

May 6, 2011

To: Bruce Brensdal, Montana Board of Housing

From: Jeanne Peterson

Re: Review of the State of Montana's Qualified Allocation Plan

Background –This review of the Montana Board of Housing's Qualified Allocation Plan (QAP) for the allocation of the state's low income housing tax credit volume cap came about as a result of a lawsuit. In September, 2010, a Settlement Agreement was reached in that lawsuit, which, among other things, stipulated that I would review the Montana QAP and make recommendations for improving it, "with particular attention to tribal interests". The settlement agreement goes on to say that the report and comments received will be considered by the QAP working group that will meet in May 2011, and will be submitted to the Montana Board of Housing for its consideration.

Section 42 of the Internal Revenue Code establishes the Low Income Housing Tax Credit and, together with various Treasury regulations, delineates the responsibilities of the state credit agencies in administering the program. Subsection 42(m) of the Code mandates that credit allocations only be made pursuant to a Qualified Allocation Plan developed by each state credit agency that "sets forth the selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions" and gives preference to projects 1) serving the lowest income tenants, projects 2) obligated to serve qualified tenants for the longest period of time, and projects 3) in qualified census tracts where the development "contributes to a concerted community revitalization plan". Additionally, the Code sets forth 10 selection criteria that QAPs must include.

Beyond the guidance found in the Code and accompanying regulations, state housing credit agencies have the ability, recognized by Congress in crafting the Low Income Housing Tax Credit Program, to determine their housing needs and to allocate the credit accordingly. This gives the states a great deal of flexibility in their allocation systems; it does not, however, permit them to violate anti-discrimination laws, whether by intent or by systems, policies, or procedures that result in a disparate impact on any protected class or group.

This report and the accompanying draft QAP includes suggestions for changes to Montana's QAP, while understanding that Montana's affordable housing stakeholders, and ultimately, the MBOH itself, will determine which, if any, of the suggested changes are ultimately adopted.

History of Tax Credit Applications and Awards from Tribal Applicants and on Indian Reservations

It does not appear to this reviewer that either by design or by application of policies and procedures, MBOH has discriminated against Indian country applicants. Below is a listing (supplied by MBOH) of Indian country applicants and awards over the years. And while it is true, as pointed out by the plaintiff in the lawsuit, that these numbers represent *project* awards and not numbers of *units or dollar awards*, MBOH has no control over the applications that it receives; those are determined by the applicants themselves.

Year	Tribal Applicant	Non-tribal applicant On Reservation Land	Credit
1987-1995	None	None	-
1996	1	1	Yes, all
1997	None	None	
1998	None	None	
1999	1	2	Yes, all
2000	3	2	Yes, all
2001	1	4	3, Yes; 1 ,no
2002	2	2	Yes; 1 returned
2003	2	None	Yes
2004	1	None	Yes
2005	2	None	Yes, all
2006	2	None	Yes
2007	2	1	Partial
2008	3	None	1
2009	None	None	
2010	None	None	

Thus, of 20 applications from tribal applicants over the years and 12 from non-tribal applicants on reservation land, all but 3 received some award of credit, and it does not appear that Indian Country applications have been treated differently than non-Indian Country applications.

However, there are certain scoring categories, and places in the QAP where it would be advisable to recognize the differences in Indian Country situations and to call them out. This includes recognition that land control is treated differently in Indian Country and that there may be funds available for Indian Country developments that are not available to others (NAHASDA, for example).

The MBOH, the body that actually determines which applicants will be awarded a tax credit Reservation, may decide to make an award that is not in accordance with the scoring and ranking system. The Internal Revenue Code recognizes that this may occasionally happen and provides for it, at subsection 42(m)(1)(A)(iv) which states that when it does, the credit agency must assure that “a written explanation is available to the general public for any allocation of a housing credit dollar amount which is not made in accordance with established priorities and selection criteria of the housing credit agency”.

MBOH staff indicate that not only do they not have the authority to determine awards (this authority lies with the Board and not staff), but that the scoring and ranking system is meant to establish those applicants that have scored the minimum point threshold (currently 85) and that the Board then considers all of those applicants meeting the minimum. The QAP states that “the awarding of points to projects pursuant to the QAP is for the purpose of determining that the projects meet the requirements of the QAP and to provide guidance to the Board, but do not control the allocation of tax credits. The Board will allocate tax credits to the projects that it determines best meet the needs of low income people within the state of Montana regardless of the score awarded to each of the several projects or staff recommendations.” It goes on to list various factors that the Board may consider in the allocation process.

While understanding that the ultimate decision-making rests with the Board, the QAP should incorporate the language of IRC 42(m)(1)(A)(iv), and should give very serious weight to the scoring and ranking of applications.

Generally, a QAP should be as transparent as possible; however, there will almost always be some element of subjectivity involved, whether it be in site selection, market analysis, or in other categories of consideration. Applicants prefer QAPs that enable them to gauge exactly how their applications will fare; however, in the Montana system (as in some others) applications in any given round are compared to one another, meaning that although an applicant may be able to predict its own score, it will most likely be unaware of other applicants’ scores.

Suggested Changes to the QAP: Reading the current QAP, one finds that there are many redundancies, some of which are proposed to be eliminated, although this reviewer has not undertaken a complete rewrite of the QAP. Also, on another non-substantive note, are suggestions for revising the order in which some of the paragraphs appear but without changing their substance. It would be helpful to have all requirements grouped together, for example, and to have an accompanying checklist of items to be included in the application.

With respect to particular substantive changes, the following general suggestions are offered:

1. Recognize that developments in Indian Country have differences from those not in Indian Country and call out those differences where appropriate (land control, zoning, use of NAHASDA funds, for examples)
2. Make zoning a threshold requirement
3. Require a letter of interest (at the very least) from a potential equity investor for “Readiness” points
4. Permit people with higher incomes to reside in units where rents may be further restricted
5. Give an advantage to applications that have permanent soft debt commitments and/or operating subsidies
6. Make sure that all selection criteria mentioned in Section 42(m) are included in the QAP (public housing waiting lists)

Scoring revision suggestions:

Section 42(m) states that QAPs should give “preference” to 1) projects serving the lowest income tenants; 2) projects obligated to serve qualified tenants for the longest periods, and 3) projects which are located in qualified census tracts..and the development of which contributes to a concerted community revitalization plan..”

Montana’s Plan does consider these preferences; however, for example, the points awarded for Extended Low Income use are far less than the number of points available for Project Characteristics.

This could be remedied by doubling the number of points in the **Extended Low Income Use** category from 10 to 20.

Lower Income Tenants: The points seem appropriate; however, MBOH should consider permitting the actual income limits to be higher while assuring that the rents will remain at the levels promised for points.

Project Location: In the first two subcategories, award 2 points (not 0-2). Keep total points the same at 7.

Housing Needs Consideration: Keep total points the same but call out 3 different categories of points

Project Characteristics: Decrease total number of points from 23 to 22.. Increase points for projects using other federal funds, using a measurable standard. Keep quality and green points the same.

Sponsor Characteristics: You may want to quantify how points will be awarded (for example, number of successful developments already in existence with positive cash flow) I have not done this in the draft.

Readiness of the Development to Proceed: Delete zoning as it should be a threshold matter. Give 2 points each for financing letter and equity provider letter and all approvals except building permits.

Participation of Local Tax-Exempt Organization: Give all 5 points to applicants meeting the requirements of the category (instead of 0-5 points)

Tenant Populations with Special Housing Needs: leave as is.

Preservation of Affordable Housing Projects: Give 2 points to applicants meeting the requirements of the category

Market Need & Community Support: leave as is

Intermediary Costs: leave as is

Public Housing Waiting Lists. This is a new category in keeping with the requirement in Section 42(m) of the IRC that it be a selection criterion. Award 1 point.

Adopting these changes (or ones like it) would level the playing field, and would bring a bit more certainty to the process and assure applicants of transparency and fairness in consideration of applications, while still permitting staff to exercise discretion in some categories. .

It is also recommended for the future that MBOH utilize statistical data to determine which areas of the state are most in need and incorporate this information into its decision making process for the allocation of housing tax credits.