## **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 that were handed down by Georgia appellate courts between June 1, 2006 and May 31, 2007. The cases surveyed fall primarily within five categories: (1) condemnation, (2) nuisance and trespass, (3) easements and restrictive covenants, (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 Supreme Court, however, did consider one interesting case involving the eminent domain powers of private utility companies and another case involving the date of taking for valuation purposes when the condemnation petition is amended. Additionally, the Georgia Supreme Court examined two cases addressing the public use requirement for urban redevelopment condemnations as well as a series of cases dealing with various evidentiary and procedural issues.

## A. Paramount Power of Electric Power Utility Companies to Condemn Property

Recently, several counties have attempted to use their land use regulatory powers to prevent or limit eminent domain condemnations by electric power utility companies ("EPUC"). However, various superior courts and the Georgia Supreme Court have rejected the counties' actions and reaffirmed that the eminent domain powers of private EPUCs preempt local zoning and land use laws.

In Forsyth County v. Georgia Transmission Corp., Forsyth County enacted an ordinance that required the approval of the Forsyth County Board of Commissioners before an EPUC could construct high-voltage power lines. The supreme court held that the ordinance violated the Home Rule Act of the Georgia constitution by infringing on the EPUC's exercise of the power of eminent domain.

Georgia Transmission Company ("GTC") is a nonprofit corporation comprised of multiple electric membership corporations that collectively distribute, transmit, and sell electric power throughout Georgia. In 2002 GTC began plans to construct an electric transmission line in Forsyth County and began acquiring property for the project.<sup>5</sup>

In June 2004 Forsyth County amended its code to create the Forsyth County Power Transmission Line Overlay Zoning District (the "PTL-OD Ordinance").<sup>6</sup> The preamble to the resolution creating the PTL-OD

<sup>1. 280</sup> Ga. 664, 632 S.E.2d 101 (2006).

<sup>2.</sup> Id. at 664, 632 S.E.2d at 102.

<sup>3.</sup> GA. CONST. art. IX, § 2, para. 1.

<sup>4.</sup> Forsyth County, 280 Ga. at 664, 632 S.E.2d at 102.

<sup>5.</sup> *Id* 

<sup>6.</sup> Id.; FORSYTH COUNTY, Ga., UNIFIED DEV. CODE §§ 21-6.1 to -6.5 (Municode through June 2004 Amendments) invalidated by Forsyth County v. Ga. Transmission Corp., 280 Ga. 664, 632 S.E.2d 101 (2006).

Ordinance provided that the construction or installation of any new electric power transmission lines "'shall be prohibited unless and until the electric utility associated therewith successfully complies with the PTL-OD procedures being created by this Resolution." The new PTL-OD Ordinance required GTC to apply for a zoning map amendment for its proposed transmission line and obtain overlay zoning approval from Forsyth County for construction and operation.<sup>8</sup> Additionally, the ordinance required GTC to prove that "the conditions governing the construction, operation, and maintenance of the transmission [line were] appropriate."9 The PTL-OD Ordinance further allowed GTC to apply for an overlay prior to acquiring property for the transmission line in order to "allow Forsyth County to exercise reasonable zoning regulatory authority over the siting of high power transmission lines without first requiring the utility to go to the possible wasteful expense of acquiring ownership of its preferred route before obtaining final land use authorization."10

GTC brought a declaratory judgment action against Forsyth County and its board of commissioners challenging the constitutionality of the PTL-OD Ordinance. The trial court ruled that the PTL-OD Ordinance was an unconstitutional infringement upon GTC's power of eminent domain, thereby violating the home rule provisions of the state constitution. <sup>11</sup>

On appeal, the Georgia Supreme Court first noted that the Home Rule Act of the Georgia constitution "grants the governing authority of each county the legislative authority 'to adopt clearly reasonably ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law and which is not inconsistent with this Constitution." The court next noted that the constitution "further provides that the powers granted to counties pursuant to the home rule provision, 'shall not be construed to extend to . . . [any] [a]ction affecting the exercise of the power of eminent domain." <sup>13</sup>

<sup>7.</sup> Forsyth County, 280 Ga. at 664-65, 632 S.E.2d at 102 (emphasis omitted).

<sup>8.</sup> *Id.* at 665, 632 S.E.2d at 102 (citing Forsyth County, Ga., Unified Dev. Code § 21-6.5).

<sup>9.</sup> Id. (citing Forsyth County, GA., Unified Dev. Code § 21-6.5(D)).

<sup>10.</sup>  $\mathit{Id.}$ , 632 S.E.2d at 102-03 (quoting Forsyth County, Ga., Unified Dev. Code § 21-6.1).

<sup>11.</sup> Id. at 665, 632 S.E.2d at 103.

<sup>12.</sup> Id. at 665-66, 632 S.E.2d at 103 (emphasis added by court) (quoting GA. CONST. art. IX, § 2, para. 1(a)).

<sup>13.</sup> Id. at 666, 632 S.E.2d at 103 (brackets in original) (emphasis added by court) (quoting GA. CONST. art. IX, § 2, para. 1(c)(6)).

Then, the supreme court stated that "[t]he general law authorizes an EPUC to exercise the power of eminent domain to effectuate the purpose of furnishing electric power and service." Thus, the court held that "GTC is a condemning body with the authority to act as the exclusive judge of the necessities of the public needs." <sup>15</sup>

The supreme court noted that in the recent cases of Rabun County v. Georgia Transmission Corp. <sup>16</sup> and Cobb County v. Georgia Transmission Corp., <sup>17</sup> it held that "certain county ordinances violated the home rule provision by effectively infringing on an EPUC's exercise of its statutory power of eminent domain to acquire property for the construction of a high-voltage power line." <sup>18</sup> In both cases, the counties enacted a moratorium on the construction of new high-voltage transmission lines, and GTC brought declaratory judgment actions challenging the ordinances. The trial courts in both cases determined that the ordinances infringed on GTC's power of eminent domain. <sup>19</sup> In both cases, the Georgia Supreme Court affirmed the trial courts' rulings, holding that the "ordinances blocked GTC's purpose of constructing high voltage transmission lines and thus violated the home rule provision by affecting the power of eminent domain."

However, in *Forsyth County*, the County argued that its PTL-OD Ordinance, unlike the ordinances in *Rabun County* and *Cobb County*, was not a moratorium or a per se obstruction to GTC's exercise of eminent domain. The County argued that its PTL-OD Ordinance "does not unconstitutionally affect GTC's power of eminent domain because it provides only 'modest oversight,' and fosters and augments, rather than halts, an applicant's plans. The Georgia Supreme Court rejected these arguments, however, finding that the PTL-OD Ordinance "forbids the erection of GTC's electric power transmission line unless GTC successfully complies with the procedures established by the [PTL-OD O]rdinance, and it authorizes Forsyth County to deny 'any or all'

<sup>14.</sup> Id. (citing O.C.G.A. § 46-3-201(b)(9) (2004); O.C.G.A. § 22-3-20 (1982)).

<sup>15.</sup> Id. (citing O.C.G.A. § 22-2-102.1 (Supp. 2007)).

<sup>16. 276</sup> Ga. 81, 575 S.E.2d 474 (2003).

<sup>17. 276</sup> Ga. 367, 578 S.E.2d 852 (2003).

<sup>18.</sup> Forsyth County, 280 Ga. at 666, 632 S.E.2d at 103 (citing Rabun County, 276 Ga. at 86, 575 S.E.2d at 477; Cobb County, 276 Ga. at 367, 578 S.E.2d at 853).

<sup>19.</sup> *Id.* (citing *Rabun County*, 276 Ga. at 84, 575 S.E.2d at 476; *Cobb County*, 276 Ga. at 367, 578 S.E.2d at 853).

<sup>20.</sup> *Id.* at 666-67, 632 S.E.2d at 103-04 (citing *Rabun County*, 276 Ga. at 86, 575 S.E.2d at 478; *Cobb County*, 276 Ga. at 367, 578 S.E.2d at 853).

<sup>21.</sup> Id. at 667, 632 S.E.2d at 104.

<sup>22.</sup> Id.

portions of an application."<sup>23</sup> Thus, the Georgia Supreme Court held that this "power to wholly preclude construction is an unconstitutional infringement on GTC's legislatively-delegated power of eminent domain."<sup>24</sup>

B. Date of Taking for Valuation Purposes is the Date that Condemnor Pays the Amount of the Special Master's Award into the Registry of the Court

In *Orr v. Georgia Transmission Corp.* ("*Orr II*"),<sup>25</sup> the Georgia Supreme Court ruled that the Georgia Court of Appeals erred when it determined in *Orr v. Georgia Transmission Corp.* ("*Orr I*")<sup>26</sup> that the date of a taking occurs when the original condemnation petition is filed.<sup>27</sup> In a unanimous opinion written by Justice P. Harris Hines, the supreme court held that under the circumstances of the case, the date of the taking occurred when the "condemnor paid the amount of the special master's award into the registry of the court pursuant to the superior court's order making [the] award the judgment of the court."<sup>28</sup>

On October 30, 2001, Georgia Transmission Corporation ("GTC") filed a condemnation petition in the Forsyth County Superior Court seeking a right of way easement for certain electric transmission lines. The petition also sought an easement to enter onto adjoining lands to remove dangerous trees ("dangerous tree maintenance easement"). On December 19, 2001, the special master awarded Orr \$15,775 as the fair market value of the property condemned and \$16,000 in consequential damages to the remaining property.<sup>29</sup>

Thereafter, Orr timely filed a notice of appeal for a jury trial on the issues of value and damages. Orr also filed exceptions to the ruling on nonvalue issues, asserting that the portion of GTC's petition involving the dangerous tree maintenance easement was vague and indefinite and an unconstitutional exercise of the power of eminent domain. The superior court overruled the exceptions and entered a judgment adopting the award of the special master on March 22, 2002.<sup>30</sup> "The judgment provided that upon payment into the registry of the court the total sum of \$31,775, the condemnor would be vested with title to the condemned

<sup>23.</sup> Id. (citing Forsyth County, Ga., Unified Dev. Code § 21-6.5(E)).

<sup>24.</sup> Id.

<sup>25. 281</sup> Ga. 754, 642 S.E.2d 809 (2007), rev'g 280 Ga. App. 251, 633 S.E.2d 564 (2006).

<sup>26. 280</sup> Ga. App. 251, 633 S.E.2d 564 (2006), rev'd, 281 Ga. 754, 642 S.E.2d 809 (2007).

<sup>27.</sup> Orr II, 281 Ga. at 754, 642 S.E.2d at 809-10.

<sup>28.</sup> Id., 642 S.E.2d at 810.

<sup>29.</sup> Id.

<sup>30.</sup> Id. at 754-55, 642 S.E.2d at 810.

property."<sup>31</sup> On June 5, 2002, GTC paid the amount of the award into the registry of the court.<sup>32</sup>

Before the case was called for trial on the issue of value and damages, the Georgia Court of Appeals held in the case of *Mosteller Mill*, *Ltd. v. Georgia Power Co.* <sup>33</sup> that "a 'danger[ous] tree' maintenance easement is effective only if it accurately and definitely describes the interest being taken." <sup>34</sup> Accordingly, on October 13, 2005, the parties filed a consolidated pretrial order in which they stipulated to an amendment to the petition to remove the dangerous tree maintenance easement. <sup>35</sup> Orr then filed a motion to elect October 13, 2005, the date of the amendment, as the date of taking. <sup>36</sup> Citing Official Code of Georgia Annotated ("O.C.G.A.") section 22-2-109, <sup>37</sup> the superior court rejected such election and ordered the date of taking to be October 30, 2001, the date GTC filed its original petition. <sup>38</sup> Orr appealed to the Georgia Court of Appeals the trial court order setting the date of taking as the date of the original petition. The court of appeals affirmed the trial court order. <sup>39</sup>

In doing so, the Georgia Court of Appeals distinguished *Dorsey v. Department of Transportation*, 40 which allowed a condemnee the right to elect whether the date of taking was the date of the filing of the original declaration of taking or the date of the filing of an amendment. 41 The Georgia Court of Appeals in *Orr I* determined that an election was not required in every case in which a condemnation petition is amended. 42 Additionally, in contrast to the amendment in *Dorsey*, the amended petition in *Orr* abandoned the acquisition of the inadequately described dangerous tree maintenance easement. 43 Thus, the Georgia Court of Appeals determined that the amendment deleted mere surplusage in the petition and did not pass title for the easement to

<sup>31.</sup> Orr I, 280 Ga. App. at 252, 633 S.E.2d at 565.

<sup>32.</sup> Orr II, 281 Ga. at 755, 642 S.E.2d at 810.

<sup>33. 271</sup> Ga. App. 287, 609 S.E.2d 211 (2005).

<sup>34.</sup>  $Orr\,I$ , 280 Ga. App. at 252, 633 S.E.2d at 565-66 (citing  $Mosteller\,Mill$ , Ltd., 271 Ga. App. at 289-90, 609 S.E.2d at 214).

<sup>35.</sup> Id., 633 S.E.2d at 566.

<sup>36.</sup> Orr II, 281 Ga. at 755, 642 S.E.2d at 810.

<sup>37.</sup> O.C.G.A. § 22-2-109 (1982 & Supp. 2007).

<sup>38.</sup> Orr II, 281 Ga. at 755, 642 S.E.2d at 810.

<sup>39.</sup> Orr I, 280 Ga. App. at 251, 633 S.E.2d at 565.

<sup>40. 248</sup> Ga. 34, 279 S.E.2d 707 (1981).

<sup>41.</sup>  $Orr\,I$ , 280 Ga. App. at 254-55, 633 S.E.2d at 567 (citing Dorsey, 248 Ga. at 37, 279 S.E.2d at 710).

<sup>42.</sup> Id. at 255, 633 S.E.2d at 567.

<sup>43.</sup> Id., 633 S.E.2d at 567-68.

GTC.<sup>44</sup> Further, contrary to the circumstances presented in *Dorsey*, the Georgia Court of Appeals determined that the record did not show any possibility that GTC would reap any benefit from having filed a faulty petition.<sup>45</sup> Instead, the Georgia Court of Appeals concluded that to hold otherwise would grant the condemnee a windfall, assuming that the market value of the condemned right-of-way increased substantially in the four years between the filing of the original petition and the amendment.<sup>46</sup>

However, the Georgia Supreme Court granted certiorari and held that "[b]oth the analysis and the conclusion of the Court of Appeals are flawed."<sup>47</sup> The supreme court pointed out that the focus of the Georgia Court of Appeals was O.C.G.A. section 22-2-109(a), which provides that the date of taking is the date of the filing of the condemnation proceedings for public road and street purposes. The supreme court noted, however, that this case concerned a condemnation for the construction of electric transmission lines and not for a public road or street. Next, the supreme court noted that "[i]n contrast to [O.C.G.A. section] 22-2-109, [O.C.G.A. sections] 22-2-110 and 22-2-111 are not limited to condemnation actions involving public roads and streets, but are generally applicable in [all] condemnation proceedings before a special master."<sup>50</sup>

The Georgia Supreme Court then noted that "[O.C.G.A. section] 22-2-111 mandates that the trial court enter a judgment condemning the property . . . when the condemnor pays into the registry of the court the amount provided in the award." Then the supreme court cited Arnold v. State Highway Department<sup>52</sup> which held that "the law specifically provides that the award of the special master shall condemn and vest title to the property . . . in the condemning body upon the deposit of such sum into the registry of the court . . . [N]o property is taken under this special master procedure until the payment is made." Accordingly, the supreme court concluded that in the circumstances of this case, the

<sup>44.</sup> Id., 633 S.E.2d at 568.

<sup>45.</sup> Id.

<sup>46.</sup> *Id*.

<sup>47.</sup> Orr II, 281 Ga. at 756, 642 S.E.2d at 811.

<sup>48.</sup> Id. (citing O.C.G.A. § 22-2-109(a)).

<sup>49.</sup> Id.

<sup>50.~</sup> Id. at 756-57, 642 S.E.2d at 811 (citing O.C.G.A.  $\$  22-2-109, -110, -111 (1982 & Supp. 2007)).

<sup>51.</sup> Id. at 757, 642 S.E.2d at 811 (citing O.C.G.A. § 22-2-111).

<sup>52. 116</sup> Ga. App. 201, 156 S.E.2d 469 (1967).

<sup>53.</sup> *Orr II*, 281 Ga. at 757, 642 S.E.2d at 811-12 (internal quotation marks omitted) (quoting *Arnold*, 116 Ga. App. at 203, 156 S.E.2d at 470).

date of taking is governed by "the date the condemnor paid the amount of the special master's award into the registry of the court pursuant to the superior court's order making said award the judgment of the court." <sup>54</sup>

# C. Eminent Domain for Economic Redevelopment—Public Use Requirement

Two years ago, the United States Supreme Court decision in *Kelo v. City of New London*<sup>55</sup> sparked attention to the issue of using eminent domain for economic redevelopment purposes. Additionally, Georgia has had its own controversies regarding eminent domain for economic redevelopment. Indeed, two cases decided by the Georgia Court of Appeals reviewed condemnations brought under Georgia's Urban Redevelopment Law<sup>56</sup> and the associated public use requirement.

1. Requirement and Burden to Show a Public Use Falls on Condemnor. In City of Stockbridge v. Meeks,<sup>57</sup> the Georgia Court of Appeals affirmed the trial court's dismissal of the city's condemnation petition.<sup>58</sup> The City of Stockbridge filed a condemnation petition to acquire certain property, including that of Mark and Regina Meeks. The Meekses operated a family florist business on the property. The property was condemned by being declared a slum under Georgia's Urban Redevelopment Law.<sup>59</sup> One week before filing the petition, the City adopted a resolution "declaring a need to build 'public facilities'" on the property.<sup>60</sup>

At the hearing before the special master, the City did not specify the public purpose for the condemnation. The Meekses sought dismissal, arguing that the City failed to plead that the proposed condemnation was for a public purpose. The special master denied the Meekses' motion, entered a condemnation award for the City, and awarded the Meekses \$325,000 for the condemned property and \$96,500 for fixtures and relocation expenses. Upon review, the trial court dismissed the City's condemnation petition for failure to set forth facts showing the

<sup>54.</sup> Id. at 754, 642 S.E.2d at 810.

<sup>55. 545</sup> U.S. 469 (2005).

<sup>56.</sup> O.C.G.A. §§ 36-61-1 to -19 (2006).

<sup>57. 283</sup> Ga. App. 343, 641 S.E.2d 584 (2007).

<sup>58.</sup> Id. at 345, 641 S.E.2d at 586.

<sup>59.</sup> Id. at 343-44, 641 S.E.2d at 585.

<sup>60.</sup> Id. at 344, 641 S.E.2d at 585.

<sup>61.</sup> Id.

<sup>62.</sup> Id. at 343, 641 S.E.2d at 585.

right to condemn pursuant to O.C.G.A. sections 22-2-102.2(1) and (5).  $^{63}$  The statute requires that a condemnation petition "'set forth [t]he facts showing the right to condemn' and the 'necessity to condemn the private property... describing the public use for which the condemnor seeks the property."  $^{64}$ 

The City appealed to the Georgia Court of Appeals, contending that the trial court erred in dismissing its condemnation petition for three reasons: (1) that "any failure by the City to show that the taking was for a specific" purpose was not "raised before nor ruled upon by the special master"; (2) that "the trial court dismissed the condemnation petition without first finding that it had been filed in bad faith"; and (3) that "it was the [Meekses'] burden to come forward with evidence showing that the condemnation was for other than a public purpose and that the petition was filed in bad faith." The Georgia Court of Appeals rejected these arguments and affirmed the trial court's dismissal of the petition. 66

The Georgia Court of Appeals noted,

The record shows that the Meeks answered the City's petition denying its right to condemn, stating that "[t]he [p]etition does not aver and the City cannot prove facts entitling the City to take the Property"; that "the Property is not needed for any public purpose"; and that the City's taking was for a private use.<sup>67</sup>

Additionally, the record showed that prior to the special master's hearing, the Meekses moved to dismiss the condemnation petition for lack of evidence that the taking was for a valid public purpose. Further, the record showed that the Meekses' exceptions and objections to the special master's award raised the same matters. Therefore, the court of appeals held that "the dismissal of the condemnation petition was not error for any failure to preserve the issue of specific use for review." The special master's award raised the same matters.

The Georgia Court of Appeals also rejected the City's other arguments on appeal, stating that "it is clear that the burden to show a taking for a public purpose lies with the condemnor, not the condemnee." Also, the requirement that the condemnor plead "facts showing the right to

<sup>63.</sup> Id. at 344, 641 S.E.2d at 584; O.C.G.A. § 22-2-102.2(1), (5) (Supp. 2007).

<sup>64.</sup> *City of Stockbridge*, 283 Ga. App. at 344, 641 S.E.2d at 585 (alteration in original) (brackets in original) (quoting O.C.G.A. § 22-2-102.2(1), -102.2(5)).

<sup>65.</sup> Id. at 343, 641 S.E.2d at 585.

<sup>66.</sup> Id.

<sup>67.</sup> Id. at 344, 641 S.E.2d at 585 (brackets in original).

<sup>68.</sup> Id.

<sup>69.</sup> Id.

<sup>70.</sup> Id. at 345, 641 S.E.2d at 586.

condemn[]' and 'the necessity to condemn the private property and describing the public use for which the condemnor seeks the property[,]' . . . is neither presumed nor conditioned upon a preliminary finding of bad faith in the trial court."<sup>71</sup>

**2. Public Use Challenge Barred by Res Judicata and Collateral Estoppel.** In *Talley v. Housing Authority of Columbus*, <sup>72</sup> the Georgia Court of Appeals held that the principles of res judicata and collateral estoppel barred the condemnee's challenge to the legality of the initial taking of his property through a condemnation proceeding. <sup>73</sup> The court of appeals also held that the Urban Redevelopment Law ("URL")<sup>74</sup> authorized the city housing authority to abandon any "public use" of the condemned property and sell the property to private citizens for other uses. <sup>75</sup>

In 1994 the city housing authority commenced a condemnation proceeding against Talley's property. The superior court entered judgment conveying full title to the property to the housing authority upon payment into the court registry of the \$17,500 awarded by the special master to the property owners. 76

In 2003 Talley filed an action against the housing authority, claiming that it unlawfully took his property in 1994 and demanding its return. Talley also asserted that in 1999 the housing authority "abandoned any public use of the property and sold it to a private citizen for \$42,800."

The housing authority moved for summary judgment on the ground that the issue of

the legality of the taking of Talley's property for a valid public purpose was decided adversely to him in the initial condemnation action, in a motion to set aside the condemnation judgment . . . [which was] denied by the [superior court] in 1997, and in a [separate] action filed by Talley against the [housing authority] in federal district court in 2004.79

<sup>71.</sup> Id. (brackets in original) (citation omitted) (quoting O.C.G.A. § 22-2-102.2(1), (5)).

<sup>72. 279</sup> Ga. App. 94, 630 S.E.2d 550 (2006).

<sup>73.</sup> *Id.* at 95, 630 S.E.2d at 551 (citing State v. Lejeune, 277 Ga. 749, 756, 594 S.E.2d 637, 643-44 (2004)).

<sup>74.</sup> O.C.G.A. §§ 36-61-1 to -19.

<sup>75.</sup> Talley, 279 Ga. App. at 95-96, 630 S.E.2d at 552 (citing O.C.G.A. § 36-61-10(a)).

<sup>76.</sup> Id. at 94, 630 S.E.2d at 551.

<sup>77.</sup> Id. at 95, 630 S.E.2d at 551.

<sup>78.</sup> *Id*.

<sup>79.</sup> Id.

The trial court granted the motion for summary judgment.<sup>80</sup> The court of appeals affirmed that Talley's challenge to the legality of the 1994 taking was barred by the principles of res judicata and collateral estoppel.<sup>81</sup>

The court of appeals also held that the housing authority was entitled to summary judgment on Talley's claim concerning the abandonment of the public use and sale of the property to a private citizen. <sup>82</sup> The court of appeals determined that "the URL authorizes Georgia municipalities and counties, either directly or through urban redevelopment agencies or housing authorities, to exercise the power of eminent domain for the acquisition and redevelopment of urban property which has been found to be a 'slum area.'" Furthermore, to effectuate such redevelopment, the condemnor is authorized under the URL to "sell, lease or otherwise transfer condemned property 'for public use'; or for various specified private uses, [including], 'residential, recreational, commercial, industrial'; or for 'other uses.'"

## D. Evidentiary and Procedural Issues

A series of cases decided during the survey period addressed various evidentiary and procedural issues presented in condemnation actions.

1. Property's Potential Commercial Value Not Relevant. In *Housing Authority of Macon v. Younis*,<sup>85</sup> the Georgia Court of Appeals held that evidence concerning a condemned property's potential commercial value was not relevant to the determination of just and adequate compensation in light of a federal order restricting the use of the property to a public playground.<sup>86</sup> In 1984 a federal court entered a racial desegregation order requiring the Bibb County Board of Education (the "School Board"), which then owned the property, to tear down a school on the property and deed it to the City of Macon (the "City") for use as a public playground.<sup>87</sup>

In September 1985 the School Board transferred the property to the City, noting the specific use restriction. Two years later, the School

<sup>80.</sup> Id.

<sup>81.</sup> Id.

<sup>82.</sup> Id., 630 S.E.2d at 552.

<sup>83.</sup> Id. (citing O.C.G.A. §§ 36-61-1 to -9, -17).

<sup>84.</sup> Id. at 96, 630 S.E.2d at 552 (citing O.C.G.A. § 36-61-10(a)).

<sup>85. 279</sup> Ga. App. 599, 631 S.E.2d 802 (2006).

<sup>86.</sup> Id. at 599, 631 S.E.2d at 803.

<sup>87.</sup> *Id.* at 599-600, 631 S.E.2d at 803 (citing Adams v. Bd. of Pub. Educ., 585 F. Supp. 215, 222 (M.D. Ga. 1984), *aff'd*, 770 F.2d 1562 (11th Cir. 1985)).

Board quitclaimed all of its remaining interest in the property to the City, claiming that it was releasing the property from all of the restrictions found in the September 1985 deed.<sup>88</sup>

Thereafter, in 1989 the City sold a portion of the property to the Younises. The Younises also purchased an adjoining tract of property. In 2002 the City's housing authority initiated separate condemnation proceedings to acquire the Younises' properties. The special masters rendered awards, and the cases were consolidated and appealed to the Bibb County Superior Court. 89

The Younises asserted that their tracts could be combined to create increased potential commercial value. The housing authority filed a motion in limine to prohibit any evidence relating to the commercial value of the property based on the 1984 federal order restricting the use of the property to a public playground. The superior court denied the motion in limine but certified the decision for immediate review by the Georgia Court of Appeals.<sup>90</sup>

The court of appeals reversed the superior court, holding that the "federal order containing the land-use restriction was neither challenged nor otherwise rendered unenforceable at the time the [housing a]uthority initiated the condemnation proceedings." The court of appeals further held that "the School Board's purported 1987 transfer of the property to the City free 'from all restrictions' was ineffectual, because the School Board did not have the power to unilaterally extinguish a court-imposed restriction on the use of the land through a quitclaim deed." Accordingly, the court of appeals concluded that because "the properties were restricted for use as a public playground, there was no basis for the admission of evidence regarding any potential commercial value that the properties could have had under other, nonexistent circumstances."

**2.** Source of Funding for Highway Project Not Relevant. In *H.D. McCondichie Properties v. Georgia Department of Transportation*, 94 the Georgia Court of Appeals held that evidence concerning the source of funding for a highway construction project was not relevant to

<sup>88.</sup> Id. at 600, 631 S.E.2d at 803.

<sup>89.</sup> Id., 631 S.E.2d at 804.

<sup>90.</sup> *Id*.

<sup>91.</sup> *Id* 

<sup>92.</sup> Id. (citing Canoeside Props. v. Livsey, 277 Ga. 425, 428, 589 S.E.2d 116, 119 (2003)).

<sup>93.</sup> Id. at 601, 631 S.E.2d at 804 (citing Wright v. MARTA, 248 Ga. 372, 373, 283 S.E.2d 466, 468 (1981)).

<sup>94. 280</sup> Ga. App. 197, 633 S.E.2d 558 (2006).

the issue of just and adequate compensation for the property taken. The court of appeals also held that the issue of who had hired a particular expert appraiser was not relevant to the issue of just and adequate compensation. In so holding, the court of appeals emphasized that "just and adequate compensation for the property taken was the only relevant issue for the jury to determine" and that the trial court had properly excluded the evidence in question. In the property taken was the only relevant issue for the jury to determine and that the trial court had properly excluded the evidence in question.

**3. Evidence of Compulsory Sale to Condemning Authority Not Admissible.** In *Gwinnett County v. Howington*, 98 the Georgia Court of Appeals held that the compulsory sale of land to a condemning authority is inadmissible in a condemnation action on the issue of the land's value. 99 Gwinnett County initiated condemnation proceedings to acquire two easements on a twenty-six acre tract of property owned by Howington. The following month, the entire tract of property was rezoned for commercial and high density residential use. A year later, the Gwinnett County School District (the "School") condemned the entire twenty-six acre tract of property. 100

During the trial of the County's condemnation action, Howington filed a motion in limine to exclude any evidence of the School's taking. The trial court agreed with Howington that the School's condemnation was irrelevant to the value of the easements sought by the County. The jury rendered an award consistent with the value and consequential damages testimony offered by Howington's expert, and the County appealed to the Georgia Court of Appeals. <sup>101</sup>

The County asserted on appeal that it should have been allowed to introduce evidence of the School's taking to challenge Howington's expert. The School claimed this evidence would rebut the expert's testimony that the property could not be developed in the manner for which it had been rezoned. The court of appeals disagreed, noting that "the courts of [Georgia] have long held that sales of land to condemning authorities are inadmissible as evidence in condemnation

<sup>95.</sup> Id. at 198, 633 S.E.2d at 560.

<sup>96.</sup> Id., 633 S.E.2d at 559 (citing Logan v. Chatham County, 113 Ga. App. 491, 493, 148 S.E.2d 471, 473 (1966)).

<sup>97.</sup> Id.

<sup>98. 280</sup> Ga. App. 347, 634 S.E.2d 157 (2006).

<sup>99.</sup> Id. at 348-49, 634 S.E.2d at 159.

<sup>100.</sup> Id. at 347, 634 S.E.2d at 158.

<sup>101.</sup> Id

<sup>102.</sup> Id. at 348, 634 S.E.2d at 159.

proceedings on the issue of the value of the land sought to be condemned."  $^{103}$ 

The court of appeals held:

[T]he admission of such evidence would have been improper because (1) Howington's compulsory sale of the 26 acres to the School District a year *after* the County initiated its condemnation action would not have affected the value of Howington's land at the time of the County's taking a year earlier, and (2) the [School's] inability to use the property as rezoned did not change the fact that the property was already in the process of being rezoned in a manner that affected its value for purposes of just and adequate compensation to Howington at the time of the County's taking. 104

This decision recognized the long standing principles of law that just and adequate compensation is determined as of the date of taking and that the fact finder may appropriately consider all reasonable and probable uses for the property when determining its value.<sup>105</sup>

4. Evidence Contesting Legality of Taking Properly Excluded and Expert Properly Allowed to Testify that House Had No Valuable Architectural Components Affecting Value. In Mayo v. City of Stockbridge, 106 the Georgia Court of Appeals reviewed procedural and evidentiary issues raised on appeal by Mayo, the property owner. 107 First, Mayo challenged the superior court's refusal to hear evidence about the legality of the taking. Mayo claimed that the City had failed to establish that the taking was for a public purpose. 108 However, the trial court found, and the court of appeals agreed, that Mayo was estopped from contesting the legality of the taking because she had withdrawn the funds deposited into the registry of the court without having properly challenged the adequacy of the City's condemnation petition or the special master's award. 109

The court of appeals cited *Styers v. Atlanta Gas Light Co.*, <sup>110</sup> in which the Georgia Supreme Court held:

<sup>103.</sup> *Id.* (quoting Oglethorpe Power Corp. v. Seasholtz, 157 Ga. App. 723, 724, 278 S.E.2d 429, 430 (1981)).

<sup>104.</sup> *Id.* at 349, 634 S.E.2d at 159 (citation omitted) (citing *Wright*, 248 Ga. at 373, 283 S.E.2d at 468; Carriage Hills Assocs. v. Mun. Elec. Auth. of Ga., 264 Ga. App. 192, 193, 590 S.E.2d 156, 158 (2003)).

<sup>105.</sup> Id.

<sup>106. 285</sup> Ga. App. 58, 646 S.E.2d 79 (2007).

<sup>107.</sup> Id. at 58, 646 S.E.2d at 80.

<sup>108.</sup> Id., 646 S.E.2d at 80-81.

<sup>109.</sup> Id. at 60, 646 S.E.2d at 81.

<sup>110. 263</sup> Ga. 856, 439 S.E.2d 640 (1994).

"In order to obtain review of the non-value issues determined by the special master, a party must file exceptions with the superior court prior to that court's entry of judgment on the special master's award. . . . Failure to file exceptions results in a waiver of the right to further litigate non-value issues."

Mayo failed to challenge the propriety of the taking before the special magistrate and likewise failed to file exceptions with the superior court. Mayo only filed a notice of appeal to a jury based on her "dissatisfaction with the estimated amount of compensation set forth in the Award of the Special Master." This notice of appeal was inadequate to preserve nonvalue issues. 114

Further, the court of appeals noted that Mayo withdrew the money awarded from the registry of the court. The court of appeals concluded that by this action, Mayo "acquiesced in the judgment of the superior court vesting title to the subject property" to the City and that Mayo was estopped from protesting the validity of the condemnation. The

Next, Mayo challenged the superior court's ruling to allow testimony by the City's expert that the house on the property, which was constructed around 1912, had no architectural components that enhanced the overall value of the condemned property. The court of appeals held that the City's expert witness was qualified to testify that the house had no valuable architectural components. The court of appeals noted that the witness had viewed the house, had nearly fifty years of experience in appraising real estate, had completed continuing education courses in appraising historic properties, had owned and restored similar houses, and had experience in removing and selling architectural components of historic homes. In light of such evidence, the court of appeals held that "the superior court did not abuse its discretion in allowing the [expert's] opinion to go to the jury, to be given such weight as it saw fit."

<sup>111.</sup> Mayo, 285 Ga. App. at 59, 646 S.E.2d at 81 (alteration in original) (quoting Styers, 263 Ga. at 857-58, 439 S.E.2d at 641).

<sup>112.</sup> *Id*.

<sup>113.</sup> Id.

<sup>114.</sup> Id. (citing Styers, 263 Ga. at 858, 439 S.E.2d at 641-42).

<sup>115.</sup> Id. at 60, 646 S.E.2d at 81.

<sup>116.</sup> *Id*.

<sup>117.</sup> Id., 646 S.E.2d at 82.

<sup>118.</sup> Id. at 60-61, 646 S.E.2d at 82.

<sup>119.</sup> Id. at 60, 646 S.E.2d at 82.

<sup>120.</sup> Id. at 61, 646 S.E.2d at 82.

#### II. NUISANCE AND TRESPASS

The nuisance and trespass jurisprudence of the Georgia Supreme Court and Georgia Court of Appeals over the survey period was dominated by surface water invasions. Another nuisance case concerned the rarely invoked "free public services doctrine," and a final case addressed the respective fact-finding roles of a jury and trial court in equity cases.

## A. Surface Water Invasion

**1. Trial Court Vested with Broad Discretion in Crafting Nuisance Remedy.** In *Menzies v. Hall*, <sup>121</sup> the defendant removed most of the grass from his property and replaced it with gravel intending to build a parking area to store an inventory of used cars. The modifications to the land substantially increased the amount of water run-off onto the plaintiff's property. The plaintiff complained to the defendant, and the defendant retained an engineer to design a water detention plan. When implementation of the detention plan did not abate the water flow onto the plaintiff's property, the plaintiff sued, alleging a continuous nuisance and trespass. <sup>122</sup> The trial court issued a temporary injunction directing the defendant "to stop any excessive water runoff onto [the plaintiff's] property but leaving it up to [the defendant] and his experts to determine what changes were necessary to achieve this result." <sup>123</sup>

Run-off continued to concentrate and disperse across the plaintiff's property at greater than pre-development levels, and the plaintiff filed a motion for contempt. The trial court held the defendant in contempt based on his failure to take corrective action. The trial court found that although some improvements had been made to the defendant's property, these improvements were insufficient to cure the run-off problem. The trial court ordered the defendant to construct a detention pond, but he was unable to complete the construction after hitting bedrock. In its final order, the trial court (1) declared the existence of a nuisance, (2) ordered the defendant to implement an engineering plan to which the parties had stipulated, and (3) ordered the defendant to

<sup>121. 281</sup> Ga. 223, 637 S.E.2d 415 (2006).

<sup>122.</sup> Id. at 224, 637 S.E.2d at 416.

<sup>123.</sup> Id.

refrain from storing or parking unattended cars on the rear portion of the lot.  $^{\rm 124}$ 

The defendant argued on appeal that the remedy fashioned by the trial court "constituted an abuse of discretion because it imposed a greater restriction than necessary to protect [the plaintiff]." The Georgia Supreme Court rejected the defendant's argument, holding that the trial court did not abuse its discretion in determining whether and how to require the defendant to abate the flow of water onto the plaintiff's property. The court determined that the trial court's order "reasonably balanced [the defendant's] interest in operating his business on [his property] and [the plaintiff's] valuable right to have her property free from artificial runoff without requiring [the defendant] to do the impossible." 127

**2.** Sale of Nuisance Causing Property No Protection From Liability. In *Green v. Eastland Homes, Inc.*, <sup>128</sup> Dozier Development Co. ("Dozier") prepared a tract of undeveloped property for a residential subdivision "by clear-cutting the trees and vegetation and creating an infrastructure through grading, providing for drainage, and installing roads, curbs, and sewer lines." Dozier was also responsible for erosion control at the site. Dozier sold the property to Eastland Homes, Inc. ("Eastland"). "Eastland developed the property further by doing final grading, building houses and driveways on the lots, backfilling the sites, and completing the landscaping." <sup>131</sup>

While Eastland owned the property, a "rainstorm resulted in torrents of water cascading down the slope from the lots and onto [the plaintiff's] backyard, immersing the backyard and patio and filling up the crawlspace under [the plaintiff's] home, which damaged the furnace and air conditioner." Subsequent rainstorms produced similar results and caused cracks in the walls and structure of the plaintiff's house and resulted in the growth of mold under the house. 133

<sup>124.</sup> Id. at 224-25, 637 S.E.2d at 417.

<sup>125.</sup> Id.

<sup>126.</sup> Id. (citing Goode v. Mountain Lake Invs., 271 Ga. 722, 723, 524 S.E.2d 229, 231 (1999)).

<sup>127.</sup> Id. at 226, 637 S.E.2d at 418.

<sup>128. 284</sup> Ga. App. 643, 644 S.E.2d 479 (2007).

<sup>129.</sup> Id. at 644, 644 S.E.2d at 480.

<sup>130.</sup> Id.

<sup>131.</sup> *Id*.

<sup>132.</sup> Id.

<sup>133.</sup> Id.

The plaintiff sued Dozier, Eastland, and the previous landowner for nuisance and trespass, claiming that the defendants "had disturbed and developed the land in such a way as to artificially increase the amount of water running down the slope." The trial court granted summary judgment to Dozier and the previous owner but denied summary judgment to Eastland. The plaintiff appealed the grant of summary judgment to Dozier while Eastland appealed the denial of its motion for summary judgment. <sup>135</sup>

The Georgia Court of Appeals noted that the Georgia Supreme Court had recently reiterated the law governing surface water run-off. The supreme court in *Menzies v. Hall* held that "[i]n surface water run-off disputes where two lots adjoin, the lower lot owes a servitude to the higher, so far as to receive the water which naturally runs from it, provided the owner of the latter has done no act to increase such flow by artificial means." The supreme court in *Greenwald v. Kersh* held that "[a]lthough property must accept the natural runoff of water from neighboring lands, an artificial increase or concentration of water discharge may give rise to a cause of action." 140

Applying the foregoing rules, the court reasoned that the question is "whether [the plaintiff] presented evidence showing that Dozier and Eastland engaged in activities that artificially increased the water runoff from their upper land onto [the plaintiff's] lower land." The plaintiff presented an expert affidavit that the development of the upper property resulted in the flooding of the plaintiff's property. The plaintiff tendered its expert's Flood Inspection Report, detailing the expert's observations concerning the substantial erosion of the two upper lots, which had no grass or groundcover. Noticeable gullies and channels on the lots channeled the full force of the rainwater downhill towards the plaintiff's land. The volume of water cascading down the hill overran the silt

<sup>134.</sup> *Id.* at 644-45, 644 S.E.2d at 481. The plaintiff also alleged personal injury resulting from the mold growth. *Id.* at 645, 644 S.E.2d at 481.

<sup>135.</sup> Id. at 645, 644 S.E.2d at 481.

<sup>136.</sup> Id.

<sup>137. 281</sup> Ga. 223, 637 S.E.2d 415 (2006).

<sup>138.</sup> Green, 284 Ga. App. at 645, 644 S.E.2d at 481 (quoting *Menzies*, 281 Ga. at 225, 637 S.E.2d at 417 (citing McMillen Dev. Corp. v. Bull, 228 Ga. 826, 828, 188 S.E.2d 491, 493 (1972)).

<sup>139. 265</sup> Ga. App. 196, 593 S.E.2d 381 (2004).

<sup>140. 284</sup> Ga. App. at 645, 644 S.E.2d at 481 (brackets in original) (quoting *Greenwald*, 265 Ga. App. at 198, 593 S.E.2d at 383) (citing Sumitomo Corp. of Am. v. Deal, 256 Ga. App. 703, 705, 569 S.E.2d 608, 611 (2002) (holding that a landowner on a higher property has no right to cause water to flow onto lower land in a way that does not otherwise naturally occur)).

<sup>141.</sup> Id.

fence, causing it to collapse. Another expert confirmed these observations in a second affidavit. The first expert exposed the defendants' flawed method of calculating groundwater seepage. The expert also faulted the removal of overburden soil from the upper lots. 142

The plaintiff's expert "testified that Dozier's development activities in developing the infrastructure (initial clear-cutting and grading, building of impervious roads, and placing of in-ground facilities) contributed to the excessive runoff." He also testified that Eastland's activities in "grading the lots in a nonconical manner (so as to create areas where water was allowed to collect and then funnel down the hillside), in removing overburden soils, and in creating more impervious surfaces, further contributed to the excessive runoff." <sup>144</sup>

The plaintiff also presented lay testimony consistent with the conclusions of her expert. Three long-time neighbors "testified that they witnessed the . . . flooding of [the plaintiff's] yard, which flooding they had not seen before that time but which they had seen several times since." The plaintiff testified that flooding had not occurred prior to the development activities of Dozier and Eastland. Finally, the plaintiff "presented numerous photographs displaying the gullies and channels beginning in the upper barren backyards and continuing down the hillside." 148

The court held that the combination of the lay testimony concerning the excessive run-off and the expert testimony that the run-off was caused by the development and construction activities of Dozier and Eastland required that the court reverse the trial court's grant of summary judgment to Dozier and affirm the trial court's denial of summary judgment to Eastland. 149

On appeal, Dozier and Eastland repeatedly directed the court's attention to other evidence showing that water run-off problems onto the plaintiff's property preexisted any development activities on the upper property. Dozier and Eastland argued that such evidence expressly contradicted the lay witnesses' testimony that the flooding was not preexisting. However, the court noted that "on summary judgment,

<sup>142.</sup> Id. at 646, 644 S.E.2d at 481-82.

<sup>143.</sup> Id., 644 S.E.2d at 482.

<sup>144.</sup> *Id*.

<sup>145.</sup> Id.

<sup>146.</sup> Id.

<sup>147</sup> Id

<sup>148.</sup> *Id.* at 647, 644 S.E.2d at 482 (citing Ponce de Leon Condos. v. DiGirolamo, 238 Ga. 188, 191, 232 S.E.2d 62, 65 (1977)).

<sup>149.</sup> Id.

<sup>150.</sup> Id.

neither [the appellate court] nor the lower court may consider the credibility of witnesses, which is a matter for the jury to resolve." <sup>151</sup>

Dozier and Eastland also argued that because "DeKalb County approved their development activities, they [could not] be held liable for a nuisance resulting therefrom." The court rejected that argument based on the plain terms of O.C.G.A. section 41-1-1, <sup>153</sup> providing that "[a] nuisance is anything 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." <sup>154</sup>

Next, Dozier and Eastland argued that the plaintiff must identify specific acts of negligence on their part before liability may attach. The court rejected that argument, noting the following:

"[n]egligence is not . . . a necessary ingredient of a cause of action growing out of a nuisance. A nuisance may arise through acts and conduct done within the pale of the law and executed with due care; and yet if the result attained injures the property or individual rights of another by causing a nuisance, the maintainer must either abate the nuisance or else respond in damages." <sup>156</sup>

Additionally, Dozier argued that because nine months passed between its development activities and the flooding, its actions could not have caused the excessive run-off.<sup>157</sup> The court similarly rejected that argument, noting that "[b]eyond the fact that the vagaries of weather may account for such, this is simply a matter which weighs in Dozier's favor that may be argued before the jury; it does not mandate summary judgment in its favor."<sup>158</sup>

Finally, Dozier and Eastland argued that because they no longer owned the property, they could not be held liable for continuing nuisance. The court noted that the Georgia Supreme Court had rejected that argument, specifically in the context of a landowner suing for excessive run-off:

153. O.C.G.A. § 41-1-1 (1997).

<sup>151.</sup> Id. (citing Columbus Clinic, P.C. v. Liss, 252 Ga. App. 559, 562, 556 S.E.2d 215, 218 (2001)).

<sup>152.</sup> Id.

<sup>154.</sup> Green, 284 Ga. App. at 647, 644 S.E.2d at 482 (brackets in original) (emphasis added by court) (quoting O.C.G.A. § 41-1-1).

<sup>155.</sup> Id. at 648, 644 S.E.2d at 483.

<sup>156.</sup> Id. (quoting City of Macon v. Roy, 34 Ga. App. 603, 606, 130 S.E. 700, 702 (1925)).

<sup>157.</sup> *Id*.

<sup>158.</sup> Id. (citing Tensar Earth Techs., Inc. v. City of Atlanta, 267 Ga. App. 45, 50, 598 S.E.2d 815, 820 (2004)).

<sup>159.</sup> Id.

"The fact that at the time the suit was filed the defendant had sold his property, from which the alleged cause of the injury arose, does not absolve him from being a continuing wrongdoer or from the responsibility of remedying its cause. The evidence showed that the defendant created the nuisance and that it was continuing. The trial court was authorized to restrain it and to require the defendant to cease and desist from continuing it." <sup>160</sup>

Accordingly, the court held that the plaintiff's action to recover damages against the alleged creators of the run-off nuisance was authorized, regardless of ownership of the property.<sup>161</sup>

3. Governmental Immunity No Bar to Municipal Liability for Continuing Nuisance. In City of Atlanta v. Broadnax, <sup>162</sup> homeowners brought a nuisance action against the City of Atlanta for the recurrent flooding of their homes. The flooding was allegedly due to an overflow from the City's combined system for the drainage of sewer water and storm water. The plaintiffs contended that the drainage system, built in 1915, lacked the capacity necessary to handle the increased drainage resulting from the tremendous growth and development of the area. <sup>163</sup> The plaintiffs also alleged that the City chronically failed to make regular pickups of trash and yard debris in the neighborhood, resulting in the clogging of storm water catch basins. <sup>164</sup> The jury returned a verdict awarding the plaintiffs a total of \$1,854,300 in damages. <sup>165</sup>

On appeal and at trial, the City asserted the defense of governmental immunity. The City relied on the rule announced in *Rogers v. City of Atlanta* <sup>166</sup> that

"[t]he duties of municipal authorities in adopting a general plan of drainage, and in determining when, where, and of what size and at what level drains or sewers shall be built, are of a quasi-judicial nature, involving the exercise of deliberate judgment and wide discretion; and the municipality is not liable for an error of judgment

 $<sup>160. \</sup>quad Id. \ ({\tt quoting} \ \textit{McMillen Dev. Corp.}, \, 228 \,\, {\tt Ga.} \,\, {\tt at} \,\, 828, \, 188 \,\, {\tt S.E.2d} \,\, {\tt at} \,\, 493).$ 

<sup>161.</sup> Id. at 649, 644 S.E.2d at 483.

<sup>162. 285</sup> Ga. App. 430, 646 S.E.2d 279 (2007).

<sup>163.</sup> Id. at 430, 646 S.E.2d at 282.

<sup>164.</sup> *Id.* at 431, 646 S.E.2d at 282.

<sup>165.</sup> Id. at 430, 646 S.E.2d at 282.

<sup>166. 61</sup> Ga. App. 444, 6 S.E.2d 144 (1939).

on the part of the authorities in locating or planning such improvements."  $^{\rm 167}$ 

The Georgia Court of Appeals distinguished Rogers, however, on the grounds that it involved a negligence claim, not a nuisance claim. 168 Further, a city may be liable for damages it causes from the operation or maintenance of a nuisance, irrespective of whether the city is exercising a governmental function. 169 As such, "'[W]here a municipality negligently constructs or undertakes to maintain a sewer or drainage system which causes the repeated flooding of property, a continuing, abatable nuisance is established, for which the municipality is liable." The court rejected the City's contention that there was no evidence that the City had in fact maintained a nuisance. <sup>171</sup> The court determined that the plaintiffs presented evidence that over a period of decades, the neighborhood residents made numerous flooding complaints to the City and that throughout that period, the City's engineers were aware that the neighborhood was prone to flooding. 172 Accordingly, the Georgia Court of Appeals affirmed the trial court's entry of judgment on the jury verdict. 173

On cross-appeal, the plaintiffs contended that the trial court erred in instructing the jury that the plaintiffs "were not entitled to recover damages for both the diminution in the value of their property and the costs of repair." Based on cases such as *Georgia Northeastern Railroad, Inc. v. Lusk*, 175 the trial court charged the jury that "an award of both the diminution in market value and costs to restore for the same injury occasioned by the same nuisance would constitute a double recovery of damages." The plaintiffs objected to the charge based on evidence that the repairs to their homes would not bring the

 $<sup>167. \;\;</sup> Broadnax, 285 \; Ga. \; App. \; at 431-32, 646 \; S.E. 2d \; at 283 \; (quoting Rogers, 61 \; Ga. \; App. \; at 446, 6 \; S.E. 2d \; at 146).$ 

<sup>168.</sup> Id. at 432, 646 S.E.2d at 283.

<sup>169.</sup> Id. (citing Mayor of Savannah v. Palmerio, 242 Ga. 419, 426, 249 S.E.2d 224, 229 (1978)).

<sup>170.</sup> *Id.* (quoting City of Roswell v. Bolton, 271 Ga. App. 1, 7, 608 S.E.2d 659, 665 (2004)).

<sup>171.</sup> Id. at 433, 646 S.E.2d at 283.

<sup>172.</sup> Id., 646 S.E.2d at 283-84.

<sup>173.</sup> Id. at 434, 646 S.E.2d at 285.

<sup>174.</sup> Id. at 438, 646 S.E.2d at 287.

<sup>175. 277</sup> Ga. 245, 587 S.E.2d 643 (2003).

<sup>176.</sup> Broadnax, 285 Ga. App. at 438, 646 S.E.2d at 287 (citing Ga. Ne. R.R., Inc., 277 Ga. at 246, 587 S.E.2d at 644).

properties back to their pre-flood market value because of the stigma of being located in a flood prone area.  $^{177}$ 

The plaintiffs relied on the case of *State Farm Mutual Automobile Insurance Co. v. Mabry* <sup>178</sup> to support their argument. In *Mabry* the two plaintiffs, who were automobile insurance policy owners, sought, in addition to the cost of repair, payment for the diminution in value of their automobiles under the theory that a damaged vehicle will suffer a diminution in value regardless of the efficacy of the repairs. <sup>179</sup> Though intimating that it believed applying the rule of *Mabry* was logical, the Georgia Court of Appeals concluded that "the rule applied by [the Georgia] Supreme Court in *Lush* remains in place and applies to *cases such as this.*" It appears that in referring to "cases such as this," the court was intending to differentiate cases concerning damage to real property and cases concerning damage to personal property.

## B. Public Nuisance and the Free Public Services Doctrine

Walker County v. Tri-State Crematory <sup>181</sup> was one of a multitude of actions emanating from the Tri-State Crematory saga. Walker County filed a suit for negligence and public nuisance against the owners and operators of the crematorium and the funeral homes and funeral directors who sent human remains to the crematory. The County sought to recover the expenses it incurred in recovering, identifying, and properly disposing of the human remains discovered at the crematorium property. The County also sought an award of punitive damages and attorney fees. <sup>182</sup> The Georgia Court of Appeals affirmed the trial court's dismissal of the County's complaint on the ground that its claims were barred by the free public services doctrine. <sup>183</sup>

Under the free public services doctrine, "absent specific statutory authorization or damage to government-owned property, a county cannot recover the costs of carrying out public services from a tortfeasor whose conduct caused the need for the services." Because the County had neither pointed to a statute authorizing the recovery of its costs nor

<sup>177.</sup> Id.

<sup>178. 274</sup> Ga. 498, 556 S.E.2d 114 (2001).

<sup>179.</sup> Id. at 498, 556 S.E.2d at 116.

<sup>180.</sup> Broadnax, 285 Ga. App. at 439, 646 S.E.2d at 287 (emphasis added).

<sup>181. 284</sup> Ga. App. 34, 643 S.E.2d 324 (2007).

<sup>182.</sup> Id. at 34, 643 S.E.2d at 325-26.

<sup>183.</sup> Id. at 35, 643 S.E.2d at 326.

<sup>184.</sup> Id. at 37, 643 S.E.2d at 327.

showed that it was seeking to recover costs associated with injury to its own property, the court held that the County's claims were barred. 185

## C. Proof of Defendant's Control Over Cause of Harm Element of Nuisance Claim

In *Grinold v. Farist*, <sup>186</sup> a slip-and-fall case, the plaintiff was injured when he fell after inspecting a camper that the defendant Farist had advertised for sale. The camper was parked on a driveway located on Farist's aunt's property. The plaintiff purportedly fell as a result of discharge from a clothes washer and kitchen sink that drained into the aunt's yard. <sup>187</sup> The plaintiff sued Farist and his aunt on the grounds that the defendants maintained a hazardous condition that constituted a nuisance. <sup>188</sup>

The trial court granted Farist's motion for summary judgment, and the Georgia Court of Appeals affirmed. The court of appeals concluded that "the essential element of nuisance is control over the cause of the harm." Because the plaintiff's injury occurred on property owned by Farist's aunt, and the alleged nuisance was composed of discharge from the aunt's house, the court held that Farist did not have control over the cause of harm. <sup>191</sup>

## D. Advisory Jury in Action to Enjoin Nuisance Case

In *Knott v. Evans*, <sup>192</sup> the plaintiff property owners filed a nuisance action against the defendants, seeking to enjoin the defendants' use of their property as a motocross track. The trial court chose to empanel a jury as an aid in fact finding. The evidence showed that the defendants' motocross facilities were open to the public from August 2002 to May 2003 and that the defendants chose to close the track to the public in June 2003. The jury returned a special verdict that the defendants' operation of a public motocross track on their property between August 2002 and May 2003 was a nuisance but that the defendants' operation of motorcycles on their property since June 2003 was not a nuisance. <sup>193</sup>

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185. Id. at 37-38, 643 S.E.2d at 327-28.
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<sup>186. 284</sup> Ga. App. 120, 643 S.E.2d 253 (2007).

<sup>187.</sup> Id. at 122, 643 S.E.2d at 254.

<sup>188.</sup> Id. at 121-22, 643 S.E.2d at 254.

<sup>189.</sup> Id. at 122, 643 S.E.2d at 255.

<sup>190.</sup> Id. (quoting Fielder v. Rice Constr. Co., 239 Ga. App. 362, 366, 522 S.E.2d 13, 16 (1999)).

<sup>191.</sup> Id. at 122-23, 643 S.E.2d at 255.

<sup>192. 280</sup> Ga. 515, 630 S.E.2d 402 (2006).

<sup>193.</sup> Id. at 515 & n.1, 630 S.E.2d at 403 & n.1.

The jury awarded no damages and declined to request that the court structure guidelines for the future operation of the track. Nevertheless, the trial court entered an order that expressly referenced the jury's verdict but permanently enjoined the defendants' use of the track except for specified days and times. <sup>194</sup> The trial court's order provided that the day and time restrictions would "'run with the land." <sup>195</sup>

On appeal, the Georgia Supreme Court considered the propriety of the trial court's order. 196 The court concluded that although there is no right to a jury trial in equity cases, the trial court may empanel a jury if "it desires to seek a jury's aid as a fact finding body." Where a jury acts in an advisory role, the trial court is not bound by the jury's factual findings. 198 Instead, the trial court maintains the authority to assess the facts independently from the jury. 199 However, where the trial court acknowledges the jury's special verdict without any reservation or expression of dissatisfaction and makes no contrary factual findings, the trial court commits error by rendering a ruling "completely at odds with" the jury's factual findings. 200 Accordingly, because the facts found by the jury and implicitly accepted by the trial court did not support the imposition of the permanent injunction, the Georgia Supreme Court reversed the trial court's grant of injunctive relief.<sup>201</sup> Additionally, the court held that inasmuch as an injunction is an equitable remedy and a court of equity acts in personam and not in rem, the trial court erred by providing that its order would "'run with the land.'"202

## E. Acrual of Trespass Cause of Action

In Ceasar v. Shelton Land Co., 203 the plaintiffs sued a developer for trespass, alleging that the developer desecrated and destroyed the plaintiffs' family cemetery. The trial court granted summary judgment to the developer on several grounds, including the running of the statute of limitations and the plaintiffs' failure to prove sufficiently the legal

<sup>194.</sup> Id. at 515, 630 S.E.2d at 403.

<sup>195.</sup> Id.

<sup>196.</sup> Id. at 515-17, 630 S.E.2d at 403-04.

<sup>197.</sup> *Id.* at 515, 630 S.E.2d at 403-04 (quoting Guhl v. Davis, 242 Ga. 356, 358, 249 S.E.2d 43, 45 (1978)).

<sup>198.</sup> Id. at 515-16, 630 S.E.2d at 404 (citing Bagley v. Robertson, 265 Ga. 144, 145, 454 S.E.2d 478, 480 (1995)).

<sup>199.</sup> Id.

<sup>200.</sup> Id. at 516, 630 S.E.2d at 404.

<sup>201.</sup> Id.

<sup>202.</sup> Id.

<sup>203. 285</sup> Ga. App. 421, 646 S.E.2d 689 (2007).

description for the boundaries of the cemetery. The Georgia Court of Appeals reversed. With respect to the four-year statute of limitations for trespass actions, the court noted that the developer's first intrusion into the cemetery occurred more than four years before the suit was filed. The court held, however, that the action was not time-barred because "all evidence of the cemetery was not destroyed until the land was bulldozed for cultivation in 1999," which was within the four-year period before the suit was filed. Turning to the sufficiency of the plaintiffs' legal description of the cemetery, the court noted that the record showed that the location of the cemetery was generally known and that there was some evidence of its location in the form of an aerial map. This was true despite the fact that the fence and trees that formerly established its boundaries had been destroyed.

## F. Intrusion of Lateral Support Measures a Trespass

In MVP Investment Co. v. North Fulton Express Oil, LLC, 210 a property owner brought an ejectment action against an adjoining property owner who constructed an earthen slope and wall that encroached upon the plaintiff's land. The purpose of the slope and wall was to laterally support the defendant's land on the common boundary line. The trial court dismissed the action for failure to state a claim.<sup>211</sup> In analyzing whether the plaintiff was entitled to an order of ejectment, the Georgia Court of Appeals cited Navajo Construction, Inc. v. Brigham<sup>212</sup> and Wachstein v. Christopher.<sup>213</sup> From these cases, the court determined that the law is well settled that a property owner is entitled to an order of ejectment where a "permanent structure" unlawfully encroaches onto the property owner's land. 214 The court saw no reason "why an earthen slope that is required to provide lateral support does not constitute a 'structure' under Wachstein or Navajo Const[ruction] when it encroaches upon the property of an adjacent landowner."215

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204. Id. at 422, 646 S.E.2d at 690.
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<sup>205.</sup> Id. at 424, 646 S.E.2d at 691.

<sup>206.</sup> Id. at 423-24, 646 S.E.2d at 691.

<sup>207.</sup> Id.

<sup>208.</sup> Id. at 424, 646 S.E.2d at 691.

<sup>209.</sup> Id.

<sup>210. 282</sup> Ga. App. 512, 639 S.E.2d 533 (2006).

<sup>211.</sup> Id. at 512, 639 S.E.2d at 533-34.

<sup>212. 271</sup> Ga. App. 128, 608 S.E.2d 732 (2004).

<sup>213. 128</sup> Ga. 229, 57 S.E.2d 511 (1907).

<sup>214.</sup> MVP Inv. Co., 282 Ga. App. at 513-14, 639 S.E.2d at 534-35.

<sup>215.</sup> Id. at 514, 639 S.E.2d at 535.

#### III. EASEMENTS AND RESTRICTIVE COVENANTS

During the survey period, the appellate courts had several opportunities to explore the application of O.C.G.A. section 44-9-40(b), <sup>216</sup> authorizing a trial court to condemn private ways of necessity. The courts also addressed the extent to which a servient tenement holder may interfere with the easement rights of a dominant holder, an easement grantor's right to refuse an easement holder's request to transfer its rights to a third part, and the manner in which a license may ripen into an irrevocable easement. In the context of restrictive covenants, the courts construed ambiguous covenant terms, and addressed the impact of restrictive covenants on a homeowner's right to sue for personal injury.

## A. Easement by Necessity and Private Rights-of-Way

1. Possession of Usufruct Insufficient Interest to Support Condemnation of Private Way. Under O.C.G.A. section 44-9-40(b), a trial court may condemn a private way or easement by necessity over the land of another when a plaintiff "owns real estate or any interest therein" to which the plaintiff has no means of access, ingress, and egress. <sup>217</sup> In *Read v. Georgia Power Co.*, <sup>218</sup> the Georgia Court of Appeals held that possession of a mere usufruct does not constitute the ownership of an interest in real property necessary to seek condemnation of a private way under the provisions of O.C.G.A. section 44-9-40(b). 219 In Read the plaintiff leased property from Georgia Power under a fifteen-year agreement. The lease agreement expressly provided that no estate would pass between Georgia Power and Read and that Read would have a usufruct only. Read's leased property was landlocked on two sides and bounded by Lake Rabun on two sides. After Georgia Power denied Read permission to build a driveway from his leased property to the main road, Read filed a complaint against Georgia Power and adjacent lessees, seeking an easement by necessity pursuant to O.C.G.A. section 44-9-40(b).<sup>220</sup>

The trial court granted summary judgment to Georgia Power and the adjacent lessees on the grounds that Read lacked a sufficient ownership interest in his leased property to entitle him to seek an easement by

<sup>216.</sup> O.C.G.A. § 44-9-40(b) (2002).

<sup>217.</sup> Id.

<sup>218. 283</sup> Ga. App. 451, 641 S.E.2d 680 (2007).

<sup>219.</sup> Id. at 452-53, 641 S.E.2d at 681.

<sup>220.</sup> Id. at 451-52, 641 S.E.2d at 680-81.

necessity.<sup>221</sup> In affirming the trial court, the Georgia Court of Appeals held that ordinarily the leasing of real estate for a period of less than five years conveys only a usufruct unless the lease contract provides otherwise.<sup>222</sup> The lease contract between Read and Georgia Power contemplated a term of fifteen years, raising the presumption that Georgia Power conveyed an estate for years. However, the lease contract expressly provided that notwithstanding the term, the lease created a usufruct only.<sup>223</sup> Thus, because Georgia Power conveyed no property interest to Read, he did not "own" an "interest" in the leased property and therefore was not entitled to pursue an easement by necessity under O.C.G.A. section 44-9-40(b).<sup>224</sup>

2. Proof That Only Means of Access by Way of Navigable Waters Sufficient to Establish Prima Facie Case of Necessity. In Pierce v. Wise, 225 the plaintiff sought to condemn a private way of necessity over adjacent property owners' lands. The plaintiff owned a triangular 0.40-acre lot located in a subdivision on Lake Lanier.<sup>226</sup> The tip of the plaintiff's lot touched the adjacent public roadway at a point so narrow that it did not allow him to access the roadway without crossing the land of either of his adjacent neighbors.<sup>227</sup> The plaintiff's only means of vehicular access was by parking along the roadway and walking 650 to 700 feet along an Army Corps of Engineers path abutting the shore of Lake Lanier. The plaintiff could also access his lot via the water. The trial court denied the parties' cross motions for summary judgment and the case proceeded to a jury trial. After the jury found that the plaintiff had a means of access to his property (presumably, by water, though the opinion does not say), the trial court entered judgment for the defendants.<sup>228</sup>

The Georgia Court of Appeals reversed.<sup>229</sup> The court noted that as a prerequisite to relief under O.C.G.A. section 44-9-40(b), a plaintiff must show that he or she has no other reasonable means of access to his or her property.<sup>230</sup> The court further noted that the Georgia Supreme Court previously addressed whether, under the statute, navigable waters

<sup>221.</sup> Id. at 452, 641 S.E.2d at 681.

<sup>222.</sup> Id. at 453, 641 S.E.2d at 681.

<sup>223.</sup> Id.

<sup>224.</sup> Id. (internal quotation marks omitted).

<sup>225. 282</sup> Ga. App. 709, 639 S.E.2d 348 (2006).

<sup>226.</sup> Id. at 709-10, 639 S.E.2d at 349.

<sup>227.</sup> Id. at 710, 639 S.E.2d at 349.

<sup>228.</sup> Id. at 709-10, 639 S.E.2d at 349.

<sup>229.</sup> Id. at 709, 639 S.E.2d at 349.

<sup>230.</sup> Id. at 710-11, 639 S.E.2d at 350.

alone may afford a person "reasonable" access to his or her property.<sup>231</sup> The court of appeals restated the supreme court's holding that where a property owner has no access to his or her property other than by navigable waterway, a presumption arises that there is no reasonable means of access for purposes of proving necessity under O.C.G.A. section 44-9-40(b). Thus, where a plaintiff establishes that the only access to his or her property is by way of navigable waters, the plaintiff has established a prima facie case that there is no reasonable means of access.233 "The burden then shifts to the condemnee to go forward with the evidence and demonstrate that access to the navigable waters constitutes a reasonable means of access under the peculiar circumstances of the case.'"234 Concluding that the defendant failed to rebut the presumption that the plaintiff lacked a reasonable means of access, the court of appeals held that the trial court erred in denying the plaintiff's motion for partial summary judgment and motion for directed verdict.235

3. Private Way by Prescription and Proper Venue in Private Way/Trespass Case. In Norton v. Holcomb, <sup>236</sup> a property owner sued the defendant for willful trespass, alleging that the defendant "unlawfully and intentionally carved out a road and knocked down trees" on the plaintiff's property.<sup>237</sup> The defendant filed a counterclaim seeking to quiet title and seeking condemnation of a private way, and the defendant moved to transfer the action to Pickens County because the case concerned title to land in that county. The trial court granted summary judgment to the plaintiff on both the trespass claim and the defendant's counterclaim and denied the motion to transfer.<sup>238</sup>

The defendant appealed and enumerated as error the trial court's grant of summary judgment to the plaintiff on the grounds that the defendant had acquired a private way by prescription over the roadway at issue. The defendant based his alleged prescriptive easement on the fact that the defendant's predecessor in interest had used the road as a

<sup>231.</sup> Id. at 711, 639 S.E.2d at 350.

<sup>232.</sup> Id. (citing Int'l Paper Realty Corp. v. Miller, 255 Ga. 676, 678, 341 S.E.2d 445, 446 (1986)).

<sup>233.</sup> Id.

<sup>234.</sup> Id. (quoting Int'l Paper, 255 Ga. at 678, 341 S.E.2d at 446).

<sup>235.</sup> Id. at 712, 639 S.E.2d at 351.

<sup>236. 285</sup> Ga. App. 78, 646 S.E.2d 94 (2007).

<sup>237.</sup> Id. at 78, 646 S.E.2d at 96.

<sup>238.</sup> Id.

means of access since 1883.<sup>239</sup> The court of appeals noted that in order to establish the existence of a private way, the defendant had to show:

(1) that he, or a predecessor in title, has been in uninterrupted use of the alleged private way for at least twenty years; (2) that the private way is no more than twenty feet wide, and that it is the same twenty feet originally appropriated; and (3) that he has kept the private way in repair during the period of uninterrupted use.<sup>240</sup>

The court held that the defendant failed to tender evidence that he or his predecessor in title had been in uninterrupted use of the roadway for at least twenty years. The defendant presented evidence from which one could infer that *someone* continued to use the road, [b]ut the law requires that the use be by the person claiming the private way or by his predecessor(s) in interest. As such, neither the defendant nor his predecessor in interest acquired a private way by prescription over the plaintiff's land. As land.

The Georgia Court of Appeals also affirmed the trial court's denial of the defendant's motion to transfer. The court noted that the Georgia constitution demands that "[a] suit involving title to land shall be brought in the county where the land lies." That mandate "does not apply, however, where the title is incidentally involved only, and is not directly put in issue." The court reasoned that an action for trespass does not involve title to land, and because the defendant's claim of prescriptive private way was incidental to the plaintiff's trespass claim, the suit was properly brought in the county of the defendant's residence. The court reasoned that are action for trespass claim, the suit was properly brought in the county of the defendant's residence.

## B. Interference with Rights to Use Easement

In Williams v. Trammell, <sup>248</sup> the plaintiff's property benefited from an express easement of ingress and egress over the adjacent property owned by the defendant. The defendant obstructed the plaintiff's use of the easement by installing one gate at the entrance to the easement

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239. Id. at 80-81, 646 S.E.2d at 98.
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<sup>240.</sup> *Id.* at 81 (citing Moody v. Degges, 258 Ga. App. 135, 137, 573 S.E.2d 93, 95 (2002)).

<sup>241.</sup> Id. at 83, 646 S.E.2d at 99.

<sup>242.</sup> Id., 646 S.E.2d at 100.

<sup>243.</sup> Id. at 84, 646 S.E.2d at 100.

<sup>244.</sup> Id. at 86, 646 S.E.2d at 102.

<sup>245.</sup> Id. (citing GA. CONST. art. VI, § 2, para. 2).

<sup>246.</sup> Id. (citing Anderson v. Black, 191 Ga. 627, 631, 13 S.E.2d 650, 653 (1941)).

<sup>247.</sup> Id. at 86-87, 646 S.E.2d at 102.

<sup>248. 281</sup> Ga. App. 590, 636 S.E.2d 757 (2006).

from the public road and another midway along the easement. The defendant admitted to installing the gates but alleged that he provided the plaintiff with keys to the gates.<sup>249</sup>

The trial court found that the middle gate was an improper obstruction and ordered the defendant to remove it. The trial court concluded, however, that with respect to the gate at the road, a fact question existed regarding whether the gate was erected prior to or subsequent to the plaintiff's acquisition of her land. The plaintiff appealed that order.<sup>250</sup>

The Georgia Court of Appeals held that the trial court erred in focusing on whether the front gate was installed prior to the plaintiff's acquisition of her property.<sup>251</sup> The trial court concerned itself with the timing of the fence installation based on the authority of Harvey v. Hightower, 252 which held that an obstruction arising after the grant of an easement is improper.<sup>253</sup> The trial court reasoned by implication that an obstruction erected before the grant of the easement could limit the scope of the easement granted.<sup>254</sup> The Georgia Court of Appeals distinguished the current case from Harvey on the grounds that it was undisputed in Harvey that no obstruction existed at the time the easement was granted. 255 Inasmuch as the evidence was conflicting regarding whether installation of the front gate predated the plaintiff's acquisition of her property, the court turned to the language of the defendant's deed.<sup>256</sup> Because the easement was purely "a creature of the deed," and the description of the easement in the deed did not provide for gates or other obstructions, the court held that both gates constituted unauthorized obstructions and that the trial court erred in not requiring the defendant to remove both gates.<sup>257</sup>

## C. License Ripening into Easement

Pursuant to O.C.G.A. section 44-9-4,258

<sup>249.</sup> Id. at 590, 636 S.E.2d at 758.

<sup>250.</sup> Id. at 591, 636 S.E.2d at 758.

<sup>251.</sup> Id. at 591-92, 636 S.E.2d at 759.

<sup>252. 239</sup> Ga. App. 684, 521 S.E.2d 367 (1999).

<sup>253.</sup> Williams, 281 Ga. App. at 591, 636 S.E.2d at 759 (citing Harvey, 239 Ga. App. at 684, 521 S.E.2d at 367-68).

<sup>254.</sup> Id.

<sup>255.</sup> Id.

<sup>256.</sup> Id. at 591-92, 636 S.E.2d at 759.

<sup>257.</sup> Id. at 592, 636 S.E.2d at 759.

<sup>258.</sup> O.C.G.A. § 44-9-4 (2002).

A parol license to use another's land is revocable at any time if its revocation does no harm to the person to whom it has been granted. 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>259</sup>

The Georgia Supreme Court has long held that qualifying expenses, for the purposes of O.C.G.A. section 44-9-4, are those incurred to make valuable improvements to the licensor's property that are necessary for the enjoyment of the license.<sup>260</sup>

In Lowe's Home Centers, Inc. v. Garrison Ridge Shopping Center Marietta, GA, L.P., 261 the Georgia Court of Appeals had to determine whether Lowe's Home Centers, Inc.'s ("Lowe's") license in a monument sign had ripened into an irrevocable easement.<sup>262</sup> The court held that it had and enjoined defendant's interference therewith.<sup>263</sup> The facts showed that a commercial property owner leased one parcel to Lowe's and the remainder of the property to Garrison Ridge Shopping Center ("Garrison Ridge"). After learning that Cobb County authorities would allow only one sign, the property owner wrote a letter to Lowe's and Garrison Ridge, stating that if Lowe's agreed to pay one-half of the cost, the owner would build a monument sign advertising both Lowe's and Garrison Ridge tenants on the property leased to Garrison Ridge. Lowe's paid \$22,000, and the sign was built. A declaration of covenants and easements was developed and recorded for the shopping center property, though no reference to the Lowe's sign was made therein. Years later, Garrison Ridge acquired the shopping center property, and after discovering that no easement had ever been recorded governing the sign, proposed a lease of \$1300 a month to Lowe's for its continued use. When Lowe's refused, Garrison Ridge indicated that it would remove the Lowe's name from the sign. Lowe's sought injunctive relief. The trial court granted Lowe's motion for a temporary restraining order but denied its request for a preliminary injunction, and Lowe's appealed.<sup>264</sup>

<sup>259.</sup> Id.

<sup>260.</sup> See Tift v. Golden Hardware Co., 204 Ga. 654, 668, 51 S.E.2d 435, 443-44 (1949) (holding that there was no easement where the licensee built a warehouse on his own property but did not make any improvements to a spur track on the licensor's property); Miller v. Slater, 182 Ga. 552, 558, 186 S.E. 413, 416 (1936) (holding that there was no easement where the licensee built a garage on her own property but did not make any improvements to a driveway on the licensor's property).

<sup>261. 283</sup> Ga. App. 854, 643 S.E.2d 288 (2007).

<sup>262.</sup> Id. at 854, 643 S.E.2d at 289.

<sup>263.</sup> Id.

<sup>264.</sup> Id. at 854-55, 643 S.E.2d at 289.

The Georgia Court of Appeals reversed, holding that Garrison Ridge's predecessor-in-interest granted Lowe's a license to construct a sign on its property and that Lowe's incurred expense in doing so, resulting in the ripening of its license into an irrevocable easement. The court further held that the Lowe's easement was binding on Garrison Ridge, as a subsequent purchaser, because it "had actual notice of the sign sufficient to charge it as a matter of law with a duty to conduct a reasonable and prudent investigation." The court additionally noted that the fact that Lowe's was a tenant rather than the owner of the property it occupied had no bearing on Lowe's property rights. <sup>267</sup>

## D. Discretion to Authorize Assignment of Easement Subject to Implied Duty of Good Faith

In *Hunting Aircraft, Inc. v. Peachtree City Airport Authority*, <sup>268</sup> Hunting Aircraft, Inc., an aviation maintenance facility, sought a declaration that a contract between itself and the Peachtree City Airport Authority (the "Authority") contained an implied duty of good faith and fair dealing. The facts showed that the Authority conveyed a nonexclusive access easement to Hunting Aircaft to move aircraft from its property across the airport's boundary and onto the airport's runways and taxiways. The contract provided that the Authority could declare a default and terminate the agreement if Hunting Aircraft sold or assigned its real property interests or its easement rights without first securing the written consent of the Authority. In 2005 Hunting Aircraft entered into an agreement to sell its property and to assign its easement rights to a prospective purchaser. Hunting Aircraft requested that the Authority consent to the transaction, but the Authority refused. <sup>269</sup>

The trial court declared that the easement did not require the Authority to act reasonably when considering a request for the assignment of rights conferred by the agreement. On appeal, the Georgia Court of Appeals noted that in *Brack v. Brownlee* the Georgia Supreme Court held that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and

<sup>265.</sup> Id. at 855, 643 S.E.2d at 290.

<sup>266.</sup> Id. at 857, 643 S.E.2d at 291.

<sup>267.</sup> Id. at 855, 643 S.E.2d at 290.

<sup>268. 281</sup> Ga. App. 450, 636 S.E.2d 139 (2006).

<sup>269.</sup> Id. at 450-51, 636 S.E.2d at 140.

<sup>270.</sup> Id. at 451, 636 S.E.2d at 140.

<sup>271. 246</sup> Ga. 818, 273 S.E.2d 390 (1980).

enforcement."272 The court also noted that, in applying the rule, Georgia appellate courts require that "'where the manner of performance is left more or less to the discretion of one of the parties to the contract, [that party] is bound to the exercise of good faith." Applying that rule, the Georgia Court of Appeals concluded that the easement agreement allowed the Authority to exercise its discretion in determining whether to grant its consent to an assignment. 274 As such, the Authority was subject to an implied obligation that such discretion be exercised in good faith.<sup>275</sup> Relying on three Georgia Court of Appeals cases, the Authority argued that the "good faith and fair dealing" rule did not In Tap Room, Inc. v. Peachtree-TSG Associates, LLC, 277 Vaswani v. Wohletz, 278 and Nguyen v. Manley, 279 the Georgia Court of Appeals held that "in the context of a lease, no requirement of reasonableness was implied to constrict a landlord's discretion whether to consent to the assignment of a lease or to consent to structural alterations to the leased property."280 The court, however, "decline[d] to enlarge this exception so as to apply it to nonleasehold contracts," reasoning that to do so would create an exception that swallowed the rule.<sup>281</sup> The court of appeals held that "the trial court erred in its legal conclusion that the duty of good faith did not apply to the Authority's decision to withhold its consent to the proposed transaction."282

## E. Restrictive Covenants

In *Skylake Property Owners Ass'n v. Powell*, <sup>283</sup> the plaintiffs sought to enjoin their property owners association from stopping the construction of their home. The association counterclaimed, contending that the

<sup>272.</sup> Id., 636 S.E.2d at 141 (brackets in original) (quoting Brack, 246 Ga. at 820, 273 S.E.2d at 392).

 $<sup>273.\</sup> Id.$  at 452, 636 S.E.2d at 141 (emphasis omitted) (quoting Camp v. Peetluk, 262 Ga. App. 345, 350, 585 S.E.2d 704, 708 (2003)).

<sup>274.</sup> Id.

<sup>275.</sup> Id. (quoting Time Warner Entm't Co. v. Six Flags Over Ga., 245 Ga. App. 334, 345, 537 S.E.2d 397, 409 (2000), vacated and remanded, 534 U.S. 801 (2001), reinstated, 254 Ga. App. 598, 563 S.E.2d 178 (2002)).

<sup>276.</sup> Id. at 453, 636 S.E.2d at 141-42.

<sup>277. 270</sup> Ga. App. 90, 606 S.E.2d 13 (2004).

<sup>278. 196</sup> Ga. App. 676, 396 S.E.2d 593 (1990).

<sup>279. 185</sup> Ga. App. 187, 363 S.E.2d 613 (1987).

<sup>280.</sup> Hunting Aircraft, 281 Ga. App. at 454, 636 S.E.2d at 142 (citing Tap Room, 270 Ga. App. at 91, 606 S.E.2d at 15; Vaswani, 196 Ga. App. at 676-77, 396 S.E.2d at 594; Nguyen, 185 Ga. App. at 187, 363 S.E.2d at 614).

<sup>281.</sup> Id.

<sup>282.</sup> Id.

<sup>283. 281</sup> Ga. App. 715, 637 S.E.2d 51 (2006).

plaintiffs failed to obtain approval to build a retaining wall on their property. The trial court found that the applicable restrictive covenants did not prohibit the construction of a retaining wall within a setback line because the retaining wall did not constitute a "structure" under the covenants.<sup>284</sup>

On appeal, in construing the covenants, the Georgia Court of Appeals ruled that the term "structure" was not defined in the covenants and that the covenants were ambiguous regarding whether a retaining wall could be built within the twenty-foot setback.<sup>285</sup> As such, the court applied the rules of contract construction to resolve the ambiguity.<sup>286</sup> Applying the rule that "'[w]ords generally bear their usual and common signification," the court reasoned that a retaining wall certainly fell within the scope of the term "structure" as defined in Black's Law Dictionary. 287 However, the court noted that using this definition, a driveway, a sewer line, and a sprinkler system, by their very nature, would all be required to cross setback lines and thus constitute Displeased with the application of the first rule of contract construction, the court turned to the rule that the whole contract should be looked to in arriving at the construction of any part. 289 After reviewing the covenants in their entirety, the court concluded that structure was "used in a limited sense to refer to a house, building, dwelling, or any above-ground or 'erected' shelters for people or property."<sup>290</sup> Accordingly, the court held that the term structure was not intended to be broad enough to encompass a retaining wall.<sup>291</sup> Therefore, the court affirmed the trial court's grant of partial summary judgment to the defendant property owners.<sup>292</sup>

In Hayes v. Lakeside Village Owners Ass'n, <sup>293</sup> property owners who were members of the Lakeside Village Owners Association, Inc. (the "Association") brought a personal injury action against the Association for injuries to Hayes, one of the plaintiffs, resulting from the collapse of a common area chair. The plaintiffs alleged negligence and gross

<sup>284.</sup> Id. at 715-16, 637 S.E.2d at 52-53.

<sup>285.</sup> *Id.* at 716, 637 S.E.2d at 53 (citing Mitchell v. Cambridge Prop. Owners Ass'n, 276 Ga. App. 326, 326-27, 623 S.E.2d 511, 512 (2005)).

<sup>286.</sup> Id.

<sup>287.</sup> Id. at 717, 637 S.E.2d at 53 (brackets in original) (quoting O.C.G.A. § 13-2-2(2) (1982)) (citing Black's Law Dictionary 1464 (8th ed. 2004)).

<sup>288.</sup> Id

<sup>289.</sup> Id. (citing O.C.G.A. § 13-2-2(4)).

<sup>290.</sup> Id., 637 S.E.2d at 54.

<sup>291.</sup> Id.

<sup>292.</sup> Id.

<sup>293. 282</sup> Ga. App. 866, 640 S.E.2d 373 (2006).

negligence on the part of the Association for failing to properly maintain the chair. The Association moved for summary judgment on the grounds that the plaintiffs were bound by a restrictive covenant that (1) absolved the association from liability resulting from injuries occurring on the common property, (2) assigned the property owners a duty to continuously inspect the common areas, and (3) provided that the property owners use the facilities at their own risk. The trial court granted the Association's motion for summary judgment, and the plaintiffs appealed.<sup>294</sup>

The plaintiffs contended that they were not bound by the restrictive covenant because it was a collateral or personal covenant that did not run with the land and bind them as subsequent assignees. The Georgia Court of Appeals, however, noted that the Georgia Supreme Court relaxed the rules governing covenants relating to land and that the supreme court frequently enforced such restrictions against subsequent grantees with notice, "whether named in the instrument or not, and though there [was] no privity of estate."

"It is immaterial in such cases whether the covenant runs with the land or not, the general rule being that it will be enforced according to the intention of the parties. It is only necessary that the covenant concern the land or its use, and that the subsequent grantee has notice of it." <sup>297</sup>

Determining that the plaintiffs had notice of the covenant through the reference in their deed and that the covenant "concern[ed] the land or its use," the court held that the covenant was enforceable against the plaintiffs and that the trial court's grant of summary judgment to the Association was proper.<sup>298</sup>

#### IV. ZONING

In the area of zoning, the Georgia Supreme Court heard several cases and reached several conclusions. For example, the supreme court held that a land owner's right to develop property under a certain zoning category is not transferrable to subsequent purchasers. Additionally, the

<sup>294.</sup> Id. at 866-67, 640 S.E.2d at 375.

<sup>295.</sup> Id. at 867, 640 S.E.2d at 375.

<sup>296.</sup> Id. at 867, 640 S.E.2d at 375 (quoting Lowry v. Norris Lake Shores Dev. Corp., 231 Ga. 549, 551, 203 S.E.2d 171, 172 (1974)).

<sup>297</sup>. Id. at 867-68, 640 S.E.2d at 375 (emphasis omitted) (quoting Lowry, 231 Ga. at 551, 203 S.E.2d at 172).

<sup>298.</sup> Id. at 869, 640 S.E.2d at 376 (citing Lowry, 231 Ga. at 551, 203 S.E.2d at 172).

court decided that traffic impacts present a rational basis to deny a conditional use permit.

### A. Vested Rights to Develop Property Not Transferable with Land

In BBC Land & Development, Inc. v. Butts County, 299 two developers bought property in Butts County. Each property was zoned R-1-C, which permitted construction of homes with a minimum of 1500 square feet. Both developers submitted plans showing housing of that size, which the County approved. The County later amended its zoning ordinance to require a minimum house size of 2000 square feet in the R-1-C zoning classification. The developers subsequently sold lots to When those builders submitted applications for building permits, they were denied on the ground that the planned houses did not meet the 2000 square foot limit of the R-1-C zoning classification. In response, the developers and the builder sued Butts County seeking injunctive relief, mandamus, a declaratory judgment, and damages. In their complaint, the plaintiffs alleged that a land owner's vested right to develop land in accordance with previous zoning attaches to the land and benefits a subsequent purchaser. In support of this argument, the plaintiffs claimed that vested rights are analogous to nonconforming uses. The trial court found for the County. 300 On review, the Georgia Supreme Court affirmed.<sup>301</sup> In doing so, the court distinguished nonconforming uses from vested rights, concluding,

[B]ased on the difference between nonconforming uses and vested rights to develop property in accordance with prior zoning, and especially on the nature of the vested rights as a property interest of the owner of the property, earned by the owner's substantial change of position in relation to the land, substantial expenditures, or incurring of substantial obligations, that vested rights to develop property in accordance with prior zoning are personal to the owner of them and are not transferable with the land.<sup>302</sup>

## B. Landfill Not "Public Utility"

In *EarthResources, LLC v. Morgan County*, <sup>303</sup> EarthResources, LLC bought property in Morgan County zoned for agricultural use. <sup>304</sup> It then sought written verification of zoning compliance in order to pursue

<sup>299. 281</sup> Ga. 472, 640 S.E.2d 33 (2007).

<sup>300.</sup> Id. at 472-73, 640 S.E.2d at 34.

<sup>301.</sup> Id. at 474, 640 S.E.2d at 35.

<sup>302.</sup> Id.

<sup>303. 281</sup> Ga. 396, 638 S.E.2d 325 (2006).

<sup>304.</sup> Id. at 396, 638 S.E.2d at 326-27.

a state permit to build a landfill. EarthResources claimed its plans met zoning requirements "because its landfill would be a public utility and public utility structures were permitted uses under the 1997 zoning ordinance then in effect."306 After the County refused to certify that the landfill was a permitted use, EarthResources filed suit. Later, the County filed a motion for summary judgment, which the trial court granted.307 Among several topics of discussion, the trial court considered EarthResources' "claim that its landfill would be a public utility and the provision in the zoning ordinance in effect when this case began that public utility structures were permitted uses in areas zoned for agriculture."308 The court turned first to the County's zoning ordinance, which defined public utilities as follows: "Entities engaged in regularly supplying the public with some commodity or service which is of public consequence or need, regulated and controlled by a state or federal regulatory commission and which may have the power of eminent domain."309

The Georgia Court of Appeals concluded that EarthResources could not meet this definition, stating,

[Although the] proposed landfill would provide a needed public service, the landfill still fails to meet an essential part of the definition, that it be "regulated and controlled by a state or federal regulatory commission." In considering the authority to regulate public utilities, this Court has held that "the Public Service Commission, rather than any other agency of the executive branch, has authority to regulate public utilities." That holding alone is sufficient to exclude the Department of Natural Resources from the role of a state regulatory commission regulating and controlling public utilities and, therefore, to exclude EarthResources' landfill from the category of public utility. 310

The court also made an interesting comment on the plaintiff's Open Meetings  $Act^{311}$  challenge. First, it cited the provision relative to publication of the agenda:

"Prior to any meeting, the agency holding such meeting shall make available an agenda of all matters expected to come before the agency at such meeting. The agenda shall be available upon request and shall

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305. Id., 638 S.E.2d at 327.
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<sup>306.</sup> Id.

<sup>307.</sup> Id.

<sup>308.</sup> Id. at 397, 638 S.E.2d at 327.

<sup>309.</sup> Id.

<sup>310.</sup> Id. (citation omitted) (quoting Lasseter v. Ga. Pub. Serv. Comm'n, 253 Ga. 227, 230, 319 S.E.2d 824, 827-28 (1984)).

<sup>311.</sup> O.C.G.A. §§ 50-14-1 to -6 (2006).

be posted at the meeting site, as far in advance of the meeting as reasonably possible." $^{312}$ 

The court then concluded that the agenda was not properly posted.<sup>313</sup> Despite this conclusion, the court held that:

Although the failure to post the agenda at the alternate site constituted a technical violation of the statute, we do not construe the statute so tightly as to consider the failure to comply with the letter of the agenda provision to require invalidation of the decision adverse to EarthResources. The Open Meetings Act "was enacted in the public interest to protect the public—both individuals and the public generally—from 'closed door' politics and the potential abuse of individuals and the misuse of power such policies entail. Therefore, the Act must be broadly construed to effect its remedial and protective purposes."<sup>314</sup>

## C. Traffic Impact Sufficient to Deny Conditional Use Permit

In the *City of Roswell v. Fellowship Christian School, Inc.*, <sup>315</sup> the school applied for a conditional use permit to construct several new buildings, including a football stadium. Despite opposition, the planning commission recommended approval of the application. The city council subsequently approved the permit, but without the stadium. <sup>316</sup> The school filed a petition for writ of mandamus, complaining that "the decision to disallow the stadium was arbitrary, capricious, a gross abuse of discretion and a violation of both federal and state guarantees of equal protection." The trial court found in favor of the school, and the City filed an appeal. <sup>318</sup>

On review, the Georgia Court of Appeals reversed:

Whether to approve or to deny that application was addressed solely to the exercise of [the City's] sound discretion in accordance with the factors enumerated in the ordinance. There was evidence to support the decision to deny the Permit based upon the negative impact the stadium would have on traffic in the area . . . .

<sup>312.</sup> EarthResources, 281 Ga. at 399, 638 S.E.2d at 328 (quoting O.C.G.A. § 50-14-1(e)(1)).

<sup>313.</sup> Id.

<sup>314.</sup> Id. (quoting Atlanta Journal v. Hill, 257 Ga. 398, 399, 359 S.E.2d 913, 914 (1987)).

<sup>315. 281</sup> Ga. 767, 642 S.E.2d 824 (2007).

<sup>316.</sup> Id. at 767, 642 S.E.2d at 825.

<sup>317.</sup> Id.

<sup>318.</sup> Id.

 $\dots$  [Further,] evidence that [the] proposed stadium would exacerbate an already existing traffic problem in the area is a rational basis for the denial of the application for the Permit. <sup>319</sup>

## D. Devisee of Real Property Has Standing Even Though Title Is Inchoate

In Hollberg v. Spalding County, 320 a property owner challenged the grant of a special exception to an adjacent property owner to reduce the minimum lot size permitted for a subdivision from two acres to one acre. On April 22, 2004, the Spalding County Board of Commissioners (the "Board") rezoned a 143-acre tract of land adjacent to that owned by the plaintiff from AR-1 (Agricultural and Residential) to R-4 (Single-Family Residential). At the zoning hearing, the plaintiff voiced objection to the rezoning but did not appeal the County's action. Five months later, the Board approved a special exception for the 143-acre tract to allow a reduction in the minimum lot size from two acres to one acre. Within thirty days of that decision, the plaintiff filed suit, alleging that the grant of the special exception was void because it was based upon a purportedly invalid rezoning decision. The defendants sought summary judgment on the grounds that (1) the plaintiff's challenge was timebarred and (2) the plaintiff lacked standing. The defendants contended that the plaintiff could not base its challenge to the special exception grant on errors purported to have occurred during the rezoning of the property because the plaintiff failed to appeal the rezoning decision within thirty days, as required by the zoning ordinance. Also, the defendants argued that the plaintiff could not, as a matter of law, satisfy the "substantial interest-aggrieved citizen" test necessary to have standing to challenge a zoning decision because the plaintiff did not own his property at the time of the zoning decision. The trial court granted the defendants' motions for summary judgment. 321

On appeal, the plaintiff argued that notwithstanding his failure to timely appeal the rezoning decision, he was entitled to a declaratory judgment under the decision from *Head v. DeKalb County*. The Georgia Court of Appeals noted that *Head* did not support the plaintiff's position. In *Head* the plaintiff sought a declaratory judgment regarding the effect of a board of commissioners vote on a rezoning (in

<sup>319.</sup> Id. at 769, 642 S.E.2d at 826.

<sup>320. 281</sup> Ga. App. 768, 637 S.E.2d 163 (2006).

<sup>321.</sup> Id. at 768-70, 637 S.E.2d at 165-67.

<sup>322.</sup> Id. at 770-71, 637 S.E.2d at 167 (citing Head v. DeKalb County, 246 Ga. App. 756, 760, 542 S.E.2d 176, 180 (2000)).

<sup>323.</sup> Id. at 771, 637 S.E.2d at 167.

other words, whether the rezoning was approved or denied).<sup>324</sup> Here, the court noted that the effect of the Board's April 22, 2004 vote was clear—the property was rezoned.<sup>325</sup> The plaintiff was simply dissatisfied by that decision.<sup>326</sup> As such, the court held that it was "incumbent upon [the plaintiff] to file a timely appeal if he wished to challenge the Board's decision on the merits."<sup>327</sup> The plaintiff's failure to do so meant that he was foreclosed from raising alleged errors occurring in the rezoning of the property in his attack on the grant of the special exception.<sup>328</sup>

The court also held that the plaintiff lacked standing to challenge the Board's grant of a special exception. 329 To have standing to challenge a zoning decision, a party must satisfy the substantial interest-aggrieved citizen test.<sup>330</sup> The defendants argued that the plaintiff lacked a substantial interest in the zoning decision because he did not own his property at the time of the Board's decision. Rather, at the time of the special exception hearing, the plaintiff was a devisee of the property under his mother's will.<sup>331</sup> In a matter of first impression, the court addressed the issue of "[w]hether a devisee of real property has a substantial interest in a zoning decision so as to satisfy the first prong" of the substantial interest-aggrieved citizen test. 332 Looking to the probate rules for guidance, the court noted that the probate rules provide that upon the death of the testator, "'devisees have an inchoate title in the realty which is perfected when the executor assents to the devise." Additionally, such assent "'relates back to the date of death of the testator.'"334 The court held, "Given the legally protected status of inchoate title to real property, we hold that such title is sufficient to give [the plaintiff] a 'substantial interest' in the grant of the special However, because the plaintiff failed to satisfy the second prong of the substantial interest-aggrieved citizen test—showing

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324. Id. (citing Head, 246 Ga. App. at 757, 542 S.E.2d at 178).
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<sup>325.</sup> See id., 637 S.E.2d at 167-68.

<sup>326.</sup> Id., 637 S.E.2d at 168.

<sup>327.</sup> Id.

<sup>328.</sup> Id.

<sup>329.</sup> Id. at 775, 637 S.E.2d at 170.

<sup>330.</sup> *Id.* at 772, 637 S.E.2d at 168.

<sup>331.</sup> Id.

<sup>332.</sup> Id

<sup>333.</sup> Id. at 772-73, 637 S.E.2d at 168 (quoting Williams v. Williams, 236 Ga. 133, 135, 223 S.E.2d 109, 110 (1976)).

<sup>334.</sup> Id. at 773, 637 S.E.2d at 168-69 (quoting Allan v. Allan, 236 Ga. 199, 201, 223 S.E.2d 445, 448 (1976)).

<sup>335.</sup> Id., 637 S.E.2d at 169.

special damages—he lacked standing to challenge the grant of the special exception. 336

### V. MISCELLANEOUS

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

# A. Open Records Act: Attorney Fees; Exception for Trade Secrets; and Electronic Data

In *Benefit Support, Inc. v. Hall County*, <sup>337</sup> Hall County appealed the denial of its motion for summary judgment on an Open Records Act<sup>338</sup> request. The County had failed to respond to the request within three business days and only made available one of the five categories of information requested. <sup>339</sup>

Pursuant to O.C.G.A. section 50-18-70(f),<sup>340</sup> once a request for review of public records is submitted, the custodian of the records shall have no more than three business days to determine whether or not the requested records are subject to the statute or whether an exemption to the statute applies.<sup>341</sup> The courts had previously interpreted the Act to "'require an affirmative response to an open records request within three business days."<sup>342</sup> If the records keeper fails to affirmatively respond to the requester "'within three business days by notifying the requesting party of the determination as to whether access will be granted, the [Act] has been violated."<sup>343</sup> In this case, the County failed to meet the requirements of the Act.

Benefit Support, Inc. ("Benefit") sought attorney fees from the County under O.C.G.A. section 50-18-73(b)<sup>345</sup> for failure to comply with the Open Records Act without substantial justification.<sup>346</sup> A two-prong test is required to obtain attorney fees under the Open Records Act.<sup>347</sup>

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336. Id. at 775, 637 S.E.2d at 170.
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<sup>337. 281</sup> Ga. App. 825, 637 S.E.2d 763 (2006).

<sup>338.</sup> O.C.G.A. §§ 50-18-70 to -77 (2006 & Supp. 2007).

<sup>339.</sup> Id. at 834, 637 S.E.2d at 772.

<sup>340.</sup> O.C.G.A. § 50-18-70(f) (2006).

 $<sup>341. \</sup>quad Id.$ 

<sup>342.</sup> Benefit Support, 281 Ga. App. at 833, 637 S.E.2d at 771 (quoting Wallace v. Greene County, 274 Ga. App. 776, 783, 618 S.E.2d 642, 648 (2005)).

<sup>343.</sup> Id., 637 S.E.2d at 772 (quoting Wallace, 274 Ga. App. at 783, 618 S.E.2d at 649).

<sup>344.</sup> Id. at 834, 637 S.E.2d at 772.

<sup>345.</sup> O.C.G.A. § 50-18-73(b) (2006).

<sup>346.</sup> Benefit Support, 281 Ga. App. at 834, 637 S.E.2d at 772.

<sup>347.</sup> Id.

First, the plaintiff must show that the records were not produced prior to the lawsuit being filed.<sup>348</sup> Second, if there was a violation, the plaintiff must show that the County lacked substantial justification for the violation.<sup>349</sup>

The court held that the first prong was met because the County failed to respond to the Open Records Act request within three business days. The second prong was met because the County did not bother to produce the remaining documents until after the civil action was filed and did not explain its dilatory conduct in any evidence submitted with its motion for summary judgment. The court held that the trial court did not err in denying the County's motion for summary judgment. The court held that the trial court did not err in denying the County's motion for summary judgment.

In *Douglas Asphalt Co. v. E.R. Snell Contractor, Inc.*, <sup>353</sup> Douglas Asphalt Co. ("Douglas") filed an Open Records Act request to the Georgia Department of Transportation (the "GDOT") for documents related to bids for road paving projects. Snell and ten other asphalt contractors brought an action against the GDOT seeking an injunction to prevent the release of the documents. Snell and the other contractors alleged that the documents contained trade secrets and as such fell under an exemption to the Open Records Act. After a bench trial, the Superior Court of Fulton County enjoined the GDOT from giving unredacted copies of the documents to Douglas. Douglas appealed. <sup>354</sup>

O.C.G.A. section 50-18-72(b)(1)<sup>355</sup> provides an exception to the Open Records Act to protect "the confidentiality of trade secrets obtained from a business entity that are confidential and required to be submitted to a government agency."<sup>356</sup> The trial court found that profit margins within the asphalt industry are very tight, running between one and five percent. It further found that asphalt companies spend significant resources in developing their asphalt formulas in order to reduce costs and increase profits.<sup>357</sup>

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348. Id. (citing Wallace, 274 Ga. App. at 781, 618 S.E.2d at 647).
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<sup>349.</sup> Id. (citing Wallace, 274 Ga. App. at 781, 618 S.E.2d at 648).

<sup>350.</sup> Id.

<sup>351.</sup> *Id*.

<sup>352.</sup> *Id*.

<sup>353. 282</sup> Ga. App. 546, 639 S.E.2d 372 (2006).

<sup>354.</sup> Id. at 546, 639 S.E.2d at 373.

<sup>355.</sup> O.C.G.A. § 50-18-72(b)(1) (2006 & Supp. 2007).

<sup>356.</sup> Douglas Asphalt Co., 282 Ga. App. at 548, 639 S.E.2d at 374 (quoting Georgia Department of Transportation, Standard Operating Procedure (SOP) 2SP: Control of Superpave Bituminous Mixture Designs II.E. (2003), available at http://tomcat2.dot.state.ga.us/thesource/pdf/auxdata/sop/sop2sp.html).

<sup>357.</sup> Id. at 546, 639 S.E.2d at 373.

As part of the bid process, the GDOT requires bidders to submit proposed design mix formulas for the asphalt prior to bidding on a job. The successful bidder must submit a "Job Mix Formula" that includes the percentages and the sources of each material that is to be used in the previously approved formula. The successful contractor is also required to provide worksheets every day of the actual construction reporting the results of tests that are run on the asphalt. The Standard Operating Procedures of the GDOT Office of Materials and Research states that "[m]ix designs shall be made available only to the designer and to users authorized by the designer. Mix designs are considered to be proprietary information. They are not subject to public disclosure under the Georgia Open Records Act by virtue of [O.C.G.A. section] 50-18-72(b)(1)."<sup>359</sup> Georgia law defines "trade secrets" as follows:

"information, without regard to form, including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information:

- (A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."<sup>360</sup>

The superior court found as a matter of law that the requested documents were trade secrets and exempt from the Open Records Act request under O.C.G.A. section 50-18-72(b)(1). Douglas contended that the court erred, arguing that the information could not be a trade secret because the roads were public property and the formula was ascertainable by testing. However, testimony established that the asphalt mix could not be readily ascertained through tests and could not be duplicated by independent research.<sup>361</sup> The court of appeals held that even if all the information regarding the materials was publicly

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<sup>358.</sup> Id. at 547, 639 S.E.2d at 373-74.

<sup>359.</sup>  $\it Id.$  at 548, 639 S.E.2d at 374 (quoting Georgia Department of Transportation,  $\it supra$  note 356.

<sup>360.</sup> Id. at 549, 639 S.E.2d at 375 (quoting O.C.G.A. § 10-1-761(4) (2000)).

<sup>361.</sup> Id. at 549-50, 639 S.E.2d at 375.

available, a unique combination of that information could add value and may qualify as a trade secret.<sup>362</sup>

Douglas further argued that because the contractor was not required by law to enter into the contracts, the information was not "required by law." The court pointed out that there was no Georgia case law addressing the issue of whether the information required to be submitted as part of a contract was actually information required by law. However, federal courts have held that information that must be submitted in conjunction with a government contract is required by law. Applying the reasoning of the federal courts, the court of appeals held that the requested information met the requirements of O.C.G.A. section 50-18-72(b)(1) as an exemption to the Open Records Act, and the judgment was affirmed.

In Georgia Department of Agriculture v. Griffin Industries,<sup>367</sup> the plaintiff, Griffin Industries ("Griffin"), filed suit in Fulton County to compel the Georgia Department of Agriculture (the "Department") to comply with an Open Records Act request.<sup>368</sup> The plaintiff requested "all departmental records relating to its Griffin facility's emissions and odor issues" as well as additional documents.<sup>369</sup> In the request, the term "'records'" was defined to include "'computer based or generated information.'"<sup>370</sup> The Department supplied the requested documents but did not provide relevant email documents. Email files were not archived, and the only source for the information was a series of emergency computer backup tapes. To provide copies of the emails, it would have been necessary for the Department to convert the emergency backup tapes from computer language and then compile them through a very laborious, expensive, and time intensive process.<sup>371</sup>

Griffin was not satisfied with the Department's response and immediately moved for an interlocutory injunction or temporary restraining order to prevent the Department from destroying the requested information before the resolution of the matter. The presiding

<sup>362</sup>. Id. at 550, 639 S.E.2d at 375-76 (citing Penalty Kick Mgmt. Ltd. v. Coca Cola Co., 318 F.3d 1284, 1291 (11th Cir. 2003)).

<sup>363.</sup> Id. at 551, 639 S.E.2d at 376.

<sup>364.</sup> Id.

<sup>365.</sup> See TRIFID Corp. v. Nat'l Imagery & Mapping Agency, 10 F. Supp. 2d 1087, 1098 (E.D. Mo. 1998).

<sup>366.</sup> Douglas Asphalt, 282 Ga. App. at 551, 639 S.E.2d at 377.

<sup>367. 284</sup> Ga. App. 259, 644 S.E.2d 286 (2007).

<sup>368.</sup> *Id.* at 260, 644 S.E.2d at 287.

<sup>369.</sup> Id., 644 S.E.2d at 287-88.

<sup>370.</sup> Id., 644 S.E.2d at 288.

<sup>371.</sup> Id. at 260-61, 644 S.E.2d at 288.

judge issued an order requiring the parties and counsel to appear at a case management conference and prepare a case status report; the judge also required the parties to discuss alternative dispute resolution.<sup>372</sup> The court stated that it might rule on "'any small motions'" and that it would enter a scheduling order following the conference.<sup>373</sup>

At the conference the court ordered the Department to "'preserve, safeguard and not destroy all electronic data files and correspondence.'" Griffin's motion for injunctive relief and the Department's motion to quash were held to be moot. The court further ordered the Department to "'put the data on any and all backup tapes back into the same document form or format that it was in prior to being backed up, review those documents for privilege, or applicable exemptions as provided for by [GORA] . . . and then produce to Plaintiff all those documents that are not either privileged or exempt."

The Georgia Court of Appeals overturned the lower court's ruling, which granted full relief to Griffin. 377 The court held that the Department was entitled to a hearing in order to present issues raised in its The court cited O.C.G.A. section 9-11-54(c)(1), 379 which provides that "'the court shall not give the successful party relief, though he may be entitled to it, where the propriety of the relief was not litigated . . . to assert defenses to such relief."380 Central issues raised in the Department's filings included whether the tapes were within the scope of the Open Records Act, the difficulty and cost of producing the information, and which party was responsible for the cost of such production.<sup>381</sup> The court that while O.C.G.A. section 9-11-65<sup>382</sup> allows for consolidation of a hearing for interlocutory injunction with the trial on the merits, "'the trial court's discretion to consolidate is tempered by the due process principle that fair notice and an opportunity to be heard must be given [to] the litigants before the disposition of

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372. Id.
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<sup>373.</sup> Id. at 261, 644 S.E.2d at 288.

<sup>374.</sup> Id., 644 S.E.2d at 289.

<sup>375.</sup> *Id*.

<sup>376.</sup> Id. at 261-62, 644 S.E.2d at 289 (alteration in original) (brackets in original).

<sup>377.</sup> Id. at 262, 644 S.E.2d at 289.

<sup>378.</sup> Id.

<sup>379.</sup> O.C.G.A. § 9-11-54(c)(1) (2006).

<sup>380.</sup> Griffin Industries, 284 Ga. App. at 262, 644 S.E.2d at 289 (quoting O.C.G.A.  $\S$  9-11-54(c)(1)).

<sup>381.</sup> Id.

<sup>382.</sup> O.C.G.A. § 9-11-65 (2006).

a case on the merits.'' $^{383}$  The decision of the superior court was thus void and reversed. $^{384}$ 

### B. Local Government Ordinances and Regulations: Liquor License

In *City of Atlanta v. Jones*, <sup>385</sup> the defendants, managers of night-clubs, were held criminally liable in municipal court for the actions of their bartenders, namely, selling alcohol without a license in violation of a city ordinance. The Superior Court of Fulton County reversed the convictions on the ground that the ordinance applies only to the designated alcohol licensee, not the designee's employees. The City appealed. <sup>386</sup>

The Georgia Court of Appeals held that the ordinance, as written, applies not only to the licensee but also to anyone who sells alcohol without a license, including managers and employees.<sup>387</sup> However, the court held that the manager's convictions were correctly set aside because there was no evidence that the managers themselves were selling alcohol.<sup>388</sup> The Georgia Supreme Court has consistently held that "vicarious criminal liability violates due process." Therefore, the managers could not be held liable for their bartenders' actions.<sup>390</sup>

### C. Sign Ordinance

In *Coffey v. Fayette County* ("Coffey II"), <sup>391</sup> Coffey brought a constitutional challenge to a Fayette County sign ordinance, which restricted noncommercial signs in residential areas to one sign per lot, where each

<sup>383.</sup>  $Griffin\ Industries$ , 284 Ga. App. at 263, 644 S.E.2d at 289 (quoting Kim v. State, 272 Ga. 343, 344, 528 S.E.2d 798, 799 (2000)).

<sup>384.</sup> Id., 644 S.E.2d at 290.

<sup>385. 283</sup> Ga. App. 125, 640 S.E.2d 698 (2006).

<sup>386.</sup> Id. at 125, 640 S.E.2d at 700.

<sup>387.</sup> *Id.* at 127, 640 S.E.2d at 701 (citing Sapp v. State, 99 Ga. App. 657, 660, 109 S.E.2d 841, 843 (1959)).

<sup>388.</sup> *Id.*; see, e.g., O'Brien v. DeKalb County, 256 Ga. 757, 758-59, 353 S.E.2d 31, 32-33 (1987) (holding that there was insufficient evidence to establish responsibility and authority as required for criminal prosecution under a regulatory ordinance). *Compare* Porter v. City of Atlanta, 259 Ga. 526, 530, 384 S.E.2d 631, 635 (1989) (upholding the conviction of the owner of a wrecker service for violation of a city ordinance mandating acceptance of checks and credit cards because evidence showed that the owner maintained complete control over the policies of the corporation and personally refused to accept the checks as required by the ordinance).

<sup>389.</sup> Jones, 283 Ga. App. at 127, 640 S.E.2d at 701 (quoting Perkins v. State, 277 Ga. 323, 325, 588 S.E.2d 719, 721 (2003)).

<sup>390.</sup> Id.

<sup>391. 280</sup> Ga. 656, 631 S.E.2d 703 (2006).

sign may not exceed six square feet in area. The case came before the Georgia Supreme Court twice on different issues.<sup>392</sup>

In 1999 the Fayette County Superior Court initially denied the applicant's motion for an interlocutory injunction, finding that "'there [was] a rational relationship between the County's sign [ordinance] and its interests in aesthetics and traffic safety." On appeal, the Georgia Supreme Court in *Coffey v. Fayette County* ("Coffey I") Held that the rational relationship test was not the correct standard. According to the court, the Georgia constitution affords broader protection than the First Amendment, He requiring the least restrictive means of achieving its goals to be adopted. The case was remanded to superior court. He remains of achieving its goals to be adopted.

On remand, the trial court found that a number of provisions in the ordinance were unconstitutional "because they were not content-neutral." However, the trial court found that those provisions could be severed without affecting the overall viability of the ordinance and that this was the least restrictive means for the county to achieve its goals of traffic safety and aesthetics. The trial court reached this ruling despite the fact that it did not receive any evidence to support it. Coffey appealed the decision to the Georgia Supreme Court. 400

The supreme court concluded that it was not in the position to dispute the county's conclusion that one sign, of the defined size, would adequately promote traffic safety and was the only way to maintain its aesthetic goals. However, in ordinances restricting free speech, the court "'must review [the ordinance] closely to ensure that it is narrowly drawn to serve the city's interest." In this case, the superior court deferred to the county's ordinance without receiving any evidence or fully considering whether the ordinance was the least restrictive means

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392. Id. at 656, 631 S.E.2d at 703.
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<sup>393.</sup> Coffey v. Fayette County ("Coffey I"), 279 Ga. 111, 111, 610 S.E.2d 41, 42 (2005).

<sup>394. 279</sup> Ga. 111, 610 S.E.2d 41 (2005).

<sup>395.</sup> Id. at 112, 610 S.E.2d at 42.

<sup>396.</sup> U.S. CONST. amend. I.

<sup>397.</sup> Coffey I, 279 Ga. at 111, 610 S.E.2d at 42.

<sup>398.</sup> Id.

<sup>399.</sup> Coffey II, 280 Ga. at 657, 631 S.E.2d at 704.

<sup>400.</sup> Id. at 656-57, 631 S.E.2d at 703-04.

<sup>401.</sup> Id. at 657, 631 S.E.2d at 704.

<sup>402.</sup> *Id.* (brackets in original) (quoting Statesboro Publ'g Co. v. City of Sylvania, 271 Ga. 92, 94, 516 S.E.2d 296, 298 (1999)).

of achieving its goals. $^{403}$  As such, the court reversed the judgment of the superior court and remanded with direction. $^{404}$ 

## D. HOA Dispute: Res Judicata

In Green v. Board of Directors of Park Cliff Unit Owners Ass'n, 405 a condominium owner, Green, brought an unsuccessful action against the Park Cliff Condominium Association ("Park Cliff") in magistrate court for damages arising from an alleged failure to maintain the condominium in accordance with the association's bylaws and standards.<sup>406</sup> magistrate judge entered judgment in favor of the defendant because the plaintiff failed to prove a claim. The same day, Green filed a pro se complaint in Fulton County Superior Court seeking an injunction against the defendant and the repair of common areas of the condominium as required by its "Declaration of Condominium." Upon review, the Georgia Court of Appeals held that the second complaint was barred by res judicata. 408 In order to bar a subsequent action based upon res judicata, "it must be established that an identity of parties and subject matter exists between the two actions, and that a court of competent jurisdiction entered an adjudication in the earlier action." If the merits of the second case were or could have been determined in the first case, then the res judicata defense is valid. The plaintiff conceded that the parties were the same, and upon review of the evidence, the court determined that the subject matter was the same. 411 The court further held that a claim for injunctive relief could have been asserted against Park Cliff in the first case. 412 The fact that the magistrate court lacked equity jurisdiction was immaterial. 413 According to the court, the applicants "'chose the forum and were bound by the limitations of the court that they chose."414

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403. Id. at 658, 631 S.E.2d at 704.
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<sup>404.</sup> Id.

<sup>405. 279</sup> Ga. App. 567, 631 S.E.2d 769 (2006).

<sup>406.</sup> Id. at 567, 631 S.E.2d at 770.

<sup>407.</sup> Id., 631 S.E.2d at 770-71.

<sup>408.</sup> Id. at 570, 631 S.E.2d at 772.

<sup>409</sup>. Id. at 569, 631 S.E.2d at 772 (quoting Mahan v. Watkins, 256 Ga. App. 260, 261, 568 S.E.2d 130, 131 (2002)).

 $<sup>410.\</sup> Id.$  at 569-70, 631 S.E.2d at 772 (citing Piedmont Cotton Mills, Inc. v. Woelper, 269 Ga. 109, 110, 498 S.E.2d 255, 256 (1998)).

<sup>411.</sup> *Id.* at 570, 631 S.E.2d at 772.

<sup>412.</sup> Id.

<sup>413.</sup> Id.

<sup>414.</sup> Id. (quoting Mahan, 256 Ga. App. at 261, 568 S.E.2d at 131).

#### E. Importation of Solid Waste

In *Fulton County v. City of Atlanta*, 415 a case of first impression, the Georgia Supreme Court held that O.C.G.A. section 36-1-16(a) 416 unconstitutionally impaired the free flow of commerce by giving Georgia counties the power to veto the importation of solid waste. 417 Under O.C.G.A. section 36-1-16(a), transportation of solid waste across county or state lines for the purpose of placement in a landfill is prohibited, unless authorized by the governing authorities of both the originating county and the receiving county. 418

The City of Atlanta had entered into contracts with private solid waste service companies to collect, transport, and dispose of the City's municipal solid waste. Waste was collected in the City, taken to transfer stations in Fulton County and Cobb County, and then transported to Forsyth County and Butts County for disposal in landfills. Fulton County brought an action in Fulton County Superior Court against the City seeking a declaratory judgment and equitable relief for the City's refusal to comply with O.C.G.A. section 36-1-16(a). The City moved for judgment on the pleadings, asserting that the statute violated the Commerce Clause of the United States Constitution. The City's motion was granted, and Fulton County appealed. The City's motion was granted, and Fulton County appealed.

Upon review, the Georgia Supreme Court noted that the United States Supreme Court had struck down a similar Michigan statute in *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources.*The Michigan statute in *Fort Gratiot* prohibited a private landfill from receiving solid waste originating from outside the county in which the landfill was located, unless such action was specifically

No person, firm, corporation, or employee of any municipality shall transport, pursuant to a contract, whether oral or otherwise, garbage, trash, waste, or refuse across state or county boundaries for the purpose of dumping the same at a publicly or privately owned dump, unless permission is first obtained from the governing authority of the county in which the dump is located and from the governing authority of the county in which the garbage, trash, waste or refuse is collected.

Id.

<sup>415. 280</sup> Ga. 353, 629 S.E.2d 196 (2006).

<sup>416.</sup> O.C.G.A. § 36-1-16(a) (2006). This subsection provides,

<sup>417.</sup> Fulton County, 280 Ga. at 353, 629 S.E.2d at 196.

<sup>418.</sup> O.C.G.A. § 36-1-16(a).

<sup>419.</sup> Fulton County, 280 Ga. at 353, 629 S.E.2d at 196-97; U.S. CONST. art. I, § 8.

<sup>420.</sup> Fulton County, 280 Ga. at 353, 629 S.E.2d at 196.

<sup>421.</sup> Id.; 504 U.S. 353 (1992).

approved in the county's solid waste management plan. The Supreme Court held that even though the statute purported to regulate only the intercounty transfer of solid waste, as opposed to interstate transfer, the statute unconstitutionally discriminated against interstate commerce. The Court noted that a state or a political subdivision of the state "may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather that through the State itself. Thus, the Court held the statute violated the Commerce Clause by allowing Michigan counties to protect themselves from competition from out-of-state waste producers and isolate themselves from the national economy. Moreover, the Court noted that no reason or rationale was given within the statute to explain why solid waste coming from outside the county should be treated differently than waste generated within the county.

The Georgia Supreme Court in *Fulton County* held that *Fort Gratiot* was controlling and that O.C.G.A. section 36-1-16(a) impinged on the Commerce Clause even more than the Michigan statute.<sup>427</sup> While the Michigan statute controlled the importation of solid waste into a county, the court held that O.C.G.A. section 36-1-16(a) controlled both the importation and exportation of solid waste.<sup>428</sup> Accordingly, the superior court decision was upheld.<sup>429</sup>

The court went on to hold that the superior court did have subject matter jurisdiction because the City had notified the Attorney General that it was challenging the constitutionality of O.C.G.A. section 36-1-16(a).<sup>430</sup>

<sup>422.</sup> Fort Gratiot, 504 U.S. at 357 (citing MICH. COMP. LAWS § 324.11513 (1999) (originally codified as MICH. COMP. LAWS § 299.413(a)).

<sup>423.</sup> Id. at 366-67.

<sup>424.</sup> *Id.* at 361.

<sup>425.</sup> Id.

<sup>426.</sup> Id.

<sup>427.</sup> Fulton County, 280 Ga. at 354 n.3, 629 S.E.2d at 197 n.3

<sup>428.</sup> Id.

<sup>429.</sup> Id. at 354, 629 S.E.2d at 197.

<sup>430.</sup> *Id.*; see Pharris v. Mayor of Jefferson, 226 Ga. 489, 490, 175 S.E.3d 845, 846 (1970); Williams v. Kaylor, 218 Ga. 576, 581, 129 S.E.2d 791, 795 (1963).