Hon. Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SENIOR HOUSING ASSISTANCE GROUP,

Plaintiff, Counter-Defendant

v.

AMTAX HOLDINGS 260, LLC, et al.

Defendants, Counter-Plaintiffs

AMTAX HOLDINGS 260, LLC,

Third-Party Plaintiffs

v.

SENIOR HOUSING ASSISTANCE CORPORATION, et al.

Third-Party Defendants

CASE NO. 2:17-cv-01115-RSM

BRIEF OF AMICI CURIAE LEADINGAGE & NATIONAL HOUSING LAW PROJECT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The nation is experiencing an affordable housing crisis. As the only significant source of new below market rate affordable housing, the low-income housing tax program (herein "LIHTC"), plays a critical role in addressing some of this substantial need. Ensuring that the properties developed by this $8 billion a year program[1] maintain long-term affordability is key to protecting these important public resources, as they provide the affordable homes that millions of low income Americans depend upon.

Nonprofits, like the Senior Housing Assistance Group (herein "SHAG"), play a pivotal role in ensuring the preservation of LIHTC properties. Such providers are not motivated by profits, but a mission to provide housing to low-income tenants. As a means of leveraging the mission-driven nature of nonprofits in the LIHTC program, Congress endorsed a special right of first refusal process (herein "special right") to facilitate the transfer of LIHTC properties to nonprofits, often at a below-market cost. This process has become a standard practice for the transfer of ownership of LIHTC properties across the country.

An interpretation that SHAG's special right is a common law right of first refusal would directly conflict with Congressional intent behind the provision. Such an interpretation would also have a devastating impact on the seniors served by SHAG and on other low-income LIHTC tenants across the nation, as the ability for nonprofits to retain and preserve long-term affordability will be

[1] Dept. of Hous. & Urban Dev., *Low-Income Housing Tax Credits* (2018).

severely limited. This will place the nearly 500,000 LIHTC units[2] built by nonprofit developers at risk of loss, plunging the nation deeper into the affordable housing crisis.

II. IDENTITY AND INTERESTS OF AMICI CURIAE

Amicus LeadingAge has a mission to be the trusted voice for aging. The members of LeadingAge and partners impact the lives of millions of individuals, families, employees and volunteers every day. Our over 6,000 members and partners include non-profit organizations representing the entire field of aging services, 38 state associations, hundreds of businesses, consumer groups, foundations and research centers. Over one-third of LeadingAge members provide affordable housing to seniors across the United States. LeadingAge is also a part of the Global Ageing Network, whose membership spans 30 countries. LeadingAge is a 501 (c)(3) tax-exempt charitable organization focused on education, advocacy and applied research.

Amicus The National Housing Law Project (NHLP) is a nonprofit national housing and legal advocacy center established in 1968. NHLP's mission is to advance housing justice for low-income people by increasing and preserving the supply of decent, affordable housing; preserving, expanding, and enforcing tenants' rights in housing; improving existing housing conditions; and minimizing involuntary displacement. NHLP partners with a host of individuals and organizations working in affordable housing, including local and national advocates, tenant and advocacy networks, nonprofit developers, and allied housing organizations. Through policy advocacy and litigation, NHLP has

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

contributed to many critically important changes to policy and programs that have resulted in increased housing opportunities and improved housing conditions for low-income people. Stemming from these decades of experience, NHLP has developed extensive expertise with regards to affordable housing preservation, the LIHTC program, and a unique perspective that will increase the court's understanding of this important and essential program.

III. BACKGROUND

Amici adopt and incorporate by reference the factual background set forth in Senior Housing Assistance Group and Senior Housing Assistance Corporation's Motion for Summary Judgment. *See generally* Dkt. No. 85.

IV. ARGUMENT

A. Preserving LIHTC housing is essential to address the severe deficit of affordable housing nationally, in the state of Washington, and the Puget Sound area.

Low-income households are facing a severe affordable housing crisis. There is only enough affordable housing to meet one-third of the need, as the demand greatly exceeds the supply.[3] In addition to stagnant wages not keeping pace with the private housing market[4], much of the reason for this deficit is due to a severe decrease in federal funding for the Department of Housing and Urban

[3] Ctr. on Budget Policy Priorities, *United States Factsheet: Federal Rental Assistance* (2017), https://www.cbpp.org/sites/default/files/atoms/files/4-13-11hous-US.pdf .

[4] Christopher Burrel, *Soaring Rents, Stagnant Wages Create Housing Crisis*, The Mail Tribune, May 3, 2015.

Development's (herein "HUD") subsidized housing programs.[5] Adjusting for inflation, from 2010 to 2017, funding for the public housing program[6] decreased by $1.8 billion.[7] This program has lost over 165,000 units since 1995[8] and no funds have been provided[9] to build new units for decades.[10] The other federal programs have also suffered cuts, with funding to house the elderly and disabled decreasing by $613 million and funding for the section 8 program[11] decreasing by $87 million.[12]

These cuts have devastated the nation's affordable housing stock. As a result, the United States now has a deficit of 7.2 million affordable and available rental homes.[13] Subsidies and other assistance are necessary to fund the production and maintenance of affordable housing because the private rental market usually cannot cover to costs of development and operating with rents that are affordable to

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[5] The "HUD subsidized housing programs" refer to programs where the federal government directly funds affordable housing. This includes public housing, which is affordable housing built and maintained by HUD; The Section 8 voucher program, which provides rental subsidies to low-income families to rent homes on the private market; and the HUD Multifamily program where HUD enters into contracts with nonprofits or private owners to provide housing to low-income tenants. *See generally* 42 U.S.C. § 1437; 42 U.S.C. § 1437f(o).

[6] Public housing is housing built by the federal government and managed by local public housing authorities. It provides affordable housing to low-income tenants at rents set at 30% of the household's income. *See generally* 42 U.S.C. § 1437.

[7] National Low Income Hous. Coalition, *The Gap: A Shortage of Affordable Rental Homes* (2018), https://nlihc.org/sites/default/files/gap/Gap-Report_2018.pdf .

[8] Will Fischer, Ctr. On Budget & Policy Priorities, *House Bill's Deep Cuts in Public Housing Would Raise Future Federal Costs and Harm Vulnerable Low-Income Families* (2011), https://www.cbpp.org/research/house-bills-deep-cuts-in-public-housing-would-raise-future-federal-costs-and-harm.

[9] Ctr. On Budget & Policy Priorities, *Policy Basics: Public Housing* (2017), https://www.cbpp.org/research/policy-basics-public-housing.

[10] Some of the loss of public housing units has been offset with allocations of new section 8 vouchers. However, these vouchers are becoming more and more difficult to utilize due to the competitive housing market. *See* Glenn Thrush, *With Market Hot, Landlords Slam the Door on Section 8 Tenants*, New York Times, Oct. 12, 2018.

[11] The larger component of the section 8 program issues vouchers to low-income tenants that allows them to rent housing on the private market while usually paying 30% of their monthly income in rent. *See generally* 42 U.S.C. § 1437f(o).

[12] *House Bill's Deep Cuts in Public Housing Would Raise Future Federal Costs and Harm Vulnerable Low-Income Families*, *supra* note 8.

[13] National Low Income Hous. Coalition, *The Gap: A Shortage of Affordable Rental Homes*(2018), https://nlihc.org/sites/default/files/gap/Gap-Report_2018.pdf .

low-income tenants. Meanwhile, rents continue to increase. Between 2005 and 2015, the number of homes renting for $2000 or more a month increased by 97%.[14]

In 2017, there were 11,094,000 low-income[15] households considered "severely cost-burdened" as they were paying 50% of more of their total incomes for rent.[16] The number of severely cost-burdened households has risen 20% in the past 10 years.[17] These rent-burdened households are also at a higher risk for eviction and are more likely to live in crowded and substandard housing.[18] Housing cost burdens also cut into the resources that can be used for other basic needs. As a result, these households are more likely to experience food insecurity and will often delay necessary medical treatment due to insufficient resources.[19]

When focusing specifically on Washington State, the situation for poor families is similar. Only 29% of households that are in need of affordable housing have access to it.[20] An estimated 230,000 low-income households in Washington are severely cost-burdened.[21] This number has increased 15% in the past 10 years.[22]

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[14] Joint Ctr. for Hous. Studies of Harvard University, *The state of the nation's housing: 2017* (2017), http://www.jchs.harvard.edu/sites/default/files/harvard_jchs_state_of_the_nations_housing_2017.pdf.

[15] HUD defines "low-income" as earning 80% or less than the area median income. *See generally* 42 U.S.C.A. § 1437a(e)(2)(c).

[16] *United States Factsheet: Federal Rental Assistance*, *supra* note 3.

[17] *Id.*

[18] National Center for Children in Poverty, *Rent Burden, Housing Subsidies and the Well-being of Children and Youth* (2011), http://www.nccp.org/publications/pdf/text_1043.pdf.

[19] *Id.*

[20] *United States Factsheet: Federal Rental Assistance*, *supra* note 3.

[21] *Id.*

[22] *Id.*

Low-income renters are also struggling to secure housing in the Puget Sound area. Eighty-seven percent of extremely low-income households[23], 78% of very-low income households[24], and 46% of low-income households, are cost-burdened (as they pay 30% or more of their incomes for rent and utilities).[25] This number has increased 15% in the past 10 years.[26]

The scarcity of affordable units in the Puget Sound area is overwhelming. In the Seattle/Tacoma/Bellevue area, there are only 28 affordable units for every 100 extremely low-income households and only 49 affordable units for every 100 very low-income households.[27] The Seattle Housing Authority has no available units in any of its subsidized buildings[28] and many of the waitlists for individual projects are also closed.[29] Most properties have waiting times of at least two to three years and the wait can stretch for up to eight years.[30] The competition in similar in other parts of the Puget Sound Area. The waiting times for many of the King County Housing Authority's properties is at least five years.[31] The waitlist for all of Tacoma Housing Authority's subsidized properties is completely closed.[32]

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[23] HUD defines "extremely low-income" as earning 30% or less than the area median income. *See* 42 U.S.C.A. § 1437a(e)(2)(c).

[24] HUD defines "very low-income" as earning 50% or less than the area median income. *See* 42 U.S.C.A. § 1437a(e)(2)(c) .

[25] *United States Factsheet: Federal Rental Assistance*, *supra* note 3.

[26] *Id.*

[27] *Id.*

[28] A vast majority of SHA's subsidized properties include public housing and senior housing developed in partnership with the City of Seattle. Although low-income tenants are statutorily eligible for public housing, other rules establish priorities for those who are at or below 30% of the AMI.

[29] Seattle Housing Authority, *SHA Housing* (2018), https://www.seattlehousing.org/housing/all/list.

[30] *Id.*

[31] King County Housing Authority, *Subsidized Housing Waiting List* (2018), https://www.kcha.org/housing/subsidized/list/.

[32] Tacoma Housing Authority, *Become a THA Tenant* (2018), https://www.tacomahousing.net/become-tha-tenant.

Seniors have been hit particularly hard by the affordable housing crisis. In 2016, 9.7 million households aged over 65 spent more than 30% of their incomes on housing and 4.9 million of those households spent more than 50%.[33] SHAG's housing is critical to meeting the housing needs of low-income seniors in Washington state as 92,000 elderly and disabled households are severely cost-burdened.[34] The elderly are also becoming homeless at an alarming rate. Between 2007 and 2014, the number of homeless people over 50 increased by 20%, growing to over 306,000.[35] Older adults now make up 31% of the nation's total homeless population.

HUD uses "worst case" housing needs to measure the affordable housing crisis. "Worst case needs" are defined as renters with very low incomes (no more than 50% of the Area Median Income) who do not receive government housing assistance and pay more than one-half of their income for rent, live in severely inadequate conditions, or both.[36] The number of elderly households with worst case housing needs has been steadily increasing. In 2005 there were 1.29 million elderly households with worst case housing needs and in 2013 this number increased to 1.47 million.[37] By 2015, the number had swelled to 1.85 million -- an increase of 382,000 in two years.[38]

B. The LIHTC program creates below market rate affordable housing and encourages long-term affordability.

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[33] Joint Ctr. for Hous. Studies of Harvard University, *Housing America's Older Adults 2018* (2018), http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Housing_Americas_Older_Adults_2018_1.pdf.

[34] *United States Factsheet: Federal Rental Assistance*, *supra* note 3.

[35] Adam Nagourney, *Old and on the Street: The Graying of America's Homeless,* New York Times, May 31, 2016.

[36] Dept. of Hous. & Urban Dev., *HUD Worst Case Housing Needs*, 2017 Report to Congress (2017).

[37] *Id.*

[38] *Id.*

Unlike traditional federal housing subsidies, which rely on annual discretionary federal appropriations, the LIHTC program provides incentives in the form of tax credits authorized by the Internal Revenue Code. The program has both 9% and 4% credits. The 9% credits are designed to cover 70 percent of the costs of developing a project without additional federal subsidies.[39] The 4% credits cover about 30% of the costs of a project and are designed to be used in conjunction with other subsidies including state and local private activity bonds.[40] The revenue created by selling these credits is used to build below-market rate affordable housing.[41] The LIHTC program allocates the credits annually to the states based on a per capita formula.[42] The state agencies administering the program, usually referred to as "housing finance agencies" allocate these credits to developers, often nonprofits. The developers then sell the credits to investors to raise capital for the construction, rehabilitation, and acquisition of affordable units.[43]

To award new credits, housing finance agencies have extensive and usually competitive application processes involving a required Qualified Allocation Plan (QAP).[44] The QAP sets forth criteria for judging development proposals, which housing finance agencies use to determine which projects will be awarded tax credits. For example, applicants may receive points for proposed projects

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[39] Tax credits are either 9% (which are very competitive and provide about 70% of the funding for a project) or 4% (which are less competitive and provide about 30% of the funding for a project); *See* 26 U.S.C. § 42 (b)(2)(B).

[40] Mark P. Keightley, *An Introduction to the Low-Income Housing Tax Credit, Congressional Research Service* (2018), https://fas.org/sgp/crs/misc/RS22389.pdf.

[41] *See generally* 26 U.S.C. § 42.

[42] 26 U.S.C. § 42(h)(3)(C)(ii).

[43] *An Introduction to the Low-Income Housing Tax Credit, Congressional Research Service*, *supra*, note 40.

[44] *See id.*; 26 U.S.C. § 42 (m)(1)(B)(i). (Defining "qualified allocation plan" as including, *inter alia*, any plan that "sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions").

that meet particular goals of the state agency, such as developing housing for seniors or other special needs populations, in certain locations, or at deeper affordability levels.[45]

In a LIHTC project, developers and investors form a partnership where typically, the investor is a limited partner who retains 99% of the partnership interest in order to receive the maximum possible tax benefits.[46] Typically, the developer is the general partner and is usually assigned the leftover 1% of the interest in the partnership.[47] The developer maintains control of the property and manages the day-to-day operations.

As a condition to receiving the credits, the owners agree to maintain the dwelling units at certain levels of affordability—usually targeted at tenants whose incomes do not exceed either 50% or 60% of the area median income.[48] The tax credits can be claimed for the first ten years after the project is put into service.[49] A declining portion of the credits can be "recaptured" during an additional five-year period in the event that the property fails to comply with the rent restrictions and other required program obligations.[50] This first fifteen-year period is referred to as the "compliance period." After this period has ended and all tax credits have been claimed and are not subject to recapture, the

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[45] *See generally* Dept. of Hous. & Urban Dev., *Effect of QAP Incentives on the Location of LIHTC Properties* (2015), https://www.novoco.com/sites/default/files/atoms/files/pdr_qap_incentive_location_lihtc_properties_050615.pdf (noting that states including Arizona, California, Colorado, Connecticut, Georgia, Massachusetts, Maryland, North Carolina, and Texas provide additional application points for projects near certain amenities).

[46] *Homeowner's Rehab, Inc. v. Related Corp. V SLP, L.P.*, 479 Mass. 741, 743 (2018).

[47] *Id.*

[48] Federal law establishes maximum rents for LIHTC units, which are based upon the agreed income limit for admission, not actual tenant incomes. Although federal law establishes minimum affordability standards and restricted use period terms, some agencies require or incentivize even deeper levels of affordability or longer terms. Most LIHTC properties have 100% affordable units, far beyond the federal minimums, in order to maximize the value of the credits in the transaction.

[49] 26 U.S.C. § 42 (b)(1)(B).

[50] 26 U.S.C. § 42 (j).

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limited partner investor will commonly leave the partnership,[51] since the lion's share of the tax benefits have been exhausted. This exit usually occurs through the investor sale of its interest to the general partner.[52]

The units produced by the LIHTC program are the nation's only significant source of new, below-market rate, affordable housing.[53] Between 1986 and 2016, the program created 46,554 projects and 3.05 million housing units.[54] This translates to an average of over 1,435 projects and 108,810 units being placed in service each year.[55] Annually, the LIHTC program allocates $8 billion in tax credits to state housing finance agencies.[56]

Although LIHTC units are nominally targeted to households with incomes at or below 50% or 60% of the Area Median Income, a majority of the households in LIHTC units have incomes far below these levels. A recent study by HUD found that 42.6% of LIHTC households had incomes between 0 and 30% of the Area Median Incomes; 17.9 % of LIHTC households had incomes between 30 and 40% of the Area Median Incomes and 16.3% of households had incomes between 40 and 50% of the Area Median Income.[57] Thus, a wide range of low-income tenants depends upon the LIHTC program for their homes because they are less expensive than rentals on the private market.

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[51] *Homeowner's Rehab, Inc. v. Related Corp. V SLP, L.P.*, 479 Mass. 741, 743 (2018).

[52] *Id.*

[53] *Compare* Dept. of Hous. & Urban Dev., *Low-Income Housing Tax Credits* (2018), https://www.huduser.gov/portal/datasets/lihtc.html *with* Ctr. on Budget Policy Priorities, *United States Factsheet: Federal Rental Assistance* (2017), https://www.cbpp.org/sites/default/files/atoms/files/4-13-11hous-US.pdf.

[54] *Low-Income Housing Tax Credits*, *supra*, note 1.

[55] *Id.*

[56] *Id.*

[57] Dept. of Hous. & Urban Dev., *Understanding Whom the LIHTC Serves: Data on Tenants in LIHTC Units 2015* (2018).

The State of Washington is currently allocated about $17 million in tax credits each year.[58] The state utilized this assistance to create 78,174 units and 1,005 LIHTC projects between 1986 and 2016.[59] This includes 17,007 units for seniors and 8,191 units for people with disabilities.[60] The LIHTC program is particularly essential to providing affordable housing to seniors. Currently, over 25% of all LIHTC households have at least one member age 62 or older.[61] In Washington, one-third of all households living in the state's total LIHTC units have at least one household member who is a senior.[62]

Because of the persistent and growing shortage of affordable housing, preserving existing affordable units, whether created under LIHTC or the other federal housing assistance programs, has become especially critical.[63] When LIHTC units are lost through foreclosure, expiration or other means, the housing is not replaced and, unlike other federal programs, tenants receive no federal replacement subsidies or other protections. As explained *infra*, Congress has therefore taken special steps to preserve the affordability of LIHTC units by extending minimum use restrictions and encouraging non-profit ownership. Courts should interpret LIHTC agreements consistently with these legislative policies.

C. Nonprofit involvement is critical to preserving the long-term affordability of LIHTC properties.

[58] Novogradac and Company, LLC, 2017 Federal LIHTC Information by State (2017), https://www.novoco.com/resource-centers/affordable-housing-resource-center/2017-federal-lihtc-information-state.

[59] Wash. State Hous. Finance Commission, *30 Years of the Tax Credit in Washington State, 1986 to 2016*. (2017), http://wshfc.org/admin/30yearsLIHTC.pdf.

[60] *Id*.

[61] *Understanding Whom the LIHTC Serves: Data on Tenants in LIHTC Units 2015*, *supra*, note 57.

[62] *Id.*

[63] *United States Factsheet: Federal Rental Assistance*, *supra*, note 3.

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Shortly after the creation of the LIHTC program in 1986, lawmakers became concerned that the properties would immediately convert to market-rate housing after the expiration of the 15-year compliance period.[64] In 1989, Congress extended the mandated affordability period for all new LIHTC properties from 15 to 30 years.[65] But this was not the only revision to Section 42 that Congress enacted to protect this significant public investment.

Recognizing that nonprofit ownership would be the best way to ensure long-term affordability, Congress also made two more amendments to section 42 to encourage nonprofit involvement.[66] In the first, Congress mandated that the states allocate at least 10% of all tax credits to projects involving nonprofit developers.[67] In the second, to facilitate long-term control by nonprofits, Congress enacted 26 U.S.C. § 42(i)(7) to allow for the inexpensive transfer of the properties to nonprofits at the end of the compliance period.[68] These changes encourage nonprofit involvement and control reduced the risk that projects would seek an early exit (after the compliance period but before the expiration of the extended use period at year 30), and would continue to provide affordable housing after that period. Nonprofit developers commonly take advantage of this safe harbor by including such purchase rights after the compliance period at the statutory minimum price, usually far below true market value, in their negotiated partnership agreements with investors. These statutory changes encouraging nonprofit involvement and control were intended to, among other things, reduce the risk that projects would seek

[64] *Report of the Mitchell–Danforth Task Force on the Low–Income Housing Tax Credit 19*(Jan. 1989).

[65] 26 U.S.C. § 42(h)(6)(D); Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106 (1989).

[66] *Homeowner's Rehab, Inc. v. Related Corp. V SLP, L.P.*, 479 Mass. 741, 743 (2018).

[67] 26 U.S.C. § 42(h)(5); Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2320 (1989).

[68] Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2321 (1989); *Report of the Mitchell–Danforth Task Force on the Low–Income Housing Tax Credit 19* (Jan. 1989); *Homeowner's Rehab, Inc. v. Related Corp. V SLP, L.P.*, 479 Mass. 741, 743 (2018).

to exercise their statutory rights to be freed from rent restrictions before the end of 30 years (after the compliance period but before the expiration of the extended use period at year 30).[69]

The LIHTC program can only accomplish its long-term goals if LIHTC properties remain affordable beyond the first 15 or 30 years. One of the best predictors of the long-term affordability of a LIHTC project is whether a nonprofit is part of the ownership structure.[70] While for-profit housing tends to be operated with the goal of maximizing profits for owners and investors,[71] nonprofits are often "mission driven" and motivated by an altruistic desire to provide affordable housing. They can maintain long-term affordability after the restrictions have expired by managing the asset in furtherance of their affordable housing mission, utilizing available public and private resources to make necessary repairs and upgrades while keeping rents affordable. This approach is far less expensive than repeatedly buying out for-profit owners at market-rates, or replacing units lost to market-rate conversion.

Additionally, during the "extended use period" (the years between the end of the compliance period and when the affordability restrictions expire), nonprofits are much less likely than their for-

[69] Prior to year 30, a property may only be released from the LIHTC affordability restrictions under two scenarios: 1) the project goes into foreclosure and 2) if the project owner gives written notice to the state agency of a desire to sell, and the agency is unable within one year to present a "qualified contract" at a statutorily dictated price (often higher than market value) for a buyer to continue under the LIHTC program. *See* 26 U.S.C. § 42(h)(6); Dept. of Hous. & Urban Dev.,*What happens to low–income housing tax credit properties at year 15 and beyond?* (2012).

[70] Meléndez, E., Schwartz, A., & Montrichard, A.,*Year 15 and Preservation of Tax Credit Housing for Low-Income Households: An Assessment of Risk*, Housing Studies, 23(1), 67–87 (2008).

[71] National Low-income Housing Coalition, *Balancing Priorities: Preservation and Neighborhood Opportunity in the Low-Income Housing Tax Credit Program Beyond Year 30* (2018), https://nlihc.org/sites/default/files/Balancing-Priorities.pdf.

profit counterparts to seek early release from the program (and to convert to market-rate) through the processes permitted by the statute.

In a 2012 report, HUD interviewed a number of LIHTC owners, developers, investors, experts, and housing finance agency staff in order to investigate the factors affecting long-term affordability of LIHTC properties.[72] The investors they interviewed had been involved in over 2,000 transfers of their ownership interests[73] (as limited partners) to general partners or to other entities at the end of the compliance period.[74] Not one of the partnerships involving nonprofit developers resulted in a property converting to market-rate housing, demonstrating the critical role of nonprofits in preserving affordability.

D. An interpretation that § 42(i)(7) creates only a traditional right of first refusal would be in direct conflict with the design and intention of the LIHTC program.

In disputes regarding interpretation of a contract, the court's main function is to give effect to the intentions of the parties.[75] The courts have recognized that interpretation of contracts solely based on their "plain meaning" without the "context surrounding an instrument's execution", is ineffective to determine the parties' intentions.[76] Accordingly, Washington courts adopted the "context rule" recognizing that the "intent of the contracting parties cannot be interpreted without examining the

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[72] *Id.*

[73] The study was limited to properties subject to pre-1990 15-year affordability restrictions, as the properties with 30-year restrictions have yet to expire.

[74] *Preservation and Neighborhood Opportunity in the Low-Income Housing Tax Credit Program Beyond Year 30, supra,* note 71.

[75] *Schauerman v. Haag*, 68 Wn.2d 868 (1966).

[76] *Hearst Communications v. Seattle Times*, 115 P.3d 262 (2005).

context surrounding an instrument's execution." Thus, extrinsic evidence is appropriate for the purposes of determining mutual intent and may include: "(1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties."[77]

The legislative history of § 42(i)(7) clearly demonstrates that its express purpose is to facilitate the inexpensive transfer of LIHTC properties to nonprofits at the end of the compliance period. In light of this explicitly stated goal, it would be illogical to interpret SHAG and AMTAX's agreement (herein "the agreement") as creating a common law right of first refusal (herein "ROFR"). Instead, the legislature created a special right only available to nonprofit organizations, other public entities, and tenant organizations. Further, unlike a common law ROFR, § 42(i)(7) allows the purchase of the property at a statutorily-determined (often below-market) price that can be exercised without a third party offer. Transfer to a nonprofit project participant is, nationwide, decidedly the most commonplace ownership pattern for LIHTC properties with non-profit involvement.[78]

Additionally, AMTAX's argument that the agreement requires a bona fide third party offer is inconsistent with § 42(i)(7)'s statutory scheme:

> [b]ecause a right of first refusal granted under § 42(i)(7)—like the one here—allows the nonprofit organization to purchase the property at a below-market price, even if it is lower than the price offered by the third party, it is difficult to imagine why a third party would make a bona fide offer for the property, knowing that the nonprofit organization has this right and is

[77] *Id.*

[78] Dept. of Hous. & Urban Dev., *What happens to low–income housing tax credit properties at year 15 and beyond?* (2012); ("By far the most common pattern of ownership change around Year 15 is for the LPs to sell their interests in the property to the general partner (GP) (or its affiliate or subsidiary) and for the GP to continue to own and operate the property. This pattern is overwhelmingly the case for properties with nonprofit developers, but also true in many cases of for-profit developers.")

> likely to exercise it…[t]o condition the right of first refusal on a bona fide offer, then, would mean that it would almost never be triggered.[79]

Similarly, interpreting the agreement to require the limited partner's consent to exercise the "Special ROFR" also frustrates the intent of the statute as the limited partner would have the power to completely block a sale at the below-market price prescribed by § 42(i)(7). The Massachusetts Supreme Court came to a similar conclusion:

> [i]f this were the case, one would expect that the limited partners would withhold their consent unless they were willing to sell the property interest at the § 42 price. But, if they were in fact willing to sell the property interest at that price, they would have no reason to wait for a third-party offer to trigger the right of first refusal; they could simply sell to the nonprofit developer at that price. Consequently, if we were to interpret the right of first refusal to require the consent of the special limited partner, the nonprofit developer could be denied any meaningful opportunity to acquire the property interest at the § 42 price. In cases where the limited partners are unwilling to sell at the § 42 price, the nonprofit developer would be able to purchase the property only by exercising its option to purchase at the market price."[80]

E. A determination that contracts implementing § 42(i)(7) only create a common law ROFR would have a devastating national impact.

Due to Congress's efforts to encourage nonprofit involvement in LIHTC properties, a significant number of projects involve nonprofit organizations. Although § 42 mandates that at least ten percent of all yearly state allocations be made to nonprofits and other public entities,[81] the number has been increasing steadily over ten percent for the past 20 years.[82] In 1995, nonprofit sponsors were involved in 13.1% of all LIHTC projects that year. Ten years later, 23.7% of projects involved

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[79] *Homeowner's Rehab, Inc. v. Related Corp. V SLP, L.P.*, 479 Mass. 741, 743 (2018).

[80] *Id.*

[81] 26 U.S.C. § 42(h)(5).

[82] *What happens to low–income housing tax credit properties at year 15 and beyond?*, *supra*, note 78.

nonprofit developers and in 2013 the number swelled to 38.3%.[83] It is estimated that almost 500,000 units were developed by nonprofits.[84]

Preservation of LIHTC units is of enormous importance now because the affordable use restrictions for a significant number of the program's current housing stock will begin expiring in 2020.[85] By 2029, an estimated 486,799 units will have lost their 30-year use restrictions and will be in danger of converting to market-rate housing.[86] Because nonprofit ownership is one of the clearest pathways to long-term affordability, nonprofit ownership is critical to preserving a large portion of these expiring properties.[87]

Accordingly, a determination that the agreement implementing § 42(i)(7)'s special right as a common law ROFR would not only have dire consequences for SHAG and the tenants that it serves, but it would also have a horrendous impact on LIHTC nonprofit ownership across the country, risking the loss of a number of LIHTC units to market-rate sales that will result in their eventual conversion to market-rate units. It is essential that the court closely scrutinize Defendant's efforts to obtain a windfall through undermining the special right intended by the parties. Otherwise, we risk falling into an even deeper affordable housing crisis.

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[83] *Id.*

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

[85] *What happens to low–income housing tax credit properties at year 15 and beyond?, supra*, note 78.

[86] *Id.*

[87] Meléndez, E., Schwartz, A., & Montrichard, A.,*Year15 and Preservation of Tax Credit Housing for Low-Income Households: An Assessment of Risk*, Housing Studies, 23(1), 67–87 (2008).

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V. CONCLUSION

For the reasons set forth above, the Court should grant Plaintiff's Motion for Summary Judgment and deny Defendant's Cross-Motion for Summary Judgment.

Respectfully submitted this 19th[th] day of December.

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2018, the foregoing document was electronically filed with the United States District Court's CM/ECF system, which will send notification of such filing to all attorneys of record.

s/ Eric Dunn

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