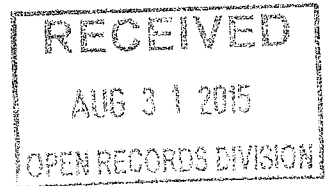


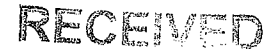
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August 26, 2015



AUG 01 2015

Honorable Ken Paxton  
Texas Attorney General  
Open Records Committee  
P O Box 12548  
Austin, Texas 78711-2548

OPINION COMMITTEE

**RQ-0049-KP**

FILE # ML-47804-15

I.D. # 47804

Re: Whether land owned by the Texas A&M University System, and improvements on that land, are exempt from ad valorem taxation

Dear Attorney General:

Brazos Central Appraisal District ("BCAD") has requested that this office seek an Attorney General opinion to assist BCAD and its chief appraiser in determining whether certain properties and improvements located in Brazos County, Texas are exempt from taxation. This request concerns two student housing projects on property owned by the Texas A&M University System ("TAMUS") in College Station, Texas. The first project described below is under construction, and the second project described below is completed and occupied. These projects will be in competition with private housing projects that do not enjoy tax exempt status, and when those private projects compete against tax exempt projects they are at a competitive disadvantage. For these reasons, it is important for BCAD to seek an opinion from the Attorney General to assist BCAD in administering the laws governing exemptions from taxation.

1. CHF-Collegiate Housing College Station project

The CHF-Collegiate Housing College Station project is a student housing project being built on property owned by TAMUS in the area of the Texas A&M University campus commonly known as "West Campus".

In May 2014, the Board of Regents of TAMUS entered into a Ground Lease

Agreement (hereinafter "Agreement") with CHF-Collegiate Housing College Station I, L.L.C. (hereinafter "CHF"). The Agreement is a lengthy and very detailed document. It is beyond the scope of this letter to outline all the provisions of the Agreement that might have a bearing on an Attorney General's opinion. Therefore, a true and correct copy of the Agreement is being provided with this request. For purposes of presenting the legal issues relating to this request, BCAD will state below some of the relevant provisions of the Agreement.

- a. The Agreement recites in part that Lessor (TAMUS) and Lessee (CHF) "desire for the Lessee to develop, finance, construct, furnish, equip and operate an approximately 1,274 bed student housing facility including the buildings and related facilities on the Property ..." It is further provided that the student housing facility will be for the use and benefit of "Eligible Tenants", which term is defined on page 3 of the agreement.
- b. Section 2 of the Agreement provides that the term of the lease is 32 years.
- c. The Agreement further recites that the New Hope Cultural Education Facilities Finance Corporation will issue Student Housing Revenue Bonds, and the proceeds from the sale of those bonds will be lent to CHF for the purpose of financing the costs of acquiring, constructing, furnishing and equipping the student housing facility.
- d. Section 11 of the Agreement pertains to construction of the improvements. There are various provisions concerning the obligation of CHF to obtain the approval of TAMUS concerning the construction. Section 11 (m) provides that during the term of the lease the title to all improvements shall be vested in CHF.
- e. Section 12 of the Agreement provides that upon completion of the construction of the housing facility, CHF shall operate the facility, and will not rent the facility to provide private residential housing to members of the public other than to Eligible Tenants. BCAD has been advised that CHF has or will enter into a Management Agreement with Texas A&M University ("TAMU") whereby TAMU will manage the property. A copy of the proposed Management Agreement is being provided with this request.
- f. Section 14 of the Agreement provides that CHF may not assign its rights under the Ground Lease without the consent of TAMUS.
- g. Section 27 of the Agreement provides that upon the expiration or termination of the lease, all improvements shall then belong to TAMUS.
- h. Section 30 of the Agreement provides that during the term of the lease, TAMUS has an option to purchase CHF's right, title and interest in the

premises. If TAMUS exercises the option to purchase, the purchase price is the principal balance then outstanding of all sums secured by any leasehold mortgage then in effect, plus any premium payable on such indebtedness, plus all interest accrued or to accrue on such indebtedness through the date of payment of such indebtedness plus any other charges due and payable under the bond documents.

### Discussion of Legal Issues

BCAD seeks guidance from the Attorney General concerning whether this student housing project is exempt from taxation.

In very general terms, in order for the property in question to be exempt, it must be publically owned and used for public purposes.

**Public Use.** The Agreement provides that the rooms at the facility will be leased only to "Eligible Tenants." The definition of Eligible Tenants appears to be sufficiently narrow as to limit the use of the facility to students, faculty and other persons whose presence is desirable or necessary in relation to events of Texas A&M University. Thus, it appears that the "public use" issue will be resolved in favor of an exemption.

**Public Ownership.** The issue of public ownership is not as clear. The Agreement provides that during the term of the lease, all improvements will be owned by CHF. Therefore, CHF will have the legal title to the improvements. Section 11.11 of the Tax Code provides that property owned by the state or a political subdivision of the state will be exempt if used for public purposes. CHF is not part of the State of Texas, nor is it a political subdivision of the state. TAMUS has pointed out case law in Texas that provides that the burden of taxation may be imposed on the equitable owner of the property. In particular, TAMUS refers to *Texas Department of Corrections v. Anderson County Appraisal District*, 834 S.W.2d 130 (Tex.App.-Tyler 1992, writ denied) where the court held that improvements to state land were exempt from taxation, despite the fact that the legal title to the improvements was vested in a trustee. The state was deemed to be the equitable owner, or otherwise had equitable rights, because it had a present right to compel legal title of the improvements.

Understanding that the Attorney General routinely declines to opine whether a particular property is exempt, BCAD would appreciate and benefit from an opinion that discusses under which circumstances "equitable title" is sufficient for granting exemptions from taxation. In connection with this question, BCAD also requests advice and opinion regarding whether under the Ground Lease Agreement in question the rights of TAMUS result in TAMUS retaining "equitable title" to the property and improvements.

## 2. ACC OP project

The ACC OP project is a student housing project built on property owned by TAMUS located northwest of the main campus of Texas A&M University in College Station.

On July 18, 2013, the Board of Regents of TAMUS entered into a ground lease with ACC OP (South College Avenue) LLC. (hereinafter "ACC OP") The ground lease recites in part that in order to assist in the development of student housing and related facilities at Texas A&M University, TAMUS has determined that property should be leased to ACC OP for the purpose of developing, constructing, and operating student housing facilities. The Ground Lease Agreement is a very detailed document. It is beyond the scope of this letter request to outline all the provisions of the Ground Lease Agreement, and thus a true and correct copy of the agreement is being provided with this request. For purposes of presenting the legal issues relating to this request, the following provisions are set forth below.

- a. The land that is the subject of the ground lease is comprised of five tracts of land that total approximately 14.323 acres. (See Exhibit A to lease) The initial term of the lease is 40 years. ACC OP has options to extend the term of the lease. Section 4.4 requires ACC OP, at its own cost, to construct the housing project. Section 4.5 requires that construction of the improvements be in substantial compliance with the Texas A&M University System, Office of Facilities Planning and Construction's Developer Project Guidelines, and in substantial compliance with other provisions of the ground lease.
- b. Article 9 of the ground lease pertains to maintenance, operation and management of the facility. ACC OP is required to maintain and manage the facility. Section 9.3 requires ACC OP to cause its manager to direct leasing efforts in the following order of priority:

- 9.3.1 University Students (i.e. students at Texas A&M University)
  - 9.3.2 University faculty and staff and other University-related individuals
  - 9.3.3 Students at Blinn College
  - 9.3.4 Blinn College faculty and staff and other Blinn College-related individuals
- c. Section 9.4 provides that ACC OP collect and keep all revenues from operation of the facility. Section 9.5 provides that ACC OP may make certain alterations, additions and improvements with the approval of TAMUS.
  - d. Article 14 provides that during the term of the lease TAMUS will own fee simple title to all the improvements at the leased premises.
  - e. Article 15 of the ground lease provides an option for TAMUS to purchase ACC OP's leasehold interest, inclusive of the fixtures and improvements. The option to purchase begins at the end of the second Lease Year. Article 15 contains various detailed provisions concerning how the purchase option is exercised, including but not limited to the purchase price, the closing, closing costs, and assignment of leases.
  - f. Articles 16 and 17 provide rights of first offer in favor the TAMUS (Article 16) and ACC OP (Article 17).

#### Discussion of Legal Issues

BCAD seeks guidance from the Attorney General concerning whether this student housing project is exempt from taxation. In general terms, the land and improvements are owned by TAMUS, but are leased for a term of 40 years. While ACC OP is directed to market the property in a certain priority, there does not appear to be any definite restriction on its right to lease to persons other than faculty, staff and students of TAMUS or Blinn College. The lease contemplates that the facilities will be subleased to students, faculty and staff of Texas A&M, and also to students, faculty and staff of Blinn College, but it appears to permit subleases to persons who are not faculty, staff or students of Texas A&M or Blinn College. (See Section 8.1.1)

It appears that Tax Code §11.11(d) might be pertinent to this issue, but it is unclear whether this section would permit an exemption only if the use of the property were

limited to use by students, faculty and staff of Texas A&M, and not to include faculty, staff and students of Blinn College. §11.11(d) refers to "the state agency or institution". Assuming that "the state agency or institution" in question is TAMUS, then for the exemption contemplated by §11.11(d) to apply, must the use be limited to faculty, staff and students of TAMUS?

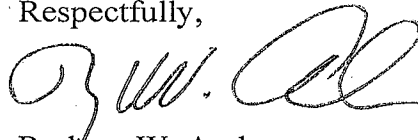
In the event that any part of the property is subleased to a person other than faculty, staff or students of Texas A&M or Blinn College, then it would appear that the property would not be used exclusively for public purposes. In that event, would an otherwise eligible exemption be lost?

### **Summary**

The issues suggested by this letter are important for BCAD to be able to correctly administer the exemption requests, not only for the two projects described herein, but for other projects that may be constructed in the future on lands owned by TAMUS. BCAD would appreciate the Attorney General's guidance on these issues.

We appreciate your assistance in this matter.

Respectfully,

A handwritten signature in black ink, appearing to read "R. W. Anderson", written in a cursive style.

Rodney W. Anderson  
County Attorney