



Eminent Domain Law

Section Newsletter, State Bar of Georgia, Fall 2016

From the Chair

Greetings:

This year's themes for our section are revival, continuity, and new directions. What better evidence is there of revival than this very newsletter? We anticipate the publication and distribution of two newsletters. Many thanks to former Section Chair Anne Sapp and our current Secretary/Treasurer Melissa Perignat for compiling, editing and distributing this newsletter. We are still hoping to adopt a new clever (but in good taste) masthead and welcome any suggestions, mockups or any other input which will enhance our already exceptional newsletter. Below you will find contact information for each of the Section's officers. Please feel free to contact any of us at any time with any comments, questions or concerns. We are here for you.

With regard to continuity, our annual seminar and Section meeting will be held on Thursday, Feb. 23, 2017, at State Bar. The Hon. Craig Schwall of the Superior Court of Fulton County will deliver the Ethics and Professionalism portion of the program. Your comments about last year's seminar which, incidentally, were universally positive, provides the theme for this year's seminar. This year's seminar is titled "The Whys and Wherefores of the Eminent Domain Trial". Our presenters this year each will present a key portion of an Eminent Domain trial and explain their reasoning and strategy underlying their questioning or presentation.

As for new directions, the Section has undertaken several new projects.

First, the Section has established a Legislative committee, chaired by Section Vice Chair Ivy Cadle, charged with the responsibility of monitoring national and local legislation and suggesting modifications or new or alternative legislation. A process to bring the committee's recommendations to the attention of the entire Section and to obtain the entire membership's consent prior to suggesting to the State Bar any new legislation or modifications to existing legislation is being developed. Additionally, the Section is taking great care to insure that the committee is composed of individuals representing the interests of both Condemnors and Condemnees.

Second, we are working to compile a directory of expert witnesses which we expect to distribute at the annual meeting. The directory is expected to include potential expert witnesses from nearly all disciplines involved in Eminent Domain practice. The Directory simply will list by discipline expert witnesses along with their contact information but will contain no other information or comments. We welcome your contributions to the directory. Information on how to contribute can be found in this newsletter.

Third, with the cooperation of the State Bar, Melissa Perignat is compiling a member directory listing the names and contact information for each member of the Section. It is anticipated that this directory will be distributed electronically to Members.

Finally, for some additional fellowship, we are planning a holiday social for early December.

We are truly privileged to live and work in a country that values and protects private property rights. The work that we do, whether it be representing Condemnors or Condemnees or as other professionals working in the field of Eminent Domain, is essential to the protection of these rights and example the United States sets throughout the world for the protection and an enlargement individual liberties. Don't ever think that your contribution to our practice through your work or otherwise is unimportant or unappreciated.

I encourage and welcome you to participate fully in all of our Section's programs and activities. If there's anything of any nature which you may wish to discuss with myself for any of our officers, we are as close as your phone. Have a pleasant and safe fall.

Ken Levy
Eminent Domain Section Chair 2016-17

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Andrea Jones Wins Charles Pursley Award

by Ken Levy

Named for the “Dean” of the Georgia Eminent Domain Bar, The Charles N. Pursley, Jr. Award, each year, is awarded to that member-attorney of our section who has distinguished himself or herself from all others in the practice of Eminent Domain law. The Award recognizes that individual who, in the preceding year, best represents and reflects the ideals of eminent domain practice. Recipients of the Award are recognized for their contributions to the practice, their exemplary ethical conduct, their professionalism, their savvy, and, in general, their achievement in advancing the goals of Eminent Domain practice.

This year’s recipient, Andrea Cantrell-Jones, is the living embodiment of the Award. A long-time partner of the Gallaway Law group and its predecessor firms, Andrea served as our Section Chair for the 2014-15 term. Andrea always has practiced with a determination and doggedness which when combined with her reputation for thorough preparation and her inexhaustible knowledge of zoning has afforded her opportunities to achieve results that many in the field would not presume possible. A well-known and experienced condemnation engineer with a lengthy resume of condemnation testimony accurately complimented Andrea while preparing for the specter of her cross examination. The engineer pleaded with this lawyer “How should I handle her [Andrea]? Like a bulldog, she keeps coming and coming”.

Recently, Andrea was confronted with some serious health challenges which, with her usual dogged determination and perseverance, she successfully battled and conquered. Andrea, who had already decided to retire and join her son and grandchildren in sunny California, decided to advance her retirement by a few months and enjoy the fruits that this next chapter of her life undoubtedly will bring. As she enters into retirement and what for most of us still practicing can only be described as “the promised land”, we wish her nothing but the best.

Andrea, Godspeed, and may good health, happiness and joy always be yours! Thanks for the memories.

Condemnation of Intellectual Property

by Ken Levy

A couple of days ago I had nothing to do and so I decided to noodle around the Internet. Actually I had a lot to do but decided that noodling around the Internet for 20 minutes was more satisfying than researching a complex condemnation question. In any event, I came across a very recent South Carolina case holding that the partial destruction by the Police of a building in which a suspect was hiding in order to effect an arrest was not a compensable taking.

This result stirred my curiosity about the recent case involving Apple and San Bernardino terrorists. As you may recall, the FBI wanted access to the terrorists’ cell phones so that they could determine with whom the terrorists were in contact and whether there were other suspects to be identified and investigated. The FBI claimed that without Apple’s help, the cell phones could not be unlocked and that the information could not be obtained. Apple, after defending what perceived to be its duty to protect the privacy of its customers, complained that the task requested by the FBI would take untold man hours and would cost a staggering amount of money, perhaps in excess of \$300 million dollars. After a Court ruled that Apple had to cooperate, the FBI found that it didn’t need Apple’s cooperation. The FBI apparently found some 17 year old kid who hacked into the cell phone in exchange for a Pokemon.

When the incident occurred, I, having been accused on many occasions (especially by Richard Hubert) as being a tool of government, wondered whether the government could condemn intellectual property. I also wondered how intellectual property would be valued.

I do believe that under the proper circumstances intellectual property can be condemned. As to how it’s to be valued, I’ll leave that for others having far greater expertise than me.

Through this article, I invite those having the same intellectual curiosity that I have regarding this issue to come forward, conduct research, and prepare an article for presentation at our February seminar or a forthcoming “Lunch and Learn”. If there are contradicting opinions on the issue, I would welcome a healthy debate. I also would like to extend an invitation to any appraiser or anyone else who has any thoughts as to how intellectual property is to be valued to come forward and share those thoughts with us.

I look forward to your response. Until then, please consider hiring a 17 year old to help you with your information technology management needs. A Pokemon goes a long way!!!

Eminent Domain Case Law Update

by Anne W. Sapp, P.C.

SUPREME COURT DECISIONS

LAND USA, LLC v. GEORGIA POWER COMPANY, 297 Ga. 237 (June 1, 2015).

Issues: Quiet Title, Trespass and Ejectment

The property owner filed suit against Georgia Power Company (Georgia Power) for quiet title, trespass, and ejectment, challenging the validity of a Georgia Power easement. L.J. Fuller (Fuller), the original owner, was behind on his taxes, and during the negotiation process with Georgia Power for an easement, the property was sold at a tax sale to Investga. During the redemption period, Georgia Power filed a condemnation action against the property, but dismissed the condemnation action when Fuller granted them the easement. No interested parties redeemed the property, and Investga sold the property to Land USA. Land USA sued Georgia Power alleging that the easement Georgia Power obtained from Fuller after he had already lost the property to a tax sale became a nullity when the property was not redeemed after Investga properly invoked the state barment statutes set forth in [O.C.G.A. § 48-4-45](#). The Supreme Court concluded that although Fuller retained possession of the property, he lacked a sufficient interest in the property to grant Georgia Power a perpetual, express easement. Therefore, the easement Georgia Power obtained from the landowner became a nullity when the property was not redeemed after a buyer properly invoked the state barment statutes.

Additionally, the Court of Appeals reversed the Trial Court finding that Georgia Power's electric line did constitute a continuing trespass for which Land USA would be entitled to seek damages. To the extent a building prohibition was required on portions of the property due to the presence of the power line, it impinged on the owner's use and enjoyment of the property and created an additional servitude for which owner had standing to seek damages.

Finally, the Court concluded that Land USA's ejectment claim against Georgia Power failed as a matter of law where an existing power line has become a necessary and constituent part of the utility's service to the public, the landowner is estopped from recovering the land in ejectment or from enjoining its use for the service and is limited to pursuing an appropriate action in damages.

COURT OF APPEALS DECISIONS

EVANS et al. v. DEPARTMENT OF TRANSPORTATION, 331 Ga. App. 313 (March 19, 2015); Writ of Certiorari denied.

Issue: Value subterranean mineral rights

The Department of Transportation (DOT) condemned property located with the city of Gordon, Georgia, that contained subterranean deposits of kaolin and was zoned agricultural. Under the zoning ordinance, mining was not permitted in an area zoned agricultural absent a special exception. No exception had been granted on the subject property. The Court of Appeals found that

the trial court did not err in denying the condemnees' motion in limine, because zoning considerations were relevant and material to the jury's determination of what constituted just and adequate compensation in the instant action involving mineral deposits.

Additionally, while an expert may not render an opinion that is wholly speculative or conjectural, the fact that the expert's opinion is based partially on speculation goes to its weight rather than its admissibility. In this case, the DOT's expert real estate appraisers may have speculated to some degree in reaching their conclusions regarding the likelihood that a special exception would be granted for kaolin mining; however, that factor went to the weight of their testimony rather than its admissibility.

Finally, the trial court correctly charged the jury that it should consider the mineral deposits as part of its valuation of the condemned property, irrespective of whether the condemnees had mined the property or planned to mine it at the time of the taking. In this case, the jury charges on mineral deposits and zoning considerations, when construed together, were not conflicting and were an accurate statement of the law.

WHITE et al. v. THE RINGGOLD TELEPHONE COMPANY, 334 Ga. App. 325, (Nov. 4, 2015); Cert applied for.

Issues: O.C.G.A. § 22-1-6, Failure to Secure the Property by Contract; O.C.G.A. § 22-1-102.2(5), Necessity to condemn private property.

The Ringgold Telephone Company condemned approximately 0.03 acres of land in Catoosa County for the purpose of providing telephone and telecommunication services. The property owners filed a Motion to Dismiss the condemnation petition and an exception to the Award of the Special Master alleging that Ringgold failed to comply with [O.C.G.A. § 22-1-6](#). Evidence at the special master hearing showed that the condemnor made an effort to agree on a purchase price for the property, but that those negotiations ultimately failed, which was sufficient to show that it could not procure the property by contract within the meaning of [O.C.G.A. § 22-1-6](#). Therefore, the trial court properly denied Condemnees Motion to Dismiss and exceptions to the Special Master Award.

The property owners also alleged that because of pending litigation with Ringgold regarding prior contractual rights to the property, Ringgold could not procure the property. Condemnation actions are separate from suits for damages related to the property to be taken and that the latter is no reason to delay the former. Therefore, the special master and the trial court were not precluded from addressing Ringgold's petition for taking.

Finally, the property owners also claimed that Ringgold did not show the required "necessity to condemn the private property." [O.C.G.A. § 22-1-102.2\(5\)](#). Georgia law provides that the condemnor is the exclusive judge of necessity in the condemnation of private property for public purposes. Because large discretion is vested in the party having the right

to condemn, the Court of Appeals found that there was sufficient evidence to show the necessity of the taking.

FINCHER ROAD INVESTMENTS, LLLP v. CITY OF CANTON, GEORGIA, 334 Ga. App. 502 (Nov. 13, 2015); Cert applied for.

Issues: *Dismissal of Condemnation Action, Attorney Fees and Expenses of Litigation, compensation for temporary taking.*

The City of Canton (the City) filed a condemnation action against Fincher Road Investments, LLLP (Fincher Road). Fincher Road filed a Notice of Appeal and Motion to Set Aside the condemnation petition. The City ultimately dismissed its condemnation action. Following dismissal of the condemnation action, Fincher Road filed a motion for attorney fees, costs of litigation and compensation for the City's temporary taking of its

property prior to the dismissal. The Court of Appeals held that the condemnor was entitled to attorney fees and costs of litigation under [O.C.G.A. § 22-1-12](#) as well as additional compensation for the government's temporary taking of its property.

EARL'S PEARLS, LLC et al. v. COBB COUNTY, GEORGIA, 334 Ga. App. 689, (Nov. 18, 2015).

Issue: *Motion for Summary Judgment*

D&B operated a Primrose School child care franchise on property leased from owner Earl Pearls, LLC. D&B moved for partial summary judgment as to its duty to mitigate its business loss damages alleging that the costs to relocate the school exceeded the value of the business. The Trial Court denied D&B's motion for partial summary judgment on two grounds: first, D&B had misinterpreted and mistakenly relied upon [Carroll County Water Authority v. LJS Grease & Tallow](#), 274 Ga. App. 353 (2005), and secondly, numerous issues of material fact existed concerning D&B's duty to mitigate. On appeal, D&B attacked only one ground for the trial court's denial of its motion for partial summary judgment, the interpretation of [Carroll County](#), and did not challenge the alternative ground for the ruling involving issues of material fact. The Court of Appeals reversed the trial court's grant of partial summary judgment to Cobb County. The appellate court concluded that the trial court erred in granting the county's motion for partial summary judgment, because there was conflicting evidence regarding whether the condemnee's child care franchise had been terminated at the time of the condemnation

SHIV ABAN, INC. v. GEORGIA DEPARTMENT OF TRANSPORTATION, 336 Ga. App. 804 (March 29, 2016).

Issue: *Pre-Judgement Interest; Attorney's Fees and Expenses*

DOT filed a condemnation petition to acquire the property of Shiv Aban, Inc. (Shiv) and deposited \$430,000 into the registry of the Superior Court of Catoosa County as its estimate of just and adequate compensation for the taking of the subject property. The DOT attached to its complaint an affidavit of John Simshauser dated December 4, 2012. Shiv timely filed a notice of appeal for a jury trial in the superior court and petitioned for an interlocutory hearing before a board of assessors on the sufficiency of the amount of compensation paid into court. Following a two-day hearing, the board of assessors determined that Shiv was entitled to total compensation of \$1,700,000, and the award was approved by an order of the trial court dated August 5, 2014. On Aug. 12, 2014, the DOT deposited into the registry of the court the balance due of \$1.27 million. Shiv dismissed its notice of appeal for a jury trial and stated its desire to accept the award of the assessors. The DOT likewise did not further appeal the assessor's award. The DOT then moved that the assessors' award be made the final judgment of the court. Shiv filed a cross-motion contending that it was entitled to prejudgment interest on the \$1.27 million payment from the date of the taking through August 12, 2014, the date that sum was deposited into the registry of the court. Shiv also filed a motion for attorney fees and expenses of litigation in the superior court, arguing that under [O.C.G.A. § 9-15-14](#), it was entitled to fees and expenses. The Court of Appeals found that the trial court

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erred by failing to award prejudgment interest on 1.27 million under [O.C.G.A. § 32-3-19\(c\)](#), from the date of the taking through the date that amount was deposited into court, as that amount was not initially deposited by the DOT; that the trial court's award of attorney fees were affirmed under [O.C.G.A. § 9-15-14\(a\)](#), based on the DOT's use of a fundamentally flawed appraisal in support of the declaration of taking and it taking of a baseless position in the litigation; and that the trial court was authorized to make an award of attorney fees based on a contingent fee agreement and it properly apportioned the fees incurred between those associated with the DOT's improper conduct and those that were not.

SUMMEROUR v. CITY OF MARIETTA, 2016 Ga. App. LEXIS 415 (July 8, 2016)

Issue: Requirements of [O.C.G.A. § 22-1-9\(3\)](#)

The City of Marietta filed a condemnation petition to acquire property owned by Ray Summerour. Following a hearing, the court-appointed special master condemned the property and awarded Summerour \$225,000 which was affirmed by the Trial Court. On appeal, Summerour contends that the trial court erred in failing to dismiss the petition, arguing that the City neglected to provide a summary of the basis for its just-compensation offer in violation of [O.C.G.A. § 22-1-9 \(3\)](#), and that the City violated [O.C.G.A. § 22-1-9 \(7\)](#) by negotiating with him in bad faith. Additionally, Summerour contends that the trial court erred in failing, at the very least, to recommit the case to the special master to complete the record. Vacating the trial court's order and remanding the case for further proceedings, the Court of Appeals found that none of the city's offers prior to 2014 satisfied the dictates of [O.C.G.A. § 22-1-9\(3\)](#) and the city took several years to comply with [§ 22-1-9\(3\)](#), which bore on the issue of whether the city acted in bad faith.

JONES v. SABAL TRAIL TRANSMISSION, LLC, 336 Ga. App. 513 (March 29, 2016)

Issues: Consolidated Hearing, Preemption, FERC certificate

Sabal Trail Transmission, LLC (Sabal) was hired to construct and operate a natural gas pipeline. The trial court granted declaratory judgment and injunctive relief authorizing Sabal to enter and survey certain property for the proposed natural gas pipeline. The property owner, Ms. Jones, claimed that she did not get adequate notice that the hearing on the Sabal's petition would consolidate the interlocutory injunction and declaratory judgment requests set forth in the petition; however, the record shows that she did receive sufficient notice and that she acquiesced in the consolidated hearing on both issues. Jones also claimed that the trial court erred in applying state law in this matter because it is preempted by federal law, but she waived this issue by not raising it below. Likewise, the argument that Sabal did not meet the definition of the term "pipeline company" as it is used in two Code sections also was waived because it was not raised in the trial court. Finally, Jones alleged that Sabal was required to obtain a certain federal certificate before it could be authorized under a state statute to survey her property; however, the plain language of the applicable state statute imposes no such requirement. For these reasons, the Court of Appeals affirmed the Trial Court.

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Accounting Principles for Valuation Lawyers: Using the CPA to Advance your Case

by Ivy N. Cadle, Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.

Accounting principles form the basic building blocks to create the language of business. Understanding how these principles affect a client's case, and how a CPA can add value to the case, are both critical skills for an attorney who relies on accurate valuations. To work effectively with a CPA, one must understand accounting principles. To understand accounting principles, one must first understand accounting terms. Much like the law is full of legalese, accounting has its very own jargon where certain terms have very specific meanings.

Accountants use certain rules that govern the accumulation and compilation of financial information. In order to understand the relationship between accounting principles and value, it is critically important to understand certain basic accounting assumptions and principles. Those assumptions and principles include the following:

1. Separate Entity Assumption - An entity's financial records should show only the subject entity's position, as distinct from its owners or any other entities. Assets, liabilities, revenue, and expenses shown on an entity's financials should follow corporate form. The entity should be governed in a manner that aligns entity activity with the entity's legitimate interests.
2. Going Concern Assumption - It is assumed that the entity will continue its operations for the foreseeable future and that there are no new threats to its ability to meet its obligations in the near term. Such obligations or events that threaten the entity's ability to meet its obligations may include lawsuit contingencies that create liquidity issues, internal governance conflicts, mismanagement of liquidity, or external issues, i.e. regulatory concerns.
3. Time Period Assumption - It must be possible to divide the activities conducted by the entity into discrete time periods. These periods may consist of weeks, months, or years.
4. Monetary Transaction Assumption - It must be possible to measure the activities of the entity in terms of observable monetary transactions.
5. The Principle of Conservatism - No one likes bad surprises and accounts are no different. Accountants seek to frame accounting information in a manner that avoids negative surprises. This results in an inherent bias that leads to understated earnings, cash flows, and asset values. It also leads to a bias that can result in the overstatement of expenses and liabilities. While conservatism is a legitimate consideration for accountants, conservatism can also be misused by management to justify the creation of reserves that serve only to smooth earnings and make an organization's results appear falsely consistent.
6. The Principle of Matching - Items of expense should be allocated to the period where they were expected to create a related benefit. Depreciation is good example of the application of the matching principle, as depreciation is simply a systematic way to allocate the cost of a fixed asset over the period of time the fixed asset will benefit the organization.
7. The Principle of Consistency - Within a set of financial statements, one must apply accounting principles and judgments in a consistent manner. It is inappropriate to apply different conventions and judgments to similar transactions being reported in a single period or set of financial statements. If the applicable principles or judgments are changed, the entity should disclose the change and the reasons for the change.
8. The Principle of Cost versus Benefit - There is a great deal of information that can be gathered. It may not be cost effective to track it all. Information should not be tracked if the costs of compiling the information outweigh the benefits of using that information. This principle is especially relevant to small businesses. Compared to GAAP standards, financial statements of small businesses are often incomplete or unaudited because of the associated costs. These costs can be a legitimate concern for a small businesses.
9. The Principle of Materiality - While it may make sense for an organization to track information, the information in financial statements should be meaningful to users and not trivial.
10. Realization - Revenue should be recognized only when the entity has sufficiently completed a bona fide exchange. Furthermore, there must be some reasonable assurance that the resulting account receivable can be collected.
11. Cost Principle - Assets are to be reported on the financial statements at their historical cost. Unless otherwise specified, assets are not reported at fair market value.

Understanding the "set" of financial statements that should be included in any reporting package and the importance of each individual statement also is critically important. Any missing financial statement may signify a problem. The financial statements that should be included in any reporting package include the following:

1. Balance Sheet a/k/a Statement of Financial Position - The balance sheet simply lists the assets of a business and the claims against those assets. The statement is relatively simple in its appearance and it is a complete description of the entity as of a specific date. The balance sheet is often called a “snapshot” because it only provides the status of an entity as of a specific point in time. There are three broad classifications of the accounts that appear on the balance sheet. Those classifications are assets, liabilities, and equity.
2. Income Statement a/k/a Profit & Loss Statement a/k/a P&L - The income statement is like a motion picture of the enterprise over a defined period and it shows how the entity performed over that period. It can be compared to a rain gauge. Each period, the income statement starts with zero balances in each account. Over a period of time, the performance of the organization, in the form of revenues and expenses, accumulates on the income statement much like rain would accumulate in a gauge over a period of time. At the end of the period, the results are measured and the income statement accounts are closed back to zero. The closing process results in a change in the equity account balance shown on the balance sheet.
3. Statement of Owner’s Equity - Most entities should include a document entitled “Statement of Stockholder’s Equity” with the financial statements. This statement should be reviewed to discover any equity interests that were added or diminished during the period. It can also reveal dividends, distributions, and adjustments to retained earnings. For any client where a valuation will be performed, a statement of equity that shows accumulated deficits in retained earnings will present a special challenge because the deficit in retained earnings indicates the entity has been operating at a loss, possibly for a prolonged period of time.
4. Statement of Cash Flows - Neither the balance sheet, nor the income statement seek to show the flow of cash through an organization during any accounting period. Rather, those statements track a range of overall operations by reporting many transactions that do not involve the inflow or outflow of cash. For an organization to continue as a going concern, it must have enough cash on hand to meet its obligations and avoid default. Therefore, the statement of cash flows focuses on the financial viability of an organization and it provides insight on how the organization met its obligations during the period under consideration.
5. Notes to the Financial Statements - The Notes to Financial Statements are required supplementary disclosures that discuss the numbers provided by the financial statements. The notes present the financials with disclosures that can be fundamental to assess the financial statements and they often provide commentary concerning changes from previous periods. Other items discussed in the notes often include business activities, significant accounting policies, changes in significant accounting policies, descriptions of significant relationships, asset sales, discussion of significant liabilities, disclosure of parent and subsidiary relationships, subsequent events, and other items important to understanding the financial statements.

Any lawyer with a valuation oriented practice depends on quality valuation opinions. Because valuations are dependent on reliable and accurate accounting information, the appropriate understanding of accounting vocabulary and principles is critical. Knowing the basic principles used by accountants can help uncover instances where an accounting principle is distorting an economic reality. Knowing the basic form of financial statements can help determine when a client is providing incomplete or misleading information. For an attorney with a practice that depends on quality valuation information, a strong understanding of accounting is especially important.

Eminent Domain Expert Directory – Please Contribute.

By **Melissa Perignat**

As Ken Levy mentioned in his opening, we are working to create a directory of eminent domain-related experts, and we need your help. We are asking the Eminent Domain Section Members to send us the names and contact information for experts who testify in eminent domain or similar valuation cases (real estate appraisers, business valuers, land planners, engineers, sign valuers, etc.).

Simply email the information to eminentdomainexperts@gmail.com letting us know the area of expertise of the expert. The directory will not list who recommended the expert or how many people recommended the expert. It is our intention merely to group the experts into their respective areas of expertise and list them in alphabetical order. We believe that this expert directory will be an excellent resource for Eminent Domain Section Members, and we thank you in advance for helping us!