

**SB**

**761**

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [WTLTestimony](#)  
**Cc:** [amel.s.chun@hawaii.gov](mailto:amel.s.chun@hawaii.gov)  
**Subject:** Submitted testimony for SB761 on Feb 12, 2015 08:45AM  
**Date:** Tuesday, February 10, 2015 10:36:58 AM  
**Attachments:** [SB0761\\_LNR\\_02-12-15\\_WTL-JDL.pdf](#)

---

**SB761**

Submitted on: 2/10/2015

Testimony for WTL/JDL on Feb 12, 2015 08:45AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Carty S. Chang	DLNR	Comments Only	Yes

Comments: DLNR acknowledges the intent of this bill, but proposes a revised version of the bill to better effectuate the intent.

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](mailto:webmaster@capitol.hawaii.gov)

DAVID Y. IGE  
GOVERNOR OF HAWAII



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

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

**Testimony of  
CARTY S. CHANG  
Interim Chairperson**

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

**Thursday, February 12, 2015  
8:45 AM  
State Capitol, Conference Room 16**

**In consideration of  
SENATE BILL 761  
RELATING TO PUBLIC LANDS**

Senate Bill 761 proposes an amendment to the appraisal statute governing rent determinations for public lands to require the State and its lessees to engage in "binding mediation" or binding arbitration to resolve rent disputes. **The Department of Land and Natural Resources (Department) acknowledges the intent of this bill, but proposes a revised version of the bill to better effectuate the intent.**

As the bill mentions, the Legislature passed legislation which was enacted into law as Act 168 last year, which amended the appraisal statute, Section 171-17, Hawaii Revised Statutes, which is used by the Department and other state agencies. Prior to amendment, the statute provided that all rent/valuation disputes were to be resolved by a three-member arbitration panel. Act 168 mandated mediation prior to arbitration in the event of a rent/valuation dispute, and abolished the three-member panel in favor of a single arbitrator. The Department opposed the 2014 legislation because of the potential for mediation and arbitration by persons other than licensed appraisers to undercut fair market rents that should be paid for commercial use of public lands, and because of other concerns explained in our prior testimony.

The Department understands from a representative of the Hawaii Chapter of the Appraisal Institute (HCAI) that certain state agencies other than the Department's Land Division were confused about Act 168 and the procedure to be followed in a particular situation. The act provides for different processes for different types of rent or valuation disputes (e.g., a lease rent reopening is not handled the same way as a new disposition, such as an easement). HCAI explained it was also hearing

**CARTY S. CHANG**  
INTERIM CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

**DANIEL S. QUINN**  
INTERIM FIRST DEPUTY

**W. ROY HARDY**  
ACTING 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

complaints about how costly the "mandatory mediation" was, and that it oftentimes proved to be a futile attempt to resolve rental values. Therefore, HCAI wanted to amend the appraisal statute to provide the parties (landlord and tenant) the **option** of mediating, but not mandating it. HCAI was behind the introduction Senate Bill 761.

The Department is suggesting Senate Bill 761 be amended to restore the procedure to a three-member arbitration panel in lease reopenings. It is not in the parties' interest to have a single arbitrator, who could be a person without real property valuation experience, resolve rent/valuation disputes. The Department has drafted a proposed revised version of Senate Bill 761 to capture what HCAI was trying to do in its original attempt to draft a bill, and addressing the single arbitrator issue the Department had. The Department's proposed revised version of the bill is found on the next page.

---

---

# A BILL FOR AN ACT

RELATING TO PUBLIC LANDS.

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

SECTION 1. Act 168, Session Laws of Hawaii 2014, amended section 171-17, Hawaii Revised Statutes, to provide a process for resolving disputes regarding the fair market value or fair rental value of public land in sale, lease, or repurchase transactions involving the board of land and natural resources through mediation while preserving the existing remedy of binding arbitration. Subsections (b) through (d) of section 171-17, Hawaii Revised Statutes, now require the board of land and natural resources and a disputing party to engage in nonbinding mediation prior to binding arbitration. The legislature finds that mandating nonbinding mediation prior to binding arbitration has the effect of making the dispute resolution process more costly and time consuming when the parties are not likely to settle, or may produce settlements where the state would receive less than fair market rents from the use of public trust lands.

The purpose of this Act is to:

- (1) Allow the board of land and natural resources and a disputing party to choose to resolve a dispute regarding the fair market value or fair market rental of public lands through nonbinding mediation;
- (2) Require, if either party in a dispute does not agree to mediate or mediation is attempted but is unsuccessful, that the dispute be determined by binding arbitration; and
- (3) Make the arbitration process for rent reopenings consistent with the arbitration process for determining the sale price or lease rental of lands disposed of by drawing or negotiation and with the arbitration process for the repurchase of land by the board.

SECTION 2. Section 171-17, Hawaii Revised Statutes, is amended by amending subsections (b) through (e) to read as follows:

"(b) The sale price or lease rental of lands to be disposed of by drawing or by negotiation shall be no less than the value determined by:

- (1) An employee of the board qualified to appraise lands; or
- (2) A disinterested appraiser or appraisers whose services shall be contracted for by the board, and the appraisal,

and any further appraisal with the approval of the board, shall be at the cost of the purchaser; provided that the sale price or lease rental shall be determined by disinterested appraisal whenever prudent management so dictates; provided further that if the purchaser does not agree upon the sale price or lease rental, the purchaser may appoint an appraiser who shall conduct an appraisal on behalf of the purchaser. If, after the purchaser's appraisal, the board and the purchaser do not agree on the sale price or lease rental, the parties ~~[shall]~~ may agree to make a good faith effort to resolve the dispute through nonbinding mediation by a single mediator, appointed by mutual agreement of the parties. The cost of mediation shall be borne equally by the parties. If mediation is not agreed upon by the parties or mediation is attempted but does not resolve the dispute, the purchaser's appraiser together with the board's appraiser shall appoint a third appraiser, and the sale price or lease rental shall be determined by arbitration as provided for in chapter 658A, which shall be final and binding. The purchaser shall pay for all appraisal costs, except that the cost of the third

appraiser shall be borne equally by the purchaser and the board.

(c) In the repurchase of any land by the board, the board shall have the option to repurchase the land for the original sale price or the fair market value at the time of repurchase, whichever is the lower. Any improvements affixed to the realty shall be purchased at their fair market value. At the time of the repurchase, the fair market value of the land, and the improvements, if any, shall be determined by a qualified appraiser whose services shall be contracted for by the board; provided that if the owner does not agree upon the value, the owner may appoint the owner's own appraiser who shall conduct an appraisal on behalf of the owner. If, after the owner's appraisal, the board and the owner do not agree on the sale price, the parties [~~shall~~] may make a good faith effort to resolve the dispute through nonbinding mediation by a single mediator, appointed by mutual agreement of the parties. The cost of mediation shall be borne equally by the parties. If mediation is not agreed upon by the parties or if mediation is attempted but does not resolve the dispute, the owner's appraiser together with the board's appraiser shall appoint a third appraiser, and the value shall be determined by arbitration as provided in chapter 658A, which shall be final and binding. The owner shall pay for all appraisal costs, except that



the cost of the third appraiser shall be borne equally by the owner and the board.

(d) If a reopening of the rental to be paid on a lease occurs, the rental for any ensuing period shall be the fair market rental at the time of reopening. At least six months prior to the time of reopening, the fair market rental shall be determined by:

- (1) An employee of the department qualified to appraise lands; or
- (2) A disinterested appraiser whose services shall be contracted for by the board; and the lessee shall be promptly notified of the determination and provided with the [complete] appraisal prepared by the board or the board's appraiser; provided that if the lessee does not agree upon the fair market rental, the lessee may appoint the lessee's own appraiser and the lessee shall provide the board with the [complete] appraisal prepared by the lessee's appraiser. Each party shall pay for its own appraiser. If the board's and the lessee's appraisers do not agree upon the lease rental, the lessee and the board ~~[shall in good faith attempt to resolve the dispute by nonbinding mediation by a single mediator mutually agreed upon by the parties. If the dispute is not resolved by the mediation, the fair~~

~~market rental shall be determined by arbitration as provided in chapter 658A, which shall be final and binding. Either the board or the lessee may initiate arbitration by a written demand to the other party. The arbitration shall be conducted by a single arbitrator, who shall be an attorney licensed in the State, a person with experience in contracts and real estate valuation, or another qualified person, who shall be mutually agreed upon by the parties. If an arbitrator is not selected within fifteen days of the demand for arbitration, appointment of an arbitrator may be requested by either party by motion made to the circuit court in the circuit in which the land is located.]~~ may agree to make a good faith effort to resolve the dispute through nonbinding mediation by a single mediator, appointed by mutual agreement of the parties. The cost of mediation shall be borne equally by the parties. If mediation is not agreed upon by the parties or mediation is attempted but does not resolve the dispute, the lessee's appraiser together with the board's appraiser shall appoint a third appraiser, and the lease rental shall be determined by arbitration as provided for in chapter 658A, which shall be final and binding. The

cost of [~~mediation or~~] arbitration shall be borne equally by the lessee and the board. Any language in present leases to the contrary notwithstanding, the provisions of this subsection, when possible and notwithstanding the six-month notice required, shall apply to leases with original lease rental reopening dates effective before and after July 1, 1996.

- (e) [~~Complete appraisal~~] Appraisal reports, including all comparables relied upon in the appraisal reports, shall be available for study by the public. All [~~complete~~] appraisal reports shall be [~~provided to the opposing party~~] exchanged between parties prior to the commencement of mediation or arbitration, [~~if~~] as applicable, of the valuation dispute."

SECTION 3. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect upon its approval.

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [WTLTestimony](#)  
**Cc:** [micah@hfbf.org](mailto:micah@hfbf.org)  
**Subject:** Submitted testimony for SB761 on Feb 12, 2015 08:45AM  
**Date:** Wednesday, February 11, 2015 1:22:53 PM  
**Attachments:** [SB 761 HFB state land leases WTL JDL 02\\_12\\_15 v.2.pdf](#)

---

**SB761**

Submitted on: 2/11/2015

Testimony for WTL/JDL on Feb 12, 2015 08:45AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Chris Manfredi	Hawaii Farm Bureau	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](mailto:webmaster@capitol.hawaii.gov)



P.O. Box 253, Kunia, Hawai'i 96759  
Phone: (808) 848-2074; Fax: (808) 848-1921  
e-mail [info@hfbf.org](mailto:info@hfbf.org); [www.hfbf.org](http://www.hfbf.org)

February 12, 2015

HEARING BEFORE THE  
SENATE COMMITTEE ON WATER AND LAND  
SENATE COMMITTEE ON JUDICIARY AND LABOR

TESTIMONY ON SB 761  
RELATING TO PUBLIC LANDS

Room 16  
8:45 AM

Aloha Chairs Thielen, Chair Keith-Agaran, Vice Chairs Galuteria, Vice Chair Shimabukuro, and Members of the Committees:

I am Christopher Manfredi, President of the Hawaii Farm Bureau (HFB). Organized since 1948, the HFB is comprised of 1,932 farm family members statewide, and serves as Hawaii's voice of agriculture to protect, advocate and advance the social, economic and educational interests of our diverse agricultural community.

**HFB strongly opposes Senate Bill 761**, which requires the board of land and natural resources and an opposing party to mutually agree to resolve disputes regarding the fair market value or fair market rental of public lands through binding mediation or binding arbitration.

Unlike the situation in most other states, many of Hawaii's farmers depend inordinately on leased land for their livelihoods. Tenants must be assured of a State process that will result in a fair market rent determination. With the elimination of language enacted just last year in Act 168, this bill will roll back farmers' efforts over the past several years to achieve that goal.

We respectfully reference Article XI of Hawaii's Constitution, "The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands." DLNR's current lease policies are inconsistent with these mandates but may be significantly worse if this bill is allowed to pass.

Farmers and ranchers have found that in some lease "negotiations" with DLNR, "fair market value" is *not* fair when applied to agricultural land. In fact, the law that this bill would eliminate was an attempt to improve the DLNR policies that had a devastating effect on farmers who wanted to continue to lease State land. That process was incompatible with the State's goal of promoting and encouraging local food production.

DLNR tenants are at a clear disadvantage when negotiating leases. At the onset of the rent determination process they are responsible for the costs of a particular appraiser selected by DLNR. They lose again by having to hire a second appraiser and then also pay half the cost of a subsequent mediator and/or arbitrator. Fairness in the mediation/arbitration process is frustrated when there is a clearly over-calculated appraisal, since the goal of arbitration is to find the middle ground and, in rental mediation issues, this is typically targeted to a mid-point compromise between the two parties' individual appraisals. Therefore, for example, if the DLNR selected appraisal is 10x over fair market value, the binding arbitration could be expected to be 5x over fair market value, with no recourse for the lessee except to walk away. The lessee also stands to pay for multiple appraisal charges that could each exceed several years fair market rent, and then pay for a final arbitrated lease rate that can be 10-1000x above fair market value.

We believe that the use of mediation is a more reasonable, much less expensive, and appropriate approach to resolving a rental dispute. We are confused by the new term, "binding mediation", used in this bill.....how is that different from binding arbitration? If the parties to mediation agree, then the agreement will be binding by mutual desire. If the parties don't agree, can the mediator force a compromise? And if so, how is mediation different from arbitration?

SB 761 amends the statute to read; "mutually agree: to resolve the dispute through binding mediation by a single mediator, appointed by mutual agreement of the parties; or that the lease rental shall be determined as provided in the lease; *provided that if the lease requires determination of the lease rental by arbitration, the fair market rental shall be determined by arbitration as provided in chapter 658A, which shall be final and binding.* The cost of arbitration shall be borne equally by the lessee and the board."

HFB wonders if DLNR could avoid having to go through mediation simply by inserting boilerplate language into all its leases stipulating that all disputes must be decided by arbitration.

Last session Act 168 was passed by the Hawaii Sate Legislature and the Governor to help keep farmers and ranchers producing food and other agricultural products on State leased lands. Farmers and their families who have worked hard, farmed or ranched successfully, and paid their rent faithfully for many years should not lose their farms and their livelihoods simply because their leases expire and are reopened.

**Please hold SB761**

Thank you for the opportunity to testify *in opposition* to this bill.

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [WTLTestimony](#)  
**Cc:** [adam.bauer@hpmhawaii.com](mailto:adam.bauer@hpmhawaii.com)  
**Subject:** Submitted testimony for SB761 on Feb 12, 2015 08:45AM  
**Date:** Tuesday, February 10, 2015 1:45:35 PM

---

**SB761**

Submitted on: 2/10/2015

Testimony for WTL/JDL on Feb 12, 2015 08:45AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Adam Bauer	HPM Building Supply	Oppose	No

Comments: We feel strongly that this measure will in fact increase the time, energy and money spent in resolving lease disputes. A measure resolving this was already passed in October 2014 and we see no reason to effectively go back to the old method of dispute resolution. HPM Building Supply is in strong opposition to this.

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](mailto:webmaster@capitol.hawaii.gov)

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [WTLTestimony](#)  
**Cc:** [gottlieb@hawaii.rr.com](mailto:gottlieb@hawaii.rr.com)  
**Subject:** Submitted testimony for SB761 on Feb 12, 2015 08:45AM  
**Date:** Wednesday, February 11, 2015 8:24:35 AM

---

**SB761**

Submitted on: 2/11/2015

Testimony for WTL/JDL on Feb 12, 2015 08:45AM in Conference Room 016

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

Comments: The Hawaii Cattlemen's Council echoes the testimony of the Hawaii Farm Bureau Federation in strong opposition to this bill. This bill will set back all goals for improving food security by farmers and ranchers in Hawaii on lands leased from the State.

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](mailto:webmaster@capitol.hawaii.gov)



**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [WTLTestimony](#)  
**Cc:** [garthyama@gmail.com](mailto:garthyama@gmail.com)  
**Subject:** Submitted testimony for SB761 on Feb 12, 2015 08:45AM  
**Date:** Tuesday, February 10, 2015 1:17:14 PM

---

**SB761**

Submitted on: 2/10/2015

Testimony for WTL/JDL on Feb 12, 2015 08:45AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Garth Yamanaka	Individual	Oppose	No

Comments: Act 168, the Mediation Bill, which was worked on last year as HB1823 was well supported as the process of Binding Arbitration is very costly to all parties involved and creates a process that is unfair to the lessee's. SB761 would allow the process to revert back to the language of the lease or Binding Arbitration of 3 appraisers and 3 arbitrators. The mediation bill was not accepted by DLNR until October of 2014 so how could it be determined that Binding Mediation is not cost effective and fair for all parties. The mediation bill should be given more time and it needs to be understood to lessee's that have gone through the process how it has worked for them.

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](mailto:webmaster@capitol.hawaii.gov)

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [WTLTestimony](#)  
**Cc:** [GordonInouye@aol.com](mailto:GordonInouye@aol.com)  
**Subject:** Submitted testimony for SB761 on Feb 12, 2015 08:45AM  
**Date:** Sunday, February 08, 2015 12:09:35 PM  
**Attachments:** [SB761.docx](#)

---

**SB761**

Submitted on: 2/8/2015

Testimony for WTL/JDL on Feb 12, 2015 08:45AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Gordon Inouye	Individual	Oppose	No

Comments: Please withdraw or defeat SB761!

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](mailto:webmaster@capitol.hawaii.gov)

Dear Senator Thielan,

I am writing to request that this bill not be passed. The last legislature passed and the Governor signed legislation enabling the parties to use mediation as a means to come to an agreement on the fair market rent at rent renewals as contained in the State Leases. This provides a means for both parties to come to a good faith compromise to resolve differences in the appraisals prepared by either side. A good faith effort by both parties can resolve such differences.

While we fully understand "binding arbitration", we have no clue on how "binding mediation" is defined. Mediation as defined in Wikipedia:

“**Mediation**, as used in law, is a form of [alternative dispute resolution](#) (ADR), a way of resolving disputes between two or more parties with concrete effects. Typically, a third party, the mediator, assists the parties to [negotiate](#) a settlement. Disputants may mediate disputes in a variety of domains, such as commercial, legal, diplomatic, workplace, community and family matters.

The term "mediation" broadly refers to any instance in which a third party helps others reach agreement. More specifically, mediation has a structure, timetable and dynamics that "ordinary" negotiation lacks. The process is private and confidential, possibly enforced by law. Participation is typically voluntary. **The mediator acts as a neutral third party and facilitates rather than directs the process.**”

The boldface and underline is mine as this is the key to mediation.

We need to give the current law a chance to work. Please withdraw or kill SB761!

Sincerely,

Gordon Inouye

**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [WTLTestimony](#)  
**Cc:** [jwmccully54@gmail.com](mailto:jwmccully54@gmail.com)  
**Subject:** Submitted testimony for SB761 on Feb 12, 2015 08:45AM  
**Date:** Tuesday, February 10, 2015 6:54:12 PM  
**Attachments:** [TestimonySB761WTL-JDL.doc](#)

---

**SB761**

Submitted on: 2/10/2015

Testimony for WTL/JDL on Feb 12, 2015 08:45AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
James McCully	Individual	Support	Yes

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](mailto:webmaster@capitol.hawaii.gov)

# McCully Works

40 Kamehameha Ave.

Hilo, Hi. 96720

Joint Committee WTL/JDL

Chair Laura Thielen: WTL

Chair Gilbert Keith-Agaran: JDL

SB761- Testimony in OPPOSITION

Aloha Chairs Thielen and Keith-Agaran

I write in strong opposition to SB761, which seeks to reverse recent reforms in HRS171-17. This bill could serve to eliminate mediation and return to binding arbitration as the sole means of dispute resolution under HRS171-17. While the bill states that the revised language would allow for “*binding mediation*” it goes on to add that “...*if either party in a dispute cannot agree on binding mediation...the dispute shall be determined by binding arbitration....*”

This effectively removes mediation should either party oppose that dispute resolution process. It should not be lost on the Legislature that D.L.N.R. has recently opposed all attempts at reform of leasehold practices governed by HRS171 including recent opposition to mediation as a dispute resolution process.

The specific reform this bill seeks to negate, HB1823 was passed by the Legislature and enacted as Act 168 on July 1, 2014. HB1823 was opposed by DLNR and it’s Chairman, William Aila submitted the following testimony before the House committee on Water & Land on January 27, 2014;

*“...will result in making the dispute resolution process more costly and time consuming....may produce settlements where the State would receive less than fair market rents from the use of public trust lands ...”*

In Section 1 of the bill before you the submitting party wrote of the effect of these reforms:

*“the legislature further finds... has the effect of making the dispute resolution process more costly and time consuming... may produce settlements where the State would receive less than fair market rents from the use of public trust lands....”*

A. I disagree with the premise and the purpose of this bill. It has already had a beneficial effect in that it led to Land Divisions return to compliance with HRS171 in

matters of rent determination. See the Timeline below in which I provide the facts regarding one of the recent issues between Land Division staff and lessees. In this matter Staff was requiring a “Determinative Appraisal” and that the lessee relinquish statutory rights in order to gain approval for lease extensions allowable under HRS171-36.

## TIMELINE

2013 DLNR begins the selective use of “determinative appraisal” not subject to arbitration (many, e.g. BLNR meeting 9.27.2013, D-3, pg.2 Rental Reopening’s). Of note, there does not appear to be a legal definition for a *determinative appraisal*. For purposes of establishment of rent the Land Division of DLNR has stated in the above matter that the affect of a determinative appraisal shall be; *“The Appraiser shall be selected by the State and paid for by the Lessee...the appraised rent for the extension period shall be determinative and not subject to arbitration.”* (Emphasis by Land Division staff)

From DLNR Land Divisions perspective a determinative appraisal is apparently intended to have a conclusive affect on the determination of rent with no basis for appeal. There does not appear to be a provision under HRS171-17, 35, 36 or HRS658A for Land Division staff to mandate a rent or remove dispute resolution provisions in statute or contract.

2014 DLNR continues use of determinative appraisals

July 1, 2014 Act 168 is signed into law requiring mediation prior to arbitration on all valuations of state lands for purposes of establishing rent

August 23, 2014 BLNR discusses whether Land Division can continue to apply a “no arbitration” provision given the requirements of the law. DAG Chow is requested to provide an opinion and the Board approves the matter pending revision if “the benefits of that bill (Act168, 2014) be extended to this lease” (BLNR meeting, 8.23.2014, Minutes, pg.10, 11)

Sept 2014 DLNR Land Division continues use of determinative appraisal (BLNR 9.26.2014, Agenda D-5, pg. 2 Rental Reopening’s)

Oct 2014 DLNR Land Division continues use of determinative appraisals (BLNR 10.24.2014 Agenda D-4, 5,6)

Oct 24, 2014 Prior to the above referenced meeting Chair Aila approached the Lessee, Michael Fujimoto, and advised him that the AG had provided an opinion and that the Department would henceforth comply with Act168 and that the “determinative appraisal” language in the conditions for approval of D-4, 5, and 6 would be revised. (I cannot cite, the minutes since this meeting have not yet been posted.)

November 14, 2014 DLNR submits recommendation for rent reset that does not require determinative appraisal (BLNR meeting 11.14.2014, D-7, pg. 2, Rental Reopening)

B. The statement that “the legislature finds that...non-binding mediation.... has the effect of making the dispute resolution process more costly and time consuming...” does not seem to be supported by the scant facts available. I say scant due to the fact that Act 168 is only 7 months on the books, and DLNR Land Division did not accept it until Oct 24, 2014 at the earliest. So, its “effect” has been in place for fewer than 4 months. Despite that short period of time a rent dispute has already been resolved using mediation as the alternative process.

Please see BLNR Meeting Agenda of January 23, 2015, Item D-4.

The rental reopening was scheduled for Nov. 4, 2014. On December 16, 2014 the parties met in mediation and apparently settled the matter that day. The recommendation to the Board was to approve the mediated settlement on January 23, 2015. The costs for the mediator were not available on the State Procurement Office website, perhaps DLNR can provide this at the committees request.

C. I hazard to even address the following:

*“...the Legislature finds...non-binding mediation...may produce settlements where the State would receive less than fair market rents...”*

Each party would enter the mediation process with an appraisal from a qualified appraiser. The mediation, if conducted in good faith and resulting in an agreement would be expected have a result somewhere between the two initial proposed rents. That would then, for the purposes of dispute resolution, be “fair market rent”. If one party were to seek a result below the range that the two qualified appraisers had determined to be fair market rent then the public interest would be harmed. However the mediation must fail if the lessee (presumably) so insisted since DLNR staff would (presumably) protect the publics’ interest by refusing to continue the mediation and the result would be for the dispute to go to binding arbitration. The same qualified appraisers would submit their USPAP compliant appraisals to this qualified arbitrator who would make a determination following HRS658A. The publics’ interest is absolutely protected under the current statutory language and the only conclusion one can draw from this “finding” is that the legislature fears a qualified appraiser might submit a non-USPAP compliant appraisal in an attempt to deceive the other party and promote a rent result that is other than “fair market rent”.

D. Finally I note that the SB761, Sec. 2, (e) seeks to remove the condition that DLNR provide a copy of the initial appraisal to the lessee. It can be said that all disputes result from some level of misunderstanding and without the underlying appraisal no lessee can fully understand the rent being proposed by Land Division. In the recent past staff had

refused to release the appraisal or allow the lessee to review it at the counter, which was the former DLNR policy. This appears to have been a staff policy decision, it was not supported by HRS171 and there had been a prior OIP ruling on the matter of release of appraisals. Current staff refused to accept this prior ruling. The statutory requirement this bill seeks to replace was specifically provided in the revised HRS171-17 to hopefully avoid disputes due to the lessee having the states appraisal available to make a better informed decision.

Mahalo,

**Required parameters are missing or incorrect.**

McCully Works

40 Kamehameha Ave.

Hilo, Hi. 96720

808-933-7000



**From:** [mailinglist@capitol.hawaii.gov](mailto:mailinglist@capitol.hawaii.gov)  
**To:** [WTLTestimony](#)  
**Cc:** [michaelshevmaker@yahoo.com](mailto:michaelshevmaker@yahoo.com)  
**Subject:** Submitted testimony for SB761 on Feb 12, 2015 08:45AM  
**Date:** Wednesday, February 11, 2015 4:57:45 AM  
**Attachments:** [TestimonyShewmakerSB761.pages.zip](#)

---

**SB761**

Submitted on: 2/11/2015

Testimony for WTL/JDL on Feb 12, 2015 08:45AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Michael Shewmaker	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](mailto:webmaster@capitol.hawaii.gov)