

# Zoning and Land Use Law

by **Dennis J. Webb, Jr.**\*  
**Marcia McCrory Ernst**\*\*  
and **Victor A. Ellis**\*\*\*

This Article provides a succinct and practical analysis of the significant judicial decisions in the area of zoning and land use law pronounced by the United States Supreme Court and Georgia appellate courts between June 1, 2004 and May 31, 2005. The cases surveyed fall primarily within six categories: (1) condemnation; (2) nuisance and environmental; (3) zoning and related ordinances; (4) easements; (5) annexation; and (6) restrictive covenants.

## I. CONDEMNATION

During the survey period, Georgia appellate courts decided a variety of condemnation cases, including those addressing utility easements, bad faith of the condemnor, attorney fees, valuation, and consequential damages. Notably, however, the United States Supreme Court decided a critical case confirming for the first time that local governments may exercise eminent domain powers to take property to promote private economic redevelopment.<sup>1</sup>

---

\* Partner in the Land Use and Litigation Practice Group of the firm of Smith, Gambrell & Russell, LLP, Atlanta, Georgia. Vanderbilt University (B.A., 1989); Mercer University, Walter F. George School of Law (J.D., 1993). Member, Mercer Law Review (1991-1993). Member, State Bar of Georgia.

\*\* Partner in the Land Use and Litigation Practice Group of the firm of Smith, Gambrell & Russell, LLP, Atlanta, Georgia. University of Georgia (B.B.A., 1984); University of Georgia School of Law (J.D., 1987). Member, Georgia Journal of International and Comparative Law (1985-1986). Member, State Bar of Georgia.

\*\*\* Vice President/General Counsel for Jolly Development Corporation, Inc., Suwanee, Georgia. University of Arizona (B.A., 1989; M.A., 1991); Southern Methodist University, Dedman School of Law (J.D., 1997). Research Editor, SMU Law Review (1995-1997). Member, State Bar of Georgia.

1. See *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

A. *Economic Development Can Satisfy "Public Use" For Eminent Domain Purposes*

In a five-to-four ruling, the United States Supreme Court in *Kelo v. City of New London*<sup>2</sup> held that New London, Connecticut (the "City") might properly exercise eminent domain power in furtherance of an economic development plan.<sup>3</sup> At issue was the scope of the Fifth Amendment,<sup>4</sup> which allows governments to take private property through eminent domain if the land is for "public use."<sup>5</sup>

In 2000 the City approved a development plan that was projected to create numerous jobs, increase taxes and other revenues, and revitalize the economically distressed City, including its downtown and waterfront areas. Working to assemble the land needed for the project, the City's development agent negotiated and purchased property from willing sellers and utilized the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. Susette Kelo and others who were unwilling to sell their properties brought an action claiming that the taking of their property, via condemnation proceedings, violated the public use restriction in the Fifth Amendment's Takings Clause. The trial court granted a permanent restraining order prohibiting the taking of certain property. Relying on United States Supreme Court cases such as *Hawaii Housing Authority v. Midkiff*<sup>6</sup> and *Berman v. Parker*,<sup>7</sup> the Connecticut Supreme Court upheld the proposed takings.<sup>8</sup>

The United States Supreme Court granted certiorari to consider the question of "whether the [C]ity's proposed disposition of this property qualifies as a 'public use' within the meaning of the *Takings Clause of the Fifth Amendment to the Constitution*."<sup>9</sup> The Supreme Court, in a close decision, upheld the Connecticut Supreme Court's ruling, holding that the City's proposed disposition did qualify as a public use, hence, it was a legitimate taking.<sup>10</sup> Justice Stevens, who wrote for the majority, noted that "[t]he [C]ity has carefully formulated an economic development plan that it believes will provide appreciable benefits to the

---

2. 125 S. Ct. 2655 (2005).

3. *Id.* at 2668.

4. U.S. CONST. amend. V.

5. *Kelo*, 125 S. Ct. at 2661.

6. 467 U.S. 229 (1984).

7. 348 U.S. 26 (1954).

8. *Kelo*, 125 S. Ct. at 2658-61.

9. *Id.* at 2658.

10. *Id.* at 2668.

community, including, but by no means limited to, new jobs and increased tax revenue.”<sup>11</sup> The majority opinion further noted that had the City taken the property simply to confer a private benefit to a particular person or corporation, that would not pass constitutional muster.<sup>12</sup> Justices Kennedy, Souter, Ginsburg, and Breyer joined in the majority opinion. Justice Kennedy also filed a concurring opinion.<sup>13</sup>

Justice O’Connor, however, issued a strong dissenting opinion, arguing that local government should not have unlimited eminent domain authority to displace families, even if the families are compensated, simply to accommodate private developers.<sup>14</sup> Justice O’Connor concluded that “[a]ny property may now be taken for the benefit of another private party, but the fallout from [the majority’s] decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms.”<sup>15</sup> Chief Justice Rehnquist and Justices Scalia and Thomas joined in the minority opinion, with Justice Thomas filing a separate dissenting opinion.<sup>16</sup>

The majority and minority opinions both analyzed the Fifth Amendment, which provides that private property may not “be taken for public use without just compensation.”<sup>17</sup> Historically, eminent domain has been used to take private property for highways and the like. But in 1954, in the landmark case of *Berman v. Parker*,<sup>18</sup> the Supreme Court expanded the definition of public use to grant local governments broad authority to condemn “blighted areas” to improve them.<sup>19</sup> Since the ruling in *Berman* more than fifty years ago, the definition of public use has been slowly expanded to include economic development purposes.<sup>20</sup> The decision in *Kelo* further expands the use of eminent domain for the transfer of property from one private party to another if the economic project creates new jobs, increases taxes and other revenues, and revitalizes a depressed or blighted urban area.<sup>21</sup>

---

11. *Id.* at 2665.

12. *Id.* at 2661.

13. *Id.* at 2657.

14. *Id.* at 2671-77 (O’Connor, J., dissenting).

15. *Id.* at 2677 (O’Connor, J., dissenting).

16. 125 S. Ct. at 2657.

17. U.S. CONST. amend. V.

18. 348 U.S. 26 (1954).

19. *Id.* at 34-36.

20. *See, e.g.,* *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975).

21. *See Kelo*, 125 S. Ct. at 2655.

Despite Justice O'Connor's warning about the "fallout" from the majority's opinion,<sup>22</sup> it remains to be seen whether the decision in *Kelo* will clear the way for unfettered private development projects through the use of eminent domain.

### B. Condemnation For Utility Easements

The Georgia Court of Appeals decided two cases during the survey period that involved condemnation proceedings for utility easements. In *Witcher v. Level 3 Communications, LLC*,<sup>23</sup> a telecommunications company commenced a special master proceeding against a property owner seeking to condemn an easement for the construction, operation, and maintenance of a fiber optic cable system. In 1941 the property owner's predecessors in title conveyed a thirty-foot easement to Plantation Pipe Line Company for the construction, operation, and maintenance of a pipeline for the transportation of petroleum products. In 1968 Plantation Pipe Line condemned an additional twenty-foot easement adjacent to the thirty-foot easement. In 1999 Plantation Pipe Line granted Level 3 Communications, LLC ("Level 3") a license to use certain pipelines and rights of way for installation of Level 3's fiber optic communications system. Level 3 brought the condemnation proceeding because of the change in the use of the easement from a petroleum pipeline to a fiber optic system. At issue was whether Plantation Pipe Line had abandoned its easement such that the property reverted back to the property owner.<sup>24</sup> The Official Code of Georgia Annotated ("O.C.G.A.") section 22-2-85<sup>25</sup> provides that "[w]henver the condemnor ceases using the property taken for the purpose of conducting his business, the property shall revert to the person from whom taken, his heirs or assigns."<sup>26</sup> The court held that this code section was inapplicable because Level 3's easement was located within the original thirty-foot easement that Plantation Pipe Line acquired by grant, not by condemnation.<sup>27</sup> Moreover, the court concluded that even if the code section applied, it was not shown that Plantation Pipe Line had ceased using the easement for its business.<sup>28</sup>

---

22. *Id.* at 2677 (O'Connor, J., dissenting).

23. 272 Ga. App. 611, 612 S.E.2d 816 (2005).

24. *Id.* at 611-13, 612 S.E.2d at 816.

25. O.C.G.A. § 22-2-85 (1982).

26. *Witcher*, 272 Ga. App. at 613, 612 S.E.2d at 818 (quoting O.C.G.A. § 22-2-85 (1987)).

27. *Id.*

28. *Id.*

In *Mosteller Mill, Ltd. v. Georgia Power Co.*,<sup>29</sup> Georgia Power filed a petition to condemn property for a 150-foot wide easement for an electric transmission line. The utility also sought to obtain, by perpetual easement, “the right to go onto nonspecific and unidentified lands adjacent to its transmission line easement in order to ‘cut away, remove and dispose of dead, diseased, weak or leaning trees.’”<sup>30</sup> The parties described this secondary easement as a “‘danger tree’ maintenance easement.”<sup>31</sup> As a matter of first impression, the Georgia Court of Appeals held that a utility is required to include in its condemnation petition a specific legal property description of the land that will be subject to a maintenance easement.<sup>32</sup> A petition to condemn an easement must describe the easement to be acquired with the same degree of definiteness as is required in a deed.<sup>33</sup>

### C. Condemnation Set Aside For Bad Faith

In *Department of Transportation v. Bunn*,<sup>34</sup> the Georgia Court of Appeals held that the Department of Transportation’s (the “DOT”) bad faith in negotiating with the landowner warranted setting aside the declaration of condemnation.<sup>35</sup> In *Bunn* the DOT brought two separate condemnation actions against landowners to acquire fee simple rights, easement rights, and access rights for a road project. In each action, the condemnees moved to set aside, vacate, and annul, alleging that the DOT misrepresented in bad faith the landowners’ access to the road. Although the property owners repeatedly sought access rights to the road during the negotiations with the DOT, the DOT officials never told the property owners that the road had limited access, and the property owners would not have direct access to the road. The trial court concluded that the DOT acted in bad faith by not divulging its decision to limit access and by insisting on taking title to the land immediately and working out access rights later.<sup>36</sup> The trial court relied on O.C.G.A. section 32-3-11,<sup>37</sup> which “authorizes the superior court to set aside a taking if the condemnee can show fraud, bad faith, or the improper

---

29. 271 Ga. App. 287, 609 S.E.2d 211 (2005).

30. *Id.* at 288, 609 S.E.2d at 213.

31. *Id.*, 609 S.E.2d at 212.

32. *Id.* at 288-89, 609 S.E.2d at 213.

33. *Id.* at 289, 609 S.E.2d at 213-14.

34. 268 Ga. App. 712, 603 S.E.2d 2 (2004).

35. *Id.* at 717, 603 S.E.2d at 6-7.

36. *Id.* at 714-15, 603 S.E.2d at 4.

37. O.C.G.A. § 32-3-11 (2001).

use, abuse or misuse of the condemnor's power."<sup>38</sup> The court of appeals held that the evidence supported the trial court's finding that the DOT acted in bad faith by using access to lure the property owners to the negotiating table.<sup>39</sup> Further, the court held that the trial court should have set aside the entire declaration of taking, not just the limited access portion.<sup>40</sup>

*D. Statute Allowing Attorney Fees in Condemnation Appeal Is Constitutional*

In *Martin v. Henry County Water & Sewerage Authority*,<sup>41</sup> the Georgia Supreme Court held that a statute allowing an award of reasonable expenses, including attorney fees, to a condemnor does not violate the condemnee's constitutional right to just and adequate compensation if the condemnee's appeal of the special master's condemnation award to the superior court does not result in an increase of at least twenty percent to the award.<sup>42</sup> In *Martin* a special master awarded the condemnees \$6500 as just and adequate compensation. The condemnees were dissatisfied with the award and appealed to the superior court. There, a jury awarded the condemnees \$6900 for the property.<sup>43</sup> The trial court also awarded the condemnor \$3500 in attorney fees pursuant to O.C.G.A. section 22-2-84.1(a), which provides:

[I]f a condemnee appeals a special master's award to superior court and if the appeal does not result in an increase to the master's award of at least [twenty percent], the condemnee "shall be liable for reasonable expenses incurred by the condemnor in determining just and adequate compensation in the superior court."<sup>44</sup>

The condemnees asserted that the code section was unconstitutional because requiring payment of the condemnor's attorney fees would diminish the amount of their compensation, thus, violating their constitutional right to receive just and adequate compensation.<sup>45</sup> The Georgia Supreme Court disagreed, noting that an appeal to the superior court concerned a matter of legislative grace and that the condemnee

---

38. *Bunn*, 268 Ga. App. at 716, 603 S.E.2d at 6 (citing O.C.G.A. § 32-3-11(a) & (b) (1973)).

39. *Id.* at 716-17, 603 S.E.2d at 6.

40. *Id.* at 717, 603 S.E.2d at 7.

41. 279 Ga. 197, 610 S.E.2d 509 (2005).

42. *Id.* at 197-200, 610 S.E.2d at 510-11; O.C.G.A. § 22-2-84.1(a) (1982 & Supp. 2005).

43. *Martin*, 279 Ga. at 197, 610 S.E.2d at 510.

44. *Id.* at 198, 610 S.E.2d at 510 (quoting O.C.G.A. § 22-2-84.1(a)).

45. *Id.*, 610 S.E.2d at 509.

does not have a constitutional right to a jury trial on the question of just and adequate compensation.<sup>46</sup> The court held:

[T]hese considerations support the conclusion that, by conditioning an appeal to superior court on the payment of costs in the manner specified by the legislature, O.C.G.A. [section] 22-2-84.1 does not violate a property owner's right to receive just and adequate compensation before a taking of his property occurs.<sup>47</sup>

#### *E. Proper Measure of Damages*

The Georgia appellate courts considered several cases dealing with the proper measure of damages in a condemnation action. For example, in *Henry County Water & Sewerage Authority v. Adelson*,<sup>48</sup> the court began its analysis with the long-established rule that:

In a condemnation proceeding involving a partial taking, two elements of damage are to be considered: (1) the market value of the property actually taken, and (2) the consequential damage that will "naturally and proximately arise to the remainder of the owner's property from the taking of the part which is taken and the devoting of it to the purposes for which it is condemned."<sup>49</sup>

The court further noted that the "proper measure of consequential damages to the remainder is the diminution, if any, in the market value of the remainder in its circumstance just prior to the time of the taking compared with its market value in its new circumstance just after the time of the taking."<sup>50</sup>

In *Adelson* the county water and sewer authority condemned land for a reservoir.<sup>51</sup> Noting that the trial court has wide discretion to admit testimony of questionable relevance, the appellate court held that the trial court properly admitted evidence concerning flooding and siltation that would naturally and proximately occur as a result of the proper construction of the reservoir to prove compensable consequential damages to the remainder.<sup>52</sup>

---

46. *Id.*

47. *Id.* at 199, 610 S.E.2d at 510.

48. 269 Ga. App. 206, 603 S.E.2d 714 (2004).

49. *Id.* at 206-07, 603 S.E.2d at 717 (quoting *Dep't of Transp. v. White*, 270 Ga. 281, 282, 508 S.E.2d 407, 408 (1998)).

50. *Id.* at 207, 603 S.E.2d at 717 (citing *Wright v. MARTA*, 248 Ga. 372, 375, 283 S.E.2d 466, 469 (1981)).

51. *Id.* at 206, 603 S.E.2d at 717.

52. *Id.* at 207, 603 S.E.2d at 717-18.

In *Georgia Department of Transportation v. Crumbley*,<sup>53</sup> the DOT condemned 1.42 acres of a 7.61 acre tract. At trial, the expert who testified on behalf of the DOT valued the condemned land at \$249,800, while the property owner's expert placed the value at \$615,000. The DOT's expert based his figure on the value of the condemned land in addition to consequential damages to the remaining land. In determining the value of the condemned land, he treated the tract as one parcel and assigned it a uniform value of \$1.75 per square foot before the condemnation. But when calculating the value of the consequential damages to the remaining land, he divided the land into two parcels, each bisected by a power-line easement. The trial court ruled that the DOT's expert could not base his assessment of the land's value on two different methods of valuation and gave a jury instruction to that effect.<sup>54</sup> After reviewing the Georgia rule for calculating consequential damages to the remainder caused by a taking, the Georgia Court of Appeals affirmed the trial court's decision.<sup>55</sup> Relying on *Gaines v. City of Calhoun*,<sup>56</sup> the court concluded that consequential damages must be calculated with reference to the entire remainder of a tract, not just a portion.<sup>57</sup> In addition, the court wrote:

We find this principle especially apt in this case because the record does not show any subdivision of the property or that it was ever treated as anything other than a single tract by the owner, and because the DOT initially treated the property as a single tract and then attempted to divide it for purposes of consequential damages only.<sup>58</sup>

In *Department of Transportation v. Bacon Farms, LP*,<sup>59</sup> the Georgia Court of Appeals examined the proper measure of consequential damages in a partial takings case involving mineral deposits.<sup>60</sup> The DOT brought a condemnation action to condemn property containing kaolin. A jury awarded \$2,064,000 to the property owner, and the DOT appealed.<sup>61</sup> The Georgia Court of Appeals reversed, holding that the testimony of witnesses who computed the value of the condemned land containing kaolin by multiplying estimated tons of "lost" kaolin by

---

53. 271 Ga. App. 706, 610 S.E.2d 663 (2005).

54. *Id.* at 706-08, 610 S.E.2d at 665-66.

55. *Id.* at 711, 610 S.E.2d at 667.

56. 42 Ga. App. 89, 155 S.E. 214 (1930).

57. *Crumbley*, 271 Ga. App. at 709-10, 610 S.E.2d at 666-68.

58. *Id.* at 710, 610 S.E.2d at 667.

59. 270 Ga. App. 862, 608 S.E.2d 305 (2004).

60. *Id.* at 862-63, 608 S.E.2d at 306-07.

61. *Id.* at 863, 608 S.E.2d at 308.

projected unit prices per ton was speculative and inadmissible.<sup>62</sup> The witnesses made no deductions or other allowances for the cost of mining and transporting the kaolin, nor did they account for future market uncertainties.<sup>63</sup> The court held that the price times unit method of valuation was improper.<sup>64</sup>

In *Bacon Farms* the court further concluded that under Georgia law, “the presence of mineral deposits on condemned land is a relevant factor to be considered in determining the overall value of the property.”<sup>65</sup> However, the court also noted that “the land and the deposits constitute one subject matter and there cannot be separate recovery for the land and also for the deposits.”<sup>66</sup> Examining decisions from other jurisdictions, including *Georgia Kaolin Co. v. United States*,<sup>67</sup> a 1954 Fifth Circuit case, the court concluded:

[E]vidence of the quantity and value of minerals on the land is admissible—along with all other relevant evidence—to determine the value of the land as a whole. In other words, while “price times unit” is not itself the proper measure of damages, the unit price and quantity of the minerals are factors upon which an opinion of fair market value may be based.<sup>68</sup>

## II. NUISANCE AND ENVIRONMENTAL ISSUES

The Georgia Court of Appeals decided several cases during the survey period that concerned nuisance or environmental issues. Most did not address novel issues. The Georgia Court of Appeals did, however, consider one case which found a nuisance as a matter of law based on the location of the nuisance.<sup>69</sup> In another case, the Georgia Court of Appeals determined that the Director of the Environmental Protection Division had authority under the Georgia Hazardous Site Response Act<sup>70</sup> to expend monies for cleanup costs and that such decisions are accorded a high level of deference.<sup>71</sup>

---

62. *Id.* at 866, 608 S.E.2d at 309.

63. *Id.*

64. *Id.* at 866-67, 608 S.E.2d at 309.

65. *Id.* at 863, 608 S.E.2d at 307 (citing *Gunn v. Dep't of Transp.*, 222 Ga. App. 684, 685, 476 S.E.2d 46, 48 (1996)).

66. *Id.* at 863-64, 608 S.E.2d at 307 (quoting *Gunn*, 222 Ga. App. at 685, 476 S.E.2d at 48).

67. 214 F.2d 284 (5th Cir. 1954).

68. *Bacon Farms*, 270 Ga. App. at 865, 608 S.E.2d at 308.

69. *See Payne v. Terrell*, 269 Ga. App. 540, 604 S.E.2d 551 (2005).

70. O.C.G.A. §§ 12-8-90 to -97 (2001).

71. *Reheis v. Baxley Creosoting & Osmose*, 268 Ga. App. 256, 601 S.E.2d 781 (2004).

A. *Nuisance as a Matter of Law*

The O.C.G.A. defines a nuisance as:

[A]nything that causes hurt, inconvenience, or damage to another and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary reasonable man.<sup>72</sup>

In *Payne v. Terrell*,<sup>73</sup> the plaintiff property owners brought a nuisance action against the adjoining land owners to enjoin the construction of four commercial poultry houses next to the plaintiffs' property. After a bench trial, judgment was entered in favor of the defendants. The plaintiffs appealed, asserting that the trial court failed to follow *May v. Brueshaber*,<sup>74</sup> which set forth the legal criteria articulated by the Georgia Supreme Court regarding nuisance issues.<sup>75</sup> The Georgia Court of Appeals agreed and reversed the trial court.<sup>76</sup>

In so holding, the court in *Payne* noted that a key consideration in *Brueshaber* was the location in which an otherwise permissible enterprise was to be performed.<sup>77</sup> The court explained that "a thing that is lawful and proper in one locality may be a nuisance in another," and that "a nuisance may consist merely of the right thing in the wrong place."<sup>78</sup> The appellate court then held that the trial court's conclusion that the proposed poultry houses were consistent with the locality and character of the county community was not determinative because it ignores the following *Brueshaber* criteria:

If one does an act, of itself lawful, which, *being done in a particular place*, necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find *some other place* to do that act where it will not be injurious or offensive.<sup>79</sup>

The court held that "[s]ince the trial court's findings establish[ed] that the defendants' proposed poultry houses would be irreparably unpleasant, irritating, offensive, and trigger asthma in some plaintiffs, it [was]

---

72. O.C.G.A. § 41-1-1 (1997).

73. 269 Ga. App. 540, 604 S.E.2d 551 (2005).

74. 265 Ga. 889, 466 S.E.2d 196 (1995).

75. *See id.*

76. *Payne*, 269 Ga. App. at 545, 604 S.E.2d at 556.

77. *Id.* at 543, 604 S.E.2d at 555.

78. *Id.* (quoting *Brueshaber*, 265 Ga. at 889-90, 466 S.E.2d at 196).

79. *Id.* at 544-45, 604 S.E.2d at 555 (quoting *Brueshaber*, 265 Ga. at 890, 466 S.E.2d at 196).

error as a matter of law to find a lack of nuisance . . . .<sup>80</sup> According to the appellate court, the important factor under *Brueshaber* was that the trial court's findings showed an alternative site existed that would have permitted the defendants to engage in their commercial poultry venture without injuriously impacting the plaintiffs' homes and health, and that the defendants had rejected that site on a cost basis because they did not want to construct an access road.<sup>81</sup> As such, the Georgia Court of Appeals reversed the trial court and remanded for entry of a permanent injunction at the current construction site and allowed, but did not require, the defendants to build on the alternative site.<sup>82</sup>

*B. Environmental Protection Division Cost Estimates Entitled to Deference*

In *Reheis v. Baxley Creosoting & Osmose Wood Preserving Co.*,<sup>83</sup> the Director of the Environmental Protection Division ("EPD") of the Department of Natural Resources entered into a consent order with a corporation whereby the corporation agreed to remove hazardous waste that leaked from five steel tanks located on its property. When the corporation did not comply with the conditions of the consent order, the director completed all corrective action at the site utilizing monies from the hazardous waste trust fund. Under O.C.G.A. section 12-8-96.1(a)<sup>84</sup> of the Georgia Hazardous Site Response Act, the state is permitted to recover reasonable costs incurred in cleaning up hazardous waste sites, as well as attorney fees and punitive damages.<sup>85</sup>

In a case of first impression, the Georgia Court of Appeals held that the defendant had no right to a jury trial on the issue of whether the costs were reasonable but the defendant was entitled to a jury trial on the issue of punitive damages.<sup>86</sup> The court further concluded that the cost-recovery determinations made by the EPD were entitled to deference and that the proper standard for reviewing such decisions was whether the agency acted beyond the discretionary powers conferred upon it, or whether it acted arbitrarily or capriciously.<sup>87</sup> Additionally, the court held that the defendant bears the burden of proving that the

---

80. *Id.* at 545, 604 S.E.2d at 555.

81. *Id.*

82. *Id.*

83. 268 Ga. App. 256, 601 S.E.2d 781 (2004).

84. O.C.G.A. § 12-8-96.1(a) (2001 & Supp. 2005).

85. *Reheis*, 268 Ga. App. at 256, 601 S.E.2d at 783; O.C.G.A. § 12-8-96.1(a).

86. *Reheis*, 268 Ga. App. at 261, 601 S.E.2d at 786-88.

87. *Id.* at 263, 601 S.E.2d at 787.

costs expended by the state agency in cleaning up the environmental hazards were unreasonable.<sup>88</sup>

### III. ZONING AND RELATED ORDINANCES

Georgia appellate courts decided a number of interesting zoning cases during the survey period. Two cases dealt with constitutional challenges in hot topic areas, namely adult-oriented businesses and signage.

#### A. *Adult-Oriented Shop Challenges Development Code as Unconstitutionally Vague*

In *105 Floyd Road, Inc. v. Crisp County*,<sup>89</sup> an adult business challenged on vagueness grounds the phrase “substantial business purpose” in the definition of “sexually-oriented adult use” contained in section 3.01.02 of the Crisp County Unified Land Development Code:<sup>90</sup>

That section defines a “sexually-oriented adult use” as “[a]ny establishment that, as a regular and substantial business purpose, offers services, . . . or materials in print or in any photographic or recorded media that [involve or depict certain defined sexually-explicit activities or anatomical areas], with the intent of providing sexual stimulation or gratification to the customer.”<sup>91</sup>

Establishments meeting this definition were allowed only in certain designated zoning districts upon approval of a special use permit.<sup>92</sup>

In addition to sexually-explicit materials and novelty items, the store also sold other adult-themed but nonsexually-explicit materials under the trade name “Love Stuff.”<sup>93</sup> The store succeeded another business of a similar name. That successor sought a special use permit to operate a sexually-oriented use store and was denied. The predecessor company, however, dealt primarily with sexually-explicit materials and catered to a mostly male clientele. The new purchaser changed the inventory, dramatically reducing the amount of sexually-explicit material and selling adult-themed but nonsexually-explicit material catering to women and couples. Appellant began operating the business without a special use permit and the county sought injunctive relief. In support of its

---

88. *Id.*, 601 S.E.2d at 788.

89. 279 Ga. 345, 613 S.E.2d 632 (2005).

90. *Id.* at 345, 613 S.E.2d at 632; CRISP COUNTY, GA., UNIFIED LAND DEVELOPMENT CODE § 3.01.02 (2001).

91. *105 Floyd*, 279 Ga. at 345, 613 S.E.2d at 632-33 (quoting CRISP COUNTY, GA., UNIFIED LAND DEVELOPMENT CODE § 3.01.02 (2000)).

92. *Id.*, 613 S.E.2d at 633.

93. *Id.*

position, the county stated that the appellant was required to have such a permit because it qualified as a sexually-oriented adult use due to its substantial business purpose involved the sale of “sexually-explicit materials.”<sup>94</sup> The trial court found that a substantial business purpose of the appellant was to offer for sale sexually-explicit materials intended to provide sexual stimulation or gratification to the customer.<sup>95</sup> Then, rejecting the appellant’s “constitutional challenges to the development code, including the assertion that the language was unconstitutionally vague, both facially and as applied to appellant, the trial court permanently enjoined appellant from operating its business.”<sup>96</sup> On appeal, the supreme court concluded that the challenged definition contained insufficient objective standards and guidelines to meet the requirements of due process:

[T]he County’s definition does not look to stock in trade, gross sales, floor space or some other readily quantifiable standard. It looks solely to the “purpose” of the business without providing any guidelines for those establishments seeking to operate within the County to enable them to determine what amount of “purpose” qualifies as “substantial.” Excluding only the most extreme cases, such as where an establishment’s sole or primary purpose is to offer sexually-explicit material, the ordinance provides no guidelines to enable a reasonable person to determine at what point the offering of sexually explicit material to the public becomes a *substantial* purpose of its business.<sup>97</sup>

#### B. *Constitutional Challenge to Sign Ordinance*

In *Coffey v. Fayette County*,<sup>98</sup> the petitioners appealed the trial court’s denial of a request to temporarily enjoin the enforcement of certain provisions of the Fayette County Sign Ordinance. Fayette County adopted a sign ordinance in 1999 that restricted noncommercial signs in residential areas to “one sign per lot and to a size of no more than six square feet.”<sup>99</sup> Contending that parts of the county’s sign ordinance were unconstitutional, petitioners also sought an interlocutory injunction prohibiting enforcement of the relevant parts of the ordinance pending a final determination of the case. The trial court denied the appellant’s motion because it found that “there is a rational relationship

---

94. *Id.*

95. *Id.* at 346, 613 S.E.2d at 633.

96. *Id.*

97. *Id.* at 348-49, 613 S.E.2d at 635.

98. 279 Ga. 111, 610 S.E.2d 41 (2005).

99. *Id.* at 111, 610 S.E.2d at 42.

between the County's sign restrictions and its interests in aesthetics and traffic safety."<sup>100</sup>

On appeal, the appellants argued that the trial court applied an incorrect standard to determine the validity of the county's sign restrictions.<sup>101</sup> The appellate court agreed, reaching two conclusions.<sup>102</sup> First, the trial court noted the test:

It is well settled that a County may "adopt reasonable restrictions regulating the time, place, or manner of expression." Under the Federal Constitution, restrictions such as those adopted by Fayette County are "valid if they do not refer to the content of the speech," "are narrowly tailored to serve a significant government interest," and "leave open alternative methods of communication." This court has interpreted the Georgia Constitution to provide even broader protection than the First Amendment, in that we require a government to adopt the least restrictive means of achieving its goals. Under this test, a government must "draw its regulations to suppress no more speech than is necessary to achieve [its] goals."<sup>103</sup>

Second, the appellate court held that:

[b]ecause the only ground given by the trial court for denying the appellants' request for injunctive relief was that "there is a rational relationship between the County's sign restrictions and its interests in aesthetics and traffic safety," it appears that the trial court denied appellants' request for interlocutory injunctive relief solely on the ground that the appellants would be unlikely to prevail on the merits of their claim that the relevant provisions of the ordinance are unconstitutional.<sup>104</sup>

In *DeKalb County v. Wal-Mart Stores, Inc.*,<sup>105</sup> Wal-Mart filed a petition for a writ of certiorari, challenging the decision of the DeKalb County Board of Zoning Appeals to deny the petitioners' variance application, which would have allowed it to erect a sign with a height greater than that permitted by the county's sign ordinance. Wal-Mart later amended its petition, adding claims for declaratory judgment and mandamus relief. After the trial court issued a mandamus nisi, the county filed a motion to dismiss, alleging that an adequate legal remedy existed and, therefore, the claim for mandamus could not lie as a matter

---

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 111-12, 610 S.E.2d at 42 (quoting *Statesboro Publ'g Co. v. City of Sylvania*, 271 Ga. 92, 93, 516 S.E.2d 296, 298 (1999)).

104. *Id.* at 112, 610 S.E.2d at 42.

105. 278 Ga. 501, 604 S.E.2d 162 (2004).

of law. The trial court granted mandamus relief, and the county sought permission to file a discretionary appeal.<sup>106</sup> The Georgia Supreme Court granted the application to consider whether mandamus relief was improper due to the “availability of adequate legal remedies.”<sup>107</sup>

The court concluded that mandamus was inappropriate because other adequate legal remedies were available: “Only when the zoning ordinance fails to prescribe a method of judicial review can mandamus be the appropriate method of reviewing the zoning board’s denial of a variance.<sup>108</sup> ‘If there be a specific remedy by certiorari, the right of mandamus will not lie.’”<sup>109</sup> As an aside, the court also concluded that a party could challenge the constitutionality of an ordinance by declaratory judgment.<sup>110</sup>

### C. *Equal Protection in Similarly Situated Properties*

In *Rockdale County v. Burdette*,<sup>111</sup> a property owner appealed the County Board of Commissioners decision denying his request to rezone property for use as a used car sales lot, a use prohibited by the current C-1 zoning. The property owner requested a change to C-2 conditional (General Commercial) and was willing to limit the use to a used car sales lot containing no more than fifteen cars. The trial court concluded that the board’s refusal to rezone constituted a denial of equal protection. In doing so, the trial court concluded that the appellee suffered disparate treatment because the board, on the same day it denied the appellee’s rezoning application, rezoned a parcel five miles away which resulted in the second parcel being rezoned from conditional (limited to use as a used car sales lot), with the condition that the owner be permitted to operate a small used car lot as a legal nonconforming use. That owner operated a small used car lot on the property since 1989, which was two years before Rockdale County adopted a Comprehensive Land Use Plan, which called for both the used car lot and appellee’s lot to be zoned C-1.<sup>112</sup>

On review, the supreme court reversed, concluding that one property had a legal nonconforming use, and the other did not, which prevented the property owners from being similarly situated. The court wrote:

---

106. *Id.* at 501-02, 604 S.E.2d at 163-64.

107. *Id.* at 502, 604 S.E.2d at 164.

108. *Id.* (citing *Jackson v. Spalding County*, 265 Ga. 792, 793, 462 S.E.2d 361, 363 (1995)).

109. *Id.* (quoting *McClung v. Richardson*, 232 Ga. 530, 531, 207 S.E.2d 472, 473 (1974)).

110. *Id.* at 503, 604 S.E.2d at 164.

111. 278 Ga. 755, 604 S.E.2d 820 (2004).

112. *Id.* at 755, 604 S.E.2d at 821.

The owners of two separate parcels of property are prevented from being similarly situated for purposes of equal protection when one of the parcels has a pre-existing nonconforming use . . . . Because the C-1 zoning did not permit use of the lot as a used-car lot, such usage was nonconforming; because the lot was legally used as a used-car lot prior to the 2002 zoning amendment changing the zoning to C-1, it was a pre-existing use. Consequently, [the appellee's] lot zoned C-1 and the lot zoned C-1, conditional, were not similarly situated and the difference in treatment does not amount to a violation of [the appellee's] right to equal protection under the law.<sup>113</sup>

*D. Zoning Violation: Challenge of Criminal Sanction for Zoning Violation*

In *Adams v. Madison County Planning & Zoning*,<sup>114</sup> property owners challenged the municipal court's imposition of a sentence issued because of a zoning violation. The magistrate court found the plaintiffs guilty of violating a Madison County Zoning Ordinance by operating a paving business on their property. The court ordered the plaintiffs to remove all equipment related to the paving operation within sixty days from the date of the court's order or pay a daily fine of \$250. The petitioners moved to set aside the judgment and filed a petition for certiorari in the superior court. The superior court denied the petition, concluding that the petitioners did not file either their motion to set aside or their certiorari petition within thirty days of the conviction.<sup>115</sup>

On appeal, the petitioners alleged that the sentence issued by the magistrate court for violation of the ordinance was void.<sup>116</sup> The court of appeals agreed and reversed.<sup>117</sup> The appellate court concluded that the "sentence issued by the magistrate court . . . [was] injunctive in nature."<sup>118</sup> Because a magistrate court does not have jurisdiction to grant injunctive relief, the court concluded that the superior court erred in denying the petition on this ground.<sup>119</sup> The court also concluded that the petitioners could challenge the sentence as void after the expiration of thirty days:

---

113. *Id.* at 756, 604 S.E.2d at 822 (citing *Puckett v. Paulding County*, 245 Ga. 439, 440, 265 S.E.2d 579, 580 (1980)).

114. 271 Ga. App. 333, 609 S.E.2d 681 (2005).

115. *Id.* at 333-34, 609 S.E.2d at 682.

116. *Id.* at 334, 609 S.E.2d at 682.

117. *Id.*

118. *Id.*, 609 S.E.2d at 683.

119. *Id.*

A conviction in Magistrate Court for violating a county ordinance is quasi-criminal in nature, and where a party convicted of an ordinance violation files a petition for certiorari in the superior court seeking review of the conviction, the proceeding in superior court is criminal and not civil. . . . In criminal cases, a void sentence may be challenged in the trial court at any time.<sup>120</sup>

#### *E. Construction of Zoning Ordinance*

In *JWIC, Inc. v. City of Sylvester*,<sup>121</sup> the plaintiff filed for a land disturbance permit with the city to build a forty-nine unit apartment complex on property zoned R-OI. The plaintiff contended that apartments constituted “multi-family dwellings” under the ordinance and that because multi-family dwellings were a permitted use as a matter of right in the R-OI district, apartments were permitted.<sup>122</sup> The city, however, argued that apartments were not permitted in the R-OI district; instead, they were only permitted in the R-M group development zoning district. In support, the city noted that the only time apartments were mentioned in the ordinance was in section 4-1(.5).<sup>123</sup> That section provides that a person seeking group development must have that property rezoned to R-M group development.<sup>124</sup> That section further provides that if rezoning is granted, certain uses, such as apartments and mobile home parks, will only be permitted by a special exception permit granted by the planning commission and the city council.<sup>125</sup>

When the city failed to issue a land disturbance permit, the plaintiff brought an action for injunctive, declaratory, and mandamus relief. The plaintiff subsequently moved for partial summary judgment, contending that the zoning ordinance permitted apartments in the R-OI zoning district as a matter of right. The trial court denied the motion, ruling that multi-family dwellings and apartments are not synonymous; that apartments are not a permitted use in the R-OI district as a matter of right; and that apartments are only permitted in the R-M group development district.<sup>126</sup>

On review, the appellate court noted that “the ordinance defines a multi-family dwelling as ‘a building either designed, constructed, altered, or used for more than two adjoining dwelling units, with each dwelling

---

120. *Id.*

121. 278 Ga. 416, 603 S.E.2d 247 (2004).

122. *Id.* at 416, 603 S.E.2d at 248.

123. *Id.*

124. *Id.*, 603 S.E.2d at 248-49.

125. *Id.*, 603 S.E.2d at 249.

126. *Id.* at 416-17, 603 S.E.2d at 248.

unit having a common wall or common floor connecting to it at least one other dwelling unit in the building.”<sup>127</sup> The court concluded that an apartment clearly falls within this definition and multi-family dwellings are a permitted use as a matter of right in the R-OI district under the ordinance’s table of permitted uses.<sup>128</sup> Given the reasonableness of both this interpretation and that of the city’s, the court concluded that the ordinance was ambiguous and cited the general principle that “ambiguities in a zoning ordinance must be resolved in favor of the property owner.”<sup>129</sup>

#### IV. EASEMENTS

##### A. *Incurred Expenses Ripen Parol License into Easement*

In *Blake v. RGL Associates, Inc.*,<sup>130</sup> the court of appeals affirmed the limitation in O.C.G.A. section 44-9-4<sup>131</sup> on the revocation of a parol license.<sup>132</sup> Appellee RGL Associates, Inc. (“RGL”) filed a complaint against John W. Blake and Brunswick Floors, Inc. (“Blake”) to enjoin Blake from interfering with RGL’s right to access an adjacent highway from Blake’s property. RGL’s right to use Blake’s property originated as a parol license, which Blake granted to RGL’s predecessor in title (ABC Home Health) in 1986. ABC Home Health made certain improvements to both properties and connected its parking lot to the road in 1986 or 1987.<sup>133</sup>

RGL bought the property in 1999, only to be informed six months later by Blake that he was revoking RGL’s right to use his property for ingress and egress to the highway. RGL’s complaint ensued, and the trial court granted RGL’s motion for summary judgment.<sup>134</sup> In affirming that judgment, the court of appeals noted that, under O.C.G.A. section 44-9-4, “[a] parol license is not revocable when the licensee has acted pursuant thereto and in so doing has incurred expense; in such case, it becomes an easement running with the land.”<sup>135</sup> Because ABC Home Health made improvements and incurred expenses in connection

---

127. *Id.* at 417, 603 S.E.2d at 249.

128. *Id.* at 417-18, 603 S.E.2d at 249.

129. *Id.* at 417, 603 S.E.2d at 248 (citing *Bo Fancy Prods. v. Rabun County Bd. of Comm’rs*, 267 Ga. 341, 342-43, 478 S.E.2d 373, 374-75 (1996)).

130. 267 Ga. App. 709, 600 S.E.2d 765 (2004).

131. O.C.G.A. § 44-9-4 (2002).

132. *Blake*, 267 Ga. App. at 710, 600 S.E.2d at 766; O.C.G.A. § 44-9-4.

133. *Blake*, 267 Ga. App. at 710, 600 S.E.2d at 766.

134. *Id.*

135. *Id.* (quoting O.C.G.A. § 44-9-4 (2002)).

with its use of Blake's property, it obtained an easement running with the land, which passed to RGL upon RGL's purchase of the property in 1999.<sup>136</sup>

*B. Express Easement Does Not Create Reciprocal Easement by Implication*

The court of appeals affirmed a denial of injunctive relief in *Pichulik v. Ball*,<sup>137</sup> a case concerning questions of both an express easement agreement and a claimed prescriptive easement. The easement agreement concerned three separate parcels: a residential lot; a paved parking area directly behind the residential lot; and a commercial parcel. Upon sale of the residential lot in 1983, seller Highland Park Center Associates ("Highland Park") granted purchaser Kwok Wai Tse ("Tse") a perpetual, nonexclusive easement recorded by the parties for parking, ingress, and egress on the parking area behind the residential lot. The residential lot had several owners over the ensuing nineteen years, until it was purchased by Stephan A. Ball ("Ball") in 2002. In the meantime, Highland Park sold the remaining parcels to a family partnership (the "Pichuliks"), who rented the commercial property to four restaurants.<sup>138</sup>

Prior to Ball's purchase of the residential lot, the Pichuliks's tenants began using a valet service, which used the residential driveway for access and the easement area for parking restaurant customers' cars. Ball began to challenge this use and what he viewed as the Pichuliks's interference with his use of the easement area. Ball subsequently began a series of actions to prevent the Pichuliks and their tenants from using the residential driveway and accessing the easement area.<sup>139</sup>

The Pichuliks sued Ball, seeking injunctive and declaratory relief, as well as damages, under claims of trespass, deprivation of a right of enjoyment, and nuisance. Ball counterclaimed for damages. The trial court, in denying the Pichuliks's injunctive relief, rejected their three separate contentions of a right to use Ball's property and granted Ball a permanent injunction prohibiting the Pichuliks and their tenants from entering Ball's property or interfering with his use of the easement area.<sup>140</sup>

The court of appeals affirmed the trial court's reasoning. First, the court of appeals reviewed the easement agreement de novo and affirmed

---

136. *Id.*

137. 270 Ga. App. 656, 607 S.E.2d 247 (2004).

138. *Id.* at 656-58, 607 S.E.2d at 249-50.

139. *Id.* at 658-59, 607 S.E.2d at 250.

140. *Id.* at 659-60, 607 S.E.2d at 251.

the trial court's finding that the express language of the easement agreement created no reciprocal easement rights for the Pichuliks on Ball's property.<sup>141</sup> Second, the court of appeals sustained the trial court's factual finding that although the Pichuliks may have enjoyed a permissive shared use of the residential driveway, such use had not ripened into a prescriptive easement.<sup>142</sup> Quoting the requirements of O.C.G.A. section 44-5-161,<sup>143</sup> the court of appeals determined that there was no evidence that the Pichuliks's use of the residential driveway had become adverse and exclusive nor had they made any claim of right to use the driveway to Ball or his predecessors in title.<sup>144</sup> Finally, although not specifically addressed by the court of appeals, the opinion implicitly upheld the trial court's rejection of the Pichuliks's claim to a "joint" or "common" driveway because such a claim can only be made in cases of a boundary line dispute, which was not present in the case at bar.<sup>145</sup>

### C. *Requirements for an Easement by Prescription*

In another case regarding a claim of a prescriptive easement, *Hobbs v. Lovelady*,<sup>146</sup> the court of appeals restated the requirement that the user of a private way notify the owner of the way that she is changing her position from a licensee to that of a prescriber.<sup>147</sup> Hobbs sued her adjoining neighbors (the appellees) after a dispute between the parties over a boundary line and shared driveway. After the trial court granted the appellees' motion for summary judgment, Hobbs appealed.<sup>148</sup> Affirming the trial court's decision in part,<sup>149</sup> the court of appeals held that Hobbs had neither established an easement by prescription nor by the appellees' purported acquiescence.<sup>150</sup> The court of appeals noted that there was no evidence that Hobbs had ever given actual or constructive notice to the appellees or their predecessors in title of an intent to establish a prescriptive easement and that Hobbs's mere use and occasional minor maintenance of the driveway did not satisfy the

---

141. *Id.* at 660-61, 607 S.E.2d at 251-52.

142. *Id.* at 661-62, 607 S.E.2d at 252.

143. O.C.G.A. § 44-5-161 (1991).

144. *Pichulik*, 270 Ga. App. at 661-62, 607 S.E.2d at 251-52.

145. *Id.* at 659, 607 S.E.2d at 251.

146. 272 Ga. App. 111, 611 S.E.2d 661 (2005).

147. *Id.* at 112, 611 S.E.2d at 662.

148. *Id.* at 111-12, 611 S.E.2d at 661-62.

149. The court of appeals reversed and remanded the boundary dispute question. *Id.* at 113-14, 611 S.E.2d at 662-63.

150. *Id.* at 113, 611 S.E.2d at 663.

notice requirement.<sup>151</sup> Referencing O.C.G.A. section 44-4-6,<sup>152</sup> the court also held that acquiescence for seven years by an adjoining landowner established a dividing line, not an easement, and declined to expand the rule under these specific facts.<sup>153</sup>

*D. Reasonable Enjoyment of an Easement Means “Full Enjoyment”*

In yet another backyard neighbor dispute that found its way into the appellate court system, the court of appeals reversed a directed verdict in favor of the defendant in *Huckaby v. Cheatham*.<sup>154</sup> Huckaby and Cheatham were neighbors who shared a common driveway in DeKalb County and were the beneficiaries of a reciprocal driveway easement agreement executed by the prior owners of the two properties in 1991. After several disputes over barking dogs and trespass allegations, the parties signed a personal agreement (the “2000 Agreement”), which expressly acknowledged the existence of the existing easement, their intent not to modify the existing easement in any fashion, and the commitment of the parties “to refrain from interfering with each party’s use of the driveway area for ingress and egress, and that each shall not block the driveway, or exercise exclusive dominion over any portion of the easement area.”<sup>155</sup> Disputes continued, however, and eventually, Huckaby sued for injunctive relief after Cheatham allegedly violated the easement agreement by parking in the driveway. Although the trial judge initially granted a temporary restraining order enjoining Cheatham from parking in the driveway “unless such vehicle is left running and attended,” at trial, the judge granted Cheatham a directed verdict.<sup>156</sup>

Reversing the judgment, the court of appeals noted that the trial judge erroneously decided to give the jury only a single special interrogatory on the driveway issue, one that focused on the 2000 Agreement and not the original easement.<sup>157</sup> The court of appeals held that because the express terms of the 2000 Agreement did not alter the terms of the easement, the proper question was the construction of the easement language in relation to Cheatham’s activities.<sup>158</sup> The court answered this question by applying well-settled Georgia law that any interference

---

151. *Id.* at 112-13, 611 S.E.2d at 662.

152. O.C.G.A. § 44-4-6 (1991).

153. *Hobbs*, 272 Ga. App. at 113, 611 S.E.2d at 663.

154. 272 Ga. App. 746, 612 S.E.2d 810 (2005).

155. *Id.* at 748, 612 S.E.2d at 812.

156. *Id.* at 748-49, 612 S.E.2d at 812.

157. *Id.* at 750-52, 612 S.E.2d at 815.

158. *Id.*

with Huckaby's easement rights, "regardless of whether she was being inconvenienced, had an alternate route, or even did not actually use the easement," was impermissible as a matter of law.<sup>159</sup>

## V. ANNEXATION

### A. *Strip Excepted From Annexation to Avoid Unincorporated Island Does Not Invalidate Annexation*

The court of appeals affirmed "Survivor" star Judge Paschal English's judgment in favor of the City of Fayetteville (the "City") in *Fayette County v. Steele*.<sup>160</sup> In *Steele* Fayette County challenged the City's annexation on the grounds that the annexed property was not contiguous. In a de novo review of undisputed facts, the court concluded that the City annexed two parcels owned by a single landowner, with the exception of a ten-foot strip of land that the landowner removed from the annexation to avoid running afoul of the prohibition in O.C.G.A. section 36-36-4(a)<sup>161</sup> on the creation of an unincorporated island.<sup>162</sup> Fayette County claimed that the strip exception violated O.C.G.A. section 36-36-20(a)(2),<sup>163</sup> which requires the "entire parcel or parcels of real property owned by the person seeking annexation [to be] annexed; provided, however, that lots shall not be subdivided in an effort to evade the requirements of this paragraph . . . ." <sup>164</sup>

In affirming the judgment in favor of the City, the court of appeals distinguished between a subdivision in which a landowner was attempting to evade the "entire parcel" requirement of O.C.G.A. section 36-36-20(a)(2), and the situation in the case at bar, in which the ten-foot exception was made in order to allow annexation without violating the prohibition in O.C.G.A. section 36-36-4(a) on the creation of an unincorporated island.<sup>165</sup> The annexed parcels were, therefore, properly "contiguous," and the court declined to reach an absurd result that would leave the property owner without any way to have his property annexed.<sup>166</sup> In doing so, the court recognized the General Assembly's intent for municipalities to retain a wide degree of freedom

---

159. *Id.* at 751, 612 S.E.2d at 814.

160. 268 Ga. App. 13, 601 S.E.2d 403 (2004).

161. O.C.G.A. § 36-36-4(a) (2000).

162. *Steele*, 268 Ga. App. at 13-14, 601 S.E.2d at 404.

163. O.C.G.A. § 36-36-20(a)(2) (2000).

164. *Steele*, 268 Ga. App. at 15, 601 S.E.2d at 404-05 (quoting O.C.G.A. § 36-36-20(a)(2)).

165. *Id.*, 601 S.E.2d at 405.

166. *Id.*

with respect to annexations.<sup>167</sup> The court also noted that, for reasons unknown, Fayette County did not avail itself of other possible remedies, including a bona fide land use objection pursuant to O.C.G.A. section 36-36-11,<sup>168</sup> or alternative dispute resolution pursuant to O.C.G.A. section 36-70-24(4)(C).<sup>169</sup>

*B. Thirty Days Notice not Required for Valid Annexation*

In a series of three related cases,<sup>170</sup> the court of appeals affirmed the Chatham County Superior Court's summary judgment in favor of the City of Savannah (the "City") with respect to an annexation notice question.<sup>171</sup> The three appellants made two challenges to the City's annexation: (1) the annexation was improperly approved at a special, rather than regularly scheduled meeting; and (2) the City's notice of intent to annex their property was deficient because they did not receive thirty days notice prior to annexation.<sup>172</sup> Upholding the annexation as valid, the court of appeals first affirmed the trial court's finding that the annexation occurred at a regular meeting of the City in conformance with the requirement of the Open Meetings Act.<sup>173</sup> Second, the court dismissed the appellants' contention that O.C.G.A. section 36-36-92(b)<sup>174</sup> requires notice of the City's intent to annex thirty days prior to the annexation vote.<sup>175</sup> The plain language of O.C.G.A. section 36-36-92(b) states that the annexation "shall be accomplished by ordinance at a regular meeting of the municipal governing authority *within* [thirty] days after written notice of intent to annex . . . is mailed to the owner . . . ."<sup>176</sup> Although the trial court's interpretation of this code section was incorrect, the court of appeals affirmed the judgment using the "right for any reason" doctrine and held that the annexation was valid.<sup>177</sup>

---

167. *Id.* at 14, 601 S.E.2d at 404.

168. O.C.G.A. § 36-36-11 (2000).

169. *Steele*, 268 Ga. App. at 14 n.3, 601 S.E.2d at 404 n.3. See O.C.G.A. § 36-70-24(4)(c) (1998).

170. *Bradley Plywood Corp. v. Mayor & Aldermen of Savannah*, 271 Ga. App. 828, 611 S.E.2d 105 (2005).

171. *Id.* at 830, 611 S.E.2d at 107.

172. *Id.* at 828, 611 S.E.2d at 106.

173. *Id.* at 828-29, 611 S.E.2d at 106-07; O.C.G.A. § 50-14-1(d) (2002).

174. O.C.G.A. § 36-36-92(b) (2000).

175. *Mayor & Aldermen*, 271 Ga. App. at 830, 611 S.E.2d at 107.

176. *Id.* (quoting O.C.G.A. § 36-36-92(b)).

177. *Id.* at 830 n.6, 611 S.E.2d at 107.

VI. COVENANTS—PROMISSORY ESTOPPEL ALLOWS LEGALLY  
INSUFFICIENT COVENANTS TO BE ENFORCED

In *Rice v. Lost Mountain Homeowners Ass'n*,<sup>178</sup> a dispute between the Lost Mountain Homeowners Association (“LMHA”) and a pair of homeowners in the subdivision (the “Rices”) was resolved in favor of LMHA by the court of appeals, affirming the judgment of the Cobb County Superior Court.<sup>179</sup> The Rices owned property in phase three of the Lost Mountain Township subdivision, for which LMHA and its Architectural Control Committee (the “Committee”) were designated as the governing entities. Prior to the commencement of the instant case, the Rices treated LMHA and the Committee as such by paying dues, attending meetings, corresponding with LMHA, and submitting architectural plans for review by the Committee. The Rices also accepted proceeds of a land sale by LMHA, which were distributed to all subdivision residents. LMHA sued the Rices in 2002 for violating the subdivision’s restrictive covenants with respect to the height of a fence on their property.<sup>180</sup> Appealing the trial court’s order to modify their fence to comply with the covenants, the Rices contended under several theories that the LMHA, its Committee, and the subdivision’s restrictive covenants did not apply, but all theories were dismissed by the court of appeals.<sup>181</sup> First, the court held that despite the Rices’ claims to the contrary, the LMHA was the legitimate governing entity for all phases of the subdivision based on an affirmative vote by the majority of all homeowners in 1996.<sup>182</sup> Moreover, the Rices were estopped from claiming that the LMHA did not govern their property, as the Rices treated the LMHA and its Committee as the legitimate governing bodies for several years until the Committee denied permission for the Rices’ fence.<sup>183</sup> Next, the court opined that the Rices’ contention that the covenants did not run with the land was unpersuasive, as the covenants were properly recorded four years prior to the Rices’ purchase of their lot, giving them constructive notice of the restrictions applicable to their property.<sup>184</sup> Finally, the Rices’ contention that the Committee’s technical failure to notify them by certified mail of any covenant violation prohibited enforcement of the covenants was also dismissed by

---

178. 269 Ga. App. 351, 604 S.E.2d 215 (2004).

179. *Id.* at 351, 604 S.E.2d at 218.

180. *Id.* at 351-52, 604 S.E.2d at 218.

181. *Id.* at 358, 604 S.E.2d at 222.

182. *Id.* at 352, 604 S.E.2d at 218-19.

183. *Id.* at 352-53, 604 S.E.2d at 219.

184. *Id.* at 354, 604 S.E.2d at 220.

the court, which noted there was “substantial compliance” with notice requirements sufficient for dealing with covenants that run with the land.<sup>185</sup> Also noteworthy in this case, the court of appeals affirmed the award of attorney fees, given the Rices’ numerous acts of bad faith.<sup>186</sup>

---

185. *Id.* at 355, 604 S.E.2d at 220.

186. *Id.* at 355-56, 604 S.E.2d at 221.