INTEREST OF AMICI CURIAE

The special contractual right of first refusal at issue here serves to preserve the affordability and viability of Low-Income Housing Tax Credit ("**LIHTC**") projects through long-term nonprofit control. That purpose is at the very heart of this appeal. As national, state and local organizations, and housing nonprofits with firsthand experience in advancing the preservation of LIHTC projects in Florida and nationwide, Amici Curiae have a strong and unique interest in this case.[1]

SUMMARY OF THE ARGUMENT

The Court must determine what event(s) served to trigger the right of first refusal (**"ROFR"**) at issue here and the Court's ruling will have an impact well beyond this one controversy.

As part of a growing trend of for-profit successor tax credit investors looking to squeeze their nonprofit general partners for profit, Appellant Aswan Village Associates LLC (**"Aswan"**) seeks to prevent Appellee Opa-locka Community Development Corporation (**"OLCDC"**) from exercising the ROFR that OLCDC secured when developing this LIHTC project. Specifically, Aswan insists that this ROFR must be interpreted in accordance

[1] In the interest of brevity, Amici Curiae respectfully incorporate their motion for leave to file this brief, wherein all 31 amici are more specifically identified.

with rigid common law rules that require a bona fide third party offer and acceptance of that offer by Aswan before its exercise. As explained below, this would effectively give successor tax credit investors like Aswan unfettered control over when and even if their nonprofit partner can exercise their ROFR, ***even after the partnership has decided to sell***. Applying these rigid common law rules is simply wrong, and would threaten thousands of affordable properties nationwide.

The special ROFR at issue here, created pursuant to 26 U.S.C. §42(i)(7)(A), allows for-profit investors and nonprofit general partners in LIHTC projects to negotiate a purchase right for the nonprofit entity at a below-market price without upsetting the investor tax incentives that drive the LIHTC program. The LIHTC statutory scheme advantages such nonprofit purchases of LIHTC projects for a vital reason: to preserve LIHTC project affordability and viability by facilitating long-term nonprofit control of the project. This special ROFR is therefore critical to the successful implementation of affordable housing preservation efforts undertaken by Florida and many other states.

In short, the discount ROFR here is purely a statutory creation – not an ordinary “meet and match” ROFR known to the common law. In the context of this special ROFR’s legislative history and unique purpose, an

owner's intent to sell is the only common law ROFR feature that makes sense. Aswan's arguments to the contrary could set a dangerous precedent that other successor tax credit investors will use to squeeze their nonprofit partners, abrogate their contractual rights, jeopardize the affordability and stability LIHTC tenants depend on, and hinder efforts by the federal and state governments to preserve the already inadequate stock of affordable housing.

Accordingly, the Court must reject Aswan's arguments on appeal and affirm the trial court's summary judgment order in favor of OLCDC.

ARGUMENT

I. FLORIDA FACES AN INCREASINGLY SEVERE SHORTAGE OF AFFORDABLE HOUSING, PROMPTING ENACTMENT OF STATE PRESERVATION POLICIES.

"[T]he shortage of affordable rental housing is a longstanding, persistent feature of our society."[2] Indeed, ". . . every state and nearly every county in the U.S. lacks an adequate supply . . ." of affordable and available rental homes.[3] Consequently, millions of renters nationwide struggle to pay rent and are forced to choose between paying rent or paying for food, health

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[2] National Low-Income Housing Coalition (**"NLIHC"**), *Out of Reach: The High Cost of Housing* (2020) at 8, available at https://reports.nlihc.org/oor.

[3] *Id*.

care, transportation, and childcare.[4] The disconnect between need and supply is especially stark in Florida.

Florida is one of the most expensive rental housing markets in the country.[5] The state has a deficit of 547,624 units that are affordable and available for low-income renter households. University of Florida Shimberg Center for Housing Studies, 2019 Rental Market Study (May 2019), Table 4.1, at 37-38 (**"UF Rental Market Study"**).[6] Consequently, of the nearly 2.8 million renter households in Florida, 795,605 are rent-burdened, low-income households. *Id*. at 13.[7] This includes 33% of low-income households with incomes between 60% and 80% AMI, a 21% increase over 20 years. *Id*. at 9. In Miami-Dade County alone, there is a deficit of 125,551 affordable, available units for low-income renter households, representing 30% of all renters in the county. *Id*. at 55. Miami-Dade has the largest share (16.93%) of Florida's rent-burdened low-income households. *Id*. at 14.

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[4] *Id*.

[5] *Id*. at 18

[6] Available at https://www.floridahousing.org/press/publications/2019-rental-market-study.

[7] This study considers a household to be rent burdened if it pays more than 40% of household income on rent. *Id*. at 5. This study classifies a household as low-income if its income is at or below 60% of the area median income, adjusted for household size. *Id*. at 13.

Florida is also at risk of losing a significant portion of its already inadequate affordable housing supply,[8] with 27,659 government-assisted units at risk of being lost by 2030 due to subsidy expirations. UF Rental Market Study, *supra*, at 3. Physical deterioration also threatens this supply. Of Florida's 286,335 government-assisted affordable housing units, more than half are between 15 and 30 years old. *Id*. Buildings this old typically need major rehabilitation, and without recapitalization, the long-term viability of these aging projects is at serious risk.[9]

The LIHTC program has become a significant tool in addressing the affordable housing crises nationwide and in Florida. The program is the primary vehicle for the development and rehabilitation of affordable housing in the U.S,[10] accounting for 48,672 affordable housing projects and 3.34

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[8] 20% of Florida's government-assisted housing developments are in Miami-Dade County. UF Rental Market Study, *supra*, at 3.

[9] *See e.g.,* Jill Khadduri et al., *U.S. Dept. of Housing and Urban Development, What Happens to Low-Income Housing Tax Credit Properties at Year 15 and Beyond?* (August 2012) at 54-55 (LIHTC projects have significant needs in terms of operating costs and significant rehabilitation 15 years after development) (**"HUD Report"**).

[10] Public and Affordable Housing Research Corporation & NLIHC, Picture of Preservation 2020 at 8, available at https://preservationdatabase.org/reports/picture-of-preservation/.

million units of affordable housing as of 2019.[11] Florida has made significant use of the program, awarding over $96 million in LIHTC in 2019 alone. Florida Housing Finance Corporation, 2019 Annual Report (2020) at 20 (**"FHFC Annual Report"**)

Florida has also leveraged its tax credit allocation to meet the state's affordable housing needs. Florida's State Apartment Incentive Loan (**"SAIL"**) program, administered by the Florida Housing Finance Corporation (**"FHFC"**), provides low-interest loans to supplement LIHTC financing as a way to fully finance the construction and rehabilitation of affordable units. Fla. Stat. Ann. § 420.5087; FHFC Annual Report at 19. In exchange for SAIL funds, owners set aside a minimum number of units for very low-income individuals. Fla. Admin. Code R. 67-48.009(4).[12] SAIL funds are also used as forgivable loans to further reduce rents and thus target the lowest-income tenants. FHFC Annual Report at 19. In 2019, Florida awarded a total of

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[11] U.S. Dep't. of Hous. & Urban Dev., Low-Income Housing Tax Credit Data Sets, Property Level Data, at https://www.huduser.gov/portal/datasets/lihtc/property.html (last visited May 14, 2021).

[12] Where SAIL funds are used to supplement LIHTC financing, "very-low-income" means income at or below the applicable LIHTC income limitation. Fla. Admin. Code R. 67-48.002 (116) (3).

$93,324,000 in SAIL funds to finance the construction or rehabilitation of 1,495 affordable rental units. *Id*.

II. THE LIHTC PROGRAM PROVIDES SUBSTANTIAL TAX INCENTIVES TO CREATE AND PRESERVE AFFORDABLE HOUSING SUBJECT TO EXTENDED USE RESTRICTIONS AND A SPECIAL PURCHASE RIGHT FOR NONPROFIT ORGANIZATIONS.

A. LIHTC Program Structure

The LIHTC program is a federal tax credit program designed to encourage the construction and rehabilitation of affordable housing in exchange for substantial tax benefits to owners. *See* Tax Reform Act of 1986, Pub. L. No. 99–514, § 252, 100 Stat. 2085, 2189–208 (codified at 26 U.S.C. §42). These credits, claimed over 10 years, provide a dollar-for-dollar offset to the holder's income tax liability. The program apportions tax credits to state housing credit agencies on a $2.8125[13] per capita basis. 26 U.S.C. §42(h)(3)(A)-(C).[14] This enormous federal investment now costs an estimated $10.9 billion annually.[15] State agencies then use a competitive

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[13] Rev. Proc. 2020-45 §3.10.

[14] State housing credit agencies award these federal tax credits pursuant to a Qualified Allocation Plan which, among other things, sets tax credit eligibility criteria in a way that reflects the state's housing needs and priorities. 26 U.S.C. §42(m)(1)(B).

[15] Mark P. Keightley, An Introduction to the Low-Income Housing Tax credit, Congressional Research Service (2021) at 1.

application process to award the allocated tax credits to developers for the construction and rehabilitation of affordable housing projects. 26 U.S.C. §42(m)(1).[16] To ensure affordability, owners must lease a minimum number of units at rents restricted to levels affordable to qualifying individuals. 26 U.S.C. §42(g).[17] These affordability restrictions must be in place for at least 30 years, i.e., the "extended use period." *Id*. §42(h)(6).[18] Owners must adhere to other federal IRS rules and state agency restrictions, which may include serving special needs populations, or providing deeper or longer affordability.

[16] Both 9% and 4% credits are available, 26 U.S.C. §42(b), and the respective percentages are applied to a project's "qualified basis" to determine the dollar amount of credits for a specific project. *Id*. Covering most capital costs, 9% credits are in high demand and highly competitive.

[17] Specifically, absent lower state-imposed limits, a tenant's income cannot exceed 50% of the Area Median Gross Income (AMI) under the 20-50 test, 60% of AMI under the 40-60 test, or the imputed income limitation designated for the subject unit under the Average Income Test. 26 U.S.C. §42(g)(1). Rents are limited to 30% of the applicable income limitation for a particular unit. 26 U.S.C. §42(g)(2).

[18] Initially, these restrictions had to be in place for only 15 years, but in 1989, in response to concerns that this affordability term was too short, and that the nation was facing an expiring use crisis across its programs, Congress extended LIHTC affordability restrictions for an additional 15 years. Report Of The Mitchell-Danforth Task Force On The Low-Income Housing Tax Credit at 19 (Jan. 1989) (**"Mitchell-Danforth"**).

The LIHTC program's affordability restrictions provide concrete financial benefits and greater housing security to tenants. The average LIHTC rent payment is 38% lower than the average market-rate rent.[19] LIHTC rents also increase at a lower rate year-to-year (0.9%) than rent in the open market (5%).[20] Unlike the private market, the LIHTC program also requires critical tenant protections, such as requiring good cause to evict tenants,[21] protecting Section 8 voucher recipients from voucher discrimination,[22] and protecting survivors of domestic violence from discrimination.[23]

Because they cannot generally benefit from using a 10-year credit, affordable housing developers awarded tax credits raise project capital by selling them to passive private investors. Nonprofit developers must sell a substantial ownership interest in the project to extract any value from the tax

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[19] FreddieMac Multifamily Div., *How Big a Difference Do Restricted Rents Make?* (March 18, 2018). Available at https://mf.freddiemac.com/research/insight/2018411_how_big_a_difference.page?. This study analyzed 44 U.S. metropolitan areas of different sizes.

[20] *Id.*

[21] Rev. Rul. 2004-82, Q&A#5.

[22] 26 U.S.C. §42(h)(6)(B)(iv).

[23] 34 U.S.C. §12491(e)(1); 24 C.F.R. §5.2005(e).

credits, since they do not pay income taxes. Limited partnerships or limited liability companies (**"LLC"**) are thus formed, for the sole purpose of developing and owning the property, under which a for-profit or nonprofit entity is typically the general partner with a nominal ownership interest (generally one percent or less) and the private investors are the limited partners who own almost all the project (generally 99 percent). HUD Report at 25; *Homeowner's Rehab, Inc. v. Related Corporation V SLP, L.P.* (2018) 479 Mass. 741, 744 (**"*Homeowner's Rehab*"**). Despite its nominal ownership interest, the general partner typically has material control over the project operations.

Because the private investors own the lion's share of a LIHTC project, valuable project tax credits and other tax benefits flow almost entirely to them.[24] Indeed, unlike typical real estate investments, where return comes primarily from cash flow and appreciation at disposition, the return for initial LIHTC investors consists almost entirely of tax benefits. HUD Report at 24.[25]

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[24] *See e.g.*, *Homeowner's Rehab, supra,* at 745-748 (describing how investor there reaped lucrative tax benefits from the tax credits purchased for an equivalent equity investment, but also from other tax losses).

[25] In addition to credits, LIHTC project tax benefits include accelerated depreciation, mortgage interest deductions, and other tax deductions. See 26 U.S.C. §§ 168(c), 163, 164. And the LIHTCs have additional special advantages over other federal tax credits, e.g., reducing the alternative

These tax benefits are also front-loaded – with the investors claiming the credits over 10 years. 26 U.S.C. §42(b)(1)(B); *Homeowner's Rehab*, *supra*, at 743. For the first 15 year "compliance period," LIHTC owners must report program compliance annually, to the IRS and the responsible state agency, under threat of credit recapture. 26 U.S.C. §42(j); HUD Report at xii; 26 U.S.C. §42(i)(1).

B. The LIHTC Program Employs Nonprofit Housing Organizations To Carry Out Specific Policy Objectives.

The LIHTC program's restricted rents and 30-year extended use period reflect the program's goal of maintaining project affordability for the long-term. But who owns a project – whether a nonprofit or a for-profit entity – plays a crucial role in maintaining affordability beyond the minimum restricted extended use period. Nonprofit owners, for example, usually operate properties as affordable housing beyond the term of any regulatory requirements because it is their mission to do so. HUD Report, *supra*, at xiv. The LIHTC program is also designed to serve the lowest income tenants and to spur revitalization in high-poverty areas, which aligns with the missions of nonprofit owners who often aim to serve hard to reach, historically underserved communities with lower income households. 26 U.S.C.

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minimum tax and allowing deduction of full depreciation without a basis offset. 26 U.S.C. §38(c)(4)(B)(ii), §42(d)(4)(D).

§42(m)(1)(B). HUD Report at 32; Megan J. Ballard, *Profiting from Poverty: The Competition Between For-Profit and Nonprofit Developers for Low-Income Tax Credits*, 55 Hastings L. J. 211, 231-32 & 235 (2003) (**"*Ballard*"**). Nonprofits also provide supportive services to tenants and tend to better meet the needs of larger families. *Ballard, supra,* at 239.[26]

OLCDC exemplifies the expanded nonprofit role envisioned by Congress. In addition to developing over 2,500 units of affordable housing in the Miami-Dade region, OLCDC provides community services such as job training, small business development, health and wellness, financial empowerment, and after-school programs. Appellant's App. to Initial Br., Vol. 1, p. 86, Compl. ¶ 6.

Because of the important role nonprofits play in advancing LIHTC program priorities, Congress structured the program to ensure their participation in project development and ownership. States must set aside at least 10% of their annual tax credit allocation for nonprofit-sponsored projects. 26 U.S.C. §42(h)(5)(A)-(B). Florida went above the statutory minimum, reserving 15% of its annual tax credit allocation for nonprofit-

[26] See Brandon M. Weiss, *Residual Value Capture in Subsidized Housing*, 10 Harv. J.L. & Pub. Pol'y 521, 552-53 (2016) (expanding on the unique role that nonprofit entities play in the realm of affordable housing).

sponsored projects. Fla. Hous. Fin. Corp., Qualified Allocation Plan (2020) at §II(F).[27] Many state agencies have done the same, allocating far more tax credits to nonprofit-sponsored projects than the minimum, with nonprofit-sponsored projects accounting for 22% of all LIHTC projects in the first 20 years of the program.[28] By 2015, almost 500,000 units had been developed by nonprofits, a number that has necessarily grown substantially, since the number of LIHTC units has increased over the last three and a half years.[29]

Thus, decisions over nonprofit control have a potentially widespread impact on nationwide efforts to provide stable affordable housing to meet a growing need.

C. Congress Specifically Advantaged Nonprofit Purchase Of LIHTC Properties After The 15-Year Compliance Period To Preserve Affordability Through Long-Term Nonprofit Control.

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[27] Available at (footnote continued on next page with hyperlink): https://www.floridahousing.org/docs/default-source/programs/developers-multifamily-programs/competitive/2020-qualified-allocation-plan-(qap).pdf?sfvrsn=f64ffb7b_2.

[28] Rachel G. Bratt, *Should We Foster the Nonprofit Housing Sector as Developers of Subsidized Rental Housing?*, Joint Center for Housing Studies Harvard University (March 2007) at 11.

[29] U.S. Dept. of Hous. & Urban Dev., *National Low-Income Housing Tax Credit Database: Projects Placed in Service Through 2015* (2017), available at https://www.huduser.gov/portal/Datasets/lihtc/tables9515.pdf.

Ensuring nonprofit participation in project development and ownership was not enough. Seeking to leverage more public value from the enormous public investment in LIHTC, both Congress and the IRS have effectively required nonprofits to take concrete steps to further long-term nonprofit control of properties – by creating a special purchase right and requiring its inclusion.

After the 15-year compliance period ends and investors have claimed all available credits without threat of recapture, for-profit investors typically sell their ownership interest to the general partner. HUD Report, *supra*, at 29-31.[30] The LIHTC program's statutory scheme expressly advantages such sales when they involve a nonprofit general partner by allowing the nonprofit partner (or other qualifying housing nonprofit or public entity) to hold a special purchase right without affecting the investor's ability to claim the credits. 26 U.S.C. §42(i)(7)(A) (the "§42 ROFR"). That provision provides:

> "No Federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified low-income building merely by reason of a right of 1st refusal held by the tenants (in cooperative form or otherwise) or resident management corporation of such building or by a qualified nonprofit organization (as defined in subsection (h)(5)(C)) or government agency to purchase the property after the close of the

[30] At this point, available tax credits have been used and continuing use restrictions constrain further value for for-profit investors.

compliance period for a price which is not less than the minimum purchase price determined under subparagraph (B)”[31]

Contrary to Aswan’s arguments, this provision should not be interpreted “purely” as a common law right of first refusal (**“ROFR”**). *See Homeowner’s Rehab*, *supra*, at 753. The origin of this provision, reflecting its unique statutory purpose, makes this clear. Initially, this special nonprofit purchase right was proposed as an outright option to purchase at less than fair market value as “a means of extending the low-income use of the property well beyond the fifteen-year compliance period” through long-term nonprofit control.” Mitchell-Danforth at 19. Concerned that authorizing a direct nonprofit purchase option would cast doubt on whether the investors have sufficient incidents of ownership to claim the credits, Congress settled on the special purchase right created by the §42 ROFR. Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 Villanova L. Rev. 871, 889-893 (1993). This mechanism thus acts as a safe harbor allowing nonprofit general partners to hold the right while protecting investor tax benefits. *Id*. at 896.

[31] The minimum purchase price referenced here is roughly equal to the project’s outstanding debt plus any tax liability associated with the sale, 26 U.S.C. §42(i)(7)(B), which in many projects is significantly below market value.

Accordingly, §42's fixed-price, below-market special ROFR serves the specific purpose of allowing nonprofit affordable housing developers and the for-profit investor(s) to structure a partnership agreement whereby all ownership of the property will be inexpensively transferred to the nonprofit at the end of the compliance period, while allowing the investor to receive full benefit of the credits. *Homeowner's Rehab, supra,* at 754-756 (discussing history and purpose of §42's ROFR provision); *see also* Mitchell-Danforth at 19. Although Congress sought to facilitate the long-term preservation of affordable housing by enabling control of the property by mission-driven nonprofit organizations, it imposed no further conditions on the fixed-price purchase right, including what is necessary to trigger it. Rather, Congress simply allowed nonprofits to purchase a property for a "minimum purchase price, should the owner decide to sell (at the end of the compliance period)." *Homeowner's Rehab*, *supra*, at 756 (quoting H.R. Rep. No. 101–247, 101st Cong., 1st Sess., at 1195 (1989)).

Thus, the special §42 ROFR provision technically does not require a special ROFR in every LIHTC partnership agreement but provides the legal security for doing so. However, as a matter of industry practice, nonprofit

partners have commonly secured this special right.[32] This is because the original for-profit investors foresee little economic incentive to remain a partner after the credits have been claimed and prefer to avoid the burden of ongoing project costs. *Id*; HUD Report, *supra*, at 31. Indeed, the IRS has effectively made this special purchase right a requirement, subject to certain limited exceptions, by requiring that nonprofit developers participating as general partners in a LIHTC project secure a §42 ROFR as a condition of maintaining their nonprofit status. Memorandum of Robert Choi, Director, Exempt Organizations. U.S. Dept. of the Treasury Internal Revenue Service to Manager, Exempt Organizations Determinations, U.S. Dept. of the Treasury Internal Revenue Service (July 30, 2007) at 3. Consequently, this special right to purchase at a preset, discounted price and the eventual transfer of the project to complete nonprofit control are deeply imbedded in the parties' expectations during negotiations and thus these transfers have historically been uncontroversial and easy to implement. WSHFC Report, *supra*, at 4.

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[32] Washington State Housing Finance Commission, *Nonprofit Transfer Disputes in the Low Income Housing Tax Credit Program: An Emerging Threat to Affordable Housing*, (September 2019) at 4 (**"WSHFC Report"**), available at https://www.wshfc.org/admin/Reporton15YearTransferDisputes.pdf.

Recently, however, as here, some organizations have challenged the special purchase and control rights of nonprofits to extract profits far beyond the original parties' expectations. WSHFC Report*, supra,* at 1. Often waged by successor investors, who are not parties to the original transaction, the linchpin of these efforts is to assert that the special nonprofit purchase right must be interpreted as a common law ROFR -- an interpretation that would gut long-standing public policies to maximize long-term affordability through non-profit control. *Id*. at 5.

III. APPLYING COMMON LAW RULES APPLICABLE TO PURELY COMMON LAW ROFRS WOULD UNRAVEL §42'S ROFR STATUTORY SCHEME AND SEVERELY UNDERCUT EFFORTS TO PRESERVE THE INCREASINGLY INADEQUATE STOCK OF AFFORDABLE HOUSING.

OLCDC and the original tax credit investor[33] included a §42 special purchase right in the partnership agreement.[34] What event(s) served to trigger this special § 42 ROFR must be answered by first interpreting the

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[33] OLCDC initially partnered with another for-profit investor to form Aswan. HallKeen Management (**"HKM"**) later acquired a majority ownership stake and the authority to manage Aswan. For a full history of each party's involvement in the subject LIHTC project, see Opa-Locka Community Development Corp., Inc. v. HK Aswan, LLC et al., 2019-16913-CA-01 (44), Omnibus Order on Summary Judgment (July 7, 2020) at 2 (**"Summary Judgment Order"**).

[34] For the full text of the special purchase right, see Appellant's App. To Initial Br., Vol. 1, Compl. Ex. J at 218.

provision in accordance with its terms and in its proper context. As is typical in LIHTC partnership agreements with nonprofit general partners, the ROFR at issue here expressly references §42 and sets the purchase price at the §42 statutory minimum, making it a special §42 ROFR that must be interpreted and applied in accordance with the purpose of the statutory scheme that created it. *Humphreys v. State*, 145 So. 858, 861 (Fla. 1933) (holding that a contractual clause must be interpreted in accordance with the laws referenced and incorporated therein).

Congress left it up to the parties to determine the mechanics of the special §42 purchase right, but expressed its intention that the triggering mechanisms should be easy and based only upon a decision to sell the underlying property at the end of the Compliance Period. Thus, the provision here makes no mention of a third-party offer of any sort or acceptance of that offer by Aswan as conditions precedent to OLCDC's ability to exercise its purchase right, stating only that the Company[35] ". . . will not sell the Project or any portion thereof to any Person without first offering the Project for a period of forty-five (45) days to [OLCDC] . . ." at the below-market statutory

[35] Although the company refers to the ownership entity, Aswan, for purposes of this ROFR provision the term "Company" necessarily refers to HKM, since it managed Aswan and had authority to market and sell Aswan Village, the subject LIHTC project, subject to OLCDC's approval.

price. Appellant's App. To Initial Br., Vol. 1, Compl. Ex. at 218. In other words, once HKM, as the manager of Aswan, has decided to sell the subject property on behalf of Aswan, i.e., once it manifests an intent to sell, OLCDC may exercise its ROFR upon its plain terms. Thus, as other courts have ruled, the *only* applicable common law feature that is consistent with the legislative history and purpose of §42's special ROFR provision is the concept of an owner's intent to sell. *Homeowner's Rehab*, *supra*, at 757-759.

Accordingly, the trial court correctly ruled that, in the absence of express contract language to the contrary, a §42 ROFR is triggered by a manifest intent to sell.[36] This is in line with the terms of the §42 ROFR provision (which leaves it to the parties to detail the ROFR mechanics) and with the terms of the specific ROFR at issue here. The ruling also advances

[36] Here, HKM clearly manifested an intent to sell Aswan Village on behalf of the Company by (among other things) marketing the property, commissioning expensive due diligence reports, negotiating deal terms, executing a letter of intent, asking OLCDC to approve the sale (which OLCDC did) and contemporaneously asking OLCDC to waive its §42 ROFR (which OLCDC did not). Summary Judgment Order, *supra*, at 9-11. Thus, OLCDC had a right to exercise its ROFR when it did, and it was improper for HKM and the Company to refuse to honor its terms. OLCDC met the ROFR's other conditions by being a nonprofit entity committed to maintaining Aswan Village as low-income housing through the end of the extended use period.

the purpose of §42's ROFR provision to facilitate nonprofits' buying and preserving LIHTC properties.

Aswan urges a rigid application of common law rules applicable to common law ROFRs to determine if the special purchase right here was triggered. But this interpretation is contrary to the relevant legislative history, the purpose of §42, and the parties' contract. First, it ignores the fact that this special §42 ROFR is a statutory creation where common law *only* applies as concerns the decision to sell requirement, unless the parties agree to supply others. Second, the ROFR here does not include even a vague reference to the common law rules Aswan claims apply, let alone an express third party offer and acceptance requirement.

Further, requiring special §42 ROFRs to rigidly comply with all customary formalities of a common law ROFR subverts Congress' intent and threatens the continued public use of billions of taxpayer funds. By conditioning a nonprofit's ability to exercise its ROFR on the other party's acceptance of a third-party offer, Aswan and other similarly situated investors would have complete control over whether a nonprofit developer can ever exercise its ROFR, and if so, when, even after a decision to sell has been made. This unfettered amount of control would not only make it more difficult to transfer ownership to nonprofit housing providers, contrary to

§42's goal, it could also eliminate these transfers altogether and render OLCDC's ROFR illusory.

In addition to abrogating the nonprofit partner's contractual rights and undercutting the clear intent behind the special §42 ROFR provision, this level of investor control over a nonprofit's ability to exercise its ROFR can easily lead to economic coercion by the for-profit investors, which has been the subject of growing litigation in other jurisdictions.[37] In those situations, the under-resourced nonprofit developer is left with the Hobson's choice of permitting its investor partners to walk away with large sums of money (rightly belonging to the nonprofit) or suing to enforce its ROFR. *Id*. Either way, the nonprofit is forced to expend substantial financial resources, which in turn threatens preservation of a given project's long-term affordability and viability, exactly the opposite of what Congress intended. WSHFC Report, *supra*, at 6.[38]

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[37] WSHFC Report, *supra*, at 5. See also Peter J. Reilly, New York AG Supports Community Group In Battle With AIG Over Tax Credit Property, Forbes, available at https://www.forbes.com/sites/peterjreilly/2021/04/21/new-york-ag-supports-community-group-in-battle-with-aig-over-tax-credit-property/?sh=f6866d838e94.

[38] Because of restricted rents and other factors, most LIHTC properties operate on very thin margins, leaving little in reserves that can be used after the 15-year compliance period to fund rehabilitation and other capital needs. HUD Report, *supra*, at xiii. If OLCDC is forced to divert reserves to pay

Aswan also argues that, at a minimum, OLCDC cannot exercise its ROFR until there is a bona fide third-party offer. But, there is no such requirement in the parties' contract and a third-party incurs considerable expense before and after it makes a bona fide offer, from document review by lawyers to hiring experts to prepare due diligence reports. A third-party is unlikely to incur the expense and effort of making an offer knowing that another party, especially a mission-driven nonprofit general partner, has a ROFR at a below market price that it will likely exercise. Like Aswan's other arguments, this would render it nearly impossible for a nonprofit to ever exercise its ROFR,[39] contrary to §42's purpose.

In short, acceptance of Aswan's common-law-based arguments would effectively unravel §42's statutory scheme and purpose, and the precedent will be used by other organizations around the country in their concerted efforts to obstruct the use of virtually all §42 special purchase rights. This will impede Florida's affordable housing preservation efforts, and similar

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investors off or to seek judicial enforcement of its ROFR, it will limit the cash flow available post-sale for operating the property and meeting capital needs, all of which threatens the subject property's long-term affordability and viability. Additional public resources will inevitably be called upon to make up for higher preservation costs due to improperly extracted profits.

[39] The third-party here made an offer to buy Aswan Village but it did so under the incorrect assumption that OLCDC would waive its ROFR.

LIHTC preservation efforts that depend on nonprofit control, which heavily rely on these properties to house the state's low-income residents.

CONCLUSION

For the reasons stated herein, it is respectfully requested that the Trial Court's summary judgment order be affirmed.

Respectfully submitted,

By: /Steven R. Kozlowski/
Steven Robert Kozlowski, Esq.
Florida Bar No. 87890
KOZLOWSKI LAW FIRM P.A.
4300 Biscayne Blvd., Suite 203
Miami, FL 33137
305-673-8988
Steven@klfpa.com

By: /Marcos Segura/
Marcos Segura, Esq. (Pro Hac Vice)
CA. Bar No.: 303122
NATIONAL HOUSING
LAW PROJECT
1663 Mission Street, Suite 460
San Francisco, CA 94103
415-546-7000
MSegura@NHLP.org

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically served this 20th day of May 2021 upon filing with the Florida e-Filing Portal upon all counsel on the attached Service List.

By: /Steven R. Kozlowski
Steven Robert Kozlowski, Esq.
Florida Bar No. 87890

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I HEREBY CERTIFY that this Brief follows the formatting requirements of Florida Rule of Appellate Procedure, Rules 9.210(b) and 9.370. This Amici Curiae Brief contains 4,997 words as counted by Microsoft Word.

By: /Steven R. Kozlowski
Steven Robert Kozlowski, Esq.
Florida Bar No. 87890

SERVICE LIST

Mark D. Solov
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130
Email: msolov@stearnsweaver.com
Secondary: mfigueras@stearnsweaver.com

Jose G. Sepulveda
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130
Email: jsepulveda@stearnsweaver.com
Secondary: mleon@stearnsweaver.com

Ryan T. Thornton
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130
Email: rthornton@stearnsweaver.com
Secondary: cveguilla@stearnsweaver.com

Alejandro D. Rodriguez
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130
Email: arodriguez@stearnsweaver.com
Secondary: mfigueras@stearnsweaver.com
Counsel for Appellant Aswan Village Associates, LLC

Joel S. Perwin, Esq.
Joel S. Perwin, P.A.
1680 Michigan Avenue
Suite 700
Miami Beach, FL 33139
Tel: 305.779.6090

David A Davenport *(Pro Hac Vice Application Filed)*
FL Bar No.: 1017138
BC DAVENPORT, LLC.
801 S. Marquette Ave., Suite 200
Minneapolis, MN 55402
Tel: 612.445.8012
Fax: 612.445.8011
david@bcdavenport.com

Counsel for Appellee Opa-Locka Community Development Corporation, Inc.