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Zoning and Land Use Law

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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 that were handed down by Georgia appellate courts between June 1, 2007 and May 31, 2008. The cases surveyed fall primarily within five categories: (1) zoning, (2) condemnation, (3) nuisance and trespass, (4) easements and restrictive covenants, and (5) miscellaneous.

I. ZONING

During the survey period, the Georgia General Assembly legislatively overruled the most controversial zoning case of last year's period, and the Georgia appellate courts decided several novel cases, ranging from the expansion of nonconforming uses, to application of the state's Anti-SLAPP statute[1] in a zoning challenge, to holding a property owner liable for negligence per se for failing to comply with certain conditions of zoning approval.

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1. O.C.G.A. § 9-11-11.1 (2000 & Supp. 2008).

A. *BBC Land & Development, Inc. v. Butts County Legislatively Overruled*

Last year's article included a discussion of *BBC Land & Development, Inc. v. Butts County*,[2] in which the Georgia Supreme Court held that a developer's vested rights to build in accordance with prior zoning requirements could not be transferred to the developer's immediate purchasers (notably builders, the principal purchasers of platted lots).[3] In a piece of legislation principally concerned with protecting railroad right-of-way rights from adverse possession claims, the 2008 Session of the Georgia General Assembly enacted legislation that effectively "overruled" the decision in *Butts County*.[4] In House Bill 1283,[5] the General Assembly added a second sentence to the Official Code of Georgia Annotated (O.C.G.A.) § 44-5-40, which now provides as follows:

> Future interests or estates are descendible, devisable, and alienable in the same manner as estates in possession. Vested interests in property stemming from the approval of land disturbance, building, construction or other development plans, permits or entitlements in accordance with a schedule or time frame approved or adopted by the local government shall be descendible, devisable and alienable in the same manner as estates in possession.[6]

The appellate courts have not had occasion to address the legislative "fix" to *Butts County*, the statute having become effective only on May 14, 2008, after signature by the Governor.

B. *Industrial Development Authority's Immunity from Zoning*

In *Effingham County Board of Commissioners v. Effingham County Industrial Development Authority*,[7] the Georgia Court of Appeals refused to address whether the Effingham County Industrial Development Authority (the Authority) was in fact immune from Effingham County's zoning regulations, holding that the Authority's petition for declaratory judgment below did not raise a justiciable controversy under the Declaratory Judgment Act.[8] The Authority alleged that it owned

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2. 281 Ga. 472, 640 S.E.2d 33 (2007).
3. *Id.* at 474, 640 S.E.2d at 35; Dennis J. Webb, Jr. et al., *Zoning and Land Use Law*, 59 MERCER L. REV. 493, 529 (2007).
4. O.C.G.A. § 44-5-40 (Supp. 2008).
5. Ga. H.R. Bill 1283, Reg. Sess. (2008).
6. O.C.G.A. § 44-5-40.
7. 286 Ga. App. 748, 650 S.E.2d 274 (2007).
8. *Id.* at 748-51, 650 S.E.2d at 275-77; O.C.G.A. §§ 9-4-1 to -10 (2007 & Supp. 2008).

approximately 4350 acres in Effingham County, none of which were "zoned for the uses intended by the Authority."[9] The petition alleged that the Authority had applied to rezone one or more of its parcels but that it and the Effingham County Board of Commissioners (the Board) "were in doubt and in need of declaration of rights with regard to the Authority's immunity from, and the Board's right to enforce, the county zoning code."[10] The trial court granted the Authority's petition.[11]

The court of appeals considered significant that the Authority, at the trial court hearing, "did not introduce any evidence to show [it] planned to use the tracts or whether its use of the tracts would conflict with the current zoning."[12] Nor did the Authority present evidence as to the status of its pending zoning applications.[13] "Thus, the facts before the trial court were as follows: the Authority owns property in Effingham County; the Authority contends it is immune from the Board's zoning regulations; and the Board disagrees."[14] The court concluded that "the Authority failed to produce any evidence . . . showing that it faces uncertainty as to a future act"[15] because the Authority "did not introduce any evidence reflecting how it [was] using or plan[ned] to use the property, and whether there [was] a conflict between its use or intended use and the Board's zoning regulations."[16] On those grounds, the court held that the trial court lacked jurisdiction over the Authority's petition and remanded the case with direction to dismiss the Authority's petition without prejudice.[17]

C. *Expansion of Nonconforming Use*

In *Henry v. Cherokee County*,[18] Henry owned a forty-three acre tract of land in Cherokee County he had purchased in the 1960s. Henry began operating an automobile salvage yard on a portion of his forty-three acres. In 1992 Cherokee County rezoned Henry's property to "light industrial," a classification that did not permit automobile salvage yards, rendering the salvage yard into a legal nonconforming use. In 1997 Henry sold fifteen acres of his property to Blankenship, leaving Henry

9. *Effingham County Bd. of Comm'rs*, 286 Ga. App. at 748, 650 S.E.2d at 276.
10. *Id.*
11. *Id.*, 650 S.E.2d at 275.
12. *Id.* at 749, 650 S.E.2d at 276.
13. *Id.*
14. *Id.*
15. *Id.* at 750, 650 S.E.2d at 276.
16. *Id.*, 650 S.E.2d at 277.
17. *Id.* at 750-51, 650 S.E.2d at 277.
18. 290 Ga. App. 355, 659 S.E.2d 393 (2008).

with twenty-eight acres. On his fifteen acres, Blankenship installed and began operating a car shredder.[19]

Cherokee County filed a petition for injunction against both Henry and Blankenship, alleging that they had unlawfully expanded the nonconforming use of the property. After a bench trial, the trial court found that Henry had violated the zoning ordinance by expanding his automobile salvage yard over his entire twenty-eight acre lot.[20]

On appeal, Henry argued that the trial court erred in finding that he had expanded his lawful nonconforming use.[21] The court of appeals turned to the provisions in the zoning ordinance governing nonconforming uses.[22] Section 13.3 of the ordinance[23] provides for the continuance of a lawful nonconforming use of land as long as the nonconforming use is not "'[e]xtended to occupy a greater area of land.'"[24] The court held that, under the terms of section 13.3, Henry's entire twenty-eight acre lot could be used for the lawful nonconforming use of an automobile salvage yard, not simply that portion of it on which Henry operated the salvage yard at the time of its being rendered nonconforming.[25]

D. Application of Anti-SLAPP Statute to Zoning Challenge

In *Hagemann v. City of Marietta*,[26] Hagemann challenged the City of Marietta's (the City) rezoning of an adjacent tract for alleged procedural irregularities. After filing its Answer, the City sought leave to amend its pleading by asserting counterclaims against Hagemann. The City alleged that it had adopted a redevelopment plan that included a Tax Allocation District (TAD), that the rezoned property was located within the TAD, that Hagemann's suit jeopardized the success of the TAD and would delay the redevelopment project, and that Hagemann had publicly stated that the purpose of his suit was to obtain zoning concessions from the owner of the rezoned property, which made his suit an abuse of process.[27]

Hagemann contended that the City's proposed counterclaims violated the Anti-Strategic Lawsuits Against Public Participation (anti-SLAPP)

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19. *Id.* at 355, 659 S.E.2d at 394-95.
20. *Id.*, 659 S.E.2d at 395.
21. *Id.* at 356, 659 S.E.2d at 395.
22. *Id.*
23. CHEROKEE COUNTY, GA., ZONING ORDINANCE § 13.3 (Municode through Aug. 7, 2007).
24. *Henry*, 290 Ga. App. at 356, 659 S.E.2d at 395 (alteration in original) (quoting CHEROKEE COUNTY, GA., ZONING ORDINANCE § 13.3).
25. *Id.* at 356-57, 659 S.E.2d at 395-96.
26. 287 Ga. App. 1, 650 S.E.2d 363 (2007).
27. *Id.* at 1-2, 650 S.E.2d at 365-66.

statute[28] because they sought to chill his right of free speech and his right to petition the government to right a wrong. Hagemann filed a motion to strike the proposed counterclaims on the grounds that (1) the claims fell under the anti-SLAPP statute; (2) the claims were not verified as required by the statute; (3) even if the claims were subsequently verified, the verification would be false; and (4) nothing in the City's proposed counterclaims demonstrated a cognizable cause of action. In response, the City filed affidavits of its mayor and attorney.[29]

The trial court granted the City's motion to add the counterclaims and then denied Hagemann's motion to strike.[30] The court of appeals granted Hagemann's application for interlocutory review.[31]

On appeal, Hagemann argued that the trial court erred by not striking the City's counterclaims as violative of the anti-SLAPP statute.[32] The anti-SLAPP statute requires that written verification under oath accompany any claim asserted against a person arising from an act "'which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances.'"[33] This verification must aver that the act forming the basis of the claim is not a privileged communication under O.C.G.A. § 51-5-7(4)[34] and that the claim is not interposed for any improper purpose such as to suppress a person's right of free speech or right to petition government.[35] Under O.C.G.A. § 51-5-7(4), a statement is privileged if it was "'made in good faith as part of an act in furtherance of the right of free speech or the right to petition government for a redress of grievances.'"[36] "A trial court may dismiss a claim that was falsely verified."[37] First, "'the court must make a threshold finding that the anti-SLAPP statute applies and that verification was required.'"[38] Second, the court must determine that

> (a) the claimant or his attorney did not reasonably believe that the claim was well grounded in fact and that it was warranted by existing

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28. O.C.G.A. § 9-11-11.1 (2006).
29. *Hagemann*, 287 Ga. App. at 2, 650 S.E.2d at 366.
30. *Id.* at 4, 650 S.E.2d at 367.
31. *Id.*
32. *Id.*
33. *Id.* (quoting O.C.G.A. § 9-11-11.1(b)).
34. O.C.G.A. § 51-5-7(4) (2000).
35. *Hagemann*, 287 Ga. App. at 4-5, 650 S.E.2d at 367 (quoting O.C.G.A. § 9-11-11.1(b)).
36. *Id.* at 5, 650 S.E.2d at 367 (quoting O.C.G.A. § 51-5-7(4)).
37. *Id.* (citing Atlanta Humane Soc'y v. Harkins, 278 Ga. 451, 452, 603 S.E.2d 289, 291 (2004)).
38. *Id.* (quoting Ga. Cmty. Support & Solutions, Inc. v. Berryhill, 275 Ga. App. 189, 191, 620 S.E.2d 178, 181 (2005)).

> law or a good faith argument for the modification of existing law, (b) the claim was interposed for an improper purpose, or (c) the defendant's statements were privileged pursuant to OCGA § 51-5-7(4).[39]

The court of appeals held that Hagemann's declaratory judgment action challenging the rezoning decision fell within the scope of the anti-SLAPP statute, and because the City's counterclaims against Hagemann were filed in response to his declaratory judgment action, the City's counterclaims were required to be verified under the anti-SLAPP statute.[40] Although the City subsequently filed verifications, the court held that the verifications were false.[41] The city attorney and mayor verified that "the counterclaims [were] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."[42] The court held that at best, the City's counterclaims alleged that Hagemann's declaratory judgment action makes him liable for the tort of abusive litigation under O.C.G.A. § 51-7-80.[43] However, the abusive litigation statute requires "'the final termination of the proceeding in which the alleged abusive litigation occurred.'"[44] Because Hagemann's declaratory judgment action had not terminated, the allegations in the City's counterclaims revealed with certainty that the City would not be entitled to relief under any state of provable facts.[45] Because the record showed that neither the city attorney nor its mayor could have reasonably believed that the counterclaims were warranted, the verifications to the contrary were false, and the trial court erred by not striking the counterclaims as violative of the anti-SLAPP statute.[46]

The City argued to the contrary that the anti-SLAPP statute was inapplicable to counterclaims.[47] The court of appeals rejected that argument, reasoning that the City's contention contradicted the plain language of the statute, which "mandates verification for *'any claim* asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances.'"[48]

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39. *Id.*, 650 S.E.2d at 368 (quoting *Berryhill*, 275 Ga. App. at 191, 620 S.E.2d at 181).
40. *Id.* at 6, 650 S.E.2d at 368.
41. *Id.*
42. *Id.*
43. *Id.*; O.C.G.A. §§ 51-7-80 to -85 (2000).
44. *Hagemann*, 287 Ga. App. at 6, 650 S.E.2d at 368-69 (quoting O.C.G.A. § 51-7-84(b) (2000)).
45. *Id.* at 6-7, 650 S.E.2d at 369.
46. *Id.* at 7, 650 S.E.2d at 369.
47. *Id.* at 7-8, 650 S.E.2d at 369.
48. *Id.* at 8, 650 S.E.2d at 370 (quoting O.C.G.A. § 9-11-11.1(b)).

In *Hagemann v. Berkman Wynhaven Associates, LP* (*Hagemann II*),[49] Wynhaven, owner of the rezoned property, sued Hagemann after Wynhaven's contract to sell its property fell through; the contract fell through at least in part because of the delay occasioned by Hagemann's suit against the City. Wynhaven asserted claims against Hagemann for tortious interference with business relations and tortious interference with contractual relations.[50] Hagemann notified Wynhaven of his intention to rely upon the anti-SLAPP statute on the grounds that "Wynhaven sought damages from him solely because he asked the court to review the City's rezoning decision."[51] In response, Wynhaven submitted affidavits, in accordance with O.C.G.A. § 9-11-11.1(b), that purported to verify that its claims were well grounded and were not interposed for any improper purpose.[52] Hagemann moved to dismiss the complaint as violative of the anti-SLAPP statute. Wynhaven subsequently dismissed without prejudice.[53]

Following dismissal, Hagemann filed a motion for attorney fees and expenses in accordance with O.C.G.A. § 9-11-11.1(f) on the grounds that Wynhaven's verifications filed in support of its complaint were false. The trial court denied the request for attorney fees, and Hagemann appealed.[54]

Turning to the language of the anti-SLAPP statute, the court of appeals noted that O.C.G.A. § 9-11-11.1(b) provides that

> [i]f a claim is verified in violation of [the anti-SLAPP statute], the court, upon motion or upon its own initiative, *shall* impose upon the persons who signed the verification, a represented party, or both an appropriate sanction which may include dismissal of the claim and an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.[55]

After concluding that Hagemann's suit against the City was conduct covered by the anti-SLAPP statute, the court analyzed whether the verifications filed by Wynhaven were false.[56] Because the court had previously held that, "'as a matter of law, a claim for tortious interfer-

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49. 290 Ga. App. 677, 660 S.E.2d 449 (2008).
50. *Id.* at 679, 660 S.E.2d at 452.
51. *Id.*
52. *Id.*
53. *Id.* at 680, 660 S.E.2d at 453.
54. *Id.*
55. *Id.* at 682, 660 S.E.2d at 454 (alterations in original) (quoting O.C.G.A. § 9-11-11.1(b)).
56. *Id.* at 681-82, 660 S.E.2d at 453-54.

ence with contractual relations cannot be predicated upon an allegedly improper filing of a lawsuit,'"[57] the court concluded that Wynhaven would not be entitled to relief under any state of provable facts asserted in support of its claims.[58] As a result, the verifications filed in conjunction with the complaint (averring that the claimant or his attorney reasonably believed that the claim was warranted by existing law) were false.[59] Concluding that the verifications were false, the court reasoned that the language of O.C.G.A. § 9-11-11.1(b) required the trial court to impose a sanction (the exact nature of which is left to the discretion of the trial court).[60]

E. Failure to Comply with Zoning Conditions and Negligence Per Se

In *Combs v. Atlanta Auto Auction*,[61] Combs brought a wrongful death and personal injury action against Atlanta Auto Auction (Auto Auction) as a result of a train-automobile collision that occurred on Auto Auction's property. Before this accident and the ensuing lawsuit, Auto Auction sought rezoning of its property in order to build a new building. The Fulton County Board of Commissioners granted the rezoning request, but the grant was subject to Auto Auction's compliance with two conditions. First, Auto Auction had to pay for the installation of traffic signals at the intersection of the public road servicing Auto Auction and the railroad crossing; second, Auto Auction had to contact the Fulton County Director of Public Works before applying for a land disturbance permit, meet with the Fulton County Traffic Engineer, and submit a copy of the results of those meetings. Following rezoning, Auto Auction constructed its new facility without fulfilling either of the two conditions of zoning approval. Auto Auction opened its new facility without first obtaining a certificate of occupancy.[62]

Combs was an employee of Auto Auction. Shortly after Auto Auction opened its new facility, a friend of Combs drove her to work and then left to take Combs's three children, who were in the car, to school. When crossing the railroad tracks at the Auto Auction property, the car was hit by a train, killing two of Combs's children and severely injuring the third.[63]

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57. *Id.* at 682, 660 S.E.2d at 454 (quoting Phillips v. MacDougald, 219 Ga. App. 152, 155, 464 S.E.2d 390, 395 (1995)).

58. *Id.*

59. *Id.*

60. *Id.* at 683, 660 S.E.2d at 455.

61. 287 Ga. App. 9, 650 S.E.2d 709 (2007).

62. *Id.* at 9-10, 650 S.E.2d at 712-13.

63. *Id.* at 10, 650 S.E.2d at 713.

Combs sued CSX Railroad, the Georgia State Department of Transportation, Fulton County, and Auto Auction. Combs alleged that Auto Auction's negligence was a proximate cause of the accident. Auto Auction moved for summary judgment on the ground that as a matter of law, its failure to comply with the conditions of zoning approval could not give rise to a claim against it. The trial court granted summary judgment to Auto Auction, concluding that the condition of zoning approval which required Auto Auction to fund the traffic signals at the crossing violated state law governing railroad crossing improvements, and thus Auto Auction's failure to comply with the condition could not be considered negligence.[64]

The court of appeals rejected the trial court's reasoning, concluding that the condition of zoning approval did not run afoul of any state law and that the condition represented a legitimate exercise of the zoning power.[65] After concluding that the zoning conditions were legal, the court turned to the question of whether Auto Auction's failure to comply therewith gave rise to a claim of negligence per se.[66]

The court noted that under Georgia law, the violation of a statute, ordinance, or mandatory regulation may constitute negligence per se.[67] Inasmuch as the zoning conditions imposed an affirmative duty upon Auto Auction, the court reasoned that its failure to undertake that duty could constitute negligence per se.[68] The court then analyzed whether Auto Auction's failure to comply with the zoning conditions constituted negligence per se as to Combs and her children by determining (1) whether Combs and her children fell within the class of persons the conditions were intended to protect and (2) whether the harm complained of was the harm the conditions were designed to prevent.[69] First, because Auto Auction's property was the only one serviced by the road, the court concluded that the traffic-related zoning conditions were meant to protect those who were required to navigate the railroad crossing when traveling to and from Auto Auction.[70] Second, the court concluded that the accident at issue was precisely the type of danger the zoning conditions were intended to prevent.[71] Therefore, Auto Auction's

64. *Id.* at 10-11, 650 S.E.2d at 713-14.

65. *Id.* at 11-12, 650 S.E.2d at 714.

66. *Id.* at 12, 650 S.E.2d at 714.

67. *Id.* (citing Hubbard v. Dep't of Transp., 256 Ga. App. 342, 349-50, 568 S.E.2d 559, 567 (2002)).

68. *Id.* (citing O.C.G.A. § 51-1-6 (2000)).

69. *Id.* (citing Rabinovitz v. Accent Rent-A-Car, Inc., 213 Ga. App. 786, 788, 446 S.E.2d 244, 246 (1994)).

70. *Id.*

71. *Id.* at 12-13, 650 S.E.2d at 714.

failure to comply with the zoning conditions constituted negligence per se, resulting in a jury question regarding causation.[72]

Combs further argued that Auto Auction's opening of its new facility without a certificate of occupancy also constituted negligence per se.[73] The court agreed that Auto Auction's operation of its facility without a certificate of occupancy constituted negligence per se as to Combs, but not as to her children because the law requiring a certificate of occupancy is designed to protect those occupying the building.[74] As an employee, Combs fell within that class of persons, but her children did not.[75] The court further held, however, that Combs could not prove as a matter of law that Auto Auction's illegal operation of its facility was a proximate cause of the underlying accident.[76] While the accident could be properly viewed as a "natural and probable consequence" of Auto Auction's failure to comply with the conditions of zoning approval, which required traffic signals at the crossing, the accident was not a natural and probable consequence of Auto Auction's operation of its new facility without a certificate of occupancy.[77]

Finally, the court held that Combs's ordinary negligence claim against Auto Auction (for failing to comply with the zoning conditions) stated a cause of action.[78] The traffic-related zoning conditions, to which Auto Auction expressly agreed, were intended for the benefit of those motorists traversing the railroad crossing at issue.[79] Therefore, whether Auto Auction exercised reasonable care in fulfilling its obligations and whether the lack of any care was a proximate cause of the underlying accident were jury questions.[80]

II. CONDEMNATION

During the survey period, Georgia appellate courts decided several condemnation cases dealing with compensable interest, expert valuation, procedural, evidentiary, and other issues. Some of the more interesting and instructional cases are discussed below.

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72. *Id.* at 13, 650 S.E.2d at 714, 715.
73. *Id.*, 650 S.E.2d at 715.
74. *Id.*
75. *Id.*
76. *Id.* at 13-14, 650 S.E.2d at 715.
77. *Id.* at 14, 650 S.E.2d at 715.
78. *Id.* at 17, 650 S.E.2d at 717.
79. *Id.*, 650 S.E.2d at 718.
80. *Id.* at 17-18, 650 S.E.2d at 718.

A. *Loss of Contract Conferring a Future Right or Interest Not Compensable*

In *Coastal Water & Sewerage Co. v. Effingham County Industrial Development Authority*,[81] a county industrial development authority (Authority) condemned approximately 2600 acres of land owned by International Paper Realty Corporation. Before the land was condemned, the owner had contracted to sell the property to Research Forest Associates, LLC. This prospective purchaser then entered into a contract with Coastal Water and Sewerage Company, anticipating that the company would provide water and sewer services for the property when purchased.[82]

Thereafter, the Authority filed a condemnation action against both the property owner and the prospective purchaser. The water and sewer company intervened in the condemnation action based on its services contract involving the property. After an evidentiary hearing, a special master entered an award for the fair market value of the condemned property to the owner and the purchaser, but denied the water and sewer company any compensation based on its contract. The company appealed the award to the superior court.[83] The superior court denied the appeal and found that the company "could not recover for business losses under its contract since it was not operating a business on the property at the time of the condemnation proceedings and since its claim was speculative."[84]

The Georgia Court of Appeals noted that "'[a] condemnee may recover business losses . . . if it operated a business on the property, if the loss is not remote or speculative, and if the property is unique.'"[85] However, because the company's claim was for remote, speculative, and anticipated profits based on a planned but incomplete contract for services, the appellate court agreed with the trial court that the anticipated losses did not result from government action on the date of the taking and were therefore not compensable.[86]

The company sought to avoid this result by arguing that it did not seek damages under the business loss rule but instead sought damages

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81. 288 Ga. App. 422, 654 S.E.2d 236 (2007).

82. *Id.* at 423, 654 S.E.2d at 237.

83. *Id.*, 654 S.E.2d at 237-38.

84. *Id.*, 654 S.E.2d at 238.

85. *Id.* (ellipsis in original) (internal citations & quotation marks omitted) (quoting Davis Co. v. Dep't of Transp., 262 Ga. App. 138, 139, 584 S.E.2d 705, 707 (2003)).

86. *Id.* at 424, 654 S.E.2d at 238.

based on the Authority's condemnation of its contractual rights.[87] The court of appeals started with the premise that a contract is a property right which may be condemned for just and adequate compensation.[88] But then it clarified that "'[i]f . . . a contract or other property is *taken* for public use, the Government is liable; but, if injured or destroyed by lawful action, without a taking, the Government is not liable.'"[89] The court then reasoned that in this case, the Authority did not appropriate the water services contract for public use; it took the land for industrial purposes and thus rendered the performance of the company's contract impossible.[90] The contract merely ended, and the company was not entitled to compensation.[91]

Moreover, the court of appeals held that "a contract is not compensable when it merely confers a *future* right or interest not being enforced at the time of the condemnation proceedings."[92] At the time of the condemnation, the water and sewer services company had not performed any services.[93] The contract was merely executory and conferred only contingent future rights.[94]

B. Construction of Sidewalk in City's Right-of-Way Not Compensable Taking

In *City of Atlanta v. Sig Samuels Laundry & Dry Cleaning*,[95] a business brought an action for an injunction to prevent the City from installing a sidewalk in the City's right-of-way. The business, which used the right-of-way area for additional parking, claimed the sidewalk constituted a taking for which compensation was required. The trial court agreed and ordered the City to compensate the business, the measure of damages being any diminution in the market value of the property caused by the interference. The City appealed.[96]

The Georgia Supreme Court reversed the trial court, holding that "a compensable taking does not occur where the complained of government activity merely interferes with a property owner's desire to use a city

87. *Id.*
88. *Id.* (citing DeKalb County v. United Family Life Ins. Co., 235 Ga. 417, 419, 219 S.E.2d 707, 709 (1975)).
89. *Id.* (ellipsis in original) (quoting Omnia Commercial Co. v. United States, 261 U.S. 502, 510 (1923)).
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. 282 Ga. 586, 652 S.E.2d 533 (2007).
96. *Id.* at 586, 652 S.E.2d at 534.

right-of-way for additional parking."[97] "Indeed, 'a property right to park in a city [right-of-way] does not exist either as an incident of the right of access or independently of that right.'"[98] The record showed that the sidewalk construction would not impair any easement of access to and from the business and would not result in a continuing nuisance.[99]

C. *Premature Attempt to Seek Public Use Determination*

In *Fox v. City of Cumming*,[100] the City sent a letter to a property owner referencing its eminent domain power and providing notice that it would be conducting a survey for the purpose of designing sewer facilities on part of the property owner's land. The property owner filed an action seeking a temporary injunction to prevent the City from surveying her property and also seeking a determination under O.C.G.A. § 22-1-11,[101] which is part of the Landowner's Bill of Rights and Private Property Protection Act,[102] regarding whether the City's sewer facilities plan was a lawful exercise of eminent domain for a public use. The City filed a motion to dismiss, and the parties entered a consent order allowing the survey to occur. Then, the trial court conducted a hearing on the remaining issue. The trial court dismissed the action ruling that there was no justiciable controversy under O.C.G.A. § 22-1-11 because the City had not filed a condemnation action.[103]

The court of appeals affirmed the trial court's dismissal.[104] In doing so, it reviewed the language of O.C.G.A. § 22-1-11, which provides,

> Before the vesting of title in the condemnor and upon motion of the condemnee, or within ten days of the entry of the special master's award by entry of exception to the case, the court shall determine whether the exercise of the power of eminent domain is for a public use and whether the condemning authority has the legal authority to exercise the power of eminent domain and may stay other proceedings of the condemnation pending the decision of the court. The condemning authority shall bear the burden of proof by the evidence presented that the condemnation is for a public use as defined in Code Section 22-1-1. Nothing in this Code section shall be construed to require the

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97. *Id.* at 587, 652 S.E.2d at 534.

98. *Id.* (alteration in original) (quoting Metro. Atlanta Rapid Transit Auth. v. Datry, 235 Ga. 568, 576, 220 S.E.2d 905, 911 (1975)).

99. *Id.*

100. 289 Ga. App. 803, 658 S.E.2d 408 (2008).

101. O.C.G.A. § 22-1-11 (Supp. 2008).

102. 2006 Ga. Laws 39.

103. *Fox*, 289 Ga. App. at 803, 658 S.E.2d at 409.

104. *Id.* at 805, 658 S.E.2d at 410.

> condemnee to seek or obtain a special master's award prior to a hearing or decision by the court under this Code section.[105]

Then, the court held that "[b]ased on a reading of the plain language of this Code section, . . . it becomes evident that this Code section applies to proceedings that are already pending."[106] Otherwise, the language pertaining to "upon motion of the condemnee" and "[b]efore the vesting of title in the condemnor" would be rendered meaningless.[107] Thus, because the City had not initiated a condemnation action against the land owner, the court held that the City had not taken any action reviewable under O.C.G.A. § 22-1-11.[108] In so holding, the court expressly stated that its ruling limited the application of O.C.G.A. § 22-1-11 to the present facts and that the court was not addressing the viability of other remedies that might be available to the property owner.[109]

D. Untimely Appeal of Special Master Award to Superior Court

In *Rutland v. Georgia Power Co.*,[110] the power company condemned an easement for electric transmission lines over the property owner's land. The trial court referred the case to a special master, who awarded $14,956 to the property owner for the fair market value of the condemned easement. The property owner appealed the award to the superior court. The trial court, however, dismissed the appeal as untimely.[111] The court of appeals affirmed the trial court's dismissal.[112]

The special master made the award on July 28, 2005. The award was filed with the trial court on July 29, 2005. However, the special master did not serve the award on the parties. After calling the special master and receiving a copy of the award via facsimile on August 10, 2005, the property owner filed an appeal of the award on August 11, 2005. The power company moved to dismiss the appeal as untimely, citing O.C.G.A. § 22-2-112,[113] which at the time required that any appeal of a special master's award be filed within ten days after the award is filed with the

105. *Id.* at 803-04, 658 S.E.2d at 409 (quoting O.C.G.A. § 22-1-11).
106. *Id.* at 804, 658 S.E.2d at 409-10 (internal citation and footnote omitted).
107. *Id.*, 658 S.E.2d at 410 (quoting O.C.G.A. § 22-1-11).
108. *Id.* at 804-05, 658 S.E.2d at 410.
109. *Id.* at 805, 658 S.E.2d 410.
110. 286 Ga. App. 14, 648 S.E.2d 436 (2007).
111. *Id.* at 14-15, 648 S.E.2d at 437-38.
112. *Id.* at 14, 648 S.E.2d at 437.
113. O.C.G.A. § 22-2-112 (Supp. 2008).

superior court.[114] The trial court granted the motion and dismissed the appeal.[115]

The property owner appealed the ruling to the court of appeals, asserting that the ten-day time for filing an appeal under O.C.G.A. § 22-2-112 cannot begin to run until after a party has been served with the special master's award.[116] The court examined the issue of "whether the special master's failure to serve the award on the parties at the time he filed it with the superior court tolled the time for filing an appeal of that award."[117] First, the court noted that the statute as written sets forth no exceptions to the ten-day period and that the court of appeals has consistently held that an appeal not filed within the ten-day period is untimely and subject to dismissal.[118]

Next, the court examined the concepts of actual, implied, and constructive notice to determine whether the property owner's constitutional due process rights were violated.[119] In doing so, the court stated that "[a]lthough the Special Master Act does not require that a party receive actual notice of the filing of a special master's award, it does provide both constructive and implied notice of the same."[120] Implied notice is found in O.C.G.A. § 22-2-110(a),[121] which requires the special master to file the award with the superior court within three days after conducting the hearing and "'is notice as a matter of law'" to all parties that the award will be filed within the required time and that any appeal to the superior court more than ten days after its filing is too late.[122] The court held that this statutory language provides information sufficient to put a party on inquiry that if followed with due diligence, would alert the party of the award filing.[123] Similarly, the court held that "the filing of the award with the superior court, standing

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114. *Rutland*, 286 Ga. App. at 15 n.1, 648 S.E.2d at 438 n.1. About six months after this action was filed, the Georgia General Assembly amended O.C.G.A. § 22-2-112 to provide that appeals of special master awards must be filed within ten calendar days from the service of the award, plus three additional days for mailing of the award. *Id.* The amendment applies to condemnation actions filed on or after February 9, 2006, when title has not vested in the condemning authority. *Id.* (quoting 2006 Ga. Laws 39, 56).

115. *Id.* at 14, 648 S.E.2d at 438.

116. *Id.*

117. *Id.*, 648 S.E.2d at 437.

118. *Id.* at 15, 648 S.E.2d at 438.

119. *See id.* at 16, 648 S.E.2d at 439.

120. *Id.*

121. O.C.G.A. § 22-2-110(a) (1981 & Supp. 2008).

122. *Rutland*, 286 Ga. App. at 16, 648 S.E.2d at 439 (quoting Wilson v. City of Waycross, 130 Ga. App. 253, 253, 203 S.E.2d 301, 301 (1973)).

123. *Id.* (quoting Hamilton v. Edwards, 245 Ga. 810, 812, 267 S.E.2d 246, 248 (1980)).

alone, provides a party with constructive notice of that fact."[124] Therefore, the court of appeals instructed that a party has the duty to exercise diligence in determining when the award is filed.[125]

E. Landowner Not Entitled to Regain Condemned Property

In *William E. Honey Business Interest, LLLP v. Georgia Power Co.*,[126] a landowner brought an action to recover possession of property over which an electric utility company had acquired an easement to construct power lines. The utility had condemned the easement more than twenty years prior but had never constructed the power lines. On cross motions for summary judgment, the trial court ruled that the utility was entitled to retain the easement.[127]

On appeal, the landowner asserted that the property should revert to it under O.C.G.A. § 22-2-85,[128] which provides in pertinent part that "'[w]henever the condemnor ceases using the property taken for the purpose of conducting its business, the property shall revert to the person from whom taken, his heirs or assigns.'"[129] A majority of the court of appeals agreed that the language in *City of Atlanta v. Fulton County*[130] provides a test for when and how to apply O.C.G.A. § 22-2-85:

> [The language] states that the above Code section applies when the land has been (1) "abandoned" for the purposes for which it was taken, and (2) "the [condemnor] does not intend to use such land for such purposes in the future," and (3) "the use of the condemned property in the business to be served permanently ceases" and "is not to be used for other purposes."[131]

In summary, the majority determined the proper test as to whether the land will revert to the person from whom it was taken is "whether the land has been abandoned, whether the condemnor does not intend to use

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124. *Id.*

125. *Id.* at 17, 648 S.E.2d at 439.

126. 291 Ga. App. 44, 661 S.E.2d 203 (2008).

127. *Id.* at 44, 661 S.E.2d at 204.

128. O.C.G.A. § 22-2-85 (1981).

129. *William E. Honey Bus. Interest*, 291 Ga. App. at 44, 661 S.E.2d at 204 (quoting O.C.G.A. § 22-2-85)).

130. 210 Ga. 784, 82 S.E.2d 850 (1954).

131. *William E. Honey Bus. Interest*, 291 Ga. App. at 45, 661 S.E.2d at 204-05 (second alteration in original) (quoting City of Atlanta v. Fulton County, 210 Ga. at 786, 82 S.E.2d at 853).

the land for such purpose in the future, and whether the use of the condemned property has permanently ceased."[132]

The same majority of the court of appeals also held there was no evidence in the record that the utility had physically abandoned the easement or permanently ceased to use the easement.[133] Instead, the majority opined that the evidence in the record showed that the utility had cleared the easement area, maintained the easement area, and planned to construct the lines between 2010 and 2020.[134]

Of note, though, in a dissenting opinion, a minority of the court held that the easement property should have reverted to the landowner.[135] The minority did not agree with the "test" derived from *City of Atlanta v. Fulton County*.[136] Instead, the minority asserted that the "relevant inquiry must focus both on how much time has elapsed since the condemnor acquired the easement but failed to use it for the condemned purpose *and* what the evidence shows concerning future use of the property."[137] The minority would have reversed the trial court because more than twenty years had elapsed since the property had been condemned and because there was only an indefinite possibility that the property would be used for the transmission lines in the future.[138] Finally, the minority noted that recently enacted O.C.G.A. § 22-3-162[139] and § 22-1-2(c)[140] provide, respectively, that construction of electric transmission lines must be commenced within either twelve or fifteen years, depending on the circumstances, or additional compensation payments to the owner may be required, and that property owners may obtain a reconveyance of the condemned property or additional compensation if the property is not put to public use within five years.[141]

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132. *Id.*, 661 S.E.2d at 205.

133. *Id.*

134. *Id.*

135. *Id.* at 46, 661 S.E.2d at 205 (Adams, J., dissenting).

136. *Id.* at 47, 661 S.E.2d at 206; City of Atlanta v. Fulton County, 210 Ga. 784, 82 S.E.2d 850 (1954).

137. *William E. Honey Bus. Interest*, 291 Ga. App. at 47, 661 S.E.2d at 206 (Adams, J., dissenting).

138. *Id.*

139. O.C.G.A. § 22-3-162 (Supp. 2008).

140. O.C.G.A. § 22-1-2(c) (Supp. 2008).

141. *William E. Honey Bus. Interest*, 291 Ga. App. at 47 n.3, 661 S.E.2d at 207 n.3 (Adams, J., dissenting) (citing O.C.G.A. § 22-3-162; O.C.G.A. § 22-1-2(c)).

F. Admissibility of Expert Value Testimony and Other Potential Uses of Property

Three cases decided during the survey period address issues concerning the admissibility of expert testimony relating to value and other potential uses of the property.

In *Woodland Partners Limited Partnership v. Department of Transportation*,[142] the Georgia Department of Transportation (DOT) condemned in 2002 a 0.913 acre strip of a larger 800 acre tract of unimproved land in order to widen a highway. At trial, the parties' valuation experts all agreed that the highest and best use of the property taken was for commercial development. But the property owner contested the DOT's estimation of just and adequate compensation. Unhappy with the judgment entered upon the jury verdict, the property owner appealed, challenging various evidentiary rulings by the trial court.[143]

The property owner asserted that the trial court erred by allowing testimony by the DOT's expert witness because he was not qualified as an expert in development or mining operations and permits. However, the evidence at trial showed that the expert witness held a master's degree in real estate, had been licensed as a real estate appraiser for fifteen years, had been appraising properties in Georgia for twelve years, had specialized in appraising commercial properties, held a real estate broker's license, and owned another company that focused on developing apartments. Additionally, for the five years preceding trial, the expert witness had become familiar with the road project at issue in the case, had provided his opinion of just and adequate compensation in approximately thirty-five condemnation cases, and had reviewed over fifty commercial sales that had occurred since 1995.[144]

The court of appeals noted that "[w]hether a witness is qualified to give his opinion as an expert is a question for the trial court, which determination will not be disturbed absent manifest abuse."[145] The court also noted that "[t]he possession of special knowledge in a field derived from experience, study, or both makes one an expert."[146] Additionally, the court stated,

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142. 286 Ga. App. 546, 650 S.E.2d 277 (2007).

143. *Id.* at 546, 650 S.E.2d at 279.

144. *Id.* at 546-47, 650 S.E.2d at 279-80.

145. *Id.*, 650 S.E.2d at 279 (citing Dep't of Transp. v. Great S. Enters., 137 Ga. App. 710, 712, 225 S.E.2d 80, 83 (1976)).

146. *Id.* at 547, 650 S.E.2d at 279 (citing *In re* C.W.D., 232 Ga. App. 200, 206, 501 S.E.2d 232, 238 (1998)).

> "Provided an expert witness is properly qualified in the field in which he offers testimony, and the facts relied upon are within the bounds of the evidence, whether there is sufficient knowledge upon which to base an opinion . . . goes to the weight and credibility of the testimony, not its admissibility."[147]

Applying these standards, and given the experience and study of the DOT's expert witness, the court of appeals ruled that the trial court did not manifestly abuse its discretion in admitting the opinion testimony of the DOT's valuation expert, to be given such weight as the jury saw fit.[148]

The court also ruled that the trial court did not abuse its discretion in controlling the nature and scope of the cross-examination of another DOT expert.[149] The court rejected the argument that the trial court's ruling impermissibly barred the property owner from exploring how the expert had arrived at his opinion of value because the witness had already detailed the methodology he employed to determine just and adequate compensation.[150] Specifically, the record showed that on direct examination, the witness testified that he inspected the property and reviewed its zoning, lack of sewer service, availability of utility services, terrain, mining permit, and mining operations.[151] He also conducted market data research, including the sales of similar properties in the area around the time of the taking.[152]

Further, the court of appeals held that the trial court did not err by striking certain valuation testimony of the property owner's expert.[153] The court held that the expert witness's valuation was without sufficient foundation because he valued the whole tract of raw land as if it had been divided into one-acre to one-and-one-half-acre tracts of land that were ready for sale to end users for immediate construction of commercial buildings.[154] Quoting its prior holding in *Department of Transportation v. Benton*,[155] the court explained,

> "The fact that the property is merely adaptable to a different use is not in itself a sufficient showing in law to consider such different use as a

147. *Id.* at 548, 650 S.E.2d at 280 (quoting Metro. Atlanta Rapid Transit Auth. v. Green Int'l, Inc., 235 Ga. App. 419, 422, 509 S.E.2d 674, 677 (1998)).
148. *Id.* at 547, 650 S.E.2d at 280.
149. *Id.* at 550, 650 S.E.2d at 281.
150. *Id.* at 549, 650 S.E.2d at 281.
151. *Id.* at 549-50, 650 S.E.2d at 281.
152. *Id.*
153. *Id.* at 552-53, 650 S.E.2d at 283.
154. *Id.* at 552, 650 S.E.2d at 283.
155. 214 Ga. App. 221, 447 S.E.2d 159 (1994).

> basis for compensation; it must be shown that such use of the property is so reasonably probable as to have an effect on the present value of the land."[156]

Further, "'[e]ven where a different use is shown to be reasonably probable, the jury cannot evaluate the property as though the new use were an accomplished fact; the jury can consider the new use only to the extent that it affects the market value *on the date of taking.*'"[157] Thus, it is error to admit expert testimony that values condemned land as if it were already subdivided, fully developed, and ready for sale on the retail market.[158] An expert's testimony is properly limited to the value of the land on the date of the taking based upon its enhanced value because of its adaptability for another use.[159]

In *Collins & Associates v. Henry County Water & Sewerage Authority*,[160] the court of appeals also affirmed the striking of expert testimony under the reasoning of *Benton*, in which the expert valued property as if it had already been subdivided for development, even though the property was undeveloped and was several miles away from a water source and utilities.[161]

In *Department of Transportation v. Patten Seed Co.*,[162] the court of appeals again examined the question of whether certain expert valuation testimony was admissible when the evidence showed that the property at issue was adaptable for another use.[163] Citing *Georgia Transmission Corp. v. Barron*,[164] the court recited the same legal standards set forth in *Benton* noted above.[165] However, in *Patten Seed*, the court held that the expert valuation testimony was properly admitted because it was not wholly speculative.[166]

The county zoning administrator testified it was highly likely that the property would have been rezoned commercial at the time of taking

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156. *Woodland Partners*, 286 Ga. App. at 550, 650 S.E.2d at 282 (quoting *Benton*, 214 Ga. App. at 222, 447 S.E.2d at 161).

157. *Id.* (quoting *Benton*, 214 Ga. App. at 222, 447 S.E.2d at 161).

158. *Id.* at 551, 650 S.E.2d at 282 (quoting *Benton*, 214 Ga. App. at 222, 447 S.E.2d at 161).

159. *Id.* (quoting *Benton*, 214 Ga. App. at 222, 447 S.E.2d at 161).

160. 290 Ga. App. 782, 661 S.E.2d 568 (2008).

161. *Id.* at 785, 661 S.E.2d at 572 (citing *Benton*, 214 Ga. App. at 221-23, 447 S.E.2d at 160-62).

162. 290 Ga. App. 532, 660 S.E.2d 30 (2008).

163. *Id.* at 532-37, 660 S.E.2d at 31-35.

164. 255 Ga. App. 645, 566 S.E.2d 363 (2002).

165. *Patten Seed*, 290 Ga. App. at 532-33, 660 S.E.2d at 32 (quoting *Ga. Transmission Corp.*, 255 Ga. App. at 647, 566 S.E.2d at 365).

166. *Id.* at 534, 660 S.E.2d at 33.

given its location beside or across from properties at a highway interchange that were zoned commercial. The zoning administrator also testified that it would have been reasonable to grant a variance from required setbacks, and the mayor and county attorney testified that the city legally could have and absolutely would have extended water and sewer services to the property. Given that the property reasonably could be adapted to commercial uses, the property owner's expert witnesses considered sales of comparable commercial properties that occurred close to the time of taking, including one that had recently been farmland. In evaluating the comparables, the experts considered factors such as location, traffic counts, highway frontage, shape, topography, utility availability, and zoning and development costs and risks, and the experts adjusted the comparables accordingly. Based on the foregoing, the property owner's experts testified that the condemned property, which was zoned agricultural, had a higher value at the time of taking based on evidence that a commercial use was reasonably feasible.[167]

III. NUISANCE AND TRESPASS

The nuisance jurisprudence of the Georgia Supreme Court and the Georgia Court of Appeals over the survey period focused on surface water invasions and uses of property that could result in a nuisance.

A. Surface Water Invasion

1. Accrual of Nuisance Cause of Action. In *Kleber v. City of Atlanta*,[168] the plaintiffs purchased an Atlanta home in 1997 that had been built seven years earlier. Shortly thereafter, they notified Norfolk Southern Corporation (Norfolk) and the City of Atlanta that there was inadequate drainage of their property during heavy rain. Almost six years later, the plaintiffs' home experienced substantial flood damage from a mixture of stormwater and raw sewage. After seeking relief from Norfolk and the City with no satisfaction, they filed suit more than seven years after their first notice of the drainage problem. The plaintiffs asserted that Norfolk was liable for the nuisance because of an inadequate drainage pipe that ran under a Norfolk train track with an inlet near their property line. They also claimed that the City was liable for its poor construction and maintenance of either the storm or sewer drainage system, or both.[169]

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167. *Id.* at 533-34, 660 S.E.2d at 32-33.
168. 291 Ga. App. 146, 661 S.E.2d 195 (2008).
169. *Id.* at 146-47, 661 S.E.2d at 196-97.

After a special master reviewed the cause of the flooding, he determined that the plaintiffs' "property lies in a small basin at the bottom of a larger drainage basin that contributes runoff to it and through it."[170] Specifically, he found that the thirty-six-inch pipe that runs under Norfolk's tracks ultimately drains the basin and is not large enough to do so without causing a backup or ponding of stormwater in the basin. He also found that the City may have tied drainage pipes into Norfolk's pipe, an arrangement Norfolk's pipe was not designed to handle. The special master noted that while Norfolk's pipe may have been sufficient to drain the basin decades ago when it was constructed, increased development had led to more impervious surfaces and increased runoff. Further, there had been a change in the standard sizing of drainage pipes over the years. Despite the findings, the trial court granted summary judgment to the defendants on the plaintiffs' nuisance claims based on the statute of limitations. The trial court found the nuisance permanent in nature, which meant that the limitation period began to run in 1997 when the plaintiffs first had notice of the flooding problem.[171]

On appeal, the plaintiffs argued that the trial court erred by finding their action barred by the four-year statute of limitations.[172] The Georgia Supreme Court noted that confusion existed surrounding when a nuisance, which is continuing by its nature, is considered permanent.[173] This issue arises in two situations: in suits filed within four years of the creation of the nuisance in order to determine "'whether the plaintiff may recover prospective as well as past damages' and in suits filed *more than four years after* the creation of the nuisance in order to determine 'whether the action for damages is barred by the statute of limitation.'"[174] In applying the previous caselaw and the Restatement of Torts[175] to the facts of this case, the court held that the railroad's activities were public and the nuisance was abatable because the City undertook to maintain a drainage system that caused repeated flooding to a property.[176] If a nuisance is not abatable, the statute of limitations begins to run when a plaintiff first becomes aware of the problem, but if a nuisance is abatable, the plaintiff can seek damages for the four

170. *Id.* at 147, 661 S.E.2d at 197 (internal quotation marks omitted).
171. *Id.*
172. *Id.* at 148, 661 S.E.2d at 197.
173. *Id.*
174. *Id.* (quoting Cox v. Cambridge Square Towne Houses, 239 Ga. 127, 127, 236 S.E.2d 73, 74 (1977)).
175. RESTATEMENT (SECOND) OF TORTS § 930 (1977).
176. *Kleber*, 291 Ga. App. at 148-50, 661 S.E.2d at 198-99.

years prior to the suit and possibly future damages if the nuisance continues.[177] Therefore, the court reversed the trial court, holding that the homeowners' claims were not barred by the statute of limitations, but they could only seek damages for the most recent four years.[178] Then the court "disapproved" previous holdings from other related cases from the court of appeals on the above reasoning.[179] Lastly, the court reversed the grant of summary judgment for the City, which argued that it had neither created or maintained the nuisance, because the special master noted that the thirty-six-inch pipe that the City installed was too small.[180]

2. Causation is a Central Element in Any Nuisance Action. In *Walls v. Moreland Altobelli Associates, Inc.*,[181] the plaintiffs lived on a large property along a highway where the local water authority obtained land to build a water reservoir. The water authority hired the defendant, a civil engineering firm, to manage the reservoir construction and other projects. As part of the construction, the defendant sought a temporary easement from the plaintiffs to permit workers to enter their property and complete drainage work. The defendant's representative assured the plaintiffs that the work on their property would not disturb any trees and would only minimally affect the land, so the plaintiffs granted the easement. However, after the work began, several trees were cut down, and the plaintiffs complained immediately. After the work was completed, the plaintiffs noticed standing water accumulated on their property near the opening of the new drain pipe. The plaintiffs could not recall the first time the water problem occurred, but testified that there had not been a problem before the defendant started work on the property.[182]

Eventually, the plaintiffs sued the defendant for trespass and nuisance. After the trial concluded, the trial court directed a verdict for the defendant because the plaintiffs did not provide any evidence that the defendant's actions caused the water problem.[183] The court of appeals noted that "'[t]he mere fact that one event chronologically follows another is alone insufficient to establish a causal relation

177. *Id.* at 150, 661 S.E.2d at 198-99.
178. *Id.*, 661 S.E.2d at 199.
179. *Id.* at 151-52, 661 S.E.2d at 199-200.
180. *Id.* at 152-53, 661 S.E.2d at 200.
181. 290 Ga. App. 199, 659 S.E.2d 418 (2008).
182. *Id.* at 199-200, 659 S.E.2d at 419-20.
183. *Id.* at 200, 659 S.E.2d at 420.

between them.'"[184] Further, the plaintiffs did not offer any testimony concerning whether the defendant's pipe installation or grading work was inadequate or led to the standing water.[185] Therefore, the court of appeals affirmed the trial court's directed verdict because the plaintiffs did not establish causation.[186]

3. Easement Rights of Upper Landowner to Lower Landowner. In *Merlino v. City of Atlanta*,[187] the plaintiffs lived two lots uphill from the defendants. In 1992 the plaintiffs completed a home renovation project on their property after rerouting an underground storm-drainage pipe that ran through several of the neighboring properties to empty into the City of Atlanta's sewer system. In 2001 the defendants attempted to do a similar renovation, but the City would not allow them to reroute the drainage pipe. After the parties could not reach an agreement to reroute the pipe, the defendants decided to plug the pipe. The plaintiffs complained to the City, which issued a stop-work order on the defendants' construction because an inspector believed the builder could not cap off an underground sewer line, and the defendants unplugged the pipe. After further investigation by the City's Law Department, the City stated that it did not have an opinion in the matter, and the defendants re-plugged the pipe. As a result, the plaintiffs' home flooded at least nine times in a little over a year, and the plaintiffs' filed this action to abate the nuisance.[188]

The plaintiffs argued an easement existed that allowed the drainage pipe to flow through the defendants' property. However, the defendants were bona fide purchasers who took the title without any knowledge of the easement. They performed a survey and a title search, and there were no visible indications of the underground drain pipe on the land itself.[189] Therefore, the Georgia Supreme Court affirmed the trial court's grant of summary judgment to the defendants on the issue of the declaratory judgment,[190] but it reversed the trial court on the plaintiffs' nuisance and trespass claims against the defendants.[191] The court stated that issues of fact remained regarding whether the defendants could be held liable for creating a continuing nuisance and

184. *Id.* (alteration in original) (quoting Langston v. Allen, 268 Ga. 733, 734-35, 493 S.E.2d 401, 403 (1997)).

185. *Id.*, 659 S.E.2d at 420-21.

186. *Id.* at 201, 659 S.E.2d at 421.

187. 283 Ga. 186, 657 S.E.2d 859 (2008).

188. *Id.* at 186-88, 657 S.E.2d at 860-61.

189. *Id.* at 188-89, 657 S.E.2d at 861-62.

190. *Id.* at 189, 657 S.E.2d at 862.

191. *Id.* at 190, 657 S.E.2d at 863.

regarding the issue of trespass.[192] The plaintiffs also asserted that the City caused a nuisance by allowing the pipe to be plugged, but the court held that the City did not exercise dominion or control over the pipe.[193] It also relied on the principle that the "'[l]iability of a municipality cannot arise solely from its approval of construction projects.'"[194] Thus, the court also affirmed the trial court's grant of summary judgment to the City, because there was no basis for holding the City liable for the defendants' decision to plug the pipe.[195]

B. Use of Property as a Nuisance

1. Interlocutory Injunction is Only Suitable When it Maintains the Status Quo. In *Green v. Waddleton*,[196] the defendant purchased a commercial dog kennel, and almost two years later, an adjacent property owner filed a lawsuit claiming that the kennel constituted a nuisance and violated restrictive covenants that governed the property. The plaintiff sought damages and injunctive relief, and the trial court granted her motion for an interlocutory injunction and ordered the defendant both to cease operating and remove the animals within forty-five days. The trial court held that the plaintiff had shown a substantial likelihood of succeeding on the merits of her claim and that there was a risk of immediate harm if the injunction was not granted. The defendant appealed and sought to stay the injunction, which was granted.[197] The court of appeals ultimately held that the trial court abused its discretion in granting the injunction because the plaintiff failed to show how an injunction would protect the status quo or how there was a risk of an immediate threat from the continuation of the established business.[198]

2. The Private Use of a Motocross Track Did Not Create a Nuisance. In *Evans v. Knott*,[199] the defendants purchased 109 acres of land at Lake Hartwell adjacent to the plaintiffs' property. The defendants used the property to build a national caliber motocross track

192. *Id.*, 657 S.E.2d at 862-63.

193. *Id.* at 189, 657 S.E.2d at 862.

194. *Id.* (quoting Fulton County v. Wheaton, 252 Ga. 49, 50, 310 S.E.2d 910, 911 (1984), *overruled on other grounds by* DeKalb County v. Orwig, 261 Ga. 137, 138, 402 S.E.2d 513, 514 (1991)).

195. *Id.*

196. 288 Ga. App. 369, 654 S.E.2d 204 (2007).

197. *Id.* at 369, 654 S.E.2d at 205.

198. *Id.* at 371, 657 S.E.2d at 207.

199. 282 Ga. 584, 652 S.E.2d 535 (2007).

and opened the track to the public. It operated from August 2002 to May 2003 with a maximum of forty-five riders per day and no more than twenty riders at a time. Then the defendants closed the track to the public in June 2003 after complaints from the plaintiffs, but the defendants continued to allow their son and a few others to ride motorcycles on the track. The plaintiffs then filed a nuisance action to enjoin the defendants from using their property as a motocross track. The trial court used a jury to determine the facts of the case, and the jury found that a public use of the track was a nuisance. The jury also found that the private use of the track was not a nuisance, but the trial court issued a permanent injunction restricting the use of the track to specific days and times and limiting the number and type of motorcycles that were allowed.[200] The defendants appealed, and the Georgia Supreme Court reversed the trial court's order as "completely at odds" with the jury's finding.[201] As a result, the trial court entered an order that denied all injunctive relief, and the plaintiffs appealed.[202]

The plaintiffs argued that without an injunction, the defendants could reopen the track to the public, but the court noted that the record was clear that the defendants closed the track to the public before suit.[203] Moreover, the plaintiffs' apprehension about the reopening of the track was not established to a reasonably certain degree.[204] Therefore, the trial court's refusal to issue an injunction was not an abuse of discretion, and the court affirmed the judgment.[205]

3. Use of Transfer Station Held Not to Be a Nuisance. In *Stanfield v. Waste Management of Georgia, Inc.*,[206] the plaintiffs purchased their home in 1987 in front of an area zoned for general industrial use. In 1995 the defendant built a transfer station to process municipal solid waste, corrugated cardboard, and construction and demolition waste. The plaintiffs claimed nuisances created by the defendant included odor, noise, rodents, and insects. However, the plaintiff's breathing problems could also be explained by her smoking and by the history of emphysema in her family, and the rodent and insect problems could be explained by the county drainage ditch bordering their property on two sides and actions they have taken on

200. *Id.* at 584-85, 652 S.E.2d at 536.

201. *Id.* at 585, 652 S.E.2d at 536 (quoting Knott v. Evans, 280 Ga. 515, 516, 630 S.E.2d 402, 404 (2006)).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. 287 Ga. App. 810, 652 S.E.2d 815 (2007).

their property. The plaintiffs brought an action for damages in excess of $750,000 and injunctive relief for nuisance and trespass by the defendant in operating a waste transfer station. After trial, the jury returned a verdict for the defendants, and the trial court denied the plaintiffs' request for injunctive relief.

The plaintiffs appealed, arguing among other errors, the trial court's refusal to grant a directed verdict.[207] The plaintiffs argued that the transfer station created a nuisance and prevented the rightful use and enjoyment of their property.[208] The court of appeals noted that when a deprivation of use and enjoyment occurs, the plaintiff may recover both nominal damages and an amount the jury determines ought to be paid by the defendant based on the discomfort and annoyance of the plaintiff caused by the nuisance.[209] However, the plaintiff cannot recover for both discomfort and property value diminution.[210] The plaintiffs did not produce any evidence of damage to their property itself, and the jury found that they should not receive any nominal or general damages for the nuisance claim.[211] Therefore, any error by the trial court was harmless because the verdict disposed of any claim for damages.[212] Before trial, the plaintiffs moved to exclude reports from four police officers, but their motion failed.[213] The plaintiffs asserted on appeal that the introduction of the reports into evidence was error, but the court of appeals also found any error here harmless.[214] Lastly, the defendants asserted that the wording of the judgment was vague and did not clearly dismiss all claims.[215] The court of appeals held that the judgment resolved all of the claims, and the court affirmed all judgments of the trial court.[216]

C. *Trespass*

In *Moses v. Traton Corp.*,[217] a subdivision lot owner filed a trespass action against the subdivision builder and its employee. The builder's employee drove a construction vehicle over the grass at the curb in front of the owner's home, causing ruts and other damage to the turf and soil.

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207. *Id.* at 810-11, 652 S.E.2d at 817.
208. *Id.* at 812, 652 S.E.2d at 817.
209. *Id.* (citing Swift v. Broyles, 115 Ga. 885, 888, 42 S.E. 277, 278 (1902)).
210. *Id.*, 652 S.E.2d at 818 (citing *Swift*, 115 Ga. at 888, 42 S.E. at 278).
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 812-13, 652 S.E.2d at 818.
215. *Id.* at 813, 652 S.E.2d at 818.
216. *Id.*
217. 286 Ga. App. 843, 650 S.E.2d 353 (2007).

The area where the truck drove and caused damage is located entirely outside of the owner's lot and within the public right of way owned by the county. On cross motion for summary judgment, the trial court denied the owner's motion and granted the builder's motion, ruling that the lot owner lacked standing to assert the claim for trespass.[218]

On appeal, the lot owner asserted that the trial court erred in failing to recognize his standing to sue based on five different theories of possessory interest in the damaged property.[219] The court of appeals rejected each argument and affirmed the trial court.[220]

First, the owner relied on O.C.G.A. § 51-9-2,[221] which states that "'[t]he bare right to possession of lands shall authorize the recovery by the owner of such right, as well as damages for the withholding of such right.'"[222] The owner asserted that because he attended to the landscaping on the property between his lot and the street and requested that others not invade the property, he sufficiently possessed the property to have standing.[223] However, the appellate court ruled that sufficient possession not only includes "'a present right to deal with property at pleasure'" but also includes the right to "'exclude other persons from meddling with it.'"[224] Here, the damaged property is in the public right of way and the owner could not exclude others from it.[225]

Second, the owner relied on O.C.G.A. § 44-5-167,[226] which states that "'[p]ossession under a duly recorded deed will be construed to extend to all the contiguous property embraced in the deed.'"[227] The owner asserted that he sufficiently possessed the damaged property "because it is contiguous to his property, which is delineated in a duly recorded deed."[228] The appellate court ruled that O.C.G.A. § 44-5-167 could not be the basis for standing because the owner's deed did not embrace or describe any property outside of his lot.[229]

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218. *Id.* at 843-44, 650 S.E.2d at 354-55.

219. *Id.* at 844, 650 S.E.2d at 355.

220. *See id.* at 844-47, 650 S.E.2d at 355-57.

221. O.C.G.A. § 51-9-2 (2000).

222. *Moses*, 286 Ga. App. at 844, 650 S.E.2d at 355 (alteration in original) (quoting O.C.G.A. § 51-9-2).

223. *Id.*

224. *Id.* (quoting Justice v. Aikin, 104 Ga. 714, 716, 30 S.E. 941, 942 (1898)).

225. *Id.*

226. O.C.G.A. § 44-5-167 (1991 & Supp. 2008).

227. *Moses*, 286 Ga. App. at 844-45, 650 S.E.2d at 355 (alteration in original) (quoting O.C.G.A. § 44-5-167).

228. *Id.* at 845, 650 S.E.2d at 355.

229. *Id.*

Third, the owner relied on O.C.G.A. § 51-9-10,[230] which states "'[t]he unlawful interference with a right of way or a right of common constitutes a trespass to the party entitled thereto.'"[231] The appellate court acknowledged that "OCGA § 51-9-10 protects the rights of users of rights of way from interference with their use."[232] However, the court held that "the right to ingress and egress enjoyed by a contiguous property owner (and not the public) does not encompass such a possessory right as to authorize the contiguous property owner to exclude the public from the right of way."[233] Further, the court noted that the damages done in the right of way did not impair the lot owner's right to ingress and egress or diminish the owner's right of use or enjoyment of his own property.[234]

Fourth, the lot owner contended that the covenants recorded with his deed create a sufficient property interest to pursue a trespass action.[235] However, the appellate court held that this argument ignores the distinction between the public right of way and the owner's private lot.[236] Also, the court noted that the covenants merely require lot owners to maintain their lots, and none of the lots include right of way areas.[237] As such, the court held that the covenants, by obligating the owners to maintain their lots, do not purport to create an ownership or possessory interest in the right of way areas nor confer standing to maintain a trespass action.[238]

Finally, the owner asserted that the facts support his claim of possession.[239] However, the appellate court held that in light of its rulings concerning the owner's lack of a legal interest in the right of way, facts such as his mowing of the area are not sufficient to create a legally cognizable possessory interest in the public right of way.[240]

IV. EASEMENTS AND RESTRICTIVE COVENANTS

During the survey period, the appellate courts had several opportunities to address a landowner's entitlement to an easement by necessity

230. O.C.G.A. § 51-9-10 (2000).
231. *Moses*, 286 Ga. App. at 845, 650 S.E.2d at 355 (alteration in original) (quoting O.C.G.A. § 51-9-10).
232. *Id.*
233. *Id.*, 650 S.E.2d at 356.
234. *Id.* at 846, 650 S.E.2d at 356.
235. *Id.*
236. *Id.*
237. *Id* at 846-47, 650 S.E.2d at 356.
238. *Id.* at 847, 650 S.E.2d at 356-57.
239. *Id.*, 650 S.E.2d at 357.
240. *Id.*

and private way and the circumstances under which a license may ripen into an easement. In the context of restrictive covenants, the courts ruled that a covenant banning "For Sale" signs in a subdivision is enforceable.

A. Unilateral Relocation of Express Easement Having Fixed Location Permitted Only When Grant Contains Reservation

Wilcox Holdings, Ltd. v. Hull[241] involved a dispute between owners of two adjacent tracts of land in a shopping center. Hull owned Tract C, and Wilcox owned Tract B. Two driveways across Tract C provided the sole access to Tract B. Tract B and Tract C were subject to a declaration that provided for mutual easements and licenses for ingress and egress over all roads and driveways and parking upon all parking areas.[242] The declaration gave the owners of Tracts A, B, C, and D the right to "relocate buildings, walkways and parking areas in any manner whatsoever," further providing that "the easement, license, right and privilege granted by this instrument shall then apply to the areas so established."[243]

Hull notified Wilcox that he intended to install a curb across both driveways in order to put in more parking spaces on Tract C. Wilcox sued, seeking to prevent Hull from blocking his access. The trial court granted Hull's motion for summary judgment.[244] On appeal, the Georgia Court of Appeals noted that "'Georgia follows the majority rule that an easement with a fixed location cannot be substantially changed or relocated without the express or implied consent of the owners of both the servient estate and the dominant estate, absent reservations contained in the instrument creating the easement.'"[245] Because the declaration did in fact contain these reservations, the court held that Hull was permitted to rearrange his building and parking spaces (blocking Tract B's access to the driveways), so long as Hull provided alternate access for Tract B over his property.[246]

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241. 290 Ga. App. 179, 659 S.E.2d 406 (2008).
242. *Id.* at 179-80, 659 S.E.2d at 407-08.
243. *Id.* at 180, 659 S.E.2d at 408.
244. *Id.* at 180-81, 659 S.E.2d at 408.
245. *Id.* at 181, 659 S.E.2d at 408 (quoting Sloan v. Rhodes, 274 Ga. 879, 879-80, 560 S.E.2d 653, 655 (2002)).
246. *Id.* at 182, 659 S.E.2d at 409.

B. *Easement by Necessity Only When Sale of Dominant Estate Precedes Sale of Servient Estate*

In *Burnette v. Caplan*,[247] the parties raised the issue of whether Caplan had an implied easement of necessity through Burnette's property. The trial court found that such an implied easement of necessity did exist, and Burnette appealed.[248]

The court of appeals noted that

> "[A] way of necessity arises in this State by implication of law . . . when the common owner sells the dominant estate first and retains the servient estate. The common owner is impliedly deemed to have granted an easement to pass over the servient estate. However, if the common owner sells the servient estate first . . ., he has deeded everything within his power to deed and retains no easement in the servient estate. Therefore, when the common grantor subsequently deeds the dominant estate to a third party, the third party . . . receives no easement over the servient estate."[249]

The evidence showed that both Burnette's and Caplan's properties were originally part of the same tract of land owned by J.H. Burnette. J.H. Burnette's heirs deeded away the land now owned by Burnette in 1936. The heirs deeded away the land now owned by Caplan in 1937.[250] Because the land now owned by Burnette (the servient estate) was conveyed out of the original tract before the land now owned by Caplan (the dominant estate), no implied easement of necessity could exist across Burnette's property for the benefit of Caplan.[251]

C. *No Private Right-of-Way After Voluntary Landlock*

In *Dovetail Properties, Inc. v. Herron*,[252] Dovetail Properties sought to condemn a private way of necessity under O.C.G.A. 44-9-40(b)[253] over a private access easement in order to access a public roadway. The trial court denied Dovetail Properties' petition because Dovetail Properties had created its own landlock.[254]

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247. 287 Ga. App. 142, 650 S.E.2d 798 (2007).

248. *Id.* at 142, 650 S.E.2d at 799.

249. *Id.*, 650 S.E.2d at 799-800 (first alteration and second ellipsis in original) (quoting Bruno v. Evans, 200 Ga. App. 437, 440, 408 S.E.2d 458, 461 (1991)).

250. *Id.* at 143, 650 S.E.2d at 800.

251. *Id.*

252. 287 Ga. App. 808, 652 S.E.2d 856 (2007).

253. O.C.G.A. § 44-9-40(b) (2002).

254. *Dovetail Props.*, 287 Ga. App. at 808-09, 652 S.E.2d at 857.

The court of appeals noted that to state a prima facie case of necessity under O.C.G.A. § 44-9-40(b), all a condemnor need show is that her property is landlocked.[255] "'The burden of persuasion then shifts to the condemnee to prove the condemnor has a reasonable means of access to the property.'"[256] A condemnee cannot show that she lacks a reasonable means of access when she voluntarily landlocks her property (by selling the tract through which she formerly accessed her property).[257]

The court held that Dovetail had made out a prima facie case by proving that its property was landlocked.[258] Herron countered by arguing that Dovetail had voluntarily landlocked itself.[259] However, the court disagreed, reasoning that Dovetail's president and owner, not Dovetail, had owned the two adjoining parcels.[260] Thus, when the president-owner sold the landlocked parcel to Dovetail, he did not voluntarily landlock himself because he retained ownership over the parcel with access.[261] Furthermore, Dovetail's purchase of the landlocked tract did not, as a matter of law, constitute "voluntary landlock" that would preclude it from obtaining a private way of necessity.[262]

D. License Ripening into Easement

In *Decker Car Wash, Inc. v. BP Productions North America, Inc.*,[263] the issue before the court of appeals was whether a parol license to use property had ripened into an easement running with the land.[264] The facts showed that Miles Daly purchased property located on Piedmont Road in Atlanta in 1964 and operated a car dealership thereon for the next thirty years. When Daly bought his property, Gulf Oil owned and operated a gas station on the adjacent property. Daly testified that he and Gulf Oil representatives verbally agreed to maintain a driveway providing interparcel access between the properties. This agreement permitted persons leaving Daly's property to access the Gulf Station (to purchase gasoline) and then exit through the Gulf Station's curb cuts on Pharr Road.[265]

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255. *Id.* at 809, 652 S.E.2d at 857 (citing Dep't of Transp. v. Freeman, 187 Ga. App. 883, 884, 371 S.E.2d 887, 888 (1988)).
256. *Id.* (quoting *Freeman*, 187 Ga. App. at 884, 371 S.E.2d at 889).
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*, 652 S.E.2d at 857-58.
261. *Id.*, 652 S.E.2d at 858.
262. *Id.* at 809-10, 652 S.E.2d at 858.
263. 286 Ga. App. 263, 649 S.E.2d 317 (2007).
264. *Id.* at 263, 649 S.E.2d at 318.
265. *Id.* at 263-64, 649 S.E.2d at 318.

Daly closed his dealership in 1995 and began leasing his property to Decker Car Wash in 2001. Decker built a large car wash on the property, which opened in 2003. In 2004 Decker's owner learned that BP, owner of the Gulf Station via corporate merger, had decided to replace the existing building and reconfigure its parking lot. In the process, BP built a solid wall across the interparcel driveway.[266]

Decker sought a declaration that because Daly (its predecessor-in-interest) and Gulf Oil "mutually agreed to link their properties with a driveway and to allow use by the other for ingress and egress and then Daly incurred expenses in the execution of the license, the license ripened into an easement running with the land."[267] In analyzing Decker's claim on appeal, the court of appeals noted that

> [w]here the execution of a parol license does not require erecting a structure on the licensor's land, Georgia courts have generally recognized the creation of an irrevocable easement only where the licensee's enjoyment of the license is necessarily preceded by some investment of funds which increases the value of the licensor's land to the licensor.[268]

Applying that rule, the court held there was no evidence below that (1) Daly built any structure or improvement on BP's land or (2) that Daly invested a substantial amount in improving BP's property.[269] Accordingly, the license granted by BP (Gulf Oil) to Daly to use BP's property did not ripen into an easement and was thus revocable by BP at will.[270]

E. "For Sale" Sign Ban as Restraint on Free Trade and Alienation

In *Godley Park Homeowners Ass'n v. Bowen*,[271] Bowen sought a ruling from the trial court allowing her to erect a "For Sale" sign in the window of her residence, despite prohibitions in her subdivision's covenants against all signs, absent Architectural Review Committee approval. The trial court ruled for Bowen, and the Godley Park Homeowners Association appealed.[272] The covenants governing Bowen's property, with respect to signage, provided,

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266. *Id.* at 264, 649 S.E.2d at 319.
267. *Id.*
268. *Id.* at 266, 649 S.E.2d at 320 (citing Cox v. Zucker, 214 Ga. 44, 51-52, 102 S.E.2d 580, 585 (1958)).
269. *Id.* at 267, 649 S.E.2d at 321.
270. *Id.*
271. 286 Ga. App. 21, 649 S.E.2d 308 (2007)
272. *Id.* at 21, 649 S.E.2d at 309.

> No sign of any kind shall be erected by an Owner or Occupant within Godley Park without the prior written consent of the Architectural Review Committee . . . . This prohibition includes signs erected within a structure on a Lot but visible from outside the structure . . . . No Owner shall erect "For Sale" or "For Rent" signs other than the Declarant.[273]

Bowen first argued that the above prohibition was inapplicable to her real estate agent's right to place a sign on her property.[274] The court of appeals disposed of that claim under basic agency law, reasoning that "[a]n agent . . . may do no more than his or her principal."[275] Bowen next argued that the covenant's sign prohibition was an "unenforceable restraint on trade."[276] The court rejected that argument as similarly unavailing, noting that "Georgia cases citing such authority pertain to restrictive covenants in the employment arena, not to restrictive covenants on the use of real property."[277] Finally, Bowen contended that the sign prohibition was an "unenforceable restraint on alienation in violation of OCGA § 44-6-43."[278] However, inasmuch as the sign prohibition did "not directly prohibit the sale of her property," working only to inhibit the sale, the court refused to find a "restraint on alienation" violation.[279]

V. MISCELLANEOUS

A. Challenge to Development Impact Fees

In *Newton County Home Builders Ass'n v. Newton County*,[280] the Newton County Home Builders Association and Home Builders Association of Georgia (collectively, the Associations) challenged Newton County's adoption of a development impact fee ordinance. In their Complaint, the Associations prayed that Newton County be required to identify the specific amount of impact fees collected since the effective date of the ordinance, that it create an escrow account into which all impact fees would be deposited until the conclusion of the case, and that the trial court identify this escrow account as the beginning of a common

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273. *Id.* at 22, 649 S.E.2d at 310 (emphasis omitted).
274. *Id.*
275. *Id.*
276. *Id.* at 23, 649 S.E.2d at 310.
277. *Id.*
278. *Id.*, 649 S.E.2d at 311; O.C.G.A. § 44-6-43 (1991).
279. *Godley Park Homeowners Ass'n*, 286 Ga. App. at 23-24, 649 S.E.2d at 311.
280. 286 Ga. App. 89, 648 S.E.2d 420 (2007).

fund from which the Associations, and others similarly situated, may recover in the event the plaintiffs prevailed on their claims.[281]

Newton County moved for summary judgment on the ground that the Associations lacked standing to recover the impact fees for their individual members. The trial court granted summary judgment to Newton County, and the Associations appealed.[282]

The Georgia Court of Appeals first concluded that the Associations lacked organizational standing, inasmuch as the Associations themselves had not paid any impact fees.[283] The court then analyzed whether the Associations had associational standing.[284] The court noted that the issue of associational standing is largely dependent on the nature of the relief sought.[285] When declaratory, injunctive, or some other form of prospective relief is sought, associational standing may be found to exist.[286] "Damage claims in which an association seeks relief on behalf of association members, however, are normally not allowed."[287] This rule against allowing an association to seek damages on behalf of its members is especially stringent "where the damage claims are not common to the entire membership, nor shared by all in equal degree."[288] Because the Associations sought the award of damages on behalf of their members and because the damages were not common to their entire membership, nor shared in equal degree, the court held that the Associations lacked standing to recover impact fees for their members.[289]

B. Sign Ordinance Challenges

Fulton County v. Galberaith[290] involved a challenge to Fulton County's Sign Ordinance (Sign Ordinance).[291] Galberaith and Action Outdoor Advertising JV (the plaintiffs) applied to place outdoor signs on two sites zoned C-1 (Commercial). Under the Sign Ordinance, the proposed signs constituted "billboards" because they would display advertising for businesses located elsewhere. Because the Sign

281. *Id.* at 89-90, 648 S.E.2d at 420-21.
282. *Id.* at 90, 648 S.E.2d at 421.
283. *Id.*
284. *See id.* at 90-91, 648 S.E.2d at 421-22.
285. *Id.* at 90, 648 S.E.2d at 421.
286. *Id.* (citing Warth v. Seldin, 422 U.S. 490, 515 (1975)).
287. *Id.* (citing *Warth*, 422 U.S. at 515).
288. *Id.* at 90-91, 648 S.E.2d at 421 (citing *Warth*, 422 U.S. at 515-16).
289. *Id.*, 648 S.E.2d at 421-22.
290. 282 Ga. 314, 647 S.E.2d 24 (2007).
291. FULTON COUNTY, GA., CODE OF LAWS art. XXXIII (Municode through Dec. 20, 2006).

Ordinance did not permit off-premises advertising in commercially zoned areas, the plaintiffs' sign applications were denied.[292]

After an unsuccessful appeal to the Fulton County Board of Zoning Appeals, the plaintiffs sought review in the superior court. The trial court found several sections of the Sign Ordinance unconstitutional. Fulton County appealed.[293]

Turning to the merits of the plaintiffs' challenge, the Georgia Supreme Court tested the Sign Ordinance against the principles enunciated by the United States Supreme Court in *Metromedia, Inc. v. City of San Diego*.[294] Because lesser protection is provided for commercial speech under the United States Constitution, "'offsite commercial billboards may be prohibited while onsite commercial billboards are permitted.'"[295] However, the court noted that the Sign Ordinance swept far more broadly than did the ordinance in *Metromedia*.[296] The ban on off-premises advertising in *Metromedia* applied only to billboards, which the ordinance in that case defined as "'large, immobile, and permanent structure[s] . . . designed to stand out and apart from [their] surroundings.'"[297] By contrast, the Fulton County Sign Ordinance defined a "billboard" as any "'sign which advertises services, merchandise, entertainment or information,'"[298] with "sign" being defined as "[A]ny name, identification, description, display, illustration, writing, emblem, pictorial representation or device which is affixed to or represented directly or indirectly upon a building, structure or land in view of the general public, and which directs attention to a product, place, activity, person, institution or business."[299] The court held the definition of "sign" in the Fulton County ordinance to be more extensive than the definition of "billboard" in the *Metromedia* ordinance and that the reach of the Fulton County ordinance went well beyond commercial speech.[300]

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292. *Galberaith*, 282 Ga. at 314, 647 S.E.2d at 26.

293. *Id.* at 314-15, 647 S.E.2d at 26.

294. *See id.* at 315-19, 647 S.E.2d at 26-28; Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

295. *Galberaith*, 282 Ga. at 316, 647 S.E.2d at 27 (quoting *Metromedia*, 453 U.S. at 512).

296. *Id.*

297. *Id.* at 316-17, 647 S.E.2d at 27 (ellipsis in original) (quoting *Metromedia*, 453 U.S. at 502).

298. *Id.* at 317, 647 S.E.2d at 27 (quoting FULTON COUNTY, GA. CODE OF LAWS § 3.3.2 (Municode through Dec. 20, 2006)).

299. *Id.* (quoting FULTON COUNTY, GA., CODE OF LAWS § 3.3.19 (Municode through Dec. 20, 2006)).

300. *Id.*

The court also concluded that the basic structure of the Fulton County ordinance differed from the *Metromedia* ordinance "in that all signs, both commercial and noncommercial, are initially declared illegal and will be exempted from the ban only on a case-by-case basis."[301] As such, the court reasoned that it must apply the four-part test established by the United States Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[302] Under that test, the court first asks whether the commercial speech concerns unlawful activity or is misleading.[303] "'If so, then the speech is not protected by the First Amendment.'"[304] If not, then the court asks whether the asserted governmental interest is substantial.[305] If it is, then the court must determine whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest.[306]

The court initially noted that under the First Amendment,[307] "commercial speech that does not involve illegal conduct and is not fraudulent or misleading is presumptively legal, and not presumptively illegal as is the case under the Fulton County ordinance."[308] As such, the court affirmed the trial court's declaration of the Fulton County Sign Ordinance as an unconstitutional First Amendment infringement.[309]

Litigation over the Fayette County Sign Ordinance (Sign Ordinance) made its third appellate appearance in *Coffey v. Fayette County* (*Coffey III*).[310] In *Coffey I*,[311] the plaintiffs challenged that portion of the Fayette County Sign Ordinance that restricted "non-commercial signs in residential areas to one sign per lot and to a size of no more than six square feet."[312] The trial court denied the plaintiffs' motion for interlocutory injunction seeking to prohibit enforcement thereof, a ruling that was reversed by the supreme court for the trial court's application of an improper legal standard.[313]

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301. *Id.* at 318, 647 S.E.2d at 28.
302. *Id.*; Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).
303. *Galberaith*, 282 Ga. at 318, 647 S.E.2d at 28.
304. *Id.* (quoting Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002)).
305. *Id.*
306. *Id.*
307. U.S. CONST. amend I.
308. *Galberaith*, 282 Ga. at 318, 647 S.E.2d at 28.
309. *Id.* at 319, 647 S.E.2d at 28.
310. 289 Ga. App. 153, 656 S.E.2d 262 (2008).
311. Coffey v. Fayette County (*Coffey I*), 279 Ga. 111, 610 S.E.2d 41 (2005).
312. *Id.* at 111, 610 S.E.2d at 42.
313. *Id.*

On remand, the trial court determined that certain provisions of the Sign Ordinance were unconstitutional because they were not "content-neutral."[314] After severing the unconstitutional provisions from the ordinance, however, the trial court found that "the redacted statute was the least restrictive means to achieve the county's goals of traffic safety and neighborhood aesthetics," a ruling that was again reversed on appeal.[315]

Before the supreme court issued its remand order in *Coffey II*, however, Fayette County amended its Sign Ordinance, deleting the suspect provisions.[316] On remand, Fayette County moved to dismiss on the ground that the deletion of the objectionable provisions had mooted the plaintiffs' claims for damages resulting from the County's enforcement of the pre-amended ordinance. The trial court granted the motion to dismiss.[317]

The supreme court once again reversed.[318] The court noted that "[t]he enforcement of an unconstitutional sign ordinance may give rise to a claim for damages against a governmental entity."[319] Because the trial court (in *Coffey II*) had previously found portions of the Sign Ordinance unconstitutional, and the plaintiffs had consistently asserted claims for damages arising from that ordinance as enforced against them, the County's postdeprivation amendment of the ordinance "[did] not moot a claim for damages based on enforcement of the prior version of the ordinance."[320]

C. Local Government's Verification of Proposed Facility's Consistency with Solid Waste Management Plan

In *R&J Murray, LLC v. Murray County* (*Murray County II*),[321] the supreme court addressed for the second time R & J Murray's (R&J) entitlement to receive verification from Murray County that R&J's proposed landfill was consistent with the County's Solid Waste Management Plan (SWMP).[322] In *Murray County I*,[323] the supreme

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314. Coffey v. Fayette County (*Coffey II*), 280 Ga. 656, 657, 631 S.E.2d 703, 704 (2006).

315. *Id.* at 657-58, 631 S.E.2d at 704.

316. *Coffey III*, 289 Ga. App. at 154, 656 S.E.2d at 263.

317. *Id.*

318. *Id.*

319. *Id.* at 155, 656 S.E.2d at 264 (citing SMD, LLP v. City of Roswell, 252 Ga. App. 438, 440-41, 555 S.E.2d 813, 816 (2001)).

320. *Id.*

321. 282 Ga. 740, 653 S.E.2d 720 (2007).

322. *See id.* at 740, 653 S.E.2d at 721.

323. Murray County v. R&J Murray, LLC (*Murray County I*), 280 Ga. 314, 627 S.E.2d 574 (2006).

court reversed the grant of summary judgment to R&J because the trial court, in reliance on *Butts County v. Pine Ridge Recycling, Inc.*,[324] held that the County could consider only "environmental and land use factors" in determining whether R&J's proposed facility was consistent with its SWMP.[325] In *Murray County I*, the supreme court overruled *Butts County*, holding that, in determining whether a proposed landfill is consistent with its SWMP, a local government may consider "'any relevant factor that it properly considered in developing its SWMP, as defined by the statutory and regulatory scheme.'"[326] On remand, the trial court granted summary judgment to Murray County, concluding that its refusal to verify that R&J's proposed landfill was consistent with its SWMP "was supported by evidence regarding relevant factors properly considered in developing Murray County's SWMP."[327]

One of the six items listed by Murray County in support of its decision that R&J's proposed landfill was inconsistent with its SWMP was that the SWMP established a "one-landfill" strategy.[328] In particular, the SWMP contained a disposal strategy for Murray County and the cities of Chatsworth and Eton "based on using the single existing landfill and expansions thereof until at least the year 2030."[329] A critical component of the SWMP's one-landfill strategy involved precluding the development of an additional landfill in the County that might "render the existing landfill financially unable to continue operations."[330] The trial court found that sustainability of a landfill furthers the purposes of Georgia's Comprehensive Solid Waste Management Act[331] and that financing of solid waste management was a factor included in Murray County's SWMP.[332] "Based on th[e] Court's holding in *Murray County [I]* that those were proper factors to be considered in a consistency determination, the trial court held that Murray County had not committed an abuse of discretion in finding R&J's proposed facility inconsistent with Murray County's SWMP."[333]

R&J also argued on appeal that "the trial court should have found that Murray County's determination that R&J's proposed facility [was]

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324. 213 Ga. App. 510, 445 S.E.2d 294 (1994).

325. *Murray County II*, 282 Ga. at 740, 653 S.E.2d at 721.

326. *Id.* at 740-41, 653 S.E.2d at 721-22 (quoting *Murray County I*, 280 Ga. at 318, 627 S.E.2d at 578).

327. *Id.* at 741, 653 S.E.2d at 722.

328. *Id.*

329. *Id.*

330. *Id.*

331. O.C.G.A. §§ 12-8-20 to -41 (2006).

332. *Murray County II*, 282 Ga. at 741-42, 653 S.E.2d at 722.

333. *Id.*

inconsistent with the SWMP was based on economic protectionism,"[334] running afoul of the court's holding in *Murray County I* that

> "nothing in the regulatory or statutory scheme authorizes local governments to develop a SWMP or deny certification for a proposed facility based on the desire by the local government to monopolize the waste management business. Because that kind of bare economic protectionism does not further the goals of the [Comprehensive Solid Waste Management] Act, it is not a proper basis for denying certification or developing a SWMP."[335]

The trial court rejected R&J's argument.[336] Quoting the United States Supreme Court's recent holding in *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*[337] that "'laws favoring local government . . . may be directed toward any number of legitimate goals unrelated to protectionism,'" the Georgia Supreme Court agreed with the trial court that Murray County's SWMP was not impermissibly protectionist.[338] Because R&J's proposed landfill was inconsistent with the one-landfill strategy embodied in the County's SWMP, and the factors leading to that conclusion were properly considered in the development of the SWMP, the standard established in *Murray County I* was met.[339]

Justice Melton concurred specially in the decision, authoring his own opinion to highlight his disagreement with the majority regarding the permissibility of a local government's consideration of the economic impact of a new facility on the local government's existing facility when making a determination about whether a proposed facility is consistent with the local government's SWMP.[340] Justice Melton focused on the stated goals of the Comprehensive Solid Waste Management Act—protection of public health, safety, or well-being and the quality of the environment.[341] Therefore, to the extent that Murray County considered the "negative environmental impact the proposed landfill would have on Murray County's highways and wetlands," its refusal to verify

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334. *Id.* at 742, 653 S.E.2d at 723.

335. *Id.* at 742-43, 653 S.E.2d at 723 (quoting *Murray County I*, 280 Ga. at 318, 627 S.E.2d at 578).

336. *Id.* at 743, 653 S.E.2d at 723.

337. 127 S. Ct. 1786 (2007).

338. *Murray County II*, 282 Ga. at 743, 653 S.E.2d at 723 (ellipsis in original) (quoting *United Haulers*, 127 S. Ct. at 1789).

339. *Id.*

340. *Id.* at 743-44, 653 S.E.2d at 723-24 (Melton, J., concurring specially).

341. *Id.*; O.C.G.A. § 12-8-21(a) (2006).

compliance with its SWMP was based upon proper and relevant factors.[342] However, "Murray County abused its discretion to the extent that it based its determination that R&J Murray's proposed landfill was inconsistent with the SWMP simply because it would create economic competition for the County's pre-existing landfill."[343]

D. Sex Offender Law's "Residency Restriction" Unconstitutional

Mann v. Georgia Department of Corrections (*Mann II*)[344] involved the second challenge initiated by plaintiff Mann to a statute prohibiting registered sex offenders from residing at a location or being employed by any business located within one thousand feet of any child care facility, church, school or area where minors congregate.[345] In *Mann v. State* (*Mann I*),[346] Mann challenged former O.C.G.A. § 42-1-13,[347] which restricted registered sex offenders from residing within one thousand feet of a child care facility but did not affect where sex offenders were employed.[348] The supreme court rejected Mann's takings challenge to that statute on the grounds that he had a minimal property interest in his residence (because he lived in his parents' home).[349]

Thereafter, Mann got married and purchased a home in Clayton County. At the time Mann purchased the home, no child care facility, church, school, or area where minors congregate was located within one thousand feet thereof. Mann also became the half owner and day-to-day operator of a Clayton County barbecue restaurant. At the time the lease for the restaurant was executed, the restaurant was not located within one thousand feet of any child care facility, church, school, or area where minors congregate.[350]

However, child care facilities thereafter located themselves within one thousand feet of Mann's home and business. Mann's probation officer then demanded that he quit his job and move from his home, in

342. *Murray County II*, 282 Ga. at 744, 653 S.E.2d at 724 (Melton, J., concurring specially).

343. *Id.*

344. 282 Ga. 754, 653 S.E.2d 740 (2007).

345. *See* O.C.G.A. § 42-1-15 (Supp. 2008).

346. 278 Ga. 442, 603 S.E.2d 283 (2004).

347. 2003 Ga. Laws 878 (current version at O.C.G.A. § 42-1-15). Former O.C.G.A. § 42-1-13 was repealed in 2006, and its provisions, as amended, were recodified as O.C.G.A. § 42-1-15. *Mann II*, 282 Ga. at 755 n.3, 653 S.E.2d at 742 n.3.

348. 2003 Ga. Laws 878.

349. *Mann II*, 282 Ga. at 754-55, 653 S.E.2d at 741-42 (citing *Mann I*, 278 Ga. at 442, 603 S.E.2d at 285).

350. *Id.* at 755, 653 S.E.2d at 742.

accordance with the mandates of O.C.G.A. § 42-1-15(d).[351] Mann filed suit, seeking a declaration that O.C.G.A. § 42-1-15 was unconstitutional inasmuch as it "authorize[d] the regulatory taking of his property without any compensation as required by the Constitution of the United States, as well as the Constitution of the State of Georgia."[352]

The supreme court first analyzed the statute's "residency restriction."[353] The court noted that because the statute lacked a "move-to-the-offender" exception to its provisions, there was "no place in Georgia where a registered sex offender [could] live without being continually at risk of being ejected."[354] Additionally, the court expressed concern that the statute's residency restriction, coupled with the mandates of the statute that information regarding where offenders reside be publicly disseminated, could result in the possibility that third parties "may deliberately establish a child care facility or any of the numerous other facilities designated in OCGA § 42-1-12 within 1,000 feet of a registered sex offender's residence for the specific purpose of using OCGA § 42-1-15 to force the offender out of the community."[355] With those concerns at the fore, the court applied the "regulatory taking" guidelines announced by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*.[356] In particular, the supreme court analyzed "'the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.'"[357] Harkening back to *Mann I*, the court acknowledged that though it earlier determined that Mann's property interest in his rent-free residence at his parents' home was minimal, Mann's property interest in his own residence was significant.[358] The court considered it to be significant that Mann was able to find and purchase a house that complied with the residency restriction of O.C.G.A. § 42-1-15, and only after he took up residence therein did certain "prohibited" child facilities move within one thousand feet of his property.[359] The court noted that "[u]nlike the situation in the typical regulatory takings case, the effect of OCGA § 42-1-15 [was] to mandate [Mann's] immediate physical removal from his . . . resi-

351. *Id.*; O.C.G.A. § 42-1-15(d).

352. *Mann II*, 282 Ga. at 755, 653 S.E.2d at 742 (internal quotation marks omitted).

353. *See id.*

354. *Id.*

355. *Id.* at 756, 653 S.E.2d at 742-43.

356. *Id.* at 757, 653 S.E.2d at 743; Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

357. *Mann II*, 282 Ga. at 757, 653 S.E.2d at 743 (quoting Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2005)).

358. *Id.*

359. *Id.* at 758, 653 S.E.2d at 743.

dence," which was "'functionally equivalent to the classic taking in which government . . . directly ousts the owner from his [property].'"[360] The court rejected the State's argument that Mann's ability to rent or sell his house minimized the economic impact of O.C.G.A. § 42-1-15(a).[361] The court concluded that O.C.G.A. § 42-1-15 did not "merely interfere with, it positively preclude[d] [Mann] from having any reasonable investment-backed expectation in any property purchased as his private residence."[362] Thus, the court held O.C.G.A. § 41-1-15(a) "unconstitutional to the extent that it permits the regulatory taking of [] property without just and adequate compensation."[363]

Mann also sought to have the statute's "work restriction" held unconstitutional.[364] In contrast to its holding on the statute's "residency restriction," however, the court concluded that the work restriction, as applied to Mann, passed constitutional muster.[365] Mann testified that he was part owner of a restaurant and that he ran the dining room, did some cooking, and performed accounting work. He also testified that the restaurant had an accountant, server, full time cook, and part time dish washer.[366] The court noted that "[a]lthough [Mann] testified that the business suffered as a result of his absence from the restaurant, he also testified that he could 'take a computer and [his] papers and so forth' and perform tasks without being physically present at the restaurant."[367] Turning to the statutory language providing "that no registered sex offender 'shall be employed by . . . any business or entity that is located within 1,000 feet of a child care facility, a school, or a church,'"[368] the court held that

> nothing in the statute prohibits a registered sex offender from owning a business or entity within the 1,000-foot buffer zone around child care facilities, schools and churches, as long as that ownership does not involve the sex offender's physical presence at the business or entity so as to enable the sex offender to come into contact with any children who may be attending the child care facility, school or church.[369]

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360. *Id.*, 653 S.E.2d at 744 (ellipsis in original) (quoting *Lingle*, 544 U.S. at 539).
361. *Id.* at 759, 653 S.E.2d at 744; O.C.G.A. § 42-1-15(a).
362. *Mann II*, 282 Ga. at 759, 653 S.E.2d at 744.
363. *Id.* at 760-61, 653 S.E.2d at 745.
364. *Id.* at 761, 653 S.E.2d at 745.
365. *Id.* at 762, 653 S.E.2d at 746.
366. *Id.* at 761, 653 S.E.2d at 746.
367. *Id.* (alteration in original).
368. *Id.* (ellipsis in original) (quoting O.C.G.A. § 41-1-15(b)(1)).
369. *Id.*

Accordingly, the court concluded that "although OCGA § 42-1-15(b)(1) ha[d] the functional effect of ousting [Mann] physically from his business, [Mann] ha[d] not shown that the regulation ha[d] unduly burdened him financially or adversely affected his reasonable investment-backed expectations in his business," with the result that Mann failed to establish that the economic impact of the "work restriction" provision of the statute, as applied to him, effected an unconstitutional taking.[370]

E. Development Delay Occasioned by Governmental Indecision Not Compensable

In *Prime Home Properties, LLC v. Rockdale County Board of Health*,[371] Prime purchased a tract of land in Rockdale County to develop a residential subdivision. Prime's principals purchased the tract with the knowledge that Rockdale County Board of Health (the Board) regulations required a 25,500 square-foot minimum lot size when septic tanks were used. The Board approved 106 of the 112 lots proposed in Prime's subdivision plan. The Board initially refused to approve six of the lots, however, because they lacked the required minimum square-footage after accounting for land lying in the flood plain (the Board initially interpreted its regulations to require that flood plain land be excluded from the minimum square-footage computation). After substantial delay, the Board ultimately approved the six lots and thereafter revised its regulations governing minimum lot size to clarify that flood plain land would be excluded from the minimum lot size calculations. Prime sued the Board on inverse condemnation grounds, and a jury awarded it damages.[372]

On appeal, the Board argued that "the trial court erred in allowing Prime's inverse condemnation claim to proceed to the jury because Prime failed to prove a 'taking' for a public purpose necessary to support a claim for inverse condemnation."[373] The court of appeals agreed.[374] Prime's claim was based on the Board's indecision with respect to whether its regulations required that land in the flood plain be excluded in calculating minimum lot size, delaying Prime's development of the property nearly two years.[375] Prime alleged that this delay "constitut-

370. *Id.* at 762, 653 S.E.2d at 746.
371. 290 Ga. App. 698, 660 S.E.2d 44 (2008).
372. *Id.* at 698-99, 660 S.E.2d at 45-46.
373. *Id.* at 701, 660 S.E.2d at 47.
374. *Id.* at 702, 660 S.E.2d at 48.
375. *Id.*

ed a temporary taking."[376] The court rejected that claim, reasoning that there was "no evidence that Prime was prevented from making other [(though undefined)] uses of th[e] six lots during the administrative process, or that it was prevented from reconfiguring the lots to conform with the ordinance."[377] The court also thought it was significant that the Board had ultimately approved the six lots and that there was no evidence that the lots had decreased in value as a result of the delay (though ignoring the developer's carrying costs).[378] Because Prime was not "deprived of all use of [its] property" during the Board's refusal to approve the six lots, the court held that its inverse condemnation claim failed as a matter of law.[379]

376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.* at 702-03, 660 S.E.2d at 48.

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