**IN THE COURT OF APPEALS**
**STATE OF GEORGIA**

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| GEORGIACARRY.ORG et al., | ) | |
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| Appellants | ) | |
| | ) | |
| | ) | |
| | ) | |
| vs. | ) | Case No. A17A1639 |
| | ) | |
| ATLANTA BOTANICAL GARDEN, INC., | ) | |
| | ) | |
| | ) | |
| Appellee | ) | |
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# BRIEF FOR THE APPELLEE

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# BRIEF FOR THE APPELLEE

The Atlanta Botanical Garden, Inc. (the "Garden") submits this Brief for the Appellee respectfully requesting that this Court affirm the trial court's judgment in Case No. 2014-CV-253810.

## PART I – INTRODUCTION AND STATEMENT OF FACTS

The record in this case contains two critical, undisputed facts. One, the Garden is a ***private*** 501(c)(3) organization under the laws of the state of Georgia. Affidavit of Gary Doubrava, R-186. Two, the Garden leases land from the City of Atlanta under a 50-year lease with the City that was signed in 1980. *Id.,* R-186.[1] The Garden operates as a private entity on that land. When visitors come to the Garden, they visit the buildings that the Garden has built and the exhibits that the Garden presents. To the public, the Garden appears to be a private operation, which it is.

From these two facts flows the conclusion that, under Georgia law, the Garden's land is in fact private property. As a result, under O.C.G.A. § 16-11-127(c), the Garden is allowed to exclude individuals carrying guns from the property that it leases. This is consistent with the long established test for determining whether property in Georgia is private or public. In the case of a lease, longstanding authority from the Georgia Supreme Court requires courts to look to the status of the

[1] The Garden is not aware of any material inaccuracy in Appellants' statement of facts.

***lessee***, not the lessor, to determine whether land is public or private. Appellants only want the Court to look to the fee owner. There is no authority that supports this as the proper test in Georgia. The trial court agreed with the Garden's formulation of the test for determining whether property is private or public and correctly granted the Garden's motion for summary judgment.

The trial court's decision is not only consistent with well-established precedent from Georgia appellate courts, it is also consistent with the plain reading of O.C.G.A. § 16-11-127(c), which provides that "persons in legal control of private property through a lease . . . shall have the right to exclude or eject a person who is in possession of a weapon or long gun on their private property . . . ." The decision is likewise supported by the legislative history of O.C.G.A. § 16-11-127(c) and the fact that Appellants' interpretation of the statute would lead to wide ranging, improper consequences.

The evidence agreed upon by the parties establishes that the Garden controls the botanical garden as private property through a lease. Appellants' claims fail as a matter of law, and the trial court's judgment in this case should be affirmed.

## PART II – ARGUMENT AND CITATION OF AUTHORITIES

### A. Standard of Review

On an appeal from a grant of summary judgment, the Court of Appeals reviews the record de novo, construing the evidence and all reasonable inferences

that can be drawn from it in the light most favorable to the party opposing the summary judgment motion. *Howerton v. Harbin Clinic,* 333 Ga. App. 191-192, 776 S.E.2d 288 (2015). For the reasons set forth below, the trial court's judgment in favor of the Garden should be affirmed.

## B. Response to Enumerations of Error

### 1. The trial court did not err in its interpretation of O.C.G.A. § 16-11-127(c).

Appellants first argue that the trial court simply misinterpreted O.C.G.A. § 16-11-127(c). Appellants are incorrect for several reasons. First, the trial court's – and the Garden's – interpretation of the statute is consistent with a literal reading of the statute and longstanding Georgia case law. Second, the trial court correctly rejected Appellants' argument that the 2014 amendments to O.C.G.A. § 16-11-127(c) prohibits the Garden from excluding guns on its property. And third, accepting Appellants' interpretation of the statute would lead to wide ranging and improper consequences that the legislature could not have intended when it enacted O.C.G.A. § 16-11-127(c).

#### *a) A literal reading of the statute and Supreme Court and Court of Appeals precedent supports the trial court's interpretation of O.C.G.A. § 16-11-127(c).*

The Garden may exclude or eject persons in possession of a gun because the botanical garden property, leased from the City of Atlanta, is private property under Georgia law. Appellants concede that O.C.G.A. § 16-11-127(c) expressly allows

"lessees of 'private' property" to exclude people carrying guns from their property. Appellants' Br. at 6. Appellants contend, however, that the Garden is not a lessee of private property because it leased its land from the City of Atlanta. Appellants are wrong. The Garden is in control of private property through a private leasehold interest.

While no court has addressed the specific language in the statute at issue, the Georgia Supreme Court has previously held that, when the City of Atlanta conveys a leasehold estate to a private lessee – as the Appellants concede was done in this case – the lessee holds the property as a private owner would hold the property. *Delta Air Lines Inc. v. Coleman,* 219 Ga. 12, 13, 131 S.E.2d 768 (1963), involved an issue of taxation on land the City of Atlanta leased to Delta Airlines. Delta sought to avoid paying *ad valorem* taxes on land that it leased from the City, arguing that "the property it leased from the City of Atlanta [was] public property" and therefore exempt from taxation. *Id.* at 13, 131 S.E.2d at 769. In concluding that the airline could be forced to pay *ad valorem* taxes on the property, the Court held that "public property" becomes "private property" when the City of Atlanta leases it to a private entity. The Court explained:

> A leasehold is an estate in land less than the fee; it is severed from the fee and classified for tax purposes as realty. Code Ann. § 92–114. When the City of Atlanta conveyed to the Delta Corporation a leasehold estate in the land here involved, it completely disposed of a distinct estate in its land for a valuable consideration, and Delta acquired it and holds it as a private owner. When any estate in public property is disposed of,

> it loses its identity of being public property and is subject to taxes while in private ownership just as any other privately owned property. Private property becomes public property when it passes into public ownership; and ***public property becomes private property*** when it passes into private ownership.

*Id.* at 16, 131 S.E.2d at 771 (emphasis added). This simple proposition – that public property is converted into private property when leased to a private entity – has been the governing law in Georgia for more than 50 years and remains good law in Georgia.

Similarly, in *Douglas County. v. Anneewakee,* 179 Ga. App. 270, 316 S.E.2d 368 (1986), a tax exempt organization leased land from a private, for-profit entity, and the county sought to tax the tax exempt organization. This Court reaffirmed that a lease of property from one type of entity to another results in a legal change of the status of the property. Specifically, the Court held that "the leasehold held by [the tax exempt organization] . . . took on the tax exempt status of the holder of the leasehold." *Id.* at 274, 316 S.E.2d at 372. This Court reiterated the *Coleman* holding that "when publicly owned property was leased to a private enterprise, the leasehold estate, having been severed from the fee, lost its tax exempt status and took on the private – and taxable – status of the lessee." *Id.* 316 S.E.2d at 372 (citing *Coleman*, 219 Ga. at 12, 131 S.E.2d at 768).

And just last year, this Court reaffirmed the rule from the *Coleman* case in *Columbus, Georgia Board of Tax Assessors v. Medical Center Hospital Authority*,

338 Ga. App. 302, 304, 788 S.E.2d 879 (2016). The board of assessors sought property tax payments from the public hospital, arguing that the property remained private property because it was private and taxable before it was leased to the public authority. *Id.*, 788 S.E.2d at 881. Following the *Coleman* decision, this Court again ruled that, under Georgia law, the property that is subject of the lease takes on the status of the lessee. *Id.*, 788 S.E.2d at 881. Because the lessee was a public entity, the property was therefore considered public property and exempt from taxation. *Id.*, 788 S.E.2d at 881.

Georgia appellate courts have been consistent on this position starting in 1963 through 1986 and continuing into 2016. Private property becomes public property when it passes to a public entity through a lease (*see id.*), and public property becomes private property when it passes to a private entity through a lease. *Coleman*, 219 Ga. at 12, 131 S.E.2d at 768.

Appellants offer no reason why the Georgia Supreme Court's opinion in *Coleman* and this Court's subsequent opinions in *Anneewakee* and *Medical Center Hospital Authority* should not control here. Their discussion of these cases is limited to a single paragraph and a footnote where they intimate those decisions are limited to classification "for tax purposes," though they acknowledge that the rule could "be correct in a context other than taxation." Appellants Br. at 15, n.15. Plaintiffs cite no case law limiting the *Coleman*, *Anneewakee*, and *Medical Center Hospital*

*Authority*. Those decisions have not been overruled or limited and remain controlling law. As discussed in detail below, it would be unjust and confusing to treat the Garden's property as private in certain circumstances and public in others. The *Coleman* decision remains controlling, and under that decision and the plain language of O.C.G.A. § 16-11-127(c), the trial court's judgment should be affirmed.

*b) The 2014 legislative changes do not impact the Garden's right to exclude individuals carrying guns.*

The bulk of Appellants' brief focuses on the amendment to O.C.G.A. § 16-11-127(c) in 2014, which was effectuated by the passing of Georgia House Bill 60 ("H.B. 60") in 2014. According to Appellants, the fact that the statute was amended is proof positive that the law applies differently to private entities leasing land from private lessors than it does to private entities leasing land from public lessors. Appellants' Br. at 14-15. Appellants offer four arguments in support of this proposition: 1) Appellants' interpretation is the only one that gives any meaning to H.B. 60's addition of the word "private" into the current version of O.C.G.A. § 16-11-127(c); 2) the Garden's interpretation of O.C.G.A. § 16-11-127(c) is superfluous given certain prohibitions on gun regulation in O.C.G.A. § 16-11-173; 3) Appellants' interpretation is the only one consistent with the legislative history of O.C.G.A. § 16-11-127; and 4) Appellants' interpretation is the only one that is consistent with the "massive, comprehensive" change to the state's gun laws in 2014.

None of these arguments is correct, and each falls far short of being sufficient to reverse the trial court's judgment.

***First***, as a threshold matter, the legislative history is irrelevant as the proper application of the statute is clear from its plain language. *See Deal v. Coleman*, 294 Ga. 170, 172, 751 S.E.2d 337 (2013) ("When we consider the meaning of a statute, 'we must presume that the General Assembly meant what it said and said what it meant'."). "Where the plain language of the statute is clear and susceptible to only one reasonable construction, [courts] must construe the statute according to its terms." *You v. JP Morgan Chase Bank*, 293 Ga. 67, 71, 743 S.E.2d 428 (2013) (citing *Hollowell v. Jove*, 247 Ga. 678, 681, 279 S.E.2d 430 (1981)). Only "where there is ambiguity, the entire legislative scheme, including its history, may be examined." *Id.*, 743 S.E.2d at 431 (citing *Botts v. Southeastern Pipe–Line Co.*, 190 Ga. 689, 707, 10 S.E.2d 375 (1940)). The statute provides, clearly and plainly, that "persons in legal control of private property through a lease . . . shall have the right to exclude or eject a person who is in possession of a weapon or long gun on their private property . . . ." O.C.G.A. § 16-11-127(c). As explained above, the botanical garden is private property following its lease from the City to the Garden. No further examination is necessary, and the trial court's judgment should be affirmed.

***Second***, the 2014 amendments do give meaning to the addition of the word "private" under the Garden's interpretation of the statute. Under the 2010 version

of the statute, all entities "in legal control of property through a lease" had the right to forbid possession of a gun on their properties. This includes private entities leasing public land, like the Garden, as well as the defendant in the *Medical Center Hospital Authority* case discussed above, which was a public entity (the Medical Center Hospital Authority) that leased land from a private entity (Columbus Regional Healthcare System, Inc.). Under the Garden's interpretation of the statute, the Hospital Authority holds its land as public property as a public lessee. The Hospital Authority could preclude guns under the 2010 statute as an entity in legal control of property through a lease; it cannot preclude guns under the 2014 version of the statute because it is not "in legal control of private property through a lease." Appellants actually concede this point, noting that the 2010 version of the statute "did not at that time distinguish between persons controlling ***public*** property and persons controlling ***private*** property" and that under the 2014 version the "exception [is] applicable only to persons in control of ***private*** property." Appellants Br. at 14. The Garden agrees with both of these statements. Contrary to what Appellants contend – and by Appellants' own admission – the Garden's interpretation gives meaning to the 2014 addition of the word "private" into O.C.G.A. § 16-11-127(c).

Appellants also argue that the Garden's interpretation of O.C.G.A. § 16-11-127(c) is incorrect because "private property owners" in the 2010 and 2014 versions of the statute "would have meant persons who owned private property and private

persons who leased property"; the 2014 amendment therefore did not change anything. Appellants Br. at 15-16. This is wrong. The Garden has never argued that it, as a lessee, owns the property where the botanical garden sits.[2] If that were the case, the idea of a lessor/lessee relationship would be a nullity. The City of Atlanta remains the owner of property that it leases to the Garden. The *Coleman* decision simply means that the Garden controls the property as private property, much "as a private owner" does. *Coleman,* 219 Ga. at 16, 131 S.E.2d at 771. The rule from *Coleman* is that "public property becomes private property" when it passes into private ownership, not that a lessor somehow becomes the legal owner of the property. *Id*, 131 S.E.2d at 771. Under this common sense view, the 2010 version of O.C.G.A. § 16-11-127(c) allowed 1) private property owners and 2) any entities – public or private – leasing property to preclude guns. After the 2014 amendment, public entities leasing land from private entities no longer had that right, giving clear meaning to the addition of the word "private" to O.C.G.A. § 16-11-127(c).

***Third***, Appellants incorrectly argue that the Garden's interpretation "would have been inconsistent with the language of O.C.G.A. § 16-11-173 (preempting regulation of carrying firearms)" while asking, "If a public entity is not permitted to regulate carrying firearms, then why create a carve-out in a separate statute,

[2] On the contrary, the Garden agrees with Appellants that "private property owners" does not include lessees of property owned by another. Appellants' Br. at 13.

appearing to preserve the power of a public entity leasing public property to forbid carrying firearms?" Appellants' Br. at 15-16. Appellants ignore the fact that the legislature has the right to create just such a carve-out: "no county or municipal corporation . . . or authority of this state, ***other than the General Assembly***, by rule or regulation or by any other means shall regulate in any manner . . . [t]he possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms" in Georgia. O.C.G.A. § 16-11-173(b)(1)(B) (emphasis added). The General Assembly in 2010 exercised its right to regulate gun regulations, allowed public entities that leased land from private owners to regulate gun possession, then changed its mind in 2014 in accordance with O.C.G.A. § 16-11-173 and took that right away from public entities. Contrary to Appellants' position, the 2014 Amendments to O.C.G.A. § 16-11-127(c) were consistent with O.C.G.A. § 16-11-173 and both trial court's and the Garden's interpretation of the statute at issue.

***Fourth***, the Garden's interpretation – not Appellants' – is the one supported by an investigation of the legislative history of O.C.G.A. § 16-11-127(c). In 2016, the Georgia House of Representatives passed House Bill 1060 ("H.B. 1060"),[3] which proposed the following amendment to O.C.G.A. § 16-11-127(c)[4]:

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[3] Affidavit of David B. Carpenter, R-150-161.

[4] Appellants suggest that "[t]he trial court questioned the Garden's attorney at the hearing on the cross motions for summary judgment, expressing skepticism over the Garden's inability to provide an alternative explanation for the wording of HB

**SECTION 3.**

Said part is further amended by adding two new paragraphs to subsection (a), by revising subsection (c), and by revising paragraph (2) of subsection (e) of Code Section 16-11-127, relating to carrying weapons in unauthorized locations, as follows:

"(3.1) 'Leased government property' means real property that is owned by a government entity but of which an individual or entity which is not a government entity is the lessee, licensee, or renter."

"(5) 'Private property' means real property that is not owned or controlled by any government entity; provided, however, that such term shall not mean leased government property."

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

The clear intent of this new language would have been to further limit entities' rights to restrict gun possession by defining property like the botanical garden as "leased

60." Appellants' Br. at 18, n.17. This suggestion is incorrect. The trial court judge did say "I understand that argument, but I don't think it's very helpful" in response to the Garden's argument that the 2016 failed amendment shows the legislature's true intent. Motion for Summary Judgment Transcript, T-47. For the reasons set forth in this section, the Garden respectfully disagrees with the trial court's conclusion on this point.

government property" and preventing the Garden from excluding gun owners. Clearly, the House of Representatives did not believe that the current version of O.C.G.A. § 16-11-127(c) went far enough to prohibit entities (like the Garden) that lease property from the government from excluding people carrying guns and wanted to expand the statute to prevent those entities from doing so. In other words, the House wanted to effectuate Appellants' proposed application of the statute. After all, if the existing statute were sufficient to prevent lessees of government property from excluding gun owners, there would be no reason to amend the statute. The Senate Committee on Judiciary, however, offered a substitute to H.B. 1060 that completely removed the House's proposed language.[5] The Georgia Senate had the opportunity to effectuate Appellants' interpretation of O.C.G.A. § 16-11-127(c) but chose not to do so. The Governor then vetoed the modified Bill on May 3, 2016.[6]

Appellants now ask the Court to do what the General Assembly itself did not do. "It is elementary that in all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly." *Spectera Inc. v. Wilson*, 294

[5] A true and correct copy of the Senate Committee on Judiciary's substitute is found at R-163-175.

[6] Governor Deal's veto had nothing to do with the proposed language affecting the Garden that the Senate had removed. At the time of the veto, he explained that his veto stemmed from "concerns about the change of policy . . . relating to the carrying of a weapon or long gun into a place of worship." *See* https://gov.georgia.gov/press-releases/2016-05-03/deal-issues-2016-veto-statements.

Ga. 23, 26, 749 S.E.2d 704 (2013). By striking the proposed language in H.B. 1060, the Senate (and the General Assembly) rejected a prohibition on entities like the Garden, which control private property through a lease from the government, from being able to exclude or eject individuals carrying a gun. The Court should rule consistently with that General Assembly's intention and affirm the trial court's judgment in favor of the Garden.

And ***fifth***, the Garden's interpretation of the 2014 amendment is consistent with the legislature's preamble. Appellants note that "the preamble to HB 60 clearly shows the General Assembly intended a massive, comprehensive, and substantive change to existing law" and contend, "It would be a difficult task indeed to reconcile HB 60's preamble with the notion that the General Assembly did not indeed intend to change existing law when it passed HB 60." Appellants' Br. at 20. The Garden does not argue – and has never argued – that HB 60 passed in 2014 "did not indeed intend to change existing law." On the contrary, the Garden agrees with Appellants that HB 60 represented "a comprehensive overhaul with wholesale changes liberalizing many provisions relating to carrying weapons." Appellants' Br. at 20. First and foremost, as discussed above, the House Bill removed the right of public entities to preclude gun carry on land leased from private entities. Moreover, even without changing the rights of private entities to exclude gun owners from leased

property, HB 60 amended no fewer than 20 sections[7] of the Georgia code governing gun rights. The Garden's interpretation of the 2014 amendment to O.C.G.A. § 16-11-127(c) is in no way inconsistent with the legislature's preamble to HB 60.

*c) Adopting Appellants' interpretation of the statute would lead to wide ranging and improper consequences.*

Appellants' interpretation of the statute is further improper because it would have substantial and absurd consequences that the legislature could not have intended. Again, "[i]t is elementary that in all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly." *Spectera*, 294 Ga. at 26, 749 S.E.2d at 708.

First and foremost, a declaration that land leased from a government entity to a private entity is public land would gut the state's *ad valorem* tax revenue. *See Clayton County Board of Tax v. City of Atlanta*, 164 Ga. App. 864, 298 S.E.2d 544 (1982). Large Atlanta businesses under leases on MARTA land, for example, would be exempt from paying taxes.

In addition, entities like the Garden would be precluded from exercising basic legal rights. For example, O.C.G.A. § 51-9-1 provides, "The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie."

[7] The full text of HB 60 passed in 2014 can be found at http://www.legis.ga.gov/Legislation/20132014/144825.pdf

Adopting Appellants' definition of "private property" might prevent the Garden from acting as any other owner of private property, with no redress for trespass or tortious interference with its property. It would also arguably leave the Garden unable to raise any claim of criminal trespass, which cannot be brought in the case of an intrusion onto public land. *See Miller v. Smith & Smith Land Surveyors, P.C.*, 194 Ga. App. 474, 474, 391 S.E.2d 20 (1990) ("[I]t is plain that no trespass of any kind occurred. Miller's own testimony shows that all of the actions she complains of here took place on a public road and not on her property.").

Appellant's definition of "private property" would have a similar, wide-ranging impact on properties owned by local development authorities (government entities). For example, properties leased by MARTA to private developers for the construction of office and apartment buildings would not be afforded the same rights related to expel trespassers that are commonly held by private property owners. The same would also be true of the many office buildings that are technically owned by local development authorities but are leased back to the "real owners" for long periods of time.

Finally, Appellants' suggested interpretation creates an impossibly confusing situation for lawful gun owners who want to know where they can or cannot carry their guns in Georgia. It is illogical to think that the General Assembly wanted gun owners to have to research title issues in order to know where they can carry their

weapons. Under the Garden's interpretation of the statute, that task is unnecessary. Consistent with the plain language of the statute, gun owners will know that they may be excluded or ejected by private entities who, like the Garden, control membership and admission of property. Plaintiff's Original Complaint, R. 6-7. And this allays Appellants' stated worry that the Garden's view of the statute could allow the state to "[r]egulat[e] the possession or carrying of firearms . . . via lease" (Appellants' Br. at 8), positing that the government could start leasing all of its land in some hidden way in order to stop people from carrying guns. Aside from the fact that this fear is completely unfounded and makes little sense, it is assuaged by the fact that lessees who simply manage public property (as opposed to control it like the Garden) may not have the same right to exclude or eject gun owners. Appellants' construction of O.C.G.A. § 16-11-127(c) results in a number of consequences that could not have been the General Assembly's goal and, therefore, should be rejected. *Spectera*, 294 Ga. at 26, 749 S.E.2d at 708.

**2. The trial court did not incorrectly rule that a lessee of the City of Atlanta can regulate the possession of firearms on the City's property even though the City itself lacks such a right.**

Appellants also argue that the trial court erred by failing to find that the City of Atlanta could not have conveyed upon the Garden the right to exclude gun owners because "a property owner cannot assign a right by contract . . . that he does not possess in the first place." Appellants' Br. at 21. The Garden does not argue – and

has never argued – that it can exclude or eject individuals carrying a gun because that right has somehow been passed on from the City of Atlanta. The Garden acknowledges that the City of Atlanta is precluded from regulating the carry of weapons on ***public property***, except as permitted by statute. As discussed in detail above, however, the botanical garden is private property by virtue of the fact that the City of Atlanta leased it to the Garden, a private legal entity that now controls the property. The Garden's right to exclude or eject individuals carrying guns is wholly independent from any rights the City of Atlanta may have and does not result from a "transfer" of that right from the City. Appellants' Br. at 22. State law – specifically O.C.G.A. § 16-11-127(c) – grants the Garden the right to exclude gun owners.

### C. The Garden is entitled to judgment as a matter of law because Appellants have no private right of action under O.C.G.A. § 16-11-127.

Finally, Georgia law precludes Appellants from pursuing a declaratory judgment claim or injunctive relief concerning the interpretation of O.C.G.A. § 16-11-127(c). In Georgia, "[n]o private right of action shall arise from any Act enacted after July 1, 2010, unless such right is expressly provided therein." O.C.G.A. § 9-2-8. While there are few reported decisions involving this statute, the existing decisions consistently preclude plaintiffs from pursuing civil claims based on purported violations of criminal statutes. *See Somerville v. White*, 337 Ga. App. 414, 417, 787 S.E.2d 350 (2016) (reversing trial court's award of summary judgment to

plaintiffs on breach of contract claim "because OCGA § 16–11–90 is a criminal statute enacted after July 1, 2010, which does not expressly provide for a private right of action"); *Araya v. Bank of America, N.A.*, No. 1:12-cv-2740, 2012 WL 12842941, at *10 (N.D. Ga. Nov. 16, 2012) (dismissing residential mortgage fraud claim because "the offense of residential mortgage fraud under O.C.G.A. § 16-8-102, a criminal statute . . . does not provide a private right of action").

The Garden is not aware of any cases applying this statute in the context of a case seeking a declaratory judgment or injunctive relief such as this one, but there is case law from other jurisdictions that is instructive. In *Cherrie v. Virginia Health Services*, 292 Va. 309, 317, 787 S.E.2d 855 (2016), for example, the plaintiffs sought to assert a private right of action in the form of a declaratory judgment for the production of documents under 12 VAC § 5–371–140(G), a statute governing nursing facility policies and procedures. The Virginia Supreme Court considered and rejected the plaintiffs' argument that a declaratory judgment was proper for interpreting a statute that did not provide for a private right of action:

> The estates next turn to the Declaratory Judgment Act, Code § 8.01–184 to Code § 8.01–191, as the statutory vehicle to give them a private right of action to enforce 12 VAC § 5–371–140(G). Again, their logic is straightforward: (i) The statute authorizes the Board's regulations; (ii) one of those regulations gives them a right to the requested documents; (iii) the Declaratory Judgment Act authorizes a court to "declare" that they have that right; and (iv) on remand, the trial court should follow up that declaration with an order compelling specific performance. See Appellant's Br. at 25 (addressing the requested remedy).

> This simple syllogism, however, proves too much. If it were true, the Declaratory Judgment Act would operate as a roving statutory private right of action for anyone claiming to be injured by someone else's violation of any statute. The very concept of statutory standing, under this view, would no longer exist. Indeed, any aggrieved claimant, by virtue of claiming that his grievance involves a statutory violation, would have standing to assert a private right of action in court—not because the allegedly violated statute grants the right, but because the Declaratory Judgment Act grants the right for all statutes.

*Id.*, 787 S.E.2d at 859.

The logic of the Virginia Supreme Court applies in this case and is bolstered by O.C.G.A. § 9-2-8, which expressly precludes Appellants from doing what they seek to do in this matter. The trial court has not yet considered this argument. If this Court declines to affirm the trial court's summary judgment award, the Garden respectfully requests that the Court remand this matter to the trial court to consider whether Appellants even have the right to seek a declaratory judgment or injunction involving O.C.G.A. § 16-11-127(c).

## CONCLUSION

For all of the reasons stated herein, the Garden asks that this Court affirm the trial court's order awarding it summary judgment on all of Appellants' claims.

Respectfully submitted this 13th day of June, 2017.

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## CERTIFICATE OF COMPLIANCE

This submission does not exceed the word count limit imposed by Georgia Court of Appeals Rule 24.

s:\ Michael L. Brown
Michael L. Brown

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and correct copy of the within and foregoing BRIEF FOR THE APPELLEE upon all counsel of record by U.S. Mail at the following addresses:

John R. Monroe
9640 Coleman Road
Roswell, GA 30075

This 13th day of June, 2017.

s:\ Michael L. Brown
Michael L. Brown