

**Hawaii State Legislature  
House Judiciary Committee  
Tuesday, March 31, 2009  
4:00 p.m.  
Room 325**

**Re SB 764, SD2, HD1 Relating to Real Property**

**Testimony of Jon M. Van Dyke  
On Behalf of  
Citizens for Fair Valuation**

This testimony is provided to address the constitutional issues that have been raised regarding SB764, SD2, HD1. It is my professional judgment that this Bill meets the standards that have been applied by state and federal courts regarding the Contracts Clause; that this Bill is unaffected by the reasoning utilized by the Hawaii Supreme Court in the Superferry Case, *Sierra Club v. Department of Transportation*, issued March 16, 2009; and that this Bill, if challenged, would, without question, be upheld as constitutional.

**The Contract Clause**

It has been argued by opponents of this Bill that it violates the Contracts Clause of the U.S. Constitution, Article I, Section 10. This provision of the Constitution has been utilized very rarely to strike down statutes. When challenges are raised, courts use a three-part test to evaluate the statute challenged:

- (1) Does the statute significantly impair a private contractual relationship?
- (2) If so, does the statute serve a significant and legitimate public purpose?
- (3) Are the provisions of the statute reasonably related to achieving the statute=s goals?

A leading constitutional law specialist, Erwin Chemerinsky (Dean of the new law school at the University of California Irvine), has explained that state statutes Aare upheld even if they interfere with contractual rights, so long as they meet a rational basis test. Not surprisingly, virtually all laws have been found to meet this deferential scrutiny. @ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 637 (3d ed. 2006).

The U.S. Supreme Court articulated this deferential level of scrutiny in *Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934), where the Court upheld a Minnesota law designed provide relief for debtors by creating a moratorium on the foreclosure of mortgages during the Depression. Even though the original purpose of the Contract Clause was to limit this type of debtor-relief legislation, the Court ruled that the Minnesota law did not violate the Contract Clause because it was an emergency measure designed Ato protect the vital interests of the community @ and Aa basic interest of society. @ *Id.* at 439 and 445.

In only one case since 1934 has the U.S. Supreme Court declared unconstitutional a state law that was alleged to have interfered with private contracts. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (striking down a Minnesota law regarding pension plans on the ground that it was not narrowly tailored emergency legislation and did not serve a broad societal interest).

Cases since 1934 that have rejected Contract Clause challenges include:

\* *El Paso v. Simmons*, 379 U.S. 497, 513 (1965), upholding a Texas law that clearly changed the terms of a contract and limited the rights of landowners to reclaim land that had been forfeited, explaining that the law had a legitimate purpose to restore confidence in the stability and integrity of land titles and to end the *Aimbroglio* over land titles in Texas.

\* *Energy Reserve Group v. Kansas Power & Light*, 459 U.S. 400, 413 (1983), upholding a Kansas law that restricted a natural gas producer from charging higher prices, explaining that in reviewing economic and social regulation, courts properly defer to legislative judgments as to the necessity and reasonableness of a particular measure.

\* *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), upholding a state law that prevented oil and gas producers from passing on the costs of a severance tax, even though their contracts permitted them to do so.

\* *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470 (1987), upholding a law limiting coal mining, even though it impaired existing contracts, because the law served a significant government interest.

\* *General Motors v. Romein*, 503 U.S. 181 (1992), rejecting a challenge to a Michigan law that changed a workers' compensation program on the ground that it did not in fact interfere with existing contracts.

The *Allied Structural Steel* case thus appears to have been an anomaly, based on its unique facts, and the cases that have been decided by the U.S. Supreme Court since then have all distinguished this case and have refused to find a violation of the Contracts Clause.

Hawaii decisions have followed these U.S. Supreme Court decisions and Hawaii courts have been similarly reluctant to strike down statutes under the Contracts Clause. In *In re Herrick*, 82 Hawaii 329, 340, 922 P.2d 942, 953 (1996), the Hawaii Supreme Court followed federal decisions in explaining that three criteria governed Contract Clause claims:

(1) whether the state law operated as a substantial impairment of a contractual relationship; (2) whether the state law was designed to promote a significant and legitimate public purpose; and (3) whether the state law was a reasonable and narrowly-drawn means of promoting the significant and legitimate public purpose.

With regard to the first criterion, the Court went on to explain that an impairment is not substantial unless it interferes with the legitimate expectations of the contracting parties, and that in reaching such a determination courts must examine the severity of the impairment.

and the extent to which the subject matter has been regulated in the past. *Id.* at 341, 922 P.2d at 954.

The other recent Hawaii case involving the Contracts Clause, *Anthony v. Kualoa Ranch, Inc.*, 69 Hawaii 112, 736 P.2d 55 (1987), is clearly distinguishable from the issues raised by S.B. No. 764 CD1, because it involved a statute that required lessors to pay lessees for improvements made on leased lands, a requirement that Avery substantially impairs the lessors' contractual rights. 69 Hawaii at 120, 922 P.2d at 60. Although the Court struck down that statute, it also noted that there are cases where, in the legitimate exercise of a state's police power, statutes which impinge upon existing contractual rights can be validly enacted without contravening the constitutional provision [the Contracts Clause], and that statutes would not be struck down unless they imposed a substantial impairment on contractual rights. *Id.*

Applying these principles to SB764, SD2, HD1 leads to the conclusion that its enactment would not raise any serious Contract Clause issues. To begin with, its language does not operate as a substantial impairment of any contractual rights. The Bill says only that leases that allow for adjustments in lease rents according to fair and reasonable terms should have that term interpreted in a manner that is fair and reasonable to both the lessor and the lessee to the lease, and the Bill identifies factors that should be considered in deciding what is fair and reasonable. The language in this Bill thus does not change the terms of any contract, but rather provides a logical interpretation of an existing term. Under no stretch of the imagination could this modest and reasonable language be viewed as a substantial impairment of any contractual right.

If, somehow, a court did decide that a substantial impairment was effected by this statute, the Contract Clause would nonetheless not be violated because of the second and third criteria that govern the invocation of this Clause. SB764, SD2, HD1 certainly serves a significant and legitimate public purpose, and does so in a manner that is narrowly drawn. As Section 1 explains, this Bill is designed to clarify lease terms and thus "to stabilize Hawaii's economy, especially during the recessionary period that the United States has entered," and to do so "without substantial reduction in the economic benefit to the landowners or impact on their ownership of the land, without impairing their lease contracts, and without the taking of any property rights without due process of law." Section 1 explains that maintaining close geographic ties between small businesses and the communities they serve is a public purpose that requires legislative support. These are certainly significant and legitimate public purposes, and they are directly promoted by the narrowly drawn provisions in Section 2. The Bill simply clarifies "vague" lease terms for the purpose of ensuring that both parties to the relevant lease contracts are able to negotiate from a level playing field. Its provisions are carefully and narrowly aimed at allowing the contractual relationship between lessor and lessee to continue in a fair manner and thus to facilitate economic activity during the present difficult time.

As this analysis of federal and state cases makes clear, challenges to state statutes under the Contracts Clause are difficult and rare, courts are deferential toward state legislatures when evaluating such challenges, and the language in SB764, SD2, HD1 is in no danger of being

declared to be in violation of the Contracts Clause.

**Sierra Club v. Department of Transportation (Hawaii Supreme Court, March 16, 2009)**

The Hawaii Supreme Court's recent ruling in the Superferry Case, *Sierra Club v. Department of Transportation*, does not have any direct or indirect effect on SB764, SD2, HD1.

In this recent decision, the Court first ruled that Act 2, the statute passed by this Legislature during the special session of the 2007 Legislature regarding "large capacity ferry vessels" was governed by Article XI, Section 5 of Hawaii's Constitution, which says that the Legislature must act through "general laws" when it enacts legislation regarding "lands owned by or under the control of the State and its political subdivisions." That constitutional provision does not apply directly to SB764, SD2, HD1, because this Bill relates to leases between private parties, and has no linkage to government lands. Nor do any of the other provisions in Hawaii's Constitution listed on pages 31-32 of the Court's opinion requiring "general laws" apply in any manner to SB764, SD2, HD1. The opinion, therefore, has no direct relevance to this Bill.

It might be argued that the *Superferry Decision* has some indirect relevance to SB764, SD2, HD1, because legislatures should, in the usual case, pass "general laws," because a law without general applicability may have the effect of discriminating against persons or entities and of violating the Equal Protection Clause. But the Court's analysis of what constitutes a "general law" makes it clear that SB764, SD2, HD1 would be viewed as a "general law."

In reaching the conclusion that Act 2 was not a "general law," the Hawaii Supreme Court explained in great detail that this enactment provided favorable treatment to "an illusory 'class of one,' as the possibility of another large capacity ferry vessel company coming within the benefits of Act 2 within the limited time of Act 2's viability is theoretical at best." (Page 112.) The Court's opinion focused on the early automatic expiration date of Act 2, which by its terms would be repealed no later than the summer of 2009, after less than 21 months, which had the practical effect of making it impossible for any other entity to take advantage of its provisions.

In contrast, SB764, SD2, HD1 would apply to a number of leases, it has no expiration date, and newly-entered-into leases could fall under the governance of this Bill. It is thus by no means an "illusory 'class of one,'" which is the evil prohibited by Hawaii's Constitution and by general concepts of due process. To emphasize the limited nature of its decision, the Hawaii Supreme Court distinguished its earlier decision in *Bulgo v. County of Maui*, 50 Hawaii 51, 430 P.2d 321 (1967), which had held that the statute challenged in that case was a "general law" even though in fact it applied, at the time of its enactment, only to the County of Maui. The *Bulgo* statute was written in general terms, and it could have applied by its terms to other counties in the future, depending on how they structured their internal governance. In addition, the Hawaii Supreme Court explained at page 36 of its *Superferry Decision* that "the *Bulgo* court did not contemplate a statute that was subject to automatic repeal on a particular date or upon the happening of a one-time event."

The *Superferry Decision* is thus a narrow one, covering classifications that are "illusory"

and explaining that for a class “to be considered genuine, it must be reasonably probable that other members could enter the class in the future.” (Page 49) SB764, SD2, HD1 certainly qualifies under this test, because it explicitly refers to “a lease existing on July 1, 2009, or entered into thereafter,” thus anticipating that “other members could enter the class in the future.” SB764, SD2, HD1 would thus certainly be viewed as a “general law” under the *Superferry* and *Bulgo* decisions, and would not be viewed as an unconstitutional “special law.”

**Ace Hardware**

**Ben Franklin Crafts**

March 29, 2009

Representative Jon Riki Karamatsu, Chair  
Representative Ken Ito, Vice-Chair  
House Committee on Judiciary  
State Capitol  
Honolulu, Hawaii 96813

Re: Testimony in Support of SB 764, SD2, HD1, Part I  
Leasehold; Commercial and Industrial Property  
Hearing Date: March 31, 2009, 4:00 pm, Room #325

Dear Representatives Karamatsu, Ito and Members of the Committee:

My name is Guy Kamitaki and I am one of the family members that own and operate the Ben Franklin Crafts Store at 2810 Paa St. in Mapunapuna. We employ over 50 people at this location.

We urge you to pass Senate Bill 764, SD2, HD1, Part 1 – Relating to Real Estate.

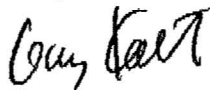
Our ground lease with our current landlord, LTMAC Properties, LLC a mainland based REIT came up for renewal on 1/1/09.

We don't want to change our contract – we just would like our ground lease negotiations to be "fair and reasonable" as our lease currently states to allow us to continue doing business in this location. We have been in this location for over 16 years and we have been operating stores in Hawaii for over 50 years.

We urge you to pass this legislation to better define the "fair and reasonable" clause in our lease and allow us to continue operating our store in the Mapunapuna area.

Thank you for your consideration.

Aloha,



Guy Kamitaki



# THE QUEEN'S MEDICAL CENTER

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Representative Jon Riki Karamatsu, Chair  
House Committee on Judiciary

Tuesday, March 31, 2009; 4:00 PM  
State Capitol, Conference Room 325

## Re: SB 764 SD2 HD1 – RELATING TO REAL PROPERTY

Chair Karamatsu, Vice Chair Ito, and Members of the Committee:

My name is Mark Yamakawa, Executive Vice President and Chief Operating Officer of The Queen's Health Systems, testifying in **opposition to Senate Bill 764 SD2 HD1**, which imposes terms on commercial and industrial leases.

The Queen's Health Systems (Queen's) is the parent company of Queen Emma Land Company. Established in 1979, Queen Emma Land Company is the non-profit organization which supports the Queen's Medical Center, Molokai General Hospital, and its affiliates in providing quality health care in Hawaii. The company accomplishes this by managing and enhancing the income-generating potential of the lands left by Queen Emma in 1885.

Any initiative that could curtail Queen's ability to get the most out of real estate income would impact our ability to support our health care mission. In FY 2007, Queen's contributed to the well-being of the State by giving back to the community more than \$44 million in healthcare services, education, and uncompensated care. Real estate income supports the Queen Emma Clinics, the State's only designated trauma center, Native Hawaiian health programs, and the continuing education and training of health care workers.

According to the Healthcare Association of Hawaii, local hospitals incurred \$141 million in uncollected payments last year resulting from bad debt and charity care. At a time when the health care industry is very fragile, this legislation could negatively impact Queen's ability to subsidize health programs that benefit the neediest in our community.

The Queen's Health Systems respectfully opposes Senate Bill 764 SD2 HD1 as it is contrary to the mission that our organization has supported for the last 150 years. Thank you for the opportunity to comment.

March 30, 2009

Representative Jon Riki Karamatsu, Chair  
Representative Ken Ito, Vice-Chair  
House Committee on Judiciary  
State Capitol  
Honolulu, Hawaii 96813

Re: Testimony in Support of SB 764, Part I  
Leasehold; Commercial and Industrial Property  
Hearing Date: March 31, 2009, 4:00 pm, Room #325

Dear Representatives Karamatsu, Ito and Members of the Committee:

I strongly support Part I of SB 764 and respectfully ask the Committee to pass this bill on.

My name is Phillip J. Silich and I own Bacon Universal Co., Inc. which employs 72 people and has been in the Mapunapuna area for 50 years.

Many of my neighbors have family members who have lost their jobs, had their hours reduced, or have businesses which are barely surviving. Our business has seen a severe drop off in revenues and we are trying to cut expenses before we have to cut benefits and lay off more workers. To date we have unfortunately had to retrench 30 loyal employees.

Rent is one of the largest expenses we face. Up to now, the rents charged by the Damon Estate were "fair and reasonable," which is what our lease specifically calls for.

Until the Damon Estate sold its fee to HRPT some 4 or 5 years ago Damon honored the provision of the lease agreement which provides for "Fair and Reasonable Rents". HRPT (the new owners) simply refuse to honor this clause by:

1. Insisting on all Lessees entering into a frightfully onerous "Confidentiality Agreement" which precludes tenants from seeking any comparable Rent Rates from their neighbors.
2. The Lessees are further humiliated by being forced to sign a "Non Binding Lease Agreement" for which HRPT do not sign!!!
3. Their attitude is "take it or leave it".
4. Our leases call for rent reviews each 10 years which are to be fixed until the next 10 years – HRPT have arbitrarily changed this provision and are endeavoring to incorporate a new escalation provision of 4% per each year – compounded.
5. Their argument is that if the tenants are unhappy they can:
  - A. Seek Mediation (which is of little use as it is "Non Binding") or
  - B. Go the arbitration route – however, because their highly paid Boston Attorneys are forcing each tenant to enter into a "Confidentiality Agreement" this course becomes a perversion of justice because the Realtor representing the Lessee is forbidden to obtain comparable lease rents!!!

Section one of this Bill if passed will:

- A. Cost the government no money whatsoever to administer, but
- B. Will greatly facilitate any arbitration case by forcing both parties to honor the existing lease terms and conditions which provide for the rent renegotiation to be conducted to achieve a "Fair and Reasonable" review and,



- C. To be quite honest most tenants simple cannot afford to engage in arbitration which can cost up to \$100,000 per hearing.

To further illustrate to you HRPT's "Wall Street Greed Mentality" – they are asking for a rent increase of approximately \$9.00 to \$10.00 per sq. ft with 4% annual escalations. (i.e. a near 300% increase!!!)

Office of Hawaiian Homelands, with property at Shafter Flats (which adjoins the Mapunapuna location) had an independent valuation done just before the start of the recession and came up with a "Fair and Reasonable Rent" of \$5.00 per sq ft with No Annual Escalations until the next rent review.

I want to stay in business and I want to keep my workers employed. However, I can't do that if the landlord makes demands that are not fair and reasonable when times are so tough. I urge you to please pass SB 764 Part I. Thank you.

Phillip J. Silich  
President & CEO  
Bacon Universal Co., Inc.  
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# SERVCO PACIFIC INC.

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March 30, 2009

To: The Honorable Jon Riki Karamatsu, Chair and Committee Members  
Committee on Judiciary

From: Carol K. Lam/Senior Vice President  
Servco Pacific Inc./2850 Pukoloa Street, Suite 300  
Honolulu, Hawaii 96819

Hearing Date: Tuesday, March 31, 2009, 4:00 p.m., House Conference Room 325

In Support of SB764 SD2 HD1/Part I, Relating To Real Property

On behalf of Servco Pacific Inc. ("*Servco*"), I submit the following comments in support of the adoption of SB764 SD2 HD1/Part I (the "*Bill*").

As testified earlier, this bill affects businesses and lessees in the Mapunapuna, Sand Island, and Kalihi Kai areas who are trying to negotiate with landowner, HRPT, a Boston-based real estate investment firm. Servco has long-term commercial and industrial ground leases with HRPT in Mapunapuna. Our ground leases specifically provide that "*said rent shall be such fair and reasonable annual rent for the demised land*". The lease does not provide a formula in determining the rent. Further, our leases do not tie rent to land values and as such rent determined on the basis of fair market land value is not the same as "fair and reasonable" rent. We and other similarly affected lessees are asking for your continued support by adopting this bill which calls for our ground lease rents to be negotiated on terms that are "fair and reasonable" to BOTH the landowner and lessees. HRPT is demanding rents that are double or triple what their lessees are now paying. They are also requiring a rent escalator of 3% to 4% that compounds annually. These rent offers are not "fair and reasonable" and our local companies simply cannot afford these rents.

This bill would only affect leases that use the "fair and reasonable" language and is not intended to amend or modify the terms of the lease. *It does not change the lease rent re-determination process.* In addition, the bill will not limit the ability of landowners and lessees to freely negotiate lease rent. What the bill does is to encourage and facilitate an open and transparent negotiation process.

The constitutionality of the bill has also been questioned. Jon M. Van Dyke (Professor/University of Hawaii) testimony states, "*In my professional judgment this bill meets the standards that have been applied by state and federal courts regarding the Contracts Clause and, if challenged, would, without question, be upheld as constitutional.*"

This bill will not cost the State anything. But without it, the State may lose additional revenues if companies are forced to shut down and more jobs are lost due to exorbitant ground lease rents that are not fair and reasonable given the difficult economy and challenges that we face today. With your support of this bill, you will be supporting our local companies, their workers, and the customers we serve throughout the State. We again thank you for the opportunity to share our comments with you.



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March 30, 2009

**The Honorable Jon Riki Karamatsu, Chair**  
House Committee on Economic Revitalization,  
Business & Military Affairs  
State Capitol, Room 302  
Honolulu, Hawaii 96813

**RE: S.B. 764, S.D. 2, H.D. 1 Relating to Real Property**

**HEARING DATE: Tuesday, March 31, 2009 at 4:00 p.m.**

Aloha Chair Karamatsu and Members of the Committee:

I am Myoung Oh, Government Affairs Director of the Hawai'i Association of REALTORS® ("HAR"), here to testify on behalf of HAR and our 9,600 members in Hawai'i. HAR opposes S.B. 764, S.D. 2, H.D. 1, which mandates that rent renegotiation terms in commercial and industrial lease agreements must provide that rent be "fair and reasonable" to lessor and lessee.

HAR empathizes with the lease renegotiation issues that businesses are facing in Mapunapuna, Kalihi Kai and Sand Island. However, we are deeply concerned that this legislation will have serious consequences on all other long-term commercial and industrial leases in Hawai'i.

HAR is opposed to this bill because it unduly interferes with the rights of lessors and lessees to freely enter into lease agreements. In addition, to the extent that this bill affects all existing long-term commercial and ground leases, HAR feels that the problem one lessor faces does not warrant modifying previously negotiated lease agreements for all other long-term leases in Hawai'i.

HAR believes that it is problematic to specify through legislation that various factors must be taken into consideration during a rent renegotiation. For example, under Section 2, page 4, lines 6-9, a rent renegotiation term must state that it is taking into account the "uses and intensity of use approved by the lessor." If rent calculations must take this factor into account, it would be in a lessor's best interest to choose high-end businesses that maximize their properties usage. This could have a negative impact on non-profits and smaller businesses in Hawai'i. Instead of imposing these problematic terms, HAR believes that fair market and property valuation should be left in the hands of licensed appraisers.

Moreover, Section 2 of S.B. 764, S.D. 2, H.D. 1 requires that, where "fair and reasonable" annual rent is provided for as a term of the lease, this term must include that the rent will be fair and reasonable to both the lessor and lessee. For future leases, this provision creates a problem, as it will be a disincentive for the lessor to provide for "fair and reasonable" annual rent at the outset of the lease.



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Finally, HAR believes that, rather than require that leases include the ambiguous language provided in the bill, the parties to a lease agreement should be left to handle rent renegotiations as they typically always have - though the process of appraisals, mediation, arbitration and, as a last option, the court system. These are appropriate existing procedures through which parties can resolve lease disputes.

For the above reasons, we respectfully ask the Committee to hold this measure.

Mahalo for the opportunity to testify.

# CITIZENS FOR FAIR VALUATION

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ROBERT M. CREPS, PRESIDENT  
CAROL LAM, VICE PRESIDENT  
CONNIE SMALES, SECRETARY  
PHILLIP J. SILICH, TREASURER

CULLY JUDD, DIRECTOR  
KEALI'I LOPEZ, DIRECTOR  
GUS COSSETTE, DIRECTOR  
MICHAEL STEINER, EXEC. DIRECTOR

March 30, 2009

**TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY**  
**March 31, 2009, at 4:00 p.m., Room 325**  
**Hawaii State Capitol**

**TESTIMONY IN SUPPORT OF SB 764, SD2, HD1, Part I**  
**Leasehold; Commercial and Industrial Property**

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee:

My name is Michael Steiner and I am the Executive Director of Citizens for Fair Valuation ("CFV"), a non-profit coalition of businesses with long-term ground leases in the Mapunapuna, Kalihi Kai and Sand Island areas. A partial list of lessees is attached to this testimony. These are the old Damon Estate lands which were purchased in 2003 by HRPT; a mainland based Real Estate Investment Trust (REIT). These ground leases, which typically last for 50 years, call for the renegotiation of rents that are "fair and reasonable," every 10 years.

### **Language of the Lease**

Some 50 years ago, the Damon Estate chose to incorporate language in their long-term ground lease contracts that was different from the leases of some of the other large landowners. While many leases use a specific formula to calculate rents during a renegotiation, the Damon leases call simply state that, "said rent shall be such fair and reasonable annual rent for the demised land" for that period. To secure "fair and reasonable" rents, the process should involve open and transparent negotiations that include the free flow of all relevant information. Rates should take into account material circumstances to determine fair and reasonable rent including, but not limited to: (1) past renegotiation practices and policies; (2) the uses and intensity of use of the leased property; and, (3) the surface and subsurface characteristics of the leased property and the surrounding neighborhood.

Fair and reasonable is a concept that we have been taught since childhood and should be reflected in our sense of right and wrong as well as our desire to do what is best for all concerned. Damon's use of "fair and reasonable," as the basis for setting rents, should instill in the process our years of accumulated knowledge and sense of fair play. As rational and sensible people, we have the ability to look at more than just the value of a prior sale and, to be fair and reasonable, include as material facts information from our current and future economic condition, to the rents of others, similar parcels that are offered for lease, recognition of past practices and policies upon which tenants have relied, and the overriding need to keep the economy of Hawaii moving forward in these difficult times.

HRPT has had the opportunity to act in a fair and reasonable manner, but instead has chosen to act in secrecy, threat and coercion in order to divide the community and while raising local rates to offset mainland losses. A landlord and tenant need to work together to provide stability and economic sustainability for both parties. However, when asked how Hawaii rents will impact HRPT's profit, Adam D. Portnoy, Managing Director of HRPT, said during HRPT's 2<sup>nd</sup> Quarter Earnings Call on August 5, 2008:

"We are pushing rates very hard especially in places like Hawaii ... we've gotten a lot of flack in that market because we're pushing rates so hard ... So rest assured that we're doing

everything we can, as much as we can and as fast as we can to try to increase the rates there to push cash flow to HRPT.”

To accomplish this goal, HRPT is demanding base rents that are double or triple existing rates plus a 3.5% to 4.5% annual escalation. In addition, **HRPT is requiring its lessees to sign confidentiality agreements before negotiations commence** – something the Damon Estate never required.

CFV is requesting that the State pass SB 764, Part I to provide the public a foundation upon which open and transparent negotiations will lead to rents that are “fair and reasonable” for both sides.

### **Need for Legislation to Protect Local Businesses and the Public**

Senate Bill 764, Part I seeks to establish that “Fair and Reasonable” rents should be applicable to both the lessor and the lessee. CFV supports this Bill as it seeks to set parameters that will encourage open and transparent negotiations resulting in ground lease rental rates that are “fair and reasonable” to both parties and would not simply favor HRPT, who is now the largest industrial and commercial landowner in the State.

This measure is not intended to destabilize the lessor-lessee relationship, as one opponent claims. In fact, the measure should strengthen the relationship as lessor and lessee come together to openly discuss and negotiate a rent that is fair and reasonable to both parties. Fair and reasonable rents will also provide relief to the people of Hawaii in that prices will not be severely increased just to cover higher rents allowing more of the transaction money to remain here in Hawaii.

### **Not a Private Dispute**

The situation with these leases is not a private dispute between a group of lessees and one lessor. HRPT is a monopolistic owner and, especially in light of the current recession in Hawaii, tenants need the assistance of the legislative body to set parameters in which ground lease rents are negotiated in an open and transparent manner to provide “fair and reasonable” rents.

The issue is the continued economic viability of the Mapunapuna/Kalihi Kai/Sand Island industrial properties, the businesses that are located there and the continued employment of the hundreds, if not, thousands, of employees who work there. Moreover, this bill addresses a state-wide concern as the lessees in the Mapunapuna area provide goods and services across the entire State of Hawaii. Among the lessees’ businesses are Grace Pacific, Servco, Sony, Coca Cola, Ameron, Olelo Television, Bacon Universal and Inter-Island Solar Supply, all of which have multi-island responsibilities. In addition, there are numerous small and medium-sized companies that include electrical and plumbing supply houses that service contractors all over the state, general and sub-contractors who have jobs throughout the state and many others who provide goods and services to consumers and businesses on every island within the State.

Accordingly, significant increases in operating expenses will clearly impact the economy of the State of Hawaii. What happens to the Mapunapuna lessees is and should be a state-wide concern for legislators in this economy. This Bill recognizes that landlords and tenants, owners and lessees, need to come together to negotiate, in an open and transparent manner, to achieve rents that are “fair and reasonable” to all parties in order to preserve the businesses that provide for our way of life.

## **SB 764, Part I Does Not Violate the Contract**

Many contracts include definitions to assist the parties in performing their obligations under a contract; however, the former Damon Estate leases that contain the “fair and reasonable” provision do not.

The pending bills would establish parameters to ensure that rent adjustments under these particular leases be fair to both the lessor and the lessees. The bill does not add any new terms or delete existing terms from the lease or change any words in the lease. As such, the Hawaii Supreme Court case of Anthony v. Kualoa Ranch, Inc. 69 Haw. 112 (1987), is not applicable as SB 764, Part I does not seek to “operate as a substantial impairment of a contractual relationship.” SB 764, Part I is written such that it supports the 2002 Attorney General’s opinion that a Bill should “provide a reasonable and narrowly drawn means to accomplish a significant and legitimate public purpose.”

The Damon leases call for a rent renegotiation every 10 years and that, “said rent shall be such fair and reasonable annual rent for the demised land (exclusive of buildings)” for that period. It is HRPT that is changing the contract language by insisting that renewals include annual escalations, confidentiality agreements, a right of first refusal and more... In this time of economic uncertainty, this is not in the public’s best interest as these steep rental increases will result in higher consumer costs, more unemployment, possible business failures and ultimately, a lowering of revenue for the State of Hawaii.

## **HRPT Intimidation Conduct**

Most ground leases in the Mapunapuna area have a term of 50 years. As mentioned, Damon would work with its tenants during tough times to ensure the viability of the businesses and protect its long-term relationship. In bad times, Damon reduced the rent and in the early 1990’s recession, it deferred rent renegotiations. Lessees have relied upon this course of conduct for the past 30 years.

With the sale 2003 sale of the property to the mainland-based HRPT, the old ways have been discarded. Instead of “fair and reasonable” negotiations, HRPT is demanding confidentiality agreements and mediation rather than simple open and transparent negotiation. No longer can neighbors meet to “talk story” without the fear of repercussion or law suit. Instead of setting a level rate for each new segment of the lease, HRPT is only offering rents with annual increases that range between 3.5% and 4.5%. In addition, HRPT is requiring the lessees to grant HRPT a right of first refusal to the lease in all re-openings and to accept the land in “as-is” condition, which attempts to transfer responsibility to the small business and away from the landowner.

As mentioned, HRPT is demanding that tenants sign a confidentiality agreement before they will even start to negotiate. Such confidentiality agreements serve to eliminate the very “free market” principles that represent the foundation of America’s economic vitality. HRPT, by keeping transaction data out of the public domain, denies tenants the ability to negotiate a fair market rent. Access to transaction data is the single most stabilizing force in real estate. Companies such as CoStar and others thrive on the mainland by providing unfettered access to rent and other transaction data to any who subscribe, e.g. appraisers, real estate brokers, investors, landlords, property managers, and tenants alike.

Open access to current market data levels the playing field and insures pricing that is based upon the free flow of information and not upon monopoly-like dominion over a given market. The Damon Estate made fair and reasonable rent renegotiations a central element of their business philosophy for more than 30 years. HRPT has made it clear that they intend to use their monopolistic holdings to restrain the free trade of negotiation to their exclusive benefit, irrespective of the harm it does to many of Honolulu’s small business owners.

These changes are not consistent with the “course of conduct” that was established over the years with Damon Estate. These changes are material and go beyond what would be considered “fair and reasonable” to both parties. They serve only to benefit the land owner and to reaffirm Portnoy’s statement, “... you’re going to see over the next 18-24 months [HRPT] continue to try to push rates as much as we can.”

### **Negotiating Under Duress**

To state the obvious, ground leases are for just the ground. It is the lessees’ responsibility to construct and maintain their buildings, which will revert to the land owner at the end of lease. In addition to the goodwill built up over years of occupying the same location, the lessees’ buildings represent a huge investment. Moving to another location is not an option as the lessee is bound to pay rent to the lessor whether they occupy the land or not. Without parameters to ensure that “fair and reasonable” rents will apply to both parties, the mainland owner can use its power to its advantage to create and demand rents that are not fairly negotiated. In essence, they are using their monopolistic power to economically evict tenants.

### **Arbitration Does Not Work**

Should the owner and lessee fail to reach agreement, the lease requires the parties enter arbitration. However, arbitration is not a viable remedy to determine the rent valuation under the methods used by HRPT.

Because HRPT has required the lessee to sign confidentiality agreements in advance of negotiations, and that agreement prohibits lessees from disclosing any terms offered or accepted, HRPT has made it impossible for the lessees to obtain meaningful information regarding the results of any other lessees’ negotiations – which could be argued to be the best comparable information. HRPT, on the other hand, is working with “inside information” as it has data for all current rents, pending negotiations, signed leases, and mediated or arbitrated outcomes.

HRPT holdings include more than 180 ground leases. With HRPT’s announced course of “pushing rents” as high as possible, the number of arbitrations will increase. Unfortunately, Hawaii’s pool of qualified appraisers is small and many may look to HRPT as a steady and lucrative source of business. The potential to sway the process to the land owner’s benefit will increase and the individual lessee, who has no access to “fair and reasonable” data, will be at a distinct disadvantage. SB 764, Part I will help set parameters to enable a fair and reasonable outcome to a negotiation, mediation and/or arbitration.

Arbitration is a lengthy and costly process that puts an extreme burden on the lessee. In these hard times, business owners are working frantically to maintain their existence and keep their employees employed. It is not within their budget projections to be forced to spend thousands of dollars to fight with the lessor – who truly should be a business associate and not an adversary.

### **Failure to Respond to Community Needs**

HRPT is an extremely large Real Estate Investment Trust (REIT) that must return at least 90% of its profits to its Stakeholders in order to maintain its preferred tax status. Most of its holdings are commercial high-rise office buildings located on the mainland and not long-term ground leases. HRPT is not accustomed to doing business here and, in the opinion of the writer, cares little for the “Aloha” that comes with the responsibility of owning land in the State of Hawaii.



HRPT has stated that it has spent \$750,000 studying the tidal flooding its Mapunapuna land and has given the state a recommendation to cure the problem – it has not offered to tackle the problem or pay for it even though HRPT owns the land and will ultimately receive the largest benefit. In contrast, back in 1999 Damon paid \$6,000,000 to provide new sewers and cesspools to its lessees.

Citizens for Fair Valuation (“CFV”), a non-profit coalition of businesses that lease land from HRPT, has sent seven (7) separate invitations to HRPT offering to meet to discuss how we can mutually obtain “fair and reasonable” rents for everyone concerned; however and to-date, no meeting has taken place. HRPT has done everything possible to intimidate its lessees and has taken aggressive steps to “divide and conquer” its tenants by forcing them to operate under a veil of secrecy.

### **Conclusion: Help Us Save Jobs**

As a final comment in support of this legislation, the lessees with HRPT leases are hard working business people who would rather conduct their business, which is getting harder to do each day, than campaign for new legislation. They do not object to paying rent that is fairly negotiated and determined by applicable economic and market factors including, but not limited to, applicable comparables, the current use of the property and the characteristics of neighborhood (i.e. daily flooding, poor streets, stream flooding, crime, construction, etc). They do, however, strongly object to a lessor who uses "take-it-or leave-it" tactics while insisting upon rents that range from \$8.00 to \$10.00 per sq. ft., with annual increases set between 3.5% and 4.5 %. As a comparison, the vacant Jackson Auto dealership on Nimitz Highway, is listed at \$6.24 per sq. ft. for the land *and* improvements (buildings) and does not have the infrastructure problems that the Mapunapuna lessees have to live with on a daily basis. Hawaiian Homelands has two parcels in Shafter Flats for lease at \$5.36 but neither has attracted any takers other than from one of the existing tenant.

In these hard times, small businesses need assistance. The state simply cannot afford to see more closures and the loss of employment. In particular, the businesses in the Mapunapuna, Kalihi Kai and Sand Island area represent a foundation upon which these islands were built. These are proud people who are not looking for a hand-out or rent control; they just want a level playing field in these lease renegotiations so that discussions between the parties are open and transparent and will result in “fair and reasonable” rents for all concerned.

CFV appreciates your consideration and asks that you please pass SB 764, SD2, HD1, Part I.

Thank you.

*Michael Steiner*

Michael Steiner  
Executive Director

Citizens for Fair Valuation

Telephone: (808) 221-5955

Email: [MSteiner@SteinerAssoc.com](mailto:MSteiner@SteinerAssoc.com)

Web Site: [www.FairValuation.org](http://www.FairValuation.org)

Video at: <http://www.fairvaluation.org/video.aspx?video=cfv.wmv>

Property Management & Leasing  
Pacific Guardian Center - Makai Tower  
733 Bishop Street, Suite 1820  
Honolulu, HI 96813



tel: (808) 599-5800 fax: (808) 599-5806

Reit Management  
& Research LLC  
PROPERTY MANAGEMENT  
DIVISION

[REDACTED] 200 [REDACTED]

VIA EMAIL & CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

[REDACTED]

Honolulu, HI

Email: [REDACTED]

RE: Lease dated [REDACTED] and between Masters Properties LLC [REDACTED]  
[REDACTED]

Dear [REDACTED]

The purpose of this letter is to commence rent resetting negotiations as pursuant to your lease, it is not an offer to set lease rent. The following are the terms upon which Masters Properties LLC would consider setting the rent [REDACTED]

- Landlord: Masters Properties LLC, a wholly-owned subsidiary of HRPT Properties Trust.
- Tenant: [REDACTED]
- Premises: Land consisting of approximately [REDACTED]
- Annual Rental Rate: For the [REDACTED] square foot of land, NNN, increasing annually by 4%. Rent will be [REDACTED]
- G.E.T.: Tenant shall pay Hawaii General Excise Tax (currently 4.712%) on all amounts payable to Landlord.
- Conditions: Tenant will accept the Premises in its "as-is" condition.
- Confidentiality: Tenant acknowledges that the economic terms of this proposal, any lease or lease amendment prepared pursuant to acceptance of this proposal, which includes Rent, Tenant Improvement Allowances, and any other consideration provided herein by the Landlord, constitute information which is either non public, confidential or proprietary, or a combination thereof. Such information, in whole or in part, is hereinafter referred to as the "Information". Tenant agrees that the Information will be kept confidential and will not, without

[REDACTED]  
Page Two

Confidentiality  
(continued):

Landlord's prior written consent, be disclosed by Tenant, in any manner whatsoever, in whole or in part. Tenant agrees to transmit the information only to its attorneys and/or partners of the firm herein for the purpose of evaluating the proposed lease transaction. Tenant will be responsible for any breach of this confidentiality provision caused by its attorneys and/or partners. Upon breach of this confidentiality provision, Landlord reserves the right, at Landlord's sole discretion, to change or modify the terms and conditions of this proposal or to withdraw the proposal altogether.

Other Terms: As set forth in Tenant's existing Lease.

It is understood by both Landlord and Tenant that this proposal is non-binding and is subject to changes, modification and/or withdrawal at any time without notice. Accordingly, there shall not be a binding agreement between Landlord and Tenant unless and until a mutually acceptable, final lease document has been executed and delivered by both Landlord and Tenant. In any event, this proposal will expire [REDACTED]  
[REDACTED]

Please indicate your agreement with the foregoing terms and conditions by signing below and returning this letter to our office. Should you have any further questions, I can be reached at (808) 599-5800.

Regards,

[REDACTED]  
Bradford C. Leach  
Vice President - Pacific Region

AGREED:

[REDACTED]

[REDACTED]  
Name:  
Its:  
Date:

**ESTATE OF SAMUEL MILLS DAMON**

April 11, 1997

Dear Trustees:

Re: Options for Extension of Fixed Rental Period & Waiver of Deferred Rent  
35,698 sq. ft., Mapunapuna Industrial Subdivision

In early 1993 the Trustees of the Damon Estate concluded rent negotiations with the lessees of Mapunapuna for the 10-year period commencing either 11/1/92 or 1/1/93. The rent was set at \$3.45 per square foot per annum at that time, with the option for incremental step-ups of \$2.45, \$3.45 and \$4.45 for 3, 3 and 4 year periods, respectively. In October of 1995, lessees were advised that the \$1.00 increase scheduled for either 11/1/95 or 1/1/96 would be deferred for a one year period due to a number of circumstances, including the drastic decline in demand for warehouse space, the lack of construction work and depressed economic conditions in general. In September of 1996, lessees were advised that the rent increases that were fully deferred a year earlier would be partially deferred for the next 2-year period and rent was set at \$2.95. As a result of the \$1.00 deferred for 1996 and the \$.50 deferred for 1997 and 1998, the total deferred obligation in the amount of \$2.00 has resulted in a substantial financial liability to our tenants.

The Trustees' ongoing evaluation of Hawaii's economic climate has resulted in their belief that the business interest of all concerned would be best served by an extension of the fixed rental period along with a waiver of the \$2.00 in deferred rent that you are currently obligated to pay. Doing so should reduce uncertainties with respect to your lease and make long range planning more meaningful. The value of your lease should also be enhanced by giving you the flexibility to more readily secure conventional mortgage financing for property improvements or other business requirements, as well as making your lease more marketable.

April 11, 1997  
Page 2

This offer is made available to certain Mapunapuna lessees who are not in default under the provisions of their lease at the present time. For those lessees who are currently in default, you will be given thirty (30) days to cure the default, or to submit a plan to cure the default that is acceptable to the Trustees.

The options being made available by the Trustees follow:

**Option 1:**

- 3 years @ \$2.95 per sq. ft. per annum (1/1/97 - 12/31/99)
- 3 years @ \$3.15 per sq. ft. per annum (1/1/00 - 12/31/02)
- Waiver of \$2.00 in deferred rent (1/1/96 - 12/31/98)

**Option 2:**

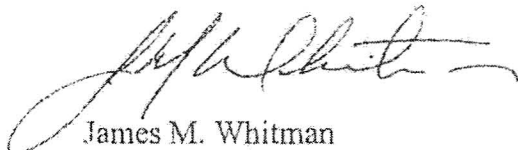
- 3 years @ \$2.95 per sq. ft. per annum (1/1/97 - 12/31/99)
- 3 years @ \$3.15 per sq. ft. per annum (1/1/00 - 12/31/02)
- 5 years @ \$3.45 per sq. ft. per annum (1/1/03 - 12/31/07)
- 5 years @ \$3.95 per sq. ft. per annum (1/1/08 - 12/31/12)
- Waiver of \$2.00 in deferred rent (1/1/96 - 12/31/98)

	<u>mo</u>	<u>annual</u>
3 years @ \$2.95 per sq. ft. per annum (1/1/97 - 12/31/99)	\$ 8,775	105,309
3 years @ \$3.15 per sq. ft. per annum (1/1/00 - 12/31/02)	9,371	112,444
5 years @ \$3.45 per sq. ft. per annum (1/1/03 - 12/31/07)	10,263	123,158
5 years @ \$3.95 per sq. ft. per annum (1/1/08 - 12/31/12)	11,757	141,007

Kindly indicate your acceptance in the space provided below, noting the option you have selected, and return one copy to this office for our files. If acceptance is not received by this office prior to the close of the Estate's office at 4:00 p.m., Hawaii time, on the 15th day of May, 1997, it is withdrawn.

Very truly yours,

ESTATE OF SAMUEL MILLS DAMON

  
James M. Whitman  
Executive Secretary

Option No. 2, Accepted this  
8 day of May 1997.

/ Lessee

# ESTATE OF SAMUEL MILLS DAMON

## MEMORANDUM

To: Lessees of the Mapunapuna Industrial Subdivision  
with Quarterly Rent Due November 1999

From: James M. Whitman  
Chief Operating Officer

Date: October 19, 1999

Re: Increase in Rent of \$0.20 Per Sq. Ft. Per Annum for the  
3-year Period Commencing January 1, 2000

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Your current rental agreement calls for an increase in your rent by \$0.20 per square foot per annum for the 3-year period commencing January 1, 2000, which is incorporated into the enclosed quarterly rent billing for November 1999.

By way of background, in early 1993, the Trustees concluded rent negotiations with the Mapunapuna lessees for the 10-year period commencing January 1, 1993. The rent established as fair and reasonable was \$3.45 per square foot per annum, with the option for incremental step-ups of \$2.45, \$3.45 and \$4.45 for 3, 3 and 4 year periods, respectively. In October of 1995, the \$1.00 increase scheduled for January 1, 1996 was deferred for a one year period due to a number of circumstances, including the drastic decline in demand for warehouse space, the lack of construction work and the depressed economic conditions in general. In September of 1996, the rent increase that was fully deferred a year earlier was partially deferred for the next 2-year period and rent was lowered from the scheduled \$3.45 to \$2.95 per square foot. The total deferred obligation in the amount of \$2.00 per square foot was subsequently waived by the Trustees. The net result of this was to reduce the average rent for the seven year period from the \$3.45 agreed to \$2.66 per square foot.

Recently, the Estate completed the installation of the new low-pressure sanitary sewer system in Mapunapuna at a cost of some \$6,000,000 to the Estate. The benefits accrued to you by the installation of the sewer system include:

- A cleaner and healthier environment.
- Elimination of the need to pump out cesspools.
- A reduction of the flooding potential by eliminating the saturation of the surrounding soils caused by cesspools.
- The option to upgrade your improvements, thereby increasing the value in your leasehold interest. Previously, the City would not issue permits to allow an increase in density on these properties due to the lack of a sewer system.

As you know, the Damon Estate will be absorbing the cost of maintaining your individual grinder pumps, as well as the service line from the pump to the main sewer line in the street.

Considering that the contracted rent agreed to was \$3.45, the Trustees believe that the proposed rent increase of \$0.20 per sq. ft. per annum is fair and reasonable. If you have any questions, please call 536-3717.

Addendum to Testimony from Michael Steiner  
 In Support of HB 1593 and SB 764  
 Hearing Date: February 26, 2009, 2:15 p.m., Room # 325  
 Partial List of Lessees in the Mapunapuna/Kalihi-Kai/Sand Island Area

	Company
1	179 Sand Island Warehouse, LLC
2	Affordable Casket Outlet
3	A S N Enterprises
4	A-1-A Electricians
5	Ahua Enterprises
6	Al Castillo
7	Albert Young
8	Allied Building Products Corp.
9	All Nations Fellowship
10	Allwaste of Hawaii LTD
11	Aloha Auto Auction
12	Aloha Products
13	American Electrical Co., LLC
14	American Savings Bank
15	American Tire (Hawaiian Island Tire)
16	Ameron Hawaii
17	Anches, Jerome
18	Associated Construction
19	AT&T Wireless
20	Bacon - Universal Company, Inc.
21	Bank of Hawaii
22	Ben Franklin
23	Beth Israel Jewish Ministries Int'l
24	Big Rock
25	Blackbern & Associates
26	BOC Group, Inc.
27	Boise Cascade Corp
28	Bond, Jan Tr
29	Boulware, Michael H
30	C & F Machinery Corp
31	Carmen, Wade & Paula
32	Chevron USA Inc
33	Coca-Cola
34	Concrete Coring Co of Hawaii
35	Cossette Investments
36	Deer, Donald G 1989 REV TR/ETAL
37	Dennis Sullivan
38	Dimauro, Pender, leona
39	Diversified Energy Services
40	First Hawaiian Bank
41	Foster Equipment Co., Ltd.
42	Gentre Properties
43	Grace Pacific Corporation
44	Grapac Properties
45	Gray, James, TRS
46	GSH&K Investment
47	H Q INC
48	Hart, Doris J TR
49	Hawaii Concrete Product, Inc
50	Hawaii Nut & Bolt, Inc

	Company
51	Hawaii Stage & Lighting
52	Hawaiian Bitumuls Paving
53	HIE Holdings Inc
54	Hirahara, Ronald Y TR
55	Honolulu Disposal Service
56	Honolulu Painting Co
57	Honolulu Warehouse Co Ltd
58	Horizon Waste Services
59	HSI Electric, Inc.
60	Hydro-Scape Irrigation Supply
61	I DOI Hauling Contr, Inc.
62	Intech, Inc.
63	Inter-Island Solar Supply
64	Island Lighting
65	Ito-En (USA) Inc.
66	Jack Endo Electric
67	John Wagner Assoc Inc
68	Kahai St Dev Partnership
69	Kaiser Foundations Helath Plan
70	Kaya, Darlyne
71	Ken Yee
72	Ken's Auto Fender Ltd
73	Kilgo, A TR
74	Killebrew, George III Fam Tr
75	Kimi, William J Jr.
76	Kobatake, Gilbert D. Tr
77	Komohana Corp
78	Langer Hawaii Corp
79	Leeward Auto Wreckers Inc
80	Luria, Mark T.
81	M.C. Auto Body& Paint
82	Marcus & Associates Inc.
83	McKillican American
84	MHI LLC
85	Mid Pac Petroleum, LLC
86	Moanalua Exchange Ltd
87	Moanalua Mortuary
88	Monier Inc
89	Moos Machine Works, Inc
90	Mr. Sandman Inc.
91	MW Group Ltd.
92	Nakasone, Lillian KG
93	Nordic Construction Ltd
94	Oahu Metal & Supply Inc.
95	Okuhara Foods Inc
96	Olelo Community Television
97	Pacific Allied Products Ltd
98	Pacific Jobbers Warehouse
99	Pacific Machinery
100	Pflueger Group LLC

	Company
101	Philip Services Hawaii Ltd
102	Pioneer Electric Inc
103	Plywood Hawaii, Inc.
104	Pohounui Partners LLC
105	Polynesian Adventure Tours
106	Prime Construction Inc.
107	R & H Machinery Inc.
108	R WO & Associates Inc.
109	Ralph S. Inouye Co., Ltd.
110	Rasko Supply
111	Refuse Inc
112	Renfro, Charles & Carol S
113	Royal Construction Co. Ltd
114	RSI Roofing & Building Supply
115	SI Center Partners
116	Sawdust
117	Sears Roebuck & Co
118	Servco Pacific, Inc.
119	SLSS Partners
120	Snyder, Family Tr
121	Sony Electronics, Inc.
122	Specialty Surfacing Co.
123	STI Industries
124	Stoneridge Recoveries LLC
125	Sugai, Rodney Y Trust
126	Sin Industries Inc.
127	Sylvia, Robert C. Tr
128	Tagupa, James Tr
129	Takane, Janlu M
130	Takiguchi, Raymond K Tr
131	Tesoro Hawaii Corporation
132	Time Warner Entertainment
133	Tokunaga Masonry
134	Tri-Palm Industries Inc.
135	Tropical Ethanol Prod Ltd
136	Twentieth Century Furn Inc.
137	United Truck Rentals
138	UTR Liquidation * Repos Inc
139	Value Service & Supply
140	W T Yoshimoto Corp
141	Walker-Moody Construction
142	Wallner, Family Trust
143	Warehouse Rentals Inc.
144	WASA Electrical Service
145	Webco Hawaii, Inc.
146	Weggeland, Francis M
147	WESCO Distribution Inc.
148	White Cap Construction Supplu
149	Won, Philip W.
150	World Carpets Inc

# **McKILLICAN**

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March 30, 2009

**TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY  
March 31, 2009, at 4:00 p.m., in Room 325**

**TESTIMONY IN SUPPORT OF SB 764, SD2, HD1, Part I  
Leasehold; Commercial and Industrial Property**

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee:

My name is Patrick Fujioka and I work at McKillican American, Inc.; 2858 Kaihikapu Street; Honolulu, Hawaii 96819. I employ 11 people and have been in the Mapunapuna area for 15+ years.

I strongly support Part I of SB 764, SD2, HD1. In these difficult economic times, I am working hard to maintain my business and to keep my employees working. My long-term ground lease is coming up for its 10 year renegotiation of rate which the lease specifically says should be "fair and reasonable."

Although the lease does not define "fair and reasonable," it does not seem fair or reasonable for the new landowner, HRPT, to require me to sign a confidentially agreement before they will discuss the renewal rate, which is the only thing the lease says is to be reset. I also think it unreasonable for HRPT to change the terms of the lease by demanding annual escalations, a right of first refusal, and the acceptance of the property "as-is."

In the past, Damon Estate would come to us with a renewal amount and we would negotiate to achieve a "fair and reasonable" rent. I have relied on fair and reasonable rent for many years and find HRPT's demand for rents of \$8 to \$10 per foot plus 3.5% to 4.5% annual increases to be excessive, especially in light of today's economic realities. I do not feel that my lot is worth as much as the now vacant Jackson Auto lot, which is available for sublease at \$6.24, including the building! There are also two properties in Shafter Flats that are available for about \$5.35, but there have been no offers other than the current tenant.

HRPT is taking advantage of its monopolistic holdings and is attempting to restrict the flow of information in order to squeeze as much rent as possible from its Hawaii tenants and send that cash back to headquarters on the mainland. Small business needs your help to encourage HRPT to come to the table and negotiate in an open and transparent manner to ensure that the process yields fair and reasonable rents for both parties.

On behalf of my employees and customers, please support Part I of SB 764, SD2, HD1 and pass it through to conference.

Thank you for the opportunity to testify.

Patrick K. Fujioka  
McKillican American, Inc.  
2858 Kaihikapu Street  
(808) 839-4404  
EMAIL





**Mr. Sandman Inc.**

Equipment Rental & Wholesale Industrial Supplies

[www.mrsandmaninc.com](http://www.mrsandmaninc.com)

Ph: (808) 833-2500 • Fax: (808) 833-2523

897 Ahua Street, Honolulu, HI 96819

March 30, 2009

**Representative Jon Riki Karamatsu, Chair**

**Representative Ken Ito, Vice-Chair**

House Committee on Judiciary

State Capitol

Honolulu, Hawaii 96813

[JUDtestimony@Capitol.hawaii.gov](mailto:JUDtestimony@Capitol.hawaii.gov)

Re: Testimony in Support of **SB 764, SD2, HD1, Part I**  
Leasehold; Commercial and Industrial Property  
Hearing Date: March 31, 2009, 4:00 pm, Room #325

Dear Representatives Karamatsu, Ito and Members of the Committee:

I support SB 764, SD2, HD1, Part I and urge you to act on this important bill in the interest of protecting the livelihood of our local business community and its' employees.

My name is Robert Freeman and I live in Honolulu. I am the owner and president of Mr. Sandman Inc.(MSI), a local supply and equipment rental company which has been in business in Hawaii for 37 years. We employ 12 people at our facility in Mapunapuna.

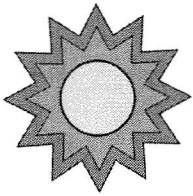
I currently pay approximately \$17,000 per month in rent, real proper taxes and GET. The mainland property owner, HRPT, Has threatened, or advised their investors, that they intend to raise rents in Hawaii by over 200%. If that occurs, my business will no longer be viable, and will be forced to close, adding more workers to the list of unemployed.

During this economic downturn, Hawaii businesses need all the support available. Your support and passage of SB764,SD2, HD1, Part 1, will assure that small businesses in Hawaii are treated fairly during future lease rent re-negotiations.

Thank you for supporting Hawaii's small business community.

Sincerely,

Bob Freeman, President  
Mr. Sandman Inc.



# INTER-ISLAND SOLAR SUPPLY

Serving Hawaii and the Pacific Islands Since 1975

761 AHUA STREET, HONOLULU, HAWAII 96819 Tel: (808)523-0711 Fax: (808)536-5586

JUDtestimony@Capitol.hawaii.gov

House Committee on Judiciary

Tuesday March 31 2009, 4 PM, Conference Room 325

## **In SUPPORT of SB 764, PART 1, Re Real Property**

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee

My name is Meleana Judd, and my family runs Inter-Island Solar Supply. I have over fifty co-workers and am proud that my company has been operating as a renewable energy wholesale distribution company since 1975. We have been a significant player in building Hawaii's status as the Nation's leader in solar water heating and we plan to continue contributing to the growing green collar industry in Hawaii. Although 'solar' has finally become a household word, Inter-Island Solar Supply has worked long and hard on policy supporting renewable energy and decreasing our dependence on imported polluting fossil fuels. Because of this experience we are no strangers to operating on an uneven and dynamic playing field, however I am asking for your help in preserving one of the few factors whose consistency we depend on, one which we signed up for with our prior landlord, namely "fair and reasonable" rent.

We have been at our Oahu branch location, 761 Ahua Street, for nearly ten years and would like to stay. The location is ideal for business and convenient for our loyal customers, some who come by daily to stock their trucks before heading out to island-wide solar jobs. Although we have four years till rent renegotiations, our new mainland-based landlord's behavior—asking neighbors to sign dialogue preventing non-disclosure agreements and presenting overly aggressive rental amount and annual increase suggestions, have made my company's management very nervous. I was glad to hear that we had joined Citizens for Fair Valuation so that you Legislators can get a feel for the numbers of employers and employees supporting this legislation.

I am asking for your support of Senate Bill 764 to address material considerations such as intensity and use of land and the value of transparent negotiations, which will enable fair and reasonable rent for both lessor and the lessee. Your support will help prevent a cycle of appraisers acting as arbitrators and keep companies like mine around the State in business.

I am a Manoa and North Shore resident and can be reached at work for further comment.

Mahalo for your consideration,

Meleana Judd

**karamatsu3-Leanne**

---

**From:** Cully Judd [cullyjudd@gmail.com]  
**Sent:** Monday, March 30, 2009 4:46 PM  
**To:** JUDtestimony  
**Subject:** Testimony SB764

CORRECTION!

I accidentally sent my draft file of testimony. Please disregard first testimony which my mistake included testimony samples following my text.

Text as follows, testimony attached

MAHALO,

cully.

Committee on Judiciary

Tuesday March 31 2009, 4 PM, Conference Room 309

**In SUPPORT of SB 764, SD2 HD1 PART 1 Re Real Property**

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee

My name is Cully Judd, I have owned and operated Inter-Island Solar Supply since 1975. We are a renewable energy wholesale distribution company contributing to the growing green collar industry in Hawaii. We have been at our Oahu branch location, 761 Ahua Street, for nearly ten years and would like to stay. Although we have four years till rent renegotiations, the veil of secrecy created by HRPT's non-disclosure agreements and overly aggressive rent increase suggestions have resulted in our decision to join the efforts of Citizens for Fair Valuation to ensure businesses like ourselves continue to have a home in the industrial area of Mapunapuna.

I ask for your support of House Bill 1593 as well as Senate Bill 764 which simply seek to establish the application of "Fair and Reasonable" rent to both the lessor and the lessee through transparent negotiations.

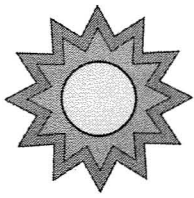
Mahalo for your consideration,

Cully Judd

--

\*\*\*\*\*

Cully Judd  
The Solaray Corp.



# INTER-ISLAND SOLAR SUPPLY

*Serving Hawaii and the Pacific Islands Since 1975*

761 AHUA STREET, HONOLULU, HAWAII 96819 Tel: (808)523-0711 Fax: (808)536-5586

JUDtestimony@Capitol.hawaii.gov

House Committee on Judiciary

Tuesday March 31 2009, 4 PM, Conference Room 325

## **In SUPPORT of SB 764, PART 1, Re Real Property**

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee

My name is Dina Miyashiro, and I am the Controller at Inter-Island Solar Supply. I have over fifty co-workers and am proud that my company has been operating as a renewable energy wholesale distribution company since 1975. We have been a significant player in building Hawaii's status as the Nation's leader in solar water heating and we plan to continue contributing to the growing green collar industry in Hawaii. Although 'solar' has finally become a household word, Inter-Island Solar Supply has worked long and hard on policy supporting renewable energy and decreasing our dependence on imported polluting fossil fuels. Because of this experience we are no strangers to operating on an uneven and dynamic playing field, however I am asking for your help in preserving one of the few factors whose consistency we depend on, one which we signed up for with our prior landlord, namely "fair and reasonable" rent.

We have been at our Oahu branch location, 761 Ahua Street, for nearly ten years and would like to stay. The location is ideal for business and convenient for our loyal customers, some who come by daily to stock their trucks before heading out to island-wide solar jobs. Although we have four years till rent renegotiations, our new mainland-based landlord's behavior—asking neighbors to sign dialogue preventing non-disclosure agreements and presenting overly aggressive rental amount and annual increase suggestions, have made my company's management very nervous. I was glad to hear that we had joined Citizens for Fair Valuation so that you Legislators can get a feel for the numbers of employers and employees supporting this legislation.

I am asking for your support of Senate Bill 764 to address material considerations such as intensity and use of land and the value of transparent negotiations, which will enable fair and reasonable rent for both lessor and the lessee. Your support will help prevent a cycle of appraisers acting as arbitrators and keep companies like mine around the State in business.

I am a Honolulu resident and can be reached at work for further comment.

Mahalo for your consideration,

Dina Miyashiro



# PLYWOOD HAWAII

1062 Kikowaena Place  
Phone (808) 834-1144

Honolulu, Hawaii 96819  
Fax (808) 834-1232

March 30, 2009

Representative Jon Riki Karamatsu, Chair  
Representative Ken Ito, Vice-Chair  
House Committee on Judiciary  
State Capitol  
Honolulu, Hawaii 96813

**Re: Testimony in Support of SB 764, SD2, HD1, Part I  
Leasehold; Commercial and Industrial Property  
Hearing Date: March 31, 2009, 4:00 pm, Room #325**

Dear Representatives Karamatsu, Ito and Members of the Committee:

I strongly your support of Part I of SB 764, SD2, HD1 and ask the Committee to pass this bill .

Plywood Hawaii has been in business for 14 years and employs 11 people. We are concerned about the current position of HRPT in asking for such a dramatic increases and change in terms. In supporting this bill we are asking the legislature to clarify the unique language that appears in our leases to allow for rent negotiation that is truly fair to both sides.

We fully recognize that the land holder has a right to a fair return on the investment that they have made. But "fair" is not what they are asking. We and others in our area are looking for clarification to be able to work out our rent renegotiations in a manner that is spelled out in our lease – "fair and reasonable".

HRPT, the largest commercial landholder in the state, has attempted to keep secret all negotiations while asking for rents that are double or more plus inserting a new step-up provision that requires 3-1/2 to 4% annual increases regardless of the economic climate. The very dramatic rent increases and the addition of step-ups will put some out of business and for those who can remain, the costs will be passed on to the consumer. The implication of the size of the proposed rent increases will be far reaching

Please note that the bill does not seek to change the contract but merely provide assistance in establishing open and transparent negotiations that will lead to fair and reasonable rents for both parties

I encourage you to pass Part I of SB764, SD2, HD1. Thank you for the opportunity to testify.

Sincerely,

Connie Smales, President

**TESTIMONY FOR THE HOUSE COMMITTEE ON JUDICIARY  
TUESDAY, MARCH 31, 2009, AT 4:00 P.M.  
CONFERENCE ROOM 325, STATE CAPITOL**

**RE: S.B. 764, S.D. 2, H.D. 1, Relating to Real Property**

Chair Karamatsu, Vice Chair Ito, and Members of the Committee:

My name is Chris Woodard, Senior Real Estate Officer, for Reit Management & Research LLC, the property manager for HRPT Properties Trust ("HRPT"). Through its affiliated companies, HRPT owns industrial zoned land in Mapunapuna, Sand Island, and Ewa, and leases many of its Hawaii properties pursuant to long-term leases.

HRPT respectfully, but strongly, opposes S.B. 764, S.D. 2, H.D. 1 (the "Bill"). This Bill is unprecedented and unconstitutional. The Bill is targeted at a single landowner—HRPT—and would effectively change the agreed upon terms of previously negotiated long-term commercial and industrial lease contracts, for the sole benefit of a small group of lessees. The proponents of the Bill include some of the largest companies in Hawaii and wealthy sandwich lease investors, who have enjoyed substantially below-market lease rents for the last decade. These lessees generally have 50-year ground leases which require that the rent be re-set every ten years. In testimony before the State Senate on this Bill, the Bill's proponents candidly admitted that they are pushing the Bill to use as leverage in lease rent renegotiations with HRPT, to use it (in the words of a State Senator) as a "club" against HRPT. HRPT respectfully submits that is not an appropriate use of the legislative process, and reinforces the conclusion that this Bill violates the Contracts Clause of the United States Constitution.

Following questions by members of this Committee at the last hearing, HRPT has changed its Hawaii practices and no longer requires that tenants or prospective tenants sign confidentiality agreements before negotiating rent re-sets, lease renewals or new leases. HRPT also is releasing information on comparable market transactions to commercial real estate brokers and appraisers, when contractually permitted. HRPT has again met with leaders of the "Citizens for Fair Valuation" group to listen to their concerns. HRPT urges the Bill be held in committee, for the following reasons:

1. **There is no public need for this legislation**— Since HRPT acquired its Hawaii properties in 2003, it has negotiated mutually agreeable rental rates for the vast majority of leases with re-set dates prior to January 1, 2009. When the lessor and lessee cannot agree, the existing lease contracts and existing law in Hawaii establish a procedure whereby the land's fair market value and resulting lease rent are determined by neutral, qualified appraisers. This fair market value appraisal procedure for determining commercial and industrial lease rent rates has

been followed here in Hawaii for many decades on all such leases, and in particular has been followed on the leases HRPT assumed from the Damon Estate. Resetting the rent at fair market value means the rent can increase or decrease.

In those few cases where the tenant and HRPT have not reached an agreement on new lease rent, HRPT has never declined a tenant's request for mediation which avoids the time and expense of arbitration otherwise required by the lease. The proponents of this Bill have stated that HRPT has made "take it or leave it" offers. That is simply false. HRPT is now negotiating with several tenants on rent re-negotiation and lease restructuring issues, where both parties have amicably exchanged offers. HRPT has even accommodated several tenants' requests to re-set rents earlier than contractually required. HRPT also has entered into dozens of new leases. Demand has remained strong for HRPT's properties, and HRPT has tried to balance that demand with the needs of its existing tenants.

HRPT is a long-term investor in Hawaii. HRPT's business plan is to work with existing tenants to offer extended lease terms and fixed-rent periods in return for rental adjustments to market rates. This approach enables more tenants to obtain bank financing to improve their buildings, because banks often will not make capital improvement loans to businesses when their lease terms are short. HRPT also is working with some tenants on plans to make more efficient use of their property, most likely by reducing the size of their rental lot and building taller or higher-ceiling warehouses. That way tenants can obtain a long-term lease where they pay less rent on a more functional warehouse, and at the same time free up additional industrial land for other companies who wish to move to the area.

Many of the proponents of the Bill are tenants whose lease rent was last re-set in the 1990s, when property values were far lower than they are today. Research data from a prominent local full-service real estate firm show that industrial warehouse rents on Oahu have doubled between 1998 and 2008. The data also show that estimated industrial land values in the Mapunapuna/Sand Island/Kalihi Kai area have doubled during the same period. Tenants who have had the benefit of a low, fixed rental rate for the last ten years will now have their rent re-set to reflect those increased values and current market rates. HRPT views each lease on its unique facts and circumstances, has always carefully considered any reasonable tenant proposal and has always treated the specifics of each tenant's lease with an appropriate degree of confidentiality. However, in response to requests from the proponents of this Bill, HRPT no longer requires tenants or potential tenants in its Oahu industrial market to sign confidentiality agreements before entering negotiations for rent re-sets, lease renewals or new leases.

**2. HRPT interprets the "fair and reasonable annual rent" lease term exactly as Damon Estate did**—Contrary to the testimony of the Bill's proponents, HRPT

interprets the rent determination provision of these leases exactly as the original lessor Damon Estate did. For example, in 1992, a group of six tenants calling itself the Upper Mapunapuna Tenants Group (which included some of the proponents of this Bill) invoked arbitration after the Damon Estate proposed doubling rents based on the substantial increase in Hawaii land values between 1982 and 1992.

The tenants claimed then, as they have 17 years later here at the Legislature, that “fair and reasonable rent” should be based on “the earning power of the property based upon its existing use....” Damon Estate presented evidence showing the tenants knew that rents were to be based on the properties’ fair market value multiplied by a market rate of return, and “it is ridiculous for (tenants) to claim that the words ‘fair and reasonable’ somehow entitle them to enjoy below-market rents.” See portions of Damon Estate’s March 1993 Closing Brief, attached as Exhibit 1. In an April 1993 decision, the arbitration panel agreed with Damon Estate, as shown in the April 29, 1993 Damon Estate memo to file attached as Exhibit 2:

**“Pursuant to the determination made by the arbitration panel on April 7, 1993 . . . which ranged between \$4.60 and \$4.90 per square foot per annum, it is evident that the fair and reasonable rent provided for in the Estate’s lease has been interpreted by the arbitration panel to mean the prevailing rate of return on the fair market value of the land, exclusive of improvements.”**

3. **The Bill is unconstitutional**—While the Bill’s proponents claim that this Bill merely “clarifies” HRPT’s leases with its tenants, in fact the Bill seeks to re-define an existing term in existing leases. By the admission of the Bill’s own proponents, the Bill seeks to change the lease rent redetermination process in existing leases for the sole benefit of lessees, to attempt to reduce their lease rent.

The Hawaii Supreme Court has cited three criteria in analyzing whether a state statute violates the Contracts Clause of the U.S. Constitution: (1) whether the state law operates as a substantial impairment of a contractual relationship; (2) whether the state law was designed to promote a significant and legitimate public purpose; and (3) whether the state law was a reasonable and narrowly-drawn means of promoting the significant and legitimate public purpose. Application of Herrick, 82 Haw. 329, 340 (1996)

a. **The Bill substantially impairs a contractual relationship**

This Bill substantially impairs HRPT’s contractual relationships with its lessees because, among other reasons:

-- The Bill materially affects the most essential term in a commercial and industrial lease: the lessee’s obligation to pay rent.

-- The Bill regulates an area of commerce, commercial and industrial leasing, that was not previously regulated by the State. State and federal courts have repeatedly held that the



lack of any prior regulation and government intervention is an important factor in determining whether a new law violates the Contracts Clause.

-- The Bill re-defines an existing term in an existing contract, and would command appraisers, arbitrators, and courts to interpret the existing term under this new legislative definition—contrary to the intent of the original lessor Damon Estate and contrary to the 1993 determination of the arbitrators interpreting the lease contract.

-- The preamble to the Bill and the abundant testimony of its proponents make clear that the intent of the Bill is to reduce the amount of rent lessees would be obligated to pay when their rents are re-set under the lease contract. In other words, the sole purpose of this Bill is to take an economic benefit from one contracting party, the lessor, and give that economic benefit to the other contracting party, the lessee.

In sum, there can be no dispute that a law which fundamentally changes the lease rent re-determination process, which is contrary to the intent of the original contracting party, and which has the intent and effect of reducing lease rent paid under the lease contract, substantially impairs a contractual relationship.

**b. The Bill does not promote a significant public purpose**

In determining whether a state law promotes a significant and legitimate public purpose, the Hawaii Supreme Court has stated that the new law must “impose a generally applicable rule of conduct designed to advance broad societal interests.” Anthony v. Kualoa Ranch, 69 Haw. 112, 123 (1987). In Anthony, the Court held that a state law that simply tries to “do equity as the legislature saw it”, by changing contractual obligations for the benefit of lessees, is unconstitutional. Id.

This Bill does not “advance broad societal interests,” and is therefore unconstitutional under Anthony. As defined by the Bill, HRPT is the only landowner in the State who holds leases affected by this Bill. This Bill is special interest legislation which benefits an “illusory” class, not unlike the special legislation recently struck down by the Hawaii Supreme Court in the Superferry case. As the Hawaii Supreme Court stated at the conclusion of its Superferry opinion, invalidating the special law:

That our Constitution prohibits laws which provide disparate treatment intended to favor a specific individual, class, or entity or to discriminate against a specific individual, class, or entity is **a fundamental principle of the democratic nature of our government: equal rights and treatment for all persons under the law.**

See Sierra Club v. State of Hawaii, March 16, 2009, (emphasis added).

This Bill is targeted at one, and only one, landowner, and would benefit a small but vocal group of lessees. Many of these lessees are wealthy sandwich lease investors. Their subtenants, often small local businesses, will not benefit from the Bill because (1) the Bill allows

sandwich investors to pass on any rent increases to their sub-tenants; and (2) the leases between tenants and sub-tenants can be written so that any savings received by the sandwich investors from this Bill would not have to be passed on to the sub-tenants. The Bill in fact will harm, not help, small local businesses.

This is simply a private dispute between one landowner and a few lessees who apparently have differing views as to the current value of industrial land in or around Mapunapuna. In such a situation, Anthony requires that this private dispute be resolved according to the existing terms of the contract—not by a new law that seeks to rearrange contractual rights and obligations.<sup>1</sup>

Finally, while the Bill speaks generally about fears that “this economic crisis will lead to more unemployment and business closures and financial failures,” there are no findings and no evidence whatsoever that reducing the rent for a small group of lessees of one landowner will resolve those problems. In fact, contrary to the claims of the Bill’s proponents, there have been no mass evictions, lease terminations, or business failures in Mapunapuna. Mapunapuna has always been and will remain a dynamic center for Oahu’s industrial and commercial businesses, both large and small.

**c. The Bill is not reasonably and narrowly drawn**

In 2002, the Legislature was considering a bill that, among other things, would have changed the way fair market value is calculated in commercial lease rent negotiations. The Senate Commerce & Consumer Protection Committee asked for an Attorney General’s opinion on the bill’s constitutionality. In an April 11, 2002 letter to the Senate, the Attorney General explained why the bill failed to provide a reasonably and narrowly drawn means to accomplish a significant and legitimate public purpose:

[A]lthough the problem of the oligopoly and residential leases in Hawaii is unique and found nowhere else in the United States, this problem does not apply to commercial leases. Most businesses lease their property rather than purchase them in fee simple. Furthermore, the businesses that can construct major improvements involving significant capital investments are generally run by managers with the knowledge and skill to negotiate terms of leases that are favorable. Those businesses with less investment in their property are more likely to be able to relocate.

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<sup>1</sup> Contrary to the testimony of this Bill’s advocates, courts in other states frequently have found state or city laws to violate the Contracts Clause. See, e.g., Ross v. City of Berkeley, 655 F.Supp. 820 (N.D. Cal 1987) (invalidating commercial lease restriction that benefited lessees in a small neighborhood of Berkeley); Northern Natural Gas Co. v. Munns, 254 F.Supp.2d 1103 (S.D. Iowa 2003) (invalidating state law that benefited a “narrow class of landowners”). “[L]eveling the playing field between contracting parties is expressly prohibited as a significant and legitimate public interest.” Equipment Manufacturers Institute v. Janklow, 300 F.2d 842, 860-61 (8th Cir. 2002) (invalidating statute altering the contract rights between agricultural manufacturers and dealers)

Furthermore, agreeing to a fixed rent even though land values may fluctuate is a business risk that businesses seeking a profit should take into consideration when negotiating a lease in the first place. In addition, the lessees have options available to them. They may continue to lease at the higher than market rent, sell their leasehold and move elsewhere, [or] negotiate a more favorable lease with another lessor because the fair market value of the land at this time is lower . . .

See Attorney General's April 11, 2002 Opinion Letter, p. 3.

The Attorney General's comments from 2002 apply equally to this Bill, seven years later. This Bill is unconstitutional; bad policy; and bad for business throughout the State of Hawaii. The Bill sets a terrible precedent, sending a message to all businesses that they cannot necessarily rely on enforcing mutually agreed contract terms in this State. I ask that the Committee hold this Bill, and I thank the Committee for the opportunity to express our opposition.

LESSOR THE ESTATE OF SAMUEL M. DAMON'S  
CLOSING BRIEF

KOBAYASHI, SUGITA & GODA

BERT T. KOBAYASHI, JR.  
LEX R. SMITH  
ERNEST H. NOMURA  
745 Fort Street, 8th Floor  
Honolulu, Hawaii 96813  
Telephone No. 539-8700

**EXHIBIT 1**

a theory in this case because neither party presented any evidence of any "bubble" in the market for industrial property.

B. Professional Standards

1. "Fair Rental" and "Market Rent."

Each of the leases involved in this arbitration proceeding provides that the Panel must determine the "fair and reasonable annual rent for the demised land (exclusive of buildings)." The term "fair rental" is defined in The Dictionary of Real Estate Appraisal (2d ed. 1989), as synonymous with "market rent." (Damon Exhibit 6). Both Mr. Conboy and Mr. Medusky endorsed this Dictionary as relevant, reliable, and a standard that should be followed by those who are members of the Appraisal Institute. (Transcript, Vol. III, p. 7).

In terms of a dictionary definition of the word "reasonable," the American Heritage Dictionary (2d ed.) (Damon Exhibit 22) defines "reasonable" as follows: "Not excessive or extreme; fair. . . ."

As the Panel observed, before Mr. Medusky was aware that the Dictionary of Real Estate Appraisal defined "fair rental" as "market rent," he went into a long narrative of the differences between these two terms [Transcript Vol. III, pp. 27 - 36]. Then, when confronted with the accepted definition, he had no explanation that would support his attempt to draw a distinction between these two terms.

There is no distinction between "fair and reasonable rent" as testified to by Mr. Conboy at page 58, Vol. IV of the

Transcript, and as specified in The Dictionary of Real Estate Appraisal. With respect to the language of the lease, the Lessees' attorney admitted:

I mean, fair and reasonable. They are common words and I think you should give them common meaning.

(Transcript, Vol. I at 9, lns. 4-5). The dictionary definition provides the common meaning to be applied.

2. Rule 1-3 of the Uniform Standards of Professional Appraisal Practice

The leases also provide that the ground lease rent must be based on the value of the demised land "exclusive of buildings." Rule 1-3(b) of the Uniform Standards of Professional Appraisal Practice, reflects the same concept:

In developing a real property appraisal, an appraiser must observe the following appraisal guidelines:

\* \* \* \*

(b) recognize that land is appraised as though vacant and available for development to its highest and best use and that the appraisal of improvements is based on their actual contribution to the site.

3. Standards Applicable To The Use Of Land Residual Method

The Appraisal Institute's publication The Appraisal of Real Estate (10th ed. 1992) at 307-8, further recognizes that the residual method is appropriate only where market data are unavailable or as a method to test alternative uses of a particular site. The Appraisal Institute thus recognizes that the residual method is only appropriate where the analysis is based on the highest and best use of the property. As Mr. Conboy confirmed:

Residual is fine if you are going to do a residual based on its highest and best use, or improvements that represent the highest and best use, and at the same time, are relatively new

(Transcript, Vol. IV, p. 60, lns 17-23..)

III. LESSEES WERE WELL AWARE AT THE TIME THEY ACCEPTED THE LEASES DIRECTLY FROM LESSOR THAT IT WAS LESSOR'S POSITION THAT THE APPRAISAL PROVISION CALLS FOR RENTS BASED UPON THE FEE SIMPLE VALUE OF THE UNIMPROVED PROPERTY VALUED TO ITS HIGHEST AND BEST USE AND APPLYING THE MARKET RATE OF RETURN

Lessees were apparently unaware that the letter of October 23, 1992, would be introduced to the Panel and represented to this Panel that the appraisal language calling for fair and reasonable rent did not mean the same thing as market rent and required that the Panel look at factors other than issues relevant to a bona fide appraisal.

This letter, which is Damon Exhibit 20, specifically states:

I am writing in reply to your letter of October 22nd. I did handle the rent renegotiation on behalf of the upper Mapunapuna lessees in 1982. As I recall, we had several meetings and discussions with representatives of the Damon Estate regarding the meaning of "such fair and reasonable annual rent."

\* \* \* \*

As best I can recall, there was disagreement between the lessees and Damon Estate regarding the meaning of those words. Damon Estate contended that the market-rate-of-return should be applied to the unencumbered fee value of the property as if vacant and unimproved. We contended that the rent should be set based upon the earning power of the property based upon its existing use, which basically amounts to a land residual approach to valuation. . . .

It is obvious in 1982, when the sub-tenants had the option of entering into direct leases with the Estate, they were well aware of the position of the Estate as to the Lessor's interpretation of the appraisal language. As the Panel has learned, the current lessees did not seek to change the language

of the lease, nor did they ask for a revision in terms of the meaning of that language. It is totally inconsistent for them to now claim that lessor is seeking a new and different interpretation or that they were not fully advised of what the appraisal language intended.

IV. THE LEASES CALL FOR APPRAISERS TO DETERMINE THE RENT ACCORDING TO THE MARKET RENT FOR THE LAND VACANT, UNENCUMBERED, AND AVAILABLE FOR DEVELOPMENT.

A. The Leases Call For Use Of Appraisers Because It Is The Function Of Appraisers To Determine Market Value.

In this jurisdiction, and elsewhere, appraisers are very frequently called upon to determine lease rent for reopening periods. The process of determining lease rent at reopening is therefore not new or unique to the members of this Panel. It is therefore not surprising that each of the leases that are the subject of this arbitration requires that new ground lease rents (if not agreed upon) be set by a panel composed entirely of appraisers.

It is ordinarily the function of appraisers to appraise market value of real property. By expressly specifying the use of "appraisers" as the means of determining new rent, the subject leases obviously require that the new ground lease rent will be determined in accordance with the standards, training, and expertise employed by appraisers in evaluating the market rents for the property. The leases do not require the input of leasing agents or brokers or persons who have limited qualifications in terms of land use.



B. The Language Of The Leases Calls For The Appraisal To Be Made Based On The Value Of The Land "Exclusive of Buildings."

The language of the lease expressly provides that the appraisers' function is to determine the fair and reasonable rent for the demised land "exclusive of buildings." The rent is thus to be determined without regard to any buildings that Lessees may or may not have elected to place on the property. This is completely consistent with Rule 1-3(b) of the Uniform Standards of Professional Appraisal Practice:

In developing a real property appraisal, an appraiser must observe the following appraisal guidelines:

\* \* \* \*

(b) recognize that land is appraised as though vacant and available for development to its highest and best use and that the appraisal of improvements is based on their actual contribution to the site. (emphasis added)

Thus, the lease language contemplates that the function of the Panel shall be to determine the market rent for the land as if unimproved, without regard to any improvements that Lessees may or may not have elected to place on the property. The term "exclusive of buildings," together with the requirement that the rent be established by appraisers (who are bound by the above standard), more than adequately demonstrates this intent. Mr. Conboy has testified that the reasonable interpretation by a Member of the Appraisal Institute of the phrase "fair and reasonable annual rent for the demised land (exclusive of buildings)" contemplates the appraisal based upon fee value of

the real property as if unimproved and to its highest and best use. (Transcript, Volume IV, pp. 2--21).

C. It is Ridiculous For Lessees To Claim That the Words "Fair and Reasonable" Somehow Entitle Them To Enjoy Below-Market Rents.

Lessees would apparently ask the Panel to conclude that the term "fair and reasonable rent" somehow entitles Lessees to pay rents that are below market. This is patently absurd. Lessees have not, and they cannot, provide any logical or legal foundation for the Panel to conclude that it is "fair" or "reasonable" for the ground lease rents on the subject parcels to be set below the market. "Market rent" by definition is identical with "fair rent" and as discussed above the distinction that Mr. Medusky sought to draw between the two terms has no support and is in fact contrary to what he recognizes to be authorities for the purpose of setting prevailing standards for Members of the Appraisal Institute.

The conclusion is simply inescapable that the fair and reasonable rent for the demised land (exclusive of buildings) is the market rent for the demised land vacant, unencumbered, and available for development. If this were not the case, the subject leases would not dictate that "appraisers" be appointed.

V. THE FAIR AND REASONABLE RENT FOR THE DEMISED LAND (EXCLUSIVE OF BUILDINGS) IS APPROPRIATELY REFLECTED IN THE APPRAISALS SUBMITTED BY MR. CONBOY.

Mr. Conboy concluded in his appraisal reports for each of the leases that the "fair and reasonable rent for the demised land (exclusive of buildings)" should be as follows:


April 29, 1993

Memo to file:

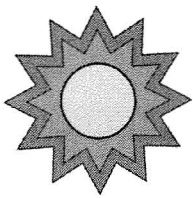
re: Moanalua Arbitration Matter

Pursuant to the determination made by the arbitration panel on April 7, 1993, in the appraisal proceedings between the Damon Estate and Moanalua lessees Webco Hawaii, Bacon-Universal, Servco Pacific, Vorelco and Sony Corporation, which ranged between \$4.60 and \$4.90 per square foot per annum, it is evident that the fair and reasonable rent provided for in the Estate's lease has been interpreted by the arbitration panel to mean the prevailing rate of return on the fair market value of the land, exclusive of improvements.

This was further substantiated by real estate appraiser Alan Conboy in his meeting with the Trustees on April 27, 1993.

A handwritten signature in black ink, consisting of a stylized 'A' followed by a large loop and a vertical line.

**EXHIBIT 2**



# INTER-ISLAND SOLAR SUPPLY

*Serving Hawaii and the Pacific Islands Since 1975*

761 AHUA STREET, HONOLULU, HAWAII 96819 Tel: (808)523-0711 Fax: (808)536-5586

JUDtestimony@Capitol.hawaii.gov

House Committee on Judiciary

Tuesday March 31 2009, 4 PM, Conference Room 325

## **In SUPPORT of SB 764, PART 1, Re Real Property**

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee

My name is Louis Valenta, and I am Photovoltaic system designer at Inter-Island Solar Supply. I have over fifty co-workers and am proud that my company has been operating as a renewable energy wholesale distribution company since 1975. We have been a significant player in building Hawaii's status as the Nation's leader in solar water heating and we plan to continue contributing to the growing green collar industry in Hawaii. Although 'solar' has finally become a household word, Inter-Island Solar Supply has worked long and hard on policy supporting renewable energy and decreasing our dependence on imported polluting fossil fuels. Because of this experience we are no strangers to operating on an uneven and dynamic playing field, however I am asking for your help in preserving one of the few factors whose consistency we depend on, one which we signed up for with our prior landlord, namely "fair and reasonable" rent.

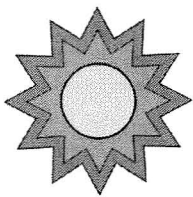
We have been at our Oahu branch location, 761 Ahua Street, for nearly ten years and would like to stay. The location is ideal for business and convenient for our loyal customers, some who come by daily to stock their trucks before heading out to island-wide solar jobs. Although we have four years till rent renegotiations, our new mainland-based landlord's behavior—asking neighbors to sign dialogue preventing non-disclosure agreements and presenting overly aggressive rental amount and annual increase suggestions, have made my company's management very nervous. I was glad to hear that we had joined Citizens for Fair Valuation so that you Legislators can get a feel for the numbers of employers and employees supporting this legislation.

I am asking for your support of Senate Bill 764 to address material considerations such as intensity and use of land and the value of transparent negotiations, which will enable fair and reasonable rent for both lessor and the lessee. Your support will help prevent a cycle of appraisers acting as arbitrators and keep companies like mine around the State in business.

I am a Koneohe resident and can be reached at work for further comment.

Mahalo for your consideration,

**Louis Valenta Jr.**



# INTER-ISLAND SOLAR SUPPLY

*Serving Hawaii and the Pacific Islands Since 1975*

761 AHUA STREET, HONOLULU, HAWAII 96819 Tel: (808)523-0711 Fax: (808)536-5586

JUDtestimony@Capitol.hawaii.gov

House Committee on Judiciary

Tuesday March 31 2009, 4 PM, Conference Room 325

## **In SUPPORT of SB 764, PART 1, Re Real Property**

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee

My name is Charles Abanes, and I am outside sales representative at Inter-Island Solar Supply. I have over fifty co-workers and am proud that my company has been operating as a renewable energy wholesale distribution company since 1975. We have been a significant player in building Hawaii's status as the Nation's leader in solar water heating and we plan to continue contributing to the growing green collar industry in Hawaii. Although 'solar' has finally become a household word, Inter-Island Solar Supply has worked long and hard on policy supporting renewable energy and decreasing our dependence on imported polluting fossil fuels. Because of this experience we are no strangers to operating on an uneven and dynamic playing field, however I am asking for your help in preserving one of the few factors whose consistency we depend on, one which we signed up for with our prior landlord, namely "fair and reasonable" rent.

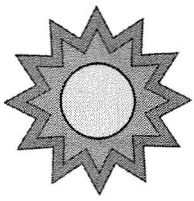
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I am a Wahiawa resident and can be reached at work for further comment.

Mahalo for your consideration,

Charles Abanes



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JUDtestimony@Capitol.hawaii.gov

House Committee on Judiciary

Tuesday March 31 2009, 4 PM, Conference Room 325

In SUPPORT of SB 764, PART 1, SD2 HD1 Re Real Property

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee

My name is Carol Silva, and I am the Corporate Secretary at Inter-Island Solar Supply. I have over fifty co-workers and am proud that my company has been operating as a renewable energy wholesale distribution company since 1975. We have been a significant player in building Hawaii's status as the Nation's leader in solar water heating and we plan to continue contributing to the growing green collar industry in Hawaii. Although 'solar' has finally become a household word, Inter-Island Solar Supply has worked long and hard on policy supporting renewable energy and decreasing our dependence on imported polluting fossil fuels. Because of this experience we are no strangers to operating on an uneven and dynamic playing field, however I am asking for your help in preserving one of the few factors whose consistency we depend on, one which we signed up for with our prior landlord, namely "fair and reasonable" rent.

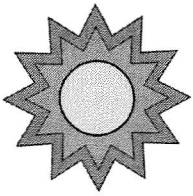
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I am a Manoa resident and can be reached at work for further comment.

Mahalo for your consideration,

Carol Silva



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House Committee on Judiciary

Tuesday March 31 2009, 4 PM, Conference Room 325

## **In SUPPORT of SB 764, PART 1, Re Real Property**

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee

My name is **Anthony Bradfield**, and I am **Accounting Manager** at Inter-Island Solar Supply. I have over fifty co-workers and am proud that my company has been operating as a renewable energy wholesale distribution company since 1975. We have been a significant player in building Hawaii's status as the Nation's leader in solar water heating and we plan to continue contributing to the growing green collar industry in Hawaii. Although 'solar' has finally become a household word, Inter-Island Solar Supply has worked long and hard on policy supporting renewable energy and decreasing our dependence on imported polluting fossil fuels. Because of this experience we are no strangers to operating on an uneven and dynamic playing field, however I am asking for your help in preserving one of the few factors whose consistency we depend on, one which we signed up for with our prior landlord, namely "fair and reasonable" rent.

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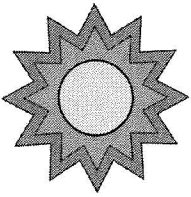
I am a **Honolulu** resident and can be reached at work for further comment.

Mahalo for your consideration,

**Anthony Bradfield**

[Abroadfield@solarsupply.com](mailto:Abroadfield@solarsupply.com)

[www.solarsupply.com](http://www.solarsupply.com)



# INTER-ISLAND SOLAR SUPPLY

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House Committee on Judiciary

Tuesday March 31 2009, 4 PM, Conference Room 325

## **In SUPPORT of SB 764, SD2, HD1 PART 1, Re Real Property**

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee

My name is **Ron Richmond**, and I am **manager of business development** at Inter-Island Solar Supply. I have over fifty co-workers and am proud that my company has been operating as a renewable energy wholesale distribution company since 1975. We have been a significant player in building Hawaii's status as the Nation's leader in solar water heating and we plan to continue contributing to the growing green collar industry in Hawaii. Although 'solar' has finally become a household word, Inter-Island Solar Supply has worked long and hard on policy supporting renewable energy and decreasing our dependence on imported polluting fossil fuels. Because of this experience we are no strangers to operating on an uneven and dynamic playing field. I, however, am asking for your help in preserving one of the few factors whose consistency we depend on, one which we signed up for with our prior landlord, namely "fair and reasonable" rent.

We have been at our Oahu branch location, 761 Ahua Street, for nearly ten years and would like to stay. The location is ideal for business and convenient for our loyal customers, some who come by daily to stock their trucks before heading out to island-wide solar jobs. Although we have four years till rent renegotiations, our new mainland-based landlord's behavior—asking neighbors to sign dialogue preventing non-disclosure agreements and presenting overly aggressive rental amount and annual increase suggestions, have made my company's management very nervous. I was glad to hear that we had joined Citizens for Fair Valuation so that you Legislators can get a feel for the numbers of employers and employees supporting this legislation.

I am asking for your support of Senate Bill 764 to address material considerations such as intensity and use of land and the value of transparent negotiations, which will enable fair and reasonable rent for both lessor and the lessee. Your support will help prevent a cycle of appraisers acting as arbitrators and keep companies like mine around the State in business.

I am a **Pearl City** resident and can be reached at work for further comment.

Mahalo for your consideration,

**Ron Richmond**



# **BIA-HAWAII**

**BUILDING INDUSTRY ASSOCIATION**

March 31, 2009

Honorable Jon Riki Karamatsu, Chair  
Committee on Judiciary  
State Capitol, Room 309  
Honolulu, Hawaii 96813

RE: SB764, SD2, HD1 "Relating to Real Property"

Dear Chair Karamatsu and Members of the Committee on Judiciary:

I am Karen Nakamura, Chief Executive Officer of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii.

BIA-Hawaii opposes SB764, SD2, HD1 "Relating to Real Property". While BIA-Hawaii sympathizes with the situation of lessees in the Mapunapuna, Kalihi Kai and Sand Island areas, some, **we cannot support** SB764, SD2, HD1 which seeks to alter the original renegotiation clauses of existing lease contracts by adding new terms and conditions.

We believe it is bad policy to pass a bill that is targeted to only one lessor and its lessees and to alter the conditions and terms of their leases. Once enacted, such a law will set a bad precedent and cause even more uncertainty in lease agreements..

The proponents of the bill believe that they can resolve their problems by enactment of this bill that uses the terms "fair and reasonable". We believe such terminology would be open to legal challenges. BIA-Hawaii believes that both parties to a lease should clarify their understanding of what the terms of the lease are and abide by the terms once agreement is reached. BIA-Hawaii believes that the terms of a contract between private parties should not be changed by state law. We also hope that the lessees can come to satisfactory agreements with the lessor.

Thank you for the opportunity to express our views.



Chief Executive Officer  
BIA-Hawaii

# Grace Pacific

C O R P O R A T I O N  
P.O. Box 78 / Honolulu, Hawaii 96810

Administrative Office (808) 674-8383 fax (808) 674-1040  
Paving Office (808) 845-3991 fax (808) 842-3206  
Quarry Office (808) 672-3545 fax (808) 672-3998



March 30, 2009

Representative Jon Riki Karamatsu, Chair  
Representative Ken Ito, Vice-Chair  
House Committee on Judiciary  
State Capitol  
Honolulu, Hawaii 96813

Re: Testimony in Support of SB 764, SD2, HD1, Part I  
Leasehold; Commercial and Industrial Property  
Hearing Date: March 31, 2009, 4:00 pm, Room #325

Dear Representatives Karamatsu, Ito and Members of the Committee:

My name is Robert Creps and I am the Senior Vice President Administration for Grace Pacific Corporation. Grace Pacific holds a ground lease for 78,000 square feet in the Sand Island/Kalihi Kai area and, through our subsidiary GP Roadway Solutions, holds four ground leases totaling 140,000 square feet in Mapunapuna. The landowner for these leases is HRPT.

I would like to comment on several statements made by the spokesperson for HRPT at the EBM hearing on March 17th.

Tenants have had the benefit of a low fixed rate for the last ten years. The leases described above have actually increased 35% over the period December 1998 through December 2008. For example, the Mapunapuna leases were at \$2.95 in December of 1998, and were at \$3.95 in December of 2008.

Industrial warehouse rates on Oahu have doubled between 1998 and 2008. More precisely, the industrial rents for the Mapunapuna/Sand Island area have increased by 70% over the period December 1998 through December 2008.

If the logic holds that trends in industrial rents are an indicator of what fair rents for the underlying ground rents should be, then Grace's Mapunapuna leases, given a 70% increase in industrial rents from December 1998, should be at \$5.00 per square foot today. If Grace's Mapunapuna leases were re-opening today, the increase from \$3.95 per square foot to \$5.00 per square foot would be reasonable. This is a far cry from the \$8.00 to \$10.00 being claimed by HRPT.

...there are no findings and no evidence whatsoever that reducing the rent ... will resolve those problems (more unemployment, business closures and financial failures). HRPT implies that the lessees are trying to "reduce the rent". This has not yet been requested by the lessees. In fact, the inclusion of this concept in lessee testimony was to show how a reasonable landowner (Damon) dealt with past tough economic times. And it was this sensitivity to Hawaii's economy back in 1993 that did help in minimizing financial failures.

I urge you to pass SB 764, SD2, HD1, Part I. Thank you.

March 31, 2009

**TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY  
March 31, 2009, at 4:00 p.m., in Room 325**

**TESTIMONY IN SUPPORT OF SB 764, SD2, HD1, Part I  
Leasehold; Commercial and Industrial Property**

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee:

My name is Robert Dewitz and own American Electric Co. LLC. I employ about 170 people, including about 150 unionized electricians. My business has operated from the same Sand Island location since the 70's.

I strongly support Part I of SB 764, SD2, HD1. In these difficult economic times, I am working hard to maintain my business and to keep my employees working. My long-term ground lease is coming up for its 10 year renegotiation of rate which the lease specifically says should be "fair and reasonable."

Although the lease does not define "fair and reasonable," it does not seem fair or reasonable for the new landowner, HRPT, to require me to sign a confidentially agreement before they will discuss the renewal rate, which is the only thing the lease says is to be reset. I also think it unreasonable for HRPT to change the terms of the lease by demanding annual escalations, a right of first refusal, and the acceptance of the property "as-is."

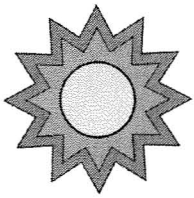
In the past, Damon Estate would come to us with a renewal amount and we would negotiate to achieve a "fair and reasonable" rent. I have relied on fair and reasonable rent for many years and find HRPT's demand for rents of \$8 to \$10 per foot plus 3.5% to 4.5% annual increases to be excessive, especially in light of today's economic realities. I do not feel that my lot is worth as much as the now vacant Jackson Auto lot, which is available for sublease at \$6.24, including the building! There are also two properties in Shafter Flats that are available for about \$5.35, but there have been no offers other than the current tenant.

HRPT is taking advantage of its monopolistic holdings and is attempting to restrict the flow of information in order to squeeze as much rent as possible from its Hawaii tenants and send that cash back to headquarters on the mainland. Small business needs your help to encourage HRPT to come to the table and negotiate in an open and transparent manner to ensure that the process yields fair and reasonable rents for both parties.

On behalf of my employees and customers, please support Part I of SB 764, SD2, HD1 and pass it through to conference.

Thank you for the opportunity to testify.

Robert Dewitz  
American Electric Co. LLC  
2308 Pahounui Drive, Honolulu 96813  
Ph. 848-0751, email bdewitz@american-electric.cc



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JUDtestimony@Capitol.hawaii.gov

House Committee on Judiciary

Tuesday March 31 2009, 4 PM, Conference Room 325

## **In SUPPORT of SB 764, SD2, HD1, PART 1, Re Real Property**

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee

My name is Lorianne Hanabusa, and I am the assistant controller at Inter-Island Solar Supply. I have over fifty co-workers and am proud that my company has been operating as a renewable energy wholesale distribution company since 1975. We have been a significant player in building Hawaii's status as the Nation's leader in solar water heating and we plan to continue contributing to the growing green collar industry in Hawaii. Although 'solar' has finally become a household word, Inter-Island Solar Supply has worked long and hard on policy supporting renewable energy and decreasing our dependence on imported polluting fossil fuels. Because of this experience we are no strangers to operating on an uneven and dynamic playing field, however I am asking for your help in preserving one of the few factors whose consistency we depend on, one which we signed up for with our prior landlord, namely "fair and reasonable" rent.

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I am asking for your support of Senate Bill 764 to address material considerations such as intensity and use of land and the value of transparent negotiations, which will enable fair and reasonable rent for both lessor and the lessee. Your support will help prevent a cycle of appraisers acting as arbitrators and keep companies like mine around the State in business.

I am a Kapolei resident and can be reached at work for further comment.

Mahalo for your consideration,

Lorianne Hanabusa

March 28, 2009

**SENT VIA FACSIMILE TO 586-8494**

Representative Jon Riki Karamatsu, Chair  
Representative Ken Ito, Vice-Chair  
House Committee on Judiciary  
State Capitol  
Honolulu, Hawaii 96813

Re: Testimony in Support of SB 764, SD2, HD1, Part I  
Leasehold: Commercial and Industrial Property  
Hearing Date: March 31, 2009, 4:00 p.m., Room # 325

Dear Representatives Karamatsu, Ito and Members of the Committee:

My name is Jason Ideta. I vote in the Kaneohe District and I am a lessee in the Mapunapuna area. My company is a small locally owned wholesale business that distributes auto parts directly to mechanics and other auto parts distributors on Oahu and the outer islands. We own an 18,000 square foot warehouse on 35,000 square foot property with a ground lease originally from the Damon Estate. We have 40 full-time and 2 part-time employees who have worked very hard to build the business over the last 23 years.

In front of the House Committee on Economic Revitalization, Business & Military Affairs, HRPT's lawyer stated to the committee that the Department of Hawaiian Homelands had a ground lease available for \$8 per square foot. That statement was more than disingenuous. It was a deliberate lie to the committee. I spoke with the person who handles DHHL commercial leases and the person who won the bid. Lease rates on those properties were determined by a bidding situation. The minimum opening bid was \$5.36 for 25 years, with no increases for the first 10 years. Only two of the current tenants showed up with just one taking the minimum. The other tenant did not bid at all.

When traditional lease contracts include a formula to calculate rents based on land value, the end result could favor the lessor or the lessee depending on the prevailing market conditions. I believe the original drafters of our leases, specifically did not include these formulas in order to hedge their positions. The Damon Estate was "fair and reasonable" with its tenants during its tenure by increasing rents during the good times and decreasing rent increases during the bad times. Even when the increases were already in the contract, they deferred then waived the scheduled increases on their own volition. This is how the contract was meant to be exercised. Currently, if the

dispute goes to arbitration, "traditional" valuation standards will be applied. The Damon Estate contracts were purposely meant to be non-traditional.

In HRPT's written testimony, they have stated that this bill interferes with the expectations of the parties and changes the agreed upon terms of the affected lease contracts. The fact is that HRPT has chosen to ignore the expectations and agreed upon terms that the lease rents be "fair and reasonable" by trying to impose rents that are 50% to 90% above market rents. HRPT states that the lease is "designed to re-align the rental rate to market, whether the result is an increase OR a decrease to the rental rate." In the latest Colliers Monroe Friedlander 3<sup>rd</sup> quarter 2008 Industrial Market Briefing, market indicators show a decrease in industrial rental rates for 2009. Yet, HRPT insists that they are being fair by asking for annual increases and rates that are clearly above market. They claim to have "worked diligently with tenants to reach creative lease solutions that reflect the current market conditions," but the unprecedented support for Citizens for Fair Valuation by small businesses proves otherwise. None of us would be here in this room today if HRPT lived up to its part of the contract.

Also in HRPT's written testimony is a statement that the proponents of this bill are large, wealthy, Mainland investors. There is nothing large, wealthy, or mainland about my company and nothing could be further from the truth about the vast majority of the businesses in Mapunapuna who could use your support.

Does this bill act as a substantial impairment of a contractual relationship? I believe it does not. This bill does not re-define the term "fair and reasonable." Most reasonable people and companies already know what it means to be fair. Unfortunately, HRPT requires legislation to ensure that it lives up to the spirit of the contract. Part I of SB 764 will set the parameters necessary to provide fair, open and reasonable negotiations for both parties.

Is it a reasonable and narrowly-drawn means of promoting a significant and legitimate public purpose? I believe it is. This bill focuses on one style of contract from one landlord. In economic times like this, there are only a few things more important to the people of Hawaii than having the legislature support the local economy. The last thing we need is to have an east coast investment company trying to cover their bad investments on the mainland by

unfairly raising rents and putting a bunch of small local companies out of business.

With the local credit markets frozen, it would be a mistake for any business to abandon their initial investment in infrastructure because they would not be able to get funding for the cost to relocate and start over. Secondly, we would still be responsible to pay HRPT the rest of the rent for the remaining 15-25 years left on our leases. HRPT would probably hold us to it because no one else will sign a lease with them for the rates they are asking. HRPT knows this and is taking advantage of the situation. Lastly, being centrally located is very important in providing timely delivery to our customers which makes moving westward unfeasible. If our rents double, we will be forced to increase prices and cut costs by decreasing our work force to stay in business. Our customers will then pass on the increased costs to their customers. The cost to maintain and repair vehicles in Hawaii will increase. Most local businesses cannot raise prices and decrease service at the same time and remain competitive.

When HRPT bought the properties at the end of 2003 from the Damon Estate, they were generating a rental income of around 7%. Today, with the stock market down 55%, the real estate investment trust market down 50-70%, and the economy in the worst shape since I can remember, HRPT expects to increase their return by more than double?

By passing this bill through your committee, you will send a message to the people of Hawaii that you care about the local economy and the plight of small business. I respectfully ask for your support on Part I of this bill and thank you for the opportunity to testify.

Sincerely,

*Jason Ideta*

Jason Ideta  
Pacific Jobbers Warehouse, Inc.

Grant Merritt  
Dba Sawdust  
151-b Pu'uhale Road  
Honolulu HI 96819

March 16, 2009

SB 764 - RELATING TO REAL PROPERTY

DATE March 31 2009  
TIME 4:00 pm  
PLACE Conference Room 325

TO: Judiciary Committee

Aloha Chair, Vice Chair, and Members of the Committee,

RE: Testimony in Support of SB 764

Dear Representatives:

My name is Grant Merritt and I own and run a small woodworking business in Kalihi Kai. This property is within the old Damon Estate now owned by HRPT.

HRPT has stated that their goal in Hawaii is to raise rents as quickly as possible to make up for losses incurred on the mainland. While I am a sub-lessee, my landlord has said that he is in negotiation now with HRPT and the ground rent may rise to double or triple what it was last year. On a straight pass through, this could translate into a fifty percent or more hike in my rent.

I employ two people and have been in business for three decades. We have just gone through one of the slowest two months we have had in perhaps a decade. If my rent goes up 50% I will have a hard time justifying staying in business. My lease option is up in November so I have a way out, but that leaves my landlord, a personal friend since the 1970's, and my employees and customers holding the bag. Hardly fair and reasonable.

One of the basic tenets of fair real estate negotiations is the ability to access information on prior transactions. HRPT requires tenants to sign a non-disclosure agreement thereby making it impossible to determine fair market value. They are evidently using their monopolistic position as the largest landowner of industrial property on the island to force greedy and destructive rents on the business community and leaving the tenants with no recourse. As a tenant, I have no way to prove or disprove these charges, but I am left with no other way of looking at these carpetbaggers as anything but just that. More



Wall Street thieves ensuring their huge bonuses at my expense and the expense of my friends and neighbors.

Hawaii will always be subject to outside power taking what it will. Always has, always will. We need to have some recourse, even if it is so weak as this. We need full disclosure. Barring that possibility, this bill seems to be our best shot for now.

SB 764 proposes parameters for “fair and reasonable,” a term unique to this lease, and does not in any way change the lease itself. I respectfully request that you pass this bill.

Sincerely,  
Grant W. Merritt  
Owner, Sawdust

**karamatsu3-Leanne**

---

**From:** Eric Reformina [ereformina@solarsupply.com]  
**Sent:** Monday, March 30, 2009 3:46 PM  
**To:** JUDtestimony  
**Subject:** Support SB764

[JUDtestimony@Capitol.hawaii.gov](mailto:JUDtestimony@Capitol.hawaii.gov)

House Committee on Judiciary

Tuesday March 31 2009, 4 PM, Conference Room 325

**In SUPPORT of SB 764, PART 1, Re Real Property**

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee

My name is Eric Reformina, and I am Assistant General Manager at Inter-Island Solar Supply. I have over fifty co-workers and am proud that my company has been operating as a renewable energy wholesale distribution company since 1975. We have been a significant player in building Hawaii's status as the Nation's leader in solar water heating and we plan to continue contributing to the growing green collar industry in Hawaii . Although 'solar' has finally become a household word, Inter-Island Solar Supply has worked long and hard on policy supporting renewable energy and decreasing our dependence on imported polluting fossil fuels. Because of this experience we are no strangers to operating on an uneven and dynamic playing field, however I am asking for your help in preserving one of the few factors whose consistency we depend on, one which we signed up for with our prior landlord, namely "fair and reasonable" rent.

We have been at our Oahu branch location, 761 Ahua Street, for nearly ten years and would like to stay. The location is ideal for business and convenient for our loyal customers, some who come by daily to stock their trucks before heading out to island-wide solar jobs. Although we have four years till rent renegotiations, our new mainland-based landlord's behavior—asking neighbors to sign dialogue preventing non-disclosure agreements and presenting overly aggressive rental amount and annual increase suggestions, have made my company's management very nervous. I was glad to hear that we had joined Citizens for Fair Valuation so that you Legislators can get a feel for the numbers of employers and employees supporting this legislation.

I am asking for your support of Senate Bill 764 to address material considerations such as intensity and use of land and the value of transparent negotiations, which will enable fair and reasonable rent for both lessor and the lessee. Your support will help prevent a cycle of appraisers acting as arbitrators and keep companies like mine around the State in business.

I am a Honolulu resident and can be reached at work for further comment.

Mahalo for your consideration,

Eric Reformina

## karamatsu3-Leanne

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**From:** brad whitten [iibrad@lava.net]  
**Sent:** Monday, March 30, 2009 3:46 PM  
**To:** JUDtestimony  
**Subject:** support SB764

House Committee on Judiciary

Tuesday March 31 2009, 4 PM, Conference Room 325

### **In SUPPORT of SB 764, PART 1, Re Real Property**

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee

My name is Brad Whitten, and I am General Manager at Inter-Island Solar Supply. I have over fifty co-workers and am proud that my company has been operating as a renewable energy wholesale distribution company since 1975. We have been a significant player in building Hawaii's status as the Nation's leader in solar water heating and we plan to continue contributing to the growing green collar industry in Hawaii. Although 'solar' has finally become a household word, Inter-Island Solar Supply has worked long and hard on policy supporting renewable energy and decreasing our dependence on imported polluting fossil fuels. Because of this experience we are no strangers to operating on an uneven and dynamic playing field, however I am asking for your help in preserving one of the few factors whose consistency we depend on, one which we signed up for with our prior landlord, namely "fair and reasonable" rent.

We have been at our Oahu branch location, 761 Ahua Street, for nearly ten years and would like to stay. The location is ideal for business and convenient for our loyal customers, some who come by daily to stock their trucks before heading out to island-wide solar jobs. Although we have four years till rent renegotiations, our new mainland-based landlord's behavior—asking neighbors to sign dialogue preventing non-disclosure agreements and presenting overly aggressive rental amount and annual increase suggestions, have made my company's management very nervous. I was glad to hear that we had joined Citizens for Fair Valuation so that you Legislators can get a feel for the numbers of employers and employees supporting this legislation.

I am asking for your support of Senate Bill 764 to address material considerations such as intensity and use of land and the value of transparent negotiations, which will enable fair and reasonable rent for both lessor and the lessee. Your support will help prevent a cycle of appraisers acting as arbitrators and keep companies like mine around the State in business.

I am a Kaneohe resident and can be reached at work for further comment.

Mahalo for your consideration,

Brad Whitten

March 30, 2009

**TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY  
March 31, 2009, 4:00 P.M., Room 325  
HAWAII STATE CAPITOL**

**TESTIMONY IN SUPPORT OF SB 764, SD2, HD1, Part I  
Leasehold; Commercial and Industrial Property**

Dear Representatives Karamatsu and Ito and Members of the Committee:

I support SB 764, SD2, HD 1, Part I and urge you to act on this important bill to help local businesses survive this recession. My name is Brian Joy and I live in Honolulu. I am co-owner of Big Rock Manufacturing, Inc. which is located in the Mapunapuna area and I employ roughly twelve people.

Many of my neighbors have family members who have lost their jobs, had their hours reduced, or have businesses which are barely surviving. Our business has seen a drop off in revenues last year, and we are trying to cut expenses before we have to cut benefits and lay off workers.

Rent is one of the largest expenses we face. Up to now, the rents charged by the Damon Estate were "fair and reasonable," which is what the lease specifically calls for. The new owners, mainland based HRPT, is demanding rents that are double or triple of the current amount plus, they want 4% per year escalations, at a time when the economy is in the worst recession since The Great Depression. In addition, HRPT demands that tenants sign a confidentiality agreement before they will even start to negotiate. Such confidentiality agreements serve to eliminate the very "free market" principals that represent the foundation of America's economic vitality.

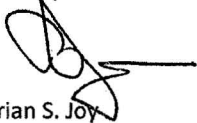
HRPT, by prohibiting lessees from talking to each other about the current rents in the neighborhood, denies tenants the ability to negotiate a fair market rent. Access to transaction data is the single most stabilizing force in real estate. Companies such as CoStar and hundreds of others thrive on the mainland, by providing unfettered access to rent and other transaction data to any who subscribes, e.g. appraisers, real estate brokers, investors, landlords, property managers, and tenants.

Open access to current market data levels the playing field and insures pricing that is based upon the free flow of information and not upon monopoly-like dominion over a given market. The Damon Estate made fair and reasonable rent escalations a central element of their business philosophy for more than 30 years. HRPT has made it clear that they intend to use their monopoly-like holdings to restrain the free trade of negotiation to their exclusive benefit, irrespective of the harm it does to many of Honolulu's small business owners.

Passage of this bill will require the mainland landowner to negotiate terms based on what is happening here in Hawaii, rather than trying to make up for losses on the mainland. We want rents that are fair and reasonable for both sides and reflect true market rents, not speculative land sales.

I want to stay in business and I want to keep my workers employed. However, I can't do that if the landlord makes demands that are not fair and not reasonable when times are so tough. I urge you to please pass SB 764, SD2, HD1, Part I.

Thank you.



Brian S. Joy  
Big Rock Manufacturing, Inc.  
1050 Kikowaena Place  
Honolulu, HI 96819  
Tel: 808 834-7625  
Email: bjoy@bigrockhawaii.com

March 30, 2009

TESTIMONY TO THE HOUSE COMMITTEE ON JUDICIARY  
March 31, 2009, at 4:00 p.m.  
ROOM 325  
HAWAII STATE CAPITOL

TESTIMONY IN SUPPORT OF SB 764, SD2, HD1, Part I  
Leasehold; Commercial and Industrial Property

Aloha Chair Karamatsu, Vice Chair Ito, and Members of the Committee:

My name is Bonnie Cooper and I am Co-Owner of Big Rock Manufacturing, Inc. I employ approximately twelve people and have been in the Mapunapuna area for nine years.

I strongly support Part I of SB 764, SD2, HD1 and respectfully ask the Committee to pass this bill on.

My business leases land from HRPT, the mainland based real estate investment trust that purchased all of the Damon Estate land back in 2003. HRPT is now the largest owner of commercial and industrial land in Hawaii and is using it monopolistic position to the detriment of its lessees. Through intimidation, lack of local decision making, insertion of new terms to the lease and the requirement to sign a confidentiality agreement before negotiation can begin; HRPT is conducting itself in a manner that is not consistent with the precedents set by Damon over these past many years.

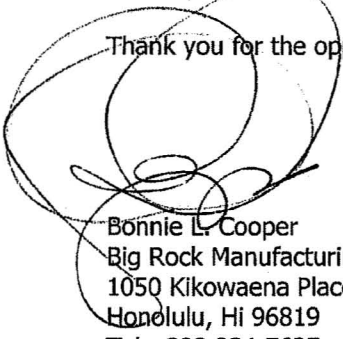
My lease specifically calls for rents that are "fair and reasonable." It does not define these terms nor does it include any type of calculation upon which to base the rent for the upcoming rental period. To make the proposed increase even more outrageous, the land we lease is not only contaminated with gasoline, but also in the area which in 2003 completely flooded warehouse, showroom and offices with two feet of mud and water. This resulted in a personal loss of several hundred thousand dollars at the time, and will likely recur. The soil remediation will continue for years, causes us lost time and money.

HRPT, to-date, has been unwilling to participate in open and transparent negotiations with those tenants whose leases are expiring. Instead HRPT is intent to raise rental rates to the point where I will be forced to significantly raise prices and reduce all other costs, including employee benefits, payroll, advertising and the like. This will further hurt my business, my customers and ultimately the State of Hawaii through lower revenues and increased social costs. We can not support the State if we are no longer in business!

Part I of SB 764, SD2, HD1 will level the playing field and provide parameters upon which both the lessor and lessee should negotiate. Part I of SB 764, SD2, HD1 will help the people of Hawaii to remain competitive and stay in business.

Please pass Part I of SB 764, SD2, HD1.

Thank you for the opportunity to testify.



Bonnie L. Cooper  
Big Rock Manufacturing, Inc.  
1050 Kikowaena Place  
Honolulu, HI 96819  
Tel: 808 834-7625  
Email: bcooper@bigrockhawaii.com

## karamatsu3-Leanne

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, March 30, 2009 5:58 PM  
**To:** JUDtestimony  
**Cc:** oz@pauspam.net  
**Subject:** Testimony for SB764 on 3/31/2009 4:00:00 PM

Testimony for JUD 3/31/2009 4:00:00 PM SB764

Conference room: 309  
Testifier position: support  
Testifier will be present: No  
Submitted by: Oswald K. Stender  
Organization: Individual  
Address: 660 Mapunapuna St. Honolulu, Hawaii  
Phone: (808)3484894  
E-mail: [oz@pauspam.net](mailto:oz@pauspam.net)  
Submitted on: 3/30/2009

### Comments:

My name is Oswald K. Stender and I am a real estate consultant and broker. I am in support of SB764, SD 2, HD1. Part 1. While I support the bill for all the reasons stated in the Citizens for Fair Valuation's testimony, my primary concern is that in these difficult times for our Hawaii businesses, I sincerely believe that the current owners of the former Damon lands in Mapunapuna, are being irresponsible in their dealings with the businesses in Mapunapuna. For too many times I have seen where investors from "out of town", having no real ties to Hawaii, or for concerns of our local businesses, continue to take undue advantage with their "take it or leave it" attitude in their dealings in Hawaii. All our local businesses are asking for in this bill is a fair and transparent treatment in these lease rent renegotiations. Having worked for a number of very large landowners in Hawaii and representing the landowner, I have found that our "local" landowners have concerns for the continued success of the businesses on their land and are willing to recognize the importance of survival for our small businesses. The Damon Estate has demonstrated this on many occasions as have other landowners. During these difficult times our small businesses need your help in seeing that they survive during these difficult times. Mahalo and aloha. Oz

Representative Jon Riki Karamatsu, Chair  
Representative Ken Ito, Vice-Chair  
House Committee on Judiciary  
State Capitol  
Honolulu, Hawaii 96813

Re: Testimony in Support of SB 764, SD2, HD1, Part I  
Leasehold; Commercial and Industrial Property  
Hearing Date: March 31, 2009, 4:00 pm, Room #325

Dear Representatives Karamatsu, Ito and Members of the Committee:

I support SB 764, SD2, HD1, Part I and urge you to act on this important bill to help local businesses survive this recession. My name is William Paik and I live in Kaimuki. I am the President of GP Roadway Solutions, which is located in the Mapunapuna area, and I employ roughly 200 people.

Many of my neighbors have family members who have lost their jobs, had their hours reduced, or have businesses which are barely surviving. Our business experienced much lower revenues last year, and we are trying to reduce all expenses before we have to cut benefits and lay off workers.

Rent is one of the largest expenses we face. Up to now, the rents charged by the Damon Estate were "fair and reasonable," which is what the language in the lease specifically calls for. The new owner, mainland based HRPT, is demanding rents that are double or triple of the current amount plus, they want 4% per year escalations. In addition, they are demanding that I sign a confidentially agreement before they will even start to negotiate. Without access to information, how am I to determine if an offer is truly "fair and reasonable"?

Passage of this bill will require the landowner to negotiate terms based on what is happening here in Hawaii, rather than trying to make up for losses on the mainland. We want rents that are fair and reasonable for both sides and reflect true market rents, not speculative land sales.

I want to stay in business and I want to keep my workers employed. However, I will not be able to weather this economic storm if the landowner does not abide by the terms of the lease and, through open and transparent negotiation, provide a rental renewal rate that is "fair and reasonable" to both parties.

I urge you to please pass SB 764, SD2, HD1, Part I. Thank you.

William Paik  
GP Roadway Solutions  
660 Mapunapuna St  
Honolulu, Hawaii 96819  
Phone: 479-4426  
Email: [williamapaik@aol.com](mailto:williamapaik@aol.com)