



*Donald W. Janney, Chair  
Warren R. Power, Vice Chair  
Paul H. Dunbar III, Secretary*

January 2008

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## Annual Eminent Domain Seminar January 2008

This full-day seminar will be held Jan. 17 at the Bar Center in Atlanta. Visit ICLE's website for more information and registration. [www.iclega.org](http://www.iclega.org)

Susan G. McCathran,  
Editor  
[smcathran@bellsouth.net](mailto:smcathran@bellsouth.net)

## Note From the Chair

By Donald W. Janney  
Eminent Domain Section Chair

I hope that you will plan to attend our annual seminar sponsored by the Eminent Domain Section and ICLE on Jan. 17, at the State Bar Center in Atlanta. The program will cover a variety of topics, such as condemnation clauses in commercial leases, compensation issues associated with the taking of parking spaces, valuation of access rights, inverse condemnation actions, potential compensation for temporary conditions, and awards of attorney's fees in condemnation cases. We will also have an update on 2007 decisions involving eminent domain law. Our speakers will include experienced practitioners who have made presentations at prior seminars and some new speakers with fresh perspectives. Please join us for this full-day session.

On behalf of the section, I want to thank Christian Torgrimson and Sarah Brooks for their work in preparing the article in this newsletter concerning wetlands mitigation, which is an issue of increasing importance to all of us who practice in this area. The section also extends its appreciation to Anne Sapp, our immediate past chair, for the update on eminent domain decisions, which I hope you will find useful. Finally, I want to express my gratitude to Susie McCathran, who has done a superb job as our newsletter editor. Without Susie's diligent efforts, this newsletter would never have been published.

## Recent Decisions in Eminent Domain Law

By Anne W. Sapp  
Anne W. Sapp, P.C.

### Procedural Issues

*Rutland v. Ga. Power Co.*, 286 Ga. App. 14 (June 2007).

**N**otice of Appeal: On July 28, 2005, the special master made an award of \$14, 956 to the property owner as the fair market value of the condemned easement. That award was filed with the trial court on July 29, 2005. On that same day, the property owner's attorney called the special master's office to ask whether the award had been filed. The special master's secretary indicated she was not sure. No follow-up was made and, after receiv-

ing a faxed copy of the award on Aug. 10, 2005, the property owner filed his appeal the next day. Georgia Power successfully obtained a dismissal of the appeal as untimely based on the 10-day time limit set forth in O.C.G.A. § 22-2-112. On appeal, the property owner argued that the 10-day time for filing an appeal couldn't begin to run until after a party has been served with the award because any other interpretation of the statute would violate the constitutional guarantee of due process. The court disagreed and held that due process included constructive notice and that the filing of

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## Recent Decisions

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an award pursuant to § 22-2-112 provided such notice. The court also noted that neither the special master nor the court was obligated to serve the parties with the award.

Approximately six months after Georgia Power Co. filed this action, the legislature amended O.C.G.A. §22-2-112 to provide that any appeal from a special master's award shall be filed within 10 calendar days from the service of the award, plus three additional calendar days for mailing of the award. However, this language applies only to those condemnation proceedings filed on or after Feb. 9, 2006.

## Business Loss

*City of Atlanta v. Sig Samuels Laundry & Dry Cleaning*, 282 Ga. 586 (October 2007)

1. Use of Existing Right of Way: The court stated that a compensable taking under Ga. Const. Art. I, §III, para. I(a) did not occur when a government activity merely interfered with a property owner's desire to use a city right of way for additional parking. The sidewalk here was to be constructed on property that was solely within the city's right of way. The sidewalk would not impede access to the business, but would merely cover a city-owned area that the business had been using for additional customer parking. The business did not have an unqualified right to use the area for that purpose. Furthermore, there was no evidence that construction of the sidewalk would result in a continuing nuisance. Thus, the trial court erred in ordering that the business be compensated for a taking and that the city make additional parking available for the business. Next, the trial court erred in ordering the city to erect signs directing the flow of pedestrian traffic. The trial court did not have the authority to substitute its judgment for that of the city officials whose responsibility it was to first make a decision as to how they believed pedestrian traffic should be directed on the streets near the business.

*Coastal Water & Sewerage Co. v. Effingham County Indus. Dev. Auth.*, 2007 Ga. App. LEXIS 1215, decided Nov. 15, 2007.

1. Compensability of Contract: A county industrial development authority condemned certain property. A limited liability company (LLC) intervened in the action based on a contract it had to provide water and sewer services to the property.

The trial court found that the LLC did not have a compensable interest in the property. The Court of Appeals agreed. The LLC's claims involved anticipated profits based on a planned but not completed contract for services. 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. Anticipated losses do not result from the government action on the date of

the taking. Moreover, anticipated losses are remote and speculative, and thus, are not compensable.

Furthermore, a contract is not compensable when it merely confers a future right or interest not being enforced at the time of the condemnation proceedings. The contract here had not been appropriated for public use; rather, the land condemnation simply rendered the performance of the contract impossible. The incidental frustration of the performance of a contract by the public taking of certain other property is noncompensable. The contract here was executory and conferred only contingent future rights at the time of the condemnation.

## Evidence

*Woodland Partners Ltd. P'ship v. Department of Transportation*, 286 Ga. App. 546 (June 2007), Cert. Denied.

1. Qualification as Expert Witness: The DOT condemned 0.913 acre of an approximately 800-acre tract of unimproved land owned by the condemnee. On appeal, the condemnee challenged various evidentiary rulings made by the trial court. The condemnee contended that the trial court erred in allowing testimony by a DOT expert, contending that he was not qualified as an expert in development. The Court of Appeals found that the trial court did not manifestly abuse its discretion in admitting that expert's opinion given his extensive experience and study. Whether 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. The possession of special knowledge in a field derived from experience, study, or both makes one an expert.

2. Appraisal Methodology: The trial court also did not abuse its discretion in controlling the nature and scope of the cross-examination of another DOT expert who testified regarding just and adequate compensation since that expert was steadfast as to the valuation methodology he used and the condemnee was permitted to cross examine the witness about his claimed methodology. 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.

3. Sufficient Foundation: Striking certain portions of the condemnee's expert witness testimony was proper since it lacked a sufficient foundation. In condemnation proceedings, it is within the trial court's discretion to determine whether the evidence shows that the subject property is reasonably suited for a use different from its existing use, and it may admit or exclude evidence of value for such other use. The fact that the property is merely adaptable to

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# What is the Highest and Best Use of Wetlands? Think Mitigation

By Christian F. Torgrimson and Sarah Tosone Brooks  
Pursley Lowery Meeks LLP

At first glance, wetlands areas may be considered as having little or no value in a condemnation case due to the federal and state limitations on development and use. The Army Corps of Engineers and the United States Environmental Protection Agency jointly define wetlands as: “[t]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”<sup>1</sup> Under the Watershed Protection and Flood Prevention Act, Congress determined that it is in the public interest to preserve, restore and improve wetlands in order to conserve water and protect certain wildlife.<sup>2</sup> If a property owner disturbs or destroys a wetlands area, the damage must be mitigated by creating or restoring an equivalent amount of wetlands either on-site or on adjacent or nearby land.<sup>3</sup> As a result, any area designated as a wetland may not be used or developed without approval permits from the Army Corps of Engineers and without significant development costs to the property owner.

In the condemnation context, this impacts the determination of fair market value and an appraiser’s opinion of the highest and best use of land. Under Georgia law, fair market value is defined as the price that a willing seller and a willing buyer agree is a fair price after due consideration of all the elements reasonably affecting value.<sup>4</sup> One of those elements affecting fair market value is the highest and best use of the property.<sup>5</sup> The highest and best use must be a legally permissible use, and the jury may consider all purposes to which the property might be legitimately put even at a future date.<sup>6</sup> “Legally permissible” use often refers to a change in zoning or future use, i.e., valuing raw land for its commercial or residential development potential.<sup>7</sup> To be considered for fair market value, the land must be reasonably capable of such different or future use on the date of taking.<sup>8</sup>

If a property owner cannot legally or reasonably develop the land being condemned due to wetlands requirements, how can wetlands be counted in the valuation? Mitigation. Wetlands mitigation banks are areas where large amounts of wetlands can be restored and preserved, creating a reserve of mitigation credits to be sold to builders needing

wetlands permits for construction and development projects.<sup>9</sup> There are several scenarios in which mitigation can play a significant part in an appraisal, and provide a basis for valuing the property as more than undeveloped swamplands. A condemning body, such as the Georgia Department of Transportation, has the authority to condemn property for use as wetlands mitigation associated with their construction projects.<sup>10</sup> The most valuable portion of a tract of land could be condemned in fee simple or be encumbered by easements, leaving a remainder that is comprised in whole or in part of wetlands. Or, a condemnor may condemn that portion of land that the owner had intended to use for on-site mitigation or for sale as a mitigation bank. In any case, land that is appropriate for mitigation banks should be considered in determining the property’s highest and best use, and valued as bankable credits that potentially hold substantial value.

The value of wetlands mitigation was addressed in *Department of Transportation v. Southeast Timberlands, Inc.*, in which DOT condemned approximately 378 acres of land in order to mitigate damages to wetlands caused by a nearby road construction project.<sup>11</sup> A jury awarded the property owner \$886,999 for the fair market value of the land taken and consequential damages to the remainder. On appeal, DOT argued that the trial court erred in admitting the testimony of the owner’s expert regarding the condemned land’s potential use as a wetlands mitigation bank, because the land was not being used for wetlands mitigation on the date of taking.<sup>12</sup> However, the Court of Appeals upheld the trial court’s ruling that allowed both the property owner and his expert to testify that the highest and best use of the property was for wetlands mitigation because such use was legally and reasonably probable as of the date of taking.<sup>13</sup> At trial, the property owner testified that he had planned on using the condemned portion of the property for onsite mitigation of a golf course community project. The property owner’s expert testified that the land could have been restored to wetlands at a cost of \$350,000, thereby producing between 1,286 and 1,701 mitigation credits that could have been sold to other developers. This made the subject property particularly more valuable than it would have been otherwise. The Court of Appeals found no abuse of discretion in allowing the testi-

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## Recent Decisions

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a different use is not in itself a sufficient showing in law to consider such different use as a 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. Even where a different use is shown to be reasonably probable, a 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. The trial court's rulings admitting or excluding such evidence will not be reversed unless there is a manifest abuse of its discretion.

### Condemnation of Private Ways

*Dovetail Properties v. Herron*, 287 Ga. App. 808 (October 2007).

1. Landlocked Property: The president and owner of a corporation did not voluntarily landlock himself when he sold one of two adjoining individually owned parcels to the corporation, retaining for himself the parcel with access to a public road. The corporation was not precluded from obtaining a private way of necessity or a private access easement on land owned by another because it had never owned both parcels owned by the president and had purchased only the landlocked parcel.

When reviewing a trial court's decision under O.C.G.A. § 44-9-40(b), the Court of Appeals of Georgia must construe the evidence in favor of the trial court's ruling and can reverse the judgment of the trial court only if it is clearly erroneous. A prima facie case of necessity is proved under § 44-9-40(b) when a condemnor proves that his property is landlocked. The burden of persuasion then shifts to the condemnee to prove the condemnor has a reasonable means of access to the property. Additionally, the necessity cannot be created by one's own voluntary action in giving up reasonable access. As a result, when an owner owns two adjacent parcels, sells one, and landlocks the remaining parcel he or she owns, a private way of necessity cannot be obtained. Knowingly purchasing landlocked property, on the other hand, does not preclude a purchaser from obtaining a private way of necessity.

## We Need You!

We need the input of all members to help make this newsletter interesting and informative. Please contact the editor, Susan G. McCathran, at [smc-cathran@bellsouth.net](mailto:smc-cathran@bellsouth.net) with any specific topics you would like to see addressed in the newsletter, or if you are interested in writing an article for an upcoming newsletter.



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# EMINENT DOMAIN SEMINAR

Thursday, January 17, 2008

State Bar of Georgia  
104 Marietta Street, N.W.  
Atlanta, Georgia 30303

Presiding: *Donald W. Janney*, Chair, Eminent Domain Section, State Bar of Georgia  
Troutman Sanders LLP, Atlanta

8:45 **REGISTRATION** (All attendees must check in upon arrival. A removable jacket or sweater is recommended.)

9:10 **WELCOME & PROGRAM OVERVIEW**

9:15 **CONDEMNATION CLAUSES IN COMMERCIAL LEASES**  
*Charles N. Pursley, Jr.*, Pursley Lowery Meeks LLP, Atlanta

10:00 **COMPENSATION ISSUES ASSOCIATED WITH TAKING OF PARKING SPACES/LOTS**  
*J. Scott Jacobson*, Holt Ney Zatcoff & Wasserman, LLP

10:45 **BREAK**

10:55 **VALUATION OF ACCESS RIGHTS**  
*Gary L. Bernes*, MAI, Bernes & Company, Marietta

11:40 **2007 DECISIONS IN EMINENT DOMAIN LAW**  
*Anne Woolf Sapp*, Anne W. Sapp, P.C., Atlanta

12:30 **LUNCH** (included in registration fee)  
Annual meeting of Eminent Domain Section  
Recognitions  
Election of officers for 2008-2009

1:10 **INVERSE CONDEMNATION ACTIONS: How They Differ from Direct Condemnation Actions**  
*Lynette Eaddy Smith*, Troutman Sanders LLP, Atlanta

2:00 **TEMPORARY CONDITIONS: Are They Compensable and, If So, How is Compensation Determined?**  
*William A. White*, Smith, Welch & Brittain, LLP, McDonough

2:50 **BREAK**

3:00 **AWARD OF ATTORNEY'S FEES IN GEORGIA CONDEMNATION CASES: Ethical Issues and Other Grounds for Fee Awards**  
*Carl R. Varnedoe*, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, Macon

4:00 **ADJOURN**

# Experts in Areas of Eminent Domain Law

This list is provided as a reference for our members. The Eminent Domain Section does not endorse or recommend any expert. If you know of an expert who does not appear on this list, but should, please contact the editor.

## Real Estate Appraisers

Dennis Carr  
CARR, LAWSON, CANTRELL & ASSOCIATES, INC.  
1795 Peachtree Street, N.E., Suite 200-B  
Atlanta, Georgia 30309  
678-686-5575

Ken Cantrell  
CARR, LAWSON, CANTRELL & ASSOCIATES, INC.  
1795 Peachtree Street, N.E., Suite 200-B  
Atlanta, Georgia 30309  
678-686-5575

David Childers  
CHILDERS & ASSOCIATES  
321 14th Street, N.W.  
Atlanta, Georgia 30319  
404-876-5100

Richard Childers  
CHILDERS & ASSOCIATES  
321 14th Street, N.W.  
Atlanta, Georgia 30319  
404-876-5100

Daniel Diaz  
readiaz@bellsouth.net  
REAL ESTATE ANALYST, INC.  
P. O. Box 261  
Tucker, Georgia 30085  
770-492-9310

Thomas A. Plunkett  
tony.plunkett@theappraisalgroupinc.com  
THE APPRAISAL GROUP, INC.  
1770 The Exchange, Suite 200  
Atlanta, Georgia 30339  
770-270-5226

Gary Hammond  
G. RANDALL HAMMOND & COMPANY  
7000 Peachtree-Dunwoody Road  
Building 4, Suite 100  
Atlanta, Georgia 30328  
770-481-0855

Michael Biggers  
M. H. BIGGERS APPRAISALS  
429 Crosshaven Way  
McDonough, Georgia 30253-4797  
770-954-0011

H. M. "Mit" Bradford  
BRADFORD REALTY GROUP  
FOREST PARK REALTY & INSURANCE COMPANY  
1115-D Morrow Road  
Morrow, Georgia 30260  
770-961-5520

William S. Stripling  
STRIPLING SHAW STRIPLING GROUP  
6185 Crooked Creek Road  
Norcross, Georgia 30092  
770-449-1600

Michael Easterwood  
DSSJME2915@earthlink.net  
2915 E. Ponce de Leon Avenue  
Decatur, Georgia 30030  
404-373-0411

Tal Wilcher  
talwilcher@realestateappraisal.net  
WILCHER GATES & ASSOCIATES, INC.  
2975 McManus Road  
Macon, Georgia 31220  
478-471-8802

Rodney Williams  
3288 Vineville Avenue  
Macon, Georgia 31204  
478-475-4316

John Chapman  
CHAPMAN REALTY  
41 Marietta Street, Suite 1020  
Atlanta, Georgia 30303  
404-688-1638

Hall Rigdon  
rigdonh@bellsouth.net  
231 Washington Avenue  
Marietta, Georgia 30060  
770-794-9433

Henry J. Wise  
PRITCHETT, BALL & WISE  
1389 Peachtree Street, N.E., Suite 300  
Atlanta, Georgia 30309  
404-874-4499

Gary L. Bernes  
gbernes@bernesandcompany.com  
BERNES & COMPANY  
4865 Olde Towne Parkway, #200  
Marietta, Georgia 30068  
770-977-1770

Dennis Lawton  
3041 Alta Ridge Way  
Snellville, Georgia 30078  
770-736-3701

Ronald Foster  
fosterco@bellsouth.net  
4703 Marc Street, S.W.  
Lilburn, Georgia 30047  
770-923-5539

Jim Turrisi  
jftjr2000@yahoo.com  
131 Smokey Hollow Drive  
Thomaston, Georgia 30286  
706-646-3476

Donald Morris  
SOUTHERN APPRAISAL COMPANY  
1928 Dawson Road  
Albany, Georgia 31707  
229-883-6660

William S. Gottschalk  
4228 First Avenue, Suite 12  
Tucker, Georgia 30084  
770-939-7897

#### **Business Valuation**

Will Geer, CPA/ABV, MBA, CVA, CFFA, CFE  
METRICS VALUATION SERVICES, LLC  
1230 Peachtree Street, NE, Suite 1900  
Atlanta, Georgia 30309  
404-942-3375 office  
404-942-3401 fax

Dan Browning  
dbrowning@morrell-browning.com  
MORRELL & BROWNING, LLC  
P. O. Box 9  
Decatur, Georgia 30031  
404-932-9960

Ian Ratner  
3340 Peachtree Road, N.E.  
Atlanta, Georgia 30342  
678-686-6733

James F. Hart  
LIGHTFOOT GROUP, LLC  
1730 Mount Vernon Road, Suite G  
Dunwoody, Georgia 30338  
Phone: 678-320-0079  
Fax: 678-320-0119

#### **Engineers**

Fred Fisher  
planningdesign@mindspring.com  
PLANNING & DESIGN GROUP, INC.  
3 Corporate Boulevard, N.E.  
Atlanta, Georgia 30329  
404-325-8200

Brian Upson  
bupson@pcgeng.com  
PARAGON CONSULTING GROUP  
118 North Expressway  
Griffin, Georgia 30223  
770-412-7700

Courtney Nolan  
courtney\_nolan@bellsouth.net  
NEW DIMENSION ENGINEERING, LLC  
199 Grant Road  
Fayetteville, Georgia 30215  
770-461-3737

Ricardo Palacios  
rpalacios@palacioseng.com  
PALACIOS ENGINEERING  
226 Middleton Place  
Grayson, Georgia 30017  
678-376-7411

Michael Elliott  
2000 Pheasant Run Drive  
McDonough, Georgia 30252  
678-432-9617

#### **Trade Fixtures**

Patti Fisher  
planningdesign@mindspring.com  
PLANNING & DESIGN GROUP, INC.  
3 Corporate Boulevard, N.E.  
Atlanta, Georgia 30329  
404-325-8200

#### **Mineral Rights Experts**

Sam M. Pickering Jr.  
INDUSTRIAL MINERAL SERVICES, INC.  
1414 Twin Pines Lane  
Macon, Georgia 31211  
478-743-9323  
478-747-7030

## Wetlands

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mony, noting that DOT had plans for the same use, even obtaining a permit to use the condemned property prior to the date of taking.<sup>14</sup>

While the opinion in *Department of Transportation v. Southeast Timberlands, Inc.*, is specific to the facts of that case, it is useful in demonstrating that wetlands mitigation can be a legally permissible use and thus can be considered by a jury in determining value and a property's highest and best use. Land that otherwise would have been useless from a development or a fair market value standpoint can be restored and either preserved for on-site mitigation or marketed as wetlands mitigation credits. Both condemners and condemnees alike should be aware that a wetlands area involved in a condemnation might be more valuable than initially thought—as a wetlands mitigation bank.

### Endnotes

1. Corps of Engineers Wetlands Delineation Manual by Environmental Laboratory, U.S. Army Corps of Engineers Waterways Experiment Station, 3909 Halls Ferry Road Vicksburg, MS 39180-6199.
2. See 16 U.S.C.A. § 1001; see also Memorandum of Agreement between The Department of the Army and the Environmental Protection Agency Concerning The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, effective February 8, 1990.
3. See *Dep't of Transp. v. Southeast Timberlands, Inc.*, 263 Ga. App. 805, 589 S.E. 2d 575, 579 (2003).
4. *Central Georgia Power Co. v. Stone*, 139 Ga. 416, 77 S.E.2d 565 (1912).

5. *Dep't of Transp. v. A.R.C. Security*, 189 Ga. App. 34, 375 S.E.2d 42 (1988).
6. *Dep't of Transp. v. Kanavage*, 183 Ga. App. 143, 358 S.E.2d 464 (1987).
7. See *Moore v. State Hwy. Dep't*, 221 Ga. 392, 144 S.E.2d 747 (1965); *State Hwy. Dep't v. Howard*, 119 Ga. App. 298, 167 S.E.2d 277 (1969).
8. *Moore*, 221 Ga. 392, 144 S.E.2d 747.
9. See *Dep't of Transp. v. Southeast Timberlands, Inc.*, 263 Ga. App. 805, 589 S.E. 2d 575, 579 (2003).
10. O.C.G.A. § 32-2-2.
11. *Id.* at 577.
12. *Id.* at 579.
13. *Id.* at 579-80.
14. *Id.* at 580.

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**State Bar of Georgia**  
**Eminent Domain Section**  
104 Marietta Street, NW  
Suite 100  
Atlanta, GA 30303

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