

**"CHAPTER 6E
HISTORIC PRESERVATION**

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State law enforcement memorial. L 2011, c 14.

Survey to identify potential historic districts and single-family residences for listing on Hawaii register of historic places; report to 2018 legislature. L 2015, c 89, §1.

Cross References

Allowance of indigenous Hawaiian architecture by county ordinances, see §46-1.55.

Kaho'olawe island reserve, see chapter 6K.

Environmental courts, jurisdiction over proceedings arising under this chapter, see §604A-2.

'Ulu'ulu: The Henry Ku'ualoha Giugni moving image archive of Hawai'i, see §304A-1864.

Law Journals and Reviews

Ensuring Our Future by Protecting Our Past: An Indigenous Reconciliation Approach to Improving Native Hawaiian Burial Protection. 33 UH L. Rev. 321 (2010).

Ke Ala Pono--The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions. 33 UH L. Rev. 447 (2011).

Case Notes

As the protections provided by this chapter to human skeletal remains and burial sites do not turn on religious distinctions, plaintiff's interest in protecting family members' unmarked burials and native Hawaiian burials were not extinguished by the burials being "Christian burials"; plaintiff thus had standing on plaintiff's claims under this chapter. 128 H. 455 (App.), 290 P.3d 525 (2012).

Where plaintiff asserted that: (1) plaintiff had family members buried on the church grounds; (2) plaintiff was a native Hawaiian and a recognized cultural descendant of the iwi found on the church grounds; (3) plaintiff had a traditional and customary practice of caring for iwi; (4) plaintiff was concerned that family members may be buried in unmarked burials on the church grounds; and (5) the disturbance of unmarked burials of family members or other cultural ancestors would cause plaintiff injury and harm, plaintiff had standing to raise

claims under this chapter. 128 H. 455 (App.), 290 P.3d 525 (2012).

"PART I. HISTORIC PRESERVATION PROGRAM

Note

Survey to identify potential historic districts and single-family residences for listing on Hawaii register of historic places; report to 2018 legislature. L 2015, c 89, §1.

[\$6E-1] Declaration of intent. 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. [L 1976, c 104, pt of §2]

Cross References

Foundation on culture and the arts, see chapter 9.

" **§6E-2 Definitions.** As used in this chapter:

"Aviation artifact" means airplanes, fallen aircraft, crash sites, or any objects or materials associated with the history of aerospace in Hawaii which are over fifty years old, or determined to be of exceptional historic significance by the department. This term includes but is not limited to actual aircraft, aircraft parts, military equipment, books, documents, and other related items.

"Burial good" means any item reasonably believed to have been intentionally placed with the human skeletal remains of an individual or individuals at the time of burial.

"Burial site" means any specific unmarked location where prehistoric or historic human skeletal remains and their associated burial goods are interred, and its immediate surrounding archaeological context, deemed a unique class of historic property and not otherwise included in section 6E-41.

"Department" means the department of land and natural resources.

"Historic preservation" means the research, protection, restoration, rehabilitation, and interpretation of buildings, structures, objects, districts, areas, and sites, including underwater sites and burial sites, significant to the history, architecture, archaeology, or culture of this State, its communities, or the nation.

"Historic property" means any building, structure, object, district, area, or site, including heiau and underwater site, which is over fifty years old.

"Human skeletal remains" means the body or any part of the body of a deceased human being.

"Mitigation plan" means a plan, approved by the department, for the care and disposition of historic properties, aviation artifacts, and burial sites or the contents thereof, that includes monitoring, protection, restoration, and interpretation plans.

"Person" means any individual, firm, corporation, partnership, or association.

"Programmatic agreement" means a document that sets forth the terms of a formal, legally binding agreement and establishes a process for consultation, review, and compliance with federal laws.

"Project" means any activity directly undertaken by the State or its political subdivisions or supported in whole or in part through appropriations, contracts, grants, 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.

"State historic preservation officer" means that officer appointed by the governor as provided in section 6E-5. [L 1976, c 104, pt of §2; am L 1985, c 108, §1; am L 1990, c 306, §4; am L 1992, c 113, §1; am L 1996, c 97, §3; am L 2005, c 128, §2; am L 2006, c 45, §1; am L 2013, c 85, §1; am L 2014, c 96, §2]

Case Notes

As: (1) §6E-42 applies to any project "which may affect historic property ... or a burial site", as defined by this section; (2) a burial site can be found in a cemetery; and (3) a cemetery can also be a historic property, as also defined by this section, church building project was not exempt from the historic preservation review process required by §6E-42 and its implementing rules because the project involved a cemetery. 128 H. 455 (App.), 290 P.3d 525 (2012).

" **§6E-3 Historic preservation program.** There is established within the department a division to administer a comprehensive historic preservation program, which shall include but not be limited to the following:

- (1) Development of an ongoing program of historical, architectural, and archaeological research and development, including surveys, excavations, scientific recording, interpretation, signage, and publications on the State's historical and cultural resources;
- (2) Acquisition of historic or cultural properties, real or personal, in fee or in any lesser interest, by gift, purchase, condemnation, devise, bequest, land exchange, or other means; preservation, restoration, administration, or transference of the property; and the charging of reasonable admissions to that property;
- (3) Development of a statewide survey and inventory to identify and document historic properties, aviation artifacts, and burial sites, including all those owned by the State and the counties;
- (4) Preparation of information for the Hawaii register of historic places and listing on the national register of historic places;
- (5) Preparation, review, and revisions of a state historic preservation plan, including budget requirements and land use recommendations;
- (6) Application for and receipt of gifts, grants, technical assistance, and other funding from public and private sources for the purposes of this chapter;
- (7) Provision of technical and financial assistance to the counties and public and private agencies involved in historic preservation activities;
- (8) Coordination of activities of the counties in accordance with the state plan for historic preservation;

- (9) Stimulation of public interest in historic preservation, including the development and implementation of interpretive programs for historic properties listed on or eligible for the Hawaii register of historic places;
- (10) Coordination of the evaluation and management of burial sites as provided in section 6E-43;
- (11) Acquisition of burial sites in fee or in any lesser interest, by gift, purchase, condemnation, devise, bequest, land exchange, or other means, to be held in trust;
- (12) Submittal of an annual report to the governor and legislature detailing the accomplishments of the year, recommendations for changes in the state plan or future programs relating to historic preservation, and an accounting of all income, expenditures, and the fund balance of the Hawaii historic preservation special fund;
- (13) Regulation of archaeological activities throughout the State;
- (14) Employment of sufficient professional and technical staff for the purposes of this chapter which shall be in accordance with chapter 76;
- (15) The charging of fees to be determined by the department that are proportional to the nature and complexity of the projects or services provided, and adjusted from time to time to ensure that the proceeds, together with all other fines, income, and penalties collected under this chapter, do not surpass the annual operating costs of the comprehensive historic preservation program;
- (16) Adoption of rules in accordance with chapter 91, necessary to carry out the purposes of this chapter; and
- (17) Development and adoption, in consultation with the office of Hawaiian affairs native historic preservation council, of rules governing permits for access by native Hawaiians and Hawaiians to cultural, historic, and pre-contact sites and monuments. [L 1976, c 104, pt of §2; am L 1987, c 330, §1; am L 1989, c 324, §2; am L 1990, c 306, §5; am L 1991, c 108, §2; am L 1993, c 323, §2; am L 1996, c 97, §4; am L 1997, c 207, §1; am L 1998, c 311, §1; am L 2000, c 253, §150; am L 2006, c 300, §2; am L 2012, c 150, §1; am L 2014, c 181, §2]

" **[§6E-3.5] Consultation.** The department shall consult with appropriate organizations on all matters relating to aviation artifacts. [L 1996, c 97, §2]

" **§6E-4 Administration.** All state historic areas and buildings surplus to the operations of the department of accounting and general services shall be transferred by executive order to the department. All state projects and programs relating to historic preservation shall come under the authority of the department. [L 1976, c 104, pt of §2; am L 2015, c 147, §2]

" **[§6E-5] State historic preservation officer.** The governor shall appoint a state historic preservation officer, and may appoint the officer without regard to chapter 76, who shall be responsible for the comprehensive historic preservation program and who shall be the state liaison officer for the conduct of relations with the federal government and the respective states with regard to matters of historic preservation. The state historic preservation officer shall be appointed on the basis of professional competence and experience in the field of historic preservation and shall be placed in the department for the purposes of the state program. [L 1976, c 104, pt of §2; am L 2000, c 253, §150]

" **§6E-5.5 The Hawaii historic places review board; creation; powers; appointments; composition.** (a) There is created a review board, to be designated the Hawaii historic places review board, for the Hawaii register of historic places and the national register of historic places which shall meet the requirements of federal law. The board shall be placed within the department of land and natural resources for administrative purposes and shall consist of ten members to be appointed and removed by the governor as provided in section 26-34. The board shall include one professionally qualified member of each of the following disciplines: archaeology, architecture, history, and sociology. In addition, there shall be one person knowledgeable in traditional Hawaiian society and culture.

(b) The review board shall:

- (1) Order and enter historic properties into the Hawaii register of historic places on the basis of their value to Hawaii's heritage;

- (2) Evaluate and, when appropriate, recommend the nomination of historic properties to the national register of historic places;
 - (3) Review the state survey of historic properties undertaken in accordance with this chapter;
 - (4) Review the content of the state historic preservation plan developed in accordance with this chapter;
 - (5) Elect a chairperson and a vice-chairperson and adopt such rules as are necessary for the purposes of this section;
 - (6) Maintain the Hawaii register of historic places, including all those listed on the national register of historic places, and a program of notification and publication regarding properties on the registers; and
 - (7) Develop policies on signage in historic districts.
- (c) The members of the review board shall serve without compensation but shall be reimbursed for expenses, including travel expenses, necessary for the performance of their duties.
- (d) The department's determinations made pursuant to section 6E-8 may be appealed to the review board. [L 1980, c 293, §§9, 10; gen ch 1993; am L 1995, c 187, §1; am L 2012, c 150, §2]

" **§6E-6 Depositories for certain specimens and objects.** The department shall serve as or shall determine the depository for all field notes, photographs, negatives, maps, artifacts, or other materials generated or recovered through historic preservation projects supported in whole or in part by the State or taking place on state lands.

Any aviation artifact or any specimen and object of natural and of botanical, ethnological, architectural, historical, or archaeological value or interest, and any book, treatise, or pamphlet relating thereto in the possession of the University of Hawaii, or any other state agency or its political subdivisions, if and when the same is no longer needed for scientific investigation, for study, or for any other purpose, at the request of the Bishop Museum or other qualified museums in this State, shall be transferred and delivered by and with the consent of such department, bureau, or board having possession thereof, to the Bishop Museum or other qualified museum, or exchanged with such museum, and whereupon, the title shall become vested in such museum and shall be held by them; provided that the aviation artifacts or any specimens and objects so transferred are made available at all reasonable times by the museum for study and examination by the officials of the

university of such department, bureau, or board and to qualified scholars. [L 1976, c 104, pt of §2; am L 1996, c 97, §5]

" **§6E-7 State title to historic property.** (a) All historic property located on lands or under waters owned or controlled by the State shall be the property of the State. The control and management of the historic property shall be vested in the department.

(b) The department may dispose of the historic property subject to chapter 171 and subject further to those reservations, restrictions, covenants, or conditions which relate to the preservation of the historic property, such as rights of access, public visitation, operation, maintenance, restoration, and repair. The department shall determine the conditions for any research affecting the historic property and may issue permits for the research.

(c) The State shall hold known burial sites located on lands or under waters owned or controlled by the State in trust for preservation or proper disposition by the lineal or cultural descendants.

(d) The State shall not transfer any historic property or aviation artifact under its jurisdiction without the concurrence of the department, and shall not transfer any burial site under its jurisdiction without consulting the appropriate island burial council. [L 1976, c 104, pt of §2; am L 1985, c 124, §1; am L 1990, c 306, §6; am L 1996, c 97, §6]

" **§6E-8 Review of effect of proposed state projects.** (a) Before any agency or officer of the State or its political subdivisions commences any project which may affect historic property, aviation artifact, or a burial site, the agency or officer shall advise the department and allow the department an opportunity for review of the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, especially those listed on the Hawaii register of historic places. The proposed project shall not be commenced, or if it has already begun, continued, until the department has given its written concurrence. If:

- (1) The proposed project consists of corridors or large land areas;
- (2) Access to properties is restricted; or
- (3) Circumstances dictate that construction be done in stages,

the department may give its written concurrence based on a phased review of the project; provided that there shall be a

programmatic agreement between the department and the project applicant that identifies each phase and the estimated timelines for each phase.

The department shall provide written concurrence or non-concurrence within ninety days after the filing of a request with the department. The agency or officer seeking to proceed with the project, or any person, may appeal the department's concurrence or non-concurrence to the Hawaii historic places review board. An agency, officer, or other person who is dissatisfied with the decision of the review board may apply to the governor, who may take action as the governor deems best in overruling or sustaining the department.

(b) The department of Hawaiian home lands, prior to any proposed project relating to lands under its jurisdiction, shall consult with the department regarding the effect of the project upon historic property or a burial site.

(c) The State, its political subdivisions, agencies, and officers shall report to the department the finding of any historic property during any project and shall cooperate with the department in the investigation, recording, preservation, and salvage of the property.

(d) The department shall adopt rules in accordance with chapter 91 to implement this section. [L 1976, c 104, pt of §2; gen ch 1985; am L 1990, c 306, §7; am L 1995, c 187, §2; am L 1996, c 13, §1 and c 97, §7; am L 2008, c 228, §2; am L 2009, c 4, §2; am L 2013, c 85, §2]

Case Notes

Where rules implementing this section and §6E-42 required that historic properties be identified in the "project area", and the broad definition of "project area" contained in the rules encompassed the entire rail project, the rules did not permit the state historic preservation division (SHPD) to concur in the rail project absent a completed archeological inventory survey (AIS) for the entire project area; because an AIS was not completed before the SHPD gave its concurrence in the project, the SHPD's concurrence in and the city's commencement of the project were improper. 128 H. 53, 283 P.3d 60 (2012).

" **[§6E-9] Investigation, recording, preservation, and salvage; appropriations.** Whenever there is any project by any government agency on lands which are owned or controlled by the State or its political subdivisions and which have historic property or value, one per cent of the appropriations for the project or so much thereof as may be necessary, shall be

expended for the investigation, recording, preservation, and salvage of such historical property or value. Nothing in this section shall be construed to limit the expenditure of more than one per cent of the project appropriations for the purposes herein stated should an additional amount be necessary and mutually agreed to by the department and the government agency planning the construction or improvement. [L 1976, c 104, pt of §2]

" **§6E-10 Privately owned historic property.** (a) Before any construction, alteration, disposition or improvement of any nature, by, for, or permitted by a private landowner may be commenced which will affect an historic property on the Hawaii register of historic places, the landowner shall notify the department of the construction, alteration, disposition, or improvement of any nature and allow the department opportunity for review of the effect of the proposed construction, alteration, disposition, or improvement of any nature on the historic property. The proposed construction, alteration, disposition, or improvement of any nature shall not be commenced, or in the event it has already begun, continue, until the department shall have given its concurrence or ninety days have elapsed. Within ninety days after notification, the department shall:

- (1) Commence condemnation proceedings for the purchase of the historic property if the department and property owner do not agree upon an appropriate course of action;
- (2) Permit the owner to proceed with the owner's construction, alteration, or improvement; or
- (3) In coordination with the owner, undertake or permit the investigation, recording, preservation, and salvage of any historical information deemed necessary to preserve Hawaiian history, by any qualified agency for this purpose.

(b) Nothing in this section shall be construed to prevent the ordinary maintenance or repair of any feature in or on an historic property that does not involve a change in design, material, or outer appearance or change in those characteristics which qualified the historic property for entry onto the Hawaii register of historic places.

(c) Any person, natural or corporate, who violates the provisions of this section shall be fined not more than \$1,000, and each day of continued violation shall constitute a distinct and separate offense under this section for which the offender may be punished.

(d) If funds for the acquisition of needed property are not available, the governor may, upon the recommendation of the department allocate from the contingency fund an amount sufficient to acquire an option on the property or for the immediate acquisition, preservation, restoration, or operation of the property.

(e) The department may enter, solely in performance of its official duties and only at reasonable times, upon private lands for examination or survey thereof. Whenever any member of the department duly authorized to conduct investigations and surveys of an historic or cultural nature determines that entry onto private lands for examination or survey of historic or cultural finding is required, the department shall give written notice of the finding to the owner or occupant of such property at least five days prior to entry. If entry is refused, the member may make a complaint to the district environmental court in the circuit in which such land is located. The district environmental court may thereupon issue a warrant, directed to any police officer of the circuit, commanding the officer to take sufficient aid, and, being accompanied by a member of the department, between the hours of sunrise and sunset, allow the member of the department to examine or survey the historic or cultural property. [L 1976, c 104, pt of §2; gen ch 1985; am L 1992, c 113, §2; am L 2008, c 228, §3; am L 2009, c 4, §3; am L 2014, c 218, §8]

" **[§6E-10.5] Enforcement.** (a) If the board of land and natural resources determines that any person has violated or is violating this chapter, or any rule adopted pursuant to this chapter, the board shall serve written notice by certified mail or personal service upon the alleged violator or violators specifying the alleged violation and may include with the notice:

- (1) An order specifying a reasonable time during which that person shall be required to take such measures as may be necessary to correct the violation and to give periodic progress reports;
- (2) An order imposing penalties provided in section 6E-11.6; and
- (3) An order that the alleged violator or violators appear before the board for a hearing at a time and place specified in the notice or to be set later and answer the charges complained of.

(b) If the board determines that any person is continuing to violate this chapter or any rule adopted pursuant to this chapter after having been served notice of violation, the board

shall serve written notice by certified mail or personal service upon the alleged violator or violators specifying the alleged violation. With the notice, the board:

- (1) Shall order the alleged violator or violators to submit a written schedule within thirty days specifying the measures to be taken and the time within which the measures shall be taken to bring that person into compliance with this chapter or any rule adopted thereunder. The board shall accept or modify the submitted schedule within sixty days of receipt of the schedule. Any schedule not acted upon after sixty days of receipt by the board shall be deemed accepted by the board;
- (2) Shall order the alleged violator or violators to cease and desist from the activities that violate this chapter or any rule adopted thereunder, if that person does not submit a written schedule to the board within thirty days. This order shall remain in effect until the board accepts the written schedule;
- (3) May impose penalties as provided in section 6E-11.6; and
- (4) May order the alleged violator or violators to appear before the board for a hearing to answer the charges issued, at a time and place specified in the notice or otherwise set by the board.

(c) If the board determines that any person has violated an accepted schedule or an order issued pursuant to this section, the board shall impose penalties by sending a notice in writing, either by certified mail or by personal service to that person, describing such non-adherence or violation with reasonable particularity.

(d) Any order issued pursuant to this chapter shall become final, unless the person or persons named therein requests in writing, not later than twenty days after notice of violation and order is served, a hearing before the board. Upon request for a hearing, the board shall require that the alleged violator or violators appear before the board for a hearing to answer the charges issued, at a time and place specified in the notice or otherwise set by the board.

Any penalty imposed pursuant to this chapter shall become due and payable twenty days after the notice of penalty is served, unless the person or persons named therein requests in writing a hearing before the board. Whenever a hearing is requested on any penalty imposed pursuant to this chapter, the penalty shall become due and payable only upon completion of all review proceedings and the issuance of a final order confirming the penalty in whole or in part.

(e) Any hearing conducted pursuant to this section shall be conducted as a contested case under chapter 91. If, after a hearing held pursuant to this section, the board finds that a violation or violations has occurred, the board shall:

- (1) Affirm or modify any penalties imposed;
- (2) Modify or affirm the order previously issued; or
- (3) Issue an appropriate order or orders for the prevention, abatement, or control of the violation or for the taking of such other corrective action as may be appropriate.

Any order issued after a hearing may prescribe timetables for necessary action in preventing, abating, or controlling the violation. If, after a hearing on an order or penalty contained in a notice, the board finds that no violation has occurred or is occurring, the board shall rescind the order or penalty.

(f) If the amount of any penalty is not paid to the department within thirty days after it becomes due and payable, the board may institute a civil action in the name of the State to collect the administrative penalty, which shall be a government realization. In any proceeding to collect the administrative penalty imposed, the board need only show that:

- (1) Notice was given;
- (2) A hearing was held, or the time granted for requesting a hearing has run without such a request;
- (3) The administrative penalty was imposed; and
- (4) The penalty remains unpaid.

(g) In connection with any hearing held pursuant to this section, the board may subpoena the attendance of witnesses and the production of evidence on behalf of all parties. [L 2003, c 104, pt of §2]

" **§6E-11 Civil and administrative violations.** (a) It shall be a civil and administrative violation for any person to take, appropriate, excavate, injure, destroy, or alter any historic property or aviation artifact located upon the private lands of any owner thereof without the owner's written permission being first obtained. It shall be a civil and administrative violation for any person to take, appropriate, excavate, injure, destroy, or alter any historic property or aviation artifact located upon lands owned or controlled by the State or any of its political subdivisions, except as permitted by the department, or to knowingly violate the conditions set forth in an approved mitigation plan that includes monitoring and preservation plans.

(b) It shall be a civil and administrative violation for any person to knowingly take, appropriate, excavate, injure,

destroy, or alter any burial site, or the contents thereof, located on private lands or lands owned or controlled by the State or any of its political subdivisions, except as permitted by the department, to knowingly fail to re-inter human remains discovered on the lands in a reasonable period of time as determined by the department, or to knowingly violate the conditions set forth in an approved mitigation plan that includes monitoring and preservation plans.

(c) It shall be a civil and administrative violation for any person to take, appropriate, excavate, injure, destroy, or alter any historic property or burial site during the course of land development or land alteration activities to which section 6E-42 applies, without obtaining the required approval.

(d) It shall be a civil and administrative violation for any person who inadvertently discovers a burial site to fail to stop work in the immediate area and report the discovery, as required by section 6E-43.6.

(e) It shall be a civil and administrative violation for any person to knowingly glue together any human skeletal remains, label any human skeletal remains with any type of marking pen, or conduct any tests that destroy human skeletal remains, as defined in section 6E-2, except as permitted by the department.

(f) Any person who violates this section shall be fined not more than \$10,000 for each separate violation. If the violator directly or indirectly has caused the loss of, or damage to, any historic property or burial site, the violator shall be fined an additional amount determined by the environmental court or an administrative adjudicative authority to be equivalent to the value of the lost or damaged historic property or burial site. Each day of continued violation of this provision shall constitute a distinct and separate violation for which the violator may be punished. Equipment used by a violator for the taking, appropriation, excavation, injury, destruction, or alteration of any historic property or burial site, or for the transportation of the violator to or from the historic property or burial site, shall be subject to seizure and disposition by the State without compensation to its owner or owners.

(g) Any person who knowingly violates this chapter with respect to burial sites shall also be prohibited from participating in the construction of any state or county funded project for ten years.

(h) Nothing in this section shall apply to land altering activities relating to family burial plots under section 441-5.5.

(i) The civil and administrative penalties imposed pursuant to this chapter shall be in addition to the criminal penalties provided by this chapter and any other penalties that may be imposed pursuant to law. [L 1976, c 104, pt of §2; gen ch 1985; am L 1990, c 306, §8; am L 1992, c 113, §3; am L 1996, c 97, §8; am L 2003, c 104, §3; am L 2005, c 128, §3; am L 2006, c 38, §1 and c 45, §2; am L 2007, c 9, §1; am L 2014, c 218, §8]

" **§6E-11.5 Civil penalties.** Except as provided in section 6E-11, any person who violates this chapter, or any rule adopted pursuant to this chapter shall be fined not less than \$500 nor more than \$10,000 for each separate violation. Each day of each violation constitutes a separate violation. [L 2003, c 104, pt of §2; am L 2005, c 128, §4]

" **[§6E-11.6] Administrative penalties.** (a) In addition to any other administrative or judicial remedy provided by this chapter, or by rules adopted pursuant to this chapter, the board may impose by order the penalties specified in section 6E-11.5.

(b) Factors to be considered in imposing an administrative penalty include:

- (1) The nature and history of the violation and of any prior violations;
- (2) The economic benefit to the violator, or anticipated by the violator, resulting from the violation;
- (3) The opportunity, difficulty, and history of corrective action;
- (4) Good faith efforts to comply; and
- (5) Such other matters as justice may require.

(c) It is presumed that the violator's economic and financial conditions allow payment of the penalty, and the burden of proof to the contrary is on the violator.

(d) In any judicial proceeding to recover the administrative penalty imposed, the board need only show that:

- (1) Notice was given;
- (2) A hearing was held, or the time granted for requesting a hearing has run without such a request;
- (3) The administrative penalty was imposed; and
- (4) The penalty remains unpaid. [L 2003, c 104, pt of §2]

" **§6E-12 Reproductions, forgeries, and illegal sales.** (a) It shall be unlawful to reproduce, retouch, rework, or forge any historic object and to represent it or offer it for trade or sale as an original and genuine object. It shall be unlawful for any person to offer for sale or exchange any historic object

with the knowledge that it has been collected or excavated in violation of any of the terms of this chapter.

(b) It shall be unlawful for any person to:

- (1) Offer for sale or exchange any exhumed prehistoric or historic human skeletal remains or associated burial goods; or
- (2) Remove those goods or remains, except those remains fabricated into artifacts prehistorically, from the jurisdiction of the State without obtaining a permit from the department.

(c) It shall be unlawful for any person to remove aviation artifacts derived from state lands or agencies from the jurisdiction of the State without obtaining a permit from the department.

(d) Any person violating this section shall be fined no more than \$10,000. Each object or part of a prehistoric or historic human skeleton or associated burial good offered for sale or trade or removed from the jurisdiction in violation of this section shall constitute a distinct and separate offense for which the offender may be punished. [L 1976, c 104, pt of §2; am L 1990, c 306, §9; am L 1996, c 97, §9]

" **§6E-13 Injunctive relief.** (a) In addition to, and without limiting the other powers of the attorney general and without altering or waiving any criminal penalty, civil, or administrative provisions of this chapter, the attorney general shall have the power to bring an action in the name of the State in any environmental court of competent jurisdiction for restraining orders and injunctive relief to restrain and enjoin violations or threatened violations of this chapter.

(b) Any person may maintain an action in the [environmental court] having jurisdiction where the alleged violation occurred or is likely to occur for restraining orders or injunctive relief against the State, its political subdivisions, or any person upon a showing of irreparable injury, for the protection of an historic property or a burial site and the public trust therein from unauthorized or improper demolition, alteration, or transfer of the property or burial site. [L 1976, c 104, pt of §2; am L 1990, c 306, §10; am L 2003, c 104, §4; am L 2014, c 218, §8]

Case Notes

Where (1) plaintiff had a legitimate interest in the iwi found in Kakaako because plaintiff was a recognized cultural descendant of those iwi, and (2) the rail project had a high

likelihood of affecting the iwi, those general factual allegations of injury resulting from defendant's conduct were sufficient to establish that plaintiff had suffered an actual or threatened irreparable injury under subsection (b). 128 H. 53, 283 P.3d 60 (2012).

Because: (1) subsection (b) allows a suit to be brought only for a restraining order or injunctive relief and is an exception to the sovereign immunity doctrine for which no waiver is necessary, and therefore does not contain a waiver of the State's sovereign immunity; and (2) nothing in article XI, §9 of the Hawaii constitution expressly waived the State's immunity for attorney's fees, there was no clear relinquishment of the State's sovereign immunity, and thus, the State's immunity barred petitioner's request for fees based on the private attorney doctrine. 129 H. 454, 304 P.3d 252 (2013).

Where plaintiff asserted that: (1) plaintiff had family members buried on the church grounds; (2) plaintiff was a native Hawaiian and a recognized cultural descendant of the iwi found on the church grounds; (3) plaintiff had a traditional and customary practice of caring for iwi; (4) plaintiff was concerned that family members may be buried in unmarked burials on the church grounds; and (5) the disturbance of unmarked burials of family members or other cultural ancestors would cause plaintiff injury and harm, plaintiff had standing to raise claims under this chapter. 128 H. 455 (App.), 290 P.3d 525 (2012).

" **[\$6E-14] Preservation activities by political subdivisions.** The political subdivisions of this State may engage in a comprehensive program of historic preservation, to promote the use and conservation of historic properties for the education, pleasure, and enrichment of the citizens of this State. The governing body of any political subdivision may establish an historic preservation commission to preserve, promote, and develop the historical resources of the political subdivision. [L 1976, c 104, pt of §2]

" **§6E-15 Regulations, special conditions or restrictions.** In addition to any power or authority of a political subdivision to regulate by planning or zoning laws and regulations or by local laws and regulations, the governing body of any political subdivision may provide by regulations, special conditions, or restrictions for the protection, enhancement, preservation, and use of historic properties or burial sites. These regulations, special conditions, and restrictions may include appropriate and

reasonable control of the use or appearance of adjacent or associated private property within the public view, or both, historic easements, preventing deterioration by wilful neglect, permitting the modification of local health and building code provisions, and transferring development rights. [L 1976, c 104, pt of §2; am L 1990, c 306, §11]

" **§6E-16 Hawaii historic preservation special fund.** (a)

There is established a Hawaii historic preservation special fund into which shall be deposited the following moneys:

- (1) Appropriations by the legislature to the special fund;
- (2) Gifts, donations, and grants from public agencies and private persons;
- (3) All proceeds collected by the department derived from historic preserve user fees, historic preserve leases or concession fees, fees charged to carry out the purposes of this chapter, or the sale of goods; and
- (4) Civil, criminal, and administrative penalties, fines, and other charges collected under this chapter or any rule adopted pursuant to this chapter.

All interest earned or accrued on moneys deposited in the fund shall become part of the fund. The fund shall be administered by the department; provided that the department may contract with a public or private agency to provide the day-to-day management of the fund.

(b) Subject to legislative authorization, the department may expend moneys from the fund:

- (1) For permanent and temporary staff positions;
- (2) To replenish goods;
- (3) To produce public information materials;
- (4) To provide financial assistance to public agencies and private agencies in accordance with chapter 42F involved in historic preservation activities other than those covered by section 6E-9; and
- (5) To cover administrative and operational costs of the historic preservation program.

(c) The department shall adopt rules in accordance with chapter 91 for the purposes of this section. [L 1989, c 388, §2; am L 1991, c 335, §2; am L 1997, c 207, §2; am L 1998, c 311, §2; am L 2006, c 214, §1]

Note

The L 1997, c 190, §6 amendment was not made to this section.

" **[\$6E-17] Archaeological data survey database.** (a) There is established a Hawaii archaeological data survey database designated as a program of the State of Hawaii Museum of Natural and Cultural History. The database shall be online and accessible to the public through the Internet. The information within the database may include information relating to the collections of the Bernice Pauahi Bishop Museum, publicly available materials, and materials from private entities or organizations. The database may include archaeological information such as reports, photographs, drawings, maps, and archived documents. The database may also include compilations of collections information from public and private repositories including:

- (1) A description of the types and amounts of materials and associated documentation in each collection;
- (2) A listing of the owner or owners of all materials and associated documentation in each collection;
- (3) A general assessment of the condition of the components of each collection; and
- (4) Other relevant information pertaining to each collection.

The data survey database shall be developed and maintained by the State of Hawaii Museum of Natural and Cultural History, in consultation with the state historic preservation division and other appropriate state and federal agencies and private organizations.

(b) The archaeological data survey shall not include any information required to remain confidential under federal, state, or county laws, rules, or regulations.

(c) The State of Hawaii Museum of Natural and Cultural History, in consultation with the office of Hawaiian affairs and the state historic preservation division, may temporarily or permanently withhold from the database any information due to a valid threat of destruction or loss of the information, or if disclosure may frustrate the legitimate and necessary function of protecting a valuable archaeological site or artifact. The entities shall determine what information shall be withheld from the data survey; provided that prior consultation is sought with any affected state or federal governmental agencies, or private individuals or organizations. [L 2008, c 161, §1]

Cross References

Bernice Pauahi Bishop Museum, see §6E-40.

"PART II. MONUMENTS AND MEMORIALS

[\$6E-31] Monuments; reservation of land; relinquishment of private claims. Upon the recommendation of the department, the governor may declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the State to be state monuments and may reserve as a part thereof parcels of land the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the State, and the governor may accept the relinquishment of such tracts in behalf of the State. [L 1976, c 104, pt of §2]

" **§6E-32 Diamond Head State Monument.** (a) There shall be a Diamond Head State Monument as a historical site on Oahu to be administered by the department of land and natural resources, and to consist of:

- (1) All state owned lands within the state conservation land use district on the slopes of Diamond Head including the board of water supply booster pump site (tax map key 3-1-42:05);
- (2) Those lands that the department considers essential to the unimpaired preservation of the visual and historic aspects of Diamond Head;
- (3) Those state lands more fully described in this section that may be best used for recreational purposes and to increase public access and enjoyment of the monument; and
- (4) Kuilei Cliffs Park (tax map key 3-1-42:02 and tax map key 3-1-38:29) and Diamond Head Park (tax map key 3-1-42:04 and tax map key 3-1-37:01), which shall be administered by the city and county of Honolulu in accordance with this section.

(b) All state lands within and adjacent to the monument shall be returned to the department for inclusion within the monument, including, but not limited to, lands identified by tax map key numbers 3-1-42:6, 8, 10, 14, 15, 16, 17, 21, 23, 24, 25, 37, and 38 and 3-1-35:22 and 23. The Na Laau Hawaii arboretum and parcels A, B, C, and D as described in Executive Order No. 2000 dated April 9, 1962, establishing the Diamond Head State Monument, shall be included within the boundaries of the Diamond Head State Monument.

[(c)] The Diamond Head State Monument Plan, adopted by the board of land and natural resources in November of 1979, shall serve as the official document setting forth the future direction of the Diamond Head State Monument.

The board of land and natural resources may amend the monument plan from time to time with the review and recommendations of the Diamond Head citizen advisory committee, organized in October of 1977.

[(d)] Notwithstanding any other law, including county ordinances, to the contrary, no expansion of buildings and other structures and no construction activity shall take place within the boundaries of the Diamond Head State Monument; provided that the board of land and natural resources may permit improvement projects that are consistent with the Diamond Head State Monument Plan of 1979 to take place.

[(e)] So much of the transfer effected pursuant to Act 138, Laws of the Territory of Hawaii 1913, from the State to the city and county of Honolulu, as relates to the transfer of the Honolulu water and sewer works at the abandoned reservoir parcels identified by tax map key number 3-1-35:22 and 23, shall be withdrawn from the operation of Act 138. The right, title, and interest of the city and county of Honolulu relating to the abandoned reservoir site identified by tax map key number 3-1-35:22 and 23, appurtenant to the water and sewer works, shall revert to and be vested in the State. [L 1976, c 104, pt of §2; am L 1988, c 195, §2; am L 1992, c 313, §§3 to 6; am L 2001, c 258, §2]

Revision Note

Subsections (c) to (e) added by revisor.

" **[\$6E-32.5] Mount Olomana state monument.** There is established the Mount Olomana state monument as a historic landmark on Oahu to be administered by the department of land and natural resources and to consist of those lands that the department determines to be essential to the preservation of the visual, cultural, and historical aspects and significance of Mount Olomana. Subject to legislative appropriation, the department shall acquire through purchase, land exchange, or both, those lands identified as significant to the preservation of Mount Olomana as a historic landmark. [L 1993, c 348, §2]

" **\$6E-33 REPEALED.** L 2015, c 147, §3.

" **[§6E-34] Capitol site.** The portion of the "Honolulu Civic Center" adopted by the Honolulu city planning commission on February 23, 1945, as the master plan for the city and county of Honolulu after a public hearing on February 1, 1945, for the executive-legislative center, specifically that area of Honolulu bounded by Richards, Beretania, Punchbowl, and Hotel Streets, for which lands have been acquired and preliminary plans have been designed pursuant to Act 401, Session Laws of Hawaii 1949, is designated as the capitol site for the State. [L 1976, c 104, pt of §2]

" **[§6E-34.5] State capitol; state capitol management committee; established; oversight and management; powers and duties.** (a) The oversight and management of the state capitol and its grounds and facilities shall be vested in the state capitol management committee established pursuant to this section.

(b) There is established the state capitol management committee, which shall be composed of the following members or their respective designees:

- (1) The governor's chief of staff;
- (2) The comptroller;
- (3) The director of public safety;
- (4) Two members of the senate as appointed by the president of the senate;
- (5) Two members of the house of representatives as appointed by the speaker of the house of representatives;
- (6) A legislative officer of the senate appointed by the president of the senate; and
- (7) A legislative officer of the house of representatives appointed by the speaker of the house of representatives;

provided that for members appointed pursuant to paragraphs (6) and (7), "legislative officer" shall have the same meaning as that term is defined in section 88-21.

The chairperson of the state capitol management committee shall be elected by the committee members. The department of accounting and general services shall provide administrative support to the state capitol management committee; provided that the committee shall also receive fiscal analysis support from the department of budget and finance as the committee deems appropriate.

(c) The state capitol management committee shall meet at times and places as specified by a call of the chairperson or a majority of the committee; provided that the committee shall

meet not less than four times per calendar year. The state capitol management committee shall prescribe rules, which shall not be subject to chapter 91, for its own management and governance. Five members of the committee shall constitute a quorum, and a quorum may exercise all the power and authority conferred on the committee.

(d) When a vacancy occurs in the membership of the state capitol management committee, the respective appointing authority shall fill the vacancy within fourteen days.

(e) Members of the state capitol management committee shall serve without pay, but shall be reimbursed for their actual and necessary expenses, including travel expenses, incurred in carrying out their duties.

(f) The state capitol management committee shall:

- (1) Approve all policies and procedures relating to the general operation and management of the state capitol and its grounds and facilities, including parking, building access, building operation hours, and general security policies;
- (2) Develop and recommend to the legislature capital improvement, programmatic, and operational priorities that require fiscal resources to maintain and enhance the appearance and operation of the state capitol and its grounds and facilities;
- (3) Review and authorize the repair and maintenance schedule for the state capitol, its grounds and facilities, and any other capital improvement projects relating to the upkeep, renovation, restoration, use, and maintenance of the state capitol and its grounds and facilities; and
- (4) Review and authorize, but not execute, the expenditure of any moneys appropriated to and allocated by the department of budget and finance, accounting and general services, or public safety for the state capitol and its grounds and facilities. [L 2014, c 97, §2]

" **§6E-35 Iolani Palace.** (a) The official designation of the palace of the former monarchs of Hawaii shall be Iolani Palace.

(b) The official designation of the Friends of Iolani Palace shall be the State of Hawaii Museum of Monarchy History. The qualifying standards and conditions related to the receipt of funds under chapter 42F shall not apply to funds received by the State of Hawaii Museum of Monarchy History; provided that if the museum contracts with a recipient or provider, then the

qualifying standards, conditions, and other provisions of chapter 42F shall apply to the recipient or provider and the contract.

(c) To receive state funds, the State of Hawaii Museum of Monarchy History shall:

- (1) Be licensed or accredited, in accordance with federal, state, or county statutes, rules, or ordinances, to conduct the activities or provide the services for which funds are appropriated;
- (2) Comply with all applicable federal and state laws prohibiting discrimination against any person on the basis of race, color, national origin, religion, creed, sex, age, sexual orientation, or disability;
- (3) Agree not to use the funds for entertainment or lobbying activities;
- (4) Be incorporated under the laws of the State;
- (5) Have bylaws or policies that describe the manner in which the activities or services for which a grant is awarded shall be conducted or provided;
- (6) Have been determined and designated to be a tax-exempt organization by the Internal Revenue Service; and
- (7) Have a governing board whose members shall have no material conflict of interest and serve without compensation.

(d) The comptroller and state auditor shall have the authority to examine the use of funds appropriated to the State of Hawaii Museum of Monarchy History.

(e) The State of Hawaii Museum of Monarchy History shall provide to the legislature an annual report no later than twenty days prior to the convening of each regular session, which shall include an explanation of the facility maintenance and other functions accomplished by state fund expenditures in the previous fiscal year. [L 1976, c 104, pt of §2; am L 2007, c 291, §§2, 3; am L 2008, c 126, §1; am L 2014, c 96, §3]

" **[\$6E-36] Sand Island.** The island on the southwest side of Honolulu Harbor, Oahu, 21 degrees 18 minutes 30 seconds north, 157 degrees 53 minutes 00 seconds west, city and county of Honolulu, proclaimed Anuenue (also known as Rainbow Island) by memorandum 1969-4 of the governor shall be named Sand Island. The name Sand Island shall be used on all official state maps, documents, and correspondence. [L 1976, c 104, pt of §2]

" **[\$6E-37] National statuary hall; Father Damien.** The State of Hawaii exercises its prerogative pursuant to section 2 of "An

Act making appropriation for sundry Civil Expenses of the Government for the Year ending the Thirtieth of June eighteen hundred and sixty-five and for other Purposes" (Act of July 2, 1864 of the Thirty-Eighth Congress, Section 1814 of the Revised Statutes) and designates the Reverend Joseph Damien deVeuster, SS. CC., as a citizen of Hawaii worthy of commemoration in the national statuary hall. [L 1976, c 104, pt of §2]

" **§6E-38 National statuary hall; King Kamehameha I.** King Kamehameha I is selected as one of the two illustrious, deceased persons whose statue shall be furnished by the State of Hawaii for placement in the national statuary hall in the national capitol pursuant to Title 40 United States Code 187. [L 1976, c 104, pt of §2]

" **§6E-38.5 Kohala Historical Sites State Monument.** (a) There shall be a Kohala Historical Sites State Monument as an historical site on the island of Hawaii that shall include a cluster of historical sites, including the Mo'okini Heiau, the Kamehameha birthsite, the Kukuipahu Heiau, and, upon acquisition by the State, the Mahukona historical sites. The monument shall be administered by the department of land and natural resources and shall consist of lands essential to the unimpaired preservation of the visual, cultural, and historical aspects of the Mo'okini Luakini, Kamehameha birthsite, Kukuipahu Heiau, and Mahukona historical sites. The monument shall be for educational and cultural purposes and there shall be public access for enjoyment of the sites that are included within the monument.

The real property to be included within the monument shall include:

- (1) Mo'okini Luakini, Kamehameha birthsite, and Kukuipahu Heiau owned by the State;
- (2) Historical sites at Mahukona; and
- (3) Sufficient additional land surrounding all of the monument sites to preserve and protect them with adequate buffers and provide public access, including but not limited to those lands running along the coast between Huinamaka and Kalaelimukoko and those lands mauka of the Mo'okini Heiau encompassing the area formerly used for the housing of the Mo'okini priests and family gravesites, to be acquired by the State through gifts or land exchanges and to be designated by the board of land and natural resources as part of the monument upon acquisition.

(b) Prior to any alterations or improvements, not including routine maintenance to the monument, including the Mo'okini Heiau, the department of land and natural resources shall consult with the kahuna nui of the Mo'okini Heiau regarding the proposed alterations or improvements.

(c) Prior to any additional organized profit-making venture involving the monument, including the Mo'okini Heiau, the entity proposing the venture shall consult with the kahuna nui of the Mo'okini Heiau regarding the proposed venture. [L 1992, c 166, §2; am L 2007, c 59, §1]

Revision Note

In section title, "historical" substituted for "historic".

" **§6E-39 Jurisdiction over World War II memorial.** The jurisdiction and control of the World War II memorial, located in the front of the state office building in Honolulu, is vested in the state department of accounting and general services. [L 1976, c 104, pt of §2]

" **§6E-40 Bernice Pauahi Bishop Museum.** The official designation of the Bernice Pauahi Bishop Museum shall be the State of Hawaii Museum of Natural and Cultural History. The qualifying standards and conditions related to the receipt of funds contained in chapter 42F shall not apply to funds received by the State of Hawaii Museum of Natural and Cultural History; provided that if the museum in turn contracts with a recipient or provider, then the qualifying standards, conditions, and other provisions of chapter 42F shall apply to the recipient or provider and the contract. [L 1988, c 398, §4; am L 1991, c 335, §3; am L 1997, c 190, §6]

" **§6E-41 Cemeteries; removal or redesignation.** (a) Any person removing or redesignating any cemetery shall comply with the following requirements:

- (1) Publish a notice in a newspaper of general circulation in the State, requesting persons having information concerning the cemetery or persons buried in it to report that information to the department;
- (2) Photograph the cemetery generally, and take separate photographs of all headstones located in the cemetery;
- (3) Turn over to the department all photographs and any other relevant historical records;

- (4) Move all headstones to the place of reinterment; and
- (5) Obtain the written concurrence of the department prior to any removal or redesignation if the cemetery has existed for more than fifty years.

(b) The requirements of subsection (a) shall be in addition to any requirements imposed by the department of health. [L 1988, c 265, pt of §1; am L 1990, c 22, §2]

" **§6E-42 Review of proposed projects.** (a) Except as provided in section 6E-42.2, before any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, aviation artifacts, or a burial site, the agency or office shall advise the department and prior to any approval allow the department an opportunity for review and comment on the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, including those listed in the Hawaii register of historic places. If:

- (1) The proposed project consists of corridors or large land areas;
- (2) Access to properties is restricted; or
- (3) Circumstances dictate that construction be done in stages,

the department's review and comment may be based on a phased review of the project; provided that there shall be a programmatic agreement between the department and the project applicant that identifies each phase and the estimated timelines for each phase.

(b) The department shall inform the public of any project proposals submitted to it under this section that are not otherwise subject to the requirement of a public hearing or other public notification.

(c) The department shall adopt rules in accordance with chapter 91 to implement this section. [L 1988, c 265, pt of §1; am L 1990, c 306, §12; am L 1995, c 187, §3; am L 1996, c 97, §10; am L 2013, c 85, §3; am L 2015, c 224, §3]

Law Journals and Reviews

Ensuring Our Future by Protecting Our Past: An Indigenous Reconciliation Approach to Improving Native Hawaiian Burial Protection. 33 UH L. Rev. 321 (2010).

Case Notes

Where rules implementing §6E-8 and this section required that historic properties be identified in the "project area", and the broad definition of "project area" contained in the rules encompassed the entire rail project, the rules did not permit the state historic preservation division (SHPD) to concur in the rail project absent a completed archeological inventory survey (AIS) for the entire project area; because an AIS was not completed before the SHPD gave its concurrence in the project, the SHPD's concurrence in and the city's commencement of the project were improper. 128 H. 53, 283 P.3d 60 (2012).

The count of plaintiff's amended complaint alleging that state and county defendants failed to comply with the requirements of chapter 13-284, Hawaii administrative rules, the historic preservation review process, by allowing the project to advance before the review process was completed, and by relying on outdated and flawed reports, was ripe for adjudication, where plaintiff's contentions focused on the failure of defendants to follow the historic review process, a determination that could be made regardless of whether the subject road was used as the access point to the development. 131 H. 123, 315 P.3d 749 (2013).

This section requires a permitting agency to seek state historic preservation division review and comment only when the permitting agency knows, or has reason to suspect, that the project may impact a burial or other historic site; where there was no evidence that defendant city department of planning and permitting knew or should have known that a burial site existed on the property, the circuit court properly ruled that the city did not violate this section. 122 H. 171 (App.), 223 P.3d 236 (2009).

As: (1) this section applies to any project "which may affect historic property ... or a burial site", as defined by §6E-2; (2) a burial site can be found in a cemetery; and (3) a cemetery can also be a historic property, as also defined by §6E-2, church building project was not exempt from the historic preservation review process required by this section and its implementing rules because the project involved a cemetery. 128 H. 455 (App.), 290 P.3d 525 (2012).

The state historic preservation division (SHPD) violated chapter 13-284, HAR, its rules implementing this section, by failing to require the completion of an archaeological inventory survey (AIS); by accepting an archaeological monitoring plan as a substitute for an AIS, the SHPD skipped to the mitigation step of the review process and allowed construction on the church building project to commence without identifying the significant historic properties at issue and evaluating the impact of the

project on them, thereby limiting the potential options for their protection and preservation. 128 H. 455 (App.), 290 P.3d 525 (2012).

Where the main footprint of the church building project had not been maintained and actively used as a cemetery for over sixty years and the church was not in the process of removing or redesignating the project site as a cemetery when government approval for the project was sought, §6E-43(a), which excludes human skeletal remains found in a "known, maintained, actively used cemetery", did not apply to the project; thus, the project and the burial sites it affected were subject to the requirements of this section. 128 H. 455 (App.), 290 P.3d 525 (2012).

Where the state historic preservation division (SHPD) did not make a determination that no historic properties were present or that an adequate archaeological inventory survey (AIS) existed and that historic properties were present, thereby allowing for evaluation of the significance of the historic properties, completion of an AIS was a necessary first step to replace the church buildings; thus, the SHPD: (1) should have required the church to complete an AIS before concurring in the church building project; and (2) violated its own rules by failing to require an AIS before permitting the project to go forward. 128 H. 455 (App.), 290 P.3d 525 (2012).

" **[§6E-42.2] Excluded activities for privately-owned single-family detached dwelling units and townhouses.** (a) An application for a proposed project on an existing privately-owned single-family detached dwelling unit or townhouse shall be subject to the requirements of section 6E-42 only if the single-family detached dwelling unit or townhouse is over fifty years old and:

- (1) Is listed on the Hawaii or national register of historic places, or both;
 - (2) Is nominated for inclusion on the Hawaii or national register of historic places, or both; or
 - (3) Is located in a historic district.
- (b) For the purposes of this section:

"Dwelling unit" means a building or portion thereof designed or used exclusively for residential occupancy and having all necessary facilities for permanent residency such as living, sleeping, cooking, eating, and sanitation.

"Single-family detached dwelling unit" means an individual, freestanding, unattached dwelling unit, typically built on a lot larger than the structure itself, resulting in an area surrounding the dwelling.

"Townhouse" has the same meaning as defined in section 502C-1. [L 2015, c 224, §2]

" **§6E-43 Prehistoric and historic burial sites.** (a) At any site, other than a known, maintained, actively used cemetery where human skeletal remains are discovered or are known to be buried and appear to be over fifty years old, the remains and their associated burial goods shall not be moved without the department's approval.

(b) All burial sites are significant and shall be preserved in place until compliance with this section is met, except as provided in section 6E-43.6. The appropriate island burial council shall determine whether preservation in place or relocation of previously identified native Hawaiian burial sites is warranted, following criteria which shall include recognition that burial sites of high preservation value, such as areas with a concentration of skeletal remains, or prehistoric or historic burials associated with important individuals and events, or areas that are within a context of historic properties, or have known lineal descendants, shall receive greater consideration for preservation in place. The criteria shall be developed by the department in consultation with the councils, office of Hawaiian affairs, representatives of development and large property owner interests, and appropriate Hawaiian organizations, such as Hui Malama I Na Kupuna O Hawai'i Nei, through rules adopted pursuant to chapter 91. A council's determination shall be rendered within forty-five days of referral by the department unless otherwise extended by agreement between the landowner and the department.

(c) Council determinations may be administratively appealed to a panel composed of three council chairpersons and three members from the board of land and natural resources as a contested case pursuant to chapter 91. In addition to the six members, the chairperson of the board of land and natural resources shall preside over the contested case and vote only in the event of a tie.

(d) Within ninety days following the final determination, a preservation or mitigation plan shall be approved by the department in consultation with any lineal descendants, the respective council, other appropriate Hawaiian organizations, and any affected property owner.

(e) Should the burial site prove to be other than Hawaiian, the department, within thirty days shall determine whether preservation in place or relocation is warranted, and within an additional ninety days a preservation or mitigation plan shall be approved by the department in consultation with

any lineal descendants, appropriate ethnic organizations, and any affected property owner. [L 1988, c 265, pt of §1; am L 1990, c 306, §13; am L 1992, c 113, §4]

Law Journals and Reviews

Ensuring Our Future by Protecting Our Past: An Indigenous Reconciliation Approach to Improving Native Hawaiian Burial Protection. 33 UH L. Rev. 321 (2010).

Ke Ala Pono--The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions. 33 UH L. Rev. 447 (2011).

Case Notes

This section and §13-300-51, Hawaii administrative rules (HAR) confer upon an aggrieved claimant the right to a contested case hearing as long as the written petition meets the procedural requirements of §13-300-52, HAR; where it was undisputed that claimant complied with the requirements of §13-300-52, HAR--that is, claimant's written petition was proper--a contested case hearing was mandated by statute under this section and agency rule under §13-300-51, HAR, and thus, was "required by law". 124 H. 1, 237 P.3d 1067 (2010).

Where a contested case hearing was required by law under §6E-43 and §13-300-51, Hawaii administrative rules, and would have determined the rights, duties, and privileges of specific parties, and: (1) the department of land and natural resources' denial of claimant's request for a contested case hearing represented a "final decision and order"; (2) claimant followed the applicable agency rules and, therefore, was involved "in" the contested case; and (3) claimant's legal interests were injured--i.e., claimant had standing to appeal, the circuit court erred in dismissing claimant's agency appeal for lack of subject matter jurisdiction. 124 H. 1, 237 P.3d 1067 (2010).

Where the main footprint of the church building project had not been maintained and actively used as a cemetery for over sixty years and the church was not in the process of removing or redesignating the project site as a cemetery when government approval for the project was sought, subsection (a), which excludes human skeletal remains found in a "known, maintained, actively used cemetery", did not apply to the project; thus, the project and the burial sites it affected were subject to the requirements of §6E-42. 128 H. 455 (App.), 290 P.3d 525 (2012).

" **§6E-43.5 Island burial councils; creation; appointment; composition; duties.** (a) There are established within the

department five island burial councils, one each for Hawai'i, Maui/Lāna'i, Moloka'i, O'ahu, and Kaua'i/Ni'ihau, to implement section 6E-43. Each council shall consist of nine members, except the Moloka'i council, which shall consist of five members. Each council shall consist of no more than three representatives of development and large landowner interests; provided that the Moloka'i council shall consist of no more than one representative of development and large landowner interests. The remaining council members shall represent the geographic regions identified in paragraphs (1) through (5). At all times, at least two of the regional representatives of each council shall have been appointed from a list of nominees submitted to the governor by the office of Hawaiian affairs, as provided under subsection (b). Each council shall include at least one representative for each geographic region identified as follows:

- (1) The Hawai'i council shall include the following geographic regions: Kohala, Kona, Ka'ū, Puna, Hilo, and Hāmākua;
- (2) The Maui/Lāna'i council shall include the following geographic regions: Honua'ula, Lahaina, Wailuku, Makawao, Hāna, and Lāna'i;
- (3) The Moloka'i council shall include the following geographic regions: West Moloka'i, Central Moloka'i, East Moloka'i, and Kalawao;
- (4) The O'ahu council shall include the following geographic regions: Wai'ānae, 'Ewa, Kona, Ko'olaupoko, Ko'olauloa, and Waialua; and
- (5) The Kaua'i/Ni'ihau council shall include the following geographic regions: Waimea/Na Pali, Kōloa, Līhu'e, Kawaihau, Hanalei, and Ni'ihau.

Regional representatives shall be selected from the Hawaiian community on the basis of the representatives' understanding of the culture, history, burial beliefs, customs, and practices of native Hawaiians in the region they each represent.

(b) Appointment of members to the councils shall be made by the governor, in accordance with section 26-34 and subsection (a), from lists for each council submitted by the department and the office of Hawaiian affairs. Lists to fill vacancies on the councils shall be submitted as follows:

- (1) For vacancies attributable to the expiration of terms, the list shall be submitted on the first business day of December prior to the expiration of the terms, except as provided in subsection (c); and
- (2) For a vacancy that occurs during a council representative's term, the list shall be submitted within thirty business days after the vacancy occurs, except as provided in subsection (c).

(c) The department may submit any list to fill a vacancy up to fifteen days after the office of Hawaiian affairs submits its list for the same vacancy; provided that the failure of the department to submit any list by any relevant deadline or fifteen days after the office of Hawaiian affairs submits its list, whichever occurs later, shall be construed as a waiver of the department's right to submit a list.

(d) The department, in consultation with the councils, office of Hawaiian affairs, representatives of development and large landowner interests, and appropriate Hawaiian organizations, such as Hui Malama I Na Kupuna O Hawai'i Nei, shall adopt rules pursuant to chapter 91 necessary to carry out the purposes of this section. The council members shall serve without compensation, but shall be reimbursed for necessary expenses incurred during the performance of their duties. The councils shall be a part of the department for administrative purposes.

(e) The councils shall hold meetings and acquire information as they deem necessary and shall communicate their findings and recommendations to the department. Notwithstanding section 92-3, whenever the location and description of burial sites are under consideration, the councils may hold closed meetings. A majority of all members to which each council is entitled shall constitute a quorum to do business. Concurrence of a majority of the members present at a meeting shall be necessary to make any action of a council valid.

(f) Department records relating to the location and description of historic sites, including burial sites, if deemed sensitive by a council or the Hawai'i historic places review board, shall be confidential.

(g) The councils shall:

- (1) Determine the preservation or relocation of previously identified native Hawaiian burial sites;
- (2) Assist the department in the inventory and identification of native Hawaiian burial sites;
- (3) Make recommendations regarding appropriate management, treatment, and protection of native Hawaiian burial sites, and on any other matters relating to native Hawaiian burial sites;
- (4) Elect a chairperson for a four-year term who shall serve for not more than two consecutive terms; and
- (5) Maintain a list of appropriate Hawaiian organizations, agencies, and offices to notify regarding the discovery of remains. [L 1990, c 306, pt of §3; am L 2000, c 6, §1; am L 2013, c 276, §2]

Note

Applicability of 2013 amendment to current sitting council members. L 2013, c 276, §3.

Law Journals and Reviews

Ensuring Our Future by Protecting Our Past: An Indigenous Reconciliation Approach to Improving Native Hawaiian Burial Protection. 33 UH L. Rev. 321 (2010).

" **§6E-43.6 Inadvertent discovery of burial sites.** (a) In the event human skeletal remains are inadvertently discovered, any activity in the immediate area that could damage the remains or the potential historic site shall cease until the requirements of subsections (b) to (d) have been met.

(b) The discovery shall be reported as soon as possible to the department, the appropriate medical examiner or coroner, and the appropriate police department. As soon as practicable, the department shall notify the appropriate council and the office of Hawaiian affairs.

(c) After notification of the discovery of multiple skeletons, the following shall be done within two working days, if on Oahu, and three working days, if in other council jurisdictions:

- (1) A representative of the medical examiner or coroner's office and a qualified archaeologist shall examine the remains to determine jurisdiction. If the remains are the responsibility of the medical examiner or coroner, the department's involvement shall end. If the remains are historic or prehistoric burials, then the remainder of this section shall apply;
- (2) The department shall gather sufficient information, including oral tradition, to document the nature of the burial context and determine appropriate treatment of the remains. Members of the appropriate council shall be allowed to oversee the on-site examination and, if warranted, removal; and
- (3) If removal of the remains is warranted, based on criteria developed by the department, in consultation with the councils, office of Hawaiian affairs, representatives of development and large property owner interests, and appropriate Hawaiian organizations, such as Hui Malama I Na Kupuna O Hawai'i Nei, through rules adopted pursuant to chapter 91, the removal of the remains shall be overseen by a qualified archaeologist and a mitigation plan shall be

prepared by the department or with the concurrence of the department.

(d) In cases involving the discovery of a single skeleton, the requirements of subsection (c) shall be fulfilled in one working day if on Oahu, and two working days if in other council jurisdictions.

(e) The mitigation plan developed by or with the concurrence of the department pursuant to subsection (c)(3) shall be carried out in accordance with the following:

- (1) In discoveries related to development where land alteration project activities exist, the landowner, permittee, or developer shall be responsible for the execution of the mitigation plan including relocation of remains. Justifiable delays resulting from the discovery of burials shall not count against any contractor's completion date agreement;
- (2) Project activities shall resume once necessary archaeological excavations provided in the mitigation plan have been completed;
- (3) In nonproject contexts, the department shall be responsible for the execution of the mitigation plan and the relocation of remains; and
- (4) The department shall verify the successful execution of the mitigation plan.

(f) In cases where remains are archaeologically removed, the department shall determine the place of relocation, after consultation with the appropriate council, affected property owners, representatives of the relevant ethnic group, and any identified lineal descendants, as appropriate. Relocation shall conform with requirements imposed by the department of health, and may be accompanied by traditional ceremonies, as determined by the lineal descendants, or, if no lineal descendants are identified, the appropriate council or representatives of the relevant ethnic group that the department deems appropriate. Specific or special reinterment requests from lineal or cultural descendants may be accommodated provided that the additional expenses incurred are paid by the affected descendants.

(g) If human skeletal remains are discovered in the course of land development or land alteration activities to which section 6E-42 applies, and for which the required approval was not obtained, all activity in the immediate area that could damage the remains or the potential historic site shall cease, and treatment of the remains shall be allowed only in compliance with section 6E-43. [L 1990, c 306, pt of §3; am L 2003, c 104, §5]

Ensuring Our Future by Protecting Our Past: An Indigenous Reconciliation Approach to Improving Native Hawaiian Burial Protection. 33 UH L. Rev. 321 (2010).

" **[\$6E-44 Veterans memorial commission.]** There is established a commission whose function is to plan and select works of art for memorials to the veterans of the Korean and Vietnam conflicts as well as to select a site for the memorials. The commission shall be composed of nine members appointed by the governor, and shall include veterans from these conflicts; of the nine members, three shall be selected from a list of persons nominated by the speaker of the house of representatives, and three shall be selected from a list of persons nominated by the senate president. Confirmation of commission members shall not be required. [L 1988, c 112, §3]

" **[\$6E-45 Korean and Vietnam memorial.]** The memorial to the veterans of the Korean and Vietnam conflicts shall be constructed on the Ewa lawn of the state capitol among the trees near the Richards Street border, bounded on one side by the covered stairway (with appropriate setback), Richards Street (with appropriate setback), and Beretania Street (with appropriate setback). The height of the memorial shall not exceed twenty feet, keeping in proportion with other statuary located in the immediate area. The design of the memorial shall utilize the natural assets of the site, with secluded areas of wall and trees for purposes of remembrance and meditation. [L 1992, c 323, §1]

" **[\$6E-46] Hawaii Sports Hall of Fame.** (a) The official designation of the Hawaii Sports Hall of Fame, a duly registered nonprofit corporation, shall be the State of Hawaii museum of sports history in the islands. The qualifying standards and conditions related to the receipt of funds contained in chapter 42F shall not apply to the funds received by the State of Hawaii museum of sports history in the islands; provided that if the museum in turn contracts with a recipient or provider, then the qualifying standards, conditions, and other provisions of chapter 42F shall apply to the recipient or provider and the contract; and provided further that a donation of money, services, goods, or food to the Hawaii Sports Hall of Fame shall not be construed to be prohibited or restricted under this section.

(b) The Hawaii Sports Hall of Fame shall serve as a repository of sport memorabilia of notable Hawaii athletes, provided by or acquired from any source.

(c) The Hawaii Sports Hall of Fame may select one or more sites for a museum, with preference given to a recreational facility having convenient access to tourists.

(d) Ownership to a piece of memorabilia displayed in the museum shall remain with the athlete, the athlete's devise or estate, or the donor; provided that the State shall not be liable for damage or theft of the memorabilia; provided further that the museum shall take appropriate measures to preserve and maintain the memorabilia. [L 2003, c 102, §2]

Revision Note

Section was enacted as an addition to chapter 109 but is renumbered to this chapter pursuant to §23G-15.

" **[\$6E-47] Pearl Harbor historic trail.** The official designation of the path that runs from Halawa landing to Waipahu shall be the Pearl Harbor historic trail. [L 2005, c 127, §2]

"[PART III.] PACIFIC WAR MEMORIAL SYSTEM

[\$6E-51] Department of land and natural resources; powers. The department may create and maintain a living war memorial commemorating the sacrifices of Hawaii's heroic dead of World War II; accept land or other property or assets transferred to it by the State or any county for the accomplishment of its objectives; adopt a seal; and adopt rules pursuant to chapter 91 for the purposes of this part.

The department may also promote and secure the cooperation of national agencies, such as the American Battle Monuments Commission, and other organizations, public or private, seeking to accomplish similar objectives.

In addition, the department may:

- (1) Solicit gifts and contributions and publicize the purposes for which such gifts and contributions are being solicited;
- (2) Advise federal and state agencies of the department's purposes and objectives, as well as private individuals and corporations in Hawaii and other states;
- (3) Accept all gifts and contributions from governmental agencies and private persons, except such gifts as may

- be conditioned upon some restriction of its authority or the purposes for which it is created;
- (4) Grant to the American Battle Monuments Commission all rights necessary, and not in conflict with this part, for the erection and maintenance of battle monuments;
 - (5) Prepare plans and develop all lands which may be placed under its jurisdiction for war memorial purposes and in that connection cooperate with the director of transportation and such other government and private organizations as may be interested in or affected by the projects;
 - (6) Enter into contracts and agreements with the government or private agencies for the attainment of its authorized purposes; and
 - (7) Utilize such contributions of labor, materials, and property, including money, as may be allocated or otherwise made available to it by any person or instrumentality whatsoever, if in the judgment of the department the acceptance thereof will not limit the scope of the purposes of this part. [L 1981, c 135, pt of §3]

" **[\$6E-52] Transfer of lands.** Any county or the State may transfer lands to the department for the purposes of this part, which are declared public purposes, on any terms or conditions or tenure or otherwise as the county or the State may desire to impose, any other law restricting such transfer, or restricting the type, location or classification of lands which may be transferred, to the contrary notwithstanding. Lands under Executive Order No. 1534, dated November 19, 1952, are transferred to the department of land and natural resources; provided that the aforesaid land under Executive Order No. 1534, subject to current encumbrances and the agreement reached on August 3, 1961, between the Pacific War Memorial Commission of Hawaii and the Disabled American Veterans, shall be used for the purposes for which that land was set aside, a site for the creation and maintenance of a living war memorial as provided by Act 288, Session Laws of Hawaii 1949, as amended by Joint Resolution 37, Session Laws of Hawaii 1951. [L 1981, c 135, pt of §3]

"[PART IV. MISCELLANEOUS PROVISIONS]

[\$6E-61] Biological survey; designation. A Hawaii biological survey is established and designated as a program of

the State of Hawaii museum of natural and cultural history. The survey shall consist of an ongoing natural history inventory of the Hawaiian archipelago to locate, identify, evaluate, and maintain the reference collections of all native and non-native species of flora and fauna within the State for a wide range of uses. The survey shall coordinate with and complement the work of the Hawaii heritage program, established by chapter 195, which manages data on rare native plants, animals, and natural communities throughout the State. To expand the use, control, and knowledge of biological species, the survey shall also be conducted in coordination with the existing databases of the department of agriculture, the department of land and natural resources, the University of Hawaii, and other appropriate organizations. [L 1992, c 111, §2]

"[PART V.] CRIMINAL OFFENSES

[\$6E-71] Taking, appropriation, excavation, injury, destruction, or alteration of historic property or aviation artifact; penalty. (a) A person commits the offense of taking, appropriation, excavation, injury, destruction, or alteration of historic property or aviation artifact if the person knowingly:

- (1) Takes, appropriates, excavates, injures, destroys, or alters any historic property or aviation artifact located upon the private land of any owner thereof without the owner's written permission being first obtained; or
- (2) Takes, appropriates, excavates, injures, destroys, or alters any historic property or aviation artifact located upon land owned or controlled by the State or any of its political subdivisions, except as permitted by the department.

(b) Taking, appropriation, excavation, injury, destruction, or alteration of historic property or aviation artifact is a misdemeanor for which a fine not to exceed \$25,000 may be imposed, in addition to any other penalty authorized by chapter 706 for a misdemeanor.

(c) Each day of a continued violation of this section shall constitute a distinct and separate offense. [L 2005, c 128, pt of §1]

" [\$6E-72] Taking, appropriation, excavation, injury, destruction, or alteration of a burial site; penalty. (a) A person commits the offense of taking, appropriation, excavation,

injury, destruction, or alteration of a burial site if the person knowingly:

- (1) Takes, appropriates, excavates, injures, destroys, or alters any burial site or the contents thereof, located on private land or land owned or controlled by the State or any of its political subdivisions, except as permitted by the department; or
- (2) Takes, appropriates, excavates, injures, destroys, or alters any burial site or the contents thereof during the course of land development or land alteration activities to which section 6E-42 applies, without obtaining the required approval.

(b) Taking, appropriation, excavation, injury, destruction, or alteration of a burial site is a misdemeanor for which a fine not to exceed \$25,000 may be imposed, in addition to any other penalty authorized by chapter 706 for a misdemeanor.

(c) Each day of a continued violation of this section shall constitute a distinct and separate offense. [L 2005, c 128, pt of §1]

" **[\$6E-73] Failure to stop work upon discovery of a burial site; penalty.** (a) A person commits the offense of failure to stop work upon discovery of a burial site if the person discovers a burial site and knowingly fails to stop work in the immediate area and report the discovery as required by section 6E-43.6.

(b) It is not a defense to the prosecution of a violation of this section that the discovery of the burial site was inadvertent.

(c) Failure to stop work upon discovery of a burial site is a misdemeanor for which a fine not to exceed \$25,000 may be imposed in addition to any other penalty authorized by chapter 706 for a misdemeanor.

(d) Each day of a continued violation of this section shall constitute a distinct and separate offense. [L 2005, c 128, pt of §1]

" **[\$6E-74] Criminal penalties not in lieu of civil or administrative penalties.** The criminal penalties imposed by this part are in addition to, and not in lieu of, any civil or administrative penalties provided by law. [L 2005, c 128, pt of §1]

" **[\$6E-75] Part not applicable to family burial plots.** Nothing in this part shall apply to land altering activities related to family burial plots under section 441-5.5. [L 2005, c 128, pt of §1]

"[PART VI.] **SOUTH KONA WILDERNESS AREA**

[\$6E-81] South Kona wilderness area; establishment. There is established the south Kona wilderness area on the island of Hawaii in the area described in section 6E-82 to be administered by the department of land and natural resources for the preservation of the visual, cultural, biological, and historical aspects of the lands covered in this part and to:

- (1) Preserve the extensive archaeological sites in the area, including ancient homesites, a holua slide, a heiau, and burial caves;
- (2) Preserve and protect native Hawaiian plants and animals currently in the area;
- (3) Provide for a wilderness area with minimal manmade structures;
- (4) Permit limited non-vehicular access for recreational purposes, such as fishing, swimming, and exploration; and
- (5) Prevent additional development in the area. [L 2011, c 178, pt of §2]

" **[\$6E-82] Lands included.** (a) Except as provided in subsection (b), the following lands shall be included in the south Kona wilderness area:

- (1) Honomalino: All lands from the shoreline to six thousand feet inland;
- (2) Okoe: All lands from the shoreline to six thousand feet inland. The Honomalino and Okoe sections include approximately one thousand four hundred fifty-eight acres;
- (3) Kaulanamauna: The Manuka natural area reserve boundary extended to the shoreline; and
- (4) Manuka: The Manuka natural area reserve boundary extended to the shoreline.

(b) Any parcel of land included in subsection (a) upon which there is a dwelling house as of July 1, 2011, together with any outbuildings forming a part of the residential complex, shall be excluded from the south Kona wilderness area.

(c) Land use district boundaries existing as of July 1, 2011, shall continue in full force and effect subject to amendment as provided in chapter 205. [L 2011, c 178, pt of §2]

" **[\$6E-83] Government-owned land; construction prohibited.**
No new homes or other structures shall be constructed on government-owned land within one thousand feet of the shoreline within the south Kona wilderness area, except as follows:

- (1) Structures built by the department for the purpose of managing the area; and
- (2) Repairs to existing structures pursuant to rules adopted by the department under chapter 91;

provided that no government-owned land within the south Kona wilderness area shall be subdivided; provided further that the State and the county of Hawaii shall not be permitted to consolidate and resubdivide lots within the area if this consolidation or subdivision would increase the number of buildable lots. [L 2011, c 178, pt of §2]