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Challenging the Right to Take: Case Law and Recent Issues

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Georgia law permits government authorities to acquire private property pursuant to eminent domain as provided by the Georgia Constitution as well as its general laws. This paper focuses on recent developments in eminent domain law. Part A discusses litigation surrounding Georgia's 2006 constitutional and statutory amendments, focusing specifically on cases involving challenges to condemning authorities' "public use." Part B provides a sampling from recent litigation regarding inverse condemnation, focusing on claims related to nuisance and zoning ordinances.

A. Property Taking for Private Third Parties/Redevelopment and Challenges to "Public Use" Takings

a. 2006 Constitutional Amendment and The Landowner's Bill of Rights and Private Property Protection Act

In 2006, Georgia's Constitution was amended to require that "[t]he power of eminent domain shall not be used for redevelopment purposes by any entity, except for public use, as defined by general law."[1] In addition, the Georgia legislature enacted new laws regarding eminent domain, as codified by Title 22 of the Georgia Code, known as "The Landlowner's Bill of Rights and Private Property Protection Act." These new laws came about in response to the Supreme Court's decision in Kelo v. City of New London[2], which upheld the constitutionality of the government's taking of property from one private owner to give to another to further economic development, finding that such a taking constitutes a "public use" for the purposes of eminent domain. Georgia's

[1] Ga. Const. Art. IX, Sec. II, par. VII.
[2] 545 U.S. 469 (2005).

constitutional and statutory amendments, which attempt to limit the scope of condemning authorities' eminent domain power to protect property owners, provides for a number of substantive and procedural changes relating to "public use."

For instance, O.C.G.A. § 22-1-1 was expanded to include new definitions for the terms "blighted property,"[3] "condemnor,"[4] "economic development," and "public use,"

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[3] O.C.G.A. § 22-1-1(1) provides that " 'Blighted property,' 'blighted,' or 'blight' means any urbanized or developed property which:"

> (A) Presents two or more of the following conditions:
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> > (i) Uninhabitable, unsafe, or abandoned structures;
> >
> > (ii) Inadequate provisions for ventilation, light, air, or sanitation;
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> > (iii) An imminent harm to life or other property caused by fire, flood, hurricane, tornado, earthquake, storm, or other natural catastrophe respecting which the Governor has declared a state of emergency under state law or has certified the need for disaster assistance under federal law; provided, however, this division shall not apply to property unless the relevant public agency has given notice in writing to the property owner regarding specific harm caused by the property and the owner has failed to take reasonable measures to remedy the harm;
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> > (iv) A site identified by the federal Environmental Protection Agency as a Superfund site pursuant to 42 U.S.C. Section 9601, et seq., or environmental contamination to an extent that requires remedial investigation or a feasability study;
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> > (v) Repeated illegal activity on the individual property of which the property owner knew or should have known; or
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> > (vi) The maintenance of the property is below state, county, or municipal codes for at least one year after notice of the code violation; and
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> (B) Is conducive to ill health, transmission of disease, infant mortality, or crime in the immediate proximity of the property.
>
> Property shall not be deemed blighted because of esthetic conditions.

[4] O.C.G.A. § 22-1-1(3) provides that " 'Condemnor' or 'condemning authority' means:"

> (A) The State of Georgia or any branch or any department, board, commission, agency, or authority of the executive branch of the government of the State of Georgia;
>
> (B) Any county or municipality of the State of Georgia;

among other things, thereby limiting the scope of those terms and the reach of eminent domain. Importantly, the definition of "public use" now provides that "[t]he public benefit of economic development shall not constitute a public use."[5] "Economic development" is defined to include "any economic activity to increase tax revenue, tax base, or employment or improve general economic health, when the activity does not result in:"

> (A) Transfer of land to public ownership;
>
> (B) Transfer of property to a private entity that is a public utility;
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> (C) Lease of property to private entities that occupy an incidental area within a public project; or
>
> (D) The remedy of blight.[6]

> (C) Any housing authority with approval of the governing authority of the city or county as provided in Code Section 8-3-31.1;
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> (D) Any other political subdivision of the State of Georgia which possesses the power of eminent domain; and
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> (E) All public utilities that possess the right or power of eminent domain.

[5] O.C.G.A. § 22-1-1(9) provides in full: (9)(A) "Public use" means:

> (i) The possession, occupation, or use of the land by the general public or by state or local governmental entities;
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> (ii) The use of land for the creation or functioning of public utilities;
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> (iii) The opening of roads, the construction of defenses, or the providing of channels of trade or travel;
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> (iv) The acquisition of property where title is clouded due to the inability to identify or locate all owners of the property;
>
> (v) The acquisition of property where unanimous consent is received from each person with a legal claim that has been identified and found; or
>
> (vi) The remedy of blight.

(B) The public benefit of economic development shall not constitute a public use.

[6] O.C.G.A. § 22-1-1(4).

Accordingly, these definitional changes significantly curtail the scope of governing authorities' power to take property for private use.

O.C.G.A. § 22-1-2, as amended, prohibits condemnation "unless it is for public use" as defined by § 22-1-1. It further provides that "[p]ublic use is a matter of law to be determined by the court and the condemnor bears the burden of proof," and that "[a]ll condemnations shall not be converted to any use other than a public use for 20 years from the initial condemnation."[7] Finally, the amendment allows a former property owner to apply to the condemnor for re-conveyance of property that is not used for public use within five years of the taking.[8]

New provisions require a condemning authority to establish that its taking satisfies the "public use" requirement. For instance, O.C.G.A. §22-2-102.2 requires the condemning authority to include in a petition for condemnation "[a] statement setting forth the necessity to condemn the private property and describing the public use for which the condemnor seeks the property." Furthermore, O.C.G.A. § 22-1-11 provides a mechanism pursuant to which a condemnee may challenge the purpose of the taking, providing that upon motion of a party in a condemnation proceeding the court must determine "whether the exercise of the power of eminent domain is for a public use and whether the condemning authority has the legal authority to exercise the power of eminent domain" prior to title vesting in the condemnor.

b. Case Law Interpreting the 2006 Amendments

1. Disputes Regarding Public Use – Procedural and Substantive Challenges

Litigation regarding the 2006 statutory amendments has focused on both the procedural and substantive aspects of takings as they relate to the "public use" requirement, forcing courts to delineate the scope of protections for property owners set forth by the new amendments.

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[7] O.C.G.A. § 22-1-2(a)-(b). As a result of other statutory amendments, condemnations made by housing authorities or for redevelopment purposes, specifically, must adhere to the "public use" requirement. O.C.G.A. § 8-2-31.1, § 36-61-3.1. In addition, O.C.G.A. § 36–42–8.1 was repealed so that a municipality or downtown development authority may no longer exercise eminent domain.

[8] O.C.G.A. § 22-1-2(a)-(c).

a. Procedural Challenges Regarding Takings for Public Use

In Fox v. City of Cumming[9] the Court of Appeals clarified that a challenge to a taking made pursuant to O.C.G.A. § 22-1-11 may only be brought after a condemnation proceeding has begun. In Fox, the City of Cumming sought to enter the plaintiff's property to conduct a survey in connection with designing sewer facilities on part of her property.[10] The plaintiff filed a temporary restraining order and an action seeking determination regarding whether the City's proposed sewer plan constituted a permissible public use for her property pursuant to § 22.-1-11.[11] The trial court dismissed the action and permitted the survey to take place, finding that the plaintiff did not have standing to seek a public use determination pursuant to § 22-1-11.

On appeal, the Court of Appeals upheld the decision, explaining that § 22-1-11, which allows a court to "determine whether the exercise of the power of eminent domain is for a public use and whether the condemning authority has the legal authority to exercise the power of eminent domain" upon motion of the condemnee, is only applicable to pending condemnation proceedings.[12] Accordingly, because the City had not yet initiated a condemnation proceeding against the plaintiff's property, she was not entitled to seek a public use determination pursuant to § 22.1-11.[13]

In Gramm v. City of Stockbridge[14] the Court of Appeals rejected a city's attempt to use certain protections provided by the new amendments for its own benefit. In Stockbridge, the City filed a condemnation proceeding before a special master under O.C.G.A. § 22-2-100, et seq., seeking to acquire the plaintiff's property for use in an urban redevelopment plan pursuant to O.C.G.A. § 36-61-1.[15] The special master granted the City's petition and awarded payment to the plaintiff for the value of her property.[16] On appeal to the trial court, the plaintiff challenged the amount of the award and sought a

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[9] 289 Ga. App. 802 (2008).
[10] Id. at 803.
[11] Id.
[12] Id. at 804.
[13] Id. at 804-05.
[14] 297 Ga. App. 165 (2009).
[15] Id. at 165. O.C.G.A. § 36-61-1, et seq., allows for takings for the purpose of urban redevelopment.
[16] Id.

jury trial regarding the issue.[17] However, prior to trial, the City voluntarily dismissed its action, determining that it no longer required use of the property.[18] The City demanded repayment of the award with interest and filed a quitclaim deed reconveying the property.[19] The plaintiff filed a motion to set aside the dismissal, which the trial court denied.[20]

On appeal to the Court of Appeals, the court reversed the trial court's decision, finding, among other things, that O.C.G.A. §§ 22-1-2(c)(1) and 22-1-12(2) did not allow the City to abandon its claim to the property.[21] In regard to § 22-1-2(c)(1), which provides that a former property owner may seek to recover her property if it is not put to use by the condemning power within five years, the court noted that this provision applied only to former property owners and did not create a separate right of abandonment for the City.[22] In regard to § 22-1-12(2), which permits a property owner to recover costs associated with condemnation proceedings that are abandoned by a condemning authority, the court noted that it was unclear whether and under what circumstances the statute created a right of abandonment for the condemnor.[23] In any event, the court indicated, such circumstances would not apply to the case at hand.

b. Substantive Challenges Regarding Public Use

In addition to challenges based on the procedural aspects relating to takings for "public use," the Court of Appeals has addressed the scope of "public use" pursuant to its new definition, although case law on point is so far somewhat limited. For instance, In Brunswick Landing, LLC v. Glynn County[24] Glynn County sought to condemn property adjacent to a detention facility in order to expand the building.[25] After a special master awarded the property to the County, the former owners appealed arguing, in relevant part,

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[17] Id.
[18] Id.
[19] Id.
[20] Id.
[21] Id. at 167. Although the court noted that these provisions were inapplicable to the action because it was initiated prior to their enactment, the court further explained that the provisions would not apply regardless. *Id.*
[22] Id. at n.2.
[23] Id. at n.4.
[24] 301 Ga. App. 288 (2009).
[25] Id. at 288.

that the County failed to prove facts showing it was entitled to condemn pursuant to O.C.G.A. § 22-2-102.2(1).[26] Specifically, the plaintiff argued that the county was not authorized to condemn its property because it was located in a separate municipality, and that the county failed to show that the municipality had consented to the taking.[27] The Court of Appeals upheld the award, noting that the right of counties to condemn property arises from constitutional authority rather than statute, and the Georgia Constitution "grants the County a right to condemn property for 'any public purpose' subject to any limitations on that power provided by general law."[28]

The court went on to note that the County was responsible for maintaining the jails within its jurisdiction, and it was "undisputed that the operation of a jail constitutes a public purpose."[29] The court further explained that because the County sought to condemn property in a separate municipality, it was required to show that "the condemnation [was] reasonably necessary for the successful completion of the public purpose of expanding the detention center, which was initiated pursuant to [the county's] express grant of authority under O.C.G.A. § 36-9-5(a)."[30] The court determined that the County had met this burden, noting that:

> It is undisputed that the County owns and maintains the current facility located within the City, and the [plaintiff] does not dispute the County's authority to maintain that facility. Further, it is apparent that the County is hampered in its ability to maintain a workable jail under the current conditions and that extra space is reasonably necessary to meet the current needs of the prison population. It is undisputed that the Detention Center was facing a serious overcrowding problem, and the importance of maintaining

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[26] Id. at 289.
[27] Id.
[28] Id. at 289-90 (citing Ga. Const. Art. IX, sec. II, Par. V) (quoting Lopez-Aponte v. Columbus Airport Com'n, 221 Ga. App. 840, 843(1)(b) (1996)).
[29] Id. at 289-90.
[30] *Id.* at 290. O.C.G.A. § 36-9-5(a) provides that "[i]t is the duty of the county governing authorities to erect or repair, when necessary, their respective courthouses and jails and all other necessary county buildings and to furnish each with all the furniture necessary for the different rooms, offices, or cells."

> a workable and secure jail facility is self-evident. Although [the county] initially considered building a separate facility to resolve the problem, other issues came up preventing this solution. Moreover, concerns regarding security, costs and duplication of effort were also cited in support of expanding the current facility, rather than purchase a new cite.[31]

Accordingly, the court concluded, the trial court did not err in determining that the taking was "reasonably necessary" for the successful completion of the public purpose of expanding the detention facility.[32] Because the plaintiff failed identify any law limiting the County's authority to condemn the property, including authority requiring a municipality's consent, the court upheld the special master's award. *Id.*

In Darling Intern., Inc. v. Carter[33] the Court of Appeals addressed whether a subsequent reconveyance must be made for public use. Although Darling dealt with application of the law prior to the amendments, the court delineated how the outcome would differ under the current statute. In Darling, Bacon County had acquired property through eminent domain in 1973 for the purposes of developing a public recreation project involving a lake.[34] The County subsequently abandoned the project and sold part of the land to the city in which it was located.[35] In 2003, the County and City then conveyed part of the property to a private company for redevelopment.[36] In 2010, the heirs of the original property brought an action pursuant to O.C.G.A. § 36-9-3 seeking to repurchase the property from the government entities. The City and County refused as to the property conveyed to the company.[37] The heirs then sought to eject the company from the property, arguing, among other things, that the conveyance was invalid as an impermissible sale of condemned property to a private developer for private use, and that

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[31] Id. at 290-91.
[32] Id. at 291.
[33] 294 Ga. 455 (2014).
[34] Id. at 455.
[35] Id. at 456.
[36] Id. at 456-57.
[37] Id.

the government entities were required to reformulate a development plan for a proper public use in order to convey the property.[38] The trial court entered summary judgment in favor of the heirs, and the company appealed.[39]

On appeal, the Court of Appeals reversed the trial court's order, finding, among other things, that the government entities were not required to reformulate a proper public use in order to convey the property.[40] According to the court, because the subsequent conveyance to the company "was not a re-taking by a municipality or county" the conveyance was not subject to the requirements of O.C.G.A. § 36-61-9, the Urban Redevelopment Law, which requires either that condemned property be devoted "to a public use" or that the condemning entity "adopt[] an urban redevelopment plan authorizing the exercise of eminent domain" that the current owner has an opportunity to develop.[41] Instead, the court explained, the subsequent conveyance to the company was merely "a re-purposing of the property from that involved in the original taking."[42]

Furthermore, the court found that the conveyance was made for a proper public use, at least as it was defined by law applicable at the time of the conveyance. In particular, the deed had included an agreement pursuant to which the company agreed to construct improvements in the public interest and to develop "new industry and employment opportunities" for the City and the County.[43] Although the court determined that this use was a permissible "public use" at the time of the conveyance, it went on to note, however, that in response to Kelo v. City of New London, the Georgia Constitution now barred conveyance of condemned property to private entities for private use, and the Landowner's Bill of Rights exempted from the definition of "public use" the public benefit of economic development.[44] Accordingly, although the Court of Appeals upheld the conveyance to the company based on prior law, its holding indicated that such

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[38] Id.
[39] Id.
[40] Id. at 461-62.
[41] Id. at 462; see O.C.G.A. § 36-61-9(c).
[42] Id. at 462.
[43] Id. at 463.
[44] Id. at 463-64 (citing O.C.G.A. § 22-1-1(9)(B), effective April 4, 2006 (Ga. L. 2006, p. 39, § 3/HB 1313)).

conveyance would not be proper pursuant to the post-Kelo constitutional and statutory amendments.

B. Temporary Takings and Inverse Condemnation

Unlike a government entity's taking of property pursuant to eminent domain, inverse condemnation does not require a physical invasion that damages property.[45] Rather, inverse condemnation occurs when government authority unlawfully interferes with an owner's right to enjoy the land, either temporarily or permanently.[46] Issues related to inverse condemnation are frequently litigated, and the following cases provide a sampling from some of the more recent opinions on the topic.

1. Inverse Condemnation Based on Nuisance

In Davis v. Effingham County Bd. Of Com'rs[47] Court of Appeals addressed whether a plaintiff could assert an inverse condemnation claim based on a nuisance theory. The plaintiff in that case brought an action against the county after her vehicle sustained damage from driving over a pothole, alleging that the pothole constituted a nuisance that rose to the level of inverse condemnation.[48] As the court noted, this cause of action could arise in the context of damage to property through a nuisance "created, maintained, or worsened" by a county.[49] However, the court went on the explain, " 'mere negligence is insufficient to constitute a nuisance that rises to an inverse condemnation.'" *Id.* (quoting *Morris v. Douglas County Bd. Of Health*, 274 Ga. 898, 899 (2002)). Rather, "'[t]o be laible for a nuisance, a county must perform a continuous or regularly repetitious act, or create a continuous or regularly repetitious condition that cause the harm. A single act of negligence is insufficient.'" *Id.* (quoting *Morris*). Accordingly, the court found that no inverse condemnation had occurred because the damage to the plaintiff's car was a "single isolated occurrence" that occurred without any direct intervention by the county. *Id.* at *14.

[45] City of Tybee Island, Georgia v. Live Oak Group, LLC , 324 Ga. App. 476, 478 (2013) (quoting Columbia County v. Doolittle, 270 Ga. 490, 491-92 (1999)).
[46] Id.
[47] 760 S.E.2d 9 (Ga. App. 2014).
[48] Id. at 12-13.
[49] Id. (quoting Howard v. Gourmet Concepts Intl., Inc., 242 Ga. App. 521, 524(3) (2000)).

2. Inverse Condemnation Based on Zoning Ordinances

In addition to nuisance claims, significant litigation involves zoning ordinance disputes in which a plaintiff seeks compensation for changes in zoning or denial of zoning applications. Generally speaking, zoning ordinances are presumptively valid.[50] According to the Georgia Supreme Court, overcoming this presumption is no easy task:

> The presumption that a governmental zoning decision is valid can be overcome only by a plaintiff landowner's showing by clear and convincing evidence that the zoning classification is a significant detriment to him, and is insubstantially related to the public health, safety, morality and welfare. Only after both of these showings are made is a governing authority required to come forward with evidence to justify a zoning ordinance as reasonably related to the public interest. If a plaintiff landowner fails to make a showing by clear and convincing evidence of a significant detriment and an insubstantial relationship to the public welfare, the landowner's challenge to the zoning ordinance fails.[51]

Perhaps not surprisingly, plaintiffs have difficulty succeeding in cases seeking compensation based on zoning ordinances. For instance, in Walleye, LLC v. City of Forest Park[52] owners of clubs featuring nude dancing brought an action against the City of Forest Park after it passed an ordinance banning the sale of alcohol and use of private booths at nude dancing clubs, which put the owners' tenants out of business, alleging inverse condemnation.[53] Specifically, the owners argued that as a result of the ordinance, there was no viable uses for their properties and the city had deprived them of all viable economic use.[54] The trial court granted summary judgment for the city, finding that the owners had no vested property rights in renewed adult business or alcoholic licenses and therefore had not established a regulatory taking.[55] On appeal, the owners urged that the

[50] See Gradous v. Bd. Of Commr's of Richmond County, 256 Ga. 469 (1986).
[51] DeKalb County v. Dobson, 267 Ga. 624, 636 (1997).
[52] 322 Ga. App. 562 (2013).
[53] Id. at 563-64.
[54] Id.
[55] Id.

trial court erred because they were not required to show a vested property right since the license requirements only applied to their tenants who actually ran the clubs.[56] The Court of Appeals rejected this argument, finding that the owners "failed to presented any evidence that their property could not be converted to a use other than an adult business."[57] Further, the court found that "the zoning for [their land] allows for adult businesses . . . [and the owners] failed to show that they could not continue leasing their buildings to other businesses in the same category that have not violated the City's licensing rules and could operate legally within the City."[58] Accordingly, the court affirmed the judgment for the city, finding that no inverse condemnation had occurred.

In City of Tybee Island, Georgia v. Live Oak Group, LLC[59] a property owner applied to the city to amend building standards applicable to its property.[60] The city denied its application, and the owner filed an action alleging inverse condemnation and federal takings claims, among other things.[61] The trial court issued a judgment in favor of the owner on its inverse condemnation claim, but finding in favor of the city as to the takings claim on the basis that it had been superseded by the takings claim.[62]

On appeal by both parties, the Court of Appeals found that the trial court erred in granting summary judgment in favor of the owner because the city's denial of the owner's application did not amount to inverse condemnation.[63] According to the court, an inverse condemnation claim against a county or municipality requires " 'some affirmative action for public purposes causing a nuisance or trespass which, in turn, result[s] in the diminished utility and functionality of a private owner's land. The diminished functionality and utility, in turn, interfere[s] with the owner's use and enjoyment of the land.' "[64]

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[56] Id.
[57] Id.
[58] Id.
[59] 324 Ga. App. 476 (2013).
[60] Id. at 476.
[61] Id.
[62] Id.
[63] Id. at 478.
[64] Id. (quoting Rabun County v. Mountain Creek Estates, 280 Ga. 855, 857 (1), 632 S.E.2d 140 (2006)).

In the case at hand, the court found that there was no such affirmative act by the city resulting in diminished utility or functionality of the plaintiff's property.[65] The court went on to note that an inverse condemnation claim is distinguishable from "a claim attacking the constitutionality of an existing zoning ordinance following denial of an application to rezone, which requires a determination as to whether the plaintiff has suffered an unconstitutional deprivation or 'taking.'"[66] Furthermore, the court explained, "[e]ven when a *new* zoning or regulatory event occurs, it provides no basis for an inverse condemnation claim unless it creates a trespass or nuisance resulting in the diminished utility or functionality of the property."[67] Finally, the court emphasized that its holding was based on Georgia Supreme Court precedence questioning whether inverse condemnation is an available remedy in zoning cases.[68]

Finally, in Prime Home Properties, LLC. V. Rockdale County Bd. Of Health[69] a developer brought an inverse condemnation claim after it was temporarily denied permission to develop lots in its subdivision as a result of an ordinance setting a minimum lot size for homes with a septic system.[70] At trial, the jury found in favor of the developer, and the county appealed.[71] On appeal, the Court of Appeals reversed the judgment, finding that no "taking" had occurred. In reaching its conclusion, the court noted that "although [the plaintiff] experienced a delay in developing the six lots at issue, it was not prevented from marketing and developing the subdivision, . . . from making other uses of those six lots during the administrative process, or . . from reconfiguring the lots to conform with the ordinance."[72] In addition, the court explained, there was no

[65] Id.
[66] Id. at 479-80 (citations omitted).
[67] Id.
[68] Id. (citing Mayor & Alderman of City of Savannah v. Savannah Cigarette and Amusement Services, Inc., 267 Ga. 173 (1996); Fulton County v. Wallace, 260 Ga. 358 (1990), overruled on other grounds, Alexander v. DeKalb County, 264 Ga. 362 (1994)).
[69] 290 Ga. App. 698 (2008),
[70] Id. at 699.
[71] Id.
[72] Id. at 702.

evidence that the lots decreased in value because of the delay.[73] Based on this evidence, the court concluded no compensable taking had occurred.[74]

[73] Id.
[74] Id.