

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

FILED IN OFFICE

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**Deputy Clerk Superior Court
Fulton County, Georgia**

FRIENDS OF PIEDMONT PARK, INC.,)
DOUGLAS L. ABRAMSON, JOHN GRADY)
BURNS, and WILLIAM L. LOCKHART)

Plaintiffs,)

v.)

ATLANTA BOTANICAL)
GARDEN, INC., THE CITY OF ATLANTA,)
GEORGIA, and)
PIEDMONT PARK CONSERVANCY,)
INC.,)

Defendants.)

CIVIL ACTION FILE NO.:

2007CV128242

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Preliminary Statement

1.

This is an action for declaratory and injunctive relief arising from the City of Atlanta's approval of amendments to the Master Plan for Piedmont Park, amendments to the Master Plan for the Atlanta Botanical Garden, and an amendment to the lease between the City of Atlanta and the Atlanta Botanical Garden all of which would, *inter alia*, authorize the Atlanta Botanical Garden, Inc. to construct and operate a 6-story, 783-space, fee-based parking deck on greenspace in the interior of Piedmont Park in Atlanta, Georgia. Despite the fact that Piedmont Park is a publicly owned city park, and despite the fact that they are acting pursuant to agreements with, and authorization from, the City of Atlanta, defendants Atlanta Botanical Garden and the Piedmont Park Conservancy claim that their actions involving the parking deck are exempt from

Georgia's Open Records Act and from state and local competitive bidding laws. Furthermore, the project represents an unlawful conversion of public park land to private uses, and violates the Gratuities Clause of the Georgia Constitution.

Parties

2.

Plaintiff Friends of Piedmont Park, Inc. ("FOPP") is a 501(c)(3) non-profit membership corporation organized under the laws of the State of Georgia. FOPP is a community based organization dedicated to preserving, protecting, and improving Piedmont Park. FOPP was founded in the 1970s and has been actively involved in many Piedmont Park activities since then. Its membership includes citizens and taxpayers of the City of Atlanta, many of whom reside close to the Park and are regular users of the Park. The website of FOPP is www.FriendsOfPiedmontPark.org.

3.

Plaintiff Douglas L. Abramson is a citizen and taxpayer of the City of Atlanta who owns and resides at 518 St. Charles Avenue, NE, Atlanta, Georgia 30308, approximately one-half mile from Piedmont Park. Plaintiff Abramson is a member of, on the Board of, and President of FOPP and regularly uses the Park to attend events, play tennis, take walks, exercise his dogs, attend meetings, and enjoy the Park.

4.

Plaintiff John Grady Burns is a citizen and taxpayer of the City of Atlanta who owns and resides at 1440 Monroe Drive, NE, Atlanta, Georgia 30324, in a home adjacent to Piedmont Park. Plaintiff Burns is a member of FOPP regularly uses the Park to attend events, take walks,

exercise, and enjoy the Park.

5.

Plaintiff William L. Lockhart is a citizen and taxpayer of the City of Atlanta who owns and resides at 1312 Monroe Drive, NE, Atlanta, Georgia 30306, in a home adjacent to the Park which he has lived in since the late 1940s. Plaintiff Lockhart is a member of FOPP and uses and enjoys the Park.

6.

Defendant Atlanta Botanical Garden, Inc. ("ABG") is a 501(c)(3) Georgia non-profit corporation that since 1976 has operated a private, non-profit botanical garden on land within Piedmont Park that it leases from the City of Atlanta. ABG's registered agent for service of process and its principal place of business are located within Fulton County, Georgia. ABG is subject to the jurisdiction of this Court.

7.

Defendant Piedmont Park Conservancy, Inc. ("PPC") is a 501(c)(3) nonprofit Georgia corporation. Its registered agent for service of process and its principal place of business are located within Fulton County, Georgia. PPC is subject to the jurisdiction of this Court.

8.

Defendant City of Atlanta, Georgia ("City") is a municipal corporation of the State of Georgia chartered by act of the Georgia General Assembly pursuant to the municipal Home Rule Act, O.C.G.A. § 36-35-1, *et seq.* Its corporate territory is located primarily within Fulton County and its principal administrative, executive and legislative offices are located within Fulton County. The City is subject to the jurisdiction of this Court.

FACTUAL BACKGROUND

Piedmont Park

9.

In 1887, the Gentlemen's Driving Club purchased 189 acres of land just north of the Atlanta city limits to establish a club and horse racing facility for its members. Subsequently, the Driving Club entered into an agreement with the Piedmont Exposition Company to hold fairs and expositions on a portion of the land. These fairgrounds became known as Piedmont Park.

10.

Piedmont Park is a public park owned by the City. The City purchased Piedmont Park in 1904, extending its city limits north to encompass the park land. In 1909, the City decided to redevelop the former fairgrounds as a city park. The Olmsted Brothers, pre-eminent landscape architects and sons of renowned landscape architect Frederick Law Olmsted, submitted a master plan for the Park. Although the 1912 Olmsted plan for Piedmont Park was not fully implemented, the plan greatly influenced the development of the Park.

11.

The Piedmont Park golf course was closed in 1979, freeing up approximately 70 acres of green space in the areas now commonly known as Oak Hill and the Tenth Street Meadow. In 1983, Piedmont Park was closed to through vehicular traffic, creating a more pedestrian-friendly park and a haven from the hustle and bustle of Atlanta.

12.

During the 1970s and 1980s, Piedmont Park fell into decline due to increasing park usage

and decreasing city budgets. To help address these problems, the City entered into a public-private partnership with the PPC pursuant to a Memorandum of Understanding dated December 15, 1992, the goal being to enhance Piedmont Park for the benefit of Piedmont Park and City residents. The City and the PPC subsequently entered into a number of agreements involving the operation, development, and maintenance of various facilities within the Park by PPC. The PPC's stated mission is "to enhance and preserve Piedmont Park as a vital, urban green space and as a cultural and recreational resource that enriches the quality of life for all Atlantans."

Atlanta Botanical Garden

13.

The City entered into leases with the ABG, first on May 31, 1977, and later on March 31, 1980. The term of the lease is 50 years and no rent or other fees are paid to the City by the ABG. The lease has been amended.

14.

The 1977 lease was approved by the Atlanta City Council on April 25, 1977. The approval resolution recited that the parties to the lease believed that the Garden could be developed "through the use of private funds and assistance from the City." Under the 1977 lease, the ABG provides services to the City and acts on behalf of the City, as set forth below.

15.

The 1977 lease declared that the City "wishes to establish a Botanical Garden and Arboretum to be located on a site of approximately sixty acres located within Piedmont Park." In the lease, the City agreed to let the ABG "develop, maintain and manage" the garden on the

park property. The ABG agreed in the lease to establish the garden "for the benefit of all citizens of the City."

16.

Specifically, the 1977 lease stated that the ABG would perform development and management activities at Piedmont Park for the City, among other things:

- a. ABG was required to prepare a master plan for development subject to approval by the City. "It is hereby expressly understood that such plan and all amendments or changes thereto must first be approved in writing by the Mayor or his [sic] designee...."
- b. ABG was authorized to "secure gifts of trees, shrubs, and plants, as well as to secure cash, gifts, bequests and endowments...."
- c. Funds raised by the ABG were to be used "for the purpose of equipping and maintaining the Garden, for the improvement of real property, for the general maintenance of the Garden, or any other purpose specified in the master plan..." previously approved by the City.
- d. The Atlanta Botanical Garden, the plant material, the collections, other personal property, the buildings and structures and enclosures are required to be maintained "in a clean and sanitary condition and in a state of repair satisfactory to the City."
- e. ABG would be "subject to the provisions of the Equal Employment Opportunity In Purchasing and Contracting Ordinance...."
- f. ABG would hold the City harmless from all claims made "against the City, its officers, agents and employees."
- g. ABG was required to purchase adequate liability, Workmen's Compensation, and property insurance, copies to be filed with the City. "The City shall have the right in its

discretion to require the [ABG] to increase the amounts of its insurance coverage from time to time.”

h. ABG was authorized to construct in the city park buildings and other necessary improvements “subject to the written approval of the Mayor or his [sic] designee....” These improvements on park property were to be “without cost or expense to the City, and without charging or subjecting the freehold of the City, as owner of the Site, to any lien, claim or charge therefor....”

17.

Under the 1977 lease, the City maintained ownership of the portion of Piedmont Park used by the ABG.

18.

The 1977 lease states that the “the Garden will be maintained for the benefit of all citizens of the City....” Specifically:

- a. The city’s Director of the Bureau of Parks and Recreation must approve operating hours.
- b. Greenhouses and other buildings “shall be open to the general public within such reasonable hours as may be agreed upon by the Director of the Bureau of Parks and Recreation and the Lessee.”
- c. Admission charges were to be “subject to the approval of the City....”

19.

The 1977 lease required the ABG to perform services for the City. Specifically, Paragraph 10 of the lease sets forth extensive rules to guarantee that there would be no

discrimination in purchasing or hiring, and begins with a recitation that the [ABG] operated "as a Contractor with the City, and a supplier of services...."

20.

Paragraph 11 of the 1977 lease states that "The City agrees to furnish utilities for the maintenance of the Garden, including heating, lighting, electricity, and water."

21.

The maintenance of the Atlanta Botanical Garden within Piedmont Park has a public purpose. One public purpose for the lease of park property is a provision requiring the ABG to make its facilities available to teachers and students for instruction at no charge, subject to reasonable restrictions.

22.

Georgia House Bill 868 signed into law in 1979 authorized the City to enter into a long-term lease for a botanical garden.

23.

The City Council directed the Mayor of Atlanta to negotiate and execute such a lease in a resolution.

24.

The resolution directing the Mayor of Atlanta to negotiate a long term lease with the ABG emphasized the public purpose of developing and maintaining the Atlanta Botanical Garden: "Whereas, the Atlanta Botanical Gardens, Incorporated, with the security of a long-term lease for the property it is currently occupying in Piedmont Park, will be able to raise more money and therefore provide a higher quality of service to the City of Atlanta."

25.

The 1980 lease repeatedly refers to the Atlanta Botanical Garden as a public facility. The 1980 lease states that the development was pursuant to a plan to establish "a public botanical garden and arboretum...." "Garden" is defined in the agreement as "the public Botanical Garden contemplated by the Plan."

26.

The 1980 lease makes it clear that facilities constructed by the ABG were for the benefit of the City:

- a. "Title to the Improvements during the Lease Term shall be in the [City]...."
- b. "[The City] has fee simple title to the Property and the Demised Improvements...."
- c. "The [ABG] agrees that the Garden will be maintained for the benefit of all the citizens of the City...."
- d. "The [ABG] agrees that the Garden shall be open to the public within such reasonable hours as shall be established from time to time...."
- e. "Any greenhouses, conservatories and other buildings in the Garden having collections or exhibits of plants, libraries or lecture rooms, shall be open to the general public...."
- f. "The [ABG] may not charge admission fees for entrance to the Garden without prior written consent of [the City]...."
- g. Provisions require use of the facility for educational purposes.
- h. ABG must comply with city non-discrimination ordinances.
- i. ABG must provide insurance in amounts satisfactory to the City.
- j. ABG must hold the City harmless from all claims and liability.

27.

Under the 1980 lease the City was obligated to provide for some maintenance and operations of a greenhouse, make storage facilities available, to allow the Botanical Garden to use tools or machinery owned by the City, and to provide topsoil and mulch when available.

The Atlanta Botanical Garden Parking Deck

28.

In January of 1996, the Atlanta City Council adopted a new Master Plan for Piedmont Park ("1995 Master Plan"), designed to honor the Olmsted Brothers' original vision for the Park as premier green space and a central gathering place for Atlantans. The 1995 Master Plan includes various physical and programmatic recommendations. Since the adoption of the 1995 Master Plan, a series of park improvement projects has been completed, including Oak Hill, the Tenth Street Meadow, Lake Clara Meer, and the Active Oval.

27.

Starting in 2004, the PPC, in conjunction with the ABG, developed an amendment (the "North Woods Master Plan") to the 1995 Master Plan. The North Woods Master Plan covers approximately 53 acres at the northern end of Piedmont Park and includes proposals for a 27-acre site in the northwestern quadrant of the Park (often called the North Woods), the 11-acre Halpern Site on Monroe Drive, and the 12-acre West Site on Piedmont Avenue.

29.

Simultaneously and in conjunction with the development of the North Woods Master Plan, the ABG developed a new master plan ("Botanical Garden Master Plan") for the property

in Piedmont Park that the ABG leases from the City. The Botanical Garden Master Plan includes, among other things: (a) a 6-story, 783-car, fee-based parking deck, along with access and service roads, associated facilities, and related infrastructure and other changes (“Parking Deck”) on land to be newly leased from the City; (b) a new visitors’ center; (c) removing a surface parking lot on the current site of the Atlanta Botanical Garden; (d) changing the Storza Woods, a public forest in Piedmont Park, from free admission to a fee-based site; and (e) eliminating approximately 3.3 acres of the Storza Woods from the ABG’s lease with the City.

30.

The Parking Deck would be operated, managed, and maintained by the ABG. The parking deck would be located to the east of the Atlanta Botanical Garden and to the north of the PPC’s headquarters and Magnolia Hall. Vehicular access to the Parking Deck from the west would be via The Prado. Vehicular access to the Parking Deck from the east would be via a roadway off Monroe Drive that would pass immediately to the south of the Clear Creek Combined Sewage Overflow, would cross the planned Belt Line at-grade, would cross through a significant section of greenspace in Piedmont Park, and would enter the Parking Deck via a tunnel. A fee would be charged to park in the Parking Deck. Approximately one-half of the Parking Deck would be reserved for people visiting the Atlanta Botanical Garden and approximately one-half would be available for public parking. Other spaces in the Parking Deck would also be reserved, from time-to-time, for visitors attending private events at the Atlanta Botanical Garden, Magnolia Hall in Piedmont Park, and during special events in the Park.

31.

Atlanta Ordinance 04-O-1117, adopted in June, 2004, requires that major renovations and

additions to a master plan for regional parks, including Piedmont Park, must be submitted to all Atlanta Neighborhood Planning Units (“NPU”) for information and input. The proposed North Woods Master Plan and the proposed Botanical Garden Master Plan were reviewed by most of the NPUs in the City. Of the twenty NPUs that took a position on the proposed changes to those master plans, nineteen voted to oppose the changes recommended by the PPC and the ABG, in all cases because of the Parking Deck.

32.

In the fall of 2005, the City of Atlanta Urban Design Commission (“UDC”) reviewed the North Woods Master Plan and the Botanical Garden Master Plan pursuant to § 6-4043 of the Atlanta City Code. In a report dated September 14, 2005, the UDC staff noted that “[t]he inclusion of the parking deck thwarts the basic principles of Olmsted’s landscape practices and the 1995 Master Plan.” In November, 2005, four of seven members of the UDC recommended against approval of the Parking Deck.

33.

On November 21, 2005, a majority of the Atlanta City Council adopted resolutions approving and authorizing: (a) the North Woods Master Plan; (b) the Botanical Garden Master Plan; and (c) an amendment to the lease between the City and the ABG (“Parking Deck Lease Amendment”), formally titled Lease Amendment No. 6. Mayor Shirley Franklin signed the legislation for the foregoing actions on November 22, 2005.

34.

As a city-owned park dedicated to use by the general public for recreational and other public purposes, Piedmont Park is held in trust by the City of Atlanta for the use by the public,

and the City has a duty to maintain the park for the benefit of the public, in accordance with the terms of that trust and within the limits of the City's lawful authority.

COUNT ONE: VIOLATIONS OF THE GEORGIA OPEN RECORDS ACT

35.

Plaintiffs repeat and reallege the allegations of paragraphs nos. 1 through 34 above as if fully set forth herein.

36.

The Georgia Public Records Act (popularly known as the Open Records Act), O.C.G.A. Section 50-18-70 et seq., provides that all public records of an agency, as defined in the Act, shall be open for a personal inspection by any citizen of this state at a reasonable time and place. A "public record" is any document prepared and maintained or received in the course of the operation of a public office or agency. O.C.G.A. Section 50-18-70(a).

37.

Records received or maintained by a private corporation in the performance of services or functions for the City are subject to disclosure to the same extent that such records would be subject to disclosure if received or maintained by the City itself. O.C.G.A. § 50-18-70(a).

38.

Both the PPC and the ABG, among other things: (a) provide public functions and services at the request of and on behalf of the City; (b) lease, improve, control, and/or manage publicly-owned land; (c) hold themselves out to the public as providing, and do provide, services

to the public on behalf of the City; (d) have contractual relationships with the City to perform public functions on behalf of the City; (e) make improvements on public land, which improvements become the property of the City; and (f) claim that the Parking Deck will be open to and is intended to benefit the public.

39.

Pursuant to their agreements with the City and practices which have developed over time, the PPC and the ABG act on behalf of the City with respect to the operation of Piedmont Park and the Atlanta Botanical Garden. Likewise, the construction and operation of park improvements contemplated by the 1995 Master Plan, the North Woods Master Plan, and Botanical Garden Master Plan, including the Parking Deck, involve projects and services that have been delegated by the City to the PPC and/or the ABG, who act on behalf of the City with respect to those projects and services. This is evidenced by the fact that the North Woods Master Plan, the Botanical Garden Master Plan, the Parking Deck Lease Amendment, and the Parking Deck all required NPU review, UDC review, City Council authorization, and Mayoral approval.

40.

All three defendants are subject to the Open Records Act with respect to their actions pertaining to Piedmont Park. The City is a public agency subject to the Open Records Act. The ABG is not a public office or public agency but it provides services for the City and acts on behalf of the City. The PPC is not a public office or public agency but it provides services for the City and acts on behalf of the City.

41.

Certain of the Plaintiffs, through counsel, sent a request to review documents to the ABG pursuant to the Open Records Act on January 3, 2005. A copy of the request is attached as Exhibit "A."

42.

Among other things, the January, 2005 Open Records Act request to the ABG that sought documents relating to studies showing the composition of soil, rock, and other materials on the site of the current ABG parking lot off Piedmont Avenue.

43.

By letter dated January 7, 2005, ABG responded to the January, 2005 Open Records Act request through counsel stating simply that "[t]he Garden is not subject to the requirement of the referenced statutes...." A copy of this response is attached as Exhibit "B."

44.

The dispute over the applicability of the Open Records Act was referred to the Georgia Attorney General pursuant to O.C.G.A. § 50-18-73(a). On March 6, 2006, Senior Assistant Attorney General Stefan Ritter wrote to counsel for ABG concerning its refusal to supply records pursuant to the January 3, 2005 request. A copy of the March 6, 2006 letter is attached as Exhibit "C."

45.

Certain of the Plaintiffs, through counsel, sent a second request to the ABG to review documents relating to the Parking Deck and other matters involving Piedmont Park pursuant to the Open Records Act on August 15, 2006. A copy of this request is attached as Exhibit "D." On

the same date, a similar Open Records request was sent to the PPC. A copy of this request is attached as Exhibit "E."

46.

Among other things, the August, 2006 Open Records Act requests to the ABG and PPC sought documents relating to: (a) the processes (including competitive bidding) for selecting persons to build the Parking Deck; (b) studies involving potential public health and safety risks related to the plan to access the Parking Deck via Monroe Drive; (c) plans to cross the Belt Line in order to allow vehicular access to the Parking Deck from Monroe Drive; and (d) plans to use the current roadway between Monroe Drive and the Clear Creek Sewer Overflow for vehicles entering or exiting the Amsterdam Walk shopping center.

47.

PPC responded to the August, 2006 Open Records Act request through counsel, stating that the "Piedmont Park Conservancy is not subject to the Georgia Open Records Act." The PPC did not provide any documents pursuant to the Open Records Act request, but on August 21, 2006 did provide very brief written descriptions in response to the document requests. A copy of the August 21, 2006 PPC response is attached as Exhibit "F."

48.

On August 21, 2006 the ABG once again asserted that it was not subject to the Open Records Act and would not produce any of the documents sought in the August 15, 2006 request. A copy of this letter is attached as Exhibit "G."

49.

Senior Assistant Attorney General Stefan Ritter wrote to ABG's counsel again on September 11, 2006, in follow-up to his previous correspondence. A copy of this letter is attached as Exhibit "H." After receiving this second letter from the Attorney General's office, on September 18, 2006, the ABG provided the plaintiffs with some of the documents sought in their January 5, 2005 request. The ABG, through its attorneys, explained that "[w]hile the Garden continues to maintain that the Act does not apply to it, the Garden does not want to appear uncooperative to you, your client, Mr. Ritter, or the Attorney General." A copy of the September 18, 2006 letter is attached as Exhibit "I."

50.

On December 28, 2006, Stefan Ritter wrote once again to counsel for ABG, whom Mr. Ritter understood also represented PPC, stating that "...the Office of the Attorney General, based on the information currently available to it, is of the opinion that both of these organizations are subject to the [Open Records] Act." A copy of this letter is attached as Exhibit "J."

51.

No records have been produced by PPC or ABG in response to the August 15, 2006 Open Records Act request.

52.

The sole ground asserted by the ABG and the PPC for failing to provide public documents is that they are not entities subject to the Open Records Act. The ABG and PPC have never asserted that the documents themselves fall within a specific exception to the Open Records Act codified at O.C.G.A. § 50-18-72.

53.

No special circumstances justifying the refusal of ABG and the PPC to comply with the Open Records Act exists. The ABG and PPC acted without substantial justification in their failure to comply.

54.

Plaintiffs Abramson, Burns, and Lockhart are entitled to an order declaring that the ABG and PPC are custodians of public records and ordering that the records they maintain on behalf of the City or pursuant to the services they provide to or on behalf of the City be produced for inspection and copying.

55.

Plaintiffs Abramson, Burns, and Lockhart are also entitled to recover their reasonable attorney fees and other litigation costs as provided by O.C.G.A. § 50-18-73.

**COUNT TWO: FAILURE TO COMPLY WITH GEORGIA
LOCAL GOVERNMENT PUBLIC WORKS CONSTRUCTION LAW**

56.

Plaintiffs repeat and reallege the allegations of paragraphs nos. 1 through 55 above as if fully set forth herein.

57.

The Georgia Local Government Public Works Construction Law ("Public Works Law") applies, with certain limited exceptions, to "the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to any public real property." O.C.G.A. § 36-91-1(10). Under the Public Works Law, it is "unlawful to

let out any public works construction contracts subject to the requirements of this chapter without complying with the competitive award requirements contained in this Code Section.”

O.C.G.A. § 36-91-21(a).

58.

The competitive award requirements for public works construction contracts under the Public Works Law, O.C.G.A. § 36-91-21(b), include that:

- (1) The governmental entity shall publicly advertise an invitation for bids;
- (2) Bidders shall submit sealed bids based on the criteria set forth in such invitation;
- (3) The governmental entity shall open the bids publicly and evaluate such bids without discussions with the bidders; and
- (4) The contract shall be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids.

59.

As an improvement to public real property, the Parking Deck is a public works project within the meaning of the Public Works Law and is not covered by any of the exceptions thereto. Among other things, the Parking Deck: (a) would be a public improvement to public land; (b) would alter public land; (c) would be a public structure; (d) would be built on public land; (e) would be open to and used by the public; (f) would become the property of the City; (g) would require demolishing a public structure; (h) would involve City funds as a part of Piedmont Park; and (i) would raise liability risks for the City. Likewise, other improvements contemplated by the Botanical Garden Master Plan would be built on public land for use by the public and involve the same issues as the Parking Deck. Accordingly, the construction and other contracts related to

the Parking Deck, related changes and improvements to Piedmont Park, and the Botanical Garden Master Plan must be let in full compliance with the competitive award requirements of the Public Works Law.

60.

Upon information and belief, defendants have started the process for selecting firms to plan and/or build the Parking Deck and make related changes and improvements to Piedmont Park. Upon information and belief, contracts for and/or related to the Parking Deck have been awarded, committed, or promised to private contractors by the ABG and/or the PPC with the knowledge, concurrence, and acquiescence of the City. Upon information and belief, the PPC and ABG have taken other steps in preparation for building the Parking Deck and related changes and improvements to Piedmont Park.

61.

The website of Silverman Construction Program Management, Inc. ("Silverman") (<http://silvermanconstruction.com/projects/>) states that PPC has awarded Silverman a contract to be the project manager for \$73 million worth of work in the "Northwoods" of Piedmont Park. The North Woods project involves aspects of the Parking Deck, including a road between Monroe Drive and the Parking Deck, a road between Piedmont Avenue and the Parking Deck, a service road between Park Drive and the Parking Deck, and infrastructure and other changes in Piedmont Park related to the Parking Deck. Silverman's website states that Silverman was hired to assist the "owner" (i.e., PPC) in coordinating and managing the consultants, assisting with budgeting and construction management for this multi-phase project. The Silverman web site lists Tunnell-Spangler-Walsh & Associates as the design team for the North Woods project.

62.

The website of Silverman states that ABG has awarded Silverman a contract to be the project manager for \$27.5 million worth of work for the "Atlanta Botanical Garden Visitors Center and Parking Structure." The Silverman web site says, among other things, that Silverman is helping the owner (i.e., ABG) manage due diligence, overseeing the design and budget process, and managing a large design team including master planners, architects, mechanical, electrical, plumbing, and civil engineers, lobbyists, and other consultants. The Silverman web site lists Hardin Construction Company as the general contractor, along with Jova, Daniels, Busby Architects, EDAW Landscape Architects, and Long Engineering, Inc. as members of the design team for this ABG project.

63.

Upon information and belief, with respect to planning and building the Parking Deck and implementing the Botanical Garden Master Plan: (a) none of the defendants have complied or plan to comply with the requirements of the Public Works Law; and (b) there has been no public advertising of invitations for bids, no submission of sealed bids, and no public opening and evaluation of bids, and any awards have not been made to the lowest responsible and responsive bidder. The foregoing actions violate the contracting and competitive bid requirements of the Public Works Law.

64.

The plaintiffs are entitled to a declaratory judgment and an injunction declaring any and all contracts for planning and building the Parking Deck and implementing the Botanical Garden Master Plan to be unlawful and void, and restraining and enjoining the defendants from awarding

any bids or contracts related to the Parking Deck and the Botanical Garden Master Plan, from proceeding further with plans for the Parking Deck and the Botanical Garden Master Plan, from commencing planning and construction on the Parking Deck and the Botanical Garden Master Plan, and from taking any further actions on any aspect of the Parking Deck and the Botanical Garden Master Plan until such time as each and all of them have fully complied with the Public Works Law.

COUNT THREE: FAILURE TO COMPLY WITH ATLANTA
CITY ORDINANCE CONTRACTING AND COMPETITIVE BID REQUIREMENTS

65.

Plaintiffs repeat and reallege the allegations of paragraphs nos. 1 through 64 above as if fully set forth herein.

66.

Section 2-1187 of the City of Atlanta Code of Ordinances (the "City Code") requires that, with certain limited exceptions, "...all city contracts, except for the purchase, sale and disposition of real estate, shall be awarded by competitive sealed bidding, pursuant to section 2-1188...." Section 2-1188 sets forth the City Code's requirements for competitive sealed bidding and the procedures for awarding contracts thereunder and requires the City to adhere to various rules and procedures including, *inter alia*, requirements for bid invitations, bid opening and evaluation, and bid award. Section 2-1193 requires the City to follow competitive selection procedures for the award of contracts for professional and consultant services, including, among other things, architecture, professional engineering, planning, landscape architecture, and land surveying

services. Section 2-1138 vests exclusive contracting authority in the Chief Procurement Officer, while Section 2-1266 imposes additional requirements for the procurement of construction, architectural, engineering and land surveying services for city projects.

67.

Planning and building the Parking Deck and implementing the Botanical Garden Master Plan would involve the award of public construction contracts and contracts for professional services within the meaning of Sections 2-1188 and 2-1193 of the City Code. Contracts for these projects do not fall within any of the limited exceptions to those code provisions. Although the City may have delegated aspects of the administration of these projects to the PPC and ABG and the projects will be built with some private funding, the improvements will be built on public land for use by the public and will be built pursuant to City authorization and approval. The PPC and ABG are agents of the City in administering these projects and thus are "using agencies" within the meaning of City Code § 2-1102. Accordingly, the construction, consulting, and other contracts for the Parking Deck and the Botanical Garden Master Plan must be let in full compliance with the contracting and competitive award requirements of the City Code.

68.

Upon information and belief, with respect to planning and building the Parking Deck and implementing the Botanical Garden Master Plan: (a) defendants have started the process for selecting firms to plan and/or build the Parking Deck and implement the Botanical Garden Master Plan; (b) consulting, construction, and other contracts have been awarded, committed, or promised to private contractors by the ABG and/or the PPC with the knowledge, concurrence, and acquiescence of the City; (c) defendants do not plan to comply with the contracting and

competitive bidding requirements of the City Code; and (d) there has been no public advertising of invitations for bid, no submission of sealed bids, and no public opening and evaluation of bids, and any contract awards have not been made to the lowest responsible and responsive bidder. The foregoing actions violate the contracting and competitive bid requirements of the City Code.

69.

The plaintiffs are entitled to a declaratory judgment and an injunction declaring any and all contracts for planning and building the Parking Deck and implementing the Botanical Garden Master Plan to be unlawful and void, and restraining and enjoining the defendants from awarding any bids or contracts related to the Parking Deck and the Botanical Garden Master Plan, from proceeding further with planning or construction of the Parking Deck and the Botanical Garden Master Plan, from commencing construction activity on the Parking Deck and the Botanical Garden Master Plan, and from taking any further actions on any aspect of the Parking Deck and the Botanical Garden Master Plan until such time as they have fully complied with the contracting and competitive bidding requirements of the City Code.

**COUNT FOUR: VIOLATION OF GEORGIA'S CONSTITUTIONAL
PROHIBITION AGAINST GRATUITIES**

70.

Plaintiffs repeat and reallege the allegations of paragraphs nos. 1 through 69 above as if fully set forth herein.

71.

Article III, § VI, Para. VI (1) of the Georgia Constitution (1983) 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.” This prohibition against gratuities is applicable to city and county governments. For the purpose of the constitutional provision, a “gratuity” is something given freely or without recompense, where the giver receives no substantial benefits in exchange.

72.

The City will not receive substantial benefit from the Parking Deck or for furnishing the public park land on which the Parking Deck will be constructed. The improvements to Piedmont Park planned by the PPC are neither tied to nor dependent upon the Parking Deck and will occur even if the Parking Deck is not built. Although construction of the Parking Deck may be privately funded in part or in whole, with respect to the Parking Deck and the Botanical Garden Master Plan, among other things: (a) the City will receive no compensation for the land used for the Parking Deck; (b) the City will be exposed to liabilities and costs as a result of the Parking Deck; (c) the City will incur operating and maintenance costs as a result of the Parking Deck; (d) the City will receive only *de minimis* revenues from the Parking Deck, and the ABG and PPC will gain and benefit from the vast percentage of the Parking Deck revenues without restriction; (e) the City will be required to relocate a maintenance facility and incur associated costs to accommodate the Parking Deck; and (e) and the public will lose access to park land, services, resources, and amenities.

73.

Many spaces in (and at times, all of) the Parking Deck will be subject to reservation for private use by the ABG and/or the PPC. To the extent that park users are able to park in the Parking Deck, they will be charged approximately \$1.75 or more per hour, making Piedmont Park the first and only City park to charge for parking. The original financial analysis developed by the ABG shows that the Parking Deck will operate at a loss for the first two years and generate only modest profits thereafter. Moreover, there will be significant negative impacts to Piedmont Park if the Parking Deck is built and the Botanical Garden Master Plan is implemented, including among other things, loss of public greenspace, loss of access to public greenspace, loss of mature trees, loss of wildlife habitat, disrupted access to the Park, damage to the Park and the Park experience, and risks to the public health, safety, and welfare.

74.

The plaintiffs are entitled to a declaratory judgment that, insofar as the Parking Deck is concerned, proceeding with the North Woods Master Plan, the Botanical Garden Master Plan and Parking Deck Lease Amendment would constitute an unlawful gratuity and violate the Constitution of the State of Georgia. Further, plaintiffs are entitled to an injunction restraining and enjoining the defendants from proceeding with planning and constructing the Parking Deck and implementing the Botanical Garden Master Plan, from selecting builders and professionals for the Parking Deck and the Botanical Garden Master Plan, from letting contracts for the Parking Deck and the Botanical Garden Master Plan, and from any site preparation or construction for the Parking Deck and the Botanical Garden Master Plan.

COUNT FIVE: UNLAWFUL CONVERSION OF PUBLICLY
DEDICATED PARK LAND AND RESOURCES TO PRIVATE USES

75.

Plaintiffs repeat and reallege the allegations of paragraphs nos. 1 through 74 above as if fully set forth herein.

76.

Under O.C.G.A. § 36-37-6.1, municipalities such as the City having a population greater than 300,000 are granted the authority to sell, exchange, or otherwise dispose of any real or personal property, including parks and property use for other recreational purposes, except where authorizing alienation would be in derogation of rights, duties, and obligations imposed by prior deed or where such alienation would cause divesting of title to a park, playground or other like property that has been dedicated to a public use and has not been abandoned. This statute prohibits the alienation of dedicated park land for non-park purposes where the park land has not been abandoned by the city or the public.

77.

Even though the City may have certain general authority to lease park land, it may not change the use of that land from public recreational purposes to private and/or non-park uses.

78.

The City exceeded its lawful authority by leasing to ABG park land currently used by the public for park uses, by approving the construction and operation of a Parking Deck that will serve private purposes, and by approving other facilities and plans that will use public land and resources for private purposes. The City also exceeded its lawful authority by, among other

things, authorizing the: (a) conversion of public park land into a fee-based Parking Deck, a significant portion of which will be reserved for paying visitors to the Atlanta Botanical Garden and guests at private events; (b) conversion of The Prado from a public passageway into a road to be used for motorized vehicles used by paying visitors to the Atlanta Botanical Garden; (c) conversion of approximately 16 acres in the Storza Woods portion of Piedmont Park from City park land that has been free and open to the public for 100 years into a site that will require a fee for admission; and (d) ABG and PPC to gain and benefit, without restriction, from revenues being generated from public land and resources.

79.

The plaintiffs are entitled to a declaratory judgment that, with respect to the Parking Deck, the City's approval of the North Woods Master Plan, the Botanical Garden Master Plan, and the Parking Deck Lease Amendment is *ultra vires* and void, and plaintiffs are further entitled to an injunction restraining and enjoining the defendants from proceeding with planning and building the Parking Deck and implementing the Botanical Garden Master Plan, from selecting persons to plan and build the Parking Deck and implement the Botanical Garden Master Plan, from letting any contracts for the Parking Deck and the Botanical Garden Master Plan, and from starting site preparation and construction for the Parking Deck and the Botanical Garden Master Plan.

WHEREFORE, the plaintiffs respectfully pray for the following relief:

- (1) That as to Count One, the Court enter an order declaring that the ABG and the PPC are custodians of public records and ordering that the records they maintain

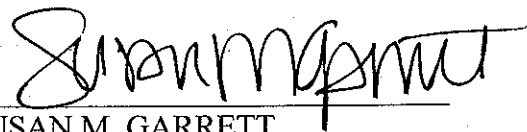
on behalf of the City and/or with respect to Piedmont Park and the Atlanta Botanical Garden be produced for inspection and copying;

- (2) That as to Count One, the plaintiffs be awarded their reasonable attorneys fees and other litigation costs;
- (3) That as to Count Two, the Court enter a declaratory judgment declaring any contracts related to the Parking Deck and the Botanical Garden Master Plan to be unlawful and void, and issue an injunction restraining and enjoining the defendants from commencing or continuing the vendor selection process, from planning or building the Parking Deck and the Botanical Garden Master Plan, and from commencing any planning or construction activity on any aspect of the Parking Deck and the Botanical Garden Master Plan until such time as each and all of them have fully complied with the Public Works Law;
- (4) That as to Count Three, the Court enter a declaratory judgment declaring any contracts related to the Parking Deck and the Botanical Garden Master Plan to be unlawful and void, and issue an injunction restraining and enjoining the defendants from commencing or continuing the vendor selection process, and from commencing any planning or construction activity on any aspect of the Parking Deck and the Botanical Garden Master Plan until such time as each and all of them have fully complied with the contracting and competitive bidding requirements in the City Code;
- (5) That as to Count Four, the Court enter a declaratory judgment that proceeding with the Parking Deck and the Botanical Garden Master Plan would involve

unlawful and unconstitutional gratuities, and issue an injunction restraining and enjoining the defendants from proceeding with the vendor selection process for the Parking Deck and the Botanical Garden Master Plan, from letting of any contracts for the Parking Deck and the Botanical Garden Master Plan, and from proceeding with planning and construction of the Parking Deck and the Botanical Garden Master Plan;

- (6) That as to Count Five, the Court enter a declaratory judgment that the Parking Deck, the Botanical Garden Master Plan, and Parking Deck Lease Amendment involve an unlawful conversion of public park land for non-park purposes, and issue an injunction restraining and enjoining the defendants from proceeding with any aspect of the Parking Deck and the Botanical Garden Master Plan; and
- (7) That the Court grant such other and further relief as it may deem just and proper.

Respectfully submitted this 17th day of January, 2007.



SUSAN M. GARRETT
Georgia Bar No. 286546

755 Commerce Drive
Suite 800
Decatur, Georgia 30030
(404) 601-4140

[Signatures continued on next page]



WILLIAM J. COBB
Georgia Bar No. 171850

Cobb & Gardner, LLP
755 Commerce Drive
Suite 800
Decatur, Georgia 30030
(404) 601-4100

Attorneys for Plaintiffs

Michael Jablonski

Lawyer

260 Brighton Road, N.E.
Atlanta Georgia 30309

404.290.2977
815.846.0719 (fax)

michael.jablonski@comcast.net

COPY

3 January 2005

Atlanta Botanical Garden
1345 Piedmont Avenue, NE
Atlanta, Georgia 30309

Via fax (404-876-7472) and regular mail

Re: Open Records Act Request

To whom it may concern:

I represent Douglas Abramson of 518 St. Charles Avenue, NE, Atlanta, Georgia 30308.

Pursuant to the Public Records Act (popularly known as the Open Records Act), O.C.G.A. Section 50-18-70 et seq., I am requesting, on behalf of Mr. Abramson, copies of the following public records:

- The memorandum of understanding, the land lease, the lease agreement, and all amendments and revisions thereto, between the Atlanta Botanical Garden and the City of Atlanta.
- All documents, including boring and core sample studies, showing the composition of soil, bedrock, rock, subsurface materials, and other substances at and under the current surface parking lot (comprising approximately 100 spaces) on the site of the Atlanta Botanical Garden.

The Public Records Act defines "public records" as including "documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, or similar material prepared and maintained or received in the course of the operation of a public office or agency." O.C.G.A. § 50-18-70(a). Our request is for all of these items. Note that the inclusion of "computer based information" in the statutory definition requires that you make available all e-mails that fall within the scope of this request.

EXHIBIT

A

Burnberg No. 0218

None of the requested materials is covered by the exemptions specified in the Act. If you disagree with this assessment then the law requires that you "specify in writing the specific legal authority exempting such record or records from disclosure, by Code section, subsection, and paragraph." O.C.G.A. § 50-18-72(h).

The Act provides that you must advise me in advance of any costs that you will assess and state the basis for computing the charges. See, O.C.G.A. § 50-18-71.

Thank you for your timely response to this request.

Very truly yours,

MICHAEL JABLONSKI

MKJ/hs

cc: Douglas L. Abramson

ALSTON & BIRD LLP

One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

404-881-7000
Fax: 404-881-4777
www.alston.com

Paul M. Cushing

Direct Dial: 404-881-7578

E-mail: pcushing@alston.com

January 7, 2005

VIA FACSIMILE and U.S. MAIL

Michael Jablonski
260 Brighton Road, N.E.
Atlanta, Georgia 30309

Re: Open Records Act Request

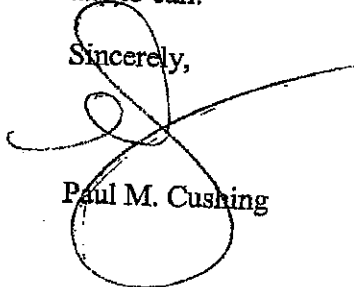
Dear Mr. Jablonski:

This firm represents The Atlanta Botanical Garden, Inc. (the "Garden"). I have been provided with a copy of your letter sent to the Garden in which you requested, on behalf of your client, Douglas Abramson, that the Garden provide copies of certain documents pursuant to Official Code of Georgia Annotated Section 50-18-70 et seq.

The Garden is not subject to the requirements of the referenced statutes and accordingly the Garden respectfully declines your request.

If you have any questions, please do not hesitate to call.

Sincerely,



Paul M. Cushing

PMC:pmc
cc: Mary Pat Matheson

ATL01/11825618v1

Bank of America Plaza
101 South Tryon Street, Suite 4000
Charlotte, NC 28280-4000
704-444-1000
Fax: 704-444-1111

90 Park Avenue
New York, NY 10016
212-210-9400
Fax: 212-210-9444

3201 Beechleaf Court, Suite 600
Raleigh, NC 27604-1062
919-862-2200
Fax: 919-862-2260

601 Pennsylvania Avenue, N.W.
North Building, 10th Floor
Washington, DC 20004-2601
202-756-3300
Fax: 202-756-3333

Blumberg No. 6208
EXHIBIT
B



THURBERT E. BAKER
ATTORNEY GENERAL

Department of Law
State of Georgia

40 CAPITOL SQUARE SW
ATLANTA GA 30334-1300
WRITER'S DIRECT DIAL
(404) 656-7298
FACSIMILE
(404) 657-9932

March 6, 2006

Mr. Paul Cushing
Alston + Bird LLP
1201 W. Peachtree Street
Atlanta, Georgia 30309

RE: Open Records complaint regarding Atlanta Botanical Garden, Inc.

Dear Mr. Cushing:

I write to you today in your capacity as the attorney for Atlanta Botanical Garden, Inc., regarding a letter I received approximately one year ago from Michael Jablonski complaining about the Atlanta Botanical Garden's refusal to supply records pursuant to Georgia's Open Records Act to Mr. Jablonski's client, Doug Abramson. A copy of Mr. Jablonski's letter and its attachments is enclosed. Subsequent communications with Mr. Jablonski have shown that these records have still not been provided, hence my correspondence today.

Mr. Jablonski asserts in his letter to the Attorney General that, although Atlanta Botanical Garden is a nonprofit organization, it operates a portion of Piedmont Park under an agreement with the City of Atlanta and was created and managed in part by the City of Atlanta. Please refer to his letter, which supports his assertions in detail.

Georgia courts have repeatedly held that nonprofits are subject to the Open Records Act when they are performing delegated activities of public agencies. *See, e.g., Red & Black Publishing Co. v. Board of Regents*, 262 Ga. 848, 854 (1993) ("Organization Court" was functioning for the University of Georgia and subject to the Open Meetings Act even though the court was independent of Regents and, as the Supreme Court expressly held, it did not fit within the literal language of the Act); *Cremins v. Atlanta Journal and Constitution*, 261 Ga. 496 (1991) (private records of football coaches employed by Regents universities subject to Open Records Act); *Dooley v. Davidson*, 260 Ga. 577 (1990) (same); *Macon Tele. Pub. Co. v. Board of Regents*, 256 Ga. 443 (1986) (certain records of the Georgia Athletic Association were open records although the Athletic Association was a private entity, since the intercollegiate program was a legitimate government function); *Athens Observer, Inc. v. Anderson*, 245 Ga. 63 (1980) (report prepared by outside consultants on the mathematical departments of the University of Georgia was a "public record"); *Hackworth v. Board of Educ. for City of Atlanta*, 214 Ga. App. 17 (1994) (records of school bus drivers employed by private company subject to the Open Records Act); *Northwest Georgia Health System, Inc. v. Times-Journal, Inc.*, 218 Ga. App. 336 (1995) (records of private, nonprofit hospital corporations subject to Open Records Act even though they did not receive substantial support in tax dollars); *Jersawitz v.*

Blumberg No. 6208

EXHIBIT

C

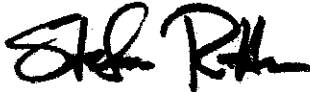
Letter to Mr. Paul Cushing
March 6, 2006
Page 2

Fortson, 213 Ga. App. 796 (1994) (meeting of the "Olympic Task Force Selection Committee" was open to the public -- the organization had both private and public officials on it but it was functioning at the behest of the Atlanta Housing Authority); *Clayton County Hosp. Auth. v. Webb*, 208 Ga. App. 91 (1993) (hospital authority organized as "a group of affiliated non-profit corporations" subject to the Open Records Act); *Compare Corporation of Mercer University v. Barrett & Farahany LLP*, 271 Ga. App. 501 (2005) (Mercer University police records were not open records because there had been no delegation of authority). These holdings are consistent with the express language of the Act. See O.C.G.A. § 50-18-70(a), which subjects private entities to the Act under certain circumstances.

Pursuant to the discretionary enforcement authority in O.C.G.A. §§ 50-18-73(a) and 50-14-5(a), the Attorney General's Office attempts to mediate disputes regarding the Open Records and Open Meetings Acts. To this end I ask that you write me detailing the Atlanta Botanical Garden's response to the assertions in Mr. Jablonski's complaint and the above cases. Given the delay that has occurred since Mr. Abramson's initial request, I ask that you respond within two weeks from the date of this letter.

I appreciate your immediate attention to this matter. Please call me if you have any questions.

Sincerely,



STEFAN RITTER
Senior Assistant Attorney General

SER: kcm
Enclosure

cc: Michael Jablonski

Michael Jablonski

Lawyer

260 Brighton Road, N.E.
Atlanta Georgia 30309

404.290.2977

815.846.0719 (fax)

michael.jablonski@comcast.net

COPY

15 August 2006

Atlanta Botanical Garden
1345 Piedmont Avenue, NE
Atlanta, Georgia 30309

Re: Open Records Act Request

To whom it may concern:

Pursuant to the Public Records Act (popularly known as the Open Records Act), O.C.G.A. § 50-18-70, et seq., I am requesting on behalf of Diana Refsland, William L. Lockhart, John Grady Burns, and Douglas Abramson an opportunity to review and copy the following public records:

1. The status of the processes, and all descriptions of the planned, possible, and/or actual processes (including any competitive bidding processes), for considering, interviewing, selecting, contracting with, retaining, and/or hiring persons (including without limitation, builders, project managers, contractors, engineers, architects, landscape architects, design firms, professional service providers, banks, financial institutions, tree removal firms, paving firms, grading firms, excavating firms, planning firms, public relations firms, and others) who might or would plan, design, engineer, finance, support, work on, and/or build the Parking Deck.
2. Actual, possible, or potential safety, health, or public welfare dangers, hazards, threats, problems, considerations, concerns, or issues associated in any way with the plan to access the Parking Deck via the road off Monroe Drive (i.e., the road off Monroe Drive which currently is used by vehicles to access the Clear Creek CSO) whether or not related to operating or maintaining the Clear Creek CSO, chlorine, chemicals, hazardous materials, liquids, solids, waste matter, fire, vapors, fumes, explosives, vehicles, traffic, park-users, or other matters.



3. Discussions, plans, commitments, proposals, concepts, and ideas to use the road off Monroe Drive described in the preceding paragraph for vehicles entering or exiting: (a) the retail and business facility currently known as Amsterdam Walk; and/or (b) the proposed new project on the current site of Amsterdam Walk.
4. Discussions, plans, commitments, proposals, concepts, and ideas to use a strip of land on what is known as the Belt Line in order to construct a road, and to provide access, between the Parking Deck and Monroe Drive, whether such use would be accomplished via land purchase, land swap, lease, easement, license, conveyance, or other means.
5. (A) Requests by or on behalf of the Atlanta Botanical Garden for consent from the City of Atlanta to charge or revise admission fees, entrance fees, or other fees to use, enter, or access the Atlanta Botanical Garden or any portion thereof or any special exhibits; and (B) responses from and positions of the City of Atlanta related to such requests.

When used in this Open Records Act request, the following terms have the following meanings:

- "City of Atlanta" includes, without limitation, the Mayor, the Offices and Agencies of the Mayor, the Department of Parks, Recreation & Cultural Affairs, the Department of Planning & Community Development, the Department of Watershed Management, the Department of Procurement, the Department of Finance, the Department of Public Works, and other departments of the City of Atlanta.
- "Atlanta Botanical Garden" means the Atlanta Botanical Garden, Inc. and all entities in control of, or under the control of, the Atlanta Botanical Garden.
- "Clear Creek CSO" means the Clear Creek Combined Sewer Overflow facility on Monroe Drive near Piedmont Park.
- "Parking Deck" means the parking deck, including associated roadways, tunnels, and other related facilities, proposed by the Atlanta Botanical Garden for a site behind Magnolia Hall in Piedmont Park, as such project may be changed or revised from time to time.
- "Piedmont Park Conservancy" means the Piedmont Park Conservancy and all entities in control of, or under the control of, the Piedmont Park Conservancy.

The Public Records Act defines "public records" as including "documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, or similar material prepared and maintained or received in the course of the operation of a public office or agency." O.C.G.A. § 50-18-70(a). The request is for all of these items. Note that the inclusion of "computer based information" in the statutory definition requires that you make available all e-mails that fall within the scope of this request. Thus, we seek all relevant correspondence, notices, studies, documents, information, and emails, printed, electronic or from a portable computer device (e.g., Blackberry).

You are a public agency as defined by O.C.G.A. § 50-18-70(a) because you are the mechanism through which a public agency – the City of Atlanta – discharges its responsibilities to manage portions of Piedmont Park. The City of Atlanta, as owner of the park, entered into leases with Atlanta Botanical Garden on May 31, 1977 and again on March 31, 1980. The leases recite that the Atlanta Botanical Garden manages the park "for the benefit of all citizens of the City" while the City expressed a desire to have "the Lessee ... develop and maintain the site." Where a private corporation functions under the direction of a public entity to perform a public function then the Act applies. *Clayton County Hosp. Auth. v. Webb*, 208 Ga. App. 91, 430 SE2d 89 (1993). See, *Corporation of Mercer University v. Barrett & Farahany, LLP*, 271 Ga. App. 501, 505 n.20, 610 S.E.2d 138, 142 n.20 (2005)

None of the exemptions specified in the Act, O.C.G.A. § 50-18-72(a), applies to the requested materials. If you disagree with this assessment then the law requires that you "specify in writing the specific legal authority exempting such record or records from disclosure, by Code section, subsection, and paragraph." O.C.G.A. § 50-18-72(h). I do not seek a social security number, mother's birth name, credit card information, debit card information, bank account information, financial data or information, and insurance or medical information.

The Act provides that you must advise me in advance of any costs that you will assess and state the basis for computing the charges. See, O.C.G.A. § 50-18-71.2.

I eagerly anticipate receiving your written response within three business days pursuant to O.C.G.A. Section 50-18-70 (f).

Very truly yours,

MICHAEL JABLONSKI

MKJ:hs

Michael Jablonski

Lawyer

260 Brighton Road, N.E.
Atlanta Georgia 30309

404.290.2977

815.846.0719 (fax)

michael.jablonski@comcast.net

COPY

15 August 2006

Piedmont Park Conservancy
P.O. Box 7795
Atlanta, Georgia 30357-0795

Re: Open Records Act Request

To whom it may concern:

Pursuant to the Public Records Act (popularly known as the Open Records Act), O.C.G.A. § 50-18-70, et seq., I am requesting on behalf of Diana Refsland, William L. Lockhart, John Grady Burns, and Douglas Abramson an opportunity to review and copy the following public records:

1. The status of the processes, and all descriptions of the planned, possible, and/or actual processes (including any competitive bidding processes), for considering, interviewing, selecting, contracting with, retaining, and/or hiring persons (including without limitation, builders, project managers, contractors, engineers, architects, landscape architects, design firms, professional service providers, banks, financial institutions, tree removal firms, paving firms, grading firms, excavating firms, planning firms, public relations firms, and others) who might or would plan, design, engineer, finance, support, work on, and/or build the Parking Deck.
2. Actual, possible, or potential safety, health, or public welfare dangers, hazards, threats, problems, considerations, concerns, or issues associated in any way with the plan to access the Parking Deck via the road off Monroe Drive (i.e., the road off Monroe Drive which currently is used by vehicles to access the Clear Creek CSO) whether or not related to operating or maintaining the Clear Creek CSO, chlorine, chemicals, hazardous materials, liquids, solids, waste matter, fire, vapors, fumes, explosives, vehicles, traffic, park-users, or other matters.

Blumberg No. 5206

EXHIBIT

E

3. Discussions, plans, commitments, proposals, concepts, and ideas to use the road off Monroe Drive described in the preceding paragraph for vehicles entering or exiting: (a) the retail and business facility currently known as Amsterdam Walk; and/or (b) the proposed new project on the current site of Amsterdam Walk.
4. Discussions, plans, commitments, proposals, concepts, and ideas to use a strip of land on what is known as the Belt Line in order to construct a road, and to provide access, between the Parking Deck and Monroe Drive, whether such use would be accomplished via land purchase, land swap, lease, easement, license, conveyance, or other means.

When used in this Open Records Act request, the following terms have the following meanings:

- "City of Atlanta" includes, without limitation, the Mayor, the Offices and Agencies of the Mayor, the Department of Parks, Recreation & Cultural Affairs, the Department of Planning & Community Development, the Department of Watershed Management, the Department of Procurement, the Department of Finance, the Department of Public Works, and other departments of the City of Atlanta.
- "Atlanta Botanical Garden" means the Atlanta Botanical Garden, Inc. and all entities in control of, or under the control of, the Atlanta Botanical Garden.
- "Clear Creek CSO" means the Clear Creek Combined Sewer Overflow facility on Monroe Drive near Piedmont Park.
- "Parking Deck" means the parking deck, including associated roadways, tunnels, and other related facilities, proposed by the Atlanta Botanical Garden for a site behind Magnolia Hall in Piedmont Park, as such project may be changed or revised from time to time.
- "Piedmont Park Conservancy" means the Piedmont Park Conservancy and all entities in control of, or under the control of, the Piedmont Park Conservancy.

The Public Records Act defines "public records" as including "documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, or similar material prepared and maintained or received in the course of the operation of a public office or agency." O.C.G.A. § 50-18-70(a). The

request is for all of these items. Note that the inclusion of "computer based information" in the statutory definition requires that you make available all e-mails that fall within the scope of this request. Thus, we seek all relevant correspondence, notices, studies, documents, information, and emails, printed, electronic or from a portable computer device (e.g., Blackberry).

You are a public agency as defined by O.C.G.A. § 50-18-70(a) because you are the mechanism through which a public agency – the City of Atlanta – discharges its responsibilities to manage portions of Piedmont Park. Where a private corporation functions under the direction of a public entity to perform a public function then the Act applies. *Clayton County Hosp. Auth. v. Webb*, 208 Ga. App. 91, 430 SE2d 89 (1993). See, *Corporation of Mercer University v. Barrett & Farahany, LLP*, 271 Ga. App. 501, 505 n.20, 610 S.E.2d 138, 142 n.20 (2005)

None of the exemptions specified in the Act, O.C.G.A. § 50-18-72(a), applies to the requested materials. If you disagree with this assessment then the law requires that you "specify in writing the specific legal authority exempting such record or records from disclosure, by Code section, subsection, and paragraph." O.C.G.A. § 50-18-72(h). I do not seek a social security number, mother's birth name, credit card information, debit card information, bank account information, financial data or information, and insurance or medical information.

The Act provides that you must advise me in advance of any costs that you will assess and state the basis for computing the charges. See, O.C.G.A. § 50-18-71.2.

I eagerly anticipate receiving your written response within three business days pursuant to O.C.G.A. Section 50-18-70 (f).

Very truly yours,

MICHAEL JABLONSKI

MKJ:hs



August 21, 2006

Michael Jablonski
260 Brighton Road NE
Atlanta, GA 30309

Dear Mr. Jablonski:

I am in receipt of your letter dated August 15, 2006 which we received August 17, 2006. As previously stated, our counsel continues to advise us that Piedmont Park Conservancy is not subject to the Georgia Open Records Act. However we are happy to respond to your request with the following information:


Item #1: The Atlanta Botanical Garden is responsible for the design, development, construction and funding of the parking facility. They, not Piedmont Park Conservancy, would have the information you request.

Item #2: The City of Atlanta Department of Watershed Management controls and maintains the Clear Creek CSO. They would have to answer your questions regarding operations, maintenance and other matters.

Item #3: We have no plans for the road off Monroe Drive other than as illustrated on the Piedmont Park Master Plan (attached).

Item #4: Please refer to the attached Piedmont Park Master Plan which illustrates the proposed access points across the Beltline.

Sincerely,



Debbie McCown
President/CEO

To enhance and preserve Piedmont Park as a vital, urban green space and as a cultural and recreational resource that enriches the quality of life for all Atlantans.



ALSTON & BIRD LLP

One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

404-881-7000
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Paul M. Cushing

Direct Dial: 404-881-7578

E-mail: paul.cushing@alston.com

August 21, 2006

FACSIMILE AND FIRST CLASS MAIL

Michael Jablonski, Esq.
260 Brighton Road, N.E.
Atlanta, Georgia 30309

Re: Letter dated August 15, 2006 from Michael Jablonski

Dear Mr. Jablonski:

My firm represents The Atlanta Botanical Garden, Inc. (the "Garden"). The Garden forwarded to me a copy of your August 15 letter in which you asserted that the Open Records Act applies to the Garden. As stated in prior correspondence, I maintain, on behalf of the Garden, that the Open Records Act, Official Code of Georgia Annotated Section 50-18-70 et seq. (the "Open Records Act"), does not apply to the Garden.

You do not dispute that the Garden is a private, non-profit corporation. Under most circumstances, the records of a private entity are likewise private. The proper inquiry to determine whether the records you requested are public and available under the provisions of the Open Records Act, therefore, is whether the Garden is the "vehicle" for the City of Atlanta to carry out one of its "responsibilities."

First, the Garden is not a vehicle for the City of Atlanta to carry out any function. For example, as dictated by the terms of the lease agreement between the City of Atlanta, a public body, and the Garden, a private entity, the Garden may not develop the premises it leases except pursuant to a city-approved plan or an approved modification to an already approved plan. Were the Garden actually the tool by which the City governed the botanical garden, then the Garden would be able to develop the premises without approval of the City. Because the Garden may not act unilaterally to plan and develop the premises, it is not a vehicle for any action by the City.

Second, operating a botanical garden is not a "responsibility" of the City of Atlanta. A "responsibility" has the legal definition of "liability," as in "the quality or state of being

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The Atlantic Building
950 F Street, NW
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EXHIBIT

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Bloomberg No. 6208

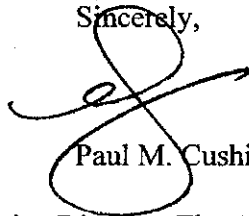
Michael Jablonski, Esq.
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legally obligated or accountable." BLACK'S LAW DICTIONARY 1314, 925 (7th ed. 1999). Common usage bears out this definition of responsibility as an obligation. See THE AMERICAN HERITAGE DICTIONARY, SECOND COLLEGE EDITION, 1053 (1982) (defining responsible as "something for which one is responsible; duty, obligation, or burden"). An obligation, in turn, is "a duty, contract, promise or other social, moral, or legal requirement that compels one to follow or avoid a given course of action." THE AMERICAN HERITAGE DICTIONARY, SECOND COLLEGE EDITION, 857 (1982) (emphasis added). The City of Atlanta has no responsibility, obligation, or duty to operate or maintain a botanical garden nor is it compelled to create, operate, or maintain a botanical garden. The mere fact that the public, as a whole, may benefit from the presence of a botanical garden does not transform a private entity's records into public records.

In sum, the Open Records Act does not apply to the records of the Atlanta Botanical Garden.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to be "Paul M. Cushing", written in a cursive style with a large loop and a long horizontal stroke extending to the right.

Paul M. Cushing

cc: Ms. Mary Pat Matheson, Executive Director, The Atlanta Botanical Garden, Inc.

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State of Georgia

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September 11, 2006

Mr. Paul Cushing
Alston + Bird LLP
1201 W. Peachtree Street
Atlanta, Georgia 30309

RE: Open Records complaint regarding Atlanta Botanical Garden, Inc.

Dear Mr. Cushing:

I am writing to follow-up on our correspondence earlier this year regarding Michael Jablonski's request under the Open Records Act for records concerning certain agreements between the City of Atlanta and the Atlanta Botanical Garden and soil and boring studies concerning the land under the Atlanta botanical Garden's parking lot.

As you are aware, at the time the Attorney General was litigating *Baker v. Metropolitan Atlanta Chamber of Commerce* in the Superior Court of Fulton County, a case in which the defendants were also represented by Alston & Bird, LLP. The defendants in the *Baker* case claimed that their conduct was not covered by the Open Records Act, in part because they no official delegation or official responsibility to maintain the records, which is the same claim you make in your response letter to me on behalf of Atlanta Botanical Garden. The defendants in *Baker* as claimed, as you have here, that the case was controlled by *Corporation of Mercer Univ. v. Barrett & Farahany*, 271 Ga. App. 501 (2005), and that cases such as *Hackworth v. Board of Educ. for City of Atlanta*, 214 Ga. App. 17 (1994), were distinguishable.

Baker v. Metropolitan Atlanta Chamber of Commerce has now been resolved in favor of the Attorney General's position. See *Central Atlanta Progress, Inc. v. Baker*, 278 Ga. App. 733 (2006). The Court of Appeals in *Central Atlanta Progress, Inc.* explicitly rejected the notion, which formed the core of your response to me, that an express delegation of "official responsibility" was necessary for a private entity to be subject to the Open Records Act. It found the holding in *Corporation of Mercer Univ.* inapplicable to the facts in that case and it relied upon *Hackworth* for precisely the principle cited in my letter to you. 278 Ga. App. at 737-38.

I have since spoken to Mr. Jablonski and learned that, despite the holding in *Central Atlanta Progress, Inc. v. Baker* and the rejection of the views espoused on behalf of Alston & Bird's clients in that case, the Atlanta Botanical Garden has still not complied with his Open Records Act request. It is possible that the failure to comply is simply an oversight. If so, I ask that your client immediately comply.

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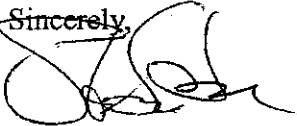
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If, on the other hand, your client still contends it is not subject to the Open Records Act, I request that you immediately inform of this fact so that appropriate legal action may be taken.

I appreciate your attention to the above.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stefan Ritter', written over the word 'Sincerely,'.

STEFAN RITTER
Senior Assistant Attorney General

SER:

cc: Michael Jablonski

ALSTON & BIRD LLP

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September 18, 2006

CERTIFIED MAIL

Michael Jablonski, Esq.
260 Brighton Road, N.E.
Atlanta, Georgia 30309

Re: The Atlanta Botanical Garden, Inc. – Open Records Act Request

Dear Mr. Jablonski:

In a letter dated January 3, 2005 to The Atlanta Botanical Garden, Inc. (the "Garden"), you requested copies of certain documents from the Garden on behalf of your client, Douglas Abramson, who is taking the position that such documents are subject to production under Georgia's Open Records Act (O.C.G.A. Section 50-18-70 *et seq.*, the "Act). As legal counsel to the Garden, I responded that the Garden is not subject to the Act. In March, 2006, I received a letter from Stefan Ritter, Senior Assistant Attorney General, asking that I detail to him the Garden's responses to the assertions in your letter, which I did.

Earlier this week, I received a follow-up letter from Mr. Ritter in which he references the recent case of *Central Atlanta Progress, Inc. v. Baker*, 278 Ga. App. 733 (2006) and his interpretation of the application of that case to the Garden's position that the Act does not apply to the Garden.

While the Garden continues to maintain that the Act does not apply to it, the Garden does not want to appear uncooperative to you, your client, Mr. Ritter or the Attorney General. Accordingly, the Garden is willing to provide you with copies of the documents you requested in your January 3 letter. However, please understand that the Garden's production of these documents should not be construed as an admission that the Garden is subject to the Act. Also, the Garden's production of these documents does not constitute a waiver of the Garden's right to object to other requests under the Act.

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Bloomberg No. 6208

EXHIBIT

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Michael Jablonski, Esq.
September 18, 2006
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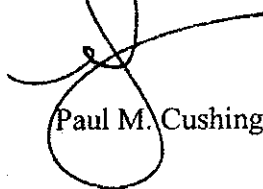
In response to your request for a copy of the "memorandum of understanding, the land lease, the lease agreement, and all amendments and revisions thereto, between the Atlanta Botanical Garden and the City of Atlanta," please find enclosed a copy of the Indenture of Lease dated March 28, 1980 between the Garden and the City of Atlanta, together with Lease Amendments Nos. 1-5 thereto. Because the City of Atlanta is a party to these documents, they are in the public domain and could have been obtained from the City of Atlanta.

As for your request for copies of "[a]ll documents, including boring and core sample studies, showing the composition of soil, bedrock, rock subsurface materials, and other substances at and under the current surface parking lot (comprising approximately 100 spaces) on the site of the Atlanta Botanical Garden," the Garden has no such documents responsive to this request.

The Garden continues to believe that it is not subject to the Act and the recent decision in the *Central Atlanta Progress* case has not influenced the Garden's position. We believe that case is distinguishable from the Garden's situation in a number of ways. Perhaps most compelling is that the Garden's construction of the proposed parking garage in Piedmont Park, which is the genesis of your client's request, will not be funded by any direct allocation of taxpayer dollars, nor will it involve any significant public official participation.

Should you have any questions, please do not hesitate to contact me.

Sincerely,



Paul M. Cushing

Enclosures

cc (w/o enc): Mr. Stefan Ritter, Senior Assistant Attorney General
Ms. Babette Henagan, Chair of the Board of Trustees of the Garden
Ms. Mary Pat Matheson, Executive Director of the Garden

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State of Georgia

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December 28, 2006

Mr. Paul Cushing
Alston + Bird LLP
1201 W. Peachtree Street
Atlanta, Georgia 30309

RE: Open Records complaints regarding Atlanta Botanical Garden, Inc.

Dear Mr. Cushing:

I write again regarding the on-going issues between the Atlanta Botanical Garden, the Piedmont Park Conservancy, and several citizens regarding whether the Botanical Garden and/or the Conservancy are subject to Georgia's Open Records Act.¹ As you will recall, the Office of the Attorney General, based on the information currently available to it, is of the opinion that both of these organizations are subject to the Act, while your opinion has been that they are not. Nonetheless, you have agreed on behalf of your clients to provide documents and hold open meetings in compliance with the Open Records and Open Meetings Acts to resolve all disputes.

Since our last correspondence (in the late summer and fall of this year), I have received letters from Michael Jablonski and State Senator Vincent Fort asserting that the Botanical Garden and the Conservancy continue to fail to comply with the Acts. A copy of Mr. Jablonski's letter and Senator Fort's letter, as well as what I understand are your responsive letters to them, are attached. In addition, since the time of their letters Mr. Jablonski and Senator Fort's Office have both confirmed to me since that the Botanical Gardens and the Conservancy have not subsequently complied with the Acts.

The Attorney General's Office remains unchanged in its position that the Botanical Garden and the Conservancy are subject to the Open Records and Open Meetings Acts, for the reasons set forth in my several prior letters. As you are aware, of course, the Attorney General's Office has discretionary power to enforce these Acts through its powers set forth at O.C.G.A. §§ 50-14-5(a) and 50-18-73(a).

If your client(s) position remains that, regardless of whether it is subject to the Acts, it intends to comply with them, please inform me of the steps they have taken to comply or why Mr. Jablonski's or Senator Fort's complaints are, in your opinion in error. On the other hand, if the

¹ My understanding is that you and/or Alston & Bird represent both the Botanical Garden and the Conservancy. If this is incorrect, I apologize, and I request that you please notify me immediately of any such error.

Bumberg No. 5208

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Letter to Mr. Paul Cushing
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Botanical Garden or the Conservancy plan to not comply with either the Open Records Act nor the Open Meetings Act, I request that you immediately inform me of this fact so that this so that appropriate action may be taken. If I do not hear otherwise from you in the next two weeks I will assume it is the latter (i.e. that the Botanical Gardens and Conservancy do not intend to comply with the Acts).

I appreciate your renewed attention to this matter.

Sincerely,

STEFAN RITTER
Senior Assistant Attorney General

SER:

cc: Michael Jablonski

VERIFICATION

Before an officer authorized to administer oaths appeared the undersigned
DOUGLAS L. ABRAMSON who, after being duly sworn, deposes and states that upon
his knowledge the factual allegations set forth in the within and foregoing Verified
Complaint For Declaratory and Injunctive Relief are true and correct.


DOUGLAS L. ABRAMSON

Sworn to and subscribed before me
this 16th day of January, 2007.


NOTARY PUBLIC
My Commission Expires _____

TRAN LANKFORD
NOTARY PUBLIC
NEWTON COUNTY, GEORGIA
MY COMMISSION EXPIRES AUGUST 11, 2007