

ACT 183

H.B. NO. 2088

A Bill for an Act Relating to Financing.

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

SECTION 1. The legislature finds that the tension between protecting the health and safety of Hawaii's residents and visitors from the coronavirus and its highly contagious variants, while managing the economic health of Hawaii's hospitality industry and small businesses over the past two years has heightened the importance of diversifying Hawaii's economic base while simultaneously investing resources toward recovery efforts. Additionally, while the coronavirus disease 2019 pandemic has demonstrated the importance of ensuring the health of our people and economic health, the legislature also finds that it is equally important to invest resources to ensure Hawaii's environmental health.

As an example, the legislature finds that the State's streams, groundwater, and ocean are being harmed by nonpoint contamination sources that flow directly off the land, rather than through pipes or ditches. Cesspools are a non-point contamination source of great concern. These substandard systems are essentially holes in the ground that do not treat wastewater but merely dispose of polluted wastewater.

There are approximately eighty-eight thousand cesspools in the State, with nearly fifty thousand on Hawaii island, approximately fourteen thousand on Kauai, over twelve thousand on Maui, over eleven thousand on Oahu, and approximately one thousand four hundred on Molokai. Collectively, the State's cesspools release more than fifty-three million gallons of untreated sewage into the ground each day. Hawaii relies on groundwater for ninety per cent of its drinking water.

In response to the State's cesspool pollution problem, legislation was enacted in 2017 that requires all cesspools not excluded by the director of health to be upgraded or converted to director of health-approved wastewater systems or connected to sewage systems by January 1, 2050; however, cesspool conversions, which are estimated to cost some \$1,300,000,000, have been lagging.

The legislature further finds that Hawaii is susceptible to property loss due to hurricanes, tropical storms, and strong winds. The best long-term solution to reducing potential damage is the statewide use of wind resistive devices. While owners should inspect, repair, and reinforce their property to prepare for the possibility of a hurricane making landfall, the inspection, repair, and reinforcement consume resources from the owners' budgets. Improved properties that are not using energy conservation or production strategies contribute to the burden and reliance on fossil fuels. Improved properties not equipped with wind or flood resistant qualifying improvements contribute to the burden affecting all properties resulting from potential wind or flood damage. Improved properties that do not use septic tanks or are not connected to wastewater sewage systems contribute to water quality problems affecting the State, and properties that are not protected from harmful environmental health hazards contribute to the environmental health burdens affecting the State.

In order to make qualifying improvements more affordable and assist property owners who wish to undertake such improvements, the legislature finds that there is a compelling state interest in enabling property owners to voluntarily finance such improvements with local government assistance. Innovative, non-traditional financing options and repayment mechanisms help bridge financing gaps, attract private capital, and address specific market failures and institutional barriers.

Providing non-traditional financing options to assist eligible commercial property owners for the upgrade, conversion, or connection to municipal or private wastewater systems, installation of energy conservation, renewable energy retrofits, improve a commercial property's resilience and remove health hazards while facilitating other allowable purposes by addressing access to capital obstacles and enabling the financing of qualifying improvements through the execution of commercial property assessment financing contracts. The related imposition of voluntary assessments is reasonable and necessary to serve and achieve a compelling state interest and is necessary for the prosperity and welfare of the State and its commercial property owners.

Additionally, leveraging these non-traditional financing options and repayment mechanisms will accelerate economic recovery and economic diversification efforts statewide.

The purpose of this Act is to:

- (1) Establish a commercial property assessed financing program; and
- (2) Authorize property assessed financing for commercial properties.

SECTION 2. Chapter 196, Hawaii Revised Statutes, is amended by adding a new section to part IV to be appropriately designated and to read as follows:

“§196- Commercial property assessed financing program. (a) Any county having a charter may authorize the authority, pursuant to this section, to offer a commercial property assessed financing program within its jurisdiction and may contract with the authority for that purpose, and any county having a charter may enact its own commercial property assessed financing program pursuant to this section and section 46-80(b) and (c).

(b) The authority, as the administrator of the commercial property assessed financing program, shall coordinate with each county to bill and collect a non-ad valorem special tax assessment on a benefitted commercial property as a repayment mechanism on the real property tax bill or stand-alone bill. The non-ad valorem special tax assessment on a benefitted commercial property shall not be a generally applicable tax upon the real property but shall be collected in the same manner as real property taxes as a result of a benefit to the commercial property owners for qualifying improvements.

(c) The authority shall design a commercial property assessed financing program authorized under this section and section 46-80(b) that addresses market needs while attracting private capital and that shall, at a minimum, include the following elements:

- (1) A commercial property assessed financing lender may enter into a commercial property assessed financing assessment contract to finance or refinance a qualifying improvement only with the recorded owner of the affected commercial property and the authority. Each commercial property assessed financing assessment contract shall be executed by the authority as the administrator of the commercial property assessed financing program. A commercial property assessed financing assessment contract shall require the authority to assign, pledge, and transfer revenues to be derived from commercial property assessed financing assessments to one or more commercial property assessed financing lenders as security for their direct financing of qualifying improvements. The obligation of the authority to transfer the revenues to one or more commercial property assessed financing lenders shall be evidenced by the commercial property assessed financing assessment contract as an instrument of indebtedness in a form as may be prescribed by the authority. No

other bonds shall be required to be issued by the State, the authority, any county, or any other public entity in order to cause qualifying improvements to be funded through a commercial property assessed financing assessment contract;

- (2) Qualifying improvements shall be affixed to a building or facility or affixed to real property, subject to the commercial property assessed financing assessments;
- (3) Before entering into a commercial property assessed financing assessment contract, the commercial property assessed financing lender shall reasonably determine that:
 - (A) The commercial property owner is able to borrow the amount of the property assessed financing using reasonable commercial underwriting practices;
 - (B) All property taxes applicable to the commercial property, and any other assessments levied on the same bill as property taxes, are paid; and
 - (C) There are no involuntary liens applicable to the commercial property, including but not limited to construction liens, that will not be paid or satisfied upon the closing of the financing;
- (4) The commercial property assessed financing assessment contract shall include the amount of an annual assessment over a fixed term that will appear as a non-ad valorem special tax assessment on the commercial property owner's tax bill or stand-alone bill annually;
- (5) The commercial property assessed financing assessment contract, or summary memorandum of the contract, shall be recorded by the commercial property assessed financing lender in the public records of the State or of the county within which the commercial property is located within five days after execution by the parties to the contract. The recorded contract shall provide constructive notice of the levy of, and obligation of the commercial property owner to pay, the commercial property assessed financing assessment. The commercial property assessed financing assessment to be levied on the commercial property shall be a non-ad valorem special tax assessment and a lien against the commercial property on a parity with the lien of general real property taxes and the lien of any other assessments levied under section 46-80, from the date of recordation entered into pursuant to this section until paid or satisfied in accordance with the commercial property assessed financing assessment contract;
- (6) Before entering into a commercial property assessed financing assessment contract for any commercial property, the commercial property owner shall provide the authority and the commercial property assessed financing lender with evidence of the written consent of each holder or loan servicer of any mortgage that encumbers or otherwise secures the commercial property, where the consent is in the sole and absolute discretion of each holder or loan servicer of a mortgage on the commercial property, at the time of the execution of the commercial property assessed financing assessment contract by the parties; provided that the consents shall be in a form prescribed by the authority;
- (7) At or before the time a purchaser executes a contract for the sale and purchase of any commercial property for which a non-ad valorem special tax assessment has been levied under this part and has an unpaid balance due, the seller shall give the prospective purchaser a

- written disclosure statement notifying the prospective purchaser of the commercial property assessed financing assessment;
- (8) The term of the commercial property assessed financing assessment contract shall not exceed the useful life of the qualifying improvement being installed or the weighted average useful life of all qualifying improvements being financed if multiple qualifying improvements are being financed, as determined by the authority; and
 - (9) Before the execution by the authority of the first commercial property assessed financing assessment contract in a county, the authority shall enter into a contract with the county director of finance or county director of budget and fiscal services to cause the county director to levy and collect any commercial property assessed financing assessment approved and certified by the authority to the director for collection. The county director shall levy and collect any commercial property assessed financing assessment approved by the authority. Each commercial property assessed financing assessment that is approved for collection shall be a non-ad valorem special tax assessment and shall be collected in the same manner as general real property taxes are collected and be subject to the same penalties and same procedure, sale, and lien priority, subject to this section, in the case of delinquency as is provided by general law for the default of the payment of real property taxes, unless another procedure, including stand-alone billing and collection, is agreed upon by the authority and the county director. The county director may add to any commercial property assessed financing assessment reasonable administrative costs as agreed upon by the authority and the county director. The county director shall remit any commercial property assessed financing assessments collected, less any reasonable administrative costs added by the county director, to or on the direction of the authority, for further application by the authority to pay each commercial property assessed financing lender and to pay the reasonable administrative costs of the authority in accordance with each commercial property assessed financing assessment contract. The county director shall covenant in a contract or instrument, for the benefit of any commercial property assessed financing lender or bondholder, to commence and diligently pursue to completion the foreclosure of delinquent commercial property assessed financing assessments and any penalty, interest, and costs by advertisement and sale and with the same effect as provided by general law for sales of real property pursuant to default in payment of property taxes. The covenant shall specify a deadline for commencement of the foreclosure sale and any other terms and conditions the county director of finance or county director of budget and fiscal services determines reasonable regarding the foreclosure sale. For commercial property assessed financing assessments levied but not paid when due pursuant to a commercial property assessed financing assessment contract, the foreclosure of the lien of the commercial property assessed financing assessment, lien of general real property taxes or any other assessments levied under section 46-80, or any other lien foreclosed, shall not accelerate or extinguish the remaining term of the commercial property assessed financing assessment as approved in the commercial property assessed financing assessment contract.”

SECTION 3. Section 46-80, Hawaii Revised Statutes, is amended to read as follows:

“§46-80 Improvement by assessment; financing[-]; commercial property assessed financing program. (a) Any county having a charter may enact an ordinance, and may amend the same from time to time, providing for the making and financing of improvement districts in the county, and ~~[such] the~~ improvements may be made and financed under ~~[such] the~~ ordinance. The county may issue and sell bonds to provide funds for ~~[such] the~~ improvements. Bonds issued to provide funds for ~~[such] the~~ improvements may be either bonds when the only security therefor is the properties benefited or improved or the assessments thereon or bonds payable from taxes or secured by the taxing power of the county. If the bonds are secured only by the properties benefited or improved or the assessments thereon, the bonds shall be issued according and subject to the provisions of the ordinance. If the bonds are payable from taxes or secured by the taxing power, the bonds shall be issued according and subject to chapter 47. Except as is otherwise provided in section 46-80.1, in assessing land for improvements a county shall assess the land within an improvement district according to the special benefits conferred upon the land by the special improvement; these methods include assessment on a frontage basis or according to the area of land within an improvement district, or any other assessment method ~~[which] that~~ assesses the land according to the special benefit conferred, or any combination thereof.

(b) There is established a special improvement program to be known as a commercial property assessed financing program, which shall be administered by the Hawaii green infrastructure authority. A commercial property owner may apply to a commercial property assessed financing lender, approved by the authority, for property assessed financing to pay the cost of qualifying improvements and enter into a commercial property assessed financing contract with a commercial property assessed financing lender and the authority. Costs incurred for qualifying improvements shall be levied and collected by each county, as provided in section 196- , as a non-ad valorem special tax assessment on the benefitted commercial property. The authority, on behalf of the State, shall authorize commercial property assessed financing assessment contracts as instruments of indebtedness in the form as may be prescribed by the authority. Commercial property assessed financing assessment contracts authorized to finance qualifying improvements, when the only security is the non-ad valorem special tax assessment levied against benefitted or improved commercial property, shall be excluded from any determination of the power of the State to issue general obligation bonds or funded debt for purposes of section 13 of article VII of the state constitution.

(c) Any county having a charter may enact an ordinance, and may amend the same from time to time, to establish a special improvement program containing the same elements as the commercial property assessed financing program authorized under chapter 196 and subsection (b), except that any program that is established shall be administered by the county in lieu of administration by the authority. The county shall assume all of the responsibilities of the authority provided in chapter 196 and subsection (b), including determining qualifying improvements eligible for property assessed financing. A commercial property owner may apply to the county for property assessed financing to pay the costs of qualifying improvements and enter into a commercial property assessed financing assessment contract with an approved commercial property assessed financing lender and the county. Costs incurred for qualifying improvements shall be levied and collected by each county, as provided in section 196- , as a non-ad valorem special tax assessment on the benefitted commercial property. The county may issue revenue bonds to finance or refinance the improvements, and the form of any revenue bond may be a commercial property assessed financ-

ing assessment contract or other instrument prescribed by the county. Bonds issued to finance qualifying improvements, when the only security is the non-ad valorem special tax assessment levied against benefitted or improved commercial property, shall be excluded from any determination of the power of the county to issue general obligation bonds or funded debt for purposes of article VII, section 13, of the state constitution.

SECTION 4. Section 196-61, Hawaii Revised Statutes, is amended by adding eight new definitions to be appropriately inserted and to read as follows:

“Commercial property” means any existing or new real property not defined as a residential property, and shall include any property where there is a leasehold or possessory interest in the property and any multi-family dwelling or townhouse consisting of five or more units as well as agricultural property.

“Commercial property assessed financing assessment” means the non-ad valorem special tax assessment that secures the repayment of financing obtained by an owner of commercial property for a qualifying improvement and that appears on a property tax bill.

“Commercial property assessed financing assessment contract” means the financing contract, under the commercial property assessed financing program, by and among one or more commercial property assessed financing lenders, one or more commercial property owners, and the authority as the administrator of the commercial property assessed financing program for the acquisition or installation of qualifying improvements.

“Commercial property assessed financing lender” means a financial institution as defined pursuant to section 412:1-109, or a private or public lender approved by the authority, as the administrator of the commercial property assessed financing program, to originate commercial property assessed financing assessment contracts, and which may include any successor or assignee of the lender as provided in the commercial property assessed financing assessment contract.

“Commercial property assessed financing program” means a program to finance qualifying improvements on commercial properties that are repaid through a non-ad valorem special tax assessment on the commercial property owner’s property tax bill.

“County director of finance” or “county director of budget and fiscal services” means the officer or officers of the county charged with the responsibility of administering the real property taxation function of the county.

“Non-ad valorem special tax assessment” means a special tax assessment or governmental charge levied by the county as provided in section 196- on a benefitted commercial property that appears on a property tax bill.

“Qualifying improvement” means a septic system or aerobic treatment unit system or connection to sewer systems, clean energy technology, efficiency technology, resiliency measure, or other improvement approved by the authority.”

SECTION 5. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 6. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 7. This Act shall take effect upon its approval.

(Approved June 27, 2022.)

Note

1. Edited pursuant to HRS §23G-16.5.