

SB 2476

Measure Title: RELATING TO REAL ESTATE APPRAISERS.

Report Title: Real Estate Appraisers; Arbitration Awards; Recordation; Non-confidentiality

Description: Requires real estate appraisers acting as arbitrators to record, or cause to be recorded, the arbitration award rendered; the findings of fact, rationale, and information regarding the evidence, including the data, methodologies, and analysis that provided the basis for the award; and any supplementary, dissenting, or explanatory opinions with the bureau of conveyances within ninety days of the determination of the award and its notification to the parties. Specifies that 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.

Companion:

Package: None

Current Referral: CPN

Introducer(s): BAKER

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

February 3, 2014

THE SENATE
THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2014

COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

Senator Rosalyn H. Baker, Chair
Senator Brian T. Taniguchi, Vice Chair

RE: Testimony in Support of SB 2476 – Relating to Real Estate Appraisals
Hearing: February 5, 2014, 9:00 am; Room 229
State Capitol, 415 South Beretania Street

Aloha Chair Baker, Vice Chair Taniguchi 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 Senate Bill 2476 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, which misleads the reader from the goal of SB 2476, which is to provide consumers the ability to make better, more informed decisions regarding lease arbitrations. LURF states:

- There is no factual justification for [SB 2476] based on a 2003 LRB report which noted there was no need for legislation “altering the existing lease agreements.”
 - **SB 2476 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.**
- [SB 2476] 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.**
- [SB 2476] “... alters and violates the confidentiality clauses of existing lease contracts, and therefore violates the Contracts Clause of the Unites States Constitution.”
 - **SB 2476 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 SB 2476 will bring information to the public in order to help create a more open and transparent market, I would suggest the language of SB 2476 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.

Citizens for Fair Valuation

Testimony in Support of SB 2476 – Relating to Real Estate Appraisals

Hearing: February 5, 2014, 9:00 am; Room 229

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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 SB 2476 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 SB 2476 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 SB 2476 to continue the work started with Act 227.

Mahalo



Michael Steiner

Executive Director, Citizens for Fair Valuation

Telephone: (808) 221-5955

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February 4, 2014

Senate Committee Commerce and Consumer Affairs

Chair Rosalyn Baker

Vice-Chair Brian Taniguchi

Re: SB2476

Aloha Chair Baker,

The passing of Act 227 (2011) was critical in establishing some equity to lessees who have long been at a disadvantage in the setting of ground lease rents by appraisers acting as arbitrators.

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 in fees some appraiser/arbitrators are requiring confidentiality clauses be added to the parties Submission Agreements (which govern the arbitration). This clearly subverts the intent of Act 227.

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. Lessor's possess a high level of sophistication when participating in the arbitration process, which creates a gross imbalance favoring landowners throughout, rent negotiations and/or arbitration proceedings.

This is compounded by a history of case law in Hawaii that leaves all legal interpretation of the lease contract in the hands of the appraisers/arbitrators, not trained lawyers. These leases, essentially standard form contracts, were written by, and in favor of, the Lessor. Judicial

relief, as provided for in HRS658a-5, has not been available to the lessee's due to this case law, established in the 1960's. Further, in recent court actions Lessors have aggressively sought to restrict lessees from utilizing provisions of HRS658A-10 that heretofore were not objected to (Re: Consolidation), one of the few means by which lessees could mitigate the excessive costs of arbitration.

Whereas for Lessees/consumers, the arbitration process presents a serious financial strain and a dauntingly complex, legalistic, maze requiring many months, even years, to navigate. The current reality is that absent public access to open and transparent arbitration data land owners will continue to use the high cost and complexity of arbitration, in combination with their cartel-like dominance, as a lever to their exclusive advantage. Unlike the US mainland, Lessees/consumers have never been able to 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 SB2476

Mahalo,

James McCully
McCully Works
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February 4, 2014

THE SENATE
State Capitol
COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

RE: Testimony in Support of SB 2476 – Relating to Real Estate Appraisals
Hearing: February 5, 2014, 9:00 am; Room 229

Aloha Chair Baker, Vice Chair Taniguchi and Members of the Committee,

My name is Phillip J. Silich and I own Bacon Universal Co., Inc., which is located in 918 Ahua Street, Mapunapuna and employs roughly 90 people.

Since my acquisition of Bacon Universal in 1994 I have always found lease renegotiations extremely difficult due to lack of prior arbitration data.

I strongly support passage of SB 2476 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.

SB 2476 will allow consumers, like me, to obtain arbitration data so we can better understand the market and all be on a level playing field on which we can then make informed decisions.

Please pass SB 2476.

Sincerely,

A handwritten signature in black ink, appearing to read 'Phillip J. Silich', written over a white background.

Phillip J. Silich
President & CEO
Bacon-Universal Company, Inc.
918 Ahua Street
Honolulu, HI 96819
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January 30, 2014

THE SENATE

State Capitol

COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

RE: Testimony in Support of SB 2476 – Relating to Real Estate Appraisals

Hearing: February 5, 2014, 9:00 am; Room 229

Aloha Chair Baker, Vice Chair Taniguchi and Members of the Committee,

My name is Clyde Kojima and I own Mutual Plumbing Supply, a small family business in Mapunapuna which employs 15 employees.

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 SB 2476 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.

SB 2476 will allow consumers, like me, to obtain arbitration data so we can better understand the market and make informed decisions.

Please pass SB 2476.

Sincerely,

Clyde T. Kojima
Mutual Plumbing Supply Co., Inc.
2812 Awaawaloa Street
Honolulu, HI 96819
Email: mutualpls@hawaiiantel.net
839-9076 (phone)

February 4, 2014

THE SENATE
State Capitol
COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

RE: Testimony in Support of SB 2476 – Relating to Real Estate Appraisals
Hearing: February 5, 2014, 9:00 am; Room 229

Aloha Chair Baker, Vice Chair Taniguchi 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 SB 2476 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.

SB 2476 will allow consumers, like me, to obtain arbitration data so we can better understand the market and make informed decisions.

Please pass SB 2476.

Sincerely,

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

Testimony in Support of SB 2476-Relating to Real Estate Appraisals

Aloha Chair Baker, Vice Chair Taniguchi and Members of the Committee on Commerce and Consumer Protection: My name is Oswald K. Stender and I am a licensed real estate broker and a real estate business consultant. I give this testimony in strong support for the passage of SB2476 which requires the recordation of arbitration awards and all documents in connection with the arbitration panel's decision to provide transparency to the process, the supporting information and data, so that consumers will have access to this information. In representing clients (lessees), I have found that decisions in arbitration are "confidential" but shared among Lessors. The Lessee's on the other hand, while affected by these decisions, are denied access to this information. In addition it appears that Lessors have "cornered" the market on appraisers, arbitrators and attorneys and therefore the Lessees have limited access or affordability to the process. This bill will bring transparency to the process and provide access to the information affecting the Lessees business dealings with the Lessors. Mahalo for your support of SB 2476. O.K. Stender

JAMES W. Y. WONG

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February 4, 2014

Honorable Senator Rosalyn H. Baker, Chair
Honorable Senator Brian T. Taniguchi, Vice Chair
Members of the Senate Committee on Commerce and
Consumer Protection

RE: TESTIMONY IN SUPPORT OF SB2476 – RELATING TO REAL ESTATE
APPRAISERS. HEARING SCHEDULED FOR WEDNESDAY, FEBRUARY 5,
2014, AT 9:00 A.M., CONFERENCE ROOM 229

Dear Honorable Chair Rosalyn Baker, Vice Chair Brian Taniguchi, and
members of the Senate Committee on Commerce and Consumer Protection:

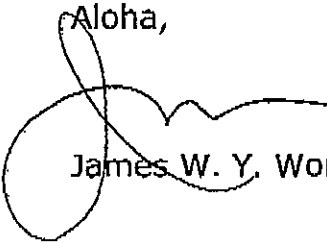
My name is James W. Y. Wong and I strongly support SB2476. If this
measure is passed, it will require the recordation of arbitration awards and
all of the documents that support the arbitration panel's decision will help
open the mystery of how rents are set and provide information to consumers
so we can all make better, more informed decisions.

Lessors are very familiar with the arbitration process and practically all
Lessees in Hawaii have a clause "if rental or fair market value cannot be
agreed by both Lessor and Lessee to resolve the issue, an arbitration clause
is enforced". Since all appraisers have access to these arbitrations, they
have the data more accessible than us as Lessees which puts the Lessees at
a disadvantage.

SB2476 will allow consumers, like me, to obtain arbitration data so we can
better understand the market and make informed decisions.

Please pass SB 2476.

Aloha,


James W. Y. Wong