

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

ALBERT E. LOVE, GREGORY L. FANN SR.,)
ANTHONY KRISTIAN VATALARO,)
CATHERINE RACHEL FLOOD,)
PETE ZYSKOWSKI, AND LYNN ZYSKOWSKI)

Petitioners,)

v.)

CIVIL ACTION FILE NO.

FULTON COUNTY BOARD OF TAX)
ASSESSORS; SALMA AHMED, in her individual)
and official capacity as a member of the Fulton)
County Board of Tax Assessors; MICHAEL)
FITZGERALD, in his individual and official)
capacity as a member of the Fulton County Board)
of Tax Assessors; BRANDI HUNTER, in her)
individual and official capacity as a member of)
The Fulton County Board of Tax Assessors; ED)
LONDON, in his individual and official capacity)
as a member of the Fulton County Board of Tax)
Assessors; ROYCE MORRIS, in his individual)
and official capacity as a member of the Fulton)
County Board of Tax Assessors; and DWIGHT)
ROBINSON, Chief Appraiser, in his individual)
and official capacity as Chief Appraiser of the)
Fulton County Board of Tax Assessors)

2017CV296655

Respondents.)

**PETITION FOR WRIT OF MANDAMUS
AND FOR DECLARATORY JUDGMENT**

COMES NOW Petitioners, above named, and file this Petition pursuant to O.C.G.A. §9-6-20 et seq. for a Writ of Mandamus, to enforce statutory obligations and official duties imposed upon the Respondents pursuant to GA. CONST. of 1983, Art. VII, Sec. I, Par. III(a); O.C.G.A. § 48-5-3; 48-5-299; 48-5-264; and, 48-5-306(a). This is also a Petition for a Declaratory Judgment to have the Court to declare the interests of the Atlanta Falcons Stadium Company,

LLC; in the Mercedes-Benz stadium, to be a taxable leasehold interest or estate for years, and therefore subject to assessment and taxation by Fulton County ad valorem taxing authorities.

Petitioners show the following:

The Parties

1.

The Petitioners are all citizens of the State of Georgia, and Fulton County, who are also ad valorem taxpayers, as owners of real property in Fulton County.

2.

ALBERT E. LOVE is a resident and real property owner in Fulton County, Georgia. He is a taxpayer in Fulton County, Georgia

3.

GREGORY L. FANN, SR. is a resident and real property owner in Fulton County, Georgia. He is a taxpayer in Fulton County, Georgia.

4.

ANTHONY KRISTIAN VATALARO and CATHERINE RACHEL FLOOD are husband and wife who are residents of the City of Atlanta and Fulton County, Georgia. They are also real property owners in the City of Atlanta and Fulton County, Georgia. Anthony Kristian Vatalaro and Catherine Rachel Flood are taxpayers in the City of Atlanta and Fulton County, Georgia.

5.

PETE ZYSKOWSKI and LYNN ZYSKOWSKI are husband and wife who are residents of the City of Atlanta and Fulton County, Georgia. They are also real property owners in the City of Atlanta and Fulton County, Georgia. Pete Zyskowski and Lynn Zyskowski are

taxpayers in the City of Atlanta, and Fulton County, Georgia.

6.

Petitioners, who are all individual ad valorem real property taxpayers in Fulton County, bring this action as representatives of all similarly situated taxpayers in Fulton County, even though this action is not styled as a class action at this time. Petitioners, reserve the right to amend the styling of this claim to assert themselves as named individual class action representatives.

7.

Respondent, FULTON COUNTY BOARD OF TAX ASSESSORS, (hereinafter referred to as the "FCBTA") is a local board of tax assessors statutorily created pursuant to O.C.G.A. § 48-5-290.

8.

Respondents SALMA AHMED, MICHAEL FITZGERALD, BRANDI HUNTER, ED LONDON, and ROYCE MORRIS, are all individual members of the FCBTA, who are sued in their individual and official capacities as members of the FCBTA. The individual members of the FCBTA are hereafter referred to collectively, along with the board itself, as the FCBTA.

9.

Respondent DWIGHT ROBINSON, is the Chief Appraiser for the FCBTA. In accordance with O.C.G.A. § 48-5-264, he is charged with the duty of: (1) carrying on the operation and functioning of the FCBTA and its appraisal staff; (2) certifying and signing documents prepared by the staff; and, (3) implementing procedures deemed necessary for the efficient operation of the staff. He is being sued in his individual and official capacity.

Jurisdiction and Venue

10.

Jurisdiction is proper in this court pursuant to GA CONST. Art. VI, Sec. IV, Par. I. All Respondents may be served at their principal place of business located at 235 Peachtree Street, Suite 1400, N.E., Atlanta, Ga. 30303.

11.

Venue is proper in this court as all actions seeking equitable relief shall be filed in the county of the residence of one of the defendants against whom substantial relief is prayed. GA CONST. Art. VI, Sec. II, Par. III; and, O.C.G.A. § 9-10-30. The FCBTA, being an agency of Fulton County government, its residency, for venue purposes, is at the seat of county government, which is located in Atlanta, Fulton County, Georgia.

Factual Background

12.

On May 18, 2015, the Atlanta Falcons Stadium Company, LLC, (hereafter referred to as “StadCo”), a private for-profit entity, organized as a Georgia limited liability company entered into what was then, and is now, called a “Stadium License and Management Agreement” (hereinafter referred to as the “SLM Agreement”) which according to its stated terms, was only intended to create, in StadCo, an exclusive right of entry, and use of the Stadium and Stadium Site, as a usufruct, and was not intended to transfer an estate for years, a tenancy, or a leasehold interest, or other real property interest. See Exhibit 1, SLM Agreement at Section 2.2 and Section 10.1.

13.

The other party to the SLM Agreement was, and is, the Georgia World Congress Center Authority (hereinafter referred to as “the GWCCA”), a public corporation which is an instrumentality of the State of Georgia.

14.

The GWCCA formerly owned and operated the Georgia Dome which was the home venue of the National Football League Atlanta Falcons football team.

15.

The SLM Agreement set forth the terms and conditions upon which the parties to the agreement would be governed for the development, construction and operation of a new stadium, now named the Mercedes-Benz stadium.

16.

The Mercedes-Benz stadium and the land it sits upon, i.e. “the Stadium Site”, is owned by the GWCCA.

17.

Because it is an instrumentality of the State of Georgia, real property belonging to the GWCCA is exempt from ad valorem taxes. O.C.G.A. § 48-5-19(a)(1)(A).

18.

The Mercedes-Benz stadium was completed and became operational in August of 2017.

19.

StadCo received its interest in the land and buildings comprising the Stadium and the Stadium Site in May of 2015 while the Stadium was still under construction, pursuant to the terms of the SLM Agreement.

20.

All tangible real property in the State of Georgia, which is not otherwise exempt, is required to be returned at fair market value and assessed at forty percent (40%) of its fair market value, as of January 1 of each year. O.C.G.A. §§ 48-5-6, 48-5-7 and 48-5-10.

21.

The law in the State of Georgia, as implemented by the appraisal procedure rules and regulations of the Georgia Department of Revenue, requires that all real property including, but not limited to, leaseholds, and interests less than fee, shall be appraised at fair market value and liable to taxation and taxed in the hands of the real property owner, even if the property is under construction. O.C.G.A. §§ 48-5-3, 48-5-9 and Ga. Comp. R. & Regs. r. 560-11-10-.09(4)(d)(2).

22.

According to the law in this State, the fair market value of the interest of StadCo in the Mercedes-Benz stadium should have been returned and assessed as of January 1, 2016 and January 1, 2017. O.C.G.A. § 48-5-10 and Ga. Comp. R. & Regs. r. 560-11-10-.09(4)(d)(2).

23.

The real property interest of StadCo in the Mercedes-Benz stadium has never been assessed by the FCBTA, which is the taxing authority in Fulton County, Georgia.

24.

On September 5, 2017, Plaintiffs' counsel sent a Memorandum of Points and Authorities to the Respondents detailing the factual and legal circumstances of the relationship between StadCo and the GWCCA in an effort to urge the Respondents to fulfill their constitutional, statutory, and regulatory duty with reference to assessing the real property interest of StadCo in the Mercedes-Benz stadium. See Exhibit 2.

25.

To the date of filing this Complaint, Respondents have not indicated that they are inclined to carry out their constitutional and statutory public duties to assess the real property interest of StadCo in the Mercedes-Benz stadium.

COUNT I

**REQUEST FOR ISSUANCE OF A WRIT OF MANDAMUS
FAILURE TO PERFORM STATUTORY AND REGULATORY DUTIES**

26.

Petitioners incorporate by reference the previous paragraphs of this Petition in the Factual Background section, specifically paragraphs 12 - 25, as if fully re-stated herein. This claim is brought against the FCBTA and its individual board members and the Chief Appraiser in both their individual and official capacities.

27.

The FCBTA is obligated by O.C.G.A. §§ 48-5-299 and 48-5-306(a) with the official duty and responsibility to investigate and identify all property subject to ad valorem taxation, and to assess and have returned all real and personal property located within the territorial boundaries of Fulton County at its fair market value, such that the valuation of all property within a particular class of property is fairly and justly equalized in order that each taxpayer is assessed only that taxpayer's proportionate share of all assessed taxes.

28.

Under Georgia law, all real property including, but not limited to, leaseholds, and interests less than fee shall be liable to taxation and shall be taxed. O.C.G.A. § 48-5-3.

29.

In the State of Georgia, for ad valorem tax purposes, the real property appraisal and

assessment process is regulated by rules and regulations promulgated by the Georgia Department of Revenue, which are mandated to be followed by all boards of tax assessors in the State.

O.C.G.A. § 48-5-269.1(b) and Ga. Comp. R. & Regs. r. 560-11-10-.01.

30.

These rules and regulations define real property as the bundle of rights, interest and benefits connected with the ownership of real estate. Ga. Comp. R. & Regs. r. 560-11-10-.02 (1) (x).

31.

It further provides that examples of real property are tangible items, such as land, all improvements attached to land, real fixtures, and leasehold interests in real property. Ga. Comp. R. & Regs. r. 560-11-10 -.09 (1)(b)(2).

32.

Under Georgia law, the transfer of an interest in real property for a term greater than 5 years is presumptively the transfer of an estate for years or leasehold interest.

33.

The SLM Agreement transfers to StadCo a real property interest in the Stadium and the Stadium Site for a term of 30 years, with 3 five-year option periods. See Exhibit 1, SLM Agreement at Section 4.1.

34.

When a public entity, such as the GWCCA, transfers a taxable interest in real property to a private entity, such as StadCo, that real property interest becomes taxable in the hands of the private entity for ad valorem tax purposes.

35.

StadCo has acquired a taxable estate in real property in the Mercedes-Benz stadium by virtue of the terms and conditions of the SLM Agreement and the rights, obligations and benefits bestowed upon it by that agreement, which provides it with almost plenary dominion and control over use of the Stadium and Stadium Site for a period of time of up to 45 years.

36.

The interest transferred by GWCCA to StadCo in the SLM Agreement is not a usufruct or license interest, but instead, is a taxable leasehold interest or an estate for years.

37.

All taxable real property in Georgia is to be assessed and returned at its fair market value as of January 1 of each year. O.C.G.A. § 48-5-10.

38.

The Respondents have not assessed and had returned the real property interest of StadCo in the Mercedes-Benz stadium, at its fair market value, or any other value, as of January 1, 2016 or January 1, 2017, and have therefor violated a clear legal duty imposed upon them by Georgia law.

39.

The Respondents have failed to carry out their public duty to identify, assess and have returned the real and personal property of StadCo in the Mercedes-Benz stadium and to subject it to ad valorem taxation.

40.

Georgia Department of Revenue rules require that an interest in taxable real property is to be assessed by the taxing authority on January 1 of each year even if the property is in the

process of construction. Ga. Comp. R. & Regs. r. 560-11-10-.09(4)(d)(2).

41.

Rule 560-11-10-.09(4)(d)(2) sets forth the methodology for appraising construction in progress. It provides:

“The appraisal staff should attempt to value construction in progress by forecasting the future cash flow a project would generate and discounting at a rate that reflects the risk and uncertainty of that cash flow. If the construction in progress is being financed by a lending institution that has established an account from which funds may be drawn by the builder as construction progresses, the appraisal staff may consider the percentage of such funds expended as of January 1 as a possible indication of percentage completion of construction in progress.”

42.

The Respondents failed to assess the real property interest of StadCo, on January 1, 2016, and January 1, 2017, while construction was in progress on the Mercedes-Benz stadium.

43.

The construction of the Mercedes-Benz stadium was partially funded by a construction loan, in the amount of \$850 million dollars, from a consortium of lending institutions lead by Bank of America, by which the FCBTA could have readily appraised the fair market value of the building in accordance with the percentage of completion methodology set forth in the Georgia Department of Revenue’s appraisal procedures manual.

44.

O.C.G.A. § 9-6-20 provides that a writ of mandamus may issue to compel a due performance of a public official’s legal duty if there is no other specific legal remedy for the legal rights sought to be performed.

45.

As taxpayers, the Petitioners, have no other adequate legal remedy to require the

Respondents to perform their official public duties as imposed upon them by O.C.G.A. §§ 48-5-299; 48-5-306(a); and, Ga. Comp. R. & Regs. r. 560-11-10.

46.

The Petitioners, as Fulton County taxpayers, have a clear legal right to have the Respondents perform their statutory and regulatory obligations to assess and have returned all taxable real property within the territorial limits of Fulton County.

47.

Petitioners have standing to bring this action in their capacities as Fulton County taxpayers, as the question presented by this Petition is one of public right and the object is to procure the enforcement of a public duty, therefore, no legal or special interest need be shown in that the Petitioners are interested in having the laws executed and the duty in question enforced. O.C.G.A. § 9-6-24.

COUNT II

REQUEST FOR ISSUANCE OF A WRIT OF MANDAMUS FAILURE TO PERFORM CONSTITUTIONAL DUTY TO TAX UNIFORMLY

48.

Petitioners incorporate by reference the previous paragraphs of this Petition in the Factual Background section, specifically paragraphs 12 - 25, as if fully re-stated herein. This claim is brought against the FCBTA and its individual board members and the Chief Appraiser in both their individual and official capacities.

49.

The Respondents have the constitutional duty to tax uniformly, all property within the same classification of property, as found within its territorial jurisdiction. GA. CONST. of 1983, Art. VII, Sec. I, Par. III(a).

50.

Both the Petitioners and StadCo own property of the same constitutional taxable classification, i.e. tangible property, within the territorial jurisdiction of the FCBTA.

51.

The Petitioners are tangible real property owners within Fulton County whose real property has been, and is, subject to ad valorem taxation by the FCBTA.

52.

StadCo has not been subjected to ad valorem taxation on the real property that it owns and the interests it holds in real property in Fulton County by the FCBTA.

53.

The Respondents have failed and refused to subject the tangible real property of StadCo in the Mercedes-Benz stadium to ad valorem taxation, as they have the tangible real property of the Petitioners, and thereby stand in violation of GA. CONST. of 1983, Art. VII, Sec. I, Par. III(a), by failing to tax uniformly, the same class of subject property owners within their territorial limits.

54.

The Respondents have failed to carry out their public duty to uniformly tax all property owners of the same class of property by failing to identify, assess, and have returned the real and personal property of StadCo in the Mercedes-Benz stadium and to subject it to ad valorem taxation in order to fairly and justly equalize the tax digest in a manner that the Petitioners are assessed only their proportionate share of all property to be assessed taxes.

55.

O.C.G.A. § 9-6-20 provides that a writ of mandamus may issue to compel a due

performance of a public official's legal duty if there is no other specific legal remedy for the legal rights sought to be performed.

56.

As taxpayers, the Petitioners, have no other adequate legal remedy to require the Respondents to perform their official public duties as imposed upon them by GA. CONST. of 1983, Art. VII, Sec. I, Par. III(a), to uniformly tax all subject property owners who are within the same class of property owners.

57.

The Petitioners have standing to bring this action in their capacities as Fulton County taxpayers, as the question presented by this Petition is one of public right and the object is to procure the enforcement of a public duty, therefore, no legal or special interest need be shown in that the Petitioners are interested in having the laws executed and the duty in question enforced. O.C.G.A. § 9-6-24.

COUNT III

PETITION FOR DECLARATORY JUDGMENT

58.

Petitioners incorporate by reference the previous paragraphs of this Petition in the Factual Background section, specifically paragraphs 12 - 25, as if fully re-stated herein. This claim is brought against the FCBTA as an instrumentality of Fulton County, and against its individual board members and the Chief Appraiser in their individual and official capacities.

59.

In cases of actual controversy, the respective superior courts of this state have the power, to declare rights and other legal relations of any interested party petitioning for such declaration.

O.C.G.A. § 9-4-2.

60.

The Petitioners have an actual controversy with the FCBTA in that its failure to assess StadCo for what would otherwise amount to approximately \$26 million dollars per year in ad valorem taxes, results in a corresponding proportionate increase in the amount of ad valorem taxes to be paid by Petitioners, and other similarly situated Fulton County taxpayers by that amount.

61.

A declaratory judgment action is cognizable notwithstanding the fact that there is an adequate available alternative legal or equitable remedy, O.C.G.A. § 9-4-2(c), however, in the present case, there is no adequate available alternative remedy.

62.

Petitioners claim the right to have their future tax assessments uniformly and equitably assessed as between them and all other real property owners who have a taxable interest in Fulton County real property, including StadCo.

63.

The FCBTA has denied them that right by failing and refusing to assess the real property interests of StadCo in the Mercedes-Benz stadium.

64.

The FCBTA's failure to assess StadCo's interest in the Mercedes-Benz stadium, as taxable real property, creates uncertainty in forthcoming assessments as it will, without legal justification, wipe off the tax rolls of Fulton County real property with a fair market value of

more than \$1.5 billion dollars and net annual ad valorem taxes due of approximately \$26 million dollars.

65.

A declaration by the court that the SLM Agreement transferred to StadCo a taxable leasehold interest, also termed an estate for years, in the Mercedes-Benz stadium will eliminate all future uncertainty as to the correctness of future assessments as to the taxable interests of StadCo in the Mercedes-Benz stadium vis-a-vis all other real property owners in Fulton County.

66.

Should the court not act to declare whether the SLM Agreement transfers to StadCo a taxable leasehold interest, or an estate for years, in the Mercedes-Benz stadium then Petitioners, and other similarly situated Fulton County taxpayers, will be faced with the uncertainty of having to individually challenge the uniformity and equalization of their future ad valorem property tax assessments premised on the fact that the FCBTA has failed and refused to include within the Fulton County tax digest over \$1.5 billion dollars of taxable real property, i.e. the Mercedes-Benz stadium.

WHEREFORE Petitioners pray that:

1) This Court issue a Mandamus Nisi to Respondents requiring Respondents to show cause at a time and place to be designated by the Court, not less than ten days nor more than thirty days from the date of service of this Petition, as to why a Writ of Mandamus should not be issued against the Respondents and ordering them:

(a) With respect to the taxable real property interests of StadCo in the Mercedes-Benz stadium, while it was under construction, on January 1, 2016 and January 1, 2017, to comply with the rules and regulations of the Georgia

Department of Revenue to retroactively assess the value of StadCo's interest in the Mercedes-Benz stadium pursuant to the department's rules contained at Ga. Comp. R. & Regs. r. 560-11-10-.09(4)(d)(2).

- (b) With respect to the taxable real property interests of StadCo in the Mercedes-Benz stadium, to fulfill their obligations under O.C.G.A. §§ 48-5-299 and 48-5-306(a) to investigate and identify all property of StadCo subject to ad valorem taxation, and to assess and return all real and personal property of StadCo located within the territorial boundaries of Fulton County at its fair market value, such that the valuation of all property within a particular class of property is fairly and justly equalized in order that each taxpayer is assessed only that taxpayer's proportionate share of all assessed taxes;
 - (c) With respect to the taxable real property interests of StadCo in the Mercedes-Benz stadium, to comply with the GA. CONST. of 1983, Art. VII, Sec. I, Par. III(a) by taxing all tangible real property owners within their territorial limits uniformly and equitably; and,
- 2) That the court declare the SLM Agreement to have transferred to StadCo a taxable leasehold interest, also termed an estate for years, in the Mercedes-Benz stadium;
 - 3) That the court order Respondents to pay the Petitioner's reasonable costs and attorney's fees, pursuant to O.C.G.A. § 9-4-9, out of any eventual successful common fund resulting from this action and/or property taxes it collects as a result this action; and,
 - 4) For such other and further relief as the court deems necessary, appropriate and equitable.

This 17th day of October 2017.

Respectfully submitted,
WAYNE B. KENDALL, P.C.

/s/ Wayne B. Kendall
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