THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

In re:
Chestnut Park Preservation, L.P.
185 Dwight Street, Springfield, Massachusetts

Protester:
The Foundation for Fair Contracting
of Massachusetts

TESTIMONY OF CITIZENS' HOUSING AND PLANNING ASSOCIATION

Citizens' Housing and Planning Association ("CHAPA") is a non-profit organization devoted to increasing and maintaining the supply of affordable housing in the Commonwealth. CHAPA members include non-profit and for-profit developers, local housing providers and advocates, municipal officials, lenders, property managers, architects, consultants, homeowners, tenants, local planners, and others.

Since 1967, CHAPA's mission has been to encourage the production and preservation of housing that is affordable to low- and moderate-income families and individuals and to foster diverse and sustainable communities through planning and community development. *See* http://www.chapa.org/about-chapa.

CHAPA submits this testimony on behalf of the undersigned organizations in opposition to the bid protest filed by the Foundation for Fair Contracting of Massachusetts ("FFC") in connection with the Chestnut Park Apartments project (the "Project") in Springfield, Massachusetts. The Project involves neither a public building nor a project undertaken by any public agency and, therefore, the Attorney General should dismiss the bid protest.

The Project does not come within the coverage of Massachusetts General Laws Chapter 149, Sections 44A–44H because the Project does not involve a "contract for the construction,

reconstruction, installation, demolition, maintenance or repair of any building by a public agency estimated to cost over $150,000" as specified in M.G.L. Chapter 149, Section 44A. Chestnut Park has been, and will continue to be, privately-owned. The factors that led the Attorney General to its conclusion in the Lyman Terrace Bid Protest Decision, dated June 20, 2019, that Lyman Terrace was subject to public bidding laws are not present in the case of Chestnut Park.

1. The Federal Government Has Two Separate Affordable Housing Systems: Public Housing and Privately-Owned Affordable Housing and the Commonwealth Has Established Independent Methods and Means to Foster Participation in Both Systems.

Affordable housing in the United States has been developed through two separate systems. The first track in affordable housing development originated with the United States Housing Act of 1937, which created public housing. In the 1930s, the General Court enacted the predecessor to Chapter 121B to allow for the creation of public housing authorities in the Commonwealth. Under this program, over 50,000 units of public housing were created in the Commonwealth and over one million nationwide. All this housing is owned by local housing authorities, which in Massachusetts are currently organized under Chapter 121B. The federal government provides grants and operating subsidies for the creation and operation of public housing. The Commonwealth operates a state funded public housing program along similar lines to the federal program. The Commonwealth is one of just a few states that has a state public housing program.

Beginning in the late 1950s and early 1960s, and culminating in the Housing Act of 1968, Congress created a series of programs that allow for private parties to develop and own affordable housing developments. Since the late 1960s, Congress has enacted numerous new programs to foster private participation in affordable housing production and ownership.

In part, these programs were designed to address the perceived limitations in the public housing system. The aim of these programs was to allow private non-profit and for-profit entities to develop and own housing which was restricted to rental at affordable levels. In order to provide the necessary economic assistance to create these privately-owned affordable developments, Congress created programs built upon three basic types of subsidies:

- Below market loans;
- Rental subsidies; and
- Federal tax incentives to encourage private investment in affordable housing.

On occasion, the Commonwealth and localities have made public land available for the development of affordable housing. This was more common during the era of urban renewal in the 1960s and 1970s.

Similar public incentives are offered in a variety of ventures ranging from construction of health care facilities to office headquarters. *See*, for example, the New Markets Tax Credit Program, Internal Review Code Section 45D (loans and equity investments to businesses in low income communities); www.MassDevelopment.com (loans and financial assistance to health care and businesses); M.G.L. chapter 121A (creation of quasi-public entities to allow payment in lieu of taxes, subject to limited dividend and regulatory agreements); and http://archive.boston.com/business/taxes/articles/2010/04/01/tax_incentives_hit_45m/ ($45 million tax break to Liberty Mutual to encourage construction of new headquarters, first under a new program). Each construction incentive listed above, and the many more that exist, require the recipient to comply with detailed obligations in exchange for receipt of the governmental incentive.

In the case of affordable housing, in exchange for receiving these economic benefits, the private owner agrees to long term restrictions on occupancy and to comply with both construction and management standards. However, the private owner is solely responsible for acquiring sites, providing for all pre-construction costs, selecting the development team, and providing the financial net worth and guarantees necessary to attract the debt and private equity. While there are public incentives, there is no public ownership. Receipt of public incentives comes with an obligation to provide the associated public good whether it is jobs in a new facility or affordable housing units.

FFC asserts that the constraints and obligations imposed on the private owner regarding matters such as approval of construction drawings, disbursement of construction financing, and tenant selection suggest a level of control that converts these privately-owned developments into some form of publicly controlled entities. However, these types of controls are included in the loan documentation of any major real estate venture and are routine requirements of lenders.

FFC further asserts that the inclusion of the requirement in certain enabling legislation to comply with specified public purposes should lead to the conclusion that some or all other public requirements should be read as being incorporated by necessary implication. FFC argues that the inclusion of the provision in the MassHousing enabling legislation with respect to the payment of prevailing wages supports its argument that compliance with Chapter 149 should be read into the act. However, the opposite is the more logical conclusion. The more powerful assumption should be that the General Court explicitly decided which public policies were to be required in order to obtain a loan from MassHousing and which were not. The Legislature's inclusion of a wage rate requirement makes the argument that the Legislature deliberately omitted a requirement to comply with Chapter 149 even more compelling.

It is interesting to note that the federal U.S. Department of Housing and Urban Development, which is responsible for both programs, has established entirely separate regulatory regimes and administers each program in a separate division.

The General Court has followed the federal lead by enacting loan and subsidy programs in parallel with the federal system. The Commonwealth's first major endeavor in creating a state-supported private-owner affordable housing program was the creation of the Massachusetts Housing Finance Agency ("MassHousing") in Section 4 of Chapter 708 of the Acts of 1966. Since its creation, MassHousing has provided financing for over 82,500 apartments. Collectively, there are over 2,000 privately-owned affordable developments in the Commonwealth. Over the last fifty years, the Commonwealth has adopted numerous loan programs to finance affordable housing as well as rental subsidy programs, and state tax credits.

The key distinction between the two systems of affordable housing development is ownership and sources of financing. Public housing projects are owned by public agencies and rely upon grants and operating subsidy. Private affordable housing projects are owned by for-profit and non-profit housing developers, which are not governmental entities and rely primarily on mortgage debt and private investor equity to provide the required capital.

The evolution of these two housing systems is outlined in detail in *Affordable Housing, an Intimate History*, by Charles L. Edson, and is incorporated into *The Legal Guide to Affordable Housing Development* by Tim Iglesias and Rochelle E. Lento, editors, published by the Forum on Affordable Housing and Community Development Law of the American Bar Association.

2. Lyman Terrace is a Public Housing Authority Project Undergoing A Conversion.

The project that was subject to the bid protest decision, *in re: Holyoke Housing Authority: Rehabilitation of Lyman Terrace*, dated June 20, 2019, illustrates the evolution of the

affordable housing delivery systems at both the federal and state levels. Lyman Terrace was built and has operated under the federal public housing system. The development program described in the decision is the result of a decision by the federal government to commence a long-term effort to convert federal public housing to a model of ownership based upon the private affordable housing model. To accomplish this goal, Congress created two programs, the HOPE VI program and the public housing Rental Assistance Demonstration ("RAD") that allow this conversion.

The need to create programs to support the rehabilitation of public housing that are more akin to how the private sector operates is well documented. MIT Professor Larry Vale in his comprehensive study of HOPE VI notes:

> A half-century after the public sector was brought into rescue failed private housing [by the passage of the 1937 Act], HOPE VI – even though it was administered and funded through public-sector agencies – needed to be remade in closer relationship to private-sector norms and practices, aided by additional private financing…
>
> Lawrence J. Vale, *Purging the Poorest* 326 (2013).

This type of system conversion naturally raises the question of what public housing policies and rules should continue to apply and which should be eliminated. These issues were thoroughly debated by Congress. The Holyoke Housing Authority chose to participate in the RAD program by having Lyman Terrace redeveloped by The Community Builders, a nonprofit owner and manager of affordable housing. In essence, the Lyman Terrace decision is a continuation in another forum of the discussion of which rules will continue to apply and which will not for these programs to redevelop public housing through public-private partnerships.

Because of the deep and on-going involvement of the public housing authority in these transactions, it has been affordable housing industry practice either to obtain relief from Chapter 149 through a home rule petition or to comply with the chapter. The General Court has recognized the benefits provided by private participation to redevelop public housing and has generally enacted the requested home rule petitions. Lyman Terrace is the only exception known to CHAPA where no home rule petition for an exemption was filed or the project did not comply with Chapter 149. The acceptance of these home rule petitions is further demonstration that the General Court believes that compliance with Chapter 149 is neither required nor compatible with the development of privately-owned affordable housing.

3. Chestnut Park is a Privately-Owned Building.

Chestnut Park was built by private parties in the 1970s. These parties applied for and received financial incentives, including a loan from MassHousing, to provide apartments to low- and moderate-income residents. There was never any public ownership of the Project. Fifty years later, it needs significant rehabilitation. Both the federal and state governments have programs that provide financial assistance to encourage the preservation of existing affordable developments in decent, safe, and sanitary condition and the owners of Chestnut Park have been granted this assistance. Often cities and towns make loans with their funds commensurate with their financial ability as a sign of support of the project, as the City of Springfield did in this case. Springfield's assistance will not trigger any public ownership.

In the private ownership model, the owner/developer selects the contractor and, in cooperation with the contractor, reviews the bids and capacity of the sub-contractors. It is the responsibility of the private owner/developer to demonstrate to the public and private providers of the required financial resources that the costs are fair and reasonable. The private

owner/developer is required to provide a financial guarantee of completion of construction. This method of procurement has generally produced a high-quality product at costs consistent with the private market place.

The General Court, in its creation of the numerous programs over the last fifty years to fund privately-owned affordable housing projects, has encouraged the private development of affordable housing.

As noted, to attract the required debt and equity, developers of privately-owned affordable housing are required to furnish guarantees of completion of construction. The very limited control provided to owners under Chapter 149 for the selection and management of contractors and subcontractors that will make it likely that reputable developers will not be prepared to make these guarantees.

In a limited number of affordable housing incentive programs, the General Court included a requirement of a public option to acquire the property in accordance with a fair market value formula or a right of first refusal. FFC argues that this is evidence of public control. The opposite is the case. Because these are privately-owned properties, after the completion of a mandatory compliance period, the owner is free to convert the property to an alternative use, most likely market rate housing. This opportunity would not be consistent with public ownership. The purpose of these public rights is to allow the public the opportunity to continue the property as affordable housing via acquisition at fair market value. The FFC suggests that an appraisal process somehow dampens the owner's value. However, that is how every eminent domain dispute is resolved in accordance with the Constitutional obligation for the public to pay fair market value.

4. Imposing Bidding Requirements Will Substantially Increase the Cost of Affordable Housing Construction and Will Lead to Reduced Production.

The application of the bidding requirements specified in Chapter 149, Sections 44A–44H adds substantially to the cost of public construction projects. This had been well documented. *See* Pioneer Institute for Public Policy Research, *The Cost of Inaction – Does Massachusetts Need Public Construction Reform?*, White Paper No. 7 (Sept. 1999). It has been estimated that compliance with those requirements would increase the cost of private affordable housing projects by 30–40%. This will result in less affordable housing being built or preserved which will contribute to the severe lack of affordable housing in Massachusetts.

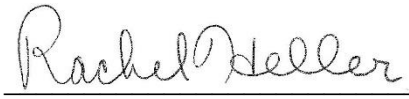
5. Massachusetts General Laws Chapter 40T Reinforces the Private Sector Nature of Projects Such as Chestnut Park Apartments.

M.G.L. Chapter 40T, the Affordable Housing Preservation Law, was enacted to foster an opportunity for the Commonwealth and localities, and their nonprofit and for-profit designees, to purchase privately-owned affordable housing projects at their fair market value upon the sale of those projects for keeping the developments affordable. It is precisely because these affordable housing projects are private and not public assets that the General Court found it necessary to intervene in the private marketplace to create the fair market value purchase option and right of first refusal contained in Chapter 40T.

Conclusion

The conversion of a development from a "public housing development" into a "privately-owned development" raises many issues of the type singled out in the Lyman decision. These regulatory challenges do not apply to the privately-owned program that has operated successfully under its procurement methods for more than half a century. CHAPA's goal is to encourage the production and preservation of housing that is affordable to households with low- and moderate-

incomes. This includes supporting public housing preservation and development as well as private affordable housing development. Requiring privately-developed affordable housing to operate under the same regulatory apparatus as public housing will undermine the factors that have made the private model a success.



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