April 26, 2024

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

Re: Request for Return and Reallocation of Tax Credits – *Force Majeure* under 10 TAC 11.6(5)
TDHCA No. 23149; The Upland

Dear Mr. Campbell:

Upland Housing Development, LP ("Owner"), received a 2023 allocation of competitive housing tax credits (the "Credits") from TDHCA for the development and construction of The Upland in Houston, Harris County, Texas (the "Project"). As detailed below, the Project has suffered a variety of unexpected setbacks we believe constitute "*force majeure*" and, consequently, Owner respectfully requests Board consideration of Owner's return of the 2023 Credits in exchange for an allocation of **2024** housing tax credits under 10 TAC 11.6(5). This request, if approved, would allow Owner the ability to meet its 10% test and placement in service deadlines, and would resolve a tax credit cap issue currently faced by the Project's incorporation of a tax-exempt partner.

FORCE MAJEURE EVENTS

1. Unanticipated Budget Gap. Several circumstances, each detailed below, have caused Owner to have an unanticipated gap in the Project's budget.

A. Tax Credit Shortfall. At the time Owner applied for Tax Credits, it underwrote the Project based upon credit pricing of $.91, which pricing is reflected in Owner's application. At the time, Owner's principals felt comfortable with this price, as it was standard market pricing. In August of 2023, shortly after receipt of the tax credit award, Owner was advised that credit pricing had reduced between $0.05-0.10 over the entire Texas market, and the Project's credit pricing came in at $0.875, creating a gap in the sources and uses of approximately $700,000.

B. Construction Costs. Construction costs have increased since the date of Owner's tax credit award, exacerbating the gap in Owner's budget. Construction materials and labor have suffered the same inflationary trend as almost every other industry. As a result, construction costs have gone from $188,817/unit at the time of Application to $221,849/unit today, creating an additional gap of $3,328,696. Supply chain issues remain prevalent. Delays in receiving necessary materials and equipment lengthen the construction period, which increases total development costs due to the additional construction interest and builders' risk insurance.

C. Increased Interest Rates. As you are aware, interest rates have increased materially since the time that Owner was awarded credits last year. As of the date of this letter, Owner's lender's interest rates have increased almost two and one-half percent per annum from rates at the time of the award. The increase in interest cost has further exacerbated the gap in Owner's budget.

2. Budget Gap Mitigation Efforts Have Created Force Majeure Events. Owner has attempted to address its funding and budget issues through two separate measures, both involving Harris County government: (a) Harris County ARPA funding (i.e., funding made available from the American Rescue Plan Act) and (b) the implementation of a tax-exempt structure by incorporating the Harris County Housing Finance Corporation into the Project's ownership structure. While Owner is extremely confident that these two items will resolve the Project's budget issues, these measures have themselves created "*force majeure*" events that imperil the Project by making it impossible to finalize a budget, plan and meet its tax credit deadlines.

A. ARPA Funding as a Force Majeure. In August, 2023, Owner began engaging with Harris County to seek supplemental ARPA funding from Harris County. Owner was not alone in its request, and Harris County was inundated with applications - particularly similarly situated LIHTC developers with 2022 and 2023 allocations seeking ARPA funding to fill gaps in their budgets. The overwhelming interest in this funding program, coupled with specific complexities of federal funding programs, has caused Harris County to suffer significant delays in administration of its ARPA funding program. As you have been informed by other developers with 2022-23 tax credit awards with projects in Harris County, Harris County has struggled to formulate and convey to applicants a clear and complete set of policies and procedures for its ARPA program and have often surprised applicants with new requirements or hurdles to overcome. To further exacerbate these delays, Harris County has largely put off work on the Project while it prioritizes other projects that it perceives to be under more dire time constraints[1]. Owner has an Order of the Commissioner's Court of Harris County authorizing ARPA funds. However, as of the date of this letter, the Project does not expect – under the very best of circumstances – the ARPA funding to close until after June, 2024, which has imperiled the Project's ability to meet its 10% test[2] and placement in service[3] deadlines.

Harris County acknowledges these delays and supports a determination that their delays have resulted in a "force majeure" to Owner in the enclosed letter. Recently, the TDHCA Board agreed with this conclusion on three similarly situated Projects at its April 2024 meeting. For these reasons, Owner also respectfully requests the Board deem these events a *force majeure*.

B. HFC-Based Exempt Structure as a Force Majeure. In addition to ARPA funding, Owner has explored another means to resolve budget issues resulting from tax credit pricing

[1] Harris County has indicated that it must prioritize 4% housing projects on a strict deadline, leaving applicants with 9% housing projects on hold.
[2] Harris County has dissuaded Owner from acquiring the Project's real estate (currently under contract) prior to the ARPA funding closing, and has advised that this will further delay closing. Therefore, Owner is not in a position to close on the real estate as a means to satisfy the 10% test.
[3] The Project construction is estimated to take 18 months to complete.

decreases, construction cost increases and interest rate increases – i.e., an exemption from the annual burden of the Project's payment of ad valorem taxation on its land and improvements. By reducing the Project's costs through elimination of its annual property tax burden, Owner is able to offset some of the deficiency created by the funding gaps above described.

Owner began working with Harris County – specifically through Harris County Housing Finance Corporation (the "HFC") – on pursuing a partnership in a manner that resulted in a tax exemption[4] in early January of 2024. Only last week (i.e., April 17, 2024) did the HFC approve an inducement to move forward with Owner on this structure,[5] and Owner has been unable to take meaningful strides toward underwriting, negotiation and documentation of this exempt structure until this inducement hurdle was satisfied. Implementation of the exempt structure has been time-consuming and continues to present challenges, including issues surrounding the HFC's ability to participate in more projects than is permitted by statute.

To Owner's surprise, the HFC recently notified Owner that it is not able to participate in Project ownership, as it has over-extended itself on the amount of 2023 tax credits that one "applicant" may receive in a single competitive round under Section 2306.6711(b) of the Texas Government Code (the "Credit Cap Statute"). Specifically, under the 2023 Credit Cap Statute, the HFC was "capped out" of participating in more than two 2023 award recipients; projects. Unfortunately, and due to existing commitments, the HFC was not inclined to participate in this Project's ownership structure. The HFC was not forthcoming with Owner on its private discussions with other 2023 award recipients, and that information was not made readily available by the HFC to Owner. This unexpected issue is another contributor to the Project's delay, costing Owner valuable time awaiting Harris County approvals on a structure that it could not ultimately achieve. The HFC's Credit Cap Statute issues have set Owner back months on implementation of another structure.

Harris County staff have identified another entity – the Harris County Redevelopment Authority (the "RDA") – that it believes could stand in the place and stead of the HFC in providing the Project a property tax exemption. Vetting this structure with stakeholders is taking some additional time, though Owner has received positive indications that this structure is viable.

3. **Delays Due to Supplier, Materials and Labor Shortages.** While the construction industry has been working through upheaval since the commencement of the pandemic, shortages remain a real problem. 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, and they have every economic incentive to close their deals, get their pre-development costs reimbursed, and start receiving developer fee.

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[4] As you are aware, many projects are structured in a specific, public-private partnership manner that results in the deemed public ownership (through both legal and equitable title) of the project improvements and real estate, resulting in an exemption from ad valorem taxation.
[5] As an aside, this request is accompanied by an ownership transfer request for the HFC's admission into Owner's ownership.

REQUEST FOR RELIEF

Owner remains committed to the Project. But it is in need of relief from the Board for the Project to remain capable of meeting tax credit program requirements. Cesar Chavez Foundation has never before requested extraordinary *force majeure* relief, and 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:

1. **Sudden and Unforeseen Circumstances Outside of Owner's Control**. The delays experienced in balancing its budget were not known to Owner at the time of its award, and they have impacted the market as a whole. The delays are a consequence of general market forces (i.e., tax credit pricing, construction costs, inflation and the increase of interest rates to counter rising inflation, labor and material shortages, etc.) and programmatic implementation delays suffered while Harris County staff develops its ARPA funding program and procedures, as well as delays associated with the discovery that the HFC was excluded from participation in the Project's ownership structure due under the Credit Cap Statute. These particular issues aren't suffered solely by Owner. Owner, however, as many other developers with projects in Houston have suffered the same results. These events have significantly impeded the Owner's ability to commence construction activities on a timeline that complies with its 10% test and placement in service deadlines applicable to the Project. Further, the incorporation of the HFC into Project ownership has, in addition to causing delay, resulted in the Credit Cap Statute issue that is resolved by the approval of this request.

2. **Owner has Actively Resolved and/or Mitigated Force Majeure Events**. Owner acted swiftly to balance its budget issues – it sought to increase sources of funds available by pursuing ARPA funding, and it sought to eliminate its annual property tax burden (a budgetary line item that is particularly high in Houston, Texas). Owner is confident that these items provide the appropriate budgetary relief. None of the delays are the result of Owner's negligent or willful act or omission. The need for the County ARPA funding was not foreseen, nor was the fact that the HFC was engaging with multiple other tax credit developers in a manner that exceeded the Credit Cap Statute.

3. **Project Remains Feasible**. The requests before you ensure the Project remains feasible. Please find enclosed letter from PNC Bank, which is both tax credit equity provider and construction and bridge lender.

4. **Credits Requested**. Owner is requesting the same amount of 2024 Tax Credits as were allocated in its 2023 Carryover Agreement.

Based on the facts outlined above, Owner deems that it has met the requirements of 10 TAC 11.6(5) for the return of the Credits and re-issuance of 2024 tax credits as herein requested. We respectfully request TDHCA Board consideration during the May, 2024 board meeting. We are hopeful that staff will recommend approval of this *force majeure* request.

Please contact Lauren Osterman at White, Starling & Osterman, PLLC if you or TDHCA staff would like additional information or have questions. Ms. Osterman's number is 214-215-1119.

Thank you for your assistance in this matter.

Very truly yours,

Paul Park

Encl.

Signature Certificate

Reference number: EC9ZT-UE6FR-AMP8Z-HAYYP

Signer	Timestamp	Signature
Paul Park Email: paulp@chavezfoundation.org Shared via link		Paul Park
Sent:	26 Apr 2024 22:20:07 UTC	IP address: 66.214.163.167
Viewed:	29 Apr 2024 21:13:40 UTC	Location: Rosemead, United States
Signed:	29 Apr 2024 21:13:48 UTC	

Document completed by all parties on:

29 Apr 2024 21:13:48 UTC

PNC

April 29, 2024

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

RE: Support for Request for Force Majeure for The Upland, #23149

Dear Mr. Campbell:

PNC Bank, National Association (PNC) is underwriting its participation in the above-referenced project to serve as the Investment Limited Partner and construction lender. As a standard underwriting guideline, PNC requires at least a 90-day cushion from the end of the construction schedule to the Placed in Service expiration date (PIS). The 2023 9% credits result in a PIS of December 30, 2025. Given the involvement of Harris County and the current construction environment, PNC will require a 12-month PIS extension to December 30, 2026, prior to closing its loan and its investment in the partnership. PNC remains fully committed to The Upland Apartments, and the vast majority of our due diligence is complete, however closing on the loan and equity investment remain subject to completion of PNC's underwriting and approval process.

Sincerely,

Kyle Cox
Senior Vice President

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

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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:
Sam Borders
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[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