

**ACT 33**

S.B. NO. 1224

A Bill for an Act Relating to Airport Concessions.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. The legislature finds that the State of Hawaii, along with the rest of the nation, is facing an economic recession that is sudden, extraordinary, and severe and one that may result in greater hardship and economic suffering than has ever been faced by the State. This is especially true for airport concessionaires who rely on air travelers for their business. Passenger counts, already weakened due to the recent history of rising fuel and ticket prices, have now dropped off even further. This decrease in the number of air travelers, coupled with the heightened security measures following the events of September

11, 2001, has restricted ticketed passengers' access to airport concessionaires, and caused airport concessionaires to realize a decline in business similar to that realized immediately after September 11, 2001.

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

Further, the continued economic downturn after September 11, 2001, along with other global events that affected Hawaii's economy such as the Severe Acute Respiratory Syndrome epidemic that took place in March 2003, required additional action by the legislature to assist airport concessionaires. Act 128, Session Laws of Hawaii 2006 (Act 128), temporarily suspended Hawaii's statutes requiring airport concessions to be put out to sealed bid and gave the state department of transportation (DOT) the sole discretion to discuss and negotiate fixed, short-term lease extensions, under certain conditions. The legislature finds that conflicting opinions exist as to the intent of Act 128 but hereby finds and clarifies that it was not the intent or purpose of the legislature, through the passage of Act 128, to remove any rent-relief provisions then existing in any concession leases or contracts that included improvements in accordance with Act 128.

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

Obviously such losses cannot continue. Some relief provisions previously given to concessionaires must be clarified or amended, such as those provisions applicable only during times of economic emergency. These provisions allow all airport concessionaires' guaranteed rent payments to DOT to rise or fall each year depending on the concession's level of success, to avoid undue hardship and the likelihood of default on airport concession contracts due to reasons beyond their control. In fairness, the DOT should consider providing the same type of relief to all concessions and not just some concessions, such as the self-adjusting eighty-five per cent formula now provided to cover twenty airport concessions.

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

Unless relief is provided, concessionaires suffering losses may no longer be economically viable and will face the harsh consequences of defaulting on their concession contract, forfeiting their performance bond, and being barred from doing business with the State of Hawaii for five years in accordance with section 171-13, Hawaii Revised Statutes. These penalties place a tremendous hardship on these businesses due to economic conditions beyond their control. Such results would not only be devastating for the concessionaire but for the State as well due to disruption in services and employee layoffs at airport concessions, and since the State likely will only be able to find a replacement concessionaire who will pay the State significantly-reduced rents for years to come. As relief for airport

concessionaires cannot be simply granted or leases and contracts amended by DOT, legislative direction and authorization is necessary.

Economic hardship for the State, as well as airport concessions, is likely to increase in future months and it could take years for an economic rebound to occur. However, these businesses in all fairness and for public purposes should continue to provide services to our visitors, for the sake of our tourist industry and to our residents. Like other concessions receiving rent relief or rent adjustments pursuant to their leases or contracts with the DOT, similar or other relief should be provided to concession leases or contracts not having such provisions.

The major purpose of this Act is to:

- (1) Give the governor and DOT the discretion and authority to provide relief to airport concessionaires:
  - (A) Whose leases or contracts with DOT were entered into on or after November 1, 2006, and who spent capital improving the concession premises; or
  - (B) Who, as a result of any agreement with DOT pursuant to Act 128, Session Laws of Hawaii 2006, or Act 201, Session Laws of Hawaii 2004, spent capital improving the concession premises;

provided that negotiations for relief for a concession covered by this Act shall commence within ninety days, or any extension agreed to between the governor or governor's designee and a concessionaire following the mailing by the concessionaire of a written request for relief to the governor; and
- (2) Provide that in seeking relief pursuant to this Act, qualified concessionaires may only seek relief for losses of gross receipts or loss of business which occurred during periods of time starting November 1, 2006, or later.

SECTION 2. Notwithstanding any laws or provisions to the contrary, including chapters 102 and 261, Hawaii Revised Statutes, the governor, or director of transportation, if so directed by the governor, with respect to airport concessions:

- (1) Shall have the discretion and authority to provide relief to airport concessionaires:
  - (A) Whose leases or contracts were granted pursuant to chapter 102, Hawaii Revised Statutes, and were entered into on or after November 1, 2006, and who spent capital improving the concession premises; or
  - (B) Who, as a result of any agreement with the department pursuant to Act 201, Session Laws of Hawaii 2004, or Act 128, Session Laws of Hawaii 2006, spent capital improving the concession premises;

provided that negotiations for relief for a concession covered by this Act shall commence within ninety days, or any agreed extension between the governor or governor's designee and a concessionaire, following the mailing by the concessionaire of a written request for relief to the governor;
- (2) Shall have the discretion and authority, without limitation, to reach a relief agreement with the concessionaire to extend the term of the lease or contract, grant or modify existing relief provisions, adjust rent, and otherwise add to, modify, and amend any of the terms of the concession lease or contract;

- (3) Shall have the discretion and authority to grant similar and fair relief to a concessionaire whose concession has suffered operating losses, reduced business, or other losses, for any period starting on or after November 1, 2006;
- (4) Shall take into account any prior rent relief granted to a concessionaire pursuant to this Act or by any governmental agency to avoid the duplication of relief benefits; and
- (5) Shall have the discretion and authority to provide relief only for the period of time on or after November 1, 2006, that a concession lease or contract was or remains in effect.

SECTION 3. The relief provided for by this Act shall be provided as long as and to the extent that such relief does not violate any applicable federal laws and regulations and does not jeopardize the receipt of any federal aid or impair the obligation of Hawaii's department of transportation to the holders of any bond issued by Hawaii's department of transportation.

SECTION 4. To the extent necessary to take action, effectuate, and fulfill the purpose and intentions of this Act including the relief to be provided, the effects of section 171-13, and chapters 102 and 261, Hawaii Revised Statutes, as well as any other statutory provisions or any rules that may be in conflict with this Act, shall be deemed waived and not applicable.

SECTION 5. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Act, which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 6. This Act shall take effect on July 1, 2009, and shall be repealed on July 1, 2011.

(Vetoed by Governor and veto overridden by Legislature on July 15, 2009.)