BOARD OF TAX APPEALS
STATE OF LOUISIANA
LOCAL TAX DIVISION

FILMORE PARC APARTMENTS II,

VERSUS BTA DOCKET NO. L01364

NORMAN WHITE, CHIEF FINANCIAL OFFICER AND DIRECTOR OF FINANCE, CITY OF NEW ORLEANS; ERROLL WILLIAMS, ASSESSOR, ORLEANS PARISH; AND THE CHAIRMAN, LOUISIANA TAX COMMISSION,

CONSOLIDATED WITH

MFLC PARTNERS,
A LOUISIANA PARTNERSHIP IN COMMENDAM,

VERSUS BTA DOCKET NO. L01365

NORMAN WHITE, CHIEF FINANCIAL OFFICER AND DIRECTOR OF FINANCE, CITY OF NEW ORLEANS; ERROLL WILLIAMS, ASSESSOR, ORLEANS PARISH; AND THE CHAIRMAN, LOUISIANA TAX COMMISSION

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JUDGMENT

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On November 3, 2022, this matter came before the Board for hearing on Cross-Motions for Summary Judgment. Present at the hearing were Cheryl M. Kornick and Robert Angelico, attorneys for Filmore Parc Apartments II, A Louisiana Partnership in Commendam ("Filmore") and MFLC Partners, A Louisiana Partnership in Commendam ("MFLC") (collectively the "Taxpayers"); and Reese Williamson, attorney for Erroll G. Williams, in his capacity as Assessor, Parish of Orleans, State of Louisiana ("Assessor"). At the conclusion of the hearing, the Board took the matter under advisement. The Board now renders Judgment in accordance with the attached written reasons.

IT IS ORDERED, ADJUDGED AND DECREED that the Taxpayers' Motion for Summary Judgment IS HEREBY DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Assessor's Motion for Summary Judgment IS HEREBY DENIED.

Judgment Rendered and Signed at Baton Rouge, Louisiana, on this 6th day of April, 2023.

FOR THE BOARD:

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LOCAL TAX JUDGE CADE R. COLE

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REASONS FOR JUDGMENT

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Background

On March 2, 2022, Taxpayers filed Petitions with the Board after making payments under protest of *ad valorem* Tax Assessments for the 2022 Tax Year. The Assessments are on affordable housing apartment complexes that Taxpayers own in Orleans Parish (collectively the "Property"). Taxpayers pray for a return of the protest payments with interest and for a declaration that the Property is dedicated to public use and exempt from taxation under La. Const. Art. VII § 21(A) (the "Exemption" or "21(A)").

The Property was first developed by Mirabeau Family Learning Center, Inc. ("Mirabeau"). Mirabeau is the Taxpayers' general partner. In order to participate in the Hope VI program administered by the Department of Housing and Urban Development ("HUD"), Mirabeau and Taxpayers were required to partner with funds established by the federal government for that purpose. In doing so, Taxpayers and Mirabeau entered into various contractual agreements and subjected themselves to various forms of regulatory oversight:

<u>Act of Sale</u>

The Act of Sale is a conveyance of the Property from the Resolution Trust Corporation ("RTC") to Mirabeau in 1995. The Act of Sale is subject to covenants and restrictions that are set forth in the Land Use Restriction Agreement ("LURA"), discussed below. The Act of Sale also incorporates a Recapture and Reinvestment of Profits Agreement ("Recapture Agreement").[1] However, the Recapture Agreement expired prior to the 2022 Tax Year.

<u>LURA</u>

Article II, Sections 2.1 and 2.2 of the LURA require Taxpayers to "maintain the Property as multifamily rental housing" and to "make continuously available for occupancy by Lower-Income families . . . 125 Units, of which not less than 99 Units shall be made available for occupancy by Very Low-Income Families." LURA Article II, Section 2.2(a) and Article VI, Section 6.1(a) provide the RTC with the right to obtain:

> [S]pecific performance of the Agreement, an injunction against any violation of this Agreement, for the appointment of a receiver to take over and operate the Property in accordance with the terms of this Agreement, or for such other relief as may be appropriate, it being

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1 The Recapture Agreement was attached to the Affidavit of Michael R. Vales ("Vales Affidavit").

> acknowledged that the beneficiaries of owner's obligations hereunder cannot be adequately compensated by monetary damages in the event of Owner's default. RTC or the Agency shall be entitled to its reasonable Attorneys' fees in any such judicial action in which RTC or the Agency shall prevail.

These remedies are also available to the RTC's successor, or to any other agency that takes over RTC's functions of preserving affordable housing.

Amended and Restated Partnership Agreements

The Amended and Restated Partnership Agreements ("Partnership Agreements") provide for the creation, continuation, management, and operations of MFLC and Filmore. The Partnership Agreements created the Taxpayers "to operate the Project . . . as a low-income housing project available only for persons having adjusted family incomes not in excess of certain specific limitations . . . ." Both Partnership Agreements prohibit the general partner from operating the Property in a manner that would cause the Property to lose its treatment as "a qualified low-income housing project under [IRC 42(g)(1)(B)] . . . ." Complimentary provisions prohibit the general partner from changing the nature of the Partnership's business, and charge the general partner with the duty to maintain the low-income housing status of the Property.

The Partnership Agreements provide for the priority of payments contingent on cash flow from revenues generated by the Property. The priority of payments is:

1) To the Limited Partner, as necessary to make the Limited Partner whole with respect to a lower than projected Low-Income Housing Credit.
2) To the Limited Partner, an amount sufficient to pay federal income taxes on taxable income allocated to the Limited Partner for such Fiscal Year by the Partnership, assuming the highest marginal tax rates applicable to corporations.
3) Investor Services Fees in accordance with an Investor Services Agreement.
4) To fund the Operating Reserve after Capital Contributions of the Limited Partner have been paid up to the Operating Reserve Amount.

5) To the General Partner to repay any Operating Deficit Contribution.

6) To repay the HOME Loan.

7) To repay the Road Home Loan.

8) To the Partners in accordance with Section 8.01 of the Partnership Agreements.

Taxpayers claim that there has never been any Credit Deficiency or federal income tax to pay, and that they have made only nominal payments of the Investor Services Fees.

Housing Assistance Payments Contracts ("HAP Contracts")

The HAP Contracts were entered into by Taxpayers and by a Public Housing Agency ("PHA") as defined in the United States Housing Act of 1937 (42 USC 1437a(b)(6)). The HAP Contracts require Taxpayers to lease all of the units at the Property for referrals by the PHA (HANO) from its waiting list. The HAP Contracts also provide restrictions on the amount of rent that can be charged. Section Fifteen of the HAP Contracts, entitled "Owner Default and PHA Remedies," include recovery of overpayments, termination or reduction of housing assistance payments, and termination of the HAP contract.

Home Affordable Rental Housing Program Regulatory Agreement ("HOME Agreement")

The HOME Agreements are contracts between Taxpayers and the City of New Orleans (the "City"). The HOME Agreements require Taxpayers to execute a security instrument to ensure their compliance with their obligations under HOME Program Regulations. Namely, 24 CFR Part 92. 24 CFR 92.503(1) requires that Program Income "be deposited in the participating jurisdiction's HOME Investment Trust Fund local account unless the participating jurisdiction permits the State recipient or subrecipient to retain the program income for additional HOME projects pursuant to the written agreement required by §92.504." 24 CFR 92.2 defines Program Income in relevant part as:

> [G]ross income received by the participating jurisdiction, State recipient, or a subrecipient directly generated from the use of HOME funds or matching contributions. . . . Gross income from the use or rental of real property, owned by the participating jurisdiction, State recipient, or a subrecipient, that was acquired, rehabilitated, or constructed, with HOME funds or matching contributions, less costs incidental to generation of the income . . . ."[2]

The HOME Agreements' Program Income provisions operate in conjunction with certain provisions of another contract: the Agreement Between the City of New Orleans and Mirabeau Family Learning Center ("MFLC-NO Agreement"). Together, these contracts require Taxpayers to give any revenues that exceed a certain threshold (derived by formula) to the City.

The Road Home Small Rental Property Program Incentive Payment Agreement ("RHA")

The RHA is a loan contract between Taxpayers and the State of Louisiana, Division of Administration, Office of Community Development ("OCD"). Section 2.2 of the RHA requires that Taxpayers own, manage, use and operate the Property exclusively as residential rental housing for tenants whose income does not exceed certain thresholds. Section 2.3 prohibits Taxpayers from converting the Property to condos during the term of the RHA. Schedule 1 provides rules for how the loan is to be repaid. According to Schedule 1, repayment is only allowed from "Surplus Cash." Surplus Cash is defined as cash remaining after payments of operating expenses; permanent loan payments; required reserve deposits; payments of credit deficiencies, income taxes or investor service fees owed to the limited partners; reimbursement of Operating Deficit Contributions by the General Partner; and repayment of the loan of HOME funds by Mirabeau.

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[2] 24 CFR 92.2 (Program Income) (2).

MFLC-NO Agreement

Under the MFLC-NO Agreement, the City will provide $1,200,000.00[3] to Taxpayers to develop one hundred and eight affordable rental units. The MFLC-NO Agreement sets forth certain restrictions that follow the funds. The "Program Income Provisions" state that Taxpayers understand that the "[d]etermination of program income shall be made in accordance with §92.503, and with HUD CPD Notice 97-09. All Program income received shall be reported to the City on a monthly basis with a statement indicating the source of the income, the amounts collected and disbursed and the balance on hand."

Small Rental Property Program Promissory Notes

The Small Rental Property Program Promissory Notes ("Promissory Notes") are loan contracts between Taxpayers and OCD. The Promissory Notes do not contain any restrictions on the use of the Property or its revenues. However, the Promissory Notes do provide that if Taxpayers default on other incentive loan documents, OCD may: accelerate the maturity of the loan, foreclose or otherwise enforce any liens and mortgage, and exercise any other available remedies.

Tax Credit Regulatory Agreements

The Tax Credit Regulatory Agreement(s) ("TCRA(s)") are contracts between Taxpayers and the Louisiana Housing Finance Agency ("LHFA"). The TCRA recites that, in connection with allocation of housing tax credits, the Taxpayers have agreed to rent or to lease portions of the Property to low or moderate income tenants "for the public purpose of assisting such persons to afford the costs of adequate housing . . . ."

TCRA Section 3 obligates the Taxpayers to own, renovate, manage, and operate the Property as a "qualified low-income housing project" within the meaning of IRC 42(g), "qualified residential rental project" within the meaning of IRC 142(d),

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3 A document entitled "Amendment to Agreement Between the City of New Orleans and the Mirabeau Family Learning Center" was also submitted into summary judgment evidence. This amendment shows that the project funding was increased by $1,000,000.00.

and "residential rental project" within the meaning of ITR 1.103-8(b)(4). If Taxpayers default[4] on their obligations under the TCRA, Section 16 provides the LHFA with remedies including: mandamus; injunctive relief; access and inspections of books and records; and other actions at law.

Taxpayer's Motion to Strike and Objection to Evidence

Taxpayers filed a Motion to Strike, in which they allege that portions of the Assessor's Memorandum imply misconduct without evidentiary support. The Assessor's response is on technical grounds, specifically that under the current version of La. C.C.P. art. 966(D)(2) and Comment (k) thereto, the motion to strike is no longer permitted as a vehicle for an objection to summary judgment evidence. The Assessor is correct. Comment (k) expressly states that a motion to strike is not a permissible means for objecting to documents filed in support of or in opposition to a motion for summary judgment. Accordingly, the Board will deny the Motion to Strike as an improper procedural device. Regardless, the nebulous implications carry no weight in deciding the question presented.

Taxpayers also object to the Assessor's Exhibit 10 for being unauthenticated hearsay. In their Opposition, Taxpayers raise their objection to "certain of the evidence in the Assessor's Cross-Motion; those objections are contained in the Motion to Strike being filed herewith and incorporated herein."[5] Under Article 966, objections may not be raised by reference. However, Taxpayers also raise an objection in their Opposition when they assert that portions of the Assessor's Cross-Motion are "based on clearly improper evidence (such as the reliance on an unauthenticated, hearsay purported email or statements in the Assessor's affidavit where the Assessor has no firsthand knowledge)." *Id.* 15-16 nn.41-42 (internal citations omitted). Only this objection will be considered.

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[4] Under the TCRA and other contracts referred to in this opinion, the Taxpayers are entitled to a notice of default and time to cure prior to being subject to the various remedies against them.

[5] Opposition to Assessor Errol Williams' Cross-Motion for Summary Judgment at 2, 13 n.36.

Assessor's Exhibit 10 purports to be a copy of an email and is attached to the article 1442 deposition of the representative of the Housing Authority of New Orleans ("HANO"). The deponent testified that she did not know who drafted the email. The deponent did not have personal knowledge of the email's creation. The Assessor claims that the email was written by HANO's attorney and was received by opposing counsel. That claim is not supported by affidavit or by deposition testimony. Accordingly, the Board finds that Exhibit 10 to the Assessor's Cross Motion for Summary Judgment is not competent summary judgment evidence and will not be considered.

Assessor's Objection to Summary Judgment Evidence

In its Opposition Memorandum, the Assessor lists forty-three objections to testimony in the Vales Affidavit. The Assessor's objections can be divided into several assertions:

Personal knowledge of the facts asserted

The Assessor claims that Vales did not prepare his affidavit, citing alleged inconsistencies in his affidavit and in his deposition. These alleged inconsistencies may be relevant as to whether a genuine dispute of material fact exists, but they are not relevant to the question of admissibility. Vales' personal knowledge is established by his experience as Executive Director for Mirabeau and that he is a signatory to the LURA, to the Recapture and Reinvestment of Profits Agreement ("RRPA"), to the Small Rental Property Promissory Note(s) ("SRPPN"), and to the HOME Agreements.

Legal interpretations, opinions, and conclusions

The Assessor claims that Vales impermissibly offers his legal interpretations and opinions in his Affidavit. The Board makes its own determinations on questions of law regardless of the opinions or legal conclusions of witnesses. To the extent that Mr. Vales' statements would be construed as such, they are disregarded. However, Vales' testimony is nevertheless sufficient to establish that the underlying authenticated documents are competent summary judgment evidence. The Assessor further raises hearsay objections to Vales' explanations of the contents of those documents. These objections are well-founded but moot; the Board looks to the documents themselves as the best evidence of their contents.

Vales' attestations as to the Road Home Incentive Agreements ("RHIA")

The Assessor points to Vales' attestation that true and correct copies of a RHIA are attached as Exhibit 7. There are six attached RHIAs and the attestation does not specifically identify to which RHIA it refers. The Assessor views this as impermissibly vague. Further, the Assessor notes that each attached RHIA refers to an "Exhibit B" that is not attached. In addition, the Assessor observes that no RHIAs for MFLC were attached. The Board does not agree that these omissions must result in striking Exhibit 7 from the record. Vales' assertion is that OCD made the loans to the Taxpayers. That fact is undisputed. Further, Taxpayers' counsel explained that submitting all RHIAs in their entirety would have been duplicative and unnecessarily burdensome. The Assessor does not contend that the omitted documents would be relevant to any of the material facts. Therefore, the Board finds that Vales adequately authenticated the RHIAs as proof of the existence of the loans, and that the RHIA excerpts that were submitted are not impermissibly vague.

Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute over any material fact. *Tate v. Touro Infirmary*, 17-0714, p. 1 (La. App. 4 Cir. 2/21/18), 317 So.3d 361, 362–63, *writ denied*, 18-0558 (La. 6/15/18), 245 So.3d 1027 (citing La. C.C.P. art. 966(A)(1)). The party moving for summary judgment normally bears the burden of proof. La. C.C.P. art. 966(D)(1). However, a movant who will not bear the burden of proof at trial needs only point to the absence of factual support for one or more essential elements of the claim. *Beal v. Westchester Surplus Lines Ins. Co.*, 2021-0187, p. 4 (La. App. 4 Cir. 12/15/21), 334 So.3d 438, 442, *writ denied*, 2022-00114 (La. 4/5/22), 335 So.3d 838. In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but to determine whether there is a genuine issue of triable fact. *White v. Cox Operating, LLC,* 2018-0755, p. 3 (La. App. 4 Cir. 3/20/19), 267 So.3d 147, 150, *writ denied,* 2019-0617 (La. 6/17/19), 274 So.3d 1258. Any doubts should be resolved against granting the motion. *Hines v. Garrett,* 04-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765.

Discussion

The Louisiana Constitution provides an exemption from *ad valorem* tax for: "Public lands and other public property used for public purposes." La. Const. art. VII, § 21(A) (the "Exemption" or "21(A)"). The Exemption applies to privately owned property that is dedicated to a public purpose. *Tulane Educ. Fund's Adm'rs v. Bd. of Assessors,* 38 La. Ann. 292 (1886) ("*Tulane*"). There are no rigid formalities necessary to dedicate private property to the public. *Abundance Square Assocs., L.P., Square v. Williams,* 10-0324, (La. App. 4 Cir. 3/23/11), 62 So.3d 261 (quoting *Holley v. Plum Creek Timber Co., Inc.*, 38,716 (La. App. 2 Cir. 6/23/04), 877 So.2d 284). It follows that the particular facts and circumstances of each case should be examined when deciding if property has been so dedicated. *See Bd. of Com'r of Port of New Orleans v. City of New Orleans,* 13–0881 (La. App. 4 Cir. 2/26/14), 135 So.3d 821.

Although each case is to be considered according to its own circumstances, use of revenues from the property has always been a critical factor in the analysis. The seminal case on this issue is *Tulane.* In 1884, the legislature renamed The University of Louisiana after Paul Tulane and transferred ownership and operation of the newly christened "Tulane University of Louisiana" to the Administrators of the Tulane Educational Fund (the "Administrators"). In exchange, the Administrators irrevocably devoted all of the revenue from the property to maintaining and operating the university in the public interest.

The Administrators were private citizens and so in their hands the university property became privately owned. The assessor ceased treating the property as public property placed it on the tax rolls. The ensuing litigation ultimately concluded with the Louisiana Supreme Court holding that the Administrators' complete and irrevocable dedication of all revenue from the property meant that the property was exempt under 21(A). The Court viewed the dedicated revenue as essentially public funds because of their exclusive use in furthering a public purpose. Any tax on the property would be paid with those same funds. Thus, the Assessor's imposition of tax would effectively tax public funds in violation of 21(A).

In *Warren County v. Hester*, 54 So.2d 12 (La. 1951), the owner of a bridge could not claim the Exemption under 21(A) because the toll revenue was used to pay off the debt incurred to acquire the bridge. The Court questioned whether this use of revenue served a public purpose. The owner argued that it did, because once the bridge was paid off, the owner could allow the public to use it freely. This assertion was merely speculative. Even at face value, it was not adequate because the owner said it would continue to charge tolls on commercial traffic. More importantly, the reality of the situation was that the revenue from the property was being used simply to build the owner's equity. The Court held that this use of revenue served no public purpose. However, the Court also opined that the bridge might have been exempt if the toll revenue had been used exclusively for its maintenance and operation.

In *Bd. of Com'r of Port of New Orleans v. City of New Orleans*, 13–0881 (La. App. 4 Cir. 2/26/14), 135 So.3d 821, the 21(A) question was too close to resolve on summary judgment when the Board of Commissioners of the Port of New Orleans ("Board") leased public warehouse space to private for-profit companies. The Board demonstrated that the private lessees had made improvements and repairs to the property at their own expense. Further, the Board claimed that putting the property to profitable use served the public interest by promoting development and commerce at the Port of New Orleans. Despite these supporting factors, the Fourth Circuit found that use for private profit raised too many questions. Thus, the Court held that a trial would be necessary to determine whether the property was exempt.

In *Abundance Square Assocs., L.P., Square v. Williams*, 10-0324, (La. App. 4 Cir. 3/23/11), 62 So.3d 261, a for-profit taxpayer leased property from the Housing Authority of New Orleans ("HANO") pursuant to Ground Lease(s) for the joint development of more than one hundred multi-family rental units. Failure to comply with the Regulatory and Operating Agreement(s) would terminate the Ground Lease(s), effectively vesting HANO with ownership of the units. Taxpayers and HANO also entered into Regulatory and Operating Agreement(s) requiring taxpayers to operate all units as qualified low-income units under IRC §42. This prohibited taxpayers from renting any unit to a person earning more than 60% of the Area Median Income ("AMI").

The majority of the units were subject to additional restrictions. These units were further required to be "PHA–Assisted Units," operated and maintained as "public housing" units under Section 3(b) of the U.S. Housing Act. PHA-Assisted Units were reserved for those in the lowest income tiers, lower than the 60% AMI threshold applicable to all of the units. HANO would subsidize the taxpayers' operating costs for the PHA–Assisted Units. However, if any profits resulted from the PHA–Assisted Units, taxpayers were obligated to place the funds in an escrow account for their operation and maintenance. Due to the restrictions on the use of the revenues, the Court held that the PHA-Assisted Units were exempt. However, the Court also held that Section 8 Project-Based Voucher Units were not exempt.

In *Filmore Parc Apartments II v. Foster*, 2018-0359 (La. App. 4 Cir. 11/7/18), 318 So.3d 718 ("*Filmore*"), *writ denied*, 2018-2050 (La. 2/11/19), 263 So.3d 1151, the same parties in the current case argued the same issues, but with slightly different evidence in the record.[6] In that case, the Court held, that based on *Abundance Square*, the Section 8 Project-Based Voucher Units were not exempt. The Court also held that rental units subject to a HAP contract were not necessarily exempt and that inconsistencies in the record precluded summary judgment. In particular, the Court

[6] Filmore II, 318 So.3d at 728.

noted inconsistencies, or factual gaps, concerning: whether the HAP units were "HANO's"; whether revenues from the HAP units had been subject to Program Income provisions; and whether any revenues were deposited into in an escrow account solely for the maintenance and operation of the HAP units.

At the hearing, the Board asked Taxpayers' counsel why the result should be different in this case. Counsel directed the Board's attention to the corporate deposition of LHC's chief operating officer, Mr. Bradley R. Sweazy. Mr. Sweazy testified that LHC is designated as a public housing authority for the administration of all bonds and credits by the IRS within the State of Louisiana. Mr. Sweazy also stated that the LHC is responsible for the oversight of projects receiving HOME and CDBG funds. Mr. Sweazy described how LHC monitors projects that use federal funds:

> So every year they send the annual audited report to us. We are looking at what was your cash flow, what was your expenses, how many units you got rented. And from that – I don't know the specifics on his note, but if he earns a little more than he is supposed to, then that is returned to us as program income, which is considered federal resources. . . .
>
> * * *
>
> I don't know the specifics of the underwriting here, but normally if it's got CDBG or federal soft money in it we underwrite it under a debt coverage ratio. And whatever that debt coverage ratio is what it has to stay within, and when it earns more than that, let's say it was a 1.2 and it goes to a 1.25, that's what our asset management team looks at, then that project then has to write us a check and that check becomes program income that we then use to invest in other affordable housing.[7]

Taxpayers assert that this testimony proves that it had an obligation to treat any profits from the Property in excess of the debt coverage ratio as Program Income and to return that money to the LHC. Taxpayers argue that this is functionally the same as how the taxpayer in *Abundance Square* had to put revenue into an escrow account.

Taxpayers also claim that their use of funds was further restricted beyond just the Program Income restrictions. Taxpayers claim that their use of funds was regulated by the State Legislative Auditor. In support of this premise, Mr. Vales

[7] Sweazy Dep. 19:15-22, 20:9-19.

avers, vaguely, that the State "Legislative Auditor's oversight is focused on the use of the revenues." Moreover, Taxpayers further claim that their status as a non-profit necessitated reinvestment of any non-Program-Income revenue.

In support, Taxpayers claim that their nonprofit operation is proven in part by their participation in LHC's nonprofit pool. The nonprofit pool has funds set aside for nonprofit applicants to enable "nonprofits to have access to dollars without competing against the big four[sic] profits."[8] Nonprofits that receive federal dollars are required to submit an audit report called an A133. On this point, Mr. Sweazy testified:

> That's part of our review. And in that we determine -- because they have an auditor – we have an accountant, a CPA firm, who is designating, yes, this nonprofit was allowed to earn this according to their debt coverage ratio. They earned this, and yes, they haven't done anything crazy with it.
>
> [Ms. Kornick]: Then it's all gone back into whatever mission is stated in the entity.
>
> [Mr. Sweazy]: Correct.[9]

Mr. Sweazy testified that nonprofits usually put their revenue back into the project. However, Mr. Sweazy also testified that "any nonprofit or for profit with cash flow under that 1.25 is theirs to use on how they want to use it."[10]

The facts that Taxpayers point to are too vague and too generalized to establish matters of undisputed fact. Mr. Sweazy's testimony was not specifically directed at how the Taxpayers used their revenue. He stated:

> [T]he Federal Government wants us to do things with nonprofits because they know that the earned profit that they get to keep is put into the bylaws or articles or whatever the purpose of that nonprofit is, unlike a for profit who can go buy the Armani suits, they can buy their Lexuses and the Jaguars, whatever they want to do.[11]

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8 Sweazy Dep. 49:9-14.
9 Sweazy Dep. 68:22-25, 69:1-6.
10 Sweazy Dep. 59:9-12.
11 Sweazy Dep. 60:15-23.

Neither Mr. Sweazy nor any documentary evidence in the record provides the "specifics of the underwriting" as to the Taxpayers. That is the information that would establish the specific ratio that would trigger application of Program Income rules. There is no evidence that Taxpayers ever realized and returned any Program Income to the LHC.

To the extent that Taxpayers rely on their provisions of the Partnership Agreements, they are also inadequate. The Partnership Agreements do not dedicate all revenues to operation and maintenance of the Property. Rather, the Partnership Agreements establish a priority of payments for Net Cash Flows. The Operating Reserve is only fourth on the list of priorities, and its priority comes after the Capital Contributions of the Limited Partner and up to the Operating Reserve Amount. The provisions of the Partnership Agreements do not compare to the unequivocal dedications of revenue found in *Tulane* or in *Abundance Square*.

Accordingly, summary judgment is not appropriate. Trial is necessary to establish what restrictions on the use of revenue actually applied. Doubts as to vague and general testimony must be resolved through questioning and cross-examination. Further, the extent to which revenues were not fully dedicated to maintenance and operation should be weighed against the numerous harsh contractual remedies if they effectively force the Taxpayers to operate the Property as affordable housing. Since each case is to be evaluated on its facts, the contractual remedies for default may balance the scope of the restrictions on the use of revenues from the Property.

Baton Rouge, Louisiana, this 6th day of April, 2023.

FOR THE BOARD:

LOCAL TAX JUDGE CADE R. COLE