taxanalysts viewpoint

Georgia's Property Tax Exemption For Charities After *Nuci Phillips*

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This article explores the current state of Georgia's property tax exemption under O.C.G.A. section 48-5-41(a)(4) for "institutions of purely public charity" following the Georgia Supreme Court's recent decision in *Nuci Phillips Memorial Foundation, Inc. v. Athens-Clarke County Board of Tax Assessors*.[1] The court issued its initial plurality decision in the case on November 8, 2010, with two of the justices signing on to Justice George H. Carley's plurality opinion and Justice David Nahmias concurring in the result. Because the court's original opinion was a plurality opinion, and because Justice Nahmias did not explain the basis for his concurrence, many of the parties interested in the outcome of *Nuci Phillips* — including the county property tax boards and charities affected by the decision — were left to wonder at the state of the exemption and how it would be applied going forward.

Following the decision, the Board of Tax Assessors moved for reconsideration. The supreme court denied that motion on December 14. That same day, the court entered a substituted opinion. In that new opinion, the original plurality and dissenting opinions were reentered without changes; however, Justice Nahmias added a lengthy concurrence to explain that he had not joined the plurality, because he believed that those justices had interpreted the exemption *too narrowly*. In the substituted opinion, Justice Harold Melton, who had originally signed on to the plurality opinion, signed the concurring opinion of Justice Nahmias instead.

Because of the detailed reasoning set forth by Justice Nahmias in his concurrence, there is now a fairly clear rule in *Nuci Phillips* that tax assessors should apply in future years. The court has also provided some excellent guidance for the legislature should it choose to further clarify the intended scope of the property tax exemption under O.C.G.A. section 48-5-41(a)(4).

Summary of the Facts and Posture of the Case

The Nuci Phillips Memorial Foundation was established in honor of a musician based in Athens, Ga., who committed suicide after a struggle with depression. The foundation was created to help others in the Athens community who need help with anxiety, depression, and other emotional disorders. To further that charitable purpose, the foundation owns and operates a facility in Athens called Nuci's Space, where individuals struggling with emotional issues may come to seek counseling and other assistance. Nuci's Space is not simply a counseling center; it is also an all-purpose venue for Athens musicians, where musicians can rent studio and rehearsal space, as well as purchase instruments and other equipment. Nuci's Space also has a small coffee shop and occasionally hosts musical performances. Finally, in a use of the property that became the crux of *Nuci Phillips*, Nuci's Space is also available to be rented for private parties (for example, birthday parties and wedding receptions) by anyone who wishes to rent the space.

The foundation applied for an exemption from property tax as an "institution of purely public charity" under O.C.G.A. section 48-5-41(a)(4). The Athens-Clarke County Board of Tax Assessors denied the exemption, and the foundation appealed to the Board of Equalization, which reversed and held that the foundation is entitled to the exemption. The Board of Tax Assessors appealed to the trial court, which affirmed the Board of Equalization's decision to grant the exemption.[2] The Board of Tax Assessors

[1]No. S10G0448, 2010 WL 5072111 (Ga., Nov. 8, 2010). (For the decision, see *Doc 2010-23994* or *2010 STT 216-9*.)

[2]In Georgia, a county board of equalization is a small panel that hears the first level of a property tax appeal at the administrative level.

then appealed to the Georgia Court of Appeals, which reversed the trial court and denied the exemption. *Athens-Clarke County Board of Tax Assessors v. Nuci Phillips Memorial Foundation, Inc.*, 300 Ga. App. 754 (2009).

In so holding, the Georgia Court of Appeals recited the well-established criteria for the exemption set forth by the Georgia Supreme Court in its 1991 *York Rite* decision:

- the owner must be an institution devoted entirely to charitable pursuits;
- the charitable pursuits of the owner must be for the benefit of the public; and
- the use of the property must be exclusively devoted to those charitable pursuits.[3]

The Court of Appeals also cited O.C.G.A. section 48-5-41(d)(2), which explicitly applies to the property tax exemption for "institutions of purely public charity" and states:

> a building which is owned by a charitable institution that is otherwise qualified as a purely public charity and that is exempt from taxation under Section 501(c)(3) of the federal Internal Revenue Code and which building is used by such charitable institution exclusively for the charitable purposes of such charitable institution, and not more than 15 acres of land on which such building is located, may be used for the purpose of securing income so long as such income is used exclusively for the operation of that charitable institution.

Citing the language from this provision that requires that an exempt building be used "by such charitable institution *exclusively* for the charitable purposes of such charitable institution," the Court of Appeals held that Nuci's Space was not entitled to the exemption.[4] Though the court did not analyze the meaning of O.C.G.A. section 48-5-41(a)(4) or the 2006 and 2007 amendments regarding that exemption, it concluded that the renting of the property for birthday parties and wedding receptions meant that the property was not used "exclusively" for the charitable purposes of the institution.

The foundation appealed the appeals court's decision to the Georgia Supreme Court. As noted above, the supreme court initially ruled on November 8, but it recently issued a substituted opinion with a lengthy concurrence by Justice Nahmias, explaining why he did not join the plurality opinion and explaining his interpretation of the staute. The remainder of this article explores the current state of the exemption following that recent substituted opinion.

Plurality Opinion

The plurality opinion begins by tracing the exemption from its inception as part of the 1877 Georgia Constitution through the recent 2006 and 2007 amendments to the exemption. As originally enacted in 1877, the exemption for property owned by a charity was not available if the property was used for "any type of private or corporate income-producing activity, whether the activity was charitable or non-charitable."[5]

After passage of the Georgia Constitution of 1945, the legislature amended the exemption statute to allow the exemption to charities even if they used their property to raise income, so long as any income raised on the property was used exclusively for the charitable purposes of the institution or for maintaining and operating the institution.[6]

The plurality then turns to the scope of the exemption following the 2006 and 2007 amendments to O.C.G.A. section 48-5-41. In determining the meaning of the exemption following the amendments that created current subsection 48-5-41(d)(2) (recited above), the plurality said, "We must presume that the General Assembly had full knowledge that statutory and case law has, for over sixty years, allowed charitable institutions to use their property to raise income."[7] Then, with little explanation, the plurality asserts:

> The General Assembly must have intended to allow those institutions that otherwise qualify as a purely public charity [under *York Rite*] to use their property to raise income from activities that are not necessarily charitable in nature so long as the "primary purpose" of the property was charitable and any "income is used exclusively for the operation of that charitable institution."

Thus, the plurality has stated its unequivocal holding regarding the scope of the exemption: Institutions of purely public charity may use their properties to raise income, so long as such income-generating activity does not become so prevalent that it is the "primary purpose" or use of the property (and, of course, so long as the income is used exclusively for the institution's charitable purposes).

Having determined what *is* allowed under the exemption, the plurality went on to note some uses that will cause the loss of the exemption, including:

[3]*Nuci Phillips*, 300 Ga. App. at 754 (citing *York Rite Bodies of Freemasonry of Savannah v. Board of Equalization of Chatham County*, 261 Ga. 558 (1991)).

[4]*Nuci Phillips*, 300 Ga. App. at 755 (emphasis added).

[5]*Nuci Phillips*, 2010 WL 5072111, at *1.

[6]*Id.* at *2.

[7]*Id.* at *3.

(1) owning property but failing to use it in furtherance of the charity's purposes; (2) limiting the use of the property only to members of the organization; and (3) distributing any income raised from the property to shareholders or other owners of the property.[8]

The plurality then concludes its opinion by reinforcing its holding that O.C.G.A. section 48-5-41(d)(2) "permits the securing of income by non-charitable activities if [the income is] used exclusively for the operation of the charitable institution."[9] Finally, the plurality also explicitly blesses the occasional rental of charitable property for unrelated private events, writing, "In light of the 2007 amendment to O.C.G.A. section 48-5-41(d)(2), any non-charitable activities, *such as party and rehearsal rentals*, which have the sole purpose of raising income to be utilized in furtherance of the organization's charitable purposes, now qualify as activities exclusively devoted to the institution's charitable pursuits."[10]

Accordingly, the plurality held that because the private events held at Nuci's Space were "activities exclusively devoted to" the foundation's charitable purposes and were not the primary purpose of the property, and because the other *York Rite* factors were met, the foundation was entitled to the exemption as an "institution of purely public charity" under O.C.G.A. section 48-5-41(a)(4).

Concurring Opinion of Justice Nahmias

In his concurrence, Justice Nahmias agrees that the foundation was entitled to the exemption, but argues that the plurality interprets the exemption too *narrowly* by imposing a primary purpose limitation that had not previously existed. The critical distinction between the conclusions reached by the plurality and the concurrence stems from Justice Nahmias's view that any activity that produces income is inherently "non-charitable."[11] Thus, according to Justice Nahmias, the suggestion by the plurality (as well as the dissent) that a charity may engage in activities to secure income that are "consistent with the charity's purpose" is a fallacy; to Justice Nahmias, either the legislature has authorized charities to use their properties to secure income or it hasn't. Justice Nahmias ultimately concurs with the plurality because he reads O.C.G.A. section 48-5-41(d)(2) to permit charities to use their properties for the purposes of securing income (almost without limitation), so long as such income is used in furtherance of the charity's purposes.

Like the plurality opinion, the concurrence also traces the history of the exemption, beginning with the 1878 statute that denied the exemption to any charity using its property "for the purposes of private or corporate profit or income." In 1946 the law was amended; that amendment "now authorized charities to use their property to produce income, with the important limitation that 'any income from such property is used exclusively for religious, educational and charitable purposes' . . . and for the purpose of maintaining or operating such institution."[12] However, according to Justice Nahmias, "under the 1946 law the tax exemption was denied where income production was clearly the primary purpose of the property."[13]

Justice Nahmias's next step breaks from the plurality; its opinion never clearly explains its interpretation of the different effects of the 2006 and 2007 amendments. He first explores the language of the 2006 amendment and concludes, "It is clear that the 2006 amendment and the referendum that allowed it to be enacted were meant to *expand* the tax exemption for a charity's property."[14] He further concludes that the 2006 amendment was intended to permit charities to use their properties for the purpose of securing income, with no limitation that the property could not be used "primarily" to secure income. That broadening of the amendment, he argues, benefited organizations like Goodwill and the Salvation Army, charitable organizations with properties on which securing income is the only activity.

Finally, Justice Nahmias explains his interpretation of section 48-5-41(d)(2) following the 2007 amendment. In his concurrence, he writes that "the only substantial change" wrought by that amendment was to limit the exemption to a building and "not more than 15 acres."[15] Although he does not purport to understand the reason for that additional limitation, he speculates that it was a response to a timber company's attempt to receive an exemption for approximately 67,000 acres of private timberland it had donated to its foundation.

Justice Nahmias summarizes his interpretation of the exemption by explaining why he disagrees with both the plurality and the dissent, both of which, he explains, erred by assuming that there is a distinction between charitable and non-charitable income-generating activity.[16] Instead, he contends, the 2006 amendment to O.C.G.A. section 48-5-41(d) was intended to permit charities to use their properties *in any manner* to secure income, with no loss

[8] *Id.* at *4-*5.
[9] *Id.* at *6.
[10] *Id.* at *5 (emphasis added).
[11] *Id.* at *7.
[12] *Id.* at *8.
[13] *Id.* at *10.
[14] *Id.* at *11 (emphasis in original).
[15] *Id.* at *12.
[16] *Id.* at *12.

of the exemption if that income-generating activity becomes the charity's "primary" use of the property.[17] ("The most conspicuous flaw is the plurality's contention that, to qualify for a tax exemption, a purely public charity's property still may not be used for the 'primary purpose' of raising income.") He notes that the plurality's view creates a practical problem, as judges will be asked to determine whether a charity is making enough charitable use of its property to avoid the conclusion that it is using its property primarily to secure income, and therefore lose its exemption.[18]

Ultimately, because Justice Nahmias agrees with the plurality that charities may use their properties to secure income under the exemption for "institutions of purely public charities," he held that the foundation was exempt.[19] ("In other words . . . any time the Justices in the plurality upheld a charity's tax exemption, I would as well, since I believe that the additional [primary purpose] requirement does not exist.") However, he makes clear that he believes the plurality's interpretation is too narrow, and he suggests that if the legislature intended for the exemption to be as broad as he interprets it, then it should amend the statute to "make its meaning crystal clear."[20]

Scope of the Exemption Following *Nuci Phillips*

Following the supreme court's initial opinion, there was uncertainty regarding the proper scope of the exemption for institutions of purely public charity, because it was unclear whether Justice Nahmias believed that the exemption should be construed more narrowly or more broadly than the plurality held. Now, however, because Justice Nahmias has filed a separate concurrence that would uphold an exemption "any time the Justices in the plurality upheld" an exemption, it is clear that under Georgia law, counties must apply the following rule — taken from the plurality's opinion — in ruling on an exemption for an institution of purely public charity:

> The General Assembly must have intended to allow those institutions that otherwise qualify as a purely public charity [under *York Rite*] to use their property to raise income from activities that are not necessarily charitable in nature so long as the "primary purpose" of the property was charitable and any "income is used exclusively for the operation of that charitable institution."[21]

Although the plurality did not broadly address the contours of this rule, it is obviously rooted in, as Justice Nahmias described, a distinction between charitable and non-charitable income-generating activities. Under the plurality's rule, it appears that a charity may engage in as much charitable income-generating activity as it likes. The most obvious example would be a Goodwill store; however, Georgia courts have long upheld charities' ability to charge fees to offset the costs of providing their charitable services, and the plurality's opinion does not indicate an intention to overturn this well-established rule.[22] However, although the line between charitable and non-charitable activities is a bit gray, the plurality opinion explicitly categorizes the foundation's party rentals as "non-charitable" uses.[23]

Thus, following the substituted opinion in *Nuci Phillips*, the contours of the exemption for "institutions of purely public charity" are fairly clear:

- The requirements of *York Rite* still apply.
- A charity may use its property for non-charitable purposes to secure income so long as those non-charitable uses do not become the "primary purpose" of the property (and so long as the income generated is used exclusively for the institution's charitable pursuits).
- A charity may use its property for charitable purposes to secure income without limitation.
- Rentals for private events, completely unrelated to the charity's purposes, are non-charitable uses. Therefore, charities should take care to ensure that such rentals do not become the primary use of their otherwise exempt properties.

Of course, if the *Nuci Phillips* holding does not comport with the legislature's intent in passing the 2006 and 2007 amendments, the legislature could further amend the statute, thus reopening the exemption to a new round of speculation and interpretation.

Commentary and Conclusion

Read together, the plurality and concurring opinions in the substituted *Nuci Phillips* decision provide a helpful set of guidelines for tax assessors and charities as they consider the application of the O.C.G.A. section 48-5-41(a)(4) exemption in future tax years. Yet there are some complaints that the

[17] *Id.* at *13.
[18] *Id.* at *15.
[19] *Id.* at *16.
[20] *Id.* at *7.
[21] *Nuci Phillips*, 2010 WL 5072111, at *3 (citing O.C.G.A. section 48-5-41(d)(1)-(2)).
[22] *See, e.g., Chatham County Bd. of Tax Assessors v. Southside Communities Fire Protection, Inc.*, 217 Ga. App. 361 (1995); *Elder v. Henrietta Egleston Hosp. for Children*, 205 Ga. 489 (1949) ("The fact that patients who are able to pay are charged for services rendered, according to their ability, does not alter its character as [an institution of purely public charity]").
[23] *Nuci Phillips*, 2010 WL 5072111, at *5.

plurality's "primary purpose" rule — which is not a bright-line determination — results in a subjective process that leaves too much discretion to the county boards to decide whether a charity is using its property for charitable purposes often enough to qualify for the exemption.

I am perplexed by the criticism that the *Nuci Phillips* decision inserts too much discretion into the determination process. Any case involving property tax exemptions necessarily involves an inquiry into the facts and circumstances regarding the use of the property. Because of the fact-intensive nature of the inquiry, these exemption decisions have always been subjective, and county boards have always had some discretion to determine whether a charity is entitled to a property tax exemption. There was no reason to believe that *Nuci Phillips* would change that decision-making process.

However, what the *Nuci Phillips* decision *does* accomplish for charities is extremely helpful: It clarifies the criteria that are still in play (that is, the three *York Rite* requirements and the requirement that all income must be used for the charitable purposes of the institution), while it also removes a major item from the list of reasons that counties used to deny exemptions to charities in prior years (that is, that a charity occasionally uses its property for non-charitable purposes to secure income). Moreover, the decision includes a specific application of those legal standards to the Nuci Phillips Foundation's facts, which provides a valuable tool for both organizations and assessors in making future determinations.

Accordingly, although the *Nuci Phillips* decision is not the *best* possible outcome that charities could have hoped for (that would have been a majority opinion adopting Justice Nahmias's interpretation), it is close. And charities should especially welcome the extensive reasoning set forth in the separate plurality and concurring opinions, given that another possible outcome of the case was a terse opinion holding that the Nuci Phillips Foundation had not satisfied one of the requirements of *York Rite* and was therefore not entitled to the exemption.

In conclusion, the plurality and concurring opinions of *Nuci Phillips*, taken together, provide a helpful set of guideposts that *could* provide a viable framework for applying the exemption for institutions of purely public charity for years to come. The only question that remains is whether, now that the supreme court has provided this guidance, the legislature will choose to amend the statute again, thereby opening up a new round of interpretation.☆