

CAUSE NO. 2012-20396

1620 HAWTHORNE LTD.
Plaintiff

vs.

MONTROSE MANAGEMENT
DISTRICT, THE MONTROSE
MANAGEMENT DISTRICT BOARD
OF DIRECTORS, CONSISTING OF
THE FOLLOWING: CLAUDE
WYNN, CHAIRMAN; DR. RANDY
MITCHMORE, VICE-CHAIRMAN;
CASSIE STINSON, SECRETARY;
KATHY HUBBARD, TREASURER;
BRAD NAGAR, ASSISTANT
TREASURER; ROBERT JARA,
POSITION 6; BOBBY HEUGEL,
POSITION 7; DANA THORPE,
POSITION 8; LANE LLEWELLYN,
POSITION 9; TAMMY MANNING,
POSITION 10; DAVID ROBINSON,
POSITION 11; MICHAEL GROVER,
POSITION 12; RANDY ELLIS,
POSITION 13; DENNIS
MURLAND, POSITION 14 and BILL
CALDERON, EXECUTIVE
DIRECTOR.

Defendants

§ IN THE DISTRICT COURT

§ HARRIS COUNTY, TEXAS

§ 333RD JUDICIAL DISTRICT

**PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION AND SUIT FOR
DECLARATORY AND INJUNCTIVE JUDGMENT**

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff, 1620 Hawthorne Ltd., hereby files this suit requesting certain

declaratory and injunctive relief as follows:

I.
Parties /Service

1. Plaintiff is a Texas Limited Partnership which owns commercial real property within the boundaries of Defendant. Plaintiff has its principal place of business in Harris County, Texas.

2. Defendant Montrose Management District is a Municipal Management District created by the Texas Legislature and subject to the provisions of Chapter 375 of the Local Government Code. Montrose Management District has filed an Original Answer in this matter. Service of this pleading shall be made on MMD's counsel, Blank Rome, LLP, Barry Abrams, 700 Louisiana, Suite 4000, Houston, Texas 77002.

3. Defendants Claude Wynn, Chairman; Dr. Randy Mitchmore, Vice Chairman; Cassie Stinson, Secretary; Kathy Hubbard, Treasurer; Brad Nagar, Assistant Secretary; Robert Jara, Position 6; Bobby Heugel, Position 7; Dana Thorpe, Position 8; Lane Llewellyn, Position 9; Tammy Manning, Position 10; David Robinson, Position 11; Michael Grover, Position 12; Randy Ellis, Position 13; Dennis Murland, Position 14 are all members of the Montrose Management District Board of Directors ("Board Defendants"). The Board Defendants are sued in each of their respective representative capacities only, in order to comply with the Texas Supreme Court's requirements for necessary and proper parties in an

ultra vires suit. The address for service for each of these Board Defendants is the same: Attn: David Hawes at Hawes, Hill & Calderon LLP, 10103 Fondren Rd., Suite 300, Houston, TX 77096.

4. Defendant Bill Calderon is the Executive Director for the Montrose Management District. Defendant Calderon is sued in his representative capacity only in order to comply with the Texas Supreme Court's requirements for necessary and proper parties in an ultra vires suit. Defendant Calderon's address for service is Attn: David Hawes at Hawes, Hill & Calderon LLP, 10103 Fondren Rd., Suite 300, Houston, TX 77096.

II.
Rule 190 Designation

5. This case is designated as Level II for discovery under Rule 190.

III.
Jurisdiction/Venue

6. This Court has jurisdiction under Chapter 375 of the Local Government Code and under the general grant of jurisdiction with which District Courts are vested by the Texas Constitution. Venue for this action is designated as Harris County by Chapter 375 of the Local Government Code and by Section 15.002 of the Civil Practice and Remedies Code since all of the Defendants are located in Harris County.

IV.
Background Facts

7. On June 17, 2005, the Texas Legislature enacted Chapter 3843 of the Texas Special District Local Laws Code. By this legislation, the Texas Legislature created a special district called the Harris County Improvement District no. 6, commonly referred to locally as the East Montrose Management District. On June 19, 2009, the Texas Legislature similarly enacted Chapter 3878 of the Texas Special District Local Laws Code. By this legislation, the Texas Legislature created a special district called the Harris County Improvement District no. 11, commonly referred to locally as the West Montrose Management District.

8. On February 15, 2011, the East Montrose Management District and the West Montrose Management District were consolidated into one, commonly referred to locally as the Montrose Management District (hereafter referred to as either “the District” or “MMD”). Plaintiff owns commercial property within the District and has been illegally assessed and/or taxed by the District.

9. On September 29, 2011, an individual named Robert Rose personally delivered approximately 988 individually-signed Petitions for Dissolution to Defendant MMD (collectively referred to as the “Petition for Dissolution”). These Petitions, when added together, constituted more than 75% of the owners within MMD who were subject to the assessments of MMD. Moreover, these Petitions, when added together, constituted more than 75% of the assessed value of the

property in the District based upon the most recent certified county property tax rolls. One of the signers of the Petition for Dissolution is Plaintiff herein. The persons signing the Petition for Dissolution were upset with the fact that the District had recently assessed their respective properties with a burdensome and costly new tax, and that such assessments and/or taxes were going to be used for the mutual benefit of many non-commercial property owners who were exempt under state law from being assessed and/or taxed by the District. Determined to eradicate this unfair, illegal and unconstitutional assessment and/or tax, the signers submitted collectively the Petition for Dissolution, which requested the District's Board of Directors (referred to as the "Board") to immediately dissolve the District.

10. The statutory basis for such a Petition for Dissolution may be found in Section 375.262(1) of the Texas Local Government Code. This statute requires that the District's Board dissolve the District upon receipt of a written petition filed with the Board by the owners of "75 percent or more of the assessed value of the property in the District based upon the most recent certified county property tax rolls."

11. Although the 75 percent requirement was met by the Petition to Dissolve, Defendant MMD refused, and continues to refuse, to dissolve. Indeed, rather than comply expeditiously with their mandatory and ministerial duty to

dissolve, Defendant MMD's Board instead stiff-armed the required dissolution—choosing instead to engage in a sham investigation into the sufficiency and/or adequacy of the Petition to Dissolve. In truth, this sham investigation was concocted to camouflage the fact that the District desperately needed to buy more precious time so that the District's lawyers and representatives could huddle behind closed doors and in secret in a vain attempt to try and figure out how to evade their clear statutory duty to dissolve. Once the District thought that it had figured out how to defend itself against extinction, their plot was hatched, and through a course of collusive and illegal actions and meetings, the District ignored, and continues to ignore, its legal obligation to dissolve and instead falsely maintained that the 75 percent requirement had not been satisfied.

12. The District reached this bogus conclusion by interpreting the 75 percent requirement to include the total value of all the properties by all owners of property, both residential and commercial, wherever located in the District. But Plaintiff will show that the District's interpretation is clearly erroneous and is indeed perverse. By interpreting the 75 percent dissolution threshold as requiring the support of those owners who have not and cannot legally be assessed by the District, both the District and the District's Board are violating state law.

13. Simply put, MMD has turned state law on its head. Their logic cannot survive a reasoned analysis. The purpose of an improvement district is to provide

services and improvements to all property owners within the improvement district by taxing and/or assessing solely the owners of the commercial properties contained within its boundaries¹. Thus, only a subset percentage of the actual owners within an improvement district will bear the brunt of the tax that benefits everyone. Clearly, it is not reasonable to assume that non-commercial owners of real property and improvements within the District, who reap the benefits of the assessment and/or tax expenditures but do not have to pay for any services or improvements, will be inclined to dissolve the District. Their motivation is exactly the opposite—they will want to keep the District alive and continue to enjoy the free services and improvements windfall created by the Texas Legislature.

14. Thus, when understood in this context, it is obvious that dissolution must be an option to those commercial landowners who are subject to the assessment and/or tax, such that 75 percent of that group may petition to obliterate the existence of the District if they so choose. Indeed, Defendant MMD's own website and official records admit that it has no legal authority whatsoever to assess any property owners other than commercial property owners. For example, the District has judicially admitted that the property subject to assessment will

¹ The property subject to these assessments was the land and improvements of the commercial property owners within the boundaries of the District. Properties exempt from the assessments were single-family detached residential, duplexes, triplexes, quadraplexes, condominiums, municipalities, counties, other political subdivisions, entities exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, public utilities, and recreational property or scenic use property the meets the requirements of Section 375.163, Texas Local Government Code.

solely be the land and improvements of the commercial property owners within the boundaries of the District. The District has further judicially admitted that the following property will be exempt from assessment: single-family detached residential, duplexes, triplexes, quadraplexes, condominiums, municipalities, counties, other political subdivisions, etc.

15. Thus, the fact that the District may not assess and/or tax non-commercial property owners is not even subject to legitimate debate, as the Texas Legislature has clearly specified that the MMD may not assess any land or improvements unless owned by commercial property owners. Thus, it is obvious that the 75 percent threshold clearly and unambiguously relates to 75 percent of the assessed value of the commercial properties within the District who have been assessed by the District, not by 75 percent of the owners within the geographical boundaries of the District who are not (and cannot ever legally be) assessed by the District but have been assessed by other instrumentalities of government, such as an ad valorem tax by Harris County. To interpret this law any other way would be to ensure that it is unconstitutional.

16. In addition to the foregoing facts regarding the District's unlawful and illegitimate attempt to avoid dissolution, another serious issue exists with respect to whether the West Montrose Management District's assessment was void and illegal in the first place. Section 3878.204(2) of the Texas Special District Local

Laws Code empowered that entity to assess or finance a service or improvement project so long as a petition of “at least 25 owners of real property in the district that will be subject to the assessment, if more than 25 persons own real property subject to the assessment in the district according to the most recent certified tax appraisal roll for Harris County.” However, not all of the owners who signed the petition in August of 2009 were eligible to do so, as will be proven by Plaintiff, as follows: (1) Moore, E Bailey, HCAD 044-184-000-0055. Bailey Moore's property is a residential property and therefore not subject to the assessment. As of the filing of this suit, it is still classified as a residential property; (2) Mitchmore Living Trust, HCAD 054-234-000-0015. Randy Mitchmore operates a dental business from this property, but he also claims a residential homestead exemption. As a residential homestead the property has not been subject to the assessment; and (3) Carter, Michael M, HCAD 054-234-000-0012. Michael Carter operates a funeral business from this property, but he also claims a residential homestead exemption. As a residential homestead his property has not been subject to the assessment. Because of these facts, the assessment petition was not in compliance with state law and the West Montrose Management District’s assessment and/or tax is void as a matter of law.

17. Finally, prior to September 1, 2011, the only areas eligible to become an improvement district under 375.201 were those which existed in “an area

devoted primarily to commercial development and business activity inside the boundaries of a municipality.” Neither the East Montrose Management District nor the West Montrose Management District met these criteria, because the land within this area was not devoted primarily to commercial development and business activity.

V. Standing

18. Plaintiff has standing to bring various claims against all of the Defendants. With respect to Plaintiff’s claims for declaratory and injunctive relief against the Defendants that MMD’s unspent tax assessments are illegal and/or unconstitutional, Plaintiff asserts that it is a taxpayer within the MMD. As shown by Exhibits “1” and “2”, attached hereto, 1620 Hawthorne Ltd. was assessed by MMD and has paid at least two assessments by MMD. Exhibit 1 is a true and correct copy of one tax assessment which was paid in March of 2011 in the amount of \$530.63. Exhibit 2 is a true and correct copy of another tax assessment which was paid in December of 2011 in the amount of \$544.60. These specific assessments, as well as all other assessed and collected tax assessments, are used by MMD for its operations and activities. Accordingly, Plaintiff has both state and municipal standing as a taxpayer, as defined and explained in *Williams v. Lara*, 52 S.W.3d 171, 180 (Tex. 2001), to seek declaratory and injunctive relief, so long as this suit does not seek to recover assessed tax funds previously expended. By this

suit, Plaintiff wants to make clear that it does not seek reimbursement from MMD for those tax assessments that have already been assessed, collected and spent. To the contrary, Plaintiff only seeks a declaration that MMD does not have the authority to spend—prospectively—previously-assessed and collected but yet-to-be spent taxes, for all of the reasons asserted herein. In addition, Plaintiff seeks injunctive relief solely to bar MMD from spending—prospectively—any such collected but unspent funds. As of this filing, Plaintiff alleges that MMD assessed \$1,321,936.00 and collected \$1,235,246.00 in 2011. As of May 14, 2012, MMD had \$1,351,065 remaining on deposit (unspent funds). Unless enjoined, MMD will continue to spend such tax assessments illegally and in violation of both the Texas and Federal Constitutions. More specifically, MMD’s purported authority to make these assessment stems from a petition of 25 signatures which, as was more fully explained above, contains several signatures from persons and/or entities that are not eligible to be counted as a signer authorized to sign such a petition, thus rendering said petition void. Moreover, even if the original petition of 25 signatures is deemed to be valid, which Plaintiff denies, MMD’s continued existence is nevertheless in question, given that a valid dissolution petition was timely submitted by Plaintiff and many other property owners within MMD. Without any factual or legal basis, MMD rejected the dissolution petition reasons which are neither factually or legally valid. Because MMD has no discretion and

has a clear and absolute ministerial duty to dissolve, any further expenditure of such tax assessments would be illegal. Further, Plaintiff falls into a certain class of taxpayers who are not being treated fairly or equally, that being an owner of commercial real property within the boundaries of MMD made subject to tax assessment by the District. MMD does not possess the authority to render a tax assessment against any other type of landowner within the District, and yet all other owners of real property within the same MMD, who do not meet the definition of commercial owners, reap the same benefits from such taxation and yet do not have to pay any portion of such assessment. Such disparate and unequal treatment amounts to a violation of the equal protection clause of both the Texas and United States Constitutions, and Plaintiff has standing to assert such claims.

VI.

Waiver of Governmental Immunity

19. Plaintiff asserts that no governmental immunity exists for a claim brought under the “ultra vires” exception to sovereign and/or governmental immunity. As explained in *City of El Paso v. Heinrich*, 284 S.W.3d 366, 369-76 (Tex. 2009), the ultra vires exception allows a plaintiff to sue a state official in his official capacity, thereby binding the State through its agent, for prospective injunctive and/or declaratory relief to restrain the official from violating statutory or constitutional provisions. Sovereign and/or governmental immunity does not bar such a suit because, in concept, acts of state officials that are not lawfully

authorized are not considered to be acts of the State. Thus, the remedy of compelling such officials to comply with the law, while binding on the State, does not attempt to exert control over the State, but instead attempts to reassert the control of the State. It is for this reason that Plaintiff has sued the Board Defendants and Defendant Calderon in their respective official capacities for MMD.

20. In addition, the Texas Declaratory Judgments Act contains a waiver of immunity from suit. Plaintiff asserts claims under this Act against each of the Defendants. With respect to Defendant MMD, this entity is a necessary party to Plaintiff's claim for declaratory and/or injunctive relief that MMD does not have any statutory authority or constitutional authority to make tax assessments. MMD is also a necessary party to Plaintiff's claim for declaratory and/or injunctive relief that MMD has a ministerial duty to dissolve. Furthermore, Plaintiff's constitutional claims of equal protection under both the Texas and United States Constitutions require MMD to be joined as a necessary party. Thus, immunity from suit is waived because Plaintiff is joining MMD to its suit: (1) which seeks a judicial declaration that MMD's tax ordinance is illegal because the petition allegedly authorizing such assessment is invalid; (2) which seeks a declaration that MMD's tax ordinance is illegal because such an assessment against only one class of land owner—commercial property owners—is unconstitutional; (3) which

seeks to construe state law relating to the requirements for a petition for dissolution of MMD and the effect of MMD's refusal to dissolve; and (4) the constitutionality of a state law which allows taxation of commercial property owners but not other property owners where the tax assessment is used for the mutual benefit of all property owners. Accordingly, governmental immunity does not preclude prospective equitable remedies in official-capacity suits against government actors who have violated statutory and constitutional provisions, by acting without legal authority, and by failing to perform a purely ministerial act. *Heinrich*, 284 S.W.3d at 372-73. Of significance, suits to require state officials to comply with the law and the constitution are not prohibited, even if a declaration to that effect compels the payment of money. Thus, to the extent this Court rules that neither MMD nor its officials have the statutory or constitutional authority to spend previously-collected tax assessments which remain unspent; such monies should be reimbursed to the taxpayers who paid them.

VII. **Causes of Action**

A Suit for Declaratory Judgment

21. Plaintiff incorporates the foregoing paragraphs herein by reference. Plaintiff brings this action pursuant to the authority of the Texas Declaratory Judgments Act, Texas Civil Practice & Remedies Code, Chapter 37. Plaintiff would note that governmental immunity is waived if a statute or ordinance is

challenged as invalid. Plaintiff hereby requests the following declaratory relief:

- a) the November 14, 2011 Order of the District, is void on its face due to the fact that the District wrongfully misinterpreted the 75 percent requirement contained in Section 375.262(1) of the Texas Local Government Code to include properties assessed by other entities rather than just by the District itself;
- b) the Dissolution Petition met the factual and legal requisites of Section 375.262(1) because it constituted “75 percent or more of the assessed value of the property in the District based upon the most recent certified county property tax rolls,” within the meaning of that statute;
- c) the District had and has a clear and unambiguous ministerial duty to dissolve and its failure to do so constitutes a clear abuse of discretion. In the alternative, should the Court find that the District’s interpretation of the 75 percent threshold is correct, which Plaintiff denies, then Plaintiff seeks a declaration that Section 375.262(1) of the Texas Local Government Code permitting dissolution is unconstitutional, both on its face and as applied to this Plaintiff. More specifically, the taxation of only commercial property owners, whether referred to as a tax or as an assessment, coupled with the fact that those burdened by the tax cannot dissolve the taxing authority because of the 75 percent rule, is in

- violation of the equal protection provisions of both the Texas and United States Constitutions, e.g., Article III, Section 1, of the Texas Constitution and Amendment XIV of the United States Constitution, and also is a violation of the substantive due process guarantees found in the 5th and 14th Amendments to the United States Constitution and the due course of law provision of Article 1, Section 19 of the Texas Constitution;
- d) to the extent that Chapter 375 of the Local Government Code purports to authorize imposing a financial burden on commercial properties to benefit all properties within the District, that law is unconstitutional, both on its face and as applied to this Plaintiff. More specifically, the taxation of only commercial property owners, whether referred to as a tax or as an assessment, coupled with the fact that assessments and/or taxes benefit other property owners not burdened by the tax, is in violation of the equal protection provisions of both the Texas and United States Constitutions, e.g., Article III, Section 1, of the Texas Constitution and Amendment XIV of the United States Constitution, and also is a violation of the substantive due process guarantees found in the 5th and 14th Amendments to the United States Constitution and the due course of law provision of Article 1, Section 19 of the Texas Constitution;
- e) all of the East Montrose Management District's assessments and/or taxes

- which have been instituted since August of 2009 are void and, to the extent not already spent, must be reimbursed to those who were forced to pay those illegal assessments and/or taxes; and
- f) neither the East Montrose Management District nor the West Montrose Management District met the criteria established prior to September 1, 2011; namely, that the only areas eligible to become an improvement district under 375.201 were those which existed in “an area devoted primarily to commercial development and business activity inside the boundaries of a municipality.”.

VIII.
CONCLUSION

For the reasons detailed above, Plaintiff 1620 Hawthorne Ltd. respectfully requests that this Court declare the parties’ rights and obligations as requested herein, together with all reasonable and necessary attorneys’ fees, expenses and costs of court, as provided under the Texas Declaratory Judgments Act, the reimbursement of all tax assessments which have been collected but not yet spent which violate statutory and/or constitutional law, as well as all other and further relief to which Plaintiff may show itself to be justly entitled.

Respectfully Submitted,

ANDY TAYLOR & ASSOCIATES, P.C.

BY: /s/ Andy Taylor

Andy Taylor

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ATTORNEYS FOR PLAINTIFF
1620 Hawthorne Ltd.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above has been served upon the following via CM, RRR on May 25, 2012:

Blank Rome, LLP
Barry Abrams
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Houston, Texas 77002
713-228-6601 (telephone)
713-228-6605 (facsimile)

/s/ Andy Taylor
Andy Taylor