Real Property

Linda S. Finley
Real Property

by Linda S. Finley*

I. INTRODUCTION

Given continued economic issues, it is tempting to turn any survey of Georgia real property law into a report solely about foreclosure law. The survey period of this Article—from June 1, 2011, through May 31, 2012—saw continued dire economic times for Georgia and the entire United States. As this Article was going to print, RealtyTrac, which reports national foreclosure statistics, released its mid-year 2012 foreclosure report showing that foreclosure activity had again increased in 125 of the nation’s 212 metropolitan areas. Of the metropolitan areas making up the top ten on the foreclosure report, only Atlanta registered an increase in foreclosure during the first half of 2012. The courts and the Georgia General Assembly continue to address issues

---

* Shareholder in the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Atlanta, Georgia. Mercer University (B.A., 1978); Mercer University, Walter F. George School of Law (J.D., 1981). Member, State and Federal Bars of Georgia and Florida, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court.

The Author wishes to give special thanks to Kitty S. Davis, who, year after year, has graciously handled the administrative tasks in bringing this Article to print. Additional thanks goes to Robert A. “Andy” Weathers, Esq. (Mercer University, Walter F. George School of Law, J.D., 1966) whose guidance is reflected in this Article; and, Carol V. Clark, Esq. (University of Georgia, J.D., 1976) for her assistance, research, and analysis. Particularly, the Author directs the reader to Carol V. Clark, 2012 Judicial Update, 2012 REAL PROPERTY LAW INSTITUTE MATERIALS (Institute of Continuing Legal Education in Georgia 2012).

1. For an analysis of Georgia real property law during the prior survey period, see Linda S. Finley, Real Property, Annual Survey of Georgia Law, 63 MERCER L. REV. 309 (2011).


3. Id.
concerning the foreclosure process and other real property issues that arise either directly or incidentally because of the foreclosure dynamic. It appears these issues will continue to be around for some time.

II. LEGISLATION

With foreclosure on the minds of members of the General Assembly, work was done to lessen its impact on Georgia families and communities. In an effort for communities to keep abreast of who has title to properties that have been foreclosed (and likely to hold those who purchase foreclosed property accountable for conditions of the property), House Bill 1104 was enacted to provide standards for local and county governments that elect to enact ordinances requiring owners to register vacant real property. The statute defines “foreclosed real property” and “vacant real property” and limits the information that the county or municipality may require. Fees for registration are limited to a maximum of $100 per registration. Penalties for failure to register or failure to update registration information cannot exceed $1,000. An owner of vacant property may request exemption from registration if certain requirements are met and may challenge a county’s determination that a property is vacant.

Following a national trend where large-scale lenders are targets of federal investigations, the General Assembly expanded the definition of “mortgage fraud.” Section 16-8-101 of the Official Code of Georgia Annotated (O.C.G.A.) was amended to expand the scope of what may be investigated as mortgage fraud by including in the definition of “mortgage lending process:” (1) “the execution of deeds under power of

5. Id. § 1 (codified at O.C.G.A. § 44-14-14(b)).
6. Id. (codified at O.C.G.A. § 44-14-14(a)(3)).
7. Id. (codified at O.C.G.A. § 44-14-14(a)(5)).
8. Id. (codified at O.C.G.A. § 44-14-14(c)).
9. Id. (codified at O.C.G.A. § 44-14-14(h)).
10. Id. (codified at O.C.G.A. § 44-14-14(i)).
11. Id. (codified at O.C.G.A. § 44-14-14(j)).
sale” (foreclosure deeds); and (2) the execution of assignments vesting the secured creditor with title to the security instrument.\textsuperscript{15}

Although most attention was placed on the provisions regarding residential property, foreclosure of commercial property was not ignored. Senate Bill 333\textsuperscript{16} amends O.C.G.A. § 44-14-162.3\textsuperscript{17} to require the same notice required in residential foreclosure to be provided to commercial property owners prior to foreclosure sales.\textsuperscript{18}

Following the Federal Protecting Tenants at Foreclosure Act of 2009,\textsuperscript{19} which provided rights to tenants who reside in property foreclosed during their tenancy,\textsuperscript{20} House Bill 445\textsuperscript{21} was enacted to give such tenants similar protection under Georgia law.\textsuperscript{22} The statute provides various protections to bona fide tenants,\textsuperscript{23} provides the tenant a period of ninety days before he or she can be evicted,\textsuperscript{24} and codifies a mechanism for recovery of the security deposit.\textsuperscript{25}

Revisiting the Georgia Supreme Court’s 2003 advisory opinion--which stated that the preparation and execution of a deed of conveyance by anyone other than an attorney licensed in Georgia constituted an unauthorized practice of law--the General Assembly amended O.C.G.A. § 44-14-13\textsuperscript{26} to codify the advisory opinion and formally legislate the requirement that only a “lender or an active member of the State Bar of Georgia” can conduct a closing or disburse settlement proceeds.\textsuperscript{27} The statute goes further than the advisory opinion, applying the attorney requirement to both new loans and transactions to refinance made by a current or a new lender.\textsuperscript{28} Civil penalties are enacted for any person violating the statute as $1,000 or double the amount of interest payable on the loan for the first sixty days

\textsuperscript{15} O.C.G.A. § 16-8-101(1).
\textsuperscript{17} O.C.G.A. § 44-14-162.3 (2002 & Supp. 2012).
\textsuperscript{18} Ga. S. Bill 333 § 1.
\textsuperscript{20} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id. § 3 (to be codified at O.C.G.A. § 44-7-55.1(d) (Supp. 2012)).
\textsuperscript{24} Id. (to be codified at O.C.G.A. § 44-7-55.1(b)(1) (Supp. 2012)).
\textsuperscript{25} Id. § 1 (to be codified at O.C.G.A. § 44-7-38 (Supp. 2012)).
\textsuperscript{27} Id. at 473, 588 S.E.2d at 741.
\textsuperscript{29} O.C.G.A. § 44-14-13(a)(10).
\textsuperscript{30} O.C.G.A. § 44-14-13(b).
after closing, whichever is greater; it also creates a misdemeanor crime punishable by a fine of up to $1,000 and up to twelve months imprisonment for each violation.

III. TITLE TO REAL PROPERTY

In Chase Manhattan Mortgage Corp. v. Shelton, the Georgia Supreme Court addressed the effect of a mortgagor's conveyance of a portion of his equitable interest in a mortgaged property to his minor children on subsequent holders of legal and equitable title.

On June 30, 1998, Shelton acquired title to the property via warranty deed. On the same day, he executed two security deeds transferring legal title of the property to secure repayment of the debt. In September 1998, Shelton conveyed his equitable interest in the property to his wife and two children (the Shelton children), each of them receiving a one-third interest.

When Shelton refinanced the property two years later, the new lender, Choice Capital Funding, Inc. (Choice Capital) refused to refinance the property unless the children's names were removed from the chain of title. To this end, the Sheltons hired an attorney to petition the probate court to appoint the children's mother as legal guardian of their interest in the property. However, the probate court never appointed Shelton's wife as the children's conservator. In September 2000, Shelton's wife executed and recorded a quitclaim deed purportedly conveying both her interest and the children's interest back to Shelton, signing the deed once for herself and twice as "Guardian of each child." Shelton then executed a security deed in favor of Choice Capital and used the loan

31. O.C.G.A. § 44-14-13(e).
32. O.C.G.A. § 44-14-13(f).
33. This section was authored by Kristin S. Miller, attorney at the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Atlanta, Georgia. Agnes Scott College (B.A., Phi Beta Kappa, 2005); Emory University School of Law (J.D., 2009).
35. Id. at 544-45, 722 S.E.2d at 745.
36. Id. at 544, 722 S.E.2d at 745.
37. Id. at 544-45, 722 S.E.2d at 745; see also O.C.G.A. § 29-1-1(2) (2007) (defining "[c]onservator" to include “guardian of the property appointed prior to July 1, 2005”). The General Assembly rewrote the guardianship code, Title 29, effective July 1, 2005. See Mary F. Radford, Wills, Trusts, Guardianships, and Fiduciary Administration, 56 Mercer L. Rev. 457, 477-78 (2004). The revision updated the code's terminology to accord with the majority of states. See O.C.G.A. § 29-1-1. A "guardian of the property" is now called a "conservator," while a "guardian of the person" is simply called a "guardian." See id.
38. Shelton, 290 Ga. at 545, 722 S.E.2d at 745.
proceeds to pay off the original security deeds, which were cancelled of record in December 2000.39

Choice Capital later assigned the security deed to Household Finance Corporation (HFC), who foreclosed on the property in December 2002. In August 2003, HFC conveyed the property to Brian and Keily Johnson (the Johnsons), who financed the purchase with a loan from Chase Manhattan Mortgage Corporation (Chase) and a Chase affiliate. The Johnsons later paid off the security deed in favor of the Chase affiliate and executed a new security deed in favor of USAA Federal Savings Bank (USAA). In April 2008, the Shelton children, through appointed counsel, sued to quiet title to the property naming the Johnsons and the holders of the two security deeds, Chase and USAA, as defendants. In December 2010, the trial court granted summary judgment in favor of the Shelton children, holding each held clear title to a one-third undivided interest in the property. Chase, USAA, and the Johnsons (appellants) appealed.40

In affirming the trial court's decision, the Georgia Supreme Court rejected the appellants' argument that they were bona fide purchasers such that equity would require their property interests be unaffected by the Shelton children's interest.41 The supreme court noted that bona fide purchaser status requires "lack of actual or constructive notice of the outstanding interest in the property."42 Here, the supreme court reasoned, the chain of title included the 2000 quitclaim deed from Shelton's wife to him, which showed on its face that the mother was the children's purported guardian.43 The supreme court held that under the circumstances, the appellants were "on notice of the need to confirm the mother's legal authority"44 to convey her children's property interest.45

The Georgia Supreme Court also upheld the trial court's finding that the children acquired a two-thirds interest in the property from the original quitclaim deed, noting that it was undisputed that Shelton held equitable title, which is freely transferrable, when he transferred it to

39. Id.
40. Id. at 545-46, 722 S.E.2d at 745-46.
41. Id. at 546-47, 722 S.E.2d at 746.
42. Id. at 547, 722 S.E.2d at 746.
43. Id.
44. Id. at 547, 722 S.E.2d at 746-47 (noting that "[a]lthough the law treats parents as the natural guardians of their children, it does not give parents an unfettered right to dispose of their children's interests in real property").
45. Id. at 547, 722 S.E.2d at 747 (citing DANIEL F. HINKEL, PINDAR'S GA. REAL ESTATE LAW & PROCEDURE § 26-49 (6th ed. 2004) ("The validity of a guardian's appointment is the first point to be examined.").
his children in 1998. Moreover, because Shelton's wife was never appointed conservator, the 2000 quitclaim deed was only effective in conveying her one-third equitable interest, leaving the children's two-thirds interest intact.\textsuperscript{47} The court stated, "When the [o]riginal [s]ecurity [d]eeds were paid off and cancelled of record in December 2000, legal title automatically reverted to Shelton and his assigns—his two children."\textsuperscript{48} Thereafter, Shelton could only convey the interest he held.\textsuperscript{49} Thus, when he executed the new security deed in favor of Choice Capital, he conveyed only his one-third interest in the property, which was all that was assigned to the foreclosing party and ultimately the only interest appellants received.\textsuperscript{50}

Disputes concerning control of church-owned property when a congregation splits from its parent church continue to raise critical property, trust, and First Amendment issues in Georgia courts. In 2011, this Survey addressed the Georgia Court of Appeals decision in \textit{Rector, Wardens & Vestryman of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Georgia, Inc.} (Christ Church),\textsuperscript{51} then on appeal to the Georgia Supreme Court.\textsuperscript{52} The Georgia Supreme Court granted certiorari and issued a long and detailed opinion analyzing the title instruments, Georgia trust statutes, and local and national church documents.\textsuperscript{53} The issue before the court was not ownership in terms of legal title but rather "[t]he question presented [was] who controls that property."\textsuperscript{54}

The supreme court began its lengthy opinion by recognizing that the First Amendment limits the manner in which secular courts resolve property disputes involving churches and religious organizations.\textsuperscript{55} Specifically, when secular courts are called to resolve property disputes in hierarchical religious denominations, they must apply "neutral principles of law" to determine who has the right to control church property and "avoid[] any inquiry into religious doctrine."\textsuperscript{56} This

\begin{itemize}
\item[46.] \textit{Id.} at 548, 722 S.E.2d at 747 (citing Hinkel, \textit{supra} note 45, at § 21-49).
\item[47.] \textit{Id.}
\item[48.] \textit{Id.}
\item[49.] \textit{Id.} at 548-49, 722 S.E.2d at 747-48.
\item[50.] \textit{Id.} at 549, 722 S.E.2d at 748.
\item[51.] 305 Ga. App. 87, 699 S.E.2d 45 (2010).
\item[52.] See \textit{Finley, supra} note 1, at 313-16.
\item[54.] \textit{Id.} at 96, 718 S.E.2d at 241.
\item[55.] \textit{Id.} at 96-97, 718 S.E.2d at 241.
\item[56.] \textit{Id.} at 97, 718 S.E.2d at 241.
\end{itemize}
neutral principles analysis requires consideration of title instruments, statutes, and church-governing documents.\textsuperscript{57}

While the supreme court stated the court of appeals may have erred by applying Georgia statutes governing the holding of church properties to the property at issue,\textsuperscript{58} it determined the issue was not dispositive and need not be decided to resolve the case.\textsuperscript{59} The supreme court agreed with the court of appeals that the title instruments did not create a trust in favor of the parent church and found that no trust was created under Georgia "express (or implied) trust statutes."\textsuperscript{60} Nevertheless, like the court of appeals, the supreme court held that the application of the neutral principles doctrine demonstrates "that an implied trust in favor of the [parent church] exists on the property of [the break-away congregation]."\textsuperscript{61}

On the same day, the Georgia Supreme Court reached the same conclusion in \textit{Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.} (Timberridge Presbyterian Church),\textsuperscript{62} through a slightly different analysis. In that case the court considered a property dispute between the local and national bodies of a hierarchical church.\textsuperscript{63} Timberridge Presbyterian Church (Timberridge) sits on property owned by Timberridge Presbyterian Church, Inc. (TPC Inc.), a corporate entity specifically formed to hold and control the Timberridge property. From 1880 to 1983, Timberridge was a member of the Presbyterian Church in the United States (PCUS), the post-Civil War southern branch of the Presbyterian Church. In 1983, PCUS and the northern branch of the denomination reunited as Presbyterian Church (U.S.A.) (PCUSA), and Timberridge became a member of PCUSA.\textsuperscript{64}

In 2007, TPC Inc. filed suit against the Presbytery of Greater Atlanta, Inc. (Presbytery), which represented PCUSA in this action, seeking a declaratory judgment that TPC Inc. owned all the Timberridge property and did not hold it in trust for the benefit of PCUSA. TPC Inc. amended its complaint to seek to quiet title. Presbytery counterclaimed that TPC Inc. held the property in trust for the benefit of PCUSA and should be enjoined from transferring the property. In November 2007, a majority of the Timberridge congregation voted to disaffiliate from PCUSA. In

\textsuperscript{57} \textit{Id.}
\textsuperscript{59} \textit{Christ Church}, 290 Ga. at 100-01, 718 S.E.2d at 244.
\textsuperscript{60} \textit{Id.} at 98, 103, 718 S.E.2d at 242, 245.
\textsuperscript{61} \textit{Id.} at 118, 718 S.E.2d at 255.
\textsuperscript{62} 290 Ga. 272, 719 S.E.2d 446 (2011).
\textsuperscript{63} \textit{Id.} at 272, 719 S.E.2d at 447.
\textsuperscript{64} \textit{Id.} at 272-73, 719 S.E.2d at 447-48.
January 2008, Presbytery filed an ejectment action against Timberridge, who then affiliated with a separate denomination.\textsuperscript{65}

On cross motions for summary judgment, the trial court held that church documents established a trust in favor of PCUSA as to any property held by TPC Inc. The Georgia Court of Appeals reversed, holding that application of the neutral principles analysis required a weighing of the relevant deeds and state statutes, as well as local and national church documents, and that the national church documents were not dispositive.\textsuperscript{66} Specifically, the court of appeals stated, “In the absence of some showing of intention and assent on the part of Timberridge, neutral principles of law cannot support the unilateral imposition of a trust provision drafted by the purported beneficiary of the trust and the resulting deprivation of the opposing party’s property rights.”\textsuperscript{67}

Like the Christ Church matter, the supreme court in \textit{Timberridge} began its opinion with a detailed analysis of the First Amendment limits to the manner in which secular courts resolve disputes involving churches and religious organizations.\textsuperscript{68} Specifically, when secular courts are called to resolve property disputes in hierarchical religious denominations, they must apply neutral principles of law.\textsuperscript{69} Thus, in determining whether the local or parent church has the right to control the property at issue, neutral principles allow consideration of the relevant deeds, state statutes, and the governing documents of both religious bodies.\textsuperscript{70} The objective of this analysis was to determine “the intentions of the parties’ at the local and national level regarding beneficial ownership of the property” as expressed before any legal controversy arose.\textsuperscript{71}

Applying the neutral principles of law, the court considered the deeds, Georgia statutes governing trusts, and the local and national governing church documents.\textsuperscript{72} While the court recognized that the relevant deeds did not show an intent by the grantors to create a trust, the deeds also did not “expressly preclude the creation of one.”\textsuperscript{73} Moreover, when

\textsuperscript{65} Id. at 275, 719 S.E.2d at 449-50.
\textsuperscript{66} Id. at 275-76, 719 S.E.2d at 450.
\textsuperscript{67} Id. (quoting \textit{Timberridge Presbyterian Church v. Presbytery of Greater Atlanta, Inc.}, 307 Ga. App. 191, 200, 705 S.E.2d 262, 269 (2010)).
\textsuperscript{68} Id. at 276, 719 S.E.2d at 450.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Id. at 277, 719 S.E.2d at 450 (quoting \textit{Jones v. Wolfe}, 443 U.S. 595, 603 (1979)) (internal quotation marks omitted).
\textsuperscript{72} Id. at 277-86, 719 S.E.2d at 451-57.
\textsuperscript{73} Id. at 277, 719 S.E.2d at 451.
Timberridge affiliated with PCUSA in 1983, it brought itself under the church's national constitution, which expressly states that local churches hold their property in trust for PCUSA even if legal title is vested in a corporation.\textsuperscript{74}

The supreme court then examined O.C.G.A. § 14-5-46, which governs all deeds of conveyance to any person, church or religious society, or trustee for the use of the church or religious society, and provides in part that "all lots of land so conveyed shall be fully and absolutely vested in [the] church . . . ."\textsuperscript{75} The court of appeals held the statute inapplicable because the deeds at issue did not convey the property to trustees.\textsuperscript{76} The supreme court disagreed, finding that the introductory language of the statute is disjunctive and governs conveyances to persons, churches, or trustees.\textsuperscript{77}

The heart of the supreme court's opinion was its rejection of the court of appeals's reliance on Georgia's generic express trust statute,\textsuperscript{78} which requires, among other things, a writing and clear evidence of intent to create a trust.\textsuperscript{79} The supreme court's holding was unequivocal: "[T]he fact that a trust was not created under our state's generic express (or implied) trust statutes does not preclude the implication of a trust on church property under the neutral principles of law doctrine."\textsuperscript{80}

Specifically, the supreme court determined that by affiliating with PCUSA in 1983, Timberridge assented to governance by PCUSA's constitution, which plainly stated that local churches hold their property in trust for the benefit of the general church.\textsuperscript{81} Having weighed the neutral principles of law, the supreme court reversed the court of appeals, holding that an implied trust for the benefit of PCUSA exists on the property to which TPC Inc. holds legal title.\textsuperscript{82}

Considered together, the two decisions present compelling questions at the intersection of First Amendment and real property law. On its petition for certiorari to the Supreme Court of the United States, Christ Church frames the issue succinctly: "whether the neutral-principles doctrine of the First Amendment compels civil courts to enforce a 'trust' imposed on affiliated churches' properties by provisions in denomination-
al documents, even when those provisions would not otherwise have any effect under generally applicable rules of state property and trust law. 83

In *Greene v. Greene*, 84 Lynette Greene, individually and as executrix of her late husband Lloyd Greene's estate, brought an action for declaratory judgment concerning the title conveyed by a deed executed in favor of Lynette Greene and her late husband. The trial court issued a declaration that (i) the deed conveyed a joint tenancy with a right of survivorship to Lynette and Lloyd Greene, and (ii) Lynette Greene was the sole owner of the property. 85

The Georgia Court of Appeals began its opinion by stating that "[i]n construing a deed, the court's overriding goal is to ascertain and give effect to the intent of the parties." 86 As the parties' intent is generally determined from the text of the deed, the court started by looking at the critical language in the deed, which provided that the Greenes "took the property 'as tenants in common, for and during their joint lives, and, upon the death of either of them, then to the survivor of them, in fee simple, together with every contingent remainder and right of reversion, and to the heirs and assigns of said survivor.'" 87 The court determined that the language of the deed did two things. 88 First, it granted the Greenes each a life estate in the property to be held as tenants in common and terminated upon death of either person. 89 Second, it granted fee simple to the surviving grantee. 90 Thus, when Lloyd died, fee simple title to the property vested in Lynette. 91

The trial court's construction of the deed was challenged by an heir under Greene's will under O.C.G.A. § 44-6-190, 92 which provides, in relevant part, "[a]ny instrument of title in favor of two or more persons shall be construed to create interests in common without survivorship." 93 The court of appeals held that the first part of the deed

---

85. Id. at 132, 714 S.E.2d at 651.
86. Id. at 132-33, 714 S.E.2d at 651 (quoting Second Refuge Church v. Lollar, 282 Ga. 721, 724-25, 653 S.E.2d 462, 466 (2007)) (internal quotation marks omitted).
87. Id. at 133, 714 S.E.2d at 651.
88. Id.
89. Id.
90. Id. at 133, 714 S.E.2d at 651-52.
91. Id. at 133, 714 S.E.2d at 652.
92. O.C.G.A. § 44-6-190 (2010).
93. *Greene*, 311 Ga. App. at 133, 714 S.E.2d at 652; see also O.C.G.A. § 44-6-190.
conveying life estates to the Greenes as tenants in common was in compliance with the statute. 94 However, because the second part of the deed conveyed the remainder in fee simple only to one party—the surviving tenant in common—the statute did not apply. 95 The court also rejected the heir’s argument that Lloyd Greene’s will passed his interest in the property to his estate. 96 Because the life estate conveyed by the deed terminated upon Greene’s death, no interest in the property could have passed to his estate. 97

Accordingly, the court of appeals affirmed the trial court’s order declaring Lynette Greene the sole owner of the property and reversed the trial court’s declaration that the deed created a joint tenancy. 98

IV. ZONING 99

In Hamryka v. City of Dawsonville, 100 the Georgia Supreme Court addressed the proper method of appeal for the review of an administrative agency decision sought through an action for a declaratory judgment and writ of mandamus. 101 Appellants, the owners of a tract of real property in Dawson County, Georgia, contested a rezoning ordinance at hearings in front of the City of Dawsonville Planning Commission and the Dawsonville City Council. The city council approved the contested rezoning ordinance, and the appellants challenged that decision by filing an action for mandamus and seeking a declaratory judgment. When the appellants were unsuccessful at the superior court, they appealed via a direct appeal. 102

The court initially dismissed the appeal as an improperly filed discretionary appeal under O.C.G.A. § 5-6-35(a)(1), 103 but on a motion to reconsider filed by appellants, the court asked for a briefing on the issue. 104 Following the briefing, the court held that regardless of the

95. Id.
96. Id.
97. Id.
98. Id. at 135, 714 S.E.2d at 653.
99. This section was authored by Joseph R. Buller, III, associate at the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Atlanta, Georgia. Louisiana State University (B.S., 2004); Emory University School of Law (J.D., 2008).
100. 291 Ga. 124, 728 S.E.2d 197 (2012).
101. Id. at 125, 728 S.E.2d at 198.
102. Id.
103. O.C.G.A. § 5-6-35(a)(1) (Supp. 2012). The statute requires that all appeals of administrative agency decisions be taken through the discretionary appeal process, not direct appeal.
104. Hamryka, 291 Ga. at 124, 728 S.E.2d at 198.
styling of the action and the relief sought, the nature of the action was a challenge to an underlying administrative decision; thus, O.C.G.A. § 5-6-35(a)(1) applied, and the appeal was dismissed as an improperly filed discretionary appeal. The court reasoned that regardless of the type of action filed to challenge the underlying zoning decision, the key fact was that the appellants had an opportunity to be heard in front of the Dawsonville Planning Commission, the Dawsonville City Council, and the superior court. Thus, in order to obtain further review, appellants were required to submit to the discretionary appeal process.

In *East Georgia Land & Development Co. v. Newton County*, the Georgia Supreme Court reversed a summary judgment in favor of the county and held that when a private party challenges the validity of a lost zoning ordinance, the judicial establishment of a copy does not moot the separate legal challenge to the validity of that copy. East Georgia Land & Development Co. (EGL) was denied a zoning compliance letter by the Newton County Board of Commissioners (Board) and Newton County Board of Zoning Appeals (BZA) on the grounds that its proposed use—landfill construction—was barred entirely in Newton County by a May 21, 1985 Newton County zoning ordinance. EGL sued in superior court in 1997 to challenge the denial on the grounds that the 1985 ordinance was not attached to the minutes for the meeting in which it was passed, calling into question the actual text of the ordinance supposedly relied upon by the Board and BZA. EGL argued specifically that the failure to attach the ordinance to the relevant board minutes violated the Zoning Procedures Law (ZPL).

After years of litigation, the case was stayed pending the county's separation action in Newton County Probate Court to establish an official copy of a lost public record, the relevant zoning ordinance. The probate court certified a copy, and EGL appealed to the Georgia Supreme Court, which affirmed the official copy in 2010. The superior court then granted summary judgment for the county on EGL's challenge to the authenticity of the ordinance, finding that the issue was moot based on the supreme court's upholding of the validity of the copy authenticated in the probate court action.

105. *Id.* at 125, 127, 728 S.E.2d at 198, 200.
106. *Id.* at 126, 728 S.E.2d at 199.
107. *Id.* at 127, 728 S.E.2d at 200.
109. *Id.* at 734, 723 S.E.2d at 911-12.
110. *Id.* at 732-33, 723 S.E.2d at 910-11.
111. *Id.* at 733-34, 723 S.E.2d at 911.
113. *Newton Cnty.*, 290 Ga. at 733, 723 S.E.2d at 911.
On appeal, the Georgia Supreme Court reversed and remanded for further proceedings on the grounds that the probate court proceedings establishing the authenticity of the ordinance copy did not answer the question of whether the failure to attach the ordinance to the meeting minutes violated the ZPL.\textsuperscript{114} The court explained that the ZPL's standards for properly enacting a zoning ordinance were not addressed in the probate action; thus, the ordinance copy was nothing more than evidence to be introduced in the underlying action.\textsuperscript{115} Even though the county had established an exact certified copy of the ordinance passed, it still had to prove that its failure to attach that ordinance to the May 21, 1985 meeting minutes did not violate the ZPL, a question remaining for the superior court to handle.\textsuperscript{116}

In \textit{Fulton County v. Action Outdoor Advertising, LLC},\textsuperscript{117} the Georgia Supreme Court upheld a summary judgment in a consolidated action in favor of several sign companies that were denied sign permits by several newly created cities based on sign ordinances that were enacted after the companies submitted their signage applications.\textsuperscript{118} The sign companies filed applications to construct billboards while their respective signage locations were situated in then unincorporated Fulton County. By the time the applications were reviewed and denied, each proposed signage location was situated in one of three newly created cities: Sandy Springs, Milton, and Johns Creek. Each city passed a sign ordinance and assessed the sign applications under these ordinances. The cities denied the sign companies' applications to construct billboards, and the sign companies challenged this action in superior court.\textsuperscript{119}

While these suits were pending in the superior court, the Fulton County sign ordinance was declared unconstitutional under the First Amendment to the United States Constitution.\textsuperscript{120} Thus, at the time each application was filed, Fulton County had no valid sign ordinance.\textsuperscript{121} The superior court granted summary judgment in favor of the sign companies, finding that at the time the sign companies filed

\begin{itemize}
  \item \textsuperscript{114} \textit{Id.} at 736, 723 S.E.2d at 913.
  \item \textsuperscript{115} \textit{Id.} at 735-36, 723 S.E.2d at 912-13.
  \item \textsuperscript{116} \textit{Id.} at 736, 723 S.E.2d at 913.
  \item \textsuperscript{117} 289 Ga. 347, 711 S.E.2d 682 (2011).
  \item \textsuperscript{118} \textit{Id.} at 348, 711 S.E.2d at 684.
  \item \textsuperscript{119} \textit{Id.} at 347-48, 711 S.E.2d at 684.
  \item \textsuperscript{120} \textit{Id.} at 347-48, 711 S.E.2d at 684-85 (citing Fulton Cnty. v. Galberaith, 282 Ga. 314, 319, 647 S.E.2d 24, 28 (2007) (holding that the Fulton County sign ordinance violated the First Amendment through its presumption that all proposed signs were unlawful pending proof from the applicant that the sign was lawful; thus, the ordinance was overly broad, and the court struck it down in its entirety)).
  \item \textsuperscript{121} \textit{Id.} at 348-49, 711 S.E.2d at 685.
\end{itemize}
their applications, the absence of any valid ordinance restricting the
signs created a vested property right in each company to construct the
signs that were permitted under the law at that time.122

The county argued on appeal that Fulton County had a valid sign
ordinance with respect to billboards at the time the applications were
filed because those specific sections were not directly considered by the
court when it struck down the ordinance.123 The supreme court
rejected this argument, finding that because the entire ordinance
was struck for constitutional reasons, each provision was deemed invalid
from the day it was enacted.124 Thus, there was no valid sign ordi-
nance at the time the sign companies filed their applications and no
restriction on the erection of billboards.125 The court went on to hold
that the lack of any signage restriction created a vested property right
in the sign companies to erect any sign permitted by law.126 The
subsequent enacting of sign ordinances by the cities could not be applied
retroactively to the sign applications without violating the sign
companies' vested rights at the time their applications were filed.127

The court further rejected the cities' argument that not all of the
companies possessed vested property rights to erect the billboards when
their applications were filed because not all had signed leases permitting
the construction.128 The court reasoned that a permit applicant in
Georgia must show the property rights necessary to follow through with
the activity described in the application in order to have a vested right
in the activity.129 If the activity described in the application is lawful,
the applicant has a right to compel the governmental body to approve
the permit; thus, the vested right is in the approval of the application,
not just the right to carry out the activity.130 The court explained that
Georgia General Assembly's creation of new cities could not affect the
vested rights of the sign companies under article I, section 1, paragraph
X of the Georgia Constitution,131 prohibiting retroactive law.132 Utilizing
the General Assembly's creation of new cities to reject the sign
applications would be retroactively applying the General Assembly's act

122. *Id.* at 348, 711 S.E.2d at 684.
123. *Id.* at 348, 711 S.E.2d at 685.
124. *Id.*
125. *Id.* at 349, 711 S.E.2d at 685.
126. *Id.*
127. *Id.*
128. *Id.* at 350, 711 S.E.2d at 686.
129. *Id.*
130. *Id.*
131. GA. CONST. art. I, § 1, para. 10.
in addition to retroactively applying the sign ordinances passed by the newly minted cities.133

V. EASEMENTS, COVENANTS, AND BOUNDARIES134

In Goodson v. Ford,135 the Georgia Supreme Court discussed the extent to which access to an easement may be revoked, limited, and restricted.136 The dispute centered on a 60 feet wide by 418 feet long rectangular strip of unpaved land dubbed “Carol Street.” Carol Street ran between the Goodson property and the Eller property, then through the Ford property to the highway. The Goodsons and the Ellers used Carol Street to access their property, as well as for customer parking, receiving deliveries, and parking machinery and equipment. Without delving too deeply into the relevant real estate transactions, a short history is required because all three properties descend from a common owner. The common owner recorded a subdivision plat, which showed Carol Street in the position that existed at the time of the lawsuit. The common owner then conveyed the Goodson property and Eller property to other parties before the properties were eventually conveyed to the Goodsons and the Ellers, respectively. The deed conveying title to the Goodsons and the Ellers incorporated by reference the original common owner’s subdivision plat. Thereafter, the original common owner recorded an affidavit stating her intent to withdraw the subdivision plat. The original common owner then conveyed her interest in the Ford property to a party who eventually conveyed it to the Fords.137

Once the Fords acquired the property, they requested that the Goodsons and the Ellers use Carol Street only as access to their respective properties and the highway. The Goodsons and the Ellers took issue with the Fords’ request, prompting the Fords to file a petition to quiet title to the tract of land on which Carol Street sat. The Goodsons and the Ellers answered and counterclaimed, seeking title to Carol Street by adverse possession and easement rights. The trial court appointed a special master, who conducted an evidentiary hearing and submitted a final report to the trial court. The trial court adopted the special master’s report and proposed order, which dismissed Goodson’s

133. Id.
134. This section was authored by Daniel P. Moore, staff attorney at the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Atlanta, Georgia. Elon University (B.A., 2005); Mercer University, Walter F. George School of Law (J.D., 2009). Member, State Bar of Georgia.
136. Id. at 662, 725 S.E.2d at 231.
137. Id. at 662-63, 725 S.E.2d at 231.
adverse possession claim and vested title of the tract of land in the Ford's. The title was subject to Goodsons and Ellers's shorted, twenty-foot-wide easement down Carol Street and restricted use as "solely for purposes of ingress and egress . . . and . . . may not be used for any . . . parking or maintenance or storage of farm equipment vehicles or goods." The Goodsons and the Ellers appealed, contending they held legal title to all of Carol Street by express grant as a result of the recorded subdivision plat. The Fords countered by arguing that any easement created under the subdivision plat was extinguished by the original common owner's recorded affidavit of withdrawal of the subdivision plat. The court disagreed with both positions by holding that where property is subdivided and conveyed according to recorded plats, the purchaser does not acquire legal title, as the Goodsons suggested, but rather, an easement by express grant is created in the areas set aside for the purchaser's use. Moreover, when a recording of a subdivision plat designates a street for use of the purchaser, a legal presumption is created that the original common owner "irrevocably dedicated such streets . . . for the use of all of the lot owners in the subdivision" and thereafter the original common owner is "estopped from denying a grantee's right to use the streets delineated in the plat." The court further held that because the Fords' title was derived from the original common owner, they were similarly estopped from denying the Goodsons and the Ellers's use of Carol Street to access their properties.

Additionally, the Goodsons and the Ellers sought to reverse the trial court's reduction in the size of the easement and limitation placed on the use of Carol Street. The Goodsons and Ellers relied on Montana v. Blount in making their argument. In Montana the Georgia Court of Appeals held that a recorded subdivision plat created a rebuttable presumption that the "reasonable enjoyment of the easement

138. Id. at 663, 725 S.E.2d at 231-32.
139. Id. at 663-64, 725 S.E.2d at 232.
140. Id. at 664, 725 S.E.2d at 232.
141. Id. at 665, 725 S.E.2d at 232.
142. Id. at 665, 725 S.E.2d at 233 (quoting Stanfield v. Brewton, 228 Ga. 92, 94-95, 184 S.E.2d 352, 354 (1971)).
143. Id. (quoting Zywiciel v. Historic Westside Village Partners, LLC, 313 Ga. App. 397, 400, 721 S.E.2d 617, 621 (2011)).
144. Id.
145. Id.
147. Goodson, 290 Ga. at 665, 725 S.E.2d at 233.
requires the full use of the . . . street as platted.”\textsuperscript{148} However, because the Goodsons and the Ellers did not provide the court with a transcript of the special master’s evidentiary hearing, the supreme court held they could only “presume that the evidence supported the relevant findings of the special master adopted by the trial court.”\textsuperscript{149} Accordingly, the supreme court found no error in the trial court’s adoption of the special master’s report, which reduced the size of the easement and limited the Goodsons and the Ellers’ use of the easement.\textsuperscript{150}

In \textit{Peck v. Lanier Golf Course},\textsuperscript{151} the owner of property adjacent to a golf course sought an implied easement limiting the golf course to operate only for golf purposes. Peck purchased a lot in the Canongate on Lanier Subdivision (Canongate) immediately adjacent to the Lanier Golf Course. Canongate and Lanier Golf Course were never commonly owned. In addition, Lanier Golf Course and the developers of Canongate subdivision reached an agreement where the developers would inform all prospective lot purchasers that the developers were not affiliated with Lanier Golf Course in any way, and that the purchase of a lot in the subdivision granted no membership or use rights of any kind at Lanier Golf Course. The purchase agreement of the Canongate lots included no representations about the golf course.\textsuperscript{152} However, a marketing brochure for Canongate included photographs of the golf course and described the subdivision as “nested in the meticulously sculptured landscape of the 18-hole golf course.”\textsuperscript{153} Furthermore, the lots immediately adjacent to the golf course were more expensive due to the proximity of the golf course.\textsuperscript{154}

In 2006 Lanier Golf Course terminated all membership and announced its intention to sell the property as a high density development. As a result, Peck filed a putative class action against Lanier Golf Course seeking declaratory judgment and injunctive relief claiming he and other similarly situated landowners acquired an implied easement or implied restrictive covenant in the golf course. The trial court granted summary judgment to Lanier Golf Course. Peck appealed.\textsuperscript{155} In fact, Peck had filed two previous appeals regarding the certification of the class action, but for the purposes of this Article, it is the court’s decision on Peck’s

\textsuperscript{148} \textit{Id.} (quoting \textit{Montana}, 232 Ga. App. at 786, 504 S.E.2d at 452) (internal quotation marks omitted).
\textsuperscript{149} \textit{Id.} at 666, 725 S.E.2d at 233.
\textsuperscript{150} \textit{Id.} at 665-67, 725 S.E.2d at 233-34.
\textsuperscript{151} 315 Ga. App. 176, 726 S.E.2d 442 (2012).
\textsuperscript{152} \textit{Id.} at 176-78, 726 S.E.2d at 444-45.
\textsuperscript{153} \textit{Id.} at 178, 726 S.E.2d at 445.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.} at 176-78, 726 S.E.2d at 444-45.
alleged implied easement that is discussed.\textsuperscript{156} Peck's claims were rooted in two theories. The first was based upon the decision in\textit{Forsyth County v. Martin},\textsuperscript{157} in which the Georgia Supreme Court granted an irrevocable easement in a lake to owners of lakefront property because they demonstrated that there was a subdivision plat clearly designated to the lake area and that they had paid a premium for their lakefront property.\textsuperscript{158} However, because no recorded subdivision plat existed, Peck attempted to demonstrate a recorded subdivision plat through a tentative unapproved plat, a marketing brochure, and surveys.\textsuperscript{159} The court determined that these items were insufficient to prove the golf course was intended to be included in the subdivision's property.\textsuperscript{160} Therefore, Peck failed to establish that he acquired an irrevocable easement in the golf course despite a showing that he paid more for a lot adjacent to the course.\textsuperscript{161}

Peck next argued an alternative theory of recovery in which he attempted to show that he relied upon the developers' oral representations that the golf course would remain on the property in his decision to purchase the lot adjacent to the course.\textsuperscript{162} The argument failed because the evidence was undisputed that the developers explicitly stated that they were not affiliated with Lanier Golf Course and that the purchase of a lot granted no membership or use rights of any kind in the golf course.\textsuperscript{163} Furthermore, Peck's closing documents included an addendum that reiterated a clause in the sales contract, which stated that "[n]o representation, promise, or inducement not included in [the] contract shall be binding upon any party hereto."\textsuperscript{164} The court held that this disclaimer barred Peck from claiming he reasonably relied on any representation that was not a part of the contract.\textsuperscript{165} Accordingly, the court held that Peck was not entitled to any restriction or limitation in the golf course's use of its property.\textsuperscript{166}


\textsuperscript{157} 279 Ga. 215, 610 S.E.2d 512 (2005).

\textsuperscript{158} \textit{Peck}, 315 Ga. App. at 180, 726 S.E.2d at 446; \textit{Martin}, 279 Ga. at 217, 726 S.E.2d at 516.

\textsuperscript{159} \textit{Peck}, 315 Ga. App. at 180, 726 S.E.2d at 446.

\textsuperscript{160} \textit{Id}.

\textsuperscript{161} \textit{Id} at 181, 726 S.E.2d at 447.

\textsuperscript{162} \textit{Id}.

\textsuperscript{163} \textit{Id}.

\textsuperscript{164} \textit{Id} at 182, 726 S.E.2d at 447 (alteration in original).

\textsuperscript{165} \textit{Id}.

\textsuperscript{166} \textit{Id}.
In *Interchange Drive, LLC v. Nusloch*, the Georgia Court of Appeals upheld lot owners' rights in a subdivision's common and recreational areas, as set forth on the subdivision plat and in the subdivision's restrictive covenants. In *Interchange*, the developer of Habersham Plantation Subdivision defaulted on its loan, resulting in the lending bank foreclosing the subdivision property not previously sold. The bank was the highest bidder at the foreclosure sale, and the foreclosure deed conveyed the developers' remaining interest in the subdivision property, which included the common and recreational areas. The common and recreational areas were specifically identified in the subdivision plat and explicitly defined and granted to the subdivision lot owners by the Habersham Covenants. Thereafter, the bank, by limited warranty deed, conveyed its interest in the subdivision to Interchange Drive, LLC (Interchange).

Interchange took the position that it was not subject to the Habersham Covenants because the bank's foreclosure had wiped out the Habersham Covenants. The subdivision lot owners brought suit seeking a declaratory judgment that they held the right to access the common areas. The trial court granted the lot owners' rights to use, access, and enjoy the subdivision's common areas and recreation areas as set forth on the subdivision plat and in the subdivision's restrictive covenants. Interchange appealed.

On appeal, Interchange relied on *Springmont Homeowners Ass'n v. Barber*, arguing it was not subject to any restrictions imposed by the Habersham Covenants because the bank took title to the subdivision prior to the restrictions of the Habersham Covenants. However, the court of appeals distinguished *Springmont* because the specifics of the deed following foreclosure in *Springmont* were not discussed, and the foreclosing bank specifically stated in a recorded writing that it was not subject to covenants. Here, the bank acquired legal title before the execution of the Habersham Covenants, and the bank accepted a deed that expressly made its interest in the subdivision property subject to the Habersham Covenants. Therefore, the bank accepted the Habersham Covenants and Interchange, as grantee, "consent[ed] to be

---

168. *Id.* at 552-53, 716 S.E.2d at 604.
169. *Id.* at 553-54, 716 S.E.2d at 605.
170. *Id.* at 555, 716 S.E.2d at 606.
173. *Id.*; *Springmont*, 221 Ga. App. at 713, 472 S.E.2d at 696.
bound by such covenants and restrictions. Accordingly, the court of appeals affirmed the trial court's decision, and Interchange was not entitled to restrict the subdivision lot owners from using the common and recreation areas.

VI. TRESPASS AND NUISANCE

During the survey period, the Georgia Supreme Court and Georgia Court of Appeals refined legal principles pertaining to nuisance actions. Also, the Georgia Department of Natural Resources Environmental Protection Division (EPD) crafted a compromise with several large lending institutions intended to control storm water and sediment discharge. These developments reduced trespass and nuisance complaints from neighboring property owners.

In Haarhoff v. Jefferson at Perimeter, L.P., the court of appeals clarified the circumstances requiring pre-suit notice under O.C.G.A. § 41-1-5(b). Haarhoff involved a nuisance action brought by neighbors against the owner of an adjacent parcel based upon the owner's alleged failure to clean and maintain detention ponds, which resulted in increased storm water runoff onto the neighbors' properties.

O.C.G.A § 41-1-5(b) states that "prior to commencement of an action by the alienee of the property injured against the alienee of the property causing the nuisance, there must be a request to abate the nuisance." The trial court granted summary judgment to Jefferson at Perimeter, L.P. (Jefferson), the adjacent property owner, because the neighbors initiated suit without first sending an ante litem notice to Jefferson. On appeal, the neighbors argued that Jefferson knowingly increased the flow of storm water onto their properties by failing to inspect or maintain the detention ponds. They asserted that in circumstances where the nuisance was known, no affirmative steps were taken, and the nuisance increased, pre-suit notice under O.C.G.A. § 41-1-5(b) was not required.
The court of appeals disagreed, stating that "the statutory notice requirement applies only to an alienee 'who merely acquires property on which there is an existing nuisance, passively permits its continuance, and adds nothing thereto.'"\(^{183}\) Hence, prior to filing suit the injured party must provide notice of the nuisance to the party allegedly causing the nuisance, unless the party causing the nuisance took an action which increased the nuisance.\(^{184}\) The court stated that the neighbors "presented no evidence that Jefferson 'altered the property' or took any other affirmative action" that increased the amount of storm water flowing from its property.\(^{185}\) Thus, the court of appeals affirmed the trial court's determination that the neighbors' failure to provide ante litem notice to Jefferson prohibited them from pursuing their nuisance claims.\(^{186}\)

In a dispute over excessive noise and vibrations from a power plant, the Georgia Supreme Court, in Oglethorpe Power Corp. v. Forrister,\(^{187}\) further defined the character of a permanent nuisance versus a continuing or abatable nuisance.\(^{188}\) The distinction can be critical because the character of a nuisance—continuing or permanent—"determines the 'manner in which the statute of limitations [is] applied.'"\(^{189}\) The four-year statute of limitations begins to run upon the creation of the nuisance once some portion of the harm becomes observable.\(^{190}\) If deemed permanent, the statute of limitations begins to run from the time the nuisance is first evident.\(^{191}\) The statute of limitations for an abatable or continuing nuisance, however, may restart: "'every continuance of the nuisance is a fresh nuisance for which a fresh action will lie,' and the statute of limitation will begin to run at the time of each continuance of the harm."\(^{192}\) The trial court found that the quantity and quality of noises and vibrations emitted from the power plant changed in 2004. Therefore, although the plant began operations in 2000, the nuisance was deemed continuing, the statute of limitation

---

183. Id. at 273, 727 S.E.2d at 142 (quoting Macko v. City of Lawrenceville, 231 Ga. App. 671, 676, 499 S.E.2d 707, 712 (1998)).
184. Id.
185. Id.
186. Id.
188. Id. at 331, 711 S.E.2d at 642.
189. Id. at 333, 711 S.E.2d at 643 (quoting City of Atlanta v. Kleber, 285 Ga. 413, 416, 677 S.E.2d 134, 137 (2009)).
190. Id. (citing Kleber, 285 Ga. at 416, 677 S.E.2d at 137); O.C.G.A. § 9-3-30 (2007).
191. Forrister, 289 Ga. at 333, 711 S.E.2d at 643.
192. Id. (quoting Kleber, 285 Ga. at 416, 677 S.E.2d at 137).
“restarted” in 2004, and the nuisance claims filed in 2007 were allowed to proceed.\textsuperscript{193}

After the court of appeals affirmed the lower court’s ruling, the supreme court granted certiorari to address the argument that the noise from the power plant was not a continuing nuisance but a permanent nuisance because it resulted from a “substantial and relatively enduring feature of the plan of construction or from an essential method of operation.”\textsuperscript{194} It was undisputed that the noise was caused by the exhaust of the gas turbines traveling at a high rate of speed through multi-story exhaust stacks (the exhaust silencing system).\textsuperscript{195} It was also undisputed that the exhaust silencing system was “an enduring feature of the power plant’s plan of construction, and the noise emanating from the exhaust stacks result[ed] from the essential method of the plant’s operation.”\textsuperscript{196} Based on that analysis, the court held that “a nuisance caused by a ‘substantial and relatively enduring feature of the plan of construction or . . . an essential method of operation’ is usually not abatable,” and, thus, is a permanent nuisance.\textsuperscript{197} Because the court deemed the noises to be permanent and not continuing, the statute of limitations began to run when the type of noise at issue was first discernable—in 2000 when the plant began operating.\textsuperscript{198} Thus, the nuisance claims based on the types of noises that originated when the plant began operations were barred because the suit was not filed until 2007, well after the four-year statute of limitations had run.\textsuperscript{199}

In the last year, the EPD, the state agency responsible for implementing Georgia’s environmental statutes and regulations, made great strides in refining a lending institution’s responsibility for preventing storm water and sediment discharge from properties foreclosed upon during construction. General Permit No. GAR100003, “Authorization To Discharge Under The National Pollutant Discharge Elimination System Storm Water Discharges Associated With Construction Activity For

\textsuperscript{193} Id. at 332, 711 S.E.2d at 642-43.
\textsuperscript{194} Id. at 333, 711 S.E.2d at 643.
\textsuperscript{195} Id. at 335, 711 S.E.2d at 644.
\textsuperscript{196} Id. at 335, 711 S.E.2d at 645.
\textsuperscript{197} Id. at 335, 711 S.E.2d at 644; see also RESTATEMENT (SECOND) OF TORTS § 930 cmt. c (1977).
\textsuperscript{198} Forrister, 289 Ga. at 335, 711 S.E.2d at 645.
\textsuperscript{199} Id. at 336, 711 S.E.2d at 645. Because the record revealed a factual dispute regarding a different noise that was not observable before 2004 and, thus, not barred by the statute of limitations which ran prior to the filing of the suit, the supreme court determined that full summary judgment on the nuisance claims was not proper. Accordingly, the court allowed the nuisance claims pertaining to the post-2004 noise to proceed. Id.
Common Developments," requires developers and owners of residential subdivisions to implement and maintain a complex set of erosion controls.\textsuperscript{200} Storm water and sediment discharge must be controlled from the roads, infrastructure, and other common areas, as well as the individual lots.\textsuperscript{201} Many erosion controls, such as storm water detention ponds, are located on common areas. This becomes problematic because the common areas typically remain on the property of the financially-stressed developer when lending institutions foreclose upon the individual lots in the subdivision. Consequently, the lending institutions do not have the right to enter the common areas and conduct maintenance activities, as required by the General Permit.\textsuperscript{202}

Slowly, lending institutions began to realize that they now owned thousands of properties on which they were responsible for complying with general permit requirements, including expensive storm water and sediment discharge monitoring, daily inspections, and maintenance. Yet, the institutions had no knowledge of monitoring or maintenance activities or whether such activities were even being conducted. In response to the realization that the foreclosure of a property under construction represented financial and legal responsibilities for which they had not accounted, the lending institutions began to question the need for general permit coverage. They argued that since no construction activity was occurring, no general permit coverage was required.\textsuperscript{203}

Rather than engage in costly and drawn-out legal battles over these issues, EPD engaged with several of the large lending institutions and developed a compromise.\textsuperscript{204} As part of the compromise, the lending institutions agreed to:

Establish a program to stabilize conditions at foreclosed properties where land disturbing activities or construction activities have previously occurred, [inspect each property to evaluate current conditions, and [identify the potential for storm water impacts]; ... prioritize all foreclosed properties based on the potential for adverse

\textsuperscript{200} The General Permit is available on EPD's website at http://gaepd.org/Files_PDF/techguide/wpb/FINAL_StormWater_NPDES_Permit_CommonDevelopment_GAR100003_Y20-08.pdf.


\textsuperscript{202} Id. at 16-17.

\textsuperscript{203} Id. at 17.

\textsuperscript{204} Id.
environmental impacts due to storm water discharge[;] . . . [d]evelop and maintain a database of properties[;] . . . includ[ing] documentation of actions taken for each property[;] . . . [and] [i]nform any purchaser . . . of the requirement to obtain a stormwater construction permit for land disturbing activities.205

In exchange, the agency agreed that once a property achieved stabilization and storm water and sediment discharges were appropriately controlled, no further action by the lending institution was required. In addition, if EPD received a complaint about a property maintained by the lending institutions, rather than immediately issue a violation or citation, it would contact the institution, review the complaint, and discuss a response.206

The agreements between the lending institutions and the agency were memorialized in a series of consent orders between the EPD and individual institutions. The agency has gone on record to say that since implementation of the consent orders, it has received very few complaints regarding sediment loss from foreclosed properties, and those they did receive were quickly resolved.207

VII. FORECLOSURE OF REAL PROPERTY208

When is a foreclosure not a foreclosure? In *Tampa Investment Group, Inc. v. Branch Banking & Trust Co.*,209 the Georgia Supreme Court affirmed a decision by the Georgia Court of Appeals that addressed the essential question of whether a non-judicial foreclosure sale had occurred where the foreclosing lender cried the sale, but rather than issuing a deed under power, opted to rescind the sale.210 The lender filed suit against the borrower and guarantors, and the trial court granted partial summary judgment to the borrowers because the lender was barred from seeking a deficiency since it foreclosed and then failed to confirm the foreclosure sale.211 The supreme court affirmed the court of appeals's ruling that reversed the trial court's decision on this issue.212 The supreme court based its decision largely on the statute of frauds, holding

205. *Id.* at 17-18.
206. *Id.* at 18.
207. *Id.*
208. This section was authored by Dylan W. Howard, associate at the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Atlanta, Georgia. Yale University (B.A., 1999); University of Georgia School of Law (J.D., 2002).
211. *Tampa Inv. Grp., Inc.*, 290 Ga. at 724, 723 S.E.2d at 676.
212. *Id.* at 726-27, 723 S.E.2d at 678.
that the foreclosure sale is only official and effective where there is a writing, typically the deed under power, binding the lender to the sale. Because no deed under power was executed or delivered, no foreclosure sale was consummated, and the Georgia statute requiring confirmation did not apply to bar the lender from suing the borrower to collect on the amounts owed under the note.

In Amirfazli v. VATACS Group, Inc., a lender advertised a foreclosure sale for two of the four required consecutive weeks before selling the mortgage to another lender. The new lender proceeded with the previously scheduled foreclosure sale, even though it was not identified in any of the published advertisements. The trial court granted summary judgment for the borrower, finding that the foreclosure sale was chilled as a matter of law because the last two advertisements inaccurately identified the foreclosing lender. The Georgia Court of Appeals concluded that even though the advertisements were incorrect, there was evidence that the borrower was aware of the assignment. As a result, the court concluded that the record did not demonstrate chilled bidding as a matter of law. It therefore reversed the summary judgment and remanded the case to the trial court for further consideration.

In JIG Real Estate, LLC v. Countrywide Home Loans, Inc., the supreme court resolved a creative argument with regard to the rescission of foreclosure sales. In the case, Countrywide rescinded a foreclosure sale and refunded the purchase price plus required interest to the third party purchaser as required by O.C.G.A. § 9-13-172.1. The third-party purchaser rejected the payment and sued, claiming that O.C.G.A. § 9-13-172.1 does not actually authorize the rescission of a foreclosure sale and instead limits damages in a case where a rescission was otherwise authorized. The trial court rejected this claim and granted summary judgment to Countrywide. On appeal, the Georgia Supreme Court affirmed the trial court's decision and clearly

213. Id. at 726, 723 S.E.2d at 677.
214. Id. at 726, 723 S.E.2d at 678.
216. Id. at 472-73, 716 S.E.2d at 524-25.
217. Id. at 474, 716 S.E.2d at 525.
218. Id. at 474, 716 S.E.2d at 526.
219. Id.
221. Id. at 489, 712 S.E.2d at 822.
222. Id. at 488, 712 S.E.2d at 822; see also O.C.G.A. § 9-13-172.1 (2006).
223. JIG Real Estate, LLC, 289 Ga. at 488-89, 712 S.E.2d at 822.
rejected the third-party purchaser's argument on this issue.\textsuperscript{224} The court held that the statute did, by its express terms, authorize the rescission of foreclosure sales as long as the requirements of the statute were met.\textsuperscript{225}

At the time this Article was going to press, the court of appeals issued a ruling that could have a dramatic effect on non-judicial foreclosures across Georgia. In \textit{Reese v. Provident Funding, LLP},\textsuperscript{226} the court concluded that foreclosure was wrongful where a loan servicer sent notice pursuant to O.C.G.A. § 44-14-162.2,\textsuperscript{227} in which it represented that it was the holder of the note and security deed, even though the security deed had been executed in favor of Mortgage Electronic Registration Systems, Inc., and the servicer had sold and delivered the note to a new lender.\textsuperscript{228} Based on these facts, the court reversed a trial court decision granting summary judgment to the foreclosing servicer on the borrowers' wrongful foreclosure claim and ordered the trial court to instead enter summary judgment in favor of the borrowers.\textsuperscript{229} O.C.G.A. § 44-14-162.2, on its face, does not require identification of the secured creditor, and prior to this decision, no Georgia court had found that the non-judicial foreclosure statutes required the identification of the secured lender.\textsuperscript{230} The court of appeals concluded that the requirement should be read into the statute because the goal of the statute was transparency in the foreclosure process.\textsuperscript{231} In a dissent joined by two other judges, Judge Blackwell argued that the decision amounted to an impermissible judicial rewriting of the statute.\textsuperscript{232} At the time of this writing, it is not yet clear whether the supreme court would review the decision on appeal.

\textsuperscript{224} \textit{Id.} at 489, 712 S.E.2d at 822.
\textsuperscript{225} \textit{Id.}
\textsuperscript{228} \textit{Reese}, 730 S.E.2d at 555.
\textsuperscript{229} \textit{Id.} at 551.
\textsuperscript{230} \textit{See} O.C.G.A. § 44-14-162.2.
\textsuperscript{231} \textit{Reese}, 730 S.E.2d at 554.
\textsuperscript{232} \textit{Id.} at 555-56 (Blackwell, J., dissenting).
VIII. EMINENT DOMAIN

In *Dehco, Inc. v. Fulton County Tax Commissioner*, Dehco appealed the trial court's ruling that it was responsible for payment of ad valorem property taxes on property condemned by the Georgia Department of Transportation (DOT) in March 2008. The issue arose when the trial court ruled on competing motions from the Fulton County Tax Commissioner (Commissioner) and Dehco for the disbursement of the DOT's deposit of just and adequate compensation. Dehco argued that the ad valorem taxes should be allocated pro rata because it did not own the property for the entire year. Citing statutory authority holding each taxpayer responsible for taxes on all property owned on January 1 of the year preceding the ad valorem tax return, the Georgia Court of Appeals held that Dehco was responsible for all the ad valorem taxes owed for 2008. Accordingly, the court flatly rejected Dehco's invitation to apply pro rata tax allocation in a condemnation: "Absent an agreement with the DOT to prorate those taxes, Dehco remained legally obligated to pay the full amount of the taxes regardless of the subsequent transfer of title to the DOT." Dehco also argued the trial court's interpretation of O.C.G.A. § 48-5-10 violated its constitutional right to equal protection. Dehco argued that such an interpretation allows DOT to engage in a coercive negotiation tactic that creates two classes of condemnees, those who negotiate settlements before the condemnation and those who do not. Holding that Dehco failed to present this constitutional argument at the hearing and that the Georgia Supreme Court has exclusive jurisdiction over this area, the court of appeals did not consider the statute's constitutionality as applied in this case.

*Cobb County v. Robertson* is the first of two cases concerning the statutory requirements to object to the legal basis of a taking. Here, Cobb County (County) filed a petition for condemnation in rem and a declaration of taking with respect to real property owned by Morgan.

---

233. This section was authored by Ivy Cadle, associate in the law firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C., Macon, Georgia. University of Georgia (B.S., 2000; MAcc, 2002); Mercer University, Walter F. George School of Law (J.D., 2007). Member, State Bar of Georgia.
235. Id. at 889, 727 S.E.2d at 531-32.
236. Id. at 889-90, 727 S.E.2d at 532; see also O.C.G.A. § 48-5-10 (2010).
238. Id.
239. Id.
Robertson (Robertson). Robertson filed a timely petition to set aside the taking, claiming the condemnation was not authorized. The trial court scheduled a hearing on Robertson's motion, but it scheduled the hearing to be held more than sixty days after the declaration of taking was filed. Accordingly, the County waited until sixty days passed after the declaration was filed and then moved to dismiss Robertson's petition, asserting that O.C.G.A. § 32-3-11(c) sets a mandatory sixty-day period for holding such a hearing.

At issue for the court of appeals was the proper construction of O.C.G.A. § 32-3-11. That statute provides the following:

The presiding judge shall thereupon cause a rule nisi to be issued and served upon the condemnor, requiring him to show cause at a time and place designated by the judge why the title acquired by the declaration of taking should not be vacated and set aside in the same way and manner as is now provided for setting aside deeds acquired by fraud. Such hearing shall be had not earlier than 15 days from the time of service of the rule nisi upon the condemnor, nor later than 60 days from the date of filing of the declaration of taking, and with the right of appeal by either party, as in other cases.

The trial court found that Robertson acted to the best of his ability in accordance with O.C.G.A. § 32-3-11, and that "the failure to hold the hearing [in sixty days] was not due to any fault or action by Robertson." Holding that the word "shall" need not be construed as mandatory in this instance, the court of appeals agreed with the trial court.

Citing authority from the Georgia Supreme Court, the court of appeals noted that a "statutory provision is generally regarded as directory where a failure of performance will result in no injury or prejudice to the substantial rights of interested persons, and as mandatory where such injury or prejudice will result." Holding that the statute did not require a ruling within the sixty-day period, the court held that the statute did not provide the County a substantive right to certainty with

---

241. Id. at 455, 724 S.E.2d at 478-79.
244. Id. at 456, 724 S.E.2d at 479.
245. O.C.G.A. § 32-3-11(c).
247. Id. at 457, 724 S.E.2d at 480.
248. Id. at 457-58, 724 S.E.2d at 480 (alteration in original) (quoting Sanchez v. Walker Cnty. Dep't of Family & Children Servs., 237 Ga. 406, 410, 229 S.E.2d 66, 69 (1976)).
The court also held that the legislature did not intend to deprive the trial court of jurisdiction to consider the motion to set aside if the hearing is not held in sixty days because the statute places the burden to set a hearing on the court, not the condemnee. In reaching its decision, the court also determined that the trial court's calendar is the sole responsibility of the court, and that failure of the court to set a hearing in sixty days "would fall solely and irreparably on the condemnee." Accordingly, the court held that the sixty-day period was directory and not a mandatory provision.

Fincher Road Investments, LLLP v. City of Canton is the second of two cases concerning filing requirements related to a petition to set aside a taking. In this consolidated appeal, the City of Canton and the Cobb County Marietta Water Authority (Condemnors) filed condemnation petitions and declarations of taking against multiple condemnees on October 11, 2010. The condemnees filed timely petitions to set aside on November 22, 2010, and a hearing was set for December 7, 2010. Following a hearing on that date, the trial court dismissed the petitions to set aside because the Condemnors were not provided with notice of the hearing fifteen days before it occurred as is required by the plain language of O.C.G.A. § 32-3-11(c). The court reasoned it had no discretion to hear the petition to set aside because the statute required the Condemnors to receive the notice of the hearing fifteen days before the hearing is conducted.

Relying on its earlier reasoning in Robertson, the court of appeals held that a superior court has the discretion to both hold a hearing outside the sixty-day time period and to hold that hearing even if the Condemnors did not receive notice a full fifteen days before the hearing. Accordingly, the court vacated the judgment of the trial court and remanded the case so the trial court could consider, as an exercise of its discretion, whether “the Condemnees should be afforded an opportunity for a hearing and a decision on the merits of their petitions to set aside the [condemnation]."
Keep an eye on this hot topic, indicated by these two recent cases from the court of appeals. This issue was recently addressed by the Georgia Supreme Court in another case where the parties were asked to address whether the trial court erred in finding that it was the condemnees' responsibility to obtain a rule nisi and a timely hearing on their motion to vacate.257

In Gwinnett County v. Ascot Investment Co.,258 a jury returned a verdict awarding more than $3 million to Ascot Investment Company (Ascot) and the Peoples Bank & Trust (Bank) (collectively, Condemnees). The county appealed, claiming the trial court erred on four counts: first, by admitting evidence of pre-taking damages; second, by failing to give a requested charge that pre-taking damages are not recoverable; third, by admitting evidence of proposed future development of the property where that future development was hypothetical or speculative; and fourth, by refusing to strike a juror based upon his difficulty understanding English.259 The court of appeals found no error and affirmed the jury's verdict.260

The court reviewed the evidence after citing the proposition that just and adequate compensation does not include damage to the value of the property before the date of taking as a result of mere anticipation that the property will later be taken.261 The evidence showed that Ascot purchased 28.606 acres from Gwinnett College in 2006, and that Ascot then entered negotiations with a third-party developer who was interested in purchasing a portion of the property to develop student housing. Ascot and the developer signed an agreement in March of 2007 where the developer agreed to buy 19.03 acres of property for $8 million. Before the closing, Ascot learned the county intended to condemn a portion of the land that was also subject to the sale agreement. Accordingly, Ascot and the developer entered an amended purchase agreement for 17.6 acres to be sold at the same price per acre. The sale closed in February of 2008, and the county filed its declaration of taking in March of 2009.262

Even though it did not object to the introduction of either purchase agreement, the county argued on appeal that testimony about the

259. Id. at 874, 726 S.E.2d at 132.
260. Id.
261. Id. at 874-75, 726 S.E.2d at 132; see also GA. CONST. art. 1, § 3, para. 1(a) (1983).
original agreement was irrelevant evidence of pre-taking damages. The court held that the testimony tended to show the developer would pay the same price per acre whether or not the contract included the land that was taken. The court also determined that evidence that the per acre price of the land never changed served to discredit the testimony of the county's experts who testified that the topography of the taken land made the part taken inferior to the land sold to the developer.

The court of appeals then disagreed with the county's assertion that the trial court erred by refusing to give a jury instruction that the condemnees were not entitled to recover any losses resulting from the mere anticipation that a taking would occur. The court first held that there was no evidence of damages related to the anticipated taking. Then, viewing the charge as a whole, the court held that the trial court appropriately instructed the jury that it was only to determine what constituted just and adequate compensation for the property taken and the resulting consequential damages.

Next, the court addressed the claim that the trial court erred by admitting hypothetical and speculative evidence of the proposed future development of Ascot's property. The county argued the trial court should have excluded testimony of an expert witness concerning financial feasibility studies and the practicality of developing student housing on the property. In its review, the court cited the rule allowing a jury to consider "all legitimate purposes, capabilities and uses' to which the property may be adapted, 'provided that such use is reasonable and probable and not remote or speculative.' After reviewing evidence that Ascot had the property rezoned and discussed its development plans with the college, and that the college assured Ascot of its continued growth and need for additional student housing, the court of appeals was not convinced that the development of student housing on the property was hypothetical or speculative.

263. Id. at 876-77, 726 S.E.2d at 134.
264. Id. at 876, 726 S.E.2d at 133.
265. Id.
266. Id.
267. Id.
268. Id. at 876-77, 726 S.E.2d at 134.
269. Id. at 877, 726 S.E.2d at 134.
270. Id.
272. Id. at 877-78, 726 S.E.2d at 134.
Finally, the county argued the trial court erred when it refused to strike a juror who was not sufficiently able to understand the English language. That juror stated that he was not able to understand technical language, but that his comprehension improved if someone spoke slowly to him.\textsuperscript{273} Considering the fact that the juror had lived in the United States since 1988 and that he works as a consultant and instructor developing training seminars in English and Spanish, the court acknowledged that the juror may have difficulty understanding technical language used by some witnesses, but that many native English speakers may have the same difficulty.\textsuperscript{274} Citing the authority that a ruling on a juror's suitability may only be reversed upon a finding of manifest abuse of discretion, the court held that the trial judge was in the best position to determine whether the juror could sufficiently understand English.\textsuperscript{275} Finding no such abuse, the court of appeals upheld the ruling of the trial judge.\textsuperscript{276}