

ACT 159

S.B. NO. 1244

A Bill for an Act Relating to Affordable Housing.

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

PART I

SECTION 1. The legislature finds that the shortage of safe, decent, and sanitary housing has been a persistent problem in Hawaii for decades. Almost 50 years ago, in 1970, the Hawaii state legislature recognized the need to address the severe shortfall of affordable housing and passed H.B. No. 397, as amended, which was enacted into law as Act 105, Session Laws of Hawaii 1970, and codified as chapter 359A, Hawaii Revised Statutes. This enabling legislation

expanded the powers of the then Hawaii Housing Authority to provide for-sale affordable housing units to the general public, in addition to providing affordable rental housing units. This legislation was the predecessor to what is today known as the Hawaii housing finance and development corporation.

In Act 105, the legislature noted “a critical shortage of housing units for lower and middle income residents” and emphasized the importance of affordable housing to the fabric of society. Act 105 also cited studies indicating that the high cost of housing is the result of multiple factors, including “the cost and availability of land, the cost of development, the cost and availability of financing, the cost added by government regulation, the cost and availability of labor and materials, the inflationary state of the economy”, and “conflicting priorities in our pluralistic society”.

The legislature further finds that, almost a half century after Act 105, the shortage of affordable housing still exists and has grown to crisis proportions. With the limited amount of developable land and the lack of needed infrastructure, we find median prices for single family homes on Oahu hovering at around \$750,000. Recent studies show a need for 60,000 housing units by the year 2020. It is necessary, therefore, for the legislature to take steps to preserve existing affordable housing units for as long as possible. This has not been the case in recent years relative to government-assisted or mandated affordable housing units. Because of the lack of financial or other resources, government agencies have often opted to waive their right of first refusal to repurchase housing units that are sold within the designated restriction period.

The intent of this Act is to create a pool of affordable housing units that will remain permanently affordable through the purchase and management of the units by the housing trust.

The purpose of this Act is to:

- (1) Authorize the Hawaii community development authority to waive a right to repurchase a reserved or workforce unit and transfer the right of repurchase to a qualified nonprofit housing trust;
- (2) Authorize the counties to waive their right of first refusal to repurchase certain privately-developed affordable housing units and transfer that right of repurchase to a qualified nonprofit housing trust;
- (3) Authorize the Hawaii housing finance and development corporation to waive its first option to repurchase certain real property and transfer the right of repurchase to a qualified nonprofit housing trust; and
- (4) Amend the means of calculating the maximum price for the Hawaii housing finance and development corporation’s first option to purchase real property.

PART II

SECTION 2. Chapter 206E, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§206E- Reserved and workforce housing units; transfer to qualified nonprofit housing trust. (a) Notwithstanding any law to the contrary, the authority may authorize a designated qualified nonprofit housing trust to administer the covenants and rules related to the reserved housing and workforce housing programs. Additionally, the authority may waive its right to repurchase a reserved or workforce housing unit during the restriction period and may transfer that right of repurchase to a qualified nonprofit housing trust for the purpose

of maintaining the reserved or workforce housing unit as an affordable housing unit. If the repurchase rights are transferred to a qualified nonprofit housing trust, the restrictions prescribed in this chapter or in rules adopted by the authority shall be automatically extinguished and shall not attach in subsequent transfers of title; provided further that the qualified nonprofit housing trust shall establish new buyback restrictions for the purpose of maintaining the unit as affordable for as long as practicable, or as otherwise required by the authority.

(b) A qualified nonprofit housing trust shall report the status and use of its housing units to the authority by November 30 of each calendar year."

SECTION 3. Section 46-15.1, Hawaii Revised Statutes, is amended to read as follows:

"§46-15.1 Housing; county powers. (a) ~~[Any]~~ Notwithstanding any law to the contrary [notwithstanding], any county shall have and may exercise the same powers, subject to applicable limitations, as those granted the Hawaii housing finance and development corporation pursuant to chapter 201H insofar as those powers may be reasonably construed to be exercisable by a county for the purpose of developing, constructing, and providing low- and moderate-income housing; provided that no county shall be empowered to cause the State to issue general obligation bonds to finance a project pursuant to this section; provided further that county projects shall be granted an exemption from general excise or receipts taxes in the same manner as projects of the Hawaii housing finance and development corporation pursuant to section 201H-36; and provided further that section 201H-16 shall not apply to this section unless federal guidelines specifically provide local governments with that authorization and the authorization does not conflict with any state laws. The powers shall include the power, subject to applicable limitations, to:

- (1) Develop and construct dwelling units, alone or in partnership with developers;
- (2) Acquire necessary land by lease, purchase, exchange, or eminent domain;
- (3) Provide assistance and aid to a public agency or other person in developing and constructing new housing and rehabilitating existing housing for elders of low- and moderate-income, other persons of low- and moderate-income, and persons displaced by any governmental action, by making long-term mortgage or interim construction loans available;
- (4) Contract with any eligible bidders to provide for construction of urgently needed housing for persons of low- and moderate-income;
- (5) Guarantee the top twenty-five per cent of the principal balance of real property mortgage loans, plus interest thereon, made to qualified borrowers by qualified lenders;
- (6) Enter into mortgage guarantee agreements with appropriate officials of any agency or instrumentality of the United States to induce those officials to commit to insure or to insure mortgages under the National Housing Act, as amended;
- (7) Make a direct loan to any qualified buyer for the downpayment required by a private lender to be made by the borrower as a condition of obtaining a loan from the private lender in the purchase of residential property;
- (8) Provide funds for a share, not to exceed fifty per cent, of the principal amount of a loan made to a qualified borrower by a private

lender who is unable otherwise to lend the borrower sufficient funds at reasonable rates in the purchase of residential property; and

- (9) Sell or lease completed dwelling units.

For purposes of this section, a limitation is applicable to the extent that it may reasonably be construed to apply to a county.

(b) Each county shall recognize housing units developed by the department of Hawaiian home lands and issue affordable housing credits to the department of Hawaiian home lands. The credits shall be transferable and shall be issued on a one-credit for one-unit basis, unless the housing unit is eligible for additional credits as provided by adopted county ordinances, rules, or any memoranda of agreement between a county and the department of Hawaiian home lands. In the event that credits are transferred by the department of Hawaiian home lands, twenty-five per cent of any monetary proceeds from the transfer shall be used by the department of Hawaiian home lands to develop units for rental properties. Credits shall be issued for each single-family residence, multi-family unit, other residential unit, whether for purposes of sale or rental, or if allowed under the county's affordable housing programs, vacant lot, developed by the department of Hawaiian home lands. The credits may be applied county-wide within the same county in which the credits were earned to satisfy affordable housing obligations imposed by the county on market-priced residential and non-residential developments. County-wide or project-specific requirements for housing class, use, or type; or construction time for affordable housing units shall not impair, restrict, or condition the county's obligation to apply the credits in full satisfaction of all county requirements, whether by rule, ordinance, or particular zoning conditions of a project. Notwithstanding any provisions herein to the contrary, the department may enter into a memorandum of agreement with the county of Kauai to establish, modify, or clarify the conditions for the issuance, transfer, and redemption of the affordable housing credits in accordance with county affordable housing ordinances or rules. Notwithstanding any provisions herein to the contrary, the department may enter into a memorandum of agreement with the city and county of Honolulu to establish, modify, or clarify the conditions for the issuance, transfer, and redemption of the affordable housing credits in accordance with county affordable housing ordinances or rules. At least half of the affordable housing credits issued by the city and county of Honolulu shall be subject to a memorandum of agreement pursuant to this subsection.

For purposes of this section, "affordable housing obligation" means the requirement imposed by a county, regardless of the date of its imposition, to develop vacant lots, single-family residences, multi-family residences, or any other type of residence for sale or rent to individuals within a specified income range.

(c) ~~[Any] Notwithstanding any law to the contrary [notwithstanding],~~ any county may:

- (1) Authorize and issue bonds under chapter 47 and chapter 49 to provide moneys to carry out the purposes of this section or section 46-15.2, including the satisfaction of any guarantees made by the county pursuant to this section;
- (2) Appropriate moneys of the county to carry out the purposes of this section;
- (3) Obtain insurance and guarantees from the State or the United States, or grants from either;
- (4) Designate, after holding a public hearing on the matter and with the approval of the respective council, any lands owned by it for the purposes of this section;

- (5) Provide interim construction loans to partnerships of which it is a partner and to developers whose projects qualify for federally assisted project mortgage insurance, or other similar programs of federal assistance for persons of low and moderate income; and
- (6) Adopt rules pursuant to chapter 91 as are necessary to carry out the purposes of this section.

(d) Notwithstanding any law to the contrary, a county may waive its right to repurchase a privately-developed affordable housing unit built pursuant to a unilateral agreement or similar instrument, and may transfer that right of repurchase to a qualified nonprofit housing trust for the purpose of maintaining the unit as affordable for as long as required by the county program.

For the purposes of this subsection, "qualified nonprofit housing trust" means a corporation, association, or other duly chartered organization that is registered and in good standing with the State; that is recognized by the Internal Revenue Service as a charitable or otherwise tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986, as amended; and that has the capacity, resources, and mission to carry out the purposes of this section as determined by the county in which the housing unit is located.

(e) A qualified nonprofit housing trust shall report the status and use of its housing units to its respective county by November 30 of each calendar year.

~~[(d)]~~ (f) The provisions of this section shall be construed liberally so as to effectuate the purpose of this section in facilitating the development, construction, and provision of low- and moderate-income housing by the various counties.

~~[(e)]~~ (g) For purposes of this section, "low and moderate income housing" means any housing project that meets the definition of "low- and moderate-income housing project" in section 39A-281."

SECTION 4. Section 201H-1, Hawaii Revised Statutes, is amended by adding a new definition to be appropriately inserted and to read as follows:

"Qualified nonprofit housing trust" means a corporation, association, or other duly chartered organization that is registered and in good standing with the State; is recognized by the Internal Revenue Service as a charitable or otherwise tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986, as amended; and has the capacity, resources, and mission to carry out the purposes of this chapter as determined by the corporation."

SECTION 5. Section 201H-47, Hawaii Revised Statutes, is amended to read as follows:

"§201H-47 Real property; restrictions on transfer; waiver of restrictions.

(a) The following restrictions shall apply to the transfer of real property developed and sold under this chapter, whether in fee simple or leasehold:

- (1) For a period of ten years after the purchase, whether by lease, assignment of lease, deed, or agreement of sale, if the purchaser wishes to transfer title to the real property, the corporation shall have the first option to purchase the real property at a price that shall not exceed the sum of:
 - (A) The original cost to the purchaser, as defined in rules adopted by the corporation;
 - (B) The cost of any improvements added by the purchaser, as defined in rules adopted by the corporation; ~~and~~
 - (C) Simple interest on the original cost and capital improvements to the purchaser at the rate of one per cent a year; and

- (D) The corporation's share of net appreciation in the real property, as determined under rules adopted pursuant to chapter 91, when applicable;
- (2) The corporation may purchase the real property either:
- (A) By conveyance free and clear of all mortgages and liens; or
 - (B) By conveyance subject to existing mortgages and liens.
- If the real property is conveyed in the manner provided in subparagraph (A), it shall be conveyed to the corporation only after all mortgages and liens are released. If the real property is conveyed in the manner provided in subparagraph (B), the corporation shall acquire the property subject to any first mortgage created for the purpose of securing the payment of a loan of funds expended solely for the purchase of the real property by the seller; and any mortgage or lien created for any other purpose provided that the corporation has previously consented to it in writing.

The corporation's interest created by this section shall constitute a statutory lien on the real property and shall be superior to any other mortgage or lien except for:

- (i) Any first mortgage created for the purpose of securing the payment of a loan of funds expended solely for the purchase of the real property by the seller;
- (ii) Any mortgage insured or held by a federal housing agency; and
- (iii) Any mortgage or lien created for any other purpose; provided that the corporation has previously consented to it in writing.

The amount paid by the corporation to the seller shall be the difference, if any, between the purchase price determined by paragraph (1)(A) to (C), and the total of the outstanding principal balances of the mortgages and liens assumed by the corporation;

- (3) A purchaser may refinance real property developed and sold under this chapter; provided that the purchaser shall not refinance the real property within ten years from the date of purchase for an amount in excess of the purchase price as determined by paragraph (1)(A) to (C); provided further that the purchaser shall obtain the corporation's written consent if any restriction on the transfer of the real property remains applicable;
- (4) After the end of the tenth year from the date of initial purchase or execution of an agreement of sale, the purchaser may sell the real property and sell or assign the property free from any price restrictions; provided that the purchaser shall be required to pay to the corporation the sum of:
- (A) The balance of any mortgage note, agreement of sale, or other amount owing to the corporation;
 - (B) Any subsidy or deferred sales price made by the corporation in the acquisition, development, construction, and sale of the real property, and any other amount expended by the corporation not counted as costs under section 201H-45 but charged to the real property by good accounting practice as determined by the corporation whose books shall be prima facie evidence of the correctness of the costs;
 - (C) Interest on the subsidy or deferred sales price, if applicable, and any other amount expended at the rate of seven per cent a year computed as to the subsidy or deferred sales price, if ap-

plicable, from the date of purchase or execution of the agreement of sale, and as to any amount expended, from the date of expenditure; provided that the computed interest shall not extend beyond thirty years from the date of purchase or execution of the agreement of sale of the real property. If any proposed sale or transfer will not generate an amount sufficient to pay the corporation the sum as computed under this paragraph, the corporation shall have the first option to purchase the real property at a price that shall not exceed the sum as computed under paragraphs (1) and (2); and

- (D) The corporation's share of appreciation in the real property as determined under rules adopted pursuant to chapter 91, when applicable;
- (5) Notwithstanding any provision in this section to the contrary, pursuant to rules adopted by the corporation, the subsidy or deferred sales price described in paragraph (4)(B) and any interest accrued pursuant to paragraph (4)(C) may be paid, in part or in full, at any time; and
- (6) Notwithstanding any provision in this section to the contrary, the corporation's share of appreciation in the real property described in paragraph (4)(D):
 - (A) Shall apply when the sales price of the real property that is developed and sold under this chapter is less than the then-current, unencumbered, fair market value of the real property as determined by a real property appraisal obtained prior to the closing of the sale;
 - (B) Shall be a restriction that runs with the land until it is paid in full and released by the corporation, or extinguished pursuant to subsection ~~[(e);~~ (f); and
 - (C) May be paid, in part or in full, at any time after recordation of the sale.

(b) If the corporation waives its first option to repurchase the real property provided in subsection (a), a qualified nonprofit housing trust shall have the option to purchase the real property at the price and in the manner set forth in subsection (a).

~~[(b)]~~ (c) For a period of ten years after the purchase, whether by lease, assignment of lease, deed, or agreement of sale, if the purchaser wishes to transfer title to the real property, and if the corporation or the qualified nonprofit housing trust selected by the corporation does not exercise the option to purchase the real property as provided in subsection (a); ~~or (b)~~, then the corporation shall require the purchaser to sell the real property to a "qualified resident" as defined in section 201H-32, and upon the terms that preserve the intent of this section and sections 201H-49 and 201H-50, and in accordance with rules adopted by the corporation.

~~[(e)]~~ (d) The corporation may waive the restrictions prescribed in ~~subsection~~ subsections (a) ~~or (b)~~ through (c) if:

- (1) The purchaser wishes to transfer title to the real property by devise or through the laws of descent to a family member who would otherwise qualify under rules established by the corporation;
- (2) The sale or transfer of the real property would be at a price and upon terms that preserve the intent of this section without the necessity of the State repurchasing the real property; provided that, in this case, the purchaser shall sell the real property and sell or assign the real property to a person who is a "qualified resident" as defined

in section 201H-32; and provided further that the purchaser shall pay to the corporation its share of appreciation in the real property as determined in rules adopted pursuant to chapter 91, when applicable; or

- (3) The sale or transfer is of real property subject to a sustainable affordable lease as defined in section 516-1.

~~[(d)]~~ (e) The corporation may release the restrictions prescribed in ~~[subsection]~~ subsections (a) ~~[or (b)]~~ through (c) if the real property is financed under a federally subsidized mortgage program and the restrictions would jeopardize the federal government's ability to recapture any interest credit subsidies provided to the homeowner.

~~[(e)]~~ (f) The restrictions prescribed in this section and sections 201H-49 to 201H-51 shall be automatically extinguished and shall not attach in subsequent transfers of title when a qualified nonprofit housing trust becomes the owner of the real property pursuant to subsection (b); or a mortgage holder or other party becomes the owner of the real property pursuant to a mortgage foreclosure, foreclosure under power of sale, or a conveyance in lieu of foreclosure after a foreclosure action is commenced; provided that the mortgage is the initial purchase money mortgage, or that the corporation consented to and agreed to subordinate the restrictions to the mortgage when originated, if the mortgage is not the initial purchase money mortgage; or when a mortgage is assigned to a federal housing agency. Any law to the contrary notwithstanding, a mortgagee under a mortgage covering real property or leasehold interest encumbered by the first option to purchase in favor of the corporation, prior to commencing mortgage foreclosure proceedings, shall notify the corporation in writing of:

- (1) Any default of the mortgagor under the mortgage within ninety days after the occurrence of the default; and
- (2) Any intention of the mortgagee to foreclose the mortgage under chapter 667 forty-five days prior to commencing mortgage foreclosure proceedings;

provided that the mortgagee's failure to provide written notice to the corporation shall not affect the mortgage holder's rights under the mortgage. The corporation shall be a party to any foreclosure action, and shall be entitled to its share of appreciation in the real property as determined under this chapter in lien priority when the payment is applicable, and if foreclosure occurs within the ten-year period after the purchase, the corporation shall also be entitled to all proceeds remaining in excess of all customary and actual costs and expenses of transfer pursuant to default, including liens and encumbrances of record; provided that the person in default shall be entitled to an amount that shall not exceed the sum of amounts determined pursuant to subsection (a)(1)(B) and (C).

~~[(f)]~~ (g) The provisions of this section shall be incorporated in any deed, lease, agreement of sale, or any other instrument of conveyance issued by the corporation. In any sale by the corporation of real property for which a subsidy or deferred sales price was made by the corporation, the amount of the subsidy or deferred sales price described in subsection (a)(4)(B), a description of the cost items that constitute the subsidy or deferred sales price, and the conditions of the subsidy or deferred sales price shall be clearly stated at the beginning of the contract document issued by the corporation. In any sale in which the corporation's share of appreciation in real property is a restriction, the terms of the shared appreciation equity program shall be clearly stated and included as an exhibit in any deed, lease, agreement of sale, or any other instrument of conveyance.

~~[(g)]~~ (h) This section need not apply to market-priced units in an economically integrated housing project, except as otherwise determined by the de-

veloper of the units; provided that preference shall be given to qualified residents in the initial sale of market-priced units.

~~[(h)]~~ (i) The corporation is authorized to waive any of the restrictions set forth in this section in order to comply with or conform to requirements set forth in federal law or regulations governing mortgage insurance or guarantee programs or requirements set forth by federally chartered secondary mortgage market participants.

(j) Notwithstanding any law to the contrary, if real property is purchased by a qualified nonprofit housing trust pursuant to subsection (b), the housing trust shall establish new buyback restrictions for the purpose of maintaining the unit as affordable for as long as practicable, or as otherwise required by the corporation.

(k) A qualified nonprofit housing trust shall report the status and use of its housing units to the corporation by November 30 of each calendar year.

SECTION 6. Section 206E-2, Hawaii Revised Statutes, is amended by adding three new definitions to be appropriately inserted and to read as follows:

“Qualified nonprofit housing trust” means a corporation, association, or other duly chartered organization that is registered and in good standing with the State; is recognized by the Internal Revenue Service as a charitable or otherwise tax-exempt organization under section 501(c)(3) of the Internal Revenue Code of 1986, as amended; and has the capacity and resources as determined by the authority to carry out the requirements of the reserved housing and workforce housing programs.

“Reserved housing” means housing designated for residents in the low-income or moderate-income ranges who meet such eligibility requirements as the authority may adopt by rule.

“Workforce housing” means new residential projects where at least seventy-five per cent of the residential units are set aside for purchase or rent for residents in the low-income or moderate-income ranges who meet such eligibility requirements as the authority may adopt by rules and that do not require financial assistance for design and construction from federal, state, or county government agencies.”

PART III

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

SECTION 8. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 9. This Act shall take effect on July 1, 2017; provided that the amendments made to section 46-15.1, Hawaii Revised Statutes, by section 3 of this Act shall not be repealed when that section is reenacted on July 1, 2019, pursuant to section 3 of Act 102, Session Laws of Hawaii 2015, and section 4 of Act 102, Session Laws of Hawaii 2015, as amended by section 50 of Act 55, Session Laws of Hawaii 2016.

(Approved July 10, 2017.)

Note

1. Edited pursuant to HRS §23G-16.5.