

Senator David Y. Ige, Chair
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COMMITTEE ON INTERGOVERNMENTAL AFFAIRS

**From: Emily R. Reed and residents of AOAO Seaside Suites Condominium,
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Date: Tuesday, February 7, 2006
Subject: Support of SB 2551, 2552, 2553, 2554

We are residents of Waikiki who have had the first hand experience of protesting the granting of a liquor license to a live music rock and roll bar, the Irish Rose Saloon, proposing to operate out of a commercial apartment located on the ground floor of a 740 unit predominantly residential condo building, The Island Colony.

We followed all the procedures for protesting the granting of a liquor license set forth in HRS §281. However the more we got into the protest the more we observed and experienced how the statutes and procedures are terribly biased toward the applicant and against the protesting community.

Since HRS §281-59 does give the community the potential to force the Liquor Commission to deny the license if they manage to get the verifiable protesting signatures of 50% plus 1 of either all the registered voters or of all the owners/lessees of record of real estate living/owning within the 500 foot radius of the bar's proposed location, clearly the law makers intended to give voice and power to the surrounding community residents. However, in practice the statute and the way it has been interpreted and enforced by the Liquor Commission and the Circuit Court create obstacles that are practically impossible for any community to overcome, especially given the amount of time in which they have to do it. It is apparent this was neither the intent of the legislature nor the spirit of the statute. This bill incorporates revisions to HRS §281 that our community, given its first-hand experience, heartily endorses the legislature to approve. It provides the legislature an opportunity to rectify some of the most grievous omissions/oversights of HRS §281.

The Island Colony/Irish Rose Saloon case is a textbook study on why HRS 281-57 and -59 need to be revised. A brief synopsis of this case has been attached at the end of this document.

The community begs the committee to approve the following revisions to HRS §281:

- **Revision #1 to HRS §281-57(c) (1): (2551, 2552, 2553, 2554)**
In HRS §281-57(c) (1) add the word "current" so that it is absolutely clear to any applicant that they cannot use mailing lists for the notice of public hearing mailing that are outdated for the express purpose of trying to notify as few owners and lessees of record of real estate as possible. In the Island Colony Case the applicant used lists for owners and lessees of record of real estate that were at least seven years old if not more. The following is the proposed change:

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(1) Not less than two-thirds of the current owners and lessees of record of real estate and owners of record of shares in a cooperative apartment or to those individuals on the list of owners as provided by the managing agent or governing body of the shareholders association situated within a distance of five hundred feet from the nearest point of the premises for which the license is asked to the nearest point of such real estate or cooperative apartment; provided that in meeting this requirement, the applicant shall mail a notice to not less than three-fourths of the owners and lessees of record of real estate and owners of record of shares in a cooperative apartment situated within a distance of one hundred feet from the nearest point of the premises for which the license is asked. Notice by mail may be addressed to the last known address of the person concerned or to the address as shown in the last tax return filed by the person or the person's agent or representative;

- **Revision #2 to HRS §281-59(a): (2551 and 2553 only)**

We recommend extending the time that the Liquor Commission has to make a decision from 15 days to 30 days and to provide an option for the Liquor Commission to extend the 30 days an additional 15 days for a total of forty-five days if it deems necessary.

The draft of this revision is incorrect and needs to be changed in committee. As the draft is written now it makes no sense to give the Commission the discretion to reduce the 30 days to 15 days, since they will never bother to do so and since there is no apparent reason for needing to do so. (1) below is the draft as it reads now. (2) below is the draft as it should be.

In the Island Colony/Irish Rose case, the Liquor Commission staff needed two weeks from the close of the hearing on 4-29-05 to verify and count the protesting signatures before the Commissioners could take a vote. This used up 14 of the 15 days they had to make a decision before the default took place. On 5-12-05 when the Commissioners met to take the vote, they did not have the option to extend the fifteen days to thirty days because there was no time left to comply with giving public notice of the extension. Hence they had to take the vote on 5-12-05 or, by default, the license would be granted, which they did not want to have happen.

Commissioner #1, who had been at both of the April hearings, was not present at the 5-12-05 meeting. Had he been present to vote, then the Irish Rose applicant would not have had any grounds for a court appeal. Commissioner #4 was not at the first hearing but was at the second. He voted to deny along with Commissioners #2 and #3 who were at all the hearings. Since the Commissioners are all volunteers, their presence at any particular hearing is ~~also~~ voluntary. For this reason and using our case as an example of why the 15 day period is too short, we strongly urge the committee to accept the revision in number (2) below extending the 15 days to 30 days with an option to extend it an additional 15 days at the Commission's discretion.

(1) As the draft is written now:

"(a) Upon the day of hearing, or any adjournment thereof, the liquor commission shall consider the application and any protests and objections to the granting thereof, and hear the parties in interest. The liquor commission shall accept all written or oral testimony for or against the application whether the application is denied, refused, or withdrawn. Within ~~[fifteen]~~ thirty days after the hearing, or ~~[within thirty days thereafter if in its discretion]~~ within fifteen days if the commission ~~[extends the fifteen days]~~ so reduces the time [to thirty days,] and ~~[gives]~~ give public notice ~~[of same,]~~ thereof, the commission shall give its decision granting or refusing the application;

(2) The draft as is should be written:

"(a) Upon the day of hearing, or any adjournment thereof, the liquor commission shall consider the application and any protests and objections to the granting thereof, and hear the parties in interest. The liquor commission shall accept all written or oral testimony for or against the application whether the application is denied, refused, or withdrawn. Within ~~[fifteen]~~ thirty days after the hearing, or ~~[within thirty days thereafter if in its discretion]~~ within fifteen days if WITHIN FORTY-FIVE DAYS THEREAFTER IF IN ITS DISCRETION the commission ~~[extends the fifteen days]~~ so reduces the time [to thirty days,] EXTENDS THE THIRTY DAYS TO FORTY-FIVE DAYS, and ~~[gives]~~ give GIVES public notice ~~[of same,]~~ thereof, OF SAME the commission shall give its decision granting or refusing the application;

- Revision #3 also to HRS §281-59(a): (2551 and 2552 only)

We very strongly recommend changing the default from automatically granting the liquor license to automatically denying the liquor license in the event that the Liquor Commission is deadlocked or for some other reason cannot make a decision.

Practically every applicant who comes before the Liquor Commission at a public hearing is granted the liquor license at the same hearing. It is very rare for the Commission to continue the hearing or to deny a liquor license to any applicant who has been vetted through the preliminary hearing and granted a public hearing.

In the 1% of 1% of these rare, exceptional cases there are only two ways the Commission would find itself in a position to not be able to take a valid vote: either the Commission is deadlocked or it does not have a proper quorum to vote. If the Commission is deadlocked, it means that from one to three Commissioners has some concern about the applicant or the location. If the Commission does not have a quorum to vote it is not because three

Commissioners are not physically present, since the HRS §281 dictates there must be a quorum in order to hold a public hearing.

When there isn't a quorum to vote it indicates that the Commissioner(s) who are qualified to vote are not present, which has to indicate that it was one of those rare cases requiring a continuation of the hearing, which implies that there is something objectionable going on that involves continuing the hearing, for example a lot of public opposition to the applicant or concerns about the location. (This is exactly what happened in the Island Colony/Irish Rose case.)

Whether the Commission is deadlocked or does not have a quorum to make a valid vote, there is something objectionable or suspect about the applicant or the chosen location. Since liquor licenses are meant to be very controlled commodities due to the responsibilities involved with dispensing liquor, the applicants who do not fit into the ordinary one hearing, non-objectionable mold are just the ones who should not be granted the liquor license by default. At present these are precisely the applicants who are granted their licenses by default, as is the case with the Island Colony/Irish Rose. We believe it is better to put the public's interests over those of an individual, when it comes to liquor it is better to err on the side of caution than not. Therefore HRS §281-59(a) should be revised as follows:

~~[provided that if a majority of the-]; provided that notwithstanding section 91-13.5, if the commission does not make a decision granting or refusing the application, the application shall be deemed denied. If a majority of the:~~

- Revision #4 also to HRS §281-59(a)(1): (2551 and 2554 only)

We strongly recommend giving the Liquor Commission the ability to make a rule that will allow it to remove names from the current registered voters list. In the Island Colony there were 100 registered voters on the current list. Going door to door we found that 46 had either deceased or moved away. This meant that in order to get a majority who protested we had to get 51 out of a possible 54 or over 95%.

This was not what the legislature had in mind. They specified a majority of registered voters but really meant a majority of "current" registered voters still living at that address. When we asked the County Clerk why the "current" list was so outdated we were told that by law they are obligated to keep a voters name on the current list for three election cycles which could be 6 years or more.

If HRS §281-59(a)(1) is revised, the Commission could make a rule that with proper verification would allow them to remove the deceased and relocated voters from the official registered voters list and use the revised total as the base upon which to calculate the percentage of protests received from the public. In the Island Colony/Irish Rose case 32% of the registered voters were verified protestors. In actuality it was 89%, well over the majority, which should have caused the Liquor Commission to deny the license, but

because the total number of registered voters upon which the percentage was based was inflated we were given credit for only 32%. The irony is that with their appeal the Irish Rose would have gotten their liquor license had they not messed up the mailing of public notices even though 89% of the registered voters protested it. Keeping this in mind we urge you to revise HRS §281-59(a)(1) as follows:

(1) Registered voters for the area within five hundred feet of the nearest point of the premises for which the license is asked; provided that the commission may remove names from the list of registered voters after confirming a lack of residency of these voters in the area, in accordance with procedures adopted by the commission pursuant to administrative rule; or

- Revision #5 also to HRS §281-59: (not currently in 2551, 2552, 2553, 2554 drafts at all, please add)

Finally we recommend adding a part (d) to HRS §281-59 which classifies the public hearing for applications for a liquor license as truly a public hearing and not as a contested case. This revision is not currently in the draft but we would like to recommend that it be added as a revision.

Corporation Council for the Liquor Commission has stated that if the public hearings for applications must be conducted as contested cases it will completely change the nature of the hearing. In that case the protestors can be cross-examined under oath by the applicant or his/her attorney, and in that case many personal questions can be asked. The protestors could easily be harassed by an over zealous or even mean spirited attorney under the rules of evidentiary hearings. Corporation Council for the Liquor Commission has stated that this will most likely have a chilling effect on the willingness of people to protest, speak up, or get involved.

Furthermore in a contested case the Commission can decide not to hear from everyone who has come to protest, citing that all the testimony is the same. This outcome clearly was not the intention of the lawmakers since within HRS §281-59 there is provision for protestors to not only be heard but also to have some power in the outcome.

If one inspects HRS §281 in its entirety one can observe that there are only eight times that this statute refers to chapter 91 or instructs that the hearings must conform to the rules set forth in chapter 91. They are the following: HRS §281-17 Jurisdiction and powers, HRS §281-32.3 One-day special licenses for fundraising events, HRS §281-41 Transfer of licenses, HRS §281-61 Renewals, HRS §281-78.5 Practices to promote excessive consumption of liquor, HRS §281-91 Revocation or suspension of license hearing, HRS §281-92 Appeals for any licensee aggrieved, HRS §281-101.4 Hearing, illegal manufacture,

importation, or sale of liquor. All of these instances are for hearings that involve someone who already has been granted a liquor license and whose rights could potentially get denied if these hearings were not conducted as contested cases conforming to chapter 91.

It can be inferred that since the wording in HRS §281 intentionally and specifically mentions chapter 91 in certain cases and in other cases the reference is conspicuously absent, the lawmakers intended that where chapter 91 was not referenced it was their intention that it did not apply in those cases. HRS §281-59 does NOT instruct that public hearings and rehearings for applications conform with the rules set forth in chapter 91. Most likely this is because the lawmakers did not intend for these other cases to be contested cases but instead they intended these other cases to be truly public hearings governed by the sunshine laws in which everyone must be heard and there is no cross-examination.

In the Island Colony/Irish Rose case on February 1, 2006 the court interpreted that HRS §281 intended that public hearings for applications be classified as contested cases as well. As such the Irish Rose applicant could be granted his license by default based on a technicality that applies only to contested cases and not to public hearings even though the Liquor Commissioners felt very strongly that the applicant should be denied the license because the Island Colony location was inappropriate for his establishment. By allowing the public hearings for applications to be contested cases the court took away much of the power that HRS §281-17 intended to give to it:

(a) The liquor commission, within its own county, shall have the sole jurisdiction, power, authority, and discretion, subject only to this chapter: ...

The exercise by the commission or board of the power, authority, and discretion vested in it pursuant to this chapter shall be final and shall not be reviewable by or appealable to any court or tribunal, except as otherwise provided in this chapter or chapter 91.

We believe that it is obvious that it was not the intention of the lawmakers for the public hearings for applications conducted by the Liquor Commission to be considered contested cases as well since HRS §281-59 makes no reference to using chapter 91 for these hearings. For this reason we ask the committee to put the following into the draft of HRS §281-59 as part (d):

(d) Any hearing or rehearing of an application shall be conducted as a public hearing not a contested case and as such does not have to conform with chapter 91.

History of the Island Colony/Irish Rose case, the outcome of which has still not been decided:

The Island Colony/Irish Rose Saloon case is a textbook study on why HRS 281-57 and -59 need to be revised.

- **The Irish Rose's application began with a preliminary hearing by the Liquor Commission on February 24, 2005.**
- **The notice of public hearing was mailed on March 7, 2005 by the applicant, exactly forty-five days before the required public hearing.**
- **The public hearing was on April 21, 2005 and was continued to April 28, 2005.**
- **The hearing was officially closed April 29, 2005.**
- **On May 12, 2005 the Liquor Commission voted to deny the liquor license to the Irish Rose Saloon given that:**
 - **There was strong opposition from the community, which produced protest signatures for 32% of the registered voters living within the 500 foot radius.**
 - **The Island Colony location, which could accommodate 425+ patrons, was not an appropriate one for a live rock and roll music establishment such as the Irish Rose Saloon in a condominium project that was predominantly residential.**
- **On August 8, 2005 the applicant filed an appeal in Circuit Court based on the following technicality;**
 - **at the 4-21-05 hearing only Commissioners #1, #2, and #3 were present out of a possible total of four Commissioners (one of the usual five Commissioner's seat was vacant at the time);**
 - **at the 4-28-05 hearing all four of the sitting Commissioners were present.**
 - **When the vote was taken on 5-12-05 only Commissioner's #2, #3, and #4 were present and voted to deny.**
 - **The applicant's appeal argument was as follows:**
 - **The public hearing for a liquor license application must be in conformity with HRS §91. Consequently;**
 - **the applicant has the right to appeal in circuit court;**
 - **the public hearing is also a contested case;**
 - **Commissioner #4 did not hear and examine all the evidence presented because he was not present at the first hearing on 4-21-05 and the minutes/transcripts for that hearing were not yet available;**
 - **The procedures outlined in HRS §91-11 were not properly followed, therefore Commissioner #4's denial vote on 5-12-05 should be vacated;**
 - **Omitting Commissioner #4's denial vote would leave only two denial votes;**
 - **Pursuant to HRS §281-59 with only two denial votes the Commission did not have a quorum to make a decision;**
 - **Since the hearing was closed on April 29, 2005, pursuant to HRS §281-59, the Commission only had until May 14, 2005 to make a decision;**
 - **Since the Commission made no decision by 5-14-05, pursuant to HRS §91-13.5 the applicant automatically should be granted the liquor license by default.**
- **On October 26, 2005 five of the community individuals who had filed a motion to intervene in the case were granted that motion.**
- **On December 14, 2005 the interveners who had filed an application with the court to present additional evidence were granted permission to do so on February 1, 2006.**

- **On February 1, 2006 the court ruled that the public hearing for the application for a liquor license was also a contested case and therefore would have granted the applicant's appeal to set aside the Liquor Commission's denial of his liquor license based on the procedural technicality. However, based on the additional evidence submitted by the interveners, the court instead remanded it back to the Liquor Commission to investigate the additional evidence which allegedly provided proof that:**
 - **the notice of public hearing mailing lists used by the applicant had been forged and were over 7 years old, and thus by design most of the notices were returned to applicant's agent,**
 - **that the applicant's agent had perjured himself in the affidavit he submitted to the Liquor Commission,**
 - **that the map denoting the 100 foot and 500 foot radii had been drawn incorrectly and as such had omitted an entire building that should have been included in the 100 foot radius and two other buildings that should have been included in the 500 foot radius,**
 - **that over 50% of the registered voters to whom applicant's agent swore he sent the notice of public hearing signed letters stating that they never received such notice.**
- **So this case continues. Either the applicant will appeal the lower court's ruling to a higher court or the Liquor Commission will investigate the notice of public hearing mailing done by the applicant and in the best case scenario it will order that a new hearing date be given and a new notice be mailed and the process will begin anew!**