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Supreme Court of Texas.  
AHF-Arbors at Huntsville I LLC, et al.  
v.  
Walker County Appraisal District.  
No. 10-0683.

December 6, 2011.

Appearances:

Connor G. Sheehan of Dunn Sheehan LLP, for Petitioners.

James R. Evans, Jr. of Hargrove & Evans, LLP, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Be seated, please. The Court is ready to hear argument in 10-0683, consolidated for argument with 10-0714, AHF-Arbors v. Walker County Appraisal District.

MARSHAL: May it please the Court, Mr. Sheehan will present arguments for the Petitioners. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF CONNOR G. SHEEHAN ON BEHALF OF THE PETITIONER

ATTORNEY CONNOR G. SHEEHAN: May it please the Court, this appeal concerns the tax exempt status for the 420-unit low-to-moderate income apartment complex located in Walker County, Texas. Arbors, the record titleholder to the property, applied for a Texas Tax Code Section 11.182 tax exemption for the tax years 2003 and beyond. The Walker County Appraisal District denied Arbors application for tax exemption and that denial was ultimately appealed to this Court. Now, Arbors contends that it's entitled to the tax exemption it seeks upon two distinct grounds. The first is that Arbors contends that the property is tax exempt because it is equitably owned by Arbors' parent company, Atlantic Housing Foundation and Atlantic Housing Foundation is a certified 501(c)(3) organization and it's also a registered and certified community housing development organization with this state.

JUSTICE NATHAN L. HECHT: Is it still in bankruptcy?

ATTORNEY CONNOR G. SHEEHAN: I'm sorry, Your Honor?

JUSTICE NATHAN L. HECHT: It's still in bankruptcy.

ATTORNEY CONNOR G. SHEEHAN: I don't believe it is in bankruptcy, Your Honor.

JUSTICE NATHAN L. HECHT: It has been, right, no?

ATTORNEY CONNOR G. SHEEHAN: I don't believe those are the facts in our record, Your Honor. I may be mistaken, but I do not believe it's currently in bankruptcy.

JUSTICE NATHAN L. HECHT: This is American Housing Foundation?

ATTORNEY CONNOR G. SHEEHAN: Atlantic Housing Foundation, Your Honor. If I said American Housing Foundation, I meant to say Atlantic Housing Foundation.

JUSTICE NATHAN L. HECHT: Atlantic. And so the case that we have abated here is still waiting some completion of that bankruptcy.

ATTORNEY CONNOR G. SHEEHAN: That's right, Your Honor. I believe that the Court is referring to the TRQ case and that case is on very similar facts to the instant case here because it dealt squarely with the equitable ownership issue and if you recall, that case came from the First Court of Appeals and the First Court of Appeals held that because the equitable loaner was a certified, tax exempt entity and could compel legal title to the property held by the record owner that the property was, in fact, tax exempt. That was the holding of the First Court of Appeals and that was the issue that was presented to the Court. However, I think it's important to note that our case has even better facts, I believe, for the Court to rule on the equitable ownership position here because TRQ involved a somewhat complex ownership structure. In that case, the property, the record owner was a limited partnership. There was an LLC that on a limited partnership and then there was the ultimate charitable parent who owed the LLC who owned the limited partnership. Here, we don't have that multi-tier structure. It's a simple two-tiered structure with a specific-purpose entity, which is Arbors LLC who's the record titleholder to the property and its sole member, its entire owner is Atlantic Housing Foundation, who reserves the right to dissolve Arbors at any time with the stroke of pen and take title to all of Arbors' assets and so while we believe that had the court had the opportunity to hear the TRQ case, we would offer that we would hope the Court would rule that equitable ownership is accepted, that's an accepted definition under the statute. We think that in our case, the relationship between the two entities is even more clear and direct because it's not an intermediary entity.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let's make sure you get your two basic reasons for the property's exemption. You've already expressed one, have you another?

ATTORNEY CONNOR G. SHEEHAN: Thank you, Justice. The second prong is the second reason why we believe that tax exemption should be afforded to Arbors is because we contend that Arbors independence satisfies the statute independent of Atlantic in that we presented at the trial court summary judgment evidence sufficient for the court to determine that even aside from Atlantic, Arbors complied to the terms of the statute.

JUSTICE DEBRA H. LEHRMANN: Is it making a profit?

ATTORNEY CONNOR G. SHEEHAN: No, it is not. The articles of incorporation specifically state that it is a not-for-profit entity and that all of the profits from Arbors go to Atlantic and Atlantic has a 501(c)(3) has to comply with those various regulations and distribute its profits and actually doesn't retain profits. It pays salaries, reasonable salaries and things of that nature so, no, the answer to your question is no, it does not and that is an important distinction because that is why this case is also separate from the 11.182 cases, such as the Cameron Village case and the Brazos County case is that this, in no way, was owned by a for-profit limited partnership. It was owned by two nonprofits.

JUSTICE PAUL W. GREEN: I think there's some dispute or question about whether an audit was done and properly delivered to the authority. You say you can independently support this contention. Was that all complied with?

ATTORNEY CONNOR G. SHEEHAN: Yes, Your Honor, that is part of Walker County's basis. Their part of their argument in this court. Specifically, what they're saying is that the Court of Appeals held that there was no evidence of delivery of an audit to the Texas Department of Housing and Community Affairs. Now that is one prong of the statute. The statute is multi-prong and that Section 11.182(g) requires three things. It requires first that an audit be created and the record's clear that an audit was created in this case for the property. It requires that an audit be delivered to the chief appraiser for Walker County. It's beyond dispute that that happened as well. Where the dispute lies and where the Court of Appeals hung its opinion is that there's no, in a Court of Appeals under a no-evidence review, it did not believe that there was sufficient evidence to overcome a no-evidence standard of delivery of that audit to the TDHCA. The TDHCA is not a party to this case, Your Honor. I think the issue that we wanted to bring before the Court today, I think it is of significant importance to the state and that is the equitable ownership issue and that is because the term own is not defined in the statute.

JUSTICE DEBRA H. LEHRMANN: Would your view somehow allow abuses of the tax exemption and what safeguards are there to prevent that from happening?

ATTORNEY CONNOR G. SHEEHAN: Your Honor, I do not think it would allowing that the term, allowing the definition of own to include both record titleholders and equitable titleholders as initial matters, a threshold matter, I think that the statute contemplates that own can mean both of those things as this Court has held in the past and own is subject to various meanings.

JUSTICE DEBRA H. LEHRMANN: What about if its subsidiary is blatantly doing something that's non-charitable?

ATTORNEY CONNOR G. SHEEHAN: And that is, Your Honor, that is a good point. That is why that the statute has multiple prongs. It has requirements that it needs to meet. You have to certify when you supply your tax application that you're complying with the terms of the statute.

JUSTICE DON R. WILLETT: Well, for example, could a CHDO own a for-profit company?

ATTORNEY CONNOR G. SHEEHAN: No, Your Honor.

JUSTICE DON R. WILLETT: That's impermissible?

ATTORNEY CONNOR G. SHEEHAN: No.

JUSTICE DON R. WILLETT: Okay, so there's no risk of a for-profit company qualifying for the exemption based on the nonprofit status of a parent?

ATTORNEY CONNOR G. SHEEHAN: I don't believe so, Your Honor, but what you're going to see is that that situation can arise, not your exact situation, but where you say a mix of a nonprofit and for-profit entities can arise under that subsection (e) of the statute, that 11.182(e). Here we don't have that situation because we have a company that does not accrue profits that's a record titleholder and then the certified nonprofit who is an owner, but that is a valid concern and that is what the legislature attempted to curtail by the 2001 amendments by adding section (e). It allowed nonprofit or allowed for-profit and limited partnerships, because limited partnerships have to be for profit under the Partnership Act, to basically continue to be involved with Section 11.182 and continue to invest in the provision of affordable housing, but it tightened the statute down a little bit. It said in order for that to happen, if a limited partnership is going to be involved in this situation, the CHDO has to own 100% of the general partner of the entity that is the record titleholder of the property and that's because at core

what we're worried about here, Your Honor, is that the property is managed and ran in accordance with the purposes of this statute and that a certain amount of the tax exemption is reinvested into the community and when you have like there are some other cases floating around out there and the Court of Appeals where the CHDO owned 1/1000th of a percent of the general partner, I think there's a concern that the for-profit entities may have more control over the property than the true CHDO who's answerable to the TDHCA, who may be answerable to the federal government or 501(c)(3).

JUSTICE EVA M. GUZMAN: How does a CHDO establish that it's organized as a CHDO versus merely indicating an intent to operate as such?

ATTORNEY CONNOR G. SHEEHAN: Well, Your Honor, the statute is not entirely clear on that point. It does speak in terms of must be organized as a CHDO and so we would submit that that language can appear in the articles of incorporation, the company's regulations. Now here, in order to be certified as a CHDO, you need to apply to the Texas Department House of Community Affairs and just like Atlantic did in this case and received a certification establishing it as a CHDO. So the statute is not entirely clear on that point, but I think at core, again, it brings us back to how are these funds being used. Is the property truly offering to rent and renting to low-and-moderate income people because what the state wants to avoid is having to assume this task itself. This is a function that investors or charitable organizations provide to low-and-moderate income Texans and I would submit that if the Court narrowly constricts this statute to disallow this tiered ownership that's going on all across the state right now, it risks removing that exemption, which in our case is multimillion dollars, from these specific entities and their parent companies and the result is that some of these properties may go into foreclosure. There are going to be significant operational concerns and what can end up happening is these properties are foreclosed, then that burden can fall back to the state. Alternatively, if there's no incentive to realize if that tax credit is not available anymore to that tiered-structure entity, it doesn't seem to me that they have any choice but to raise the rates to make up for that loss in profit margin, bringing them outside the scope of that low-to-moderate income housing window.

JUSTICE DEBRA H. LEHRMANN: Aren't we supposed to construe tax exemptions narrowly?

ATTORNEY CONNOR G. SHEEHAN: Yes, Your Honor, that is a fundamental tenant of tax law. However, and this is the fallacy in Walker County's argument is that that is step one. That's the spectacle through which the court views the tax exemption and that's the lens through which it views legislative intent. So the inquiry does not stop at strict construction and that's the issue that I saw in the Brazos County opinion that's the issue I saw it in the Cameron Village opinion is that those courts assumed that own is restricted to legal titleholder, but that's not necessarily the case and, in fact, it's not the case. The Court needs to go beyond that and look at what the legislative purpose is and the legislative purpose, the sole legislative purpose of 11.182 is to provide and further the availability of affordable housing. That does not happen if it's restricted to legal titleholders because it's undercutting these charitable organizations' ability to go out and purchase property to invest in property.

JUSTICE NATHAN L. HECHT: How would you fair under 11.1825?

ATTORNEY CONNOR G. SHEEHAN: It's a different statute, Your Honor, obviously. It is a much more complex and rigorous statute. Only about half of the tax exemptions would be available, which I would submit would have the same effect, which would be either a raise in rents, potential risk for foreclosure and I do think that there is a concern and why I think this case is so important is that own is not defined under 11.1825 either and so what I--

JUSTICE NATHAN L. HECHT: But under (c), it kind of looks like more direct ownership than equitable ownership because it talks in terms of a parent.

ATTORNEY CONNOR G. SHEEHAN: I agree with you, Your Honor, and I think not only does 11.1825 seem to allow for tiered ownership, there is no doubt that 11.182 also does by way of (e) by allowing the limited part-

nership structure to come into play and that's a concern. What I'm concerned about and what the property owners are concerned about is that not only will if a narrow construction is accepted here, not just a narrow construction but only the right of a legal titleholder to possess the property. If that's how the court restricts the statute here, I think that the appraisal districts across the state are going to affect essentially a land grab and they're going to attack any application going forward where there is a tiered ownership structure essentially. I think it gives rise to multiple problems.

CHIEF JUSTICE WALLACE B. JEFFERSON: What's the purpose for delivering the audit to the Housing Department?

ATTORNEY CONNOR G. SHEEHAN: Well, Your Honor, Walker, I think we need to look at it in the overall framework of the importance of the audit, all right? Walker County, the appraisal district is the sole entity who's responsible for determining whether or not the property owner gets the exemption. Now can the TDHCA have some input? Sure, but Walker County makes that decision on the application. So essentially what's happening here is Walker County is asserting another entity's position. Now the TDHCA has multiple responsibilities, one of which is a reporting requirement. It will take these audits and it will report to the government to talk to the governor to say to advise them how these tax credits are being used essentially. It also can accept people as being CHDOs, the housing development organizations and it's also on some level responsible for distributing federal funds in the National Affordable Housing Act. Now, none of that applies to this case because Atlantic and Arbors, we're not seeking to gain the benefit of federal funds. They were just seeking to get the tax credits that they applied for at the time and at the time the statute was in place to promote the availability of affordable housing. That's what they were seeking.

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes, Counselor, are there any further questions? Thank you, Mr. Sheehan.

ATTORNEY CONNOR G. SHEEHAN: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court will now hear from the Respondent.

MARSHAL: May it please the Court, Mr. Evans will present argument for Respondents.

ORAL ARGUMENT OF JAMES R. EVANS, JR., ON BEHALF OF THE RESPONDENT

ATTORNEY JAMES R. EVANS, JR.: May it please the Court, my name is Jim Evans of Hargrove & Evans for the Walker County Appraisal District. The Court of Appeals in this case, the Tenth Court, did not address at all in its opinion the issue of tiered ownership or whether whatever status Atlantic has imputes it to somebody else. The only thing the Tenth Court addressed was whether an audit was furnished to the Texas Department of Housing and Community Affairs and that section, that requirement is found in Section 11.182(g) of the Texas Tax Code and there are three or four different requirements. One is that an audit must be furnished and that section says to receive an exemption, to receive an exemption, an audit must be prepared which details the sources and uses of funds. Furthermore, the audit must be delivered to the chief appraiser and must be delivered to the Texas Department of Housing and Community Affairs.

JUSTICE EVA M. GUZMAN: The two entities communicate about the contents of the audit or what is, I guess, to back with the same question, what is the underlying purpose of doing that?

ATTORNEY JAMES R. EVANS, JR.: They don't have to communicate. The bill analysis in 2001, which is the year that that section, subsection (g) was enacted, says this about the enactment of (g). That there were concerns that the owners of CHDOs were not taking the money they save in the tax exemption and using that money to fulfill the purposes required in another section, which is to make expenditures on social, educational and other programs for the benefit of the members. The legislature's concern was this isn't happening so we're going to

have to instill, enact audit requirements and so I think that while there's no requirement to communicate between the two entities, TDLR's participation in the audit process is critical. Now while the chief appraiser is responsible for--

JUSTICE EVA M. GUZMAN: Well how is it critical to the determination of tax exempt status because that's done at the chief appraiser's office, correct?

ATTORNEY JAMES R. EVANS, JR.: The chief appraiser absolutely is the final arbiter at that level, but

TDHCA has staff. It has trained staff. It has resources. It has accounting personnel who can look at these audits and read what the auditor says about where the income sources come from and where the income sources go. Chief appraisers generally are not CPAs. They're--

JUSTICE EVA M. GUZMAN: They going to do, call you, has that ever happened where they call you and say, wait, stop the presses, don't make an assumption because we've noticed an irregularity?

ATTORNEY JAMES R. EVANS, JR.: Where TDHCA calls?

JUSTICE EVA M. GUZMAN: Yes.

ATTORNEY JAMES R. EVANS, JR.: I've never experienced that. I can't speak for every appraisal district in the state though. It might have happened, but I do think that there's a public policy reason for that and I don't think the legislature would have included TDHCA if there wasn't a legitimate reason for that and the legitimate reason for imposing that requirement is to make sure that these entities, these apartment projects are spending the tax savings the way they're required to under 11.182 and in this case, for example, Arbors at Huntsville I and II are really upscale apartments in Huntsville. They were built for Sam Houston State University students. There's no requirement in 11.182 that rents be low or that rents be at a certain level unlike Section 11.1825, Justice Hecht brought up. That section absolutely requires limitations on rent. There's no limitation in 11.182; hence, the requirement for the TDHCA audit. It's important the legislature said it needs to be in there and it's in there. Now--

JUSTICE NATHAN L. HECHT: Noticeably though, in (g), it does not repeat to receive an exemption with the next two, with requirements to the next two sentences.

ATTORNEY JAMES R. EVANS, JR.: That's right, to receive the exemption is the and the first words in that paragraph, it's not in every sentence in that section.

JUSTICE NATHAN L. HECHT: But you could see if you were thinking about it. Maybe if you don't prepare an audit at all, you don't get the exemption, but if you prepare it and it's not detailed enough or it doesn't, leaves out a source or leaves out a use or something, that doesn't cost you the exemption. That just has to do with a deficient audit.

ATTORNEY JAMES R. EVANS, JR.: The requirement just says set out the sources and uses assigned and then it's enforced by the CPA as prepared by the CPA. The requirement's in there to furnish that to TDHCA and I respectfully submit that it would be parsing of the terms to require that every sentence in that section say to receive an audit, you deliver it to the chief appraiser. To receive an audit, you deliver it to TDHCA. I think it's in there that section is one solid piece there and I don't think you need to have it in there. I think you probably infer that that's what it means. There's another case that we cited in our brief. It's Texas VOA Elderly Housing v. Montgomery County Appraisal District that talks about missing an element of another section, it's 11.18, which is the charitable organization section. In that case, VOA Elderly Housing had a dissolution clause that was incorrect and the Court of Appeals held that the dissolution clause because it was incorrect meant that the exemption failed. The upshot is that the owner missed one element of Section 11.18; therefore, that exemption failed

and I don't think that the language in that, I mean it might have. I'll have to go back and read it, but 11.18 is actually longer than 11.182 and it has all these elements. It missed an element and they were out.

JUSTICE NATHAN L. HECHT: Oddly, there's no deadline in the statute so when does it have to be delivered?

ATTORNEY JAMES R. EVANS, JR.: It would have to be within, well, it's an annual requirement.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY JAMES R. EVANS, JR.: So I think there is a deadline. I think it might be in 11.1826. I'm not positive about that. I believe that there is a deadline there, but, Justice Hecht, you had mentioned deadlines and that brings me to another argument here. Arbors is casting this requirement as being penal in nature or being punitive or that the actions by the Court of Appeals works at forfeiture of an exemption that it's entitled to. I want to point out to the Court, remind the Court, that this is a not a forfeiture issue. This is simply a judgment on a no-evidence motion for summary judgment in which the trial court said there's no evidence to meet the exemption. If this case had been tried on the merits instead of pursuant to a no-evidence summary judgment, we would have made the same assertion that Arbors is required to satisfy every element of Section 11.182 and because it failed to do this at least one, and we contend there are several other things that Arbors failed to do, but because it failed to deliver the audit, the exemption fails and if you go back to the Texas VOA case, you can see that the elements all have to be met. In 11.182, it doesn't say do this, this, this or this. It says do all of these things and there are about 20 requirements and at the end, it says and so every requirement is required to be met. Now regarding the strict construction issue, you are right that these cases are strictly construed and in the Cameron Village case, the opinion from that court, the Fourth Court, is that the term owner has to be strictly construed because this is an exemption case and we're talking about ownership in the exemption context so since owner is strictly construed, we're looking at the plain language here. Now, I want to point this out and I may have to brief this later for the Court, if the Court lets me do this, but this is a limited liability corporation. Actually, there are two limited liability corporations, Arbors I and Arbors II. The member of Arbors I and II is Atlantic Housing Foundation. Business Organizations Code Section 101.106 states that the member of an LLC does not own the property of the LLC. So while the LLC may be the fee-simple owner, the member is not the owner and this concept is actually carried through in a couple of memorandum opinions I think also out of the Fourth Court and I could provide those to the Court later on with regard to limited partnerships, but regardless of what the courts say with respect to limited partners in limited liability partnerships or limited partnerships, I don't think those facts are in play here.

JUSTICE DEBRA H. LEHRMANN: Could I ask, I mean, could they get equitable title if they chose to of the subsidiary? And if so, isn't this just really form over substance?

ATTORNEY JAMES R. EVANS, JR.: I don't think Atlantic has equitable title. I don't think it can get equitable title unless it, under those limited areas in which somebody is a purchaser in an earnest money contract or something like that or perhaps a beneficiary during the probate of a will proceeding or something like that. Our position is that Atlantic simply does not have equitable ownership, buttressed by the fact that Section 101.106 of the Business Organizations Code prevents that.

JUSTICE PAUL W. GREEN: Well property, subject to a deed of trust, I mean I don't want to get that far afield here, but it seems to me that the record owners and the trustee, but I would have equitable ownership and you're saying that I wouldn't qualify under that event.

ATTORNEY JAMES R. EVANS, JR.: Well, that's actually addressed in the tax code specifically. Lien holders are not considered owners. That's a specific code section somewhere else in the tax code that says the owner is well basically said that lien holders are not owners for the purpose of how you list the property on the appraisal role. So if in this instance, Atlantic were a lien holder, it would absolutely not be an equitable owner for the purpose of this case.

JUSTICE NATHAN L. HECHT: How does it impair the purpose of the statute to consider an equitable owner like this, a member of an LLC, who has the absolute right to control the LLC? It's true that legal title is somewhere else, but you have the absolute control over it. How does that impair the statute?

ATTORNEY JAMES R. EVANS, JR.: I'm not sure that that is the issue as much as what the plain language of the statute requires, but here's how it could, I'm sorry.

JUSTICE NATHAN L. HECHT: But humor me and answer that part of it.

ATTORNEY JAMES R. EVANS, JR.: Okay.

JUSTICE NATHAN L. HECHT: You're probably right, but if it, if we were looking at the purpose of it, does it impair it or defeat it in anyway?

ATTORNEY JAMES R. EVANS, JR.: I think it could impair the statute. Here's how it could happen. You have situations where you have an owner that has absolute control. You have an owner that has some control so you get into a situation of uncertainty, which requires yet another fact determination. The chief appraiser now has to go behind the let's say the member of the LLC and determine how much control the member of the LLC has over the LLC. What happens, for example, if you have two members? Who has control? What if this is a general partnership that owns a partnership that owns the property, where do you go there? So, yes, I think it would impair the statute to allow an owner who claims to be the equitable owner to get that exemption. I want to also address some things that Arbors says in its brief on the merits about disregarded entities and why this is a statutory scheme that benefits everybody. It may be true that the Internal Revenue Service treats members of LLCs as disregarded entities in this particular tax framework, income tax framework, but that does not automatically mean that if it's a disregarded entity at the federal level that the exemption should automatically be carried into state property tax at this level. Arbors would have this Court grant the exemption by implication and in another case we've cited, *Bullock v. National Baneshares*, this Court has held not only that exemptions are strictly construed and are the antithesis of equality and uniformity because it requires individuals and businesses to pay higher taxes, but it also says that in this context, it's a very strict standard and bear with me here just a moment, please. In *Bullock*, this Court said that an exemption cannot be raised by implication, but must affirmatively appear and that all doubts are resolved in favor of the taxing authority. So Arbors would ask this Court to overturn its own holding and say that now we can have exemptions by inference now, which would essentially toss the entire standard about how courts are supposed to look at exemptions out the window. So I think Arbors' position is tenuous at best. They're asking the Court to infer that there's an exemption here because of the federal tax guidelines on disregarded entities, etc., our contention is that the Business Organization Code prevents that even if the Business Organization Code didn't have that provision and even if the standard was not as strict as it is, our contention still is that the exemption fails because as the *Cameron Village* case and the *Brazos County* cases say, look at the plain language of the code section. Look at the plain language of the statute and in twice in the statute in 11.182, it requires that the owner is entitled to the exemption, that the owner has to follow all these requirements in order to get the exemption. Frankly, we submit that the *Amarillo Court of Appeals* case cited in Arbors' brief is misdirected and probably wrong. That's the *Southeast Texas Housing Case v. Harris County Appraisal District*. This Court, the Supreme Court, has at least three times determined that ownership is in the fee-simple owner and those cases are in our brief. That's in the *Childress* case, in *Bailey v. Cherokee County Appraisal District*. In that case, there is a pending probate and this Court said that the heirs have no standing even though they're perhaps equitable owners and then there's the *Texas Turnpike Authority Case* from the 1950's where this Court held that a contingent remainder is not equitable title for any reason. So the cases that this Court has addressed when ownership comes up and it's rare when it's an equitable versus fee-simple ownership issue, but the cases in which it comes up, this Court has held that you look at the plain meaning and that ownership means exactly that, ownership. It's not an esoteric equitable concept or anything like that. So in summary, I just want to say again that the Tenth Court of Appeals only addressed the audit issue and our position is that every single element of 11.182 needs to be followed. There is a public policy reason for the audit re-



quirement that it be delivered to the chief appraiser and the TDHCA and that is to prevent abuse, to prevent fraud and--

JUSTICE DALE WAINWRIGHT: Counsel, in the little time you have remaining, let me ask you a little bit about your idea of the term owner. If there's a 25% ownership relationship in a two-tiered structure, are both entities owners, the 75% owner and the 25% in your view?

ATTORNEY JAMES R. EVANS, JR.: In other words, if the fee-simple owner has a split 75/25% ownership, then the fee-simple owner would be the owner. In other words, if it's an LLC.

JUSTICE DALE WAINWRIGHT: Both entities, or just the 75% owner?

ATTORNEY JAMES R. EVANS, JR.: No, no, sir. Neither entity that owns a piece of the fee-simple owner would be an owner. In other words, let's say this is a general partnership and you have a 75% partner and a 25% partner, the owner of the property would not be the partners. The owner would be the partnership.

JUSTICE DALE WAINWRIGHT: If the partners that owned the property and they owned 75% and 25%, both are owners in your view?

ATTORNEY JAMES R. EVANS, JR.: No, no, Your Honor, neither partner is an owner because the owner is the partnership.

JUSTICE DALE WAINWRIGHT: Take a partnership out of it, just talking about two individuals and I'm trying to figure out how you determined that own means only legal title owner. Two individuals who both, one owns 75% and the other owns 25% of the property are both owners as you read this term?

ATTORNEY JAMES R. EVANS, JR.: Yes, they would be co-tenants.

JUSTICE DALE WAINWRIGHT: Okay. And you determine that from this word how?

ATTORNEY JAMES R. EVANS, JR.: If you have two owners who are individuals, my understanding of property law is that they would be co-tenants or tenants in common. Partnership law says that if they are partners in a partnership, then it's the partnership that owns the property and I think under the Business Organizations Code with regard to limited partnerships, it's the same deal. The limited partnership is the owner, not the LP.

JUSTICE DALE WAINWRIGHT: There's nothing in statutory legislative history that provides any further information about that term?

ATTORNEY JAMES R. EVANS, JR.: Not in 11.182 I haven't found any. There might be some somewhere else. I don't know where it is. Thank you, Justices.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

#### REBUTTAL ARGUMENT OF CONNOR G. SHEEHAN ON BEHALF OF PETITIONER

ATTORNEY CONNOR G. SHEEHAN: May it please the Court, I'd like to start by addressing the Texas Supreme Court precedence that Counselor raised a minute ago. The Bullock case, the Texas Turnpike case, the Childress case, all of those cases are distinguishable. As a threshold matter, the Bullock case is distinguishable as a point to being irrelevant because all it does is lay out the black letter law as far as analyzing tax statutes not an equitable ownership statute. That case involved national banking associations in a despair treatment between taxing holding companies that were residing in Texas and were Texas citizens or not taxing those entities yet taxing Texas state banks so that's a black letter law case. The Texas Turnpike case, case issued by this Court,

opinion issued by this Court, is it recognizes the availability of equitable ownership and this Court, going all the way back to 1938 in the Realty Trust Craddock case has always said that own is subject to disparate and various meanings and when that is the case, like it is here, even under strict construction, step one, you look at the purpose and the intent of the statute and the only purpose and intent of the statute here for 11.182 is to provide and further the availability of affordable housing for low-and-moderate income Texans. In that, the only interpretation of the term own that provides for that is one that includes equitable ownership because it allows for these marketplace realities such as financing on projects. Banks don't want to cross collateralize multiple projects. Atlantic doesn't want to own 15 different low-to-moderate income apartment complexes because the complexity of getting a loan on one project that that project if it defaults would subject its other loans for the other projects to potential default as well. It's just not realistic and that's why these specific-purpose entities are set up to own the project themselves and insurability, you've got bankruptcy remoteness, all these practical matters and further, if the Court was to accept the Walker County's interpretation, which is every time somebody wants to apply to 11.182 for the new statute, they have to be a CHDO or a charitable organization. That means they'll have to identify a project that's for sale. Go and purchase that project after they have already become a registered CHDO or after they've gone and applied for a 501(c)(3) determination. That's not a quick process. During that time, that project can be sold to somebody else. That project can go into bankruptcy. Many things can happen and that's why the only interpretation that truly furthers the purpose of the Act allows for equitable ownership because it allows for these specific-purpose entities to go out and hold these properties or finance these properties, insure these properties.

JUSTICE NATHAN L. HECHT: The Court of Appeals only addressed the (g) issue, subsection (g) and the parties have argued a lot here about the ownership issue, but the Respondent has raised a number of other issues and is it the case that if the Respondent were right about some of those issues that would defeat the exemption as well or what's the status of all those issues?

ATTORNEY CONNOR G. SHEEHAN: When you're talking about the other issues, Your Honor, I want to make sure that--

JUSTICE NATHAN L. HECHT: Raised in the brief response and then addressed in the reply brief.

ATTORNEY CONNOR G. SHEEHAN: Your Honor, this case was presented to the Court as threshold matters, the trial court denied, struck all of Arbors' summary judgment evidence. Every single piece of it was a blanket order, struck every single sentence in the affidavit, all of the attachments. It was up to the Court of Appeals. The issue before the Court of Appeals was twofold just like it is in front of this Court. One, equitable ownership. Two, does Arbors independently comply. In the oral argument in front of the Court of Appeals, the argument centered almost entirely on the equitable ownership issue in distinguishing our case from the Brazos County opinion. The opinion that we received from that court was a little bit of a surprise. It essentially found what they believed to be one area where we did not comply and that was the basis for their holding. Now to clarify something that Counsel said earlier, there is no evidence in this case that the audit was not, in fact, delivered to the TDHCA. No evidence in this case it wasn't delivered. The evidence is an audit was created. An audit was delivered to Walker County Appraisal District. Walker County Appraisal District is the party who determines whether or not we get the exemption. That's the current status of the (g) issue and so, Your Honor, I think all of these issues are before the Court today. I definitely believe that the equitable ownership issue is right. I think it's important, I think that property owners in this state would like to hear from the Court on this issue and I think if the Court decides in favor of Walker County and restricts the interpretation of the term own, it not only negatively impacts applicants of 11.182, but under the new statute as well and that risk would benefit the statute basically being eviscerated at that point.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Sheehan and Mr. Evans. The cause is submitted. That concludes the arguments for this morning and the Marshal will adjourn the Court.

MARSHAL: All rise.



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