

DAVID Y. IGE
GOVERNOR OF
HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
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**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the Senate Committee on
JUDICIARY**

**Monday, February 24, 2020
12:15 PM
State Capitol, Conference Room 229**

**In consideration of
SENATE BILL 2076, SENATE DRAFT 1
RELATING TO HISTORIC PRESERVATION REVIEWS**

Senate Bill 2076, Senate Draft 1 proposes to amend Section 6E-42, Hawaii Revised Statutes (HRS) to authorize the Department of Land and Natural Resources (Department) to delegate permit reviews under Section 6E-42, HRS, to the Counties, provided the counties establish a program to carry out such reviews in a manner consistent with Section 6E-42, HRS, and the relevant administrative rules and that the Department certifies the county program. Senate Bill 2076, Senate Draft 1 also proposes to amend Section 6E-42, HRS, to authorize the Department to establish a program to certify individuals or organizations to conduct third-party reviews to ensure that submissions to the Department for review under Section 6E-42, HRS, are complete and meet the requirements of governing regulations. **The Department supports this measure.**

Senate Bill 2076, Senate Draft 1 proposes to authorize the Department to delegate permit reviews required by Section 6E-42, HRS, to the counties. Senate Bill 2076, Senate Draft 1 proposes to set forth the requirements for such delegations, which the Department believes will ensure that the counties have qualified professionals to carry out the reviews, that reviewers are able to function in an independent manner, in a manner that avoids an appearance of a conflict of interest, and that the county provides for proper public notification of projects being reviewed. Senate Bill 2076, Senate Draft 1 also proposes to require that the delegation be made under a written agreement between the county and the Department, and that it will automatically terminate if the county loses the staff necessary to complete the reviews. Senate Bill 2076, Senate Draft 1 proposes to reserve to the Department projects subject to review under section 6E-8 (state and county projects, projects occurring on state or county land) and Section 6E-10, HRS, (properties listed in the Hawaii or national registers of historic places). The Department believes that the provisions of this amendment allow for an appropriate of delegation of review

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
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AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
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CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

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authority to the counties, if they wish to assume this duty, while assuring that the reviews will be carried out in a manner ensuring professional independence and in manner consistent with the requirements of Chapter 6E, HRS, and to the standards necessary to ensure proper consideration of the state's historic properties in the permit review process.

The Department believes that the provisions of Senate Bill 2076, Senate Draft 1, if enacted, offers the potential to expedite Section 6E-42, HRS, permits reviews while ensuring that significant historic properties receive consideration consistent with existing practice.

Thank you for the opportunity to comment on this measure.



LATE

SB2076 SD1
RELATING TO HISTORIC PRESERVATION REVIEWS
Ke Kōmike 'Aha Kenekoa o ka Ho'okolokolo

Pepeluali 24, 2020

12:15 p.m.

Lumi 016

The Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on SB2076 SD1, which will allow the State Historic Preservation Division (SHPD) to 1) in consultation with OHA, delegate to counties the responsibility for Hawai'i Revised Statutes Chapter 6E historic preservation project reviews, provided that certain requirements are met; and 2) establish a program to certify third-party individuals and organizations authorized to review documents prior to submission of the documents to the division for review.

This measure will allow SHPD to develop additional processes to assist it in fulfilling its important kuleana. OHA appreciates that this draft, as amended, would apply certain conditions for any delegation by SHPD of the HRS 6E historic preservation review authority; these conditions will provide additional safeguards for Hawaiian cultural sites and burials and may address many concerns relating to the professional standards, informational resources, and institutional processes necessary to carry out such authority. These provisions include: 1) requiring consultation with OHA during the certification of counties for HRS Chapter 6E review delegation of authority; and 2) explicitly reaffirming the authority of the Island Burial Councils over reviews pertaining to Native Hawaiian burials, pursuant to HRS §§ 6E-43, -43.5 and -43.6, and their implementing regulations, in recognition of the councils' unique cultural expertise with regard to burial matters.

In order to offer the best protection for irreplaceable Native Hawaiian cultural sites and burials, we respectfully request additional amendments that would require OHA to consult on and approve **1) the scope of delegation of historic preservation review authority to the impacted counties via a written agreement; and 2) the certification of third-party individuals and organizations who may conduct HRS Chapter 6E document review.**

Accordingly, OHA respectfully requests that the language on page 4, lines 8-9 of the measure be amended to read as follows:

"(6) Entered into a written agreement with the department and the Office of Hawaiian Affairs memorializing the scope of delegation to the county;"

We also request amending the language beginning on page 5, line 3, through page 6, line 9, be amended to read as follows:

"(f) The department may establish a program to certify third-party individuals and organizations to review documents

prior to submission of the documents to the department for review. Certification of third-party individuals and organizations shall require approval by the office of Hawaiian affairs. The department shall maintain a list of certified third-party reviewers. A review by a third party shall ensure that the information submitted is complete and complies with the department's documentation requirements and that any accompanying data and analysis supports recommendations made in the submission. All third-party reviews shall be conducted in accordance with the following requirements:

- (1) The department shall select the third-party reviewers for each project;
- (2) Third-party reviewers who conduct the reviews shall meet professional qualifications and standards established by the department;
- (3) Third-party reviewers that apply for certification shall demonstrate that they have established sufficient internal organizational controls to ensure that the qualified professional staff can make independent determinations regarding the effects of projects on historic properties and can function in a manner that does not create a conflict of interest or an appearance of a conflict of interest; and
- (4) Third-party reviewers that precede the department's review shall be independent from the individual or organization that drafted or generated the documents."

Allowing OHA to share authority over the certification of counties seeking delegation of HRS Ch 6E review authority, and requiring OHA to be a party to written agreements to memorialize these delegations, will provide a more consistent and appropriate level of protection for Native Hawaiian cultural and historic sites and resources and actually facilitate the goals of county delegation. As the state agency mandated to assess the policies and practices of other state agencies for possible impacts to Native Hawaiians, OHA has been an important partner to SHPD for the last three decades, and has a demonstrated interest in long-term agreements that would change historic preservation review authorities and that could result in the potentially inappropriate or inconsistent treatment of irreplaceable Hawaiian cultural resources and burial sites. Therefore, we appreciate the current draft's requirements to ensure OHA consultation on any certification of counties to carry out SHPD's historic preservation responsibilities and urge that OHA be allowed to approve the agreements that memorialize delegations of authority. Such consultation will give OHA the opportunity to ensure that counties first develop the appropriate expertise and procedural infrastructure to consistently and appropriately protect Native Hawaiian cultural resources and burials, before they are granted this critical kuleana. Even more importantly, a written agreement that can be referenced even after administration and staff changes is critical to memorialize what kuleana is being granted and what kuleana is not being granted; allowing OHA to be a party to such agreements will allow OHA to help ensure that any delegation of SHPD's responsibilities will be carried out consistently in perpetuity.

Finally, OHA approval of third-party reviewers will also provide an additional safeguard for Native Hawaiian cultural resources and burial sites. The current language of the measure would allow SHPD to delegate authority to review documents for completeness and accuracy to third-party individuals or organizations, which could help to accelerate the state historic preservation review process. To best achieve this goal, however, it is critical that these third-party reviewers be competent and responsible professionals with the requisite expertise. To this end, OHA has three decades of experience working with local archaeological firms and our staff have extensive historic preservation and iwi kūpuna experience and expertise; therefore, OHA may offer unique insights on firms and individuals who have exercised the highest standards of care and professionalism toward Native Hawaiian resources and burials as well as the Hawaiian community. OHA accordingly requests the measure be amended as detailed above to require OHA approval for certification of third-party reviewers to whom further HRS 6E review responsibilities may be delegated.

Mahalo nui loa for the opportunity to testify on this measure.



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To: Senator Karl Rhoads, Chair; and Senator Jarrett Keohokalole, Vice Chair
From: Lorraine Minatoishi Ph.D., AIA
Hearing: Committee on Judiciary February 24, 2020, 12:15 in Room 016
Subject: **OPPOSED** to SB2076SD1, Relating to Historic Preservation

I am writing in opposition to SB2076SD1.

I understand that this was written in response to the anecdotal determination that the State Historic Preservation Division is taking too long to review and proposed projects.

I believe that SHPD is not the only one to blame for this. Many archeological firms in Hawaii are not producing reports that meet a competent professional standard. This slows reviews down and requires them to submit several times over.

Secondly, it is difficult to recruit historic preservationists and historic architects for the open positions at SHPD because of lower state salary levels and the fact that the SHPD office is located in Kapolei. Moreover, there are very few SOI qualified historic preservationists and historic architects in Hawaii. If the counties were given the right to review their own projects, I am sure they would run into the same problem or recruitment.

Revising HRS 6E-42 to allow the County to review their own projects is unacceptable. HRS 6E is one of the most important state laws which mandates that the State oversee our cultural and historic sites, buildings, and landmarks. We should not water-down this law and give oversight to the counties. It is the epitome of the “fox watching the hen-house” scenario. The state must oversee its important cultural treasures.

Thank you very much for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lorraine', with a stylized flourish at the end.

Lorraine Minatoishi, Ph.D., AIA



LATE

February 23, 2020

Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair
Senate Committee on Judiciary

Support for SB 2076, SD1 RELATING TO HISTORIC PRESERVATION REVIEWS (Allows Office of Hawaiian Affairs consultation with State Historic Preservation Division to delegate to the impacted counties the responsibility for historic preservation project reviews, provided that certain requirements are met. [SD1])

JDC Hrg: Monday, February 24, 2020, 12:15 p.m., in Conference Room 016

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and utility companies. LURF's mission is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii's significant natural, cultural and historic resources, and public health and safety.

LURF members include Hawaiian trusts and Kama'aina companies that have served for over one hundred years as stewards of the natural, cultural and historic resources of their lands in Hawaii. LURF and its members have worked closely with their archaeologists, and historic and cultural consultants and the Department of Land and Natural Resources, State Historic Preservation Division (SHPD) to protect and manage the historic places, aviation artifacts or burial sites on their lands. Thus, LURF is in **strong support of SB 2076, SD1.**

SB 2076, SD1. This measure allows the Office of Hawaiian Affairs consultation with the SHPD to delegate to the impacted counties the responsibility for historic preservation project reviews, provided that certain requirements are met.

LURF's Position. Section 6E-42, Hawaii Revised Statutes (HRS), requires agencies and officers of the State and its subdivisions, prior to project approval, to submit for review by SHPD all projects that may affect historic properties, aviation artifacts, or burial sites, consistent with section HRS 6E-43, including those listed in the Hawaii register of historic places. However, due to SHPD's internal procedures and the large number of project applications for review due to the current demand for construction of housing and critical infrastructure, the SHPD has an unacceptably large backlog of projects needing review.

For the reasons set forth above, LURF is **in support of SB 2076, SD1** and respectfully urges your favorable consideration of this bill.

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TO: Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole., Vice Chair
Senate Committee on Judiciary

**SOCIETY FOR HAWAIIAN
ARCHAEOLOGY**



FROM: Angus Raff-Tierney, M.A., Legislative Committee Chair,
Society for Hawaiian Archaeology
angusrafftierney@yahoo.com

HEARING: February, 24 2020, 12:15 PM, Conference Room 016

SUBJECT: Comments on SB 2076, Relating to Historic Preservation

I am Angus Raff-Tierney, Chair of the Legislative Committee of the Society for Hawaiian Archaeology (SHA). We have over 150 members including professional archaeologists and advocates of historic preservation. On behalf of SHA, I present our comments on SB 2076_SD1 (Relating to Historic Preservation).

We support the intent of SB 2076 which is to address the unacceptably large backlog of projects to be reviewed by the State Historic Preservation Division (SHPD) under Chapter 6E-42, Hawaii Revised Statutes (HRS). This excessive backlog has resulted in delays affecting residential and commercial projects due to SHPD's failure to complete timely reviews of county permits. SB 2076 would allow the counties to review some Chapter 6E-42 projects normally reviewed by SHPD if the counties meet certain requirements. However, currently the SHPD is the only entity that houses the previous reports, records and other documents that are required to conduct these reviews. The SHPD has been digitizing their documents to put on an online portal that would allow remote access, but the system is not yet available for public use. Completion and availability of this "HCRIS" system would be critical for the many bills coming up this session that hope to outsource some of the SHPD's review powers to counties or third parties, yet completion of this project continues to be delayed.

We offer the following comments and hope that they will be useful in amending future versions of the subject bill.

Section 2, Proposed amendments to Section 6E-42, Hawaii Revised Statutes (HRS):

“(e) The department may establish a program to certify third—party individuals and organizations to review documents prior to submission of the documents to the department for review...”

We believe that having third parties conduct the review of documents would create more problems than it solved. It is likely that any such third parties will actually turn out to be competing firms reviewing each other's work. This would create the appearance of a conflict of interest, if not an actual conflict of interest. In the past the SHPD has hired a third-party consultant to review reports and this lead to accusations of bias. More recently, the SHPD has tried to hire third party reviewers and could not find anyone to take on the bid. We recommend instead that the counties, or the SHPD, hire full-time civil service employees who possess the qualifications prescribed by the Secretary of the Interior for historic preservation professionals in regulations under the National Historic Preservation Act, thus keeping the review process entirely with government employees. We believe that this would keep the

<https://hawaiianarchaeology.org/>

The Society for Hawaiian Archaeology is a registered tax-exempt organization established in 1980 to promote and stimulate interest and research in the archaeology of the Hawaiian Islands, encourage a more rational public appreciation of the aims and limitations of archaeological research, serve as a bond among those interested in Hawaiian archaeology, both professionals and non-professionals, and aid in directing their efforts into more scientific channels as well as encourage the publication of their results, advocate and assist in the conservation of archaeological data, discourage unethical commercialism in the archaeological field and work for its elimination.

review process independent and less vulnerable to conflicts of interest. Thus, SHA suggests that the bill be changed to allow either county employees to review documents prior to submission, or to have this as a specific position within the SHPD, rather than looking to third parties.

Should the bill pass out of this committee, we request to be consulted as a stakeholder in future deliberations on an amended bill. Should you have any questions, please feel free to contact me at the above email. Mahalo for considering our testimony.

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SB-2076-SD-1

Submitted on: 2/21/2020 6:51:44 PM

Testimony for JDC on 2/24/2020 12:15:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Benton Kealii Pang, Ph.D.	Individual	Oppose	No

Comments:

Aloha Chair Rhodes, Vice-Chair Keohokalole, and the Senate Committee on Judiciary,

My name is Benton Kealii Pang. I do not support SB2076 SD1.

I am native Hawaiian and support the State Historic Preservation Division (SHPD) for their review of archaeological surveys, burial treatment plans, and other historic preservation plans. For Federal Projects, the SHPD is delegated the authority to review projects on behalf of the Advisory Commission on Historic Preservation. Their delegated powers are described in the National Historic Preservation Act. To delegate these powers to counties, may not be legally feasible. Do not pass SB2076 SD1.

Benton Kealii Pang, Ph.D.

SB-2076-SD-1

Submitted on: 2/22/2020 8:36:33 AM

Testimony for JDC on 2/24/2020 12:15:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Leimomi Khan	Individual	Oppose	No

Comments:

Aloha,

SB 2076 SD1, Allows the Office of Hawaiian Affairs consultation with State Historic Preservation Division to delegate to the impacted counties the responsibility for historic preservation project reviews, provided that certain requirements are met. (SD1)

Specifically, Senate Bill 2076 proposes to amend Section 6E-42, Hawaii Revised Statutes (HRS), to authorize the Department of Land and Natural Resources (Department) to delegate permit reviews under Section 6E-42, HRS, to the counties, provided the counties establish a program to carry out such reviews in a manner consistent with section 6E-42 and the relevant administrative rules and that the Department certifies the county program. Senate Bill 2031 also proposes to amend Section 6E-42, HRS, to authorize the Department to establish a program to certify individuals or organizations to conduct third-party reviews to ensure that submissions to the Department for review under Section 6E-42, HRS, are complete and meet the requirements of governing regulations.

The basis for this bill seems to be founded in the State Historic Preservation Division's (SHPD) large backlog of project reviews, a long-standing problem mired by the lack of resources. I do not believe that turning this responsibility over to Counties is the solution, especially since I note no testimonies from the Counties about their ability to source and do this work. Further, SHPD is the only entity that houses the previous reports, records and other documents that are required to make these reviews.

While the idea of transferring this kuleana to counties may have merit, it appears premature. Further thought needs to be placed on how and where the counties will get the resources to do this work and the timeliness of such transfer of responsibility. Consideration should also be given to the current backlog, i.e., how many reviews are outstanding by county, do the counties have the funds to hire the professionals to do this, are these skilled professionals available on neighbor islands, etc.

Mahalo for your consideration of my testimony.

