

Carole Hagihara

From: David Arakawa [darakawa@lurf.org]
Sent: Tuesday, February 08, 2011 6:34 AM
To: Mailing List; ERBtestimony
Cc: 'Shannon Alivado'; 'Wynde Yamamoto'
Subject: LATE TESTIMONY - Testimony for HB846 on 2/8/2011 8:00:00 AM
Attachments: 100319 Gov's Veto of SB 71 GM368.pdf; 100224 Appraisal Institute Testimony at CPC.pdf

Aloha ERB Committee Clerk,

The website could not attach these two documents which are part of LURF's testimony in opposition to HB 846
Please attach these two documents to our testimony.

Feel free to contact me at 783-9407 (mobile) or at the office 783-9407.

Mahalo, Dave

-----Original Message-----

From: mailinglist@capitol.hawaii.gov [mailto:mailinglist@capitol.hawaii.gov]

Sent: Tuesday, February 08, 2011 6:19 AM

To: ERBtestimony@capitol.hawaii.gov

Cc: darakawa@lurf.org

Subject: Testimony for HB846 on 2/8/2011 8:00:00 AM

Testimony for ERB 2/8/2011 8:00:00 AM HB846

Conference room: 312

Testifier position: oppose

Testifier will be present: No

Submitted by: David Arakawa

Organization: Land Use Research Foundation of Hawaii

Address: 1100 Alakea St., 4th Floor Honolulu, Hawaii 96813

Phone: 808-521-4717

E-mail: darakawa@lurf.org

Submitted on: 2/8/2011

Comments:



GOV. MSG. NO. 368

EXECUTIVE CHAMBERS
HONOLULU

LINDA LINGLE
GOVERNOR

March 19, 2010

The Honorable Colleen Hanabusa, President
and Members of the Senate
Twenty-Fifth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

Dear Madam President and Members of the Senate:

I am transmitting herewith SB771 SD1 HD1, without my approval, and with the statement of objections relating to the measure.

SB771 SD1 HD1

A BILL FOR AN ACT
RELATING TO APPRAISALS.

Sincerely,


LINDA LINGLE

EXECUTIVE CHAMBERS

HONOLULU

March 19, 2010

STATEMENT OF OBJECTIONS TO SENATE BILL NO. 771

Honorable Members
Twenty-Fifth Legislature
State of Hawaii

Pursuant to Section 16 of Article III of the Constitution of the State of Hawaii, I am returning herewith, without my approval, Senate Bill No. 771, entitled "A Bill for an Act Relating to Appraisals."

The purpose of this bill is to require real estate appraisers to comply with the Uniform Standards of Professional Appraisal Practice when they are acting as arbitrators. The bill also requires that the record of an award in an arbitration proceeding conducted by an appraiser include specific findings of fact, evidence, and the appraiser's reasoning for the award.

This bill is objectionable because appraisers who serve as arbitrators are not engaging in the practice of real estate appraisal. The fact that arbitration is being conducted for the purpose of determining the value of real estate does not cure this objection. Arbitration is an alternative dispute resolution process used to reach a compromise solution, and not an appraisal. In an arbitration proceeding, the parties submit their cases to an impartial person or panel for what is intended to be a final, binding decision.

During an arbitration proceeding to determine the value of real estate, both sides typically hire their own appraisers as expert witnesses. These expert witnesses are required by state statute to follow the Uniform Standards of Professional Appraisal Practice ("USPAP") if they perform an appraisal. Arbitrators therefore have an opportunity to evaluate competing and USPAP conforming appraisals and make an accordingly informed decision.

STATEMENT OF OBJECTIONS
SENATE BILL NO. 771
Page 2

Forcing arbitrators to use USPAP would require them to follow a standard that is not applicable to their proceedings, increasing costs and lengthening the process of arbitration. It would be more appropriate to require these panels to follow the Uniform Arbitration Act, as set forth in Chapter 658A of the Hawaii Revised Statutes, and amend the chapter to specify the award explanation.

While requiring arbitrators to comply with USPAP is not an appropriate mechanism for improving transparency, there is some merit in the second element of this legislation, which would require that the record of an award in an arbitration proceeding conducted by an appraiser include specific findings of fact, evidence, and the appraiser's reasoning for the award. Parties to arbitrations that determine the value of real estate might indeed benefit from a more detailed rationale for an arbitration award. Accordingly, legislation along these lines may be worth pursuing in the future, with the input of all stakeholders. However, while improving the transparency of these types of arbitration proceedings deserves attention, this bill, as written, is not the appropriate mechanism for achieving that goal.

For the foregoing reasons, I am returning Senate Bill No. 771 without my approval.

Respectfully,



LINDA LINGIE
Governor of Hawaii

VETO

THE SENATE
TWENTY-FIFTH LEGISLATURE, 2009
STATE OF HAWAII

S.B. NO. 771
S.D. 1
H.D. 1

A BILL FOR AN ACT

RELATING TO APPRAISALS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The purpose of this Act is to require a real
2 estate appraiser to rely on the Uniform Standards of
3 Professional Appraisal Practice when acting as an appraiser or
4 an arbitrator in an arbitration proceeding.

5 SECTION 2. Section 466K-4, Hawaii Revised Statutes, is
6 amended by amending subsection (a) to read as follows:

7 "(a) No person may practice as a real estate appraiser in
8 this State unless that person has been licensed or certified to
9 practice in accordance with this chapter and rules adopted by
10 the director of commerce and consumer affairs pursuant to
11 chapter 91. All real estate appraisers who are licensed or
12 certified to practice in this State shall comply with the
13 current uniform standards of professional appraisal practice
14 approved by the director when performing appraisals in
15 connection with a federally or non-federally related real estate
16 transaction. A real estate appraiser shall comply with the
17 uniform standards of professional appraisal practice when acting
18 as an appraiser or as an arbitrator in an arbitration proceeding



1 to determine the fair market value or fair market rental of real
2 estate."

3 SECTION 3. Section 658A-19, Hawaii Revised Statutes, is
4 amended to read as follows:

5 "~~[-]~~ §658A-19 ~~[+]~~ Award. (a) An arbitrator shall make a
6 record of an award. The record shall be signed or otherwise
7 authenticated by any arbitrator who concurs with the award. The
8 arbitrator or the arbitration organization shall give notice of
9 the award, including a copy of the award, to each party to the
10 arbitration proceeding.

11 (b) In an arbitration proceeding to determine the fair
12 market value or fair market rental of real property where the
13 arbitrator is a real estate appraiser licensed under chapter
14 466K, the record of an award shall include but not be limited to
15 findings of fact, the appraiser's rationale for the award, and
16 information regarding the evidence which provided the basis for
17 the award.

18 ~~[-(b)-]~~ (c) An award shall be made within the time
19 specified by the agreement to arbitrate or, if not specified
20 therein, within the time ordered by the court. The court may
21 extend or the parties to the arbitration proceeding may agree in
22 a record to extend the time. The court or the parties may do so



1 within or after the time specified or ordered. A party waives
2 any objection that an award was not timely made unless the party
3 gives notice of the objection to the arbitrator before receiving
4 notice of the award."

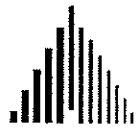
5 SECTION 4. Section 658A-23, Hawaii Revised Statutes, is
6 amended by amending subsection (c) to read as follows:

7 "(c) If the court vacates an award on a ground other than
8 that set forth in subsection (a) (5), it may order a rehearing.
9 If the award is vacated on a ground stated in subsection (a) (1)
10 or (2), the rehearing shall be before a new arbitrator. If the
11 award is vacated on a ground stated in subsection (a) (3), (4),
12 or (6), the rehearing may be before the arbitrator who made the
13 award or the arbitrator's successor. The arbitrator shall
14 render the decision in the rehearing within the same time as
15 that provided in section [~~658A-19(b)~~] 658A-19(c) for an award."

16 SECTION 5. Statutory material to be repealed is bracketed
17 and stricken. New statutory material is underscored.

18 SECTION 6. This Act shall take effect upon its approval.





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Hawaii Chapter

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February 24, 2009

Senator Rosalyn H. Baker, Chair
Senator David Y. Ige, Vice-Chair
Commerce and Consumer Protection Committee
Ted Yamamura, Vice President
The Hawaii Chapter of the Appraisal Institute
(808) 270-0604
Thursday, February 26, 2009

Testimony against SB 771, Relating to Appraisals

The Hawaii Chapter of the Appraisal Institute is part of an international organization of professional real estate appraisers with nearly 24,000 members and 91 chapters throughout the world. Its mission is to advance professionalism and ethics, global standards, methodologies, and practices through the professional development of property economics worldwide.

We speak against SB 771, Relating to Appraisals, which would require a real estate appraiser to comply with the Uniform Standards of Professional Appraisal Practice when acting as an appraiser or arbitrator in an arbitration to determine the value or rental of real estate.

“Arbitration” is not the same as “appraisal”. “Appraisal” is the process of estimating value. For real estate appraisals, USPAP provides generally accepted appraisal standards for 1) the process of analyzing information and arriving at a value conclusion and 2) reporting the appraisal process and value conclusion.

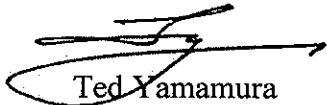
“Arbitration” is the last resort in dispute resolution. In arbitration the parties submit their cases to an impartial, disinterested person or panel for a final and binding decision.

An arbitrator does not serve the same function as an appraiser. Appraisers may act as arbitrators. However, when they are acting as arbitrators, they are undertaking an arbitration process and not an appraisal practice

In *Wong v. Chalmers*, the federal district court concluded that the real estate appraisers, when acting as arbitrators, are not engaging in an appraisal function. As a result, the court rejected a claim that an arbitration award should be vacated because the arbitrators failed to comply with USPAP. The court stated:

As an initial matter, the court rejects KUA'S argument that Defendants disregarded the law by not following professional standards for appraisers. The court finds that these guidelines do not govern the arbitration proceeding because here Hallstrom, Hulten and Vernon were acting as arbitrators, not as appraisers. The fact that the arbitrators were required to be licensed appraisers is immaterial here¹.

We urge the Committee to deny the passage of SB 771. Thank you for this opportunity to testify.



Ted Yamamura
Vice President

¹ *Wong v. John F. Chalmers 1990 Revocable Trust*, Civil No. 94-811 DAE (D. Haw., Jan 24, 1996).

January 7, 2011

State of Hawaii
House of Representatives
Committee on Economic Revitalization & Business
Honolulu, HI

RE: HB 846 Hearing Date: February 8, 2011

Dear Honorable Chair McKelvey, vice Chair Choy, and Members of the House
Committee on Economic, Revitalization, and Business,

The core reason that our nation's financial markets are currently in such a mess, is a direct result of the lack of accountability and transparency in the real estate valuation process (appraisals). If valuations were conducted properly, the other parties to the real estate transactions would have been far less likely to be able to abuse the system, to the extent that many did.

Please pass HB 846.

This bill will bring much needed transparency and accountability to Hawaii's real estate valuation process, whether the valuation is taking place via the marketplace or via an arbitration.

A similar bill was introduced in 2009 (SB 771), and during a Hawaii senate committee, the Senate committee posed the question to one of the parties testifying against this bill, and asked if there are already safeguards in the system that address the accountability and transparency issues that bill seeks to correct.

The party that testified, stated that there are such safeguards and he went on to specify that HRS 658 (the Hawaii arbitration statute) accomplished the safeguards.

Please note that during that year's legislative session, testimony against that bill was provided by the Hawaii chapter of the Appraisal Institute. In their testimony they reference the Hawaii case of Wong v. Chalmers. That case actually specifies that the arbitrator in a real estate matter is not bound by the USPAP standards, or for that matter, any other accountability or transparency standards.

Whereas it appears from the testimony that the Hawaii chapter of the Appraisal Institute and the others that oppose HB 846, are in agreement that an arbitrator in a real estate value or rental dispute is not (and should not be) required to follow any standard, and further is not (and should not be) subject to any accountability or transparency in their decision making, the difference is:

That these testifiers are doing everything they can to keep this "black box" decision making process intact; ---- this is in contrast to the supporters of HB 846, who are trying

hard to replace the “black box” arbitration awards when involving real estate matters, with a level of transparency and accountability that will allow the term “fair” to stay in the concept of “fair market value” or “fair market rental”.

The cost to Hawaii is too great to allow this “black box” decision making to continue in the real estate sector; especially when one considers Hawaii’s disproportionately large percentage of long term leases that much of Hawaii’s businesses and employment base relies on.

Every dollar that a business is required to spend on overpriced real estate or an excessively high rental rate, takes away dollars that can otherwise be spent for growing and expanding businesses and employment.

This bill will bring accountability and transparency to an arbitrator’s decision for real estate valuation/rental matters. Without passing this bill, that accountability and transparency does not exist.

The USPAP standards were established via Congress after the Savings & Loan industry fiasco of the 1980’s, in an effort to require appraisers to value real estate on a fair and equitable basis, and have the valuation supported by appropriate documentation. Unfortunately, during the past several years, these USPAP rules were not enforced.

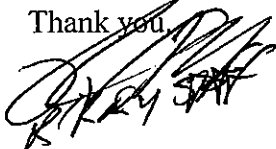
Again, when considering that an arbitrator’s award is so difficult (nearly impossible) to change, the need for this bill becomes even more apparent. And in the case of real estate, the results usually affect long-term matters.

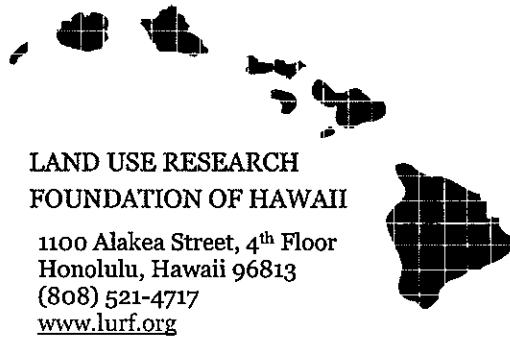
Additionally, the notion that requiring USPAP rules & standards, would add unwarranted costs to a valuation process, is completely unfounded. If a bank even attempted to pass-off real estate appraisal valuations, that do not meet the USPAP standards, that bank would find itself in quite troubling waters with its banking regulator. If the requirement to use USPAP is economically feasible when valuing a home with a value of a Few Hundred Thousand dollars, then certainly, the economic feasibility of requiring USPAP in valuation matters (whether sales or rentals) that involve Millions and/or Multi-Millions of dollar property values, is also cost effective. The cost of abuse without USPAP, by and far outweigh any notion of additional cost (if any) of requiring USPAP.

The passing of this bill will cost the state nothing, but without this bill, there are many businesses that may be forced to shut their doors as a result of “black box” arbitrations in real estate matters. And since so many Hawaii businesses have arbitration clauses in their leases, Hawaii businesses have been and continues to be, especially vulnerable.

Whereas many disputes lend themselves well to arbitration and the typical one-line response in the arbitration award, the matter of real estate valuations or rentals does not.

Thank you,

A handwritten signature in black ink, appearing to be "GARY STAFF", written over the "Thank you," text.



LATE TESTIMONY

LAND USE RESEARCH
FOUNDATION OF HAWAII

1100 Alakea Street, 4th Floor
Honolulu, Hawaii 96813
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February 8, 2011

Representative Angus L.K. McKelvey, Chair
and Representative Isaac W. Choi, Vice Chair
House Committee on Economic Revitalization & Business

Testimony of the Land Use Research Foundation of Hawaii

OPPOSITION to HB 846 Relating to Appraisals
(Mandates use of the Uniform Standards of Professional Appraisal Practice when acting as an arbitrator in arbitration proceedings.)

Tuesday, February 8, 2011 at 1:15 p.m. in CR 225

My name is Dave Arakawa, and I am the Executive Director of the Land Use Research Foundation of Hawaii (LURF), a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. One of LURF's missions is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural and cultural resources and public health and safety.

HB 846. This bill will mandate the use of the Uniform Standard of Professional Appraisal Practice (USPAP) when acting as an arbitrator in an arbitration proceeding, particularly arbitration proceedings involving disputes in determining the fair market value in a lease renewal.

LURF opposes HB 846 based on the following:

- **In 2010, Governor Lingle vetoed a bill with an identical provision which attempted to mandate USPAP for arbitrators.** In 2010, Governor Lind Lingle vetoed SB 771 (2010), which included provisions which are identical to HB 846. In her Governor's Veto Message No. 368, Governor Lingle stated the following:

"This bill is objectionable because appraisers who serve as arbitrators are not engaging in the practice of real estate appraisal. The fact that arbitration is being conducted for the purpose of determining the value of real estate does not cure this objection. Arbitration is an alternative dispute resolution process used to reach a compromise solution, and not an appraisal. In an arbitration proceeding, the parties submit their cases to an impartial person or panel for what is intended to be a final, binding decision.

Forcing arbitrators to use USPAP would require them to follow a standard that is not applicable to their proceedings, increasing costs and lengthening the process of arbitration. ”

(Emphasis added)

- **Hawaii Supreme Court case law has held: “When acting as arbitrators, appraisers are not engaging in an appraisal function.”** We also urge you to consider the attached February 24, 2010 testimony of the Hawaii Chapter of the Appraisal Institute, who testified in opposition to SB 771 (2010) and cited federal case Wong v. Chalmers, where the federal district court concluded that the real estate appraisers, when acting as arbitrators, are not engaging in an appraisal function. As a result the court rejected a claim that an arbitration award should be vacated because the arbitrators failed to comply with the USPAP.
- **Concerned Real Estate Appraisers of America warn that imposing USPAP requirements on arbitrators will limit the independent judgment and discretion of arbitrators.** There is grave concern regarding this measure because it will result in a lack of discretion by the appraisers. Conclusively, this could lead to compromised decisions lacking objectivity in solving arbitration disputes. The Concerned Real Estate Appraisers of America, which represent organizations that serve and support real estate appraisers, indicated that mandating that arbitrators use USPAP causes concerns with “independent judgment according to uniform high professional standards and ethics.”

Additional Objections to HB 846. We have the following additional objections to the current form of HB 846:

- **Requiring USPAP for arbitration panels is inconsistent with the application of USPAP across the United States nation;**
- **Requiring USPAP on the arbitration panels is inconsistent with standard arbitration panel practices across the United States;**
- **The arbitration process is supposed to be final and binding – however, HB 846 would lead to appeals and litigation to vacate arbitration awards.** It appears that HB 846 is intended to provide a means for dissatisfied parties to bring legal challenges against the lease arbitrations. Such an intent is contrary to the intent of arbitration provisions in leases, which usually provide for a final and binding dispute resolution alternative.
- **The arbitration process currently allows for fair representation and equity.** While there will always be complaints by parties who disagree with the arbitrator, the arbitration process is participatory and transparent decision making process. Each party selects their own arbitrator (paid by the party) to sit on the arbitrator panel. The selected arbitrators then agree and select a third arbitrator. This allows representation for all parties throughout the process and equity between parties.
- **The role of and practices of and arbitrator (impartial judge) is very different from an appraiser advocating by use of USPAP.** The roles and practices

applicable to arbitrators sitting on arbitration panels which make rulings require that arbitrators be impartial and neutral, acting in a quasi-judicial capacity. Unlike appraisers who prepare reports for private clients using USPAP, who reach a land value as advocates of their individual clients and must “defend” their valuation, thus eliminating any impartiality as the its appraisal conclusions;

- **There is no evidence of how the use of USPAP by arbitrators will impact or change lease renegotiation arbitrations.** While HB 846 seeks to impose a new standard on arbitrators in appraisal arbitrations to determine fair market value or fair market rental of real estate (Representative Scott Saiki’s March 10, 2010 letter);
- **It is unclear how this measure will impact the State’s leases of public lands** (Representative Scott Saiki’s March 10, 2010 letter);
- In 2010, a similar bill, SB 771, SD1, HD1 was vetoed by Governor Lingle, and the House of Representatives failed to override the veto.

For these reasons, **we respectfully request that you hold HB 846.**

Thank you for this opportunity to share our opposition to HB 846.



HOUSE OF REPRESENTATIVES

STATE OF HAWAII
STATE CAPITOL
HONOLULU, HAWAII 96813

March 10, 2010

VIA HAND DELIVERY

The Honorable Linda Lingle
Governor
Executive Chambers
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: Senate Bill 771 SD1 HD1 Relating to Appraisals

Dear Governor Lingle:

On March 5, 2010, Senate Bill 771 SD1 HD1 Relating to Appraisals was enrolled to you for your review.

I respectfully request that you veto this measure. The Department of Commerce and Consumer Affairs ("DCCA") and applicable trade associations opposed this measure as it advanced in the Legislature. I have enclosed copies of their recent testimony for your consideration.

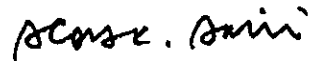
Please note that seventeen members of the House of Representatives voted against S.B. 771 SD1 HD1 on Third Reading (March 2, 2010). Their objections primarily reflected those expressed by DCCA and the trade associations. As you are aware, the House requires a two-thirds vote of its membership to override a veto.

My concerns are three-fold. First, there is little understanding of how application of the Uniform Standards of Professional Appraisal Practice will impact lease renegotiation arbitrations. Second, it is unclear as to what extent this measure will impact the State's leases of public lands. Third, this measure will cloud the validity of arbitration awards. It appears that this measure is designed to provide a basis for dissatisfied parties to vacate arbitration awards pursuant to H.R.S. § 658A-23 (permitting the Circuit Court to vacate an arbitration award where *e.g.*, [a]n arbitrator exceeded the arbitrator's powers"). As such, the number of appeals to the Circuit Court will undoubtedly increase and the certainty normally afforded to the arbitration process will be diminished.

The Honorable Linda Lingle
March 10, 2010
Page 2

Thank you for your consideration of my comments. Please do not hesitate to contact me if you have any questions or additional concerns.

Sincerely,



SCOTT K. SAIKI
State Representative
District 22

Enclosures

Representative Scott K. Saiki, District 22
McCully – Moiliili – Kaheka – Kanewai
Hawaii State Capitol, Room 418 / Honolulu, Hawaii 96813
Phone: (808) 586-8485 / Fax: (808) 586-8489 / E-mail: repsaiki@capitol.hawaii.gov