

THIRTIETH LEGISLATURE, 2020  
STATE OF HAWAII

\_\_\_\_.B. NO. \_\_\_\_\_

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# A BILL FOR AN ACT

RELATING TO HISTORIC PRESERVATION.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. Iwi kūpuna and wahi kūpuna are treasured among  
2 the Native Hawaiian community as fundamental parts of its  
3 history and identity. Burial sites and other historic sites are  
4 physical vestiges of Native Hawaiian heritage; their continuing  
5 presence is vital to the perpetuation of the Native Hawaiian  
6 culture and the unique mana and character of Hawai‘i.

7           This legislature has acknowledged the deep significance of  
8 irreplaceable historic resources and has developed prudent  
9 policy to protect iwi kūpuna and historic properties from  
10 inadvertent destruction as a result of development. State  
11 historic preservation laws provide a process by which county  
12 grading- and construction-related permit applications can be  
13 vetted for potential impacts to iwi kūpuna and other  
14 archaeological and historic sites.

15           Unfortunately, these goals are undermined when landowners  
16 and developers circumvent required permits and, likewise, the  
17 historic preservation review process they trigger. As a result,

1 it is impossible to know whether and how many significant  
2 historic resources have been destroyed.

3 Therefore, the purpose of this Act is to better protect  
4 historic properties and burial sites and facilitate stronger,  
5 more effective enforcement against non-compliance with county  
6 permitting processes that involve historic preservation review  
7 as well as against violations of other historic preservation  
8 review requirements by:

9 (1) Explicitly clarifying that any failure to comply with  
10 advisement or approval processes that would trigger  
11 state historic preservation review shall be a  
12 violation of chapter 6E, Hawai'i Revised Statutes;

13 (2) Authorizing the state historic preservation division  
14 of the department of land and natural resources to  
15 issue an order to stop work immediately where such a  
16 violation has occurred until a site inspection by  
17 department staff or an approved archaeologist is  
18 conducted and a work schedule for recommended  
19 mitigation or restoration measures is approved by the  
20 board of land and natural resources;

21 (3) Providing that any violators shall be responsible for  
22 the costs of site inspections and any mitigation or  
23 restoration measures recommended;

- 1           (4) Increasing the limit for civil and administrative  
2            fines for violations of historic preservation review  
3            requirements to further disincentivize noncompliance;
- 4           (5) Requiring the department to publish a list of  
5            violators of chapter 6E, Hawai'i Revised Statutes, to  
6            inform state agencies of the individuals and entities  
7            with whom they are restricted from contracting  
8            pursuant to subsection 6E-11(g);
- 9           (6) Explicitly allowing for moneys in the historic  
10           preservation special fund, including civil and  
11           administrative fines collected for violations of  
12           chapter 6E, to be expended for the costs of  
13           enforcement against violations of chapter 6E;
- 14           (7) Requiring the department to establish a citizen  
15           complaint intake process and to prepare informational  
16           materials, including a worksite poster, related to  
17           that process for dissemination to the public; and
- 18           (8) Requiring construction worksites to post prominently  
19           an informational poster regarding the citizen  
20           complaint intake process developed by the department.

21           SECTION 2. Section 6E-8, Hawai'i Revised Statutes, is  
22   amended by amending subsection (a) to read as follows:

1           "(a) Before any agency or officer of the State or its  
2 political subdivisions commences any project which may affect  
3 historic property, aviation artifact, or a burial site, the  
4 agency or officer shall advise the department and allow the  
5 department an opportunity for review of the effect of the  
6 proposed project on historic properties, aviation artifacts, or  
7 burial sites, consistent with section 6E-43, especially those  
8 listed on the Hawaii register of historic places. The proposed  
9 project shall not be commenced, or if it has already begun,  
10 continued, until the department has given its written  
11 concurrence. If:

- 12           (1) The proposed project consists of corridors or large  
13           land areas;
- 14           (2) Access to properties is restricted; or
- 15           (3) Circumstances dictate that construction be done in  
16           stages,

17 the department may give its written concurrence based on a  
18 phased review of the project; provided that there shall be a  
19 programmatic agreement between the department and the project  
20 applicant that identifies each phase and the estimated timelines  
21 for each phase.

22           The department shall provide written concurrence or non-  
23 concurrence within ninety days after the filing of a request

1 with the department. The agency or officer seeking to proceed  
2 with the project, or any person, may appeal the department's  
3 concurrence or non-concurrence to the Hawaii historic places  
4 review board. An agency, officer, or other person who is  
5 dissatisfied with the decision of the review board may apply to  
6 the governor, who may take action as the governor deems best in  
7 overruling or sustaining the department.

8 Commencing or continuing any project or any phase of any  
9 phased project without a written concurrence from the department  
10 as required in this subsection shall be a violation of this  
11 chapter."

12 SECTION 3. Section 6E-42, Hawai'i Revised Statutes, is  
13 amended by amending subsection (a) to read as follows:

14 "(a) Except as provided in section 6E-42.2, before any  
15 agency or officer of the State or its political subdivisions  
16 approves any project involving a permit, license, certificate,  
17 land use change, subdivision, or other entitlement for use,  
18 which may affect historic property, aviation artifacts, or a  
19 burial site, the agency or office shall advise the department  
20 and prior to any approval allow the department an opportunity  
21 for review and comment on the effect of the proposed project on  
22 historic properties, aviation artifacts, or burial sites,

1 consistent with section 6E-43, including those listed in the  
2 Hawaii register of historic places. If:

3 (1) The proposed project consists of corridors or large  
4 land areas;

5 (2) Access to properties is restricted; or

6 (3) Circumstances dictate that construction be done in  
7 stages,

8 the department's review and comment may be based on a phased  
9 review of the project; provided that there shall be a  
10 programmatic agreement between the department and the project  
11 applicant that identifies each phase and the estimated timelines  
12 for each phase.

13 Commencing or continuing any project or any phase of any  
14 phased project without first obtaining an approval from an  
15 agency or office that would have initiated the historic  
16 preservation review process with the department pursuant to this  
17 section is a violation of this chapter."

18 SECTION 4. Section 6E-10.5, Hawai'i Revised Statutes, is  
19 amended to read as follows:

20 "**§6E-10.5 Enforcement.** (a) If the board of land and  
21 natural resources determines that any person has violated or is  
22 violating this chapter, or any rule adopted pursuant to this  
23 chapter, the board shall serve written notice by certified mail

1 or personal service upon the alleged violator or violators  
2 specifying the alleged violation and may include with the  
3 notice:

4 (1) An order to stop all work in the parcel containing the  
5 site of the violation;

6 (2) An order specifying a reasonable time during which  
7 that person shall be required to take such measures as  
8 may be necessary to correct the violation and to give  
9 periodic progress reports;

10 [~~2~~] (3) An order imposing penalties provided in section  
11 6E-11.6; and

12 [~~3~~] (4) An order that the alleged violator or violators  
13 appear before the board for a hearing at a time and  
14 place specified in the notice or to be set later and  
15 answer the charges complained of.

16 (b) If the board determines that any person is continuing  
17 to violate this chapter or any rule adopted pursuant to this  
18 chapter after having been served notice of violation, the board  
19 shall serve written notice by certified mail or personal service  
20 upon the alleged violator or violators specifying the alleged  
21 violation. With the notice, the board:

22 (1) Shall order the violator or violators to cease and  
23 desist from the activities that violate this chapter

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1 or any rule adopted thereunder and to stop work in any  
2 parcel or parcels where unauthorized or unapproved  
3 work has commenced, until the board accepts the  
4 written schedule required by this subsection;

5 (2) Shall order the alleged violator or violators to  
6 submit a written schedule within thirty days  
7 specifying the measures to be taken and the time  
8 within which the measures shall be taken to bring that  
9 person into compliance with this chapter or any rule  
10 adopted thereunder[-]; provided that for violations  
11 involving the commencement or continuation of work  
12 without a written concurrence from the department as  
13 required by 6E-8(a) or an approval from an agency or  
14 office that would have triggered historic preservation  
15 review requirements as required by 6E-42(c), the  
16 written schedule shall include findings and a timeline  
17 of mitigation or restoration measures for any impacted  
18 or potentially impacted burial site or historic  
19 property as recommended by department staff or an  
20 archaeologist approved by the department who has  
21 conducted an inspection of the site, provided further  
22 that the violator or violators shall be responsible  
23 for all costs of any site inspection. The board shall



1 accept or modify the submitted schedule within sixty  
2 days of receipt of the schedule. Any schedule not  
3 acted upon after sixty days of receipt by the board  
4 shall be deemed accepted by the board;

5 ~~[(2) Shall order the alleged violator or violators to~~  
6 ~~cease and desist from the activities that violate this~~  
7 ~~chapter or any rule adopted thereunder, if that person~~  
8 ~~does not submit a written schedule to the board within~~  
9 ~~thirty days. This order shall remain in effect until~~  
10 ~~the board accepts the written schedule.]~~

11 (3) May impose penalties as provided in section 6E-11.6;  
12 and

13 (4) May order the alleged violator or violators to appear  
14 before the board for a hearing to answer the charges  
15 issued, at a time and place specified in the notice or  
16 otherwise set by the board.

17 (c) If the board determines that any person has violated  
18 an accepted schedule or an order issued pursuant to this  
19 section, the board shall impose penalties by sending a notice in  
20 writing, either by certified mail or by personal service to that  
21 person, describing such non-adherence or violation with  
22 reasonable particularity.

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1           (d) Any order issued pursuant to this chapter shall become  
2 final, unless the person or persons named therein requests in  
3 writing, not later than twenty days after notice of violation  
4 and order is served, a hearing before the board. Upon request  
5 for a hearing, the board shall require that the alleged violator  
6 or violators appear before the board for a hearing to answer the  
7 charges issued, at a time and place specified in the notice or  
8 otherwise set by the board.

9           Any penalty imposed pursuant to this chapter shall become  
10 due and payable twenty days after the notice of penalty is  
11 served, unless the person or persons named therein requests in  
12 writing a hearing before the board. Whenever a hearing is  
13 requested on any penalty imposed pursuant to this chapter, the  
14 penalty shall become due and payable only upon completion of all  
15 review proceedings and the issuance of a final order confirming  
16 the penalty in whole or in part.

17           (e) Any hearing conducted pursuant to this section shall  
18 be conducted as a contested case under chapter 91. If, after a  
19 hearing held pursuant to this section, the board finds that a  
20 violation or violations has occurred, the board shall:

- 21           (1) Affirm or modify any penalties imposed;
- 22           (2) Modify or affirm the order previously issued; or

1           (3) Issue an appropriate order or orders for the  
2                    prevention, abatement, or control of the violation or  
3                    for the taking of such other corrective action as may  
4                    be appropriate.

5           Any order issued after a hearing may prescribe timetables  
6 for necessary action in preventing, abating, or controlling the  
7 violation. If, after a hearing on an order or penalty contained  
8 in a notice, the board finds that no violation has occurred or  
9 is occurring, the board shall rescind the order or penalty.

10          (f) If the amount of any penalty is not paid to the  
11 department within thirty days after it becomes due and payable,  
12 the board may institute a civil action in the name of the State  
13 to collect the administrative penalty, which shall be a  
14 government realization. In any proceeding to collect the  
15 administrative penalty imposed, the board need only show that:

- 16           (1) Notice was given;
- 17           (2) A hearing was held, or the time granted for requesting  
18                    a hearing has run without such a request;
- 19           (3) The administrative penalty was imposed; and
- 20           (4) The penalty remains unpaid.

21          (g) In connection with any hearing held pursuant to this  
22 section, the board may subpoena the attendance of witnesses and  
23 the production of evidence on behalf of all parties."

1 SECTION 5. Section 6E-11, Hawai'i Revised Statutes, is  
2 amended by amending subsections (f) and (g) to read as follows:

3 "(f) Any person who violates this section shall be fined  
4 not more than [~~\$10,000~~] \$25,000 for each separate violation. If  
5 the violator directly or indirectly has caused the loss of, or  
6 damage to, any historic property or burial site, the violator  
7 shall be fined an additional amount determined by the  
8 environmental court or an administrative adjudicative authority  
9 to be equivalent to the value of the lost or damaged historic  
10 property or burial site. Each day of continued violation of  
11 this provision shall constitute a distinct and separate  
12 violation for which the violator may be punished. Land owners  
13 and developers responsible for projects where violations are  
14 found to have occurred shall execute any mitigation and  
15 preservation measures ordered by the department and shall be  
16 jointly and severally liable for the costs of such mitigation  
17 and preservation. Equipment used by a violator for the taking,  
18 appropriation, excavation, injury, destruction, or alteration of  
19 any historic property or burial site, or for the transportation  
20 of the violator to or from the historic property or burial site,  
21 shall be subject to seizure and disposition by the State without  
22 compensation to its owner or owners.

1 (g) Any person who [~~knowingly~~] violates this chapter with  
2 respect to burial sites shall also be prohibited from  
3 participating in the construction of any state or county funded  
4 project for ten years. The department shall maintain a list of  
5 violators who have violated this chapter with respect to burial  
6 sites during the preceding ten years and the dates and locations  
7 of such violations, provided that the list shall be transmitted  
8 to all other state departments and the counties annually, and  
9 made available to the public."

10 SECTION 6. Section 6E-11.5, Hawai'i Revised Statutes, is  
11 amended to read as follows:

12 "**§6E-11.5 Civil penalties.** Except as provided in section  
13 6E-11, any person who violates this chapter, or any rule adopted  
14 pursuant to this chapter shall be fined not less than \$500 nor  
15 more than [~~\$10,000~~] \$25,000 for each separate violation. Each  
16 day of each violation constitutes a separate violation."

17 SECTION 7. Section 6E-16, Hawai'i Revised Statutes, is  
18 amended by amending subsection (b) to read as follows:

19 "(b) Subject to legislative authorization, the department  
20 may expend moneys from the fund:

- 21 (1) For permanent and temporary staff positions;
- 22 (2) To replenish goods;
- 23 (3) To produce public information materials;

- 1           (4) To provide financial assistance to public agencies and
- 2                   private agencies in accordance with chapter 42F
- 3                   involved in historic preservation activities other
- 4                   than those covered by section 6E-9; [~~and~~]
- 5           (5) To cover administrative and operational costs of the
- 6                   historic preservation program[~~-~~]; and
- 7           (6) To cover administrative and operational costs for
- 8                   enforcement of this chapter."

9           SECTION 8. Chapter 6E, Hawai'i Revised Statutes, is amended  
10 by adding a new section to part I to be appropriately designated  
11 and to read as follows:

12           "§6E- Citizen complaint intake hotline. (a) The  
13 department shall establish an intake hotline by which citizens  
14 may confidentially report via telephone or electronic  
15 communication alleged violations of this chapter.

16           (b) The department shall develop and distribute to the  
17 public appropriate informational materials, including a worksite  
18 poster that explains the statutory protections for burials,  
19 historical sites, and archaeological resources, and provides  
20 information on how citizens can submit complaints to the citizen  
21 complaint intake hotline.

22           (c) Beginning on July 1, 2021, a copy of the department's  
23 informational poster shall be prominently posted at all

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1 worksites where ground disturbing construction activities take  
2 place to provide notice of the citizen complaint intake hotline  
3 to construction personnel or the public."

4 SECTION 9. Statutory material to be repealed is bracketed  
5 and stricken. New statutory material is underscored.

6 SECTION 10. This Act shall take effect upon its approval.

INTRODUCED BY: \_\_\_\_\_

By Request