



TESTIMONY BY:

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

February 15, 2022
3:30 p.m.
State Capitol, Teleconference

S.B. No. 2402
RELATING TO CONCESSIONS

Senate Committee on Transportation

The Department of Transportation DOT provides **comments** to S.B. 1953 and amendments in the enclosed draft bill. S.B. 1953 offers the DOT with additional flexibility and discretion to address substantial hardship situations that impact airport concession contracts.

The DOT would like to emphasize that it already has the flexibility and discretion to grant relief to airport concessions under Section 102-10, Hawaii Revised Statutes, and provisions in the concession agreements.

Any type of relief should not be based on anticipated events, but upon 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 COVID-19. The proposed bill creates broad relief trigger mechanisms which may not be directly related to substantial hardship situations and may create undue risk and obligation to the DOTA.

Thank you for the opportunity to provide testimony.

A BILL FOR AN ACT

RELATING TO CONCESSIONS.

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

1 SECTION 1. The legislature finds that like airports on the
2 mainland, the department of transportation needs flexibility and
3 discretion to grant relief to airport concessions in times of
4 hardship, such as the coronavirus disease 2019 (COVID-19)
5 pandemic. The current lack of flexibility resulted in the
6 department of transportation not being able to grant the same
7 relief to all airport concessions who suffered through the
8 COVID-19 pandemic. ~~This resulted in unfair treatment as some~~
9 ~~concessions received an extension on their contracts, while~~
10 ~~others did not receive any form of relief.~~

11 The legislature further finds that unlike Hawaii, some
12 airports on the mainland are granted the flexibility needed to
13 offset any hardship faced by concessions, such as offering an
14 extension of a contract or authorizing a modification to an
15 existing contract to allow extra time to recoup its losses due
16 to an unexpected crisis. Other airports have recognized that in
17 times of crises, if a concession closes it will take a long



S.B. No.2402

1 period to find a replacement to service passengers. For Hawaii,
2 it typically takes eighteen to twenty-four months, or longer, to
3 find and replace a concession. In addition, temporary operators
4 with temporary facilities often generate more complaints and
5 problems.

6 ~~The legislature also finds that the State's antiquated laws~~
7 ~~and contract provisions must be modified to address any unfair~~
8 ~~treatment of concessions and to allow the department of~~
9 ~~transportation the ability to better support airport~~
10 ~~concessions.~~

11 The legislature recognizes airport concession revenues are
12 very important. Historically, airport concessions have averaged
13 about fifty per cent of airport operation revenues, and one time
14 going as high as seventy per cent.

15 The legislature further recognizes that concessions are
16 unique and very challenging businesses as they have term limits,
17 are dependent on travelers, and cannot appeal to the general
18 public like other local businesses. Airport concessions have
19 suffered devastating losses and the levels of pre-COVID-19
20 passengers are not expected to return until the beginning of
21 2026, according to the State's chief economist.



1 The legislature additionally finds that the unpredictable
2 and devastating hardships of COVID-19 and its variants are a
3 wakeup call and require the development of new business models
4 between airports and concessions. Congress provided direct
5 relief to airlines, and while the department of transportation
6 expeditiously utilized the federal funds to support airport
7 concessions, the legislature is concerned that the department
8 has not yet moved forward in the development of new concession-
9 business models, a position that was strongly advocated in June
10 2021 for all mainland airports by national organizations such as
11 American Association for Airport Executives, Airports Council
12 International - North America, and the Airport Restaurant and
13 Retail Association.

14 The intent of this Act is to give the department of
15 transportation flexibility and discretion to grant relief like
16 other mainland airports in times of crisis. While it does not
17 mandate that the department of transportation provide any
18 relief, it gives the department the option to consider all types
19 of relief opportunities.

20 Accordingly, the purpose of this Act is to provide the
21 department of transportation flexibility and discretion to



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.** ~~[(f)]~~ (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
10 presently in force [] there] ~~by verbal agreement, or both:~~

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, caused by construction work
20 conducted during the period of time on, or within or
21 contiguous to, the public property upon which the



1 concession is located by either the state or county
 2 governments, or both, the officer, with the approval
 3 of the governor in the case of a state officer and the
 4 chief executive of the respective county in the case
 5 of a county officer, may modify any of the terms of
 6 the contract, including the agreed upon rent, for a
 7 period which will allow the concessionaire to recoup
 8 the amount lost by ~~[such]~~ the reduction; ~~[provided~~
 9 ~~that if]~~ and

10 (2) A significant hardship is anticipated or has occurred
 11 to one or more airport concession, as determined by
 12 the officer letting the contract, the officer, with
 13 the approval of the governor, shall have the
 14 discretion to grant recoupment for the amount lost as
 15 limited to, modifying the agreed upon rent or
 16 may be applicable for the period that the
 17 extending the term without any requirement of further improvements
 18 concessionaire has been in business; provided that the
 19 for a period which will allow the concessionaire to recoup the amount lost
 20 recoupment may periodically include one or more of the
 21 due to such significant hardship.
following:

19 (A) Entering into a new contract; and

20 (B) Modifying the terms of any type of existing
 21 contract, including without limitation holdover



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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 ill 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.



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Notwithstanding any provision herein to the contrary, for airport concessions,

1 ~~(C) For airport concessions, the term of the contract~~
2 ~~any modification shall in no event result in a total term of more than twenty-five years,~~
3 ~~shall not be more than twenty five years, which shall include~~
4 ~~which maximum term shall be cumulative and include the initial term of the contract and any and all extensions thereof~~
5 ~~the remaining term of the contract and any extension thereof.~~

6 ~~(d) To the extent that the provisions of chapter 171~~
7 ~~conflict with the purpose and intent of this section, chapter~~
8 ~~171 shall not apply to airport concessions.~~

9 ~~(e) For purposes of this section, "significant hardship"~~
10 ~~includes one or more of the following that may occur or~~
11 ~~continue, or both, from time to time:~~

12 ~~i. A reduction of:~~

13 ~~(A) Fifteen per cent or more in the volume of~~
14 ~~business of the concessionaire for a period of~~
15 ~~sixty days or more, computed on the average~~
16 ~~monthly gross income for the eighteen months~~
17 ~~immediately preceding the period or the length of~~
18 ~~time that the concessionaire has been in~~
19 ~~business, whichever is shorter; and~~

20 ~~(B) Ten per cent or more in the volume of business of~~
21 ~~the concessionaire for a period of one hundred~~
 ~~eighty days or more, computed on the average~~
 ~~monthly gross income for the period one hundred~~



H.B. NO. 1953

1 ~~eighty days immediately preceding the period or~~
2 ~~the length of time that the concessionaire has~~
3 ~~been in business, whichever is shorter;~~

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

11 (3) ~~Unexpected circumstances, including but not limited to~~
12 ~~rising international tariffs, construction site or~~
13 ~~design problems, or other circumstances resulting in~~
14 ~~the infeasibility or other significant burden for the~~
15 ~~concessionaire to proceed with the improvements~~
16 ~~described in the concessionaire's contract with the~~
17 ~~State;~~

18 ~~111 Situations in which one or more concession contracts~~
19 ~~have more favorable relief terms to address financial~~
20 ~~or operating hardships when compared to the relief~~
21 ~~terms of other concession contracts;~~



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1 (5) ~~Situations in which one or more of a concessionaire's~~
 2 ~~locations are in default, withdrawn, or in the process~~
 3 ~~of being transferred and a sublessee, a joint venture~~
 4 ~~partner, or licensee generating less than twenty-five~~
 5 ~~per cent or less of the total gross receipts of the~~
 6 ~~concessionaire will not be allowed to continue~~
 7 ~~operations and amortize the cost of the sublessee,~~
 8 ~~joint venture partner, or licensee's concession~~
 9 ~~improvements over the remaining term of the sublessee,~~
 10 ~~joint venture partner, or licensee's contract with the~~
 11 ~~concessionaire; or~~

12 (6) ~~Situations in which an extension of time on the~~
 13 ~~contract would assist the concessionaire in the~~
 14 ~~recoupment of the concessionaire's loss or the loss of~~
 15 ~~time for the concessionaire to amortize the cost of~~
 16 ~~the concession improvements, or both, due to the loss~~
 17 ~~of volume of business as described paragraphs (1)(A)~~
 18 ~~and (1)(B)."~~

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

21 SECTION 4. This Act shall take effect upon its approval.



S.B. NO. 2402

INTRODUCED BY:

A handwritten signature in black ink, appearing to be "M. J. A. i", written over a horizontal line.

JAN 24 2022



H.B. NO. 1953

Report Title:

DOT; Airport Concessions; Substantial Hardship; Contracts

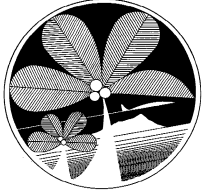
Description:

Provides the department of transportation with more flexibility and discretion to address substantial hardship situations that impact airport concession contracts.

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



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: SB 2402 – RELATING TO CONCESSIONS – IN OPPOSITION
February 15, 2022; 3:30 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 SB 2402, which provides the Department of Transportation 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, provided over \$120M in relief to date to airport concessionaires since the start of the pandemic.

Any reduction in concessions revenue to the Department of Transportation is directly passed on to the airlines. The airline industry is still recovering from the pandemic, reporting multi-billion dollar losses each quarter, and this would add to our already heavy financial burden.

Additionally, we question the ambiguity and reliance on the term “by verbal agreement” in Section 2 Modification of Contract Terms, on page 4, line 10 and page 6, lines 1 and 2.

For these reasons, we respectfully ask the committee to hold this bill. Thank you.

Sincerely,

Brendan Baker
ACH Co-chair

Mark Berg
ACH Co-chair

Wendell F. Brooks, Jr.

Real Estate & Business Consultant
Broker/Realtor - CPM - CRE

February 14, 2022

Senator Chris Lee, Chair
Committee on Transportation

Re: Testimony SB 2402 Relating to Airport Concessions

Dear Chair Lee & Honorable Committee Members.

Thank you for the opportunity to submit testimony in support of SB 2402 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 Aisa and parts of the South Pacific. Most of my work is focused on Commercial Real Estate, including Retail and Food & Beverage.

I Strongly support SB 2402 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, and for their own survival.

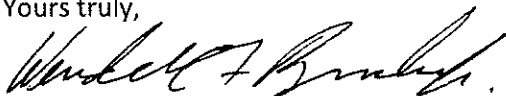
Other airports on the Mainland U.S. recognize that discretion and flexibility are important as a means of granting relief due to significant hardship for events such as the current Coronavirus outbreak. History tells us that it is impossible to know what the crisis might be, how sever it might be or 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. SB 2402 does not create risk for HDOT since the type or amount of relief is not mandatory and HDOT can deny for any reason.
4. SB 2402 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.

With Covid and Omicron continuing and uncertain challenges for concessionaries in the future it is important that SB 2402 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

For Hearing: February 15, 2022, 330pm; VideoConference

Re: SB 2402– Relating to Concessions

Chair Johanson and Honorable Committee Members,

My name is Ron Tang and I am the co-chair of the Legislative Committee 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".
- 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.
- 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.
- 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) Reviewed and Processed. Per the review and process, any relief granted will be reviewed by staff, Deputy Airport Director, 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.
- 8) 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. 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? Is the new frontier that DOT needs to prepare for and have all of the tools and flexibility to do so immediately at times like other airports . It needs to be ready to quickly act when it's in the best interest of the airports and services to passengers. This bill provides DOT with such flexibility and discretion with noting mandated as to relief.

Proposed Amendments: NOTE CHANGES WERE MADE TO A "WORD VERSION" OF THE BILL. THUS WHILE THE EXHIBITS ARE SHOWING CHANGES TO THE WORD VERSION, THE LINE REFERENCES BELOW REFER TO THE "PDF VERSION" OF THE BILL. We wanted to provide the 'word version' since proposed hand written changes at times can be misunderstood.

- 1) Page 5, line 14 – We added the word "sole" to discretion to emphasize the 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. Please see Exhibit 1.
- 2) Page 7, line 1– Language clarifies that maximum extension the DOT can grant due to significant hardship is 10 years in DOT's discretion. Please see Exhibit 2.

Note: This is the proposed maximum additional extension of time that can be granted due to significant hardship which is what this bill is all about ---"times of significant hardship". Also, depending on the circumstances DOT can say "no" or can grant less than 10 years in its sole discretion. Again, this bill is not a threat to the DOT since it can say "no" or perhaps grant just 1 or 2 years at DOT's discretion or nothing.

- 3) Page 7, line 9 – April 1, 2020 is when Covid started to effect airport concessions per DOT as it stated to all concessions. As a result the relief granted by this bill should not be effective date of July 1, 2022 and the granting of relief should be considered from April 1, 2020 so this bill/Act will fairly measure the sufferings by concessions who had contracts in effect on April 1, 2020 as well as future contracts suffering significant hardships thereafter. Please see Exhibit 2.

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.

- 4) 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 3.

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.

This bill provides “flexibility” to the DOT so it has powers to provide relief to concessions during times of significant hardship like Covid, etc as set forth in this bill.

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 seeking to maintain services to passengers during times of Covid or other significant hardships that this bill pass to grant flexibility to deal with a variety of problems as they may arise.

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.

~~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 #] 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 1

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 2

- (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 3

Deleted language with
strikethrough; addend
language underlined; see
yellow areas - 2/14/2022,
115PM

WORD
VERSION

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 like airports on the mainland, the department of transportation needs flexibility and discretion to grant relief to airport concessions in times of hardship, such as the coronavirus disease 2019 (COVID-19) pandemic. The current lack of flexibility resulted in the department of transportation not being able to grant the same relief to all airport concessions who suffered through the COVID-19 pandemic. This resulted in unfair treatment as some concessions received an extension on their contracts, while others did not receive any form of relief.

The legislature further finds that unlike Hawaii, some airports on the mainland are granted the flexibility needed to offset any hardship faced by concessions, such as offering an extension of a contract or authorizing a modification to an existing contract to allow extra time to recoup its losses due

to an unexpected crisis. Other airports have recognized that in times of crises, if a concession closes it will take a long period to find a replacement to service passengers. For Hawaii, it typically takes eighteen to twenty-four months, or longer, to find and replace a concession. In addition, temporary operators with temporary facilities often generate more complaints and problems.

The legislature also finds that the State's antiquated laws and contract provisions must be modified to address any unfair treatment of concessions and to allow the department of transportation the ability to better support airport concessions.

The legislature recognizes airport concession revenues are very important. Historically, airport concessions have averaged about fifty per cent of airport operation revenues, and one time going as high as seventy per cent.

The legislature further recognizes that concessions are unique and very challenging businesses as they have term limits, are dependent on travelers, and cannot appeal to the general public like other local businesses. Airport concessions have suffered devastating losses and the levels of pre-COVID-19 passengers are not expected to return until the beginning of 2026, according to the State's chief economist.

The legislature additionally finds that the unpredictable and devastating hardships of COVID-19 and its variants are a wakeup call and require the development of new business models between airports and concessions. Congress provided direct

relief to airlines, and while the department of transportation expeditiously utilized the federal funds to support airport concessions, the legislature is concerned that the department has not yet moved forward in the development of new concession-business models, a position that was strongly advocated in June 2021 for all mainland airports by national organizations such as American Association for Airport Executives, Airports Council International - North America, and the Airport Restaurant and Retail Association.

The intent of this Act is to give the department of transportation flexibility and discretion to grant relief like other mainland airports in times of crisis. While it does not mandate that the department of transportation provide any relief, it gives the department the option to consider all types of relief opportunities.

Accordingly, the purpose of this Act is to provide the department of transportation flexibility and discretion to provide fair and important relief to concessions who are struggling in times of unpredictable crisis to remain in place and provide services to passengers.

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

"§102-10 Modification of contract

terms. [~~±~~] (a) Notwithstanding any other law to the contrary, if during the term of the contract [±], including [contracts which have] any type of contract that has been executed [and

~~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

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:

- (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

receipts of the concessionaire will not be allowed to continue operations and amortize the cost of the sublessee, joint venture partner, or licensee's concession improvements over the remaining term of the sublessee, joint venture partner, or licensee's contract with the concessionaire; or

(6) Situations in which an extension of time on the contract would assist the concessionaire in the recoupment of the concessionaire's loss or the loss of time for the concessionaire to amortize the cost of the concession improvements, or both, due to the loss of volume of business as described paragraphs (1)(A) and (1)(B)."

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

SECTION 4. This Act shall take effect upon its approval.

INTRODUCED BY: _____

Report Title:

DOT; Airport Concessions; Substantial Hardship; Contracts

Description:

Provides the department of transportation with more flexibility and discretion to address substantial hardship situations that impact airport concession contracts.

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

LATE

SB-2402

Submitted on: 2/15/2022 12:50:25 PM

Testimony for TRS on 2/15/2022 3:30:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Benjamin Sadoski	Testifying for UNITE HERE, Local 5	Oppose	No

Comments:

Aloha,

UNITE HERE Local 5 represents workers at the Honolulu, Kahului and Lihue airports. Many of them have struggled throughout this pandemic and many are still struggling as they haven't been recalled to work despite the recovery in visitor arrivals. We do not see why airport concessions companies should be allowed to get more relief with no strings attached at this time. We oppose this measure as currently written.

Thank you for your consideration.