IN THE COURT OF APPEALS
STATE OF GEORGIA

GEORGIACARRY.ORG, et al.,

Appellants,

v.

ATLANTA BOTANICAL GARDEN, INC.,

Appellee.

Case No. A17A1639

AMICUS CURIAE BRIEF OF THE DEVELOPMENT AUTHORITY OF FULTON COUNTY AND THE JOINT DEVELOPMENT AUTHORITY OF METROPOLITAN ATLANTA

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I. INTRODUCTION

The Development Authority of Fulton County ("Development Authority of Fulton County") and the Joint Development Authority of Metropolitan Atlanta (the "JDAMA") submit this *amicus curiae* brief, asking the Court to affirm the trial court's ruling that, under O.C.G.A. § 16-11-127(c) ("the Statute"), private persons who lease public property are not prohibited from excluding persons licensed to carry firearms from the leased property. They do so because Appellant GeorgiaCarry.org's ("GeorgiaCarry") proffered interpretation of the Statute would require an impermissible derogation of Georgia common law, and it relies on an incorrect understanding of the nature of property rights in Georgia.

Most importantly, the Development Authority of Fulton County and the JDAMA file this *amicus curiae* brief because GeorgiaCarry's interpretation of the Statute, if adopted, would significantly impair Georgia's ability to attract business to the State. In particular, each of the thousands of companies that might consider leasing property from the Development Authority of Fulton County or from the JDAMA's member organizations—the development authorities of Clayton, DeKalb, Douglas, Fulton, Henry, and Rockdale Counties—(collectively, the "Development Authorities"), or from other development authorities throughout the State, could be prohibited

from excluding persons carrying firearms from their workplaces during the terms of their leases. This would impair the ability of development authorities, and by extension the State of Georgia, to compete with neighboring states in the economic battle to lure businesses and jobs to their respective states.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Development Authorities are nonprofit governmental entities whose missions are to promote the economic development of Fulton County and Metropolitan Atlanta. The Development Authorities are therefore interested in the outcome of this appeal given the nature of their primary economic development tool: the sale-leaseback bond transaction.

As will be explained below, the nature of these transactions is such that the private companies attracted to Georgia by the Development Authorities become private lessees of public property. Therefore, GeorgiaCarry's interpretation of the Statute is directly applicable to the Development Authorities' economic development efforts and each of its contracting partners.

III. ARGUMENT AND CITATION OF AUTHORITY

In support of the trial court's grant of summary judgment, the Development Authorities write separately to do three things: first, to

illuminate the negative effect that GeorgiaCarry's interpretation would have on the State's economic development; second, to emphasize that GeorgiaCarry's interpretation would require an impermissible derogation of the common law rule announced in *Delta Airlines*; and third, to note that GeorgiaCarry's "bundle of sticks" argument erroneously confuses property rights with a municipality's ability to exercise governmental authority. Each of these arguments will be taken in turn.

A. GeorgiaCarry's interpretation of the Statute would impede economic development in Georgia.

GeorgiaCarry's interpretation of the Statute is not only incorrect (*see infra,* Sections III.B & C), it also would significantly impair the State of Georgia's economic development efforts, risking hundreds of millions of dollars in economic growth and job creation.

1. The structure of the Development Authorities' sale-leaseback bond transactions

The Development Authorities attract businesses to Metropolitan Atlanta and Fulton County by offering tax incentives through sale-leaseback bond transactions. But because the Georgia Constitution prohibits the State

and its local governments from offering gratuities to private entities, *see* Ga. Const. Art. III, § VI, ¶ VI, the structure of these transactions is complex.[1]

A transaction begins with a private company owning or acquiring private property in Metropolitan Atlanta or Fulton County that it wishes to develop. The company sells the property in fee simple to one of the Development Authorities, who pays for the purchase by issuing revenue bonds to the company equal to the purchase price. The company then leases the property from the Development Authority, generally for a ten-year term, after which fee simple transfers back to the company.

Because government entities are relieved of *ad valorem* tax liability, the Development Authority does not pay any *ad valorem* taxes on the property during the ten-year leasehold. The private company is not similarly tax-exempt and must pay taxes on its leasehold interest, but its tax obligation as a mere lessee is substantially less than had it retained fee simple during

[1] Georgia is at a competitive disadvantage to its many neighboring states who are not similarly barred from directly offering tax incentives for corporate relocations or real estate development projects. The Development Authorities' sale-leaseback bond transactions are therefore one of the few tax abatement mechanisms available under Georgia law to compete with these other states.

the ten-year period. Through this mechanism, cities and counties throughout Georgia can offer tax incentives to woo businesses.[2]

Germaine to the instant appeal, during the ten-year lease term, the private company is a private lessee of public property.

2. The economic development created through the Development Authorities' use of sale-leaseback bond transactions is immense.

Complex as it may be, the Development Authorities' use of sale-leaseback bond transactions has led to economic development that measures in the billions. In fact, the Development Authority of Fulton County alone has procured $5.1 billion in planned capital investments over the last ten years, and had 56 active projects in 2016 alone. These 2016 projects created approximately 30,165 jobs Fulton County, while also generating $11.2 million in new property tax revenues. Multiply this, then, by each of the other development authorities that operate in cities and other counties throughout the state, and the total economic benefit to the state is enormous.

[2] The bond associated with each such transaction is subjected to, and contingent upon, validation by the courts. Because the transaction leads to property being developed that otherwise might lie fallow, the resulting tax revenue to the county is likely to be much greater than had the transaction not occurred, notwithstanding the considerable tax benefit to the private company.

To further illustrate this point, below is a sample of recent projects developed through Development Authority of Fulton County sale-leaseback transactions with private companies.

Description of Selected Projects in Fulton County
$110 million investment for the relocation of a company's national corporate headquarters from another state. The project will generate approximately 800 new jobs.
$220 million investment for the consolidation, expansion, and retention of a corporation's national headquarters. The project will generate 350 new jobs.
Approximately $550 million investment for the development of a mixed use project including retail, office, hotel, and a convention center. The project has generated approximately 1,100 new jobs.
$80 million investment for the development of a hotel. The project has generated approximately 300 new jobs.
$16 million investment for the development of a corporate headquarters and printing facility. The project will generate 40 new jobs.

$150 million investment for the development of an office building including retail space. The project has generated approximately 2,000 new jobs.
Approximately $474 million investment for the development of a hotel, office building, and retail in midtown Atlanta. The project has generated approximately 2,000 new jobs.

These projects, although just a sample, represent the diverse set of contracting partners and industries that are attracted to Georgia or retained in Georgia through the Development Authorities' sale-leaseback power. Yet, as explained below, each of these projects—and billions of dollars in economic development and job creation—would be at risk under GeorgiaCarry's interpretation of the Statute.

3. GeorgiaCarry's interpretation of the Statute risks hundreds of millions of dollars in economic development and job creation.

Simply put, the Development Authorities' contracting partners need and desire the ability to choose whether to exclude weapons from their properties. If prospective contracting partners are unable to do so—simply because they are private lessees of property from the Development Authorities—then they will be less likely to enter into sale-leaseback bond transactions in the State of Georgia. And because this is one of few tax abatement mechanisms available under Georgia law, these companies will

be further incentivized to go to different states altogether, and Georgia's economic development will suffer. At the same time, if the Development Authorities' current private contracting partners are no longer able to lawfully choose to exclude firearms from their properties, then they would have relied to their detriment on the common law of *Delta Airlines*—investing billions of dollars in new projects yet deprived of the ability to continue excluding weapons from their premises.

For example, among the Development Authority of Fulton County's many tenants and sub-tenants are a national law firm in midtown Atlanta and a national grocery chain in Alpharetta. Each has a policy prohibiting weapons in their workplace. If GeorgiaCarry's interpretation of the Statute were to prevail, these companies could be stripped of their ability to enforce these policies in their own workplaces and in the grocery chain's store.

GeorgiaCarry's interpretation of the Statute thus could significantly impair Georgia's economic development and many of the burgeoning industries that are driving its economic growth—such as the sports and entertainment, hospitality, and tourism industries—for the foreseeable future. Without a clear statement from the General Assembly that this is the intended effect of the 2014 amendments to the Statute, the Court should not take the drastic and costly leap urged by GeorgiaCarry, namely, the

unnecessary and unsupported derogation of Georgia common law as set forth in *Delta Airlines*.

B. GeorgiaCarry's suggested interpretation of the Statute would require an unsupported derogation of Georgia common law.

As the trial court correctly found, the common law rule in *Delta Airlines* cannot be confined to tax issues alone, but instead governs the definition of private property under the Statute broadly. (*See* R. 197-99.) Nevertheless, GeorgiaCarry argues that *Delta Airlines* has no application to the Statute, and that "in the context of [the Statute], the Garden is neither a 'private property owner' nor a person in legal control of 'private property.'" (Reply Brief of Appellants at 13.) As support for this argument, GeorgiaCarry cites the fact that the General Assembly inserted the word "private" into the Statute in 2014 where it had not been before. (Brief of Appellants at 18.)

GeorgiaCarry is mistaken. The common law rule in *Delta Airlines* is not confined to tax cases (as more fully explained by the Appellee in its Brief for the Appellee at 4-7), and the Statute can derogate that common rule only if it does so expressly or by necessary implication. As explained below, the Statute here does neither. Therefore, the common law rule that public property assumes the status of private property when it is leased to a private

entity governs the Statute's application . As a result, and under the Statute's plain meaning, private entities that lease property from the government—such as the Appellee Garden, or the Development Authority of Fulton County's contracting partners—may exclude from their leased properties persons carrying weapons.

1. A statute may derogate the common law only if it does so expressly or by necessary implication.

Georgia law holds that a statute may derogate the common law only if it does so expressly or by necessary implication. *See Fortner v. Town of Register*, 278 Ga. 625, 626, 604 S.E.2d 175, 177 (2004); *see also Humphreys v. State*, 287 Ga. 63, 70, 694 S.E.2d 316, 326 (2010). As a result, "the common law rules are still in force and effect in this State, except where they have been changed by express statutory enactment or by necessary implication." *See Fortner*, 278 Ga. at 626, 604 S.E.2d at 177 (internal citations omitted).

2. The Statute does not expressly derogate Georgia common law.

Here, the Statute does not expressly derogate the common law rule set forth in *Delta Airlines*. To the contrary, the common law definition of private property must continue to govern application of the Statute because the Statute itself makes no attempt to define the term "private property"

differently. *See* O.C.G.A. § 16-11-127(a) (defining various terms, but not "private property"); *id.* § 16-11-125.1 (same); *see also Fortner*, 278 Ga. at 626, 604 S.E.2d at 177 (rejecting any express-derogation argument because "[n]othing in the [Georgia Code of Public Transportation] expressly preempts the common law.").

Without speaking expressly to the definition of "private property," the General Assembly is presumed to speak in harmony with the common law. *See Thornton v. Anderson*, 207 Ga. 714, 718, 64 S.E.2d 186 (1951) ("All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection with and in harmony with the existing law, and their meaning and effect is to be determined in connection . . . with the common law."). And that common law, as set forth in *Delta Airlines*, is that public property leased to a private person takes on the status of private property during the leasehold term. (*See* Brief for the Appellee at 4-7.)

3. The Statue does not derogate the common law by necessary implication.

Nor does the Statute derogate the common law by necessary implication. This appears to be what GeorgiaCarry implies when it argues that there is no reason the General Assembly would have inserted the word "private" into the Statute in 2014, unless the General Assembly necessarily

intended to derogate the common law. More specifically, GeorgiaCarry argues that this must be so because otherwise, according to GeorgiaCarry, insertion of the word "private" would have no meaning. (*See* Brief of Appellant at 18.)

GeorgiaCarry is correct that addition of the word "private" to the Statute in 2014 meaningfully changed the statutory law, but contrary to GeorgiaCarry's suggestion, it did so without the need to derogate the common law set forth in *Delta Airlines*. Two examples should suffice to confirm this. First, adding the word "private" acted to restrict the government's ability to exclude weapons from property it leases from private persons. Before the 2014 amendment, a public entity leasing property from a private person (thus making the property public under *Delta Airlines* common law) arguably could have excluded persons carrying weapons from the leased property because, under O.C.G.A. § 16-11-127 (2010 version), the government would be a "person in legal control of property through a lease." *See* O.C.G.A. § 16-1-3 (including "public corporation," "government," and "government agency" in the definition of "person" for purposes of Title 16). Adding the word "private" to the Statute in 2014 changed this by prohibiting government lessees of private property from excluding licensed weapon carriers from the property (as the right to

exclude is now limited to lessees of private property). Because this material change did not depend on a derogation of the broad common law pronounced in *Delta Airlines*, GeorgiaCarry is clearly wrong when it argues that addition of the word "private" in 2014 can only have meaning if the common law in *Delta Airlines* is narrowed.

For a second example, consider a private company that operates a canoe rental concession in a state park. All parties agree that, even under the *Delta Airlines* common law, mere "control" of public property, in contrast to leasing public property, does not convert the property's status to that of private property. Under the 2010 Statute, however, the concessionaire arguably could have excluded weapons nonetheless because the Statute's right of exclusion was not limited to controllers of only private property. *See* O.C.G.A. § 16-11-127(c) (2010 version) ("[P]ersons in legal control of property through … [an] agreement to control such property shall have the right to forbid [weapons]."). The 2014 amendment changed this. With the addition of the modifier "private," persons who merely control public property can no longer exclude weapons. *See* O.C.G.A. § 16-11-127(c) (2014 version) (limiting the exclusionary power to persons in control of private property: "[P]ersons in legal control of private property through … [an] agreement to control access to such private property shall have the right

to exclude [weapons]."). Again, this meaningful change did not require any derogation of *Delta Airlines*' broad common law.

As these two examples demonstrate, the enduring common law definition of private property set forth in *Delta Airlines* is easily reconciled with the General Assembly's 2014 revisions to the Statute. As such, the Statute does not derogate the common law by necessary implication. *See Fortner*, 278 Ga. at 626-27, 604 S.E.2d at 178; *Humphreys*, 287 Ga. at 70-71, 694 S.E.2d at 326-27. Therefore, application of the Statute is governed by the common law rule that public property takes on the status of private property when it is leased to a private entity. As a result, under the plain meaning of the Statute, private entities that lease public property—such as the Garden, and the Development Authorities' private lessees—may exclude persons carrying weapons from their leaseholds.

C. GeorgiaCarry's "bundle of sticks" argument confuses property rights with the municipal power to regulate, and therefore should be rejected.

GeorgiaCarry also contends that, because the City of Atlanta is prohibited from barring firearms from its property, any lease the Garden may secure from the City cannot include such a right. Specifically, GeorgiaCarry writes, "[t]he City cannot, therefore, lease to a third party a right it does not itself possess, as a 'landlord cannot create any greater

interest in his lessee than he himself possesses.'" (Brief of Appellant at 21 (quoting *Kace Investments, L.P. v. Hull*, 263 Ga. App. 296, 300, 587 S.E.2d 800 (2003).)

This "bundle of sticks" argument is fundamentally flawed. In fact, this exact argument was explicitly rejected by another court on strikingly similar facts. *See Starrett v. City of Portland ex rel. State*, 196 Or. App. 534, 543-44, 102 P.3d 728, 734 (2004).

In *Starrett*, the city of Portland, Oregon entered into a lease with a private company, by which the company contracted to host a New Year's Eve celebration on public property. *See id.* at 536, 102 P.3d at 730. Although Oregon statutory law bars government entities from excluding firearms from public property, the private company implemented a rule prohibiting people from attending the event while possessing a weapon. *See id.* at 536, 542, 102 P.3d at 730, 733. The plaintiff sought to enjoin the city from allowing a private lessee to enact such a rule on property leased from the city. *See id.* at 537, 102 P.3d at 730. The trial court granted summary judgment in favor of the city, and the Oregon Court of Appeals affirmed. *See id.* at 544, 102 P.3 at 734.

In doing so, the Court of Appeals rejected the plaintiff's "bundle of sticks" argument, in which the plaintiff asserted that the private company, as

lessee, could not exercise a right that the city itself did not possess. *See id.* at 543-44, 102 P.3d at 733-34. "The problem with [that] argument," the Court wrote, "is that it confuses property rights with municipal authority to exercise governmental regulatory power." *Id.* at 543, 102 P.3d at 734. As the Court explained, "[r]estrictions on a municipality's regulatory authority are not the legal or logical equivalent of restrictions on its property rights." *Id.*

Thus, the Oregon law that prohibited the city from barring licensed concealed weapons on public property—similar to O.C.G.A. § 16-11-173(b)(1)—" [did] not alter [the] city's title to property." *See id.* (emphasis in original). "Rather," the Court continued, "those statutes limit a city's regulatory authority." *Id.* at 543-44, 102 P.3d at 734 (emphasis in original). The Court thus concluded:

> If a city possesses fee title to property, it can convey fee title to property (assuming, of course, that it has authority to possess and sell property in the first place). Nothing in [the Oregon statutes] serves to prevent a private purchaser of formerly public property from both receiving and exercising the full rights of the title conveyed, which would include the right to exclude from the property persons who carry concealed handguns pursuant to a license to do so. The same is true when a city rents or leases property—that is, the statutes do not limit private property rights in property rented or leased from a city or other governmental entity.

Id. at 544, 102 P.3d at 734.

So too here. Simply put, GeorgiaCarry "confuses property rights with municipal authority to exercise governmental regulatory power." *See id*. at 543, 102 P.3d at 734. O.C.G.A. § 16-11-173(b)(1)'s "[r]estrictions on [the City of Atlanta's] regulatory authority are not the legal or logical equivalent of restrictions on its property rights." *See id*. at 543-44, 102 P.3d at 734. Therefore, nothing in the Statute "serves to prevent a private purchaser [or lessee] from both receiving and exercising the full rights of the title conveyed," including the right to exclude licensed weapon carriers from property leased from the government. *See id.* at 544, 102 P.3d at 734. For this reason, GeorgiaCarry's "bundle of sticks" argument should be rejected. *See id.*

To hold otherwise could lead to clearly-unintended consequences. For example, private purchasers of public property would be similarly unable to exclude persons carrying firearms from their newly purchased property, simply because (according to GeorgiaCarry's logic) the public property owner lacked that property right and therefore was unable to convey it.

And in the context of the sale-leaseback bond transactions used by the Development Authorities, the consequences would be even more absurd. There, a private company owning the property in fee simple would begin with the right to exclude persons carrying firearms, but lose that right upon

transferring the fee to one of the Development Authorities and leasing the property back for ten years. Then, at the end of the ten-year lease term, when the private company re-acquires the property in fee simple, it still would be unable to exclude licensed persons carrying weapons, arguably in perpetuity, because, according to GeorgiaCarry, the Development Authority did not have that right to convey in its bundle.

These results further weigh in favor of rejecting GeorgiaCarry's "bundle of sticks" argument. *See e.g.*, *Telecom*USA, Inc. v. Collins*, 260 Ga. 362, 363-64, 393 S.E.2d 235, 237 (1990) (The language of a statute should be followed "unless it produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else.") (citing *Department of Transportation v. City of Atlanta*, 255 Ga. 124, 137, 337 S.E.2d 327 (1985)).

IV. CONCLUSION

This Court should affirm the trial court's ruling. GeorgiaCarry's suggested interpretation of the Statute would require an improper finding that the 2014 amendments to the Statute derogate the common law set forth in *Delta Airlines*, despite the absence of the necessary prerequisites for any such derogation. And in the course of doing so, GeorgiaCarry would have this Court do great harm to Georgia's economic development throughout the

State. Simply put, GeorgiaCarry's interpretation of the Statute is as misplaced as GeorgiaCarry's "bundle of sticks" argument, and it should be rejected by this Court.

Respectfully submitted this 31st day of August, 2017.

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CERTIFICATE OF COMPLIANCE

This submission does not exceed the page limit imposed by Georgia Court of Appeals Rule 24.

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CERTIFICATE OF SERVICE

This is to certify that I have served copies of the foregoing **AMICUS CURIAE BRIEF OF THE DEVELOPMENT AUTHORITY OF FULTON COUNTY AND THE JOINT DEVELOPMENT AUTHORITY OF METROPOLITAN ATLANTA** upon the persons listed below by e-mail and U.S. Mail, first class postage, on this 31st day of August, 2017:

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