

**DEPARTMENT OF BUSINESS,
ECONOMIC DEVELOPMENT & TOURISM**

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Statement of
THEODORE E. LIU

Director

Department of Business, Economic Development, and Tourism
before the

SENATE COMMITTEE ON WAYS AND MEANS

Friday, March 28, 2008

9:30 a.m.

State Capitol, Conference Room 211

in consideration of

HB 2040, SD1

RELATING TO HAWAII'S ECONOMY.

Chair Baker, Vice Chair Tsutsui, and Members of the
Committee.

HB 2040, SD1, Relating to Hawaii's Economy, creates a
Department of Planning and Sustainability by combining the Office
of Planning, Commission on Water Resource Management, Energy
Resources Coordinator responsibilities, Land Use Commission,
Office of Environmental Quality Control, and Hawaii Community
Development Authority (Parts II-VI).

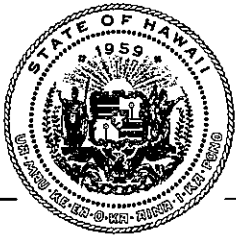
The purpose of the new department would be to address issues
regarding long-range planning of the State, to coordinate
policies and actions relating to state planning and
sustainability, and to provide a comprehensive sustainability
agenda for the State.

DBEDT understands the concept behind the proposed measure. However, we respectfully oppose this bill because of the significant resource implications of creating a new department, including staff time and attention and funding that will of necessity be diverted from the programs whose missions are to achieve the objectives sought by the proposed measure.

Rather than a time- and expense-consuming reorganization, we suggest that better collaboration among agencies is more effective and appropriate than a structural reorganization. Pursuing the creation of an entirely new department will be costly, diverting funding from the State's important priorities as the State enters a period of increasing constraints on resources.

The department respectfully suggests the work of the Hawai'i 2050 Sustainability Task Force itself, which used a collaborative approach across multiple organizations, demonstrates both that sustainability cannot be contained within a department, and requires a collaborative approach. True sustainability can only be accomplished by agencies and organizations working together across the state. Meeting the triple bottom line of economic, social, and environmental goals is not possible within the construct of a single governmental department. It will be very expensive to try, with significant lost time and effort for a questionable return.

Thank you for the opportunity to testify.



**DEPARTMENT OF BUSINESS,
ECONOMIC DEVELOPMENT & TOURISM**

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Statement of
ABBEY SETH MAYER
Interim Director, Office of Planning
Department of Business, Economic Development, and Tourism
before the
SENATE COMMITTEE ON WAYS AND MEANS
Friday, March 28, 2008
9:30 AM
State Capitol, Conference Room 211

in consideration of
HB 2040, SD1
RELATING TO HAWAII'S ECONOMY.

Chair Baker, Vice Chair Tsutsui, and Members of the Senate Committee on Ways and Means.

The Office of Planning (OP) offers these comments on HB 2040, SD1 which would correct inequities in long term commercial and industrial leases and create a new department of planning and sustainability. We will confine our comments to Parts III through VI which address the establishment of the department of planning and sustainability. The purpose of the new department would be to address issues regarding long-range planning of the State, to coordinate policies and actions relating to state planning and sustainability and to provide a comprehensive sustainability agenda for the State.

OP opposes Parts III through VI of this bill because of the cost implications of creating a new department. Past experience indicates that the planning and

implementation of a new department requires additional funds that are not included in this bill.

In addition, OP's mission under Chapter 225M, HRS, is to guide the development of the State to meet the physical, economic and social needs of Hawaii's people – the triple bottom line. The Legislature's goal can be accomplished by working together within our existing organizational structure.

Thank you for the opportunity to testify.



QUEEN EMMA LAND COMPANY

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March 27, 2008

The Honorable Rosalyn H. Baker, Chair
Members of the Senate Committee on
Ways and Means
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: In Opposition of HB 2040 SD1, Relating to Hawaii's Economy

Dear Chair Baker and Committee Members:

My name is Les Goya testifying on behalf of Queen Emma Land Company (QEL) on HB 2040 SD1, "A BILL OR AN ACT RELATING TO HAWAII'S ECONOMY." We thank you for the opportunity to provide testimony in opposition of this Bill.

QEL is part of The Queen's Health Systems which also includes The Queen's Medical Center and Molokai General Hospital. Our mission is to provide health care for the people of Hawaii. QEL is a nonprofit entity, designated as such because the income generated by QEL goes toward supporting health care for the people of Hawaii, primarily through The Queen's Medical Center. Most of the income QEL generates is from lands bequeathed by Queen Emma, wife of King Kamehameha IV.

Our testimony focuses on Part 1 of this Bill which establishes various conditions on long term leases for commercial and industrial properties. The concern regarding this Bill is that the leases of commercial and industrial properties are negotiated as business contracts with terms and conditions that meet the specific needs of the parties to the lease. The provisions proposed by this Bill will limit the ability to freely negotiate some of the basic provisions of a lease, including the flexibility of a rent structure and thereby negatively affecting both parties,

The Bill, as proposed, is to help small businesses who lease commercial and industrial properties, but would appear to run contrary to its intent.

- ❖ The prime beneficiaries of the Bill will be those holding the "sandwich" position and not the small businesses who are more likely to be the sublessees. The end user may not necessarily realize the benefit of the Bill.

The Honorable Rosalyn H. Baker, Chair
and Members of the Senate Committee on Ways and Means
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- ❖ There are no incentives for the landowners to enter into long term leases. This will make it very difficult for lessees to secure financing for any significant capital improvements the tenant may contemplate.
- ❖ The Bill calls for increases in lease rent to be determined in part by the financial feasibility of the increase in relation to the use of the leasehold property at the time of the increase. Determining the financial feasibility will put significant responsibility on the lessee to establish the appropriateness of the feasibility. It will likely necessitate the hiring of consultants and ultimately lead to extended litigation to prove the reasonableness of the feasibility provision.

The Bill further describes a commercial or industrial leasehold property as one that is subject to a lease with an unexpired term of twenty years or more, which would seem to include existing executed leases. Mandating changes to existing leases which affect only certain provisions of those leases would create an inequity in the overall balance of the lease agreement which had been negotiated in good faith at the inception of the lease term. This action would appear to be unconstitutional as opined by the State Attorney General on similar bills in previous legislative sessions.

We thank you for the opportunity to provide testimony and respectfully request that this Bill be held in Committee.

Written Testimony Only
HB 2040, SD1
RELATING TO HAWAII'S ECONOMY.
PRESENTED TO THE
COMMITTEE ON WAYS AND MEANS
THE SENATE
THE TWENTY-FOURTH LEGISLATURE
REGULAR SESSION OF 2008
By Patrick M. Walsh, Endemic Farmer
Hilo, Hawaii

Wednesday, March 28, 2008 9:30 P.M. Conference Room 211

Chair Roz Baker and Members of the Committee,

Thank you very much for allowing me to testify on **H.B. 2040 S.D.1**. I **oppose** this measure and offer the following comments. I fail to see how **H.B. 2040 S.D.1 Part I** benefits small business and lacks merit to represent the complication that land ownership poses for Hawaii's small businesses.

I oppose H.B. 2040 S.D.1 Parts II-VI pages 6 -30 for the same reasons that I opposed SB2555

During the 2005 Special Session the Legislature enacted Act 8, S.B.1592 which created a task force to "review" the Hawaii state plan and make recommendations for the Hawaii 2050 Sustainability Plan. In the ensuing two years the task force collected community input "to guide future development of Hawaii".

It was exciting to participate at a input meeting in Hilo in November 2007. We spoke about our concerns, fuel and food prices and discussed major problems like of the sinking of Waikiki due to global warming and the commitment to financing research on alternative fuel. There was a conceptual outline of a commission of political appointees that would measure the success of the public policy with all this new community input in mind.

I understand from reviewing the Hawaii 2050 website that the meeting I attended was typical of the other community input meeting held around the state.

I fail to see how this process can represent the creating a Department of Planning and Sustainability as an umbrella agency by combining seven existing departments as detailed in **H.B. 2040 Parts II-VI**

I like the idea of having an eye on the future and collecting information from communities so as the law making process can be representative. I feel however that by passing **H.B. 2040 S.D.1** you will be simply adding yet one more layer between elected officials and the people.

I support any measure that has merit for the benefit for tomorrows generation. However in light of the methodology used by the Hawaii 2050 Task Force to support **H.B. 2040 S.D.1** - urge you to consider a future that engages the citizens rather than manipulates them.

Thank You for your time and consideration.

Respectfully submitted by:


Patrick M. Walsh
Endemic Farmer

Post Office Box 10277 Hilo, Hawaii 96721 Phone: 808 966-7814



KAMEHAMEHA SCHOOLS

March 27, 2008

WRITTEN COMMENT TO THE SENATE COMMITTEE ON WAYS AND MEANS

By

Paul Quintiliani, Director
Commercial Assets Division/Endowment Group
Kamehameha Schools

Hearing Date: Friday, March 28, 2008

9:30 a.m., Conference Room 211

To: Senator Rosalyn H. Baker, Chair
Senator Shan S. Tsutsui, Vice Chair
Members of the Committee on Ways and Means

RE: **House Bill No. 2040, S.D. 1 - Relating to Hawai'i's Economy**

Kamehameha Schools respectfully submits the following in opposition to House Bill No. 2040, S.D. 1 (the "**Bill**"):

As a lessor of commercial and industrial real property, Kamehameha Schools **opposes** this Bill because, as written, it: (1) will not fulfill its stated purpose of helping "small businesses" and Hawai'i's economy; (2) sets bad policy and will have severe unintended consequences on small businesses, the community, and landowners; (3) is not supported by any legitimate facts, studies or research; and (4) violates constitutionally protected rights of landowners.

I. Will Not Fulfill its Stated Purpose of Helping "Small Businesses" and Hawai'i's Economy.

- A. Although the Bill purports to help "small businesses," the primary beneficiaries will be large companies and sophisticated real estate investors, including wealthy mainland and offshore entities, who lease large lots and then sublease portions of the lot to smaller commercial and industrial businesses for shorter terms and at rents adjusted to market rate on a regular basis.
- B. By forcing down ground lease rents, the Bill will improve the profit margins of those so-called "sandwich lease" investors who are not small business operators themselves.
- C. There are no requirements in the Bill that these "sandwich lease" investors share their newfound windfall with their small business sublessees, and these small business sublessees ultimately pay the same rent whether leasing space in buildings on fee owned or leasehold owned land.

II. Sets Bad Policy Leading to Severe Unintended Consequences for Small Businesses, the Community, and Landowners.

- A. **As to small businesses** the Bill sets bad policy, which will result in unintended consequences, by:
 - 1. Preventing the free negotiation of leases that best suit business requirements of both lessors and lessees, especially lessees who are leasing smaller premises or starting new businesses;

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2. Discouraging landowners from making ground leases longer than twenty-five years and discouraging landowners from amending existing leases when requested to do so by lessees, which would restrict a small business lessee's ability to obtain long-term financing to make new or additional leasehold improvements;
 3. Forcing many potential small business lessees who would otherwise choose a ground lease to purchase the land, ultimately making it less affordable to open a business;
 4. Making it unfeasible for lessors to agree to very low lease rents at the beginning of a long-term lease to permit new lessees to grow their business in exchange for a long-term commitment by the lessee to maintain and return the property in a superior condition, which allows lessors to realize fair returns at the end of the lease;
 5. Discouraging development of additional commercial and industrial properties and subdivisions and encouraging landowners in urban areas confronted with the requirement to subsidize rents to "sandwich lease" investors to seek rezoning of their properties to alternative uses, thereby reducing the supply of commercial and industrial zoned land for small businesses; and
 6. Causing landowners and lessees to fight over the "financial feasibility of rent increases," which would increase the costs and time needed to determine rents, would make transfers of leasehold interests difficult to complete, and would lead to regular litigation over the operation of the lessee's business.
- B. As to the community, the Bill sets bad policy, which will result in unintended consequences, by:**
1. Encouraging lessees to perform minimal repair and maintenance on their buildings and prohibiting lessors from enforcing higher standards of maintenance, thereby resulting in decrepit and poorly maintained properties that create industrial and commercial blight in key urban locations;
 2. Impairing upgrades to and revitalization of underutilized industrial areas such as Kaka'ako, Mapunapuna, Kapalama and Waipahu, to the detriment of communities, businesses and consumers in those areas;
 3. Prohibiting landowners from enforcing lease provisions and impairing plans for redevelopment that are consistent with long-term community values; and
 4. Allowing a lessee who lets the premises fall into disrepair or poorly manages its business to pay far less lease rent than a successful or well-maintained business next door, which would result in significant and unfair rent disparities between neighboring businesses.
- C. As to the landowners, the Bill sets bad policy, which will result in unintended consequences, by:**
1. Unexpectedly reducing the lease rent income of small local landowners, family and charitable trusts and businesses, and other individuals, trusts and estates around the State who abided by

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the lease contract, in good faith relied on the lease rent income, and are deprived of such income to survive while giving “sandwich lease” investors a windfall; and

2. Permitting lessees to keep the premises in disrepair even if that is a breach of the lease and rewarding them with below market rents to the detriment of the landowner.

III. No Legitimate Facts, Studies or Research to Support the Public Need for the Bill.

- A. Legislative Reference Bureau – Report No. 5, 2003 “Real Property Leases” (the “*2003 Report*”) found that commercial and industrial lease rents are “probably right where they should be,” and that the underlying “primary problem” instead was that “there simply is not enough commercial and industrial zoned land, fee simple and leasehold, in the market place.” The LRB recommended a review of the land use and zoning process to increase the availability of industrial and commercial land in the State rather than imposing ineffective rules to address the cost issues perceived under the Bill.
- B. Since the 2003 Report, there have been no study of lease rents and no review of land use and zoning processes, and at the very least, no study to justify legislation that contradicts the clear conclusions of the 2003 Report.
- C. Thus, there are no legitimate facts, studies or research to support the public need for the Bill.

IV. Violates the Constitutional Rights of Landowners.

- A. **The Bill violates the Contract Clause** because it serves no legitimate public purpose.
 1. A desire to achieve “equity” for a small group of individuals is **not** a legitimate public purpose. That is, merely trying to give selected lessees a benefit is **insufficient** to serve as a public purpose.
 2. The Hawai‘i Supreme Court recognized in Anthony v. Kualoa Ranch, Inc., 69 Haw. 112, 736 P.2d 55 (1987) (“*Anthony*”) that an impairment of contractual rights in existing leases is unconstitutional. There, the Court rejected the application of amendments to Haw. Rev. Stat. § 516-70 to existing leases, stating:

“This statute, as applied to leases already in effect, purely and simply, is an attempt by the legislature to change contractual remedies and obligations, to the detriment of all lessors and to the benefit of all lessees . . . **simply for the purpose of doing equity, as the legislature saw it.** If there is any meaning at all to the contract clause [of the United States Constitution], it prohibits the application of HRS § 516-70 to leases existing at the time of the 1975 amendment. Accordingly, that section, as applied to leases existing at the time of the adoption of the 1975 amendment, is declared unconstitutional.”

Id. at 123, 736 P.2d at 63.

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3. The Bill offers no facts or data to support the suggestion that such inequities exist, or that the protections proposed are needed, or that such protections would provide a legitimate benefit to the public-at-large. To the contrary, according to the 2003 Report, “there is no indication at this time of a broad based compelling need for the Legislature to pass legislation to mandate the alteration of existing lease agreements.” 2003 Report at 24.
 4. Opinions of the Department of the Attorney General dated April 20, 2000, March 22, 2001, April 11, 2002, and April 23, 2002, on proposed legislation changing the lease contract concluded that each violated the Contract Clause. The April 11, 2002 letter concluded that the proposed legislation “substantially impairs contractual relationships without promoting a significant and legitimate board societal interest.” In a June 19, 2000 communication from then Governor Cayetano, the Anthony case was cited by him to return a rent control bill without his approval to the Senate because he did not believe the “bill will pass constitutional muster.”
 5. If the Bill is not intended to apply to existing leases, then the Bill should be clarified by a specific provision that it does not apply to leases executed prior to its effective date. If it does not apply to existing leases, then it sets bad policy for new leases and will continue to have many of the unintended consequences described above.
- B. The Bill violates the Takings Clause of the 5th Amendment.** The government cannot take or damage private property without paying just compensation to the owner.
1. The United States District Court for the District of Hawai‘i and the Ninth Circuit have previously considered and rejected as unconstitutional a rent cap that the City and County of Honolulu attempted to impose upon leasehold residences. See Richardson v. City & County of Honolulu, 802 F. Supp. 326 (D. Haw. 1992) (“Richardson”), aff’d, 124 F.3d 1150 (9th Cir. 1997), cert. denied, 525 U.S. 871 (1998).
 2. In the context of a rent control statute, the lessor is entitled to a just and reasonable rate of return on its investment.
 3. In Richardson, Judge Ezra held that the rent control ordinance did not guarantee landlords a just and reasonable rate of return on its investment because, in part, **there was a lack of individualized consideration and an absence of any meaningful review process.** See Richardson at 334-37.
 4. The Bill is unconstitutional because it also fails to ensure that lessors receive a just and reasonable rate of return.
- C. The Bill violates lessors’ Due Process Rights.** The fourteenth amendment of the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”
1. This clause is a guaranty against any legislation that arbitrarily deprives a lessor of its rights. It protects the lessor against the arbitrary, capricious, and unreasonable exercise of the legislature’s power.

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2. Vague and ambiguous provisions of the Bill violate the due process rights of lessors because the provisions can be applied in an arbitrary, capricious, and unreasonable manner. For example, in R.S.T. Builders, Inc. v. Village of Bolingbrook, 141 Ill.App.3d 41, 44, 489 N.E.2d 1151, 1154 (1986), the court held that a city ordinance that failed to prescribe adequate standards to control the actions of a city land use committee in determining whether an application for a building permit would be approved was unconstitutionally vague and indefinite.
 3. By way example, subsection (a)(4) of Section 2 of the Bill provides: "Where a lease provides for periodic step-ups in lease rent over the term of the lease, the increases in lease rent shall be determined, in part, on a determination of the financial feasibility of the rent increase in relation to the current use of the leasehold property." Commercial leases that include increases in rent are typically structured with a specific, mathematical formula clearly stated in the lease instrument that is negotiated between the lessor and the lessee before the lease commences. If implemented, Subsection (a)(4) would cause that certainty to disappear in lieu of an unspecified derivative of "the financial feasibility of the rent increase in relation to the current use of the leasehold property." The Bill does not define the phrase "financial feasibility." Consequently, this broad, undefined phrase is subject to innumerable interpretations. Lacking such requisite specificity, it is doubtful the Bill could ever be enforced.
- D. **The Bill denies lessors their Equal Protection Rights.** The United States Constitution, amend. XIV provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."
1. Legislation that burdens one class will not be upheld if the varying treatment does not bear a rational relation to a legitimate state interest.
 2. The Bill purportedly only applies where the parcel or portion thereof is fifty thousand square feet or more. Assuming that one can determine how this standard is applied, there is no rational relation between landowners covered by the legislation (versus other landowners) and any legitimate reason for the Bill.

In view of the bad policy set by the Bill, the unintended consequences, the numerous opinion letters cited above, and the constitutional deficiencies of the legislation, we respectfully request that you hold the Bill or refer it to the Department of the Attorney General for review. Thank you for this opportunity to express our opposition to the Bill.

Nohea M. Santimer
2444 Huene Street
Honolulu, Hawaii 96817
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THE SENATE
TWENTY-FOURTH LEGISLATURE
REGULAR SESSION OF 2008

March 27, 2008

WRITTEN TESTIMONY FOR:
H.B. NO. 2040 S.D. 1

I am submitting this testimony in opposition to H.B No. 2040 because I am a small landowner and the bill, if passed will severely, negatively affect me as well as small businesses who purportedly would benefit from it.

In 2003, the State of Hawaii Legislative Reference Bureau issued a study entitled "Real Property Leases" in which they determined that commercial and industrial lease rents are "probably right where they should be" and further concluded: "While it is clear that certain lessees are experiencing significant difficulty under their present leases, there is no indication at this time of a broad based compelling need for the Legislature to pass legislation to mandate the alteration of existing lease agreements." The study found that the primary problem was that there simply is not sufficient commercial and industrial zoned land, both fee simple and leasehold, in the marketplace. Although the LRB recommended a review of the land use and zoning process, there have been no updates of the original study done therefore there are no legitimate facts, studies or research to support the public need for this Bill.

The Bill as written purports to benefit small business owners of which I am one, but the real beneficiaries will be the lessees who control a "sandwich" position in the lease chain by owning the first lease position and subleasing smaller portions of a larger piece. It is this group of lessees who will ultimately benefit from the provisions in this Bill by forcing down ground lease rents and charging "market rate rents" enriching themselves off the small business owners almost always have a lease term less than 25 years and would thus not realize any of the intended benefits of the Bill.

This Bill will encourage lessees to minimally maintain the improvements which will lead to decrepit structures and property in commercial and industrial areas. It's passage will impede any plans to upgrade and revitalize underutilized areas such as Aiea, Mapunapuna, Waipahu and Kakaako – to name a few. Landowners would be discouraged from making long-term ground leases thereby restricting a lessee's ability to obtain long-term financing to make any leasehold improvements as well as discourage development of additional commercial and industrial properties and subdivisions and would reduce the available supply of land and make it much more difficult for small businesses to operate in the long run.

The Bill would reduce the lease rent income of small local landowners as well as charitable trusts, businesses and other individual around the state who depend on rental income to survive:

Finally, there have been three separate State Attorney General opinions in 2000, 2001 and 2002 which struck down bills which tried to achieve a similar means of rewriting the terms of commercial and industrial leases. Lastly, in a Hawaii Supreme Court case, Anthony v. Kualoa Ranch, Inc 69 zhse. 112 (1987), a court would likely strike down the Bill as unconstitutional.

Respectfully Submitted,



Nohea M. Santimer

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March 26, 2008

THE SENATE
TWENTY-FOURTH LEGISLATURE
REGULAR SESSION OF 2008

WRITTEN TESTIMONY FOR:
H.B. NO. 2040 S.D. 1

I am a small landowner writing this testimony to void the passing of H.B. NO. 2040 S.D. 1. House Bill NO. 2040 S.D. 1 if passed will be solely beneficiary to the lessees with no regard for the lessors. This bill's provision states a) whenever a lessee has less than 30 years remaining on its lease, the lessee's obligation to make major improvements to any structures or infrastructure on the leasehold property would be limited to only making "maintenance and repair work" necessary to satisfy federal, state, and county laws- even if the existing terms of the lease requires the lessee to do additional work or meet a higher standard; b) due to the fact that this bill mandates minimum maintenance by lessee's, the lessors will be adversely affected because the rent would not be developed to its potential with regard to the marketability of the property; c) as this bill states, the renegotiation of rent is to be "fair and reasonable to both parties" and will "take into account improvements existing on the renegotiation date" which if minimally maintained by lessee's will adversely affect the lessors.

A 2003 State of Hawaii Legislative Reference Bureau study entitled "Real Property Leases" found that commercial and industrial lease rents are "right where they should be." It also states the underlying "primary problem" was "there are simply not enough commercial and industrial zoned land, fee simple and leasehold, in the market place." Since 2003 no studies have been conducted to support the public need for this bill.

Although this bill claims to support "small businesses," the primary beneficiaries will be large companies and wealthy real estate investors, including mainland and offshore entities worth billions, who lease large lots then sublease portions of the lot to smaller commercial and industrial businesses. By forcing down ground lease rents, this bill will improve the profit

margin of those so-called "sandwich lease" investors. This bill will not help small business sublessees.

This bill will encourage lessees to perform minimal repair and maintenance on their buildings, and lead to decrepit structures, waste and other blight in commercial and industrial neighborhoods. This bill would impair current plans to upgrade and revitalize underutilized industrial areas such as Kakaako, Mapunapuna, Kapalama and Waipahu, to the detriment of communities, businesses and customers in those areas. This bill will discourage landowners from making long-term ground leases, thereby restricting a lessee's ability to obtain long-term financing to make new or additional leasehold improvements. It will also discourage development of additional commercial and industrial properties. This bill would reduce the lease rent income of small local landowners, family and charitable trusts and businesses, and other individuals, trusts, and estates around the State who depend on rent income to survive.

This bill disregards three prior State Attorney General opinions concluding that the terms of commercial and industrial leases were unconstitutional. This bill substantially impairs existing leases but regulating an area that was not previously subject to regulation. This bill also creates a "taking" of private property, under the 5th Amendment of the State and U.S. Constitution. Based on a Hawaii Supreme Court case, Anthony v. Kualoa Rance, Inc. 69 Haw. 112 (1987), a court likely would immediately strike down the bill as unconstitutional.

Respectfully,

Liesel Santimer



LAURA H. THIELEN
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STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
P.O. BOX 621
HONOLULU, HAWAII 96809

**TESTIMONY OF THE CHAIRPERSON
OF THE COMMISSION ON WATER RESOURCE MANAGEMENT
DEPARTMENT OF LAND AND NATURAL RESOURCES**

on House Bill 2040, Senate Draft 1 – Relating To Hawaii's Economy

**BEFORE THE SENATE COMMITTEE ON
WAYS AND MEANS**

March 28, 2008

House Bill 2040, Senate Draft 1 mandates certain conditions applicable to certain commercial and industrial leases (Part I) and creates a Department of Planning and Sustainability by combining the Office of Planning, the Commission on Water Resource Management, the Energy Resources Coordinator responsibilities, the Land Use Commission, the Office of Environmental Quality Control, and the Hawaii Community Development Authority (Parts II-VI). The Department of Land and Natural Resources' (Department) comments are limited to Parts II-VI of this measure. While the Department recognizes the need for coordinated planning to achieve a sustainable future, the Department nonetheless opposes this measure for the following reasons.

The Department notes that there are ongoing actions that are addressing planning and sustainability on multiple fronts. One example is that the Department of Business, Economic Development, and Tourism is currently developing a comprehensive renewable biofuels framework, pursuant to Act 253, Session Laws of Hawaii, 2007. Additionally, an agreement was signed January 28, 2008 for a partnership between Hawaii and the United States Department of Energy to make Hawaii a world model for a clean energy economy. It is unclear how the establishment of a new department would affect such ongoing initiatives.



**Testimony to the Senate Committee on Ways and Means
Friday, March 28, 2008 at 9:30 a.m.
Room 211, State Capitol**

RE: H.B. 2040, SD1 Relating to Hawaii's Economy

Chair Baker, Vice Chair Tsutsui, and Members of the Committee:

My name is Christine H. Camp, Chair of The Chamber of Commerce of Hawaii, Land Use and Transportation Committee. **The Chamber of Commerce of Hawaii strongly opposes House Bill No. 2040 SD 1 Relating to Hawaii's Economy.**

The Chamber is the largest business organization in Hawaii, representing 1100 businesses. Approximately 80% of our members are small businesses with less than 20 employees. The organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

The bill mandates certain conditions applicable to certain commercial and industrial leases (Part I) {Formerly HB 1075}. Creates a department of planning and sustainability by combining the office of planning, commission on water resource management, energy resources coordinator responsibilities, land use commission, office of environmental quality control, and Hawaii community development authority (Parts II-VI) {Formerly SB 2555}.

The Chamber of Commerce of Hawaii is strongly opposed to Part 1 of this bill.

I. BILL SUMMARY: PART 1

Part 1 proposes to implement certain conditions governing long-term leases of commercial and industrial properties.

We do not believe it is appropriate for the legislature to interject itself into an existing contractual arrangement between to private parties. Lessees who choose to invest in their improvements should make their respective decisions based on the remaining term of the lease. Further, we believe while the proposed bill may provide temporary relief to the lessees, small business lessees may actually be harmed by such legislation.

The lease contract reflects a business decision that both parties made of their own free will. Amending or modifying the contract through legislation is inappropriate and may serve to discourage landowners for

entertaining or entering into long-term leasehold arrangements in the future.

II. THIS BILL WILL NOT FULFILL ITS STATED PURPOSE, AND WILL NOT HELP "SMALL BUSINESSES" OR HAWAII'S ECONOMY

1. Although the bill purports to help "small businesses," the primary beneficiaries will be large companies and wealthy real estate investors, including mainland and offshore entities worth billions, who lease large lots and then sublease portions of the lot to smaller commercial and industrial businesses. By forcing down ground lease rents, this bill will improve the profit margins of those so-called "sandwich lease" investors. The bill will not help small business sublessees, who almost always have subleases of less than 25 years and would thus not realize any of the intended benefits of the bill.

III. THIS BILL WILL DISCOURAGE MUCH-NEEDED ECONOMIC REDEVELOPMENT, MAY NEGATIVELY IMPACT SMALL BUSINESSES IN THE LONG RUN, AND LEAD TO OTHER SEVERE UNINTENDED CONSEQUENCES

1. The bill will encourage lessees to perform minimal repair and maintenance on their buildings, and lead to decrepit structures, waste and other blight in commercial and industrial neighborhoods. The bill would impair current plans to upgrade and revitalize underutilized industrial areas such as Kakaako, Mapunapuna, Kapalama and Waipahu, to the detriment of communities, businesses and customers in those areas.

2. The bill would discourage landowners from making long-term ground leases or amending existing leases when requested to do so by lessees, thereby restricting a lessee's ability to obtain long-term financing to make new or additional leasehold improvements.

3. The bill would discourage development of additional commercial and industrial properties and subdivisions, and would reduce the available supply of land and make it much more difficult for small businesses to operate in the long run.

4. The provisions regarding the "financial feasibility of rent increases" would be impossible to reasonably implement, would increase the costs and time needed to determine rents, would make transfers of leasehold interests difficult to complete, and would lead to regular litigation over the operation of the lessee's business.

5. The bill would reduce the lease rent income of small local landowners, family and charitable trusts and businesses, and other individuals, trusts and estates around the State who depend on rental income to survive.

VI. WE QUESTION THE UNCONSTITUTIONALITY OF SUCH ACTIONS.

1. Three separate State Attorney General opinions—in 2000, 2001, and 2002—concluded that similar bills to rewrite the terms of commercial and industrial leases were unconstitutional. As the 2002 Attorney General opinion stated: "The bill does not appear to provide a reasonably and narrowly drawn means to accomplish a significant and legitimate public purpose."

2. Under the Contracts Clause of the Hawaii State Constitution, a law is invalid if it "operates as a substantial impairment of a contractual relationship." This bill substantially impairs existing leases by regulating an area that was not previously subject to regulation, thereby interfering with the expectations of the parties, and impairing the agreed upon terms of those leases. The bill also creates a "taking" of private property, under the 5th Amendment of the State and U.S. Constitutions.

3. Based on a Hawaii Supreme Court case, Anthony v. Kualoa Ranch, Inc. 69 Haw. 112 (1987), a court likely would immediately strike down the bill as unconstitutional. It is also likely that a court would hold the State liable for damages as a result of the Bill.

The Chamber of Commerce of Hawaii, while we support the adoption of Sustainability Plan 2050, is strongly opposed to Part 2 of this bill.

I. BILL SUMMARY: PART 2

Part 2 of this bill (formerly S.B. No. 2555 SD 1) proposes to create a department of planning and sustainability by combining the office of planning, commission on water resource management, energy resources coordinator responsibilities, land use commission, office of environmental quality control, and Hawaii community development authority to address issues regarding the long-range planning of the State.

The new department will coordinate policies and actions relating to state planning and sustainability, and to provide a comprehensive sustainability agenda for the State the department of planning and sustainability to make broad policy determinations with respect to long-range planning and sustainability issues in the State. The department shall endeavor to gain an understanding of those functions and activities of other governmental agencies and of private agencies that relate to the fields of state planning and sustainability. It shall at all times encourage initiative, creative thinking, and community engagement and perspective in harmony with the objectives of the department.

The department shall have sole jurisdiction over the agribusiness development corporation, commission on water resource management, duties and responsibilities of the energy resources coordinator, Hawaii community development authority, land use commission, office of environmental quality control, and office of planning.

Our understanding of the Sustainability 2050 Plan was advisory and not to be viewed as another level of government permitting or approvals.

The proposed bill attempts to consolidate the functions of a number of different agencies whose present roles and responsibilities include planning, implementation and regulatory duties. In effect, adding yet another layer of permitting to businesses and residents of the State of Hawaii.

If the intent is to "re-engineer" certain government functions around a new mission of sustainability, then we would recommend that the bill be redirected toward re-engineering all applicable state programs around a defined "sustainable" mission. The process would identify three distinct program groups:

1. Programs whose missions conformed with the new Sustainability mission;
2. Programs that did not conform to the mission but were necessary government functions; and,
3. Programs that are not focused on preserving or protecting "public health and safety" should be eliminated.

Combining the various agencies listed in the bill without a comprehensive re-engineering of the mission and processes may create more problems.

Therefore, we respectfully oppose the bill as proposed, in whole.

Thank you for the opportunity to testify.



KANEOHE
RANCH

March 27, 2008

The Honorable Rosalyn H. Baker, Chair
The Honorable Shan S. Tsutsui, Vice Chair
and Members – Senate Ways & Means Committee
24th Legislature, 2008 – State of Hawaii
Hawaii State Capitol
Honolulu, HI 96813

RE: HB2040, SD1

Ladies and Gentlemen:

This testimony is submitted in opposition to Part 1 of HB No. 2040, SD1. This legislation unilaterally changes the terms and conditions of existing long-term commercial and industrial lease contracts, for the sole benefit of lessees. The reasons for this opposition are set forth hereinbelow.

Part I of HB2040, SD1 invites litigation.

Three separate State Attorney General opinions concluded that similar bills were unconstitutional in 2000, 2001 and 2002. The bill appears to violate the contracts clause of the Hawaii State and United States Constitutions and be a taking of private property under both Constitutions. Years of litigation will result from the passage of this legislation.

Part I of HB2040, SD1 is anti-business.

Although there are good intentions, this legislation will make the Hawaii State Legislature look anti-business and foster a “Hawaii is a bad place to invest and do business” image. Among other things, there are many unintended consequences of this legislation. It helps major financial interests from outside of Hawaii to the detriment of Hawaii-based property owners, small and large, including the Harold K.L. Castle Foundation and Kaneohe Ranch Company LLC (in each case with regard to a major financial interest from outside Hawaii which acquired the lessees’ interest with knowledge of the lease terms).

Part I of HB2040, SD1 invites blight.

The legislation will foster blighted conditions in Hawaii neighborhoods on leasehold properties by eliminating requirements of property maintenance on lessees.

The Honorable Rosalyn H. Baker, Chair
The Honorable Shan S. Tsutsui, Vice Chair
and Members – Senate Ways & Means Committee
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Part I of HB2040, SD 1 should be deleted in its entirety.

Thank you for your kind consideration of these matters.

Respectfully submitted,



H. Mitchell D'Olier
President and
Chief Executive Officer