Coates' Canons Blog: Construction in Progress and Property Tax Exemptions

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If property is under construction, is it being "used" by its owner? That is the arcane but important question that the North Carolina Court of Appeals recently addressed in the *Highwater Solar*appeal concerning the 80% property tax exclusion available for solar electricity equipment in GS 105-275(45). The court's answer was yes, construction counts as a qualifying use for the exclusion.

This decision might have big-time ramifications across the state, for two reasons. First, most exemptions require that an owner use property for an exempt purpose. Second, local tax officials have long assumed that property under construction was not being used for an exempt purpose. If the *Highwater Solar* decision forces counties to change this practice for all exemptions and exclusions with a use requirement, many more properties will qualify for special property tax treatment across the state in coming years.

Before I tackle the potential ramifications of the case, here's a quick primer on the use requirement.

Most North Carolina property tax exemptions and exclusions contain both ownership and use requirements . It's not enough that property is owned by a charity or a private college or a mosque in order for that property to receive a charitable or educational or religious exemption. That property must also be used by those owners for a charitable or educational or religious purpose.

There are few exceptions to the use requirement, the biggest of them being the government property exemption in GS 105-278.1. That exemption applies to all government property regardless of how it is used. Government-owned property that is vacant or that is leased to commercial entities is still exempt even though it might not be used for governmental purposes.

But that's the exception, not the rule. Generally, vacant property or property leased to another user cannot qualify for the major (religious, educational, and charitable) exemptions.

The solar electricity exclusion at issue in the *Highwater Solar* appeal follows the general rule and has a use requirement. G.S. 105-275(45) states that its 80% exclusion applies to "equipment *used* directly and exclusively for the conversion of solar energy to electricity." (emphasis added)

Highwater Solar completed its 20-acre solar farm installation in Wayne County (pictured above) in mid-2016. But eligibility for exemptions and exclusions is determined as of January 1, the listing date. Because Highwater Solar's

equipment was not converting solar energy to electricity as of January 1, 2016, Wayne County denied the company's request for a 2016 exclusion. In other words, Wayne County decided that solar electricity equipment that was under construction did not satisfy the use requirement in GS 105-275(45).

It is fair to say that Wayne County's decision reflects the majority view across North Carolina on the question of whether construction in progress counts as a qualifying use for property tax exemptions. In fact, eight other counties (Alamance, Bertie, Bladen, Greene, Harnett, Robeson, Rockingham, and Vance) made the same decision as did Wayne County on 2016 exclusion applications for solar farms in their jurisdictions that were under construction as of January 1, 2016.

All nine of these rejected exclusion applications were appealed and consolidated into one case before the Property Tax Commission, which issued a split-decision in favor of the solar electricity companies. The counties then appealed to the Court of Appeals, which in March 2019 affirmed the Property Tax Commission decision. In April 2019, the North Carolina Supreme Court denied the counties' request for a review, which means the Court of Appeals decision granting the exclusions is final.

The Court of Appeals based its decision primarily on a 60-year old North Carolina Supreme Court case, *Seminary, Inc. v. Wake County*, 251 N.C. 775 (1960), in which the Supreme Court concluded that in-progress construction of a seminary cafeteria qualified as an educational use for purposes of a property tax exemption.

Following the *Seminary* precedent, the Court of Appeals concluded that property on which solar electricity equipment was being installed as of the listing date was being used as required by G.S. 105-275(45) and therefore satisfied the requirements for the 80% exclusion.

Was this the right result?

Given the controlling 1960 Supreme Court precedent from *Seminary,* it's hard to say that the *Highwater Solar* is incorrect. But just four years ago the Court of Appeals reached the opposite decision in In re: Vienna Baptist Church, a case involving a partially completed church building. The court's decision in that case to deny an exemption for construction in progress led the General Assembly to amend G.S. 105-278.3, the religious exemption statute, to expressly cover land and buildings under construction.

The General Assembly's decision to amend one exemption statute—but no others—to expressly cover construction in progress was a bit curious. Did it mean that those other, unchanged exemption statutes still do not cover construction in progress? Because if the General Assembly really wanted *all* exemptions to cover construction in progress, then wouldn't they have added that language to all exemptions and not just to the religious exemption?

More support for the argument that exemptions should cover construction in progress only when the statute in question does so expressly is found in G.S. 105-275(8). The four pollution-control/recycling exclusions in that provision all expressly cover real property that is under construction and personal property that is being installed. If the General Assembly wanted all exclusions to cover construction in progress, as *Seminary* suggests, why would it feel the need to add language expressly covering construction in progress to G.S. 105-275(8)? The fact that construction-in-progress language exists in some exclusions but not all seems to imply that the General Assembly wanted only some exclusions and not all to cover construction in progress.

Then again, the *Vienna Baptist* decision ignored entirely the *Seminary* precedent that concluded construction in progress did qualify for a property tax exemption. Maybe *Vienna Baptist* was just plain wrong, and the General Assembly wanted to correct that error but didn't feel the need to amend any other exemption statutes because the *Seminary* case had already held that they covered construction in progress.

The bottom line is that we have two recent inconsistent Court of Appeals cases, one old Supreme Court case, and one limited statutory amendment on the issue of construction in progress.

Adding to the confusion, the *Highwater Solar* case was an unpublished opinion. As my SOG colleague Jonathan Holbrook has written here, the Court of Appeals is permitted to designate an opinion as unpublished when "the appeal involves no new legal principles" and "would have no value as a precedent."

It seems odd for the Court of Appeals to make this determination for the *Highwater Solar* opinion when there was a contradictory Court of Appeals opinion on essentially the same issue just a few years ago in *Vienna Baptist*. Does this mean that the Court of Appeals thought the conclusion in *Highwater Solar* did not create new law because the issue had long been settled by the 1960 Supreme Court decision in *Seminary?* Or did the Court of Appeals not want its ruling on the solar electricity exclusion to be used as precedent for other exemptions and exclusions? We'll never know, because the Court of Appeals does not offer explanations for why it chooses to label opinions as unpublished.

How should tax officials interpret this complicated legal tale?

The one clear-cut conclusion we can draw from the *Highwater Solar* case is that the solar electricity exclusion in G.S. 105-275(45) now covers equipment that is under construction as of the listing date. Going forward, I think it would be wise for all counties, not just the nine counties involved in this appeal, to approve exclusion applications for solar electricity farms that are under construction as of January 1.

Does that mean that counties should give refunds under G.S. 105-381 to taxpayers who were denied G.S. 105-275(45) exclusions for solar farms under construction in prior years? I don't think so. Those taxpayers waived their right to appeal the denial of their applications by failing to pursue appeals to the county boards of equalization and review and beyond. The 1997 *Ammons v. Wake County* case stands for the proposition that a legal determination in a subsequent year that an exemption application decision from a prior year was incorrect does not justify a refund under G.S. 105-381.

But the $64,000 question is this: Does the *Highwater* Solar decision mean that *all* property tax exemptions and exclusions now cover construction in progress?

I think the answer is yes. If construction in progress constitutes use under the solar electricity exclusion, it seems likely that construction in progress would also constitute use for other exemptions or exclusions. Remember, we already have *Seminary*, the sixty-year-old Supreme Court opinion that—although ignored by many counties in practice and by the Court of Appeals in the *Vienna Baptist* case—reached the same conclusion under the education exemption as the *Highwater Solar* opinion did under the solar electricity exclusion. *Seminary* remains controlling law unless and until the Supreme Court revisits the issue.

The best approach for all counties is to adopt an expansive interpretation of the *Highwater Solar* case and conclude that the use requirement for *any* exemption or exclusion is satisfied by construction in progress. Unless, of course, if the statute in question contains language that explicitly excludes construction in progress. Assuming that is not the case, if a qualifying taxpayer owns land on which it has begun construction as of January 1, then the county should approve an exemption application for that land and that partially completed construction for the coming tax year.

Links

- law.justia.com/cases/north-carolina/court-of-appeals/2018/18-396.html
- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_105/GS_105-275.pdf
- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_105/GS_105-278.1.pdf
- casetext.com/case/seminary-inc-v-wake-county
- appellate.nccourts.org/opinions/?c=2&pdf=32730
- www.ncleg.net/Sessions/2015/Bills/House/PDF/H229v5.pdf
- nccriminallaw.sog.unc.edu/unpublished-cases-whats-the-law/
- caselaw.findlaw.com/nc-court-of-appeals/1235512.html