

No. 10-0053

IN THE SUPREME COURT OF TEXAS

PAUL E. NUNU,

Petitioner

vs.

***HARRIS COUNTY APPRAISAL DISTRICT,
HARRIS COUNTY APPRAISAL REVIEW BOARD,***

Respondents

MOTION FOR REHEARING PETITION FOR REVIEW

**On Petition for Review from the Fourteenth Court of Appeals
at Houston, Texas (Cause No. 14-08-00528CV)**

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ISSUE PRESENTED

If Tex. Const. Art. 16 Sec 51 ¹ and Tex. Prop. Code § 41.002(a) expressly grant a homestead claimant the right to a business and residential use of the homestead, and Texas Constitution Art. 8 Sec. 1-b. expressly grants the unconditional right to a homestead tax exemption:

- a) Did the Court of Appeals violate those constitutional rights by declaring as a matter of law that ***business*** use of the homestead is ***“incompatible” with residential use***, justifying partial revocation of the residential homestead tax exemption under Texas Tax Code §11.13(k)?

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Section 51 - AMOUNT OF HOMESTEAD; USES

The homestead, not in a town or city, shall consist of not more than two hundred acres of land, which may be in one or more parcels, with the improvements thereon; the homestead in a city, town or village, shall consist of lot or contiguous lots amounting to not more than 10 acres of land, together with any improvements on the land; provided, **that the homestead in a city, town or village shall be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business, of the homestead claimant, whether a single adult person, or the head of a family**; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired; provided further that a release or refinance of an existing lien against a homestead as to a part of the homestead does not create an additional burden on the part of the homestead property that is unreleased or subject to the refinance, and a new lien is not invalid only for that reason.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Paul E. Nunu, (“Petitioner”) petitions this Honorable Supreme Court as the ultimate guardians of the Texas Constitution to grant rehearing and thereafter to reverse the Court of Appeal’s opinion of August 27, 2009, and to affirm the District Court’s judgment.

I. The Denial of this Petition is Bad News for the People of Texas.

This case of first impression presents an important, recurring issue of property tax law and the Court of Appeals’ interpretation of this statute directly conflicts with the homestead rights granted by the Texas Constitution. This case has far reaching implications and sets precedent that will directly and adversely affect many Texas homeowners.

The denial of this petition gives precedential value to the Court of Appeals declaration that a homeowner’s business use of a portion of the residence is as a matter of law “*incompatible with the owner’s residential use*”. It is bad news for all Texas homeowners and the millions of Mom and Pop small business owners who use a portion of their home for business purposes. The denial of this petition is the equivalent of a judicially imposed tax increase and will have a chilling effect on many home based enterprises.

The denial of this petition is bad news for the protections of Texas Constitution Art. 16 Sec 51 and the unconditional right to a homestead tax exemption granted by Texas Constitution Art. 8 Sec. 1-b. The constitutional rights granted therein have just been legally neutered by the Court of Appeals.

The denial of this petition is however good news for proponents of big government and overzealous appraisal districts like Harris County because the Court of Appeals decision implicitly creates a road map for an end run around the statutory 10% cap on valuation increases of the homestead.

More importantly, the Court of Appeals decision sets precedent for incorrectly using “*harmoniously*” as the legal standard for finding incompatible use justifying revocation of the homestead tax exemption.² No other Texas court has used this standard. If this Court acquiesces *harmoniously* as the legal standard for *incompatibility*, then it will create confusion in all types of litigation for years to come. Subjective opinions about what is or is not *harmonious* should not be admissible as evidence under *Daubert* and its progeny, but now the Court of Appeals’ subjective opinions about what is or is not *harmonious* sets the legal standard in ad valorem tax cases.

The “*harmonious*” legal standard will empower and embolden appraisal districts all over the state to revoke homestead exemptions for homeowners having any type of home office as a means to exceed the 10% valuation cap. This means that an assumed name filing or professional licensing combined with a computer in the study or extra bedroom would justify partial revocation of the homestead exemption and valuation increases greater than 10%. If the Legislature had

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“Incompatible” refers to an incapability of existing together without discord or disharmony. “Incompatible” may also refer to a situation involving mutually inconsistent demands. In the context of physical space, therefore, incompatible would refer to uses that could not occur ***harmoniously in the same space, uses such as intimate family conversations and client conferences or loud children’s play and legal study.*** Court of Appeals opinion at p. 6.

intended *harmonious* to be the legal standard for *incompatible*, it would have clearly said so, and it didn't. No other Texas court has so held and only this Court can remedy this error.

If uncorrected, the Court of Appeals decision will be carried to its logical next step, revocation of homestead exemptions for other "business use". Arguably frequent entertaining or business meetings at one's residence could be declared non-harmonious and thus incompatible with residential use. Parking a business vehicle could also be non-harmonious, justifying revocation of the exemption. The non-harmonious examples are limited only by the imagination of the tax collector.

The erroneous decision grants license to a whole new intrusion by the government into the homes of every citizen just to determine if any lawful business activities were being conducted and homestead exemptions being "wrongfully" claimed. If uncorrected, this precedent will lead to the creation of a whole new branch of tax collectors to be known as the "exemption police" whose sole purpose will be to check for lawful business activity conducted in residential homesteads. The exemption police will violate the privacy of every law abiding citizen claiming homestead exemption in Texas.

Until now, no Texas court supported the fantasy of the tax assessor that a homeowners business use of a portion of his residence is "*incompatible*" with residential use negating exemption. However, today this fantasy has been given new life by the denial of this petition. If rehearing is denied the Court of Appeals decision will be used against small business owners throughout Texas because correction by this Court has been expressly rejected.

ARGUMENT AND AUTHORITIES

The decision of the Court of Appeals is unconstitutional, erroneously decided, and must be corrected for a number of public policy considerations.

First, the Court of Appeals's opinion failed to consider the substantive constitutional rights granted in Texas Constitution Art. 16 Sec 51 and Art. 8 Sec. 1-b when it declared incompatible homestead use.

Second, the Court of Appeals completely ignored the plain language of the statute when it declared "*We conclude, as did HCAD and the Review Board, that twelve percent of the property is used primarily for purposes that are incompatible with [Nunu's] residential use"³ when it should have declared that *twelve percent of the structure is incompatible*, following the plain language of the statute.⁴ This mis-reading of the statute is extremely prejudicial to the rights of homeowners as well as the purposes and application of this statute.*

Thirdly, under the principles of statutory construction, business use of the homestead is not *incompatible* with residential use as a matter of law because the Texas Constitution Art. 16 Sec 51 and homestead statute Tex. Prop. Code

³ Court of Appeals opinion at p. 1

⁴ Tax Code §11.13(k) provides: "*A qualified residential structure does not lose its character as a residence homestead if a portion of the structure **is rented to another or is used primarily for other purposes that are incompatible with the owner's residential use of the structure.** However, the amount of any residence homestead exemption does not apply to the value of that portion of the structure that is used **primarily for purposes that are incompatible with the owner's residential use.***"

§41.002(a) expressly make compatible a business and residential use of the family homestead.

The Court of Appeals's finding of incompatible use is based upon purely subjective opinion and the personal preferences of the Court, not the record or agreed facts of the case:

*"In the present case, Nunu agreed he "sometimes" held conferences or depositions in the dining room and "sometimes" interviewed clients in the sitting room. **In the United States, the home is generally associated with the freedom to engage in private conduct in which one would not engage before strangers or business acquaintances. It is reasonable to conclude that, when Nunu was using the dining room and sitting room to accommodate business acquaintances or strangers to the family, such use was incompatible with residential use.**" . . .*⁵

TEXANS HAVE A CONSTITUTIONAL RIGHT TO HOMESTEAD EXEMPTION

The *unconditional* right to a homestead tax exemption is expressly granted by Texas Constitution Art. 8 Sec. 1-b. Nothing contained in Art. 8 Sec. 1-b prohibits business use of the residence homestead or suggests that incompatible uses justify revocation of the exemption.

TEXANS HAVE A CONSTITUTIONAL RIGHT TO BUSINESS USE OF THE HOMESTEAD

The Court of Appeals's decision directly conflicts with the substantive constitutional rights granted in Texas Constitution Art. 16 Sec 51: "**provided that**

⁵ Court of Appeals opinion at p. 6-7

the homestead in a city, town or village shall be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business, . . . when it declared “*We conclude, as did HCAD and the Review Board, that twelve percent of the property is “used primarily for purposes that are incompatible with [Nunu’s] residential use.”*”⁶ The constitutional right to business use of the homestead could not be more clear.

Texas Property Code §41.002(a) expressly makes compatible a business and residential homestead use. Texas Property Code §41.002(a) provides that “*if used for the purposes of an urban home or as both an urban home and a place to exercise a calling or business, the homestead of a family . . . shall consist of . . .*” By this language, “*if used . . . as both an urban home and a place to exercise a calling or business, the homestead of a family*” the Property Code specifically authorizes Petitioner’s business use as a compatible family homestead use. When the Constitution and this statute are read together, Petitioner’s business use is expressly protected and cannot be an incompatible use as a matter of black letter law.

Statutory Construction

This case presents a question of first impression for the interpretation of the provisions of Texas Tax Code §11.13(k) and turns on this Court’s construction of “*incompatible*”. The Court of Appeals stated that “*“Incompatible” refers to an*

⁶ Court of Appeals opinion at p. 1

*incapability of existing together without discord or disharmony. “Incompatible” may also refer to a situation involving mutually inconsistent demands. In the context of physical space, therefore, incompatible would refer to uses that could not occur harmoniously in the same space, uses such as intimate family conversations and client conferences or loud children’s play and legal study.”*⁷

The Property Tax Code does not define “*incompatible*” and the word is subject to more than one definition. It may very reasonably be construed to mean an *incompatible* use that interferes with the owners use, i.e. such as renting it out to another. Incompatible could also apply to the acquisition of a new homestead, i.e. a fact that is incompatible with a homestead claim.

The word “*incompatible*” is an adjective modifying “owner” and “*is rented to another*”, reflects more on the owner's right to present possession, i.e. to use, than it does to the term residential. This language should be applicable to situations such as a homestead that is temporarily rented to another, or contains separately secured areas of the structure such as a duplex or apartment project and rented to another. In those situations, the property should still qualify as homestead because it is owned and occupied as a principal residence, but the segregated portion of the structure that is under a superior right of present possession by another would not qualify for the owners’ homestead tax exemption.

⁷ Court of Appeals opinion at p. 6

This Court should declare that the correct legal standard for “*incompatible*” use should be “*mutually exclusive*” use. This interpretation not only honors the plain language of the statute, but furthers the constitutional and legislative intent. It is also consistent with the common law “*incompatibility doctrine*” adopted en banc in *State vs Hill* 887 S.W.2d 921 (Tex. Crim. App 1994).

CONCLUSION AND PRAYER

The Legislatures’ failure to define “*incompatible*” as used in Texas Tax Code §11.13(k) renders the statute vague and ambiguous because it is subject to more than one interpretation. The Court of Appeals interpretation does violence to the protected constitutional rights and is contrary to the legislative intent and exemption purpose. It is illogical to conclude that the Legislature and the Texas Constitution would expressly protect a business use of the residence homestead in the Property Code only to subject it to a declaration that the same business use is incompatible with residential use in the Tax Code. This is a mis-reading of the statute by the Court of Appeals and must be corrected.

This Courts highest duty should be to “preserve, protect and defend” the Texas Constitution. Today the people of Texas need this Honorable Supreme Court to preserve, protect and defend their constitutional rights to business use the homestead from an aberrant Court of Appeals and an overzealous appraisal district, and all others like them similarly situated throughout this state.

WHEREFORE, PREMISES CONSIDERED Petitioner moves this Honorable Supreme Court upon rehearing to grant the petition and reverse the Court of Appeals's decision of August 27, 2009, and to affirm the District Court's judgment as correct in all respects, and for such other and further relief to which he is entitled.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

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