



Oregon

Tina Kotek, Governor

HPAC Finance Work Group Recommendation

Recommendation:

Require that OHCS utilize **outside legal counsel** with experience in affordable housing finance to prepare, negotiate, and close all affordable rental housing transactions rather than relying on Oregon DOJ attorneys.

Include attorneys' fees in closing costs.

Related Work Plan Topics

- Improve program delivery at OHCS
- Quasi-independent Housing Finance Agency

Adoption Date:

October 18, 2023

Method of Adoption:

Unanimous

Co-chairs Guidance: Standards for Analysis

1. Clearly describe the housing production issue that the recommended action(s) will address.

Engagement of knowledgeable outside legal counsel will expedite document preparation and transaction closings.

This long-standing issue worsened considerably in March 2023, when DOJ abruptly issued an amended opinion and interpretation of how the Local Innovation and Fast Track (LIFT) program could be operated within the constraints of Article XI-Q of the Oregon Constitution. DOJ's new opinion has effectively brought the production of thousands of units to a halt because it requires that the State – rather than any primary

lender – take a first lien position, which is unacceptable to regulated banks and CDFIs. Construction and permanent lenders have been unable to close on long-standing pipeline transactions, worsening the affordable housing crisis.

2. Provide a quantitative, if possible, and qualitative overview of the housing production issue.

OHCS’s requirement to use DOJ lawyers to prepare, review, and negotiate documents creates significant time delays for transactions. The lack of capacity and transaction specialization of DOJ lawyers within the highly technical affordable housing finance arena is a common concern among developers, lenders, investors, and other funders.

The LIFT opinion offers a stark example of the problem, and its resolution has become a top policy priority for Housing Oregon, among others.

3. To assess the issue and potential action(s), include subject matter experts representing all sides of the issue in work group meetings, including major government, industry, and stakeholder associations.

Most members of HPAC Finance have experience with the issue of poor legal representation by DOJ and it is a common complaint by stakeholders. Additionally, OHCS staff have informally identified document prep and turnaround time as an area ripe for improvement.

4. Provide an overview of the expected outcome of the recommended action(s), including quantitative/qualitative context if available.

- Faster times to transaction closing
- Increased ability to tailor documents to specific projects while maintaining industry standard funder protection.
- Reduction in DOJ fees to be paid by OHCS as transaction fees will be included in closing costs.

5. Estimate of the time frame (*immediate, short, medium, long-term*), feasibility (*low, medium, high*), and cost (*low, medium, high*) for implementation of the recommended action(s).

SHORT timeframe

HIGH feasibility

LOW cost

6. Provide a general overview of implementation, the who and how for the recommended action(s).

This recommendation may require a change in statutes, and likely requires a change in administrative rule.

OHCS would simply conduct a procurement to select a handful of qualified law firms to work on projects. Alternatively, the Attorney General could appoint outside counsel as Special Assistant AGs (however, statutory direction would still be helpful to delineate between outside counsel's role vs. the AG proper).

7. Outline the data and information needed for reporting to track the impact and implementation of the recommended action(s).

- Average time to closing
- Customer satisfaction

8. Identify any major externalities, unknowns, tradeoffs, or potential unintended consequences.

- Most law firms with experience in affordable housing already work on Oregon transactions, so the state will need to be prepared to manage potential and/or perceived conflicts of interest (which the lawyers can help with), and to secure the on-call services of multiple firms.
- Some less experienced OHCS staff are accustomed to relying on DOJ attorneys for business advice, as well as legal advice. These lines are commonly blurred. Underwriting and program staff will need to be better trained and have access to support from authorized decision-makers when complicated transactional are being negotiated.

Please include any relevant reports, data analyses, presentations, or other documents that would be informative and useful for the full HPAC as the recommendation is discussed and considered.

[LIFT Article in WW](#)