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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

NO. 14-0577

In the Supreme Court of Texas

1620 HAWTHORNE LTD.,

Petitioner

v.

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),

Respondents.

FROM THE FOURTEENTH COURT OF APPEALS, CAUSE NO. 014-13-00233-CV, AND THE 333RD DISTRICT COURT FOR HARRIS COUNTY, CAUSE NO. 2012-20396, HONORABLE JOSEPH J. "TAD" HALBACH, JR.

RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Codes and Rules

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RESPONSE TO PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT OF TEXAS:

Respondents, the Montrose Management District ("District") and the Public Officials,[1] respectfully request that the Court dismiss, deny or refuse the petition for review ("Petition") filed by 1620 Hawthorne, Ltd. ("Hawthorne").

[1] The Public Officials have been sued in their official capacities only and are 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.

I.
STATEMENT OF THE CASE

Nature of the Case: The District is a municipal management district located in the Montrose area of Houston, Texas.[2] The Public Officials are the volunteer members of the District's board of directors and its Executive Director (Calderon).[3] Hawthorne owns commercial property in the portion of the District formerly known as the West Montrose Management District.[4]

Hawthorne seeks to dissolve the District and objects to paying the annual assessment[5] the District levied to fund various legislatively-authorized improvements such as enhancing public safety, promoting economic development, and improving mobility within the District.[6] The thrust of Hawthorne's complaint is that the cost of District improvements is borne by commercial property owners within the District, while others who own property within the District are exempt from assessment.[7] Hawthorne seeks a declaratory judgment

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2 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 LOC. 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.

3 Clerks Record ("CR") 347-48.

4 CR 346-47.

5 The assessment equals 1/8th of 1% of the taxable value of Hawthorne's property as shown on the tax roll of the Harris County Appraisal District. CR 96, 104. In 2011 Hawthorne's assessment was $530.63; in 2012 the assessment was $544.60. CR 1496-96. Hawthorne equates the District's assessments with taxes, for purposes of this lawsuit. However, under Texas law, "taxes" and "assessments" are two legally distinct creatures. *City of Wichita Falls v. Williams*, 119 Tex. 163, 169, 26 S.W.2d 910, 911 (1930).

6 CR 359-62.

7 CR 350; 1st Supplemental Clerks Record ("Supp. CR") 185 (Robert Rose Hawthorne's general partner and owner: "The one thing that irks me here is not whether you're getting compensated or whether it's a good idea. It's that I'm being singled out as a commercial property owner to pay for the benefit of everyone. And that's my biggest gripe.").

requiring the District to dissolve and to refund assessments levied to fund its activities (the "Dissolution Claim").[8]

Trial Court: 333rd Judicial District Court of Harris County, Texas, Hon. Joseph J. "Tad" Halbach, Jr., presiding, Cause No. 2013-20396.

Trial Court Disposition: Initially, Hawthorne sued only the District.[9] Hawthorne later amended its petition to assert *ultra vires* claims against the Public Officials.[10]

The District and Public Officials filed pleas to the jurisdiction below, asserting that: (a) the District remains immune from suit, except where the Legislature has expressly waived its immunity and no such waiver exists here;[11] and (b) the Public Officials have the same immunity, derivatively, as does the District, except to the extent that Hawthorne asserted a viable *ultra vires* claim, and Hawthorne has not done so.[12]

To simplify and expedite resolution of their jurisdictional objections, the District and Public Officials filed a summary judgment motion consolidating their multiple jurisdictional and merits-based grounds for dismissal.[13] The district court opted to consider only the jurisdictional grounds.[14]

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8 CR 346, 359-62.

9 CR 7-8.

10 CR 346-48.

11 CR 23-340; Supp. CR 3-12; CR 396-412.

12 CR 437-78.

13 CR 929-69; Supp. CR 13-343.

14 CR 1548.

Following oral argument, the district court denied the District's and the Public Officials' jurisdictional summary judgment grounds on February 25, 2013.[15]

The District and Public Officials timely pursued an interlocutory appeal of the denial of their jurisdictional pleas, as authorized under TEX. CIV. PRAC. & REM. CODE §51.014(a)(8).[16]

Parties in the Court of Appeals: The District and Public Officials were appellants; Hawthorne was appellee.

Court of Appeals: The Fourteenth Court of Appeals. The panel consisted of Justices McCally, Busby and Donovan. Justice McCally authored the opinion of the Court.

Appellate Disposition: The Court of Appeals reversed the trial court in large part but found a fact issue with respect to one of Hawthorne's *ultra vires* claims and remanded that issue. *Montrose Management District v. 1620 Hawthorne, Ltd.*, 435 S.W.3d 393, 404 (Tex. App.–Houston [14th Dist.] 2014, pet. filed). Specifically, the Court of Appeals held that:

(a) Hawthorne failed to establish any waiver of the District's immunity from suit on the claim that the District's Order denying dissolution was void due to a misinterpretation of Section 375.262(1) of the Texas Local Government Code;

(b) Hawthorne failed to establish any waiver of the Public Officials' immunity from suit under an *ultra vires* theory on the claim that the Public Officials had misinterpreted Section 375.262(1);

(c) Hawthorne failed to establish any waiver of the

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15 CR 1547-48.

16 CR 1552-53.

District's immunity from suit based upon alleged constitutional infirmities in Section 375.262(1) and Chapter 375 of the Texas Local Government Code;

(d) Hawthorne failed to establish any waiver of the District's immunity from suit regarding the claim that it had not satisfied the criteria of Section 375.021 of the Texas Local Government Code;

(e) Hawthorne failed to establish any waiver of the District Executive Director Calderon's immunity from suit; and

(f) a fact issue existed precluding dismissal with respect to Hawthorne's request for a declaration that the Public Officials had acted in an *ultra vires* manner in adopting the West District's assessment order.

II.
RESPONSE TO STATEMENT OF JURISDICTION

Hawthorne's petition asserts jurisdiction in this Court solely under TEX. GOV'T CODE §22.001(a)(6).[17] No such jurisdiction exists because the underlying appeal was an interlocutory appeal and Legislature has determined that appellate jurisdiction over such appeals is final in the court of appeals, except in circumstances not present here. *See, e.g, In re H.V.*, 252 S.W.3d 319, 322 & n. 9 (Tex. 2008); *Collins v. Ison-Newsome*, 73 S.W.3d 178, 180 (Tex. 2001); TEX. GOV'T CODE § 22.225(b)(3), (d) (providing that generally "a judgment of a court of appeals is conclusive on the law and facts, and a petition for review is not allowed to the supreme court . . . from other interlocutory appeals that are allowed by law").

[17] Mistakenly referenced by Hawthorne as Section 22.01(a)(6).

See also Molinet v. Kimbrell, 365 S.W.3d 407, 410 (Tex. 2011)(the Supreme Court has jurisdiction over an interlocutory appeal if the justices of the court of appeals disagree on a material question of law or if the court of appeals' decision conflicts with a prior decision of this Court or another court of appeals. TEX. GOV'T CODE § 22.225(c)).

Here the decision of the Court of Appeals was unanimous and Hawthorne has not invoked the Court's conflicts jurisdiction. Appellate jurisdiction is therefore final in the Court of Appeals, this Court lacks jurisdiction over Hawthorne's petition, and it should be dismissed.

III.
ISSUES PRESENTED[18]

1. Whether the Court of Appeals correctly held that Hawthorne did not establish any waiver of the District's immunity from suit on the claim that the District "wrongfully misinterpreted" TEX. LOC. GOV'T CODE §375.262(1)?[19]

2. Whether the Court of Appeals correctly held that Hawthorne did not establish any waiver of the Public Officials' immunity from suit under an *ultra vires* theory on the claim that the officials had misinterpreted Section 375.262(1)?

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[18] Hawthorne has not addressed in its petition the following holdings by the Court of Appeals: (1) Hawthorne failed to establish any waiver of the District's immunity from suit based upon alleged constitutional infirmities in Section 375.262(1) and Chapter 375 of the Texas Local Government Code; (2) Hawthorne failed to establish any waiver of the District's immunity regarding the claim that it had not satisfied the criteria of Section 375.021 of the Texas Local Government Code; and (3) Hawthorne failed to establish any waiver of the District Executive Director Calderon's immunity from suit. For that reason, the District and the Public Officials confine their response to the issues Hawthorne has raised. *See* TEX. R. APP. 53.3(e).

[19] CR 360.

IV.
STATEMENT OF FACTS

A. The District Was Formed By Special Legislation.

The District resulted from the consolidation of two management districts created by the Texas Legislature, following public discussion and support from members of the Montrose business community.[20]

B. Public Participation in District Activities.

The District is governed by a volunteer board of directors appointed by the governing body of the City of Houston.[21] The District conducts public meetings, following public notice.[22] The District has four citizens committees that meet monthly.[23]

C. Adoption of Service and Improvement Plans and Assessment Orders.

The District may not impose an assessment until after receipt of a written petition requesting improvements and services, public notice, public hearing, and a vote of the Board at a public meeting.[24]

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[20] CR 48-81; Supp. CR 210, 214, 223, 241, 262, 267.

[21] TEX. SPECIAL DISTRICT LOC. LAWS CODE §3843.051(d); *id.* §3878.051(d).

[22] *See, e.g.,* Supp. CR 76, 89, 262, 279, 324, 327.

[23] *See* http://montrosedistrict.org/committtees.

[24] TEX. SPEC. DIST. LOC. LAWS CODE. §3843.204, 3878.204; TEX. LOC. GOV'T CODE §§375.115-.124.

1. Public hearings on petitions, service plans and assessments.

The Legislature conferred the District Board with authority to hear and determine matters arising during the course of its duties and to make factual findings and legal determinations incident to its functions.[25] The Board conducted hearings on the proposed services and assessments, evaluated the petitions submitted, considered competing evidence, heard and ruled on objections, and issued findings of fact and conclusions of law authorizing the assessment.[26]

2. Board action on proposed service and improvement plans and assessments.

Following the public hearings, the hearing examiners prepared Reports and Proposals for Decision that were submitted to the District's Board at later public meetings.[27] The members of the District's Board considered the hearing examiners' reports, made findings of fact and conclusions of law, and adopted orders which approved the petitions, approved the proposed Service and Improvement Plans and adopted assessment orders to levy assessments to pay for proposed services and improvements.[28]

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25 *See, e.g.*, TEX. LOC. GOV'T CODE §§375.113, .116, .118.

26 *See* Supp. CR 76, 89, 103, 142.

27 Supp. CR 76, 89.

28 Supp. CR 76, 89.

D. Certain Property In the District Is Exempt From Assessment.

The Legislature has exempted from the District's assessment certain categories of real property in the District, even though that property is assessed by other political subdivisions and it comprises a portion of the total assessed value of the real property within the District.[29]

E. Statutory Appellate Procedure.

A property owner has a statutory right to appeal an assessment levied on its property, but any such appeal must be made to the board no later than thirty (30) days after the assessment is adopted and, if that appeal is denied, to a court of competent jurisdiction.[30] The failure to timely pursue either appellate remedy results in the loss of the right to appeal the assessment."[31]

This two-part appellate process is the only express legislative waiver of the District's governmental immunity from suit and the exclusive method the Legislature provided for a property owner to contest its obligation to pay a District assessment.[32] Hawthorne did not invoke this procedure to complain about any

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29 *See, e.g.,* TEX. LOC. GOV'T CODE §§375.161, .162, .163; TEX. SPEC. DIST. LOC. LAWS CODE §§3843.207, 3878.207.

30 TEX. LOC. GOV'T CODE §375.123.

31 TEX. LOC. GOV'T CODE §375.123(c).

32 *See, e.g., Caspary v. Corpus Christi Downtown Management Dist.*, 942 S.W.2d 223, 226 (Tex. App.—Corpus Christi 1997, writ denied); *Spring Branch Management Dist. v. Valco Instruments Co., L.P.*, No. 01-11-00164-CV, 2012 Tex. App. LEXIS 5662, at *5-13 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

aspect of the District's assessment orders.

F. Alternative Dissolution Procedures.

1. The Legislature provides four ways to dissolve a district.

The Legislature has authorized four alternative ways to dissolve an existing management district, in addition to dissolution through later legislative action:

- By a majority vote of a district's board of directors;[33]
- By a two-thirds vote of the governing body of a municipality in which a district is located;[34]
- By a petition submitted by the owners of 75% or more of the surface area of the district subject to assessment;[35] or
- By a petition of the owners of 75% or more of the assessed value of the property in the district.[36]

2. The Chapter 375 dissolution procedure has the same operative language as the procedure to create a district.

Separate and apart from the method by which the District was created – by special legislation – the Legislature has elsewhere provided that a management district can be created by a petition submitted in accordance with procedures specified in Section 375.022 of Chapter 375. The verbal formula the Legislature used in Section 375.022 to determine the requisite support to create a district under

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[33] TEX. LOC. GOV'T CODE §375.261.

[34] *Id*. at §375.263(a).

[35] *Id*. at §375.262(2).

[36] *Id*. at §375.262(1).

Chapter 375 matches the verbal formula that the Legislature used in Section 375.262(1) to calculate whether a petition has sufficient support to require dissolution of a district. The relevant characteristic stated in each statute is the percentage of "the assessed value of the property in the district [or the proposed district] based on the most recent certified county property tax rolls."

Here is a comparison of Sections 375.022 and 375.262:

TEX. LOC. GOV'T CODE §375.022:

(a) Before a district may be created, the commission must receive a petition requesting creation of the district.

(b) The petition must be signed by:

(1) *the owners of a* ***majority of the assessed value of the real property in the proposed district****, according to the most recent certified county property tax rolls*; or

(2) 50 persons who own real property in the proposed district if, according to the most recent certified county property tax rolls, more than 50 persons own real property in the proposed district. (emphasis added).

TEX. LOC. GOV'T CODE §375.262:

[T]he board shall dissolve the district on written petition filed with the board by the owners of:

(1) ***75 percent or more of the assessed value of the property in the district*** *based on the most recent certified county property tax rolls*; or

(2) ***75 percent or more of the surface area of the district, excluding*** roads, streets, highways, utility rights-of-way, other public areas, and other ***property exempt from assessment*** under Sections 375.161, 375.163, and 375.164, according to the most recent certified county property tax rolls.

G. District Evaluation of the Dissolution Petition.

On September 29, 2011, the District Board received a petition requesting that the Board dissolve the District.[37]

On October 14, 2011, the District Board adopted protocols and procedures to review the petition, including verifying the legal authority for the petition, validating the authority of the signatories, and responding to and implementing the petition in accordance with applicable law.[38]

On November 14, 2011, the District Board received public comments on the dissolution petition, received a report regarding a review of the petition, and adopted an order finding that the value of the property represented by the petitioners was insufficient to meet the statutory requirement for dissolution.[39] The District's analysis concluded that the value of the property represented by the petition constituted 13.7% of the "assessed value in the property in the district based on the most recent certified county tax roll."[40]

On February 13, 2012, the District Board amended and restated its earlier order, to include findings and conclusions regarding the fact that the property represented by the petition was insufficient to encompass either the required

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37 Supp. CR 275.

38 *See* Supp. CR 296.

39 *See* Supp. CR 279, 282, 291, 301.

40 Supp. CR 279-80.

percentage of assessed value of the District or the required percentage of the surface area of the District that would require its dissolution.[41] The District's amended analysis concluded that property represented by the petition constituted 13.7% of the "assessed value in the property in the district based on the most recent certified county tax roll"[42] and 15.38% of the "*the surface area of the district, excluding* roads, streets, highways, utility rights-of-way, other public areas, and other *property exempt from assessment* under Sections 375.161, 375.163, and 375.164, according to the most recent certified county property tax rolls."[43]

1. The District's interpretation of Section 375.262(1).

After receipt of advice from its legal counsel, and in accordance with that legal advice,[44] the District and District Board interpreted the phrase "the assessed value of the property in the district based on the most recent certified county property tax rolls" in Section 375.262(1), to mean that before the board must

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41 *See* Supp. CR 327-43.

42 Supp. CR 327-43.

43 Supp. CR 327-43.

44 CR 287-88 ("Mr. Lord [of Vinson & Elkins, L.L.P.] read aloud the proposed, 'Order Responding to Petition to Dissolve the Montrose Management District,' dated November 14, 2011, hereby attached as Exhibit C. Director Stinson asked for the advice of Mr. Lord regarding clarifying the statutory language about the matter of total assessed property value. Mr. Lord explained that the statute states that the assessed property value refers to all of the property within the boundaries of the District. Director Murland said that the Board is operating within the confines of the law and that he would welcome hearing the points of view of area business owners. He also requested that meeting attendees respect the volunteer Board members. Upon a motion duly made by Director Mitchmore and being seconded by Director Stinson, the Board voted unanimously to approve the Order.")

dissolve the District, petitioners must submit a petition filed by owners of 75 percent or more of the assessed value of *all property located within the District* according to the most recent certified county property tax roll.[45] TEX. GOV'T CODE §311.011(a), Common and Technical Usage of Words ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage"). The Public Officials did not exclude from the calculation "the assessed value of property in the District" contained on the most recent certified county property tax roll, that was exempt from assessment by the District.

2. Hawthorne's reading of Section 375.262(1).

Hawthorne contends that Section 375.262(1) must be read to encompass only the non-exempt property in the District that is subject to assessment.

V.
SUMMARY OF ARGUMENT

The underlying interlocutory appeal concerns whether Hawthorne sustained its burden to plead and prove the existence of an express statutory waiver of the District and Public Officials' governmental immunity from suit. This Court lacks jurisdiction over the Hawthorne's petition, because the Legislature has determined that appellate jurisdiction over such appeals is final in the court of appeals, except in circumstances not present here.

On the merits, the Court of Appeals correctly determined that:

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[45] Supp. CR 327-43.

1. Hawthorne did not affirmatively establish the existence of an express waiver of the District's immunity from suit on the claim that the District misinterpreted the dissolution statute, TEX. LOC. GOV'T CODE 375.262(1); and

2. Hawthorne did not affirmatively establish the existence of an express waiver of the Public Officials' immunity from suit under an *ultra vires* theory.

VI.
ARGUMENT AND AUTHORITIES

The District is a State political subdivision that retains an immunity from suit, except when the Legislature has expressly waived it.[46] *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). The Public Officials sued in their official capacities have the same governmental immunity, derivatively, as does a government entity, except when a plaintiff asserts a viable claim that the official acted *ultra vires*. *Franka v. Velasquez*, 332 S.W.3d 367, 382-83 (Tex. 2011); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 380 (Tex. 2009).

Hawthorne has attempted to invoke the Texas Declaratory Judgment Act ("DJA") and the *ultra vires* doctrine to avoid the District's and Public Officials' immunities from suit. But neither the DJA nor the *ultra vires* doctrine provide general waivers of governmental immunity to suit. Both afford only a limited waiver of immunity, under narrow circumstances that are not present here.

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[46] *See* TEX. SPEC. DIST. LOC. LAWS CODE §3843.002, 006*; id.* §3878.002; TEX. LOC. GOV'T CODE §375.004(a), (b); TEX. CIV. PRAC. & REM. CODE §101.001(3)(B).

A. DJA Affords Only a Limited Waiver of Immunity.

This Court has "consistently stated" that "the [DJA] does not enlarge the trial court's jurisdiction but is 'merely a procedural device for deciding cases already within a court's jurisdiction.'"[47] The DJA provides only a limited waiver of immunity, and governmental entities generally remain immune from declaratory judgment actions.[48]

The scope of the narrow waiver of immunity available under the DJA is limited to specified claims and parties:

- Under the DJA, a waiver of immunity may exist for viable claims against *a government entity* which challenge *the validity of a statute or municipal ordinance.*[49]

- The DJA does not provide any waiver of *public officials'* immunity from suit for actions challenging *the validity of a statute or municipal ordinance.*[50]

- Nor does the DJA "waive the state's sovereign immunity when the plaintiff seeks a declaration of his or her rights under a statute or other law."[51]

- And the DJA does not provide for any waiver of immunity for

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47 *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621-22 (Tex. 2011); *Heinrich*, 284 S.W.3d at 370.

48 *See Sefzik*, 355 S.W.3d at 621-23; *Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011). *See* TEX. CIV. PRAC. & REM CODE § 37.006(b); *Heinrich*, 284 S.W.3d at 373 n.6.

49 *Sefzik*, 355 S.W.3d at 622; *see also* TEX. CIV. PRAC. & REM. CODE §§ 37.004(a), 37.006(b)

50 *Sefzik*, 355 S.W.3d at 622; *cf.* TEX. CIV. PRAC. & REM. CODE § 37.006(b).

51 *Sefzik*, 355 S.W.3d at 621.

> claims against a government entity complaining about *actions taken under a statute.*[52]

Therefore, if a plaintiff asserts a viable challenge to the validity of a statute or municipal ordinance, the DJA may, in appropriate circumstances, result in the waiver of a government entity's immunity from suit; but it does not afford any waiver of a public official's immunity from suit. If a plaintiff asserts a complaint about actions taken under a statute, the DJA does not provide any waiver of a government entity's immunity from such a suit.

B. *Ultra Vires* Doctrine Provides Only a Limited Waiver of Immunity.

The *ultra vires* doctrine provides only a limited waiver of a public official's immunity from suit, and only then with respect to a specific category of claims:[53]

- Under appropriate circumstances, the *ultra vires* doctrine can result in a waiver of a public official's immunity from suit for unlawful *actions taken under a statute.*[54]

- But the *ultra vires* doctrine does not waive a public official's immunity from suit for challenges to *the validity of a statute or municipal ordinance.*[55]

- "[T]o fall within th[e] *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

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[52] *Id.*

[53] See *generally Heinrich*, 284 S.W.3d 369-73.

[54] *Heinrich*, 284 S.W.3d at 373 & n.6; *see also Sefzik*, 355 S.W.3d at 621-2; *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 633 (Tex. 2010).

[55] *Id.*

act."[56]

- And, claims asserting a waiver of immunity from suit under the *ultra vires* doctrine must be asserted against the "official whose acts or omissions allegedly trampled on the plaintiff's rights," they cannot be asserted against the governmental entity itself.[57]

C. The Court of Appeals Correctly Held that Hawthorne Has Not Properly Invoked Either The DJA or the *Ultra Vires* Doctrine.

Both below and in this Court, Hawthorne makes talismanic references to the DJA and *ultra vires* doctrines. But it then co-mingles them in its argument and ignores the well-established distinctions and limitations summarized above. Hawthorne's pleadings and briefing advance the incorrect notion that both the DJA and the *ultra vires* doctrine provide a basis for waiving the District and the Public Officials' immunity from suit with respect to its Dissolution Claim.[58]

However, the Court of Appeals' analysis confirms what Hawthorne's briefing attempts to obscure – that Hawthorne has not met its burden to plead and prove the existence of an express statutory waiver of the District and Public Officials' governmental immunity from suit.

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[56] *Texas Dep't of Ins. v. Reconveyance Servs.*, 306 S.W.3d 256, 258 (Tex. 2010).

[57] *Sefzik*, 355 S.W.3d at 621; *Reconveyance*, 306 S.W.3d at 258.

[58] Hawthorne's pleadings state that "[T]he Texas Declaratory Judgments Act contains a waiver of immunity from suit. Plaintiff asserts claims under this Act against each of the Defendants." CR 346-63 (Plaintiff's Amended Petition at ¶ 20).

1. The Court of Appeals correctly held that Hawthorne did not establish any waiver of the District's immunity from suit on its Dissolution Claim that the District had "wrongfully misinterpreted" TEX. LOC. GOV'T CODE §375.262(1).

Hawthorne's Dissolution Claim below was that the District "wrongfully misinterpreted" Section 375.261(1).[59] This Court held in *Sefzik*, however, that government immunity is not waived under the DJA for complaints about a government entity's actions under a statute. 355 S.W.3d at 622. As a matter of law, no waiver of immunity exists for Plaintiff's complaint about *the District's* application of TEX. LOC. GOV'T CODE §375.262(1). *Sefzik*, 355 S.W.3d at 622.

Hawthorne's Dissolution Claim is in substance an *ultra vires* claim that the Public Officials misinterpreted the dissolution statute.[60] The District is immune from that claim, as a matter of law, because the DJA does not waive its immunity from a complaint about its actions under a statute and the *ultra vires* doctrine is inapplicable to the District as an entity.[61]

Moreover, the DJA does not waive governmental immunity for challenges to the validity of the District's *order responding to the dissolution petition*, because that order is not a municipal ordinance or franchise. *See* TEX. CIV. PRAC. & REM. CODE §37.006(b)(in "action involving the validity of a municipal ordinance or

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[59] CR 360.

[60] CR 346-63 (Plaintiff's Amended Petition at ¶¶10-15, 21(a)-(c). *See* Hawthorne's Brief in the Court of Appeals at 21 (referring to the "Dissolution Claim").

[61] *See Reconveyance*, 306 S.W.3d at 258-59; *Sefzik*, 355 S.W.3d at 622.

franchise, the municipality must be made a party").[62] As this Court stated in *Kirby Lake Dev. Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 838 (Tex. 2010):

> "Since *Tooke*, we have consistently refused to find waivers of immunity implicit in statutory language: there can be no abrogation of governmental immunity without clear and unambiguous language indicating the Legislature's intent to do so."

Because the DJA contains no clear and unambiguous language waiving the District's immunity from suit for challenges to its *order responding to the dissolution petition*, that Act cannot serve as the basis for any waiver of the District's immunity from suit for claims challenging the validity of those orders.

2. The Court of Appeals correctly held that Hawthorne did not establish any waiver of the Public Officials' immunity from suit under an *ultra vires* theory on the Dissolution Claim that the officials had misinterpreted Section 375.262(1).

The Court of Appeals also correctly held that Hawthorne failed to establish a waiver of the Public Officials' immunity from suit under the *ultra vires* doctrine.

The Public Officials sued in their official capacities have the same governmental immunity, derivatively, as does a government entity, except when a plaintiff asserts a viable claim that the official acted *ultra vires*. *Franka,* 332 S.W.3d at 382-83; *Heinrich*, 284 S.W.3d at 380. For the same reasons that are discussed above with respect to the District, the Public Officials remain immune from Hawthorne's claims.

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[62] Hawthorne's characterization of the District order as "the legislative equivalent of a municipal ordinance or a state statute" is without statutory support and is incorrect. *See* Petition at 16 n. 5.

Merely claiming that a government official has engaged in *ultra vires* conduct, does not suffice to waive an official's immunity from suit. It is incumbent upon a plaintiff to assert a viable claim by alleging facts negating the officials' immunity from suit and establishing the existence of subject matter jurisdiction. *Andrade v. NAACP*, 345 S.W.3d 1, 11 (Tex. 2011)(Texas Secretary of State retains immunity from suit absent pleading of facially valid claim); *Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality*, 307 S.W.3d 505, 514-16 (Tex. App.—Austin 2010, no pet.)(plaintiff's characterization of a public official's conduct as *"ultra vires*" or a "constitutional violation" does not control the jurisdictional determination).

The Court of Appeals correctly concluded that to assess an *ultra vires* claim, it had to construe the applicable statutory or constitutional provisions implicated, apply them to the facts plead and not negated by the competing evidence, and determine whether the plaintiff has alleged acts that would exceed the public official's authority under the relevant statutory provisions. 435 S.W.3d at 405; *see Creedmoor,* 307 S.W.3d at 514-16.

The Court of Appeals also correctly concluded that Hawthorne's Dissolution Claim, which complains that the District (and Public Officials) misinterpreted Section 375.262(1), did not waive the District or Public Officials' immunity from

suit, because their interpretation is both rational and correct.[63] The Court of Appeals' reading of Section 375.262(1) is true to both the literal language of that statue and its internal logic – which distinguishes between owners of a certain percentage of "the assessed value" of property in a district and owners of property "subject to assessment" or "exempt from assessment."

Hawthorne's contrary proposed statutory interpretation[64] mixes and matches text from Section 3878.204(b)(2) of the Texas Special District Local Laws Code, with disparate text from Chapter 375 of the Texas Local Government Code, rather than comparing the parallel and corresponding provisions of Sections 375.022(b)(1) and 375.262(1) of the Texas Local Government Code. This verbal slight of hand, however, cannot obscure the fact that when the Legislature enacted general legislation authorizing the creation and dissolution of a district (Chapter 375), it used the same language to define the relevant property owners.[65]

Hawthorne conceded below that before a district has been created under the procedure set forth in Section 375.022(b)(1), the phrase "the assessed value of the real property in the proposed district," *must* refer to the assessed value of all of the properties on the county tax rolls – because at that point in time there cannot have

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63 435 S.W.3d at 405-07.

64 Petition at 20-22.

65 *See* page 11 *supra*.

been any relevant assessment levied.[66] Hawthorne offered no explanation for why the Legislature would have intended one meaning when it used the phrase "the assessed value" in the statute authorizing the creation of a district under Chapter 375, and a different meaning when it imported the same phrase into the parallel statute authorizing a later dissolution of a Chapter 375 district.

And, Hawthorne did not respond to the District's discussion of, and reliance upon, the four well-settled principles of statutory interpretation which together confirm the correctness of the Court of Appeals' reading of Section 375.262(1):

- the plain meaning of the statute supports the District's interpretation. The District and Public Officials relied upon advice from the District's legal counsel[67] that under the plain meaning of Section 375.262(1), the phrase "property in the district" referred to all property located within the District and that before a board must dissolve the District, petitioners must submit a petition filed by 75 percent or more of the assessed value of *all property located within the District* according to the most recent certified county property tax roll. TEX. GOV'T CODE §311.011(a), Common and Technical Usage of Words ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage");

- the Legislature's omission of language in Section 375.262(1) stating that only "property subject to assessment" should be included in the calculation of the required percentage of the "assessed value of the property in the district," when the Legislature made that distinction in the adjacent subsection of the same statute (Section 375.262(2)), demonstrates that language and concept was omitted for a reason. The fact that

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66 Hawthorne's Brief in the Court of Appeals at 10 n. 9.

67 CR 287-88.

Section 375.262(2) draws an explicit distinction between *"property subject to assessment*" and "*property exempt from assessment*," demonstrates that the Legislature understood the difference between the concept of "the assessed value" of property within the District and the concepts of "property subject to assessment" and "property exempt from assessment." If the Legislature had intended for the verbal formula in Section 375.262(1) to refer only to property "subject to assessment" in the District, it knew how to say so (as Section 375.262(2) reflects). *See, e.g., Texas Mun. Power Agency v. Public Util. Comm'n*, 253 S.W.3d 184, 193 n. 20 (Tex. 2007)(legislative omission of statutory language in one statute that is included in another raises presumption that exclusion was purposeful); *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985)("[e]very word excluded from a statute must be presumed to have been excluded for a reason."); *Cameron v. Terrell & Garrett, Inc*., 618 S.W.2d 535, 540 (Tex. 1981)(same).

- the phrase "the assessed value of the property in the district based on the most recent certified county property tax rolls" in Section 375.262(1), dealing with dissolution of a Chapter 375 district, should have the same meaning as the virtually identical language the Legislature used in Section 375.022(b)(1), which deals with formation of a Chapter 375 district.[68]

Hawthorne claims that the Court of Appeals' interpretation of the dissolution statute is "tortured" and would render it "entirely meaningless" if that statute did not afford commercial property owners the right to dissolve.[69] But, as the Court of Appeals correctly observed, the Legislature was not required to provide for dissolution of the District on Hawthorne's terms. The Legislature has instead provided for multiple ways in which a district may be dissolved, and nothing in the

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[68] TEX. LOC. GOV'T CODE §375.022(b)(1).

[69] Petition at 23, 26.

Texas or United States Constitutions requires the Legislature to provide any statutory mechanism for dissolution.[70] The Legislature could have required future legislative action to dissolve the District. The fact that the Texas Legislature has provided at least four different statutory mechanisms to dissolve a district, does not render Section 375.262(1) meaningless, simply because Hawthorne and other commercial property owners may not be able to utilize it to their liking.

VII.
PRAYER

The District and the Public Officials respectfully request that the Court dismiss, deny or refuse Hawthorne's petition for review.

Respectfully submitted,

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[70] 435 S.W.3d at 409-10.

CERTIFICATE OF COMPLIANCE

Pursuant to 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 4495 words.

/s/ Barry Abrams
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was forwarded to the following counsel of record by United States First Class Mail, certified, return receipt requested, on October 27, 2014:

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