

SB2966

Measure Title: RELATING TO PUBLIC LANDS.
Report Title: Public Lands; Reopening Lease; Mediation; Arbitration
Description: Requires mediation in disputes regarding the fair market value or fair market rental of public lands. Provides for binding arbitration in the event of unsuccessful mediation.
Companion: [HB1823](#)
Package: None
Current Referral: WTL/JDL, WAM
Introducer(s): KAHELE, Solomon

Sort by Date		Status Text
1/23/2014	S	Introduced.
1/23/2014	S	Passed First Reading.
1/23/2014	S	Referred to WTL/JDL, WAM.
2/4/2014	S	The committee(s) on WTL/JDL added the measure to the public hearing scheduled on 02-07-14 1:45PM in conference room 225.

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



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

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

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

**Before the Senate Committees on
WATER AND LAND
and
JUDICIARY AND LABOR**

**Friday, February 7, 2014
1:45P.M.
State Capitol, Conference Room 225**

**In consideration of
SENATE BILL 2966
RELATING TO PUBLIC LANDS**

Senate Bill 2966 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 its 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

ESTHER KIA'AINA
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

McCully Works

40 Kamehameha Ave.

Hilo, Hi. 96720

February 5, 2014

Testimony in SUPPORT of SB2966

Joint Hearing

Senate Committee Water and Land

Chair Malama Solomon Vice-Chair Brickwood Galuteria

Senate Committee Judiciary and Labor

Chair Clayton Hee, Vice-Chair Maile Shimabukuro

Aloha Chair Solomon and Chair Hee,

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 Kanoelehua Industrial Area in Hilo. That business is "McCully Works". I have previously made comments in support of the companion bill to SB2966, which is HB1823. Those comments follow.

With all due respect, I would first like to address some objections that Chair William Aila made to the House Committee on Water & Land when hearing HB1823 on Jan 27, 2014

Staff expresses concerns that the Mediators may not be qualified in matters of real estate. The bill requires the parties to mutually agree on a qualified mediator, of which the state has many. The most important qualifications of a mediator are the ability to help the parties resolve their dispute prior to the additional expenses of time and money that arbitrations necessarily entail. This objection does not seem serious.

Staff goes on to express concerns with how the "non-binding" Mediation may be conducted, with the stated concern that delays may result. In the last few years I have been involved in two protracted and expensive ground lease rent resets of my state properties. I can't imagine how using a mediator at the very beginning of the process could not have been more efficient. If this committee has concerns about mediation leading to inordinate delays then this bill could be amended to provide a statutory control for this portion of the rent reset process or Hawaii Administrative Rules could be adopted to address this issue.

Staff objections to experts other than appraisers serving as mediators or arbitrators is misguided. Appraisers who are qualified to serve as arbitrators currently are drawn from a very small pool of professionals who are not necessarily trained in contract law, lease law or dispute resolution, all of which matters are equally, or in fact, may be more

important in resolving the dispute. Under this legislation the qualified appraisers would continue to provide their expert testimony and the mediator or single arbitrator will have had the training or expertise to resolve the differences. An obvious analogy is the judicial system, in which judges resolve differences between the parties relying on expert testimony. You don't have to be a doctor to resolve a malpractice lawsuit, nor do you have to be an expert in the field to resolve an intellectual property suit. In fact, lease contracts in dispute without arbitration clauses are invariably decided by non-appraisers.

DLNR staff speculation that this legislation "may produce settlements where the State would receive less than fair market rents....resulting in decreased lease rentals..." seems to suggest that the appraisers would not be providing USPAP compliant appraisals to the mediator or the arbitrator in the future, thereby potentially harming the state should their errors lead to undervaluing the property. The only other way to interpret this objection is that the existing process has led to greater rents than are likely to be decided by a dispute resolution process that is not decided by appraisers.

The footnote appended to Chair Aila's testimony raises the issue of DLNR's obligation to support a percentage of ceded land revenues, and that this legislation, a "...continued attempt to lower lease rent revenues..." is a threat to their ability. This suggestion impugns the current process since it suggests, as with the above paragraph, that if there were a different way to manage the arbitration process the Land Division would lose revenues. To the contrary, this legislation specifically protects the states need to gain "fair market rents" and continues to require qualified appraisers to provide USPAP compliant appraisals to be the basis for the decision. It simply provides for two ways to lessen the timing and cost of the process.

1. Mediation
2. A single arbitrator, drawn from a larger pool of qualified individuals.

Following is the testimony I submitted in support of the House companion bill:

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.

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»

McCully Works
40 Kamehameha Ave.
Hilo, Hi. 96720
808-933-7000

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 5, 2014

**THE SENATE
THE TWENTY-SEVENTH LEGISLATURE
REGULAR SESSION OF 2014**

**COMMITTEE ON WATER AND LAND
Senator Malama Solomon, Chair
Senator Brickwood Galuteria, Vice Chair**

**COMMITTEE ON JUDICIARY AND LABOR
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair**

**RE: Testimony in Support of SB 2966 – Public Lands
Hearing: February 7, 2014, 1:45 pm; Room 225
State Capitol, 415 South Beretania Street**

Aloha Chairs Solomon and Hee, Vice Chairs Galuteria and Shimabukuro and Members of the Joint Committees,

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 2966 which would require mediation before arbitration in determining the sale price or lease rental of State lands.

Over the past half dozen years, the arbitration process used in deciding land and/or lease rent valuation has become more and more cumbersome. Arbitrations, which were originally put in place to provide a more cost effective and efficient option of dispute resolution, have taken on a life of their own often costing in excess of \$100,000 per side and taking months, if not years, to complete. Appraisers, acting as arbitrators, do not have the legal training required to fully understand both the legal and valuation issues at hand.

In business, lessors and lessees enter into a relationship in which each side brings value and succeeds based upon a common goal. A lessor is paid for the use of property and the lessee works to derive income from the property which goes to pay rent, employees and provide a profit for themselves. In this relationship, both parties succeed when they can work together.

Unfortunately, when rent resets cannot be settled by negotiation, the pursuing arbitration process creates a tension in the lessor/lessee relationship. The parties become adversaries hiring attorneys and experts to prove their position before an appraiser, who is acting as an arbitrator. Is there a burden of proof? How right do you have to be to prevail? 50.1%? What happens to the business relationship during and after a contentious arbitration?

On the other hand, mediators are trained to find common ground that builds upon and often strengthens the business relationship. It changes the mindset of the parties from winning at all costs 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 core relationship between lessor and lessees.

SB 2966 provides the foundation for mediation and mediation provides a structure upon which the business relationship can be preserved.

CFV believes in open access to the data that would allow all parties involved to make better, more informed decisions. Lessors, especially the State and other large commercial entities, are quite familiar with the process and the appraisers. They have unrestricted access to the data as they control large tracts of land. Individual lessees, as consumers, would be better served if they were able to understand prior arbitrations results through proper disclosure.

Please make a difference and pass SB 2966.

Mahalo

Mahalo



Michael Steiner

Executive Director, Citizens for Fair Valuation

Telephone: (808) 221-5955

Email: MSteiner@SteinerAssoc.com

From: mailinglist@capitol.hawaii.gov
To: [WTLTestimony](#)
Cc: office@hilobayprinting.com
Subject: Submitted testimony for SB2966 on Feb 7, 2014 13:45PM
Date: Thursday, February 06, 2014 10:01:08 AM

SB2966

Submitted on: 2/6/2014

Testimony for WTL/JDL on Feb 7, 2014 13:45PM in Conference Room 225

Submitted By	Organization	Testifier Position	Present at Hearing
Don O'Reilly	Hilo Bay Printing Co., Ltd.	Support	No

Comments: Currently, businesses situated on State lands are unable to negotiate rents without going through a protracted, costly ordeal that few of us can afford. Please support this measure allowing rent negotiations to be a less burdensome process, and enable small businesses to concentrate on business.

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.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

From: mailinglist@capitol.hawaii.gov
To: [WTLTestimony](#)
Cc: rhcabral@rhomac.com
Subject: *Submitted testimony for SB2876 on Feb 7, 2014 13:45PM*
Date: Thursday, February 06, 2014 6:39:48 AM

SB2876

Submitted on: 2/6/2014

Testimony for WTL/JDL on Feb 7, 2014 13:45PM in Conference Room 225

Submitted By	Organization	Testifier Position	Present at Hearing
Randy Cabral	Individual	Support	No

Comments:

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.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

From: mailinglist@capitol.hawaii.gov
To: [WTLTestimony](#)
Cc: mccalljeffreyw@gmail.com
Subject: *Submitted testimony for SB2876 on Feb 7, 2014 13:45PM*
Date: Thursday, February 06, 2014 5:35:43 AM

SB2876

Submitted on: 2/6/2014

Testimony for WTL/JDL on Feb 7, 2014 13:45PM in Conference Room 225

Submitted By	Organization	Testifier Position	Present at Hearing
Jeffrey McCall	Individual	Support	No

Comments:

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.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

From: mailinglist@capitol.hawaii.gov
To: [WTLTestimony](#)
Cc: gottlieb@hawaii.rr.com
Subject: *Submitted testimony for SB2876 on Feb 7, 2014 13:45PM*
Date: Thursday, February 06, 2014 5:11:18 AM

SB2876

Submitted on: 2/6/2014

Testimony for WTL/JDL on Feb 7, 2014 13:45PM in Conference Room 225

Submitted By	Organization	Testifier Position	Present at Hearing
Alan Gottlieb	Hawaii Cattlemen's Council	Support	No

Comments:

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.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

From: mailinglist@capitol.hawaii.gov
To: [WTLTestimony](#)
Cc: toomey@mkir.com
Subject: Submitted testimony for SB2966 on Feb 7, 2014 13:45PM
Date: Wednesday, February 05, 2014 10:12:20 AM

SB2966

Submitted on: 2/5/2014

Testimony for WTL/JDL on Feb 7, 2014 13:45PM in Conference Room 225

Submitted By	Organization	Testifier Position	Present at Hearing
Douglas Toomey	Mauna Kea Infrared, LLC	Support	No

Comments: The present method of appraisal for leases and the determination of lease rents is unclear and the process is not transparent. This bill would address those issues and provide a reasonable method for settling disputes. We strongly support this bill.

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.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

From: mailinglist@capitol.hawaii.gov
To: [WTLTestimony](#)
Cc: apohi21@gmail.com
Subject: *Submitted testimony for SB2966 on Feb 7, 2014 13:45PM*
Date: Tuesday, February 04, 2014 1:03:10 PM

SB2966

Submitted on: 2/4/2014

Testimony for WTL/JDL on Feb 7, 2014 13:45PM in Conference Room 225

Submitted By	Organization	Testifier Position	Present at Hearing
Bill Brown	Individual	Oppose	No

Comments:

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.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov