

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



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

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WILLIAM J. AILA, JR.  
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HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

**Testimony of  
WILLIAM J. AILA, JR.  
Chairperson**

**Before the House Committee on  
WATER, LAND, AND OCEAN RESOURCES**

**Monday, February 14, 2011  
9:00 AM  
State Capitol, Conference Room 325**

**In consideration of  
HOUSE BILL 376 -  
RELATING TO STREAMLINING PERMIT, LICENSE, AND APPROVAL  
APPLICATION PROCESSING**

House Bill 376 proposes to streamline the permitting process to promote the construction industry in Hawaii, including changing review times and guidelines for the State Historic Preservation Division (SHPD) of the Department of Land and Natural Resources (Department). The Department opposes the bill as written.

SECTION 3 of the measure proposes a maximum of sixty days to complete a review and comment "beginning from the time the department is advised of the proposed project by the agency or officer." This language is problematic for the following reasons:

1. While SHPD could agree to a maximum of 60 days to complete its comments, we sometimes need to wait more than 60 days for project proponents to respond to our comments, and even then, on complicated projects it may take more discussion to come to an agreement about mitigation for a resource. If SHPD does not complete its initial review within 30 days, the Counties have the ability to move forward with a project (13-284.5, Hawaii Administrative Rules (HAR)), thus we believe that the current law addresses the need of construction project to move forward.
2. The start time for the 60 day clock is when the Department is "advised of the proposed project by the agency or officer." Merely advising the Department of a project does not ensure that the required information (HAR 13-284) is provided to the Department. HAR 13-284 clearly defines the materials needed for the clock to start, including the receipt of required fees. We believe the rules as they exist provide sufficient guidance.

3. The new language states, "Projects previously reviewed by the department pursuant to this section and found to have no impact . . . shall not be subject to subsequent department reviews under this section. Again, the rules provide guidance on this area (see HAR 13-284 generally and specifically HAR 13-284 (5) (4), and allow for SHPD or an agency to determine that a project will have "no effect" based on previous studies or ground disturbance. The language provide in the bill as written could lead to confusion and further delay. For example, inventory studies done over ten years ago may have found no impact, but only tested a limited area. New information could change SHPD's determination on a project (i.e. Brescia).

In summary, SHPD feels that the current rules already allow for the Counties to take control of the Historic Preservation Review process through either moving forward if SHPD does not comment within 30 days, or hiring their own staff to do reviews per HAR 13-284-5 (5) (2).



**HB 376**  
**RELATING TO STREAMLINING PERMIT, LICENSE, AND APPROVAL**  
**APPLICATION PROCESSING**  
House Committee on Water, Land and Ocean Resources

February 14, 2011

9:00 a.m.

Room 325

The Office of Hawaiian Affairs (OHA) offers the following comments on HB376, which would streamline portions of the review process for various county and state permits, licenses, and approvals.

The OHA Administration will recommend that the OHA Board of Trustees oppose HB376 because the bill grants counties the authority to delegate their mandates to protect Hawai'i's natural and cultural resources to "third-party reviewers." This is unacceptable. Article XI, Section 1 of the state Constitution expressly spells out the state's mandate to protect Hawai'i's natural resources:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

In addition, Article XII, Section 7 of the Hawai'i Constitution provides that the state must protect traditional practices, which are intrinsically linked to cultural sites and natural resources:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

It is the responsibility of the counties, as instrumentalities of the state, to ensure that permit, license, and approval of applications comply with various laws, rules, court orders, and the state Constitution. Counties cannot pass off this kuleana in the interests of quicker review.

Furthermore, HB376 reduces the possibility of project proposals being comprehensively and impartially reviewed. Under HB376, architects and engineers, the third-party reviewers, would be "retained by an owner of the property being reviewed and all fees and costs for third-party review services shall be the responsibility of the owner of the property being reviewed." With owners having complete control over which third-party reviewer to contract with, OHA is concerned that there will be no review and determination if conflicts arise. Although these reviewers do not have authority to grant discretionary approvals, they would be able to make a determination if such a discretionary approval is even necessary for a proposed project or if the project can proceed as a matter of course. In addition, such determinations would be without consequences, as HB376 also insulates third-party reviewers from liability unless their actions rise to the level where intentional misconduct, gross negligence, or malfeasance can be proven.

The bill's proposed changes to Chapter 6E, Hawaii Revised Statutes, are equally problematic. The State Historic Preservation Division (SHPD) is suffering from a severe lack of resources. Rather than direct needed resources to SHPD, HB376 seeks to overhaul Chapter 6E and strip power from SHPD. If projects were automatically approved when the agency fails to complete reviews and offer comments within sixty days, the state may fail to uphold the goals and intent of the Historic Preservation Program. The Legislature has already found with Section 1 of Chapter 6E, HRS, that:

The Constitution of the State of Hawaii recognizes the value of conserving and developing the historic and cultural property within the State for the public good. The legislature declares that the historic and cultural heritage of the State is among its important assets and that the rapid social and economic developments of contemporary society threaten to destroy the remaining vestiges of this heritage. The legislature further declares that it is in the public interest to engage in a comprehensive program of historic preservation at all levels of government to promote the use and conservation of such property for the education, inspiration, pleasure, and enrichment of its citizens. The legislature further declares that it shall be the public policy of this State to provide leadership in preserving, restoring, and maintaining historic and cultural property, to ensure the administration of such historic and cultural property in a spirit of stewardship and trusteeship for future generations, and to conduct activities, plans, and programs in a manner consistent with the preservation and enhancement of historic and cultural property.

HB376 also reduces the authority of SHPD by precluding the review of previously approved projects. Archaeological surveys completed twenty years ago are often deemed to be inadequate by today's archeological standards.

Unfortunately, previous approvals have relied on these surveys. Large development projects like Ku'ilima on the North Shore of O'ahu that were once deemed to have little potential to impact historic resources, are now seen to have major impacts to historic properties when revisited today with improved archaeological methods and new information. SHPD must be allowed to review previously approved projects in order to ensure that all historic properties are carefully protected with current and accurate information.

OHA understands that the approval process for projects can be lengthy. But even the current review process, which is fairly thorough, results in mistakes and misses problems. If the process is shortened, these errors will surely increase and Hawai'i's natural and cultural resources will surely suffer as a result.

- Mahalo for the opportunity to testify.



**HAWAII GOVERNMENT EMPLOYEES ASSOCIATION**  
AFSCME Local 152, AFL-CIO

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The Twenty-Sixth Legislature, State of Hawaii  
House of Representatives  
Committee on Water, Land and Ocean Resources

Testimony by  
Hawaii Government Employees Association  
February 14, 2011

H.B. 376 - RELATING TO STREAMLINING  
PERMIT, LICENSE, AND APPROVAL  
APPLICATION PROCESS

The Hawaii Government Employees Association opposes H.B. 376. The purpose of this bill is to streamline portions of the review process for permits, licenses and approvals to minimize time delays and to expedite the start of construction for workforce housing and other projects that will result in the generation of construction and other related jobs. This bill would allow each county to contract with a third party to certify compliance with building, electrical, mechanical, plumbing and structural codes, as well as land use ordinances, by reviewing an application for permit, license or approval.

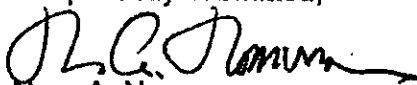
The HGEA maintains that any consideration of contracting services of this nature to a third party provider is clearly contrary to the *Konno* Supreme Court decision, which stated that all work "customarily and historically" done by government employees should remain with government. The review process is currently done by county employees and the accountability of the issuance of permits, licenses and approvals remains with the counties. In addition, these third party reviewers are granted immunity from liability except for acts of intentional misconduct, gross negligence or malfeasance. Essentially, they are insulated from all liability, except for the most egregious of errors.

The HGEA supports the efficiency and streamlining of the review process for the purpose of expediting construction projects. However, there is no compelling reason to allow an outside third party to do the work which is currently done by county employees.

Another concern is the automatic approval provisions applicable to the State Historic Preservation Division and agencies responsible for granting a business or development-related permit, license or approval. We oppose the 60-day and 30-day automatic approval provision. Such automatic approval deadlines are problematic and may lead to unintended adverse consequences.

House of Representatives  
Committee on Water, Land and Ocean Resources  
Re: H.B. 376 - Relating To Streamlining Permit, License, And Approval Application  
Process  
Page 2

Thank you for the opportunity to testify in opposition of H.B. 376.

Respectfully submitted,  
  
Nora A. Nomura  
Deputy Executive Director

**HISTORIC  
HAWAII  
FOUNDATION**

**VIA WEB:** [www.capitol.hawaii.gov/emailtestimony](http://www.capitol.hawaii.gov/emailtestimony)

**TO:** Rep. Jerry L. Chang, Chair  
Rep. Sharon E. Har, Vice Chair  
Committee on Water, Land and Ocean Resources

**FROM:** Kiersten Faulkner, Executive Director  
Historic Hawaii Foundation

**Committee:** Monday, February 14, 2011  
9:00 a.m.  
Conference Room 325

**RE:** **HB376, Relating to Streamlining Permit, License, and Approval Application Processing**

On behalf of Historic Hawaii Foundation (HHF), I am writing in **opposition to HB376**, unless amended. The bill would authorize third-party review of applications; establish maximum time periods for designated agencies to process permits and other applications before they are deemed granted if not acted upon; and eliminate subsequent reviews by the state historic preservation division (SHPD):

HB376, Section 3 would amend HRS §6E-42, which relates to the review process and timelines for “projects” that have potential effects on historic properties. “Project” is defined in HRS §6E-2 as “any activity directly undertaken by the State or its political subdivisions or supported in whole or in part through appropriations, contracts, grants, subsidies, loans, or other forms of funding assistance from the State or its political subdivisions or involving any lease, permit, license, certificate, land use change, or other entitlement for use issued by the State or its political subdivisions.”

The bill would mandate that once SHPD has provided one approval of a proposed project—whether by affirming a determination of no effect on historic properties or through inaction—subsequent reviews would not be allowed.

Historic Hawaii Foundation finds this section of the bill most concerning as written, but suggests that **an amendment could resolve the issue by adding language to clarify that “projects” refers to each distinct application for approval, entitlement or funding, and not to a single sweeping approval of any and all development activity that may ever occur on a particular piece of property.** This would close a loophole that could otherwise cause unintended consequences that would be devastating to historic and cultural resources of Hawai‘i.

The professional staff of the historic preservation division has been steadily eroded over the past several years. Currently, there is only one staff member to provide all architectural project reviews for the entire state, include federal undertakings. The division has lost its architectural branch chief,

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P.O. Box 1658 • Honolulu, HI 96806 • Tel: 808-523-2900 • FAX: 808-523-0800 • [www.historichawaii.org](http://www.historichawaii.org)

Historic Hawai‘i Foundation was established in 1974 to encourage the preservation of historic buildings, sites and communities on all the islands of Hawai‘i. As the statewide leader for historic preservation, HHF works to preserve Hawai‘i’s unique architectural and cultural heritage and believes that historic preservation is an important element in the present and future quality of life, environmental sustainability and economic viability of the state.



its preservation architect, its architectural historian and other professional, clerical and support positions. The lack of funding, staffing and support for the division makes it difficult for it to meet its mandates for high quality and timely review of projects. This leads to frustration by those seeking approvals, as well as by those whose priority is the protection of the state's historic and cultural resources.

The bill attempts to address this impasse by setting a maximum number of reviews and a maximum number of days for those reviews. While the intent may be to provide greater timeliness and certainty to developers, it will come at the expense of protections for historic sites and cultural resources. The absolute deadline on taking action could also lead to a quick denial of projects rather than a slower and more thoughtful approval, simply in an attempt to meet the deadlines. The state's historic and cultural resources should not be penalized by removing protections at the local or the state level.

The provision limiting the number of SHPD reviews per undertaking disregards the reality that developments have multiple phases of design and construction and there is a need to check-in at key points, especially if the undertaking changes. In most development undertakings, there is a continuum of due diligence, planning, entitlements, design and construction. It is rare that all possible effects on historic properties are known at each stage of the development and design process. For example, the area of potential effect for historic sites is less defined at the time of a land use change or subdivision than it is at the time of construction. The certainty and specificity of SHPD's review is directly proportionate to the level of information provided to it, which can and does change as undertakings evolve.

For example, while SHPD may determine that no historic properties are affected by a simple change in entitlements, that same undertaking could very well have an effect at the time of site planning and construction. This is especially true when the historic properties are unknown (such as from sub-surface archeological sites or native Hawaiian burials), undocumented (such as cultural landscapes or traditional cultural properties), when the project takes many years from concept to execution (in which time structures may become eligible for the historic register by virtue of increasing age or significance), or when the scope and scale of the undertaking changes.

It is also a rare development that does not change in its details from the time of concept, to schematic design, to design development, to construction. At any of these stages, a historic property that was not previously anticipated to be affected could become at risk. Therefore, an earlier determination of no adverse effect may not hold true when the undertaking becomes more specific and more information is provided, and vice versa.

HB376 Section 2 provides for third party reviewers to certify that proposals are in compliance with applicable codes and standards. **HHF requests that this section be amended to require that any architects, engineers or other third parties that review an application for a permit, license or approval for a project that affects historic properties meet the education and experience standards and qualifications for preservation professionals as defined by the Secretary of the Interior's Standards.** This will help ensure that reviewers are qualified to make the determinations entrusted to them when making decisions that impact the historic and cultural resources of the Islands and refers to industry standards in federal statute.

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Historic Hawai'i Foundation was established in 1974 to encourage the preservation of historic buildings, sites and communities on all the islands of Hawai'i. As the statewide leader for historic preservation, HHF works to preserve Hawai'i's unique architectural and cultural heritage and believes that historic preservation is an important element in the present and future quality of life, environmental sustainability and economic viability of the state.

TO: Representative Jerry Chang, Chair  
Representative Sharon Har, Vice-Chair  
House Committee on Water, Land & Ocean Resources

FROM: Sara L. Collins, Ph.D., Legislative Chair  
Society for Hawaiian Archaeology  
[sara.l.collins.sha@gmail.com](mailto:sara.l.collins.sha@gmail.com)

HEARING: February 14, 2011, 9:00 AM, Conference Room 325

SUBJECT: Testimony in OPPOSITION to HB 376 (RELATING TO STREAMLINING PERMIT, LICENSE, AND APPROVAL APPLICATION PROCESSING)

I am Dr. Sara Collins, Chair of the Legislative Committee of the Society for Hawaiian Archaeology (SHA). We have over 150 members that include professional archaeologists and advocates of historic preservation in general. On behalf of SHA, I am providing testimony in opposition to HB 376.

We are most concerned with Section 3 of the subject bill and ask, at the least, that Section 3 be removed entirely from HB 376. This section of the bill proposes to amend §6E-42, Hawaii Revised Statutes (HRS) by setting a maximum of 60 days for the Department of Land and Natural Resources (represented by the State Historic Preservation Division [SHPD]) to review and comment on applications it receives from a State or County agency. Section 3 further stipulates that if the department fails to "complete a review and comment" within 60 days that the proposed project "shall be deemed approved." Finally, Section 3 proposes to amend §6E-42, HRS by stipulating that projects which have undergone a previous review by the department and were found to have "no impact on historic properties, aviation artifacts, or burial sites" will not be subject to subsequent reviews.

We find Section 3 to be problematic for several reasons:

- The proposed amendments ignore the existing regulatory timeframes for SHPD's review of materials (e.g., applications, reports, plans, etc.) submitted under §6E-42, HRS. The implementing regulations at Hawaii Administrative Rules (HAR) §13-284 call for the SHPD's review to be completed within 30 days of receipt of the application if it is determined or demonstrated that significant historic sites are not present on the property. If significant historic sites are present within the area covered by the application, additional review periods occur as additional documents (such as inventory survey reports) are submitted, but all subsequent reviews also have specific timelines. Furthermore, we note that §6E-10 contains provision for a review period of up to 90 days in the case of applications that may affect a privately owned historic site listed on the Hawai'i Register of Historic Places (HRHP). Finally, §6E -8 includes review timelines of up to 90 days for projects carried out by State and County agencies. In view of these existing timelines, both in the statute and regulation, we see no need for the proposed amendments.
- The proposal to stop additional review(s) of projects that were previously reviewed by the department and found not to have a significant effect on significant historic properties is dangerously shortsighted for several reasons. Our members are familiar with many cases where significant changes have occurred over time in previously reviewed projects. These changes – in design, scope, or methodology – were such that projects formerly found not to have an effect on significant historic sites became actions that

caused significant harm to such sites as subsurface cultural layers or human burials. Also, subsequent work on neighboring lands may provide evidence that historic properties are, in fact, likely in an area that was previously thought to have been disturbed or rarely used traditionally. The proposed exemption would preclude SHPD from applying continually evolving and refined approaches to predicting the probability of historic properties in a project area. An example of the latter situation is the property on which the Keeaumoku Street WalMart store in Honolulu is located. The first development reviews that SHPD conducted of proposed activities for this property yielded determinations of "no historic properties affected." These determinations were made at a time before it was known that large numbers of burials existed beneath the fill soils in parts of the Kewalo and Kaka`ako areas of Honolulu.

- We are concerned that HB 376 as written will curtail or remove existing opportunities for public participation in the §6E review process. Currently, the review deadlines in HAR §13-284 contain a number of opportunities for public review of and comment on applications and associated documents submitted to SHPD under §6E-42, HRS. If the proposed amendments are adopted, it is not clear that any of these opportunities will remain. Perhaps the proposed amendment could be partially reworded so as to read as follows:

"The department shall have a maximum of sixty days to complete a review and comment, beginning from the time the Department gives public notice to interested parties of its receipt of documents submitted for review."

Finally, we would like to note that our members have experienced first hand the frustrations associated with SHPD's late reviews of documents generated through §6E-42, HRS compliance actions. We believe, however, that SHPD's difficulties arise from its gradual deterioration over the last few years rather than from inherent deficiencies in the language of §6E-42, HRS. We have repeatedly called for SHPD to be fully staffed by qualified historic preservation professionals who are provided sufficient resources to do their jobs. We are hopeful that the new administration will find ways to accomplish these goals. Until these goals are met, the agency will continue to be ill equipped to do its job under the current statutory and regulatory controls, inevitably leading to delays in conducting reviews. Changes such as those proposed in the subject bill will not improve this situation but simply make it more likely that significant historic sites, including burials, will be damaged or destroyed because of a failure to identify them in a timely manner. The inadvertent discovery of significant historic sites like burials, after permits or other entitlements are approved is not good for anyone involved in such a situation, and it is obviously bad for our historic heritage, which is irreplaceable.

In view of the above issues, we respectfully ask that your committees amend HB 376 by removing Section 3 pertaining to Chapter 6E-42, HRS; we have no concerns over or comments on other portions of the subject bill. Thank you for considering our comments. Should you have any questions, please feel free to contact me at the above email address.

February 13, 2011

**House Committee on Water, Land, and Ocean Resources**  
**Representative Jerry L. Chang, Chair**  
**Representative Sharon E. Har, Vice Chair**

**Public Hearing: Monday, February 14, 9:00 a.m., Room 325**

**Re: HB 376, Relating to Streamlining Permit, License, and Approval Application Processing**

Dear Chair Chang, Vice Chair Har, and members of the Committee,

I oppose House Bill 376.

Among many other problems with this bill, I find the idea of automatic approvals a shockingly shortsighted solution to agencies' inability to process applications in a timely manner. Permits should not be granted by default, but following careful consideration of the merits and impacts of each project. Please defer this bill.

Thank you for the opportunity to testify.

Nicole Lowen  
MA Candidate  
Department of Urban and Regional Planning  
University of Hawaii at Manoa  
nlowen@gmail.com  
Honolulu, HI 96816

## har3 - Megan

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**From:** Janice Palma-Glennie [palmtree7@hawaiiantel.net]  
**Sent:** Sunday, February 13, 2011 4:27 PM  
**To:** WLOtestimony  
**Subject:** No automatic approval --"NO" on HB376

**Importance:** High

HB376-- hearing is scheduled for Monday, February 14th at 9:00 a.m.  
*Please make copies of my testimony and circulate to the appropriate legislators. Mahalo.*

Aloha,

HB376 would automatically approve projects if an agency fails to pass rules and meet a sixty day deadline to review the project. Automatic approval makes a mockery of democratic process. Why should developers and development take precedent over due process and input by the public, especially when government is continually emasculated by the very corporate interests who are proponents of this bad bill? A 60-day window is ludicrous and puts the onerous on the public rather than private, self-interests and properly-funded government agencies to insure that proper land use planning. This is clearly wrong.

Why should the public suffer the effects of poor planning because of issues with agency delay?

Please say "no" to this and any other bills that would automatically approve what could be devastatingly negative development proposals.

Mahalo for your consideration of my views on this critical legislation.

Sincerely,  
Janice Palma-Glennie  
PO Box 4849  
Kailua-Kona, HI 96745

### har3 - Megan

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Sunday, February 13, 2011 11:54 AM  
**To:** WLOtestimony  
**Cc:** clk@quixnet.net  
**Subject:** Testimony for HB376 on 2/14/2011 9:00:00 AM

Testimony for WLO 2/14/2011 9:00:00 AM HB376

Conference room: 325  
Testifier position: oppose  
Testifier will be present: No  
Submitted by: Carolyn Knoll  
Organization: Individual  
Address:  
Phone:  
E-mail: [clk@quixnet.net](mailto:clk@quixnet.net)  
Submitted on: 2/13/2011

**Comments:**

I am opposed to HB376/SB762. Agencies shouldn't just respond to developer applications. They should also consider the public's concerns and natural resource needs. Automatic permit approvals tilt the balance too far in favor of development.

We need real leadership, with real solutions. There must be alternatives to just turning agencies into rubber stamps for development.

Carolyn Knoll  
Kaneohe, Hawaii

**har3 - Megan**

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**From:** Michele Nihipali [nihipalim001@hawaii.rr.com]  
**Sent:** Sunday, February 13, 2011 11:30 AM  
**To:** WLOtestimony  
**Subject:** I oppose HB 376

Dear Representatives:

Permits should not be approved automatically just because they fall outside of the sixty day deadline. The Honolulu City and County public already suffers the effects from poor planning from the City's permit and planning department because they do not do sufficient reviews. The State should not follow their lead. We should not suffer the effects of poor planning because of issues in agency delays. We live on islands and any permits for more construction of any kind should have full review regardless of how much time it takes.

Thank you for your consideration in this matter,  
Michele Nihipali  
54-074 A Kam Hwy  
Hauula, HI 96717