20-4223

United States Court of Appeals for the Second Circuit

RISEBORO COMMUNITY PARTNERSHIP INC.,
fka Ridgewood Bushwick Senior Citizens Council, Inc.,
Plaintiff-Appellant,

v.

SUN AMERICA HOUSING FUND NO. 682, SLP HOUSING I, LLC,
Defendants-Appellees,

420 STOCKHOLM STREET ASSOCIATES L.P.,
Defendant.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR STATE OF NEW YORK AND CITY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF APPELLANT

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INTEREST OF AMICI CURIAE

The federal Low-Income Housing Tax Credit (LIHTC) program, codified at 26 U.S.C. § 42, is the largest source of federal funding for affordable housing creation and preservation in the United States. Under that program, private investors partner with non-profit developers to provide capital for new or rehabilitated affordable housing developments in exchange for valuable, government-backed tax credits for ten years; after year fifteen, the credits become irrevocable, at which point the non-profit entity typically takes over full ownership of the project to continue its affordable status. To ensure the long-term affordability of these projects, Congress took care to safeguard the ability of such non-profits to contract with investors for a special "right of first refusal," under which the non-profits may purchase the investors' interests after year fifteen at statutorily-defined, below-market prices.

This case concerns the proper interpretation of that right. In a dispute between a private investor and the nonprofit seeking to exercise its right, the United States District Court for the Eastern District of New York (Dearie, J.) held that the non-profit could not exercise its right of first refusal—and thus could not assume ownership over this project—

because of the objection of the private investor. That decision is inconsistent with the established understanding of the right as authorized by statute and established by contract. And the decision removes a long-recognized and critical aspect of the LIHTC program's design and undermines its twin purposes of incentivizing the creation of new affordable housing and preserving long-term affordability.

Amici curiae the State of New York and the City of New York have a direct interest in this dispute. Amici are committed to preserving and expanding the stock of affordable housing in New York, and amici rely on the LIHTC program to address New York's affordable housing crisis: State and city agencies administer the LIHTC program by awarding LIHTC credits, imposing additional criteria on LIHTC projects, facilitating bond issuances and other public investments in LIHTC-backed housing, and helping implement LIHTC deals.

The decision below threatens amici's interests. If for-profit investors who have already obtained tax credits under the LIHTC program may now refuse to transfer their interests to non-profits after year fifteen, the inevitable outcome will be either (a) onerous new transfer costs for non-profit partners, depleting the capital that non-profits need to sustain long-term affordable housing or (b) a conversion of these developments to market rate, putting them beyond the reach of low-income New Yorkers. Both outcomes harm residents of LIHTC-funded projects and undermine the significant investments that the State and City have made in these projects for the purpose of long-term affordability.

The district court also based its decision on an incorrect interpretation of New York law. The court relied on New York cases concerning rights of first refusal in other contexts and failed to interpret the contract's terms in the particular context of the unique LIHTC program, as required by New York law. *See, e.g.*, *Newhall v. Appleton*, 114 N.Y. 140, 143-44 (1889). Here, there is significant evidence from the time the agreement was made that a below-market "right of first refusal" clause like the one here, in the context of a LIHTC deal, was intended to give the non-profit the right to purchase the investor's interest at a statutorily set price. At minimum, there is sufficient uncertainty about this interpretation that this Court should certify the state law question here to the New York Court of Appeals.

STATEMENT

A. The LIHTC Program

LIHTC is the largest federal source of affordable housing financing in the country.[1] The program was enacted by Congress in 1986 in response to a nationwide shortage of affordable housing. *See* 26 U.S.C. § 42. Although LIHTC has helped finance the development and preservation of over two million affordable housing units since the program's inception, including tens of thousands in New York, that crisis continues, including in New York State and New York City.[2] Wages, particularly in the City, have not kept pace with the rising cost of renting an apartment.[3] Today, close to half of all renter-occupied households in New York spend more than 30% of their incomes on housing, and over a

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[1] N.Y.U. Furman Ctr., The Effects of the Low-Income Housing Tax Credit (LIHTC) 1 (May 2017) (internet); *see Homeowner's Rehab, Inc. v. Related Corp. V SLP, L.P.*, 479 Mass. 741, 743 (2018). For authorities available on the internet, full urls appear in the Table of Authorities. All websites last checked April 14, 2021.

[2] N.Y.U. Furman Ctr., *supra*, at 1.

[3] Office of the Mayor, City of N.Y., *Housing New York: A Five-Borough, Ten-Year Plan* 5 (May 2014) (internet).

quarter of all such households spend more than half of their incomes on housing.[4]

State and local agencies play a crucial role in administering the LIHTC program, among other things by allocating LIHTC credits. *See* 26 U.S.C. § 42. The State's affordable housing agencies[5] currently allocate approximately $105 million in LIHTC credits annually.[6] On average, these LIHTC allocations support approximately 7,200 affordable units across seventy projects annually and generate almost $1 billion each year

[4] Statewide, nearly half of all renter-occupied households spend more than 30% of their incomes on housing, and in the City more than half of all such households do. *See* Office of N.Y. State Comptroller, *Housing Affordability in New York State* 3 (June 2019) (internet); Office of the Mayor, *supra*, at 5. And statewide, over a quarter of all renter-occupied households spend at least half of their incomes on housing, and in the City more than 30% of all such households do. *See* Office of N.Y. State Comptroller, *supra*, at 3; Office of the Mayor, *supra*, at 5.

[5] New York State Homes and Community Renewal (HCR) is a consolidated platform of associated New York State executive agencies and public benefit corporations with a shared mission to build, preserve and protect affordable housing and increase home ownership across New York State. HCR includes, among other agencies and public authorities, the State Division of Housing and Community Renewal (DHCR) and the State Housing Finance Agency (HFA).

[6] *See, e.g.*, 9 N.Y.C.R.R. pt. 2040 (DHCR); 21 N.Y.C.R.R. pt. 2188 (HFA).

in LIHTC equity. The City, through its Department of Housing Preservation and Development (NYCHPD), has additionally allocated over half a billion dollars in LIHTC credits to create or rehabilitate nearly 50,000 affordable housing units since the inception of the LIHTC program, attracting over $5 billion in private investment.[7] These LIHTC credits and the private financing they attract are frequently combined with additional investments and tax benefits from the State and City to support affordable housing development. See *infra* at 19-20.

The LIHTC program encourages both the initial creation and long-term preservation of affordable housing. It encourages the creation of affordable housing by giving valuable tax credits and other tax benefits to private investors that provide investment capital for such developments. And it encourages the long-term affordability of such housing by providing a mechanism (the contractual "right of first refusal" at issue in this appeal) for investors to exit from the development and transfer their interest to a non-profit that will maintain the project's affordability after the investor has fully reaped the tax benefits of its initial investment.

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[7] NYCHPD, 2020 Low Income Tax Credit Qualified Allocation Plan 4 (Mar. 2020) (internet).

Under the LIHTC scheme, the federal government allocates tax credits to the States, and provides that at least ten percent of the credits must go to projects sponsored by a non-profit affordable housing developer; investors can obtain the valuable tax credits by partnering with a non-profit developer to create the affordable housing projects. *See* 26 U.S.C. § 42(h)(5). In such projects, the private investor—typically acting as a "limited partner"—provides capital for the project, while the non-profit (known as the "general partner") helps to develop the property and manages it once it is complete.[8] An investor that partners with a non-profit in this way is entitled to obtain millions of dollars in annual allotments of tax credits over the course of the next ten years, and may also accrue additional tax benefits from their partnership interests. *See, e.g.*, *Homeowner's Rehab, Inc. v. Related Corp. V SLP, L.P.*, 479 Mass. 741, 744-46 (2018). After fifteen years, the tax credits become

[8] *See, e.g.*, DHCR, *Using the Low-Income Housing Tax Credit Program for Special Needs Housing* 10 (June 2000) (internet) (describing typical ownership structure); *see also, e.g.*¸ Office of Pol'y Dev. & Research, U.S. Dep't of Hous. & Urban Dev., *What Happens to Low-Income Housing Tax Credit Properties at Year 15 and Beyond?* xviii (Aug. 2012) (internet) (noting typical structure).

irrevocable.[9] *See* 26 U.S.C. § 42(a), (c)(2), (f)(1). At that point, the private investor typically exits the investment, while the non-profit, often with additional financial support from state or local agencies, continues to operate the property as affordable housing.[10]

Private investor exits from LIHTC projects after year fifteen are often accomplished pursuant to a "right of first refusal" clause in the parties' partnership agreement. Such a clause allows the non-profit general partner to purchase the private investor's interest for a statutorily set, below-market price without jeopardizing the private investor's claim to the lucrative tax benefits received in the deal.

Specifically, Congress provided in the LIHTC statute that "[n]o federal income tax benefit shall fail to be allowable to the taxpayer with respect to any qualified low-income building merely by reason of a right

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[9] LIHTC-backed properties are statutorily required to maintain affordability for another fifteen years after the initial tax compliance period, but project owners may seek a waiver of this "extended use period" affordability requirement unless prohibited by the state or local LIHTC-allocating agency. Office of Pol'y Dev. & Research, *supra*, at xii.

[10] *See, e.g.*, *Homeowner's Rehab, Inc.*, 479 Mass. at 744-45; Office of Pol'y Dev. & Research, *supra*, at 30-31 & n.20. See *infra* at 14-15, 26-30.

of 1st refusal held by," among others, "a qualified nonprofit organization . . . to purchase the property." 26 U.S.C. § 42(i)(7)(A). The statute further specifies that this protected right to purchase the property may only be exercised "after the close of the compliance period" (i.e., the fifteen years after which the investor's tax credits become irrevocable) and "for a price which is not less than" the cost of the outstanding debt secured by the building and any taxes owed. § 42(i)(7)(A)-(B). Congress created this safe harbor to prevent the Internal Revenue Service from disallowing tax credits or benefits to the private investor due to the presence of a below-market transfer mechanism in the investor's partnership agreement, which could otherwise be argued to undercut the investor's claimed ownership of the property under a principle of tax law known as the "economic substance doctrine." *See, e.g.*, *Homeowner's Rehab*, 479 Mass. at 754 & n.9.

B. Factual and Procedural Background

The dispute here arises from a 1999 partnership agreement between non-profit RiseBoro Community Partnership Inc. (the general partner) and investor SunAmerica Housing Fund No. 682 (the limited partner).[11] For ten years, SunAmerica received millions of dollars in valuable tax credits as the reward for its initial investment of capital into an affordable housing project. SunAmerica's exit from the project at the end of the fifteen-year compliance period was contemplated by the partnership agreement, which included a "right of first refusal" (ROFR) clause. That clause, which mirrors the language in the LIHTC statute, provides as follows:

> On and after the end of the 15 year Compliance Period, [RiseBoro] or its designee, if it is at that time a qualified nonprofit corporation, shall have a right of first refusal to purchase the Apartment Complex for the price equal to the sum of: (i) the principal amount of outstanding indebtedness secured by the building . . . (ii) all Federal, State, and local taxes attributable to such sale . . . and; (iii) any amount of [LIHTC credits that the investor was unable to realize].

(J.A. 120 (Agreement § 12.03).)

The partnership agreement also provides that RiseBoro, as the general partner, has significant latitude to manage the affairs of the partnership, including, in some circumstances, to make decisions

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[11] The general partner is more specifically a wholly owned RiseBoro subsidiary; for ease of reference, this brief refers to "RiseBoro" throughout.

regarding the sale of the property. Specifically, RiseBoro is empowered to "make all decisions affecting the business of the Partnership and shall manage and control the affairs of the Partnership to the best of ability and use best efforts to carry out the purpose of the Partnership." (J.A. 90 (Agreement § 8.01(a)).) The agreement further provides that RiseBoro may not, without consent, "sell or otherwise dispose of, at any time, all or any material portion of the assets of the Partnership, *except as expressly provided in this Agreement*." (J.A. 91 (Agreement § 8.02(b)(i)) (emphasis added).)

In 2015 and again in 2018, RiseBoro notified SunAmerica of its intent to purchase SunAmerica's interest under the ROFR clause and thus facilitate SunAmerica's exit. But SunAmerica refused, arguing, among other things, that RiseBoro could not make this purchase without SunAmerica's consent.

The district court agreed with SunAmerica's reading of the 1999 partnership agreement. RiseBoro had argued, as it does here, that the provisions of the 1999 partnership agreement, including the ROFR clause and the powers accorded to the general partner, allow RiseBoro to transfer the property to non-profit ownership after fifteen years by selling at the below-market price set forth in the contract and the statute, once the tax credits and benefits from the parties' arrangement have been obtained, consistent with the basic purposes of the LIHTC scheme. *See, e.g.*, Br. for RiseBoro Cmty. P'ship Inc. at 19-22. But the district court held that the term "right of first refusal" has only a generic common law meaning under New York law, as a preemptive or defensive right that must be triggered by a third-party offer to purchase and the willingness of the seller to sell. (J.A. 592-593 (citing *LIN Broad. Corp. v. Metromedia, Inc.*, 74 N.Y.2d 54, 60 (1989)).) The court never explained how this interpretation could be squared with the below-market price specified in the parties' agreement, which as a practical matter would allow RiseBoro to underbid any third-party offer and would thus necessarily deter third parties from making an offer on the property in the first place. *See Homeowner's Rehab*, 479 Mass. 757-58. See *infra* 30-31.

ARGUMENT

POINT I

THE DECISION BELOW IMPEDES THE LIHTC PROGRAM'S ABILITY TO PROVIDE LONG-TERM HOUSING AFFORDABILITY

"[O]ne of the key policy goals of the LIHTC program . . . is to ensure that affordable housing remains affordable in the long term." *Homeowner's Rehab, Inc. v. Related Corp. V SLP, L.P.*, 479 Mass. 741, 754 (2018). And one of the ways the LIHTC program accomplishes this goal is by providing a mechanism for private investors to exit from a project after receiving the full benefit of the tax credits. That mechanism is a special contractual "right of first refusal" held by a non-profit general partner that, when exercised, transfers the private investor's remaining interest to the non-profit to enable it to continue operating the development as affordable housing indefinitely.

The decision below threatens this essential transfer mechanism by allowing private investors to hold on to their interest and refuse to allow their non-profit partners to take full ownership of the affordable housing project, despite the parties' ex ante agreement to a below-market ROFR clause. That precedent will tend to prevent LIHTC properties from achieving long-term affordability—and it will dissuade non-profits from developing LIHTC projects in the first place. The result will be the loss of existing affordable units, fewer new affordable units created, and a needless waste of tens of millions of public dollars spent to support non-profit partnership deals like the one here.

A. Industry Participants Rely on Investor Exit and Long-Term Non-Profit Ownership for the LIHTC Program to Work as Intended.

The efficacy of the LIHTC program rests on the longstanding and widespread practice and expectation that investor partners will reap the tax benefits of a LIHTC deal and then exit the partnership after the expiration of the fifteen-year tax credit period. That exit allows non-profits to assume full ownership of affordable housing projects and maintain their affordability into the future. Because non-profits are strongly committed to preserving affordability even when market pressures would otherwise encourage higher rents, long-term non-profit ownership is a critical feature of the LIHTC program.

Industry participants have long acted in accordance with this established practice and understanding. For example, a study commissioned by the United States Department of Housing and Urban Development found that the vast majority of LIHTC properties remain affordable at the end of the tax credit period, and noted that "[b]y far the most common pattern of ownership change around Year 15" is for investor partners to sell their interest in the property to the general partner. In projects that, as here, involve partnerships with non-profit developers, "[t]his pattern is overwhelmingly the case."[12]

This well-established practice over the last three decades has served the LIHTC program's interrelated goals of incentivizing private investment while preserving long-term affordability. As the billions of dollars invested in LIHTC properties demonstrate, the program's lucrative tax credits and tax benefits alone are sufficient to spur private investment, even on the assumption that the investor will exit the property after fifteen years. Indeed, the tax credits were designed to attract investment in properties that were presumed to produce lower levels of rental income. At the same time, the ability of the non-profit partner to take over complete ownership of the development after the expiration of the tax credits ensures that the project will be maintained as affordable housing in the long term rather than converted to market

[12] Office of Pol'y Dev. & Research, *supra*, at xiii.

rates, and allows the non-profit to seek new infusions of capital to maintain housing quality. A proper understanding of the contractual "right of first refusal" mechanism would preserve this important transfer of ownership interests and thus serve LIHTC's key policy goals, as well as the settled expectations of industry players as illustrated by longstanding practice.

By contrast, weakening this transfer mechanism would undermine the incentive structure that has long bound non-profit developers and private investors together in the LIHTC program. Without a mechanism for the non-profit general partner to initiate an investor's exit, there will always be an incentive for investors to try to extract more from the partnership, the tenants, and the property, and to foment expensive and time-consuming contract disputes, all of which burdens existing affordable housing efforts. And eliminating this mechanism will deter non-profits' involvement in the LIHTC program going forward: Non-profits will be less likely to enter a partnership with an investor if doing so entails a serious risk of an ownership battle after year fifteen, or may impose their own demands on such deals to compensate for the new paradigm of contested investor exits.[13] The district court's unsettling of the industry's established understanding of the contractual right of first refusal thus threatens to make LIHTC deals fundamentally less attractive to all parties in the long run.

B. Amici Have Also Relied on the Expectation of Investor Exit in Making Their Own Substantial Investments in LIHTC Properties.

The State and the City have invested massive resources to support and administer the LIHTC program and ensure its success. Those investments have been premised on the practice and custom of investor exit after year fifteen and a transition to long-term affordable status under the management of the non-profit partner. The district court's ruling here will undercut the purpose of these investments by impeding the long-term viability of affordable housing in these projects. Indeed, if for-profit investors (who have already received the bargained-for benefit of lucrative tax credits) were able to regularly extract additional value

[13] For example, in this case, RiseBoro, which owned the underlying land prior to the execution of the partnership agreement, gave the land to the partnership as part of the deal for no additional consideration. (J.A. 58.) Non-profits' willingness to make similar contributions in the future may be reduced if there is no guarantee of long-term affordability.

from LIHTC properties as a condition of exiting the partnership—or if such investors refuse to exit the partnership altogether—those investors will be able to reap the benefits of years of public investment in those properties for their own private gain.

For example, the district court's ruling here threatens to frustrate the purposes of NYCHPD's "Year 15" financing program, which works with LIHTC project owners to help transition their properties out of LIHTC at the end of the tax credit period while preserving long-term affordability and ensuring the future financial and physical viability of the projects.[14] Projects receiving assistance from NYCHPD's Year 15 program, in the form of a loan or a tax exemption, agree to extend existing underlying regulatory agreements regarding affordability in exchange for additional financial assistance. Absent investor exit at the end of the tax credit period, NYCHPD's Year 15 program —and other programs which support continued affordability at the end of the tax credit period—will be severely hampered.

[14] NYCHPD, *LIHTC Preservation (Year 15) Program* (internet).

The district court's decision threatens to undercut a host of other state and city investments as well. NYCHPD provides extensive investments, including subordinate loans, grants, public land conveyed at nominal value, project-based rental assistance, and tax benefits, to support LIHTC properties. For example, NYCHPD offers capital funding to new LIHTC projects through its Extremely Low- and Low-Income Affordability Program and its Mixed Income Program: Mix and Match Program;[15] offers long-term loans to LIHTC properties that provide supportive housing with on-site social services through NYCHPD's Supportive Housing Loan Program;[16] and offers low-interest loans and tax exemptions to rehabilitate LIHTC properties through its Participation Loan Program.[17] Similarly, the State's affordable housing agencies have several preservation programs and funding sources that they use to support LIHTC projects and to reposition such projects at the end of the tax credit compliance period in order to ensure adequate

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[15] NYCHPD, *Extremely Low- and Low-Income Affordability Program* (internet); NYCHPD, *Mixed Income Program: Mix & Match* (internet).

[16] NYCHPD, *Supportive Housing Programs* (internet).

[17] NYCHPD, *Participation Loan Program (PLP)* (internet).

capitalization, extended affordability, and, if necessary, a change in ownership structure. For example, the State Housing Finance Agency (HFA) provides financing through the Multifamily Preservation Program for the preservation and improvement of multi-family rental housing like LIHTC projects that are subject to a regulatory agreement or extended use agreement with a governmental housing agency.[18] In addition, the State's Rural and Urban Community Investment Fund supports the creation, preservation, and improvement of affordable housing and the commercial, retail, and community facilities that serve the needs of affordable housing residents, including significant amounts of LIHTC housing in rural areas.[19] The State also dedicates funds from the federal Housing Trust Fund program to support the preservation of existing affordable housing.[20]

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[18] HCR, Multifamily Preservation Program (June 2018 update) (internet).

[19] HCR, Rural and Urban Community Investment Fund (Nov. 2020) (internet).

[20] HCR, Federal Housing Trust Fund (FHTF*)* (Nov. 2020) (internet).

Amici spend all of this funding and other resources to support affordable housing, not to entrench or enrich private investors who have already received the tax benefits for which they bargained.

By empowering investors to veto any transfer of ownership to the non-profit partner pursuant to a LIHTC ROFR clause, the district court's decision here undercuts amici's investments in other ways as well. As a result of the resource drain caused by legal disputes between LIHTC partners, a development may be rendered a weaker applicant for public loans and benefits through city, state, or other housing agencies that are designed to provide capital and support for affordable housing. Such disputes may even weaken the non-profit itself and jeopardize its ability to own and maintain multiple projects, undermining affordability on a structural level and promoting disinvestment.

The bottom line is that amici's significant investments in the LIHTC space would be threatened by profit-driven entities taking ownership at the end of the tax credit period—or even just refusing to leave without additional concessions. Such entities, unlike housing non-profits, have no inherent commitment to preserving affordability.[21] Should the widespread and longstanding norm of long-term non-profit ownership be upended, this sea change would jeopardize the benefits created by amici's investments, enable for-profit investors to reap financial returns from those public investments beyond what the LIHTC program already generously provides, and undermine amici's efforts to create and preserve desperately needed affordable housing.

POINT II

THE DISTRICT COURT ERRED IN ITS ANALYSIS AND APPLICATION OF NEW YORK LAW

The district court here held that the meaning of a "right of first refusal" under New York common law allowed SunAmerica to unilaterally block the transfer of its interest to the non-profit partner, RiseBoro. But the district court's analysis relied on generic case law regarding rights of refusal in inapposite contexts. In fact, there is strong contemporaneous evidence that the term "right of first refusal" has a

[21] *See* Office of Pol'y Dev. & Research, *supra*, at xviii (explaining how "properties with for-profit owners in favorable market locations" are "at risk of becoming unaffordable").

distinct meaning in the unique context of the LIHTC program. That strong evidence of a particular trade usage matters under New York law. At minimum, the state-law question here is sufficiently close that this Court should certify the question to the New York Court of Appeals.

There is no dispute that the 1999 partnership agreement at issue here is governed by New York contract law. (J.A. 592.) When interpreting a contract under New York law, "the judicial function is to give effect to the parties' intentions." *Federal Ins. Co. v. Americas Ins. Co.*, 258 A.D.2d 39, 44 (1st Dep't 1999); *see, e.g.*, *Gorham v. Fillmore*, 111 N.Y. 251, 255 (1888) ("the intentions of the parties must control"). And evidence of a term's idiosyncratic usage "as used in any particular trade or business" is especially important "as a means of enabling the court to declare what the language of the contract did actually express to the parties." *E.g.*, *Newhall*, 114 N.Y. at 144; *see Eskimo Pie Corp. v. Whitelawn Dairies, Inc.*, 284 F. Supp. 987, 993-94 (S.D.N.Y. 1968) (explaining that under New York law the "plain meaning" of a contract's terms is to be "objectively interpreted in the light of surrounding circumstances, customs and usage"); *see also Sayers v. Rochester Tel. Corp. Supplemental Mgmt. Pension Plan*, 7 F.3d 1091, 1095 (2d Cir. 1993) ("cognizant of the customs, practices, usages and terminology" (quoting *Eskimo Pie*, 284 F. Supp. at 994)). Such evidence of trade usage is "always admissible" in order "to ascertain with greater certainty what was the intention of the parties at the time of [the contract's] making." *Newhall*, 114 N.Y. at 144; *see International Multifoods Corp. v. Commercial Union Ins. Co.*, 309 F.3d 76, 87 n.4 (2d Cir. 2002) (evidence of custom and usage is admissible and relevant regardless of a finding of ambiguity). Indeed, the rule in New York is that an established usage of a particular contract term, known in the industry, is part of the "implicit understanding of the parties," *Zurakov v. Register.Com, Inc.*, 304 A.D.2d 176, 179 (1st Dep't 2003) (quotation marks omitted), and "is deemed to form part of the contract" where the evidence shows that the parties would have been familiar with such usage, *Newhall*, 114 N.Y. at 143-44. *See Nicoll v. Pittsvein Coal Co.*, 269 F. 968, 972 (2d Cir. 1920).

Trade usage or custom may even overcome a more literal interpretation of the contract language where it better evinces the parties' intent. For example, in *Nicoll*, even though it was clear that "literal compliance with the written portion of the [contract] would have meant the delivery to Nicoll of 4,166 tons of coal per month," this Court held that the question whether trade usage in the coal industry allowed the delivery of a smaller amount was one of fact, properly determined at trial.[22] 269 F. at 969-73. Similarly, in *Miller v. Fischer*, New York's Appellate Division explained that even though the contract at issue, for carrying a load of ice by boat to the City, had set forth no conditions on payment, the question whether there was a custom in the industry that contracts to transport ice "should not be paid for unless ice should form [in the winter] of sufficient thickness to be marketable" should nevertheless "have been submitted to the jury." 142 A.D. 172, 173-74 (3d Dep't 1911). Those decisions are consistent with the New York Court of Appeals' emphasis that an agreement's "words may be transposed, rejected, or supplied, to make its meaning more clear" and "[t]o carry out the intention of a contract." *Castellano v. State*, 43 N.Y.2d 909, 911-12 (1978); *see Reape v. New York News, Inc.*, 122 A.D.2d 29, 30 (1st Dep't 1986).

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[22] *See also Mutual Chem. Co. of Am. v. Marden, Orth & Hastings Co.*, 235 N.Y. 145, 151 (1923) (where contract called for carloads of potash "to be 36,000 pounds each," held that evidence supported industry custom that delivery of 36,418 pounds was proper under the agreement).

As this Court has explained, to control the contract analysis, a proffered trade usage must be sufficiently "fixed" or a custom sufficiently "notorious" that it would have been known to the contracting parties. *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 134 (2d Cir. 2006) (quotation marks omitted). Here, public documents from the time that the 1999 partnership agreement was executed show that there was a known and established trade usage of the term "right of first refusal" in the LIHTC context as allowing the non-profit to ensure the transfer of LIHTC-backed properties from investor to non-profit ownership after the tax compliance period.

For example, a comprehensive report from a key affordable housing agency, the State Division of Housing and Community Renewal, on the LIHTC program from 2000 repeatedly and expressly defined a "right of first refusal" in the LIHTC context as an "[o]ption granted to a not-for-profit sponsor to acquire the investor limited partner's partnership interest at the end of the 15-year tax credit compliance period." DHCR, *Using the Low-Income Housing Tax Credit Program*, *supra*, at 91; *see id.* at 11 (stating that "an option to acquire the investor limited partner's partnership interest at the end of the initial compliance period (15 years)" is "usually referred to as the *right of first refusal*"); *id.* at 62 (describing a "Right of First Refusal" as an "option" provided to the nonprofit sponsor "to buy out the investor at the end of the fifteen-year compliance period"). As DHCR explained in the report, this option allows the nonprofit developer "to maintain the affordable status of the project over a longer term." *Id.* at 62. DHCR's report includes this definition of an ROFR—and only this definition—in its glossary. *See id.* at 91. This DHCR report is especially compelling evidence because, at the time the partnership agreement here was executed, DHCR was the primary state agency allocating the bulk of LIHTC tax credits in New York, including for the project at issue in this appeal.[23] *Id.* at 3.

[23] LIHTC provides multiple classes of tax credits. A class of 9% credits is limited; each State is allocated a set amount of credits which state agencies then distribute to projects on a competitive basis. In New York, HCR's Multifamily Finance 9% Request For Proposal is the competitive process used to award 9% LIHTC credits and subsidy financing to sponsors proposing affordable and supportive multifamily housing projects. HCR, *Fall 2020 Multifamily Finance 9% RFP Information* (internet). The 4% class of credits are not limited, though projects must often obtain additional financing or governmental backing (such as through public bonds) to make use of them. *See, e.g.*, Corianne Payton Scally et al., *The Low-Income Housing Tax Credit: How It Works and Who It Serves* 3-4 (Urban Inst. 2018) (internet). This case involves 9% credits that were allocated by DHCR through HFA, another public

Other contemporaneous evidence from the industry is in accord. For example, an article from a 2001 issue of *Property Compliance Report*, a trade publication about LIHTC compliance issues, described 26 U.S.C. § 42(i)(7)'s reference to ROFRs as a "special provision" whereby "a partnership that owns a project *subject to a below-market option* will not be treated as the owner of the project for tax purposes." Ronald A. Shellan, *Thinking About Year 15 of a Low-Income Housing Tax-Credit Partnership*, 4 Prop. Compliance Report 1, 1 (Aug. 2001) (internet) (emphasis added). Similarly, a few years later the industry publication *LIHTC Monthly Report*, reporting on an industry conference regarding year fifteen transitions, described "[t]he right-of-first-refusal granted to not-for-profits" as an "option" involving the sale of the property or the investor's partnership interest. Lindsay Weiford, *Year 15: Are You Ready?*" 17 LIHTC Monthly Report 1, 1 (June 2006) (internet).

Additional evidence in the record demonstrating the custom and practice of parties to LIHTC deals is consistent with these contemporaneous sources. As explained by William Callison, a real estate

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authority that is now part of the consolidated HCR platform. (*See* J.A. 404-453 (regulatory agreement with HFA for the property at issue).)

finance attorney who has "reviewed and negotiated many ROFR provisions" in LIHTC deals, where LIHTC deal partners seek to implement a more limited ROFR that can only be exercised by the non-profit partner upon a particular "trigger," they set forth that triggering condition in writing. (J.A. 469-472) Here, though, "the words do not set forth any trigger, and this supports a conclusion that the parties did not intend to establish a particular objective trigger." (J.A. 471-472.) Rather, the parties intended the ROFR here to operate in the same manner that it has for hundreds of other properties to allow the non-profit to exercise its right to obtain full ownership of the project after the realization of the tax credits. As explained above, this transfer of ownership furthers the long-term goal of the LIHTC program to transition properties to non-profit stewards who are committed to affordability. See *supra* at 13-17. *See, e.g.*, *Schmidt v. Magnetic Head Corp.*, 97 A.D.2d 151, 157 (2d Dep't 1983) (courts must consider "the purpose of the parties in entering into the contract"); *cf. Grad v. Roberts*, 14 N.Y.2d 70, 75 (1964) (noting that New York law requires contracting parties "to exercise good faith not to frustrate the contracts into which they have entered"); *Cross & Cross*

Props., Ltd. v. Everett Allied Co., 886 F.2d 497, 502 (2d Cir. 1989) (quoting *Grad*).

SunAmerica itself understood the ROFR clause in precisely this way, as other contemporaneous evidence from around the contract period confirms. For example, SunAmerica's Vice President told an industry publication in 1996 that "[i]nvestors are not looking at these properties to generate traditional real estate benefits in the same way as conventional multifamily investments—it's not the cash flow they're looking at—but the ability to reduce their federal tax liability." (J.A. 485-486 (quoting interview in Zaner, *The Low-Income Housing Tax Credit*, National Real Estate Investor (April 1, 1996)).) Such evidence of the parties' own behavior is often "the most persuasive evidence of the agreed intention of the parties." *Federal Ins. Co.*, 258 A.D.2d at 44 (quotation marks omitted); *accord IBJ Schroder Bank & Tr. Co. v. Resolution Tr. Corp.*, 26 F.3d 370, 374 (2d Cir. 1994).

Here, the evidence confirms that the understanding of industry participants such as SunAmerica was that investors would reap the substantial tax benefits from LIHTC properties, then exit those properties in favor of their non-profit partners. By contrast, the district court's generic interpretation of "right of first refusal," drawn from outside the LIHTC context, makes little sense for the particular, below-market right at issue here; as the Massachusetts Supreme Judicial Court explained, unlike a "typical right of first refusal" that allows a party to match an outside offer, "it is difficult to imagine" why any third party would make an offer on the property in the first place where the non-profit sponsor could then underbid them and prevail. *Homeowner's Rehab*, 479 Mass. at 757-58.

All of this evidence of trade usage and custom in the unique LIHTC context is relevant to any interpretation of the meaning of the contractual ROFR clause here. The district court should at least have declined to grant summary judgment in light of these facts. *See, e.g., SR Int'l Bus. Ins. Co.*, 467 F.3d at 134 (evidence of industry custom relating to meaning of contested contract term created fact issue); *Zurakov*, 304 A.D.2d at 179 (same); *Horby Realty Corp. v. Yarmouth Land Corp.*, 270 A.D. 696, 697 (1st Dep't 1946) (same); *see also Walls v. Bailey*, 49 N.Y. 464, 477 (1872) ("It is for the jury . . . to take all the evidence in the case; that as to the existence, duration and other characteristics of the custom or usage, and that as to the knowledge thereof of the parties; and therefrom to determine whether there is shown a custom of such age and character, as that the presumption of law will arise . . . ."). Accordingly, this Court should vacate and remand so this case may proceed to trial.

In the alternative, this Court should certify the dispositive issues of New York contract law presented here to the New York Court of Appeals.[24] *See* Second Cir. L.R. 27.2; Rules of N.Y. Ct. App. (22 N.Y.C.R.R.) § 500.27. All of the relevant factors support certification. *See generally Barenboim v. Starbucks Corp.*, 698 F.3d 104, 109 (2d Cir. 2012) (listing three factors). Neither the Court of Appeals nor any of the Appellate Division Departments have addressed the operation of the ROFR mechanism in the LIHTC context. The question presented here has significant implications for New York housing policy and for the long-term future of affordable housing in New York. The dispute here turns almost entirely on the meaning and operation of a partnership agreement that is governed by New York law. And for the reasons already stated, there are good reasons both on policy and on the legal merits to think

[24] Whether or not the parties request it, this Court is "empowered to seek certification *nostra sponte*." *Kuhne v. Cohen & Slamowitz, LLP*, 579 F.3d 189, 198 (2d Cir.2009).

that the Court of Appeals might disagree with the district court on the state law question presented here. Such disputed questions at the intersection of state contract law and policy are worthy of certification. *See, e.g.*, *Global Reinsurance Corp. of Am. v. Century Indem. Co.*, 843 F.3d 120, 128 (2d Cir. 2016); *Ramos v. SimplexGrinnell LP*, 740 F.3d 852, 859 (2d Cir. 2014); *Rooney v. Tyson*, 127 F.3d 295, 297 (2d Cir. 1997); *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 110 F.3d 6, 9 (2d Cir. 1997).

CONCLUSION

The Court should vacate the decision of the district court and remand for trial, or else certify to the New York Court of Appeals.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,457 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and Local Rules 29.1 and 32.1.

/s/ Oren L. Zeve