IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC., and PHILLIP EVANS, Plaintiffs, v. THE ATLANTA BOTANICAL GARDEN, INC., Defendant.	)	Civil Action No.: 2014CV253810

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case is before this Court on remand (for the second time) from the Supreme Court. *GeorgiaCarry.Org., Inc. v. Atlanta Botanical Garden, Inc.*, 834 S.E.2d 27 (2019).[1] The Court ruled that the case turns on whether the Garden's interest in the property at issue is a usufruct or an estate for years. Because the lease documents were not part of the record, the Court was not able to make that determination. The Court remanded for an analysis of the lease to determine if there is a usufruct or an estate for years. Plaintiffs will show that there are genuine disputes of material fact, that the Current Lease conveys only a usufruct, and the Garden is not entitled to judgment as a matter of law.

The Garden emphasizes that it does not pay taxes on the property. Plaintiffs emphasize that fact, too, because it is dispositive of the case. Either the Garden does not pay taxes because

[1] Plaintiffs note that Justice Peterson filed a concurrence in which he expressed concern that the statutory amendment at issue in this case may be unconstitutional as applied to lease agreements executed prior to 2014 (when the amendment became effective). Because the Current Lease was executed in 2017, Justice Peterson's concerns do not apply in the present case.

it has only a usufruct, or the Garden has an estate for years and owes the City of Atlanta and Fulton County over $100M in back taxes.

Argument

Summary Judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. O.C.G.A. § 9-11-56; *Battlefield Investments, Inc. v. City of Lafayette,* 326 Ga.App. 405, 756 S.E.2d 639 (2014). The court must view the facts in the light most favorable to the non-moving party. *Id.* Plaintiffs will show that there is a genuine issue of material fact and the Garden's Motion must be denied.

With the aid of the Supreme Court's decision, this Court's task is clear. If the lease between the City of Atlanta and the Garden conveys a usufruct, the conveyance is one of public property (the City of Atlanta being the owner). If the lease conveys an estate for years, the leasehold interest is private property and the Garden is free to exclude weapons carriers from its property.

There is a Genuine Issue of Material Fact

Rather than rely on the Current Lease itself to support its position, the Garden filed an affidavit of its CEO. That affidavit states, *inter alia,* that for the last 40 years, the Garden has continuously maintained exclusive control and management over the property. The Current Lease itself shows this not the case, and, therefore, sets up a genuine issue of material fact.

Here are some of the provisions of the Current Lease that show the Garden does ***not*** have exclusive control and management of the property:

- The Garden is obligated to use the property as a botanical garden and for no other purpose, and only in accordance with the "Master Plan" approved by the City. § 5.1, § 5.2

- The Garden is prohibited from assigning its rights under the Current Lease. § 1.12, § 8.4
- The City prohibits the Garden from discriminating in its visitors the way a private property owner is otherwise permitted to do. §5.4
- The City retains the right to disapprove of future developments. § 5.2
- The City retains title to all improvements during the lease term. § 2.2
- The Garden must make its books available to the City for inspection. § 10.2(d)
- The Garden must maintain the property for the benefit of the City and the people of Atlanta. § 5.4
- The Garden has to maintain the property in a clean condition. § 6.1
- The Garden has to maintain the plants, do lawn care and pest control, and maintain the roads. § 7.1
- The Garden has to maintain a "first class green" parking facility. § 8.1
- The Garden and the City share the parking facility (i.e., the City retains partial possession). § 8.2.2
- City approval is required for changes to parking fees. § 8.6
- If the parking facility suffers a casualty, the Garden must rebuild it or give the City the insurance proceeds. § 8.8
- The Garden is required to file compliance reports with the City. § 10.2(e)

We also know from the Original Lease that the City had to approve the "Master Plan" before the Garden could implement it. Original Lease, § 5.2. Because the Garden relies extensively on its "fact" that the Garden has continuously maintained exclusive control and management over the

property for 40 years, and because there is a genuine issue with that fact, the Garden's Motion for Summary Judgment must be denied as a matter of law.

The Current Lease Conveys a Usufruct

Even if this Court concludes that there is no dispute of material fact, the Garden still loses on the merits. A usufruct is created "when the owner of real estate grants to another person … the right simply to possess and enjoy the use of such real estate…." O.C.G.A. § 44-7-1(a). A lease of less than five years is presumed to convey only a usufruct, "unless the contract is agreed by the parties to the contract and is so stated in the contract." O.C.G.A. § 44-7-1(b). A usufruct is a lesser interest in real estate than is an estate for years. *Searcy v. Peach County Board of Tax Assessors,* 180 Ga.App. 531, 349 S.E.2d 515 (1986).

An estate for years "carries with it the right to use the property in as absolute a manner as may be done with a greater estate, provided that the property or the person who is entitled to the remainder or reversion interest is not injured by such use." O.C.G.A. 44-6-103. Placing some limitations on the use of the estate does not reduce it to a usufruct. *State v. Davison,* 198 Ga.27, 31 S.E.2d 225 (1944). But if the restrictions are pervasive, they are fundamentally inconsistent with an estate for years. *Allright Parking of Ga., Inc. v. Joint City-county Board of Tax Assessors,* 244 Ga. 378, 260 S.E.2d 315 (1979).

By way of example, when the Board of Regents leased property to a fraternity for 99 years, and the fraternity could erect a building on it, convey the property to another fraternity, and execute a mortgage, the lease was an estate for years. *Davison.* On the other hand, when a lease completely restricted assignments without the lessor's written consent, expressly stated what use was to be made of the property, and that the property must be maintained in "the usual high standard of care," it was merely a usufruct and not an estate of years. *Searcy.*

Whether an estate in land passes to the tenant or he obtains merely the usufruct depends upon the intention of the parties; and this is true without regard to the length of the term. *Diversified Golf v. Hart County Board of Tax Assessors*, 267 Ga.App. 8, 10, 598 S.E.2d 791, 794 (2004) ("[A]ll provisions of the lease must be scrutinized objectively to determine whether the legal effect of the agreement is to grant an estate in the property or merely a right of use.") The City so pervasively retains control over the use and operations of the Garden's interest that the interest is merely a usufruct.

In *Diversified Golf*, Hart County had leased land to Diversified for use as a golf course (and only a golf course). The Court ultimately ruled that even though there was a 50-year lease, the lease only granted a usufruct. The Court noted several factors indicating a usufruct:

- Lease did not state if it conveyed a usufruct or an estate
- Lease gave Diversified "possession, use, or occupancy."
- Lease said property was not subject to ad valorem taxation.
- Diversified was required to accept all wastewater sent to it and spray it on the property.
- Lease required Diversified to develop, construct, operate, and maintain a public golf course for the benefit of the community, but the lease regulated how Diversified could operate the golf course.
- Lease prohibited Diversified from selling or disposing of the golf course.
- Lease required Diversified to maintain insurance and name government as additional insured.
- Lease required Diversified to make financial records of golf course available for inspection by government.

- Lease imposed several generic operating restrictions on Diversified (e.g., to operate efficiently and to employ an adequate number of employees).

Moreover, in *Southern Airways Company v. DeKalb County*, 216 Ga. 358, 116 S.E.2d 602 (1960), where a county leased property to a corporation but the county reserved rights of all members of the public, the lease did not convey an estate for years.

Applying the factors discussed above to the Current Lease, we find:

- The Current Lease does not state if it conveys a usufruct or an estate
- The Garden is obligated to use the property as a botanical garden, and only in accordance with the "Master Plan" approved by the City. § 5.1, § 5.2
- The Garden is prohibited from assigning its rights under the Current Lease. § 1.12, § 8.4
- The Garden pays no ad valorem taxes on the property. § 3.4
- The City prohibits the Garden from discriminating in its visitors the way a private property owner is otherwise permitted to do. §5.4
- The City retains the right to disapprove of future developments. § 5.2
- The City retains title to all improvements during the lease term. § 2.2
- The Garden pays no rent. §4.1
- The Garden must make its books available to the City for inspection. § 10.2(d)
- The Garden must carry insurance and name the City as an additional insured. §9.1, § 9.2
- The Garden must maintain the property for the benefit of the City and the people of Atlanta. § 5.4
- The Garden has to maintain the property in a clean condition. § 6.1

- The Garden has to maintain the plants, do lawn care and pest control, and maintain the roads. § 7.1
- The Garden has to maintain a "first class green" parking facility. § 8.1
- The Garden and the City share the parking facility (i.e., the City retains partial possession). § 8.2.2
- City approval is required for changes to parking fees. § 8.6
- If the parking facility suffers a casualty, the Garden must rebuild it or give the City the insurance proceeds. § 8.8
- The Garden is required to file compliance reports with the City. § 10.2(e)

As can be seen from the list above, the City has imposed pervasive restrictions on the Garden's use of the property. The Garden can use the property for only one thing: a botanical garden. It must use the property as a botanical garden for the benefit of the City. The City agrees that the Garden pays no ad valorem taxation.

Because the Garden Pays No Taxes, the Current Lease Cannot Convey an Estate for Years

The property in the hands of the Garden is either subject to taxation or it is not, as a matter of law. The City of Atlanta has no authority by contract to waive a person's obligation to pay ad valorem taxes. As with the golf course in *Diversified Golf*, where the agreement from Hart County that Diversified did not have to pay taxes was an admission that Diversified's interest was a mere usufruct, the City of Atlanta only can state that the Garden does not have to pay taxes if the Garden's interest is a usufruct and not an estate for years.

The large majority of cases differentiating between usufructs and estates for years were brought for one purpose: To determine whether the lessee is obligated to pay ad valorem taxes. While there are gray areas in the ***hypothesis*** of whether a given lease conveys a usufruct or an

estate for years, the ***conclusion*** is a bright line rule: A holder of a usufruct is not subject to ad valorem taxes on the property and a holder of a estate for years is. That bright line rule, together with the state Constitution, are dispositive of this case.

Art.7, § 1, ¶ III(a) of the Constitution provides, in pertinent part, "[A]ll taxation shall be uniform upon the same class of subjects…."[2] Art. 7, § 2, ¶ I provides, "Except as authorized in or pursuant to this Constitution, all laws exempting property from ad valorem taxation are void." Art. 7, § 2, ¶ II provides that exemptions must be approved by 2/3 of the members of each house of the General Assembly and by a majority of the electors in the state. There is no evidence in the record of the present case that any such approval has been granted to the Garden.

A contract between a city and an entity not to impose and collect ad valorem taxes on that entity's property is illegal and void. *Tarver v. Mayor,* 134 Ga. 462, 67 S.E.929, 931 (1910) ("It is as unlawful to sell an exemption as it is to give it away. Municipal authorities can no more bestow on an owner of property subject to taxation an exemption therefrom for a consideration than it could bestow it gratuitously.") In *Tarver,* a taxpayer sued the City of Dalton for a writ of mandamus to require the city to impose and collect ad valorem taxes on the property owned by a cotton mill. The city had executed a contract with the mill that exempted the mill from ad valorem taxes. The Supreme Court ruled the contract illegal and void and that a writ of mandamus absolute should have been issued to the city to compel collection of the tax.

Applying the principles of *Tarver* to the present case, the City of Atlanta has no authority to exempt the Garden from ad valorem taxation. The fact that the Current Lease says that the Garden pays no ad valorem taxes on the property can mean one of two things: 1) the property is a usufruct in the hands of the Garden and the Current Lease memorializes that fact by observing

[2] The uniformity requirement has certain exceptions listed in the Constitution, none of which are relevant to the present case.

that the property is not subject to taxation to the Garden; or 2) the property is an estate for years in the hands of the Garden and the City has unconstitutionally exempted the Garden's property from ad valorem taxation. If the former is true, then the property is a usufruct and the Garden is not able to restrict GWL holders from carrying weapons at the Garden. If the latter is true, then the Current Lease is void (to the extent of the tax exemption) and the City and Fulton County are subject to a suit in mandamus to compel the City and County to impose and collect ad valorem taxes from the Garden for the last several years.

The Garden urges this Court to adopt the latter interpretation, that the parties intended to create an estate for years and then intended to create a (illegal, unconstitutional) tax exemption. Garden Brief, p. 14 ("[T]he City of Atlanta – having extended an estate for years to the Garden – explicitly agreed to eliminate the tax burden associated with that estate for years.") But when faced with two competing, plausible interpretations of a contract, "A court should construe a contract to give a reasonable, ***lawful*** and effective meaning to all manifestations of intention by the parties." *Duke Galish, LLC v. Manton,* 308 Ga.App. 316, 319, 707 S.E.2d 555, 558 (2011); *Rice v. Huff,* 221 Ga.App. 592, 472 S.E.2d 140 (1996) [emphasis supplied]. *See also, Richard Bowers & Co. v. Creel,* 633 S.E.2d 555, 557, 280 Ga.App. 199 (2006) (It is unreasonable to interpret a contract to have an unlawful meaning). In addition, "A contract to do an immoral or illegal thing is void." O.C.G.A. § 13-8-1.

Because the Garden's interpretation of the Current Lease would result in a finding that the parties intended a blatantly illegal tax exemption, this Court must reject that interpretation. The only valid, ***lawful***, interpretation of the Current Lease is that the parties merely recited that the Garden would not be responsible for ad valorem taxation because the Current Lease created only a usufruct, which is not subject to ad valorem taxation.

In *Buoy v. Chatham County Board of Tax Assessors*, 142 Ga.App. 172, 235 S.E.2d 556 (1977), the Court of Appeals considered a lease agreement with just the opposite language from that contained in the Current Lease. In *Buoy*, the language of the contract said that the lessee ***would be*** responsible for taxes. The Court of Appeals ruled that language saying a lessee would be responsible for taxes indicated an intention to create an estate for years. By that logic, it follows that a lease provision saying a lessee is ***not*** obligated to pay taxes means the intention was ***not*** to create an estate for years, but merely to create a usufruct.

Even assuming *arguendo* that the City has illegally and unconstitutionally exempted the Garden from ad valorem taxes, the Fulton County Board of Tax Assessors would not be bound by such an arrangement. The Board of Tax Assessors would still, if the Current Lease conveyed an estate for years, tax the Garden for the value of the estate for years. But that is not what happens. In the records of the Board of Tax Assessors, the property's value is appraised at $313M, but it is listed as "Exempt-***Public*** Property" [emphasis supplied] and owned by the City of Atlanta. The assessed value is therefore listed as 0. Second Affidavit of Phillip Evans. That is, the Board of Tax Assessors must have made a determination that the Current Lease conveys only a usufruct.

If the Current Lease ***did*** convey an estate for years, consider what the tax liability to the Garden would be. The current combined City and County millage rates are .02145. At an appraised value of $313M, the assessed value would be 40% of that figure, or $125M. Multiplied by the millage rate yields an annual tax obligation of the Garden of $2.7M. Assuming the interest accruing and the inflation of taxes over the years roughly cancel each other out, the Garden's tax obligation for the past 40 years is approximately $108M. If this Court rules in the

Garden's favor, it is fair to expect many Atlanta taxpayers will line up to bring an action in mandamus to require the Garden to pay its fair share of the City and County taxes.

The Garden's Reliance on Jekyll Island Development *is Misplaced*

The Garden relies heavily on *Jekyll Development Associates, L.P. v. Glynn County Board of Tax Assessors*, 523 S.E.2d 370, 240 Ga.App. 273 (1999) as an example of a lease agreement that conveyed an estate for years. The Garden claims the present case closely mimics *Jekyll Development*, but an examination of the facts of that case reveal the two cases have stark differences.

In *Jekyll Development*, the Court of Appeals identified the following trappings of an estate for years (a comparison of each provision such provision to the Current Lease is provided in bold italics for the Court's convenience)

- The lease creates a "leasehold estate" (but the court noted that the statement of intend is not controlling) ***[The Current Lease is silent on creating a leasehold estate]***
- There is an initial term of 55 years, presumptively creating an estate for years (but the presumption is rebuttable) ***[The Current Lease has a term of 50 years]***
- The lessee has some rights of extension beyond the initial term of 55 years ***[The Current Lease has no provisions for extension beyond the initial lease term]***
- The lessee must provide broad insurance coverage ***[Current Lease requires Garden to provide insurance]***
- The lessee ***must pay all taxes and assessments [Current Lease exempts Garden from taxes]***
- The lessee must make all necessary maintenance and repairs ***[Current Lease requires Garden to maintain premises]***

- Destruction of property does not relieve lessee from obligations ***[Current Lease is silent on Garden's obligations if property destroyed]***
- Lessee may encumber property with a loan ***[Current Lease prohibits all assignments, so Garden is prohibited from executing any deeds of trust or mortgages]***
- Assignment does not relieve Lessee of obligations ***[Current Lease prohibits all assignments]***

The Court of Appeals found the following indicia of a usufruct:

- The property only could be used as a "top quality, family, tourist and convention oriented resort hotel", with prescribed quality standards ***[Current Lease requires that the property be used as a botanical garden and be used for the benefit of the City]***
- The lessee must maintain landscaping that preserves the natural characteristics of the property and prohibits cutting trees ***[Current Lease requires Garden to maintain the property as a botanical garden]***
- Rates for rooms must be comparable to similar properties ***[Current Lease is silent on rates]***
- Oil and mineral rights reserved to lessor ***[Current Lease is silent on oil and mineral rights]***
- Lessee must expend minimum sums making repairs ***[Current Lease is silent on sums spent on repairs]***
- Lessee must follow certain rules and regulations of Lessor ***[Current Lease requires Garden to follow certain rules in the parking garage]***

- Construction plans must be approved by Lessor ***[Under Current Lease, construction must be in accordance with Master Plan, which required City approval in the Original Lease]***
- Lessor must approve mortgage loans above a certain amount and all loan proceeds must be used to benefit the property ***[Mortgages are not permitted at all in Current Lease]***
- Lessee may not assign without consent of lessor (but consent may not be unreasonably withheld, which is more like estate for years than usufruct) ***[Current Lease prohibits all assignments]***

Given that so many features of *Jekyll Development* are different from the present case, it is difficult to rely on *Jekyll Development.* Perhaps the largest difference between the two cases is the issue already discussed extensively above: In the present case, the Current Lease states that the Garden will not pay ad valorem taxes. In *Jekyll Development,* the lease stated that the lessee ***would*** pay all taxes. Again, because the City has no authority to exempt the Garden from taxation, the inescapable conclusion is that the Current Lease conveys a usufruct which is not subject to taxation.

Conclusion

The City retains control over 1) what the Garden does with the property; 2) whom the Garden can (or must) allow access to the property; 3) how the Garden maintains the property; and 4) how often the Garden has to take out the trash on the property.

Because the City pervasively controls what the Garden does with the property, prohibits the Garden from any assignments of the Current Lease, and because the City concedes the Garden's interest in the property is not taxable, the Garden holds a mere usufruct and not an estate for years. The property is not "private" because it is a usufruct and the fee owner is a

public entity (the City). The Garden is prohibited under O.C.G.A. § 16-11-127(c) from banning guns on its property, and the Garden's Motion must be denied.

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CERTIFICATE OF SERVICE

I certify that on August 21, 2020, I served a copy of the foregoing via efile and serve upon:

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