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**Advancing the Common Good in the
Texas Legislative Process**

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ADVANCING THE COMMON GOOD IN THE TEXAS LEGISLATIVE PROCESS

Do nonprofits have a special role and status in public affairs?

By Richard W. Meyer

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INTRODUCTION:

Nonprofit tax-exempt charities, trade and professional associations, religious and faith-based organizations, and activist advocacy groups appear increasingly as active players in the public forum and in the political and legislative process. Each advocates for its mission and stakeholders and, expressly or not, claims to represent the higher purpose of its mission and activities to advance and benefit the common good. In return for these perceived benefits to the society at large, these tax-exempt groups receive substantial benefits and variances from government regulation and taxation at every level.

Some would question whether these groups are really not much different from other special interest groups that also compete and advocate in the civic forum and marketplace. Do nonprofits really calm and elevate the public debate by advocating for noble causes and the improvement of society? Does the impact of their activities truly justify a privileged “cost” to government in tax revenues not collected or regulatory exceptions not granted to other interest groups, businesses and persons?

The “common good” to be advanced by persons and groups is a concept going back to Aristotle’s observations on the virtues and shortcomings of the Greek city-states (*... governments which have a regard for the common interest are constituted in accordance with strict principles of justice and are therefore true forms....*). Benjamin Franklin also left us wise admonitions about virtuous civic involvement (*Well done is better than well said.*). And add Will Rogers’ pointed observations about the shortcomings of public high-mindedness (*There’s no trick to being a humorist when you have the whole government working for you.*). The idea of the common good implies beneficial outcomes such as justice, security and freedom from want achieved through positive citizenship, collective action and active participation in the public forum free of self-interest. (*Encyclopedia Britannica Online, <https://www.britannica.com/topic/common-good>*).

QUESTION PRESENTED:

Aside from the noble aspirations commonly attributed to well-intentioned tax-exempt nonprofit groups, how are they actually perceived when their interests are the subject of specific legislation in the Texas legislative session, in proposed rules promulgated by state agencies, or involvement in a contested campaign or ballot initiative? In these situations, these groups

become actors in a public, competitive and often hostile environment where the meek are often left behind. There can be criticism of their interests, motives and message. When they compete for the public dollar in the legislative appropriations process, are they any different from any other special interest group or person who believes that dollar should be theirs?

REALITY CHECK: A sampling of 15 years of Texas legislation affecting nonprofits from www.nonprofitlawandpolicy.com

Note: In the following, **HB** refers to a House Bill and **SB** a Senate Bill in the legislative session indicated. Bill numbers are in **BOLD**, and passed bills are **underlined and BOLD** (example: **SB 378**).

1. Tax-exempt status of nonprofits is considered a “cost” to state government

The total value of longstanding exemptions enjoyed by nonprofit entities from the state’s property taxes, business revenues taxes, sales and other fees continues to increase. To state budget analysts, legislators and critics, these uncollected taxes are a cost to state government in that they represent revenues that could be collected if taxing schemes were applied without exemptions or waivers. What is this “cost”? The State Comptroller’s most recent report, entitled *Tax Exemptions and Tax Incidence* (March 2017), reported to legislators that approximately \$55.5 billion in potential state tax revenue is bypassed due to previously enacted exemptions, waivers and preferences granted to commercial businesses, nonprofit organizations and quasi-governmental entities. In the past, legislators taking the long view of the state’s fiscal health have filed the following bills to examine and evaluate tax exemptions and the policies behind them—all of which should be of concern to the nonprofit sector as beneficiaries of these policies:

- **HB 1003** (84th Legislature, 2015) would have required the periodic “sunset” or automatic repeal of all state tax exemptions, credits or other exceptions unless re-authorized by the legislature after a review of the costs and benefits to the state. This bill got attention because it was the subject of a hearing by the House Ways and Means Committee, meaning the idea is gaining support.
- **SB 868** and **SJR 38** (84th Legislature, 2015) would have granted the legislature broad authority to review all state and local tax exemptions and preferences. All such breaks in the Tax Code would have had a six-year shelf life unless re-authorized by legislation.
- **HB 3201** (82nd Legislature, 2011) would have granted the Sunset Advisory Commission authority to periodically review all exemptions under the state’s tax laws, which would lapse (“sunset”) unless re-authorized by the legislature.
- In every session there are numerous bills to expand or clarify nonprofits’ property tax exemptions under §11.18, Tex. Tax Code. The regular additions to §11.18 grow longer and longer and are often “local” bills addressing a specific situation or unpopular ruling by a local tax appraisal board or court. At some point this invites a holistic review of the significant tax revenues bypassed by state and local government and a critical look at the vast real estate holdings of nonprofits and whether they advance a charitable purpose.
- **HB 440** (83rd Legislature, 2013) would have required a religious organization to file with its local appraisal district a public annual report of its tax-exempt real property holdings, the its current use, and the income derived from each parcel.

- Counties and school districts can donate their surplus property to nonprofit organizations under certain circumstances. **HB 970** and **HB 1633** (78th Legislature, 2003)
- “PILOT” initiatives by local government entities have diminished in Texas although they continue to rage in other states. “Payment-in-lieu-of-taxes” (PILOT) proposals abound elsewhere and are simply creative ways to tax the property or activities of entities that have tax-exempt status under federal, state or local law. These can include public improvement user fees, public service/safety fees, utility assessments, and special assessments that are applied to nonprofits as well as all others, without exemptions. A simple solution for many other state legislatures has been to disown the user fee idea for the state government tax revenues but give local government entities the local option of imposing these kinds of fees on nonprofits. For a snapshot of national developments, see www.lincolnst.edu/publications/payments-in-lieu-taxes.

2. Special limits on liability and immunity are granted to Texas nonprofits under various statutes and court decisions

A review of Chapter 84 of the Texas Civil Practices and Remedies Code and related court decisions indicates the special legal protections afforded to §501(c)(3) nonprofits and others under Texas law. In every session of the legislature, there are bills to expand or refine the Chapter 84 provisions and add other protections to nonprofit operations, usually without visible opposition. Some recent examples:

- **SB 378** and **HB 2119** (84th Legislature, 2015) added volunteer social workers and volunteer wildfire fighters to the long list of persons with immunity under Chapter 84.
- **SB 610** (84th Legislature, 2015) created an entirely new Chapter 75A in the Civil Practices and Remedies Code to limit liability to guests engaged in “agri-tourism” activities.
- The long list of volunteers, persons and charities exempted from liability in earlier legislation includes most healthcare professionals, youth sports leaders, crime prevention patrols, community gardens, chambers of commerce and volunteer wildfire and firefighter groups.
- **HB 671** (81st Legislature, 2009) permits a prosecutor to pursue an enhanced category of criminal offense and enhanced punishment if the theft of property victim is a nonprofit organization (*see* §31.03(f)(3)(B), Tex.Penal Code).
- **HB 2973** (82nd Legislature, 2011) provides for an accelerated court review and possible early dismissal of a groundless or harassing suit against an organization or person exercising free speech rights in a public controversy (*see* Chap. 27, Texas Civil Prac. & Rem.Code).

3. Nonprofits receiving large contracts or grants for privatized state agency operations enter a competitive commercial environment

About 20 years ago, state government plunged into an era of “privatization”, which involved identification of state government functions that arguably could be performed more efficiently and at lower cost by private or commercial contractors, consultants or nonprofit organizations.

Texas nonprofits of all sizes and varieties have benefitted from this trend, with significant state agency functions outsourced under the contracting/procurement process or through periodic agency grants, sometimes specified in the legislative appropriations bill. Often, the legislature authorizes by statute creation of a nonprofit organization to conduct certain off-budget activities to support state programs (CPRIT, OneStar). Successful nonprofits that prosper in this arena can become state vendors of considerable scale and no longer “fly under the radar”. They have entered a competitive marketplace that invites scrutiny and criticism, especially when nonprofits are given a special preference or “first-look” status in competing for a state contract. Competitors in the business community or trade associations are quick to complain about the unfair competitive advantage of tax-exempt operators. Recent examples:

- **HB 3859** (85th Legislature, 2017) continued the privatization of the state CPS agency’s role in placing children with foster care or adoption agencies while adding accommodations for the religious beliefs of the provider organization or contractor. A related bill, **HB 6**, proposed a transfer of the state’s operations of most child protective services, foster care and adoption services, to private contractors through statewide “SSCC” (single-source continuum contractor) vendors.
- A huge free labor pool for qualified Texas nonprofits would have been delivered if **HB 22** (83rd Legislature, 2013) had passed. The bill required every undergraduate student in a state university, college or junior college to provide 20 hours of “mandatory-volunteer” community service, for credit, as a requirement for graduation. Critics responded that this program would be a recordkeeping nightmare and could sour young people to truly voluntary service later in life.
- **HB 2718** (84th Legislature, 2015) permits receipt by persons and families of certain charitable assistance from community and faith-based organizations without jeopardizing their existing public benefit eligibility under TANF, SNP and other assistance programs. *See* §531.02482, Tex.Gov.Code.
- The growth of charter schools in Texas and proposed private school vouchers (**SB 3**, 85th Legislature, 2017) reflect a transfer of considerable public funds to these nonprofit organizations.
- An experienced nonprofit operating an immigrant detention center under government contract might find intense public and media scrutiny challenging.
- Nonprofits engaging large-scale disaster relief operations often have an expectation of reimbursement later from public disaster funds.

4. Activist advocacy groups resist campaign and lobbying activity regulation, raising “dark money” concerns

The increased scale and visibility of activity by some §501(c)(4) organizations generated legislative scrutiny in the 2015 session and attempts to define the permissible limits of political advocacy, lobbying, fundraising and campaign activities by tax-exempt groups. Proposed rulemaking by the Texas Ethics Commission to define restricted activities subject to Election Code registration were met with constitutional law challenges in court. At question is the privilege of these nonprofits not to disclose the names of donors, which is routinely required under the campaign and election laws. “Dark money” allegations flew freely but legislative consensus or solutions were few:

- **SB 19** and companion bills **HB 37** and **HB 38** (84th Legislature, 2015) were the lead “ethics reform” bills in that session and proposed the mandatory disclosure of donor names in certain situations (not otherwise required by state or federal law) and the characterization of certain activist “persons or groups” receiving donated funds as a *political committee* under §251.002(12), Tex.Election Code, whether called that or not, and thus subjecting them to filings and regulation under the Election Code. The legislation was seen as a state limitation on advocacy and fundraising opportunities expanded in the U.S. Supreme Court’s 2010 *Citizens United* case. News accounts generated a picture of influential, secretive and non-transparent nonprofit organizations exerting considerable clout in the political process. Opponents of the bills pointed to certain constitutional challenges to the somewhat vague and broad language in the proposals.
- The Texas Supreme Court passed up an opportunity to bring closure to some of these issues when it declined last year to rule on what activities by a group would constitute a political committee and whether the current definition in the Elections Code, as applied, is constitutional. *King Street Patriots et al. v. Texas Democratic Party, et al.*, 521 S.W.3d 729 (Tex.2017).
- **SB 346** (83rd Legislature, 2013) represented the earlier skirmish in the wake of the *Citizens United* case and would have broadened the definition of activities of §501(c)(4) groups that would constitute them as political committees under Texas election and campaign law. Passed by the House and Senate, SB 346 was vetoed by the governor.

5. **Visibility in public affairs and use of public funds trigger expectations for transparency and disclosure**

Legislators in the 2019 session may again attempt to craft statutory language that forces disclosure of the certain records of organizations or quasi-public entities that spend public funds or perform governmental functions. This has proved difficult in the past, as opponents pointed to the hundreds or thousands of local organizations that instantly would be subject to the legal procedures and liabilities triggered by an “open records” request from anyone. Challenges in court to such legislation again can be expected.

- **SB 408** (85th Legislature, 2017) revisited the 2015 public access, transparency and “dark money” debates. After passing the Senate, the bill fell victim to late-session deadlines and disputes over broad language that would have defined thousands of nonprofits as a *government body*. They would have been subjected to the records disclosure provisions of the Texas Public Information Act (PIA), Chapter 552, Tex.Gov.Code, if they received or spent public funds, used real or personal property owned or leased by a government entity that is not generally available to the public under an agreement that provides for no or nominal consideration, or receives or spends public funds under an agreement to provide services traditionally provided by a government body. SB 408 was intended to reverse the limitations on records disclosure to the public outlined by the Texas Supreme Court in *Greater Houston Partnership v. Paxton*, 468 S.W. 3d 51 (Tex.2015). It was never clear whether thousands of nonprofits affected by such a new law and operated by

part-time volunteers could or would comply with the strict timelines specified in the PIA or could navigate the legal procedures to object to disclosure or obtain an Attorney General open records opinion. This issue is sure to return.

- **HB 3573** (82nd Legislature, 2011) prevents any Texas governmental entity from requiring disclosure by a charitable organization or foundation of the race, religion, gender, national origin, socioeconomic status, age, ethnicity, disability, marital status, sexual orientation or political party registration of an employee, officer, director, trustee, or member of the organization, trust or foundation (§2252.906, Tex.Gov.Code).
- The Cancer Prevention and Research Institute of Texas (CPRIT) has weathered scrutiny since its creation as a separately-chartered nonprofit that exists solely to dispense public funds to other public and private entities involving complex and costly research programs.
- **SB 24** (85th Legislature, 2017) provides that a governmental unit is not able to compel the production or disclosure of any record of a sermon delivered during religious worship or compel a religious leader to testify regarding a sermon in any civil or administrative proceeding.
- Calls to require mandatory disclosure to the public of detailed financial information by nonprofits brought only one bill in the 2017 session, **SB 2180**, which invites similar proposals in the future. **HB 2674** would have required a tax-exempt entity that receives 25 percent or more of its revenues from state funding to file an annual report listing the salaries of each of its employees and officers and post it on a new Secretary of State website available to the public.
- **SB 1215** (79th Legislature, 2005) proposed mandatory annual CPA audits of §501(c)(3) organizations with annual revenues in excess of \$250,000 and penalties for non-compliance. Considerable opposition from community-based nonprofits prevented its passage.

6. Some charities have been granted special fundraising opportunities

Legislation authorizing “super raffles” and state agency fee collections for donations to certain causes enhances charitable donation opportunities for preferred groups. While there is some statutory regulation of high-dollar charitable fundraising such as auctions and raffles, recent legislation puts some groups ahead of others:

- **HB 975** (84th Legislature, 2015), with subsequent statewide voter approval as a ballot proposition, provides a special status for fundraising by major league sports teams and permits NFL, NBA, MLB and MLS clubs that maintain an affiliated §501(c)(3) charity to conduct “jackpot” or “50-50” raffles at every home game in their venues. This allows the “house” (the club’s charity) to split the days’ ticket sales with one winning ticket holder. In the 2017 session, sports clubs affiliated with NASCAR, IndyCar, hockey, minor league baseball were added to the privileged list in **HB 3125** and **HJR 100**, the ballot proposition approved later by the voters (*see* §2004.002(2), Tex.Occup.Code). Who’s

next seeking to join the list: state and county fairs, rodeos, college sports events, town festivals?

- **SB 31** (84th Legislature, 2015) permits volunteer firefighter and EMS groups to conduct up to ten fundraising sales or auctions events per year.
- When registering a vehicle at DMV, persons may now use the form to make an additional donation to Special Olympics (**SB 272**, 84th Legislature, 2015).
- When applying for a license to carry a concealed handgun or a hunting or fishing license, the applicant may check the box to make a donation to a veteran's assistance fund managed by the state (**HB 1584**, 84th Legislature, 2015).
- On page 323 of the 355-page **SB 1488** (85th Legislature, 2017, a standard "clean-up" bill to tidy up statutory cross-references and stray language) appeared a provision that permits a judge to order a probationer to make a contribution to a local veterans' service group in lieu of performing community service work (*see* Art.42A.304(f), Tex.Code of Crim.Proc.).
- Permitted bingo operations represent the special fundraising niche granted to certain charities and can operate on a continuing basis. **HB 394** (83rd Legislature, 2013) represented a further refinement of bingo operation regulation (*see generally*, Chap. 2001, Tex.Occup.Code). Under §2001.456(3), a licensed organization may not use net proceeds from bingo operations directly or indirectly to influence legislation.

7. Hundreds of nonprofit property owner associations have become Texas' mini-governments

Today the hundreds of Texas nonprofit homeowner associations (HOAs) and property owner associations (POAs) affect the daily lives of millions and perform quasi-governmental functions such as neighborhood maintenance, refuse collection, recreational programs, road maintenance and safety. Well-intentioned volunteers serve on their boards, and when enforcement activities lead to disputes, these organizations appear in court or before the legislature to resolve issues relating to their authority (*see* www.txcommunityassociationadvocates.org or www.txlandlaw.com/blog). They are regulated generally under Chapters 82 and 89, Tex.Prop.Code, and function in a realm separate from other nonprofits although they are often created and governed under the Texas nonprofit corporation law in Chapter 22, Tex.Bus.Org.Code. In every legislative session problems identified by POA/HOA residents and critics beg for legislative or regulatory solutions, resulting in well-intentioned bills that inadvertently may also extend to charities and other groups.

- **SB 1168** (84th Legislature, 2015) was an "omnibus" POA bill and reflects the latest regulatory changes affecting owner associations and their boards.

8. Self-reflection question

Do charities and nonprofits become just part of the herd when pushing legislation or chasing state money in the appropriations bill?

Prospects for the 2019 legislative session

- Stay current on developments during the 140-day January-May session at www.nonprofitlawandpolicy.com .
- Review the text of any bill before the legislature, monitor committee deliberations, and track the progress of bills of interest at www.capitol.texas.gov .
- The Legislative Budget Board provides a deeper look at the state's budgeting and appropriations process at www.lbb.state.tx.us .
- Briefings on related policy issues before the U.S. Congress and federal agencies can be found at www.councilofnonprofits.org .

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