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' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiffs commenced this action for declaratory and injunctive relief, seeking a declaration that Defendant Atlanta Botanical Garden, Inc. (the "Garden") may not prohibit people with Georgia weapons carry licenses ("GWLs") from carrying weapons on property Defendant leases from the City of Atlanta, together with an injunction prohibiting the Garden from banning such visitors. Plaintiffs now move for summary judgment.

Argument

The Garden argues that its lease is vastly different from the lease at issue in *Diversified Golf, LLC v. Hart County Board of Tax Assessors*, 267 Ga. App., 598 S.E.2d 791 (2004). It is not. The Garden identifies the most significant issue in *Diversified Golf* is that the lessee was required to accept all the wastewater given to it. The Garden points out that this use the lessee was required to put to the property was paramount in the lease, and because the lessee could not use the property in a different way, the lease conveyed only a usufruct. Comparing this concept to the Garden lease, one finds that the Garden is absolutely obligated to use the property for a botanical garden for the benefit of the City. The Garden cannot use the property for any other

purpose. The Garden cannot, for example, allow the property to lie fallow, cannot cultivate it as agricultural space, cannot build a building to operate stores, restaurants, beauty parlors, or skating rinks.

This is the same as the situation in *Diversified Golf.* A lessee that is constrained to use the property only for a purpose dictated by the lessor must convey only a usufruct. This is because an estate for years allows a lessee to use the property for any purpose that does not interfere with the reversionary interest of the fee owner. The Garden has not explained why its inability to use the property for ***anything*** other than a botanical garden is necessary to protect the reversionary interest of the City.

The Garden continues, without explanation or authority, that ***all*** the restrictions in its lease are for the protection of the City's reversionary interest. This cannot be true. The following illustrate just some of the restrictions in the lease that do not affect the City's reversionary interest:

- 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 cannot possibly explain how the City's reversionary interest would be harmed if the Garden used the property for any other purpose or no purpose at all if the result left the property otherwise unaffected.
- The Garden is prohibited from assigning its rights under the Current Lease. § 1.12, § 8.4. A hallmark of an estate for years is that the interest is freely alienable. The City's reversionary interest would not be affected in the least by the Garden's assignment to a third party.

- The City prohibits the Garden from discriminating in its visitors the way a private property owner is otherwise permitted to do. §5.4. The Garden's discrimination in its visitors is completely unrelated to the City's reversionary interest.
- The City retains the right to disapprove of future developments. § 5.2. The holder of an estate for years generally may make whatever improvements he cares to. If anything, developments would enhance the reversionary interest.
- The Garden must make its books available to the City for inspection. § 10.2(d). The Garden's financial situation has no relationship to the City's reversionary interest.
- The Garden must maintain the property for the benefit of the City and the people of Atlanta. § 5.4. The lease may only protect the City's ***reversionary*** interest. It cannot protect the City's present interest (which is nonexistent if the lease conveys an estate for years).
- City approval is required for changes to parking fees. § 8.6. Again, the present use of the property (and fees and rents therefor) have no impact on the City's reversionary interest.

Perhaps the surest indication that the Current Lease conveys a usufruct and not an estate for years is the fact that the Garden pays no *ad valorem* taxes on the property. It is well established that tenants of usufructs pay no taxes and tenants of estates for years do.

The City of Atlanta has no authority by contract to waive a person's obligation to pay *ad valorem* taxes. Art.7, § 1, ¶ III(a) of the Constitution provides, in pertinent part, "[A]ll taxation

shall be uniform upon the same class of subjects…."[1] 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 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

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

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 takes the untenable position that by ***city ordinance*** the City has over-ridden the state Constitution. The Garden contends that Section 146-37 of the City's ordinances empowers the City to grant exemptions to *ad valorem* taxes. The Garden ignores the clear requirements of the Constitution, that exemptions from *ad valorem* taxes ***must*** be approved by 2/3 of the members of each house in the General Assembly and by a majority of voters statewide. The City Council cannot override that constitutional requirement. Because the City failed to follow the procedures in the Constitution, it cannot be true that the Garden's failure to pay *ad valorem* taxes is because the City exempted it. The only way the Garden cannot be paying taxes is because the Garden holds a mere usufruct.

Moreover, Fulton County classifies the Garden property as "public" and does not tax it on that basis. The Garden fails to advance any arguments at all to support why Fulton County would not be assessing taxes on the Garden. Fulton County is not a party to the lease agreement and the Garden does not claim the Fulton County Commission also has the unconstitutional authority to grant exemptions. Again, the only way the Garden can escape paying *ad valorem* taxes to Fulton County is if the Garden has a mere usufruct, and the fee owner (the City) would be liable for the taxes (if it were not a government entity).

The Garden argues that it does not matter if the City lawfully exempted the Garden from *ad valorem* taxes. What matters, the Garden contends, is that the City ***thought*** the Garden would be liable for the taxes if the City did not provide the (unconstitutional) exemption. The Garden

provides no evidence of what the City "thought," it only draws inferences from the Current Lease itself. Of course, a competing inference is that the City recognized that the Garden would not have to pay taxes because the Current Lease conveyed only a usufruct and the City merely recited that fact in the Current Lease.

When faced with competing interpretations of a contract, this Court should adopt the interpretation that does not result in an unconstitutional provision. Because it would be blatantly unconstitutional for the City to exempt the Garden from taxes, the better interpretation is that the Garden does not owe them. This also would be consistent with Fulton County's conclusion that the property is public in the hands of the City and therefore no taxes are owed.

Conclusion

Because the City so 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 this Court must declare the same. Plaintiffs also are entitled to an appropriate injunction against the Garden.

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CERTIFICATE OF SERVICE

I certify that on September 16, 2020, I served a copy of the foregoing via efile and serve upon:

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