

# C-Engrossed House Bill 3485

Ordered by the Senate June 8  
Including House Amendments dated May 2 and Senate Amendments dated  
June 4 and June 8

Sponsored by Representative DINGFELDER; Representatives BARNHART, BOONE, BUCKLEY, CANNON, COWAN, GELSER, KOTEK, MACPHERSON, MERKLEY, ROSENBAUM, TOMEI, WITT (at the request of Portland Community Land Trust)

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Authorizes creation of affordable housing covenant restricting price, rental rate or occupancy to ensure adequate supply of rental and owner-occupied affordable housing for low or moderate income households. **Specifies that covenant is automatically terminated if holder of covenant is corporation that is dissolved without conveying or assigning covenant and no person is entitled to exercise third-party right of enforcement.**

## A BILL FOR AN ACT

1  
2 Relating to affordable housing covenants; creating new provisions; and amending ORS 94.504 and  
3 197.309.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1. The Legislative Assembly finds and declares that:**

6 (1) **There is a serious shortage of decent, safe and sanitary housing available and af-**  
7 **fordable to low and moderate income households in the State of Oregon.**

8 (2) **The inadequacy in the supply of decent, safe and sanitary affordable housing endan-**  
9 **gers the public health and jeopardizes the public safety and general welfare of the state.**

10 (3) **To obtain the benefits of covenants and restrictions that seek to preserve and main-**  
11 **tain affordable housing, the Legislative Assembly authorizes the creation and enforcement**  
12 **of affordable housing covenants.**

13 **SECTION 2. As used in sections 1 to 6 of this 2007 Act:**

14 (1) **"Affordable housing covenant" means a nonpossessory interest in real property im-**  
15 **posing limitations, restrictions or affirmative obligations that encourage development or that**  
16 **ensure continued availability of affordable rental and owner-occupied housing for low or**  
17 **moderate income individuals.**

18 (2) **"Area median income" means the median income for the standard metropolitan sta-**  
19 **tistical area in which the affordable housing is located, as determined by the Housing and**  
20 **Community Services Department, adjusted for household size.**

21 (3) **"Eligible covenant holder" means:**

22 (a) **A public body, as defined in ORS 174.109;**

23 (b) **An agency of the United States government;**

24 (c) **A public benefit corporation or religious corporation, as those terms are defined in**  
25 **ORS 65.001, one purpose of which is to provide affordable housing for low or moderate income**

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 households;

2 (d) A consumer housing cooperative, as defined in ORS 456.615;

3 (e) A manufactured dwelling park nonprofit cooperative corporation; or

4 (f) A federally recognized Indian tribe.

5 (4) "Low income household" means a household with income less than or equal to 80  
6 percent of the area median income.

7 (5) "Moderate income household" means a household with income less than or equal to  
8 120 percent and greater than 80 percent of the area median income.

9 (6) "Subsidy" includes, but is not limited to:

10 (a) A grant, loan or contract made by a federal agency, a federally recognized Indian  
11 tribe or a public body, as defined in ORS 174.109;

12 (b) A grant, loan or contract made by a nonprofit corporation or a limited liability com-  
13 pany the sole member of which is a nonprofit corporation;

14 (c) A subsidized loan from a lending institution that makes loans for residential housing;  
15 or

16 (d) A subsidized private transaction.

17 (7) "Third-party right of enforcement" means a right provided in an affordable housing  
18 covenant to a third party to enforce the terms of the covenant.

19 **SECTION 3.** (1) A person may create an affordable housing covenant as a condition of  
20 giving or receiving a subsidy during ownership or upon conveyance of real property, in the  
21 form of a covenant, servitude, easement, condition or restriction in a deed, declaration, land  
22 sale contract, trust deed, mortgage, security agreement, assignment, will, trust, rental  
23 agreement, lease or other written instrument that is:

24 (a) Executed by the owner of the real property and the covenant holder; and

25 (b) Recorded in the deed and mortgage records of the county in which the real property  
26 is located.

27 (2) The affordable housing covenant creates a real property right in an eligible covenant  
28 holder to:

29 (a) Limit the use of real property to occupancy by low or moderate income households  
30 in rental or owner-occupied housing;

31 (b) Restrict the rental rate or sale price of real property to ensure affordability by future  
32 low and moderate income households; or

33 (c) Limit, restrict or condition the use and enjoyment of real property to create or retain  
34 rental or owner-occupied affordable housing for occupancy by low or moderate income  
35 households.

36 (3) The affordable housing covenant may be conveyed, assigned, modified or terminated  
37 by a written instrument recorded in the deed and mortgage records of the county in which  
38 the real property is located. The affordable housing covenant may be:

39 (a) Conveyed or assigned by a written instrument executed by the conveying or assigning  
40 covenant holder and the accepting covenant holder;

41 (b) Modified by a written instrument executed by the covenant holder and the owner of  
42 the real property; or

43 (c) Terminated by a written instrument executed by the covenant holder and a third  
44 party with the right to enforce the covenant.

45 (4) An affordable housing covenant is not invalid because a holder of the covenant is not

1 an eligible covenant holder. A covenant holder who is not an eligible covenant holder may  
2 not modify, terminate or commence an action to enforce the covenant. However, the  
3 covenant holder may convey or assign the covenant to an eligible covenant holder who may  
4 modify or terminate the covenant or commence an action to enforce the covenant.

5 (5) An affordable housing covenant is unlimited in duration unless:

6 (a) The instrument creating the covenant provides otherwise;

7 (b) The duration of the covenant is modified prior to the expiration of its stated term;

8 or

9 (c) The covenant is terminated.

10 (6) Upon termination of an affordable housing covenant for any reason prior to the ex-  
11 piration of its stated term, the covenant holder is entitled to receive the difference between  
12 the fair market value of the real property immediately before termination and the fair mar-  
13 ket value of the real property immediately after termination.

14 (7) An interest in real property in existence when an affordable housing covenant is  
15 created is not impaired by the affordable housing covenant unless the owner of the interest  
16 is a party to the affordable housing covenant, subordinates the interest to the affordable  
17 housing covenant or otherwise agrees to be bound by the affordable housing covenant.

18 (8) The instrument creating an affordable housing covenant may grant the eligible  
19 covenant holder, or a designee of the eligible covenant holder, a right to enter the real  
20 property to ensure compliance with the covenant and, if the right is granted, the instrument  
21 shall designate the time and manner in which the eligible covenant holder or designee may  
22 enter the real property.

23 (9) An affordable housing covenant holder may assign a third-party right of enforcement,  
24 by a written instrument executed by the covenant holder and recorded in the deed and  
25 mortgage records of the county in which the real property is located, to a person that qual-  
26 ifies to be an eligible covenant holder but that is not the holder of that covenant.

27 (10) An affordable housing covenant is automatically terminated if:

28 (a) The only holder of the covenant is a corporation, as defined in ORS 65.001, that is  
29 dissolved without conveying or assigning the covenant; and

30 (b) No person is entitled to exercise a third-party right of enforcement pursuant to sub-  
31 section (9) of this section.

32 **SECTION 4. An affordable housing covenant may:**

33 (1) Include limitations, restrictions and affirmative obligations on the sale price or rental  
34 rate of real property or the use of real property or the income or assets of purchasers or  
35 tenants;

36 (2) Limit the amount of equity appreciation that a property owner may derive from  
37 ownership of the real property;

38 (3) Grant a right of first refusal or an option to purchase to the eligible covenant holder;

39 (4) Restrict the class of persons to whom real property may be sold, leased or rented  
40 according to, but not limited to, household income, assets, residency and prior  
41 homeownership;

42 (5) Limit the use of the real property to residential use as the primary residence of a low  
43 or moderate income household;

44 (6) Limit, condition or prohibit leasing or subletting;

45 (7) Impose obligations for maintenance and insurance of the real property;

- 1 (8) Limit, condition or prohibit the owner from allowing liens on the real property; and
- 2 (9) Make other limitations, conditions or prohibitions that affect the affordability of real
- 3 property for low or moderate income households.

4 **SECTION 5.** An action affecting an affordable housing covenant may be commenced or

5 intervened in by:

- 6 (1) The owner of an interest in the real property burdened by the covenant;
- 7 (2) An eligible covenant holder of the benefit of the covenant;
- 8 (3) A person that has a third-part right of enforcement; or
- 9 (4) A public body, as defined in ORS 174.109, in the jurisdiction of which the real property
- 10 burdened by the covenant is located.

11 **SECTION 6.** (1) An affordable housing covenant is valid and enforceable even though the

12 covenant is not of a character traditionally recognized at common law or is inconsistent with

13 a common law doctrine of real property law that might invalidate, impair enforcement of or

14 cause the termination of the covenant, including but not limited to common law doctrine

15 that holds that:

- 16 (a) The covenant is not appurtenant to an interest in the real property.
- 17 (b) The covenant imposes a negative burden.
- 18 (c) The covenant imposes affirmative obligations upon the owner of an interest in the
- 19 burdened real property or the eligible covenant holder.
- 20 (d) The covenant is held by an eligible covenant holder that does not have an interest in
- 21 the real property that is benefited by enforcement of the covenant against the burdened
- 22 property.
- 23 (e) The benefit of the covenant does not touch or concern real property in any other way.
- 24 (f) There is no privity of estate or privity of contract.
- 25 (g) The covenant can be or has been conveyed or assigned to a covenant holder.
- 26 (h) The covenant is an unreasonable restraint on alienability.
- 27 (i) The covenant is a clog on the equity of redemption.
- 28 (j) The covenant lacks adequate consideration.
- 29 (2) An affordable housing covenant is valid and enforceable even if the covenant violates
- 30 the rule against perpetuities set forth in ORS 105.950 to 105.975.

31 (3) If a court denies equitable enforcement of an affordable housing covenant because of

32 a change of circumstances that renders the covenant not in the public interest, the court

33 may award damages as the only remedy in an action to enforce the affordable housing

34 covenant.

35 (4) The court may not use a comparative economic test as a basis for a determination

36 that an affordable housing covenant is not in the public interest.

37 **SECTION 7.** ORS 94.504 is amended to read:

38 94.504. (1) A city or county may enter into a development agreement as provided in ORS 94.504

39 to 94.528 with any person having a legal or equitable interest in real property for the development

40 of that property.

41 (2) A development agreement shall specify:

- 42 (a) The duration of the agreement;
- 43 (b) The permitted uses of the property;
- 44 (c) The density or intensity of use;
- 45 (d) The maximum height and size of proposed structures;

- 1 (e) Provisions for reservation or dedication of land for public purposes;
- 2 (f) A schedule of fees and charges;
- 3 (g) A schedule and procedure for compliance review;
- 4 (h) Responsibility for providing infrastructure and services;
- 5 (i) The effect on the agreement when changes in regional policy or federal or state law or rules
- 6 render compliance with the agreement impossible, unlawful or inconsistent with such laws, rules or
- 7 policy;
- 8 (j) Remedies available to the parties upon a breach of the agreement;
- 9 (k) The extent to which the agreement is assignable; and
- 10 (L) The effect on the applicability or implementation of the agreement when a city annexes all
- 11 or part of the property subject to a development agreement.

12 (3) A development agreement shall set forth all future discretionary approvals required for the

13 development specified in the agreement and shall specify the conditions, terms, restrictions and re-

14 quirements for those discretionary approvals.

15 (4) A development agreement shall also provide that construction shall be commenced within a

16 specified period of time and that the entire project or any phase of the project be completed by a

17 specified time.

18 (5) A development agreement shall contain a provision that makes all city or county obligations

19 to expend moneys under the development agreement contingent upon future appropriations as part

20 of the local budget process. The development agreement shall further provide that nothing in the

21 agreement requires a city or county to appropriate any such moneys.

22 (6) A development agreement must state the assumptions underlying the agreement that relate

23 to the ability of the city or county to serve the development. The development agreement must also

24 specify the procedures to be followed when there is a change in circumstances that affects compli-

25 ance with the agreement.

26 (7) A development agreement is binding upon a city or county pursuant to its terms and for the

27 duration specified in the agreement.

28 (8) The maximum duration of a development agreement entered into with:

- 29 (a) A city is 15 years; and
- 30 (b) A county is seven years.

31 **(9) ORS 94.504 to 94.528 do not limit the authority of a city or county to take action**

32 **pursuant to sections 1 to 6 of this 2007 Act.**

33 **SECTION 8.** ORS 197.309 is amended to read:

34 197.309. (1) Except as provided in subsection (2) of this section, a city, county or metropolitan

35 service district may not adopt a land use regulation or functional plan provision, or impose as a

36 condition for approving a permit under ORS 215.427 or 227.178, a requirement that has the effect

37 of establishing the sales price for a housing unit or residential building lot or parcel, or that re-

38 quires a housing unit or residential building lot or parcel to be designated for sale to any particular

39 class or group of purchasers.

40 (2) [Nothing in] This section [is intended to] **does not** limit the authority of a city, county or

41 metropolitan service district to:

- 42 (a) Adopt or enforce a land use regulation, functional plan provision or condition of approval
- 43 creating or implementing an incentive, contract commitment, density bonus or other voluntary reg-
- 44 ulation, provision or condition designed to increase the supply of moderate or lower cost housing
- 45 units; **or**

1           **(b) Enter into an affordable housing covenant as provided in sections 1 to 6 of this 2007**  
2 **Act.**

3           **SECTION 9.** **(1) Sections 1 to 6 of this 2007 Act apply to a covenant:**

4           **(a) Created under sections 1 to 6 of this 2007 Act on or after the effective date of this**  
5 **2007 Act.**

6           **(b) Created before the effective date of this 2007 Act if the covenant would have been**  
7 **enforceable under sections 1 to 6 of this 2007 Act had it been created on or after the effective**  
8 **date of this 2007 Act.**

9           **(2) Sections 1 to 6 of this 2007 Act do not invalidate an otherwise enforceable affordable**  
10 **housing covenant, as defined in section 2 of this 2007 Act, created before, on or after the**  
11 **effective date of this 2007 Act.**

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