

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Mr. Michael Kontur

Plaintiff,

vs.

Riverfront Apartments Limited Partnership

Defendant.

* Case No. 3:19-cv-248

* Judge

* COMPLAINT

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*

* George Thomas (0083354)
* Taylor Burns (0095976)

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Preliminary Statement

1. Defendant, Riverfront Apartments Limited Partnership (Riverfront Apartments) owns and controls an affordable housing apartment complex in a developing and gentrifying area of downtown Toledo, Ohio, on Summit Street.
2. Riverfront Apartments is a “Low-Income Housing Tax Credit” (LIHTC) development. Developers of such affordable housing complexes receive federal tax credits in exchange

for an irrevocable commitment to provide affordable housing for a minimum of thirty years.

3. Pursuant to the federal statute and regulations implementing the LIHTC program, Riverfront was required to and did record a Restrictive Covenant affirming its minimum thirty-year commitment to affordable housing.
4. The Restrictive Covenant carefully details the affordability requirements and obligations of Riverfront Apartments, as required by federal statute and regulations.
5. The Restrictive Covenant explicitly intends to benefit, and is enforceable by, individuals who meet the income-limitations of the program, as required by federal statute and regulations.
6. Fifteen years after Riverfront Apartments began leasing affordable housing units, it sought to escape its thirty-year commitment.
7. After some discussions with the Ohio Housing Finance Agency (OHFA)—the state governmental body charged with implementing the federal LIHTC program in Ohio—and after consideration by OHFA's Board of Directors, Riverfront Apartments and OHFA recorded an Amendment to the Restrictive Covenant.
8. The Amendment to the Restrictive Covenant terminates all affordability requirements after three years, and leaves only the tenants currently living in the complex with the benefits of the LIHTC program.
9. The federal statute, Section 42 of the Internal Revenue Code (codified at 26 U.S.C. § 42), and the implementing regulations do not allow for such an amendment to terminate the affordable housing created through the program. To the contrary, the statute and implementing regulations unambiguously mandate the thirty-year commitment to

affordable housing. The Restrictive Covenant, as originally recorded, concurrently issues the same requirements and offers no mechanism for Riverfront Apartments to end the affordability requirements prematurely.

10. Plaintiff, Mr. Kontur is a low-income individual who meets the income limitations provided in the original Restrictive Covenant; he has applied for housing at Riverfront Apartments; he is an intended beneficiary of the Covenant; and he may enforce its terms.
11. Mr. Kontur seeks declaratory and injunctive relief against Riverfront Apartments to declare the Amended Restrictive Covenant unlawful and enforce the requirements of the Restrictive Covenant and Section 42 of the Internal Revenue Code as it applies to Riverfront Apartments.

Jurisdiction and Venue

12. This Court has jurisdiction over the claims brought herein pursuant to 28 U.S.C. § 1331 because this case presents an important disputed issue of federal law—at 26 U.S.C. § 42, and 26 C.F.R. § 1.42-1, et. seq.—and seeks relief through the federal Declaratory Judgment Act at 28 U.S.C. § 2201.
13. Venue lies in this District pursuant to 28 U.S.C. §§ 1391(b) and 1391(c) because the real property at issue is situated in this District, a substantial part of the acts complained of in this District.

Parties

14. Plaintiff, Mr. Kontur, is a low-income individual residing in Toledo, Ohio, who meets the income limitations applicable to the Riverfront Apartments project as described in the restrictive covenant encumbering the property, as explained further below.

15. Mr. Kontur's sole source of income is Social Security Disability, and he would like to obtain affordable housing in the downtown Toledo area.
16. Mr. Kontur applied for an apartment at Riverfront Apartments in June 2018.
17. Riverfront Apartments Limited Partnership is the sole owner of a Low-Income Housing Tax Credit development located at 245 North Summit Street, Toledo, Ohio 43604. Its primary place of business is the same address. It agreed to operate the apartment complex, consisting of more than one hundred housing units, pursuant to the requirements of the federal LIHTC program.

Statutory and Regulatory Framework

A. The Low-Income Housing Tax Credit Program, and the Irrevocable Election

18. The LIHTC program is the federal government's primary program for encouraging the investment of private equity in the development of affordable rental housing for low-income households. The program makes federal tax credits available that incentivize individual and corporate investment in the development, acquisition, and rehabilitation of affordable rental housing. The tax credits provide about 70% of the cost of low-income units in a project. 26 USC 42 (b)(1)(B).
19. Since its creation in 1986, the LIHTC program has helped to finance more than two million affordable rental-housing units for low-income families.
20. The LIHTC program was established as part of the Tax Reform Act of 1986 and is commonly referred to as "Section 42," the applicable section of the Internal Revenue Code.
21. In summary, the Internal Revenue Service ("IRS") operates the program by allocating federal tax credits to state "housing credit agencies," such as the Ohio Housing Finance

Agency, which administer the LIHTC program locally in each state. State housing credit agencies then distribute the tax credits to developers through a competitive bidding process. A developer who bids on and receives tax credits through this process must comply with the LIHTC programmatic requirements, as described at 26 U.S.C. § 42, and 26 C.F.R. § 1.42-1, et. seq.

22. To qualify for the funding, the proposed low-income housing project must elect to set aside a certain number of rental units in the project as affordable housing. Specifically, it must set aside at least forty (40) percent or more of the housing units for renters earning sixty (60) percent or less of the area's median income, or twenty (20) percent or more of the housing units for renters earning fifty (50) percent or less of the area's median income. 26 U.S.C. § 42(g)(1).
23. The selection procedures and competitive bidding process for tax credit allocations often encourage project developers to provide more than the minimum number of affordable units and commit to a lower level of minimum affordability. Indeed, competition for the scarce tax credit allocations is so intense that many applications designate one hundred (100) percent of units in properties as affordable and reserve some units for renters earning well below fifty (50) percent of the area median income.
24. Once a project elects to reserve a certain portion for affordable housing, they are required by Section 42 to execute and record these promises in a restrictive covenant that runs with the land. The covenant contains a use restriction that affordability will be maintained for at least thirty years. Furthermore, the election to reserve a certain portion for affordable housing is "irrevocable." 26 U.S.C. 42(g)(1) ("Any election under this paragraph, once made, shall be irrevocable"). In other words, once the LIHTC project is committed to a

certain portion of affordable units reserved at a certain maximum rent, under 42(g)(1), the project can never revoke that election.

25. The commitment to the irrevocable election lasts a minimum of thirty years,¹ after which the project owner may convert the rent restricted units to market rate.
26. The project developer enters an agreement with the state housing credit agency, in which the project promises to provide the irrevocable election. 26 U.S.C. § 42(h)(6). This agreement is in addition to a required restrictive covenant as explained below.

B. LIHTC Projects Are Encumbered with a Restrictive Covenant that Is Enforceable by Any Individual who Meets the Income Limitations Provided in the Irrevocable Election

27. To ensure compliance with the statute and regulations, 26 U.S.C. § 42 requires that LIHTC projects be encumbered with a restrictive covenant detailing the requirements of the LIHTC program generally, as well as the specific commitments of the project. 26 U.S.C. § 42(h)(6)(B)(vi).
28. This restrictive covenant ensures that any successor owners of the project are bound by the LIHTC commitment. 26 U.S.C. § 42(h)(6)(B)(v).
29. The restrictive covenant further ensures that anyone who meets the income limitations of the project, including past, present, and prospective tenants, may enforce such requirements. 26 U.S.C. § 42(h)(6)(B)(ii).

C. Determining Income in the LIHTC Program

30. Any individual who meets the income limitations of a project may enforce the restrictive covenant to ensure compliance with the LIHTC program. *Id.*

¹ The thirty-year period consists of an initial 15-year “compliance period,” during which time the tax credits are subject to recapture if the project fails to comply with the LIHTC program requirements, followed by an “extended use period” of at least fifteen additional years. See 26 U.S.C. §§ 42(i)(1) (compliance period), 42(h)(6)(D) (extended use period).

31. For purposes of the LIHTC program, tenant income is determined in the same manner as other federally subsidized housing programs. See 26 C.F.R. § 1.42-5(b)(1)(vii) (Tenant “income is calculated in a manner consistent with the determination of annual income under section 8 of the United States Housing Act of 1937 (‘Section 8’).”)
32. The income limitations for the LIHTC projects are based on calculations provided by the U.S. Department of Housing and Urban Development for local median family income.
33. For example, in Lucas County, Ohio, the 2018 area median family income is \$67,200 and the income limitations for families at 50% of area median income are adjusted for family size as follows²:
- a. For a family of one, \$23,550.
 - b. For a family of two, \$26,900.
 - c. For a family of three, \$30,250.
 - d. For a family of four, \$33,600.
 - e. For a family of five, \$36,300.
 - f. For a family of six, \$39,000.
 - g. For a family of seven, \$41,700.
 - h. For a family of eight, \$44,400.
34. Thus, if a project in Lucas County elected an affordable housing commitment of 20% of units at 50% of area median income, a project with one hundred housing units would be required to set aside twenty units (i.e., 20%) for households with incomes at or below the limitations listed in the preceding paragraph.

² For a family of four, the 2018 median family income is 67,200, 50% of which is 33,600. Family size adjustments are made by reducing 10% for each family member below four, and increasing by 8% for each family member above four. More information is available at https://www.huduser.gov/portal/datasets/il.html#2018_query.

D. Ending the LIHTC Commitment

35. The LIHTC program requires a commitment to the irrevocable election for a minimum of thirty years. 26 U.S.C. § 42(h)(6). The project may commit to a longer period. 26 U.S.C. § 42(h)(6)(D)(ii)(I).
36. This thirty-year commitment is to operate the project at the level of affordability elected pursuant to 26 U.S.C. § 42(g), which is enforceable through the restrictive covenant. See 26 U.S.C. § 42(h)(6)(B)(ii).
37. The statute creating the LIHTC program provides only two exceptions that allow a termination of the LIHTC restrictions before the thirty-year commitment expires.
38. First, the commitment may end early if the property is foreclosed upon. See 26 § U.S.C. 42(h)(6)(E)(i)(I) (but note this exception does not apply if the taxpayer is using the foreclosure as part of a scheme to end the restrictions prematurely, i.e., if “the Secretary determines that such acquisition is part of an arrangement with the taxpayer a purpose of which is to terminate such period.”)
39. Otherwise, the commitment may end before expiration of the thirty-year period if the project owner gives written notice to a state housing credit agency of a desire to sell the property, and the housing credit agency is unable within one year thereafter to present a “qualified contract” for a buyer to continue to operate the property under the LIHTC program. See 26 U.S.C. § 42(h)(6).
40. The statute identifies these two exceptions under the heading “Exceptions if foreclosure or if no buyer willing to maintain low-income status.” See 26 U.S.C. § 42(h)(6)(E). There are no other exceptions to the thirty-year commitment.

41. If a LIHTC project does qualify for one of the two exceptions provided, the statute protects the tenants living in the building for a three-year period after the exception applies by prohibiting rent increases and evictions. 26 U.S.C. § 42(h)(6)(E)(ii).

Facts

A. Riverfront Apartments committed to an irrevocable election of 100% of units at 44% of Area Median Income

42. The Defendant, Riverfront Apartments Limited Partnership (Riverfront Apartments), took advantage of the LIHTC program to establish a 113-unit low-income housing apartment building in the downtown area of Toledo, Ohio, on North Summit Street.
43. In exchange for the LIHTC funds, Riverfront Apartments entered an irrevocable election, under 26 U.S.C. § 42(g)(1), to make 100% of the housing units at Riverfront Apartments affordable to households at or below 44% of area median income.
44. During the application process when the LIHTC funds were sought, the Ohio Housing Finance Agency relied on the proposed commitment in scoring and awarding the low-income housing tax credit funds. Had the proposal not offered to make so many units affordable, and at such a deep level of affordability, it may not have been selected (and the tax credits would have been awarded to other developers whose bids were not selected).
45. Riverfront Apartments executed a restrictive covenant encumbering the real property where the LIHTC project is located. A copy of the Restrictive Covenant is attached as Exhibit A and incorporated herein by reference.
46. Paragraph four (4) of the Restrictive Covenant specifically details the irrevocable election:
- “the Owner has elected to maintain the gross rents of: 100% of the low-income units at a level which is affordable to persons with incomes at or below 44% (60% or lower) of the area median gross income (AMGI), adjusted for family size.”

47. Under paragraph nine (9) of the restrictive covenant, any person who meets the income limitations for the project may enforce the restrictive covenant:

“This covenant shall constitute an ‘Agreement’ between the parties which is enforceable in the courts of the State of Ohio by the Agency or by any individual(s), whether prospective, present, or former occupants of the Project, who meets the income limitations applicable to the Project under Section 42(g) of the Code [the irrevocable election], said individual(s) being an express beneficiary(ies) of this Agreement.”

B. Riverfront Apartments has ceased compliance with the Restrictive Covenant.

48. In June 2015, Riverfront Apartments contacted the Ohio Housing Finance Agency and asked to be released from the requirements of the restrictive covenant.
49. The Ohio Housing Finance Agency reviewed the request and collected information from Riverfront Apartments.
50. However, OHFA did not collect information from persons on the waiting list for admission to Riverfront Apartments or other beneficiaries of the Restrictive Covenant, low-income housing advocates or representatives, or other stakeholders who may have opposed the request for “early release” from the LIHTC commitments.
51. Riverfront Apartments did not request the “qualified contract” process as described above in Paragraph 39.
52. On August 17, 2016, OHFA’s board formally considered Riverfront Apartments’ request. OHFA presented an agenda item to its board for consideration that provided a summary of the agency’s discussions with Riverfront Apartments, and a recommendation to release the restrictive covenant.
53. The proposal outlined in the agenda item provided an 80/20 (Market/LIHTC) mixed-income composition, meaning that only 20% of the housing units would be set at 60% of

area median income. This was a dramatic shift to reduce the affordability of the housing units from 100% of units at 44% of area median income.

54. The proposal further provided that for every LIHTC resident who vacates his or her unit subsequent to the effective date of the release, that unit will be converted to a market rate unit irrespective of its unit type.

55. Finally, the proposal provided a protection for existing tenants:

“Any LIHTC resident in occupancy on the effective date of the release that remains at Riverfront Apartments in good standing under his or her lease will be permitted to remain as a resident in his or her apartment unit at the applicable LIHTC restricted rent level. Any long-term affordable housing resident that would like to remain at Riverfront Apartments will be permitted to do so in a restricted unit. However, if at any time after the effective date of the release, any LIHTC resident vacates his or her unit, that unit will be converted to a market rate unit.”

56. OHFA’s board approved the proposal on August 17, 2016.

57. On September 1, 2016, an Amendment to the Restrictive Covenant (“Amendment”) was recorded at the Lucas County Recorder. A copy of the Amendment is attached as Exhibit B, and incorporated herein by reference.

58. The Amendment sets forth the new program for the building which eliminates the majority of low-income housing units, converting them to market rate units, effectively communicating that Riverfront ceased compliance with the affordability requirements.

59. The Amendment further provides that after a three-year period, all affordable housing requirements of the LIHTC program will be eliminated entirely. The only exception provided is for those tenants already living in affordable units, who cannot be evicted without good cause until the original Restrictive Covenant would have expired in 2030.

60. Riverfront Apartments never notified or contacted any beneficiaries of the Restrictive Covenant to obtain their consent before recording the Amendment or attempting to eliminate the benefits of the Covenant.

61. The Amendment does not identify any authority for Riverfront Apartments to change the original Restrictive Covenant, or to eliminate the affordable housing required by Section 42 of the Internal Revenue Code.

C. Plaintiff is a low-income individual who meets the income limitations provided in the Restrictive Covenant.

62. Plaintiff, Mr. Kontur, is a low-income individual within the meaning of the LIHTC program.

63. Mr. Kontur's sole source of income is Social Security.

64. Mr. Kontur would like to obtain affordable housing in the downtown Toledo area.

65. He meets the income limitations applicable to Riverfront Apartments as described in the Restrictive Covenant. *See* Exhibit A, paragraphs 1 through 9.

66. He is presently in need of affordable housing.

67. He applied for housing at Riverfront Apartments in June 2018.

68. He is a prospective occupant of the Riverfront Apartments project who meets the income limitations applicable to the project under Section 42(g) of the IRS Code.

69. He remains on the waiting list and has yet to receive a response to his application.

70. He meets the description of an express beneficiary of the Restrictive Covenant as set forth in Paragraph 9 of Exhibit A:

This covenant shall constitute an "Agreement" between the parties which is enforceable in the courts of the State of Ohio by the Agency or by any individual(s), whether prospective, present, or former occupants of the Project, who meets the income limitations applicable to the Project under

Section 42(g) of the Code, said individual(s) being an express beneficiary(ies) of this Agreement.

71. Pursuant to 26 U.S.C. § 42(h)(6)(B), Mr. Kontur is an express beneficiary of the Restrictive Covenant and may enforce its terms.
72. Upon information and belief, since the Amendment indicates that Riverfront Apartments need only maintain 23 units of the 113 total units under the LIHTC restrictions, Mr. Kontur has and will continue to wait much longer to receive an affordable housing unit than he would if Riverfront had continued to comply with the LIHTC requirements.
73. Furthermore, the Amendment provides that all LIHTC restrictions will terminate entirely after three years—on September 1, 2019—making it impossible for Mr. Kontur to obtain affordable housing thereafter.

Count 1 – Declaratory Judgment, 28 U.S.C. § 2201

74. Plaintiff incorporates the above paragraphs as if fully rewritten.
75. 28 U.S.C. § 2201 provides for declaratory judgement to determine rights and other legal relations:

In a case of actual controversy within its jurisdiction...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201.

76. Plaintiff seeks declaratory judgment from this court to determine that Defendant violated federal law and Mr. Kontur's rights as identified in 26 U.S.C. § 42, as well as Riverfront Apartments' obligations pursuant to and the Restrictive Covenant mandated by 26 U.S.C. § 42.

77. Plaintiff requests a declaratory judgment from this Court confirming that:

- a) pursuant to 26 U.S.C. § 42, 100% of the housing units located at Riverfront Apartments must be provided to low-income individuals at 44% of area median income;
- b) rents for such units must be determined by 26 U.S.C. § 42(g)(2);
- c) as provided in 26 U.S.C. § 42, Mr. Kontur's rights and Riverfront's obligations provided in the Restrictive Covenant remain despite Riverfront Apartments' recent noncompliance with the Covenant; and
- d) The Amendment to the Restrictive Covenant is invalid under federal law.

Count 2 – Injunctive Relief

78. Plaintiff incorporates the above paragraphs as if fully rewritten.

79. Plaintiff is an intended beneficiary of 26 U.S.C. § 42 and the Restrictive Covenant mandated by 26 U.S.C. § 42.

80. Plaintiff may, therefore, enforce the Covenant pursuant to paragraph nine (9) of the Covenant attached as Exhibit A.

81. Plaintiff seeks injunctive relief to enforce the Restrictive Covenant to require Riverfront Apartments to provide affordable housing as detailed in the Restrictive Covenant.

Prayer for Relief

Plaintiff requests that judgment be entered in his favor and against Defendant as follows:

- (a) That this Court enter a judgment against the Defendant declaring that it must comply with the federal Low-Income Housing Tax Credit program requirements as set forth at 26 U.S.C. § 42, and 26 C.F.R. § 1.42-1, et. seq.; that, pursuant to 26 U.S.C. § 42(h)(6)(B), it must comply with the terms of the Restrictive Covenant attached as Exhibit A; that the Amendment to the Restrictive Covenant, attached as Exhibit B, is invalid as it contradicts and violates federal law as well as the restrictive covenant originally recorded pursuant to 26 U.S.C. § 42(h)(6)(B).
- (b) That this Court issue a judgment for injunctive relief requiring that the Defendant comply with the affordability requirements set forth at 26 U.S.C. § 42, and 26 C.F.R. § 1.42-1, et. seq., consistent with the irrevocable election it entered as identified in the Restrictive Covenant attached as Exhibit A.

DATED: Feb. 1, 2018

/s/ George Thomas

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