

DAVID Y. IGE
GOVERNOR OF
HAWAII



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

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the House Committee on
WATER, LAND, & HAWAIIAN AFFIARS**

**Wednesday, March 11, 2020
9:00 AM
State Capitol, Conference Room 325**

**In consideration of
SENATE BILL 2076, SENATE DRAFT 2
RELATING TO HISTORIC PRESERVATION REVIEWS**

Senate Bill 2076, Senate Draft 2 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 2 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 2 proposes to authorize the Department to delegate permit reviews required by Section 6E-42, HRS, to the Counties. Senate Bill 2076, Senate Draft 2 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 a conflict of interest or 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 2 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 2 proposes to reserve to the Department projects subject to review under Section 6E-8, HRS, (state and county projects, projects occurring on state or county land) and Section 6E-10, HRS, (properties listed in the Hawaii or National Register of Historic

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

ROBERT K. MASUDA
FIRST DEPUTY

KALEO L. MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Places). It also proposes to reserve to the Department reviews under Section 6E-43, HRS, and ensures that the authority of the various Island Burial Councils are not diminished.

Senate Bill 2076, Senate Draft 2 also proposes to authorize the Department to establish a program to certify third-party reviewers. To be certified third-party reviewers would have to meet professional qualification standards specified by the Department; demonstrate that they have internal controls ensuring the independence of the reviewers and that they can function in a manner that avoid conflicts of interest or an appearance of a conflict of interest; and that the reviewers and the organization have not participated directly or indirectly in drafting or preparing the documents under review.

The Department believes that the provisions of this amendment allow for an appropriate of delegation of review 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 also believes that Senate Bill 2076, Senate Draft 2 provides for the establishment of a third-party review program that provides for appropriate oversight, and that third-party reviewers may contribute to expediting Section 6E-42, HRS, reviews.

The Department believes that the provisions of Senate Bill 2076, Senate Draft 2 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.



SB2076 SD2
RELATING TO HISTORIC PRESERVATION REVIEWS
House Committee on Water, Land, & Hawaiian Affairs

March 11, 2020

9:00 a.m.

Room 325

The Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on SB2076 SD2, 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 (HRS) 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 prior amendments have been retained from the SD1 draft of this measure that 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 1) require OHA to consult on and approve **the scope of delegation of historic preservation review authority to the impacted counties via a written agreement**, 2) **require OHA to consult on and approve the certification of third-party individuals and organizations who may conduct HRS Chapter 6E document review, clarify the purpose of the third-party reviewers, and clarify the continued responsibility of the department.**

OHA believes that it may be critical for any delegations of historic preservation review authority to the counties be memorialized in a written agreement, with OHA as a party. A written agreement that can be referenced even after agency administration and staff changes is critical to ensuring a continued understanding of what kuleana (responsibility) is being granted and what kuleana is not being granted with regards to delegated historic preservation review. Notably, other delegations of SHPD authority are consistently solidified via written agreements

with specific scopes clearly described.¹ OHA inclusion as a party to written agreements concerning county delegations, meanwhile, **will allow OHA to ensure that any delegations of SHPD’s responsibilities are carried out consistently and as originally agreed upon.** As the state agency statutorily 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. Accordingly, OHA respectfully urges the inclusion of language to require that OHA is a party to any written agreements to memorialize the delegation of authority to the counties by amending **the language on page 4, lines 10-11, 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;”

OHA believes our 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 OHA 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. As the HRS 6E process includes standards for consultation (especially in regard to sites of importance to Native Hawaiians) that are not governed by technical archaeological standards/methods, OHA’s involvement would be beneficial to assisting the SHPD on assessing a firm’s ability to carry out meaningful consultation.

Additionally, OHA also urges the Committee to adopt amendments to clarify that SHPD is not completely delegating all of its statutory and regulatory responsibilities, and will still be required to review the HRS Ch 6E submissions after the third-party reviewer. Requiring the department to maintain a list of certified reviewers and select the third-party reviewers from its list for each project, clarify the department’s continuing responsibilities. Accordingly, OHA respectfully urges the inclusion of the language **beginning on page 5, line 5, through page 6, line 11, 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 reviewers shall require approval by the office of Hawaiian affairs. The department

¹ For example, written agreements memorialize SHPD delegations of Certified Local Government authorities pursuant to the NHPA to Hawai’i, Kaua’i, and Maui counties, as well as SHPD delegations of NHPA Section 106 adverse effect determinations to Base Historic Preservation Officers.

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."

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

SB-2076-SD-2

Submitted on: 3/9/2020 9:13:19 PM

Testimony for WLH on 3/11/2020 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Leimomi Khan	Democratic Party of Hawaii, Hawaiian Affairs Caucu	Oppose	No

Comments:

The Hawaiian Affairs Caucus of the Democratic Party of Hawaii opposes this measure.

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. We do not believe that turning this responsibility over to Counties is the solution, especially since we 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.

There is also some question as to whether it is legal to transfer this responsibility. As was testified by Benton Pang, "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."

Respectfully, Leimomi Khan, Chair, Hawaiian Affairs Caucus



MAUI
CHAMBER OF COMMERCE
VOICE OF BUSINESS

**HEARING BEFORE THE HOUSE COMMITTEE ON
WATER, LAND & HAWAIIAN AFFAIRS
HAWAII STATE CAPITOL, HOUSE CONFERENCE ROOM 325
WEDNESDAY, MARCH 11, 2020 AT 9:00 A.M.**

To The Honorable Ryan I. Yamane, Chair;
The Honorable Chris Todd, Vice Chair; and
Members of the Committee on Water, Land & Hawaiian Affairs,

**TESTIMONY IN SUPPORT OF SB2076 RELATING TO
HISTORIC PRESERVATION REVIEWS**

Aloha, my name is Pamela Tumpap and I am the President of the Maui Chamber of Commerce, with approximately 650 members. I am writing share our support of SB2076.

Affordable housing and rentals are one of our top priorities this year. In working with developers, two of the biggest obstacles to expediting these projects are state and county redundancies and the time it takes to go through various reviews. As reviews take more time and if there are any delays, this translates to higher costs which are passed on to homeowners. This bill helps to address these issues by delegating the counties the responsibility for historic preservation project reviews. All efforts to gain more affordable housing and rentals in Maui County and throughout the State of Hawaii should be a top state priority. Therefore, we support this bill.

We appreciate the opportunity to testify on this matter and ask that this bill be passed.

Sincerely,

Pamela Tumpap

Pamela Tumpap
President

To advance and promote a healthy economic environment for business, advocating for a responsive government and quality education, while preserving Maui's unique community characteristics.

SB-2076-SD-2

Submitted on: 3/9/2020 5:36:50 PM

Testimony for WLH on 3/11/2020 9:00:00 AM

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

Comments:

Aloha Chair Yamane, Vice-Chair Todd, and the members of the Committee on Water, Land and Hawaiian Affairs,

My name is Benton Kealii Pang. I do not support SB2076 SD2.

I am native Hawaiian and support the work of 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.

Alternatively, I suggest each county develop its own programmatic agreement with SHPD to include the types of projects it would like SHPD to exempt from case-by-case review. Additionally, the county should provide the necessary financial resources to SHPD to hire additional qualified staff specifically designated to review county projects.

Please do not pass SB2076 SD2.

Benton Kealii Pang, Ph.D.

SB-2076-SD-2

Submitted on: 3/9/2020 9:47:04 PM

Testimony for WLH on 3/11/2020 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Don Aweau	Individual	Support	No

Comments:

Council Chair
Alice L. Lee

Vice-Chair
Keani N.W. Rawlins-Fernandez

Presiding Officer Pro Tempore
Tasha Kama

Councilmembers
Riki Hokama
Kelly Takaya King
Michael J. Molina
Tamara Paltin
Shane M. Sinenci
Yuki Lei K. Sugimura



Director of Council Services
Traci N. T. Fujita, Esq.

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793
www.MauiCounty.us

March 10, 2020

LATE

TO: The Honorable Ryan I. Yamane, Chair
House Committee on Water, Land, and Hawaiian Affairs

FROM: Alice L. Lee
Council Chair 

SUBJECT: **HEARING OF MARCH 11, 2020; TESTIMONY IN SUPPORT OF
SB 2076 SD2, RELATING TO HISTORIC PRESERVATION**

Thank you for the opportunity to testify in **support** of this important measure. The purpose of this measure is to allow the State Historic Preservation Division to delegate to the impacted counties the responsibility for historic preservation project reviews, if certain requirements are met.

The Maui County Council has not had the opportunity to take a formal position on this measure. Therefore, I am providing this testimony in my capacity as an individual member of the Maui County Council.

I support this measure for the following reasons:

1. Section 6E-42, Hawai'i Revised Statutes, plays an essential role in the protection and management of the State's historic places, burial sites, and aviation artifacts. Section 6E-42 requires agencies and officers of the State and its subdivisions, prior to project approval, to submit for review by the State Historic Preservation Division all projects that may affect historic properties.
2. Many affordable-housing projects are delayed because of the State Historic Preservation Division's inability to efficiently and effectively provide necessary reviews to ensure compliance with State historic preservation law.
3. This measure authorizes the counties to employ qualified archaeologists to perform necessary reviews under Chapter 6E, Hawai'i Revised Statutes, which will ensure compliance with State preservation law while helping to eliminate delay of affordable-housing projects.

For the foregoing reasons, I **support** this measure.

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LATE

SB-2076-SD-2

Submitted on: 3/10/2020 9:50:11 PM

Testimony for WLH on 3/11/2020 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Angus Raff-Tierney	Society for Hawaiian Archaeology	Comments	No

Comments:

Comments on SB 2076 SD2 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_SD2 (Relating to Historic Preservation).

We support the intent of SB 2076 SD2 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 SD2 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):

"(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..."

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 led 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 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.