

TAKINGS

The Official Newsletter of the
Eminent Domain Law Section
State Bar of Georgia

1st Edition



Summer 2002

Dear Fellow Lawyers:

Welcome to the inaugural edition of **TAKINGS**, the newsletter for the Eminent Domain Section of the State Bar of Georgia. As you are aware, last year the State bar of Georgia voted to form an eminent domain section in recognition of the growing practice of this discipline in the State of Georgia. Moreover, anyone who has examined the law in this area, as handed down by the appellate courts, can certainly understand the need for clarity and reform in many areas that have been addressed by both statute and common law.

The Executive Committee of the Eminent Domain Section will be meeting soon to plan a midyear function in Atlanta. I solicit your suggestions as to what might be an appropriate midyear function and a suitable location for such a function.

We solicit your input into all aspects of the Eminent Domain Law Section, as we certainly do not claim to have a corner on wisdom for where to take this new section. We look forward to working with you to make this section a viable, effective part of the State Bar of Georgia.

Yours truly,

Charles L. Ruffin, Chair



Letter From The Editor

Joel Sherlock

I hope everyone is having a good and productive Summer. First of all, I should address the section house-keeping issues. As you are aware, this is the inaugural edition of the Eminent Domain Newsletter, **TAKINGS**. The section officers are Charles L. Ruffin, Chair, Luther H. Beck, Jr., Chair-Elect, J. Scott Jacobson, Secretary, and myself as Editor. The current officers were elected in January of 2002 and will serve until June 2004. Any of you wishing to serve or any of you who knows someone who should serve during the 2004-2005 term please contact one of the section officers.

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The section hosted its first CLE on January 24, 2002. Speakers included the Hon. Frank M. Eldridge, Mr. Charles N. Pursley, Jr., Ms. Anne W. Sapp, many notable attorneys from both the condemnor and condemnee camps, Roger T. Lane, President of the Georgia Oilmen's Association, numerous valuation experts from around the country, and representatives from the Georgia D.O.T. During the CLE luncheon, the highly esteemed Charles N. Pursley, Jr., was presented the section's first Lifetime Achievement Award for his years of outstanding work in the field of eminent domain.

The current plan for the section is to have at least one section CLE per year and a quarterly newsletter. *Takings* will attempt to unofficially report the latest cases bearing on our area of practice, offer insights into new trends around the country, and serve as a forum for discussion of contested issues

from both the condemnor and condemnee perspectives. I welcome contributions for inclusion in the newsletter, and am already looking for articles for the October issue. Also, if anyone is interested in being a part of our future "Point & Counter Point" discussion section please let me know.

On a personal note, I would like to thank the officers and members of the section for allowing me this opportunity and for their help in preparing the inaugural edition of *TAKINGS*. I would especially like to thank Lesley Smith and the Bar staff without whom this endeavor would not be possible.

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Letter From Supreme Court of Georgia

May 20, 2002

To the Eminent Domain Law Section:

I commend you for your willingness to organize and become members of the Eminent Domain Law Section of the State Bar of Georgia. As a direct result of representation of both condemnors and condemnees during my practice spanning 31 years, I am well aware of the difficulties you face with technical procedures and restrictive rules of evidence peculiar to condemnation proceedings. This specific part of our law has long needed a section which has expertise to recommend reasonable solutions to problems which litigants routinely confront in these actions.

The lives of thousands of Georgia's citizens are affected by eminent domain proceedings each year. I am confident that your joint efforts will ultimately bring about such reform as is necessary to make the process as fair and predictable as possible for all parties involved in these proceedings. I wish you much success in all your endeavors.

Sincerely,
Justice Norman S. Fletcher
 Supreme Court of Georgia

From the Chair-Elect

Luther H. Beck, Jr., Chandler & Britt, LLC

It is with great pride that I welcome the membership of the newly minted Eminent Domain section of the State Bar of Georgia to the first section newsletter. Being selected as the Chair-Elect of the section at our annual meeting was a great honor. Nothing, however, gives me greater satisfaction than participating in the institution and expansion of the Eminent Domain section. Paramount among our efforts to inform our "brothers and sisters of the Bar" is the section newsletter. It provides the section with its greatest tool for the accomplishment of its mission: providing information and education about the practice of law within the specialty of eminent domain.

If I sound a little over enthusiastic about my area of practice, you are very perceptive. In my experience in the

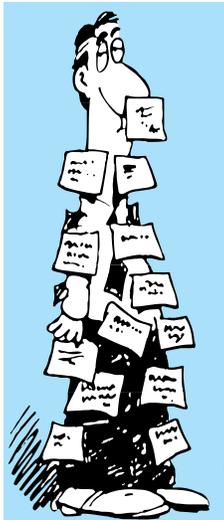
practice of law, I have found no other niche which combines what I perceive to be the most desirable elements of civil practice. From a historical perspective, the common law inception of the principles of eminent domain is interesting.

Similarly, the constitutional foundations of eminent domain are intermingled with the most important freedoms we enjoy as Americans and arguments in this regard always provide thought provoking analysis. Finally, the ultimate availability of a trial by jury for the purpose of determining just and adequate compensation provides the opportunity for persuasion that trial attorneys seek by nature.

It is my hope that a little of my enthusiasm for our area will rub off on you. Toward that end, the newsletter will provide section updates and matters of interest for your consideration. I want to take this opportunity to express my grateful appreciation to Joel Sherlock for his contributions in this endeavor. Without Joel and his technical and sub-

stantive background, there would be no newsletter. I hope that you all find the information provided to be of assistance to you in your practices. I am always looking for feedback regarding the section and I welcome you to contact me either via e-mail at lbeck@chandlerandbritt.com or telephone 770-271-2991 with your comments or offers of assistance (please notice that I did not solicit complaints).

Luther Beck
Chair-Elect



Did You Remember To Rejoin This Section ?

(not sure? go to the member roster on this section's web page)

Section Photo Gallery



Pictured l-r- Justice P. Harris Hines; Scott Jacobson, Section Secretary; Luther Beck, Jr., Chair-elect; Charles Pursley; Charles Ruffin, Chair & Joel Sherlock, the Section's Newsletter Editor



Charles Pursley is presented with the Section's first Lifetime Achievement Award by Chair-elect Luther Beck.

The Bar Year is just beginning, so you haven't missed a thing. Annual dues for this section are **\$35**. To join, fill out this form and return with your check made payable to the **State Bar of Georgia**.

Your Name _____

Your Bar# _____

Address Change? _____
(list only if there is a change)

Phone _____ Fax _____

Email _____

CASE UPDATE

Recent Developments in Eminent Domain

By: Anne W. Sapp

EXCEPTIONS TO SPECIAL MASTER FINDINGS: The trial court erroneously adopted the special master's report before the 10-day period for filing objections expired. The case was remanded with instructions that the parties be allowed to file objections to the Special Master report. *Fowler v. City of Warm Springs*, 251 Ga. App. 497 (August 22, 2001).

OPTION TO PURCHASE: In a direct condemnation action, Five Forks asserted a claim that an expired purchase option gave them a compensable interest in the property. The court of Appeals affirmed summary judgment to DOT finding that Five Fork's alleged losses occurred before the actual date of taking and was not a consequence of the instant condemnation action. *Five Forks v. Department of Transportation*, 250 Ga. App. 157 (2001).

RIGHT OF ACCESS:

1. Taking of Access rights: Interfering with access by impeding or rendering difficult ingress or egress is a taking of a property right entitling the injured party to compensation. However, alternate access to the property is a factor that may be considered in determining the amount of damages, if any, due the landowner for his loss of access. *Harper Investments, Inc. v. Department of Transportation*, 251 Ga. App. 521 (2001). Additionally, the right to maintain a driveway encroaching on DOT's right of way was nothing more than a revocable license. Therefore, the landowner was not entitled to compensation for cancellation of the right of use. *Harper Investments*, supra.

2. Taking of Access Rights, Circuity of Travel: The Court of Appeals found that *DOT v. Pilgrim*, 175 Ga. App. 576 (1985), did not govern situations where entire access to a single street was removed. Applying *DOT v. Whitehead*, 253 Ga. 150 (1984), the Court found that the complete loss of access to the one road was a compensable taking and that damages, if any, could be mitigated by continued access to the other. *McDonald v. Department of Transportation*, 247 Ga. App. 763 (2001).

LOSS OF VISIBILITY: Where the owner was not seeking business losses, loss of visibility from the highway could not be used as a consequential damage in determining any diminution in the value of the real estate. *McDonald v. Department of Transportation*, 247 Ga. App. 763 (2001).

CHANGE IN ZONING: The fact that property is merely adaptable to 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 is so reasonably probable as to have an effect on the present value of the land. Even where a different use is reasonably probable, the jury cannot evaluate the property as though the new use were an accomplished fact. *Georgia Transmission Corporation v. Barron*, Case No. A02A0686 (Court of Appeals May 24, 2002). In *Barron*, the appellate court found that the trial court abused its discretion by admitting testimony that lacked both a proper foundation and probative value. But see, *Unified Government of Athens-Clarke County, Georgia v. Billy L. Watson*, Case No. A01A2441 (Court of Appeals March 13, 2002), Application for Certiorari pending, whereby a different panel of judges reached the opposite conclusion based on indistinguishable facts.

TIME PERIOD FOR CONSTRUCTION OF PROJECT:

O.C.G.A. §32-3-1(c)(1) applies only to land purchased by the State using "Q" funds (a Right of Way revolving fund for future public road projects). Because the DOT did not use these special funds to acquire the subject property, construction was not required to begin within a minimum of 2 years and a maximum of 10 years. *Burt v. Department of Transportation*, 250 Ga. App. 709 (2001).

PREJUDGMENT INTEREST: O.C.G.A. §22-2-113(c) requires the payment of interest from the date of the taking on the difference between a special master's award and an arbitrator's award. O.C.G.A. §9-11-67 does not abate prejudgment interest. *Threatt v. Forsyth County*, 250 Ga. App. 838 (2001)●

Dates to Remember-

2003 State Bar Midyear Meeting
January 9-11, 2003
Swissôtel Atlanta
Atlanta, GA

2003 Annual Meeting
June 12-15, 2003
Amelia Island Plantation
Amelia Island, FL