Technical Frequently Asked Questions – for Housing Professional and Jurisdictions

March 2024

As required by the San Francisco Bay Area Regional Housing Finance Act of 2019 (the Act, defined below), BAHFA staff conducted outreach to stakeholders, including city and county officials, in developing programs to be funded if San Francisco Bay Area voters approve a regional affordable housing bond measure at the November 2024 general election. Below are questions that arose during outreach, requiring additional information about the Act, financing requirements and bond expenditures. The FAQs are organized as follows:

A. Definitions of Frequently Used Terms
B. Distribution and Allocation of Revenue
C. Expenditure Plans
D. Use of Production Funds
E. Use of Preservation Funds
F. Use of Flexible Funds
G. Background

Disclaimer: The following questions and answers are intended to assist local governments as they develop Expenditure Plans and programs in the event that the voters approve the Bond (defined below). However, in addition to requirements set forth in the Act, any particular program or project funded with County Housing Revenue will need to comply with other applicable state laws, the voter-approved ballot measure (which, at the time of publication of this document, has not been submitted to the voters), and any guidelines that BAHFA may adopt. Local governments are encouraged to consult with their legal counsel and to check these questions for updates.

A. Definitions of Frequently Used Terms

Affordable Unit: a legally enforceable agreement for at least 30 years that restricts occupancy and requires affordable housing costs (Health and Safety Code section 50052.5 or affordable rent (Health and Safety Code section 50053) be provided to person(s) whose household income qualifies as extremely low, very low, low, or moderate income.

AMI: area median income. There is a different AMI for each county in the Bay Area.

BAHFA Jurisdiction: area within the boundaries of the counties of Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano and Sonoma, and the city and county of San Francisco. Also referred to as the San Francisco Bay Area.

Bond: the general obligation affordable housing bond that BAHFA is preparing to submit to the voters at the November 2024 general election.

County Housing Revenue: the portion of the Revenue that the Act requires to be disbursed to counties, and to cities that qualify as a Direct Recipient. *See Questions B.Q1 and B.Q2*.

Direct Recipient: a county or city that receives a direct distribution of County Housing Revenue. *See Question B.Q2*.

Expenditure Plan: the plan that a Direct Recipient adopts to plan for expenditure of its distribution of the County Housing Revenue.

Flexible Funds: the remaining allocation after the minimum allocations for Production Funds, Protection Funds and tenant protections, as required by the Act, have been made. *See Question C.Q1*.

Local Government: a city or county or city and county within BAHFA's jurisdiction.

Production Funds: the minimum allocation that must be allocated to the production of new affordable housing as required by the Act. *See Question C.Q1*.

Preservation Funds: the minimum allocation that must be allocated to the preservation of affordable housing as required by the Act. *See Question C.Q1*.

Real Property: a qualified interim housing project.

Regional Housing Revenue: the portion of the Revenue that the Act requires to be disbursed to BAHFA. *See Question B.Q1*.

Revenue: the funds derived from the Bond and consisting of both County Housing Revenue and Regional Housing Revenue.

RHNA: Regional Housing Needs Allocation.

San Francisco Bay Area Regional Housing Finance Act: California Government Code § 64500, et seq., the Act creating the Bay Area Housing Finance Authority (BAHFA).

B. Distribution and Allocation of Revenue

Q1: If the voters pass the Bond, how will the Revenue be distributed throughout the San Francisco Bay Area?

A: Eighty percent of the net Revenue will be distributed to the counties of origin, based on assessed property values, with the distribution referred to as County Housing Revenue. The remaining 20% of the Revenue will be distributed to BAHFA, commonly called Regional Housing Revenue.

Q2: Who will receive direct distributions of the County Housing Revenue, i.e., who are the Direct Recipients?

A: Each county in the San Francisco Bay Area, including the City and County of San Francisco, on whose ballot the bond appears will receive a direct distribution of the County Housing Revenue. In addition, certain cities receive a direct distribution of funds, based upon their assessed property values. The Direct Recipient cities include Oakland and San Jose, as the largest cities in the region. Any other city in the San Francisco Bay Area that carries 30% or more of the RHNA obligation for its county to plan for very low-income housing will receive a direct distribution. Currently, this includes the cities of Napa and Santa Rosa.

Q3: Does the Act prescribe how entities receiving direct distributions expend the Bond proceeds?

A: Yes. If San Francisco Bay Area voters pass the Bond, the counties and cities receiving direct distributions of County Housing Revenue must follow the rules set forth in the Act. (See Government Code § 64650.) *See also Question No. C.Q1 below*.

Q4: Which entity will administer distributions for Direct Recipients?

A: Each Direct Recipient will select an entity to administer its distribution of the County Housing Revenue consistent with the jurisdiction's Expenditure plan. A county may request that BAHFA administer all or a portion of its distribution of the County Housing Revenue. If the ABAG Executive Board and the BAHFA Board approve the request, BAHFA will administer the county's distribution in accordance with the Expenditure Plan approved by the county, BAHFA's board and the ABAG Executive Board.

Q5: Can County Housing Revenue be used to cover administrative costs?

A: Yes. Direct Recipients may use up to five percent of their direct distribution to cover administrative costs.

Q6: Can BAHFA require labor standards for Direct Recipients' use of the County Housing Revenue?

A: No. The Act does not authorize BAHFA to implement labor standards specific to the Direct Recipients' use of the County Housing Revenue. Direct Recipients should contact their local counsel to determine what state or local labor standards apply to their use of the County Housing Revenue.

Q7. Can Direct Recipients contract out the administration of their funds to a community-based organization?

A: Yes. The Act allows Direct Recipients to select the appropriate entity within their counties to administer the funds. *See also Question B.Q.4.*

Q8. What is the timeline by which Direct Recipients must spend their funding?

A: The Act states that after counties commit funds to a specific project, they shall remain available for expenditure for three years. Counties are able to authorize expenditures beyond three years, but they must do so in accordance with guidelines approved by the BAHFA Board and the ABAG Executive Board. Direct Recipient cities must commit funds to a specific project within five years and they shall remain available for expenditure for an additional 5 years unless an extension is authorized under the Act.

C. Expenditure Plans

Q1: Does the Act impose any requirements on Expenditure Plans adopted by Direct Recipients?

A: Yes. For an initial Direct Recipient Expenditure Plan to be deemed complete, it must demonstrate that over a five-year period it achieves the following:

- A minimum of 52% of the distribution is allocated towards construction of new affordable housing (“Production Funds”). These expenditures must prioritize developments that help achieve the jurisdiction’s regional housing need allocation (RHNA) targets for housing affordable to extremely low income (ELI), very low income (VLI), and low income (LI) households.
- A minimum of 15% of the distribution is allocated towards affordable housing preservation (“Preservation Funds”).
- A minimum of five percent of the distribution is allocated towards tenant protection programs (see C.Q2 below for additional information).

The Expenditure Plan must demonstrate that the remaining 28% of unallocated funds, referred to as Flexible Funds, will be expended on programs and projects that are consistent with voter approval of the Bond measure and the legal requirements of the Act and general obligation bonds.

Subsequent Expenditure Plans must include a report on the allocations and expenditures to date of projects and programs funded.

Q2: Can the Expenditure Plan lawfully allocate a minimum of five percent towards tenant protection programs, such as rental assistance and homeless prevention services?

A: Currently, Section 1 of Article XIIIA of the California Constitution provides that general obligation bonds may be used for the acquisition or improvement of Real Property. However, state legislators approved Assembly Constitutional Amendment 1 (ACA 1) in 2023, which will be submitted to California voters at the November 2024 general election. If that measure passes, it is possible that the eligible uses of general obligation bonds may be expanded to include some form of tenant protections. If the measure does not pass or does not include an expansion of allowable general obligation bond uses and the Bond passes, BAHFA staff will take forward an agenda item recommending that the BAHFA Board and the ABAG Executive Board allow Direct Recipients to deviate from the five percent minimum allocation for tenant protections. *See also Question C.Q3*.

Q3: May a county deviate from the Act's prescribed minimum allocations in its Expenditure Plan?

A: Yes. If after consulting with the BAHFA Advisory Committee, the BAHFA Board and the ABAG Executive Board each adopt a finding by two-thirds vote that the minimum allocations are not the best use of the funds to address the Direct Recipient's affordable housing needs, then the Direct Recipient's proposed alternative allocations may be implemented.

In addition, at least five years after passage of the Bond, the ABAG Executive Board and the BAHFA Board may change the minimum allocation rules by adopting a finding by a two-thirds vote that the region's housing need in any given expenditure category differs from the Act's requirements.

Q4: What role does BAHFA play in Expenditure Plans adopted by Direct Recipients?

A: The Direct Recipients will submit their adopted expenditure plans to BAHFA by a deadline set by BAHFA. The deadline will be at least 90 days after voters approve the Bond. BAHFA staff will confirm that submitted Expenditure Plans meet the requirements of the Act as outlined in Question C.Q1. BAHFA will post all approved Expenditure Plans on its website.

Q5: Are there any special notice procedures that Direct Recipients must follow prior to adopting an Expenditure Plan?

A: Yes. At least 30 days prior to the governing body of a Direct Recipient adopting the Expenditure Plan, the governing body must discuss the proposed Expenditure Plan at a properly noticed meeting of the governing body. In addition, Direct Recipients should consult with their legal counsel regarding compliance with other noticing requirements, such as the Ralph M. Brown Act (Cal. Gov. Code § 54950, *et seq*.).

Q6: Does the Act require a county Expenditure Plan to incorporate input from cities in their jurisdiction regarding the cities' housing needs?

A: Yes. As discussed in Question C.Q5, counties must have a discussion meeting prior to adopting their Expenditure Plan, and the Act requires counties to demonstrate in their Expenditure Plans that they have consulted with each city in the county (exclusive of cities that are Direct Recipients). To assist counties with this outreach effort, BAHFA is offering technical assistance. Please contact BAHFA@bayareametro.gov for further information on the technical assistance.

D. Use of Production Funds

Q1: How does an Expenditure Plan demonstrate that it prioritizes projects that help achieve RHNA targets for housing affordable to extremely low income, very low income and low-income households?

A: Of the RHNA assigned to every county, approximately 45% is comprised of housing affordable to extremely low income and very low-income households (affordability up to 30% AMI and 50% AMI, respectively). Another approximately 26% of the RHNA is attributable to low-income housing needs (affordability up to 80% AMI). Expenditure Plans should clearly outline the jurisdiction's intent to spend at least approximately 45% of their total production funding on extremely low income and very low-income housing and at least approximately 26% on low-income housing. In addition, Expenditure Plans should include a narrative regarding their prioritization process that is rationally tied to their RHNA obligations.

Q2: How long do new affordable housing developments using Production Funds need to remain affordable?

A: For projects funded with County Housing Revenue, the Act does not specify the term that the new affordable housing developments must remain affordable. However, Expenditure Plans must prioritize new developments that meet RHNA obligations. In determining the projections for RHNA, the California Department of Finance defines an Affordable Unit which then requires that new affordable housing developments funded with County Housing Revenue that are identified as RHNA prioritization projects must remain affordable for a minimum of 30 years.

All production and preservation development funded by BAHFA must remain affordable for a minimum of 55 years.

Q3: How do Local Governments ensure that affordable housing developments remain affordable for the applicable term?

A: A regulatory agreement executed by both the funding public entity and the property owner prescribes the term for affordability for the development and is recorded against the property. Future property owners are obligated to comply with the regulatory agreement.

Q4: Could adaptive reuse projects use Production Funds?

A: Yes. If the project to be funded converts commercial property to a new residential use, then the project may use Production Funds.

Note that a project could use both Production and Preservation Funds if, for an existing mixed-use building, the project includes rehabilitation of the existing residential portion and the conversion of the commercial space to a new residential use.

Q5: Could construction of new Accessory Dwelling Units (ADUs) use Production Funds?

A: Yes. Local Governments may use Production Funds for construction of ADUs. If the ADU is to satisfy the Local Government's RHNA obligation, then it must satisfy certain deed-restricted occupancy requirements (*see Question D.Q2*). Otherwise, occupancy of the ADU must be restricted to households earning 120% of AMI or less.

If BAHFA funds construction of ADUs, the new ADUs must remain affordable for a minimum of 55 years to households earning 80% of area median income or less.

Q6: Could master-leased housing serving special needs populations use Production Funds?

A: Yes. However, if a master leasing housing project is to satisfy a portion of a Local Government's extremely low income, very low income or low income RHNA obligation for state reporting purposes then Local Government should consult with its legal counsel. Note that in its Housing Element Annual Progress Report (APR) instructions, HCD indicates that local governments should not include group quarters facilities.

BAHFA can use Production Funds for master leased housing serving special needs populations as long as it carries a recorded deed restriction ensuring 55 years of affordability for households earning 80% AMI or less.

Q7: Could "interim" housing use Production Funds?

A: Under current law, an interim housing development may qualify as an eligible use of Production Funds if the funds will be used for the acquisition or improvement of Real Property (a "qualified interim housing project"). Note, some interim housing developments use fixtures to provide shelter, such as tiny houses on wheels, and such fixtures may not be considered an improvement of Real Property. Local Governments are encouraged to consult with their legal counsel to ensure the use of Production Funds for an interim housing development is consistent with the funding requirements of general obligation bonds.

In addition to Production Funds being a source for qualified interim housing under the Act, a Local Government may use Flexible Funds from County Housing Revenue for qualified interim housing.

BAHFA can use Regional Housing Revenue for a qualified interim housing development as long as the development is subject to a recorded deed restriction limiting occupancy to households earning 80% of area median income and below for 55 years.

Q8: Could homeless encampment closures use Production Funds?

A: Local Governments could use Production Funds for activities related to homeless encampment closures if the activities are necessary to construct new affordable housing and they otherwise meet general bond requirements. For example, if a Local Government sought to purchase the site of an encampment or prepare it for housing (e.g., by bringing utilities to the site) Production Funds could be expended on such activity. However, under current law, Production Funds cannot be used to assist residents with relocation assistance payments.

Q9: Can Production Funds be used for predevelopment activities?

A: Yes, as relates to the acquisition and improvement of real property. For example, costs directly related to building such as the creation of architectural drawings, engineering, geotechnical work, and permitting processes would be eligible.

Q10: Can Production funds be used for grants?

A: Yes, direct recipients of Bond funds may provide them to developer partners as grants as well as loans. BAHFA recommends that direct recipients work with their city/county counsel to ensure that grants include enforceable compliance language to ensure that the deed restrictions required by the Act will be met. In addition, BAHFA recommends tax counsel advice for direct recipients wishing to layer grants with other funding sources such as LIHTC and CDLAC.

E. Use of Preservation Funds

Q1: What type of projects qualify for Preservation Funds use?

A: There are three main types of qualifying Preservation projects:

1. The conversion of market-rate housing to affordable housing.
2. The preservation of affordable housing with expiring restrictions.
3. The rehabilitation of existing affordable housing not facing expiring restrictions.

Further, all Preservation projects may be subject to the following requirements:

- Projects funded by BAHFA must have a 55-year deed restricting the use of the project for affordable housing.
- Projects funded with County Housing Revenue must have a deed restricting the use to affordable housing, but the length of time is not prescribed by the Act.
- All preservation projects must cap affordability at 120% AMI.
- Both rental and ownership housing are eligible for use of Preservation Funds.

F. Use of Flexible Funds

Q1: Could the Revenue fund "silent second" mortgages to protect low to moderate income homeowners from foreclosure?

A: Yes. A "silent second" mortgage refers to a second loan held by a homeowner and provided by the Local Government for the purpose of curing a default on the primary mortgage to avoid foreclosure. The homeowner generally makes no payment or very little payment on the second mortgage, with the second lender being repaid when the property transfers. For Direct Recipients, Flexible Funds are the best source for this activity.

Any program to protect low to moderate income homeowners from foreclosure that is funded with either Regional Housing Revenue or County Housing Revenue must ensure that the program is consistent with the laws that govern the use of proceeds from general obligation bonds. Under current law, general obligation bond proceeds must be expended on the acquisition or improvement of Real Property. Local Governments are encouraged to work with their legal counsel to ensure that any "silent second" mortgage programs are designed to be consistent with the rules governing the use of funds from general obligation bonds.

G. Background

Bay Area Housing Finance Authority

The San Francisco Bay Area Regional Housing Finance Act (California Government Code § 64500, et seq.) (the Act) created the Bay Area Housing Finance Authority (BAHFA). BAHFA's purpose is to raise, administer and allocate funding and provide technical assistance at a regional level for tenant protection, affordable housing preservation and new affordable housing production. BAHFA's jurisdiction is the entire area within the boundaries of the counties of Alameda, Contra Costa, Marin, Napa, San Mateo, Santa Clara, Solano and Sonoma, and the city and county of San Francisco (San Francisco Bay Area).

BAHFA Governance

BAHFA is a joint effort of the Metropolitan Transportation Commission (MTC) and the Association of Bay Area Governments (ABAG). MTC was created by the state Legislature in 1970 (California Government Code § 66500 et seq.) to serve as the transportation planning, coordinating and financing agency for the nine-county San Francisco Bay Area.

BAHFA is governed by the same board that governs MTC. ABAG was formed in 1961 by a joint powers agreement among Bay Area local governments and serves as the comprehensive regional planning agency and Council of Governments for the nine counties and 101 cities and towns of the San Francisco Bay Area. The Executive Board of ABAG serves as BAHFA's executive board. Some actions require approval by both the BAHFA Board and the ABAG Executive Board in its role as BAHFA's executive board.