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 WITH REASONS

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On September 13, 2023, this matter came before the Board for hearing on the merits. Present at the hearing were: Cheryl 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 "Petitioners"); Reese Williamson, attorney for Erroll G. Williams, in his capacity as Assessor, Parish of Orleans, State of Louisiana ("Assessor"); and James Gilbert, attorney for the Orleans Parish School Board ("OPSB"). Norman White, Chief Financial Officer and Director of Finance of the City of New Orleans ("City") and the Chairman of the Louisiana Tax Commission ("LTC") waived their appearances at the hearing.

At the end of proceedings on September 13, 2023, and with the consent of the parties, the Board held the record open to take testimony from the Petitioners' witness Bradley Sweazy, who was unable to attend due to Covid. The Board received Mr. Sweazy's testimony on September 27, 2023, by Zoom. The Board then took the matter under advisement. The Board now renders Judgment in accordance with the attached Written Reasons.

IT IS ORDERED, ADJUDGED, AND DECREED that Judgment is hereby rendered in favor of the Assessor, the City, OPSB, and the LTC and against Filmore and MFLC dismissing the Petitioners' claims. Petitioners are not entitled to claim the 21(A) Exemption on the Filmore I and Filmore II apartment complexes for the 2022 Tax Year.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be Judgment in favor of the Respondents and against the Petitioners authorizing the Respondents to retain and distribute the amounts paid under protest in these consolidated matters.

Judgment Rendered and Signed at Baton Rouge, Louisiana, on this 11th day of April, 2024.

FOR THE BOARD:

LOCAL TAX JUDGE CADE R. COLE.

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WRITTEN REASONS FOR JUDGMENT
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On September 13, 2023, this matter came before the Board for hearing on the merits. Present at the hearing were: Cheryl 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 "Petitioners"); Reese Williamson, attorney for Erroll G. Williams, in his capacity as Assessor, Parish of Orleans, State of Louisiana ("Assessor"); and James Gilbert, attorney for the Orleans Parish School Board. Norman White, Chief Financial Officer and Director of Finance of the City of New Orleans ("City") and the Chairman of the Louisiana Tax Commission ("LTC") waived their appearances at the hearing.

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Facts

Petitioners challenge the legality of *ad valorem* property tax assessments on two apartment complexes: "Filmore I" and "Filmore II" (collectively, the "Property"). Filmore I consists of 108 rental units. Petitioner MFLC owns Filmore I. Filmore II consists of 56 rental units. Petitioner Filmore owns Filmore II. The tax year at issue in these consolidated matters is 2022. Petitioners claim that the Property is dedicated to, and used for, the public purpose of providing affordable housing.

Petitioners are not non-profit entities. However, they share a common general partner, Mirabeau Family Learning Center, Inc. ("Mirabeau"), that is a Louisiana nonprofit I.R.C. § 501(C)(3) corporation. Mirabeau's executive director and founder is Michael Vales. Mr. Vales was responsible for the formation of Mirabeau and the Petitioners. He has overarching authority, responsibility, knowledge regarding the construction, reconstruction, and continued operation of the Property.[1]

Mr. Vales testified that Mirabeau purchased the Property from the Resolution Trust Corporation ("RTC") in 1995, subject to a Land Use Restriction Agreement ("LURA"). The LURA requires Petitioners[2] to "maintain the Property as multifamily rental housing," and to "make continuously available for occupancy by Lower-Income

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[1] Although a management company operates the Property under a contract, Mr. Vales' knowledge and familiarity were established by his testimony and his signature on the Petitioners' organizational documents in the record.

[2] Mirabeau transferred the Property to MFLC. MFLC transferred Filmore II to Filmore. Petitioners succeeded to Mirabeau's obligations under the LURA.

families . . . 125 Units, of which not less than 99 Units shall be made available for occupancy by Very Low-Income Families." The LURA gives the RTC, or its successor, the right to obtain specific performance of the agreement and to have a receiver appointed to take over the Property if Petitioners default on their obligations under the LURA and the default remains uncured for 60 days after notice.

Mirabeau had to rehabilitate the Property in order to operate it as affordable housing. Mirabeau raised capital by obtaining Low Income Housing Tax Credits ("LIHTC's") to entice investors. Mirabeau also secured subsidies in the form of Section 8 Project-Based Voucher ("PBV") Assistance by entering into Housing Assistance Payment ("HAP") Contracts with the Housing Authority of New Orleans ("HANO").[3] HANO is a Public Housing Authority ("PHA") that administers PBV's with funds distributed by the U.S. Department of Housing and Urban Development ("HUD"). The HAP Contracts apply to 71 of the 108 units in Filmore I and 32 of the 56 units in Filmore II. Tenants for the units covered by the HAP Contracts can only come from HANO's Section 8 waiting lists. The HAP Contracts are effective until June 30, 2027.[4]

Mirabeau restored the Property and operated it as affordable housing until it was devastated by Hurricane Katrina. At that point, Mirabeau could have taken the insurance proceeds from the loss and walked away. Instead, Mirabeau decided to once again restore and rehabilitate the Property. Petitioners secured funding for the reconstruction by executing a number of agreements, each of which is called: "The Road Home Small Rental Property Program Incentive Payment Agreement" ("Road Home Agreements")[5], with the State of Louisiana, Division of Administration, Office

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[3] HANO is a Public Housing Authority ("PHA") that administers PBV's with funds distributed by the U.S. Department of Housing and Urban Development ("HUD").

[4] This is an extension of the original 10 year term of the HAP Contracts.

[5] All of the Road Home Agreements have identical terms.

of Community Development ("OCD"), funded through the HUD Community Development Block Grant ("CDBG") Program. The Road Home Agreements recite that their purpose is to provide owners of qualified residential rental projects with an incentive to reduce rents and deliver affordable rental housing in the parishes affected by Hurricanes Rita and Katrina. The Road Home Agreements also provide for an event of default[6] if the borrower defaults on other "Incentive Loan Documents."

The term "Incentive Loan Documents" is not defined in the Road Home Agreements, but the other documents that it references are: Commitment Letters; Incentive Payment Agreements; Mortgages; and attached repayment schedules. The Commitment Letters, introduced during the merits hearing as Taxpayer Exhibit 21, contain a definition of "Incentive Loan Documents." The definition in the Commitment Letters identifies: a Promissory Note; the Incentive Payment Agreement; a Mortgage; and other documents required by the lender. The Commitment Letter describes occupancy and rent restrictions, but does not impose them. Instead, it states that the borrower is required to execute an Incentive Payment Agreement containing said restrictions.

Mirabeau obtained grants from the HOME Investment Partnerships Program administered by the City of New Orleans. Mirabeau, in turn, lent these funds to Petitioners ("HOME Loans"). Both the grants to Mirabeau and the HOME Loans to Petitioners are subject to a HOME Affordable Rental Housing Program Regulatory Agreement ("HOME Regulatory Agreement"). The HOME Regulatory Agreement applies to all units. If Petitioners violate the terms of the HOME Grants or the Road

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[6] There is also provision for "Default Under This Note," but that provision only refers to a failure to make timely payments when due.

Home Loans, then the loans[7] become immediately due and payable. Petitioners would be unable to make the payments, and would face foreclosure.[8]

The rent that Petitioners can charge to tenants is limited, as is the pool of tenants that they can rent to. The HOME Regulatory Agreements require four Phase I units to be rented to households whose incomes do not exceed 50% of the Area Median Income ("AMI") and for 104 Phase I units to be rented to households whose incomes do not exceed 65% of the AMI. For Phase II, three units are designated for the lower income restriction (50% of AMI) and 53 units are designated for the higher income restriction (65% of AMI).

Petitioners offered testimony from the Louisiana Housing Corporation ("LHC"), through its designated officer, Bradley Sweazy. Mr. Sweazy participated in underwriting Road Home Loans and HOME Grants. This underwriting relied on a formula called the "Debt-Coverage Ratio" ("DCR"). The DCR is calculated based on expected revenues from the Property over the expected costs of maintaining the Property. The LHC requires that rental projects have a DCR of 1.1 to 1.4, which means that the underwriter expects revenues to exceed expenses by 10% to 40%.

There are consequences for exceeding, or falling below, the DCR. If the revenues from a HOME-assisted development project exceed costs by more than 40% (*i.e.* earn more profit than the DCR allows), then the excess revenue is considered Program Income. For this purpose, Program Income is treated as a return on the public's investment in the project, and must be paid back to the LHC. Alternatively, the LHC can require that the Program Income be placed in an operating reserve. Mr. Vales testified that he attended an LHC training, where he was told to use the

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7 In this event, the grants will convert to loans.

8 The HOME Regulatory Agreements required Petitioners to record a mortgage on the Property as security for their compliance.

operating reserve. However, Mr. Vales also testified that revenues have never come close to the maximum DCR of 1.4.

Mr. Vales testified that all revenue from the Property is "Program Income." Mr. Vales' understanding was that Program Income, in this context, meant restrictions on any revenue from the Property that had been restored with HOME funds. Further, since Mr. Vales understood all of the Property to have been restored with HOME funds, he treated all revenue as Program Income. Further, Mr. Vales' understanding was that this "Program Income" could only be spent on "eligible costs." He testified that the eligible costs were chiefly the expenses of operating and maintaining the Property.

The Board asked Mr. Vales to identify what document or documents he signed that imposed the Program Income restrictions, as he understood them, on all revenues from the Property. Mr. Vales identified the Road Home Loans and the HOME Agreements. The HOME Agreements specify that HOME funds may only be used for the payment of costs associated with eligible HOME activities identified in 24 C.F.R. § 92.205 and § 92.206. The eligible costs defined in the regulations are generally the following costs: construction, rehabilitation, maintenance and repairs, connecting essential services, demolition, necessary re-financing, and related soft costs. 24 C.F.R. § 206 (a) - (d). Paying off loans used for eligible costs is permitted for qualified projects.[9] Mr. Vales testified that rents generated by HOME-assisted Property are Program Income and that the entirety of the Property was restored with HOME funds after Hurricane Katrina.

Mr. Vales stated that Petitioners undertook each contractual and regulatory obligation in concert as part of an integrated financing plan. Mr. Vales' testimony is

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[9] Thus, there appears to be no conflict with using Program Income to pay off loans taken out in order to make the Property compliant with the ADA and to install smoke detectors. For this reason, the Assessor's allegation that Petitioners used revenue for those purposes does not affect the outcome of this case.

supported by several of Petitioners' contracts that refer to each other and provide that non-compliance with one contract will result in non-compliance with the other contract. Mr. Vales provided an example in the Tax Credit Regulatory Agreements ("TCRA"). The TCRA's were entered into by the Petitioners with the Louisiana Housing Finance Agency ("LHFA"), which is now the LHC.[10] The TCRA incorporates and refers to the HOME Agreements, so that if Petitioners fail to meet their obligations under the HOME Agreements, their LIHTC's will become invalid. If the LIHTC's become invalid, then the investors who provided capital in exchange for the LIHTC's will take action to force the Petitioners, or their contractors, to remedy the default, or remove Petitioners and get someone else to operate the Property.

The Assessor also called Mr. Vales as a witness. Mr. Vales agreed that revenues from non-PHA-Assisted (i.e. non PBV) units are expected to subsidize shortfalls from operating the PHA-Assisted units. Shortfalls occur occasionally, in part because of the rent and occupancy restrictions, and also in part because the PHA-Assisted units must remain vacant until HANO refers a tenant from its Section 8 waiting lists. However, the Assessor introduced a Vacancy Analysis for, in relevant part, January through May of 2022, that reports no loss from vacancy with respect to Filmore II, and vacancy losses of $1,594 for May and $797 for April with respect to Filmore I. The Assessor claims that these are minor vacancy losses.

The Assessor provided testimony from Sonja Young, HANO's Housing Choice Voucher ("HCV") Program Acting Director. Ms. Young testified that the HCV Program is a Section 8 Program that includes the PBV Assistance Program. HANO's Section 8 Program is distinct from its public housing program. Petitioners only

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[10] Agreeing to the TCRA was required for Mirabeau and the Petitioners to obtain LIHTC's.

participate in Section 8 Programs.[11] Petitioners do not have any contract or relationship with HANO with respect to public housing.

Ms. Young confirmed that some vacancy is anticipated as a result of reserving units for HANO's Section 8 tenants. She further stated that HANO provides some relief to landlords in the event of an extended vacancy. In order to qualify for vacancy loss assistance, a unit must remain vacant for 60 days, despite the landlord actively trying to fill it with an eligible tenant. If those criteria are met, HANO will pay the landlord 80% of the rent. This difference is a component of Petitioners' vacancy loss.

The Assessor provided testimony from Louis Russell, LHC's Deputy Administrator of Multi-Family Affordable Housing Development. Mr. Russell testified that LIHTC's are an annual allocation from the federal government through the IRS. Mr. Russell explained that the LIHTC creates affordable housing through a public-private partnership in which investors are allowed to invest in the production of affordable housing in certain low-to-moderate income developments. The LIHTC incentivizes investors to fund the construction, repair, and improvement of affordable housing properties. The investors get the benefit of the credit in exchange for putting equity into the project.

LIHTC's are typically distributed through a partnership between a taxable entity (an investor) and a developer, who may or may not be a taxable entity. Usually, the investor is a 99% limited partner and the developer is a 1% general and managing partner.[12] Most developers who apply for the LIHTC are for-profit entities, but there

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[11] Ms. Young testified that, in addition to PBV Assistance, some of Petitioners' tenants receive Section 8 Tenant-Based Voucher ("TBV") Assistance. Ms. Young stated that TBV Assistance is available for renters for any unit that is not identified as a PBV unit. According to Ms. Young, there are a total of 30 units, in Filmore I and Filmore II combined, with tenants receiving TBV assistance. The rent restrictions for TBV Assistance are not as severe as the restrictions for PBV Assistance.

[12] For both MFLC and Filmore, Mirabeau holds a 0.01% general partnership interests. For MFLC, the 99.99% limited partner is Housing Outreach

are funds set aside for non-profit applicants. The LIHTC comes with occupancy and rent restrictions. However, the restrictions will end after what is typically a 30 year period. Then, the owner is free to use the property as they wish. The LIHTC will allow the investor to reduce their federal tax liability over a ten-year period. However, if the developer is noncompliant with the terms of the TCRA during the initial ten-year period, then the IRS can recapture the LIHTC. Mr. Russell testified that the TCRA imposes the same requirements on both non-profit and for-profit entities.

Discussion

The 21(A) Exemption applies to: "Public lands and other public property used for public purposes." The jurisprudence interpreting the 21(A) Exemption has held that privately-owned property can be exempt if it satisfies a two-pronged test. *Bd. of Com'r of Port of New Orleans v. City of New Orleans*, 2015-0768 (La. App. 4 Cir. 3/16/16), 186 So.3d 1282. First, the property must be vested in the public. *Id.* Second, the property must be used for a public purpose. *Id.* For property to vest in the public it must be dedicated to a public purpose. *Tulane Educ. Fund's Adm'rs v. Bd. of Assessors*, 38 La. Ann. 292 (1886) ("Tulane"). There is no formal procedure for this kind of dedication. *Abundance Square Assocs., L.P. 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). Instead, whether privately-owned property has been dedicated to the public is determined by the facts and circumstances of each case. *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.

For the second prong of the test, the taxpayer must show that the property was used for the benefit of the public. *Abundance Square Assocs., L.P. v. Williams*, 10-

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Fund XIII Limited Partnership, a District of Columbia limited partnership. For Filmore, the 99.99% limited partner is Housing Outreach Fund Limited Partnership, also a District of Columbia limited partnership.

0324, (La. App. 4 Cir. 3/23/11), 62 So.3d 261. In *Abundance Square*, the Fourth Circuit considered whether the 21(A) Exemption applied to privately-owned housing complexes located at the site of the former Desire Housing Projects ("Desire"). The facts recited by the Court indicate that Desire had been constructed in 1949 as part of the United States Housing Program and that HANO owned and operated Desire until the late 1990's. The City razed Desire as part of a revitalization plan in connection with the HOPE VI program. After the project had been demolished, HANO entered into a ground lease with the taxpayer. The ground lease provided that HANO continued to own the land and that ownership of the housing complexes and improvements would revert to HANO upon termination of the lease. The taxpayer and HANO also entered into a Regulatory and Operating Agreement ("ROA"). The ROA obligated the taxpayer to assist in developing the property into multi-family units and to own and operate the property in part as low-income housing and in part as "public housing" under Section 3(b) of the U.S. Housing Act. The rents of the units operated as public housing, or "PHA-Assisted" units, were restricted by the tenants' income levels, so that a person making 10% of the AMI would pay less than a person making 35% of the AMI. Further, all of the units in the property were "tax credit" units, meaning that they could not be rented to anyone earning more than 60% of the AMI. Moreover, the ROA prohibited the taxpayer from making a profit on the PHA-Assisted units and required that any profits that were realized to be deposited in escrow and used exclusively for the benefit of the PHA-Assisted units. Failure to comply with the ROA would terminate the Ground Lease, effectively vesting HANO with ownership of the units.

The Court held:

> To the extent the plaintiffs are contractually and legally obligated to operate and maintain forty-eight (48) rental units in the Abundance Square Apartments and twenty-three (23) [rental units] in the Treasure Village Apartments as public housing or PHA–Assisted Units, we conclude those units have been dedicated to public use, clearly serve a

> public purpose and, thus, are exempt from *ad valorem* taxes under Louisiana Const. Art. VII, § 21(A).[13]

There was no dispute that the revenues from the PHA-Assisted units were used exclusively for their operation and maintenance. However, the Court affirmed the portion of the trial court's decision holding that the remaining units, *i.e.* the PBV units, were not exempt.

In this case, almost all of the units at the Property are PBV units and "tax credit" units. An appeal from the Board's decision in this case would lie with the Fourth Circuit. In *Abundance Square*, the Fourth Circuit clearly held that PBV units are not subject to the 21(A) Exemption. Further, since all of the units in *Abundance Square* were stated to be tax credit units, it follows that a unit is not exempt by virtue of being both a PBV unit and a tax credit unit. Thus, Petitioners cannot qualify for the 21(A) Exemption, unless they show that they undertook significantly greater restrictions on the Property than those imposed by the HAP Contracts and the TCRA.

The Petitioners sought to do just that 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. In *Filmore*, the Court stated in its recitation of the facts that, "Filmore operated the Property as 'affordable housing for low-and very low-income families.'" *Filmore*, 2018-0359, p. 3, 318 So.3d at 719. Nevertheless, the Court reversed partial summary judgment that had been granted in Petitioners' favor. The trial judge had relied on counsel's argument that the Property was public housing controlled by HANO and effectively part of HANO's public housing inventory. The summary judgment evidence did not support that holding. In particular, the record contained conflicting evidence about whether the Property served as "public housing." The Court also found that there was no evidence of what revenue was subject to

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[13] *Abundance Square*, 2010-0324, at 11–12; 62 So.3d at 267 (emphasis in original) (substitution added).

Program Income restrictions, nor was there evidence that the revenues had to be deposited into an operating reserve.

Petitioners' reliance on Mirabeau's non-profit status is misplaced. First, the Assessor's evidence demonstrated that the TCRA does not impose special rules for non-profits. Second, Mirabeau's non-profit status shows that it was operated for a charitable purpose, but not necessarily a public purpose. In *Tulane*, the legislature transferred ownership of what had, until then, been known as "The University of Louisiana" to the Administrators of the Tulane Educational Fund. The Administrators contracted with the state to irrevocably devote all the revenues from property to the support and maintenance of the university. Thus, the administrators operated the university just as the state had, essentially continuing to provide the societal benefit that the public university had. In *Abundance Square*, the taxpayers continued to operate public housing just as HANO had. In *Holley*, privately owned land was leased to, and essentially operated by, the Department of Wildlife and Fisheries.

Mirabeau and the Petitioners in this case have contracts with public agencies and they operate for a charitable purpose, but they are not so restricted as to become extensions of public entities. Their claim depends on all of their contracts functioning as an integrated financing plan. This includes their organizational documents, which are essentially private contracts. Finally, it should be noted that the Constitution provides a separate exemption for property owned by charitable non-profit entity that meets other particular criteria.

Accordingly, the Board holds that Petitioners are not entitled to claim the 21(A) Exemption. PBV units and Tax Credit housing units are not exempt under *Abundance Square* and *Filmore II.* Petitioners are not restricted to operating as extensions of a public entity, and their claim is inextricably intertwined with private contracts. Therefore, Petitioners are not entitled to claim the 21(A) Exemption on the

Property for the 2022 Tax Year and Judgment will be rendered in favor of the Assessor.

Baton Rouge, Louisiana, this 11th day of April, 2024.

FOR THE BOARD:

LOCAL TAX JUDGE CADE R. COLE