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LAND
STATE PARKS

**Testimony of
CARTY S. CHANG
Interim Chairperson**

**Before the House Committee on
WATER & LAND**

**Friday, February 06, 2015
09:00 AM
State Capitol, Conference Room 325**

**In consideration of
HOUSE BILL 1409
RELATING TO RESIDENTIAL PROPERTY**

House Bill 1409 proposes to amend the definition of “programmatic agreement” in §6E-2, Hawaii Revised Statutes (HRS), in a manner that would allow phased compliance to be used for projects subject to review under either state or federal law. Under current law, phasing is only available to projects when there is a “programmatic agreement” entered into under federal law. Programmatic agreements are developed through compliance with §106 of the National Historic Preservation Act and its implementing regulations, 36 CFR Part 800. The proposed amended definition would allow for a programmatic agreement to be developed under either federal or state law, thus expanding the potential use of phasing to projects subject to review only under Chapter 6E, HRS. **The Department of Land and Natural Resources (Department) offers the following comments on this measure.**

It is unclear to the Department what issue or problem with Chapter 6E, HRS, compliance House Bill 1409 is intended to resolve. During the past fifteen months, only once has a project sponsor discussed the possibility of phased compliance with the Department. During this period approximately 7,000 projects were reviewed by the Department under Chapter 6E, HRS.

In 2013, the Legislature recognized that occasionally projects can only get through the historic preservation compliance process using a phased approach. The Legislature carefully crafted a limited exception allowing state agencies that must comply with both Chapter 6E, HRS, and §106 of the National Historic Preservation Act to use phased compliance under very specific and limited set of circumstances.

The Department believes that the limited exception already granted by the Legislature is warranted and sufficient to meet the actual needs of project sponsors. The fact that only once in the last roughly 7,000 projects reviewed by the Department has anyone one discussed the possibility of using phased compliance suggests that there is no need for expanding the phasing exemption further.

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Testimony to the House Committee on Water and Land Friday, February 6, 2015

9:00 a.m.

State Capitol - Conference Room 325

RE: House Bill 1409, Relating to the Review of Historic Preservation Projects

Chair Yamane, Vice-Chair Cullen, and members of the Committee,

My name is Gladys Marrone, Chief Executive Officer for the Building Industry Association of Hawaii (BIA-Hawaii), the Voice of the Construction Industry. We promote our members through advocacy and education, and provide community outreach programs to enhance the quality of life for the people of Hawaii. BIA-Hawaii is a not-for-profit professional trade organization chartered in 1955, and affiliated with the National Association of Home Builders.

BIA-Hawaii **supports the intent** of H.B. 1409, which proposes to amend the definition of "programmatic agreement" to ensure an agreement is consistent with state or federal laws.

Based on our understanding, current law requires below grade site investigation of the entire property early on in the process. The issue that arises is for those parcels with existing users, such as commercial, the required excavation would disrupt a tenant's business before a project is fully approved. We also understand H.B. 1409 does not circumvent or eliminate the site investigation, but allows for it after some of the discretionary approvals are obtained. The developer still carries risk, but the bill would allow the existing user to be removed or relocated prior to the site being investigated.

We appreciate the opportunity to share with you our views.

The Howard Hughes Corporation
1240 Ala Moana Boulevard
Suite 200
Honolulu, Hawaii 96814

February 6, 2015

The Honorable Ryan Yamane, Chair
The Honorable Ty Cullen, Vice Chair
House Committee on Water and Land

RE: **HB 1409 – Relating to the Review of Historic Preservation Projects – In Support**
Hawaii State Capitol Room 325, 9:00 AM

Aloha Chair Yamane, Vice Chair Cullen and members of the Committee:

The Howard Hughes Corporation, and its wholly-owned subsidiary Victoria Ward Limited (“VWL”), supports HB 1409, which amends the definition of “programmatic agreement” to ensure an agreement is consistent with state or federal laws.

HB 1409 is a housekeeping matter.

HRS §6E-42 applies to private developers seeking agency approvals for permits, licenses, or land use changes which may affect historic properties or a burial site. Prior to approval, the agency must provide the State Preservation Historic Division (“SPHD”) the opportunity to review and comment on the effect of the proposed project on historic properties or burial sites.

HRS §6E-42 also allows a programmatic agreement between SPHD and the project applicant to establish a process for consultation and compliance.

However, the term “programmatic agreement” is defined in HRS §6E-2 as a “... legally binding agreement and establishes a process for consultation, and compliance with federal law.”

Private developers must comply with state law (including HRS Chapter 6E and the regulations promulgated under it) when seeking permits, licenses and other approvals. They do not follow federal law.

Hence, we believe that the legislative intent was to allow programmatic agreements for non-federal projects, but the definition needs clarification so that a programmatic agreement can be consistent with state law.

Thank you for the opportunity to provide comments. We ask for your favorable consideration of this measure.

David Striph
Senior Vice President - Hawaii

Howard Hughes

LATE



HB1409
RELATING TO THE REVIEW OF HISTORIC PRESERVATION PROJECTS
House Committee on Water & Land

February 6, 2015

9:00 a.m.

Room 325

The Office of Hawaiian Affairs (OHA) committee on Beneficiary Advocacy and Empowerment will recommend to the Board of Trustees a position of **OPPOSE** for HB1409, which amends the definition of a “programmatic agreement” allowing phased archaeological reviews, to remove the requirement that such agreements comply with federal law. This bill would expand the phased archaeological review provisions to be much more broadly applicable than originally intended, and remove important procedural safeguards and public involvement processes in protecting our historic and sacred sites.

OHA has always maintained that phased archaeological reviews of large projects undermine the spirit of historic preservation laws, and puts valuable and irreplaceable historic sites – as well as iwi kūpuna – at great risk. When burial sites and historic properties are not identified before fundamental planning decisions are made, many options that could protect those sites are effectively foreclosed (such as adjustments to project scope, size, location, design, etc.). Notably, one of the only safeguards in the state’s phased review process is in the requirement of a programmatic agreement, executed in compliance with governing federal law.

Currently, federal law requires such programmatic agreements to clearly detail the project-specific plan for the phased archaeological identification and review of historic sites. In addition, when the project has the potential to affect historic properties of religious and cultural significance to Native Hawaiians, 36 C.F.R. 800.14(b) requires consultation with Native Hawaiian organizations and members of the public in every step of the development and implementation of these agreements. This ensures that project developers have necessary information about the sites they are likely to find, and that Native Hawaiians have a voice in shaping the review process and mitigation options for their sacred and historic sites.

In contrast, by allowing programmatic agreements to comply only with undefined “state law,” and not federal law, this measure fails to give any guidance as to whom the signatories of an agreement must be, what it must contain, or what consultation or procedural steps should be undertaken in its development and implementation. This bill’s vague reference to “state law” is far too ambiguous.

OHA notes that the original argument in support of the need for phased archaeological reviews for state projects was largely based on concerns regarding federally-funded highway projects. State agencies and developers in 2013 argued that making the state archaeological review law “consistent” with the federal law would eliminate duplicitous processes for projects that were already complying with federal phased review requirements (including the creation and implementation of federally-defined programmatic agreements). In consideration of these concerns, our state historic preservation review process was amended to accommodate phased reviews, so long as they complied with such federally-defined regulatory protections.

By now allowing phased reviews to take place without complying with federal regulatory guidelines, this bill has the potential to relax the state standards for phased reviews far beyond what would be “consistent” with federal law. This measure may in fact create such ambiguity in the state’s phased archaeological review process that inconsistencies with federal law may again result in the delays that state phased reviews were intended to mitigate. Most importantly, without any defined procedural requirements for public and Native Hawaiian involvement in the planning process for phased reviews, this bill could endanger our iwi kūpuna and irreplaceable historic sites and resources.

Therefore, OHA urges the Committee to **HOLD** HB1409. Mahalo for the opportunity to testify on this measure.