

March 25, 1998

Mr. Donald K. W. Lau
Chairperson, Board of Directors
Housing Finance and Development
Corporation
State of Hawaii
677 Queen Street, Suite 300
Honolulu, Hawaii 96813

Dear Chairperson Lau:

Re: Housing Projects Developed Pursuant to Act 15, Session Laws of Hawaii 1988

By letter dated December 9, 1997, Mr. Roy S. Oshiro, Executive Director of the Housing Finance and Development Corporation ("HFDC"), requested our opinion on the following questions, which we have paraphrased after a discussion with your staff:

1. Are the counties mandated to accept any and all certifications approved by HFDC pursuant to Act 15 so long as the certifications comply with Act 15 and the applicable administrative rules?
2. If yes, can the counties now require that HFDC file applications to the counties on matters already reviewed and certified by HFDC pursuant to Act 15?

Brief Answers

Briefly we answer the first question in the affirmative and the second in the negative.

Discussion

Because of a critical need for affordable housing and against the opposition of all of the counties, the Legislature enacted Act 15, 1988 Haw. Sess. Laws 15, to expedite the construction of units by providing HFDC flexibility to develop housing projects without going through the review and approval process of the counties. Section 4(c) of Act 15 provided that HFDC shall adopt "rules on health, safety, building, planning, zoning, and land use" that related to HFDC projects and that such rules "shall have the force and effect of law and shall supersede . . . all other inconsistent laws, ordinances, and rules." Section 5(c) of Act 15 provided that, after a public hearing on a housing project was held and the HFDC found that the housing project was consistent with the purpose and intent of Act 15 and did not contravene any safety standard or tariff approved by the Public Utilities Commission for public utilities, the housing project "shall be exempt from all statutes, ordinances, charter provisions, and rules of any governmental agency relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of units thereon." ([top](#))

Furthermore, Section 5(b) of Act 15 provided that:

The final plans and specifications for the project which are consistent with the purpose and intent of this Act and which meets [sic] minimum requirements of health and safety shall constitute the zoning, building, construction, and subdivision standards for that project. For purposes of section[s] 501-85 and 502-17, the executive director of the [HFDC] may certify maps and plans of the lands connected with the project as having complied with applicable laws and ordinances relating to consolidation and subdivision of lands, and such maps and plans shall be accepted for registration or recordation by the land court and registrar.

With respect to projects initiated by private developers, section 6(c) of Act 15 provided as follows:

The [HFDC] may review the plans, specifications, districting, and zoning of the project for the purpose of exempting the project from all statutes, ordinances, charter provisions, and rules of any governmental agency relating to zoning and construction standards for subdivisions, development, and improvement of land and the construction, improvement, and sale of homes thereon

When HFDC built its projects pursuant to Act 15, its rules on health, safety, building, planning, zoning, and land use controlled and superseded any county ordinance or charter provision. HFDC approved and certified maps and final plans and specifications for its own projects and exempted certain private developers from ordinances and county rules. ([top](#))

HFDC projects and private subdivisions developed pursuant to Act 15 when Act 15 was law are legal even today after the sunset of the law in 1993. 1A Norman J. Singer, *Sutherland Statutory Construction* §§ 23.33 and 23.34 (5th ed. 1993). Generally, a repealed statute in its operative effect is considered as if it never existed "[e]xcept as to proceedings past and closed," *id.* § 23.33, and "[a]side from matters and transactions past and closed," 73 Am. Jur. 2d *Statutes* § 384 (2d ed. 1974) (footnote omitted).

It has been held that the repeal of a statute renders it thenceforth inoperative, but it does not undo or set aside the consequences of its operation while in force, even where no question of vested rights is involved, unless such a result is directed by express language or necessary implication. It has also been held that where the result will be to impair contracts or vested rights, a construction is to be avoided which will give a retrospective operation to a repealing statute. Under this rule, where a right has arisen upon a contract, or a transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or any action for its enforcement. ([top](#))

73 Am. Jur. 2d *Statutes* § 385 (2d ed. 1974) (footnotes omitted) (citing *Chism v. Phelps*, 228 Ark. 936, 311 S.W.2d 297, 77 A.L.R.2d 329 (1958); *Blakemore v. Cooper*, 15 N.D. 5, 106 N.W. 566 (1905)). The repeal of the statute is only prospective as to actions "'hereafter accruing', and [is] not retroactive." *Chism*, 311 S.W.2d at 300.

Act 15 did not provide and did not mandate that the counties accept, certify, and record certifications by HFDC, only that the land court and the registrar accept HFDC's certifications of maps and final plans and specifications for registration and recordation. The legislative history is silent as to any legislative intent that the counties certify or record HFDC certifications of projects. ([top](#))

Although the county officials and employees were given an opportunity to be heard and in fact testified at the public hearings held pursuant to section 5(a)(3) of Act 15, since HFDC, and not the counties, certified and recorded maps and plans and specifications of Act 15 projects, the counties' records are devoid of these prior certifications of HFDC. Hence, the counties now claim to have a problem with approving subsequent requests of HFDC regarding the subdivisions built pursuant to Act 15. The counties require that concurrently with any submittals for amendments or extensions of Act 15 subdivision approvals, HFDC submit an application for those actions already approved and certified by HFDC under Act 15 when Act 15 was valid law. Not only is it a waste of time for HFDC to do this since these actions of HFDC are legally binding, but more importantly, HFDC's submission at this time, after the fact, may not be approved by the county under the current law. For example, the county continues to argue that Kekuilani is too densely built. Instead HFDC is willing to provide the counties with all the maps and documents regarding Act 15 subdivision approvals. ([top](#))

In answer to your questions, we respond as follows:

1. The counties must accept HFDC certifications as legal and binding, but the law does not require the counties to certify, record, or accept into their records the certifications of HFDC. HFDC's certifications speak for themselves and are sufficient records of HFDC's legitimate actions.
2. Since HFDC's certifications are legally binding, there does not appear to be a need to address that matter again by a filing of an application on matters approved and certified by HFDC under Act 15. The counties may only require applications for matters subsequent to Act 15 certifications, such as, resubdividing the number of lots in an Act 15 development or any other amendments or extensions to an Act 15 subdivision plan. Only such subsequent applications would be subject to current law, ordinances, and administrative rules. ([top](#))

If there is anything we can do to assist you with regard to this matter, please do not hesitate to let us know.

Very truly yours,
Carolee M. Aoki
Deputy Attorney General

APPROVED:
Margery S. Bronster
Attorney General

CMA:yes
CMA6:ACT15

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