

HISTORIC HAWAII FOUNDATION

TO: Representative Linda Ichiyama, Chair
Representative Mahina Poepoe, Vice Chair
Committee on Water and Land (WAL)

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

Committee: Tuesday, January 31, 2023
9:00 a.m.
Via Video Conference and Conference Room 430

RE: HB 202, Relating to Historic Preservation Reviews

On behalf of Historic Hawai'i Foundation (HHF), I am writing **with comments and concerns about HB 202.**

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 mandates that such reviews 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.

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 require 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:

- 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.



January 31, 2023

TO: HONORABLE LINDA ICHIYAMA, CHAIR, HONORABLE MAHINA POEPOE, VICE CHAIR, COMMITTEE ON LABOR & GOVERNMENT OPERATIONS

SUBJECT: **SUPPORT OF H.B. 202, RELATING TO HISTORIC PRESERVATION REVIEWS.** Requires the department of land and natural resources, through the state historic preservation division and subject to approval from the appropriate island burial council, 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 department will not be able to complete its review within sixty days.

HEARING

DATE: Tuesday, January 31, 2023
TIME: 9:00 a.m.
PLACE: Capitol Room 430

Dear Chair Ichiyama, Vice Chair Poepoe and Members of the Committee,

The General Contractors Association of Hawaii (GCA) is an organization comprised of approximately five hundred (500) general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. Our mission is to elevate Hawaii's construction industry and strengthen the foundation of our community.

GCA is in support of H.B. 202, which requires the department of land and natural resources, through the state historic preservation division and subject to approval from the appropriate island burial council, 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 department will not be able to complete its review within sixty days.

This measure attempts to address the backlog of historic reviews by utilizing qualified third-party consultants to review projects to meet the required 90-day review timeline. This would help deliver much needed housing in a more timely manner.



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January 31, 2023

To: Committee on Water and Land
Rep. Linda Ichiyama, Chair
Rep. Mahina Poepoe, Vice Chair

From: Malcolm Barcarse, Jr. ABC Hawaii Board Legislative Committee Chair

Associated Builders and Contractors Hawaii Chapter Testimony in **SUPPORT** of HB 202

Chair Ichiyama, Vice Chair Poepoe and members of the Committee:

Thank you for the opportunity to testify, my name is Malcolm Barcarse, Jr. I am the Chair of the Legislative Committee of Associated Builders and Contractors, Hawaii Chapter which represents over 150 member companies in the Construction Industry in Hawaii. We also have a State Approved Trade Apprenticeship Program in the trades of Carpentry, Electrical, Painting, Plumbing and Roofing. Our national organization has over 21,000 members across 69 chapters.

There are many factors behind the delay in obtaining building permits and ABC Hawaii is in favor of measures that will help streamline the process. We feel that the State Historic Preservation Division can benefit from the help of third-party support in assisting with the backlog of Historic Preservation Reviews which is only going to get bigger as more buildings fall within their jurisdiction. Therefore, we ask that this committee advance this bill.

Thank you for the opportunity to testify.



**HOUSE COMMITTEE ON WATER & LAND
State Capitol
415 South Beretania Street
9:00 AM**

January 30, 2023

RE: HB 201 - RELATING TO HISTORIC PRESERVATION

Chair Ichiyama, Vice Chair Poepoe, and members of the committee:

My name is Max Lindsey, 2023 Government Relations Chair of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii. Our members build the communities we all call home.

BIA-Hawaii is in support of HB 202, Relating to Historic Preservation. This bill would require the Department of Land and Natural Resources State Historic Preservation Division (SHPD), subject to approval from the appropriate island burial council, 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 department will not be able to complete its review within sixty days.

BIA-Hawaii is generally in support of the intent to streamline SHPD review. Allowing SHPD to outsource projects to third-party reviewers would help reduce their current backlog.

The state of Hawaii is in a dire housing crisis. As the Legislature is aware, the cost of housing in Hawaii is extremely high, with Oahu's median price of homes being currently over \$1 million. Approximately 153,967 U.S. households are priced out of buying a home for every \$1000 increase in price, according to the National Association of Home Builders (NAHB). We are in support of legislation that would allow for the building of much-needed housing at every price point in Hawaii.

We appreciate the opportunity to express our support for HB 202.

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January 30, 2022

Representative Linda Ichiyama, Chair
Representative Mahina Poepoe, Vice Chair
Committee on Water and Land

RE: **HB 202 - Relating to Historic Preservation Reviews**
Hearing date: January 31, 2023 at 9:00AM

Aloha Chair Ichiyama, Vice Chair Poepoe and members of the committee,

Mahalo for the opportunity to submit testimony on behalf of NAIOP Hawaii in **SUPPORT** on HB 202. NAIOP Hawaii is the local chapter of the nation's leading organization for office, industrial, retail, residential and mixed-use real estate. NAIOP Hawaii has over 200 members in the State including local developers, owners, investors, asset managers, lenders and other professionals.

HB 202 is intended to promote more timely reviews of projects by requiring the Department of Land and Natural Resources (DLNR) State Historic Preservation Division (SHPD) to contract its review of the proposed state projects, projects on privately owned historic property, and projects affecting historic properties to third-party consultants if the department will not be able to complete its review within sixty days.

Primarily, HB 202 seeks to address the significant delays that permit applicants face in obtaining county permits that require review under section 6E-42, Hawaii Revised Statutes. Currently, the backlog of historic reviews is encumbering permits throughout the state. Consequently, much needed housing, economic development, and critical infrastructure projects often face significant delays in permit approvals and project implementation. NAIOP understands the great importance that these reviews hold in preservation of Hawaii's historic and cultural sites, however, a balance needs to be found to increase efficiency while maintaining the quality of reviews.

Accordingly, we strongly support the utilization of qualified third-party consultants to review projects in order to meet the intended statutorily required 90-day review timeline. Currently, SHPD is facing challenges in completing the overwhelming number of reviews due to capacity issues in the department. Allowing for third party consultants to conduct reviews will significantly reduce the current caseload while expediting future reviews that allow for the development of much needed housing and critical infrastructure.

Moreover, permitting third-party reviews offers the benefit of having market demand drive the number of reviewers entering the space. The more demand, the more

Representative Linda Ichiyama, Chair
Representative Mahina Poepoe, Vice Chair
Committee on Water and Land
January 30, 2023
Page 2

qualified reviewers will take on the liability and responsibility of these historic preservation project reviews. This will allow market forces to help solve this issue

Additionally, the language of HB 202 requires third party consultants to meet qualifications for preservation professionals pursuant to rules adopted by SHPD. This ensures that reviews will be conducted by qualified consultants to meet the high standards of review. NAIOP Hawaii supports this provision of the measure which seeks to balance the interests of all stakeholders by expediting quality reviews.

To further the intent of the measure to expedite reviews, we recommend an amendment to remove the burial council approval language in each respective section. Currently, the measure requires the proper burial council approve of the select qualified third-party consultant. This process is duplicative and unnecessary due to SHPD's ability to set the qualifications that a third-party consultant must meet in order to conduct the reviews. Essentially, the public interests will be protected as the most qualified individuals will be selected to uphold the high standards of review conducted by SHPD. This amendment preserves the protection of cultural sites while furthering the intent of the measure to expedite reviews.

Furthermore, NAIOP Hawaii recommends that SHPD be required to assign the reviews to a third-party consultant no later than 60 days after submission of the an application to SHPD if the department determines it will be unable to complete its review within 60 days. Specifically, language in the newly amended Sections 6E-8(d), 6E-10(e), and 6E-42(c) to state the following:

"The department shall retain a third-party consultant to conduct the review described under subsection (a) no later than sixty days after application submittal if, after an initial evaluation, the department determines that:"

This amendment is consistent with the intent of the bill to expedite reviews and alleviate the overwhelming volume of work SHPD currently faces.

NAIOP greatly supports the intent of the measure to identify a solution to the significant backlog of much needed projects awaiting SHPD review. Ultimately, HB 202 addresses a critical issue in the development of more affordable housing and critical infrastructure for Hawaii residents. NAIOP appreciates the Legislature's commitment to collaborating on this issue and look forward to working together.

Mahalo for your consideration,



Jennifer Camp, President
NAIOP Hawaii