

Novogradac Journal of Tax Credits

News, Analysis and Commentary On Affordable Housing, Community Development and Renewable Energy Tax Credits

December 2010, Volume I, Issue XII

Published by Novogradac & Company LLP

Montana, Travois Reach Settlement Agreement in QAP Lawsuit

By Jennifer Dockery, Staff Writer, Novogradac & Company LLP

In September, Travois Inc., a housing and economic development financing firm that works with Native American communities, reached an agreement through mediation with three named Montana Board of Housing (MBOH) staff and the board chairperson. The agreement released a 2008 lawsuit filed by Travois in response to what it saw as inequalities in the qualified allocation plan (QAP) that Montana used to award low-income housing tax credits (LIHTCs). Specifically, Travois asserted that scoring for Native American applications was inconsistent and that a waiting period had a negative effect on Native American communities. As a result of the mediation session, the two parties agreed that the housing finance agency would hire an independent third-party professional to review the state's QAP and make recommendations for improving the document, paying particular attention to tribal interests.

"Even though we disagreed that the MBOH had acted in any discriminatory fashion, we felt that the changes we proposed to Travois to resolve the litigation would result in a stronger QAP," said Bruce Brensdal, MBOH's executive director.

The Issues

In discussing the reasons for bringing the suit, Travois' chairman David Bland said that a QAP should have three characteristics; it should be objective, measurable and transparent. "In our view, the Montana QAP was none of those things."

Travois came to this conclusion after reviewing applications submitted during the 2007 and 2008 funding rounds. Travois felt that a year-long waiting period required for first-time

developers had a negative effect on LIHTC development on tribal lands.

Travois also asserted that the scoring inconsistencies were partially the result of the MBOH not placing a high enough value on the soft debt, including funds provided by the federal government, that the tribes' proposed developments carried.

Additionally, Travois felt that the QAP did not clearly state the value it assigned to community support letters. The QAP stated that MBOH would award up to 10 points for support letters, but it did not provide guidance on the weight of letters from various community members or organizations. Travois' Bland said that this resulted in MBOH awarding the points, which properties use to reach the minimum threshold, in a subjective manner.

"We're using it as an example of what needs to come out of the QAP," Bland said. "We're not asking for a preference for Native Americans. What we're asking for is a level playing field."

Another cause of disagreement was that MBOH would not approve a developer's second LIHTC development until that developer had successfully managed its first property for at least one full year. Tribal lands have only one housing developer—the housing authority. Calculating that it would take a developer six months to one year to find an investor and 13 to 14 months to build and place the units in service, Bland said that the additional one-year waiting period essentially imposed a three-year stoppage of LIHTC housing develop-

continued on page 2

continued from page 1
ment on tribal lands.

"It's effectively a three-year no-build period and there's just no way to fill that gap on an Indian reservation," Bland said. Travois argued that the first development should only have to be fully leased and pass a compliance audit before a developer can apply for another LIHTC allocation.

Resolution

On September 14, the defendants and Travois reached a settlement agreement. As part of the agreement, MBOH staff members agreed to recommend that the board eliminate the one-year waiting period and allow a developer to apply after its project is fully leased and a compliance audit that has revealed no significant problems has been conducted. Additionally, the staff members will recommend that MBOH eliminate five of the 10 points for community support and not have staff score community support. Instead community support letters will receive no preference points but must be included. Letters must be development specific and address how the property meets the needs of the community. New letters of support and nonsupport must be submitted for each application for each round of competition. These letters will be provided to the board for consideration.

Under the agreement, MBOH also will conduct or participate in several workshops. It will conduct a "soft debt" workshop for board members and staff to better acquaint them with tribes use of the funds. The agency will also conduct annual or biannual workshops on LIHTCs for the Montana Tribal Housing Authority Coalition.

Finally, MBOH agreed to hire a consultant to review the QAP and post the resulting report on its web site and provide it to persons on its listserv. MBOH will then collect public comments. The QAP working group that will meet in May 2011 will consider the report and comments.

"I think [the settlement] acknowledged that the QAP is flawed," Bland said. He added that he is pleased with the agreement and hopes that it will lead to other QAP changes.

On September 17, MBOH sent a memo to board members proposing that MBOH amend the 2011 QAP to include a shorter waiting period and a fewer number of community support points. The memo encourages the board to accept the changes. MBOH will consider other changes for the 2012 QAP.

"For a variety of reasons, we did not believe that Travois would prevail in this matter. Our research indicated that, contrary to Travois' assertions, the Montana Board of Housing has been very cognizant of issues involving Indian Country matters, and that

continued on page 3

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ISSN 2152-646X

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continued from page 2

the statistics demonstrate that the MBOH funds housing projects on Indian reservations at a much higher rate than projects that are off reservation," said Gerald Watne, MBOH's multifamily housing program director. "However, in order to resolve the litigation, it was a reasonable cooperative agreement that we could as the staff for the board of housing take to the board for their consideration."

MBOH planned to hold a public hearing on the proposed changes at its November 15 board meeting. ❖

This article first appeared in the December 2010 issue of the Novogradac Journal of Tax Credits.

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