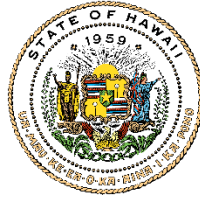


**JOSH GREEN, M.D.**  
GOVERNOR | KE KIA'ĀINA

**SYLVIA LUKE**  
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



**STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAI'I  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
KA 'OIHANA KUMUWAIWAI 'ĀINA**

P.O. BOX 621  
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DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
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COMMISSION ON WATER RESOURCE  
MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES  
ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

**Testimony of  
DAWN N. S. CHANG  
Chairperson**

**Before the Senate Committee on  
WATER AND LAND**

**Monday, March 13, 2023  
1:00 PM**

**State Capitol, Conference Room 229, Via Videoconference**

**In consideration of  
HOUSE BILL 202, HOUSE DRAFT 2  
RELATING TO HISTORIC PRESERVATION REVIEWS**

House Bill 202, House Draft 2 proposes to amend Sections 6E-8, 6E-10, and 6E-42, Hawaii Revised Statutes (HRS), to require the Department of Land and Natural Resources (Department) to contract with third-party reviewers for affordable housing projects, if the Department is unable to complete its reviews in sixty days, provided that the consultant meets the Department's professional qualifications and experience, will be make their recommendation to the Department in thirty days, and that the contract is approved by the appropriate Island Burial Council. **The Department supports this measure with recommended amendments.**

The Department recognizes the need to support affordable housing units in Hawai'i and acknowledges that even though review of such projects is one of our highest priorities, reviews of such submissions are not always completed as promptly as project proponents might like or within the time provided by the administrative rules. The Department acknowledges and appreciates the support of the Legislature by creating 14 new positions in the Department's State Historic Preservation Division (SHPD) during the last session. The Department believes once filled, these positions will provide SHPD with the capacity to reduce the time it takes to complete Chapter 6E, HRS, of most projects, including affordable housing projects.

The Department does not have funds to contract with third-party consultants and this mandate is not included in the Department's budget. While we believe this authorization may facilitate more timely review of affordable housing projects, funds would need to be appropriated. The Department appreciates that House Bill 202, House Draft 2 appropriates a blank amount of funds for third-party reviewers. The Department notes that it cannot estimate the number of times that third-party reviews may be needed in the coming fiscal year. Furthermore, it is difficult to determine in advance the cost estimate for a third-

party consultant contract, thus, Department cannot advise the Committee on a meaningful estimate of the costs and budgetary requirements of such third-party contracts.

The Department believes that difficulty in estimating, and budgeting third-party consultants can be overcome by providing a statutory mechanism for the project proponent to pay for the third-party consultant selected and approved by the Department. The Department recommends amending this measure by adding a new subparagraph (4) beginning at page 5, line 4:

(4) The project proponent shall pay for the reasonable fee requirements of the third party consultant; provided that the project proponent may contract with or sponsor any county, housing authority, non—profit organization, or person, to meet the fee requirements.

Insert a new subparagraph (4) on page 8, beginning at line 12:

(4) The project proponent shall pay for the reasonable fee into the State Historic Special Fund, and the Department will use this fee to meet the funding requirements of the contract with the third party consultant; provided that the project proponent may contract with or sponsor any county, housing authority, non—profit organization, or person, to meet the fee requirements.

Insert a new subparagraph (4) on page 12, beginning at line 3:

(4) The project proponent shall pay for the reasonable fee into the State Historic Special Fund, and the Department will use this fee to meet funding requirements of the contract with the third party consultant; provided that the project proponent may contract with or sponsor any county, housing authority, non—profit organization, or person, to meet the fee requirements.

The Department believes that these amendments will resolve funding and budgeting questions and avoid even the appearance of a conflict of interest.

Mahalo for the opportunity to provide testimony in support of this measure.



**HB202 HD2**  
**RELATING TO HISTORIC PRESERVATION REVIEWS**  
Senate Committee on Water and Land

March 13, 2023

1:00 PM

Room 229

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The Administration of the Office of Hawaiian Affairs (OHA) will recommend to the Board of Trustees the following **COMMENTS** on **HB202 HD2**, which would authorize the Department of Land and Natural Resources (DLNR), through the State Historic Preservation Division (SHPD) and subject to the approval from the appropriate island burial council, to contract third-party review if unable to complete its review within sixty days. **OHA has concerns, in the absence of any statutory provision delineating the appropriate standard for review, that a third-party review conducted by a private entity, which does not possess a public trust obligation, will be ineffective, inappropriate, and could lead to waste. Should the Legislature feel compelled to advance this measure, OHA offers amendments to mitigate its concerns for the preservation and protection of Native Hawaiian cultural and historic resources and the constitutional rights of the Native Hawaiian people.**

OHA wishes to emphasize that despite the obligations to preserve and protect the historic and cultural interests that have been enshrined within the Hawai'i State Constitution,<sup>1</sup> the State has endured a sordid history of abuse of these interests that have led to Native Hawaiian inequities, disparities, and irreparable harm. While mostly unintentional, the State has employed numerous safeguards in the service of these interests, safeguards, as is evidenced by this proposed measure, that still need to be refined, adapted, and improved.

OHA maintains a vested interest in advancing these safeguards for the betterment of conditions of Native Hawaiians as the principal public agency in the State responsible for the performance, development, and coordination of programs and activities relating to Native Hawaiians.<sup>2</sup> OHA takes care to note that the purpose of this measure is “to promote timely reviews of projects by authorizing [DLNR], through [SHPD] and subject to approval from the appropriate island burial council, to contract its review... to third party consultants if the department will not be able to complete its review within sixty days.” The Island Burial Councils have served as a critical safeguard for preserving and protecting Native Hawaiian historic and cultural resources with kuleana (responsibilities) to assist DLNR and SHPD in developing the inventory of these resources as well as making recommendations for their preservation and protection.

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<sup>1</sup> Haw. Stat. Con. Art. IX sec. 7 and 9; Haw. Stat. Con. Art. XII (1978).

<sup>2</sup> HRS §10-3.



**HB202 HD2**  
**RELATING TO HISTORIC PRESERVATION REVIEWS**  
**Senate Committee on Water and Land**

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For these reasons, OHA offers the following amendment to the proposed section on page 4, lines 12-14, to better preserve and protect the State's historic and cultural interests and to read:

(d) The department may retain a third-party consultant to conduct the review described under subsection (a) if, after an initial evaluation that is subject to the appropriate island burial council, the department determines that:

OHA also offers the following amendment to the proposed section on page 7, lines 18-20, to better preserve and protect the State's historic and cultural interests and to read:

(e) The department may retain a third-party consultant to conduct the review described under subsection (a) if, after an initial evaluation that is subject to the appropriate island burial council, the department determines that:

Finally, OHA offers the following amendment to the proposed section on page 11, lines 10-12, to better preserve and protect the State's historic and cultural interests and to read:

(c) The department may retain a third-party consultant to conduct the review and comment described under subsection (a) if, after an initial evaluation that is subject to the appropriate island burial council, the department determines that:

OHA appreciates the opportunity to provide comments on this measure and respectfully asks that the Legislature **takes into consideration our recommendation to improve HB202 HD2 for the betterment of conditions of Native Hawaiians.** Mahalo nui loa.



**HAWAII GOVERNMENT EMPLOYEES ASSOCIATION**

AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922

The Thirty-Second Legislature, State of Hawaii  
The Senate  
Committee on Water and Land

Testimony by  
Hawaii Government Employees Association

March 13, 2023

H.B. 202, H.D.2 – RELATING TO HISTORIC PRESERVATION  
REVIEWS

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO has comments on H.B. 202, H.D. 2, which allows the Department of Land and Natural Resources to retain third-party consultants to conduct reviews on proposed construction, alteration, disposition, or improvement of any nature on a historic property, when the department will not be able to provide its written concurrence or non-concurrence within sixty-days of the landowner's notification.

Retaining a third-party for this function contradicts what has customarily and historically been performed by civil service employees within the State Historic Preservation Division. These employees meet the existing qualifications and standards established by the department and can make independent determinations.

The Department should consider alternatives within its current policies or seek additional positions and funding from the Legislature rather than contracting out a necessary government function when reviews cannot be completed within sixty days. Civil service duties and responsibilities should be reserved for civil servants.

Thank you for the opportunity to testify on H.B. 202, H.D. 2.

Respectfully submitted,

Randy Perreira  
Executive Director

# HISTORIC HAWAII FOUNDATION

**TO:** Senator Lorraine R. Inouye, Chair  
Senator Brandon J.C. Elefante, Vice Chair  
Committee on Water and Land (WTL)

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

**Committee:** Monday, March 13, 2023  
1:00 p.m.  
Via Video Conference and Conference Room 229

**RE: HB 202 HD2, Relating to Historic Preservation Reviews**

On behalf of Historic Hawai'i Foundation (HHF), I am writing **in opposition to HB 202 HD 2**.

The bill relates to the duties of the Department of Land and Natural Resources for historic preservation reviews of state projects (HRS 6E-8); private property listed on the state register of historic places (HRS 6E-10); and other private property (HRS 6E-42). The bill provides for these reviews to be delegated to third-party consultants for projects in circumstances where the State Historic Preservation Division (SHPD) anticipates being unable to complete its review in 60 days.

The Constitution recognizes the value of conserving historic and cultural property for the public good; the purpose of HRS 6E is to implement “the public policy of this State to provide leadership in preserving, restoring and maintaining historic and cultural property...and to conduct activities, plans and programs in a manner consistent with the preservation and enhancement of historic and cultural property” (HRS 6E-1).

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.

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Historic Hawai'i Foundation is a statewide nonprofit organization established in 1974 to encourage the preservation of historic buildings, sites, structures, objects and districts on all the islands of Hawai'i. As the statewide leader for historic preservation, HHF works to preserve Hawai'i's unique architectural and cultural heritage and believes that historic preservation is an important element in the present and future quality of life, environmental sustainability and economic viability of the state.

## SUMMARY OF HHF CONCERNS and RECOMMENDATIONS

The bill does not demonstrate how the proposed third-party consultant would achieve either the aims of appropriate treatment and preservation of Hawaii's historic and cultural resources, nor how the third-party consultant would achieve the aims of expediting development proposals and project reviews.

The measure would allow SHPD to retain a third-party consultant to conduct the historic preservation reviews on behalf of the department in the event that SHPD is unable to complete its review within 60 days. The bill implies that SHPD would develop and maintain a list of individuals or organizations who are qualified as third-party consultants who can be activated on demand.

**Rather than establish a new program and divert SHPD's resources and professional staff to overseeing and managing third-party reviewers, HHF recommends that SHPD be provided with the adequate professional staffing and resources to execute its statutory responsibilities.**

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.

Rather than introduce an entirely new bureaucracy to the process, Historic Hawai'i Foundation recommends 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.

### ISSUE #1: Qualifications and Logistics for 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 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.

HHF appreciates that the measure makes reference to education and experience standards and qualifications for preservation professionals as determined by SHPD rules. HHF recommends that the administrative rules also include a quality control and audit procedure that ensures the appropriateness and quality of the reviews, data tracking, implementation of review comments, and reporting.

**HHF recommends that additional criteria and standards be established for any such third-party consultants.** At minimum, the criteria should include:

- Professional qualifications and standards that each consultant shall demonstrate;
- Sufficient internal controls to ensure qualified third-party consultant can make independent determinations and function in a manner that does not create a conflict or appearance of a conflict of interest; and
- The third-party consultants must be independent from the party that drafted or generated the project or program submittal that is the subject of the review.

It is unclear what action is required of SHPD once it receives the third-party consultant's recommendation. What action is the department expected to take? Do state personnel then review the third-party consultant's recommendations? If there are discrepancies or conflicts, how will they be resolved? Is SHPD responding to the original applicant or to the third-party reviewer? How will appropriate quality control and checks and balances be sustained? These issues will need to be addressed either in the bill or in the implementing rules and regulation.

HHF recommends that the bill include a deadline by which DLNR is to develop the draft rules for public input and comment, as well as a deadline for the final version of the rules be presented to the Board of Land and Natural Resources for action.

#### 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 many public projects, including transportation and other infrastructure, as well as 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:

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Historic Hawai'i Foundation is a statewide nonprofit organization established in 1974 to encourage the preservation of historic buildings, sites, structures, objects and districts on all the islands of Hawai'i. As the statewide leader for historic preservation, HHF works to preserve Hawai'i's unique architectural and cultural heritage and believes that historic preservation is an important element in the present and future quality of life, environmental sustainability and economic viability of the state.



- 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 attach 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, but 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 introduce more uncertainty in the development process.

**Given the ambiguities of the policy and proposed direction, and the availability of simpler and more direct solutions, HHF recommends that HB 202 be deferred.**

Thank you for the opportunity to comment.



**Hawai'i YIMBY**  
Honolulu, HI 96814

hawaiiyimby.com  
admin@hawaiiyimby.com

Monday, March 13, 2023

Senate Committee on Water and Land  
Hawai'i State Capitol  
Honolulu, HI 96813

**RE: SUPPORT for HB 202 HD2 - RELATING TO HISTORIC PRESERVATION  
REVIEWS**

Aloha Chair Inouye, Vice Chair Elefante, and Members of the Committee,

On behalf of Hawai'i YIMBY, I'm writing to support HB 202 HD2, which authorizes the state historic preservation division to contract reviews to third-party consultants when necessary to clear the backlog of reviews.

This bill offers a practical solution by utilizing the expertise of third-party consultants. This approach is not only efficient, but it also ensures that the review process remains thorough and accurate. Not only does the current pileup threaten historic properties by failing to adequately protect them in a timely manner, it also serves as yet another roadblock in the way of much-needed housing development amidst a devastating and deepening housing undersupply crisis.

Hawai'i YIMBY (*Yes In My Backyard*) is a new and rapidly growing grassroots advocacy organization dedicated to solutions for Hawai'i's housing crisis. Our members are deeply concerned about Hawai'i's chronic and worsening housing shortage, which pushes thousands of kama'āina out to the mainland or into homelessness every single year.

We urge your support for this bill. Thank you for the opportunity to testify.

Sincerely,

Matt Popovich

Co-Lead, Hawai'i YIMBY

