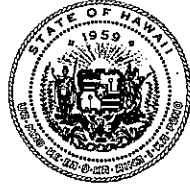


SB 1224



STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

Deputy Directors
MICHAEL D. FORMBY
FRANCIS PAUL KEENO
BRIAN H. SEKIGUCHI
JIRO A. SUMADA
IN REPLY REFER TO:

February 11, 2009

TESTIMONY OF THE DEPARTMENT OF TRANSPORTATION

COMMITTEE ON TRANSPORTATION,
INTERNATIONAL AND INTERGOVERNMENTAL AFFAIRS

SENATE BILL NO. 1224, RELATING TO AIRPORT CONCESSIONS.

The Department of Transportation (DOT) **opposes** this bill because it would require the State to modify previously bid-and-awarded concession leases in ways that fundamentally change the conditions under which the lease was initially offered for bid.

This bill requires that a concession lease, which was publicly advertised and awarded to the entity that bid the highest minimum annual guaranteed rent for each year of the term of the concession lease, be changed to eliminate the amount bid for each year after the first year of the term. In lieu thereof, this bill requires that the concession lease adjust the amount to be paid to 85% of what was paid and payable in the first year.

By changing the rules after the contract is bid and awarded, this bill undermines the statutory requirements for issuing bids. In so doing, this bill penalizes all parties – whether they bid in good faith, but failed to win the concession; or whether they reviewed the bid offering, but decided not to bid. Those parties who were not awarded the concession, would have lost the bid to the winning bidder who could be paying less than what they were willing to pay.

Additionally, the bill would prohibit the State from issuing concession agreements in the future in which bidders promised to pay the State a fixed amount each year for the privilege of doing business at the airport facilities. Currently, financial institutions that provide ATMs at the airports, pay a fixed monthly fee based on the number of ATM machines installed. This bill would require the State to establish a sliding scale for such a concession. This sliding scale would in effect guarantee that, over the course of the concession agreement, the monthly fee per ATM would decline. Although the stated purpose of this bill is to provide relief to “all airport concessions,” such will not be the case.

Further, through its broad language, the bill seeks to legislatively amend: 1) the Settlement Agreement between the Hawaii State Committee of Blind Vendors, the Hawaii Blind Vendors Association, Clyde Ota, Kenneth Oshiro, Glenn Oshiro, the Department of Human Services,

Testimony of the Department of Transportation
Senate Bill No. 1224
Page 2
February 11, 2009

State of Hawaii, and the Department of Transportation, State of Hawaii, dated April 4, 1992, and 2) the Settlement Agreement between the Hawaii State Committee of Blind Vendors, the Hawaii Blind Vendors Association, Walter Ishikawa, Charlotte Kauhane, Esrom Nihoa, Yoshiko Nishihara, Miriam Onomura, Clyde Ota, Alice Schaar, Warren Toyama, Filo Tu, Jeanette Tu, the Department of Human Services, State of Hawaii, and the Department of Transportation, State of Hawaii, dated July 28, 1993. Both Settlement Agreements do not have the economic relief provisions that would trigger the provisions of this bill.

Act 128, Session Laws of Hawaii 2006, enabled many of the same concessionaires who now seek to have this legislation passed, to get the terms of their concession agreements extended. By doing so, these concessionaires have avoided having to go out to bid again for anywhere from two to six years. In return for this contract extension, these concessionaires were required to construct “concession improvements.”

Moreover, Act 128 provided that, “The rents during the extension period shall not be lower than rents paid by the concession under its existing lease or permit.” Now, the concessionaires are back, seeking another adjustment to the terms of those agreements.

Finally, this bill replicates the language in Section 102-10, Hawaii Revised Statutes, which allows the concessionaire to “recoup the amount lost by such reduction.” The use of this phrase in Section 102-10 is appropriate because the reduction in gross receipts is due to the impact of construction on the concession and such construction would only have taken place with the approval of the State. However, under this bill, the concessionaire would have a “right” to a previously established level of gross receipts and would thus be entitled to “recoup” the amount of any reduction, independent of any adverse action by the State. This, we believe, is inappropriate.

Accordingly, we respectfully request that this bill be held in committee.

Honorable J. Kalani English, Chair
Committee on Transportation, International
And Intergovernmental Affairs
Hawaii State Senate

Hearing: February 11, 2009

Re: SB 1224 Relating to Airport Concessions

Honorable Chair English and Honorable Committee Members:

My name is Peter Fithian and I am the Chair of the Airport Concessionaires Committee whose membership consists of most of the major concessions at Hawaii's public airports.

We support this very important bill with clarifying amendments attached to our testimony as proposed SD1. One of these amendments seeks to leave blank the effective date of this bill.

We understand that further study and changes to this bill will likely be made and thus for purposes of allowing for such possible changes and advancement of the bill as stated we propose for now in one of our amendments that the effective date be left blank. Regardless, due to the dire hardship now being experienced by some of our members and likely future hardships by other members it is critical that a bill pass this legislative session to avoid closure by airport concessions. One concession is suffering a loss of business of more than 30% and another concessions is suffering a loss of business of more than 40%. This cannot continue much longer.

Background. This legislature kindly came to our aid at least on two (2) occasions following the events of September 11, 2001. We again seek your assistance.

Airport Concessions are Unique Businesses. As you recognized in the past, airport concessions are unique businesses especially following the events of September 11, 2001 since you now need a ticket and security clearance before you can eat or shop at airport concessions. Also, unlike other Hawaii businesses, airport concessions cannot offer Kamaiana discounts or 75% off sales like major shopping centers. Further airport concessions must remain open from the first flight to the last flight to service our traveling public regardless of the dwindling number of passengers. And yet during these times, Hawaii's DOT expects its guaranteed rents to be paid. Even further, airport concessions are not like airlines which can cut expenses by reducing their number of flights or increase their revenues by fuel surcharges and charging for extra luggage. Airport concessions are unique and difficult businesses to successfully operate.

DOT Grants Relief To Some But Not All Concessions; This Unfairness Must Be Corrected Given These Harsh Economic Times. While Hawaii's DOT following the events of September 11, 2001 has sought to provide relief in concession contracts and leases, such relief provisions unfortunately are not in all concession contracts and leases. Thus, while some concessions are presently enjoying relief other concessions are not. This is not fair during these harsh economic times.

85% Formula. One of these relief provisions allows the guaranteed rents a concession must pay the airport to rise and fall depending on the concession's level of success during the previous 12 months. This is what we call the "85% formula" that is done on an annual basis. Thus, if during a prior 12-month period your business did better then your guaranteed rents to be paid to the airport for the next 12-month period would likely increase. The formula also provides for the opposite in that if your business suffered in the prior 12-month period then your guaranteed rents for the next 12-month period would be reduced up to a maximum of 15%.

Economic Emergency Relief Formula. Recognizing that this 85% formula may not grant sufficient relief in that it was limited to a maximum of 15% and also a one time annual adjustment, the airports also started to include in their leases an "economic-emergency-relief formula". This formula allowed for an adjustment to be made immediately (and not annually) and the granting of relief of more than 15% when necessary and thus not just limited to 15% pursuant to the 85% formula.

Unfairness; Relief To Some But Not Others During Extremely Harsh Times Not Fair. As stated, while some concessions are enjoying the benefits of both relief provisions, some concessions have only one of these provisions and some concessions may not have any of these provisions. Given the harsh economic times this bill seeks to correct this unfairness by providing that all concessions (and not just some) should be allowed to seek relief under both types of relief provisions and an optional economic relief provision that measures a concession's hardship from the start of concession based on its published gross receipts as long as the hardship is due to reasons beyond the control of the concessionaire.

Prevents Duplicate Relief. This bill contains provisions that allows the Director of Transportation to prevent duplicate benefits to a concessionaire under both formulas or other similar governmental relief.

Precludes Relief Prior to November 1, 2006. Although some concessions may have suffered financial losses prior to November 1, 2006 since they failed to have both formulas, this Act seeks to limit and recognize relief for losses incurring on and after November 1, 2006, a 12-month period of time prior to the reported commencement of the recession as of November 1, 2007. Thus, although a concession may have been in business and suffered losses many years prior to November 1, 2006 it cannot seek relief prior to November 1, 2006.

Summary. Given the dire economic hardship being experienced by a number of airport concessions, we believe this bill is both necessary and fair. At the same time, the bill seeks to avoid the duplication of relief and limits the start of any relief period to only on and after November 1, 2006. Thank you for allowing us to testify. Please pass this bill with the amendments as proposed in our attached SD1. Thank you.

THE SENATE
 TWENTY-FIFTH LEGISLATURE, 2009
 STATE OF HAWAII

S.B. NO. 1224

PROPOSED SBI

A BILL FOR AN ACT

RELATING TO AIRPORT CONCESSIONS.

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

SECTION 1. The legislature finds that the State of Hawaii, as well as the nation, is facing an economic recession that is ^{SUBDEN, EXTRAORDINARY AND SEVERE} severe and one that may result in greater hardship and economic suffering than has ever been faced by the State. This is especially true for airport concessionaires who rely on air travelers for their business. Passenger counts, already weakened due to the recent history of rising fuel and ticket prices, have now dropped off even further. This decrease in the number of air travelers, coupled with the heightened security measures following the events of September 11, which restricts access to airport concessionaires only to ticketed passengers, has caused airport concessionaires to realize a decline in business similar to that realized immediately after September 11, 2001.

As a result of the events of September 11, 2001, the legislature passed legislation granting relief to airport concessionaires due to the financial hardship they were suffering so that they could remain open and continue serving Hawaii's tourists and residents.

Further, the continued economic downturn after September 11, 2001, along with other global events that affected Hawaii's economy such as the Severe Acute Respiratory Syndrome epidemic that took place in March 2003, required additional action by the legislature to assist airport concessionaires. Act 128, Session Laws of Hawaii 2006, temporarily suspended Hawaii's statutes

requiring airport concessions to be put out to sealed bid and gave the state department of transportation (DOT) the sole discretion to discuss and negotiate fixed, short-term lease extensions, under certain conditions.

While DOT has sought to be a reasonable landlord by providing various economic relief provisions to airport concessionaires, the interdependence of our global economy has caused economic uncertainty to increase. The fluctuations experienced in the economy due to this uncertainty have caused various concessions to suffer financial losses, losses they continue to suffer. One concession in particular has suffered and continues to suffer a loss of gross receipts of more than thirty per cent with monthly operating losses.

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

Unlike many local businesses which have survived during this current economic recession by way of cutting expenses and offering kamaaina discounts and incentives, airport concessionaires can only provide services for passengers arriving or departing on daily flights. This fact severely restricts the economic base for airport concessionaires. Furthermore, unlike some airport tenants such as airlines that are able to make up for lost revenue through other means such as fuel surcharges and baggage fees, or are able to cut expenses by reducing their number of flights, Hawaii's airport concessions

can only appeal to the legislature for relief.

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

Economic hardship for the state, as well as airport concessions, is likely to increase in future months and it will take years for an economic rebound to occur. However, the services of these businesses must continue to be provided to our visitors and for the sake of our tourist industry. Measured economic relief must be provided ^{TO} these businesses.

The purpose of this [↑] Act is to:

- (1) Provide relief to airport concessionaires by providing for annual adjustments in their guaranteed rents to be paid to the State not just for some concessions but in fairness to all airport concessions;
- (2) Clarify the economic emergency relief provisions for airport concessions ^{AND PROVIDE OPTIONAL RELIEF} that are designed to aid concessions during dire economic times; [↑]
- (3) Further clarify that in granting economic emergency relief, the director of transportation shall take into account the concession's economic circumstances and whether the concession received relief by way of annual adjustment in guaranteed rents or other governmental

PURSUANT TO THIS ACT OR OTHERWISE

relief for purposes of avoiding duplicate economic relief benefits to a
^
concessionaire; and

- (4) Provide that in seeking relief pursuant to this Act, qualified concessionaires may only seek relief for losses of gross receipts or loss of business which occurred during periods of time starting November 1, 2006, or later.

SECTION 2. Notwithstanding any laws or provisions to the contrary, the governor, or director of transportation, if so directed by the governor, shall adjust and modify existing airport concession leases and contracts as follows:

- (1) The airport concession lease and contract for each airport concessionaire who does not object shall be adjusted and modified to provide in part that its annual guaranteed rents payable to the State shall be adjusted as follows: For the second and each successive-
OR CONTRACT
twelve-month period from the start of the concession lease to the end of its term, including any holdover or extension period as[^] set forth in the concession lease[^]
OR CONTRACT,
the annual guaranteed rents to be paid to the State shall be eighty-five per cent of the rents (the greater of guaranteed rents or percentage rents as applicable), paid by the concessionaire for the just-ending twelve-month period. Thus, such annual guaranteed rents may be adjusted upward or downward for each succeeding twelve-month period depending on the concession's gross receipts and rents paid during the prior twelve-month period;
- (2) Each airport concession lease not having an economic emergency
OR CONTRACT
provision similar to other concession leases[^]
OR CONTRACTS
issued following the events of September 11, 2001, shall be modified and adjusted to contain such provisions. Further, in part for each such concession lease[^]
OR CONTRACT,
as well as for economic emergency relief provisions in any existing concession lease, shall provide, or be adjusted and modified

OPTIONAL ADDITIONAL

to provide in part, that the director of transportation shall grant relief allowing the concessionaire to recoup the amount lost by such reduction in gross receipts to the concession whenever:

- (A) The average gross receipts for a concession for a sixty-day period is fifteen per cent or more less than the average gross receipts for the concession for the twelve months prior to the month the bid was submitted for the concession or month of contract award, which event occurred first, or other comparable information if information as to twelve months of prior gross receipts is not available; and
- (B) Such reduction of fifteen per cent or more loss in gross receipts is due to circumstances beyond the control of the concessionaire;
- (3) Each concession lease ^{*OR CONTRACT*} shall contain provisions in part stating that prior to granting any relief pursuant to the economic relief provisions of a concession lease ^{*OR CONTRACT,*} the director of transportation, before deciding the past amount or continuing monthly amounts of relief, shall first take into account any prior relief granted to a concessionaire ^{*PURSUANT TO THIS ACT OR*} by any governmental agency to avoid the duplication of relief benefits;
- (4) The adjustments and modifications to each concession lease shall take place as soon as possible and any existing concession lease ^{*OR CONTRACT*} provisions in conflict with the purposes and intent of this Act shall be revised so that they are no longer in conflict with the intent and provisions of this Act; and ^{*PURSUANT TO THIS ACT*}
- (5) A concessionaire who qualifies for relief may only seek relief for the period of time on or after November 1, 2006.

SECTION 3. The relief provided for by this Act shall take place as long

as and to the extent such relief does not violate any applicable federal laws and regulations and do not jeopardize the receipt of any federal aid or impair the obligation of Hawaii's department of transportation to the holders of any bond issued by Hawaii's department of transportation.

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

SECTION 5. To the extent necessary to take action, effectuate, and fulfill the purpose and intentions of this Act including the relief to be provided, the effects of section 171-13, Hawaii Revised Statutes, as well any other statutory provisions that may be in conflict with this Act, shall be deemed waived and not applicable.

DN _____

SECTION 6. This Act shall take effect ~~upon its approval.~~

INTRODUCED BY: _____



Island Shoppers, Inc.

Honolulu International Airport
300 Rodgers Boulevard #3
Honolulu, Hawaii 96819
Tel: 808.834.1136
Fax: 808.834.1137

Honorable J. Kalani English, Chair
Committee on Transportation, International
And Intergovernmental Affairs
Hawaii State Senate

Hearing: February 11, 2009

RE: SB1224 Relating to Airport Concessions

Chair English and Honorable Committee Members:

My name is John Matias and I am the President and Owner of Island Shoppers, Inc.

We support this bill and the testimony by the Airports Concessionaires Committee. Many Airport concessions are unique and difficult businesses to operate. Just as you sought to provide relief to airport concessions after the events of September 11, 2001 we again seek your support in obtaining relief.

Our business is presently down about 35%. The current recession and loss of ATA and Aloha Airlines has resulted in a drastic reduction of flights and passenger traffic to our shops. This is much more severe than the events of September 11, 2001. Some concessions are not suffering like us since they have relief provisions in their airport agreements that we do not have.

We urge you to support this bill so airport concessions have fair relief options that allow them to survive and not close during these harsh economic times that are beyond our control. Closing an airport concession requires an airport concession to give up its performance bond and be barred from doing business with the State for five years. This is not good business and a replacement concession will most likely pay less rent to the State.

Please support this bill and keep it alive. We understand during the legislative process changes to the bill may have to be made.

Thank you for allowing us to testify.



Honorable J. Kalani English, Chair
Committee on Transportation, International
And Intergovernmental Affairs
Hawaii State Senate

Hearing: February 11, 2009

RE: SB1224 Relating to Airport Concessions

Chair English and Honorable Committee Members:

My name is Alan Yamamoto and I am the District General Manager for the Hawaiian Islands with HMSHost.

We support this bill and the testimony by the Airports Concessionaires Committee. Many reports say the current recession is worse than the terrorist events of September 11, 2001. Airport concessions are unique and difficult businesses to operate. Just as you sought to provide relief to airport concessions after the events of September 11, 2001 we again seek your support in obtaining relief.

Our business is presently down about 10 % after recently spending approximately \$ 15 million on capital improvements. Some concessions are not suffering like us since they have relief provisions in their airport agreements that we do not have.


We urge you to support this bill so airport concessions have fair relief options that allow them to survive and not close during these harsh economic times that are beyond our control. Closing an airport concession requires an airport concession to give up its performance bond and be barred from doing business with the State for five years. This is not good business and a replacement concession will most likely pay less rents to the State.

Please support this bill and keep it alive. We understand during the legislative process changes to the bill may have to be made.

Thank you for allowing us to testify.

HMSHost Corporation
Hawaiian Islands

By


Alan Yamamoto
District General Manager



Honorable J. Kalani English, Chair
Committee on Transportation, International
And Intergovernmental Affairs
Hawaii State Senate

Hearing: February 11, 2009

RE: SB1224 Relating to Airport Concessions

Chair English and Honorable Committee Members:

My name is Frank Hercik and I am the Kahului General Manager for HMSHost.

We support this bill and the testimony by the Airports Concessionaires Committee. Many reports say the current recession is worse than the terrorist events of September 11, 2001. Airport concessions are unique and difficult businesses to operate. Just as you sought to provide relief to airport concessions after the events of September 11, 2001 we again seek your support in obtaining relief.

Our business is presently down about 25 % after recently spending approximately \$ 3 million on capital improvements. Some concessions are not suffering like us since they have relief provisions in their airport agreements that we do not have.

We urge you to support this bill so airport concessions have fair relief options that allow them to survive and not close during these harsh economic times that are beyond our control. Closing an airport concession requires an airport concession to give up its performance bond and be barred from doing business with the State for five years. This is not good business and a replacement concession will most likely pay less rents to the State.

Please support this bill and keep it alive. We understand during the legislative process changes to the bill may have to be made.

Thank you for allowing us to testify.

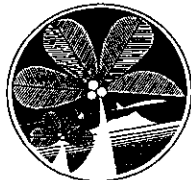
HMSHost Corporation
Kahului Airport

By

A handwritten signature in black ink, appearing to read "Frank Hercik", written over a horizontal line.

Frank Hercik
General Manager

AIRLINES COMMITTEE OF HAWAII



Honolulu International Airport
300 Rodgers Blvd., #62
Honolulu, Hawaii 96819-1832
Phone (808) 838-0011
Fax (808) 838-0231

February 11, 2009

The Honorable J. Kalani English, Chair
The Honorable Mike Gabbard, Vice Chair

Re: **SB1224 – RELATING TO AIRPORT CONCESSIONS – Oppose with Comments**
Senate Committee on Transportation, International and Intergovernmental
Affairs, Hawaii State Capitol Room 224 – 1:30 PM

Aloha Chair English, Vice Chair Gabbard and Members of the Committee:

The Airlines Committee of Hawaii*, which is made up of 20 signatory air carriers that underwrite the Hawaii State Airport System, **does not support SB1224 because of its potential impact to airline costs.**

The airlines entered into a partnership with the State and have guaranteed that all costs of the State airports system will be paid each fiscal year. The residual nature of this partnership dictates that any rent abatement for airport's system concessionaires is passed on to the airlines. Simply put, every dollar of rent abatement provided to concessionaires raises airline costs by a dollar. A fifteen percent reduction in concessionaire rental payments to the State would result in airline costs increasing by nearly \$10 million annually.

The Airlines Committee of Hawaii and the State have partnered together to develop a \$2.3 billion program to modernize and improve airports throughout the state. The economic stimulus of these construction projects is significant. Like airport concessionaires, the airline industry is also struggling financially. Thus, the Airlines Committee of Hawaii is unable to subsidize other airport tenants while supporting this capital improvement program in Hawaii.

However, the Airlines Committee of Hawaii would not oppose a reduction in concession rental payments to the State if that impact was not passed on to the airlines serving Hawaii.

Thank you for the opportunity to provide testimony on SB1224.

**ACH members are Air Canada, Air New Zealand, Air Pacific, Alaska Airlines, All Nippon Airways, American Airlines, China Airlines, Continental Airlines, Delta Air Lines, Federal Express, go!, Hawaiian Airlines, Japan Airlines, Korean Air, Northwest Airlines, Philippine Airlines, Qantas Airways, United Airlines, United Parcel Service, US Airways, and Westjet.*



Honorable J. Kalani English, Chair
Committee on Transportation, International
And Intergovernmental Affairs
Hawaii State Senate

Hearing: February 11, 2009

RE: SB1224 Relating to Airport Concessions

Chair English and Honorable Committee Members:

My name is Aleta Lindsay and I am a Vice President with International Currency Exchange (ICE). We operate seven (7) locations at Honolulu International Airport, offering foreign currency exchange; WiFi internet; internet kiosks; and two business centers.

We support this bill and the testimony by the Airports Concessionaires Committee. Many reports say the current recession is worse than the terrorist events of September 11, 2001. Airport concessions are unique and difficult businesses to operate. Just as you sought to provide relief to airport concessions after the events of September 11, 2001 we again seek your support in obtaining relief.

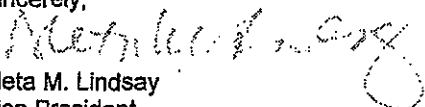
Our business is presently down over 30% despite recent investments to improve our business and services we offer to the traveling public. Some concessions are not suffering like us since they have relief provisions in their airport agreements that we do not have.

We urge you to support this bill so airport concessions have fair relief options that allow them to survive and not close during these harsh economic times that are beyond our control. Closing an airport concession requires an airport concession to give up its performance bond and be barred from doing business with the State for five years. In the case of the foreign exchange concession, historically over the last 5 years, there have been only two global companies that have participated in concession bids for the foreign exchange business. Essentially this could mean that if we are forced to close our Honolulu operations and then be barred from bidding, the State could find themselves in a non-compete situations where the possibility is great that only one company would consider bidding for the foreign exchange concession. This is not good business and a replacement concession will most likely pay less rent to the State.

Please support this bill and keep it alive. We understand during the legislative process changes to the bill may have to be made.

Thank you for allowing us to testify.

Sincerely,


Aleta M. Lindsay
Vice President