

**CONSERVATION EASEMENTS and CONDEMNATION –**  
**WHICH ONE WINS?**

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*"The 'Conservation Purpose' of this Conservation Easement is to protect, in perpetuity, the ecological and scenic resources, and the conservation interests and values of the Property identified herein..., while permitting compatible uses of the Property that are consistent with the Protected Conservation Values. The Conservation Purposes advanced by this Conservation Easement are:*

*(1) Preservation of the existing Protected Conservation Values of the Property which include natural habitats, forests, wildlife, scenic, agricultural and other ecological values which qualify the Property as a scenic, natural and rural area that has not been subject to significant development and as a significant natural area that provides a 'relatively natural habitat for fish, wildlife, plants or similar ecosystems' as that phrase is used in Section 170(h)(4)(A)(ii) of the Internal Revenue Code...."*

#### **A. Conservation Easements, The Basics:**

Conservation easements intentionally restrict the development and use of land in order to protect the ecological, natural, scenic and conservation interests or values of land. Owners voluntarily grant such easements to governmental entities or qualified, private charitable land trusts in exchange for charitable or tax benefits, monetary payments and/or development related benefits, such as variances and stream buffer

credits. In turn, the grantee entities and trusts assume enforcement obligations and sometimes maintenance responsibility of the conservation values on the burdened property. For governmental entities, acquiring a conservation easement can alleviate requirements or mitigate environmental damage caused by public projects or neglect of public projects.<sup>1</sup>

Conservation easements are granted in perpetuity and typically held in “gross,” meaning they are not appurtenant to another, dominant piece of property. At the state level, they are governed by enabling statutes, which allow for certain purposes and enforcement. Public policy is strongly in favor of using conservation easements as land protection tools as evidenced by the increase in the total acreage of protected land across the country, the federal and state tax benefits to owners, and the use of public funds to purchase them.<sup>2</sup> Along with land preservation and conservation values, these easements offer an alternative to government fee acquisition of land or regulations of private land.<sup>3</sup>

Georgia has a Uniform Conservation Easement Act, which provides in part:

(a) Except as otherwise provided in this article, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements, except that a conservation easement may not be created or expanded by the exercise of the power of eminent domain.

(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a

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<sup>1</sup> See, e.g., City of Atlanta Final Approved Greenway Acquisition Plan dated March 29, 2001.

<sup>2</sup> See Nancy A. McLaughlin, Condemning Conservation Easements: Protecting the Public Interest an Investment, 41 UC Davis Law Review 1897.

<sup>3</sup> Conservation Easements: The Good, the Bad, the Ugly, <http://www.nationalcenter.org/NPA569.html>.



conservation easement before its acceptance by the holder and a recordation of the acceptance.

(c) Except as provided in subsection (c) of *Code Section 44-10-4*, a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.

(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

(e) The ownership or attempted enforcement of rights held by the holder of an easement shall not subject such holder to any liability for any damage or injury that may be suffered by any person on the property or as a result of the condition of such property encumbered by a conservation easement.

(f) No county, municipality, or consolidated government shall hold a conservation easement unless the encumbered real property lies at least partly within the jurisdictional boundaries of such county, municipality, or consolidated government.<sup>4</sup>

The popularity of these easements has grown exponentially in the past two decades<sup>5</sup> and for good reason. Although property owners relinquish certain land uses by granting such easements in perpetuity, the corresponding tax breaks and incentives can add up to real savings through: (1) federal income tax deduction of up to 50% percent of annual income for fifteen years<sup>6</sup>; (2) estate tax incentives that reduce estate value<sup>7</sup>; and (3) state and local tax deductions and/or reduction in value assessments. These incentives not only represent value to the owners, they also result in public investment in land preservation through use of funds to purchase easements, land management, and a reduction in tax revenues.

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<sup>4</sup> OCGA §44-10-3.

<sup>5</sup> Conservation Easements: The Good, the Bad, the Ugly, <http://www.nationalcenter.org/NPA569.html>.

<sup>6</sup> See <http://www.landtrustalliance.org/topics/taxes/income-tax-incentives-land-conservation>.

<sup>7</sup> See <http://www.landtrustalliance.org/topics/taxes/estate-tax-incentives-land-conservation>.

Ironically, the same land that can be preserved by one arm of the government through a conservation easement can be damaged by another arm of the government through the power of eminent domain. Broadly speaking, eminent domain is the constitutional power conferred upon federal and state governments to take or acquire private property without consent and devote to a particular public use. This power is limited by the Fifth Amendment in two very important respects: the taking must be for a public use and just compensation must be paid. Eminent domain authority is delegated by constitutional amendments and enacting legislation to specific entities, such as state Departments of Transportation, cities, counties, schools, utilities, railroads, or housing development authorities. The term "condemnation", often used interchangeably with eminent domain, is the formal exercise of or procedure to carry out the power of eminent domain and transfer title from the private property owner to the government.

### **B. Georgia Condemnation Law**

The Georgia Constitution provides that "[p]rivate property shall not be taken, or damaged, for public purposes, without just and adequate compensation being first paid."<sup>8</sup> All private property, all property rights and interests of every type and nature can be condemned so long as just and adequate compensation is first paid by the condemning authority.<sup>9</sup> In other words, if a property right exists, it can be taken, no matter the nature. This includes not only the actual land, but also leasehold values, trade fixtures, buildings and improvements, billboards, access rights, air rights,

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<sup>8</sup> GA. Const. 1983, Art. I, § III, ¶ I.

<sup>9</sup> Woodside v. City of Atlanta, 214 Ga. 75, 103 S.E.2d 108 (1958).



easements, certain contract rights, operating businesses or income streams and business values that are inherent in the property. Land protected by conservation easements are not exempt from condemnation even when the easement is held by a governmental entity. While Georgia's Uniform Conservation Easement Act makes clear that the power of eminent domain cannot be used to establish or expand a conservation easement, it does not carve out any protection of an existing easement when the burdened land is required for another public use.<sup>10</sup>

### **C. Compensation of Ownership Interests Under Georgia Condemnation**

#### **Law**

While all property interests can be condemned, not all ownership interests are entitled to receive the compensation that must be first paid before the property is taken. For example, the holder of a right of first refusal, owners of franchise rights, and beneficiaries of restrictive covenants have no right to be paid for any loss or damage to such interests. Just and adequate compensation under Georgia law begins with the principle that a property owner whose land is taken for a public use must be paid the value of the land or interest that is actually taken.<sup>11</sup> Where the taking is only partial, the owner must be compensated for the value of land taken, plus any reduction in the fair market value of the remainder property, also known as consequential damages caused by the taking.<sup>12</sup> To determine the value of the remainder, any consequential benefits resulting from the taking may be offset against the consequential damages but

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<sup>10</sup> O.C.G.A. § 44-10-3(a).

<sup>11</sup> See, e.g., O.C.G.A. §§ 22-2-62, 22-2-63.

<sup>12</sup> Wright v. MARTA, 248 Ga. 372, 283 S.E.2d 466 (1981).

may not be offset against the value of the property actually taken.<sup>13</sup> A property's value, including consequential damages and benefits, is determined by the fair market value of the property on the date of the taking.<sup>14</sup> Fair market value is defined as "the price a property will bring when it is offered for sale by one who desires, but is not obligated to, sell it, and is bought by one who wishes to buy it, but is not obligated to do so."<sup>15</sup> In the absence of fair market value, a property may be valued for its uniqueness, such as where the condemned property is not of a type generally bought and sold on the open market.<sup>16</sup>

#### **D. Compensation for Condemnation of Conservation Easements**

In general, the holder of an easement is entitled to compensation for the taking or damaging of the easement interest on the burdened land.<sup>17</sup> Likewise, the owner of the burdened land may be entitled to compensation for the additional taking of or damage to the underlying fee. Any value to be paid is measured by the fair market value of the easement before and after the taking, and represents a portion of the total fee value.<sup>18</sup> Conservation easements can pose particular and conflicting challenges for determining just and adequate compensation for the burdened land, the easement and the holder of the easement. On the one hand, the subject land and its uses already are restricted, which can reduce fair market value. On the other hand, the conservation easement attaches an additional, unique value to the land based on its preservation for

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<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Central Georgia Power Co. v. Stone, 139 Ga. 416, 77 S.E.2d 565 (1913).

<sup>16</sup> Housing Auth. of Atlanta v. Southern Ry. Co., 245 Ga. 229, 264 S.E.2d 174 (1980).

<sup>17</sup> Lee v. City of Atlanta, 219 Ga. App. 264, 464 S.E.2d 879 (1995).

<sup>18</sup> Id.



a specific use. In addition, the land owner may have been paid fair market value in exchange for granting the easement across the land, which in turn may reduce any subsequent compensation for the taking of the land that also impacts a conservation easement. The most common example of this is when a new utility easement is taken on the same land with existing utilities – the value of the new easement can be substantially reduced because the owner has already been paid a portion of the fee value for the existing utilities.

There is no case law directly addressing the condemnation of a conservation easement or how compensation of the various should be handled.<sup>19</sup> Georgia courts adhere to the “common denominator” or the undivided fee rule, in which individual parcels of or interests in land are condemned and valued as one property so long as there is common ownership.<sup>20</sup> This rule is intended to prevent the total value of the various interests from exceeding the total fair market value of the entire property. In addition, Georgia law excludes recovery of consequential damages to an adjacent benefitted property caused by the loss of easement rights on the burdened land.<sup>21</sup> As a result, the holder of an easement can recover the loss of value of the easement on the burdened land. It cannot, however, recover damages that may occur to its property that is benefitted by the easement. For example, the owner of an outparcel, Parcel A, that enjoys access easement rights across Parcel B, can recover the value of its easement that is taken on Parcel B, but it is barred from recovering damages to its

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<sup>19</sup> See McLaughlin, Condemning Conservation Easements, *supra*, (examinations of arguments in favor of and against compensating a holder of an existing conservation easement that is condemned).

<sup>20</sup> DOT v. Olshan, 237 Ga. 213, 227 S.E.2d 349 (1976).

<sup>21</sup> Georgia Power v. Bray, 232 Ga. 558, 207 S.E.2d 442 (1974).



outparcel for the loss of access rights, which could be much greater. Whether this exclusion would be applied in the taking of a conservation easement has not been addressed in Georgia. The statutory provisions for the creation of conservation easements are silent as to compensation when these easements are condemned.