IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS AT HOUSTON

No. 14-13-00233-CV

THE MONTROSE MANAGEMENT DISTRICT AND THE PUBLIC OFFICIALS (CLAUDE WYNN, RANDY MITCHMORE, CASSIE STINSON, KATHY HUBBARD, BRAD NAGAR, ROBERT JARA, BOBBY HUEGEL, DANA THORPE, LANE LLEWELLYN, DAVID ROBINSON, MICHAEL GROVER, RANDY ELLIS AND BILL CALDERON),
Appellants,

v.

1620 HAWTHORNE LTD.
Appellee.

On Appeal from the 333rd Judicial District Court of Harris County, Texas;
Trial Court Cause No. 2012-20396

APPELLEE'S BRIEF

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APPELLEE REQUESTS ORAL ARGUMENT

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STATEMENT ON ORAL ARGUMENT

Appellee agrees that oral argument would give the Court a more complete understanding of the jurisdictional facts presented in this appeal.

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

Appellee 1620 Hawthorne, Ltd. (hereinafter referred to as "1620 Hawthorne" or as "Appellee") asks that the Trial Court's order denying Appellants' summary judgment—based upon its finding that subject matter jurisdiction exists—be affirmed in all respects. Judge Halbach's ruling denying Appellants' Motion for Summary Judgment should be affirmed because Appellants' assertion of governmental immunity from suit does not apply to the claims brought by Appellee in this suit. Accordingly, because the Trial Court does have subject matter jurisdiction over all Appellants and all claims raised in this case, this Honorable Court should affirm and remand for full discovery and trial on the merits.

ISSUES PRESENTED

1. Did the Trial Court Correctly Deny Appellants' Motion for Summary Judgment Because Subject Matter Jurisdiction Exists?

2. Did The Trial Court Correctly Conclude That No Governmental Immunity From Suit Exists For Any Of The Appellants?

STATEMENT OF THE CASE

Appellee is a Texas Limited Partnership which owns commercial real property within the boundaries of the Montrose Management District

("MMD or District"). CR 386. Appellee has its principal place of business in Harris County, Texas. *Id*. Appellee has received and paid tax assessments imposed upon it by MMD for the past two years. *Id*. Appellant 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. *Id.*

Appellee filed this lawsuit on April 5, 2012 against Appellant MMD. CR 7. On May 25, 2012, Appellee filed its First Amended Original Petition. CR 346. In addition to various claims asserted against MMD, this Amended Petition also asserts ultra vires claims against each of the Board Members of MMD, as well as its Executive Director, in their respective official and representative capacities only, in order to comply with the Texas Supreme Court's requirements for necessary and proper parties in an ultra vires suit. CR 347-CR 348. Appellee's First Amended Petition also asserts additional claims not previously asserted against MMD in its Original Petition, and clarifies those claims raised previously against MMD. CR 357-CR 362. Appellee also filed a Supplemental Petition to its First Amended Original Petition on August 30, 2012. CR 898. Accordingly, the live pleadings at the time of the hearing on Appellants' Motion for

Summary Judgment were Appellee's First Amended Original Petition and Supplemental Petition.

Appellants filed Pleas to the Jurisdiction asserting jurisdictional arguments, as well as a Motion for Summary Judgment incorporating the previous jurisdictional arguments and adding argument on the merits. CR 23; CR 396; CR 437; 929. The Court instructed the parties that it was only going to consider the jurisdictional issues at the present time. CR 1548. Judge Halbach heard lengthy oral arguments on two separate occasions, June 1, 2012 (RR, Vol. 2) and January 18, 2013 (RR, Vol. 4). The Trial Court thereafter denied Appellants' Motion for Summary Judgment based solely on jurisdictional grounds. CR 1547. Appellants then appealed that order to this Honorable Court. CR 1552. Accordingly, the sole issue before this Honorable Court at the present time is whether subject matter jurisdiction exists. Inasmuch as Appellants' assertion of governmental immunity from suit as a jurisdictional bar is erroneous, Appellee files this Brief in response.

STATEMENT OF FACTS[1]

A. Creation of the District

1 The statements of facts are supported by the affidavit of Robert Rose and the attachments thereto. CR 483-CR 890.

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. On February 15, 2011, the East Montrose Management District and the West Montrose Management District were consolidated into one district, commonly referred to locally as the Montrose Management District (hereafter referred to as either "the District" or "MMD"). Under state law, the District can only assess and/or tax owners of commercial property[2]. No other type of property can be

2 There is no disagreement between the Parties that the only property subject to District assessment and/or taxes is the land and improvements of the commercial property owners within the boundaries of the District. The Parties also agree that the properties which are statutorily exempt from the District's assessments are 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 that meets the requirements of Section 375.163, Texas Local Government Code.

assessed and/or taxed by the District.

B. Certain District Assessments Were Based Upon Assessment Petitions Containing Signatures From Ineligible Property Owners

Appellee introduced evidence before the Trial Court that, as of this filing of this lawsuit, MMD had already assessed $1,321,936.00 and collected $1,235,246.00 in 2011. CR 1081. Appellee also proved that, as of May 14, 2012, MMD had $1,351,065.00 remaining on deposit (unspent funds). Id. In response to Appellants' Motion for Summary Judgment, Appellee brought forward evidence that the West Montrose Management District's assessment was void and illegal in the first place. CR 485-86. 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, Appellee brought forth evidence to the Trial Court that not all of the owners who

signed the petition in August of 2009 were eligible to do so. More specifically, Appellee's proved that at least three of the twenty-five petition signers were not eligible to sign[3]. The first ineligible property and signer was Moore, E Bailey, HCAD 044-184-000-0055. As proven before the Trial Court, Bailey Moore's property was a residential property and therefore not subject to the District assessment. CR 485-86. The second ineligible property and signer was the Mitchmore Living Trust, HCAD 054-234-000-0015. Appellee proved that, although Randy Mitchmore operated a dental business from this property, he also claimed a residential homestead exemption. As a residential homestead, this particular property was not been subject to District assessment. CR 485-86. The third ineligible property and signer was Carter, Michael M, HCAD 054-234-000-0012. Appellee proved that, although Michael Carter operated a funeral business from this property, he also claimed a residential homestead exemption. As

3 The above-quoted statute requires the twenty-five signatures to come from persons owning "real property subject to the assessment." Under the facts of this case, however, three of the twenty-five persons owned real property that was not subject to District assessment. To the contrary, these particular properties were exempt from assessment. Appellee introduced evidence that none of these properties were listed on the District's own tax rolls, proving that they had not been assessed by the District during the relevant time periods. Further, Appellee introduced evidence that each of the three properties were shown to be exempt from District assessment on the Harris County tax rolls and the Harris County Appraisal District ("HCAD") Real Property Account Information sheets. CR 485-86.

a residential homestead, this property was not subject to District assessment and/or taxation. Id. Because of these facts, Appellee alleged that the assessment petition was not in compliance with state law and the West Montrose Management District's assessment and/or tax was void as a matter of law.

C. Appellee's Attempt to Dissolve the District

Appellee owns commercial property within the consolidated District and has been assessed and/or taxed by the District over several tax years. On September 29, 2011, Robert Rose, on behalf of Appellee, personally delivered approximately 988 individually-signed Petitions for Dissolution to Appellant MMD (collectively referred to as the "Petition for Dissolution"). One of the signers of the Petition for Dissolution is Appellee 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 what they believe is an unfair, illegal and unconstitutional assessment and/or tax, the

signers submitted collectively the Petition for Dissolution, which requested the District's Board of Directors to immediately dissolve the District.

D. Statutory Basis for Dissolution

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."[4] These Petitions, when added together, constituted more than 75% of the assessed value of all of the commercial properties 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.

E. Basis for dispute

i. Appellee's Interpretation

4 Section 375.262(1) uses the term "shall dissolve." According to Section 311.016(2) of the Texas Government Code, commonly referred to as the Code Construction Act, "shall" means the imposition of a "duty."

Appellee's First Amended Original Petition alleged that the 75 percent threshold statutory requirement was satisfied by the Petition for Dissolution, thereby creating an unconditional and mandatory ministerial duty for Appellant MMD to dissolve. Appellee reached this conclusion by interpreting the statutory threshold requirement to require the total assessed value of the commercial property owners who actually signed the Petition to be included within the numerator of the calculation, while the denominator of the calculation would include the total combined value of all the commercial property owners within the District[5].

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5 Appellee's interpretation is supported by the temporal and textual differences between Section 3878.204(2) of the Texas Special District Local Laws Code (the "Assessment Statute"), Section 375.262(1) of the Texas Local Government Code (the "Dissolution Statute"), and Section 375.022 of the Texas Local Government Code (the "Creation Statute"). The language used in the Assessment Statute is "at least 25 owners of real property in the district that ***will be subject to*** the assessment…." This "forward-looking" language makes sense, because the subject matter contemplated in the Assessment Statute is the empowerment of a District to make an assessment in the future. Thus, the pool from which the 25 persons must come is the group of property owners who own properties that will be eligible to pay the District's assessments—in other words, the owners of commercial properties. By contrast, the Dissolution Statute is "backward-looking," in that the attempted dissolution occurs after the creation of the District and after the assessments of the District. Thus, it makes sense to refer to 75 percent or more ***of the assessed value of the property*** in the District **rather than** 75 percent or more of *the assessed value of the property subject to assessment.* Simply put, by the time dissolution is contemplated, assessments will have already been made and that is why the statute is phrased in the past tense, e.g., the assesse**d** value of the property in the District. Since the only properties which may be assesse**d** are commercial properties, it is unnecessary for the Legislature to have added the words "subject to assessment," as such wording would be duplicative, confusing and mere surplusage. Finally, the language in the Creation Statute of "the owners of a majority of the assesse**d**

ii. Appellants' Interpretation

Although Appellants apparently do not disagree with what is required to be input in the numerator of the dissolution equation, Appellant MMD and the other Appellants do disagree with what is supposed to be included in the denominator for the 75 percent threshold calculation. More specifically, Appellants take the position that the 75 percent threshold requirement requires the inclusion—irrespective of whether a particular property within the geographical boundaries of the District may be assessed and/or taxed by the District or not—of the total value of all of the properties wherever located in the District. Appellants contend that all properties, even those types of property which are exempt from assessment and/or taxation by the District, must nevertheless be included.

iii. Appellee's Interpretation Renders Dissolution Meaningless and Impossible to Obtain

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value of the real property," likewise makes perfect sense. At the creation stage, no assessments have occurred, and the only assesse**d** properties at this point are properties assessed by Harris County. Thus, all three statutes peacefully co-exist and support—rather than oppose—Appellee's interpretation of the denominator for calculating the 75 percent statutory threshold for dissolution.

If Appellee's interpretation is correct, then the 75 percent threshold was met and the District had a ministerial duty to dissolve itself. If Appellants' interpretation is correct, however, then not only was the 75 percent threshold not met, but it is also true that the 75 percent threshold cannot and will not ever be met. As stated before the Trial Court, the combined total of all of the properties within the District at the time the Petition for Dissolution was submitted was approximately 4 billion dollars, while the combined total of all of the commercial properties within the District was approximately 1 billion dollars. (4 RR 49). Thus, as a matter of simple mathematical calculation, even if 100% of all of the commercial property owners signed a petition to dissolve, applying the Appellants' version of the denominator would only result in a mere 25% of the total property in the District. Simply put, the only properties subject to assessment and/or taxation by the District—commercial properties—would never be able to reach the 75 percent threshold needed to dissolve the District by them. It would require a substantial majority of support from owners of properties which reap all of the benefits from District assessment and/or taxation, but which do not pay any District assessments and/or taxes because those benefited properties are exempt for District

assessment and/or taxation by state statute. It is for this reason that Appellee alternatively sought a declaration that such an interpretation—if valid—would render such law unconstitutional. More specifically, Appellee asserts that such disparate and unequal treatment amounts to a violation of the equal protection clause of both the Texas and United States Constitutions, and Appellee argues that it has standing to assert such claims. Although the merits of these claims have not yet been determined by the Trial Court, the pleading of such claims provides a basis for subject matter jurisdiction and a waiver of governmental immunity from suit.

F. Irrespective Of The Assessment And/Or the Dissolution Disputes, The Geographical Boundaries Of The District Were Not Eligible For Creation Of A District

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." Appellees proved before the Trial Court that 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. Appellee is entitled to a declaration as such.

SUMMARY OF THE ARGUMENT

Although it is generally true that governmental immunity protects MMD from lawsuits for money damages, an action against the District to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against MMD that governmental immunity would bar. By its Amended Petition and in its Response to Appellants' Motion for Summary Judgment, Appellee asserted and proved that certain prior assessments by the District were illegal and void because the Assessment Petition upon which they were based failed to contain the minimum number of authorized signatures required by state statute. In addition, Appellee alleged and proved that, although the District had a mandatory and ministerial duty to dissolve upon the filing by Appellee of a valid Petition to Dissolve, it wrongfully failed to do so. Such failure was based upon an incorrect and unreasonable interpretation of the mathematical percentage calculations required by state statute. By misapplying the law, Appellant wrongly contended that the minimum percentage requirements had not been reached, when in fact those

requirements had been completely satisfied. In the alternative, should this Court find that the dissolution statute does not permit dissolution as suggested by Appellants, then Appellee's constitutional claims are triggered and the Trial Court has subject matter jurisdiction over those claims, irrespective of whether jurisdiction exists over the dissolution claim itself. Finally, Appellee asserted and proved that the District was illegally formed because if failed to meet the statutory criteria that the land within this area was devoted primarily to commercial development and business activity.

These claims and the evidence to support them more than justified the Trial Court's denial of Appellants' Motion for Summary Judgment. Indeed, 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. It is for this reason that Appellee sued the Board Appellants and Appellant Calderon in their

respective official capacities for MMD.

In addition, the Texas Declaratory Judgments Act contains a waiver of immunity from suit. If a party joins a governmental entity and seeks a declaration that an ordinance or statute is invalid, based on either constitutional or even nonconstitutional grounds, immunity from suit is waived. Likewise, if a party joins a governmental entity and seeks a declaration construing an ordinance or statute, immunity from suit is waived. Thus, immunity from suit is waived because Appellee is joining MMD to its suit: (1) which seeks a judicial declaration that MMD's tax and/or assessment ordinance is illegal because the petition allegedly authorizing such tax and/or assessment is invalid; (2) which seeks a declaration that MMD's tax and/or assessment 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, the effect of MMD's refusal to dissolve, and MMD's insistence on continuing to illegally assess and collect taxes after its duty to dissolve arose; 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. 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. *Id*. at 372. 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.

Finally, Appellee has standing both as a payor of the illegal District assessments and/or taxes and as a taxpayer to bring these claims.

ARGUMENT AND AUTHORITIES

I. GOVERNMENTAL IMMUNITY FROM SUIT DOES NOT EXIST UNDER THE FACTS AND LAW OF THIS CASE

A. Suits Against a State Official Acting Without Legal or Statutory Authority are not Barred by Governmental Immunity

Although it is generally true that governmental immunity protects

MMD from lawsuits for money damages, an action against the District to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against MMD that governmental immunity would bar. *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). And "while governmental immunity generally bars suits for retrospective monetary relief, it does not preclude prospective injunctive remedies in official-capacity suits against government actors who violate statutory or constitutional provisions." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 369-76 (Tex. 2009).

B. Ultra Vires Suits Constitute an Exception to Governmental Immunity

By its Amended Petition, Appellee 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. Suits to require state officials to comply with

statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money. To fall within this ultra vires exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act. *City of El Paso v. Heinrich*, 284 S.W. 3d 366, 373 n.6 (Tex. 2009). 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 Appellee sued the Board Appellants and Appellant Calderon in their respective official capacities for MMD.

C. **The Declaratory Judgments Act Contains a Waiver of Immunity From Suit**

In addition, the Texas Declaratory Judgments Act contains a waiver of immunity from suit. *City of El Paso v. Heinrich*, 284 S.W. 3d 366, 372 (Tex. 2009). If a party joins a governmental entity and seeks a declaration

that an ordinance or statute is invalid, based on either constitutional or even nonconstitutional grounds, immunity from suit is waived[6]. *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 391-92 (Tex. 2007); *Heinrich*, 284 S.W. 3d at 373, n. 6; *Lakey v. Taylor ex rel. Shearer*, 278 S.W. 3d 6, 15 (Tex. App.—Austin 2008, no pet.); *City of Beaumont v. Bouillion*, 896 S.W. 2d 143, 148-49 (Tex. 1995). Likewise, if a party joins a governmental entity and seeks a declaration construing an ordinance or statute, immunity from suit is waived. *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W. 3d 628, 634 (Tex. 2010), *Heirnrich,* 284 S.W. 3d at 373, n.6; *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 445-46 (Tex. 1994). By its Amended Petition, Appellee asserts claims under this Act against each of the Appellants. With respect to Appellant MMD, this entity is a necessary party to Appellee'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 Appellee's claim for declaratory and/or injunctive relief that MMD has a ministerial duty to dissolve. Furthermore, Appellee's constitutional claims of equal protection under both the Texas

6 The void and illegal tax assessments and District Orders challenged by Appellee in this lawsuit are the legislative equivalent of a municipal ordinance or a state statute.

and United States Constitutions require MMD to be joined as a necessary party. Thus, immunity from suit is waived because Appellee is joining MMD to its suit: (1) which seeks a judicial declaration that MMD's tax and/or assessment ordinance is illegal because the petition allegedly authorizing such tax and/or assessment is invalid; (2) which seeks a declaration that MMD's tax and/or assessment 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, the effect of MMD's refusal to dissolve, and MMD's insistence on continuing to illegally assess and collect taxes after its duty to dissolve arose; 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. *Id*. at 372. 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.

D. **The Dissolution Claim Has Merit And Invoked The Trial Court's Subject Matter Jurisdiction**

The interpretation of the method by which the dissolution percentage should be calculated under the applicable state statute is a question of law. Appellants' interpretation of the denominator for calculation of the 75 percent threshold for dissolution is clearly erroneous and is indeed perverse. By interpreting the 75 percent dissolution threshold as requiring the support of a substantial percentage of those owners who have not been assessed and/or taxed and who cannot legally be assessed and/or taxed by the District, Appellee alleges that both the District and the District's Board are violating state law and their clear and unambiguous ministerial duty to dissolve.

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 boundaries.[7] Thus, only a subset percentage of the actual owners within an improvement district will bear the brunt of the tax that benefits everyone. Appellee alleges that 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.

7 The property subject to these assessments is 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.

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

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.

E. The Assessment Claim Has Merit And Invoked The Trial Court's Subject Matter Jurisdiction

In addition to the District's unlawful and illegitimate attempt to avoid dissolution, 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, Appellee brought forth evidence to the Trial Court that not all of the owners who signed the petition in August of 2009 were eligible to do so. Because of these facts, Appellee alleged that the

assessment petition was not in compliance with state law and the West Montrose Management District's assessment and/or tax was void as a matter of law.

F. The Creation Claim Has Merit And Invoked The Trial Court's Subject Matter Jurisdiction

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." Appellees proved before the Trial Court that 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. Although Appellants have pointed out that this statute has since been repealed, that argument is irrelevant because the statute was in existence at the time this District was formed. Accordingly, Appellee is entitled to a declaration on this issue.

II. EXHAUSTION OF REMEDIES DOES NOT APPLY UNDER THESE FACTS

Another argument asserted by Appellants is that this Court lacks jurisdiction to hear and adjudicate Appellee's claims because Appellee allegedly failed to exhaust its available remedies to challenge MMD's tax assessment. Appellants are wrong. Under the facts of this case, there is an applicable exception recognized in Texas courts to the general rule requiring exhaustion of administrative remedies. For example, the San Antonio Court of Appeals explained in the case of *Benavides Independent School District v. Guerra*, 681 S.W.2d 246 (Tex. App. -- San Antonio 1984, writ ref'd n.r.e.) that exhaustion of administrative remedies is not required when the governmental body's actions are in violation of the law. "[W]here a school board acts without express or implied statutory authority or in contravention of a statute, then its act is void and a direct appeal will lie to the courts. *Palmer Publishing Co. v. Smith*, 109 S.W.2d 158, 159 (1937); *Bear v. Donna Independent School District*, 74 S.W.2d 179, 180 (Tex. Civ. App. -- San Antonio 1934, writ ref'd)." *Id*. at 249. This makes sense where, as here, Appellee is not complaining about the *amount* of the tax assessment. Rather, Appellee is complaining about the District's constitutional and/or statutory *authority* to make the assessment.

In the case of *James v. Consolidated Steel Corporation, Limited*, 195 S. W. 2d 955 (Tex. App.–Austin 1946), the Austin Court of Appeals has also identified an exception to the general rule require the exhaustion of administrative remedies: namely, when an administrative agency or commission refuses to act, acts illegally or arbitrarily, or acts beyond the scope of its authority. More specifically, the Austin Court of Appeals stated that "[t]here is a rule of practically universal application that where the law provides a method whereby an aggrieved party may, in tax matters, have his rights determined in a hearing before an administrative agency, he must exhaust his remedy there before appealing to the courts. And this rule applies to Unemployment Compensation laws. 40 TEX.JUR. § 137, p. 192; 51 AM.JUR. § 769, p. 698; *Abelleira v. District Court of Appeal*, 17 Cal.2d 280, 109 P.2d 942 (1941); 132 A.L.R. 715." An exhaustive discussion of this rule, with review of numerous cases is found in the *Abelleira* case. It is a matter subject to legislative control, and when the legislature has provided a method of review, it may make it mandatory, in which case resort must first be had to the method prescribed before the courts will entertain jurisdiction. 51 AM.JUR. § 768, p. 697. But such rule does not bar a resort to the courts, if such administrative agency or commission refuses to

act, acts illegally or arbitrarily, or beyond the scope of its authority." *James*, 195 S. W. 2d at 959-60.

Although it is an unpublished opinion, the Dallas Court of Appeals has an excellent discussion of this issue in a case called *Dallas Cent. Appraisal Dist. v. Hamilton*, No. 05-99-01401-CV, 2000 Tex.App.LEXIS 5069 at *16-*17 (Tex. App.--Dallas 2000, no pet.) (not designated for publication). There, the court stated the following:

> We next turn to the issues presented by the remaining appellants. Appellants contend the trial court lacked subject matter jurisdiction because the taxpayers failed to exhaust their administrative remedies before filing suit. 'The general rule is that where a statute creates an administrative remedy available to plaintiff, the plaintiff must first exhaust his administrative remedy before the district court has subject matter jurisdiction over the dispute.' *Garcia-Marroquin v. Nueces County Bail Bond Bd.*, 1 S.W.3d 366, 375 (Tex. App.-Corpus Christi 1999, no pet.); *see also Texas Educ. Agency v. Cypress-Fairbanks Indep. Sch. Dist.*, 830 S.W.2d 88, 90 (Tex. 1992). This general rule, however, is subject to several well established exceptions. 'When the facts are not in dispute and only questions of law are presented, a plaintiff may seek relief from the trial court without exhausting administrative remedies.' *Texas Dep't of Health v. Texas Health Enters.*, 871 S.W.2d 498 (Tex. App.-Dallas 1993, writ denied), overruled on other grounds by *Federal Sign v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997); *see also Grounds v. Tolar Indep. Sch. Dist.*, 707 S.W.2d 889, 892 (Tex. 1986); *Jones v. Dallas Indep. Sch. Dist.*, 872 S.W.2d 294, 296 (Tex. App.-Dallas 1994, writ denied); *Benton v. Wilmer-Hutchins Indep. Sch. Dist.*, 662 S.W.2d 696, 698 (Tex. App. --Dallas 1983, writ dism'd), disapproved on other grounds by *Orange County v. Ware*, 819

S.W.2d 472 (Tex. 1991); *Benavides Indep. Sch. Dist. v. Guerra*, 681 S.W.2d 246, 248 (Tex. App.-San Antonio 1984, writ ref'd n.r.e.). Further, as we noted in *Jones*, Texas also allows immediate access to the courts in the following circumstances: 1. The exhaustion of administrative remedies will cause irreparable injury, or administrative remedies are inadequate. *Houston Fed'n of Teachers v. Houston Indep. Sch. Dist.*, 730 S.W.2d 644, 646 (Tex. 1987); 2. An administrative agency acts without authority. *Mitchison v. Houston Indep. Sch. Dist.*, 803 S.W.2d 769, 773 (Tex. App. - Houston [14th Dist.] 1991, writ denied); *Alvin Indep. Sch. Dist. v. Cooper*, 404 S.W.2d 76, 78 (Tex. Civ. App.-Houston [1st Dist.] 1966, no writ); or 3. A plaintiff raises Title 42 or constitutional claims. *Texas Educ. Agency v. Cypress-Fairbanks Indep. Sch. Dist.*, 830 S.W.2d 88, 91 n. 3 (Tex. 1992). *Jones*, 872 S.W.2d at 296. This court has specifically noted that common law exceptions to the rule requiring the exhaustion of administrative remedies are applicable to property tax disputes. *See Dallas County Appraisal Dist. v. Funds Recovery, Inc.*, 887 S.W.2d 465, 470 (Tex. App.-Dallas 1994, writ denied) (noting in property tax case that "an exception [to exhaustion] exists when the dispute involves a pure question of law"); *see also Birdville Indep. Sch. Dist. v. First Baptist Church*, 788 S.W.2d 26, 29 (Tex. App.-Fort Worth 1988, writ denied) (noting in property tax case that exhaustion doctrine has no application for pure questions of law and determination of whether statute is constitutional); *Grand Prairie Hosp. Auth. v. Tarrant Appraisal Dist.*, 707 S.W.2d 281, 284 (Tex. App.-Fort Worth 1986, writ ref'd n.r.e.) (noting that because appellant's property was not exempt as a matter of law, exception to exhaustion requirement for pure legal issues did not apply). Requiring exhaustion of administrative remedies is not meant to deprive an aggrieved party of its legal rights. Its purpose is to provide an orderly procedure by which aggrieved parties may enforce those rights. *See Jones*, 872 S.W.2d at 296; *Hinojosa v. San Isidro Indep. Sch. Dist.*, 273 S.W.2d 656, 657-58 (Tex. Civ. App.-San Antonio 1954, no writ).

Finally, the Austin Court of Appeals has held in the case of *Henry v. Kaufman County Development District No. 1*, 150 S.W.3d 498 (Tex. App.--Austin 2004, pet. dism'd by agr.), it is well settled law that a party need not exhaust administrative remedies when the issue before the court is a pure question of law. The Court stated that: "The sole issue presented in this declaratory-judgment action is whether the assessments were validly levied pursuant to statutory authority. This is purely a question of law, and the answer is dispositive of that issue....The Homeowners were not required to exhaust administrative remedies prior to seeking a declaration that the assessments were invalid for lack of statutory authority." *Id*. at -503.

Thus, as the above-cited and quoted cases demonstrate, Appellee's claim is of the type which does not require the exhaustion of administrative remedies, including Section 375.123 of the Texas Local Government Code. Thus, the District is wrong in its contention that this Court lacks jurisdiction to hear and adjudicate Appellee's claims.

III. **STANDING**

Although the Appellants apparently concede Appellee's standing, Appellee nevertheless alleges that it has standing to bring all of these

various claims against all of the Appellants. With respect to Appellee's claims for declaratory and injunctive relief against the Appellants that MMD's unspent tax assessments are illegal and/or unconstitutional, Appellee asserted before the Trial Court that it was a taxpayer within the MMD. As proven below, Appellee 1620 Hawthorne Ltd. was assessed by Appellant MMD and has paid at least two assessments by MMD. These specific assessments, as well as all other assessed and collected tax assessments, are used by MMD for its operations and activities. Since the presentation of the Petition to Dissolve, Appellants have continued to make assessments and require payment of same by the commercial property owners within the District, including Appellee. Accordingly, Appellee alleges that it 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, Appellee does not seek reimbursement from MMD for those tax assessments that have already been assessed, collected and spent. To the contrary, Appellee 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. Thus, under these circumstances, Appellee has standing as a taxpayer to assert claims to restrain prospective governmental expenditures—money that has not yet been spent. *Bland Indep. Sch. Distr.*, 34 S.W.3d 547, 556-58 (Tex. 2000). In addition, Appellee seeks injunctive relief solely to bar MMD from spending—prospectively—any such collected but unspent funds. As long as the public money has not yet been spent, the taxpayer is considered to have a justiciable interest in ensuring that the money not be spent illegally. As of this filing of the lawsuit, 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). By its live pleading, Appellee alleged that, unless enjoined, MMD will continue to spend such tax assessments, which Appellee asserts is illegal 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. Accordingly, Appellee alleges that these facts render said petition void, and justified the Trial Court's determination that it possessed

subject matter jurisdiction and denial of Appellants' Motion for Summary Judgment.

PRAYER

For the above reasons, Appellee 1620 Hawthorne, Ltd. asks the Court to affirm the Trial Court's Order denying Appellants' Motion for Summary Judgment and to remand this case for discovery and trial on the merits.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with TEX. R. APP. P. 9.4(i)(3), I certify that this Brief complies with the type-volume restrictions of TEX. R. APP. P. 9.4(e), (i)(2)(B). Exclusive of the portions exempted by Rule 9.4(i)(1), this Brief contains 6,563 words.

/s/ Andy Taylor
Andy Taylor

CERTIFICATE OF SERVICE

By affixing my signature above, I, Andy Taylor, hereby certify that a true and correct copy of the above Appellee's Brief has been delivered via Certified Mail, Return Receipt Requested to the parties below on the 15th day of July, 2013.

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