

AH Committee

From: Jocelyn Moniz <Jocelyn.Moniz@co.maui.hi.us>
Sent: Friday, August 27, 2021 1:24 PM
To: AH Committee
Cc: Mimi Desjardins
Subject: (AH-14) Comprehensive Affordable Housing Plan (Contract C7183; Hawaiian Community Assets, Inc.)
Attachments: 2021-08-27 AH Memo to Chair Johnson.pdf; AH -14 2021-08-05 Memo from Chair Johnson.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Hi AH Committee,

Please see the attached memo to Gabe Johnson, Chair from Mimi Desjardins in response to his memo dated July 30, 2021.

Thank you,

Jocelyn C. Moniz,
Law Technician II
Secretary to
Mimi Desjardins
Stephanie M. Chen
Daniel J. Kunkel
Deputies Corporation Counsel
808-270-1777

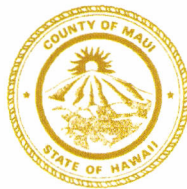
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August 27, 2021

To: Gabe Johnson, Chair
Affordable Housing Committee

From: Mimi Desjardins, Deputy Corporation Counsel *MD*

SUBJECT: Comprehensive Affordable Housing Plan (Contract No. C7183;
Hawaiian Community Assets, Inc.) (AH-14)

You requested that this office provide comments on the following matters. Short answers are provided immediately below the question, with more substantive information following.

1. Establishing a two-year residency requirement in Maui County for residential workforce housing eligibility, whether such residency is based on: (a) full-time residential occupancy or full-time employment in the County; and (b) eligibility for housing units that are for sale or for rent. Please also indicate whether there would be any implications if the residency requirement was established for less than two years or more than two years.

Short Answer: Durational residency requirements are subject to “strict scrutiny” and may be successfully challenged if they are found to infringe upon constitutional rights.

2. Establishing a residential workforce housing preferential waitlist based on the number of years as a Maui County resident or length of time on a centralized waitlist.

Short Answer: See answer to No. 1. The “length of time on a centralized waitlist” may not explicitly implicate durational residency requirements, and thus may be less vulnerable to successful legal challenge.

3. Establishing a residential workforce housing policy on an increased number of lottery entries based on the number of years as a Maui County resident or length of time on a centralized waitlist.

Short Answer: See answer to No. 1.

4. Please indicate whether any of the above proposed requirements and policies could be used in conjunction with each other.
5. Please indicate whether the Council can legally establish an end date for the phasing out of the short-term rental homes exemption in the Apartment District.

Short Answer: This subject matter was referred to the Planning and Sustainable Land Use Committee during the August 24, 2021, Council meeting (County Communication No. 21-422). Because the matter will be taken up by PLSU, the preference is to address this substantial matter in that forum.

6. Please indicate whether the Council can legally place a condition on a housing development’s Change in Zoning that requires market-rate housing units to be assessed higher homeowners’ association fees than residential workforce housing units.

Short Answer: While legally possible, it may not be practical or advisable.

7. Please indicate whether the Affordable Housing Fund can be used to buy back housing credits issued under Chapter 2.96, Maui County Code.

Short Answer: Probably not. The Charter of the County of Maui (1983), as amended, limits the use of the fund to the “provision, protection, and expansion of affordable housing and suitable living environments”

Questions 1 through 4 involve variations of durational residency requirements, which implicate certain fundamental rights under the U.S. Constitution (e.g., equal protection; the right to interstate travel). These rights are protected from infringement under a legal standard termed “strict scrutiny.” Under a strict scrutiny analysis, if challenged, the County must prove that: 1) it has a compelling governmental interest; 2) the regulation is “narrowly tailored” to meet that compelling interest; and 3) the regulation is the least restrictive means of accomplishing the desired objective. In other words, a compelling governmental interest may override fundamental constitutional rights *if* the strict scrutiny test is met. Examples of compelling governmental interests include protection of public health and safety (e.g., regulation of violent crime) and national security. Therefore, as a threshold matter, we advise the Committee to investigate and document the compelling government interest(s) that can only be met by requiring a durational residency requirement, as this data in the Committee’s record would be critical to any related defense.

As pointed out in the Maui County Comprehensive Affordable Housing Plan in Appendix G, at page 147, “The most conservative legal approach would be to require no specific length of time for residency but simply that a person be a current Maui resident.” We concur.

As a related aside, a “residency” requirement is viewed differently by the courts than a “durational residency requirement.” For example, in Shapiro v. Thompson, 394 U.S. 618, 636 (1969), the U.S. Supreme Court explained that “(t)he residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites” for assistance and only the latter was held to be unconstitutional. Later, in invalidating a durational residence requirement for voter registration on the basis of Shapiro, the Supreme Court cautioned that its decision was not intended to “cast doubt on the validity of appropriately defined and uniformly applied bona fide residence requirements.” Dunn v. Blumstein, 405 U.S. 330, 342 n. 13, 92 S.Ct. 995, 1003 (1972).

Establishing a residential workforce housing policy on durational residency requirements (whether two years or less), an increased number of lottery entries based on the number of years as a Maui County resident, or length of time on a centralized waitlist, could implicate the right to travel under the Fourteenth Amendment to the United States Constitution; however, we are unaware of legal challenges currently being raised in opposition to this structure, and so it is difficult to predict with certainty whether or not such a legal challenge would withstand strict scrutiny analysis. See, e.g., Saenz v. Roe, 526 U.S. 489 (1999) (striking down preferential welfare benefits for residents of one year or

more as unconstitutional); Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986) (striking down preferential points for civil service veteran applicants who had already been residents at the time when they had joined the military); Zobel v. Williams, 457 U.S. 55 (1982) (striking down preferential oil royalty benefits that would have been awarded according to the duration of state residency); and Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974), (striking down a one-year durational residency requirement for receiving entitlement to nonemergency hospitalization or emergency care).

An additional consideration when contemplating how to structure a centralized waitlist would be to develop a list where qualified, new applicants to the waitlist would be at the bottom of the list, which applies equally to new residents to Maui County as well as longer-term residents. As a practical result, the longer an individual remains on the waitlist before being selected for housing, the longer he or she will have been a Maui resident. Under this scheme, one's status as a "newly arrived" Maui resident or a long-term Maui resident would be irrelevant, but the longer one is on the waitlist the more likely the unit will go to a long-term resident.

However, in contrast to circumstances that do not involve perceived necessities of life or fundamental rights, the Supreme Court has upheld the validity of a one-year residence requirement for eligibility to obtain a divorce in a state's courts in Sosna v. Iowa, 419 U.S. 393 (1975), and it has upheld the validity of fee disparities between residents and nonresidents in a state's hunting license system. Baldwin v. Fish & Game Commission of Montana, 436 U.S. 371 (1978). The Supreme Court has also explained that a "State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates." Vlandis v. Kline, 412 U.S. 441, 453-54 (1973); see, e.g., Martinez v. Bynum, 461 U.S. 321 (1983) (upholding the validity of a statute permitting a school district to deny tuition-free admission to its public schools for a minor who lived apart from a parent, guardian, or other person having lawful control of him if his presence in the district was for the primary purpose of attending the free public schools).

Question 6: Please indicate whether the Council can legally place a condition on a housing development's Change in Zoning that requires market-rate housing units to be assessed higher homeowners' association fees than residential workforce housing units.

Homeowners' association fees generally relate to the costs of maintaining common areas and may also apply to the costs of common utilities such as water, sewer, and rubbish service when such services are not separately metered or charged. HOA fees are typically apportioned based on the unit's ownership interest in the common areas or common expenses, and are set forth in the declaration or bylaws (See, §§514B-41 and 42, Hawaii Revised Statutes, relating to condominium expenses and metering of utilities). The declaration or bylaws are private agreements that can be modified. Imposing a requirement of different fees therefore is possible; however, it could be a complicated and cumbersome requirement to fulfill dependent upon the stage of development and the governing documents. Additionally, as applied to charges for utility services, if units are separately metered, this requirement may be impractical or potentially impossible to fulfill.

Question 7: Please indicate whether the Affordable Housing Fund can be used to buy back housing credits issued under Chapter 2.96, Maui County Code.

If the intention is to sunset the issuance of credits, a code change to that effect is recommended. The Charter of the County of Maui (1983), as amended, limits the use of the Affordable Housing Fund to the "provision, protection, and expansion of affordable housing and suitable living environments" The uses of the fund are further enumerated in Section 3.35.040, Maui County Code. The Council would have to make a policy decision that a "buy back" of credits previously issued by the Director of Housing and Human Concerns to developers pursuant to Section 2.96.050, MCC, is in furtherance of one or more of the allowable purposes.

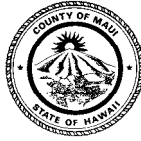
At this time, it does not appear that a "buy back" of credits is sufficiently related to the "provision, protection, and expansion of affordable housing" nor does it fit one of the allowable subgroups in Section 3.35.040. However, this is a policy decision that must be made by Council. As a practical matter, even if Section 3.35.040 could be read to allow for the buyback of credits, Section 2.96.050 provides that the issuance of credits is discretionary, so to issue credits only to buy them back would appear to be an unreasonable use of the affordable housing fund.

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COUNTY COUNCIL

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July 30, 2021

RECEIVED

By Dept of the Corporation Counsel at 3:20 pm, Aug 05, 2021

MEMO TO: Moana M. Lutey
Corporation Counsel

F R O M: Gabe Johnson, Chair 
Affordable Housing Committee

SUBJECT: **COMPREHENSIVE AFFORDABLE HOUSING PLAN (CONTRACT C7183; HAWAIIAN COMMUNITY ASSETS, INC.)** (AH-14)

At its meetings of July 19, 2021, and July 27, 2021, the Affordable Housing Committee discussed the Maui County Comprehensive Affordable Housing Plan ("Plan"), dated June 2021, prepared by Hawaiian Community Assets, Inc.

May I please request the Department's comments on the following:

1. Establishing a two-year residency requirement in Maui County for residential workforce housing eligibility, whether such residency is based on:
 - (a) Full-time residential occupancy or full-time employment in the County; and
 - (b) Eligibility for housing units that are for sale or for rent.

Please also indicate whether there would be any implications if the residency requirement was established for less than two years or more than two years. (See page 29, paragraph 6 of the Plan.)

2. Establishing a residential workforce housing preferential waitlist based on the number of years as a Maui County resident or length

Moana M. Lutey
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of time on a centralized waitlist. (See page 148, “Length of time preference. Example: Washington D.C.,” of the Plan.)

3. Establishing a residential workforce housing policy on an increased number of lottery entries based on the number of years as a Maui County resident or length of time on a centralized waitlist. (See page 148, “Length of time preference. Example: Vail, Co.,” of the Comprehensive Affordable Housing Plan.)
4. Please indicate whether any of the above proposed requirements and policies could be used in conjunction with each other.
5. Please indicate whether the Council can legally establish an end date for the phasing out of the short-term rental homes exemption in the Apartment District.
6. Please indicate whether the Council can legally place a condition on a housing development’s Change in Zoning that requires market-rate housing units to be assessed higher homeowners’ association fees than residential workforce housing units.
7. Please indicate whether the Affordable Housing Fund can be used to buy back housing credits issued under Chapter 2.96, Maui County Code.

I would appreciate receiving a response by **Friday, August 13, 2021**. To ensure efficient processing, please transmit your response to ah.committee@mauicounty.us and include the relevant Committee item number in the subject line of your response.

Should you have any questions, please contact me or Committee staff (Alison Stewart at ext. 7661, or James Forrest at ext. 7137).

ah:ltr:014acc01:ans/jbf

cc: Mayor Michael P. Victorino