

NBI TITLE LAW IN GEORGIA – SECTION V. TRANSFER OF TITLE

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I. Voluntary Transfers

A. Requirements for an Effective Conveyance

A voluntary transfer occurs when the owner voluntarily and of their own accord transfers its ownership in real property, which can be distinguished from involuntary transfers such as foreclosures, tax sales, condemnation, or adverse possession. In order to transfer or convey title to real property effectively in Georgia, there are certain requirements:¹

- Written, original instrument that purports to convey title to land;
- A grantor (either individual or legal entity) who is legally capable of contracting;
- A grantee (individual or legal entity);
- Words indicating the grantor’s present intent to convey a present interest in the named land to the grantee;
- Description of the property being conveyed;
 - Whether the description is sufficient is a question of law for the court.²
- Good and valuable consideration
- Recording
 - Not necessary for deed to be valid between the named parties
 - Necessary for the deed to serve as record notice to third parties
 - Never forget to record a deed
- Attestation

¹ See, generally, O.C.G.A. §44-5-30, et seq.

² “It is well settled by the decisions of this court that a deed is sufficient to pass title, and will not be declared void for uncertainty of description, if the descriptive averments contained therein are certain, or if they afford a key by which the land can be definitely located by the aid of extrinsic evidence.” Gainesville Midland R. Co. v. Tyner, 204 Ga. 535, 537 (1948) (emphasis added); see also Morris v. Byrd, 338 Ga. App. 540 (2016) (holding that without a sufficient key in the deed, extrinsic evidence cannot be added to complete the description of the land to be conveyed).

- By two witnesses
 - One must be an authorized officer (usually a notary public)
- Attestation is not required for deed to be valid between the parties
- Attestation is required for deed to be recorded

B. Types of Deeds

Georgia law recognizes a number of different types of deeds, *i.e.*, the written instrument purporting to transfer title from grantor to grantee, all of which have differing force and legal effect from one another. Some deeds are recognized by statute while others are creation of the common law. Such deeds include:

- (General) Warranty Deed³
 - Contains a general warranty of title against all claims, and conveys the right to sell the property, the right of quiet enjoyment of the property, and freedom from encumbrances.
- Limited Warranty Deed
 - Effectively a Warranty Deed “Light.”
 - Contains specific limitations to the rights and warranties conveyed in a Warranty Deed.
 - Limited Warranty Deeds usually warrant against any defects or encumbrances against the named grantor but not as a result of actions by a prior owner.
- Quitclaim deed
 - Conveys absolutely nothing but the grantor’s rights, titles, and interests, whatever those may be, described within its own terms.
 - Terms *may* have the same effect as a Warranty Deed
 - Often conveys something like “all the Grantor’s right, title, and interests” in the land being conveyed.⁴
- Testamentary Deed

³ O.C.G.A. § 44-5-62.

⁴ Georgia courts construe this language to have the same effect as language conveying the land itself. See, e.g., Archer v. Kelley, 194 Ga. 117, 122 (1942)

- An instrument that conveys an interest that does not accrue or have effect until the grantor’s death.
 - Remember the “present intent to convey a present interest” requirement
 - Any present interest will result in a valid deed⁵
- A true testamentary deed is generally void unless it can be probated as a will.
- Security Deed⁶
 - Conveys an interest in land to secure a debt.
 - Conveys a present title or interest (unlike a mortgage).
 - The grantor reserves a right to have the property conveyed back upon payment in full of the underlying debt.
 - Surrender and cancellation of the security deed operates to convey title back to the grantor.⁷
 - Typically provides the grantee with the right to conduct a non-judicial foreclosure.
 - This right is not provided by statute so it must be exist as a contractual term in the document with the appropriate power of attorney language.
 - If a creditor forecloses without a valid power of sale provision, it is subject to a wrongful foreclosure claim.

II. Involuntary Transfers

A. Foreclosures

In Georgia, secured lenders can conduct non-judicial foreclosures if there is a power of sale provision in the security deed.⁸ This section will give a brief overview of the foreclosure

⁵ See, e.g., *Harris v. Neely*, 257 Ga. 361, 362 (1987) (holding that deed that retained a life interest for the grantor plus the right to dispose of the land during the grantor’s lifetime conveyed to the grantee a vested remainder subject to divestment, and thus was a valid deed).

⁶ O.C.G.A. § 44-14-60

⁷ O.C.G.A. § 44-14-67

⁸ O.C.G.A. § 44-14-162, et seq.

requirements, including notice, advertisement, and conduct of the sale; the lender's duty when conducting the sale; and the borrower's defenses to prevent or delay the sale.

1. Notice

Before starting the foreclosure process, the lender's attorney must first review the promissory note and security deed's default provisions to ensure that the borrower's actions qualify as a default under the note and/or deed and whether the lender must provide notice and a cure period. The lender must follow all notice requirements provided for in the note and deed strictly. If the loan has not matured, the law may also require the lender to give the borrower notice that it is accelerating the note and calling the entire loan balance immediately due based on the borrower's default. Since most loan documents are drafted by the lender, notice requirements are almost always waived by the borrower.

In addition to contractual notice provisions, some borrowers are also entitled to statutory notice. Georgia law now requires the lender follow specific notice provisions, regardless of whether the property is to be used as a dwelling place.⁹ Specifically, the lender must give the borrower notice thirty days before the proposed foreclosure sale.¹⁰ The notice must be in writing, and include the name, address, and telephone number of any individual or entity who shall have full authority to negotiate, amend and modify the terms of the mortgage with the debtor.¹¹ The lender must send the notice by registered or certified mail or statutory overnight delivery, return receipt requested to the property address or to another address he debtor designates in writing to the lender.¹² Georgia law, however, states that no waiver or release of these notice requirements is valid if made contemporaneously with the security instrument containing the power of non-judicial foreclosure sale.¹³

Regardless whether required by the loan documents or Section 162, most lenders send "ten-day letters" to borrowers and guarantors in default in order to perfect its ten (10) day notice for attorneys' fees under Georgia law. O.C.G.A. § 13-1-11 states in relevant part:

⁹ O.C.G.A. § 44-14-162.2, -162.3.

¹⁰ O.C.G.A. § 44-14-162.2.

¹¹ O.C.G.A. § 44-14-162.2.

¹² O.C.G.A. § 44-14-162.2.

¹³ O.C.G.A. § 44-14-162.3(c).

The holder of the note or other evidence of indebtedness or his attorney at law shall, after maturity of the obligation, notify in writing the maker, endorser, or party sought to be held on said obligation that the provisions relative to payment of attorney's fees in addition to the principal and interest shall be enforced and that such maker, endorser, or party sought to be held on said obligation has ten days from the receipt of such notice to pay the principal and interest without the attorney's fees. If the maker, endorser, or party sought to be held on any such obligation shall pay the principal and interest in full before the expiration of such time, then the obligation to pay the attorney's fees shall be void and no court shall enforce the agreement. The refusal of a debtor to accept delivery of the notice specified in this paragraph shall be the equivalent of such notice.

A lender's failure to comply with these notice requirements can raise valuable defenses for the borrower.

2. Advertisement

The lender must properly advertise the foreclosure sale once a week for a period of four (4) weeks immediately preceding the date of the sale in the legal organ of the county where the property is located.¹⁴ If there is no newspaper so designated, the advertisement must be published in the nearest newspaper having the largest general circulation in the county.¹⁵ The advertisement must give a full and complete description of the property being sold (including the property's legal description) and provide the names of any persons who may be in possession of the property.¹⁶ If the advertisement contains the property's street address, the street address, city and zip code must be clearly set out in bold type.¹⁷

3. The Sale

The lender must conduct the foreclosure sale on the date, time and place which is required of sheriff's sales.¹⁸ This means that foreclosure sales must occur on the first Tuesday of the month,

¹⁴ O.C.G.A. § 44-14-162; O.C.G.A. § 9-13-140.

¹⁵ O.C.G.A. § 9-13-140.

¹⁶ O.C.G.A. § 9-13-140.

¹⁷ O.C.G.A. § 44-14-162.

¹⁸ O.C.G.A. § 44-14-162.

between the hours of 10:00 A.M. and 4:00 P.M. local time.¹⁹ If the first Tuesday falls on New Year's Day or on Independence Day, the sale takes place on the immediately following Wednesday.²⁰ The sale takes place on the steps of the county courthouse where the property is located.²¹

4. The Lender's Duty During the Sale.

Generally, courts have held that the lender has a duty to conduct the foreclosure sale fairly. "It is our opinion that when a power of sale is exercised '(a)ll that is required of (the foreclosing party) is to advertise and sell the property according to the terms of the instrument, and that the sale be conducted in good faith.'"²² The person calling out the sale should not do anything that chills the bidding process.²³

The lender's duty of good faith, however, does not require the lender sell the property for its highest market value unless the lender intends to confirm the sale. In Kennedy v. Gwinnett Commercial Bank,²⁴ the Georgia Court of appeals held that the lender does not have a fiduciary duty when conducting a foreclosure sale. The Kennedy court explained that the power of sale in a security deed gives the lender the remedy to collect its debt in a summary way and does not create a fiduciary relationship between the lender and borrower. The court explained:

In determining whether this duty under a power of sale has been breached the focus is on the manner in which the sale was conducted and not solely on the result of the sale. The foreclosing party is not an insurer of the results of his exercise of the power of sale; his only obligation is to sell according to the terms of the deed and in good faith and to obtain the amount produced by such a sale. If the manner in which the sale was conducted is otherwise unobjectionable, the mere fact that, in the debtor's opinion, it brought an inadequate price does not demonstrate that the power was exercised other than in good faith. It is only when the sale is conducted

¹⁹ O.C.G.A. §§ 9-13-161(a)-(b).

²⁰ O.C.G.A. §§ 9-13-161(a); Miller Grading Contractors, Inc. v. Ga. Fed. Sav. and Loan, 247 Ga. 730 (1981).

²¹ O.C.G.A. §§ 9-13-161(a).

²² Giordano v. Stubbs, 228 Ga. 75, 78 (1971).

²³ Tarlton v. Griffin Fed. Sav. Bank, 202 Ga. App. 454 (1992).

²⁴ 155 Ga. App. 327, 328-329 (1980).

in such a manner and under such “circumstances” as to result in a grossly inadequate price that the foreclosing party has breached his duty to the debtor.²⁵

A lender can be liable, however, if the sale is conducted unfairly. In Kennedy, the court explained when a lender can be liable: “[w]e reiterate that ‘(i)t is only when the price realized is grossly inadequate and the sale is accompanied by either fraud, mistake, misapprehension, surprise or other circumstances which might authorize a finding that such circumstances contributed to bringing about the inadequacy of price that the foreclosing party has breached his duty under the power of sale.’²⁶

5. Preventing a Foreclosure Sale

It is very difficult to prevent a foreclosure sale. A borrower may file a motion for a temporary restraining order, however, in order to be successful, the borrower must tender the amount owed to the court. “On the maxim that one who seeks equity must do equity, it has been said many times that one who seeks to restrain or set aside a sale under power in a security deed must do equity by paying or tendering to the creditor the amount of indebtedness owing to him.”²⁷ In Michel v. Pickett,²⁸ the Georgia Supreme Court held that to enjoin a foreclosure proceeding, a borrower must tender the amounts admittedly due to the registry of the court. The Georgia Supreme Court has held that “a borrower who has executed a deed to secure debt is not entitled to an injunction against a sale of the property under a power in the deed, unless he first pays or tenders to the creditor the amount admittedly due.”²⁹ Although a debtor may attempt to enjoin a foreclosure proceeding, the chances of prevailing are *de minimis* unless the debtor tenders the amounts due. Consequently, an injunction is very impractical as most debtors do not have the funds to tender the amounts due to the court.

²⁵ Id.

²⁶ Id. (citing Giordano, 228 Ga. at 79).

²⁷ Pindar’s Georgia Real Estate Law, 2 Ga. Real Estate Law & Procedure § 21-105 (6th ed.).

²⁸ 241 Ga. 528 (1978).

²⁹ Brevard Federal Savings & Loan, Assoc. v. Ford Mountain Investments, 261 Ga. 619 (1991)(quoting Wright v. Intercounty Properties, Ltd., 238 Ga. 492 (1977)).

Furthermore, the grounds on which a foreclosure may be enjoined are limited. The Georgia Supreme Court gave the following general guidance in Bramblett v. Bramblett³⁰:

The grant or denial of the request to permanently enjoin the foreclosure of the security deed is not, as argued by the plaintiff, a matter lying within the discretion of the trial judge. *Unless the security deed is found to be invalid, or unless there is found to be some other legal or equitable grounds supporting the injunction against foreclosure of the security deed, the security deed holder has the legal right to proceed with a foreclosure of it by exercising the power of sale contained therein.*

Thus, in deciding whether or not to enjoin the foreclosure, the superior court must make findings and/or conclusions concerning the validity of the security deed as between these parties

More specifically, for instance, Georgia courts have held that significant questions concerning the construction of a forbearance agreement between a lender and a debtor and the course of conduct, both of which, if proved, could constitute a waiver of strict performance of the deed to secure a debt, justify an interlocutory injunction restraining the lender's assignee from foreclosing on property based on the debtor's alleged failure to pay taxes on the property.³¹ A permanent injunction **enjoining** enforcement of the **foreclosure** provisions of a security deed is also warranted, where the deed is invalid.³²

Alternatively, the borrower can prevent the foreclosure, at least temporarily, by seeking bankruptcy protection. Pursuant to Section 362 of the Bankruptcy Code, there is an automatic stay in place immediately after a debtor seeks bankruptcy protection. If a lender conducted a foreclosure sale when the stay was in place, the sale is void. The lender can ask the bankruptcy court to lift the automatic stay, but this generally takes time and generally ensures a delay of the foreclosure sale. One should bear in mind, however, that putting the borrower into bankruptcy does not protect other people or entities that might have guaranteed the loan. The lender may bring suit against guarantors despite the borrower's filing for bankruptcy.

³⁰ 252 Ga. 21 (1984).

³¹ Atlanta Dwellings, Inc. v. Wright, 272 Ga. 231 (2000).

³² Jones v. Phillips, 227 Ga. App. 94 (1997).

B. Materialman's Lien Actions and Foreclosures

Once a lien claimant has filed a valid claim of lien, the claimant must perfect and foreclose the lien. To perfect its lien, the lien claimant must demonstrate substantial compliance with its contract to furnish labor, services, or materials.³³ The lien claimant also must commence a "lien action" on the underlying debt for the recovery of the amount of the claim "within 365 days from the date of filing for record of [the] claim of lien" and must file a notice of commencement of the lien action with the clerk of the superior court of the county in which the claim of lien was filed within thirty days after filing the action.³⁴ A "lien action" is an *in personam* "lawsuit, a proof of claim in a bankruptcy case, or a binding arbitration."³⁵

The notice of commencement must be executed under oath by the lien claimant or the claimant's attorney and must contain a caption referring to the "then" owner of the property against which the lien was filed and referring specifically to a deed or other recorded instrument in the chain of title of the affected property. This notice of commencement of the lien action also must identify the court or arbitration venue where the lien action on the underlying debt was brought; the style and number, if any, of the lien action; the names of all parties to the lien action; the date of filing the lien action; and the book and page number of the records of the county wherein the subject lien is recorded in the same manner in which materialmen's liens are otherwise filed.³⁶

A claim of lien is unenforceable if the lien claimant fails to commence a "lien action" within 365 days from the date of filing the claim of lien or fails to file the statutory notice of commencement within 395 days from the same date. The following statement must be included on the face of any claim of lien filed after March 31, 2009: "This claim of lien expires and is void 395 days from the date of filing of the claim of lien if no notice of commencement of lien action

³³ O.C.G.A. § 44-14- 361.1(a)(1).

³⁴ O.C.G.A. § 44-14-361.1(a)(3). Failure to properly file this notice within the thirty-day time limit destroys all lien rights. See, e.g., Allied Elec. Contractors, Inc. v. Kern & Co., 362 S.E.2d 452 (Ga. Ct. App. 1987).

³⁵ O.C.G.A. § 44-14- 360(2.1).

³⁶ O.C.G.A. § 44-14-361.1.

is filed in that time period.” Failure to include this language will invalidate the lien and prevent it from being filed, but no release or voiding of the lien will be required.³⁷

There are certain statutory exceptions to the requirement that the lien claimant bring suit on the underlying debt which allow the lien claimant to proceed in rem directly against the property owner.³⁸ Regardless, a notice of commencement of the lien action still must be filed. To foreclose on a perfected lien after obtaining a judgment against the debtor, the lien claimant must file suit against the owner of the real estate – often times this is asserted concurrently as a separate claim if the lien action is against the property owner. Once a lien claimant obtains judgment against the owner, the real estate may be levied by sheriff’s sale. A purchaser at a sheriff’s sale takes free and clear of all liens and encumbrances.³⁹

C. Foreclosure of Tax Liens⁴⁰

A property owner’s obligation to pay property is secured by the property itself. If a property owners fails to pay taxes, the county tax commissioner can sell the real estate to raise the amount due in back taxes via the automatic creation of a tax lien. By law, the county tax commissioner automatically gains a lien against property the first day property taxes for the prior year come due, January 1, of each calendar year. Once the property owner pays the taxes, the lien dissolves. If the property owner fails to pay taxes for 12 months, the taxes are past due and the tax commissioners can proceed in rem against the property.⁴¹

Once the property taxes become past due, the tax collector can proceed in one of two ways: (i) a Non-Judicial Tax Sale; or (ii) Judicial Tax Sale. Both types of proceedings rely upon the sheriff to conduct the tax sale. Each type of sale has its own set of special procedures and its own types of public notice.

³⁷ O.C.G.A. § 44-14-367.

³⁸ O.C.G.A. § 44-14-361.1(a)(4). Ex: the underlying debt cannot be satisfied through the in personam lien action.

³⁹ O.C.G.A. § 9-13-160, et seq.

⁴⁰ Title to property bought at tax sales, especially of the non-judicial variety typically is considered to be clouded. Quiet Title Actions are the de facto subsequent procedure that most tax sale purchasers will engage in to clear title.

⁴¹ O.C.G.A. §§ 48-4-75 through 48-4-81.

1. Non-Judicial Tax Sale

In Georgia, a non-judicial tax sale typically is the most common route for the tax commissioner to take to sell a piece of property on which taxes are past due. After the property tax payment deadline passes, and after providing the property owner with written notice, the tax commissioner turns the matter over to the sheriff by issuing a tax *fi. fa.* or writ of execution. *Fi. fa.* is the abbreviation of a Latin term, *feri facias*, meaning “cause it to be done,” and the writ, in this case, formally commands the sheriff to sell the property at auction to the highest bidder. The sheriff has no discretion in the matter. The ensuing process is known as sheriff’s levy and sale. Tax *fi. fa.*’s are treated in the same manner as judicial executions under O.C.G.A. § 9-13-140 but also have their own Code Section at O.C.G.A. § 48-4-1.

Prior to any such sale, the sheriff must send out written notice and also publish a Notice of Sheriff’s Sale in the legal newspaper for the county in question. Such Notices of Sheriff’s Sale are usually grouped under the heading of “Non-Judicial Tax Sales” in the relevant section of the legal newspaper in question. After providing proper notice, the sheriff auctions the property to the highest bidder at the County’s legally designated location, normally the steps of the County courthouse, on a set day each month. The money raised at the sale goes is applied toward back taxes, and the winning bidder then takes ownership to the property.⁴²

2. Non-Judicial Redemption Rights.

Once the property is sold on the courthouse steps, the former owner still has the chance to rescue the property through a process called redemption. To do so, the owner, creditor, or any other person with interest in the property, must pay the tax deed purchaser, the amount paid for the property at tax sale, plus 20% premium for the first year or fraction of a year, plus any taxes paid on the property by the purchaser after the sale, plus any special assessment on the property, and a 10% premium of the amount for each year or fraction of a year, which has elapsed since the date of sale plus costs.⁴³

Such a redemption may take place at any time during the twelve (12) months following the tax sale. The purchaser of the tax deed cannot take actual possession of the property during this time, and the tax deed purchaser is not authorized to receive rents or make any improvements to

⁴² O.C.G.A. § 48-4-1, et seq.

⁴³ O.C.G.A. § 48-4-42.

any structure on the property or grade any lot prior to this time. When the property has been redeemed (all monies due the purchaser paid as prescribed by law), the purchaser shall then issue a quitclaim deed to the owner of the property (as stated on the Fi.fa.) releasing the property from tax deed. The redemption of the property puts the title conveyed by the tax sale back to the owner, subject to all liens that existed at the time of the tax sale. If the redemption was made by any creditor of the owner or by any person having any interest in the property, the amount expended by the creditor or the person interested shall constitute a first lien on the property.⁴⁴

3. Judicial Tax Sales and Judicial Redemption Rights⁴⁵

Ad valorem taxes must be delinquent at least 12 months to be eligible for Judicial In Rem Tax Foreclosure. A full title search, consisting of 50 years or more pursuant to Georgia Title Standards, is performed to determine the current owner of record and any legally interested parties associated with the property. Several legal documents pertaining to the foreclosure process, which include the Petition for Judicial In Rem Tax Foreclosure and the Notice to Respondents and All Interested Parties, are filed with the relevant County Clerk of Superior Court. An appointed County Superior Court judge establishes a rule *nisi* date (hearing date). Notice to all parties is published twice within thirty days (30) of the hearing, in the relevant legal newspaper for the county.

At the hearing, provided the judge's ruling is in favor of the County, the judge will sign an Order, ordering the property to be sold at the legally appointed spot no earlier than 45 days after the hearing. Notice of the ensuing tax sale is published in the legal newspaper for the County for four (4) consecutive weeks prior to the date of sale. At sale, the minimum bid listed for each property will consist of delinquent taxes plus any accrued interest, penalties and fees through the date of sale, plus, outstanding current ad valorem taxes must be paid at the same time the successful bid is paid.

After the sale, only the current owner of record has sixty (60) calendar days to redeem the property (pay off delinquent taxes plus any accrued interest, penalties and fees). If the current owner of record fails to redeem in the property in sixty (60) days, the owner loses all rights to the

⁴⁴ O.C.G.A. §§ 48-4-21, 48-4-40, 48-4-41, 48-4-42, 48-4-43, and 48-4-44.

⁴⁵ See O.C.G.A. §§ 48-4-75 through 48-4-81 for the Judicial Tax Sale provisions.

property. Within thirty (30) days after the sixty (60) day redemption period the *bona fide* purchaser at sale will be issued a Judicial In Rem Tax deed to the property.

D. Adverse Possession

See Section III(A) of Author's "The Law of Real Estate Titles" paper presented concurrently at this CLE for a discussion of adverse possession.

E. Eminent Domain/Condemnation

Eminent domain is the constitutional power conferred upon federal and state governments and some private actors to take or acquire title to private property without consent. This power is limited by the U.S. Fifth Amendment and the Georgia constitution in two very important respects: the taking must be for a public use and just compensation must be paid.⁴⁶ 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.

There are volumes upon volumes of published material and case law dealing with what constitutes "public purposes" and "just and adequate compensation."⁴⁷ A full discussion of that

⁴⁶ The Georgia Constitution protects property owners against having their property taken by an entity wielding the power of eminent domain unless (i) there is a legal basis for the taking; and (ii) the owners are paid just and adequate compensation for the taking:

a. Art. 1, § 3, ¶ 1

i. (a) Except as otherwise provided in this Paragraph, private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.

b. Art. IX, § 2, ¶ V

"The governing authority of each county and of each municipality may exercise the power of eminent domain for any public purpose subject to any limitations on the exercise of such power as may be provided by general law."

⁴⁷ See, e.g., DOT v. Livaditis, 129 Ga. App. 358 (1973) (error to set aside declaration of taking where condemned property would be used for road that would primarily benefit one company but any member of public could use road); Back v. City of Warner Robins, 217 Ga. App. 326 (1995)

substantive law is both impossible in this presentation and outside the scope of our purposes here today. O.C.G.A. §§ 22-1-1, *et seq.* and 32-3-1 (Declaration of Taking), *et seq.* may be consulted for the statutory provisions codifying the eminent domain power in Georgia. From a title perspective, all you need to know is that any type of title may be taken, period.

The term “condemnation” is often used interchangeably with eminent domain. A “condemnation” 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. If a property right exists, it can be taken. In fact, all private property rights and interests of every type and nature are subject to being condemned. This includes not only the actual land, but also leasehold values, trade fixtures, buildings and improvements, billboards, access rights, air rights, easements, certain contract rights, operating businesses or income streams and business values that are inherent in the property. A compensable interest in a condemned property or a claim to just and adequate compensation can be assigned. The assignee is entitled to seek the fair market value of the property and all damages arising out of the taking, and not merely the value paid for the assignment.

There are four general categories of taking that entitle an owner to compensation: full, partial with a remainder, inverse and regulatory. A full taking of real property occurs when title to every interest in property is completely acquired or destroyed. When a landowner is deprived of a portion of property and retains a remainder or remnant, or his rights to use a certain portion are impaired, a partial taking has occurred. An inverse taking occurs when the condemning authority’s actions on an adjacent parcel deprive or severely deplete the economic value of the property in question. A regulatory taking arises from the government’s exercise of police power, such as a zoning regulation, that exceeds the police power and runs afoul of the constitution. In all instances, a property owner’s rights must be permanently damaged in order to recover compensation. The temporary inconvenience or temporary damages caused by construction, such as noise and dust that the entire driving public experiences, cannot be the basis for recovery of compensation in a condemnation.

(holding “[m]oreover, even if only one person primarily benefits from a project, it is a public use as long as everyone who has occasion to use it may lawfully do so”).

F. Reversion.

A reversion occurs when a property owner makes an effective transfer of property to another but retains some future right to the property. For example, if Grantor transfers a piece of property to Grantee for life, Grantee has the use of the property for the rest of his life. Upon Grantee's death, the property reverts, or goes back, to Grantor, or if Grantor has died, it passes to her heirs. Grantee's interest in the property, in this example, is a life estate. Grantor's ownership interest during Grantee's life, and her right or the right of her heirs to take back the property upon Grantee's death, are called reversionary interests.

A reversion differs from a remainder because a reversion arises through the operation of law rather than by act of the parties. A remainder is a future interest that is created in some person other than the grantor or transferor, whereas a reversion creates a future interest in the grantor or his or her heirs. If Sara's transfer had been "to Grantor for life, then to Person X," Person X's interest would be a remainder. Although a creation of the common law, Georgia does codify certain reversionary interests in specific situations.

O.C.G.A. § 44-14-80(a) provides that title to real property conveyed to secure a debt or debts shall revert to the grantor or the grantor's heirs, personal representatives, successors, under certain specific circumstances: to wit, the later of (A) seven years from the maturity of the debt or debts or the maturity of the last installment thereof as stated or fixed in the record of conveyance or, if not recorded, in the conveyance; or (B) 20 years from the date of the conveyance as stated in the record or, if not recorded, in the conveyance.

If the maturity of the debt or debts or the maturity of the last installment thereof is not stated or fixed, title to real property conveyed to secure a debt or debts reverts at the expiration of seven years from the date of the conveyance as stated in the record or, if not recorded, in the conveyance. Provided, however, that where the parties by affirmative statement contained in the record of conveyance intend to establish a perpetual or indefinite security interest in the real property conveyed to secure a debt or debts, the title shall revert at the expiration of 20 years from the date of the conveyance as stated in the record or, if not recorded, in the conveyance.⁴⁸

If the maturity is not stated or fixed and the conveyance is not dated, title to real property conveyed to secure a debt or debts shall revert at the expiration of seven years from the date the

⁴⁸ O.C.G.A. § 44-14-80(a)(2).

conveyance is recorded or, if not recorded, is delivered. Provided, however, that foreclosure by an action or by the exercise of power of sale, if started prior to reversion of title, shall prevent the reversion if the foreclosure is completed without delay chargeable to the grantee or the grantee's heirs, personal representatives, successors, or assigns.⁴⁹

G. Forfeiture.

Under Georgia's Uniform Civil Asset Forfeiture Procedure Act, O.C.G.A. § 9-16-1, et seq., state law enforcement officials can take property, both personal and real, from any person if the officials suspect the property is connected to a crime; however, those same officials do not necessarily have to charge or convict that person with that crime. Instead, the government need only prove by a preponderance of the evidence that seized property is connected to a crime or that there is no other likely source for the property other than criminal activity.⁵⁰ Property owners who file an innocent owner claim bear the burden of proving that they neither knew about nor consented to any illegal uses of their property.

In rem actions are controlled by O.C.G.A. § 9-16-12, which provides the following relevant provisions:

(a) In actions in rem, the property which is the subject of the complaint for forfeiture shall be named as the defendant. The complaint shall be verified on oath or affirmation by a duly authorized agent of the state in a manner consistent with Article 5 of Chapter 10 of this title. Such complaint shall describe the property with reasonable particularity; state that it is located within the county or will be located within the county during the pendency of the action; state its present custodian; state the name of the owner or interest holder, if known; allege the essential elements of the criminal violation which is claimed

⁴⁹ O.C.G.A. § 44-14-80(a)(3). A practical example of the power of a reversrionary clause in a deed can be found in First Rebecca Baptist Church v. Atlantic Cotton Mills, 263 Ga. 688, 440 S.E. 2d 159 (1993). In Rebecca Baptist, the deed provided that the property was conveyed to a church to be "used for church purposes and that in the event the property was not used for church purposes, all right, title, and interest in the property would revert to the grantor." The Supreme Court of Georgia upheld the reverter clause and vested title back in the grantor once the property was no longer being used by the Church; see also Rustin v. Butler, 195 Ga. 389, 24 S.E. 2d 318 (1943) (upholding reverter clause where the deed specified that school was to be built on the property, and a forfeiture of title would result should the property not be used for school purposes).

⁵⁰ O.C.G.A. § 16-13-49

to exist; state the place of seizure, if the property was seized; and conclude with a prayer of due process to enforce the forfeiture.

(b) (1) A copy of the complaint and summons shall be served on any person known to be an owner or interest holder and any person who is in possession of the property.

(2) Issuance of the summons, form of the summons, and service of the complaint and summons shall be as provided in subsections (a), (b), (c), and (e) of Code Section 9-11-4.

(3) If real property is the subject of the complaint for forfeiture or the owner or interest holder is unknown or resides out of this state or departs this state or cannot after due diligence be found within this state or conceals himself or herself so as to avoid service, a copy of the notice of the complaint for forfeiture shall be published once a week for two consecutive weeks in the legal organ of the county in which the complaint for forfeiture is pending. Such publication shall be deemed notice to any and all persons having an interest in or right affected by such complaint for forfeiture and from any sale of the property resulting therefrom, but shall not constitute notice to an interest holder unless that person is unknown or resides out of this state or departs this state or cannot after due diligence be found within this state or conceals himself or herself to avoid service.

(4) If tangible property which has not been seized is the subject of the complaint for forfeiture, the court may order the sheriff or another law enforcement officer to take possession of the property. If the character or situation of the property is such that the taking of actual possession is impracticable, the sheriff shall execute process by affixing a copy of the complaint and summons to the property in a conspicuous place and by leaving another copy of the complaint and summons with the person having possession or his or her agent. In cases involving a vessel or aircraft, the sheriff or other law enforcement officer shall be authorized to make a written request with the appropriate governmental agency not to permit the departure of such vessel or aircraft until notified by the sheriff or the sheriff's deputy that the vessel or aircraft has been released.

(c) (1) An owner of or interest holder in the property may file an answer asserting a claim against the property in the action in rem. Any such answer shall be filed within 30 days after the service of the summons and complaint. If service is made by publication and personal service has not been made, an owner or interest holder shall file an answer within 30 days of the date of final publication. An answer shall be verified by the owner or interest holder under penalty of perjury. In addition to complying with the general rules applicable to filing an answer in civil actions as set forth in Article 3 of Chapter 11 of this title, the answer shall set forth:

(A) The name of the claimant;

(B) The address at which the claimant resides;

(C) A description of the claimant's interest in the property;

(D) A description of the circumstances of the claimant's obtaining an interest in the property and, to the best of the claimant's knowledge, the date the claimant obtained the interest and the name of the person or entity that transferred the interest to the claimant;

(E) The nature of the relationship between the claimant and the person who possessed the property at the time of the seizure;

(F) A copy of any documentation in the claimant's possession supporting his or her answer; and

(G) Any additional facts supporting the claimant's answer.

(2) If the state attorney determines that an answer is deficient in some manner, he or she may file a motion for a more definite statement. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 15 days after notice of the order, or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. If a motion for a more definite statement is filed, the time requirements for a trial set forth in subsection (f) of this Code section shall not commence until a sufficient answer has been filed.

(d) In addition to any injured person's right of intervention pursuant to Code Section 9-16-16, any owner or interest holder or person in possession of the property who suffers a pecuniary loss or physical injury due to a violation of Code Section 16-5-46, Article 4 or 5 of Chapter 8 of Title 16, or Chapter 14 of Title 16 may be permitted to intervene in any civil action brought pursuant to this Code section or Code Section 9-16-13 as provided by Chapter 11 of this title.

(e) If at the expiration of the period set forth in subsection (c) of this Code section no answer has been filed, the state attorney may seek a default judgment as provided in Code Section 9-11-55 and, if granted, the court shall order the disposition of the seized property as provided for in Code Section 9-16-19.

(f) If an answer is filed, a bench trial shall be held within 60 days after the last claimant was served with the complaint; provided, however, that such trial may be continued by the court for good cause shown. Discovery as provided for in Article 5 of Chapter 11 of this title shall not be allowed; however, prior to trial, any party may apply to the court to allow for such discovery, and if discovery is allowed, the court may provide for the scope and duration of discovery and may continue the trial to a date not more than 60 days after the end of the discovery period unless continued by the court for good cause shown.

(g) An action in rem may be brought by the state attorney in addition to or in lieu of any other in rem or in personam action brought pursuant to this chapter.

In actions in rem, the property which is the subject of the complaint for forfeiture shall be named as the defendant. The complaint shall be verified on oath or affirmation by a duly

authorized agent of the state in a manner consistent with Article 5 of Chapter 10 of this title. Such complaint shall describe the property with reasonable particularity; state that it is located within the county or will be located within the county during the pendency of the action; state its present custodian; state the name of the owner or interest holder, if known; allege the essential elements of the criminal violation which is claimed to exist; state the place of seizure, if the property was seized; and conclude with a prayer of due process to enforce the forfeiture.

III. Private Covenants and Restrictions

Restrictive covenants are specialized contracts that run with the title to the land and that inure to the benefit of all property owners affected. Covenants relating to land, or its mode of use or enjoyment, are enforceable against subsequent grantees with notice, whether named in the instrument or not, and though there is no privity of estate.⁵¹ It is immaterial in such cases whether the covenant runs with the land or not, the general rule being that it will be enforced according to the intention of the parties. It is only necessary that the covenant concern the land or its use, and that the subsequent grantee has notice of it.⁵² For a covenant to run with the land, its performance or nonperformance must affect the nature, quality, or value of the property demised, independent of collateral circumstances, or it must effect the mode of enjoyment, and there must be a privity between the contracting parties.⁵³

So, the key is not whether a covenant is described as running with the land, but, instead, the nature and effect of the promise. As the Lend a Hand court said, what matters is that the covenant concern the land or its use and that the subsequent grantee has notice of it. The Lend a Hand court also noted that privity of estate is not necessary to create a covenant that runs with the land. Where a restrictive covenant is recorded, the purchaser is charged with legal notice of the covenant, even if it is not stated in his own deed.⁵⁴

Georgia courts use the rules of contract interpretation when interpreting restrictive covenants. Therefore, the court's first stop is to determine if the covenant is ambiguous. If no ambiguity appears, the court enforces the contract according to its terms irrespective of all technical or arbitrary rules of construction. Thus, where the terms of the contract are clear and

⁵¹ Rice v. Lost Mountain Homeowners Ass'n, Inc., 269 Ga. App. 351, 354 (2004).

⁵² Lend A Hand Charity, Inc. v. Ford Plantation Club, Inc., 338 Ga. App. 594, 597–98 (2016).

⁵³ Hayes v. Lakeside Vill. Owners Ass'n, Inc., 282 Ga. App. 866, 867 (2006).

⁵⁴ Timberstone Homeowner's Ass'n, Inc. v. Summerlin, 266 Ga. 322, 323 (1996).

unambiguous, the court looks only to the contract to find the parties' intent. If the potential for ambiguity appears, the existence or non-existence of an ambiguity is itself a question of law for the court, unless an ambiguity remains even after the court has applied the pertinent rules of contract construction.⁵⁵

The court should look to the document as a whole and interpret all parts in a manner that permits all of the terms contained therein to be consistent with one another. All terms and phrases within in a contract must be given their ordinary meaning. The construction of a particular phrase that will uphold a contract in its entirety is preferred. Courts should avoid a construction that renders a portion of the contract meaningless.⁵⁶ Since restrictions on private property are generally not favored in Georgia, they will not be enlarged or extended by construction, and any doubt will be construed in favor of the grantee.⁵⁷ Because covenants run with the land, the obligations are not dischargeable in bankruptcy.⁵⁸

⁵⁵ Gill v. B & R Int'l, Inc., 234 Ga. App. 528, 530 (1998).

⁵⁶ O.C.G.A. § 13-2-2(4); Kreimer v. Kreimer, 274 Ga. 359, 361 (2001); CPI Phipps LLC v. 100 Park Ave. Partners, LP, 288 Ga. App. 614, 617 (2007).

⁵⁷ Duffy v. Landings Ass'n, Inc., 245 Ga. App. 104, 107, (2000).

⁵⁸ In re Heatherwood Holdings, LLC, 746 F.3d 1206 (11th Cir. 2014); In re Hall, 454 B.R. 230, 236-37 (Bankr. N.D. Ga. 2011); In re Montalvo, 546 B.R. 880, 886 (Bankr. M.D. Fla. 2016) (concluding that the Debtor is responsible for all accruing post-petition assessments unless title to the real property transfers.)