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Real Property

by Linda S. Finley

I. INTRODUCTION

The months since the last survey period from June 1, 2009 to May 31, 2010, have continued to prove perilous to the nation as well as to the State of Georgia, as real estate values have plummeted and foreclosure of real property has reached an all time high. However, as this Article attempts to show, other issues concerning real property abound. As is the case each year, it is difficult to choose the few cases that may be surveyed from the numerous decisions affecting real property law. The cases in this Article were selected either for their legal significance, to update practicing attorneys, or in some cases to recognize trends.

II. LEGISLATION

The Speaker’s and Lieutenant Governor’s gavels struck the block just before midnight on Thursday, April 29, 2010, signifying the end of the


The Author wishes to give special thanks to Kitty Davis, who year after year has typed and reviewed this Article. Additional thanks go to Lauren Coleman (University of Georgia School of Law, J.D. candidate, 2012) who identified every real property case decided during the survey period; Robert A. “Andy” Weathers, Esq. (Mercer University, Walter F. George School of Law, J.D., 1966) whose constant guidance is reflected in the Article; and Carol V. Clark, Esq., for her assistance, research, and analysis of real property law. Particularly, the Author directs the reader to Carol V. Clark, 2010 Judicial Update, in REAL PROPERTY LAW INSTITUTE MATERIALS (Institute of Continuing Legal Education in Georgia 2010).

1. For analysis of Georgia real property law during the prior survey period, see Linda S. Finley, Real Property, Annual Survey of Georgia Law, 61 MERCER L. REV. 301 (2009).

longest legislative session in Georgia history. The 2010 legislature reached an agreement on a state budget, a much-touted transportation bill that some say could ultimately produce private solutions to Atlanta’s traffic gridlock, and an education budget reform bill. Included in the myriad of legislation were several bills affecting Georgia real property.

Georgia House Bills 1191 and 1192 each concern the allocation of certain fees accrued in multijurisdictional real estate transactions. House Bill 1191 amends section 48-6-69 of the Official Code of Georgia Annotated (O.C.G.A.), which relates to “recording, payment, and certification where encumbered real property is located in more than one county or is located within and outside the state.” Specifically, the amendment provides a method to prorate recording fees in transactions involving property that lies in several counties or across state lines. The formula used to determine the proration is “calculated by applying the ratio of the value of the real property in such county as it bears to the total value of the real properties in all counties described in the instrument to the total tax due.” The value of the property used in the formula is “calculated pursuant to the most recently determined fair market valuations of the property as determined by the county board of tax assessors or comparable assessing entity in any affected state.”

Likewise, House Bill 1192 relates to payment of real estate transfer tax in multijurisdictional transactions. Like the amendments to O.C.G.A. § 48-6-69, this bill provides how tax due on the transaction is divided among the various counties or states where the property lies. The bill amended O.C.G.A. § 48-6-6 to provide that the tax to be paid shall be prorated among all applicable counties and the amount paid to the clerk or his or her deputy of the county in which the deed, instrument, or other writing is recorded shall be that proportion of the total tax due calculated by applying the ratio of the value of the real

8. Id. at § 1, 2010 Ga. Laws at 528.
9. Id.
10. Id.
12. Id. at § 1, 2010 Ga. Laws at 528.
property in such county as it bears to the total value of the real properties in all counties described in the deed, instrument, or other writing to the total tax due. 14

The amendments to O.C.G.A. § 48-6-4 also use the county tax assessor’s valuation of the property to determine the proportional amount of payment. 15

Georgia Senate Bill 37116 revised certain provisions of the Georgia Residential Mortgage Fraud Act17 and other provisions of the O.C.G.A. to provide the Georgia Bureau of Investigation (GBI) with the authority to investigate certain offenses involving fraudulent real estate transactions and to give the GBI subpoena power for such investigations. 18 Specifically, the bill amends O.C.G.A. §§ 16-8-10419 and 35-3-4,20 each of which relates to the power of the GBI. 21 The bill also added O.C.G.A. § 35-3-4.2,22 which authorizes the GBI, with the consent of the Georgia Attorney General, to issue a subpoena and to compel the production of documents and computer records. 23 Should a party fail to comply with the subpoena, “the director, assistant director, or the deputy director for investigations, through the Attorney General or district attorney, may apply to a superior court . . . for an order compelling compliance.” 24

III. TITLE TO REAL PROPERTY

In Simmons v. Community Renewal & Redemption, LLC, 25 the Georgia Supreme Court analyzed how title vests by adverse possession, either by expiration of a period of twenty years or by seven years under color of title. 26 Further, the supreme court analyzed the term “claim of right” as used in the context of a claim to property and held that the

15. Id. at § 1, 2010 Ga. Laws at 527.  
22. O.C.G.A. § 35-3-4.2 (Supp. 2010).  
24. Id.  
25. 286 Ga. 6, 685 S.E.2d 75 (2009).  
term “is synonymous with ‘claim of title’ and ‘claim of ownership.’”

In this matter, Simmons claimed that he owned property based on his use of it for over twenty years. The problem with Simmons’s claim was that he knew title to the claimed property was vested in Mike Marable. Nevertheless, Simmons claimed that his use was hostile to Marable’s and consistent with the requirement of the adverse possession statute.

The supreme court held that

[n]o prescription runs in favor of one who took possession of land knowing that it did not belong to him. Rather, one must enter upon the land claiming in good faith the right to do so. To enter upon the land without any honest claim of right to do so is but a trespass and can never ripen into prescriptive title.

In other words, Simmons was nothing more than a trespasser, and his title could “never ripen into prescriptive title by adverse possession.”

In *Mann v. Blalock*, the supreme court determined that a prior petition to quiet title under O.C.G.A. §§ 23-3-60 to -69 was so deficient that the order from that 2004 action quieting title could be voided several years later. In 2004 Mann filed a quiet title action, which resulted in an order vesting him, as executor of an estate, with fee simple title to land. The property later sold for unpaid taxes, and in 2007 the purchaser of the tax deed, Blalock, sought to remove clouds upon the title, including the order from the 2004 quiet title action. The matter was heard before a special master who determined that as a matter of law, Mann’s 2004 petition to quiet title was deficient. Relying on the special master’s findings and recommendations, the Superior Court of Lamar County, Georgia, entered judgment for Blalock, granting him fee simple title to the land and clearing all clouds from the title.

The special master found in the 2007 hearing that the 2004 quiet title proceeding was procedurally deficient as a matter of law because the petition was not verified as required by [O.C.G.A.] § 23-3-62(b); it did not include a plat of survey of the land as required by [O.C.G.A.] § 23-3-62(c); a lis pendens was not filed.

27. *Simmons*, 286 Ga. at 6, 685 S.E.2d at 77.
28. *Id.* at 6-7, 685 S.E.2d at 77.
29. *Id.* at 7, 685 S.E.2d at 77 (citations omitted) (quoting *Ellis v. Dasher*, 101 Ga. 5, 9, 29 S.E. 268, 270 (1897); *Halpern v. Lacy Inv. Corp.*, 259 Ga. 264, 265, 379 S.E.2d 519, 521 (1989)) (internal quotation marks omitted).
30. *Id.*
32. O.C.G.A. §§ 23-3-60 to -69 (1982).
33. *See Mann*, 286 Ga. at 543, 690 S.E.2d at 376-77.
34. *Id.* at 541-42, 690 S.E.2d at 376.
contemporaneously with the filing of the petition as required by [O.C.G.A.] § 23-3-62(d); the petition was not submitted to an authorized special master as required by [O.C.G.A.] § 23-3-63; and the record failed to establish service on any party as required by [O.C.G.A.] § 23-3-65(b). The supreme court held that the superior court properly adopted the special master’s findings that Mann never received title from the 2004 action and properly decreed that the judgment from that action should be removed from the title.

In Cunningham v. Gage, the plaintiffs alleged that the defendant and his predecessor in interest had fraudulently conveyed property to an innocent purchaser. The evidence was undisputed that the plaintiffs obtained a judgment lien against Jeanette Gage, a prior owner, which was memorialized by a fieri facias which remained in force at the time of the suit. Further, it was undisputed that Gage quitclaimed the property to her brother, Cunningham, for little or no consideration in order to avoid the judgment lien. Thereafter, Cunningham conveyed the property by warranty deed to an apparently innocent purchaser. At trial Cunningham moved to dismiss the action on the grounds that the plaintiffs lacked standing to bring the quia timet action. The trial court denied the motion to dismiss, and an appeal ensued.

In reversing the trial court, the Georgia Court of Appeals held that “in order to bring a quia timet action, the plaintiff must assert that he holds some current record title or current prescriptive title. . . . Otherwise, he possesses no title at all, but only an expectancy.” The court of appeals stated that because the plaintiffs did not claim title to the property at issue, “they ha[d] no standing to maintain a quia timet action.”

Another case of note regarding quiet title actions concerns the nature of the compensation awarded to court-appointed special masters and the duty of the parties to make that payment. In Davis v. Harpagon Co., the court of appeals dismissed a party’s appeal because the special master’s compensation had not been paid prior to appeal of the trial court’s order. The court noted that such fees “shall be assessed as

35. Id. at 543, 690 S.E.2d at 376.
36. Id. at 543, 690 S.E.2d at 377.
38. Id. at 307, 666 S.E.2d at 801.
39. Id. at 308, 666 S.E.2d at 802 (quoting In re Rivermist Homeowners Ass’n, 244 Ga. 515, 518, 260 S.E.2d 897, 899 (1979)).
40. Id.
42. Id. at 644, 686 S.E.2d at 260-61.
court costs and shall be paid prior to the filing of any appeal from the judgment of the court.

In Nelson v. Georgia Sheriff's Youth Homes, Inc., the supreme court addressed the authority vested in the special master upon appointment by the superior court. In Nelson a special master was appointed pursuant to O.C.G.A. § 23-3-63 in a quiet title action to land in Troup County. Two years later, the trial court granted summary judgment to one of the respondents in the case in “an order which included no findings of fact or conclusions of law.”

On appeal, the court noted that O.C.G.A. §§ 23-3-60 to -69, also known as the Quiet Title Act of 1966, “sets out ‘specific rules of practice and procedure with respect to an in rem quiet title action against all the world’ that take precedence over the Civil Practice Act when there is a conflict.” The Quiet Title Act requires the trial court to issue an order appointing the special master and requires the special master to make findings and report them to the trial court. After being appointed, the special master shall have complete jurisdiction within the scope of the pleadings to ascertain and determine the validity, nature, or extent of petitioner's title and all other interests in the land . . . or to remove any particular cloud or clouds upon the title to the land and to make a report of his findings to the judge of the court.

However, the appointment of a special master does not divest the trial court of its overall jurisdiction of the case, and the court retains its authority to issue the final order determining title to the real property in dispute.

The court of appeals acknowledged that under the Civil Practice Act (CPA), a superior court has the authority “to grant a motion for summary judgment without setting forth findings of fact and conclusions of law,” but the court of appeals stated that the procedures set out in the

43. Id. at 646, 686 S.E.2d at 261; see also O.C.G.A. § 9-7-22(c) (2007).
44. 286 Ga. 192, 686 S.E.2d 663 (2009).
45. Id. at 192, 686 S.E.2d at 663-64. Under O.C.G.A. § 23-3-63, the court is required to submit the petition and other filed instruments to a special master.
47. Id. (quoting Woodruff v. Morgan Cnty., 284 Ga. 651, 652, 670 S.E.2d 415, 416 (2008)).
49. Id. at 286 Ga. at 193, 686 S.E.2d at 664 (internal quotation marks omitted); see also O.C.G.A. § 23-3-66.
Quiet Title Act that require the special master to make factual findings and report them to the court take precedence over the conflicting requirement of the CPA. Because the trial court's order did not reflect the special master's findings of fact, and because the trial court made an adjudication without its own findings, the case was remanded for the trial court to include findings of the special master or the trial court.

Recording a lis pendens is an important tool for giving notice to prospective purchasers that real property is involved in litigation and that the relief sought in the suit involves the particular property. The flipside of a lis pendens is that this notice also makes real property virtually unmarketable. In Meadow Springs, LLC v. IH Riverdale, LLC, the supreme court considered whether "a right of first refusal to invest in development of real estate through a limited liability company is an interest sufficient for the filing of a lis pendens."

A company's operating agreement was the subject of the suit before the supreme court. Riverdale Capital Investments, LLC (Riverdale Capital), was composed of two members—McChesney Capital Partners, LLC and IH Riverdale, LLC (IH Riverdale). Riverdale Capital was created for the sole purpose of acquiring separate tracts of land and developing two apartment complexes on that land. Both complexes would be called "Meadow Springs Apartments," the first to be built as "Phase I" and the second as "Phase II." The operating agreement also provided that the Phase II development was "referred to in Section 5.11(e) hereof." Section 5.11(e) of the operating agreement provided that McChesney Capital Partners, having an option to buy the Phase II land, would allow "IH Riverdale the first right of refusal to invest" [for] Phase II. The operating agreement further stated that

"[i]f IH elects to invest, IH shall have the right to invest from twenty-five percent up to fifty percent of the capital and receive its proportionate share of profits and losses," and that "[i]n the event that [Riverdale Capital Investments] elects to sell the Option or 'flip' the Second Phase land for profit," IH Riverdale would be entitled to [forty] percent of the profit.

53. Id.
55. 286 Ga. 701, 690 S.E.2d 842 (2010).
56. Id. at 701, 690 S.E.2d at 843.
57. Id.
58. Id.
59. Id.
60. Id. at 701-02, 690 S.E.2d at 843 (alterations in original).
At the time of the supreme court's review of the case, Meadow Springs, LLC, (Meadow Springs) owned the Phase II development.61

IH Riverdale and Geoffrey Nolan, a member of IH Riverdale, commenced this action by filing a complaint against Meadow Springs, alleging that Meadow Springs deprived IH Riverdale of its first right of refusal to invest in the Phase II land.62 IH Riverdale requested specific performance of the option to purchase 50% of the Phase II land and "the imposition of a constructive trust on the land and profits of that development."63 IH Riverdale later recorded a notice of lis pendens that informed the court of the relief it sought concerning Phase II and delivered a copy of the notice to Regions Bank, which subsequently refused to fund the approved construction loan.64

In January 2005, Meadow Springs filed an action against IH Riverdale and Nolan, seeking damages for slander of title and other torts arising from the filing of the lis pendens and its delivery to Regions Bank.65 The trial court addressed the issue of "whether IH Riverdale's 2003 action 'involved' the real property within the meaning of the lis pendens statute, [O.C.G.A.] § 44-14-610."66 The trial court determined that the parties' operating agreement granted IH Riverdale and Nolan "a right of first refusal to invest in Phase II," and concluded that if Riverdale was successful in its claim, a trust could be placed on the Phase II land.67 Therefore, the trial court held that the 2003 lawsuit "involved" the property, which in turn made the filing of the lis pendens proper.68

The court of appeals affirmed the trial court's conclusion that IH Riverdale's action "involved" the property within the meaning of O.C.G.A. § 44-14-610 and that the lis pendens was valid.69 However, the court of appeals noted that Nolan only had a right to invest in the property's development, not an option to purchase the land.70 The court then concluded that it "could not 'say that as a matter of law IH and Nolan would not be entitled to any equitable relief with respect to the property.'"71

61. Id. at 702, 690 S.E.2d at 843.
62. Id.
63. Id.
64. Id.
65. Id.
66. Id.
67. Id. at 702, 690 S.E.2d at 844 (internal quotation marks omitted).
68. Id.
69. Id. at 702-03, 690 S.E.2d at 844.
70. Id. at 702, 690 S.E.2d at 844.
71. Id. at 702-03, 690 S.E.2d at 844.
In determining whether the court of appeals erred in its ruling, the supreme court conducted an exhaustive review of the meaning of the word “involved” as used in the lis pendens statute.\textsuperscript{72} The supreme court concluded that “[r]eal property is ‘involved’ in litigation within the meaning of the lis pendens statute ‘only [if it is] actually and directly brought into litigation by the pleadings in a pending suit and as to which some relief is sought respecting that particular property.’”\textsuperscript{73} A plaintiff’s direct interest in real estate will often support legal relief against the property and can be enough for a court to determine that a lis pendens is valid.\textsuperscript{74} For example, a plaintiff could obtain relief such as cancellation of a deed or specific performance.\textsuperscript{75} However, a lis pendens can still be valid even if a plaintiff does not have a direct interest in the real property “so long as the real property would be directly affected by the relief sought.”\textsuperscript{76}

In reversing the court of appeals, the supreme court found that the case was controlled by the rationale of \textit{Hill v. L/A Management Corp.},\textsuperscript{77} which the court of appeals had not considered.\textsuperscript{78} In \textit{Hill} the plaintiff filed a notice of lis pendens against real estate owned by a partnership, claiming that the defendants denied him his right to invest in that real estate. The plaintiff in that case was only entitled to his pro rata share of the partnership profits because his partnership interest constituted personalty rather than realty.\textsuperscript{79} The supreme court, in \textit{Hill}, further explained that “if the plaintiff ultimately prevailed in the litigation, he would obtain damages and an interest in the partnership, but not a direct interest in the realty, which also would not be directly affected by that relief.”\textsuperscript{80} Ultimately, the conclusion in \textit{Hill} was that Hill’s interest in personalty did not grant him relief against that property and that the lis pendens was invalid.\textsuperscript{81}

In applying \textit{Hill} to the present case, the supreme court held that the trial court and the court of appeals correctly determined that the option

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 703, 690 S.E.2d at 844.
\item \textit{Id.} (second alteration in original) (quoting \textit{Hill v. L/A Mgmt. Corp.}, 234 Ga. 341, 342-43, 216 S.E.2d 97, 99 (1975)) (internal quotation marks omitted).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} (citing \textit{Hill}, 234 Ga. at 341-43, 216 S.E.2d at 97-99).
\item \textit{Id.} at 703-04, 690 S.E.2d at 844 (citing \textit{Hill}, 234 Ga. at 343, 216 S.E.2d at 99).
\item \textit{Id.} at 704, 690 S.E.2d at 844-45 (citing \textit{Hill}, 234 Ga. at 343, 216 S.E.2d at 99).
\end{enumerate}
\end{footnotesize}
of first right of refusal to invest granted IH Riverdale the right to invest in development of the real estate but did not grant any right to actual ownership of that realty.\textsuperscript{82} The supreme court held that because IH Riverdale had merely an interest in personality, not in real estate, the lis pendens was improper because such an interest "do[es] not constitute relief against the land."\textsuperscript{83}

**IV. SALE OF REAL PROPERTY**

Each year the appellate courts remind attorneys and all those involved in real estate transactions about the importance of valid legal descriptions both in contracts and as a means to attack the validity of a contract or recorded instrument. In *Oconee Land & Timber, LLC v. Buchanan*,\textsuperscript{84} the court of appeals provided a written reminder of the importance of an accurate legal description, and declared that a legal description can be used as a tool in bringing or defending suit.\textsuperscript{85}

Oconee Land & Timber, LLC (Oconee Land), brought suit against René Buchanan. The complaint sought specific performance of a contract between the parties for the sale of real property or money damages for breach of the contract. With cross-motions for summary judgment before it, the trial court ruled for Buchanan, concluding that the contract was unenforceable because it lacked a legally sufficient description of the property for sale. Oconee Land appealed the trial court's judgment.\textsuperscript{86}

According to the evidence, Buchanan owned approximately 136 acres in Pulaski County, Georgia. From 1996 to 2000, Buchanan leased the property to WLD Farms, Inc. (WLD Farms) for ninety dollars per acre, and she granted WLD Farms a right of first refusal if Buchanan ever sold the property.\textsuperscript{87} In August 2007, Buchanan entered into a written contract with Oconee Land, under which she "agree[d] to sell [a]ll that tract of land lying and being in Land Lot 267 of the 12[th], District . . . of Pulaski County, Georgia[,] . . . 31036 . . . as recorded in Plat Book see, Page Ex. A' for $272,240."\textsuperscript{88}

There were no exhibits attached to the contract, which provided that the closing would be held on or before September 25, 2007. Buchanan later contacted WLD Farms, at which point WLD Farms, in exercising

\textsuperscript{82} Id. at 704, 690 S.E.2d at 845.
\textsuperscript{83} Id.
\textsuperscript{84} 300 Ga. App. 853, 686 S.E.2d 452 (2009).
\textsuperscript{85} See id. at 855-56, 686 S.E.2d at 454.
\textsuperscript{86} Id. at 853-54, 686 S.E.2d at 453.
\textsuperscript{87} Id. at 854, 686 S.E.2d at 453.
\textsuperscript{88} Id. (first and second alterations in original).
its right of first refusal, made a verbal offer on the property that exceeded Oconee Land's offer by $500 per acre. After Oconee Land learned of the lease between WLD Farms and Buchanan, Oconee Land expressed to WLD Farms that it intended to enforce its contract with Buchanan to purchase the property. WLD Farms responded by offering to buy the property from Oconee Land after its purchase for $500 more per acre than WLD Farms would have paid Buchanan. Oconee Land rejected the offer, indicating that it did not intend to sell the property after purchasing it from Buchanan. After Oconee Land bought the land from Buchanan, however, it contracted to sell the property to Joe Meadows. Oconee Land sued Buchanan after she failed to appear for the closing of Oconee Land's sale of the property to Meadows.\textsuperscript{89}

The court of appeals began its analysis of the trial court's decision by reviewing the requirements under the statute of frauds for a contract for the sale of land.\textsuperscript{90} The court first noted the requirement that a contract for the sale of land must be in writing and must provide a sufficiently definite description of the property to be sold.\textsuperscript{91} To meet this requirement, the "contract must describe the property to be sold with the same degree of certainty as that required in a deed conveying realty."\textsuperscript{92} The court also noted that parol evidence can be admitted to supplement a contract description when it is legally insufficient.\textsuperscript{93}

Next, the court further reviewed when extrinsic evidence may be admitted, stating that

\begin{quote}
[a] requirement for the admission of extrinsic evidence, however, is that the premises are so referred to within the contract as to indicate the seller's intention to convey a particular tract of land. Under those circumstances, the descriptive language in the contract functions as a "key" that opens the door to parol evidence, and such evidence is admissible to show the precise location and boundaries of such tract. Conversely, if the land is so imperfectly and indefinitely described in the contract that no particular tract or lot is designated, parol evidence is not admissible to supply a description.\textsuperscript{94}
\end{quote}

The court held that the purchase agreement failed to describe the property with sufficient certainty and did not contain a "key" that would

\begin{flushright}
89. \textit{Id.} at 854-55, 686 S.E.2d at 453.
90. \textit{Id.} at 855, 686 S.E.2d at 454.
91. \textit{Id.}
93. \textit{Id.}
94. \textit{Id.} at 855-56, 686 S.E.2d at 454.
\end{flushright}
have allowed the admission of extrinsic evidence.\textsuperscript{95} Most importantly, the court hesitated to use such a key, stating that the idea of a "key" has been overworked, and it has certainly been frequently misunderstood. There need not be confusion about this word, and no confusion will result if the word is given its true and literal meaning. A metallic bar is a key only when it serves the purpose of unlocking the door, and is not a key if it fails in its primary purpose, which is to unlock the door. Likewise any descriptive words in a contract for the sale of land, which will lead unerringly to the land in question, constitute the key which the law contemplates. But no amount of words in such a contract which fail to lead definitely to the land therein will constitute a key. If such words, when aided by extrinsic evidence, fail to locate and identify a certain tract of land, the description fails and the instrument is void.\textsuperscript{96}

\section*{V. EASEMENTS, COVENANTS, AND BOUNDARIES}

In \textit{Gibson v. Rustin},\textsuperscript{97} the court of appeals reviewed the rules set out in the Georgia statute for determining disputed boundary lines. The dispute in \textit{Gibson} concerned the exact position of the boundary line between the northeast and southeast corners of Rustin's property, which was purchased from Whelchel in 1965. The deed to the land referenced a 1965 survey that described Rustin's property as taken from a plat drawn by a surveyor. The plat did not show any landmarks or monuments except for a spring to the east of the property. According to the plat, two land lot corners and two disputed points on the southeastern and northeastern corners established the four corners of Rustin's property.\textsuperscript{98}

Rustin resurveyed the property in 2003 and found a closure failure of twelve feet missed in the earlier survey. The new survey also determined that the metes and bounds on the deed's description of Rustin's property did not match the calls on the plats.\textsuperscript{99} A dispute arose concerning Rustin's right to build a fence and the Gibsons' right to maintain a garden on the land. As a result, Rustin filed a quiet title petition to remove cloud from his title, and filed for trespass and ejectment against the Gibsons.\textsuperscript{100} In response, the Gibsons and the 

\textsuperscript{95} \textit{Id.} at 856, 686 S.E.2d at 454.
\textsuperscript{96} \textit{Id.} at 856-57, 686 S.E.2d at 454-55 (quoting Blumberg v. Nathan, 190 Ga. 64, 65-66, 8 S.E.2d 374, 375 (1940)) (internal quotation marks omitted).
\textsuperscript{98} \textit{Id.} at 170, 676 S.E.2d at 801.
\textsuperscript{99} \textit{Id.}
\textsuperscript{100} \textit{Id.} at 172, 676 S.E.2d at 802.
other affected landowners "filed a petition against Rustin to remove cloud from their [respective] title[s], establish a boundary line, and for ejectment." The two cases were eventually consolidated.

At a bench trial, the trial court found for Rustin and enjoined the Gibsons from trespassing on the property. On appeal, the Gibsons contended that the trial court's determination of the boundary line was not properly supported by the evidence. Upholding the trial court, the appellate court reviewed O.C.G.A. § 44-4-5, which sets out the general rules for determining disputed boundary lines. The court noted that under § 44-4-5, evidence offered to show the presence of natural landmarks is most conclusive in determining disputed boundary lines, and "[a]ncient or genuine landmarks such as corner stations or marked trees . . . control the course and distances called for by the survey." The statute also instructs the fact finder on how to determine boundary lines in the absence of higher evidence or when the corners are established, but the lines are not marked.

In Hitch v. Vasarhelyi, the supreme court reversed the court of appeals decision that the Hitches had no standing to bring suit against government entities that had issued his neighbor a permit to build a dock. At the time the suit was filed, the dock was not yet built. The State of Georgia, the Department of Natural Resources, and the Coastal Resources Division issued a permit to Vasarhelyi to build a dock extending over state-owned tidewater beds and marshlands. The Hitches "sought . . . a declaratory judgment to determine whether the issuance of a dock permit 'impacting the property and property value of an adjacent landowner is subject to the provisions of the Administrative Procedures Act,' as well as . . . other relief."

In reversing the court of appeals, the supreme court found that to prove standing to object to government action, "a landowner must demonstrate a substantial interest in the government action and show that this interest is in danger of suffering a special damage or injury not
Property owners can show substantial interest by demonstrating a diminution in the value of their property and including evidence that there would be visual intrusions, traffic issues, and the like, although special damages are not limited to economic loss alone. The court held that even though the dock had not been completed, the Hitches had standing as landowners and were not required to wait until a structure was built before seeking relief. Additionally, the supreme court held that the court of appeals had “misapplied the concept of speculative or contingent injuries.” According to the court of appeals, any damages that the Hitches might incur were speculative because the permit to build the dock did not relieve Vasarhelyi from complying with other laws protecting the rights of those affected by the dock. The supreme court, however, determined that it was the issuance of the license itself that enlarged Vasarhelyi’s rights to the detriment of the Hitches. The supreme court concluded that the Hitches would suffer special damages because the construction of Vasarhelyi’s dock would affect the view from the Hitches’ property, limit their own ability to build a dock, and diminish the value of their property.

Dissenting, Justice Carley opined that the majority opinion was in error because the Hitches’ injury was not caused by the permit allowing construction, and injury would only accrue once the dock was built. Justice Carley argued that the Hitches “would not have a right of action against a private party who merely permitted construction on its own adjoining property, at least so long as the structure did not constitute a nuisance.”

An easement that granted a family access to a cemetery was at issue in Davis v. Overall. Davis, Farmer, and other family members had continuously maintained a family cemetery since the burial of six relatives. Accessing the cemetery was not an issue until 2007 when the property on which the cemetery was located was sold to Richard Overall. Davis called Overall when he learned that the property had been sold,

113. Id. at 628, 680 S.E.2d at 412.
114. Id. at 628, 680 S.E.2d at 413 (quoting Moore v. Maloney, 253 Ga. 504, 506, 321 S.E.2d 335, 337 (1984)).
115. Id. at 629, 680 S.E.2d at 413.
116. Id.
117. Id.
118. Id.
119. Id. at 629-30, 680 S.E.2d at 413-14.
120. Id. at 631, 680 S.E.2d at 415 (Carley, J., dissenting).
121. Id. at 631, 680 S.E.2d at 414.
but Overall stated that he knew nothing about the cemetery and forbade the family from coming onto his property. Davis then retained an attorney, who wrote Overall a letter explaining that the family had the right to cross Overall’s property to access the cemetery and a right to maintain it. Overall responded by cluttering the cemetery and the adjacent land with debris and building materials. Davis and Farmer brought suit against Overall for interfering with the easement, for trespass, and for nuisance. Shortly after suit was filed, Overall’s attorney informed the family that they could access the cemetery. However, when the family visited the property, they found that Overall allowed goats and large dogs to roam freely across the cemetery property, which they purported constituted a continuing nuisance and trespass. The trial court granted Davis and Farmer a permanent easement to access the cemetery but granted summary judgment to Overall on the plaintiffs’ claims of nuisance, trespass, punitive damages, declaratory judgment, injunctive relief, and attorney fees. Davis and Farmer appealed.

In holding that the trial court erred in granting Overall’s motion for summary judgment on the claims of nuisance and trespass, the court of appeals first looked to the law that pertains specifically to family burial plots. The court explained that

[w]hen a family burial plot is established, it creates an easement against the fee, and while the naked legal title will pass, it passes subject to the easement created. . . . The easement and rights created thereunder survive until the plot is abandoned either by the person establishing the plot or his heirs, or by removal of the bodies by the person granted statutory authority.

Therefore, the court held that since Davis and Farmer were heirs of the person who established the cemetery, they had a right to enter, care for, and maintain the burial plots and to use and enjoy the family cemetery property. The court also held that Davis and Farmer were entitled to recover damages from Overall because allowing the animals to roam on the property and piling refuse in and around the cemetery property interfered with the family’s right to use and enjoy the

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123. Id. at 5, 686 S.E.2d at 841.
124. Id. at 4, 686 S.E.2d at 840-41.
125. Id. at 5, 686 S.E.2d at 841.
127. Id. at 5-6, 686 S.E.2d at 841 (quoting Walker v. Ga. Power Co., 177 Ga. App. 493, 495, 339 S.E.2d 728, 730 (1986)).
property. Whether the damages were nominal was a question for the jury. On the issue of punitive damages, the court held that the trial court erred in granting Overall summary judgment because damages flowed directly from the interference with a property right.

VI. TRESPASS AND NUISANCE

In Adams v. Georgia Power Co., a property owner brought a suit against Georgia Power Company (GPC), seeking several remedies, including "damages for trespass . . . , a declaratory judgment that GPC lacked rights to occupy or enter his property, and an injunction prohibiting GPC from entering or occupying his property in the future." In 1953 GPC entered into a twenty-five year lease with the property owner's predecessor that authorized GPC to install and operate power lines across the property. During the term of the lease, GPC was to pay $34.25 per year. Although the lease was recorded, GPC had no records to show that the payments had been made or to show that the lease had been renewed after its expiration in 1978. It was undisputed that GPC installed poles on the property and used the poles for power lines from at least 1991 through 2002. When Adams bought the property in 1999, the property still contained the original utility poles installed by GPC. In 2006, as part of a planned upgrade to the lines, GPC offered to pay Adams to update the easement over the property. The parties did not reach an agreement, and GPC moved the existing line from the poles on Adams's property, while leaving the wooden poles themselves in place. The new power line passed over Adams's property, which he purported constituted trespass. The trial court granted GPC summary judgment, and Adams appealed, arguing that the trial court erred when it ruled that GPC had acquired an easement by prescription. However, the court of appeals held that Adams was not entitled to relief because the applicable statute of limitations had expired.

The trial court and the court of appeals relied upon Webster v. Snapping Shoals Electric Membership Corp., which held that a landowner's right to bring a trespass action against an electric company

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128. Id. at 6, 686 S.E.2d at 841.
129. See id. at 6, 686 S.E.2d at 841-42.
130. Id. at 6, 686 S.E.2d at 842.
132. Id. at 400, 682 S.E.2d at 651.
133. Id.
134. Id. at 401, 682 S.E.2d at 652.
was governed by O.C.G.A. § 9-3-30, which provides a four-year statute of limitation for actions for trespass or damage to realty. Here, Adams was on notice of the power lines because the lease was recorded and because the lines existed on the property at the time of his purchase. Therefore, the statute of limitations barred Adams from bringing the trespass action because he filed it more than four years after his 1999 purchase date.

Adams also argued that the trial court erred in granting judgment to GPC on his claim for exclusive title to the property and in refusing to enjoin GPC from operating or maintaining the power line across his property. In affirming the trial court, the court of appeals held that Adams waived his sole remedy for damages because he did not timely file suit pursuant to the four-year statute of limitations provided in O.C.G.A. § 9-3-30. The court of appeals stated,

If a landowner stands by and permits, without legal objection, a public utility company to appropriate his land to its necessary corporate use until such becomes a necessary and constituent part of its service to the public, and the rights of the public intervene to such extent that to oust the company would interrupt the service and deny it to the public, the landowner, not for the protection so much of the company but for the benefit of the public, will be estopped from recovering the land in ejectment or from enjoining its use for the service, but will, if he moves in time, be remitted to an appropriate action for damages.

Although it was not the primary inquiry on appeal, in City of Atlanta v. Kleber, the supreme court explained the difference between a permanent nuisance and a continuing nuisance in the context of the applicable statute of limitations. The homeowners in that case brought an action for negligence and nuisance against the City of Atlanta (City) and a railroad company, claiming that the City and the railroad company did not adequately maintain a drainage pipe and culvert situated near the homeowners' property, which caused flooding during heavy rains. Over the span of many years, the railroad company

137. Adams, 299 Ga. App. at 400-01, 682 S.E.2d at 651 (citing Webster, 176 Ga. App. at 267, 335 S.E.2d at 640); see also O.C.G.A. § 9-3-30.
139. Id. at 401, 682 S.E.2d at 651-52.
140. Id. at 401, 682 S.E.2d at 652.
141. Id. at 401-02, 682 S.E.2d at 652.
144. Id. at 416, 677 S.E.2d at 137.
installed railroad tracks, a culvert, and a thirty-six-inch drainage pipe on the property that would eventually be owned by the homeowners. At the time they were installed, at least four decades ago, the culvert and pipe could adequately drain the basin where the property sat. However, by the time the homeowners purchased the property in the summer of 1997, heavy rains consistently resulted in damage to the property from flooding. The homeowners requested that the City and the railroad company ameliorate the flooding. Receiving no response, the homeowners brought suit against the City and the railroad company for negligence and nuisance.\textsuperscript{145}

Based on the findings of a special master,\textsuperscript{146} the trial court granted summary judgment to the City and the railroad company on the ground that the applicable statute of limitations had expired. In reversing the trial court, the court of appeals determined that the nuisance was continuing in nature and therefore was not barred by the four-year statute of limitations. The case was then appealed to the supreme court. The issues on appeal were whether the court of appeals erred when it concluded that the homeowners presented triable negligence and nuisance claims against the railroad company and whether the homeowners presented a triable nuisance claim against the City.\textsuperscript{147}

The supreme court disagreed with the court of appeals determination that the nuisance at issue was continuous in nature, noting that such a determination directly controls how the statute of limitations will be applied to the nuisance claim.\textsuperscript{148} The supreme court stated that the damage or destruction caused by "[a] nuisance, permanent and continuing in its character . . . gives but one right of action, which accrues immediately upon the creation of the nuisance, and against which the statute of limitations begins . . . to run."\textsuperscript{149} On the other hand, the supreme court explained that

\begin{quote}
[where a nuisance is not permanent in its character, but is one which can and should be abated by the person erecting or maintaining it, every continuance of the nuisance is a fresh nuisance for which a fresh action will lie. This action accrues at the time of such continuance,\
\end{quote}

\begin{itemize}
\item \textsuperscript{145} Id. at 413-14, 677 S.E.2d at 135-36.
\item \textsuperscript{146} Id. at 415, 677 S.E.2d at 136.
\item \textsuperscript{147} Id. at 413, 677 S.E.2d at 135.
\item \textsuperscript{148} Id. at 415-16, 677 S.E.2d at 136-37.
\item \textsuperscript{149} Id. at 416, 677 S.E.2d at 137 (quoting City Council of Augusta v. Lombard, 101 Ga. 724, 727, 28 S.E. 994, 994 (1897)) (internal quotation marks omitted).
\end{itemize}
and against it the statute of limitations runs only from the time of such accrual.\textsuperscript{150} Under this standard, the court held that the statute of limitations barred the homeowners' claim that the mere presence of the culvert and pipe created a nuisance because that claim was permanent in nature.\textsuperscript{151} However, the statute of limitations did not bar the homeowners' claim that the culvert and pipe had not been properly maintained because that claim was continuous in nature.\textsuperscript{152}

\section*{VII. Foreclosure of Real Property}

In \textit{Colbert v. Branch Banking & Trust Co.},\textsuperscript{153} a borrower brought suit against his mortgage lender for wrongful foreclosure, alleging that the lender had failed to properly notify him of foreclosure proceedings pursuant to O.C.G.A. § 44-14-162.2(a).\textsuperscript{154} Colbert owned property in Springfield, Georgia, on which he established a $175,000 mortgage loan. The property lacked a mailbox, and Colbert designated P.O. Box 1380 as his address for purposes of the notice provision of the mortgage loan. In 2003 Colbert began using his Laurel Street business address instead of the P.O. Box, and he implemented a change of address with the U.S. Postal Service and notified the bank of the change by telephone. Although Colbert did not notify the bank in writing of his change of address, he received mail from the bank at the Laurel Street address concerning certain tax issues. When Colbert filed for bankruptcy in 2004, he designated his Laurel Street address as his mailing address for purposes of the bankruptcy proceedings. The bank was identified as a creditor of Colbert's, and provided with the Laurel Street address during the bankruptcy process. Colbert defaulted in making his mortgage payments and, after receiving stay relief from the bankruptcy court in 2008, the bank commenced foreclosure proceedings. To notify Colbert of the foreclosure, the bank sent notice of the sale by certified mail with a return receipt requested to the P.O. Box address designated in the loan documents. The bank also published notice of foreclosure sale in the \textit{Effingham Herald}. In February 2009, consistent with the notice and publication, the bank foreclosed the property selling it to Martion T. Lanier III and executed a deed under power of sale. A deed under power

\begin{footnotesize}
\begin{enumerate}
\item[150.] \textit{Id.} (quoting City Council of Augusta v. Lombard, 101 Ga. 724, 727, 28 S.E. 994, 994 (1897)) (internal quotation marks omitted).
\item[151.] \textit{Id.} at 416-17, 677 S.E.2d at 137.
\item[152.] \textit{Id.} at 417, 677 S.E.2d at 137.
\item[153.] 302 Ga. App. 687, 691 S.E.2d 598 (2010).
\item[154.] O.C.G.A. § 44-14-162.2(a) (Supp. 2010).
\end{enumerate}
\end{footnotesize}
evidencing the sale and transfer of title to the Springfield property was recorded. After Colbert learned of the foreclosure, he asked the superior court to void the sale and provide him with injunctive relief. The superior court denied Colbert's request, and Colbert appealed.155

It was not disputed that Colbert defaulted on repayment of the mortgage loan and that the bank had the power to foreclose on the property. Rather, Colbert disputed the superior court's conclusion that the bank gave proper notice of the foreclosure sale under O.C.G.A. § 44-14-162.2(a).156 In affirming the trial court, the court of appeals first looked to the relevant requirements of the statute:

Notice of the initiation of proceedings to exercise a power of sale in a mortgage, security deed, or other lien contract shall be given to the debtor by the secured creditor no later than 30 days before the date of the proposed foreclosure. Such notice shall be in writing . . . and shall be sent by registered or certified mail or statutory overnight delivery, return receipt requested, to the property address or to such other address as the debtor may designate by written notice to the secured creditor.157

The court of appeals noted that two essential facts were undisputed: the bank sent notice of the foreclosure sale to Colbert's post office box, and Colbert designated the P.O. Box as his mailing address in the loan documents.158 At the hearing, Colbert admitted that he used his Laurel Street address as the return address when mailing loan payments to the bank but never gave the bank written notice of his address for purposes of the loan.159 The court further noted that rather than provide the bank with written notice, Colbert gave oral notice of the change over the telephone, resulting in the bank sending some correspondence to the Laurel Street address.160 According to the court, Georgia case law is well settled that none of Colbert's actions could satisfy his obligation to give the bank written notice of his change of address.161 Not even the bank's actual notice of the change could meet that obligation.162 In order to designate a change of address under O.C.G.A. § 44-14-162.2(a),

156. Id. at 688, 691 S.E.2d at 599.
157. Id.; see also O.C.G.A. § 44-14-162.2(a).
158. Colbert, 302 Ga. App. at 688, 691 S.E.2d at 599.
159. Id.
160. Id.
161. Id. at 688-89, 691 S.E.2d at 599.
162. Id.
The plain language of the statute requires that the debtor designate in writing another address to the secured creditor. A telephone call, a notation on a file by an employee of [the Bank], and the receipt of payment by checks [or envelopes] with the new address, do not show compliance with the requirement that [the debtor] designate an address by "written notice."\(^{163}\)

In light of economic conditions during the survey period that have resulted in the devaluation of real property, Greenwood Homes, Inc. v. Regions Bank\(^{164}\) provides a timely opinion on how commercial or multifamily property may be valued for foreclosure sale and subsequent confirmation of the foreclosure.\(^{165}\) In Greenwood Homes, the appraiser testified about his use of a "sales comparison approach" and "discounted cash flow" analysis to determine the property's value.\(^{166}\) First, the appraiser determined the retail value of the property by comparing it to other properties of similar value.\(^{167}\) In selecting comparable properties, the appraiser looked only at property sold in "bulk sale transactions," which were comprised of groups of townhome lots sold together.\(^{168}\) The appraiser also considered the "absorption rate" of the properties—that is, the rate at which the lots would sell over a span of time.\(^{169}\) After he studied the demand for these comparable properties, the appraiser determined that the subject property's demand would not mature until after a twelve-month holding period. Taking into account the deferred demand for townhome lots, the appraiser determined the present market value of the property using a discounted cash flow analysis.\(^{170}\)

The appellant argued that the appraiser's methodology failed to comply with O.C.G.A. § 44-14-161(b), which requires that the property foreclose for at least its true market value.\(^{171}\) The appellant particularly disputed the appraiser's use of a bulk sales methodology that

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163. Id. at 689, 691 S.E.2d at 599 (alterations in original) (quoting Zeller v. Home Fed. Sav. & Loan Ass'n, 220 Ga. App. 843, 845, 471 S.E.2d 1, 2 (1996)).


165. See generally O.C.G.A. § 44-14-161(b) (2002) ("The court shall require evidence to show the true market value of the property sold under the powers and shall not confirm the sale unless it is satisfied that the property so sold brought its true market value on such foreclosure sale.").

166. Greenwood Homes, 302 Ga. App. at 593, 692 S.E.2d at 45 (internal quotation marks omitted).

167. Id.

168. Id. (internal quotation marks omitted).

169. Id. (internal quotation marks omitted).

170. Id.

171. See id. at 594, 595, 692 S.E.2d at 46. See generally O.C.G.A. § 44-14-161(b).
included discounts for the sale of bulk property in arriving at his opinion of the property's value. However, in this instance the court of appeals determined the appraiser's method was proper. Specifically, the language of the underlying security deed authorized the lender "to dispose of the [p]roperty in 'one or more sales.'" This language provided the rationale for analyzing bulk sale valuations. The testimony of the appraiser "that '[i]n all my experience, I have never seen a sale of an individual town home lot, and the reason for that is that town homes aren't built individually" supported the plaintiff's position. That testimony was supported by other authority that said "[O.C.G.A.] § 44-14-161(b) must be read to require proof of true market value under the usual market conditions for sales of such property." The appellant also attacked the appraiser's discounted cash flow analysis as conflicting with O.C.G.A. § 44-14-161(b) because he applied a discounted rate and deduction for taxes incurred during the holding period. Recognizing that the testimony of both parties' appraisers was "that subdivision lots aren't moving," the court "held that in determining true market value, a trial court may consider market conditions in general at the time of the sale under power and the effect of depressed market conditions on the value of a subject property." The procedural technicalities of an action to foreclose were reviewed in Belans v. Bank of America. Belans appealed from an order confirming foreclosure of three properties and claimed that the trial court erred because Belans was not personally served with notice of the confirmation hearing and the trial court confirmed the sale without receiving evidence of the true market value of the properties. The evidence at the confirmation hearing was that the lender had retained two separate special process servers to attempt personal service of the petitioner for confirmation and rule nisi setting the hearing, but after over a dozen attempts to serve and over sixty-five hours trying to locate him, Belans could not be personally served. After these failed attempts at personal service, the lender applied for and was granted an order

173. Id. at 595, 692 S.E.2d at 46.
174. Id. at 594, 692 S.E.2d at 46.
175. Id.
176. Id. at 595, 692 S.E.2d at 46 (alteration in original).
178. Id.
179. Id. at 595, 692 S.E.2d at 46-47 (internal quotation marks omitted).
181. Id. at 35, 692 S.E.2d at 694.
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allowing service by publication. The court of appeals held that the trial court did not err in allowing service by publication because, under Georgia law, when a party to a confirmation cannot be found after due diligence, service by publication is sufficient.\textsuperscript{182}

However, there was another problem. Although the appraiser was present at the hearing and was prepared to testify, because there was no other party present to object, the trial court allowed the attorney for the lender to state in his place that the properties had sold at fair market value. After reviewing the written appraisal reports, the trial court concluded that the properties were sold at fair market value and confirmed the foreclosure sales.\textsuperscript{183} The court of appeals, although recognizing that attorneys as officers of the court can make statements for their client, held that the trial court should have taken testimony from the appraiser and that the written appraisal reports alone should not have been the sole basis for a determination of fair market value.\textsuperscript{184} "When the appraisal reports are eliminated from the record, no evidence remains to support the trial court's determination that the sales under power brought at least the fair market value."\textsuperscript{185} Therefore, the trial court's confirmation of the foreclosure sale was reversed.\textsuperscript{186}

In \textit{Banks v. Echols},\textsuperscript{187} the court of appeals reversed the grant of summary judgment to the purported holder of a note in an action for judicial foreclosure.\textsuperscript{188} The evidence at trial showed that in 1980 Ed Echols sold real property to Jimmy Banks for $17,500 and conveyed title to Banks via a warranty deed. To secure repayment of the debt, Banks executed a security deed in favor of Echols. Banks made payment to Echols until his death and thereafter made payment to Echols's son, Ted Echols.\textsuperscript{189}

In 1998 Banks and his wife separated, and as part of the separation agreement, Banks conveyed the property to his wife, Eunice Banks, who took over payment of the debt. Shortly after the property was conveyed, Eunice Banks asked Echols for the loan payoff amount. Echols responded that no payment had been made from 1986 through 1996, and he requested copies of Banks' payment records for those years. Banks

\textsuperscript{182} \textit{Id.} at 37-38, 692 S.E.2d at 696; see also O.C.G.A. § 9-11-4(f)(1)(A) (2006).
\textsuperscript{183} \textit{Belans}, 303 Ga. App. at 39, 692 S.E.2d at 697.
\textsuperscript{184} \textit{Id.} (quoting \textit{In re Estate of Bell}, 274 Ga. App. 581, 583, 618 S.E.2d 194, 196 (2005)).
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.}
\textsuperscript{188} \textit{Id.} at 772, 691 S.E.2d at 668.
\textsuperscript{189} \textit{Id.} at 772-73, 691 S.E.2d at 668.
claimed the payments had been made during the period and produced documents to support her position. Echols continued to maintain that over $16,000 was due on the mortgage, but he offered to accept that sum in full payment in exchange for mutual releases. Even though the parties differed on the state of the loan balance, Eunice Banks continued to make the monthly mortgage payments, and in June 2000 she sent a payment and letter to Echols indicating that this was the final payment due.\footnote{190}

Echols waited nearly a year before sending Eunice Banks a letter rejecting and returning the payment, informing her that the balance to pay off the debt was $17,298 and “that he ‘intend[ed] to rely on the exact terms’ of the Security Deed, and would pursue all remedies, including foreclosure, if she failed to pay the balance within 30 days.”\footnote{191} However, the trial record showed “no further correspondence between the parties until six years later when” in June 2007, Echols filed a lawsuit seeking a declaratory judgment that he was entitled to payment or foreclosure of the secured property.\footnote{192} Echols also sought “a special lien against the property, damages for unjust enrichment, and payment of attorney fees [and] costs.”\footnote{193} Eunice Banks defended the complaint on the grounds that the debt was paid in full, but Jimmy Banks failed to answer the complaint, and a default judgment was entered against him.\footnote{194} Echols moved for summary judgment on the basis that the default judgment against Jimmy Banks entitled Echols to judgment against Eunice Banks as well. In opposition to the motion, Eunice Banks provided documents reflecting payment to Echols totaling $28,800 from 1980 to June 2000 and a letter written by Echols that stated the loan payoff in 1994 was $8,236.44. Eunice Banks also disputed Echols’s claim that the debt had not been paid in full.\footnote{195} The trial court granted summary judgment to Echols without a hearing, reasoning that Eunice Banks’s possession was created by virtue of the quitclaim deed from Jimmy Banks and that there was no disputed issue of material fact that Jimmy Banks had not paid in full.\footnote{196}

On appeal, the court of appeals noted that when the property was purchased, Echols retained legal title, and Jimmy Banks was vested in

\footnotesize{190. Id.}
\footnotesize{191. Id. at 773, 691 S.E.2d at 668-69 (alteration in original).}
\footnotesize{192. Id. at 773, 691 S.E.2d at 669.}
\footnotesize{193. Id.}
\footnotesize{194. Id. at 773-74, 691 S.E.2d at 669.}
\footnotesize{195. Id. at 774, 691 S.E.2d at 669; see also O.C.G.A. § 9-11-56 (2006); GA. UNIF. SUPER. CT. R. 6.5.}
\footnotesize{196. Banks, 302 Ga. App. at 775, 691 S.E.2d at 670.}
equitable title, which he was free to dispose of as he wished.\textsuperscript{197} The court held that Eunice Banks, as a co-defendant in an action based on a common deed, was entitled to the opportunity to prove her position separately from Jimmy Banks's default.\textsuperscript{198} Eunice Banks also argued that Echols's acceptance of repeatedly late and irregular payments over the years created a new quasi-contract to the effect “that Echols could not insist on strictly enforcing the original terms [of the note and security deed] without first giving her reasonable notice.”\textsuperscript{199} The court of appeals stated that “[t]he determination of whether a quasi new contract has been created is ordinarily one for jury resolution.”\textsuperscript{200} Further, a jury question also existed as to whether Echols gave Eunice Banks reasonable notice, consistent with O.C.G.A.\textsection 13-4-4,\textsuperscript{201} of his intent to strictly enforce the terms of the agreement.\textsuperscript{202}

VIII. CONDEMNATION

In \textit{Brunswick Landing, LLC v. Glynn County},\textsuperscript{203} Glynn County (County) brought a petition to condemn property owned by Brunswick Landing, LLC (Brunswick Landing) to expand the county jail located within the city limits of Brunswick, Georgia (City). A special master denied Brunswick Landing's challenges to the condemnation and entered an award. The superior court affirmed the award, and the property owner appealed on the grounds that the County did not prove facts sufficient to entitle it to condemn the property, the County improperly used special purpose local options sales tax funds, the resolution authorizing the condemnation was invalid, and the standard of review used by the superior court violated equal protection.\textsuperscript{204}

The court of appeals held that because the power of eminent domain is conferred to the County by the Georgia Constitution, the County does “not need any enabling legislation granting [it] the power of eminent domain,” but it may condemn the property for any public purpose.\textsuperscript{205} However, because the property was located within the City, a separate municipality, “the County must also meet the ‘additional restriction’ of demonstrating that the condemnation [was] reasonably necessary for the

\textsuperscript{197} Id.
\textsuperscript{198} Id.
\textsuperscript{199} Id. at 776, 691 S.E.2d at 670.
\textsuperscript{200} Id. at 776, 691 S.E.2d at 671.
\textsuperscript{201} O.C.G.A. § 13-4-4 (2010).
\textsuperscript{202} Banks, 302 Ga. App. at 777, 691 S.E.2d at 671.
\textsuperscript{204} Id. at 288-89, 687 S.E.2d at 273-74.
\textsuperscript{205} Id. at 289, 687 S.E.2d at 274.
successful completion of the public purpose. The court held that expansion of the jail was reasonably necessary to maintain the jail system and affirmed the condemnation.

The court further held that the county’s use of special purpose local option sales tax funds was proper. According to O.C.G.A. § 48-8-121(a)(1), such funds must be used exclusively for a specified purpose. One of the purposes of the special option tax in this case was for the construction of detention facilities. The court rejected the property owners’ argument that the statute prohibits the County’s use of the funds generated by the special option tax because the County planned to use a substantial portion of the funds for construction of administrative offices rather than for detention facilities. The court reasoned that use of the funds was proper because the expansion of the detention facility would necessarily require additional administrative office space due to the increased inmate population that a larger jail would allow.

The property owner contended that the condemnation was invalid because the County resolution authorizing the taking of the property was improper, as it only generally described the expansion and did not show that the City (in addition to the County) consented to the condemnation within its boundaries. The court rejected that argument, holding that the City’s consent was not required for a proper resolution by the County. The County only needed to demonstrate that the condemnation was reasonably necessary for the completion of the public purpose for which the property was condemned.

Finally, the court rejected the claim that the trial court should have applied an abuse of discretion standard instead of the bad faith standard applied by the special master. The court stated that it is well settled that condemnation cases brought under title 22 of the O.C.G.A. are governed by the bad faith standard. The property own-

206. Id. at 290, 687 S.E.2d at 275.
207. Id. at 291, 687 S.E.2d at 275.
208. Id. at 293, 687 S.E.2d at 276.
211. Id.
212. Id.
213. Id. at 293, 687 S.E.2d at 277.
214. Id. at 294, 687 S.E.2d at 277.
215. Id.
216. See id. at 290-91, 687 S.E.2d at 275.
217. Id. at 294, 687 S.E.2d at 277.
er’s constitutional claim also failed because the owner failed to raise the issue in the trial court.  

In Department of Transportation v. Jordan, the court of appeals reviewed whether future potential zoning restrictions may be considered to determine the market value of a property to be condemned. The facts showed that the Georgia Department of Transportation (DOT) condemned the home the Jordans had owned for thirty years. At the condemnation hearing, the owner’s son testified on behalf of the Jordans that the property had a value of $480,000. A real estate appraiser testified that the highest value and best use of the property had three forms: the value as it was currently developed ($353,250 to $392,500), the value as cleared for redevelopment ($399,422), and the value as rezoned for development as residential property ($535,400). The appraiser testified that rezoning was “possible” in this instance. At trial the DOT moved to strike the appraiser’s testimony concerning the possible value of the property if it were to be rezoned. The trial court denied the DOT’s motions to strike and to remove the word “possible” from the pattern charge and entered judgment on the jury’s condemnation award for $400,000 for Jordan. The DOT claimed on appeal that the testimony should have been excluded because it did not establish that the rezoning was “probable” and that admitting the appraiser’s testimony of the value of the property if rezoned was an abuse of the trial court’s discretion. 

Affirming the denial of both the DOT’s motions to strike the appraiser’s testimony and to change the charge to the jury, the court of appeals held that when there is a possibility or probability that the zoning restrictions may in the near future be repealed or amended so as to permit the use in question, such likelihood may be considered if the prospect of such repeal or amendment is sufficiently likely as to have an appreciable influence upon present market value [provided] such possible change in zoning regulations must not be remote or speculative.

220. Id. at 294-95, 687 S.E.2d at 277-78.
222. See id. at 104-06, 684 S.E.2d at 142-43.
224. See id. at 294-95, 687 S.E.2d at 277-78.
226. Id. at 104-05, 684 S.E.2d at 142.
227. Id. at 105, 684 S.E.2d at 143.
228. Id. at 106, 684 S.E.2d at 143 (alteration in original) (quoting Unified Gov’t of Athens-Clarke Cnty. v. Watson, 276 Ga. 276, 276, 577 S.E.2d 769, 770 (2003)) (internal quotation marks omitted).
Compensation for property taken by the DOT was also the issue in *Department of Transportation v. Crowe.* In 2007 the DOT filed a condemnation action to acquire 1.217 acres out of a 2.807 acre parcel owned by Walter Crowe and Nelda Crowe Lewis. The taking included a pond located on the property, which was about one acre in size. The property owners objected to the DOT's $46,800 appraisal as inadequate and demanded a jury trial. At trial, a jury determined the value of the property to be $156,074. The DOT appealed the award on the grounds that the trial court improperly denied its motion in limine to prevent the property owners from introducing evidence regarding the cost it would take to build a new pond on the remaining property.

The court of appeals found no error in the trial court's decision to allow the property owners to present evidence of the cost to rebuild a pond, as such costs were "consequential damages resulting from the taking." In order to determine adequate compensation for the taking of property by a governmental entity like the DOT, two elements must be considered: "(i) the market value of the portion actually taken and (ii) the consequential damage, if any, to the remainder." The cost of replacing the pond was a cost to cure what the condemnation of the property had removed (the pond), and although the costs to cure were not recoverable as a separate element of damage, such costs were admissible as evidence of consequential damages.

Additionally, the DOT asked the trial court to instruct the jury that it could not award the property owners both the value of the land with the pond upon it and the separate value of the pond. The DOT conceded that giving the instruction would cure any confusion resulting from introducing the cost of rebuilding the pond. The trial court gave the instruction requested. During the trial, the DOT brought to the trial court's attention that it anticipated that when the property owners' expert testified, he would state that the cost of replacing the pond should be awarded as separate damages. After discussion, the trial court anticipated that it would allow evidence of the cost to replace the pond to go to the jury but deferred a ruling until there was further discussion on the issue. However, when the property owners' expert testified, the DOT failed to raise an objection to the testimony and did not seek a ruling on its objection to exclude such testimony. Rather, the DOT

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228. Id. at 756, 683 S.E.2d at 695.
229. Id. at 757, 683 S.E.2d at 696.
230. Id.
231. Id.
called its own appraiser, who testified that the property owners were not entitled to any amount related to the rebuilding of the pond.\textsuperscript{232} The court of appeals ruled that because the DOT failed to make an objection at the time the property owners' expert testified, it had waived the issue on appeal.\textsuperscript{233}

\textbf{IX. ZONING}

In \textit{Cox v. City of Sasser},\textsuperscript{234} the court of appeals reviewed nonconforming uses of property that violated zoning ordinances, in contrast with provisions in the ordinances that allowed improvements on those same nonconforming properties.\textsuperscript{235} In 1990 the Coxes placed a 660 square foot mobile home on their property in Sasser, Georgia (City), for the use of Mrs. Cox's elderly parents. Mrs. Cox's parents resided there until the death of her mother in 1995. It was undisputed among the parties that in 2002 the City amended its zoning ordinance, and the Cox property was then rezoned as R-1 single family residential. The amended ordinance prohibited mobile homes in the zoning district but did not prohibit modular homes. Further, the zoning ordinance allowed existing nonconforming residences to make improvements, including replacement, that could be done without violating the zoning provisions. In April 2006, the City issued the Coxes a permit to place a 2080 square foot manufactured/modular home on their property. Thereafter, Mr. Cox purchased a new 1980 square foot mobile home and placed it upon the property. The City filed suit to enjoin the Coxes from violating the zoning ordinance by placing the mobile home on the property and sought an order to compel removal of the mobile home. The Coxes argued that the newer mobile home was a replacement of the older home and was authorized under the city ordinance. The trial court disagreed and granted the city's motions, from which decision the Coxes appealed.\textsuperscript{236}

In confirming the trial court's order, the court of appeals looked at how the ordinance defined mobile home, manufactured home, and modular home.\textsuperscript{237} The ordinance classified “mobile home” as synonymous with “manufactured home,” stating that “a detached single family dwelling unit, designed for long-term occupancy, which has been prefabricated and then transported to its site or to a sales lot usually on its own wheels and requires only minor work before occupancy such as

\begin{footnotes}
\item[232.] \textit{Id.} at 757-58, 683 S.E.2d at 696.
\item[233.] \textit{Id.} at 758, 683 S.E.2d at 696.
\item[235.] \textit{See id.} at 252, 684 S.E.2d at 387.
\item[236.] \textit{Id.} at 251-53, 684 S.E.2d at 386-87.
\item[237.] \textit{Id.} at 251-52, 684 S.E.2d at 386-87.
\end{footnotes}
connection to utilities or to a foundation. A “modular home” was defined to be a factory-fabricated single family dwelling which is constructed in one or more sections. These units are manufactured in accordance with the Georgia Industrialized Building Act and the rules of the Department of Community Affairs issued pursuant thereof. Each unit must bear a seal of approval by the Commission of DCA.

It was undisputed that the previous 660 square foot mobile home was a nonconforming use. The court also held that the new home was not a replacement for the original mobile home and was therefore a violation of the ordinance. The court distinguished the Coxes reliance upon Henry v. Cherokee County, which referred to a “non-conforming use of a ‘lot or parcel of land,’” from the issues of this case, which concerned “non-conforming residences.”

In U.S.A. Gas, Inc. v. Whitfield County, Whitfield County, Georgia (County), brought an action against the defendant gas company and its owners seeking a declaratory judgment from the trial court that the gas company and property owners had vested rights in the continued and alleged nonconforming use of a 30,000 gallon liquefied petroleum gas tank. The trial court ordered that the tank be removed from the County’s property because the County’s zoning ordinance barred the installation and use of the gas tank, and the license issued to the gas company by the safety fire commissioner did not create a vested right in the defendants to use the tank. The gas company and owners appealed.

In 1994 the State of Georgia’s safety fire commissioner verified the gas company’s plan to construct a gas tank on the county’s property contingent on the completion of a required fire safety analysis. The Whitfield County Fire Department conducted a safety analysis of the tank in 1995, finding that it was located in a heavily populated area and that an explosion at the site could be catastrophic. Based on that finding, the safety fire commissioner initially refused the gas company’s application for a liquefied petroleum gas facility license, but in 2003 the

238. Id. at 252, 684 S.E.2d at 386 (internal quotation marks omitted).
239. Id. at 252, 684 S.E.2d at 387 (internal quotation marks omitted).
240. Id. at 252-53, 684 S.E.2d at 387.
241. Id. at 253, 684 S.E.2d at 387.
245. Id. at 851-52, 681 S.E.2d at 659.
246. Id. at 852, 681 S.E.2d at 659.
commissioner issued a license to the gas company to store and distribute liquefied petroleum. After concerned neighbors demanded enforcement of the existing zoning regulations, the County filed a complaint for declaratory judgment on the grounds that it was empowered to challenge the use and operation of the tank by virtue of the violation of zoning ordinance. Intervening in the action was Stephan Fromm, a neighboring property owner who opposed the installation and use of the gas tank. The gas company defended the suit on the ground that the County had not objected when the gas company received approval for the tank, and based upon that approval, the gas company incurred substantial expenses to make the structure compliant with the law. The trial court granted the County’s request for declaratory judgment, finding that the property where the tank sat was not zoned for such use.

Much of the court of appeals opinion concerned procedures under Georgia’s Declaratory Judgment Act, particularly whether the county was entitled to declaratory relief after it initially failed to oppose the installation of the gas tank and its use thereafter. The court held that declaratory relief was just for two reasons. First, the neighbor, Fromm, whose interests were adverse to the defendant’s, opposed the installation and use of the gas tank from the beginning. Second, the County was in jeopardy of facing multiple suits from neighbors of the property if it failed to enforce its zoning ordinances. The court noted that “[b]ecause there was a bona fide dispute over the applicability of the County’s zoning ordinance and over whether the defendants had vested rights to use the tank, and since the County was in a position of uncertainty as to its legal rights, a declaratory judgment was authorized.”

In Camden County v. Lewis, Camden County, Georgia (County), erroneously issued a building permit and a certificate of occupancy for the construction of a seafood business owned by Lewis. Lewis first applied for and received a building permit for an open shed. Later that day, however, he decided to enlarge the building, so he applied for and received a permit for an 800 square foot commercial outbuilding. Lewis also applied for a septic permit indicating that he was constructing a live

247. Id. at 852, 681 S.E.2d at 659-60.
248. Id. at 852-53, 681 S.E.2d at 660.
251. See id. at 854, 681 S.E.2d at 661.
252. Id.
253. Id.
254. Id.
bait shop. Subsequently, the County determined that the permit for the larger structure was improper because it violated the County's electrical, plumbing, and zoning ordinances. Based on those violations, the county issued a stop work order. In response, Lewis sought a writ of mandamus against the County to revoke the stop work order on the grounds that his constitutional due process and equal protection rights were violated and that he detrimentally relied upon the County's issuance of the building permit, which resulted in lost profits and other damages. The County was denied summary judgment when the trial court found that there were genuine issues of material fact as to Lewis's claims. The County appealed.256

The court of appeals held that one cannot detrimentally rely on the government's issuance of a permit when it is issued in violation of an ordinance law because the permit is void from the beginning and cannot confer rights upon the holder of the permit.257 The court also noted that the issuance of a certificate of occupancy cannot be construed as an approved exception to code violations or violation of other ordinances.258

Buckler v. Dekalb County Board of Commissioners259 concerns the standard of review applicable to issues regarding ordinances that protect historic districts.260 The Georgia General Assembly adopted the Georgia Historic Preservation Act (HPA)261 to create uniform procedures for counties and municipalities in protecting historic districts.262 Here, developers argued that Dekalb County, Georgia (County), had failed to properly comply with the HPA when it designated a certain area as an historic district. The developers argued that the County's denial of their request to use their property was inconsistent with the provisions of the historic district designation and therefore violated their constitutional rights. The trial court denied the developers' motion for partial summary judgment, finding that the County substantially complied with the provisions of the HPA. The developers appealed, contending that the appropriate standard to determine whether the

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256. Id. at 594-95, 680 S.E.2d at 623.
257. Id. at 597-98, 680 S.E.2d at 626 (quoting Union County v. CGP, Inc., 277 Ga. 349, 351, 589 S.E.2d 240, 242 (2003)).
258. Id. at 598, 680 S.E.2d at 625.
260. See id. at 465, 683 S.E.2d at 24.
262. Id. § 44-10-21.
County's actions were proper was that of "strict compliance."\textsuperscript{263} The court of appeals disagreed and affirmed the trial court's decision.\textsuperscript{264} The court of appeals reviewed O.C.G.A. § 1-3-1(c),\textsuperscript{265} which states that "substantial compliance with any statutory requirement, especially on the part of public officers, shall be deemed and held sufficient, and no proceeding shall be declared void for want of such compliance, unless expressly so provided by law."\textsuperscript{266} The HPA does not mandate a strict compliance standard; therefore, it was not error for the trial court to apply the lesser "substantial compliance" standard.\textsuperscript{267} Applying that standard, "the [trial] court found that the evidence presented showed that the [C]ounty had, in fact, substantially complied with the applicable statutory requirements" of the HPA at the time it enacted the ordinance designating the historic district.\textsuperscript{268}

The developers also complained that the County had not complied with the HPA for the following reasons: "the [C]ounty failed to have the appropriate official execute a final version of the ordinance which designated the historic district, failed to show the historic district's boundaries on the [C]ounty's official zoning map, failed to mail notices to all property owners, and failed to list the names of all property owners in the ordinance."\textsuperscript{269}

In affirming the trial court, the court of appeals looked to the Dekalb County Board of Commissioners' records.\textsuperscript{270} Although the County had been unable to produce a copy of the ordinance designating the historic district, which would show execution on the part of the County's chief executive officer, the County relied upon "[s]ection 15(b) of the DeKalb County Organizational Act [which] provides that, 'if the chief executive does not approve or veto an ordinance or resolution within eight (8) business days after its adoption by the commission, it shall become effective without the chief executive's approval.'"\textsuperscript{271} The County could neither affirmatively show that its CEO signed the resolution nor show that the CEO vetoed the redesignation.\textsuperscript{272} Based on the evidence, the

\textsuperscript{264} Id. at 465, 683 S.E.2d at 24.
\textsuperscript{265} O.C.G.A. § 1-3-1(c) (2000).
\textsuperscript{266} Buckler, 299 Ga. App. at 466, 683 S.E.2d at 25 (internal quotation marks omitted); see also O.C.G.A. § 1-3-1(c).
\textsuperscript{267} Buckler, 299 Ga. App. at 467, 683 S.E.2d at 25.
\textsuperscript{268} Id. at 466, 683 S.E.2d at 24.
\textsuperscript{269} Id. at 467, 683 S.E.2d at 25 (footnotes omitted).
\textsuperscript{270} Id. at 467-68, 683 S.E.2d at 25-26.
\textsuperscript{271} Id. at 468, 683 S.E.2d at 26.
\textsuperscript{272} Id.
court held that the ordinance was valid. As to the constitutional arguments made by the developers, because the property was designated as part of an historic district at the time it was purchased, the developers could not show that their constitutional right of due process was denied or that they were harmed by the alleged notice deficiencies in 2000.

273. Id.
274. Id.