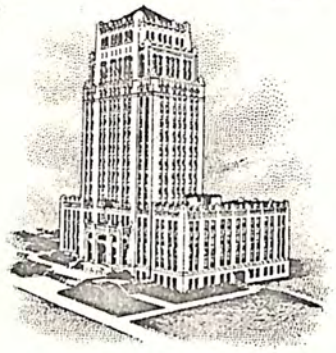

CITY OF ATLANTA

DEPARTMENT OF LAW

1114 WILLIAM-OLIVER BUILDING
Atlanta, Georgia 30303

February 1, 1967

HENRY L. BOWDEN
CITY ATTORNEY
FERRIN Y. MATHEWS
ASSISTANT CITY ATTORNEY

ROBERT S. WIGGINS
MARTIN McFARLAND
EDWIN L. STERNE
RALPH C. JENKINS
JOHN E. DOUGHERTY
CHARLES M. LOKEY
THOMAS F. CHOYCE
JAMES B. PILCHER

ASSOCIATE CITY ATTORNEYS

ROBERT A. HARRIS
HENRY M. MURFF

CLAIMS ATTORNEYS

Mr. Jack C. Delius
General Manager
Department of Parks
and Recreation
City Hall Annex
Atlanta, Georgia

Dear Sir:

I am in receipt of your letter of January 26, 1967 in which you advised me that you received a letter from Mr. John H. Gress, dated January 16, 1967. You then go on to quote the letter and end up by requesting an opinion from me as to the contents of the letter and such other germane documents and consequences I find necessary to investigate in the premises.

To begin with, Mr. Gress is correct when he states that the original deed of conveyance from G. V. Gress to the City of Atlanta did make a recitation such as the one he alludes to in his letter. More specifically, the recitation is made in a deed of conveyance, dated April 14, 1898, between Mr. Gress and the City of Atlanta, and reads in part as follows:

> "It is understood and agreed that the said picture shall be used for the benefit of the whole people, and shall be kept open the year round, subject to reasonable rules and regulations, and that only a nominal entrance fee shall be charged, not to exceed ten (10) cents for each person, and that the said building shall bear an appropriate sign indicating the battle which the painting represents, and also that it was presented to the City of Atlanta by the aforesaid party of the first part."

I have a photostatic copy of this deed in the event you require further inspection. With respect to the deed itself and besides the provision above quoted, the deed is what is referred to as "honest on its face", that is, we have no reason to doubt the validity of the instrument nor should we doubt its validity. Also, I am of the opinion that not only a nominal consideration was given for the picture (stated to be One ($1.00) Dollar in the deed), but also that the additional consideration is sufficient to give rise to the theory of a deed of gift which was duly accepted by the City of Atlanta.

With this in mind, the first question that poses itself is whether or not Mr. John H. Gress, who purports to be the "only living heir" of G. V. Gress, has the right to bring about a forfeiture of the picture in question. I am assuming that the portion of the letter from Mr. Gress that he is the only living heir of G. V. Gress is correct. With this as an assumption, I am of the legal opinion that no one, including Mr. John H. Gress, has the right to create a forfeiture such as he envisages in his letter.

My basis for this opinion is found in the case of City of Atlanta vs. Jones, et al, 135 Ga. 376 (1910), at page 379, wherein it was in part held:

> "The language of the deed constituted a covenant, rather than a condition subsequent. Where an owner of land conveys it to a city, and states in the deed that it is to be used for a specified purpose, he may have such an interest as to prevent its sale or diversion from that purpose to others, or perhaps he may have an action of covenant. But such language alone does not create a condition subsequent, on breach of which a forfeiture results and the original owner may recover the land. Devlin on Deeds (2d ed.), 978 and notes; Warvelle on Real Property (2d ed.), § 317; Thompson v. Hart, 133 Ga. 540 (66 S. E. 270). It may be thought by many laymen that such language creates a condition subsequent, but it is well settled in law that it does not do so. If parties desire that a forfeiture shall result, or that an estate shall terminate because of the breach of a covenant or failure to use

the property for the purpose mentioned in the deed, they should so state."

It is my opinion also that there is no language with respect to that portion of the deed dealing with the nominal fee which would give rise to a forfeiture inasmuch as no reversionary provision is contained in that portion of the deed.

We now have disposed of the easy part of the opinion.

The hard part is, what consequences, if any, arise from the City of Atlanta's maintaining the current admission price to see the Cyclorama? Once again, we refer to the language in City of Atlanta vs. Jones, et al, wherein it was in part held that the grantor "... may have an action of covenant."

There is very little law with respect to a breach of covenant in Georgia and it is necessary for me to refer to other legal precedents to determine what the consequences of a breach of covenant are under these circumstances.

With this as a background, I am of the opinion that the ordinary remedy for breach of a covenant is by an action at law for damages. (20 Am Jur 2d 589). However, in a proper case, equity will sufficiently enforce covenants or grant an injunction to restrain their violation. (Ibid.). Therefore, I am of the opinion without more, as will more fully be hereinafter set forth, that a proper party might bring an action against us to enjoin us from charging the fee we are now charging.

The next question which addresses itself to us is: "Who are proper parties to enforce the covenant?"

Please bear in mind that the language of the above quoted portion of the deed states, "... the said picture shall be used for the benefit of the whole people, and shall be kept open the year round,... and that only a nominal entrance fee shall be charged, not to exceed ten (10) cents for each person...." With this in mind, I am of the opinion that this is the type of a

situation which permits a third party to enforce a promise made for his benefit, and a covenant made for the sole benefit of a class of persons not parties to it may be availed of by an individual of that class. (20 Am Jur 2d 592). In other words, we have a third party beneficiary contract which can be maintained in the name of any person who constitutes not only a citizen of Atlanta, or Fulton County, or the United States, but anybody in the world; which, being a rather large class, is, in my opinion, a beneficiary of the Cyclorama. Therefore, I am of the opinion that an injunction could be maintained by anybody in the world to enforce the covenant as written.

I do not know exactly how long we have charged more than a ten cent admission fee to the Cyclorama. I trust that you will use your good office to determine when this practice began. This factual determination by you is very important in the light of the next portion of this opinion.

Although we have a technical breach of a covenant, as set forth above, I am of the opinion that the doctrine of estoppel is applicable to the situation here involved with respect to the enforcement of covenants. By this I mean that a person, or a class of persons, may be estopped by conduct from asserting a right to enforce a covenant. (20 Am Jur 2d 590). By this I mean that if we could satisfy a Court of Law that the beneficiaries of this covenant, by their inaction, acquiesced in the charge of more than a dime, this would act as estoppel to prevent them from enforcing the covenant. While acquiescence is spoken of as estoppel, strictly speaking, it is no more than a part of estoppel. By this I mean that I am inclined to believe that a Court of Law would prevent anybody from initiating an injunction against us because the entire class of beneficiaries had acquiesced to increased charges. Legally speaking, no set time is necessary to constitute estoppel such as we have in this case; rather, it would be that amount of time which induced us to act to our detriment. It is my thought that ten years would be sufficient, although I am reluctant to determine what a Court would determine to be sufficient.

I know that this has been a lengthy opinion and one on which you will probably need further elaboration; however, for the purpose of recapitulation, my opinion is as follows:

(1) There are no words in the deed which would give rise to a forfeiture;

(2) A suit might be filed against the City of Atlanta praying an injunction be granted to prevent the further breach of the covenant by any person;

(3) In the event such a suit is filed seeking an injunction, I am of the opinion that we could plead estoppel in this case due to the acquiescence by the general public from asserting the breach of the covenant at the time of its breach.

Should you need any further elaboration in this matter, please feel free to call upon me.

With my kindest regards, I am

Very truly yours,

Thomas F. Choyce

TFC:jc