DOWNTOWN DEVELOPMENT DISTRICT OF THE CITY OF NEW ORLEANS	*	**NO. 2018-CA-0726**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
THE CITY OF NEW ORLEANS AND BEVERLY B. GARIEPY, INDIVIDUALLY AND IN HER CAPACITY AS DIRECTOR OF FINANCE FOR THE CITY OF NEW ORLEANS	*	**STATE OF LOUISIANA**

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2018-03901, DIVISION "I-14"
Honorable Piper D. Griffin, Judge
* * * * * *
Judge Joy Cossich Lobrano
* * * * * *

(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Tiffany G. Chase)

BELSOME, J., CONCURS IN THE RESULT
CHASE, J., CONCURS IN THE RESULT

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AFFIRMED; EXCEPTIONS DENIED; MOTION DENIED

MAY 8, 2019

In this ad valorem tax matter, defendants/appellants, the City of New Orleans and Norman White in his official capacity as Director of Finance for the City of New Orleans (collectively the "City"), appeal the August 1, 2018 judgment of the district court, which, in pertinent part, granted a preliminary injunction in favor of plaintiff/appellee, the Downtown Development District of the City of New Orleans ("DDD"), prohibiting the City from withholding certain proceeds of a special ad valorem tax. The DDD answers the appeal herein, seeking reversal of the district court's denial of the DDD's request for writ of mandamus. The City also raises peremptory exceptions of no cause of action and no right of action, as well as a motion for this Court to take judicial notice of certain DDD budget hearing testimony. For the reasons that follow, the judgment of the district court is affirmed, and the exceptions and motion are denied.

The DDD is a special taxing district, located within the City,[1] which was created effective January 1, 1975, pursuant to La. R.S. 33:2740.3 (its "enabling

[1] The territorial boundaries of the DDD are as follows: "[t]he point of beginning shall be at the intersection of the east bank of the Mississippi River and the Mississippi River Bridge approaches and Pontchartrain Expressway: thence continuing along the upper line of the

statute"). The enabling statute authorizes the city council to levy and collect a special ad valorem tax (the "DDD tax") on all taxable real property located in the DDD boundaries to be used for public improvements, facilities, and services within the DDD geographical area.[2] Thus, owners of property within the DDD boundaries are assessed the DDD tax in addition to the regular ad valorem taxes levied on their property. In 2001, pursuant to the enabling statute, a ballot proposition for the continuation of the DDD tax was presented to the voters as follows:

Pontchartrain Expressway right-of-way less and except ramp areas, and in a northwesterly direction to the lake side right-of-way line of Claiborne Avenue; thence northeasterly along the lake side of said right-of-way line of Claiborne Avenue to the lower right-of-way line of Iberville Street; thence along the said lower right-of-way line of Iberville Street to the east bank of the Mississippi River; thence continuing along the east bank of said river to the upper right-of-way line of the Mississippi River Bridge approaches and Pontchartrain Expressway, being the point of beginning." La. R.S. 33:2740.3(A).

[2] La. R.S. 33:2740.3(I) provides:

> The city council, in addition to all other taxes which it is now or hereafter may be authorized by law to levy and collect, is hereby authorized to levy and collect as hereinafter specifically provided for a term not to exceed fifty years from and after the date the first tax is levied pursuant to the provisions of this Section, in the same manner and at the same time as all other ad valorem taxes on property subject to taxation by the city are levied and collected, a special ad valorem tax upon all taxable real property situated within the boundaries of the core area development district. The number of mills hereby authorized shall be computed by dividing the number of mills levied and collected by the city of New Orleans for general operating purposes for the year 1977 into the number of mills levied and collected by the city of New Orleans for general operating purposes for the year 1978 and multiplying the result by ten. No such tax shall be levied until a plan requiring or requesting the levy of a tax is finally and conclusively adopted in accordance with the procedures prescribed in this Section. The proceeds of said tax shall be used solely and exclusively for the purposes and benefit of the district. Said proceeds shall be paid over to the Board of Liquidation, City Debt, day by day as the same are collected and received by the appropriate officials of the city of New Orleans and maintained in a separate account. Said tax proceeds shall be paid out by the Board of Liquidation, City Debt, solely for the purposes herein provided upon warrants or drafts drawn on said Board of Liquidation, City Debt, by the appropriate officials of the city and the treasurer of the district.

CITY OF NEW ORLEANS (DOWNTOWN DEVELOPMENT DISTRICT)

PROPOSITION (TAX CONTINUATION)

SUMMARY: CONTINUED AUTHORITY TO LEVY A NOT EXCEEDING 22.97 MILLS PROPERTY TAX IN THE DOWNTOWN DEVELOPMENT DISTRICT FOR AN ADDITIONAL 25 YEARS, BEGINNING WITH THE YEAR 2005 AND ENDING WITH THE YEAR 2029, FOR PUBLIC IMPROVEMENTS, FACILITIES AND SERVICES, AND DEBT SERVICE ON BONDS OF THE CITY ISSUED FOR CAPITAL IMPROVEMENTS AND FACILITIES WITHIN THE DISTRICT.

Shall the City of New Orleans, State of Louisiana (the "City"), acting through its Council as the governing authority thereof, continue to be authorized to levy a special tax of not exceeding Twenty-Two and Ninety-Seven Hundredths (22.97) mills upon all taxable real property situated within the boundaries of the Downtown Development District of the City of New Orleans (the "District") as defined by La. R.S. 33:2740.3, as amended (the "Act"), for an additional twenty-five (25) years, beginning with the year 2005 and ending with the year 2029, said tax to be for the use and benefit of the District with the proceeds of said tax to be dedicated and used solely for public improvements, facilities and services within the District, and shall the City be further authorized to issue such bonds in a principal amount not exceeding $10,000,000, which bonds shall be payable solely from the proceeds of special tax?

On April 20, 2018, the DDD filed a Petition for Preliminary and Permanent Injunction, Writ of Mandamus, and/or Alternatively, Declaratory Judgment, and Damages, alleging that in or about 2007, the City began withholding money from the net tax receipts due to the DDD, which totaled $393,207.00 as of December 31, 2016. The DDD alleges that the City illegally withheld these tax proceeds from the DDD in an effort to finance the City's indebtedness to certain state pension funds. According to the DDD, the City is required to pay its obligations to the pension funds from ad valorem taxes due to the City, not from the DDD tax. Rather, the

DDD alleges, the enabling statute requires that DDD tax proceeds be used solely and exclusively for the purposes and benefit of the DDD.

In its petition, the DDD sought preliminary and permanent injunctions prohibiting the City from withholding and/or diverting the proceeds of the DDD tax, for a purpose other than the exclusive benefit of the DDD. The DDD also sought a writ of mandamus ordering the City to immediately direct payment to the DDD of all illegally withheld tax proceeds. Alternatively, the DDD sought a declaratory judgment that the City's actions are unlawful and monetary damages.

On July 20, 2018, the district court held a hearing, and on August 1, 2018, it rendered judgment granting the DDD's request for preliminary injunction, which ordered as follows:

> …the City of New Orleans and Norman White in his Capacity as Director of Finance, are prohibited from withholding and/or diverting the proceeds of the special ad valorem tax, specifically approved by a vote of the citizens of New Orleans for the exclusive benefit of the DDD, for any purpose other than the exclusive benefit of the DDD, except for a 2% collection fee, in compliance with La. R.S. 33:2740.3(I).

The DDD's request for writ of mandamus, however, was denied. This appeal followed. Before reaching the merits of the City's appeal and the DDD's answer to appeal, we address the exceptions filed by the City.

For the first time on appeal, the City filed in this Court a combined exception of no right of action and no cause of action, disputing the DDD's power to sue and contending that the City is entitled to dismissal of all claims against it

by the DDD.[3] The City argues that: (1) the DDD's enabling statute does not grant it the power to sue; (2) the DDD is not a separate juridical entity from the City; (3) the doctrine of confusion would extinguish any award against the City because the DDD is not a separate entity from the City; and (4) the city council has not authorized the DDD to sue the City.

The exception of no right of action and the exception of no cause of action are peremptory exceptions. La. C.C.P. art. 927. "The appellate court may consider the peremptory exception filed for the first time in that court, if pleaded prior to a submission of the case for a decision, and if proof of the ground of the exception appears of record." La. C.C.P. art. 2163. Both the exception of no right of action and the exception of no cause of action involve questions of law. *Hornot v. Cardenas*, 2006-1341, p. 12 (La. App. 4 Cir. 10/3/07), 968 So.2d 789, 798. "[O]ne of the primary differences between the exception of no right of action and no cause of action lies in the fact that the focus in an exception of no right of action is on whether the particular plaintiff has a right to bring the suit, while the focus in an exception of no cause of action is on whether the law provides a remedy against

[3] The City previously filed, in the district court, an exception of no cause of action on different grounds, challenging the DDD's right to petition for a writ of mandamus, mandatory injunction, or to bring a suit on open account. This exception was denied in the judgment presently on appeal. Also, on August 13, 2018, after the judgment on appeal was rendered, the City filed an "Answer, Exceptions, and Affirmative Defenses to the Petition for Preliminary and Permanent Injunction, Writ of Mandamus, and/or Alternatively Declaratory Judgment, and Damages," which contains exceptions of no cause of action and no right of action. The record on appeal, however, contains no memorandum in support describing the basis for these exceptions or any indication that these exceptions were ever set for hearing. Nothing in the record indicates that the City's arguments regarding the DDD's power to sue have been brought before or considered by the lower court.

the particular defendant." *Badeaux v. Sw. Computer Bureau, Inc.*, 2005-0612, p. 6 (La. 3/17/06), 929 So.2d 1211, 1216-17 (citations omitted).

The exception of no right of action questions whether the particular plaintiff has standing to bring the lawsuit, "but it assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case is a member of the class that has a legal interest in the subject matter of the litigation." *Howard v. Administrators of Tulane Educ. Fund*, 2007-2224, p. 17 (La. 7/1/08), 986 So.2d 47, 60 (citations omitted). "If the pleadings fail to disclose a right of action, the claim may be dismissed without evidence, but the plaintiff should be permitted to amend to state a right of action if he or she can do so." *Gisclair v. Louisiana Tax Comm'n*, 2010-0563, p. 1 (La. 9/24/10), 44 So.3d 272, 273 (citations omitted). "If the pleadings state a right of action in the plaintiff, the exceptor may introduce evidence to controvert the pleadings on the trial of the exception, and the plaintiff may introduce evidence to controvert any objections." *Id.*, 2010-0563, p. 2, 44 So.3d at 274.

"In contrast, an exception of no cause of action questions whether the law extends a remedy against the defendant to anyone under the factual allegations of the petition." *Badeaux*, 2005-0612, p. 7, 929 So.2d at 1217 (citation omitted). The exception of no cause of action is tried "on the face of the petition" and, "to determine the issues raised by the exception, each well-pleaded fact in the petition must be accepted as true." *Id.*

Whether a party has the power to sue or be sued is an issue typically raised in the dilatory exception of lack of procedural capacity.[4] *See* La. C.C.P. art. 926; *Bridges v. Anderson*, 2016-0432, p. 7 (La. App. 4 Cir. 12/7/16), 204 So.3d 1079, 1083; *Stonecipher v. Caddo Par.*, 51,148 (La. App. 2 Cir. 4/7/17), 219 So.3d 1187, 1192, *reh'g denied* (5/11/17), *writ denied*, 2017-0972 (La. 10/9/17), 227 So.3d 830. "The determination of whether a party has the procedural capacity to sue or be sued involves a question of law." *Woodard v. Upp*, 2013-0999, p. 5 (La. App. 1 Cir. 2/18/14), 142 So.3d 14, 18.

Procedural capacity of a party to sue or be sued "shall be presumed, unless challenged by the dilatory exception." La. C.C.P. art 855. The dilatory exception is waived if not pleaded prior to or in the answer. La. C.C.P. arts. 926(B), 928(A); *Bridges*, 2016-0432, pp. 7-8, 204 So.3d at 1083. The City raises the DDD's capacity to sue for the first time for appeal. As this issue was not raised in the lower court or preserved for appellate review, it is not properly before us, and this Court cannot consider it.

Failure to assert a dilatory exception in the lower court, however, does not dispose of the City's remaining arguments. This Court must next consider whether

[4] The City cites to several cases for the proposition that capacity to sue can be challenged via exceptions of no cause of action or no right of action. These cases are inapposite. In *City Council of City of Lafayette v. Bowen*, 94-584 (La. App. 3 Cir. 11/2/94), 649 So.2d 611 and *Roy v. Alexandria City Council*, 2007-1322 (La. App. 3 Cir. 5/7/08), 984 So.2d 191, the adverse party also contemporaneously filed an exception of lack of procedural capacity. *Brown v. State Farm Fire & Cas. Co.*, 2000-0539 (La. App. 1 Cir. 6/22/01), 804 So.2d 41 is also distinguishable because it does not involve a lack of capacity to sue; rather, the exception of no right of action cited a specific statute prohibiting the Department of Insurance from seeking judicial review of a decision made under the Louisiana Administrative Procedure Act. Also, *Council of City of New Orleans v. Sewerage & Water Bd. of New Orleans*, 2005-0384 (La. App. 4 Cir. 7/12/06), 936 So.2d 862, *writ granted*, 2006-1989 (La. 11/9/06), 941 So.2d 28, and *vacated*, 2006-1989 (La. 4/11/07), 953 So.2d 798 was vacated as moot by the Louisiana Supreme Court.

the DDD is a separate juridical entity from the City in order to determine whether any obligation that the City owes the DDD is extinguished by confusion and whether the DDD's right to proceed is barred for failing to obtain city council approval to sue the City.

"A juridical person is an entity to which the law attributes personality, such as a corporation or a partnership." La. C.C. art. 24. "[J]uridical persons are classified either as private persons or public persons." *Williams v. New Orleans Ernest N. Morial Convention Ctr.*, 2011-1412, p. 5 (La. App. 4 Cir. 5/11/12), 92 So.3d 572, 576 (quoting La. C.C. art. 24, cmt. c). "The capacity of a juridical person is governed by provisions in its charter, governing legislation, and customs." La. C.C. art. 24, cmt. d.

Louisiana Constitution Article VI, §44 defines a political subdivision as "a parish, municipality, and any other **unit of local government, including** a school board and a **special district** authorized by law to perform governmental functions." (Emphasis added). The Louisiana Supreme Court, in reviewing an exception of no cause of action, has considered whether a local government unit qualifies as a separate juridical person from the City. *Roberts v. Sewerage & Water Bd. of New Orleans*, 92-2048 (La. 1994), 634 So.2d 341. In *Roberts*, the Supreme Court found that the Sewerage and Water Board of New Orleans ("SWB") was a separate juridical entity from the City and, therefore, a "third person" for the purposes of the Louisiana Workers' Compensation Act. *Id.*, 92-2048, pp. 8-11, 634 So.2d at 346-47.

The Supreme Court explained that "[l]ocal government units such as the SWB are generally treated as separate and distinct public juridical persons or corporations for certain purposes whether they are called that or not." *Id.*, 92-2048, p. 10, 634 So.2d at 346. The Court further set forth its "functional approach" for determining whether a political subdivision is a separate and distinct juridical person:

> The important determination with respect to the juridical status or legal capacity of an entity is not its creator, nor its size, shape, or label. Rather the determination that must be made in each particular case is whether the entity can appropriately be regarded as an additional and separate government unit for the particular purpose at issue. In the absence of positive law to the contrary, a local government unit may be deemed to be a juridical person separate and distinct from other government entities, when the organic law grants it the legal capacity to function independently and not just as the agency or division of another governmental entity.
>
> Such a determination will depend on an analysis of specifically what the entity is legally empowered to do.
>
> *Id.*, 92-2048, p. 10, 634 So.2d at 346-47 (internal citations omitted).

In concluding that the SWB is a separate juridical entity from the City, the *Roberts* court "refuse[d] to disregard the autonomy and independence of the SWB from the City of New Orleans in regards to its management and operations; its source of revenues; and its employment, deployment, direction and control of its work force." *Id.*, 92-2048, pp. 20-21, 634 So.2d at 352.

According to its enabling statute, the DDD is a special taxing district. La. R.S. 33:2740.3(A). The enabling statute creates an eleven-member board of commissioners to provide for the "orderly planning, development, acquisition, construction and effectuation of the services, improvements and facilities to be

furnished by the [DDD], and to provide for the representation in the affairs of the [DDD] of those persons and interests immediately concerned with and affected by the purposes and development of the district…" La. R.S. 33:2740.3(C). Nine of those board members are appointed by the mayor, with city council approval, but five of those mayor-appointees must come from a list of nominees generated by the New Orleans Chamber of Commerce. La. R.S. 33:2740.3(D)(1)(a). The remaining two board members "shall be jointly appointed by the state senators and state representatives who represent the [DDD] district." La. R.S. 33:2740.3(D)(2)(a). The board has the authority to elect officers "from their number," "select[]" or "employ[]" a secretary of the board, "engage such assistants and employees as [] needed to assist the board in the performance of its duties," and "adopt such rules and regulations as it deems necessary or advisable for conducting its business and affairs…" La. R.S. 33:2740.3(D)(3). The board has the power to contract with the City for services and capital improvements in the DDD, for which the DDD must pay, to the City, from the proceeds of the DDD tax. La. R.S. 33:2740.3(H)(2). With prior approval from the mayor and city council, the DDD may contract with other entities to obtain services not ordinarily provided by the City, and the DDD must pay for the contracted services from the DDD's budgeted funds. La. R.S. 33:2740.3(H)(3). City council is authorized to levy and collect the DDD tax. La. R.S. 33:2740.3(I). The DDD tax proceeds "shall be used solely and exclusively for the purposes and benefit" of the DDD and be "maintained in a separate account." *Id.* The DDD, with city council approval, can authorize the City to incur

indebtedness for the DDD's sole benefit, which is solely payable from the DDD tax and "shall not constitute general obligations of the [C]ity…" La. R.S. 33:2740.3(J). The DDD has the power to acquire, lease, insure, or sell property within its boundaries. La. R.S. 33:2740.3(L). The DDD has the authority to pay the City for services rendered pursuant to a contract between the DDD and the City. La. R.S. 33:2740.3(M).

Pursuant to *Roberts* and particularly considering the DDD's separate source of revenue (the DDD tax), its purpose of using DDD tax proceeds for enhanced services in the DDD geographical area, the board's hiring and employment authority, power to enter into contracts with the City and pay the City with separate DDD funds, and authority to acquire and dispose of property, the DDD is a political subdivision of the State of Louisiana and a separate juridical entity from the City. As the Supreme Court noted, in the absence of positive law to the contrary, local government units are typically treated as separate, public juridical persons, distinct from other government entities. *Roberts*, 92-2048, p. 10, 634 So.2d at 347. The City likewise points to no law or jurisprudence deeming a statutorily created special taxing district an arm of city government. Further, the DDD appears nowhere in the Home Rule Charter of the City of New Orleans.

While custom may not abrogate legislation, a juridical person's charter, governing legislation and custom may govern its capacity. La. C.C. art 3 ("Custom results from practice repeated for a long time and generally accepted as having acquired the force of law."). La. C.C. art. 24, cmt. d. Further supporting such

customary treatment of DDD's separate juridical personhood, this Court can take judicial notice of appeals in this Circuit in which the DDD has been named as a party, separate from the City and represented by separate counsel, for purposes of liability. *See, e.g.*, *Meyers ex rel. Meyers v. City of New Orleans*, 2005-1142 (La. App. 4 Cir. 5/17/06), 932 So.2d 719; *639 Julia St. Partners v. City of New Orleans*, 2017-0940 (La. App. 4 Cir. 5/2/18), 246 So.3d 847. *See generally* La. C.E. art 202. Thus, the City's contention, that the DDD is a branch of City government, lacks merit.

In addition, Louisiana law provides no support for the City's argument that its obligations to the DDD are extinguished under the doctrine of confusion. "When the qualities of obligee and obligor are united in the same person, the obligation is extinguished by confusion." La. C.C. art. 1903. Confusion is an affirmative defense to the merits of the lawsuit, which generally cannot be raised in an exception of no right of action. *Madisonville State Bank v. Glick*, 2005-1372, p. 3 (La. App. 3 Cir. 5/3/06), 930 So.2d 263, 265; *Guzman v. Jago Sols., LLC*, 2017-340, p. 1 (La. App. 3 Cir. 11/2/17), 239 So.3d 1038, 1040, *reh'g denied* (3/21/18), *writ not considered*, 2018-0648 (La. 8/31/18), 250 So.3d 891; La. C.C.P. 1005 (enumerating "extinguishment of the obligation in any manner" as an affirmative defense).

As this Court has explained:

> Although evidence could be considered in determining an exception of no right of action, whether the defendant may be able to defeat the plaintiff's cause of action is immaterial to the determination of an exception of no right of action. Any evidence admitted which does not

> relate to the plaintiff's right of action must therefore be referred to the merits of the case. This rule includes affirmative defenses, which may not be raised through the peremptory exception of no right of action.

Wirthman-Tag Const. Co. v. Hotard, 2000-2298, pp. 3-4 (La. App. 4 Cir. 12/19/01), 804 So.2d 856, 860 (internal citations omitted).

Moreover, neither the law nor the record substantiates the City's argument that the DDD has a cause of action due to confusion. Subsection (I) of the enabling statute specifically describes the DDD tax. Even though the city council collects the DDD tax "in the same manner and at the same time as all other ad valorem taxes on property subject to taxation by the city are levied and collected," the proceeds of the DDD tax "shall be used solely and exclusively for the purposes and benefit of the district [DDD]." La. R.S. 33:2740.3(I). The enabling statute further specifies that the proceeds of the special ad valorem tax "shall be paid over to the Board of Liquidation, City Debt … and maintained in a separate account." *Id.* Moreover, under the enabling statute, the Board of Liquidation, City Debt must pay out the tax proceeds "solely for the purposes herein…" *Id.*

The petition specifically alleges that, although the City collected the special ad valorem tax on the DDD's behalf and paid proceeds to the Board of Liquidation City Debt for ultimate distribution to the DDD, the City withheld or diverted tax money due to the DDD, for purposes other than for the exclusive benefit of the DDD, causing financial harm to the DDD. The enabling statute provides no support for the City's contention that the DDD tax proceeds become "City funds" or that its mandate to turn over the tax proceeds becomes "City debt." This argument lacks merit.

Lastly, in support of its exceptions, the City contends that the DDD cannot pursue a cause of action without city council approval. The DDD does not allege in its petition that it sought or obtained city council approval to sue the City.[5] The City relies on the following language in the enabling statute:

> B. The council of the city of New Orleans, or its successor exercising the legislative powers of said city hereinafter referred to, collectively, as the "city council," shall have such power and control over, and responsibility for, the functions, affairs and administration of the district as are prescribed.
> …
> F. The provisions of Subsection E of this Section to the contrary notwithstanding, the board may prepare and submit directly to the city council a plan or plans setting forth its intention to employ professional consultants and experts and such other advisors and personnel as it in its discretion shall deem to be necessary or convenient to assist it in the preparation of a plan or plans for the orderly and efficient development of services and improvements within the district….

La. R.S. 33:2740.3.

This Court is unconvinced that the enabling statute requires the DDD to obtain city council approval to hire attorneys or file suit. In reviewing the exception of no cause of action, we are confined to the "four corners of the petition to determine whether on its face the petition states a cause of action" upon which relief may be granted by law. *Boyd v. Cebalo*, 2015-1085, p. 2 (La. App. 4 Cir. 3/16/16), 191 So.3d 59, 61. On the facts of record, this Court rejects the City's

[5] The City's argument sounds in prematurity; according to the City, the DDD cannot sue the City until it obtains city council approval. The Supreme Court recognized in *Moreno v. Entergy Corp.*, 2010-2268, p. 3 (La. 2/18/11), 64 So.3d 761, 763 that the peremptory exception of no cause of action and the dilatory exception of prematurity "serve completely different functions" though the Court recognized that, in *Steeg v. Lawyers Title Ins. Corp.*, 329 So.2d 719, 720 (La. 1976), it held that exception based on failure to exhaust administrative remedies may be brought either as an exception of no cause of action or an exception of prematurity. Like the exception of lack of procedural capacity, the exception of prematurity is a dilatory exception, which is waived if not filed in the district court prior to or with the answer. La. C.C.P. arts. 926, 928.

argument. In summary, we, therefore, deny the exceptions of no cause of action and no right of action.

We now address the merits of the City's appeal, in which the City sets forth the following assignments of error:

1. The trial court clearly erred when it improperly granted injunctive relief against the City of New Orleans, a public entity, where the DDD is only seeking monetary damages, and therefore had an adequate remedy at law, via ordinary proceeding.

2. The trial court clearly erred in granting a preliminary injunction without a specific finding that the DDD satisfied its stringent burden on its motion for preliminary injunction, and particularly failing to make a specific finding that the DDD proved that immediate and irreparable injury would result if the extraordinary remedy of a preliminary injunction were not granted, particularly where the DDD is only seeking monetary damages.

3. The trial court clearly erred in granting a mandatory injunction, forcing the City to take affirmative steps, rather than a preliminary injunction, which would only maintain the status quo, and by failing to have a full hearing on the merits in granting a mandatory injunction.

4. The trial court clearly erred in granting an overbroad preliminary injunction without temporal limitations and failing to consider all relevant statutory and jurisprudential authority.

A district court "has broad discretion" in granting or denying a preliminary injunction, and "its ruling will not be disturbed on review absent clear abuse of that discretion." *Harvey v. State*, 2014-0156, p. 20 (La. App. 4 Cir. 12/16/15), 183 So.3d 684, 700 (citing *Yokum v. Pat O'Brien's Bar, Inc.*, 2012-0217, p. 6 (La. App. 4 Cir. 8/15/12), 99 So.3d 74, 80)(other citations omitted). "That broad standard is, of course, based upon a conclusion that the trial court committed no error of law and was not manifestly erroneous or clearly wrong in making a factual

finding that was necessary to the proper exercise of its discretion." *Id.*, 2014-0156, pp. 20-21, 183 So.3d at 700 (internal quotation omitted).

"Injunctive relief is an equitable remedy, which is ordinarily only available when a party has no adequate legal remedy." *Faubourg Marigny Imp. Ass'n, Inc. v. City of New Orleans*, 2015-1308, p. 12 (La. App. 4 Cir. 5/25/16), 195 So.3d 606, 615. "It is well settled under Louisiana law that the judicial branch may not ordinarily enjoin a municipal body from acting under the guise of its legislative powers." *Broadmoor, L.L.C. v. Ernest N. Morial New Orleans Exhibition Hall Auth.*, 2004-0211, pp. 5-6 (La. 3/18/04), 867 So.2d 651, 656 (citing *La. Associated Gen. Contr., Inc. v. Calcasieu Parish School Bd.*, 586 So.2d 1354, 1357 (La. 1991)). "However, where the threatened action of a municipal body is 'in direct violation of a prohibitory law' a court of equity may enjoin the threatened action." *Id.*, 2004-0211, p. 6, 867 So.2d at 656.

Generally, in order to prevail on a petition for preliminary injunction, "the petitioner is required to establish by prima facie evidence that: (1) it will suffer irreparable injury, loss, or damage if the injunction is not issued; (2) it is entitled to the relief sought; and (3) it will likely prevail on the merits of the case." *A.P.E., Inc. v. City of New Orleans*, 2013-1091, p. 5 (La. App. 4 Cir. 1/15/14), 132 So.3d 475, 478 (quoting *Moretco, Inc. v. Plaquemines Parish Council*, 2012-0430, pp. 6-7 (La. App. 4 Cir. 3/6/13), 112 So.3d 287, 290). "Irreparable injury means the [petitioner] cannot be adequately compensated in money damages for his injury or

suffers injuries, which cannot be measured by pecuniary standards." *Harvey*, 2014-0156, p. 21, 183 So.3d at 700-01.

Nevertheless, Louisiana courts have set forth an "unlawful conduct" exception to the "irreparable injury" requirement. In *Jurisich v. Jenkins*, 99-0076, p. 4 (La. 10/19/99), 749 So.2d 597, 599, the Louisiana Supreme Court explained:

> A petitioner is entitled to injunctive relief without the requisite showing of irreparable injury when the conduct sought to be restrained is unconstitutional or unlawful, i.e., when the conduct sought to be enjoined constitutes a direct violation of a prohibitory law and/or a violation of a constitutional right. *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 555 So.2d 1370 (La. 1990). Once a plaintiff has made a prima facie showing that the conduct to be enjoined is reprobated by law, the petitioner is entitled to injunctive relief without the necessity of showing that no other adequate legal remedy exists [citation omitted].

Thus, to qualify for the unlawful conduct exception, "[t]he jurisprudential rule requires three findings": (1) "the conduct violates a prohibitory law (ordinance or statute) or the constitution"; (2) "the injunction seeks to restrain conduct, not order it"; and (3) the petitioner "has met the low burden of making a *prima facie* showing that he is entitled to the relief sought." *Yokum*, 2012-0217, pp. 8-9, 99 So.3d at 81.

The City's first three assignments of error require this Court to determine whether the DDD qualifies for the unlawful conduct exception. The City argues that the exception does not apply because the DDD has not met the first and second elements. Thus, under the City's argument, the DDD is required to prove that it will suffer irreparable injury if the preliminary injunction is denied. The City

argues that the DDD cannot prove irreparable injury because the DDD can seek monetary damages in an ordinary proceeding.

Under the particular facts of this case, the unlawful conduct exception applies, and the DDD is not required to prove irreparable injury.

The first element of the exception obliges us to determine whether the City's action – withholding the disputed portion of the DDD tax – directly violated a prohibitory law or the Louisiana Constitution. The record reflects no dispute that the City is withholding a portion of the DDD tax to defray the City's obligation to pay certain pension funds.[6] The City maintains that the DDD tax is an ad valorem tax, and that, by withholding the disputed portion of the DDD tax, the City is performing its statutorily authorized function under La. R.S. 11:82 to fund state retirement systems via the collection and remission of aggregate ad valorem tax proceeds. La. R.S. 11:82(A) states that "[a]d valorem tax contributions to state and statewide public retirement systems shall be as follows" and lists the eight specific retirement funds subject to the statute along with the percentage of "aggregate taxes shown to be collectible by the tax rolls of each parish" relative to each fund.[7]

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[6] The judgment on appeal permits the City to withhold a 2% collection fee from the DDD tax. None of the parties dispute the City's authority to do so, and this fee is not raised as an issue in this appeal.

[7] In its entirety, La. R.S. 11:82 reads:

A. Ad valorem tax contributions to state and statewide public retirement systems shall be as follows:

(1) Assessors' Retirement Fund. Dedicated funds are .25% (1% for Orleans Parish) of aggregate taxes shown to be collectible by the tax rolls of each parish.

(2) Clerks' of Court Retirement and Relief Fund. Dedicated funds are .25% (.5% for Orleans Parish) of aggregate taxes shown to be collectible by the rolls of each parish.

The DDD, however, contends that the DDD tax is a "dedicated tax" or "special tax," which the City is illegally diverting in violation of the Louisiana Constitution, state statutes, and the New Orleans Home Rule Charter. Specifically, the DDD relies on the following.

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(3) Municipal Employees' Retirement System of Louisiana. Dedicated funds are .25% of aggregate taxes shown to be collectible by the tax rolls of each parish except Orleans; funds collected from the parish of East Baton Rouge are to be distributed pursuant to R.S. 11:1862. These amounts are split between Plan A and Plan B based on active member payroll.

(4) Parochial Employees' Retirement System of Louisiana. Dedicated funds are .25% of aggregate taxes shown to be collectible by the tax rolls of each parish except Orleans and East Baton Rouge. These amounts are split between Plan A and Plan B based on active member payroll.

(5) Sheriffs' Pension and Relief Fund. Dedicated funds are .5% of aggregate taxes shown to be collectible by the tax rolls of each parish.

(6) District Attorneys' Retirement System. Dedicated funds are .2% of aggregate taxes shown to be collectible by the tax rolls of each parish.

(7) Registrars' of Voters Employees' Retirement System. Dedicated funds are .0625% of aggregate taxes shown to be collectible by the tax rolls of each parish.

(8)(a) Teachers' Retirement System of Louisiana. Dedicated funds are one percent of aggregate taxes shown to be collectible by the tax rolls of each parish except Orleans.

(b) Effective with the 2004 tax roll payment, the Teachers' Retirement System of Louisiana shall credit each city, parish, or other local public school system located completely within East Baton Rouge Parish with an amount equal to one percent of the aggregate taxes shown to be collectible by the tax rolls for any millage levied by that school system plus an amount equal to the percentage of the total aggregate taxes collected by that school system of all aggregate taxes collected by all school systems within the parish of one percent of the aggregate taxes shown to be collectible by the tax rolls for any millage levied by an entity other than a school board remitted to the system from East Baton Rouge Parish.

(c) Within thirty days after the effective date of Subparagraph (b) of this Paragraph, the East Baton Rouge Parish School Board, the Baker City School Board, and the Zachary Community School Board shall file with the Teachers' Retirement System of Louisiana and the assessor for East Baton Rouge Parish a formula to be used to calculate the amount to be credited to each school board.

B. Provided, however, in the event the employer contributions become zero and employee contributions and dedicated taxes prescribed in this Section provide more than the total actuarially required contribution to any system, then the Public Retirement Systems' Actuarial Committee shall determine the amount of the aggregate taxes shown on the tax rolls of each parish that shall be remitted to such retirement system.

In *City of New Orleans v. Louisiana Assessors' Ret. & Relief Fund* ("*Assessors*"), the Louisiana Supreme Court held:

> The diversion of taxes dedicated to a specific purpose is expressly prohibited by La. Const. art. VI, §§ 26(B) and 32, which provide as follows:
>
> La. Const. Art. VI, § 26. Parish Ad Valorem Tax
>
> > (B) Millage Increase Not for General Purposes. When the millage increase is for other than general purposes, the proposition shall state the specific purpose or purposes for which the tax is to be levied and the length of time the tax is to remain in effect. *All proceeds of the tax shall be used solely for the purpose or purposes set forth in the proposition*. [Emphasis added.]
>
> La. Const. Art. VI, § 32. Special Taxes; Authorization
>
> > Section 32. For the purpose of acquiring, constructing, improving, maintaining, or operating any work of public improvement, a political subdivision may levy special taxes when authorized by a majority of the electors in the political subdivision who vote thereon in an election held for that purpose.
>
> This court has consistently interpreted the constitution to prohibit the use of dedicated and special taxes for purposes other than those for which they were levied.

2005-2548, p. 14 (La. 10/1/07), 986 So.2d 1, 13-14, *on reh'g* (1/7/08)(citing La. Const. art. VI, §§ 26(B) and 32).

Similarly, La. R.S. 39:704 provides that the "proceeds of any special tax shall constitute a trust fund to be used exclusively for the objects and purposes for which the tax was levied…." Likewise, the enabling statute states, in relevant part:

> The city council, in addition to all other taxes which it is now or hereafter may be authorized by law to levy and collect, is hereby authorized to levy and collect … a special ad valorem tax upon all taxable real property situated within the boundaries of the core area [downtown] development district….The proceeds of said tax shall be

> used solely and exclusively for the purposes and benefit of the district. Said proceeds shall be paid over to the Board of Liquidation, City Debt, day by day as the same are collected and received by the appropriate officials of the city of New Orleans and maintained in a separate account. Said tax proceeds shall be paid out by the Board of Liquidation, City Debt, solely for the purposes herein provided upon warrants or drafts drawn on said Board of Liquidation, City Debt, by the appropriate officials of the city and the treasurer of the district.
>
> La. R.S. 33:2740.3(I).

Additionally, Section 4-1301 of Chapter 13 of the New Orleans Home Rule Charter provides:

> (1) The Department of Finance, headed by the Director of Finance, shall:
>
> (a) Collect all taxes, license and permit fees, and other moneys which may be due to or receivable by the City …
> …
> (d) Prepare tax rolls and bills, including those required by state law.
> …
> (l) Permit no disbursements to be made except pursuant to authorizations adopted under the terms of this Charter or applicable State law.
> …
> (q) Approve all disbursements of funds held by the City.

Here, the DDD tax is a dedicated tax. It is evident from the record and the enabling statute that the DDD tax was dedicated by the voters specifically for enhanced services in the DDD. The enabling statute explicitly states that the "proceeds of said tax shall be used solely and exclusively for the purposes and benefit of the district." La. R.S. 33:2740.3(I). "A 'dedicated tax' is, quite simply, a tax that is dedicated for a specific purpose." *Assessors*, 2005-2548, p. 18, 986 So.2d at 16. "Under the constitution, taxes dedicated to a specific purpose cannot be used for another purpose." *Id.* As the Louisiana Supreme Court recognized, "when citizens are presented with a proposition that would impose a special tax for

a specific purpose, and they approve the imposition of that tax, a covenant is created which must be respected and upheld." *Id.* (citing *Denham Springs Econ. Dev. Dist.*, 2004-1674, p. 14 (La. 2/4/05), 894 So.2d 325, 335). "Once citizens vote for a tax dedicated to one purpose, the tax cannot be used for a purpose other than that approved by the citizens." *Id.* "Any alteration of a prior dedication must be by vote of the people." *Id.*, 2005-2548, pp. 18-19, 986 So.2d at 16. "The constitution, at Article VI, §§ 26(B) and 32, respects and upholds this most basic proposition." *Id.*, 2005-2548, p. 19, 986 So.2d at 16.

"When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." *Denham Springs Econ. Dev. Dist.*, 2004-1674, p. 12, 894 So.2d at 334 (citing La. C.C. art. 9; La. R.S. 1:4). "[W]hen a law is susceptible of different meanings, 'it must be interpreted as having the meaning that best conforms to the purpose of the law.'" *Id.* (quoting La. C.C. art. 10). "Under our well-settled rules of statutory construction, where it is possible, courts have a duty in the interpretation of a statute (or by analogy, constitutional provision) to adopt a construction which harmonizes and reconciles it with other provisions dealing with the same subject matter." *Assessors*, 2005-2548, p. 17, 986 So.2d at 15 (citing La. C.C. art. 13; *Louisiana Mun. Ass'n v. State*, 2004-0227, p. 36 (La. 1/19/05), 893 So.2d 809, 837; *Hollingsworth v. City of Minden*, 2001-2658, p. 4 (La. 6/21/02), 828 So.2d 514, 517). Pursuant to these principles, no conflict exists between La. R.S. 11:82

and the enabling statute, which would authorize the City to use dedicated taxes for purposes other than those for which the taxes were levied. The enabling statute prohibits the DDD tax from being used for purposes other than their dedicated purpose. Accordingly, La. R.S. 11:82 does not permit the City to withhold DDD tax proceeds to fund state retirement systems. The DDD has thus shown that it seeks to enjoin unlawful conduct.

Addressing the second element of the exception, the district court's judgment is not a mandatory injunction. "A mandatory injunction 'commands the doing of some action' and 'cannot be issued without a hearing on the merits.'" *Yokum*, 2012-0217, p. 9, 99 So.3d at 81 (quoting *Concerned Citizens for Proper Planning, LLC v. Parish of Tangipahoa*, 2004-0270, p. 7 (La. App. 1 Cir. 3/24/05), 906 So.2d 660, 664). In contrast, "[a] prohibitory injunction is one that seeks to restrain conduct." *Id.* (citing *Jurisich*, 99-0076, p. 4, 749 So.2d at 599). The preliminary injunction herein orders the City to restrain conduct; specifically, the district court ordered the City to stop withholding the disputed tax proceeds from the DDD. The record and the law provide no support for the City's argument that the injunction mandates the City to undertake the affirmative act of changing its collection practices. The district court's judgment granted a prohibitory injunction, not a mandatory injunction. Because the injunction orders the City to refrain from violating prohibitory law and the Louisiana Constitution, the DDD satisfied the unlawful conduct exception and was not required to prove irreparable injury to prevail on a petition for preliminary injunction.

The City also relies on *Kruger v. Garden Dist. Ass'n*, 2000-1135 (La. App. 4 Cir. 1/17/01), 779 So.2d 986 for its argument that, because the DDD's complaint is tax-related, it is compensable in money damages and therefore not a proper subject for an injunction. *Kruger* is distinguishable because, under those particular facts, this Court found no direct violation of a prohibitory law or due process. *Id.*, 2000-1135, p. 7, 779 So.2d at 991. Thus, this Court found that the petitioners were required to prove irreparable injury and failed to meet their burden of proof. Similarly, in *Harvey*, 2014-0156, p. 28, 183 So.3d at 704, this Court found no violation of a prohibitory law, such that the unlawful conduct exception did not apply; under those facts, the petitioner could not prove irreparable injury because his damages, lost sales, were compensable in money. Consequently, the City's first, second, and third assignments of error lack merit.

In its fourth assignment of error, the City contends that the preliminary injunction is vague and overly broad. La. C.C.P. art. 3605 provides that an "order granting either a preliminary or a final injunction or a temporary restraining order shall describe in reasonable detail, and not by mere reference to the petition or other documents, the act or acts sought to be restrained." The City cites to several cases for the proposition that an injunction that merely orders compliance with the law, but fails to name the parties or describe the specific acts enjoined, is vague and insufficient. *See Wells One Investments, LLC v. City of New Orleans*, 2017-0415, p. 5 (La. App. 4 Cir. 11/2/17), 231 So.3d 54, 58; *Weaver v. Chimneywood Homeowners Ass'n, Inc.*, 2001-1444, p. 4 (La. App. 4 Cir. 1/30/02), 809 So.2d

1071, 1074; *Miller v. Knorr*, 553 So.2d 1043, 1046 (La. App. 4th Cir. 1989); *Lenfants Caterers, Inc. v. Firemen's Charitable & Benev. Ass'n of New Orleans*, 386 So.2d 1053, 1055 (La. App. 4th Cir. 1980). All of these cases, however, are factually dissimilar, and none of the defects ascribed to these cases are present here. The judgment on appeal reads, in pertinent part as follows:

> **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Plaintiff's Request for Preliminary Injunction is hereby **GRANTED**. Defendants, the City of New Orleans and Norman White in his Capacity as Director of Finance, are prohibited from withholding and/or diverting the proceeds of the special ad valorem tax, specifically approved by a vote of the citizens of New Orleans for the exclusive benefit of the DDD, for any purpose other than the exclusive benefit of the DDD, except for a 2% collection fee, in compliance with La. R.S. 33:2740.3(I).

It is readily apparent that the parties subject to the preliminary injunction are identified. The acts enjoined are also sufficiently described: the City is restrained from withholding more than a 2% collection fee from the DDD tax. The City's argument, that the judgment lacks sufficient detail by not describing the City's obligations under La. R.S. 11:82, is likewise without merit. As the injunction explicitly prohibits the City from withholding more than the 2% collection fee from the DDD tax proceeds, it is evident that the district court rejected the City's argument that that it is entitled to withhold additional sums, under the auspices of La. R.S. 11:82, to fund its State retirement system obligations.

Louisiana law also provides no basis for the City's complaint that the district court's oral ruling was vague. Appellate courts review judgments and not reasons for judgment. *Wooley v. Lucksinger*, 2009-0571, p. 77 (La. 4/1/11), 61 So.3d 507, 572. A district court's oral reasons for judgment form no part of the judgment and

"do not alter, amend, or affect the final judgment being appealed." *Id.*, 2009-0571, pp. 77-78, 61 So.3d at 572 (quotation omitted). Even if a district court's oral reasons conflict with its written, signed judgment, the written judgment prevails. *Kirby v. Poydras Ctr., LLC*, 2015-0027, p. 11 (La. App. 4 Cir. 9/23/15), 176 So.3d 601, 607.

The City also complains that the injunction "has no temporal limitations." However, a preliminary injunction remains in effect from the time "the parties restrained … receive actual knowledge of the order" until it is dissolved or modified by further orders of the court. La. C.C.P. arts. 3605, 3607. The preliminary injunction is "designed to preserve the status quo as it exists between the parties, pending trial on the merits." *Faubourg Marigny Imp. Ass'n, Inc.*, 2015-1308, p. 12, 195 So.3d at 615. "The principal demand for a permanent injunction, however, is determined on its merits only after a full trial under ordinary process, even though the hearing on the summary proceedings to obtain the preliminary injunction may touch upon or tentatively decide merit-issues." *Id.*, 2015-1308, p. 13, 195 So.3d at 615 (quotation omitted).

Finding no merit in the City's assignments of error, we affirm the district court's grant of the preliminary injunction in the DDD's favor.

We now turn to the DDD's answer to the appeal, wherein the DDD contends that the district court erred in denying its request for mandamus. An appellate court reviews a district court's judgment denying a writ of mandamus under an abuse of discretion standard. *Chaisson v. State, Dep't of Health & Hosps. through Registrar*

of Vital Records, 2017-0642, p. 5 (La. App. 4 Cir. 3/7/18), 239 So.3d 1074, 1078, *writ denied*, 2018-00540 (La. 5/25/18), 243 So.3d 567. "[F]indings of fact in a mandamus proceeding are subject to a manifest error standard of review." *Id.*

"Mandamus is an extraordinary remedy which should be applied only where ordinary means fail to afford adequate relief." *Bd. of Trustees of Sheriff's Pension & Relief Fund v. City of New Orleans*, 2002-0640, p. 2 (La. 5/24/02), 819 So.2d 290, 292 ("*Sheriff's*")(citing *La. Assessors' Retirement Fund, et al v. City of New Orleans, et al*, 2001-735, p. 2 (La. 2/26/02), 809 So.2d 955; *Smith v. Dunn*, 263 La. 599, 268 So.2d 670, 672 (1972)). "A writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law." *Id.* (citing La. C.C.P. art. 3863). A " 'ministerial duty' is one in which no element of discretion is left to the public officer, in other words, a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." *Chaisson*, 2017-0642, p. 5, 239 So.3d at 1078. "A public official cannot be compelled to exercise discretionary authority via a writ of mandamus and a writ of mandamus will not be issued in doubtful cases." *Id.*, 2017-0642, pp. 5-6, 239 So.3d at 1078. "The writ should be issued only in cases where the law provides no relief by ordinary means or where the delay involved in obtaining ordinary relief may cause injustice." *Sheriff's*, 2002-0640, p. 2, 819 So.2d at 292 (citing La. C.C.P. art. 3862; *Smith*, 268 So.2d at 672).

The DDD argues that a writ of mandamus is warranted because the delay in obtaining ordinary relief would cause injustice. The DDD acknowledges in its

petition, by combining its request for mandamus with alternative claims for declaratory judgment and damages, that another remedy is available through which the DDD can seek the disputed amounts through ordinary procedure. The DDD contends, however, that its claim is "time-sensitive" because the DDD's taxing authority expires in 2029, and the DDD requests that the district court take judicial notice of unpaid judgments and settlements owed by the City, which have been outstanding for 20 years. The DDD alleges that the City began withholding the disputed portion of the tax proceeds in approximately 2007. The DDD argues that, while it did not file its petition until 2018, it has been trying to reach a resolution with the City since that time. The district court's oral reasons reflect that it rejected the DDD's arguments that its claims were time-sensitive. Considering the facts of record, the district court properly found that the DDD failed to meet its burden to show that a delay in obtaining ordinary relief would cause injustice sufficient to warrant the issuance of a writ of mandamus. The district court did not abuse its discretion in denying the writ of mandamus. The DDD's answer to the appeal is denied.

Lastly, we address the City's motion for this Court to take judicial notice of the DDD's budget hearing testimony on November 20, 2018. The City submits that DDD representative Anthony Carter testified that the DDD has a budget surplus, which is being reserved for capital investments. The City contends that this testimony is relevant to: (1) the City's exceptions, particularly, whether the DDD is a separate juridical entity from the City; (2) whether the DDD proved it would

suffer irreparable injury if the injunction is denied; and (3) whether the DDD is entitled to mandamus due to delay in obtaining ordinary relief. The City argues that the meeting was open to the public and video footage of the hearing was broadcast on television and streamed on the city council's website.

This hearing did not take place until after the judgment on appeal was rendered, and the testimony could not have been before the district court in determining the DDD's entitlement to a preliminary injunction or mandamus. Likewise, the testimony could not be part of the record sent to this Court. This Court can only consider an exception filed for the first time in this Court if proof of the exception appears **in the record**. La. C.C.P. art. 2163. La. C.C.P. art. 2164 provides that "[t]he appellate court shall render any judgment which is just, legal, and proper **upon the record on appeal**." (Emphasis added). "An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence." *City of Hammond v. Parish of Tangipahoa*, 2007-0574, p. 5 (La. App. 1 Cir. 3/26/08), 985 So.2d 171, 176 (declining to take judicial notice of minutes of parish council meeting held after district court rendered judgment). Additionally, as described above, the DDD was not required to prove irreparable injury because it sought an injunction to prohibit unlawful conduct. The testimony therefore is not relevant to the DDD's burden of proving its entitlement to a preliminary injunction under the facts of this case. The motion is denied.

For the reasons set forth in this opinion, the exceptions of no cause of action and no right of action and the motion to take judicial notice are denied, and the judgment of the district court is affirmed.

AFFIRMED; EXCEPTIONS DENIED; MOTION DENIED