August 27, 2019

Subject: Funding Recommendation for Alternative Affordable Housing and Sustainable Communities Project

Reporting Period: June – August 2019

Staff Lead: Doug Bojack, SGC Staff Counsel

Recommended Action
Reconfirm award recommendations approved at the June 21, 2019 Strategic Growth Council meeting for the Affordable Housing and Sustainable Communities Program, maintaining West Carson Villas as a substitute project.

Summary
At the June 21, 2019 Strategic Growth Council (SGC) meeting, SGC staff recommended the West Carson Villas project be approved for funding as a substitute project in Round 4 of the Affordable Housing and Sustainable Communities (AHSC) Program. The Council considered whether to fund the substitute project “[i]f one of the 25 projects recommended for award declines its funding prior to the posting of the Round 5 AHSC Notice of Funding Availability… as long as there are enough funds to substantially fulfill the requested award amount.” The Council approved this motion and requested staff explore the statutory and programmatic considerations for pulling forward funding to award the West Carson Villas project as an additional award in Round 4.

This report provides staff’s reasoning for the substitute project designation, considers the relevant legal landscape including the Round 4 Notice of Funding Availability and AHSC Program Guidelines, and addresses programmatic considerations for the continuing development and implementation of the AHSC Program. Based on this analysis, staff finds the following:
- The Council is afforded statutory discretion in the development of program guidelines and award of funds;
- Previous Council action in which a second phase of awards was made using future auction revenues is not a practical analog to apply in this round; and
- Program design and implementation considerations are important to maintain program stability and predictability for applicants.

As a result, staff recommends that the Council reaffirm its decision from June 21, 2019 and maintain West Carson Villas as a substitute project.

Background
In the AHSC Round 4 Award Recommendations, posted June 11, 2019, staff recommended that the West Carson Villas project be approved as a substitute
project. The intention of this designation is to enable immediate award of funds to the project should they become available. Funds could become available due to discovery of ineligible costs, unforeseen circumstances preventing an awarded project’s ability to proceed, or material non-compliance with AHSC Program requirements. The expiration date of this conditional action was set at the opening of the AHSC Program’s next funding round so as not to prevent the project from applying to the future round of funding.

Statutory Analysis
Public Resources Code section 75200, *et seq.* establishes the AHSC Program and Health and Safety Code section 39719, subdivision (b)(1)(C) continuously appropriates twenty percent of the annual proceeds of the Greenhouse Gas Reduction Fund to the program. Public Resources Code section 75215 exempts the Council’s development and adoption of the AHSC Program guidelines and selection criteria from the Administrative Procedures Act, but it also prescribes a required method for the public and member agencies to participate in that development. Council adopted the Round 4 FY 2017-2018 AHSC Program Guidelines on October 29, 2018 (the “Guidelines”). The Department of Housing and Community Development then released a Notice of Funding Availability (NOFA) to announce “approximately $395 million in funding” on November 1, 2018.

Section 108, subsection (d), entitled Application Process, of the Guidelines identifies staff’s scoring recommendations for the Council. Subsection (d)(5) provides that, “[s]ince it is in the interest of the State to fund a variety of project types and scales in a variety of locations to demonstrate the many ways [greenhouse gas] emissions may be reduced, adjustments may be made in the recommendation and award of funds.”

Through this Guideline language and case law, the Council is afforded significant discretion in how it develops, adopts, and interprets its Guidelines. The Guidelines are “quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to ‘make law,’ and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves.” *Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal.4th 1, 7 (1998). Indeed, “[b]ecause agencies granted this power are truly making law, their quasi-legislative rules have the dignity of statutes. When a court assesses the validity of such rules, the scope of its review is narrow. If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end.” (*Id.* at p.16). The Legislature clearly delegated the power to adopt the quasi-legislative regulations embodied in the Guidelines and explicitly excluded this power from general rulemaking procedures; the resulting Guidelines acknowledge that Council retains some discretion to make awards under the AHSC Program.
**Previous Council Actions**

In Round 1, the Council used this discretion to award funds from the next Fiscal Year’s auction proceeds to augment the number of awards made. However, the structure and timeline of the program was quite different at that time. These differences make this action less relevant as precedent for the current question at hand.

In the first round of AHSC, the program implemented a “jurisdictional cap,” which limited funding in a given geographic location to $15 million and prevented some top-scoring applications from being awarded. Of the 147 concept proposals received, program staff invited fifty-six projects to apply for the first round of AHSC. Applications requested a total of $313 million, with only $120 million available. At the June 30, 2015 Council meeting, the Council approved awards to 28 projects and indicated a desire to fund four additional projects that did not receive funding because of the jurisdictional cap. In response to the Council’s request, at the October 15, 2015 Council meeting, staff recommended that AHSC issue a new Notice of Funding Availability using $30 million from the next Fiscal Year’s auction proceeds. Applicants above a certain scoring threshold, including the four top-scoring, non-funded applications, were eligible to apply. A total of seven projects were then able to apply with a statement of interest and rely upon previous materials, unless the project had changed in scope.

No jurisdictional cap exists in the program at this time and the recommended awards for Round 4 reflect the highest scoring projects in each project area type, regardless of location. SGC will release the NOFA for Round 5 in early November, which makes an interim NOFA impractical.

**Program Considerations**

Over the four Rounds of AHSC, local jurisdictions, developers, technical assistance providers, and other stakeholders have provided SGC feedback to inform and refine the guidelines and program structure. One major goal of these amendments has been to develop a sustainable, predictable funding program that operates on an annual cycle. Round 4 is the first cycle to have been completed on this 12-month cycle.

The extension of Cap-and-Trade through 2030, combined with the AHSC Program’s continuous 20 percent appropriation of the Greenhouse Gas Reduction Fund, creates certainty about the future of the AHSC Program and its source of funding. This predictable cycle combined with the programmatic objective of consistent eligibility criteria aids AHSC Program staff’s ability to conduct outreach to local jurisdictions, encouraging them to develop potential AHSC projects and create “pipelines” for future application cycles. With a recurring AHSC schedule and consistent eligibility criteria, project developers and partners can better plan for applying in future rounds. Staff desire to continue to provide better forecasting and planning continuity for future applicants. A Council decision to pull funding “out of cycle” will reduce the ability of applicants in the pipeline to gauge their projects’ competitiveness accurately and could erode confidence in the Program’s stability.
Staff further wishes to clarify that the recommended designation of an application as a substitute project should not be confused as a recommendation for an award under the NOFA. Staff recommended one project for an alternate award should one of the awarded projects be unable to proceed. This recommendation was made to identify a contingency project that could move forward quickly without further Council action if one of the 25 projects recommended for award lost its funding prior to the posting of the Round 5 AHSC Notice of Funding Availability, and which could use the $281,309 remainder of Round 4 available funds.

**Staff Recommendation**

Staff recommends the Council approve retaining West Carson Villas as the Round 4 substitute project such that, in the event that an awarded project does not satisfy conditions for receiving its award or an awarded project foregoes an award prior to the publishing of the Round 5 AHSC NOFA, staff will award the substitute project as identified in Appendix A of the June 21, 2019, staff report if there are enough funds available to substantially fulfill its funding request.

Staff recommends in the alternative that Council modify this recommendation to extend the horizon for the substitute project eligibility to the Round 5 Application Due date as Council will determine in the final FY 2018-2019 AHSC Program Guidelines.