



300 Colorado Street, Suite 2100
Austin, Texas 78701
Telephone: 512-305-4700
Fax: 512-305-4800
www.lockelord.com

Cynthia L. Bast
Direct Telephone: 512-305-4707
Direct Fax: 512-391-4707
cbast@lockelord.com

March 25, 2024

Via E-mail

Mr. Cody Campbell
Director of Multifamily Finance
Texas Department of Housing and Community Affairs
221 E. 11th Street
Austin, Texas 78701

RE: Lost Oaks in Houston, Texas -- Request for Force Majeure Relief
TDHCA No. 23209

Greetings:

We represent Lost Oaks, LP (the "**Development Owner**"), which received an award of Tax Credits¹ in the 2023 Application Round. The Development Owner hereby requests the opportunity to return its Tax Credits and have them reissued under the *force majeure* provisions of Section 11.6(5) of the QAP.

Unexpected Financing Gap. When the Development Owner applied for Tax Credits, it underwrote the transaction based upon credit pricing of \$0.92. This was the price offered by multiple proposed equity investors and utilized in the Application. The Development Owner felt comfortable with this price, as it had been steadily available for some time. The Development Owner continued to check on the credit pricing even after the Application was submitted, and received assurances that \$0.92 would be available. In August 2023, shortly after receipt of the Tax Credit award, the Development Owner was advised that credit pricing had reduced between \$0.05-0.10 over the entire market. For this particular Development, every \$0.05 of credit pricing is equivalent to roughly \$1,000,000 of equity. Ultimately, the Development Owner received equity offers for \$0.86, creating a gap in the sources and uses of approximately \$1,200,000.

¹ Capitalized terms used but not defined herein shall have the meanings given them in the 2024 Qualified Allocation Plan (the "**QAP**").

Supplier, Materials, and Labor Shortages. In addition, construction costs for this type of building (4 story, elevator served, on a small site, with underground detention) have gone from \$173,428/unit at the time of Application to \$200,986/unit today, creating an additional gap of \$2,149,524. Supply chain issues remain prevalent. In the current market, it is most difficult to access supplies for underground detention, electrical gear, elevators, and connection of electrical utilities. Delays in receiving necessary materials and equipment lengthen the construction period,² increasing total development cost by increasing the amount of construction interest and builders risk insurance. In some instances, to avoid the delays, the Developer has been forced to choose a more expensive product because it could be delivered more quickly.

Mitigating the Financing Gap. As the Development Owner began to seek gap financing, it became aware of an RFP from Harris County, offering up ARPA funds. Harris County was approved for these funds based upon Congressional action in March 2021 and set out to deploy them. It developed a staged plan, in which certain priority needs would be addressed first. Finally, in 2023, the County set out to commit \$89 million of the funds for acquisition of affordable housing, by way of the RFP that was published in July 2023. The Development Owner began working with the County to seek supplemental funds in September 2023, conversing with the County about their expectations and goals for the program. Based upon the County's input, the Development Owner applied for ARPA funds on November 7, 2023. When the Development Owner followed up with the County in December 2023, it learned that the County wanted to acquire the land using the ARPA funds, leasing the land to the applicant. Additional funds for construction could be loaned to the applicant if needed. This request presented significant changes for a Development that had already been awarded Tax Credits and was not consistent with the Development Owner's understanding from initial conversations with the County, but the Development Owner submitted a revised application, per the County's request, on December 22, 2023. On January 12, 2024, Harris County advised that, in order for the application to be successful, the Development Owner would need to admit a Harris County affiliate as a general partner of the Development Owner which, accompanied with the ground lease structure, would entitle the Development Owner to a property tax exemption. Once again, the County asked the Development Owner to resubmit its application. The Development Owner resubmitted an application for \$3,100,000 of ARPA funds in a very prompt five (5) days. Despite committing to this new ownership structure, the Development Owner still does not know what kinds of fees or economics the County will require in connection with this structure, and how that will affect the overall operating budget.

² See attached article. See, also <https://elevatorworld.com/article/state-of-the-u-s-elevator-industry-2023/>. In a survey of nearly 100 elevator professionals in 2023, approximately 70% confirmed supply chain delays or shortages for equipment and materials.

Despite the delays, the Development Owner has made progress with the County, passing through two (2) of the three (3) levels of approval for the funding. The application has been approved by the Focus Area Team and the Steering Committee. It now needs to be approved at Commissioner's Court on March 26, 2024.

Mitigating the Construction Issues. The Developer has undertaken every strategy it can to mitigate the construction cost and delay issues. Unfortunately, until the County clearly enunciates its procurement requirements (as described below), the Development Owner cannot do anything further at this time.

Force Majeure Delays Associated with County Funding. In preliminary discussions, the County was anxious to deploy the ARPA funds as quickly as possible. Based on its conversations with the County in late 2023, the Development Owner felt there would be sufficient time to obtain TDHCA approval for the required structural changes (the ground lease and Harris County's participation in ownership), receive the funds, and complete construction by the placement in service date of December 31, 2025. Subsequent, unexpected events have now jeopardized the Development Owner's ability to achieve the deadline.

After the Development Owner applied for the funds under the RFP last year, the County requested substantive changes in organizational structure, as described above, that will require TDHCA consent and fundamentally change the operational economics for the Development. Further, the County has engaged additional legal counsel to assist it with the federal regulatory overlay. In January 2024, the County announced that 2 CFR Part 200 would apply, but provided no further guidance. In early February 2024, under the advice of its counsel, the County started to change some of its requirements for procurement. Later in February, the County provided both a form Procurement Checklist and a form Transaction Checklist. Other promised guidance from the County remains outstanding. Until the County provides clear guidance on the procurement standards for this situation in which an affiliate of the Developer is the general contractor, the Development Owner will not be able to finalize construction contracts and other critical items.

Further, the County has advised us that some of the successful applicants for ARPA funds are utilizing tax-exempt bonds in conjunction with 4% Tax Credits. These applicants have firm closing deadlines in July 2024. The County is prioritizing these transactions and does not expect to close on funding with the Development Owner until August 2024, at the earliest. Such a delay was clearly unforeseen and out of the Development Owner's control. Now, with a construction schedule of 18-24 months because of the supply shortages, the Development Owner is unlikely to be able to complete the construction by December 31, 2025. Further, the proposed equity investor has advised that it will not proceed to finance this transaction, unless *force majeure* relief is granted. See Exhibit A.

Force Majeure Delays Associated with Supply, Materials, and Labor Shortages. While the construction industry has been working through upheaval since the commencement of the pandemic, shortages remain a real problem. As noted through the article attached as Exhibit B, the time to get certain critical items may be more than triple what it was pre-pandemic. The statutory placement in service deadline imposed by Section 42 was enacted in 1986 and certainly does not take current conditions into account. This Board can provide the relief necessary to address these ongoing issues and allow the Tax Credit development community to complete their projects. No Developer wants to seek *force majeure* relief. Developers have every economic incentive to close their deals, get their pre-development costs reimbursed, and start receiving Developer Fee.

Request for Relief. The Development Owner remains committed to this Development. It has the necessary financing commitments. It is willing to work with the County and TDHCA to revise its organizational structure to receive the ARPA funds. But there is no point in continuing down this path if the timing is not going to work. While this Developer has never requested extraordinary *force majeure* relief, it does so now so it can get the housing on the ground.

This request meets all the requirements for *force majeure* relief in accordance with Section 11.6(5) of the QAP, in that:

- The Development has been impacted by *force majeure* events that have materially impeded construction progress. Specifically:
 - In applying for the Harris County ARPA funds, the Development Owner has experienced changes in rules and regulations that make it impossible to finalize a construction budget and plan. Four (4) months after submitting its application, the Development Owner still does not have all the information from the County necessary to finalize its construction plans. After being advised the County was anxious to deploy the funds, the Development Owner has learned that another four (4) months may elapse before the County is ready to close.
 - The supply of critical materials and equipment, such as elevators and electrical equipment, remains unsteady. Receipt of such goods has been delayed by weeks and months.
- None of the delays are the result of the Development Owner's negligent or willful act or omission. The need for the County ARPA funding was not foreseen. The decrease in credit pricing was not anticipated, in that the pricing had remained steady for a

significant period of time and only reduced after the Tax Credits had been awarded. The increase in construction costs was unforeseen. Indeed, the overall price growth for construction materials was stabilizing in 2023, when the Development Owner was applying for these Tax Credits.³

- The Development Owner has taken reasonable steps to mitigate the delays caused by the *force majeure* events.
- The timing for the County ARPA funding, combined with extended construction schedules due to shortages, will make it impossible for the Development Owner to meet its construction schedule.
- The Development Owner is requesting the same amount of 2024 Tax Credits as were allocated in its 2023 Carryover Agreement.
- The Development, with the ARPA funding, will remain financially feasible.

The Development Owner asks for this matter to be heard at the April 11 Board meeting. If any additional information is required, please do not hesitate to contact the Development Owner or myself.

Sincerely,



Cynthia L. Bast

Exhibit A – Letter from Equity Investor

Exhibit B – Recent Article on Construction Industry Supply Delays

³ See <https://www.nahb.org/blog/2024/01/building-materials-prices-plummet-in-2023>.

EXHIBIT A

Letter from Equity Investor



RBC Capital Markets®

RBC Capital Markets Corporation

Tax Credit Equity Group

Cleveland, Ohio, 44102

Telephone: (216) 875-2626

Fax: (216) 875-2612

March 22, 2024

MARK-DANA CORPORATION
26302 Oak Ridge Drive
Suite 100
Spring, Texas 77380
Attn: David M. Koogler

Re: *Lost Oaks*
Houston, TX

Dear Mr. Koogler:

Thank you for providing us the opportunity to submit a proposal on Lost Oaks. We are very excited about the opportunity to work with you again in bringing this much needed affordable housing to Houston. However, we do have an issue with the placed in service risk. All the upper tier investors we spoke with about this deal are not comfortable moving forward with the current deadline for placing the deal in service. They are outright passing on the opportunity unless we can get an extension on the PIS deadline. As you know, we are one of the largest equity syndicators in the country and represent most of the investors in LIHTC. Without a PIS extension, we cannot invest in this deal. If TDHCA is able to grant an extension, we would have the investors back at the table and ready to move forward. We would need that extension approved ahead of closing.

Very truly yours,

A handwritten signature in black ink, appearing to read 'DK' followed by a stylized flourish.

Dan Kierce
Managing Director
RBC Community Investments

EXHIBIT B

Recent Article on Construction Industry Supply Delays

3/21/24, 5:09 PM

Supply chain headaches persist 4 years into pandemic | Construction Dive



Supply chain headaches persist 4 years into pandemic

As the fourth anniversary of COVID-19's arrival in the U.S. nears, contractors are still dealing with challenges around materials pricing and availability.

Published Feb. 29, 2024

By Shefali Kapadia

A ship transits the Suez Canal toward the Red Sea on January 10, 2024 in Ismailia, Egypt. Geopolitical issues such as the latest Israel-Hamas war are likely to keep the cost of some materials elevated, experts say. Sayed Hassan via Getty Images

It's been nearly four years since the COVID-19 pandemic upended global supply chains, driving up prices and slowing availability of products and materials.

For U.S. construction firms, prices remain high due to ongoing materials shortages and high costs of logistics and labor, while global conflicts are adding in new levels of volatility and risk.

Indeed, construction input costs are up 38.7% compared to February 2020, according to an Associated Builders and Contractors analysis of Bureau of Labor Statistics data. Prices of unprocessed energy materials, natural gas and iron and steel have risen more than 50%.

Construction input prices ticked up 1% in January, the first overall price increase after three months of moderation. Overall construction costs remain 0.4% higher than a year ago, while nonresidential construction input prices gained 0.7% during the last 12 months.

<https://www.constructiondive.com/news/construction-materials-supply-chain-shortage/708866/>

1/6

Iron and steel costs went up more than 4% year over year in January, and stainless steel costs could rise further due to supply and demand dynamics. Supplies of nickel ore in Indonesia — the largest global producer of nickel, which is used to make stainless steel — could be depleted in six years, according to the Indonesian Nickel Mining Association, said Gregory Beischer, CEO of Alaska Energy Metals.

Meanwhile, demand for nickel is increasing because it's used in electric vehicle battery production. The construction industry and stainless steel manufacturers will have to compete with EV producers for the same supply of nickel.

“It would not be unlikely to see stainless steel price jumps, which, in turn, would make construction projects more expensive,” Beischer said.

Global issues



Brent Thielman

Permission granted by D.A. Davidson & Co.

Contractors are seeing some relief, though. Construction input prices for some materials like copper wire and cable and gypsum products have fallen since last January, per the ABC analysis. Costs for plastic and resin-based products, which were “through the roof” during the pandemic, are beginning to normalize, according to Brent Thielman, managing director and senior research analyst at national investment banking firm D.A. Davidson & Co.

“Prices are coming down from those extraordinary levels of a year or two ago, but they’re not back to what we’ve seen pre-pandemic,” Thielman said.

Nevertheless, global issues will likely keep the cost of some materials elevated. The latest Israel-Hamas war could affect prices, availability and lead times of various imported materials. Firms in Europe initially bore the brunt of the increases, but the effects will likely trickle down to U.S.-based firms due to the global nature of construction supply chains, said Maria Davidson, founder and CEO of Kojo, a tech company focused on the materials supply chain for the construction industry.

In addition, many transportation providers are rerouting around the Red Sea, which has created a surge in ocean shipping rates, adding yet another cost increase to contractors’ books.

“Transportation is an enormous piece of the cost,” Davidson said.

Davidson’s advice to contractors facing high prices is to have a competitive quote process and system to track bids, along with plans to ensure materials will be delivered when and where they need them.

Lengthy lead times

In addition to paying more for some products and materials, contractors are also waiting longer for them to be delivered. Pre-pandemic, materials such as steel and timber could be had within two to four weeks. Today, those same materials can take 12 to 16 weeks to arrive.



Maria Davidson
Permission granted by Kojo

Electrical switchgear, generators and AV components have some of the longest lead times, at 42 to 60 weeks, according to Raylena Browning, vice president of preconstruction at Tulsa, Oklahoma-based Manhattan Construction Co.

HVAC equipment continues to have extended lead times, Thielman said, and electrical wire is difficult to source. Transformers can take as long as 52 weeks to arrive on a jobsite, according to

Davidson, who expects to see limited availability for transformers and switchgear throughout 2024.

Construction supply chains are particularly susceptible to long lead times because of specialized materials and equipment. Alternative suppliers or domestic sources may not be available.

“When it comes to things like concrete or cement mix, there are real physical limitations on where you can order that from,” Davidson said.

Tight labor market

According to Browning, the construction industry’s biggest supply chain challenge is the availability of manpower, both skilled and unskilled.

The construction industry needs to recruit more than half a million workers to meet demand, according to Associated Builders and Contractors. Nearly 2 million construction workers are expected to leave their jobs this year. About 20% of them are at least 55 years old, meaning retirement could be imminent, and the industry needs younger workers to fill the pipeline.

“A lot of people coming out of high school don’t see the construction industry as a sexy sector,” Davidson said.

But Davidson said the industry has started to flip the narrative, adjusting apprentice programs, adopting modern practices and recruiting with high schools.

“It’s an incredibly steady profession,” Davidson said. “Pursuing a job in the trades is a really great career to build.”

Despite the sourcing challenges of the last few years, contractors are now more optimistic about their supply chains. More than half

of respondents in a 2023 Turner & Townsend survey expect supply chains to improve, while just 1% said they would weaken.

“The industry has adjusted to the new reality,” said Thielman. “But it’s still delicate in some areas.”



HARRIS COUNTY COMMUNITY SERVICES DEPARTMENT

Thao Costis, Executive Director

To whom it may concern,

Texas Department of Housing and Community Affairs- Force Majeure Request

When Harris County became aware it would receive approximately \$915 million of American Rescue Plan Act (ARPA) funds in March 2021, it established a plan for the deployment of those funds in the following Focus Areas: Health, Housing, Jobs & Education, and County Operations. The County sought community engagement to create an equitable framework. Necessarily, the County prioritized funding for immediate needs, but pursued planning for longer-term transformational investments on a parallel track.

In 2021, the County created programs providing economic relief for low-income households for basic needs, assistance for small businesses, funding for supportive services for those experiencing homelessness, vaccine incentives, and relief for the court system.¹

Through 2022, the County established preferred outcomes for its Focus Areas. An integrated team was created for each Focus Area, to engage in additional outreach and research before recommending any particular investments to the County's steering committee. In the Housing Focus Area, the County sought to:

- reduce the number of persons experiencing homelessness
- increase the supply of affordable housing
- increase housing stability for low-income households
- enable successful transition out of the criminal justice system
- increase access to clean drinking water and functional sewer systems, especially in underserved communities

In these areas, the County approved funding for supportive housing, the addition of staff members to implement the programs, and the engagement of professionals to study infrastructure needs. The

¹ Harris County 2021 Recovery Plan Performance Report
https://harriscountyarpa.org/Portals/arpa/Documents/SLFRF_Recovery_Plan_Performance_Report.pdf

County further began to establish program guidelines and seek third party contractors to assist with the implementation of RFPs to expand the availability of affordable housing.²

For 2023, the County committed to substantial investment in affordable housing development.³ It created the Harris County Treasury ARPA Multi-Family Acquisition Program Request for Proposal (RFP), published July 21, 2023, with an application period extending to December 31, 2023. At the time Harris County created this RFP, it did not anticipate that so many applicants would be seeking gap funding for projects that were already underway, particularly those that had received 9% low-income housing tax credits (LIHTCs). This requires special considerations for federal regulatory issues, including procurement requirements for construction contractors and subcontractors. The County hired special counsel for this undertaking. With the assistance of counsel, the County is working as quickly as possible to address questions and provide guidance so that the applicants can proceed. Admittedly, the County's guidance for its applicants has evolved since the RFP was published.

Many other applicants for the ARPA funds were applying for reservations in the Bond Review Board lottery. A number of them receive reservations in January and now have hard closing deadlines in July. The nature of these deadlines is that the County must prioritize processing and closing the transactions using bonds ahead of those using 9% LIHTCs.

Per the American Rescue Plan Act, the County must commit all of its funding by December 31, 2024, and it is on track to do. Having implemented its own pandemic-related programs, we know TDHCA understands the many levels of work required to implement assistance across diverse populations and industry sectors, with transparency and accountability. Consistent with TDHCA's statutory purpose to assist local governments with providing essential services, Harris County seeks TDHCA's cooperation. We respectfully request that you act favorably on *force majeure* relief for 9% LIHTC applicants to allow the County to implement its funds for these developments.

Respectfully,
Sam Borders, Director

DocuSigned by:

32DB35B9F215445...

² Harris County 2022 Recovery Plan Performance Report
https://harriscountyarpa.org/Portals/arpa/Documents/7_27_SLFRF_Recovery_Plan_FINAL.pdf

³ Harris County 2023 Recovery Plan Performance Report <https://harriscountyarpa.org/Portals/arpa/Documents/FINAL%20-%202023%20Harris%20County%20ARPA%20Recovery%20Plan%20.pdf>