

LATE

SB1258

Submitted on: 2/13/2013

Testimony for CPN on Feb 13, 2013 08:30AM in Conference Room 229

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|------------------------------|---------------------------|---------------------------|
| David Arakawa | Land Use Research Foundation | Oppose | Yes |

Comments: SB 1258 will alter the confidentiality clauses in existing leases, by making the terms of existing private leases matters of public record. This bill is unnecessary, as the Legislature passed Act 227 (SLH 2011), which specifies required contents of the record of award when a certified real estate appraiser acts as an arbitrator in an arbitration proceeding to determine the fair market value, fair rental value, or fair and reasonable rent of real estate; and requires certification of compliance with Uniform Standards of Professional Appraisal Practice. The Legislature should allow Act 227 sufficient time to be implemented.



February 25, 2013

Senator Rosalyn H. Baker, Chair
Senator Brickwood Galuteria, Vice Chair
Senate Committee on Commerce and Consumer Protection

Testimony in Opposition to SB 1258, Relating to Real Estate Appraisers. (Requires real estate appraisers, acting as arbitrators, to record arbitration awards, the records of the awards, if separately issued, and any supplementary, dissenting, or explanatory opinions with the bureau of conveyances within 90 days of the determination of the award and its notification to the parties.)

Tuesday, February 26, 2012 at 10:00 a.m. in CR 229

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. LURF's mission 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 appreciates the opportunity to provide this testimony in **opposition to SB 1258**.

SB 1258. This bill alters the terms of the confidentiality clauses in many existing commercial and industrial leases, by requiring real estate appraisers, acting as arbitrators, to record arbitration awards, the records of the awards, if separately issued, and any supplementary, dissenting, or explanatory opinions with the bureau of conveyances within 90 days of the determination of the award and its notification to the parties.

LURF **opposes SB 1258**, based upon the following:

- **The SB 1258 is premature, as it should await the completion of the Legislative Reference Bureau ("LRB") Report required by SCR 90, SD1 (2012) "Requesting the Legislative Reference Bureau to Update Their 2003 Report Analyzing the Major Problems Faced by Commercial Lessees by Incorporating an Economic Analysis to Determine if There is a Nexus Between the Existence of High Lease Rents in Hawaii and the Stagnation of Hawaii's Economy."** The 2013 LRB Report, could not complete such an economic analysis, but recommended that the "Chairs of the appropriate subject matter

committees in the House and Senate consult with UHERO to draft legislation that ensures a workable approach, including a sufficient timetable and funding.” Instead of passing SB 1258, the Legislature should provide for funding for an economic analysis to determine whether there is actually a strong a nexus between lease rents and the stagnation of Hawaii’s economy, which could establish a legal basis to change the terms of existing lease contracts.

- **There is no factual justification for SB 1258.** The latest LRB Report (dated 2003) concluded that *“there was no indication of a broad-based compelling need for legislation altering existing lease agreements, which would be required to pass constitutional muster. Instead, the Bureau found that the primary problem facing lessees was the lack of available fee simple commercial and industrial property on the market.”* (See, LRB Report No. 5, 2003, “Real Property Leases,” by Eric Maehara, Research Attorney)
- **The SB 1258 violates the Contracts Clause of the United States Constitution, because it alters and violates the confidentiality clauses of existing lease contracts.** The Legislature should not inject itself into existing private leases, by changing the confidentiality clauses of leases, which are very important contract terms which were mutually agreed to by the parties. The U.S. District Court, District of Hawaii (“Court”) ruled that Act 189 (SLH 2009) (“Act 189”) violated the Contracts Clause of the U.S. Constitution. Although Act 189 involved a different law, the Court ruled that the law impaired the contractual relationship between the parties; and that Act 189 did not “reasonably or justifiably further the legitimate purpose of stabilizing Hawaii’s economy.” In addition to the above (but inapplicable in this case) , the Court also held that Act 189 violated the Equal Protection Clause of the U.S. Constitution by unfairly targeting one lessor, HRPT. (See, *HRPT Properties Trust v. Lingle*, 715 F.Supp.2d 1115 [D. Hawaii 2010])

LURF believes that a court would similarly find SB 1258 unconstitutional, based on, among other things, the following:

- ❖ Under the law, confidentiality provisions in leases, especially relating to lease renegotiations, are important mutually bargained-for terms of lease contracts. SB 1258, would violate such existing contract terms, by requiring publicizing such information. A court would likely rule that SB 1258 clearly “impairs the contractual relationship and expectations of lessors”; and
- ❖ There is “no factual basis to reasonably or justifiably further the legitimate purpose of stabilizing Hawaii’s economy.” The latest State study regarding commercial and industrial lease rents – the 2003 LRB Report, does not support the allegations in SB 1258, in fact, just the opposite. Furthermore, as noted above, last year, the Legislature passed SCR 90, SD1 (2012)“*Requesting the Legislative Reference Bureau to Update Their 2003 Report Analyzing the Major Problems Faced by Commercial Lessees by Incorporating an Economic Analysis to Determine if There is a Nexus Between the Existence of High Lease Rents in Hawaii and the Stagnation of Hawaii’s Economy – and the LRB recommended that the Senate and the House fund such an economic analysis during the 2013 session.* In fact, SB 1258 totally ignores the recommendations of the LRB relating to SCR 90, SD1 (2012). Given the total lack of factual basis or economic analysis

to support SB 1258, and the Legislature's total disregard for its own SCR 90, SD1 (2012) and request for an economic analysis - - LURF believes that a court would find that there is no factual basis to justify SB 1258.

- **The bill violates the spirit and intent of the USPAP Ethics rule relating to confidentiality.** Act 227, Session Laws of Hawaii 2011 ("Act 227, SLH 2011), requires appraisers in arbitration proceedings to certify compliance with the most current Uniform Standards of Professional Appraisal Practice ("USPAP"). USPAP includes and Ethics Rule which requires an appraiser to protect the confidential nature of the appraiser-client relationship. While there may be exceptions to this USPAP Ethics Rule – SB 1258 violates the spirit and intent of the USPAP Ethics Rule, and does the legislature really want to violate the USPAP Ethics Rule, and claim an exception?

Conclusion. For all of the reasons set forth above, LURF believes that the intent and application of SB 1258 is not justified, unwarranted, violates the confidentiality terms of existing lease contracts, and should therefore **be held in this Committee.**

Thank you for the opportunity to express our **strong opposition to SB 1258.**