

I.

OBJECTION AND MOTION TO QUASH

1. On October 22, 2012, counsel for the District received the Notice, which purports to notice the oral deposition of the District's former Executive Director, David Hawes ("Mr. Hawes"), three days later, on October 25, 2012, at 10:00 a.m. A true and correct copy of the Notice is attached as **Exhibit A**.

2. Pursuant to Rule 199.4 of the Texas Rules of Civil Procedure, the District, the Board, the Executive Director and Mr. Hawes object to the time/date noticed and move to quash the deposition. This motion is filed before the third business day after service of the Notice and automatically stays the deposition pending resolution of the motion.

3. The District, the Board, the Executive Director and Mr. Hawes also move for a protective order, as is discussed below.

II.

MOTION FOR PROTECTIVE ORDER

4. The District is a municipal management district created by the Texas Legislature to "promote, develop, encourage, and maintain employment, commerce, transportation, housing, tourism, recreation, the arts, entertainment, economic development, safety and the public welfare in the area of the District."^{3/}

^{3/} The District is the result of the consolidation of two management districts created by the Texas Legislature. The first, earlier referred to as the East Montrose Management District, was created in 2005. TEX. SPECIAL DISTRICT LOCAL LAWS CODE §3843.001 *et seq.* The second, earlier referred to as the West Montrose Management District, was created in 2009. *Id.* §3878.001 *et seq.* On February 15, 2011, the districts were combined into the District.

5. The District's Board consists of volunteer public officials. The Executive Director and Hawes, the District's former Executive Director, are likewise public officials in those capacities.^{4/}

6. The District is a political subdivision of the State,^{5/} and the District, its Board and the District's Executive Directors retain an immunity from suit, except where the Legislature has expressly waived it.

7. Plaintiff is a commercial property owner within the District who seeks a declaratory judgment requiring the District to dissolve and to refund assessments levied to fund the District's activities.

8. The District filed its plea to the jurisdiction, based upon this Court's lack of subject matter jurisdiction, on May 7, 2012. After Plaintiff amended its petition, the District supplemented its jurisdictional plea on May 31, 2012. The Court conducted a hearing on the District's plea on Jun 1, 2012, but has not yet ruled.

9. After Plaintiff joined the Board and Executive Director as parties based upon the theory that their official actions were *ultra vires*, they filed their plea to the jurisdiction on July 31, 2012, and set their plea for hearing on August 31, 2012.

^{4/} Cf. *Cloud v. McKinney*, 228 S.W.3d 326, 340 (Tex. App.—Austin 2007, no pet.) (executive director of lottery commission is public official); *Titus Reg'l Med. Ctr. v. Tretta*, 180 S.W.3d 271, 274 (Tex. App.—Texarkana 2005, no pet.) (contractor serving as chief executive officer of regional medical center possesses official immunity; notes majority rule that official immunity extends to private party acting pursuant to contract with governmental entity as an official fulfilling statutorily-mandated functions); *Knowles v. City of Granbury*, 953 S.W.2d 19, 24 (Tex. App.—Fort Worth 1997, pet. denied) (contractor hired as city airport manager possesses official immunity); *Guarjardo v. Linebarger Goggan Blair & Sampson, L.L.P.*, No. 04-04-0211-CV, 2005 Tex. App. LEXIS 3133 (Tex. App.—San Antonio Apr. 27, 2005, pet. denied) (tax collector).

^{5/} See TEX. SPECIAL DISTRICT LOCAL LAWS CODE §3843.002, 006; *Id.* §3878.002; TEX. LOCAL GOV'T CODE §375.004(a) (municipal management districts are political subdivision of the state), (b) (municipal management districts qualify as governmental units under Chapter 101 of the Civil Practices & Remedies Code); TEX. CIV. PRAC. & REM. CODE §101.001(3)(B) (defining a "governmental unit" for immunity purposes as "a political subdivision of this state").

10. On August 23, 2012, Plaintiff filed a narrative affidavit of its principal, Robert Rose, and objected to certain aspects of an affidavit earlier submitted by Mr. Hawes in support of the Board and Executive Director's jurisdictional plea.

11. In response to Plaintiff's objections to the Hawes affidavit, the District filed a supplemental affidavit by Mr. Hawes on August 30, 2012, which authenticated the relevant portions of the certified tax appraisal roll for Harris County – the documents dispositive of Plaintiff's complaints about the status of certain signatories to the petition required for assessment and for financing services and improvement by what was then the West Montrose Management District.^{6/}

12. Thereafter, on August 30, 2012, Plaintiff supplemented its amended petition and filed its response to the plea to the jurisdiction filed by the Board and Executive Director. Plaintiff's counsel also objected to the timeliness of the filing of the supplemental Hawes affidavit and demanded the opportunity to depose Mr. Hawes.

13. In response, counsel for the District, the Board and the Executive Director voluntarily deferred the hearing on the Board and Executive Director's jurisdictional plea.

14. Since that time, counsel for the parties have discussed but have been unable to resolve their disagreement about whether a deposition of Mr. Hawes is either necessary or appropriate given the pendency of the jurisdictional pleas filed by the District, the Board and the Executive Director.

15. Counsel for the Plaintiff has rejected requests to:

- (a) defer discovery pending a ruling on the pending jurisdictional pleas;
- (b) rely upon the written record of the District's actions and certified copies of the relevant certified appraisal roll provided by the Harris County Appraisal District, which are the relevant materials pertinent to the jurisdictional pleas;

^{6/} See TEX. SPECIAL DISTRICT LOCAL LAWS CODE §3878.204.

- (c) identify what subjects he contends raise material factual issues pertinent to the jurisdictional pleas pending before the Court that require discovery in advance of a ruling on those pleas;
- (d) accept an offer by counsel for the District, the Board and the Executive Director to revise the supplemental Hawes affidavit to omit passages Plaintiff's counsel contends are objectionable; or
- (e) conduct by written questions any examination the Court deems necessary to resolution of the pending jurisdiction plea, which Defendants deny is either necessary or appropriate, to minimize the burden on the District, the Board, the Executive Director and its former Executive Director, Mr. Hawes.

16. Although in some cases limited discovery may be necessary to allow a court to resolve the jurisdictional issues raised, no such discovery is required in this case for the Court to determine whether Plaintiff has established a waiver of the District's immunity from suit or whether the challenged actions by the Board and Executive Director were *ultra vires*.

17. Plaintiff gives short shrift to the well-recognized principle that:

“a governmental unit's entitlement to be free from suit is effectively lost if the trial court erroneously assumes jurisdiction and subjects the governmental unit to pre-trial discovery and the costs incident to litigation; therefore, the trial court abuses its discretion and there is no adequate remedy at law [when a trial court does not identify fact issues concerning jurisdiction for which discovery is necessary and instead allows discovery to proceed].”

City of Galveston v. Gray, 93 S.W.3d 587, 591 (Tex. App.—Houston [14th Dist.] 2002, pet. denied)(mandamus issued when trial court allowed discovery while refusing to rule on pending jurisdictional plea). *See City of Kemah v. Vela*, 149 S.W.3d 199, 202, 205 (Tex. App.—Houston [14th Dist.] 2004, pet. denied)(lack of deposition of affiant no reason to deny jurisdictional plea when material jurisdictional facts are undisputed); *Employees Retirement System of Texas v. Putnam, LLC*, 294 S.W.3d 309, 323 (Tex. App.—Austin 2009, no pet.)(where no fact issue involved, trial court did not err in declining to allow discovery on jurisdictional issue). No disputed jurisdictional fact issue

exists here which can justify allowing discovery in advance of a ruling on the pending jurisdictional pleas.

18. Moreover, under well-recognized public official immunity doctrines, Plaintiff is not entitled to elicit testimony from Mr. Hawes, the District's former Executive Director, regarding his conduct on behalf of the District. *See, e.g., Joe v. Two Thirty Nine J.V.*, 145 S.W.3d 150, 157 (Tex. 2004) ("Legislative immunity applies to legislators at the federal, state, regional, and local levels of government - including city council members - who are performing "legitimate legislative functions." [lawyer city council member]); *In Re Perry*, 60 S.W.3d 857, 860 (Tex. 2001) ("[b]ecause the immunity doctrine serves important public purposes, courts have affirmed that the doctrine generally shields legislative actors not only from liability, but also from being required to testify about their legislative activities." [members of Legislative Redistricting Board]); *Sledd v. Garrett*, 123 S.W.3d 592, 594 (Tex. App.–Houston [14th Dist.] 2003, no pet.) (members of appraisal review board hearing taxpayer protests perform quasi-judicial function and are entitled to judicial immunity); *Clear Lake City Water Authority v. Salazar*, 781 S.W.2d 347, 349-50 (Tex. App.–Houston [14th Dist.] 1989, orig. proceeding [leave denied])(legislative immunity applies to members of local water authority board).

Accordingly, the District, the Board, the Executive Director and Mr. Hawes respectfully request that the Court quash the Notice, and direct that no discovery shall occur until after the Court has had the opportunity to rule upon the pending jurisdictional pleas, and that they be granted such other and further relief, whether legal or equitable, to which they may show themselves to be justly and equitably entitled.

Respectfully submitted,

BLANK ROME LLP

By:  _____

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ATTORNEYS FOR DEFENDANTS
MONTROSE MANAGEMENT DISTRICT, ITS BOARD, AND
ITS EXECUTIVE DIRECTOR

CERTIFICATE OF CONFERENCE

I certify that I conferred with Plaintiff's counsel regarding the subject of this motion on October 22, 2012, and he is opposed to the relief sought.




Barry Abrams

CERTIFICATE OF SERVICE

I certify that on October 23, 2012, I served a true and correct copy of the foregoing instrument on counsel of record, at the address and in the manner indicated below:

By CM/RR #70110470000305607645

Mr. Andy Taylor
ANDY TAYLOR & ASSOCIATES, P.C.
2668 Highway 36S, #288
Brenham, Texas 77833



Barry Abrams

CAUSE NO. 2012-20396

1620 HAWTHORNE LTD.
Plaintiff

IN THE DISTRICT COURT

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

HARRIS COUNTY, TEXAS

333RD JUDICIAL DISTRICT

NOTICE FOR ORAL DEPOSITION OF DAVID HAWES

To: David Hawes, by and through his attorney of record Barry Abrams,
Blank Rome, LLP 700 Louisiana, Suite 4000, Houston, Texas 77002.

Please take notice that pursuant to the Texas Rules of Civil Procedure,

Plaintiff 1620 Hawthorne, Ltd., will take the oral deposition of David Hawes, commencing at 10:00 a.m. on October 25, 2012, and continuing from day to day thereafter until completed. This deposition will take place at the office of Barry Abrams, Blank Rome, LLP 700 Louisiana, Suite 4000, Houston, Texas 77002. The deposition will be stenographically recorded by Sunbelt Reporting, 6575 West Loop South, Suite 580, Bellaire, Texas 77401, who will administer the oath as authorized by law. The deposition is being taken for the purpose of discovery, for use at trial, and for all other purposes as permitted by the TEXAS RULES OF CIVIL PROCEDURE.

Respectfully Submitted,

ANDY TAYLOR & ASSOCIATES, P.C.

BY: /s/ Andy Taylor

Andy Taylor

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713-222-1817 (telephone)

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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 facsimile transmission, on October 22, 2012:

Blank Rome, LLP
Barry Abrams
700 Louisiana, Suite 4000
Houston, Texas 77002
713-228-6601 (telephone)
713-228-6605 (facsimile)

/s/ Andy Taylor
Andy Taylor