

HB 1568

HD2, SD1

NEIL ABERCROMBIE
Governor



State of Hawaii
DEPARTMENT OF AGRICULTURE
1428 South King Street
Honolulu, Hawaii 96814-2512

RUSSELL S. KOKUBUN
Chairperson, Board of Agriculture

JAMES J. NAKATANI
Deputy to the Chairperson

TESTIMONY OF RUSSELL S. KOKUBUN
CHAIRPERSON, BOARD OF AGRICULTURE

BEFORE THE SENATE COMMITTEE ON WAYS AND MEANS
FRIDAY, APRIL 1, 2011
9:00 AM
ROOM 211

HOUSE BILL NO. 1568, S.D.1
RELATING TO AGRICULTURE.

Chairperson Ige and Members of the Committee:

Thank you for the opportunity to testify on House Bill No. 1568 S.D.1, which proposes to add a new section to HRS 261 – A, for the State Department of Transportation to authorize the Department of Agriculture to provide biosecurity inspection facilities at air and sea ports statewide, in compliance with HRS section 150A-53 for the inspection, consolidation, deconsolidation, and treatment of cargo, and to facilitate the inspection and safe storage of cargo, and to meet the needs of each island's agricultural industries.

The Department of Agriculture supports the intent of this measure as the measure is supportive of the Biosecurity Program under section HRS 150A-53(2), authorizing that the Department shall establish, operate, or participate in operating port-of-entry facilities for state plant pest prevention programs.

The first and only biosecurity inspection facility in the State is on Maui at Kahului Airport. The ASAP Inspection facility houses the federal and state agencies responsible for receiving and inspecting agricultural cargo on domestic and foreign flights. The building has been designed so that inspection and treatment/destruction can be done



within the inspection facility so that invasive species cannot escape. As a result, the number of pests intercepted at Kahului airport is far greater than the rest of the State, despite being 5% of the total volume of the state. As a secondary benefit, because the importers are aware of the improved inspection process, importers have chosen to wash their commodities prior to shipment into Maui, resulting in cleaner products being sent to Maui.

The Department is working closely with the Department of Transportation to identify our respective and specific needs to strengthen biosecurity initiatives to prevent entry of new pests of concern to agriculture, public health, and environment in Hawaii. The primary concern seems to be the method of funding. We respectfully propose that the method be changed to funding by G.O. bonds to be expended by the Department. This would enable the planning, design, and construction of biosecurity facilities at Honolulu International Airport and Honolulu Harbor to proceed in a focused manner. The requested amount of \$10 million in G.O. bond would provide the means to address biosecurity initiatives at the two primary points of entry into Hawaii.

Thank you for the opportunity to testify on this measure.

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 Committee on
WAYS AND MEANS**

**Friday, April 01, 2011
9:00 AM**

State Capitol, Conference Room 211

**In consideration of
HOUSE BILL 1568, HOUSE DRAFT 2, SENATE DRAFT 1
RELATING TO AGRICULTURE**

The Department of Land and Natural Resources (Department) supports the intent of House Bill 1568, House Draft 2, Senate Draft 1 to establish adequate biosecurity and inspection facilities at major airports and harbors in the State to strengthen and support Hawaii's agricultural industry, but defers to the Department of Agriculture and the Department of Transportation to find the best solutions for funding and implementation.

Because transportation by air and sea have been identified as the risk pathways for invasive species into the State of Hawaii, appropriate inspection facilities and consistent inspection activities are crucial to protecting the health, safety, and welfare of the public. These facilities are a "need to have", not just "nice to have" component of the program. By initiating and continuing the implementation of biosecurity facilities, House Bill 1568, House Draft 2 reduces the likelihood of and economic loss associated with additional invasive species introductions and a quarantine on Hawaii's exported goods. The Department supports the intent of House Bill 1568, House Draft 2 and urges an expeditious resolution of the issues.

WILLIAM J. AILA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

GUY H. KAULUKUKUI
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
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LAND
STATE PARKS



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

IN REPLY REFER TO:

April 1, 2011

COMMENTS OF THE DEPARTMENT OF TRANSPORTATION

HOUSE BILL NO. 1568, HD2, SD1

COMMITTEE ON WAYS AND MEANS

House Bill No. 1568, HD2, SD1 requires the Department of Transportation (DOT) to provide space and infrastructure at various harbors and airports in the State for biosecurity and inspection facilities. The bill authorizes the Department of Agriculture (DOA) to reimburse the DOT for the design and construction of such facilities and for appropriate rent for the use of space for the facilities. The bill also authorizes the DOA to reimburse the Aloha Tower Development Corporation for the design and construction of biosecurity and inspection facilities at the Aloha Tower Complex.

We oppose this bill.

1. The bill imposes the burden on initially funding the design and construction of these agricultural inspection facilities on DOT. This will divert our limited financial resources generated from airport and harbor user fees to finance improvements that should be funded by the general fund. Our primary focus is the implementation of needed airport and harbor improvements under the New Day Work projects and our revenues and staffing resources should not be diverted from these purposes.
2. Under our respective bond certificates, airport and harbor revenues are pledged towards the payment of debt service on revenue bonds and to cover operating expenses related to the airport and harbor undertakings. We question whether the capital needs of the DOA would qualify as a related operating expense of DOT under our bonds and defer to the Department of Budget and Finance.
3. Additionally, the DOT-Airports Division has executed grant agreements to construct airport facilities with federal funds. All grant agreements mandate that airport revenue be expended only for capital or operating costs of the airport that are directly and substantially related to the actual air transportation of passengers or property. The use of airport revenue

for DOA facilities may result in the breach of this provision thereby jeopardizing the ability to receive future federal funds.

GOODSILL ANDERSON QUINN & STIFEL

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TO: Senator David Y. Ige
Chair, Committee on Ways and Means
Hawai'i State Capitol, Room 215
Via Email: WAMTestimony@Capitol.hawaii.gov

FROM: Gary M. Slovin / Mihoko E. Ito

DATE: March 29, 2011

RE: **H.B. 1568, H.D. 2, S.D. 1 – Relating to Agriculture
Decision Making: Friday, April 1, 2011 at 9:00 a.m.**

Dear Chair Ige and Members of the Committee on Ways and Means:

We submit these comments on behalf of Air Transport Association (“ATA”), the nation's oldest and largest airline trade association. ATA members include all of the major U.S. passenger and cargo airlines,¹ which together carry more than 90% of domestic passenger and cargo traffic. ATA's fundamental purpose is to foster a business and regulatory environment that ensures safe and secure air transportation and enables U.S. airlines to flourish, stimulating economic growth locally, nationally and internationally. ATA has also been committed to being a partner with the State of Hawaii, and its members have contributed several hundred million investment dollars into airport modernization for the State.

ATA **submits comments** regarding H.B. 1568, H.D. 2, S.D. 1, which requires the Hawaii Department of Transportation to establish biosecurity and inspection facilities at Hawaii's airports.

ATA appreciates that this measure is intended to protect Hawaii's environment

¹ ATA's Airline Members include the following: ABX Air, Inc., AirTran Airways, Alaska Airlines Inc., American Airlines, Inc., ASTAR Air Cargo Inc., Atlas Air, Inc., Continental Airlines, Inc., Delta Air Lines, Inc., Evergreen International Airlines, Inc., Federal Express Corporation, Hawaiian Airlines, JetBlue Airways Corp., Southwest Airlines Co., United Airlines, Inc., UPS Airlines, US Airways, Inc.

March 31, 2011

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from invasive species, and includes appropriations from the general fund for the purpose of establishing biosecurity and inspection facilities.

While H.B. 1568, H.D. 2, S.D. 1 presently purports to fund this program from the general fund, the bill requires divisions within the Department of Transportation to provide "space, planning and design support, and other infrastructure," among other locations, for the Honolulu International Airport, Hilo International Airport, Kona International Airport at Keahole, Kahului Airport, and Lihue Airport.

Given this and other measures that are being considered before this Legislature, ATA would caution the Committee that any funds for establishing such biosecurity and inspection facilities cannot come from airport funds. Federal law has long prohibited state and local governments from using airport revenues for purposes other than the capital and operating costs of an airport. See 49 U.S.C. § 47133 and 49 U.S.C. § 47107(b).

In 2006, the Federal Aviation Administration specifically stated that in Hawaii, it would be unlawful under federal law to use airport revenue to fund agricultural inspections at Hawaii's airports because the Hawaii Department of Agriculture inspections are not an airport function.

The consequences of improperly diverting airport revenues are harsh and will jeopardize federal aviation funding, at a time when the State cannot afford to lose this important source of revenue.

ATA is willing to work with the Department of Agriculture and Department of Transportation to discuss alternatives to assist the State in its endeavors to protect Hawaii's environment from invasive species, but urges the Committee to ensure that airport funds are not diverted for this purpose.

Thank you very much for the opportunity to submit comments regarding this measure.

Testimony of The Nature Conservancy of Hawai'i
Opposing Senate Draft 1 of H.B. 1568 Relating to Agriculture
Senate Committee on Ways and Means
Friday, April 1, 2011, 9:00AM, Rm. 211

The Nature Conservancy of Hawai'i is a private non-profit conservation organization dedicated to the preservation of Hawaii's native plants, animals, and ecosystems. The Conservancy has helped to protect nearly 200,000 acres of natural lands for native species in Hawai'i. Today, we actively manage more than 32,000 acres in 11 nature preserves on Maui, Hawai'i, Moloka'i, Lāna'i, and Kaua'i. We also work closely with government agencies, private parties and communities on cooperative land and marine management projects.

The Nature Conservancy strongly supported prior versions of H.B. 1568, but **we now strenuously object to the amendments included in the SD 1 version of the bill.** The SD 1 version of the bill effectively eliminates any shared responsibility by the Hawai'i Department of Transportation (HDOT) for inspection facilities and services made necessary by the business of the air and sea ports that are owned and operated by the HDOT; placing that responsibility entirely on the shoulders of the Hawai'i Department of Agriculture (HDOA).

We think the language of H.B. 1568 HD 2 should be restored, and that both HDOA and HDOT, along with the relevant federal agencies, should share in the cost of effective inspection facilities and services at air and sea ports.

Questions have been raised about the use of airport revenue or charging airport users or tenants for the costs of constructing and operating agriculture inspection facilities at airports. The attached legal memo provides an analysis of the federal law and policy in this regard, concluding that such funding mechanisms are not prohibited.

Invasive pests and diseases are one of the greatest threats to Hawaii's economy, agriculture, natural environment, and the health and lifestyle of its people. There are two primary pathways for new pests to arrive in Hawai'i—airports and seaports. Having proper, enclosed inspection and quarantine facilities at all major air and sea ports, similar to the one at Kahului airport, is one of the most important components of an effective biosecurity program. The Legislature's ongoing policy and financial support of the HDOA's Biosecurity Program has been essential to its implementation, and supporting the HDOA with proper facilities at all of the State's major ports of entry is one of the most highly leveraged and cost effective things that can be done to help prevent new pests from becoming established in our islands. Evidence from Hawai'i and around the world shows that preventing new pest establishment is exponentially more economical than eradicating a pest or, even worse, controlling it indefinitely once it becomes established.

Attachment

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March 17, 2011

MEMORANDUM

To: Mark Fox and Jeff Benz
From: Evan Cox
Re: Use of Airport Revenues for the Construction and Operation of Biosecurity Inspection Facilities

This memorandum considers the legality under federal law of using airport revenue to design, construct, and operate biosecurity and agricultural inspection facilities at Hawaii airports (“inspection facilities” and “inspections”).

Section I of this memorandum provides a legal and factual background of this issue, including brief summaries of the most recently proposed laws and most recent views expressed by a Federal Aviation Administration (“FAA”) representative. Section II concludes that while there is very little clear-cut precedent, inspections in Hawaii airports could reasonably be considered permitted operating costs of the airport under applicable law and FAA guidance and, therefore, be supported by airport revenue. Finally, Section III describes the requirement that airports’ rates and rentals be as financially self-sustaining as possible and concludes that this might require Hawaii airports to recover the costs associated with the proposed inspection facilities.

We conclude that there is nothing in the applicable laws or FAA policies that specifically prohibits the use of revenues for biosecurity and agricultural inspection facilities, particularly if the costs of such facilities are recovered or offset by a combination of rental fees and benefits provided to the airport.

I. Legal and Factual Background

Proposed legislation would require the Hawaii Department of Transportation (“HDOT”) to provide space and infrastructure at Hawaii airports for inspection facilities. One version would authorize HDOT to use airport revenues.¹ A second version would instead allow HDOT to charge appropriate rent for the use of the facilities and would allocate state funds to the Hawaii Department of Agriculture (“HDOA”) to reimburse HDOT for necessary costs.² HDOT testified with respect to proposed legislation that inspections are inherently a “state function that falls outside the scope of permitted airport activities,” and HDOT therefore is prohibited from using airport revenues for these purposes.³

¹ See H.B. No. 1567 H.D. 2., available at http://www.capitol.hawaii.gov/session2011/Bills/HB1567_HD1_.HTM

² See H.B. No. 1568 H.D. 2., available at http://www.capitol.hawaii.gov/session2011/Bills/HB1568_HD2_.HTM

³ Testimony of the Department of Transportation, House Committee on Transportation, House Bill No. 1567, available at http://www.capitol.hawaii.gov/session2011/Testimony/HB1567_TESTIMONY_TRN_02-14-11_.pdf; see also Testimony of the Department of Transportation, Committees on Transportation and Agriculture, House Bill No. 1568, available at http://www.capitol.hawaii.gov/session2011/Testimony/HB1568_TESTIMONY_TRN_02-14-11_.PDF.

By federal law, airport revenues “may not be expended for any purposes other than the capital or operating costs of (1) the airport; (2) the local airport system; or (3) any other local facility that is owned or operated by the person or entity that owns or operates the airport that is directly and substantially related to the air transportation of passengers or property.”⁴ Federal law instructs the U.S. Department of Transportation (“USDOT”) to establish policies and procedures that would enforce these requirements and specifically prohibit certain airport revenue “diversions.”⁵ The Secretary, through the FAA, met this obligation and interpreted applicable law by issuing its 1999 document entitled Policy and Procedures Concerning the Use of Airport Revenue (“Revenue Use Policy”).⁶ The FAA Airport Compliance Manual (“Compliance Manual”), issued in 1999, provides additional guidance for FAA personnel in interpreting and administering these financial responsibilities imposed on airports.⁷

Federal law further requires that airports maintain as financially self-sustaining a fee and rental structure as possible.⁸ This requirement is contained in the FAA’s 1999 Revenue Use Policy and its 1996 Policy Regarding the Establishment of Airport Rates and Charges (“Airport Rates Policy”),⁹ with additional guidance in the Compliance Manual.

Neither applicable law nor the relevant FAA guidance explicitly permits or prohibits the use of airport revenue for biosecurity inspections or facilities. The FAA has communicated mixed messages on this issue to HDOT. In a July 31, 1998, letter to HDOT, the FAA opined that “infrastructure” for inspections, including construction and equipage of a facility with specialized equipment for inspections at Kahalui airport could be funded 100% with airport revenue provided the facilities are used “exclusively by airport inspectors for airport facilities.”¹⁰ In 2006, the FAA advised that this prior position was strictly limited to the specific circumstances of the earlier Kahalui airport invasive species plan, and advised that “uncircumscribed” use of airport funds for HDOA inspectors at all Hawaii airports would be outside the revenue use policies. At the same time, however, it suggested that it would be permissible to “allocate the cost of the inspection facilities and operations to airport tenants as a common area cost or as a form of cost allocation.” In the most recent e-mail, an FAA representative in the Honolulu office stated that the “Revenue Use policy determination has been re-confirmed by Headquarters,” and that payments by HDOT for biosecurity inspection or inspection facilities “would represent a prohibited use of airport revenue because such expenditures would not represent a capital or operating cost of the airport or airport system.”¹¹ HDOT in turn cited the FAA’s position in opposing H.B. 1567, which would use airport funds, and raising concerns about, if not outright opposing, H.B. 1568, which would provide HDOA with state funds to reimburse HDOT.

⁴ 49 U.S.C. § 47133(a); *see also* 49 U.S.C. § 47107(b) (requiring assurances of the same from airports receiving federal grants).

⁵ 49 U.S.C. § 47107(l)(2).

⁶ 64 Fed. Reg. 7696 (Feb. 16, 1999).

⁷ FAA Airport Compliance Manual, Order 5190.6B (Sept. 2009), *available at* http://www.faa.gov/airports/resources/publications/orders/compliance_5190_6/.

⁸ 49 U.S.C. § 47107(a)(13)(A), (l)(3).

⁹ 61 Fed. Reg. 31994 (June 21, 1996).

¹⁰ Letter from Mr. Barry L. Molar, FAA, to Mr. Kazu Hayashida of HDOT (July 31, 1998).

¹¹ E-mail from Stephen Wong, Program Manager, FAA, Honolulu Airports District Office to Jeff Chang (February 7, 2011).

II. Expenses Associated with a Biosecurity Inspection Facility Reasonably Constitute “Capital or Operating Costs of the Airport.”

There are, at the very least, reasonable interpretations of the applicable law and the FAA’s Revenue Use Policy that would permit the use of airport revenue for the costs of designing, constructing, and operating inspection facilities. If the cost of the inspections themselves is a permitted use of airport revenues, as suggested by the FAA in 1998, then it would follow that the design and construction of inspection facilities necessary to carry out these inspections would constitute a permitted use of airport revenue. Expenses associated with inspection facilities would be “operating costs of the airport” on the grounds that the inspections (1) are directly and substantially related to the air transportation of passengers or property and therefore fall under the definition of an aeronautical use, and (2) are analogous to other permitted services that provide benefits to airlines and airline passengers.

The Revenue Use Policy provides that airport operating costs “may include reimbursement to a state or local agency for the costs of services actually received and documented” and that such costs may be both “direct and indirect.”¹² Past USDOT precedent suggests that these services must benefit the airlines or airline customers and not be “more directly concerned with benefiting” the residents of the surrounding municipality.¹³

A. *Biosecurity inspections are an aeronautical use.*

Biosecurity inspections appear to fit within the FAA’s definition of an aeronautical use of an airport, and at least one FAA report stated that similar agricultural inspections are an aeronautical use. The FAA provides that an aeronautical use is—

any activity that involves, makes possible, is required for the safety of, or is otherwise directly related to, the operation of aircraft. Aeronautical use includes services provided by air carriers related directly and substantially to the movement of passengers, baggage, mail and cargo on the airport.¹⁴

We understand that the proposed facilities would allow for the inspection, consolidation, deconsolidation, and treatment of air cargo, including its possible quarantine, fumigation, disinfection, destruction, or exclusion.¹⁵ Such on-airport inspections would allow more efficient and safer processing of air cargo for air carriers, shippers of cargo, and passengers carrying cargo. Such services in a literal sense do relate “directly and substantially to the movement of . . . baggage . . . and cargo.”

The FAA has stated in one report, that very similar inspections conducted by the U.S. Department of Agriculture (“USDA”) are considered an aeronautical use of the airport facility. In an audit conducted by the Department of Transportation’s Inspector General’s Office (the “Orlando Report”), the Inspector General determined that the USDA’s use of an airport building for plant inspections was an

¹² Revenue Use Policy, at § V.A.1; *see also* Compliance Manual, at 15-4.

¹³ Second Los Angeles International Airport Rates Proceeding, Docket OST-95-474 (Order 95-12-33 served Dec. 22, 1995) (“LAX Proceeding”) 1995 DOT Av. LEXIS 841, at *79, *84.

¹⁴ Airports Rate Policy, at B.

¹⁵ H.B. No. 1567 H.D. 1; H.B. No. 1568 H.D. 1; *see also* HAW. REV. STAT. § 150A-53(2), (4).

aeronautical use.¹⁶ It based this in large part on the airport's finding that having such inspection facilities and capabilities would "significantly enhance its ability to attract and process international air commerce." Significantly, the Orlando Report found the capital costs of building and maintaining (including recurring operating costs such as janitorial services) these USDA inspection facilities to be an aeronautical use, and not an impermissible diversion of airport funds, even though USDA (like HDOA in the current situation) was paying for the inspectors themselves.¹⁷ In the present case, the findings of H.B. 1567 and 1568 recite that the inspection facilities would benefit not just the general public, but airline operators themselves. The USDA inspections differ from the HDOA inspections in at least one important way: they are required by federal law, which allows the USDA to impose fees sufficient to recover the cost of the services.¹⁸ The FAA view might be that, although agricultural inspections generally are not a permitted airport revenue use, the two federal statutes must be interpreted in such a way that they do not conflict with one another. However, USDA inspection facilities are not required at any specific airport, as the Orlando Report indicates. Furthermore, the Orlando Report does not preclude the possibility that an airport could use airport revenues to reimburse the cost of agricultural inspectors themselves, assuming that such payments provide sufficient benefits to the airport and meet the airport's sustainability requirement.

B. Biosecurity inspections are analogous to other services airports routinely pay for using airport revenues.

The proposed inspections can also be analogized, although less directly, to other services that provide benefits to airlines and airline passengers and are widely recognized as permitted revenue uses. For example, there is little controversy that the costs of security provided by police and fire services are operating costs of the airport. Some airports provide police protection services through their own police forces, and it appears that these costs are rarely, if ever, challenged as an improper use. Other airports pay external entities, typically local municipalities, to provide police services to the airport. It is a permitted use of airport revenue to pay for the appropriate direct and indirect costs of municipal police services, provided that the levels of reimbursement are not artificially high in relation to the level of services provided and the actual costs of those services.¹⁹ It is not an adequate objection that these police forces, like HDOA, are a state or local agency or that police protection, like HDOA inspections, occurs outside the airport as well as on its grounds.

Appropriate police expenses include, at the very least, those police services that are beyond the basic services provided elsewhere in the municipality and that provide a direct or indirect benefit to overall airport operations.²⁰ Similarly, it appears likely that expenses for security services to airports are considered

¹⁶ See *The Use of Airport Revenues by The Greater Orlando Aviation Authority*, Report No. AV-2006-056 (Aug. 3, 2006) ("Orlando Report"), at 10, *available at* <http://www.oig.dot.gov/sites/dot/files/pdfdocs/OrlandoFinalReport8-3-06.pdf>.

¹⁷ Having determined that the use of the facilities by USDA inspectors constituted an aeronautical use, the report went on to examine whether the airport was in compliance with separate requirements that airports be as self-sustaining as possible, as discussed further in Section III, below. In that context, the Inspector General questioned whether the \$1 per year lease with USDA was reasonable, given the building's \$1.9 million construction cost and \$36,000 annual maintenance costs. *Id.*

¹⁸ 21 U.S.C. § 136a(a)(1). Currently, international passengers are charged a user fee of \$5 for each arrival in the United States. 7 C.F.R. § 354.3(f).

¹⁹ *E.g.*, Report on Revenue Diversions at San Francisco International Airport, Report No. SC-2004-038 (March 31, 2004), at 8, *available at* <http://www.oig.dot.gov/sites/dot/files/pdfdocs/sc2004038.pdf>; *see also* Preamble to the Revenue Use Policy, 64 Fed. Reg. 7706-07.

²⁰ *See, e.g.*, LAX Proceeding, at *77, *79.

more appropriate if the other users that have needs for special services similar to those of airports pay similar expenses to the municipality for these services.²¹ The services provided in Hawaii's biosecurity and inspection facilities are certainly specialized to the airport context. However, we understand that, just like police services, HDOA's enforcement efforts also take place outside the airport. Harbors are the only other entities that would use HDOA inspection services in a similarly intense and special way as airports. Notably, harbors and their users pay HDOA for these services and the facilities.

However, USDOT has considerable discretion and can draw very fine distinctions when deciding whether particular outside services are aeronautical and reimbursable or not. For example, in the case concerning reimbursement for police services provided by the City of Los Angeles to Los Angeles International Airport ("LAX"), reimbursement for the costs of a Narcotics Division police unit at LAX was found permissible, while reimbursement for an organized crime intelligence police unit at LAX was disallowed.²² The decision found that

the narcotics smuggling at the airport is made possible due to the flights operated by the airlines. . . [By contrast,] the work of the organized crime intelligence unit is too remote to be included as a charge to airport users. While airline flights may make it possible for organized crime members to reach Los Angeles, the unit's work seems more directly concerned with benefiting the residents of Los Angeles generally, not with promoting the safety of airport users.²³

The report then went on to recognize just how narrow this distinction might appear:

We recognize that our findings on this unit and the Narcotics Division . . . do not seem to be entirely consistent. Nonetheless, we think the work of the Narcotics Squad is more directly related with the protection of airport users and a more direct result of the airlines' operations and may therefore be more appropriately billed to the airport than the work of the organized crime intelligence unit.

A similar debate can be had about whether biosecurity inspection activities should be regarded as an aeronautical cost. On the one hand, as found by the legislature in H.B. 1567 and 1568, 80% of the invasive species entering Hawaii are, like the narcotics smuggling, "made possible due to the flights operated by the airlines" and the on-airport inspections benefit airlines, air shippers and passengers by expediting their transit. On the other hand, it could be argued that airlines and airline passengers are no more directly threatened by invasive species than by organized crime suspects, and the real purpose of the inspections is to "benefit the residents [of Hawaii] generally." However, to the extent that the airlines' facilitation of the traffic is viewed as decisive, the legislative findings suggest the need for biosecurity inspections are overwhelmingly a result of airline traffic at the airports.

²¹ See *id.* at *76-77.

²² *Id.* at *83-84.

²³ *Id.*

III. The financial self-sustainability requirement might require that the airport recovers any costs associated with biosecurity and inspection facilities.

In addition to the requirement that an airport revenue use be a capital or operating costs of the airport, airports must also set their rental rates and fees to be as financially self-sustaining as possible.²⁴ This sustainability principle is reflected in the FAA's Policy Statements and Compliance Manual:

- The Airport Rates Policy provides that airports are “encouraged, when entering into new or revised agreements or otherwise establishing rates, charges, and fees, to undertake reasonable efforts to make their particular airports as self-sustaining as possible in the circumstances existing at such airports.”²⁵
- The Revenue Use Policy requires that airports generally must charge fair market value rent for nonaeronautical uses, and rent sufficient to recover costs for aeronautical uses.²⁶
- The Compliance Manual prohibits the use of airport land “for free or nominal rental rates by the [airport] sponsor for aeronautical purposes . . . except to the extent permitted under the *Revenue Use Policy* section on the self-sustaining requirement.”²⁷

This sustainability requirement appears to be the basis for the USDOT Inspector General's concerns about the Orlando Airport's expenditures and rental agreement with the USDA, under which USDA paid a nominal lease rent of one dollar per year. The Orlando Report states that:

The plant inspection station should be generating enough additional commerce to justify the capital and maintenance costs of the facility. Otherwise, the Aviation Authority should find a tenant willing to pay the aeronautical-use rate, the fair market value rate, or a rate at which it can recover its cost, especially since there are other aeronautical users whose Airport leases are at or near fair market value.²⁸

However, interpreting the sustainability standard in this manner seems at odds with the conclusion that the airport could itself pay the costs of aeronautical services, as the Inspector General recognized was appropriate in the case of properly proportioned contributions to the City of Orlando's police and firefighter pension funds. The FAA appears to have recognized this inconsistency when it disagreed with the USDOT Inspector General's interpretation and stated it would not require USDA to pay a higher, cost recovery rent, if either (1) the airlines were knowingly covering the costs of the inspection facilities through their rates, or (2) the costs could be covered through other airport income derived from concessions.²⁹ The FAA's interpretation appears to take the view that the sustainability requirement does not preclude passing on the cost of facilities for agricultural inspections to either the airlines as part of their general airport fees, or to airport concessionaires, rather than to the agency providing and paying the inspectors.

²⁴ 49 U.S.C. § 47107(a)(13)(A), (1)(3).

²⁵ Airport Rates Policy, at 4.1.1. However, this requirement does not permit airports, absent agreement with aeronautical users, “to establish fees for the use of the airfield that exceed the . . . airfield costs.” *Id.* at 4.1.1(a).

²⁶ Revenue Use Policy, at VI.B.5, VI.C; Compliance Manual, at 17-3 to 17-4.

²⁷ Compliance Manual, at 15-10.

²⁸ Orlando Report, at 14.

²⁹ These conditions are consistent with the FAA requirement that airports use a “transparent (i.e. clear and fully justified) method of establishing” rates for aeronautical users. Airport Rates Policy, at 2.3.

Because of the lack of clarity in this area, the apparent conflict within the FAA's own regulations, and the paucity of prior relevant decisions, the FAA's ultimate conclusion about whether Hawaii's airports need to recover costs for these inspection facilities is unpredictable. At best, its determination might be based on a factor that has not been delineated in its guidance to this point. For example, the FAA could determine that airports must recover costs where the aeronautical services have the ability to receive cost reimbursements independent from the airport. This is certainly true for the USDA inspections (by federal statute) and air carrier use (ticket revenues) and would not be true for airport police services; with respect to Hawaii's inspection services, separate fees are in place but also the subject of a current lawsuit. Alternatively, the FAA might look to common airport practices for guidance.³⁰

If it is necessary for Hawaii's airports to recover the costs of the inspection facilities, the FAA's interpretation in the Orlando Report strongly suggests that the airports may do so through (1) additional revenues from airline fees or concessionaire rental rates besides rental charges to HDOA, or (2) offsets from benefits the facility provides to the airport. In the Orlando Report, the FAA and USDOT Inspector General agreed that these benefits potentially included increased commercial activity for the airport due to the USDA facility. Additional benefits of on-airport biosecurity inspections in Hawaii's situation might include increased efficiencies for airlines and passengers, and better and more timely handling of air freight that encourages rather than discourages increased airport traffic.

IV. Conclusion

There appears to be a principled basis on which FAA could conclude that providing facilities to support biosecurity inspections and paying for the inspectors themselves are aeronautical uses that are appropriately supported by airport revenues. We have been unable to identify anything in applicable law and FAA policies that mandates a conclusion that such uses constitute a prohibited diversion of airport revenues as most recently asserted by the FAA and HDOT. There is an apparent basis for the FAA to insist on a cost recovery approach to recover the up-front capital costs of constructing the facilities, based on the sustainability principle. But the available precedent does not clearly mandate that such cost recovery must come from the HDOA, rather than from sources of airport revenue including airline fees and concessionaire rents.

³⁰ Cf. LAX Proceeding, at *33 ("While airport practices are not binding on us, they do provide guidance on whether a charge included in a fee is reasonable.")



Senate
Committee on Ways and Means
Friday, April 1, 2011
9:00 a.m., Conference Room 211
State Capitol

Testimony in Support of the Intent of HB 1568 HD2 SD1

Aloha Chair Ige, Vice Chair Kidani, and Members of the Committee,

The Coordinating Group on Alien Pest Species (CGAPS) **supports the intent of HB 1568 HD2 SD1, Relating to Agriculture.** There are only two pathways for invasive species to arrive in Hawai'i: air and maritime transportation. Stopping new invasive species at ports of entry saves us hundreds of millions (if not billions) of dollars per year, yet only Kahului Airport has a joint Federal/State cargo inspection facility. All ports of entry must include inspection facilities for State and Federal agencies to conduct their inspection work, yet these facilities do not appear in port modernization documents. Closer collaboration between agencies is required so that each agency's mandate can be met, while providing for the efficient movement of goods.

CGAPS is concerned about the wording in this bill's current version, added in SD1, and we respectfully request that the bill be amended to its previous HD2 wording. Specifically, SD1 removes HDOT of the responsibility to design, construct, and operate inspection facilities at air and sea ports on each island. CGAPS supports the intent of SD2 in clarifying the issue of reimbursement for these services.

It is clear what a difference that properly planned and staffed inspection facilities can make. Between July 1 and December 31, 2010 there were just **87 pest interceptions at Honolulu International Airport.** During that same time period at the new ASAP inspection facility at **Kahului Airport, inspectors made 639 pest interceptions.**

It is not clear why the Hawai'i Department of Transportation continues to distance themselves from working to ensure that the Hawai'i Department of Agriculture can achieve its mandate. If inspection facilities at each port must be built off-site, it will increase the cost, time, and complexity of moving commodities and cargo into the state, and it may even impact visitors. Surely air and sea carriers would not want this.

In its HD2 form, this bill would ensure that the Department of Transportation provides the same planning and operational services to Hawai'i Department of Agriculture as it would to other port facility users/tenants. Mahalo for your consideration.

Aloha,

Christy Martin
Coordinating Group on Alien Pest Species (CGAPS)
Ph: (808) 722-0995



MISC

MAUI INVASIVE SPECIES COMMITTEE

Testimony of the Maui Invasive Species Committee
Opposing Senate Draft 1 of H.B. 1568 Relating to Agriculture
Before the Senate Committee on Ways and Means
Conference Room 211

April 1, 2011, 9:00AM

The Maui Invasive Species Committee (MISC) opposes the current version of H.B. 1568, despite initially supporting this bill. The Senate version has turned this bill on its head by deleting language that would establish Hawaii Department of Transportation's responsibility for preventing the introduction of invasive species. This is not consistent with the legislature's clear directive about the need for state agencies to cooperate on prevention and control of invasive species. HRS § 194-2. The legislature recognized that invasive species arrive in Hawaii by air and sea and are spread along our roads when it made HDOT a statutory member of the Hawaii Invasive Species Council. Just as invasive species do not recognize property boundaries, they also do not recognize jurisdictional boundaries. While state agencies are arguing about kuleana issues, new species are slipping through our inadequate quarantine system every day.

The amendments to HB 1568 SD 1 are a step in the wrong direction. The Hawaii Department of Agriculture has been steadily working over the last five years to develop and implement a comprehensive biosecurity plan, but the department needs the assistance, support, and cooperation of HDOT, specifically in the development of adequate inspection facilities at our airports and harbors.

Please restore the language of HB 1568 HD 2. Thank you for your consideration.

AIRLINES COMMITTEE OF HAWAII



Honolulu International Airport
300 Rodgers Blvd., #62
Honolulu, Hawaii 96819-1832
Phone (808) 838-0011
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March 31, 2011

Honorable David Ige, Chair
Honorable Michelle Kidani, Vice Chair
Committee Members
Senate Committee on Ways and Means

**Re: HB 1568 SD1 – Relating to Agriculture
Senate Committee on Ways and Means Hearing – April 1, 2011, 9 AM
Conference Room 211**

Aloha Chair Ige, Vice Chair Kidani, and Members of the committee:

The Airlines Committee of Hawaii* (ACH), which is made up of 21 signatory air carriers that underwrite the State Airport System appreciates the opportunity to offer testimony on this bill.

Firstly, the ACH supports the intent of the SD1 passed version of this bill because it clarifies that Hawaii Department of Transportation (DOT) or Aloha Tower Development Corporation (ATDC), whichever is applicable, must be reimbursed by the Hawaii Department of Agriculture (DOA) in full for the design and construction of biosecurity and inspection facilities. However, the ACH is concerned with the existing language which further references assessing DOA appropriate rent for the use of space for such facilities. This is due to the fact that such an arrangement may be considered Revenue Diversion if initially funded by the DOT. In addition, appropriate rent is undefined and could result in a rental rate that does not allow DOT or ATDC to fully recover its capital costs associated with the project. We also support the use General Funds for the construction and operation of these facilities. However, we would object to any suggestion that airport revenues be used since this would be considered Revenue Diversion.

Background on Revenue Diversion:

Our concerns stem from previous versions of this bill, and other bills (HB1567 or HB970) which included language that may trigger an unqualified diversion of airport funds by proposing that the DOT construct and operate biosecurity and inspection facilities at major airports through out state through airline rates and charges. For your reference, we have attached a white paper on the Revenue Diversion issue.

Federal law on Revenue Diversion is clear that revenue derived from airlines must be used for capital and operating costs of the airport and the local airport system. Prohibited uses include: Payments that exceed the fair and reasonable value of services provided to the airport; General Economic Development; Direct subsidies of carriers; Rental or use of facilities for non-aeronautical use at less than market value.

A key requirement when the state accepts federal/state financial grants or property transfers is to abide by certain binding contractual obligations. One of those rules specifies that all airport-generated revenues should be spent at the airport. Violating any of the grant assurances is like violating the terms of a contract. Congress allows the Secretary of Transportation to withhold transportation funds from any local government that violates the airport revenue retention restriction.

Revenue Diversion can lead to costly and protracted litigation and civil penalties. We have provided an example of a case involving the City of Los Angeles as an attachment. In a Final Decision and Order the Los Angeles City Council agreed to return more than \$21.2 million to the operator of LAX to settle legal claims that airport funds were misappropriated in violation of federal regulations.

Secondly, juxtaposing the roles of the DOA and DOT-A to fund biosecurity and inspections at airports does not make it a permissible function covered by federal law.

State Biosecurity and Inspection Not Covered by Federal Aviation Administration Law
While biosecurity screening for air cargo takes place at the airport, there is no linkage recognized for agricultural inspections in Federal Aviation Administration (FAA) statute. The FAA considers the aeronautical use of an airport to be any activity that involves, makes possible, is required for the safety of, or is otherwise directly related to, the operation of an aircraft.

DOA's responsibility for inspecting cargo terminating in the state is a state function. There is no provision under FAA law that recognizes biosecurity or inspection functions.

For a number of years, legislation has been considered to construct agricultural inspection facilities at the expense of the DOT and airlines. Consequently, the DOA, DOT and the airlines have met several times over the years to discuss this matter and the DOA has been advised that Revenue Diversion issues would arise that could adversely impact eligibility to receive federal funds.

The findings contained in Section 1 on page 2 of this bill which state that the "FAA is moving toward a sustainable airport concept that implements sustainable principles as part of airport planning" and lists the core principles are not an accurate assessment of the authority recognized by federal law. We suggest lines 9 through 19 be stricken from this bill to accurately reflect federal policy with regard to this issue.

We have cautioned the executive and legislative branches that the FAA advised DOT that the use of Airport Revenue Funds are prohibited to construct an agricultural inspection facility or to fund inspectors. In addition to Revenue Diversion, the shifting of the burden of capital and/or operational costs from the HDOA to DOT-A will reverberate on a national level as well as create significant adverse financial implications with the Terminal Modernization Program.

The ACH has also raised concerns that a single inspection facility at HNL is unacceptable due to the fact that airline cargo facilities are located at opposite ends of the airport. The logistics of such an operation would materially impact the costs associated with air cargo shipments which would ultimately be passed on to consumers.

Thirdly, the ACH is ready and willing to help with solutions that do not jeopardize federal transportation funding.

Last year to help with the anticipated reduction in agricultural inspections, Hawaiian Airlines and United Airlines previously offered as a solution to DOA the use of excess space within their respective cargo facilities to accommodate DOA inspections. Consolidating inspections at these two nodes of the airport, not only saves costs it helps to streamline inspection since cargo transported directly through HNL comes either to the Diamond Head or Ewa side of the airport. We continue to offer this as a solution for the Administration to consider.

We remain committed to working together with the Governor's Office, DOT and DOA and the legislature to come up with practical solutions that do not involve Revenue Diversion to help meet the state needs.

Sincerely,

Lori Peters
ACH Co-chair

Blaine Miyasato
ACH Co-chair

CC: Honorable Neil Abercrombie, Governor of the State of Hawaii
Glenn Okimoto, Director of the Department of Transportation
Russell Kokubun, Director of the Department of Agriculture

Attachments: 2

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

REVENUE DIVERSION

Federal law has long prohibited state and local governments from using airport revenues for purposes other than the capital and operating costs of an airport.

STATUTES

The current provisions restricting the use of airport revenue are found in two separate statutes:

- 49 U.S.C. § 47133 requires that revenues generated by an airport that is the subject of federal assistance may not be expended for any purpose other than the capital or operating costs of the airport, the local airport system, and other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property.
- 49 U.S.C. § 47107(b) requires that the proprietors of airports receiving federal grant money give written assurances to the Secretary of Transportation that airport revenues and state and local taxes on aviation fuel will be expended only for the capital or operating costs of the airport, the local airport system, and other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property.

REGULATIONS

Similarly, the Federal Aviation Administration's "Policy and Procedures Concerning the Use of Airport Revenue" *64 Fed. Reg. 7696* (February 16, 1999) provides:

Unlawful revenue diversion is the use of airport revenue for purposes other than the capital or operating costs of the airport, the local airport system, or other local facilities owned or operated by the airport owner or operator and directly and substantially related to the air transportation of passengers or property. (*64 Fed. Reg. at 7716.*)

In a June 7, 2006 letter, the FAA specifically stated that it would be unlawful under the above-cited statutes and Policy to use airport revenue to fund agricultural inspections at Hawaii's airports. The FAA concluded that agricultural inspections were not an airport function.

CONCLUSION

Federal law does not allow airport revenues to be used for non-aviation purposes. The State of Hawaii may not circumvent this restriction by placing a non-aviation function (agricultural inspection) on airport property and funding it with airport revenues.

L.A. to return \$21.2 million to LAX's operator

The City Council acts after the FAA had accused Los Angeles World Airports of improperly diverting funds to L.A. Inc., the city's convention and visitors bureau.

By Dan Weikel

December 17, 2009

The Los Angeles City Council on Wednesday agreed to return more than \$21.2 million to the operator of LAX to settle legal claims that airport funds were misappropriated in violation of federal regulations.

On its last vote of the year, the council unanimously approved a plan for the city to repay \$18.1 million to Los Angeles World Airports, which had been accused by the Federal Aviation Administration of improperly diverting the funds to L.A. Inc., the city's convention and visitors bureau.

The other \$3.1 million is money the city kept from the sale of land at Los Angeles International Airport that Caltrans had acquired in the early 1990s as right-of-way for the Century Freeway project.

For more than 14 years, the FAA and two national aviation associations contended that the proceeds of the sale should have been given to Los Angeles World Airports, the operator of LAX, LA/Ontario International and Van Nuys airports.

"Our goal is to bring agencies into compliance with federal regulations and ensure that any improperly transferred money is repaid. This is exactly what the settlement does," said Ian Gregor, an FAA spokesman in Los Angeles.

According to the plan, the city will reimburse the airport department by reducing the amount of money it will charge the agency during the next 10 years for municipal services, such as police officers and firefighters. The reimbursements include interest.

Los Angeles World Airports also must develop a more clearly defined marketing plan that specifically relates to airport amenities, airlines and advantages for travelers as mandated by federal regulations. In addition, the agency is required to document those expenditures.

After a routine audit of airport funds in July 2008, the FAA questioned whether Los Angeles World Airports had illegally provided more than \$38.8 million to L.A. Inc. for marketing services since 2002 and asked the agency to justify the allocations. Airport officials said they eventually provided enough information to reduce the amount in question.

In 1994, the Air Transport Assn. and the Aircraft Owners and Pilots Assn. complained to the FAA that the city had placed the proceeds of the LAX property sale into its general fund. After years of dispute, the FAA determined in June that the city should return the money to the airport department.

"You have these huge airports today. In many cases, public agencies view them as cash cows," said Bill Dunn, a vice president at the Aircraft Owners and Pilots Assn. "They don't seem to understand that airport funds must be used for airport purposes."

dan.weikel@latimes.com

March 30, 2011

TO: Senate Committee on Ways and Means
Hearing for Friday, April 1, 9:00 a.m., Conference Room 211

FROM: Mary Ikagawa, Kaijua

RE: Support earlier version of the bill: HB1568-HD2

As a taxpayer it really ticks me off when departments try to shed responsibilities for needed work. How can the State's work be performed efficiently if departments do not work together strategically? According to their testimony on the House version of this bill, the Department of Transportation does not consider itself responsible for airport facilities, for example facilities required for cargo inspection. I beg to differ. Our policies need to spell it out and hold departments responsible for working together as needed to do big jobs efficiently. Efficiency will suffer if any partner is not fully invested.

I support the intent of this bill. The cost of doing business includes managing the effects your activity has on others. In this case, "others" is the people of Hawai'i and visitors who are impacted by introduced pests, and the business is transportation. If transport entities are not to take reasonable measures to prevent harm from the things they bring into the state, who will?

All involved parties need to step up and do their part.

