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The Relationship between Direct Condemnation and Inverse Condemnation under Georgia Law

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Research Guides

The Relationship between Direct Condemnation and Inverse Condemnation under Georgia Law

Guide Information

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Guide Index

1. Introduction
2. Primary Sources
3. Secondary Sources
4. Computerized Research
5. Associations and Interest Groups

1. Introduction

a. Topic Overview

To many, the concept of direct condemnation through eminent domain is a familiar topic within Georgia law. Many Georgia citizens and businesses are faced with eminent domain through projects by the Department of Transportation requiring the acquisition of private land. However, the concept of inverse condemnation is not as familiar to many citizens within the state of Georgia.

While direct condemnation requires a substantial desire and action to take private land, inverse condemnation often occurs accidentally and indirectly. By unintentionally damaging private property, a government entity has likely created a cause of action for inverse condemnation. Inverse condemnation is a cause of action against the government to recover the value of property which has been taken by the government, even though no formal exercise of eminent domain has been attempted.

While direct condemnation and inverse condemnation represent two entirely different topics, the two actions are often intertwined and confused. The purpose of this research guide is to provide a starting point for one analyzing the relationship between direct condemnation and inverse condemnation under Georgia law.

b. Scope of This Topic

This research guide is intended to provide an introduction to the relationship between direct condemnation and inverse condemnation in Georgia. This research guide analyzes the relationship between direct condemnation and inverse condemnation in Georgia by looking at primary sources of Georgia law and a variety of secondary sources. The research guide also suggests different systems of computerized research that will assist a user of this guide in his continued research tasks.

d. About the Author

This research guide was prepared for Professor Nancy Johnson's Advanced Legal Research class in Spring 2010 by Lauren Meadows, a third year law student at Georgia State University's College of Law. Send an email to njohnson@gsu.edu for more information about this bibliography.

c. User Warning

This legal bibliography does not constitute legal advice and is not comprehensive. It has not been updated since April 2010. This research guide should serve as a starting point for researching the effects of inverse condemnation in Georgia. The materials below do not address all issues that will arise, and researchers should read the full text of the resources cited. If you have questions as to how to proceed with your research, please consult a legal reference librarian.

Back to Top

2. Primary Sources

a. Constitution of the State of Georgia

- Ga. Const. Art. 1, § 3, Para. 1

-This paragraph of the Georgia Constitution, quoted below, serves as the legal basis for both direct and inverse condemnation actions.

(a) Except as otherwise provided in this Paragraph, private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.

(b) When private property is taken or damaged by the state or the counties or municipalities of the state for public road or street purposes, or for public transportation purposes, or for any other public purposes as determined by the General Assembly, just and adequate compensation therefor need not be paid until the same has been finally fixed and determined as provided by law; but such just and adequate compensation shall then be paid in preference to all other obligations except bonded indebtedness.

(c) The General Assembly may by law require the condemnor to make prepayment against adequate compensation as a condition precedent to the exercise of the right of eminent domain and provide for the disbursement of the same to the end that the rights and equities of the property owner, lien holders, and the state and its subdivisions may be protected.

(d) The General Assembly may provide by law for the payment by the condemnor of reasonable expenses, including attorney's fees, incurred by the condemnee in determining just and adequate compensation.

(e) Notwithstanding any other provision of the Constitution, the General Assembly may provide by law for relocation assistance and payments to persons displaced through the exercise of the power of eminent domain or because of public projects or programs; and the powers of taxation may be exercised and public funds expended in furtherance thereof.

b. Official Code of Georgia Annotated

1. Direct Condemnation

- O.C.G.A. § 22-1-2

-This section of Georgia Code discusses the government's right to obtain land through the process of eminent domain.

- O.C.G.A. § 22-1-9

-In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for property owners, and to promote public confidence in land acquisition practices, the General Assembly requires that all condemnations and potential condemnations adhere to the following policies and practices to the greatest extent possible:

(1) The government authority to make every reasonable effort to acquire property by negotiation.
(2) The government authority must generally appraise the property before negotiation and allow the owner to accompany the appraiser during the inspection of the property.
(3) The government authority must determine an amount it believes to be just compensation, which must not be less than the independent appraisal of the fair market value of the property, and it must provide a written statement of, and summary of the basis for, that amount.
(4) This amount of just compensation should be paid or tendered into court before the owner is required to surrender possession.
(5) The government authority shall not act in bad faith to compel an agreement regarding the price for the property.
(6) If the government authority cannot acquire the property by negotiation, the condemning authority

shall institute formal condemnation proceedings.

-O.C.G.A. § 22-1-10(a).

-Before a governmental authority may condemn private property, notice must be given to the public by a roadway sign near the project at least 15 days before the resolution for condemnation is to be considered, and each condemnee must be served with notice of the meeting at least 15 days before the hearing.

-O.C.G.A. § 22-1-10.1

-After a favorable resolution for condemnation is passed, the government authority may not file condemnation proceedings until 30 days elapse, unless an emergency exists or the owner consents..

- O.C.G.A. § 22-2-100 et seq.

-The special master method of condemnation is not limited to transportation takings and may be utilized by a government authority so long as it articulates a legitimate public use for the condemnation of the building.

-O.C.G.A. § 32-3-1 et seq.

-A condemning body may acquire property for transportation purposes through the declaration of taking method.

- However, the declaration of taking method only applies to public road or transportation purposes.

2. Indirect Condemnation

-O.C.G.A. § 22-1-8

-This section states that any government entity that damages private property shall proceed as set forth in the eminent domain title of Georgia Code.

c. Georgia Case Law

1. Direct Condemnation

-Georgia Court of Appeals

-Hulsey v. Dept. of Transp., 230 Ga. App. 763, 765, 498 S.E.2d 122 (1998)

-The value of a property subject to direct condemnation is determined as of the exact date of the taking.

-Losses that occur prior to the date of the taking are not recoverable in a condemnation proceeding because they are not a direct consequence of the instant taking.

-Flo-Rob, Inc. v. Colonial Pipeline Co., 170 Ga. App. 650, 651, 317 S.E.2d 885 (1984)

-In a condemnation proceeding, the condemnee is entitled to recover two types of damages: (1) the market value of the property actually taken and (2) any consequential damage to the remainder of the owner's property caused by the taking. .

-

2. Indirect Condemnation

-United States Supreme Court

-United States v. Clark, 445 U.S. 253 (1980).

-Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.

-Supreme Court of Georgia

-*Black v. Fayette County, Ga.*, 268 Ga. 570, 492 S.E.2d 517 (1997)

-The pendency of an inverse condemnation action does not preempt or delay a government institution from initiating a direct condemnation action.

- In this case, a group of condemnees alleged that Fayette County could not proceed with a formal condemnation of property while there was an inverse condemnation action pending with regard to the same property. While the Georgia Supreme Court determined this issue to be a matter of first impression before the court, it held that the condemnation action was separate from the inverse condemnation action. As such, the inverse condemnation action was no reason to postpone or prevent the government's condemnation action.

-*Dept. of Transp. V. Edwards*, 267 Ga. 733, 737, 482 S.E.2d 260 (1997).

-The measure of damages in an inverse condemnation action is "[t]he actual depreciation in market value of the premises resulting from the taking and the effect upon the property."

-Georgia Court of Appeals

- *Shealy v. Unified Government of Athens-Clarke* County, 244 Ga.App. 853, 537 S.E.2d 105 (2000).

-An inverse condemnation claim arises when the government creates a condition on private property

that amounts to a taking without compensation.
-However, an inverse condemnation claim is not rendered moot by a subsequent condemnation action.
- In this case, Kenneth Shealy sought damages for inverse condemnation alleging that toxic substances had escaped from an Athens-Clarke County landfill and contaminated his property. Athens-Clarke County moved to condemn the property, and the trial court rendered Mr. Shealy's claims moot by the condemnation of the property. The Georgia Court of Appeals disagreed with the trial court's determination that the resolution of the condemnation proceedings also resolved the issues presented in the inverse condemnation action. The Court of Appeals held that since the measure of damages recoverable in the inverse condemnation proceeding differed from the measure of damages available in the formal condemnation initiated by the county, the inverse condemnation claim should not have been rendered moot..

-*Butler v. Gwinnett County,* 223 Ga. App. 703, 705, 479 S.E.2d 11 (1996)
-An inverse condemnation claim arises when a government entity, such as a county, "creates a condition on private property that amounts to . . . a taking without compensation."

-Northern District of Georgia
- *Provident Mut. Life Ins. Co. of Philadelphia v. City of Atlanta*, 864 F.Supp. 1274 (N.D. Ga., 1994).
-Inverse condemnation is a cause of action against the government to recover the value of property which has been taken by the government, even though no formal exercise of eminent domain has been attempted.

Back to Top

3. Secondary Sources

a. Treatises

1. Michael M. Berger, *Inverse Condemnation Practice Pointers: The Owner's Viewpoint*, SP011 ALI-ABA 867 (2008).
-This treatise provides a historical background of the concept of inverse condemnation, detailing major United States Supreme Court cases.

b. Law Review Articles

1. T. Daniel Brannan & William J. Sheppard, *Annual Survey of Georgia Law: Real Property*, 50 Mercer L. Rev. 307 (1998).
-This article discusses in detail Hulsey v. Dept. of Transportation, 230 Ga. App. 763, 498 S.E.2d 122 (1998) and analyzes the distinct differences in the "date of the taking" in an inverse condemnation action as compared to a direct condemnation action.

2. John Martinez, *A Proposal for Establishing Specialized Federal and State "Takings" Courts*, 61 Me. L. Rev. 467 (2009).
-This article discusses the complexities of both direct and inverse condemnation, as well as the complexities of how the two doctrines intertwine.
-As a result of these complexities, the article's author suggests and discusses the need to specialized federal and state courts that are responsible for hearing all condemnation and takings claims.

3. Gregory M. Stein, *Pinpointing the Beginning and Ending of a Regulatory Taking*, 70 Wash. L. Rev. 953 (1995).
-The article focuses upon the initiation and conclusion of a condemnation in analyzing the differences between direct condemnation and indirect condemnation.

d. Books

1. Alan T. Ackerman and Darius W. Dynkowski, Current Condemnation Law : Takings, Compensation and Benefits (American Bar Association, 2006).
-This book provides a summary of current condemnation law within the United States. While it is not focused on Georgia law, it provides a helpful tool in comparing and analyzing condemnation law throughout the country.
-GSU Law Library Call Number: KF5599.Z9 C87 2006

2. Barbara G. Hering and Marilyn G. Ordover, Theory and Practice in Inverse Condemnation for Five Representative States (Washington Highway Research Board, National Research Council, 1969).
-Similar to the above discussed book, this book does not focus on Georgia law, but instead

provides an analysis of the theory of inverse condemnation in five representative states throughout the country.
-This book is somewhat dated, but it still serves as a helpful introductory tool to the theory of inverse condemnation.
-GSU Law Library Call Number: KF5599 .H48

c. Legal Encyclopedias

1. Georgia Jurisprudence

-Georgia Jurisprudence is the official legal encyclopedia of the State of Georgia. It is available both in print form as well as electronically via WestLaw or Lexis.

-2 Ga. Jur. Property § 19:162

-Section 19:162 discusses the relationship between direct and inverse condemnation actions by specifically addressing the impact of a pending inverse condemnation action while an existing direct condemnation has been instituted.

Back to Top

4. Computerized Research

a. Westlaw

-Westlaw is a fee-based research system with subscription access to both legal and news documents.
-Through Westlaw, one can search and view not only federal and state statutes and case law, but also secondary sources such as legal encyclopedia, law journals, and law reviews.
-Westlaw uses the “Key Numbers” system to identify and separate underlying concepts relevant to your research topic.
-The eminent domain key number on Westlaw is 148.
-More specifically, key numbers 148k266 – 148k316 relate to inverse condemnation.

c. LoisLaw

-Loislaw is a third fee-based research site. While a subscription to Loislaw is substantially less expensive than a subscription to either Westlaw or LexisNexis, the amount of material available through Loislaw is not as comprehensive.

e. LexisOne

-Lexis One is a less expensive alternative to Lexis Nexis. Certain material on Lexis One is available free of charge. However, the amount of material available to someone using Lexis One is significantly less than what is available through Lexis Nexis.

b. LexisNexis

-Lexis Nexis is extremely similar to Westlaw in that it is also a fee-based subscription service with access to both legal and news documents.

d. Casemaker

-Casemaker is a free legal research site available to members of specific state bar associations. The Georgia Bar Association has a subscription to Casemaker; as such, all members of the Georgia Bar have free access to Casemaker.

-Using Casemaker, one can research state and federal statutes, state and federal court rules, administrative codes, and Attorney General opinions.

Back to Top

5. Associations and Interest Groups

a. Georgia Associations

1. State Bar of Georgia Eniment Domain Section

The Eminent Domain Section is organized to promote education relating to the law of eminent domain in the State of Georgia.

2. State Bar of Georgia Local Government Law Section

The Local Government Law Section provides a forum for attorneys representing local governments to exchange ideas and experience. The Local Government Institute for City and County Attorneys is held annually in Athens. Speakers are chosen to discuss current legal, practical and ethical problems in defending and advising local governments.

This Association is applicable to the topic of Direct and Indirect Condemnation as local governments may be faced with law suits resulting from such condemnation actions.

b. American Bar Association

1. American Bar Association State and Local Government Association

The ABA Section of State and Local Government Law is the premier association for lawyers involved in urban, state, and local government law and policy. Lawyers representing countless government agencies from across the country turn to the ABA Section of State and Local Government Law to access the latest expert information on issues that relate to their practice and share ideas and best practices with colleagues.

The ABA Section of State and Local Government Law encompasses many practice areas:

- Administrative Law
- Condemnation
- Environmental Law
- Government Liability
- Government Operations
- Homeland Security
- Housing and Urban Development
- Land Use
- Municipal Bond Practice
- Public Contract Law
- Public Education
- Public Finance
- Public Utility Law
- Regulatory Practice
- Zoning

2. American Bar Association Government and Public Sector Association

The Government and Public Sector Lawyers Division's mission is to serve the nation’s public lawyers. By promoting integrity and excellence among public advocates, providing meaningful services not obtainable elsewhere, and by highlighting the extraordinary work of public lawyers, the Division works to enhance the position of public lawyers and create camaraderie and pride within the public sector. The Division is dedicated to providing representation within the ABA for government and public sector lawyers who make up one eighth of the legal profession.

Back to Top

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