PLANTATION POTPOURRI:
REAL ESTATE ISSUES UNIQUE TO PLANTATION PROPERTIES

(Otherwise Known as Petitions for Private Way and Miscellaneous Other Points)

Ellen W. Smith, Esq.
Parker Poe Adams & Bernstein, LLP
1180 Peachtree Street, Suite 3300
Atlanta, Georgia 30309

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I. Introduction. The acquisition and ownership of large (5,000 acres or more) quail and other hunting plantations or preserves often result in unanticipated legal issues that may be unique to large tracts of generally undeveloped land, but that present interesting possibilities for consideration in urban acquisitions and land use issues. This paper explores several issues that have presented themselves in the course of working on the acquisition of quail hunting plantations and ongoing representations relating thereto.

II. Petitions for Private Way

Imagine that your client has just acquired approximately 5,840 acres of prime quail hunting and conservation property in south Georgia but because of timing of the transaction and cost, did not obtain a survey (boundary or ALTA). Six months into the operations of the plantation, a demand letter is sent by a neighbor claiming a prescriptive easement to 60 landlocked acres that is farmed (although without any well or other water source) in the middle of your client's prime quail lines. There is a "road" named after your neighbor's family that at one point was public, but now has been closed by action of the county commission and consent of all parties, access to the landlocked acreage from a public right of way via a "road" (really an ATV or horse trail) via a gate shared by adjacent property owners, a dissenting neighbor family that also owns landlocked property and the list goes on.

Your response to the claimed prescriptive easement is that it fails because the neighbor cannot establish one basic component necessary for the creation of an easement by prescription: adverse use, ***without permission***, of the alleged private way. *See Lopez v. Walker*, 250 Ga. App. 706, 708 (2001). By her own admission, the neighbor confirmed that her historical access over your client's property has been with permission, thereby defeating any claim for easement by prescription. Additionally, the claim fails because (i) she did not establish exclusive possession of the purported private way (*see Pichulik v. Ball, 270 Ga. App. 656 (2004)*); (ii) there was no evidence that there was continued use of the same route without shifting paths over the course of more than 20 years; and (iii) there is no evidence of maintenance or repair by the neighbor over the alleged private way. *See Revocable Trust of Timothy W. Griffin v. Timberlands Holding Co. Atlantic, Inc.*, 328 Ga. App. 33 (2014).

Moreover, even if her alleged private way originated in permission but ripened over time to a prescriptive easement, her claims still failed. Permissive possession of a private way cannot

be the foundation of a prescriptive easement until and unless an adverse claim is made and actual notice is provided to the other party. *See O.C.G.A. § 44-5-161(b); Yawn v. Norfolk S. Ry. Co., 307 Ga. App. 849, 852 (2011).* Until those conditions are met, the claimant has at most a revocable license. *Trammell V. Whetstone, 250 Ga. App. 503, 506 (2001).*

What does the neighbor do? Files a petition to condemn the private way.

Under Georgia law, a private property owner may act as a condemnor in certain instances to condemn an easement for access, ingress and egress. *See O.C.G.A. § 44-9-40(b); generally, O.C.G.A. § 44-9-40 through O.C.G.A. § 44-9-48.* This is a strict statutory process. To commence the process, the property owner files a petition Superior Court claiming the easement that can be no more than 20 feet in width over another's private property. *See O.C.G.A. § 44-9-40.* The petition is deemed a "declaration of necessity", effectively a rebuttable presumption. The condemnee(s) may defend against the declaration by showing that either (1) the condemnor has reasonable access by an alternate 20 foot wide route (which could be owned in fee simple or by easement) or (2) that the condemnation is "otherwise unreasonable" (whatever that may be). If the judge agrees with the condemnee(s) as to either of these, then the superior court judge may enjoin the proceeding, finding that the condemnation and declaration constitutes an abuse of discretion. *Id.*

The statutory requirements for the condemnor's petition include:

(1) stating the distance and direction of the private way;
(2) identifying any improvements through which the private way will go;
(3) a plat showing the measurements and location;
(4) the names and addresses of all property interest owners; and
(5) naming an assessor to act on behalf of the condemnor.

See O.C.G.A. § 44-9-41; O.C.G.A. § 44-9-42. Moreover, service of process methods for this type of proceeding are specified and includes, in addition to personal service requirements, advertising like a foreclosure sale: once a week for four consecutive weeks in the county newspaper with sheriff's advertisements. *See O.C.G.A. § 44-9-41(5).*

Upon the filing of the condemnation petition, the judge shall enter a show cause order specifying a date and time for the condemnee(s) to identify their assessor and to show why the private way should not be condemned. At the show cause hearing, presuming the judge does not enjoin the proceeding, the judge schedules a board of assessors hearing to assess damages to the condemnee(s) in accordance with the provisions of O.C.G.A. §§ 22-2-60, *et seq.* *See*

O.C.G.A. § 44-9-43. Appeal rights are governed by O.C.G.A. § 22-2-80, *et seq.* See O.C.G.A. § 44-9-45.

At the show cause hearing and presuming the condemnee objects to the private way, the condemnee must put forth evidence to prove why the private way should not be condemned as demanded by the petitioner / condemnor and why no temporary order for access (if one is included in the petition) should not be granted. Evidence can include witness testimony and subpoenas should be issued to ensure their availability, but can be on subjects showing: (a) the petitioner is not entitled to a private way because its predecessor in title created the landlocked problem; (b) that upon acquisition, the property owner knew the property was landlocked and should have negotiated access or an easement at that time; (c) a failure to act during the road closure process acts as an estoppel to a claim for private way; and (d) an alternative route is more reasonable than the proposed route because of length, improvement costs, wetlands issues, impact on condemnee property or improvements, or impact on only one condemnee verses multiple condemnees. Condemnees should not forget to raise, if appropriate, procedural defenses like service of process and notice; proper parties; no plat of the proposed private way; and venue. Issues like this and compensation damages to the condemnee are determined by a jury trial.

From an evidentiary standpoint, consideration should be given to: (1) the need for surveys (of alternative routes or otherwise to show improvements and damage) and the time and expense that those can take, (2) the identification and preparation of assessors and other witnesses for the show cause and assessment hearings and trial; (3) obtaining certified copies of documents that are title documents, road closure documents (including governing authority or board of commissioners minutes); and (4) evidence of negative impact on condemnee property operations (whether that is quail habitat, wetlands, or improvements).

If the private way is granted, there are affirmative obligations on the condemnor that, if not met, can result in the termination of the private way and a reversion to the condemnee. Specifically, upon the final condemnation of the private way, the condemnor and its successors in title must maintain the private way or suffer a termination of the right and a reversion of title to the condemnee or its successors in title. *See O.C.G.A. § 44-9-45*. Additionally, upon judgment rendered in the case, the compensation for the private way must be paid into the Court's registry or the private way is deemed abandoned. There may be a motion by "any

interested party" to seek a judgment of abandonment. If an abandonment judgment is granted, then no application for private way over the same land may be filed by that condemnor or petitioner or his successor in title. *See O.C.G.A. §§ 44-9-46 and 44-9-47*.

As an alternative to the jury trial, expense and time, private ways may be established by an agreement in writing between the parties concerned, which agreement may stipulate any damages to be paid. *See O.C.G.A. § 44-9-48*.

O.C.G.A. §§ 44-9-49 through O.C.G.A. 44-9-60 allows for the establishment of private ways by agreement of parties and by use, but also allows for the conversion of a private way into a public road by declaration by the probate court judge if the road is "of sufficient length and importance" and if the people using it "do as much work thereon as is their proper share."

Examples of a petition for private way and answers thereto may be found in the records of that certain case styled Mary T. Stringer v. Beetlejuice, LLC, John E. Phipps and Nancy P. Phipps, Superior Court of Thomas County, Georgia, Civil Action File No. 15-CV-0562 (2015).

II. **Acquisition and Sale Issues: Do Not Forget These in the PSA**. There are all of the normal negotiation points in a purchase and sale agreement for plantation or large tract properties, but there are nuances that an urban commercial real estate attorney may not be familiar with or know to include or address in the parties' purchase and sale agreement. A few of these are highlighted below.

A. Title and Legal Descriptions. Selling or acquiring 5,000 plus acres of land has its own challenges that differ from a typical commercial real estate transaction, ranging from negotiating the timeline for closing (not a typical 30 or 60 day due diligence and 10 day close) to whether a survey is performed (it can take up to 6 months and cost in excess of $100,000) to home inspections. First, a 50 year chain of title might not be sufficient given that these large tracts tend not to turn over frequently and further given that when they last did, there may have been something that was missed. A boundary survey and especially an ALTA survey that identifies access ways, "roads" (or pig paths), gates, cemeteries and the like can help protect against future claims like one for private way (discussed below). There are also a significant likelihood that there are half-century old power easements that are now being viewed for fiber and other uses. Thankfully, Google Earth can help, as can a basic understanding of the land lot system for the particular county.

B. Farm Contracts, Timber Agreements, Licenses and Possessory Rights. It is not atypical for there to be small tracts of a larger property that are leased for farming or timber management, some of which are recorded but not all. It is also typical for plantation managers and employees to live on site, sometimes subject to a lease agreement and other times not. Access to plantation managers and others who provide services to the Plantation and work or live there is key.

C. Due Diligence and Operations. Like all due diligence, it is imperative to understand all aspects of the property operation but to balance those typical due diligence items (Phase I, property condition or assessment report, zoning) with these as purchase and sale agreement timelines and due diligence costs are considered. A few items unique to more rural or large scale properties:

(1) In the ongoing "water wars" climate, know whether any portion of the property served by public water or sewer? If not, consider due diligence requests for well water tests and reports for the past three (3) years, a list of the number of water wells serving the property and a current statement showing how many gallons per minute (GPM) is being used from each such well.

(2) Many of these properties have been managed by generations of families who have lived on the property, working for absentee owners who visit only during hunting season or holidays. Obtain information concerning or identifying any existing cemetery plots or graves on the property, including the identity of any persons buried on the property or the history related thereto by conducting interviews, researching local newspapers and historical society offices. This is particularly helpful to understand who may have or want "visitation" rights to the property and how to manage that going forward.

(3) Even if the property does not support a commercial hunting operation, if its use is any kind of hunting, wildlife preservation or habitat management, request documents and records relating to those operations.

(4) All licenses, business and use permits in respect of the property, including, without limitation hunting, lake and dam permits or licenses. Often these properties have one or more lakes and dams. If a lake is self-contained, as many are, it may not have a dam or any permit for it.

D. FF&E = MD&ATV (also known as "Mules, Dogs and ATVs"). Unlike other commercial real estate properties, there may very well be heated negotiations regarding the transfer of personal property, equipment, vehicles, dogs, horses and livestock located on and used on the property by staff and owners. It is critical to identify any of these that are either included with or excluded from the transaction. With respect to any animals, documents to request should include color photographs, tags and other identifiers, pedigrees and medical records. With respect to vehicles, farm equipment, and other machinery, photographs and descriptions for insurance and transfer purposes are key, as is obtaining EINs and running UCC and other lien searches to confirm ownership.

E. FLPA, CUVA and Other Incentives. Properties in excess of 200 acres often are encumbered by or participate in various types of conservation, wildlife management, habitat and forest protection programs. Some of these are private contract incentives and others include covenants that run with title to the land. Examples of common incentives that affect title are The Forest Land Protection Act (or "FLPA") and the Conservation Use Valuation Assessment (or "CUVA"). Additional information on these programs may be found at: https://georgiawildlife.com/sites/default/files/wrd/pdf/management/Landowners_Guide_to_Conservation_Incentives.pdf

Note: there is a proposed constitutional amendment that will be voted on November 6, 2018, that may revise the methodology for reimbursement and value determinations, and seeks to standardize the interpretation of valuation of timberland for property taxation purposes. The "Fair Forest Tax Initiative" was passed by the Georgia General Assembly and signed by the Governor earlier this year as House Resolution 51 and House Bill 85, and is listed on this November's ballot as "Amendment No. 3".