

CITIZENS FOR FAIR VALUATION

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February 11, 2014

HOUSE OF REPRESENTATIVES
THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2014

COMMITTEE ON CONSUMER PROTECTION & COMMERCE
Rep. Angus L.K. McKelvey, Chair
Rep. Derek S.K. Kawakami, Vice Chair

RE: Testimony in Support of HB 2043 – Relating to Real Estate Appraisals
Hearing: February 12, 2014, 2:10 pm; Room 325
State Capitol, 415 South Beretania Street

Aloha Chair McKelvey, Vice Chair Kawakami 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 2043 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.

Act 227 (Session Laws of Hawaii 2011) requires appraisers in arbitration proceedings to certify compliance with the Uniform Standards of Professional Appraisal Practice (USPAP). Act 227 further requires appraisers to provide relevant data related to the findings of fact and methodologies employed to support their conclusions, within the record of the award.

Since the passage of Act 227, real estate appraisers when acting as arbitrators have circumvented the intent of the legislature, which was to bring data, openness and transparency to a market controlled by few landowners and very few commercial/industrial appraisers. Without the release of the data and analysis that support the arbitration awards, lessees are ill-equipped to make decisions involving hundreds of thousands of dollars.

Recordation of the arbitration awards and rationale documents will allow interested parties access to underlying information required to make informed decisions.

Rebuttal to Opposition Testimony:

The Land Use Research Foundation (LURF), an advocacy group representing many of the State's largest landowners, submitted opposing testimony on HB 1830 and SB 2476 (session 2014), which misleads the reader from the goal of HB 2043, which is to provide consumers the ability to make better, more informed decisions regarding lease arbitrations. LURF states:

- There is no factual justification for [HB 2043] based on a 2003 LRB report which noted there was no need for legislation “altering the existing lease agreements.”
 - **HB 2043 does not change existing lease agreements!** This bill simply requires appraisers to file their arbitrations reports with the Bureau of Conveyances thus allowing public access to data heretofore kept solely in the hands of those who control the land.
- [HB 2043] is “premature” as the legislature should wait for the completion of an unfunded LRB Report (SCR 90 of (2012)).
 - **SCR 90 was intended to study the effects of long-term ground leases on the overall economy of the State of Hawaii. It will not address consumers’ access to market-making data or provide any additional consumer protection.**
- [HB 2043] “... alters and violates the confidentiality clauses of existing lease contracts, and therefore violates the Contracts Clause of the Unites States Constitution.”
 - **HB 2043 does not change existing lease contracts.** In addition, ground leases throughout the State simply do not have confidentiality clauses restricting an appraiser, acting as an arbitrator, from filing the HRS 466K-6 required arbitration documentation with the Bureau of Conveyance.
- “The bill violates the spirit and intent of USPAP Ethics rule relating to confidentiality.”
 - **As proven in testimony on SB 1258 (2013), USPAP clearly shows an exception to the confidentiality rule is made “as authorized by due process of law.”** Indeed, USPAP states under Rule 4:

An appraiser must not disclose confidential information or assignment results prepared for a client to anyone other than:

 - a. the client;
 - b. persons specifically authorized by the client;
 - c. state appraiser regulatory agencies;
 - d. third parties as may be authorized by due process of law;
 - e. a duly authorized professional peer review committee ...
 - **Furthermore, opposition testimony fails to recognize USPAP’s Rule of Jurisdictional Exception which is defined as:**

An assignment condition established by applicable law or regulation which precludes an appraiser from complying with a part of USPAP.
 - **The issue of USPAP’s confidentiality clause was settled last session when the Professional and Vocational Licensing Division of the Department of Commerce and Consumer Affairs reported to the Chair of CPN it was withdrawing its SB 1258 opposition testimony as its reliance on USPAP’s confidentiality rules was not appropriate.**

Suggested Changes:

While HB 2043 will bring information to the public in order to help create a more open and transparent market, I would suggest the language of HB 2043 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 1, 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.

To that end, I respectfully suggest the language of HB 1830 HD1 be incorporated in this bill. The pertinent portions are as follows:

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.

Captive Lessees:

Citizens for Fair Valuation believes informed decisions are better decisions. Most long-term lessees are “captive” to their leases, meaning they are not free to move as they are contractually bound by their leases even if the rent demand is beyond their capability.

Mapunapuna lessees, with 10 or more years left on the lease, are “captive” lessees. In such a closed transaction, lessees are at a distinct disadvantage, leaving extremely expensive arbitration as their only option should they not agree with the lessor’s “take-it-or-leave-it” rent offer.

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 2043 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 2043 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 2043 to continue the work started with Act 227.

Mahalo



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Hearing: February 12, 2014, 2:10 pm; Room 325
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Aloha Chair McKelvey, Vice Chair Kawakami and Members of the Committee,

My name is Phillip J. Silich and I own Bacon Universal Company, Inc., which is located in 918 Ahua Street, Mapunapuna and employs approximately 100 people.

My company, like so many other Leasehold tenants is severely disadvantaged when entering into negotiation to extend our lease as we at present simply have no knowledge as to how our neighbors have been assessed. On the contrary the Lessor now has full knowledge of every Lessee valuation and thus has a grossly unfair competitive advantage. Having prior arbitration data available would greatly help me determine if I should settle or arbitrate.

I strongly support passage of HB 2043 as the recordation of arbitration awards and all of the documents that support the arbitration panel's 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.

Lessors are very familiar with the arbitration process and the appraisers who sit as arbitrators. As a course of business, they are party to numerous arbitrations and have unrestricted access to arbitration data. As a lessee, I am at a disadvantage and the lack of information limits my ability to make an informed decision.

HB 2043 will allow consumers, like me, to obtain arbitration data so we can better understand the market and make informed decisions.

Please pass HB 2043.

Sincerely,

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From: mailinglist@capitol.hawaii.gov
Sent: Monday, February 10, 2014 9:27 PM
To: CPCtestimony
Cc: jwmccully54@gmail.com
Subject: Submitted testimony for HB2043 on Feb 12, 2014 14:10PM

HB2043

Submitted on: 2/10/2014

Testimony for CPC on Feb 12, 2014 14:10PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
James McCully	Individual	Support	No

Comments: Aloha Chair McKelvey I had asked my East Hawaii representatives to introduce a bill on the same issue, it is HB 1830. I appreciate there support on this critical issue. Mahalo for introducing HB2043, I hope that whichever version passes through the House that it will gain comparable support from the Senate. Recordation is a critical improvement that will preserve the gains made in transparency and fairness. A key area for future legislation, or rule making, will be addressing what constitutes "findings of fact" and what represents " the appraisers rationale". Making the Records of the Awards and the Report of the Award a recorded, hence public document, will allow for determination of compliance with HRS466k-6. Mahalo for your support James McCully

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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