rouse + copeland LLC
ATTORNEYS

Memo

From: CLR
Date: Thursday, May 15, 2025
Re: Anticipated dispute re: Notice of Assessment to OmniTRAX

Development authorities in Georgia are separate legal entities that the Legislature has designated as "public corporations." O.C.G.A. § 36-62-2(1). These are generally governed by O.C.G.A. § 36-62-1 *et seq*. This includes the Development Authority of Effingham County. It is common for development authorities across Georgia to create usufructuary interests in real property for businesses, to provide tax incentives to these businesses in exchange for their commitment to make investments in Georgia (typically in manufacturing plants). These are set up as bond-financed sale-leaseback structures. And the "usufruct creates a lesser interest in real estate than does an estate for years, and is not subject to *ad valorem* taxation." *Chatham County Bd. of Assessors v. Jay Lalaji, Inc., Airport Hotels*, 357 Ga. App. 34, 35 (2020). "Therefore, the provisions of the lease must be scrutinized objectively to determine whether the legal effect of the agreement between [the parties] is to give [the business] a usufruct or an estate for years." *Allright Parking of Ga. v. Joint City-County Bd. of Tax Assessors for the City of Atlanta-County of Fulton*, 244 Ga. 378, 386 (3) (1979); *accord Macon-Bibb County Bd. of Tax Assessors v. Atlantic Southeast Airlines, Inc.*, 262 Ga. 119, 120 (1992).

It is hornbook law that property is a set of "rights of the owner in relation to land or a thing" that includes "the right of a person to possess, use, enjoy and dispose of it ...." *Rabun County v. Mountain Creek Estates, LLC*, 280 Ga. 855, 856-857 (1) (2006) (citation and punctuation omitted); *quoting* Daniel F. Hinkel, *Pindar's Georgia Real Estate Law & Procedure* (7th ed. 2023) ("Land ownership is often described as a bundle of rights, powers and privileges such as the right of possession, the right to exclude others, the privilege of using or not as desired, and the right and power to sell or otherwise dispose of it." Id. *See Kennestone Hosp., Inc. v. Emory Univ.*, 318 Ga. 169, 179 (2024).

In leaseback arrangements, an interest in land will usually fall into one of three property classes: (1) fee simple, (2) a leasehold estate for some

number of years, or (3) a usufruct.

O.C.G.A. §44-7-1 (Relation of landlord and tenant exists, when; leases for less than five years) generally governs the creation of usufructs and leaseholds:

> (a) The relationship of landlord and tenant is created when the owner of real estate grants to another person, who accepts such grant, the right simply to possess and enjoy the use of such real estate either for a fixed time or at the will of the grantor. In such a case, no estate passes out of the landlord and the tenant has only a usufruct which may not be conveyed except by the landlord's consent and which is not subject to levy and sale.
>
> (b) All renting or leasing of real estate for a period of time less than five years shall be held to convey only the right to possess and enjoy such real estate, to pass no estate out of the landlord, and to give only the usufruct unless the contrary is agreed upon by the parties to the contract and is so stated in the contract.

Some time ago, in *DeKalb County Bd. of Tax Assessors v. W. C. Harris & Co.*, 248 Ga. 277 (1981) examined what property interest was held in one of these lease back arrangements. It noted there that "… the leases contain terms consistent with absolute ownership, [but] other restrictions in the leases are not consistent with fee simple ownership." Id. At 279. These provisions included that the company would operate the funded projects throughout the lease term, limiting expenditures the company could make on the property, limits on plant modifications, and an agreement to maintain corporate existence throughout the term of the lease.

Later cases on the usufruct/leasehold issue settled on five factors to look at when determining whether a usufruct or a leasehold exists:

(1) the terms used in the instrument of conveyance to describe the grantee's rights;

(2) any provisions in the instrument addressing the parties' understanding as to liability for ad valorem taxes;

(3) the grantor's retention of dominion or control over the leased property;

(4) which party has retained the duties to keep and maintain the premises and appurtenances; and

(5) whether the grantee may assign the lease or allow any part of the leased premises to be used by others without the grantor's consent. Although an estate for years may be encumbered or somewhat limited without being reduced to a usufruct, if the lease imposes sufficient conditions and limitations upon the use of the premises to negate the conveyance of an estate for years the interest passed is reduced to a mere usufruct.

Chatham Cnty. Bd. of Assessors v. Jay Lalaji, Inc., Airport Hotels, 357 Ga. App. 34, 35–36 (2020); *quoting City of College Park v. Paradies-Atlanta, LLC*, 346 Ga. App. 63, 66 (2) (2018) (citations and punctuation omitted).

More recently, in *Joint Dev. Auth. of Jasper Cnty. v. McKenzie*, 367 Ga. App. 514, 526 (2023) (finding ownership over personal property despite bailment agreement), *cert. denied*, the court examined the applicable rental agreement and noted it provided for a property interest "beyond mere use." There, the lease agreement gave the business "rights in the equipment of the Project which are inconsistent with a lack of ownership and it deprives the [development authority] of rights which are consistent with ownership." It also noted there was not just "complete dominion," which can also occur in a usufruct, but also complete dominion over *title*—the business could demand the development authority quitclaim its title and the rental agreement did not allow the development authority to refuse.

Here, the documents provided appear to show significant markers of even more than a leasehold—most especially the right to grant easements, the limited power of attorney over the land which appears to include the right to negotiate sales and sign deeds transferring land, the continuing ownership of fixtures constructed on the land, and the right to lease the land to others, per the Memorandum of Master Development Agreement.

I propose to send a letter to OmniTRAX outlining our position, concurrent with an assessment notice, and invite them to give reasons for contending differently. Perhaps there are other documents that significantly constrain their power and rights over the land, including the full lease agreement, so that the documents reviewed so far aren't controlling. We can then review their position.