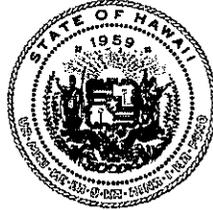


NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



## LATE TESTIMONY

WILLIAM J. AILA, JR.  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI  
FIRST DEPUTY

WILLIAM M. TAM  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

**Testimony of  
WILLIAM J. AILA, JR.  
Chairperson**

**Before the House Committee on  
ECONOMIC REVITALIZATION AND BUSINESS**

**Tuesday, February 14, 2012  
8:30AM  
State Capitol, Conference Room 312**

**In consideration of  
HOUSE BILL 1829  
RELATING TO LEASES**

House Bill 1829 proposes to: (1) Require lessors of commercial and industrial property to afford lessees the option of renewing their leases; and (2) Require, in leasehold renegotiations, that a rent based on fair market value shall apply even if that value is lower than existing rent and the lease contract bars the lowering of rent upon renegotiation. The Department of Land and Natural Resources (Department) opposes this bill.

The bill as drafted appears to apply to leases of public lands. The definition of "[l]essors", "lessees", "fee owners", and "legal and equitable owners" for the new Hawaii Revised Statutes chapter includes the "State of Hawaii and any county or other political subdivision of the State". By contrast, the substantive provision in SECTION 2 of the chapter only mentions "leases of private lands". If the intent of the bill is to regulate private land leases by mandating renewal options and prohibiting provisions that bar the lowering of rent at renegotiation, then the State and public lands should be expressly excluded from the new chapter's application.

Chapter 171, Hawaii Revised Statutes ("HRS"), imposes a maximum lease term of 65 years for leases of public lands. This limit is intended to allow a lessee sufficient time to occupy the property and recoup its investment, while also precluding that lessee from using and occupying public lands in perpetuity. Upon expiration of a lease, the Department may offer a new lease with a term of up to 65 years. Chapter 171, HRS, provides for leases to be offered by public auction to allow any interested member of the public the opportunity to use public lands.<sup>1</sup>

<sup>1</sup> Some people wait all their lives for an opportunity to obtain a State lease. Allowing existing lessees the option to renew their leases for an additional 65 years and lockup the land for a total of 130 years will assure some other interested folks will never have an opportunity to even bid on a State lease.

This bill, while providing a benefit to existing lessees, does so at the expense of ensuring fair competition for the leasing of public lands by effectively excluding other potential bidders seeking to participate in the public disposition process. The Department acknowledges the need for long-term leases in order for certain business ventures to be economically viable. However, options to renew have a chilling effect on other prospective bidders' willingness to bid on the property. Many prospective bidders would be reluctant to invest the substantial time, effort and resources to prepare and submit a bid with the knowledge that the existing lessee can exercise his or her right and nullify the bid at any time. Options to renew provide an unfair benefit to the current lessee by depriving persons awaiting the published termination of the lease a fair opportunity to compete for the use of those lands at public auction. That inherent inequity ensures lower bids and consequently less revenue to the State.

An option to renew clearly goes against all the provisions for fairness in the leasing of state land in Chapter 171, HRS, and inappropriately impinges on the Board of Land and Natural Resources' (Board) discretionary authority to control the use of state lands. When seeking public lands for private use, potential lessees are well aware of the benefits and drawbacks of leasing state lands as opposed to conducting their activities on private lands. First and foremost is the knowledge that those lands are public assets that must serve primarily the interests of the general public and the public trust purposes, and secondarily the needs of a private user.

The safeguards and terms for leasing public lands are codified in Chapter 171, HRS, to ensure transparency and fairness in the disposition of state assets. Paramount in that process is the need to ensure and maintain the State's ability to use its land resources when and as needed to meet all of the State's obligations and priorities as well as the greater public needs of all of Hawaii's residents. Fundamental to that responsibility is the preservation and protection of the discretionary authority of the Board to consider and determine the most appropriate use of state land at any given time, including when and if an ongoing use should continue. The Board's ability to fulfill its fiduciary obligations to promote all five public trust purposes equally should never be compromised by any erosion of this authority.

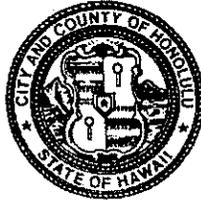
Additionally, requiring a fair market value rent to apply in leasehold renegotiations even if that value is lower than existing rent and the lease bars the lowering of rent upon renegotiation would jeopardize a lessor's ability to plan by subjecting future revenue streams to uncertainty. Chapter 171, HRS, with very limited exceptions, requires that public lands can only be rented at no less than fair market value. However, since nearly all State lands are public trust lands, the State has a fiduciary duty to seek the highest possible lease rent for its beneficiaries whenever possible. The proposed requirement to use a lower fair market rent at renegotiation would undermine the State's fiduciary obligations to its public trust beneficiaries.

For all of the foregoing reasons, the Department respectfully requests this bill be deferred.

DEPARTMENT OF FACILITY MAINTENANCE  
**CITY AND COUNTY OF HONOLULU LATE TESTIMONY**

1000 Ulu'ohia Street, Suite 215, Kapolei, Hawaii 96707  
Phone: (808) 768-3343 • Fax: (808) 768-3381  
Website: www.honolulu.gov

PETER B. CARLISLE  
MAYOR



WESTLEY K.C. CHUN, Ph.D., P.E., BCEE  
DIRECTOR & CHIEF ENGINEER

KENNETH A. SHIMIZU  
DEPUTY DIRECTOR

February 13, 2012

The Honorable Angus L.K. McKelvey, Chair  
and Committee Members  
Committee on Economic Revitalization and Business  
House of Representative  
State of Hawaii  
State Capitol, Room 427  
Honolulu, Hawaii 96813

Dear Chair McKelvey and Committee Members:

Subject: H.B. 1829, Relating to Leases

Chair McKelvey and Members of the House Committee on Economic Revitalizations & Business,  
Westley K. C. Chun, PhD., P.E., BCEE submits the following comments **in opposition** to H.B.  
1829 :

I am the Director and Chief Engineer of the Department of Facility Maintenance for the City & County of Honolulu, and am submitting this testimony on behalf of the Department of Facility Maintenance and the City & County of Honolulu.

The above bill proposes to change the terms of existing long-term commercial and industrial leases. Among other things the bill would:

(1) Require lessors of commercial and industrial property to afford lessees the option of renewing their leases, and set certain parameters on the terms of the renewal; and

(2) Require, in leasehold renegotiations, that a rent based on fair market value shall apply even if the value is lower than the existing rent and the contract bars the lowering of rent upon renegotiation.

The Honorable Angus L.K. McKelvey, Chair  
and Committee Members  
February 13, 2012  
Page 2

The City opposes the bill in part because it fails to set forth a significant and legitimate public purpose, supported by findings, and fails to elaborate how the changes it proposes would further such purpose.

The City is also concerned that the bill could have harmful unintended consequences generally for the future use of commercial and industrial ground leases in Hawaii, including: discouraging redevelopment of leaseholds in need of rehabilitation where the current lessee does not have the financial wherewithal to redevelop; cutting off opportunities for small businesses that cannot afford fee purchases; and encouraging land speculators to acquire leaseholds with resale in mind.

A more particular concern prompting the City's opposition is how the bill might adversely impact City operations. The City leases property for a range of uses, including commercial and office uses and affordable housing projects, and owns other such properties that it might lease out in the future. This measure would effectively give holders of commercial and industrial leases the right to demand the renewal of their leases without the usual competitive bidding process designed to maximize the City's return on its land assets. Further, the measure would allow for unlimited lease extensions, essentially giving current lessees the right to lease and occupy public land in perpetuity. Under the bill the City could not reoccupy its own property and subsequently lease it out for other public purposes. The bill thus could severely curtail the City's ability to manage its land assets most appropriately and in the best interests of all of its people.

As applied to existing commercial and industrial ground leases, this bill faces serious questions as to its constitutionality under the Contracts Clause of the U.S. Constitution, which says: "No State shall. . . pass any. . . Law impairing the Obligation of Contracts." Existing lessors will no doubt challenge an enacted bill on Contracts Clause grounds, alleging that it takes away important rights and opportunities, thwarts performance of essential and substantial lease terms, nullifies contractual expectations of the parties, and alters substantial financial terms. In the recent past, both the local federal District Court in HRPT Properties Trust v. Lingle, 715 F. Supp.2d 1115 (D. Hawaii 2010) and the Hawaii Supreme Court in Anthony v. Kualoa Ranch, Inc., 69 Hawaii 112 (1987) have upheld similar Contract Clause challenges by lessors to laws mandating material changes in existing leases.

As many Committee Members may be aware, the City is currently exploring ways of preserving affordable housing in this community, including the prospect of entering into long-term ground leases with non-profits relating to twelve City-owned affordable housing projects. Two of those projects include leases of commercial space. This bill could therefore adversely impact that effort. We are concerned that while the inevitable legal challenges to an enacted bill wended their ways through the courts, the cloud of uncertainty created over the rights of lessors and lessees will hamper the City's efforts to structure and finance leases for non-profits that are aimed at preserving City housing projects as affordable.

For these reasons I respectfully request that you hold S.B. 2546

Thank you for this opportunity to testify before you.

Sincerely,



Westley K.C. Chun, Ph.D., P.E., BCEE  
Director and Chief Engineer



**HB1829**

**RELATING TO LEASES**

House Committee on Economic Revitalization & Business

February 14, 2012

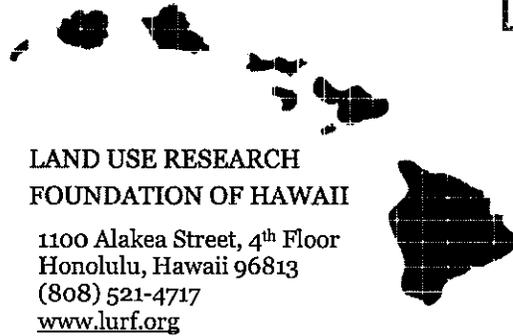
8:30 a.m.

Room 312

The Office of Hawaiian Affairs (OHA) **OPPOSES** HB 1829, which...

For these reasons, OHA urges the committee to HOLD HB 1829.

Mahalo for the opportunity to testify on this important measure.



LAND USE RESEARCH  
FOUNDATION OF HAWAII

1100 Alakea Street, 4<sup>th</sup> Floor  
Honolulu, Hawaii 96813  
(808) 521-4717  
[www.lurf.org](http://www.lurf.org)

February 13, 2012

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

**Strong Opposition to HB 1829 Relating to Leases. (Requires lessors of commercial and industrial property to afford lessees the option of renewing their leases.)**

**Tuesday, February 14, 2012, 8:30 a.m., in Conference Room 312**

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.

LURF **strongly opposes** **HB 1829**, which requires lessors of commercial and industrial property to afford lessees the option of renewing their leases. The bill also requires in leasehold negotiations, that a rent based on fair market value shall apply even if that value is lower than the existing rent and the contract between the parties bars the lowering of rent upon renegotiation.

**HB 1829.** The bill is based on the unfounded belief that underlying inequities exist in the relationship between owners of commercial and industrial land in Hawaii (lessors) and the holders of leasehold interests in such land (lessees).<sup>1</sup> The bill unreasonably mandates the renewal of leases of commercial, business, manufacturing, mercantile, or industrial or other nonresidential property, if for a term of five years or more, upon terms that are favorable only to lessees and unjustly detrimental to lessors, including an extended lease term of not less than

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<sup>1</sup> HB 1829 is vague and somewhat confusing with respect to its application to commercial and industrial land owned by the State of Hawaii. LURF understands, however, that the State is one of the largest owners of commercial and industrial leasehold parcels which are targeted by this bill, and must therefore assume, for purposes of this testimony, that this proposed measure (which is based on the justification expressly provided in its Section 1), applies to all lessors, including the State. To assume otherwise would render this bill even more unjust and susceptible to legal challenge based on the constitutional concerns discussed *infra*, as well as discrimination against private lessors.

thirty-five years, with fixed rent and a limited rate of return. The bill also imposes punitive consequences upon the lessor should the parties fail to agree on the terms of a lease renewal, specifically, the forced sale of the leased property by lessor to lessee, or if lessee should decide not to purchase the fee simple title, the assessment to the lessor, of a one hundred per cent windfall surcharge tax based upon the then tax-assessed valuation of the leasehold improvements made by the lessee.

HB 1829 violates the Contract Clause of the U.S. Constitution by mandating material changes in the existing lease contracts between the parties, to the sole benefit of lessees. Such changes are unconstitutional and illegal as they will **result in substantial and severe impairment** of leasehold contracts by depriving lessors of important rights and opportunities afforded under existing leases, and destroying the contractual expectations and relationships of the parties to those lease contracts, **without significant and legitimate public purpose**.

The bill is just yet another unconstitutional attempt to change the terms of existing leases, similar in intent to Act 189 (2009), which was found to be unconstitutional by the U.S. District Court, District of Hawaii, in 2010.

**LURF's Position.** LURF strongly opposes HB 1829 based on the following:

➤ **HB 1829 violates Article I, Section 10, Clause 1 (the Contract Clause) of the United States Constitution ("U.S. Constitution").**

HB 1829 is unconstitutional because it alters major terms and provisions in existing lease contracts and would substantially impair the contractual relationships underlying such leases. The proposed bill would change the terms and provisions of existing leases, which have already been negotiated and agreed to by the parties, and is an attempt to have the Legislature change contractual remedies and obligations, to the sole detriment of lessors and to the sole benefit of lessees.

- **The State of Hawaii Department of the Attorney General has opined that legislation such as HB 1829, which would change existing contract rights, violates the Contract Clause, and is therefore illegal.**

Prior legal opinions issued by the State of Hawaii Department of the Attorney General (AG) have repeatedly cautioned that analogous legislation, which would alter the terms and conditions of existing lease agreements, would violate the Contract Clause of the U.S. Constitution.

As recently articulated by the AG in an opinion censuring similar legislation (HB 845, H.D. 2, Relating to Ground Leases) which was attempted to be passed in the 2011 legislative session, "Although [the bill] no longer requires a lessor who does not extend its lease to sell its fee interest, it still makes significant changes to the existing terms of the lease contract by forcing the lessor to rent to the lessee...The essence of the Contract Clause is that "No State shall...pass any...Law impairing the Obligation of Contracts." (citing the U.S. Const. Art. I § 10, cl.1).

LURF likewise believes that if challenged in court, the provisions of HB 1829 would fail to meet the test of constitutionality under the Contract Clause, to an even greater degree in this case, as 1) the bill operates as a substantial impairment of a contractual relationship (adjusting the financial terms [such as rent] of the lease contract has already been found to constitute a substantial impairment [see *HRPT, infra*, at 1137], however, the subject bill's forced sale of title to the property if the terms of the renewal are not agreed upon, would constitute not only substantial impairment, but complete transformation of the contractual relationship from a lease to a sale agreement); 2) the proposed state law is not designed to promote a significant and legitimate public purpose (must be a broad societal interest, rather than a narrow class such as lessees of commercial and industrial property); and 3) the proposed state law is not a reasonable and narrowly-drawn means of promoting the significant and legitimate public purpose.

- **HB 1829 contradicts the ruling of U.S. District Judge Susan Oki Mollway in *HRPT Properties Trust, et al., v. Linda Lingle, in her capacity as Governor of the State of Hawaii*, Civil No. 09-0375 (U.S. District Court, D. Hawaii), in which Plaintiff lessor successfully challenged the constitutionality of Act 189 (2009).**

In 2009, the Hawaii State Legislature passed Act 189, which was targeted to apply to only one lessor. The Act mandated material changes in existing long-term commercial or industrial ground leases solely to the benefit of lessees, and such changes resulted in substantial and severe impairment of leasehold contract terms.

The targeted lessor challenged the constitutionality of Act 189 in a lawsuit brought in federal court entitled *HRPT Properties Trust, et al., v. Linda Lingle, in her capacity as Governor of the State of Hawaii*, Civil No. 09-0375 (U.S. District Court, D. Hawaii). On May 31, 2010, U.S. District Judge Susan Oki Mollway issued her decision in the *HRPT* case, finding that Act 189 was unconstitutional, as it violated the Contract Clause of the U.S. Constitution.

Similar in intent to Act 189, HB 1829 applies to lessors who have entered into long-term commercial and industrial ground leases, and by attempting to change major terms and provisions in existing leases, would result in substantial and severe impairment of those lease contracts, for the following reasons:

- **The bill would change major lease terms, thereby depriving private lessors of significant rights and causing severe impairment of existing lease agreements.** HB 1829 would strip lessors of significant rights afforded to them pursuant to lease terms and conditions which are inherent or freely negotiated in lease agreements, including:
  - the right to determine and uphold the nature of the contractual relationship which has been freely and openly agreed to by, and continues to validly exist between the parties – in this case, a lease, and NOT a sale agreement;

- the right to freely determine the rent and financial obligations of the parties (which adjustment of financial terms of the lease contract was expressly found by the court in the *HRPT* case to constitute a substantial impairment [*See HRPT at 1137*]);
  - the right to freely determine the length of the lease (by requiring renewal of leases upon expiration for a minimum of 35 additional years, HB 1829 is, in effect, **mandating a PERPETUAL lease term**);
  - the right to freely make decisions relating to use and development of the property within a time period freely determined by lessor (by requiring renewal of the lease term upon expiration for a minimum of 35 years, the bill in effect precludes lessors from free use of their property);
  - the right to terminate or extend the lease based on terms specified by lease provisions, or if there are no such provisions, the right to terminate or extend the lease based on freely negotiated terms;
  - the right to freely change the lease terms upon extension (which may be required, particularly for long-term leases due to changes in economic and market conditions over time, unforeseen and/or uncontrollable circumstances, etc.);
  - the right to execute specific lease provisions relating to the timing of lease termination or extension, or if there are no such provisions, the right to freely determine the timing of negotiations to terminate or extend the lease;
  - the right to seek arbitration under specific lease provisions, or if there are no such provisions, the right to freely seek other dispute resolution alternatives; and
  - any and all other rights which may in any way relate to, or be affected by the termination or extension of the lease or the timing thereof; and
  - the right to freely sell or transfer the interest in the land upon termination of the lease to whomever the lessor may choose, based upon freely and openly negotiated terms and conditions.
- **The bill destroys the contractual expectations and relationships of the parties to existing leases.** HB 1829 changes the parties' bargain by requiring lessor who had fairly negotiated a lease with a definite end date to now unreasonably extend the lease term, or even worse, to sell the fee simple title to the property regardless of any plans lessor may have with respect to the property. As such, the bill completely transforms the nature of the agreement between the parties (potentially from a lease agreement to a sales contract), and imposes new requirements onto the contractual relationship which had not originally, and do not currently exist in the lease, and which were never "bargained for" by the lessor and lessee.
- **The bill alters substantial financial terms of the existing leases.** The bill precludes or affects the unrestricted establishment (or re-establishment) of financial terms and obligations such as rent which is a critical term in any lease. Adjustments in financial terms constitute substantial impairments of contractual obligations thereby intensifying the unconstitutional character of the bill. *See HRPT at 1137.*

As shown above, similar to the *HRPT* case, the impairment of lessors' rights under HB 1829 is **substantial** as it deprives lessors of important rights; defeats the expectations of the parties; alters financial terms; and destroys contractual expectations, and therefore **violates the Contract Clause of the U.S. Constitution**.

- **HB 1829 is yet another unconstitutional attempt in a long line of unsuccessful past attempts to introduce Hawaii legislation which unconstitutionally alters the terms and provisions of existing leases to the detriment of lessors, and to the benefit of a narrow class of lessees.**

Over the past years, recurring attempts have been made to legislatively alter the terms and conditions of existing leases to the benefit of lessees and to the detriment of lessors. These efforts, including all of the following, were unsuccessful; however, similar legislation continues to be introduced despite, and with complete disregard to warnings by the AG that the measures proposed are constitutionally unsound and susceptible to legal challenge, thereby potentially exposing the State to significant liability and expense:

- In 2011, HB 844 and 845, both conceptually similar, if not identical, to the subject bill, versions of which imposed unreasonable conditions on leases, including mandatory term renewals and the forced sale of property to lessees, was introduced, then deferred and carried over to the current session.
- In 2009, SB 770, which proposed alterations of existing lease contracts to favor the lessee, was introduced, however, the members of the Senate Committee on Commerce and Consumer Protection unanimously voted to hold the bill in Committee. By operation of the legislative rules, SB 770 was carried over to the 2010 Regular Session, however, was never set for hearing in 2010.

Prior to 2009 and 2010, a number of other attempts to introduce similar legislation were also made **unsuccessfully, having been declared unconstitutional**:

- In 2008, HB 1075 proposed alterations of existing lease contracts to favor the lessee, however, the Senate Economic Development and Tourism Committee (EDT) held the bill. EDT placed the contents of HB 1075 into HB 2040, SD2, however this bill was held in Conference Committee.
- In 2007, SB 1252 and SB 1619 proposed alterations of existing lease contract to favor the lessee;
- In 2006, SB 2043 would have imposed a surcharge tax on the value of improvements to real property subject to reversion in a lease of commercial or industrial property;
- In 2000, SB 873 SD 1, HD 2 also attempted to alter existing lease contract terms to the detriment of lessors and to the benefit of lessees by proposing to alter existing lease terms to require a lessor to purchase a lessee's improvements at the expiration of the lease term. The Department of Attorney General opined that SB 873, SD 1, HD 2 violated the Contract Clause of the U.S. Constitution. Governor Cayetano, relying on the Attorney General's opinion, vetoed SB 873, SD 1, HD 1.
- In 2001, in response to HB 1131, HD 1, yet another bill which proposed to alter existing lease contracts to favor lessees, the Attorney General again reaffirmed its opinion that the proposed bill violated the Contract Clause of the U.S. Constitution.

- In 1987, the Hawaii Supreme Court in *Anthony v. Kualoa Ranch*, 69 Haw. 112, 736 P.2d 55 (1987), ruled that a statute requiring a lessor to purchase a lessee's improvements at the expiration of the lease term violated the Contract Clause. The Court in the *Anthony* case observed that:

“This statute, as applied to leases already in effect, purely and simply, is an attempt by the legislature to change contractual remedies and obligations, to the detriment of all lessors and to the benefit of all lessees, without relation to the purposes of the leasehold conversion act; without the limitations as to leaseholds subject thereto contained in the conversion provisions; not in the exercise of the eminent domain power; but simply for the purpose of doing equity, as the legislature saw it. If there is any meaning at all to the contract clause, it prohibits the application of HRS §516-70 to leases existing at the time of the 1975 amendment. Accordingly, that section, as applied to leases existing at the time of the adoption of the 1975 amendment, is declared unconstitutional.”

- **HB 1829 does not serve any legitimate public purpose and is simply bad public policy.**

The bill undermines the integrity of contracts and agreements entered into openly and willingly between private parties. Moreover, it allows the State to unfairly alter the terms and conditions of agreements to favor one party to a contract over the other, thereby creating uncertainty as to the ability of any individual or business organization to legally enforce contractual terms and agreements.

**CONCLUSION.** For the reasons set forth above, LURF believes that HB 1829 is unconstitutional, potentially illegal, and profoundly anti-business, and should therefore **be held in this Committee.**

Thank you for the opportunity to provide testimony **strongly opposing** this bill.



## LATE TESTIMONY

LOYALTY DEVELOPMENT  
COMPANY, LTD.  
SUITE 600  
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February 13, 2012

Representative Angus L.K. McKelvey, Chair; Representative Isaac W. Choy, Vice Chair  
and Members of the House Committee on Economic Revitalization & Business

**RE: OPPOSITION TO H.B. 1829 RELATING TO LEASES**

**HEARING: TUESDAY, FEBRUARY 14, 2012 @ 8:30 AM in CR 312**

Dear Chair McKelvey, Vice Chair Choy, and Committee Members:

Loyalty Development Company, Ltd. hereby submits its written testimony in opposition to H.B. 1829 Relating to Leases. This is the companion bill to S.B. 2456, which the Senate Committee on Commerce and Consumer Protection deferred action on last week Thursday, after the Department of the Attorney General testified that the bill was likely unconstitutional, as a violation of both the Contract Clause and the Fifth Amendment of the United States Constitution.

Among other things, H.B. 1829 would rewrite existing commercial and industrial leases (including those on State-owned land) by requiring lessors to offer lessees the option to renew their leases for not less than thirty-five years, with rent during the renewal period capped at a rate of return of not more than five per cent, and with the land value based upon the tax-assessed valuation from 1985, adjusted by the increase in the consumer price index. Further, if the lessor and lessee are unable to agree on the terms of a lease renewal, then the bill would give the lessee the option to purchase fee simple title to the property based upon the aforesaid land value. And where an existing lease of private lands (i.e., not restricted to commercial or industrial leases) provides for renegotiated rent based upon the fair market value of the land, or the value of the land as determined by its highest and best use, or similar words, then "[a]ny disputes over value shall be settled by the procedure selected by the lessee and not by arbitration under chapter 658A." The bill would also require, in lease renegotiations, that a rent based on fair market value shall apply even if the value is lower than the existing rent and the lease prohibits the lowering of the rent upon renegotiation.

As stakeholders, we believe the bill unfairly mandates one-sided changes to existing lease contracts to favor lessees only, without any significant and legitimate public purpose. Commercial and industrial ground leases are lengthy and complex contracts covering many subjects over a long period of time. They were freely negotiated by both lessors and lessees, at arm's length. Over the life of a lease, some provisions may tend to favor the lessor, while at other times the lessee may be favored. For the legislature to intervene now to make substantial and material changes in the provisions of existing lease contracts to favor one business party over another -- for example, by giving lessees the right to renew their leases for 35 years with the rent capped or alternatively to purchase fee simple title to the property, and by providing that disputes over land value are to be settled by any procedure selected by the lessee and not by arbitration as set forth in the lease -- is an unfair and arbitrary infringement of existing contracts.

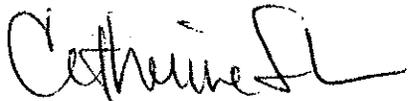
We share the concern of the legal authorities and of other small and large landowners and lessors that H.B. 1829 raises serious constitutional issues. As the written testimony of the Department of the Attorney General pointed out last week with respect to the companion bill in the Senate, S.B. 2456 Relating to Leases, "it is likely unconstitutional" because it will infringe on both the Contract Clause, Article I, Section 10 of the United States Constitution, which says: "No State shall . . . pass any . . . Law impairing the obligation of Contracts," and on the Fifth Amendment to the United States Constitution, which provides that private property can be taken only for a public purpose upon paying just compensation.

The Department of the Attorney General also pointed out that the federal courts and the Hawaii Supreme Court have struck down Hawaii laws that made material changes in existing leases to the detriment of one party and the advantage of the other, citing the decisions in *HRPT Properties Trust v. Lingle*, 715 F. Supp.2d 1115 (D. Hawaii 2010) and *Anthony v. Kualoa Ranch, Inc.*, 69 Hawaii Reports 112 (1987).

We thank you for this opportunity to express our views on this important issue, and we respectfully urge you to hold this bill.

Very truly yours,

LOYALTY DEVELOPMENT COMPANY, LTD.



Catherine Luke  
Its Vice President

LATE TESTIMONY

February 10, 2012

VIA FACSIMILE 586-8479

Honorable Representative Angus L. K. McKelvey, Chair  
Honorable Representative Isaac W. Choy, Vice Chair  
House Members of Committee on Economic Revitalization & Business

RE: TESTIMONY IN SUPPORT OF HOUSE BILL HB1829 - RELATING TO  
LEASES - HEARING SCHEDULED FOR TUESDAY, 02/14/2012,  
AT 8:30 AM, STATE CAPITOL, CONFERENCE ROOM 312

Dear Honorable Chair Angus McKelvey, Vice Chair Isaac Choy, and Members  
of the House Committee on Economic Revitalization & Business:

PETITION:

We support passage of House Bill HB1829 which would require Lessors of  
commercial and industrial properties to afford Lessees the option of  
renewing their leases at expiration and require in renegotiations that a rent  
based on fair market value shall apply even if the value is lower than the  
existing rent and the contract bars the lowering of rent upon renegotiation.

Hawaii has a very high disproportionate amount of business properties on  
leasehold lands with hundreds of leases beginning to expire in the very new  
future. If lessors are unwilling to extend leases at reasonable rents, this  
could result in closure of many businesses since there is a scarcity of  
available and suitable properties available for such businesses to relocate to.  
There would be more leases expiring as compared to the number of  
available properties such businesses could relocate to. This could also result  
in lessors charging exorbitant rents since the lessor is currently not requires  
to renew leases with current tenants and lessees would face extremely high  
costs in relocation and reconstruction cost. In either case, the results would  
negatively impact the consumer by increased costs of products and services.

We urge your approval of this bill.

Print Name	Signature	Address
_Myron M. Nakata_		___2033 Kilakila Drive___

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