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GOVERNOR OF HAWAII



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

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

**Before the Senate Committee on
WAYS AND MEANS**

**Friday, March 28, 2014
9:20A.M.
State Capitol, Conference Room 211**

**In Consideration of
HOUSE BILL 1823, HOUSE DRAFT 1
RELATING TO PUBLIC LANDS**

House Bill 1823, House Draft 1 proposes to amend Section 171-17, Hawaii Revised Statutes (HRS), to require mediation in disputes regarding the fair market value or fair market rental of public lands, and provides for binding arbitration in the event of unsuccessful mediation. **The Department of Land and Natural Resources (Department) opposes this measure.**

Section 171-17, HRS, already provides a fair process for binding arbitration that requires the participation of qualified real estate appraisers. Conversely, this bill does not require that the mediator possess any real estate appraisal qualifications or expertise. In addition, for lease rental re-openings, the bill would require that the arbitrator be a licensed attorney or other person, rather than strictly a real estate appraiser.

Requiring the Department and the opposing party to engage in non-binding mediation prior to binding arbitration will result in making the dispute resolution process more costly and time consuming. Particularly objectionable is the measure's relaxed standards over who may serve as a mediator or arbitrator, serving as an endorsement (and in some instances, requirement) of potentially less than qualified individuals presiding over the resolution of real property valuation disputes. The mediation and arbitration processes as contemplated in this measure may produce settlements where the State would receive less than fair market rents from the use of public trust lands, resulting in decreased lease rentals, including ceded land revenues.¹

¹ Because of the Office of Hawaiian Affairs (OHA) settlement, OHA no longer receives a percentage of actual ceded land revenues received by the State, but instead receives an annual amount fixed at \$15.1 million. Though agencies receiving ceded land revenues have been directed to continue to pay the 20% share to OHA, there has historically been an annual shortage in arriving at the \$15.1 million dollar level, which shortage has so far been made up solely by the Department's Land Division. Continued attempts to lower the lease rent revenues received by the Land Division (which manages the bulk of the Department's leases) will result in the Division no longer being able to make up the annual shortfall owed by the State.

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

JESSE K. SOUKI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

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BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
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March 28, 2014

HEARING BEFORE THE
SENATE COMMITTEE ON WAYS AND MEANS

TESTIMONY ON HB 1823 HD1
RELATING TO PUBLIC LANDS

Room 211
9:20 AM

Aloha Chair Ige, Vice Chair Kidani, and Members of the Committee:

I am Christopher Manfredi, President of the Hawaii Farm Bureau Federation (HFB). Organized since 1948, the HFB is comprised of 1,832 farm family members statewide, and serves as Hawaii's voice of agriculture to protect, advocate and advance the social, economic and educational interests of our diverse agricultural community.

HFB strongly supports HB 1823 HD1 that requires mediation in disputes regarding the fair market value or fair market rental of public lands.

This bill is extremely important to help keep farmers and ranchers producing food and other agricultural products on State leased lands. Farmers and their families who have worked hard, farmed or ranched successfully and paid their rent faithfully for many years should not lose their farms and their livelihoods simply because their leases expire and are reopened.

We have found that in some lease "negotiations" with DLNR, "**fair market value**" is **not fair** when applied to agricultural land. In fact, the current law has had a devastating effect on farmers who want to continue to lease State land. Lease rents based on inflated land prices often exceed what a legitimate farmer or rancher can reasonably pay, based on the true value of agricultural production from the leasehold. The current process for contesting a State lease appraisal is cumbersome and expensive. This process is not compatible with the State's goal of promoting and encouraging local food production.

The use of **mediation is a more reasonable, much less expensive, and appropriate approach** to resolving a rental dispute. We also agree with a policy of transparency regarding the sharing of appraisal reports prior to mediation. Although we don't believe

that this measure, in itself, will solve all the problems inherent in agricultural leases held by State agencies other than the Department of Agriculture (whose mandate is to promote agriculture) these modest amendments are a good first step to ensure that farmers are treated more equitably.

Thank you for supporting **HB 1823 HD1**.

From: mailinglist@capitol.hawaii.gov
To: [WAM Testimony](#)
Cc: djr@teamdeluz.com
Subject: Submitted testimony for HB1823 on Mar 28, 2014 09:20AM
Date: Tuesday, March 25, 2014 6:06:05 PM

HB1823

Submitted on: 3/25/2014

Testimony for WAM on Mar 28, 2014 09:20AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
David S. De Luz, Jr.	David S. De Luz, Sr., Enterprises, Inc.	Support	No

Comments: Aloha Chair Ige & Vice Chair Kidani: I strongly supports HB 1823 HD1 that requires mediation in disputes regarding the fair market value or fair market rental of public lands. This bill is extremely important to help keep farmers and ranchers producing food and other agricultural products on State leased lands. Farmers and their families who have worked hard, farmed or ranched successfully and paid their rent faithfully for many years should not lose their farms and their livelihoods simply because their leases expire and are reopened. I have heard from fellow Ranchers that in some lease "negotiations" with DLNR, "fair market value" is not fair when applied to agricultural land. In fact, the current law has had a devastating effect on farmers who want to continue to lease State land. This process is not compatible with the State's goal of promoting and encouraging local food production. The use of mediation is a more reasonable, much less expensive, and appropriate approach to resolving a rental dispute. We also agree with a policy of transparency regarding the sharing of appraisal reports prior to mediation. Although we don't believe that this measure, in itself, will solve all the problems inherent in agricultural leases held by State agencies other than the Department of Agriculture, whose mandate is to promote agriculture; these modest amendments are a good first step to ensure that farmers are treated more equitably. Respectfully Submitted by: David S. De Luz, Jr. David S. De Luz, Sr. Enterprises, Inc. 811 Kanoelehua Avenue Hilo, HI 96720 808-895-4284 djr@teamdeluz.com

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CITIZENS FOR FAIR VALUATION

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March 26, 2014

COMMITTEE ON WAYS AND MEANS
Senator David Y. Ige, Chair
Senator Michelle N. Kidani, Vice Chair

RE: In Support of HB 1823 HD1 – Public Lands; Reopening Lease; Mediation; Arbitration
Hearing: March 28, 2014, 9:20 am; Room 211, State Capitol, 415 South Beretania Street

Aloha Chair Ige, Vice Chair Kidani, and Members of the Committee:

My name is Michael Steiner and I am the Executive Director of Citizens for Fair Valuation (CFV), a non-profit coalition of lessees. I **strongly support passage** of House Bill 1823 which would require mediation before arbitration in determining the sale price or lease rental of State lands.

Our current arbitration process has become more and more cumbersome. Arbitrations, which were originally put in place to provide a more efficient and cost effective form of dispute resolution, have become mini-trials costing more than \$100,000 per side and taking months to complete. Appraisers, acting as arbitrators, simply do not have the legal training required to fully understand the legal issues and wrangling in play while also trying to determine a USPAP compliant valuation.

In business, lessors and lessees enter into a relationship in which each side brings value and success is a mutual goal. It is a partnership of sorts in which the lessor is paid for the use of property and the lessee works the land to earn enough to pay rent, employees and provide a profit for themselves. In this relationship, both parties succeed when they can work together.

When negotiation fails, the required arbitration becomes a battle between lessor and lessee. The parties become combatants hiring attorneys, appraisers and other experts to prove their position before a third appraiser, who acts as the arbitrator. Is there a burden of proof? How right do you have to be to prevail? What happens to the business relationship that once existed?

On the other hand, mediators are trained to find common ground that builds upon and strengthens the business relationship. It changes the mindset of the parties from winning to understanding the other parties' issues in order to find a mutually acceptable position. Mediation is not only cost effective and efficient, it preserves and extends the original relationship between the parties.

HB 1823 HD1 provides the foundation for mediation and mediation provides a structure upon which business relationship can be preserved.

Please make a difference and pass HB 1823 HD1.

Mahalo



Michael Steiner, Executive Director, Citizens for Fair Valuation

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From: mailinglist@capitol.hawaii.gov
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Subject: Submitted testimony for HB1823 on Mar 28, 2014 09:20AM
Date: Thursday, March 27, 2014 10:50:07 AM

HB1823

Submitted on: 3/27/2014

Testimony for WAM on Mar 28, 2014 09:20AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
Ronald Weidenbach	Hawaii Aquaculture & Aquaponics Association	Support	No

Comments: The HAAA strongly support this measure. The current appraisal process of determining fair agricultural lease rents on DLNR managed lands is no longer working, and the current appeal process is both cost prohibitive and inherently biased against determining a fair and affordable agricultural lease rate. This situation is worsened by the lack Certified agricultural land appraisers in Hawaii and the use of general commercial and residential property appraisers who do not understand or consider the economic realities of farming and ranching. The mediation and binding arbitration guidelines provided by this measure should help improve this current unfair and inappropriate appeal process as a first step in addressing the overall leasing process for State lands for agricultural purposes. The HAAA therefore strongly supports this measure.

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Subject: *Submitted testimony for HB1823 on Mar 28, 2014 09:20AM*
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HB1823

Submitted on: 3/27/2014

Testimony for WAM on Mar 28, 2014 09:20AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
Frederick M. Mencher	Individual	Support	No

Comments:

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McCully Works

40 Kamehameha Ave.

Hilo, Hi. 96720

Testimony in SUPPORT of HB1823HD1

Senate Committee WAM

Chair David Ige

Vice Chair Michelle Kidani

Aloha Chair Ige,

My name is James McCully, I am a farmer here in Hilo (Mauna Kea Orchids) and over the years I have invested in state leasehold property for my retirement. I currently operate a business leasing demised warehouse spaces to other small businesses on 3 parcels of state land in the Kanoiehua Industrial Area in Hilo. That business is "McCully Works".

Prior to my testimony I would like to point out the support this bill has gained at other hearings. When Chair Evans WTL committee heard the measure they passed it unanimously and when I testified to that committee there seemed broad support for Mediation as an effective tool to resolve disputes. There was also strong support for the reduction of the current 3 arbitrator system to a single arbitrator and enlarging the pool of potential arbitrators to include those trained in dispute resolution and the law. When the companion bill, SB2966, was heard before the joint committee of WTL/JDL there was again strong support and the committee report states;

"Your Committees find that mediation is an effective method of resolving disputes that should be made available to resolve disputes regarding the fair market value or fair market rental of public lands in transactions involving the Board of Land and Natural Resources and private purchasers, owners, or leaseholders. The present statutory framework for the arbitration of such disputes is cumbersome and does not provide the parties an opportunity to work collaboratively toward mutual solutions to disputes."

My testimony is based on my actual experience of going through lease resets with DLNR. In the last few years I have been involved in two protracted and expensive ground lease rent resets of my state properties. During this process it was observed to me on numerous occasions by both lawyers and appraisers that, in their opinion, HRS171-17 was not meeting the needs of the parties it was intended to serve. This bill is directed at correcting some of these faults and I wholeheartedly support it.

HB1823 has three features that seem fair to all the parties.

First, the release of the initial appraisal commissioned by DLNR to arrive at a proposed lease rent provides the lessee with the opportunity to review the report before making a

decision to accept or reject the rent. This is fair and it allows the lessee to make an informed decision, which is always preferable. While the current statutory language requires that the appraisals be a matter of public record this has recently been interpreted to mean that the appraisal report would not be released until the matter of rent resets were completed. There is an Office of Information Practice ruling on this matter, OIP 91-10 that fully supports the position that the appraisals should be released during the negotiation process.

Second, while arbitration was originally envisioned as being an effective, low cost means of dispute resolution it has evolved into a much more expensive and time consuming creature. Mediation, when entered into in good faith, seems to be a reasonable and proper beginning to a disagreement and may lead to a reasonable resolution at a very low cost. Trained mediators are readily available and the time required to go through the process can be controlled through administrative rules.

Third, the transition from a three member panel to a single arbitrator provides an immediate cost savings if only by reduction in numbers. As it stands each of the “three disinterested appraisers” are required to complete their own study, then review the work of the other appraisers, and then sit in judgment and decide the final value determination. This has led to the party appointed appraisers becoming advocates for their client’s position, with a wide disparity in proposed values frequently being the starting point. This is the opposite of “disinterested”. It would be appropriate to have the appraisers do what they are specifically trained to do, that is, arrive at a fair market rent or valuation as required by the lease contract.

If differences arise then hopefully they can be resolved through mediation. If not, by allowing experts to serve as arbitrators who are experienced in law, contract, real estate and resolving disputes we would better separate the decision from the advocacy. Other advantages include that this would dramatically increase the size of the arbitrator pool. It would likely reduce the costs of the arbitrator to something closer to what a Judge would allow as arbitration fees in a court ordered arbitration. Currently the appraisers are charging much higher rates to provide this same function.

Finally, there are no “Continued attempts to lower the lease rent revenues received by the Land Division...” which was stated in earlier opposition testimony to HB1823HD1. The possibility of the state receiving less than “fair market rents” should an arbitration be decided by means other than the existing system would require violations of rules and statutes. It would require that the qualified arbitrator selected by the parties would not rely on the expert reports prepared by qualified appraisers. This is a common feature in Submission Agreements which govern how the parties will allow the arbitration to proceed. If this were to ever happen a Motion to Vacate could be submitted by the state based on a violation of HRS-658A-23(a)(4) , the offending arbitrator would have “exceeded the arbitrator’s powers”. Under this statutory reform Fair Market Rents are assured to continue to be paid to the State of Hawaii for the use of public lands.

I appreciate your consideration of this very important modification of existing statute to better serve all the parties; the State, the Lessee's, as well as those who serve as appraisers and arbitrators in these matters. If you have any questions please feel free to contact me at your convenience

Mahalo,

«GreetingLine»

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HB1823

Submitted on: 3/27/2014

Testimony for WAM on Mar 28, 2014 09:20AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
Janet Ashman	Individual	Support	No

Comments: Please support farmers and ranchers on State leased lands. This bill is extremely important to help keep farmers and ranchers producing food and other agricultural products. It provides fairness for farmers and their families who have worked hard and successfully and are in good standing with the State. These producers need the ability to retain their leases. Moreover, the bill is in the best interests of the public, as it comports with our State goals for greater food security. The current law should be amended; it has had a devastating effect on farmers who want to continue to lease State land. Inflated land prices should not be used to determine lease rents since they often exceed what a farmer or rancher can afford to pay, based on the value of farm production from the land. The current process for contesting a State lease appraisal is not fair and does not work for farmers. By adding a process for mediation, farmers may have a better chance to continue to farm and provide food for all of us. This bill merely adds a reasonable, much less expensive and appropriate approach to the lease process. Please support it. Thank you.

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Subject: Submitted testimony for HB1823 on Mar 28, 2014 09:20AM
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HB1823

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Testimony for WAM on Mar 28, 2014 09:20AM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
rodney kim	siba	Support	No

Comments: we strongly support this biil.

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