Defects and Encumbrances: How They Affect Title, How They Can Be Removed

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A. Title Defect vs. Encumbrance

Title insurance protects against "defective titles," and a forged deed conveys a defective title.[1] "[E]ven a bona fide purchaser for value without notice of a forgery cannot acquire good title from a grantee in a forged deed ..., because the grantee has no title to convey."[2] Title insurance protects an insured from "losses resulting from title defects not discoverable from a search of the public records, such as forgery, missing heirs, previous marriages, impersonation, or confusion in names."[3] "[T]he liability of an insurer under a title insurance policy is for loss or damage by reason of defects in the title to the property or by reason of liens or encumbrances thereon.... The coverage of title insurance extends to reasonably anticipated implications of ownership which attach to the insured by reason of the record, but does not extend beyond that point."[4] Location of property in a flood plain does not constitute a title defect.[5]

Under Georgia law, a marketable title is one that is both unencumbered and "free of any such cloud as would prevent it from being sold to a reasonable purchaser or mortgaged to a person of reasonable prudence."[6]

> While title "defect" and title "marketability" are both used to describe the peril against which title insurance offers protection, it is important to understand that only that

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[1] Fidelity Nat'l Title Ins. Co. v. Keyingham Investments, LLC, 288 Ga. 312, 313, 702 S.E.2d 851, 853 (2010).
[2] Id.
[3] Id. (quoting FTC v. Ticor Title Ins. Co., 504 U.S. 621, 626 (1992)).
[4] Chicago Title Ins. Co. v. Investguard, Ltd., 215 Ga. App. 121, 122, 449 S.E.2d 681, 682 (1994).
[5] Id. at 123, 449 S.E.2d at 683.
[6] Fidelity Nat'l Title Ins. Co. v. Matrix Fin. Servs. Corp., 255 Ga. App. 874, 877, 567 S.E.2d 96, 99 (2002). See also Ardex, Ltd. v. Brighton Homes, 206 Ga. App. 606, 608, 426 S.E.2d 200 (1992) ("A good title means not merely a title valid in fact, but a marketable title which can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence as a security for the loan of money.").

> decreased marketability which stems from the condition of title is within title insurance. The fact that a given property suffers from "economic" lack of marketability, which relates to physical conditions affecting the use of the property or other nontitle matters, is not relevant to title insurance coverage. In essence, defects which merely diminish the value of the property, as opposed to defects which adversely affect a clear title to the property, will not render title unmarketable within the meaning and coverage of a policy insuring against unmarketable title. This is often expressed by the principle that one can hold perfect title to land that is valueless and one can have "marketable title" to land while the land itself is unmarketable.[7]

Even in the absence of language in a sales contract requiring marketability of title, a *seller* cannot force a buyer to proceed with a transaction and accept unmarketable title.[8]

In Georgia, the Marketable Title Act has a 40 year title search requirement: "a prima facia case shall be made out in actions respecting title to land upon showing good record title for a period of 40 years, and it shall not be necessary under such circumstances to prove title to the original grant from the state."[9] However, it typically is local custom to follow the State Bar of Georgia title standards:

> A record title covering a period of **50 years** or more is considered sufficient to determine marketability; provided that the basis thereof is a warranty deed, one or more quitclaim deeds supported by a reasonable proof that they convey the full title, or a grant from the state, a probate proceeding in which the property is reasonably identifiable, a security deed if subsequently regularly foreclosed or any other instrument which shows of record reasonable probability of title and possession thereunder; provided further that the period actually searched does not refer to or indicate prior instruments or defects in title, in which case such prior instruments may be used in turn as a start, and that the period actually searched discloses instruments which confirm and carry forward the title to be established. (Emphasis added).[10]

B. Missing, Erroneous, or Invalid Records

1. Apparent Breaks In Chain Of Title

[7] Old Republic Nat'l Title Ins. Co. v. RM Kids, LLC, 352 Ga. App. 314, 319-20, 835 S.E.2d 21, 27 (2019).
[8] Stewart v. Gainesville Bank & Tr., 263 Ga. App. 93, 94, 587 S.E.2d 241, 242–43 (2003).
[9] O.C.G.A. § 44-2-22.
[10] Georgia Title Standards, § 2.1

Apparent breaks are not actually breaks in the chain of title. They are cases or situations in which certain necessary information, reflecting actual facts, has not been filed for record. Once this information is made part of the land records, the break disappears.

Among the most common apparent breaks, we can cite:

- Unrecorded Instruments. These are validly executed and acknowledged instruments that have not been filed for record. This apparent break can be eliminated by filing these instruments of record.
- Matters of Probate.
    - Lack of Proceedings. In the absence of probate proceedings, and after the expiration of the allowed statutory period of time for commencement, this apparent break can be eliminated by the filing for record of a satisfactorily and properly executed affidavit of heirship stating the necessary heirship information.
    - Probate Proceedings in Different Jurisdiction. The recordation of proper transcripts of probate proceedings can eliminate the apparent break.
- Matters of Corporation. The recordation of proper certificates of merger, acquisition, or change of value can eliminate the apparent break.
- Divorce Proceedings in Different Jurisdictions. The recordation of proper transcripts of the divorce proceedings can eliminate the apparent break.
- Proof of Death. The recordation of a death certificate or a proper affidavit can eliminate the apparent break.
- Variation in Names. It is essential to a record title to land that the various instruments in the chain show a direct connection between the different owners. Any substantial

variation between the name of the grantee in one instrument and of the grantor in the following instrument will render the title unmarketable. If there is a variance between the name of the grantee in a deed to him/ her and the name of such person as grantor in a subsequent deed from him/her, title under the latter deed is unmarketable unless the two names can be identified as those of one and the same person.

- Where there are variations between the Christian name of the grantee in one instrument and the grantor in the following instrument, between the surnames of a grantee in one instrument and the grantor in the following instrument, or between the name of the mortgagee in a mortgage and his/her name in a subsequently executed release or satisfaction, affidavits or corrected deeds must be executed in order to cure the defect in title. A mistake in the name of a party to the deed may be proven by an affidavit made at the time of changing the deed to correct the mistake. Often affidavits or a corrected deed is all that is needed to cure the defect.

2. Real Breaks In Chain Of Title

Conversely, real breaks are actual breaks in the chain of title. These situations cannot be cured by adding certain additional information to the records. These situations relate to parties who claim and hold certain rights, title or interest in the property which are adverse to those being claimed by the present record owners. These real breaks can be corrected by the elimination of the rights and interests of these claimants through one of the following methods:

- The execution and filing for record of a proper quitclaim deed.
- The filing and completion of a quiet title action or a trespass to try title action with a certified copy of the final judgment or decree filed for record.

- The provisions of the state's marketable title act, if any.
- In some jurisdictions, by recording an affidavit of adverse possession relative to the uninterrupted period of adverse possession established by state law.

1. Errors in public records. Clerical or filing errors could affect the deed or survey of the property and cause undo financial strain in order to resolve them.

2. Unknown liens. Prior owners of property may not have been meticulous bookkeepers — or bill payers. And even though the former debt is not the buyer's, banks or other financing companies can place liens on property for unpaid debts even after a buyer has closed on the sale. This is an especially worrisome issue with distressed properties.

3. Illegal deeds. While the chain of title on the property may appear perfectly sound, it's possible that a prior deed was made by an undocumented immigrant, a minor, a person of unsound mind, or one who is reported single but in actuality married. These instances may affect the enforceability of prior deeds, affecting prior (and possibly present) ownership.

4. Missing heirs. When a person dies, the ownership of his home may fall to his heirs, or those named within his will. However, those heirs are sometimes missing or unknown at the time of death. Other times, family members may contest the will for their own property rights. These scenarios — which can happen long after you have purchased the property — could affect your rights to the property.

5. Forgeries. Sometimes forged or fabricated documents that affect property ownership are filed within public records, obscuring the rightful ownership of the property. Once these forgeries come to light, rights to the property may be in jeopardy.

6. Undiscovered encumbrances. At the time of purchase, a buyer may not know that a third party holds a claim to all or part of her property — due to a former mortgage or lien, or non-financial claims, like restrictions or covenants limiting the use of the property.

7. Unknown easements. An unknown easement may prohibit a buyer from using her property as she would like, or could allow government agencies, businesses, or other parties to access all or portions of the property. Although usually non-financial issues, easements can still affect the right to enjoy property.

8. Boundary/survey disputes. A buyer may have seen several surveys of the property prior to purchasing, however, other surveys may exist that show differing boundaries. Therefore, a neighbor or other party may be able to claim ownership to a portion of the property.

9. Undiscovered will. When a property owner dies with no apparent will or heir, the state may sell his or her assets, including the home. When a buyer purchases such a home, she assumes her rights as owner. However, even years later, the deceased owner's will may come to light and buyer's rights to the property may be seriously jeopardized.

10. False impersonation of previous owner. Common and similar names can make it possible to falsely "impersonate" a property owner.

11. Easements. Any easements that appear on the title commitment should be located on the survey. It is also important to have copies of the easement documents for review. In connection with utility easements, if underground utilities are located on the property, the surveyor, if requested to do so, can review plans of the utility company to determine where the easements are located. Otherwise, they can hire companies with special equipment to detect where the utilities are located.

In addition to easements located on the property, appurtenant easements which benefit the property should also be shown on the survey. Sometimes, it will be necessary to obtain an appurtenant easement in case a utility runs off the property without any apparent supporting easement. If this is the case, it must be created and the adjoining owners will need to grant it. Sometimes, it becomes apparent from the survey that there is an appurtenant easement that does not appear on the title commitment. It is not unusual for a title company, once the order is placed on a particular parcel of property, not to include an appurtenant easement on the title commitment. If this happens, it is important that the survey be discussed with the title company in connection with researching the title to the appurtenant easement.

Easements may appear on the surveys that are not shown on the title commitment. Perhaps a gravel road across the property has been observed and placed on the survey by the surveyor. It is important for the attorney to review these sorts of items with the title company to make sure that an easement is created or that it is taken into account in the title insurance policy. Other matters that ought to be recognized by a surveyor and shown on a survey might be a possible prescriptive easement or right of way that is unrecorded affecting the property. This may only be apparent from a visual inspection of the property by the surveyor. If such an easement is discovered, it should be thoroughly investigated and proper documents to validate it be drafted.

Moreover, sometimes an easement appearing on the title commitment does not affect the property and the surveyor will be able to determine this and the attorney can then request deletion from the title commitment. As mentioned above, in connection with encroachments of improvements onto a property or over a property line, the easement areas should also be carefully followed for encroachments lying within them. In connection with title insurance

matters, some encroachments are not extremely risky or would be inexpensive to remove and a title company is likely to insure over them. However, more permanent items, such as a swimming pool lying in the middle of a utility easement crossing the property would be another matter and likely need more significant measures to deal with removing them.

3. Quiet Title Actions

a. What is a Quiet Title Action?

Quieting title is a legal procedure to establish an individual's right to ownership of real property against one or more adverse claimants. A quiet title action also is called a suit to remove a cloud in title. A cloud is any claim or potential claim to ownership of the property. The cloud can be a claim of full ownership of the property or a claim of partial ownership, such as a lien in an amount that does not exceed the value of the property or an easement that purports to give the respondent the right to use the property in some fashion. Said differently, a title to real property is clouded if the plaintiff, as the buyer or recipient of real property, might have to defend his/her full ownership of the property in court against some party in the future. A landowner may bring a quiet title action regardless of whether the respondent is asserting a present right to gain possession of the premises.

Such an action can be a "quasi-in-rem" proceeding (against one or more specific individuals) or a true "in rem" proceeding (against the whole world, claimants known and unknown). In effect, a "quiet title" action is a form of declaratory judgment in which the Court is declaring the rights of the parties in respect to the property in question.[11] In Georgia, those types of actions are respectively also called Equitable Quiet Title and Statutory Quiet Title.

i. Conventional/Equitable Quiet Title Action

[11] The use of equitable causes of action, such as rescission or reformation, effectively to quiet title is outside the scope of this presentation.

"A quia timet, or quiet title action, is intended to remove a cloud on the plaintiff's title to land."[12] "In order to bring a quia timet action, the plaintiff 'must assert that he *holds* some current record title or current prescriptive title. … Otherwise, he possesses no title at all, but only an expectancy. …"[13] Where plaintiffs do not assert that they have title to the property at issue, they have no standing to maintain a quia timet action.[14] Plaintiffs have no right to a jury trial under the conventional quia timet statute.[15]

In a proceeding to remove a cloud upon the title to real estate, the court must grant the relief sought "whether the invalidity of the instrument sought to be canceled appears upon the face of the instrument or whether the invalidity appears or arises solely from facts outside of the instrument."[16] An instrument which, either by itself or in connection with other extrinsic facts, "gives the claimant thereunder an apparent right in or to the property may constitute a cloud on the title of the true owner."[17] The true owner of property may have a cloud on title removed by proving: (1) that he cannot immediately maintain or protect his rights by any other course of proceeding open to him; (2) that the instrument sought to be canceled would operate to throw a cloud or suspicion upon his title and might be used against him; and (3) that he either suffers a present injury because of the hostile claim of right or has reason to believe that the evidence upon which he relies to impeach or invalidate an adverse claim may be lost or impaired by lapse of time.[18]

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[12] Cunningham v. Gage, 301 Ga. App. 306, 308 (2009) (citing O.C.G.A. § 23-3-40).
[13] Id. (quoting In re Rivermist Homeowners Ass'n, 244 Ga. 515, 518 (1979)) (emphasis in original).
[14] Id.
[15] Karlen v. Reliance Equities, LLC, 291 Ga. 549, 550 (2012).
[16] O.C.G.A. § 23-3-41.
[17] O.C.G.A. § 23-3-42.
[18] Id.

When an action is brought challenging an identified cloud, the court determines the validity of the outstanding claim and issues a decree. The relief sought will be granted where the invalidity of the specific instrument sought to be canceled appears on its face or is revealed through outside facts.[19] In granting the relief, the court may cancel instruments, construe them to avoid conflicts, grant injunctions, or use other available equitable power.[20] This malleability of remedies is an advantage not found in the statutory proceeding.

For example, the quia timet statute may be used to cancel a deed on the grounds of forgery.[21] Further, a lender with a valid security deed may bring a claim to quiet title to property over which a purported lender has an invalid security deed securing nonexistent debt, because the invalid deed casts a cloud over the actual lender's title to the property.[22]

The plaintiff in a conventional quiet title action may request that the matter be submitted to a special master in the same manner as provided in the Quiet Title Act of 1966.[23] Where the plaintiff makes this request, appointment of a special master is mandatory.[24] The special master is then authorized to handle every aspect of the quiet title claim.[25]

ii. Actions Under Quiet Title Act of 1966

Actions against "all the world" to quiet title to real property are governed by the Quiet Title Act of 1966 (the "Act").[26] "The purpose of the Act is to create a procedure for removing any cloud upon the title to land; the Act is to be liberally construed; and the remedy provided is

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[19] O.C.G.A. § 23-3-41.
[20] See 25 *Encyclopedia of Georgia Law, Quieting Title*, § 3 (1986 Rev.).
[21] Brock v. Yale Mortg. Corp., 287 Ga. 849, 851 (2010).
[22] Harris v. West Cent. Ga. Bank, 335 Ga. App. 114, 117 (2015) (citing O.C.G.A. § 23-3-40).
[23] O.C.G.A. § 23-3-43.
[24] Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 643 (2014) (citation omitted).
[25] Id.
[26] O.C.G.A. §§ 23-3-60, et seq.

intended to be cumulative and not exclusive."[27] The Act is "a special statutory proceeding designed for a specific purpose."[28] The Act "creates an efficient, speedy and effective means of adjudicating disputed title claims and sets out specific rules of practice and procedure with respect to an in rem quiet title action against all the world that take precedence over the Civil Practice Act when there is a conflict."[29]

A quiet title action under the Act is in rem and is not an action against any person or entity; instead, it is an action against the underlying property, and its purpose is to remove any and all clouds on the title of that property.[30] In an in rem action, the named defendant is real or personal property.[31] "Any person who claims an interest in that property/defendant must affirmatively assert that claim against the property/defendant in the quiet title action."[32] Thus, an "in rem quiet title action is not subject to sovereign immunity because it does not involve a claim against the State, though the State may certainly make a claim to the property in question during the pendency of the quiet title action."[33]

The court issues a decree based upon the findings of the special master or jury that quiets title and binds all parties known or unknown.[34] The statutory proceeding has the clear advantage

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[27] Johnson v. Bank of Am., N.A., 333 Ga. App. 539, 540 (2015), reversed on other grounds, Bank of Am., N.A. v. Johnson, No. S15G1878, 2016 WL 6407261 (Ga. Oct. 31, 2016) (citations and internal punctuation omitted). See also Smith v. Ga. Kaolin Co., 264 Ga. 755, 756 (1994) ("The legislature intended the act to serve as an additional remedy to other legal and equitable claims."); Smith v. Ga. Kaolin Co., 269 Ga. 475, 477 (1998) ("The 1966 Quiet Title Act was designed to broaden the relief available by supplementing and not supplanting the quia timet procedure.").
[28] Id. (quoting James v. Gainey, 231 Ga. 543, 545 (1974)).
[29] Id. (quoting Nelson v. Ga. Sheriffs Youth Homes, 286 Ga. 192 (2009)).
[30] TDGA, LLC v. CBIRA, LLC, 298 Ga. 510, 512 (2015).
[31] Id. (citing Black's Law Dictionary (10th ed. 2014)).
[32] Id.
[33] Id. In contrast, the State and its agencies are immune from suit under O.C.G.A. § 23-3-40, because that statute contains no waiver of sovereign immunity. Id.
[34] O.C.G.A. § 23-3-67.

over the equitable action due to the breadth of the court's decree. Owners, either currently in possession or not, do not have to join the specific individuals that may have outstanding claims to the property, as all outstanding claims are presumed adjudicated. However, failure to follow the specific requirements of the statute can be a bar to relief.[35]

4. Curative Instruments

In some instances, a lawyer may have options other than instituting a full blown quiet title action in order to clarify ownership or right to a certain piece of real property. Consider the following options:

- Rental Division Order

Used to clarify undivided ownership and/or direct allocation of bonus, or and rental income in a manner other than equally.

- Lease Ratification.

Ratifications evidence that a party in interest by title, grant of authority, or act of law confirms and adopts the specific act of another party in interest without altering the terms of the original act. (e.g., Execution of an oil and gas lease, mortgage, assignment, etc.) Most notably used for NPRIs (non-participating royalty owners) so they are bound by lease pooling provision.

- Lease Amendments

The lease contains a drafting error, or a proper provision is omitted. Terms, description, etc. If the legal description does not adequately identify the land covered by the lease with reasonable certainty, the lease is VOID from inception.

- Lease Amendments - Extension of Primary Term

[35] Piedmont Cotton Mills, Inc. v. Woelper, 1998 Ga. LEXIS 272 (February 23, 1998).

If the lease does not contain an option to extend, the Lessee has the option to pay a bonus to extend the primary term. However, there are times when the secondary term of a lease might be questionable. In these instances, an affidavit might be negotiated and filed to provide notice that both parties agree the primary lease has been extended.

- Release of Lien, or Deed of Trust

A lien or deed of trust is a claim on the property that can be exercised upon the default of the first party. Oftentimes a release, or partial release is filed if the lease is conveyed, in whole, or part, and the lease is subject to a mortgage.

- Subordination Agreement

A subordination agreement is used to place parties on notice that an agreement (usually a lease agreement) takes precedence over another agreement. For example, a mortgage agreement. If a mortgage is filed against the surface owner who is also the mineral owner, in the event of loan default, the mortgagee could claim the oil and gas lease was taken after the mortgage and, therefore null and void.

- Quitclaim Deed

A quitclaim deed is used to disclaim title to interests that may or may not exist or to confirm or repair title when ambiguities exist as a result of prior conveyances. This is a curative instrument.

- Affidavit of Joint Tenancy

Affirms the existence of a joint tenancy at the time of death of one of the joint tenants and evidences the passing of the interest of the joint tenant by operation of death.

- Affidavit of Identity

Corrects inconsistencies in a party's name as it appears in the public record.

- Affidavit of Heirship

Provides record notice that an interest is claimed to have been transferred by death to the putative heirs or devisees of a decedent without the benefit of probate. Affidavits of Heirship do not convey title.

- Affidavit of Adverse Possession

Identifies party in possession of the land and states the duration and nature of use. Claims open, notorious and continuous possession

- Affidavit of Use and Possession

Avoid claims of adverse possession. Recites history of land and identifies all parties in possession and their nature and duration of use.

Based on the facts of the case, any of these curative instruments might be more appropriate, and, frankly, less time consuming that engaging in full litigation. The desirability and practicality of these curative solutions will, of course, depend on the facts of your case and the goal which your client is seeking to obtain.

C. Mortgages and Liens

"A security deed containing a power of sale and a deed to secure debt are matters of contract, the provisions of which are controlling as to the rights of the parties, and will be enforced as written."[36] "Generally, the priority of each deed or lien is determined by the date of its recording. Thus, a deed that was executed second, but filed first can take the first priority over the earlier mortgage. Nevertheless, parties can agree to modify the order of lien priority."[37]

[36] U.S. Bank, N.A., as Trustee of the Cabana Series IV Trust v. Carrington Mortgage Servs., LLC, 364 Ga. App. 179, 181, 874 S.E.2d 372, 375 (2022).
[37] Id. (internal citations omitted).

"[W]here facts apparent on the face of the mortgages show that it was the intention of the parties to give preference to one over the other, the lien so preferred will be enforced .... The parties may, as between themselves, make a valid agreement ... that one of two mortgages shall be prior to the other, and the order of record is then immaterial unless they are subsequently assigned to other persons who have no notice of the agreement."[38] As the Georgia Court of Appeals has explained:

> [t]he legal order or priority as between mortgages and other liens or claims may be fixed, reversed, or modified by an agreement of the parties or by a waiver or release on the part of the senior lienholder. ... Furthermore, even absent a specific agreement, a lienholder may waive priority by implication; without any agreement there may be facts and circumstances which would indicate an intention to make one of two claims prior to the other.[39]

Under Georgia law, a written agreement is not necessary, as the "legal order or priority as between mortgages and other liens or claims may be fixed, reversed, or modified by an agreement of the parties or by a waiver or release on the part of the senior lienholder. The agreement or waiver may be written or verbal."[40]

D. Deed Restrictions/CC&Rs

The declaration of a homeowner's association is "considered a contract, and [courts] therefore apply the normal rules of contract construction to determine the meaning of the terms therein."[41]

> First, the construction of a contract is "a question of law for the court." That being said, it is well established that the cardinal rule of construction is "to ascertain the intent of the parties[and w]here the contract terms are clear and unambiguous, the court will look to that alone to find the true intent of the parties." In determining the parties' intent, "all the

[38] Id.
[39] Id. at 182, 874 S.E.2d at 375-76.
[40] F & W Agriservices, Inc. v. UAP/GA Ag. Chem., Inc., 250 Ga. App. 238, 240, 549 S.E.2d 746, 749 (2001).
[41] Marino v. Clary Lakes Homeowners Ass'n, Inc., 331 Ga. App. 204, 208, 770 S.E.2d 289, 293 (2015).

> contract terms must be considered together in arriving at the construction of any part, and a construction upholding the contract in whole and every part is preferred." And when the language employed by the parties in their contract is plain, unambiguous, and capable of only one reasonable interpretation, the language used "must be afforded its literal meaning and plain ordinary words given their usual significance."[42]

Restrictive covenants are specialized contracts that run with the land.[43] In the courts' review of restrictive covenants, they are "mindful that '[t]he general rule is that the owner of land has the right to use it for any lawful purpose. Restrictions upon an owner's use of land must be clearly established and must be strictly construed. Moreover, any doubt concerning restrictions on use of land will be construed in favor of the grantee[,]' because restrictions on private property are not favored in Georgia. As such, they will not be enlarged or extended by construction."[44] Restrictive covenants are also governed by the normal rules of contract construction.[45] "It is well settled that the grantor of real property may restrict the use of it by restrictive covenants.... Moreover, [c]ourts exercise extreme caution in declaring a contract void as against public policy and will do so only where the case is free from doubt and the injury to the public interest is clearly apparent."[46] For example, a restrictive covenant in homeowners' association documents that prohibited a homeowner from erecting a "For Sale" sign on her property was not unenforceable restraint on alienation; the covenant did not directly prohibit sale of the property.[47]

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[42] Id.
[43] Mitchell v. Cambridge Prop. Owners Ass'n, Inc., 276 Ga. App. 326, 326–27, 623 S.E.2d 511, 513 (2005).
[44] Charter Club on River Home Owners Ass'n v. Walker, 301 Ga. App. 898, 899, 689 S.E.2d 344, 346 (2009).
[45] Glisson v. IRHA of Loganville, Inc., 289 Ga. App. 311, 312, 656 S.E.2d 924, 926 (2008).
[46] Godley Park Homeowners Ass'n, Inc. v. Bowen, 286 Ga. App. 21, 23, 649 S.E.2d 308, 311 (2007) (internal quotation marks omitted).
[47] Id.

Restrictions on the use of property in a deed are not a restraint on the alienation of property or transferability of realty with no time limit and void as a violation of the rule against perpetuities. The rule against perpetuities does not pertain to covenants restricting the land to certain uses.[48]

E. Easements

Generally, an easement is an "encumbrance" that is a defect on the title.[49] However, "the existence of a public road on land, of which the purchaser knew or should have known at the time of the purchase, is not such an encumbrance as would constitute a breach of a general warranty of title."[50]

> The recording of a deed gives constructive notice of the ownership of the legally described property and any encumbrances to the property. A properly recorded deed gives notice of such ownership rights and encumbrances whether or not the subsequent purchaser knows of the record. When an easement is properly recorded of public record, the world has constructive notice of such easement whether or not they have actual notice. When a grantee receives title to land that has a survey plat that is recorded, showing an existing recorded easement, such grantee takes title subject to such easement. The recorded easement document in their chain of title provided notice to them of the express terms of the easement granted to the [United States of America] to operate and maintain [a flowage easement], which provided that they could not use the land in a manner inconsistent with the [USA]'s full use and enjoyment of the [flowage] easement. When title is conveyed by a limited warranty deed subject to known easements, encumbrances, or defects, there is no breach of warranty of title, because the grantee received what it bargained for in the bundle of rights to the land conveyed by limited warranty deed.[51]

"When a limited warranty deed conveys title with the description of the land incorporated by reference from a recorded survey plat, any encumbrance, easement, or other defect shown on the survey is part of the limited warranty of title."[52]

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[48] Gibson v. Huffman, 246 Ga. App. 218, 220, 540 S.E.2d 222, 224 (2000).
[49] RM Kids, LLC, 352 Ga. App. at 318, 835 S.E.2d at 26.
[50] McMurray v. Housworth, 282 Ga. App. 280, 282, 638 S.E.2d 421, 423 (2006).
[51] Sec. Union Title Ins. Co. v. RC Acres, Inc., 269 Ga. App. 359, 361, 604 S.E.2d 547, 550 (2004) (internal citations omitted).
[52] Id. at 362, 604 S.E.2d at 550-51 (citations omitted).

[T]he crucial test in determining whether a conveyance grants an easement in, or conveys title to, land, is the intention of the parties, but in arriving at the intention many elements enter into the question. The whole deed or instrument must be looked to, and not merely disjointed parts of it. The recitals in the deed, the contract, the subject-matter, the object, purposes, and nature of the restrictions or limitations, if any, or the absence of such, and the attendant facts and circumstances of the parties at the time of the making of the conveyance are all to be considered.[53]

"Generally, an easement is lost by the foreclosure of a mortgage or trust deed on the servient tenement, where such mortgage or trust deed was executed prior to creation of the easement. In Georgia, the purchaser at a sale under a power of sale in a [deed to secure debt] takes the [grantee's] title divested of all incumbrances made since the creation of the power."[54]

Any easements that appear on the title commitment should be located on the survey. It is also important to have copies of the easement documents for review. In connection with utility easements, if underground utilities are located on the property, the surveyor, if requested to do so, can review plans of the utility company to determine where the easements are located. Otherwise, they can hire companies with special equipment to detect where the utilities are located.

In addition to easements located on the property, appurtenant easements which benefit the property should also be shown on the survey. Sometimes, it will be necessary to obtain an appurtenant easement in case a utility runs off the property without any apparent supporting

[53] Latham Homes Sanitation, Inc. v. CSX Transp., Inc., 245 Ga. App. 573, 574, 538 S.E.2d 107, 109 (2000) (citation omitted).
[54] Massey Assocs., Ltd. v. Whitehorse Inns of Georgia, Inc., 265 Ga. 320, 321, 454 S.E.2d 513, 514–15 (1995) (internal citations and quotation marks omitted).

easement. If this is the case, it must be created and the adjoining owners will need to grant it. Sometimes, it becomes apparent from the survey that there is an appurtenant easement that does not appear on the title commitment. It is not unusual for a title company, once the order is placed on a particular parcel of property, not to include an a appurtenant easement on the title commitment. If this happens, it is important that the survey be discussed with the title company in connection with researching the title to the appurtenant easement.

Sometimes an easement will appear on the survey that is not shown on the title commitment. Perhaps a gravel road across the property has been observed and placed on the survey by the surveyor. It is important for the attorney to review these sorts of items with the title company to make sure that an easement is created or that it is taken into account in the title insurance policy. Other matters that ought to be recognized by a surveyor and shown on a survey might be a possible prescriptive easement or right of way that is unrecorded affecting the property. This may only be apparent from a visual inspection of the property by the surveyor. If such an easement is discovered, it should be thoroughly investigated and proper documents to validate it be drafted.

Sometimes an easement appearing on the title commitment does not affect the property and the surveyor will be able to determine this and the attorney can then request deletion from the title commitment.

The easement areas should also be carefully followed for encroachments lying within them. In connection with title insurance matters, some encroachments are not extremely risky or would be inexpensive to remove and a title company is likely to insure over them. However, more permanent items, such as a swimming pool lying in the middle of a utility easement

crossing the property would be another matter and likely need more significant measures to deal with removing them.

F. Licenses

A license "is defined as authority to do a particular act or series of acts on land of another without possessing any estate or interest therein."[55] "A parol license to use another's land is revocable at any time if its revocation does no harm to the person to whom it has been granted. A parol license is not revocable when the licensee has acted pursuant thereto and in so doing has incurred expense; in such case, it becomes an easement running with the land."[56] This executed parol license doctrine is essentially one of estoppel.[57]

> As the Supreme Court of Georgia explained in a case upon which the Code section was based, "where acts have been done by one party, upon the faith of a license given by another, the [licensor] will be estopped from revoking it to the injury of the [licensee], and this even if the exercise of the right given by the license, is of a nature to amount to the enjoyment of an easement or other incorporated hereditament." A license subject to this exception is one such as permission to erect a building or other structure, "which in its own nature seems intended to be permanent and continuing." In the case of such a license, the licensee would necessarily have to incur expense to execute the agreement and would sustain a resulting loss if the licensor were entitled to later revoke the license. When the enjoyment of a license must necessarily be preceded by the expenditure of money, and when the licensee "has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration." This is so because such a license "is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived." In other words, where the license has been executed, "in distinction from cases where it is executory only," it becomes irrevocable.[58]

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[55] Harper Invs., Inc. v. Dep't of Transp., 251 Ga. App. 521, 524, 554 S.E.2d 619, 622 (2001) (citing Jekyll Dev. Assoc. v. Glynn County Bd. of Tax Assessors, 240 Ga. App. 273, 274, 523 S.E.2d 370 (1999)).

[56] O.C.G.A. § 44-9-4. While a parol license generally is revocable at any time, it "is not revocable when the licensee has executed it and in so doing has incurred expense. In such case it becomes an easement running with the land." Hopkins v. Virginia Highland Assocs., L.P., 247 Ga. App. 243, 245, 541 S.E.2d 386, 389 (2000).

[57] Decker Car Wash, Inc. v. BP Prod. N. Am., Inc., 286 Ga. App. 263, 265, 649 S.E.2d 317, 319 (2007).

[58] Id. at 265, 649 S.E.2d at 319-20

"As noted in the Restatement, '[t]he power to dispense with the Statute [of Fraud]'s requirements to give effect to the intent of the parties [to an oral agreement to create a servitude] should be exercised with caution [,] because of the risk that exceptions will undermine the policies underlying the Statute of Frauds[,]' and only when necessary to prevent injustice."[59] "Where the execution of a parol license does not require erecting a structure on the licensor's land, Georgia courts have generally recognized the creation of an irrevocable easement only where the licensee's enjoyment of the license is necessarily preceded by some investment of funds which increases the value of the licensor's land to the licensor."[60]

G. Encroachments

a) Actions for Ejectment and Trespass

"Georgia law allows an owner of real property to bring an ejectment action to remove an adjoining owner who, either by inadvertence or with predatory intent, encroaches upon the property of his neighbor."[61] "The purpose of the action is to eject the defendant from possession of the disputed land."[62] "A land owner's entitlement to an action in ejectment stems from our deep-rooted belief that the owner of real property has the right to possess, use, enjoy, and dispose of it, and the corresponding right to exclude others from the use."[63] As relief, the property owner may obtain the recovery of the property encroached upon and removal of the intruding structure.[64]

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[59] Id. at 266, 649 S.E.2d at 320.
[60] Id.
[61] MVP Inv. Co. v. North Fulton Express Oil, LLC, 282 Ga. App. 512, 513 (2006).
[62] Id. (citing Vinson v. Cannon, 213 Ga. 339, 341 (2004)).
[63] Id.
[64] Navajo Constr., Inc. v. Brigham, 271 Ga. App. 128, 129 (2004). See also O.C.G.A. § 44-11-2 ("A plaintiff in ejectment may recover the premises in dispute upon his prior possession alone against one who subsequently acquires possession of the land by mere entry and without any lawful right whatsoever.").

"In addition, the construction of a permanent structure encroaching upon adjacent property 'constitutes a continuing trespass and nuisance which may be abated as such.'"[65] "In an action for trespass, the landowner may recover damages arising from 'any wrongful, continuing interference with a right to the exclusive use and benefit of a property right.'"[66]

In *Navajo Construction*, a construction company built a "spec" house on a lot in a new subdivision.[67] The defendants bought that house without obtaining a survey of the property. Id. Later, the plaintiff bought the lot next door to the defendants' house, intending to build a spec house on it.[68] The plaintiff then had a survey done which showed that the defendants' house encroached on its lot by over five feet.[69] Plaintiff then filed suit, asserting claims for trespass and negligence. The trial court denied the plaintiff's motion for summary judgment on its trespass claim and granted the defendants' cross-motion for summary judgment.[70]

The Georgia Court of Appeals held that the defendants' home's encroachment necessarily interfered with the plaintiff's right to possess, use, enjoy, and dispose of its entire parcel.[71] Although the defendants did not cause the encroachment, they intentionally possessed and occupied the encroaching structure.[72] Because the plaintiff adduced evidence making out a

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[65] Navajo Constr., Inc., 271 Ga. App. at 129 (quoting Pindar's Ga. Real Estate Law & Procedure, § 14-3).
[66] Id. (quoting Lanier v. Burnette, 245 Ga. App. 566, 570 (2000)); see also O.C.G.A. § 51-9-1 ("The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie."); O.C.G.A. § 44-11-7(a) ("By adding a count in his petition and submitting the evidence to the jury, the plaintiff in ejectment may recover by way of damages all such sums of money to which he may be entitled by way of mesne profits, together with the premises in dispute.").
[67] 271 Ga. App. at 128.
[68] Id.
[69] Id.
[70] Id.
[71] Id. at 129.
[72] Id.

prima facie claim of trespass, the trial court erred in granting the defendants' motion for summary judgment.[73] "But it is also undisputed that, after failing to obtain a survey of the property, [plaintiff] purchased its parcel with the encroaching structure already in place. Because the [defendants had] adduced evidence in support of their defenses on the trespass claim, the trial court correctly denied [plaintiff's] motion for summary judgment."[74]

In *MVP Inv. Co. v. North Fulton Express Oil*, the defendants built an oil change facility on a piece of property adjoining the property of the plaintiff.[75] Plaintiff alleged that during the construction, the defendants raised the height of their property by four to five feet and "laterally supported the 4-to-5-foot increase in the … [p]roperty's elevation by wrongfully backfilling and sloping fill dirt on [plaintiff's] property along the common boundary line."[76] According to plaintiff, the backfilling and sloping fill dirt resulted in an "earth slope and wall [created] to provide lateral support to the raised elevation of [defendants'] property" which encroached onto plaintiff's property.[77] The plaintiff asserted that as a result of the encroachment, it could not develop its property as it intended unless it built an eight-to-ten-foot structural load-bearing wall to replace the lateral support supplied by the fill dirt.[78] Plaintiff brought claims for trespass and ejectment, both of which the trial court dismissed.[79]

The sole issue on appeal was whether the trial court erred in dismissing plaintiff's claim for ejectment. The Georgia Court of Appeals noted that plaintiff alleged that the defendant constructed an "earth slope and wall" from fill dirt that extended over the common boundary and

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[73] Id.
[74] Id.
[75] 282 Ga. App. at 512.
[76] Id.
[77] Id.
[78] Id. at 512-13.
[79] Id. at 513.

encroached onto plaintiff's property.[80] Defendants continued to use the fill dirt that they deposited onto plaintiff's property to laterally support the raised elevation of their own property, which plaintiff could not disturb.[81] The court concluded that Georgia precedent supported plaintiff's contention that it was entitled to eject the defendants from possession of its property.[82] "Courts of this state have previously held that a permanent structure that has been unlawfully erected onto an adjacent owner's property or that unlawfully encroaches onto that property necessarily interferes with the owner's right to possess, use, enjoy, and dispose of his property."[83] The earthen slope required to provide lateral support constituted a "structure" when it encroached upon the property of the adjacent landowner. Id. During the elevation of its own property, defendants appropriated plaintiff's property to the extent they placed the fill dirt being used as lateral support over the common boundary and onto plaintiff's property, and plaintiff was therefore entitled to an action for ejectment for this encroachment.[84] According to the court,

> [I]f one party, building upon his own land, encroaches upon the adjoining land of his neighbor, no question should arise as to the right of the latter to maintain ejectment against the former. … One who ousts another from the possession of his property must take all the consequences resulting from the application of the appropriate remedy given by the law to restore to the owner that of which he has been deprived.[85]

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[80] Id.
[81] Id.
[82] Id.
[83] Id. at 514 (citing Wachstein v. Christopher, 128 Ga. 229 (1907)).
[84] Id.
[85] Id. (quoting Wachstein, 128 Ga. at 231-32). See also Duke v. S & J Marble, 277 Ga. App. 331 (2006) (where the defendant presented a survey showing that its building was constructed within the boundaries of its property, there was evidence to support the jury's verdict that the defendant's building did not encroach on plaintiff's property, and the plaintiff was not entitled to ejectment).

b) Defense of Good Faith

"In all actions for the recovery of land, the defendant who has a bona fide possession of the land under adverse claim of title may set off the value of all permanent improvements placed on the land in good faith by himself or other bona fide claimants under whom he claims." O.C.G.A. § 44-11-9(a). "Whether a defendant has placed improvements on land in good faith is an issue for the trier of fact."[86]

[86] Small v. Irving, 291 Ga. 316, 317 (2013) (citing Gay v. Strain, 261 Ga. App. 708 (2003)). See also McGlashan v. Snowden, 292 Ga. 450, 451 n.2 (2013).