Beyond Shelter inc.

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December 18, 2020

Internal Revenue Service
Attn: CC:PA:LPD:PR (Reg-119890-18)
Room 5203
PO Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Comments on proposed Average Income Test regulations section 42(g)(1)(C)

To Whom It May Concern;

Beyond Shelter, Inc. is a small non-profit developer of affordable housing. One of our most important tools in meeting the affordable housing needs in our community is the Low Income Tax Credit program. We were glad to have the Average Income Test added to the program, as a means of both renting to households at 60% and 80% of area median income, who often are the missing middle when it comes to access to affordable housing, and balancing that with more units for extremely low income households. Based on our review of the proposed rule we offer the following observations, comments and suggestions.

Observation

- code references "designated income limitations" (infers designated units can float)
- proposed rule references "designated low income units" (infers physical units fixed)

Comments & Concerns

- Fair Housing - Fixing the income targets to physical units will certainly become problematic with regard to reasonable accommodation requests under the Fair Housing Act. Say we have a household that income certifies at 60% of AMI and occupy a standard apartment, then suffer an illness or injury rendering a member of the household disabled thus trigging a request for accommodation to move to an accessible unit. If the accessible unit has a 50% income target we could not make that accommodation. That opens owners and managers up to fair housing and disability law suits which is not in anyone's best interest. This is a very plausible scenario, particularly in senior designated housing which we produce a lot of. It is also very avoidable by allowing the income limitations to float.
- VAWA – With fixed income targeting tied to a physical unit we could also easily have a situation where for instance, a tenant is experiencing domestic violence in their current apartment and requests an emergency move for their safety. If the household is certified as a 50% income household, but the only unit available is a 30% unit we could not accommodate their request to

move without violating the set asides. This would be dangerous to the tenant, and also put the owner at risk legal action for violating the VAWA. The ability to float the income target with the household, instead of tying it to a physical unit, offers owners and managers much more flexibility to meet the needs of their tenants in a reasonable way. There is no down side to this.

- Change in Income upon recertification – if a household is income qualified at 50% of AMI at initial occupancy, then gets a better job, or gets married and their income goes up, over 140% (allowed to stay under the current rules of the program), then the next available unit rule would say the next household to lease to would be a 50% income household. But the only unit vacant is a 30% unit, or a 60% unit. Or alternatively, if you had an 80% income household that lost a job and at recertification qualified at 50% of AMI, do you move them to a 50% unit? What if there is not a 50% unit available? There seems to be a mismatch between these code and the proposed rule.
- Layering multiple funding sources – Our LIHTC developments almost always have multiple funding sources, frequently including other federal funds like the HOME Program, and the Housing Trust Fund. Those programs are operating under the premises that income targets float with the tenants, and the overall mix of incomes in the building is what they monitor for. In fact, in the HOME Program, the remedy for having an over income household at recertification is for another unit to be rented to an income eligible household to bring the project back into balance. Another example of how units float to meet the overall objective of the project rather than focusing on one particular unit. In order to meet the affordable housing needs in our community and state, we need to be able to blend multiple funding sources to keep rents as low as possible. The rules of these federal programs really need to mesh and not fight each other or we will not be able to serve as many households in need of affordable housing.
- Non-compliance – Under these proposed rule the chance of being non-compliant and not even knowing it until after the 60 day grace period seems to be a significant risk. Our Housing Finance Agency generally monitors in the summer time, well after the cure period has expired. We would not even know there was a problem until it was too late to fix it.
- Risk of Credit Loss – given all of the above we see there is a serious chance of credits being lost over small errors and program differences. Credit loss is the worst case scenario for a developer. Developers make guarantees to investors that they will deliver the tax credits that the investor has pre-paid for. If the credits are not delivered as promised, the developer/guarantor has to pay money back to the investor to cover their credit losses. As a non-profit developer seeking to house those most in need, we too make those guarantees to investors in order to get deals done. We are generally quite conservative in our underwriting and really try to minimize our risks to limit exposure under the guarantees. If the proposed rule goes into effect without any changes we will be unlikely to pursue deals that include the Average Income set-aside.

Suggestions

- First, use the same language in the rule as is used in Section 42 of the Code with respect to designating "income limitations", not "low income units", thus allowing the income targets to float and not be fixed to a particular unit.

- Second, use the 40/60 test as a minimum safe harbor so that if a project has at least 40% of households earning 60% of AMI or less they will not be at risk of losing credits. An alternative would might be limiting the non-compliance to the unit that caused the average income to go over 60% rather than the whole project being at risk of credit loss.
- Third, if nothing else changes there must at a minimum be some means of getting an exception in the case of requests for reasonable accommodation or VAWA relocations. The program should not be in conflict with other laws already enacted.

We thank you for your consideration and the opportunity to provide comments.

Sincerely,

Daniel P. Madler
CEO

Lisa Rotvold
Development Director

Randy Bach
Asset Management Director