

August 17, 2020

Wille Logan, PhD.
President/Chief Executive Officer
Opa-locka Community Development Corporation
490 Opa-locka Boulevard
Suite 20
Opa-locka, Florida 33054

RE: Opa-Locka Community Development Corporation, Inc. v. HK Aswan, LLC, Hallkeen Management, Inc. and Aswan Village Associates, LLC – Case No. 2019-16913-CA-01

Dear Dr. Logan,

On behalf of the National Housing Trust and the undersigned organizations, we are writing this letter to express our collective support for Opa-locka Community Development Corporation (“OLCDC”) in connection with the above-referenced litigation, and to address recent arguments made by the Defendants in their Motion for Reconsideration filed in your case. Specifically, we write to express our disagreement with the Defendants’ hypothesis that the Court’s recent summary judgment decision is inconsistent with sound public policy and will frustrate the cause of affordable housing. In our opinion, which is based on decades of experience working and investing in, developing, and managing affordable housing financed with the Low Income Housing Tax Credit (“LIHTC”), the Court’s decision is consistent with congressional intent and will serve to enhance the cause of affordable housing. We also believe that the Court’s decision will serve to further the mission of nonprofit participants and others who utilize the LIHTC program, as well as organizations that provide equity investments in the development of new affordable housing and partner with nonprofits like OLCDC. Also, based on many of our organizations’ participation in the original drafting of the nonprofit Right of First Refusal (“ROFR”) and the enactment of Section 42(i)(7) of the I.R.S. Code in 1989 when the ROFR was created, we want to share with you our perspective on the issues concerning the ROFR.

As you know, the purpose of the ROFR is to enable nonprofit general partners (in addition to government agencies and tenant organizations) to obtain full ownership of affordable housing developments, financed under the LIHTC program, after a 15-year period known as the Compliance Period, and to do so for a statutorily prescribed, below market purchase price that includes the assumption of property debt and the payment of certain taxes as may be applicable. Virtually all LIHTC partnerships involving nonprofit owners include a ROFR, and in almost all cases the ROFR has worked as intended to transfer ownership under the terms of the statute. More recently, however, disputes have arisen because some organizations – typically entities who acquired control of LIHTC partnership interests years after the original investment – have rejected the ability of nonprofits like OLCDC to exercise their rights under the ROFR in hopes of receiving

financial windfalls never intended by the LIHTC program. As a result, this has engendered legal disputes that have resulted in litigation, like your case. In such disputes, these organizations have taken the position that the section 42(i)(7) ROFR is a common law right-of-first-refusal and they do not need to recognize the rights established in the partnership agreement without a bona fide and enforceable offer from an unrelated third party with whom a contract for sale is ultimately executed. In essence, they have rejected a bargained-for-right in the partnership agreement held by the nonprofit – taking the position that the contractual language is basically meaningless. Most nonprofits do not have the resources to litigate these issues in court, so a stalemate ensues that is used by such parties to leverage a cash payment in return for leaving the partnership. The payment of such scarce funds undermines the continued viability of the property as affordable housing, in contravention of congressional intent. This unfortunate reality, which we believe has played out in your case, is discussed at length in a detailed report issued by the Washington State Housing Finance Commission, referred to as the “WSHFC Report,” in the Fall of 2019.

While the language in section 42(i)(7) refers to a “right-of-first-refusal,” it clearly was not intended to be a common law right-of-first-refusal because the purchase price is established in the statute and therefore is not based on the nonprofit holder of the ROFR meeting or matching an offer price from a third party. This view, as in your case, is supported by the Supreme Judicial Court of Massachusetts in *Homeowner’s Rehab, Inc. v. Related Corporate V SLP, LP* (479 Mass. 741 (2018)), where the Court found that a nonprofit general partner appropriately exercised its ROFR even though not all common law right-of-first-refusal requirements were satisfied. In reaching this holding, the Court gave significant weight to public policy considerations and congressional intent. For instance, the Court noted, “[t]o condition the right of first refusal on a bona fide offer, then, would mean that it would almost never be triggered. We decline to interpret the agreements in a way that would so obviously contravene the purpose of § 42(i)(7).” As you know, the Court in your case reached similar, correct conclusions in support of the clear purpose of § 42(i)(7). The Court’s decision in your case is consistent with and furthers the sound policy objectives of § 42(i)(7), and thus furthers the cause of affordable housing.

Additionally, under the LIHTC program, there is a 10% set-aside designed to encourage and ensure nonprofit participation in the development and long-term ownership of affordable housing. As you know, this 10% set-aside results in, on an annual basis, nonprofit participation in at least 10% of all new affordable housing development nationwide. This set-aside, when coupled with the intent of the ROFR and its statutorily created below market minimum purchase price (often referred to as the “debt plus taxes” transfer price), makes clear the LIHTC program’s intent to facilitate long-term nonprofit participation in, and ownership of, affordable housing. These policy objectives are accomplished through the Court’s summary judgment decision in your case because, in part, it ensures OLCDC’s long-term sole ownership. We further believe that the decision also serves to prevent the Defendants from stripping full access to real estate equity away from OLCDC. And, by allowing OLCDC to exercise the ROFR as intended under the LIHTC program and enforcing OLCDC’s clear contractual right, the Court furthered the program’s objective of an

ease of transfer of ownership to nonprofit participants, like OLCDC, after the tax credit investment had run its course during the aforementioned Compliance Period. And, notably in your case, we believe that the Court's decision and enforcement of OLCDC's contractual right furthers the sound policy objectives of racial equity and social justice by, among other things, ensuring that OLCDC – an organization founded by people of color to work in diverse communities to provide safe, affordable housing, programs and opportunities – will own this real estate, in perpetuity, and be able to use all of the equity that has built up in it for future development of affordable housing, as well as the funding of additional community programs and opportunities.

We also want to specifically reject the Defendants' contention that this will undermine investment in affordable housing through the LIHTC program. While we don't believe that is an appropriate consideration for the Court in a case that turns on the contractual rights of the parties as permitted in federal statute, we want to stress that the Defendants' contention is without any merit. As stated above, in almost all cases the ROFR works as intended to transfer full ownership after the Compliance Period to the nonprofit general partner. Tax credit investors understand when they commit equity capital to this program that their investment is undertaken for a financial return that is based on the tax subsidies in the program, not based on an expectation of residual value. They understand, and invest billions of dollars in affordable housing, with the assumption that the ROFR will work as Congress intended to transfer full ownership to the nonprofit general partner. Court decisions that uphold the contractually bargained for ROFR will have absolutely no effect whatsoever on the availability and cost of equity capital for the LIHTC program. We express this view as organizations representing nonprofit developers and tax credit investors, and as organizations in the business of raising billions of dollars of equity capital annually from investors.

In conclusion, we continue to support your efforts and wish to share our whole-hearted disagreement with the Defendants' contention that the Court's summary judgment decision will stifle future investment in affordable housing; it will do no such thing in our collective opinions. Rather, the Court's decision will serve to further the sound policy objectives of the LIHTC program and the statutorily provided ROFR, and, hopefully, it will serve to discourage those who wish to prevent enforcement of the nonprofit ROFR as a means to strip equity from communities in need across the United States.

Sincerely,

Community Economic Development Assistance Corporation

Downtown Action to Save Housing

Florida Housing Coalition

Housing Partnership Network

Local Initiatives Support Corporation

Mercy Housing

National Affordable Housing Trust

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National Association of Affordable Housing Lenders
National Association of State and Local Equity Funds
National Church Residences
National Equity Fund
National Housing Law Project
National Housing Trust
National Low Income Housing Coalition
Network for Oregon Affordable Housing
Preservation of Affordable Housing
Retirement Housing Foundation
Stewards of Affordable Housing for the Future
The Community Builders
Volunteers of America

