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Real Property

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by Linda S. Finley*

I. INTRODUCTION

For the last several years, the Author has begun this Survey with a comment about the American economy and the increase in the number of foreclosures facing Georgia homeowners.[1] Although the number of residential foreclosures appears to be decreasing,[2] the plight of homeowners remains a critical issue. Rest assured, this Article does not limit itself to a review of consumer-related law. It also looks at broad topics pertaining to real property, because whether the topic is foreclosure, boundaries, condemnation, or title, ". . . it is just about the dirt."[3]

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1. *See* Linda S. Finley, *Real Property, Annual Survey of Georgia Law*, 64 MERCER L. REV. 255 (2012); Linda S. Finley, *Real Property, Annual Survey of Georgia Law*, 63 MERCER L. REV. 309 (2011); Linda S. Finley, *Real Property, Annual Survey of Georgia Law*, 62 MERCER L. REV. 283 (2010).

2. Dan Levy, *U.S. Foreclosure Filings Decline to Lowest in Six Years*, BLOOMBERG (May 9, 2013), http://www.bloomberg.com/news/2013-05-09/u-s-foreclosure-filings-decline-to-lowest-in-six-years.html; *Georgia foreclosures declined 39% in April*, ATLANTA BUS. CHRON. (May 12, 2011), http://www.bizjournals.com/atlanta/news/2011/05/12/georgia-foreclosures-declined-39-in.html.

3. James A. Rehberg, Law Professor, Walter F. George School of Law, Mercer University, Class Lecture: Real Property (1978 or 1979).

II. LEGISLATION

The 2013 session of the Georgia General Assembly saw amendments to existing law and enactment of new legislation important to real estate practitioners. House Bill 83[4] amended section 7-1-1001 of the Official Code of Georgia Annotated (O.C.G.A.)[5] to exempt real estate sales brokers and agents from licensing requirements applicable to mortgage lenders and mortgage brokers.[6] The bill revised paragraph six of subsection 11(a) to exclude registration when "a Georgia licensed real estate salesperson provid[es] information to a lender or its agent related to an existing or potential short sale transaction in which a separate fee is not received."[7] The amendment did not exempt realtors from the registration requirement in circumstances where the realtor "directly or indirectly negotiates, places, or finds a mortgage" for the borrower.[8]

House Bill 160[9] made transfer-fee covenants applicable to real property void and unenforceable, subject to exemptions for transfer fees paid to condominium or homeowners' associations and real estate brokers.[10] The bill, among other things, amended O.C.G.A. § 44-14-14,[11] which was enacted in the 2012 legislative session and concerns vacant and foreclosed property registries.[12] The amendment changed the definition of "foreclosed real property" by removing the language requiring a land-disturbance permit to have been issued by a county or municipality.[13] The amendment also clarified how to calculate the deadline to register a foreclosure deed or a deed in lieu of foreclosure sale.[14] Prior to the amendment, the statute defined the deadline as "within [sixty] days of the transfer."[15] The language of the amendment clarified the calculation and provides that the foreclosure deed or deed in lieu of foreclosure be "filed with the clerk of [the] superior court

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4. Ga. H.R. Bill 83, Reg. Sess., 2013 Ga. Laws 638 (codified at O.C.G.A. § 7-1-1001 (Supp. 2013)).
5. O.C.G.A. § 7-1-1001 (2004).
6. Ga. H.R. Bill 83 § 1.
7. *Id.*
8. *Id.*
9. Ga. H.R. Bill 160, Reg. Sess., 2013 Ga. Laws 634 (codified as amended at O.C.G.A. § 44-14-14 (Supp. 2013)).
10. *Id.* § 3.
11. O.C.G.A. § 44-14-14 (Supp. 2013).
12. Ga. H.R. Bill 160 § 2; *see also* Ga. H.R. Bill 110 § 1, Reg. Sess., 2012 Ga. Laws 656 (enacting O.C.G.A. § 44-14-14).
13. Ga. H.R. Bill 160 § 2.
14. *Id.*
15. O.C.G.A. § 44-14-14.

within [sixty] days of the foreclosure sale or transfer of the deed in lieu of foreclosure."[16] Failure to file the instruments by the deadline results in the penalties described in the original statute.[17]

The third part of House Bill 160 created a new code section, O.C.G.A. § 44-14-15,[18] which prohibits private transfer fees.[19] That is, there can be no agreement or covenant that requires a party to a land conveyance to pay a third party a fee in connection with a future transfer of the property.[20]

House Bill 175[21] also created a new statute, O.C.G.A. § 44-5-59,[22] which codified the common law practice whereby recorded covenants run with the land for a period of twenty years.[23] The statute specifically excepts the covenants defined in O.C.G.A. § 44-5-60[24] (land covenants, zoning laws, and scenic easements) and excludes those covenants created by a landowner solely for the benefit of that landowner.[25] Thus, the statute seemingly supersedes the decision by the Georgia Court of Appeals in *Gilbert v. Fine*,[26] which had cast doubt upon the common practice of a landowner imposing easements by declaration on portions of a property for the benefit of other portions while all portions of the property were under the same ownership.[27]

Senate Bill 185[28] amended Article 9 of Title 11 of the O.C.G.A.[29] to align Georgia law with the current uniform commercial code. Two provisions are of relevance to real property attorneys: first, Section 10 provides that mortgages recorded on or after July 1, 2013, may serve as fixture filings, and that the instrument sufficiently identifies the debtor "if it provides the individual name of the debtor or the surname and first personal name of the debtor."[30] Section 11 provides that "if the collateral is held in a trust that is not a registered organization," a

16. Ga. H.R. Bill 160 § 2.
17. *See* O.C.G.A. § 44-14-14(i).
18. O.C.G.A. § 44-14-15 (Supp. 2013).
19. Ga. H.R. Bill 160 § 3; *see also* O.C.G.A. § 44-14-15.
20. O.C.G.A. § 44-14-15(b).
21. Ga. H.R. Bill 175, Reg. Sess., 2013 Ga. Laws 776 (codified at O.C.G.A. § 44-5-59 (Supp. 2013)).
22. O.C.G.A. § 44-5-59 (Supp. 2013).
23. *Id.*
24. O.C.G.A. § 44-5-60 (2010 & Supp. 2013).
25. O.C.G.A. § 44-5-59.
26. 288 Ga. App. 20, 653 S.E.2d 775 (2007).
27. *Id.* at 24, 653 S.E.2d at 778.
28. Ga. S. Bill 185, Reg. Sess., 2013 Ga. Laws 690 (codified at O.C.G.A. ch. 11-9 (Supp. 2013)).
29. O.C.G.A. ch. 11-9 (2002).
30. Ga. S. Bill 185 § 10.

financing statement must state: (a) if the trust agreement specifies a name for the trust, the name specified; or (b) if the record of the trust does not specify a name, the name of the settlor or testator.[31] If the record does not specify a name, the financing statement must also contain other information confirming trust ownership and distinguishing the trust from others, as necessary.[32]

III. TITLE TO REAL PROPERTY[33]

During the survey period, the Georgia Supreme Court and the Georgia Court of Appeals issued two noteworthy opinions delineating the purpose, scope, and differences between Georgia's two legal avenues to quiet title to real property: conventional *quia timet* and *quia timet* against all the world.[34] Read together, the courts' opinions highlight the procedural and substantive differences between the two causes of action, as well as the different rights, protections, and results afforded by each. A third case decided during the survey period addressed a separate but equally noteworthy title issue.[35] Specifically, it addressed the effect of a judicial decree or judgment that fails to adequately describe the real property it purports to affect.[36]

In *Vatacs Group, Inc. v. U.S. Bank, N.A.*,[37] the Georgia Supreme Court explained that the statutory avenue chosen by a litigant bringing a quiet title action determines whether he is entitled to a jury trial.[38] U.S. Bank, N.A. (U.S. Bank) and Vatacs Group, Inc. (Vatacs) both claimed title to residential real property. U.S. Bank filed a petition to quiet title. Adopting the findings of the special master, the Superior Court of Fulton County adjudged the property vested in U.S. Bank.[39]

Vatacs appealed, arguing that it had a right to a trial by jury.[40] The court began its opinion by stating Georgia law provides two avenues to quiet title to real property: a party may seek relief under O.C.G.A. §§ 23-

31. Ga. S. Bill § 11.

32. Ga. S. Bill 185.

33. This section is authored by Kristin S. Miller, attorney in the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Atlanta, Georgia. Agnes Scott College (B.A., Phi Beta Kappa, 2005); Emory University School of Law (J.D., 2009).

34. Vatacs Grp., Inc. v. U.S. Bank, N.A., 292 Ga. 483, 738 S.E.2d 83 (2013); Cartwright v. First Baptist Church of Keysville, Inc., 316 Ga. App. 299, 728 S.E.2d 893 (2012).

35. United Cmty. Bank v. Pack, 320 Ga. App. 484, 740 S.E.2d 228 (2013).

36. *Id.* at 484, 740 S.E.2d at 229.

37. 292 Ga. 483, 738 S.E.2d 83 (2013).

38. *Id.* at 483-84, 738 S.E.2d at 84.

39. *Id.*

40. *Id.* at 483, 738 S.E.2d at 84.

3-40 to -44,[41] conventional *quia timet*, or under O.C.G.A. §§ 23-3-60 to -73,[42] *quia timet* against all the world.[43]

The choice between conventional *quia timet* and *quia timet* against all the world is a material one, as each type of action is governed by its own set of statutory procedures—one that allows a jury trial and one that does not. Specifically, a party seeking conventional *quia timet* is not entitled to a jury trial pursuant to O.C.G.A. § 23-3-43;[44] however, a litigant seeking *quia timet* against all the world is entitled to a jury trial under the provisions of O.C.G.A. § 23-3-66.[45]

Affirming the trial court's decision not to submit the case to a jury, the supreme court noted that while U.S. Bank's original petition sought both conventional *quia timet* and *quia timet* against all the world, U.S. Bank later amended its petition to "omit [its] reference to and prayer for relief under O.C.G.A. § 23-3-60."[46] The court further observed that the proceedings before the special master focused on the specific cloud on the title resulting from the interest claimed by Vatacs, and, therefore, the case was both substantively and nominally an action only for conventional *quia timet*.[47] Consequently, Vatacs had no right to a jury trial.[48]

In *Cartwright v. First Baptist Church of Keysville, Inc.*,[49] the Georgia Court of Appeals emphasized the scope and finality of a decree entered "against all the world" concerning real property.[50] The court upheld the Superior Court of Burke County's decision that a judgment entered in a prior *quia timet* action brought under O.C.G.A. §§ 23-3-60 to -73 between the parties barred any new challenges to title.[51]

Maggie C. Cartwright sued First Baptist Church of Keysville, Inc. (the Church), seeking title to two tracts of land previously occupied by the Church under theories of implied and express trust. Although the jury returned a verdict in favor of Cartwright, the trial court entered a judgment notwithstanding the verdict based on its discovery of a 1998 order, issued in a prior *quia timet* action, holding that fee simple title

41. O.C.G.A. §§ 23-3-40 to -44 (1982).
42. O.C.G.A. §§ 23-3-60 to -73 (1982).
43. *Vatacs*, 292 Ga. at 483, 738 S.E.2d at 84.
44. O.C.G.A. § 23-3-43 (1982).
45. O.C.G.A. § 23-3-66.
46. *Vatacs*, 292 Ga. at 484, 738 S.E.2d at 84 (alteration in the original).
47. *Id.* at 484, 738 S.E.2d at 84-85.
48. *Id.* at 484, 738 S.E.2d at 85.
49. 316 Ga. App. 299, 728 S.E.2d 893 (2012).
50. *Id.* at 302, 728 S.E.2d at 896.
51. *Id.*

was vested in the Church. The trial court held that the prior order rendered Cartwright's title claims barred by res judicata.[52]

Cartwright appealed the trial court's judgment, arguing that her current claims arose in 2009 and therefore could not be barred by the 1998 order.[53] The court of appeals rejected this argument and stated that Cartwright's position "misapprehends the nature of the [*quia timet* action]," which by statutory definition settled title to the land conclusively.[54]

A full understanding of the court's decision requires a brief overview of the history of the property at issue and the relationship between Cartwright and the Church. Prior to 1907, the property was owned by Cartwright's grandfather, Robert Cheatham. Cheatham, who was the Church's pastor, conveyed a portion of the property to the Church, which began operating on the property. The deed evidencing the transfer was lost, and after Cheatham's death, there was a dispute regarding whether the deed had been properly recorded.[55]

To correct this defect in title, in 1976, Cartwright, as Cheatham's heir, executed a deed conveying the property in fee simple to the Church, with the understanding that if the Church ever stopped operating on the property, the land would revert to her family. Cartwright conveyed an additional parcel of land in 1993, subject to the same understanding that this property would also revert to her should the property cease to be used by the Church.[56]

In 1997, a boundary-line dispute arose between Cartwright and the Church. The Church filed a *quia timet* action under O.C.G.A. §§ 23-3-60 to -73 with respect to the two tracts of land conveyed by Cartwright. In 1998, the trial court entered an order finding that fee simple title to both parcels was vested in the Church and resolving the boundary dispute according to an agreement between the Church and Cartwright.[57]

By 2009, the Church was no longer operating on the property, and Cartwright filed suit seeking title to the property under theories of express and implied trust. On the last day of the trial, the 1998 order surfaced, and the trial court adjudged all Cartwright's title claims against the property at issue barred by res judicata.[58]

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52. *Id.* at 299-300, 728 S.E.2d at 894.
53. *Id.* at 300, 728 S.E.2d at 894.
54. *Id.* at 301, 728 S.E.2d at 895.
55. *Id.*
56. *Id.* at 299-300, 728 S.E.2d at 894.
57. *Id.*
58. *Id.* at 299, 728 S.E.2d at 894.

The court of appeals affirmed, grounding its decision in the statutory text of O.C.G.A. § 23-3-60, which defines the purpose of actions in *quia timet* against all the world: to create a procedure to

> *conclusively establish[] that certain named persons are the owners of all the interests in land defined by a decree* entered in such proceeding, *so that there shall be no occasion for land in this [s]tate to be unmarketable because of any uncertainty as to the owner of every interest therein.*[59]

The court reasoned, "[a]ccording to the statutory procedure, and by the explicit terms of the decree, the 1998 order settled the title to the land conclusively, not only as to a specific person but as to a specific cloud on the title."[60] The court determined that the 1998 order conclusively established that the Church owned all the interests in the land defined by the decree.[61]

The court further noted that O.C.G.A. § 23-3-60 operates to prevent precisely the scenario before the court—a party who participated in a prior *quia timet* action later asserting a new claim concerning the property.[62] To allow such suits would preclude a quiet title action from producing the result intended by the statute.[63]

The court also rejected Cartwright's argument that her claims could not have been raised in the 1998 action because they did not arise until 2009 when the Church ceased operating on the property.[64] The court reasoned that even if reversion had not yet occurred, she nevertheless had standing to raise the allegedly then-existing express or implied trust claims.[65]

Because Cartwright could have raised her claims and failed to do so in the prior action, she was barred by res judicata from asserting them.[66] Because her new action focused on different potential defects in the Church's title was irrelevant.[67] Cartwright was a party to the prior *quia timet* action, in which a conclusive judgment was rendered by a court of competent jurisdiction on the merits of the Church's ownership

59. *Id.* at 300-01, 728 S.E.2d at 895 (emphasis in original) (quoting O.C.G.A. § 23-3-60).
60. *Id.* at 301, 728 S.E.2d at 895.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 302, 728 S.E.2d at 895.
65. *Id.*
66. *Id.*
67. *Id.*

interest in the land; therefore, Cartwright's claims were barred as a matter of law.[68]

Throughout its opinion, the court emphasized the purpose and legislative intent of the statute: "[r]ecognizing the sometimes impossible task of determining the identity or residence of all possible adverse claimants due to title irregularities spanning many years, the legislature made the [*quia timet*] proceeding in rem against all the world."[69]

The court concluded its opinion emphasizing the finality of an adjudication under O.C.G.A. §§ 23-3-60 to -73, stating succinctly, "[a] litigant must discharge all his weapons, and not reserve a part of them for use in a future encounter. He must realize that one defeat will not only terminate the campaign, but end the war."[70]

In *United Community Bank v. Pack*,[71] the Georgia Court of Appeals held that title to real property will not be affected by any decree or judgment that fails to identify specifically the property it purports to affect.[72] The court affirmed the Superior Court of Union County's denial of the plaintiff's motion for summary judgment that the defendant borrower—a divorced man—was the sole owner of real property pledged as security for certain loans.[73] The court noted that while Georgia law generally provides that "[a] final divorce decree which conveys property has the same force and effect as a deed and establishes title,"[74] the divorce decree at issue in this case, relied on by the plaintiff to establish the borrower's sole ownership, did not describe the property at issue.[75] The decree's failure to identify the property rendered it a nullity; title was unaffected and remained vested jointly in the defendant borrower and his former wife.[76]

United Community Bank (the Bank) made a series of loans to the defendant Frank Pack, secured by real property that he had previously owned jointly with his former wife, Jeanette Pack. When the Packs divorced in 2000, the divorce decree provided that Jeanette Pack would be awarded all right, title, and interest in specific properties—none of which were the property at issue.[77] The decree further provided that

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68. *Id.*

69. *Id.* at 302, 728 S.E.2d at 896 (internal citations omitted) (alteration in the original).

70. *Id.* (internal citations omitted) (alteration in the original).

71. 320 Ga. App. 484, 740 S.E.2d 228 (2013).

72. *Id.* at 485-86, 740 S.E.2d at 230.

73. *Id.* at 484, 740 S.E.2d at 229.

74. *Id.* at 485, 740 S.E.2d at 230 (quoting Price v. Price, 286 Ga. 753, 754, 692 S.E.2d 601, 603 (2010)).

75. *Id.* at 486, 740 S.E.2d at 231.

76. *Id.*

77. *Id.* at 485, 740 S.E.2d at 229.

Frank Pack would "have all right, title and interest in any property jointly owned by the parties not herein awarded to [Jeanette Pack] as well as any property titled solely in his name and not herein awarded to [Jeanette Pack]."[78] Frank Pack proceeded to use the "jointly held property" as security for the loans he obtained from the bank. Frank Pack defaulted on the loans. Before the bank initiated foreclosure proceedings to satisfy the debt, Jeanette Pack filed an affidavit in the real property records asserting joint ownership of the property at issue and declaring she had not conveyed any property interest to the Bank.[79]

The Bank filed suit to clear title, seeking a declaration that Frank Pack was the sole owner of the property. The Bank then moved for summary judgment, relying on the divorce decree it argued title vested solely in Frank Pack.[80] The trial court denied the Bank's motion due to the failure of the divorce decree to specify the property, holding that "as a matter of law, . . . the divorce decree did not transfer Jeanette Pack's rights to property to Frank Pack."[81]

Affirming the trial court's decision on appeal, the court of appeals quoted the Georgia Supreme Court, which has held that "title to property not described in a verdict or judgment is unaffected by the decree and remains titled in the name of the owners as before the decree was entered."[82] Applying this rule to the facts of the case before it, the court of appeals held that the decree's failure to identify the property rendered it a nullity; the title was unaffected and remained vested jointly in Frank and Jeanette Pack.[83]

IV. SALE OF REAL PROPERTY[84]

In *Garrett v. Southern Health Corp. of Ellijay, Inc.*,[85] the Georgia Court of Appeals considered a dispute arising from an option contract for the sale of real property to a hospital.[86] The property at issue was comprised of six tracts owned by James Garrett and Roberta Mundy,

78. *Id.* at 484-85, 740 S.E.2d at 230.
79. *Id.* at 485, 740 S.E.2d at 229-30.
80. *Id.* at 485, 740 S.E.2d at 230.
81. *Id.* (quoting the trial court record) (ellipsis in original).
82. *Id.* (quoting Andrews v. Boykin, 273 Ga. 386, 387-88, 543 S.E.2d 12, 14 (2001)).
83. *Id.* at 486-87, 740 S.E.2d at 231.
84. This section authored by Joann E. Johnston, attorney in the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Atlanta, Georgia. University of South Carolina (B.A. & B.S., 2001); Emory University School of Law (J.D., 2004). Member, State Bar of Georgia.
85. 320 Ga. App. 176, 739 S.E.2d 661 (2013).
86. *Id.* at 176, 739 S.E.2d at 663.

individually and as the administratrix of her late husband's estate. Through the option contract, the sellers granted the hospital an irrevocable option to purchase the property for $3.3 million, and for utility work to be performed by the sellers at no cost to the hospital. In the option contract, the sellers represented that they were the fee simple owners of the property and would convey the property to the hospital through a limited warranty deed if the option was exercised. The sellers chose not to consult with legal counsel prior to executing the option contract.[87]

The option contract provided for an inspection period during which the parties could terminate the contract, but neither the hospital nor the sellers did so. After the end of the inspection period, the sellers were required to provide a surety commitment letter to the hospital for a performance bond to cover the utility work, which they did not do. The sellers also informed the hospital that they refused to perform any utility work unless it was paid for by other sources.[88]

Despite these issues, the hospital decided to exercise its option to purchase the property, and the parties agreed to a closing date for the sale. The hospital then sent a letter to the sellers demanding that they provide the surety commitment letter and advising the sellers that they were expected to provide a performance bond and perform the utility work. A few days before the closing, however, an attorney retained by the sellers informed the hospital that the sellers could not sign a limited warranty deed to convey the property without additional signatures from the heirs of Mr. Mundy's estate and proposed instead that the hospital accept a quitclaim deed. The hospital responded that its title insurer had assured it that the property could be conveyed through a limited warranty deed signed only by the sellers, and, therefore, there were no impediments to moving forward with the closing. The sellers, nevertheless, informed the hospital that they would not sign a limited warranty deed and were not ready to close. The hospital went to the closing at the agreed-upon date and time, but the sellers never appeared.[89]

The hospital subsequently filed suit against the sellers seeking, among other things, monetary damages for the sellers' breach of the option contract. The sellers filed a counterclaim against the hospital for fraudulent inducement.[90]

87. *Id.* at 176-77, 739 S.E.2d at 663-64.
88. *Id.* at 177-78, 739 S.E.2d at 664.
89. *Id.* at 179-80, 739 S.E.2d at 665.
90. *Id.* at 180, 739 S.E.2d at 665-66.

After discovery, the hospital filed a motion for partial summary judgment on its breach of contract claim.[91] The terms of the option contract provided that the hospital was entitled to certain remedies if the failure to close was the sellers' fault but precluded monetary damages "unless the default by [the] [s]eller[s] hereunder was willful and intentional."[92] The hospital argued that the undisputed evidence showed that the sellers' default was willful and intentional because their decision not to fulfill their obligations under the option contract was a matter of deliberate choice.[93] The hospital's argument was based on defining "willful" as "voluntary and intentional, not necessarily malicious."[94] In response, and in their own motions for summary judgment, the sellers contended that the hospital's definition of "willful" was incorrect and that "an act [was] not 'willful' if it was 'due to reasonable cause, and lacked evil intent or bad motive.'"[95] According to the sellers, under this definition, their alleged default was the reasonable result of their refusal to execute a limited warranty deed without signatures from Mr. Mundy's heirs.[96]

The Superior Court of Gilmer County granted the hospital's motion for partial summary judgment on its breach of contract claim and the sellers' fraudulent inducement claim, adopting the hospital's definition of "willful and intentional" and finding that the only issue remaining was the amount of the hospital's damages from the seller's willful and intentional breach. The trial court also denied the sellers' motions for summary judgment.[97]

However, the Georgia Court of Appeals ruled that the trial court's interpretation of the option contract's language was erroneous.[98] After determining that the phrase "willful and intentional" was ambiguous, the court interpreted the language to require evidence that the sellers' default "was done intentionally and in bad faith."[99] The court of appeals determined that the evidence of bad faith by the sellers was conflicting, thereby creating a fact issue for a jury at trial.[100] Consequently, the court of appeals reversed the trial court's grant of partial

91. *Id.*
92. *Id.* at 180, 739 S.E.2d at 665 (quoting option contract).
93. *Id.* at 181, 739 S.E.2d at 666.
94. *Id.* (quoting Defendant Petitioner's Motion for Summary Judgment).
95. *Id.* at 180, 739 S.E.2d at 666 (quoting Defendant Petitioner's Motion for Summary Judgment).
96. *Id.* at 180-81, 739 S.E.2d at 666.
97. *Id.* at 181, 739 S.E.2d at 666.
98. *Id.* at 181-82, 739 S.E.2d at 666.
99. *Id.* at 182-84, 739 S.E.2d at 667-68.
100. *Id.* at 185, 739 S.E.2d at 669.

summary judgment in the hospital's favor on its claim for breach of contract.[101]

In *Wells Fargo Bank, N.A. v. Gordon*,[102] the Georgia Supreme Court addressed certified questions from the United States Court of Appeals for the Eleventh Circuit concerning whether a security deed that was not attested to by an unofficial witness could provide notice to subsequent bona fide purchasers under Georgia law.[103] The case centered on a 2006 security deed that the debtor executed in favor of Wells Fargo Bank, N.A. (Wells Fargo). The last page of the security deed, as subsequently recorded, was signed by the debtor, co-debtor, and a notary, but the signature line for the "unofficial witness" was left blank. In addition to the security deed, a fully executed adjustable rate rider, planned unit development rider, and waiver of borrower's rights (the "Waiver") were also recorded. The Waiver stated that its provisions were incorporated into, and made part of, the security deed and was signed by the debtor, co-debtor, notary, and an unofficial witness.[104]

The debtor subsequently filed for Chapter 7 bankruptcy, and the trustee commenced an adversary action against Wells Fargo seeking to avoid its interest in the property pursuant to 11 U.S.C. § 544.[105] The trustee argued that because the security deed lacked an unofficial

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101. *Id.* The court of appeals also affirmed the trial court's order denying the sellers' motions for partial summary judgment. *Id.* at 191, 739 S.E.2d at 692. First, the court rejected the sellers' argument that the hospital's only possible relief for the sellers' default was to waive the contingencies (the surety commitment letter and performance bond) or terminate the contract because a separate provision in the contract specifically entitled the hospital to sue for breach of contract based on the sellers' uncured default. *Id.* at 187-88, 739 S.E.2d at 669-71. The court further held that the evidence did not support the sellers' assertion that they terminated the contract during the inspection period or that the option contract was not executed by an authorized representative of the hospital. *Id.* at 188-91, 739 S.E.2d at 671-72.

102. 2013 Ga. LEXIS 158 (Ga. Feb. 18, 2013).

103. *Id.* at *1; *see also* Wells Fargo Bank, N.A. v. Gordon (*In re* Codrington), 691 F.3d 1336 (11th Cir. 2012) (certifying state law questions to the Georgia Supreme Court).

104. *Wells Fargo Bank, N.A.*, 2013 Ga. LEXIS 158, at *2.

105. 11 U.S.C. § 544 (2006). *Wells Fargo Bank, N.A.*, 2013 Ga. LEXIS 158, at *2. Section 544 provides in pertinent part:

> The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by . . . (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. § 544(a)(3).

witness signature, it was not properly recorded and could be avoided for failure to provide constructive notice to subsequent bona fide purchasers. The bankruptcy court agreed and entered judgment in the debtor's favor, and Wells Fargo ultimately appealed to the Eleventh Circuit.[106]

In answering the Eleventh Circuit's certified questions, the Georgia Supreme Court first ruled that the security deed was not in recordable form because it lacked an unofficial witness signature as required by O.C.G.A. § 44-14-33.[107] The court rejected Wells Fargo's argument that the security deed was properly attested and in recordable form because the Waiver, which had been incorporated into the security deed by reference, was signed by an unofficial witness.[108] To rule otherwise, the court stated, "would be false and contrary to the purpose of attestation, namely for the witness to verify that the document in question has been executed by the signatories" and "would likely lead to more complications than it would resolve for lenders, debtors, and subsequent purchasers alike."[109]

The supreme court also rejected Wells Fargo's contention that the Waiver itself was sufficient to provide inquiry notice to a bona fide purchaser of the existence of the security deed in the property's chain of title.[110] The court determined that the Waiver was "manifestly too meager, imperfect, or uncertain to serve as adequate means of identification" to put a subsequent purchaser on inquiry notice because it made only generic references to the security deed and did not identify or describe the property being conveyed or encumbered by the security deed.[111]

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106. *Wells Fargo Bank, N.A.*, 2013 Ga. LEXIS 158, at *3.

107. *Id.*; *see also* O.C.G.A. § 44-14-33 (2002); U.S. Bank Nat'l Ass'n v. Gordon, 289 Ga. 12, 15, 709 S.E.2d 258, 258 (2011). O.C.G.A. § 44-14-33 provides that a security deed "must be attested by or acknowledged before an officer as prescribed for the attestation or acknowledgment of deeds of bargain and sale; and, in the case of real property, a mortgage must also be attested or acknowledged by one additional witness."

108. *Wells Fargo Bank, N.A.*, 2013 Ga. LEXIS 158, at *5.

109. *Id.* at *7.

110. *Id.*

111. *Id.* (quoting Deljoo v. SunTrust Mortg., Inc., 284 Ga. 438, 439-40, 668 S.E.2d 245, 247 (2008)).

V. TAXATION OF REAL PROPERTY[112]

In *Iglesia Del Dios Vivo Columna y Apoyo De La Verdad La Luz Del Mundo, Inc. v. Downing*,[113] a property owner sued Gail Downing, the Cobb County tax commissioner (the tax commissioner) regarding the tax commissioner's use of excess funds from a tax sale to pay taxes owed on the property that accrued after the tax sale occurred.[114] The facts were undisputed. Certain property owned by Iglesia Del Dios Vivo Columna y Apoyo De La Verdad La Luz Del Mundo, Inc. (Iglesia) was sold at a tax sale to JB Holdings, Inc. (JB Holdings) in January 2007. The sale proceeds were sufficient to pay the delinquent taxes and also to pay off the holder of a security deed on the property. After these payments were made, approximately $38,000 in excess funds still remained. The tax commissioner ultimately used these excess funds to satisfy the unpaid taxes for 2008, 2009, and 2010. In 2011, Iglesia sent a letter to the tax commissioner demanding repayment of the excess funds. The tax commissioner then filed an interpleader and deposited the remaining surplus funds into the court registry, and they were awarded to Iglesia.[115] The property owner also filed a money rule petition, pursuant to O.C.G.A. § 15-13-3,[116] to recover the excess funds that had been used by the tax commissioner to cover the 2008, 2009, and 2010 taxes.[117] Iglesia moved for summary judgment, arguing that JB Holdings was solely liable for the taxes that arose after the tax sale. The tax commissioner cross-moved for summary judgment, arguing that Iglesia and JB Holdings were jointly liable for the delinquent taxes. The Superior Court of Cobb County granted the tax commissioner's motion for summary judgment, holding that the property owner had a taxable interest in the property because it remained in possession of the property and its right of redemption had not been barred.[118]

Iglesia appealed.[119] The Georgia Court of Appeals reversed the decision of the superior court.[120] The court of appeals ruled that under

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112. This section authored by Jonathan E. Green, shareholder in the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Atlanta, Georgia. Vanderbilt University (B.A., 1998); University of Georgia School of Law (J.D., 2001).

113. 321 Ga. App. 778, 742 S.E.2d 742 (2013).

114. *Id.* at 778-80, 742 S.E.2d at 742-43.

115. *Id.*

116. O.C.G.A. § 15-13-3 (2012).

117. *Iglesia*, 321 Ga. App. at 778-80, 742 S.E.2d at 742-43.

118. *Id.*

119. *Id.* at 780, 742 S.E.2d at 744.

120. *Id.* at 780, 742 S.E.2d at 745.

O.C.G.A. § 48-4-5,[121] the excess funds were to be paid "to the owner or owners as their interests appear in the order of priority."[122] Similarly, the court of appeals noted that O.C.G.A. § 48-4-42[123] indicated that the tax-deed purchaser is solely responsible for paying ad valorem taxes accruing after the tax sale, with the defendant subject to the *fieri facias* (*fi.fa.*) only being responsible for those taxes if the defendant chooses to redeem the property sold at the tax sale.[124]

In *Morgan County Board of Tax Assessors v. Ward*,[125] the court of appeals examined an appeal from the determination that Nancy Ward was in breach of a conservation-use covenant.[126] The Morgan County Board of Tax Assessors (the Tax Board) had notified the taxpayer that this covenant had been breached and that a penalty would be assessed. Ward appealed that determination to the Morgan County Board of Equalization (the Board of Equalization). After the Board of Equalization ruled against her, Ward appealed for a de novo review in the Superior Court of Morgan County. Ward and the Tax Board filed cross-motions for summary judgment, which the superior court denied. Both Ward and the Tax Board applied for and were granted interlocutory appeals.[127]

In March 2004, the taxpayer applied for a conservation-use covenant on 124.29 acres of land in Morgan County. This was approved. Ward later conveyed a portion (27.263 acres) of this property to a third party, who ultimately transferred the property to Montana Partners Limited, Inc. (Montana Partners). On August 23, 2007, Montana Partners sold the 27.263 acres to Montana Development, Inc. (Montana Development). Montana Development applied to continue the covenant, but the Tax Board refused. On February 3, 2009, the Tax Board notified Ward that the covenant was breached and that a penalty was being assessed.[128]

On appeal, Ward maintained that the Tax Board was not entitled to assess any penalty because it failed to provide the taxpayer with notice and an opportunity to cure.[129] The court of appeals noted that "the Tax Board is required to notify an 'owner' in writing in case of an alleged breach of a conservation use covenant,"[130] pursuant to O.C.G.A.

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121. O.C.G.A. § 48-4-5 (2010).
122. *Iglesia*, 321 Ga. App. at 780-81, 742 S.E.2d at 745.
123. O.C.G.A. § 48-4-42 (2010).
124. *Iglesia*, 321 Ga. App. at 782, 742 S.E.2d at 745-46.
125. 318 Ga. App. 186, 733 S.E.2d 470 (2012).
126. *Id.* at 186, 733 S.E.2d at 470-71.
127. *Id.*
128. *Id.* at 186-87, 733 S.E.2d at 471.
129. *Id.* at 188, 733 S.E.2d at 472.
130. *Id.*

§ 48-5-7.4(k.1).[131] The statute further provided that a second notice was to be sent notifying the "owner" if the breach has been cured.[132] The court of appeals noted that the Tax Board sent a notice to Montana Development informing it of the alleged breach.[133] However, the Tax Board only sent Ward the second notice, which informed her that the breach had not been cured.[134]

The Tax Board argued that the taxpayer waived the notice argument because it was not raised before the Board of Equalization.[135] The court of appeals ruled that, while insufficiency of notice was not specifically raised in Ward's appeal to the Board of Equalization, it was clear that the legitimacy of the breach and penalty was before the Board of Equalization.[136] The court of appeals also ruled that Ward qualified as an owner under O.C.G.A. § 48-5-7.4(k.1).[137] The court of appeals noted that the Department of Revenue regulation required that notice must be provided before a taxpayer could be assessed a penalty.[138] The court of appeals reversed the decision of the superior court and held that the taxpayer was entitled to summary judgment.[139]

VI. TRESPASS AND NUISANCE[140]

During this survey period, the Georgia Court of Appeals clarified what circumstances constitute a permanent nuisance versus a continuing nuisance in the installation and maintenance of city infrastructure systems. This clarification has ramifications on a government entity's liability for nuisance claims. At a time when cities and counties around the state are replacing aging infrastructure systems and updating over-utilized systems, governments may be increasingly liable for certain types of nuisance actions.

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131. *Id.*; *see also* O.C.G.A. § 48-5-7.4(k.1).

132. *Ward*, 318 Ga. App. at 188-89, 733 S.E.2d at 472.

133. *Id.* at 189, 733 S.E.2d at 472.

134. *Id.*

135. *Id.*

136. *Id.* at 189-90, 733 S.E.2d at 473.

137. *Id.* at 190, 733 S.E.2d at 473 (applying O.C.G.A. § 48-5-7.4(k.1)).

138. *Id.* at 190-91, 733 S.E.2d at 474 (citing GA. COMP. R. & REGS. 560-11-6-.06(5) (2013)).

139. *Id.* at 191, 733 S.E.2d at 473.

140. This section was authored by Tracy L. Starr, attorney in the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Atlanta, Georgia. Clemson University (B.A., 1991); American University (M.A., 1997); Georgia State University College of Law (J.D., 2007). Member, State Bar of Georgia.

In *City of Columbus v. Cielinski*,[141] Mary Jo Cielinski, a resident of Columbus, Georgia, brought suit against the City of Columbus for a nuisance arising from allegedly inadequate drainage systems and the city's failure to properly maintain a sanitary sewer line located on her property. Cielinski claimed that these shortcomings resulted in the repeated flooding of her land and home, damaging her garage and causing mold to grow. She further alleged that the negligent construction and maintenance of the drainage system created a permanent nuisance and a continuing nuisance.[142]

Cielinski purchased her home in 1985. Beginning in 1989, Cielinski repeatedly complained to the city about clogged gutters, flooding, and repair and maintenance attempts made by the city. In 1990, the house flooded in the middle of the night during a heavy rainstorm. To correct the issue, in 1991, the city replaced a storm drainage pipe that ran along the side yard of the home. The situation came to a head in 2005 when the house and yard were flooded after a rainstorm, and, as a result, Cielinski sued the City of Columbus.[143]

In Georgia, if the destruction or damage is complete upon the conclusion of the act that creates the nuisance, then one right of action arises.[144] That right of action accrues immediately upon the creation of the permanent nuisance, and the statute of limitations begins to run from that time.[145] Where a nuisance is not permanent, but may be abated, each continuance of the nuisance is a fresh nuisance that creates a new cause of action.[146] Thus, because a new cause of action for continuing nuisance accrues at the time of each continuance, the statute of limitations runs from the time of each new accrual.[147]

In response to Cielinski's suit, the city filed a motion for summary judgment contending that the nuisance was only permanent in nature, and, consequently, Cielinski's claim was barred by the applicable four-year statute of limitations. The city argued that Cielinski's nuisance claim was based solely on the installation of the storm drainage pipe in 1991, and because that action was complete upon installation, Cielinski's cause of action accrued at that time. As the four-year statute of limitations period ran from the date of installation, it argued that

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141. 319 Ga. App. 289, 734 S.E.2d 922 (2012).
142. *Id.* at 290, 734 S.E.2d at 923.
143. *Id.* at 289-90, 734 S.E.2d at 923-24.
144. *Id.* at 291, 734 S.E.2d at 924.
145. *Id.*; City of Atlanta v. Kleber, 285 Ga. 413, 416, 677 S.E.2d 134, 137 (2009).
146. *Cielinski*, 319 Ga. App. at 291, 734 S.E.2d at 925.
147. *Id.*; *City of Atlanta*, 285 Ga. at 416, 677 S.E.2d at 137.

Cielinski's nuisance claim was time barred. The Superior Court of Muscogee County denied summary judgment and the city appealed.[148]

The Georgia Court of Appeals affirmed in part and reversed in part.[149] To the extent that Cielinski's claim was based on the installation of the pipe, the claim was permanent in nature and barred by the statute of limitations.[150] However, because Cielinski presented evidence of numerous complaints to the city regarding its maintenance of the drainage system, the claim based on the maintenance of the system was a continuous nuisance action that was not barred.[151]

In effect, cities and counties with aging infrastructures are likely to be currently protected from claims arising from the installation of those systems. However, governments should act to avoid infrastructure maintenance issues, as those types of claims do not necessarily derive from installation. Moreover, as aging infrastructure systems are replaced, the statute of limitations on new installations will be refreshed.

VII. FORECLOSURE OF REAL PROPERTY[152]

In a dramatic turn of events, the Georgia Supreme Court resolved many issues facing mortgage lenders in its decision in *Chae Yi You v. JP Morgan Chase Bank, N.A.*[153] Borrowers throughout the state have filed thousands of lawsuits over the past several years challenging their lenders' right to foreclose based on alleged issues with the underlying promissory note. These lawsuits were briefly bolstered by the Georgia Court of Appeals decision in *Reese v. Provident Funding Associates, LLP.*[154] In *Reese*, the court of appeals held that foreclosure notices pursuant to O.C.G.A. § 44-14-162.2[155] must identify the true identity of the secured creditor, rather than the identity of the mortgage servicer who handled all aspects of foreclosure on behalf of the note holder.[156] While the court of appeals did not specify how to determine who the secured creditor might be with respect to a given loan, it assumed that the party who had last been assigned the promissory note was the

148. *Cielinski*, 319 Ga. App. at 290, 734 S.E.2d at 924.

149. *Id.* at 294, 734 S.E.2d at 926.

150. *Id.* at 292, 734 S.E.2d at 925.

151. *Id.*

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

153. 293 Ga. 67, 743 S.E.2d 428 (2013).

154. 317 Ga. App. 353, 730 S.E.2d 551 (2012), *vacated*, 2013 Ga. LEXIS 466 (Ga. 2013).

155. O.C.G.A. § 44-14-162.2 (2002).

156. *Reese*, 317 Ga. App. at 355, 730 S.E.2d at 552.

secured creditor even in circumstances where the security deed had been assigned to a loan servicer prior to the foreclosure sale.[157] Because O.C.G.A. § 44-14-162.2 did not contain an express requirement that the secured creditor be identified, and no court had interpreted Georgia law to require identification of the secured creditor, *Reese* resulted in substantial uncertainty. This uncertainty was resolved in favor of mortgage lenders and servicers by the Georgia Supreme Court in *Chae Yi You*.[158]

In *Chae Yi You*, the Georgia Supreme Court answered three questions certified by the United States District Court for the Northern District of Georgia:

> (1) Can the holder of a security deed be considered a secured creditor, such that the deed holder can initiate foreclosure proceedings on residential property even if it does not also hold the note or otherwise have any beneficial interest in the debt obligation underlying the deed? (2) Does [O.C.G.A.] § 44-14-162.2(a) require that the secured creditor be identified in the notice described by that statute? (3) If the answer to the preceding question is "yes," (a) will substantial compliance with this requirement suffice, and (b) did [the lender] substantially comply in the notice it provided in this case?[159]

The Georgia Supreme Court answered the first question in the affirmative, stating that the "deed holder possesses full authority to exercise the power of sale upon the debtor's default, regardless of its status with respect to the note."[160] The court then answered the second question in the negative.[161] Since O.C.G.A. § 44-14-162.2 simply requires identification of the party with authority to negotiate, amend, and modify the loan, the court held that the note holder only need be named when it was the entity with such authority.[162] This conclusion effectively overturned the decision in *Reese*.[163] The Georgia Supreme Court then declined to answer the third question.[164]

The result of *Chae Yi You* is a substantial simplification of the legal situation faced by lenders. As long as the security deed has been assigned to the lender or servicer prior to foreclosure, that entity is the

157. *Id.* at 355, 730 S.E.2d at 552-53.
158. *Chae Yi You*, 293 Ga. at 74-75, 743 S.E.2d at 433-34.
159. *Id.* at 69, 743 S.E.2d at 430.
160. *Id.* at 73, 743 S.E.2d at 433.
161. *Id.* at 75, 743 S.E.2d at 434.
162. *Id.*
163. *Id.*
164. *Id.*

secured creditor and is entitled to enforce the security deed by foreclosing.[165] The promissory note is irrelevant to this determination.[166]

Just prior to the order in *Chae Yi You*, the Georgia Court of Appeals issued a decision in a similar case that addressed both the issues resolved by *Chae Yi You* and an additional issue relevant to many wrongful foreclosure cases.[167] Over the past several years, one of the continuing themes in foreclosure litigation has been the allegation that assignments of security deeds were improperly executed. In *Montgomery v. Bank of America,*[168] the court of appeals conclusively determined that a borrower has no standing to bring a claim arising from alleged errors in the execution of an assignment.[169] The decision affirmed the long-standing principle of Georgia law that a non-party to an agreement lacks standing to challenge the agreement. "As the [Superior Court of Gwinnett County] correctly found, the assignment at issue is a contract between [the assignor and assignee]."[170] Even if the borrower was correct that the person who signed the assignment lacked authority to sign, the only party with authority to bring such a claim is the other party to the assignment.[171]

On the other end of the spectrum is the Georgia Court of Appeals decision in *Stowers v. Branch Banking & Trust Co.*[172] Therein, the court concluded that its earlier holding in *TKW Partners, LLC v. Archer Capital Fund, L.P. (TKW Partners)*[173] should not be applied retroactively.[174] In *TKW Partners*, the court of appeals held that a bank substantially complied with O.C.G.A. § 44-14-162.2's requirement that the foreclosure notice identify the entity with full authority to negotiate the loan where the notice identified the lender's counsel.[175] In *Stowers*, the court of appeals refused to apply this standard to a notice sent prior to the decision in *TKW Partners*, on the basis that applying the earlier decision retroactively would be inconsistent with the legislature's intent

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165. *Id.* at 74, 743 S.E.2d at 433.

166. *Id.*

167. *See* Montgomery v. Bank of Am., 321 Ga. App. 343, 348, 740 S.E.2d 434, 439 (2013) (Miller, J., dissenting) (noting that the instant case would be controlled by the outcome of *Chae Yi You*, and arguing that the court should remand the case to be decided accordingly).

168. 321 Ga. App. 343, 740 S.E.2d 434 (2013).

169. *Id.* at 345, 740 S.E.2d at 437.

170. *Id.* at 346, 740 S.E.2d at 438.

171. *Id.*

172. 317 Ga. App. 893, 731 S.E.2d 367 (2012).

173. 302 Ga. App. 443, 691 S.E.2d 300 (2010).

174. *Stowers*, 317 Ga. App. at 897, 731 S.E.2d at 371.

175. *TKW Partners, LLC*, 302 Ga. App. at 446, 691 S.E.2d at 303.

in enacting the statutory notice requirement in the first place.[176] The end result of *Stowers* is additional confusion. Notices sent prior to the decision in *TKW Partners* are governed by a strict-compliance standard requiring the entity identified to have full authority to negotiate the loan.[177] Notices sent after the *TKW Partners* decision are presumably subject to a broader substantial-compliance standard that permits identification of other persons, including foreclosure counsel.[178] It remains to be seen whether the Georgia courts will attempt to further limit the *TKW Partners* decision in the future.

VIII. CONDEMNATION AND EMINENT DOMAIN[179]

In *Adkins v. Cobb County,*[180] a property owner sought to set aside a declaration of taking, but a hearing was not held on the issue until more than sixty days after the declaration was filed.[181] The Superior Court of Cobb County dismissed the petition to set aside the ruling and the Georgia Supreme Court granted an application for interlocutory appeal.[182]

Georgia law sets forth three particular procedural requirements for the filing of a valid petition to set aside a declaration of taking.[183] First, the petition must be filed no later than thirty days after service of the declaration of taking.[184] Second, a hearing "shall be had not . . . later than [sixty] days from the date of filing of the declaration of taking."[185] Third, the condemnor must be served with the rule nisi for the hearing at least fifteen days before the hearing.[186]

In *Adkins*, the issue was the requirement that a hearing be held within sixty days after the declaration is filed.[187] The court construed the statutory language under the following rule of construction:

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176. *Stowers*, 317 Ga. App. at 896-97, 731 S.E.2d at 370.

177. *Id.* at 897, 731 S.E.2d at 371.

178. *Id.*

179. This section was authored by Ivy N. Cadle, associate in the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Macon, Georgia, and Adjunct Professor of Law at Walter F. George School of Law, Mercer University. University of Georgia (B.S., 2000); University of Georgia (MAcc., 2002); Walter F. George School of Law, Mercer University, (J.D., 2007), (C.P.A., 2008).

180. 291 Ga. 521, 731 S.E.2d 665 (2012).

181. *Id.* at 521, 731 S.E.2d at 666.

182. *Id.* at 521, 731 S.E.2d at 667.

183. *Id.* at 522, 731 S.E.2d at 667 (citing O.C.G.A. § 32-3-11 (2012)).

184. *Id.* (citing O.C.G.A. § 32-3-11(c)).

185. *Id.* (quoting O.C.G.A. § 32-3-11(c)).

186. *Id.* (citing O.C.G.A. § 21-3-11(c)).

187. *Id.*

> Language contained in a statute which, given its ordinary meaning, commands the doing of a thing within a certain time, when not accompanied by any negative words restraining the doing of the thing afterward, will generally be construed as merely directory and not as a limitation of authority, and this is especially so where no injury appeared to have resulted from the fact that the thing was done after the time limited by the plain wording of the statute.[188]

After applying the rule of construction, the court concluded that the language in question was directive, rather than mandatory, because there is no express restraint on the trial court's authority to hold a hearing after the sixty-day period, nor is there a penalty concerning the failure of the court or party to comply with the sixty-day directive.[189] The court also cited cases from the Georgia Court of Appeals where this rule of construction was twice applied under "virtually identical circumstances."[190] Furthermore, the condemnor is not harmed because the petition to set aside the declaration of taking must be filed within thirty days after the condemnor is served.[191]

The court also reversed the trial court's dismissal of the appellants' petition to set aside the ruling because the trial court erroneously ruled that it was the duty of the appellants to schedule a hearing within the sixty-day requirement.[192] Rather, the clear language of O.C.G.A. § 32-3-11(c)[193] places that duty on the presiding judge to "cause a rule nisi to be issued and served upon the condemnor."[194] Accordingly, the judgment of the trial court was reversed and remanded with a direction to the trial court for a hearing on the merits of the petition to set aside the taking.[195]

In *Postell v. Board of Commissioners of Houston County,*[196] Cranda Postell protested a taking of his property on the grounds that the condemnor county did not follow condemnation procedures.[197] The condemnation concerned a 101.26 acre tract of land, of which Houston

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188. *Id.* (quoting Jasper Cnty. Bd. of Tax Assessors v. Thomas, 289 Ga. App. 38, 39, 656 S.E.2d 188, 189 (2007)).

189. *Id.* at 523, 731 S.E.2d at 667-68.

190. *Id.* at 523, 731 S.E.2d at 668 (citing Fincher Rd. Invs., LLLP v. City of Canton, 314 Ga. App. 852, 736 S.E.2d 120 (2012); Cobb Cnty. v. Robertson, 314 Ga. App. 455, 744 S.E.2d 478 (2012)).

191. *Id.*

192. *Id.*

193. O.C.G.A. § 32-3-11(c) (2012).

194. 291 Ga. at 524, 731 S.E.2d at 668 (quoting O.C.G.A. § 32-3-11(c)).

195. *Id.*

196. 317 Ga. App. 898, 732 S.E.2d 303 (2012).

197. *Id.* at 898, 732 S.E.2d at 304.

County condemned a small portion to construct a road. Postell's great-grandfather died intestate in 1949, and the tract eventually transferred to Postell's mother. She executed a quit claim deed on August 22, 2011, in favor of her son Crandall.[198]

The operative condemnation petition was filed by the Houston County Board of Commissioners (the Board) on July 27, 2011. The Superior Court of Houston County issued an order of taking on August 9, 2011. On August 23, 2011, the day after he received a quit-claim deed to the property, Postell filed a motion to set aside the condemnation, alleging that he was an heir to the property, that the county failed to follow proper condemnation procedures, and that the county discriminated against him on the basis of his race and class.[199]

Pursuant to O.C.G.A. § 32-3-4(a),[200] a condemnor can initiate an in rem proceeding in the superior court of the county having jurisdiction and condemn property or interests therein so long as the condemnor tenders a payment of just and adequate compensation.[201] Furthermore, so long as the condemning authority strictly conforms to the requirements of the statute, there is no violation of the due process guarantees of the federal or state constitutions.[202] After a hearing, the trial court dismissed Postell's objection, finding that the property passed to the Board before Postell obtained a valid interest in the property. Without a valid interest in the property, Postell had no standing to protest the condemnation.[203]

Accordingly, the court affirmed the trial court's ruling, dismissing Postell's petition to set aside the taking for Postell's lack of standing, because Postell held no legal interest in the property at the time the condemnation petition was filed, and an estimate of just and adequate compensation was deposited.[204]

In *Georgia Department of Transportation v. Bae*,[205] the Baes, owners of a convenience store, sued the Georgia Department of Transportation (the DOT) in inverse condemnation for rerouting a state highway so it no longer passed near their convenience store and for dead-ending the abandoned portion of the state highway, effectively making it a one-way street. The DOT filed a motion for summary judgment. The Superior

198. *Id.* at 898, 732 S.E.2d at 303-04.
199. *Id.*
200. O.C.G.A. § 32-3-4(a) (2012).
201. *Id.*
202. *Postell*, 317 Ga. App. at 899, 732 S.E.2d at 304.
203. *Id.* at 898, 732 S.E.2d at 304.
204. *Id.* at 899, 732 S.E.2d at 304.
205. 320 Ga. App. 358, 738 S.E.2d 682 (2013).

Court of Spalding County denied that motion, finding genuine issues of fact regarding whether the owners suffered a material alteration of access to their property and whether that damage was different in kind from that suffered by the public at large.[206]

Access rights to property have been classified into two categories: general rights that are held in common with the public, and special rights that are held by virtue of the ownership of a particular piece of property.[207] Only a person who loses a special-access right can be compensated.[208] Authority from the Georgia Supreme Court provides precedent for denying compensation when a road is rerouted.[209] Compensation is available when a special right, the owner's direct access to a particular road, is modified or totally eliminated.[210] In this case, it was undisputed that the DOT did not alter the portions of the road that abutted the Baes' business, and their access to the highway was not changed.[211] Accordingly, the court of appeals reversed, holding that no compensable taking occurred when the DOT rerouted access to the state highway so that traffic no longer passed by the property and when the Department changed the road from two-way to one-way traffic without altering the direct access of the property to the public roads.[212]

IX. ZONING[213]

In *Haralson County v. Taylor Junkyard of Bremen, Inc.*,[214] the Georgia Supreme Court affirmed the Superior Court of Haralson County's grant of a writ of mandamus and ruled that Haralson County lacked authority to vest the superior court with appellate authority over the county board of zoning appeals.[215] The board of zoning appeals denied the appellee's application for a business license on the ground that the appellee had altered its business in recent years sufficient to forfeit permission to operate under a grandfather clause dating back to 1998. The superior court granted the appellee's writ of mandamus on

206. *Id.* at 358-59, 738 S.E.2d at 682-83.

207. *Id.* at 359, 738 S.E.2d at 683.

208. *Id.*

209. *Id.* at 360, 738 S.E.2d at 683 (citing Metro. Atlanta Rapid Transp. Auth. v. Fountain, 256 Ga. 732, 352 S.E.2d 781 (1987)).

210. *Id.* at 360-61, 738 S.E.2d at 684.

211. *Id.* at 359, 738 S.E.2d at 683.

212. *Id.* at 361, 738 S.E.2d at 684.

213. This section was authored by Jay Buller, associate in the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Atlanta, Georgia. Louisiana State University (B.A., 2004); Emory University School of Law (J.D., 2008).

214. 291 Ga. 321, 729 S.E.2d 357 (2012).

215. *Id.* at 321, 729 S.E.2d at 358.

the basis that the board of zoning appeals' denial of the business license was unsupported by any evidence in the record. The county appealed, arguing that the superior court should have denied the request for a writ of mandamus because appellee's appropriate remedy was to appeal the board of zoning appeals' ruling to the superior court under a county ordinance granting appellate jurisdiction to the superior court and setting a thirty-day deadline for filing appeals (which had passed when the suit was filed).[216]

The supreme court held that a writ of mandamus was the appropriate form of relief because the county lacked authority to confer appellate jurisdiction on the superior court without specific statutory authorization, and here, there was none.[217] Thus, because the superior court did not have jurisdiction over an appeal, the appropriate remedy for the appellee was to apply for a writ of mandamus, which the superior court granted, and the supreme court affirmed.[218]

In *City of Suwanee v. Settles Bridge Farm, LLC*,[219] the Georgia Supreme Court held that the requirement to exhaust administrative remedies applies even when the remaining administrative appeals would return the matter to a body that recently issued a potentially adverse decision.[220] Suwanee's city planning commission and city council amended the city's zoning ordinance to prohibit certain "large developments" unless the respective developers obtained "special-use permits" from the city planning commission and the city council. The developer, Settles Bridge Farm, LLC, did not apply for a special-use permit but, instead, filed a suit challenging the amendment as an unconstitutional regulatory taking and was granted judgment against the city after a bench trial. On appeal, the developer argued that while it chose not to apply for a special-use permit, it was not required to do so before filing suit because the application would have been futile. Specifically, the developer argued that an application for a special-use permit would have been futile because the application would have been filed with the same bodies (the city planning commission and city council) that just passed the adverse zoning ordinance amendment.[221] The supreme court held that even though the application would have gone to the same bodies that decided the zoning ordinance amendment, the issues presented in an application for a special-use permit are completely different then the

216. *Id.* at 322, 729 S.E.2d at 358-59.
217. *Id.* at 323, 729 S.E.2d at 359.
218. *Id.*
219. 292 Ga. 434, 738 S.E.2d 597 (2013).
220. *Id.* at 437, 738 S.E.2d at 599-600.
221. *Id.* at 435-38, 738 S.E.2d at 599-600.

issues presented to the commission and the council in considering whether to pass a zoning ordinance amendment.[222] Thus, even if the developer could have shown that the special-use permit likely would have been denied and that the commission and council seemed to be targeting the developer with the ordinance amendment, the developer was still required to apply for a special-use permit and receive a decision before challenging the amendment as unconstitutional.[223] The developer failed to exhaust its administrative remedies by failing to apply for a special-use permit as the city ordinance provided; thus, the litigation challenging the amendment requiring applications for special-use permits was not ripe, and the Superior Court of Gwinnett County should have dismissed it.[224]

The Georgia Court of Appeals faced a similar question in *Marietta Properties, LLC v. City of Marietta*,[225] where a developer sued, seeking a determination that it held a vested right to construct a five-story building in the historic district of Marietta, Georgia.[226] In 2008, the developer was issued a certificate of approval for the building and claimed that it incurred significant expenses relying on that certificate of approval in working toward construction of the building. In 2011, the city passed a zoning ordinance restricting the height of buildings to forty-two feet in the same historic section. While the developer had been given a certificate of approval, it had not obtained a permit to construct the building. The developer did not apply for a permit but, instead, filed suit seeking a declaration that it had a vested right to go forward with construction.[227]

The court of appeals held that the lawsuit was not ripe because the developer had not exhausted its administrative remedies.[228] It had not applied for and had not been denied a permit. The developer argued that the ordinance did not provide any administrative remedies and that it was not required to exhaust its administrative remedies when its challenge was to the threshold issue of the city's power to regulate its

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222. *Id.* at 437-38, 738 S.E.2d at 600 ("Requiring exhaustion of administrative remedies 'prevents unnecessary judicial intervention into local affairs and promotes judicial economy because [local authorities], unlike the court, have the power to grant the [zoning] relief sought.' ") (alteration in original) (quoting Powell v. City of Snellville, 266 Ga. 315, 316, 467 S.E.2d 540 (1996)); *accord* Cooper v. Unified Gov't of Athens-Clarke Cnty., 277 Ga. 360, 361, 589 S.E.2d 105, 107 (2003).

223. *Settles Bridge Farm, LLC*, 292 Ga. at 439, 738 S.E.2d at 601.

224. *Id.*

225. 319 Ga. App. 184, 732 S.E.2d 102 (2012).

226. *Id.* at 184, 732 S.E.2d at 103.

227. *Id.* at 184-86, 732 S.E.2d at 104-06.

228. *Id.* at 188, 732 S.E.2d at 106.

construction of the building in question.[229] The court of appeals held that a simple application was required because the mere existence of the ordinance could not violate any constitutional rights without it being applied to the developer.[230] Further, the developer never sought a ruling from the city regarding its authority to enforce the ordinance, and thus, there was no ripe controversy.[231]

The developer then argued that the city's overall set of actions "conclusively prove[d]" that it would not grant the developer's permit application.[232] However, the court of appeals ruled that the city's zoning ordinance provided for permit applications to be filed with the city's planning and zoning director and for appeals to be filed with the board of zoning appeals, and neither body had even received an application from the developer or issued an adverse ruling.[233] Thus, the entire lawsuit was not ripe for consideration, and the court of appeals affirmed dismissal.[234]

In *Ass'n of Guineans in Atlanta, Inc. v. DeKalb County*,[235] the Georgia Supreme Court upheld the Superior Court of DeKalb County's decision not to consider constitutional grounds for challenging a county's denial of a zoning application because the constitutional issues were not raised to the county before suit in the superior court; however, the court reversed dismissal of the association's statutory claims because the superior court applied an improper standard of review.[236] The Association of Guineans in Atlanta (the Association) applied for a special land-use permit to use a single-family residence as a "place of worship and family life center."[237] The DeKalb County Board of Commissioners denied the application, and the Association sued seeking a declaratory judgment, an injunction, and a writ of mandamus based on the Religious Land Use and Institutionalized Persons Act (RLUIPA)[238] and on constitutional religious freedom grounds.[239] The superior court dismissed the suit because the Association never raised its constitutional challenge in front of the board of commissioners and failed to make a

229. *Id.* at 187, 732 S.E.2d at 106.
230. *Id.*
231. *Id.*
232. *Id.* at 187-88, 732 S.E.2d at 106.
233. *Id.* at 188, 732 S.E.2d at 106.
234. *Id.* at 189, 732 S.E.2d at 107.
235. 292 Ga. 362, 738 S.E.2d 40 (2013).
236. *Id.* at 363-64, 738 S.E.2d at 41.
237. *Id.* at 362-64, 738 S.E.2d at 40-41 (quoting permit application).
238. 42 U.S.C. § 2000cc (2006).
239. *Ass'n of Guineans in Atlanta, Inc.*, 292 Ga. at 362, 738 S.E.2d at 41.

prima facie showing that the county violated the RLUIPA.[240] The supreme court held that while the Association told the county it planned to use the property for religious activities, it never asserted that denial of its application would be unconstitutional.[241] Placing the county on notice of planned religious activity was not sufficient to place it on notice that its actions could be challenged as unconstitutional; instead, the Association had to make its argument directly.[242]

The supreme court nonetheless reversed dismissal of the lawsuit because it held that the superior court used the wrong standard of review to evaluate the Association's statutory claim.[243] Specifically, the superior court failed to assume that all facts in the complaint were true for the purpose of considering the motion to dismiss, and the case was remanded for reconsideration of the statutory claims.[244]

X. EASEMENTS, COVENANTS, AND BOUNDARIES[245]

Easements and declarations of covenants are both viewed as contracts, and courts apply the usual rules of contract construction in interpreting both types of documents. On the other hand, actions to establish boundary lines between properties require a factual determination.

In *Hall v. Town Creek Neighborhood Ass'n*,[246] the Georgia Court of Appeals addressed whether certain homeowners association covenants authorized a developer to act in place of the association's board of directors in levying special assessments.[247] The Town Creek Neighborhood Association (the Association) filed suit against a homeowner, seeking to recover amounts allegedly owed as a special assessment levied by the Association against all homeowners in 2009 and 2010.[248] The Declaration of Covenants, Conditions, and Restrictions for Town Creek

240. *Id.* at 363, 738 S.E.2d at 41.

241. *Id.*

242. *Id.* ("[The Appellant] never mentioned the words 'constitutional' or 'unconstitutional,' either verbally or in writing, at any time during the application process before the [board of commissioners]. The assertion that [the] appellant intended to use the property as a place of worship was insufficient to give the [board of commissioners] fair notice that [the] appellant was challenging the constitutionality of the zoning ordinance or the applicable zoning classification.").

243. *Id.* at 363-64, 738 S.E.2d at 41.

244. *Id.* at 364, 738 S.E.2d at 41.

245. This section was authored by Sarah-Nell H. Walsh, associate in the firm of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Atlanta, Georgia. University of Virginia (B.A., 2001); William and Mary School of Law (J.D., 2004).

246. 320 Ga. App. 897, 740 S.E.2d 816 (2013).

247. *Id.* at 897, 740 S.E.2d at 817.

248. *Id.* at 897, 740 S.E.2d at 816-17.

clearly provided that "the [B]oard of [D]irectors shall have the power to make specific special assessments . . . in its discretion, as it shall deem appropriate."[249] The declaration of covenants also granted the developer the "exclusive authority to appoint and remove directors and officers until . . . [seven] years after the recording of the [d]eclaration."[250] Based on this language, the State Court of Fulton County granted summary judgment to the Association, finding that the declaration of covenants governing the Association was properly recorded with the homeowner's title; that the declaration authorized the Association's board of directors to impose special assessments; that under the bylaws of the Association, the developer was authorized to name the board of directors during the first seven years of the Association's existence; that because the developer was given control of the board, the developer was not mandated to appoint a board; and that the assessments imposed by the developer, while acting in lieu of the board, were legal.[251]

The court of appeals disagreed, holding that the declaration did not permit the developer to forgo appointing a board of directors and, instead, act in place of that board.[252] Applying the clear and unambiguous language of the declaration, the court ruled that "[n]either the [d]eclaration nor the [b]ylaws . . . state that the [developer] is not obligated to appoint a board or that the [developer] may act in lieu of the board."[253] The court noted, "[g]iven that no board of directors was ever appointed, there was no body that had the authority to levy the assessments at issue . . . [and], therefore, [the homeowner] was not required to pay those assessments."[254]

The court of appeals again enforced the clear and unambiguous language of the declaration of covenants, conditions, and restrictions in *Henderson v. Sugarloaf Residential Property Owners Ass'n.*[255] In this matter, the owner of two adjoining lots within a subdivision filed suit against the homeowners association for violating the declaration by requiring the homeowner to execute an affidavit before the adjoining lots could be consolidated.[256] After analyzing the plain language of the declaration, the court of appeals held that the "[a]ssociation improperly

249. *Id.* at 898, 740 S.E.2d at 817 (ellipsis in the original) (quoting the Declaration of Covenants, Conditions, and Restrictions for Town Creek).

250. *Id.* (ellipsis in the original) (quoting the Declaration of Covenants, Conditions, and Restrictions for Town Creek).

251. *Id.* at 898-99, 740 S.E.2d at 818.

252. *Id.* at 899, 740 S.E.2d at 818.

253. *Id.*

254. *Id.* at 900, 740 S.E.2d at 818.

255. 320 Ga. App. 544, 740 S.E.2d 273 (2013).

256. *Id.* at 545-46, 740 S.E.2d at 275.

conditioned the combination of the [homeowner's] lots on their execution of an unnecessary affidavit."[257]

Turning to conservation-use covenants, in *Morgan County Board of Tax Assessors v. Ward*,[258] the Morgan County Board of Tax Assessors (the Assessors) determined that a property owner breached a conservation-use covenant, and therefore was assessed a penalty.[259] In the appeal of that penalty, the court of appeals determined that the Assessors were not entitled to assess a penalty against the property owner because they failed to provide her with the mandatory notice of breach and opportunity to cure under the applicable statute.[260]

The court of appeals gave a primer in the difference between restrictive covenants and easements in *Davista Holdings, LLC v. Capital Plaza, Inc.*,[261] holding that certain provisions in an easement agreement were in fact restrictive covenants that expired by operation of law twenty years after being created.[262] Davista Holdings, LLC (Davista) took title to its property subject to certain restrictive covenants and subject to an easement agreement.[263] The court of appeals explained that "[a]n easement grants an affirmative right 'to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.'"[264] Conversely, a restrictive covenant does not convey any rights, but it "restricts the rights of a landowner by limiting the use he may make of his property."[265] Applying these legal concepts to the easement agreement, the court of appeals held that the first three sentences constitute an easement because they "confer[] a benefit on [the other party's] property and grant[] [that party] affirmative rights."[266] Conversely, the court of appeals held that the one sentence of the agreement did constitute a restrictive covenant because it create no affirmative rights and "operate[d] solely to restrict the rights of Davista, as the landowner, by limiting the use of its property."[267] The court noted that Georgia law does not favor "restrictions on private property," and "the general rule

257. *Id.* at 548, 740 S.E.2d at 277.
258. 318 Ga. App. 186, 733 S.E.2d 470 (2012).
259. *Id.* at 186, 733 S.E.2d at 470-71.
260. *Id.* at 187-89, 733 S.E.2d at 472.
261. 321 Ga. App. 131, 741 S.E.2d 266 (2013).
262. *Id.* at 131-32, 741 S.E.2d at 268.
263. *Id.* at 131, 741 S.E.2d at 268.
264. *Id.* at 134, 741 S.E.2d at 269 (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 (2000)).
265. *Id.*
266. *Id.*
267. *Id.* at 134, 741 S.E.2d at 270.

[is] that the owner of land has the right to use it for any lawful purpose."[268]

In reviewing express easements, the court of appeals again applied the normal rules of contract construction. In *Calhoun, GA NG, LLC v. Century Bank of Georgia*,[269] the court of appeals held that the plain language of the easements allowed the owner of the servient estate to relocate the easements benefitting the dominant estate.[270]

In *Wilann Properties I, LLC v. Georgia Power Co.*,[271] the court of appeals upheld Georgia Power Company's (Georgia Power) right to replace old wooden utility poles with new concrete poles capable of handling higher voltage lines.[272]

> [A] change in the manner, frequency, and intensity of use of the easement within the physical boundaries of the existing easement is permitted without the consent of the other party, so long as the change is not so substantial as to cause unreasonable damage to the servient estate or unreasonably interfere with its enjoyment.[273]

Because Georgia Power constructed the new poles in nearly the same location as the old poles within the 100-foot right-of-way granted by express easement, and such easement had never been abandoned, the court of appeals upheld the Superior Court of Floyd County's grant of summary judgment to Georgia Power.[274]

In *Camp Cherokee, Inc. v. Marina Lane, LLC*,[275] the landowners argued that they had an implied easement to access the nearby lake owned by Camp Cherokee.[276] The landowners based this implied easement on the principle set forth in *Walker v. Duncan*,[277] which states that

> [i]t is well-established that where a developer sells lots according to a recorded plat, the grantees acquire an easement in any areas set apart for their use. An easement acquired in this manner is considered an express grant, and is an irrevocable property right. The rationale is

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268. *Id.* at 133, 741 S.E.2d at 269 (quoting Charter Club on the River Home Owners Ass'n v. Walker, 301 Ga. App. 898, 899, 689 S.E.2d 344, 346 (2009)).

269. 320 Ga. App. 472, 740 S.E.2d 210 (2013).

270. *Id.* at 476, 740 S.E.2d at 213.

271. 321 Ga. App. 297, 740 S.E.2d 386 (2013).

272. *Id.* at 303, 740 S.E.2d at 391.

273. *Id.* (alteration in original) (quoting Parris Props., LLC v. Nichols, 305 Ga. App. 734, 739, 700 S.E.2d 848, 854 (2010)).

274. *Id.* at 304, 740 S.E.2d at 392.

275. 316 Ga. App. 366, 729 S.E.2d 510 (2012).

276. *Id.* at 368-69, 729 S.E.2d at 513.

277. 236 Ga. 331, 332, 223 S.E.2d 675, 676 (1976).

> that the grantees of the property have given consideration for its enhanced value in the increased price of their lots.[278]

However, in this case, the evidence showed that (a) the plat did not reflect that the lake would be set aside as a common area for the landowners, (b) the lots were not adjacent to the lake, and (c) the landowners did not pay a premium for their lots.[279] For these reasons, the court of appeals upheld the Superior Court of Habersham County's ruling that the landowners never obtained an implied easement to access the nearby lake.[280]

Because boundary issues are a question of fact and "[f]actual findings and credibility determinations by the trial court will be upheld on appeal if there appears in the record any evidence to support them,"[281] both appellate cases upholding the trial court's boundary determinations are brief.[282]

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278. *Camp Cherokee, Inc.*, 316 Ga. App. at 369, 729 S.E.2d at 513 (quoting *Walker*, 236 Ga. at 332, 223 S.E.2d at 676).

279. *Id.* at 369-70, 729 S.E.2d at 514.

280. *Id.* at 370, 729 S.E.2d at 514.

281. Dudley v. Snead, 250 Ga. 804, 805, 301 S.E.2d 480 (1983).

282. *See* Pace v. Turner, 292 Ga. 520, 520, 739 S.E.2d 384, 385 (2013) (holding that there was sufficient evidence to support the trial court's ruling with regard to a boundary line); Hudson v. Godowns, 320 Ga. App. 157, 160-61, 739 S.E.2d 462, 465 (2013) (upholding trial court's factual determination as to the location of a boundary line).