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TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

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November 13, 2013

RQ-1167-GA

The Honorable Greg Abbott
Attorney General
209 West 14th Street
Austin, Texas 78701

Dear General Abbott:

The question presented, as more thoroughly described below, is:

Is it within authority of the Governing Board of the Texas Department of Housing and Community Affairs (the "Department") to treat a development that, under the Rental Assistance Demonstration ("RAD") program, converts an operating subsidy under Section 9 of the United States Housing Act of 1937 to rental assistance under Section 8 of that act as an "at risk development" within the meaning of Tex. Gov't Code, § 2306.6702(a)(5), eligible to compete in the "at risk" set-aside created under Tex. Gov't Code, §2306.6714?

Tex. Gov't Code, Chapter 2306, Subchapter DD establishes the low income housing tax credit ("tax credit") program as a program to be administered by the Texas Department of Housing and Community Affairs (the "Department"). As provided for by Internal Revenue Code §42, Subchapter DD provides for the Department to develop and adopt a qualified allocation plan for the administration of the tax credit program. Among other things, Subchapter DD provides for the establishment of certain set-asides under which qualified applicants may compete for tax credits. One such set-aside is the "at risk" set aside created under Tex. Gov't Code, §2306.6714. "At risk" developments are defined in Tex. Gov't Code, §2306.6702(a)(5).

The 83rd Texas Legislature enacted HB 1888, amending Tex. Gov't Code, §§2306.6702(a)(5) and .6714. A copy of that bill, as enrolled, is attached as Exhibit A hereto.

The U. S. Department of Housing and Urban Development ("HUD") has created the RAD, a program whereby public housing annual operating subsidy inclusive of operating reserves, capital funds, and replacement housing factor under Section 9 of the United States Housing Act of 1937 (the "Act") (42 U.S.C. 1437) converts to a rental subsidy under Section 8 of the Act either as project-based



vouchers or as project-based rental assistance. Attached as Exhibit B is HUD's notice regarding RAD, issued July 2, 2013 revising an earlier notice, issued by HUD on July 26, 2012. Attached as Exhibit C is HUD's Frequently Asked Questions regarding RAD Rent Levels for Applications Submitted by December 31, 2013, issued October 23, 2013.

Department staff, at the request of a group of officials of certain public housing authorities ("PHAs") in the state, had a conference call with Patrick Costigan, a high level official at HUD involved in overseeing the development of the RAD program. Mr. Costigan stated that in developing the RAD program HUD had tried to the fullest extent possible to have it conform to the operating subsidy principles of Section 9 of the Act, specifically, the post-conversion rental subsidy is limited to the amount provided under the previous operating housing subsidy. Moreover, former public housing tenants will retain most of the same benefits and have the procedural safeguards under Section 6 of the Act in the post-conversion housing. Accordingly, even though the post-conversion housing will operate under the authority of Section 8, it has many substantive connections to the prior Section 9 housing.

It appears that HUD proceeded with the development of the RAD program in a manner intended to make it, as closely as possible, align with a traditional subsidy funded under Section 9 of the Act. The Department believes that many of the PHAs in Texas will be seeking to convert operating subsidies under the RAD program. Many of these PHAs have conveyed to the Department, to its Board and to staff, the strong belief that PHAs converting operating subsidy to rental subsidy under the RAD program should be treated as eligible to complete in the at risk set-aside. It is possible, however, that other applicants competing in the set-aside would qualify under other aspects of Tex. Gov't Code, §§2306.6702(a)(5) and .6714. Accordingly, before the Board takes any action to treat a development that is undergoing RAD conversion as eligible under the at risk set-aside, your opinion is requested as to whether this would be within the Board's authority.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Paul Oxe", with a long horizontal flourish extending to the right.

J. Paul Oxe
Chair of the Governing Board