RETHINKING "PUBLIC USE": RECENT CASES AND EMERGING TRENDS CONCERNING EXCLUSIVITY FOR PUBLIC PROPERTY TAX EXEMPTIONS

By Daniel R. Smith, Esq. and Andrew Albright, Esq.[1]

It is commonly understood that public property is not taxable. Generally, property owned by a public entity and used for public purposes will be exempt from ad valorem taxation. That is why public schools, universities, parks, and roads, for example, can be operated and managed without the tax burden shouldered by private property owners. Whether certain property qualifies for a public property exemption may seem obvious. Property owners, appraisal districts, and courts, however, have struggled for decades when applying Texas law, especially as to whether the property must be *exclusively* used for public purposes. Published opinions have yielded mixed and inconsistent results, though recent cases are clarifying governing standards.

A. Origin of Public Property Exemption

The Texas Constitution makes clear that all property in the state, "unless exempt as required by or permitted by this Constitution," shall be taxed in proportion to its value.[2] In other words, property tax exemptions must originate in the constitution. The constitution provides two separate and distinct sources for public property exemptions.

The first source, Article 11, Section 9, states:

> The property of counties, cities and towns, owned and held only for public purposes, such as public buildings and the sites therefor, fire engines and the furniture thereof, and all property used, or intended for extinguishing fires, public grounds and all other property devoted exclusively to the use and benefit of the public shall be exempt from forced sale and from taxation, provided, nothing herein shall prevent the enforcement of the vendors lien, the mechanics or builders lien, or other liens now existing. [3]

There is no doubt that this provision requires exclusive public use in order for its public property exemption to apply. The drafters removed any uncertainty by expressly including the terms "exclusively" and "only for public purposes" in its language.

The second source, Article 8, Section 2(a), provides, in pertinent part, that "the legislature may, by general laws, exempt from taxation public property used for public purposes."[4] Unlike its counterpart, the language of this provision does not expressly require use only and exclusively for public purposes. Moreover, this language does not create a property exemption. It simply allows the legislature to create

---

[1] Daniel R. Smith, Esq., is a principal with and general counsel for Austin, Texas law firm Popp Hutcheson, PLLC, the Texas member of American Property Tax Counsel, the national affiliation of property tax attorneys. Andrew Albright, Esq., is an associate attorney with Popp Hutcheson, PLLC. Contact Daniel at daniel.smith@property-tax.com and Andrew at andrew.albright@property-tax.com.

[2] TEX. CONST. art. 8, §1(b).

[3] *Id.* art. 11, §9.

[4] *Id.* art. 8, §2(a).

an exemption by statute. This statutory exemption, found in Section 11.11(a) of the Texas Tax Code, is the exemption that has puzzled courts.[5]

B. Confusing the Exemptions

Keeping these two exemptions straight has been a challenge. Opinions from Texas courts of appeals demonstrate the confusion set upon the judiciary when interpreting the concept of public use. This has resulted in misapplication of controlling standards and misinterpreting the reach of certain decisions.

For instance, in the 1980s, the Grand Prairie Hospital Authority was denied a public property exemption on medical office space in two separate cases, commonly referred to as the *Grand Prairie Hospital Authority* decisions.[6] The Hospital Authority, a public entity, had leased this space to private physicians for their own commercial purposes. Both the Fort Worth Court of Appeals and the Dallas Court of Appeals affirmed the denial of the Hospital Authority's exemption because the office was not being "exclusively used" for a public purpose.

These courts were analyzing statutory exemptions, particularly the one found in Section 11.11(a) of the Texas Tax Code. They confused their analysis, however, by looking to the self-executing constitutional exemption found in Article 11, Section 9 of the Texas Constitution for guidance, which expressly requires exclusive public use. They further relied upon opinions interpreting this constitutional exemption, particularly the Supreme Court of Texas's decision in *Satterlee v. Gulf Coast Waste Disposal Authority*.[7] The particular holding in *Satterlee*, however, does not concern the public use requirement for the *statutory* exemption. *Satterlee*, moreover, does not establish a broad-sweeping exclusivity requirement for all public property tax exemption cases, nor does it intend to.

In 2013, the Amarillo Court of Appeals in *Texas Student Housing Authority v. Brazos County Appraisal District* chose to follow the precedent set by its *Grand Prairie Housing Authority* "sister courts."[8] The court of appeals refused to apply the public property exemption found in Section 11.11(a) of the Texas Tax Code to student housing facilities associated with Texas A&M University. This is because these facilities provided room and board to teenagers attending hockey and cheerleading camps during the summer months, which the court believed did not qualify as exclusive public use. Interestingly, the court of appeals acknowledged the distinction between the two exemptions. Nevertheless, it chose to follow the *Grand Prairie Hospital Authority* decisions because the Supreme Court of Texas has yet to overturn them. It explained that "both cases rely on *Satterlee*" and that the effect of doing so "is to imprint upon section 11.11(a) an exclusivity element."[9]

---

[5] *See* Tex. Tax Code §11.11(a).

[6] *Grand Prairie Hosp. Auth. v. Tarrant Appraisal Dist.*, 707 S.W.2d 281 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.); *Grand Prairie Hosp. Auth. v. Dallas County Appraisal Dist.*, 730 S.W.2d 849 (Tex. App.—Dallas 1987, writ ref'd n.r.e.).

[7] 576 S.W.2d 773 (Tex. 1978).

[8] 440 S.W.3d 779 (Tex. App.—Amarillo 2013), *rev'd on other grounds*, 460 S.W.3d 137 (Tex. 2015).

[9] 440 S.W.3d at 794-95.

C. A Path to Clarifying Standards

Recent opinions show that courts are beginning to recognize, or at least hint that they might recognize, that the public use component of the two exemptions are different and are to be interpreted differently. They clarify that merely leasing public property to a private entity will not necessarily destroy the property's exempt status. Importantly, these decisions reflect a trend toward liberally interpreting the concept of public use to encourage private involvement in managing and promoting public recreation areas.

In *Lower Colorado River Authority v. Burnet Central Appraisal District*, the appraisal district revoked the public property exemption claimed by the Lower Colorado River Authority (LCRA) on its Sunset Point RV Park property.[10] LCRA, a special water control district, had historically operated and managed the park itself. It later contracted with a private company to operate and manage the park through a lease agreement. The private company profited from the lease, but was restricted to operating the premises as a public commercial recreation facility and public park.

Citing the *Grand Prairie Hospital Authority* decisions, the appraisal district contended that the park was not tax exempt because it was being leased to a private party for private commercial purposes. The Austin Court of Appeals rejected this argument. Even though the private company might enjoy a profit, the company was operating the property for a public purpose, namely the operation of a public park. This is the same underlying purpose for which the LCRA itself was operating the park. Accordingly, there was public use sufficient for a public property exemption, which use just happened to be exclusive. Passing on the *Grand Prairie Hospital Authority* decisions, the court noted, "We leave for another day whether we agree with the construction and interpretation of the constitutional provisions outlined in these opinions."[11]

In 2018, the Fort Worth Court of Appeals issued *Tarrant Appraisal District v. Tarrant Regional Waiter District*.[12] Tarrant Regional Water District (TRWD) owned land along the Trinity River that it planned to develop into a public recreation area. TRWD leased part of the land to a private company that would operate a restaurant on the premises for profit. The lease limited the permitted uses of the property to "restaurant (eat-in and take-out) with alcohol sales, recreational activities and entertainment, including live music to the extent permitted by applicable municipal ordinances."[13]

Citing the *Grand Prairie Hospital Authority* decisions, the appraisal district argued that the property was no longer tax-exempt because it was leased to a private company for private commercial purposes. The court of appeals rejected this position. It emphasized that neither Section 11.11(a) of the Texas Tax Code nor Article 8, Section 2(a) of the Texas Constitution makes any mention of "exclusive" public use, unlike the language in Article 11, Section 9 of the Texas Constitution. Furthermore, the court of appeals expressly overruled its holding in its *Grand Prairie Housing Authority* decision. "TRWD has no obligation to prove that the Property was devoted exclusively to the use and benefit of the public," the court of appeals wrote.

---

[10] *Lower Colorado River Auth. v. Burnet Cent. Appraisal Dist.*, 497 S.W.3d 117 (Tex.App.—Austin 2016, pet. denied).
[11] *Id.* at 121 n. 2.
[12] 2018 WL 1865918 (Tex. App.—Fort Worth, Apr. 19, 2018)(on reh'g)
[13] *Id.* at *2.

"So long as the Property is 'used for public purposes,' TRWD is entitled to an exemption under tax code section 11.11(a)."[14]

Recognizing that whether property is used for public purposes is a highly fact-specific question, the court of appeals agreed that the requirement had been met. The evidence showed that the property was leased to the restaurant in connection with TRWD's optimistic plan to develop the property for economic and recreational purposes. It further showed that the property is used primarily for the comfort and welfare of the public, and that the restaurant's lease payments would go into a public fund where they would be used for public purposes. Accordingly, the property is used for public purposes as a matter of law.[15]

D. Conclusion

Although the confusion over whether Section 11.11(a) of the Texas Tax Code requires exclusive public use may not be completely resolved, *LCRA* and *Tarrant Regional Water District* go a long way in clearing up misconceptions about governing standards. These cases have severely weakened any precedential value of the *Grand Prairie Hospital Authority* decisions and *Satterlee* in interpreting the statutory public property exemption. The Supreme Court of Texas, though, has not weighed in on the issue. We will see if it will follow the trend set by these recent cases in clarifying and liberalizing governing standards.

[14] *Id.* at *7.

[15] *City of San Antonio v. Bastrop Central Appraisal District* provides a good counter-example of public property not being used for a public purpose, and thus not tax-exempt. The City of San Antonio acquired lands in Bastrop County for the purpose of extracting lignite to use in electricity generation for the benefit of San Antonio residents, but the city later leased the land to Alcoa, Inc., a privately-owned company, "for the exclusive use and benefit of Alcoa." The Austin Court of Appeals held that the city was not entitled to an exemption as the property was no longer used for public purposes. 275 S.W.3d 919 (Tex. App.-Austin 2009, pet. dism'd).