DAVID Y. IGE
GOVERNOR

TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
LYNN A.S. ARAKI-REGAN
DEREK J. CHOW
ROSS M. HIGASHI
EDWIN H. SNIFFEN

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

February 20, 2020
12:00 p.m.
State Capitol, Room 308

H.B. 2604, H.D. 1
RELATING TO CONCESSIONS

House Committee on Finance

The Department of Transportation (DOT) **opposes** H.B. 2604, H.D. 1 to provide State and County Governments more flexibility and discretion to address substantial hardship situations that impact concession contracts for the following reasons:

The DOT is concerned that this bill is too broad and provides too much flexibility to concessionaires to request relief and/or amend terms of a lease more favorable to themselves. This could result in a concessionaire deliberately bidding high to win a contract and then immediately arguing for relief once the contract is left for some unforeseen circumstance or an anticipated significant event. This could impact DOT 's relationship with the rating agencies and the bond market because DOT would need to disclose that all the concessions revenues are subject to downward adjustment due to the ability for the concessionaires to take advantage of this proposed statute.

This bill could negatively affect the relationship between the DOT and the airlines. This relationship may be affected as many concessionaires may attempt to take advantage of these provisions knowing that the airline lease agreement provides for a residual cost recovery, thereby requiring the airlines to pay for any shortages to meet any bond covenant. Additionally, the signatory airlines have the ability to terminate the lease on 30 days' notice.

Thank you for the opportunity to provide testimony.

AIRPORT CONCESSIONAIRES COMMITTEE

Representative Sylvia Luke, Chair
Committee on Finance
House of Representatives
Hawaii State Legislature

Hearing on February 20, 2020 ; 12noon; Room 308

Re: HB 2606, HD1 – Relating to Concessions

Dear Chair Luke and Honorable Committee Members:

My name is Peter Fithian and I am the Chair of the Government Affairs section of the Airport Concessionaires Committee. Members of our Committee represent the majority of businesses conducting concessions operations at our public airports. Airport concessions have historically provided 50% of more of the operational revenues at our public airports.

Our Committee supports this bill with clarifying amendments. Please see attached which seeks to 1) make the term "significant hardship" (page 4 line 5 consistent with page 4 starting at line 19) and the term "average gross monthly income" (page 4 line 22 and page 5 line 2 consistent with page 5 line 5); and 2) clarifies that those minority businesses with 25% or less of the gross receipts of a concession operator and stuck with unamortized costs (page 5 starting at line 22) will not significant hardship by continuing to operate to the end of contract term.

This bill does not mandate relief or require that any amount of relief be provided. All of that is "discretionary". In response to a request for relief the answer by a State or county government or agency /division can be simply "no" to anyone asking for relief.

Our Committee supports the bill and strongly believe it is fair and appropriate for 4 reasons:

1) When "unexpected circumstances occur" it does not mandate but allows county and state governments "at their discretion" (thus can say "no") to grant relief to concessions having significant hardship due to various "unexpected problems" since county/state contracts are often written "so tight" that relief cannot be granted since the unexpected circumstances are not recognized in the contract, not predicted when the contract was written;

2) It gives flexibility to preserve jobs and help businesses survive due to "unexpected circumstances" resulting in "significant hardship" that would force a business to close or reduce services;

3) When relief cannot be provided everyone suffers since jobs will be lost and services/improvements will not be made often for years until a new contract issued resulting in less revenues paid to county/state governments and loss of public services; and

4) If relief is provided, the bill provides that an explanation and "reasons for relief must be stated and available in writing" for all to see. This provision in the bill ensures justification being stated in writing for the relief being granted for the public to see.

This bill by the Legislature simply gives county and state governments the "flexibility" to solve "unexpected problems" at "their discretion". Again this bill by the Legislature does not require or mandate anything. It provides an opportunity for problems to be solved.

If anyone complains to a legislator about its concession suffering and "unexpected circumstance" resulting in "significant hardship" resulting in loss of jobs, services and revenues to county or State agencies and the public, the legislator will be able to say it provided "discretion" to the agencies to address those problems.

It is difficult to understand why anyone would oppose this bill that "only grants discretion", has "no mandates as to any amount of relief to be granted and thus an agency can say "no" to a relief request, and ensures where there is "significant hardship" the roadblocks to the continuation of jobs and concession services to the public and resulting revenues to the county and State agencies will be maximized.

Please support the passage of this bill with proposed amendments that: 1) recognizes unexpected circumstances; 2) saves jobs and businesses were justification and significant hardship; 3) grants county and state governments discretion to solve problems and avoid disruption in services and loss of revenues; and 3) requires written justification for granting such relief for public viewing.

If there are any questions please contact me or Jim Stone at cell: 808-223-7810. Mahalo

HOUSE OF REPRESENTATIVES
THIRTIETH LEGISLATURE, 2020
STATE OF HAWAII

H.B. NO. 2604 H.D. 1 Proposed Amendment

A BILL FOR AN ACT

RELATING TO CONCESSIONS.

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

SECTION 1. The legislature finds that state and county governments sometimes lack the flexibility in concession contracts to quickly address unexpected problems and emergencies that may arise, resulting in a loss of services to the public and loss of revenues to state and county governments.

The legislature notes that state and county governments would benefit from added flexibility in concession contracts to address the following issues:

(1) Delays in construction of premises by state and county governments;

(2) Unexpected circumstances, including increased construction costs due to tariffs, construction site problems, or other circumstances making it no longer feasible for a concessionaire to complete planned concession improvements during the contract term;

(3) Situations where a concession operator's location is in default, withdrawn, or being transferred, and the state and county governments as landlords need to be able to avoid disruption of services and loss of revenues by immediately negotiating with another person or entity to assume the contract, including anyone who may have unamortized costs relating to concessions improvements; or

(4) Where other concession contracts have more generous relief terms to address financial or other hardships that a concession contract does not have.

The purpose of this Act is to provide more flexibility and discretion to state and county governments to address unexpected substantial hardship situations that are not provided in their concessions contracts.

SECTION 2. Section 102-10, Hawaii Revised Statutes, is amended to read as follows:

"**§102-10 Modification of concession contract terms.** (a) [~~If~~] Notwithstanding any other law to the contrary, if during the term of the contract [~~(~~], including contracts which have been executed and are presently in force[~~) there has been a reduction of fifteen per cent or more in the volume of business of the concessionaire for a period of sixty days or more, computed on the average monthly gross income for the eighteen months just~~

~~prior to the period or as long as the concessionaire has been in the business, whichever period is shorter,~~], a significant hardship is anticipated or has occurred, and [~~such reduction~~] the significant hardship, as determined by the officer letting the contract, is related to improvements or operations on premises governed by the contract or caused by construction work conducted during the period of time on, or within or contiguous to, the public property upon which the concession is located, by either the state or county governments, or both, the officer, with the approval of the governor in the case of a state officer and the chief executive of the respective county in the case of a county officer, may grant relief by entering into a new contract or modify any of the terms of the existing contract, including the agreed upon rent, extension of term, or assumption of the contract, for a period [~~which~~] or upon terms that the state or county officer determines in their discretion will allow the concessionaire to recoup the amount or portion of the amount lost by [~~such reduction;~~] the significant hardship; provided that [~~if~~] upon granting relief the state or county officer shall consider and state in writing, the duration and extent of the significant hardship during the term of the contract, the relief granted, and reason for granting relief.

(b) Subsection (a) shall not apply:

(1) If the existing contract includes provisions allowing modification for [~~the above contingencies, this section shall not be applicable thereto; provided further that this provision shall not apply to~~] a significant ~~substantial~~ hardship; and

(2) To any particular concession if the application [~~thereto~~] may impair any contractual obligations with bondholders of the State or counties or with any other parties.

(c) The extension of any term shall not be more than fifty per cent of the maximum term of sixty-five years as set forth in section 171-36(2) when counting the remaining term of the concession plus any extension thereof.

(d) The other provisions of chapter 171 shall not apply if in conflict with the intent and purposes of this section providing broad discretion to the state and county governments and their respective agencies and subdivisions to grant relief.

(e) For the purposes of this section:

"Significant hardship" means:

(1) A reduction of:

(A) Fifteen per cent or more in the volume of the average gross monthly income ~~business~~ of the concessionaire for a period of sixty days or more; or

(B) Five per cent to fourteen per cent of the average gross monthly income ~~in business~~ of the concessionaire for a period of one hundred days or more,

computed on the average monthly gross income for the eighteen months just prior to the period or as long as the concessionaire has been in the business, whichever period is shorter;

(2) A delay of more than thirty days in the anticipated substantial completion of premises being constructed by the state or county governments resulting in less time for the concessionaire to construct, occupy, and amortize its tenant improvements before the contract termination date;

(3) Unexpected circumstances, including but not limited to rising international tariffs, construction site problems, or other circumstances resulting in the infeasibility of the concessionaire to proceed with its improvements;

(1) (4) Where one or more of a concession operator's locations are in default, withdrawn, or in the process of being transferred and a sublessee , joint venture partner or licensee generating twenty-five percent or less of the total gross receipts of the

concession operator will not be allowed to continue its operations and amortize its improvement costs over the remaining term of its agreement with the concession operator; or

(5) Where one or more concession contracts have more generous relief terms to address financial or other hardships suffered by a concession when compared to other concession contacts."

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 4. This Act shall take effect on January 1, 2050

Report Title:
Concessions; Substantial Hardship; Public Property; Contracts

Description:
Provides state and county governments more flexibility and discretion to address substantial hardship situations that impact concession contracts. Effective 1/1/2050. (HD1)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

UNITE HERE! LOCAL 5 HAWAII
Eric W. Gill, Financial Secretary-Treasurer Gemma G. Weinstein, President Godfrey Maeshiro, Senior Vice-President

February 18, 2020

House Committee on Finance
Hawaii State Legislature
415 South Beretania Street
Honolulu, Hawaii 96813

Re: ***<u>HB 2604 - HD1 RELATING TO CONCESSIONS</u>***

Chair Luke, Vice-Chair Cullen & Members,

UNITE HERE Local 5, a local labor organization representing nearly 12,000 hotel, health care and food service workers employed throughout our State - including more than one thousand workers that service our State airports, would like to offer comments in strong opposition to HB2604.

HB 2604 is a corporate giveaway – a bill designed for the specific purpose of benefiting two large corporations that already enjoy long-term and lucrative contracts at our State airports. A giveaway our State cannot afford. Or can we?

We live in a time when our local working people continue to struggle while living paycheck to paycheck. We live in a State with a lower minimum wage than Arizona – where the cost of living is more than 40% less than it is here in Hawaii. While workers at our airports struggle to keep up with Hawaii's cost of living, Airport concessionaires have been successful year after year in asking the State for flexibility, leniency and hand-outs at the expense of taxpayers. But why? Those that stand to gain from HB 2604 have failed to live up to their end of the bargain. They make millions of dollars each year, yet they do not yet provide good, long-term living wage jobs.

Enough is enough. As members of the Finance Committee, how much money does the State take in each year from its concessions contracts at the Airport? How will the State benefit from HB2604 in ways it wouldn't already be able to?

To be clear, our State's airport concessionaires already have lots of flexibility. In fact, take a close look at HMSHost– which has been operating the food & beverage concessions at Honolulu International Airport through a contract which has not gone out to bid since 1992. The State granted HMSHost three contract extensions following the passages of Act 128 in 2006[i], Act 33 in 2009[ii] and Act 46 in 2012, respectively.[iii] Those extensions represent just three of the 31 contract amendments HMSHost has gotten with the State. And in 2017, Act 138 gave existing concessionaires even more flexibility. Despite previous 15-year limitations on bidded State contracts, the HMSHost agreement at Honolulu Airport will continue without a competitive bid process until at least 2029 – 35 years after it began. Despite everything the State has done, HMSHost workers continue to be grossly underpaid and mistreated. To ask for more is unbelievable. To entertain the idea of granting the Concessionaires' request is a travesty.

As a Community, we believe *One Job Should be Enough* - to have a roof over our heads, to keep up with the cost of living, to raise our families, to have quality affordable healthcare and enough to retire with dignity. But we can't achieve that if our government is constantly working against us. We urge you to oppose HB2604 and support workers' right to a living wage at our Airports.

Thank you.

---

[i] Amendment 5 to HMSHost's lease with the State (10/27/06) allowed HMSHost got an extension to 4/30/14 (from 4/30/08). Lessee agreed to spend $8 million in improvement costs. Annual percentage rents were spelled out in that document.

[ii] Amendment 13 to HMSHost's lease with the State allowed HMSHost got an extension to 4/30/20 (from 4/30/14). There was no spending requirement or change to the annual rent required through this amendment, although it mentioned that Host had spent $14 million in improvements since 2009 and was committed to spend another $6 million. Amendment 18 (from 10/1/2012) included an updated table of annual percentage rents and minimum annual guarantee amounts, but it was exactly the same as that listed in Amendment 5.

[iii] Amendment 22 to HMSHost's lease with the State (6/5/15) extended the contract to 4/30/29. It contained a rent increase that would be triggered upon the opening of the Diamond Head Marketplace and the Ewa Marketplace. The Minimum Annual Guaranteed rental would then become 85% of whatever the rent was from the previous year, instead of 85% of what it was in year 10. The floor of the Minimum Annual Guarantee was set at $5.1 million, whereas 85% of the Year 10 rent was $4,807,600. Additionally, the table for percentage revenue calculation was modified to slightly increase the percentage of revenue from alcohol sales. Host also agreed to pay for some improvements, although technically the dollar amount was just a projection rather than a guarantee.

AIRLINES COMMITTEE OF HAWAII

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

February 20, 2020

Representative Sylvia Luke, Chair
Representative Ty J.K. Cullen, Vice Chair
Committee on Finance

Re: HB 2604 HD1 – Relating to Concessions – IN OPPOSITION
Conference Room 308; 12:00 p.m.; Agenda #2

Aloha Chair Luke, Vice Chair Cullen and members of the Committee,

The Airlines Committee of Hawaii (ACH), which is comprised of 19 signatory air carriers that underwrite the State of Hawaii Airports System, appreciates the opportunity to express its concerns with HB 2604 HD1, which provides state and county governments the discretion to reduce and/or eliminate certain counterparties obligations with regards to concession contracts.

We believe this legislation was proposed to help the current duty-free operator, DFS, avoid paying the "Minimum Annual Guarantee(d)" amounts for which it contracted and is the result of failed efforts to persuade the State to grant this relief on behalf of the DOT-A. Moreover, this is not the first time DFS is seeking rent relief at the expense of the DOT-A and the airlines, as DFS has previously sought relief from its contractual obligations in years past. Further, the current DFS contract was extended when DFS unilaterally offered the DOT-A the current minimum annual guarantee from which it now seeks relief, in exchange for a long-term extension of their prior contract. We would also note that DFS has been seeking this relief for months before the current crisis with the coronavirus, but now seeks to use that economic cudgel to further its own ends in its quest for contractual relief.

Because any reduction in duty free rent to the DOT-A is directly passed on to the airlines and their respective customers (dollar for dollar), allowing concession contracts to be modified for nearly any reason, may have other unintended consequences.

- **DOT-A Bond Ratings** – Bond ratings could be adversely impacted, lowering its ratings and increasing DOT-A's costs of borrowing. Bond rating agencies assess risk and probabilities and the uncertainty in contractually agreed to revenues is likely to negatively affect their opinion as to DOT-A and other Hawaii municipal debt, perhaps with implications far beyond the DOT-A.

- **Airport-Airline Lease** – Signatory airlines' risk and cost increase materially if concession revenues to the DOT-A can be adjusted downward for nearly any reason. Further, the residual nature of the airlines' agreements with the DOT-A is defined by state statute, so we are also not entirely clear how unilaterally relieving contractual obligations and the revenues guaranteed to the DOT-A is consistent with these concepts statutorily. Finally, given the nature of the existing lease between the DOT-A and Signatory airlines, we believe the airlines to be intended third party beneficiaries of the contract for which the concessionaires now seek relief.

- **Legal Challenges** – We believe this bill could violate the Contracts Clause of the U.S. Constitution. It substantially impairs contracting rights and the justification of equity has previously been found to not allow for the creation of substantial impairment. If a party can enter into a contract with the DOT, then soon thereafter seek relief from that contract and, if not granted, seek that same relief legislatively, we are not sure how any other contract or contracting entity can be assured of the benefit for which they bargained when similarly situated.

  In addition, as pointed out in the Department of Land and Natural Resources' prior testimony, "there may be substantial legal implications associated with after the fact amendments, particularly after a formal bid process where the terms have been vetted and legally approved."

Finally, it should be noted that DFS and DOT-A negotiated specific criteria in the current contract that would enable DFS to seek rent relief in certain circumstances, none of which have been met. Therefore, it is inappropriate for DFS to seek legislative intervention to modify that criteria, especially in light of the fact that they were specifically considered and defined in the contract at issue.

Thank you for the opportunity to share our concerns. For the above reasons, we respectfully request the committee hold this bill.

Sincerely,

Matthew Shelby ACH Co-chair	Brendan Baker ACH Co-chair	Mark Berg ACH Co-chair

**ACH members are Air Canada, Air New Zealand, Alaska Airlines, All Nippon Airways/Air Japan, Aloha Air Cargo, American Airlines, China Airlines, Delta Air Lines, Federal Express, Fiji Airways, Hawaiian Airlines, Japan Airlines, Korean Air, Philippine Airlines, Qantas Airways, Southwest Airlines, United Airlines, United Parcel Service, and WestJet.*

HB-2604-HD-1
Submitted on: 2/19/2020 11:16:50 AM
Testimony for FIN on 2/20/2020 12:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Ruston Utu	Individual	Support	No

Comments:

I am in support of this bill.