

# Real Property Law Section NEWSLETTER State Bar of Georgia

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**REAL PROPERTY  
LAW SECTION**

## COMMENTS FROM THE CHAIR

*Susan Langley Elliott*

Thank you for honoring me with the privilege of serving as the Chair of the Executive Committee of the Real Property Law Section, State Bar of Georgia. With over 2,700 members, the RPLS is an active, vibrant community of real estate lawyers seeking to assist our clients and colleagues in furtherance of our common goals of education and service. The generosity of our members in time and talent on a daily basis, as evidenced by the questions and comments on the listserv, and the work of the pro-bono volunteers, never ceases to amaze me!

The dedication of our Executive Committee members this year has been extraordinary, with countless hours spent reviewing and commenting on the proposed RESPA revisions last summer, the legislative agenda and bills of this year's session, the proposed revisions to the intangible tax regulations, and the real estate legal opinion, to name a few. Each of our Committee members has played an active and vital role in serving our community, and this legacy will continue as we are fortunate to have Shelli Willis serving as the next Chair of the RPLS.

It has been a pleasure working with each of you!

With kind regards,  
Susan Langley Elliott

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## DEEP FREEZE: THE EFFECTS OF HOUSE BILL 233

*Bradley A. Hutchins*

*Proctor Hutchins*

In response to a “crisis in the reduction of value of tangible property of unprecedented magnitude,” the General Assembly passed House Bill 233 in April, which became effective May 5, 2009. HB 233 amends Title 48, creating a new Section 48-5B-1, and enacts a moratorium on property tax assessment increases for tax years 2009, 2010, and 2011. The measure essentially freezes assessed property values for three years for local government ad valorem tax purposes, although there are several exceptions written into the law. The following is a brief overview of how the new law will affect taxable values, and what issues may arise.

### What Has Changed?

HB 233 freezes assessed property values for all taxable real property—residential, commercial, and industrial—at the 2008 assessment value. The freeze applies retroactively, and therefore covers even properties that have been reassessed at higher levels in 2009. The property value for ad valorem tax purposes will be held constant at the 2008 amount for tax years 2009 through 2011, even if the property is sold. Property values can be *lowered* on reassessment, but not raised, and therefore the tax appeal process is virtually without risk. Property owners essentially get a free shot at a lower tax value, without running the risk that their assessed value will increase and subject them to higher taxes.

One significant effect of the new law is that it prevents County tax assessors from reassessing real property at higher values in order to raise tax revenues without raising millage rates—the so called “back door” tax increase. While such increases may seem like an attractive way to combat shrinking government budgets without appearing to have raised taxes, the practice is especially suspect following the burst of the real estate bubble. While many homeowners are facing declining home values, they have thus far received no relief in the form of lower property taxes. Some taxpayers have even been hit with an increase in the assessed value of their property, despite all market indications to the contrary. HB 233 explicitly recognizes the decline in the real estate market, and while the law allows for a *reduction* in assessed property values, the values cannot increase above the 2008 level.

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### Exceptions to the Freeze

While the freeze on property values covers all taxable real property, the law has exceptions. Three exceptions to the moratorium depend on the nature of the property itself, and two additional exceptions are dependent on the county where the property is located.

The law recognizes that the assessed value should be based on the true nature of the property, and therefore if there is a significant change, or if the assessment is based on a "manifest, factual error or omission," the property can be reassessed. If the 2008 valuation is based on erroneous or incomplete information, the assessed value will be adjusted to reflect the true nature of the property. Similarly, if any improvements or additions are made to real property or structures thereon, those improvements are assessed at their current fair market value, which is then added to the 2008 valuation amount to obtain the new assessed value. Further, if the use of the property changes because the property is re-zoned, subdivided, or combined with another tract, the property will be reassessed at its current fair market value. HB 233 protects current taxpayers from any increase in the assessed value for properties that remain constant (and whose fair market value is almost certainly not increasing), but provides for reassessment at the fair market value for properties that have changed in such a way as to increase their value.

HB 233 also recognizes that this freeze on property assessments will negatively affect certain counties that have recently undertaken to reassess all of their properties, and also those counties that have enacted measures to limit ad valorem tax amounts via local constitutional amendment. Any county that in 2008 performed a county-wide reassessment of all properties is exempt from the moratorium imposed by the law until January 1, 2010, at which point the property values are frozen at the then-current levels. The freeze will also be stayed until January 1, 2010 for any county that contracted for a comprehensive revaluation prior to February 28, 2009. The limitations of HB 233 are entirely inapplicable to those counties that limit their millage rates by local constitutional amendment.

### Issues Which Will Arise

Based on disputes arising under existing law freezing value for two years after an appeal (O.C.G.A. § 48-5-299(c)), some assessors may test the exceptions by stretching the "mistake" exception in the bill to include mere mistakes in value. Moreover, some assessors already contend that the law is unconstitutional, but it may be difficult for them to assert that position.

### Conclusion

HB 233 is designed to be a temporary relief measure for Georgia property owners, and should eliminate the double-edged sword of rising property taxes coupled with declining property values. But, given the state of the real estate market, it is likely to provide very little real relief. A classic case of "too little, too late."

## PRO BONO MATCHMAKER PROJECT UPDATE

*Mark A. Shaffer*

*Metlife Real Estate Investments*

The Pro Bono Matchmaker Project (PBMP) continues to match attorneys with real estate pro bono opportunities throughout the state. You may have also seen the front page article in the March 11, 2009, edition of the Fulton County Daily Report regarding the PBMP and our need for additional pro bono projects. As a result of that article, we were contacted by individuals and organizations in need of real estate pro bono assistance.

Recently, we matched an attorney with the Atlanta Volunteer Lawyers Foundation to represent tenants to determine what remedies are available to them when the heat and water to their apartment units were cut off numerous times over this past winter. We are also currently seeking an attorney to represent a 52 year-old disabled woman who contacted the Georgia Legal Services Corporation office in Dalton. The woman has been sued, along with her 30 year-old son, in a dispossessory action by her brother-in-law to evict them from the property in which they have lived for 30 years.

The Real Property Law Section created the PBMP in December 2005 to increase pro bono participation by real property attorneys by matching attorneys with pro bono opportunities. Currently, over 120 attorneys have volunteered to be a part of PBMP. The RPLS Pro Bono Committee has established points of contact with several qualifying organizations that need real property legal services. Attorneys simply volunteer to be part of a pool of attorneys available to take on such projects. Once an organization communicates a real property pro bono project to us, we send an e-mail solely to the pool of volunteer attorneys with a project description. Once volunteer(s) respond to the e-mail agreeing to assist with the project, we put the organization and volunteer(s) in contact with each other to coordinate handling of the project. Potential projects include land closings, declarations, easements, affordable housing, single-family housing, property tax appeals, etc. Please note that by agreeing to be included in the pool of volunteer attorneys, you are only agreeing to receive e-mails about possible pro bono projects. You are not obligated to take on any projects.

Thanks to all of the attorneys who have volunteered to be a part of this project, particularly those who have already agreed to provide legal assistance. We continue to seek attorneys to participate in the PBMP and pro bono projects for attorneys who have already agreed to participate in the PBMP. If you are interested in joining our pool of volunteers for the Pro Bono Matchmaker Project, assisting with the Georgia Legal Services Corporation project described above or are aware of any pro bono needs with which our group of volunteers may be able to assist, please email our project coordinator, Evan Cohn at [evan.cohn@agg.com](mailto:evan.cohn@agg.com).

## 31st ANNUAL REAL PROPERTY INSTITUTE

The Real Property Law Section and ICLE of Georgia presented its 31st annual Real Property Law Institute on May 7th – 9th, 2009, at Amelia Island, FL. Shelli Willis, Program Chair and RPLS Chair Elect, presided, with over 325 attendees registered for the Institute. The subjects discussed offered up to date guidance to the attendees on the issues of our times.

### Thursday Session

Thursday morning's session began with Carol Clark's judicial update with trial practice pointers, followed by W. Wheeler Bryan who spoke on property taxes and James Jordan, who enlightened us on the New and Improved Report on Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions.

### Awards

Two awards were then presented. First, Jim Jordan of Sutherland was awarded a **Special Recognition** for all his tireless effort on the Legal Opinions Report, for which Shelli Willis presented him a plaque; then R. Ernest Harben Jr. of Lawyers Title, was presented **The Pindar Award** by Nancy Liu, Awards Chair.

Following the break, Jeffrey Kelley and Alisa Aczel spoke on bankruptcy 101 for the real estate practitioner and Edward D. Burch, Jr. spoke on the ethics and zealous advocacy. In the afternoon ICLE hosted its annual Raiford Memorial golf tournament.

Friday morning the parking lot of the Tennis facility was the venue for the 5th annual "Feat for McFee," 5K run and 1 Mile walk, which brought out runners and walkers at a bright and early 7:00 A.M. Shirts were presented to all the participants.

### Friday Concurrent Sessions

Concurrent sessions for Commercial and Residential Real Estate were on the agenda for Friday morning. The Commercial side enjoyed a talk by Carole Horde on bankruptcy issues in leasing, Tommy Linstroth and Camille Pope on green building initiatives, Bill Hood and Dawn Lewallen on current issues in 1031 exchanges, Josh Kamin on real estate finance, and David Herrigel and Kurt Raulin on the REO's for mixed use projects. The Residential session listened to talks by Josh Huckaby on RESPA, a panel moderated by Rob Brannen with Kellyn O'McGee and Steve Kaczkowski on UPL issues, a talk by Edward Hudson, Camille Brannon and Natalie Kelly on practice tips for the recovery, George Nowak on current issues with owners' associations, and Peter Lublin and Monica Gilroy rounded out the day with a discussion on title insurance claims.

A tennis tournament followed the morning session.

### Final Session/Saturday Meeting

Saturday morning ICLE and RPLS co-hosted a continental breakfast kicking off the final session. At the annual meeting, Shelli Willis, incoming RPLS Chair, presented the slate of officers for the forthcoming year, which was approved by the general membership. The new Executive Board consists of: Chair, Shelli Willis, Troutman Sanders; Chair-Elect, Patrise M. Perkins



*SPECIAL RECOGNITION* was presented to James B. Jordan for his tireless efforts and donated time and expertise in connection with the Report on Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions. Program Chair and in-coming RPLS Chair, Shelli Willis, made the presentation at ICLE.

*PINDAR AWARD* presented to R. Ernest Harben, Jr., Lawyers Title Insurance Company, by Nancy Liu, Awards Chair and Program Chair, Shelli Willis



Hooker, Hollowell, Foster & Gepp, and Secretary-Treasurer, J. Noel Schweers, III, J. Noel Schweers, III, PC. Four new Executive Board members were also approved for a three year term. They are: John P. Cripe, Attorney at Law; Bradley A. Hutchins, Proctor Hutchins, PC; Gayle Camp Keener, Attorney as Law, and M. Suellen Henderson, Habitat for Humanity. These board members replace four board members rotating off, who are to be commended for their years of service. They are Edward Hudson, past chair, as well as Leon Adams, Machel Redmond and Janney Sanders.

Following the annual meeting, attendees listened to a Legislative update by John Taylor and talks by William Dodson and Danny Bailey on the historical development of deeds to secure debt in Georgia, Simon Bloom on real estate litigation with a focus on lender/borrower disputes, David Johnson on the new mechanics' lien laws and Robert Rodriguez on tips of the zoning process, which concluded the 31st annual Real Property Law Institute.

By a decision reached a few years ago upon a vote of members, the Institute next year will be held at: Sandestin Hilton, Sandestin, Florida, May 6-8, 2010.

Many thanks to all the speakers, sponsors and attendees who continually support and help make this Seminar such a success.



*ALL WINNERS* in the Feat for McFee Fun Run held Friday morning of the ICLE conference at Amelia Island this past May.

*Pictured above are:* photo 1, Drew Marlar; photo 2, walkers (l. to r.) Kim Kline Dickens, Nancy Liu and Deborah Bailey; photo 3, John Davis; photo 4, Scott Wills, and photo 5, Elizabeth Wharton.

## REO 101

*Charles Chacko*

*O'Kelley & Sorohan, Attorneys at Law, LLC*

REO (Real Estate Owned) is the industry term used to describe real property taken back by a mortgagee at the conclusion of a foreclosure proceeding. [Foreclosure.com](http://Foreclosure.com) states, as of Jan. 25, 2009, there were more than 14,000 Georgia properties in foreclosure. For a more parochial look, [Realtytrac.com](http://Realtytrac.com) states that, as of the same day, Fulton County has more than 1400 properties in foreclosure, which amount to 1 in 293 properties. The bottom line evidence indicates that if one's practice has never involved REOs previously, one will be hard pressed to miss them in the next few months.

REO business is generally generated through relationships with asset managers at banks, servicers, and outsourcers. Asset managers look for attorneys who are familiar with title curative work and can achieve shortened timelines for their asset sales. Additionally, asset managers look for attorneys that can handle "cradle-to-grave" default work, i.e. handle all the legal aspects from foreclosure, eviction, to REO disposition/closing.

Sophisticated asset managers begin the REO process by requesting a preliminary title examination of the subject property. This preliminary title examination will reveal defects that have encumbered the property since the foreclosure sale date and any defects that were not wiped out by the foreclosure action. A typical foreclosure sale eliminates most interests and liens against the property which were junior to the interest being foreclosed. Typical defects revealed by such an examination include prior open security deeds and property tax fifas.

Defects that were not wiped out by the foreclosure sale can be "cured" with the use of the foreclosed security deed's mortgagee policy of title insurance. Typically, the current insuring title insurance company will require a letter of indemnity from the previous mortgagee title insurer or the defect may fall within the privity of the Mutual Indemnification Agreement to which most Georgia Title Insurance Companies are parties. If a federal tax lien is properly filed more than 30 days prior to the foreclosure sale date, proof of written notice of the foreclosure sale to the Internal Revenue Service must be obtained. Defects that arise post-foreclosure need to be paid at closing or settled with the creditor/lienholder.

Once "insurable title" is obtained, the REO closing is ready to move forward. This article emphasizes insurable title because the vast majority of REO sellers will stipulate that they will only convey "insurable title" as opposed to "free and clear" or "marketable" title.

Most REO sellers require their potential purchasers to understand and agree to a lengthy addendum to the standard purchase and sales agreement. This document attempts to mitigate the REO seller's exposure to potential liability. Common stipulations these addendums include are: proof of loan pre-approval from purchaser's lender or proof of purchaser's funds for cash purchases; hold harmless clauses for property related matters

(habitability, merchantability, marketability, profitability, etc.) and similar seller friendly provisions. Typically, contingent offers are refused and the seller will designate the closing office. Failure of purchaser to sign required addendums will result in non-consideration of purchaser's offer.

Assuming no title issues and no purchaser issues, one needs to prepare for potential closing delays. Most REO sellers have specific requirements for closings. They typically require their deed package, consisting typically of the Special Warranty Deed, Seller's Affidavit, and other documents, to be forwarded to the REO seller at least 72 hours prior to closing. Often REO sellers will require the deed packages to be dispatched immediately upon the acceptance of an offer from a potential purchaser.

In order to prepare the deed package, one will have to confirm the vesting on the Special Warranty Deed in order to make sure that it will match the vesting on the Deed Under Power. Additionally, one will need to obtain a power of attorney that grants authority to the corporate signer to execute the Special Warranty Deed. Finding the correct power of attorney is like finding a needle in a haystack, especially in a metro county like Fulton County, GA. For example, a power of attorney search for Deutsche Bank on the Georgia Superior Court Clerks' Cooperative Authority website ([www.gscca.org](http://www.gscca.org)) reveals more than 700 potential matches. Once the correct power of attorney has been obtained, one needs to obtain a corporate resolution to indicate corporate authority for the signer.

In addition to the time requirements for REO seller deed package, one must pay close attention to the time requirements for the approval of the closing or HUD-1 statement. REO sellers will stipulate anywhere from 72 hours to 24 hours prior to closing for review of the closing or HUD-1 statement. Failure to comply with these requirements may result in delay of the closing.

Often at closing, REO seller will require the purchaser to acknowledge that all prorations are final and that the REO seller will not adjust any sums for errors or omissions. Additionally, many REO sellers will agree to provide, at their cost, an owner's policy of title insurance. Some REO sellers will go beyond by agreeing to provide, at their cost, a mortgagee's policy of title insurance. However, the REO sellers will often stipulate the selection of the title insurance company.

At the conclusion of the closing, most REO sellers require the closing attorney to promptly wire their proceeds and provide wire confirmations. Failure to wire seller proceeds on the day of closing can result in REO sellers requiring a re-close.

Yes, REO closings may involve more challenges than a typical "straight" sale. However, a tough market means making tough choices, and sometimes when life gives you lemons, you need to make lemonade!

### NOTICE

If you know someone who has not joined the Real Property Law Section, please encourage them to do so.

## RECENT DEVELOPMENTS IN FORECLOSURE CONFIRMATION LAW

*Delia Corinne Elder*

*Thompson, O'Brien, Kemp & Nasuti, P.C.*

In the first quarter of 2009, the Georgia Court of Appeals handed down two decisions touching on several areas germane to confirmation proceedings.

### *Nash v. Compass Bank, No. A08A274*

In Nash v. Compass Bank, No. A08A274, 2009 WL 737007 (Ga. Ct. App. March 23, 2009), the court upheld the confirmation of a commercial foreclosure sale where the property consisted of an office park with both complete and incomplete buildings on site. Various methods of valuation were conducted by the testifying appraiser in the appraisal at stake, but her superior had a hand in reconciling the ultimate valuation. The court also passed on the propriety of the trial court's consideration of evidence on deductions such as lost rental income and cost to complete.

Appraisers routinely work in tandem with other appraisers and their supervisors. Where multiple appraisers are involved in an appraisal, a decision must be made as to who testifies at the confirmation hearing. An attorney may choose the testifying appraiser based on years of industry experience, credentials, or experience in providing testimony in court. Typically, as the analysis becomes more complex, as in commercial, mixed-use, or multi-lot valuation, the person testifying will most likely be the person who performed the analysis that resulted in the final appraised value, not necessarily the person who performed the legwork in gathering all of the applicable data.

However, in Nash, the court held that the fact that an appraiser's superior conducted the final reconciliation between several methods of valuation did not render the appraiser's testimony inadmissible hearsay. The court stated that where the testifying appraiser was involved in every step of the appraisal, was accepted as an expert in the field of commercial real estate appraisal, and was consulted by her superior in reaching the final value, her testimony consisted of her own opinion as to value, and thus the trial court properly admitted her testimony as non-hearsay. Id. at \*2.

The court also examined the appraiser's use of deductions in arriving at a valuation. Generally, it is within the trial court's discretion to refuse considerations other than the sales price of a subject property. See Prestley Mill Professional Center, Ltd. v. National Bank of Georgia, 183 Ga. App. 161, 163, 358 S.E.2d 307, 310 (1987) (finding that trial court properly excluded evidence from the developer of development costs expended prior to foreclosure); Wheeler v. Coastal Bank, 182 Ga. App. 112, 114, 354 S.E.2d 694, 696 (1987) (finding that trial court improperly considered evidence of closing costs in arriving at true market value).

In the instant case, the court held that it was within the discretion of the trial court to find the appraiser's deductions, including lost rental income and cost to complete, proper in determining the "as-is" market value of the property. "That rental property fully occupied by paying tenants is worth more to a prospective buyer than if that property were not fully occupied by paying tenants is almost

self-evident." Nash, at \*2. The court noted that respondents' appraiser agreed that one could apply a discounted value to account for lost rent, although he disagreed with the amount of the discount.

As to the cost to complete construction, the court determined that, as an expert, the appraiser was qualified to estimate the cost to complete the project. Id. at \*3. In formulating her opinion, the appraiser listed the incomplete items, reviewed a construction cost manual, and reviewed ten construction budgets from office park projects with similar scope of work. The court found that respondents failed to show that the use of a cost expert "is the only acceptable method for an appraiser to employ." See also BPI Constr. Co. v. Collective Fed. Savings Ass'n, 186 Ga. App. 324, 367 S.E.2d 269 (1988) (refusing to pass on merits of contention that appraiser was unqualified to estimate costs to complete).

### *Iwan Renovations, Inc. v. North Atlanta National Bank, No. A09A0341*

On February 16, 2009, the Georgia Court of Appeals addressed whether the holder of two notes containing cross-default provisions is allowed to sue on the second note while foreclosing and seeking a deficiency on the first note without confirming the foreclosure sale on the first note. The decision casts further light on when debts may be considered "inextricably intertwined" for purposes of the confirmation statute, O.C.G.A. § 44-14-161 et seq.

In Iwan Renovations, Inc. v. North Atlanta National Bank, 296 Ga. App. 125, 673 S.E.2d 632 (2009), the borrower executed an initial note for the acquisition and development of a single tract of property. Seven months later a second note was executed. Id. at 126, 634. The notes were secured respectively by two security deeds on the same tract of property, and contained cross-default provisions.

After the borrower defaulted on payment, the lender filed suit on both notes for the balances owed. While the lawsuit was pending, the lender foreclosed on the first note. Id. at 127, 634. It then amended its suit to reflect that it was seeking recovery under only the second note. The trial court granted summary judgment for the lender on its suit for the amount owed under the second note.

The Court of Appeals reversed, holding that because the notes were issued by the same lender, were issued for the same purpose only seven months apart, and were always held by the same creditor, the debts were inextricably intertwined such that the lender lost its ability to sue on the second note absent confirmation of the foreclosure of the first instrument. Id. at 129, 635-636.

The lender had cited Devin Lamplighter, Ltd. v. American General Finance, Inc., 206 Ga. App. 747, 426 S.E.2d 645 (1992), in support of its position that the lawsuit was an action to recover on an independent, separate, unsecured obligation (the second note), which obligation became unsecured after foreclosure on the first note. In Devin Lamplighter, the lender held a third-position security deed on a piece of property, with the first-position and second-position deeds held by other creditors. The lender later purchased the second-position security deed and foreclosed on it. The court held that foreclosure of the second deed rendered the third security deed an independent, unsecured obligation on which the lender could sue. Id. at 748, 646-647.

*Continued from page 5*

The court in Iwan Renovations distinguished Devin Lamplighter on the basis that the latter involved “two separate debts, evidenced by two separate notes and secured by two separate security deeds. Until [the third-position lienholder] purchased the second mortgage from [the second-position lienholder], there were two creditors.” Devin Lamplighter, at 748, 646–647. See also Murray v. Hasty, 132 Ga. App. 125, 207 S.E.2d 602 (1974) (allowing holder of downpayment note and mortgage to sue on downpayment note after foreclosure of mortgage where debts unrelated and notes contained no cross-default language).

In contrast, Iwan Renovations concerned notes secured by the same property, held and issued by the same creditor, owed by the same debtor, and thus were inextricably intertwined. Iwan Renovations at 129, 635-636. See also Tufts v. Levin, 213 Ga. App. 35, 37, 443 S.E.2d 681, 683 (1994) (finding debts inextricably intertwined where the second of two notes held by a lender represented deferred interest on the first note, were secured by the same collateral, and contained cross-default clauses).

Thus, in Iwan Renovations, the foreclosure of the first mortgage was subject to the confirmation statute, and the lender lost its right to pursue a deficiency claim on the first note when it failed to comply with the requirements of O.C.G.A. § 44-14-161 *et seq*

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## RESPA REFORM UPDATES AND STATUS

*Jeffrey W. Rubnitz  
Rubnitz & Clements, P.C.*

The Real Estate Settlements and Procedures Act (“RESPA”) has been a hot button topic over the last year as practitioners and real estate industry professionals have been preparing for implementation of HUD’s somewhat controversial 2008 Final RESPA Rule. Under the new rule, HUD will require that lenders and mortgage brokers provide consumers with a new Good Faith Estimate (“GFE”) disclosing key loan terms and closings costs. Closing agents will also be required to provide parties with a new HUD-1 Settlement Statement that compares the HUD-1’s final costs with the GFE’s estimated costs. Compliance with the changes pertaining to the new Good Faith Estimate and the new Settlement Statement mandated by the 2008 Final RESPA Rule are scheduled to go into effect on January 1, 2010. In preparation for these changes, both the Real Property Law Section’s Residential Real Estate Seminar held on February 13, 2009 and the recent Real Property Law Institute held at Amelia Island offered speakers and materials detailing changes mandated by the new RESPA Rule.

After the recent passage of HR 1728, the Mortgage Reform and Anti-Predatory Lending Act, commonly referred to as the “mortgage reform bill,” many wondered, however, if the future of the 2008 Final RESPA Rule was in jeopardy. On May 7, 2009, the U.S. House of Representatives passed the mortgage reform bill, which was one of the House’s responses to the subprime mortgage crisis. HR 1728 would amend the Truth-In-Lending Act (“TILA”) to specify duty of care standards for originators of res-

idential mortgages. The bill would reform consumer mortgage practices and provide accountability for such practices.

Of keen interest on the RESPA front, HR 1728 included an amendment urging HUD to withdraw the Final RESPA Rule and to work with the Federal Reserve Board to issue a new joint rule within 12 months. The amendment had the support of the Mortgage Bankers Association, the American Land Title Association and other real estate trade groups. In spite of this amendment and pressure from Congress for the withdrawal of the 2008 RESPA rule, HUD Secretary Donovan’s press release dated May 11, 2009 indicates that HUD is nonetheless committed to going forward with implementation of the updated RESPA rules to take full effect on January 1, 2010 (minus the “required use” provision, which will be revisited).

“This administration is committed to providing consumers with clear and transparent information when they make the biggest purchase of their lives,” said Donovan. “We will implement the new RESPA rules as part of broader reforms to the mortgage process. And after further consultation with the public, stakeholders and Congress we will propose a clearer and more effective “required use” definition that truly protects borrowers from those who force them to use affiliated businesses. Needed consumer protections are too important to allow confusion over one specific provision to hold up needed RESPA reforms.”

(See the press release at

<http://www.hud.gov/news/release.cfm?content=pr09-058.cfm>)

Perhaps, this is not the end of the relay of concerns over RESPA reform. Just a few days after Secretary Donovan’s comments, the American Land Title Association (“ALTA”) and several other trade organizations wrote HUD requesting that HUD suspend the implementation of the new GFE and HUD-1 forms. ALTA encouraged HUD to work with the Federal Reserve to establish policy complimentary to RESPA and the Truth In Lending Act in order to reduce consumer confusion of the mortgage process and to avoid potential harm to consumers in the already sensitive housing market. ALTA noted that both RESPA and TILA disclosures are essential in order for consumers to understand the costs of a transaction. Since both sets of disclosures are provided at the time of the consumer’s application and at closing, ALTA’s letter pointed out that it is essential that “both sets of disclosures compliment each other to avoid confusion and potential harm.” ALTA suggests that the RESPA and TILA forms be merged so that consumers receive one set of disclosures at each stage of the mortgage process.

In requesting a suspension of the RESPA Reform Rule at this time without further delay, ALTA legitimately pointed out that if HUD decides to withdraw the new GFE and HUD-1 forms later this year, much money will have already been unnecessarily spent by real estate professionals to implement the new forms and to update systems.

For now, residential practitioners should be aware of the new RESPA Rules. The new GFE and HUD-1 are still scheduled to take affect on January 1, 2010. We will continue to monitor further developments. As of this writing, HR 1728, the mortgage reform bill, sits in the Senate for consideration.

## WHY AN ADR CLAUSE CAN SAVE YOUR BUSINESS

*Chauncey Davis, Vice President  
American Arbitration Association*

Often times, in the real estate industry, businesses believe that when an issue surfaces, they will be able to resolve it either by discussion and/or negotiation. Unfortunately, real estate businesses sometimes fall into this false perception that they can “make it right” regardless of the type or complexity of the dispute. This mindset, which has permeated the industry for many years, has also often times led to costly litigation, or closing of businesses, or permanent damage with their client’s relationship or the ruin of an organization’s reputation. For these reasons, and others, I strongly encourage businesses in the real estate industry to write an alternative dispute resolution (ADR) clause into their agreements. The process of doing so is very simple.

It is important for potential ADR users to understand the differences between the two most widely used ADR processes---mediation and arbitration.

Mediation is a non-binding process that involves a neutral mediator who assists the parties in crafting the terms of their own settlement. It is a very fast, efficient dispute resolution process that is confidential and cost effective. In fact, because the process is less adversarial than litigation or arbitration, it often times allows parties the opportunity to maintain their relationships.

Arbitration is also an effective method of resolving disputes, but it is typically a binding process where parties have their dispute resolved by a neutral or party appointed arbitrator or arbitrators in less formal setting than court. It is typically a faster process than litigation, and it is also confidential. Arbitration cases are typically conducted in a conference room, like mediation, but the steps in the process are very similar to how the court process proceeds. Unlike litigation, the rules of evidence generally do not apply in arbitration, discovery is usually limited and a subject matter expert hears the evidence and renders a decision or award which can not be appealed in court on the merits of the case. Only in rare circumstances can an award be overturned so once an award is rendered, the decision is usually final.

Due to the nature of the disputes that surface in the real estate industry, including an ADR clause makes sense, from a perspective of cost, time and quality of the decision or settlement. Real estate disputes such as title disputes, HOA disputes, loan default disputes and real estate agent commission disputes, are often inappropriate matters to be resolved in the courts. In fact, I specifically discourage the use of litigation for resolving real estate disputes for several reasons. First, statistics show that a similar real estate case that would take two years to complete in court takes ten months to complete in arbitration and only two months in mediation. The benefits of ADR in real estate-related disputes often outweigh the need to resolve a dispute in court. In fact, businesses that do not rely on alternative methods of resolving disputes are commonly dissatisfied with the decisions that are rendered in court.

Despite these facts, surprisingly, many lawyers and organizations in the real estate industry are still not familiar with the benefits of ADR or how each alternative dispute resolution method works. As a result, our organization spends a significant amount of time educating real estate businesses and lawyers about ADR and the reasons why including an ADR clause makes sense. Our advice is that real estate agreements include the use of mediation for resolving disputes first and then the use of arbitration should mediation fail to generate a settlement between the parties. Fortunately, the American Arbitration Association provides standard ADR clause language that can be inserted into any contract.

Statistics have also shown that utilizing ADR techniques in real estate-related disputes can yield better decisions than litigation and the parties involved. Furthermore, ADR has also been found to be the preferred method of resolving real estate disputes because disputes are heard by a neutral party with specific experience relating to the dispute, instead of a judge or jury who may have either very limited or no experience in the real estate industry. The use of mediation, arbitration or other form of ADR also provides real estate parties with a greater level of satisfaction than litigation because parties can select the expert neutral party who will hear the dispute, the process is confidential, and less adversarial, and the parties can control various aspects of the process.

Unfortunately, often times when contracts are drafted, attorneys do not consider including an ADR clause. For future agreements, I highly recommend that one consider the potential benefits of doing so. Furthermore, individuals must remember that issues can rise to a level where parties end up in court despite the fact that ADR may be a better option. I hear this too often: “I never had an issue with a client or a business that has reached a level where the matter required arbitration or litigation.” For those of you who have this mindset, please consider, all it takes is one dispute and that dispute could cost an organization everything.

So remember, disputes are likely to occur and regardless of existing relationships, some disputes may require some assistance to resolve them. Therefore, to protect any organization and their reputation, I recommend including an effective ADR clause into most agreements. It’s one of the best ways of ensuring the continued success of your client’s business.

If you need any information or assistance about drafting an ADR clause, you can contact Mr. Chauncey Davis, Vice President, American Arbitration Association at 404-320-5111 or [davisch@adr.org](mailto:davisch@adr.org). You can also reach him at the Atlanta Regional Office, 2200 Century Parkway, Suite 300, Atlanta, GA 30345.

AAA and ADR-related information can also be found at the American Arbitration Association’s website at [www.adr.org](http://www.adr.org).

## CURRENT DECISIONS

*Daniel F. Hinkel*

*ING Investment Management*

### Law firm was not an escrow agent

A borrower and lender entered into a construction loan agreement under which the lender would fund the construction costs of a home for the borrower. The lender hired a law firm to close the construction loan and to act as the lender's agent for disbursement of funds under the construction loan agreement.

The construction loan agreement provided that "All conditions of the obligations of lender hereunder, including the obligation to make advances are imposed solely and exclusively for the benefit of lender and its successors and assigns..."

After closing, the borrower sued both the lender and the law firm for disbursements of funds in violation of the terms of the construction loan agreement. The borrower alleged that the law firm was an escrow agent and breached its fiduciary duty to the borrower.

The trial court granted summary judgment in favor of the law firm and the Georgia Court of Appeals affirmed.

The Court held that Georgia legal history requires "In every case of an escrow there is a contract and privity between the grantor and the grantee. The depository is, by mutual agreement, constituted the agent of both parties."

Here, the construction loan agreement provided for the disbursement of funds by the lender or its agent, subject to conditions imposed solely for the benefit of the lender and which could be waived by the lender. The law firm was an agent for only the lender. There was no language in the construction loan agreement that is legally sufficient to impose upon the lender's agent the duties of an escrow agent. In addition, since an express contract existed, the law will not imply such an agency. The borrower's claims against the law firm for breach of fiduciary duty or breach of trust fail.

*Rogan v. Patterson*, 294 Ga. App. 35, 668 S.E. 2d 459 (2008)

### Property owners were not indispensable parties to appeal of re-zoning

Property owners had entered into contract to sell property. Pursuant to power given to the purchaser in the contract, the purchaser filed an application to have the property rezoned and the application was granted. Adjacent property owners brought suit against the county and the applicant to appeal the rezoning. The plaintiff did not join the owners of the rezoned property in the action. The trial court dismissed the complaint for failure to join indispensable parties and on other grounds.

The Supreme Court of Georgia reversed. The Court found that although the new zoning designation runs with the land and is not personal to the applicant who obtained it, it does not necessarily follow that the owners of the property are indispensable parties for purposes of an appeal from the grant of the re-zoning appli-

cation. When the owner of the property for which re-zoning is sought is not the applicant for re-zoning but had entered into a contract for the sale of the property with the applicant, which contract is contingent upon the applicant obtaining re-zoning, the owner does not fit within the definition of "indispensable party" because the case could be decided on its merits without prejudicing the rights of the owners since the re-zoning applicant is a party and presents a thorough case on behalf of itself and, ultimately the owner."

*Stendahl v. Cobb County*, 284 Ga. 525, 668 S.E. 723 (2008)

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## YOU DON'T HAVE TO PICK YOUR POISON: Foreclosure, Deficiency Judgments, and other Collection Strategies in Georgia

*Walt Burton and Shelli Willis  
Troutman Sanders*

Despite record numbers of foreclosure filings in Georgia in recent months, many lenders are not aware of the full array of collection strategies available to them in pursuing deficiency judgments against borrowers, guarantors, or both.

A basic understanding of the Georgia confirmation statute is critical to evaluate properly all available collection strategies. Pursuant to O.C.G.A. § 44-14-161, to obtain a deficiency judgment after foreclosure, a lender must report a sale to a superior court judge in the county where the foreclosed property is located within thirty days after the sale and request confirmation. In a confirmation hearing, a lender must present evidence to the court, usually in the form of an appraisal effectively dated as of the day of the sale, that the successful bidder at the foreclosure sale bid at least the "true market value" for the property. A lender must also present evidence regarding the legality of the notice and advertisement and the regularity of the sale. The primary purpose of the requirement to confirm foreclosure sales is to protect the borrower "from being subjected to double payment in cases where the property was purchased for a sum less than its market value." *First Nat'l Bank v. Kunes*, 128 Ga. App. 565, 567 (1973). The Georgia legislature enacted the confirmation statute during the Great Depression when many borrowers were forced into bankruptcy after their properties were sold for substantially diminished values at foreclosure. *Taylor v. Thompson*, 158 Ga. App. 671, 672 (1981).

When a borrower defaults, the first instinct of most lenders is immediately to exercise the power of sale and foreclose the property, confirm the sale, and then file suit to obtain a deficiency judgment. This process is effective, but it is not the only method of obtaining a deficiency judgment. In Georgia, "a creditor who holds a promissory note secured by a deed is not put to an election of remedies as to whether he shall sue upon the note or exercise the power of sale contained in the deed, but he may do either, or 'pursue both remedies concurrently until the debt is satis-

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fied.” *Taylor*, 158 Ga. App. at 672 (internal citations omitted). In other words, foreclosure and suit on the note or guaranty are not necessarily mutually exclusive remedies and do not have to be pursued in any particular order.

A lender can always sue on the note, guaranty, or both first, obtain a judgment, and then exercise the power of sale contained in the security deed to foreclose the property. *Taylor*, 158 Ga. App. at 673. Because the confirmation statute is in derogation of the common law “and must be strictly construed,” courts have interpreted the statute to require confirmation only as a condition precedent to *future deficiency actions*. *Taylor*, 158 Ga. App. at 672 (citing *First Nat'l Bank*, 128 Ga. App. at 565) (emphasis added); see also Frank S. Alexander, *Real Estate Finance and Foreclosure Law* 158-59 (Thompson West 2004). Accordingly, foreclosures carried out subsequent to the lender obtaining a judgment are not subject to the confirmation statute—only deficiency actions brought after foreclosure.

Another useful strategy in some instances is to file suit on the note, guaranty, or both concurrently with commencement of foreclosure on the property. Once the foreclosure and confirmation process is complete, the lender can amend its complaint to account for any developments during the foreclosure process.

The primary benefit of this strategy is to accelerate the litigation timeline (rather than waiting until after the foreclosure and confirmation process is complete to file suit). This strategy often produces a judgment more quickly than a purely bifurcated foreclosure and litigation strategy.

There are pros and cons to all methods of obtaining and collecting on deficiency judgments in Georgia. A lender who immediately exercises the power of sale and forecloses the property takes title cheaply and quickly, while avoiding waste of the property during the pendency of a potentially lengthy lawsuit, but the lender must comply with the confirmation statute if the lender intends to seek recovery of a deficiency. If the borrower, guarantor, or both have “deep pockets,” and the lender determines there is a high probability of collection from one of those parties, it may be prudent for the lender to sue on the note or guaranty first, obtain a judgment, exhaust collection efforts, and then foreclose on the property to collect the balance of the judgment. There is also the strategy of foreclosing and suing on the note, guaranty, or both simultaneously where the lender desires to quickly take title to the property, accelerate the litigation timeline, and has concluded based on the appraised value of the property and loan balance that it will pursue a deficiency.

Any good collection strategy should include an assessment of the likelihood of a deficiency after foreclosure of the property and selection of the best remedy for successful recovery of the indebtedness. The assessment should be made early in the collection process and should consider the unique facts of each loan. Early planning can make the difference between successfully collecting a debt in full and writing off a loan loss.

## IN A STATE OF FLUX: Finding Your Way Through Zoning and Land Use Issues in Newly Formed Municipalities

*Stephen F. Fusco, Esq.*  
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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<sup>1</sup> (Fulton County); the City of South Fulton<sup>2</sup> (Fulton County); the City of Dunwoody<sup>3</sup> (DeKalb County); the City of Riverside<sup>4</sup> (Fulton County); the City of Milton<sup>5</sup> (Fulton County); and the City of Johns Creek<sup>6</sup> (Fulton County). Of these six bills, the General Assembly approved three of them and the Governor has signed them.<sup>7</sup> 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<sup>8</sup> 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 councilmembers 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 regula-

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tions 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.<sup>9</sup> 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 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")<sup>10</sup> 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.<sup>11</sup> 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.

<sup>1</sup> SB 533

<sup>2</sup> SB 552

<sup>3</sup> SB 568

<sup>4</sup> HB 1072

<sup>5</sup> HB 924

<sup>6</sup> HB1321

<sup>7</sup> SB 552, SB 553 and HB 1321

<sup>8</sup> The proposed charters for each municipality include the delegation of planning and zoning power to the City Council to provide comprehensive city planning for city land use/signage/outdoor advertising/development by zoning and the power to provide subdivision regulation and the like as the city council deems necessary and reasonable to ensure a safe, healthy, and aesthetically pleasing community.

<sup>9</sup> Persons developing in the newly formed municipality should be aware, however, that the county may not be responsible for interpreting or applying its regulations to property within the jurisdictional boundaries of the new municipality unless there is an agreement between the county and municipality to review development issues. The newly former municipality's planning and zoning department should enforce the planning/zoning regulations.

<sup>10</sup> O.C.G.A. § 36-66-1 et. seq.

<sup>11</sup> As a general rule, this is the case under Georgia law. However, there are certain instances when regulations may be applied retroactively and practitioners should review the Georgia case law to determine if the municipality can retroactively apply zoning/planning regulations.

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## NEIGHBORHOOD STABILIZATION PROGRAM: HUD Responds to the Foreclosure Crisis

*Drew Marlar  
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The Neighborhood Stabilization Program (NSP) is an aggressive and swift response to the housing foreclosure crisis. The program is being implemented in two phases by the U.S. Department of Housing and Urban Development (HUD). The first phase was authorized by The Housing and Economic Recovery Act of 2008 (HERA) that was signed into law on July 30, 2008 (NSP 1). NSP

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1 provides \$3.92 billion in emergency federal funds to stabilize neighborhoods impacted by foreclosed and abandoned properties. The second phase was authorized by the American Recovery and Reinvestment Act of 2009 (ARRA) and provides \$1.93 billion to carry out neighborhood stabilization and \$50 million to provide technical assistance and capacity building (NSP 2). The funding for both phases is provided through HUD's Community Development Block Grant (CDBG) program and may be used to establish financing mechanisms, purchase and rehabilitate homes, establish land banks, demolish blighted structures and redevelop demolished or vacant properties.

### NSP 1

The NSP 1 funds were allocated to local jurisdictions with the greatest needs based on a formula developed by HUD and based on the number of home foreclosures, subprime mortgages and homes in default or delinquency. Each state received at least \$19 million, but not every local government that receives CDBG funding received an allocation of NSP funds. However, HUD encouraged the state wide programs to direct NSP 1 funds to areas with the greatest need.

The NSP 1 regulations required each local grantee to submit a plan for how they would use NSP 1 funds within the five (5) eligible uses described above on or before December 1, 2008. Once the plans are approved by HUD, the funds are available in the form of low interest loans and grants to implement program goals. These funds are allocated pursuant to a competitive application process with each local jurisdiction. The NSP 1 regulations require that all funds must be "obligated" within eighteen (18) months after receipt. Funds are obligated for an activity when orders are placed, contracts are awarded, services are received and similar transactions have occurred that require payment by the state, unit of general local government or sub recipient during the same or a future period. 100% of the NSP 1 funds must be used with respect to individuals and families whose income does not exceed 120% of area median income. Not less than 25% of the NSP 1 funds must be used for the purchase and redevelopment of abandoned or foreclosed homes or residential properties that will be used to house individuals or families whose incomes do not exceed 50% of area median income.

### NSP 2

On May 4, 2009, the U.S. Department of Housing and Urban Development (HUD) issued its Notice of Fund Availability (NOFA) for NSP 2. As mentioned above, there are two types of funds available under NSP 2 – \$1.93 billion for neighborhood stabilization activities and \$50 million for technical assistance and capacity building. Both types of funds will be awarded pursuant to a separate competitive application process directly to HUD, as opposed to the local CDBG entitlement grantee under NSP 1. HUD must receive paper applications at the Robert C. Weaver HUD Headquarters by 5:00 PM EDT on July 17, 2009.

Applications must request a minimum of \$5 million and must have the effect of either returning a minimum of 100 abandoned or foreclosed homes back to productive use or otherwise eliminating or mitigating their negative effects on the stability of the target geography. Applicants must also demonstrate that they successfully carried out and completed eligible activities involving at least 75 units of housing within the 24 month period

immediately preceding the date of the NOFA (May 4, 2009). Eligible entities include states, units of general local government, nonprofits and consortia of nonprofits. If a consortia of nonprofits applies for funds then one must be designated as the lead applicant and assume responsibility for the grant on behalf of the consortium. Any of these entities may apply with a for profit entity as a partner.

NSP 2 applicants must complete the required citizen participation as detailed in the NOFA. Minimum citizen participation involves publishing in a newspaper of general circulation or other general news media outlet covering your target geography and posting on your official website a description of your proposed target geography.

Applicants will be scored on their target geography based on average foreclosure needs or average foreclosures with vacancy risk. Single neighborhood, city wide, metropolitan area wide, regional and national scale NSP 2 applications are all permitted. HUD has published a calculation tool at <http://www.hud.gov/nsp> and <http://www.huduser.org/nspgis/map.aspx> to assist applicants in developing their target geography.

Recipients of NSP 2 funds may be reimbursed for pre award costs. Nongovernmental entities cannot incur pre award costs for activities other than administrative and planning because all other activities require an environmental review.

NSP 2 is the same as NSP 1 in that all funds must be made available to individuals and families whose income does not exceed 120% of area median income and 25% must be used to purchase and redevelop abandoned or foreclosed homes or residential properties to benefit individuals or families whose income does not exceed 50% of area median income. There are three ways to satisfy the 120% area median income requirement under NSP 2: (a) providing or improving permanent residential structures that will be occupied by a household whose income is at or below 120% area median income; (b) serving an area in which at least 51% of the residents have incomes at or below 120% area median income; or (c) serving a limited clientele whose incomes are at or below 120% area median income.

Land banks may not hold property for more than 10 years without obligating the property for a specific, eligible redevelopment of that property in accordance with NSP requirements. Recipients may fund costs, such as reasonable developer's fees, related to NSP 2 – assisted housing rehabilitation or construction activities. These new regulations clarify that the appraisal and purchase discount requirement only applies to NSP assisted acquisition of a foreclosed upon home or residential property.

NSP 2 is on an expedited timeline as compared to NSP 1. All NSP 2 recipients must expend 50% of their award on eligible NSP 2 within 2 years and 100% within 3 years. Also, the requirement contained in HERA that revenues generated by the use of NSP funds must be returned to the Treasury after five years has been repealed. The new regulations clarify that all program income shall be governed by the regular CDBG rules. Excess cash flow generated by the NSP assisted project should be shared with the NSP recipient. Generally, excess cash flow on a real estate project is the amount of cash generated from operations, sales or refinancing that

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is in excess of the amount required to provide the owner a reasonable return on its equity investment.

The ARRA made the following minor revisions to the original NSP legislation: (a) NSP funds may be used for the establishment and operation of land banks for homes and residential properties (as opposed to just the establishment of land banks) and (b) NSP funds for the redevelopment of demolished or vacant structures can only be used for housing. The original HERA legislation permitted small scale commercial uses.

The ARRA caps each grantee's spending on demolition in connection with land bank and redevelopment activities at 10% of their grant unless HUD determines such use appropriate to local market conditions. The ARRA forbids grant and loan recipients from refusing to rent a unit in an NSP assisted dwelling to a household based on their status as a Section 8 voucher holder (this applies to the original NSP legislation) and establishes required notice periods for certain tenants prior to eviction.

NSP 1 and NSP 2 provide many interesting opportunities for developers and local jurisdictions to help alleviate the effects that subprime lending and foreclosures have had on our neighborhoods. HUD has been actively engaged with the CDBG and the developer community to help draft the regulations in such a way as to maximize the effectiveness of the program. We are starting to see the first effects of this funding make its way into a number of different projects and the results look promising. We are hopeful that this program will make housing opportunities available to low income residents while helping to stabilize our neighborhoods affected by this unprecedented housing crisis.

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## HEIR PROPERTY PROJECT

*Crystal Chastain Baker, Equ.*

*Cousins Fellow*

*University of Georgia School of Law*

All real estate attorneys have seen those properties- the ones with titles that seem impossible to clear, with dozens of unknowns and generations of families spread throughout the country. As practitioners, most of us call our title insurance companies with bated breath hoping for answers other than the ones we suspect are inevitable in these situations. A deal is on the table, and no one wants to hear that months, or sometimes years, of corrective work are needed before title can be deemed marketable. Although a common problem, most in the real estate community have not stopped to assess the causes or the possible solutions.

The issue, gaining recognition as the "heir property problem", was revealed most prominently across the southern United States in the aftermath of Hurricane Katrina, when lack of clear title to property prevented families in Louisiana from accessing disaster assistance available for home owners recovering from the impact of the disaster. In trying to identify whether persons rebuilding

after Katrina held proper title to the property for which they were seeking federal assistance, the government discovered that an estimated 20,000 titles did not correspond with the identity of the claimant.<sup>1</sup>

Initial research shows that heir property largely results from intestate succession and more prominently arises in African-American communities in the rural South, where as many as 80% of African-American rural landowners do not have wills.<sup>2</sup> Often, when a decedent dies intestate, parties who succeed to property in accordance with the Georgia intestacy laws fail to formalize title to the property in the deed records. Georgia laws on descent and distribution provide that intestate property to which there are multiple heirs-at-law, is held jointly by such heirs in a tenancy-in-common ownership arrangement.<sup>3</sup> Tenants in common each have an undivided, fractional ownership interest in the whole of the property. While each tenant has a distinct interest in the entirety of the land, no tenant holds legal title to a distinct portion of the land that corresponds to the fractional interest.<sup>4</sup> Therefore, co-owners of heir property as individuals lack clear title to land and as a result are not eligible, independent of all other co-owners, for government assistance and grant programs; have difficulty using the land as collateral to obtain loans; and cannot use the timber, mineral or agricultural resources of the land without the consent of all co-owners. Thus, lack of clear title resulting from heir property succession limits the ability of those living on the property to rehabilitate, maintain or develop their property.

The end result is that an entire group of Georgians, who are already disadvantaged and marginalized, face the threat of greater social and economic loss due partly to a lack of knowledge about the issue of heir property.

Georgia Applesseed, a public-interest law center and campaigner for social justice, adopted Heir Property as the signature project of its Young Professionals Council (YPC) in order to help address the problem in Georgia. The YPC is comprised of young professionals committed to carrying out the mission of Georgia Applesseed by encouraging young professionals to devote pro bono time and effort to effect systemic change. Led by YPC President, Jason Carter (Bondurant, Mixson & Elmore, LLP) and YPC Heir Property Chair, Avril McKean-Dieser (UCB, Inc.), YPC and Georgia Applesseed were awarded the prestigious Cousins Fellowship at the UGA School of Law to

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## DAVID BURGE APPOINTED TO GEORGIA REAL ESTATE COMMISSION

David J. Burge was appointed by Governor Sonny Perdue to the board of the Georgia Real Estate Commission which licenses and regulates Georgia real estate brokers, salespersons and property managers. Burge, who is a past Chair of the Real Property Law Section, is a partner with Smith, Gambrell and Russell, LLP, in Atlanta, where he practices commercial real estate law.

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study heir property in Georgia. Crystal Chastain Baker, Esq. is the Cousins Fellow. The mission of the YPC Heir Property Project is threefold: to find solutions that provide low income landowners of heir property with the necessary tools to protect and preserve their property from land loss while generating wealth and economic value among these landowners; to increase the capacity of service providers to offer pro bono services in Georgia in an effort to address and remedy the problems associated with heir property; and to find sustainable solutions by increasing awareness of the issue and pursuing systematic responses, including possible legislative changes within Georgia.

Two early goals of the project have been met. *Heir Property in Georgia*, a booklet for landowners, was published in conjunction with the University of Georgia School of Law, Alabama Appleseed, and DLA Piper, and an educational seminar on heir property has been developed. The booklets and educational seminars will serve to empower Georgians to better understand their rights and obligations as landowners, and enable them to confront the common (and often complex) legal, social, and environmental issues brought on by ownership of heir property. The first seminar was held on May 2, 2009 in Liberty County, Georgia. The YPC hopes to continue these seminars on a statewide basis.

The input and assistance of the Real Property Section is essential to the success of Georgia Appleseed's Heir Property Project in Georgia. Pro bono involvement is needed of attorneys and other real estate professionals who are familiar with this issue to render advice and offer suggestions for solving this problem affecting many disadvantaged Georgians. The YPC particularly welcomes the involvement of young professionals throughout Georgia, as this project has a statewide focus.

Current volunteer opportunities include researching tax database and property records to determine the prevalence of heir property in various counties in Georgia; presenting educational seminars to interested organizations; researching partition cases in targeted counties; and training to assist individual property owners with legal and non-legal property issues.

To learn more about Georgia Appleseed, the Young Professionals Council and/or the Heir Property Project, please contact Georgia Appleseed at (404) 685-6750, visit Georgia Appleseed's website at [www.gaappleseed.org/heir](http://www.gaappleseed.org/heir), or contact Crystal Chastain Baker at [ccbaker@uga.edu](mailto:ccbaker@uga.edu).

<sup>1</sup> Malcolm A. Meyer, *Louisiana Heirship Property: Solutions for Establishing Record Title*. LA BAR J., Vol 55. No. 5 (2008).

<sup>2</sup> M. Thomas, J.Pennick, and H. Gray, What is African American Land Ownership?, Federation of Southern Cooperatives Land Assistance Fund at [www.federationsoutherncoop.com](http://www.federationsoutherncoop.com) (2004).

<sup>3</sup> GA CODE ANN. § 44-6-120

<sup>4</sup> See *Deal v. State*, 153 S.E. 537, (1914); *Glover v. Ware*, 510 S.E.2d 895 (1999) (An undivided interest in real property may be created into as many fractional shares as desired because it is fractional ownership in the whole and not a division of the land into discrete parts).

## PLEASE PARTICIPATE

Attention all RPLS Members – Volunteers are needed to serve on various Section committees. Please consider donating your time to serve on one of the Section's committees, including the legislative, newsletter, property tax, pro bono or web/listserv committees. If you are willing to serve, please contact RPLS Chair, Shelli Willis, at: [shelli.willis@troutmansanders.com](mailto:shelli.willis@troutmansanders.com).

## UPCOMING CALENDAR DATES REAL PROPERTY LAW SECTION

— 2009 —

SEPTEMBER 11<sup>th</sup> – 13<sup>th</sup>, 2009  
Executive Committee Fall Retreat  
(Reynolds Plantation)

OCTOBER 20<sup>th</sup>, 2009  
RPLS monthly meeting  
(Troutman Sanders)

November 12<sup>th</sup>, 2009  
Fall Commercial Real Estate  
Law Seminar  
Georgia State Bar Headquarters

November 12<sup>th</sup>, 2009  
RPLS monthly meeting  
(Capital City Club)

December 15<sup>th</sup>, 2009  
RPLS monthly meeting  
(Troutman Sanders)

— 2010 —

JANUARY 19<sup>th</sup>, 2010  
RPLS Monthly Meeting  
(Troutman Sanders)

February 12<sup>th</sup>, 2010  
Spring Residential Practice Seminar  
Georgia Public Television Headquarters  
(February 18<sup>th</sup> Replay)

February 16<sup>th</sup>, 2010  
RPLS monthly meeting  
(Troutman Sanders)

March 16<sup>th</sup>, 2010  
RPLS monthly meeting  
(Troutman Sanders)

April 1<sup>st</sup>, 2010  
Foreclosure Seminar  
Georgia State Bar Headquarters

April 20<sup>th</sup>, 2010  
RPLS monthly meeting  
(Troutman Sanders)

May 6<sup>th</sup> - 8<sup>th</sup>, 2010  
Real Property Law Institute  
(Sandestin Hilton)

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## **Real Property Law Section Web Site Update**

The Real Property Law Section maintains a web site for its members located at [www.garealproperty-law.com](http://www.garealproperty-law.com). We have recently updated the site with the following useful information:

- Revised Report on Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions
- 2009 Georgia Association of Realtors Form Contract Changes
- Latest HUD Developments on RESPA Reform
- ProBono Matchmaker Project

You may also access the web page to join the RPLS Listserve, make a posting to the RPLS Bulletin Board, volunteer as a mentor, access information on real estate related CLEs and contact the Executive Committee Members.

Please let me know if there is anything else that you would like to see on the web page. It is here for your convenience and we can easily update it to suit your practice needs.

Drew Marlar – [drew.marlar@kutakrock.com](mailto:drew.marlar@kutakrock.com).