

GEORGIA DEPARTMENT OF REVENUE

LOCAL GOVERNMENT SERVICES DIVISION



EXEMPT PROPERTY WORKSHOP CASE STUDIES SUPPLEMENT

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Georgia Department of Revenue

LEVERETT et al. v. JASPER COUNTY BOARD OF TAX ASSESSORS.
COURT OF APPEALS OF GEORGIA
July 16, 1998, Decided

Opinion

The trial court in this bench trial committed legal error in entering a judgment for the Jasper County Board of Tax Assessors ("Assessors") for two reasons that caused the assessments to lack uniformity: (1) in failing to follow the mandate of O.C.G.A. 48-5-2 (3) (B) (ii) and (iv) "existing use of [the] property" and "any other factors {233 Ga. App. 471} deemed pertinent in arriving at fair market value"; and (2) in failing to exempt from taxation standing timber under the uniformity mandate of O.C.G.A. 48-5-7.1 (a) (1) and 48-5-7.5 as set forth in Art. VII, Sec. I, Par. III (e) (2), Ga. Const. of 1983 (Ga. L. 1990, pp. 2437, 2438, 2), "standing timber shall be assessed only once, and such assessment shall be made following its harvest or sale and on the basis of its fair market value at the time of harvest or sale." These errors resulted from following the erroneous appraisal methods used by the Assessors in which growing, but not yet marketable, timber is treated as adding no value to the land and in which stump land and scrub timberland are treated as having substantially the same value as cleared cultivatable land, pasture land, or growing timberland.

1. The Assessors failed to follow the mandate of O.C.G.A. 48-5-2 (3) (B) (ii) and (iv) when they refused to consider "existing use of the property" both as to the comparables and as to the subject property. This made their method of arriving at evidence of comparable value an error of law. *Inland Container Corp. v. Paulding County Bd. of Tax Assessors*, 220 Ga. App. 878 (470 S.E.2d 702) (1996). "Under that statute, the tax assessor must consider, inter alia, the existing use of property and 'any other factors deemed pertinent in arriving at fair market value.' O.C.G.A. 48-5-2 (3) (B) (ii) and (iv)." *Id.* at 879 (1). Thus, the trial court, in relying upon a valuation conducted in violation of O.C.G.A. 48-5-2 (3) (B) (ii) and (iv), committed a plain legal error in thus ruling for the Assessors and against the taxpayers, Cason and Leverett.

Further, such failure to follow statutory mandate is reviewed by "the customary 'plain error' standard of appellate review." *Harper v. Landers*, 180 Ga. App. 154, 157 (348 S.E.2d 698) (1986). This is not an analysis under the "any evidence" standard, which deals with errors of law based upon the factual predicate. *Hawkins v. Grady County Bd. of Tax Assessors*, 180 Ga. App. 834, 835 (3) (350 S.E.2d 790) (1986). 1 The recitation of the evidence in the record is only to show {233 Ga. App. 472} how the refusal to obey the statutory mandate led the Assessors and the trial court into reversible legal error.

(a) The General Assembly in 1991 exempted standing timber, both growing and marketable, from ad valorem taxation until the standing timber is sold unharvested or after harvest, whichever first occurs. See Ga. L. 1991, pp. 1903, 1907, 1919-1924, 2, 6; O.C.G.A. 48-5-7 (b); 48-5-7.1 (a) (1); 48-5-7.5 (unamended). Such Act was passed under the uniformity requirement of Art. VII, {504 S.E.2d 561} Sec. I, Par. III (e) (2), Ga. Const. of 1983 that permits only one assessment of standing timber, either on sale or harvest.

This annual tax exemption caused a major problem for Jasper County because \$ 20,000,000 of standing timber, representing 51,000 acres of timberland, suddenly was removed from the county tax digest. The Jasper County Board of Tax Assessors ("Assessors") was in the middle of a reappraisal of the timberland and suddenly had to change the method of their appraisals of timberland. Both appellants' tracts were timberland.

Under the statute, the Assessors could no longer value timber on the land as part of the fair market value of the land for assessment purposes. Therefore, they made the decision to ignore and treat growing timber of less than six inches in diameter under the assumption that it had zero value as nonmerchantable. They assumed that merchantable timber is "timber that you can sell on the market if there's a market for it." They assumed that the minimum size pine tree to qualify as pulpwood would be a tree with a six-inch diameter or greater. They made another assumption that all rural land, i.e., cleared land, stump land, and non-merchantable timberland, was of comparable value except where there is "merchantable timberland." Stump land is land where the trees have been harvested, and the stumps, brush, and debris remain on the land.

However, the Chief Assessor admitted in *judicio* that cleared land and stump land had a substantial difference in value, because it cost approximately \$ 400 per acre to clear the land, i.e., grub out the stumps, clear the land, and burn the debris. Therefore, stump land versus cleared land, i.e., pasture, agriculture fields, and even cleared and replanted pine land, have a substantially different value based upon cost to improve alone; thus, improved land has a higher acreage fair market value which reflects the cost of clearing and replanting pines or of fencing.

Thus, under the Assessors' methodology, previously harvested timberland that had been replanted and contained replanted standing timber less than six inches in diameter was treated as having no value added to the land price because the timber is non-merchantable in that tax year, although the timber would have value upon maturity. The record contained expert witness testimony which {233 Ga. App. 473} demonstrated that clearing and replanting pines can cost up to \$ 400 per acre. If the land reassessed had standing timber, then the Assessors sought to determine the stump value of the land under the standing timber without calculating the value of the timber.

The Assessors decided that the way to determine the value of timberland, without determining the value of the standing timber and subtracting such value from the overall value of the timberland, was to determine the value of rural land alone without regard to timber. This would save them labor, even though the pre-1992 reappraisal provided the data for such calculations as part of the Assessors' records. Further, in the individual property reappraisals they made no adjustment for timber on the land to prevent taxing the timber. In fact, the Assessors ignored the value of standing timber on the land. However, using such comparable sales, the Assessors also made no adjustment to fair market value for the comparable sales or tracts reassessed for standing timber, i.e., growing or merchantable. On all of the comparable sales the tax records indicate that there was some timber on the land, but the timber was treated as having no value. Therefore, the timber value was reflected in the price of the land, because the value of the timber alone was not removed.

Had the Assessors calculated the value of the growing timber, i.e., seedling to pre-marketable timber, for each comparable tract sold, subtracted out such growing timber value, and then calculated the sales ratio from the remaining values, such method could then be used as a comparable for stump land to determine the fair market value of the land with timber being reassessed without calculating the value of the timber. In short, had the Assessors, in arriving at their 19 comparables for the sales ratio, accounted for the value that growing timber added to the land and subtracted out such value to arrive at the fair market value for the stump land alone, then those 19 calculations of growing timber value subtracted out of the comparables {504 S.E.2d 562} would allow them to have a sales ratio for stump land that would allow them to ignore the standing timber on each reassessment, because the fair market value of the comparables thus determined would reflect only the value of stump land and not have land and growing timber mixed together to form the fair market value.

(b) In the initial nineteen large acreage tracts the Assessors had as part of the sales ratio and as having no merchantable timber to form the comparables the following: seventeen had been partially cut over to form stump land or had some scrub timber; eight had significant natural regeneration of pines; eight had well-stocked, natural regeneration of pines; one had pine trees less than twenty feet tall and four inches in diameter; two had pines taller than twenty feet and more than four inches in diameter; and the two Greer tracts, upon belated visual inspection, had merchantable standing timber. {233 Ga. App. 474} Of the comparables, eleven were sales of less than fifty acres, and only seven were sales of one hundred acres or more. All of the comparables were classified as primarily woodland with no merchantable standing timber, although two were later determined to have significant merchantable timber. While none was classified as being cultivated open land, seven had some pasture land between three and 25.82 acres, with the remaining acreage primarily woodland; however, one hundred six-acre parcel had sixty-eight acres of pasture. Two had ponds: one was an eight-acre pond, and the other was a one-acre pond.

The flaw in the methodology used by the Assessors in relation to the property described above is that the Assessors ignored the mandate of O.C.G.A. 48-5-2 (3) (B) (ii) and (iv) requiring the consideration of the "existing use of property" and "any other factors deemed pertinent in arriving at fair market value," i.e., O.C.G.A. 48-5-7.4 (a) (1) and (2). They ignored the existing use of the comparable sales of woodland, as well as the appellants' timberland, by ascribing no value to the growing trees. They recognized that the value of mature trees influenced the value of the land; however, they refused to recognize that stump land had a different value from pasture with fencing or fields, because of land preparation and clearing costs.

In their tax records, the Assessors already had set up subcategories of woodland with less than merchantable timber for valuation: (1) stump land or scrub woods; (2) significant natural regeneration of pines; (3) well-stocked, natural pine regeneration; (4) planted pines with trees less than six feet in height; (5) planted pines with trees less than twenty feet in height and diameter less than four inches; and (6) planted pines with trees over twenty feet in height and over four inches in diameter. Each such category would have a different per-acre value effect on the fair market value of the land. However, the Assessors did nothing to factor such different values out of the fair market value per acre of each comparable, so that such value of the growing timber would not be part of the assessed value and taxed. Instead, the Assessors engaged in the fiction that such different values for growing timber had no effect on the fair market value of the land used as comparables to obtain the value of land alone. Treating the six categories of woodland and cleared land as having substantially the same values violated uniformity of treatment of Art. VII, Sec. I, Par. III (e) (2), Ga. Const. of 1983, because the values per acre differed between the woodland and the preparation costs of cleared and improved land. While defining merchantable timber as pines with a diameter of less than six inches, they removed the two Greer tracts from the sales ratio study as comparables after the tax reassessments had been made and mailed, because the trees were greater than four inches but less than six inches in diameter and had {233 Ga. App. 475} a merchantable value. The Assessors determined that the error of inclusion of the Greer tracts, in their opinion, would not distort the sales ratio and invalidate the reassessments already made before their error was discovered, although the tracts did contain marketable timber that was exempt; they had not inspected the Greer tracts and assumed that this was stump land, because that was the only land the grantor normally sold. {504 S.E.2d 563} (c) "Taxation of all kinds of property of the same class must be uniform and by the same standard of valuation, equally with other taxable property of the same class." *Champion Papers v. Williams*, 221 Ga. 345, 346 (144 S.E.2d 514) (1965); see Art. VII, Sec. I, Par. III (e) (2), Ga. Const. of 1983. "The [trial] court erred, however, in approving a valuation which tilted market value in favor of an assumed 'highest and best use' to appear from future speculation and development, rather than first determining the criteria for zoning, existing use, and deed restrictions, if any, at which time

other pertinent factors may be considered. *Chilivis v. Backus*, 236 Ga. 88 [(222 S.E.2d 371) (1976)], was written before the Legislature substituted 'fair market value' for 'cash price' in [O.C.G.A. 48-5-2 (3)]; the specific criteria were, however, a part of the statute at that time and the court held that 'highest and best use' is a factor only if it would reflect the amount that would be realized from a cash sale of the property; that valuation will not be confined to actual use alone, and that all criteria added by the General Assembly (see Ga. L. 1975, p. 96) are to be considered." *Dotson v. Henry County Bd. of Tax Assessors*, 155 Ga. App. 557, 559 (271 S.E.2d 691) (1980); see also *Cobb County Bd. of Tax Assessors v. Sibley*, 244 Ga. 404 (260 S.E.2d 313) (1979); *Sibley v. Cobb County Bd. of Tax Assessors*, 171 Ga. App. 65 (318 S.E.2d 643) (1984); *Stoddard v. Bd. of Tax Assessors of Grady County*, 163 Ga. App. 499, 501 (3) (295 S.E.2d 170) (1982). "Under [O.C.G.A. 48-5-2], the tax assessor must consider, inter alia, the existing use of property and 'any other factors deemed pertinent in arriving at fair market value.' O.C.G.A. 48-5-2 (3) (B) (ii) and (iv)." *Inland Container Corp. v. Paulding County Bd. of Tax Assessors*, supra at 879 (1); see also *Brian Realty Corp. v. DeKalb County*, 229 Ga. App. 185 (493 S.E.2d 595) (1997). While comparable land sales used to determine fair market value do not have to be identical to the subject property, such sales must be sufficiently similar to the subject property to be fairly said to have some rational and probative comparability other than mere geographic location. See *Hawkins v. Grady County Bd. of Tax Assessors*, supra; see also *Inland Container Corp. v. Paulding County Bd. of Tax Assessors*, supra at 881.

"Existing use' must be employed as a 'yardstick' with which to measure fair market value." *Inland Container Corp. v. Paulding County Bd. of Tax Assessors*, supra at 879 (1). Accord *Dotson v. Henry* {233 Ga. App. 476} *County Bd. of Tax Assessors*, supra at 559. The Assessors rejected consideration of "existing use" not only in the sales ratio studies to develop comparables, but also in the assessment of the subject tracts, by ascribing no value to growing timber in different stages of maturity of agricultural/forestry use. The "evidence [demanded] a finding that the assessors 'did not consider use of the property in question or the property of all others similarly situated.' *Ayers v. Douglas County Bd. of Tax Assessors*, 162 Ga. App. 224, 225 (2), 226 (291 S.E.2d 84) (1982)." *Inland Container Corp. v. Paulding County Bd. of Tax Assessors*, supra at 881.

Further, in this case, the Assessors did not consider present use, either in developing the comparables or in reassessing the tracts, because standing timber or timberland was either removed or treated as non-merchantable, which is to disregard present use for forest agricultural purposes. Thus, the method and the comparables lack uniformity. Art. VII, Sec. I, Par. III (e) (2), Ga. Const. of 1983; *Inland Container Corp. v. Paulding County Bd. of Tax Assessors*, supra at 879-880; *Hawkins v. Grady County Bd. of Tax Assessors*, supra at 835; *Stoddard v. Bd. of Tax Assessors of Grady County*, supra at 501; *Dotson v. Henry County Bd. of Tax Assessors*, supra at 559; *Sibley v. Cobb County Bd. of Tax Assessors*, supra at 69.

Hilton, the Chief Tax Appraiser, when asked why timber sales were not utilized to develop the sales ratio for comparables, testified: "we did not use tracts with substantial timber. Because of the timber market being so volatile where you -- where I have seen where tracts of land have sold for, say, \$ 100,000 and they cut the trees and they sale [sic] the timber for \$ 110,000 giving a negative value. It just does not give a true bare dirt {504 S.E.2d 564} price in the market." "We don't have the knowledge to back the timber out." He also testified that "not all pieces of property fit a schedule. It's not a perfect, as you say, world. Therefore other underlying factors must be considered and therefore you could flat value a piece of property based on characteristics, location or neighborhood. . . . Small and large." However, such cannot be done in disregard of the statutory mandates. There were 7,700 tax parcels in the county, and 1,100 were considered large parcels. Of the 1,100 large parcels, approximately 600 have no improvements on them, i.e., houses, barns, or other structures. However, from the Assessors' own records and appraisal

methods used by other tax assessors elsewhere, it is practical and possible for standing timber to be appraised separately from the land. See generally *Hancock County Bd. of Tax Assessors v. Dickens*, 208 Ga. App. 742, 743 (1) (431 S.E.2d 735) (1993) (1991 tax year when Ga. L. 1990, p. 1901 applied prohibiting separate treatment). See Art. VII, Sec. I, Par. III (e) (2), Ga. Const. of 1983.

2. The Georgia Constitution prohibits standing timber being {233 Ga. App. 477} assessed more than once and requires such assessment be made after sale or harvest. Art. VII, Sec. I, Par. III (e) (2), Ga. Const. of 1983. The General Assembly deferred ad valorem taxation on growing trees so that growing forestry products were exempt from annual ad valorem taxation until sold or harvested, because the Assessors were taxing annually all stages of timber growth prior to 1992, which caused multiple taxation of the same standing timber at different stages of growth. See Art. VII, Sec. I, Par. III (e) (2), Ga. Const. of 1983; O.C.G.A. 48-5-7.5. This meant that the growing but not yet merchantable timber had value that required deferral and exemption from taxation so that standing timber would not be annually taxed prior to harvest or sale. Deferral prevented multiple taxation of the single forestry product prior to harvest, thereby causing taxation to occur at harvest or sale of the unharvested timber. Art. VII, Sec. I, Par. III (e) (2), Ga. Const. of 1983. To the extent that growing standing timber is reflected in the land value at reassessment of the land and the value for growing timber is not removed from the fair market value, such growing standing timber is being assessed over and over at each annual reassessment in violation of the constitutional prohibition against more than one assessment of standing timber; further, such assessment is being done at a time other than sale or harvest. Art. VII, Sec. I, Par. III, Ga. Const. of 1983.

The General Assembly did not define "standing timber" for purposes of O.C.G.A. 48- 5-7.5 as "trees less than six inches in diameter" as did the Assessors, because all stages of timber growth were to receive tax deferral. Tax deferral has a rational basis only when timber is considered as an agricultural cash crop that takes considerable time to grow to full maturity, and when it can be harvested, returns cash to pay the deferred taxes. O.C.G.A. 48- 5-7.1 (a) (1) provides deferral from ad valorem taxation to bona fide agricultural uses, including "forestry." The statute makes no distinction between "merchantability" and maturing forests. In fact, if trees that had not reached maturity, i.e., "merchantable" within the Assessors' definition, had no economic value, then the General Assembly performed a futile act in deferring taxation on "standing timber"; clearly, the General Assembly intended to exclude from ad valorem taxation all growing forestry products, i.e., pine seedlings to harvestable timber or pulpwood, until either sold or harvested. Thus, growing timber has economic value that must be exempted from annual taxation, even though the growing timber could not be sold. Ga. L. 1991, pp. 1903, 1907, 1919-1924, 2, 6 (O.C.G.A. 48-5-7.5 unamended).

In point of fact, in Jasper County in 1991, there were 51,000 acres of timberland with \$ 20,000,000 worth of growing "standing timber," and there were 1,100 tracts of land larger than 26 acres and 6,600 parcels of less than 26 acres. A substantial portion of the {233 Ga. App. 478} 51,000 acres of timberland, worth \$ 20,000,000, was in the 1,100 large tracts, which included the 17 comparable sales that the Assessors defined as having no "merchantable" timber because the timber was not mature. The Assessors' assumption that growing, but not mature, timber had no value was not supported by the Assessors' own records. {504 S.E.2d 565} Thus, the Assessors, in not subtracting the value of growing timber from the fair market value of the land used in the sales ratio as comparables, refused to treat growing timber as tax-exempt and caused what is exempt from taxation until sold or harvested to be part of the assessed value of the land. See Art. VII, Sec. I, Par. III (e) (2), Ga. Const. of 1983; O.C.G.A. 48-5-7.1 (a) (1); 48-5-7.5. Had the Assessors calculated the value of the growing timber for each of the comparables and

subtracted out such value of the sales price for each comparable before calculating the sales ratio, so as to reflect only the value of the land alone, then current use for growing trees and tax deferral would have complied with the statutory mandate, and the sales ratio for the comparables would reflect only the value of the underlying land for timberland, excluding the standing timber.

Judgment reversed. Johnson, P. J., Beasley, Smith, JJ., and Senior Appellate Judge Harold R. Banke concur. Andrews, C. J., and McMurray, P. J., dissent.

Dissent

The superior court denied the appeal of these two appellants after determining that they "failed to prove by a preponderance of the evidence that there was a lack of uniformity or that the values and the methods used were improper or incorrect." On appeal, this Court considers the sufficiency of evidence and not its weight. The evidence presented at trial was sufficient to authorize the judgment of the trial court, which should be affirmed. *Hawkins v. Grady County Bd. of Tax Assessors*, 180 Ga. App. 834, 835 (350 S.E.2d 790). My view of the evidence supporting the trial court's findings differs from the majority's views, especially concerning the market value of immature timber. Therefore, I respectfully dissent.

The 1994 appraisal of appellants' land was increased over the appraisal for the preceding year because of an increase in a location zone multiplier assigned to the northern portion of the county where the property in question was located. The location zone multiplier for appellants' land was increased from 1.08 to 1.6 resulting in a 48 percent increase in the appraisals. This Court has previously approved of dividing a county into zones so as to realistically include location as a factor of value, so long as the zones are not arbitrarily fixed but drawn from analysis of property sales in the county. *Bethea v. Joint City-County Bd. of Tax Assessors*, 219 Ga. App. 111 (1), 112 (464 {233 Ga. App. 479} S.E.2d 37); *Thomas County Bd. of Tax Assessors v. Balfour Land Co.*, 214 Ga. App. 181, 182 (446 S.E.2d 745).

In the case sub judice, the change in the location zone multiplier, accompanied by a reduction in the number of zones into which the county was divided and a consequent redrawing of the zones, was based upon sales ratio studies which appellants maintain were flawed. Appellants maintain that the large tract study (pertaining to tracts of 26 or more acres) was flawed because the tax assessors excluded sales of timberland from the study and also because some of the tracts of land included in the study did contain significant quantities of timber for which no adjustment in sales price was made, resulting in a taxing of timber value prior to harvesting in violation of the uniformity requirement and the provision of the Georgia Constitution that standing timber be assessed only once following harvest. Art. VII, Sec. I, Par. III (e) (2).

As to the exclusion of timberland sales from the study, there is no requirement in Georgia law that comparable sales be identical, so that the valuation of timberland may be properly accomplished without the benefit of timberland sales. *Inland Container Corp. v. Paulding County Bd. of Tax Assessors*, 220 Ga. App. 878, 879 (1), 881 (470 S.E.2d 702). Therefore, the trial court was authorized to consider evidence that the valuation of the underlying land from timberland sales was not practical due to the volatile nature of timber prices. The conflicting evidence presented by appellants, that timber value could and should be backed out of timberland sales to obtain a realistic value for the underlying land, presented a factual question for resolution by the trial court as trier of fact and which was determined adversely to appellants. {504 S.E.2d 566} Appellants' contention, that the land sales used in the large tract study contained tracts with timber for which no adjustments in sales prices were made, presents another factual dispute which the trial court resolved against defendants. The original list of sales considered did include two timberland tracts which were later removed from the study without affecting the conclusions

of the study. As to the tracts left in the study, the tax assessors testified as to examining each tract and finding no merchantable timber. There was no evidence that growing but not yet merchantable timber might contribute to the value of a tract of land. Therefore, no error was apparent in the failure to adjust the sales prices for such tracts.

Finally, I fail to find any lack of uniformity inherent in the subclassification of the county by tract size, the division here being into large tracts of 26 acres or more, and small tracts of less than 26 acres. Tract size was acknowledged as a consideration in determining fair market value by the experts who testified in this case and has been noted in our prior decisions. See *Thomas County Bd. of Tax {233 Ga. App. 480} Assessors v. Balfour Land Co.*, 214 Ga. App. 181-182, *supra*, and *Monroe County Bd. of Tax Assessors v. Remick*, 165 Ga. App. 616, 619 (300 S.E.2d 203). Furthermore, within each subclassification there were further adjustments for tract size. In the case sub judice, appellants have attempted to demonstrate a lack of uniformity by showing a divergence in the values assigned to similar properties near the boundary of these two subclassifications. However, once more, the evidence on this point is conflicting and within the domain of the trial court as trier of fact.

I am authorized to state that Chief Judge Andrews joins in this dissent.

GOLD KIST, INC. v. JONES et al.
Supreme Court of Georgia
March 7, 1974, Decided

Opinion:

The controlling factor in this appeal is whether farm products held by a nonprofit marketing cooperative under contracts with the farmers, either as inventory or processed into other products, can be considered to be "remaining in the hands of the producer" as contemplated by the Georgia Constitution, and therefore exempt from taxation.

The question arose when Gold Kist, Inc. filed a suit in the Superior Court of Peach County against Julian F. Jones, Ordinary, {204 S.E.2d 585} Walter B. Tharpe, Tax Commissioner, J. R. (Reg) Mullis, Sheriff and other officials of that county, seeking to enjoin the assessment and levy of ad valorem taxes upon the inventory of a certain amount of soy beans held by it for sale.

Upon a rule nisi hearing a temporary restraining order was issued against the levy or collection of such taxes.

Subsequently, a motion of the State Revenue Commissioner to intervene as a party defendant was granted.

It was agreed that the case be tried before a judge without a jury upon a stipulation of facts and other evidence consisting of affidavits and depositions.

These showed in material part as follows: that Gold Kist operates a storage facility in Peach County for grain, normally consisting of corn, soy beans, oats, barley and wheat; that there is also a store operation there; that it deals directly with the farmers who bring the grain to the storage facilities; that when a farmer brings his grain in it is weighed and graded; that if a farmer asks for advance payment for such grain it is made according to the market price as of the date of delivery; and that the grain goes into storage and is held for processing at a later date, depending upon when it is needed to go to market.

The evidence also showed that soy beans are stored in grain facilities along with other soy beans in the possession of Gold Kist in a common container, such as a silo or grain elevator; that when {231 Ga. 883} they are processed they are taken to its processing plant in Valdosta, Georgia, where they are ground and made into other products; that during the last year prior to this litigation Gold Kist stored and processed approximately 300,000 bushels of soy beans; that soy beans are normally brought in October, November and December of a given year, immediately after harvest; that Gold Kist's year closes on June 30 of the following year, so that there must be an accounting and settlement with the farmer or producer no later than May 15 in order to complete its records; and that upon final accounting any net margin goes back to the farmer, regardless of who brought the grain in.

It was also undisputed that once the grain or soy beans were stored in Gold Kist's grain elevator or silo it was impossible to return the same grain to the farmer if he wanted it, although he could receive something comparable, because the grain that the member brought in may have been sent to the processing plant or intermingled with other grain.

The evidence further revealed that the only requirement a person has to meet in order to become a member of the co-operative is to sign a membership agreement and do business with Gold Kist; that there are other such co-operatives in Peach County; that any person who brings his grain to Gold Kist can sign an agreement and become a member; and that none of the members has anything to do with the determination of policy of Gold Kist, which is set by a board of directors in Atlanta.

Based upon the facts and the written contract entered into by the producer and Gold Kist, the trial court found in essence as follows: that the producer farmer, upon delivering his grain to Gold Kist, transferred title and received the market price in payment therefor as of the date of delivery; that he had no further control over the grain after delivery and "what happens thereafter is completely out of his hands"; that he had no voice in the final disposition of the products or control over the policies or operations of the business; that "under the terms of the contract between Gold Kist and the producer, Gold Kist obtains title and absolute control over the products," subject only to an accounting at the end of their fiscal year as to whether he receives more or less money; and that "Gold Kist is completely independent of the producer except as to this accounting or settlement as required by the contract."

{204 S.E.2d 586} The trial court found as a matter of law that "it was the intent of the legislation [Ga. Const., Art. VII, Sec. I, Par. IV, Code Ann. 2-5404; Ga. L. 1913, p. 122, as amended; Code Ann. 92-201] not {231 Ga. 884} to extend the benefits of the exemption of farm products beyond the producer himself, and to him only for a limited time and only while the products remained in his hands."

Thereupon it dissolved the temporary restraining order, denied the permanent injunction sought by Gold Kist against the collection of ad valorem taxes on inventory held by it, and ordered the check tendered by it into court returned as due for such taxes.

Gold Kist appeals from this order, also urging as erroneous the findings of fact and conclusions of law made therein.

The constitutional provision in question here authorizes the General Assembly to exempt from ad valorem taxation certain property. Among those specified are "farm products, including baled cotton, grown in this State and remaining in the hands of the producer, but not longer than for the year next after their production . . ." Const. Art. VII, Sec. I, Par. IV (Code Ann. 2-5404). Such an exemption was enacted by the legislature in the language of the constitutional provision (Code Ann. 92-201, *supra*).

Although the point was not raised here, for purposes of accuracy it should be noted that the constitutional amendment approved by the people of this state on August 6, 1912 (Ga. L. 1912, p. 36), is as above shown, but that the punctuation was incorrectly quoted and the word "next" omitted in subsequent codifications of this constitutional provision. See Code Ann. 2-5404. The Act putting into effect the constitutional amendment, its later amendments and the codal annotations of the statutory provisions are also incorrectly punctuated. See Ga. L. 1913, p. 122; 1919, p. 82; 1943, p. 348; 1946, p. 12; 1947, p. 1183; 1955, pp. 262, 263; 1965, pp. 182, 183; 1973, p. 934 (Code Ann. 92-201).

In our view, the obvious intent of this exemption is to relieve the farmer by giving him a year after harvest in which to sell his products. Therefore, during that period until he sells his products, he is exempt from ad valorem taxation thereupon.

Gold Kist strenuously argues that the exemption should also be applied to farm products which are delivered to it by the farmers because it is the agent of the producer rather than the purchaser of title to the products. It takes the position that nonprofit marketing cooperatives such as it simply stand in the place of the individual farmers, and are thus entitled to whatever exemptions they might receive.

We do not agree.

As we construe the language of these provisions, it does not contemplate an exemption for such products either after an {231 Ga. 885} outright sale, or when placed in the hands of another for future sale or processing with advance payment to the producer. In either case, the underlying reason for the temporary exemption would no longer exist. Therefore it is immaterial whether the contract between the cooperative and its members creates the relationship of buyer-seller or of agency, since only the farmers themselves are intended to receive the benefit of the tax exemption thereunder.

It is well established that "The exemption from taxation must be strictly construed, 'and the exemption will not be held to be conferred unless the terms under which it is granted clearly and distinctly show that such was the intention of the legislature.'" Cherokee Brick & Tile Co. v. Redwine, 209 Ga. 691, 693 (75 S.E.2d 550) (one Justice not participating).

As held by this court in Athens City Water-works Co. v. City of Athens, 74 Ga. 413 (1), "Taxation is the rule and exemption the exception; and, under the constitution of this state, no property except that specifically mentioned can be exempted from taxation." We find it significant {204 S.E.2d 587} that the Cooperative Marketing Act (Ga. L. 1921, p. 139 et seq.; Code Ann. Ch. 65-2), under which Gold Kist was created, includes a provision for the exemption of such co-operatives from license or franchise taxes (Code 65-225), but that it does not include a provision exempting cooperatives from taxes on their inventory.

Furthermore, a tax exemption cannot be created by implication. City of Columbus v. Muscogee Mfg. Co., 165 Ga. 259, 261 (140 S.E. 860). Thus this court has stated that "In interpreting such a constitutional exemption, it is to be presumed that the words therein used were employed in their natural and ordinary meaning [Cit.]; and where a constitutional provision or statute is plain and susceptible of but one natural and reasonable construction, the court has no authority to place a different construction upon it, but must construe it according to its terms." Rayle Electric Membership Corp. v. Cook, 195 Ga. 734, 735 (25 S.E.2d 574).

Nor do we find anything said in Ga. Milk Producers Confederation v. City of Atlanta, 185 Ga. 192 (194 S.E. 181), (two Justices absent), or the cases cited therein, which are relied upon by Gold Kist in support of its position, to be controlling here. That case turned upon the city's attempt to tax the accounts receivable of the co-operative, not its inventory, and this court held that it amounted to a tax on the gross sales of the products in violation of Code 5-603.

The two cases cited by this court in the Milk Producers case, {231 Ga. 886} Yakima Fruit Growers Assn. v. Henneford, 182 Wash. 437 (47 P2d 831, 100 ALR 435), and City of Owensboro v. Dark Tobacco Growers Assn., 222 Ky. 164 (300 SW 350), are likewise distinguishable.

The Washington case involved an attempt to levy an occupational tax on a cooperative association, which, as previously noted, is expressly prohibited by statute in Georgia. Code 65-225, *supra*.

The Kentucky case was concerned with the constitutionality of a statute of that state exempting from local taxation unmanufactured agricultural products "in the hands of the producer or in the hands of any agent or agency of the producer," and whether the tobacco co-operative met the definition of an agent.

It is indicative of the point we make here that the Kentucky legislature found it necessary to include the words "any agent or agency" in its exemption statute. Here, even if an agency relationship is created by the contract between Gold Kist and its members, neither our Constitution nor our statutes authorize an exemption from ad valorem taxes for the agent of a producer of farm products.

In our view, the trial court correctly found that the clear intent of the Georgia legislation was to grant the benefit of the exemption only to the farmer himself and then only for a limited time. To allow this statute to be extended to include farm products in the hands of Gold Kist, which are irretrievably co-mingled with others, or even converted into different products before their ultimate sale, would make it impossible to determine which products have been stored beyond the period for the exemption and thus be in violation of the constitutional mandate.

Therefore, for the reasons stated above, the judgment of the trial court is affirmed.

Judgment affirmed.

AIRCRAFT SPRUCE & SPECIALTY CO., et al. v. FAYETTE COUNTY BOARD OF TAX ASSESSORS.

A08A0901.

COURT OF APPEALS OF GEORGIA, THIRD DIVISION

October 27, 2008, Decided

Judgment affirmed.

COUNSEL: Smith, Gambrell & Russell, Edward H. Wasmuth, Jr., for appellants. Donald M. Comer II, for appellee.

JUDGES: Miller, Judge. Blackburn, P. J., and Ellington, J., concur.

OPINION BY: Miller

This action arises out of a ruling by the Fayette County Board of Tax Assessors (the "Board"), that certain inventory held by Aircraft Spruce & Specialty Company, a division of [Irwin International, Inc.](#) ("Irwin"), at its Peachtree City warehouse was not exempt from ad valorem taxes under [OCGA § 48-5-48.2 \(b\)](#). After that ruling was affirmed by a board of equalization, Irwin filed an appeal in the Superior Court of Fayette County. The parties filed cross-motions for summary judgment, and the trial court granted summary judgment in favor of the Board and against Irwin. The trial court found that the exemption sought by Irwin did not apply to the inventory in question, because, even though such inventory was purchased by and shipped to out-of-state customers, that inventory was nevertheless being sold "at retail" in Georgia. Irwin now appeals from that ruling, arguing that its catalog and Internet retail sales to out-of-state customers cannot be considered retail sales made in Georgia. We disagree and affirm.

The facts are undisputed and the issue before us is whether, in finding that Irwin was not entitled to the tax exemption it sought, the trial court correctly interpreted and applied the relevant statutes. "This question is one of law, which we review de novo." [State of Ga. v. Free At Last Bail Bonds, 285 Ga. App. 734 \(647 SE2d 402\) \(2007\)](#).

The record shows that Irwin is a privately held, California corporation that sells aircraft parts and pilot supplies to both retail customers and wholesalers throughout the United States. Irwin markets its products through a printed catalog and a website and customers order products from Irwin using either the Internet or a toll-free telephone number. The orders are then filled from one of two warehouse facilities maintained by Irwin, one of which is located in Peachtree City. Most orders are shipped directly to the customer, but the company also maintains a "will-call" area at its warehouse in Peachtree City where customers may pick up previously placed orders, thereby avoiding shipping costs. Irwin also makes occasional "walk-in" sales at its Peachtree City facility.

In 2005 (the year prior to the assessment date at issue), approximately 84 percent of the sales made

from Irwin's Peachtree City warehouse were retail sales, with 7.2 percent being retail sales to customers residing in Georgia and 76.71 percent being retail sales to out-of-state residents. Additionally, 1.34 percent of sales from the Peachtree City warehouse were made to Georgia wholesalers, and 14.73 percent were made to out-of-state wholesalers.

Under Georgia law, a retailer may be assessed ad valorem taxes based on the value of its inventory as of January 1. Certain inventory, however, is exempt from taxes under [OCGA § 48-5-48.2 \(b\)](#), commonly known as the "freeport exemption." The relevant portions of this statute exempt from the ad valorem tax those finished goods in a retailer's inventory that, as of January 1: (i) are stored in a warehouse; and (ii) are destined for shipment to a final destination outside of Georgia. [OCGA § 48-5-48.2 \(b\) \(3\)](#).

Specifically excluded from the freeport exemption, however, is otherwise eligible inventory that constitutes the "stock in trade of a retailer," which is defined as "finished goods held by one in the business of making sales of such goods at retail in this state, . . . when such goods are held or stored at a business location from which such retail sales are regularly made." [OCGA § 48-5-48.2 \(a\) \(4\)](#). An exception to this exclusion, found within the statutory definition of the "stock in trade of retailer," provides:

Goods stored in a warehouse, . . . including a warehouse . . . which is part of or adjoins a place of business from which retail sales are regularly made, shall not be considered stock in trade of a retailer to the extent that the taxpayer can establish, through a historical sales or shipment analysis, . . . or other reasonable, documented method, the portion or percentage of such goods which is reasonably anticipated to be shipped outside this state for resale purposes. [OCGA § 48-5-48.2 \(a\) \(4\)](#).

As of January 1, 2006, Irwin's Peachtree City warehouse contained inventory valued at approximately \$ 3.1 million. Irwin filed for a freeport exemption as to 91.44 percent of that inventory, based on the fact that 91.44 percent of its sales in the previous year from the Peachtree City warehouse had been to out-of-state customers, both retail and wholesale. The Board instead allowed an exemption for roughly 15 percent of the inventory, citing the fact that this represented the percentage of sales Irwin had made to out-of-state wholesalers and reasoning that inventory that was the subject of out-of-state retail sales represented the "stock in trade of a retailer."

Irwin appealed that ruling, arguing that the freeport exemption should apply to all out-of-state sales, both retail and wholesale. In support of its position, Irwin first asserts that retail sales made via the telephone or Internet to an out-of-state customer are not sales "at retail in this state," i.e., they are not sales that occur in Georgia. It then reasons that, because such transactions do not qualify as retail sales in this state, by default they must be considered the shipment of goods outside the state "for resale purposes." We disagree.

The burden of proof in a tax appeal to the superior court is on the party who initiated the appeal. Therefore, in this case the burden was on [Irwin]. Further, laws granting an exemption from taxation must be construed strictly in favor of the taxing authority, and all doubts must be resolved against the taxpayer. Consequently, no exemption will be allowed unless the exemption is clearly and distinctly intended by the legislature.

(Citations omitted.) *Apollo Travel Svcs. v. Gwinnett County Bd. of Tax Assessors*, 230 Ga. App. 790, 791 (1) (498 SE2d 297) (1998). Additionally, we must read the relevant statute "according to [the] natural

and most obvious import of the language without resorting to subtle and forced constructions for the purpose of either limiting or extending its operation," and this interpretation "must square with common sense and sound reasoning." [Id. at 792 \(3\)](#).

As a practical matter, we find that in determining whether a retail sale is made in this State, we must look to the location and conduct of the seller, rather than the location of the buyer. Here, all aspects of the retail sales made from Irwin's Peachtree City warehouse to Internet and telephone customers occur in Georgia. Irwin receives telephone and Internet orders at the Peachtree City warehouse, and also receives the payment for such orders at that facility. It thereafter processes the orders in Peachtree City, fills the orders from inventory located in Peachtree City, and packages and ships the orders from that location. Thus, with respect to each of these telephone and Internet retail transactions, *all* of the seller's conduct occurs in this State. Logically, therefore, these transactions qualify as retail sales occurring in Georgia.

This conclusion is supported by our decision in [Apollo, supra, 230 Ga. App. 790](#). In that case, the taxpayer, Apollo, distributed computer software and hardware to its clients around the country for use in a computer travel reservation system. Apollo owned the computer hardware and leased it to its customers, 97 percent of whom were located outside of Georgia. Apollo stored such equipment at a warehouse in Gwinnett County and sought a freeport exemption for that inventory. On appeal, this Court upheld the denial of the exemption, finding that Apollo's inventory did not meet the definition of "inventory of finished goods" as contemplated by [O.C.G.A. § 48-5-48.2](#), because the computers were not "goods being held for shipment to final destinations outside [Georgia] for resale." [Id. at 792](#). Noting that Apollo was holding this inventory "merely for shipment to its retail customers," this Court concluded that the computers were in the nature of Apollo's stock-in-trade and did not qualify for the freeport exemption. *Id.* Notably, the fact that 97 percent of these computers would be shipped to out-of-state customers did not impact our analysis. ¹

FOOTNOTES

¹ Irwin attempts to distinguish Apollo by pointing to the fact that Apollo's inventory would be leased, rather than sold, to customers. Therefore, [***8] that inventory could not be viewed as being shipped out-of-state "for resale purposes." This "distinction," however, ignores the fact that the retail goods Irwin sells via catalog and the Internet are not being shipped outside the state "for resale purposes" -- i.e., they will not be resold to another consumer once they reach their out-of-state destination.

The conclusion that the freeport exemption does not apply to the retail sales at issue is also supported by the relevant rules of statutory interpretation, which require us to construe that statute "in relation to other statutes of which it is a part," reading all statutes together "so as to ascertain the legislative [intent] and give effect thereto." (Citation and punctuation omitted.) [Goldberg v. State, 282 Ga. 542, 546-547 \(651 SE2d 667\) \(2007\)](#). See also [Sikes v. State, 268 Ga. 19, 21 \(2\) \(485 SE2d 206\) \(1997\)](#) ("in construing language in any one part of a statute, a court should consider the entire scheme of the statute and attempt to gather the legislative intent from the statute as a whole") (footnote omitted).

Thus, in determining whether Internet and telephone sales to out-of-state consumers constitute retail sales occurring in Georgia, we look to [OCGA § 48-8-2 \(6\) \(A\)](#). That statute defines "retail sale" and "sale at retail," in relevant part, as "[a] sale to a consumer or to any person *for any purpose other than for resale* of tangible personal property. . . ." (Emphasis supplied.) Under this definition, any sale to the final, end user of consumer goods constitutes a retail sale. We must conclude, therefore, that the term "for resale purposes," as used in [OCGA §48-5-48.2 \(a\) \(4\)](#), expressly excludes from the freeport exemption any merchandise sold at retail, regardless of whether the sale is made to a resident or nonresident of Georgia. Had the legislature intended for all sales to out-of-state customers - both retail and wholesale - to come within the freeport exemption, then there would have been no need to add the qualifying phrase "for resale purposes" at the end of [OCGA § 48-5-48.2 \(a\) \(4\)](#). And, we refuse to read the statute so as to make that phrase irrelevant. See *Osborne Bonding & Sur. Co. v. State*, 224 Ga. App. 590, 591 (481 SE2d 578) (1997) ("We must seek to effectuate the intent of the legislature and to . . . avoid [statutory] constructions that make some language mere surplusage . . . , because it is not presumed that the legislature intended to enact meaningless language.") (citations omitted).

Despite the foregoing, Irwin argues that, by definition, retail sales made via catalog and the Internet to out-of-state customers are not sales at "retail *in this state*." In essence, Irwin asserts that whether a retail sale occurs in Georgia depends not upon the seller's conduct, but upon the location of the purchaser. To support its position, Irwin points to the fact that such transactions are not subject to the state sales tax. Sales taxes, however, are imposed on the purchaser of goods, rather than the seller. See [OCGA § 48-8-30 \(b\) \(1\)](#). As a result, sales taxes generally do not apply to out-of-state retail customers, because Georgia's taxing authority does not reach beyond the state's boundaries. See Ga. Comp. R. & Reg. r. 560-12-2.54 (2). Thus, the absence of a sales tax merely demonstrates that the merchandise was shipped to an out-of-state customer; it does not demonstrate that the sale did not occur in Georgia. ²

FOOTNOTES

² Indeed, if such sales did not occur in Georgia, there would be no need for the Department of Revenue regulation expressly exempting these transactions from the otherwise applicable sales tax.

Irwin also argues that a finding that telephone and Internet sales to out-of-state customers constitute retail sales in Georgia will produce an absurd or illogical result in the application of the freeport exemption, thereby violating well-established principles of statutory interpretation. See *Rite-Aid Corp. v. Davis*, 280 Ga. App. 522, 526 (1) (634 SE2d 480) (2006). Specifically, Irwin asserts that if it did not have a "will-call" area at the Peachtree City warehouse, then none of its inventory could be considered the "stock in trade of a retailer" and therefore all of that inventory would be entitled to the freeport exemption. We disagree.

Irwin is subject to the ad valorem tax at issue not because it makes retail sales to customers who come to the Peachtree City warehouse. Rather, Irwin is subject to that tax because it is a retailer and all inventory sold at retail represents its "stock in trade." Thus, even if Irwin made no retail sales to Georgia

residents and had no "will-call" window at its Peachtree City warehouse, its retail inventory still would not qualify for the freeport exemption.

Nor do we find any merit in Irwin's argument that the trial court's interpretation of the statute violates the constitutional principle that all taxation of similar goods must be uniform -- i.e., that it treats goods sold over the Internet and via catalog differently from those sold by traditional retailers. To support its argument, Irwin poses a hypothetical in which it has traditional retail stores located out of state. If items were shipped to those stores from the Peachtree City warehouse, it notes, those items would be entitled to the freeport exemption. Thus, Irwin concludes that it is being punished for selling its items directly over the Internet and by catalog.

Given that this self-serving hypothetical compares "apples to oranges," we find it unpersuasive. If Irwin had additional out-of-state facilities from which it made Internet and catalog retail sales, then any inventory shipped from its Peachtree City warehouse to those facilities would, like the inventory of a traditional retailer shipped to an out-of-state store, be eligible for the freeport exemption. In either case, such inventory is being shipped out-of-state for resale purposes. Similarly, Irwin is being treated no differently than a traditional retailer in Georgia who has no out-of-state stores. The inventory of such a retailer would, like Irwin's retail inventory, be subject to an ad valorem tax, even if that traditional retailer also sold its items over the Internet or the telephone. Accordingly, we fail to see how the refusal to apply the freeport exemption to retail merchandise sold only through the Internet or catalogs disadvantages retailers such as Irwin.³

FOOTNOTES

³ Arguably, such retailers have a tax advantage over traditional retailers, because out-of-state customers purchasing from Internet or catalog retailers may or may not have to pay tax on the goods purchased. Yet, if they purchased identical items from a traditional retailer, either in their own state or in a neighboring state, they would definitely be subject to state and local sales tax. It appears that Irwin is seeking to add to this advantage by avoiding an ad valorem tax that is imposed on all traditional retailers in Georgia.

For the reasons set forth above, we affirm the trial court's order granting summary judgment in favor of the Board and against Irwin.

Judgment affirmed. Blackburn, P. J., and Ellington, J., concur.

MUSCOGEE COUNTY BOARD OF TAX ASSESSORS v. PACE INDUSTRIES INC

No. A10A1856.

COURT OF APPEALS OF GEORGIA

January 05, 2011

Counsel: Travis Carlisle Hargrove, Kirsten Colleen Stevenson, for Muscogee County Board of Tax Assessors.
Mary Terry Benton, Timothy James Peaden, for Pace Industries, Inc.

OPINION: Judge Mikell

The Muscogee County Board of Tax Assessors (the “Board”) appeals from the trial court's grant of summary judgment to Pace Industries, Inc. (“Pace”), in an ad valorem tax dispute concerning the availability of the freeport exemption¹ for inventory held by Pace in Georgia. Pace applied for the freeport exemption for the tax year 2006 for its inventory of barbecue grill bodies stored in the Columbus warehouse that it leased. The Board ruled that the inventory in question was not exempt from ad valorem taxes under OCGA § 48-5-48.2(b) and denied the freeport exemption. After that ruling was affirmed by the board of equalization, Pace appealed to the Superior Court of Muscogee County. The parties filed cross-motions for summary judgment, and the court granted summary judgment in favor of Pace and against the Board. The trial court concluded that Pace's inventory of grill bodies qualified for the freeport exemption found in OCGA § 48-5-48.2(b)(3) (a “Category 3” exemption), because the grill bodies are destined for shipment to “a final destination outside this state.”² The Board appeals from this order. We conclude that the freeport exemption does not apply to the grill bodies at issue here, and we reverse.

On appellate review of the grant or denial of a motion for summary judgment, we conduct a de novo review of the law and the evidence,³ and we view the evidence in the light most favorable to the nonmovant.⁴ “When a question of law is at issue, as here, we owe no deference to the trial court's ruling and apply the ‘plain legal error’ standard of review.”⁵ We further note that “[t]he burden of proof in a tax appeal to the superior court is on the party who initiated the appeal. Therefore, in this case the burden was on [Pace].”⁶

The facts in this case are undisputed. Pace, a wholly-owned subsidiary of Leggett & Platt, Inc., operates a manufacturing facility in Arkansas. There Pace manufactures barbecue grill bodies, which are die-cast aluminum bodies for gas and charcoal barbeque grills. Pace ships the grill bodies from its Arkansas plant to a warehouse it leases in Columbus, where they are stored until they are needed by Char-Broil, a producer and distributor of barbeque grills located in Columbus. Char-Broil is one of Pace's major customers for the grill bodies, and Pace manufactures the grill bodies to Char-Broil's specifications. Pace sells and delivers the grill bodies to Char-Broil at Char-Broil's Columbus plant. Char-Broil incorporates the grill bodies into finished barbecue grills, which Char-Broil then ships to its customers, mainly large retail stores. The record reflects that during calendar year 2003, Char-Broil shipped 94.4 percent of its completed grills to customers outside the state of Georgia.⁷

Pace argues that the grill bodies qualify for the freeport exemption because they are sold to Char-Broil, which then ships them out of state once they are incorporated into finished barbecue grills. The trial court accepted this argument, ruling that the grill bodies are “destined for shipment to a final destination outside this state,” as contemplated by OCGA § 48-5-48.2. We disagree, because as far as Pace is concerned, the final destination of the grill bodies is Char-Broil's Columbus plant. Thus, we conclude that the grill bodies do not qualify for the freeport exemption.

The Category 3 freeport exemption, at issue here, applies generally to “inventory of finished goods held for shipment outside the state.”⁸ Category 3 inventory is described at OCGA § 48-5-48.2(b)(3), and includes:

*Inventory of finished goods which, on January 1, are stored in a warehouse, dock, or wharf, whether public or private, and which are destined for shipment to a final destination outside this state and inventory of finished goods which are shipped into this state from outside this state and stored for transshipment to a final destination outside this state. The exemption provided for in this paragraph shall be for a period not exceeding 12 months from the date such property is stored in this state.*⁹

Thus, to qualify for a Category 3 freeport exemption, the inventory in question must be (1) “finished goods”; (2) in Georgia for less than 12 months; and (3) “destined for shipment to a final destination outside this state.” Pace records the grill bodies as “finished goods” for inventory accounting purposes on its books and records, and the Board concedes that Pace’s inventory of grill bodies constitute “finished goods,” as defined in OCGA § 48-5-48.2(a)(2).¹⁰ The Board also concedes that Pace stores the grill bodies in Georgia for less than the 12-month statutory maximum, based on an average inventory turnover rate of 47.1 days for tax year 2004. The Board contends, however, that the grill bodies do not meet the third test necessary to qualify for the Category 3 freeport exemption. Thus, the issue presented here is whether the grill bodies are “destined for shipment to a final destination outside this state.”¹¹

OCGA § 48-5-48.2(a)(1) provides that inventory “[d]estined for shipment to a final destination outside this state” includes “that portion or percentage of an inventory of finished goods which is reasonably anticipated to be shipped to a final destination outside this state.”¹² That goods are “reasonably anticipated” to be shipped out of state must be established by the taxpayer “through a historical sales or shipment analysis, either of which utilizes information from the preceding calendar year, or other reasonable, documented method.”¹³

We note that this is a case of first impression, and disposition of this appeal requires construing the statutes authorizing the freeport exemption.¹⁴ “[L]aws granting an exemption from taxation must be construed strictly in favor of the taxing authority, and all doubts must be resolved against the taxpayer. Consequently, no exemption will be allowed unless the exemption is clearly and distinctly intended by the legislature.”¹⁵ At the same time, “[i]n construing a legislative act, a court must first look to the literal meaning of the act. If the language is plain and does not lead to any absurd consequences, the court simply construes it according to its terms and conducts no further inquiry.”¹⁶ Our interpretation of the statute “must square with common sense and sound reasoning. In this sense, a statute should be read according to its natural and most obvious import of the language without resorting to subtle and forced constructions for the purpose of either limiting or extending its operation.”¹⁷

Pace contends that the grill bodies are “destined for shipment to a final destination outside this state” because they are sold by Pace to Char-Broil and then sold by Char-Broil to customers outside Georgia. Pace concludes that “nothing in the statute makes it relevant that the grill bodies are first sent to Char-Broil before being shipped outside the state.” However, this argument does not take into account the facts of this case. Pace does not merely send the grill bodies to Char-Broil; Pace sells them to Char-Broil. Pace argues that the change in title does not make any difference, but in light of the statutory scheme, this argument cannot stand. “Statutes are not to be construed in a vacuum, but in relation to other statutes of which they are a part, and all statutes

relating to the same subject-matter are to be construed together, and harmonized wherever possible.”¹⁸

Unless exempted, Georgia law imposes ad valorem tax on all personal property.¹⁹ The tax is charged against the owner of the property.²⁰ The taxpayer is obligated to make tax returns of the property;²¹ and the return covers “property held and subject to taxation on January 1 next preceding each return.”²² The tangible personal property exemption known as the freeport exemption is available for certain business inventory described in OCGA § 48-5-48.2(b). Under OCGA § 48-5-48.1(a), the entity seeking the freeport exemption is required to file a written application and schedule of the property for which the exemption is sought.²³ Thus, the statutory scheme looks to the property, that is, the inventory, held by the taxpayer;²⁴ what becomes of the inventory in the hands of a purchaser from the taxpayer is not relevant to the determination of the availability of the freeport exemption. As far as Pace is concerned, the “final destination” of the grill bodies constituting the inventory here at issue is the Columbus plant of Char-Broil.

Our decision in *Aircraft Spruce*²⁵ is instructive. There, we held that the freeport exemption did not apply to the inventory of a retailer engaged in the business of selling aircraft parts to customers outside Georgia over the internet, because the sales occurred in Georgia.²⁶ We noted that “in determining whether a retail sale is made in this [s]tate, we must look to the location and conduct of the seller, rather than the location of the buyer.”²⁷ Similarly, here we look to the conduct of Pace, the seller. Pace's involvement with the grill bodies ends when Pace sells them to Char-Broil, and therefore the “final destination” of the grill bodies is the Char-Broil plant located in Columbus. It follows that the grill bodies sold to Char-Broil do not fall within the Category 3 freeport exemption found in OCGA § 48-5-48.2(b)(3). Char-Broil incorporates the grill bodies into finished barbecue grills, and it is these completed barbecue grills that Char-Broil eventually ships out of state.

For the reasons stated above, we reverse the decision of the trial court.

Judgment reversed.

SMITH, P.J., and ADAMS, J., concur.

FOOTNOTES

¹. See OCGA §§ 48-5-48.1, 48-5-48.2.

². See OCGA §§ 48-5-48.2(a)(1), (b)(3).

³. *Clayton County Bd. of Tax Assessors v. City of Atlanta*, 286 Ga.App. 193, 194 (648 S.E.2d 701) (2007).

⁴. *Delta Air Lines v. Clayton County Bd. of Tax Assessors*, 246 Ga.App. 225, 226 (539 S.E.2d 905) (2000).

⁵. (Citation and punctuation omitted.) *City of Atlanta, supra. Accord Delta Air Lines, supra.*

⁶. *Aircraft Spruce & Specialty Co. v. Fayette County Bd. of Tax Assessors*, 294 Ga.App. 241, 243 (669 S.E.2d 417) (2008).

⁷. *The instant case concerns tax year 2006. By agreement, the parties submitted cross-motions for summary judgment and related briefing which had been filed in a companion case pending before the superior court, relating to tax year 2004. The sole difference between the two cases was the amount of exemption claimed.*

⁸. (Footnote omitted.) *Delta, supra* at 227.

⁹. OCGA § 48-5-48.2(b)(3).

¹⁰. Under OCGA § 48-5-48.2(a)(2), “[f]inished goods” includes “goods, wares, and merchandise of every character and kind but shall not include unrecovered, unextracted, or unsevered natural resources or raw materials or goods in the process of manufacture or production or the stock in trade of a retailer.”

¹¹. OCGA §§ 48-5-48.2(a)(1), (b)(3).

¹². OCGA § 48-5-48.2(a)(1).

¹³. *Id.*

¹⁴. See *Delta, supra* at 226.

¹⁵. (Citation omitted.) *Aircraft Spruce, supra.*

16. (Citation and punctuation omitted.) *Apollo Travel Svcs. v. Gwinnett County Bd. of Tax Assessors*, 230 Ga.App. 790, 791-792(3) (498 S.E.2d 297) (1998).
17. (Citations and punctuation omitted.) *Id.* at 792(3). *Accord Aircraft Spruce, supra.*
18. (Citations and punctuation omitted.) *Fulton County Tax Commr. v. Gen. Motors Corp.*, 234 Ga.App. 459, 464(1) (507 S.E.2d 772) (1998).
19. OCGA § 48-5-3 (“all personal property shall be liable to taxation and shall be taxed, except as otherwise provided by law”).
20. OCGA § 48-5-9 (“Taxes shall be charged against the owner of property if the owner is known”).
21. OCGA § 48-5-10 (“All property shall be returned by the taxpayers for taxation to the tax commissioner or tax receiver as provided by law”).
22. *Id.*
23. See OCGA § 48-5-48.1(a).
24. Cf. *Aircraft Spruce, supra* at 242 (“Under Georgia law, a retailer may be assessed ad valorem taxes based on the value of its inventory as of January 1”) (emphasis supplied).
25. *Id.*
26. *Id.* at 244.
27. *Id.* at 243 (retail sales occurred at taxpayer's warehouse in Georgia, where orders were received, processed and filled) (*id.* at 243-244).

DeKALB COUNTY BOARD OF TAX ASSESSORS v. W. C. HARRIS & COMPANY; and vice versa. DeKALB COUNTY BOARD OF TAX ASSESSORS v. OHIO-SEALY MATTRESS MANUFACTURING COMPANY; and vice versa. DeKALB COUNTY BOARD OF TAX ASSESSORS v. NOLAND COMPANY; and vice versa. DeKALB COUNTY BOARD OF TAX ASSESSORS v. LANIER BUSINESS PRODUCTS, INC; and vice versa

Nos. 37319, 37320, 37321, 37322, 37323, 37324, 37325, 37326

Supreme Court of Georgia

October 8, 1981, Decided

COUNSEL: Robert H. Walling, Jones, Bird & Howell, Michael P. Sarrey, for appellant. Smith, Cohen, Ringel, Kohler & Martin, John A. Blackmon, John C. Gordon, for appellees.

JUDGES: Clarke, Justice. Jordan, C. J., Hill, P. J., Marshall, Smith & Gregory, JJ., concur.

OPINION BY: CLARKE

These are ad valorem tax cases. The controlling issue is whether the interest held by certain corporations in real estate financed through a development authority is taxable as being fee simple or leasehold, or is it only a usufruct. The trial court determined the interest to be taxable as a leasehold. We agree.

The leases in question were individually executed between the DeKalb County Development Authority (hereinafter "Authority") and W. C. Harris & Co., Ohio-Sealy Manufacturing Co., [Noland Co.](#), and Lanier Business Products, Inc. (hereinafter "Taxpayers"). Each case originated with a decision by the DeKalb County Board of Tax Assessors (hereinafter "Assessors") that the long-term leases were in effect delayed warranty deeds which would subject the properties to valuation as a fee simple interest. Each Taxpayer appealed to the DeKalb County Board of Equalization (hereinafter "Equalization Board") which determined that the interest under each lease agreement was a leasehold and developed a formula for ad valorem tax valuation.

The Assessors appealed that decision to the superior court. Both sides moved for summary judgment and the court granted summary judgment to the Taxpayers, upholding the decision of the Equalization Board. The Assessors now appeal those judgments and the Taxpayers have each filed a cross appeal, contending that if the Equalization Board's decision was in error in its determination of the leasehold interests then the lease agreements must be construed to give the Taxpayers only a usufruct which would not be subject to ad valorem taxation.

1. These cases were originally docketed in the Court of Appeals which transferred the cases here on the basis of our decision in [Collins v. State, 239 Ga. 400 \(236 SE2d 759\) \(1977\)](#). The transfer order classifies these cases as involving the constitutionality of a municipal ordinance. There being no ordinance involved in this case, we feel it appropriate to examine our jurisdiction over this type of case under

Collins, supra.

The *Collins* decision was necessitated by an enactment of the legislature attempting to change Supreme Court jurisdiction by statute. The act at issue stated in part "The Supreme Court shall have jurisdiction of the trial and correction of errors of law in cases involving State revenue, contested elections, and the validity of legislative enactments of municipalities." Ga. L. 1977, pp. 710-711. After holding the legislature could not by statute change the constitutional jurisdiction of this court, we ordered the above-stated classes of cases to be docketed in the Court of Appeals and transferred to "effectuate the legislative intent of Act No. 299, Ga. L. 1977, p. 710." *Collins, at 403.*

Since that order went into effect, there have been contested ad valorem tax cases handled by the Court of Appeals as well as by this court. See *Henderson v. Tax Assessors, Camden County*, 156 Ga. App. 590 (275 SE2d 78) (1980); *Dotson v. Henry County Bd. of Tax Assessors*, 155 Ga. App. 557 (271 SE2d 691) (1980); *Loudermilk v. Cobb County Bd. of Tax Assessors*, 155 Ga. App. 591 (271 SE2d 723) (1980); *Camden County Bd. of Tax Assessors v. Proctor*, 155 Ga. App. 650 (271 SE2d 902) (1980); *Martin v. Liberty County Bd. of Tax Assessors*, 152 Ga. App. 340 (262 SE2d 609) (1979); *DeKalb County Bd. of Tax Assessors v. Stone Mountain Indus. Park*, 147 Ga. App. 503 (249 SE2d 318) (1978); *Mundy v. Clayton County Tax Assessors*, 146 Ga. App. 473 (246 SE2d 479) (1978). These cases are like the cases in these appeals in that there is no ordinance under attack, the constitutionality of a state law is not in question, and no extraordinary remedies are sought.

It is the opinion of this court that the Court of Appeals properly entertained jurisdiction in the cases cited above. These were disputes between property owners and local governing authorities concerning valuation of ad valorem tax assessments and not questions of "State revenue" as contemplated by Ga. L. 1977, p. 710, and as interpreted by *Collins*. This type of appeal from a local tax assessment does not challenge a state law or state assessment. Furthermore, there is no challenge to any ruling by the State Revenue Commissioner. In fact, the commissioner's authority does not generally extend to local ad valorem tax assessment or collection. Code Ann. § 91A-207 (d) (1) (former Code § 92-8447). Since the issue of jurisdiction in ad valorem tax assessment cases of this type had not been addressed since *Collins*, we shall reach the merits of the present case. However, we hold that in the future, appeals from a local governing authority's assessment of ad valorem taxation which do not raise the constitutionality of a statute or ordinance nor involve equitable remedies shall be in the jurisdiction of the Court of Appeals and not transferred to this court under *Collins*.

2. In the case of each Taxpayer, the Authority issued industrial development revenue bonds and acquired fee simple title to the tracts of land in question. The property was then leased to the Taxpayers for the purposes of manufacturing, assembling and storing goods handled by the respective companies. The Authority executed a deed to secure debt as security for the bonds. The rights of the Authority to receive rental payments under the leases were also assigned.

The leases are for twenty and twenty-five year terms, and each contains a contract whereby the Authority agrees to sell the property and the Taxpayers agree to purchase the property for the

consideration of ten dollars, once the revenue bonds are paid in full. The Assessors contend that the substance of the transactions give the Taxpayers a fee simple interest for ad valorem tax purposes.

The DeKalb County Development Authority was established pursuant to Chapter 69-15 of the Georgia Code. As an entity formed under this chapter, the Authority is exempt from the payment of taxes. Code Ann. § 69-1510. While the Authority is exempt, a business which takes a leasehold from the Authority is subject to ad valorem taxation on the fair market value of the possessory interest held. *Delta Air Lines v. Coleman*, 219 Ga. 12 (131 SE2d 768) (1963). "A leasehold is an estate less than the fee; it is severed from the fee and classified for tax purposes as realty." *Henson v. Georgia Indus. Realty Co.*, 220 Ga. 857 (142 SE2d 219) (1965).

In determining the interest held by the lessee, the court will look to the interest the parties to the agreement intended to create, although this intent may not be controlling. *Allright Parking of Ga., Inc. v. Atlanta-Fulton Bd. of Tax Assessors*, 244 Ga. 378 (260 SE2d 315) (1979); *Henson v. Airways Service, Inc.*, 220 Ga. 44 (136 SE2d 747) (1964). The Authority in this case is authorized by statute to either convey title or lease the project. Code Ann. § 69-1505. The DeKalb Authority has chosen long term leases with contracts to buy at nominal consideration at the end of the lease terms. The Assessors determined that the contract together with other provisions of the lease result in the Taxpayers holding an interest valued at a fee simple absolute.

"An absolute or fee-simple estate is one in which the owner is entitled to the entire property, with unconditional power of disposition during his life, and which descends to his heirs and legal representatives upon his death intestate." Code Ann. § 85-501. The leases require the Taxpayers to maintain insurance against all risks of the companies involved and require that the Taxpayers be liable for all taxes on their interest in the property. The Taxpayers may assign and sublease the property and may in their discretion make modifications or improvements at their own expense. If the taxpayers perform under the leases, the Authority is obligated to convey title to the projects for a consideration of ten dollars.

While the leases contain terms consistent with absolute ownership, we agree with the trial court that other restrictions in the leases are not consistent with fee simple ownership. The leases require the Taxpayers to operate the projects throughout the terms of the lease for the sole purpose of continuing their respective business operations. The leases limit the expenditures which the Taxpayers can make on the properties and any plans for modification must be submitted to the Authority which has retained the right to inspect the premises. The Taxpayers are obligated to maintain their corporate existence throughout the lease terms. If the premises are sublet, the Taxpayers are still primarily responsible for rental payments and the premises must continue to be operated for the same project purposes. The Taxpayers agree not to convey their interests during the lease term and the Authority agrees that it will not convey or sell the property during the lease term except for the security instruments executed for the financing of the project. Furthermore, in the event of default by the lessee, the agreement gives the Authority the right to terminate the lease and exclude the lessee from possession.

The Taxpayers argue that under our decision in *Allright Parking of Ga.*, supra, their interest under the lease must be construed as a usufruct which is not subject to ad valorem taxation. That decision, however, points out that during the term of the lease, the lessor had the sole power to determine if the lessee could occupy the premises at all and could totally "preclude Allright from using any and all portions of the property during the construction and operation of MARTA and other 'public projects.'" *Allright*, at 387. There is a presumption in this state that where a lease agreement is for a term of more than five years, an estate for years is created. *Warehouses, Inc. v. Wetherbee*, 203 Ga. 483 (46 SE2d 894) (1948). We find that these provisions of these agreements, together with the contract to sell are not inconsistent with the creation of a taxable leasehold estate.

3. The remaining issues in these appeals concern the valuation formula applied by the Equalization Board and upheld by the trial court as well as the determination of time of possession. The first question to be determined is what is the fair market value of the leasehold interests held by the Taxpayers. Code Ann. § 91A-1008 (former Code Ann. § 92-5701.) "The fair market value of land, whether it be the fee, a leasehold, or any other interest, is a question which necessarily addresses itself to the honesty, the experience, and the familiarity with land values in a given locality of the person or persons whose duty it becomes to determine and fix it." *Coleman*, supra at 18.

The Equalization Board examined the lease transactions and expert appraisal evidence was offered. The Equalization Board then held: "The appraisal technique to be used is as follows: First determine the total value of the property based on market rent. Second, determine the value of the leased fee by capitalizing the yearly bond repayment. Third, subtract this lease fee value from the total. Add to this figure the estimated reversion. This technique should be repeated on an annual basis, as the values will change over the period of the lease." The record shows that the formula is intended to take into account the fair market value of similarly leased property and to be based upon prevailing rents in the area. The potential reversionary interest is added to the base tax and will increase throughout the terms of the lease as the potential of the vesting of the potential reversionary interest in the Taxpayers increases. The fair market value of a leasehold interest must necessarily vary in accordance with the terms and conditions of each agreement as well as the nature and location of the property involved. We do not find the method of valuation utilized by the Equalization Board to be an arbitrary or unreasonable one, and hold the trial court did not err in approving the formula adopted in these cases.

4. The final point raised by the Assessors involves a determination by the Equalization Board that Noland Company and Lanier Business Products, Inc. owed no ad valorem taxes for the year 1979. These two projects were not completed as of January 1, 1979. A taxpayer must return property for taxation for property held as of January 1. Code Ann. § 91A-1008 (former Code Ann. § 92-6202). These two taxpayers did not obtain possession of the property in question until long after January 1, 1979. The lease agreements state that the Authority retains possession of the projects during construction, and that exclusive possession of the project be delivered to lessee on the date of completion. The agreements further state that the lease will become effective at the date of delivery. The trial court held that since Noland and Lanier had no right to possess or occupy the leasehold on January 1, 1979, the Equalization Board was correct in finding no ad valorem taxes were due for that period. The Assessors

contend that since Noland and Lanier in fact "owned" the property once the lease agreements were executed and that the agreements were executed prior to January 1, 1979, those projects were subject to taxation on that date. Since we have held that the agreements do not constitute a conveyance for ad valorem tax purposes, the property was held by the Authority until delivery was later made upon completion.

We affirm the ruling of the trial court in these cases. The judgment below granted a complete summary judgment as moved for by the Taxpayers in the superior court. Therefore, the alternative cross-appeals filed by each Taxpayer are hereby dismissed.

Judgment affirmed in case numbers 37319, 37321, 37323 and 37325; case numbers 37320, 37322, 37324 and 37326 are dismissed.

In the Supreme Court of Georgia

Decided: November 1, 2010

S10A0924. SHERMAN v. FULTON COUNTY
BOARD OF ASSESSORS et al.

CARLEY, Presiding Justice.

On June 26, 2009, John Sherman, a taxpayer and resident of Fulton County, filed on behalf of himself and all others similarly situated, a petition for declaratory judgment, injunction, and mandamus against the Fulton County Board of Assessors and its chief appraiser and members in their official capacities (FCBOA). The trial court permitted the Development Authority of Fulton County (DAFC) to intervene. In his petition, Sherman contends that the method of valuing leasehold estates arising from a local development authority sale-leaseback bond transaction is illegal, unconstitutional, ultra vires and constitutes a failure of FCBOA and DAFC (Appellees) to perform their duty.

A bond transaction leasehold estate is created when a local development authority, in accordance with its redevelopment powers, enters into a bond

transaction agreement with a private developer of certain real property. The local development authority issues revenue bonds under a financing program to the developer, who conveys to the authority fee simple title to the property. The development authority and the developer then enter into a multi-year lease arrangement whereby the authority, as owner, leases the property to the developer. The resulting lease payments are used by the local development authority to make the principal and interest payments on the revenue bonds. The terms of the agreement allow the developer to repurchase the fee simple estate for a nominal amount once the revenue bonds are paid down or retired.

As part of the transaction, the parties enter into a written agreement that sets forth a specific method for determining the fair market value of the resulting leasehold estate held by the private developer. The method estimates the initial fair market value of the leasehold estate to be 50 percent of the fair market value of the fee simple estate. The estimated value of the leasehold estate is then “ramped up” by five percent per year. By the eleventh year, the leasehold estate is valued at 100 percent of the fair market value of the fee simple estate.

Sherman seeks the following relief: a declaration that this valuation method, used by Appellees and allegedly codified in OCGA § 36-80-16.1(e),

violates the Georgia and United States Constitutions; an injunction prohibiting Appellees from using this valuation method for purposes of determining the fair market value of leasehold estates created by a revenue bond transaction; and a writ of mandamus ordering Appellees to commence determining the actual fair market value of all existing leasehold estates and to reassess all such leasehold estates for all prior years that the valuation method at issue was used. The trial court entered an order granting a motion to dismiss filed by FCBOA and a motion for judgment on the pleadings filed by DAFC, and denying a motion for partial summary judgment filed by Sherman. Sherman appeals from that order, contending that the dismissal of the petition and the grant of judgment on the pleadings were erroneous.

The standard of review for the dismissal of a petition for failure to state a claim upon which relief may be granted is *de novo*, and ““all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party’s favor.” (Cit.)’ [Cit.]” Southstar Energy Services v. Ellison, 286 Ga. 709, 710 (1) (691 SE2d 203) (2010).

“(A) motion to dismiss for failure to state a claim upon which relief can be granted ‘should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. . . .’ (Cit.)” [Cit.]

Southstar Energy Services v. Ellison, supra. “If, within the framework of the complaint, evidence may be introduced which will sustain a grant of the relief sought by the claimant, the complaint is sufficient and a motion to dismiss should be denied. [Cits.]” Anderson v. Flake, 267 Ga. 498, 501 (2) (480 SE2d 10) (1997).

“‘For the purposes of [a] motion [for judgment on the pleadings], all well-pleaded material allegations of the opposing party’s pleading are to be taken as true, and all allegations of the moving party which have been denied are taken as false.’ [Cit.]” Ware v. Fidelity Acceptance Corp., 225 Ga. App. 41, 44 (3) (482 SE2d 536) (1997). A motion for judgment on the pleadings should “be granted only if . . . the moving party is clearly entitled to judgment.” Gulf American Fire & Casualty Co. v. Harper, 117 Ga. App. 356 (1) (160 SE2d 663) (1968).

Construed in favor of Sherman, the petition alleges that Appellees, by using the above-referenced valuation method, have intentionally valued bond transaction leasehold estates for purposes of ad valorem taxation at less than fair market value. Sherman claims that Appellees' alleged undervaluation of these leasehold estates violates their duty to "see that all taxable property within the county is assessed and returned at its fair market value and that fair market values as between the individual taxpayers are fairly and justly equalized. . . ." OCGA § 48-5-306 (a). He also alleges violations of several provisions in the Georgia and United States Constitutions, including the uniformity of taxation provision. The overriding issue in this case is whether the valuation method used by Appellees fairly and justly establishes the fair market value of a bond transaction leasehold estate such that the method is not "arbitrary or unreasonable." DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., 248 Ga. 277, 281 (3) (282 SE2d 880) (1981).

Appellees have failed to show that they are clearly entitled to judgment and that no evidence may be introduced sufficient to grant the relief sought by Sherman. In fact, Sherman provided such evidence in the trial court in the form of an affidavit of a qualified expert real estate appraiser, which specifically

opines that the valuation method used by Appellees does not fairly and accurately determine the fair market value of a bond transaction leasehold estate and thus is arbitrary and unreasonable. In a previous dispute over the proper valuation method for determining the fair market value of real property for purposes of ad valorem taxation, this Court stated that, “[a]lthough the tax assessors or the property owners, or both, may be incorrect as a matter of fact, such determination cannot be made on motion for summary judgment. . . .” Dougherty County Bd. of Tax Assessors v. Burt Realty Co., 250 Ga. 467, 469 (298 SE2d 475) (1983). See also Delta Air Lines v. Clayton County Bd. of Tax Assessors, 246 Ga. App. 225, 235 (4) (539 SE2d 905) (2000) (“Determination of the fair market value of the property involved is generally a question for the trier of fact. [Cits.]”); J.C. Penney Co. v. Richmond County Bd. of Tax Assessors, 233 Ga. App. 399, 400-401 (504 SE2d 201) (1998) (“Just and fair valuation of property is a question to be determined by the factfinder. . . . (Cit.)”). Clearly then, that determination can rarely be made under the more stringent standards applicable to motions to dismiss for failure to state a claim and motions for judgment on the pleadings.

It is clear that county boards of tax assessors are not required to use any particular appraisal approach or method when determining the fair market value of property for purposes of ad valorem taxation. See Rogers v. DeKalb County Bd. of Tax Assessors, 247 Ga. 726, 728 (2) (279 SE2d 223) (1981) (“The object of the assessors must be to determine the fair market value of the property subject to taxation in the county and the methods employed may be varied if the object is attained.’ [Cit.]”); Lamplight Court Apartments v. DeKalb County Bd. of Tax Assessors, 259 Ga. App. 642, 643 (1) (577 SE2d 814) (2003) (“[I]t is not impermissible under the uniformity of taxation provision of the constitution to apply different methods of arriving at the fair market value of tangible property.”). However, this does not mean that the boards “can act with unlimited discretion. . . .” Cross v. Miller, 221 Ga. 579, 581 (1) (146 SE2d 279) (1965). The law still requires valuations to be just and fair between all taxpayers of the county. Cross v. Miller, supra. The valuation methods used must not be “arbitrary or unreasonable.” DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., supra. Therefore, it cannot be said that, within the framework of the petition, no evidence could be introduced that would support a finding that the valuation method used by Appellees unfairly undervalues the

fair market value of a bond transaction leasehold estate and thus is arbitrary or unreasonable.

Appellees contend that they have authority for the use of their valuation method pursuant to the decisions upholding similar valuation methods for bond transaction leasehold estates in DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., supra, and Coweta County Bd. of Tax Assessors v. EGO Products, 241 Ga. App. 85, 87-88 (1) (526 SE2d 133) (1999). However, neither of those cases involved a motion to dismiss or for judgment on the pleadings. Furthermore, both cases are otherwise distinguishable from the case at bar.

In DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., supra, this Court determined that a valuation method applied by the local county board of tax assessors to a bond transaction leasehold estate was not “arbitrary or unreasonable.” To reach that conclusion, this Court pointed to evidence in the record that the method followed an authorized income appraisal approach that “[took] into account the fair market value of similarly leased property and [was] based upon prevailing rents in the area.” DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., supra. Moreover, this Court emphasized that “[t]he fair market value of a leasehold interest must necessarily vary in accordance with the

terms and conditions of each agreement as well as the nature and location of the property involved.” DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., supra. In this case, the record does not show that Appellees’ valuation method was derived by following an authorized appraisal approach or that it took into account similarly leased property in the area, the market rents in the area, or the terms and conditions of each lease agreement. Although Appellees have proffered an affidavit describing the rationality behind a ramp-up formula, the formula used for the calculations set forth in that affidavit is substantially different than the formula presently at issue. The formula described in Appellees’ affidavit requires ten years on the life of the lease before the developer can invoke its option to repurchase the fee simple estate for a nominal amount. The formula in this case allows for a repurchase at any time once the lease begins. This difference is essential, especially considering that, according to Appellees’ affidavit, “[a]lmost all of the leasehold value represented by the lease is represented by the [repurchase option] in the real property at the end of the lease term.” Thus, the affidavit appears to be inapplicable to the formula at issue in the present case. Moreover, Sherman must be given the opportunity to refute that affidavit rather than having his complaint dismissed.

In Smith v. Elbert County Bd. of Tax Assessors, 292 Ga. App. 417, 418 (2) (664 SE2d 786) (2008), a taxpayer also challenged the methodology employed by the county board of tax assessors to value her property. The Court of Appeals upheld the challenged method because “the Board presented evidence both of the methodology it employed and that its methodology resulted in a determination of fair market value.” Smith v. Elbert County Bd. of Tax Assessors, supra. Although the methodology employed in the present case is clear, Appellees have not presented evidence that this methodology actually resulted in a fair valuation of the leasehold estate. Appellees argue that their initial valuation of the fee simple estate follows an authorized appraisal approach and takes into account some of the factors referenced above, such as similarly leased properties in the area and the market rents in the area. However, a valuation of the fee simple estate is just the first step. Appellees will need to offer evidence as to how their method applied to the leasehold estate incorporates the requisite factors. They assert that we should just assume that every leasehold estate is worth 50 percent of its fee simple estate, but offer no evidence to support this assumption. Without such evidence, and in light of the affidavit filed by Sherman to the contrary, we are unable to determine, pursuant

to DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., supra, that the valuation method used by Appellees is not arbitrary and unreasonable, and therefore the petition should not have been dismissed pursuant to OCGA § 9-11-12 (b) (6).

Appellees' reliance on Coweta County Bd. of Tax Assessors v. EGO Products, supra, is also misplaced. In that case, a taxpayer challenged a county board's valuation of its personal property for purposes of ad valorem taxation. Coweta County Bd. of Tax Assessors v. EGO Products, supra at 86. In a footnote, the Court of Appeals described a method used by the county board to value the taxpayer's bond transaction leasehold estate which "set the value of [the] real property at a flat 50 percent." Coweta County Bd. of Tax Assessors v. EGO Products, supra at 87 (1), fn 1. Appellees argue that the mention of this set percentage valuation method for a bond transaction leasehold estate shows approval by the court for the use of such a method. However, the substantive issue in that case was a challenge to the valuation method applied to the taxpayer's leasehold interest in the personal property, not in the real property. A challenge to the leasehold valuation method applied to the real property was not before the court and thus was not ruled upon by the court. The footnote's

purpose was informational only and therefore is not authority for the valuation method at issue in this case.

Appellees also contend that OCGA § 36-80-16.1 (e) provides statutory authorization for the use of their valuation method. This provision gives county boards of tax assessors authority to determine the fair market value of bond transaction leasehold estates by using a valuation method “based on assessments of the increasing interest of the [lessee] in the real or personal property, or both, over the term of the lease, or to use a simplified method or methods employing a specified percentage. . . .” OCGA § 36-80-16.1 (e). Although OCGA § 36-80-16.1 (e) gives county boards of tax assessors authority to use certain simplified methods for determining the value of a bond transaction leasehold estate, the statute does not purport to relieve Appellees from their duty to value the leasehold estate at its fair market value. Any contention that the statute does allow Appellees to value a bond transaction leasehold estate at less than its fair market value would make the statute illegal and unconstitutional. See OCGA § 48-5-306 (a), *supra*; Griggs v. Greene, 230 Ga. 257, 267 (4) (197 SE2d 116) (1973) (“[T]he requirement in the Constitution that the rule of taxation shall be uniform, means that all kinds of property of the same class . . . must be taxed

alike, by the same standard of valuation. . . .’ [Cits.]”). Thus, OCGA § 36-80-16.1 (e) does not bear upon the overriding issue in this case of whether the valuation method used by Appellees fairly and justly approximates the fair market value of a bond transaction leasehold estate. Therefore, it would not be appropriate to address the constitutionality of the statute in the present case. See Grantham v. Grantham, 269 Ga. 413, 414 (2) (499 SE2d 67) (1998) (“a reviewing court will decide a case on constitutional grounds as a matter of last resort ([Cits.]”); Bell v. Austin, 278 Ga. 844 (1) (607 SE2d 569) (2005) (“A constitutional question will not be decided unless it is essential to the resolution of the case. [Cit.]”).

Finally, the dissent contends that the present action is barred because it amounts to a collateral attack on concluded bond validation proceedings which is proscribed by Georgia law. See Ga. Const. of 1983, Art. IX, Sec. VI, Par. IV; OCGA § 36-82-78; Quarterman v. Douglas County Bd. of Commissioners, 278 Ga. 363 (602 SE2d 651) (2004). However, the restriction on challenging matters addressed in bond validation proceedings only attaches to those matters that are referenced and adjudicated in those proceedings. For example, in

Charlton Development Auth. v. Charlton County, 253 Ga. 208, 209 (317 SE2d 204) (1984), this Court upheld a tax levy agreement that “was referred to in the pleadings and final judgment in the bond validation proceedings.” A second tax levy agreement was held by this Court to be unenforceable because it was “in no manner . . . mentioned in the order validating the bonds and security.”

Charlton Development Auth. v. Charlton County, supra. Furthermore, every case cited by the dissent upholds only those agreements that were specifically adjudicated valid in the bond validation proceedings. See Quarterman v. Douglas County Bd. Of Commissioners, supra at 365 (challenged “intergovernmental contract . . . was specifically found in the validation order to constitute a legal, valid, binding, and enforceable obligation”); Ambac Indemnity Corp. v. Akridge, 262 Ga. 773, 775 (1) (425 SE2d 637) (1993) (taxpayer attack held invalid because the validation order specifically “found that the contract was ‘a legal, valid, binding and enforceable obligation’ of the county and that the county could levy taxes to fulfill its obligations under the contract”); Miller v. Columbus, 229 Ga. 234, 236 (2) (190 SE2d 535) (1972) (challenged “conveyance and lease . . . were adjudicated valid in the bond validation proceeding”); Gibbs v. City of Social Circle, 191 Ga. 422, 425 (2) (12

SE2d 335) (1940) (“action to enjoin the issuance and sale of [bond] certificates” not allowed where the “judgment validat[ed] and confirm[ed]” them). Requiring that agreements relating to bond transactions be specifically referenced in the pleadings and adjudicated in the validation proceedings protects the public’s “constitutional [right] of due process [to receive] adequate notice of the subject of the hearing and [the] opportunity to be heard.” Ambac Indemnity Corp. v. Akridge, supra at 774 (1). Therefore, the present challenge to the memoranda of agreement that set forth the tax assessment formula at issue will only constitute a prohibited collateral attack on a concluded bond validation proceeding if the memoranda were specifically adjudicated in the proceedings and held valid by the bond judgment. This may be the case in the present action, but Appellees must put forth evidence that the applicable bond validation orders did in fact expressly rule upon each memorandum of agreement. The requirement of this evidence is a further reason why the trial court should not have dismissed Sherman’s petition. Moreover, even if Sherman is barred from challenging the tax agreements on concluded bond transactions, he also seeks an injunction to prohibit the use of the formula in future bond agreements.

Because Sherman has made material allegations which could be supported by admissible evidence on the issue of whether the valuation method used by Appellees fairly and justly approximates the fair market value of a bond transaction leasehold estate, the trial court erred in dismissing the petition for failure to state a claim upon which relief may be granted. Furthermore, because Appellees have failed to show that they are clearly entitled to judgment, the trial court erred in granting the motion for judgment on the pleadings.

Judgment reversed. All the Justices concur, except Hunstein, C. J., Benham and Thompson, JJ., who dissent.

S10A0924. SHERMAN v. FULTON COUNTY
BOARD of ASSESSORS et al.

BENHAM, J., dissenting.

Appellant John Sherman sought a writ of mandamus and injunctive relief against the members of the Fulton County Board of Tax Assessors (“the Board”) and the county’s chief appraiser to compel them to stop what he asserts are illegal tax abatements and preferential tax assessments given in 2006-2009 to several real estate developments that were the subject of bonds issued by the Fulton County Development Authority and validated by the superior court. Sherman asserts that the Board is not fulfilling its statutory duty to under OCGA § 48-5-263(b) to make appraisals of fair market value and comply with rules and regulations established by the tax commissioner for staff duties, and contends that the purported illegal activity is facilitated by the Board’s use of a 50% “ramp-up” formula to value, for ad valorem tax purposes, the leasehold interest held by a real estate developer, the value of which interest has the potential to increase annually as the developer buys back the leased property from the local development authority. See DeKalb County Bd.of Tax Assessors v. W.C. Harris

& Co., 248 Ga. 277 (282 SE2d 880) (1981). Acknowledging that OCGA § 36-80-16.1(e) authorizes the use of the valuation method employed by the Board, Mr. Sherman also contended the statute is unconstitutional. The trial court dismissed Mr. Sherman's petition and granted judgment on the pleadings to the Board and the chief appraiser. Because I cannot agree with the majority's decision to reverse the judgment entered by the trial court, I respectfully dissent.

In his petition, Mr. Sherman sought to have the court order the Board to determine the 2009 fair market value of all existing bond transaction leaseholds and re-assess them for prior years, and to cease use of the 50% valuation formula. In so doing, Mr. Sherman's petition takes issue with and seeks judicial reformation of the memoranda of agreement executed years ago in conjunction with each bond transaction by the real estate developer, the Fulton County Development Authority and the Board. Each of those transactions has been the subject of a bond validation proceeding which resulted in the issuance of a judgment of validation. I believe the trial court correctly dismissed Mr. Sherman's petition because Mr. Sherman may not collaterally attack the judgment of validation that preceded the issuance of bonds for these projects. "[E]ven if the judgment of validation is unconstitutional, arguably void, or

obtained by fraud, accident, or mistake, it cannot be collaterally attacked ... [t]hat judgment is conclusive as to ...all other questions which could and should have been asserted and adjudicated during the bond validation proceedings.”

Quarterman v. Douglas County Bd. of Commrs., 278 Ga. 363, 365 (602 SE2d 651) (2004). See also Charlton Dev. Auth. v. Charlton County, 253 Ga. 208 (317 SE2d 204) (1984) (conclusiveness of validation proceedings places agreements referred to in the validation judgment beyond challenge); Miller v. Columbus, Georgia, 229 Ga. 234 (190 SE2d 535) (1972) (following the conclusive adjudication of a bond validation proceeding, citizen/taxpayers could not maintain an action attacking the conveyance and lease that were adjudicated valid in the bond validation proceeding). The Georgia Constitution requires that there be “incontestable and conclusive” validation of revenue bonds (1983 Ga. Const., Art. IX, Sec. VI, Par. IV), and OCGA § 36-82-78, the legislative implementation of the constitutional requirement, “prevents any collateral attack by the county, county residents, or taxpayers who had proper notice of the validation proceedings but chose not to intervene.” AMBAC Indem. Corp. v. Akridge, 262 Ga, 773, 774 (425 SE2d 637) (1993). “The validation scheme provides an easy remedy for every taxpayer, whereby he may have his day in

court, without the hazard and risk of seeking the aid of an equity court by injunction ...It provides a speedy and less expensive remedy for the taxpayer. There is no reason, in logic or in law, why the taxpayer should be permitted to decline to enter his appearance and objections in the validation proceeding, allow the decree there to be entered, and then make a formal attack which might have been made in that proceeding....” Gibbs v. City of Social Circle, 191 Ga. 422, 426 (12 SE2d 335) (1940), quoting Love v. Yazoo City, 162 Miss. 65 (138 So. 600, 603) (1932).

The preclusion of collateral attacks on matters that could have been raised in the bond validation proceeding

is necessary to protect the ability of governmental bodies to obtain long-term financing in the bond market. Potential purchasers would be reluctant to invest in the state’s bonds without the assurance that the revenue bonds and their security are not subject to collateral attacks after a court with proper jurisdiction has entered a final validation order. Any perceived risk in the revenue bonds as an investment would impede the ability of state and local governments to finance needed public improvement projects.

AMBAC Indem. Corp. v. Akridge, supra, 262 Ga. at775. The trial court was correct when it dismissed Mr. Sherman’s petition and granted judgment on the pleadings to the Board and chief appraiser. Because the majority authorizes Mr.

Sherman to mount a collateral attack on concluded bond validation proceedings that the Georgia Constitution, Georgia statutes, and Georgia jurisprudence prohibit, I respectfully dissent, and I am authorized to state that Chief Justice Hunstein and Justice Thompson join this dissent.

In the Supreme Court of Georgia

Decided: March 27, 2015

S14A1493. SJN PROPERTIES, LLC v. FULTON COUNTY
BOARD OF ASSESSORS et al.

HUNSTEIN, Justice.

In 2009, John Sherman, a resident and taxpayer of Fulton County, filed suit, on behalf of himself and all others similarly situated, against the Fulton County Board of Assessors (hereinafter, “FCBOA”), along with its Chief Appraiser and each of its members in their official capacities, to challenge the FCBOA’s method of valuing leasehold estates arising from a sale-leaseback bond transaction involving the Development Authority of Fulton County (hereinafter, “DAFC”).¹ As described in an earlier appeal arising from this same case, the sale-leaseback transaction at issue here was structured as follows:

A bond transaction leasehold estate is created when a local development authority, in accordance with its redevelopment powers, enters into a bond transaction agreement with a private developer of certain real property. The local development authority issues revenue bonds under a financing program to the developer,

¹Shortly after the petition was filed, the DAFC successfully moved to intervene as a defendant in the case.

who conveys to the authority fee simple title to the property. The development authority and the developer then enter into a multi-year lease arrangement whereby the authority, as owner, leases the property to the developer. The resulting lease payments are used by the local development authority to make the principal and interest payments on the revenue bonds. The terms of the agreement allow the developer to repurchase the fee simple estate for a nominal amount once the revenue bonds are paid down or retired.

As part of the transaction, the parties enter into a written agreement that sets forth a specific method for determining the fair market value of the resulting leasehold estate held by the private developer. The method estimates the initial fair market value of the leasehold estate to be 50 percent of the fair market value of the fee simple estate. The estimated value of the leasehold estate is then “ramped up” by five percent per year. By the eleventh year, the leasehold estate is valued at 100 percent of the fair market value of the fee simple estate.

Sherman v. Fulton County Bd. of Assessors, 288 Ga. 88, 89 (701 SE2d 472) (2010) (hereinafter, “Sherman I”). Sherman claims that this so-called “50% ramp-up” methodology results in the valuation of the developers’ leasehold estates at less than fair market value, in violation of defendants’ statutory and constitutional duties to ensure that ad valorem taxes are assessed uniformly and at fair market value.

In October 2009, the trial court granted the defendants’ motion to dismiss/motion for judgment on the pleadings, and, on appeal, this Court

reversed. Sherman, 288 Ga. at 95. The Court held that the case was not subject to dismissal because, while there was no dispute as to the valuation methodology employed, there was no way to conclusively determine at that stage of the proceedings that such methodology actually resulted in a fair valuation of the leasehold estate. *Id.* at 93. This Court reasoned:

[Defendants] argue that their initial valuation of the fee simple estate follows an authorized appraisal approach and takes into account some of the factors referenced above, such as similarly leased properties in the area and the market rents in the area. However, a valuation of the fee simple estate is just the first step. [Defendants] will need to offer evidence as to how their method applied to the leasehold estate incorporates the requisite factors. They assert that we should just assume that every leasehold estate is worth 50 percent of its fee simple estate, but offer no evidence to support this assumption. Without such evidence, and in light of the affidavit filed by Sherman to the contrary, we are unable to determine, pursuant to *DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co.*, *supra*, that the valuation method used by [Defendants] is not arbitrary and unreasonable, and therefore the petition should not have been dismissed pursuant to OCGA § 9–11–12 (b) (6).

Id.

After remand, SJN Properties, LLC (hereinafter, “SJN”) was added as a plaintiff in the action.² The plaintiffs filed an amended and restated class action

²In December 2013, Sherman moved to be dropped as party to the proceedings, ostensibly for health reasons, leaving SJN as the sole plaintiff in the case.

petition, again seeking declaratory, injunctive, and mandamus relief with respect to the valuation methodology, and adding a claim seeking declaratory, injunctive, and mandamus relief with respect to a subset of DAFC-owned properties involved in these bond transactions, which, according to the plaintiffs, have improperly been treated as tax-exempt. Thereafter, the parties filed cross-motions for summary judgment, and the trial court granted the defendants' motions. Though we find error in the trial court's striking of two affidavits submitted by SJN, we nonetheless, for the reasons set forth below, affirm the grant of summary judgment to the defendants.

1. At the summary judgment hearing, the trial court struck as untimely two affidavits SJN had filed and served on the day before the hearing. The first is the affidavit of expert real estate appraiser J. Carl Schultz, Jr., comprised of 16 pages of testimony accompanied by more than 200 pages of supporting exhibits. The second is the affidavit of John F. Woodham, one of three attorneys of record for SJN; this affidavit is comprised of nine pages of testimony and approximately 150 pages of supporting exhibits. SJN filed these affidavits in the trial court and served them on the defendants on December 19, 2013, the day before the December 20, 2013 summary judgment hearing.

Service was effectuated both by U.S. mail and electronically; defendants' counsel received electronic copies of the affidavits at 5:24 p.m. on December 19. Concluding that these affidavits were untimely filed, the trial court declined to consider them.

SJN contends the trial court erred in striking the affidavits, claiming that they were filed and served in accordance with the Civil Practice Act. Though we find SJN's voluminous eleventh-hour filing discourteous, we are constrained to agree that this filing was technically in compliance with the requirements of the Civil Practice Act and thus that the trial court erred in striking the affidavits. OCGA § 9-11-56 (c) authorizes a party against whom a summary judgment motion has been filed to serve affidavits in opposition to the motion at any time "prior to the day of hearing." See also OCGA § 9-11-6 (d) (governing motions generally, providing that "[o]pposing affidavits may be served not later than one day before the hearing"); Woods v. Hall, 315 Ga. App. 93 (1) (726 SE2d 596) (2012) (vacating grant of summary judgment, finding that trial court erred in striking as untimely plaintiff's opposing affidavit, filed three days prior to hearing). Cf. Brown v. Williams, 259 Ga. 6 (4) (375 SE2d 835) (1989) (opposing affidavit filed on day of hearing was untimely). The Court of

Appeals has, in fact, held that opposing affidavits were timely where served on the day before the hearing only by U.S. mail, such that the movant had not even received them as of the time of the hearing. See Kirkland v. Kirkland, 285 Ga. App. 238 (2) (645 SE2d 626) (2007) (opposing affidavit served by mail on day before summary judgment hearing was timely and properly considered); Martin v. Newman, 162 Ga. App. 725 (2) (293 SE2d 18) (1982) (same). Though we find the gamesmanship in such delayed filings distasteful, we cannot ignore the plain language of OCGA § 9-11-56 (c), which, regrettably, allows parties to employ such tactics.³ The trial court therefore erred in refusing to consider the Schultz and Woodham affidavits in its adjudication of defendants’ motions for summary judgment. In our de novo review of the evidence here, see Jones v. Kirk, 290 Ga. 220, 221 (719 SE2d 428) (2011), we will thus consider these affidavits, to the extent they are otherwise “admissible in the evidence [and] . . . show affirmatively that the affiant is competent to testify to the matters stated

³We note that the Federal Rules of Civil Procedure, on which our Civil Practice Act is modeled, see Ambler v. Ambler, 230 Ga. 281 (1) (196 SE2d 858) (1973), currently require the service of opposing affidavits no later than seven days prior to a hearing. Fed. R. Civ. P. 6 (c) (2). The current rule is more stringent than the prior version, which required only that opposing affidavits be served at least one day before the hearing. See Charles Alan Wright et al., 4B Fed. Prac. & Proc. Civ. § 1170, n.3 (4th ed., updated Jan. 2015).

therein.” OCGA § 9-11-56 (e).

2. In reviewing the merits of a trial court’s decision on a motion for summary judgment, ““this Court conducts a de novo review of the evidence to determine whether there is a genuine issue of material fact and whether the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law.”” Jones, 290 Ga. at 221. As we stated in Sherman I,

[t]he overriding issue in this case is whether the valuation method used by [the defendants] fairly and justly establishes the fair market value of a bond transaction leasehold estate such that the method is not “arbitrary or unreasonable.” [Cit.]

Sherman, 288 Ga. at 90. The other issue, raised in the plaintiffs’ amended petition on remand following Sherman I, is whether certain properties held in fee simple by the DAFC have been and continue to be unlawfully exempted from ad valorem taxation.⁴ In connection with the resolution of these issues, SJN seeks a declaratory judgment (a) affirming the invalidity of the 50% ramp-up valuation method, both as employed in connection with the bond transaction

⁴Specifically, SJN claims that various properties held by the DAFC fall within certain categories specified under state law as ineligible for exemption from ad valorem taxes. See OCGA §§ 36-62-3, 36-62-2 (6) (H) (vi), (J) & (K).

leasehold estates here and in general; and (b) establishing DAFC's liability for back taxes on various properties as to which it has been unlawfully afforded an exemption from ad valorem taxes. In addition, SJN seeks "a mandatory injunction and/or writ of mandamus" to (a) restrain the FCBOA from using the 50% ramp-up valuation method in assessing the value of bond transaction leasehold estates; (b) compel the FCBOA to re-appraise all existing leasehold estates at issue here using an appraisal approach that comports with state law and to issue assessments for the collection of back taxes on such estates to the extent they have been previously under-appraised; and (c) compel the FCBOA to issue ad valorem tax assessment notices to the DAFC as to its non-tax-exempt properties for prior years and to commence such assessments for future years.

(a) We first address SJN's claims regarding the allegedly non-tax-exempt status of certain properties held by the DAFC. In support of its claims in this regard, the only evidence SJN has offered is the affidavit testimony of John Woodham, its own counsel of record. In his affidavit, Woodham identifies various properties owned by the DAFC which he claims constitute either office building or hotel facilities that are specifically excluded from the tax exemption afforded to most development authority-owned property. See OGCA §§ 36-62-

3, 36-62-2 (6) (H) (vi) & (J). Woodham designates these properties via handwritten notations in the margins of a list of DAFC-owned properties, purportedly obtained from the FCBOA during discovery, attached as an exhibit to his affidavit. In the affidavit, Woodham attests that he “personally reviewed the property record information” regarding the designated properties and opines on this basis that these properties are not tax-exempt. SJN offers no other evidence in support of its claims in this regard.

Setting aside the questionable ethics of Woodham’s assumption of the role as witness in a case he is prosecuting as counsel of record,⁴ we find that Woodham’s “testimony” is insufficient to create an issue of material fact on SJN’s claims in regard to the tax-exempt status of the DAFC-owned properties at issue. See, e.g., Pfeiffer v. Ga. Dept. of Transp., 275 Ga. 827, 828-829 (2) (573 SE2d 389) (2002) (once a defendant on motion for summary judgment exposes an absence of evidence to support the plaintiff’s case, the plaintiff must then “point to specific evidence giving rise to a triable issue”). Entirely absent is any factual basis for the conclusion that any of the properties in question

⁴See Georgia Rules of Professional Conduct, Rule 3.7 (“[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness”).

actually possess the characteristics an “office building” or “hotel facility” as defined in OCGA § 36-62-2 (6) (H) (vi) & (J). Woodham’s “testimony” on this issue is nothing more than legal arguments lacking in evidentiary support; his affidavit is simply a legal brief cloaked under the solemnity of an oath. The fact that SJN could apparently find no witness or documentary evidence that would substantiate its claims on this issue, other than the self-serving so-called “testimony” of its own attorney, demonstrates the propriety of summary judgment on these claims. We therefore affirm the grant of summary judgment as to these claims.

(b) We now consider SJN’s claims regarding the FCBOA’s use of the 50% ramp-up formula in assessing the value of the bond transaction leasehold estates held by the private developers who are parties to the bond transactions here.

(i) Claims for injunctive relief. As an initial matter, the defendants contend, citing this Court’s recent decision in Georgia Dept. of Natural Resources v. Ctr. for a Sustainable Coast, 294 Ga. 593 (755 SE2d 184) (2014), that SJN’s claims for injunctive relief are barred by sovereign immunity. We agree. In Sustainable Coast, this Court held that sovereign immunity, in its

current incarnation under this State’s constitution, may be waived only by an act of the General Assembly. *Id.* at 598-601. Accordingly, we overruled precedent that had previously recognized a common law exception to sovereign immunity for suits seeking injunctive relief against the State. *Id.* at 593, 599-602 (overruling *Intl. Bus. Machines Corp. v. Evans*, 265 Ga. 215 (453 SE2d 706) (1995)). Thus, after *Sustainable Coast*, injunction actions against the State, including those against State employees in their official capacity, see *id.* at 599, n.4, may proceed only where such actions are expressly authorized under our constitution or by a statute evincing the legislature’s express intent to permit claimants to seek injunctive relief against the State. Accordingly, SJN’s claims for injunctive relief are barred by sovereign immunity.

(ii) Claims for mandamus relief. Sovereign immunity does not, however, preclude SJN’s claims for mandamus relief. See *Southern LNG, Inc. v. MacGinnitie*, 290 Ga. 204 (719 SE2d 473) (2011).⁵ Our mandamus statute expressly authorizes claimants to seek relief against a public official “whenever . . . a defect of legal justice would ensue from [the official’s] failure to perform

⁵Were we to hold otherwise, mandamus actions, which by their very nature may be sought only against public officials, would be categorically precluded by sovereign immunity.

or from improper performance” of “official duties.” OCGA § 9-6-20. SJN, as a citizen and taxpayer of Fulton County, clearly has standing to seek the type of mandamus relief it requests here. See OCGA § 9-6-24 (conferring standing to seek mandamus relief on any person “interested in having the laws executed and the duty in question enforced”); Southern LNG, Inc. v. MacGinnitie, 294 Ga. 657 (2) (755 SE2d 683) (2014) (corporate taxpayer had standing to sue for mandamus to compel State Revenue Commissioner to recognize it as a “public utility” for ad valorem tax purposes).⁶

⁶We note that we have previously held that OCGA § 9-6-24 and its predecessor statute confer standing to seek enforcement of public duties not only via mandamus but also by injunction. See, e.g., Arneson v. Bd. of Trustees of Employers’ Retirement Sys. of Ga., 257 Ga. 579 (2) (b), (c) (361 SE2d 805) (1987) (taxpayers generally have standing to seek to enjoin public officials from committing ultra vires acts); Griggs v. Green, 230 Ga. 257 (1) (197 SE2d 116) (1973) (taxpayer had standing to seek to enjoin taxing authorities from proceeding under allegedly void and illegal tax digest); Head v. Browning, 215 Ga. 263 (2) (109 SE2d 798) (1959) (taxpayers had standing to seek to enjoin State Revenue Commissioner from issuing liquor license to defendant). In none of these cases did we address sovereign immunity, likely due, at least in part, to their timing in relation to the evolution of our doctrine of sovereign immunity and whether judicially-created exceptions to the doctrine – such as that for injunction actions – were recognized as valid. See Sustainable Coast, 294 Ga. at 597-599 (examining history of sovereign immunity from its adoption in our common law in 1784, to its constitutionalization in 1974, and subsequent changes with the adoption of the Georgia Constitution of 1983 and further amendments in 1991). Insofar as these and similar cases permitted the prosecution of injunction actions against state officials, they now stand abrogated by Sustainable Coast; however, to the extent these cases simply confirmed a taxpayer’s standing to seek to enforce a public duty by way of some viable cause of action, they remain good law.

In order to be entitled to mandamus relief, a claimant must establish that “(1) no other adequate legal remedy is available to effectuate the relief sought; and (2) the applicant has a clear legal right to such relief.” Bibb County v. Monroe County, 294 Ga. 730, 734 (2) (755 SE2d 760) (2014). Pretermitted whether another adequate legal remedy is available here, we conclude, as explained below, that SJN has failed to come forth with evidence of a clear legal right to the relief it is seeking.

A clear legal right to the relief sought may be found only where the claimant seeks to compel the performance of a public duty that an official or agency is required by law to perform. . . . Where performance is required by law, a clear legal right to relief will exist either where the official or agency fails entirely to act or where, in taking such required action, the official or agency commits a gross abuse of discretion.

Id. at 735. Here, SJN seeks to compel the FCBOA to fulfill its statutory duty in relation to the assessment of ad valorem taxes within its jurisdiction. The essence of this duty is

to see that all taxable property within the county is assessed and returned at its fair market value and that fair market values as between the individual taxpayers are fairly and justly equalized so that each taxpayer shall pay as nearly as possible only such taxpayer’s proportionate share of taxes.

OCGA § 48-5-306 (a); see also Ga. Const. of 1983, Art. VII, Sec. I, Par. III (requiring uniformity in taxation). As to the fulfillment of this duty, we have held:

Tax assessors are authorized to fix the fair market value of property for taxes from the best information obtainable. This does not require the tax assessors to use any definite system or method, but demands only that the valuations be just and that they be fairly and justly equalized among the individual taxpayers . . . according to the best information obtainable.

(Citations and punctuation omitted.) Colvard v. Ridley, 218 Ga. 490, 490 (1) (128 SE2d 732) (1962); accord Sherman, 288 Ga. at 91 (“[i]t is clear that county boards of tax assessors are not required to use any particular appraisal approach or method when determining the fair market value of property”).

In sum, the FCBOA’s duty is to assess all taxable properties within its jurisdiction at fair market value, utilizing the “best information obtainable.” In support of their motions for summary judgment, the defendants have adduced the testimony of two expert real estate appraisers, both of whom opine that the 50% ramp-up formula is an analytically sound approach that comports with standard appraisal practice and, in the words of one of these witnesses, “represents an appropriate, reasonable, and non-arbitrary simplified method of

arriving at the fair market value for tax purposes of the leasehold interest[s]” at issue. This Court has in fact previously endorsed the concept of a formula for the valuation of leasehold estates in property held in fee simple by a county development authority. See DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., 248 Ga. 277, 280-281 (3) (282 SE2d 880) (1981) (“[w]e do not find the method of valuation utilized . . . to be an arbitrary or unreasonable one, and . . . the trial court did not err in approving the formula adopted in these cases”); see also Coweta County Bd. of Tax Assessors v. EGO Products, Inc., 241 Ga. App. 85, 87 (1) (526 SE2d 133) (1999) (noting with approval county board of tax assessors’ “long-standing policy of taxing leasehold interests in real property that are the subject of a financing agreement . . . at 50 percent of the appraised value for the term of the lease”).

Not surprisingly, SJN’s expert appraiser disagrees with the defendants’ experts, contending that, because of the structure of the bond transaction and the terms of the operative agreements, virtually 100% of any leased property’s value resides in the leasehold at all times during the term of the lease and that use of the 50% ramp-up formula thus systematically underestimates the value of the

leasehold estate.⁷ However, this witness, while assailing in the abstract the assumptions underlying the 50% ramp-up formula, admitted at his deposition that he has not actually appraised any of the leasehold estates involved in this case. Critically, when this witness was asked point-blank whether the assessed values of any of the properties at issue here in any given tax year were incorrect, he replied that he did not know.

In the end, though much ink is spilled in the parties' debate over whether the 50% ramp-up formula, in the abstract, is the best – or even a valid – methodology for valuing the leasehold estates here, SJN's mandamus claims fail for the simple reason that it has adduced no evidence that any actual assessment of any particular property has been or is other than at fair market value. SJN has thus failed to adduce any evidence that the FCBOA has failed to comply with its legal duty to “see that all taxable property within the county is assessed and returned for taxes at its fair market value.” OCGA § 48-5-306 (a). On the

⁷We note that the defendants moved in the trial court to exclude the testimony of SJN's expert as lacking the prerequisites for admissibility of expert testimony under OCGA § 24-7-702 (b). As the trial court did not rule on this motion, we have no occasion to review this issue and thus assume for present purposes that this testimony would be admissible at trial.

evidentiary record presented, SJN’s claims for mandamus relief cannot withstand summary judgment.

(iii) Claims for declaratory relief. We have previously left unresolved the question of whether sovereign immunity generally bars claims against the State for declaratory relief. See Southern LNG, 290 Ga. at 205-206 & n.1 (expressly sidestepping issue of whether declaratory judgment actions against the State are generally barred by sovereign immunity, but noting that this Court has in the past in certain contexts permitted declaratory judgment actions to proceed against state agencies and officials). But see DeKalb County Sch. Dist. v. Gold, 318 Ga. App. 633, 637 (1) (a) (734 SE2d 466) (2012) (holding that “[o]ur Constitution and statutes do not provide for a blanket waiver of sovereign immunity in declaratory-judgment actions”). Under the rationale of Sustainable Coast, it appears that, absent a statutory provision affording claimants an express right to seek declaratory relief against the State, sovereign immunity would bar such claims. See Gold, 318 Ga. App. at 637 (noting that OCGA § 50-13-10 provides for specific waiver of sovereign immunity for declaratory judgment actions challenging state agency administrative rules). Because this

significant legal issue has received little attention in these proceedings and because these claims can be disposed of on other grounds, as discussed below, we decline to definitively resolve it here.

Our Declaratory Judgment Act, OCGA § 9–4–2, provides that the superior courts may declare rights and other legal relations of any parties petitioning for declaratory relief in “cases of actual controversy,” or when “the ends of justice require that the declaration should be made.” The purpose of the Act is “to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” OCGA § 9–4–1. The proper scope of declaratory judgment is to adjudge those rights among parties upon which their future conduct depends.

Fourth St. Baptist Church of Columbus v. Bd. of Registrars, 253 Ga. 368, 369 (1) (320 SE2d 543) (1984). Accordingly, declaratory relief is proper only where the party seeking such relief faces some uncertainty or insecurity as to rights, status, or legal relations, upon which its future conduct depends. See, e.g., Baker v. City of Marietta, 271 Ga. 210, 214 (1) (518 SE2d 879) (1999) (“[w]here the party seeking declaratory judgment does not show it is in a position of uncertainty as to an alleged right, dismissal of the declaratory judgment action is proper”); Fourth St. Baptist Church of Columbus, 253 Ga. at 369 (claims for declaratory relief were properly dismissed, where plaintiffs

“face[d] no uncertainty or insecurity with respect to their voting rights, nor any risk stemming from undirected future action”); Henderson v. Alverson, 217 Ga. 541 (123 SE2d 721) (1962) (declaratory judgment action could not be maintained where plaintiff failed to allege need for guidance as to his future conduct but rather merely sought declaration that legislative enactment was void). Here, SJN faces no uncertainty or insecurity as to any of *its own* future conduct, but rather seeks an adjudication only of issues that will impact the future conduct of the FCBOA. As such, SJN’s claims for declaratory relief cannot be maintained, and summary judgment was properly granted thereon.

In summary, though we find error in the trial court’s striking of the Schultz and Woodham affidavits, we nonetheless, for the foregoing reasons, affirm the grant of summary judgment to the defendants as to all of SJN’s claims.

Judgment affirmed. All the Justices concur.

CITY OF ATLANTA et al. v. CREST LAWN MEMORIAL PARK CORPORATION
Supreme Court of Georgia
December 3, 1962, Decided

Opinion:

The Crest Lawn Memorial Park Corporation brought a petition for declaratory judgment and injunctive relief against the City of Atlanta and Riley F. Elder, as the Municipal Revenue Collector of the city. It was alleged: The petitioner is a nonprofit cemetery corporation, owning six described tracts of land. Property owned by the petitioner described as Tract No. 1 has been developed for burial sites, and numerous burials have been made throughout various portions of this tract. There is situated on this tract an administration building which is used exclusively in connection with the operation {218 Ga. 498} of the cemetery and for the sole purpose of carrying out its corporate function as a cemetery in selling burial sites and mausoleum crypts, opening graves, and burying human remains. Also located on this tract is a maintenance building or tool house in which {128 S.E.2d 724} is housed described equipment used in maintaining and operating the cemetery. The other tracts of land owned by the petitioner have not yet been developed by it, but this property is held for future development for cemetery purposes. The City of Atlanta has assessed all of the petitioner's property for ad valorem taxes for the year 1956. The defendant Elder has levied the tax fi. fa. issued by the city on that portion of the petitioner's property described as Tract No. 1 for the purpose of satisfying the fi. fa. for ad valorem taxes contended to be due for the year 1956. The city has assessed all of the petitioner's property for ad valorem taxes for the year 1957 and has caused a fi. fa. to be issued against it. The defendant Elder has notified the petitioner that unless the taxes claimed by the city are paid, he will levy upon the petitioner's property and sell it for the purpose of satisfying this fi. fa. The petitioner contends that it is not indebted to the city in any amount for taxes since all of its property is owned solely for burial purposes and is specifically exempt from all property taxes under the laws of Georgia.

It was prayed that the court make a declaratory judgment adjudicating that the following property is exempt from the property taxes sought to be imposed by the city: the real property described as Tract No. 1; the real property described as Tracts Nos. 2, 3, 4, 5, and 6; the buildings and other improvements situated on the real property; and the furniture, fixtures, machinery, and equipment used by the petitioner. It was also prayed that the defendants be temporarily restrained and permanently enjoined from levying upon any of the property of the petitioner or proceeding with the sale of any of its property to satisfy any fi. fa. issued for taxes claimed to be due by the city.

The defendants filed a demurrer, which was overruled. The case was tried by the trial judge without the intervention of a jury, and he found that the land described as Tract No. 1, including all buildings located thereon, was exempt from ad valorem {218 Ga. 499} taxes for the years 1956 and 1957; and that all other property of the petitioner, both real and personal, was subject to ad valorem taxes for those years. The defendants were permanently enjoined from collecting ad valorem taxes for the years 1956 and 1957 on the property described as Tract No. 1.

The City of Atlanta and Charles L. Mathews filed their motion for new trial on the usual general grounds, which was amended by the addition of several special grounds. The first special ground amended the motion for new trial to show that the defendants were dissatisfied with the verdict and judgment, except that part which held that certain property of the petitioner was subject to taxation. The other special grounds were elaborations of the general grounds.

1. It is suggested by the defendant in error that the jurisdiction of this case may be in the Court of Appeals under the decision in *Suttles v. Hill Crest Cemetery*, 209 Ga. 160 (71 S.E.2d 217). That case involved a money rule, and no question of equitable jurisdiction was involved. In the present case the petitioner prayed for a permanent injunction, and a permanent injunction was granted by the trial judge. It is therefore a case in equity within the jurisdiction of this court.

2. Under the authority of the Constitution, Art. VII, Sec. I, Par. IV (Code Ann. Supp. 2-5404), the legislature has exempted from taxation "places of . . . burial; . . . provided the property so exempted be not used for the purpose of private or corporate profit and income, . . ." Code 92-201, as amended. Under the allegations of the petition, the petitioner was entitled to an injunction against a levy on that portion of its property used as a place of burial, such property being exempt from taxation. *Tharpe v. Central Ga. Council of Boy Scouts of America*, 185 Ga. 810 (196 S.E. 762, 116 ALR 373); *Church of God of the Union {128 S.E.2d 725} Assembly v. City of Dalton*, 213 Ga. 76 (97 S.E.2d 132); *Alford v. Emory University*, 216 Ga. 391 (116 S.E.2d 596). The trial judge properly refused to dismiss the petition on the demurrer which asserted only that the petition did not state a proper basis for declaratory judgment.

3. The two real issues in the present case are whether the tax exemption of "places of . . . burial" includes undeveloped {218 Ga. 500} areas in the property of the petitioner described as Tract No. 1, and whether this exemption includes administrative and maintenance buildings located on this tract. The trial judge held that parcels of land acquired by the petitioner for future cemetery purposes, but not yet used for any purpose directly connected with the cemetery, were subject to taxation, and no exception to this judgment is under review.

The property described as Tract No. 1 is all in one tract. It was acquired by the petitioner from a predecessor cemetery corporation, Crest Lawn Memorial Park, Inc., and at the time of its acquisition numerous burials had been made on the tract. One of the petitioner's exhibits appearing in the record is a copy of a trust agreement dated August 2, 1940, between Crest Lawn Memorial Park, Inc., and the Fulton National Bank of Atlanta, providing for perpetual care and maintenance of the lots and graves in the Crest Lawn Memorial Park Cemetery.

Mr. Gilbert O. Johnson, who was manager of the petitioner in 1956 and 1957, testified that there had been burials in the cemetery prior to 1900. This witness testified that all of the property identified as Tract No. 1 was held for cemetery use, but that some parts of the tract contained ravines and steep hills which were not suitable for burials, and could never be used for any purpose except for the beautification of the cemetery. This witness pointed out on a map a hill with an estimated area of from two to four acres which was believed to have historical value since it was the site of one of the last points of defense under General Joe Johnson in the Battle of Atlanta, and retains evidences of the battle, such as shells, trenches, and fortifications; and he stated that the petitioner had hoped to save the area as a historical spot.

It is contended in the special grounds of the motion for new trial, and in the brief of the plaintiffs in error, that the undeveloped areas of Tract No. 1 are subject to taxation, and it is particularly urged that the undeveloped area of historical interest is not to be used for burial purposes and should not be exempt from taxation.

In his "Elegy Written in a Country Church-Yard" Thomas {218 Ga. 501} Gray wrote movingly of man's ultimate destination in this world:

*"The boast of heraldry, the pomp of power,
And all that beauty, all that wealth e'er gave,
Await alike the inevitable hour:
The paths of glory lead but to the grave."*

Our civilization has respect for the burying-places of its dead, and one way that this respect is shown is by the exemption of burial places from taxation. "One reason perhaps why cemeteries are exempt from taxation is the difficulty of collecting a tax thereon and the obvious impropriety of selling the graves of the dead in order to pay the expenses of carrying on the government of the living."

In *Mountain View Cemetery Co. v. Massey*, 109 W. Va. 473, 476 (155 S.E. 547), it was said:

"Recurring now to the suggestion that only the portions of a cemetery property which have been actually sold should be exempt from taxation, it will be observed that such construction of the statute might easily result in gross hardship in its operation. Portions assessed for taxation for a given year might very well be sold within a short time after assessment and actually put in use for burial purposes. If the tax were not paid, these {128 S.E.2d 726} very lots with dead bodies therein would be subject to sale to satisfy the tax . . . It is not the policy of a great commonwealth to be parsimonious in its dealings with its people, and least of all where the tender sentiments attending the place of sepulcher of their dead is involved. The State should eschew and scorn a policy that will even carry the possibility of harassment of bereaved survivors with reference to the last resting place of departed loved ones, or that might disturb the repose of the dead."

In *Haslerig v. Watson*, 205 Ga. 668, 680 (54 S.E.2d 413), this court quoted with approval the following excerpts from *6 Words and Phrases* (Perm. ed.), pages 407, 408, dealing with the word "cemetery": "A 'cemetery' is defined as a place where human bodies are buried; a graveyard. Actual interment and enclosure of land for use as cemetery constituted dedication as cemetery of all land so set apart, whether occupied by graves or not. *Smallwood v. Midfield Oil Co.*, Tex. Civ. App., 89 S. W. 2d 1086, 1090. " {218 Ga. 502} "A cemetery includes not only lots for depositing the bodies of the dead, but also avenues, walks, and grounds for shrubbery and ornamental purposes. All must be regarded as consecrated to a public and sacred use. *Evergreen Cemetery Assn. v. City of New Haven*, 43 Conn. 234, 243, 21 Am. Rep. 643. " In *Haslerig v. Watson*, supra, this court also quoted with approval from 10 Am. Jur. 491, 8, as follows: "When a tract of land has been dedicated as a cemetery, it is perpetually devoted to the burial of the dead and may not be appropriated to any other purpose." See also *Arlington Cemetery Corp. v. Bindig*, 212 Ga. 698, 704 (95 S.E.2d 378); *Greenwood Cemetery, Inc. v. MacNeill*, 213 Ga. 141 (97 S.E.2d 121); *Arlington Cemetery Corp. v. Hoffman*, 216 Ga. 735 (119 S.E.2d 696).

The trial judge was authorized to find from the evidence that the petitioner is a nonprofit cemetery corporation, and that the property designated as Tract No. 1 had been dedicated to burial purposes by the numerous burials therein. The evidence indicated that the number of burials was increasing each year, and that the undeveloped area of this tract was not disproportionate to the future needs of the area from which the burials are made (mainly Fulton, DeKalb, and Cobb Counties). Since the tract is dedicated to burial purposes, it may not thereafter be appropriated to other purposes. There is nothing in the present record to show that any use has been made of this tract inconsistent with the dedication to burial purposes. The preservation of a historical site in a tract of land dedicated to burial purposes would not change its character as a place of burial. The trial judge did not err in holding that the undeveloped portion of Tract No. 1 is exempt from taxation.

4. It appears from the evidence that a new administration building was being built on Tract No. 1 during the years 1956 and 1957, and that a tool shed and house where the custodian lived were on the property. Mr. Johnson, the manager of the petitioner at that time, testified that the administration building was necessary to the operation of the cemetery, that it was used to house

the sales department, and for the keeping of {218 Ga. 503} records of the owners of grave lots, interments, transfers, markers, and memorials; and that the tool house was necessary to house the tools and equipment needed for the maintenance of the cemetery.

In 84 CJS 601, Taxation, 292 (3-d), it is stated: "The exemption accorded to cemetery lands may extend to all property used or held exclusively for the burial of the dead or for the care, maintenance, or upkeep of such property, and ordinarily applies to a columbarium, a crematory, a mausoleum, or unsold lots, crypts, or niches, and covers permanent improvements placed on the land and necessary to its use as a burying ground."

{128 S.E.2d 727} In cases where an injunction was sought against the construction of a mortuary and a crematory on property dedicated as a cemetery, our court has held that such structures are not for the purpose of the burial of the dead. *Greenwood Cemetery, Inc. v. MacNeill*, 213 Ga. 141, supra; *Arlington Cemetery Corp. v. Hoffman*, 216 Ga. 735, supra. However, there is a distinction between these structures, in which bodies are prepared for burial, and buildings necessary for the administration of the cemetery and the maintenance of the burying grounds. The trial judge did not err in holding that the buildings on Tract No. 1 are exempt from taxation.

Judgment affirmed.

ROBERTS et al. v. RAVENWOOD CHURCH OF WICCA; and vice versa
Supreme Court of Georgia
April 30, 1982

Opinion

On Motion for Rehearing.

The taxing authorities have filed a motion for rehearing in this case.

1. In the motion for rehearing, they argue, among other things, that Ravenwood's receipt of rental income on some of the rooms in the Moreland Avenue dwelling destroys its character as a place of religious worship.

As authority, they cite two decisions which have not been heretofore cited: Atlanta Masonic Temple Co. v. City of Atlanta, 162 Ga. 244 (7) (133 S.E. 864) (1926) and Trustees Academy of Richmond County v. Bohler, 80 Ga. 159 (7 S.E. 633) (1887). However, our reading of Masonic Temple and Bohler actually bolsters our conclusion that the tax exemption is not lost where, as here, the trial court has found that a building is used primarily as a place of religious worship with some rooms in the building being rented out to students of the religion and with the rent being used to defray such expenses as the mortgage on the property. Under these circumstances, there is no "element of profit" in the receipt of rent, and the element of income is "altogether secondary and incidental." Trustees Academy of Richmond County v. Bohler, 80 Ga., supra, at p. 163. Nor are the rooms being rented out for a "business purpose." Atlanta Masonic Temple Co. v. City of Atlanta, 162 Ga., supra, at p. 245. As held in Peachtree on Peachtree Inn v. Camp, 120 Ga. App. 403 (170 S.E.2d 709) (1969), see n. 1, supra, the fact that residents are charged a rental toward expenses of operating a charitable institution does not destroy the charitable nature of the institution. Nor should it destroy {249 Ga. 354} the religious nature of an otherwise religious institution.

In addition, both Peachtree on Peachtree Inn v. Camp, supra, and Massenburg v. Grand Lodge F. & A. M. of State of Ga., 81 Ga. 212 (7 S.E. 636) (1888), recognize that where only a portion of a building is used for a tax-exempt purpose, the comparative value of the portion used for the tax-exempt purpose should be distinguished from the remainder, with only that part used for the tax-exempt purpose being spared taxation.

2. The taxing authorities also argue that our decision exposes the subject tax exemption to the possibility of practically unlimited abuse.

In responding to this argument, it is first necessary to dispel the dissent's suggestion that under the majority opinion, places of religious worship are practically unlimited and would include places in which Satanic cults worship a supernatural evil force.

Under the majority opinion, demonology and stereotypical witchcraft most emphatically do not constitute religion. As we stated in the majority opinion, the minimum requirements of religion are (1) a sincere and meaningful belief in God occupying in the life of its possessors a place parallel to that occupied by God in traditional religions, and (2) a dedication to the practice of that belief. Thus, in order to constitute a religion, there is the requirement that there be a belief in a deity occupying a place parallel to that occupied by God in traditional religions. However, this is not to say that under the legal definition of religion, only traditional religions qualify. In determining that the legal definition of religion should not be circumscribed in this manner, one need look no further than the guarantee of freedom of religion contained in the First Amendment to the United States Constitution.

Motion for rehearing denied.

**PICKENS COUNTY BOARD OF TAX ASSESSORS et al. v. ATLANTA BAPTIST
ASSOCIATION, INC.
Court of Appeals of Georgia
April 5, 1989, Decided**

Opinion

The Pickens County Board of Tax Assessors assessed ad valorem property taxes on {381 S.E.2d 420} 640 acres of land in Pickens County owned by the Atlanta Baptist Association, Inc. The Association appealed to superior court, contending that the property is exempt from such taxation pursuant to O.C.G.A. 48-5-41 (a) (2) because it is used as a "place of religious worship." The trial court granted summary judgment to the Association, and the Board of Tax Assessors filed the present appeal to this court, contending that there was evidence that the property, particularly the undeveloped portion, is maintained and operated primarily as an income generating recreational facility.

The property is known as the Burnt Mountain Baptist Assembly. In support of its motion for summary judgment, the Association introduced the deposition of the director of the Assembly, who described the various improvements located on the property, including worship facilities, a dining hall, cabins, indoor and outdoor meeting spaces, a swimming pool and ball fields. He stated that approximately one-third of the total acreage is unimproved and is used for nature walks, outdoor Bible study and meditation. The improvements were constructed by the Association with contributions from its associate churches. While user fees are charged for the use of the facility, they are insufficient to cover all of the operating expenses, and the deficiency is made up by subsidies provided by the Association. The facility is used exclusively by adult and youth church groups of various denominations. The Association requires that each group conduct a religious program during its stay, and the director previews each program to ensure that the scheduled events include "worship and knowledge of God, Bible study and prayer." He also monitors the activities of the visiting groups to ensure that the religious aspect of their programs is followed. There is no question, however, that secular {191 Ga. App. 261} activities, such as softball and swimming, normally are also incorporated into the programs. Held:

As a general rule, statutes exempting property from taxation are to be strictly construed in favor of taxation, "but this rule must not be pushed to unreasonableness." *Church of God &c. Assembly v. City of Dalton*, 213 Ga. 76, 78 (97 S.E.2d 132) (1957). In *Leggett v. Macon Baptist Assn.*, 232 Ga. 27, 30 (205 S.E.2d 197) (1974), our Supreme Court, in determining whether property qualified for an exemption under the predecessor to O.C.G.A. 48-5-41 (a) (2) , stated that "the words 'religious worship' import a concept of a congregation assembling in a place open to the public to honor the Deity through reverence and homage." Subsequently, in *Roberts v. Ravenwood Church of WICCA*, 249 Ga. 348, 351 (292 S.E.2d 657) (1982), the Court held that a determination as to whether property qualifies for tax exemption as a place of religious worship is to be made on the basis of the primary use of the property.

In *Roberts v. Atlanta Baptist Assn.*, 240 Ga. 503 (241 S.E.2d 224) (1978), the Court addressed the issue of whether property used as a facility for religious retreats qualified for an exemption under the statute. There, the taxing authority had not sought to tax the improved portion of the property but only the contiguous, undeveloped land. After examining the evidence concerning the purpose of the facility and the activities conducted on the premises, the Court concluded that all of the essential elements of "religious worship" had been shown to exist with reference to the undeveloped land as well as the developed land, stating: "[I]f the presence of the omnipotent and

omnipresent God cannot be restricted to a mere man made edifice, surely it was not intended to limit the worship of such a God to a building." *Id.* at 508.

In the case before us, as in *Roberts*, the evidence establishes without dispute that religious activities are an integral part of every aspect of the use of the property. Although the recreational facilities which are provided to visitors are secular in nature, their use was shown to be intimately connected and intertwined with the religious activities to which the property is primarily dedicated. The fact that visitors are charged fees which are applied towards {381 S.E.2d 421} the operating expenses of the facility does not alter its fundamentally religious character. Accord *Roberts v. Ravenwood Church of WICCA*, *supra*, 249 Ga at 353. In light of the foregoing authorities, and on the basis of the uncontroverted evidence in the present case, we hold that the trial court did not err in concluding as a matter of law that the property was exempt from taxation as a place of religious worship.

Judgment affirmed.

CHURCH OF GOD OF THE UNION ASSEMBLY, INC. v. CITY OF DALTON et al.
Supreme Court of Georgia
March 9, 1961, Decided

Opinion:

The decision by this court on the former appearance of this case in *Church of God of the Union Assembly v. City of Dalton*, 213 Ga. 76 (97 S. E. 2d 132), states at page 80 upon what allegations of the petition our decision that a cause of action was alleged was based, as follows: "It is alleged . . . that the property upon which the execution has been levied is a place of religious worship, is used in maintaining and operating a church, that the income derived therefrom is used exclusively for religious purposes, and that the primary purpose of such real estate is not that of securing an income thereon, but the primary purpose is that of providing a meeting place and quarters for members of affiliates of the church." We held that, because of such allegations, the petition was not subject to demurrer. From the volume of evidence in this record we fear counsel on both sides misconstrued our decision. In harmony with that decision, we shall now undertake to define clearly the exact property belonging to religious institutions that {216 Ga. 661} the statute (Code Ann. 92-201; Ga. L. 1946, p. 12; 1947, p. 1183; 1955, pp. 262, 263), which was enacted in virtue of authority conferred {119 S.E.2d 13} by the Constitution, art. 7, sec. 1, par. 4 (Constitution of 1945, Code 2-5404; as amended by Ga. L. 1953, Nov.-Dec. Sess., p. 70, ratified in 1954), exempts from taxation, the statute being an almost verbatim copy of the exemption clause of the Constitution.

The property belonging to a religious institution which is exempt from taxation is described therein as follows: "Places of religious worship or burial, and all property owned by religious groups used only for single family residences and from which no income is derived . . . all intangible personal property owned by or irrevocably held in trust for the exclusive benefit of religious . . . institutions, no part of the net profit from the operation of which can enure to the benefit of any private person." The foregoing enumerates, defines, and clearly identifies the property, and the only property belonging to a religious institution that is exempted from taxation. This identification should not be allowed to become uncertain because of subsequent provisions in the law concerning income. All such later provisions must relate back to the enumerated exempted property and in no event be construed as introducing into the law additional property for exemption. We have in mind the following clause in both the statute and the Constitution: "provided the property so exempt be not used for the purpose of private or corporate profit and income, distributable to shareholders in corporations owning such property . . . and any income from such property is used exclusively for religious . . . purposes . . . and for the purpose of maintaining and operating such institutions; this exemption shall not apply to real estate or buildings other than those used for the operation of such institution and which is rented, leased or otherwise used for the primary purpose of securing an income thereon."

We think that the excerpts quoted from the statute should reveal that only the properties enumerated are exempt from taxes, and that all references to income relate solely to such exempted property. This fact is spelled out in a portion of the last above quoted excerpt, such portion being: "this exemption shall not apply to real estate or buildings other than those used for the {216 Ga. 662} operation of such institution and which is rented, leased or otherwise used for the primary purpose of securing an income thereon."

This unambiguous language means that, if the property is used primarily for either profit or purposes other than the operation of the institution, it is not exempt from taxes. The fact that the property is used to make profit which will in turn be given or used by the church for church purposes in no degree confers tax exemption thereupon. This would subject to ad valorem taxation, since not coming under the exemption, the following items of property belonging to the church and involved in this case, to wit: (1) apartment buildings on Central Avenue; (2) property formerly used as a dining hall but now as an apartment rented to a widow who sometimes pays rent; (3) lot and dwelling house on Francis Street, rented sometimes to a widow who sometimes pays rent when and if she can. But the restaurant, located in the main church building on Central Avenue, being a part of the church and used primarily for church purposes, though secondarily to feed some people for pay, if able, and without charge if unable to pay, comes within the exemption conferred by law, and the verdict as to this tract is contrary to the evidence. Consequently, the first three items above listed are subject to taxes, and the evidence demanded the verdict to that effect. The fourth item is exempt and the evidence demanded a verdict so exempting it. In this situation, where the evidence demanded certain verdicts, alleged errors in the charge or failure to charge are immaterial, and no rulings on the special grounds raising such questions will be made, as the result could not be changed by such rulings. Therefore, the judgment denying the amended motion for a new trial is affirmed with direction that the verdict {119 S.E.2d 14} be modified to provide that the restaurant in the main church building be not subject to taxation, and final judgment be entered subjecting the first three items listed above to taxation, and exempting the fourth from taxation. Code 70-102, 110-112; Scott v. Winship, 30 Ga. 879; Summerville Macadamized &c. Road Co. v. Baker, 70 Ga. 513 (3); Love v. National Liberty Ins. Co., 157 Ga. 259 (121 S. E. 648); Reserve Life Ins. Co. v. Gay, 214 Ga. 2 (102 S. E. 2d 492); New York Life Ins. Co. v. Watson, 48 Ga. App. 211 (172 S. E. 602).

Judgment affirmed with direction.

MARATHON INVESTMENT CORPORATION v. SPINKSTON et al.

S07A0523.

SUPREME COURT OF GEORGIA

281 Ga. 888; 644 S.E.2d 133; 2007 Ga. LEXIS 306; 2007 Fulton County D. Rep. 1373

April 24, 2007, Decided

DISPOSITION: Judgment affirmed.

CASE SUMMARY: In a quiet title action filed by the successful bidder at a tax sale against two trustees, in their representative capacities for the subject property, a special master found in the trustees' favor on the issue that the property was tax-exempt, making the tax sale void or voidable. A Georgia trial court approved and adopted the special master's report, vesting title in the trustees and declaring the tax sale void. The bidder appealed.

OVERVIEW: After a review of the record, it was undisputed that the property at issue was exempt from taxes. But, the trustees never received notice of the tax sale. Moreover, no past or present member of the congregation ever lived at the address which the tax notices were sent, and the special master was authorized to so find. Thus, because the trustees were never given the required notice, their due process rights were violated by the tax sale and the deed to the bidder resulting from that unconstitutional sale was, therefore, void. Second, the exception to the tender requirement applied, as taxes were not due at the time the property was sold because of its tax-exempt status.

COUNSEL:

Perrie, Bone & Burr, C. Terry Blanton , Amelia T. Phillips, for appellant.

Luann M. Evans, Jennesia M. Primas , William A. Castings, Jr., for appellees.

JUDGES: CARLEY , Justice. All the Justices concur.

OPINION BY: Carley , Justice.

At a tax sale, Marathon Investment Corporation (MIC) was the successful bidder for a vacant lot located at 321 Hills Avenue in Atlanta and a tax deed was executed and delivered. The owners of the parcel and defendants in fi. fa. were listed as Janet Spinkston and Roxie Taylor, in their representative capacities as trustees for the Hills Avenue Baptist Church (Church). At the [**134] time of the sale, the Church was an unincorporated religious association. The Church sanctuary and the subject property were separated by the main parking lot for the parishioners' vehicles. The parcel at 321 Hills Avenue was used for overflow parking.

A year after receiving the tax deed, MIC filed notice of foreclosure of the right to redeem the property. Ms. Spinkston and Ms. Taylor (Trustees) were personally served, but neither they nor the Church tendered the redemption price to MIC. Thereafter, MIC initiated this quiet title action. The Trustees answered, and asserted that, because the property [***2] actually belonged to the Church, it was tax-

exempt and that the tax sale was, therefore, void or voidable. The proceeding was heard by a special master, who found in favor of the Trustees. The superior court approved and adopted the special master's report, vesting title in Trustees and declaring the tax sale void. MIC appeals from the superior court's order.

1. OCGA § 48-5-41 (a) (2.1) (A) provides that^{HN1} “[a]ll places of religious worship” are exempt from ad valorem taxes.^{HN2} “[T]he words ‘religious worship’ import a concept of a congregation assembling in a place open to the public to honor the Deity through reverence and homage.” *Leggett v. Macon Baptist Assn.*, 232 Ga. 27, 30 (II) (205 SE2d 197) (1974). 321 Hills Avenue is the site of the Church's auxiliary parking lot, not its actual sanctuary. However, OCGA § 48-5-41 (a) (2.1) (A) is phrased in inclusive general terms of “all places of religious worship,” and does not employ the terms “house” or “church” of religious worship, which, arguably, might have limited it to a building. If the presence of the omnipotent and omnipresent God cannot be ^{***3} restricted to a mere man made edifice, surely it was not intended to limit the worship of such a God to a building. ... Even in cases relating primarily to exemptions for “buildings” of colleges, this [C]ourt has held that “the exemption embraces the land adjacent thereto necessary for their proper use, occupancy, and enjoyment.” [Cits.] (Emphasis in original.) ^{*889} *Roberts v. Atlanta Baptist Assn.*, 240 Ga. 503, 508-509 (241 SE2d 224) (1978). Certainly, the proper use, occupancy and enjoyment of places of religious worship can require that accommodation be provided for the vehicles of the members of the attending congregation.

There does not appear to be any dispute that the Church's primary parking lot, which is located between the sanctuary and the subject parcel, is exempt from taxes. Thus, “[t]he evidence in the case sub judice showed that the two contiguous tracts [to that where the sanctuary was located] were principally or even exclusively used as a ‘place of religious worship.’ ” *Roberts v. Atlanta Baptist Assn.*, supra at 509. GA(1)(1) It follows that “[t]he vacant lot here involved was, for reasons indicated above, properly held exempt ^{***4} from taxation.” *Elder v. Trustees of Atlanta Univ.*, 194 Ga. 716, 720 (1) (22 SE2d 515) (1942).

2. Prior to the tax sale, the Trustees did not contest the tax assessment and claim tax exempt status for the parcel. However, the evidence also shows that the opportunity to do so was never provided, because all tax notices for 321 Hills Avenue were sent to an address on Cascade Road at which neither of them had ever resided. Moreover, the Church pastor testified that no past or present member of the congregation had ever lived at the address to which the tax notices were sent. There was no evidence that, after the notices sent to Cascade Road proved ineffective, any additional effort was made to locate the Trustees, even though their names and correct addresses were listed in the telephone directory. Thus, the special master was authorized to make the following finding: Practically speaking this Church had absolutely no notice that taxes were due. The notices did not go to an address known by any witness. ... The Church itself was tax exempt with the exception of charges for trash collection and sewage which were billed and paid. The result is that the Church ^{***5} had no opportunity to either dispute or pay the taxes and the Church's right to due process to object to the taxes (or even to pay the taxes) was denied when it received no notice.

[**135] HN3 “[D]efects in following the notice provisions of the tax sale statute may give an injured party a claim for damages, but will not render the tax sale or the deed therefrom void. [Cit.]” GE Capital Mortgage Services v. Clack, 271 Ga. 82, 83 (1) (a) (515 SE2d 619) (1999). However, the circumstances here show more than a mere “defect” in providing a taxpayer with notification of a sale to be conducted for the failure to pay taxes assessed on property that is unquestionably taxable. Compare GE Capital Mortgage Services v. Clack, supra; Haden v. Liberty Co., 183 Ga. 209, 210 (1) (188 SE 29) (1936); Harper v. Foxworthy, 254 Ga. App. 495, 497 (1) (562 SE2d 736) (2002). GA(2)(2) What [*890] is involved is property which is otherwise tax-exempt, coupled with the lack of notification to the owner so that the tax records can be corrected and the proper exemption can be claimed. Under those circumstances, the “defect” is potentially of constitutional magnitude. [***6] HN4 “Constitutional due process of law includes notice and hearing as a matter of right where one’s property interests are involved. [Cit.]” Hamilton v. Edwards, 245 Ga. 810, 811 (267 SE2d 246) (1980). “(T)he enforcement and collection of taxes through the sale of the taxpayer’s property has been regarded as a harsh procedure, and, therefore, the policy has been to favor the rights of the property owner in the interpretation of such laws. ...” [Cits.] Blizzard v. Moniz, 271 Ga. 50, 53-54 (518 SE2d 407) (1999). That policy of favoring the rights of the owner is certainly no less applicable where, as here, the taxes that were collected pursuant to the sale were unauthorized because the property was exempt from taxation. As a practical matter, the owner of taxable property will generally have at least constructive or implied notice that taxes will be assessed and that, unless they are paid, the parcel may be sold. However, that is in stark contrast to the present circumstances in which, as found by the special master, “it is uncontroverted that neither [Trustee] expected a tax billing statement as the [s]ubject [p]roperty was thought [***7] to be tax exempt due to its use solely by the Church.” Notice is defined as “information; the result of observation, whether by senses or the mind; knowledge of the existence of a fact or state of affairs; the means of knowledge.” [Cit.] We cannot conclude that the [Trustees] had either information, observation, knowledge or means of knowledge prior to the receipt of the notice [that taxes had been assessed on Church property]. Hamilton v. Edwards, supra. However, that notice was never received. [A]n interested party is entitled to notice which is reasonably calculated, under all of the circumstances, to apprise him of the pendency of a tax sale. [Cits.] ... [T]he current constitutional standard ... is that the notice must be sent to those interested parties whose names and addresses are ascertainable by “reasonably diligent efforts.” [Cits.] [*891] Hamilton v. Renewed Hope, 277 Ga. 465, 467 (589 SE2d 81) (2003). GA(3)(3) Because the Trustees were never given that requisite notice, their due process rights were violated by the tax sale and the deed to MIC resulting from that unconstitutional sale is, therefore, void.

[***8] 3. MIC urges that the Trustees lack standing to contest the tax sale because they did not tender the amount of unpaid taxes for which the property was sold. However, HN5 the requirement that the redemption price be tendered before the validity of a tax deed can be challenged does not apply if “it clearly appears that ... [t]he tax or special assessment for the collection of which the execution under or by virtue of which the sale was held was not due at the time of the sale. ...” OCGA § 48-4-47 (b) (1). GA(4)(4) That exception to the tender requirement is applicable here, since taxes were not due at the time the property was sold because of its tax-exempt status.

Judgment affirmed. All the Justices concur.

**FIRST DIVISION
ELLINGTON, C. J.,
PHIPPS, P. J., and DILLARD, J.**

**NOTICE: Motions for reconsideration must be
physically received in our clerk's office within ten
days of the date of decision to be deemed timely filed.
(Court of Appeals Rule 4 (b) and Rule 37 (b), February 21, 2008)
<http://www.gaappeals.us/rules/>**

March 27, 2013

In the Court of Appeals of Georgia

A12A2535. FIRST CONGREGATIONAL CHURCH v. FULTON
COUNTY BOARD OF TAX ASSESSORS.

PHIPPS, Presiding Judge.

First Congregational Church appeals the superior court's summary judgment against it and in favor of the Fulton County Board of Tax Assessors. Specifically, the superior court ruled that certain of First Congregational's real estate (an income-producing parking lot) did not qualify for an exemption from ad valorem property taxation. We affirm.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law.”¹ “In our de novo review of the grant [or denial] of a motion for summary judgment, we must view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmovant.”²

The material facts are uncontested. At all times relevant, First Congregational was organized as a tax-exempt entity within the meaning of Section 501 (c) (3) of the Internal Revenue Code. It provided religious and charitable services for its members and the community. First Congregational’s sanctuary building, as well as its other properties, were situated within the same city block of downtown Atlanta.

By 1994, First Congregational owned two parking lots – a “main” lot and another lot located behind the building that housed the sanctuary. First Congregational determined it did not have enough parking spaces on its main lot, however. As a First Congregational board of trustees member³ explained, a problem

¹ OCGA § 9-11-56 (c).

² *Cowart v. Widener*, 287 Ga. 622, 624 (1) (a) (697 SE2d 779) (2010) (citation and punctuation omitted); see *Norton v. Budget Rent A Car System*, 307 Ga. App. 501 (705 SE2d 305) (2010) (“We review the denial of summary judgment de novo, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.”) (footnote omitted).

³ According to this individual, the board of trustees was responsible for managing and safeguarding First Congregational’s financial assets.

faced by “downtown churches . . . is that they become landlocked and they can’t provide adequate parking, members were parking on the street and having to pay.”

Thus, in May 1994, First Congregational purchased the land parcel at issue (“Property”) for \$250,000; it was located across the street from the sanctuary building. According to the board member, “[First Congregational] bought it for the express purpose of creating parking.” Within four months of the purchase, First Congregational tore down the only building situated on the Property, created thereon a paved parking lot with sixty-four parking spaces, and entered into the first of a series of parking contracts with various private companies.

The contract relevant here was executed in 2004. First Congregational (as “Lessor”) entered a “Parking Lot Lease Agreement” with Central Parking System of Georgia, Inc. (as “Lessee”), which covered the “Term” commencing January 3, 2005 and ending January 2, 2010. The Parking Lot Lease Agreement provided that “Lessor, for and in consideration of the rents . . . hereby leases and rents the [Property] to Lessee”; it provided that “Lessee shall use, occupy and operate the [Property] throughout the Term of this Lease for the parking of automobiles only.”

As First Congregational points out, the Parking Lot Lease Agreement provided free parking for its parishioners, guests, and specified others as follows. One

provision stated: “Lessee’s operation hours and days shall exclude Sundays, Thanksgiving and Christmas, during which times and days, the Lessor shall have exclusive use of the [Property].” Another provision stated: “Lessor shall have exclusive use of seven (7) reserved parking spaces adjacent to the Church for use by Church personnel, at no cost to Lessor.”

Additionally, the Parking Lot Lease Agreement required the Lessee to “make every reasonable effort to provide at no cost to Lessor or its parishioners and guests” accommodations such as: (i) parking at “funerals and special occasions (weekends and evenings only for special occasions), upon giving Lessee one day’s advance notice”; (ii) “occasional” night parking for “meetings and special events”; and (iii) “temporary” parking for “Lessor’s contractors and service people from time to time.” These free parking spaces were to be located, as the Parking Lot Lease Agreement specified, either “on the [Property] or at another comparable parking facility managed or owned by Lessee in the immediate vicinity of the [Property].”

Pursuant to the Parking Lot Lease Agreement, First Congregational received from Central Parking System a yearly amount of \$90,000, payable in equal monthly installments of \$7,500. In turn, the fees that Central Parking System charged its parking patrons fluctuated, depending on, for example, the availability of other

parking options for those conducting business in the area, whether the college in the vicinity was in session, and whether special events were convened nearby. As the board member recounted, First Congregational had always used a third-party company in connection with operating the parking lot on its Property because “parking revenues [are] very variable, it’s up and down, and [First Congregational] wanted a fixed amount . . . a fixed rate so [First Congregational] could count on that and budget that income for its operations budget.” First Congregational used the monies paid to it under the Parking Lot Lease Agreement to support its services and operations, including maintenance and upkeep of its buildings. In 2010, First Congregational sold the Property for \$1,225,000.

This case concerns tax year 2008.⁴ First Congregational submitted an application for exemption from ad valorem taxation for the Property, describing the Property as a paved parking lot that was open to the public, and claiming that the

⁴ Although First Congregational asserts in its brief that it applied for an exemption for tax years 2007, 2008, and 2009, the Board of Equalization’s decision of record is for “TAX YEAR: 2008.” Moreover, counsel for First Congregational acknowledged to the superior court that the ruling [from the Board of Equalization] “only addressed the 2008 tax appeal portion of it.” And the superior court’s order expressly so noted. See generally *Hart v. Groves*, 311 Ga. App. 587, 588 (1) (716 SE2d 631) (2011) (“This is a Court for correction of errors below, and, in the absence of a ruling by the trial court, this Court has nothing to review.”) (citation and punctuation omitted).

Property was “used for charitable purposes.” Regarding a question on whether “income or fees [were] received for the use of any part of this [P]roperty,” First Congregational responded, “Yes, the Church leases the parking lot to an Operator and receives lease income as well as uses parking lot for its Services.”

First Congregational’s application was denied by the Fulton County Board of Tax Assessors. The Fulton County Board of Equalization likewise concluded that the Property did not qualify for tax exempt status in 2008. Thereafter appearing before the superior court, First Congregational and the Fulton County Board of Tax Assessors presented on cross-motions for summary judgment the question whether the Property qualified for tax-exempt status in 2008 under either of two paragraphs of OCGA § 48-5-41 (a),⁵ as discussed below.

First Congregational claimed that the Property was exempt under: (i) OCGA § 48-5-41 (a) (2.1), pertaining to “places of religious worship,”⁶ and/or (ii) OCGA § 48-5-41 (a) (4), pertaining to “institutions of purely public charity.” Fulton County countered that First Congregation’s use of the Property to secure income pursuant to the Parking Lot Lease Agreement with a third-party commercial entity disqualified

⁵ (Enumerating categories of property exempt from ad valorem property taxes).

⁶ OCGA § 48-5-41 (a) (2.1) (A).

the Property from tax-exempt status. As Fulton County’s representative deposed, “The property [was] being leased to a commercial entity for use in a commercial enterprise. . . . The property was operated as a commercial parking facility, commercial parking lot.” Hence, Fulton County cited, inter alia, the restriction set forth in OCGA § 48-5-41 (d) (1), which states that, except as provided therein, the exemption provisions relied upon by First Congregational “shall not apply to real estate or buildings which are rented, leased, or otherwise used for the primary purpose of securing an income thereon.”⁷ And according to Fulton County, no exception was invoked.

The superior court agreed with Fulton County, determining that “First Congregational had leased the parking lot to a commercial enterprise for the primary purpose of securing income” and that, under OCGA § 48-5-41 (d), the use of the Property disqualified it from tax-exempt status (having also determined that no exception to that Code provision was invoked). Further, the superior court rejected First Congregational’s alternate ground for summary judgment, which alleged that Fulton County had granted ad valorem tax exemptions to other churches for their

⁷ See OCGA § 48-5-41 (d) (1) (containing language “[e]xcept as otherwise provided in paragraph (2) of this subsection”).

income-producing parking lots. The superior court thus granted the summary judgment motion filed by Fulton County and denied the cross-motion filed by First Congregational.

1. As an initial matter, we recognize that these general principles govern. “Taxation is the rule; exemption from taxation is the exception.”⁸ “[C]laims for exemption from taxation should generally be construed in favor of the State and against the taxpayers.”⁹ Therefore, “we strictly construe taxation statutes, and we will not find an exemption unless it is clear that the legislature intended such exemption.”¹⁰ “[T]he facts of each case must be viewed as a whole and all of the

⁸ *Thomas v. Northeast Ga. Council, Inc., Boy Scouts of America*, 241 Ga. 291, 293 (244 SE2d 842) (1978) (citation and punctuation omitted); see *Leggett v. Macon Baptist Assoc.*, 232 Ga. 27, 28 (1) (205 SE2d 197) (1974).

⁹ *Johnson v. Wormsloe Foundation*, 228 Ga. 722, 728 (2) (187 SE2d 682) (1972) (citation omitted); see *Fulton County Bd. of Tax Assessors v. Visiting Nurse Health System of Metropolitan Atlanta*, 243 Ga. App. 64, 65 (2) (532 SE2d 416) (2000).

¹⁰ *Visiting Nurse Health System of Metropolitan Atlanta*, *supra* at 67 (3) (footnote omitted).

circumstances surrounding the institution [of purely public charity or the place of religious worship] must be considered.”¹¹

2. First Congregational contends that the superior court erred by concluding that neither the tax exemption for places of religious worship nor the tax exemption for institutions of purely public charity applied to its Property. First Congregational charges the superior court with misapplying the two paragraphs of OCGA § 48-5-41 (d), analyzed below.

(a) Paragraph (1) of that subsection pertinently provides:

Except as otherwise provided in paragraph (2) of this subsection, this Code section . . . *shall not apply to real estate or buildings which are rented, leased, or otherwise used for the primary purpose of securing an income thereon* and shall not apply to real estate or buildings which are not used for the operation of religious, educational, and charitable institutions.¹²

First Congregational cites evidence that it had purchased the Property for the purpose of creating a parking lot, and that after it converted the Property into a paved

¹¹ *Nuci Phillips Mem. Foundation v. Athens-Clarke County Bd. of Tax Assessors*, 288 Ga. 380, 385 (1) (703 SE2d 648) (2010) (citations and punctuation omitted) (plurality opinion).

¹² (Emphasis supplied.)

parking lot, it indeed used the Property for overflow parking for its parishioners and guests attending religious activities or obtaining charitable services. First Congregational acknowledges that it derived income from the Property by way of its contract with a third party, but points out that the income received by *it* (as opposed to whatever income was received by Central Parking System) was used to support its religious services and charitable pursuits. In light of these circumstances, First Congregational maintains that the Property’s “primary” use was the provision of overflow parking, that income production of \$90,000 yearly was an “incidental” use of its Property, and that under *Nuci Phillips Mem. Foundation v. Athens-Clarke County Bd. of Tax Assessors*,¹³ its Property was entitled to the claimed tax exemptions.

In *Nuci Phillips Mem. Foundation*, the Supreme Court of Georgia explained that, under OCGA § 48-5-41 (d) (1),¹⁴ whether a tax exemption was available for an income-producing property required a determination of the “primary purpose” of the

¹³ *Supra*.

¹⁴ (Expressly “excluding paragraph (1) of subsection (a) of this Code section”).

property.¹⁵ In that case, a foundation had applied for a tax exemption for its facility, a “building [that] provid[ed] a safe haven for musicians, or others, who [were] coping with mental illness.”¹⁶ At its facility, the foundation “rent[ed] out rehearsal space as well as space for private birthday parties and wedding receptions.”¹⁷ When the foundation sought an exemption as an institution of purely public charity, the taxing authority cited such income-producing activities as disqualifying the facility from tax-

¹⁵ Id. at 383 (1) (citing paragraphs (1) and (2) of OCGA § 48-5-41 (d)). While expressly noting that “OCGA § 48-5-41 (d) (1) prefaces its restrictions with the phrase ‘[e]xcept as otherwise provided in [(d)] (2),’” *Nuci Phillips Mem. Foundation*, supra at 386-387 (2), the *Nuci Phillips Mem. Foundation* Court held that “for an institution to be granted a property tax exemption pursuant to OCGA § 48-5-41 (a) (4), it must satisfy [inter alia] OCGA § 48-5-41 . . . (d) (1) and (2).” *Nuci Phillips Mem. Foundation*, supra at 385 (2). The special concurrence, however, interpreted the noted prefacing phrase as expressly excepting from OCGA § 48-5-41 (d) (1)’s “primary purpose” test the property of a purely private charity used to secure income as provided in paragraph (d) (2). *Nuci Phillips Mem. Foundation*, supra at 395 (6), 398 (6) (Nahmias, J., specially concurring). But as the special concurrence acknowledged, “the plurality opinion will be [the Supreme Court’s] effective precedent, governing the outcome of future cases raising this issue.” *Nuci Phillips Mem. Foundation*, supra at 398-399 (8) (Nahmias, J., specially concurring). And at any rate, the facts of the instant case render OCGA § 48-5-41 (d) (2) unavailing to First Congregational. See Division 2 (b), *infra*.

¹⁶ *Nuci Phillips Mem. Foundation*, supra at 385 (2).

¹⁷ Id. at 380.

exempt status.¹⁸ However, the Supreme Court determined, “The activities cited by the [taxing authority], such as rehearsal space and party rentals are an *incidental* use of the property.”¹⁹ The Court took into account that “[m]ost activities that take place on the property, such as the professional counseling assistance program, the provision of group meeting space for Survivors of Suicide and other groups, and the career resources board, are at the core of the organization’s charitable purposes.”²⁰ Given those circumstances, the Court concluded:

The Foundation is not disqualified from the tax exemption under the restrictions in OCGA § 48-5-41 [] (d) (1). . . . Although the organization *periodically* rents out *part* of its building to third parties, the primary purpose of the building is not to raise income but to provide services for those seeking mental health assistance. Any income raised is incidental to the primary use of the property.²¹

Unlike the entity in *Nuci Phillips Mem. Foundation*, which “periodically rent[ed] out part of its building to third parties,” and which entity *otherwise* used its

¹⁸ See *id.* at 386 (2).

¹⁹ *Id.* (emphasis supplied).

²⁰ *Id.*

²¹ *Id.* (emphasis supplied).

property for activities that were “at the core of the organization’s charitable purposes,” First Congregational used almost the entirety of its Property (reserving exclusive use of only seven of the sixty-four parking spaces) approximately eighty-five percent of the time (six days of every week, save Thanksgiving Day and Christmas Day) to secure income pursuant to the Parking Lot Lease Agreement. As a result, most activities that took place on First Congregational’s Property – essentially leasing its Property to a third-party, commercial entity for the designated purpose of the parking of automobiles for the general public – were patently *not* at the core of First Congregational’s religious or charitable purposes. Such activities, unlike the ones at issue in *Nuci Phillips Mem. Foundation*, did not amount to an incidental use of the property. Because the circumstances underlying this case are inapposite to those underlying *Nuci Phillips Mem. Foundation*, First Congregational’s reliance upon that case is misplaced.

First Congregational points out that, even for those six days of every week (Monday through Saturday, save Thanksgiving Day and Christmas Day), the Parking Lot Lease Agreement contained certain other provisions for accommodating free parking for its parishioners, guests, and other specified individuals. But that argument is unavailing. None of those cited provisions *required* Central Parking System to

provide free parking to any of those persons; Central Parking System was obligated only to “make every reasonable effort” to do so; and even if free parking could be provided, Central Parking System was not required to provide for such upon the Property; the Parking Lot Lease Agreement provided that “another comparable parking facility” would suffice. Additionally, the cited provisions contemplated only sporadic parking: at “funerals and special occasions,” “occasional” night parking for “meetings and special events,” and “temporary parking.” What is more, First Congregational has cited no evidence regarding the extent to which its parishioners, guests, or other specified individuals parked free upon the Property on those six days (Monday through Saturday).

Given the circumstances here – in particular, the Parking Lot Lease Agreement and its impact upon First Congregational’s use of the Property, we conclude that the Property was “real estate . . . rented, leased, or otherwise used for the primary purpose of securing an income thereon,” as contemplated by OCGA § 48-5-41 (d) (1).²² There

²² Accord *Ga. Osteopathic Hosp. v. Alford*, 217 Ga. 663, 668 (124 SE2d 402) (1962) (disallowing tax exemption, where hospital was “engaged principally for non-charitable purposes and apparently chiefly for the benefit of its staff”); *Cobb County Bd. of Tax Assessors v. Marietta Educ. Garden Center*, 239 Ga. App. 740, 744-745 (2) (521 SE2d 892) (1999) (disallowing tax exemption for the Center not because the Garden Center generated income by charging membership dues and renting its facilities for social events, using the income to offset the center’s expenses, but rather

is no merit in First Congregational’s contention that the superior court misapplied that paragraph.

(b) Nor is there any merit in First Congregation’s contention that the superior court erred by finding inapplicable OCGA 48-5-41 (d) (2), the exception to OCGA § 48-5-41 (d) (1) that First Congregational claimed was invoked. OCGA § 48-5-41 (d) (2) states:

With respect to paragraph (4) of subsection (a) of this Code section, a *building* which is owned by a charitable institution that is otherwise qualified as a purely public charity and that is exempt from taxation under Section 501(c)(3) of the federal Internal Revenue Code *and which*

because the Center provided substantial benefits, including free use of the Center, only to dues-paying member clubs). Cf. *Nuci Phillips Mem. Foundation*, supra at 387 (2); *Church of God of the Union Assembly v. City of Dalton*, 216 Ga. 659, 661-662 (119 SE2d 11) (1961) (explaining that the language “this exemption shall not apply to real estate or buildings other than those used for the operation of such institution and which is rented, leased or otherwise used for the primary purpose of securing an income thereon” is unambiguous language which means that “if the property is used primarily for . . . purposes other than the operation of the institution, it is not exempt from taxes,” and thus concluding that a “restaurant, located in the main church building . . . , being a part of the church and used primarily for church purposes. . . comes with the exemption conferred by law”); *Elder v. Henrietta Egleston Hosp. for Children*, 205 Ga. 489 (53 SE2d 751) (1949) (allowing exemption to charitable hospital open to all patients, where 45 percent were not charged due to poverty, 24 percent were partly charged in light of their limited finances, and 31 percent of its patients were charged for all their medical care because they were financially able to pay).

building is used by such charitable institution exclusively for the charitable purposes of such charitable institution, *and* not more than 15 acres of *land on which such building is located*, may be used for the purpose of securing income so long as such income is used exclusively for the operation of that charitable institution.²³

According to its plain and unambiguous terms, this paragraph limits “land” to that upon which a qualifying building is located.²⁴

To be sure, the language of OCGA § 48-5-41 (d) (2) set forth above became effective as part of a 2007 amendment.²⁵ Prior to that amendment, the paragraph did not include the limiting language with respect to “land”; it pertinently provided instead:

With respect to paragraph (4) of subsection (a) of this Code section, *real estate or* buildings which are owned by a charitable institution that is exempt from taxation under Section 501 (c) (3) of the federal Internal Revenue Code and used by such charitable institution for the charitable purposes of such charitable institution may be used for the purpose of

²³ (Emphasis supplied.)

²⁴ See generally *Chase v. State*, 285 Ga. 693, 695 (2) (681 SE2d 116) (2009) (“[W]here the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden.”) (punctuation and footnote omitted).

²⁵ Ga. L. 2007, p. 341, § 1; see *Nuci Phillips Mem. Foundation*, *supra* at 382 (1).

securing income so long as such income is used exclusively for the operation of that charitable institution.²⁶

Had the General Assembly intended for OCGA § 48-5-41 (d) (2), as amended in 2007, to apply to land other than that upon which a qualifying building is located, it would not have included the limiting language, which plainly and unambiguously states otherwise.²⁷

Correctly, the superior court found that “the provision references a building and there is no building on the parcel/lot,” then ruled that this exception to OCGA § 48-5-41 (d) (1) did not apply so as to exempt First Congregation’s Property from ad valorem taxation.²⁸

²⁶ Ga. L. 2006, pp. 376, 377, § 1 (emphasis supplied); see *Nuci Phillips Mem. Foundation*, supra at 382 (1).

²⁷ See *Nuci Phillips Mem. Foundation*, supra at 383 (1) (holding that OCGA § 48-5-41 (d) (2), as amended in 2007, contemplates “any building *and* not more than 15 acres of land owned by the institution”) (emphasis supplied); see further *Nuci Phillips Mem. Foundation*, supra at 394 (4) (Nahmias, J., concurring specially) (“The only substantial change made by the 2007 amendment was to limit – to the building owned by the charity and not more than 15 acres on which the building sits – the extent of property that may be used primarily to generate income. The reason for this limitation is not apparent from the statute . . .”).

²⁸ See *Collins v. City of Dalton*, 261 Ga. 584, 585-586 (4) (a) (408 SE2d 106) (1991) (“Exemption, being the exception to the general rule, is not favored; but every exemption, to be valid, must be expressed in clear and unambiguous terms, and, when

The cases cited by First Congregational, *Marathon Investment Corp. v. Spinkston*²⁹ and *Elder v. Trustees of Atlanta Univ.*,³⁰ do not provide for an outcome in its favor. Those cases were decided prior to the 2007 amendment to OCGA § 48-5-41 (d) (2); moreover, the issues resolved therein did not concern income-producing real estate.³¹

(c) First Congregational complains that, if the superior court’s summary judgment rulings are not reversed, “religious institutions will be forced to let their

found to exist, the enactment by which it is given will not be enlarged by construction, but, on the contrary, will be strictly construed.”).

²⁹ 281 Ga. 888-889 (1) (644 SE2d 133) (2007) (finding that a land parcel which was “the site of the Church’s auxiliary parking lot, not its actual sanctuary” was exempt as a place[] of religious worship,” reasoning that “the proper use, occupancy and enjoyment of places of religious worship can require that accommodation be provided for the vehicles of the members of the attending congregation).

³⁰ 194 Ga. 716, 722 (2) (22 SE2d 515) (1942) (“The issue of tax exemptions should not depend upon whether or not a street separates some buildings from others, all a part of one institution and all used for college purposes.”).

³¹ *Marathon Investment Corp.*, supra at 889 (1); *Elder*, supra at 718, 723 (2) (concerning tax exemption that covered “all buildings erected for and used as a college,’ . . . and provided that such property ‘is not used for purposes of private or corporate profit or income’”; noting further that the land tracts at issue were either not income-producing or were tracts which the parties had “agreed to be subject to be taxed”).

parking facilities sit fallow or be taxed, which would wastefully prohibit the public from parking on those lots during the work week.”

However, as recognized above as governing principles: taxation is the rule; exemption from taxation is the exception; and we will not find an exemption unless it is clear that the legislature intended such exemption.³² Moreover, “exemptions are made, not to favor the individual owners of property, but in the advancement of the interests of the whole people.”³³ Whether and the extent to which an exemption applies are matters of policy judgment reserved for the legislature.³⁴

The evidence showed that, by procuring the land parcel, then converting it into a parking lot, First Congregational increased available off-street, free parking spaces for its parishioners and guests. But the evidence further showed that First Congregation, determined to secure a fixed amount of income, placed its Property

³² See Division 1, *supra*.

³³ *Collins*, *supra* at 585 (4) (a) (citation omitted).

³⁴ *Perdue v. Baker*, 277 Ga. 1, 14 (6) (586 SE2d 606) (2003) (“The core legislative function is the establishment of public policy through the enactment of laws.”) (footnote omitted); *Commonwealth Investment Co. v. Frye*, 219 Ga. 498, 499 (134 SE2d 39) (1963) (holding that “the legislature, and not the courts, is empowered by the Constitution to decide public policy, and to implement that policy by enacting laws; and the courts are bound to follow such laws if constitutional”).

under contract so that (during the time period relevant here) 90 percent of its Property would be used by a third-party commercial enterprise approximately 85 percent of the time to compete in the business of public paid parking in a congested area of downtown Atlanta. By doing so, First Congregational deliberately put its Property “in direct competition with private concerns which are engaged in the same business but enjoy no tax-exemption benefit. If our system of private enterprise is to survive, government must not by exempting competitors of free enterprise from taxes aid in destroying it by such unfair competition.”³⁵ In balancing the competing policies at issue here, our General Assembly has determined that, except under circumstances not shown here, no exemption from ad valorem property taxation is permitted for places of religious worship or for institutions of purely public charity, if the “real estate . . . [is] rented, leased, or otherwise used for the primary purpose of securing an income thereon.”³⁶ Because First Congregational’s Property constituted such real estate,³⁷ First Congregational’s complaint is unavailing.

³⁵ *United Hosp. Srv. Assoc. v. Fulton County*, 216 Ga. 30, 34 (114 SE2d 524) (1960).

³⁶ OCGA § 48-5-41 (d) (1).

³⁷ See Division 2, *supra*.

3. First Congregational points to evidence that Fulton County has granted tax exemptions to other churches in the Atlanta area for their income-producing parking lots. Merely citing Ga. Const. Art. 7, Sec. 1, Para. III (a), it makes the conclusory assertion that the superior court’s grant of summary judgment to Fulton County “[v]iolates the Constitutional Rule of Uniformity in Taxation.”

First Congregational’s assertion is unaccompanied by any meaningful legal argument.³⁸ Furthermore, the conclusory assertion fails to demonstrate how First Congregational was entitled to a ruling allowing for an exemption from ad valorem taxation where such is statutorily proscribed.³⁹ No reversible error has been demonstrated.⁴⁰

³⁸ See Court of Appeals Rule 25.

³⁹ See Division 2, *supra*.

⁴⁰ See *Brooks v. Meriwether Mem. Hosp. Auth.*, 246 Ga. App. 14, 16 (2) (539 SE2d 518) (2000) (determining that appellant failed to preserve for appellate review her contention that she was deprived of due process, where she cited no authority other than the Due Process Clause, nor provided any real argument in support of her contention, except to repeatedly assert that she was being denied due process, even though she mentioned certain facts that suggested she was contending that statute was unconstitutional only as applied to her case); see generally *Chapman v. State*, 290 Ga. 631, 633 (2) (724 SE2d 391) (2012) (although appellant mentioned in summary fashion numerous instances of what he maintained supported his contention that he was denied a constitutional right, such claims were not pursued by specific legal argument and consequently were deemed to have been abandoned).

4. Given the foregoing, there is no merit in First Congregational's claim that it presented undisputed evidence entitling it to summary judgment.

Judgment affirmed. Ellington, C. J., concurs. Dillard, J., concurs only in the judgment.

**FOURTH DIVISION
DOYLE, P. J.,
ANDREWS, P. J., and BOGGS, J.**

NOTICE: Motions for reconsideration must be
physically received in our clerk's office within ten
days of the date of decision to be deemed timely filed.
(Court of Appeals Rule 4 (b) and Rule 37 (b), February 21, 2008)
<http://www.gaappeals.us/rules/>

March 12, 2013

In the Court of Appeals of Georgia

A12A2321. DeKALB COUNTY BOARD OF TAX ASSESSORS v.
PRESBYTERY OF GREATER ATLANTA, INC.

BOGGS, Judge.

The trial court wrote an excellent, thorough, complete, and correct order in granting appellee's motion for summary judgment.¹ We adopt the trial court's order, set out below in full, verbatim, as our opinion in this case.²

FINAL ORDER

“Appellant's Motion for Summary Judgment and Appellee's cross Motion for Summary Judgment having come before the Court for hearing on May 9, 2012, after

¹As it did below, the Board erroneously relies upon cases construing OCGA § 48-5-41 (a) (4), pertaining to “institutions of purely public charity.” This case involves OCGA § 48-5-41 (a) (2.1) (A), “all places of religious worship,” and the trial court correctly applied the relevant law.

²See *Kordares v. Gwinnett County*, 220 Ga. App. 848 (470 SE2d 479) (1996).

review of the record and hearing argument from the parties, the Court enters the following Order:

FINDINGS OF FACT

“Appellee is a Georgia non-profit corporation recognized as a bona fide tax exempt religious non-profit organization by the Internal Revenue Service. Appellee is the district-level governing body of the Presbyterian Church (U.S.A.) (‘PCUSA’), a national religious denomination. In 2010, when the Midway Presbyterian Church became defunct, the Appellee took ownership of the Midway Presbyterian Church property (‘Property’) in accordance with the Constitution of the PCUSA. It is the tax exempt status of the Property that is at issue in this case.

“The tax parcel number of the Property is 15 199 17 003 and the Property is commonly referred to as 3363 Midway Road, Decatur, DeKalb County, Georgia. A portion of the property contains a cemetery, which the parties agree is tax exempt. It is the remainder of the Property that Appellant claims is not tax exempt.

“Upon assuming ownership of the Property, Appellee attempted to sell the Property but was unable to find a ready, willing and able buyer. Faced with the obligations of maintenance, upkeep and other expenses associated with ownership of the property, Appellee leased the Property to Kingdom Fellowship Christian Church,

Inc. ('Kingdom Fellowship') to defray the costs of ownership and to prevent the Property from sitting vacant. Kingdom Fellowship is recognized as a bona fide tax exempt religious non-profit corporation by the Internal Revenue Service. Kingdom Fellowship uses the Property as a place of religious worship. All other use of the Property by Kingdom Fellowship, such as religious instruction classes, meetings related to church business, and community outreach for the church, is all integral to the use of the Property as a place of religious worship.

“Under the lease agreement between Appellee and Kingdom Fellowship, the monthly rent payable by Kingdom Fellowship was \$1,000.00 per month for the year 2011. The 2011 market rental rate for the Property was approximately \$5,000.00 per month, exclusive of utilities and costs. Appellee does not realize a profit from the lease of the Property to Kingdom Fellowship.

“In 2011, Appellant withdrew the ad valorem tax exemption that had previously been granted on the Property. Appellee challenged the withdrawal of the exemption and the Board of Equalization found in favor of Appellee, concluding that the Property in its entirety is tax exempt. Appellant appealed the Board of Equalization decision to this Court.

CONCLUSIONS OF LAW

“The issue in this case is whether the non-cemetery portion of the Property qualifies for a tax exemption. O.C.G.A. § 48-5-41 (a) (2.1) (A) provides that ‘all places of religious worship’ shall be exempt from all ad valorem Property taxes. It is undisputed that the Property is a place of religious worship, thus, the Property must be tax exempt unless some other provision of law specifically removes the Property from the tax exemption. Appellant argues that the Property is not tax exempt because the owner, Appellee, does not personally use the Property for religious worship; however, this Court finds no statutory requirement that the owner be the user of the property when dealing with a ‘place of religious worship’ tax exemption.

“It is the use of the property that governs the analysis of religious worship tax exemptions. The Georgia Court of Appeals resolved this issue in favor of granting the exemption in a case with facts that are materially indistinguishable from the facts of the case under consideration. In *Pickens County Bd. of Tax Assessors v. Atlanta Baptist Assoc., Inc.*, 191 Ga. App. 260 [(381 SE2d 419)] (1989), the Atlanta Baptist Association owned property upon which the Association itself did not worship but it rented the property out to adult and youth church groups of various denominations each of which conducted a religious worship program during their stay on the

property. Focusing on the use of the property rather than the ownership of the property, the Court of Appeals concluded that the property was tax exempt as a matter of law under the religious worship exemption.

“Under O.C.G.A. § 48-5-41 (a) (2.1) (A) and *Pickens*, the Court concludes that the Property is tax exempt as a place of religious worship. This decision is consistent with the long-standing public policy of the State of Georgia to ‘encourage and advance religion.’ *The Trustees of the First Methodist Episcopal Church, South v. The City of Atlanta*, 76 Ga. 181, [191] (1886). The Court does not find merit in Appellant’s argument that the Property is not entitled to tax exempt status because the Property is leased to another entity. O.C.G.A. § 48-5-41 (d) (1) provides that otherwise tax exempt property may become subject to taxation if it is rented, leased or otherwise used ‘for the primary purpose of securing an income thereon. . .’ The record reflects that no profit is realized from the lease to Kingdom Fellowship. (Kelly Aff. ¶9). This is not a case of a for-profit landlord leasing space to a church organization for profit. Rather, the uncontested facts show a religious non-profit corporation leasing the Property to another religious non-profit corporation at approximately 20% of the market rental rate without realizing a profit; thus, the Court

concludes the ‘primary purpose’ of the lease is not to secure an income on the property.

“Having decided that the Property is tax exempt under O.C.G.A. § 48-5-41 (a) (2.1) (A) and *Pickens*, the Court need not address Appellee’s alternative theory of tax exemption under O.C.G.A. [§] 48-5-41 (a) (2.1) (B).

“Appellant’s Motion for Summary Judgment is hereby DENIED. Appellee’s cross Motion for Summary Judgment is hereby GRANTED. [Trial court order ends.]”

Judgment affirmed. Doyle, P. J. and Andrews, P. J., concur.

LEGGETT et al. v. MACON BAPTIST ASSOCIATION, INC.
Supreme Court of Georgia
April 4, 1974, Decided

Opinion:

The controlling issue to be decided in this case is whether the real property owned and used by the Macon Baptist Association, Inc., is a "place of religious worship," as that term is used in the Georgia Constitution and implementing statute, so as to exempt the Association from the payment of ad valorem taxes. The trial court determined, on motion for summary judgment, that the Association is exempt, and the taxing authorities have now brought that judgment here for review.

I.

Article VII, Sec. I, Par. IV of the 1945 Constitution of Georgia (Code Ann. 2-5404) authorizes the General Assembly to exempt from taxation "Places of religious worship or burial, and all property owned by religious groups used only for residential purposes and from which no income is derived . . . all intangible personal property owned or irrevocably held in trust for the exclusive benefit of religious . . . institutions, no part of the net profit from the operation of which can inure to the benefit of any private person." (Emphasis supplied.) The {232 Ga. 28} implementing statute found in Code Ann. 92-201 uses the same language to exempt property of a religious institution from ad valorem taxation although neither specifically defines "places of religious worship," the provision under which the tax exemption is claimed in the present case. These broad provisions have been interpreted generally to mean, however, that, "if the property is used primarily for either profit or purposes other than the operation of the institution, it is not exempt from taxes." *Church of God v. City of Dalton*, 216 Ga. 659, 662 (119 S.E.2d 11). We, therefore, draw from the Dalton decision the general rule that, in applying the exemption authorized by basic Georgia law to the facts in the individual case, we must look to the use of the property, not merely its ownership, and we must also look to the primary use of the property to determine whether it is exempt from taxation. In addition, we are mindful, in applying these principles, that all tax exemptions are to be strictly construed since taxation is the rule and exemption is the exception. *Brandywine Townhouses, Inc. v. Joint City-County Bd. of Tax Assessors*, 231 Ga. 585 (203 S.E.2d 222).

It is from this background that we proceed to the specific issue presented. Is the primary use of this property shown to be as a place of religious worship? The facts are not disputed and the trial court's clear and well-stated findings show the following:

"The Macon Baptist Association is served by an ordained Missionary Baptist Minister who is called to his position as Associational Missionary like other Baptist Pastors. He is furnished a parsonage like any other Baptist Pastor. No commercial activities of any kind are carried on by the Association, and none are conducted in its building. The Macon Baptist Association {205 S.E.2d 199} is supported by its 47 associated Baptist Churches with their 34,000 members, by voluntary contributions, and its facilities are available to all of its associated churches for group meetings, for committee and departmental work of the association, and to any interested group for religious and worship purposes. Other than the administrative work of the association, there is a pastor's conference held once and occasionally twice a quarter on a Monday afternoon, {232 Ga. 29} which is a religious service primarily for the fellowship and inspiration of the pastors of the associated churches, although laymen also attend, and the format includes prayer, the singing of hymns, the giving of testimonies, and the sermon. No business is transacted at the services. No religious service is conducted on Sunday mornings, but on Sunday afternoons various groups

meet in the building and engage in worship, though this does not occur on every Sunday afternoon. Also, there are held in the buildings seminars promoting the work of the churches; meeting of heads of Women's Missionary Unions, Royal Ambassadors and Brotherhoods; conferences concerning day care nurseries, kindergartens, and senior citizen's clubs; and seminars for the American Baptist Theological Seminary for Negro ministers and laymen.

"The basic function of the Associational Missionary is coordination, training and promotion. He exercises these functions for the Association just as a pastor executes and carries out similar responsibilities as a minister in a local church. He also does personal counseling with individuals and has worship meetings with representatives of the Association.

"The Association has three employees. These include the Associational Missionary, his Secretary, and a week-day minister's consultant. In the performance of his administrative duties, the Associational Missionary visits churches, meets with various committees, counsels with pastors and other individuals with regard to church work, visits hospitals, especially with the ministers and their families and other people who may be within the leadership of the Associational structure, gets out communications and promotes all the missionary work of the Association. Records of the work performed are kept on file in the building.

"The building was formerly a 6-room residence purchased in 1969 and occupied by the Association in 1970. A partition was knocked out between two rooms and new lighting was installed, to form the chapel. This chapel occupies about 25 percent of the space in the building and is furnished with metal chairs, arranged in aisle form, hymn books, a Bible, a podium and a piano. {232 Ga. 30} In addition to the chapel, there is a kitchen, restrooms, closets, a study for the Associational Missionary, an office for his secretary, and an office for the week-day minister's consultant. The exterior has the outside appearance of a residence, with a carport and a parking area. It does not have a cross on it. Prior to moving into this building, the Association worked out from the Ingleside Baptist Church. The sign outside the building says, 'Macon Baptist Association office.' Sunday-School and Church services, in the common every-day language of Protestants attending religious services, are not held in this building."

II.

We have said we have no authoritative definition of the words "places of religious worship" under the law of Georgia. The phrase itself appeared in the Georgia Constitution of 1877, but the debates of the constitutional convention thereon shed no light upon the framers' intended meaning of these words, and the subsequent inclusion of the same provision in later Constitutions similarly added no illumination to their meaning. Prior decisions of the two appellate courts of our state are helpful but also do not provide a specific definition of "places of religious worship." In *Amorous v. State*, 1 Ga. App. 313, 316 (57 S.E. 999), the Court of Appeals said {205 S.E.2d 200} (with reference to a criminal statute making it a misdemeanor to carry a weapon to a place of public worship) that a place of public worship was not necessarily a church, but included "the gathering of individuals for public worship, at whatever place they may be." The case of *Trustees of First M. E. Church v. City of Atlanta*, 76 Ga. 181, 195, which was later overruled on its holding that churches were exempt from paving assessment, spoke of the purpose of the exemption as being the prevention of "impositions . . . too onerous to be borne by worshiping congregations." (Emphasis supplied.) *Wardens of St. Mark's Church v. Mayor of Brunswick*, 78 Ga. 541 (3 S.E. 561), equated "religious worship" with "public worship." At best, these cases express a "feeling" that the words "religious worship" import a concept of a congregation assembling in a place open to the public to honor the Deity through reverence and homage. The word {232 Ga. 31} "worship" alone is defined by Webster as an "act of paying divine honors to a deity; religious reverence and homage." In Black's Law Dictionary, it is defined in terms of "religious service"

and "religious exercises." These definitions express, we believe, the generally accepted public notion of thinking of worship in terms of congregational worship services intended to express adoration and homage for the Deity. For the Christian Church Universal, this would include saying prayers, singing hymns, reading scriptures, and the giving of testimonies and sermons in a congregational setting. It would also include the traditional sacraments and rites of baptism, marriage, communion and funeral services.

The Macon Baptist Association capably argues that the activities carried on in this building constitute an essential part of their worship because service through good works is among the highest forms of love, homage and reverence to God. This argument is cogent and is undoubtedly correct. But its truth does not mean this particular property is used primarily as a "place of religious worship" under the findings of the trial court. While some religious exercises and services are held on the property, it is nonetheless a fact that the primary use of the property is for coordination, training and promotional work in furtherance of the administrative duties of the Association. This is conceded in the brief of the Association and was so found by the trial court. This use, though a vital aspect of the exercise of Baptist and other Christian faiths, clearly does not include congregational worship services and administration of traditional sacraments. It is this difference which requires the Association to be taxed in contradistinction to the Baptist churches themselves that are served by the Association.

Decisions of other jurisdictions do not authorize a different result in this case. There are language differences in our law and the law of other jurisdictions. Nevertheless, the decision we reach here is consistent with the view held generally in a number of other jurisdictions that exemptions from taxation of places of religious worship, unless stated otherwise, are intended primarily to apply to buildings where congregations come {232 Ga. 32} together in a public forum for religious services. See, e.g., *In re Walker*, 200 Ill. 566 (66 NE 144); *Masonic Building Assn. v. Town of Stamford*, 119 Conn. 53 (174 A 301); *Town of Woodstock v. The Retreat*, 125 Conn. 52, 3 A2d 232 (1938); *Evangelical Baptist &c. Society v. City of Boston*, 204 Mass. 28 (90 NE 572); *People v. Collison*, 6 N.Y.S. 711; *City of Philadelphia v. Overbrook Park Congregation*, 171 Pa. Super. 581 (91 A2d 310); *Laymen's Week-End Retreat League v. Butler*, 83 Pa. Super. 1; *Whelon v. United States*, 191 F. Supp. 945 (Cust. Ct. 1961).

We conclude that the property of the Macon Baptist Association, Inc., here involved is not being used primarily as a place of religious worship within the meaning of the Georgia Constitution and statute {205 S.E.2d 201} authorizing the exemption of the property from ad valorem taxation. In summary, this conclusion is based primarily upon the finding that the property is not open as a public place of worship where a congregation gathers to practice the rites and ceremonies of its doctrinal theology, and to receive the sacraments of the church.

III.

The appellee also argues in this case that if taxation of the Association's building is required this will work a favoritism by the state toward those religious groups whose theologies do not require the kind of activity carried on by the Association as an essential part of the Baptist faith. The appellee asserts that this would violate the constitutional requirement that the state must remain neutral in its attitude toward religion under the First Amendment to the United States Constitution. See *Engel v. Vitale*, 370 U.S. 421 (82 S. Ct. 1261, 8 L. Ed. 2d 601, 86 ALR2d 1285); *Abington School District v. Schempp*, 374 U.S. 203 (83 S. Ct. 1560, 10 L. Ed. 2d 844); and *Sherbert v. Verner*, 374 U.S. 398 (83 S. Ct. 1790, 10 L. Ed. 2d 965).

Religious groups do not enjoy a general immunity from the imposition of property taxes under the First Amendment to the United States Constitution. See *Watchtower &c. Soc. v. Los Angeles County*, 30 Cal. 2d 426 (182 P2d 178), cert. den. 332 U.S. 811. Cf. *Walz v. Tax Comm. of New York*, 397 U.S. 664 (90 S. Ct. 1409, 25 L. Ed. 2d 697). Appellee's argument is essentially one which focuses on whether the denial of a religious tax {232 Ga. 33} exemption to it would be discriminatory. It is sufficient to note in answer to this contention that there is no evidence in the record before us that the taxing authorities are discriminating against the appellee Association as opposed to other members of the class of religious associations similarly situated and subject to ad valorem taxation. The missionary work and the administration and coordination of those activities essential to appellee's religious beliefs and practices are not uncommon to other religious groups. The property of other religious groups, when used primarily for purposes similar to the use made by the appellee of its property here involved, would also be subject to ad valorem taxation. Thus, we cannot agree that the tax sought to be imposed on appellee in this case is discriminatory or otherwise violative of the First Amendment to the Constitution of the United States.

The trial court erred in granting summary judgment in favor of the appellee and in denying summary judgment in favor of the appellants.

Judgment reversed; remanded with direction.

**THARPE, tax-collector, et al. v. CENTRAL GEORGIA COUNCIL OF BOY SCOUTS OF
AMERICA**
Supreme Court of Georgia
March 9, 1938, Decided

Opinion

The Central Georgia Council of the Boy Scouts of America, a corporation, brought an action against the tax-collector and sheriff of Peach County, to enjoin a sale for taxes of real estate belonging to the plaintiff, and for cancellation of tax executions, on the ground that the property is exempt from taxation under the Code, 92-201. The material portion of the Code provision is as follows: "The following described property shall be exempt from taxation, to wit: . . . all institutions of purely public charity; all buildings erected for and used as a college, incorporated academy or other seminary of learning . . .: provided, . . . the above-described property so exempted is not used for purposes of private or corporate profit or income." A general demurrer to the petition was overruled, and the defendants excepted {185 Ga. 811} pendente lite. The case was tried on an agreed statement of facts, upon which the court directed a verdict in favor of the plaintiff. The defendants' motion for new trial was overruled, and they excepted. The bill of exceptions assigns error upon the overruling of the demurrer, the direction of the verdict, and the overruling of the motion for a new trial.

The facts shown in the agreed statement were substantially as follows: The plaintiff is a corporation, having obtained its charter from the superior court of Bibb County in 1928. The charter includes the following provisions: "The corporation shall have no capital stock, its object and purpose being solely of a benevolent character, and not for individual pecuniary gain or profits to its members. The object of the corporation is to assist in carrying out the purpose of the Boy Scouts of America, as declared in the charter granted by Congress to that corporation, to promote, through organization, and co-operation with other agencies, the ability of boys to do things for themselves and others, to train them in Scout-craft, and to teach them patriotism, courage, self-reliance, and kindred virtues, using the methods which are now in common use by Boy Scouts. The purpose of this corporation is to promote the Boy Scout program for character development, citizenship training, physical fitness, and Americanization within the territory designated for its activities by the National Council of the Boy Scouts of America, and in accordance with the constitution and by-laws of the National Council and the policies and regulations thereof, as set forth in its official publications; and further, to share with the National Council responsibility for furnishing adequate leadership, maintaining standards of the Boy Scout Movement, protecting its badges and official insignia against use by those not duly registered as Scouts and Scout officials, and in extending the benefits of the movement to all the boys in America." Twenty-eight counties in central Georgia are assigned to the plaintiff corporation for the development and training of Boy Scouts. As soon as a boy reaches the age of twelve years he is eligible for membership in the Scout organization. The membership in the plaintiff's district now numbers more than one thousand boys, and efforts are being made to increase the enrollment. The plaintiff owns approximately 400 acres of land in Peach County, on which is located an artificial lake covering about seventy-five acres. The {185 Ga. 812} buildings on the property consist of a mess-hall or assembly-room, a workshop, about fifteen small cabins, and a caretaker's house. An annual summer camp is maintained for Boy Scouts on this property, during which time four or five hundred boys attend. The only expense charged against the boys coming to the camp at this time is a sufficient amount to pay for their food, all other expenses being borne by the plaintiff. During the balance of the year the camp is open at all times to the boys, but when they use the camp during such time they carry their food with them. The Scout oath is as follows: "On my honor I will do my best to do my duty to God and to my country, and to obey the Scout

law; to help other people at all times; to keep myself physically strong, {196 S.E. 764} mentally awake, and morally straight." Under the Scout law the boys are taught that a Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean, and reverent. Special courses are taught at the summer camp, in order to instill in the boys the Boy Scout principles as embodied in the Scout oath and law. A few of the courses taught are archery, bird study, botany, camping, civics, conservation, first-aid, forestry, life-saving, personal health, public health, surveying, swimming, and zoology. Instructors are provided for the teaching of these subjects without cost to the boys. Frequently Boy Scouts are unable to find sufficient money to defray the expense of attending summer camp, and in such cases the plaintiff obtains funds by solicitation and undertakes to see that every worthy boy is given an opportunity to attend camp and study the various subjects.

The sheriff has levied on twenty-five acres of the land, to satisfy a tax execution issued by the tax-collector for ad valorem taxes against the property for the year 1931, and executions for other years have been turned over to the sheriff for collection. The petition described the property, alleged the facts touching its use, and claimed that under the facts alleged it was exempt from taxation. The plaintiffs in error have treated the case as embracing the question whether the property is exempt under the statute relating to "institutions of purely public charity" (Code, 92-201), and contend only that under the facts shown there is no exemption on this ground; while in the brief filed for the defendant in error the only question argued is whether the property is exempt {185 Ga. 813} as "buildings erected for and used as a college, incorporated academy, or other seminary of learning." In other words, so far as the briefs are concerned, neither side combats the contentions of the other; and therefore this court is in the awkward position of having to decide the case without any friction of minds between counsel, no matter on what ground we may base our conclusion. In the circumstances we shall endeavor to follow the safest course. In the view which we take of the case, we may assume with the plaintiffs in error that the record does embrace the question whether the property is exempt as a charitable institution under the law. Since the statute contains fewer qualifying words and phrases in regard to such an institution than in reference to property used for educational purposes, exemption on the ground of charity appears to be the less doubtful of the two questions mentioned. Accordingly, in pursuance of the policy just indicated, we have examined both questions, but having concluded that the property is exempt as a charitable institution, and being less certain that it is exempt upon the ground relating to education, although perhaps it may be exempt for that reason also, we will discuss only the question as to charity, laying aside the other question.

Under the statute, "the following described property shall be exempt from taxation, to wit: . . . all institutions of purely public charity." Code, 92-201. The test is whether the property itself is "dedicated to charity and used exclusively" as an institution of purely public charity, not whether the plaintiff is an organization of purely public charity. "The exemption from taxation of institutions of public charity, provided for by the constitution, is of such institutions as property not as persons, -- the physical things, not the ideal institutions." Trustees of the Academy of Richmond County v. Bohler, 80 Ga. 159 (7 S. E. 633). The character of the plaintiff corporation, as disclosed by its charter provisions and the other evidence, will be considered, of course, in determining whether the use of the property is such as to exempt it from taxation. Cf. Elder v. Atlanta-Southern Dental College, 183 Ga. 634 (189 S. E. 254). A familiar meaning of the word "charity" is almsgiving, but as used in the law it may include "substantially any scheme or effort to better the condition of society or any considerable part of it." Wilson v. Independence First {185 Ga. 814} National Bank, 164 Iowa, 402, 412 (145 N. W. 948, Ann. Cas. 1916D, 481). "Charity," as used in tax exemption statutes, is not restricted to the relief of the sick or indigent, but extends to other forms of philanthropy or public beneficence, such as practical enterprises for the good of humanity, operated at moderate cost to the beneficiaries, or enterprises operated for

the general improvement and happiness of mankind." 61 C. J. 455, 505. This court has said: "The property of a Young Men's Christian Association, used solely for purposes of public charity, using the term 'charity' in its broad sense, is not taxable, provided its income is not used, nor intended to be used, as dividends or profits." (Italics {196 S.E. 765} ours.) *City of Waycross v. Waycross Savings & Trust Co.*, 146 Ga. 68 (4) (90 S. E. 382). The plaintiff derives no income from the property sought to be taxed, and therefore it is necessary to determine only whether the property is used solely for purposes of public charity, "using the term 'charity' in its broad sense." It appears that the plaintiff uses the property as a camp or recreation center, open to all of the Boy Scouts in 28 counties in central Georgia. The boys are allowed to use the camp without charge, except that during the annual summer convention they are required to pay for their food. The plaintiff bears all other expenses. During the summer encampment, special courses are provided through instructors furnished by the plaintiff, for the purpose of instilling in the boys the principles of the Scout organization.

As shown above, the purpose of the organization is the physical, mental, and moral development of boys who have reached a stated age. No one can deny that such an institution is a benefit to society, and that it improves and promotes the happiness of man. In our opinion, the word "charity," as used in the statute, and in the provision of the constitution authorizing its enactment (Code, 2-5002), is broad enough to include the use which, according to the record, the plaintiff makes of the property here involved. We have been able to find only two cases dealing with the question whether property used by the Boy Scout organization may be treated as a charitable institution, within the meaning of exempting statutes. In both cases its charitable nature was recognized. In *Camden County Council Boy Scouts of America v. Bucks County, 13 Pa. Dist. & Co. R. 213*, it appeared that the use of the property was substantially identical with that shown in the {185 Ga. 815} instant case. While the main question for decision was whether the property of the plaintiff, a New Jersey corporation, should be denied exemption as an "institution of purely public charity" because it was a non-resident corporation, the other question was involved, and in regard to it the court said: "It is not seriously disputed that the petitioner is an institution of purely public charity, within the meaning of section 1, article ix, of the constitution of Pennsylvania, and the act of April 29, 1874, P. L. 73, and the supplements thereto, as interpreted by the superior court in *Lancaster County v. Y. W. C. A. of Lancaster*, 92 Pa. Superior Ct. 514, and cases therein cited." In *Charter Oak Council Inc. Boy Scouts of America v. New Hartford*, 121 Conn. 466 (185 Atl. 575), the case turned on a different point, but in the course of the opinion the court said: "The conclusions that the plaintiff corporation is organized exclusively for educational and charitable purposes, and that the real property in question is used exclusively for carrying out those purposes, are amply supported by the finding, which is not susceptible of material correction. They are not invalidated or impaired by any of the facts found concerning the activities and operation of the camp, including the payment, by each Boy Scout attending, of a regular charge toward the expenses, the operation of a camp store, open about twenty minutes a day, the small profits from which go into the camp fund, and the payment, when income permits, of bonuses, in addition to their salaries, to certain officials and employees, for services performed in operating the camp. *Connecticut Junior Republic Association Inc. v. Litchfield*, 119 Conn. 106, at page 108, 174 A. 304, at page 306, 95 A. L. R. 56, and cases cited; *Tillinghast v. Council at Narragansett Pier*, 47 R. I. 406, 133 A. 662, 46 A. L. R. 823; *Camden County Council, B. S. of A. v. Bucks County, 13 Pa. Dist. & Co. R. 213*. "

Under the Georgia decisions, the fact that the boys are charged a sum sufficient only to pay for their food would not destroy the charitable nature of the institution nor prevent its exemption. *Brewer v. American Missionary Association*, 124 Ga. 490 (52 S. E. 804); *Hurlbutt Farm v. Medders*, 157 Ga. 258 (121 S. E. 321). The plaintiffs in error contend that if this be a charity it is a private charity, and not a "purely public" charity, because the camp is open only to boys who

are members of the Scout organization. {185 Ga. 816} We can not agree to this contention. According to the record, every boy on reaching the age of twelve years is eligible to become a member, with no other qualification or restriction. The organization is thus open to all boys alike, within the classification as to age, and all under the age of twelve will in time become eligible, if they live. In Trustees of the Academy of Richmond County v. Bohler, supra, it was held in effect that charitable institutions {196 S.E. 766} are public, if they are open "to the whole public, or to the whole of the classes for whose relief they are intended or adapted." See also Brewer v. American Missionary Association, supra. It follows from what has been said that the court did not err in overruling the demurrer to the petition, or in refusing a new trial.

Judgment affirmed.

**INSTITUTE OF NUCLEAR POWER OPERATIONS v. COBB COUNTY BOARD OF
TAX ASSESSORS et al. (eight cases).
COURT OF APPEALS OF GEORGIA
January 5, 1999, Decided**

Opinion

For the tax years 1993 and 1994, the Institute of Nuclear Power Operations ("INPO" or "Taxpayer") filed a total of eight applications for exemption from tangible property taxes on real and personal property located in Cobb County, Georgia, contending INPO is an institution "of purely public charity." The property at issue consists of business assets such as a computer system, two airplanes, and the multi-story office building used as INPO's headquarters. 1 The Cobb County Board of Tax Assessors and the Board of Equalization ("the Board") denied all applications for an exemption, and INPO appealed to the superior court for a de novo determination. O.C.G.A. 48-5-311 {236 Ga. App. 49} (g) (3). Over INPO's objection, Cobb County and the Cobb County School Board ("Intervenors") were permitted to intervene. On cross-motions for summary judgment, the following undisputed facts were adduced:

After the 1979 nuclear incident at Three Mile Island, "the U.S. nuclear electric utility industry established the [INPO] in 1979 [with the corporate mission] to promote the highest levels of safety and reliability . . . in the operation of . . . nuclear [electric generating] plants, . . ." and thereby promote public health and safety. "All organizations having direct responsibility and legal authority to operate or construct commercial nuclear electric generating plants in the United States are INPO members. Many organizations that jointly own these nuclear power plants are associate members." Conversely, {510 S.E.2d 845} "all INPO members which own Nuclear Power Plants have a commercial license issued by the Nuclear Regulatory Commission [{"NRC"}]." Specifically, "all members of INPO are investor-owned utilities with the exceptions of the Nebraska Public Power District, New York Power Authority, Omaha Public Power District, Tennessee Valley Authority, and Washington Public Power Supply System." According to Angelina S. Howard, Director of the INPO Communications Division, "all activities of INPO are commercial in the sense that they relate to the commercial generation of electricity." In 1994, the for-profit members of INPO earned a combined net income exceeding \$ 12 billion. According to the 1995 annual report, "INPO's value to the industry lies in its ability to provide utilities with timely performance insights that can be used to improve plant operation and to identify and follow up on initiatives to enhance safety, reliability and efficiency." The 1995 financial statement lists "members' net assets -- unrestricted [at \$]24,602,010."

INPO is recognized as a charitable organization exempt from income taxes by both the Internal Revenue Service and the Georgia Department of Revenue. "All of INPO's revenues are used to pay its expenses. It has no retained earnings and pays no dividends to its members." All members of INPO's Board of Directors are high officers employed by INPO members. These directors are not compensated for their services. But INPO's 13 full-time officers are paid salaries competitive with the commercial nuclear electricity industry, ranging from \$ 84,291.82 to a base salary of \$ 390,000 plus a five-year deferred compensation bonus of \$ 454,976.31 for the president and Chief Executive Officer, Zack T. Pate. Total salaries and benefits paid in 1995 amounted to \$ 31,845,998. INPO paid ad valorem taxes on personalty from 1980 through 1992, before it acquired its headquarters.

All members of INPO must pay dues or lose their membership. For 1993, membership dues amounted to more than \$ 50 million. In {236 Ga. App. 50} addition to annual dues, INPO imposes a requirement whereby "each supplier participant provides INPO with one loaned

employee or \$ 6,000 per month for each month a loaned employee is not provided. . . . [INPO] believes the INPO loaned employee program provides a valuable benefit and is a career development opportunity for the industry's nuclear management personnel."

According to the Memorandum of Agreement between INPO and the NRC, INPO is an organization sponsored by the nuclear electric utility industry. The NRC "[recognizes] the ability of INPO to contribute to safe and reliable operation with a resulting benefit to public health and safety. . . ." INPO's major activities consist of four cornerstone technical programs: evaluation of member utilities; training and accreditation programs for member utilities; events analysis and information exchange programs for member utilities; and assistance programs, whereby INPO "collects and monitors nuclear plant performance indicator data and provides periodic reports to the industry."

"INPO conducts an evaluation of a nuclear plant by sending a team of engineers and other technical specialists to the plant for two weeks. A team numbers approximately 15 people and includes both INPO personnel and peer evaluators from other nuclear plants. During the two-week evaluation at the plant, the members of the team observe plant personnel carrying out their assigned duties. INPO relies heavily on observations of people at work and on the frank [and confidential] feedback from working-level employees to determine the effectiveness of plant programs and activities. . . ." But because "INPO is not a government organization [it therefore reasons it] has no obligation to provide its reports to the public. The Institute, on behalf of its members, has worked diligently over the years to protect the confidential nature of its evaluation and other plant-specific reports." Consequently, "Plant Evaluation Reports are provided only to the utility . . . responsible for operating the [evaluated] plant. . . ." INPO members who are also members of Nuclear Electric Insurance Limited (NEIL) have authorized and instructed INPO to make available to NEIL at the Institute's office copies of INPO evaluation reports and other data.

INPO's president, Zack T. Pate, publicly acknowledged "there is increasing evidence that the highest levels of safety, reliability, and economic performance go hand in hand. . . . Operators of nuclear power {510 S.E.2d 846} plants are required by law, NRC rules and good business practices to obtain or provide insurance coverage for their plants. The primary sources of insurance are: (1) commercial insurance pools . . . ; (2) nuclear utility insurance pools [such as] NEIL; and (3) additional liability insurance as required by the secondary financial requirements of [federal law]." (Emphasis supplied.) NEIL is an "industry {236 Ga. App. 51} captive insurance [company]," or a "mutual insurance company . . ." providing government-mandated insurance to "its members against property losses, business interruption coverage and decontamination [and decommissioning] costs resulting from accidental damage." NEIL administers and services its own insurance plans, and INPO "has no involvement with the provision of [such] insurance. . . ." But NEIL reviews INPO reports and data for items that could affect the insurability of its members, and gives member utilities a ten percent property insurance "premium [credit] for INPO Category 1 plants."

"INPO's meeting facilities are intended primarily for INPO-sponsored and INPO-conducted meetings and trainings. . . . Nuclear industry groups may be approved to meet in INPO meeting facilities subject to the following considerations: . . . The meeting will not be open to the public." An INPO airplane is routinely used by the president of INPO for personal use.

The superior court denied INPO's motion for summary judgment and granted that of the Board, concluding that "INPO is not devoted entirely to charitable pursuits, and the use of the property is not exclusively devoted to those charitable pursuits." These eight appeals concerning four tax

accounts for two tax years raise identical issues of law based on the same facts, and so the appeals are hereby consolidated for disposition in a single appellate decision. Held:

In two related enumerations of error, INPO complains of the grant of the Board's motion for summary judgment and the denial of its own motion, arguing it meets all elements of the appropriate test to be exempt from ad valorem taxes as a purely public charity.

1. "When the tax officer goes forth to search for taxable property, all which he finds employed in the ordinary uses of common life, unless it belongs to the public, he is to regard as taxable." *Trustees &c. of Richmond County v. Bohler*, 80 Ga. 159, 164 (7 S.E. 633). "Taxation is the rule, and exemption the exception; and, under the [laws] of this state, no property except that specifically mentioned can be exempted from taxation." *The Athens City Water-Works Co. v. Mayor &c. of Athens*, 74 Ga. 413, hn. 1. "The following property shall be exempt from all ad valorem property taxes in this state: . . . all institutions of purely public charity." O.C.G.A. 48-5-41 (a) (4). "In determining whether property qualifies as an institution of 'purely public charity' as set forth in O.C.G.A. 48-5-41 (a) (4), three factors must be considered and must coexist. First, the owner must be an institution devoted entirely to charitable pursuits; second, the charitable pursuits of the owner must be for the benefit of the public; and third, the use of the property must be exclusively devoted to those charitable pursuits." *York Rite Bodies &c. of Savannah v. Bd. of Equalization of Chatham County*, 261 Ga. 558 (2) (408 S.E.2d 699).2. INPO first contends it is an institution devoted entirely to {236 Ga. App. 52} charitable pursuits, arguing it is a "practical enterprise for the good of humanity" because its mission is excellence and a high degree of safety in the generation of nuclear power, which redounds to the benefit of the environment and the public at large.

"A familiar meaning of the word "charity" is almsgiving, but as used in the law it may include "substantially any scheme or effort to better the condition of society or any considerable part of it." [Cit.] "'Charity,' as used in tax exemption statutes, is not restricted to the relief of the sick or indigent, but extends to other forms of philanthropy or public beneficence, such as practical enterprises for the good of humanity, operated at moderate cost to the beneficiaries, or enterprises operated for the general improvement and happiness of mankind." 61 CJ 455, 505.' *Tharpe v. Central Ga. Council, B.S.A.*, 185 Ga. 810 (196 S.E. 762, 116 ALR 373)." *Peachtree on Peachtree Inn v. Camp*, 120 Ga. App. 403, 409 (170 S.E.2d 709). But of the infinite charities that deserve the plaudits of mankind, {510 S.E.2d 847} our law "restricts tax exemption of institutions of charity to those and those only that are 'purely' charitable and also that are 'public' charity." *United Hosp. Svc. Assn. v. Fulton County*, 216 Ga. 30, 32 (114 S.E.2d 524).

We do not doubt that INPO's stated mission and successful history of promoting excellence and the highest safety standards within the commercial nuclear power industry benefit all of mankind every day that a nuclear incident is thereby avoided. But such diffuse public benefit is, in our view, inevitably secondary to the immediate pecuniary benefit of INPO's members, predominantly commercial suppliers, and their shareholders, in an industry generating \$ 12 billion in net profits. Pursuant to the Price-Anderson Act, 42 USCS 2210 et seq., federal law imposes strict liability in tort for a nuclear incident, via a waiver of all legal defenses in exchange for a limitation of liability. See *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 64-65 (98 S. Ct. 2620, 57 L. Ed. 2d 595). Every avoided Chernobyl-like catastrophe also avoids catastrophic strict liability. Preventing power outages benefits members and their shareholders by preventing lost profits. We can discern no eleemosynary element to all of INPO's admirable efforts. While there is undeniable public benefit attending each avoided nuclear catastrophe, it does not result from INPO's philanthropy or public beneficence in operating an enterprise for the good of humanity or for the general improvement and happiness of mankind.

The Taxpayer's reliance on *Chatham County Bd. of Tax Assessors v. Southside Communities Fire Protection*, 217 Ga. App. 361, 364 (457 S.E.2d 267) is misplaced. There, a non-profit tax-exempt corporation which provided local fire and rescue services under contract to Chatham County through 48 paid employees and 150 volunteers was held entitled to the charitable exemption from ad valorem taxes, where {236 Ga. App. 53} the evidence showed that "Southside provided its services to all in need of assistance, not just to subscribers." (Emphasis supplied.) *Id.* That element of charitable intent or truly public beneficence (extended during an existing emergency) is sufficient to distinguish that case from the circumstances of INPO as an entity sponsored by a consortium collectively generating \$ 12 billion annual net profits. The superior court in the case sub judice correctly determined that, under the undisputed facts, INPO's efforts are not purely charitable.

3. "The fact that an institution serves a benevolent purpose does not necessarily make it a 'purely public charity.' *United Hospitals Service Assn. v. Fulton County*, 216 Ga. 30, 33[, supra]. No matter how high the ideals of an institution, nor how lofty its purposes, in order for it to qualify as a charitable institution for tax exemption under Code Ann. 92-201 [now O.C.G.A. 48-5-41 (a) (4)], it must have the sole purpose and activity of dispensing public charity." *Camp v. Fulton County Med. Society*, 219 Ga. 602, 605 (3) (135 S.E.2d 277). *Accord York Rite*, 261 Ga. 558 (2), 559 (2) (b), supra.

As the president of INPO acknowledges, plant safety and a high degree of reliability go "hand in hand" with economic performance. The same economic factors indicating that INPO's efforts are not purely charitable also indicate that they are not purely public. The primary purpose of INPO is to collect, analyze and disseminate industry lessons learned based on highly confidential surveys. Moreover, there is not a single outside or disinterested director on INPO's Board of Directors. Members must pay dues to belong. See *Ga. Congress of Parents &c. v. Boynton*, 239 Ga. 472, 473 (238 S.E.2d 113). That portion of the building occupied by INPO is restricted to members and their guests; the public is expressly excluded from industry meetings. The undisputed facts indicate that INPO does not exist for the sole purpose and activity of dispensing purely public charity.

4. Remaining contentions have been considered and are found to be rendered moot by our holdings in Divisions 2 and 3.

Judgment affirmed. Blackburn and Eldridge, JJ., concur.

**FOURTH DIVISION
PHIPPS, P. J.,
ANDREWS and BOGGS, JJ.**

**NOTICE: Motions for reconsideration must be
physically received in our clerk's office within ten
days of the date of decision to be deemed timely filed.
(Court of Appeals Rule 4 (b) and Rule 37 (b), February 21, 2008)
<http://www.gaappeals.us/rules/>**

November 16, 2012

In the Court of Appeals of Georgia

**A12A1100. H. O. P. E. THROUGH DIVINE INTERVENTIONS,
INC. v. FULTON COUNTY BOARD OF TAX ASSESSORS.**

PHIPPS, Presiding Judge.

H.O.P.E. Through Divine Interventions, Inc. appeals the superior court's summary judgment against it and in favor of the Fulton County Board of Tax Assessors. Specifically, the superior court ruled that H.O.P.E.'s real property (hereinafter, "Property") did not qualify during certain years for an exemption from ad valorem property taxation under OCGA § 48-5-41 (a) (4), which pertains to "[a]ll institutions of purely public charity." We affirm.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law.”¹ “In our de novo review of the grant of a motion for summary judgment, we must view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmovant.”²

The material facts are uncontested. H.O.P.E. was incorporated solely to provide residential, recovery, employment, self-development and other supportive services to individuals and families with histories of substance abuse, unemployment, homelessness, or criminal behavior. It is a non-profit corporation organized exclusively for charitable purposes within the meaning of Section 501 (c) (3) of the Internal Revenue Code, and is registered in Georgia as a “charitable organization” pursuant to OCGA § 43-17-5.

In July 2007, H.O.P.E. purchased the Property located in Fulton County; upon the Property was situated a gutted 40-unit apartment building; H.O.P.E. intended to provide upon the Property permanent supportive housing to low-income individuals and families who were homeless or at high risk of becoming homeless and who also were contending with various other special needs. In 2007, 2008, and 2009, H.O.P.E.

¹ OCGA § 9-11-56 (c).

² *Cowart v. Widener*, 287 Ga. 622, 623 (1) (a) (697 SE2d 779) (2010) (citation and punctuation omitted).

engaged in the finance, construction, and renovation phases of developing the Property, and the construction and renovation undertakings were completed in November 2009. Meanwhile, no individual or family had been housed on the Property by H.O.P.E., nor had any other charitable services of H.O.P.E. been provided to anyone on the Property. In December 2009, when the apartments and its community center opened, the Property became home to formerly homeless persons. H.O.P.E.'s application that the Property be declared tax exempt as an "institution[] of purely public charity" was granted for 2010.

This case concerns years 2008 and 2009. H.O.P.E.'s exemption applications for those years were denied by the Fulton County Board of Tax Assessors, and the Fulton County Board of Equalization likewise concluded that the Property did not qualify for tax exempt status for 2008 and 2009. Thereafter appearing before the superior court, H.O.P.E. and the Fulton County Board of Tax Assessors presented on cross-motions for summary judgment the question whether, based upon the construction and renovation work during tax years 2008 and 2009, the Property qualified for tax exempt status as an "institution[] of purely public charity" pursuant to OCGA § 48-5-41 (a) (4).

That Code provision states: “The following *property* shall be exempt from all ad valorem property taxes in this state: All *institutions* of purely public charity.”³ The Supreme Court of Georgia has held that “in order for an institution to be granted a property tax exemption pursuant to OCGA § 48-5-41 (a) (4), it must satisfy the [three factors set forth in *York Rite Bodies of Freemasonry of Savannah v. Board of Equalization of Chatham County*⁴]”⁵ In *York Rite*, the Supreme Court of Georgia held:

In determining whether property qualifies as an institution of purely public charity as set forth in OCGA § 48-5-41 (a) (4), three factors must be considered and must *coexist*. First, the owner must be an institution devoted entirely to charitable pursuits; second, the charitable pursuits of the owner must be for the benefit of the public; and third, *the use of the property must be exclusively devoted to those charitable pursuits*.⁶

³ OCGA § 48-5-41 (a) (4) (emphasis supplied).

⁴ 261 Ga. 558 (408 SE2d 699) (1991).

⁵ *Nuci Phillips Mem. Foundation v. Athens-Clarke County Board of Tax Assessors*, 288 Ga. 380, 385 (2) (703 SE2d 648) (2010). *Nuci Phillips Mem. Foundation* held further that OCGA § 48-5-41 (c), (d) (1) and (2) also had to be satisfied. *Nuci Phillips Mem. Foundation*, supra at 381 (1) (explaining that *York Rite* summarized the requirements for an institution to qualify as a “purely public charity” for an ad valorem tax exemption under the exemption statutes from 1946 to the pre-2006 exemption statute, OCGA § 48-5-41).

⁶ *York Rite*, supra at 558 (2) (emphasis supplied).

The parties agreed before the superior court that their dispute concerned only the third *York Rite* factor. Summary judgment was granted against H.O.P.E. and in favor of Fulton County, because the superior court held that H.O.P.E.’s “intended use and preparation for that use” during 2008 and 2009 were insufficient to satisfy that factor.

On appeal, H.O.P.E. contends that the superior court erred in concluding that the Property did not qualify for tax exempt status as an “institution[] of purely public charity”⁷ for tax years 2008 and 2009, when the Property was undergoing construction and renovation. It points out that constructing and renovating the Property were necessary steps because, without their successful completion, “H.O.P.E. would not have been able to ultimately provide permanent supporting housing to formerly homeless men and women at the Property, nor provide the infrastructure and support they need to prepare them for independent and permanent housing.” H.O.P.E. asserts further that there is no evidence that, during the financing, construction, and renovation phases, it used the Property for any non-charitable purpose. Additionally, H.O.P.E. cites evidence that, during the financing phase, it executed agreements with various organizations promising that the acquired funds

⁷ OCGA § 48-5-41 (a) (4).

would be used to provide housing and other supportive services to persons who would live upon the Property.

But given the language of the statutory provision at issue, the long line of judicial decisions interpreting that language, and general principles applicable when determining entitlement to a tax exemption, the superior court properly concluded that the cited tax exemption did not apply to the Property, as urged by H.O.P.E.

We begin by recognizing the following general principles. “Taxation is the rule; exemption from taxation is the exception.”⁸ “[C]laims for exemption from taxation should generally be construed in favor of the State and against the

⁸ *Thomas v. Northeast Ga. Council, Inc., Boy Scouts of America*, 241 Ga. 291, 293 (244 SE2d 842) (1978) (citing former Code Ann. § 92-201); see *Tharpe v. Central Ga. Council of Boy Scouts of America*, 185 Ga. 810, 813 (1) (196 SE 762) (1938) (setting forth language of Code § 92-201: “the following described property shall be exempt from taxation, to wit: . . . all institutions of purely public charity.”); see further *Leggett v. Macon Baptist Assoc.*, 232 Ga. 27, 28 (I) (205 SE2d 197) (1974).

taxpayers.”⁹ Therefore, “we strictly construe taxation statutes, and we will not find an exemption unless it is clear that the legislature intended such exemption.”¹⁰

The pertinent Code provision, OCGA § 48-5-41 (a) (4), does not expressly exempt from taxation property at which charitable housing and supportive services are merely contemplated, property for which funding is being procured so as to finance the necessary charitable infrastructure, or property upon which construction and renovation is in progress for its initial charitable use.¹¹ But as stated above, there is extensive case law interpreting the statutory language, including *York Rite*.¹² In addition to enumerating the three factors, *York Rite* provided the following guidance as to the third factor (at issue here):

[T]he applicability of this tax exemption will turn upon a determination of *how the property is being used* by the institution. Mere latent ownership of property by an institution of public charity will not entitle

⁹ *Johnson v. Wormsloe Foundation*, 228 Ga. 722, 728 (2) (187 SE2d 682) (1972) (citation omitted); see *Fulton County Bd. of Tax Assessors v. Visiting Nurse Health System of Metropolitan Atlanta*, 243 Ga. App. 64, 65 (2) (532 SE2d 416) (2000).

¹⁰ *Visiting Nurse Health System of Metropolitan Atlanta*, supra at 67 (3) (footnote omitted).

¹¹ See text accompanied by note 3, supra.

¹² Supra.

the property to an exemption. Nor will merely making real estate available to other public or charitable institutions for their use be sufficient to qualify for the tax exemption. Instead, the *use* of the property must be *exclusively devoted to conduct that benefits the public by furthering the charitable pursuits of its owner*.¹³

Although H.O.P.E. maintains that its construction and renovation work during 2008 and 2009 constituted such “use,” we cannot agree, in light of more than 100 years of decisions by the Supreme Court of Georgia, including *York Rite*,¹⁴ *Thomas v. Northeast Ga. Council, Inc.*, *Boy Scouts of America*,¹⁵ *Mu Beta Chapter Chi Omega House Corp. v. Davison*,¹⁶ and *Trustees of the Academy of Richmond County v. Bohler*.¹⁷

¹³ *York Rite*, supra at 559 (2) (c) (emphasis supplied).

¹⁴ Supra.

¹⁵ Supra.

¹⁶ 192 Ga. 124, 126 (14 SE2d 744) (1941).

¹⁷ 80 Ga. 159 (7 SEd 633) (1887), superceded on other grounds as stated in *Elder v. Henrietta Egleston Hosp. for Children*, 205 Ga. 489, 491-493 (53 SE2d 751) (1949) (concerning effects of income-producing activity upon the tax-exempt status of institutions of purely public charity), and *Cobb County Board of Tax Assessors v. Marietta Educ. Garden Center*, 239 Ga. App. 740, 745 (2) n. 2 (521 SE2d 892) (1999) (acknowledging that *Elder*, supra, determined that the use of property to produce income may not defeat entitlement to exemption from ad valorem property taxation).

The *York Rite* Court, elaborating further on the third factor, made clear that the dispensation of public charity must exist.¹⁸ There, where the properties at issue were used as “meeting places” and for other purposes primarily by members of the organizations,¹⁹ the Court instructed, “If the [organizations] can establish that the use of their respective properties is exclusively for the administration *and dispensation of public charity*, then they will have established the third factor.”²⁰ H.O.P.E.’s quests for the tax exemptions, however, were not based upon any claim that, upon its Property, it was then *dispensing* charitable housing or other supportive services to the *public*;²¹ its quests for the exemptions rested upon the construction and renovation efforts as necessary steps toward ultimately providing such charity.

¹⁸ *York Rite*, supra at 559-560 (3) (b).

¹⁹ *Id.*

²⁰ *Id.* (emphasis supplied).

²¹ See *Nuci Phillips Mem. Foundation*, supra at 386 (2) (explaining that to qualify as “public,” it is not necessary that the facility be open to the entire public; rather, it is sufficient that it be “open to the classes for whose relief it was intended”); *Cobb County Board of Tax Assessors*, supra at 745 (2) (denying tax exemption because the property provided substantial benefits, including free use of the property, only to dues-paying member clubs and their memberships).

Moreover, the superior court’s conclusion that H.O.P.E.’s “intended use and preparation for that use” – as manifested by its construction and renovation work – were insufficient to constitute “use” heeds the seminal case of *Trustees of the Academy of Richmond County*.²² There, a testator had devised to trustees and their successors certain real estate, the annual product of which was to be appropriated to the erection of a poor-house and for the support of its inmates forever.²³ No poor-house had been erected, but the trustees were accumulating a fund for that purpose and for the purchase of a suitable site therefor, from the income of the devised property.²⁴ The devised property was taxed, and the trustees sought to enjoin the collection of taxes, claiming that the property was exempt as an institution of purely public charity.²⁵ The Supreme Court of Georgia concluded that the devised property was not exempt, and that the poor-house, “[w]hen it shall come into being and into

²² *Supra*.

²³ *Id.* at 159-160.

²⁴ *Id.* at 160.

²⁵ *Id.*

use, pursuant to the scheme of the founder, it will be exempt from taxation” as an institution of purely public charity.²⁶

The Court observed that the statutory language at issue – “[a]ll institutions of purely public charity”²⁷ – did not “mention[] property *of*, or *belonging to*, institutions of purely public charity, but only the institutions themselves.”²⁸ Reasoning that “[t]hese institutions are thus mentioned as property,”²⁹ the Court held, “[U]ntil property gets into the form of the [statutorily] enumerated items or articles, no exemption obtains.”³⁰ The Court elaborated, “When the tax officer goes forth to search for taxable property, all which he finds employed in the ordinary uses of

²⁶ Id. at 165.

²⁷ Id. at 160.

²⁸ Id. at 161 (emphasis supplied). Likewise, neither does the statutory language at issue in the instant case; see the text in this opinion that is accompanied by n. 3, *supra*. Cf. *Board of Tax Assessors of Ware County v. Baptist Village*, 269 Ga. App. 848, 851 (1) (605 SE2d 436) (2004) (determining that the General Assembly’s passage of OCGA § 48-5-41 (a) (12), which pertains to “[p]roperty of a nonprofit home for the aged used in connection with its operation,” was an expansion of the older category of institutions of purely public charity).

²⁹ *Trustees of the Academy of Richmond County*, *supra* at 161.

³⁰ Id. at 164.

common life, unless it belongs to the public, he is to regard as taxable.”³¹ When exemption is claimed, the Court continued,

[the tax officer] is not to look for persons, natural or artificial, nor for ideal beings, but for real, visible things. . . , and unless they are in present tangible existence, he cannot exempt something else which he is informed will be used to produce them hereafter. In other words, he is not to spare a form of property not enumerated because, for the time being, it represents a part or the whole of one or more of the forms which are enumerated. The exemption is not a release *in personam*, but a release *in rem*, and the *res* to which the release applies must be found and identified by the officer, or no exemption can be recognized.³²

Employing language subsequently incorporated in cases such as *York Rite*, as well as in the 2007 amendment to OCGA § 48-5-41,³³ the Court proclaimed that institutions are exempt, “provided they are dedicated to charity and *used exclusively as*

³¹ *Id.*

³² *Id.* at 164-165 (emphasis in original).

³³ In 2007, the General Assembly amended OCGA § 48-5-41 (d) (2), including the requirement that, “[w]ith respect to paragraph (4) of subsection (a) of this Code section,” the “building is used by such charitable institution exclusively for the charitable purposes of such charitable institution.” Ga. L. 2007, p. 341, § 1. See *Nuci Phillips Mem. Foundation*, *supra* at 387 (2) (noting that OCGA § 48-5-41 (d) (2), as amended in 2007, encompasses, inter alia, the third prong of *York Rite*).

institutions of purely public charity.”³⁴ The Court instructed, “[H]omes of various kinds, soup-houses, etc., permanently established and open, without charge, to the whole public, or to the whole of the classes for whose relief they are intended or adapted, are institutions of the exempt order.”³⁵

Accordingly, almost a century later, in *Thomas v. Northeast Ga. Council*,³⁶ the Supreme Court of Georgia expounded:

[T]he test for determining whether property is exempt from taxation under [OCGA § 48-5-41 (a) (4)] . . . is “whether the property itself is dedicated to charity and used exclusively as an institution of purely public charity.”^[37] This usage test is succinctly stated in *Mu Beta Chapter Chi Omega House Corp. v. Davison*,^[38] as follows: “If exempt, it is only because it is property used exclusively as an institution of purely public charity.” Property owned by a charitable institution is not

³⁴ *Trustees of the Academy of Richmond County*, supra at 161 (emphasis supplied).

³⁵ Id.

³⁶ Supra.

³⁷ *Tharpe*, supra at 813 (punctuation omitted), citing *Trustees of the Academy of Richmond County*, supra.

³⁸ Supra.

exempt from taxation unless it is used for the purposes *for which that institution was established*.³⁹

H.O.P.E. was established to provide residential, recovery, employment, self-development and other supportive services to certain individuals and families. There is no evidence that H.O.P.E. provided upon its Property any such housing or services during the construction and renovation phases of 2008 and 2009. Rather, it is undisputed that, while the construction and renovation were underway, the Property was not yet established and open to the classes for whose relief H.O.P.E. intended. Given the foregoing, the superior court properly rejected H.O.P.E.'s position that its ongoing construction and renovation upon the Property qualified the Property as an "institution[] of purely public charity."

H.O.P.E. cites evidence that, in procuring grants and other financial contributions, it executed agreements promising that the funds obtained would be used for the purposes of providing housing and other supportive services to persons who would live upon the Property. While those agreements may have shown

³⁹ *Thomas*, supra at 292-293 (citations and punctuation omitted).

H.O.P.E.’s dedication to its charitable pursuits,⁴⁰ the agreements do not supply the requisite “use.” Moreover, it has long been settled that parties may not contractually defeat a government’s right to collect taxes.⁴¹

Nothing in the cases of *City of Atlanta v. Crest Lawn Mem. Park Corp.*,⁴² *Suttles v. Hill Crest Cemetery*,⁴³ or *City of Atlanta v. Clayton County Board of Tax Assessors*,⁴⁴ cited by H.O.P.E., provides for an outcome in its favor. Tax exemptions were allowed in those cases, but under other subsections of OCGA § 48-5-41. *Crest Lawn Mem. Park Corp.* and *Suttles* concerned the statutory tax exemption for “places

⁴⁰ See *Johnson*, supra at 726 (2) (“Whether express or implied, an intention on the part of the owner to dedicate his property to the public use must be shown.”) (citation and punctuation omitted).

⁴¹ See *Real Estate Loan Co. v. Union City*, 177 Ga. 55 (1) (169 SE 301) (1933) (“Aside from such exemptions from taxation as may be provided by law, parties can not by any sort of contract defeat the right of the government to collect the taxes for which property would otherwise be liable.”) (citations omitted).

⁴² 218 Ga. 497 (128 SE2d 722) (1962).

⁴³ 87 Ga. App. 343 (73 SE2d 760) (1952).

⁴⁴ 284 Ga. App. 871 (645 SE2d 42) (2007), disapproved on other grounds as stated in *Gilmer County Board of Tax Assessors v. Spence*, 309 Ga. App. 482, 483 (711 SE2d 51) (2011).

of burial.”⁴⁵ And *Clayton County Board of Tax Assessors* concerned the statutory tax exemption for “public real property which is owned by a political subdivision of this state and which is situated outside the territorial limits of the political subdivision.”⁴⁶

Finally, H.O.P.E. makes a policy argument that disallowing a tax exemption under the circumstances presented by this case would “discourage” development. But as “the Supreme Court [has] noted, ‘[t]here are infinite charities that deserve the plaudits of all mankind, but the [law] restricts tax exemption of institutions of charity. . . .’”⁴⁷ Whether and the extent to which an exemption applies are matters of policy

⁴⁵ See OCGA § 48-5-41 (a) (2) (exempting from ad valorem property taxes “All places of burial”); *Crest Lawn Mem. Park Corp.*, supra at 499-502 (3); *Suttles*, supra at 346-348 (explaining that, regarding the tax exemption for places of burial, “[t]he inquiry is: Has the property been committed to use as a cemetery and is it being held in good faith for that purpose?”).

⁴⁶ See OCGA § 48-5-41 (a) (1) (B); *Clayton County Board of Tax Assessors*, supra at 871-872.

⁴⁷ *Visiting Nurse Health System of Metropolitan Atlanta*, supra at 65-66 (2), quoting *Ga. Osteopathic Hosp. v. Alford*, 217 Ga. 663, 667 (124 SE2d 402) (1962) (further noting that without qualifying legal parameters, “courts would ramble in a wilderness of private charitable actions in seeking an answer to their eligibility to tax exemption” and therefore cautioning that “great admiration for all charitable acts must not cause [courts] to overlook the [law]”).

judgment reserved for the legislature.⁴⁸ Here, nothing in the plain language of the statutory exemption expressly encompasses property merely intended for charitable use or property merely being prepared for its initial charitable use.⁴⁹ And the interpretation of the statutory language proposed by H.O.P.E. exceeds the boundaries drawn by judicial decisions that constrain this court.⁵⁰ Indeed, when previously considering the exemption provided by OCGA § 48-5-41 (a) (4), this court described

⁴⁸ *Perdue v. Baker*, 277 Ga. 1, 14 (6) (586 SE2d 606) (2003) (“The core legislative function is the establishment of public policy through the enactment of laws.”) (footnote omitted); *Commonwealth Investment Co. v. Frye*, 219 Ga. 498, 499 (134 SE2d 39) (1963) (holding that “the legislature, and not the courts, is empowered by the Constitution to decide public policy, and to implement that policy by enacting laws; and the courts are bound to follow such laws if constitutional”); see *Ga. Osteopathic Hosp.*, *supra*; *Visiting Nurse Health System of Metropolitan Atlanta*, *supra*.

⁴⁹ OCGA § 48-5-41 (a) (4). See generally OCGA § 48-5-41 (d) (1), which provides that, except under circumstances not at issue here, “this Code section . . . shall not apply to real estate or buildings which are not used for the *operation* of . . . charitable institutions.” (Emphasis supplied.) Also see generally *Nuci Phillips Mem. Foundation*, *supra* at 385 (1) (ascertaining that OCGA § 48-5-41 (d) (1) counters attempts for a “greatly expanded tax exemption” that “would be vulnerable to abuse by commercial developers wishing to evade property tax”).

⁵⁰ See *York Rite*, *supra*; *Thomas*, *supra*; *Mu Beta Chapter Chi Omega House Corp.*, *supra*; *Trustees of the Academy of Richmond County*, *supra*. Cf. *Nuci Phillips Mem. Foundation*, *supra* at 383 (1) (determining that the General Assembly’s 2007 amendment to OCGA § 48-5-41 (d) (2) was intended to broaden the ability of charitable institutions to use their property to raise income, where specified parameters were met); *Baptist Village*, *supra*.

“it [as] a *narrow* exception.”⁵¹ Given the statutory language, binding precedents interpreting that language, and governing principles applicable when discerning entitlement to tax exemptions, this court (as was the superior court) is without authority to effectively expand upon the reaches of OCGA § 48-5-41 (a) (4), as urged by H.O.P.E.

As the Supreme Court of Georgia has recently reiterated in *Nuci Phillips Mem. Foundation v. Athens-Clarke County Board of Tax Assessors*:⁵² “an exemption is still unavailable in those situations where a public charity owns property, but does not use the property in its charitable purposes.”⁵³ Given the facts and circumstances of this case,⁵⁴ the superior court correctly concluded that H.O.P.E.’s cited “use” of the Property during 2008 and 2009 did not bring the Property within the ambit of OCGA § 48-5-41 (a) (4), which pertains to “[a]ll institutions of purely public charity.”

Judgment affirmed. Andrews and Boggs, JJ., concur.

⁵¹ *Visiting Nurse Health System of Metropolitan Atlanta*, supra at 65 (2).

⁵² *Supra*.

⁵³ *Id.* at 385 (1) (citation omitted).

⁵⁴ *Id.* (emphasizing that, in determining applicability of a statutory tax exemption, the facts of each case must be viewed as a whole and all of the circumstances surrounding the institution must be considered).

**SECOND DIVISION
ANDREWS, P. J.,
MILLER and BRANCH, JJ.**

**NOTICE: Motions for reconsideration must be
physically received in our clerk's office within ten
days of the date of decision to be deemed timely filed.
<http://www.gaappeals.us/rules/>**

July 16, 2015

In the Court of Appeals of Georgia

**A15A0356. FULTON COUNTY BOARD OF TAX ASSESSORS v.
PIEDMONT PARK CONSERVANCY.**

BRANCH, Judge.

Appellant Fulton County Board of Tax Assessors (“the Board”) denied appellee Piedmont Park Conservancy (“the Conservancy”) a charitable tax exemption as to a building in the Atlanta park owned by the Conservancy but occupied in part by lessees operating two restaurants. The Conservancy appealed to the Fulton County Board of Equalization, which also denied the exemption, and then to the superior court, which granted the Conservancy a tax exemption as to those portions of the building not occupied by the restaurants. On this appeal, the Board asserts that the superior court erred when it granted the Conservancy the proportional tax exemption

because such exemptions are not authorized by law and because the Conservancy has failed to prove that it is entitled to such an exemption. We find no error and affirm.

The relevant facts are not in dispute. The Conservancy, which is recognized by the Internal Revenue Service and the Georgia Secretary of State as a Section 501 (c) (3) charitable corporation, purchased the property at issue, which includes one building, from the American Legion in 1999. In March of that year, the Conservancy applied for a tax exemption for the property on the basis of the Conservancy's status as a "purely public charity"¹ and represented to the Board that a portion of the building would be provided to the City of Atlanta police as a precinct "without charge." The Conservancy also stated that fees arising from activities held at the property, such as evening courses, "would only cover expenses associated with programs" and "[would] not constitute a 'lease' or 'rent.'" On the basis of these representations, the Board granted the Conservancy a full tax exemption as to the building in 1999. The police did not use any portion of the building as a precinct, however, and soon vacated the space given to them.

In 2001, after learning that visitors to the Park sought food services there, the Conservancy leased 18.57% of the building to Willy's Mexicana Grill for ten years

¹ See OCGA § 48-5-41 (a) (4).

in exchange for more than \$50,000 annual rent and a profit-sharing arrangement under which the Conservancy would receive 6% of gross sales in excess of \$1,000,000. In 2002, the Conservancy leased an additional 9.73% of the building to a second restaurant for ten years in exchange for more than \$28,000 annual rent and 6% of gross sales in excess of \$850,000. All of the income received by the Conservancy from the restaurants during the years at issue has been devoted to the Conservancy's charitable purposes, which include the preservation and enhancement of the park and the provision of recreational and educational services to the public; no part of the Conservancy's earnings is distributed to private persons or shareholders. The portion of the building not leased to the restaurants, amounting to 71.7% of its square footage and known as the Piedmont Park Community Center, consists of office space for the Conservancy, an environmental education center, and a room used for Conservancy events and community meetings. The Conservancy also uses the Center for events including summer camp programs and an open-air community market.

In 2005, and in response to an inquiry from the Board, the Conservancy represented that it continued to use the property for charitable purposes. In January 2013, after an appraiser observed the restaurants in operation at the property, the

Board notified the Conservancy that its entire tax exemption as to the property was denied for the tax years 2010, 2011, and 2012, and requested that the Conservancy complete an exemption application concerning its use of the property for the tax years 2010 and 2011. The Conservancy did not complete the application; instead, it appealed to the Board of Equalization, which also denied the exemption. The Conservancy then appealed to the superior court, which granted an exemption as to the 71.7% of the building not leased to the restaurants.

On appeal from this ruling, the Board argues that Georgia law does not authorize a tax exemption for any portion of a property owned by a charitable organization engaged in commercial activities on that same property. The Board also argues that the Conservancy did not present evidence as to the charitable use of the remainder of the property. We disagree with these contentions.

OCGA § 48-5-41 (a) (4) provides an exemption for “all ad valorem property taxes” to “[a]ll institutions of purely public charity.” Under the Georgia Constitution of 1945 and a 1946 amendment to it, charitable institutions were authorized to use a portion of their property to generate income as long as the property’s “primary purpose” remained charitable. See Ga. Const. of 1945, Art. VII, Sec. I, Par. IV; Ga. L. 1946, p. 13, § 1 (a), now codified as OCGA § 48-5-41 (d) (1); *Nuci Phillips Mem.*

Foundation v. Athens-Clarke County Bd. of Tax Assessors, 288 Ga. 380, 389-390 (2) (703 SE2d 648) (2010) (Nahmias, J., concurring specially). As subsections (c) and (d) (1) of the same statute explain:

(c) The property exempted by this Code section . . . *shall not be used for the purpose of producing private or corporate profit and income distributable to shareholders* in corporations owning such property or to other owners of such property, and *any income from such property shall be used exclusively for religious, educational, and charitable purposes* or for either one or more of such purposes and for the purpose of maintaining and operating such religious, educational, and charitable institutions.

(d) (1) *Except as otherwise provided in paragraph (2) of this subsection [quoted below], this Code section . . . shall not apply to real estate or buildings which are rented, leased, or otherwise used for the primary purpose of securing an income thereon and shall not apply to real estate or buildings which are not used for the operation of religious, educational, and charitable institutions.* Donations of property to be exempted shall not be predicated upon an agreement, contract, or other instrument that the donor or donors shall receive or retain any part of the net or gross income of the property.

(Emphasis supplied.) OCGA § 48-5-41 (c), (d). And the Supreme Court of Georgia has long granted tax exemptions to charities even when the commercial activity at those charities' properties have generated income, as long as that income is used

exclusively for religious, educational, or charitable purposes.” In *Elder v. Henrietta Egleston Hosp. for Children*, 205 Ga. 489 (53 SE2d 751) (1949), for example, our Supreme Court upheld an ad valorem exemption for a hospital that charged patients for varying proportions of their medical care, but used all of the income generated for charitable purposes, on the ground that such charges did not destroy the hospital’s status as a “purely public charity,” with “the fact that patients who are able to pay are charged for services rendered” not altering “its character as such.” Id. at 490-491 (citing the 1947 predecessor of OCGA § 48-5-41). Likewise, in *Church of God of the Union Assembly v. City of Dalton*, 216 Ga. 659 (119 SE2d 11) (1961), the Court upheld an ad valorem exemption for a church building containing a restaurant used primarily to feed members of the church, visiting church personnel, and persons in need, but which was also open to paying customers. Because the evidence “demanded a verdict so exempting” the building, including the restaurant, the Court ordered that a verdict be modified so as to grant the building an exemption. Id. at 660, 662 (citing the 1947 and 1953 predecessors to OCGA § 48-5-41).

In *Peachtree on Peachtree Inn v. Camp*, 120 Ga. App. 403 (170 SE2d 709) (1969), this Court held that although a small portion of a building owned by the Georgia Baptist Convention and used by two retail stores “would not be tax exempt”

because “[t]he area where the stores are located is being used to gain rental [income] and not for the primary purpose of operating the [home],” that portion of the same building actually used as a home for the aged was tax-exempt, even though its residents paid rent. *Id.* at 411. Thus, and although prior precedent had recognized that income-producing operations could occur on a property without destroying the charitable status of any part of that property, see *Elder*, 205 Ga. at 490-491; *Church of God of the Union Assembly*, 216 Ga. at 660-662, *Peachtree on Peachtree* ratified a charitable tax exemption as to those portions of a property not used to produce income. 120 Ga. App. at 411 (citing predecessor statute to OCGA § 48-5-41 as well as *Church of God*, *supra*).

In 1991, the Supreme Court of Georgia reaffirmed that OCGA § 48-5-41 authorized ad valorem tax exemptions for property owned by a “purely public charity” under a three-part test: “First, the owner must be an institution devoted entirely to charitable pursuits; second, the charitable pursuits of the owner must be for the benefit of the public; and third, the use of the property must be exclusively devoted to those charitable pursuits.” *York Rite Bodies of Freemasonry of Savannah v. Bd. of Equalization of Chatham County*, 261 Ga. 558 (2) (408 SE2d 699) (1991). In the wake of *York Rite*, this Court continued to hold that proportional exemptions

as to those portions of a property not engaged in income-producing activities were consistent with OCGA § 48-5-41's provision of exemptions to "purely public charities." See, e.g., *Lamad Ministries v. Dougherty Cty. Bd. of Tax Assessors*, 268 Ga. App. 798, 804-806 (4) (602 SE2d 845) (2004) (reversing trial court's denial of exemption as to home for the aged when the court's aggregation of property "deprived that portion of the property used primarily as a place of worship from tax exemption"; tax assessors were "fully capable of separating the tax exempt property from nonexempt property" and assessing each accordingly) (footnote omitted).

In *Nuci Phillips*, decided in 2010, a plurality of the Supreme Court of Georgia summarized the history of OCGA § 48-5-41 through 2006 as follows:

Under the exemption statutes from 1946 to 2006, those institutions that qualified as purely public charities were allowed to use their property to produce income *as long as the primary purpose of the property was not to secure income, the income-producing activity was consistent with its charitable activities, and the income was used exclusively for the institution's charitable purposes*. As long as these three income rules were satisfied, then a charitable organization that raised income would be considered as using its property "exclusively" for its charitable purposes and thus remain a purely public charity.

(Citation omitted; emphasis supplied.) 288 Ga. at 381-382 (1). As the *Nuci Phillips* plurality also noted, subsection (d) (2) was added to OCGA § 48-5-41 in 2006, providing that

real estate or buildings which are owned by a charitable institution that is exempt from taxation under Section 501(c) (3) of the federal Internal Revenue Code and used by such charitable institution for the charitable purposes of such charitable institution may be used for the purpose of securing income so long as such income is used exclusively for the operation of that charitable institution.

Ga. L. 2006, pp. 376, 377, § 1. Only one year later, however, the legislature replaced this version of subsection (d) (2) with one providing that

a building which is owned by a charitable institution that is otherwise qualified as a purely public charity and that is exempt from taxation under Section 501(c)(3) of the federal Internal Revenue Code and which building is used by such charitable institution exclusively for the charitable purposes of such charitable institution, and not more than 15 acres of land on which such building is located, may be used for the purpose of securing income so long as such income is used exclusively for the operation of that charitable institution.

Ga. L. 2007, p. 341, § 1 (emphasis supplied); *Nuci Phillips*, 288 Ga. at 382 (1).

The *Nuci Phillips* special concurrence noted that “[t]he only substantial change made by the 2007 amendment was to limit – to the building owned by the charity and not more than 15 acres on which the building sits – the extent of property that may be used *primarily* to generate income.” 288 Ga. at 394 (4) (Nahmias, J., concurring) (emphasis supplied). “The reason for this limitation is not apparent from the statute, but its effect is to prevent a charity from receiving the tax exemption if it owns a large amount of income-producing land.” *Id.* Notwithstanding these observations, an outright majority of the *Nuci Phillips* Court agreed that with the 2006 and 2007 amendments to the statute, “the General Assembly intended to *broaden* the ability of charitable institutions to use their property to raise income.” 288 Ga. at 383 (1) (plurality); see also *id.* at 392 (3) (Nahmias, J., concurring) (the 2006 amendment to OCGA § 48-5-41 (d) “*expanded* the existing tax exemption” by deleting the “‘primary’ purpose qualifier present in the old subsection (d)’”) (emphasis supplied).

In the face of this legislative and interpretative history, the Board argues that the plain language of subsections (c) and (d) (2) of the statute forbids the Conservancy from using any portion of the property at issue for income-producing activity while maintaining tax-exempt status. This argument runs contrary to at least forty years of Georgia law.

We remain bound by our Supreme Court’s decision in *York Rite* as applied by the plurality in *Nuci Phillips*, to the effect that “three factors must be considered and must coexist” in order for a court to conclude that “property qualifies as an institution of ‘purely public charity’” under OCGA § 48-5-41 (a) (4): “First, the owner must be an institution devoted entirely to charitable pursuits; second, the charitable pursuits of the owner must be for the benefit of the public; and third, the use of the property must be exclusively devoted to those charitable pursuits.” *York Rite*, 261 Ga. at 558 (2). As the *York Rite* Court also noted, “the requirements of OCGA § 48-5-41 (c) and (d) must also be complied with by any institution that qualifies under subsection (a) (4) as an institution of purely public charity in order to entitle that institution to exemption from ad valorem taxation.” *Id.* at 559 n. 3 (3) (a). Specifically, an institution seeking an ad valorem tax exemption as to a property must show that “any income from such property shall be used exclusively for religious, educational, and charitable purposes,” OCGA § 48-5-41 (c); that the property is not “rented, leased, or otherwise used for the primary purpose of securing an income thereon,” *id.* at (d) (1); and that any income earned by that property “is used exclusively for the operation of that charitable institution.” *Id.* at (d) (2).

Here, the Conservancy remains “devoted entirely” to its mission of furthering recreational and educational activities in the Park, and these activities continue to be undertaken “for the benefit of the public,” such that the first two requirements of *York Rite* are satisfied. See *York Rite*, 261 Ga. at 558 (2), citing OCGA § 48-5-41 (a) (4). Further, the Conservancy’s use of income generated at the property is “used exclusively for the operation” of the Conservancy such that *York Rite*’s third requirement is satisfied. *York Rite*, 261 Ga. at 558 (2). Specifically, any income earned by the Conservancy is used in furtherance of its “religious, educational, and charitable purposes,” OCGA § 48-5-41 (c); 71.7% of the building at issue remains “exclusively devoted to” the Conservancy’s charitable purposes, such that the property’s “primary purpose” remains charitable, *id.* at (d) (1); and such income earned by the Conservancy is used “exclusively for the operation of” the Conservancy. *Id.* at (d) (2); see also *York Rite*, 261 Ga. at 558 (2). In the language of the *Nuci Phillips* plurality, the tax-exempt status of the Conservancy building at issue is not abrogated simply because a part of that property is used to produce income because the property has never been used ““for the *primary purpose* of securing an income thereon.”” *Id.* at 385 (emphasis supplied), quoting OCGA § 48-5-41 (d) (1). Rather, and because the statute “permits the securing of income by non-charitable

activities if used exclusively for the operation of the charitable institution,” *Nuci Phillips*, 280 Ga. at 387 (2), the Conservancy is entitled to a proportional tax exemption concerning the building at issue. *Id.*; see also *id.* at 398 (7) (Nahmias, J., concurring) (foundation’s property was “exclusively devoted to those charitable pursuits” when income from the property was “used exclusively for the operation of the charitable institution”) (citations and punctuation omitted). Compare *First Congregational Church v. Fulton County Bd. of Tax Assessors*, 320 Ga. App. 868, 878 (2) (c) (740 SE2d 798) (2013) (physical precedent only) (church was not entitled to exemption as to its parking lot used to produce income approximately 85% of the time); *H.O.P.E. Through Divine Interventions v. Fulton County Bd. of Tax Assessors*, 318 Ga. App. 592, 598-599 (734 SE2d 288) (2012) (charity that did not use any of the subject property for its stated charitable purposes during the two-year period at issue was not entitled to an exemption for that period).

The Board also argues that the Conservancy is not entitled to a proportional exemption under the circumstances of this case because it failed to provide evidence of the charitable use of that portion of the building not occupied by the restaurants and because the restaurants are turning a profit, generating “more income than what is paid for rent.” The first of these contentions is belied by the record, which includes

an unrefuted affidavit stating that the Community Center occupies 71.7% of the building at issue and that the Center is used for purposes consistent with the Conservancy's charitable mission. And the profitability of the tenant restaurants has no bearing on the question whether the Conservancy is entitled to a proportional exemption as to the space *not* occupied by these tenants.

Citing the *Nuci Phillips* special concurrence,² the Conservancy argues that it is entitled to a charitable exemption as to 100% of the building at issue. We have no jurisdiction over this question, however, because the Conservancy did not cross-appeal the trial court's imposition of ad valorem tax on the 28.3% of the building dedicated to income-producing activities. See OCGA § 5-6-38 (a) (a civil appellee

² The *Nuci Phillips* special concurrence suggested that income-generating activities having the "sole purpose of raising funds to be used for [an] organization's charitable services" should not bar that organization from an exemption "even if the property were used for the primary purpose of securing such income." 288 Ga. at 398 (Nahmias, J., concurring specially). By contrast, the plurality continued to consider whether the "primary purpose" of the property was "not to raise income but to provide services for those seeking mental health assistance." 288 Ga. at 386 (2). We also note that the General Assembly has not accepted our Supreme Court's invitation in *Nuci Phillips* to amend OCGA § 48-5-41 (d) (2). See 280 Ga. at 398-399 (8) (plurality's imposition of "primary" purpose restriction on "non-charitable" and "charitable" income-producing activities "will be our effective precedent, governing the outcome of future cases raising this issue"); Ga. L. 2014, Act 613, § 1, eff. Jan. 1, 2015 (amending only subsection (a) (1) (F) as to private property "primarily used for student housing or parking" by the Board of Regents of the University System of Georgia).

may institute a cross appeal “by filing notice thereof within 15 days from service of the notice of appeal by the appellant,” thus presenting “for adjudication on the cross appeal all errors or rulings adversely affecting him”); *Reliance Ins. Co. v. Cobb County*, 235 Ga. App. 685, 686 (510 SE2d 129) (1998) (dismissing appellee’s direct appeal in light of availability of both interlocutory and cross-appeal procedures).

For all these reasons, the trial court did not err when it construed OCGA § 48-5-41 as authorizing a proportional tax exemption for that portion of the building at issue not devoted to producing income for the Conservancy.

Judgment affirmed. Andrews, P. J., and Miller, J., concur.

ATLANTA ARTISTS CENTER, INC. v. FULTON COUNTY BOARD OF ASSESSORS.
COURT OF APPEALS OF GEORGIA
July 19, 2000, Decided

Opinion

The primary question for decision in this case is whether a facility owned and operated by the Atlanta Artists Center, Inc. (AAC) constitutes a building "erected for and used as a college, incorporated academy, or other seminary of learning," thereby entitling it to an ad valorem tax exemption under O.C.G.A. 48-5-41 (a) (6). We conclude that it does not.

The Fulton County Board of Tax Assessors denied AAC's application for a tax exemption. AAC appealed to the Fulton County Board of Equalization. In the appeal, AAC also complained of the valuation of the property and a lack of uniformity in assessment based on assessments against real properties of similar educational institutions.

After the Board of Equalization rendered a decision adverse to it, AAC appealed to the Fulton Superior Court. AAC moved for summary judgment on the issue of its tax-exempt status. The Board of Assessors filed a cross-motion for summary judgment, asserting that the sole issue in this case is the taxability of the subject property. {245 Ga. App. 254} AAC responded to the cross-motion, stating that there are issues of uniformity of taxation and valuation as well as taxability. The superior court found that the property is not tax exempt and awarded complete summary judgment to the Board.

The evidence shows that AAC is a nonprofit, nonstock corporation recognized by the Internal Revenue Service as exempt from federal income taxes. It is supported by membership dues and voluntary contributions. The object of the corporation, as set {537 S.E.2d 702} forth in its charter application, is the advancement of artistic standards for its members and the community, promotion of the general welfare and good fellowship among artists, assistance in the cultural advancement of the community, and other charitable activities. AAC's facility, known as the Atlanta Arts Center, is located on Grandview Avenue in Atlanta. At the center, a library is maintained, art meetings are conducted at which art teachers or instructors make educational presentations, and off-site educational activities are coordinated.

AAC maintains that the center is entitled to a 90 percent tax exemption because it is used 90 percent of the time for "sketch groups," which are offered to members and nonmembers. One of AAC's officers, who is also a professional artist, testified that only persons who have an innate and natural ability to form perceptions and translate the form of animate and inanimate objects to paper or canvas can become artists; that only those who have developed this ability can be taught artistic techniques; and that development of this ability is achieved through sketching, which improves through practice and is self-taught. Aspiring artists learn of AAC sketch groups through word of mouth, art teachers in high schools and colleges, and artists. Fees range from \$ 2 to \$ 5 dollars. Sketching sessions are held throughout the year. There are no teachers or students. There is no grading, curriculum, or degree program. Held:

1. It is the use to which property is put that determines the question of exemption from taxation under O.C.G.A. 48-5-41 (a) (6). 1 We construe this statute by giving the words used in it their ordinary and everyday meaning. 2

The ordinary and everyday meaning of "college" is a school of higher learning that grants a bachelor's degree in liberal arts or science or both and may include a technical or professional school. 3 An "academy" is ordinarily understood as meaning a secondary or college-preparatory school. 4 A "seminary" is ordinarily thought of simply {245 Ga. App. 255} as a school, especially a theological school for the training of members of the clergy. 5 According to ordinary understanding, a school is an institution in which teachers instruct students. 6

Consistent with these meanings, J.A.T.T. Title 7 held that a four-year post-high school trade school qualified for a property tax exemption. Camp 8 held that a building owned by a society of physicians and used for the continuing education of members and for the meetings of various civic organizations and medical professional groups did not qualify for an exemption. American Institute of Indus. Engineers v. Chilivis 9 held that the national headquarters for an organization composed of industrial engineers and dedicated to the purpose of advancing engineering knowledge was not tax exempt.

The latter two cases show that use of a building for some educational purpose does not necessarily qualify it for a tax exemption. At a minimum, the building must be a place where teachers instruct students. A building in which aspiring artists develop their abilities by practicing their craft does not qualify. The superior court did not err in granting summary judgment to the Board on the issue of taxability.

2. The court did, however, err in awarding full summary judgment to the Board in view of the unresolved issues relating to property valuation and uniformity of assessment.

Johnson, C. J., and Smith, P. J., concur.

J.A.T.T. TITLE HOLDING CORPORATION v. ROBERTS et al.
Supreme Court of Georgia
September 23, 1988, Decided

Opinion

We granted certiorari to determine whether the property owned by a non-profit corporation comes within the terms of the exemption set forth in O.C.G.A. 48-5-41 (a) (6) for buildings erected for and used as a "seminary of learning." *Roberts v. J.A.T.T. Title Holding Corp.*, 185 Ga. App. 892 (366 S.E.2d 297) (1988).

The Mechanical Trades Institute is located on the property in question, and provides an apprenticeship program in the plumbing and steamfitting-pipefitting industry for persons with high school educations. The program consists of four years of educational training, including more than 800 hours of classroom instruction and almost 7,000 hours of practical training.

1. O.C.G.A. 48-5-41 (a) (6) provides that "all buildings erected for and used as a college, incorporated academy, or other seminary of learning" are exempt from ad valorem property taxes, provided that they are open to the general public, and that they are "not . . . used for the purpose of producing private or corporate profit and income . . . and any income from such property shall be used exclusively for . . . educational . . . institutions." See O.C.G.A. 48-5-41 (b) , (c), (d). This provision is consistent with the constitutional authorization.¹

2. The term "seminary of learning" long has been construed to denote educational institutions in general.² The term appeared in Georgia law as early as the 1700's, as a general reference to educational institutions, as here delineated:

(a) In 1783, the General Assembly authorized the commissioners of Augusta to lay out lots and resell them for the purpose of erecting an "academy or seminary of learning." "And, whereas, a seminary of learning {371 S.E.2d 863} is greatly necessary for the instruction of our youth, and ought to be one of the first objects of attention, after the promotion of religion. . . ." Sec. 4, Act of July 31, 1783. *Marbury and Crawford*, p. 132.

(b) In 1784 the General Assembly enacted legislation for the endowment of a state university, which was to be a "College or seminary of learning." *Cobb's Digest*, p. 1082.

(c) The Constitution of Georgia of 1798 contained this provision: "The arts and sciences shall be promoted in one or more seminaries of learning. . . ." Art. 4, Sec. 13. *Cobb's Digest*, p. 1125.

3. The term first was applied to tax exemptions in the 1870's, when statewide public education was required in Georgia. The language employed was identical to that of the current statute and constitution.³

4. The resolution of the tax exempt status of "buildings erected for and used as a college, incorporated academy, or other seminary of learning" has been determined by the use made of the property, and not by any specific definition of terms. *Trustees of Richmond Academy v. Bohler*, 80 Ga. 159, 163-4 (7 S.E. 633) (1887).⁴ Thus while an {258 Ga. 521} educational institution may be exempt, some of its grounds and buildings may be taxed if those grounds or buildings generate a private profit. *Mundy v. Van Hoose*, 104 Ga. 292 (30 S.E. 783) (1898); *Rabun Gap-Nacoochee School v. Thomas*, 228 Ga. 231 (184 S.E.2d 824) (1971).⁵

5. The term "seminary of learning," as applied in its general meaning, does not exclude an institution such as the Mechanical Trades Institute. We decline to import into the meaning of the term any of the restrictions⁶ suggested by the taxing authority. To do so would be unduly to enlarge upon constitutional and statutory pronouncements, and, worse, to convert the tax commissioner into the supervisor of curricula for every educational institution within the taxing jurisdiction.

6. The record does not show that the use made of the property by the Institute failed to comply with the constitutional and statutory requirements for exemption from taxation. The trial court's order finding entitlement to the exemption was correct.

Judgment reversed.

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288 Ga. 241

S10A0905. MASTERS v. DEKALB COUNTY BOARD OF TAX
ASSESSORS.

MELTON, Justice.

In 1978, Sandra H. Masters and her husband purchased a home in DeKalb County, and they lived there with their children until they separated in 1992. At that time, Masters' husband moved out of the house, and Masters remained. The parties have lived separately since 1992, but they have never divorced. In 1998, Masters' husband deeded his interest in the house to Masters, and she applied for and received a homestead exemption on the property the following year. Meanwhile, by 2001, Masters' husband had acquired another home in Glynn County, and he applied for and received a homestead exemption on that property as well.

In 2008, the DeKalb County Board of Tax Assessors (Board) learned about the Glynn County homestead exemption, and the Board decided to rescind Masters' DeKalb County exemption retroactively. The Board then charged Masters with back taxes for the years 2002 through 2007. In addition, the Board

prohibited Masters from receiving any future homestead exemption on the DeKalb property as long as one existed on the Glynn County property of Masters' husband. Although Masters paid the back taxes assessed against her, she subsequently filed suit against the Board, contending, among other things, that the statute providing for homestead exemptions is unconstitutional based on equal protection grounds. The trial court granted summary judgment in favor of the Board, and Masters appeals. For the reasons set forth below, we reverse.

1. Masters contends that, because Section 48-5-40 (1) (A) (i) of the homestead exemption statute defines an applicant, in part, as a "married individual living with his or her spouse," a married couple who live in separate residences cannot apply for a homestead exemption. As a result, Masters contends that the statute contains an equal protection violation. As the trial court found, however, the homestead statute treats all married persons equally. There is no question that the statute was intended to afford one exemption to all married couples, whether living together or separately. The statute clearly states: "Only one homestead shall be allowed to one immediate family group." OCGA § 48-5-40 (1) (G). A husband and wife qualify as such a group. Furthermore, the statute explicitly indicates that a homestead subject to an exemption may

include a home “[w]here a husband *or* wife occupies a dwelling and the title of the homestead is in the name of the wife.” (Emphasis supplied.) OCGA § 48-5-40 (1) (E). In addition, the statute defines a home “[o]ccupied primarily as a dwelling” to mean that an “applicant or members of his family occupy the property as a home.” OCGA § 48-5-40 (6) (A). Both of these provisions contemplate that a home inhabited by a married person separated from his or her spouse may be subject to a homestead exemption. The partial definition of applicant in OCGA § 48-5-40 (1) (A) (i) does not alter this fact. Contrary to Masters’ arguments, the statute does not prevent a married person living separately from his or her spouse from applying for a homestead exemption, and, as shown by the provisions above, the statutory text presumes that married persons living separately will have the same rights to an exemption as those living together. Therefore, the statute extends one exemption to each married couple, whether living together or separately, and, as a result of this equal treatment of all married couples, Masters’ equal protection argument necessarily fails. See, e.g., Copeland v. State, 268 Ga. 375 (3) (490 SE2d 68) (1997).

2. This does not mean, however, that Masters’ homestead exemption was properly taken away from her. Under the analysis of the Board, Masters’ pre-

existing homestead exemption was automatically nullified by her husband's later request and approval for a homestead exemption on a different house in a different county. This does not automatically follow from a finding that any married couple is entitled to only one homestead exemption, especially under facts like those currently before us. To the contrary, the facts here show that the homestead exemption on the home in which Masters resided had been in place for at least four years before her husband filed for a second homestead exemption on his home. In addition, there was no mutual intent between the parties to transfer the homestead exemption to another county; instead, Masters' husband intended to create a new, additional exemption. Under these circumstances, there is no legal authority to allow Masters' husband, years later, to nullify the pre-existing exemption. In other words, at the time that Masters' husband applied for a homestead exemption, there was already a valid exemption in place. As a result, the exemption request of Masters' husband should not have been honored, and Masters' valid, pre-existing homestead exemption should not have been rescinded by the Board. Therefore, the trial court's ruling in this case must be reversed.

Judgment reversed. All the Justices concur, except Benham, J., who

dissents.

BENHAM, Justice, dissenting.

I respectfully dissent because I disagree with Division 2 of the opinion which reverses the trial court's grant of summary judgment in favor of appellee. In Division 2, the majority creates a rule neither contemplated by the homestead statute nor called for by the issues raised on appeal.¹ Instead of simply determining the issues raised, the majority has decided to reverse the trial court based on what Glynn County "should have" done with regard to its administration of homestead exemptions. Specifically, the majority concludes that DeKalb County's act of rescinding the homestead exemption on the DeKalb County property in which appellant resides was erroneous because Glynn County should not have "honored" husband's homestead application based on the fact appellant's residence had the exemption during the four years prior to husband's application. In effect, the majority has created an equitable rule awarding the right of the homestead exemption to the property of the estranged spouse who first obtained such an exemption.

One problem with this result is the fact that neither Glynn County nor Mr. Masters are parties to this lawsuit. Indeed, the trial court did not make any determinations regarding their actions, but only determined that the homestead statute was constitutional and that the Masters were a "family group" such that

¹Appellant has only challenged the constitutionality of the homestead statute and the definition of the term "family group" therein.

they were only entitled to one homestead exemption. The majority's reversal does nothing to rectify the underlying problem at hand because, when appellee reinstates the homestead exemption on appellant's residence, as the majority opinion seemingly obliges it to do, the Masters will again have two homestead exemptions which the majority agrees in its Division 1 is not permitted by the homestead statute.

The majority is overreaching in its effort to resolve the matter as a response to Mr. Masters' implied bad behavior of causing the "nullification"² of the exemption on appellant's DeKalb County residence. The majority overlooks the fact that, because the Masters are married, the homestead exemption on the Glynn County property, which presumably is marital property, is as much appellant's homestead exemption as it is her husband's. The alleged estrangement³ that causes the Masters to be unable or unwilling to decide for themselves which of their properties they will apply their one homestead exemption does not justify denying DeKalb County the ability to administer the homestead exemption in compliance with the homestead statute.⁴ Nor do the vagaries of the couple's purported estrangement justify this Court making

²Although Mr. Masters is not a party to this case, the majority takes issue with his being able to "nullify the pre-existing exemption" without authority.

³Given the fact that the appellant is employed by her husband in his private tax business and that her husband is a certified public accountant, I find it difficult to believe that the couple is so completely estranged that they cannot make basic tax-related decisions.

⁴The majority does not explain how or why DeKalb County would have authority over Glynn County's administration of the homestead exemption, or vice versa.

equitable rulings beyond the scope of the issues raised on appeal. Since DeKalb County became aware that the Masters had two homestead exemptions and the law does not allow such, it was entitled to rescind the homestead exemption on the DeKalb County property. Accordingly, I would affirm the trial court's grant of summary judgment to appellee.

Decided November 22, 2010.

OCGA § 48-5-40; constitutional question. DeKalb Superior Court.

Before Judge Hunter.

Richard J. Dreger, Kenneth P. Robin, for appellant.

Duane D. Pritchett, Stephen E. Whitted, for appellee.

FULTON COUNTY BOARD OF TAX ASSESSORS et al. v. MARANI et al. (two cases).

A09A0915, A09A0916

COURT OF APPEALS OF GEORGIA

August 6, 2009

Counsel: Robert D. Ware, Cheryl M. Ringer, Vincent D. Hyman, Carmen R. Alexander,
for appellants.
Proctor Hutchins, Robert J. Proctor, Bradley A. Hutchins, Christopher M.
Porterfield, for appellees.

OPINION: Judge Phipps

Fulton County property owners Mark and Judith Marani filed a class action against Fulton County, the Fulton County Board of Tax Assessors ("BTA"), various BTA members, and the Fulton County Tax Commissioner (collectively, "the County"), alleging that the County had improperly assessed property taxes without affording taxpayers the required notice and opportunity to appeal. The Maranis sought, among other things, to enjoin the County from collecting these taxes from them and other similarly situated property owners. Following an evidentiary hearing, the trial court certified the class and entered a final judgment granting equitable relief to class members. In Case No. A09A0915, the County appeals the trial court's class certification order, and it challenges the final judgment in Case No. A09A0916. 1 For reasons that follow, we affirm.

The underlying facts are not in dispute. In 2004, the General Assembly passed a local {683 S.E.2d 138} act that granted Fulton County property owners an additional homestead exemption beyond the exemptions set forth in the Georgia Code. 2 The amount of the new exemption varied from parcel to parcel, depending on factors such as the property's assessed value, the structures on the parcel, and the Consumer Price Index. The BTA calculated the exemption for property owners such as the Maranis and applied that calculation to property tax bills issued for 2005, 2006, and 2007.

In 2008, however, the County determined that the BTA had miscalculated the homestead exemption for thousands of property owners. As to certain taxpayers, it had undervalued the exemption, resulting in an overpayment of taxes in 2005, 2006, and 2007. Those taxpayers received refunds in 2008. The County also concluded, however, that it had overvalued the exemption for more than 5,000 property owners, resulting in tax underpayments. That group of {299 Ga. App. 581} owners, which included the Maranis, received tax bills in 2008 assessing additional taxes for 2005, 2006, and 2007. The new bills did not address whether taxpayers had a statutory right to appeal the recalculations to the Fulton County Board of Equalization under OCGA 48-5-311. And when taxpayers contacted the County about the bills, they were told that they had no right to appeal.

Asserting that affected taxpayers had not been afforded proper notice and appeal rights, the Maranis brought this class action suit to challenge the new assessments. The trial court certified a class of taxpayers and entered equitable relief for the class. These appeals followed.

Case No. A09A0915

The appeal in Case No. A09A0915 focuses on the trial court's class certification order. Pursuant to that order, the trial court certified as a class "all taxpayers whose property tax assessments and/or homestead exemptions have been changed for tax years 2005, 2006, 2007, and/or 2008 without first having received adequate legal notice of said changes pursuant to O.C.G.A. 48-5-306 and an opportunity to appeal the same pursuant to O.C.G.A. 48-5-311."

A trial court exercises its discretion in granting class certification, and its decision will be upheld absent abuse of that discretion. [3](#) Before certifying a class, however, the trial court must make several determinations. Under OCGA 9-11-23 (a), it must find that: (1) the class is so numerous that joinder of all members is impracticable; (2) questions of law or fact are common to the class; (3) the representative parties' claims or defenses are typical of the class members' claims or defenses; and (4) the representative parties will fairly and adequately protect the interests of class members. [4](#) If the class meets these four requirements - known as numerosity, commonality, typicality, and adequacy - the trial court must then find that the litigation satisfies at least one of the following three grounds outlined in OCGA 9-11-23 (b):

(1) the prosecution of separate actions would create a risk of inconsistent adjudications or would impair other parties' ability to protect their interests; (2) the defendant has acted {299 Ga. App. 582} or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or declaratory relief with respect to the whole class; or (3) questions of law or fact common to members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. [5](#)

1. The trial court determined that the taxpayer class met all four requirements of OCGA 9-11-23 (a) - numerosity, commonality, {683 S.E.2d 139} typicality, and adequacy. On appeal, the County focuses on the commonality requirement, arguing that class members do not share common questions of law and/or fact. Specifically, it contends that because class members are entitled to a unique homestead exemption based on the particular characteristics of their property, common questions do not exist.

The trial court, however, did not address whether the County had properly recalculated the homestead exemptions. It merely considered whether taxpayers had statutory notice and tax appeal rights, a procedural question common to all class members. After finding such rights, the trial court noted that substantive challenges to the calculations would have to be raised through individual taxpayer appeals to the Fulton County Board of Equalization. Simply put, the trial court certified a class solely to consider a common procedural issue - whether the County was required to provide class members with statutory notice of and the right to appeal the exemption recalculations. Accordingly, it did not abuse its discretion in finding commonality. [6](#)

2. The County also argues that the trial court erred in certifying the class because class action litigation was not the best method for resolving this controversy. Although the "superior" method of adjudication is relevant to class certification under OCGA 9-11-23 (b) (3), an appropriate class may pursue class action litigation if it meets any one of the three grounds in OCGA 9-11-23 (b). [7](#) In this case, the trial court determined that class litigation could proceed under OCGA 9-11-23 (b) (1) or (b) (2). It made no finding with respect to OCGA 9-11-23 (b) (3).

{299 Ga. App. 583} The County has not argued or demonstrated that the trial court erred in certifying the class under OCGA 9-11-23 (b) (1) or (b) (2). Its claim regarding OCGA 9-11-23 (b) (3), therefore, presents no basis for reversal. [8](#)

Case No. A09A0916

In this appeal, the County challenges the trial court's entry of final judgment and equitable relief. The trial court ultimately found that the County had improperly denied class members their statutory right to notice and appeal under OCGA 48-5-306 and 48-5-311, violated various revenue statutes, and infringed upon the taxpayers' due process rights. It granted the class equitable relief, requiring the County to: (1) provide taxpayers with proper notice of and the right to appeal changes in the homestead exemptions; (2) stop collecting taxes referenced in bills sent without proper notice; and (3) refund any tax money collected based on bills issued without such notice. The trial court also concluded that the County could issue supplemental tax bills relating to the exemptions if it complied with the statutory notice and appeal requirements.

3. On appeal, the County questions the trial court's underlying conclusion that statutory notice and appeal rights attached to the homestead exemption recalculations. It argues that taxpayers had no right to appeal the recalculations under OCGA 48-5-311, which provides in pertinent part:

Any resident or nonresident taxpayer may appeal from an assessment by the county board of tax assessors to the county board of equalization or to an arbitrator or arbitrators as to matters of taxability, uniformity of assessment, and value, and, for residents, as to denials of homestead exemptions. [9](#)

Asserting that this case involves the correction of a homestead exemption, rather than the denial of an exemption, the County argues that OCGA 48-5-311 does not apply. It also claims that OCGA 48-5-306, which requires the BTA to notify taxpayers {683 S.E.2d 140} of changes to or corrections in taxpayer returns, has no application here. We disagree.

The County's strict interpretation of OCGA 48-5-311 ignores {299 Ga. App. 584} specific language relating to homestead exemptions in OCGA 48-5-49. That Code section authorizes the BTA to determine both a property owner's eligibility for an exemption and the value of the exemption. It then grants property owners "the right of appeal from the decision of the [BTA] to the county board of equalization as provided in Code Section 48-5-311." [10](#)

The record shows that the BTA reviewed homestead exemptions claimed by thousands of Fulton County property owners and concluded that the exemptions had been improperly assessed. For many of those property owners, it determined that the exemptions had been overcalculated, resulting in a tax deficiency. The recalculations involved the value of the exemptions, bringing them within OCGA 48-5-49, which specifically permits an appeal under OCGA 48-5-311. [11](#) Furthermore, a reasonable reading of OCGA 48-5-311 reveals that a taxpayer who is entitled to an appeal must be given the statutory notice required by OCGA 48-5-306. [12](#)

When interpreting a statute, a court must construe the provision "in relation to other statutes of which it is a part, reading all statutes together so as to ascertain the legislative intent and give effect thereto." [13](#) The trial court did so here, properly viewing OCGA 48-5-49, 48-5-306, and 48-5-311 together to provide notice and appeal rights to the class members in this case. Accordingly, we find no error.

4. Finally, the County claims that the trial court should not have granted injunctive or equitable relief because class members had an adequate remedy at law. [14](#)

(a) Asserting that class members did not need access to the appeal procedures in OCGA 48-5-311, the County argues that members could have challenged the recalculations by paying the additional tax and seeking a refund under OCGA 48-5-380. [15](#) In {299 Ga. App. 585} essence, it claims that the class litigation and resulting equitable relief were unnecessary, given the tax refund procedure.

Taxpayers generally have two avenues for challenging an improper tax assessment: (1) the appeal process in OCGA 48-5-311, and (2) the refund procedure in OCGA 48-5-380. [16](#) These distinct remedies, however, serve different purposes. An appeal under OCGA 48-5-311 provides "the most expeditious resolution of a taxpayer's dissatisfaction with an assessment, preferably before taxes are paid." [17](#) In contrast, an OCGA 48-5-380 refund action has been described as a "procedure . . . to protect taxpayers from later-discovered defects in the assessment process which have resulted in taxes being erroneously or illegally assessed and collected." [18](#) Moreover, the refund procedure is available only to correct {683 S.E.2d 141} errors of fact or law that caused erroneous or illegal taxation. [19](#) It cannot be used to address "[a] claim based on mere dissatisfaction with an assessment, or on an assertion that the assessors, although using correct procedures, did not take into account matters which the taxpayer believes should have been considered." [20](#)

Some class members may have been able to challenge the newly assessed taxes through an OCGA 48-5-380 refund action. But this is not a situation where taxpayers ignored the administrative process and filed a lawsuit. [21](#) On the contrary, they sued to secure access to the tax appeal procedure that they were entitled to use. Given the differences between the appeal and refund remedies - as well as the possibility that a refund action might not be available to all class members - the trial court did not err in determining that equitable relief was necessary to protect the class members' right to pursue the legal remedy provided in OCGA 48-5-311.

(b) In a related claim, the County argues that once the trial court determined that class members had a right to appeal under OCGA 48-5-311, the members had an adequate remedy at law and no longer needed equitable relief. Again, however, equitable relief was imposed to protect the taxpayers' appeal rights and make sure that they did, in fact, have access to the remedy in OCGA 48-5-311. {299 Ga. App. 586} The trial court did not err in granting such relief. [22](#)

Judgments affirmed. Smith, P. J., and Bernes, J., concur.

Footnotes

1. *The Fulton County Tax Commissioner did not join in the appeal in Case No. A09A0915, and neither the Commissioner nor Fulton County joined in Case No. A09A0916. For ease of discussion, however, we will continue to refer to the appellants collectively as "the County."*
2. *See, e.g., OCGA 48-5-44 (general homestead exemption); OCGA 48-5-47 (homestead exemption for persons 65 years and older); OCGA 48-5-47.1 (homestead exemption for persons 62 years or older with annual income not exceeding \$ 30,000); OCGA 48-5-48 (exemption for qualified disabled veterans).*
3. *Village Auto Ins. Co. v. Rush*, 286 Ga. App. 688 (649 S.E.2d 862) (2007).
4. *See id.*
5. *EarthLink, Inc. v. Eaves*, 293 Ga. App. 75, 76 (1) (666 S.E.2d 420) (2008) (footnote omitted).
6. *See Village Auto*, *supra* at 690-691 (1) (common issues existed where class action complaint alleged that insurance company engaged in standard practices and tactics towards its customers).
7. *See EarthLink, Inc.*, *supra*.
8. *See id.* at 77 (2) (where trial court properly certifies class under one ground of OCGA 9-11-23 (b), appellate court need not consider whether certification was proper under alternate ground).
9. OCGA 48-5-311 (e) (1) (A).
10. OCGA 48-5-49 (b).
11. *See GMC Group v. Harsco Corp.*, 293 Ga. App. 707, 709 (667 S.E.2d 916) (2008) (absent contrary legislative intent, a specific statute prevails over a general statute when resolving inconsistencies in statutory language).
12. *See OCGA 48-5-311 (e) (2) (A)* ("An appeal shall be effected by mailing to or filing with the county board of tax assessors a notice of appeal within 45 days from the date of mailing the notice pursuant to Code Section 48-5-306. . . .").
13. *Aircraft Spruce & Specialty Co. v. Fayette County Bd. of Tax Assessors*, 294 Ga. App. 241, 244 (669 S.E.2d 417) (2008) (citation and punctuation omitted).
14. *See Glynn County Bd. of Tax Assessors v. Haller*, 273 Ga. 649, 650 (3) (543 S.E.2d 699) (2001) ("[A] superior court should not grant an injunction in a tax case when state law provides an adequate remedy at law.") (footnote omitted).
15. *See OCGA 48-5-380 (a)* ("Each county and municipality may refund to taxpayers any and all taxes . . . which are determined to have been erroneously or illegally assessed and collected from the taxpayers under the laws of this state or under the resolutions or ordinances of any county or municipality or which are determined to have been voluntarily or involuntarily overpaid by the taxpayers.").
16. *See Wilmington Trust Co. v. Glynn County*, 265 Ga. App. 704, 705 (595 S.E.2d 562) (2004).
17. *Gwinnett County Bd. of Tax Assessors v. Gwinnett I Ltd. Partnership*, 265 Ga. 645, 646 (458 S.E.2d 632) (1995).
18. *Id.* (punctuation omitted).
19. *Id.* at 646-647.
20. *Id.* at 647.
21. Compare *Haller*, *supra*.
22. *See Roberts v. Lee*, 289 Ga. App. 714, 717 (3) (658 S.E.2d 258) (2008) (trial court has broad discretion to fashion equitable remedies based on the exigencies of each case and should craft an injunction that is least oppressive to the defendant but protects the plaintiff's rights).

MARCONI AVIONICS, INC. v. DeKALB COUNTY

No. 65504

Court of Appeals of Georgia

165 Ga. App. 628; 302 S.E.2d 384; 1983 Ga. App. LEXIS 1983

February 16, 1983, Decided

DISPOSITION: Judgment reversed.

CASE SUMMARY: Appellant taxpayer sought review of a decision of the DeKalb Superior Court (Georgia), which granted appellee county's motion to dismiss the taxpayer's action for refund of overpayment of property taxes, which it filed pursuant to Ga. Code Ann. § 48-5-380. The trial court granted the motion on the ground that Ga. Code Ann. § 48-5-311(e) provided the exclusive procedure for challenging a property tax assessment on the ground of taxability.

OVERVIEW: The taxpayer overpaid state property taxes and later filed an action seeking a refund. The trial court granted the county's motion to dismiss the action. On appeal, the court reversed. The court held that Ga. Code Ann. § 48-5-380 provided a procedure whereby a taxpayer could claim a refund of taxes that were erroneously assessed or overpaid and provided that if such a claim was denied by the governing authority, the taxpayer could file an action for a refund in the superior court. The court rejected the county's argument that Ga. Code Ann. § 48-5-311(e), which provided that a taxpayer could only raise issues of taxability in the superior court on appeal from a decision of the board of equalization, was the exclusive procedure for challenging an assessment on the ground of taxability. The court found that such a requirement was not stated in Ga. Code Ann. § 48-5-380 and was not consistent with its provisions or purpose, in that it would have virtually eliminated refunds when the mistake of overpayment was discovered only after the taxes were paid. The court found that § 48-5-380 clearly contemplated claims for refund for any reason, including those based on questions of taxability.

OUTCOME: The court reversed the grant of the county's motion to dismiss the taxpayer's petition for a refund of a tax overpayment.

COUNSEL: Mims Wilkinson, Jr., John G. McCullough, Hugh H. Howell, Jr., for appellant.
George Dillard, Gail C. Flake, for appellee.

JUDGES: Birdsong, Judge. Shulman, C. J., and McMurray, P. J., concur.

OPINION BY: BIRDSONG

This is an appeal from the trial court's grant of DeKalb County's motion to dismiss this action for refund of overpayment of property taxes. The trial court granted the motion on the ground that O.C.G.A. § 48-5-311 (e) (Code Ann. § 91A-1449) provides the exclusive procedure for challenging a property tax assessment on the ground of taxability. We reverse.

1. This action was instituted by appellant pursuant to O.C.G.A. § 48-5-380. This enactment, which was originally codified in Code Ann. § 92-3901a et seq. (Ga. L., 1975, p. 774, § 1) and recodified as Code [*629] Ann. § 91A-1601 (Ga. L., 1978, p. 309, § 2), altered the preexisting rule that a payment of taxes, even under protest, was a voluntary payment and could not be recovered. [***2] *Town of Lyerly v. Short*, 234 Ga. 877, 879 (218 SE2d 588). HN1 O.C.G.A. § 48-5-380 (Code Ann. § 91A-1601) clearly sets forth a procedure whereby taxpayers may obtain a refund of "any and all taxes . . . which are determined to have been erroneously or illegally assessed and collected from the taxpayers . . . or which are determined to have been voluntarily or involuntarily overpaid by the taxpayers." Id. (a). The statute provides that the taxpayer must file its claim for refund with the appropriate governing authority within three years of the payment of the tax for which a refund is sought. Id. (b). If the claim is denied by the governing authority, the taxpayer has an additional year from the date of the denial to file "an action for a refund in the superior court of the county in which the claim arises." Id. (c).

The complaint seeks to recover \$ 32,766.18 "by reason of the voluntary overpayment [***385] of property taxes" and alleges compliance with the refund provisions. Aside from certain statements contained in the trial court's order, the record contains no further description of the nature of appellant's claim for refund. Treating the motion to dismiss as a motion on the pleadings, it is [***3] clear that the complaint is not subject to dismissal. It states a cause of action for refund of voluntarily overpaid tax and alleges acts showing compliance with the statutory procedure O.C.G.A. § 48-5-380 (Code Ann. § 91A-1601). Acceptance of appellee's position, which is based on failure to state a claim, and on jurisdictional and statute of limitation grounds, all of which are premised on appellant's failure to comply with O.C.G.A. § 48-5-311 (e) (Code Ann. § 91A-1449), would place a requirement on O.C.G.A. § 48-5-380 (Code Ann. § 91A-1601) clearly not contemplated by the statute. The refund statute does not state that the taxpayer must first have complied with O.C.G.A. § 48-5-311 (e) (Code Ann. § 91A-1449) before it is entitled to a refund of improperly paid taxes. Indeed, the wording of O.C.G.A. § 48-5-380 (a) (Code Ann. § 91A-1601) giving the taxpayer the right to a refund of "any and all taxes . . . which are determined to have been . . . voluntarily or involuntarily overpaid," belies any attempt to place such a severe, artificial, and non-statutory restriction on that right. Appellee's argument, which would prevent recovery of a refund for any taxes paid without exhaustion of appeal [***4] rights pursuant to O.C.G.A. § 48-5-311 (e) (Code Ann. § 91A-1449), would virtually eliminate refunds when the mistake of overpayment is discovered only after the taxes are paid. This would again render most tax payments unrecoverable "voluntary payments," which O.C.G.A. § 48-5-380 (Code Ann. § 91A-1601) was designed to alleviate. *Town of Lyerly*, supra. We hold [*630] that HN2a taxpayer need not comply with the appeal procedure provided in O.C.G.A. § 48-5-311 (e) (Code Ann. § 91A-1449) prior to proceeding under O.C.G.A. § 48-5-380 (Code Ann. § 91A-1601).

2. Appellee argues, however, that this claim questions the taxability of appellant's property, and that questions of taxability may be raised only through O.C.G.A. § 48-5-311 (e) (Code Ann. § 91A-1449). It should be noted that since the pleadings do not raise the issue of taxability, the trial court obviously considered matters outside the record in reaching the conclusion that this action is premised on appellant's discovery, after payment of the tax, that certain property upon which tax was paid was exempt. HN3To the extent that the motion requires consideration of matters outside the record, it will

be treated as a motion for summary judgment and subject to the notice and hearing requirements of O.C.G.A. § 9-11-56 (Code Ann. § 81A-156). *Ellis v. Major Gas &c. Co.*, 154 Ga. App. 34 (267 SE2d 485). The record in this case indicates that these requirements have been satisfied.

Appellee cites *Buoy v. Kiley*, 238 Ga. 47, 48 (230 SE2d 861), and *C. C. Leasing Corp. v. Bd. of Tax Assessors of Hall County*, 143 Ga. App. 520 (239 SE2d 204), in support of its argument that a taxpayer cannot initiate an action in the superior court to raise questions of taxability except on appeal from a decision of the Board of Equalization pursuant to O.C.G.A. § 48-5-311 (e) (Code Ann. § 91A-1449), and that the superior court does not have jurisdiction to consider taxability except on such appeal. However, neither *Buoy* nor *C. C. Leasing* was brought pursuant to the refund statute and neither is apposite to the present case. Acceptance of appellee's position would render the refund statute virtually meaningless, since it would preclude refund actions by taxpayers who later discover that property not properly subject to taxation "has been erroneously or illegally assessed and [taxes] collected from the taxpayers" or that taxes "have been voluntarily or involuntarily overpaid." O.C.G.A. § 48-5-380 (a) (Code Ann. § 91A-1601). This is the very "injustice to taxpayers" remedied by the refund statute. See *Town of Lyerly*, supra, p. 881 (Hill, J., concurring). We interpret the refund statute according to its literal and logical meaning: it applies to all property "erroneously or illegally assessed" and taxes "voluntarily or involuntarily overpaid," for whatever reason.

Appellee's attempt to limit O.C.G.A. § 48-5-380 (Code Ann. § 91A-1601) to situations involving errors of a clerical nature, as where duplicate payments are made, belies the language of subsection (e) of the statute, which provides that the "governing authority" may delegate the "approval or disapproval of claims where the reason for the claim is based on an obvious clerical error." However, in disputed cases where there is no obvious error, the approval or disapproval of claims may not be delegated by the governing authority." O.C.G.A. § 48-5-380 (e) (Code Ann. § 91A-1601). Thus, the statute clearly contemplates claims for refund going beyond mere correction of clerical errors.

"It is a well-established principle that a statute must be viewed so as to make all its parts harmonize and to give a sensible and intelligent effect to each part. It is not presumed that the legislature intended that any part would be without meaning." *Houston v. Lowes of Savannah*, 235 Ga. 201, 203 (219 SE2d 115). The legislature clearly has provided a statutory scheme whereby a taxpayer may obtain a refund for overpaid or erroneously or illegally assessed taxes. There is nothing in that statutory scheme, or in the procedure for appeals from property tax assessments, that precludes consideration of the taxability or non-taxability of the property if that forms the basis of the allegation that the property was erroneously or illegally assessed or that there was an overpayment. Accordingly, the trial court erred in granting appellee's motion to dismiss.

Judgment reversed.

[Marconi Avionics, Inc. v. De Kalb County](#), 165 Ga. App. 628, 628-631 (Ga. Ct. App. 1983)

A Brief History of Property Tax

By Richard Henry Carlson

This paper was initially delivered at the IAAO Conference on Assessment Administration in Boston, Massachusetts, on September 1, 2004.

Taxation has existed in various forms since civilization began. In days of old the source of wealth was land and its proceeds. Before the existence of a monetary system, taxes were paid by a percentage of crops raised. Through most of history, the tax assessor and the tax collector were the same person; therefore, “tax collector” is used interchangeably with “tax assessor” throughout the following paper. Some of the most common forms of taxation over the millennia were poll taxes, tariffs on goods, and property taxes on the value of land, buildings, and other personal property. The purpose of this paper is to present some of the major moments in the history of real and personal property taxation. Let’s take a short walk through time to understand what we have in common with our ancestor assessors, what we can learn from them, and how developed the current property tax system has come to be.

Ancient Times

The earliest known tax records, dating from approximately six thousand years B.C., are in the form of clay tablets found in the ancient city-state of Lagash in modern day Iraq, just northwest of the Tigris and Euphrates Rivers. The king used a tax system called *bala*, which meant “rotation.” The assessors would focus on one area of the city-state, assessing and taxing one area each month, thereby breaking down the arduous task into more manageable components. (This is a lesson that we have used in present day Boston by not attempting to focus on all property in a revaluation year. Instead, we focus great attention on the valuation of retail and industrial property during one year, following up the next year with apartments or other sub-sets of property. This allows a thorough review of the various components of value and ultimately leads to better assessments.) In Lagash taxes were very low, but in a time of crisis or war the tax rate was ten percent of all goods, which were primarily composed of food.

You can have a Lord, you can have a King, but the man to fear is the tax assessor. ~ Anonymous citizen of Lagash

Property taxes were used in Egypt, Babylon, Persia, and China and throughout the ancient world. Most people were poor and lived in hovels. The primary focus of early property taxation was land and its production value.

Ancient Egypt had a thriving culture that began around 5,000 B.C. and lasted thousands of years. Taxes were levied against the value of grain, cattle, oil, beer and land. Approximately one in a hundred people were literate; they were called scribes. Some of the scribes were tax assessors. They kept records about who owned title to lands along with the size of their fields. At various times they collected annual or biannual data by counting cattle and checking the crop yields. The most common taxpayers were the farmers, from whom assessors coerced collection. If a taxpayer did not or was not able to pay, he was brought before courts that immediately dispensed justice. A typical tax rate was ten percent of all production. Tax assessors were highly valued people because of their skills with hieroglyphics and their ability to collect revenue. Often when a king died, the assessor was the only staff person not killed and buried along with the king, so valued was his service. There were tombs and monuments for assessors in Egypt and Syria that rivaled those of some kings. In Egypt, the famous Rosetta Stone was actually a tax document granting exemption to priests.

Be weary of strong drink. It can make you shoot at tax assessors... and miss. ~ Robert Heinlein

Tax assessors were also highly valued officials in ancient Greece. Near the Acropolis there is a monument to the honest tax assessor. The Athenian general Aristides (530 B.C.–468 B.C.) completely reformed the property tax assessment system of Athens while serving as treasurer (i.e., assessor). Known as the most competent and impartial person who ever held the position in Athens, Aristides acted in the interests of the city above all else. His prestige was so great that he became known as Aristides the Just.

The good and fair tax system established by Aristides fell apart during the Peloponnesian War (Sparta vs. Athens,

431 B.C.–404 B.C.). Athenian citizens complained that real and personal property taxes were too high and demanded that the government lower expenditures. The tax assessment system was also perceived as biased and inefficient compared to the earlier standards set by Aristides. The Athenian council decided to reduce property taxes but increased both tariffs and tributes paid by council allies. The tribute from each ally was calculated according to the value of property that came under each state. Taxes assessed in Athens and Attica (Athens's territory) were assessed according to the value and productivity of the land, with the more productive lands receiving higher assessments. As the Peloponnesian War dragged on, the Athenians increased the tribute expected from allies to the breaking point. The tribute was doubled and then doubled again. Ultimately, Athens ran out of money and lost the war.

Alexander the Great (356 B.C. – 323 B.C.) conquered the known world. While he was a military genius, he was also an able administrator. As he moved through Persia, India, Egypt and other parts of his world, he left administrators with explicit instructions on how to implement property taxes. Specifically, he was concerned that there would be revolts in areas that were already conquered. When there were, he was brutal in stopping them. Prior to his conquest, the people were very heavily taxed, and the collected money typically went to the treasury of the king, not to public improvements. Alexander's tack was to substantially cut taxes and use half of the raised funds for public improvements (water systems, roads, ports, etc.) while keeping the remaining half for his treasury. Therefore, the people not only paid fewer taxes while receiving more benefits for their taxes, but they were also far less likely to revolt against his administrators.

From roughly 200 B.C. to 300 A.D., Romans paid property taxes on the value of land, buildings, livestock, trees, vines and other personal property.

When Julius Caesar was preparing for the Gaulic campaign, one of his generals told him there was not enough money to pay for the needed materials. Caesar's response was, "Send out the assessors!" Pothinus once asked Julius Caesar, "Is it possible that Caesar, the conqueror of the world, has time to occupy himself with such a trifle as our taxes?" Caesar's response "My friend, taxes are the chief business of a conqueror of the world."

Only little people pay taxes. ~ Leona Helmsley

Early Roman administrations had tax policies with intended outcomes. Prior to Augustus Caesar, the state sold the rights to collect taxes to private citizens. These people would make significant profits by enforcing Roman tax law. Today we call such people consultants. Augustus put an end to the practice by making Roman assessors public employees. In the early years of the Roman Republic, the tax rate was just one percent of value (land, buildings and all personal property including plants and animals). The tax rate climbed during war and crisis to three percent. However, as Rome expanded public benefits the budget was stretched. Prior to Julius Caesar, over 300,000 people received food from the state. Caesar thought that many of these people should be working instead of receiving public benefits and therefore cut the number of recipients of public welfare in half. The result was that expenditures went down, and with more people plowing fields, the tax revenue increased.

Augustus Caesar was greatly concerned that people were not producing at maximum levels and made other adjustments to the system. One of the more important advances was a reassessment based on flat land rates. He implemented a valuation system based not on what a farmer produced but what a farmer *could* produce. If a farmer worked hard and produced more crops than a less productive

neighbor, he still paid the same in property taxes. Economic incentive and maximum use of the land was at the heart of his taxation policy. The tax rate for wealthy farmers became one percent of value per year.

Other Roman emperors were far less insightful. Tiberius Caesar cut back on public improvements and retained huge portions of tax in his treasury. This resulted in a financial crisis where money was in short supply. Over time there were other emperors who implemented disastrous policies that were largely to blame for the collapse of the empire. Public expenditures increased with more expensive entertainment. Entire months of the year became holidays and public welfare systems became very generous. Over time, fewer people produced goods and the tax rates began to soar. Some emperors wanted to reduce the wealthy Senate class and taxed the value of their estates so high that the property was confiscated or the owners were driven away or into hiding. The emperors also began to reduce the silver content of coins. This practically destroyed the economy. In fact, some property owners tried to give themselves up as slaves until it was declared illegal to do so by Emperor Valens (368 A.D.). Eventually the system so completely broke down that there was no longer a monetary system and trade went back to barter. Of course with no ability to pay an army, the entire system collapsed and the barbarians invaded Rome. It has been noted that many citizens were happy to be free of the excessive tax burdens and could once again produce for themselves.

In Roman times assessors were no longer honored but considered evil and low class people who often required military escort. After being criticized by religious leaders for associating with tax assessors in Jerusalem, Jesus Christ said, "The tax assessors and prostitutes are entering the kingdom of God ahead of you." Christ also said, "Render unto Caesar the things that are Caesar's, and render unto

God the things that are God's." The apostle Matthew was a tax assessor.

Medieval Times

It is the part of the good Shepherd to shear his flock, not slay it. ~ Tiberius Caesar

In the 11th century, Lady Godiva rode naked on a white horse through the streets of Coventry, England to protest the tax assessment on her husband's property. He received an abatement. Although poll taxes were prevalent in England, land taxes had existed for hundreds of years, and although the lords and king owned land, most peasants paid taxes by way of rent each

After abusing his power and raising taxes to a confiscatory level in 1215, King John was forced to sign the Magna Carta, which limited the king's power to raise revenue. Taxes from this point on could be collected only with the common consent of his barons. By the sixteenth century, the king's own lands and estates were taxed. In 1689, the English Bill of Rights endorsed a law that the king could not tax without Parliament's consent.

After 1290, personal property taxes were implemented with exemptions for the poorest (i.e., those whose assessments were less than a shilling). The church was also exempt, as were certain items such as a knight's armor

hearth cruck house (typical peasant housing) received a low assessment compared to some mansions that had twenty or thirty heated rooms. This tax was hated and was eventually phased out.

The power of taxing people and their property is essential to the very existence of government. ~ James Madison

In the legend of Robin Hood, the Sheriff of Nottingham collected taxes. The role originated in the tenth century when each "shire" had a "reeve." The shire or sheriff was the most important local government official,

NAME	VALUATION	TAX		COUNTRIES OF REAL EST. VLE.
		Real Estate	Personal Property	
Adams Richard	1000	1.00	1.00	11 80
Appleton William	1000	1.00	1.00	11 80
Appleton Charles	1000	1.00	1.00	11 80
Atkins John	1000	1.00	1.00	11 80
Atkins William	1000	1.00	1.00	11 80
Atkins Joseph	1000	1.00	1.00	11 80
Atkins Samuel	1000	1.00	1.00	11 80
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Atkins William	1000	1.00	1.00	11 80
Atkins Joseph	1000	1.00	1.00	11 80
Atkins Samuel	1000	1.00	1.00	11 80
Atkins Thomas	1000	1.00	1	

Boston's towns went directly to the church. This practice lasted for over one hundred years.

So who exactly was the assessor at this time? In Boston up until 1733, the sheriff was the ex-officio tax assessor and collector. Property taxes paid for the expenses of the community—a sharp contrast to the English stamp act and tea tax that were designed to pay for the cost of security in the New World.

The Boston Town Records of 1676 show the name of each taxpayer, the number of acres of land, the value of houses, the number of cows, swine and sheep, the value of mills and the assessment of personal estate. The assessors kept maps that were numbered. Each number had corresponding narratives listing assets, value and tax. Detailed and proportionate maps showed the metes and bounds of property. Assessors used maps of various scale. By 1822, Boston assessing records broke down real and personal property value along with the calculated taxes for each taxpayer.

In Boston, the expenses of local government were low. There were watchmen at night, a multi-tasking sheriff, expenses for common defense, public infrastructure and education. In fact, Boston had the first public school, Boston Latin, established in 1635. The town council met every year at a public hearing and discussed taxes and expenses. Citizens' particular situations were also discussed. The grievances of people who were held responsible for municipal expenses beyond the norm were considered.

The art of taxation consists in so plucking the goose as to get the most feathers with the least hissing. ~ Jean Baptiste Colbert

An examination of a two hundred year old record of a town council meeting in Boston shows that each property assessment and bill laid out before the council required calling upon certain individuals who may have been sick, aged or in poverty.

When determining the tax bill for a widow with twelve children, for example, the council voted to not only exempt her from property taxes but grant her a certain number of shillings quarterly out of the general tax fund. Conversely, a Mr. Phillips, who ran over three light posts while riding drunk down Tremont St. on a horse and wagon, was called before the council and told he would not only be required to pay his property tax bill but also the cost of repairs.

There was a general property tax assessing the value of land, buildings, animals and all personal property. The assessors had accurate records as to ownership, number and types of animals and all personal property including intangible assets. At an early town meeting, voters directed the town council to publish and distribute a complete list of all taxpayers together with the amount and base of their taxes. For years there had been rumblings of inequitable assessments, abatement irregularities, and residency fraud (i.e., moving assets to another town when the assessors were coming).

Note in the table that the tax rate is lower today, but the assessments are probably closer to market value. It has been common throughout history that property is underassessed compared to market value. In the *Memorial History of Boston* it is stated that property is worth approximately five times its assessed value. The theme of underassessment has repeated itself throughout the history of assessing property values.

As for the rest of the northern colonies, similar systems were in place, but the Southern colonies had already established that property taxes were not in the interest of the wealthy classes who owned large estates and significant personal property. The south opted for a greater focus on poll taxes.

Early United States

During the Revolution, the colonies agreed to raise taxes (mostly through property, except in the south where

the tax system was more dependent on poll taxes) by state quotas. This system did not work well; in fact, states did not meet their quotas. As a result the Continental Congress spent far more cash than it had; the money was borrowed and not paid off until 1834.

But in this world nothing is certain but death and taxes. ~ Benjamin Franklin

During the debate for the U.S. constitution, delegates grappled with the revenue issue. Advocates pushed for a national property tax, but because of the interest of the large estates of the southerners, no agreement could be reached. The tax clause in the constitution (the same clause that apportions representatives) states that all direct taxes (as opposed to indirect taxes like tariffs) should be apportioned among the states according to population. Ultimately, the primary sources of federal government revenue for the Civil War were tariffs and sales of public land.

There were attempts to implement national taxes with quotas apportioned among the states by population. There were two primary camps after the revolution: the Alexander Hamilton camp that thought there should be a larger central government with greater revenue raising capacity and the Jefferson camp that thought revenue should be raised locally because it more suits a democracy. The first camp also argued that the country should push for industrial development, while the latter pushed for a more agrarian society to foster independence and democracy. Hamilton was the first Secretary of the Treasury of the United States. He was a financial genius for the country, helping create the foundation of the capitalist system that we have here today; however, the issue of taxation turned into a disaster for him and his party.

The Washington and Adams Administrations attempted to implement various national taxes that created rebellions such as the Whiskey

Rebellion and the Fries Rebellion. In 1797, John Adams was greatly concerned that war with France was imminent. He required revenue to pay for a force to resist the French. Congress enacted a national property tax apportioned by population. Two million dollars was to be raised with Pennsylvania's share at \$237,000. The tax became known as the window tax because assessors were to assess real estate according to the number and size of windows and doors of each house in addition to a land tax. The German settlers of Pennsylvania were outraged because it reminded them of the much hated hearth tax in Germany. John Fries became the leader of the tax protesters. Small bands were formed to search for federal assessors who were coming to count and measure windows. These bands intimidated, beat up and ran assessors off to the county line. In one case three assessors were captured and brought to Enoch Roberts Tavern and held for some time. Their papers were destroyed. The sheriff went with thirteen or fourteen men to the Inn to arrest the responsible parties. He captured nineteen men and held them at the Inn when a party of 400 men came to try to rescue prisoners. John Fries negotiated the release of the assessors' kidnappers. The sheriff sent word to President Adams, who rallied troops to arrest the parties involved. John Fries was captured and convicted of various charges including hindering assessors in their duties. He was sentenced to death. There was much consternation regarding his sentence, and the governor was pressured to repeal the sentence and release him. At the last minute Fries was pardoned due to irregularities at the trial. The tax was repealed.

Another early rebellion took place in Massachusetts resulting from excessive property taxes and court rulings on farmers' debts. Daniel Shays, a former Revolutionary War captain, led the armed rebellion. His group took over a courthouse and demanded lower property taxes along with more protection for farmers from foreclosure and "sound money" polices. In

the end, the rebellion was put down by Federal troops. There were death sentences issued, but they were commuted.

Death and taxes may be inevitable, but they shouldn't be related. ~J. C. Watts, Jr.

Throughout the nineteenth century, most state and local governments raised their revenue through the property tax, though the south continued extensive use of poll taxes with some property taxes. Most state constitutions required uniformity of taxation. The administration of taxes came primarily through the sheriff's office where the sheriff continued to be law enforcer, tax assessor and collector. One finds that the more rural and further west you went in the United States, the more recent the separation of law enforcement and financial responsibilities. Most of the western and rural states did not separate the role of sheriff from that of financial officer until the late 1800's.

Wyatt Earp moved to Tombstone Arizona in the late 1870's. He was the most famous lawman in the country, but he retired and went to Arizona to make his fortune. Once there, he became engaged in town politics. His brother Virgil became chief of police to help protect the brothers' financial interests. Wyatt signed on as deputy sheriff to supplement his income as owner of a gambling concession in a saloon. While it is well known that the shoot-out at the OK corral took place in 1881, few people know that Wyatt ran for the office of sheriff. In Tombstone, as elsewhere in the rural west, the sheriff was both law enforcement officer and tax assessor/collector, as was Wyatt Earp's opponent, incumbent Sheriff Johnny Behan. Compared to Behan, who might be called a cowboy Democrat by modern standards, the Earp brothers were urbanized Republicans. Due in part to the financial officer's unchecked power in Tombstone, Wyatt Earp was unable to defeat Behan.

Before becoming U.S. President, Abraham Lincoln was a general attorney, whose responsibilities included trying murder cases, preparing estates and wills, and even representing property taxpayers in the Illinois courts. Yes, Lincoln was a actually a property tax attorney: a tax rep. There were three famous cases that he tried:

1. The owner of a ferryboat moved his boat out of its assessing jurisdiction on the lien date. The assessor taxed the boat at a normal assessment and Lincoln appealed the case in court, arguing that the boat was not in the jurisdiction of the assessor on the lien date. He won the case.
2. Another case was a valuation issue for The Illinois Central Railroad. The railroad was under construction and approximately half complete on the lien date. Lincoln contended that the property was assessed as though the work was completed, but that the assessment should have reflected its true value as half constructed. He won this case for the biggest legal fee of his life: \$5,000.
3. He tried another railroad case on an exemption issue and won that case also.

Twentieth Century

By the end of the 1900's, it was widely felt that the tax system in the United States could not equitably tax the complicated economy. There were various reform movements to implement sales and income taxes and reduce reliance on property taxes. Part of this reform effort intended to narrow personal property taxes especially for homeowners and intangible assets. Presidents Cleveland, McKinley, T. Roosevelt, Wilson and others began to push for lower property taxes and the implementation of sales and income taxes. State by state things changed, and by 1913 the sixteenth amendment was passed allowing for direct taxes without apportionment and income taxes.

By the time of the Great Depression, people's incomes began to drop. With so many unemployed, the property tax collection rates dropped. The result was fiscal reform throughout the country. Many states began to implement sales taxes and cut property taxes. This is the period during which many homestead exemptions were created. In 1932 and 1933, sixteen states also implemented property tax limitation laws.

What is the difference between a taxidermist and a tax assessor? A taxidermist takes only your skin. ~ Mark Twain

Two other reasons for such major reform were the institution of prohibition and the booming 1920's economy. Alcohol tax revenues from licenses and taxes (formerly a major source of revenue) declined to nothing for cities, states, and the federal government. This loss combined with added expenses on enforcing the new law. Personal incomes, meanwhile, were rising, and property taxes didn't seem overwhelmingly burdensome.

Income taxes, which had stayed low and affected few people until World War II, nearly doubled as a percentage of one's income from 11.6% in 1929 to 21.1% in 1932. On the local level, property taxes doubled from 5.4% of people's income in 1929 to 11.7% in 1932. The tax delinquency rate rose to over 30%. The rate in some areas, especially rural communities, was much higher.

In 1933, prohibition ended, greatly increasing revenue at all governmental levels. In 1932, the federal government collected no liquor tax revenue. In 1934, \$259 million was collected, and in 1939, \$624 million was collected. The tax rate was 100%. Despite the high tax, prices of alcohol came down significantly.

Hundreds of taxpayer groups formed across the country to address and demand real tax reform. In 1934, the National Association of Assessing Officers was created and eventually become the International Association of Assessing Officers.

Some of the major tax reforms of the first half of the century:

- Narrowly defined personal property taxes on citizens and almost complete elimination of intangible property taxation;
- Creation of various exemptions for sick, aged, poor, farms, homesteads;
- Creation of circuit breakers were to limit the percentage of one's income going to property tax;
- Creation of property tax limitations in a large number of states.

After World War II, the economy grew at significant rates along with people's incomes and total property tax collections. However, property taxes as a percentage of total revenue began to drop. More notably, as a source of state revenue, property taxes were supplanted by sales and income taxes. Even at the local level, property taxes as a percentage of total tax revenue declined as cities began adopting sales and income taxes. In 1927, property taxes accounted for 97.3% of total local tax revenue; today the total is less than 75%.

The wisdom of man never yet contrived a system of taxation that would operate with perfect equality. ~ Andrew Jackson

During the 1970's, states that had not implemented property tax limits came under increasing pressure from referendum votes and court cases. On June 7, 1978, Proposition 13 passed in California, limiting the assessment to current value plus 2% per year. When the property sold or was newly constructed, the assessment process began again with the new sale price.

Massachusetts after years of taxpayers' complaints and failed attempts to lower property taxes:

- implemented state sales tax and distributed revenue to cities and towns in 1967;
- implemented a state lottery to distribute revenue to relieve property tax pressure in 1971;

- increased state income and sales taxes for revenue sharing in 1975.

Property taxes still did not decline and during the same time period, Massachusetts courts made the following decisions:

- Springfield mandated 100% valuation in 1961.
- Sudbury mandated the predecessor of the Department of Revenue to enforce 100% standard in 1974.
- The classification amendment enabled cities and towns to tax commercial, industrial and personal property at a higher rate than residential property to avoid a massive tax shift.
- The Tregor decision cost Boston tens of millions of dollars in abatements when it lost a disproportionate assessing case.

Finally on November 4, 1978, Proposition 2½ passed, severely limiting the amount and growth of property taxes.

The past thirty years have led to advances in assessing practices through the use of statistics, cadastral maps, advances in technology and various refinements of old ideas.

Conclusion

Gross inequalities may not be ignored for the sake of ease of tax collection. ~ Owen J. Roberts

Since the beginning of civilization property taxes have been a major source of revenue for most governments. Oliver Wendell Holmes said "Taxes are what we pay for a civilized society." There have been good taxation policies created by admirable assessors like Aristides the Just and disastrous ones invented by corrupt leaders such as the latter Roman emperors. While modern assessors are mandated to develop more fair and accurate assessments than most of our predecessors, the pressure to have a fair tax system has always existed. It is not enough to have an equitable tax system; the taxpayers need to under-

stand that they are paying their fair share. The tools at our disposal, combined with advances in methodology and the lessons of the past have put us in a more favorable position to make intelligent decisions. Our everyday decisions have significant consequences on residential and commercial taxpayers. We need to have a balanced view that considers our obligations to both the taxpayers and their jurisdictions. People make the difference in making the system better or worse. Those people are us. It is up to us to think, work hard, be prospective, anticipate problems, and come up with creative solutions to those problems. The best means to develop an understanding of improvements in assessing is to pursue education. Take classes through the IAAO and other appraisal and assessing groups. Learn from each other when opportunities such as conferences present themselves. Most importantly, perhaps, learn and prioritize the responsibilities within your own jobs. You may come up with answers to complicated issues if you try. Strive to become the modern day Aristides. ■

No government can exist without taxation. This money must necessarily be levied on the people; and the grand art consists of levying so as not to oppress. ~ Frederick the Great

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Richard Henry Carlson has been the Director of Valuation for the City of Boston Assessing Department for eleven years, helping to develop the most accurate real estate assessments in the city's history as measured by descriptive statistics and the lowest number of taxpayer complaints in twenty years. Richard has formulated multiple linear regression equations for valuation of residential properties and has implemented new valuation techniques including the use of geographic information systems. He has worked to resolve thousands of appeals at the Massachusetts Appellate Tax Board and has been actively involved in the development and implementation of tax policy as well as the valuation of all commercial, industrial and personal property assessments in Boston. A member of both IAAO and MAAO, Richard has a Bachelor of Arts Degree from the University of Massachusetts at Boston with majors in Political Science and Economics.

A Man of Many Hats: Richard Henry Carlson

One of the highlights of this year's Annual IAAO Conference on Assessment Administration was Richard Henry Carlson's animated presentation on the History of Property Tax. Richard recalls the event and describes how he came to be an assessor of so many hats.

The IAAO Conference in Boston last year provided me with the unique opportunity to present a history of property taxes to fellow professionals.

Having long been a student of Ancient, European, and American History, I have conducted extensive research on property taxes in Boston, and have sifted through old tax records from the 17th through the 20th centuries. In the process, I've become familiar with the proceedings of colonial town meetings and have assembled tax rates, values and levies from 1691, 1791, 1891, analyzing them and comparing them to those of 1991.

Using my knowledge of history and my eighteen years of experience in Boston's Assessing Department to compliment my research, I detailed the impact of property taxes over the course of history, from the system of high property taxation under the later Roman emperors through the failed attempts at implementing a national property tax after our Revolutionary War. Not only did I stress how much has changed since then, but I illustrated how many similar policy issues have populated

sheriff, given that he was also a tax assessor. As my chronological presentation continued, I changed hats, wearing a Roman emperor's laurel, then a proud pilgrim's hat followed by a colonial tricorne hat and a 1930s fedora. Hopefully, the costume changes not only informed but entertained in a pointed fashion. I thoroughly enjoyed presenting the paper and

was most grateful for the keen attentiveness of my fellow assessors.

A very special thanks to Commissioner Rakow and the IAAO Education Committee for allowing me to share my passion and knowledge of the history of property taxes. I hope my presentation enlightened all to the historical record as well as the value of

our assessing tasks and profession. Indeed our work is of great value.

the historical landscape for thousands of years, considering both macro and micro policy issues—those of the state and nation and those of the average taxpayer.

With a flair for the dramatic, I discoursed and dressed as a 19th century



Photos: courtesy of Richard Henry Carlson.

Above: Richard and some of his many hats: a Roman laurel, a 16th century Pilgrim hat, an 18th century tricorne hat, and a 19th century sheriff hat.

Left and Right: Some of the 17th Century assessors' maps Richard studied in preparing his presentation.