

January 26, 2014

**HOUSE OF REPRESENTATIVES
THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2014
COMMITTEE ON WATER & LAND**

**RE: Testimony in Support of HB 1830 – Relating to Real Estate Appraisals
Hearing: January 27, 2014, 9:30 am; Room 325
State Capitol, 415 South Beretania Street**

Aloha Chair Evans, Vice Chair Lowen and Members of the Committee,

My name is Jason Ideta and I am one of the owners at Pacific Jobbers Warehouse, Inc., which is located in Mapunapuna and employs 82 people.

As my company is currently in lease reset talks and arbitration is possible, having prior arbitration data available would really help me determine if I should settle or arbitrate.

I strongly support passage of HB 1830 but would ask you to clarify “based on an agreement to arbitrate entered into after July 1, 14 2014”, to ensure the requirement to record applies to all appraisers named or appointed to an arbitration as of July 14th, 2014.

Recordation of arbitration awards and the documents that support the decision will help open the mystery of how rents are set and provide information to consumers so we can all make better, more informed decisions.

Please clarify the language to apply directly to the appraisers acting as arbitrators and pass this bill.

Thank you for your support in bringing light to a dark process.

Sincerely,

Jason Ideta
Pacific Jobbers Warehouse, Inc.
2809 Kaihikapu Street
jasoni@pjwhawaii.com
808-772-5922

January 26, 2014

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CITIZENS FOR FAIR VALUATION

841 Bishop Street, Suite 1500
Honolulu, HI 96813

ROBERT M. CREPS, PRESIDENT
CULLY JUDD, VICE PRESIDENT
CONNIE SMALES, SECRETARY

PHILLIP J. SILICH, TREASURER
OSWALD STENDER, DIRECTOR
MICHAEL STEINER, EXEC. DIRECTOR

January 25, 2014

**HOUSE OF REPRESENTATIVES
THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2014
COMMITTEE ON WATER & LAND**

Rep. Cindy Evans, Chair
Rep. Nicole E. Lowen, Vice Chair
Members of the Committee

RE: Testimony in Support of HB 1830 – Relating to Real Estate Appraisals
Hearing: January 27, 2014, 9:30 am; Room 325
State Capitol, 415 South Beretania Street

Aloha Chair Evans, Vice Chair Lowen 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 support passage of House Bill 1830 which would require real estate appraisers, when acting as arbitrators, to record all arbitration awards, the records of the arbitration awards and any supplementary, dissenting, or explanatory opinions with the bureau of conveyances within ninety days of the determination of the arbitration award and the notification of its determination to the parties.

Suggested Changes:

While HB 1830 will bring information to the public in order to help create a more open and transparent market, I would suggest the language of HB 1830 be amended to clearly identify that all awards and records of award be recorded, that the law pertains to all appraisers who have been named or appointed to act as an arbitrator in an arbitration proceeding, as of July 14, 2014, and that no agreement between the parties shall preclude recordation. In addition, the law should be clear that failing to record the materials shall be deemed a violation of the license requirement.

Specifically, HB 1830, Section (b), lines 11-14, currently reads:

(b) A real estate appraiser licensed under this chapter who is acting as an arbitrator in an arbitration proceeding based on an agreement to arbitrate entered into after July 1, 14 2014, shall . . .

To clarify that the “arbitration agreement” noted above should be between the appraiser and the parties in the arbitration and not the controlling lease document solely between the lessor and lessee. I would recommend the following:

(c) A real estate appraiser licensed or certified under this chapter who is named or appointed as an arbitrator in a submission agreement to appraise or arbitrate entered into after July 1, 2014, shall . . . (see below)

With respect to the other issues noted above, I would further suggest adding sections to clarify the purpose and strength of the statute. To that end, I have attached a revised draft for your consideration and review. The pertinent portions are as follows:

- (a) Arbitration awards, records of the awards and related supporting materials under this chapter shall be open to the public.
- (b) In an arbitration proceeding to determine the fair market value, fair market rental, or fair and reasonable rent of real property where the arbitrator is a real estate appraiser licensed or certified under this chapter, the record of an award shall include but not be limited to findings of fact; the state-licensed appraiser's rationale for the award; the state-licensed appraiser's certification of compliance with the most current Uniform Standards of Professional Appraisal Practice as approved by the director; and information regarding the evidence, including the data, methodologies, and analysis that provided the basis for the award.
- (c) A real estate appraiser licensed or certified under this chapter who is named or appointed as an arbitrator in a submission agreement to appraise or arbitrate entered into after July 1, 2014, shall record all arbitration awards, the record of an award, if separately issued, and any supplementary, dissenting, or explanatory opinions on the award with the bureau of conveyances within ninety days of the notification of the determination of the award to the parties.
- (d) No agreement between the parties or the appraisers acting as arbitrators may preclude or deny the recordation of the award, the record of the award, or any supplementary, dissenting, or explanatory opinions.
- (e) Failure to comply with this section shall be deemed a violation of the license or certification requirements under this chapter.

Captive Lessees:

Citizens for Fair Valuation believes informed decisions are better decisions. Considering most long-term lessees are “captive” to their leases meaning they are not free to leave their leases should the rent demand be beyond their capability.

Mapunapuna lessees, with 10 or more years left on the lease, are “captive” lessees. In a closed transaction, lessees are at a distinct disadvantage as they are contractually obligated to continue the lease. Should they not agree with the lessor’s “take-it-or-leave-it” offer, arbitration becomes their only option.

Making arbitration data available to the public, will help create a more open and transparent market. The long-term ground lease rent valuation market controls what lessees pay and that in turn is reflected in the cost of goods and services provided to the public. It is time the process is unveiled.

Added Expenses:

Opponents of this bill may argue that HB 1830 will cause additional expense in rendering and recording the records of awards. Over the past two years, appraisers have consistently raised their fees from roughly \$15,000 per arbitration to what is now close to \$50,000 per arbitration. With the cost of recordation at the Bureau of Conveyance starting in the \$30 range, this should not present a hardship to the arbitrator.

Vacating an Award:

Opponents of this bill seem to be afraid that HB 1830 will create a basis for lessees to vacate arbitration awards. Again, this is just not the case. The truth is that it remains extremely difficult to vacate the award of an arbitration panel. Arbitration awards are given wide deference by the courts and judicial review is limited. There are only certain enumerated grounds under which an arbitration award can be vacated, which include evident partiality of the panel, corruption of the panel, misconduct of the panel, and the panel exceeding its powers. Mistakes of law or fact by the panel in making its award are generally not sufficient grounds to vacate an arbitration award.

Please pass HB 1830 to continue the work started with Act 227.

Mahalo



Michael Steiner

Executive Director, Citizens for Fair Valuation

Telephone: (808) 221-5955

Email: MSteiner@SteinerAssoc.com

HOUSE OF REPRESENTATIVES
TWENTY-SEVENTH
LEGISLATURE, 2014
STATE OF HAWAII

H.B. NO. 1830
HD1
Proposed

A BILL FOR AN ACT

RELATING TO REAL ESTATE APPRAISERS.

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

SECTION 1. The legislature finds a lack of openness and transparency exists in the implementation of Act 227, Session Laws of Hawaii 2011, which was codified as section 466K-6, Hawaii Revised Statutes.

Act 227 requires appraisers acting as arbitrators to fully report the basis for an award and to certify compliance with the nationally accepted Uniform Standards of Professional Appraisal Practice when valuing properties and determining market value or market rent. Compliance with these standards ensures adherence to professional standards that protect the parties to an arbitration and the consumers of the State.

The legislature also finds that Hawaii has relatively few commercial appraisers who specialize in these matters and these

individuals or firms are the exclusive determiners of the market value or market rents of leasehold property in Hawaii. This results in members of the same profession gathering and selecting market data, presenting that data to arbitration panels as expert witnesses, and then deciding the matter as appointed arbitrators.

The legislature further finds that since the enactment of Act 227, confidentiality clauses have been incorporated into agreements that govern individual arbitration panels. Inclusion of these confidentiality clauses frustrates the legislature's intent in enacting Act 227 and works to the detriment of consumers because valuable market data is wilfully withheld from public use.

Real estate transactions that occur as sales transactions are recorded with the bureau of conveyances; any interested party may request a copy of a recorded real estate transaction from the bureau. Financial institutions, real estate firms, buyers, and sellers all take advantage of this data prior to participating in the market. Access to this information allows participants in the real estate market to better understand the volume and the value of that market in an open and transparent manner, allowing the market to function more efficiently.

In the resetting of industrial and commercial leasehold rents, recordation of an arbitration award and access to the record of the award at the bureau of conveyances would ensure public access to

data that is currently unavailable, despite the enactment of Act 227. For the leasehold market to function with openness and transparency, and to further protect consumers in the State of Hawaii, the legislature finds that arbitration awards and reports should be available to all interested participants in the market.

The purpose of this Act is to:

- (1) Improve and protect the process by which real estate appraisers, when acting as arbitrators to determine fair market value, fair market rent, or fair and reasonable rent of leasehold property, fully and publicly record arbitration awards along with the record of the arbitration award and any supplementary, dissenting, or explanatory opinions as required by section 466K-6, Hawaii Revised Statutes; and
- (2) Improve the economy and protect the interests of the people of Hawaii by making data pertinent to industrial and commercial ground lease valuations and rents available to the general public.

SECTION 2. Section 466K-6, Hawaii Revised Statutes, is amended to read as follows:

"[~~§~~466K-6~~]~~ Appraisers in arbitration proceedings.

(a) Arbitration awards, records of the awards and related supporting materials under this chapter shall be open to the public.

(b) In an arbitration proceeding to determine the fair market value, fair market rental, or fair and reasonable rent of real property where the arbitrator is a real estate appraiser licensed or certified under [†]this[†] chapter, the record of an award shall include but not be limited to findings of fact; the state-licensed appraiser's rationale for the award; the state-licensed appraiser's certification of compliance with the most current Uniform Standards of Professional Appraisal Practice as approved by the director; and information regarding the evidence, including the data, methodologies, and analysis that provided the basis for the award.

(c) A real estate appraiser licensed or certified under this chapter who is named or appointed as an arbitrator in a submission agreement to appraise or arbitrate entered into after July 1, 2014, shall record all arbitration awards, the record of an award, if separately issued, and any supplementary, dissenting, or explanatory opinions on the award with the bureau of conveyances within ninety days of the notification of the determination of the award to the parties.

(d) No agreement between the parties or the appraisers acting as arbitrators may preclude or deny the recordation of the award,

the record of the award, or any supplementary, dissenting, or explanatory opinions.

(e) Failure to comply with this section shall be deemed a violation of the license or certification requirements under this chapter."

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 4. This Act shall take effect on July 1 2014.

Report Title:

Real Estate Appraisers; Arbitration Awards; Recordation

Description:

Requires real estate appraisers, acting as arbitrators, to record arbitration awards, the record of an award, and any supplementary, dissenting, or explanatory opinions with the Bureau of Conveyances within a specified period of time. Effective July 1, 2014.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

McCully Works

40 Kamehameha Ave.
Hilo, Hi. 96720

January 25, 2014

HB1830

Testimony in SUPPORT

House Committee on Water and Land

Chair Cindy Evans, Dist. 7

Vice-Chair Nicole Lowen, Dist 6

Aloha Chair Evans and members of WAL,

I have been involved in the reform of appraisal and arbitration practices as controlled by HRS466k since 2009. After great effort by lessee's and concerned parties, and with the leadership of both House and Senate members, we have gained some measure of equity in how leasehold arbitrations are conducted. With the passage of Act 227 (2011) and it's incorporation into statute as HRS466k-6 there has been a renewed focus on adhering to the standards established in U.S.P.A.P when appraisers are acting as arbitrators. This benefits all consumers in Hawaii and was a long needed reform. It has only occurred because of the Report of the Award now required by law. *

Unfortunately some lessees have seen an extraordinary increase in arbitrator's fees, in some cases over 100%. Appraisers have stated the reason for this is the additional reporting requirement necessitated by HRS466k-6. From the perspective of the lessee, this is unjustified and only serves to suppress or intimidate lessees from engaging in the arbitration process. The report required by the statutory reform is a type that is similar to those provided in commercial work and is usually produced for less than 1/5 the cost of a single arbitrators proposed fees for a recent arbitration. In addition to the increase some appraiser/arbitrators are requiring confidentiality clauses be added to the parties Submission Agreements (which govern the arbitration).

It is critical to note that ground leases tend to be long-term leases spanning decades. Ownership of the leased lands is concentrated in the hands of a very small, very wealthy, very sophisticated, group. These owners are not financially stressed by the high cost of arbitration, their expert witnesses or legal representation. Lessors possess a high level of sophistication when participating in the arbitration process, which creates a gross imbalance favoring land ownership throughout, rent negotiations and/or arbitration proceedings.

Whereas for Lessees/consumers, the arbitration process presents a serious financial strain and a complex, legalistic maze which usually requires years to navigate. The current reality is that absent public access to open and transparent arbitration data land owners can use the high cost and complexity of arbitration, in combination with their monopoly-like dominance, as a lever to their exclusive advantage. Unlike the US mainland,

Lessees/consumers never benefit from public access to transparent market data, real estate cycles or supply/demand dynamics that level the playing field for all parties. This leads to greater costs to consumers and inefficiencies in our local economy. The bill before you would strengthen 466k-6, ensuring accountability and transparency as the Legislature intended.

This reform should provide further protection for the consumers in Hawaii. Please support HB1830

Aloha,

James McCully

- It should be noted that with a single exception the Reports of Awards that I have been able to review do NOT meet the standards as required by HRS466k-6. The language of the statute requires “findings of fact” and the “appraisers rationale”. This then constitutes the highest standard required for reporting of any arbitration award. Findings of Fact are well understood by attorneys but not apparently by appraisers who have either not been trained in law or do not practice it.
- See [Cat Charter, LLC v. Schurtenberger] Eleventh U.S. Circuit Court of Appeals July 13, 2011 Part II, B (page 12-13)

January 26, 2014

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THE TWENTY-SEVENTH LEGISLATURE
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**RE: Testimony in Support of HB 1830 – Relating to Real Estate Appraisals
Hearing: January 27, 2014, 9:30 am; Room 325
State Capitol, 415 South Beretania Street**

Dear Chair Evans, Vice Chair Lowen and Members of the Committee,

My name is Robert Creps and I am the Senior Vice President of Administration for Grace Pacific LLC.

As a subsidiary of my company is currently in lease reset talks and arbitration is possible, having more complete prior arbitration data available would really help me determine if I should settle or arbitrate.

I strongly support passage of HB 1830 but would ask you to clarify "based on an agreement to arbitrate entered into after July 1, 14 2014", to ensure the requirement to record applies to all appraisers named or appointed to an arbitration as of July 14th, 2014.

Recordation of arbitration awards and the documents that support the decision will help to shed light on how rents are set and provide information to consumers so we can all make better, more informed decisions.

Please clarify the language to apply directly to the appraisers acting as arbitrators and pass this bill.

Thank you for your support.

Sincerely,



Robert M. Creps
Senior Vice President Administration
Grace Pacific LLC



LAND USE RESEARCH
FOUNDATION OF HAWAII

1100 Alakea Street, Suite 408
Honolulu, Hawaii 96813
(808) 521-4717
www.lurf.org

January 26, 2014

Representative Cindy Evans, Chair
Representative Nicole E. Lowen, Vice Chair
and Members of the House Committee on Water & Land

Opposition to HB 1830, Relating to Real Estate Appraisers. (Requires real estate appraisers, acting as arbitrators, to record arbitration awards, the record of an award, and any supplementary, dissenting, or explanatory opinions with the bureau of conveyances within a specified period of time.)

Monday, January 27, 2014 at 9:30 a.m. in Conference Room 325

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 express its **strong OPPOSITION to HB 1830**, based on, among other things, the following:

- **There is no factual justification for HB 1830 (the latest 2003 LRB Report 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.*”); and HB 1830 includes numerous factual inaccuracies.** (See 2012 LRB Report, Finding #5, p. 19).
- **HB 1830, is premature, the Legislature should fund, and await the completion of the Legislative Revenue Bureau (“LRB”) Report required by SCR 90, SD1 (2012).** (See SCR 90, SD1 (2012) and the 2012 LRB Report, Executive Summary, p. vii and Recommendation, p. 20)
- **HB 1830, alters and violates the confidentiality clauses of existing lease contracts, and therefore violates the Contracts Clause of the United States Constitution.** (See, *HRPT Properties Trust v. Lingle*, 715 F.Supp.2d 1115 [D. Hawaii 2010]; also 2012 LRB Report, Findings 2, 3 and 4; and Recommendation , pp. 18-19)

- **The bill violates the spirit and intent of the USPAP Ethics rule relating to confidentiality.**
- **HB 1830 should also be referred to the House Committees on the Judiciary (JUD) and Finance (FIN).** This bill should be reviewed by the House JUD and FIN, due to the legal issues regarding alteration of existing lease contracts, and the impact on the State lease programs administered by the Department of Land and Natural Resources and other state departments and the State budget.

HB 1830. Many existing leases in Hawaii provide for confidentiality of the terms relating to the lease and lease rents. 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 HB 1830**, based upon the following:

- **There is no factual justification for HB 1830.** The bill includes numerous undocumented assertions and factual inaccuracies which are inconsistent with the latest LRB Report (dated 2003), which 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.*”

The 2003 LRB Report did not find any problems with the lease arbitration and appraisal process, and concluded that industrial and commercial lease rents in Hawaii are a result of the supply and demand: “*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, and 2013 LRB Report, Finding #5, p. 19)

- **HB 1830, is premature, the Legislature should fund, and await the completion of the 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.”** In 2012, both the Senate and the House passed SCR 90, SD1 (2012), which requested that the LRB 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.

SCR 90, SD1 (2012), also required LRB to submit a final report of the economic analysis, including any proposed legislation, to the Legislature no later than twenty days prior to the convening of the Regular Session of 2013.

The 2013 LRB Report submitted to the Legislature for this session, stated that it 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 HB 1830, 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.

- **HB 1830, alters and violates the confidentiality clauses of existing lease contracts, and therefore violates the Contracts Clause of the United States Constitution.** 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.

With respect to prior legislation that altered the terms of existing contracts, the U.S. District Court, District of Hawaii (“Court”) recently 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.*” (*See, HRPT Properties Trust v. Lingle*, 715 F.Supp.2d 1115 [D. Hawaii 2010]) While inapplicable to this bill, the Court also held that Act 189 unfairly targeting one lessor, HRPT, and thus also violated the Equal Protection Clause of the U.S. Constitution.

LURF believes that a court would find HB 1830, unconstitutional, based on, among other things, the following:

- ❖ **Violates terms of existing lease contracts.** Under the law, confidentiality provisions in leases, especially relating to lease renegotiations, are important mutually bargained-for terms of lease contracts. HB 1830, would violate such existing contract terms, by requiring publicizing such information. A court would likely rule that HB 1830, 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 HB 1830, 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, HB 1830 totally ignores the recommendations of the LRB relating to SCR 90, SD1 (2012).

Given the total lack of credible factual basis or economic analysis to support HB 1830, and given the Legislature's own SCR 90, SD1 (2012), which urges an economic analysis relating to the exact issue that is the basis of HB 1830, LURF believes that a court would find that there are no facts and economic analysis to justify passage of HB 1830.

- **HB 1830 violates the spirit and intent of the USPAP Ethics rule relating to confidentiality.** Act 227, Session Laws of Hawaii 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.

Major ethical conflicts will arise whenever lease contracts which are subject to an appraisal and arbitration proceedings include confidentiality clauses. While there may be local exceptions to this USPAP Ethics Rule – HB 1830 violates the spirit and intent of the USPAP Ethics Rule. We do not believe that the legislature should claim a local exception, and pass a bill that violates the spirit and intent of the USPAP Ethics Rules relating to confidentiality.

Conclusion. For all of the reasons set forth above, LURF believes that the intent and application of HB 1830, is not factually justified, is premature, violates the confidentiality terms of existing lease contracts, would result in an unconstitutional violation of the Contracts Clause of the U.S. Constitution and should therefore **be held in this Committee.**

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