



ECONOMIC DEVELOPMENT LAW IN GEORGIA

RECENT DEVELOPMENTS IN REVENUE BOND LITIGATION
AFFECTING PROPERTY TAX INCENTIVES IN GEORGIA

Prepared By:

Renee Huskey
Itcher Thomas LLP
Atlanta, Georgia

Presented By:

Cary Ichter
Itcher Thomas LLP
Atlanta, Georgia

Sandra Z. Zayac
Schiff Hardin LLP
Atlanta, Georgia

Robert E. Simmons
Development Authority of Fulton County
Atlanta, Georgia

**RECENT DEVELOPMENTS IN REVENUE BOND LITIGATION
AFFECTING PROPERTY TAX INCENTIVES IN GEORGIA***

**Cary Ichter, Ichter Thomas LLP
Sandra Z. Zayac, Schiff Hardin LLP
Robert E. Simmons, Development Authority of Fulton County
Atlanta, Georgia**

Table of Contents

I. Recent Challenges to Bond Validations.....1

II. Legislative Action.....2

III. Supreme Court Ruling.....3

IV. DAFC Response.....6

Exhibit A O.C.G.A 36-80-16.1(e).....7

**Exhibit B Sherman v. Fulton Co. Bd. Of Assessors,
Supreme Ct. of Ga., Case No. S10A0924, November 1, 2010.....9**

***Written materials prepared by Renee Huskey, Ichter Thomas LLP**

RECENT DEVELOPMENTS IN REVENUE BOND LITIGATION AFFECTING PROPERTY TAX INCENTIVES IN GEORGIA

I. Recent Challenges to Bond Validations

Tax incentives offered by sale-leaseback revenue bond transactions have been challenged in several recent court proceedings. Individual taxpayers and/or citizen's advocacy groups have intervened, pursuant to O.C.G.A. § 36-82-77 (a), in certain bond validation proceedings.¹ In other actions, individuals and/or advocacy groups have filed lawsuits challenging the constitutionality of the tax incentives offered in these transactions.²

In June, 2009, John Sherman, a Fulton County taxpayer, filed a petition in Fulton County Superior Court challenging the method employed by the Fulton County Board of Assessors ("Board") to value leasehold estates arising from the sale-leaseback bond transactions offered by the Development Authority of Fulton

¹ See, e.g., State of Ga. v. Atlanta Dev. Auth. and 13th Street Holdings LLC, Fulton Co. Sup. Ct. Civil Action No. 2008CV159232; State of Ga. v. Atlanta Dev. Auth. and Mezzo Dev., LLC, Fulton Co. Sup. Ct. Civil Action No. 2008CV159238 (resulting in an award of sanctions against the intervenor's counsel for what the trial court found to be "unethical conduct," which order was the subject of an appeal, Citizens for Ethic in Government, LLC v. Atlanta Dev. Auth., 303 Ga. App. 724 (2010), and the matter has now been remanded to the trial court for further proceedings); See also State of Ga. v. Dev. Auth. of Fulton Co. and Dendreon Corp., Fulton Co. Sup. Ct. Civil Action No. 2010CV192339 (in which a non-party who did not move to intervene nevertheless filed a Motion for Reconsideration and Notice of Appeal of the Validation Order.

² See, e.g., Sherman v. Fulton Co. Bd. of Assessors, et al., Fulton Co. Sup. Ct. Civil Action No. 2009-CV-17275; Sherman v. Fulton Co. Bd. of Assessors, et al., Fulton Co. Sup. Ct. Civil Action No. 2010-CV-183245.

County (“DAFC”). (See Sherman v. Fulton Co. Bd. of Assessors, et al., Fulton County Superior Court Civil Action No. 2009-CV-171275.) The DAFC intervened in the litigation as an affected party in order to protect one of the only economic development tools available in Georgia. The challenged method is widely used in Georgia as an economic development incentive and is referred to as a “ramp up” formula. It starts with the assumption that the fair market value of the leasehold estate is 50% of the fair market value of the fee. The lease agreement in these bond transactions grants an ever-increasing reversionary interest in the fee estate over the ten-year term of the lease, whereby the company purchasing the bonds owns fee simple title at the end of year ten. Thus, the formula for determining the fair market value of the leasehold “ramps-up” each year in an ever-increasing percentage until it is at 100% of the fair market value of the fee estate in the eleventh year, the year the company owns the fee simple title. The formula is typically agreed upon in a memorandum of agreement entered into between the tax assessor, the development authority, and the company purchasing the bonds at the time the bonds are issued.

II. Legislative Action

Effective April 22, 2009, the legislature enacted a statute, O.C.G.A. § 36-80-16.1(e), that expressly authorizes each county board of tax assessors to employ a simplified method of valuing the leasehold estate created by the issuance of sale-leaseback revenue bonds that is based on the non-governmental user’s increasing interest in the property over the term of the lease.³ (See O.C.G.A. 36-80-16.1(e),

³ The statute authorizes the tax assessors to “continue” employing these simplified methods of valuing the leasehold estates created by these bond

attached hereto as Exhibit “A.”) In essence, the statute approves the tax assessors’ application of a “ramp up” formula to these properties.

III. Supreme Court Ruling

In the Superior Court action, Sherman challenged the constitutionality of O.C.G.A. § 36-80-16.1 (e) as well as the practice of applying a ramp up formula in these transactions. He sought declaratory judgment on his constitutionality claims and also injunctive relief and a writ of mandamus requiring the Fulton County tax assessor to cease using the ramp up formula to reassess the fair market value of all existing leasehold estates created by sale-leaseback bond transactions for all prior years, limited only by the applicable statute of limitation. In response to DAFC’s motion for judgment on the pleadings, and the Board’s motion to dismiss for failure to state a claim, the Superior Court dismissed the action. Sherman appealed to the Georgia Supreme Court.⁴

transactions and thus confirms the authority of tax assessors to use such methods that they may have already been applying in these transactions.

⁴ While this matter was pending before the Georgia Supreme Court, Sherman filed another lawsuit alleging the ramp-up valuation method and the statute authorizing its use violated yet a different constitutional provision. (See Sherman v. Fulton Co. Bd. of Assessors, et al., Fulton County Superior Court Civil Action No. 2009-CV-183245.) When the trial court issued an order staying the action until such time as the Georgia Supreme Court had ruled in the previous appeal, Sherman appealed the stay order. See Sherman v. Fulton Co. Bd. of Assessors, Ga. Supreme Court Case No. S10A1982, which appeal was dismissed on procedural grounds.

In its opinion dated November 1, 2010, the Georgia Supreme Court reversed the order dismissing the action. See Sherman v. Fulton Co. Bd. of Assessors, Ga. Supreme Ct. Case No. S10A0924, Nov. 1, 2010 (2010 WL 4273347), a copy of which is attached hereto as Exhibit "B." The opinion does not address the constitutional issues and in no way holds that the valuation method applied by the Board is improper. Instead, it holds that the complaint contained sufficient allegations regarding the propriety of the method such that it should not have been dismissed without an evidentiary hearing on the issues raised. The opinion really sets forth a roadmap for what evidence needs to be presented to the trial court once the case is remanded before that court can properly rule on the allegations.

The opinion contains some very good language for the tax assessors and development authorities. Contrary to plaintiff's allegations that the Board was required to apply specific valuation methods set forth in certain statutes and regulations, the Supreme Court held that the Board is not required to use any particular appraisal approach or method when determining the fair market value of the leasehold estates created by these bond transactions. Instead, the Supreme Court held that the trial court must decide the "overriding issue" of whether the valuation method "fairly and justly establishes the fair market value of a bond transaction leasehold estate such that the method is not 'arbitrary or unreasonable.'"

The Supreme Court relied upon the rationale of its earlier opinion in DeKalb Co. Bd. Of Tax Assessors v. W.C. Harris & Co., 248 Ga. 277 (1981), in which it held a similar "simplified method" of determining the fair market value of the leasehold estate was not arbitrary or unreasonable. The Court distinguished the facts in W.C. Harris & Co. by noting that it was able, in that case, to reach a conclusion regarding the reasonableness of the method because the record included

evidence that the method took into account the fair market value of similar leased property and prevailing rents in the area. Discussing the expert affidavit presented to the trial court by DAFC, the Court determined that additional issues remained to be addressed by the evidence, such as: 1) whether the valuation method was derived by following an authorized appraisal approach; 2) whether the approach took into account similarly leased property in the area, market rents, or the terms and conditions of each lease agreement; and 3) how the number of years required to repurchase the fee simple estate for a nominal amount figures into the reasonableness of the formula.

The opinion states that the DAFC and the Board “will need to offer evidence as to how their method applied to the leasehold estate incorporates the requisite factors.” Id. at p. 10. It cautions that the defendants must present evidence that every leasehold estate is worth 50 percent of the fee simple estate, and not just start from that assumption.

Three justices dissented based on DAFC’s assertion that plaintiff’s challenge was untimely as a collateral attack upon final judgments approving the existing bond validations. The majority, however, distinguished the cases relied upon by the dissenting justices by pointing out that in each case holding that the challenge was untimely, the matter that was being challenged was expressly included in the bond validation judgment. In the Sherman case, however, the record did not establish that the memorandum of agreement concerning the tax valuation method to be applied in these bond transactions had been put at issue and approved in the bond validation judgment.

IV. DAFC Response

In response to the Sherman opinion, in recent bond validation proceedings, the DAFC has introduced these agreements into evidence and has presented expert testimony at the bond validation hearing attesting that the memorandum of agreement to be signed by the DAFC, the Board, and the company purchasing the bonds sets forth a reasonable and non-arbitrary method of arriving at the fair market value of the subject property for tax assessment purposes. The DAFC has also sought an express finding in the validation order that the memorandum of agreement sets forth a reasonable and non-arbitrary method of arriving at fair market value. Such a finding should help to insulate the validation order from a collateral attack on the constitutionality of the formula used to arrive at fair market value.

EXHIBIT "A"

Ga. Code Ann., § 36-80-16.1

(a) This Code section shall be known and may be cited as the "PILOT Restriction Act."

(b) As used in this Code section, the term "payments in lieu of taxes" means payments made directly or indirectly:

(1) Primarily in consideration of the issuance of revenue bonds or other revenue obligations and the application by the issuer of such bonds or other obligations of the proceeds of such bonds or other obligations to finance all or a portion of the costs of acquiring, constructing, equipping, or installing a capital project; and

(2) In further consideration of the laws of the State of Georgia granting an exemption from ad valorem taxation for such capital project,

to or for the account of the issuer of revenue bonds or other revenue obligations or the public bodies whose consent would otherwise be required, in the case of the separate payments provided for under subsection (d) of this Code section. Payments in lieu of taxes shall be deemed to be payments in lieu of taxes for educational purposes in the same proportion that property taxes for educational purposes would bear to total property taxes on such capital project if the project were subject to ad valorem property taxation. The term "payments in lieu of taxes" shall not include payments made primarily in consideration for the use or occupancy of property, including but not limited to lease payments or rent paid under a lease, regardless of whether or not the lessee or tenant holds an interest that is taxable for property tax purposes.

(c)(1) No local government authority, as defined in Code Section 36-80-16, shall be authorized to issue revenue bonds or other revenue obligations to finance, in whole or in part, any capital project if the terms governing such revenue bonds or other revenue obligations provide for such capital project to be used primarily by a nongovernmental user or users that have no taxable property interest in any portion of such capital project and provide for such revenue bonds or other revenue obligations to be repaid, in whole or in part, through payments in lieu of taxes made by a nongovernmental user or users, unless:

(A) Each of the local governments that have property tax levying authority in the area in which such capital project is located consents by ordinance or resolution to the use of payments in lieu of taxes for such purposes; and

(B) In the case of payments in lieu of taxes for educational purposes, a consent is obtained that covers the use for such purposes of such payments in accordance with subsection (d) of this Code section, except that the terms governing such revenue bonds or other revenue obligations may provide for one or more of the public bodies, whose consent would otherwise be required, instead to receive, in such capacity, separate payments in lieu of taxes at least equal to the property taxes that such public body or bodies would have received if the capital project were subject to ad valorem taxation or in such other amount or amounts as may be agreed to by such public body or bodies.

(2) No such revenue bonds or other revenue obligations may be so issued without compliance with the requirements of paragraph (1) of this subsection.

(d)(1) When a capital project is located within the boundaries of a municipality with an independent school system, a consent by the municipality under subparagraph (c)(1)(B) of this Code section shall cover the use of payments in lieu of taxes for educational purposes, provided that, if the board of education of the independent school system is empowered to set the ad valorem tax millage rate for educational purposes and the legislative body of the municipality does not have the authority to modify such rate set by the board of education, the requisite consent shall be that of the board of education of the independent school system rather than that of the legislative body of the municipality.

(2) For those municipalities which do not have an independent school system, a consent by the municipality under subparagraph (c)(1)(B) of this Code section shall cover the use of payments in lieu of taxes for educational purposes if the county board of education or the local legislative body of the county, whichever is authorized to establish the ad valorem tax millage rate for educational purposes, consents to such coverage by resolution duly adopted by said board of education or local legislative body, as appropriate.

(3) The use of payments in lieu of taxes levied for county school district purposes shall be covered by a consent under subparagraph (c)(1)(B) of this Code section if the board of education of the county school district or the local legislative body of the county, whichever is authorized to establish the ad valorem tax millage rate for educational purposes, consents to such coverage by resolution duly adopted by said board of education or local legislative body, as appropriate.

(4) The use of payments in lieu of taxes levied for school district purposes within the boundaries of a consolidated government shall be covered by a consent under subparagraph (c)(1)(B) of this Code section if the board of education of such school district or the local legislative body of the consolidated government, whichever is authorized to establish the ad valorem tax millage rate for educational purposes within the school district, consents to such coverage by resolution duly adopted by said board of education or local legislative body, as appropriate.

(e) This Code section shall not affect revenue bonds or other revenue obligations which any local government authority has issued or which have been judicially validated on or before April 22, 2009. Each county board of tax assessors shall continue, notwithstanding this Code section, to exercise its powers and discharge its duties and is specifically authorized, without limitation, to use a method or methods of valuation for leases related to revenue bonds or other revenue obligations issued by a local government authority for a capital project or projects to be leased primarily to a nongovernmental user or users, based on assessments of the increasing interest of the nongovernmental user or users in the real or personal property, or both, over the term of the lease, or to use a simplified method or methods employing a specified percentage or specified percentages of such leasehold interests. Each local government authority that is authorized to issue revenue bonds or other revenue obligations secured by a taxable property interest, such as a taxable lease of a capital project, shall continue, notwithstanding this Code section, to exercise its powers and discharge its duties, including, in the case of development authorities, the development of trade, commerce, industry, and employment opportunities. Any local government or local government authority which directly or indirectly receives payments in lieu of taxes shall be authorized to use the same for any governmental or public purpose of such local government or local government authority.

CREDIT(S)

Laws 2009, Act 52, § 3, eff. April 22, 2009.

EXHIBIT "B"

Supreme Court of Georgia.
SHERMAN
v.

FULTON COUNTY BOARD OF ASSESSORS et al.

No. S10A0924.
Nov. 1, 2010.

CARLEY, Presiding Justice.

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

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

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

Sherman seeks the following relief: a declaration that this valuation method, used by Appellees and allegedly codified in OCGA § 36-80-16.1(e), violates the Georgia and United States Constitutions; an injunction prohibiting Appellees from using this valuation method for purposes of determining the fair market value of leasehold estates created by a revenue bond transaction; and a writ of mandamus ordering Appellees to commence determining the actual fair market value of all existing leasehold estates and to reassess all such leasehold estates for all prior years that the valuation method at issue was used. The trial court entered an order granting a motion to dismiss filed by FCBOA and a motion for judgment on the pleadings filed by DAFC, and denying a motion for partial summary judgment filed by Sherman. Sherman appeals from that order, contending that the dismissal of the petition and the grant of judgment on the pleadings were erroneous.

***2** The standard of review for the dismissal of a petition for failure to state a claim upon which relief may be granted is de novo, and "all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the

filing party's favor." (Cit.)' [Cit.]" Southstar Energy Services v. Ellison, 286 Ga. 709, 710(1) (691 S.E.2d 203) (2010).

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

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

" 'For the purposes of [a] motion [for judgment on the pleadings], all well-pleaded material allegations of the opposing party's pleading are to be taken as true, and all allegations of the moving party which have been denied are taken as false.' [Cit.]" Ware v. Fidelity Acceptance Corp., 225 Ga.App. 41, 44(3) (482 S.E.2d 536) (1997). A motion for judgment on the pleadings should "be granted only if ... the moving party is clearly entitled to judgment." Gulf American Fire & Casualty Co. v. Harper, 117 Ga.App. 356(1) (160 S.E.2d 663) (1968).

Construed in favor of Sherman, the petition alleges that Appellees, by using the above-referenced valuation method, have intentionally valued bond transaction leasehold estates for purposes of ad valorem taxation at less than fair market value. Sherman claims that Appellees' alleged undervaluation of these leasehold estates violates their duty to "see that all taxable property within the county is assessed and returned at its fair market value and that fair market values as between the individual taxpayers are fairly and justly equalized...." OCGA § 48-5-306(a). He also alleges violations of several provisions in the Georgia and United States Constitutions, including the uniformity of taxation provision. The overriding issue in this case is whether the valuation method used by Appellees fairly and justly establishes the fair market value of a bond transaction leasehold estate such that the method is not "arbitrary or unreasonable." DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., 248 Ga. 277, 281(3) (282 S.E.2d 880) (1981).

Appellees have failed to show that they are clearly entitled to judgment and that no evidence may be introduced sufficient to grant the relief sought by Sherman. In fact, Sherman provided such evidence in the trial court in the form of an affidavit of a qualified expert real estate appraiser, which specifically opines that the valuation method used by Appellees does not fairly and accurately determine the fair market value of a bond transaction leasehold estate and thus is arbitrary and unreasonable. In a previous dispute over the proper valuation method for determining the fair market value of real property for purposes of ad valorem taxation, this Court stated that, "[a]lthough the tax assessors or the property owners, or both, may be incorrect as a matter of fact, such determination cannot be made on motion for summary judgment...." Dougherty County Bd. of Tax Assessors v. Burt Realty Co., 250 Ga. 467, 469 (298 S.E.2d 475) (1983). See also Delta Air Lines v. Clayton County Bd. of Tax Assessors, 246 Ga.App. 225, 235(4) (539 S.E.2d 905) (2000) ("Determination of the fair market value of the property involved is generally a question for the trier of fact. [Cits.]"); J.C. Penney Co. v. Richmond County Bd. of Tax Assessors, 233 Ga.App. 399, 400-401 (504 S.E.2d 201) (1998) (" 'Just and fair valuation of property is a question to be determined by the factfinder.... (Cit.)' "). Clearly then, that determination can rarely be made under the more stringent standards applicable to motions to dismiss for failure to state a claim and motions for judgment on the pleadings.

***3** It is clear that county boards of tax assessors are not required to use any particular appraisal approach or method when determining the fair market value of property for purposes of ad valorem taxation. See Rogers v. DeKalb County Bd. of Tax Assessors, 247 Ga. 726, 728(2) (279 S.E.2d 223) (1981) (" 'The object of the assessors must be to determine the fair market

value of the property subject to taxation in the county and the methods employed may be varied if the object is attained.' [Cit.]"); Lamplight Court Apartments v. DeKalb County Bd. of Tax Assessors, 259 Ga.App. 642, 643(1) (577 S.E.2d 814) (2003) (" '[I]t is not impermissible under the uniformity of taxation provision of the constitution to apply different methods of arriving at the fair market value of tangible property.' "). However, this does not mean that the boards "can act with unlimited discretion...." Cross v. Miller, 221 Ga. 579, 581(1) (146 S.E.2d 279) (1965). The law still requires valuations to be just and fair between all taxpayers of the county. Cross v. Miller, supra. The valuation methods used must not be "arbitrary or unreasonable." DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., supra. Therefore, it cannot be said that, within the framework of the petition, no evidence could be introduced that would support a finding that the valuation method used by Appellees unfairly undervalues the fair market value of a bond transaction leasehold estate and thus is arbitrary or unreasonable.

Appellees contend that they have authority for the use of their valuation method pursuant to the decisions upholding similar valuation methods for bond transaction leasehold estates in DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., supra, and Coweta County Bd. of Tax Assessors v. EGO Products, 241 Ga.App. 85, 87-88(1) (526 S.E.2d 133) (1999). However, neither of those cases involved a motion to dismiss or for judgment on the pleadings. Furthermore, both cases are otherwise distinguishable from the case at bar.

In DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., supra, this Court determined that a valuation method applied by the local county board of tax assessors to a bond transaction leasehold estate was not "arbitrary or unreasonable." To reach that conclusion, this Court pointed to evidence in the record that the method followed an authorized income appraisal approach that "[took] into account the fair market value of similarly leased property and [was] based upon prevailing rents in the area." DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., supra. Moreover, this Court emphasized that "[t]he fair market value of a leasehold interest must necessarily vary in accordance with the terms and conditions of each agreement as well as the nature and location of the property involved." DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co., supra. In this case, the record does not show that Appellees' valuation method was derived by following an authorized appraisal approach or that it took into account similarly leased property in the area, the market rents in the area, or the terms and conditions of each lease agreement. Although Appellees have proffered an affidavit describing the rationality behind a ramp-up formula, the formula used for the calculations set forth in that affidavit is substantially different than the formula presently at issue. The formula described in Appellees' affidavit requires ten years on the life of the lease before the developer can invoke its option to repurchase the fee simple estate for a nominal amount. The formula in this case allows for a repurchase at any time once the lease begins. This difference is essential, especially considering that, according to Appellees' affidavit, "[a]lmost all of the leasehold value represented by the lease is represented by the [repurchase option] in the real property at the end of the lease term." Thus, the affidavit appears to be inapplicable to the formula at issue in the present case. Moreover, Sherman must be given the opportunity to refute that affidavit rather than having his complaint dismissed.

*4 In Smith v. Elbert County Bd. of Tax Assessors, 292 Ga.App. 417, 418(2) (664 S.E.2d 786) (2008), a taxpayer also challenged the methodology employed by the county board of tax assessors to value her property. The Court of Appeals upheld the challenged method because "the Board presented evidence both of the methodology it employed and that its methodology resulted in a determination of fair market value." Smith v. Elbert County Bd. of Tax Assessors, supra. Although the methodology employed in the present case is clear, Appellees have not presented evidence that this methodology actually resulted in a fair valuation of the leasehold estate. Appellees argue that their initial valuation of the fee simple estate follows an authorized appraisal approach and takes into account some of the factors referenced above, such as similarly leased properties in the area and the market rents in the area. However, a valuation of the fee simple estate is just the first step. Appellees will need to offer evidence as to how their method applied to the leasehold estate incorporates the requisite factors. They assert that we

should just assume that every leasehold estate is worth 50 percent of its fee simple estate, but offer no evidence to support this assumption. Without such evidence, and in light of the affidavit filed by Sherman to the contrary, we are unable to determine, pursuant to *DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co.*, supra, that the valuation method used by Appellees is not arbitrary and unreasonable, and therefore the petition should not have been dismissed pursuant to OCGA § 9-11-12(b)(6).

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

Appellees also contend that OCGA § 36-80-16.1(e) provides statutory authorization for the use of their valuation method. This provision gives county boards of tax assessors authority to determine the fair market value of bond transaction leasehold estates by using a valuation method "based on assessments of the increasing interest of the [lessee] in the real or personal property, or both, over the term of the lease, or to use a simplified method or methods employing a specified percentage...." OCGA § 36-80-16.1(e). Although OCGA § 36-80-16.1(e) gives county boards of tax assessors authority to use certain simplified methods for determining the value of a bond transaction leasehold estate, the statute does not purport to relieve Appellees from their duty to value the leasehold estate at its fair market value. Any contention that the statute does allow Appellees to value a bond transaction leasehold estate at less than its fair market value would make the statute illegal and unconstitutional. See OCGA § 48-5-306(a), supra; *Griggs v. Greene*, 230 Ga. 257, 267(4) (197 S.E.2d 116) (1973) (" '[T]he requirement in the Constitution that the rule of taxation shall be uniform, means that all kinds of property of the same class ... must be taxed alike, by the same standard of valuation....' [Cits.]"). Thus, OCGA § 36-80-16.1(e) does not bear upon the overriding issue in this case of whether the valuation method used by Appellees fairly and justly approximates the fair market value of a bond transaction leasehold estate. Therefore, it would not be appropriate to address the constitutionality of the statute in the present case. See *Grantham v. Grantham*, 269 Ga. 413, 414(2) (499 S.E.2d 67) (1998) ("a reviewing court will decide a case on constitutional grounds as a matter of last resort ([Cits.])"); *Bell v. Austin*, 278 Ga. 844(1) (607 S.E.2d 569) (2005) ("A constitutional question will not be decided unless it is essential to the resolution of the case. [Cit.]").

*5 Finally, the dissent contends that the present action is barred because it amounts to a collateral attack on concluded bond validation proceedings which is proscribed by Georgia law. See Ga. Const. of 1983, Art. IX, Sec. VI, Par. IV; OCGA § 36-82-78; *Quarterman v. Douglas County Bd. of Commissioners*, 278 Ga. 363 (602 S.E.2d 651) (2004). However, the restriction on challenging matters addressed in bond validation proceedings only attaches to those matters that are referenced and adjudicated in those proceedings. For example, in *Charlton Development Auth. v. Charlton County*, 253 Ga. 208, 209 (317 S.E.2d 204) (1984), this Court upheld a tax levy agreement that "was referred to in the pleadings and final judgment in the bond validation proceedings." A second tax levy agreement was held by this Court to be unenforceable because it was "in no manner ... mentioned in the order validating the bonds and security." *Charlton Development Auth. v. Charlton County*, supra. Furthermore, every case cited by the dissent upholds only those agreements that were specifically adjudicated valid in the bond validation

proceedings. See *Quarterman v. Douglas County Bd. Of Commissioners*, supra at 365 (challenged "intergovernmental contract ... was specifically found in the validation order to constitute a legal, valid, binding, and enforceable obligation"); *Ambac Indemnity Corp. v. Akridge*, 262 Ga. 773, 775(1) (425 S.E.2d 637) (1993) (taxpayer attack held invalid because the validation order specifically "found that the contract was 'a legal, valid, binding and enforceable obligation' of the county and that the county could levy taxes to fulfill its obligations under the contract"); *Miller v. Columbus*, 229 Ga. 234, 236(2) (190 S.E.2d 535) (1972) (challenged "conveyance and lease ... were adjudicated valid in the bond validation proceeding"); *Gibbs v. City of Social Circle*, 191 Ga. 422, 425(2) (12 S.E.2d 335) (1940) ("action to enjoin the issuance and sale of [bond] certificates" not allowed where the "judgment validat[ed] and confirm[ed]" them). Requiring that agreements relating to bond transactions be specifically referenced in the pleadings and adjudicated in the validation proceedings protects the public's "constitutional [right] of due process [to receive] adequate notice of the subject of the hearing and [the] opportunity to be heard." *Ambac Indemnity Corp. v. Akridge*, supra at 774(1). Therefore, the present challenge to the memoranda of agreement that set forth the tax assessment formula at issue will only constitute a prohibited collateral attack on a concluded bond validation proceeding if the memoranda were specifically adjudicated in the proceedings and held valid by the bond judgment. This may be the case in the present action, but Appellees must put forth evidence that the applicable bond validation orders did in fact expressly rule upon each memorandum of agreement. The requirement of this evidence is a further reason why the trial court should not have dismissed Sherman's petition. Moreover, even if Sherman is barred from challenging the tax agreements on concluded bond transactions, he also seeks an injunction to prohibit the use of the formula in future bond agreements.

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

Judgment reversed.

All the Justices concur, except HUNSTEIN, C.J., BENHAM and THOMPSON, JJ., who dissent.

BENHAM, J., dissenting.

*6 Appellant John Sherman sought a writ of mandamus and injunctive relief against the members of the Fulton County Board of Tax Assessors ("the Board") and the county's chief appraiser to compel them to stop what he asserts are illegal tax abatements and preferential tax assessments given in 2006-2009 to several real estate developments that were the subject of bonds issued by the Fulton County Development Authority and validated by the superior court. Sherman asserts that the Board is not fulfilling its statutory duty to under OCGA § 48-5-263(b) to make appraisals of fair market value and comply with rules and regulations established by the tax commissioner for staff duties, and contends that the purported illegal activity is facilitated by the Board's use of a 50% "ramp-up" formula to value, for ad valorem tax purposes, the leasehold interest held by a real estate developer, the value of which interest has the potential to increase annually as the developer buys back the leased property from the local development authority. See *DeKalb County Bd. of Tax Assessors v. W.C. Harris & Co.*, 248 Ga. 277 (282 S.E.2d 880) (1981). Acknowledging that OCGA § 36-80-16.1(e) authorizes the use of the valuation method employed by the Board, Mr. Sherman also contended the statute is unconstitutional. The trial court dismissed Mr. Sherman's petition and granted judgment on the pleadings to the Board and the chief appraiser. Because I cannot agree with the majority's decision to reverse the judgment entered by the trial court, I respectfully dissent.

In his petition, Mr. Sherman sought to have the court order the Board to determine the 2009 fair market value of all existing bond transaction leaseholds and re-assess them for prior years, and to cease use of the 50% valuation formula. In so doing, Mr. Sherman's petition takes issue with and seeks judicial reformation of the memoranda of agreement executed years ago in conjunction with each bond transaction by the real estate developer, the Fulton County Development Authority and the Board. Each of those transactions has been the subject of a bond validation proceeding which resulted in the issuance of a judgment of validation. I believe the trial court correctly dismissed Mr. Sherman's petition because Mr. Sherman may not collaterally attack the judgment of validation that preceded the issuance of bonds for these projects. "[E]ven if the judgment of validation is unconstitutional, arguably void, or obtained by fraud, accident, or mistake, it cannot be collaterally attacked ... [t]hat judgment is conclusive as to ... all other questions which could and should have been asserted and adjudicated during the bond validation proceedings." Quarterman v. Douglas County Bd. of Commrs., 278 Ga. 363, 365 (602 S.E.2d 651) (2004). See also Charlton Dev. Auth. v. Charlton County, 253 Ga. 208 (317 S.E.2d 204) (1984) (conclusiveness of validation proceedings places agreements referred to in the validation judgment beyond challenge); Miller v. Columbus, Georgia, 229 Ga. 234 (190 S.E.2d 535) (1972) (following the conclusive adjudication of a bond validation proceeding, citizen/taxpayers could not maintain an action attacking the conveyance and lease that were adjudicated valid in the bond validation proceeding). The Georgia Constitution requires that there be "incontestable and conclusive" validation of revenue bonds (1983 Ga. Const., Art. IX, Sec. VI, Par. IV), and OCGA § 36-82-78, the legislative implementation of the constitutional requirement, "prevents any collateral attack by the county, county residents, or taxpayers who had proper notice of the validation proceedings but chose not to intervene." AMBAC Indem. Corp. v. Akridge, 262 Ga. 773, 774 (425 S.E.2d 637) (1993). "The validation scheme provides an easy remedy for every taxpayer, whereby he may have his day in court, without the hazard and risk of seeking the aid of an equity court by injunction ... It provides a speedy and less expensive remedy for the taxpayer. There is no reason, in logic or in law, why the taxpayer should be permitted to decline to enter his appearance and objections in the validation proceeding, allow the decree there to be entered, and then make a formal attack which might have been made in that proceeding...." Gibbs v. City of Social Circle, 191 Ga. 422, 426 (12 S.E.2d 335) (1940), quoting Love v. Yazoo City, 162 Miss. 65 (138 So. 600, 603) (1932).

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

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

AMBAC Indem. Corp. v. Akridge, supra, 262 Ga. at 775. The trial court was correct when it dismissed Mr. Sherman's petition and granted judgment on the pleadings to the Board and chief appraiser. Because the majority authorizes Mr. Sherman to mount a collateral attack on concluded bond validation proceedings that the Georgia Constitution, Georgia statutes, and Georgia jurisprudence prohibit, I respectfully dissent, and I am authorized to state that Chief Justice Hunstein and Justice Thompson join this dissent.