No. A23A0574

In the

Court of Appeals of Georgia

Joint Development Authority of Jasper County, Morgan County, Newton County, and Walton County,

Appellant,

v.

State of Georgia,

Appellee.

On Appeal from the Superior Court of Morgan County,
Civil Case No. 2022-SU-CA-128

BRIEF OF APPELLEESJEFFREY V. MCKENZIE, NEAL S. FITZGERALD, VIRGINIA MCFADDIN, JENNIFER V. DEROCHE, VALLE S. ASHLEY, JOELLEN ARTZ, & RICHARD HAYNES

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INTRODUCTION

This appeal arises out of the Superior Court of Morgan County's denial of a petition to validate certain bonds filed by the State of Georgia ("State") against Appellant and Rivian Horizon, LLC ("Rivian") in accordance with O.C.G.A. § 36-82-73 – § 36-82-83. In seeking to reverse this denial, Appellant argues that a bond validation action is not a true legal proceeding, but rather a mere perfunctory process which divests the trial court of its fact finding and legal analysis functions and would excuse Appellant from satisfying its burden of proof. These arguments are directly contrary to controlling case law. This Court must therefore upheld the trial court's denial of this bond validation action.

The trial court had a statutory obligation "to hear and determine all questions of law and of fact in the case and shall render judgment thereof." O.C.G.A. § 36-82-77(a). When deciding factual issues—such as whether a bond proposal is sound, feasible, and reasonable or whether a bond proposal will promote the general welfare of the local community—the trial court is entitled to weigh the evidence presented and determine credibility because it is the ultimate fact finder. *See Carter v. State*, 93 Ga. App. 12, 13 (1955) ("It is the duty of the trial court [at a bond validation hearing] to determine from the evidence the fact of whether or not the venture is sound, feasible and reasonable, and not to review the discretion of the [government] authorities in proposing the venture.").

The party requesting validation always bears the burden of establishing its *prima facie* case in support of validation, which includes the allegations contained in the petition. *See Harrell v. Whigam,* 141 Ga. 322, 80 S.E. 1010, 1012 (1914) (explaining that "[w]hen [intervenors] deny the substantial allegations of the [bond] petition . . . this places upon the [party seeking validation] the burden of proving such allegations"). The fact that Appellant may have admitted the allegations of the State's petition is irrelevant since Intervenors answered and denied the substance of the allegations and the right to validation of the bonds. The State and Appellant therefore had the burden to establish all necessary facts and legal compliance necessary for the requested validation of the bonds.

The trial court applied the correct legal standards, discharged its duty as fact finder, properly evaluated the facts under the law, and concluded that Appellant failed to carry its burden in support of validation on three separate grounds. This Court must affirm the judgment if there was any evidence (which there was) to support the trial court's decision to deny the Petition on any one of these three independent grounds. Further, the trial court determined that Rivian's interests under the Rental Agreement did not constitute a usufruct or a bailment for hire, which determination were also correct as a matter of law.

PART ONE - STATEMENT OF THE CASE

I. Procedural History

The State filed its Petition and Complaint ("Petition") seeking validation of Taxable Revenue Bond ("Bonds") in excess of $15 billion for the purpose of financing the costs associated with Rivian's development of a proposed heavy industrial electric vehicle manufacturing plant in Morgan and Walton Counties ("Project"). (V4-46) The Petition named as "defendants" the Appellant and Rivian.

The State prayed in its Petition for the entry of a Final Bond Validation Order that would include seventeen (17) separate findings. (V2-16–20.) Relevant here, the Petition expressly requested that the trial court find the following:

> (9) the Rental Agreement will create in the Company a usufruct in the real property comprising part of the Project and a bailment for hire as to the personal property comprising part of the Project, which interests are not subject to *ad valorem* property taxes;
>
> (10) the Project… will develop and promote… the general welfare within the territory of the [Appellant]; and
>
> (17) the undertaking for which the Bonds are issued, the issuance of the Bonds and the security therefor are sound, feasible and reasonable.

(V2-18, 20) Appellant and Rivian filed Answers to the Petition, urging validation of the Bonds. (V2-627, 633)

Seven Georgia citizens and Morgan County residents—Jeffery V. McKenzie, Neal S. Fitzgerald, Virginia McFaddin, Jennifer V. DeRoche, Valle S. Ashley, JoEllen Artz, and Richard M. Haynes ("Intervenors")—filed a motion to intervene in the action, which was unopposed and subsequently granted. (V2-952, 1058) Intervenors filed an Answer to the Petition, denying the substance of its allegations. (V2-1027–1036)

The trial court conducted its evidentiary hearing on the Petition on July 28, 2022. While the District Attorney represented the State, he was excused from the hearing because, in the District Attorney's own words, "[my] role in this matter is merely ministerial, and as such, I've fulfilled my statutory requirements and defer to the defendants to present their case to the Court…" (V4-7.) Appellant proceeded to present its evidence to the Court, with counsel for Appellant acknowledging that it was Appellant's burden to establish a prima facie case. (V4-8.) Rivian did not participate in the hearing.

The trial court entered its Final Order on Bond Validation denying the Petition and refusing to validate the bonds on September 29, 2022. The trial court denied the Petition on four independent grounds: (1) Appellant failed to carry its burden to show that the Project was sound, feasible, and reasonable; (2) Appellant failed to carry its burden to show that the Project would promote the general welfare of the local community; and (3) Appellant's waiver of the audit and performance review

requirement was not sound, feasible, and reasonable; and (4) under the terms of the Rental Agreement, Rivian possessed an estate for years and the agreement did not create a bailment relationship between the Appellant and Rivian with respect to personal property. (V2-1228, 1235, 1238, 1239, 1245.)

II. Material Facts

While Appellant spends a significant portion of its brief extolling the significance of the economic development agreement reached with Rivian, it fails to acknowledge the significant issues which were revealed at the trial of this action, and that much of what it now presents as "facts" were not proven at trial. Further, Appellant seeks to convert certain facts into conclusions of law, in violation of the trial court's original jurisdiction.

The risk associated with the bonds at issue in this case, and of the project as a whole, is founded in numerous facts identified by the trial court. Many of these facts are included in the Rivian Form 10-K for 2021 (V4-142–249) and Form 10-Q for the first quarter of 2022 (V4-250–299), which were admitted at the hearing without objection. (V4-49, 59) These statements from Rivian itself include: (1) Rivian is a startup and its "executive officers have limited experience in the management of a publicly traded company" which could result in a "significant disadvantage" to Rivian. (V4-196); (2) Rivian's untested distribution model for its vehicles "subjects [it] to substantial risk and makes evaluating [its] business, prospects, financial

condition, results of operations, and cash flows difficult." (V4-166); and (3) Rivian possesses "minimal experience servicing and repairing [its] vehicles" and if its "partners are unable to adequately service [its] vehicles," Rivian's "business, prospects, financial condition, results of operations, and cash flows could be materially and adversely affected." (V4-166)

While Rivian's stock price opened at $78 following its initial public offering, the price plummeted to an all-time low of $22, and was only trading at $31 a share at the time of the bond hearing. (V4-44) The precipitous drop in Rivian's stock price is unsurprising given Rivian's reported $1.579 billion in operational losses for the first quarter of 2022, which was nearly four times the amount of losses it reported for the same period in 2021. (V4-257) These facts underscore Rivian's tenuous status as an infant public company and distinguish it from the other original equipment manufacturers currently located in Georgia—Hyundai and Kia—both of which are established concerns with proven track records. (V4-113–14.)

Appellant called two lay witnesses to testify: Mr. Jerry Luke Silvo ("Silvio"), Chairperson of Appellant, and Mr. Andrew Capezzuto ("Capezzuto"), Chief Administrative Officer and General Counsel for the Georgia Department of Economic Development. (V4-22, 82.) Appellant did not call any expert witness to testify and Rivian offered no evidence.

Upon cross-examination, Silvio testified that he had not reviewed Rivian's

10-K submittals for 2019, 2020, or 2021, nor had he reviewed any of Rivian's 10-Q submittals during the same period. (V4-48–49) Silvio testified that Appellant did not employ any experts to assist them in analyzing Rivian or the Project. (V4-46–47) Rather, Silvio testified that Appellant "relied upon our State partners" to evaluate the Rivian Project. (V4-47) He also admitted that Appellant did not analyze the burden on local governmental services. (V4-63–64)

Upon cross-examination, Capezutto acknowledged that none of the State's analysis involved the question of whether the Project would promote the general welfare of the local communities. Rather, he confirmed that the State limited its analysis of the Project to the State's return on investment, and not on the impact of the Rivian plant on local governmental services. (V4-99, 109-10)

Appellant offered no evidence to justify its waiver of the audit and performance review requirement as set forth in O.C.G.A. § 36-82-100. Further, while Appellant introduced the Rental Agreement between Appellant and Rivian, it did not offer any testimony in support of its claims that such Rental Agreement created both a usufruct and bailment for hire in Rivian. This is because Appellant acknowledged this is a legal question, not a factual one. (V4-33–34)

PART TWO - ARGUMENT

I. Standard of Review

"Whether a proposal to issue bonds is sound, feasible, and reasonable is a question for the trial court, and its findings about soundness, feasibility, and reasonableness must be sustained on appeal if there is any evidence to support them." *Greene Cnty. Dev. Auth. v. State*, 296 Ga. 725, 726 (2015) (citations omitted). Because the "any evidence" standard is highly deferential to a trial court's factual findings, appellate courts "construe the evidence in the light most favorable to support the [trial] court's judgment . . . ." *McWay v. Mckenney's, Inc.*, 359 Ga. App. 547, 548 (2021) (cleaned up). Appellate courts do not re-weigh the evidence presented below nor make credibility determinations. *See DeKalb Cnty. v. Bull*, 295 Ga. App. 551, 552 (2009) (explaining that "the factfinder in the initial proceedings is charged with weighing the evidence and judging the credibility of the witness"—not the appellate court).

Conversely, the trial court's legal determinations are subject to *de novo* review. *See Central Mortg. Co. v. Humphrey*, 328 Ga. App. 474, 475 (2014) (applying "de novo standard of review to any questions of law decided by the trial court . . .").

II. The trial court correctly found that Appellant failed to carry its burden to establish that the Project would promote the general welfare of the local community (Enumeration of Error 2).

After thoroughly reviewing and considering the record in this case, including the pleadings, evidence, and arguments of counsel, the trial court found that the Appellant failed to carry its burden to establish the tenth requested finding of the Petition: that the Project would promote the general welfare of the local community it was formed to serve. (V2-1215–16, 1239) The Court should affirm this finding.

Whether a given project will promote the general welfare of the local community is a question of fact for the trial court to determine. *See Greene Cnty. Dev. Auth.*, 296 Ga. at 727 (affirming decision to deny validation petition where there was evidence to support trial court's finding that the proposal would not benefit local community). Here, there a was ample evidence to support the trial court's finding.

The simple fallacy of Appellant's argument is that while Appellant cites to certain general allegations which it contends constitute benefits to the local community resulting from the Project, Appellant fails to identify in any manner the costs to the local community associated with the Project. Much like a struggling company points to its revenue in order to tout its viability, it is only once a full analysis of the costs associated with such revenue is performed can it be determined if the company is actually profitable. Here, Appellant admittedly failed to offer any

analysis of the local costs associated with the Project and as such failed to carry its burden of proof regarding the economic benefit to the local community.

Appellant points to certain performance standards contained within the Economic Development Agreement ("EDA") (V2-395), a "finding" in the Bond Resolution (V2-48), and the testimony of Capezutto (V4-94-95, 102-103) to assert that it carried its burden of proof. An analysis of the alleged "evidence" reveals this assertion is incorrect and was directly contradicted by other evidence.

First, the referenced portion of the EDA (V2-395) contains certain performance standards associated with the Project. However, Rivian's failure to satisfy these standards simply results in a loss of the incentives paid to Rivian previously. Thus, , this is not a "guarantee" of the supposed benefits of the Project.

Second, the referenced portion of the Bond Resolution (V2-48) is a self-serving conclusory statement that does not offer any evidence in support thereof. Simply because Appellant included a statutorily required boiler-plate conclusion in the Bond Resolution does not make it true. Further, this "evidence" was directly contradicted by Silvio, who testified that Appellant did not perform any analysis to determine the increased maintenance, infrastructure, and payroll costs incurred by each affected county due to the construction and operation of the Project (V4-63–64) and that Appellant did not conduct any analysis to determine if Rivian's PILOT payments under the Rental Agreement would be sufficient to cover any additional

expenses the local communities may incur as a result of the Project. (V4-64) Rather, Appellant relied upon the State for this. (V4-46–47, 63–64)

The final evidence Appellant relies upon is certain testimony of Capezutto. (V4–94-95, 102–03) However, such testimony did not focus on the costs and benefits to the local community itself, but rather focused on "the State or [] the region." (V4-102.) When asked whether the State performed any analysis of the costs incurred by, or benefits accruing to, the local communities, Capezzuto testified: "No. Our State . . . the analysis we did was limited to the kind of State costs and the State benefits." (V4-109–10)

The trial court considered and weighed Silvio and Capezzuto's testimony against the recitations contained in the EDA and Bond Resolution—as it was required to do—and rightly determined that Appellant failed to carry its burden to show that the Project would promote the general welfare of the local communities. *See Greene Cnty. Dev. Auth.*, 296 Ga. at 727 (affirming trial court's decision to not validate bonds where a witness "offered only scant and conclusory testimony . . . about the *particular* impact upon economic development that construction of the proposed facility . . . might be expected to have" and where the trial court expressed concern "about the extent to which the . . . proposal would, in fact, benefit the citizens" of the local area) (emphasis in original).

In an attempt to excuse its failure to carry its burden of proof, Appellant argues

that the Intervenors bore the burden to show that "local government costs will exceed the Project's benefits to the community." (Appellee Br. 30) This contention puts the cart before the horse because at all times Appellant possessed the initial burden to show that Project would benefit the local community. Intervenors denied the Petition's allegation that the Project would provide such benefit. (V2-1031) The trial court found that Appellant failed to carry its burden; thus, the burden never shifted to the Residents. *See Harrell*, *supra*; *Brown v. City of Atlanta*, 152 Ga. 283, 109 S.E. 666, 672 (1921) (explaining that when parties' opposing bond validation "deny the substantial allegations of the petition," it "places upon [the party seeking validation] the burden of proving such allegations") This is not a situation such as in *Dade County v. State*, 77 Ga. App. 139 (1948), where the government introduced evidence, including expert testimony of an engineer regarding an amortization plan for the water system at issue therein. Here, Appellant failed to introduce any financial information or other actual evidence but rather offers solely conclusory statements not supported by any facts or studies. While not requiring Appellant to have conducted a quantitative study, the trial court properly considered the lack thereof in determining that Appellant did not put forth sufficient **facts**, rather than mere conclusory statements, in failing to carry its burden of proof.

Appellant boldly claims that "the trial court had no valid basis for second-guessing Appellant's conclusion" about the Project and its purported benefits.

(Appellee Br. at 26) However, this completely misses the point of the bond validation procedure, which requires the trial court "to hear and determine all questions of law and of fact in the case and shall render judgment thereof." § 36-82-77(a). The trial court does not sit in review of the underlying determination of Appellant. In fact, if that were the case, Appellant's Notice of Appeal should be dismissed for failure to file an application for discretionary appeal as is required for any appeal of a superior court decision reviewing decisions of local administrative agencies. O.C.G.A. § 5-6-35.

Such argument also incorrectly implies that the trial court was not at liberty to assess the evidence in the case, including the testimony of the Appellant's own witnesses. *See Greene Cnty. Dev. Auth.*, 296 Ga. at 727 (recognizing that a trial court, as the finder of fact, possesses the power to assess witness testimony when determining if a proposed project will promote the general welfare of the local area) Indeed, as a practical matter, if the Court were to accept Appellant's position that the mere submission of bond documents including boiler plate statements required under the controlling statutes satisfies its burden, then a validation proceeding becomes meaningless, functioning solely as a "rubberstamp" in favor of approval. The Court should not tolerate this absurd result.

Finally, Appellant's argument impermissibly invites this Court to re-weigh the evidence and make its own witness credibility determinations. Such an invitation

is outside the scope of this Court's review. *See Wallis v. Porter*, 290 Ga. 218, 219 (2011) (explaining that appellate courts do "not re-weigh the evidence" because the trial court, as the finder of fact, "is the final arbiter of the weight of the evidence and the credibility of the witnesses") This holds true even in the face of conflicting evidence. *See Buckmon v. Futch*, 237 Ga. App. 67, 68 (1999) (even though "there was conflicting testimony" the appellate court was "bound by the trial court's determination").

The record here plainly authorized the trial court to deny the Petition based on Appellant's failure to carry its burden to show that the Project would benefit the local community. The Court may affirm the trial court's decision on this basis alone and need not address any other ground upon which the trial court denied the Petition. *See Greene Cnty. Dev. Auth.*, 296 Ga. at 728 n.4 ("We need not, and do not, address the other grounds upon which the trial court denied validation.").

III. The trial court correctly found that Appellant failed to carry its burden to establish that the Project was sound, reasonable, and feasible. (Enumeration of Error 1)

A. <u>The trial court properly considered whether the Project was sound, reasonable, and feasible.</u>

Whether the Project—including its economic feasibility—was sound, reasonable, and feasible was a question of fact for the trial court to determine in the first instance. *See Carter v. State*, 93 Ga. App. 12, 19 (1955) (in a bond validation

proceeding, whether the project at issue was "sound, feasible, and reasonable" was "a question of fact . . . for the trial court to determine, under the evidence"); *Copeland v. State*, 268 Ga. 375, 379 (1997) ("Whether the County's bond proposal was sound, reasonable, and feasible is a determination of fact made by the trial court."). The trial court's finding on this issue must be affirmed where, as here, there was evidence to support it. *See Greene Cnty. Dev. Auth.*, 296 Ga. at 726.

The State specifically requested in its Petition that the trial court declare "the undertaking for which the Bonds are issued" was "sound, feasible and reasonable." (V2-20.) Now, despite the express request below, Appellant complains that the trial court should have never consider the viability of the Project. The Court should not entertain this complaint. To the extent the trial court erred in considering the viability of the Project, the parties below invited the error thereby precluding reversal. *See Video Warehouse, Inc. v. Newsome*, 285 Ga. App. 786, 788 (2007) ("A party will not be heard to complain of error induced by his own conduct, nor to complain or errors expressly invited by him.") (citations omitted).

Relying on *Nations v. Downtown Development Authority of City of Atlanta*, 255 Ga. 324 (1985), Appellant asks the Court to adopt a bright line rule that a trial court shall never consider the viability of a proposed project as it relates to its economic feasibility. (Appellee Br. at 11) *Nations* does not support such a wide-sweeping edict.

While the *Nations* court noted that "the economic feasibility of the plan is not *required* to be shown by the state in its petition," and therefore the trial court was not *required* to make a finding regarding the same, nothing in *Nations* prevents a trial court from evaluating whether the project for which the bonds are to be issued is sound, reasonable, and feasible. *Id*. at 330. A fair reading of *Nations* actually permits a trial court to make a finding about the economic feasibility of a proposed project. This is especially true given that the Petition here specifically requested this finding. (V2-20)

Appellant cites many of the trial court's *factual* findings concerning the viability of Project and asserts that these findings impermissibly interfered with Appellant's and the State's policy decisions. (Appellee Br. at 12–14) This argument runs directly contrary to the trial court's statutory obligation: Render a factual determination in the first instance on whether the Project was sound, reasonable, and feasible. *See Carter*, 93 Ga. App. at 19.

Indeed, the trial court would have committed reversible error if it simply deferred to Appellant's and the State's decisions about the Project rather than discharging its duty as the fact finder. *See id*. at 20 (reversing trial court where it merely reviewed the decision of the governmental entities "in launching the undertaking rather than" using its "own discretion as the trier of facts in determining the issues presented to [it] under the evidence in the case"); § 36-82-77(a).

B. The trial court applied the correct legal standard.

Georgia law is clear that the burden was on Appellant to establish its *prima facie* case to support validation of the Bonds. *See Dade Cnty. v. State*, 77 Ga. App. 139, 144 (1948) (holding that the burden is on the party seeking validation to make its *prima facie* case). The burden only shifts to the party opposing validation if the *prima facie* case is satisfied. *See Harrell v. Town of Whigham*, 141 Ga. 322 (1914) (where a bond validation plaintiff failed to make out its *prima facie* case it was not "necessary to go further and refer to the evidence introduced by the contestants. . .")

Contrary to this established framework, Appellant contends that that trial court "erred because it put the burden of proof on Appellant to show economic feasibility as part of its prima facie case." (Appellee Br. at 22.) However, Appellant had the burden to establish that the Project was sound, reasonable, and feasible because the State's Petition sought this exact finding, (V2-20), and Intervenors filed an Answer expressly denying the allegation. (V2-1031) As such Appellant—not Intervenors—had the burden to establish the viability of the Project. *See Brown*, 109 S.E. at 672 (when parties opposing bond validation "deny the substantial allegations of the petition," it "places upon [the party seeking validation] the burden of proving such allegations"). As demonstrated above, the trial court applied the appropriate standard and correctly found that Appellant failed to carry its burden.

C. The trail court owed no deference to the State's alleged analysis of the Project's economic feasibility.

Appellant claims that the trial court erred in finding that the Project was not economically feasible because it failed to afford the "appropriate level of deference" to the State alleged "analysis" concerning the same. (Appellee Br. at 24.) No deference is owed because it was the obligation of Appellant to present facts upon which the trial court could make such a finding.

Aside from Mr. Capezutto's general testimony that "the State views original equipment manufacturing like the Rivian Project as 'the holy grail of economic development projects'"—Appellant does not point to any specific analysis that the State performed concerning whether the Project was economically feasible. (Appellee Br. at 24.) Nor can it because it did not introduce any document into evidence showing such analysis.

Next, Appellant relies on case law which is wholly distinguishable. *See Ga. Dep't of Cmty. Health v. Medders*, 292 Ga. App. 439, (2008); *Savage v. State*, 297 Ga. 627 (2015). *Medders* involved an "appeal from a superior court order reversing a final agency decision regarding . . . *Medicaid benefits*"—not an appeal from a trial court's order on a bond validation petition. *Id*. at 439 (emphasis added).

Savage is also distinguishable. Although that case involved a bond validation proceeding, Appellant quotes from a portion of the opinion dealing with the court's analysis of whether the intergovernmental agreement at issue was valid "under the

contracts clause of the Constitution"—not whether the underlying project was sound, feasible, and reasonable. *Id*. at 638. *Savage* is inapposite for this reason alone. *Savage* actually forecloses Appellant's deference argument because it recognizes that appellate courts defer to the trial court's findings—not an agency's—regarding the feasibility of a given project. *See id*. at 648 ("And to the extent the concerns affect whether the bond proposal is sound, feasible, and reasonable, we defer to the trial court's finding on those factors . . . .").

Appellant's deference argument flies in the face of binding precedent which holds that it is the trial court's duty, as the fact finder, to determine whether an underlying project is sound, feasible, and reasonable. *See Carter*, 93 Ga. App. at 20 (reversing trial court where it merely reviewed the decision of the governmental entities "in launching the undertaking rather than" using its "own discretion as the trier of facts in determining the issues presented to [it] under the evidence in the case").

D. The record contains ample evidence supporting the trial court's finding.

As detailed in the Order, the evidence presented by Appellant was insufficient to establish that the Project was sound, feasible, and reasonable. (V2-1217–1224, 1235–1238.) In reaching its finding, the trial court reviewed, weighed, and considered the testimony of Appellant's only witnesses—Silvio and Capezutto—as

well as other record evidence, including information contained in Rivian's publicly available financial disclosures.

Concerning Silvio, the trial court concluded that his "general and vague testimony" did not support a finding that Project was sound, feasible, and reasonable. (V2-1235–36.) Such conclusion was well-founded since Silvio's testimony confirmed that Appellant did not "perform any independent analysis". (V2-1236; *see also* V4-39–40, 46–47, 58)

The trial court also found Capezzuto's testimony unpersuasive, concluding that "his knowledge regarding the current financial condition of Rivian was very limited." (V2-1236) Far from being clearly erroneous, this finding was supported by Capezzuto's own testimony. (V4-105 (testifying that he was "generally aware" of Rivian's risk disclosures but that he wasn't going through "their 10-Qs with a fine-toothed comb")) The trial was entitled to assess this testimony, afford it the weight due, and make an appropriate finding—which is exactly what occurred here.

The trial court also relied upon information contained in Rivian's 2021 10-K and 2022 10-Q, both of which were admitted into evidence without objection and were unrebutted. (V2-1236–37; V4-142, 250) As the trial court correctly determined, Rivian's financial disclosures painted a "troubling" picture of the company's financial condition and status as a start up with limited experience in a competitive industry. (V2-1236–37.) As noted above, the 10K highlighted that

Rivian's "management has limited experience in operating a public company" that could result in a "significant disadvantage" to the company (V4-196); Rivian's untested distribution model "subjects [it] to substantial risk" (V4-166); and Rivian has "minimal experience servicing and repairing [its] vehicles" which could materially and adversely affect its business (V4-166).

The general and vague testimony of both Silvio and Capezutto, in addition to the information contained in Rivian's financial disclosures, provided ample evidence for the trial court's finding that the Project was not sound, feasible, and reasonable. This is particularly true against the backdrop of the any evidence standard, which is highly deferential to the findings below. *McWay*, 359 Ga. App. at 548.

Appellant quibbles with the trial court's decision—again, impermissibly inviting this Court to re-weigh the evidence—asserting that "no evidence supports the characterization of Rivian's burn rate as 'alarming,'" and the trial court somehow speculated about Rivian's finances. (Appellee Br. at 27.) Both arguments fail.

First, Rivian's financial disclosures speak for themselves. As the trial court explained, in the first quarter of 2022, "Rivian recorded operation losses of $1.579 billion", amounting to over $500,000,000 a month, and that "[t]his loss [was] nearly quadruple the amount of operation losses that Rivian recorded for the" same period in 2021. (V2-1237.) It was reasonable for the trial court to describe Rivian's burn rate as alarming. *See Mut. Benefit Health & Accident Assoc. of Omaha v. Hickman*,

100 Ga. App. 348, 359 (1959) ("It is the province of the [fact finder] to examine, weigh, and consider . . . the evidence as a whole, together with such reasonable inferences as may drawn therefrom . . . .")

Second, the authority Appellant cites for its speculation argument is inapplicable to the instant case. *See Handberry v. Manning Forestry Servs., LLC*, 353 Ga. App. 150, 158 (2019). In stark contrast to the posture here, *Handberry* involved an appeal from the grant of *summary judgmen*t. *Id*. at 150. Unlike the trial court here, which sat as the fact finder and was permitted to weigh the evidence and make credibility determinations, a trial court deciding summary judgment cannot. *See Dover v. Mathis*, 249 Ga. App. 753 ("[T]he trial court cannot in considering summary judgment weigh the evidence or determine its credibility.").

The trial court correctly found that the Project was not sound, feasible, and reasonable. The Court should affirm this decision.

IV. The trial court's finding concerning performance and audit review requirements was further basis to conclude that the project was not sound, feasible and reasonable. (Enumeration of Error 3)

As a separate ground for denying the Petition, the trial court found that the bond proposal was not sound, feasible, and reasonable because Appellant waived performance and audit review requirements under O.C.G.A. § 36-82-100. (V2-1228–32.) While the trial court noted that Appellant complied with the waiver requirement contained in § 36-82-100(d), it reasoned that the bond proposal, as

structured, would exempt the Project from public accountability. (V2-1232.) The trial court explained that it had concerns about whether Rivian would be required to place any funds in the Project Fund, whether the Project would actually benefit Georgia citizens and the citizens in the local area, and whether the Project was economically viable. (V2-1232–32.) The trial court concluded that the waiver of the performance and audit review contributed to its concerns whether the Project and bonds were sound, feasible and reasonable. As such, this was a proper factor for the trial court to consider in denying the bond validation.

V. The Rental Agreement does not create a bailment for hire.

The trial court did not err in finding that the Rental Agreement did not create a bailment for hire. Under O.C.G.A. § 44-6-101, a bailment relationship conveys "no interest in the property to the bailee *but merely the right of use*." (emphasis added). Here, Rivian's interest in the Equipment goes far beyond a mere right of use. For example, § 6.2 of the Rental provides that "[i]n any instance where [Rivian] determines that any items of Equipment are not necessary at the facility or facilities . . . , [Rivian] may remove such items of Equipment and transfer, sell, trade-in, exchange or otherwise dispose of them . . . ." (V2-88.) Further, if Rivian simply asks, Appellant "shall deliver a quitclaim bill of sale for such removed Equipment to [Rivian]." (V2-88.) These provisions establish that Rivian is not merely using the Equipment but rather possesses the right remove and acquire title to it.

The Georgia Supreme Court's decision in *Park 'N Go of Georgia, Inc., v. United States Fidelity and Guaranty Company*, 266 Ga. 787 (1996)—a case upon which Appellant relies—show why the Rental Agreement does not create a bailment for hire. There, the court held that a bailment relationship existed between a parking lot owner and its customers who parked their cars on the lot. *Id*. at 790. This analysis is consistent with the traditional understanding of a bailment relationship: The bailor grants possession of the property to the bailee for a limited period with the expectation that the property will be returned.

Unlike the instant case, the company in *Park 'N Go* did not possess the right to remove its customers' vehicles from the lot for any reason nor did it have the right to demand that the customers transfer title to their cars upon request from the company. The presence of these distinguishing factor renders *Park 'N Go* inapplicable to this case.

Rivian's interest in the Equipment transcends mere use but include all indices of ownership except formal title and therefore the trial court was correct in concluding that the Rental Agreement does not create a bailment for hire.

VI. The Rental Agreement creates an estate for years in favor of Rivian which is subject to taxation. (Enumeration of Error 5)

The trial court correctly determined that "Rivian would possess an estate for years that would be subject to ad valorem taxes, rather than a usufruct." (V2-1246) Appellant contends that that the trial court erred in two ways. First, it wrongly asserts that the trial court erred by not deferring to the legal determinations made by the Morgan and Walton County Board of Tax Assessors. Second, it contends that the trial court somehow misapplied Georgia law concerning Rivian's interest under the Rental Agreement. The Court should affirm the decision below because neither argument is availing.

A. The trial court owed no deference to the legal determinations made by the Morgan and Walton County Board of Tax Assessors.

During a bond validation proceeding, the trial court is obligated to "determine *all question of law* and fact in the case and shall render judgment thereof." § 36-82-77(a) (emphasis added). This is a *de novo* standard of review which does not require deference to a board of assessors' prior finding. Appellant's "deference" argument ignores the trial court's statutory obligation. The trial court was not sitting in an appellate capacity to review the determinations of Appellant, but rather was sitting as a court of original jurisdiction charged with making its own independent findings of fact and conclusions of law.

Moreover, it is settled law that the construction of a contract, like the Rental

Agreement, is a question of law for courts to decide. *See Mariner Healthcare, Inc. v. Foster*, 280 Ga. App. 406, 409 (2006) ("The construction of a lease, which is a contract, is generally a question of law for the court."); O.C.G.A. § 13-2-1. Because the issue involving Rivian's interest under the Rental Agreement necessarily entails a question of law, it was for the trial court to decide, not the board of assessors.

To support its misguided deference argument, Appellant cites *Love v. Fulton County Board of Tax Assessors*, 311 Ga. 682 (2021). *Love* has no application to this case. That case involved a *mandamus* challenge to the Fulton County Board of Tax Assessors' decision not to review for a second time whether an interest at issue qualified as a usufruct. *Id*. at 682. The trial court in *Love* was tasked with resolving whether the Fulton County Board exercised its discretion "in a manner that was unreasonable, arbitrary, and capricious" in declining such second review. *Id*. at 694.

The unreasonable, arbitrary, and capricious standard of review does not apply in this bond validation action. Rather, the trial court was required to "determine all questions of law"—including whether Rivian possessed an estate for years—without deference to the board of assessors' decisions. § 36-82-77(a). The trial court correctly noted that counsel for Appellant agreed that "it was appropriate for" the trial court to make a determination on the estate for years issue. (V2-1246.)

B. The Rental Agreement creates an estate for years.

Georgia law expressly provides that "[a]ll real property, including, but not limited to, leaseholds, interests less than a fee, and all other personal property shall be liable to taxation and shall be taxed, except as otherwise provided by law." O.C.G.A. § 48-5-3. While an estate for years is subject to taxation, a usufruct is not. *Compare Jekyll Dev. Assoc., L.P. v. Glynn Cnty. Bd. of Tax Assessors*, 240 Ga. App. 273, 274 (1999) ("an estate for years . . . constitutes a taxable interest in land"), *with Diversified Golf, LLC v. Hart Cnty. Bd. of Tax Assessors*, 267 Ga. App. 8, 10 (2004) ("a usufruct is not considered an interest in land and therefore is not subject to ad valorem taxation").

i. *Appellant cannot overcome the presumption in favor of an estate for years.*

"Where the term of a lease is for a period greater than five years, a rebuttable presumption arises that the parties intended to create an estate for years rather than a usufruct. *Chatham Cnty. Bd. of Assessors v. Jay Lalaji, Inc., Airport Hotels*, 357 Ga. App. 34, 35 (2020). Appellant does not contest that this presumption exists. (Appellee Br. at 29–36.)

To determine whether Appellant can overcome the presumption in favor of an estate for years, the Court should examine five factors: (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." *Chatham Cnty. Bd. of Assessors*, 357 Ga. App. at 35–36. Applying these five factors to the instant case establishes that Rivian's interest under the Rental Agreement constitutes an estate for years.

a. *The parties' self-serving statement of intent is not dispositive.*

Appellant relies heavily on the self-serving language contained in the Rental Agreement that describes Rivian's interest as a usufruct. (V2-79.) Such self-serving and conclusory language, however, is not dispositive and the Court should afford it little weight. *See Jekyll Dev. Assoc., L.P.*, 240 Ga. App. at 274–75 (explaining that the parties' statement of intent does not control).

Indeed, "all provisions of the [Rental Agreement] must be scrutinized objectively to determine whether the legal effect of the agreement is to grant an estate in the property or merely a right of use." *Id.*; *see also Clayton Cnty. Bd. of Tax Assessors v. Aldeasa Atlanta Joint Venture*, 304 Ga. 15, 16 (2018) (parties' statement of intent "are not dispositive . . . since the key inquiry turns upon whether various restrictions in the agreement, limiting the lessee's use of the premises, sufficiently negate" the presumption in favor of an estate for years). Appellant's contention that

the parties' statement of intent controls is non-sensical. If that were the law, then courts would have no role to play in interpreting interests under leases.

b. *Rivian is responsible for payment of ad valorem tax in the event the parties' self-serving language fails.*

Apellant again relies on conclusory and partial language contained in § 6.3 of the Rental Agreement to assert that the agreement reflects the parties' intent that Rivian would not responsible for payment of ad valorem tax. (Appellant Br. at 33.) However, Appellant ignores § 6.3's express language that "in the event that *ad valorem* taxes are levied on the Project, then the Company will receive a credit against its obligations to make PILOT Payments to the extent of such *ad valorem* taxes paid." (V2-89.)[1] Section 6.3 also provides that Appellant "cannot and does not warrant, guaranty or promise any particular ad valorem tax treatment resulting from" the agreement. (V2-89.) This language establishes that the parties' had a clear understanding that Rivian would face liability for the payment of ad valorem tax if the statement of intent failed.

More importantly, if the parties truly intended to create a usufruct, then "the provision eliminating the tax burden would have been unnecessary." *GeorgiaCarry.org, Inc. v. Atlanta Botanical Garden, Inc.*, 362 Ga. App. 413, 420

[1] At the very least, § 6.3 is a neutral factor, favoring neither an estate for years nor a usufruct. *See Chatham Cnty. Bd. of Assessors*, 357 Ga. App. at 36–37 (explaining that "if-then" clause concerning payment of tax "is not dispositive of an intent to create an estate for years").

(2022); *see also Milliken & Co. v. Ga. Power Co.*, 354 Ga. App. 98, 100 (2020) ("It is a cardinal rule of contract construction that a court should, if possible, construe a contract so as not to render any of provisions meaningless and in a manner that gives effect to all of the contractual terms.").

c. *Appellant retains little control over the Property.*

Appellant argues that it retains "significant control over the Project," thus suggesting that Rivian's interest constitutes a usufruct. (Appellee Br. at 33.) The trial court appropriately found that this Court's recent decision in *Atlanta Botanical Garden* dictates otherwise. 362 Ga. App. 413.

In that case, this Court held that the lease at issue created an estate for years even though the agreement contained numerous restrictions. For example, the lessee was "obligated to use the property as a botanical garden, and only in accordance with the Master Plan" approved by the lessor; the lessee was "prohibited from assigning its rights under the lease"; the lessor retained "the right to disapprove of future developments"; the lessee was required to "make its books available to the [lessor] for inspection"; the lessee was required to "maintain the property in a clean condition for the benefit of the [lessor] and the people of Atlanta"; the lessee was required to "maintain the plants, do lawn care and pest control, and maintain the roads and parking lots"; the lessee was required to "maintain and share" the parking facility; the lessee was required to seek the lessor's "approval for changes to parking fees";

and the lessee was "required to file compliance reports with the [lessor] showing non-discrimination practices." *Id*. at 418–19.

Significantly, this Court held that "none of these restrictions so severely restricts the [lessee's] use and enjoyment of the property as a botanical garden to overcome the presumption that the lease is one for an estate for years." *Id*. at 419. Here, none of the purported limitations in the Rental Agreement cited by Appellant function to overcome the presumption that Rivian possesses an estate for years.

Appellant cites § 4.5 of the Rental Agreement, which provides Rivian may only use the Project "for the limited purposes of developing and operating vehicle manufacturing and research, development, testing, sales and/or service facilities." (V2-83.) However, the lease in *Atlanta Botanical Garden* contained a greater restriction, requiring the lessee use the property only in accordance with the "Master Plan" approved by the lessor.[2]

Appellant asserts that "Rivian must comply with certain health, environmental, safety and anti-discrimination law . . . ." (Appellee Br. at 34.) Again, the lease in *Atlanta Botanical Garden* contained a similar restriction which did not transform the estate for years into a usufruct. Moreover, requiring a tenant—or anyone for that matter—to comply with applicable law is no greater restriction than

[2] Section 4.5 provides no meaningful restriction on Rivian's use of the Property as it allows Rivian to use the Property for each and every purpose of it business.

would exist without such provision. Likewise, Appellant asserts that it retains control over the project because the Rental Agreement incorporates Walton County's Comprehensive Land Development Ordinance and certain state environmental protection laws, with which Rivian must comply. (Appellee Br. at 34.) These additional "restrictions" do not enhance Appellant's control over the Project because Rivian would have to comply with them regardless of whether the Rental Agreement incorporated them.

d. *Rivian is in primary control of the Property.*

Many provisions of the Rental Agreement require Rivian to keep and maintain the Property, thus establishing that the company is in primary control:

- Section 3.3 grants Rivian a covenant of quiet enjoyment. (V2-81.) This provision is a strong indicator of an estate for years. *See Jekyll Dev. Assoc., L.P.*, 240 Ga. App. at 277 (covenant of quiet enjoyment indicates that an estate for years has been created); *Atlanta Botanical Garden, Inc.*, 362 Ga. App. at 420 (same). Likewise, Section 5.2 grants Rivian the "sole and exclusive possession, occupancy, and use of each component of the Project, as completed . . . ." (V2-85.)
- Section 6.7 provides that Rivian shall maintain the Project at its own expense and Appellant shall have no maintenance responsibilities. (V2-91). This provision is consistent with an estate for years. *See Jekyll Dev.*

Assoc., L.P., 240 Ga. App. at 276 (provisions obligating a lessee to repair and maintain the property at issue indicates an estate for years).

- Section 6.5 provides that Rivian is obligated to "maintain the Project in all material respects in compliance with all applicable life and safety codes and all legally enforceable health, environmental, and safety ordinances and laws . . . ." (V2-90.)
- Section 6.4 requires Rivian to maintain insurance for the property and the project. This undermines the notion that Rivian's interest under the Rental Agreement qualifies as a usufruct. *See Jekyll Dev. Assoc., L.P.*, 240 Ga. App. at 275 (a requirement for the "lessee to provide broad insurance coverage for the premises and facilities" indicates an estate for years); *Buoy v. Chatham Cnty. Bd. of Tax Assessors*, 142 Ga. App. 172, 173 (same).
- Section 6.1 grants Rivian the right to "make additions, modifications, or improvements to the Project . . . ." (V2-87.) Appellant did not retain any right to review or approve Rivian's additions or modifications, with merely a notification being required to be delivered.
- Section 6.2 requires Appellant to provide a quitclaim bill of sale to Rivian at any time in the event that Rivian desires to remove any of its equipment from the property for any reason. (V2-88.)

- Section 4.2 provides that Rivian is responsible for all construction of the Project. Rivian retains the full right to make changes to the property. (V2-81.)
- Section 7.2 provides that in the event of a condemnation of all or any portion of the property, Appellant will only receive that portion of the award attributable to the "portion of the Land which has not been materially improved by the Company . . . ." (V2-92.) This language illustrates that any compensation associated with the portion of the Land that has been improved by Rivian will be paid to Rivian, not Appellant.

Taken together, the these sections of the Rental Agreement compel a finding that Rivian possesses primary control of the property, and Appellant is not merely permitting Rivian to occupy it.

e. ***The Rental Agreement grants Rivian the right to allow others to use the Property only subject to Appellant's reasonable consent.***

While § 9.2 of the agreement grants the company the right to sublet all or a portion of the property to any of its suppliers subject to Appellant's consent, Appellant shall not "unreasonably" withhold its consent. (V2-96). This language promotes Rivian's power to allow others to use the Property. *See Jekyll Dev. Assoc., L.P.*, at 276 (similar reasonable consent language circumscribed "lessor's power to

withhold its consent") (citation omitted)). Indeed, § 9.1(a) of the agreement actually permits Rivian to "assign or convey any of all of its rights, interests, duties, and/or obligations in this Agreement" to any of its "Affiliates" *without Appellant's consent*. (V2-95.)

Moreover, Rivian's somewhat limited ability to sublet the Property to its suppliers in no way prevents a finding that it enjoys an estate for years because the lease in *Atlanta Botanical Garden* contained a provision completely prohibiting the lessee from assigning its rights thereunder. 362 Ga. App. at 418. Simply put, §§ 9.1(a) and 9.2—which are far less restrictive than the complete prohibition in *Atlanta Botanical Garden*—demonstrate Rivian may allow others to use the Property consistent with an estate for years.

CONCLUSION

This Court must affirm the decision below if it was right for any reason. *See Mun. Elec. Auth. of Ga. v. City of Calhoun*, 227 Ga. App. 571, 574 (1997) (holding that "a judgment which is right for any reason must be affirmed"); *Allstate Ins. Co. v. Spillers*, 252 Ga. App. 26, 28 (2001) (explaining that after a bench trial, "the decision of the trial court will be affirmed if it is right for any reason"). Here, the trial court correctly found multiple basis to deny the Petition. After assessing both the law and facts in this case, the trial court properly denied the Petition. The trial court's decision must be affirmed.

This the 12th day of December, 2022.

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *Brief of Intervenors* was filed with the Clerk of Court and served on all parties of record via the Court's electronic filing system and by depositing a copy of same in the United States first class mail in a properly addressed envelope with adequate postage affixed thereon addressed to:

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