto made a motion to move the rules to the Governor for public hearing. Ms. Kimura seconded the motion, and the Board members unanimously agreed.

D. Discussion and Action on Proposed Amendments to HAR Title 15 Chapter 15, Land Use Commission Rules, promulgated by DBEDT / Land Use Commission (LUC)

Mr. Scott Derrickson, Chief Planner at DBEDT's LUC, explained that the proposed amendments entail housekeeping changes, clarify procedures, provide updates, and clarify requirements for a petition and the methodology for presenting evidence to Land Use Commission.

Regarding the involvement of small business, the impact would largely be indirect as it would relate to construction and construction projects' use of land. Because LUC is a small office with only two planners and an executive officer, there is not a great of opportunity for outreach. However, LUC does work with the Land Use Research Foundation and the Farm Bureau, which represent a collection of small business developers.

Chair Borge requested from Mr. Derrickson a list of small businesses and/or small business organizations in the "small business statement after the public hearing" that were involved in the process.

Mr. Ritchie made a motion to move the rules to public hearing. Vice Chair Cundiff seconded the motion, and the Board members unanimously agreed.

## V. LEGISLATIVE MATTERS

A. Update on House Bill 2235, Senate Bill 2753, and Senate Bill 2885, "Relating to the Small Business Regulatory Review Board"

Chair Borge explained that the only measure still alive is Senate Bill 2753, which clarifies the Board's authority regarding the review of county rules.

B. Discussion and Action on Proposed Governor's Message to the State Legislature Submitting for Consideration the Gubernatorial Nomination of Mary Albitz to the Small Business Regulatory Review Board for a term to expire June 20, 2020

Mr. Baker made a motion to approve and testify in support of the gubernatorial nomination of Ms. Mary Albitz as a member of the Small Business Regulatory Review Board. Mr. Ritchie seconded the motion, and the board members unanimously agreed.

C. Discussion and Action on Proposed Governor's Message to the State Legislature Submitting for Consideration the Gubernatorial Nomination of Will Lydgate to the Small Business Regulatory Review Board for a term to expire June 20, 2022

Mr. Baker made a motion to approve and testify in support of the gubernatorial nomination of Mr. Will Lydgate as a member of the Small Business Regulatory Review Board. Mr. Ritchie seconded the motion, and the board members unanimously agreed.

D. Update on Governor's Message 513 and 514 Submitting for Consideration the Gubernatorial Nomination of Reg Baker to the Small Business Regulatory Review Board for a term to expire June 30, 2018 and June 30, 2022

This measure is currently with Senator Wakai's committee; the next step is that it will be scheduled for a hearing.

E. Discussion and Action on Senate Bill 2059 "Relating to Public Accountancy"

Mr. Baker explained that this measure reflects an ongoing battle for years where Hawaii is the only state in the country that does not have CPA-mobility. Thus, if a person is licensed as a CPA in another state, he/she can cross the border and do work in Hawaii without having a temporary license; Mr. Baker added that he does not support this measure.

## VI. ADMINISTRATIVE MATTERS

A. Discussion and Action on the Board's Investigative Taskforce's Recommendation for Proceeding with the Redesign of the existing Website

Mr. Ritchie stated that the website taskforce approached three different well-known website companies/organizations to discuss recommendations for the redesign of the Board's existing website; the meetings went well.

One of the organizations that was approached was HIC (Hawaii Information Consortium), which has a master contract with the State. While HIC submitted a proposal to the Board, the other two organizations would need to respond to an RFP, just as other organizations would be required to do so. However, if the Board does not want to go through the RFP process, which will take a lot of time and effort, it can instead go with HIC's proposal without going through the procurement process. Mr. Ritchie also stated that the proposed bid from HIC appears to be "within the ballpark."

This item will be deferred until the next Board meeting.

B. Discussion on Governor's Administrative Directive No. 18-02, dated January 1, 2018, updating the policy and procedure by which departments or agencies request executive approval of any proposed adoption, amendment, or repeal of administrative rules

Deputy Attorney General Waihee-Polk explained that the new Governor's Administrative Directive (AD), on a policy level, provides less information than the prior AD. The new AD requires that before submitting a request to conduct public hearing, if the proposed rules affect small business, agencies must complete and submit a small business impact statement pursuant to Chapter 201M, HRS.

She added that on the website where agencies submit their rule proposals, the process requires the small business impact statement with this Board's comments attached. It is not clear from the AD if this Board's comments are to be submitted before the public hearing or not.

C. Discussion and Action on the Board's proposed Letter to Governor Ige regarding the current Pilot Project that allows Uber and Lyft Drivers to Operate at the Honolulu International Airport

Chair Borge reminded the board members about Ms. Dale Evans, President and CEO of Charlie's Taxi, previously approaching this Board to discuss a pilot program instituted by the Department of Transportation (DOT) that allows Uber and Lyft drivers to operate at the Honolulu airport without the advantage of rules or regulations. As DOT has indicated to this Board that there were no plans to institute new or amended rules, it is beyond this Board's jurisdiction.

During the board's discussion, however, it was noted that DOT was in the process of promulgating rules regarding this matter and that the rules will be coming before this Board in the very near future. In the meantime, DBEDT staff will contact DOT to determine the status of the proposed rules.

D. Update on the Board's Upcoming Advocacy Activities and Programs in Accordance with the Board's Powers under Section 201M-5, HRS - Discussion and Action on Hawaii Small Business conference held at Maui Art & Cultural Center on May 2 to 3, 2018

It was announced that DBEDT staff was approved to attend the two-day Maui small business conference for board outreach purposes.

- VII. NEXT MEETING** – The next meeting is scheduled for Wednesday, April 18, 2018, in Conference Room 436, 250 South Hotel Street, Honolulu, Hawaii at 10:00 a.m.
- VIII. ADJOURNMENT** – Ms. Kimura made a motion to adjourn the meeting and Mr. Baker seconded the motion; the meeting adjourned at 1:10 p.m.