
A BILL FOR AN ACT

RELATING TO AIRPORT CONCESSIONS.

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

1 SECTION 1. The legislature finds that the State of Hawaii,
2 along with the rest of the nation, is facing an economic
3 recession that is sudden, extraordinary, and severe and one that
4 may result in greater hardship and economic suffering than has
5 ever been faced by the State. This is especially true for
6 airport concessionaires who rely on air travelers for their
7 business. Passenger counts, already weakened due to the recent
8 history of rising fuel and ticket prices, have now dropped off
9 even further. This decrease in the number of air travelers,
10 coupled with the heightened security measures following the
11 events of September 11, 2001, restricting ticketed passengers'
12 access to airport concessionaires, has caused airport
13 concessionaires to realize a decline in business similar to that
14 realized immediately after September 11, 2001.

15 As a result of the events of September 11, 2001, the
16 legislature passed legislation granting relief to airport
17 concessionaires due to the financial hardship they were



1 suffering so that they could remain open and continue serving
2 Hawaii's tourists and residents.

3 Further, the continued economic downturn after September
4 11, 2001, along with other global events that affected Hawaii's
5 economy such as the Severe Acute Respiratory Syndrome epidemic
6 that took place in March 2003, required additional action by the
7 legislature to assist airport concessionaires. Act 128, Session
8 Laws of Hawaii 2006 (Act 128), temporarily suspended Hawaii's
9 statutes requiring airport concessions to be put out to sealed
10 bid and gave the state department of transportation (DOT) the
11 sole discretion to discuss and negotiate fixed, short-term lease
12 extensions, under certain conditions. The legislature finds
13 that conflicting opinions exist as to the intent of Act 128 but
14 hereby finds and clarifies that it was not the intent or purpose
15 of the legislature, through the passage of Act 128, to remove
16 any rent-relief provisions then existing in any concession
17 leases or contracts that included improvements in accordance
18 with Act 128.

19 While DOT has sought to be a reasonable landlord by
20 providing various economic relief provisions to airport
21 concessionaires, the interdependence of our global economy has
22 increased economic uncertainty. The fluctuations experienced in



1 the economy due to this uncertainty have caused various
2 concessions to suffer financial losses, losses they continue to
3 suffer. One concession in particular has suffered and continues
4 to suffer a loss of gross receipts of more than thirty per cent
5 with monthly operating losses.

6 Obviously such losses cannot continue. Some relief
7 provisions previously given to concessionaires must be clarified
8 or amended, such as those provisions applicable only during
9 times of economic emergency. DOT should also consider making
10 relief provisions, such as a self-adjusting eighty-five per cent
11 formula that provides relief to all concessions and not just
12 some concessions during slow economic times. This provision
13 allows all airport concessionaires' guaranteed rent payments to
14 DOT to rise or fall each year depending on the concession's
15 level of success, to avoid undue hardship and the likelihood of
16 default on airport concession contracts due to reasons beyond
17 their control.

18 Unlike many local businesses which have survived during
19 this current economic recession by cutting expenses and offering
20 kamaaina discounts and incentives, airport concessionaires can
21 only provide services for passengers arriving or departing on
22 daily flights. This fact severely restricts the economic base



1 for airport concessionaires. Furthermore, unlike some airport
2 tenants such as airlines that are able to make up for lost
3 revenue through other means such as fuel surcharges and baggage
4 fees, or are able to cut expenses by reducing their number of
5 flights, Hawaii's airport concessions can only appeal to the
6 legislature for relief.

7 Unless relief is provided, concessionaires suffering losses
8 will no longer be economically viable and will face the harsh
9 consequences of defaulting on their concession contract,
10 forfeiting their performance bond, and being barred from doing
11 business with the State of Hawaii for five years in accordance
12 with section 171-13, Hawaii Revised Statutes. These penalties
13 place a tremendous hardship on these businesses. Such results
14 would not only be devastating for the concessionaire but for the
15 State as well since the State likely will only be able to find a
16 replacement concessionaire who will pay the State significantly-
17 reduced rents for years to come. As relief for airport
18 concessionaires cannot be simply applied or amended by DOT,
19 legislative direction and authorization is necessary.

20 Economic hardship for the State, as well as airport
21 concessions, is likely to increase in future months and it will
22 take years for an economic rebound to occur. However, these



1 businesses must continue to provide services to our visitors,
2 for the sake of our tourist industry and to our residents.
3 Measured economic relief must be provided to these businesses.

4 The major purposes of this Act are to:

5 (1) Give the governor and DOT the discretion and authority
6 to provide relief to airport concessionaires:

7 (A) Whose leases or contracts with DOT were entered
8 into on or after November 1, 2006, and who spent
9 capital improving the concession premises; or

10 (B) Who, as a result of any agreement with DOT
11 pursuant to Act 128, Session Laws of Hawaii 2006,
12 or Act 201, Session Laws of Hawaii 2004, spent
13 capital improving the concession premises;

14 provided that if the governor or DOT and a
15 concessionaire, through negotiations, cannot agree on
16 modifications granting relief within one hundred
17 twenty days following the effective date of this Act
18 or any agreed extension between the governor or DOT
19 and a concessionaire, then after this period, if
20 requested by the concessionaire, the concession shall
21 be withdrawn by DOT and rebid, or opened to
22 negotiation if applicable, with the concessionaire



1 being allowed to participate in the rebid or
2 negotiation within six months without any penalty,
3 undue hardship, or forfeiture of a performance bond by
4 the concessionaire;

5 (2) Give the governor and DOT the discretion to grant fair
6 and reasonable relief to a concessionaire whose
7 concession has suffered operating losses for any
8 period starting on or after November 1, 2006,
9 considering the following factors:

10 (A) Profit and loss of the concession; and

11 (B) Capital improvement investments of the
12 concession;

13 (3) Give the governor and DOT the discretion of providing
14 relief to airport concessionaires by granting annual
15 adjustments in their guaranteed rents to be paid to
16 the State similar to other concessions;

17 (4) Give the governor and DOT the discretion to include in
18 concession contracts and leases, economic emergency
19 relief provisions designed to aid concessions during
20 dire economic times and provide optional relief;

21 (5) Give the governor and DOT the discretion, in granting
22 economic emergency relief, of taking into account the



1 concession's economic circumstances and whether the
2 concession received rent relief by way of annual
3 adjustment in guaranteed rents or other governmental
4 rent relief for purposes of avoiding duplicate
5 economic relief benefits to a concessionaire; and
6 (6) Provide that in seeking relief pursuant to this Act,
7 qualified concessionaires may only seek relief for
8 losses of gross receipts or loss of business which
9 occurred during periods of time starting November 1,
10 2006, or later.

11 SECTION 2. Notwithstanding any laws or provisions to the
12 contrary, including chapters 102 and 261, Hawaii Revised
13 Statutes (HRS), the governor, or director of transportation, if
14 so directed by the governor, with respect to airport
15 concessions:

16 (1) Shall have the discretion and authority to provide
17 relief to airport concessionaires:

18 (A) Whose leases or contracts were granted pursuant
19 to chapter 102, HRS, and were entered into on or
20 after November 1, 2006, and who spent capital
21 improving the concession premises; or



1 (B) Who, as a result of any agreement with the
2 department pursuant to Act 201, Session Laws of
3 Hawaii 2004, or Act 128, Session Laws of Hawaii
4 2006, spent capital improving the concession
5 premises;

6 provided that if the governor or director of
7 transportation and a concessionaire, through
8 negotiations, cannot agree on modifications granting
9 relief within one hundred twenty days following the
10 effective date of this Act or any agreed extension
11 between the governor or director of transportation and
12 a concessionaire, then after this period, if requested
13 by the concessionaire, the concession shall be
14 withdrawn by the department of transportation and
15 rebid, or negotiated as may be applicable, within six
16 months without penalty, undue hardship, or forfeiture
17 of performance bonds by the concessionaire; provided
18 further that the concessionaire shall not be allowed
19 to request a withdrawal and rebid, or a withdrawal and
20 renegotiation if the concessionaire has refused to
21 accept relief from the department of transportation
22 that was effective as of November 1, 2006, or as of



1 the start of the concessionaire's lease or contract if
2 after November 1, 2006, the eighty-five per cent
3 annual adjustment rent formula and economic emergency
4 relief formula now in various concession contracts
5 that were issued by the department of transportation
6 after November 1, 2006;

7 (2) Shall have the discretion and authority, without
8 limitation, to reach a relief agreement with the
9 concessionaire to extend the term of the lease or
10 contract, grant or modify existing relief provisions,
11 reduce or waive rent, and otherwise modify and amend
12 any of the terms of the concession lease or contract;

13 (3) Shall have the discretion and authority to grant fair
14 and reasonable relief to a concessionaire whose
15 concession has suffered operating losses for any
16 period starting on or after November 1, 2006;

17 (4) Shall consider in the governor's or director of
18 transportation's discretion, granting lease or
19 contract provisions in keeping with the following:

20 (A) For the second and each successive twelve-month
21 period from the start of the concession lease or
22 contract to the end of its term, including any



1 holdover or extension period as set forth in the
2 concession lease or contract, the annual
3 guaranteed rents to be paid to the State shall be
4 eighty-five per cent of the rents (the greater of
5 guaranteed rents or percentage rents as
6 applicable), paid by the concessionaire for the
7 just-ending twelve-month period. Thus, such
8 annual guaranteed rents may be adjusted upward or
9 downward for each succeeding twelve-month period
10 depending on the concession's gross receipts and
11 rents paid during the prior twelve-month period;
12 and

13 (B) Each airport concession lease or contract not
14 having an economic emergency provision similar to
15 other concession leases or contracts issued
16 following the events of September 11, 2001, shall
17 be modified and adjusted to contain such
18 provisions. Further, in part, each such
19 concession lease or contract, as well as for
20 economic emergency relief provisions in any
21 existing concession lease, shall provide, or be
22 adjusted and modified to provide in part, that



1 the governor or director of transportation shall
2 grant optional additional relief allowing the
3 concessionaire to recoup the amount lost by such
4 reduction in gross receipts to the concession
5 whenever:

6 (i) The average gross receipts for a concession
7 for a sixty-day period is fifteen per cent
8 or more less than the average gross receipts
9 for the concession for the twelve months
10 prior to the month the bid was submitted for
11 the concession or month of contract award,
12 which event occurred first, or other
13 comparable information if information as to
14 twelve months of prior gross receipts is not
15 available; and

16 (ii) Such reduction of fifteen per cent or more
17 loss in gross receipts is due to
18 circumstances beyond the control of the
19 concessionaire;

20 (5) Shall take into account any prior rent relief granted
21 to a concessionaire pursuant to this Act or by any



1 governmental agency to avoid the duplication of relief
2 benefits; and

3 (6) A concessionaire who qualifies for relief pursuant to
4 this Act shall only be entitled to relief for periods
5 of time on or after November 1, 2006, that the
6 concession lease or contract was in effect.

7 SECTION 3. The relief provided for by this Act shall be
8 provided as long as and to the extent that such relief does not
9 violate any applicable federal laws and regulations and does not
10 jeopardize the receipt of any federal aid or impair the
11 obligation of Hawaii's department of transportation to the
12 holders of any bond issued by Hawaii's department of
13 transportation.

14 SECTION 4. If any provision of this Act, or the
15 application thereof to any person or circumstance is held
16 invalid, the invalidity does not affect other provisions or
17 applications of the Act, which can be given effect without the
18 invalid provision or application, and to this end the provisions
19 of this Act are severable.

20 SECTION 5. To the extent necessary to take action,
21 effectuate, and fulfill the purpose and intentions of this Act
22 including the relief to be provided, the effects of section 171-



1 13, Hawaii Revised Statutes, as well as any other statutory
2 provisions that may be in conflict with this Act, shall be
3 deemed waived and not applicable.

4 SECTION 6. This Act shall take effect on July 1, 2009, and
5 shall be repealed on July 1, 2011.



S.B. NO. 1224
S.D. 1
H.D. 2

Report Title:

Airports; Airport Concessions; Leases

Description:

Allows for certain adjustments and modifications to airport concession leases. Effective 07/01/09. (SB1224 HD2)

SB1224 HD2 HMS 2009-3681

