

HHT Committee

From: David Arakawa <darakawa@lurf.org>
Sent: Wednesday, December 13, 2017 11:40 AM
To: HHT Committee
Cc: Wynde Yamamoto
Subject: MAUI - HHT-27 Residential Workforce Housing Policy-Perpetuity amendment - LURF Opposition (HHT Mtg December 14, 2017)
Attachments: 171212 Maui - Resid Wkfrce Hsg and Aff Hsg Fund - LURF Testimony (12.14.17 HHST Comm Mtg) (wmy)(final).pdf

Aloha Clerk for the Housing, Human Services and Transportation Committee of the Maui County Council (HHT),

Attached is the testimony of the Land Use Research Foundation of Hawaii (LURF), including **comments, concerns, opposition and a recommendation of deferral of HHT Agenda Item HHT-27**, regarding “in perpetuity” and other amendments to the Residential Workforce Housing Policy and Affordable Housing Fund; Proposed Bill Entitled “A Bill for an Ordinance Amending Chapters 2.96 and 3.35, Maui County Code, Relating to the Residential Workforce Housing Policy and Affordable Housing Fund” which is on the HHT agenda for Thursday, December 14, 2017 at 2:30 pm.

Please accept the attached LURF testimony for Maui County Council records and distribute to the Maui County Council members.

Feel free to contact me, or my law partner, Wynde Yamamoto, if you have any questions.

Mahalo, Dave

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Via E-Mail

December 12, 2017

Honorable Stacy Crivello, Chair
Honorable Robert Carroll, Vice-Chair,
and Members of the Housing, Human Services, and Transportation Committee
Council of the County of Maui
200 South High Street
Wailuku, Maui, Hawaii 96793

Comments Regarding Amendments to the Residential Workforce Housing Policy and Affordable Housing Fund; Proposed Bill Entitled “A Bill for an Ordinance Amending Chapters 2.96 and 3.35, Maui County Code, Relating to the Residential Workforce Housing Policy and Affordable Housing Fund” (Item HHT-27 on the Committee’s Agenda).

Thursday, December 14, 2017, at 2:30 p.m. in the Council Chamber, Kalana O Maui Building, 8th Floor, 200 South High Street, Wailuku, Hawaii 96793

The Land Use Research Foundation of Hawaii (LURF) is a private, non-profit research and trade association whose members include major Hawaii landowners, developers and a utility company. LURF’s mission is to advocate for reasonable, rational and equitable land use planning, legislation and regulations that encourage well-planned economic growth and development, while safeguarding Hawaii’s significant natural and cultural resources, and public health and safety.

For consideration before this Committee, is a proposed bill, the purpose of which is to amend provisions of the Maui County Code (MCC) to require that housing provided pursuant to the Workforce Housing Policy or with Affordable Housing Fund money is kept affordable **in perpetuity** through deed restrictions.

Background. The provisions of Chapters 2.96 and 3.35 of the MCC, respectively, relating to the Residential Workforce Housing Policy (the “Policy”) and Affordable Housing Fund, have been heretofore drafted and subsequently amended by the Council to establish the currently existing deed restrictions and time periods therefor based on public input, including the extensive findings by a Task Force convened by the County’s

Department of Housing and Human Concerns and comprised of an independent group of experts, stakeholders and representatives from the nonprofit, construction and development sectors of the community. The Task Force in turn, invited and relied upon feedback on issues from the community, including the lending and development industries.

LURF therefore finds it somewhat concerning, if not disturbing, that the subject bill be submitted for discussion and approval by this Committee without any facts, evidence, community and stakeholder input, or law to justify, or otherwise validate the need for the proposed amendment.

LURF's Position. While LURF acknowledges the demand for more workforce housing on Maui, it strongly believes this proposed amendment violates the Takings Clause of the U.S. Constitution since it does not legally satisfy the requirement for such a measure - specifically, the proposed deed restriction in perpetuity fails to establish a nexus between the proposed real property exaction and the anticipated effects of a land use, deeming it unconstitutional; and equally significant, that the measure will not effectively address the County's housing shortage issue.

A. The Proposed Bill Violates the Takings Clause of the U.S. Constitution, Because Proponents Have Not Proven the Required "Nexus" and "Rough Proportionality" Between the Deed Restriction in Perpetuity and the Anticipated Effects of a Land Use.

LURF believes that this bill violates the "nexus" and "rough proportionality" established by the U.S. Supreme Court in *Nollan v. California Coastal Commission*, 43 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Koontz v. St. Johns River Water Management District*, 568 U.S. ____ (2013). Pursuant to those cases, a demand for property or money as a condition of a land use permit (i.e., an "exaction") will be unlawful and invalid unless the government proves a "nexus" between the government's demand and the effects of the proposed land use, and that the government requirement is "rough proportionate" mitigation for an adverse impact of the development. In this case, proponents of the proposed measure attempt to mandate that developers build a certain number of affordable units at below cost (developer will take a financial loss), and require a resale deed restriction "**in perpetuity**" (which will hinder the marketing and sale of the units), all without having conducted any nexus studies, or otherwise having proven any "nexus" and "rough proportionality" to justify this proposal.

In the event a land use regulation operates to deprive the owner of beneficial economic use of the property, there exists an issue as to whether the owner may be entitled to compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution. U.S. courts have recently even considered temporary land use controls to amount to a deprivation of beneficial use in the property (i.e., a "taking"), potentially entitling landowners to compensation.

At stake in this case is the constitutional rights of private property owners and developers which should not be improperly regulated unless the County can prove a proportionality between the effects of the activity (land use) and the County's proposed uncompensated taking. In the absence of such proof, the County may be subject to legal

challenge and liability for “just compensation.” Such litigation is foreseeable and could likely cost the County substantial sums to defend.

B. Deed Restrictions in Perpetuity Are Unjustified and Unnecessary, and Will Not Resolve Maui’s Workforce Housing Shortage Issue.

As this Committee is aware, Maui’s 50% affordable housing requirement and 25-year IZ restriction failed (2006-2014). According to this Committee’s Report to the Council on MCC Chapter 2.96, dated December 5, 2014, upon review of the Residential Workforce Housing Policy it was determined that “[s]ince the enactment of the Policy in 2006, there has been only one project with a signed residential workforce housing agreement.” That agreement (which imposed less stringent, more relaxed deed restrictions) had called for 17 affordable single-family units, however, between 2006 and 2014, however, only three were able to be sold at affordable rates, with the balance sold at market rates.

In December 2014, due in part to the findings by this Committee, the Maui Council amended the County’s Housing Policy via Ordinance 4177, changing the prior 25-year restricted period to the following¹:

- 10 years – “Below-moderate income” (80% AMI up to 100% AMI)
- 8 years – “Moderate income” (100% AMI up to 120% AMI)
- 5 years – “Above-moderate income” (120% AMI up to 140% AMI)

Despite the manifest history underlying the County’s Housing Policy, and despite failing to present any facts or evidence, or practical need to warrant the imposition of even more stringent requirements, proponents of this bill now inconceivably desire to mandate that housing provided pursuant to the Workforce Housing Policy or with Affordable Housing Fund money be kept affordable **in perpetuity** through deed restrictions.

LURF believes that while longevity of certain deed restrictions such as qualifying income and resale may afford some buyers an initial windfall, those same restrictions, particularly if imposed in perpetuity, also negate critical homeownership incentives such as price appreciation, and detrimentally limit, if not drastically reduce buyer financing options making such housing purchase transactions impractical, undesirable, and nearly impossible.

Moreover, the proposed measure is **unnecessary** as LURF understands the current Policy is working and does not require major amendment (such as deed restrictions in perpetuity) which may likely prove detrimental to new home buyers by limiting their ability to move up the housing ladder. There is also a process already in place (County right to buy back affordable units sold by original owners) to keep housing affordable. The County could additionally elect to devote funding and staff toward other, more reasonable and effective alternatives that can be implemented to improve the current process of retaining affordable housing.

¹ See, Section 2.96.060, MCC.

History has proven that **perpetual restrictions do not work**. A prime example is the 2016 amendment of the Charter of the City and County of Honolulu (“City”), via City Charter Amendment Question No. 5, which abolished a similar requirement that any Affordable Housing Fund-assisted dwellings remain affordable “in perpetuity.”

1. Other IZ Resale Restrictions Have Failed Numerous Times in Hawaii

Statewide, the following **less stringent** Inclusionary Zone (“IZ”) restrictions **have all failed** due to buyers’ opting to purchase housing without IZ restrictions, leaving the restricted units unsold:

- a. From 1988-1992, the State’s 60% affordable housing requirement and IZ restrictions **failed** (Office of State Planning/Harold Matsumoto).²
- b. In 1999, the Honolulu City Council admitted that the City’s 10-year IZ restrictions on buyer income and resale **failed**, and the City Council stopped the IZ restrictions from 1999 to 2005.³
- c. The Honolulu City Council reinstated the IZ restrictions in 2005, and between 2005–2010 the restrictions **failed again**, with no new affordable housing projects submitted for review and approval under the City’s affordable housing policy.⁴
- d. In January 2010, like the City, the Hawaii Housing Finance and Development Corporation (“HHFDC”) was **forced to remove its IZ restrictions** on its Plantation Town Project’s 138 unsold units reserved for gap income buyers. The HHFDC said that declines in property values had narrowed the gap between market prices and Plantation Town unit prices to the point where the income limits and resale restrictions turned away buyers. Qualifying gap income households were not interested in reserved affordable housing units that come with major restrictions when market units with no restrictions were already affordable to them.⁵
- e. Kauai’s 20-year IZ restriction (2007-present) is currently **failing**. According to a presentation by the Kauai Housing Director at the HSAC Conference in September 2017, Kauai’s IZ policy has resulted in zero affordable housing units built and sold. Due to the failure of Kauai’s IZ policy, the Kauai County Council is presently considering amendment of Kauai’s IZ requirements.

² See, David L. Callies; *Preserving Paradise, Why Regulation Won’t Work*, 49-51 (1994).

³ See, University of Hawaii Economic Research Organization; *Inclusionary Zoning: Implications for Oahu’s Housing Market* (February 12, 2010) (“UHERO IZ Report”), p.4.

⁴ See, UHERO IZ Report, p. 4.

⁵ See, UHERO IZ Report, pp. 5-6.

2. IZ Restrictions (Including Those with Less Constraining Provisions) Have Been Determined to be Economically Unfeasible.

- a. The City's 2016 IZ Financial Analysis draft report confirms that IZ restrictions (including 30-year resale restrictions) are **unfeasible for all areas studied on Oahu**, except for high-rise projects in the Ala Moana corridor, *with Community Benefits*.⁶
- b. Numerous other economic studies and articles confirm that IZ restrictions **will result in less housing production and higher prices**.⁷
- c. Experienced housing developers, as well as the State's economic experts (Dr. Carl Bonham and Dr. Paul Brewbaker) are **unanimously opposed** to additional IZ requirements and restrictions, agreeing that it will result in **less housing production and higher prices**.⁸

It has also recently been reported that IZ exactions – even those far less restrictive than proposed by this bill - are also being met with disfavor and are proving unfeasible in addressing the affordable housing crises in other jurisdictions across the U.S.⁹ As examples, a Florida County Commissioner's plan to mandate workforce housing in all Miami-Dade County residential projects was retracted and is being revised as a voluntary system; and legislation imposing an exaction on developers in order to obtain a building permit was challenged as unconstitutional in San Jose, California.¹⁰

Recommendations. Based on the concerns articulated above, and the fact that the Policy is, in large part, the result of the efforts of the Task Force which reviewed the merits and weaknesses of each component and each proposed change thereto, and reported and recommended its findings to this Committee, LURF must strongly encourage that a similar standard be upheld with respect to the proposal being made by this bill, and that more investigation and research relating to housing policies; precedence of such policies; and the potential economic impacts of this proposal be conducted and vetted by a **similar task force** prior to this Committee's consideration of this bill.

⁶ See, Strategic Economics; Affordable Housing Requirement Financial Analysis, Draft Report Prepared for the City & County of Honolulu (April 7, 2016).

⁷ See, UHERO IZ Report, p. 4.

⁸ Testimony of Carl Bonham, Ph.D. in opposition to City Resolution 13-168 (September 18, 2013); Testimony of Paul Brewbaker, Ph.D. in opposition to Hawaii County Development Authority, Proposed Amendments Relating to HAR Chapter 15-218 "Kakaako Reserved Housing Rules," dated May 17, 2017.

⁹ <https://therealdeal.com/miami/2016/12/21/mandatory-workforce-housing-act-rejected-by-miami-dade-commission>

¹⁰ <https://therealdeal.com/miami/2017/02/03/forcing-developers-to-build-workforce-and-affordable-housing-is-a-bad-idea-panelists-say>

Conclusion. As with any government proposal or action which may potentially divest members of the public of their rights and private property, LURF must respectfully caution that action taken by this Committee must not be made arbitrarily, particularly where the underlying bases used to justify such proposals are subjective and unsupported by hard facts and clear evidence, and when current and future consequences to public and private property owners, as well as the community, could be economically destructive. To support the approval of what may be an unnecessary and unwarranted measure, any such ordinance must be clearly defensible, with measurable benefits resulting therefrom that would sufficiently outweigh possible detriment to stakeholders and the community.

In addition to the potentially injurious economic impact to Maui, what is troubling about this Committee taking any type of arbitrary action is the poor example being set and the bad precedent being laid, demonstrating the ease with which the County government may so easily elect to utilize its power and influence to overregulate without valid purpose or justification.

LURF believes it would be unreasonable for this Committee to support this proposal without thorough **task force review and analysis** of facts, information, and precedence relating to the legality and appropriateness of the imposition of the proposed deed restriction in perpetuity; legitimacy of the present need for such a restriction; and further consideration of the potential consequences of such an amendment to the Policy, and must therefore strongly recommend **deferral of this proposed measure.**

Thank you for the opportunity to provide comments regarding this important matter.