

ACT 104

H.B. NO. 1285

A Bill for an Act Relating to Historic Sites.

*Be It Enacted by the Legislature of the State of Hawaii:*

SECTION 1. According to section 6E-42, Hawaii Revised Statutes, when a private landowner seeks a land development permit, such as a grading permit which may affect historic property, aviation artifacts, or a burial site, the department of land and natural resources, division of historic preservation, must be given an opportunity to review and comment on the application. The legislature finds that the intent of this review is to provide appropriate protection of historic property. However, the law does not apply penalties if someone does not seek prior approval and damages an historic property or burial site.

Thus, the purpose of this Act is to extend the same protections and penalties for the damage of an historic property or burial site discovered on private lands when the necessary approvals have not been sought as required by the historic preservation law.

SECTION 2. Chapter 6E, Hawaii Revised Statutes, is amended by adding three new sections to be appropriately designated and to read as follows:

“§6E-A 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-C; 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-C; 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.

**§6E-B Civil penalties.** 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 offense. Each day of each violation constitutes a separate offense.

**§6E-C 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-B.

(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."

SECTION 3. Section 6E-11, Hawaii Revised Statutes, is amended to read as follows:

**“§6E-11 Penalties.** (a) It shall be unlawful for any person, natural or corporate, 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 unlawful for any person, natural or corporate, 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.

(b) It shall be unlawful for any person, natural or corporate, 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. Violators of this subsection are also subject to prosecution pursuant to section 711-1107, the penalties for which shall be imposed in addition to, and not in lieu of, any penalties imposed under this section.

(c) It shall be unlawful 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. The penalties imposed pursuant to subsections (e) and (f) shall be in addition to any other penalties that may be imposed pursuant to law.

(d) It shall be unlawful 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)] (e) Any person who violates this section shall be fined not more than \$10,000 for each separate offense. If the violator directly or indirectly has caused the loss of, or damage to, historic property or burial site, the violator shall be fined an additional amount determined by the court 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 offense for which the offender may be punished. Equipment used by a violator for the taking, appropriation, excavation, injury, destruction, or alteration of historic property or a burial site, or for the transportation of the violator to or from the historic property or a burial site, shall be subject to seizure and disposition by the State without compensation to its owner or owners.

[(d)] (f) Any person, natural or corporate, who knowingly violates this section with respect to burial sites shall also be prohibited from participating in the construction of any state or county funded project for ten years.

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

SECTION 4. Section 6E-13, Hawaii Revised Statutes, is amended by amending its title and subsection (a) to read as follows:

“**§6E-13 [Enforcement.] 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 court of competent jurisdiction for restraining orders and injunctive relief to restrain and enjoin violations or threatened violations of this chapter.”

SECTION 5. Section 6E-43.6, Hawaii Revised Statutes, is amended to read as follows:

“**[§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."

SECTION 6. In codifying the new sections added by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.<sup>1</sup>

SECTION 8. This Act shall take effect upon its approval.

(Approved May 30, 2003.)

**Note**

1. Edited pursuant to HRS §23G-16.5.