IN THE COURT OF APPEALS OF GEORGIA

GEORGIACARRY.ORG, INC., et.al.	)	
	)	
Appellants,	)	
	)	
v.	)	Case No. A17A1639
	)	
ATLANTA BOTANICAL GARDEN, INC.,	)	
	)	
	)	
Appellee	)	

REPLY BRIEF OF APPELLANTS

Appellants GeorgiaCarry.Org, Inc. and Phillip Evans (collectively, "GCO") state the following as their Reply Brief.

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1. Summary of the Garden's Position and Applicable Property Law

The Garden argues in its Brief that its facility is on private property, and concludes that the Garden may exercise the power to exclude people merely for carrying firearms. It comes to this conclusion based on two facts: 1) that it is a private corporation; and 2) that it leases the property from the City of Atlanta. The former provision is irrelevant, and the latter is fatal to the Garden's position. The Garden relies heavily on *Delta Air Lines Inc. v. Coleman,* 219 Ga. 12, 13, 131 S.E.2d 768 (1963) for the proposition that when it holds "the leasehold estate as a private lessee, [it] holds the property as a private owner would hold the property." Brief of Appellee, p. 4.

The Garden glosses over important delineations both in *Delta Air Lines* and real estate law generally. In order to understand why, it is necessary to take a step back and review Georgia property law. The highest level of property ownership is fee simple. O.C.G.A. § 44-6-20. It entitles the owner to the entire property with unconditional power of disposition. *Id.* It is the greatest estate that a person can hold in property. *Regents of University System v. Trust Company,* 186 Ga. 498, 198 S.E.345 (1938). Anything different from fee simple ownership is less than fee simple. *Id.* A leasehold is, by definition, less than a fee.

Leases can be divided into two categories. There are estates for years, and there are usufructs. A usufruct is less than an estate for years. *Searcy v. Peach County Board of Tax Assessors,* 180 Ga.App. 531, 349 S.E.2d 515 (1986). A usufruct is merely the right to use and enjoy the land and involves the landlord-tenant relationship. O.C.G.A. § 44-6-101. The holder of a usufruct may not convey the usufruct without the landlord's consent, and a usufruct is not subject to levy and sale. *Searcy,* 180 Ga.App. at 531. The major distinction between an estate for years and a usufruct is that in the latter the tenant has no estate, but merely a right of use. *Midtown Chain Hotels Co. v. Bender,* 77 Ga.App. 723, 49 S.E.2d 779 (1948).

When the term of a lease is greater than five years, there is a rebuttable presumption that the lease is for an estate for years. *In re Emory Properties, Ltd.*, 106 Bankr. 318 (Bankr. N.D. Ga. 1989); *Robinson v. Perry,* 21 Ga. 183 (1857). Estates for years are taxable to the lease holder, usufructs are not. *See* O.C.G.A. § 48-5-3; *Diversified Golf, LLC v. Hart County Board of Tax Assessors,* 267 Ga.App. 8, 10 (2004); *Macon-Bibb County Board of Tax Assessors v. Atlantic Southeast Airlines,* 262 Ga. 119 (1992).

"In this State there can be several separate and distinct estates in the same parcel of land…." *Delta Air Lines,* 219 Ga. at 16. Importantly, in *Delta Air Lines,* it was the ***leasehold interest*** (i.e., not the parcel itself), that was held to be taxable. *Id.*, 219 Ga. at 22. We thus have the result that some leases of

public property (estates for years) are subject to taxation while others (usufructs) are not.

As noted earlier, a lease term of five years or more creates a presumption of an estate for years, but that presumption is rebuttable even for very long leases such as the 50-year lease in the present case. R-186. In *Diversified Golf,* the lessee leased a parcel from the City of Hartwell under a 50-year lease for the purpose of operating a golf course. The county assessed the leasehold for taxes on the grounds that the leasehold was an estate for years. This Court found the leasehold to be a usufruct because of the restrictions contained within the lease.

In the present case, the Garden did not include its lease with Atlanta in the record, so it is not possible to determine if the lease is a usufruct or an estate for years. Under the Garden's theory, because only estates for years are taxable, only estates for years magically transform the underlying parcel into private property for purposes of a non-tax related statute, O.C.G.A. § 16-11-127. If the Garden's leasehold interest is only a usufruct, however, it is not taxable and therefore does not magically convert the underlying parcel into private property for purposes of non-tax related statutes. In that case, the Garden would have to concede under its own theory that it cannot regulate carrying firearms on its property. It is surprising, therefore, that the Garden did not attempt to demonstrate that its leasehold interest is an estate for years,

subject to taxation, levy, and sale.[1]

Under GCO's theory, it does not matter if the Garden holds a usufruct or an estate for years (or even just a "license" or "other agreement to control access to such ***private*** property."). Whether the Garden's leasehold is a usufruct not subject to taxation or an estate for years subject to taxation, the underlying parcel is held in fee by the City of Atlanta. That parcel is not magically converted from public property to private property merely because the City of Atlanta leases ***some*** property rights to the Garden. Regardless of whether the leasehold interest is taxable, it is a lease by the Garden of ***public*** property, so that the Garden is ***not*** a person "in legal control of ***private*** property through a lease." *See* 127(c) (emphasis added).

The *Delta Air Lines* case does not stand for the proposition that Delta Air Lines was a person in legal control of private property ***through*** a lease. Rather, the Court held that the lease itself, for purposes of ad valorem taxation, was private property. Stated another way, Delta Air Lines was still leasing public land. Its leasehold interest was, however, taxable as private property. This Court should reject the Garden's overly broad application of *Delta Air Lines* and other ad valorem tax cases. The Delta Air Lines case did not address the question of whether the Garden is a person or "persons in legal

[1] The Garden does assert that it is a 501(c)(3) corporation, which is exempt from taxation. Despite the fact that the Garden's theory of the case is based on the taxability of property, it is curious that the Garden fails to discuss how its tax exemption affects its theory.

control of ***private*** property through a lease" for purposes of Georgia's criminal laws relating to carrying firearms, nor was any party to that case even contemplating addressing that question. *Delta Air Lines* was an ad valorem taxation case with no application to the present question before this Court.

2. The 2014 Changes to O.C.G.A. § 16-11-127(c)

The Garden has had several opportunities throughout this litigation (at the trial court, then at the Supreme Court, then back at the trial court) to explain the meaning of the 2014 changes to O.C.G.A. § 16-11-127, in which the legislature inserted the word "private" into section 127(c) in two new places (a third already existed). See lines 186 and 189 of HB 60. It has never attempted to do so until now, for the first time, on the second appeal of this case. GCO will address each point made by the Garden in turn.

2.A. The Legitimacy of Using a Statute's Own Evolution to Aid Interpretation

First, the Garden claims that it is not permissible to look at the evolution of § 16-11-127 over time, because "the plain language of the statute is clear and susceptible to only one reasonable construction." Hypocritically, however, the Garden has to resort to a multitude of tax cases to explain the meaning of this criminal gun law. Case law is clear that a statute is interpreted with an eye on the history of that statute, and that "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." *Inland Paperboard & Packaging, Inc. v.*

Georgia Department of Revenue, 274 Ga.App. 101, 104 (2005). When a statutory change is made, it is presumed that an exclusion in the new law means that the old law did not contain that exclusion. *Id.* In the present case, the pre-2014 version of § 16-11-127(c) included all property (i.e., both public and private), and the post-2014 version included only private property. ***Something*** was excluded by the change.

The Garden in its Brief now provides an explanation of the meaning of the change. It gives an example of the Medical Center Hospital Authority ("Authority") in Columbus. According to the Garden, the Authority is a public entity, and was free to exclude guns from its property before the 2014 change, but not after. In the Garden's example, the Authority leases its property from a private entity, and the Authority's leasehold interest became ***public*** by virtue of the lease and thus not subject to gun exclusion under the 2014 change.

The fatal flaw in the Garden's example is that the Authority, as a public entity, is precluded from regulating the carrying or possession of firearms "in any manner." O.C.G.A. § 16-11-173(b). That is, public entities other than the General Assembly are specifically precluded from regulating carrying guns at all, regardless of whether the proposed regulation applies to public or private property, owned or leased. The Garden's example is therefore wrong, as its premise is fatally flawed, and we remain in the situation that the Garden

cannot explain, under its theory of the case, the significance of the 2014 legislative change.

The Garden argues that in 2010 public entities were permitted to regulate carrying firearms on their own property. Again, the Garden's premise is flawed. O.C.G.A. § 16-11-173, formerly codified as O.C.G.A. § 16-11-184, has preempted local regulation of firearms and restricted public entities from regulating carrying firearms since 1999. *See Sturm, Ruger, & Co. v. City of Atlanta*, 253 Ga. App. 713 (2002). The Authority had no firearms regulatory authority in 2010.

2.B. Legislation That Is Not Enacted Has No Use in Interpreting Enacted Laws

The Garden next argues that the current law cannot mean what GCO contends because some members of the General Assembly contemplated passing a bill to say more explicitly what GCO argues the current law means. HB 1060 (2013). The Garden cites no authority for the legitimacy of interpreting a statute based on later bills of the General Assembly ***that do not pass.*** Indeed, the Garden raised this same argument in the trial court and the trial court dismissed it as not helpful. Tr. p. 47.

There are many reasons why language introduced in a bill does not survive the rigorous process of passing legislation, not the least of which is a majority does not believe the language to be necessary ***because existing law***

already says the same thing. It is impossible to draw any conclusions from a legislative proposal that does not pass.

2C. The Garden's Theory is Inconsistent With the Rest of HB 60

Finally, the Garden argues that its interpretation of § 16-11-127 is somehow consistent with the rest of HB 60, which the Garden concedes enacted "wholesale changes liberalizing many provisions relating to carrying weapons." Garden Brief, p. 14. This concession is inconsistent with the argument that the change to § 16-11-127(c), inserting the word "private" before "property" in two instances relating to leases had no effect on the Garden's lease of ***public*** property from the City of Atlanta.

3. GCO's Theory Will Not Result in the Sky Falling

3.A. This Case Has No Bearing on Taxation or Tax Revenues

The Garden worries that its loss would "gut the state's *ad valorem* tax revenue." The taxability of a leasehold estate is not dependent, however, on whether a law regulating carrying firearms applies to such leasehold estate. There is no correlation between taxability of estates and applicability of the criminal code.

The tax code explicitly states that leaseholds are subject to taxation. O.C.G.A. § 48-5-3. To reiterate, there can be multiple estates in the same parcel. Even assuming the Garden has a taxable estate for years, the underlying parcel held in fee by the City of Atlanta is exempt from taxation on

account of it being public property. The criminal code (O.C.G.A. § 16-11-127(c)) regulates carrying firearms "in every location in this state," and draws distinctions between public and private property for those purposes. It does nothing to alter the taxability of such property.

3.B. This Case Affects Only Property Rights Regarding Firearms On Public Property

The Garden next argues would not be able to bring actions in trespass or tortious interference with property if it loses this case. The Garden is correct in one respect, and one respect only. O.C.G.A. § 16-11-127(c) removes one (and only one) right from the bundle of rights in the leasehold (to the extent that right existed in the first place, which is a dubious proposition). It precludes the Garden from bringing a trespass action against people lawfully carrying firearms merely on account of the presence of the firearm.

As already explained in a footnote to GCO's original brief to this Court, in all other respects, the Garden retains whatever rights it has under its leasehold interest. O.C.G.A. § 44-6-103. Even a mere tenant (i.e., of a usufruct) has the right to enjoyment of the leasehold. O.C.G.A. § 44-7-1(a). More importantly, the Garden continues to confuse the difference between the property in the hands of the fee owner and the property in the hands of a lessee.

To illustrate this point, it is helpful to look once again at the statute at

issue in this case, O.C.G.A. § 16-11-127(c):

> (c) A license holder or person recognized under subsection (e) of Code Section 16-11-126 shall be authorized to carry a weapon as provided in Code Section 16-11-135 and in every location in this state not listed in subsection (b) or prohibited by subsection (e) of this Code section; provided, however, that ***private property owners or persons in legal control of private property*** through a lease, rental agreement, licensing agreement, contract, or any other agreement to control access to such ***private*** property shall have the right to exclude or eject a person who is in possession of a weapon or long gun on their private property in accordance with paragraph (3) of subsection (b) of Code Section 16-7-21, except as provided in Code Section 16-11-135. A violation of subsection (b) of this Code section shall not create or give rise to a civil action for damages.

[Emphasis supplied]. The emphasized language shows that both private property owners ***and*** persons in legal control of private property have the power to exclude or eject a person who is in possession of a weapon on the property. The fact that the legislature included both possibilities demonstrates that the legislature was looking at the public/private nature of the property in the hands of the fee owner (i.e., not the lessee, licensee, etc.) Otherwise, it would have been sufficient to say only "private property owners" and omit "or persons in legal control of private property…." This is true because the leasehold estate in the hands of a private person is always held by a "private property owner." The only reason to include the "or persons in legal control of private property …" language is to capture lessees, licensees, etc. This inclusion makes clear that the legislature was referring to the nature of the

property (i.e., "private") in the hands of the fee owner.

The Garden's leading case, *Delta Air Lines,* further illustrates GCO's point. That case shows us that the leasehold estate itself is "private property," subject to taxation. That leasehold estate is "owned" by the lessee. In that respect, Delta could be called a "private property owner," but in the context of O.C.G.A. § 16-11-127(c), the Garden is neither a "private property owner" nor a person in legal control of "private property." The underlying parcel of property is owned in fee by the City of Atlanta.

3.C. Gun Owners Are More Burdened Under the Garden's Interpretation

Lastly, the Garden argues that GCO's interpretation of O.C.G.A. § 16-11-127 leaves gun owners having to research the title of property to know if the fee owner is a public or private entity. It is true that the law imposes burdens on those who choose to carry firearms. But the burden of discovering land ownership pales in comparison to the burden imposed by the Garden's theory.

Under the Garden's interpretation, a gun owner has to know both who the fee owner is and then whether there is a leaseholder. If there is a leaseholder, the gun owner has to obtain a copy of the lease. Then he has to read the lease to determine if the lease is for a usufruct or an estate for years. Because the usufruct is not taxable (and therefore does not magically convert the underlying parcel to private property under the Garden's theory), a usufruct

given to a private entity by a public entity would be clear for carrying firearms over the leasholder's objection. An estate for years would not be. This would in turn spawn declaratory judgment actions over whether a given lease of more than five years is in reality still a usufruct because it contains too many conditions or restrictions. *Cf. Diversified Golf, supra* (lengthy litigation and appeal to determine whether lease was a usufruct or estate for years). The Garden fails to explain how this system would be somehow simpler for gun owners.

4. The Garden As Lessee Cannot Have a Greater Right Than the Fee Owner

GCO argued in its opening Brief that the Garden cannot regulate carrying guns on its leasehold because the City of Atlanta cannot regulate carrying guns on the underlying fee simple parcel. Atlanta is precluded by O.C.G.A. § 16-11-173 from regulating carrying firearms "in any manner." Moreover, as noted in GCO's opening Brief, the City of Atlanta is permanently enjoined by the Superior Court of Fulton County from enforcing a prohibition against carrying firearms in its parks, including Piedmont Park in which the Garden's leasehold is located.

The Garden counters this argument with the startling statement that it did not obtain the right to exclude gun owners ***from the City of Atlanta***. Rather, it obtained that right ***from*** O.C.G.A. § 16-11-127(c). The Garden

overlooks that fundamental principle that "[N]o grantee can take a greater interest than his or her grantor had." *Diversified Golf*, 267 Ga. at 15. If the fee simple owner cannot exclude gun owners, the holder of a lesser interest cannot do so, either.

5. The Supreme Court Already Ruled On Private Rights of Action

Finally, the Garden argues that GCO has no private right of action under O.C.G.A. § 16-11-127. The Supreme Court already considered and rejected this argument. The trial court dismissed the case (the first time) on the grounds that GCO impermissibly sought a declaratory judgment on a criminal statute. R., pp. 68-69. The Supreme Court reversed, holding:

> Appellants seek a determination of whether licensed individuals may carry a weapon on the grounds of the Garden in accordance with OCGA § 16-11-127(c)…. Appellants [sic] request for declaratory relief was not impermissible, and it was error to dismiss Appellants' declaratory judgment action….

GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc., 299 Ga. 26, 30 (2016).

It is true that the Garden did not argue the issue in exactly the same way the first time around. It argued that GCO was precluded from bringing this action because it involved a criminal statute (O.C.G.A. § 16-11-127(c)). The Garden brought that argument in its motion to dismiss for failure to state a claim. R-27 *et seq.* If the Garden had additional grounds for such motion, it was required to bring them at that time. O.C.G.A. § 9-11-12(b). Now that the

Supreme Court has ruled that the complaint did state a valid claim, it is too late for the Garden to re-litigate that issue, even if on slightly different grounds.

The Garden's argument is essentially, "Even if GCO is correct, we can keep violating the law because GCO has no remedy." GCO does, in fact, have a remedy, and the Supreme Court has already so stated.

Moreover, O.C.G.A. § 9-2-8 reflects the codification of longstanding Georgia public policy. *See Somerville v. White*, 337 Ga. App. 414, 417 n.12 ("the plain language of O.C.G.A. § 9–2–8 merely reflects the General Assembly's agreement with longstanding Georgia precedent that the imposition of civil as well as criminal penalty must be found in the provisions of the criminal statute at issue, not extrapolated from the public policy the statute generally appears to advance.") (Citation and punctuation omitted). The Garden fails to quote subsection (b) of this statute, which states, "Nothing in subsection (a) of this Code section shall be construed to prevent the breach of any duty imposed by law from being used as the basis for a cause of action under any theory of recovery otherwise recognized by law," which causes of action presumably includes the present declaratory judgment that the Supreme Court has already reinstated.

CONCLUSION

The history of legislation regulating carrying firearms in this State makes crystal clear the legislature's intention as applied to the present case.

The legislature had already, as a matter of public policy, "authorized" the carry of weapons by licensees "in every location in this state," permitting only private property owners and lessees of any property the power to exclude those carrying arms. The 2014 amendments to the law at issue in this case clearly show that the legislature intended to withhold the right to exclude people carrying firearms from those who choose to lease property from a public entity. Under the 2014 amendments, a private entity that desires to exclude people carrying firearms must either buy property or lease property from a private, rather than a public, entity.

Respectfully submitted this this 24th day of July, 2017.

This submission does not exceed the word count imposed by Rule 24.

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CERTIFICATE OF SERVICE

I certify that on July 24, 2017, I served a copy of the foregoing via U.S. Mail upon:

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Respectfully submitted this 24th day of July, 2017.

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