

JAN 28 2009

S.B. NO. 1224

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## A BILL FOR AN ACT

RELATING TO AIRPORT CONCESSIONS.

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

1           SECTION 1. The legislature finds that the State of Hawaii,  
2 as well as the nation, is facing an economic recession that is  
3 severe and one that may result in greater hardship and economic  
4 suffering than has ever been faced by the State. This is  
5 especially true for airport concessionaires who rely on air  
6 travelers for their business. Passenger counts, already  
7 weakened due to the recent history of rising fuel and ticket  
8 prices, have now dropped off even further. This decrease in the  
9 number of air travelers, coupled with the heightened security  
10 measures following the events of September 11, which restricts  
11 access to airport concessionaires only to ticketed passengers,  
12 has caused airport concessionaires to realize a decline in  
13 business similar to that realized immediately after September  
14 11, 2001.

15           As a result of the events of September 11, 2001, the  
16 legislature passed legislation granting relief to airport  
17 concessionaires due to the financial hardship they were



1 suffering so that they could remain open and continue serving  
2 Hawaii's tourists and residents.

3 Further, the continued economic downturn after September  
4 11, 2001, along with other global events that affected Hawaii's  
5 economy such as the Severe Acute Respiratory Syndrome epidemic  
6 that took place in March 2003, required additional action by the  
7 legislature to assist airport concessionaires. Act 128, Session  
8 Laws of Hawaii 2006, temporarily suspended Hawaii's statutes  
9 requiring airport concessions to be put out to sealed bid and  
10 gave the state department of transportation (DOT) the sole  
11 discretion to discuss and negotiate fixed, short-term lease  
12 extensions, under certain conditions.

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



1           Obviously such losses cannot continue. Some relief  
2 provisions previously given to concessionaires should be  
3 clarified or amended, such as those provisions applicable only  
4 during times of economic emergency. DOT should also consider  
5 making relief provisions, such as a self-adjusting eighty-five  
6 per cent formula that provides relief to all concessions and not  
7 some concessions during slow economic times. This provision  
8 allows all airport concessionaires' guaranteed rent payments to  
9 DOT to rise or fall each year depending on the concession's  
10 level of success, to avoid undue hardship and the likelihood of  
11 default on airport concession contracts due to reasons beyond  
12 their control.

13           Unlike many local businesses which have survived during  
14 this current economic recession by way of cutting expenses and  
15 offering kamaaina discounts and incentives, airport  
16 concessionaires can only provide services for passengers  
17 arriving or departing on daily flights. This fact severely  
18 restricts the economic base for airport concessionaires.  
19 Furthermore, unlike some airport tenants such as airlines that  
20 are able to make up for lost revenue through other means such as  
21 fuel surcharges and baggage fees, or are able to cut expenses by



1 reducing their number of flights, Hawaii's airport concessions  
2 can only appeal to the legislature for relief.

3 Unless relief is provided, concessionaires suffering losses  
4 will no longer be economically viable and will face the harsh  
5 consequences of defaulting on their concession contract,  
6 forfeiting their performance bond, and being barred from doing  
7 business with the State of Hawaii for five years in accordance  
8 with section 171-13, Hawaii Revised Statutes. These penalties  
9 place a tremendous hardship on these businesses. Such results  
10 would not only be devastating for the concessionaire but for the  
11 State as well since the State likely will only be able to find a  
12 replacement concessionaire who will pay the State significantly-  
13 reduced rents for years to come. As relief for airport  
14 concessionaires cannot be simply applied or amended by DOT,  
15 legislative direction and authorization is necessary.

16 Economic hardship for the state, as well as airport  
17 concessions, is likely to increase in future months and it will  
18 take years for an economic rebound to occur. However, the  
19 services of these businesses must continue to be provided to our  
20 visitors and for the sake of our tourist industry. Measured  
21 economic relief must be provided these businesses.

22 The purpose of this Act is to:



- 1           (1) Provide relief to airport concessionaires by providing  
2           for annual adjustments in their guaranteed rents to be  
3           paid to the State not just for some concessions but in  
4           fairness to all airport concessions;
- 5           (2) Clarify the economic emergency relief provisions for  
6           airport concessions that are designed to aid  
7           concessions during dire economic times;
- 8           (3) Further clarify that in granting economic emergency  
9           relief, the director of transportation shall take into  
10          account the concession's economic circumstances and  
11          whether the concession received relief by way of  
12          annual adjustment in guaranteed rents or other  
13          governmental relief for purposes of avoiding duplicate  
14          economic relief benefits to a concessionaire; and
- 15          (4) Provide that in seeking relief pursuant to this Act,  
16          qualified concessionaires may only seek relief for  
17          losses of gross receipts or loss of business which  
18          occurred during periods of time starting November 1,  
19          2006, or later.

20           SECTION 2. Notwithstanding any laws or provisions to the  
21          contrary, the governor, or director of transportation, if so



1 directed by the governor, shall adjust and modify existing  
2 airport concession leases and contracts as follows:

3 (1) The airport concession lease and contract for each  
4 airport concessionaire who does not object shall be  
5 adjusted and modified to provide in part that its  
6 annual guaranteed rents payable to the State shall be  
7 adjusted as follows: For the second and each  
8 successive-twelve-month period from the start of the  
9 concession lease to the end of its term, including any  
10 holdover or extension period as set forth in the  
11 concession lease, the annual guaranteed rents to be  
12 paid to the State shall be eighty-five per cent of the  
13 rents (the greater of guaranteed rents or percentage  
14 rents as applicable), paid by the concessionaire for  
15 the just-ending twelve-month period. Thus, such  
16 annual guaranteed rents may be adjusted upward or  
17 downward for each succeeding twelve-month period  
18 depending on the concession's gross receipts and rents  
19 paid during the prior twelve-month period;

20 (2) Each airport concession lease not having an economic  
21 emergency provision similar to other concession leases



1 issued following the events of September 11, 2001,  
2 shall be modified and adjusted to contain such  
3 provisions. Further, in part for each such concession  
4 lease, as well as for economic emergency relief  
5 provisions in any existing concession lease, shall  
6 provide, or be adjusted and modified to provide in  
7 part, that the director of transportation shall grant  
8 relief allowing the concessionaire to recoup the  
9 amount lost by such reduction in gross receipts to the  
10 concession whenever:

11 (A) The average gross receipts for a concession for a  
12 sixty-day period is fifteen per cent or more less  
13 than the average gross receipts for the  
14 concession for the twelve months prior to the  
15 month the bid was submitted for the concession or  
16 month of contract award, which event occurred  
17 first, or other comparable information if  
18 information as to twelve months of prior gross  
19 receipts is not available; and

20 (B) Such reduction of fifteen per cent or more loss  
21 in gross receipts is due to circumstances beyond  
22 the control of the concessionaire;



1           (3) Each concession lease shall contain provisions in part  
2           stating that prior to granting any relief pursuant to  
3           the economic relief provisions of a concession lease,  
4           the director of transportation, before deciding the  
5           past amount or continuing monthly amounts of relief,  
6           shall first take into account any prior relief granted  
7           to a concessionaire by any governmental agency to  
8           avoid the duplication of relief benefits;

9           (4) The adjustments and modifications to each concession  
10          lease shall take place as soon as possible and any  
11          existing concession lease provisions in conflict with  
12          the purposes and intent of this Act shall be revised  
13          so that they are no longer in conflict with the intent  
14          and provisions of this Act; and

15          (5) A concessionaire who qualifies for relief may only  
16          seek relief for the period of time on or after  
17          November 1, 2006.

18          SECTION 3. The relief provided for by this Act shall take  
19          place as long as and to the extent such relief does not violate  
20          any applicable federal laws and regulations and do not  
21          jeopardize the receipt of any federal aid or impair the  
22          obligation of Hawaii's department of transportation to the





1 holders of any bond issued by Hawaii's department of  
2 transportation.

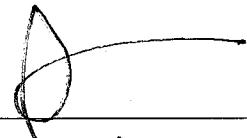
3 SECTION 4. If any provision of this Act, or the  
4 application thereof to any person or circumstance is held  
5 invalid, the invalidity does not affect other provisions or  
6 applications of the Act, which can be given effect without the  
7 invalid provision or application, and to this end the provisions  
8 of this Act are severable.


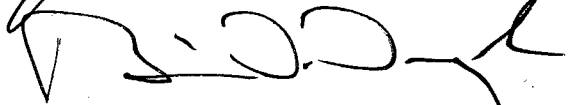
9 SECTION 5. To the extent necessary to take action,  
10 effectuate, and fulfill the purpose and intentions of this Act  
11 including the relief to be provided, the effects of section 171-  
12 13, Hawaii Revised Statutes, as well any other statutory  
13 provisions that may be in conflict with this Act, shall be  
14 deemed waived and not applicable.

15 SECTION 6. This Act shall take effect upon its approval.

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INTRODUCED BY:

  
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**Report Title:**

Airports; Airport Concessions; Leases

**Description:**

Allows for certain adjustments and modifications to airport concession leases.

