

Real Property Law Section NEWSLETTER

State Bar of Georgia

A Publication for Real Property Lawyers

Spring/Summer 2006

COMMENTS FROM THE CHAIR

Linda B. Curry

Weissman, Nowack, Curry & Wilco, P.C.

This is my third and final column as Chair of the Real Property Law Section. Actually, I have already relinquished my position to the able leadership of David Burge at the Real Property Law Institute earlier this month. My time as Chair went so quickly and was truly a pleasure; mostly because of the great, active members of the Executive Committee and the Section. The Section now has almost 2,500 members and is still the largest section. Thanks to all of you who gave me support, encouragement and great suggestions and contributed in so many ways to the Section.

A few words about the Real Property Law Institute ("RPLI") are in order so that you are all aware of the thinking of the Executive Committee with regard to the scheduling of the location. This year the RPLI was at the Hilton Sandestin in Sandestin, Florida. Attendance was good and most of the attendees liked the location and the accommodations. We did have some suggestions that it was too far in terms of driving distance for attorneys in the northeast section of Georgia. Because of the need to book years in advance RPLI is already scheduled for Sandestin in 2007 and Amelia Island Plantation in 2008. At our Executive Committee meeting after the last RPLI session we voted to go to Amelia in

2009. The thinking is that we have some members who prefer one location, and some prefer the other. There are also those who like having a change of location periodically. Therefore, if everything continues to go well in both locations, the idea would be to rotate between them every couple of years to accommodate distances and preferences of real estate attorneys in different parts of the state. This is not "set in stone" and is certainly subject to change as the Executive Committee continues to book a future location each year, usually 3 years in advance. Let us know your thoughts and suggestions.

As I have stated before in this column, one of the goals of the Executive Committee is communication with all the members of the Section. This Newsletter is certainly one of the ways that we try to accomplish this goal. Therefore, we have decided to publish elsewhere in this Newsletter our annual summary of Section activities that I prepared and submitted to the Bar for publication at the Mid-Year Meeting in June. I hope this information will make you, as members, more fully aware of what the Section is doing and give you some ideas on how you might like to be involved.

Although I am no longer Chair, I will remain on the Executive Committee for one final year and plan to stay involved. Thanks for some great memories!

Linda

FRANK S. ALEXANDER HONORED WITH 2006 GEORGE A. PINDAR AWARD

The George A. Pindar Award is granted by the Executive Committee of the Real Property Law Section of the State Bar of Georgia to honor a member of the real estate section of the Bar who unselfishly gives of himself for the benefit of the real estate Bar and whose lifetime contribution has been significant to the real estate Bar.



This year, Frank S. Alexander, Interim Dean of Emory University School of Law, has been honored for his years of service both as a practitioner and educator in real estate. Frank Alexander has been a full-time Professor of Law

PINDAR WINNER, Frank Alexander (right), accepts award from Shelli Willis, chair, Awards and Recognition Committee, (center) and David Burge, RPLS Chair-elect.

since 1982 at Emory University School of Law teaching in the areas of Property, Real Estate Finance, State and Local Government Law, Law and Theology, and Federal Housing Policies and Homelessness. He is a past Fellow of the Carter Center of Emory University, specializing in affordable housing and homelessness, as well as the author many times over of state legislation regarding land banks, the tax foreclosure process and affordable housing, both in Georgia and throughout the country.

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Pindar Award, continued from page 1

He has been a dedicated servant of the community in pro bono service and nonprofit board service, and currently serves on the boards of Community Friendship, Consumer Credit Counseling Service and Habitat for Humanity in Atlanta; serves as Special Counsel to the Atlanta Legal Aid Society; and serves as an advisor to the Georgia Municipal Association, Committee on Community Development and Human Resources and the National Vacant Properties Campaign, Smart Growth America. The Pindar Award was presented May 4, 2006 at the annual Real Property Law Institute, held this year in Sandestin, Florida.

2ND ANNUAL "FEAT FOR McFEE" A WINNER

The second annual ICLE "Feat For McFee," 5K Run and 1 Mile Walk, the Friday May 5th morning event, honoring the memory of Bill McFee, Jr., chair-elect for 2005 -2006, once again drew a rousing turnout. Runners and walkers, volunteers and well wishers gathered at 6:45 A.M. for the 7:00 start of the flat and scenic course through the Sandestin Resort.

Greg Riley and Mark Shaffer tied the 5K with a time of 26:54 and our lead walker was Pres Willis with a finish of 12:54.

Organized by Drew Marlar and Jed Beardsley, RPLS Executive Board members, the walk and run drew 51 contestants, both young and older.

We are looking forward to next year's run and a new set of course records. See you next year!!



TIED FOR FIRST PLACE were CHRIS RILEY #27 and MARK SCHAFFER #21 for the men and CHRISSY SIMMONS #26 for the women. Jed Beardsley, RPLS Executive Board member, helped organize the run.



YOUNGER GENERATION also participated in "Feat for McFee" fun run.

SENATE BILL 253 – A STEP IN THE RIGHT DIRECTION

By: Nancy Wasdin

O'Kelley and Sorohan, LLC

With acknowledgement to Tim Minors of Old Republic Title.

The Georgia legislature passed Senate Bill 253 this year, which changes certain provisions related to filing Certificates of Permanent Location for manufactured homes. It provides an alternate method of obtaining a Certificate of Permanent Location that does not involve a certificate of title.

The new procedure allows the manufactured home to become part of the real property upon which it is affixed without having a certificate of title issued. The procedure does require that a Manufacturer's Original Certificate of Origin be submitted as an attachment to the Certificate of Permanent Location (also known as form T-234) when it is filed for recording with the Clerk of Superior Court. Therefore, a Certificate of Permanent Location can be recorded using the manufacturer's certificate and without having to get a certificate of title issued from the department of motor vehicles.

To which homes this new law applies is somewhat unclear. It applies to: "A manufactured home which has not been issued a certificate of title from the commissioner and which is sold on or after July 1, 2006." 2006 Ga. Laws 253 Mostly, this will affect newly manufactured homes. However, there exist some homes that have not been issued a certificate of title but that were manufactured in the past. The hurdle for that situation will be to obtain the Manufacturer's Original Certificate of Origin.

Regulations are being formulated now; their release is expected to provide insight as to how the law will be applied going forward.

2006 REAL PROPERTY LAW INSTITUTE

David J. Burge

Chair-Elect, RPLS

Smith, Gambrell & Russell, LLP

The 2006 Real Property Law Institute was held on May 4-6, 2006, at the Sandestin Hilton in Sandestin, Florida. Thirty speakers made presentations to over 450 attendees over the three morning sessions of the seminar.

One day of the Institute was devoted to separate breakout sessions for residential and commercial practitioners, while afternoons and evenings were devoted to rigorous beachfront activities.

On Friday, May 5, the Section held the 2nd annual Feat for McFee Run/Walk in memory of former Section Chair-Elect Bill McFee. The Section held its annual business meeting on the morning of May 6th and the Executive Board held its meeting following the conclusion of the Institute. After a long run at Amelia Island, this was the first time for the Institute at Sandestin.

**SUMMARY OF REAL PROPERTY
LAW SECTION ACTIVITIES
2005-2006 BAR YEAR**

May 12, 2005 – Real Property Law Section (“RPLS” or “Section”) awarded George A. Pindar Award posthumously to William C. McFee, Jr., Chair-Elect of the RPLS.

May 13, 2005 - The first annual fun run (“Feat for McFee”) is held at the Real Property Law Institute in honor of William C. “Bill” McFee, Jr.

May 14, 2005 – Section wide meeting held at Real Property Law Institute, Amelia Island Florida, and election of officers for 2005-2006.

May 14, 2005 – Executive Committee meeting held at Real Property Law Institute, Amelia Island, Florida.

June 10, 2005 – RPLS is Silver Sponsor for Opening Night Event of State Bar Annual Meeting, Savannah, Georgia. Real Property Law Section presented Section of the Year Award by the State Bar.

September 10, 2005 – Executive Committee held Planning Retreat in Savannah, Georgia.

October 6, 2005 – Section co-sponsored Title Standards Seminar with ICLE.

October 17, 2005 – Fall edition of the newsletter circulated to all Section members.

October 18, 2005 – Monthly meeting of Executive Committee. Resolution adopted modifying terms of awards given to law students in Georgia law schools to move from a first-year student to a second or third-year student with an interest in practicing real property law in Georgia.

November 10, 2005 – Section co-sponsored Commercial Real Estate Seminar with ICLE followed by Speakers’ and Executive Committee Appreciation Dinner at Canoe. Recipients of 2005 Law School Scholarship Awards from Emory University, University of Georgia, Georgia State University and Mercer University were also invited and recognized.

November 10, 2005 – Monthly meeting of Executive Committee.

November 15, 2005 – Section co-sponsored with Environmental Law Section of Georgia Bar and Environment and Toxic Tort Section (Atlanta Bar) Brown Bag Seminar on Atlanta Beltline: Issues and Perspectives.

December 12, 2005 – Launch of ListServ for Section discussion of real estate issues. Over 200 members signed up for the ongoing opportunity to ask and answer questions related to real estate law and practice in Georgia. Link for sign up is located on the RPLS website: garealpropertylaw.com.

December 13, 2005 – Monthly meeting of Executive Committee.

January 12, 2006 – E-mail blast from RPLS Pro Bono Committee on Pro Bono Matchmaker Project to match Section attorneys with pro bono opportunities. The Pro Bono Committee establishes points of contact with qualifying organizations that need real property legal services. Once an organization communicates a real property pro bono project, an e-mail is sent to the volunteers with the project description. Volunteers and projects are then matched. Possible projects include land

closings, declarations, easements, affordable housing, and property tax appeals. Over 50 Section members have volunteered.

January 17, 2006 - Monthly Meeting of Executive Committee.

January 20, 2006 – E-Blast at the request of the Bar to solicit mentors from Section for Transition into Law Practice Program.

February, 2006 – RPLS published Winter edition of Newsletter and circulated to all members.

February 3, 2006 – Section co-sponsored Residential Real Estate Practice and Procedure seminar with ICLE at Georgia Public Television and other locations via satellite.

February 9, 2006 - Replay of Residential Real Estate Practice and Procedure seminar at various locations around the State.

February 21, 2006 - Monthly Meeting of Executive Committee.

March 21, 2006 - Monthly Meeting of Executive Committee.

March, 2006 - Senate Bill 253 (simplifying provisions of statutes relating to manufactured homes) proposed by the RPLS was adopted by Legislature and sent to the Governor for signature.

April, 2006 – Awarded \$1,000 scholarship to law students; a first year student at University of Georgia and second or third year students at Emory University, Georgia State University and Mercer University law schools to encourage academic excellence and participation in the Real Property Law Section.

April 7, 2006 – Co-sponsored Foreclosure seminar with ICLE at State Bar Headquarters; Linda Curry, Section Chair, gave brief update on Section activities, including Website, Listserv and pro bono matching project.

April 18, 2006 - Monthly Meeting of Executive Committee.

April 18, 2006 - Executive Committee votes to make a \$10,000 contribution to Georgia Legal Services Program and Pro Bono Project of the State Bar to provide financial support for a summer associate for Georgia Legal Services and ongoing support for “A Business Commitment” (ABC) Pro Bono Project to develop and promote pro bono opportunities for real property law attorneys.

April 25, 2006 – E-mail blast from RPLS to solicit members for Property Tax Committee of the Section. Immediate response received from a half dozen members.

May 4-6, 2006 – Section co-sponsored Real Property Law Institute with ICLE at Sandestin Resort in Sandestin, Florida.

May 4, 2006 - Frank S. Alexander, Interim Dean, Emory University Law School, is awarded the George A. Pindar Award at RPLI.

May 5, 2006 - The second annual fun run (“Feat for McFee”) is held at the Real Property Law Institute in honor of William C. “Bill” McFee, Jr.

May 6, 2006 – Section wide meeting held at the Real Property Law Institute; new officers and members of the Executive Committee are approved.

May 6, 2006 – Executive Committee meeting held at RPLI.

June, 2006 – Published Spring Newsletter and distributed to all Section members.

Members in September, 2005 – 2,410

Members in May, 2006 – 2,499

GEORGIA JOINS PROPERTY RIGHTS REVOLUTION

By: *Simon H. Bloom, Partner*
Stephanie E. Dyer, Associate
Powell Goldstein, LLP

Georgia's response to the Supreme Court's ruling in *Kelo v. City of New London*, arms property owners with new weapons in the fight against eminent domain. Previously, property owners often chose to forego a fight because their efforts seemed useless based upon years of case law giving vast discretion and power to condemnors. On April 4, 2006, Governor Sonny Perdue signed House Bill 1313, otherwise known as the Landowners Bill of Rights and Private Property Protection Act (the "Act"), into law, which made both substantive and procedural changes to Georgia's eminent domain law.

The Act's substantive changes redefined which entities and under what circumstances private property may be taken. The Act eliminates the taking power of downtown development authorities and redevelopment agencies. The Act also redefines "public purpose," by eliminating "public benefit" as part of that concept, and clarifies that economic development takings do not qualify as a viable public purpose. These changes force condemnors to identify the specific public use gained from the taking, rather than hiding behind blurred descriptions of potential public benefits.

The Act's procedural changes allow property owners more opportunities to challenge takings. The Act requires condemning authorities to "make every reasonable effort to acquire expeditiously real property by negotiation;" to make an initial offer that is at least that of an independent appraiser's assessment of fair market value and include damages; and requires the authority to consider alternative locations. The Act also requires pre-suit notice to property owners through personal service, publication, signage, and a public hearing. These procedures will give property owners greater and earlier access to challenge the taking.

The Act should significantly alter the scope of Georgia's eminent domain law and will likely have a chilling effect on future takings.

IN A STATE OF FLUX:

Stephen F. Fusco, Esq.
Epstein Becker & Green, P.C.

Finding Your Way Through Zoning and Land Use Issues in Newly Formed Municipalities

The Georgia General Assembly changed the political landscape for counties and municipalities throughout Georgia over the past two years. As of December, 2005, Sandy Springs broke away from Fulton County and became its own municipality, the City of Sandy Springs. Additionally, six bills were introduced

during the 2005 and 2006 legislative sessions to create: the City of Chattahoochee Hill Country (Fulton County); the City of South Fulton (Fulton County); the City of Dunwoody (DeKalb County); the City of Riverside (Fulton County); the City of Milton (Fulton County); and the City of Johns Creek (Fulton County). Of these six bills, the General Assembly approved three of them and the Governor has signed them. The next step is a voter referendum and if more than one-half of the qualified voters (those eligible voters who reside within the proposed corporate limits of the municipality) vote in favor of creating the proposed cities, then these municipalities will come into existence.

According to John Allen Paulos, "uncertainty is the only certainty there is, and knowing how to live with insecurity is the only security." For real estate practitioners, developers, lenders and other parties involved in real estate matters, the creation of new municipalities raises a host of logistical and legal concerns: who will be responsible for inspecting properties and issuing permits; will the zoning of properties change; who is responsible for maintaining the records for properties that were previously permitted; what court is responsible for hearing cases involving code violations; and what will the new code look like? The purpose of this article is to highlight some of these questions and offer practical advice regarding working with newly formed governments. This article should not be taken as "black letter law" regarding development in newly formed municipalities but should be read as a roadmap to the issues that may affect development in the newly formed municipalities.

A. The "Transition Period"

While newly formed municipalities generally come into existence shortly after the voter referendum, complete control of planning and zoning does not occur immediately. Most of the legislation creating the new municipalities includes a "transition period" which begins on the date the initial mayor and council members take office and ends approximately two years later. During the transition period, the provisions of the municipality's charter are effective as law, but not all provisions of the charter will be implemented. Additionally, the governing authority of the newly formed municipality may begin exercising its planning and zoning powers and the municipal courts of the newly formed municipalities immediately have jurisdiction to enforce the planning and zoning ordinances of the city even if all of the provisions of the municipality's charter are not implemented.

As a practical matter, many municipalities adopt the zoning and planning regulations from the county from which they came during the transition period. If the municipality has adopted the regulations from the county, the municipal clerk for the newly formed City will have copies of any resolutions, ordinances or intergovernmental agreements adopting the county's regulations. Practitioners should request these documents as soon as possible. If the developer is familiar with the rules and regulations of the local jurisdiction, understanding the zoning/planning regulations that apply to development should be easier to navigate.

Some jurisdictions may choose to enact new planning and

In a State of Flux, continued from page 4

zoning regulations and zoning maps. If the newly formed municipality adopts new regulations, practitioners should once again request copies of all new zoning and planning regulations. As always, practitioners should familiarize themselves with all of the regulations which will affect their development in the new municipality. Additionally, if the municipality proposes to rezone property to correspond to new zoning regulations, the Georgia Zoning Procedures Law ("ZPL") requires notice to the owner of the property being rezoned and a public hearing. Failure to follow the procedures contained in the ZPL may result in the invalidation of the rezoning of the property. Affected property owners should contact the local jurisdiction to request copies of the applicable zoning/planning regulations for the proposed zoning district of the property. In some instances, the new zoning district may not allow the same uses as the "old" county zoning district or the new development standards may be stricter than the county regulations.

Inspections and permitting during the transition period may be handled by either jurisdiction. While the proposed charters for the municipalities include a broad provision which allows the municipal authorities to create administrative and service departments (e.g. planning, development and zoning departments), the legislation does not spell out who will be responsible for inspecting properties and issuing permits for development within the newly formed municipality. It is likely that the parties will set a date certain, which must occur prior to the expiration of the transition period, to transfer inspections and permitting to the municipality.

B. Grandfathering

While the legislation creating the new municipality grants the cities the power to regulate planning and zoning issues, such power is not unfettered and can not be applied retroactively to projects which have been validly approved by the local government prior to the effective date of the new regulations. Claims of grandfathering often require a property owner to demonstrate certain milestone events (issuance of a permit, approval of final plats, approval of certificates of occupancy) prior to the date the new regulations become effective. Persons wishing to make such a claim should keep detailed files with all documents related to the project and if the file is incomplete, they should request all documents applicable to their claim from the local government. During the transition period, these documents may be under the control of the county from which the newly created municipality was formed.

C. Municipal Court

The legislation related to the six proposed municipalities (and Sandy Springs) provides for the establishment of a municipal court. The municipal court has jurisdiction and authority to try offenses against the laws and ordinances of the cities and to punish for a violation of the same. Violations of the ordinances which apply to property within the jurisdictional boundaries of the newly formed municipalities, regardless of whether they were newly created or adopted in the same form as the county from which the municipality came, will likely go before the municipal court. For example, violations of NPDES permits, development regulations (setbacks, density maximums, building heights, permitted uses) and other "land

use/zoning" regulations will be tried before the municipal court for the newly formed city.

D. Conclusion

While it may be true that uncertainty is the only certainty there is, the navigation of uncharted waters with new municipalities can be streamlined with a little due diligence. Requesting all new regulations as they are adopted, watching for notices regarding the possible rezoning of your property and understanding that you may be shuffled back and forth between the county and newly formed municipality may simplify the process and ease the hysteria that can arise during the transition period.

CURRENT DECISIONS

PROCURING CAUSE IS AN ELEMENT OF A REAL ESTATE BROKER'S QUANTUM MERUIT CLAIM

By: Dan Hinkle

ING Investment Management

By way of Amend v. 485 Properties, 409 F.3d 1288 (Eleventh Circuit 2005) the United States Court of Appeals asked the Georgia Supreme Court to decide "whether a procuring cause was an element of a quantum meruit claim under Georgia law." The Supreme Court of Georgia held that for real estate brokers, the answer is yes. When a real estate broker brings a quantum meruit claim to recover the value of his services under Georgia law, he must prove that he was the procuring cause of the sale.

This decision clarifies and resolves a conflict in Georgia's case law. The majority of the cases have reiterated the long-held rule that the procuring cause is a necessary ingredient in a quantum meruit claim brought by a real estate broker, however, a handful of more recent cases starting with Sharp-Boylston Co. v. Lundeen, 145 Ga. App. 672, 244 S.E. 2d 622 (1978), held a contrary view.

The rule in Georgia is that a real estate broker cannot recover in quantum meruit unless he or she is the procuring cause of the sale. To the extent that Lundeen and its progeny depart from this rule, they are overruled. Amend v. 485 Properties, 2006 WL 584321, 6 FCDR 715

March 13, 2006

Contract Signed by Only One Co-Trustee Was Unenforceable

A purchaser entered into a contract to purchase six parcels of property from several members of a family. An undivided interest in two of the parcels was owned by a trust with two designated trustees. One of the co-trustees signed the contract. There was a dispute between the buyer and seller and the buyer brought suit seeking specific performance or, in the alternative, damages in connection with the contract.

The trial court held that the contract was unenforceable against the trust because only one of the co-trustees had signed the contract. The Georgia Court of Appeals agreed. Georgia law mandates that, unless a trust instrument provides otherwise, the

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Current Decisions, continued from page 5

authority of co-trustees to act on behalf of a trust may be exercised only by their unanimous vote. O.C.G.A. § 53-12-172(1). Here, the trust agreement did not provide for authority of either trustee to act on behalf of the trust.

The Court of Appeals also held that the trustee who had not signed the contract was not precluded from asserting that the contract was unenforceable under the doctrine of estoppel by silence. The trustee was aware of the contract negotiations, but he did not have a duty to speak during the negotiations. The trustee had no direct involvement in the contract negotiations, had not been approached by anyone to sign the agreement, and, indeed, was entirely unaware that his signature was necessary to convey the trust property. Under these circumstances, the trustee had no opportunity or duty to speak. Thus, he was not automatically excluded from objecting to the sale of the trust property.

Interestingly enough, the trial court held that the entire contract was unenforceable, including the portion which provided for the sale of the four parcels in which the trust did not have an interest. The trial court found that the contract was not severable upon evidence that: (1) all the sellers signed a single contract; (2) the property was referred to as “the Carter Property”; (3) the purchase price was to be paid in one sum, not in proportion to the ownership interest of the sellers; and (4) some family members pressured the others “in order to seal the deal - thereby evidencing that the property was to be sold as a ‘whole’”. The Court of Appeals found that the record supported the trial court’s determination that the parties intended for the contract to be entire. Peach Consolidated Properties, LLC v. Carter, 2006 WL 648696.

March 16, 2006

**Practice Pointer*

Make certain when preparing a real estate contract that all parties required for the sale or purchase of the property sign the contract. If the property is owned by an entity such as a trust, a partnership, etc., this requires inquiring into the authority of the various participants (trustees, partners, etc.) to bind the entity in connection with the contract.

“Rear One Acre” Was Legally Sufficient Description

A purchaser and seller entered into a written contract for the purchase and sale of real property. The real property was described by a specific description of a larger two acre tract of property and the provision: “Purchaser was to acquire the rear 1-acre of the above described Property as shown per survey to be conducted prior to closing”. A registered land surveyor subsequently surveyed the larger tract and prepared a plat, carving out the rear one acre.

The seller refused to close on the contract and the purchaser filed suit for breach of contract seeking damages. The trial court granted the seller a summary judgment holding that the sales contract was unenforceable as a matter of law because it failed to sufficiently identify the location of the purported property line between the property being sold and that being retained by the seller.

The Court of Appeals disagreed. A perfect description of land is not required. A vague description will suffice if by competent parol evidence the precise location is capable of being determined. Where, as here, only one side of the property fronts a road, language indicating that the “rear” half of the property is

sufficient to indicate that portion of the land the transferor intends to convey. This is particularly true where there is no evidence that the parties were confused about that portion of the property to be conveyed. The whole property was approximately two acres and the purchaser sought to purchase, and the seller agreed to sell, the rear one acre of the property. **Kay v. W. B. Anderson Feed & Poultry Company, Inc.**, 2006 WL 464244, 6 FCDR 659

February 28, 2006

**Practice Pointer:*

Although the Court of Appeals upheld the contract in this case, it is important when drafting legal descriptions in contracts, deeds or other legal documents, that the description of the property be as precisely described as possible. A legal description should accurately describe the property without the necessity of extrinsic evidence to show the location and boundaries of the property.

Aircraft Hangar is a Trade Fixture

A dispute arose between the City of Vidalia (“City”) and S. S. Air, Inc. (“Tenant”), an owner of an aircraft hangar that had been installed on real property owned by the City. The City considered Tenant a “tenant at will” and sent the proper notices to terminate the tenancy and to demand that the aircraft hangar be removed. There was no formal lease agreement between the City and the Tenant nor was the Tenant obligated to pay rent to the City. The trial court properly determined that a landlord-tenant relationship existed between the City and the Tenant, and the Tenant was a “tenant at will”. A landlord-tenant relationship may exist even where the tenant is not required to pay rent, since the payment of rent is not essential to the creation of a tenancy at will. A “tenant at will” is also obligated to remove any trade fixtures from a landlord’s property upon termination of the lease, and any trade fixtures remaining will be regarded as abandoned for the use of the landlord and will become the landlord’s property.

Was the aircraft hangar a trade fixture? The Court of Appeals held it was. Trade fixtures are any articles annexed to the realty by a tenant for the purpose of carrying on a trade. Even though a structure may be large and attached to premises, it will nevertheless be considered a trade fixture if the tenant installed the structure for purposes of carrying on its business. The hangar was used by the Tenant in connection with its business to generate rental income and to store office equipment. The hangar was bolted to the ground in such a way that it could be disassembled and rebuilt elsewhere. Despite its size, the hangar was a trade fixture. The court cited *Carr v. Georgia*, R 74 Ga 73 (1884), in which a brick railroad depot building used in connection with the tenant’s business was a trade fixture. *S. S. Air, Inc. v. City of Vidalia*, 2006 WL 399749, 6 FCDR 612

February 22, 2006

**Practice Pointer*

Attorneys drafting or reviewing leases need to be aware of the definition of a trade fixture. Absence a definition contained in the lease, any article, no matter how large or small, affixed to the realty by the tenant may be considered a trade fixture. The identification of articles as trade fixtures can be important in determining the allocation of insurance proceeds, condemnation awards, and title to property following expiration of the lease.

SOLO FLIGHT

Stanley M. Lefco

Law Offices, Stanley M. Lefco, P.C.

Peacock bought a house in Clayton County from the Kisers. Before the closing and as he began his inspection and investigation, as it was, he asked them about the boundary lines. According to Peacock, Mrs. Kiser, with her husband present, pointed out boundaries, which turned out to be inconsistent with the actual boundaries. (Said Secretary Rumsfeld when asked about the troop strength in Iraq, what they are saying is inconsistent with the facts. Is this a code for nicely saying someone is lying?)

On February 10, 2001 (Our birthday, and they didn't even call us! It also takes a long time for a case to work its way up to the appellate court level.), the parties signed a purchase and sale agreement. The sale closed about five weeks later. Before the closing Peacock had a title search performed, and, as the court noted, this yielded a deed for the property. It was accurate with metes and bounds duly shown. Noted the court further, Peacock apparently did not appreciate that the boundaries described in the deed differed from those pointed out by the Kisers.

Of course, there is always the question of whether Peacock looked at the deed at all, much less studied it and compared the printed word with the verbal representations of Mrs. Kiser. However, if somebody should have done his or her homework, that duty and burden falls on the buyer. **Caveat emptor?**

After the closing Peacock's next door neighbor gave him the bad news. His reaction was to sue the Kisers. He claimed fraud and being induced to buy their house. He also sued Matthews (listing agent) and Tim Jones Realty asserting that Matthews had fraudulently breached her duty to disclose the boundaries.

The Kisers moved for summary judgment. Essentially, they asserted that there are no material issues of fact and Peacock should lose. (They wanted to clip his wings and bring him down to earth and reality.) As part of their motion, they argued that he failed to rescind the contract and his possession of the deed prior to closing precluded his fraud claim. The agent and broker file their own motion and added that the disclaimer clause in the purchase and sale agreement precluded his claim against them.

When one sues for fraud, he or she can go one of two ways: [1] affirm the contract and sue for damages and [2] rescind the contract and sue in tort for fraud.

Peacock did not rescind, which meant he agreed to be bound by the terms of his contract. (Whether he really meant this, we will never know.) Peacock got the slam dunk by the appellate court: when a home buyer elects to affirm a purchase agreement, which contains a merger or entire agreement clause (It is extremely rare these days to find any contract without such a clause. [our comments]), he or she is precluded from recovering for the seller's fraudulent inducement based on misrepresentations made **outside** the contract.

Peacock argued that rescission is not required and cited a 1991 case concerning fraud in the purchase of a car. That decision, which we will not review here, (If you would like it, contact us.) contained an exception to rescission.

The court held that this case would not help Peacock. (His goose was cooked!) **DUE DILIGENCE!!** The term brings shudders to the unwary. Without it, you have a lack of justifiable reliance, one of the five elements of fraud. And to win a fraud case, you have to show the five elements. Peacock, said the court, must prove the defect could not have been discovered by him in the exercise of due diligence in the purchase of the property.

The Georgia Supreme Court has held: A party buying real property who makes no attempt to discover the boundaries of the property cannot be said to have justifiably relied on a misrepresentation by the seller regarding those boundaries. The court chastised Peacock, indeed, if he had merely taken the initiative to have the deed explained to him, he would have discovered the true boundaries. Thus, his fraud claim fails as a matter of law.

Peacock maintained that this did not prevent him from going against the agent and broker. He relied on BRRETA (Brokerage Relationships in Real Estate Transactions Act). The Act requires a broker to disclose adverse material facts which are actually known to the broker, *which could not be discovered by a reasonably diligent inspection of the property* by the buyer. (These italics appear in the decision; we did not add them.) The court essentially reiterated the due diligence defense.

The lower court (Henry County Superior Court) had found for the defendants and the appellate court affirmed its decision.

The lessons are obvious: a buyer has got to do her or his homework and cannot rely on the representations of a seller of those conditions, which can be easily confirmed. [Test: The seller tells the buyer there is a small crack in the basement. He notes on the Seller's Property Disclosure Statement. It turns out that part of the crack goes behind some paneling, where the crack is much wider and obviously not visible. Buyer sues. Who wins?]

REAL PROPERTY LAW SECTION
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The Real Property Law Section of
the State Bar of Georgia proudly announces
the formation of the

PROPERTY TAX SUBCOMMITTEE OF THE REAL PROPERTY LAW SECTION

Plans for the initial Organizational Meeting are underway, and we are recruiting
members who want to be involved.

For More Information, Please Contact the Co-Chairs of the Subcommittee:

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SAMPLES FROM SANDESTIN

With appreciation for all the presenters at the Real Estate Institute, a wide variety of very useful information was provided to the attendees, both in the residential and commercial setting. The materials are well worth your review. Listed below are some items from the seminar that will be of interest to the Section.

Judicial Decisions (with our yearly thank you to Carol Clark)

Battle v. Liberty Mutual. 623 SE 2nd 541. Summary judgment to insurer affirmed on appeal based on judicial estoppel. Debtor failed to list property on bankruptcy petition. Debtor cannot subsequently obtain reimbursement for a damage claim on the same property. Hint: bankruptcy petitions can be a source of useful information.

Sledge v. Peach County. 634 SE 2nd 288. Case refers to OCGA 44-4-5 for determining disputed land lines. Natural landmarks are the most reliable and conclusive evidence and will trump land lot references.

Snipes v. Marcene P. Powell & Associates. 616 SE 2nd 152 Real Estate Broker sued for commission and prevailed on Summary Judgment. Court of Appeals focused on the meaning of the word "introduced" in the GAR listing agreement. Court found that as long as the broker had some minimal causal connection with the sale or was in the chain of causation leading to the sale, that the requirements of the listing agreement were met.

Crowell v. Williams. 615 SE 2nd 797. A sales contact was silent regarding remedies for default of either buyer or seller. Buyer could not close. Seller retained deposit. Court of Appeals held Buyer was entitled to return of deposit since the contract failed to have any forfeiture language in the event of default of either party.

Torgesen v. Torgeson. 617 SE 2nd 233. Simple point. Make "Time is of the essence" a part of any contract, court order or settlement agreement.

United Bank v. West Central Georgia Bank. 620 SE 2nd 654. This is a contest by two lenders over reverter under 44-14-80(a) (2) which provides that title to property reverts to the grantor seven years from the conveyance IF THERE IS NO MATURITY DATE STATED IN THE SECURITY DEED. Lender argued since the maturity date was stated in the note, and the note was incorporated into the security deed, that the maturi-

ty date was stated in the security deed and therefore.

Croft v. Fairfield Plantation POA. 623 SE 2nd 531. Court found that purchaser at a tax sale has a defeasible fee but that defeasible fee is sufficient to render the tax sale purchaser responsible for real estate taxes as well as homeowners association dues.

Brandenburg v. Navy Federal Credit Union. 625 SE 2nd 44. Lender makes HELOC to owner. Lender obtained ownership report and not a title exam. The title exam would have disclosed a divorce decree recorded in the deed records. Lender tried to claim BFP status. Court said even though the settlement agreement was not on the GED, the reference in the deed records was constructive notice and BFP status denied.

General Assembly Legislation

(with thanks to Patrise Perkins-Hooker)

OCGA 8-2-181 was amended concerning the process of converting manufactured homes into real estate. The process is much easier going forward on new manufactured homes but the previous process will apply on older homes. It is important to read the legislation to be able to determine which process to follow.

Legislation was passed which amends the current landlord/tenant statute on placement of escrow accounts in banks. The amendment still requires the tenant be informed of where the account is located but removes the requirement of the account number being furnished.

Notice of Settlement

This is a new creature and the law provides for a separate index for "Notice of Settlement" to be filed with other documents transferring real property from one party to another. The statute allows any party, or their legal representatives, to a settlement that will convey legal or equitable title to any real estate or any interest therein to file the "Notice of Settlement" with the Clerk of Superior Court where the land is located. After such filing, any person who claims an interest in the real estate described in the notice basically acquires title with knowledge of the settlement and is subject to the documents filed with the clerk.

Environmental Matters

The seminar had three presentations in this area and is illustrative of the ongoing relationship between development and

the environment. Brownfields, Conservation Easements and the LEED program were discussed in detail and the materials by all three speakers are excellent. If your practice touches these areas, you will find the information very useful. Even if you do not work in these areas, the knowledge will broaden your understanding of the applicable statutes.

IOLTA Account Management

The attention of the section is called to Formal Advisory Opinion 04-1 and the State Bar's petition for discretionary review that was decided by the Supreme Court on February 13 (see 626 SE2nd 480). The Opinion states in part: "Accordingly, we adopt Formal Advisory Opinion 04-1 to the extent it is in accord with the rule that attorneys must place client closing proceeds that are nominal or held for a short period of time in an IOLTA account. We clarify that closing proceeds that are more than nominal in amount or that will be deposited for more than a short period of time must be placed in a non-IOLTA interest-bearing account with interest payable to the client. Rule 1.15 (II) (c)(1). Please note that the opinion of court also discusses whether a transaction supervised by an attorney conducted by a non-lawyer entity was subject to the IOLTA requirements of the Rules of Professional Conduct.

Practice Hint: If the escrow is to be conducted for longer than a short period, an escrow agreement should be signed by all parties with clear instructions.

New Rule on Pro Hac Vice Admission

The Supreme Court of Georgia has recently amended Rule 4.4 of the Uniform Rules of Superior Court to require that out-of-state lawyers applying for *pro hac* vice admission in Georgia serve a copy of their application for admission *pro hac* vice on the Office of the General Counsel, State Bar of Georgia. The applicant must pay a \$200 fee to the Bar. The Office of the General Counsel may object to the application or request that the court impose conditions to its being granted. Among other reasons, the Bar may object to an application if the lawyer has history of a discipline in his or her home jurisdiction, or if the lawyer has appeared in Georgia courts so frequently that he or she should become a member of the bar in this state. Layers admitted *pro hac* agree to submit to the authority of the State Bar of Georgia and the Georgia courts.

REAL PROPERTY LAW SECTION ADDS THREE NEW MEMBERS TO BOARD

With the recent retirement of three of its board members, The Real Property Law Section is pleased to announce the appointments of Robert B. Brannen, Jr., Jay V. Dell, Jr. and Jeffrey H. Schneider for a three year term.

Rob, a member of the firm of Inglesby, Falligant, Horne, Courington & Chisholm in Savannah, practices in the area of both Commercial and Residential Real Estate and Corporate Law. A graduate of the University of Georgia Law School, he was admitted to the Georgia Bar in 1986.

Jay, a 1994 graduate of Walter F. George School of Law, Mercer University, is a shareholder in the firm of Blasingame, Burch, Garrard, Bryant & Ashley, P.C., located in Greensboro. His areas of concentration are Residential and Commercial Real Estate Closings, Corporate Law and Business Organizations.

Jeff has been an attorney with Weissman, Nowack, Curry and Wilco, P.C., Atlanta since 1994 and practices in the areas of litigation, arbitration, and negotiating resolution of real estate disputes. He also serves as a mediator and special master by appointment in the Superior Court of Fulton County. He received his Juris Doctorate from Georgia State in 1989.

The Board looks forward to working with its three new members.