



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

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Testimony of
SUZANNE D. CASE
Chairperson

Before the House Committee on:
WATER, LAND, AND NATIVE HAWAIIAN AFFAIRS

Wednesday, January 29, 2020
10:00AM
State Capitol, Conference Room 325

In consideration of
HOUSE BILL HB1783
RELATING TO HISTORIC PRESERVATION

House Bill HB1783 proposes to amend Chapter 6E, Hawaii Revised Statutes (HRS)), to enable the Department of Land and Natural Resources (Department) to more effectively enforce the provisions in Sections 6E-8 and 6E-42, HRS, requiring submittal of projects to the Department for historic preservation review prior to the initiation of a project with potential to impact historic properties, including iwi kupuna (Native Hawaiian human burials). **The Department appreciates the intent of this measure and offers comments.**

House Bill 1783 addresses the persistent issue involving projects proceeding without proper Department review, establishes a process for transparent Department reporting of possible violations of the permitting process, and authorizes the Department to issue stop work orders for projects violating the provisions of Sections 6E-8 or 6E-42, HRS, and increases assessments for violations.

The Department believes that House Bill 1783 will support the efforts of all participants in the procedures implementing Chapter 6E, HRS, including agencies, developers and their project contractors and consultants, private landowners, the Native Hawaiian community, and historic preservation advocates, as well as the State Historic Preservation Division (SHPD) by clarifying processes and penalties to ensure greater compliance with the Sections 6E-8 or 6E-42, HRS, historic preservation review processes and by providing public violation reports that may be used during the design and planning phases by agencies, developers, and other entities.

The Department believes that SECTION 2(a) of this measure is unnecessary as the Department's Division of Conservation and Resources Enforcement already operates a hotline 24-hours a day,

7-days a week; an additional hotline does not need to be established. The Department believes public notice required by SECTION 2(b) of this measure represents a potentially valuable tool for informing project managers, construction personnel, and the public about the requirements to protect historic properties and burial sites, but is concerned that it does not currently have the resources to develop, print, and distribute the required notices.

The Department believes that the amendments proposed in SECTION 3 of this measure inappropriately places the stop work orders and cease and desist orders in the section of Chapter 6E, HRS, that addresses violations. Stop work orders are potentially valuable tools for providing the Department time to determine whether violations have occurred or if historic properties and/or iwi kupuna are threatened. The steps the Department takes after a stop work order is issued might lead the Department to take an enforcement action to the Board of Land and Natural Resources, but does not presume that a violation has occurred. Accordingly, this provision should be placed elsewhere in Chapter 6E, HRS. The Department recommends amending Chapter 6E, HRS, as follows:

"§6E- Stop work orders and cease and desist orders.

(a) The administrator of the state historic preservation division of the department is authorized to issue stop work orders when notified of an alleged violation of sections 6E-8 or 6E-42 permitting and review processes. The administrator of the state historic preservation division shall serve written notice by certified mail or personal service.

The Department supports raising the maximum penalty for violation of Chapter 6E, HRS, from \$10,000 to \$25,000 as proposed in SECTIONs 5 and 6 of this measure. The maximum penalty was established many years ago and has never been raised. Raising it now appears appropriate.

The Department does not believe that the amendments proposed in SECTION 7 of this measure are needed. The statute as currently codified is clear.

Finally, while the Department believes that clarifications of the violations provisions of Chapter 6E, HRS, are needed and appropriate, House Bill 2443 addresses this more completely and clearly.

Thank you for the opportunity to comment on this measure



HB1783
RELATING TO HISTORIC PRESERVATION
House Committee on Water, Land, & Hawaiian Affairs

January 29, 2020

10:00am

Room 325

The Office of Hawaiian Affairs (OHA) **STRONGLY SUPPORTS** HB1783, a bill in OHA's 2020 Legislative Package. HB1783 seeks to amend Hawai'i's Historic Preservation law by **establishing new violations based on the evasion of historic preservation review in unpermitted and unauthorized activities, reinforcing existing state enforcement mechanisms, and increasing financial penalties** for historic preservation violations for the first time in over 15 years.

The Hawai'i Historic Preservation law, codified in Hawai'i Revised Statutes (HRS) Chapter 6E, was enacted to ensure that invaluable historic sites and archaeological resources are given appropriate consideration when they may be impacted by development activities. **Historic cultural resources, burials, and sites protected under HRS Chapter 6E embody the continued physical and spiritual connections between Native Hawaiians, their ancestors, and their cultural heritage and are, therefore, of great significance to the Native Hawaiian community.** HRS § 6E-42 and § 6E-8 accordingly lay out processes by which development permit applications or requests for approval can be reviewed for potential impacts to iwi kūpuna and other archaeological and historic resources and sites. These processes provide a critical opportunity to assess potential impacts to such resources, **sites, and iwi that can help developers, decision-makers (including the appropriate island burial council), and the community make well-informed decisions about preservation and protection measures** prior to the commencement of ground-disturbing work or construction activity.

Unfortunately, the historic preservation review processes embodied in Chapter 6E has been undermined by weak enforcement provisions and in some cases, unscrupulous landowners and developers. In particular, unpermitted grading and construction activities have been of longstanding and growing concern; **since such unpermitted activities are not accompanied by a county permit application or request for approval, they do not undergo the historic preservation review process under HRS §§6E-42 or -8, which might otherwise protect iwi or historic sites through appropriate assessment, consultation, and planning.** Moreover, even where iwi or sites may likely have been impacted or destroyed by unpermitted or unapproved work – which would constitute a violation of Chapter 6E – the State Historic Preservation Division (SHPD) has indicated an inability to investigate due to the likelihood that evidence of such impacts have already been destroyed. Notably, **SHPD does not currently have a clear mechanism or resources to meaningfully address and deter procedural non-compliance with processes that would otherwise trigger historic preservation review.**

Countless Native Hawaiian historic sites and burials are threatened and an unknown number have likely been destroyed by developers who sidestep permitting and state historic preservation review processes. For many construction projects, and particularly those that have a

higher risk of impacting iwi kūpuna and historic sites, the minimal consequences for unpermitted work may be far less than the costs of complying with historic preservation review and potential conditions to protect such iwi and sites. For unscrupulous landowners and contractors, SHPD's admitted lack of after-the-fact enforcement ability may even represent a significant financial incentive to engage in unpermitted work. As a result, there may be untold cases of burials unearthed and historic sites destroyed due to unpermitted or unapproved activities. Indeed, without the record normally provided through consistent historic preservation review compliance, the scope of the damage is impossible to truly know.

Accordingly, **this measure will reinforce HRS Chapter 6E's historic review process, encourage compliance with historic preservation laws, and thereby provide more meaningful protection for iwi kūpuna and historic sites, by:**

- **Establishing as a violation under HRS Chapter 6E any unpermitted or unapproved activities** (e.g. grading and grubbing) **that would have triggered state historic preservation review** under HRS §§ 6E-42 or -8, to specifically address and enforce the evasion of the historic preservation review process;
- **Increasing the maximum fines** for violations of HRS Chapter 6E for the first time in over 15 years, from \$10,000 to \$25,000 per violation, to be more commensurate with the costs of statutory compliance, and **to provide a meaningful deterrent** to unpermitted construction that circumvents historic preservation review;
- **Allowing SHPD to prohibit any further work** (i.e. issue a stop work order) or the issuance of a permit for any parcel **where unpermitted or unapproved activities have occurred**, unless and **until a site inspection has been conducted** by trained SHPD staff or a licensed archaeologist paid for by the landowner, **to identify any evidence of potential impacts** to iwi kūpuna or historic sites and to recommend measures to mitigate such impacts;
- **Holding landowners and contractors** jointly and severally **liable for all assessment and mitigation costs** associated with unpermitted or unapproved activities, to ensure the burden of investigation and enforcement is appropriately placed upon violators;
- **Requiring the establishment of a citizen complaint hotline and process**, as well as the dissemination of informational resources for citizens to document and report impacts to iwi kūpuna or historic sites, to empower the community to assist in identifying violations and protecting historic resources and burials;
- **Requiring the posting of notice at worksites regarding iwi kūpuna and historic preservation laws**, and informing workers and the public of the citizen complaint process;
- **Requiring SHPD to maintain and publish a list of violators** to inform other state agencies of whom they are restricted from contracting with, pursuant to HRS 6E-11(g); and
- **Amending the historic preservation special fund**, which collects historic preservation fines and fees, **to explicitly allow fund monies to be dedicated toward enforcement** related activities.

To improve clarity and best align with the intent of this measure, OHA respectfully requests a small amendment to change the word "initiated" to "initiates" where it appears throughout the measure as follows:

Page 4, line 6 (section 1, subsection 8):

"(8) Clarifying that commencing or continuing any project or any phase of any phased project without written concurrence from an agency or office that **initiates** the historic preservation review process with the department of land and natural resources as required pursuant to section 6E-42, Hawaii Revised Statutes, shall be a violation of chapter 6E, Hawaii Revised Statutes."

Page 9, line 5 (section 4):

"(2) 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[-]; provided that for violations involving the commencement or continuation of work without a written concurrence from the department as required by section 6E-8(a) or an approval from an agency or office that **initiates** the historic preservation review process as required by section 6E-42(a), the written schedule shall include findings and a timeline of mitigation or restoration measures for any impacted or potentially impacted burial site or historic property as recommended by department staff or an archaeologist approved by the department who has conducted an inspection of the site; provided further that any violator shall be responsible for all costs of any site inspection. 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;..."

Page 14, line 12, (section 8):

"(c) Commencing or continuing any project or any phase of any phased project without first obtaining an approval from an agency or office that **initiates** the historic preservation review process with the department pursuant to subsection (a) shall be a violation of this chapter."

The survival of the remaining Native Hawaiian historic resources, historic sites, and burials relies on a robust and well-enforced historic preservation review process. HB1783 will establish the enforcement mechanisms needed to meaningfully deter violations of the existing state historic preservation review process and better realize the protection for historic sites and burials intended by HRS Chapter 6E.

Accordingly, OHA urges the Committee to **PASS** HB1783. Mahalo nui loa for the opportunity to testify on this measure.



TO: Rep. Ryan Yamane, Chair
Rep. Chris Todd, Vice Chair
Committee on Water, Land & Hawaiian Affairs

FROM: Kiersten Faulkner, Executive Director
Historic Hawaii Foundation

Committee: Wednesday, January 29, 2020
10:00 a.m.
Conference Room 325

RE: HB 1783, Relating to Historic Preservation

On behalf of Historic Hawaii Foundation, I am writing in **support for the intent of HB 1783**, with comments and recommendations. The bill would require DLNR to establish a process by which to take citizen complaints, investigate, issue stop work orders, and assess penalties for violations of HRS 6E related to historic preservation.

Historic Hawai'i Foundation (HHF) agrees that there is a growing and pervasive disregard for the statute and implementing rules, regulations and procedures that are developed to protect and preserve properties of historic and cultural significance. We have seen both blatant and unintentional actions that result in the destruction of cultural sites, demolition of historic properties and disturbance of iwi kūpuna in a variety of circumstances across the state. HHF frequently receives calls from members of the public asking who to inform and how to ensure enforcement of the laws that were designed to take into account effects on historic properties both during planning and implementation of projects.

We share the frustration that neither the State Historic Preservation Division, the Division of Conservation and Resources Enforcement nor the county Police Departments has adequate resources, training or authorities to address these concerns.

The intent of the bill is to establish a means by which citizens may report alleged violations of HRS 6E; to improve education and information to target audiences to avoid such violations; and to provide additional tools for enforcement, including the authority for the Department of Land and Natural Resources to issue stop work orders and conduct investigations. HHF supports all of these goals and any legislative remedies to achieve them.

However, the section of the bill that relates to investigation and enforcement is limited the HRS 6E-10, which applies only to privately-owned historic property that is listed on the Hawai'i Register of Historic Places. While these sites are highly significant, they are not the most vulnerable to damage. The most common destructive activities occur on properties that are subject to HRS 6E-8 (projects managed by the State and its subdivisions), 6E-42 (privately-owned property not listed on the State Register of Historic Places), and 6E-43 (prehistoric and historic burial sites).

HHF recommends that the bill be amended so the relevant notification, investigation, enforcement and penalty objectives apply to the entirety of HRS 6E, not only to specific subsections.

Historic Hawai'i Foundation supports the intent and recommends amendments to HB 1783.

Thank you for the opportunity to comment.



Hawaii's Thousand Friends

300 Kuulei Road Unit A #281 *Kailua HI 96734* Phone/Fax 808-262-0682 E-mail htf3000@gmail.com

January 29, 2020

COMMITTEE ON WATER, LAND, & HAWAIIAN AFFAIRS

Rep. Ryan I. Yamane, Chair

Rep. Chris Todd, Vice Chair

Committee Members

HB 1783

RELATING TO HISTORIC PRESERVATION

Hawaii's Thousand Friends, a non-profit organization dedicated to ensuring that growth is reasonable and responsible and that planning and land use decisions protect natural and cultural resources and human health and are implemented in conformity with the law, supports HB 1783.

We concur with the bills findings that Hawai'i's state historic preservation and land use planning laws and county and state approval processes are in place to protect historic sites and areas but far too often the laws, processes and permits are ignored or circumvented. Thus, leading to the destruction of historic sites and the integrity of those sites.

We support establishing a citizen complaint intake process within the Department of Land and Natural Resources that will provide stronger and more effective state oversight and enforcement of the counties permitting processes.

In addition to posting a worksite poster at a construction site we recommend that the statutory protections for burials, historic sites and archaeological resources be listed in the Office of Environmental Quality Control bi-monthly Environmental Notice. The bi-monthly notice will reach more people and be a continuous reminder of critical historic preservation laws.

On page 11 line 20 we recommend adding and each county planning department after *each county department of public works*. This addition alerts county planning departments of any violations when reviewing applications for construction activities.

We urge the committee to help protect Hawai'i's `iwi kupuna, archaeological sites and historic properties by passing HB 1783.

HB-1783

Submitted on: 1/26/2020 6:36:34 PM

Testimony for WLH on 1/29/2020 10:00:00 AM

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

Comments:

My name is Benton Kealii Pang and I support HB1783.

This bill requires the Department of Land and Natural Resources to establish a citizen complaint intake process and prepare related informational material for dissemination and posting. It also clarifies that failure to comply with certain advisement or approval processes shall constitute a violation of chapter 6E, Hawaii Revised Statutes. Further, it authorizes the State Historic Preservation Division to issue an order to stop work immediately in the event of a failure to comply with certain advisement or approval processes and makes any violator responsible for the costs of any site inspection and any recommended mitigation or restoration measures. Please pass HB1783.

Benton Kealii Pang, Ph.D.

HB-1783

Submitted on: 1/27/2020 5:36:35 PM

Testimony for WLH on 1/29/2020 10:00:00 AM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Wayne | Individual | Support | No |

Comments:

Dear Chair Yamane, Vice Chair Todd, and members of the Water, Land & Hawaiian Affairs Committee,

I respectfully urge your **STRONG SUPPORT** of this measure, which will address the widespread disregard of county permitting laws by unscrupulous landowners and contractors who are able to escape liability for destroying irreplaceable historic sites and burials, specifically through their evasion of county-triggered historic preservation review (which would identify such sites and burials), and SHPD's inability to prove such destruction after-the-fact.

The passage of this law would address the source of much conflict and heartbreak in the Native Hawaiian and historic preservation communities, and prevent the continued destruction of our last remaining physical connections to the past, and the continued erosion of our islands' heritage and identity.

Mahalo nui loa for your careful consideration of this matter!

Wayne Tanaka

Form Letter

I strongly support HB1783, a bill in OHA's 2020 Legislative Package. Countless Native Hawaiian historic sites and burials are threatened and an unknown number have likely been destroyed by developers who sidestep permitting and State historic preservation review processes. This bill seeks to amend Hawai'i's Historic Preservation law by increasing enforcement and guidelines to deter evasion of the historic preservation review process. This will be the first update of state enforcement mechanisms and penalties for historic preservation violations in over 15 years. Therefore, I respectfully urge the Committee to PASS HB1783. Mahalo nui for the opportunity to testify in support of this bill.

Sincerely,

| | |
|----------------------|------------|
| Tadia Rice | Individual |
| Heide Kila | Individual |
| Local Island Girl | Individual |
| Tom Lindsey | Individual |
| Constance Warrington | Individual |
| Jen Jenkins | Individual |

LATE

HB-1783

Submitted on: 1/28/2020 9:58:37 PM

Testimony for WLH on 1/29/2020 10:00:00 AM

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

Comments:

TO: Representative Ryan I. Yamane, Chair

Representative Chris Todd, Vice Chair

House Committee on Water, Land & Hawaiian Affairs

FROM: Angus Raff-Tierney, M.A., Legislative Committee Chair,

Society for Hawaiian Archaeology

angusrafftierney@yahoo.com

HEARING: January 29, 2020, 10:00 AM, Conference Room 325

SUBJECT: Comments on HB 1783, Relating to Historic Preservation

I am Angus Raff-Tierney, Chair of the Legislative Committee of the Society for Hawaiian Archaeology (SHA). We have over 150 members including professional archaeologists and advocates of historic preservation. On behalf of SHA, I present our comments on HB 1783 (Relating to Historic Preservation).

We support the intent of HB 1783 which is to ensure better protection of vulnerable historic properties, especially burial sites, and to provide more accountability and transparency in historic preservation compliance, as managed by the State Historic Preservation Division (SHPD). We offer the following comments and hope that they will be useful in amending future versions of the subject bill.

Section 4, Proposed amendments to Section 6E-10.5, Hawaii Revised Statutes (HRS): The Board of Land and Natural Resources (BLNR) oversees state-owned lands and permits issued for private lands under one or more agencies of the Department of Land and Natural Resources (DLNR), such as Conservation District Use Permits. We are uncertain if the current wording of the proposed amendment reflects this jurisdiction accurately. Instead of extending the enforcement authority of the SHPD, they should be limited to enforcement of the provisions of plans and permits that they already approve.

Section 5, Proposed amendments to Section 6E-11, HRS: Violators should only be placed on a list to be disseminated to the counties and the public after due process has substantiated any allegations of wrong-doing. This should be clarified by adding after the first new sentence to subsection (g) “, provided that no person shall be placed on the list until all administrative and judicial appeals have been exhausted...”.

Section 7, Proposed amendments to Section 6E-16, HRS: If all of the enforcement and public education provisions proposed in the subject bill are adopted, we believe that the Historic Preservation Special Fund will not yield sufficient funds to support these additional duties on the part of SHPD and related agencies. We are also concerned the SHPD may come to rely on handing out fines to replenish the Historic Preservation Special Fund to support all of these duties, rather than just as a deterrent for violators.

Section 8, Proposed amendments to Section 6E-42, HRS: Since the SHPD's recommendations to the counties are advisory in nature, we are uncertain about how the addition of proposed Paragraph (c) will work since the primary oversight for county-issued permits lies with the counties and not SHPD. Implementing regulations may clarify what is intended.

Should the bill pass out of this committee, we request to be consulted as a stakeholder in future deliberations on an amended bill. Should you have any questions, please feel free to contact me at the above email. Mahalo for considering our testimony.

HB-1783

Submitted on: 1/29/2020 12:06:50 AM

Testimony for WLH on 1/29/2020 10:00:00 AM

LATE

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Kama Hopkins | Individual | Support | No |

Comments: