

Zoning and Land Use Law

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This Article provides a succinct and practical analysis of the significant judicial decisions in the area of zoning and land use law handed down by Georgia appellate courts between June 1, 2005 and May 31, 2006. The cases surveyed fall primarily within five categories: (1) condemnation, (2) restrictive covenants, (3) easements, (4) zoning, and (5) miscellaneous.

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I. CONDEMNATION

During the survey period, Georgia appellate courts decided several condemnation cases, many of which did not involve novel issues. The Georgia Court of Appeals did, however, consider one case with an interesting temporary work easement issue. Furthermore, in two other cases, the Georgia Court of Appeals examined the proper legal and evidentiary basis for an award of business loss damages. Two different panels of the court, with one common judge, held business losses appropriate in the first case and precluded business losses in the second.

A. *Temporary Work Easement*

In *Georgia 400 Industrial Park v. Department of Transportation*,¹ the Georgia Department of Transportation (“DOT”) filed a petition and declaration of taking pursuant to Official Code of Georgia Annotated (“O.C.G.A.”) sections 32-3-1 to 32-3-20² to acquire certain land for transportation purposes and the right to dismantle and remove a building sitting partly on the condemned land and partly on adjacent land, as well as a temporary work easement to enter the adjacent land for purposes of removing the building. The condemnees filed a motion pursuant to O.C.G.A. section 32-3-11 to set aside, vacate, and annul the declaration of taking, arguing in part that the declaration failed to provide a sufficient description of the temporary work easement. The trial court denied the motion.³

In an interlocutory appeal, the Georgia Court of Appeals reversed the trial court with respect to the temporary work easement.⁴ The court of appeals noted that the Georgia Supreme Court has consistently held that a condemning body seeking to acquire an easement must describe the easement with the same degree of definiteness required for a land deed.⁵ A condemnee is entitled to have an accurate, definite description of the property it is to lose and nothing must be left open to the judgment or interpretation of another.⁶ The appellate court determined that the language of the temporary work easement did not provide the width of the easement or any limitation regarding a pathway to be utilized when traversing the adjacent land.⁷ Although the DOT argued

1. 274 Ga. App. 153, 616 S.E.2d 903 (2005).

2. O.C.G.A. §§ 32-3-1 to -20 (2006).

3. *Georgia 400 Industrial Park*, 274 Ga. App. at 153, 616 S.E.2d at 905.

4. *Id.* at 154, 616 S.E.2d at 905.

5. *Id.*, 616 S.E.2d at 906.

6. *Id.*

7. *Id.* at 155, 616 S.E.2d at 906.

that the description contained a temporal limitation, the appellate court held that the limitation did not convey even a hint of the extent of the physical invasion contemplated.⁸

The court of appeals also rejected the DOT's argument that the issue was moot because the building was dismantled during the pendency of the interlocutory appeal.⁹ The court noted that due process requires a condemnee to be provided a legally sufficient description of its land interest sought to be acquired and that this type of description is required for the easement to be accurately valued for purposes of just and adequate compensation.¹⁰ Based on this, the court remanded the case with instructions to the trial court requiring the DOT to amend the declaration of taking to provide an accurate and legally sufficient description of the land it traversed, along with the period of time it was used, for purposes of determining the value of the land taken or consequential damages to land not taken.¹¹

B. Business Loss Damages

The Georgia Court of Appeals decided two cases during the survey period that involved business loss damages. In one case, the appellate court determined that the business loss award for a well-established business was not too speculative and remote. However, in another case, the court held that such an award was precluded when the business was not established and the award was based on speculative evidence of business losses.

In *Carroll County v. L.J.S. Grease & Tallow*,¹² the county water authority condemned 37.959 acres of land for construction of a reservoir. A special master awarded the condemnee \$140,000 as the market value of the property taken. The condemnee appealed the award and demanded a jury trial. By consent of the parties, the case was heard by a court-appointed arbitrator with further right of appeal. The arbitrator awarded the condemnee \$265,000 as the value of the land and \$1,250,000 for business loss damages. The water authority appealed, arguing that the business loss damages were too speculative and remote.¹³

The condemnee had operated a long-established grease rendering plant on the condemned land. Grease rendering plants perform a sanitation service for restaurants by collecting used grease for a pickup fee and

8. *Id.*

9. *Id.* at 156, 616 S.E.2d at 907.

10. *Id.* at 157, 616 S.E.2d at 908.

11. *Id.* at 158, 616 S.E.2d at 908.

12. 274 Ga. App. 353, 617 S.E.2d 612 (2005).

13. *Id.* at 353, 617 S.E.2d at 614.

then converting the grease into an end product, which is sold for use in animal feed, cosmetics, and lubricants. When the water authority announced its intent to construct the reservoir, the condemnee began losing its customers due to the threatened closure of the plant. Therefore, the condemnee began winding down plant operations until its federal permits expired. Subsequently, the water authority filed its petition to condemn approximately one-half of the condemnee's acreage.¹⁴

The water authority challenged the business loss award on the ground that the condemnee had ceased operations more than a year before the condemnation and that the award violated the general rule that business losses occurring before the date of taking are not recoverable.¹⁵ The Georgia Court of Appeals, however, rejected this argument on the ground that when the "imminency of a condemnation forces an established business to close before the date of condemnation, the absence of a business in operation on the property on the date of taking does not automatically end all inquiry into the relevancy of business loss evidence."¹⁶

The water authority also challenged the business loss award on the ground that the condemnee failed to relocate the grease rendering plant.¹⁷ The appellate court rejected this argument as well, holding that the evidence showed that the condemnee found an alternate plant site, but that the water authority refused to help relocate the plant because the estimated cost of relocation was in excess of two million dollars.¹⁸ Accordingly, the appellate court concluded that the arbitrator was authorized to find that the water authority bore responsibility for not relocating the plant.¹⁹ Recognizing that a condemnee may be required to relocate a business to mitigate business loss damages, the court held that where the estimated relocation costs exceed the value of the business, as in this case, the condemnee cannot be charged with a failure to mitigate damages by not relocating.²⁰

The water authority also challenged the amount of the business loss award as remote and speculative.²¹ The court of appeals noted that a condemnee may recover business losses as a separate item if it operated

14. *Id.* at 353-54, 617 S.E.2d at 614-15.

15. *Id.* at 354, 617 S.E.2d at 615.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

an established business on the property, if the loss is not remote or speculative, and if the property is unique.²² First, the court held that the condemnee's grease rendering plant was an established business.²³ Next, the court held that "[b]ased on evidence showing that grease rendering plants are not generally bought and sold on the open market, the arbitrator was authorized to find the property unique."²⁴

Finally, the court of appeals determined that the business loss damages were not too speculative or remote to warrant recovery.²⁵ The court first reviewed Georgia Supreme Court authority that allows a condemnee to recover for the destruction of an established business as a separate item of recovery in addition to the value of the underlying real estate.²⁶ The court then noted that the general rule, "that lost profits are too speculative to authorize a direct recovery, is not necessarily a bar to the admission of evidence of lost profits to aid in establishing the value of a business."²⁷ After reviewing in detail the business valuation evidence, which included the condemnee's total capital investment in the plant, an appraiser's determination of the plant's asset-based value, and an appraiser's determination of the plant's income-based value, the court held that the business loss award was well within the range of the evidence presented.²⁸ Accordingly, the court of appeals affirmed the condemnation award.²⁹

In *Georgia Power Co. v. Jones*,³⁰ however, the court of appeals held that the condemnees were precluded from seeking business loss damages separately from the lost value to their land, and that the trial court abused its discretion in admitting speculative evidence of business losses.³¹ In 1997 the Joneses purchased mountain property, which had space for a lodge, six cottages, nature trails, and a pond. In 1999 the Joneses built a road to the property and began constructing a lodge. In the spring of 2001, Georgia Power notified the Joneses that it intended to seek an easement across their property for a power line with tall towers. Because the Joneses were concerned about the negative impact of the power line on their business, they delayed the development of the other planned improvements. They continued construction of the lodge,

22. *Id.*

23. *Id.* at 355, 617 S.E.2d at 615.

24. *Id.* at 356, 617 S.E.2d at 616.

25. *Id.*

26. *Id.* (citing *Bowers v. Fulton County*, 221 Ga. 731, 739, 146 S.E.2d 884, 891 (1966)).

27. *Id.*

28. *Id.* at 356-57, 617 S.E.2d at 617.

29. *Id.* at 358, 617 S.E.2d at 617.

30. 277 Ga. App. 332, 626 S.E.2d 554 (2006).

31. *Id.* at 332, 626 S.E.2d at 555.

which was substantially complete in the fall of 2002. In November 2002 Georgia Power filed a condemnation action for a power line easement approximately 1000 feet from the back of the lodge.³²

A special master awarded the Joneses \$26,000 as the actual fair market value of the condemned property and \$5880 for consequential damages.³³ The Joneses filed an exception to the special master's award and a jury trial followed. The Joneses claimed that the power lines completely destroyed their plans for a bed and breakfast inn, and they sought damages for the loss of the business separately from, and in addition to, the damages for the value of the property taken. At trial, Georgia Power objected to evidence of the Joneses' business losses on the ground that the Joneses were not ready to open the business and had not yet earned any income from the business.³⁴ The trial court overruled the objections and allowed the Joneses to present evidence of the value of the bed and breakfast business "as it existed at the time of the taking."³⁵

Despite the fact that there were only four rooms potentially available for customers at the time of the taking, Mrs. Jones testified that her ballpark estimate of the potential gross income for the bed and breakfast was \$60,000 per month, which was based on future plans to build twenty-four rooms and a projected 50% occupancy rate for those rooms at \$150 per night. Mrs. Jones's testimony also included an estimate of \$3000 per month in income from hosting weddings. Moreover, she did not testify about potential expenses or the value of the business at the time of the taking. The testimony of other witnesses, such as a bed and breakfast consultant, was also based on hypothetical figures and estimates. Nonetheless, the jury awarded the Joneses \$1,003,500 in damages. Georgia Power filed a motion for new trial, which the trial court denied, and then Georgia Power appealed.³⁶

On appeal, Georgia Power argued that the trial court erred in admitting speculative evidence regarding business losses for the bed and breakfast when the business was not yet in operation or otherwise "established."³⁷ Additionally, Georgia Power asserted that even if it is not necessary to have an established business to recover business losses, the Joneses' evidence of potential future earnings was based on assumptions regarding occupancy rates, possible special event bookings,

32. *Id.* at 332-33, 626 S.E.2d at 555-56.

33. *Id.* at 332, 626 S.E.2d at 555.

34. *Id.* at 333, 626 S.E.2d at 556.

35. *Id.*

36. *Id.* at 333-34, 626 S.E.2d at 556.

37. *Id.* at 334, 626 S.E.2d at 556.

and other factors that were too speculative to support the jury's verdict.³⁸ The Georgia Court of Appeals agreed.³⁹

The appellate court started with the general rule that a condemnee may recover business losses as a separate item if it operated an established business on the property, if the loss is not remote or speculative, and if the property is unique.⁴⁰ However, the court then noted that a condemnee may not recover separate business loss damages for projected profits from an unexecuted business plan.⁴¹ After a detailed review of the evidence and case law, the court of appeals held that the Joneses failed to demonstrate that they had an established business at the time of the taking and that the Joneses' evidence of potential future income was too speculative to support an award for loss of business.⁴²

II. RESTRICTIVE COVENANTS

A. *Amendment of Restrictive Covenant*

In *Brockway v. Harkleroad*,⁴³ the court considered a subdivision developed in 1987 as a 112-lot residential community.⁴⁴ Each lot was encumbered with a "Declaration of Covenants and Restrictions," which was recorded in 1988 and applied uniformly to each lot.⁴⁵ The declaration stated that the covenants and restrictions ran with the land for twenty years and:

thereafter shall be automatically extended for successive ten-year periods unless seventy-five percent of the lot owners terminate the duration of the covenants and restrictions prior to the commencement of any such ten-year period "These covenants and restrictions may be amended during the first twenty (20) years from the date of this Declaration, by an instrument signed by not less than ninety percent (90%) of the Lot Owners and thereafter by an instrument signed by not less than seventy-five (75%) of the Lot Owners." ⁴⁶

38. *Id.*, 626 S.E.2d at 556-57.

39. *Id.*, 626 S.E.2d at 557.

40. *Id.* at 335, 626 S.E.2d at 557 (citing *Davis Co. v. Dep't of Transp.*, 262 Ga. App. 138, 139, 584 S.E.2d 705, 707 (2003)).

41. *Id.*

42. *Id.* at 337, 626 S.E.2d at 558.

43. 273 Ga. App. 339, 615 S.E.2d 182 (2005).

44. *Id.* at 339, 615 S.E.2d at 183.

45. *Id.*

46. *Id.* at 339-40, 615 S.E.2d at 183-84.

The subdivision failed; after twelve years, only eighteen homes had been built and the developers had abandoned the project. Subsequently, investors purchased all but three lots in the subdivision, comprising more than ninety percent of the landowners. Those landowners recorded an instrument amending the duration provisions of the declaration to provide that instead of running for twenty years—from 1988 to 2008—the covenants and restrictions ran for fifteen years through May 30, 2003. One homeowner in the subdivision opposed the amendment. The investors filed an action for declaratory judgment. The trial court granted summary judgment to the investors and the hold-out landowner appealed.⁴⁷ The court of appeals affirmed the trial court.⁴⁸

The declaration expressly provided that it could be amended during the initial 20-year period by the agreement of at least 90 percent of the lot owners. Since the declaration was recorded, all those buying lots in the subdivision were charged with notice of and were bound by the amendment provision along with all other provisions in the declaration Accordingly, the investors, acting as more than 90 percent of the lot owners, were entitled to enforce the clear written provisions of the declaration binding all the lot owners, and to use the amendment provision in any manner not contrary to law or public policy.⁴⁹

B. Challenge to Payment of Homeowners Association Fees

In *Croft v. Fairfield Plantation Property Owners Ass'n*,⁵⁰ the plaintiff purchased a total of seven residential lots in the defendant subdivision at a tax sale that resulted from unpaid property taxes. The lots were subject to restrictive covenants requiring payment of homeowners' association assessment for maintenance of common areas.⁵¹ One provided that:

Every person upon acquiring title, legal or equitable, to any lot in the Subdivision[] shall become a member of the [Fairfield Plantation] Property Owners Association, Inc., a Georgia non-profit corporation, herein referred to as "Association" and as long as he is the owner of any such lot, he must remain a member of the Association. Such membership is not intended to apply to those persons who hold an interest in any lot merely as security for the performance of an obligation to pay money, e.g., mortgages, deeds of trust, or real estate

47. *Id.* at 340, 615 S.E.2d at 184.

48. *Id.* at 342, 615 S.E.2d at 185.

49. *Id.* at 340-41, 615 S.E.2d at 184 (citations omitted).

50. 276 Ga. App. 311, 623 S.E.2d 531 (2005).

51. *Id.* at 312, 623 S.E.2d at 532.

contract purchases. However, if such a person should realize upon his security and become the real owner of a lot, he will then be subject to all the requirements and limitations imposed in these Restrictions on owners of lots within the Subdivision and on members of the Association, including those provisions with respect to payment of annual charges.⁵²

The plaintiff refused to pay the annual charges. When the homeowners association later hired a collection agency and filed liens against the properties, the plaintiff filed suit against the association and others. The association counterclaimed for unpaid assessments, late charges, interest, and attorney fees. The trial court granted summary judgment to the defendant on the plaintiff's claims and granted summary judgment to the defendant on its counterclaims.⁵³

On appeal, the plaintiff maintained that the title he acquired in the tax sale was insufficient to trigger membership in the association and an obligation to pay annual assessments.⁵⁴

In support of this argument, [the plaintiff] points to the statutory right of redemption granted to his predecessors in title. [The relevant statute] provides that title can be restored to specified predecessors through payment of the statutory amount of redemption within 12 months from the date of the sale, or at any time before the right to redeem is foreclosed by the tax sale purchaser giving of the notice under [the relevant statute]. Another mechanism by which the purchaser at a tax sale can cut off the right of redemption is through adverse possession of the property for the requisite number of years after the tax deed is recorded. [The plaintiff] argues that since he did not exercise his right to cut off the right of redemption through either (1) the giving of notice 12 months after the tax sale; or (2) adversely possessing the property, he does not have fee simple title and is not obligated to pay the Association's assessments.⁵⁵

The court rejected this argument, determining that the plaintiff's interest was sufficient to render the purchaser liable for homeowners' association assessments.⁵⁶ The court noted that "[a] contrary holding would result in a situation in which a tax deed purchaser could, by inaction, keep the redemption period alive indefinitely, reap the benefit

52. *Id.*

53. *Id.* at 312-13, 623 S.E.2d at 532-33.

54. *Id.* at 313, 623 S.E.2d at 533.

55. *Id.*

56. *Id.* at 314, 623 S.E.2d at 533.

of property value increases, and avoid the obligation to pay maintenance expenses which increase the value of the property.”⁵⁷

III. EASEMENTS

A. *A Plat's Notations Cannot Vary or Expand the Access Rights Conveyed in a Deed*

In *Department of Transportation v. Meadow Trace, Inc.*,⁵⁸ the Georgia Supreme Court affirmed the Georgia Court of Appeals decision to affirm the trial court's grant of partial summary judgment to Meadow Trace.⁵⁹ Meadow Trace's predecessor in interest conveyed tracts of land to the Georgia Department of Transportation (“DOT”) in 1966, including access rights to Interstate 985 (“I-985”). The deed described the access rights by metes and bounds and noted the plat of the property. Subsequently, the DOT filed an action to condemn portions of Meadow Trace's property, located at the intersection of I-985 and U.S. Highway 129 in Hall County. During the condemnation action, the DOT contended that when Meadow Trace's predecessor in interest conveyed property to the DOT in 1966 for the construction of I-985, notations on the plat incorporated into the deed also conveyed the access rights to Highway 129. At the same time, Meadow Trace contended the 1966 conveyance was limited to the metes and bounds described on the deed and did not include the access rights from Meadow Trace's remaining lands to Highway 129.⁶⁰

The Georgia Supreme Court applied the cardinal rule of construction, which is to ascertain the intention of the parties.⁶¹ It affirmed the Georgia Court of Appeals, holding that the 1966 deed only conveyed access rights to I-985, not Highway 129.⁶² In addition, the Georgia Supreme Court cited *Wooten v. Solomon*⁶³ and *Johnson v. Willingham*⁶⁴ for support in holding that a plat's notations incorporated into a deed cannot vary or expand the access rights conveyed on a deed.⁶⁵ Independent of the cardinal rule and case law, the Georgia Supreme Court also concluded that the plat itself did not support the DOT's interpretation regarding the access rights to Highway 129 because the

57. *Id.*

58. 280 Ga. 720, 631 S.E.2d 359 (2006).

59. *Id.* at 723, 631 S.E.2d at 362.

60. *Id.* at 720-21, 631 S.E.2d at 360.

61. *Id.* at 721, 631 S.E.2d at 361.

62. *Id.* at 723, 631 S.E.2d at 362.

63. 139 Ga. 433, 77 S.E. 375 (1913).

64. 212 Ga. 310, 92 S.E.2d 1 (1956).

65. *Meadow Trace*, 280 Ga. at 722, 631 S.E.2d at 361-62.

specific notation on the plat is on the border between Meadow Trace's property and a tract the plat shows was to be acquired pursuant to a different project.⁶⁶

B. *Scope of Easements*

In *Municipal Electric Authority v. Gold-Arrow Farms*,⁶⁷ the Georgia Court of Appeals affirmed in part, reversed in part, and remanded in part the trial court's judgment that the easements at issue limit the use of a fiber optic line to internal communications by the appellants and that the general telecommunications use of the line by the appellants exceeds the scope of the easements.⁶⁸

The appellees sought class action certification to represent similarly-situated landowners, an award of actual and punitive damages based on claims for trespass on the easements, breach of easement agreements, malicious interference with the easements, unjust enrichment, estoppel, and breach of duty of good faith and fair dealing. They also sought injunctive and declaratory relief. Georgia Power possessed easement rights to construct and operate electric transmission, distribution, and communication lines across the appellees' property. The owners of the land traversed by the easements, including Gold-Arrow Farms, filed action against the appellants asking the trial court to declare that the easements limited the use of the fiber optic line to internal communications by the appellants related to the transmission and distribution of electricity, and that the use of the easement for general telecommunications exceeded the scope of the easement.⁶⁹ The appellants contended the easement to construct electric communication lines also granted the right to construct lines over which communications are transmitted.⁷⁰

The Georgia Court of Appeals reversed the trial court's holding that the easements prohibited use for general telecommunications.⁷¹ The Georgia Court of Appeals agreed with the trial court that the easements granting the right to construct electric transmission, distribution, and communication lines also granted the right to construct electric transmission lines, electric distribution lines, and electric communication lines.⁷² Using the cardinal rule of construction,⁷³ the Georgia Court

66. *Id.* at 722-23, 631 S.E.2d at 362.

67. 276 Ga. App. 862, 625 S.E.2d 57 (2005).

68. *Id.* at 862, 872, 625 S.E.2d at 58, 65.

69. *Id.* at 862-63, 625 S.E.2d at 58-59.

70. *Id.* at 864, 625 S.E.2d at 60.

71. *Id.* at 867, 625 S.E.2d at 61.

72. *Id.*, 625 S.E.2d at 62.

73. *Id.* at 866, 625 S.E.2d at 61.

of Appeals ascertained that the clear and unambiguous intent of the parties was to grant easements for electric communication lines without any limit prohibiting use for general telecommunications,⁷⁴ and that the trial court erroneously considered matters outside the easements to find that the parties intended to exclude a general telecommunications use.⁷⁵ The Georgia Court of Appeals also held that the use of the fiber optic communication line instead of an electric communication line is a change in the manner or degree of the granted use to accommodate a new technology and is within the scope of the easements.⁷⁶ Based on its holding that the easements did permit a general telecommunications use, the Georgia Court of Appeals remanded to the trial court to determine whether the exclusive easements in gross were divisible and whether the sale, lease, or license of communication capacity to third parties was done within the scope of the easements.⁷⁷

C. *Use and Enjoyment of Recreation Easement*

In *Savannah Jaycees Foundation v. Gottlieb*,⁷⁸ the Georgia Court of Appeals affirmed the trial court's judgment that parking on a property was necessary for the grantee's use of a recreation easement but modified the trial court's order to allow parking anywhere on the property as overly broad.⁷⁹ Subdivision residents and community organizations used a park in the Groveland Subdivision Part Three to which the Savannah Jaycees Foundation acquired title in 1986. Since at least 1963 the subdivision residents and members of the adjacent synagogue parked their cars on the northern part of the property. Later, an assisted living facility was built on the western boundary of the property, outside the subdivision. After the facility opened, its residents, employees, and visitors parked their vehicles on the property. The Jaycees sent the facility a letter asking it not to use the property as overflow parking and notified it of the illegal alterations the facility made to the property. When the facility ignored the letter, the Jaycees began constructing an eight-foot wooden fence along its western boundary with the facility. In addition, the Jaycees placed the framing for a fence along the edge of the property facing the public road. The

74. *Id.* at 867, 625 S.E.2d at 61.

75. *Id.* at 869, 625 S.E.2d at 63.

76. *Id.*

77. *Id.* at 870, 625 S.E.2d at 63-64.

78. 273 Ga. App. 374, 615 S.E.2d 226 (2005).

79. *Id.* at 377, 615 S.E.2d at 229.

appellees filed a declaratory judgment action against the Jaycees because the Jaycees began erecting the fence.⁸⁰

The trial court held that the appellees were entitled to free and open access to the property at all times, including automobile parking.⁸¹ The Georgia Court of Appeals affirmed the trial court's holding that parking was necessary and reasonable for the use of the recreational easement, but it modified the trial court's holding by limiting the parking rights of residents and synagogue members because free and open access to the property was unnecessary use of the easement.⁸² The Georgia Court of Appeals noted that the residents and synagogue members had been parking on the property incident to their recreational use of the property for more than forty years, the parking on the adjacent public street is limited, the Jaycees never objected to the residents or synagogue members parking before their dispute with the assisted living facility, and the Jaycees also parked on the property during their weekly meetings.⁸³

The Georgia Court of Appeals affirmed the trial court's finding that the construction of the eight-foot fence on the western boundary of the property did not violate an easement of light and air in the property.⁸⁴ In affirming the trial court's finding, the Georgia Court of Appeals applied the rule that unless an easement is exclusive, the grantor may construct improvements on his land that do not substantially interfere with the easement previously granted.⁸⁵ The Georgia Court of Appeals also cited the rule that "[t]he right to the free passage of light and air is subject to the superior right of the adjoining landowner to make use of his property in good faith."⁸⁶ Using the aforementioned rules, the Georgia Court of Appeals determined that the fence did not inhibit the subdivision residents' access to the property and the fence was not built out of malevolent intent; rather, the Jaycees intended to use the fence to keep out unauthorized users.⁸⁷

80. *Id.* at 374-75, 615 S.E.2d at 228. The appellees claimed that the Jaycees threatened to tow the automobiles of the subdivision residents. *Id.* at 374, 615 S.E.2d at 227.

81. *Id.* at 377, 615 S.E.2d at 229.

82. *Id.* at 377-78, 615 S.E.2d at 230 (citing *Folk v. Meyerhardt Lodge*, 218 Ga. 248, 249, 127 S.E.2d 298, 300 (1962)).

83. *Id.* at 377, 615 S.E.2d at 229.

84. *Id.* at 379, 615 S.E.2d at 230-31.

85. *Id.* at 378-79, 615 S.E.2d at 230 (quoting *Upson v. Stafford*, 205 Ga. App. 615, 616, 422 S.E.2d 882, 884 (1992)).

86. *Id.* at 379, 615 S.E.2d at 231 (quoting *S.A. Lynch Corp. v. Stone*, 211 Ga. 516, 522, 87 S.E.2d 57, 62 (1955)).

87. *Id.*

D. Requirements for Implied Easement

In *Eardley v. McGreevey*,⁸⁸ a quiet title proceeding, a special master determined that an implied easement had arisen in favor of Eardley with respect to a gravel drive between the Eardley tract and the McGreevey tract. The trial court then reversed the decision of the special master.⁸⁹ The Georgia Court of Appeals affirmed the trial court's order denying the existence of an implied easement in favor of Eardley over McGreevey's property because the gravel drive was neither necessary for access to the Eardley property nor was the plat showing the drive recorded or referenced in Eardley's deed.⁹⁰

In 1989 a one-acre tract fronting 150 feet on Jett Road was conveyed to McGreevey. In 1997 McGreevey conveyed to Hutchins and Cole a portion of his property fronting one hundred feet on Jett Road. The deed conveying the property to Hutchins and Cole did not reference a recorded plat and did not mention a gravel drive or any type of easement over the portion retained by McGreevey. In 1998 Eardley purchased her property from Hutchins and Cole and claimed to have an unrecorded and unreferenced plat showing the gravel drive to Jett Road.⁹¹

The Georgia Court of Appeals stated that an implied easement may arise when the owner of land conveys a portion of that land to another, and the only access to a public road from the conveyed property is over that portion of the property retained by the grantor.⁹² Applying that rule, the court of appeals determined that the Eardley property borders a public street known as Jett Road and that Eardley could access Jett Road from her property without unreasonable difficulty.⁹³ Further, access to and from her property across the McGreevey property is unnecessary and convenience is not a sufficient reason to establish an implied easement.⁹⁴

E. Merger of Easement

In *Tew v. Hinkle*,⁹⁵ the Georgia Court of Appeals affirmed the trial court's dissolution of the temporary restraining order granted to Tew

88. 279 Ga. 562, 615 S.E.2d 744 (2005).

89. *Id.* at 563, 615 S.E.2d at 745.

90. *Id.* at 563-64, 615 S.E.2d at 745-46.

91. *Id.* at 562-63, 615 S.E.2d at 744-45.

92. *Id.* at 563, 615 S.E.2d at 745.

93. *Id.*

94. *Id.*

95. 273 Ga. App. 12, 614 S.E.2d 160 (2005).

and dismissal of the complaint for injunctive relief.⁹⁶ Tew's mother deeded Tew Tract 1 of property that had been subdivided and owned by Tew's family. In that same warranty deed, her mother conveyed to Tew an easement across Tract 5 for the purpose of ingress and egress to Tract 1. Three years later, Tew's mother conveyed Tract 5 to Tew and her siblings. Five years later, Tew and her siblings sold Tract 5 to Hinkle. Hinkle's purchase agreement did not reference the easement, and the warranty deed conveying the property to Hinkle did not reserve any interest in Tract 5.⁹⁷

The Georgia Court of Appeals cited the rule that when there is a union of absolute title to and possession of dominant and servient estates in the same person, it operates to extinguish any existing easement.⁹⁸ Once Tew became a tenant in common with other owners of Tract 5, her easement across it was extinguished.⁹⁹ The court of appeals determined that Hinkle had no constructive knowledge of the easement because it ceased to exist when Tew became an owner of Tract 5.¹⁰⁰ The court also determined that Tew lost her easement because it was not mentioned in the purchase contract or warranty deed conveying the property to Hinkle.¹⁰¹

F. Encroachments upon Easement

In *Daiss v. Bennett*,¹⁰² the Georgia Court of Appeals affirmed the trial court's conclusion that neither the Bennetts nor Daiss had a right to encroach upon the shared easement.¹⁰³ The Bennetts, Daiss, and others had been using Pamela Drive, a private turn-around, for more than thirty-seven years to access their property and the Moon River boat launch.¹⁰⁴

The trial court ordered Daiss to remove his garage from the turn-around because it substantially interfered with the turn-around's purpose. The trial court did not order the removal of Daiss's fence, even though it determined the fence encroached into the private drive, because the fence did not substantially interfere with the enjoyment of the easement.¹⁰⁵

96. *Id.* at 12, 614 S.E.2d at 162.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 13, 614 S.E.2d at 162.

101. *Id.* at 13-14, 614 S.E.2d at 163 (citing *Boyd v. Hand*, 65 Ga. 468, 471 (1880)).

102. 273 Ga. App. 784, 616 S.E.2d 114 (2005).

103. *Id.* at 784-85, 616 S.E.2d at 115.

104. *Id.* at 785, 616 S.E.2d at 115.

105. *Id.* at 786, 616 S.E.2d at 115-16.

The Georgia Court of Appeals rejected Daiss's assertion that Margaret Bennett gave him permission to build the garage and that his permissive use ripened into a prescriptive easement.¹⁰⁶ First, the court of appeals determined that others besides Ms. Bennett may enjoin a co-owner from erecting obstructions on the street.¹⁰⁷ Second, Daiss had no claim of prescriptive or adverse possession because he had not notified the owner that he changed his position from licensee to prescriber.¹⁰⁸ Third, even if the building of the garage could have been considered sufficient notice to the easement holders, the garage had been built only three years prior, which is an insufficient period of use for a claim of prescriptive use to arise.¹⁰⁹

The Georgia Court of Appeals affirmed the trial court's refusal to order removal of Daiss's fence.¹¹⁰ The Bennetts argued that Daiss's fence reduced the width of Pamela Drive by fifteen percent and impeded traffic flow; however, the court determined that the Bennetts failed to demonstrate as a matter of law how the Daiss's fence substantially or materially interfered with Bennett's easement or how the fence adversely affected the easement.¹¹¹

IV. ZONING

A. *Appeal of Administrative Zoning Decision to Supreme Court Discretionary*

In *Ladzinske v. Allen*,¹¹² an academy was operating a charter school in DeKalb County. Beginning in 2001, the county considered the charter school exempt from the local zoning ordinance, granting all necessary building permits and certificates of occupancy. Several years later, the county issued a permit for the construction of a new building. Six months later, a neighbor objected to the construction and the county placed construction on hold while conducting an investigation.¹¹³ Ultimately the county "affirmed that the charter school is exempt from the zoning ordinance, that the new building constitutes a valid accessory

106. *Id.*, 616 S.E.2d at 116.

107. *Id.* at 786-87, 616 S.E.2d at 116.

108. *Id.* at 787, 616 S.E.2d at 116.

109. *Id.* (citing O.C.G.A. § 44-9-1 (2002) (describing the seven-year requirement for prescriptive use)).

110. *Id.*, 616 S.E.2d at 117.

111. *Id.*, 616 S.E.2d at 116-17 (citing *Upson v. Stafford*, 205 Ga. App. 615, 617, 422 S.E.2d 882, 884 (1992)).

112. 280 Ga. 264, 626 S.E.2d 83 (2006).

113. *Id.* at 264, 626 S.E.2d at 84.

use to the charter school's operations, and that the building permit was properly issued."¹¹⁴ Three months after this decision and after construction resumed, the neighbor brought suit against the school and the county for mandamus and injunctive and declaratory relief, among other claims.¹¹⁵

The superior court dismissed the neighbor's claims for mandamus and declaratory relief on the ground of his failure to exhaust administrative remedies. The court noted that the neighbor failed to appeal from the issuance of the building permit to the county zoning board of appeals. Further, the superior court denied an interlocutory injunction due to laches and an extreme unlikelihood of success on the merits. The superior court also denied the claim because the school had spent more than \$6.4 million on the project, and thus the school's rights to the building permit had vested. The neighbor then filed a notice of direct appeal.¹¹⁶

The Georgia Supreme Court conceded that the matter was within its jurisdiction.¹¹⁷ However, the court decided it must determine whether the neighbor was entitled to a direct appeal or must file an application to appeal from the mandamus action.¹¹⁸ Ultimately, the court concluded that the neighbor was required to obtain permission to file the appeal, and because he had not, the court lacked jurisdiction to hear the matter: "Our holding is simply that the underlying subject matter concerns the review of an administrative zoning decision and, therefore, we have jurisdiction to address the merits only in the context of a discretionary appeal."¹¹⁹

B. Homeowner Lacks Standing Without Showing Special Damages

In *Massey v. Butts County*,¹²⁰ Reid owned property in Butts County. He began building a barn on the property without first obtaining a building permit. After learning that a permit was required, he sought and received one.¹²¹

Massey owned property near Reid's. He challenged the issuance of the building permit by filing an appeal to the Butts County Board of Zoning Appeals ("the Board"). The Board denied the appeal and Massey

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 264-65, 626 S.E.2d at 84-85.

119. *Id.* at 266-67, 626 S.E.2d at 86.

120. 275 Ga. App. 478, 621 S.E.2d 479 (2005), *cert. granted.*

121. *Id.* at 478, 621 S.E.2d at 479.

appealed to superior court. In his petition, he alleged that the barn violated certain set-back provisions and asked that the building permit be declared null and void.¹²²

The superior court dismissed the appeal, holding that Massey lacked standing because he had not demonstrated that he sustained special damages.¹²³ Specifically, Massey pointed to a line of Georgia cases that allowed a property owner to seek an injunction against the use of property in its vicinity on the grounds that the proposed use violated the relevant zoning ordinance.¹²⁴ The appellate court distinguished that situation from the one at hand:

“By definition, an injunction provides relief from *future* wrongful conduct: the remedy by injunction is to prevent, prohibit or protect from future wrongs and does not afford a remedy for what is past.” Here, Massey does not actually seek an injunction—the permit has already been granted and the barn is actually built. Rather, Massey seeks the affirmative relief of having the building permit rescinded and the barn destroyed. In other words, Massey is essentially challenging the government’s decision to grant Reid the building permit [Because] Massey does not contend—much less demonstrate—that he sustained special damages[,] . . . he lacks standing, and the trial court properly dismissed his petition.¹²⁵

C. Settlement Agreement between County Board of Commissioners and Landowner Violates Zoning Procedures Law

In *Buckner v. Douglas County*,¹²⁶ a real estate developer entered into an agreement to purchase sixty-eight acres in Douglas County. At that time, the Douglas County Zoning Ordinance allowed the developer to build single-family homes on one-acre lots. The developer’s contract to purchase the sixty-eight acres was contingent upon his ability to obtain the necessary building permits. After entering into the purchase contract, the developer met with Douglas County’s director of planning and zoning, who assured the developer that his conceptual development plan satisfied the county’s existing zoning ordinance.¹²⁷

Douglas County later amended its zoning ordinance to create various watershed protection districts, which included the developer’s property.

122. *Id.*

123. *Id.*

124. *Id.* at 479, 621 S.E.2d at 480.

125. *Id.* at 479, 480, 621 S.E.2d at 480 (quoting *Catrett v. Landmark Dodge*, 253 Ga. App. 639, 644, 560 S.E.2d 101, 106 (2002)).

126. 273 Ga. App. 765, 615 S.E.2d 850 (2005).

127. *Id.* at 765, 615 S.E.2d at 851.

The amendment now required a minimum three-acre lot size for residential developments, including that owned by the developer. After learning of the amendment, the developer contacted the planning and zoning director and was told that he would be “grandfathered” into the prior zoning ordinance. The developer subsequently met with the planning and zoning director, the chairman of the Douglas County Board of Commissioners (the “Board”), and one other board member to discuss his development plans. After the meeting, the developer sent a letter to the director and chairman documenting his claim that he had acquired a vested right to develop the tract in conforming with the zoning regulations in effect prior to May 2002.¹²⁸ Three board members responded to that letter, stating that:

the Board had carefully reviewed Buckner’s documentation and his revised development plans (that incorporated upgrades not required under regulations then or previously in effect). The letter advised Buckner that, in view of his “substantial documentation” of his claim of vested rights as well as his offer of community upgrades, the Board had agreed as an offer of compromise and settlement of threatened litigation to allow him to proceed with the modified development plans.¹²⁹

The Board placed certain conditions on the development to which the developer agreed in writing. Later, however, the developer was told that he would not be issued building permits because his proposed development plan specified one-acre lots, which violated the three-acre minimum specified in the amendment.¹³⁰

The developer brought suit, seeking a writ of mandamus compelling the county to issue permits authorizing him to develop his property under the prior zoning classification. In support, he claimed that he had acquired a vested right to do so by spending substantial sums of money in reliance on assurances by county officials that such permits would be issued and that the board had already agreed to do so by settling his threatened litigation. At trial, the developer abandoned his claim of vested rights and instead sought enforcement of the Board’s letter as a binding litigation settlement agreement.¹³¹ The trial court concluded that the Board’s attempt to allow the developer to develop the property under the previous zoning ordinance was a nullity because the Board failed to comply with the requirement of the Zoning Procedures Law

128. *Id.* at 765-66, 615 S.E.2d at 852.

129. *Id.* at 766, 615 S.E.2d at 852.

130. *Id.*

131. *Id.*

("ZPL")¹³² for notice and a hearing before a local government takes action resulting in a zoning decision.¹³³ On review, the court of appeals agreed.¹³⁴

The Board's . . . letter to Buckner, therefore, amounted to an agreement to amend the zoning ordinance to authorize [the developer] to develop the property in conformity with the prior zoning classification on certain conditions. Even though that did not constitute a zoning ordinance amendment changing the text of the county zoning ordinance . . . it constituted an amendment to the zoning ordinance rezoning (or perhaps, re-rezoning) the property from one classification to another The grant of such a request, even if motivated by a claim of vested property rights by Buckner, still resulted in an amendment to the zoning ordinance that invoked the notice and hearing requirements of the ZPL.¹³⁵

D. Standard of Review on Appeal for Denial of a Building Permit

In *Northside Corp. v. City of Atlanta*,¹³⁶ the plaintiff had owned a package store since 1976. In 2003 the plaintiff applied to the City of Atlanta for a building permit to add floor space to the back of the store. The city denied the permit and the plaintiff appealed to the City of Atlanta Board of Zoning Adjustment, which affirmed the director's denial. The plaintiff then appealed to the superior court.¹³⁷ The superior court "ruled that its own function was not to interpret [the relevant] code section, but to determine only if the zoning board's interpretation was reasonable. The court concluded that it must defer to the board's interpretation of the code section because that interpretation was not arbitrary or capricious."¹³⁸ The plaintiff then sought discretionary review from the court of appeals.¹³⁹

The court of appeals reversed the superior court's decision.¹⁴⁰ The court held that the superior court did not apply the appropriate standard of review:

The superior court here had an obligation to construe [the zoning code section] as a matter of law. "The construction of a zoning ordinance,

132. O.C.G.A. §§ 36-66-1 to -6 (2005).

133. *Buckner*, 273 Ga. App. at 766, 615 S.E.2d at 852.

134. *Id.* at 768, 615 S.E.2d at 853.

135. *Id.*

136. 275 Ga. App. 30, 619 S.E.2d 691 (2005).

137. *Id.* at 30, 619 S.E.2d at 692.

138. *Id.*

139. *Id.*

140. *Id.*

under the facts, is a question of law for the courts, and in construing it the cardinal rule is to ascertain and give effect to the intention of the law making body.” The superior court erred in abdicating its responsibility to interpret the applicable zoning ordinance.¹⁴¹

Strictly construing the ordinance at issue in favor of the plaintiff, the court of appeals then upheld the plaintiff’s interpretation.¹⁴²

V. MISCELLANEOUS

This section mentions five cases that share little, thematically speaking, with the previously discussed topics, but the cases cover issues still within the broad spectrum of zoning and land use law.

A. *Open Records Act*

The Georgia Court of Appeals heard *Central Atlanta Progress, Inc. v. Baker* and *Metropolitan Atlanta Chamber of Commerce, Inc. v. Baker*¹⁴³ together. The Atlanta Journal-Constitution (“AJC”) requested documents under the Open Records Act (“ORA”)¹⁴⁴ from Central Atlanta Progress, Inc. (“CAP”) on its bid for the NASCAR Hall of Fame and from the Metropolitan Atlanta Chamber of Commerce, Inc. (“MACOC”) on its bid for the 2009 Super Bowl game. Both requests were refused by the companies, which denied that they were subject to the ORA as private corporations.¹⁴⁵ At the request of the AJC, the attorney general reviewed written arguments and issued an opinion stating that “in light of the significant involvement of public officials, public employees, public resources and public funds in the matters, the bids were subject to the Open Records Act and should be disclosed.”¹⁴⁶ Both companies refused to release the documents and the attorney general brought actions to require disclosure. CAP and MACOC appealed.¹⁴⁷

The court of appeals summarized the intent of the ORA by noting:

The Open Records Act was enacted in the public interest to protect the public from “closed door” politics and the potential abuse of individuals and misuse of power such policies entail. Therefore, the Act must be broadly construed to effect its remedial and protective purposes. The intent of the General Assembly was to encourage public access to

141. *Id.* at 31, 619 S.E.2d at 693 (quoting *DeKalb County v. Post Apartment Homes*, 234 Ga. App. 409, 411, 506 S.E.2d 899, 901 (1998)).

142. *Id.* at 32, 619 S.E.2d at 693.

143. 278 Ga. App. 733, 629 S.E.2d 840 (2006).

144. O.C.G.A. §§ 50-18-70 to -77 (2006).

145. *Central Atlanta Progress*, 278 Ga. App. at 733-34, 629 S.E.2d at 841.

146. *Id.* at 734, 629 S.E.2d at 842.

147. *Id.*

information and to promote confidence in government through openness to the public.¹⁴⁸

The court noted that the ORA requires that all public records, except those specifically exempted by court order or law, shall be open for personal inspection by any citizen of the state.¹⁴⁹ Public records are defined to include all documents “prepared and maintained or received in the course of the operation of a public office or agency” and “such items received or maintained by a private person or entity on the behalf of a public office or agency which are not otherwise subject to protection from disclosure.”¹⁵⁰ The ORA further states that it “shall be construed to disallow an agency’s placing or causing such items to be placed in the hands of a private person or entity for the purpose of avoiding disclosure.”¹⁵¹

1. Case No. A06A1028. CAP denied that it was acting “for or on the behalf of” a public agency.¹⁵² However, the trial court found extensive involvement by public officials and agencies. Funding for bid preparation was received from Fulton County, the Fulton County Development Agency, the Atlanta Convention and Visitors Bureau (“ACVB”), and the Georgia Department of Economic Development.¹⁵³ Future expenditures of public funds in the form of a tax allocation district were involved, and proceeds and state funds “in whatever form” were pledged as part of the bid submittal.¹⁵⁴ Members of the organizing committee included numerous public officials. Bid preparation was reviewed and approved by various public officials and public officials were involved in promoting the bid.¹⁵⁵ The trial court found in favor of the attorney general and the AJC. It found sufficient evidence that the NASCAR bid was prepared on behalf of public offices or agencies and thereby fell under the ORA.¹⁵⁶ The trial court stated that CAP “systematically and purposefully sought to evade the Open Records Act by permitting the public officials to review the documents, and then retrieving the records in order to prevent them from reaching government files The Act

148. *Id.* at 734-35, 629 S.E.2d at 842.

149. *Id.* at 735, 629 S.E.2d at 842 (citing O.C.G.A. § 50-18-70(b) (2006)).

150. O.C.G.A. § 50-18-70(a).

151. *Id.*; *see also* Clayton County Hosp. Auth. v. Webb, 208 Ga. App. 91, 94-95, 430 S.E.2d 89, 93 (1993).

152. *Central Atlanta Progress*, 278 Ga. App. at 735, 629 S.E.2d at 842.

153. *Id.* at 735-36, 629 S.E.2d at 842-43.

154. *Id.*

155. *Id.* at 736, 629 S.E.2d at 843.

156. *Id.* at 738, 629 S.E.2d at 844.

clearly does not condone evasive efforts such as those practiced here.¹⁵⁷ To reverse a bench trial court's findings, the appeals court must find clear error.¹⁵⁸ Here, the court found none.¹⁵⁹

2. Case No. A06A1028. MACOC contended that the trial court erred in holding that it prepared its bid on behalf of a public agency. It stated that only six of its 3000 members had government ties, only six of the fifteen Super Bowl Committee members had affiliations with government entities, and no public money was spent on the bid. Again, however, the trial court found sufficient involvement by government agencies and officials. The bid committee included numerous public officials, many of whom wrote letters to the National Football League ("NFL") expressing their commitment to provide the public services described in the bid. GWCC staff members were involved in the preparation of bid documents, and the executive director personally reviewed the bid as it pertained to the Georgia Dome and GWCC. ACVB staff analyzed and prepared portions of the bid. The bid required future use of public resources including the lease of the Georgia Dome, GWCC, and parking lots owned by the GWCC Authority to the NFL at no charge. Evidence was also presented that public agencies would provide millions of dollars in in-kind services for the Super Bowl.¹⁶⁰ The court of appeals, again, held that there was sufficient evidence to support the trial court's findings that the Super Bowl bid was made on behalf of a public agency, and therefore the court of appeals concluded that the trial court's decision was not clearly erroneous.¹⁶¹ Accordingly, the court of appeals affirmed the trial court's decision.¹⁶²

B. Partial Cancellation of Lis Pendens

In *Colony Bank Southeast v. Brown*,¹⁶³ Colony Bank appealed the trial court's order denying its petition to cancel, in part, a lis pendens on a five-acre tract upon which Colonial Bank was initiating foreclosure.¹⁶⁴ Colony Bank contended that the lis pendens did not "involve"

157. *Id.*

158. *Id.* (citing *Simmons v. McBride*, 228 Ga. App. 752, 753, 492 S.E.2d 738, 739 (1997)).

159. *Id.*

160. *Id.* at 739, 629 S.E.2d at 844-45.

161. *Id.* at 740, 629 S.E.2d at 845.

162. *Id.*

163. 275 Ga. App. 807, 622 S.E.2d 7 (2005).

164. *Id.* at 807, 622 S.E.2d at 8.

property as defined within section 44-14-610¹⁶⁵ of the Official Code of Georgia Annotated (“O.C.G.A.”).¹⁶⁶

Property owners adjacent to the five acres owned by Kyle Waldron, the property at issue, and ninety-four acres owned by Mary June Waldron sued in federal court as a result of a man-made lake constructed by the Waltons. The adjacent property owners alleged that the creation of the lake raised the local water table, resulting in standing water, septic tank problems, and a decrease in the fair market value of their properties.¹⁶⁷ They further alleged that the lake was built in violation of the Clean Water Act,¹⁶⁸ the Georgia Water Quality Control Act,¹⁶⁹ and the Georgia Erosion and Sedimentation Act of 1975.¹⁷⁰ Finally, they alleged that the construction of the lake failed to comply with an order issued by the U.S. Army Corps of Engineers to either restore the stream and wetlands to pre-existing conditions or implement a wetlands mitigation plan. Money damages were sought based on the theories of trespass, nuisance, and negligence. Injunctive relief and civil penalties were also sought under violations of the Clean Water Act.¹⁷¹

The adjacent property owners filed notices of lis pendens on the five-acre and ninety-four acre parcels to notify potential purchasers of the pending lawsuit.¹⁷² However, the lake sat on only 0.31 acres of the five-acre tract. Colony Bank claimed that the equitable relief requested in the federal suit applied only to the ninety-four acre tract, not the five-acre site.¹⁷³ The court determined that the remedial measures sought in the lawsuit made no distinction between the parcels and could involve the entire five-acre site.¹⁷⁴

The court distinguished *Hutson v. Young*,¹⁷⁵ a case relied on by Colonial Bank, in which the court held that when a party was entitled only to money damages—not equitable relief on the merits—the suit did not “involve” the land and cancellation of a lis pendens was proper.¹⁷⁶ Instead, the court noted its decision in *Griggs v. Gwinco Development*

165. O.C.G.A. § 44-14-610 (2002).

166. *Colony Bank Southeast*, 275 Ga. App. at 807, 622 S.E.2d at 8.

167. *Id.*, 622 S.E.2d at 8-9.

168. 33 U.S.C. §§ 1251-1387 (2000).

169. O.C.G.A. §§ 12-5-20 to -53 (2006).

170. O.C.G.A. §§ 12-7-1 to -22.

171. *Colony Bank Southeast*, 275 Ga. App. at 807, 622 S.E.2d at 8-9.

172. *Id.* at 808, 622 S.E.2d at 9.

173. *Id.* at 809, 622 S.E.2d at 10.

174. *Id.*

175. 255 Ga. App. 169, 564 S.E.2d 780 (2002).

176. *Colony Bank Southeast*, 275 Ga. App. at 809, 622 S.E.2d at 10 (citing *Hutson*, 255 Ga. App. at 172-73, 564 S.E.2d at 783).

Corp.,¹⁷⁷ in which the Georgia Supreme Court held that “land was ‘involved’ in a lawsuit brought by adjoining landowners for an injunction requiring the defendants to remove obstructions of a creek that caused unnatural amounts of water on their land.”¹⁷⁸ In this case the court stated that “*Hutson* should not be construed as holding that a party must assert a legal or equitable ‘interest’ in the land in order to file a valid *lis pendens*.”¹⁷⁹

The court further clarified that it had not held in *Evans v. Fulton National Meeting Corp.*¹⁸⁰ that a trial court has the power to partially cancel a *lis pendens* when the land can be theoretically subdivided into multiple parcels.¹⁸¹ Furthermore, “even if a trial court is authorized to partially cancel a *lis pendens*, it would not be appropriate on the facts of this case.”¹⁸² The injunctive relief requested by the plaintiffs called for measures that might involve the entire five-acre tract, and as such, potential buyers were entitled to notice of the pending lawsuit.¹⁸³ Partial cancellation of the *lis pendens* could not be justified.¹⁸⁴

C. Covenants Not to be Extended by Construction

In *Crawford v. Damman*,¹⁸⁵ Crawford, a property owner and builder in a subdivision, sued the property owners’ association to, in part, determine whether the declaration of covenants and restrictions (“covenants”) authorized the board to assess various fees on him. The property owners’ association is a non-profit corporation responsible for managing and maintaining the subdivision, including all common property and the closed-end water supply system for the subdivision. The charges in question included a refundable \$3000 building permit fee, a \$100 administrative processing fee for building permits, a ready to serve fee of \$70 per residential lot per year for the availability of water service, and a water meter fee of \$1350 for each water meter installed by the board for each newly developed lot or lots to be developed.¹⁸⁶

After a lengthy trial process with appeals and cross-appeals, the appellate court held that paragraph 8.05 of the covenants specifically

177. 240 Ga. 487, 241 S.E.2d 244 (1978).

178. *Colony Bank Southeast*, 275 Ga. App. at 808-09, 622 S.E.2d at 9 (citing *Griggs*, 240 Ga. at 487, 241 S.E.2d at 245).

179. *Id.* at 809, 622 S.E.2d at 10.

180. 168 Ga. App. 600, 309 S.E.2d 884 (1983).

181. *Colony Bank Southeast*, 275 Ga. App. at 810, 622 S.E.2d at 10.

182. *Id.*, 622 S.E.2d at 10-11.

183. *Id.*, 622 S.E.2d at 11.

184. *Id.*

185. 277 Ga. App. 442, 626 S.E.2d 632 (2006).

186. *Id.* at 442, 626 S.E.2d at 636.

allowed the board to assess owners for the installation and maintenance of water supply and sewage disposal systems, the maintenance of water quality in lakes, protective maintenance of lots, and similar services.¹⁸⁷ The court upheld the trial court's finding that the water fees conferred a tangible benefit upon Crawford "because they enabled the Association to provide a private closed-end water system" that was authorized under paragraph 8.05.¹⁸⁸

The appellate court overruled the trial court's ruling that the building fee and administrative processing fee were authorized by the covenants.¹⁸⁹ A past president of the association testified that the builders had been clear-cutting lots of all trees and that the association raised the refundable building permit fee to \$3000 to deter such actions. She further testified that the deterrence was effective because the deposit was usually returned. The \$100 administrative fee was imposed to process paperwork and to pay a consultant to inspect site development for conformity with applicable rules and regulations.¹⁹⁰

Restrictions on private property are not favored in Georgia.¹⁹¹ Therefore, these restrictions will not be enlarged or extended by construction, with any doubt construed in favor of the grantee.¹⁹² The court held that the covenants do not authorize the imposition of fees for building permits or related administrative fees.¹⁹³ Further, the covenants only allow special assessments to defray the cost of capital improvement projects and require approval by a two-thirds vote of the property owners.¹⁹⁴ No such actions were ever undertaken by the association.¹⁹⁵ As a result, the court would not extend the meaning of the covenants beyond their clear and plain language to include fees not specifically authorized.¹⁹⁶

187. *Id.* at 445, 626 S.E.2d at 637-38.

188. *Id.* at 446, 626 S.E.2d at 638.

189. *Id.*

190. *Id.* at 446-47, 626 S.E.2d at 639.

191. *Id.* at 447, 626 S.E.2d at 639.

192. *Id.* (citing *Duffy v. The Landings Ass'n*, 245 Ga. App. 104, 107, 536 S.E.2d 758, 760 (2000); *Lake Arrowhead Prop. Owners' Ass'n v. Dalton*, 257 Ga. App. 655, 656, 572 S.E.2d 25, 26 (2002)).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

D. Sketch Plan Approval

In *Screven County Planning Commission v. Southern States Plantation, LLLP*,¹⁹⁷ Southern States Plantation (“SSP”) submitted a sketch plan to the planning commission for the development of a thirty-two lot subdivision. Access to the subdivision was by way of two unpaved county roads. The planning commission was concerned that the county roads should be paved as a condition of the sketch plan approval.¹⁹⁸ According to section 6.1 of the county’s land development regulations, small subdivisions “consisting of six to ten lots, shall have ‘paved streets, provided, however, that paving shall not be required if all lots are located on the right-of-way of an existing county road.’”¹⁹⁹ The regulations require intermediate subdivisions, which consist of eleven to twenty-nine lots, such as the subdivision at issue, to have “‘paved streets.’”²⁰⁰ Streets are also addressed in section 6.8, which provides that the planning commission “‘shall not approve a subdivision in a location where the existing roads providing primary access are inadequate to serve the additional traffic generated by the development.’”²⁰¹ The planning commission discussed section 6.8, but it relied on provisions in section 6.1 in recommending denial of the sketch plan application, interpreting the regulations to require subdivisions to have paved roads as their primary access. The board of commissioners also denied the sketch plan application and specifically stated it would uphold the recommendation of the planning commission on the ground that section 6.1 required the paving of county roads.²⁰²

SSP filed a mandamus action in superior court challenging the county’s decision. The trial court ruled in favor of SSP, entitling it to have the planning commission approve its sketch plat plan for the subdivision. The court found that section 6.1 was ambiguous regarding whether paving was required only within the subdivision or whether it required pavement of county roads providing access to the development.²⁰³ The trial court also ruled that “‘as evidence was presented which showed that the development of Runs Branch would not have a significant impact on traffic in the area, [SSP has] a vested right to the

197. 279 Ga. 404, 614 S.E.2d 85 (2005).

198. *Id.* at 404, 614 S.E.2d at 86.

199. *Id.* (citing SCREVEN COUNTY, GA., CODE § 66-181(2005)).

200. *Id.* (citing SCREVEN COUNTY, GA., CODE § 66-181).

201. *Id.* (citing SCREVEN COUNTY, GA., CODE § 66-188 (2005)).

202. *Id.* at 404-05, 614 S.E.2d at 86.

203. *Id.* at 405, 614 S.E.2d at 86.

approval of their sketch plan.”²⁰⁴ The planning commission appealed the trial court’s judgment granting mandamus relief to SSP.²⁰⁵

Upon review, the Georgia Supreme Court concluded that the trial court properly interpreted section 6.1 in favor of SSP.²⁰⁶ The court held that the section was ambiguous, and in construing the ordinance, “ambiguities in a zoning ordinance must be resolved in favor of the property owner.”²⁰⁷ However, the court disagreed with the trial court’s conclusion that evidence was presented that showed the development would not have a significant impact on traffic in the area, instead concluding that the evidence on traffic in the area was in dispute.²⁰⁸ While the planning commission discussed section 6.8, it denied the sketch plan only on the ground that section 6.1 required paving of county roads.²⁰⁹ Section 6.8 grants the planning commission the discretion to determine whether existing roads that provide primary access to a subdivision are adequate to serve the additional traffic generated by the development.²¹⁰ As the planning commission did not exercise that discretion, the trial court erred in ruling that SSP was entitled to approval of its sketch plan.²¹¹

E. Determination of Property Line

In *Sledge v. Peach County*,²¹² Rauls sued Sledge to determine the boundary line between property owned by Rauls and property owned by Sledge. Sledge appealed the bench trial judgment in favor of Rauls alleging that there was insufficient evidence to sustain the judgment, and that the ruling should have been in favor of Sledge as a matter of law.²¹³

Sledge’s deed described the land’s size and shape, boundaries by lands owned by particular individuals, and a reference to a plat prepared by “T.F. Flournoy, surveyor.”²¹⁴ The plat did not locate the property other

204. *Id.* (brackets in original).

205. *Id.*

206. *Id.*

207. *Id.* (quoting *JWIC, Inc. v. City of Sylvester*, 278 Ga. 416, 417, 603 S.E.2d 247, 248 (2004); *Bo Fancy Prods. v. Rabun County Bd. of Comm’rs*, 267 Ga. 341, 342-43, 478 S.E.2d 373, 375 (1996); *Cherokee County v. Martin*, 253 Ga. App. 395, 396, 559 S.E.2d 138, 140 (2002)).

208. *Id.* at 406, 614 S.E.2d at 87.

209. *Id.* at 406-07, 614 S.E.2d at 87.

210. *Id.*

211. *Id.* at 407, 614 S.E.2d at 87.

212. 276 Ga. App. 780, 624 S.E.2d 288 (2005).

213. *Id.* at 780, 624 S.E.2d at 289.

214. *Id.*

than to identify it as “a 91.3-acre rectangle on the southern end of Land Lot 15 . . . with northern and southern [property] lines extending 2,970 feet in length and eastern and western lines extending 1,340 feet in length (with Hatcher owning the land to the south).”²¹⁵ Rauls was the successor-in-interest to the Hatcher land.²¹⁶ Rauls’s deed to the Hatcher land described the land in part as

containing 145 acres, more or less, and composed of 100 acres off the East side of Lot No. 14 and a strip lying North of Butcher’s Branch in said Lot 14 bounded East and South by lands formerly owned by G.C. Hartley; West by Mossy Creek; North by lands formerly owned by Elizabeth Howard Estate.²¹⁷

Sledge later acquired the Elizabeth Howard land.²¹⁸

As part of a refinancing of the Rauls property, the land was surveyed and the property line between the Sledge and Rauls parcels was demarcated by an old fence and by iron pins located 280 feet north of the land lot line between lot 14 and lot 15. Sledge disputed the property line location and began using the 280 feet north of the land lot lines. Rauls filed suit to have the property line determined as per the survey. The trial court found in favor of Rauls, determining that the property line was consistent with the survey. Sledge appealed.²¹⁹

The appellate court’s standard of review for a non-jury trial of disputed material fact is the clearly erroneous test.²²⁰ The sole question on appeal is whether there is any evidence to authorize the trial court’s judgment.²²¹ “In the absence of legal error, an appellate court is without jurisdiction to interfere with a judgment supported by some evidence.”²²²

Rules for determining disputed land lines are provided in O.C.G.A. section 44-4-5:

- (1) Natural landmarks, being less liable to change and not capable of counterfeiting, shall be the most conclusive evidence;
- (2) Ancient or genuine landmarks such as corner stations or marked trees shall control the course and distances called for by the survey;

215. *Id.*

216. *Id.* at 781, 624 S.E.2d at 289.

217. *Id.*

218. *See id.*

219. *Id.*, 624 S.E.2d at 289-90.

220. *Id.*, 624 S.E.2d at 290 (citing *Schowalter v. Washington Mut. Bank*, 275 Ga. App. 182, 182, 620 S.E.2d 437, 438 (2005)).

221. *Id.* (citing *Schowalter*, 275 Ga. App. at 182, 620 S.E.2d at 438).

222. *Id.* at 782, 624 S.E.2d at 290 (quoting *Schowalter*, 275 Ga. App. at 182, 620 S.E.2d at 438).

(3) If the corners are established and the lines are not marked, a straight line as required by the plat shall be run but an established marked line, though crooked, shall not be overruled;

(4) Courses and distances shall be resorted to in the absence of higher evidence.²²³

“Traditional evidence as to ancient boundaries and landmarks shall be admissible in evidence, the weight to be determined by the jury according to the source from which it comes.”²²⁴ Ancient landmarks are considered to be those in place for more than thirty years that can be evidenced by the “general reputation in the neighborhood.”²²⁵ Further, land lot lines are only one factor to be considered and do not trump all other evidence.²²⁶

In this case, there were no natural landmarks to establish the boundary.²²⁷ However, based upon the evidence presented at trial, including continuous use of the land by Rauls for more than thirty years and a survey locating a fence line and iron pipes that were more than thirty years old, the court of appeals held that the trial court had sufficient evidence to support its award.²²⁸

223. O.C.G.A. § 44-4-5 (1991).

224. O.C.G.A. § 24-3-13 (1995).

225. *Sledge*, 276 Ga. App. at 782, 624 S.E.2d at 290 (quoting *Duncan v. Harcourt*, 267 Ga. App. 224, 226, 599 S.E.2d 196, 198 (2004)).

226. *Id.* (citing *Morgan v. Lester*, 215 Ga. 570, 571-72, 111 S.E.2d 228, 229-30 (1959)).

227. *Id.*

228. *Id.* at 783-84, 624 S.E.2d at 290-91.