IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, Plaintiff, v. JOINT DEVELOPMENT AUTHORITY OF JASPER COUNTY, MORGAN COUNTY, NEWTON COUNTY AND WALTON COUNTY and RIVIAN HORIZON, LLC Defendants, and JEFFREY V. MCKENZIE, NEAL S. FITZGERALD, VIRGINIA MCFADDIN, JENNIFER V. DEROCHE, VALLE S. ASHLEY, JOELLEN ARTZ, and RICHARD HAYNES Intervenors.	)	CIVIL ACTION FILE NO. 2022-SU-CA-128 BOND VALIDATION

FINAL ORDER ON BOND VALIDATION

This matter is before the Court on the State of Georgia's Petition and Complaint ("Petition") against the Joint Development Authority of Jasper County, Morgan County, Newton County and Walton County ("JDA") and Rivian Horizon, LLC ("Rivian"). The Petition seeks the validation of Taxable Revenue Bonds ("Bonds") in the amount of $15 billion for the purpose of financing the costs associated with Rivian's development of a proposed electric vehicle manufacturing plant on land located in Walton and Morgan Counties (the "Project"). Upon reviewing the pleadings, evidence and argument of counsel

presented at the July 28, 2022, hearing, the parties' briefs, appropriate case authority, and all other matters of record, the Court hereby finds as follows:

BACKGROUND AND PROCEDURAL HISTORY

On July 8, 2022, the State of Georgia filed the Petition, seeking a judgment approving the issuance of the Bonds by the JDA to Rivian and validating both the Bonds and other related documents. These related documents include: (1) an Economic Development Agreement dated May 2, 2022 ("EDA"); (2) a Pilot Agreement dated May 25, 2022 ("PILOT Agreement"); (3) an *unsigned* Intergovernmental Lease Agreement ("State Lease"); (4) an *unsigned* form Rental Agreement ("Rental Agreement"); (5) a Bond Resolution adopted by the JDA on April 26, 2022 ("Bond Resolution"); (6) an *unsigned* form Bond Purchase Agreement ("Bond Purchase Agreement"); (7) an *unsigned* form Option Agreement ("Option Agreement"); and (8) an *unsigned* form Deed to Secure Debt and Security Agreement ("Security Deed") (collectively "Bond Documents"). The Petition requests that the Court make seventeen (17) separate findings in connection with approving and validating the Bonds and Bond Documents.

After the State filed the Petition, the Court issued a Rule Nisi scheduling a hearing before the Court on July 28, 2022 (the "Hearing"). Both the JDA and Rivian filed Answers

to the Petition, praying for a judgment in favor of approving and issuing the Bonds as well as validating the Bond Documents.[1]

On July 27, 2022, seven citizens of the State of Georgia and residents of Morgan County, Georgia—Jeffery V. McKenzie, Neal S. Fitzgerald, Virginia McFaddin, Jennifer V. DeRoche, Valle S. Ashley, JoEllen Artz, and Richard M. Haynes (collectively "Intervenors")—filed a motion, pursuant to O.C.G.A. §§ 36-82-77 and 9-11-24(a)(1), to intervene in this action. Along with their motion to intervene, Intervenors filed an Answer to the Petition—denying many of its allegations—as well as a brief in opposition to the bond validation. At the Hearing, the Court granted Intervenors' motion to intervene, which was not opposed.

FINDINGS OF FACT

At the Hearing, the JDA presented the testimony of two witnesses: Mr. Jerry Luke Silvo, Chairperson of the JDA; and Mr. Andrew Capezzuto, Chief Administrative Officer and General Counsel for the Georgia Department of Economic Development. The JDA did not call any expert witnesses to testify in support of the Petition. Rivian offered no evidence and no representative of Rivian was called to testify.

In support of the Petition, Mr. Silvo testified that the proposed project was a bond for title transaction. The State of Georgia leases the property to the JDA, who in turn leases

[1] The JDA is the proposed issuer of the Bonds and the primary party advocating for the validation of the Bonds. Thus, for ease of reference, the Court utilizes "JDA" to refer to each of the parties seeking validation of the Bonds.

the property to Rivian for an initial five years, with an option for the leases with Rivian to be renewed until the year 2047. Rivian would initially invest five billion dollars into the project, either in funds or in construction (with a possibility of increasing the bond amounts to fifteen billion dollars), and the JDA would issue bonds upon performance. (It should be noted that there is a conflict in the documentation submitted. Some documentation requires a minimum investment by Rivian of five billion dollars, but the Bond Purchase Agreement does not contain such a requirement.) During the lease by Rivian, no ad valorem taxes would be paid, but instead, PILOT payments in the amount of $1,300,000.00 would be paid each year to be divided between the member counties of the JDA and the city of Social Circle. The property itself would be leased by Rivian for $1.00 per year, with an option for Rivian to purchase the property for $100.00.

Mr. Silvio testified that three prior revenue bonds had been issued by the JDA for the Stanton Springs development. Those bonds were issued to a biopharmaceutical company, a data center, and an additional data center related to the first one, all of which were well established business operations. None of the prior bonds was for a heavy industrial operation, which the witness testified the current project would be. The JDA pointed out that Baymere project was one wherein the bonds were validated by the Court. However, that validation was not opposed as is the current bond validation proposal.

Mr. Silvio further testified that in the current proposed project, Rivian also committed to creating 7,500 new jobs by 2028 with an average pay of $56,000 per year. However, on cross examination, he admitted that he did not know how the salary he attested

to was calculated or how much executive salary was included in the projected salary amount. Further, no explanation was given in regard to the stated commitment of Rivian in Exhibit F to the Economic Development Agreement that FTE positions

> ...means a job with no predetermined end date, with a regular work week of 35 hours or more for the entire normal year of Company operations and will have an hourly wage of at least $20.00 per hour. Contract or third-party jobs will, for the purposes of the satisfaction of Jobs Commitment, be considered employees of the Company. A job may include employees of an Affiliate of the Company working at the Project.

According to this provision of the EDA, the projected jobs could include other employees of the Company or contract workers, but the only guaranteed average salary is $36,400.00 per year, not the $56,000.00 referenced.

In the Bond Resolution, (and stated in the Petition herein), the JDA found and determined, by a duly adopted resolution, that "the Project will increase employment in the territorial area of the [JDA] and thereby develop and promote trade, commerce, industry and employment opportunities for the public good and the general welfare within the territory of the [JDA] and will promote the general welfare of the State; that the Project, and the use thereof will each further the public purposes of the Act for which the [JDA] was created, and that the Project and the Bonds of all of the Series ... will each be sound, feasible and reasonable." He testified that the Georgia Department of Economic Development assisted in making sure the project was sound, and that they were cautious because "they've been burned a few times in years past..." However, during his cross-examination, Mr. Silvio admitted that the JDA did not employ an investment banker, an economist, a financial analyst, or any third party to evaluate the financial wherewithal of

Rivian or in making the decision on the soundness of this Project. The 10-K 2021 annual report of Rivian to the U.S. Securities and Exchange Commission report showed that Rivian delivered only around a thousand cars during that time. Mr. Silvio could not state how much of the EV market that Rivian had, nor how many cars had been delivered in 2022. He indicated that in making a determination that the project for which the issuance of the bonds was sought was sound, reasonable and feasible, the JDA did not consider the 10-K reports for Rivian for 2019, 2020 or 2021 with disclaimers in those reports:

A. Our products contain thousands of parts that we purchase from hundreds of mostly single or limited-source suppliers which no immediate or readily available alternative supplier exists;

B. Our business involves a high degree of risk;

C. We have incurred net losses since our inception including net losses of .4 billion, one billion, and 4.7 billion for the years ending 2019, 2020, and 2021;

D. We believe that we will continue to incur operating net losses in the future while we grow, including following our initial generation of revenues from the sale of our vehicles;

E. Our limited operating history makes it difficult for us to evaluate our future business prospects;

F. We are a company with extremely limited operating history and have not generated material revenue from sales of our vehicles or other products and services to date. As we continue to transition from research to development

activities to production and sales, it is difficult, if not impossible, to forecast our future results, and we have limited insight to trends that may emerge and affect our business.

G. The automotive business is highly competitive and we may not be successful in competing in this industry.

H. Our distribution model is different from the predominant current distribution model for automobile manufacturer, which subjects us to substantial risks and makes evaluating our business prospects, financial condition, results of operation, and cash flows difficult.

I. We have minimal experience servicing and repairing our vehicles. If we or our partners are unable to actually service our vehicles, our business prospects, financial condition, results of operation and cash flows could be materially and adversely affected.

J. We have incurred a significant amount of debt and may in the future incur additional indebtedness. Our payment obligations under such indebtedness may limit the funds available to us and the terms of our current or future debt.

K. Our management has limited experience in operating a public company;

L. We have generated significant losses from operations.

M. We have generated significant negative cash flows of operations and investing activities and we continue to support the growth of our business.

Mr. Silvio also testified that the JDA did not consider the lastest10-Q of Rivian in making its determination. He attested that in 2022, Rivian produced 2,553 vehicles and delivered 1227, and showed losses of 1.4 billion dollars from January through the end of March, 2022. Mr. Silvio further testified that there were no studies done to determine what the cost of maintenance of county improvements would be if the Project is constructed. For instance, no study was done to determine addition EMS costs, school expenses, educational buildings and facilities or teachers, or infrastructure costs. No determination was made of additional county costs for the construction of the project.

When asked, Mr. Silvio admitted that the IPO price for Rivian in late 2021 was $78 per share. That share price at the date of the hearing was $31, and had been as low as $22. Further, Ford sold the bulk of its interest in Rivian in 2022, and Amazon, which had a commercial letter agreement with Rivian to supply trucks, subsequently entered into an agreement with another company to provide vehicles.

Mr. Silvio did testify that employees of the Newton County Industrial Development Authority and the Walton County Development Authority participated with the State and provided advice and assistance to the JDA in analyzing the project. He further testified that, according to their SEC filings, Rivian was equipped in their Normal factory to produce up to 150,000 vehicles annually, and that their decisions and investments were made with the objective of maintaining long term growth. As of December 31, 2021, Rivian had employees of 10,422 employees across the United States, Canada and Europe. Rivian also showed cash on hand of $16,432,000,000.00 as of March 31, 2022, with total assets of

$21.297 billion. Mr. Silvio testified that public companies have to disclose all kinds of potential risks in their SEC filings. While the agreement in this matter is not with Rivian, but Rivian Horizon, LLC., Rivian is guaranteeing the payments referenced herein.

Andrew Capezzuto, chief administrative officer and general counsel to the Georgia Department of Economic Development, also testified in the validation hearing. His testimony confirmed that the transaction proposed is a bond for title transaction. As he explained, there is no statutory or constitutional mechanism in Georgia to abate taxes, so if the property is transferred to an entity like a JDA that does not have an obligation for taxes, property tax incentives can be given. He testified that for projects of the scale in this proposal, there are indirect benefits to economies, such as job creation, construction expenditures, housing demands and local retail expenditures.

He described "high level" incentives that have been offered to Rivian by the State of Georgia to locate their factory here: land and improvements, grading, wetlands mitigation, road improvements, infrastructure and utility improvements, and other discretional incentives, a 21.3 million dollar REBA grant, and a larger grant of $111 million. Mr. Capezzuto testified that "probably" new businesses will be opened or existing businesses will expand to provide services as a result of Rivian's opening.

In making a determination regarding the economic condition of Rivian, Mr. Capezzuto advised that the State was interested in knowing how Rivian was going to pay the cost for this project, but "they did an IPO in the fall of '21 and raised a tremendous amount of capital." Afterward, the State felt comfortable in making the agreement

knowing the amount of cash that Rivian had on hand. He indicated they had almost 17 billion on hand, their Normal, Illinois plant was running well, and they were impressed with the product. Further, they were also convinced because no third party financing was involved in the project. He did admit that was aware that the current burn rate for Rivian's capital indicated a 6.4 billion dollar loss for 2022 if it continued at the same rate. Mr. Capezzuto also acknowledged that the State did no analysis as to the impact the Rivian plant would have on the local communities and the additional expenses of government services. Their analysis was limited to the State costs and benefits.

Following the Hearing, the JDA[2] and Intervenors submitted briefs to the Court regarding the legal issues to be determined in this action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW[3]

The Petition requests that the Court make several separate findings in connection with approving and validating the Bonds and Bond Documents. (*See* Pet. at 12–16.)

1. That the Rental Agreement, the EDA and the Option Agreement do not create a tangible property interest of the Company in the project which would be subject to ad valorem taxes;

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[2] Although it is the Petitioner in this case, the State of Georgia submitted no evidence and did not offer a brief in support of its Petition.

[3] Any Finding of Fact contained herein which could be considered Conclusion of Law is hereby deemed to be a Conclusion of Law, and any Conclusion of Law which could be considered a Finding of Fact is hereby deemed to be a Finding of Fact.

2. That the documentation and the project do not violate the Georgia Constitutional prohibition against payment of gratuities to private persons;
3. That no payments in lieu of taxes in the Rental Agreement, EDA or Pilot Agreement are subject to the Pilot Restriction Act;
4. That the validation of the bonds is sufficient to exempt the parties from performance audits or reviews with respect to the expenditures of bond proceeds; and
5. That the undertaking, issuance and security for the bonds is sound, reasonable and feasible.

The Intervenors oppose the validation of the bonds on several different bases:

1. That the bond validation process is premature, since the agreements for the activity for which the bonds are sought to be validated have not been executed by the parties;
2. That the JDA failed to establish a prima facie case that validation would be sound, feasible and reasonable as required by law, specifically:
    a. The JDA failed to establish that the bonds and project are sound, feasible and reasonable; and
    b. The JDA failed to establish a prima facie case that the project will promote the general welfare of the local communities within its territory.
3. That the bonds do not comply with Georgia law; and

4. The Rental Agreement is an estate for years subjecting Rivian to ad valorem taxes.

The Court will address each of the contentions of the parties.

1. Validation of the Subject Bonds is Premature.

Intervenors argue that validating the Bonds is premature because the Rental Agreement and State Lease have not yet been executed. However, bonds are not issued until they have been validated, and the point of a validation proceeding is to "consider whether the proposal to issue those bonds is sound, feasible, and reasonable." *Savage v. State*, 297 Ga. 627, 647 (2015). At least one Georgia court has approved the validation of unexecuted bond documents. See, e.g., *Berry v. City of E. Point*, 277 Ga. App. 649, 651 (2006) (upholding validation where bond structure involved "an unexecuted lease" that was "subject to revision"). Unlike *Fulton County v. City of Atlanta*, 299 Ga. 676 (2016), where the "advisory opinion" was about "proposed legislation," this case involves an existing bond resolution. Id. at 678–79. In Fulton County, the Supreme Court distinguished cases in which a "statutory scheme"—like the Revenue Bond Law—authorizes a judicial decision with "immediate legal consequences." Id. at 679.

The Bond Resolution requires that the final Rental Agreement must "be in substantially the form set forth" in the Bond Resolution, "subject to such changes as may be agreed upon by the Authority and the Company prior to the Closing Date." PILOT Agreement § 2.1. The Court agrees that the most natural reading of this provision is that any agreed upon changes cannot be substantial. In addition, the Court is validating the

form of the Rental Agreement that is in the record—not a hypothetical version with substantial changes. If a major change is made, the JDA and the Company will bear the risk that the new version may not benefit from the protection of the validation. See *Sherman v. Fulton Cnty. Bd. of Assessors*, 288 Ga. 88, 94 (2010). Therefore, this argument of the Intervenors must fail.

2. **The documentation and the project do not violate the Georgia Constitutional prohibition against payment of gratuities to private persons..**

> "The [G]ratuities [C]lause in the Georgia Constitution provides that 'the General Assembly shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public.' Ga. Const. of 1983, Art. III, Sec. VI, Par. VI." *Avery v. State*, 295 Ga. 630, 633 (2) (b) (761 SE2d 56) (2014) (citation and punctuation omitted). The Supreme Court of the United States has interpreted this provision as not applying to a "conveyance in aid of a public purpose from which great benefits are expected[.]" *State of Ga. v. Trustees of Cincinnati Southern R.*, 248 U. S. 26, 30 (39 SCt 14, 63 LE 104) (1918). Similarly, the Supreme Court of Georgia has held repeatedly that there is no gratuity when the state receives a substantial benefit in exchange for the use of public property. See, e.g., *Garden Club of Ga. v. Shackelford*, 274 Ga. 653, 654-655 (1) (560 SE2d 522) (2001). See also: *Bene v. State of Ga.*, 362 Ga . App. 73, 77-78 (2021).

This project would not violate the Constitution prohibitions if there is a substantial benefit to the State and the Community served by the JDA. This issue is addressed in the following conclusions regarding the Court's finding concerning the soundness, reasonableness and feasibleness of the project.

3. **The payments in lieu of taxes in the Rental Agreement, EDA or Pilot Agreement are not subject to the Pilot Restriction Act.**

None of the payments in lieu of taxes under the Rental Agreement, EDA or the PILOT Agreement are pledged to secure payment of any of the Bonds, and the Bonds are therefore not subject to the PILOT Restriction Act (O.C.G.A. § 36-80-16.1).

4. **The validation of the bonds is sufficient to exempt the parties from performance audits or reviews with respect to the expenditures of bond proceeds.**

Petitioners allege in their pleadings that the validation of the bonds herein that the Bond Resolution authorized the JDA to waive the performance audit or review and periodic report requirements set forth in O.C.G.A. 36-82-100. The Statute provides as follows:

> (b) When bonds are issued by a county, municipality, or local authority in the amount of $5 million or more, the expenditure of bond proceeds **shall** be subject to an ongoing performance audit or performance review as provided in this Code section; but this Code section shall not apply if such bond issue is below $5 million.
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> (c) Each county, municipality, or local authority expending bond proceeds shall provide for a continuing performance audit or performance review of the expenditure of such funds. The county, municipality, or local authority shall contract with a certified public accountant or with an outside auditor, consultant, or other provider accredited or certified in the field of performance audits or performance reviews. Such accountant, auditor, consultant, or other provider shall only be qualified to perform the audit and review functions under this Code section if such accountant, auditor, consultant, or other provider has significant experience and competence in conducting comprehensive audits and reviews in conformance with generally accepted government auditing standards. The performance audit or performance review contract **shall:**

(1) Include a goal of ensuring to the maximum extent possible that the bond funds are expended efficiently and economically, so as to secure to the county, municipality, or local authority the maximum possible benefit from the bond funds;

(2) Provide for the issuance of periodic public reports, made accessible through electronic or printed format, or both, at a location advertised in the legal organ not less often than once annually, with respect to the extent to which expenditures are meeting the goal specified in paragraph (1) of this subsection; and

(3) Provide for the issuance of periodic public recommendations, made accessible through electronic or printed format, or both, at a location advertised in the legal organ not less often than once annually, for improvements in meeting the goal specified in paragraph (1) of this subsection.

(d) The auditor, consultant, or other provider to carry out the performance audit or performance review shall be selected through a public request for proposals process. The reasonable cost of the performance audit or performance review shall be paid from the proceeds of the bonds **unless a specific waiver of public accountability is included in a legal advertisement in bold print contained within requisite public notice soliciting public preapproval of the applicable bond issue which expressly states that no performance audit or performance review shall be conducted with respect to such bond issue.**

(e) On and after May 5, 2006, the expenditure of bond proceeds shall be under the jurisdiction of and subject to review by the inspector general of this state with respect to any claim of fraud, waste, abuse, or mismanagement of funds. O.C.G.A. § 36-82-100 (emphasis added).

The Intervenors have opposed this validation on several bases – one of which is that it is not sound, feasible or reasonable. While the statute provides that such an auditor **SHALL** be required, it thereafter excuses same if a waiver of public accountability is included in the legal advertisement for the proposed validation. It is without question

that the specific waiver language was filed, however, it is still an issue for this Court to determine if that provision is sound, feasible or reasonable.

The statute is designed to provide safety and accountability to the public for bond issues, and is required for bonds of five million dollars and over. This validation petition concerns a minimum of five billion (not million as in the statute) dollars up to fifteen billion dollars in bonds to be issued to Rivian. It is still a question whether any funds will be supplied to the Project Fund by Rivian or whether it will make its investments for the bonds totally by construction and other expenses. While the absence of such a review might not be an issue if the JDA were holding and dispersing funds, what is proposed herein is that the Company, who is to invest an initial five billion dollars into the proposed project, has no oversight in regard to the expenditures of funds therefrom. This Agreement even allows Rivian to remove and not replace equipment, which has been counted as a portion of their required investment, without any accounting to JDA until the aggregate book value of the disposed equipment reaches $15,000,000.00, three times the statutory amount of O.C.G.A. § 36-82-100. (See Rental Agreement, 6.2). [Note also, Exhibit F, Performance Standards, allow the company to count original cost, without depreciation, in its calculation of company investment, as well as is the value of machinery and equipment leased to the company.]

The testimony from Mr. Capezzuto indicates that the agreement between the State, the JDA and Rivian involves a "bond for title" transaction. As Mr. Capezzuto describes

it, this is a mechanism to obtain tax abatement for a private company for which there is no ability legislatively or constitutionally.

> A. In essence, what happens is there's not a statutory or a constitutional mechanism in Georgia to abate taxes and so the idea is that you transfer title of either real and/or personal property to an entity that doesn't -- is not subject to taxation. And it's typically done through a development authority. And by virtue of doing that, you have a property tax incentive that communities can provide and offer to economic development projects. Sometimes it's done for residential developments, as well.
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> Q. And you may have touched on this already. What's the purpose of this type of bond structure, a bond for title?
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> A. The purpose is to offer property tax incentives.

Mr. Capezzuto also testified that these types of transactions, in spite of no legislative or Constitutional enablement, are used regularly in investments of this type. He also testified that the PILOT payments anticipated from Rivian "it's a lesser amount of what they would otherwise be taxed at if they were taxed at, you know, the normal tax rate." Further, he indicated initial State concerns about economic viability.

> ...one of the things that the State was interested in finding out was how was Rivian going to pay for all of this. You know, they did an IPO in the fall of '21 and raised a tremendous amount of capital. And after that IPO occurred, you

know, the State felt comfortable knowing the amount of cash and cash reserves that Rivian had on hand.

In spite of those concerns, in spite of the fact that there is some discrepancy about whether the bond will be a 5 billion dollar maximum or minimum, or whether Rivian will be required to place any funds in the Project Account, or whether there will actually be a benefit to the State or Community (Mr. Capezzuto admitted that his analysis was limited to the State costs and benefits, not that of the Community), the fact that lesser payments would be made than taxes due, the parties want to exempt the project from public accountability.

While initially concerned about how the Company was going to pay for "all of this," the State was satisfied by the amount of cash and reserves Rivian received from its IPO. However, Rivian is **NOT** required to pay five billion into the project fund, but can continue its current burn rate and be entitled to bonds as it pays for construction. The question is whether the funding will be sufficient at the time that the expenditures are made, or whether the burn rate or other expenses will negate its ability to pay for the construction expenses.

It is not sound, feasible or reasonable for such an investment to be exempt from the provisions of law that are specifically designed to ensure "to the maximum extent possible that the bond funds are expended efficiently and economically, so as to secure to the county, municipality, or local authority the maximum possible benefit from the bond funds..." This Court does not find that this provision is sound, feasible or reasonable, and cannot validate these bonds with the offending provision.

5. The Bonds do not comply with Georgia Law.

O.C.G.A. § 36-62-8(b) requires that "[t]he proceeds derived from the sale of all bonds and bond anticipation notes issued by an authority shall be held and used for the ultimate purpose of paying, directly or indirectly as permitted in this chapter, all or part of the cost of any project..." Section 4.02 of the Bond Resolution establishes the "Project Fund," which is to be funded by "[a]ll cash proceeds from the sale of the Bonds or an advance of the principal amount thereof..." Further, "[a]mounts advanced on the Bonds in cash, if any, under the Bond Purchase Agreement shall be deposited in the Project Fund..."

Intervenors, contend, however, that Section 4.02(b) of the Bond Resolution makes the Bond issuance contrary to statute. That Section provides: "provided, however, if the Company rents the Project under the Rental Agreement, and is also the Custodian, and if the Company is also the Holder of the Bonds, then it shall not be necessary to deposit any Net Proceeds in the Project Fund." Section 4.02(c) contains similar language: "Notwithstanding the foregoing, if the Company rents the Project under the Rental Agreement and is the Custodian of the Project Fund and if the Company or an Affiliate thereof is also the Holder of the Bonds, and if the Company or an Affiliate thereof has paid Costs of the Project which are to be reimbursed, then it shall not be necessary for cash to be disbursed by the purchaser of the Bonds under the Bond Purchase Agreement to the Custodian for deposit in the Project Fund..."

While it is possible that no payments will be made into the Project Fund (the JDA Chairman did not seem to know how payment was to be made), it does not appear that such

violates the law. These are "draw-down" bonds, to be issued as work is performed or equipment supplied. Thus, they satisfy the statutory obligation. "The Bonds are "draw-down" bonds that will be issued only if sufficient infrastructure fees are projected to service the bonds." *Franzen v. Downtown Dev. Auth. of Atlanta*, 309 Ga. 411, 430 (2020). The Intervenors objections on this basis are hereby denied.

6. JDA Failed to Establish its *Prima Facie* Case.

The law is clear that the burden is on the JDA to establish a *prima facie* case to support its request for validating the bonds at issue. *See Dade Cnty. v. State*, 77 Ga. App. 139, 144 (1948) (explaining that the burden is on the plaintiff to make its *prima facie* case for validation of bonds). The burden only shifts to the Intervenors in the event that the JDA makes out its *prima facie* case. *See Harrell v. Town of Whigham*, 141 Ga. 322, 80 S.E. 1010, 1012 (1914) (holding that where a bond validation plaintiff failed to make out *prima facie* case, it was not "necessary to go further and refer to the evidence introduced by the contestants . . ."). This burden of proof includes establishing that the Project and/or Bonds are "sound feasible and reasonable," *see Carter v. State*, 93 Ga. App. 12, 21 (1955), and that the Project will promote the general welfare of the local community, *see Greene Cnty. Dev. Author. v. State*, 296 Ga. 725, 727 (2015).

A. The JDA Failed to Establish that the Bonds and Project are Sound, Feasible, and Reasonable.

The Petition asks to have this Court find that "the undertaking[4] for which the Bonds are issued, the issuance of the Bonds and the security therefor are sound, feasible, and reasonable." (Petition, § II, ¶ 17) This is a requirement for validation of the Bonds. See *Greene Cnty. Dev. Author.*, 296 Ga. at 726. The JDA failed to put forward sufficient evidence to support this allegation and therefore the request to validate the Bonds must be denied.

Mr. Silvio testified that the JDA determined the Project for which the Bonds are to be issued was sound, reasonable, and feasible based on the group's "experience," input from "partners at the State level," and generally learning "as much as we can about the company." (Hearing Tr. at 39:23–40:1–5.) However, Mr. Silvio offered no further testimony detailing about what information was reviewed or what facts the JDA uncovered, nor did the JDA introduce any documents to support his conclusory testimony.

Upon cross-examination, Mr. Silvio's confirmed that the JDA did not employ an investment banker, economist, financial analyst, or any other third-party to evaluate the financial wherewithal of Rivian and its ability to commence and complete the project. Instead, the JDA merely relied on "our State partners" to evaluate the financial wherewithal of Rivian. (*See* Hearing Tr. at 46:19–47:1–8.) Mr. Silvio testified that he had not reviewed

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[4] The *undertaking* is the Project.

Rivian's publicly available 10-Ks or any 10-Q (Hearing Tr. at 58:14–20), nor did the JDA perform any independent analysis concerning the economic viability of the Bonds, the Project, or Rivian itself. Mr. Silvio's general and vague testimony is insufficient to establish that the Project and/or the Bonds are sound, reasonable, and feasible.

Mr. Capezzuto's testimony did not aid the JDA in carrying its burden. While Mr. Capezzuto testified that "the State felt comfortable knowing the amount of cash and cash reserves that Rivian had on hand" following the company's Initial Public Offering, (*id.* at 103:23–25), his knowledge regarding the current financial condition of Rivian was very limited. Intervenors introduced into evidence, without objection, Rivian's 2021 publicly filed 10-K and March 2022 10-Q. (*See* Ex. I-1 and I-2.) Mr. Capezzuto testified that he had only general knowledge regarding the information contained in such financial reports. (*Id.* at 105:15-18.)

The financial reports of Rivian reveal significant troubling information that was not considered by the JDA, or presumably the State of Georgia. For instance, the 2021 10-K provides that Rivian faces "significant challenges as a new entrant into the automotive industry," and that the market is "highly competitive," and Rivian "may not be successful in competing in this industry." (Ex. I-1 at 3.) Underscoring the substantial obstacles that Rivian faces is the fact that the company has "incurred net losses since [its] inception, including net losses of $0.4 billion, $1.0 billion, and $4.7 billion for the years ended December 31, 2019, 2020, 2021, respectively." (*Id.* at 15.) Rivian expects these operating and net losses to continue. (*See id.*) Indeed, Rivian is "a company with an extremely limited

operating history and [has] not generated material revenue from sales of [its] vehicles or other products and services to date." (*Id.*) Rivian's 2022 10-Q paints a similarly bleak financial picture. For the first three months of 2022, Rivian recorded operation losses of $1.579 billion. (*See* Ex. I-2 at 17.) This loss is nearly quadruple the amount of operation losses that Rivian recorded for the first three months of 2021. If this rate continues, Rivian will incur more than $6 billion in operating losses for 2022 or over $500,000,000 per month.

Rivian's 2021 10-K and 2022 10-Q are both publicly available documents. Nevertheless, Mr. Silvio testified that the JDA *never reviewed* them. (Hearing Tr. at 58:14–20.) Mr. Capezutto did not testify that he reviewed them. To the extent Mr. Capezutto relied on Rivian's cash reserves to support the financial viability of the Project, such reliance is undercut by the fact that company is depleting money at an alarming rate of $1.579 billion per calendar quarter. In other words, Rivian's cash reserves are quickly drying up, thus casting serious doubt on whether it will be able to commence, let alone complete, the Project.[5] While JDA could have insisted that the five billion dollars be placed into the Project Fund to insure its availability for Project expenses, and while Mr. Silvo

[5] The JDA asserts that in the "worst-case scenario" of Rivian's filing for bankruptcy," the "State and the JDA could claw back many of the financial incentives offered to Rivian." (JDA Br. at 5.) However, the JDA offers no explanation of how this "claw back" would occur once Rivian files for bankruptcy since Rivian would not have sufficient assets to pay its creditors. Also no explanation or contingency is offered as to how the PILOT payments will be paid if Rivian fails or files bankruptcy.

testified that the investment could be made in either payment or construction expenses, it is became evident in the hearing of this matter that payments are not anticipated.

The JDA contends that this Court's inquiry is limited to whether the Bonds, as opposed to the Project, are sound, feasible and reasonable. However, this contention is a distinction with a difference and is directly contrary to the prayer for relief sought in the Petition. (*See* Pet. at 16.) Further, whether Rivian's Project is sound, reasonable, and feasible is a relevant issue for the Court to determine. *See Carter*, 93 Ga. App. at 21 (1955) (remanding to the trial court to "determine the issue of whether or not this project is sound, reasonable and feasible"). The JDA has put the issue of the Project's economic feasibility squarely before the Court and therefore it bears the burden of proving the same – a burden which it has not carried. [6]

A. The JDA Failed to Establish a *Prima Facie* Case to Support that the Project Will Promote the General Welfare of the Local Communities Within its Territory.

The Petition also seeks a finding that:

> the Project described in the Rental Agreement constitutes a 'project' as defined in O.C.G.A. § 36-62-2(6)(N) . . . will develop and promote trade, commerce, industry and employment opportunities for the public *and the general welfare within the territory of the Authority*; will promote the general welfare of the State of Georgia and its residents; that the Project and the use thereof will each further the public purposes of the Act for which the Authority was created and will promote economic development and job creation and will facilitate a property tax incentive for the Company; and that therefore, the Project is a proper project to be undertaken and financed

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[6] Even if the JDA has made out a *prima facie* case, the Intervenors offered evidence in the form of the cross examination which rebuts any *prima facie* case.

(whether directly or indirectly, in whole or in part) with the Bonds under the Provisions of the Act.

(Petition § II, ¶ 10) The evidence does not support this requested finding.

The JDA failed to put forward sufficient evidence demonstrating that the Project would promote the "general welfare within the territory of the Authority." For instance, Mr. Capezutto's testimony confirms that only the State of Georgia performed a financial analysis of the Project to determine the "rate of return" on the direct State grants to the Project. (Hearing Tr. at 99:16–25.) Moreover, Mr. Silvio's testified that the JDA 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 Rivian Project. (*See id.* at 63:5–64:1–3.) Mr. Silvio also confirmed that the JDA 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 construction and operation of the Project. (*See id.* at 64:4–10).

This lack of evidence provides an independent basis for the Court to decline to validate the Bonds. *See Greene Cnty. Dev. Author.*, 296 Ga. at 727.

7. The Rental Agreement creates an Estate for Years in the Company which is Subject to *Ad Valorem* Taxation.

A usufruct has been referred to as merely a license in real property, which is defined as authority to do a particular act or series of acts on land of another without possessing any estate or interest therein. On the other hand, an estate for years carries with it the right to use the property in as absolute a manner as may be done with a greater estate, provided that the property or

> the person who is entitled to the remainder or reversion is not injured by such use. Ga. Code Ann. § 44-6-103. Therefore, an estate for years, unlike a usufruct, constitutes a taxable interest in land. All renting or leasing of real estate for a period of time in excess of five years is presumed to be an estate for years. *Jekyll Dev. Assocs. L.P. v. Glynn County Bd. of Tax Assessors*, 240 Ga. App. 273 (1999).

The entire premise of the Bonds which are sought to be validated is that the Project will be exempt from *ad valorem* taxation based upon the structure of the Rental Agreement. Indeed, the Petition seeks an express finding that "the Rental Agreement will create in [Rivian] a usufruct in the real property comprising part of the Project . . . which interest[] [is] not subject to ad valorem property taxes." (Petition § II, ¶ 9)

At issue herein is whether the Rental Agreement to be executed by the parties creates a usufruct, which would not subject Rivian to the payment of ad valorem taxes, or whether it is an estate for years, requiring the payment of ad valorem taxes.

> Factors to be considered in determining whether the parties intended to create a usufruct include:
>
> (i) the terms used in the instrument of conveyance to describe the grantee's rights;
>
> (ii) any provisions in the instrument addressing the parties' understanding as to liability for ad valorem taxes;
>
> (iii) the grantor's retention of dominion or control over the leased property;
>
> (iv) which party has retained the duties to keep and maintain the premises and appurtenances; and

> (v) whether the grantee may assign the lease or allow any part of the leased premises to be used by others without the grantor's consent.
>
> Although an estate for years may be encumbered or somewhat limited without being reduced to a usufruct, if the lease imposes sufficient conditions and limitations upon the use of the premises to negate the conveyance of an estate for years the interest passed is reduced to a mere usufruct. *Chatham County Bd. of Assessors v. Jay Lalaji, Inc.*, 357 Ga. App. 34 (2020).

We must apply those factors to the case at bar to determine whether the conveyance is a usufruct or an estate for years. It is without question that the agreement is for five years, which presumes that it is an estate for years. *County Bd. of Assessors, supra.* However, the agreement provides for extensions of the agreement in five year increments though and including December 1, 2047, all of which are automatic unless the company gives the JDA written notice prior to the expiration of the term that it does not want to extend the agreement. (Article Article V, Section 5.1).

> Section 7 of the lease establishes an initial term of 55 years, and thus presumptively creates an estate for years. Moreover, if the lessee offers to lease the premises beyond the termination of the lease, § 7 requires the lessor to either accept the offer or make a good faith counteroffer. It would be "at least somewhat unusual" for a lessor to give a lessee such extended rights of use and occupancy of premises under the relationship of landlord and tenant. *Jekyll Dev. Assocs. L.P. v. Glynn County Bd. of Tax Assessors*, 240 Ga. App. 273, 275 (1999).

The conveyance itself says that a usufruct was being conveyed, but further stated that no ad valorem taxes would be paid.

> Generally, the leasehold interest created by an estate for years is taxable but the license in property created by a usufruct is not. See *Camp v. Delta Air Lines*, 232 Ga. 37, 39 (1974). Accordingly, if the City intended to create a non-taxable usufruct, the provision eliminating the tax burden would

> have been unnecessary. "It is a cardinal rule of contract construction that a court should, if possible, construe a contract so as not to render any of its provisions meaningless and in a manner that gives effect to all of the contractual terms." *Milliken & Co. v. Ga. Power Co.*, 354 Ga. App. 98, 100 (2020) (citation and punctuation omitted). *GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden*, 362 Ga. App. 413 (2022).

However, if ad valorem taxes are assessed, they are the responsibility of Rivian, and not the JDA. (Rental Agreement, Article III, Section 3.1, (vii).

> Section 17 of the lease prohibits the lessee from assigning the lease or subletting any part of the premises without the consent of the lessor. This limitation is clearly inconsistent with the grant of an estate for years, "which normally can be alienated without the grantor's consent." 20 But § 21 states that any consent requested by the lessee shall not be unreasonably withheld, thereby circumscribing the lessor's power to withhold its consent. 21 Moreover, § 17 provides that any assignment or subletting shall not relieve the lessee of liability under the lease unless specified by the lessor. This indicates that an estate for years was transferred. *Jekyll Dev. Assocs. L.P.*, supra, p. 276-277.

The Court finds that the recent case of *GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden*, 362 Ga. App. 413 (2022) is controlling. In that case, the Georgia Court of Appeals held that the lease at issue created an estate for years even though the agreement contained the following restrictions:

- 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 "carry insurance and name the [lessor] as an additional insured;"

- 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.

The 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.

The Rental Agreement at issue here contains many of the same provisions, and actually gives the JDA less control over the use of the property:

- Section 4.5 provides that Rivian may only use the project "for the limited purpose of developing and operating vehicle manufacturing and research, development, testing, sales, and/or service facilities, including potential battery manufacturing facilities, and related facilities." This is the entire business of Rivian, however, and therefore does not provide any meaningful restriction on its use of the property.

- Section 9.2 of the Rental Agreement grants Rivian the right to sublet all or a portion of the property to any of its suppliers and the consent of the JDA "will not be unreasonably withheld." *Jekyll Dev. Assoc., L.P. v. Glynn Cnty. Bd. of Tax Assessors*, 240 Ga. App. 273, 274 (1999) ("reasonable consent" language circumscribes "lessor's power to withhold its consent"). Section 9.1(a) further provides that Rivian may assign or convey any and all of its rights, interests, duties, and/or obligations under the Rental Agreement to any

of its "Affiliates" without the JDA's consent. In this same vein, Section 4.3 of the Rental Agreement permits Rivian to create liens or encumbrances on the Project if consented to in writing by the JDA, *which consent shall not be unreasonably withheld, conditioned or delayed.*

- JDA may not disapprove of any future development of the property unless such development is inconsistent with the use of the property. *See* Sections 4.2. 6.1, and 6.2.

- Section 6.4 requires Rivian—not the State of Georgia nor the JDA—to maintain insurance for the property and the Project, and to name JDA as an additional insured.

- Rivian is required to fully maintain the property and the Project, and the JDA has no obligation to perform any maintenance of the Project. *See* Sections 4.2 and 6.7.

- While Rivian is required to comply with applicable laws (*See* Section 3.1(iii), 4.5, 6.5, 10.1, and 10.2), these are legal requirements for which Rivian would already be responsible and subject to enforcement by the applicable local, state, or federal agency. In fact, JDA may not take any action against Rivian under this provision so long as Rivian is challenging the determination that it is not in compliance with a legal provision. *See* Section 6.5.

- Section 3.3 grants Rivian a covenant of quiet enjoyment, expressly providing that the JDA "warrants and covenants that it will defend [Rivian] in the quiet enjoyment and peaceable possession of the Project . . . ." This provision is a strong indicator of an estate for years. *See Jekyll Dev. Assoc., L.P.*, 240 Ga. App. at 277 (holding that covenant of quiet enjoyment indicates that an estate for years has been created). Likewise, Section 5.2 grants Rivian the "sole and exclusive possession, occupancy, and use of each component of the Project, as completed . . . ."

- Section 6.2 requires the JDA 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. The fact that Rivian can direct its landlord to transfer the equipment to Rivian at any time indicates that Rivian has full and complete title and control over the equipment. Further, Rivian only has to report "from time to time" such removal, but does not need to make such a report until the aggregate of such removed property is at least 15 million dollars.

- Section 7.2 of the Rental Agreement provides that in the event of a condemnation of all or any portion of the property, the JDA will only receive that portion of the award attributable to the "portion of the Land which has not been materially improved by the Company . . . ." As such, the parties contemplate that Rivian is entitled to the fair market value of any condemned property it improved – an indication of rights well beyond those of the holder of a usufruct.

Taken together, each of these provisions of the Rental Agreement demonstrate that Rivian would possess an estate for years, rather than a usufruct. As such, its interests in the property and the Project would be subject to *ad valorem* taxation. The Sale language quoted above also establishes that Rivian has control over the equipment, and a bailment was not intended. Therefore, Rivian has tax liability for the equipment of the project, as well.

The JDA's reliance on *Diversified Golf, LLC v. Hart County Board of Tax Assessors*, 267 Ga. App. 8 (2004), does not change this conclusion. Critical to the court's holding in *Diversified Golf, LLC* was the fact that the lease required the lessee to "accept all treated municipal wastewater sent to it and spray it on the property." *Id.* at 12. In fact, the lease made "clear that wastewater treatment overrides *any other use* of the property . . . ." *Id.* (emphasis added). The court described the lessee's obligation to accept and spray treated wastewater on the property as "[b]y far the most important restriction in the lease" and noted that "in the first four years, 996 million gallons of wastewater was sprayed on the property." *Id.* at 12–13. Primarily because the lessee's use of the property was "severely restricted and always subject to use as a wastewater spray field," the court concluded its

interest constituted a usufruct." *Id.* at 15. The severe and pervasive use restrictions present in *Diversified Golf, LLC* are wholly lacking in the instant case.

Simply put, the JDA has failed to overcome the presumption in favor of a finding that the Rental Agreement would create an estate for years in Rivian, and as such the Court denies the request to conclude otherwise.

Notwithstanding the recitations set forth in Rental Agreement concerning the nature of the rights granted therein, after thoroughly reviewing the Rental Agreement, the Court concludes that under the terms of the Rental Agreement submitted with the Petition, Rivian would possess an estate for years that would be subject to ad valorem taxes, rather than a usufruct.

JDA argues that this Court should defer to the Boards of Assessors' determination that the Rental Agreement conveys a usufruct to the Company, citing *Love v. Fulton Cnty. Bd. of Tax Assessors*, 311 Ga. 682, 696 n.15 (2021). However, during the hearing and questioning by this Court, JDA acknowledged that a lawsuit was pending over that same issue (though the Agreement specifies there are no lawsuits pending that would affect the rights of the parties thereunder), and agreed that it was appropriate for this Court to make that determination after a review of the evidence.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, the State of Georgia is not entitled to a judgment validating the Bonds and the Bond Documents. It is hereby

ORDERED, ADJUDGED and DECREED that the Petition is **DENIED** and the Bonds are not validated.

This 29 day of September, 2022.

Hon. Brenda Holbert Trammell, Chief Judge
Ocmulgee Superior Courts

CERTIFICATE OF SERVICE

This is to certify that I, Brandi B. Boswell, Judicial Assistant to Judge Brenda H. Trammell, that I have this day served all parties with the attached ORDER hand-delivery, electronic transmission, facsimile and/or by depositing same in the United States Mail, with sufficient postage affixed thereto as follows:

John A. Christy, jchristy@swfllp.com (via electronic transmission)

Stephen Mulherin, smulherin@swfllp.com (via electronic transmission)

Christian G. Henry, chenry@hallboothsmith.com (via electronic transmission)

Robert B. Remar, rremar@sgrlaw.com (via electronic transmission)

Andrea P. Gray, andrea@andreapgray.com (via electronic transmission)

Henry R. Chalmers, henry.chalmers@agg.com (via electronic transmission)

Kadiw D'Ambrosio, kdambrosio@sgrlaw.com (via electronic transmission)

Michael Eber, meber@sgrlaw.com (via electronic transmission)

Andrew Schutt, andrew.schutt@agg.com (via electronic transmission)

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This 29 day of September, 2022

Brandi B. Boswell, Judicial Assistant
Brenda H. Trammell, Chief Judge
Superior Court - Ocmulgee Judicial Circuit

100 South Jefferson Avenue, Suite 335
Eatonton, Georgia 31024
706.485.7530