IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

CITY OF TUCKER,
Plaintiff/Counterclaim Defendant,

v.

CITY OF CLARKSTON; HOUSING AUTHORITY OF DEKALB COUNTY; DEKALB COUNTY;
Defendants,

and PEACHTREE CREEK ON PONCE APARTMENTS, LLC,
Defendant/Counterclaim Plaintiff.

CIVIL ACTION FILE
NO. 20CV8024-1

FINAL ORDER

Following argument before this Court on April 27, 2022, and after consideration of all pleadings and evidence submitted, the Court hereby DENIES Plaintiff's Motion for Partial Summary Judgement. Further, the Court DISMISSES Plaintiff's Complaint in its entirety as to all Defendants pursuant to O.C.G.A. § 9-11-12(b)(6) and -12(h)(3).

Background

On November 8, 2018, Defendant City of Clarkson ("Clarkston") adopted an ordinance to annex a property identified as 4692 East Ponce de Leon Avenue, Stone Mountain, GA 30083 with the tax parcel ID# 18-142-01-086 (the "Property") under the provisions of O.C.G.A. § 36-36-21. The Property was previously owned by a church, and is now owned by Defendant the Housing Authority of DeKalb County ("HADC"). On November 8, 2018, Clarkston also adopted an ordinance to rezone the Annexed Property to an NR-1 designation. Following such annexation and rezoning, Defendant/Counterclaim Plaintiff Peachtree Creek on Ponce Apartments, LLC ("Peachtree Creek") set about financing, building, and leasing an affordable multifamily housing complex on the portion of the Property south of the creek that bisects the Property.

On November 24, 2020, more than two years after Clarkston's annexation and rezoning votes, Plaintiff the City of Tucker ("Tucker") filed the instant lawsuit alleging, *inter alia*, that some portion of the Property north of the creek was inside Tucker's municipal boundaries at the time of Clarkson's November 8, 2018 annexation vote. In the original complaint, Tucker sought declaratory and injunctive relief.

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After Defendants answered and moved to dismiss Tucker's suit, this Court held a hearing on July 13, 2021, on the parties' respective pending motions. At that hearing, Defendants collectively stipulated that they would take all necessary steps to de-annex the entire portion of the Property north of the creek on the property, i.e., the entire territory at issue in the suit, and consent to its annexation into Tucker. Subsequently, Defendants have collectively taken all necessary steps within their power to consummate that stipulation. On October 5, 2021, Clarkston approved the deannexation of the contested property – the portion north of the creek. On January 25, 2022, Defendant DeKalb County gave its consent to that deannexation. On February 1, 2022, HADC (the property owner) delivered a written request for annexation of the contested property to Tucker, pursuant to O.C.G.A. § 36-36-21 *et seq*. On April 27, 2022, this Court conducted a hearing on Plaintiff's pending Motion for Partial Summary Judgment and other pending motions.

Findings of Fact

Based on the argument and evidence presented, the Court makes the following findings of fact that are relevant to the Court's analysis. The portion of the Property north of the creek is un-buildable, un-inhabited stream buffer/wetlands. *See* Map of Property Showing Floodplains, Exhibit F to Defs.' Stmt. of Undisputed Facts, filed Mar. 28, 2022 ("Defs.' SUF"); Affidavit of Shawanna Qawiy ("Qawiy Aff.") ¶ 8, Exhibit A to Defs.' SUF. The entire Property was previously owned by a church, and is now owned by HADC. *See* Fifth Affidavit of Chrispher Eisenzimmer ¶ 6, filed Apr. 25, 2022 ("Fifth Eisenzimmer Aff."). Accordingly, the Property does not generate property tax revenue for any government. All portions of the (now essentially complete) affordable housing complex being built by Defendant Peachtree Creek are located south of the creek bisecting the Property, i.e., indisputably outside Tucker's boundaries. Fifth Eisenzimmer Aff. ¶ 8.

On October 29, 2018, Tucker's then-Deputy Community Development Director and current Director of Planning and Zoning, Courtney Smith sent an email to Ken Hildebrandt, Tucker's City Engineer. In that email, Ms. Smith asked Mr. Hildebrandt to "pull up 4692 East Ponce De Leon Avenue on DeKalb GIS and give me a call[.]" Oct. 29, 2018 Email, Exhibit C to Defs.' SUF ("Tucker October 2018 Email"). 4692 East Ponce De Leon Avenue is the address of the Property. On November 8, 2018, Clarkston held a public meeting at which it adopted the annexation ordinance and subsequent rezoning ordinance related to the Property. Exhibit 4A to Clarkston's Notice of Filing Municipal Records. Tucker registered no objection to either ordinance at the time. Well over a year later, a notice of commencement related to the affordable multifamily housing project was filed on July 15, 2020, in the records of the Superior Court of DeKalb County. And still, Tucker did not object to the annexation and rezoning of the Property or object

to the Project for several more months. Affidavit of Christopher Eisenzimmer ¶ 5, Exhibit B to Defs.' SUF ("First Eisenzimmer Aff."); Qawiy Aff. ¶ 6.

Prior to filing this suit, neither Tucker nor any of its officials or employees communicated any belief that Tucker had jurisdiction over any portion of the Property to Clarkston, Peachtree Creek, or anyone else as far as Defendants are aware. Qawiy Aff. ¶ 4; First Eisenzimmer Aff. ¶ 4. Relatedly, there is no evidence Tucker ever tried to tax any portion of the Property or otherwise communicate to any owners that their property was in Tucker. Qawiy Aff. ¶ 4; First Eisenzimmer Aff. ¶ 6. Clarkston did not receive any objections from Tucker or any of its officials prior to its 2018 votes regarding the Property, and neither Tucker nor any of its officials filed any appeal or challenge to the annexation or rezoning subsequently, until this instant suit. Qawiy Aff. ¶¶ 4–5.

In reliance on the uncontested annexation and rezoning, and on the lack of objection to the Project commencing, Peachtree Creek has expended significant resources and performed substantial work on the Project, including clearing, grading, digging, pouring concrete, installing sewer and storm water infrastructure, and building retaining walls. Fifth Eisenzimmer Aff. ¶ 7. All told, Peachtree Creek has incurred over $33 million in expenses to date, all in reliance on the uncontested annexation and rezoning. *Id.* ¶ 9. After over a year of intensive construction, the Project is virtually complete. *Id.* ¶¶ 7–8.

As to the stipulation presented to this Court at the hearing on July 13, 2021, the Court finds that the Defendants have collectively taken all necessary steps within their power to consummate it. No evidence was introduced prior to or at the April 27, 2022, hearing to suggest that there is any live controversy involving a third party regarding the Property's incorporation status. For example, no arrests or citations have occurred on the Property since 2018, so there is no need for a jurisdictional determination for law enforcement purposes. Further, as implied above, there are no disputes about whether taxes or other funds are owed by any entity in relation to the Property, nor school attendance or any other discrete issue, aside from Tucker's asserted curiosity about the location of its municipal boundary.

In short, Defendants have fully executed implementation of the stipulation, and have taken every step within their power to remove any cloud or dispute between them and Tucker over the jurisdiction Tucker sued to get.

In its Motion for Partial Summary Judgment, and at the hearing, Tucker argues that undisputed

facts conclusively establish Tucker's pre-existing claim to jurisdiction over all portions of the Property north of the creek, but the Court does not agree. First, the Court notes that Tucker introduced at least two conflicting maps as to the relevant portion of its municipal boundary. *Compare* Exhibit D to Tucker's Verified Compl. for Declaratory and Injunctive Relief, filed Nov. 24, 2020 and Verification of Courtney Smith to same (the original, smaller jurisdictional claim) *with* Exhibit D to Tucker's First Am. Verified Compl. for Declaratory and Injunctive Relief, filed Feb. 22, 2021 (a subsequent, much larger jurisdictional claim).

The Court also notes that Plaintiff's own core map exhibit contains a prominent disclaimer saying that it is not to be used for the purpose Tucker cites it for, i.e., determining a jurisdictional boundary. Specifically, the United States Census Bureau map that Tucker cites has the following disclaimer on it: "All legal boundaries and names are as of January 1, 2010. The boundaries shown on this map are for Census Bureau statistical data collection and tabulation purposes only; their depiction and designation for statistical purposes does not constitute a determination of jurisdictional authority or rights of ownership or entitlement." Exhibit D to Tucker's First Am. Verified Compl. for Declaratory and Injunctive Relief (emphasis added). The Court accordingly is dubious about whether Tucker may legitimately use the map for precisely the purpose the creator of the map says it is not intended to be used for. At the very least, the Court cannot take that boundary as an undisputed fact at this stage of the litigation.

Ultimately, however, the Court need not resolve the disputed issue of whether any portion of the Property was in Tucker's municipal limits at the time of the annexation, for the following reasons.

Application of Law to Facts/Conclusions of Law

I. Justiciability/Lack of Concrete Interest

As Defendants point out, and Plaintiff concedes, the portion of the Property over which Tucker seeks to assert jurisdiction is non-taxable, non-inhabitable/buildable wetlands/stream buffer. Because of that uncommon but undisputed status, Tucker does not have a legally-cognizable injury necessary to contest the annexation of that parcel in this Court, having lost neither tax revenue nor any concrete regulatory/governmental interest. *See City of Atlanta v. Atlanta Indep. Sch. Sys.*, 307 Ga. 877, 879-81 (2020). *City of Atlanta*, like this case, involved a challenge to a city's annexation of an uninhabited, non-taxable property owned by a governmental entity. As in *City of Atlanta*, the government bringing suit primarily seeks a declaration regarding annexation's validity because of concerns about its jurisdictional boundary, but a unanimous Supreme Court held that such concerns were insufficient to permit a declaratory

judgment action to proceed. *See id.* at 880-81 (noting the tax-exempt and uninhabited status of the parcel in question in finding the dispute non-justiciable – "the declaration of the rights of the parties as prayed would be an advisory, academic, and useless declaration."). Accordingly, on that basis alone, Defendants are entitled to judgement here.

Tucker's lack of a legal injury because of the uncommon characteristics of the property and its ownership distinguishes this suit from the authority Tucker cites, none of which involved government-owned, non-taxable, non-buildable/inhabitable property. Finally, Tucker's intimations that some as-yet unidentified future controversy or concern might arise which could require a court's determination of the Property's status are inadequate to provide subject matter jurisdiction. *See GeorgiaCarry.Org, Inc. v. Bordeaux*, 360 Ga. App. 807, 810-11 (2021) ("a party has standing to pursue a declaratory action where the threat of an injury in fact is actual and imminent, not conjectural or hypothetical. … [D]eclaratory judgment will not be rendered based on a possible or probable future contingency because such a ruling would be an erroneous advisory opinion."). *See also Kellar v. Davis*, 350 Ga. App. 385, 389 (2019) ("declaratory judgment will not be rendered based on a possible or probable future contingency.").

II. Futility of Tucker's Position

Defendants point to a variety of evidence that, at the very least, put Tucker on constructive notice – both before and after Clarkston's contested November 2018 votes – that the Property had been bought and was proposed to be annexed and then redeveloped into an affordable multifamily housing complex, including a variety of contemporaneous public meetings in winter and spring 2020 up to and including bond validation proceedings in the Superior Court of DeKalb County, with validation occurring by Order of the Superior Court of DeKalb County on May 14, 2020. Most notably, Defendants point to an email between two of Tucker's senior officials on October 29, 2018 regarding the property. *See* Tucker October 2018 Email. That October 2018 email obviously preceded Clarkston's November 2018 votes to annex and rezone the Property. The Court notes that the author of the email, Ms. Courtney Smith, verified Tucker's original Complaint in this suit. The Court further observes that in the face of the Tucker October 2018 Email, Tucker chose not to introduce any evidence contradicting or refuting the inference that Tucker officials did in fact have actual knowledge of the planned annexation and rezoning more than two years before Tucker filed this suit.

While laches may not apply to Tucker's request for declaratory relief because it is an equitable defense, laches would unquestionably preclude any injunctive relief, underscoring the futility of Tucker's

continued prosecution of this dispute. It has long been the law in Georgia that "the extraordinary equitable relief of injunction will be denied a party where, with full knowledge of his rights[,] he has been guilty of delay in asserting them, and has allowed large expenditures to be made by another party on whom great injury would be inflicted by the grant of the injunction." *Davies v. Curry*, 230 Ga. 190, 192 (1973).[1] That is because "through [the plaintiff's own] neglect and delay, it [would be] impossible to grant the relief sought without material damage to the defendant, which might have been avoided had the plaintiff[] moved at the proper time." *Whipkey v. Turner*, 206 Ga. 410, 418 (1950); *see also Waller v. Golden*, 288 Ga. 595, 597 (2011) ("The trial court 'may bar a complaint based on laches when the lapse of time and the claimant's neglect in asserting rights results in prejudice to the adverse party.'").

Moreover, where a building is to be constructed pursuant to a permit or permission from the relevant authorities, a plaintiff must act with particular haste to assert its rights. *Whipkey*, 206 Ga. at 410; *Waller*, 288 Ga. at 599. In *Whipkey*, the Supreme Court held "[p]arties with knowledge that a building may be constructed pursuant to an ordinance and permit of a city (which ordinance and permit may be invalid), must be diligent and act promptly to protect their rights." 206 Ga. at 410. *See also Waller*, 288 Ga. at 599 ("Indeed, parties with knowledge that a structure may be constructed with the express permission of the relevant authorities involved, even where the rule upon which such permission was granted may be invalid, must be diligent and act promptly to protect their rights.") (citation and punctuation omitted).

Accordingly, the Court is dubious that entry of partial summary judgment on Tucker's behalf would have any practical value, as Tucker would be barred from seeking any further relief, such as a cancellation of the rezoning on the other portion of the Property or similar measures.

Relatedly, the Court doubts whether the ruling Tucker seeks would have any effect on the remaining portion of the Property, i.e., the portion on which Peachtree Creek has built the multifamily housing complex. By both statutory and precedential command, this Court should uphold the portion of the annexation that is not in Tucker, assuming, *arguendo*, that Tucker's allegations are correct. That follows from both O.C.G.A. §§ 1-3-1(c) (general) and 36-36-39(b) (annexation specific), as well as prior appellate

[1] *See also Bales v. Duncan*, 231 Ga. 813 (1974) (affirming denial of interlocutory injunction where a plaintiff sought, based on a restrictive covenant, to enjoin the conversion of a subdivision residence to a day care center two months after the plaintiff had notice of the conversion plans and the defendant had spent approximately $15,000 on the project); *McGregor v. Town of Ft. Oglethorpe*, 236 Ga. 711, 713 (1976) (affirming denial of interlocutory injunction where "construction of [a] project had commenced to the extent that large excavations had already been made on the property [and, t]he evidence showed that expenditures had been made and expenses incurred by the appellees in connection with the project").

holdings that trial courts are to review annexations with a liberal standard with the goal of upholding annexations to the extent possible. *See City of Lovejoy v. Clayton Cty.*, 335 Ga. App. 881, 886 (2016) ("[u]pon a finding that procedural defects … exist, the court, where possible, shall frame a judgment to perfect such defect and uphold the ordinance.") (emphasis added). *See also Fayette Cty. v. Steele*, 268 Ga. App. 13, 14 (2004) (reaffirming "liberal" standard of review); *Higdon v. City of Senoia*, 273 Ga. 83 (2000) (reaffirming legislative intent for deferential review of municipal annexation); *H-B Props., Ltd. v. City of Roswell*, 247 Ga. App. 851, 852-53 (2001); and *City of Gainesville v. Hall Cty. Bd. of Educ.*, 233 Ga. 77, 80 (1974).

Finally, the Georgia Supreme Court has repeatedly applied the doctrine of *argumentum ab inconvenienti* in the context of annexation challenges, directing that this Court can and should weigh "the inconvenience which would result to property owners if such annexation ordinances were declared invalid at this point in time." *See Upson Cty. Sch. Dist. v. City of Thomaston*, 248 Ga. 98, 103 (1981); *City of Gainesville*, 233 Ga. at 81; *Plantation Pipe Line Co. v. City of Bremen*, 227 Ga. 1, 11-13 (1970) (Almand, J. *concurring specially*).

Thus, in addition to the potential estoppel and laches interests of the Defendants based on their significant reliance interests and incurred expenses in the presumptive validity of the annexation and zoning ordinances, this Court also weighs the interests of the hundreds of people now living at the Project. Thus viewed, the Court determines that even were the Court to find that some or all of the portion of the Property north of the creek was in Tucker at the time of Clarkston's 2018 annexation vote, the Court would nonetheless uphold the annexation of the remaining portion of the Property, and the Defendants' subsequent activity thereon.

III. Effect of the Stipulation's Execution

The Court further finds that Defendants are entitled to judgment in their favor based on their collective execution of the stipulation they presented to the Court last summer. At least as of February 1, 2022, the only barrier to Tucker asserting jurisdiction over the portion of the Property at issue in this suit is Tucker's current refusal to do so. But for statutory and constitutional reasons, a party cannot maintain a suit for declaratory judgment in the absence of a live controversy between them and other parties that requires judicial resolution.

First, insofar as Tucker is asking the Court to opine as to the validity of the 2018 annexation vote

by Clarkston, Georgia courts lack authority to enter such declarations regarding the "propriety of past conduct." [2] *See Richardson v. Phillips*, 302 Ga. App. 305, 309-10 (2010) (holding declaratory relief inappropriate when petitioner "simply aimed to have the trial court decide the propriety of past conduct," explaining "a declaratory judgment 'represents a signal for the future, not a seal of approval (or otherwise) for the past.'") (citations omitted).

Second, Tucker has not identified a current or certain future need for declaratory relief from the Court following the stipulation. If a plaintiff does not have "uncertainty and insecurity with regard to the propriety of some *future act or conduct*, . . . which if taken without direction might reasonably jeopardize his interest, the plaintiff is not entitled to a declaratory judgment." *Empire Fire & Marine Ins. Co. v. Metro Courier Corp.*, 234 Ga. App. 670, 671 (1998) (emphasis added). Relatedly, because the property subject to the stipulation is neither taxable nor buildable, and no portion of the affordable housing complex is located on it, Tucker has no actual concrete interest in either taxing or regulating building on any portion of the Property.

Third, consummation of the stipulation also means that there is no remaining dispute *between the parties* as to Tucker's right to assert jurisdiction over the parcel now and going forward. No Defendant contests Tucker's right or ability to claim jurisdiction over the property north of the creek from the present going forward, should Tucker now choose to do so. Given the statutory and constitutional limits on this Court's jurisdiction, this fact is dispositive. *See Sexual Offender Regis. Rev. Bd.v. Berzett*, 301 Ga. 391, 395 (2017) ("[T]he future conduct of the parties toward each other does not depend on an adjudication of their rights. … Accordingly, because there is no actual or justiciable controversy between Berzett and the Board, the superior court erred when it denied the Board's motion to dismiss Berzett's declaratory judgment action.").

In short, Tucker has not identified any actual, live controversy between the parties requiring declaratory judgment from this Court regarding the status of the property between November 2018 and the

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[2] *The Annexation Act contains a limited exception to this general rule that declaratory relief is not available to opine on the legitimacy of already-completed actions, but Tucker is not eligible to rely on it. In O.C.G.A. § 36-36-39, the General Assembly expressly permitted "any resident elector of the area so annexed or of the municipal corporation or any property owner of such area or of the municipal corporation" to bring a declaratory judgment action "to determine the validity" of the annexation, so long as that action was brought "[w]ithin 30 days of the effective date of the [annexation] ordinance." But Tucker is neither a resident elector nor a property owner, so cannot utilize that limited supplemental grant of jurisdiction. Also, Tucker did not bring this suit within 30 days (or even 700 days) of the effective date of the annexation.*

present. Further, the stipulation's execution means that there is no live controversy between Defendants and Tucker going forward either. This conclusion is also consistent with *Scarbrough Group v. Worley*, 290 Ga. 234, 236-38 (2011), where a city acted to resolve an alleged flaw with an annexation mid-suit, and the Supreme Court ruled that the curative action made the suit moot. *Id*. at 237 ("the existence of litigation does not, in and of itself, preclude a municipality or county from rectifying the deficiency highlighted by the litigation.… The City's 2008 annexation of the unincorporated island by the time the trial court issued its ruling cured the deficiency … thereby making moot the question of whether the deficient annexation in 2007 was void.").

By clear statutory and precedential command, the Court does not have jurisdiction to either opine on the "propriety of past conduct" nor enter declaratory judgment without a currently justiciable controversy. *See Baker v. City of Marietta*, 271 Ga. 210, 214-15 (1999) ("[r]egardless of when an action reaches the point that it no longer presents a justiciable controversy and presents only a question of academic interest, when it reaches that point, the entry of a declaratory judgment is not appropriate, because a court has no province to determine whether or not a statute, in the abstract, is valid, or to give advisory opinions.") (citations omitted).

Disposition of Peachtree Creek's Counterclaim & Pending Motions

Currently, Peachtree Creek has an existing counterclaim which was included with its Answer. Peachtree Creek's Ans. to Verified Compl. & Countercls., filed Jan. 19, 2021. Last fall, Peachtree Creek moved this Court for leave to amend its counterclaim to add certain allegations regarding Tucker's compliance with an Open Records Act request from Peachtree Creek. Peachtree Creek's Mot. to Amend. its Countercls., filed Sept. 27, 2021. This winter, Peachtree Creek also moved for leave to add parties as Counterclaim defendants based on their alleged roles in the ORA response. Peachtree Creek's Supp. Br. Regarding the Non-Justiciability of Tucker's Claims & Contingent Second Mot. to Amend Countercls., filed Feb. 11, 2022. Both of those motions remain pending as of today. Based on Peachtree Creek's counsel's representation at the April hearing, the Court will accept the voluntary dismissal of Peachtree Creek's existing counterclaim without prejudice, as well as Peachtree Creek's withdrawal of its pending motions for leave to amend that Counterclaim and to add parties to it. Peachtree Creek may, if it chooses, bring those claims in a separate suit, but this case is hereby closed in its entirety.

So **ORDERED** this 12th day of August, 2022.

Hon. Courtney L. Johnson, Judge
Superior Court of DeKalb County
Stone Mountain Judicial Circuit

Prepared by on Behalf of All Defendant:

Mr. Robert L. Ashe III, Esq.
Ga. Bar No. 208077
Jane D. Vincent
Ga. Bar No. 380850
BONDURANT MIXSON & ELMORE LLP
1201 W Peachtree Street, NW
Suite 3900
Atlanta, GA 30309
Tel: 404-881-4100
Fax: 404-881-4111
ashe@bmelaw.com
vincent@bmelaw.com
Counsel for Defendant Peachtree Creek on Ponce Apartments, LLC

Copies via Odyssey eFile Georgia to:

Mr. Mark Ford, Esq.
mark@fordlegalpc.com
Counsel for Plaintiff

Mr. Stephen G. Quinn, Esq.
squinn@wmdlegal.com
Counsel for Defendant City of Clarkston, Georgia

Ms. Suzanne Success Osborne, Esq.
sesosborne@dekalbcountyga.gov
Counsel for Defendant DeKalb County, Georgia

Mr. Curtis Romig, Esq.
curtis.romig@byrancave.com
Counsel for Defendant Housing Authority of DeKalb County

Mr. Michael B. Jones, Esq.
jones@bmelaw.com
Counsel for Defendant Peachtree Creek on Ponce Apartments, LLC