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Oregon Housing & Community Services

Affordable Rental Housing Division

Average Income Test (AIT) Policy

Low Income Housing Tax Credit Program (LIHTC)

March 2025

What is Average Income?

Average Income (AI) is a minimum set-aside election under Section 42 of the Internal Revenue Code as authorized by The Consolidated Appropriations Act of 2018. AI's implementation has been stipulated in the Final Regulations issued in the Treasury Regulations at 1.42-19. The Average Income set aside is now a third option to the traditional minimum set aside election options of 20/50 or 40/60 and functions as a set-aside test, as such it's commonly known as an Average Income Test or AIT.

Multifamily Tax Subsidy Projects (MTSP) Income and Rent Limits

Under the Housing and Economic Recovery Act (HERA) Act of 2008, Low Income Housing Tax Credit (LIHTC) properties were given their own income and rent limits, referred to by HUD as Multifamily Tax Subsidy Projects (MTSP) limits. OHCS publishes and updates these limits periodically.

Average Income allows a property to serve households of up to 80% of Area Median Income (AMI), if the average income limit for all tax credit units in the project (as defined by the 8609 Line 8b election) is at or below 60% AMI. The income limit options under Average Income are expanded to include 20%, 30%, 40%, 50%, 60%, 70%, and 80% AMI designations in whole number increments.

Averaging is based on the AMI level designated to the unit, not the actual income of the household residing in the unit. AMI designations are allowed to float between units within the project (i.e. a particular unit is not locked into a specific AMI level) but the total unit mix must be maintained at 60% AMI or less. Additionally, AMI designations are elected by the taxpayer before a unit is first occupied §1.4219(c)(3)(i)(A) or by the end of the first year of the compliance period consistent with the REUA.

The final regulation allows for a change in unit designation under any of the following circumstances:

1. Federally permitted changes: any IRS forms, instructions, or guidance published in any Internal Revenue Bulletin allow for such changes.
2. Agency-permitted changes: To address noncompliance with AIT minimum set-aside or project average. When an event occurs that causes a previously qualifying group of units identified for either the minimum set-aside or the applicable fraction to no longer be described in Treas. Reg. 1.41-19(b)(2)(ii), redesignation may be allowed. This is limited to units that are vacant or are occupied by a household that would satisfy the new lower imputed income limitation. Note that rent may need to be lowered to avoid noncompliance with rent limits. Such correction may also include adding or removing units to the qualified group of units to achieve an average of imputed income limitations at or below 60% AMI. If an issue is not discovered and corrected within the taxable year that the problem occurs, any retroactive correction to designations must be made within 180 days of discovery by the owner or OHCS. If discovered by the owner, the issue and owner's intended corrective action must be

promptly reported to OHCS's assigned compliance officer to benefit from this discretionary correction period. On a case-by-case basis, if retroactive correction is made within 180 days of discovery, OHCS has the discretion to waive in writing any failure to comply with the requirements of Treas. Reg. 1.42-19T(c)(1)-(3)

3. Certain Laws: As required or appropriate to enhance protections under the Americans with Disability Act, The Fair Housing Act, The Violence Against Women Act, The Rehabilitation Act of 1973 of any other state, federal or local law or program that protects tenants. Tenant Transfer: When a current income-qualified tenant transfers to a different unit in the same project, the units "swap" status.
4. Restoring compliance with the Average Income requirements: As needed for the purposes of identifying a qualified group of units, either for purposes of satisfying the AIT set-aside and for purposes of identifying the units to be used in computing applicable fraction(s).

Please note: The minimum set-aside election is irrevocable once made on the IRS Form 8609. Therefore, existing projects already placed in service are not eligible for the AI election.

Election Requirements

a. Oregon Housing & Community Services requires that all projects utilizing the Average Income minimum set-aside election reflect this election in their project design and final construction product. Project designs that do not require the Average Income minimum set-aside election should not choose this set-aside election on the Form 8609.
b. For projects with more than one building, Owners must select that each building is part of a multiple building set-aside on line 8b in Part II of IRS Form 8609; Both 9% LIHTC and 4% LIHTC/Bond projects may select the Average Income set-aside election for any project applying for resources.

Special Provisions & Applicability to 4% LIHTC / Tax Exempt Bond Developments

Section 142 (the tax-exempt bond regulation) was not amended to include Average Income provisions. Therefore, to be eligible for tax-exempt bonds under Section 142, a project must still meet a 20/50 or 40/60 minimum set-aside. However, for purposes of the 4% credit allocation, the project can elect to do Average Income. Therefore, a 4%/bond development can elect an Average Income minimum set-aside for purposes of tax credit compliance, as long as the unit mix selected would also meet either a 20/50 or 40/60 minimum set-aside test for purposes of bond compliance.

Development Requirements

Only new construction projects and rehabilitation projects not subject to an existing Declaration of Land Use Restrictive Covenants for Low-Income Housing Tax Credits are eligible to utilize Average Income. Applicants electing to use Average Income must comply with the following Oregon Housing & Community Services (OHCS) requirements:

c. The income average for the project cannot exceed 60% of the area median income (AMI);

d. Market rate units are not allowed;
e. Owners must provide a market study/analysis addressing the need/demand for the income mix;
f. Owners must provide an acceptable Operating Budget indicating sufficient cash flow during the duration of the affordability period, and;
g. Owners are required to submit a written authorization from all permanent lenders and investors and/or public or private funders to utilize Average Income.

Projects may select income levels consisting of 20%, 30%, 40%, 50%, 60%, 70% & 80% AMI. The owner must designate the Qualified Group of Units for purposes of the Minimum Set-Aside AND Applicable Fraction.

Any project utilizing Average Income will be subject to a property assessment fee. Properties may choose between:

A. A one-time assessment fee per unit (assessed on all units including employee units), to be paid prior to issuance of the project's IRS Form 8609.
B. Properties may also choose to include these fees with their annual monitoring fees as an additional per unit annual fee (assessed on all units including employee units). Average income fees are in addition to standard monitoring fees.

The Average Income fee determination will become a part of the underwriting process. Assessment fees have been aligned with similar OHCS layered programs that require additional program monitoring such as bond funding. Assessment fees are subject to review and modification as determined necessary by OHCS.

Policy Process Requirements

One of the benefits of the Average Income set aside is the ability to provide deeper subsidy to some units. Properties selecting Average Income as the set aside must incorporate the following in their processes:

- For the purpose of applying the Next Available Unit Rule (NAUR), a household is deemed to be over-income if the household's income exceeds the higher of 140% of the 60% income limit (for income levels 20%, 30%, 40%, 50% or 60%) or over 140% of the limit that applies to the unit (70% or 80%).
- Projects with a recorded Housing Tax Credit Land Use Restrictive Covenant (LURC) are ineligible to change the set-aside election at re-syndication. Only newly constructed buildings, separate from the original project, can elect the Average Income set-aside via a waiver request to OHCS. New units/BINs must be treated as a multiple building project, by checking "Yes" on line 8b on Form 8609.
- Applicants will designate units at a specific AMI by unit type (e.g., 10 one-bedroom units at 50%) during lease-up and at year one reporting, consistent as much as is possible with underwriting assumptions.
- Income limits must be equally distributed, as a percentage, among bedroom sizes to ensure that every unit size represents all AMI layers offered. OHCS will consider exceptions to this requirement when necessary to:

- reduce relocation impact in occupied rehab properties,
- comply with the requirements of federal project-based assistance, and
- facilitate HUD 811 units or other forms of supportive housing.

NOTE: The 30% AMI income and rent limit under the LIHTC program for purposes of Income Averaging is not the same as the extremely low-income limit under the National Housing Trust Fund requirements. Owners that have layered National Housing Trust funds with LIHTCs should be mindful of this difference as well as differences between the LIHTC income and rent limits and those of other programs that apply to a project.

Additional Compliance Monitoring Requirements:

OHCS retains the ability to monitor all projects as determined necessary by OHCS staff.

a. Income and rent designations are allowed to float to maintain compliance with set-asides specified in the application.
b. All set-asides must follow the Multifamily Tax Subsidy Program (MTSP) income and rent limits as published by HUD Annually. Any units where income or rent exceeds the limit for the set-aside specified on the low-income certification will be reported to the IRS.
c. As part of the annual review of the Annual Owner Certification, the Agency will test compliance with the Average Income requirements.
d. A 100% tax credit project that has elected Average Income is still exempt from performing full recertifications subsequent to the first-year recertification. If a project requires recertification and the household's income has increased at time of recertification, OHCS will continue to use the AMI level the household initially qualified under at time of move-in to calculate the Average Income Test, as long as the unit remains restricted at that rent level. The unit is not "redesignated" due to income increases at recertification.
e. Projects electing AIT set-aside should make sure to address average income in their tenant selection plan, specifically how the waitlist will be managed in accordance with their average income requirements.

Average Income Policy

Appendix A – Initial Implementation Provisions

Average Income Policy terms are applicable to all Low-Income Housing Tax Credit (LIHTC) awardees making the Average Income set-aside election under the provisions of OHCS' current Qualified Allocation Plan (QAP). All LIHTC applications must specify this set-aside election within their application. Non-competitive LIHTC awards may request a modification to their original election prior to issuance of 8609's.

To request a modification, the owner must submit to OHCS an update from the market analyst confirming that they have reviewed the proposed changes in income targeting and rents charged and that the changes will not negatively impact market demand. This information should be submitted to Jacqueline Santiago, Sr. Tax Credit Program Manager: jacqueline.santiago@hcs.oregon.gov no later than 60 days prior to planned lease up. OHCS approval is required prior to project lease up.

Approval is subject to OHCS' confirmation that:

A. the owner's proposed plan meets the Average Income requirements; and
B. the application still meets OHCS' underwriting and market study threshold requirements.

Updated regulatory documents will be required upon approval. OHCS will not approve any request that would result in a decrease in the total number of tax credit units committed to in the initial application.

Resources:

Federal Register - https://www.federalregister.gov/documents/2022/10/12/2022-22070/section-42-low-income-housing-credit-average-income-test-regulations

Novogradac - https://www.novoco.com/periodicals/articles/irs-releases-final-temporary-regulations-average-income-test

https://www.ncsha.org/resource/housing-credit-reference-guide-3/