

Academic Component Institutions:
The University of Texas at Arlington
The University of Texas at Austin
The University of Texas at Brownsville
The University of Texas at Dallas
The University of Texas at El Paso
The University of Texas-Pan American
The University of Texas at the Permian Basin
The University of Texas at San Antonio
The University of Texas Institute of Texan Cultures at San Antonio
The University of Texas at Tyler



Health Component Institutions:
The University of Texas Southwestern Medical Center at Dallas
The University of Texas Medical Branch at Galveston
The University of Texas Health Science Center at Houston
The University of Texas Health Science Center at San Antonio
The University of Texas M.D. Anderson Cancer Center
The University of Texas Health Center at Tyler

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THE UNIVERSITY OF TEXAS SYSTEM

Office of General Counsel

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RECEIVED

Ray Farabee
Vice Chancellor and
General Counsel

June 30, 1994

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OGC# 033107

Opinion Committee

SJS

Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711

FILE # ML-27340-94

I.D.# 27340

RE: Request for opinion on whether the El Paso County Water Improvement District No. 1 may legally assess a "benefit assessment" against Permanent University Fund lands

Dear Honorable Morales:

On behalf of The Board of Regents of the University of Texas System, I respectfully request your official opinion on the following question:

May the El Paso County Water Improvement District No. 1 legally assess a "benefit assessment" against Permanent University Fund lands that do not receive, and for which no request has been made for, the services rendered by the district?

INTRODUCTION

This issue involves three tracts of land in El Paso County that are Permanent University Fund lands. Since 1977, the El Paso County Water Improvement District No. 1 ("District") has been levying assessments, penalty and interest against these three tracts. The amount of the assessment is based on the acreage. The three tracts comprise 2.67 acres, 5.05 acres, and 4.08 acres, respectively. Copies of the tax statements are enclosed.

All three tracts are under grazing leases. Neither The Board of Regents nor the lessee has requested water from the District; the land has never received water service from the District.

The University of Texas System has sought for many years to have the three tracts removed from the tax rolls of the District without success. The District takes the position that the assessment is a "benefit assessment" and not based on an ad valorem system. Therefore, the District maintains that the exemption from taxation in Section 11.11 of the Texas Tax Code does not apply and the land is subject to the benefit assessment.

The University of Texas System's position is that there is no clear legislative authorization allowing the District, as a political subdivision of the State, to levy a benefit assessment against Permanent University Fund lands, which are State property. In the alternative, if the assessment is a tax, Section 11.11 of the Property Tax Code exempts the land from taxes other than county taxes.

CASE LAW AND AUTHORITIES

Texas case law and prior opinions of the Texas Attorney General support the position of The Board of Regents. In a writ refused decision, the court determined that land owned by the Veterans' Land Board was exempt by statute from ad valorem taxation and was not subject to special assessments because no statute expressly allowed the water control and improvement district to levy a special assessment against State property. Maverick County Water Control & Improvement District No. 1 v. State, 456 S.W.2d 204, 206-207 (Tex. Civ. App.--San Antonio 1970, writ ref'd). The court noted disagreement among the courts regarding whether a special assessment constitutes a tax that thus falls within the exemption from taxation. Id. at 206. The court, however, determined that it was not necessary to decide whether the assessment was a tax "where, as here, a political subdivision created by the sovereign is attempting to impose a monetary exaction upon its creator." Id.

A special assessment requires express statutory authority:

Even if it be assumed that a county or municipality is subject to special assessments levied by another political subdivision of the State, it does not necessarily follow that a subordinate political subdivision can impose an involuntary monetary obligation on the sovereign. It is generally held that, in the absence of clear legislative authorization, a political subdivision of the State has no power to levy a special assessment against State property. We adopt this view at least in a case where, as here, the sovereign is neither making nor contemplating any use of the allegedly benefitted land and has neither received nor requested the services rendered by the assessing agency.

Id. at 207 (emphasis added).

The Maverick court drew a distinction between a subordinate political subdivision's ability to levy a special assessment against a county or municipality and its ability to levy such an assessment against the State. That distinction is the key to the earlier decision of the court in Wichita County Water Improvement Dist. No. 2 v. City of Wichita Falls, 323 S.W.2d 298 (Tex. Civ. App.--Fort Worth 1959, writ ref'd n.r.e). In that case, a city was held liable for benefit assessments levied by a water improvement district against city-owned land (land that had received services of the district).

Permanent University Fund lands were set aside in the Texas Constitution for the establishment and maintenance of the University of Texas. See Tex. Const. art. VII, § 11. Those lands, thus, are property of the State. See Walsh v. University of Texas, 169 S.W.2d 993 (Tex. Civ. App.--El Paso 1942, writ ref'd); Op. Tex. Att'y Gen. No. 0-1861 (1940). Property of the State, as the Maverick court declared, is not subject to special assessments absent express statutory authority.

That statutory authority did not exist in Maverick and it does not exist in this case. Maverick involved assessments by a water control and improvement district. The statutory authorization for assessments by a water control and improvement district are strikingly similar, often identical, to statutory authorization for assessments by a water improvement district. See Tex. Water Code Ann. §§ 51.631 - 51.657 and §§ 55.651 - 55.677 (Vernon 1972 and Supp. 1994) (compare, for example, §§ 55.652 and 55.673, §§ 51.653 and 55.674, and §§ 55.655 and 55.676).

The Water Code permits a water improvement district to "levy, assess, and collect taxes on the ad valorem or on the benefit basis." Tex. Water Code Ann. § 55.651 (Vernon 1972). In the subchapter of the Water Code titled "Taxation on a Benefit Basis," the code states that the board of the water district "shall examine the tax rolls to determine if all properties subject to taxation appear on the tax rolls under the proper classification." Tex. Water Code Ann. § 55.674 (Vernon Supp. 1994) (emphasis added). A subsequent section of the Water Code states that "[i]n a district that levies taxes on a benefit basis, the rate of taxation and the assessment and collection of taxes shall be governed by the law relating to ad valorem taxes to the extent applicable." Id. at § 55.676 (emphasis added).

The provisions authorizing a water improvement district to levy taxes on the benefit basis do not expressly authorize the district to levy those taxes against State property. Moreover, by expressly making taxation on a benefit basis subject to the law relating to ad valorem taxes, the Water Code expressly incorporates the provision of the Texas Tax Code that exempts Permanent University Fund lands from taxes other than county taxes. See Tex. Tax Code Ann. § 11.11 (a) & (b) (Vernon 1992). See also Tex. Const. art. VII, § 16(a) (all lands mentioned in Sections 11, 12 and 15 of article VII "now [1930] belonging to the University of Texas" are subject to taxation for county purposes); Op. Tex. Att'y Gen. No. JM-1049 (1989) ("land comprising the state permanent university fund is taxable for county purposes only"). The exemption of state lands from taxation is more fully discussed below.

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Thus, if the charge is a special assessment and not a tax, the District does not have the requisite express statutory authority to levy the assessment against Permanent University Fund lands. The Maverick case, consequently, is directly on point.

Moreover, The Board of Regents' position is further supported by several recent opinions of the Texas Attorney General that cite the Maverick opinion. Attorney General Opinion JM-523 (1986) stated that "[l]evying special assessments against the state requires authorization from the state legislature." That opinion concluded that a home rule city cannot impose an involuntary monetary obligation on the State without express legislative authorization, but that the general rule does not prevent a city from requiring the State to pay the actual cost attributable to extending service to the State when the State requests the service. In the present case, The Board of Regents has not requested service from the District nor has the land received any services from the District.

Attorney General Opinion MW-551 (1982) stated that the Maverick case, while not clarifying whether a charge was a special assessment or a tax, did clarify that "where there is no 'clear legislative authorization' for a particular special assessment against State-owned property, and where the State has done nothing to indicate its willingness to be subjected to such assessment, the assessment is impermissible, because it would result in an 'involuntary monetary obligation on the sovereign,'" (quoting from Maverick). The Attorney General thus concluded that State-owned property within the city limits was exempt from a drainage fee because there was no express legislative authorization for the drainage fee.

Finally, Attorney General Opinion JM-1035 (1989) again cited the Maverick case's requirement that there be express statutory authority for imposing special assessments on a political subdivision. In that opinion, the Attorney General found express legislative authority in the Texas Water Code that expressly set forth the Legislature's intent that governmental subdivisions or agencies be subject to a capital recovery fee.

No such statutory authorization exists in the section of the Texas Water Code authorizing a water improvement district to assess taxes on a benefit basis. Further, the statutory authorization for the District's imposition of a benefit assessment is within a subchapter of the Water Code titled "Taxation on a Benefit Basis," and permits the District to "levy, assess, and collect taxes on the ad valorem basis or on the benefit basis." Tex. Water Code Ann. § 55.651(a) (Vernon 1972) (emphasis added). The legislature thus termed the assessment a tax.

It would not be appropriate in this case to reject that label. Courts typically distinguish a tax from a special assessment by describing a tax as a charge to raise revenue for the general purposes of government and not related to any special benefit to the taxpayer from the expenditure of the funds. Conlen Grain and Mercantile, Inc. v. Texas Grain Sorghum Producers Board, 519 S.W.2d. 620, 623 (Tex. 1975).

The "benefit assessment" levied by the District is not related to any benefit received by the landowner. Rather, it is a set dollar amount multiplied by the total acreage owned by the landowner. As noted earlier, The Board of Regents has neither requested nor received the services of the District for the land at issue. The benefit assessment is thus in substance a tax to raise revenue for the general purposes of the District. As such, the Permanent University Fund lands are exempt pursuant to Section 11.11 of the Texas Tax Code.

It is the "general rule and not the exception" that state land is exempt from taxation. Op. Tex. Att'y Gen. No. 0-1861 (1940). Thus there must be an express legislative enactment for state property to be subject to taxation. *Id.* "This is proved by the fact that when the state decided that the land belonging to the Permanent University Fund should be subject to taxation for county purposes, it was necessary to adopt Article VII, Section 16(a) of the Constitution." *Id.*

Section 11.11 of the Tax Code was enacted as a result of that constitutional amendment. That section provides that "[e]xcept as provided by Subsections (b) and (c) of this section, property owned by this state or a political subdivision of this state is exempt from taxation if the property is used for public purposes." Tex. Tax Code Ann. § 11.11(a) (Vernon 1992). Subsection (b) provides that "[I]and owned by the Permanent University Fund is taxable for county purposes." *Id.* at §11.11(b).

The legislature thus expressly permitted taxation by counties of Permanent University Fund lands. The legislature set aside funds out of the General Revenue Fund of the State for the State Comptroller to pay county taxes on Permanent University Fund lands. General Appropriations Act I-70 (S.B.5, 73rd Leg., R.S. (1993).

No other taxation of Permanent University Fund lands has been authorized by the legislature; no other appropriation has been made by the legislature for the payment of other taxes on Permanent University Fund lands. Thus, the District cannot legally assess a tax against the lands in question.

In summary, it is The Board of Regents' position that the three Permanent University Fund tracts are not subject to the "benefit assessment" levied by the District, whether that assessment is considered a special assessment or a tax.

CONCLUSION

There is no express statutory authority permitting the District to levy a special assessment against the Permanent University Fund lands. Moreover, the statute authorizing the District to levy a benefit assessment expressly makes the levying of that assessment subject to the laws on ad valorem taxation. The Permanent University Fund lands are exempt from taxation under Section 11.11 of the Texas Tax Code.

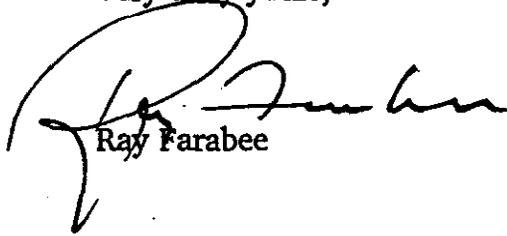
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Alternatively, the charge is in substance a tax and not a special assessment in that it does not relate to any benefit received by the landowner. Permanent University Fund lands are statutorily exempt from all but county taxes.

Therefore, it is the position of The Board of Regents that, whether the charge is a benefit assessment or a tax, the District may not legally assess the charge against the three tracts of Permanent University Fund land.

Thank you for considering the above legal analysis and providing the requested opinion. A copy of this letter and enclosures has been sent to the District for its information.

Very truly yours,



Ray Farabee

RF/FPM:lml

Enclosures

xc: El Paso County Water Improvement District No. 1
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El Paso, Texas 79907-5599