



Association of Hawaiian Civic Clubs

P. O. Box 1135
Honolulu, Hawai`i 96807

**JOINT SENATE COMMITTEES ON TOURISM AND HAWAIIAN
AFFAIRS
AND
TECHNOLOGY AND THE ARTS**

**SENATE BILL 1171 RELATING TO THE REVIEW OF
HISTORIC PRESERVATION PROJECTS**

Monday, February 11, 2013; 2:45pm; Room 224

Aloha Chairman Galuteria and Chairman Wakai of the joint committees meeting on Senate Bill 1171 Relating to the Review of Historic Preservation Projects. I am Soulee Stroud president of the Association of Hawaiian Civic Clubs speaking in opposition to this bill.

The Association of Hawaiian Civic Clubs (AHCC) is currently comprised of sixty nine component member clubs in Hawaii and fifteen states on the continent. The first civic club was organized in 1918 by Prince Kuhio and a group of prominent Hawaiian men when Kuhio was a Delegate to the US Congress. Kuhio recognized the need for Native Hawaiians to become more involved in the passage of the Hawaiian Homes Act then before the Congress, and to further become engaged in the intricacies of federal and local government. He further expressed serious concerns about the decline of the Hawaiian people, culture and traditions – issues that the Civic Clubs have always defended.

Over almost a century the Hawaiian civic club movement expanded and never deviated from its course to be involved in those issues of importance to Native Hawaiians. Each year there is a convention that brings delegates together to discuss and consider issues that have been submitted by clubs via written resolutions. If adopted by the body, AHCC resolutions that require follow up are subsequently acted upon. In our conventions of 2011 and again in 2012 resolutions were adopted that expressed our concern for the iwi kupuna referencing the Oahu Rapid Rail System in particular.

SB 1171, Review of Historic Preservation Projects, appears to make the progression of a project such as the Rail System less complicated for developers and constructors yet detrimental to iwi kupuna that may be found in the pathway. “Phased review” should be, but is not defined in the bill. A better explanation is needed of the term.

Common understanding and use of the “phased review” could allow the inexorable approval and forward movement, development and construction of a project, regardless of what lies in its path, due to previous expenditures of time and money. In other words, Senators, if iwi kupuna are hindering the project after so much has already been finished, and after the passage of earlier phased reviews, the argument to press on is valid. But looked at holistically, given a project review in its entirety – not phased - this would not happen because what’s at the end of the path would be revealed before development begins and accommodations could be planned.

We are also extremely concerned that consultation with the advisory council has been deleted and decision making given to the Governor, basically taken away from the community. Please do not delete this language.

Transparency and early community input – as through an advisory council, hearings and open meetings – has precluded needless controversy and costly lawsuits.

From our perspective at this time, SB1171 very much favors development and construction with the potential of destroying iwi kupuna and trust in governmental process.

We accept kuleana to protect iwi kupuna and oppose this bill.

Contact: jalna.keala2@hawaiiantel.net



NATIVE HAWAIIAN LEGAL CORPORATION

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March 4, 2013

Senate President Donna Mercado Kim
Hawaii State Capitol, Room 408
Honolulu, HI 96813

RE: SB 1171 SD1

Dear Senate President Kim,

Aloha. My name is Moses Haia and I am the Executive Director of the Native Hawaiian Legal Corporation. As you know, the Native Hawaiian Legal Corporation is a private, non-profit law firm whose core mission is the protection, preservation, and perpetuation of the Native Hawaiian identity; an identity that speaks to the very essence of Hawai'i.

Although Senate Bill 1171 SD1 includes a defective date, the Native Hawaiian Legal Corporation would like you to consider the implications of this bill. As you know, this bill is a response to the Hawaii Supreme Court's decision in *Kaleikini v. Yoshioka*, 128 Hawai'i 53 (2012). This bill would allow fundamental land use decisions to be made **before** agencies are given all the necessary information they need to make an informed decision on the impact a project may have on important historic resources. It would also confer unfettered discretion upon the State Historic Preservation Division, a division with a blemished record.

When agencies approve projects **before** necessary studies are completed on the historic properties that may be affected, the result is construction delays, cost over-runs, and the desecration of iwi and/or other important historic resources. The failure to prepare an archaeological inventory survey (AIS) prior to decision-making led to the unnecessary disturbance of over sixty burials at each of these projects: the Wal-Mart on Ke'eaumoku Street, General Growth's Ward Village Shops Project and Kawaiaha'o Church's multi-purpose center project.

When burial sites and other historic property are not identified before fundamental decisions are made, many options that could protect those sites are foreclosed (including the project's scope, size, location and design) When burials are identified later in the process, it often becomes very difficult for adjustments to be made, particularly when large sums of money have already been outlaid to forward construction plans that do not account for or appropriately anticipate the locations or numbers of burials within a project area. For example, General Growth insisted that

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burials could not be preserved in place and had to be relocated because its construction plans did “not allow for a lot of redesign” and it had already “spent \$18-20 million” that it could not recover (September 13, 2006 minutes of the O’ahu Island Burial Council at 5-6).

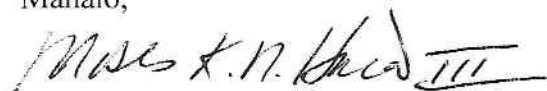
If an EIS can be prepared before decisions are made, there is no reason that an AIS cannot be completed as well. In fact, an AIS was prepared for a 10 mile long, 600 acre area for the Saddle Road. In the words of the Hawai’i Supreme Court, allowing decisions to be made prior to historic properties being identified would “turn the process upside down.” *Kaleikini v. Yoshioka*, 128 Hawai’i 53, 77 (2012).

Please consider SHPD’s track-record. It has allowed hundreds of burials to be desecrated despite the plain meaning and intent of HRS chapter 6E. The National Park Service issued a scathing audit expressing a lack of confidence in the current management and operations of SHPD. The federal agency concluded: “Copies of SHPD letter responses and comments shared by federal agencies and outside groups illustrate that some Section 106 and State 6E reviews are incomplete, inappropriate, and inconsistent with relevant law and regulation.” Similarly, the Hawai’i Supreme Court concluded that “the SHPD failed to comply with HRS chapter 6E and its implementing rules when it concurred in the rail project prior to the completion of the required archaeological inventory survey for the entire project.” *Kaleikini v. Yoshioka*, 128 Hawai’i at 57. The court ruled that SHPD ignored the plain meaning of SHPD’s own rules. The Intermediate Court of Appeals has also ruled that “SHPD violated its rules by failing to require the completion of an AIS, part of the first sequential step, before continuing in the review process. This was a critical error because the preparation of an AIS was necessary for the SHPD to properly identify and evaluate the significance of the historic properties present in the MPC Project area and to determine the impact of the MPC Project on significant historic properties before considering mitigation plans. By treating the AMP as a substitute for an AIS, the SHPD skipped the critical first step and other required sequential steps in the review process. The rules do not permit the SHPD to accept a monitoring plan as a substitute for an AIS. Monitoring plans are directed at the mitigation step of the review process. See HRS § 6E-2 (defining “[m]itigation plan” to include monitoring plans). Indeed, the AMP submitted by Kawaiaha'o Church described the proposed monitoring program as a "mitigation measure." One of the central purposes of the historic preservation law ‘is to require that the effects on historic properties be reviewed prior to the approval of a project.’ *Kaleikini*, 128 Hawai’i at 70, 283 P.3d at 77. By accepting the AMP as a substitute for an AIS, the SHPD skipped to the mitigation step of the review process and allowed construction on the MPC Project to commence, without identifying the significant historic properties at issue and evaluating the impact of the MPC Project on them, thereby limiting the potential options for their protection and preservation.” *Hall v. Dep't of Land & Natural Res.*, 128 Hawai’i 455, 469-470 (Haw. Ct. App. 2012).

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Given SHPD's track record, does the State Senate really want to give SHPD even more discretion and does it feel comfortable putting even more iwi at risk?

Mahalo,

A handwritten signature in black ink that reads "Moses K.N. Haia III". The signature is written in a cursive style with a horizontal line at the end.

Moses K.N. Haia III
Executive Director

Cc: All members of the Senate