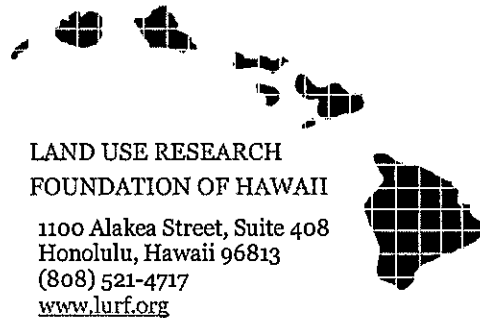


LATE



LAND USE RESEARCH
FOUNDATION OF HAWAII

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February 3, 2014

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

Opposition to SB 2476, Relating to Real Estate Appraisers. (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.)

Wednesday, February 5, 2014 at 9:00 a.m. in Conference Room 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 express its **strong OPPOSITION to SB 2476**, based on, among other things, the following:

- There is no factual justification for SB 2476 (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 SB 2476 includes numerous factual inaccuracies. (See 2012 LRB Report, Finding #5, p. 19).

- **SB 2476, 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)
- **SB 2476, 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 Uniform Standards of Professional Appraisal Practice (“USPAP”) Ethics rule relating to confidentiality.**
- **SB 2476 should also be referred to the Senate Committee on Judiciary and Labor (“JDL”) and Ways and Means (“WAM”).** This bill should be reviewed by the Senate JDL, due to the legal issues regarding alteration of existing lease contracts. This bill should also be reviewed by WAM, because the proponents claim that this bill will result in lower lease rents, so WAM should determine the financial impact on the State lease programs administered by the Department of Land and Natural Resources (“DLNR”) and other state departments and the resulting impact on the State budget.

SB 2476. 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, 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.

LURF **strongly opposes SB 2476**, based upon the following:

- **There is no factual justification for SB 2476.** 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)

- **SB 2476, 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 this SB 2476, 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.

- **SB 2476, 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 targeted one lessor, HRPT; and thus also violated the Equal Protection Clause of the U.S. Constitution.

LURF believes that a court would find SB 2476, 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 SB 2476, 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 2476, in fact, just the opposite.

Furthermore, as noted above, in 2012, 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 2476 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 SB 2476, 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.

- **SB 2476 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 USPAP rules. 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 – SB 2476 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 SB 2476, 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 SB 2476.**

Darryl P. Wong
1836 Punahou Street
Honolulu, Hawaii 96822
(808) 381-2711

LATE

February 4, 2014

VIA FACSIMILE
586-6071

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:

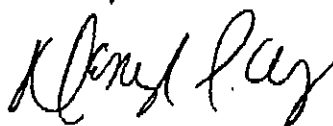
My name is Darryl Wong and I support SB2476. Having this measure
passed will require the recordation of arbitration awards and all of the
documents that support the arbitration panel's decision. This will assist in
uncovering how rents are set and provide information to consumers so they
all can make more informed decisions.

Today, most commercial leases contain the provision "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, that puts the Lessee at a disadvantage since more data is
accessible currently to appraisers, owners and arbitrators.

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

Please pass SB 2476.

Aloha,



Darryl P. Wong