ROAD AND ACCESS LAW

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ROAD AND ACCESS LAW
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I. RIGHTS IN THE ROADS & GOVERNMENT CONTROL

A. Introduction. History has changed and will continue to change the respective rights and duties of private citizens and governmental bodies regarding the use of roads. A century ago, roads were thought to be primarily a way for citizens to travel by foot, by horseback, or by some other animal-drawn conveyance. *Atlanta & W. P. R. Co. v. Atlanta B & A. R. Co.*, 125 Ga. 529, 545-46 (8), 54 S.E. 736 (1906):

> A highway is a public way open and free to any one who has occasion to pass along it on foot or with any kind of vehicle. ... It is the generic name for all kinds of public ways, including, among others, roads, streets, and alleys. ... [It is] free to any one who has occasion to pass along it on foot or with vehicles. It will be observed that there is no restriction as to the person, because, in order to be public, it must be free to every one. Nor is there restriction as to the kind of vehicle to be used as a means of conveyance over the street other than as qualified by the implication that no kind shall be used which within itself, or which by the manner of its use, shall interfere with the general public in their enjoyment of the right of travel over the way. There is no restriction as to the purpose of the use. It may be for pleasure or business or for any cause for which occasion may arise. ... A given street may be a greater necessity to those people residing in the immediate vicinity, but it would not be limited to their uses, because the limitation would at once destroy the public feature of the way, and it would cease to be a public street. For the same reason it could not be restricted to use for the purpose of pleasure or business or any necessity. The nature of the right demands that it be opened for all purposes. It may be a driveway for carriages, or a footway for pedestrians, or a wagonway for hauling loads or for numerous other similar purposes. ... Under the present system, the entire country is open and accessible to every one, affording a splendid opportunity for that intellectual, commercial, and industrial development which follows association with others and exchange of products. The wider the range, the greater the benefit. We should not take a backward step, and the law does not authorize any policy looking to a destruction of this means of communication.

The success of the automobile and the development of earth-moving equipment has changed the situation. Now the car or truck is the norm; pedestrians have only limited rights to use the roads. In an effort to make the roads safer for cars traveling at ever faster speeds, governing authorities have redefined the rights of

the citizens to use the roads for access in ways that would have boggled the minds of the founders of our free republic.

B. Rights in Public Roads. Private citizens have two kinds of rights in the public road system: a *public* right to travel on the highway, in common with all other citizens, and a *private* right of access, ingress and egress, from their property to the public road and back again. *DOT v. Hardin*, 231 Ga. 359, 361, 201 S.E.2d 441 (1973); *SHD v. Strickland*, 213 Ga. 785, 787, 102 S.E.2d 3 (1958). The public right is not a property right protected by the constitution, but the private right is a property right that arises from the ownership of land abutting a public road, and it is automatically protected by the eminent domain clause. *DOT v. Whitehead*, 253 Ga. 150, 151-152, 317 S.E.2d 542 (1984). The private property right does not require that the citizen own the underlying fee of the abutting property; it is sufficient if the citizen has a private easement across adjoining property that provides access. *Lee v. City of Atlanta*, 219 Ga. App. 264, 266, 464 S.E.2d 879 (1995).

Although this right of access belongs to the owner of property, it is not limited to the owner's personal use. Instead, the right of access includes the right to invite customers to one's property. *City of Rome v. Lecroy*, 59 Ga. App. 644, 644, 1 S.E.2d 759 (1939); *MARTA v. Datry*, 235 Ga. 568, 573-575, 220 S.E.2d 905 (1975).

A category of road to which there is no right of access of adjoining owners is the "limited access" highway. OCGA § 32-6-110 et seq. These roads were authorized in 1955 to provide safe, high volume, high speed transportation. OCGA § 32-6-111(a). When a new limited access highway is created, abutting owners have no inherent rights of access to the right-of-way, although the taking may cause consequential damages in the use of the remaining property. *DOT v. Hardin*, 231 Ga. 359, 361, 201 S.E.2d 441 (1973). The conversion of an existing general access highway to a limited access highway may give an abutting owner a right to damages for lost access. *SHD v. Ford*, 112 Ga. App. 270, 271-272, 144 S.E.2d 924 (1965).

A *public* road is defined as a "highway, road, street, avenue, toll road, tollway, drive, detour, or other way open to the public and intended or used for its enjoyment and for the passage of vehicles in any county or municipality of Georgia." OCGA § 32-1-3(24). An owner whose property abuts a *private* right of way has no automatic right of access to the private right of way. *Stutts v. Moore*, 218 Ga. App. 624, 627-28, 463 S.E.2d 30 (1995); *McConnell Drum Service, Inc. v. DeKalb County*, 205 Ga. App. 234, 235, 421 S.E.2d 749 (1992). However, a taking that precludes the use of an adjacent private right of way may be compensable. *Id.*, 236.

C. Access Points Not Protected By Law. Not all driveways from one's property to a public road are considered "property" that is protected by the eminent domain clause. See section F below on the quality of access rights for some

limitations. Also, a driveway that extends from one's property to the road through adjoining property of a third person is not protected in eminent domain unless one has a legal right to the use of the third person's property; mere permissive access through the third person's property is insufficient. *Southwire Co. v. DOT*, 147 Ga. Ap. 606, 607-608, 249 S.E.2d 650 (1978).

D. Access Rights Acquired by Contract. In the typical case, the owner's rights of access to a public road accrue simply by being adjacent to a public road. In other cases, the owner may acquire a right of access by virtue of a contract with the governing authority. See, e.g., *Brown v. DOT*, 195 Ga. App. 262, 393 S.E.2d 36 (1990) (right to park cars on the right-of-way -- see right of way deed in the appendix); *DOT v. Consolidated Equities Corp.*, 181 Ga. App. 672, 674, 353 S.E.2d 603 (1987) (contract requiring DOT to allow left turns to and from the subject property and to signalize the intersection); *Trustees of Atlanta University v. City of Atlanta*, 93 Ga. 468, 475, 21 S.E.74 (1893) (contract gave school the perpetual right to maintain bridge across public road).

E. Geographical Extent of Right of Access. The right of access includes the right to go from one's property to the public road, and from there to the system of public roads, and back. *DOT v. Whitehead*, 253 Ga. 150, 151-52, 317 S.E.2d 542 (1984); *Clayton County v. Billups Eastern Petroleum Co.*, 104 Ga. App. 778, 123 S.E.2d 187 (1961); *SHB v. Baxter*, 167 Ga. 124, 133, 144 S.E. 796 (1928). Consequently, the right of access is damaged either when one's driveway to the public road is damaged or when the abutting public road is entirely disconnected from other public roads.

However, the protection for a citizen's access rights at points beyond the driveway has significantly narrowed since the early 20th century, probably in response to the advent of interstate highways (I-75). Before the interstates, an owner was entitled to compensation if governmental control restricted access to property by closing a route that was a significant means of customer access (*Central of G. R. Co. v. Bibb Brick Co.*, 145 Ga. 149, 157-158, 88 S.E. 676 (1916); *Coker v. Atlanta K. & N. R. Co.*, 123 Ga. 483, 489, 51 S.E. 481 (1905); *Savannah F. & W. R. Co. v. Gill*, 118 Ga. 737, 746, 45 S.E. 623 (1903); *Pause v. City of Atlanta*, 98 Ga. 92, 99-103, 26 S.E. 489 (1895); *Harvey v. Georgia s. & F. R. Co.*, 90 Ga. 66, 68, 15 S.E. 738 (1892)); by closing a route that provided quick access throughout the city (*Pause v. City of Atlanta*, 98 Ga. 92, 102, 26 S.E.2d 489 (1895)); and by closing a route that made it less expensive to deliver products to customers (*Central of G. R. Co. v. Bibb Brick Co.*, 145 Ga. 149, 157-158, 88 S.E. 676 (1916)). More recent cases have continued this line of thinking by recognizing that the purchaser of a lot according to a subdivision plat thereby acquires property rights in the streets and alleys shown on the plat. *Harrison v. City of East Point*, 208 Ga. 692, 693, 69 S.E.2d 85 (1952); *Ward v. Murdock*, 271 Ga. 216, 216 (2), 518 S.E.2d 685 (1999). As late as 1962, the courts recognized that an owner has property rights in the closure of the abutting road at any point up to an adjoining intersection. *Decatur County v.*

Settles, 107 Ga. App. 150, 152, 129 S.E.2d 212 (1962); *Dougherty County v. Long*, 93 Ga. App. 212, 212, 91 S.E.2d 198 (1956).

Starting in 1963, coincidental with the construction of I-75, the Supreme Court ignored its own earlier cases and began holding that changes of the road system that allowed the owner access to the system of road by *any* circuitous route would not violate the owner's constitutional right of access. *Tift County v. Smith*, 219 Ga. 68, 72, 131 S.E.2d 527 (1963); *MARTA v. Fountain*, 256 Ga. 732, 733, 352 S.E.2d 781 (1987); *DOT v. Taylor*, 264 Ga. 18, 19-20, 440 S.E.2d 652 (1994); *DOT v. Bridges*, 268 Ga. 258, 259, 486 S.E.2d 593 (1997).

Pre-1963 cases also recognized that an abutting owner had a right of access "in the whole street" for purposes of maintaining access to his property. *Athens Terminal Co. v. Athens Foundry & Machine Works*, 129 Ga. 393, 401, 58 S.E. 891 (1907) (track laid along road that impeded the flow of business); *Atlantic & B. R. Co. v. McKnight*, 125 Ga. 328, 333-35, 54 S.E. 148 (1906) (railway located in the street, 42 feet from plaintiff's property, "interfered to some extent, slight though it may be, with the right of approach"). In these cases, a property owner was entitled to object to the placement of obstructions on the far side of the road, even though sufficient room remained for travel on the near side of the road.

Likewise, however, the cases since 1963 have established that the placement of a median in a roadway, limiting left turns into and out of the property and access to the entire roadway, do not infringe on the owner's property rights. *Cobb County v. Princeton*, 205 Ga. App. 72, 421 S.E.2d 102 (1992); *Clark v. Clayton County*, 133 Ga. App. 171, 210 S.E.2d 335 (1974); *Dougherty County v. Snelling*, 132 Ga.App. 540, 208 S.E.2d 362 (1974); *Hadwin v. City of Savannah*, 221 Ga. 148, 143 S.E.2d 734 (1965).

These harsh rules do not apply where the governing authority has given the landowner, or its predecessors in title, a contractual right to a certain flow of traffic. *DOT v. Consolidated Equities Corp.*, 181 Ga. App. 672, 675-76, 353 S.E.2d 603 (1987).

F. Points and Quality of Access. The government has the authority under its police power to make reasonable regulations of the private citizen's constitutional right of access to the roads. The government may deny the owner access at *all* points along the boundary between the property and the road, so long as some convenient access remains. *MARTA v. Datry*, 235 Ga. 568, 578, 220 S.E.2d 905 (1975); *DeKalb County v. Glaze*, 189 Ga. App. 1, 2, 375 S.E.2d 66 (1988). The government may regulate the existence of curb cuts for the safety of the public, as shown in the next section. The government's police power is, however, limited by its constitutional duty to pay just and adequate compensation when it takes or damages property (*Dougherty County v. Hornsby*, 213 Ga. 114, 116, 97 S.E.2d 300 (1957); *MARTA v. Datry*, 235 Ga. at 577), and the government may not, without

triggering a right to compensation under the eminent domain clause:

* Deny all access. Thus, conversion of a general access highway into a limited access highway triggers a right of compensation. *DOT v. Hardin*, 231 Ga. 359, 360, 201 S.E.2d 441 (1973); *SHD v. Ford*, 112 Ga. App. 270, 271-272, 144 S.E.2d 924 (1965). Under current law, government may create a new highway as a limited access highway, and abutting owners cannot claim a right of access to the new highway, though any disruption in the use of an owner's property caused by the imposition of an uncrossable roadway is compensable. *Hardin*, supra at 360. It does not matter that the loss of access is temporary only. *DeKalb County v. Cowan*, 151 Ga. App. 753, 755, 261 S.E.2d 478 (1979) (compensation awarded for temporary loss of total income leading to business failure); *Wooley & Co. v. City of Atlanta*, 38 Ga. App. 15, 16 142 S.E. 573 (1928), affd. 169 Ga. 216, 150 S.E. 85 (1929) (compensation awarded after loss of access led to collapse of farm supply business).

* Deny the owner reasonable and convenient access. *Circle K General, Inc. v. DOT*, 196 Ga. App. 616, 617, 396 S.E.2d 522 (1990); *Theo v. DOT*, 160 Ga. App. 518, 519, 287 S.E.2d 333 (1981). Convenient access includes a right of vehicular access. *MARTA v. Datry*, 235 Ga. 568, 575-77, 220 S.E.2d 905 (1975). It also includes the right of access for pedestrians and other various modes of travel. *Atlanta & W. P. R. Co. v. Atlanta B & A. R. Co.*, 125 Ga. 529, 547-48 (8), 54 S.E. 736 (1906).

* Substantially interfere with reasonable access. *MARTA v. Datry*, 235 Ga. 568, 575-577, 220 S.E.2d 905 (1975). Even if the interference is temporary, as long as it is substantial, the owner may recover. *Waters v. DeKalb County*, 208 Ga. 741, 743-745, 69 S.E.2d 274 (1952) (compensation warranted for restaurant that suffered loss of business due to highway construction); *DOT v. Hillside Motors, Inc.*, 192 Ga. App. 637, 642, 385 S.E.2d 746 (1989) (compensation warranted for auto dealership that lost revenue due to trenches dug in frontage road during construction of highway); *City of Rome v. Lecroy*, 59 Ga. App. 644, 644, 1 S.E.2d 759 (1939) (compensation warranted where city left large ditch preventing access by vehicles uncovered for 15 days causing lost revenue).

G. Effectuating the Right of Access. Earlier cases recognized a right of the owner to get access to an adjoining road by his own efforts. An owner could bridge a ditch on public property or construct a grade on public property to get access to and from the road, so long as the owner did not thereby obstruct the ditch or road. *Barham v. Grant*, 185 Ga. 601, 605, 196 S.E. 43 (1938).

Later, the General Assembly passed a statute that authorized the DOT to issue regulations for granting commercial driveways on state highways. The current version of the act may be found at OCGA § 32-6-130 et seq. Under the statute, DOT may make regulations for safety and to specify the circumstances under which permits may be issued or revoked, but a key proviso of this statute prohibits any such regulations from "depriv[ing] the landowner of reasonable access

to the public road on the state highway system." OCGA § 32-6-133(a); *Benton v. Chatham County*, 206 Ga. App. 285, 290-91, 425 S.E.2d 317 (1992). Driveways created or modified after 1973 are subject to the permitting system. OCGA § 32-6-131. Driveways in existence before 1973 that are later adjudged by DOT to be unsafe may be closed or modified by the DOT. OCGA § 32-6-132. DOT bears the cost of such changes unless the driveway had provided "unsafe and unreasonable access from the abutting property, considering that there exists in the owner of the abutting property a private property right to have a reasonable access from such property to the public road as the same was and would have continued to be according to the mode of its original use." OCGA § 32-6-134(b).

The foregoing statutes apply to roads within the jurisdiction of DOT. OCGA § 32-4-42(10) provides similar rules for counties, and OCGA § 32-4-92(a)(7) provides similar rules for cities.

Failure to obtain a proper permit before building a driveway constitutes negligence per se in a tort case alleging that the driveway contributed to the accident. *Keith v. Beard*, 219 Ga. App. 190, 464 S.E.2d 633 (1995).

The government may not arbitrarily deny an abutting property owner the right of access even to limited access highways. *Mansfield v. Standard Oil Co.*, 100 Ga. App. 393, 396, 111 S.E.2d 151 (1959); *Benton v. Chatham County*, 206 Ga. App. 285, 290-91, 425 S.E.2d 317 (1992) ("DOT cannot refuse to issue a commercial driveway permit when the landowner would be obtaining thereby a reasonable access from his property to the public roadway concerned"). Nor may the government condition the approval of an application to build a new driveway onto a limited access highway on retaining the future right to close access without compensation. *Mansfield*, supra, 100 Ga. App. at 396.

In order for the permit to be valid, it must be issued in full accordance with the law. In *Michiels v. Fulton County*, 261 Ga. 395, 405 S.E.2d 40 (1991), a counter clerk issued a permit for a subdivision curb cut onto a large road, contrary to a provision of the governing zoning ordinance. Over a year later, the government was allowed to revoke the permit, without liability to the owners of the subdivision lots.

Commercial driveway permits are often accompanied by a formal conveyance of access rights, except at points shown on the approved driveway plans. Such deeds in effect relinquish pre-existing rights of access at points other than the approved driveway. *King Cotton, Ltd. v. Powers*, 190 Ga. App. 845, 850 (4), 380 S.E.2d 481 (1989).

In a condemnation case, an expert may testify on the probabilities that the governing authority will grant a driveway permit or curb cut for the subject property. *DOT v. Ross*, 148 Ga. App. 256, 257-58 (3), 251 S.E.2d 141 (1978). The availability of a means to apply for a commercial driveway is a factor in

determining the extent to which a condemnation has affected a landowner's access rights. *Benton v. Chatham County*, 206 Ga. App. 285, 290-91, 425 S.E.2d 317 (1992)

H. Uses of Roads other than for Access. Although each landowner has a constitutional right of access to adjoining public roads, the owner has no private right to make other uses of an adjoining road. Thus an owner may use the adjoining road for parking or loading, but this is a right which the owner shares with the public in general, and the government may regulate it or eliminate it without paying compensation. *DOT v. Ladson Investments, Inc.*, 158 Ga. App. 687, 688-690, 282 S.E.2d 171 (1981); *MARTA v. Datry*, 235 Ga. 568, 576, 220 S.E.2d 905 (1975). The owner may enjoy the benefit of shade trees or plants within the public right of way, but the government may again remove them without compensating the owner for their loss. *Castleberry v. City of Atlanta*, 74 Ga. 164, 170 (1885); *Drew v. DeKalb County*, 239 Ga. 35, 36-37, 235 S.E.2d 528 (1977). Improvements built by the landowner on the public right of way adjoining the land may be removed by the government without compensation, even if the government originally consented to the construction of the improvements. *Sutton v. City of Cordele*, 230 Ga. 681, 682-683, 198 S.E.2d 856 (1973).

A landowner may, however, obtain the compensable right to use the public right of way for personal uses by contract with the governing authority. *Brown v. DOT*, 195 Ga. App. 262, 393 S.E.2d 36 (1990) (right to park cars on the right-of-way).

Unlike the rights of the citizen, the government's rights to use the right-of-way have been construed expansively. In addition to facilitating travel, the government may use the right-of-way for the construction of sewers, drains, gas and water lines, communications wires, sidewalks, vegetation and ornamentation. *Franklin v. Board of Lights and Water Works*, 212 Ga. 757, 757-758, 95 S.E.2d 685 (1956).

I. Change of Use by Government. The government may generally change the use of land within the public right of way without compensating the abutting owner for the change. *MARTA v. Gomez*, 261 Ga. 617, 618, 409 S.E.2d 35 (1991) (no compensation when railroad tracks were moved closer to building but still within right-of-way); *Mason v. DOT*, 159 Ga. App. 471, 471, 283 S.E.2d 690 (1981) (no compensation when right-of-way was modified to include drain pipe and no additional property was taken). It must pay compensation, however, if:

* The change affects the right of access or other private property rights. *MARTA v. Datry*, 235 Ga. 568, 575-578, 220 S.E.2d 905 (1975) (road in front of store changed to prevent vehicular access and front of store obstructed); *Athens Terminal Co. v. Athens Foundry & Machine Works*, 129 Ga. 393, 398-399, 58 S.E. 891 (1907) (compensation awarded when railroad tracks laid along street preventing access to business).

* The change exceeds the scope of the original dedication. *SHD v. Alexander*, 222 Ga. 354, 357, 149 S.E.2d 788 (1966) (sidewalk not allowed to be taken for use in expanding road without compensation); *R. G. Foster & Co. v. Fountain*, 216 Ga. 113, 120, 114 S.E.2d 863 (1960) (state not allowed to take sidewalk in order to widen road unless compensation given).

J. Utility Company's Rights to Use the Right of Way.

A utility may seek a permit to place its facilities along the public right-of-way. While governmental authorities may regulate the terms and conditions under which a utility may place facilities in the right-of-way, counties and cities may not impose more stringent regulations than the DOT imposes. OCGA § 32-6-170 et seq. (DOT); OCGA § 32-4-42(6) (counties); OCGA § 32-4-92(a)(10) (cities); *Twiggs County v. Atlanta Gas Light Co.*, 262 Ga. 276, 417 S.E.2d 13 (1992). The governing authority may also not impose its regulations in such a way as to take the utility's property rights. *Bibb County v. Georgia Power Co.*, 241 Ga. App. 131, 525 S.E.2d 136 (1999).

Installation of utility lines on the road right-of-way is deemed to be a use of the right-of-way that is consistent with its fundamental purpose of travel. Therefore, such installation does not entitle an abutting landowner to damages due to increased use of the right-of-way. *Faulkner v. Georgia Power Co.*, 243 Ga. 649, 650, 256 S.E.2d 339 (1979).

K. Government's Duty to Maintain the Right of Way.

The government has a duty to maintain the right of way of public roads. OCGA § 9-6-21(b) authorizes a writ of mandamus against a county if "public roads" in the county are "out of repair; do not measure up to the standards and do not conform to the legal requirements as prescribed by law; and are in such condition that ordinary loads, with ordinary ease, cannot be hauled over such public roads."

Under OCGA § 32-1-3(24), a "public road" is defined as a "highway, road, street, avenue, toll road, tollway, drive, detour, or other way open to the public and intended or used for its enjoyment and for the passage of vehicles in any county or municipality of Georgia." The term does not apply to roads that have not been "opened," even if the government has accepted a dedication. *Chatham County v. Allen*, 261 Ga. 177, 178, 402 S.E.2d 718 (1991).

The duty to maintain the right of way may also be enforced in tort, subject to the limitations of governmental immunity and the Georgia Tort Claims Act. *Lennen v. DOT*, 239 Ga. App. 729, 521 S.E.2d 885 (1999) (DOT liable if its "plan, design, operation or maintenance was not in substantial compliance with generally accepted engineering or design standards in effect at the time of preparation of the plan or design").

II. TYPICAL ROAD AND ACCESS PROBLEMS

A. Changing Land Use

This section deals with litigation that arises when land use changes, resulting in the creation, alteration, or change of use of the roads.

1. Effect on Property Rights. In all cases, the landowner seeking recovery of damages due to the road change must establish that the change has affected some property right, some right belonging to the owner by virtue of owning the property, rather than a general right belonging to the owner simply as a citizen. *Tift County v. Smith*, 219 Ga. 68, 72, 131 S.E.2d 527 (1963). As shown above in Section I of this paper, some road changes are compensable as affecting the owner's property rights, while others are not. The difference has been expressed in several ways:

* Whether the alleged damage affects everyone in or passing through the vicinity, without regard to their interest in property, *Hillman v. DOT*, 257 Ga. 338, 340, 359 S.E.2d 637 (1987);

* Whether the damage is peculiar to the condemnee because of the ownership of condemnee's property, *Tift County v. Smith*, 219 Ga. 68, 72, 131 S.E.2d 527 (1963);

* Whether the damage is shared by the general public or substantially and materially interferes with the owner's access to or use of the property, *Valley View Church of God in Christ, Inc. v. Atlanta Housing Auth.*, 157 Ga. App. 6, 7, 276 S.E.2d 71 (1981);

* Whether the burden imposed on the condemnee differs in character from the burden placed by the taking on the general public, *DOT v. Eastern Oil Co.*, 149 Ga. App. 504, 254 S.E.2d 730 (1979).

In any case, the damage does not have to be absolutely unique; as long as it affects the convenience, accessibility, or use of the property, it is a special damage even if all other owners of neighboring property sustain the same damage by virtue of their ownership of property. *Circle K General, Inc. v. DOT*, 196 Ga. App. 616, 617, 396 S.E.2d 522 (1992); *Williams v. SHD*, 124 Ga. App. 645, 646-647, 185 S.E.2d 616 (1971).

2. Effect from the Part Taken (Condemnation Cases Only). In direct condemnation cases, unlike inverse condemnation cases, the damage must flow from the property rights actually taken. *Simon v. DOT*, 245 Ga. 478, 478-479, 265 S.E.2d 777 (1980). In a direct condemnation, the owner may not recover from damages flowing from the taking of nearby property (*Riviera Assoc. v. DOT*, 174 Ga.

App. 29, 30, 329 S.E.2d 221 (1985)), from the overall project (*Simon*, supra), or from governmental actions before or after the taking (*Josh Cabaret, Inc. v. DOT*, 256 Ga. 749, 749-750, 353 S.E.2d 346 (1987); *Lee v. DOT*, 191 Ga. App. 1, 3, 380 S.E.2d 726 (1989) (denial of permit to build large building was based on knowledge that a future condemnation would remove sufficient parking for the building)).

In evaluating the property rights taken, consideration must not be limited to the situation as designed by the condemnor in its construction diagrams. On occasion, the condemnor changes the plans, either during construction or long after, and if the condemnor acquired the rights to make such changes, the condemnee may not seek compensation for damages later. Hence, the condemnee may prove damages for the possibility of such changes at the time of the taking. For example, in *MARTA v. Gomez*, 261 Ga. 617, 618, 409 S.E.2d 35 (1991), the court ruled that no compensation was warranted when the government moved a rail track closer to the landowner's property because the original description of the right of way made no mention of keeping the right of way in the same condition when the taking occurred. Such a damage must be recovered in the original taking.

The damage, in a direct condemnation case, must be caused by the taking of property rights rather than changes of traffic for reasons unrelated to the taking of property rights. *DOT v. Taylor*, 264 Ga. 18, 20, 440 S.E.2d 659 (1994) (no compensation when bridge was widened and access to property was inconvenienced).

3. Typical Access Problems

* **Changing traffic flow**: making a road one-way, dead-ending a road, imposing a median on a road, re-routing traffic, etc. Unless a property right is affected, this is not compensable. *Tift County v. Smith*, 219 Ga. 68, 72, 131 S.E.2d 527 (1963) (no compensation when city created cul-de-sac that inconvenienced access to property); *Hadwin v. City of Savannah*, 221 Ga. 148, 149, 143 S.E.2d 734 (1966) (unsuccessful action brought to force city to create an opening in the median of a highway); *Clark v. Clayton County*, 133 Ga. App. 171, 172, 210 S.E.2d 335 (1974) (no compensation when median providing direct access to property was closed); *DOT v. Katz*, 169 Ga. App. 310, 312-313, 312 S.E.2d 635 (1983) (no compensation when traffic was changed from two-way to one-way); *Cobb County v. Princeton Assoc.*, 205 Ga. App. 72, 72, 421 S.E.2d 102 (1992) (no award for creation of raised median preventing direct access to property).

* **Closing driveway access**. This is typically compensable unless the owner retains adequate access to the same street. *Shugart v. DOT*, 184 Ga. App. 692, 693, 362 S.E.2d 474 (1987) (ending direct access and forcing the owner to allow access through other adjoining property authorizes an award of damages).

* **Changing grade of access**, making access difficult or unappealing, or

diminishing visibility, or diverting surface run-off to the property, or interfering with the internal configuration or use. This is usually compensable. *DOT v. 0.590 Acres of Land*, 174 Ga. App. 589, 591, 330 S.E.2d 738 (1985) (diminished visibility of property from nearby mall led to award); *DOT v. Kendricks*, 148 Ga. App. 242, 246, 250 S.E.2d 854 (1978) (loss of visibility and display area for tractor/farm equipment dealership led to award); *Harrell v. Monroe County*, 147 Ga. App. 685, 686, 250 S.E.2d 20 (1978) (land damaged as a result of grading of an adjoining road); *Mayor of Buford v. Light*, 65 Ga. App. 99, 99, 15 S.E.2d 459 (1941) (compensation awarded for diminution of value of property due to grading of road); *City of Atlanta v. Dinkins*, 46 Ga. App. 19, 23-25, 166 S.E. 429 (1933) (compensation awarded for the lowering of spur track of railroad which provided access to business); *Mayor of Americus v. Phillips*, 13 Ga. App. 321, 321, 79 S.E. 36 (1913) (award given for resulting flooding after road grade was changed).

Often condemnors have "neglected" to mention that they were changing the grade of the road and obtained signatures on right-of-way deeds from owners who simply saw an overhead representation of where the road was to be built. Such deeds can be set aside for failure of the condemnor to disclose its plans to change substantially the elevation of an adjoining roadway, *Whipple v. County of Houston*, 214 Ga. 532, 105 S.E.2d 898 (1958); *Clay v. DOT*, 198 Ga. App. 155, 400 S.E.2d 684 (1990); *East Point v. Allison*, 97 Ga. App. 499, 103 S.E.2d 664 (1958), at least as long as the owner is justified in assuming that the road will remain at grade level. *White County v. Wooten*, 219 Ga. 236, 132 S.E.2d 653 (1963).

* **Changing points of access**, making access difficult or interfering with internal configuration. This is usually compensable. *Dougherty County v. Hornsby*, 213 Ga. 114, 117, 97 S.E.2d 300 (1957) (installation of curbing and raised median as well as faulty construction of driveway); *Richmond County v. 0.153 Acres of Land*, 208 Ga. App. 208, 209, 4370 S.E.2d 47 (1993) (moving the curb cut closer to an intersection may make access less convenient and authorize an award of damages); *Brown v. DOT*, 191 Ga. App. 321, 322, 381 S.E.2d 532 (1989) (moving curb closer to intersection and adding a right turn only lane); *DeKalb County v. Glaze*, 189 Ga. App. 1, 2-3, 375 S.E.2d 66 (1988) (installation of curbs restricted access to store). If the change leaves adequate access, however, the owner is not entitled to recover simply because there is less access than before. *Homeyer v. SHD*, 112 Ga. App. 462, 464, 145 S.E.2d 613 (1965).

* **Changing proximity of road**, thereby placing the traveled roadway too close to facilities, or increasing danger from the road. This can be compensable. *DOT v. Swanson*, 191 Ga. App. 752, 754, 382 S.E.2d 711 (1989) (taking resulted in loss of vegetation shielding property from interstate); *AGS Embarcadero Assoc. v. DOT*, 185 Ga. App. 574, 576, 365 S.E.2d 125 (1988) (award for taking resulting in exit ramp 15 feet from building); *DOT v. Brown*, 155 Ga. App. 622, 623-624, 271 S.E.2d 876 (1980) (award for splitting land into smaller segments resulting in increased noise in nearby house); *DOT v. Driggers*, 150 Ga. App. 270, 272, 257

S.E.2d 294 (1979) (award warranted for property taken as right of way for interstate near house); *SHD v. Davis*, 129 Ga. App. 142, 144, 199 S.E.2d 275 (1973) (award for property so divided as to substantially diminish its value); *SHD v. Geehr*, 112 Ga. App. 664, 664, 145 S.E.2d 736 (1965) (curve in road for which property was taken may warrant increased award).

* **Creatings a new road**, dividing a tract and interfering with its utility. *DOT v. Hardin*, 231 Ga. 359, 361, 201 S.E.2d 441 (1973).

B. Loss of Privacy

The privacy afforded by a piece of property, and its consequent aesthetic appeal, is an element that may add to its value. *Macon-Bibb County Water & Sewerage Auth. v. Reynolds*, 165 Ga. App. 348, 350, 299 S.E.2d 594 (1983) (condemnee claimed damages due to cutting a line for a sewer easement through wooded land next to river due to -- in condemnor's attorney's words -- "dune buggy accessibility"). The imposition of public facilities on the property, in such a way as to detract from or spoil the owner's privacy and view, entitles the owner to compensation. *Reynolds*, supra; *Georgia Power Co. v. Bray*, 130 Ga. App. 618, 620, 204 S.E.2d 351 (1974), revd. on other grounds, 232 Ga. 558, 207 S.E.2d 442 (1974).

It may be possible to extend the scope of privacy rights by granting a "privacy easement" in certain circumstances. See the appendix for such an easement in *City of Eastman v. Hall.*

III. LITIGATING THE ROAD CASE

A. The Importance of Historical Research

Where the existence of access rights is disputed, it is critical to examine various sources of information:

* **Deeds** in the chain of title, particularly right-of-way deeds.

* **Plats** of the subject property and neighboring properties. These can help locate existing access and right-of-way lines, show dedications of roads, etc.

* **Aerial photographs** of the property. These can often be obtained from the county's tax assessors office. Most of these are collected by the University of Georgia. Visit its online "Map Room" at:

http://www.libs.uga.edu/maproom/ahtml/mchpi1.html

which will provide information about availability from the university. Their aerials

are not, however, available for online viewing. Recent aerial photographs are available for online viewing at Microsoft's Terraserver:

http://terraserver.microsoft.com

* **Right-of-way Permits**, and plats accompanying them.

* **Business license or Zoning Applications**.

* **Prior owners of the subject property or neighboring property**.

* **Current survey**, seeking evidence of historical access points.

Many of these techniques are illustrated in the case study on *DOT v. Harper* in the appendix.

B. The Survey

In *Walker v. Hurd*, 195 Ga. App. 855, 394 S.E.2d 925 (1990), one property owner applied for a driveway based on a survey that erroneously reflected that he owned the plaintiff's neighboring property. When DOT orally refused plaintiff's request for a driveway on grounds that it had already granted all of the driveways that it was going to grant for what it erroneously considered one larger lot, the plaintiff sued DOT and the surveyor. DOT caved in and granted access rights. Plaintiff's suit against the surveyor was dismissed in part on grounds that the survey was not intended for plaintiff's benefit, but also on grounds that the plaintiff was not damaged, due to plaintiff's failure to ask *formally* for a driveway, which was granted upon the formal filing of the complaint. Under other circumstances, though probably rare ones, the surveyor might have been liable.

The DOT's survey should show any access points that exist after the taking. If it fails to do so, the condemnee may offer evidence that the property has been deprived of access by the taking. *DOT v. Brooks*, 153 Ga. App. 386, 389-90 (3), 265 S.E.2d 610 (1980).

C. The Decree

The property description controls the rights taken in a condemnation case. A party may not change them at trial by taking a position contrary to the property description. *DOT v. Worley*, 150 Ga. App. 768, 770-771 (2), 258 S.E.2d 595 (1979) (condemnor's attorney's statement "in his place" that the taking was not intended to acquire all rights of access and that he would file a conforming amendment to the taking was ineffective to change the description by which the condemnor took all access rights); *City of Dalton v. Smith*, 210 Ga. App. 858, 859, 437 S.E.2d 827 (1993) (document executed at time of trial purporting to grant access was inadmissible

because the issue in a condemnation case is the value of the property at the time of the taking).

IV. ODDS AND ENDS

A. Transactions: Inspection of the Property, Title

Generally, parties are bound by the deeds in the chain of title, and indeed by extrinsic documents (such as contracts) referred to in those deeds. *Southeast Toyota Distributors, Inc. v. Felton*, 212 Ga. App. 23, 25 (1), 440 S.E.2d 708 (1994). Hence, a prudent title search will require examination of the deeds in question for potential access (and other) problems and the production of unrecorded documents that may affect access (and other) rights.

Likewise, a purchaser will be charged with notice of an easement where inspection of premises would have readily revealed such physical facts as would put the purchaser upon inquiry in the exercise of ordinary diligence. *Carroll v. Pierce*, 221 Ga. App. 805, 805(1), 472 S.E.2d 560 (1996). Therefore, it is prudent for purchasers to obtain a survey to determine the exact bounds of a roadway on the subject property. The existence of a public road on the land, known to the purchaser, is not such an incumbrance as would constitute a breach of the covenant of warranty. *Hood v. Spruill*, 242 Ga. App. 44, 528 S.E.2d 565 (2000) (purchaser could not recover from seller because the purchaser knew of the existence of a road on the subject property, even if the purchaser did not know that it was 50 feet in width).

B. Deeds

A landowner can reserve the right to use a portion of the public right of way by an express stipulation in the right of way deed. *Brown v. DOT*, 195 Ga. App. 262, 263-264, 393 S.E.2d 36 (1990), the text of which appears in the appendix. The deed may impose other conditions, such as the requirement that the government retain a stop light at the entrance to the property (*DOT v. Consolidated Equities Corp.*, 181 Ga. App. 672, 674, 353 S.E.2d 603 (1987)) or a bridge over the public road. *Trustees of Atlanta University v. City of Atlanta*, 93 Ga. 468, 475, 21 S.E. 74 (1893). The violation of such conditions triggers a right to compensation on behalf of the landowner.

C. Avoiding Conflicts of Interest

From the condemnee's perspective, conflicts occur frequently when there are multiple condemnees or interests in the property taken.

Landlord-Tenant: The terms of a lease may place the landowner and tenant

at odds over the award or control of the litigation, and must therefore be inspected closely. For example, a lease may assign all of a lessee's rights to the lessor in the event of condemnation. *Henson v. DOT*, 160 Ga. App. 521, 287 S.E.2d 299 (1981). If so, the lessor is entitled to a verdict for the value of the lessee's interest although the lessor would not be entitled to this sum but for the assignment. *Fulton County v. Bailey*, 107 Ga. App. 512, 130 S.E.2d 800 (1963). A lease may assign to the lessor the right to collect full payment, subject to allocation between lessor and lessee, the effect of which is to eliminate the tenant as a condemnee, but to require that the landlord seek compensation for the lessee's benefit and to distribute to the lessee the part due to the lessee. *Simmerman v. DOT*, 167 Ga App 383, 307 SE2d 4 (1983). For an agreement to divest the lessee of its rights, the language must be clear and explicit. *DOT v. Calfee Co. of Dalton, Inc.*, 202 Ga. App. 299, 414 S.E.2d 268 (1991). Clauses terminating the leasehold in the event of condemnation do not automatically divest a lessee of its right to recover for the loss of its tenancy. *Franco's Pizza & Delicatessen, Inc. v. DOT*, 178 Ga. App. 331, 343 S.E.2d 123 (1986). As between the lessor and lessee, a condemnation of the entire premises will not affect the lessee's debt to the lessor for rent absent special terms in the lease. *Sims v. Foss*, 201 Ga. App. 345, 411 S.E.2d 59 (1991). The validity of a lessee's unilateral termination of a lease based upon clauses allowing cancellation if a substantial part of the premises is condemned or if the condemnee determines in good faith that the property is unusable may be resolved by the trial court. *Continental Corp. v. DOT*, 172 Ga. App. 766, 324 S.E.2d 588 (1984); *Carasik Group v. City of Atlanta*, 146 Ga. App. 211, 246 S.E.2d 124 (1978).

Other cases: Though less litigated, similar conflicts can occur when the parties are life tenants and remaindermen, mortgagors and mortgagees, and any other case in which ownership is divided. As between the life tenant and remaindermen, the award of compensation stands as a whole in place of the property, and the life tenant is entitled to the interest on the award, with the principal reserved for ultimate distribution to the remaindermen. *Baxley v. Moody*, 195 Ga. App. 699, 394 S.E.2d 623 (1990). In the absence of controlling contract provisions, the rights of the parties among landowner, tenant, and mortgage-holder are governed by general rules of priority. Hence, the rights of a tenant to compensation are superior to a subsequent lienholder, unless the tenant's rights are contractually subordinated to the lienholder's rights. *Raiford v. DOT*, 206 Ga. App. 114, 424 S.E.2d 789 (1992). Typically, in case of a partial taking, the award of compensation should be apportioned so as to compensate the secured party for the value of its interest. *Harwell v. Georgia Power Co.*, 250 Ga. 435, 298 S.E.2d 498 (1983).

Tenants in common, however, usually have a common interest in the property and may be safely represented jointly in normal circumstances. Likewise, there is generally no conflict between the seller and purchaser who have a binding contract for sale at the time of the taking, because an equitable conversion occurs, by which the law treats the property as if it were already owned by the purchaser,

who is entitled to the award of compensation for the taking. *Simmons v. Krall*, 201 Ga. App. 893, 412 S.E.2d 559 (1991). A conflict may occur if there is a dispute as to the enforceability of the contract.

D. Attorney's Fees

Attorneys representing condemnees on a contingent fee basis should realize that a mortgage lienholder's interest is generally superior to the attorney's lien. *Leiden v. General Motors Acceptance Corp.*, 136 Ga. App. 268, 220 S.E.2d 716 (1975). If the debt exceeds the award, there may be no recovery on which the attorney may enforce a lien or from which the attorney may be paid. The lawyer may seek an agreement with the mortgage holder that the attorney's fee will be paid from any recovery. Alternatively, the landowner may re-finance the property, eliminating the prior lien, in which case the attorney's lien on the case may take priority.

There is no general authority for recovery of attorney's fees and other expenses of litigation from the condemning authority. Instead, such fees are allowed:

* When it is determined that the condemnor may not acquire the property or abandons the property or condemnation proceeding. OCGA §§ 22-4-7, 32-8-1(a)(2)(B).

* In inverse condemnation cases where the government has taken or damaged property rights without paying for them. OCGA §§ 22-4-8, 32-8-1(a)(2)(C). It is possible that this rule applies in all inverse condemnation cases, even if the foregoing statutes do not apply. *DOT v. B & G Realty, Inc.*, 197 Ga. App. 613, 398 S.E.2d 762 (1990); *De Kalb County v. Daniels*, 174 Ga. App. 319, 329 S.E.2d 620 (1985); *Taylor v. Georgia Power Co.*, 137 Ga. App. 44, 222 S.E.2d 869 (1975).

* In cases in which the condemnor (like any other parties in civil cases generally) asserts a frivolous position, litigates to harass the opponent, or unnecessarily expands the proceedings by improper conduct. OCGA § 9-15-14; *DOT v. Woods*, 269 Ga. 53, 494 S.E.2d 507 (1998).

APPENDIX

DOT v. Harper: Historical Research on Access

1. Aerial Photograph, 1938
2. Right of Way Deed, 1946
3. -- Plat referred to in 1946 Right of Way Deed
4. Aerial Photograph, 1950
5. Aerial Photograph, 1964
6. Aerial Photograph, 1967
7. 1972 plat of neighboring property, referring to 1964 plat on subject property
8. Temporary Conditional Permit, 1978
9. -- Plat accompanying 1978 Temporary Conditional Permit
10. -- Agreement accompanying 1978 Temporary Conditional Permit
11. Aerial Photograph, 1980
12. Temporary Conditional Permit, 1988
13. -- Plat accompanying 1988 Temporary Conditional Permit
14. -- Right of Way Deed accompanying 1988 Permit
15. April 1993 Revocation letter
16. Diagram showing situation before the taking in June 1993
17. Diagram showing situation after the taking in June 1993
18. Aerial Photograph 1996, from Microsoft Terraserver
    http://terraserver.microsoft.com/advfind.asp

Brown v. DOT: Contractual Reservation of Access Rights

19. Right of Way Deed, 1954

City of Eastman v. Hall: Protecting privacy interests

20. Privacy Easement

DOT v. Parten: Road widening: Effect on parking, visibility

21 Cross-section before taking
22 Cross-section after taking
23 Parking situation after taking

Misc. Pictures Showing Road Widening/Change of Grade Issues

24 #1 Truck stuck on DOT approved 6% slope
#2 "Mommy, where did the front yard go?"
#3 Slope into gas station
#4,5, Front/back of restaurant that had been on road grade; DOT neglected to mention the change of grade when getting owner to sign right-of-way deed.

From *Brown v. DOT*

Italicized text was typed onto the printed form

STATE OF GEORGIA
COUNTY OF BIBB

WHEREAS, the State Highway Department of Georgia and the County of Bibb desire to construct a road between Macon and Gray known as (Federal) (~~State~~) Aid Project No. F-002-4 (2).

AND WHEREAS, the Project will extend within the limits of the City ~~or County~~ of Macon, Georgia,

I or We, A. O. B. Sparks, owner(s) of the Property, do hereby agree to a slope easement in accordance with widths listed below:

Station 26+01, from a distance of 44 feed from Centerline to a distance of 46 feet from Centerline.

Station 26+53, from a distance of 44 feed from Centerline to a distance of 47.5 feet from Centerline.

Such easement to be Right of Centerline, beginning at Station 26+01 and extending to Station 26+53.

Such easement to be used for the construction of slopes and/or ditch to road on the above project.

This grant is expressly conditioned upon the curb being lowered to provide vehicular access to the undersigned's adjacent property.

This the 21st day of June 1954. ...

==

STATE HIGHWAY DEPARTMENT OF GEORGIA
RIGHT OF WAY DEED

GEORGIA, Bibb County Project No. F-002-4(2)

THIS CONVEYANCE made and executed the 21st day of June 1954

Witnesseth that A. O. B. Sparks, the undersigned, is the owner of a tract of land in said county through which a state aid road, known as project No. F-002-4(2), on State Highway No. 11 & 22 between Macon and Gray has been laid out by the State Highway Department of Georgia as a part of the State Aid Road System of Georgia, as provided in Acts of the General Assembly of Georgia of 1919 and 1921, said road being more particularly described in a map and drawing of said road in office of the State Highway Department of Georgia, Atlanta, Ga., to which reference is hereby made.

Now therefore, in consideration of the benefit to my property by the construction or maintenance of said road, and in consideration of ONE DOLLAR ($1.00) in hand paid, the receipt of which is hereby acknowledged, I do hereby grant, bargain, sell and convey to said State Highway Department of Georgia, and their successors in office so much land in Land Lot No. ___ of the ______ Land District or ____ G. M. District of said County as to make a right of way for said road as surveyed and measured from the center line of the highway location as follows: From Sta. 26+20 to Sta. 26+60 a strip 44 ft. wide Right side

This grant and conveyance is expressly conditioned upon the curb being lowered at the curb line as shown upon the attached plat, so as to provide vehicular access

to the undersigned's adjacent property shown upon said plat, and to the paving of the area between the curb line as shown and the inside edge of the sidewalk.

...

AND for the same consideration, I do further grant the right to all necessary drainage in the construction and maintenance of said road constructed over the said right of way and on my lands adjacent thereto, and also release said County and State Highway Department from any claim of damage arising on account of construction of said roads or fills and embankments, ditches or culverts or bridges, on account of back water, changing of courses of streams, or in any other manner.

To have and to hold the said conveyed premises in fee simple.

I hereby warrant ~~that I have the right to sell and convey said land and bind myself, my heirs, executors and administrators forever to defend by virtue of these presents.~~ *the title to said described property only as against myself and those claiming through or under me.*

...