

December 17, 2024

Subject: **Affordable Housing and Sustainable Communities: Guidelines Technical Amendment**

Reporting Period: AHSC Round 3-Round 8

Staff Lead: Jessica Lopez, Affordable Housing and Sustainable Communities, Acting Program Manager

Recommended Action

Approve Staff recommendations to amend the Affordable Housing and Sustainable Communities Program (AHSC) Round 3-Round 8 Guidelines to remove the Limited Waiver of Sovereign Immunity (LWSI) and increase the Supportive Services Cost Cap Limit.

Summary

AHSC Program seeks Council approval to amend the AHSC Round 3-8 Program Guidelines (Guidelines) to update the Limited Waiver of Sovereign Immunity requirement for tribes and increase the Supportive Services Costs Cap Limits. The removal of the Limited Waiver of Sovereign Immunity is a long-standing concern for tribes when applying to AHSC and other state programs. The increase for Supportive Services Cost Cap Limits aims to improve the quality of Supportive Services through a more reflective cost cap, while still encouraging projects to seek other sources of funding specifically dedicated to Supportive Services.

Background

About the AHSC Program

The AHSC Program, as part of California Climate Investments (CCI), provides competitive grants and loans to projects that will achieve Greenhouse Gas (GHG) emission reductions through the development of affordable housing and housing-related infrastructure, active transportation infrastructure, transit operations and capital improvements, and related social programming. Most of the funding provides direct and meaningful benefits within Disadvantaged and Low-income Communities. AHSC is structured to encourage partnerships between local municipalities, transit agencies, and affordable housing developers to achieve the integration of affordable housing and transportation projects.

Since the program’s inception 10 years ago, there have been eight funding rounds with cumulative awards totaling more than \$3.8 billion for 200+ projects across the state. Throughout all 8 rounds, the AHSC program has continually received high-quality applications; usually 40-60% of applications receiving funding, making it a highly attractive program for the affordable housing development community. The program has funded some of the highest GHG-reducing projects and has received high praise as one of the most impactful programs in the California Climate Investment portfolio. AHSC is managed in partnership with Housing and Community Development (HCD or Department) and the California Air Resources Board (CARB).

- The Council adopted the FY 16-17 Round 3 AHSC Program Guidelines at the July 2017 Council Meeting with Technical Amendments 08/14/17, 10/23/17; 01/29/18; 07/31/18; and 02/24/21
- The Council adopted the FY 17-18 Round 4 AHSC Program Guidelines at the October 2018 Council Meeting and later two technical amendments on 2/19/19 and 2/24/21.
- The Council adopted the FY 18-19 Round 5 AHSC Program Guidelines at the October 2019 Council Meeting and later two technical amendments on 12/19/19 and 2/24/21.
- The Council adopted the FY 19-20 Round 6 AHSC Program Guidelines at the February 2021 Council Meeting.
- The Council adopted the FY 21-22 Round 7 AHSC Program Guidelines at the December 2022 Council Meeting.
- The Council adopted the FY 21-22 Round 8 AHSC Program Guidelines at the December 2023 Council Meeting.

Limited Waiver of Sovereign Immunity

Since Round 3, tribal applicants, technical assistance providers, and interested parties have requested the removal of the Limited Waiver of Sovereign Immunity requirement. On Sept. 17, 2024, HCD released Administrative Notice No. 24-04, which detailed the removal of the Waiver of Sovereign Immunity Requirement from seven housing programs, including AHSC pending approval of Council.

Previously, HCD required tribal entities to waive their sovereign immunity by signing a Limited Waiver of Sovereign Immunity (LWSI) to establish enforceable contractual obligations. However, after engaging in extensive consultations with tribal representatives and receiving their invaluable feedback, HCD has come to understand that this requirement has posed significant barriers to tribal participation.

Tribal sovereignty is a cornerstone of tribal self-governance, which grants tribes immunity from lawsuits unless they consent to such actions. This principle of immunity is deeply rooted in both the legal framework and the historical context of Tribal Nations. While tribes have the option to voluntarily waive this immunity, many tribes have voiced concerns about being asked to do so in relation to affordable housing programs, which are vital for their self-governance and the well-being of their communities.

In light of these concerns and our ongoing commitment to fostering respectful government-to-government relationships, HCD has reevaluated the need to mandate an LWSI for most of their programs. HCD has concluded that they can fulfill our compliance obligations through alternative risk mitigation strategies that honor tribal sovereignty by eliminating the requirement for a waiver.

This approach aligns with the Governor's Executive Orders B-10-11 and N-15-19, which affirm the state's dedication to respecting tribal sovereignty, and is further affirmed under AB 1878 by

Assemblymember Garcia (D-Coachella) (Chapter 266, Statutes 2024), which goes into effect Jan. 1, 2025.

As detailed in the attached [Omnibus Amendment](#) (Under Memos at <https://www.hcd.ca.gov/grants-and-funding>), LWSI language has been removed from the Affordable Housing Sustainable Communities and other HCD programs.

SGC, CARB, and HCD remain dedicated to working collaboratively with tribal governments to ensure the effective implementation of housing programs that benefit tribal communities while respecting their sovereign status and right to self-governance.

Supportive Services Cost Cap Limits

Supportive housing, commonly defined as permanent housing with no limit on the length of stay that is linked to onsite or offsite services that assist the resident in retaining the housing, improving their health status, and maximizing their ability to live and, when possible, work in the community, is an effective model for improving tenant outcomes. Budget appropriations and voter-approved initiatives have increasingly focused on investments in Department programs that support supportive housing over the past two decades.

Providing high-quality Supportive Services requires operating funding to hire skilled staff. The 2017 UMRs allowed Supportive Services Costs as eligible Operating Expenses within a Project's operating budget, within prescribed limits, for the first time.

After the 2017 Uniform Regulations (UMRs) were adopted, some Department programs set higher cost limits for Supportive Services. These limits do not fully cover the expenses of high-quality services, thus encouraging Project Sponsors (i.e. developers) to bring in additional third-party services, such as health services from the County health department.

Many Project Sponsors struggle to obtain these supplemental services, resulting in underfunding. This can lead to negative outcomes for tenants, including increased move-out rates and a higher risk of returning to homelessness, as well as operational challenges for the Projects. In response to these issues, AB2483 by Assemblymember Maienschein (D-San Diego) requires the Department to evaluate to what extent caps on Supportive Services funding are needed. The evaluation found that many supportive housing Projects spend well below the current limits, often leaving them with little cash flow after essential operating expenses.

To address this, the Department proposes increasing the cost limits for Projects providing Supportive Services. The new limits will be based on best practices for staffing levels and recommended caseloads for case managers. Additionally, the cap on staff supervision funding will rise from 10% to 15% of on-site staff salaries.

While the Department will not eliminate these cost limits entirely or increase them for certain non-specialized services, the proposed changes aim to improve the quality of Supportive Services. Projects are also encouraged to seek other funding sources, such as Medi-Cal and the Mental Health Services Act (MHSA).

As noticed in the [HCD memo dated 10/7/24](https://www.hcd.ca.gov/grants-and-funding) (Administrative Notice No 24-05 - under Memos at <https://www.hcd.ca.gov/grants-and-funding>), this policy sets forth and establishes the HCD's Supportive Services Cost Limits Policy ("Policy") applicable to all Department state multifamily rental finance programs subject to supportive services cost caps under the 2017 Uniform Multifamily Regulations, except in cases where this Policy conflicts with federal requirements.

Summary of changes to regarding Limited Waiver of Sovereign Immunity Round 3-8 AHSC Guidelines

The HCD Omnibus Modification to Program Guidelines: Limited Waiver of Sovereign Immunity Requirements notice sets forth, clarifies, and repeals certain requirements under multiple affordable housing programs administered by the Department of Housing and Community Development (Department or HCD) as described in the Program Guidelines as detailed below:

All express provisions of the Program Guidelines set forth and listed below that require Indian Tribes or Tribal Entities to provide a Limited Waiver of Sovereign Immunity (LWSI) in order to participate in the Department's affordable housing programs, or that require waivers for personal and subject matter jurisdiction subject to said Program Guidelines, are hereby removed.

Amendments include the removal of indicated language and the replacement of the above-amended language as follows:

- Round 3 Guidelines (effective July 17, 2017; Amended Aug. 17, 2017, Oct.23, 2017, Jan. 29, 2018, July 31, 2018, and Feb. 24, 2021) and applicable to Notice of Funding Availability (NOFA) issued on Oct. 2, 2017. Round 3 pg. 56-57: Strike text from Appendix B(b)(2), (3) & (7)
 - (2) Personal Jurisdiction for Tribal Applicants. For applicants that are Indian Tribes or Indian Tribe controlled entities, all such applicants shall provide and execute a limited waiver of sovereign immunity agreeing to the personal jurisdictions of state court.
 - (3) Subject Matter Jurisdiction for Restricted Tribal Lands. For applicants proposing projects that are to be within property described in sub-divisions (i)(1), (i)(2), (i)(3), and (i)(4), all such applicants shall cause the subject Indian Tribe to provide and execute a limited waiver of sovereign immunity satisfactory to the Department, agreeing to the subject matter jurisdiction of state court.
 - (7) Minimum Requirements for Sovereign Immunity Waivers. Sovereign immunity waiver language shall be included in the Department Standard Agreement, and all Department regulatory and loan or grant agreements, all of which may be accomplished by incorporating by reference a separately executed sovereign immunity waiver instrument. The Applicant shall also provide or obtain a separate limited waiver of sovereign immunity instruments for both

personal and subject matter jurisdiction which shall require, at a minimum, compliance with State construction standards and regulations.

- Round 4 Guidelines (effective Oct. 29, 2018; Amended Feb. 19, 2019 and Feb. 24, 2021); and applicable to Notice of Funding Availability (NOFA) issued on Nov. 1, 2018. Round 4 pg. 60-61: Strike text from Appendix B(b)(2),(3), & (7)
 - (2) Personal Jurisdiction for Tribal Applicants. For applicants that are Federally Recognized Indian Tribes or Tribal controlled entities, all such applicants shall provide and execute a limited waiver of sovereign immunity agreeing to the personal jurisdictions of state court.
 - (3) Subject Matter Jurisdiction for Restricted Tribal Lands. For applicants proposing projects that are to be within property described in sub-divisions (i)(1), (i)(2), (i)(3), and (i)(4), all such applicants shall cause the subject Indian Tribe to provide and execute a limited waiver of sovereign immunity satisfactory to the Department, agreeing to the subject matter jurisdiction of state court.
 - (7) Minimum Requirements for Sovereign Immunity Waivers. Sovereign immunity waiver language shall be included in the Department Standard Agreement, and all Department regulatory and loan or grant agreements, all of which may be accomplished by incorporating by reference a separately executed sovereign immunity waiver instrument. The Applicant shall also provide or obtain a separate limited waiver of sovereign immunity instruments for both personal and subject matter jurisdictions which shall require, at a minimum, compliance with state construction standards and regulations.
- Round 5 Guidelines (effective Oct. 31, 2019; Amended Dec. 9, 2019); and applicable to Notice of Funding Availability (NOFA) issued on Nov. 1, 2019. Round 5 pg. 65-66: Strike text from Appendix B(b)(2), (3) & (7)
 - (2) Personal Jurisdiction for Tribal Applicants. For applicants that are Federally Recognized Indian Tribes or Tribal controlled entities, all such applicants shall provide and execute a limited waiver of sovereign immunity agreeing to the personal jurisdictions of state court.
 - (3) Subject Matter Jurisdiction for Restricted Tribal Lands. For applicants proposing projects that are to be within property described in sub-divisions (i)(1), (i)(2), (i)(3), and (i)(4), all such applicants shall cause the subject Indian Tribe to provide and execute a limited waiver of sovereign immunity satisfactory to the Department, agreeing to the subject matter jurisdiction of state court.
 - (7) Minimum Requirements for Sovereign Immunity Waivers. Sovereign immunity waiver language shall be included in the Department Standard Agreement, and all Department regulatory and loan or grant agreements, all of which may be accomplished by incorporating by reference a separately executed sovereign immunity waiver instrument. The Applicant shall also provide or obtain a separate limited waiver of sovereign immunity instruments for both

personal and subject matter jurisdictions which shall require, at a minimum, compliance with State construction standards and regulations.

- Round 6 Guidelines (effective Feb. 24, 2021); and applicable to Notice of Funding Availability (NOFA) issued on Feb. 26, 2021 as amended on Oct. 14, 2021. Round 6 pg. 68-69: Strike text from Appendix B(b)(2), (3) & (7)
 - (2) Personal Jurisdiction for Tribal Applicants. For applicants that are Federally Recognized Native American Tribes or Tribal controlled entities, all such applicants shall provide and execute a limited waiver of sovereign immunity agreeing to the personal jurisdictions of state court.
 - (3) Subject Matter Jurisdiction for Restricted Tribal Lands. For applicants proposing projects that are to be within property described in sub-divisions (i)(1), (i)(2), (i)(3), and (i)(4), all such applicants shall cause the subject Native American Tribe to provide and execute a limited waiver of sovereign immunity satisfactory to the Department, agreeing to the subject matter jurisdiction of state court.
 - (7) Minimum Requirements for Sovereign Immunity Waivers. Sovereign immunity waiver language shall be included in the Department Standard Agreement, and all Department regulatory and loan or grant agreements, all of which may be accomplished by incorporating by reference a separately executed sovereign immunity waiver instrument. The Applicant shall also provide or obtain a separate limited waiver of sovereign immunity instruments for both personal and subject matter jurisdictions which shall require, at a minimum, compliance with state construction standards and regulations.
- Round 7 Guidelines (effective Dec 15, 2022); and applicable to Notice of Funding Availability (NOFA) issued on Jan. 30, 2023 as amended on March 15, 2023. Round 7 pg. 72-73: Strike text from Appendix B(b)(2) & (6)
 - (2) Personal and Subject Matter Jurisdiction. Personal and subject matter jurisdiction in regard to the Standard Agreement, Project, or any matters arising from either of them is in state court and the Department has received any legal instruments or waivers, all dully approved and executed, as are or may be legally necessary and effective to provide for such personal and subject matter jurisdiction in state court.
 - (6) Minimum Requirements for Sovereign Immunity Waivers. Sovereign immunity waiver language shall be included in the Department Standard Agreement, and all Department regulatory and loan or grant agreements, all of which may be accomplished by incorporating by reference a separately executed sovereign immunity waiver instrument. The Recipient shall also provide or obtain a separate limited waiver of sovereign immunity instruments for both personal and subject matter jurisdictions which shall require, at a minimum, compliance with State construction standards and regulations or with respect to tribal

housing Projects in Indian Country, compliance with tribal construction standards and regulations that are at least as stringent as state construction standards and regulations, subject to the Department's review and satisfaction[.]

- Round 8 Guidelines (effective December 14, 2023) and applicable to Notice of Funding Availability (NOFA) issued January 19, 2024. Strike text from Appendix B(b)(2) & (6)
 - (2) Personal and Subject Matter Jurisdiction. Personal and subject matter jurisdiction in regard to the Standard Agreement, Project, or any matters arising from either of them is in state court and the Department has received any legal instruments or waivers, all dully approved and executed, as are or may be legally necessary and effective to provide for such personal and subject matter jurisdiction in state court.
 - (6) Minimum Requirements for Sovereign Immunity Waivers. Sovereign immunity waiver language shall be included in the Department Standard Agreement, and all other relevant Department agreements memorializing or securing the awards of funds, which may be accomplished by incorporating by reference a separately executed sovereign immunity waiver instrument. The Tribal Entity shall also provide or obtain a separate limited waiver of sovereign immunity instruments for both personal and subject matter jurisdictions which shall require, at a minimum, compliance with state construction standards and regulations or with respect to tribal housing Projects in Indian Country, compliance with tribal construction standards and regulations that are at least as stringent as state construction standards and regulations, subject to the Department's review and satisfaction[.]

Summary of changes to regarding Supportive Services Cost Cap Limits Round 3-8 AHSC Guidelines

HCD notice 10/07/24 amends all of the Department state multifamily rental finance program guidelines adopted or amended on or after Nov. 15, 2017, which is the effective date of the 2017 Uniform Multifamily Regulations (UMRs) as well as any program guidelines released prior to the adoption of the 2017 UMRs that had stated cost caps. The provisions detailed herein will be applicable to any project with an award under the referenced guidelines in the attached omnibus amendment. Although AHSC Guidelines do not specify Supportive Services Cost Cap Limits, it is noted in the application workbooks.

This amendment is applicable to Department-awarded rental housing Projects funded under programs subject to this memo that meet one or more of the following conditions:

1. The Project is subject to guidelines adopted or amended on or after Nov. 15, 2017 of one or more applicable programs;
2. The Project's Regulatory Agreement was recorded after Nov. 15, 2017, triggering applicability of the 2017 UMRs;

3. In the event that the cost caps under this memo conflict with those of another funding source not subject to this memo, the most restrictive cost caps will apply.

Effective Date: For the programs subject to this memo:

1. These limits will be included in all future NOFAs issued by the Department, as applicable, and apply to all multifamily rental projects seeking funding under future NOFAs.
2. For projects that were awarded funds prior to the effective date of this memo but have not yet closed their construction or permanent financing with the Department, these new limits will take effect as part of that next loan closing process.
3. For all other projects in HCD’s portfolio subject to this memo, these limits will take effect as part of Department’s review and approval of the Project’s annual operating budget or annual audit.

Affordable Housing and Sustainable Communities (Division 44, Part 1 Chapter 2 of the Public Resources Code) Program Guidelines, will include the addition of Appendix C or D, as applicable:

Appendix C or D: Allowable Supportive Service Cost Cap Increases

(a) The following administrative notices, policies, and guidance are hereby incorporated herein by reference and shall be deemed to have the same force and effect as if set forth in full herein:

(1) The Department’s “Notice of Omnibus Program Guideline Amendments Supportive Services Costs Limits” (Administrative Notice No. 24-05) dated Oct. 7, 2024, and as may be subsequent amended

- Round 3 Guidelines (effective July 17, 2017; Amended Aug. 14, 2017; Oct. 23, 2017; Jan. 29, 2018; July 31, 2018; and Feb. 24, 2021);
- Round 4 Guidelines (effective Oct. 29, 2018; Amended Feb. 19, 2019 and Feb. 24, 2021);
- Round 5 Guidelines (effective Oct. 31, 2019; Amended Dec. 9, 2019); Round 6 Guidelines (effective Feb. 24, 2021);
- Round 7 Guidelines (effective Dec. 15, 2022);
- Round 8 Guidelines (effective Dec. 14, 2023);

Council Recommendation

Should the Council agree with Staff’s recommendation, the following motion language is suggested:

“I move that the Council approve staff recommendations to amend the Affordable Housing and Sustainable Communities Program Round 3 to 8 Guidelines to recognize the removal of Limited Waiver of Sovereign Immunity Requirements and increase Supportive Service Costs Cap Limits.”

Attachments

Attachment A: Affordable Housing and Sustainable Communities (AHSC): Final Round 3 Program Guidelines: Amendment

Attachment B: Affordable Housing and Sustainable Communities (AHSC): Final Round 4 Program Guidelines: Amendment

Attachment C: Affordable Housing and Sustainable Communities (AHSC): Final Round 5 Program Guidelines: Amendment

Attachment D: Affordable Housing and Sustainable Communities (AHSC): Final Round 6 Program Guidelines: Amendment

Attachment E Affordable Housing and Sustainable Communities (AHSC): Final Round 7 Program Guidelines: Amendment

Attachment F: Affordable Housing and Sustainable Communities (AHSC): Final Round 8 Program Guidelines: Amendment