

Real Property Law Section NEWSLETTER State Bar of Georgia

A Publication for Real Property Lawyers

Fall 2008



**REAL PROPERTY
LAW SECTION**

COMMENTS FROM THE CHAIR

Susan Langley Elliott

As your new Chair, I am pleased to report that the Executive Committee of the Real Property Law Section is hard at work to improve the practice of law for our members and clients, and I want to welcome each of our new members to the Section. If you have not already done so, I would encourage you to log onto our website and look around. There you will find useful information for new attorneys as well as seasoned practitioners, and the link to join our listserve (look for the link on the right hand side of the web page). Special thanks go to Drew Marlar and Nancy Liu for keeping the website up to date and the listserve up and running!

Under the guidance of Jeff Rubnitz, our Residential Closings Subcommittee took the lead in researching HUD's proposed changes to RESPA, polling our members, consulting with other states, and submitting our comments to the Regulations Division, Office of General Counsel for HUD. You will find a copy of the letter containing our comments on our website at <http://www.garealpropertylaw.com/>. Our Opinions Subcommittee, under the leadership of Lisa Roberts, is updating and modernizing the Georgia "real estate white paper opinion", has been soliciting comments from our members and will propose suggested changes in the near future. Dan Hinkel is leading an effort to update the Intangible Tax Regulations to address current market concerns, and propose needed changes to the Department of Revenue. The Pro-bono Subcommittee, with Mark Shaffer at the helm, is growing both in terms of volunteers from our Section and recipients of our services.

Patrise Perkins-Hooker led the Legislative Subcommittee last year as we introduced new legislation on behalf of our members and monitored or reviewed proposed legislation submitted by other parties. One piece of legislation, the so-called "Good Funds Statute" was submitted to the Legislature in response to the failure of a few lenders last spring. Since that time, other lenders have failed and our Legislative Subcommittee will have another busy year. Under the leadership of John Taylor the subcommittee will review proposals

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REGISTER NOW FOR NOVEMBER 13TH COMMERCIAL SEMINAR

The Real Property Law Section, in conjunction with ICLE, will hold its annual Fall Commercial Seminar on Thursday November 13th at the State Bar Headquarters.

Chaired by RPLS' Secretary – Treasurer, Patrise Perkins-Hooker, some of the topics being presented are: The Unique Challenges of Retail and Office Condominiums; Ground Leases from Different Perspectives; Fundamentals of Property Taxes and Water Liens; Housing Rescue Bill; Problems with Development Foreclosure; Ethical Issues in Commercial Real Estate Transactions; New Tax Market Credits and the Auburn Avenue Project, and Changes in Foreclosure Processes.

For more information and registration, go to the ICLE web site: www.iclega.org or call: 1-800-422-0893, ext. 305.

CURRENT DECISIONS

*By: Daniel F. Hinkel
ING Investment Management*

Unenforceable option

A landlord and tenant entered into a lease whereby the tenant leased the "premises" identified as "approximately half of [the] office space" in a commercial building. The lease also gave the tenant a first right to purchase the "property" during the lease term. During the lease term, the tenant exercised his option to purchase, claiming that he had the right to purchase the entire building and the grounds. The landlord refused to honor the

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for electronic filings and signatures, among other legislation. More information on the Good Funds Statute can be found on the State Bar Website at <http://www.gabar.org/>.

The Executive Committee met on September 12th and 13th at Callaway Gardens for the Fall Retreat work weekend. We reviewed current initiatives and set goals for our Subcommittees based on feedback from our members. The Executive Committee will meet each month from September – May and the calendar of meetings can be found on the Section website. Because of the current gas crunch, the October meeting will be held via a conference call. We have an addenda item reserved for feedback from the Section and we welcome all Section members to attend any meeting – please just let us know with an e-mail or phone call if you plan to attend.

Our Section is committed to informing and educating our membership. We sponsor several CLE seminars throughout the year. For the remainder of 2008, we have three (3) seminars available: title standards, materialmen's liens and commercial. Jeff Schneider spent part of his summer planning the Fall Title Standards seminar to be held on October 2nd. Dan Hinkel chairs the Materialmen's Liens seminar every May, but with the new changes taking effect in March 2009, we are co-sponsoring an extra seminar on November 7th. Patrise Perkins-Hooker has organized the Fall Commercial Seminar to be held on November 13th.

We co-sponsored a joint members' reception with the Real Estate Section of the Georgia Society of Certified Public Accountants on September 25th. Those attending reported a good turnout for the fun event.

One of the legacies of our out-going Chair, Edward Hudson, is the reduction of our membership fees which you may have noticed in your summer dues statement. On behalf of the Executive Committee, I want to thank Edward for his excellent leadership.

I appreciate the opportunity to serve as your Chair this year and I look forward to working with you as we continue our tradition of service and education.

With best regards,
Susan

NOTICE

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

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option and a civil action followed. The landlord argued that the option was unenforceable because the property subject to the option was not defined. The trial court denied the landlord's motion for summary judgment on that issue.

The Court of Appeals reversed the trial court's judgment. The Court found that the lease described the leased "premises" but the option was for "the property" which term was not defined in the option provision or in any other provision of the lease. The option provision failed to identify the "property" by description, street address, or any other means. The only description in the lease was of the leasehold "premises". The failure to identify the property subject to the purchase option was particularly troublesome in this case because the tenant had leased only a portion of the building for office space but was claiming the right to purchase the entire building.

Because the option purchase provision failed to contain any description identifying with sufficient certainty the quantity of the property to which it applied, the purchase provision was unenforceable as a matter of law. Marshall v. Floyd, 292 Ga. App. 407 (2008).

Legal standard for confirmation

The superior court confirmed a foreclosure sale by approving an appraised value based upon a \$10,000 deduction because the properties "were in foreclosure". The debtor argued that it was inappropriate for the superior court to consider the \$10,000 foreclosure discount. The trial court rejected this argument and concluded that it was obligated only to determine if its "judicial conscience was shocked" by any disparity between the foreclosure sale price and the true market value.

The Court of Appeals reversed, holding that the trial court had applied the wrong legal standard when determining whether to confirm the foreclosure sale. The standard to be applied by a trial court in an action to confirm a foreclosure sale differs from that used in an equity action to set aside a foreclosure sale. "Shocking the judicial conscience" standard may be used by a court in equity in deciding whether to set aside a foreclosure sale, but it is not the standard to be used in confirming a foreclosure sale.

A trial court cannot confirm a foreclosure sale "unless it is satisfied that the property sold brought its true market value". True market value "is the price that the property will bring when it is offered for sale by one who is not obligated but has the desire to sell it, and is bought by one who wishes to buy it, but is under no necessity to do so." Confirming a sale based upon a quick sale value is improper because such a valuation does not reflect the price that would be obtained in a sale under usual market conditions. Cartersville Developers LLC v. Georgia Bank & Trust, 292 Ga. App. 325 (2008).

The decision disapproves Darby & Associates v. Federal Deposit Insurance Corporation, 141 Ga. App. 78 (1977) which stated in dicta that the "shock the judicial conscience" standard could be applied in actions to confirm a foreclosure sale.



Real Property Law Section Committee members convene at Calloway Gardens for their annual Fall Retreat and weekend of planning for the forthcoming year.

COMMERCIAL REAL ESTATE PURCHASE AND SALE AGREEMENTS: BASIC PRINCIPLES AND PRACTICE POINTS

By: John E. Taylor
&
Angela Ligouri
Carlton Fields, P.A

This article is the second in the series begun with the introductory discussion and outline in the last issue of the newsletter. The subject is basic terms of commercial real estate purchase and sale agreements. Follow-up articles will cover other parts of the introductory outline.

PART I: BASIC TERMS OF THE COMMERCIAL REAL ESTATE PURCHASE AGREEMENT

The statute of frauds (O.C.G.A. §13-5-30(4) and §13-5-31) requires, subject to limited exceptions, that any contract for the sale of an interest in land be in writing and contain every essential element of the transaction. Essential elements of an enforceable contract include (i) identification of the parties, (ii) a legally adequate description of the property, (iii) a description of the consideration, including a definite price or the criteria by which it may be calculated, and (iv) terms of payment. *Estate of Ryan v. Shuman*, 655 S.E.2d 644, 647 (Ga. App. 2007); *A.S. Reeves & Co., Inc. v. McMickle*, 605 S.E.2d 857, 859 (Ga. App. 2004). Similarly, for a court to grant the remedy of specific performance of a sales contract, (1) the contract must be certain, definite, and specific as to the following elements: subject matter, purpose, parties, consideration, and the time and place of performance; (2) the contract must be fair; (3) the contract must be based upon an adequate consideration; and (4) the contract must be capable of being performed. *Hutson v. Young*, 564 S.E.2d 780, 783 (Ga. App. 2002).

Pindar's Georgia Real Estate Law and Procedure, the leading

SPOTLIGHT ON

Isabel M. Garcia, one of the newest additions to the RPLS Executive Committee, is a partner in the law firm of McLarty, Robinson & Van Voorhies, LLP where her practice emphasizes commercial real estate and title insurance. An officer of Piedmont Title Insurance Agency, Inc., Ms. Garcia has experience conducting title examinations throughout the metro Atlanta area, negotiating and drafting real estate documents in commercial transactions, and underwriting a variety of complex commercial acquisition and loan transactions for developers of retail shopping centers, mixed-use developments, apartment complexes, office parks and high-rise office towers.

Ms. Garcia received her B.S. from the University of Florida and in 1999 received her Doctor of Law from Emory University.

treatise on Georgia real estate law, suggests that a purchase agreement, at a minimum, address the following items: (a) identification of the parties and price, terms of payment, disposition of existing or proposed mortgages, time of closing, and the transfer of possession; (b) disposition of insurance, taxes, liens, outstanding leases, fixtures, fuel and other supplies; and (c) reservations or grants of easements appurtenant to the property being sold or to property retained by the seller. DANIEL F. HINKEL, PINDAR'S GEORGIA REAL ESTATE LAW AND PROCEDURE, 6th Ed., Vol. 2, §18-6.

The statute of frauds also requires that the contract be signed by the party to be charged or a person authorized by such party. O.C.G.A. §13-5-30. The agreement does not need to be signed by the party seeking enforcement. *Fraser v. Jarrett*, 112 S.E. 487, 491 (Ga. 1922) ("If a contract for the sale of land is signed by the purchaser, it may be enforced by the seller, though not signed by him; and vice versa . . .").

1. WHO ARE THE PARTIES?

The contract must identify the buyer and the seller and the parties must be persons or entities that can legally contract. *Pierce v. Rush*, 82 S.E.2d 649 (Ga. 1954); see also O.C.G.A. §13-3-20 (stating the age of majority for contracts). If a corporation is party, the contract should be signed by its authorized agent, owner or manager (as provided in its governing organizational documents) in his or her corporate capacity, not as an individual. O.C.G.A. §§ 11-3-402(b)(2), 14-2-151 (corporate seals), 14-5-7 (corporate transfer of real property), 14-11-302 (limited liability company authority to transfer real property); see e.g., *Phillips v. Georgia Dev. Co.*, 149 S.E. 559 (Ga. 1929) (finding a contract signed by an agent individually did not bind the company); *Bowen Builders Group, Inc. v. Reed*, 555 S.E.2d 745 (Ga. App. 2001) (finding a sales contract signed by an owner of a company for property owned by the company was binding on the company). Commercial contracts customarily state this information in the

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opening paragraph. Some simpler contracts, and the standard residential contract form, simply rely upon identification of the parties in the signature blocks.

While the name of an entity need not be exactly correct, the identity of the entity intended must be clear or able to be ascertained by proof and any errors must not be likely to confuse and mislead, or to hide the identity of the entity intended. *Johnson v. Unified Residential Dev. Co., Inc.*, 648 S.E.2d 163, 169 (Ga. App. 2007) (finding that the omission of the words “Dev. Co.” in the name of a corporation was a “mere misnomer” that did not render the sales contract unenforceable). In contrast, an omission of one or more words in the name of an individual would likely be misleading or hide the identity and therefore may render the contract unenforceable. *Id.*

The named seller typically should be the party indicated by the public records as owning the property. Good practice dictates, from the purchaser’s perspective, inclusion in the contract of a representation and warranty by the seller that the seller owns the property. Occasionally, the named seller will not own the property when the contract is signed. This circumstance may arise, for example, if the seller either (a) “controls” the property under another existing contract by which the seller has the right to purchase the property or (b) intends to obtain control—or right to purchase—by an agreement to be executed subsequently. The parties in such a case should address any timing requirements or termination rights associated with the seller’s obligation to obtain title to the property.

A buyer or seller may include the property in an exchange qualifying for tax deferral pursuant to the Internal Revenue Code (the “Code”). The most common type exchange is a so-called “1031 exchange” pursuant to Section 1031 of the Code in which a party, the “exchanger”, includes the property in a “deferred exchange”. The Code requires the involvement of a “qualified intermediary” on behalf of the exchanger and imposes several technical requirements that must be satisfied for an exchange to achieve the desired tax deferral. In such a transaction, the contract, instead of naming the exchanger as a party, will customarily name “[NAME OF QUALIFIED INTERMEDIARY], as qualified intermediary for [THE SELLER/PURCHASER]” and will include other provisions relating to the exchange. Additional documentation will be required for the exchange. Several companies provide exchange services. One of these companies, as well as a tax advisor, should be engaged for an exchange.

2. ASSIGNMENT OF CONTRACT RIGHTS

Purchase agreements that contemplate cash sales are assignable by either party unless the terms of the contract say otherwise. *Mangum v. Jones*, 54 S.E.2d 603, 606 (Ga. 1949); *Pearson v. Courson*, 59 S.E. 907 (Ga. 1907). A contract with personal responsibilities or involving a relation of personal confidence is not assignable without the other party’s consent. *Thurmond v. Allgood*, 86 S.E. 542 (Ga. 1915); *Sims v. Cordele Ice Co.*, 46 S.E. 841 (Ga. 1904) (right to purchase based on credit of purchaser is not assignable by purchaser).

A well-drafted contract includes a provision that expressly states whether the agreement may be assigned by the buyer or the seller. A seller will want to restrict assignment by the buyer to protect against assignment to a party unable to perform under the contract. Restrictions may, for example, include limiting assignment to an entity owned by the named buyer or principals of the named buyer or limiting assignment to a buyer with certain financial qualifications. Note that a provision prohibiting transfer or assignment by a purchaser beyond payment in full of the purchase price may constitute an illegal restraint on alienation. *Cowart v. Singletary*, 79 S.E. 196 (Ga. 1913).

Assignment by the seller during the pendency of a contract, while rare, would typically occur in connection with a sale of the property to a party other than the named purchaser. Such an assignment and sale would not constitute a breach by the seller absent an express covenant that the seller will not enter into other sale agreements or otherwise transfer any interest in the property during the term of the contract. Even so, anyone who buys property from a seller that has the property under contract with another buyer and has notice of the prior contract takes the land subject to that contract and the seller’s obligation to sell. *Brown Loan & Abstract Co. v. Willis*, 102 S.E. 814 (Ga. 1920). For this reason, a buyer may occasionally want to require the seller to agree to record the sales contract (see O.C.G.A. §44-2-6), but such a requirement is atypical unless the contract has an unusually long term.

3. WHAT PROPERTY IS INCLUDED?

The statute of frauds requires that the property being sold be capable of identification. *Smith v. Wilkinson*, 67 S.E.2d 698 (Ga. 1951). The description of the property to be sold must be “clear and definite” but it does not need to be perfect. *Swan Kang, Inc. v. Tae Sang Kang*, 534 S.E.2d 145, 148 (Ga. App. 2000). Although a legal description will be insufficient if it is “so indefinite that no particular tract of land is pointed out,” the statute of frauds only requires that the contract disclose “with sufficient certainty” the quantity and location of the land the seller intends to convey and furnish a key to identification of the particular tract. *Id.* The key must be found within the contract. *Smith*, 67 S.E.2d at 702.

Georgia courts have made the following important conclusions with respect to the sufficiency of legal descriptions:

- Use of the words “more or less” or “approximately” in describing the acreage will not, by itself, render a description insufficient. *Saine v. Clark*, 219 S.E.2d 407 (Ga. 1975); *Bowles v. Babcock & Wilcox Co.*, 76 S.E.2d 703 (Ga. 1953).
- A contract to sell part of a larger tract shown on a plat referred to must identify which part. *McMichael Realty & Ins. Agency, Inc. v. Tysinger*, 270 S.E.2d 88, 89 (Ga. App. 1980).
- A postal address may be a legally sufficient description. *Swan Kang*, 534 S.E.2d 145.
- The description need not state the city, county and state where the land is located if parol evidence is available to

show it. *Stroud v. Moore*, 104 S.E. 633 (Ga. 1920); but see *Murphy v. Morse*, 100 S.E.2d 623 (Ga. App. 1957) (where a street address without reference to a city, county, state or country was too indefinite).

- A reservation in the contract for later insertion of a legal description is only sufficient if the description of the property in the contract, without the later inserted legal description, provides a sufficient key to identify the property. *Murphy*, 100 S.E.2d at 624-25 (stating that the reference to a legal description to be attached later would be sufficient if it had “referred to where the legal description was to be obtained with such definiteness that only one legal description could have been attached”).
- An insufficient legal description renders both specific performance monetary damages unavailable. *Tippins v Phillips*, 51 SE 410 (Ga. 1905).

a. Real Property, Appurtenances and Reservations

The Georgia Code defines realty to include:

- (1) All **lands** and the buildings thereon;
- (2) All **things permanently attached to the land or the buildings** thereon; and
- (3) Any **interest** existing in, issuing out of, or dependant upon land or the buildings thereon.

O.C.G.A. §44-1-2(a) (emphasis added); *Sawyer v. Foremost Dairy Products*, 169 S.E. 115, 118 (Ga. 1933). In contrast, the Georgia Code defines personalty to include “all property which is movable in nature, has inherent value or is representative of value, and is not otherwise defined as realty.” O.C.G.A. §44-1-3(a). In addition, a transfer of realty will include easements and appurtenances that are in existence at the time of the transfer as well as rights that are incident to and necessary for the enjoyment of the land transferred. *Muscogee Mfg. Co. v. Eagle & Phenix Mills*, 54 S.E. 1028, 1034-35 (Ga. 1906). “Appurtenances” are incorporeal rights and privileges incident to the interest being conveyed. *Etheridge v. Gillen*, 34 S.E.2d 105 (Ga. 1945). In the alternative, a deed may contain reservations or exceptions to the interest granted. *Alderman v. Crenshaw*, 66 S.E.2d 265 (Ga. App. 1951). Thus, a buyer and seller should each consider what other aspects of the land may affect their intended use of the property, including machinery, structures, utilities, and equipment. The buyer will want to insure that these items and any rights that seller or any other former owner has previously been granted are included in the sale, either as appurtenances in the legal description of the property (if realty) or through a separate bill of sale (if personalty). These rights may include air rights, mineral rights, access easements, utility easements and other real property rights. Sellers should take care to expressly reserve or except out any rights or items that they do not want to transfer.

i. Improvements and Fixtures

As stated above, generally, anything permanently attached to either land or buildings is considered realty and anything that is not physically attached to the land (is movable) is considered personalty. O.C.G.A. §§ 44-1-2(a), 44-1-3(a); *Sawyer*, 169 S.E. 115. The Georgia Code expands its definition of realty to include fixtures intended to remain on the land:

- (a) Anything which is intended to remain permanently in its place even if it is not actually attached to the land is a fixture which constitutes a part of the realty and passes with it.
- (b) Machinery which is not actually attached to the realty but is movable at pleasure is not a part of the realty.
- (c) Anything detached from the realty becomes personalty instantly upon being detached.

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UPCOMING CALENDAR DATES REAL PROPERTY LAW SECTION

— 2008 —

NOVEMBER 7th, 2008
Materialmen's Lien Seminar
Georgia State Bar Headquarters

NOVEMBER 13th, 2008
Fall Commercial Real Estate
Law Seminar
Georgia State Bar Headquarters

NOVEMBER 13th, 2008
RPLS MONTHLY MEETING
Capital City Club

DECEMBER 16th, 2008
RPLS MONTHLY MEETING

— 2009 —

JANUARY 20th, 2009
RPLS MONTHLY MEETING

FEBRUARY 13th, 2009
Spring Residential Practice Seminar
GPTV – live
FEBRUARY 19th, 2009 – Replay
of Spring Residential Practice Seminar

FEBRUARY 17th, 2009
RPLS MONTHLY MEETING

MARCH 17th, 2009
RPLS MONTHLY MEETING

APRIL 3rd, 2009
Foreclosure Seminar
Georgia State Bar Headquarters

APRIL 21st, 2009
Executive Board Monthly Meeting

MAY 7th - 9th, 2009
Real Property Law Institute,
Amelia Island

MAY 15th, 2009
Construction Materialmen's &
Mechanics' Lien Seminar
Savannah, GA

**SIGNIFICANT RECENT LEGISLATION AFFECTS
REAL ESTATE CLOSING INDUSTRY:
THE HOUSING AND ECONOMIC
RECOVERY ACT OF 2008
SUMMARY OF KEY PROVISIONS AND
THE EMERGENCY ECONOMIC STABILIZATION
ACT OF 2008**

*By: Monica K. Gilroy
Dickenson Gilroy, LLC*

In light of the continuing changes to our economic landscape, including the landmark federal intervention into Freddie Mac and Fannie Mae, it is important to understand how our industry is currently affected by recent legislative corrective measures.

H.R. 3221, the "Housing and Economic Recovery Act of 2008," ("HERA") passed the House on July 23, 2008, by a vote of 272-152. On July 26, 2008, the Senate passed the bill by a vote of 72-13. The President signed the bill on July 30, 2008. The bill is aimed at stimulating economic factors which will in turn stimulate buying and lending behavior. Various aspects of the bill are highlighted below.

- **Homebuyer Tax Credit** - a \$7,500 tax credit that would be available for any qualified purchase between April 9, 2008 and June 30, 2009. The credit is repayable over 15 years (making it, in effect, an interest free loan). The amount of the tax credit is fixed at ten percent of the cost of the home, not to exceed \$7,500.00. Any single-family residence (including condos and coops) that will be used as a principal residence is considered to be eligible property. The tax credit is technically refundable as it reduced income tax liability for the year of the purchase. It can be claimed on the tax return for that tax year. There is an income limit which is the full amount of with credit available for individuals with adjusted gross income of no more than \$75,000 (\$150,000 on a joint return). Phase out above caps (\$95,000 and \$170,000 respectively). The tax credit is limited to first time homebuyers and the Purchaser (and purchaser's spouse) may not have owned a principle residence in 3 years previous to purchase. A portion of the credit (6.67% of credit) is to be recaptured to be repaid each year for 15 years. If home sold before 15 years, then remainder of credit recaptured on sale. The effective date of the tax credit is for purchases from April 9, 2008 through July 1, 2009. The Homebuyer tax credit can be used against the alternative minimum tax credit ("AMT") so the Homebuyer tax credit will not place the borrower into a situation of facing the AMT.
- **FHA foreclosure rescue** -loss mitigation is legislated with the development of a refinance program for homebuyers. This will be especially targeted to homeowners with problematic subprime loans. Lenders will be able to write down qualified mortgages to 85% of the current appraised value and qualified borrowers will be eligible for a new FHA 30-year fixed mortgage at 90% of appraised value. Borrowers would have to share 50% of all future appreciation with FHA. The loan limit for this program is \$550,440 nationwide. Program is effective on October 1, 2008.
- **Government Sponsored Enterprises ("GSE") Reform** – the new legislation includes a strong independent regulator, and permanent conforming loan limits up to the greater of \$417,000 or 115% local area median home price, capped at \$625,500. The effective date for reform is immediate upon enactment, but the loan limits will not go into effect until the expiration of the Economic Stimulus limits (December 31, 2008).
- **FHA Reform** – permanent FHA loan limits are increased to the greater of \$271,050 or 115% of local area median home price with a cap at \$625,500; the law creates a streamlined process for FHA condos and reforms to the FHA manufactured housing program. The down payment requirement on FHA loans will increase to 3.5% (from 3%). The effective date for reforms is immediate upon enactment, but the loan limits will not go into effect until the expiration of the Economic Stimulus limits (December 31, 2008).
- **GSE Stabilization** –HERA includes language proposed by the Treasury Department to authorize the Treasury to make loans to and buy stock from the GSEs to make sure that Freddie Mac and Fannie Mae could not fail.
- **Mortgage Revenue Bond Authority** is now authorized to create \$10 billion in mortgage revenue bonds for refinancing subprime mortgages.
- **Additional Property Tax Deduction** – HERA provides a one-year benefit that will be available to *all* homeowners. Under current law, property taxes are deductible only if an individual itemizes his/her deductions on Schedule A of their tax return. The new provision will permit a deduction of up to \$500 (\$1,000 on a joint return) for all individuals who utilize the standard deduction and do not itemize. Instructions will be provided on the 2008 tax return when it is distributed at year-end.
- **Loan Originator Requirements** – the legislation strengthens the existing state-run nationwide mortgage originator licensing and registration system (and requires a parallel HUD system for states that fail to participate). Federal bank regulators will establish a parallel registration system for FDIC-insured banks. The purpose is to prevent fraud and require minimum licensing and education requirements. The bill exempts those who only perform real estate brokerage activities and are licensed or registered by a state, unless they are compensated by a lender, mortgage broker, or other loan originator.
- **Seller-funded down payment assistance programs** – HERA codifies existing FHA proposals to prohibit the use of down payment assistance programs funded by those who have a financial interest in the sale. The new law does not prohibit other assistance programs provided by non-

profits funded by other sources such as churches, employers, or family members. This prohibition does not go into effect until October 1, 2008.

- **VA loan limits** are temporarily increased so that the VA home loan guarantee loan limits are at the same level as the Economic Stimulus limits which will run through December 31, 2008.
- **Risk-based pricing** – HERA puts a moratorium on FHA using risk-based pricing for one year. This provision is effective from October 1, 2008 through September 30, 2009.
- **National Affordable Housing Trust Fund** – The new law develops a Trust Fund funded by a percentage of profits from the Government Sponsored Enterprises. In its first years, the Trust Fund would cover costs of any defaulted loans in FHA foreclosure program. In out years, the Trust Fund would be used for the development of affordable housing.
- **Community Development Block Grant Funding** is increased to provide \$4 billion in neighborhood revitalization funds for communities to purchase foreclosed homes.
- **Low Income Housing Tax Credit** is modernized to create more efficiency.
- **Modification of \$250,000/\$500,000 Exclusion on gain** – HERA modifies the tax incentive by issuing a \$250,000/\$500,000 exclusion of gain on the sale of a principal residence. Beginning in 2009, the exclusion, as it applies to a second home (or rental property) that is converted to a principal residence will be allocated appropriately. When the second home is sold, any gain attributable to use as a second home (or rental property) will be taxed at capital gains rates. Any gain attributable to use as a principal residence will remain excludable, up to the \$250,000 and \$500,000 limits. A formula is provided for computing the proper treatment of these gains.

To dovetail with HERA, the recently passed Emergency Economic Stabilization Act of 2008 (the “Act”) was signed into law by President Bush on October 3, 2008. http://www.house.gov/apps/list/press/financialsvcs_dem/ess-abill.pdf contains a full view of the Act.

The goal of the Act is to provide the Secretary of the Treasury with immediate authority to create a mechanism to restore liquidity and stability to the US financial system. The Secretary of the Treasury is empowered and authorized to create a Troubled Asset Relief Program (TARP) to make funds available or to commit funds to the purchase up to \$700 billion of troubled assets from any financial institution. The Secretary of the Treasury may spend the \$250 billion immediately. The President can increase the fund from \$250 billion to \$350 billion at any time by written certification to Congress. The final \$350 billion requires

the president to submit a detail report to Congress on how the money will be spent and Congress has a 15 day window to disapprove the Secretary’s plan. In addition to the TARP provision of the Act, there were some add on provisions to “help American consumers and business.” There additional provisions include tax incentives for business to invest and create jobs. There is a temporary increase of the FDIC (Federal Deposit Insurance Corporation) and NCUA (National Credit Union Association) insurance limit on qualified deposits from \$100,000 to \$250,000 until December 31, 2009. There is a provision to provide consumers and small businesses relief from the Alternative Minimum Tax (the “AMT”). Moreover, the Federal Reserve is now authorized to pay interest on Bank Reserve.

The closing industry is more wholly assisted by HERA but the Stabilization Act will serve hopefully for additional mechanism to bolster our industry’s current conditions.

STATUS REPORT ON LEGAL OPINION PROJECT

A committee of the RPLS has recently been formed to review in detail the Report on Legal Opinions to Third Parties in Georgia Real Estate Secured Transactions published in 1997. The committee is in the process of analyzing each substantive provision of the report and the model opinion to see whether any revisions or updates are required. Great progress has been made to date and we expect that the updated report and model opinion will be presented at the 2009 Real Property Law Institute.

Committee members are as follows:

William J. Berg (Kitchens Kelley Gaynes, PC)
David Burge (Smith, Gambrell & Russell, LLP)
Michael R. Davis (Alston & Bird LLP)
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If you have any questions, feel free to contact either of the co-chairs listed below.

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O.C.G.A. §44-1-6; see also *Sawyer*, 169 S.E. 119. Thus, it is the intention of the owner that governs. Similarly, items that are attached to the land may remain personalty if the owner intends that they do not remain on the land. *Sawyer*, 169 S.E. 115. In accordance with this rule, and as provided in the statute, a fixture that is detached from the land is converted to personalty. O.C.G.A. §44-1-6(c); *Sellers v. Sellers*, 46 S.E.2d 205, 206 (Ga. App. 1948) (cut pulpwood was personalty excepted from the sale); *Power v. Garrison*, 81 S.E. 225, 227 (Ga. 1914) (machinery that was attached to the land and would ordinarily be considered realty was converted to personalty when the parties agreed in the purchase contract that the machinery was reserved to the seller). The distinction between whether an item is realty or personalty is important because it determines (A) whether the item will be transferred automatically with the realty in the absence of an express provision and (B) what mechanics are necessary for the effective transfer of such item.

Certain items, such as crops and timber, have led to the creation of specific rules regarding their characterization. All matured and unmatured crops are considered personal property. O.C.G.A. §44-14-101; *Miller v. Jackson*, 10 S.E.2d 35 (Ga. 1940) (crops includes the fruits and products of all trees). Therefore, a sale of farmland would not include crops unless specifically conveyed. See e.g., *Chatham Chemical Co. v. Vidalia Chemical Co.*, 136 S.E. 62 (Ga. 1926). However, plants, trees and shrubs attached to and growing in the soil are part of the realty and would be transferred unless expressly excepted. *Adcock v. Berry*, 21 S.E.2d 605 (Ga. 1942). However, once any plant, tree or shrub is detached from the property, it becomes personalty. *Sellers*, 46 S.E.2d at 206; *Clarke Bros. v. McNatt*, 64 S.E. 795 (Ga. 1909) (“A contract of sale in regard to timber which is attached to the soil, but which is presently to be severed therefrom and converted into personalty before the title is to pass to the purchaser, is an executory sale of personalty, and not of an interest in land.”). An owner can also sever an interest in items of realty from the land through (i) a reservation in a conveyance, (ii) the separate sale of the item, or (iii) a lease of the rights to the item. See e.g., *Simpson v. Powell & Co.*, 123 S.E. 741 (Ga. 1924). Thus, the parties should take care in crafting the language and terms of the contract to match their intentions regarding what will be transferred and to ensure satisfaction of the requisite formalities for an effective transfer.

The language of the contract is especially important because agreement between the parties as to whether an item should be treated as personalty or realty controls. *Power*, 81 S.E. at 227. Parties may agree that an article which would otherwise be realty may be treated as personalty, if the owner and other relevant parties agree, third parties have notice, and such article may be detached without injury. *Farrell v. Atlanta Gas Light Co.*, 5 S.E.2d 607, 609 (Ga. App. 1939). Because there are an extensive amount of rules regarding characterization of different items, and since the parties’ agreement governs, parties to a purchase contract should be as specific as possible regarding what items will be transferred with the land and what will be retained by the seller. See e.g., *Manderson & Associates, Inc. v. Gore*, 389 S.E.2d 251 (Ga. App. 1989) (billboards are personalty because they could be moved with proper equipment despite the height and weight).

ii. Air and Mineral Rights

Unless otherwise stated, “The property right of the owner of real estate extends downward indefinitely and upward indefinitely.” O.C.G.A. §§ 44-1-2(b), 51-9-9; *Sawyer*, 169 S.E. at 118. Therefore, ownership of land includes all mineral and other subterranean rights, and all air rights within the surface boundaries of the property. As with fixtures, a deed or a contract may sever a shape in space or interests in underground features. In addition, a seller’s easement of light and air over an adjoining piece of property may pass to the buyer as an appurtenance if it is necessary to the enjoyment of the land sold, but it will not pass with the land if the buyer can substitute other light at a reasonable cost. O.C.G.A. §44-9-2; *S. A. Lynch Corp. v. Stone*, 87 S.E.2d 57, 62 (Ga. 1955).

With respect to mineral interests, a conveyance of the land without reservation transfers all mineral interests, provided that title to the minerals has not already been severed. *Bryan v. Willingham-Little Stone Co.*, 22 S.E.2d 40 (Ga. 1942). Mineral interests include, but are not limited to, marble, granite, oil and gas rights, sand and gravel, coal, and clay. *Imerys Marble Co. v. J.M. Huber Corp.*, 577 S.E.2d 555, 558 (Ga. 2003) (marble and mineral interests); *Phillips v. Collinsville Granite Co.*, 51 S.E. 666, 670-71 (Ga. 1905) (granite); *Slade v. Rudman Resources, Inc.*, 230 S.E.2d 284 (Ga. 1976) (oil, gas and other minerals); *Smith v. Aggregate Supply Co.*, 102 S.E.2d 539 (Ga. 1958) (sand and gravel); *Zugar v. Crystal Springs Bleachery*, 32 S.E.2d 414 (Ga. App. 1944) (coal); *McCaw v. Nelson*, 147 S.E. 364 (Ga. 1929) (clay). Mineral rights can be severed (and become personalty) by extraction, by a reservation or exception in a conveyance of the land, or by a fee simple sale of the mineral interests. See e.g., *Phillips v. Collinsville Granite Co.*, 51 S.E. 666, 671 (Ga. 1905) (reservation); *Nelson v. Bloodworth*, 232 S.E.2d 547 (Ga. 1977) (sale). Once severed, ownership in the surface and ownership in the minerals are separate and distinct estates. *Georgia Peruvian Ochre Co. v. Cherokee Ochre Co.*, 109 S.E. 609, 612-13 (Ga. 1921).

Grants or reservations of these types of property interests may include easements and appurtenances related thereto. A grant of an interest includes “that without which the grant itself would be of no effect” but only those things that are “incident to the grant and directly necessary to enjoyment of the thing granted.” *Muscookee Mfg. Co. v. Eagle & Phenix Mills*, 54 S.E. 1028, 1034-35 (Ga. 1906). For example, “[a] grant of minerals conveys, by implication, the rights of ingress and egress, and possession of the surface necessary to the use and enjoyment of the estate conveyed.” *Slade v. Rudman Resources, Inc.*, 230 S.E.2d 284 (Ga. 1976); see also *Davison v. Reynolds*, 103 S.E. 248, 249 (Ga. 1920). However, severed interests in mineral rights can create conflicts between rights of the surface owner (to the support and use of his land) and the rights of the mineral owner (to possess the minerals). *Phillips v. Collinsville Granite Co.*, 51 S.E. 666, 670-71 (Ga. 1905) (acknowledging that a holder of rights to granite may not be able to take possession of unexposed granite where taking out the granite would require removal of the surface soil); see also O.C.G.A. §44-5-168 (regarding adverse possession of mineral rights). The Georgia Supreme Court in *Phillips* stated, “Where one grants the sur-

face of land and reserves the minerals, or grants the surface to one and the minerals to another, an implied right to support of the surface passes with the grant of the surface. This does not mean that all of the mineral does not belong to the mineral owner, but that he cannot get it out without leaving a sufficient support, natural or artificial, for the surface.” *Id.* Thus, there may be ambiguity in what rights may be exercised by the parties owning severed interests. The parties should detail express provisions in the contract regarding possession, access, exploration, and extraction to avoid confusion and dispute.

iv. Easements

In addition, the buyer may require certain rights and easements to accommodate the intended use of the property. For example, if the subject property is to be carved from a larger tract and would otherwise be landlocked, the buyer will want to obtain or create easement rights across the remaining portion of the larger tract. Similarly, a seller may want to retain certain rights with respect to the transferred property. For example, if there is a private roadway going through the subject property, the seller may want to reserve an easement over that roadway to preserve access to other parcels retained by the seller. Or, the seller may want to reserve specific rights to the property, such as the right to harvest timber or extract minerals. In any such case, the contract should clearly describe the granted or reserved rights. If these rights or their scope is undetermined when the contract is signed (e.g., where a road will be constructed), the parties may provide for a mechanism for making the determination within a specified time period (e.g., engage an engineer within 15 days). The drafter of such a provision must avoid as much as possible the risk of such mechanism being constructed as an unenforceable “agreement to agree”, but exigencies sometimes require the flexibility of such an approach. *Miami Heights LT, LLC v. Home Depot U.S.A., Inc.*, 643 S.E.2d 1, 3 (Ga. App. 2007) (“If a contract fails to establish an essential term, and leaves the settling of that term to be agreed upon later by the parties to the contract, the contract is deemed an unenforceable agreement to agree.” But, “a deferral of agreement on a nonessential term does not invalidate an otherwise valid contract.” (internal citations omitted)). Regardless of how the final determinations are made, all real property easements and rights should be recited in the deed delivered at closing.

v. Use Restrictions

Property being transferred is always subject to certain encumbrances such as riparian rights, taxation, condemnation and police regulation. It may also be subject to judgments, liens, easements, and leases. Any of these encumbrances, as well as declarations, covenants or restrictions, may impose conditions, limitations, or prohibitions on the use and development of a tract of land. In addition, a buyer and seller may choose to place new restrictions on the land as part of their sale, subject to legal limitations on certain use restrictions. Also, Georgia policy against restraint on alienation may prevent certain use restrictions from permanently affecting the use of the property. See *Jackson v. Jackson*, 113 S.E.2d 766 (Ga. 1960) (finding a restriction that the property be used for a house for a particular family was an unenforceable restraint on alienation).

b. Tangible and Intangible Property

The contract should expressly address any personal property within the land and improvements that is of unique concern, whether it is to be retained and removed by the buyer or transferred to the buyer as part of the sale. This determination will depend in part upon whether the buyer intends to continue the existing use of the property (in which case the buyer may want to obtain all of the operating assets) or to change the use (in which case the buyer may not care or may want to negotiate for removal of the personal property by the seller). The parties should take care to sufficiently describe the personal property as well as the land, because courts have refused to uphold a contract that includes personalty for failure to identify the personalty, even if the land is described. *O'Rear v. Lamb*, 22 S.E.2d 74, 80 (Ga. 1942).

If the property has come to be recognized in the public mind by a particular name, the buyer may want an assignment of the name and the seller's agreement that seller will not use the name for any other property or for any other purposes. If the name is registered as a trademark, then buyer will want to satisfy the requirements for assignment of the trademark. The buyer may also want the seller to assign any equipment warranties, such as manufacturers' warranties for HVAC or other equipment, at least to the extent assignable.

For many transactions, leases will constitute the primary value for the transaction. Purchase contracts for these transactions should include particular provisions, such as requirements for assignment to the buyer, representations and warranties by the seller regarding the status of the leases, requirements that the tenants sign and deliver estoppel certificates to the buyer, and agreement of the seller to cooperate with the buyer to obtain subordination agreements from the tenants for the benefit of a new lender, if any.

The property may also be subject to, or have the benefit of, various other types of agreements that will require attention by the buyer, such as service contracts, management agreements, or leasing agreements. The buyer must determine if it would like these agreements to remain in place beyond the closing. The buyer should negotiate representations and warranties from the seller regarding the existence of such agreements and covenants of the seller to deliver, or make available, copies of the agreements to the buyer. Depending on the type of agreement, the buyer may desire to obtain estoppel agreements from the other parties to the agreement to confirm that the buyer, upon purchasing the property, will not assume unintended liabilities. For example, the property may be subject to continuing agreements that require the owner to pay assessments for various improvements, in which case the buyer will want to confirm that no such payments are in default. If the buyer wants to retain a particular agreement, he should review the agreement to make sure that it is assignable by seller, is not terminable, and will survive the sale of the property. Any third-party consents required to transfer these agreements should be made a condition to closing under the purchase contract and should be obtained as soon as possible.

The remainder of the article to be continued in the winter issue.

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NEW IMPLEMENTATION DATE FOR LIEN LAW CHANGES

In the final version of the legislation that was signed by the Governor, the effective date for the implementation of the changes to the Mechanics and Materialmen's Lien Statute is **March 31, 2009**. The date in the Summer issue of the RPLS newsletter reflects the incorrect date. Please mark the change in your newsletter and take advantage of the additional time to become more familiar with the extensive changes. Sorry for any confusion!!!

TITLE STANDARDS SEMINAR HELD OCTOBER 2ND

ICLE Georgia and the Real Property Section of the State Bar of Georgia recently held its annual Title Standards Seminar: Real Property Basics for the Commercial and Residential Practitioner on October 2nd, at the State Bar Headquarters.

Chaired by RPLS Committee member Jeff Schneider, Weissman, Nowack, Curry and Wilko, P.C., some of the topics included; foreclosure, bankruptcy, lawyer liability and ethical duties regarding defects. The Title Standards can be found on RPLS' website: www.garealpropertylaw.com.