TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00214-CV

Chisholm Trail SUD Stakeholders Group, Appellant

v.

Chisholm Trail Special Utility District and District Directors Delton Robinson, Ed Pastor, Mike Sweeney, James Pletcher, Robert Kostka, David Maserang, Gary Goodman, and Robert Johnson, Jr., in their Official Capacities; The City of Georgetown; and The Public Utility Commission of Texas and its Commissioners Donna L. Nelson, Kenneth W. Anderson, Jr., and Brandy Marty Marquez, in their Official Capacities, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 419TH JUDICIAL DISTRICT
NO. D-1-GN-15-003337, HONORABLE KARIN CRUMP, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Chisholm Trail SUD Stakeholders Group (the Stakeholders Group) appeals from the trial court's interlocutory order granting the pleas to the jurisdiction of appellees Chisholm Trail Special Utility District and its directors Delton Robinson, Ed Pastor, Mike Sweeney, James Pletcher, Robert Kostka, David Maserang, Gary Goodman, and Robert Johnson, Jr., in their official capacities; the City of Georgetown; and the Public Utility Commission of Texas and its Commissioners Donna L. Nelson, Kenneth W. Anderson, Jr., and Brandy Marty Marquez, in their official capacities. Because we conclude that the Stakeholders Group failed to demonstrate the trial court's jurisdiction over the claims that appellees challenged in their pleas to the jurisdiction, we affirm the trial court's order granting the pleas.

BACKGROUND

By 2013, Chisholm Trail Special Utility District (the District) had acquired a water supply and distribution utility system that served customers in Williamson, Burnet, and Bell counties. In October of that year, the District and the City of Georgetown (the City) entered into an asset transfer and utility system consolidation agreement. In exchange for the District's agreement to transfer all of its assets "used or held for use in connection with, the water and wastewater service provided by [the District]" except $500,000 in cash, the City agreed to assume certain specified liabilities and obligations. Among other requirements for the closing of the transaction, the parties agreed to use their best efforts to obtain the approval of the transfer of the District's certificate of convenience and necessity (CCN) to the City. Pursuant to the terms of this agreement, the parties filed an application to transfer the certified service area, assets, and facilities subject to the District's CCN to the City, decertify the District's CCN, and amend the City's CCN to reflect incorporation of the District's service area and facilities.[1] In May 2014, the application was referred to the State Office of Administrative Hearings (SOAH) for a contested case hearing with protestants.

In September 2014, the City and the District entered into a first amendment to the asset transfer and utility system consolidation agreement and a service area operations and management agreement. In the first amendment to the asset transfer and utility system consolidation agreement, the parties agreed that it was in the best interest of the parties for the District to maintain

[1] The City initially filed the application with the Texas Commission on Environmental Quality (TCEQ), but jurisdiction over water and sewer utility certification was transferred to the PUC in September 2014. *See* Act of May 13, 2013, 83d Leg., ch. 170, § 2.96, 2013 Tex. Gen. Laws 725, 769–70 (transferring economic regulation of water and sewer service from the TCEQ to PUC, including issuance and transfer of CCNs).

its CCN at and after closing the transaction. Under the terms of the management agreement, the District continued in its role as the CCN holder for water utility service with "all of the powers and duties of the CCN holder," adopted rates, fees, and charges consistent with the City's rates, and agreed to a transition surcharge initially set at $4.75 per meter per month to offset operating costs and expenses associated with the transition of services to the City. In return, the City agreed to specified responsibilities of operating and maintaining the water utility system during the regulatory approval period, including paying $4.45 per meter per month of the transition surcharge to the District. At the same time that the parties entered into the first amendment and the management agreement, they closed on the transaction, transferring the specified assets and liabilities of the District to the City as outlined in the agreement.[2]

In July 2015, the contested case hearing on the CCN transfer application occurred. The Stakeholders Group, a nonprofit corporation organized to advocate for residents and landowners in rural areas of Bell, Burnet, and Williamson counties concerning adequate water utility service, was not a party to the administrative proceeding. After the contested case hearing had concluded but

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[2] The parties also amended the asset transfer and utility system consolidation agreement for a second time in January 2015, expressly stating their intent for the agreement to constitute a contract under section 13.248 of the Texas Water Code. *See* Tex. Water Code § 13.248. Section 13.248 of the Texas Water Code states:

> Contracts between retail public utilities designating areas to be served and customers to be served by those retail public utilities, when approved by the utility commission after public notice and hearing, are valid and enforceable and are incorporated into the appropriate areas of public convenience and necessity.

Id. In the administrative proceeding concerning the transfer of the District's CCN to the City, the PUC determined that this section was not applicable.

before the PUC had entered a final order, the Stakeholders Group sued the District, the District's directors in their official capacities, the City, and the PUC, challenging the transfer of the District's water utility assets and certified service area to the City. The Stakeholders Group alleged ultra vires conduct and sought declaratory and injunctive relief under the Uniform Declaratory Judgments Act (UDJA). *See* Tex. Civ. Prac. & Rem. Code §§ 37.001–.011.[3] The District and its directors answered and asserted pleas to the jurisdiction. In their pleas, they argued that the trial court did not have jurisdiction over the Stakeholders Group's claims because the District was immune from suit, the Stakeholders Group lacked standing, and certain claims were not ripe for review.[4] The City also answered and asserted a plea to the jurisdiction on similar grounds.

In January 2016, the PUC issued its final order in the related administrative proceeding, approving the application.[5] The PUC thereafter filed a plea to the jurisdiction in this case, asserting that the trial court lacked jurisdiction over the claims against the PUC because the

[3] The original petition is not in the appellate record. The trial court's order granting appellees' pleas to the jurisdiction addresses the Stakeholders Group's first amended petition.

[4] The District, its directors, and the City also filed special exceptions. In its order granting the pleas to the jurisdiction, the trial court sustained special exceptions to the Stakeholders Group's claims that are based on alleged violations of the Texas Open Meetings Act. *See* Tex. Gov't Code § 551.002 (generally requiring "regular, special, or called meeting of a governmental body" to be open to the public). Those claims remain pending before the trial court.

[5] The appeal from the suit for judicial review of the PUC's final order is pending before this Court in cause number 03-16-00540-CV, *Fisher v. Public Utility Commission*. The Stakeholders Group is not a party in that case, but intervenors John Fisher, Jeff Daniell, Sheila Cunningham, and the C.L. Dockery Trust in this case were protestants in the administrative proceeding and are appellants in cause number 03-16-00540-CV. The PUC, the District, and the City are appellees in that case.

UDJA did not waive sovereign immunity over the claims asserted against the PUC and that the PUC had primary or exclusive jurisdiction to consider the CCN transfer application.

Shortly after the PUC filed its plea to the jurisdiction, the District, its directors, and the City filed briefing and evidence (some of which we have previously summarized) in support of their pleas. Among other arguments, they argued that the Stakeholders Group had failed to plead a valid waiver of immunity as to the City and the District "because declaratory judgment suits against a governmental entity to invalidate a contract are barred by immunity" and that the Stakeholder Group's ultra vires claims were not proper because, as a matter of law, the Directors acted within their authority. The evidence to support the pleas included copies of the asset transfer and utility system consolidation agreement with exhibits,[6] the service area operations and management agreement dated September 12, 2014, and the first amendment to the asset transfer and utility system consolidation agreement dated September 12, 2014 (collectively the Agreements).[7]

The hearing on appellees' pleas to the jurisdiction occurred on March 8, 2016. On the day of the hearing, the Stakeholders Group filed a first amended petition, continuing to seek declaratory and injunctive relief under the UDJA but adding the Commissioners of the PUC in their

[6] The exhibits included the form for the contract management services agreement, lists of contracts and agreements, the schedule of the District's long-term debt service requirements, required consents, deeds and assignment of easements, the form for the special warranty deed and assignment of easements, the form for the bill of sale and assignment, water rates and charges schedule, and the form for the defeasance escrow agreement.

[7] Other evidence included the second amendment to the asset transfer and utility system consolidation agreement dated January 15, 2015, the closing certificate of the City dated September 12, 2014, a map of the District's certified area under its CCN, and a flow of funds memorandum for the closing on September 12, 2014.

official capacities.[8] In addition to its allegations that the PUC was acting outside its statutory powers and jurisdiction by processing and granting the CCN transfer application, the Stakeholders Group alleged that the Commissioners acted ultra vires by processing and approving the application. As to its claims against the City, the District, and the Directors, the Stakeholders Group asserted that the first amendment to the asset transfer and utility consolidation agreement provided an "illegal grant of public funds," violating article III, section 52 of the Texas Constitution. *See* Tex. Const. art. III, § 52. It also argued that the Agreements between the City and the District and the application for the CCN transfer would illegally render the District incapable of providing water utility services to its constituents, illegally nullify the District's landowners' and consumers' statutory right to vote on water utility issues, and effect an illegal dissolution of the District and an illegal transfer of the District's CCN.

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[8] Also on March 8, 2016, Fisher, Daniell, Cunningham, and the C.L. Dockery Trust, protestants in the administrative proceeding before the PUC, filed a petition in intervention for judicial review in this case. The intervenors are not parties in this appeal. As previously stated, the intervenors also filed a separate suit for judicial review of the PUC's final order that is pending before this Court in cause number 03-16-00540-CV.

The District, the Directors, and the City have filed a plea to the jurisdiction or, in the alternative, motion to sever, asking this Court to consider the trial court's subject matter jurisdiction over the intervenors' claims or alternatively to sever their claims. Because the trial court proceeding is subject to an automatic stay during the pendency of this appeal, the trial court has not considered appellees' jurisdictional arguments directed to this Court as to the intervenors' claims. *See* Tex. Civ. Prac. & Rem. Code § 51.014(b). Appellees have not identified, and we have not found, authority that would support this Court's jurisdiction over claims against parties in the underlying proceeding that are not before this Court on appeal. Thus, we decline to address these arguments and dismiss appellees' plea to the jurisdiction and alternative motion to sever as to the intervenors' claims.

Following the hearing, the trial court granted appellees' pleas to the jurisdiction, specifically addressing the Stakeholders Group's various requests for declaratory and injunctive relief.[9] This interlocutory appeal followed.

ANALYSIS

In one issue, the Stakeholders Group argues that the trial court erred in granting appellees' pleas to the jurisdiction and addresses various pleaded claims "for declaratory and injunctive relief necessary to remedy the appellee[s]' unconstitutional, unlawful, and *ultra vires*

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[9] In its order, the trial court specifically addressed and dismissed the Stakeholders Group's requests for declaratory judgment (i) "that the Chisholm Defendants have acted illegally and ultra vires by acting to illegally dissolve [the District]"; (ii) "that Defendants have acted illegally and ultra vires by acting to illegally transfer [the District]'s assets to the City"; (iii) "that the Asset Transfer Agreement, including any amendments, between [the District] and the City is illegal and void"; (iv) "that Georgetown's Application seeks PUC approval to affect an illegal dissolution of the District and transfer of the District CCN and assets"; (v) "that the PUC lacks jurisdiction over Georgetown's Application"; and (vi) "that the Commissioners have acted illegally and ultra vires by processing and approving Georgetown's Application."

The trial court also specifically addressed and dismissed the Stakeholder's requests for injunctions (i) "enjoining, staying, voiding, and reversing Defendants' illegal and ultra vires acts"; (ii) "enjoining, staying, voiding, reversing, and preventing any acts to implement the Asset Transfer Agreement, including any amendments"; (iii) "staying and enjoining all proceedings before the PUC and [SOAH] related to Georgetown's Application, including any amendments"; (iv) "enjoining, staying, voiding, and reversing any proposal for decision or final order by the PUC and/or any presiding officer who has or will conduct any hearing (including any Administrative Law Judge with SOAH) related to Georgetown's Application, including any amendments"; and (v) "enjoining the transfer of the District's CCN to Georgetown."

Finally, the trial court specifically addressed and dismissed the Stakeholder's requests for "a permanent injunction enjoining, staying, voiding, and reversing [the District]'s actions related to the transfer of [the District]'s CCN to the City of Georgetown and the transfer of [the District]'s assets pursuant to the Asset Transfer Agreement and amendments" and "a permanent injunction enjoining, staying, reversing, voiding, and preventing the effectiveness of the transfer of [the District]'s CCN to the City of Georgetown and the transfer of [the District]'s assets pursuant to the Asset Transfer Agreement and amendments."

acts," asserting that its "pleadings clearly allege facts that affirmatively demonstrated the trial court's subject matter jurisdiction" over its claims.

Standard of Review and Applicable Law

"A plea to the jurisdiction challenges the court's authority to decide a case." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 149 (Tex. 2012). We review a plea questioning the trial court's subject matter jurisdiction de novo. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). "The burden is on the plaintiff to affirmatively demonstrate the trial court's jurisdiction." *Heckman*, 369 S.W.3d at 150. When assessing a plea to the jurisdiction, we focus first on the plaintiff's petition to determine whether the facts that were pleaded affirmatively demonstrate that subject matter jurisdiction exists. *Miranda*, 133 S.W.3d at 226. We construe the pleadings liberally in favor of the plaintiff. *Id.* "However, if a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do." *Id.* at 227 (citing *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000)).

Governmental immunity generally precludes suits against political subdivisions of the State, such as the City (for its governmental functions) and the District, depriving the court of subject matter jurisdiction. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003) (explaining that governmental immunity protects political subdivisions of state from suit); *City of Austin v. Utility Assocs.*, No. 03-16-00565-CV, 2017 Tex. App. LEXIS 2548, at *8–10 (Tex. App.—Austin Mar. 24, 2017, no pet. h.) (explaining doctrine of governmental immunity and

distinction between governmental and proprietary functions).[10] Similarly, absent an express waiver, sovereign immunity generally deprives the courts of subject matter jurisdiction over suits against agencies of the State, such as the PUC. *See State v. Shumake*, 199 S.W.3d 279, 283 (Tex. 2006). But governmental and sovereign immunity do not bar certain claims for prospective relief against a government official who has acted ultra vires in carrying out his duties. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 371–72 (Tex. 2009); *see Houston Belt & Terminal Ry. Co. v. City of Hous.*, 487 S.W.3d 154, 158 n.1 (Tex. 2016) ("[W]hen a governmental officer is sued for allegedly *ultra vires* acts, governmental immunity does not apply from the outset."); *Utility Assocs.*, 2017 Tex. App. LEXIS 2548, at *10–11 (describing requirements for bringing ultra vires claims). Suits alleging ultra vires acts may only be brought against state actors in their official capacities. *See Heinrich*, 284 S.W.3d at 373 ("[B]ecause the rule that *ultra vires* suits are not 'suits against the State within the rule of immunity of the State from suit' derives from the premise that 'acts of officials which are not lawfully authorized are not acts of the State,' it follows that these suits cannot be brought against the state, which retains immunity, but must be brought against the state actors in their official capacity.") (internal citations omitted).

We also observe that the Stakeholders Group's claims are brought under the UDJA. The UDJA does not create or augment a trial court's subject matter jurisdiction—it is "merely a procedural device for deciding cases already within a court's jurisdiction." *Texas Ass'n of Bus.*

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[10] The Stakeholders Group does not dispute that the asset transfer and utility system consolidation agreement and related agreements fall into the "governmental functions" category. *See* Tex. Civ. Prac. & Rem. Code § 101.0215 (listing governmental functions); *City of Austin v. Utility Assocs.*, No. 03-16-00565-CV, 2017 Tex. App. LEXIS 2548, at *8–10 (Tex. App.—Austin Mar. 24, 2017, no pet. h.).

v. Texas Air Control Bd., 852 S.W.2d 440, 444 (Tex. 1993); *see Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 (Tex. 2011) (per curiam) (noting that Texas Supreme Court has consistently stated that "UDJA does not enlarge the trial court's jurisdiction but is 'merely a procedural device for deciding cases already within a court's jurisdiction'"). The UDJA also "is not a general waiver of sovereign immunity." *Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 388 (Tex. 2011); *see* Tex. Civ. Prac. & Rem. Code §§ 37.004 (addressing subject matter of relief), .006 (addressing required parties); *Ex parte Springsteen*, 506 S.W.3d 789, 798–99 (Tex. App.—Austin 2016, pet. filed) ("[T]he UDJA's sole feature that can impact trial-court jurisdiction to entertain a substantive claim is the statute's implied limited waiver of sovereign or governmental immunity that permits claims challenging the validity of ordinances or statutes." (citing *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 634–35 (Tex. 2010) (citing Tex. Civ. Prac. & Rem. Code § 37.006(b)))). "And a litigant's couching its requested relief in terms of declaratory relief does not alter the underlying nature of the suit." *See Sawyer Trust*, 354 S.W.3d at 388 (citing *Heinrich*, 284 S.W.3d at 370–71; *Texas Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002)). Applying these standards, we address the Stakeholders Group's arguments on appeal as to their pleaded claims.

Constitutional Claims Against the City and the District

The Stakeholders Group argues that the trial court has jurisdiction over its claims brought against the City and the District under article III, section 52(a) of the Texas Constitution because "[s]ection 52(a) provides a right of action against the government for violations of that provision without the need for legislative consent or waiver of immunity." *See* Tex. Const. art. III,

§ 52(a). According to the Stakeholders Group, the Agreements violate section 52(a) and, thus, are void. To support its position, it argues that "[w]hen a political subdivision transfers funds, it must be for a public purpose with a clear public benefit received in return" and that "the political subdivision must retain some degree of control over the performance of the contract," such as the Agreements at issue here, to be in compliance with the prohibitions in section 52(a).

Section 52(a) of article III states in relevant part: "[T]he Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever." *Id.* The Texas Supreme Court has explained that the prohibition of granting public money in section 52(a) "means that the Legislature cannot require *gratuitous* payments to individuals, associations, or corporations," but "[a] political subdivision's paying public money is not 'gratuitous' if the political subdivision receives return consideration." *See Texas Mun. League Intergovernmental Risk Pool v. Texas Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002) (citations omitted) (emphasis in original). The Texas Supreme Court also has determined that "section 52(a) does not prohibit payments to individuals, corporations, or associations so long as the statute requiring such payments: (1) serves a legitimate public purpose; and (2) affords a clear public benefit received in return." *Id.* at 383–84. "A three-part test determines if a statute accomplishes a public purpose consistent with section 52(a)." *Id.* at 384. "Specifically, the Legislature must: (1) ensure that the statute's predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is

accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit." *Id.*

We agree with the Stakeholders Group that governmental immunity generally does not bar claims alleging constitutional violations and seeking equitable remedies, *see City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995) ("[S]uits for equitable remedies for violation of constitutional rights are not prohibited."), but a plaintiff must actually plead a valid constitutional violation, *see Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77 (Tex. 2015) (stating "principle that claims against state officials—like all claims—must be properly pleaded in order to be maintained"); *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 476, 491–92 (Tex. 2012) (observing that state retains immunity in "absence of a properly pled takings claim" and concluding that existence of jurisdiction was not established because plaintiff could not "establish a viable takings claim"); *see also Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 516 (Tex. App.—Austin 2010, no pet.) (noting that "if the claimant is attempting to restrain a state officer's conduct on the grounds that it is unconstitutional, it must allege facts that actually constitute a constitutional violation"). We turn then to review the Stakeholders Group's factual assertions in its first amended petition and the relevant jurisdictional evidence to determine if the Stakeholders Group alleged facts that were not negated by the evidence and that would actually constitute a constitutional violation under section 52(a) to confer jurisdiction on the trial court. *See Miranda*, 133 S.W.3d at 227; *Creedmoor-Maha Water Supply Corp.*, 307 S.W.3d at 516.

In its first amended petition, the Stakeholders Group sought a declaration that the District transferred its assets in violation of article III, section 52 of the Texas Constitution, arguing that the transfer was an "illegal grant of public funds." Its factual assertions, focusing on the first amendment to the asset transfer and utility system consolidation agreement, alleged in pertinent part:

> 7.12. As discussed above, the Asset Transfer Agreement indicates that the District has more than $60 million in assets, and provides that the City with a net acquisition of assets valued at more than $46 million. In September 2014, [the District] illegally consummated the asset transfer pursuant to the First Amended Asset Transfer Agreement. The City has produced a Financial Report for fiscal year 2014 which reports that [the City] experienced a 91.8% increase in revenue over the prior year, including $71.5 million in capital grants and contributions due primarily to the acquisition of [the District]. Hence, under the First Amendment to the Asset Transfer Agreement, the City acquired the District's water system, which the City has valued at more than $70 million, as well as the District's water reserves and the revenues from its profitable retail water utility.
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> 7.13. The First Amended Asset Transfer Agreement affected a transfer of the District's entire water system to the City without consideration. This transaction clearly is a financial benefit to the City, but does not provide any clear public benefit to the District, the District's customers, or landowners within the District. Rather, it transferred the District's water utility system to [the City] and imposed an improper surcharge of $4.75 per meter per month for District customers to fund [the City]'s operation of the water system under [the District]'s CCN. Further, the Asset Agreement provides for the District's dissolution and negates any method to insure any public purpose could be accomplished. Therefore, it provides an illegal grant of public funds.

Although the factual assertions in its pleadings include that the District did not receive consideration from the Agreements, the evidence, including the express terms of the Agreements, conclusively negates this asserted fact. *See Miranda*, 133 S.W.3d at 228 (explaining that standard for reviewing evidence in context of plea to jurisdiction "generally mirrors that of a summary judgment"); *Walker v. City of Georgetown*, 86 S.W.3d 249, 260 (Tex. App.—Austin 2002,

pet. denied) (concluding that City's lease of land in park to private entity for $400 a month was not "gratuitous donation" or violation of article III, section 52(a), noting that City was not required to "lease at fair market value" to comply with section 52(a), and stating purpose of section 52(a) "to prevent the gratuitous transfer of public funds to any individual"). In exchange for the transfer of the District's assets "used or held for use in connection with, the water and wastewater service provided by [the District]," the City generally assumed the District's liabilities and obligations to provide water and wastewater services to the public in the District's CCN service area.

The evidence also conclusively established that the Agreements were for public purposes. *See Texas Mun. League*, 74 S.W.3d at 383–84. The service area operations and management agreement expressly stated the parties' guiding principles as follows:

> The Parties agree that the following guiding principles are integral to this Agreement and important to the success of the service area operations: 1) that cost savings and efficiencies of operation, along with economies of scale, will result from combining the water utility systems of [the District] and the City, 2) that establishing and maintaining uniform service policies between the City and [the District] are a key to ensuring efficient operations, 3) avoidance of disputes between the City and [the District] over customers, service areas, and service policies is in the customer's interest, and 4) cooperative efforts to secure new water supplies and to build and operate regional facilities will help reduce water service costs to all of our customers.

See id. at 384.

We also observe that, even if the District was required to retain some degree of control, the Agreements expressly grant the District control going forward. *See Key v. Commissioners Court of Marion Cty.*, 727 S.W.2d 667, 669 (Tex. App.—Texarkana 1987, no writ) (distinguishing cases that involve contractual agreements for services or property between

governmental entity and private business with "retention of formal control" by governmental entity and that, where consideration is accomplishment of public purpose, "some form of continuing public control is necessary"). Under the terms of the service area operations and management agreement, the District agreed to continue in its role as the CCN holder with "all the powers and duties of the CCN holder" during the regulatory approval period, and the City agreed to specified obligations, including operating and maintaining the District's water utility system. The parties also have the right to terminate based on non-compliance by the other party under the terms of the Agreements.

In short, the express terms of the Agreements conclusively establish the District's return consideration and the Agreements' public purposes. *See Texas Mun. League*, 74 S.W.3d at 383–84, *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995) ("A transfer of funds for a public purpose, with a clear public benefit received in return, does not amount to a lending of credit or grant of public funds in violation of article III, sections 51 and 52."); *compare Walker*, 86 S.W.3d at 260; *Graves v. Morales*, 923 S.W.2d 754, 757 (Tex. App.—Austin 1996, writ denied) (concluding that article III, section 52 of Texas Constitution was not violated because transfer of challenged public funds to state employees provided public benefit of "continued employment of professionals in its service"), *with Magnolia Bend Volunteer Fire Dep't v. McDonnell*, No. 09-03-00051-CV, 2003 Tex. App. LEXIS 10404, at *5–6 (Tex. App.—Beaumont Dec. 11, 2003, no pet.) (mem. op.) (concluding "evidence set forth by the Fire Department does not show the funds were in exchange for return consideration" and that "Fire Department [did] not demonstrate the District's act—placing title to the property in its name—was in exchange for sufficient consideration so that it was not 'gratuitous'" to comply with article III, section 52).

Thus, we conclude that the Stakeholders Group failed to allege un-negated facts that would actually constitute a constitutional violation under article III, section 52(a) to establish the trial court's jurisdiction over this claim. *See Miranda*, 133 S.W.3d at 228; *see also Creedmoor-Maha Water Supply Corp.*, 307 S.W.3d at 516 (requiring court to resolve "pure legal question of whether pled and un-negated facts would establish a constitutional violation" to establish trial court's jurisdiction).

Claims Against the PUC and its Commissioners

The Stakeholders Group argues that the trial court has jurisdiction over its claims against the PUC and the Commissioners that are premised on its positions that the PUC lacked jurisdiction to consider the CCN transfer application and that its final order granting the transfer was void. According to the Stakeholders Group, the PUC "was only granted authority to exercise *economic* regulation over water utility services" and it "has no jurisdiction to take regulatory action in a manner that: (i) renders the District legally incapable of providing water utility service to its constituents; (ii) precludes the District and its Directors from governing the manner in which water utility service is provided to their constituents; (iii) nullifies the District landowners' and consumers' statutory right to vote on water utility issues affecting them; or (iv) effects the District's dissolution." The Stakeholders Group also argues that it was not required to exhaust administrative remedies because the PUC's final order was void on its face. *See Chocolate Bayou Water Co. & Sand Supply v. Texas Nat. Res. Conservation Comm'n*, 124 S.W.3d 844, 853 (Tex. App.—Austin 2003, pet. denied) ("Collateral attacks upon an agency order may be maintained successfully on one ground alone—that the order is void. . . . An agency order may be void in the requisite sense on either of

two grounds: 1) the order shows on its face that the agency exceeded its authority, or 2) a complainant shows that the order was procured by extrinsic fraud." (citation omitted)). As to its claims against the Commissioners, the Stakeholders Group argues that the Commissioners acted ultra vires in processing the application and ultimately adopting the order that revoked the District's CCN and amended the City's CCN to include the District's certified service area.

The Stakeholders Group's first amended petition recites the history of the CCN transfer application before the PUC. The application was referred to SOAH for a contested case hearing, and the PUC entered a final order following the contested case proceeding on January 13, 2016. Although the Stakeholders Group frames its argument that the PUC and the Commissioners were acting outside their authority, the Legislature specifically granted the PUC the authority to grant, revoke, and amend CCNs and provided the right to judicial review of a PUC decision concerning a CCN. *See* Tex. Water Code §§ 13.241 (addressing PUC's authority to grant application for CCN), .246 (addressing notice, hearing, and factors to be considered by PUC in determining whether to grant CCN application), .254 (addressing revocation or amendment of CCNs by PUC), .381 (providing party to proceeding before PUC with right to judicial review).[11] Because the PUC has express statutory authority to grant, revoke, and amend CCNs, we conclude that the PUC's final order was not void on its face such that it would be subject to collateral attack. *See Chocolate Bayou Water Co.*, 124 S.W.3d at 853. It follows then that, because the Stakeholders Group did not file a motion for rehearing from the PUC's final order granting the application or

[11] As previously stated, a suit for judicial review of the PUC's final order is pending before this Court in a separate appeal.

otherwise participate as a party to the contested case proceeding, they are foreclosed from challenging the final order for failure to exhaust administrative remedies. *See Subaru of Am., Inc. v. David McDavid Nissan, Inc*., 84 S.W.3d 212, 221 (Tex. 2002) (observing that failure to exhaust administrative remedies when required deprives court of subject matter jurisdiction over claim); *Chocolate Bayou Water Co.*, 124 S.W.3d at 853 ("Administrative remedies must be exhausted before a district court may hear the issue as a jurisdictional matter."); *see also* Tex. Water Code § 13.381; *Patel*, 469 S.W.3d at 79 (discussing redundant remedies doctrine and explaining its focus on "whether the Legislature created a statutory waiver of sovereign immunity that permits the parties to raise their claims through some avenue other than the UDJA"); *Beacon Nat'l Ins. Co. v. Montemayor*, 86 S.W.3d 260, 267 (Tex. App.—Austin 2002, no pet.) (observing that "power of courts to issue declaratory judgments under the UDJA in the face of administrative proceedings is limited" and "when a statute provides an avenue for attacking an agency order, a declaratory judgment action will not lie to provide redundant remedies").

Further, to the extent that the Stakeholders Group argues that the trial court had jurisdiction because the Stakeholders Group is challenging the PUC's interpretation of statutes in chapter 13 of the Texas Water Code, the UDJA does not waive immunity for "bare statutory construction claims." *See McLane Co. v. Texas Alcoholic Beverage Comm'n*, ___ S.W.3d ___, No. 03-16-00415-CV, 2017 Tex. App. LEXIS 851, at *7–8 (Tex. App.—Austin Feb. 1, 2017, pet. filed) (quoting and citing *Ex parte Springsteen*, 506 S.W.3d at 802). And as to the Stakeholders Group's ultra vires claims against the Commissioners, we also observe that the retrospective remedy of reversal of the PUC's order would not be available. *See Heinrich*, 284 S.W.3d at 375–76

(holding that generally ultra vires claimant is entitled to prospective relief only); *Utility Assocs.*, 2017 Tex. App. LEXIS 2548, at *11.

Given the Legislature's express grant of authority to the PUC and the available administrative proceeding and remedies, we conclude that the Stakeholders Group failed to establish the trial court's jurisdiction over its pleaded claims against the PUC and the Commissioners.[12]

Ultra Vires Claims against Directors

The Stakeholders Group argues that the trial court has jurisdiction over its pleaded ultra vires claims against the Directors that they acted outside their statutory and constitutional duties by approving the Agreements.[13] In its first amended petition, the Stakeholders Group alleged that the Directors acted ultra vires "when [they] approved the original Asset Transfer Agreement and the amendments thereto" and sought a declaration that the directors "committed ultra vires acts outside

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[12] On appeal, the Stakeholders Group argues that the PUC failed to present any jurisdictional challenge to the trial court as to the ultra vires claims against the Commissioners because the PUC only orally requested dismissal of those claims during the hearing on the pleas to the jurisdiction. But subject matter jurisdiction may be raised at any time and may be considered by a court sua sponte. *See Finance Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 580 (Tex. 2013) (citing *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445–46 (Tex. 1993)); *see also Texas Ass'n of Bus.*, 852 S.W.2d at 445 ("Subject matter jurisdiction is an issue that may be raised for the first time on appeal; it may not be waived by the parties." (citations omitted)); *Utilities Assocs.*, 2017 Tex. App. LEXIS 2548, at *8.

[13] The Stakeholders Group's requests for declaratory relief directly against the District and the City based on its position that the Agreements were illegal are barred by governmental immunity. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003). Further, to the extent that the Stakeholders Group seeks declaratory relief based on the District's interpretation of statutes, as we previously explained, the UDJA does not waive immunity for "'bare statutory construction' claims." *See McLane Co. v. Texas Alcoholic Beverage Comm'n*, ___ S.W.3d ___, No. 03-16-00415-CV, 2017 Tex. App. LEXIS 851, at *7–8 (Tex. App.—Austin Feb. 1, 2017, pet. filed) (quoting and citing *Ex parte Springsteen*, 506 S.W.3d 789, 802 (Tex. App.—Austin Dec. 21, 2016, pet. filed)).

of their legal authority in approving and effectuating the Asset Transfer Agreement." To support its position that the trial court has jurisdiction over these claims, it argues that "the Agreement expressly provides for a transaction that will make it impossible for [the District] to accomplish the purposes for which it was created" and "affected dissolution of the District and an illegal grant of the District's assets to the City." The Stakeholders Group further pleaded and argues that sections 65.723 through 65.276 of the Texas Water Code precluded the District from consolidating with the City. *See* Tex. Water Code §§ 65.723–.726 (addressing steps to consolidate special utility districts).

We cannot agree with the Stakeholders Group that its pleaded and un-negated facts as to the Agreements would constitute ultra vires conduct by the Directors, i.e., conduct outside their statutory or constitutional authority. *See Creedmoor-Maha Water Supply Corp.*, 307 S.W.3d at 516. The Stakeholders Group's ultra vires claim against the Directors asserting a constitutional violation is based on the same pleaded facts as their claim against the City and the District under article III, section 52(a) of the Texas Constitution. *See* Tex. Const. art. III, § 52(a). For the same reasons that we concluded that the Stakeholders Group failed to establish the trial court's jurisdiction over its constitutional claim against the City and the District asserted under that provision, we conclude that the Stakeholders Group failed to establish the trial court's jurisdiction over its ultra vires claim against the Directors based on that provision.

We also conclude that the Stakeholders Group's pleaded and un-negated facts to support its claims that the Directors acted outside their statutory authority do not constitute ultra vires conduct. *See Creedmoor-Maha Water Supply Corp.*, 307 S.W.3d at 516. The Legislature expressly has granted special utility districts the authority to contract with regard to their water utility

services. *See* Tex. Water Code §§ 49.213 (authorizing districts to enter into contracts), .226 (authorizing districts to sell or exchange property), .227 (authorizing district to "act jointly with any other person or entity, private or public, whether within the State of Texas or the United States, in the performance of any of the powers and duties permitted by this code or any other laws"); Tex. Gov't Code § 791.026(1) (authorizing district to contract with municipality "to obtain or provide part or all of . . . water supply or wastewater treatment facilities"); *see also* Tex. Gov't Code §§ 791.003 (defining "local government" to include special district and municipality), .011 (authorizing local government to contract with another local government). Whether it was imprudent or unwise for the Directors to enter into the Agreements does not impact their statutory authority to do so. *See Creedmoor-Maha Water Supply Corp*., 307 S.W.3d at 517–18 (contrasting "allegations that TCEQ reached an incorrect or wrong result when exercising its delegated authority" with "facts that would demonstrate TCEQ exceeded its authority" and concluding that trial court did not have jurisdiction over ultra vires claims that TCEQ reached incorrect or wrong result).

Further, the Stakeholders Group's pleaded ultra vires claims asserted against the Directors ultimately seek to invalidate the Agreements and, thus, seek retrospective relief and are barred by governmental immunity. *See Sawyer Trust*, 354 S.W.3d at 388 (looking to underlying nature of claims brought under UDJA); *Heinrich*, 284 S.W.3d at 375–76 (holding that generally ultra vires claimant is entitled to prospective relief only); *IT-Davy*, 74 S.W.3d at 855–56 (explaining that "declaratory-judgment suits against state officials seeking to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities are suits against the State . . . because such suits attempt to control state action by imposing liability on the State" and, therefore,

that "such suits cannot be maintained without legislative permission" (internal citations omitted)); *Utility Assocs.*, 2017 Tex. App. LEXIS 2548, at *11, *17–20; *Texas Logos, L.P. v. Texas Dep't of Transp.*, 241 S.W.3d 105, 120–21, 122–23 (Tex. App.—Austin 2007, no pet.) (holding that sovereign immunity barred claim seeking to invalidate previously executed state contract because remedy was retrospective in nature, noting that "the 'only plausible remedy'" for past statutory violations would have been invalidation of contract, and disagreeing that alleged statutory violations would render contract "*void*; i.e., a nullity"). Thus, we conclude that the Stakeholders Group failed to establish the trial court's jurisdiction over its ultra vires claims against the Directors.[14]

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[14] During oral argument and in supplemental briefing, counsel for the Stakeholders Group also raised section 49.067(b) of the Texas Water Code to support the Stakeholders Group's position that the trial court had jurisdiction. *See* Tex. Water Code § 49.067(b). Section 49.067(b) states:

> Notwithstanding any other law, a contract for technical, scientific, legal, fiscal, or other professional services must be approved by the board unless specifically delegated by board action. The terms and conditions of such a contract, including the terms for payment, are subject to the decision of the board unless specifically delegated by board action. The board through such action cannot abrogate its fiscal responsibility.

Id. To the extent that the Stakeholders Group is asserting an ultra vires claim based on the Director's alleged violation of this statute, it would fail for the same reasons as stated above concerning the other alleged statutory violations. *See Texas Logos, L.P. v. Texas Dep't of Transp.*, 241 S.W.3d 105, 120–21, 122–23 (Tex. App.—Austin 2007, no pet.).

In its briefing to this Court, the Stakeholders Group also cites section 791.011(e) of the Texas Government Code to support its ultra vires claim against the Directors. *See* Tex. Gov't Code § 791.011(e) ("An interlocal contractual payment must be in an amount that fairly compensates the performing party for the services or functions performed under the contract."). The Stakeholders Group argues that its allegation of "lack of fair consideration" must be taken as true and establishes the trial court's jurisdiction. As noted above, this allegation similarly is foreclosed by the retrospective relief that it seeks—invalidation of the Agreements. *See Texas Logos, L.P.*, 241 S.W.3d at 120–21, 122–23.

CONCLUSION

For these reasons, we overrule the Stakeholders Group's issue and affirm the trial court's order granting appellees' pleas to the jurisdiction.[15]

Melissa Goodwin, Justice

Before Justices Puryear, Pemberton, and Goodwin

Affirmed

Filed: May 11, 2017

[15] Because we have concluded that the trial court correctly granted the pleas to the jurisdiction on other grounds, we do not address other jurisdictional arguments that appellees make. *See* Tex. R. App. P. 47.1, 47.4.

We also deny the Stakeholders Group's request to remand the case to the trial court to allow it an opportunity to cure the jurisdictional defects in its claims. *See Texas A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007) (declining to remand for opportunity to amend pleadings when pleading defects could not be cured and plaintiff "made no suggestion as to how to cure the jurisdictional defect"). After appellees filed their pleas to the jurisdiction with evidence, the Stakeholders Group had the opportunity to file an amended petition, and it has failed to suggest how it would cure the jurisdictional defects by further amending its pleadings.