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| **FILMORE PARC APARTMENTS II** | * | **NO. 2018-CA-0359** |
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| | | **COURT OF APPEAL** |
| **VERSUS** | * | |
| | | **FOURTH CIRCUIT** |
| **NORMAN S. FOSTER, OFFICER AND DIRECTOR OF FINANCE, CITY OF NEW ORLEANS, ERROLL G. WILLIAMS, ASSESSOR, ORLEANS PARISH AND THE LOUISIANA TAX COMMISSION** | * | **STATE OF LOUISIANA** |
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2014-01725, DIVISION "1"
Honorable Nakisha Ervin-Knott, JUDGE
* * * * * *
**Judge Paula A. Brown**
* * * * * *

(Court composed of Judge Edwin A. Lombard, Judge Daniel L. Dysart, Judge Paula A. Brown)

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**AFFIRMED IN PART; REVERSED IN PART; REMANDED**
**11/07/2018**

This appeal arises out of a suit to recover *ad valorem* taxes paid for the year of 2014. Filmore Parc Apartments II ("Filmore II") filed a petition to recover taxes paid under protest to the City of New Orleans against Norman S. Foster, Chief Financial Officer and Director of Finance for the City of New Orleans, Erroll G. Williams, as the Assessor of Orleans Parish ("Assessor Williams"), and the Louisiana Tax Commission. Assessor Williams filed a motion for summary judgment, and Filmore II, in turn, filed a cross-motion for summary judgment. On December 8, 2017, the district court rendered judgment granting in part and denying in part Filmore II's cross-motion for summary judgment, and granting in part and denying in part Assessor Williams' motion for summary judgment. From this judgment, Assessor Williams appeals.[1] Additionally, Filmore II filed an answer to the appeal seeking review of the district court's judgment granting in

[1] The appellate brief was also submitted on behalf of Norman S. Foster, in his capacity as the Director of Finance for the City of New Orleans; The Department of Finance, Bureau of the Treasury, City of New Orleans; and The City of New Orleans.

part Assessor Williams' motion and denying in part its cross-motion.[2] For the reasons set forth below, the district court's judgment is reversed in part, affirmed in part, and remanded.

## FACTS AND PROCEDURAL HISTORY

This matter was previously before this Court in *Filmore Parc Apartments II v. Foster* ("*Filmore I*"), wherein this Court set forth the procedural history of this case as follows:[3]

> Michael Vales formed Mirabeau Family Learning Center, Inc. ("MFLC"), a Louisiana non-profit corporation, as a vehicle to counteracting poverty. MFLC acquired the property ("Property") in question in 1995, "for the specific purpose of constructing housing units to provide affordable housing to low and very low income families." MFLC entered into a Land Use Restriction Agreement ("LURA") with the requirement that the Property be used "solely to provide housing to low- and very low-income families." Filmore Parc Apartments II ("Filmore"), a partnership in commendam, was formed by Mr. Vales with MFLC as the general partner. The Housing Outreach Fund VII Limited Partnership, a Fannie Mae entity, is the limited partner. MFLC's interest in the Property was then transferred to Filmore.
>
> Filmore operated the Property as "affordable housing for low- and very low-income families." The Property operates 32 units as Section 8 Project Based Voucher units.[4] The remaining [24] units meet the requirements of § 42 of the Internal Revenue Code. Filmore contends that the Property is operated pursuant to the federal Hope VI program[5] and La. R.S. § 40:600.1-600.24. Filmore Parc was

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[2] The district court's granting in part of Filmore II's cross-motion for summary judgment and granting in part of Assessor Williams' motion for summary judgment resolved all issues of the litigation. Thus, the matter is properly before this Court as a final appealable judgment.

[3] Throughout the *Filmore I* opinion, Filmore Parc Apartments II was referred to as "Filmore" or "Filmore Parc."

[4] A Section Eight Project-Based Voucher, defined in 42 U.S.C.A. § 1437f(f)(6), is rental assistance that is attached to the structure.

[5] In *Abundance Square Assocs., L.P. v. Williams*, 10-0324, p. 1 (La. App. 4 Cir. 3/23/11), 62 So.3d 261, 262, this Court explained that the Hope VI program ("Hope VI") was started by the federal government in 1992 to replace "dilapidated, obsolete public housing projects with new, redesigned mixed income housing units. Pursuant to Hope VI, HUD [Housing and Urban Development] issued grants to cities and local public housing authorities for physical revitalization and management improvements. HUD also encouraged the housing authorities to

> assessed *ad valorem* taxes for the Property for the 2014 tax year. Filmore paid $61,755.92 on January 24, 2014, and contended that it was exempt pursuant to Louisiana Const. Art. VII, § 21(A).
>
> Filmore then filed a Petition to Recover Taxes Paid Under Protest against Norman Foster, Chief Financial Officer and Director of Finance for the City of New Orleans; Erroll Williams, as the Assessor of Orleans Parish; and the Louisiana Tax Commission . . . . Mr. Williams also filed a Motion for Summary Judgment contending that the housing units in the Property were not exempt from *ad valorem* taxation. Filmore filed a Cross-Motion for Summary Judgment alleging exemption. Following a hearing, the trial court found that the Property was not exempt from *ad valorem* taxation for 2014. Accordingly, the trial court granted Mr. Williams' Motion for Summary Judgment and denied Filmore's Cross-Motion for Summary Judgment. Filmore's Petition for Suspensive Appeal followed.

*Id*., 16-0568, pp. 2-3, (La. App. 4 Cir. 2/15/17), 212 So.3d 621, 623-24 (footnotes omitted). In *Filmore I*, this Court explained that "La. Const. art. VII, § 21(A) exempts 'public property used for public purposes' from *ad valorem* taxation." *Id*., 16-0568, p. 4, 212 So.3d at 624 (quoting *Slay v. Louisiana Energy & Power Auth.*, 473 So.2d 51, 53 (La. 1985). This Court found the first requirement—whether the property was public property—was not met as Filmore Parc Apartments II was privately owned. However, in reversing the district court's judgment and remanding the matter, this Court held that "the trial court committed a legal error when it failed to apply the proper test for determining whether the Property is public." *Id*., 16-0568, p. 9, 212 So.3d at 626-27. This Court explained that the trial court did not consider the restrictions Filmore placed upon "the Property in furtherance of the mission of providing affordable housing for 'low- and very low-income residents in New Orleans.'" *Id*., 16-0568, p. 8, 212 So.3d at 626.

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develop public/private partnerships with private sector developers and management firms to build, own and operate the new units."

Following remand, the district court held a hearing on Assessor Williams' motion for summary judgment and Filmore II's cross-motion.[6]

In support of the motion, Assessor Williams submitted an affidavit along with exhibits attached, and the affidavit of Magdalena Merrill ("Ms. Merrill"), Director of Asset Management with the Housing Authority of New Orleans. Assessor Williams attested that Filmore II was a for-profit entity. He stated the Housing Authority of New Orleans ("HANO"), through the Section 8 Project-Based Voucher program, entered into a Housing Assistance Payments Contract ("HAP contract") with Filmore II to provide housing payments to thirty-two of the apartment units. Assessor Williams explained that a HAP contract is a standard Housing and Urban Development ("HUD") agreement "whereby Section 8 tenant-based assistance under the housing choice voucher program is offered to private business owners."[7] He attested that the HAP agreement was the only agreement

[6] The first presiding district court judge was elected to the Louisiana Fourth Circuit Court of Appeal; thus, another district court judge heard the matter on remand.

[7] A summary of the pertinent provisions of the HAP contract between Filmore II and HANO provides:

(1) The purpose of the HAP contract "is to provide housing assistance payments for eligible families who lease contract units that comply with HUD housing quality standards . . . from the owner";

(2) There are thirty-two contracted units to be rented to eligible families;

(3) The eligible families are referred to the owner by the PHA from its waiting list. The PHA must determine the "family eligibility in accordance with HUD requirements";

(4) "The owner is responsible for screening and selecting tenants from the families referred by the PHA from its waiting list";

(5) The owner is not the agent of the PHA;

(6) The lease, which must be in compliance with the "HAP contract" and "HUD requirements," is between the owner and the tenant;

(7) If a contracted unit becomes vacant the owner must promptly notify the PHA of the vacancy and the PHA "shall make every reasonable effort to refer a sufficient number of families to fill

between HANO and Filmore II and that Filmore did not offer any "public housing" on behalf of HANO, HUD, or the City of New Orleans.

Ms. Merrill agreed with Assessor Williams' attestation. She stated HANO entered into a HAP agreement with Filmore II wherein HANO committed to provide "project based 'Section 8' housing assistance payments for thirty-two (32) apartment units" which were owned and managed by Filmore II. Ms. Merrill explained the tenants in project based 'Section 8' units pay a portion of the approved rent not to exceed "30% of their adjusted income. . . ." Ms. Merrill stated that to the best of her knowledge Filmore II had no "public housing," and aside from the HAP agreement, there are no other contractual agreements between Filmore II and HANO related to operation of the property. Ms. Merrill attested there was no Regulatory and Operating Agreement between HANO and Filmore II.[8] Ms. Merrill explained that "[p]ublic housing is low income housing assisted by

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the vacancy." If an assisted family vacated the contracted unit which they were leasing, the PHA will continue to pay its share of the rent to the owner for a "vacancy period of up to sixty days from commencement of the vacancy" if the owner notifies the PHA of the vacancy, the vacancy is no fault of the owner, the owner takes steps to minimize the "likelihood and length" of the vacancy. If vacancies occur, there is a procedure set forth for the PHA to reduce the number of contracted units required;

(8) The rent is pre-determined and made part of the contract. During the term of the HAP contract, the owner may request the PHA to adjust the rent in accordance with the law and HUD requirements;

(9) The tenant or eligible family pays a portion of the pre-determined rent, and PHA assist the tenant by paying the remaining portion directly to the owner; and

(10) Under the contract the owner is responsible for "all management and rental functions of the contract units," "enforcing tenant obligations under the lease," and collecting the tenant's rent and security deposit.

[8] In *Abundance Square Assocs., L.P. v. Williams*, 10-0324, p. 11 (La. App. 4 Cir. 3/23/11), 62 So.3d 261, 267, this Court explained that a Regulatory and Operating Agreement is an agreement whereby profits made in operating a Public Housing Authority ("PHA") Assisted Unit ("PHA-Assisted Unit") have to be deposited into the "Affordability Reserves," an escrow account in which the funds were to be used solely for the assistance of the PHA-Assisted Units.

a PHA [Public Housing Assistance] under the provision of the U.S. Housing Act of 1937 (other than Section 8)."

In support of Filmore II's cross-motion for summary judgment, Filmore II submitted the affidavit of Michael R. Vales ("Mr. Vales"), along with exhibits, and an affidavit of Nyssa A. Hackett ("Ms. Hackett"), Manager of the Project Based Vouchers for HANO. Mr. Vales stated he was the executive director of Mirabeau Family Learning Center of New Orleans ("MFLC")—a non-profit entity. He purchased the land and complex which is now Filmore Parc Apartments II, in November of 1995, from Resolution Trust Corporation ("RTC").[9] The Act of Sale provided that the sale was subject to two agreements: Land Use Restriction Agreement ("LURA") and the Recapture and Reinvestment of Profits Agreement. Mr. Vales stated that the LURA required MFLC or its successor in title to the property "to maintain the Property as multifamily residential housing for Low-Income Families and Very Low-Income Families as defined by the Housing Act of 1937, 42 U.S.C. § 1437a(b)(2). . . . ."[10] The Recapture and Reinvestment of Profits

[9] A U.S. government-owned asset management company.

[10] In 2014, 42 U.S.C.A. § 1437a(b)(2) (footnote omitted) provided:

> (b) Definition of terms under this chapter
>
> * * *
>
> (2) Low-income families
>
> **(A)** The term "low-income families" means those families whose incomes do notexceed 80 per centum of the median income for the area, as determined by the Secretary with adjustments for smaller and larger families, except . . .
>
> **(B)** The term "very low-income families" means low-income families whose incomes do not exceed 50 per centum of the median family income for the area, as determined by the Secretary with adjustments for smaller and larger families, except . . .
>
> **(C)** The term extremely low-income families means very low-income families whose incomes do not exceed the higher of—

Agreement, which was applicable in the event of a sale or transfer of the property, terminated on November 15, 1997. Mr. Vales stated that Filmore Parc Apartments II has fifty-six units. Thirty-two units in Filmore Parc Apartment II were, in 2014, under a HAP Contract with the PHA through its Project Based Voucher Program; the pertinent HAP contract was effective from August 1, 2012 to July 31, 2027. He stated because the tenants from the thirty-two units must be referred by HANO, some of the units remain vacant resulting in loss of rental income for the affected units. Mr. Vales attested that the remaining units in Filmore Parc Apartments II were not subject to the same restrictions as the thirty-two units and were fully occupied in 2014. Mr. Vales stated that Filmore II entered several agreements with the city, state, and federal government for loans and grants. The pertinent agreements included:

> (1) The Recapture and Reinvestment of Profits Agreement which expired on November 15, 1997;
>
> (2) Tax Credit Regulatory Agreement of the Louisiana Housing Finance Agency for federal Low Income Housing Tax Credits, regulated by Section 42 of the Internal Revenue Code of 1986, as amended;[11]
>
> (3) The HOME Investment Partnerships Program in which the City of New Orleans issued to MFLC $1,000,000.00 and MFLC lent the funds to Filmore II.

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> **(i)** the poverty guidelines updated periodically by the Department of Health and Human Services under the authority of section 9902(2) of this title applicable to a family of the size involved . . . .
>
> **(ii)** 30 percent of the median family income for the area, as determined by the Secretary, with adjustments for smaller and larger families . . . .

[11] In *Williams v. The Muses, Ltd. 1*, 16-0250 (La. App. 4 Cir. 10/19/16), 203 So.3d 558, 577, *writ denied sub nom. Williams v. The Muses, Ltd. 1*, 16-2034 (La. 1/13/17), 215 So.3d 254, this Court held that a federal Low-Income Housing Tax Credit ("LIHTC") was not considered income, and the Assessor could not include the LIHTC in assessing the value of such affordable housing for *ad valorem* taxes.

> (4) The Road Home Small Rental Property Program loaned Filmore II $162,150.00 (a non-interest bearing loan); and
>
> (5) The Home Affordable Rental Housing Program Regulatory Agreement, regulated by Volume 24, Part 92 of the Code of Federal Regulations, wherein the City of New Orleans issued a loan/grant to Filmore II in the amount of $1,575,000.00.

Mr. Vales attested that "[n]o cash had been left to make repayments of the HOME loan, or the Road Home loan. Additionally, Mr. Vales stated that "[b]ecause of the restrictions on the rents . . . [Filmore II] will never have profits or other cash to distribute to the partners through the term of the numerous regulatory and other agreements encumbering the Property [Filmore Parc Apartments II]." Mr. Vales declared that Filmore Parc Apartments II was dedicated to the public purpose of providing "workforce housing for the City of New Orleans" on a long term basis through its "agreements, encumbrances, and restrictions."

In Ms. Hackett's affidavit, dated January 4, 2016, she referred to the units as "the 32 Section 8 PBV [Project Based Voucher] units." Ms. Hackett stated that HANO confirmed that "units in . . . Filmore II do constitute part of the affordable public housing inventory available in the City of New Orleans based on the Project Based Voucher contracts with HANO and HANO's understanding of circumstances that exist with regard to the development and financing of these apartments and the rent and use restrictions that exist along with these agreements." However, Ms. Hackett revised her affidavit on January 21, 2016 and acknowledged her prior affidavit was not "based on her personal knowledge but based upon a letter that the Executive Director of HANO, Gregg Fortner, composed on or about December 15, 2014 and submitted to Michael Vales."

The district court rendered judgment on December 8, 2017, denying Assessor Williams' motion in part and granting Filmore II's cross-motion in part as to "amounts paid under protest attributable to the thirty-two PHA Units." As to the remaining units, the district court granted in part Assessor Williams' motion and denied in part Filmore II's cross-motion finding that the remaining units were not exempt from *ad valorem* taxes. At the request of Assessor Williams, the district court, pursuant to La. C.C.P. art. 966(C)(4), provided written reasons for the judgment which stated in pertinent part:[12]

> Based on the facts and evidence presented, and examining the first requirement for tax exemption, there is no dispute that Filmore Parc's property is privately owned.
>
> * * *
>
> In the case at bar, the units in dispute are located on privately-owned property. The Fimore [sic] Parc property, in dispute, consists of 56 units. The Court believes 32 of the 56 housing units meet the criteria of being classified as public housing units because these units are set aside for very low-income and extremely low-income tenants, and any monies derived from these units are strictly set aside for the maintenance and operation of those units, pursuant to federal regulation. During oral argument, counsel for Filmore Parc explained that for 32 units, the residents were required to be HANO public housing tenants. If HANO does not have a place for their very low-income and extremely low-income residents in the "Big Six" (the six major HANO-owned public housing developments in New Orleans), the tenants are placed in these 32 units. In essence, these units serve as additional inventory for HANO. And, legally, Filmore Parc cannot use these 32 units for any other purposes other than to house these designated residents. Although Filmore Parc's 32 units are privately-owned, these units have been specifically dedicated for public use.
>
> Based on the caselaw, evidence, and arguments presented before the Court, the Court granted, in part, and denied, in part,

[12] Louisiana Code of Civil Procedure Article 966 codifies the summary judgment process. Article 966 was amended and reenacted by La. Acts 2015, No. 422, § 1, with an effective date of January 1, 2016. The motions, in this case, were filed after the effective date of this Act, thus, the amended version of La. C.C.P. art. 966 applies. La. C.C.P. art. 966 (C)(4) provides: "In all cases, the court shall state on the record or in writing the reasons for granting or denying the motion. If an appealable judgment is rendered, a party may request written reasons for judgment as provided in Article 1917."

> *Defendant Errol Williams' Motion for Summary Judgment.* The Court determined that the 32 units used by HANO, and that serve as public housing to very low-income and extremely low-income tenants, qualify for the *ad valorem* tax exemption under La. Cont. [sic] art. VII, § 21(A). Filmore Parc is entitled to a refund of the amount paid under protest and attributable to the 32 units determined by this Court to be public housing, which is THIRTY-FIVE THOUSAND TWO HUNDRED EIGHTY-SEVEN DOLLARS AND TWENTY-TWO CENTS ($35,287.22), plus interest as allowed by law. The remaining 24 units, which do not house very low-income and extremely low-income tenants and do not serve as additional inventory that HANO can use, do not qualify for the *ad valorem* tax exemption under La. Cont. [sic] art. VII, § 21(A).

From this judgment, this appeal follows.

## DISCUSSION

Assessor Williams asserts the district court erred in granting in part Filmore II's cross-motion for summary judgment and denying in part his motion for summary judgment by finding Filmore II was entitled to partial exemption from *ad valorem* taxation under La. Const. art. VII, §21(A). Alternatively, Assessor Williams contends that the district court erred in finding the land on which Filmore Parc Apartments II is built qualifies for a partial exemption from *ad valorem* taxation under La. Const. art. VII, 21(A).[13]

"A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by the litigant." *Tate v. Touro Infirmary*, 17-0714, p. 1 (La. App. 4 Cir. 2/21/18), __ So.3d ___, ___, *writ denied*, 18-0558 (La. 6/15/18), 245 So.3d 1027 (citing La. C.C.P. art. 966(A)(1)).[14] Generally, the burden of proof rests with the mover. La. C.C.P. art. 966(D)(1). An appellate court's standard of review for a grant of a

[13] In its written reasons for judgment, the district court noted this issue was not submitted to the court for consideration, and it would not be addressed. For reasons discussed *infra*, this Court finds the issue is moot and is pretermitted.

[14] 2018 WL 992322.

summary judgment is *de novo*, and it employs the same criteria district courts consider when determining if a summary judgment is proper. *Madere v. Collins*, 17-0723, p. 6 (La. App. 4 Cir. 3/28/18), 241 So.3d 1143, 1147 (citing *Kennedy v. Sheriff of E. Baton Rouge*, 05-1418, p. 25 (La. 7/10/06), 935 So.2d 669, 686). In *Chanthasalo v. Deshotel*, 17-0521, p. 5 (La. App. 4 Cir. 12/27/17), 234 So.3d 1103, 1107 (quoting *Ducote v. Boleware*, 15-0764, p. 6 (La. App. 4 Cir. 2/17/16), 216 So.3d 934, 939, *writ denied*, 16-0636 (La. 5/20/16), 191 So.3d 1071), this Court explained:

> This [*de novo*] standard of review requires the appellate court to look at the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to determine if they show that no genuine issue as to a material fact exists, and that the mover is entitled to judgment as a matter of law. A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery; a fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, no need for trial on that issue exists and summary judgment is appropriate. To affirm a summary judgment, we must find reasonable minds would inevitably conclude that the mover is entitled to judgment as a matter of the applicable law on the facts before the court.

La. Const. art. VII, § 21, provides in pertinent part:[15]

> [T]he following property and no other shall be exempt from ad valorem taxation:
>
> (A) Public lands and other public property used for public purposes.

[15] Previously, La. Const. art. X, §4, set forth the constitutional provisions for tax exemptions, and in 1974, these tax exemptions were encompassed in La. Const. art. VII, § 21. Article VII, § 21 was amended by Act 2018 La. Sess. Law Serv. Act 721 (S.B. 163) with additions to the article. Subpart (A) was not amended or revised.

This Court, in *Gulf Coast Hous. P'ship, Inc. v. Bureau of Treasury of City of New Orleans*, 13-0556, p. 12 (La. App. 4 Cir. 11/27/13), 129 So.3d 817, 824 (citation omitted), explained that when interpreting a constitutional provision that "the starting point is the language of the constitutional [sic] itself." Moreover, "exemptions from taxation are strictly construed against the taxpayer claiming the benefit thereof and must be clearly, unequivocally, and affirmatively established by the taxpayer." *Id*., 13-0556, pp. 12-13, 129 So.3d at 824.

In *Bd. of Comm'rs of Port of New Orleans v. City of New Orleans*, 15-0768, p. 5 (La. App. 4 Cir. 3/16/16), 186 So.3d 1282, 1285 (footnote omitted), this Court expounded that a two-part test has developed in the interpretation of La. Const. art. VII, § 21(A):

> [J]urisprudence interpreting La. Const. art. VII, § 21(A) has created a two-part test to determine the exemption status of such improvements on public property. *See Bd. of Comm'rs of the Port of New Orleans v. City of New Orleans*, 2013-0881, p. 6 (La. App. 4 Cir. 2/26/14), 135 So.3d 821, 825 (citing *Slay* [*v. Louisiana Energy and Power Authority*,] 473 So.2d 51, 53-54 [(La.1985)]. Under this test, to be exempt from *ad valorem* taxation, public property must be (1) vested in or owned by the public, and (2) used for a public purpose. *See Slay*, 473 So.2d at 53-54; *Abundance Square v. Williams*, 2010-0324, p. 10 (La. App. 4 Cir.2011), 62 So.3d 264, 266.

In the case *sub judice*, as properly set forth in the district court's reasons for judgment, it is undisputed that Filmore II's land and improvements are privately owned; thus, the first requirement for tax exemption under La. Const. art. VII, § 21(A) is not met.

However, "[i]t is not necessary that title to the property be vested in the state or in any of its political subdivisions in order for it to be exempt as public property. If the property is consecrated to public use, it is not taxable irrespective of the nature of the ownership." *Holley v. Plum Creek Timber Co., Inc.*, 38,716, p. 8, (La.

App. 2 Cir. 6/23/04), 877 So.2d 284, 290 (citing *Warren County, Mississippi v. Hester*, 219 La. 763, 54 So.2d 12 (1951)). This Court, in *Bd. of Comm'rs of Port of New Orleans*, espoused that "property has been held to have been utilized for a 'public purpose' when property is either (1) dedicated and open to the public, or (2) used in a way that benefits the general public." *Id*., 15-0768, pp. 5-6, 186 So.3d at 1285-86 (citing *St. Bernard I, LLC v. Williams*, 12-0372, pp. 7-9 (La. App. 4 Cir. 3/13/13), 112 So.3d 922, 927-28 (La. App. 4 Cir.2013)). Louisiana courts also consider how the revenue derived from the private property is used for the public purpose when reviewing whether the property is dedicated to public use. A discussion of the following cases is imperative to understand the application of these factors when determining exemption status pursuant to La. Const. art. VII, § 21(A).

In the case of *Administrators of the Tulane Education Fund v. Bd. of Assessors*, 38 La.Ann. 292 (La. 1886), the Louisiana Legislature passed Act 43 of 1884, which transferred the ownership and operation of the "University of Louisiana" to the Board of Administrators of the Tulane Education Fund ("the Administrators"). *Id*. at 294. The Administrators, in a contract with the State, agreed to devote all their revenues to the public purpose of maintaining and developing the University of Louisiana. *Id*. at 295. The Board of Assessors of New Orleans placed upon the tax roll for 1885 property given by Paul Tulane to the Administrators. The university was public property but the Administrators' property was private.[16] The Administrators filed suit to annul the 1885 tax assessment imposed on the property donated by Paul Tulane. The Supreme Court

[16] At the time the case was decided, the "University of Louisiana" was a public institution. *Tulane*, 38 La. Ann. 292, 295.

was faced with the issue of whether "the dedication by the Tulane Administrators of all their revenues to the support and maintenance of the University of Louisiana is such dedication to public use as will exempt their property from taxation [under the Louisiana Constitution]. . . ." *Id*. at 295. The Supreme Court noted that although the purpose of the General Assembly in enacting of Act 43 was "to effect an exemption of the [Administrators'] property from taxation," the "General Assembly" could not exempt property from taxation "by its own will" "[u]nless the expression of that will is in accord with the Constitution . . . ." *Id*. at 293. The Court further explained that "[t]he Legislature cannot exempt from taxation property that is constitutionally liable to it, but an owner of property may translate it into the domain of constitutional exemption by dedicating it to a public use." *Id*. at 297. The Supreme Court found the actions of the Administrators—dedicating *all* revenues to pay for the support and maintenance of the university—rendered the property exempt public property. *Id.* The Supreme Court held "that property, dedicated to a public use, the revenues of which serve a public purpose, is public property although the title be not in the public." *Id.* at 297.

In *Warren County, Mississippi v. Hester,* 219 La. 763, 773, 54 So.2d 12, (1951), Warren County, a political subdivision of the State of Mississippi, owned a toll bridge that the public used; it spanned the Mississippi River between Vicksburg, Mississippi, and the town of Delta, in Madison Parish, Louisiana.[17] Warren County sued to recover the taxes it paid to Madison Parish under protest, claiming that the bridge was tax exempt under the Louisiana Constitution because

[17] The toll bridge was a combination highway and railway bridge. The owners hoped to make the toll bridge free of charge to the public traveling on the highway when the loan to construct the toll bridge was paid in full.

it was for a public purpose and dedicated to a public use.[18] On appeal, the Supreme Court considered how the money derived from the toll bridge was used, and found the toll bridge was not dedicated to public use because Warren County used a substantial portion of the toll revenues to satisfy the debt it incurred in acquiring the bridge. The Court stated that "[i]f the revenues derived from the tolls of the bridge were being used exclusively for its maintenance and economic operation, it might be reasonable to rule that there has been a dedication." *Id.*, 219 La. at 775-76, 54 So.2d at 16.

Later, in *Holley*, 877 So.2d 284, Georgia-Pacific Corporation, a private landowner, leased, without compensation or payment, 25,480 acres of land to the Louisiana Department of Wildlife and Fisheries ("LDWF") to be used for a wildlife management area as defined in La. R.S. 56:8(108). LDWF agreed to maintain and manage the property for hunting and fishing by the public. Georgia-Pacific and its successors in title claimed an exemption from *ad valorem* taxes under La. R.S. 56:24.[19] Suit was brought by the Morehouse Parish Police Jury. In the petition the police jury, challenged the tax exemption on several grounds: (1) Georgia-Pacific's land was not dedicated to public use; (2) La. R.S. 56:24 was unconstitutional because the legislature could not exempt property from *ad valorem* taxes; and (3) the property was not one of the categories set forth as tax exempt property under La. Const. art. VII, § 21. Georgia-Pacific moved for a

[18] At that time, La. Const. art. 10, § 4 set forth the tax exemptions.

[19] La. R.S. 56:24 provided in pertinent part:

> The commission may contract with any private landowner for the use of his lands . . . for the purpose of establishing wildlife management areas, and may agree, where such use is granted without compensation or payment therefor, that the lands shall be relieved of all state, parish, and district taxes . . . .

summary judgment and the police jury filed a cross-motion; the trial court granted Georgia-Pacific's motion. The appellate court affirmed the trial court's judgment and held that the lease of private property to the LDWF for the public purpose of establishing a wildlife management area fell within the exemption from taxation contained in La. Const. art. VII, § 21. *Id.*, 38,716, pp. 10-11, 877 So.2d at 291-92. In addressing the constitutionality of La. R.S. 56:24, the appellate court opined that "[t]he legislature is powerless to create tax exemptions or enlarge the scope of those provided by the Louisiana Constitution." *Id.*, 38,716, pp. 6-7, 877 So.2d at 289 (citation omitted). The appellate court concluded that La. R.S. 56:24 was "in compliance with and authorized by La. Const. art. 7, § 21." *Id.*, 38,716, pp. 10-11, 877 So.2d at 292.

Finally, in *Abundance Square Assocs., L.P., Square v. Williams*, 10-0324, (La. App. 4 Cir. 3/23/11), 62 So.3d 261, a case more parallel to the factors in the case *sub judice*, the plaintiffs, Abundance Square Associates, L.P. ("Abundance Square") and Treasure Village Associates, L.P. ("Treasure Village"), filed suit against the City of New Orleans ("the City") and Erroll G. Williams, in his capacity as Assessor for the City's Third Municipal District, challenging the 2008 *ad valorem* tax assessments on housing development properties owned and operated by the plaintiffs.[20] HANO[21] executed a Ground Lease and a Regulatory and Operating Agreement with Abundance Square, wherein HANO leased ninety-eight acres of real property to Abundance Square. As part of the agreement,

[20] Plaintiffs were for-profit Louisiana limited partnerships.

[21] In *Kohler v. Hous. Auth. of New Orleans*, 00-2558, pp. 3-4, (La. App. 4 Cir. 3/6/02), 812 So. 2d 851, 853, this Court held that HANO was a political subdivision of the state explaining that "the definition set out in La. R.S. 13:5102(B) states that an authority is a political subdivision. Further, La. R.S. 40:384(16) specifically defines local housing authorities as political subdivisions of this state."

HANO, with the assistance of Abundance Square, would develop the real property into seventy-three multi-family rental units that Abundance Square would operate and manage. Under a Regulatory and Operating Agreement entered into between HANO and Abundance Square, the units or apartments ("PHA assisted units') had to be operated as "qualified low-income units" under Section 42 of the U.S. Internal Revenue Code; forty-eight had to be operated as "public housing" under Section 3(b) of the U.S. Housing Act and fourteen of the units as Section 8 Project-Based Vouchers. Also, under the agreement, if Abundance Square made a profit in operating the PHA-Assisted Units, those profits had to be deposited into the "Affordability Reserves," an escrow account whose funds were to be used solely for the benefit of the PHA-Assisted Units. Abundance Square would own the units until the lease expired in 2077.

The same type of lease and agreement was entered between HANO and Treasure Village. The Treasure Village Regulatory and Operating Agreement required all thirty-four units to be operated as qualified low-income units and, of those, twenty-three had to be operated as public housing and six as Section 8 Project-Based Vouchers. The agreement provided that Treasure Village would own the apartments until the lease expired in 2088.

A trial was held, and the trial court rendered judgment in favor of the tax assessor. On appeal, this Court amended in part the judgment to grant Abundance Square a return of the 2008 *ad valorem* taxes paid under protest on the forty-eight PHA-Assisted Units in the Abundance Square Apartments and to grant Treasure Village a return of the 2008 *ad valorem* taxes paid under protest on the twenty-three PHA-Assisted Units in Treasure Village Apartments. In amending the trial court's judgment in part, this Court reasoned in pertinent part:

> The evidence discloses that the Abundance Square and Treasure Village Apartments are all "tax credit" units, meaning IRS regulations prohibit an owner from renting the unit to anyone earning more than sixty (60) percent of the area median income (AMI). Pursuant to the respective Regulatory and Operating Agreements, a majority of the units in the Abundance Square Apartments (48 of 73) and Treasure Village Apartments (23 of 34), must be "PHA-Assisted Units," which are defined as a "dwelling unit in the Development designated as such by Owner and operated and maintained as a 'public housing' unit in accordance with Public Housing Requirements."
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> * * *
>
> The Regulatory and Operating Agreements also recognize that, in operating the public housing units, the owners (plaintiffs) will not likely be able to recoup the operating costs and, thus, HANO will subsidize the operation of the PHA-Assisted Units. However, in the event the owners (plaintiffs) make a profit in operating the PHA-Assisted Units, the Regulatory and Operating Agreements mandate that those profits be deposited into the "Affordability Reserves," an escrow account whose funds are to be used solely for the benefit of the PHA-Assisted Units. Moreover, if the owners (plaintiffs) fail to comply with the specific terms of the Regulatory and Operating Agreements, the Ground Leases will terminate, effectively vesting ownership of the rental units in HANO.
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> * * *
>
> 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) 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).

*Id.*, 10-0324, pp.10-12, 62 So.3d at 266-67 (footnotes omitted). This Court affirmed in part the district court's judgment and squarely held the Section 8 Project-Based Voucher units at Abundance Square Apartments and Treasure Village Apartments were not exempt from *ad valorem* taxation despite HANO owning the lands and the complexes reverting back to HANO at termination of the leases.

Filmore II's basis for a tax exemption under La. Const. art. VII, § 21(A) is summed up in Mr. Vale's declaration:

> 72. The Project [which includes Filmore Parc Apartments II] is dedicated, through the agreements, encumbrances, and restrictions . . . , on a long-term basis to its public purpose of providing workforce housing for the City of New Orleans.
>
> 73. The City of New Orleans, the State of Louisiana, and the federal government, through the agreements, encumbrances, and restrictions . . . , have recognized the dedication of the Project to the public purpose of providing workforce housing for the City of New Orleans.

As set forth in *Tulane*, and reiterated in *Holley*, the legislature cannot create tax exemptions or expand the extent of those exemptions provided by the Louisiana Constitution; the legislation has to be "in compliance with and authorized by La. Const. art. [VII], § 21." *Holley*, 38,716, p. 11, 877 So.2d at 292. Thus, whether the thirty-two units at Filmore Parc Apartments II are (1) utilized in a way that is dedicated and open to the public, or (2) used in a way that benefits the general public, *as contemplated by La. Const. art. VII § 21(A)*, encompasses both a legal and factual determination. With these precepts in mind, we will conduct a *de novo* review.

In the case *sub judice*, although the affidavits of Ms. Hackett, Mr. Vales, Assessor Williams, Ms. Merrill, and the HAP contract referred to the thirty-two units as Section 8 Project-Based Voucher units, Filmore II's attorney, at the hearing before the district court, urged the units were HANO's. Counsel stated that "it is housing that HANO completely owns and controls, but we have title" and "[e]ssentially[,] they are HANO units in everything but title." Filmore II's counsel attempted to clarify the classification of the units and stated that "[o]ur building is not public housing. The tenants are HANO public housing tenants."

Nevertheless, Filmore II's counsel continued to urge the thirty-two units were additional inventory of HANO stating:

> [T]hey are set aside for HANO, essentially. So people that qualify for public housing under HANO's rules, which is very low and extremely low income. . .
>
> * * *
>
> Not Section 8 -- if you qualify to get into a HANO owned public housing unit, those people, HANO can place them in those 32 units instead of its own public housing. It's just additional inventory that HANO can use.

The district court relied on counsel's declaration that the units were classified as public housing writing:

> The Court believes 32 of the 56 housing units meet the criteria of being classified as public housing units because these units are set aside for very low-income and extremely low-income tenants, and any monies derived from these units are strictly set aside for the maintenance and operation of those units, pursuant to federal regulation. During oral argument, counsel for Filmore Parc explained that for 32 units, the residents were required to be HANO public housing tenants. If HANO does not have a place for their very low-income and extremely low-income residents in the "Big Six" (the six major HANO-owned public housing developments in New Orleans), the tenants are placed in these 32 units. In essence, these units serve as additional inventory for HANO. [22]

Moreover, there are competing affidavits of the two HANO employees. Ms. Hackett attested, although not based on her personal knowledge, that Filmore Parc Apartments II constitutes "part of the affordable public housing inventory available in the City of New Orleans." In contrast, Ms. Merrill attested that there were no

[22] Assessor Williams asserts the district court erroneously relied on facts and evidence contrary to the record.

"public housing" units at Filmore Parc Apartments II and there were no other contracts between Filmore II and HANO other than the HAP contract.[23]

We find there are material issues of facts as to whether the thirty-two units were utilized in a way that is dedicated and open to the public, or used in a way that benefits the general public.

Furthermore, there are material issues of fact as to the use of the revenue generated by the thirty-two units. At the hearing, the district court inquired: "So all the monies and all the rent that's generated from those units, they go back into those units." Filmore II's attorney responded "Absolutely. . . ." Filmore II's counsel argued that the Home Regulatory Agreement and the Road Home Agreement, through "Program Income," required the revenue generated from the units to go back into the units for maintenance and operation. In its written reasons for judgment, the district court relied on this declaration by Filmore II's counsel and reasoned "any monies derived from these units are strictly set aside for maintenance and operation of those units, pursuant to federal law." However, Mr. Vales never referred to "Program Income"[24] in his affidavit, nor did he attest that

[23] In its reply brief, Assessor Williams points out that no evidence was introduced by Filmore II "regarding the classifications of the families who are actual tenants" to support its contention that the units are for a public purpose.

[24] The Home Affordable Rental Housing Program Regulatory Agreement referenced by Filmore II's counsel was regulated by "Volume 24, Part 92 of the Code of Federal Regulation." A review of this federal regulation includes "Program Income" set forth in 24 C.F.R. § 92.503, effective August 23, 2013 to January 2, 2017, which provided in pertinent part:

> (a) Program income.
>
> > (1)Program income must be used in accordance with the requirements of this part. Program income must 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.

the monies derived from the thirty-two units were mandated to be set aside for maintenance and operation of the units. Moreover, no evidence was presented to show that, in 2014, Filmore II deposited revenue generated from the thirty-two units into an escrow account, as mandated, for the sole purpose of operation and maintenance of these units.

"A trial court cannot make credibility determinations on a motion for summary judgment." *Williams v. Archer W. Constr., LLC*, 16-0158, p. 7 (La. App. 4 Cir. 10/5/16), 203 So.3d 325, 330 (quoting *Hutchinson v. Knights of Columbus, Council No. 5747*, 03-1533, p. 8 (La. 2/20/04), 866 So.2d 228, 234. Accordingly, we find there remain genuine issues of material fact as to whether Filmore II is exempt from *ad valorem* taxation, precluding summary judgment as a matter of law.[25]

**Answer to appeal**

Filmore II challenges the district court's judgment denying in part its cross-motion for summary judgment and granting in part Assessor Williams' motion for summary judgment finding the remaining units in Filmore Parc Apartments II were not tax exempt. However, Mr. Vales' affidavit supports the district court's finding. Mr. Vales attested that there are no HAP contract restrictions on the remaining units, that these units were fully occupied in 2014, and that these units generate income to subsidize the other thirty-two units. Accordingly, this portion of the district court's judgment is affirmed.

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> (2)If the jurisdiction is not a participating jurisdiction when the program income is received, the funds are not subject to the requirements of this part.

The record is devoid of any evidence to show whether Filmore II is subject to section (1) or (2) of 24 C.F.R. § 92.503.

[25] Assessor Williams' alternative argument is rendered moot; and any discussion pretermitted.

## CONCLUSION

The district court's judgment granting in part Filmore II's cross-motion for summary judgment and denying in part Assessor Williams' motion for summary judgment is reversed. The matter is remanded to the district court for further proceedings consistent with this opinion. In all other respects, the district court's judgment is affirmed.

**AFFIRMED IN PART; REVERSED IN PART; REMANDED**