

August 4, 2025

MEMO TO: Tasha Kama, Chair
Housing and Land Use Committee

F R O M: Carla Nakata, Legislative Attorney *cmn*

SUBJECT: **HOUSING PROJECTS UNDER CHAPTER 201H, HAWAI'I
REVISED STATUTES: KAIAHALE 'O KAHILUHILU AFFORDABLE
HOUSING RENTAL PROJECT** (HLU-1(1))

I. Background

On July 28, 2025, the Council received an application for the Kaiahale 'o Kahiluhilu affordable housing rental project under Section 201H-38, Hawai'i Revised Statutes. The Council Chair referred the resolutions on the application to the Housing and Land Use Committee, which will consider the project on August 5, 2025. Under HRS Section 201H-38, the Council has 45 days to approve, approve with modification, or disapprove the project. The statutory deadline is September 11, 2025.

On July 3, 2025, the Governor signed into law Act 294, Session Laws of Hawai'i 2025, which amended HRS Section 201H-38(a)(1) by:

- Requiring the Hawai'i Housing and Finance Development Corporation to “provide[s] the county an opportunity to comment” on projects (Section 201H-38(a)(1)(A)); and
- Providing that “the legislative body shall not impose stricter conditions, impose stricter median income requirements, or reduce fee waivers that will increase the cost of the project beyond those approved by the corporation” (Section 201H-38(a)(1)(C)(i)).

A copy of Act 294 is attached.

According to an HHFDC representative, the Kaiahale 'o Kahiluhilu affordable housing rental project is the first 201H project to be considered by a county council since Act 294's enactment.

II. Question posed

You have asked for a written assessment of Act 294’s impact on the Council’s ability to alter the project or the requested exemptions.

III. Short answer

The extent of the prohibition against county councils imposing “stricter conditions” is unclear. The Legislature did not define “condition” or explain how a condition differs from a modification. Act 294’s legislative history does indicate that the Council’s ability to approve a project with modification—even if the modification increases project cost—is still an available option.

IV. Analysis

A. Act 294’s evolution

Act 294 originated as Senate Bill 38 (2025). As introduced, SB 38 provided that “the legislative body shall not make any modifications that will increase the cost of the project.”

The first committee to consider the measure—the Senate Committee on Housing—passed the measure with amendments and issued Senate Standing Committee Report 6. The Committee on Housing found, as stated in the report, “that county land-use rules are a key driver of Hawaii’s housing shortage” and that “[h]ousing regulations in the State are the strictest in the country.” In addition, according to the report, when affordable housing “projects go before a county council for final approval, new conditions may be added that frequently lead to increased costs, making the project no longer financially viable.” The report did not include examples of “new conditions” that have rendered projects infeasible.

In its SD1 version, the Senate Committee on Housing amended the measure by “[c]larifying that a county legislative body shall not make any

modifications or impose any conditions to a housing project that would increase the cost of the project.” SSCR 6.¹

The Senate Committee on Judiciary’s only amendment in the SD2 version was to insert a defective effective date to encourage further discussion. SSCR 737. The Committee found that:

. . . modifications or conditions imposed by a county can dramatically inflate the cost of a housing development. Additionally, research done at the University of Hawai‘i estimated that regulations comprise fifty-eight percent of new condominium construction costs. By reducing the restriction power of county legislative bodies over state-approved affordable housing projects, this measure will significantly decrease overall project development costs.

Id.

After crossover, the House Committee on Housing considered SB 38, SD2. As expressed in House Standing Committee Report 1361 (attached), the Committee found that:

. . . prohibiting a county legislative body from imposing necessary modifications to a project that would increase the cost can negate the quality of their review and could jeopardize the entire project. Your Committee further notes that any conditions that required a change to the plans and drawings could be argued to increase the cost of the project. However, your Committee believes that some guardrails are necessary to ensure that these housing projects remain affordable.

Emphasis added.

Accordingly, the House Committee on Housing amended the measure by:

- (1) Deleting language that would have prohibited a county legislative body from making *any* modification to a housing project that would increase the cost of the project; and

¹ SB 38, SD1 inserted the phrase “or impose conditions” into the restriction, to read: “the legislative body shall not make any modifications or impose conditions that will increase the cost of the project.”

- (2) Prohibiting a county legislative body from imposing conditions stricter than the Hawaii Housing Finance and Development Corporation, stricter area median income requirements, or a reduction in fee waivers that will increase the cost of the project.

Id. (italics added).

The resulting HD1 version read: “the legislative body shall not impose stricter conditions than the Hawaii housing finance and development corporation, stricter area median income requirements, or a reduction in fee waivers that will increase the cost of the project.”

The House Committee on Judiciary & Hawaiian Affairs supported SB 38, SD2, HD1 and made technical amendments. HSCR 2040.

The Committee on Conference—the Legislature’s final committee to consider the measure—stated:

While the legislative body of a county serves an important role in reviewing the proposed development of certain housing units within their respective communities, the addition of stricter conditions imposed by a county’s legislative body to the proposed housing development may inadvertently increase construction costs and delay completion of a project. Therefore, this measure will help to ensure the financial feasibility of housing development projects that assist the State in alleviating its housing shortage.

Apart from technical amendments and making the measure effective upon approval, the Committee on Conference’s only amendment was to insert language requiring HHFDC to provide counties with an opportunity to comment. Conference Committee Report 77. According to its report, the Conference Committee’s wording changes in the phrase that is the focus of this analysis were merely “technical, nonsubstantive amendments for the purposes of clarity and consistency.”

B. Construing Act 294’s impact

Act 294 has yet to be applied by the HHFDC or a county council or interpreted by a court. So, the Kaiahale ‘o Kahiluhilu project is on untested

ground when it comes to evaluating the scope of the Council's authority following its enactment.

- 1. Act 294 prohibits the Council from reducing fee exemptions that will increase project cost beyond those approved by HHFDC and from imposing stricter median income requirements.**

HRS Section 201H-38(a)(1)(C)(i) provides, with repealed material in brackets and new material underscored:

The legislative body shall approve, approve with modification, or disapprove the project by resolution within forty-five days after the corporation has submitted the preliminary plans and specifications for the project to the legislative body[.]; provided further that the legislative body shall not impose stricter conditions, impose stricter median income requirements, or reduce fee waivers that will increase the cost of the project beyond those approved by the corporation. If, on the forty-sixth day, a project is not disapproved, it shall be deemed approved by the legislative body;

HHFDC has submitted to the Council a "For Action" approved by its board. It appears that the Council is prohibited from reducing or eliminating fee exemptions covered by the board's approval. This language does not on its face include exemptions from non-fee-related requirements under the Maui County Code.

Act 294 prohibits the Council from imposing stricter median income requirements. This language appears to prohibit the Council from requiring the housing to serve lower AMI ranges or a greater number of units in lower AMI ranges.

- 2. Act 294's prohibition against imposing "stricter conditions" is unclear.**

Act 294 does not alter the Council's ability to approve a 201H project with modification. That authority in HRS Section 201H-38 was untouched by Act 294. Act 294 does prohibit the Council from imposing stricter conditions,

without defining a condition or stating how a condition differs from a modification.²

Black's Law Dictionary defines "condition" as follows: "A future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance." Under this definition, a resolution that provides immediate approval of the project, even with changes, could be considered an act of "approval with modification." In contrast, a resolution with only conditional approval of a project, subject to "a promised performance" in the future, might be considered an act of approval with conditions—triggering the requirement to avoid "stricter conditions."

House Standing Committee Report 1361 is instructive in considering the Council's authority. As explained in its report, the House Committee on Housing purposefully deleted "language that would have prohibited a county legislative body from making any modification to a housing project that would increase the cost of the project." The Committee reasoned that "prohibiting a county legislative body from imposing necessary modifications to a project that would increase the cost can negate the quality of their review and could jeopardize the entire project." Further, the Committee noted that "any conditions that required a change to the plans and drawings could be argued to increase the cost of the project." HSCR 1361.

The reasoning acknowledges that preventing a county council from modifying a project in a way that would increase project cost could force a straight up-or-down vote on the project as presented. This result would preclude a council from taking community input and mitigative measures into account and risk denial of a project that would benefit the community. It also recognizes that any change to a project's plans would likely involve a cost to redraw or alter the plans.

Introducing the term "conditions" into HRS Section 201H-38 forces an analysis of how the term differs from "modifications." HRS Section 201H-38(C) authorizes the legislative body to "approve, approve with modification, or disapprove the project." Section 201H-38(a)(1)(C)(ii) states: "No action shall be prosecuted or maintained against any county, its officials or employees on

² The Council's ability to approve a project with modification was granted by Section 32 of Act 249, SLH 2007. The statute does not define "modification." The term has not been an issue for the Maui County Council.

account of actions taken by them in *reviewing, approving, modifying, or disapproving the plans and specifications.*” (Italics added.)

Without a definition or further explanation, a clear answer is not apparent. One reasonable inference is that a modification is a change to the project’s plans and specifications and that a condition is a change to something separate from those plans and specifications or relating to a future event. In evaluating the requested exemptions, the Council will be required to consider whether denying an exemption that is not a fee exemption but nonetheless will impact project cost is either the equivalent of a “stricter condition” and thus outside its authority or, in contrast, the equivalent of a modification and thus within its authority.

Certain non-fee exemptions requested by the developer will necessarily impact the project’s preliminary plans and specifications. So, changes to these exemptions may be more susceptible to being treated as a modification.

If a change is characterized as a “stricter condition,” it would appear that the Council will be without authority to make the change. As a practical matter, however, because HHFDC is required to find that the project meets minimum requirements of health and safety under Section 201H-38(a)(1)(A), if a change is needed to meet that standard, HHFDC and the Council may be faced with project denial—followed by resubmittal, if appropriate—or determining that the change is more appropriate as a project modification.

For these reasons, HHFDC and the project developer should be afforded an opportunity to weigh in on changes proposed by the Committee.

3. The restriction on increasing project cost appears limited to fee waivers.

It may be debated whether the phrase “that will increase the cost of the project beyond those approved by the corporation” applies only to the phrase to which it is immediately attached—“reduce fee waivers”—or also applies to the first two restrictions—on stricter conditions and stricter median income requirements.

But when interpreting the language, the phrase must make sense as it applies to the second circumstance (median income requirements) if it is to also apply to the first (stricter conditions). And it would be illogical to conclude that imposing stricter income requirements could increase project cost. Project cost

will be fixed at the time units are offered for rent to households in applicable income ranges. Indeed, lower AMI categories may allow for low-income housing tax credits and other incentives that lower project cost. Stricter median income requirements may lower project revenues, which is not the same as increasing project costs.

Under this reasoning, the phrase would not qualify the first guardrail, prohibiting the imposition of stricter conditions. Thus, the restriction on increasing project cost appears limited to fee waivers.

V. Conclusion

The Council retains its express ability to approve with “modification” affordable housing projects under HRS Chapter 201H, such as the pending Kaiahale ‘o Kahiluhilu affordable housing rental project.

But Act 294, which took effect just a few weeks ago, prohibits the Council from:

- Imposing stricter conditions;
- Imposing stricter median income requirements; and
- Reducing fee waivers that will increase the project’s cost.

“Stricter conditions” is undefined and an unclear term. If the Housing and Land Use Committee decides to recommend approval of a resolution approving the project with modification, staff would suggest that the Committee make clear its intention to not impose stricter conditions. Consultation and concurrence with HHFDC on this intention would be helpful. Likewise, if the Committee recommends reducing fee waivers, it should make a factual finding that doing so will not increase the project’s cost.

Thank you for raising this question. I hope this information is helpful. If further clarification or work is needed, please contact me at ext. 5519.

hlu:ltr:001(1)amc01:cmn

Attachments

cc: Corporation Counsel

JOSH GREEN, M.D.
GOVERNOR
KE KIA'ĀINA



GOV. MSG. NO. 1397

EXECUTIVE CHAMBERS
KE KE'ENA O KE KIA'ĀINA

July 3, 2025

The Honorable Ronald D. Kouchi
President of the Senate,
and Members of the Senate
Thirty-Third State Legislature
State Capitol, Room 409
Honolulu, Hawai'i 96813

The Honorable Nadine Nakamura
Speaker, and Members of the
House of Representatives
Thirty-Third State Legislature
State Capitol, Room 431
Honolulu, Hawai'i 96813

Aloha President Kouchi, Speaker Nakamura, and Members of the Legislature:

This is to inform you that on July 3, 2025, the following bill was signed into law:

S.B. NO. 38, S.D. 2, H.D. 2,
C.D. 1

RELATING TO HOUSING.
ACT 294

Mahalo,

A handwritten signature in black ink that reads "Josh Green M.D.".

Josh Green, M.D.
Governor, State of Hawai'i

on JUL 3 2025

THE SENATE
THIRTY-THIRD LEGISLATURE, 2025
STATE OF HAWAII

ACT 294
S.B. NO. 38
S.D. 2
H.D. 2
C.D. 1

A BILL FOR AN ACT

RELATING TO HOUSING.

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

SECTION 1. Section 201H-38, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) The corporation may develop on behalf of the State or with an eligible developer, or may assist under a government assistance program in the development of, housing projects that shall be exempt from all statutes, charter provisions, ordinances, and rules of any government agency relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of dwelling units thereon; provided that ~~[either]~~:

(1) The housing projects meet the following conditions:

(A) The corporation finds the housing project is consistent with the purpose and intent of this chapter, ~~[and]~~ meets minimum requirements of health and safety~~[+]~~, and provides the county an opportunity to comment;



1 (B) The development of the proposed housing project
2 does not contravene any safety standards,
3 tariffs, or rates and fees approved by the public
4 utilities commission for public utilities or of
5 the various boards of water supply authorized
6 under chapter 54;

7 (C) The legislative body of the county in which the
8 housing project is to be situated has approved
9 the project with or without modifications:

10 (i) The legislative body shall approve, approve
11 with modification, or disapprove the project
12 by resolution within forty-five days after
13 the corporation has submitted the
14 preliminary plans and specifications for the
15 project to the legislative body[-]; provided
16 further that the legislative body shall not
17 impose stricter conditions, impose stricter
18 median income requirements, or reduce fee
19 waivers that will increase the cost of the
20 project beyond those approved by the
21 corporation. If, on the forty-sixth day, a



1 project is not disapproved, it shall be
2 deemed approved by the legislative body;

3 (ii) No action shall be prosecuted or maintained
4 against any county, its officials, or
5 employees on account of actions taken by
6 them in reviewing, approving, modifying, or
7 disapproving the plans and specifications;
8 and

9 (iii) The final plans and specifications for the
10 project shall be deemed approved by the
11 legislative body if the final plans and
12 specifications do not substantially deviate
13 from the preliminary plans and
14 specifications. The final plans and
15 specifications for the project shall
16 constitute the zoning, building,
17 construction, and subdivision standards for
18 that project. For purposes of sections
19 501-85 and 502-17, the executive director of
20 the corporation or the responsible county
21 official may certify maps and plans of lands



1 connected with the project as having
2 complied with applicable laws and ordinances
3 relating to consolidation and subdivision of
4 lands, and the maps and plans shall be
5 accepted for registration or recordation by
6 the land court and registrar; and

7 (D) The land use commission has approved, approved
8 with modification, or disapproved a boundary
9 change within forty-five days after the
10 corporation has submitted a petition to the
11 commission as provided in section 205-4. If, on
12 the forty-sixth day, the petition is not
13 disapproved, it shall be deemed approved by the
14 commission; or

15 (2) The housing projects:

16 (A) Meet the conditions of paragraph (1);

17 (B) Do not impose stricter income requirements than
18 those adopted or established by the State; and

19 (C) For the lifetime of the project, require that one
20 hundred per cent of the units in the project be
21 exclusively for qualified residents."

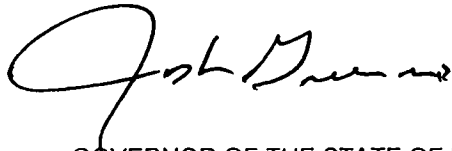


- 1 SECTION 2. Statutory material to be repealed is bracketed
2 and stricken. New statutory material is underscored.
3 SECTION 3. This Act shall take effect upon its approval.



S.B. NO. 38
S.D. 2
H.D. 2
C.D. 1

APPROVED this 3rd day of July, 2025

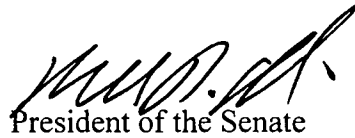
A handwritten signature in black ink, appearing to read "Josh Green", is written over a horizontal line.

GOVERNOR OF THE STATE OF HAWAII

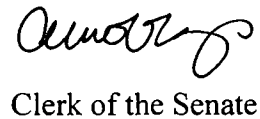
THE SENATE OF THE STATE OF HAWAI‘I

Date: April 30, 2025
Honolulu, Hawai‘i 96813

We hereby certify that the foregoing Bill this day passed Final Reading in the Senate
of the Thirty-Third Legislature of the State of Hawai‘i, Regular Session of 2025.



President of the Senate



Clerk of the Senate

SB No. 38, SD 2, HD 2, CD 1

THE HOUSE OF REPRESENTATIVES OF THE STATE OF HAWAII

Date: April 30, 2025
Honolulu, Hawaii

We hereby certify that the above-referenced Bill on this day passed Final Reading in the House of Representatives of the Thirty-Third Legislature of the State of Hawaii, Regular Session of 2025.



Nadine K. Nakamura
Speaker
House of Representatives



Brian L. Takeshita
Chief Clerk
House of Representatives

STAND. COM. REP. NO.

17361

Honolulu, Hawaii

MAR 18, 2025

RE: S.B. No. 38
S.D. 2
H.D. 1

Honorable Nadine K. Nakamura
Speaker, House of Representatives
Thirty-Third State Legislature
Regular Session of 2025
State of Hawaii

Madame:

Your Committee on Housing, to which was referred S.B. No. 38,
S.D. 2, entitled:

"A BILL FOR AN ACT RELATING TO HOUSING,"

begs leave to report as follows:

The purpose of this measure is to prohibit a county legislative body from making modifications or imposing conditions to affordable housing development proposals that would increase the cost of the project.

Your Committee received testimony in support of this measure from the Hawaii Housing Finance and Development Corporation and Grassroot Institute of Hawaii. Your Committee received testimony in opposition to this measure from the Department of Planning and Permitting of the City and County of Honolulu; one member of the Maui County Council; Hawai'i State Association of Counties; Lāhainā Strong; HI Good Neighbor; LIMBY Hawai'i; Hawaii's Thousand Friends; and two individuals.

Your Committee finds that projects developed under Hawaii Housing Finance and Development Corporation programs must be primarily affordable and conditions of approval and exactions often add significant cost to developments that ultimately may make the projects infeasible. However, your Committee notes that

2025-2665 SB38 HD1 HSCR HMSO



1761

prohibiting a county legislative body from imposing necessary modifications to a project that would increase the cost can negate the quality of their review and could jeopardize the entire project. Your Committee further notes that any condition that required a change to the plans and drawings could be argued to increase the cost of the project. However, your Committee believes that some guardrails are necessary to ensure that these housing projects remain affordable.

Accordingly, your Committee has amended this measure by:

- (1) Deleting language that would have prohibited a county legislative body from making any modification to a housing project that would increase the cost of the project;
- (2) Prohibiting a county legislative body from imposing conditions stricter than the Hawaii Housing Finance and Development Corporation, stricter area median income requirements, or a reduction in fee waivers that will increase the cost of the project; and
- (3) Making a technical, nonsubstantive amendment for the purposes of clarity, consistency, and style.

As affirmed by the record of votes of the members of your Committee on Housing that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 38, S.D. 2, as amended herein, and recommends that it pass Second Reading in the form attached hereto as S.B. No. 38, S.D. 2, H.D. 1, and be referred to your Committee on Judiciary & Hawaiian Affairs.

Respectfully submitted on
behalf of the members of the
Committee on Housing,

2AC

LUKE A. EVSLIN, Chair



State of Hawaii
House of Representatives
The Thirty-third Legislature

HSCR 1361

Record of Votes of the Committee on Housing

Bill/Resolution No.: SB38 SD2	Committee Referral: HSG, JHA	Date: 3/14/25		
<input type="checkbox"/> The committee is reconsidering its previous decision on the measure.				
The recommendation is to: <input type="checkbox"/> Pass, unamended (as is) <input checked="" type="checkbox"/> Pass, with amendments (HD) <input type="checkbox"/> Hold <input type="checkbox"/> Pass short form bill with HD to recommit for future public hearing (recommit)				
HSG Members	Ayes	Ayes (WR)	Nays	Excused
1. EVSLIN, Luke A. (C)	✓			
2. MIYAKE, Tyson K. (VC)	✓			
3. COCHRAN, Elle				✓
4. GRANDINETTI, Tina Nakada		✓		
5. KILA, Darius K.	✓			
6. KITAGAWA, Lisa	✓			
7. LA CHICA, Trish	✓			
8. MURAOKA, Christopher L.	✓			
9. PIERICK, Elijah				✓
TOTAL (9)	6	1	0	2
The recommendation is: <input checked="" type="checkbox"/> Adopted <input type="checkbox"/> Not Adopted If joint referral, _____ did not support recommendation. <div style="text-align: center; font-size: small;">committee acronym(s)</div>				
Vice Chair's or designee's signature: <u><i>Tyson Miyake</i></u>				
Distribution: Original (White) – Committee Duplicate (Yellow) – Chief Clerk's Office Duplicate (Pink) – HMSO				