

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

January 14, 2021

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 of Education's ("Board") office and filed the document in accordance with Hawaii Administrative Rules ("HAR") §8-2-2.¹ The proposed rule in the Petition

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.

reads, “Whenever any state or county agency or private landowner seeks comment from the [Department of Education (“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.”

Citing Unga’s reasons for seeking the adoption of the rule, the Petition states, “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 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.

(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.

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

On December 17, 2020, the Board held a special meeting to reconsider the Petition. At this meeting, the Board rescinded its February 6, 2020 determination on the Petition. However, the Board deferred taking further action on the Petition because several Board members wanted comments from the Department and the Hawaii State Public Library System (“HSPLS”) on the Petition. The Department’s comments are attached as **Exhibit C**, and HSPLS’s comments are attached as **Exhibit D**.

II. APPLICABLE LAW AND AUTHORITY

According to Hawaii Revised Statutes §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.

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

(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 Departments 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 HSPLS. As such, the Department would not have authority over the land on which the library is located. 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'olaupua, 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

Exhibit C

Department of Education's Comments on Petition 20-01



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

OFFICE OF THE SUPERINTENDENT

January 14, 2021

TO: The Honorable Catherine Payne
Chairperson, Board of Education

FROM: Dr. Christina M. Kishimoto
Superintendent

A handwritten signature in blue ink, appearing to read "CK", is written over the name "Dr. Christina M. Kishimoto".

SUBJECT: **Board Action on Petition of Sunny Unga, Petition No. 20-01 Proposing the Adoption of a New Administrative Rule**

This memorandum is in response to your request for comments regarding a petition proposing a rule that would require the Hawaii State Department of Education (Department) to collect and consider the views of the community if the Department is asked to provide comments by a county agency, another state agency, or a private landowner on any proposed development or change in land use within five miles of a school or library.

The Department has reviewed the petition, the testimony received by the Hawaii State Board of Education (Board) regarding the petition, and the recording of the Board members' concerns. The Department opposes the request for the adoption of the rule proposed by Ms. Sunny Unga.

While the Department shares the concern for the safety of students at all Department campuses, Ms. Unga's request should first be addressed by the Hawaii State Legislature. The legislature possesses broad jurisdiction over diverse and complex issues and is better suited to reconcile differing views on land use concerns similar to those raised by Ms. Unga. Additionally, the Department believes that the State Land Use Commission, which is charged with determining uses of land in the state, is also the most appropriate entity to address the issues raised in Ms. Unga's petition.

Article X, section 3 of the Hawaii State Constitution delegates to the Board the authority to "formulate statewide educational policy." The Department then implements those educational policies pursuant to the Board's direction, which can include the adoption, repeal, and changes to Title 8 of the Hawaii Administrative Rules. Engaging in rulemaking is a relatively rare and meticulous occurrence that usually follows a determination made by the Department of the need to clarify processes directly related to education or pursuant to a statutory requirement made by the legislature.

The Honorable Catherine Payne
January 14, 2021
Page 2

The Department's Office of Facilities and Operations serves as the internal monitor for projects in communities that may have an effect on a campus. When state agencies with jurisdiction over land entitlements are in the process of formulating land use decisions, the Office of Facilities and Operations is consulted on behalf of the Department whenever a school campus is in close proximity to a project. Furthermore, large projects customarily require environmental impact statements or environmental assessments before proceeding. These environmental impact statements or environmental assessments consider the proximity of schools and oftentimes require consultation with the Department to discuss potential effects on a campus. The Department believes there are adequate safeguards and mechanisms in place to monitor and address any projects being proposed in the vicinity of Department campuses with potentially adverse effects on students.

The Department shares the concerns of the Board regarding the text of Ms. Unga's proposed rule. It appears to require school principals and head librarians to conduct public meetings to solicit community input before submitting comments on a proposed change in land use. The proposed rule again imposes an open-ended responsibility on the Department that is not contemplated by its core mission of implementing the educational policies of the Board.

Department schools face tough decisions given the extraordinary budget cuts facing all campuses for the foreseeable future. Should the Board consider implementing some semblance of this rule, it will obligate schools to devote already scarce resources for public meetings. These concerns again highlight the appropriateness of having the legislature address Ms. Unga's concerns.

The Department appreciates the Board's invitation to provide input on the proposed rule contained in Ms. Unga's petition. Community participation is a critical component of successful public schools and the Department encourages community engagement whenever possible. The safety of students is always a primary concern and the Department will do whatever is necessary to ensure safe school campuses. The draft rule is premature without the input by the state legislature as it proposes to saddle the Department with kuleana that is likely outside the scope of its constitutional and statutory subject matter jurisdiction. As such, the Department opposes the Board's adoption of the proposed rule at this time.

Thank you for this opportunity to provide comments on this matter. Should you have any questions, please contact Randall Tanaka, Assistant Superintendent of the Office of Facilities and Operations, at (808) 784-5000.

CMK:wke

c: Office of Facilities and Operations
Office of Strategy, Innovation and Performance

Exhibit D

Hawaii State Public Library System's Comments on Petition 20-01

DAVID Y. IGE
GOVERNOR



STACEY A. ALDRICH
STATE LIBRARIAN

STATE OF HAWAII
HAWAII STATE PUBLIC LIBRARY SYSTEM
OFFICE OF THE STATE LIBRARIAN
44 MERCHANT STREET
HONOLULU, HAWAII 96813

January 4, 2021

TO: The Honorable Catherine Payne, Chairperson
Board of Education

FROM: Stacey A. Aldrich, State Librarian
Hawaii State Public Library System (HSPLS)

A handwritten signature in blue ink, appearing to read "Stacey A. Aldrich".

SUBJECT: **BOE IOU: Comments on Petition for Administrative Rules**

Thank you for the opportunity to provide comments regarding the Petition No. 20-01 proposing the adoption of a new administrative rule that proposes "*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.*"

The Hawaii State Public Library System (HSPLS) opposes this petition.

HSPLS has authority over land that is executive ordered for the use of public libraries. We do not have jurisdiction over property that falls outside of our authority.

While we understand the concerns expressed by the petitioner, providing opportunity for public feedback regarding proposed development or change in lands falls more appropriately under the responsibility of the landowner and other governmental agencies, like the City and County of Honolulu's Department of Planning and Permitting or Hawaii State Land Use Commission.

If you have any questions or require additional information, please do not hesitate to contact Stacey Aldrich, State Librarian at stacey.aldrich@librarieshawaii.org or (808) 586-3704.