BLOOM
SUGARMAN

Eminent Domain Damages

By: Stephanie A. Everett, Esq.

Ryan E. Harbin Esq.

BLOOM SUGARMAN EVERETT, LLP

Telephone: 404-577-7710

www.bloomsugarman.com

If the public entity can establish the right to condemn private property, the Georgia constitution requires the entity to pay "just and adequate compensation" to the private property owner. Damages are a question for the jury at trial. But how does a jury decide what amount gets paid? This is a thorny question dependent upon a multitude of factors.

I. Damages Standard

Georgia courts have held that only two basic categories of damages can be awarded in condemnation proceedings: 1) the market value of the property taken by the condemning authority; and 2) "the consequential damage that will naturally and proximately arise to the remainder of the owner's property from the taking of the part which is taken and the devoting of it to the purposes for which it is condemned."[1] Of course, neither of these is a straightforward amount, and numerous different factors go into them both.

A. Value of the Condemned Portion

Unless a property has unique characteristics or there is some other sort of evidence indicating that fair market value is not just and adequate compensation, then fair market value is the standard award.[2] Uniqueness in this context means a property "which must be valued by something other than the fair market standard because there is no general market for such property."[3] It is determined from "the characteristics of the land

---

1 Simon v. Dep't of Transp., 245 Ga. 478, 478 (1980); Dep't of Transp. v. Foster, 262 Ga. App. 524, 525 (2003).
2 Fountain v. MARTA, 147 Ga. App. 465, 469 (1978).
3 Dep't of Transp. v. Metts, 208 Ga. App. 401, 402 (1993).

and the use of the land by the owner, but not the characteristics of the owner."[4] For example, when the only evidence of uniqueness or particularity of the property is its "riverfront" location and its "privacy," the property is not so one of a kind as to justify a charge that allowed the jury to compute damages based on a "peculiar" value.[5] Unique means so one of a kind or so infrequently bought or sold as to not have a "market value."[6]

Market value is determined from the perspective of the condemnee, not the value of whatever purpose to which the condemnor will put the land.[7] Additionally, fair market value will be awarded even if the condemnee purchased the property for less than fair market value or received the property as a gift.[8] Any sentimental value the property may have had to the condemnee is not relevant and may not be considered by the jury. "Condemnation proceedings are *in rem* and just compensation must be based upon the value of the rights taken, without regard to the personality of the owner or his personal relationship to the property taken."[9] This is because all property is likely to have some sentimental value to the owner.

Despite the fact that typically the measure of damages is the value of the property at the time of the taking,[10] courts may submit to the jury evidence that it was generally known or anticipated in the surrounding community that impending improvements would be made that would enhance the property's value—even if the improvements were to be undertaken by the condemnee itself.[11]

Condemnation damages are not limited to an owner's fee simple interest—for example, an owner whose easement is extinguished by condemnation of the subservient parcel is entitled to compensatory damages for the property interest she has lost.[12]

---

4 Id.
5 Macon-Bibb Cnty. Water & Sewerage Auth. Reynolds, 165 Ga. App. 348 (1983).
6 Id. at 351.
7 Fulton Cnty. v. Funk, 266 Ga. 64, 65-66 (1995) ("There is no doubt that, in Georgia, each condemnee must be paid for what he has lost, not for what the condemnor has gained.").
8 Elbert Cnty. v. Brown, 16 Ga. App. 834 (1915).
9 Dep't of Transp. v. Metts, 208 Ga. App. at 402.
10 Dep't of Transp. v. Mendel, 237 Ga. App. 900, 901 (1999) ("The only relevant inquiry is the fair market value of the property at the time of the taking.").
11 City of Gainesville v. Chambers, 118 Ga. App. 25, 26 (1968).
12 Lee v. City of Atlanta, 219 Ga. App. 264 (1995).

B. Consequential Damages:

"Where a portion of property is taken for a public use, the condemnee is entitled to compensation for consequential damages to the remainder caused by the taking."[13] Consequential damages are additional damages, "if any, which naturally and proximately arise to the remainder of the condemnee's property from the original taking. Therefore, it must be shown that the consequential damage to the remainder was a continuous and permanent incident of the taking in the present action."[14] Consequential damages are determined by calculating "the difference between the fair market value of the remaining property prior to the taking and the fair market value of the remaining property after the taking."[15]

Therefore, a jury calculating an award for a partial taking should follow a five-step procedure:

> (1) determine the fair market value of the entire tract of property before any part is taken; (2) the value of the partial portion taken considered as a part of the whole tract; (3) the value of the remaining tract but just before the taking; i.e., the value of the remainder as a part of the whole by subtracting the value of a part taken from the value of the entire property; (4) the market value of the remainder just after the taking, considering the negative impact of the separation of the part from the whole; and (5) the positive impact of the taking of the part upon the value of the remainder just after the taking.[16]

For example, in Dep't of Transportation v. Ogburn Hardware & Supply, Inc.,[17] the Court of Appeals upheld the value determination of the landowner's expert appraiser where the appraiser followed these steps. The appraiser first determined the value of the entire tract using a market and comparable sales

13 Georgia Dep't of Transp. v. Crumbley, 271 Ga. App. 706, 708 (2005).
14 Fountain v. DeKalb Cnty., 154 Ga. App. 302, 303 (1980) (quoting MARTA v. Datry, 235 Ga. 568, 580 (1975)).
15 Dep't of Transp. v. Morris, 263 Ga. App. 606, 608 (2003) (citing Dep't of Transp. v. Gunnels, 255 Ga. 495, 496-497 (1986)).
16 Dep't of Transp. v. Ogburn Hardware & Supply, Inc., 273 Ga. App. 124, 125-26 (2005).
17 273 Ga. App. 124.

analysis.[18] Second, the appraiser calculated the value of the remaining portion after part of the tract was condemned.[19] Next, the appraiser determined the cost to cure the issues caused by the partial taking, such as lack of parking and access.[20] There being no positive effect from the taking, the appraiser then calculated damages based upon the value of the remainder portion prior to the taking and then the value after the taking, resulting in the amount of consequential damages to be awarded.[21]

1. Duty to Mitigate

Georgia courts have held that condemnees who suffer consequential damages may be required to mitigate damages where possible. For instance, in Continental Corp. v. Dep't of Transportation,[22] the DOT condemned an area that amounted to twelve parking spots that the condemnee argued would prevent developing the location into a Dairy Queen, as the land had previously been used, because the parking lot reduction would prohibit the franchise from becoming sufficiently profitable to be financially feasible.[23] However, the DOT presented evidence that the condemnee could cure the problem and simply submit proof of the costs expended, which would then be reimbursed as damages.[24] For more on the cost to cure as damages, see Section II.C, below.

II. Factors in the Damages Calculation

While the abovementioned two-factor formula is the only way for condemnation damages to be calculated in Georgia, a number of different factors are included in the fact finder's equation.

A. Fixtures and Improvements

In determining the amount of a condemnation award, "[a]nything that enhances the value of the property may be considered, including improvements."[25] Therefore,

18 Id. at 126.
19 Id.
20 Id.
21 Id.
22 172 Ga. App. 766 (1984).
23 Id. at 767.
24 Id.
25 Simmerman v. Dep't of Transp., 167 Ga. App. 383, 387 (1983) (internal citations omitted).

improvements and fixtures upon condemned land can be considered as a separate factor in the damages calculation outside of the value of the dirt itself. For instance, in Dep't of Transportation v. Foster,[26] the Georgia Court of Appeals upheld value calculations from the DOT'S expert despite the fact that the expert valued the condemned land using a highest and best use of commercial development worth $2.50 per square foot and then valued the home on the un-condemned portion based upon its potential rental income.[27] The Court of Appeals also upheld a damages calculation in Dep't of Transportation v. Brooks[28] that included separate values for the condemned dirt and the improvements thereupon.[29] In Brooks, the Court of Appeals specifically disapproved of jurisdictions in which the award is premised on one single value for land and improvements thereupon. The court stated that "these limitations are a misguided approach to just and adequate compensation and they are not the law in Georgia,"[30] as Georgia's constitution "is susceptible to no construction except the condemnee is entitled to be compensated for all damage to his property and expense caused by the condemnation proceedings."[31] Where the property condemned includes improvements, the Brooks court concluded such improvements must be given value independent of the land in the damages calculation.[32] The same is true of any lessee's equipment or fixtures upon a condemned property.[33]

B. Leases

Often, the condemned property is subject to a lease. When this is the case, the lease could be rendered invalid or impaired as a result of the condemnation. In those circumstances, the issue of damages has two facets: damages due to the lessor, and damages due to the lessee.

A landlord is entitled to damages due to a broken lease. This is because the damages awarded in a condemnation action are determined based upon "the value of that

26 262 Ga. App. 524 (2003).
27 Id. at 526.
28 153 Ga. App. 386 (1980).
29 Id. at 390-92.
30 Id. at 391.
31 Id. (quoting Bowers v. Fulton County, 221 Ga. 731, 738 (1966)).
32 Brooks, 153 Ga. App. at 391-92.
33 E.g., Lil Champ Food Stores, Inc. v. Dep't of Transp., 230 Ga. App. 715, 719-20 (1998).

which the owner has lost rather than that which the condemnor has gained."[34] For instance, in Carasik Group v. City of Atlanta,[35] a lessor was entitled to damages in the amount of his lost lease revenue where the lessee determined in good faith that it could not continue to use the leased land.[36] However, lessors should be careful, because at least one Georgia court has refused to award damages from lost lease income where the lease contained a provision permitting the lessee to cancel a lease in the event of condemnation of leased land. The court concluded that this provision meant that the lessor did not lose any funds to which he was entitled after the land was in fact condemned and the lessee exercised that lease provision.[37]

A lessee will also be entitled damages for the loss of use of the lease property in the amount of "the diminution in the market value of the leasehold during the remainder of the unexpired term of the lease, less any rents to be paid by the lessee."[38] Therefore, if the lessee is paying about fair market rent, the lessee may not be entitled to any damages at all.[39] For example, in Lil Champ Food Stores, Inc. v. Dep't of Transportation,[40] the lessee convenience store was awarded $13,549 in damages for leasehold equipment and fixtures on the condemned property but nothing for its leasehold interest.[41] The Court of Appeals upheld the damages award based upon evidence that the lessee was paying about market rent, so any value of the leasehold was offset by the rent the lessee would have paid.[42] Therefore, the lessee was only entitled to damages for the equipment and fixtures it installed on the property.[43]

C. Costs to Cure

"In a partial taking case, evidence as to the cost to cure may be admissible as a factor to be considered in determining the amount of recoverable consequential damages

34 Carasik Grp. v. City of Atlanta, 146 Ga. App. 211, 216 (1978).
35 146 Ga. App. 211.
36 Id. at 216.
37 Budd Land Co. v. City of Valdosta, 165 Ga. App. 534 (1983).
38 Ellis v. Dep't of Transp., 175 Ga. App. 123, 123 (1985).
39 Lil Champ Food Stores, Inc. v. Dep't of Transp., 230 Ga. App. 715 (1998).
40 230 Ga. App. 715, 719 (1998) ("Generally, a leasehold has value to the lessee only if he is paying below-market rent . . . . ").
41 Id. at 718-19.
42 Id. at 719.
43 Id.

to the remainder."[44] There is some confusion in application of cost to cure damages. Generally, courts hold that cost to cure evidence is to be considered as a factor that reduces the fair market value of the remaining property, not as a separate damages calculation.[45] Therefore, it has been held that even where an expert testifies regarding the amount it will cost to cure damage to property, that amount cannot be considered in a damages calculation unless it is accompanied by testimony regarding the reduced market value of the property.[46] However, the Court of Appeals has also stated that "[c]ost of cure is . . . properly used as a factor to be considered in determining the amount of consequential damages" without any requirement that it be framed in terms of market value.[47]

D. Business Loss Damages

There are numerous provisions of Georgia law restricting the availability and amount of damages as compensation of loss of business. First, to recover for business loss in addition to the market price of the property, it must be shown that the property was unique in some way:

> The destruction or loss of a business being operated upon the condemned property requires compensation where the land is shown to be unique. Every person who has an established business in a location which cannot be duplicated within the immediate area suffers a loss which is particular and unique to him. If the property must be duplicated for the business to survive, and if there is no substantially comparable property within the area, then the loss of the forced seller is such that market value does not represent just and adequate compensation to him.[48]

For instance, in Dep't of Transportation v. Kendricks,[49] a lessee showed that he suffered lost business damages of over $100,000 because a public works project

44 Dep't of Transp. v. Metts, 208 Ga. App. 401, 403 (1993).
45 See, e.g., Steele v. Dep't of Transp., 295 Ga. App. 244, 247 (2008).
46 Id. at 247-48.
47 Dep't of Transp. v. Morris, 263 Ga. App. 606, 609 (2003).
48 Dep't of Transp. v. Kendricks, 148 Ga. App. 242, 246-47 (1978).
49 148 Ga. App. 242.

interfered with the grading of land the lessee used to display cars, boats and tractors the lessee sold.[50] The leased land was not taken, but the changed topography greatly lessened visibility of the displayed vehicles from the nearby highway and almost completely blocked visibility from one direction.[51] The Court of Appeals found these allegations adequately showed unique characteristics sufficient to permit damages due to lost business.[52]

In contrast, a condemnee who does not show such unique value is not entitled to business loss damages and is only permitted to introduce business loss amounts to establish fair market value of condemned land.[53] Additionally, it has been said that an owner of partially taken land must show "a total destruction of the business" in order to recover.[54]

E. Multiple owners

Landowners should be wary of buying into a parcel of a large tract with common owners, because Georgia law entitles a public authority to condemn multiple tracts via a single *in rem* action and award one lump sum if there is a "common denominator" amongst the owners of the tracts.[55] This sum is apparently to be divided between "all persons interested" based upon "the damages to which they are respectively entitled." If this seems vague and problematic, just imagine trying to actually litigate the amounts that should be awarded amongst all parties—this practice had been upheld for up to sixteen parties.[56]

F. Access to Roads

Georgia law falls in two separate directions when determining whether to award damages based on impaired access to public roads. The difference comes down to whether any portion of the landowner's property will be left without access to public

50 Id. at 243.
51 Id.
52 Id. at 247.
53 Dep't of Transp. v. Dent, 142 Ga. App. 94, 95, (1977).
54 Kendricks, 148 Ga. App. at 256.
55 Dep't of Transp. v. Olshan, 237 Ga. 213, 216 (1976); Kennedy v. State Highway Dep't, 108 Ga. App. 1, 1 (1963).
56 Olshan, 237 Ga. App. at 213.

roads or whether the landowner's travel routes will simply become less convenient. In the former situation, damages will be awarded, while in the latter they will not.

1. Access to Public Roads

"The right of access, or easement of access, to a public road is a property right which arises from the ownership of land contiguous to a public road, and the landowner cannot be deprived of this right without just and adequate compensation being first paid."[57] Interference with access to premises is a taking and will typically entitle the injured party to damages in the amount of the diminution of market value of the property.[58] For instance, in MARTA v. Datry,[59] the Georgia Supreme Court held that a landowner was entitled to damages after a condemnation for a MARTA station would "cause some interference" with the landowner's vehicular access easement in Decatur.[60]

2. Circuity of Travel

In contrast, damages are not available where a party still has the same access to public roads but a condemnation renders the party's travel route is made longer or more circuitous. For instance, in Tift County v. Smith,[61] the landowner attempted to recover damages from the county after a public highway project resulted in dead-ending of a road by the plaintiff's property.[62] The plaintiffs' property was not physically damaged, nor was their ingress and egress affected.[63] Instead, the plaintiffs argued that the dead-ending of the road made their route to certain nearby destinations longer and more inconvenient, thus decreasing the value of their property.[64] The Georgia Supreme Court, however, held that the plaintiffs did not "show that this inconvenience, and resulting diminution of value, was brought about by a violation of any special right they hold as owners of this

57 Metro. Atlanta Rapid Transit Auth. v. Datry, 235 Ga. 568, 575 (1975); See also State Highway Dep't v. Price, 123 Ga. App. 655, 655 (1971) ("Where the State has specifically condemned access rights to a proposed highway, and when the highway will result in a loss of access to a part of the condemnee's land, a charge which designated the former as an element of compensation for the taking and the latter as an element of consequential damages, did not authorize a double award for the same thing.").
58 Datry, 235 Ga. at 575.
59 235 Ga. at 568.
60 Id. at 575.
61 219 Ga. 68 (1963).
62 Id. at 70.
63 Id.
64 Id. at 71.

property."[65] Instead, the plaintiffs alleged only an injury to a right held in common with the general public, which was not a constitutional taking.[66]

G. Water rights

The issue of water rights is not often litigated in the eminent domain context, perhaps because the Supreme Court of Georgia has stated that Georgia's constitutional takings clause does protect an owner's right to the "natural and usual flow" of even a non-navigable stream, finding that any water rights are "inseparably annexed to the soil [and] parcel of the land itself."[67] A lawyer whose client is facing a condemnation action should definitely take advantage of any naturally occurring water on the client's property.

H. Contaminated Property Valuations

"Though the law generally favors the prevention of a multiplicity of actions, it appears that condemnation law in Georgia rather strictly limits the relevant evidence in condemnation cases and therefore separate suits for different kinds of damages are not uncommon."[68] This is perhaps nowhere more clear than situations in which a condemnor has already damaged the condemned property due to contamination.

For instance, in Shealy v. Unified Government of Athens-Clarke County,[69] the owners of land near a landfill operated by Athens-Clarke County sued the county for nuisance, trespass and inverse condemnation based on contamination to the owners' property from the landfill.[70] The plaintiffs also sought an injunction preventing the county from condemning the property at issue. Shortly before the plaintiffs sued the county, the county instituted condemnation actions for the damaged land, though apparently the landowners were not aware of the condemnation actions at the time they filed their suit.[71] The county moved to dismiss the injunctive counts for mootness, as the

65 Id. at 72.
66 Id. See also Dep't of Transp. v. Durpo, 220 Ga. App. 458, 460 (1996) ("If the property owner has the same access to the public road or highway which abuts his property, as he did before the road closing, then his damage is not special.").
67 City of Elberton v. Hobbs, 121 Ga. 749 (1905).
68 Simon v. Dep't of Transp., 245 Ga. 478, 479 (1980).
69 244 Ga. App. 853 (2000).
70 Id. at 853.
71 Id.

condemnation suit had already been filed.[72] The trial court granted the motion as to the injunctive count and the remaining counts as well.[73] The plaintiffs appealed the dismissal of their non-injunction counts, which the Court of Appeals reversed.[74]

The Court of Appeals noted that in a condemnation proceeding, a condemnee can recover two types of damages: the market value of the condemned property and consequential damage caused to any of plaintiff's remaining property.[75] Property value is determined at the time the condemnor actually pays the damage, so it is based on the market value of the property as it was at that date.[76] In fact, a jury is prohibited from considering the value of the property at any previous time:

> In determining the market value of the property as of the date of taking, the general environmental condition of the condemned property, including the need for remediation, is a relevant factor. Losses occurring prior to the date of taking are not compensable in a condemnation proceeding. In particular, losses resulting from a previous taking, even by the same condemnor, are not recoverable in a condemnation proceeding, since such damages are not a consequence of the instant taking. Such damages must be recovered in an independent suit for damages, and may not be raised in the current condemnation proceedings.[77]

The Georgia Court of Appeals evaluated the dismissal and determined that since there was no evidence compensation was delivered prior to any damage to the property, the value at issue would have been determined after the alleged damage had occurred and the plaintiff's property value had been reduced.[78] Therefore, the plaintiffs were not only permitted to maintain a separate action for nuisance and inverse condemnation damages before the condemnation, but were in fact required to do so in order to recover the full value of the property before any contamination from the landfill. "Because the damages

72 Id. at 854.
73 Id.
74 Id. at 855.
75 Id.
76 Id.
77 Id. (internal quotes and citations omitted).
78 Id. at 855-56.

recoverable in the two actions were different, the trial court erred in concluding that the inverse condemnation claim was rendered "moot" by the subsequent condemnation of the fee simple title."[79]

I. Relocation Expenses

Relocation expenses have been awarded by Georgia courts in the past[80] and are now available by statute in some circumstances. The Georgia Relocation Assistance and Land Acquisition Policy Act[81] provides that entities undertaking public works projects whose cost is at least partially financed by federal funds should "make or approve" payments for relocation expenses and replacement housing expenses.[82] This provision applies to "any person, family, business, farm operation, or nonprofit organization" displaced by a federally funded project.[83] The entity should pay for "actual reasonable expenses."[84]

J. Litigation costs/attorneys fees

Attorneys' fees and litigation costs are available to condemnees under several statutory provisions. First, any time a public body brings and then abandons a condemnation action.[85] Second, if a court rules that the condemning authority is not entitled to condemn the property.[86] The Supreme Court of Georgia has also indicated a willingness to entertain petitions for fees under § 9-15-14's prohibition against bringing action that lack any justiciable issue of law or fact or are not substantially justified.[87] For instance, in McKemie v. City of Griffin,[88] Griffin filed a petition to condemn certain property of McKemie for sewer easements.[89] After an award to McKemie of twice Griffin's appraised value, the city abandoned the action and decided to solve its sewer

79 Id. at 858.
80 E.g., Metro. Atlanta Rapid Transit Auth. v. Funk, 263 Ga. 385 (1993).
81 O.C.G.A. § § 22-4-1 et seq.
82 O.C.G.A. § 22-4-4.
83 Id.
84 42 U.S.C. § 4622.
85 O.C.G.A. § 22-1-12(a); O.C.G.A. § 22-4-7.
86 O.C.G.A. § 22-2-12(b); O.C.G.A. § 22-4-7.
87 Dep't of Transp. v. Woods, 269 Ga. 53, 55 (1998) (finding that though attorneys's fees were not authorized under the facts at bar, attorneys' fees in a condemnation action could be awarded under O.C.G.A. § 9-15-14); McKemie v. City of Griffin, 272 Ga. 843, 843-44 (2000).
88 272 Ga. at 843.
89 Id.

issues by redesigning the lines.[90] McKemie sought and were awarded fees under § 9-15-14 and § 22-4-7, the section authorizing a fee award where the condemnor abandons the action. The Court of Appeals, however, ruled that the award was not supported by the evidence and reversed.[91] The Georgia Supreme Court disagreed. The court noted first that fees were not available under § 22-4-7 because that section authorizes fees only where federal funds support the public project at issue.[92] The court then held that fees were justified under § 9-15-14(b).[93] The court stated that:

> A governmental entity should invoke its power of eminent domain only for the legitimate purpose of actually accomplishing a public goal, and not as a means merely to establish the most cost effective method for doing so. Because such misuse of the power lacks "substantial justification," the trial court may, in the exercise of its discretion, find that the City was liable for attorney fees under OCGA § 9-15-14(b).[94]

III. Conclusion

Though the law is Georgia is nominally that only two factors are considered in eminent domain damages calculation, the above cases and statutes show that in reality, any number of amounts can be considered. A clever lawyer should be able to ensure sufficient compensation for her client by pursuing and introducing as evidence every possible avenue for damages.

90 Id.
91 Id.
92 Id. at 843-44 (but note that § 22-1-12 does not contain this restriction).
93 Id. at 844.
94 Id.