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## Real Property

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# Real Property

by Linda S. Finley\*

## I. INTRODUCTION

The survey period, from June 1, 2008 to May 31, 2009,<sup>1</sup> has been a volatile period for attorneys who regularly practice in areas involving real estate. Each day the media is replete with stories involving the country's historic economic crisis, and the effects can be seen in Georgia neighborhoods and in resulting legislation. Given our point in history, the cases and legislation discussed in this Survey were chosen for their significance to real property law and to update attorneys who regularly or occasionally practice or render opinions regarding real estate law.

## II. LEGISLATION

The Georgia General Assembly used its 2009 session to consider and enact legislation designed to lessen the impact of the economic decline upon Georgia citizens. Notable legislation enacted during the 2009 session includes Senate Bill 55,<sup>2</sup> which, among other things, amended

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The Author wishes to give special thanks to Kitty S. Davis who, year after year, has methodically reviewed this Article; Robert A. "Andy" Weathers, Esq. who is constantly on the lookout for cases to include in the Article; and Carol V. Clark, Esq., for her assistance, not only to the Author, but to the entire Real Property Law Section of the State Bar of Georgia through her unparalleled analysis of real property law. Particularly, the Author directs the reader to Carol V. Clark, *2009 Judicial Update*, in 1 REAL PROPERTY LAW INSTITUTE PROGRAM MATERIALS (Institute of Continuing Legal Education in Georgia 2009). Other Authors of individual sections are credited in footnotes 106, 191, 205, and 287.

1. For analysis of Georgia real property law during the prior survey period, see Linda S. Finley, *Real Property, Annual Survey of Georgia Law*, 60 MERCER L. REV. 345 (2008).

2. Ga. S. Bill 55, Reg. Sess., 2009 Ga. Laws 27 (amending scattered sections of O.C.G.A. ch. 48-5 (1999 & Supp. 2009)).

and expanded the factors to be used to determine the value of real property for ad valorem taxation assessment.<sup>3</sup> Specifically, the Bill amended section 48-5-2 of the Official Code of Georgia Annotated (O.C.G.A.)<sup>4</sup> to specify six factors to be used in determining the tax value of real property.<sup>5</sup> The criteria the county tax assessor must now use to determine tax values are: (1) the “[e]xisting zoning of [the] property;”<sup>6</sup> (2) the “[e]xisting use of [the] property, including any restrictions or limitations on the use of [the] property” on account of state or federal laws, rules, or regulations that may limit the use of the property;<sup>7</sup> (3) existing covenants or deed restrictions that dedicate the property to a particular use;<sup>8</sup> (4) foreclosures of comparable property;<sup>9</sup> (5) decrease in value because the property is subject to a conservation easement;<sup>10</sup> and (6) “[a]ny other existing factors deemed pertinent in arriving at fair market value.”<sup>11</sup>

Again looking at Georgia ad valorem taxation and reacting to what it defined as “a crisis in the reduction of value of tangible property of unprecedented magnitude,”<sup>12</sup> the General Assembly passed House Bill 233<sup>13</sup> to freeze assessed property values for all taxable real property—including residential, commercial, and industrial—at the 2008 assessment values.<sup>14</sup> The Bill, effective May 5, 2009, amended Title 48 of the Georgia Code and created Chapter 5B, the “Moratorium Period for Valuation Increases in Property.”<sup>15</sup> Specifically, O.C.G.A. § 48-5B-1<sup>16</sup> freezes an assessed property value at the 2008 value for the tax years 2009, 2010, and 2011.<sup>17</sup> The freeze applies retroactively and covers

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3. *Id.* § 1, 2009 Ga. Laws at 27–28.

4. O.C.G.A. § 48-5-2 (1999 & Supp. 2009).

5. Ga. S. Bill 55, § 1, 2009 Ga. Laws at 27–28 (amending O.C.G.A. § 48-5-2(3)(B) (1999 & Supp. 2009)).

6. O.C.G.A. § 48-5-2(3)(B)(i) (1999 & Supp. 2009).

7. O.C.G.A. § 48-5-2(3)(B)(ii) (1999 & Supp. 2009).

8. O.C.G.A. § 48-5-2(3)(B)(iii) (1999 & Supp. 2009).

9. O.C.G.A. § 48-5-2(3)(B)(iv) (Supp. 2009).

10. O.C.G.A. § 48-5-2(3)(B)(v) (Supp. 2009).

11. O.C.G.A. § 48-5-2(3)(B)(vi) (Supp. 2009).

12. Ga. H.R. Bill 233, § 1, Reg. Sess., 2009 Ga. Laws 780, 780 (codified at O.C.G.A. § 48-5B-1(a) (Supp. 2009)).

13. Ga. H.R. Bill 233, Reg. Sess., 2009 Ga. Laws 780 (codified at O.C.G.A. § 48-5B-1 (Supp. 2009)).

14. *Id.*; see also Bradley A. Hutchins, *Deep Freeze: The Effects of House Bill 233*, REAL PROP. L. SEC. NEWSL. (State Bar of Georgia), Summer 2009, at 1–2, available at <http://www.garealpropertylaw.com/documents/2009-SPRING-SUMMER.pdf>.

15. O.C.G.A. ch. 48-5B (Supp. 2009).

16. *Id.* § 48-5B-1.

17. *Id.* § 48-5B-1(b).

even those properties assessed at higher values for the 2009 tax year.<sup>18</sup> Property values can be lowered during the three-year period but cannot be raised.<sup>19</sup> However, the statute sets forth certain exceptions to the moratorium. First, the statute recognizes that the assessed value should be based on the true nature of the property; therefore, if there is a significant change or if the prior assessment was based on “manifest, factual error or omission,” the property can be reassessed.<sup>20</sup> Similarly, if improvements are made to the property during the freeze, then the assessed value can be adjusted.<sup>21</sup> Finally, the statute sets the start date of the moratorium for those Georgia counties that have recently undertaken to reassess all of their properties and those counties that have enacted measures to limit ad valorem tax amounts pursuant to local constitutional amendment.<sup>22</sup> Any county that performed a county-wide reassessment of property in 2008 is exempt from the moratorium until January 2010, at which point the property values are frozen at the then-current levels.<sup>23</sup> The freeze will also be stayed until January 1, 2010, for any county that contracted for a comprehensive revaluation prior to February 28, 2009.<sup>24</sup>

Other legislation of note includes Senate Bill 141,<sup>25</sup> which amended O.C.G.A. § 44-14-160<sup>26</sup> and O.C.G.A. § 44-14-162.3.<sup>27</sup> Prior to the revisions, O.C.G.A. § 44-14-160 merely provided directions to the clerk of the superior court to “write in the margin of the page where the deed to secure debt or mortgage foreclosed upon is recorded the word ‘foreclosed’ and the deed book and page number on which is recorded the deed under power conveying the real property.”<sup>28</sup> Although the scrivener’s duties of the clerk to make a notation upon the deed to secure debt remain, the amendment imposes a duty upon the holder of the security instrument to record the security instrument “[w]ithin [ninety]

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18. *Id.*

19. *Id.* § 48-5B-1(d)-(e).

20. *Id.* § 48-5B-1(c).

21. *Id.* § 48-5B-1(f).

22. *Id.* § 48-5B-1(c), (i).

23. *Id.* § 48-5B-1(c).

24. *Id.*

25. Ga. S. Bill 141, Reg. Sess., 2009 Ga. Laws 614.

26. O.C.G.A. § 44-14-160 (2002 & Supp. 2009).

27. O.C.G.A. § 44-14-162.3 (2002 & Supp. 2009).

28. O.C.G.A. § 44-14-160 (2002), amended by Ga. S. Bill 141, § 1, 2009 Ga. Laws at 615.

days of a foreclosure sale.<sup>29</sup> Prior to the amendment, there was no such duty placed upon the lien holder.<sup>30</sup>

The amendment also provided some housekeeping of the provisions of O.C.G.A. § 44-14-162.3 by eliminating subsection (b) of the previous codification and clarifying that O.C.G.A. § 44-14-162.2<sup>31</sup> applies only to the foreclosure of residential and not commercial properties.<sup>32</sup>

At long last recognizing electronic and computer mediums, the General Assembly passed the Uniform Real Property Electronic Recording Act,<sup>33</sup> which sets forth in detail the methods to record deeds and other instruments by electronic means.<sup>34</sup> Specifically, the clerks of all superior courts are to record “electronic documents” that comply with the statute in the county real estate records.<sup>35</sup> The statute defines *electronic documents* as those “received by the clerk of superior court in an electronic form”<sup>36</sup> and *electronic signatures* as “electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.”<sup>37</sup> Now, a document that is prepared and transmitted in compliance with the statute satisfies the recording requirement that “a document be an original, on paper . . . , or in writing.”<sup>38</sup>

### III. TITLE TO REAL PROPERTY

Title examinations often reveal the existence of a recorded notice of lis pendens—an instrument designed to give notice to potential interest holders that real property is involved in a legal action.<sup>39</sup> In *Boca Petroco, Inc. v. Petroleum Realty II*,<sup>40</sup> the Georgia Supreme Court addressed the issue of “whether a lis pendens may be filed in Georgia to give notice of litigation pending outside of Georgia that involves the Georgia property.”<sup>41</sup>

29. Ga. S. Bill 141, § 1, 2009 Ga. Laws at 615.

30. See O.C.G.A. § 44-14-160 (2002), amended by Ga. S. Bill 141, § 1, 2009 Ga. Laws at 615.

31. O.C.G.A. § 44-14-162.2 (2002 & Supp. 2009).

32. Ga. S. Bill 141, § 2, 2009 Ga. Laws at 615.

33. Ga. H.R. Bill 127, Reg. Sess., 2009 Ga. Laws 695 (codified at O.C.G.A. §§ 44-2-35 to -39.2 (Supp. 2009)).

34. See O.C.G.A. §§ 44-2-35 to -39.2.

35. *Id.* § 44-2-38.

36. *Id.* § 44-2-36(4).

37. *Id.* § 44-2-36(5).

38. *Id.* § 44-2-37(a).

39. See O.C.G.A. § 44-14-610 (2002).

40. 285 Ga. 487, 678 S.E.2d 330 (2009).

41. *Id.* at 487, 678 S.E.2d at 331.

The underlying litigation arose in Florida when Boca Petroco, Inc., Trico V Petroleum, Inc., and Trico VII, Inc. (collectively, Boca) filed suit against Petroleum Realty II, LLC and Petroleum Realty V, LLC (collectively, PR) over lease contracts for properties located in Georgia. At the time it filed its Florida suit, Boca also filed notices of *lis pendens* in the various Georgia counties where the properties subject to the litigated leases were located. PR sought cancellation of the *lis pendens* in each of the Georgia counties where they were filed and achieved varying degrees of success. Boca appealed the decision of the Gwinnett County Superior Court cancelling the *lis pendens* in that county.<sup>42</sup> The Georgia Court of Appeals held that the notices of *lis pendens* filed in Georgia “were invalid because the Florida court lacked subject matter jurisdiction over the properties located in Georgia.”<sup>43</sup>

In affirming the court of appeals, the Georgia Supreme Court performed an exhaustive review of the meaning of *lis pendens* and its proper use.<sup>44</sup> Stating that “[t]he phrase “*lis pendens*” means, literally, pending suit,” the supreme court noted that its purpose is to give notice to prospective purchasers that the real property is involved in a pending lawsuit and that the relief sought by the parties to such a suit involves the particular property.<sup>45</sup> The court then looked to the common law origins of *lis pendens* and noted that to have a valid and effective *lis pendens*, a showing of certain elements regarding the property and the court adjudicating the issues of the underlying lawsuit were required.<sup>46</sup> The court also analyzed O.C.G.A. § 44-14-610,<sup>47</sup> the Georgia statute enacted to address a *lis pendens* filing.<sup>48</sup> This statute provides that a *lis pendens* must be filed with the clerk of court in the county where the property is located and also recorded by the clerk of the superior court in a book to provide notice of: (1) the legal action, (2) the names of the parties, (3) when the action was filed, (4) the court in which the action is pending, (5) the legal description of the property, and (6) a statement of the relief sought.<sup>49</sup> In addition to the requirements of the statute, the court reaffirmed that Georgia law requires a showing of the common

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42. *Id.* at 487–88, 678 S.E.2d at 331–32.

43. *Id.* at 488, 678 S.E.2d at 332 (citing *Boca Petroco, Inc. v. Petroleum Realty II, LLC*, 292 Ga. App. 833, 837, 666 S.E.2d 12, 15 (2008)).

44. *See id.* at 488–92, 678 S.E.2d at 332–34.

45. *Id.* at 488, 678 S.E.2d at 332 (alteration in original) (quoting *Boca Petroco*, 292 Ga. App. at 835, 666 S.E.2d at 13).

46. *Id.* (citing *Walker v. Houston*, 176 Ga. 878, 879–80, 169 S.E. 107, 108 (1933)).

47. O.C.G.A. § 44-14-610 (2002).

48. *Boca Petroco*, 285 Ga. at 488, 678 S.E.2d at 332.

49. O.C.G.A. § 44-14-610.

law elements of *lis pendens*.<sup>50</sup> The court noted its affirmation of those requirements in *Scroggins v. Edmondson*,<sup>51</sup> in which it identified three essential elements for a valid *lis pendens*: first, “the property must be of a character to be subject to the rule;” second, the court must have both proper personal and subject matter jurisdiction; and third, the property at issue must be sufficiently described in the pleadings.<sup>52</sup> Additionally, “the real property must be involved in the suit . . . i.e., it must be property which 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.”<sup>53</sup>

The supreme court rejected Boca’s argument that the jurisdictional requirement of *Scroggins* was controlled by where the property in question lay (Georgia), holding that it was the court having jurisdiction of the underlying litigation (Florida) that determined the jurisdictional element.<sup>54</sup>

The court noted that “[t]he states are split on the question of extraterritorial application of *lis pendens*” but distinguished the states that have “justified this expansion of the reach of common law *lis pendens* on policy considerations and/or in light of statutory provisions.”<sup>55</sup> Unlike those states, Georgia has no statute or other authority to indicate a legislative intent to expand the scope of *lis pendens* to include litigation from other states.<sup>56</sup> Then-Presidenting Justice Hunstein dissented from the majority,<sup>57</sup> as did Justice Carley.<sup>58</sup>

In *Steinichen v. Stancil*,<sup>59</sup> the supreme court considered whether a party claiming title to land by adverse possession could use a prior tenant’s possession to comply with the time of possession requirement.<sup>60</sup> Karen Steinichen filed suit to quiet title against all the world to four contiguous parcels. Larry Stancil, the owner of adjacent property, counterclaimed and sought title to one of the four parcels

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50. *Boca Petroco*, 285 Ga. at 489, 678 S.E.2d at 332.

51. 250 Ga. 430, 297 S.E.2d 469 (1982).

52. *Boca Petroco*, 285 Ga. at 489, 678 S.E.2d at 332 (quoting *Scroggins*, 250 Ga. at 432, 297 S.E.2d at 472).

53. *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Scroggins*, 250 Ga. at 432, 297 S.E.2d at 472).

54. *Id.* at 489–90, 678 S.E.2d at 333.

55. *Id.* at 491, 678 S.E.2d at 333.

56. *Id.*, 678 S.E.2d at 334.

57. *See id.* at 492, 678 S.E.2d at 334 (Hunstein, P.J., dissenting). Justice Hunstein was elevated to Chief Justice on July 1, 2009.

58. *See id.* at 495, 678 S.E.2d at 336 (Carley, J., dissenting).

59. 284 Ga. 580, 669 S.E.2d 109 (2008).

60. *Id.* at 581, 669 S.E.2d at 110.

under the theory of adverse possession.<sup>61</sup> Stancil claimed adverse possession under both color of title (requiring a showing of possession for seven years)<sup>62</sup> and prescriptive title (requiring a showing of possession for twenty years).<sup>63</sup> The evidence before a special master<sup>64</sup> was that Stancil acquired the disputed property by deed in 1999 as part of a lot he purchased from the DeLaPerriere estate. Prior to his purchase, Stancil used the disputed property in connection with a business he operated on the contiguous property, which he leased from the DeLaPerriere estate from 1985 until his purchase in 1999. During that time, Stancil placed two school buses on the disputed property and also stored automobile parts on the property. From 1971 through 1984, a prior tenant openly, continuously, and exclusively used the parcel claimed by Stancil. That tenant maintained the parcel, keeping it clean and mowed. After the earlier tenant departed, Stancil fenced the disputed property and continued its open, continuous, and exclusive use.<sup>65</sup> The special master found for Steinichen concerning three of the lots but found that "Stancil had presented sufficient evidence to establish adverse possession under color of title as well as prescriptive title without color of title."<sup>66</sup> The trial court adopted the recommendation of the special master, and Steinichen appealed.<sup>67</sup>

Steinichen contended that Stancil's prescriptive claim could not begin to run because he had not used the property continuously.<sup>68</sup> The supreme court, however, affirmed the order of the trial court, holding that "the DeLaPerriere estate possessed the [Stancil] tract from 1971 to 1999, by and through its tenants, and that possession [could] be tacked onto Stancil's possession as owner from 1999 until the present."<sup>69</sup>

In *Intown Redevelopment Alliance, LLC v. Reliance Equities, LLC*,<sup>70</sup> the Georgia Court of Appeals considered the issue of "whether fiduciary duties generally owed between tenants in common preclude [one party]

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61. *Id.* at 580-81, 669 S.E.2d at 110.

62. O.C.G.A. § 44-5-164 (1991).

63. O.C.G.A. § 44-5-161 (1991); O.C.G.A. § 44-5-163 (1991); *Steinichen*, 284 Ga. at 581, 669 S.E.2d at 110.

64. The matter was submitted to a special master for a hearing on the evidence and submission of findings of fact and law to the court pursuant to O.C.G.A. § 23-3-63 (1982). *Steinichen*, 284 Ga. at 581, 669 S.E.2d at 110.

65. *Steinichen*, 284 Ga. at 581-82, 669 S.E.2d at 110.

66. *Id.* at 581, 669 S.E.2d at 110.

67. *Id.*

68. *Id.*

69. *Id.* at 582, 669 S.E.2d at 111.

70. 295 Ga. App. 396, 671 S.E.2d 884 (2008).



from seeking foreclosure on a debt deed encumbering common property.<sup>71</sup> The underlying facts showed that four individuals acquired property as tenants in common through a November 1988 deed. At the time of the conveyance, the four individuals granted a deed to secure debt to the entire property to Joyce Jones. In 1990, to avoid foreclosure of the property, three of the four owners quitclaimed their seventy-five percent interest in the property to Jones.<sup>72</sup> The quitclaim deed stated that "it was given in full satisfaction of grantor's indebtedness that secured by the debt deed."<sup>73</sup>

In April 2005 the county sheriff sold the property for unpaid ad valorem taxes, and a tax deed conveyed the property to Crown Ambassador Properties, LLC. Jones, holding a seventy-five percent undivided interest in the property, and Stephen Ogletree, holding the remaining twenty-five percent interest, were the parties who held the right<sup>74</sup> to redeem the property from the tax deed.<sup>75</sup> In May 2005 Jones deeded her seventy-five percent interest in the property to Intown Redevelopment Alliance, LLC. Jones also transferred her remaining rights in the security deed to Intown. In June 2005 Crown Ambassador transferred its interest in the unredeemed tax deed to Intown. When Ogletree deeded his twenty-five percent interest to Reliance Equities, LLC on July 6, 2005, Intown and Reliance became tenants in common. On July 20, 2005, Intown notified Ogletree that it was commencing foreclosure of the property pursuant to the power of sale provisions within the security deed. Reliance notified Intown that Reliance had acquired Ogletree's interest and asserted that Intown owed Reliance fiduciary duties as a tenant in common.<sup>76</sup> Further, Reliance claimed that "neither Reliance nor Intown could gain a [one hundred] percent interest in the property without coming to some agreement."<sup>77</sup> No agreement was reached, and Intown filed an action for declaratory judgment, seeking a determination of its right to foreclosure on the security deed.<sup>78</sup>

The trial court granted Reliance's motion for partial summary judgment, concluding that the fiduciary duties owed by each co-tenant to the other precluded Intown from foreclosing the deed.<sup>79</sup> On appeal,

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71. *Id.* at 396, 671 S.E.2d at 885.

72. *Id.* at 397, 671 S.E.2d at 885.

73. *Id.*

74. See O.C.G.A. § 48-4-40 (1999).

75. *Intown Redevelopment Alliance*, 295 Ga. App. at 397, 671 S.E.2d at 885.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

the court of appeals reversed, applying an exception to the general rule that

tenants in common sustain such a confidential relation to each other, with respect to their interests in the common property and the common title under which they hold, that it would be inequitable to permit one of them, without the consent of the others, to buy an outstanding adversary's claim to the common estate and assert it for his exclusive benefit, to the injury or prejudice of his cotenants.<sup>80</sup>

In reversing the trial court, the court of appeals relied upon *Hodgson v. Federal Oil & Development Co.*,<sup>81</sup> in which the United States Supreme Court observed that "the general rule does not apply [when] the interests of the cotenants accrue at different times by different instruments and under circumstances that show there is no good reason to recognize mutual fiduciary duties."<sup>82</sup> Because Intown acquired and recorded its interest in the property and the security deed before Reliance acquired its interest, an adversarial relationship existed between Intown and Reliance regarding their actual acquisition of interests thereto.<sup>83</sup> The court held that these parties "did not become cotenants in a relationship of mutual trust and confidence with respect to interests in common property acquired from a common source at the same time" and that they were "cotenants in law only . . . with no apparent expectation of trust or cooperation."<sup>84</sup> Accordingly, there existed none of the duties typically owed from one cotenant to another.<sup>85</sup>

#### IV. SALE OF REAL PROPERTY

The importance of clear and valid terms in contracts for the sale of real property continues to be an issue. In *Parks v. Thompson Builders, Inc.*,<sup>86</sup> the court of appeals considered whether a contract provision regarding forfeiture of funds could be enforced if the contract itself was unenforceable.<sup>87</sup>

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80. *Id.* at 397–98, 671 S.E.2d at 885 (internal quotation marks omitted) (quoting *Hardin v. Council*, 200 Ga. 822, 830, 38 S.E.2d 549, 555 (1946)).

81. 274 U.S. 15 (1927).

82. *Intown Redevelopment Alliance*, 295 Ga. App. at 398, 671 S.E.2d at 886 (citing *Hodgson*, 274 U.S. at 19–20).

83. *Id.*

84. *Id.*

85. *Id.*

86. 296 Ga. App. 704, 675 S.E.2d 583 (2009).

87. *Id.* at 706, 675 S.E.2d at 585.

Monica Parks signed a contract with Thompson Builders to purchase a lot and build a home but failed to read the contract before signing it.<sup>88</sup> The contract “reflected a purchase price of \$415,900 and stated that Parks was to obtain a [thirty]-year loan in an amount ‘TBD’ (to be determined) at an interest rate ‘TBD.’”<sup>89</sup> Parks paid earnest money in the amount of \$16,000 after execution of the contract. In anticipation of the construction, Parks obtained conditional loan approval, but the loan amount was for \$332,720 and not for the full \$415,900 sale price. Parks failed to read the provisions of the loan documents and did not realize that the loan did not provide for one hundred percent financing. It was also undisputed that the mortgage contract placed a number of duties upon Parks that she failed to perform. Once Thompson Builders began construction, Parks ordered and paid for upgrades and appliances totaling approximately \$6000. At no time while the home was being constructed did Parks indicate to the builder that she could not close on the home. The construction proceeded, and a certificate of occupancy was obtained so that closing could take place. It was not until the scheduled closing in July 2006 that Parks told the builder that she could not close, and she requested the return of her earnest money. When the money was not returned, Parks filed suit. Six months after Parks filed suit, the lender formally notified Parks that the mortgage loan would not be approved due to insufficient income. The builder sold the home eighteen months later after sustaining carrying costs of over \$38,000.<sup>90</sup>

The trial court directed a verdict for the builder on the grounds that the contract was not binding because it failed to specify the loan amount or interest rate. The trial court held that Parks was estopped from recovering any earnest money because she did not exercise due diligence in pursuing financing, having failed to read the contract in its entirety.<sup>91</sup>

The court of appeals affirmed the trial court’s decision for the builder regarding the enforceability of the contract finding its terms vague and indefinite but reversed the trial court’s decision on the issue of return of the earnest money.<sup>92</sup> The court held that if the contract as a whole was unenforceable, then the provisions governing forfeiture of the earnest

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88. *Id.* at 704–05, 675 S.E.2d at 584.

89. *Id.* at 704, 675 S.E.2d at 584.

90. *Id.* at 705, 675 S.E.2d at 584.

91. *Id.*

92. *Id.* at 705–06, 675 S.E.2d at 584–85.

money were also unenforceable, and Parks was entitled to return of the funds.<sup>93</sup>

The court of appeals had previously stressed the importance of valid legal descriptions in sales contracts in *O'Dell v. Pine Ridge Investments, LLC*.<sup>94</sup> In that case, John O'Dell, the broker for the purchaser JOD Consulting Services (collectively, O'Dell), executed an "Offer to Purchase Real Estate" with Pine Ridge Investments.<sup>95</sup> The property to be sold was described as "187.5 acres in Land Lot 170 Sumter County Georgia [a]nd containing 8,167,500 (187.5 a) square feet of land, more or less."<sup>96</sup> O'Dell paid the earnest money required under the agreement, and a date for the closing the sale was set with a stipulation "that the [d]eposit is forfeited if property does not close."<sup>97</sup> The closing did not occur by the contract date.<sup>98</sup>

O'Dell brought suit against Pine Ridge for the return of the earnest money and for the expenses of litigation, claiming that the contract was unenforceable because it lacked a sufficient legal description and that the provision concerning forfeiture of the earnest money was an unlawful penalty. Pine Ridge counterclaimed for breach of contract on account of O'Dell's failure to close by the scheduled date, seeking the earnest money as liquidated damages. Pine Ridge claimed that the contract was enforceable and that the provision calling for forfeiture of the earnest money was a lawful provision for liquidated damages. On cross-motions for summary judgment, the trial court denied summary judgment to O'Dell and granted summary judgment to Pine Ridge. O'Dell appealed.<sup>99</sup>

On appeal, O'Dell argued that the legal description contained in the contract was insufficient, rendering the offer contract unenforceable. Further, O'Dell argued that the use of evidence outside the legal description contained in the offer contract was inadmissible parol evidence.<sup>100</sup> The court of appeals noted that "[i]n the absence of a legally sufficient description within the contract itself, a court may, under certain circumstances, allow the introduction of parol evidence to provide such a description."<sup>101</sup> However, such parol evidence was

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93. *Id.* (citing *O'Dell v. Pine Ridge Invs., LLC*, 293 Ga. App. 696, 700, 667 S.E.2d 912, 916 (2008)).

94. 293 Ga. App. 696, 700, 667 S.E.2d 912, 916 (2008).

95. *Id.* at 696, 667 S.E.2d at 914.

96. *Id.* (internal quotation marks omitted).

97. *Id.* (alteration in original).

98. *Id.*

99. *Id.* at 696-97, 667 S.E.2d at 914.

100. *Id.* at 697, 667 S.E.2d at 914.

101. *Id.*

admissible only if “the premises are so referred to within the contract as to indicate the seller’s intention to convey a particular tract of land.”<sup>102</sup> The contract language must provide “a ‘key’ that opens the door to parol evidence.”<sup>103</sup>

The court of appeals reversed the trial court, holding that the property description within the four corners of the contract failed to adequately identify the property’s location, there was no legal description of the metes and bounds of the property, and there was no language that would serve as a key to allow extrinsic parol evidence to supply the description.<sup>104</sup> Without such information, it was undisputed that the property description did not satisfy the statute of frauds.<sup>105</sup>

#### V. EASEMENTS, COVENANTS, AND BOUNDARIES<sup>106</sup>

In an action to remove a cloud from a title, establish a boundary line, and for ejectment, the court of appeals in *Gibson v. Rustin*<sup>107</sup> relied upon a set of rules delineated in O.C.G.A. § 44-4-5<sup>108</sup> to aid the court in its determination of disputed boundary lines.<sup>109</sup> The dispute concerned the exact location of the boundary line joining the northeast and southeast corners of Jesse Rustin’s 70.95-acre tract of land, which was purchased from Johnnie Whelchel in 1965.<sup>110</sup> The deed to the land referenced a 1965 survey that “described Rustin’s property as ‘taken from a plat drawn by [Williams],’” who was the property’s surveyor at the time.<sup>111</sup> The plat showed a spring to the east of Rustin’s property with no other landmarks or monuments referenced in the deed or plat. Also, the four corners of Rustin’s property were established by two land lot corners and points on the southeastern and northeastern corners.<sup>112</sup>

In 2003 Rustin had his property surveyed by John Gaston, whose survey revealed a twelve-foot closure failure in the Williams survey.<sup>113</sup> Additionally, “[t]he metes and bounds on the deed’s description of

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102. *Id.*

103. *Id.*

104. *Id.* at 699–700, 667 S.E.2d at 916.

105. *Id.* at 698, 667 S.E.2d at 915.

106. This section was authored by Jennifer L. Ervin, Clark Atlanta University (B.A., 2005); Northwestern University School of Law (J.D., candidate, 2010).

107. 297 Ga. App. 169, 676 S.E.2d 799 (2009).

108. See O.C.G.A. § 44-4-5 (1991).

109. *Gibson*, 297 Ga. App. at 176, 676 S.E.2d at 804.

110. *Id.* at 170, 676 S.E.2d at 801.

111. *Id.* (alteration in original).

112. *Id.*

113. *Id.*

Rustin's property . . . did not coincide with the calls on the flats."<sup>114</sup> Robert and Virginia Gibson and several others had purchased property from Whelchel that adjoined Rustin's land. Many of these landowners likewise had their properties surveyed to determine the boundary lines.<sup>115</sup>

By 2005 disputes 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 petition against the Gibsons to remove a cloud from his title and for ejectment. In 2007 the Gibsons and the other landowners filed a petition against Rustin seeking the same relief, but also seeking to establish a boundary line. The two cases were eventually consolidated.<sup>116</sup>

At a bench trial, the trial court found for Rustin and enjoined the Gibsons from trespassing on the property.<sup>117</sup> The Gibsons subsequently appealed, contending, among other things, that the trial court's determination of the boundary line was not properly supported by the evidence.<sup>118</sup> The court of appeals disagreed, citing O.C.G.A. § 44-4-5, which provides general rules for determining disputed boundary lines.<sup>119</sup> According to this code section, 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."<sup>120</sup> The statute also instructs the factfinder on how to determine boundary lines in the absence of higher evidence or when the corners are established and the lines are not marked.<sup>121</sup>

Applying the statute, the court of appeals affirmed the trial court's decision and held that "although no natural landmarks established the boundary, it was undisputed that the spring was not on Rustin's property; thus . . . there was some evidence from which the factfinder could establish the boundary lines."<sup>122</sup> The court of appeals also affirmed the trial court's rulings regarding the admissibility of statements made by Whelchel,<sup>123</sup> the possible ambiguity of the description

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114. *Id.*

115. *Id.* at 170-71, 676 S.E.2d at 801-02.

116. *Id.* at 172, 676 S.E.2d at 802.

117. *Id.* at 172-73, 676 S.E.2d at 802.

118. *Id.* at 176, 676 S.E.2d at 804.

119. *See id.* (citing O.C.G.A. § 44-4-5).

120. O.C.G.A. § 44-4-5(2).

121. *See id.* § 44-4-5(3).

122. *Gibson*, 297 Ga. App. at 176, 676 S.E.2d at 805.

123. *Id.* at 173, 676 S.E.2d at 803.

of the disputed property in Rustin's deed,<sup>124</sup> and the sufficiency of evidence to show adverse possession.<sup>125</sup>

During the survey period, several cases involving easement rights were decided in Georgia, with issues ranging from abandonment to reinforcement of well-established legal theories. In *Mize v. McGarity*,<sup>126</sup> the landowners filed an action for declaratory judgment, injunctive relief, and trespass against Van and Edna Mize, claiming that the Mizes improperly interfered with the petitioners' rights to use easements across the Mizes' property. In 1965 the original owners of adjoining Lots 4, 5, and 6 accessed their property by boat. Later, the original owners agreed to split the costs to build a driveway they could all use to access their property from the public road. Because of the steep terrain on Lot 4, the original owners decided to place the driveway on Lots 5 and 6.<sup>127</sup>

At the end of the driveway were four mailboxes labeled for each of the original owners and a large iron gate to which each owner had a key. At one point, two of the original owners paid and arranged for the installation of a set of concrete stairs that gave them easier access from their property to the lake.<sup>128</sup>

By 1994 Lots 5 and 6 had been sold to the Mizes, and Lot 4 was deeded to the petitioners. When the petitioners asked the Mizes to grant an easement in the joint driveway, the Mizes refused. However, the Mizes continued to allow the petitioners to use the driveway. The Mizes later removed the concrete stairs that allowed for easier access to the lake and planted several trees across the roadway that the petitioners used to access the driveway. In response, the petitioners filed their claims.<sup>129</sup>

Following a bench trial, the trial court found for the petitioners and granted them the irrevocable easement rights they sought according to O.C.G.A. § 44-9-4,<sup>130</sup> among other relief.<sup>131</sup> On appeal, the Mizes

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124. *Id.* at 175, 676 S.E.2d at 804.

125. *Id.* at 175-76, 676 S.E.2d at 804.

126. 293 Ga. App. 714, 667 S.E.2d 695 (2008).

127. *Id.* at 714-15, 667 S.E.2d at 697.

128. *Id.* at 715, 667 S.E.2d at 697.

129. *Id.* at 716, 667 S.E.2d at 698.

130. O.C.G.A. § 44-9-4 (2002). This section provides that "[a] parol license is not revocable when the licensee has acted pursuant thereto and in so doing has incurred expense." *Id.* When the parol license is not revocable, "it becomes an easement running with the land." *Id.* The court in *Mize* recognized the Georgia Supreme Court's holding that "[t]he principle embodied in this section is that [the use of the easement] must necessarily be preceded by the expenditure of money." 293 Ga. App. at 717, 667 S.E.2d at 698 (first alteration in original) (quoting *Miller v. Slater*, 182 Ga. 552, 558, 186 S.E. 413, 416 (1936)).

131. *Mize*, 293 Ga. App. at 716, 667 S.E.2d at 698.

challenged the trial court's holding on several grounds. First, the Mizes argued that according to O.C.G.A. § 44-9-4, the petitioners' actual use of the joint driveway was not preceded by the expenditure of money to maintain the easement.<sup>132</sup> The court of appeals disagreed, holding that such use occurred because the original owners shared equally in the costs associated with the initial and subsequent clearing and grading of the driveway.<sup>133</sup> The court also noted that the petitioners expended money for concrete pads that comprised the roadway—an action clearly in the purview of O.C.G.A. § 44-9-4.<sup>134</sup>

Second, the court of appeals recognized that as subsequent purchasers, the Mizes could not be burdened with the easement if they had no notice of the easement when they took possession of their property.<sup>135</sup> The Mizes argued that they had no such notice, but the court disagreed.<sup>136</sup> The court held that a “reasonably prudent person” would have observed that the petitioners' use of the easement was open and obvious.<sup>137</sup> The court noted that the presence of clearly labeled mailboxes for the owners of each of the adjoining lots and a large iron gate, all at the end of the driveway, demonstrated open and obvious use.<sup>138</sup> Furthermore, the court explained that the petitioners “were openly using the driveway and roadbed at and after the time the Mizes acquired their property.”<sup>139</sup>

Third, the Mizes argued that the petitioners abandoned their rights to the easement because of non-use.<sup>140</sup> The court of appeals, however, recognized that although the right to an easement can be lost by non-use, such forfeiture “will not be incurred unless the non-use[] [is] for a period sufficient to raise the presumption of a release or abandonment.”<sup>141</sup> Although the petitioners used their homes only on the weekends or for vacations, the court noted that they also used the driveway and roadway while there.<sup>142</sup> Thus, the court held that even such sparing use did not constitute abandonment.<sup>143</sup>

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132. *Id.* at 717, 667 S.E.2d at 699.

133. *Id.*

134. *Id.*

135. *Id.* at 718, 667 S.E.2d at 699.

136. *Id.*

137. *Id.* (quoting *Lowe's Home Ctrs., Inc. v. Garrison Ridge Shopping Ctr. Marietta, Ga., L.P.*, 283 Ga. App. 854, 856, 643 S.E.2d 288, 291 (2007)).

138. *Id.*

139. *Id.*

140. *Id.* at 719, 667 S.E.2d at 699.

141. *Id.* (first alteration in original) (quoting *Mathis v. Holcomb*, 215 Ga. 488, 489, 111 S.E.2d 50, 52 (1959)).

142. *Id.*, 667 S.E.2d at 699–700.

143. *Id.*, 667 S.E.2d at 700.



Finally, the court of appeals also disagreed with the Mizes' contentions that stairway easements are intended for the purpose of ingress and egress only and that the petitioners' right to enter and exit the property was not prohibited by the Mizes' removal of the concrete stairs.<sup>144</sup>

In an action seeking a declaration of easement rights and injunctive relief, the court of appeals in *Pleasure Bluff Dock Club, Inc. v. Poston*<sup>145</sup> held that the defendant developers had presented sufficient evidence for a ruling that the plaintiff homeowners had abandoned a natural landing easement.<sup>146</sup> In this case, Pleasure Bluff subdivision had been developed in 1948 along the Julington River, where subdivision developers acquired numerous lots, as well as St. Julington Boulevard, "a [one hundred]-foot-wide strip of land running between several lots and the river's low water mark."<sup>147</sup> The subdivision plat designated St. Julington Boulevard as a private road, but the developers maintained ownership of the property.<sup>148</sup>

When the developers began selling the subdivision lots, they also granted the purchasers the right of ingress and egress along the private road.<sup>149</sup> That road was never paved, and over time, "a narrow dirt road measuring slightly over nine feet wide developed within [the] original [one hundred]-foot expanse."<sup>150</sup> Additionally, certain purchasers held deeds that granted them access to a natural boat landing, which was later replaced by a common dock that the community built. However, the river's marsh eventually filled in the landing area, and the community stopped using it altogether.<sup>151</sup>

One set of developers, Robert and Linda Poston, owned two adjacent subdivision lots along the river. St. Julington Boulevard (the nine-foot dirt road) and the landing area both fronted the Postons' property. When the Postons decided to build a private dock, they obtained quitclaim deeds to the one hundred-foot-wide St. Julington Boulevard, which included the nine-foot dirt road. In response, the homeowners sued, seeking to establish their easement rights in the entire one hundred-foot expanse of St. Julington Boulevard. The trial court referred the case to a special master.<sup>152</sup> The special master concluded that "the Postons had a fee simple interest in the portion of St. Julington

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144. *Id.*

145. 294 Ga. App. 318, 670 S.E.2d 128 (2008).

146. *Id.* at 320, 670 S.E.2d at 130.

147. *Id.* at 318, 670 S.E.2d at 129.

148. *Id.*

149. *Id.* at 319, 670 S.E.2d at 129.

150. *Id.* (emphasis omitted).

151. *Id.*

152. *Id.*

Boulevard that fronted their property,” but the homeowners had the limited easement right of “ingress and egress along the 9.2-foot-wide dirt road.”<sup>153</sup> The special master also determined that the homeowners’ rights to the landing had been abandoned altogether.<sup>154</sup>

The homeowners appealed, claiming that “because their original property deeds granted them easement rights” to use the entire one hundred-foot expanse of St. Julington Boulevard, as well as the landing, those rights could “never be extinguished or lost.”<sup>155</sup> Therefore, they contended that the special master improperly reduced their easement based on abandonment and non-use.<sup>156</sup> The court of appeals disagreed, explaining that the evidence demonstrated the homeowners’ intent to abandon these properties.<sup>157</sup> Specifically, intent to abandon was demonstrated by the community’s building of a new deck, the overgrown marsh, and testimony admitting that the full use of the one hundred-foot-wide expanse was not required for the homeowners’ reasonable use and enjoyment.<sup>158</sup>

In *de Castro v. Durrell*,<sup>159</sup> the court of appeals refused to expand the concept of quasi-easements in Georgia.<sup>160</sup> In this case, Lots 1, 2, 3, and 4 were originally part of a 3.9-acre tract of land, which historically was used for several activities, including soccer. When the land was conveyed to Thomas and Martha Shim, the Shims continued to allow soccer activities on the land.<sup>161</sup> However, “[t]here were no recorded covenants or contractual restrictions upon the Shims’ use of the property.”<sup>162</sup>

Years later, the Shims decided to divide the tract of land into four lots, designating Lot 1 as a soccer field. John de Castro and Carolyn Cash purchased Lot 4, which was conveyed to them by a warranty deed that incorporated a “Declaration of Easement Agreement.”<sup>163</sup> That agreement created a “Recreation Easement Area” on “a [twenty]-foot strip of land spanning the rear of Lots 3 and 4 ‘for the benefit of the owner of Lot 1, and as a burden upon Lots 3 and 4 . . . for the conduct of recreational activities thereon, including, but not limited to use of said

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153. *Id.*

154. *Id.*

155. *Id.* at 319–20, 670 S.E.2d at 129.

156. *Id.*

157. *Id.* at 320, 670 S.E.2d at 129–30.

158. *Id.* at 319–20, 670 S.E.2d at 129–30.

159. 295 Ga. App. 194, 671 S.E.2d 244 (2008).

160. *Id.* at 199, 671 S.E.2d at 249.

161. *Id.* at 195, 671 S.E.2d at 247.

162. *Id.*

163. *Id.* at 195–96, 671 S.E.2d at 247.

easement area as part of a soccer field.”<sup>164</sup> The declaration also required the owner of Lot 1 to manage, maintain, operate, and improve the recreation easement area, and the declaration could not be amended without the consent of all the lot owners. The declaration did not, however, provide the owners of Lots 3 and 4 with reciprocal rights to use Lot 1.<sup>165</sup>

A few years later, Amy Durrell and Russell Currey bought Lots 1 and 2, and David Oedel bought Lot 3. The warranty deeds to Lots 1, 2, and 3 each included the final recorded plat and the declaration.<sup>166</sup> When Durrell ceased allowing the community to access the soccer field on Lot 1, the owners of Lots 3 and 4 sued, seeking a declaratory judgment as well as injunctive and monetary relief. De Castro, Cash, and Oedel claimed they had quasi-easement rights in the soccer field. At trial, the court granted Durrell’s motion for summary judgment on all claims, and de Castro, Cash, and Oedel appealed.<sup>167</sup>

In their first argument on appeal, de Castro, Cash, and Oedel argued that they had established all of the elements necessary to prove the existence of a quasi-easement.<sup>168</sup> They argued that a quasi-easement arose pursuant to Georgia law “when the Shims partitioned the property in such a way that [Durrell and Currey] were benefitted as well as burdened.”<sup>169</sup> However, the court of appeals disagreed, noting that the focus of this inquiry is the prior benefit.<sup>170</sup> Accordingly, the court noted that the declaration, which was recorded before partition, created a benefit to the Lot 1 owners but no benefit for the owners of Lots 3 and 4.<sup>171</sup> Additionally, the court noted that the special stipulation, intending to establish an easement for the benefit of Lot 3, was not recorded.<sup>172</sup>

Finally, the court observed that a quasi-easement is created “only in instances where an implied easement is necessary to provide water or other essential services to one parcel of property after partition of the tract by the developer or other common owner.”<sup>173</sup> After analyzing de Castro, Cash, and Oedel’s additional claims of implied easement, prescriptive easement, estoppel, and public dedication, the court affirmed

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164. *Id.* at 196, 671 S.E.2d at 247 (second alteration in original).

165. *Id.*

166. *Id.* at 197, 671 S.E.2d at 248.

167. *Id.* at 194–95, 671 S.E.2d at 246–47.

168. *Id.* at 198, 671 S.E.2d at 248.

169. *Id.*, 671 S.E.2d at 249.

170. *Id.* at 198–99, 671 S.E.2d at 249.

171. *Id.* at 199, 671 S.E.2d at 249.

172. *Id.*

173. *Id.*

the trial court's granting of Durrell and Currey's motion for summary judgment.<sup>174</sup>

In *DeSarno v. Jam Golf Management, LLC*,<sup>175</sup> the court of appeals clarified the definition of *excessive use* in the context of interpreting the scope of easement rights.<sup>176</sup> In this case, "the owner of a large tract of land (which the owner intended to develop into residential lots) agreed to subject those lots to an easement in favor of adjacent property being developed as a golf course."<sup>177</sup> The written and recorded easement permitted "golf balls unintentionally to come upon the Lot . . . , and for Golfers at reasonable times and in a reasonable manner to come upon the exterior portions of a Lot . . . to retrieve errant golf balls."<sup>178</sup> Further, the easement provided that "[u]nder no circumstances shall the . . . Golf Course Owner . . . be held liable for any damage or injury resulting from errant golf balls or the exercise of these easements."<sup>179</sup>

Five years later, James and Susan DeSarno contemplated purchasing one of the lots and were made aware that the lot was subject to the golf ball easement. Without consulting anyone from the golf course about their anticipated purchase, the DeSarnos purchased the lot.<sup>180</sup> They received "a deed that expressly stated the conveyance was subject to all easements of record affecting the lot."<sup>181</sup> As time passed, the golf course's business dramatically increased as did the number of errant golf balls coming into the DeSarnos' yard. Because of the errant golf balls, the DeSarnos suffered significant property damage, and they prohibited their children from playing in the yard for safety reasons.<sup>182</sup>

As a result, the DeSarnos sued the golf course operators for trespass, nuisance, and the damage to their property. The trial court, however, granted summary judgment to the golf course operators, and the DeSarnos appealed.<sup>183</sup> On appeal, the court held that the language of the easement "explicitly permitted the complained-of conduct and . . . exonerated the golf course owner from any liability for damages caused by the errant golf balls."<sup>184</sup> Therefore, the court held that "no claim for

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174. *Id.* at 199–202, 671 S.E.2d at 249–51.

175. 295 Ga. App. 70, 670 S.E.2d 889 (2008).

176. *See id.* at 72–74, 670 S.E.2d at 892.

177. *Id.* at 71, 670 S.E.2d at 889.

178. *Id.* (alterations in original).

179. *Id.*, 670 S.E.2d at 890 (alterations in original).

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 71–72, 670 S.E.2d at 890.

184. *Id.* at 72, 670 S.E.2d at 890.

trespass or nuisance could be maintained.<sup>185</sup> Moreover, the court noted that the DeSarnos bought the property with full knowledge of the easement.<sup>186</sup>

The court of appeals also rejected the DeSarnos' argument "that the extremely large number of errant golf balls coming onto their property constituted an 'excessive use' of the easement (and therefore a nuisance)."<sup>187</sup> In rejecting their argument, the court noted that "the concept of 'excessive use' of an easement relates not to the number of times an easement is used but rather to a use of the easement that exceeds the scope of the easement or that is intended to benefit a property that is not the dominant estate."<sup>188</sup> Furthermore, the court noted that unless there is a limit set forth in the easement, the easement holder may use the easement as many times as it chooses without fear of liability to the fee owner.<sup>189</sup>

Notably, because the easement did not expressly relieve golfers of liability for damage caused by the errant golf balls,<sup>190</sup> the DeSarnos may have had a cause of action against the golfers. Neither the trial court nor the appellate court, however, discussed this possibility.

#### VI. TRESPASS AND NUISANCE<sup>191</sup>

Although not the primary inquiry on appeal, the difference between a permanent nuisance and a continuing nuisance in the context of the applicable statute of limitations was explained by the supreme court in *City of Atlanta v. Kleber*.<sup>192</sup> The homeowners in that case brought an action for negligence and nuisance against the City of Atlanta and a railroad company, claiming that the city and the railroad company failed to properly maintain a drainage pipe and culvert near the homeowners' property.<sup>193</sup>

At various times over the span of two centuries, the railroad company installed railroad tracks, a culvert, and a thirty-six-inch drainage pipe on property that was eventually owned by the homeowners. At the time of their installations, the culvert and the pipe were adequate to drain

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185. *Id.*

186. *Id.*, 670 S.E.2d at 891.

187. *Id.*

188. *Id.* at 73, 670 S.E.2d at 891.

189. *Id.*

190. *See id.* at 71, 670 S.E.2d at 889-90.

191. This section was authored by Jennifer L. Ervin, Clark Atlanta University (B.A., 2005); Northwestern University School of Law (J.D., candidate, 2010).

192. 285 Ga. 413, 416, 677 S.E.2d 134, 137 (2009).

193. *Id.* at 413, 677 S.E.2d at 135.

the thirty-seven-acre basin where the homeowners' property sat. However, by the time the homeowners purchased the property in the summer of 1997, heavy rains consistently resulted in damaging floods to the property. To fix the flooding problem, the homeowners contacted the city and the railroad company, but the homeowners received no response. As a result, the homeowners sued the city for nuisance and the railroad company for negligence and nuisance.<sup>194</sup>

Based on the findings of a special master, the trial court granted summary judgment to the city and the railroad company.<sup>195</sup> However, the court of appeals reversed, holding "that the nuisance about which the homeowners complained was continuing in nature and, as a result, . . . was not barred by the four-year statute of limitations."<sup>196</sup> The case was subsequently appealed to the Georgia Supreme Court.<sup>197</sup> There, the issues on appeal were

(1) whether the [c]ourt of [a]ppeals erred in concluding that the homeowners presented triable issues with respect to their negligence and nuisance claims against [the railroad company] and (2) whether the [c]ourt of [a]ppeals erred in concluding that the homeowners presented a triable issue with respect to their nuisance claim against the [c]ity.<sup>198</sup>

As an initial matter, the supreme court expressed its disagreement with the court of appeals decision that the type of nuisance at issue was continuous in nature, noting that such a determination "directly controls the manner in which the statute of limitations will be applied to the underlying claim."<sup>199</sup> Accordingly, the 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."<sup>200</sup> On the other hand, the court explained,

[when] a nuisance is not permanent in its character, but is one [that] 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,

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194. *Id.* at 414, 677 S.E.2d at 135-36.

195. *Id.*, 677 S.E.2d at 135.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 415-16, 677 S.E.2d at 136-37.

200. *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)).

and against it the statute of limitations runs only from the time of such accrual.<sup>201</sup>

Under this standard, the court held that to the extent that the homeowners claimed that the mere presence of the culvert and pipe created a nuisance, the homeowners' nuisance claims were permanent in nature and were barred by the statute of limitations.<sup>202</sup> However, "to the extent that the homeowners contend[ed] that the culvert and drainage pipe ha[d] not been properly *maintained*," those claims were continuous in nature and were not barred by the statute of limitations.<sup>203</sup> Finally, the court reviewed the factual findings entered by the special master to decide on the primary issues before it on appeal.<sup>204</sup>

#### VII. FORECLOSURE OF REAL PROPERTY<sup>205</sup>

Confirmation of foreclosure pursuant to O.C.G.A. § 44-14-161<sup>206</sup> was a popular topic for the court of appeals during the survey period. In *Iwan Renovations, Inc. v. North Atlanta National Bank*,<sup>207</sup> the borrower obtained two mortgage loans secured by the same property. The security deeds evidencing the loans were executed seven months apart, but the proceeds from both loans were used to finance the renovation of the secured property. Upon default, the lender filed a lawsuit and sought to recover the amount owed on both promissory notes. While the lawsuit was pending, the lender initiated a nonjudicial foreclosure of the property pursuant to the power of sale provision in its first-priority security deed. After the foreclosure sale occurred, the lender amended its complaint to reflect the fact that it was now seeking to recover solely the amount owed pursuant to its second-priority security deed.<sup>208</sup> The borrower objected, arguing that the "amended complaint was the equivalent of a claim for a deficiency judgment."<sup>209</sup> The trial court denied the argument, and the borrower appealed.<sup>210</sup>

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201. *Id.* (internal quotation marks omitted) (alteration in original) (quoting *Lombard*, 101 Ga. at 727, 28 S.E. at 994).

202. *Id.* at 416-17, 677 S.E.2d at 137.

203. *Id.* at 417, 677 S.E.2d at 137.

204. *See id.* at 417-19, 677 S.E.2d at 137-39.

205. This section was authored by Dylan W. Howard, associate in the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Yale University (B.A., 1999); University of Georgia School of Law (J.D., cum laude, 2002). Member, State Bar of Georgia.

206. O.C.G.A. § 44-14-161 (2002).

207. 296 Ga. App. 125, 673 S.E.2d 632 (2009).

208. *Id.* at 126-27, 673 S.E.2d at 634.

209. *Id.* at 127, 673 S.E.2d at 634.

210. *Id.*

The court of appeals overturned the ruling of the trial court.<sup>211</sup> The court of appeals concluded that the debts held by the bank were inextricably intertwined,<sup>212</sup> stating that “two debts that are incurred for the same purpose, secured by the same property, held by the same creditor, and owed by the same debtor are inextricably intertwined.”<sup>213</sup> Because the two debts were inextricably intertwined, the court concluded that an attempt to recover under the promissory note evidencing the unforeclosed second priority mortgage loan constituted a deficiency action.<sup>214</sup> Because the bank had not confirmed the foreclosure sale under O.C.G.A. § 44-14-161, which is an absolute prerequisite for seeking a deficiency judgment, the bank’s lawsuit was barred.<sup>215</sup>

In *Cartersville Developers, LLC v. Georgia Bank & Trust*,<sup>216</sup> the court of appeals addressed the proper standard for evaluating the purchase price obtained at foreclosure in the context of an action to confirm the foreclosure sale.<sup>217</sup> The confirmation statute requires that in order to preserve the right to seek a deficiency judgment after foreclosure, foreclosed property must be sold for its “true market value.”<sup>218</sup> Failure to sell a property for at least its true market value bars the foreclosing entity from confirming the sale or seeking a deficiency judgment.<sup>219</sup> At the confirmation hearing in *Cartersville Developers*, the lender presented an appraiser’s testimony on the market value of the properties at issue. The appraiser testified that he had calculated the value of each property and then deducted \$10,000 from the value of each property because the properties were in foreclosure. The borrower contended that the \$10,000 discount was inappropriate.<sup>220</sup> The trial court rejected the argument and applied a “shock the conscience” standard, whereby the confirmation would only be denied if the “disparity between the foreclosure sale price and the true market value” shocked the “judicial conscience.”<sup>221</sup> The court of appeals overturned the trial court’s rulings on these issues.<sup>222</sup>

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211. *Id.* at 129, 673 S.E.2d at 636.

212. *Id.*, 673 S.E.2d at 635–36.

213. *Id.* at 128, 673 S.E.2d at 635.

214. *Id.* at 129, 673 S.E.2d at 635–36.

215. *Id.*, 673 S.E.2d at 636.

216. 292 Ga. App. 375, 664 S.E.2d 783 (2008).

217. *Id.* at 375, 664 S.E.2d at 784.

218. *See* O.C.G.A. § 44-14-161(b).

219. *See id.*

220. *Cartersville Developers*, 292 Ga. App. at 375–76, 664 S.E.2d at 784–85.

221. *Id.* at 376, 664 S.E.2d at 785.

222. *Id.* at 378, 664 S.E.2d at 786.



First, the court of appeals noted that the shock the conscience standard applies to lawsuits that seek to set aside a foreclosure sale, not to confirmation actions.<sup>223</sup> Although the trial court based its use of the standard in the confirmation context on an earlier court of appeals case, *Darby & Associates v. Federal Deposit Insurance Corp.*,<sup>224</sup> the court of appeals held that the *Darby* decision had been impliedly overruled.<sup>225</sup> The court concluded that the shock the conscience standard is no longer applicable to confirmation actions, and the trial court erred in applying it.<sup>226</sup> The court also concluded that “[t]rue market value ‘is the price that the property will bring when it is offered for sale by one who is not obligated, but has the desire to sell it.’”<sup>227</sup> Because a foreclosure does not involve a willing seller acting under usual market conditions, the court held that the effect of the foreclosure status of a property cannot be utilized in determining its true market value.<sup>228</sup> As a result, the court concluded that the lender’s appraiser erred in applying a discount to the value based on the property’s foreclosure status.<sup>229</sup> Because there was no other evidence from which a court could conclude that the properties sold for their true market value, the court of appeals overturned the confirmation order and remanded the case to the trial court for further proceedings.<sup>230</sup>

In *Nash v. Compass Bank*,<sup>231</sup> the court of appeals again addressed the proper standard for property valuation in the context of a confirmation action. In this case, the lender’s appraiser testified that she obtained the true market value of the property in part by deducting value from the property to account for the cost of completion and by deducting additional value to account for lost rent during the time period in which those particular units were being completed. The appraiser’s testimony in this regard was based in part on communications with another appraiser, who advised her on the evaluation. The borrower objected to the appraiser’s testimony on two grounds. First, the borrower argued that the testimony constituted inadmissible hearsay because it was based in part on the opinions of an appraiser not present

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223. *Id.* at 377, 664 S.E.2d at 785–86.

224. 141 Ga. App. 78, 232 S.E.2d 615 (1977).

225. *Cartersville Developers*, 292 Ga. App. at 377, 664 S.E.2d at 786.

226. *Id.* at 378, 664 S.E.2d at 786.

227. *Id.* at 377, 664 S.E.2d at 785 (quoting *Wilson v. Prudential Indus. Props., LLC*, 276 Ga. App. 180, 180 n.1, 622 S.E.2d 890, 891 n.1 (2005)).

228. *Id.*

229. *Id.*

230. *See id.* at 378, 664 S.E.2d at 786.

231. 296 Ga. App. 874, 676 S.E.2d 28 (2009).

at the confirmation hearing.<sup>232</sup> The court of appeals disagreed with this argument.<sup>233</sup> Although witnesses may “not act as a conduit for the opinions of others,” the court concluded that because the testifying appraiser was personally involved in each step of the appraisal and was accepted by all parties as an expert on real estate valuation, her reliance on the advice of another appraiser did not bar her testimony.<sup>234</sup>

The borrower also challenged the appraiser’s testimony based on the deductions the appraiser applied to the property’s value.<sup>235</sup> The borrower argued that the loss of rental income was “a collateral expense analogous to closing costs,” which should not have been included in the property’s market value.<sup>236</sup> The court again disagreed, holding that because a property without tenants is worth less to a potential purchaser than an occupied property, the testimony regarding the loss of rental income was clearly relevant to the issue of the property’s true market value.<sup>237</sup>

Finally, the borrower argued that because the appraiser was not qualified as a construction expert, her testimony regarding the cost to complete the property was inappropriate.<sup>238</sup> Although the court noted that this was a close question, it concluded that because the appraiser’s opinion was based on more than sheer speculation, there was some evidence to support the trial court’s order upholding the appraiser’s evaluation.<sup>239</sup> The court thus affirmed the trial court’s decision confirming the foreclosure sale.<sup>240</sup>

One important case this year not involving confirmation or property valuation was *Federal Home Loan Mortgage Corp. v. City of Atlanta*.<sup>241</sup> In that case, Federal Home Loan Mortgage Corporation (Freddie Mac) owned property by virtue of a prior foreclosure sale. The City of Atlanta maintained that it possessed a lien on the property that survived the foreclosure and was enforceable against Freddie Mac because of an unpaid water bill incurred by the prior owner.<sup>242</sup>

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232. *Id.* at 874–76, 676 S.E.2d at 29–30.

233. *Id.* at 876, 676 S.E.2d at 30.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 876–77, 676 S.E.2d at 30–31.

238. *Id.* at 877, 676 S.E.2d at 31.

239. *Id.*

240. *Id.*

241. 285 Ga. 189, 674 S.E.2d 905 (2009).

242. *Id.* at 189–90, 674 S.E.2d at 906.

The city based its claim on section 154-120 of the Atlanta, Georgia, Code of Ordinances,<sup>243</sup> which states that unpaid water bills constitute automatic liens by operation of law.<sup>244</sup> The city also contended that these liens survived foreclosure.<sup>245</sup> Freddie Mac argued that the ordinance was preempted by O.C.G.A. § 36-60-17,<sup>246</sup> which, inter alia, bars municipalities from imposing a lien for unpaid water service when the owner of the property was not the person who incurred the charges.<sup>247</sup> Freddie Mac filed its lawsuit in the United States District Court for the Northern District of Georgia. The district court, in turn, sought guidance from the Georgia Supreme Court.<sup>248</sup> In its opinion, the supreme court addressed two specific questions certified by the district court: (1) whether the statute preempted the ordinance, and (2) whether the statute “prohibit[ed] a municipality from retaining, as well as imposing, a lien on residential property . . . when the property is no longer owned by the person who incurred the charges.”<sup>249</sup>

The supreme court ultimately concluded that the statute did not preempt the ordinance and that the statute did not preclude the city from retaining and enforcing a water lien against a subsequent property owner.<sup>250</sup> In so doing, the supreme court noted that cases predating the statute held that a municipal lien could arise by operation of law when a water bill went unpaid, and the resulting lien was analogous to a lien for ad valorem taxes because it survived foreclosure.<sup>251</sup> The court then concluded that the statute is “a limited legislative modification” that only affects situations in which the party incurring the water bill was not the owner of the property at the time the lien arose.<sup>252</sup> When the charges are incurred by an owner of the property, the court concluded that the statute does not affect existing case law holding that the lien is a “heightened-status” lien that survives foreclosure.<sup>253</sup> Thus, the court concluded that the lien at issue was enforceable against Freddie Mac.<sup>254</sup> The practical effect of this decision is that foreclosure purchasers will almost always be liable for unpaid water bills incurred

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243. ATLANTA, GA., CODE OF ORDINANCES § 154-120 (Municode through Aug. 25, 2009).

244. *Id.* § 154-120(1).

245. *Fed. Home Loan Mortgage Corp.*, 285 Ga. at 190, 674 S.E.2d at 906.

246. O.C.G.A. § 36-60-17 (2006).

247. *Id.* § 36-60-17(c).

248. *Fed. Home Loan Mortgage Corp.*, 285 Ga. at 189, 674 S.E.2d at 905–06.

249. *Id.*, 674 S.E.2d at 906.

250. *Id.* at 193–94, 674 S.E.2d at 908–09.

251. *Id.* at 191–92, 674 S.E.2d at 907–08.

252. *Id.* at 193, 674 S.E.2d at 908.

253. *Id.*

254. *Id.* at 194, 674 S.E.2d at 909.

pre-foreclosure. As a result, it is of critical importance for any potential property bidder to contact the municipal water provider to determine whether a water bill on the property is overdue.

#### VIII. TAXATION OF REAL PROPERTY

The purchase of property at tax sales and the redemption of such properties pursuant to statute<sup>255</sup> continues to be a hot topic each year. This survey period was no exception. In *Washington v. McKibbon Hotel Group, Inc.*,<sup>256</sup> the supreme court addressed whether, between competing tax deed purchasers, actual possession of property trumped compliance with the statutory requirement for redemption.<sup>257</sup>

Vernita Kearsse originally had record title to a parcel but lost the property in 1982 for nonpayment of taxes at which time Charles Layton obtained title to the property by tax deed. Layton also lost the property in 1984 for unpaid taxes, and the title to the property was conveyed by tax deed to Johnnie Mae Shedrick. Thereafter, Shedrick also failed to pay ad valorem taxes, and the property was conveyed to Alvin Washington by tax deed in 1990. McKibbon Hotel Group, Inc., which owned the property contiguous to the former Kearsse property, purchased Layton's interest in 2006. In 2007 McKibbon brought a quiet title action, claiming the property through the right of redemption, which it acquired through purchase.<sup>258</sup> Washington claimed title to the property by his purchase of the 1990 tax deed and what he purported was foreclosure of the equity right of redemption pursuant to O.C.G.A. § 48-4-45.<sup>259</sup> Alternatively, Washington claimed title to the property through ripening of the tax deed by prescription.<sup>260</sup> The trial court adopted the recommendation of the special master, which vested fee simple title in McKibbon.<sup>261</sup>

Although Washington claimed that he took all the steps necessary to bar the equity right of redemption of the tax deed,<sup>262</sup> the trial court found that

the documentary record is silent as to any actions taken by him in this regard and, even if that were not so, he still failed to set out all of the

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255. See O.C.G.A. §§ 48-4-40 to -48 (1999 & Supp. 2009).

256. 284 Ga. 262, 664 S.E.2d 201 (2008).

257. *Id.* at 262-63, 664 S.E.2d at 202.

258. *Id.*

259. O.C.G.A. § 48-4-45 (1999 & Supp. 2009).

260. *Washington*, 284 Ga. at 262-63, 664 S.E.2d at 202.

261. *Id.*

262. *Id.*

requisite requirements for a barment, such as notice to any occupants of the property and all persons with any interest of record.<sup>263</sup>

Specifically, the trial court found that Washington had failed to record an affidavit or other document “memorializing the successful completion of the foreclosure of the right of redemption.”<sup>264</sup> The supreme court concluded that this failure alone, regardless of whether Washington took the steps to foreclose the right of redemption, was sufficient to preclude his interest.<sup>265</sup> Therefore, McKibbin took its interest in the property with notice only that Washington held a defeasible title to the property, subject to the equity bar of redemption.<sup>266</sup>

The supreme court then addressed Washington’s claim to the property by prescription.<sup>267</sup> The court stated that “for a tax deed title to ripen by prescription into fee simple title,” the claimant must prove “adverse possession . . . for a period of four years.”<sup>268</sup> Although the court recognized that Washington met three of the four requirements of adverse possession, because he could not prove that his possession was “public, continuous, exclusive, uninterrupted, and peaceable,” his claim under a theory of prescriptive title also failed.<sup>269</sup>

In *Fulton County Board of Tax Assessors v. National Biscuit Co.*,<sup>270</sup> the Fulton County Board of Tax Assessors appraised and assessed National Biscuit Company’s (NBC) commercial property at a fair market value of \$7,469,500 for the 2005 tax year. In response, NBC commissioned a private appraisal that valued the property at \$4,200,000. NBC then appealed the assessed value to the county’s board of equalization. The board of equalization valued the property at \$5,196,360, and NBC appealed to the superior court. Following a bench trial, even though the superior court found that the tax assessors proved a value of \$5,650,000, the court concluded that the property value could not exceed that set by the board of equalization. The tax assessors appealed on the ground that the superior court erred in limiting the property’s assessed value to the lower amount set by the board of equalization.<sup>271</sup>

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263. *Id.* (internal quotation marks omitted).

264. *Id.*

265. *Id.* at 263–64, 664 S.E.2d at 202–03.

266. *Id.*, 664 S.E.2d at 203.

267. *Id.* at 264, 664 S.E.2d at 203.

268. *Id.* (citing O.C.G.A. § 48-4-48(b)).

269. *Id.* at 264–65, 664 S.E.2d at 203–04 (internal quotation marks omitted) (quoting O.C.G.A. § 44-5-161(a)(3) (1991)).

270. 296 Ga. App. 884, 676 S.E.2d 41 (2009).

271. *Id.* at 884, 676 S.E.2d at 42.

On appeal the court relied upon O.C.G.A. § 48-5-311(g)(3),<sup>272</sup> which provides that in tax appeals to the superior court, “[t]he appeal shall constitute a de novo action.”<sup>273</sup> Therefore, the superior court “was required to exercise its independent judgment in valuing the property, without being bound by . . . the board of equalization’s findings.”<sup>274</sup> The court of appeals also noted that the statute “contemplates that the final determination of value on appeal can be greater than the valuation set by the board of equalization.”<sup>275</sup> Accordingly, the court held that if the county tax assessor met its burden of “proving a particular value by the preponderance of the evidence at the de novo trial, the court was authorized to enter its valuation determination and judgment in the amount so proven.”<sup>276</sup>

In *Morton v. Glynn County Board of Tax Assessors*,<sup>277</sup> the court of appeals considered whether membership in a private club enhanced the value of real property so as to increase the assessed value of the property.<sup>278</sup> William and Daisy Morton and other similarly situated taxpayers appealed the 2002 assessments of their properties located on Sea Island, arguing that the county board of tax assessors improperly included the value of their memberships in the exclusive Sea Island Club in the assessments of their real properties. The evidence was that the Sea Island Company created the private club and limited access to guests of the Cloister, the guests of the Sea Island Resort, and those who purchased property from the Sea Island Company. The Sea Island Company intended for the limited membership to increase property values on the island. The Mortons contended that the membership constituted nontaxable, intangible personal property. The appeal of the assessments progressed through the tax assessors’ office to the board of equalization, and then to the superior court.<sup>279</sup> The superior court granted summary judgment to the tax assessors on the ground that “the value of the [taxpayers’] real property had been enhanced by immediate access to a [c]lub membership, [and] that enhanced value must be included in the appraisal for ad valorem tax.”<sup>280</sup>

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272. O.C.G.A. § 48-5-311(g)(3) (1999 & Supp. 2009).

273. *Nat’l Biscuit Co.*, 296 Ga. App. at 884, 676 S.E.2d at 42 (alteration in original) (quoting O.C.G.A. § 48-5-311(g)(3)).

274. *Id.* at 885, 676 S.E.2d at 43.

275. *Id.*

276. *Id.*

277. 294 Ga. App. 901, 670 S.E.2d 528 (2008).

278. *Id.* at 901, 670 S.E.2d at 529.

279. *Id.* at 901–02, 670 S.E.2d at 529.

280. *Id.* at 903, 670 S.E.2d at 530.

The court of appeals considered whether “the value of the membership [was] distinct and severable from the fair market value of the real property” and whether “the memberships themselves [were] intangible personal property.”<sup>281</sup> The court held that the assessments did not improperly include an intangible benefit in assessing the properties’ fair market values because the tax assessors based the appraisals on the amount “buyers are prepared to pay for real property with the right to apply for [club] membership attached.”<sup>282</sup> The court noted that it would be inequitable to force the tax assessors to reduce the fair market value of these properties when the Sea Island Club policies enhanced the value of the properties by allowing a buyer and seller to arrange for the seller to turn in his or her membership so that the buyer is at the top of the membership waiting list.<sup>283</sup> The court recognized the distinction that

[the] properties sell at an enhanced value, not because they include a membership, but because the seller agrees to arrange that the buyer will have preferential eligibility for an available membership. It is this enhanced value, not the value of the membership itself, that is included in the county’s appraisals.<sup>284</sup>

Further, if a member resigns independently to the sale of property, independent buyers receive no preferential treatment because “[t]his right cannot be transferred outside the property and thus is coexistent with it.”<sup>285</sup> Therefore, the court concluded that the membership, being a part of the enhanced value paid by a purchaser for the property, could be included in the assessed tax value of the property.<sup>286</sup>

#### IX. CONDEMNATION<sup>287</sup>

In *Gramm v. City of Stockbridge*,<sup>288</sup> the City of Stockbridge filed a petition for condemnation to acquire property owned by Marilyn Gramm.<sup>289</sup> The special master granted the city’s petition and awarded

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281. *Id.*

282. *Id.* at 904, 670 S.E.2d at 531.

283. *Id.* at 905, 670 S.E.2d at 531.

284. *Id.*

285. *Id.*

286. *Id.*

287. This section was authored by Jonathan E. Green, associate in the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC. Vanderbilt University (B.A., 1998); University of Georgia School of Law (J.D., cum laude, 2001). Member, State Bar of Georgia.

288. 297 Ga. App. 165, 676 S.E.2d 818 (2009).

289. *Id.* at 165, 676 S.E.2d at 819.

Gramm \$430,000 in compensation for the value of the condemned property. The superior court adopted the special master's findings. Subsequently, the money for the condemnation was deposited into the court registry and then paid to Gramm. Gramm, in turn, filed an appeal seeking a jury trial on the issue of damages.<sup>290</sup>

While the trial was pending, the city determined that it no longer needed the property for its planned redevelopment and dismissed the action. The city then filed a quitclaim deed transferring the real property back to Gramm and filed a claim seeking a return of the \$430,000 paid to Gramm, plus interest. Gramm, in turn, filed a motion to set aside the city's dismissal. The superior court denied the motion to set aside the dismissal but granted Gramm's application for an interlocutory appeal.<sup>291</sup>

The court of appeals reversed the superior court's dismissal.<sup>292</sup> The court of appeals first held that title had vested in the city upon the superior court's entry of a condemnation judgment and the payment of an award to Gramm.<sup>293</sup> Noting that Gramm had challenged the amount of the award, not the validity of the taking, the city's title was conclusive and could not be re-litigated.<sup>294</sup>

The city argued that O.C.G.A. § 22-1-2(c)(1)<sup>295</sup> and O.C.G.A. § 22-1-12<sup>296</sup> justified its actions.<sup>297</sup> But these statutes, enacted as part of the Landowner's Bill of Rights and Private Property Protection Act,<sup>298</sup> were not applicable because the condemnation action had originally been filed in November 2005, which was before the effective date of the statutes.<sup>299</sup> The court of appeals also distinguished *Gatefield Corp. v. Gwinnett County*<sup>300</sup> from the present case.<sup>301</sup> In *Gatefield Corp.*, the court of appeals held that the condemnor was permitted to set aside a judgment of condemnation because of a mistake.<sup>302</sup> The condemnor filed the condemnation action on the wrong property due to an error by

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290. *Id.*

291. *Id.* at 165–66, 676 S.E.2d at 819.

292. *Id.* at 168, 676 S.E.2d at 821.

293. *Id.* at 166, 676 S.E.2d at 820.

294. *Id.*

295. O.C.G.A. § 22-1-2(c)(1) (Supp. 2009).

296. O.C.G.A. § 22-1-12 (Supp. 2009).

297. *Gramm*, 297 Ga. App. at 167, 676 S.E.2d at 820.

298. 2006 Ga. Laws 39, 42–43, 47.

299. *Gramm*, 297 Ga. App. at 167, 676 S.E.2d at 820.

300. 234 Ga. App. 621, 507 S.E.2d 164 (1998).

301. *Gramm*, 297 Ga. App. at 167–68, 676 S.E.2d at 820–21.

302. 234 Ga. App. at 621–22, 507 S.E.2d at 165.



its surveyor.<sup>303</sup> In the present case, however, the court observed that the city did not identify an error causing it to erroneously file the condemnation petition.<sup>304</sup> The court also observed that the equities of the situation pointed to upholding the condemnation.<sup>305</sup> The court reasoned that a contrary finding would require a condemnee to retain condemnation proceeds in case the condemnor sought to reverse the condemnation, thus creating uncertainty for the condemnee.<sup>306</sup>

In *Georgia Department of Transportation v. Bowles*,<sup>307</sup> the Georgia Department of Transportation (DOT) initiated a condemnation proceeding under O.C.G.A. § 32-3-4<sup>308</sup> against property owned by Lynn and Judy Bowles and Synovus Mortgage Corporation on April 19, 2001. The condemnees filed a timely notice of appeal, demanding a jury trial on the issue of compensation. During the trial of the case, the condemnees moved to dismiss the condemnation action. The condemnees argued that the original petition was defective because the supporting affidavit was not notarized. The motion to dismiss was granted by the trial court, and the DOT appealed.<sup>309</sup>

The court of appeals reversed the ruling of the trial court.<sup>310</sup> The court of appeals first noted that the condemnees had withdrawn the condemnation proceeds that were filed in the registry of the court.<sup>311</sup> By doing so, the court of appeals determined that the condemnees had acquiesced to the judgment of the superior court that vested title in the DOT.<sup>312</sup>

In *Cedartown North Partnership, LLC v. Georgia Department of Transportation*,<sup>313</sup> the DOT filed two condemnation petitions pursuant to O.C.G.A. § 32-3-5<sup>314</sup> and O.C.G.A. § 32-3-6<sup>315</sup> against two parcels of real property owned by Cedartown North Partnership, LLC.<sup>316</sup> The estimated just compensation, in the amount of \$17,600, was deposited in the registry of the superior court. On September 1, 2006, Cedartown's

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303. *Id.* at 621, 507 S.E.2d at 165.

304. *Gramm*, 297 Ga. App. at 168, 676 S.E.2d at 821.

305. *Id.*

306. *Id.*

307. 292 Ga. App. 829, 666 S.E.2d 92 (2008).

308. O.C.G.A. § 32-3-4 (2009).

309. *Bowles*, 292 Ga. App. at 829-30, 666 S.E.2d at 92-93.

310. *Id.* at 831, 666 S.E.2d at 94.

311. *Id.* at 830, 666 S.E.2d at 93.

312. *Id.*

313. 296 Ga. App. 54, 673 S.E.2d 562 (2009).

314. O.C.G.A. § 32-3-5 (2009).

315. O.C.G.A. § 32-3-6 (2009).

316. *Cedartown*, 296 Ga. App. at 54, 673 S.E.2d at 564.

registered agent, Byron Slaughter, was served with the condemnation petitions. Cedartown filed a notice of appeal in each condemnation action on October 5, 2006, thirty-four days later. The DOT sought to dismiss the appeals because they were filed more than thirty days after service of process. The trial court granted the DOT's motion to dismiss the appeals, and Cedartown appealed.<sup>317</sup>

Cedartown first argued that the period to file an appeal had been equitably tolled because statements made by counsel for the DOT to Cedartown's attorney led Cedartown's attorney to believe that the DOT's petitions had not been served on Cedartown. Specifically, in a conversation between counsel for Cedartown and counsel for the DOT, counsel for Cedartown asked counsel for the DOT if his client had been served.<sup>318</sup> Counsel for the DOT responded that "no petitions had been filed or served on his client."<sup>319</sup>

The court of appeals held that the doctrine of equitable estoppel did not apply because the failure to file a timely appeal was a jurisdictional issue that deprived the superior court of subject matter jurisdiction.<sup>320</sup> The court of appeals noted that subject matter jurisdiction "cannot be conferred by agreement or consent, or be waived."<sup>321</sup> Accordingly, the court of appeals held that equitable tolling was unavailable to Cedartown.<sup>322</sup>

Cedartown also alleged that pursuant to O.C.G.A. § 9-3-96,<sup>323</sup> the thirty-day period was tolled due to the DOT's fraud.<sup>324</sup> The court of appeals noted that O.C.G.A. § 9-3-96 only provides for the tolling of the statute of limitations.<sup>325</sup> Accordingly, the court of appeals held that the argument was without merit because the period for filing an appeal is not a statute of limitations.<sup>326</sup> The court of appeals also held that no fraud occurred.<sup>327</sup> The court reasoned that the DOT's statement that the condemnation action had not been served on Slaughter was

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317. *Id.*

318. *Id.* at 54–55, 673 S.E.2d at 564. At the time of this conversation, counsel for Cedartown also represented Cedartown's registered agent for service of process. *Id.* Therefore, counsel for Cedartown's reference to his "client" was ambiguous. *See id.* at 56, 673 S.E.2d at 565.

319. *Id.* at 55, 673 S.E.2d at 564.

320. *Id.* at 56, 673 S.E.2d at 565.

321. *Id.* (quoting *Redmond v. Walters*, 228 Ga. 417, 417, 186 S.E.2d 93, 94 (1971)).

322. *Id.*

323. O.C.G.A. § 9-3-96 (2007).

324. *Cedartown*, 296 Ga. App. at 57, 673 S.E.2d at 565.

325. *Id.*, 673 S.E.2d at 566.

326. *Id.*

327. *Id.*

accurate because the petition had been served upon him in his capacity as registered agent for Cedartown and not in his individual capacity.<sup>328</sup>

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328. *Id.* at 56, 673 S.E.2d at 565.