
A BILL FOR AN ACT

RELATING TO AFFORDABLE HOUSING.

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

1 SECTION 1. The joint legislative housing and homeless task
2 force (task force) spent numerous hours conducting research and
3 meeting with various stakeholders to discuss Hawaii's housing
4 crisis. Bold and creative steps must be taken immediately to
5 provide the thirty-six thousand housing units needed over the
6 next five years for affordable housing for households earning
7 one hundred forty per cent or less of the adjusted median family
8 income.

9 The task force further found that counties were
10 inconsistent in their approaches to encouraging the development
11 of affordable housing and ensuring that families of all income
12 groups have access to housing. The task force recommended that
13 a model inclusionary zoning law be adopted to facilitate the
14 counties' efforts to develop affordable housing through public-
15 private partnerships.

16 The purpose of this Act is to authorize the counties to
17 adopt inclusionary requirements in residential housing
18 developments.



1 SECTION 2. Chapter 46, Hawaii Revised Statutes, is amended
2 by adding a new part to be appropriately designated and to read
3 as follows:

4 "PART . INCLUSIONARY ZONING

5 **§46-A Purpose.** The purpose of this part is to:

- 6 (1) Mitigate the impact of market-rate housing
7 construction on the limited supply of land suitable
8 for housing, by preventing county residential zoning
9 ordinances from having the effect of excluding housing
10 that meets the needs of all economic groups within the
11 county and state;
- 12 (2) Encourage smart growth to reduce urban sprawl and long
13 commutes between residential centers and places of
14 work;
- 15 (3) Meet the needs of low- and moderate-income families
16 who are unable to rent or purchase affordable homes;
17 and
- 18 (4) Prevent overcrowding and deterioration of the limited
19 supply of affordable housing, and thereby promote the
20 public health, safety, and general welfare.

21 **§46-B Definitions.** For the purposes of this part:



1 "Applicant" means an applicant for a building permit for a
2 covered project.

3 "Covered project" means a project or development for which
4 a building permit is requested and to which the ordinance
5 applies.

6 "Ordinance" means an inclusionary zoning ordinance adopted
7 by a county that includes all the provisions of this part.

8 **§46-C Applicability.** (a) Each county is authorized to
9 adopt an inclusionary zoning ordinance that includes all
10 provisions of this part.

11 (b) The ordinance shall apply to any building permit
12 requests for a project that will create:

13 (1) Ten or more single-family dwelling units through new
14 construction or substantial rehabilitation of existing
15 residential structures;

16 (2) Twenty or more multi-family dwelling units through new
17 construction, existing condominium conversion, or
18 substantial rehabilitation of existing residential
19 structures; and

20 (3) Ten or more dwelling units through adaptive reuse or
21 conversion of a nonresidential use to residential use.



1 (c) Multiple projects by the same applicant or responsible
2 party within any consecutive twelve-month period that in the
3 aggregate equal or exceed the criteria in subsection (b) shall
4 be subject to the ordinance.

5 (d) Any project meeting the criteria under this section
6 shall be deemed a covered project except:

7 (1) Projects that are the subject of development
8 agreements currently in effect with a county and
9 approved prior to the effective date of this Act;

10 (2) Projects that are within the jurisdiction of a
11 development authority, including the department of
12 Hawaiian home lands, which has adopted requirements
13 for affordable housing for any residential development
14 within its jurisdiction;

15 (3) Projects authorized by the Hawaii housing finance and
16 development administration that meet its affordable
17 housing requirements for the development; and

18 (4) Building permit applications for which a use permit
19 and any extension was approved prior to the effective
20 date of this Act.

21 **§46-D Inclusionary requirements.** (a) For a covered
22 project where units are offered for rent, at least fifteen per



1 cent of all dwelling units in the project shall be affordable
2 rental units. These affordable rental units which shall be
3 constructed or completed no later than the market rate units in
4 the project. Of the affordable rental units:

5 (1) Fifty per cent shall be available at rents affordable
6 to households earning fifty per cent or less of the
7 adjusted median family income; and

8 (2) Fifty per cent shall be available at rents affordable
9 to households earning between fifty and eighty per
10 cent of the adjusted median family income.

11 (b) The county may waive all or part of the requirements
12 of subsection (a) upon a showing by the applicant that:

13 (1) Imposition of the requirement will cause undue
14 hardship;

15 (2) Government subsidies or incentives are not sufficient
16 to mitigate against undue hardship; and

17 (3) The project will contribute significantly to
18 affordable housing opportunities within the county.

19 (c) For covered projects where units are offered for sale
20 through the conveyance of individual units by deed or share:

21 (1) If the average sales price of the project units is
22 affordable to households earning eighty per cent or



1 less of the adjusted median family income, ten per
2 cent of the units shall be affordable to households
3 earning fifty per cent or less of the adjusted median
4 family income;

5 (2) If the average sales price of the project units is
6 affordable to households earning one hundred per cent
7 or less of the adjusted median family income, fifteen
8 per cent of the units shall be affordable to
9 households earning eighty per cent or less of the
10 adjusted median family income;

11 (3) If the average sales price of the project units is
12 affordable to households earning one hundred forty per
13 cent or less of the adjusted median family income,
14 twenty per cent of the units shall be affordable to
15 households earning one hundred per cent or less of the
16 adjusted median family income; and

17 (4) If the average sales price of the project units is
18 affordable to households earning above one hundred
19 forty per cent of the adjusted median family income,
20 twenty per cent of the units shall be affordable to
21 households earning one hundred and forty per cent or
22 less of the adjusted median family income;



1 provided that if the applicant designates twenty-five per cent
2 or more of the units for households earning one hundred and
3 forty per cent or less of the adjusted median family income, or
4 twenty per cent or more of the units for households earning one
5 hundred per cent or less of the adjusted median family income,
6 the applicant shall be entitled to an additional density bonus
7 of five per cent for the proposed development or the county may
8 substitute an incentive of financial value equal to the density
9 bonus that the county determines will further affordable housing
10 opportunities.

11 **§46-E Alternative equivalent proposal.** (a) An applicant
12 may submit a proposal to meet the inclusionary requirements
13 under subsection 46-D by an alternative equivalent action that
14 may include but is not limited to dedication of vacant land, the
15 construction of affordable units on another site, or acquisition
16 and enforcement of required rental or sales price restrictions
17 consistent with section 46-D on existing standard dwelling
18 units.

19 (b) The proposal shall show how the alternative action
20 will further affordable housing opportunities in the county to
21 an extent equal to or greater than compliance with the



1 inclusionary requirement of section 46-D or payment of the
2 appropriate in-lieu housing fee.

3 (c) Proposals shall be considered on a case-by-case basis
4 by the county council and may be approved by the county council
5 if the county council determines that the proposed alternative
6 will further affordable housing opportunities in the county to
7 an extent equal to or greater than compliance with the
8 inclusionary requirements under section 46-D.

9 **§46-F Housing fee in-lieu of inclusionary requirements.**

10 (a) An applicant for a single-family residential project
11 may meet the inclusionary requirements of section 46-D by
12 payment of an in-lieu fee.

13 (b) An applicant for a multi-family residential project
14 may propose to pay the in-lieu fee instead of meeting the
15 inclusionary requirements of section 46-D by submitting at the
16 time of application:

- 17 (1) A request to pay the in-lieu fee;
- 18 (2) A report identifying all conditions affecting the
19 project that prevent the applicant from constructing
20 the affordable units;
- 21 (3) Sufficient independent data, including appropriate
22 financial information, to support the applicant's



1 claim that contain conditions prevent the applicant
2 from constructing the required affordable units; and
3 (4) A detailed analysis of why government zoning and other
4 development waivers or concessions cannot mitigate the
5 conditions that the applicant identifies as preventing
6 the applicant from constructing the affordable units.

7 The county planning director and housing director shall review
8 the requests and prepare a recommendation for the county
9 council. The county council shall consider requests on a case-
10 by-case basis and may approve a request if the council
11 determines that there are conditions affecting the project that
12 prevent the applicant of a multi-family residential development
13 from meeting the requirements of section 46-D and that payment
14 of the in-lieu fee will further affordable housing
15 opportunities.

16 **§46-G In-lieu fee; calculation; form; time of payment.**

17 (a) The housing in-lieu fee shall be based on a percentage
18 of the projected construction costs of market rate dwelling
19 units. The calculation and amounts of the fee shall be
20 established by resolution of the county council. For attached
21 single-family residential and rental residential development
22 projects, construction costs of market rate dwelling units shall



1 be separately calculated for each dwelling unit and the
2 appropriate fee paid for each unit within the residential
3 project.

4 (b) The housing in-lieu fee may be satisfied either by
5 cash payment or, upon approval of the county council, by an
6 alternative which will provide the county with a value equal to
7 or greater than the amount of the required in-lieu fee.

8 (c) The housing in-lieu fee shall be paid prior to the
9 issuance of a building permit, or upon execution by the
10 applicant and owner, if different, of the county's secured
11 building agreement recorded against the property at the time of
12 final inspection or issuance of the certificate of occupancy.

13 (d) For purposes of this section, "construction costs"
14 means the estimated cost per foot of construction, as
15 established by the building department of the county for use in
16 the setting of regulatory fees and building permits, multiplied
17 by the total square footage to be constructed for each dwelling
18 unit, minus square footage for garage area.

19 **§46-H Affordable housing concessions or incentives.** (a)
20 For covered projects that meet the inclusionary requirement
21 through the actual construction of affordable units, the county



1 shall provide the following concessions or incentives through
2 the process set forth below:

3 (1) Prior to the submittal by an applicant of any formal
4 application for a general plan amendment, rezoning,
5 use permit, tentative subdivision or parcel map, or
6 other permit or entitlement, and within ninety days of
7 submittal by an applicant of a written preliminary
8 conceptual development proposal describing and
9 specifying the number, type, location, and size of the
10 housing development, and identifying any density
11 bonus, additional incentives, or concessions, waivers,
12 or modifications of development or zoning standards
13 necessary to make construction feasible for the
14 proposed development, including the affordable units,
15 the county council shall review the preliminary
16 development proposal at a public hearing noticed in
17 accordance with county ordinance, and indicate
18 preliminary approval or disapproval of the proposed
19 development and any requests for additional affordable
20 housing incentives, concessions, waivers, or
21 modification of development or zoning standards.

22 Preliminary approval or disapproval shall not bind the



1 county council and shall be subject to modification by
2 the county council based upon a full review of all
3 pertinent project information, including any
4 environmental impact report presented at the public
5 hearing of the application;

6 (2) Regardless of the original submittal date, county
7 departments shall give priority to the processing of
8 applications for covered projects over all other land
9 use applications except those eligible for expedited
10 processing under section 201G-118. Applications for
11 covered projects that include affordable rental units
12 shall be processed before applications for covered
13 projects that include owner-occupied units;

14 (3) The payment of all county fees applicable to the
15 affordable units in a covered project shall be
16 deferred until the issuance of the certificate of
17 occupancy;

18 (4) Using available funds, the county shall purchase and
19 assume responsibility for marketing and selling an
20 owner-occupied affordable unit that remains unsold
21 upon the issuance of a certificate of occupancy. The
22 developer shall be responsible for marketing and



1 selling the affordable units until the issuance of a
2 certificate of occupancy; and

3 (5) The county shall establish and provide a minimum
4 density bonus for covered projects.

5 (b) The county council may consider, on a case-by-case
6 basis, and provide a covered project with the following
7 additional concessions or incentives:

8 (1) An additional density bonus or other incentives of
9 equal financial value;

10 (2) Where not inconsistent with required building and
11 safety code standards and necessary for the
12 feasibility of the covered project, waiver or
13 modification of county standards that have a direct
14 impact on reducing total project costs, including but
15 not limited to subdivision infrastructure
16 requirements, set-asides for parks and public access,
17 and impact fees. The developer shall be responsible
18 for documenting that the waiver or modification is
19 necessary for the feasibility of the project and is
20 consistent with required building and safety code
21 standards;



1 (3) Direct financial assistance in the form of a loan,
2 revenue bonds or grants, as authorized by sections 46-
3 15.1 and 46-15.2; and

4 (4) Deferral of payment of county fees on market rate
5 units until the issuance of the certificate of
6 occupancy for the unit.

7 (c) The county council may consider, on a case-by-case
8 basis, providing additional concessions or incentives for
9 covered projects that provide more affordable units than
10 required by section 46-D.

11 **§46-I Basic requirements for owner-occupied and affordable**

12 **rental units.** (a) Affordable units shall be comparable in the
13 number of bedrooms, exterior appearance, and overall quality of
14 construction to market rate units in the same covered project.
15 Subject to the approval of the planning director and housing
16 director, square footage of affordable units and interior
17 features in affordable units may not be the same as or
18 equivalent to those in market rate units in the same covered
19 project; provided that the interior features are of good quality
20 and are consistent with contemporary standards for new housing.

21 (b) Affordable units shall be dispersed throughout the
22 covered project or, subject to the approval of the planning



1 director and housing director, may be clustered within the
2 covered project to further affordable housing opportunities.

3 **§46-J Continued Affordability.** (a) Deeds of trust and
4 other documents that are acceptable to the county and consistent
5 with the requirements of this part shall be recorded against
6 parcels with affordable units in covered projects, and shall be
7 effective for a minimum of thirty years with respect to each
8 owner-occupied affordable unit and in perpetuity for affordable
9 rental units. The deeds of trust and other documents shall be
10 recorded for these units prior to the issuance of certificates
11 of occupancy, approval of the final inspection of the units, and
12 finalization of regulatory agreements and, for owner-occupied
13 units, prior to the issuance of resale restrictions.

14 (b) Notwithstanding any other provision in this part:

15 (1) The maximum sales price permitted on resale of an
16 affordable unit intended for owner-occupancy shall not
17 exceed the seller's purchase price, adjusted for the
18 percentage increase in median income from the time
19 the seller purchased the unit, plus the value of
20 substantial structural or permanent fixed improvements
21 to the property, plus the cost of a reasonable
22 seller's broker fee as determined by the housing



1 director. For purposes of this subparagraph, median
2 income shall be calculated based upon the presumed
3 occupancy levels used to determine affordable sales
4 price; and

5 (2) The resale restrictions shall provide that in the
6 event of the sale of an affordable unit intended for
7 owner-occupancy, the county shall have the right to
8 purchase or assign its right to purchase the
9 affordable unit at the maximum price which could be
10 charged to an eligible household.

11 (c) No household shall be permitted to occupy an
12 affordable unit or purchase an affordable unit for owner-
13 occupancy unless the purchaser has established residency within
14 the county for not less than six months and has been approved by
15 the county for income eligibility. The county may establish
16 other criteria for eligibility for occupancy of affordable
17 units.

18 **§46-K Annual monitoring and transfer fees.** (a) For each
19 affordable rental unit provided under the ordinance, the current
20 owner may be required to pay an annual monitoring fee for the
21 term of required affordability. The fee shall be specified in
22 the regulatory agreement required under the ordinance.

1 (b) For each owner-occupied affordable unit provided under
2 the ordinance, the current owner may be required to pay a
3 transfer fee for any change of ownership during the term of
4 required affordability. The fee shall be specified in the
5 resale restrictions required under this part.

6 **§46-L Requirements for certificate of occupancy and final**
7 **inspection.** (a) An applicant shall satisfactorily complete the
8 requirements under this part, including but not limited to
9 onsite construction of affordable units, alternative equivalent
10 action, or payment of the in-lieu fee, prior to the issuance of
11 a temporary or permanent certificate of occupancy, approval of
12 final inspection, or authorization for the release of utilities
13 for any new dwelling unit in a covered project.

14 (b) An applicant shall make an acceptable showing to the
15 county that an exemption is appropriate prior to the issuance of
16 a temporary or permanent certificate of occupancy, approval of
17 final inspection approved, or authorization for the release of
18 utilities for a dwelling unit in a covered project. The county
19 shall develop and implement regulations to ensure that initially
20 exempt dwelling units remain in compliance with the terms of the
21 exemption throughout the first two years of occupancy. An
22 applicant of a dwelling unit found to be out of compliance at



1 any time during a two-year period shall be required to pay one
2 hundred twenty-five per cent of the current in-lieu fee for that
3 dwelling unit, as specified by resolution of the county council.
4 The payment shall not limit the county's ability to proceed
5 against any party pursuant the enforcement provisions or other
6 applicable law.

7 **§46-M Enforcement provisions.** (a) It shall be unlawful,
8 a public nuisance, and a misdemeanor for any person to sell or
9 rent an affordable unit at a price or rent exceeding the maximum
10 allowed under the ordinance or to a household not qualified
11 under this part. Violation of this section shall be subject to
12 a \$500 fine per month from the date of original non-compliance
13 until the affordable unit is in compliance with this section.

14 (b) The county prosecutor shall be authorized to:

15 (1) Abate violations of the ordinance;

16 (2) Enforce the provisions of the ordinance; and

17 (3) Enforce all implementing regulatory agreements and
18 resale controls placed on affordable units,

19 by civil action, injunctive relief, and any other proceeding or
20 method permitted by law.

21 (c) The remedies provided for under the ordinance shall be
22 cumulative and not exclusive, and shall not preclude the county



1 from any other remedy or relief to which it otherwise would be
2 entitled under law or equity.

3 **§46-N Appeal and adjustment process.** (a) An applicant
4 may appeal to the county council for a reduction, adjustment, or
5 waiver of any requirement imposed under the ordinance based
6 upon:

7 (1) The absence of any reasonable relationship or nexus
8 between the impact of the development and either the
9 amount of the fee charged or the inclusionary
10 requirement; or

11 (2) Clear and convincing financial data or evidence
12 relating to the character of the development or
13 surroundings that the imposition of the fee charged or
14 inclusionary requirement causes an undue hardship so
15 as to render the project unfeasible and that
16 government subsidies or incentives are not sufficient
17 to mitigate the undue hardship.

18 (b) An applicant subject to the requirements of the
19 ordinance who has received an approved tentative subdivision or
20 parcel map, use permit, or similar discretionary approval and
21 who submits a new or revised tentative subdivision or parcel
22 map, use permit, or similar discretionary approval for the same



1 property may appeal for a reduction, adjustment, or waiver of
2 the requirements with respect to the number of lots or square
3 footage of construction previously approved.

4 (c) Any appeal shall be made in writing and filed with the
5 county clerk no later than ten days prior to the first public
6 hearing on any discretionary approval or permit for the
7 development. If discretionary approval or permit is not
8 required, or if the action complained of occurs after the first
9 public hearing on such permit or approval, then the appeal shall
10 be filed within ten days after the action objected to. The
11 appeal shall set forth in detail the factual and legal basis for
12 the claim of waiver, reduction, or adjustment. The council
13 shall consider the appeal at the public hearing on the permit
14 application or at a separate hearing within sixty days after the
15 filing of the appeal, whichever is later. The appellant shall
16 bear the burden of presenting substantial evidence to support
17 the appeal, including comparable technical information to
18 support the appellant's position. No waiver shall be approved
19 by the county council for a new tentative subdivision or parcel
20 map, use permit, or similar discretionary approval on property
21 with an approved tentative subdivision or parcel map, use
22 permit, or similar discretionary permit unless the county



1 council finds that the new tentative subdivision or parcel map,
2 use permit, or similar discretionary approval is superior to the
3 approved project both in its design and its mitigation of
4 environmental impacts. The decision of the county council shall
5 be final. If a reduction, adjustment, or waiver is granted, any
6 change in use within the project shall invalidate the waiver,
7 adjustment, or reduction of the fee or inclusionary
8 requirement."

9 SECTION 3. Section 46-123, Hawaii Revised Statutes, is
10 amended to read as follows:

11 "[~~+~~]**\$46-123**[~~+~~] **General authorization.** Any county by
12 ordinance may authorize the executive branch of the county to
13 enter into a development agreement with any person having a
14 legal or equitable interest in real property, for the
15 development of such property in accordance with this part;
16 provided that such an ordinance shall:

17 (1) Establish procedures and requirements for the
18 consideration of development agreements upon
19 application by or on behalf of persons having a legal
20 or equitable interest in the property, in accordance
21 with this part;



- 1 (2) Designate a county executive agency to administer the
- 2 agreements after such agreements become effective;
- 3 (3) Include provisions to require the designated agency to
- 4 conduct a review of compliance with the terms and
- 5 conditions of the development agreement, on a periodic
- 6 basis as established by the development agreement;
- 7 ~~and~~
- 8 (4) Include provisions establishing reasonable time
- 9 periods for the review and appeal of modifications of
- 10 the development agreement~~[and]~~; and
- 11 (5) For residential developments covered under part ,
- 12 describe the inclusionary requirements or alternative
- 13 equivalents."

14 SECTION 4. Section 46-126, Hawaii Revised Statutes, is
 15 amended by amending subsection (a) to read as follows:

- 16 "(a) A development agreement shall:
- 17 (1) Describe the land subject to the development
- 18 agreement;
- 19 (2) Specify the permitted uses of the property, the
- 20 density or intensity of use, and the maximum height
- 21 and size of proposed buildings;

1 (3) Provide, where appropriate, for reservation or
2 dedication of land for public purposes as may be
3 required or permitted pursuant to laws, ordinances,
4 resolutions, rules, or policies in effect at the time
5 of entering into the agreement; and

6 (4) Provide a termination date; provided that the parties
7 shall not be precluded from extending the termination
8 date by mutual agreement or from entering subsequent
9 development agreements[-]; and

10 (5) Describe compliance with part for any residential
11 development covered under part ."

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

18 SECTION 6. In codifying the new sections added by section
19 2 of this Act, the revisor of statutes shall substitute
20 appropriate section numbers for the letters used in designating
21 the new sections in this Act.



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

3 SECTION 8. This Act shall take effect on July 1, 2006.

4

INTRODUCED BY:

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JAN 25 2006



HB3202

Report Title:

Affordable Housing; Counties; Inclusionary Zoning

Description:

Authorizes the counties to adopt inclusionary requirements in residential housing developments.

