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Zoning and Land Use Law

by **Dennis J. Webb Jr.***
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This Article provides a succinct and practical analysis of the significant judicial decisions in the area of zoning and land use law handed down by Georgia appellate courts between June 1, 2008 and May 31, 2009.¹ The cases surveyed fall primarily within five categories: (1) zoning; (2) condemnation; (3) nuisance and trespass; (4) easements and restrictive covenants; and (5) miscellaneous.

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1. For analysis of Georgia zoning and land use law during the prior survey period, see Dennis J. Webb Jr. et al., *Zoning and Land Use, Annual Survey of Georgia Law*, 60 MERCER L. REV. 457 (2008).

I. ZONING

A. *Property Owner Not Indispensible Party on Zoning Appeal*

In *Stendahl v. Cobb County*,² a rezoning applicant sought to rezone a sixty-five acre parcel. After the rezoning request was granted, neighbors filed an appeal, challenging the rezoning decision. The neighbors filed a motion to dismiss the complaint for failure to join an indispensable party.³ In support, they noted that the rezoning applicant did not own the subject property. Instead, the applicant entered into a purchase and sale agreement with the property owner, and the contract was contingent upon the rezoning applicant obtaining rezoning. The trial court granted the motion.⁴ On review, the Georgia Supreme Court reversed, holding as follows:

While the trial court was correct in its observation that the new zoning designation runs with the land and is not personal to the applicants who obtained it, it does not necessarily follow that the owners of the property are indispensable parties for purposes of an appeal from the grant of the re-zoning application. When the owner of the property for which re-zoning is sought is not the applicant for re-zoning but has entered into a contract for the sale of the property with the re-zoning applicant, which contract is contingent upon the applicant obtaining re-zoning, the owner does not fit within the definition of "indispensable party" because the case could be decided on its merits without prejudicing the rights of the owners since the re-zoning applicant is a party and presents a thorough case on behalf of itself and, ultimately, the owner.⁵

B. *Public Service Commission Has Authority to Regulate Placement of Substations But is Not Required to Exercise This Authority*

In *Georgia Public Service Commission v. Turnage*,⁶ residential property owners filed a petition with the Georgia Public Service Commission (PSC) to halt construction of an electrical substation. The PSC dismissed the petition, claiming it had no authority to regulate the siting of electrical substations and stating that neither regulations nor criteria had been created to guide decisions on siting. The property

2. 284 Ga. 525, 668 S.E.2d 723 (2008).

3. *Id.* at 525, 668 S.E.2d at 725.

4. *See id.* at 527–28, 668 S.E.2d at 726–27.

5. *Id.* at 528–29, 668 S.E.2d at 727 (citing *Guhl v. Tuggle*, 242 Ga. 412, 414, 249 S.E.2d 219, 221 (1978)).

6. 284 Ga. 610, 669 S.E.2d 138 (2008).

owners filed a petition for judicial review and a writ of mandamus in the trial court. The trial court denied the petition for judicial review on standing grounds.⁷ It granted the petition for mandamus, however,

“refus[ing] to countenance the counterintuitive proposition that there is no agency with the authority to make zoning-like decisions or provide any governmental review with regard to the siting of substations” or other complex construction projects, and finding that [Georgia law] “expressly vests the PSC with that power and thus holds that the PSC has a clear public duty to hear [the property owners’] case.”⁸

Upon review, the Georgia Supreme Court reversed.⁹ The supreme court recognized the trial court’s correct determination that the PSC’s granted powers included authority to regulate substation placement.¹⁰ However, the court then reasoned that “whether preemption results from a statutory delegation of authority [was] a separate question from whether the PSC . . . actually exercised the particular power it [was] granted.”¹¹ Because the PSC did not have rules and regulations covering substation placement, the PSC had not exercised its power over substation siting.¹² The court also noted that contrary to the trial court’s reasoning, the supreme court “[had] not found any requirement that every property or even every complex construction project be subject to zoning-like restrictions.”¹³ A mere grant of governmental power does not imply a duty to exercise the granted power, and the court held that this case at most involved a power that was optional to exercise.¹⁴

C. *Developer’s § 1983 Equal Protection Claim Upheld*

In *Fulton County v. Legacy Investment Group, LLC*,¹⁵ the plaintiff was a large volume developer and builder of single-family homes in Fulton County, Georgia for several years.¹⁶ In the spring and summer of 2006, the plaintiff was cited twice for violating the Fulton County Soil

7. *Id.* at 610–11, 669 S.E.2d at 138–39.

8. *Id.* at 611, 669 S.E.2d at 139 (first alteration in original) (citing *City of Buford v. Ga. Power Co.*, 276 Ga. 590, 581 S.E.2d 16 (2003)).

9. *Id.* at 613, 669 S.E.2d at 140.

10. *Id.* at 612, 669 S.E.2d at 139.

11. *Id.*, 669 S.E.2d at 140.

12. *Id.*

13. *Id.*

14. *Id.*

15. 296 Ga. App. 822, 676 S.E.2d 388 (2009).

16. *Id.* at 822, 676 S.E.2d at 390.

Erosion and Sedimentation Control Ordinance of 2005.¹⁷ Subsequently, the county notified the builder it intended to bar the builder from receiving land disturbance permits for a three-year period pursuant to local law.¹⁸ In a letter to the plaintiff, the county stated that it intended to enforce section 26-40(b)(8) of the Fulton County Code.¹⁹ Section 26-40(b)(8) provides that “[i]f a permit [applicant] has had two or more violations of previous permits, this article, or the Erosion and Sedimentation Act, as amended, within three years prior to the date of filing of the application under consideration, Fulton County shall deny the permit application.”²⁰ The letter continued by stating the county would deny the land disturbance permit applications for a period of three years from the date of the builder’s permit violation of April 28, 2006, due to the builder’s multiple violations of previous permits; and all applications prior to that date were also denied.²¹

Shortly after receiving the debarment notice, the builder filed a complaint against the county, seeking damages under 42 U.S.C. § 1983²² and Georgia law²³ for violation of equal protection rights.²⁴ The builder also sought attorney fees pursuant to 42 U.S.C. § 1988²⁵ and section 13-6-11 of the Official Code of Georgia Annotated (O.C.G.-A.),²⁶ as well as a declaratory judgment that the ordinance violated due process.²⁷ Subsequently, the county withdrew its debarment notice, and the superior court denied the declaratory judgment petition as moot and entered judgment on a jury verdict for the builder on the § 1983 claim. Both parties appealed.²⁸

The county argued that no developer has a vested property interest in receiving a land disturbance permit and, therefore, that the trial court erred in denying its motion for directed verdict on the builder’s equal protection claim.²⁹ Rejecting this claim, the court of appeals stated that the county’s argument was based on the faulty premise that

17. FULTON COUNTY, GA., CODE OF LAWS §§ 26-35 to -48 (Municode through Dec. 5, 2007); *Legacy Inv. Group*, 296 Ga. App. at 822, 676 S.E.2d at 390–91.

18. *Legacy Inv. Group*, 296 Ga. App. at 823, 676 S.E.2d at 391.

19. FULTON COUNTY, GA., CODE OF LAWS § 26-40(b)(8) (Municode through Dec. 5, 2007); *Legacy Inv. Group*, 296 Ga. App. at 823, 676 S.E.2d at 391.

20. FULTON COUNTY, GA., CODE OF LAWS § 26-40(b)(8).

21. *Legacy Inv. Group*, 296 Ga. App. at 823, 676 S.E.2d at 391.

22. 42 U.S.C. § 1983 (2006).

23. GA. CONST. art. I, § 1, para. 2.

24. *Legacy Inv. Group*, 296 Ga. App. at 823, 824, 676 S.E.2d at 391.

25. 42 U.S.C. § 1988 (2006).

26. O.C.G.A. § 13-6-11 (1982 & Supp. 2009).

27. *Legacy Inv. Group*, 296 Ga. App. at 824, 676 S.E.2d at 391.

28. *Id.*, 676 S.E.2d at 391–92.

29. *Id.* at 825, 676 S.E.2d at 392.

identification of a property interest was required for an equal protection claim.³⁰ The Fourteenth Amendment³¹ itself demonstrates that interests in property and liberty are irrelevant to such claims.³² The court stated that “to properly plead an equal protection claim, a plaintiff need only allege that . . . through state action, similarly situated persons have been treated disparately.”³³

The court also vacated the trial court’s ruling that the builder’s petition for declaratory judgment was moot.³⁴ The court stated that the ordinance remained on the books despite the county’s withdrawal of the debarment notice.³⁵ The county thus was required to deny future applications so long as the builder had two or more violations within three years preceding any future applications.³⁶ The court stated that although “a petition seeking a declaration that a particular debarment notice was void would presumably be rendered moot by the withdrawal of the notice, [the builder] did not seek a declaration that the . . . debarment notice was void.”³⁷ The builder instead sought a declaration that the ordinance itself was unconstitutional.³⁸

D. The ZPL Requirement of Publication Fifteen Days, But Not More Than Forty-five Days, Prior to a Hearing is Not Extended When the Forty-fifth Day Falls on a Weekend

In *C & H Development, LLC v. Franklin County*,³⁹ neighbors challenged the county’s grant of a conditional use permit. Among other things, the neighbors argued that the notice of the public hearing on the neighbor’s conditional use permit did not comply with the zoning procedures law. The notice was published forty-six days before the hearing date,⁴⁰ not forty-five days as required by O.C.G.A. § 36-66-4(a).⁴¹ In response, the county argued that the forty-fifth day fell on a Sunday, and therefore, under Georgia law, the time limit would be

30. *Id.*

31. U.S. CONST. amend. XIV.

32. *Legacy Inv. Group*, 296 Ga. App. at 825, 676 S.E.2d at 392.

33. *Id.* (quoting *Thigpen v. Bibb County*, 223 F.3d 1231, 1237 (11th Cir. 2000)).

34. *Id.* at 828, 676 S.E.2d at 394.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. 294 Ga. App. 792, 670 S.E.2d 491 (2008).

40. *Id.* at 792, 793, 670 S.E.2d at 492.

41. O.C.G.A. § 36-66-4(a) (2006).

extended to the following Monday.⁴² The trial court granted the county's motion for summary judgment.⁴³

On review, the court of appeals reversed.⁴⁴ The county argued that if the forty-fifth day after publication fell on a Sunday, its Board of Commissioners could hold the public hearing the following Monday.⁴⁵ However, under O.C.G.A. § 36-66-4(a), the county was required to publish notice of the hearing "[a]t least [fifteen] but not more than [forty-five] days prior to the date of the hearing."⁴⁶ The court held that the hearing date was the date from which the time limits of the notice had to be considered.⁴⁷ Because the hearing was not set for Sunday and was not held on that day, no pertinent date fell on a Sunday for purposes of O.C.G.A. § 1-3-1(d)(3).⁴⁸

II. CONDEMNATION

During the survey period, the Georgia appellate courts decided several condemnation cases dealing with procedural, evidentiary, and business loss issues. Some of the more interesting and instructive cases are discussed herein.

A. *A Property Owner's Untimely Notices of Appeal Were Not Excused Based on the Doctrine of Equitable Estoppel*

In *Cedartown North Partnership, LLC v. Georgia Department of Transportation*,⁴⁹ the Georgia Department of Transportation (GDOT) filed two condemnation petitions on August 11, 2006, to acquire two parcels of property owned by Cedartown North Partnership, LLC, as well as easements and access rights. Thirty-four days after Cedartown was served in the two cases, it filed notices of appeal challenging the amount of compensation deposited by the GDOT in the registry of the court.⁵⁰ Relying on O.C.G.A. § 32-3-14,⁵¹ the GDOT moved to dismiss the appeals on the ground that the notices of appeal were untimely because

42. *C & H Dev.*, 294 Ga. App. at 794, 670 S.E.2d at 493.

43. *Id.* at 792, 670 S.E.2d at 492.

44. *Id.* at 795, 670 S.E.2d at 493.

45. *Id.* at 794, 670 S.E.2d at 493.

46. O.C.G.A. § 36-66-4(a).

47. *C & H Dev.*, 294 Ga. App. at 794, 670 S.E.2d at 493.

48. O.C.G.A. § 1-3-1(d)(3) (2000 & Supp. 2009); *C & H Dev.*, 294 Ga. App. at 794, 670 S.E.2d at 493.

49. 296 Ga. App. 54, 673 S.E.2d 562 (2009).

50. *Id.* at 54, 673 S.E.2d at 564.

51. O.C.G.A. § 32-3-14 (2009).

they were filed outside the thirty-day appeal period. The trial court granted the motion.⁵²

On appeal, Cedartown asserted that the GDOT was equitably estopped by its counsel's misleading and false statements from relying on the thirty-day appeal period⁵³ or, in the alternative, that under O.C.G.A. § 9-3-96,⁵⁴ the appeal period was tolled.⁵⁵ The court of appeals rejected both arguments.⁵⁶

First, the court noted:

We have previously held that "[t]he right to appeal to a jury from a declaration of taking [is] absolutely conditional upon the filing of a timely notice of appeal in the superior court," pursuant to [O.C.G.A.] § 32-3-14 and that "[n]ot even the trial court is empowered to extend the period of time for filing the notice of appeal."⁵⁷

Thus, the court of appeals held that the "trial court did not err in declining to excuse Cedartown's untimely notices of appeal based on the doctrine of equitable estoppel."⁵⁸

Second, the court of appeals disagreed that the thirty-day appeal period was tolled under O.C.G.A. § 9-3-96 by the GDOT's fraud.⁵⁹ The court noted that pursuant to O.C.G.A. § 9-3-96, "[i]f the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud."⁶⁰ The court held that the statute providing for the tolling of a cause of action on grounds of fraud had no application to the GDOT's condemnation proceedings and that the thirty-day time limit for Cedartown to appeal the estimated compensation could not be tolled per the statute.⁶¹ More specifically, the court held that O.C.G.A. § 32-3-14 "sets forth a mandatory time period for filing an appeal in a condemnation action, not a statute of limitation for commencing a particular type

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

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

54. O.C.G.A. § 9-3-96 (2007).

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

56. *Id.* at 55-57, 673 S.E.2d at 564-66.

57. *Id.* at 55, 673 S.E.2d at 565 (first, second, and fourth alterations in original) (quoting *Chambers v. Dep't of Transp.*, 172 Ga. App. 197, 197, 322 S.E.2d 366, 367 (1984)).

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

59. *Id.* at 57, 673 S.E.2d at 565.

60. *Id.*, 673 S.E.2d at 565-66 (quoting O.C.G.A. § 9-3-96).

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

of action. As such, by its terms, [O.C.G.A.] § 9-3-96 has no application here.⁶²

B. Property Owners Were Estopped From Contesting the Right to Condemn Property Because They Withdrew the Money the GDOT Deposited in the Registry of the Court

In *Georgia Department of Transportation v. Bowles*,⁶³ under O.C.G.A. § 32-3-4,⁶⁴ the GDOT filed a condemnation action on April 19, 2001, against Lynn and Judy Bowles's property. On May 18, 2001, the Bowleses filed a notice of appeal expressing dissatisfaction with the estimated amount of compensation. On November 14, 2001, the Bowleses filed a certification for withdrawal of the funds. An order condemning the funds was entered on the same date. At the trial to determine the value of the property, the Bowleses orally moved to dismiss the condemnation petition because the required appraiser affidavit was not attested properly. The trial court granted the motion.⁶⁵

On appeal, the GDOT asserted under O.C.G.A. § 32-3-11(c)⁶⁶ that the Bowles waived any right to challenge the sufficiency of the petition because they failed to raise the issue within thirty days.⁶⁷ The GDOT also asserted on appeal that the Bowleses were estopped from contesting the right to condemn the property because they withdrew the money the GDOT deposited in the registry of the court.⁶⁸

The court of appeals held that “[p]remitting whether a court may grant a motion to dismiss a petition made more than [thirty] days after service for failure to submit a properly attested affidavit, the Bowles[es] were estopped from challenging the taking because they withdrew the money deposited in the court registry.”⁶⁹ The court stated the rule is that condemnees are estopped from contesting the right to condemn and the validity of the action when they accept payment for the property.⁷⁰ Accepting payment estops condemnees from objecting to “the condemnation proceedings[,] to the necessity of the taking, or to the *validity* of the

62. *Id.*

63. 292 Ga. App. 829, 666 S.E.2d 92 (2008).

64. O.C.G.A. § 32-3-4 (2009).

65. *Bowles*, 292 Ga. App. at 830, 666 S.E.2d at 93.

66. O.C.G.A. § 32-3-11(c) (2009).

67. *Bowles*, 292 Ga. App. at 829, 666 S.E.2d at 93.

68. *Id.* at 829–30, 666 S.E.2d at 93.

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

70. *Id.* at 830–31, 666 S.E.2d at 93.

condemnation proceedings.”⁷¹ Thus, condemnees may neither directly nor indirectly protest the condemnation.⁷² However, acceptance of payment does not estop a condemnee from objecting to the amount of payment so long as the objection is timely pursued.⁷³ As such, the court held that the trial court erred by dismissing the GDOT’s petition and thus, reversed the trial court.⁷⁴

C. The Condemnor Cannot Dismiss a Condemnation Action and Demand Return of the Previously Paid Award

In *Gramm v. City of Stockbridge*,⁷⁵ the City of Stockbridge filed a petition for condemnation before a special master under O.C.G.A. § 22-2-102⁷⁶ and the Urban Redevelopment Law⁷⁷ to acquire certain property owned by Marilyn Gramm for use in the city’s redevelopment plan. The special master granted the city’s petition and awarded Gramm \$430,000 as the value of the condemned property. The trial court entered a judgment incorporating the special master’s award. After the city paid the amount awarded into the court’s registry, the funds were disbursed to Gramm. Gramm filed a timely appeal in the trial court to challenge the amount of the award and asked for a jury trial on the issue.⁷⁸

However, the city determined it no longer needed Gramm’s property for its redevelopment plan and voluntarily dismissed the condemnation action without prejudice. The city filed a quitclaim deed reconveying the property to Gramm and filed a claim of lien seeking Gramm’s repayment of the condemnation award plus interest at a rate of seven percent per annum. Gramm filed a motion to set aside the city’s dismissal of the condemnation action, which the trial court denied.⁷⁹ The court of appeals granted Gramm’s application for interlocutory appeal.⁸⁰

The court of appeals held that title to the property at issue vested in the city on January 19, 2006, upon the superior court’s entry of the condemnation judgment and the payment of the award to Gramm.⁸¹ Therefore, the court held that the city did not have the authority to

71. *Id.* at 831, 666 S.E.2d at 93 (quoting *Fulton County v. Threatt*, 210 Ga. App. 266, 267, 435 S.E.2d 672, 674 (1993)).

72. *Id.*

73. *Id.*, 666 S.E.2d at 93–94.

74. *Id.*, 666 S.E.2d at 94.

75. 297 Ga. App. 165, 676 S.E.2d 818 (2009).

76. O.C.G.A. § 22-2-102 (1982 & Supp. 2009).

77. O.C.G.A. § 36-61-1 to -19 (2006).

78. *Gramm*, 297 Ga. App. at 165, 676 S.E.2d at 819.

79. *Id.*

80. *Id.*

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

unilaterally dismiss the condemnation action and demand return of the previously paid award.⁸²

The court of appeals also noted that strong countervailing policy considerations existed to prohibit the city from setting aside the condemnation judgment.⁸³ The court reasoned that O.C.G.A. § 22-2-107(g)⁸⁴ was significant because the statute “provides that ‘upon the payment of the amount awarded by the special master into the registry of the court, the award of the special master and the judgment of the court condemning the property or interest to the use of the condemning body shall be conclusive.’”⁸⁵ Thus, “after a condemnation judgment has been entered, ‘[t]he condemnor can[not] assent to the judgment adopting the master’s findings, pay in its money and seek to take possession of the property, and then disown the very property it has paid for, and sought possession of’ in the action.”⁸⁶ The court of appeals noted that property owners “should not be required to retain funds paid pursuant to a condemnation award until such time as the condemnor determines whether it actually ‘needs’ or can develop property it has already acquired.”⁸⁷ A requirement like that would cause prolonged uncertainty and would be inequitable to property owners in condemnation actions.⁸⁸

D. Property Owners Should Have Been Allowed to Impeach the GDOT Appraiser’s Trial Testimony With His Inconsistent Pretrial Estimate of Just and Adequate Compensation

In *Steele v. Department of Transportation*,⁸⁹ the GDOT filed a condemnation petition seeking acquisition of “fee simple title to 0.653 acres of land and a construction-and-maintenance easement in 0.028 acres of land within a 2.365-acre tract owned by Thomas Jerry Steele and others” (collectively, Steele).⁹⁰ The GDOT paid \$154,050 into the court registry as an estimate of the just and adequate compensation due to Steele, and Steele appealed to the trial court. The jury returned a

82. *Id.*

83. *See id.*, 676 S.E.2d at 819–20.

84. O.C.G.A. § 22-2-107(g) (1982 & Supp. 2009).

85. *Gramm*, 297 Ga. App. at 166, 676 S.E.2d at 819 (quoting O.C.G.A. § 22-2-107(g)).

86. *Id.*, 676 S.E.2d at 819–20 (alterations in original) (quoting *Johnson v. Fulton County*, 103 Ga. App. 873, 878–79, 121 S.E.2d 54, 59 (1961)).

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

88. *Id.*

89. 295 Ga. App. 244, 671 S.E.2d 275 (2008).

90. *Id.* at 244, 671 S.E.2d at 276.

verdict for Steele and awarded \$308,000 as just and adequate compensation. Steele then appealed to the court of appeals.⁹¹

The first issue presented on appeal was whether the trial court erred by barring Steele from using the GDOT appraiser's inconsistencies between his pretrial affidavit and trial testimony for impeachment purposes.⁹² The court of appeals held that the trial court prejudicially erred in refusing to allow Steele to impeach the GDOT appraiser's trial testimony with his pretrial estimate of just and adequate compensation.⁹³ The court noted that Steele's expert appraiser estimated just and adequate compensation at \$584,135 and that the jury might have rendered a verdict closer to that estimate if the trial court had allowed Steele to impeach the GDOT's expert appraiser "by showing the wide disparity in his \$154,050 and \$288,600 compensation estimates before and at trial."⁹⁴

Steele also argued that the trial court erred by placing limitations on Steele's "ability to prove cost to cure damages."⁹⁵ The court of appeals held that the trial court did not err in refusing to allow Steele to claim cost to cure as a separate element of damages because Steele was allowed to show how the cost to cure adversely affected the value of the remaining property.⁹⁶ Finally, because Steele made no offer of proof concerning how a reduction in allowable building space for the remaining property affected its value, the court held that the trial court did not err in refusing to allow Steele to prove consequential damages by showing that the taking reduced the allowable building space on the remaining property.⁹⁷

E. The Trial Court Did Not Err in Allowing the GDOT's Expert Appraiser to Testify as to the Net Value of the Taking When Temporary Easements Ultimately Benefited the Property Owner

In *Bulgin v. Georgia Department of Transportation*,⁹⁸ the GDOT condemned land for a highway expansion. A White County, Georgia jury awarded the property owners \$12,600 as just and adequate compensa-

91. *Id.*

92. *Id.* at 246, 671 S.E.2d at 277.

93. *Id.* at 247, 671 S.E.2d at 278.

94. *Id.*, 671 S.E.2d at 277-78.

95. *Id.*, 671 S.E.2d at 278.

96. *Id.* at 248, 671 S.E.2d at 278.

97. *Id.*, 671 S.E.2d at 278-79.

98. 292 Ga. App. 1, 663 S.E.2d 730 (2008).

tion for the condemned property. The property owner appealed the amount of the award.⁹⁹

On appeal, the property owner asserted, among other things, that the trial court erred in denying his motion to strike the testimony of the GDOT's real estate appraiser. The appraiser testified that he assessed the appropriate compensation for the 0.072 acres of condemned property at \$12,600 and that he did not include any compensation for two temporary easements for the contractor to build a new driveway and a new fence for the property owner. The appraiser explained these improvements were for the property owner's use and benefit, and the temporary loss of use was offset by the improvements. The property owner argued the appraiser's testimony should have been stricken because he did not value all interests taken and because he improperly offset benefits against the value of the taking.¹⁰⁰

Recognizing first that the trial court has broad latitude in admitting expert opinion testimony, the court of appeals further noted that the Georgia "Supreme Court has recognized that '[i]f the taking of a temporary easement can be shown by competent evidence to have diminished the fair market value of the land not taken, the owner is entitled to just and adequate compensation.'"¹⁰¹ Consequently, if it can be adduced that the taking of a temporary easement diminished the fair market value, competent evidence should be admissible to establish that the temporary taking does not diminish the fair market value.¹⁰² Under the circumstances of this case, the court of appeals held that the trial court did not abuse its discretion in failing to strike the appraiser's testimony.¹⁰³

F. The Trial Court Misstated the Correct Test for Business Loss Damages in a Condemnation Case and Improperly Heightened the Burden for Showing Uniqueness

In *ABM Realty Co. v. Board of Regents of the University System of Georgia*,¹⁰⁴ the State's university system filed a condemnation action to take real property containing an office building. ABM Realty Company, a tenant in the building, operated a business acting as the building property manager and leasing agent for the owners. ABM

99. *Id.* at 1, 663 S.E.2d at 731.

100. *Id.* at 3, 663 S.E.2d at 733.

101. *Id.* (alteration in original) (quoting *Dep't of Transp. v. Edwards*, 267 Ga. 733, 737, 482 S.E.2d 260, 264 (1997)).

102. *Id.* at 3-4, 663 S.E.2d at 733.

103. *Id.* at 4, 663 S.E.2d at 733.

104. 296 Ga. App. 658, 675 S.E.2d 549 (2009).

intervened in the condemnation action and sought business loss damages as a result of the university system's complete condemnation of the building.¹⁰⁵

The trial court appointed a special master who awarded ABM \$5000 to compensate the loss of its business interest. ABM appealed to the trial court, and a jury found that ABM lacked the requisite uniqueness necessary to recover business loss damages in a condemnation action. ABM appealed and argued that the trial court erred in its jury instructions.¹⁰⁶

On appeal, the court of appeals first noted that when businesses in condemnation actions belong to a lessee other than the property owner, the lessee can recover for business losses.¹⁰⁷ Such recovery is an "element of compensation separate from the value of the land whether the destruction of his business is total or merely partial, provided only that the loss is not remote or speculative. In either event, *business losses are recoverable as a separate item only if the property is unique.*"¹⁰⁸ The court then explained the three methods used to demonstrate the unique character of property for business loss purposes: (1) "[i]f the property must be duplicated for the business to survive, and if there is no substantially comparable property within the area, then the loss of the forced seller is such that market value does not represent just and adequate compensation";¹⁰⁹ (2) looking to whether the property has "a value particular to the owner incapable of being passed to a third party";¹¹⁰ or (3) recognizing that "unique properties are generally not of a type bought or sold on the open market" so that there is no market value in the ordinary sense of the term because there is no willing buyer and seller.¹¹¹ The court noted that "[o]nly one of the three criteria need be satisfied in order to authorize recovery of business loss damage."¹¹²

On appeal, ABM focused on the trial court's charge to the jury concerning the first method of demonstrating uniqueness: whether there

105. *Id.* at 659, 675 S.E.2d at 551.

106. *Id.*

107. *Id.*

108. *Id.* (internal quotation marks omitted) (quoting *Dep't of Transp. v. Dixie Highway Bottle Shop, Inc.*, 245 Ga. 314, 314, 265 S.E.2d 10, 10 (1980)).

109. *Id.* (quoting *Hous. Auth. of Atlanta v. Troncalli*, 111 Ga. App. 515, 518, 142 S.E.2d 93, 95 (1965)).

110. *Id.* at 660, 675 S.E.2d at 551 (citing *City of Gainesville v. Chambers*, 118 Ga. App. 25, 27, 162 S.E.2d 460, 463 (1968)).

111. *Id.*, 675 S.E.2d at 551-52 (citing *Dep't of Transp. v. E. Oil Co.*, 149 Ga. App. 504, 505, 254 S.E.2d 730, 732 (1979)).

112. *Id.*, 675 S.E.2d at 552.

is a substantially comparable property within the area.¹¹³ The court of appeals noted that under this “locality rule,” the specific locale is part of the test.¹¹⁴ Thus, the court reversed the trial court’s judgment because the trial court improperly instructed the jury that the difficulty relocating the business in the same general area was not a test for uniqueness when evaluating business loss.¹¹⁵ In so holding, the court distinguished *Almond v. M.A.R.T.A.*¹¹⁶ because that case involved the uniqueness of only the real estate, and not of a business in relation to the location of the building.¹¹⁷ The court noted that the error was not harmless because evidence was presented regarding the difficulty of relocating the business to a comparable site in the area.¹¹⁸

G. The County Could Regulate and Control Access, But it Could Not Cut Off All Access to a Public Road Without Paying Just and Adequate Compensation for Such Inverse Condemnation

In *Cobb County v. Annox Self Storage # 1, LLC*,¹¹⁹ the GDOT acquired, by condemnation, property located at the corner of Cumberland Parkway and Paces Ferry Road for a road widening project along I-285. During the construction project, vehicles used an existing driveway to enter and exit the property on Cumberland Parkway. In 2004 the GDOT offered the remaining property for sale to the highest bidder. Annox Self Storage #1, LLC took title to the property by quitclaim deed, with construction and easement rights over a portion of the property reserved for the GDOT.¹²⁰

Annox submitted its development plans to the director of the Cobb County Department of Transportation, which approved the site plans with a “right in only access” on Cumberland Parkway.¹²¹ Annox ultimately filed an application with the Cobb County Board of Commissioners to grant a right of egress on Cumberland Parkway. The board denied Annox’s request. Annox appealed to the trial court and argued that the board’s refusal to permit access to and from its property constituted an inverse taking. The trial court granted partial summary

113. *Id.*

114. *Id.* at 661, 675 S.E.2d at 552.

115. *Id.*

116. 161 Ga. App. 363, 288 S.E.2d 129 (1982).

117. *ABM Realty Co.*, 296 Ga. App. at 661–62, 675 S.E.2d at 552–53.

118. *Id.* at 661, 675 S.E.2d at 552.

119. 294 Ga. App. 218, 668 S.E.2d 851 (2008).

120. *Id.* at 218–19, 668 S.E.2d at 852–53.

121. *Id.* at 219, 668 S.E.2d at 853 (alteration in original).

judgment to Annox. Cobb County applied to the court of appeals for discretionary review.¹²²

The court of appeals held that Annox had a right of access to and from Cumberland Parkway and that Cobb County could regulate and control such access pursuant to its police power, but the county could not cut off all access without paying just and adequate compensation to the property owner.¹²³ The court determined that the GDOT acquired the property and its access rights from a third party, conveyed all of its rights in the property to Annox in fee simple, and retained only a maintenance and construction easement along Paces Ferry Road.¹²⁴ Thus, Annox owned the property in fee simple and had access rights to it.¹²⁵ Accordingly, the court held Annox was not required to sue neighboring property owners for a private right-of-way because it appealed to the trial court from the adverse decision of the board.¹²⁶

III. NUISANCE AND TRESPASS

During this survey period, the nuisance and trespass jurisprudence of the Georgia Supreme Court and the Georgia Court of Appeals focused on when liability exists for a nuisance or a trespass, the award of punitive damages for failure to remedy claims of nuisance and trespass, and a private road as public nuisance and trespass on an adjoining, private roadway. Finally, the supreme court also reversed a case from last year distinguishing a permanent nuisance from a continuing nuisance.

A. *The Exercise of Dominion and Control Leads to Liability for Nuisance*

In *City of Atlanta v. Hofrichter/Stiakakis*,¹²⁷ Hofrichter purchased a house in Atlanta in 1985 without knowledge of an underground storm drainage pipe that traversed the property. The pipe was connected to a catch basin on her street and drained storm and surface water from the street into a ditch at the edge of Hofrichter's property. At some point in 1996 or 1997, Hofrichter noticed flooding in the street and on her property caused by clogging of the catch basin, which was cleaned after she reported it to the city. Hofrichter again complained of flooding in October 1998, and the city discovered a ruptured pipe, which was

122. *Id.* at 219–20, 668 S.E.2d at 853.

123. *Id.* at 221, 668 S.E.2d at 854.

124. *Id.*

125. *Id.*

126. *Id.*, 668 S.E.2d at 854–55.

127. 291 Ga. App. 883, 663 S.E.2d 379 (2008).

fixed during two or three visits to the property. Additionally, the city responded to a problem with the pipe in 2000.¹²⁸

Early in 2002 Hofrichter noticed a geyser in her yard that shot red clay into the air and was flooding her property and her home. During an investigation by a waste water collection specialist, it was recommended that the city perform a dye test to determine if there was a problem with the pipe. However, shortly after this investigation, the city determined it did not have a storm water easement for the property and took the position that it was not responsible for the pipe. Despite the city's position, a few months later another specialist inspected the property and the flooded part of the yard. The specialist recommended that the city inspect the pipe with a closed circuit camera, but the city chose not to do so at that time. Instead, the city repaired portions of the pipe; however, more flooding occurred, which led Hofrichter to file additional complaints. Ultimately, the city replaced the entire pipe in August 2005, allegedly to prevent the storm line from rupturing and compromising the integrity of the sanitary sewer system.¹²⁹

Hofrichter's property, house, and yard incurred extensive damage, which included the accumulation of trash in her yard and ants and rats in her home. Hofrichter also started to suffer from migraines due to mold growth in her house. She moved out of the property in January 2005 and sold it in November 2006 for \$130,000 below the fair market value. Hofrichter filed this action for the city's failure to maintain the storm pipe and for the damages caused by the flooding of her property and home.¹³⁰ The trial court found that the subject pipe was part of the city's storm water system pursuant to Atlanta City Ordinance 74-428¹³¹ and that the city was responsible for its proper functioning. In addition, the city was estopped from denying liability because it used the pipe for its own benefit, undertook to maintain and repair it, and never disclaimed responsibility until the lawsuit.¹³² The trial court awarded Hofrichter a total of \$510,376 in damages and \$325,148 for attorney fees and costs.¹³³

On appeal, the city argued that the trial court erred in deciding it had dominion and control over the pipe to the extent it could be responsible for continued maintenance and for creation and maintenance of a

128. *Id.* at 884, 663 S.E.2d at 381–82.

129. *Id.* at 884–85, 663 S.E.2d at 382.

130. *Id.* at 885, 663 S.E.2d at 382.

131. ATLANTA, GA., CODE OF ORDINANCES § 74-428 (Municode through June 10, 2009).

132. *Hofrichter*, 291 Ga. App. at 885–86, 663 S.E.2d at 382.

133. *Id.* at 883, 663 S.E.2d at 381.

nuisance.¹³⁴ The court of appeals determined that the alternative rationale of the trial court was a sufficient reason to affirm its order because the city's actions to maintain the drainage pipe created liability for its flooding.¹³⁵ Further, the court noted that ownership of the property that caused the nuisance is not required because "the exercise of dominion or control over the property causing the harm is sufficient."¹³⁶ The city again argued it had maintained its position at all times that the pipe was a private structure over which it had no control due to the absence of an easement.¹³⁷ However, the record clearly showed that the city maintained the pipe for over seven years, including completely replacing the pipe.¹³⁸

In addition, the court noted that the city knew or should have known as early as 2002 that the pipe was damaged or deteriorated, but it failed to take the recommendations of its own employees to do a dye test or use a closed circuit camera.¹³⁹ City officials also acknowledged that the pipe on Hofrichter's property carried water from a city street via a catch basin which was owned and maintained by the city.¹⁴⁰ The court of appeals disagreed with the city's argument that the trial court erred in awarding attorney fees because there was no evidence that it acted in bad faith.¹⁴¹ The court held that the city was liable for attorney fees because it did not maintain the drainage pipe despite knowledge of the tendency of the pipe to cause flooding on Hofrichter's property.¹⁴² Moreover, the city ignored recommendations from its employees, failed to disclaim responsibility at any time, and denied responsibility only when the instant suit was filed.¹⁴³ Thus, the court concluded there was evidence to support the trial court's finding that the city acted in bad faith.¹⁴⁴ Further, the court noted that there was adequate evidence to show that the attorney fees charged by Hofrichter's counsel were reasonable.¹⁴⁵

134. *Id.* at 886, 663 S.E.2d at 382-83.

135. *Id.*, 663 S.E.2d at 383.

136. *Id.* (quoting *City of Columbus v. Barngrover*, 250 Ga. App. 589, 592, 552 S.E.2d 536, 540 (2001)).

137. *Id.*

138. *Id.*

139. *Id.* at 887, 663 S.E.2d at 384.

140. *Id.* at 888, 663 S.E.2d at 384.

141. *Id.*

142. *Id.*

143. *Id.* at 889, 663 S.E.2d at 384-85.

144. *Id.*, 663 S.E.2d at 385.

145. *Id.* at 890, 663 S.E.2d at 385.

Finally, the city argued that the compensatory damage award of \$300,000 was excessive and thus should be set aside.¹⁴⁶ However, the court noted that in a nuisance action, the plaintiff may recover for both damage to person and damage to property.¹⁴⁷ There was also evidence that Hofrichter suffered special damages for the loss of personal property, diminution of her property, and rental expenses for being forced to move from her home.¹⁴⁸ Further, she spent over seven years battling sinkholes, flooding, rats, insects, and mold which caused her to experience migraines.¹⁴⁹ Therefore, the court affirmed the judgment for Hofrichter and the awards for damages, costs, and attorney fees.¹⁵⁰

B. Private Road as Public Nuisance

In *City of College Park v. 2600 Camp Creek, LLC*,¹⁵¹ the court of appeals reversed a grant of summary judgment to Camp Creek when the city appealed a finding that a private access road was a public nuisance.¹⁵² The facts in the underlying case, viewed in the light most favorable to the city, showed that Frontage Road connected two other streets and provided the only access to Wynterbrook Apartments. Camp Creek owned the portion of Frontage Road that adjoined its apartment complex. The road was used by residents, guests, emergency vehicles, and the general public.¹⁵³

Several problems with Frontage Road led to the city's initiation of the action. Numerous potholes, uneven surfaces, broken cement, and other structural defects caused the city to allege the road was a public nuisance. In addition, the city's police chief found the condition of the road inhibitive to emergency vehicles traveling to provide emergency services. The fire marshal also stated that large fire trucks were forced to travel at slower rates of speed, which could lead to critical delays when responding to fires. Moreover, the evidence showed that the residents of Wynterbrook were in particular need of police and fire services because the low occupancy rate of the complex made it attractive to the homeless, gangs, drug activity, and crime.¹⁵⁴

146. *Id.*

147. *Id.*

148. *Id.*, 663 S.E.2d at 386.

149. *Id.* at 891, 663 S.E.2d at 386.

150. *Id.*

151. 293 Ga. App. 207, 666 S.E.2d 607 (2008).

152. *Id.* at 207, 666 S.E.2d at 607.

153. *Id.* at 208, 666 S.E.2d at 608.

154. *Id.* at 208–09, 666 S.E.2d at 608.

During its review of the grant of summary judgment, the court of appeals explained that a public nuisance is “one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals.”¹⁵⁵ Based on the facts in the record, the court concluded it was possible a trier of fact could determine that the condition of the road impeded the necessary provision of emergency services.¹⁵⁶ The court stated that if there is a significant interference with the public’s health, safety, peace, comfort, or convenience, there may be a finding of a public nuisance.¹⁵⁷ The court held there was no merit in the argument by Camp Creek that the road could not be a public nuisance because it was located on private property.¹⁵⁸ Because both residents and visitors to Wynterbrook were likely to be affected by the condition of the road, the court reversed the grant of summary judgment to Camp Creek.¹⁵⁹

C. *Surface Water Invasion as Permanent Nuisance*

In *City of Atlanta v. Kleber*,¹⁶⁰ Scott Kleber and Nancy Habib purchased a home that began to experience substantial flood damage during heavy rains. They brought a nuisance and negligence action against Norfolk Southern Corporation and the City of Atlanta, which was appealed last year to the court of appeals. The court of appeals reversed the trial court’s grant of summary judgment to Norfolk and the city, holding that the nuisance complained of by the homeowners was continuing in nature and that the homeowners’ claims were not barred by the four-year statute of limitations.¹⁶¹ However, the supreme court granted certiorari to consider two issues:

- (1) whether the Court of Appeals erred in concluding that the homeowners presented triable issues with respect to their negligence and nuisance claims against Norfolk and
- (2) whether the Court of Appeals erred in concluding that the homeowners presented a triable issue with respect to their nuisance claim against the City.¹⁶²

The evidence from the trial court showed that Norfolk installed railroad tracks next to the property at issue in the late 1800s, and at least four decades ago, it installed a thirty-six-inch drainage pipe and

155. *Id.* at 209, 666 S.E.2d at 608 (quoting O.C.G.A. § 41-1-2 (1997)).

156. *Id.*

157. *Id.*

158. *Id.*, 666 S.E.2d at 609.

159. *Id.* at 210, 666 S.E.2d at 609.

160. 285 Ga. 413, 677 S.E.2d 134 (2009).

161. *Id.* at 413–14, 677 S.E.2d at 135.

162. *Id.* at 414, 677 S.E.2d at 135.

culvert under the tracks. The pipe and culvert were properly maintained over the years and were clean of debris, intact, and in working order. In addition, the city placed a connecting pipe onto Norfolk's pipe to direct runoff to a combined sewer overflow culvert. Kleber and Habib purchased the home in 1997 and experienced flooding during heavy rains. They contacted both Norfolk and the city for months about the problem, but it was not until 2003 that they incurred substantial property damage that led to the filing of a lawsuit after both Norfolk and the city refused to fix the flooding problem.¹⁶³

During the litigation, the parties agreed to be bound by the findings of a court-appointed special master. The special master found that the property was prone to flooding because Norfolk's pipe was not large enough to empty the basin without creating ponding or a backup in the basin. However, the special master noted that the thirty-six-inch pipe was maintained properly and that it was probably appropriately sized to accommodate the flow of storm water at the time it was installed. Additionally, the special master determined that the city's connection to Norfolk's pipe did not create an increase of storm water that backed up onto the homeowners' property. Instead, the development of surrounding properties likely led to the increase of impervious surfaces, which added to the runoff flowing into the basin.¹⁶⁴

The supreme court first reviewed the determination that the nuisance was wholly continuing in nature.¹⁶⁵ The court pointed out that to be a permanent nuisance, it must have been the mere presence of the pipe that created a nuisance due to improper installation; however, a continuing nuisance is one that was not properly maintained.¹⁶⁶ The court held that the only nuisance claim the homeowners could bring was a continuing nuisance claim for improper maintenance within the preceding four years.¹⁶⁷ However, the court then determined that the homeowners failed to present a triable issue with respect to their negligence and nuisance claims because all the evidence and findings showed that the pipe was properly installed and maintained.¹⁶⁸ The court also noted there were no triable issues of fact as to the nuisance claim against the city because the special master found that the city's connecting pipe did not contribute to the flooding.¹⁶⁹ The homeowners

163. *Id.*, 677 S.E.2d at 135–36.

164. *Id.* at 415, 677 S.E.2d at 136.

165. *Id.*

166. *Id.* at 416, 677 S.E.2d at 137.

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

168. *Id.*, 677 S.E.2d at 138.

169. *Id.* at 418, 677 S.E.2d at 138.

also argued the city created a nuisance by approving construction permits for the development of the surrounding property, but this argument was unsuccessful.¹⁷⁰ The court concluded that the record did not present any actions by the city that demonstrated control over the property in question or an acceptance of a dedication of the property; thus, the city could not be held responsible for maintaining the railroad's culvert.¹⁷¹ Therefore, the court reversed the decision of the court of appeals.¹⁷²

Two justices dissented from the majority opinion, agreeing with the court of appeals that the claims were not barred by the statute of limitations.¹⁷³ The dissent noted that the majority changed the traditional rule in classifying a permanent or a continuing nuisance; the traditional rule in the supreme court and below was that a continuing nuisance is one that can be classified as transient and abatable.¹⁷⁴ The dissent pointed out that the special master found the flooding could be alleviated by the construction of an additional drainage pipe on Norfolk's property or the widening of the existing pipe, so the dissent determined that the majority incorrectly classified the nuisance as permanent when it was continuing.¹⁷⁵ The dissent believed a genuine issue of material fact existed as to whether Norfolk's drainage pipe caused the damage to the homeowners' property because the special master found that the thirty-six-inch pipe was not large enough to empty the basin without a backup of storm water.¹⁷⁶ The dissent also noted that the special master found that the surrounding development could have generated additional water runoff, which should have created a causation question for the jury; thus, the dissent would have affirmed the court of appeals decision.¹⁷⁷

D. No Nuisance or Trespass if Express Easement Exists

In *DeSarno v. Jam Golf Management, LLC*,¹⁷⁸ James and Susan DeSarno filed a lawsuit for injunctive relief against the owners and operators of a golf course. The golf course was developed in 1999, and at that time an easement was entered into that permitted golf balls to

170. *Id.* at 418–19, 677 S.E.2d at 138.

171. *Id.* at 419, 677 S.E.2d at 139.

172. *Id.*

173. *Id.* (Hunstein, P.J., dissenting). Chief Justice Sears joined the dissent. *Id.*

174. *Id.* at 420, 677 S.E.2d at 139–40.

175. *Id.* at 422, 677 S.E.2d at 141.

176. *Id.* at 422–23, 677 S.E.2d at 141.

177. *Id.* at 423, 677 S.E.2d at 141.

178. 295 Ga. App. 70, 670 S.E.2d 889 (2008).

be hit onto the neighboring lots and allowed golfers to enter the lots to retrieve errant golf balls at reasonable times. The easement also relieved the golf course owner from liability for damage or injury resulting from errant golf balls.¹⁷⁹

In 2003 the DeSarnos decided to build a home on one of the neighboring lots. Initially, the husband was a member of the golf course and played the course approximately fifteen to twenty times. As more time passed, the golf course's business substantially increased until about 30,000 rounds of golf were played annually. As a result, the DeSarnos experienced a dramatic increase in the number of errant golf balls, receiving about ten to fifteen balls a day. They sustained twenty-three broken windows, twenty-six chips or breaks on the siding of their house, two dents in their vehicle, broken lights, and near misses with their children.¹⁸⁰

The DeSarnos' suit was based on claims of trespass and nuisance arising from the errant golf balls. The trial court granted summary judgment in favor of the defendants.¹⁸¹ On appeal, the court of appeals decided the easement explicitly permitted such activity to take place on the DeSarnos' property, and it exonerated the golf course owner from any liability.¹⁸² Therefore, no claim for nuisance or trespass could be maintained.¹⁸³

The court relied on the rule that "[a]n express easement permitting conduct that would otherwise constitute trespass or nuisance precludes such claims by the owner of the servient estate against the owner or legal occupant of the dominant estate for engaging in such conduct."¹⁸⁴ The DeSarnos argued the increase in golf balls constituted an excessive use of the easement, creating a nuisance; however, the court rejected that argument because it implied a use that exceeded the scope of the easement or was intended to benefit a property other than the dominant estate.¹⁸⁵ Therefore, the court affirmed the grant of summary judgment to the defendants because the easement expressly permitted the offensive conduct.¹⁸⁶

179. *Id.* at 71, 670 S.E.2d at 889-90.

180. *Id.*, 670 S.E.2d at 890.

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

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 72-73, 670 S.E.2d at 891.

186. *Id.* at 74, 670 S.E.2d at 892.

E. The Failure to Remedy Nuisance and Trespass Leads to Punitive Damages

In *Wildcat Cliffs Builders, LLC v. Hagwood*,¹⁸⁷ Wildcat Cliffs Builders appealed the trial court's award of punitive damages and attorney fees to Ed Hagwood in Hagwood's trespass and nuisance case against Wildcat. Wildcat's owner, Mark Rudolph, developed a portion of the Wildcat Lakes subdivision, including Lot 73, and the back of Lot 73 adjoined property owned by Hagwood. For Wildcat to grade Lot 73, Rudolph needed to grade a portion of Hagwood's property. He contacted Hagwood on several occasions about purchasing some of the property. Hagwood explained to Rudolph that he had no interest in selling, so Wildcat proceeded with the grading and building of two concrete retaining walls on what Wildcat believed was the rear of Lot 73. However, the grading contractor graded a portion of Hagwood's property, taking down approximately forty-one old-growth hardwood trees in the process and building portions of the retaining walls on Hagwood's property. Wildcat offered to pay Hagwood \$10,000 for an easement on his property if he would assume liability arising from the retaining walls, but Hagwood rejected the offer.¹⁸⁸

After the grading and construction of the retaining walls, Hagwood experienced severe problems with run-off and erosion, which led to large pools of water and mud rushing into the streets, causing neighbors to complain. Hagwood filed suit because Wildcat did nothing to remedy or ameliorate these problems. The jury awarded Hagwood both compensatory and punitive damages, as well as attorney fees and costs.¹⁸⁹

On appeal, the question was whether the evidence supported a finding of "conscious indifference to consequences," which would justify punitive damages under O.C.G.A. § 51-12-5.1(b).¹⁹⁰ The court cited a case with similar facts wherein the supreme court held that "such a conscious indifference to consequences may exist where a party creates a nuisance that causes a runoff of water and silt onto or from another's property, and thereafter fails to ameliorate or remedy the same."¹⁹¹ In the instant case, the court of appeals held that the facts supported the jury's award of punitive damages because when Wildcat created the problem

187. 292 Ga. App. 244, 663 S.E.2d 818 (2008).

188. *Id.* at 244-45, 663 S.E.2d at 820.

189. *Id.* at 245-46, 663 S.E.2d at 820-21.

190. O.C.G.A. § 51-12-5.1(b) (2000); *Wildcat Cliffs Builders*, 292 Ga. App. at 246, 663 S.E.2d at 821.

191. *Wildcat Cliffs Builders*, 292 Ga. App. at 246, 663 S.E.2d at 821 (citing *Tyler v. Lincoln*, 272 Ga. 118, 120-21, 527 S.E.2d 180, 183 (2000)).

of erosion and run-off, it was put on notice of its conduct and continuing consequences thereof, and yet it made no effort to remedy the problem.¹⁹² In its defense, Wildcat asserted it could not correct the problem without trespassing further on Hagwood's property.¹⁹³ However, the court noted there was no evidence Wildcat ever attempted to seek permission to return to the property to take remedial measures.¹⁹⁴ For these reasons, the court of appeals affirmed the award of punitive damages and attorney fees.¹⁹⁵

F. Trespass on Adjoining Private Road

In *Warner v. Brown*,¹⁹⁶ the court of appeals addressed the issue of whether Scott and Susan Warner were trespassing on Brown's property or whether they had acquired prescriptive rights to the property.¹⁹⁷ The parties owned neighboring lots on Talahi Island in Chatham County, Georgia, that were separated by a thirty-foot roadway. The roadway served as a driveway to Brown's property and was originally part of a single parcel owned by a prior owner, Donald Shearhouse. Shearhouse's property was bordered by a marsh on the southern end and a public street on the northern end. He subdivided the lot into two parcels with one lot fronting the marsh and the other fronting the public street.¹⁹⁸

Shearhouse then sold the street lot to Hugh and Vivian Holland and the marsh lot to W.I. and Effie Robinson, and both deeds described the lots "as being bordered on the east by a 'thirty foot street.'"¹⁹⁹ The Robinsons used the roadway to access the public street while the Hollands used it for pedestrian access. The families had a close relationship that was typified by their joint construction of both an earthen causeway over the roadway that extended across the marsh, as well as a dock attached to the causeway. Each family used the causeway and dock for approximately forty to fifty years.²⁰⁰

In 1991 the Warners were deeded an undeveloped lot directly east of the roadway and later built a house on it. The Warners obtained permission from Mrs. Robinson, who at the time owned the property

192. *Id.* at 248, 663 S.E.2d at 822.

193. *Id.* at 247, 663 S.E.2d at 822.

194. *Id.*

195. *Id.* at 248, 663 S.E.2d at 822.

196. 290 Ga. App. 510, 659 S.E.2d 885 (2008).

197. *Id.* at 510-11, 659 S.E.2d at 886.

198. *Id.* at 511, 659 S.E.2d at 887.

199. *Id.*

200. *Id.* at 511-12, 659 S.E.2d at 887.

jointly with her son, to use the roadway for pedestrian access to the causeway. The Warners built a dock at the end of the causeway, and while the dock was located on their property, the only access to it was over the causeway. Despite permission from Mrs. Robinson to use the causeway, her son installed a fence to block the Warners' pedestrian access, and counsel for the Robinsons sent a letter revoking the previous permission.²⁰¹

In 1999 the Hollands and the Warners filed suit for access to and use of the causeway against Brown and Robinson, who jointly owned the marsh lot by that time. A settlement was reached allowing the Warners pedestrian access to the causeway, but in 2004 Brown notified the Warners that their access and use was revoked because they violated the agreement. The Robinsons' interest in the property was ultimately deeded solely to Brown. Later, Brown filed the instant action seeking an injunction to prevent the Warners from accessing or using the causeway and damages for trespass. Both parties filed motions for summary judgment, and the trial court granted Brown's motion and denied the Warners' motion because it found that Brown had valid title to the roadway.²⁰²

On appeal, the Warners argued that the chain of title did not support Brown's claim to the roadway.²⁰³ The court of appeals dismissed this argument because Georgia law operated to convey title to the adjoining roadway to the grantees and their successors.²⁰⁴ The court noted, "When a grantor conveys property as bounded by a road that the grantor also owns, Georgia courts apply a rule of construction to hold that the deed conveys the fee interest that the grantor held in the road unless there is a clear expression of a contrary intent."²⁰⁵ There was no contrary intent expressed in the deed from Shearhouse, so Brown, as a successor in the interest, had valid title in the roadway.²⁰⁶ Because Brown owned the property, the court held that he had the right to determine who traveled over it or used it.²⁰⁷

201. *Id.* at 512, 659 S.E.2d at 887.

202. *Id.* at 512-13, 659 S.E.2d at 888.

203. *Id.* at 513, 659 S.E.2d at 888.

204. *Id.*

205. *Id.* (quoting 1845 La Dawn Lane, LLC v. Bowman, 277 Ga. 741, 742, 594 S.E.2d 373, 374-75 (2004)).

206. *Id.* at 514, 659 S.E.2d at 888.

207. *Id.*, 659 S.E.2d at 889.

The Warners also argued that even if Brown owned the roadway, they obtained prescriptive rights to use it.²⁰⁸ However, O.C.G.A. § 44-9-1²⁰⁹ required the Warners to show

(i) that their use of the Roadway was uninterrupted for at least seven consecutive years; (ii) that they kept the Roadway open and in good repair during that time; (iii) that their use of the Roadway was adverse . . . ; and (iv) that the Roadway was no more than 20 feet wide.²¹⁰

The court noted there was no evidence in the record that the Warners maintained the roadway.²¹¹ Furthermore, the roadway was wider than the twenty-foot maximum required by the statute.²¹²

In addition, the Warners argued they were given a parol license to use the roadway and that their license ripened into an easement pursuant to O.C.G.A. § 44-9-4²¹³ based on their expenditure of funds to construct and maintain their dock.²¹⁴ The court determined this argument ignored the rule that a licensee's erection of improvements on his own land with the expectation of enjoying a parol license does not make the license irrevocable.²¹⁵ Instead, it is an expenditure of funds to improve the property over which the license was issued or the licensor's property that would provide support for an easement.²¹⁶ Thus, the court affirmed the grant of summary judgment to Brown on his trespass claim and held that he owned the part of the roadway bordering his property.²¹⁷

IV. EASEMENTS AND RESTRICTIVE COVENANTS

During the survey period, in the context of restrictive covenants, the appellate courts addressed (1) whether restrictive covenants disqualified property from current use assessment as "bona fide conservation use" land and (2) whether an access easement could be used to add a restrictive term to a fee simple warranty deed for an adjacent property. In the context of easements, the courts analyzed access easement rights,

208. *Id.* at 515, 659 S.E.2d at 889.

209. O.C.G.A. § 44-9-1 (1982).

210. *Warner*, 290 Ga. App. at 515, 659 S.E.2d at 889-90.

211. *Id.* at 515-16, 659 S.E.2d at 890.

212. *Id.* at 516, 659 S.E.2d at 890.

213. O.C.G.A. § 44-9-4 (2002).

214. *Warner*, 290 Ga. App. at 515-16, 659 S.E.2d at 890.

215. *Id.* at 516, 659 S.E.2d at 890 (citing *Decker Car Wash, Inc. v. BP Prods. N. America, Inc.*, 286 Ga. App. 263, 266, 649 S.E.2d 317, 320 (2007)).

216. *Id.* (citing *Cox v. Zucker*, 214 Ga. 44, 51-52, 102 S.E.2d 580, 585 (1958)).

217. *Id.* at 517, 659 S.E.2d at 890.

abandonment of easement rights, and whether a parol license had ripened into an irrevocable easement running with the land.

A. Restrictive Covenants Prevented Property From Qualifying As “Bona Fide Conservation Use” Under O.C.G.A. § 48-5-7.4

In *Morrison v. Claborn*,²¹⁸ the issue on appeal was whether the Jasper County Board of Tax Assessors properly determined that David Morrison’s three parcels of agricultural property did not qualify as “bona fide conservation use” under O.C.G.A. § 48-5-7.4²¹⁹ when restrictive covenants prevented the property owner from conducting some, but not all, of the activities described in O.C.G.A. § 48-5-7.4(a)(1)(E).²²⁰ In two previous years, Morrison’s three properties were approved by the board as bona fide conservation use properties eligible for current use assessment. Morrison’s properties were subjected to restrictive covenants prohibiting poultry and swine operations at the time of the initial and continuation applications. After a county-wide audit in 2006, the board discovered Morrison’s properties were subject to the restrictive covenants and voted to remove the conservation use designation and the current use assessment from those properties.²²¹

The board relied on O.C.G.A. § 48-5-7.4(b)(5) to remove the current use assessment.²²² At the time, the statute provided that “[n]o property shall qualify as bona fide conservation use property if such property is at the time of application for current use assessment subject to a restrictive covenant which prohibits the use of the property for any purpose described in subparagraph (a)(1)(E) of this Code section.”²²³ Resolution of the issue turned on the meaning of the word *any*, because the restrictive covenants on Morrison’s properties prohibited him from conducting some, though not all, of the activities described in O.C.G.A. § 48-5-7.4(a)(1)(E).²²⁴

218. 294 Ga. App. 508, 669 S.E.2d 492 (2008).

219. O.C.G.A. § 48-5-7.4 (1999 & Supp. 2009). Under O.C.G.A. § 48-5-7.4, owners of “bona fide conservation use property,” including property used for certain agricultural purposes and that meets other statutory criteria and conditions, may apply to the county board of tax assessors for “current use assessment” of their property for the purposes of calculating ad valorem taxes. O.C.G.A. § 48-5-7.4(j). A tax savings is realized because property is assessed at forty percent of its “current use value” instead of forty percent of its “fair market value.” *Morrison*, 294 Ga. App. at 509 n.1, 669 S.E.2d at 493 n.1.

220. *Morrison*, 294 Ga. App. at 508–09, 669 S.E.2d at 493.

221. *Id.* at 509–10, 669 S.E.2d at 493–94.

222. *Id.* at 511, 669 S.E.2d at 495.

223. O.C.G.A. § 48-5-7.4(b)(5) (1999) (amended 2008).

224. *Morrison*, 294 Ga. App. at 511–12, 669 S.E.2d at 495.

The court noted it is well-established in Georgia that laws granting tax exemptions must be construed strictly in favor of the authority imposing the tax.²²⁵ This rule required the court to construe any ambiguity in favor of the board.²²⁶ In addition, the provision at issue would amount to mere surplusage if the court adopted Morrison's interpretation.²²⁷ The court stated that "[i]f property is disqualified from eligibility as bona fide conservation use property only if a restrictive covenant bars *all* of the conceivable qualifying uses within the scope of [O.C.G.A.] § 48-5-7.4(a)(1)(E), a restrictive covenant would rarely, if ever, violate [O.C.G.A.] § 48-5-7.4(b)(5), and that subsection would serve little or no purpose."²²⁸ Thus, the court concluded that this type of property, with a restrictive covenant prohibiting an activity enumerated in subsection (a)(1)(E), does not qualify as a bona fide conservation use property.²²⁹

Effective May 14, 2008, the General Assembly amended certain language in O.C.G.A. § 48-5-7.4(b)(5).²³⁰ The new language removed the word *any* (the definition of which created the issue in *Morrison*), and now reads as follows:

No property shall qualify as bona fide conservation use property if such property is at the time of application for current use assessment subject to a restrictive covenant which prohibits the use of the property for the specific purpose described in subparagraph (a)(1)(E) of this Code section for which bona fide conservation use qualification is sought.²³¹

B. An Access Easement Could Not Be Used to Add a Restrictive Term to a Fee Simple Warranty Deed

In *White House Inn & Suites, Inc. v. City of Warm Springs*,²³² a property owner who deeded the city a parcel for the construction of a water tower, as well as an easement over the owner's property for access to the tower, brought an action to enjoin the city from using the site for

225. *Id.* at 512, 669 S.E.2d at 495 (citing *Ethicon, Inc. v. Ga. Dep't of Revenue*, 291 Ga. App. 130, 130, 661 S.E.2d 170, 171 (2008)).

226. *Id.*

227. *Id.* at 513, 669 S.E.2d at 496.

228. *Id.*

229. *Id.* at 513–14, 669 S.E.2d at 496; *see also Jasper County Bd. of Tax Assessors v. Solomon*, 296 Ga. App. 441, 441, 674 S.E.2d 668, 668 (2009).

230. 2008 Ga. Laws 1149, 1149–50.

231. *Id.* (codified at O.C.G.A. § 48-5-7.4(b)(5)).

232. 285 Ga. 322, 676 S.E.2d 178 (2009).

construction of a radio tower. The trial court denied injunctive relief, and the property owner appealed.²³³

The warranty deeds granted the city fee simple title to property upon which the city initially built a water tower.²³⁴ The language of the contemporaneously executed easement instrument, entitled “Water and Sewer Line Easement,” stated it was granted “for the purpose of installing and maintaining utilities . . . and for any other purposes necessary to construct and maintain water and sewer lines.”²³⁵ In 2006 the city entered a contract to allow construction of a radio tower on the parcel in exchange for certain public safety communications equipment and services. Attempting to halt operation of the radio tower, the plaintiff argued the easement clearly restricted the property to a water tower and related utilities and that the contemporaneously executed warranty deeds should be construed as similarly restricted.²³⁶ The Georgia Supreme Court noted the scope of O.C.G.A. § 24-6-3(a),²³⁷—which authorizes the use of contemporaneously executed writings to correct obvious errors or provide necessary terms not contained in the document at issue²³⁸—did not allow adding to an agreement a representation or warranty that is not there.²³⁹ The court held that the easement, though it was contemporaneously executed with the warranty deeds, could not be used to burden the warranty deeds with a restrictive use that was not contained therein.²⁴⁰ Furthermore, the court determined that the stated purpose of the easement was unambiguous and authorized its use for utility purposes that were not limited to sewer lines and water.²⁴¹

C. Whether a Parcel is “Landlocked” or Has Access Rights is Governed by the Deed; The Possibility of Access Through a Private Right-of-Way Goes to the Issue of Damages

In *Cobb County v. Annox Self Storage #1, LLC*,²⁴² the court granted a discretionary appeal to review the trial court’s finding that Annox had a right of ingress and egress (an access easement) to and from certain

233. *Id.* at 322, 676 S.E.2d at 179.

234. *Id.*

235. *Id.*

236. *Id.* at 322–23, 676 S.E.2d at 179.

237. O.C.G.A. § 24-6-3(a) (1995).

238. *Id.*

239. *White House Inn & Suites*, 285 Ga. at 323, 676 S.E.2d at 179–80.

240. *Id.*, 676 S.E.2d at 180.

241. *Id.*

242. 294 Ga. App. 218, 668 S.E.2d 851 (2008). For additional discussion of this case, see *supra* text accompanying notes 119–26.

Cobb County property that Annox owned contiguous to Cumberland Parkway.²⁴³

In 2004 Annox purchased approximately one acre of property left over from a GDOT road-widening project. The deed conveyed all of the GDOT's rights in the property, including the access rights the GDOT obtained from the prior owner. Annox submitted plans for the property, including a proposed entrance and exit configuration, to state and county department of transportation officials, the county manager, and finally the Cobb County Board of Commissioners. Each exit proposal was rejected, supposedly for public safety reasons, and conflicts with the existing traffic movements.²⁴⁴

Annox appealed to the trial court, asserting that Cobb County took Annox's property without just compensation by depriving Annox of the right of access. The county moved for summary judgment, arguing that Annox's property was landlocked when purchased and that Annox failed to exhaust its administrative remedies because it did not appeal the GDOT's denial of egress and did not bring suit against a neighboring landowner for private right-of-way access rights.²⁴⁵

By well-established law, the court of appeals held that because the subject property abutted a public road, Annox had a right of access to and from that public road.²⁴⁶ Furthermore, the court concluded that the county could regulate and control that access pursuant to its police powers, but it could not cut off all access without having to pay just and adequate compensation.²⁴⁷ The county's argument that the property was landlocked when purchased by Annox failed because the deed governed access rights; the deed in this case was not ambiguous in showing that Annox acquired all rights the GDOT acquired from its grantor, including the right of access to the abutting public road.²⁴⁸

Finally, the county's argument that Annox failed to exhaust its administrative remedies was unsuccessful because Annox appealed the board's decision to the trial court, and the rulings of other agencies were not at issue.²⁴⁹ Whether there were alternative means of access through a private right-of-way went to the amount of damages due, if any, for the deprivation of one means of access to the property, but an alternative means of access did not foreclose altogether the plaintiff's

243. 294 Ga. App. at 218, 668 S.E.2d at 852.

244. *Id.* at 218-20, 668 S.E.2d at 852-53.

245. *Id.* at 220, 668 S.E.2d at 853-54.

246. *Id.* at 220-21, 668 S.E.2d at 854.

247. *Id.* at 221, 668 S.E.2d at 854.

248. *Id.*

249. *Id.* at 222, 668 S.E.2d at 854-55.

right to seek compensation for the county's interference with its existing right of ingress and egress to the adjoining public road.²⁵⁰

D. A Parol License Ripened into an Irrevocable Easement Running With the Land

In *Mize v. McGarity*,²⁵¹ lakefront lot owners filed suit against the owners of adjoining lots, asserting claims for trespass and alleging that the defendants were improperly interfering with their rights to easements located on the defendants' property. The properties at issue consisted of Lots 4, 5, and 6, which were adjoining lakefront properties at Lake Lanier. In the 1960s the three owners of Lots 4, 5, and 6 agreed to split the costs of grading and preparing a driveway on Lots 5 and 6, which they could all use to access their properties from the public road. At the end of the driveway, the owners installed mailboxes for the three properties and a gate to which each owner had a key. The owners of Lots 4 and 5 also jointly built a set of stairs that began on Lot 4 and ended on Lot 5 to give Lot 4 access to the lake. Finally, the owners installed concrete parking pads on Lots 4 and 5, which the owners of Lot 4 used as a roadway to access the joint driveway on Lots 5 and 6.²⁵²

Eventually, Lots 5 and 6 were sold and consolidated to a single owner. The respective warranty deeds included language that the conveyances were made subject to the joint driveway between Lots 5 and 6. However, the new owner of Lots 5 and 6 subsequently planted trees on Lot 5, including across the roadway the owners of Lot 4 used to access the joint driveway. They also removed the concrete steps on Lot 5, which cut off lake access to the owners of Lot 4.²⁵³

The owners of Lot 4 filed suit asserting easement rights in the joint driveway on Lots 5 and 6, the roadway on Lot 5, and the location where the steps had been on Lot 5. The trial court found in favor of the owners of Lot 4 and granted them the easements they sought pursuant to O.C.G.A. § 44-9-4,²⁵⁴ which provides that a parol license to use another's land "is not revocable when the licensee has acted pursuant thereto and in so doing has incurred expense; in such case, it becomes an easement running with the land."²⁵⁵ Because of the verbal agreement between the initial lot owners and their expenditures to construct the driveway and concrete pads, the court of appeals affirmed that the

250. *Id.*, 668 S.E.2d at 855.

251. 293 Ga. App. 714, 667 S.E.2d 695 (2008).

252. *Id.* at 714-16, 667 S.E.2d at 697-98.

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

254. O.C.G.A. § 44-9-4 (1982); *Mize*, 293 Ga. App. at 716, 667 S.E.2d at 698.

255. O.C.G.A. § 44-9-4; *Mize*, 293 Ga. App. at 717, 667 S.E.2d at 698.

owners of Lot 4 had an irrevocable easement in the joint driveway and roadway.²⁵⁶

The court noted that as subsequent purchasers, the defendants could only be burdened with the easement if the record showed they had notice of the easements when they took possession of their properties.²⁵⁷ In this case, the easement was open and observable to any reasonably prudent person.²⁵⁸ The court noted that the mailboxes, the locked gate to which the owners of Lot 4 had a key, the stairs descending from Lot 4 to Lot 5, the lack of any other access between Lot 4 and the public road, and the Lot 4 owner's open use of the driveway and roadway all evidenced notice of the easements.²⁵⁹ Finally, the evidence showing the trees were planted to block use of the driveway constituted a willful trespass and, thus, supported a finding of bad faith for the recovery of attorney fees.²⁶⁰

E. No Reciprocal Benefit Evident to Create Quasi-Easement; Recorded Documents Not Ambiguous, Thus No Easement by Implication; Improvements Did Not Benefit Licensor's Property and Thus Did Not Ripen Into Irrevocable Easement

In *de Castro v. Durrell*,²⁶¹ a dispute arose over property historically used as a soccer field on Lot 1 of a subdivision consisting of four adjoining lots. A twenty-foot strip of the field spanned the rear of Lots 3 and 4.²⁶² Preliminary site plans for the subdivision designated Lot 1 for a soccer field;²⁶³ however, the final recorded subdivision plat showed the twenty-foot strip easement area on Lots 3 and 4, but no easement area on Lot 1. In addition, the warranty deed to the purchasers of Lots 1, 2, 3, and 4 incorporated a declaration of easement agreement, which created a "Recreation Easement Area" upon the twenty-foot strip as a burden on Lots 3 and 4 and for the benefit of Lot 1.²⁶⁴

In 2004 the owners of Lots 1 and 2 ceased allowing the owners of Lots 3 and 4 to access the soccer field and erected a "no trespassing" sign. The plaintiffs sued, claiming the right to access the disputed land for

256. *Mize*, 293 Ga. App. at 717, 667 S.E.2d at 698–99.

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

258. *See id.*

259. *Id.*

260. *Id.* at 721, 667 S.E.2d at 701.

261. 295 Ga. App. 194, 671 S.E.2d 244 (2008).

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

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

264. *Id.* at 196, 671 S.E.2d at 247–48.

recreational purposes under theories of parol license, prescriptive easement, estoppel, quasi-easement, and restrictive covenants, among others.²⁶⁵ They provided evidence that the property had been publicly marketed as including a recreational area to be shared by all lot owners.²⁶⁶

The court of appeals first tackled the quasi-easement claim.²⁶⁷ A quasi-easement is an easement implied from a prior existing use and requires proof that "before the conveyance or transfer severing the unity of title, the common owner used part of the united parcel for the benefit of another part, and this use was apparent and obvious, continuous, and permanent."²⁶⁸ However, the court reasoned that the declaration agreement made clear that no reciprocal benefit was created for the owners of Lots 3 and 4.²⁶⁹ The court further noted that the concept of quasi-easement has been applied in Georgia "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."²⁷⁰ The court would not expand this application in the manner argued by the plaintiffs for use of a recreational area.²⁷¹

The court addressed implied easement, oral restrictive covenant, and estoppel jointly because these theories are governed by similar principles of law.²⁷² As the plat and declaration agreement were unambiguous and did not contradict one another, the court could neither entertain parol evidence nor accept the plaintiffs' arguments that an easement had arisen by implication on Lot 1.²⁷³ Furthermore, the plaintiffs lost on their theory of an oral restrictive covenant because they purchased their lots with knowledge of the recorded easement and recorded plat, neither of which created a recreational easement.²⁷⁴ The plaintiffs also could not rely on the unrecorded preliminary plat to claim estoppel, otherwise

265. *Id.* at 195, 671 S.E.2d at 246-47.

266. *Id.* at 196-97, 671 S.E.2d at 248.

267. *See id.* at 198, 671 S.E.2d at 248.

268. *Id.*, 671 S.E.2d at 249 (quoting *Granite Props. Ltd. P'ship v. Manns*, 512 N.E.2d 1230, 1236 (Ill. 1987)).

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

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 200, 671 S.E.2d at 250.

274. *Id.* at 200-01, 671 S.E.2d at 250.

it would “unreasonably expand the Georgia law of implied easements, and would do great harm to the predictability of land titles.”²⁷⁵

Finally, the court considered the argument that a parol license resulted in an irrevocable easement in favor of the owner of Lot 4.²⁷⁶ The plaintiff provided evidence that he made significant improvements to the disputed field by redirecting a drain line on his property, rather than plugging it, during construction of the foundation for his house so that it would not flood the field on Lot 1, and that he installed sprinklers on his property which also sprayed water onto Lot 1.²⁷⁷ The court recognized the rule that a “parol license is not revocable when the licensee has acted pursuant thereto and in so doing has incurred expense; in such case, it becomes an easement running with the land.”²⁷⁸ However, the court noted the licensee’s enjoyment of the license must be preceded by an investment that increases the value of the licensor’s land to the licensor.²⁷⁹ In the instant case, the improvements made were essential to enjoyment of the plaintiff’s property, and there was no evidence they enhanced the value of Lot 1.²⁸⁰ The court stated that “[t]he mere fact that a licensee erects improvements upon his own land and thereby incurs expense in the expectation of enjoying the license” is not enough to make the licensee a purchaser for value and the license irrevocable.²⁸¹ Thus, the parol license argument failed as a matter of law.²⁸²

F. Portion of Easement Extinguished by Nonuse Despite Recorded Plat and Easement Granted by Deed

In *Pleasure Bluff Dock Club, Inc. v. Poston*,²⁸³ homeowners and a homeowners association sued the Robert and Linda Poston to establish the parties’ easement rights in disputed property. First, certain deeds granted access to a natural boat ramp on the river. However, the landing area had not been used since a common dock had been built in the 1960s, and the marsh eventually filled in the area. Second, a subdivision plat filed by the original developers designated a 100-foot-

275. *Id.* at 201–02, 671 S.E.2d at 251 (quoting *Eardley v. McGreevy*, 279 Ga. 562, 564, 615 S.E.2d 744, 746 (2005)).

276. *Id.* at 202, 615 S.E.2d at 251.

277. *Id.*

278. *Id.*

279. *Id.* at 202–03, 671 S.E.2d at 252.

280. *Id.* at 203, 671 S.E.2d at 252.

281. *Id.* (alteration in original) (quoting *Cox v. Zucker*, 214 Ga. 44, 51, 102 S.E.2d 580, 585 (1958)).

282. *Id.*

283. 294 Ga. App. 318, 670 S.E.2d 128 (2008).

wide strip of land running between several lots and the adjacent river's low water mark as a private road to be known as St. Julington Boulevard. The developers retained ownership of the boulevard but granted lot purchasers the right of ingress and egress along the road. The boulevard was never paved; rather a 9-foot-wide dirt road developed within the boulevard's original 100-foot expanse. The Postons' two lots fronted the landing and the boulevard. The Postons obtained quitclaim deeds from the developers' heirs to the 100-foot-wide section of the boulevard between their lots and the river to build a private dock.²⁸⁴

A special master found, and the trial court affirmed, that the Postons had a fee simple interest in the portion of the boulevard that fronted their property. This was subject to the homeowners' right of ingress and egress along the approximately 9-foot-wide dirt road that developed in front of their property, but advanced no further because they never used more than this section. On appeal, the homeowners argued that because their original deeds granted them easement rights over the entire width of the boulevard, those rights could not be lost or extinguished.²⁸⁵

On appeal, the court of appeals analyzed whether an easement granted by deed, though not lost by non-use alone, may be deemed abandoned when the evidence demonstrates "an intent to abandon."²⁸⁶ The court concluded that the easement to the natural boat ramp had been abandoned because it had not been used in decades and because residents had allowed the marsh to fill in the landing area.²⁸⁷ As for the boulevard, the court noted that although a subdivision plat "creates a presumption that reasonably necessary use, fair, or reasonable enjoyment of the easement requires the full use of the right-of-way . . . as platted," that presumption may be rebutted.²⁸⁸ In this case, evidence showed that the 9-foot-wide track adequately provided ingress and egress because it had been used at that width since the 1960s.²⁸⁹ The homeowners thus retained easement rights over only the 9-foot-wide dirt road because the rest of the easement across the boulevard was abandoned.²⁹⁰

284. *Id.* at 318–19, 670 S.E.2d at 129.

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

286. *Id.* at 320, 670 S.E.2d at 129 (quoting *Whipple v. Hatcher*, 283 Ga. 309, 310, 658 S.E.2d 585, 586 (2008)).

287. *Id.*, 670 S.E.2d at 129–30.

288. *Id.*, 670 S.E.2d at 130 (internal quotation marks omitted) (quoting *Montana v. Blount*, 232 Ga. App. 782, 786, 504 S.E.2d 447, 452 (1998)).

289. *Id.*

290. *Id.* at 320–21, 670 S.E.2d at 130.

V. MISCELLANEOUS

A. Claims Not Redressable When Applications for Sign Permit Violated Non-Challenged Provisions of the Sign Ordinance

In *Covenant Media of Georgia, LLC v. City of Lawrenceville*,²⁹¹ an outdoor advertising company brought suit to challenge an allegedly unconstitutional sign ordinance. Covenant Media of Georgia, LLC submitted nine sign applications to the City of Lawrenceville in February 2007, which were all denied. Covenant Media claimed that the sign ordinance (1) granted the city unfettered discretion and (2) imposed an unconstitutional prohibitive fee on expressive activity. The undisputed facts showed that all of the proposed billboards were denied because they did not conform to various height, size, location, and certification provisions of the city sign ordinance, and Covenant Media failed to pay the required application fee.²⁹²

The United States District Court for the Northern District of Georgia found that Covenant Media lacked standing because it could not establish that a favorable decision on its claims would allow it to build its proposed signs—the redressability element of standing.²⁹³ All of Covenant Media's applications violated provisions of the sign ordinance Covenant did not challenge, and these in no way related to the allegedly unconstitutional discretionary and fee provisions of the sign ordinance upon which Covenant Media based its claims.²⁹⁴ The court reasoned that even if Covenant Media succeeded in showing the contested provisions of the ordinance were unconstitutional, other unchallenged provisions would still prevent the plaintiff from erecting its billboards.²⁹⁵ Thus, Covenant Media could not show that its federal constitutional claims were redressable, and therefore, the court lacked standing to hear the claims.²⁹⁶

291. 580 F. Supp. 2d 1313 (N.D. Ga. 2008).

292. *Id.* at 1314–16.

293. *Id.* at 1317.

294. *Id.*

295. *Id.* at 1318.

296. *Id.*

B. Lack of Time Limit Rendered Sign Ordinance an Unconstitutional Prior Restraint on Speech

In *Roma Outdoor Creations, Inc. v. City of Cumming*,²⁹⁷ Roma Outdoor Creations, Inc. attempted to secure sign permits and variances to erect two advertising signs that did not adhere to the requirements of the City of Cumming's sign ordinance in terms of height, allowable proximity to other existing signs, and content. The sign ordinance limited the locations and dimensions of all signs and restricted the permissible advertising messages to the following: (1) travel service facilities including gas, food, and camping; (2) areas of scenic beauty; (3) public attractions; and (4) any combination of the former with directional content.²⁹⁸ The plaintiff claimed that the lack of a time limit in the ordinance permitted the city to delay processing the plaintiff's applications in violation of equal protection and that the regulation of content constituted an unconstitutional prior restraint on speech.²⁹⁹

The court found that the plaintiff's first alleged injury—damages resulting from the city's 154-day processing delay in taking action on the plaintiff's variance requests—was redressable and could go forward.³⁰⁰ However, the plaintiff lacked standing to raise First Amendment³⁰¹ claims arising from the application denials because the applications failed to conform to the unchallenged height and separation requirements.³⁰² As in *Covenant Media*, the court followed other recent cases which have held that a plaintiff challenging a sign ordinance cannot demonstrate redressability if the plaintiff's permit applications violate unchallenged provisions of the ordinance.³⁰³

It is well-settled that sign-permitting ordinances are prior restraints because they may deny access to a forum for expression before the expression occurs.³⁰⁴ However, whether the lack of time limits in the ordinance at issue is unconstitutional depends on whether the ordinance is content-based or content-neutral, because "time limits are required when their lack could result in *ensorship* of certain viewpoints or ideas . . . but are not categorically required when the permitting scheme is

297. 599 F. Supp. 2d 1332 (N.D. Ga. 2009).

298. *Id.* at 1335.

299. *Id.* at 1337.

300. *Id.* at 1339.

301. U.S. CONST. amend. I.

302. *Roma Outdoor Creations*, 599 F. Supp. 2d at 1340.

303. *Id.* at 1341.

304. *Id.* at 1344.

content-neutral.”³⁰⁵ While the size and height restrictions under which the sign applications were denied were deemed content-neutral time, place, and manner restrictions, the processing delay was injury from which the plaintiff’s time-limit claim arose.³⁰⁶ Therefore, the court had to consider whether the ordinance as a whole was content-based rather than evaluating only the provisions under which the applications were denied.³⁰⁷ The court determined that the city’s sign ordinance was content-based because it limited the advertising to travel service facilities, areas of scenic beauty, and public attractions.³⁰⁸ The court held that the ordinance, both facially and as applied to the plaintiff, violated the First Amendment because it was content-based and lacked a time limit within which the city was required to process permit applications.³⁰⁹

305. *Id.* at 1344–45 (alteration in original) (quoting *Granite State Outdoor Adver., Inc. v. City of Clearwater*, 351 F.3d 1112, 1118 (11th Cir. 2003)).

306. *Id.*

307. *Id.* at 1345.

308. *Id.* at 1345–46.

309. *Id.* at 1348.