

TESTIMONY BY:

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

March 17, 2022
3:00 pm
State Capitol, Conference Room 224 & Teleconference

H.B. 1953, H.D. 2
RELATING TO CONCESSIONS

Senate Committee on Transportation

The Department of Transportation –Airports Division (DOTA) **opposes** H.B. 1953, H.D. 2.

H.B. 1953, H.D. 2 provides the Department of Transportation with more flexibility and discretion to address substantial hardship situations that impact airport concession contracts.

The DOTA would like to emphasize that it already has the discretion to grant relief to airport concessions under provisions of its Concession Lease Agreements and Section 102-10, Hawaii Revised Statutes. In late March 2020, due to the COVID-19 pandemic, the DOTA offered financial relief to all concessions based upon their contract type, terms and remaining time of their lease. Effective April 1, 2020, the DOTA demonstrated discretion based on its Concession Lease Agreements to allow concessions to pay the DOTA a percentage of gross receipts, rather than the minimum rent guarantee. Since April 1, 2020, the DOTA has provided financial relief of approximately \$125 million dollars.

The findings in the proposed bill describes the need for relief during times of crisis, such as the COVID-19 pandemic. However, the proposed amendments suggest a multitude of conditions in which financial relief could be requested.

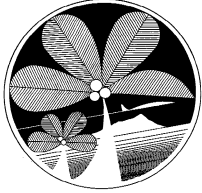
Any type of relief should relate and be based on an actual “Sudden Event” (defined in the concession agreements as “the occurrence of an event that is sudden, extraordinary, and generates relatively immediate severe adverse impacts for the State of Hawaii”), which is also beyond the control of the airport concessionaire, such as the COVID-19 pandemic. A decrease in gross receipts not related to a Sudden Event could be related the type merchandise offered, service, sales team and pricing provided by the concession. This should not be a reason for the DOTA to provide financial relief.

The proposed bill is unnecessary and goes beyond providing relief for a “Sudden Event” by including other relief triggers that may not be directly related to a “Sudden Event” and will create undue risk and obligation to the DOTA.

Lastly, this proposed bill amends HRS 102-10 (Modification to Contract Terms) and not only impacts the DOTA, but also all concessions on public property.

Thank you for the opportunity to provide testimony.

AIRLINES COMMITTEE OF HAWAII



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

Senator Chris Lee, Chair
Senator Lorraine Inouye, Vice Chair
Committee on Transportation

Re: HB 1953 HD2 – RELATING TO CONCESSIONS – IN OPPOSITION
March 17, 2022; 3:00 p.m.

Aloha Chair Lee, Vice Chair Inouye, and members of the committee:

The Airlines Committee of Hawaii (ACH), comprised of 20 signatory air carriers that underwrite the State of Hawaii Airports System, is in opposition to HB 1953 HD2, which provides the Department of Transportation (DOT) with more flexibility and discretion to address substantial hardship situations that impact airport concession contracts.

This bill is unnecessary as the Department of Transportation already has the discretion to address substantial financial hardship situations and has, in fact, waived minimal annual guarantees (MAG) resulting in over \$120M in relief to date to airport concessionaires, plus extended contracts, since the start of the pandemic.

DOT has agreements with both airlines and concessionaires to establish financial and operational commitments to support the airport system. Legislating the ability of one party to a valid contract to reduce their financial commitment is inequitable and creates revenue uncertainty which bond rating agencies could view as a risk. Further, any reduction in concessions revenue to the DOT is directly passed on to the airlines. The airline industry is still recovering from the pandemic and this would add to our already heavy financial burden.

As this bill creates unfair subsidy by transferring financial risk to the airlines, we respectfully ask the committee to hold this bill. Thank you.

Sincerely,

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, Sun Country Airlines, United Airlines, United Parcel Service, and WestJet.*

Wendell F. Brooks, Jr.
Real Estate & Business Consultant
Broker/Realtor - CPM - CRE

Senator Chris Lee, Chair
Committee on Transportation

Hearing – March 17, 2022

Re: Testimony HB 1953 HD2 - Relating to Airport Concessions

Dear Chair Lee & Honorable Committee Members.

Thank you for the opportunity to submit testimony in support of HB 1953 HD2 Relating to Hawaii airport concessions.

My name is Wendell F. Brooks, Jr. and by profession I am a Real Estate & Business Consultant with over fifty (50) years of experience in Hawaii, parts of the U. S. Mainland, parts of Asia and parts of the South Pacific. Most of my work is focused on Commercial Real Estate, including Retail and Food & Beverage.

I strongly support HB 1953 HD2 with amendments for the following reasons:

1. In times of crisis, it is critical that a landlord, such as the Hawaii Department of Transportation (“HDOT”) have discretion and flexibility to timely help concessionaires remain open and operating to serve the traveling public, for their survival and like other commercial landlords.

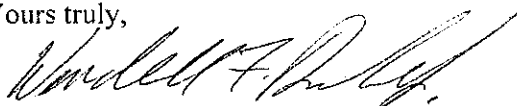
Other airports on the Mainland U.S. recognize that discretion and flexibility are important as a means of granting relief due to significant hardship resulting from events such as the current Coronavirus outbreak. History tells us that it is impossible to know what the crisis might be, how severe it might be or when it might occur.

2. In the future, Federal and/or other financial support may not be available or as generous as in the past.
3. HB 1953 does not create risk for HDOT or airlines or anyone else since the type or amount of relief is not mandatory and HDOT can deny a relief request for any reason. It is not fair or honest for anyone to argue that there is any risk or harm caused by this HB 1953 with proposed amendments.
4. HB 1953 corrects the unfairness that occurred and is needed to clearly state the flexible powers HDOT would have and reduce the uncertainty of applicable laws and contract provisions, which currently exist and as interpreted by the State’s Attorney General.

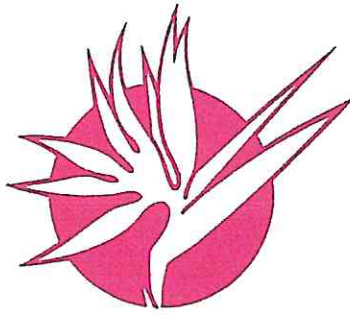
Even with the hopeful signs that Covid, Delta and Omicron are fading, businesses are still struggling and uncertain challenges for the future exist for concessionaires. It is important that HB 1953 be passed to provide HDOT with the flexibility it needs now, and likely in the future, to manage a major element of Hawaii’s airport operations.

Thank you for your time and consideration. I will be happy to attempt to answer any questions.

Yours truly,



Wendell F. Brooks, Jr., CPM – CRE – B/R



AIRPORT CONCESSIONAIRES COMMITTEE

Honorable Chris Lee, Chair
Committee on Transportation
Hawaii State Senate
230pm

For Hearing: March 17, 2022, Rm: 224

Re: HB 1953, HD2 – Relating to Concessions

Chair Lee and Honorable Committee Members,

My name is Ron Tang and I am the co-chair of the Legislative Committee along with Peter Fithian for the Airport Concessionaires Committee which assists a majority of the concessions at Hawaii's public airports.

We stand in strong support of this bill with amendments. This bill:

- 1) Will allow DOT to correct unfairness where some concessions got an extension due to Covid, some got less and some got "nothing". It will also prevent future unfairness to occur again.
- 2) Will clarify antiquated laws and any contract provisions that result in unfairness and no consideration for relief when "significant hardships" occur such as with Covid. We expressed concern last session that it would happen and it did.
- 3) Will allow the DOT to have flexible powers like other US airports to grant relief in times of crisis like Covid which presents new-future challenges to airports across the United States and elsewhere.
- 4) Contrary to misleading arguments, this bill does not create any financial hardships for the DOT since it can say "no" to any request for relief for "any reason". THIS BILL POSES NO THREAT TO THE DOT.
- 5) Contrary to past arguments by the airlines that this bill will burden them is not a fair statement. The DOT can say "no" and it's the DOT --- not the airlines -----that decides what type of relief is fair, if any, and what is in the "best interest of the airports" including services to passengers provided by concessions.

- 6) Will clearly explain the discretion the DOT has to say “yes’ or “no” to relief in times of significant hardships such as Covid and as described.
- 7) DOT’s Testimony has been confusing and misleading. It says it already has flexibility and discretion but as mentioned, it does not and thus as factually pointed out unfairness occurred. DOT’s says it already has adequate powers per HRS 102-10 but it does not unless proposed amendments to HRS 102-10 as proposed by this bill are made. It does not want to grant relief based on “anticipated events” and it doesn’t have to and can say no to any such request. The bill has no mandates for the DOT to do anything.

The DOT states the types of relief in the bill are broad along with the trigger mechanisms but they are no different than triggers other airports can consider in granting relief. Also they need to be board since future events are very difficult to predict. Who predicted Covid and its sufferings around the world now lasting 2 years?

The DOT argues that the request for relief may not be due to substantial hardship situations and place undue risk and obligations on the DOT. Also, DOT argues the request creates any undue risk or obligation to the DOT. These matters being problems is simply not true, since the DOT clearly has the discretion to say “no” to any request for relief in DOT’s sole discretion for any reasons. So why is the DOT arguing these matters when simply not true?

- 8) Reviewed and Processed. Per the review and process, any relief granted will be reviewed by DOT staff, Deputy Airport Director, DOT Director, Attorney General’s office and likely other State officials. Other airports have a similar process of multiple review and Hawaii will be no different with multiple reviews as part of the process before any relief is granted.
- 9) Will Require DOT to Roll Up It’s Sleeves; Think Outside the Box: Nobody likes change but change and creative thinking is necessary during times of Covid and significant hardships. IT’S THE NEW FRONTIER, DOT MUST BE PREPARED AND HAVE THE FLEXIBILIT AND DISCRETION . An airport needs all the flexibility and tools to ensure services to passengers while collecting reasonable rents depending on the circumstances.

Hawaii needs to have the flexibility and tools like other mainland airports.

Covid/Delta/Omicron....Next? Again, it is the new frontier that DOT needs to prepare for and have all of the tools and flexibility to act immediately and respond like other airport.

- 10) Please don’t let the Legislature be blamed. Don’t let the DOT argue it cannot consider correcting the unfairness because the Legislature failed to pass this

bill. Please do not let the DOT argue that it cannot consider the request for relief due to Covid/significant hardships since the Legislature did not give the DOT the flexibility and discretion with nothing mandated to consider granting such types of relief like other US mainland airports.

Proposed Amendments: NOTE – referenced attached exhibits may not line up exactly with exact lines of the current bill but should be easy to locate. Our apologies for any inconvenience but we felt exhibits would be helpful to you.

- 1) Page 5, line 10, pg 6, line 1 – Please add back the words “verbal agreement” and related language that were deleted as noted. Since DOT was not able to finalize new agreements in time, some concessions were operating under prior agreements and thus “verbal” since nothing was in writing. These concessions continued to perform during Covid, Delta, Omicron, next? and should not be overlooked and thus considered and not barred from being able to ask for relief. Please Exhibit 1.
- 2) Page 5, line 14 – We added the word “sole” to emphasize DOT’s discretion and the fact that DOT is not mandated to grant relief and has the “sole discretion” to say “no” to any request for relief. This bill is not a threat to DOT which has sole discretion and to say otherwise is misleading. Please see Exhibit 2.
- 3) Page 6, line 13 --- An employee recall provision was added to the bill and we suggest that it be deleted since not all employees may agree to being recalled to work as in the past. Please see Exhibit 3. If such provision is going to be added to all employee-type contracts that would be fine but to single concessions that are struggling to recover places an undue burden on concessions. Also, many employees do not want to return to work at the airports given the ups and downs as to such businesses.
- 4) Page 7, line 1– Language clarifies that maximum extension the DOT can grant due to significant hardship is up to 10 years in DOT’s sole discretion. Please see Exhibit 4. Prior language in the bill had up to 25 years and that was vague and problematic as to meaning . This will clear up the problem.

Note: Please understand some concessions have 10 and 15 year contracts at the start and during that length of time they can suffer multiple/lingering significant hardship events. Covid/Delta/Comicron has lasted 2 years and the lingering effects remain. There may be more than one such significant hardship periods and DOT should have the discretion to grant relief if it deems it appropriate. The granting of an extension of time costs the DOT nothing and especially important during times the DOT cannot grant monetary relief.

- 5) Page 7, line 9 – April 1, 2020 is when Covid started to effect all airport concessions per DOT. As a result the relief while the effective date of this bill can be the traditional July 1, 2022 the granting of relief must be considered from the start of Covid on April 1, 2020. For this bill/Act to fairly measure the sufferings by concessions it has to be clarified that the starting point is for contracts that were in place and in effect on April 1, 2020 as well as future contracts suffering significant-hardship events thereafter. Please see Exhibit 4.

Also, by referring to April 1, 2020, those concessions that got “no extension” or “less extension than other concessions” will be allowed to be recognized for relief in all fairness that they should have received but did not get.

Without this requested change, the unfairness to concessions who were not fairly treated shall remain as an unfair act that DOT will not be allowed to correct. Also in measuring the start of hardship going forward the starting point for all concessions will be April 1, 2020 for concessions in effect at that time, the start of Covid per DOT.

- 6) Page 8, line 13, Covid has reportedly also resulted in “unexpected increase in construction costs” and “supply-chain delays”. As a result, during times of significant hardship we suggest that these words be added as reasons DOT may consider in granting relief Please see Exhibit 5.

As you are aware, there are reports that construction costs have increased 30% and more and that all materials may not arrive on time for a project to proceed and be finished on time.

Concessions unexpectedly confronted with such problems, should be allowed to ask for relief like concessions at other airports can ask their airport-landlord during times of significant hardship.

Again, this change poses no threat since the DOT can say no.

CLOSING --- In closing allow us to again say we thank you for seeking to provide flexibility to Hawaii's airports like mainland airports with no mandate that Hawaii airport provide any relief. THIS IS A VERY IMPORTANT AND FAIR BILL THAT RESULTS IN NO HARDSHIP.

The DOT can say “no” to any request for relief and any arguments that this bill will cause problems or burden the DOT is simply not valid.

This bill will avoid “unfairness” in the granting of relief such as explained.

It's in the best interests of Hawaii's airports that like other mainland airports it has the flexibility and discretion to provide relief to concessions so they are able to maintain services to passengers during times of Covid or other significant hardships. Other airports have such important flexibility and so should Hawaii's airports to help ensure passengers are served to the maximum extent feasible.

Further, again, it should be noted that one way of providing relief to concessions is an extension of time to help concessions recover their losses suffered during periods of significant hardship . Granting such extensions of time cost the airports nothing which is important when an airport can no longer provide significant monetary relief.

Thank your for allowing us to testify on this important bill that gives the DOT the discretion to correct unfairness which it presently does not have and also powers to provide relief in its discretion like other US mainland airports.

Please don't hesitate to ask any questions you may have . Mahalo.

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Further, again, it should be noted that one way of providing relief to concessions is an extension of time to help concessions recover their losses suffered during periods of significant hardship . Granting such extensions of time cost the airports nothing which is important when an airport can no longer provide significant monetary relief.

Thank your for allowing us to testify on this important bill that gives the DOT the discretion to correct unfairness which it presently does not have and also powers to provide relief in its discretion like other US mainland airports.

Please don't hesitate to ask any questions you may have . Mahalo.

H.B. NO. 1953

1 provide fair and important relief to concessions who are
2 struggling in times of unpredictable crisis to remain in place
3 and provide services to passengers.

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

6 "§102-10 Modification of contract terms. [~~ff~~] (a)
7 Notwithstanding any other law to the contrary, if during the
8 term of the contract [~~+~~], including [~~contracts which have~~] any
9 type of contract that has been executed [~~and are~~] or is *REPAIRS*
10 presently in force [~~+~~ there] by verbal agreement, or both *deleted*

11 (1) There has been a reduction of fifteen per cent or more
12 in the volume of business of the concessionaire for a
13 period of sixty days or more, computed on the average
14 monthly gross income for the eighteen months [~~just~~
15 ~~prior to~~] immediately preceding the period or [~~as long~~
16 ~~as~~] the length of time that the concessionaire has
17 been in the business, whichever period is shorter, and
18 [~~such~~] the reduction, as determined by the officer
19 letting the contract, is caused by construction work
20 conducted during the period of time on, or within or
21 contiguous to, the public property upon which the

EXHIBIT 1 (PAGE 1 OF 2)

H.B. NO. 1953

*REPLACES
deleted*

1 agreements, revocable permits, or by verbal
 2 agreement; the adjustment of rent; granting of an
 3 extension of the contract's term with or without
 4 any further required investments or obligations;
 5 permitting the assumption or transfer, or both,
 6 of a contract; permitting the withdrawal of the
 7 contract without a concessionaire being in
 8 default or barred from doing business with the
 9 State, or both; and any other form of relief to a
 10 concession suffering significant hardship.

11 (b) Subsection (a) shall not apply:

12 (1) If the contract includes provisions allowing
 13 modification for all of the [above] contingencies [
 14 this section shall not be applicable thereto; provided
 15 further that this provision shall not apply to] and
 16 types of relief described in this section; and

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



EXHIBIT 1 (PAGE 2 OF 2) 6

~~are]~~ or is presently in force ~~(+ there]~~ by verbal agreement, or both:

(1) 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]~~ immediately preceding the period or [as long as] the length of time that the concessionaire has been in the business, whichever period is shorter, and [such] the reduction, as determined by the officer letting the contract, is 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 modify any of the terms of the contract, including the agreed upon rent, for a period which will allow the concessionaire to recoup the amount lost by [such] the reduction; [provided that if] and

(2) A significant hardship is anticipated or has occurred to one or more airport concession, as determined by the officer letting the contract, the officer, with the approval of the governor, shall have the SOLE discretion to grant recoupment for the amount lost as may be applicable for the period that the concessionaire has been in business; provided that the recoupment may periodically include one or more of the following:

- (A) Entering into a new contract; and
- (B) Modifying the terms of any type of existing contract, including without limitation holdover agreements, revocable permits, or by verbal agreement; the adjustment of rent; granting of an extension of the contract's term with or without any further required investments or obligations; permitting the assumption or transfer, or both, of a contract; permitting the withdrawal of the contract without a concessionaire being in

EXHIBIT 2

1 (B) Modifying the terms of any type of existing
 2 contract, including without limitation holdover
 3 agreements or revocable permits; the adjustment
 4 of rent; granting of an extension of the
 5 contract's term with or without any further
 6 required investments or obligations; permitting
 7 the assumption or transfer, or both, of a
 8 contract; permitting the withdrawal of the
 9 contract without a concessionaire being in
 10 default or barred from doing business with the
 11 State, or both; and any other form of relief to a
 12 concession suffering significant hardship; and

13 (C) A requirement for the airport concession to
 14 recall employees who were laid off due to an act
 15 of God.

*Don't
add*

16 (b) Subsection (a) shall not apply:
 17 (1) If the contract includes provisions allowing
 18 modification for all of the [above] contingencies[
 19 this section shall not be applicable thereto; provided
 20 further that this provision shall not apply to] and
 21 types of relief described in this section; and

EXHIBIT 3

default or barred from doing business with the State, or both; and any other form of relief to a concession suffering significant hardship.

(b) Subsection (a) shall not apply:

(1) If the contract includes provisions allowing modification for all of the [above] contingencies[, this section shall not be applicable thereto; provided further that this provision shall not apply to] and types of relief described in this section; 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) For airport concessions the term of the contract DUE TO SIGNIFICANT HARDSHIP shall not be EXTENDED more than 10 YEARS BEYOND THE MAXIMUM CONCESSION TERM AND SHALL SUPPLEMENT ALL OF THE RIGHTS GRANTED TO CONCESSIONS AS SET FORTH IN SECTION 102-2 ~~twenty five years, which shall include remaining term of the contract and any extension thereof.~~

(d) To the extent that the provisions of chapter 171 conflict with the purpose and intent of this section, chapter 171 shall not apply to airport concessions.

(e) For purposes of this section, "significant hardship" includes one or more of the following that may occur or continue, or both, from time to time FOR CONTRACTS IN EFFECT AS OF APRIL 1, 2020 AND ANY FURTHER CONTRACTS THEREAFTER SUFFERING SIGNIFICANT HARDSHIP:

(1) A reduction of:

EXHIBIT *if*

- (A) 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 immediately preceding the period or the length of time that the concessionaire has been in business, whichever is shorter; and
- (B) Ten per cent or more in the volume of business of the concessionaire for a period of one hundred eighty days or more, computed on the average monthly gross income for the period one hundred eighty days immediately preceding the period or the length of time that the concessionaire has been in business, whichever is shorter;

(2) A delay of more than ninety days in the anticipated substantial completion of premises being constructed by the State resulting in less time for the concessionaire to construct, occupy, and amortize the concessionaire's tenant improvements over the remaining term of the concessionaire's contract with the State;

(3) Unexpected circumstances, including but not limited to rising international tariffs, construction site or design problems, UNEXPECTED INCREASE IN CONSTRUCTION COSTS, SUPPLY-CHAIN DELAY, or other circumstances resulting in the infeasibility or other significant burden for the concessionaire to proceed with the improvements described in the concessionaire's contract with the State;

(4) Situations in which one or more concession contracts have more favorable relief terms to address financial or operating hardships when compared to the relief terms of other concession contracts;

(5) Situations in which one or more of a concessionaire's locations are in default, withdrawn, or in the process of being transferred and a sublessee, a joint venture partner, or licensee generating less than twenty-five per cent or less of the total gross

EXHIBIT 5