



STATE OF HAWAII
BOARD OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAII 96804

December 17, 2020

TO: Board of Education

FROM: Catherine Payne
Chairperson, Board of Education

SUBJECT: Board Action on petition of Sunny Unga, Petition No. 20-01 proposing
the adoption of a new administrative rule

I. BACKGROUND

On January 15, 2020, Sunny Unga, Petitioner, hand-carried the petition proposing the adoption of a new administrative rule, attached as **Exhibit A**, ("Petition") to the Board's office and filed the document in accordance with Hawaii Administrative Rules ("HAR") §8-2-2.¹ The proposed rule in the Petition reads as follows:

¹ Hawaii Administrative Rules §8-2-2, entitled "Filing of documents," provides:

(a) All pleadings, submittals, petitions, reports, exceptions, briefs, memoranda, and other papers required to be filed with the board in any proceeding shall be filed with the board chairperson. The papers may be sent by mail or hand-carried to the board's office within the time limit, if any, for the filing. The date on which the paper is actually received by the board shall be deemed to be the date of filing.

(b) All papers filed with the board shall be written in ink, typewritten, mimeographed, or printed; shall be plainly legible; shall be on strong durable paper; not larger than 8 1/2" x 14" in size, except that tables, charts and other documents may be larger, folded to the size of the documents to which they are attached.

(c) All papers shall be signed in ink by the party signing the papers or the party's duly authorized agent or attorney. The signature of the person signing the document constitutes a certification that the person has read the document; that to the best of the person's knowledge, information, and belief every statement contained in the instrument is true and no statements are misleading; and that it is not interposed for delay.

(d) Unless otherwise specifically provided by a particular chapter or order of the board, an original and twelve copies of all papers shall be filed unless the papers are printed or mimeographed, in which case twenty-five copies shall be filed.

“[w]henever any state or county agency or private landowner seeks comment from the Department or any of its employees, agents or officers or whenever the Department intends to provide comment regarding any proposed development or other change in land use within five miles of a school or library, the principal or head librarian shall hold a public meeting at the school or library and shall obtain and consider the views of the community when providing such comment.”

Unga’s reasons for seeking the adoption of the rule is: “[i]n many instances, the Department is asked to provide comments on proposed developments and other land use changes that will occur near a school or library and is not aware of the full range of community views regarding the proposed developments or their impact on school children or library patrons. This is especially important because the Department has an obligation to support child learning environments and open space of libraries and that informing parents/guardians and patrons about nearby and use actions is a means of meeting that obligation. This rule would require schools and libraries to obtain and consider these views before providing comment.”

The Board did not hold a public hearing or other proceeding in accordance with HAR §8-3-6(c), which provides that “[n]o public hearing or other proceedings shall be held with respect to such determination.”² The Board made a determination on the petition on February 6, 2020, attached as **Exhibit B**, that the Petition did not disclose sufficient reasons to justify the institution of public rulemaking proceedings for Unga’s proposed rule.

On April 14, 2020, Unga filed a lawsuit against the Board in circuit court.³ Among other things, the lawsuit alleged that the Board violated Sunshine Law by not holding a meeting open to the public and accepting testimony when making its decision on

(e) The initial document filed by any person in any proceeding shall state on the first page thereof who may be served with any documents filed in the proceeding.

² Hawaii Administrative Rules §8-3-6(c) provides:

(c) Petitions for rulemaking shall be given a docket number and shall become matter of public record upon filing. The board shall within thirty days following the filing of the petition either deny the Petition in writing or initiate public rulemaking proceedings as set forth in sections 8-3-1 to 8-3-4. No public hearing or other proceedings shall be held with respect to such determination. Where the board determines that the petition does not disclose sufficient reasons to justify the institution of public rulemaking proceedings, or where the petition for rulemaking fails, in material respect, to comply with the requirements of these rules, the board shall deny the petition and the petitioner shall be so notified together with the grounds for denial. The provisions of this section, however, shall not operate to prevent the board, on its own motion, from acting on any matter disclosed in any petition.

³ A copy of the complaint is available here:

http://boe.hawaii.gov/Meetings/Notices/Meeting%20Material%20Library/GBM_2020-08-20_Action%20on%20Unga%20Settlement.pdf

the Petition. To settle the lawsuit, the Board agreed to reconsider its February 6, 2020 determination and decide the Petition in a public meeting.

II. APPLICABLE LAW AND AUTHORITY

According to HRS §91-6, "Any interested person may petition an agency requesting the adoption, amendment, or repeal of any rule stating reasons therefor. Each agency shall adopt rules prescribing the form for the petitions and the procedure for their submission, consideration, and disposition. Upon submission of the petition, the agency shall within thirty days either deny the petition in writing, stating its reasons for the denial or initiate proceedings in accordance with section 91-3."

HAR §8-2-2, entitled Filing of Documents, prescribes the form for petitions:

(a) All pleadings, submittals, petitions, reports, exceptions, briefs, memoranda, and other papers required to be filed with the board in any proceeding shall be filed with the board chairperson. The papers may be sent by mail or hand-carried to the board's office within the time limit, if any, for the filing. The date on which the paper is actually received by the board shall be deemed to be the date of filing.

(b) All papers filed with the board shall be written in ink, typewritten, mimeographed, or printed; shall be plainly legible; shall be on strong durable paper; not larger than 8 1/2" x 14" in size, except that tables, charts and other documents may be larger, folded to the size of the documents to which they are attached.

(c) All papers shall be signed in ink by the party signing the papers or the party's duly authorized agent or attorney. The signature of the person signing the document constitutes a certification that the person has read the document; that to the best of the person's knowledge, information, and belief every statement contained in the instrument is true and no statements are misleading; and that it is not interposed for delay.

(d) Unless otherwise specifically provided by a particular chapter or order of the board, an original and twelve copies of all papers shall be filed unless the papers are printed or mimeographed, in which case twenty-five copies shall be filed.

(e) The initial document filed by any person in any proceeding shall state on the first page thereof who may be served with any documents filed in the proceeding.

HAR §8-3-6, entitled Petitions for adoption, amendment or repeal of rules, prescribes the procedure for the submission, consideration, and disposition of petitions:

(a) Any interested person, organization or agency may petition the board for the adoption, amendment, or repeal of any rule, which is designed to implement, interpret, or prescribe law, policy, organization, procedure or practice requirements of the board.

(b) Petitions for rulemaking shall conform to the requirements of section 8-2-2. A petition for rulemaking shall set forth the text of any proposed rule or amendment or specify the rule proposed to be repealed; shall state concisely the nature of petitioner's interest in the subject matter and petitioner's reasons for seeking the adoption, amendment or repeal of the rule; and shall include any facts, views, arguments and data deemed relevant by the petitioner. A request for the adoption, amendment, or repeal of a rule which does not conform to the requirements set forth in this section may not be considered by the board.

(c) Petitions for rulemaking shall be given a docket number and shall become matter of public record upon filing. The board shall within thirty days following the filing of the petition either deny the Petition in writing or initiate public rulemaking proceedings as set forth in sections 8-3-1 to 8-3-4. No public hearing or other proceedings shall be held with respect to such determination. Where the board determines that the petition does not disclose sufficient reasons to justify the institution of public rulemaking proceedings, or where the petition for rulemaking fails, in material respect, to comply with the requirements of these rules, the board shall deny the petition and the petitioner shall be so notified together with the grounds for denial. The provisions of this section, however, shall not operate to prevent the board, on its own motion, from acting on any matter disclosed in any petition.

Specifically, HAR §8-3-6(c) requires the Board to deny a petition if:

- (1) The board determines the petition does not disclose sufficient reasons to justify the institution of public rulemaking proceedings; or
- (2) The petition fails, in material respect, to comply with the requirements of HAR §§8-2-2 and 8-3-6.

III. DISCUSSION

The Petition proposes a rule that would apply when the Department comments on any proposed development or change in land use within five miles of a school or library and would require the Department to collect and consider the views of the community if the Department is asked to provide comment by a county agency, another state agency, or a private landowner. However, the Department is not responsible for obtaining public input on proposed developments or land use changes and does not have authority over the nature and scope of public comments collected in relation to proposed developments or land use changes.

The applicable county or state agency or private landowner with authority over the land is the one responsible to obtain public input on proposed developments or land use changes, not the Department. The Department does not have authority over proposed developments unless the developments are on land under the Department's jurisdiction and not all lands within five miles of every school or library are within the Department's jurisdiction. If the Department does not have authority over these lands, which is likely if the request for comments is coming from a third-party, it would not be responsible for collecting public comment beyond what was requested of it. Moreover, the Department does not have jurisdiction over non-school-based public libraries, as such libraries fall under the jurisdiction of the Hawaii State Public Library System ("HSPLS"). As such, the Department would not have authority over the land the library is located on. Further, the Department would not have authority over and would not be able to direct the head librarian of a library that is a part of the HSPLS, not the Department.

The Department does not have authority over the nature and scope of public comments collected in relation to proposed developments or land use changes. These laws and rules are under the jurisdiction of other government agencies with authority and jurisdiction over proposed developments or land use changes, like the City and County of Honolulu's Department of Planning and Permitting or Hawaii State Land Use Commission.

IV. RECOMMENDATION

I recommend the Board deny the Petition because it does not disclose sufficient reasons to justify the institution of public rulemaking proceedings for the reasons stated herein.

Exhibit A
Petition 20-01

PETITION FOR THE ADOPTION OF A RULE

Pursuant to Haw. Admin Rules §§ 8-3-6(b) and 8-2-2(e), the person who may be served with any document in this proceeding is Sunny Unga, whose mailing address is 56-303 Kiu Place, Kahuku, HI 96731.

1. Petitioner Sunny Unga hereby petitions the Board of Education, Department of Education, State of Hawai'i (hereafter "the Board") for the adoption of a new rule pursuant to Haw. Rev. Stat. § 91-6 and Haw. Admin. Rules § 8-3-6.

Petitioner is an Interested Party

2. Sunny Unga is a parent of small school-aged children who live in Kahuku, Koolauloa, O'ahu and attend Kahuku Elementary and is concerned that changes in land use nearby her children's school may impact their health, welfare, and learning environment.

Draft Text of Proposed Rule

3. Petitioner hereby submits the following draft text as the proposed rule in Ramseyer format:

"Whenever any state or county agency or private landowner seeks comment from the Department or any of its employees, agents or officers or whenever the Department intends to provide comment regarding any proposed development or other change in land use within five miles of a school or library, the principal or head librarian shall hold a public meeting at the school or library and shall obtain and consider the views of the community when providing such comment."

Reasons for Proposed Rule

4. In many instances, the Department is asked to provide comments on proposed developments and other land use changes that will occur near a school or library and is not aware of the full range of community views regarding the proposed developments or their impact on school children or library patrons. This is especially important because the Department has an obligation to support child learning environments and open space of libraries and that informing parents/guardians and patrons about nearby land use actions is a means of meeting that obligation. This rule would require schools and libraries to obtain and consider these views before providing comment.

Requested Action

5. Petitioner hereby requests the Board conduct an open meeting to determine whether to deny the petition and giving its reasons or accept the petition and set the matter for public hearing pursuant to Haw. Rev. Stat. § 91-3.

6. In conjunction with the request above, Petitioner notes that Haw. Rev. Stat. § 92-3

requires the Board to conduct an open meeting in which oral testimony from the public must be received in order to deliberate towards and to make a decision on the granting or denying of this petition. Insofar as Haw. Admin. Rules § 8-3-6(c) is in conflict with Chapter 92, Haw. Rev. Stat., it is not valid.

7. Petitioner hereby requests the Board accept the petition and set the matter for public hearing pursuant to Haw. Rev. Stat. § 91-3. If this petition is granted and the matter set for public hearing, Petitioner requests the hearing done pursuant to Haw. Admin Rules § 8-3-3(a) be conducted statewide or simultaneously through video conferencing.

DATED: Kahuku, Ko'olaup'oa, O'ahu

January 15, 2020



SUNNY UNGA

Exhibit B

Board's February 6, 2020 Determination

DETERMINATION OF STATE OF HAWAII BOARD OF EDUCATION

Petition No.: 20-01
Petitioner: Sunny Unga
Determination Date: February 6, 2020

Board Members Present and Voting:
Catherine Payne, Board Chairperson
Brian De Lima, Board Vice Chairperson
Kaimana Barcarse
Margaret Cox
Kili Namau'u
Kenneth Uemura

INTRODUCTION

A petition for rulemaking (the "**Petition**") is brought before the State of Hawaii Board of Education (the "**Board**"), pursuant to Hawaii Revised Statutes ("**HRS**") §91-6 and Hawaii Administrative Rules ("**HAR**") §8-3-6, wherein Sunny Unga (the "**Petitioner**") proposes the adoption of a new administrative rule.

FINDINGS OF FACT

1. To the extent that any findings of fact are more properly construed as conclusions of law, they shall be so construed.
2. On January 15, 2020, the Petitioner hand-carried the Petition to the Board's office and filed the document in accordance with HAR §8-2-2.
3. The Petition sets forth the text of the proposed rule as follows: "Whenever any state or county agency or private landowner seeks comment from the Department or any of its employees, agents or officers or whenever the Department intends to provide comment regarding any proposed development or other change in land use within five miles of a school or library, the principal or head librarian shall hold a public meeting at the school or library and shall obtain and consider the views of the community when providing such comment."
4. The Petition does not define the term "Department," and the Board interprets it to mean the Department of Education (herein referenced as the "Department").
5. The Petition states the nature of the Petitioner's interest in the subject matter as follows: "Sunny Unga is a parent of small school-aged children who live in Kahuku, Koolauloa, O'ahu and attend Kahuku Elementary and is concerned that changes in land use nearby her children's school may impact their health, welfare, and learning environment."

6. The Petition states the Petitioner's reasons for seeking the adoption of the rule as follows: "In many instances, the Department is asked to provide comments on proposed developments and other land use changes that will occur near a school or library and is not aware of the full range of community views regarding the proposed developments or their impact on school children or library patrons. This is especially important because the Department has an obligation to support child learning environments and open space of libraries and that informing parents/guardians and patrons about nearby land use actions is a means of meeting that obligation. This rule would require schools and libraries to obtain and consider these views before providing comment."
7. The Department generally does not have authority over "proposed development[s] or other change[s] in land use" unless those developments are on land under the Department's jurisdiction.
8. The Department does not have authority over non-school-based public libraries, as such libraries fall under the jurisdiction of the Hawaii State Public Library System.
9. Any comments the Department provides to state or county agencies or private landowners on "proposed developments or other land use changes that will occur near a school" are its own views and not the views of the community.
10. The Board did not hold a public hearing or other proceeding in accordance with HAR §8-3-6(c).
11. The Board reviewed, deliberated, and made a determination on the petition on February 6, 2020.

APPLICABLE LAW AND AUTHORITY

According to HRS §91-6, "Any interested person may petition an agency requesting the adoption, amendment, or repeal of any rule stating reasons therefor. Each agency shall adopt rules prescribing the form for the petitions and the procedure for their submission, consideration, and disposition. Upon submission of the petition, the agency shall within thirty days either deny the petition in writing, stating its reasons for the denial or initiate proceedings in accordance with section 91-3." HAR §8-2-2 prescribes the form for petitions, and HAR §8-3-6 prescribes the procedure for the submission, consideration, and disposition of petitions. The Board must either deny the Petition in writing or initiate public rulemaking proceedings within thirty days following the filing of the Petition. The Board must deny the Petition if:

- (1) The Board determines the Petition does not disclose sufficient reasons to justify the institution of public rulemaking proceedings; or

(2) The Petition fails, in material respect, to comply with the requirements of HAR §§8-2-2 and 8-3-6.

CONCLUSIONS OF LAW

1. If any of the following conclusions of law are more properly construed as a finding of fact, it shall be so construed.
2. The Board concludes that the Petition does not disclose sufficient reasons to justify the institution of public rulemaking proceedings for the Petitioner's proposed rule.
3. The Petitioner failed to include in the Petition any facts, views, arguments, or data that sufficiently support the Petitioner's reasons for seeking the adoption of the rule.
4. The applicable state or county agency or private landowner is responsible to obtain public input on proposed developments or land use changes, not the Department. If the Petitioner feels she does not have adequate opportunity to provide public comments on proposed developments or land use changes, the Petitioner should address that issue with the government agencies that have the authority and jurisdiction over such proposed developments or land use changes.

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DETERMINATION

RE: PETITION NO. 20-01, Sunny Unga

After reviewing the Petition, the Board, by unanimous vote of the above-noted members who were present and voting, denies the Petitioner's request for rulemaking based on the grounds noted herein.

Honolulu, Hawaii, this 6th day of February 2020.

BOARD OF EDUCATION

Catherine Payne, Chairperson

NOTICE OF DETERMINATION OF THE STATE OF HAWAII BOARD OF EDUCATION

RE: PETITION NO. 20-01, Sunny Unga

Enclosed herewith is the determination of the State of Hawaii Board of Education with respect to the aforementioned petition for rulemaking.

CERTIFICATE OF SERVICE

This is to certify that on February 7, 2020, the above notice and the attached decision were mailed postage prepaid to:

Sunny Unga
56-303 Kiu Place
Kahuku, Hawaii 96731

Alison Kunishige, Executive Director
State of Hawaii Board of Education