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TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE

TO THE SENATE COMMITTEE
ON
HOUSING

February 4, 2021, 1:00PM

SENATE BILL 869
RELATING TO AFFORDABLE HOUSING

Chair Chang, Vice-Chair Kanuha, and members of the committee, thank you for the opportunity to submit testimony on SB869. The State Procurement Office (SPO) opposes the 103D, Hawaii Revised Statutes (HRS), exemption language and testifies that third-party consultants for this program should be competitively procured.

SPO recommends the following changes:

Section 2, page 5 lines 11-13:

“the department shall immediately retain a third-party consultant ~~without regard to chapter 103D~~ to conduct the review described under subsection (a)”

SECTION 3, page 8 lines 13-16:

“the department shall immediately retain a third-party consultant ~~without regard to chapter 103D~~ to conduct the review described under subsection (a)”

SECTION 4, page 11 lines 17-20 set forth below.

“the department shall immediately retain a third-party consultant ~~without regard to chapter 103D~~ to conduct the review and comment described under subsection (a)”

Chapter 103D, HRS, the Hawaii Public Procurement Code (code), is the single source of public procurement policy to be applied equally and uniformly, while providing fairness, open competition, a level playing field, government disclosure and transparency in the procurement and contracting process vital to good government.

Public procurement's primary objective is to provide everyone equal opportunity to compete for government contracts, to prevent favoritism, collusion, or fraud in awarding of contracts. To legislate that any one entity should be exempt from compliance with HRS chapter 103D conveys a sense of disproportionate equality in the law's application.

Exemptions to the code mean that all procurements made with taxpayer monies will not have the same oversight, accountability and transparency requirements mandated by those procurements processes provided in the code. It means that there is no requirement for due diligence, proper planning or consideration of protections for the state in contract terms and conditions, nor are there any set requirements to conduct cost and price analysis and market research or post-award contract management. As such, Agencies can choose whether to compete any procurement or go directly to one contractor. As a result, leveraging economies of scale and cost savings efficiencies found in the consistent application of the procurement code are lost. It also means Agencies are not required to adhere to the code's procurement integrity laws.

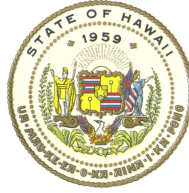
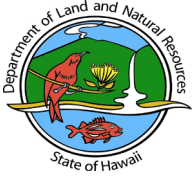
The National Association of State Procurement Officials state: "Businesses suffer when there is inconsistency in procurement laws and regulations. Complex, arcane procurement rules of numerous jurisdictions discourage competition by raising the costs to businesses to understand and comply with these different rules. Higher costs are recovered through the prices offered by a smaller pool of competitors, resulting in unnecessarily inflated costs to state and local governments."

When public bodies, are removed from the state's procurement code it results in the harm described above. As these entities create their own procurement rules, businesses are forced to track their various practices. Moreover, a public body often can no longer achieve the benefits of aggregation by using another public body's contract because different state laws and regulations may apply to the various public bodies making compliance more difficult.

Each year new procurement laws are applied to state agencies causing state agency contracts to become more complex and costly, while other public bodies, such as agencies with strong legislative influence, are exempted. Relieving some public bodies from some laws by exempting or excluding them from compliance with a common set of legal requirements creates an imbalance wherein the competitive environment becomes different among the various jurisdictions and the entire procurement process becomes less efficient and costlier for the state and vendors.

Thank you.

DAVID Y. IGE
GOVERNOR OF HAWAII



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

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LAND
STATE PARKS

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the Senate Committee on
HOUSING**

**Thursday, February 4, 2021
1:00PM
State Capitol, Conference Room 225**

**In consideration of
SENATE BILL 869
RELATING TO AFFORDABLE HOUSING**

Senate Bill 869 proposes to amend Sections 6E-8, 6E-10, and 6E-42, Hawaii Revised Statutes (HRS), by requiring the State Historic Preservation Division (Division) of the Department of Land and Natural Resources (Department) to contract reviews under these sections of the HRS for affordable housing projects to third-party reviewers if the department determines it will be unable to complete the review within established timelines. **The Department appreciates the intent of this measure and offers comments.**

Senate Bill 869 would amend Sections 6E-8, 6E-10, and 6E-42, HRS, by requiring the Division to contract reviews under those sections of the HRS to third-party reviewers for affordable housing projects when at least 80 percent of the units will be affordable and the Division determines that it cannot complete the required review within the timelines established by rule.

The Department is aware of Hawaii's affordable housing problem and supports measures that will help to alleviate it. The Department regrets that it is unable to support this measure because it requires the Division to engage third-party reviewers but does not appropriate funds for that purpose. The budget of the Division, which implements the review process under these various sections of the law, is extremely lean. There are no funds within the Division's proposed Fiscal Year 2022 budget that could be reprogrammed to support contracting with third-part reviewers as would be required if this measure is enacted.

Should the funding issue be resolved, the Department notes that all projects that would be subject to review under Section 6E-10, HRS, will require a permit subject to Section 6E-42, HRS, and the Department believes that the proposed amendment to Section 6E-10, HRS, is unnecessary and recommends that this amending language be removed.

Thank you for the opportunity to comment on this measure.

HISTORIC HAWAII FOUNDATION

TO: Senator Stanley Chang, Chair
Senator Dru Mamo Kanuha, Vice Chair
Committee on Housing (HOU)

FROM: Kiersten Faulkner, Executive Director
Historic Hawai'i Foundation

Committee: Thursday, February 4, 2021
1:00 p.m.
Via Video Conference/Conference Room 225

RE: SB 869, Relating to Affordable Housing

On behalf of Historic Hawaii Foundation (HHF), I am writing in **opposition to SB 869**. The bill would amend Hawai'i Revised Statutes §6E to require the State Historic Preservation Division (SHPD) of the Department of Land and Natural Resources to contract its review of affordable housing projects to third-party consultants when SHPD review time would exceed 60 days.

We infer that the intent of the bill is to streamline or improve timeliness of permitting, review and compliance processes for faster delivery of affordable housing developments. The bill implies—but does not provide evidence for—a connection between issues or delays affecting affordable housing development and the timeliness of SHPD review and compliance actions.

State law (HRS §6E-8), currently requires that prior to any state, county or public project commencing, that the proposed project shall be referred to SHPD for its review of the proposed project's potential effect on historic properties, aviation artifacts, or burial sites, especially those listed on the state register of historic places. The proposed project shall not commence until the department gives its written concurrence. SHPD review and comment is also required for privately-owned projects (see §6E-10, §6E-42 and §6E-43).

SHPD's review of proposed projects is an important safeguard to ensure that historic properties and cultural resources are identified and appropriate treatment measures are in place during planning and design work, which also then limits surprises or delays during construction.

SUMMARY OF HHF CONCERNS

The bill does not demonstrate how the proposed third-party consultant would achieve either the aims of appropriate treatment and preservation of Hawai'i's historic and cultural resources, nor how the third-party consultant would achieve the aims of providing additional affordable housing.

In addition to issues of effectiveness, HHF is also concerned with several practical issues, including: professional qualifications that would be required; selection and contracting procedures; how conflicts of interest would be addressed; how the third-party consultant decisions would be reviewed and incorporated into the administrative record; what resources the Division would need to manage the third-party consultants and review processes; and how the decisions reached by the third-party reviewers would be institutionalized, communicated and tracked.

ISSUE #1: Qualifications of Third-Party Consultants

Although the reliance on third-party reviewers could be a viable approach for matters such as building or zoning codes, most architects and engineers do not possess the specialized technical training to allow them to make determinations of effect on historic properties and provide meaningful review comments to ensure appropriate treatment of historic properties. We are also concerned with the issue of ensuring that the reviewers have knowledge, understanding and expertise in native Hawaiian cultural resources or values, especially if the third-party consultants are selected from out-of-state.

If the bill moves forward, HHF requests that it be amended to require that any architects, engineers, archaeologists, planners or other third parties that review an application for a permit, license or approval for a project that affects historic properties meet the education and experience standards and qualifications for preservation professionals as determined by SHPD rules. This will help ensure that reviewers are qualified to make the determinations entrusted to them when making decisions that impact the historic and cultural resources of the Islands.

We also recommend that it include a quality control and audit procedure that ensures the appropriateness and quality of the reviews, data tracking, implementation of review comments, and reporting.

ISSUE #2: Integration with Federal Historic Preservation Reviews

The review and compliance process currently outlined in State statute and rules is substantially parallel to a similar process in Federal regulations, which provides for the identification, review and agreement on treatment of historic properties in cases where federal funding, land, permits or other approvals apply. However, there are key differences that need to be accommodated.

In the case of affordable housing projects, federal funds are frequently used for land acquisition and/or project financing. In those cases, Section 106 of the National Historic Preservation Act applies. The Code of Federal Regulations (36 CFR Part 800) governs issues related to historic preservation and includes specific roles and responsibilities for the State Historic Preservation Officer (SHPO). While the technical reviews may be delegated to qualified preservation professionals in the fields of architecture, architectural history or archaeology, the SHPO is ultimately responsible for the authorization and approval of the Section 106 process and resolution of potential effects on historic properties.

In the cases where federal funds, lands, permitting, licenses or approvals are required, the proposed use of third-party consultants would result in a double review process: one by the third-party reviewer for purposes of HRS §6E and one by the SHPD personnel for compliance with 36 CFR 800.

There are key differences between State and Federal historic preservation regulations, including:

- Federal law requires the agency or department to consult with other parties, including preservation organizations; other individuals or organizations with an interest in the historic resource or the proposed project; and Native Hawaiian Organizations that ascribe religious or cultural significance to the historic property. Hawai'i Administrative Rules include only a limited duty to consult with other interested parties. Third-party consultants would be ill-equipped to manage or participate in the consultation process and could not represent the SHPD views.
- Federal law requires that review of projects include not only direct effects within the footprint of the project, both also indirect and cumulative effects, in which the entirety of the effect is identified and evaluated, and appropriate measures are taken. State law is primarily concerned only with direct effects and seldom looks beyond the immediate consequences to a larger picture. Third-party consultants would be ill-equipped to understand the cumulative effects or how to address them.
- Another significant difference between State and Federal regulations as they apply to historic resources is that State law is explicitly concerned with protection of Native Hawaiian burials and cultural resources, whereas Federal law is much less direct. Early identification of other types of historic properties—buildings, structures, archaeological sites—is relatively simple in that they can almost always be seen. However, subsurface or submerged historic properties are usually not previously identified. Third-party consultants would likely be unaware of unseen historic properties or have information on how to identify and resolve effects to them.

SHPD professional staff are versed in these and other differences and are able to ensure that review and compliance procedures address them. If a double-review with third-party consultants were introduced, the review processes would be segregated, adding conflict, confusion and contradiction.

Besides being inefficient and ineffective, the use of third-party consultants has the potential to remove an important safety net for the preservation and protection of the historic and cultural resources of Hawai'i, and would also introduce more uncertainty in the development process.

HISTORIC HAWAII FOUNDATION RECOMMENDATIONS:

Rather than introduce an entirely new bureaucracy to the process, we strongly recommend that SHPD be provided with the resources for personnel, technology, equipment and training to do the job for which it has been entrusted. If the Division is fully staffed and supported, the issues of timeliness and quality of reviews would be addressed at the source, and the proposed work-around is moot.

For these reasons, **Historic Hawai'i Foundation respectfully asks the committee to hold the bill and not pass it on further.** Thank you for the opportunity to comment.

Testimony of The Michaels Organization | Michaels Development - Hawai'i Region
RELATING TO Senate Bill No. 869

Thursday, February 4, 2021 at 1:00 p.m.
Conference Room 225

COMMITTEE ON HOUSING

Senator Stanley Chang, Chair, Senator Dru Mamo Kanuha, Vice Chair; and
Senator Sharon Y. Moriwaki; Senator Kurt Fevella; and Senator Karl Rhoades; Members

Support

Senate Bill 869 requires the State Historic Preservation Division to contract its review of proposed state projects, projects on privately owned historic property, and projects affecting historic properties to third-party consultants if the projects involve the development of affordable housing and the division will not be able to complete its review within 60 days.

The State of Hawai'i housing market has a severe shortage of affordable housing, in part due to regulatory barriers to housing development that are overly burdensome and time-consuming, which increase the cost and prolong the completion of new housing supply.

Maintaining historic heritage is a worthy pursuit, but the progression of reviewing, documenting, and agreeing to mitigating measures cannot be an open-ended process that consistently delays or ultimately precludes adding to the supply of housing, worsening the shortage of homes, driving up rents and inequitably affecting low- and median-income residents.

Government agencies routinely use third-party services to expedite a variety of regulatory reviews. Third party review is a particularly apt solution for departments facing chronic staffing shortages and budget shortfalls. With detailed delegation, along with authorization for the obligatory rule making allowing for the establishment of a delegation of authority to qualified and approved consultants, the State Historic Preservation Division would have an opportunity to implement third-party review that could appreciably shorten the timeline for affordable housing completion.

Thank you for the opportunity to provide comments in **support** of Senate Bill 869.



Karen Seddon
Regional Vice President
Michaels Development – Hawai'i Region