

ENFORCEMENT ACTION AGAINST
WITH RESPECT TO
MITAY, INC. WITH RESPECT TO
2904 WALNUT
(FILE # 70054, CMTS 2345)

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BEFORE THE
TEXAS DEPARTMENT OF
HOUSING AND
COMMUNITY AFFAIRS

AGREED FINAL ORDER

General Remarks and official action taken:

On this 16th day of June, 2015, the Governing Board (“Board”) of the Texas Department of Housing and Community Affairs (“TDHCA”) considered the matter of whether enforcement action should be taken against **Mitay, Inc.**, a Texas corporation (“Respondent”).

This Agreed Order is executed pursuant to the authority of the Administrative Procedure Act (“APA”), Tex. Gov’t Code §2001.056, which authorizes the informal disposition of contested cases. In a desire to conclude this matter without further delay and expense, the Board and Respondent agree to resolve this matter by this Agreed Final Order. The Respondent agrees to this Order for the purpose of resolving this proceeding only and without admitting or denying the findings of fact and conclusions of law set out in this Order.

Upon recommendation of the Enforcement Committee, the Board makes the following findings of fact and conclusions of law and enters this Order:

WAIVER

Respondent acknowledges the existence of their right to request a hearing as provided by TEX. GOV’T CODE § 2306.044, and to seek judicial review, in the District Court of Travis County, Texas, of any order as provided by TEX. GOV’T CODE § 2306.047. Pursuant to this compromise and settlement, the Respondent waives those rights and acknowledges the jurisdiction of the Board over Respondent.

FINDINGS OF FACT

Jurisdiction:

1. The Department has jurisdiction over this matter pursuant to Tex. Gov't Code §§2306.041-.0503, and 10 TEX. ADMIN. CODE §2.
2. During 1990, Walter C. Spear was awarded an allocation of Low Income Housing Tax Credits by the Board, in an annual amount of \$1,173 to acquire, rehabilitate and operate one unit known as 2904 Walnut (HTC file No. 70054 / CMTS No. 2345 / LDLD No. 455).
3. Walter C. Spear signed a land use restriction agreement ("LURA") regarding 2904 Walnut. The LURA was effective November 30, 1990, and filed of record at Volume 2137, Page 390 of the Records. In accordance with Section 2 of the LURA, the LURA is a restrictive covenant/deed restriction encumbering the property and binding on all successors and assigns for the full term of the LURA.
4. Walter C. Spear transferred his interests in 2904 Walnut to Mitay Inc. through a Warranty Deed with Vendor's Lien effective December 15, 1994, and filed in the Records at Volume 2134, Page 843. Although Mitay, Inc. did not sign an Agreement to Comply with the LURA, the restrictions remained in place in accordance with Section 2 of each LURA, thereby binding Mitay, Inc. to the terms of the agreement.
5. Respondent is that is qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a housing development that is subject to the regulatory authority of TDHCA.

Compliance Violations¹:

6. Respondent has a history of violations and previously signed an Agreed Final Order on November 6, 2013, agreeing to a \$5,000 Administrative Penalty, divided among multiple properties, which was to be partially forgivable provided that Respondent submitted full corrective documentation on or before December 9, 2013. Respondent did not submit any corrective documentation and the full administrative penalty came due and payable. The final payment was made on or about April 22, 2015.
7. On February 28, 2014 and May 31, 2014, TDHCA sent notice that Respondent had failed to timely submit their 2013 Annual Owner's Compliance Report via TDHCA's electronic Compliance Monitoring and Tracking System ("CMTS"), a violation of 10 TEX. ADMIN. CODE §10.607 (Reporting Requirements), which requires each development to submit an Annual Owner's Compliance Report. All parts remain outstanding.

¹ Within this Agreed Final Order, all references to violations of TDHCA Compliance Monitoring rules at 10 TEX. ADMIN. CODE, CHAPTER 10 refer to the versions of the code in effect at the time of the compliance monitoring reviews and/or inspections that resulted in recording each violation. All past violations remain violations under the current code and all interim amendments.

8. An on-site monitoring review was conducted on October 23, 2014, to determine whether Respondent was in compliance with LURA requirements to lease units to low income households and maintain records demonstrating eligibility. A second component of this monitoring review as to verify whether past violations under the 2013 Agreed Final Order had been resolved. The monitoring review found new violations of the LURA and TDHCA rules and past violations also remained unresolved. Notifications of noncompliance were sent and a February 15, 2014, corrective action deadline was set to resolve all findings, old and new. No response was received and the following violations remain unresolved:

New findings identified during the 2014 onsite review:

- a. Respondent failed to properly calculate the utility allowance for the property, a violation of 10 TEX. ADMIN. CODE §10.614 (Utility Allowances), which requires all developments to establish a utility allowance.
- b. Respondent failed to maintain written tenant selection criteria, a violation of 10 TEX. ADMIN. CODE §10.610 (Tenant Selection Criteria), which requires all developments to establish written tenant selection criteria that meet minimum TDHCA requirements.
- c. Respondent failed to submit pre-onsite documentation, a violation of 10 TEX. ADMIN. CODE §10.607 and §10.618, which require all developments to submit necessary documentation as requested in preparation for an upcoming monitoring review.
- d. Respondent failed to provide an Annual Eligibility Certification, a violation of 10 TEX. ADMIN. CODE §10.612 (Tenant File Requirements), which requires developments to annually collect an Annual Eligibility Certification form from each household.

Prior findings that remained unresolved during the 2014 review and were cited for a second time:

- e. Respondent failed to execute required lease provisions or exclude prohibited lease language, a violation of 10 TEX. ADMIN. CODE §10.613 (Lease Requirements), which requires leases to include specific language protecting tenants from eviction without good cause and prohibiting owners from taking certain actions such as locking out or seizing property, or threatening to do so, except by judicial process.
9. All violations listed above remain unresolved at the time of this Agreed Final Order.

CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter pursuant to Tex. Gov't Code §§2306.041-.0503, and 10 TEX. ADMIN. CODE §2.
2. Respondent is a "housing sponsor" as that term is defined in Tex. Gov't Code §2306.004(14).

3. Pursuant to IRC §42(m)(1)(B)(iii), housing credit agencies are required to monitor for noncompliance with all provisions of the IRC and to notify the Internal Revenue Service of such noncompliance.
4. Respondent violated 10 TEX. ADMIN. CODE §10.607 in 2014 by failing to submit the Annual Owner's Compliance Report for the year 2013.
5. Respondent violated 10 TEX. ADMIN. CODE §10.614 in 2014 by failing to properly calculate the utility allowance.
6. Respondent violated 10 TEX. ADMIN. CODE §10.610 in 2014, by not maintaining written tenant selection criteria meeting TDHCA requirements.
7. Respondent violated 10 TEX. ADMIN. CODE §10.607 and §10.618 in 2014, by not submitting pre-onsite documentation in preparation for the monitoring review.
8. Respondent violated 10 TEX. ADMIN. CODE §10.612 in 2014 by failing to collect an Annual Eligibility Certification.
9. Respondent violated 10 TEX. ADMIN. CODE §10.613 in 2014, by not executing required lease provisions.
10. Because Respondent is a housing sponsor with respect to the Property, and has violated TDHCA rules and agreements, the Board has personal and subject matter jurisdiction over Respondent pursuant to TEX. GOV'T CODE §2306.041 and §2306.267.
11. Because Respondent is a housing sponsor, TDHCA may order Respondent to perform or refrain from performing certain acts in order to comply with the law, TDHCA rules, or the terms of a contract or agreement to which Respondent and TDHCA are parties, pursuant to Tex. Gov't Code §2306.267.
12. Because Respondent has violated rules promulgated pursuant to Tex. Gov't Code Chapter 2306 and has violated agreements with the Agency to which Respondent is a party, the Agency may impose an administrative penalty pursuant to TEX. GOV'T CODE §2306.041.
13. An administrative penalty of \$2,725 is an appropriate penalty in accordance with 10 TEX. ADMIN. CODE §2.

Based upon the foregoing findings of fact and conclusions of law, and an assessment of the factors set forth in Tex. Gov't Code §2306.042 to be considered in assessing such penalties as applied specifically to the facts and circumstances present in this case, the Board of the Texas Department of Housing and Community Affairs orders the following:

IT IS HEREBY ORDERED that Respondent is assessed an administrative penalty in the amount of \$2,725, subject to deferral as further ordered below.

IT IS FURTHER ORDERED that Respondent shall pay and is hereby directed to pay 50% of the assessed administrative penalty (\$1,362.50) by cashier's check payable to the "Texas Department of Housing and Community Affairs" on or before September 14, 2015.

IT IS FURTHER ORDERED that Respondent shall complete and submit all parts of the 2013 Annual Owner's Compliance Report via CMTS at <https://pox.tdhca.state.tx.us/aims2/pox>, on or before September 14, 2015. Part B (Unit Status Report) must report current data, but all other report parts must report data as of December 31, 2013.

IT IS FURTHER ORDERED that Respondent shall fully correct the file monitoring violations as indicated in Attachment 1 and submit full documentation of the corrections to TDHCA on or before September 14, 2015.

IT IS FURTHER ORDERED that Respondent shall follow the requirements of 10 Tex. Admin. Code 10.406, a copy of which is included at Attachment 2, and obtain approval from the Department prior to consummating a sale of the property, if contemplated.

IT IS FURTHER ORDERED that if Respondent timely and fully complies with the terms and conditions of this Agreed Final Order, correcting all violations as required, the satisfactory performance under this order will be accepted in lieu of the remaining assessed administrative penalty and the remaining amount of \$1,362.50 will be deferred and forgiven.

IT IS FURTHER ORDERED that if Respondent fails to satisfy any conditions or otherwise violates any provision of this order, then the remaining administrative penalty in the amount of \$1,362.50 shall be immediately due and payable to the Department. Such payment shall be made by cashier's check payable to the "Texas Department of Housing and Community Affairs" upon the earlier of (1) within thirty days of the date the Department sends written notice to Respondent that it has violated a provision of this Order, or (2) the property closing date if sold during the term of this Order.

IT IS FURTHER ORDERED that corrective documentation must be uploaded to the Compliance Monitoring and Tracking System ("CMTS") by following the instructions at this link: <http://www.tdhca.state.tx.us/pmcdocs/CMTSUserGuide-AttachingDocs.pdf>. After the upload is complete, an email must be sent to Ysella Kaseman at ysella.kaseman@tdhca.state.tx.us to inform her that the documentation is ready for review. Penalty payment(s) must be submitted to the following address:

If via overnight mail (FedEx, UPS):	If via USPS:
TDHCA Attn: Ysella Kaseman 221 E 11 th St Austin, Texas 78701	TDHCA Attn: Ysella Kaseman P.O. Box 13941 Austin, Texas 78711

IT IS FURTHER ORDERED that the terms of this Agreed Final Order shall be published on the TDHCA website.

Approved by the Governing Board of TDHCA on 6/16, 2015.

By: /s/ J. Paul Oxer
Name: J. Paul Oxer
Title: Chair of the Board of TDHCA

By: /s/ James "Beau" Eccles
Name: James "Beau" Eccles
Title: Secretary of the Board of TDHCA

THE STATE OF TEXAS §
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COUNTY OF TRAVIS §

Before me, the undersigned notary public, on this 18th day of June, 2015, personally appeared J. Paul Oxer, proved to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

(Seal)

/s/ Leah Sargent Rosas
Notary Public, State of Texas

THE STATE OF TEXAS §
§
COUNTY OF TRAVIS §

Before me, the undersigned notary public, on this 18th day of June, 2015, personally appeared James "Beau" Eccles, proved to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

(Seal)

/s/ Leah Sargent Rosas
Notary Public, State of Texas

STATE OF TEXAS §
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COUNTY OF Potter §

BEFORE ME, Jesus Rivero, a notary public in and for the State of Texas, on this day personally appeared Edgar Miles, known to me or proven to me through TX Drivers Lic to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that (he/she) executed the same for the purposes and consideration therein expressed, who being by me duly sworn, deposed as follows:

1. “My name is Edgar Miles, I am of sound mind, capable of making this statement, and personally acquainted with the facts herein stated.
2. I hold the office of President for Respondent. I am the authorized representative of Respondent, owner of 2904 Walnut, which is subject to a Land Use Restriction Agreement monitored by the TDHCA in the State of Texas, and I am duly authorized by Respondent to execute this document.
3. Respondent knowingly and voluntarily enters into this Agreed Final Order, and agrees with and consents to the issuance and service of the foregoing Agreed Order by the Board of the Texas Department of Housing and Community Affairs.”

RESPONDENT:

MITAY, INC., a Texas corporation

By: /s/ Edgar A. Miles
Name: Edgar Miles
Title: President

Given under my hand and seal of office this 8th day of July, 2015.

/s/ Jesus Rivero
Signature of Notary Public

Jesus Rivero
Printed Name of Notary Public

NOTARY PUBLIC IN AND FOR THE STATE OF Texas
My Commission Expires: Sept 16, 2016

Attachment 1

File Monitoring Violation Resources and Instructions

1. Refer to the following link for all rules at 10 TEX. ADMIN. CODE §10 that are referenced below:

[http://texreg.sos.state.tx.us/public/readtac\\$ext.ViewTAC?tac_view=5&ti=10&pt=1&ch=10&sch=F&rl=Y](http://texreg.sos.state.tx.us/public/readtac$ext.ViewTAC?tac_view=5&ti=10&pt=1&ch=10&sch=F&rl=Y)

2. Refer to the following link for copies of forms that are referenced below:

<http://www.tdhca.state.tx.us/pmcomp/forms.htm>

3. Technical support and training presentations are available at the following links:

Video/Audio Training: <http://www.tdhca.state.tx.us/pmcomp/presentations.htm>

Income and Rent Limits: <http://www.tdhca.state.tx.us/pmcomp/irl/index.htm>

Utility Allowance: <http://www.tdhca.state.tx.us/pmcomp/utility-allowance.htm>

Online Reporting: <http://www.tdhca.state.tx.us/pmcomp/reports.htm>

FAQ's: <http://www.tdhca.state.tx.us/pmcomp/compFaqs.htm>

4. **Utility allowance:** A utility allowance for the cost of any utility paid directly by the tenant(s) (except for telephone, cable television and internet) is included in the computation of gross rent. Owner has indicated that residents pay electricity (A/C), gas (unit heating, cooking and hot water heating), water, sewer, and trash.

In accordance with 10 TEX. ADMIN. CODE §10.614, owners must use a utility allowance that complies with this section and applicable program regulations. During the previous onsite review on October 11, 2011, the owner used the local Public Housing Authority (PHA) for the City of Amarillo to establish the utility allowance.

Implement an approved utility allowance methodology that complies with 10 TEX. ADMIN. CODE §10.614 and submit for review. Also update and submit the unit status report to demonstrate that the new utility allowance has been implemented. Once an approved allowance has been implemented, the Department will ensure that rents are restricted. If any additional findings are identified, the owner will be notified under separate cover and provided a new corrective action deadline. Any additional findings would be considered new violations and are not subject to this Agreed Final Order.

5. **Written tenant selection criteria:** Submit updated written tenant selection criteria addressing all requirements at 10 TEX. ADMIN. CODE §10.610, including but not limited to a wait list policy and the requirement to state that the Development will comply with state or federal fair housing and anti-discrimination laws.
6. **Pre-onsite documentation:** Submit the following:
 - a. Entrance Interview Questionnaire – available via CMTS at: <https://pox.tdhca.state.tx.us/aims2/pox>.
 - b. Written leasing criteria, including required deposits and refund policy.
 - c. Documentation supporting any application fees or charges.

7. **Annual Eligibility Certification:** Throughout the affordability Period, all Owners of 100 percent Housing Tax Credit Developments must collect annually information regarding each household that includes the number of household members, age, ethnicity, race, disability status, rental amounts, rent assistance and student status in accordance with TEX. ADMIN. CODE §10.612. This information can be collected on the Department's Annual Eligibility Certification form (AEC).
8. **Lease Language:** The owner has not implemented the required lease language as required in 10 TEX. ADMIN. CODE §10.613. Owners are required to specifically state in the lease, or in an addendum attached to the lease, that (a) evictions or terminations of tenancy for other than good cause are prohibited and (b) lockouts are not permissible. Please note that the Texas Apartment Association (TAA) has a lease addendum that encompasses these Housing Tax Credit requirements if you are a member.

Execute an appropriate lease or lease addendum with the household, then submit a copy.

Attachment 2:

Texas Administrative Code

<u>TITLE 10</u>	COMMUNITY DEVELOPMENT
<u>PART 1</u>	TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS
<u>CHAPTER 10</u>	UNIFORM MULTIFAMILY RULES
<u>SUBCHAPTER E</u>	POST AWARD AND ASSET MANAGEMENT REQUIREMENTS
RULE §10.406	Ownership Transfers (§2306.6713)

(a) Ownership Transfer Notification. All multifamily Development Owners must provide written notice to the Department at least thirty (30) calendar days prior to any sale, transfer, or exchange of the Development or any portion of or Controlling interest in the Development. Transfers that are the result of an involuntary removal of the general partner by the investment limited partner must be reported to the Department, as soon as possible due to the sensitive timing and nature of this decision. If the Department determines that the transfer, involuntary removal, or replacement was due to a default by the General Partner under the Limited Partnership Agreement, or other detrimental action that put the Development at risk of failure, staff may make a recommendation to the Board for the debarment of the entity and/or its Principals and Affiliates pursuant to the Department's debarment rule. In addition, a record of transfer involving Principals in new proposed awards will be reported and may be taken into consideration by the Executive Award and Review Committee, in accordance with §1.5 of this title (relating to Previous Participation Reviews), prior to recommending any new financing or allocation of credits.

(b) Requirement. Department approval must be requested for any new member to join in the ownership of a Development. Exceptions include changes to the investment limited partner, non-controlling limited partner, or other partners affiliated with the investment limited partner, or changes resulting from foreclosure wherein the lender or financial institution involved in the transaction is the resulting owner. Any subsequent transfer of the Development will be required to adhere to the process in this section. Furthermore, a Development Owner may not transfer an allocation of tax credits or ownership of a Development supported with an allocation of tax credits to any Person or entity unless the Development Owner obtains the Executive Director's prior, written approval of the transfer. The Executive Director may not unreasonably withhold approval of the transfer requested in compliance with this section. Notwithstanding the foregoing, a Development Owner shall be required to notify the Department but shall not be required to obtain Executive Director approval when the transferee is an Affiliate of the Development Owner with no new members or the transferee is a Related Party who does not Control the Development and the transfer is being made for estate planning purposes.

(c) Transfers Prior to 8609 Issuance or Construction Completion. Transfers (other than those that do not require Executive Director approval, as set forth in subsection (b) of this section) will not be approved prior to the issuance of IRS Form(s) 8609 (for Housing Tax Credits) or the completion of construction (for all Developments funded through other Department programs) unless the Development Owner can provide evidence that the need for the transfer is due to a hardship (ex. potential bankruptcy, removal by a partner, etc.). The Development Owner must provide the Department with a written explanation describing the hardship and a copy of any applicable agreement between the parties to the transfer, including any Third-Party agreement.

(d) Non-Profit Organizations. If the ownership transfer request is to replace a non-profit organization within the Development ownership entity, the replacement non-profit entity must adhere to the requirements in paragraph (1) or (2) of this subsection.

(1) If the LURA requires ownership or material participation in ownership by a Qualified Non-Profit Organization, and the Development received Tax Credits pursuant to §42(h)(5) of the Code, the transferee must be a Qualified Non-Profit Organization that meets the requirements of §42(h)(5) of the Code and

Texas Government Code §2306.6706.

(2) If the LURA requires ownership or material participation in ownership by a qualified non-profit organization, but the Development did not receive Tax Credits pursuant to §42(h)(5) of the Code, the Development Owner must show that the transferee is a non-profit organization that complies with the LURA.

(e) Historically Underutilized Business ("HUB") Organizations. If a HUB is the general partner of a Development Owner and it (i) is being removed as the result of a default under the organizational documents of the Development Owner or (ii) determines to sell its ownership interest, in either case, after the issuance of 8609s, the purchaser of that general partnership interest is not required to be a HUB as long as the LURA does not require such continual ownership or a material LURA amendment is approved. Such approval can be obtained concurrent with Board approval described herein. All such transfers must be approved by the Board and require that the Board find that:

(1) the selling HUB is acting of its own volition or is being removed as the result of a default under the organizational documents of the Development Owner;

(2) the participation by the HUB has been substantive and meaningful, or would have been substantial and meaningful had the HUB not defaulted under the organizational documents of the Development Owner, enabling it to realize not only financial benefit but to acquire skills relating to the ownership and operation of affordable housing; and

(3) the proposed purchaser meets the Department's standards for ownership transfers

(f) Documentation Required. A Development Owner must submit documentation requested by the Department to enable the Department to understand fully the facts and circumstances that gave rise to the need for the transfer and the effects of approval or denial. Documentation includes but is not limited to:

(1) a written explanation outlining the reason for the request;

(2) a list of the names of transferees and Related Parties;

(3) detailed information describing the experience and financial capacity of transferees and related parties holding an ownership interest of 10 percent or greater in any Principal or Controlling entity;

(4) evidence and certification that the tenants in the Development have been notified in writing of the proposed transfer at least thirty (30) calendar days prior to the date the transfer is approved by the Department. The ownership transfer approval letter will not be issued until this 30 day period has expired.

(g) Within five (5) business days after the date the Department receives all necessary information under this section, staff shall initiate a qualifications review of a transferee, in accordance with §1.5 of this title, to determine the transferee's past compliance with all aspects of the Department's programs, LURAs and eligibility under this chapter.

(h) Credit Limitation. As it relates to the Housing Tax Credit amount further described in §11.4(a) of this title (relating to Tax Credit Request and Award Limits), the credit amount will not be applied in circumstances described in paragraphs (1) and (2) of this subsection:

(1) in cases of transfers in which the syndicator, investor or limited partner is taking over ownership of the Development and not merely replacing the general partner; or

(2) in cases where the general partner is being replaced if the award of credits was made at least five (5) years prior to the transfer request date.

(i) Penalties. The Development Owner must comply with any additional documentation requirements as stated in Subchapter F of this chapter (relating to Compliance Monitoring). The Development Owner, as on record with the Department, will be liable for any penalties imposed by the Department even if such penalty can be attributable to the new Development Owner unless such ownership transfer is approved by the Department.

(j) Ownership Transfer Processing Fee. The ownership transfer request must be accompanied by corresponding ownership transfer fee as outlined in §10.901 of this chapter (relating to Fee Schedule).

Source Note: The provisions of this §10.406 adopted to be effective December 9, 2014, 39 TexReg 9518