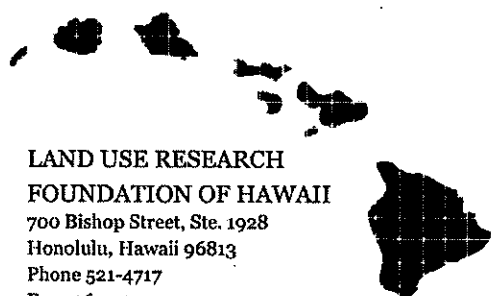


## LATE TESTIMONY



LAND USE RESEARCH  
FOUNDATION OF HAWAII  
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Honolulu, Hawaii 96813  
Phone 521-4717  
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January 23, 2012

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

**Opposition to HB 1830, Relating to Arbitration; Appraisers. (Establishes a process by which real estate appraisers are used for arbitration proceedings to determine fair market value, rental, or reasonable rent of real property.)**

**Tuesday, January 24, 2012 at 8:30 a.m. in CR 312**

My name is David Arakawa, 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 1830.** This bill proposes to establish a process by which licensed or certified, unbiased real estate appraisers are used for arbitration proceedings to determine the fair market value, fair market rental, or fair and reasonable rent of real property. The measure also requires the State Department of Commerce and Consumer Affairs (DCCA) to provide a list of appraisers meeting certain criteria.

**LURF's Position.** LURF strongly opposes this bill based on the following:

**Allowing Only Appraisers to Serve as Arbitrators in Proceedings to Determine Fair Market Value or Rental of Real Property is Unwarranted and Contrary to the Intent of the State's Arbitration Law (Hawaii Revised Statutes Chapter 658A).**

There is no rational or legal reason to limit the group of qualified arbitrators in proceedings to determine fair market value or rental of real property strictly to appraisers, regardless of whether such appraisers are certified, licensed, or otherwise.

➤ **Limiting Arbitrators to Appraisers Would Restrict the Parties' Will, Further Delays, and Increase Costs, Thereby Violating the Intent and Purpose of Arbitration.**

The Hawaii Arbitration Law (HRS Chapter 658A), premised upon the national Uniform Arbitration Act, is the law governing arbitration proceedings, which are not appraisals, but alternative dispute resolution proceedings entered into voluntarily by parties who agree to submit their cases to an impartial person or panel for a binding decision.

The intent underlying the Hawaii Arbitration Law, and the arbitration process in general, is primarily to provide an alternative to judicial proceedings by which the parties involved may ideally secure more control over the outcome of any dispute resolution proceeding which may arise from their relationship, and also save time and expenses by avoiding litigation.

The establishment of a process which commands the use of real estate appraisers (qualified by the DCCA) in arbitration proceedings is therefore directly contrary to the intent of the law, as it disallows the parties themselves to appoint the individual or panel which will make the final decision. Moreover, potential challenges to the procedures proposed, and appeals of the decisions generated by HB 1830, would negate the advantages of arbitration altogether, as there would arguably be no cost or time saving benefits to gain by electing the dispute resolution alternative for property valuation matters.

➤ **There is No Logical Basis to Allow Only Appraisers to Serve as Arbitrators in Proceedings to Determine Fair Market Value or Rental of Real Property.**

Passage last year, of Act 227 (2011), which mandates that real estate appraisers comply with the Uniform Standards of Professional Appraisal Practice (USPAP) **when acting as arbitrators** was, in the opinion of the bill's opponents, misdirected and contrary to case law in view of the fact that appraisers who serve as arbitrators are **not**, in such capacity, engaging in the practice of real estate appraisal.

There may, nevertheless, have arguably been some logic behind the passage of Act 227 in that the requirement applies only to appraisers, and only when acting as arbitrators, purportedly to ensure their professionalism particularly while acting in a decision making capacity. It appears, however, that proponents of HB 1830 now seek to take that legally questionable Act yet a step further to direct that **ONLY** appraisers are allowed to serve as arbitrators in real property valuation proceedings, as though no other individual or profession could possibly be qualified to serve as a competent decision maker in such proceedings. If this line of reasoning is followed, decisions in all different types of arbitration proceedings, and in all different types of cases in all courts and tribunals

would rightly need to be made by judges and juries who are qualified experts or specialists in each specific subject matter involved in each different proceeding or case.

Arbitrations and appraisals are quite different and distinct. "Arbitration" is an alternative dispute resolution process used to reach a compromise solution – it is NOT an "appraisal," which is the process of estimating value. As such, while familiarity with appraisals may be one beneficial qualification for real property valuation proceedings, the proficiencies even more valuable and ideally applicable are impartiality, good judgment, and the ability to fairly evaluate information and come to a sound and just decision.

As such, there is a number of other equally, if not perhaps better qualified individuals who are competent in their own right, including attorneys, economists, and realtors, who are also able to serve well as arbitrators and render fair decisions. It is therefore unwarranted and unreasonable to disqualify these people from being allowed to serve as arbitrators, even in proceedings which relate to the valuation of real property.

➤ **There are a Number of Legal and Practical Issues and Consequences Relating to the Proposed Bill.**

One significant legal concern relating to the implementation of HB 1830 is the effect of the bill on existing agreements such as leases in which the parties have already mutually agreed upon an arbitration process which does not conform to the new process set out in the bill. To now require these parties to comply with the new arbitration process prescribed by the bill is in effect, forcing the parties to modify the terms of their original agreement, which raises serious legal issues affecting the validity of the amendment, as well as the underlying agreement.

From a practical perspective, a consequence of limiting the pool of qualified arbitrators only to licensed or certified appraisers, especially in a small community like Hawaii which already houses a limited number of appraisers, is the likely need to go outside of the state to retain appraisers due to the shortage of qualified local candidates, or as a result of the disclosure of prior dealings or conflicts of interest between an appraiser and parties to the proceeding or transaction. While these out-of-state appraisers may well be qualified professionally, they will not likely have extensive experience dealing with local real property and real property transactions, or knowledge relating to unique underlying and/or intangible factors which may affect their assessment of Hawaii property values. Given these potential shortcomings and concerns, it makes even less sense to limit the group of qualified arbitrators just to appraisers.

The process set out in HB 1830 relating to the selection/appointment of the appraiser-arbitrators is also impractical and suspect. According to the process described in the bill, the appraiser-arbitrators respectively appointed by the lessor and lessee, then select the third appraiser-arbitrator from the list provided by the DCCA). That third appraiser-

arbitrator then becomes the “supreme” arbitrator who may alone review the valuations of the two other arbitrators and prepare a report setting forth the final valuation. Such a process is contrary to the process generally followed in an arbitration involving more than one arbitrator, in which the final decision is usually mutually agreed upon by all of the arbitrators. A lone decision also lends itself to scrutiny by the other arbitrators and challenge or appeal by the parties, and leads to cost considerations and delays as discussed above.

Finally, there are also many questions and issues relating to the process by which the DCCA will qualify appraisers. By way of example, how will a potential appraiser be determined to be “unbiased,” and once placed on the list and/or selected in a proceeding, could the appraiser be challenged or rejected by the parties, and what would that process entail?

**Conclusion.** For all of the reasons set forth above, LURF believes that the intent and application of HB 1830 are unreasonable, unwarranted, and anti-business, and should therefore **be held in this Committee.**

Thank you for the opportunity to express our **strong opposition to HB 1830.**

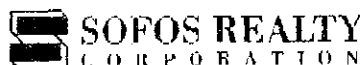
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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Monday, January 23, 2012 4:00 PM  
**To:** ERBtestimony  
**Cc:** mynaka@gmail.com  
**Subject:** LATE TESTIMONY - Testimony for HB1830 on 1/24/2012 8:30:00 AM

Testimony for ERB 1/24/2012 8:30:00 AM HB1830

Conference room: 312  
Testifier position: Support  
Testifier will be present: No  
Submitted by: Myron Nakata  
Organization: Individual  
E-mail: [mynaka@gmail.com](mailto:mynaka@gmail.com)  
Submitted on: 1/23/2012

Comments:



Commercial Brokerage + Property Management

January 24, 2012

VIA FACSIMILE: 586-8479

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

RE: HOUSE BILL HB1830 RELATING TO ARBITRATION  
HEARING DATE/TIME/LOCATION: TUESDAY, JANUARY 24, 2012,  
AT 8:30 A.M., STATE CAPITOL, CONFERENCE ROOM 312

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

I support passage of House Bill HB1830, which is a bill that clarifies the  
procedure to select real estate appraisers that are involved in an arbitration  
proceeding to determine the fair market value or fair market rental of real  
estate.

Hawaii is a small state with a limited number of qualified real estate  
appraisers that are licensed or certified under chapter 466K, HRS. This  
inevitably leads to the possibility of conflicts of interest or bias resulting in  
possibly very disparate values. HB1830 provides for a process by which a  
third arbitrator may be selected from another jurisdiction to allow for  
valuation of lands for sale or lease that are fair and reasonable.

I urge you to approve House Bill 1830.

Aloha,



S. Steven Sofos  
President/CEO



Commercial Brokerage • Property Management

January 24, 2012

VIA FACSIMILE: 586-8479

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

**PETITION:**

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procedure to select real estate appraisers that are involved in an arbitration  
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third arbitrator may be selected from another jurisdiction to allow for  
valuation of lands for sale or lease that are fair and reasonable.  
We respectfully urge you to please approve Senate Bill SB1830.

Print Name

*Steven Sofos*

Signature

Address

*3228 Oahu Avenue  
Honolulu HI 96822*