

March 2, 2011

LATE TESTIMONY

The Hon. Gilbert S.C. Keith-Agaran, Chair
and Members of the
House Committee on Judiciary
State Capitol, Room 302
Honolulu, Hawaii 96813

Re: Testimony in Opposition to H.B. 845, Relating to Ground Leases

Dear Chair Keith-Agaran and Members of the Committee:

As a law firm, we have represented numerous landowners over the years with regard to both the Land Reform Act as well as rent control and mandatory conversion measures passed by the City and County of Honolulu. We want to make the committee aware of one aspect of this bill that relates to its inclusion of residential property.

As presently drafted, this bill would require lessors of commercial, industrial and residential land perpetually to renew their leases with their lessees at a rent favorable to the lessee. If they do not do so, they are compelled by this bill to then sell the land to the lessee.

As will no doubt be covered by other testifiers, the bill violates the Contracts Clause and is also an uncompensated taking of property and contract rights from the lessor. Although the bill has constitutional infirmities as to all types of leaseholds being included, in this testimony we would like to focus on the unconstitutional inclusion of residential leaseholds.

Apart from the Land Reform Act (which applied only to certain single-family residential leaseholds), the Legislature has consistently refused to extend mandatory conversion and rent control legislation to other types of residential leasehold property. This was for good reason. In 1987, a study was prepared for the Legislature entitled Leasehold Conversion of Condominium and Cooperative Housing Phase I (Nov. 1987). Among other things, that report concluded that there was no public purpose to justify extending mandatory conversion or rent control to multi-family residential properties.

In disregard of this and other similar studies, mandatory conversion and rent control legislation for residential multi-family leaseholds was later enacted by the City and County of Honolulu. The rent control measures were twice declared unconstitutional by the federal courts. And although the "facial" constitutionality of the mandatory conversion legislation was initially upheld by the federal courts, the State trial courts repeatedly struck down application of the law to specific multi-family projects because of lack of public purpose.

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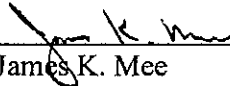
The Hon. Gilbert S.C. Keith-Agaran, Chair
and Members of the
House Committee on Judiciary
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The result was that the City was held liable for millions of dollars in damages to affected landowners. Because of the steadily increasing monetary liability of the City as well as substantially growing and vocal public opposition, the mandatory conversion law was eventually repealed by the City Council.

This measure possesses all of the same constitutional infirmities as the prior City bills, plus many more. Passage of this legislation will result in substantial liability of the State for confiscation and transfer of property and contract rights.

This is a very bad piece of legislation and we would urge that it be deferred and held in committee. Thank you for the opportunity to testify on this measure.

Very truly yours,
ASHFORD & WRISTON LLP

By  _____
James K. Mee

JKM:pnh



Hawaii Reserves, Inc.
A LAND MANAGEMENT COMPANY

LATE TESTIMONY

March 2, 2011

Via E-Mail: JUDTestimony@Capitol.hawaii.gov

House Committee on Judiciary
Rep. Gilbert S.C. Keith-Agaran, Chair
Rep. Karl Rhoads, Vice Chair

Re: H.B.845, H.D. 1 (Re: Ground Leases)
Testimony In Opposition
Hearing: Wednesday, March 2, 2011, 2:05 p.m., Conf. Rm. 325

Honorable Chair Keith-Agaran, Vice Chair Rhoads and Committee Members:

Aloha, and thank you for the opportunity to testify in strong opposition to House Bill 845, House Draft 1 on behalf of Hawaii Reserves, Inc., a land management company located in Laie, Oahu. We manage and own approximately 7,000 acres currently in agricultural, residential and commercial uses.

While this bill may be well-intentioned, it could threaten worthy projects that would provide much needed affordable housing. It is also unconstitutional, violating both the spirit and letter of the contracts clause of the U.S. Constitution.

First, this bill will threaten worthy projects that would provide much needed affordable housing. Our company and community have been exploring ways to facilitate an affordable housing project in a "sustainable affordable development". Such sustainable affordable development projects require that 30% of the units must be affordable to persons in the county's median income range, and the sales price of at least 51% of the residential lots must be no higher than 80% of the fair market value of the lots in fee (HRS 516-1). One of the keys to achieving these challenging targets in Hawaii's real estate market is the use of a unique, long-term ground lease.

These unique leases facilitate a landowner's willingness to receive a return on the value of its land over an extended period of time, as opposed to taking out full market value in a one-time fee sale. The long-term ground lease is the key element of the program. Unlike the traditional ground lease in Hawaii that is subject to escalating rent step-ups and periodic renegotiations, lease rent is capitalized and paid once upfront, at the time of purchase. The lease enables the landowner to control, among other things, appreciation of the property and alienation (the purchaser's right to sell or give the property to whomever it wishes) to ensure affordability for subsequent buyers.

Testimony in Opposition to H.B. 845, H.D. 1

March 2, 2011

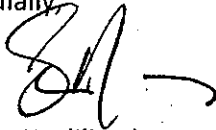
Page 2 of 2

If this bill passes, it would undermine the key element in these “sustainable affordable developments” – the long-term ground lease – and thus severely threaten the creation of much needed affordable housing in our community.

Second, this bill is unconstitutional, violating both the spirit and letter of the contracts clause of the U.S. Constitution. If passed, it would deprive private lessors of important rights and opportunities under existing leases, thwart performance of essential and substantial lease terms, nullify the contractual expectations and relationships of parties to existing leases, and alter substantial financial terms of leases. It would also divest private lessors of their constitutionally recognized right to own property. If it becomes law, the language of this bill will likely generate unnecessary litigation and ultimately be found unconstitutional.

For these reasons and others we respectfully request that you hold H.B. 845, H.D. 1. In the alternative, we ask that you exempt “sustainable affordable developments” that employ long-term ground leases.

Cordially,



Steve Keali'iwahamana Hoag, Esq.
Vice President
Communications & Administration

TESTIMONY IN SUPPORT OF HB845, HD1: RELATING TO GROUND LEASES

LATE TESTIMONY

DATE: 3/1/2011

TO: Representative Gilbert Keith-Agaran, Chair, Representative Karl Rhodes, Vice Chair, and Members, House Judiciary Committee

FROM: JANICE M. DEIF

ADDRESS: 425 Ena Road, #205A, Honolulu, HI 96815

CONTACT: 808 358 3449

HEARING: March 2, 2011 at 2:05 P.M. In Room 325

Thank you for the opportunity to testify on this very important bill that can make a crucial difference in my life.

I am an Owner-Occupant of a residential leasehold condominium (or cooperative housing unit), at 425 Ena Road, Honolulu, HI 96815. I have owned and lived in my unit for three years.

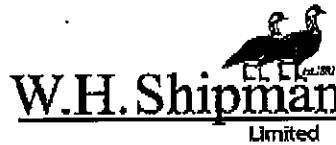
Residential land leases are an enormous issue for Hawaii with about 18,000 units of residential leasehold units throughout the State. We face the loss of our units and our equity. There is a public purpose to promote affordable housing and allowing people to remain in their homes. What will Hawaii do as hundreds and then thousands of us begin to lose our homes? Where is there other affordable housing that we can move to?

When my Land Lease expires, I will lose all of my equity in my unit and I may not be able to afford the "market rent" that the lessor (who will become my landlord) will assess at fair market value. Since this has been my home for three years, I would like to live out my life in the unit and in the neighborhood where I now reside. I do not want to move to some other area and rent a home since currently I own my own unit, but not the fee interest.

I respectfully urge you to support HB845.

Sincerely yours,

Janice M. Deif



LATE TESTIMONY

To: REP Keith-Agaran	From: Bill Walter, W. H. Shipman, Limited
Fax No: 808-586-6211	No. of Pages: 3
Date: March 2, 2011	Importance: HIGH
Subject: <u>HB 845, HD1</u>	

Representative Keith-Agaran:

Please understand our very strong opposition to this legislation that materially changes contracts already in place and will have a dramatic and negative affect on future contracts and business dealings. Some of our concerns are:

1. **AGRICULTURAL LEASES** – This part of the legislation would require that a landowner either extend a lease for 30 years or sell the land to the farmer if the farmer wishes the land.
 - a. Most of our agriculture leases are far less than 30 years in the first place, few of them even as many as ten years. Why? Simple – the crops being supported (i.e. papayas, bananas, etc.) generally have cycles that are not as long as even ten years and the farmer often wishes to move on to another crop and another parcel at that point. Given the opportunity to extend the lease in order to control the land or to purchase the land some may very well take the opportunity – but the result of that is likely to be that funds that would otherwise go into crops goes into property, reducing both income and production. A further result is to keep land in particular crops longer than is warranted from a productivity or commercial sense. The farmer, knowing his/her crop, is reticent to move the land on to better agricultural uses. This is much less likely to happen when the land is owned by a separate entity.
 - b. It is vital to understand the economics of these leases. Typical leases range in price from \$15/acre/year + real property taxes (i.e. ranching) to \$400/acre/year + real property taxes (i.e. vegetables, foliage). The sales value of the property generally ranges from \$15,000 and up. With such pricing, purchase makes no sense. The discrepancy in apparent market values can be attributed to:
 - i. Land speculation (and one has to wonder in how many of these cases the land would, after being purchased by the farmer, simply be “flipped” to a speculator).
 - ii. Using part of the land to build a farmhouse. This adds a residential component to the land. Note that when we start down this road on increasing numbers of acres we are practically removing a portion of the land from the inventory that supports actual cropping. Further we are putting residential into areas where the infrastructure often does not support residential requirements.

Confidential

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3/2/11



- c. There needs to be an understanding of how today's agriculture in Hawaii differs from plantation days. The differences are stark. They include:
- i. There are many smaller farmers operating as small businesspeople. This has added vitality and productivity to farm operations. In Shipman's case where we once had 1 operator (Puna Sugar) we now have about 100 operators. Where there were once about 400 men and women involved in the operation there are now (by our best estimate) more than 900 involved. Product coming off of those fields is, accordingly, of higher value with more families supported contributing significantly more to sustainability for families and the State.
 - ii. When we had large industrial farms those farms had associations, engineers and researchers whose jobs it was to improve productivity, improve crops and the like. Our smaller farms do not have resources on the same scale. While this reality keeps overhead low – it also makes us more vulnerable to crop failures and to competition from foreign sources. We are now more open to farm theft, vandalism and illegal hunting than when large farms had 24 hour operations or otherwise guarded against such threats. In today's economy landowners often pick up much of this burden as an added service to those who farm their lands. These services are lost if the large land owners also "go away." The underlying assumption in this legislation is that the landowner really adds little or nothing to the equation. This is a false assumption.
 - iii. It is easy to respond to these issues by simply stating that "the farmer need not choose to purchase the land." However this legislation puts a strong incentive out there for the farmer to take his/her once in a lifetime option to purchase the land, whether it makes economic or social sense to do so. And whether or not this may bankrupt the farmer.
 - iv. One result, not intended – and there will be many unintended results – may be that the large land owners decide to simply cease all farm leasing and try farming themselves. This would allow them (us) to retain the land for income and avoid the potential loss of our asset. It would also reduce the vitality and opportunity for upward mobility of those small farmers who put all they have into their farms.
 - v. If there is a strong desire to see what happens when such legislation is in place the State should be completely intellectually honest in the understanding that this is an experiment. In this case the State should first experiment on its own agricultural lands. Put this to a test by applying this concept first there for a period of ten years – and see what the effect is so we can all see it. Do not experiment on the private sector!
2. **COMMERCIAL LEASES** – Many of the problems noted above for agricultural leases would be similar in commercial leases. Rather than bore you with each I will summarize



- a. There is a place in the market for a landowner, a building owner and a retailer/distributor, etc. The market rather efficiently assigns values to each of sector. An important advantage of separation to two or three levels is that the final level (i.e. retailer) generally has a lower cost structure which encourages start up operation while allowing the operator at this level to focus singularly on developing and advancing his/her business.
- b. Existing leases are based on relationships established within those leases. Values are based on the financial assumptions of those relationships. A third party (in this case the State) inserting itself out of sync with what has been established completely changes the economic relationships and understandings that were there. If the State were to insist on taking the action, as a matter of equity and fairness, the State should allow an existing property to:
 - i. Be appraised at the time the law becomes effective for the particular piece of property (i.e. when a forced sale or forced lease extension). If the appraised value is diminished the State, as the now third party to the transaction, should be required to compensate the landowner for the difference - in cash at the time of the transaction. This is only fair.
 - ii. Should allow the transfer to occur without any transaction or income or capital gains tax.
- c. Again, this is experimental in nature. The State should first apply this standard to the many commercial leases it has as a lessor. The Hilo Industrial park along Kanoelehua comes immediately to mind. Lets first apply this standard there and see over a period of time what the result is.

Thank you for considering my testimony.

Bill Walter
President

Testimony for JUD 3/2/2011 2:05:00 PM HB845

Conference room: 325
Testifier position: oppose
Testifier will be present: Yes
Submitted by: Sam Gilbert
Organization: Individual
Address:
Phone:
E-mail: lazysranch@hawaiiantel.net
Submitted on: 3/2/2011

LATE TESTIMONY

Comments:

As a small landowner lessor and commercial lessee I am opposed
H.B.845 H.D.1

As lessors my family and I have been adhering to our contractual obligations for over 50 years. It is unethical and unconstitutional for the government to alter legal binding contracts and confiscate land for the purpose of transferring wealth from one party to another.

Rather than "encourage by requiring" perhaps the State can encourage by subsidizing low income housing, regulating maintenance fees and providing tax incentives, or even lead the way by selling its leased land. There is a parcel across the street from me that I would really like to own.

Please do not allow this bill to proceed.

Sincerely,
Sam S. Gilbert, III

Committee on Judiciary
Rep. Gilbert S.C. Keith-Agaran, Chairman
Rep. Karl Rhoads, Vice Chairman
Twenty-Sixth State Legislatures
Regular Session of 2011
March 2, 2011, 2:05 pm
Conference Room 325
415 S. Beretania St.
State Capitol of Hawaii

LATE TESTIMONY

Sir:

I am writing to ask you to oppose HB. No.845, HD 1 (HSCR 497)

“A BILL FOR AN ACT RELATEING TO GROUND LESASE,”

A bill that will soon be coming to a vote in the state house.

I'm Gay McGuire and I represent 55 members of my family; and we are small land owners. We are also, member of Small Land Owners Associates and The Small Land Owners of Oahu.


My great grandmother, had the foresight, and saw a need, that the land her father in law had purchase would be an ongoing gift to her descendants, knowing that many would never be able to own their own land.

We don't appreciate you trying to enforce the regulating control of long term ground leases and controlling rent, to the point of forcing us to sale of our land.

Please see fit to stop the stealing of our land.

Thank you for your support.

Sincerely,


Gay McGuire

P.O. Box 140 Waimanalo, Hawaii 96795 808-295-9683