COMMON EVIDENTIARY ISSUES IN CONDEMNATION CASES AND HOW NEW CHANGES TO GEORGIA'S EVIDENCE CODE IMPACT CONDEMNATION LAW

Angela D. Robinson
Pursley Friese Torgrimson, LLP
1230 Peachtree Street, N.E., Suite 1200
Atlanta, Georgia 30309
arobinson@pftlegal.com - pftlegal.com

Introduction

This paper presents a range of basic evidentiary issues which arise in condemnation cases and highlights certain portions of the new Georgia Evidence Code that are most germane to condemnation law.[1] For a comprehensive review of the new Georgia Evidence Code see: Milich, Paul S. (2011) "Georgia's New Evidence Code- An Overview," Georgia State University Law Review: Vol. 28: Iss. 2, Article 3.

I. Burden of Proof and Sufficiency of the Evidence

A. Burden of Proof

The condemnor, as the plaintiff, has the burden to prove just and adequate compensation for the property taken and for consequential damages to the remaining property.[2] The condemnor meets the burden of proof, i.e. a prima facie case, as soon as it offers evidence of value.[3] A jury charge that places this burden on the condemnee is reversible error.[4] The condemnee, however carries the burden of proving that the property is unique if he seeks business damage or if he contends that fair market value does not represent actual loss.[5]

B. Burden of Going Forward

Although the burden of proof as to just and adequate compensation for the land taken and any consequential damages always rests upon the condemnor, the burden of going forward with the evidence shifts to the condemnee if the condemnee contends that the value of the amount of damage is greater than is shown by the condemnor's evidence.[6] Accordingly, when a condemnee seeks a verdict for some greater amount than that established by the condemnor's evidence, the condemnee must introduce evidence that will itself, or together with other evidence in the case, support a higher verdict.[7] While these rules apply in condemnation cases

[1] Because evidence rules rarely change in condemnation cases, this paper relies upon and incorporates significant portions of a previous seminar paper prepared by the Honorable Justice Norman F. Fletcher and Douglas A. Henderson, "Evidence Issues on Georgia Condemnation Cases" (2007).
[2] Dept. of Transp. v. El Carlo Motel, Inc., 140 Ga. App, 779 (1976); Reed v. City of Atlanta, 136 Ga. App. 193 (1975); State Hwy Dept. v. Smith, 111 Ga. App. 292 (1965).
[3] Glover v. Department of Transportation, 166 Ga. App. 512, 304 S.E.2d 567 (1983).
[4] Pendarvis Constr. Corp v. Cobb County, 239 Ga. App. 14, 15 (1999).
[5] Kim v. Metro. Atlanta Olympic Games Auth., 227 Ga. App. 563 (1997)
[6] Dawson v. DOT, 203 Ga. App. 157, 158-159 (1992)
[7] Dawson, 203 Ga. App. at 159, Lewis v. State Highway Dep't, 110 Ga. App. 854 (1964).

filed by the condemnor, the burden of proof is squarely on the property owner when he files an inverse condemnation case.[8]

C. Sufficiency of the Evidence

Despite the case law in Georgia regarding the burden of proof and the burden of going forward, Georgia courts have held that a jury, in its determination of just and adequate compensation, is not bound by the opinions of value presented by the parties. Jurors are not required to accept as correct the opinions of value witnesses, even when such opinions are not contradicted by other opinion testimony. The jury may fix a lower or higher value on the property than the stated opinions of the value witnesses, provided the verdict is not clearly unreasonable in light of all the evidence.[9]

II. Establishing Value

A. Highest and Best Use

The value of the land taken should reflect the highest and best use of the entire tract immediately before the taking. Accordingly, neither a jury nor a witness is restricted to its actual current use. Inquiry may be made to all other legitimate purposes to which the property could be appropriated.[10]

1. Future Use of Land

Evidence of possible future uses is admissible to show the highest and best use of the property if there is a demand for such use or if such use is otherwise reasonably probable provided that such use is not remote or speculative.[11] The evidentiary standard is whether the land is realistically useable for other purposes, not whether such use is certain.[12] Even in cases where a different use is probable, a jury cannot evaluate the land as if the new use were an accomplished fact; the jury can only consider the new use to the extent that it affects market value on the date of taking.[13] The trial court's exercise of discretion in admitting such evidence for consideration by the jury, or in excluding it, will not be reversed unless there is a manifest abuse of this discretion.[14]

2. Zoning Limitations on Future Use

The possible future use of property is not necessarily limited to the property's current zoning. If there is a reasonable probability or possibility that zoning restrictions might be repealed or amended or a variance granted so as to permit the use in questions, such likelihood may be considered by the jury.[15] The prospect of such repeal, amendment or variance must be sufficiently likely to have an appreciable influence upon the present market value of the

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[8] DeKalb County v. Daniels, 174 Ga. App. 319 (1985).
[9] See generally DOT v. Driggers, 150 Ga. App. 270 (1979) (upholding a jury verdict 14 percent higher than the testimony of any witness).
[10] O.C.G.A.§ 22-2-62
[11] Clark v. City of Kennesaw, 237 Ga. App. 42, 46 (1999); Flint v. DOT, 223 Ga. App 815, 817 (1996); Georgia Power v. Cole, 141 Ga. App. 806 (1977).
[12] See MARTA v. Cent. Parking Sys. Of Ga., Inc., 167 Ga. App. 649 (1983).
[13] Colonial Pipeline Co. v. Williams, 206 Ga. App. 303 (1992); DOT v. Benton, 214 Ga. App. 221 (1994)
[14] DOT v. Great So. Enter. Inc., 137 Ga. App. 710 (1976).
[15] DOT v. Jordan, 300 Ga. App. 104 (2009); and Civils v. Fulton County, 108 Ga. App. 793 (1963).

property.[16] As long as the possible change in zoning is neither remote nor speculative, the current zoning will not restrict evidence concerning the highest and best use.[17]

B. Fair Market Value

Just and adequate compensation is usually determined by reference to the fair market value of the property as of the date of taking.[18] Fair market value is the price a seller who desires, but is not required, to sell and a buyer who desires, but is not required, to buy, would agree is a fair price, after due consideration of all the elements reasonably affecting value.[19] In determining the fair market value of the land taken in an eminent domain proceeding, it is proper for the trial court, in the exercise of its discretion, to admit evidence of all factors which an owner could reasonably urge upon prospective purchaser in order to influence his decision.[20]

There are three recognized methods of establishing the fair market value of the property: the market or comparable sales approach; the income approach; and the cost approach.

1. Comparable Sales

As direct evidence of value, the facts of and the amount paid in the sale of comparable tracts of property may be introduced without additional analysis. When such direct evidence of comparable sales is introduced, a proper foundation must be laid through a showing of the similarity of the properties. Whether such foundation has been laid is left to the discretion of the trial court since exact similarity is not generally obtainable. Factors to be considered in determining similarity include the size, location, and physical characteristics of the property that is claimed to be comparable, and whether its sale was freely and voluntarily made at or reasonably near the time of the taking of the subject property. Any dissimilarity in the property or the circumstances of its transfers are generally matters that go to the weight of the evidence after its admissibility has been determined by the trial court.[21]

On the other hand, evidence of comparable sales is often presented, not as direct evidence of value, but as the basis for a witness' opinion of value. When such explanatory use is made of evidence of comparable sales, no foundation need be laid concerning the similarity of the property. The jury may use this evidence in determining the weight to be given to the witness' opinion of value.[22]

2. Forced Sales

Sales or awards in other condemnation proceedings are not admissible as comparable sales under Georgia law.[23] Evidence of an exchange of property between a condemnor and another condemnee is also inadmissible on the issue of value, since such an exchange is not

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[16] Id.
[17] Id.
[18] Canada West, Ltd. v. City of Atlanta, 169 Ga. App. 907, 909 (1984).
[19] Wright v. MARTA, 248 Ga. 372, 375 (1981).
[20] Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348 (1983).
[21] Ga. Power Co. v. Walker, 101 Ga. App. 454 (1960); Fulton County v. Elliott, 109 Ga. App. 775 (1964), rev'd on other grounds, 220 Ga. 377 (1964).
[22] See Jordan v. DOT, 178 Ga. App. 133, 134 (1986); Macon-Bibb County Water & Sewerage Auth., 165 Ga. App. at 357; Panos v. DOT, 162 Ga. App. 53, 55 (1988).
[23] Ga. Power Co. v. Brooks, 207 Ga. 406, 410 (1950); Jordan, 178 Ga. App 133.

necessarily free from compulsion.[24] Similarly, evidence of other forced sales, such as foreclosures, should not be admitted as comparable sales.

3. Offers by Condemnor

An offer by the condemnor on the subject parcel or on other property is not admissible as direct evidence of market value.[25] Furthermore, the condemnor's appraisal affidavit provided for in O.C.G.A. § 32-3-6(b)(5) is not admissible evidence of value at trial. The affidavit signifies an "estimated" value and represents an opinion rather than a conclusion of fact. It does not constitute an admission in judicio, and is not binding upon the condemnor in a subsequent de novo proceeding to establish the value of the property taken.[26] Accordingly, evidence of the initial estimate of just and adequate compensation deposited with the court is not permitted to go out with the jury.[27]

4. Unaccepted Offers by Third Parties

An unaccepted offer on a comparable property is not generally admissible as direct evidence of value.[28] Similarly, an unaccepted offer on the property being condemned is not generally admissible as direct evidence of value.[29] Testimony of an unaccepted offer on the subject property is admissible, however, when it is introduced not as evidence of value in itself but rather as part of the basis of an expert witness' opinion of value.[30]

5. Options

Evidence of options on the subject property or on a comparable property are generally not admissible as direct evidence of value.[31] Such options can be used as a basis for an expert's value opinions.[32]

6. Unclosed Contracts of Sale

As a general rule, unclosed contracts of sale are admissible as evidence of value. A contract between a condemnee and a third party for the sale of the subject property could be used as the basis for expert testimony and would be admissible as direct evidence of value.[33] However, if the contract contains contingencies that effectively eliminate the risk to the buyer, such contingencies may render the contract too speculative to be admissible.[34]

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[24] Collins v. MARTA, 163 Ga. App. 168 (1982).
[25] State Highway Dep't v. Hilliard, 114 Ga. App. 328 (1966).
[26] Aiken v. DOT, 171 Ga. App. 154 (1983); Morrison v. DOT, 166 Ga. App. 144 (1983).
[27] DOT v. Gunnels, 175 Ga. App. 632-636 (1985), rev'd on other grounds, 255 Ga. 495. See also CNL APF Partners, LP v. DOT, 307 Ga. App. 411 (2010) (admission of evidence of the fact that the DOT made a deposit of funds into the court registry representing an estimate of just and adequate compensation was improper).
[28] DOT v. Simon, 151 Ga. App. 807 (1979), aff'd, 245 Ga. 478 (1980); Southwell v. State Highway Dep't, 104 Ga. App 479 (1961).
[29] So. R. Co. v. Miller, 94 Ga. App. 707, 706 (1956).
[30] Mauldin v. Housing Auth. of Marietta, 223 Ga. App. 158, 159 (1996); City of Atlanta v. Hadjisimos, 168 Ga. App. 840, 842 (1983).
[31] Department of Transp. v. Cochran, 160 Ga. App. 583 (1981); Nichols on Eminent Domain, § 7-8 (2007).
[32] Cochran, 160 Ga. App. at 583; See Jordan, 178 Ga. App. at 134.
[33] Dep't of Transp. v. White, 175 Ga. App. 68 (1984); Nichols on Eminent Domain, § 7-8 (2007).
[34] Mauldin, 223 Ga. App. at 159.

7. Tax Assessments and Returns

A property tax assessment or return is not admissible as direct evidence of value of the subject property, but they may be admitted to impeach or contradict the testimony of the property owner or his witnesses.[35] The evidence must show that the return was prepared or approved by the property owner; and when an oath is required, the giving of the oath must be shown before the return or assessment can be admitted. [36]

When the tax return contains an assessment by someone other than the property owner and the return has not been signed or approved by the owner, it is pure hearsay and inadmissible under existing case law in Georgia.[37] Under the new Georgia Evidence Code, however, hearsay is no longer deemed "illegal" evidence.[38] Therefore, if a party does not properly object to the admission of such a tax return or assessment, "the objection shall be deemed waived and the hearsay evidence shall be legal and admissible." [39]

8. Introduction of Appraisals under the Business Record Exception

Appraisals are opinions and were not admissible under the old Georgia Evidence Code as a business record exception to hearsay.[40] Therefore, under the old Georgia Evidence Code the appraisal of a deceased appraiser was inadmissible hearsay and could not be introduced to establish the value of the property at trial.[41] The new Georgia Evidence Code, however, permits the introduction opinion evidence through the business record exception to hearsay, which would include appraisals so long as the other requirements to the business record rule are met. [42]

C. Unique Value

When the uniqueness of the property prevents the fair market value of the property from representing just and adequate compensation due to the condemnee, other measures of value may be taken into account.[43] To establish a unique value, a landowner must show that he is currently devoting the property to a use for which the land has a peculiar value.[44] A condemnee is not entitled to present witnesses to testify to both the fair market value and the unique value of the property.[45]

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[35] State Hwy. Dep't v. Raines, 129 Ga. App. 123 (1973); Housing Auth. of Atlanta v. Republic Land & Investment Co., 127 Ga. App. 84 (1972); Seymour v. Housing Auth. of Dublin, 109 Ga. App. 613 (1964); State Highway Dept. v. Wilkes, 106 Ga. App. 634, overruled in party by State Highway Dept. v. Howard, 119 Ga. App. 298 (1969); Nichols on Eminent Domain, § 7-9 (2007).
[36] Raines, 129 Ga. App. 123; Seymour, 109 Ga. App. 613; Wilkes, 106 Ga. App. 634; Nichols on Eminent Domain, § 7-9 (2007).
[37] Seagraves v. Seagraves, 193 Ga. 280 (1942); Gruber v. Fulton County, 111 Ga. App. 71 (1965); Wilkes, 106 Ga. App. 634; Nichols on Eminent Domain, § 7-9 (2007).
[38] O.C.G.A. § 24-8-802 (2013).
[39] Id.
[40] See O.C.G.A. § 24-3-14 (2012).
[41] See Dickens v. Calhoun First National Bank, 214 Ga. App. 490 (1994)
[42] O.C.G.A.§ 24-8-803(6) (2013): Records of regularly conducted activity. Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness and subject to the provisions of Chapter 7 of this title, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, **opinions**, or diagnoses . . .. (Emphasis added).
[43] Housing Auth. of Atlanta v. So. R. Co, 245 Ga. 229 (1980).
[44] DOT v. Sharpe, 213 Ga. App. 549, 550 (1994).
[45] Taylor v. Jones County, 205 Ga. App. 628, 630 (1992).

D. Value of Leased Property

The correct measure of damage for the loss of use of leased property is the diminution in the market value of the leasehold during the remainder of the unexpired term of the lease, less any rents to be paid by the lessee.[46] If the rents to be paid by the lessee are a reasonable approximation of the market rent, then the lessee is not paying below rent and the leasehold has no compensable value.[47]

III. Consequential Damages and Consequential Benefits

To prove consequential damages, as well as consequential benefits, one must establish the highest and best use of the remainder immediately before and after the taking, and assuming that highest and best use, establish the fair market value of the remainder immediately before and after the taking. The proper measure of consequential damages to the remainder is the diminution, if any, in the market value of the remainder in its circumstances just prior to the time of the taking compared with its market value in its new circumstances just after the time of the taking.[48] The consequential damages that may be recovered in a condemnation action are limited to those damages that naturally and proximately arise to the remaining property for the taking of the part of the property and devoting that part to the public purpose for which it was condemned.[49] Damages that may appear to be related or intertwined with a taking, but which are not a direct consequence of it and which arise from the entire project, are not compensable in a condemnation proceeding.[50]

Damages caused by mere temporary inconvenience due to the construction of a project for which the property was taken should not be considered in determining consequential damages.[51] Consequential damages can be awarded, however, to compensate for inconvenience caused by the deprivation of access to an existing public road.[52] The right of access or easement of access to a public road is a property right that arises from the ownership of land contiguous to a public road.[53] When this right is interfered with, the measure of consequential damage is any diminution in the market value of the property, by reason of such interference.[54] Inconveniences of access shared by the public in general, such as a change of traffic pattern or increase in circuity of travel, are not compensable.[55] On the other hand, where the property owner's direct access to a particular street is totally eliminated, there is taking of an easement of access as a

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[46] MARTA v. Funk, 263 Ga. 385, 387 (1993).
[47] Lil Champ Food Stores v. Dept of Transp., 230 Ga. App. 715, 719 (1998).
[48] Gunnels, 255 Ga. 495, 498-497; Wright, 248 Ga. at 376.
[49] Cox Communications v. DOT, 178 Ga. App. 499 (1986), rev'd on other grounds, 256 Ga. 455 (1986); Mason v. DOT, 159 Ga. App. 471 (1981).
[50] Simon v. DOT, 245 Ga. 478 (1980); Fountain v. DeKalb County, 154 Ga. App. 302 (1980); Dep't of Transp. v. Simon, 151 Ga. App. 807 (1979); Reed v. City of Atlanta, 136 Ga. App. 193 (1975); McArthur v. State Hwy Dep't, 85 Ga. App. 500 (1952); Herron v. MARTA, 177 Ga. App. 201 (1985); Rivera Associates v. Dep't of Transp., 174 Ga. App. 29 (1985); Mason v. Dep't of Transp., 159 Ga. App. 471 (1981); Nichols on Eminent Domain, § 5-6 (2007).
[51] Bridges v. DOT, 209 Ga. App. 33 (1993)
[52] DOT v. Whitehead, 253 Ga. 150 (1984).
[53] DOT v. Taylor, 264 Ga. 18, 19 (1994).
[54] Whitehead, 253 Ga. 150.
[55] DOT v. Durpro, 220 Ga. App. 458 (1996); Taylor, 264 Ga. At 20.

matter of law.[56] Evidence pertaining to traffic patterns and traffic flow can be introduced for consideration of consequential damages, provided that it is shown that the taking of part of the property has cut off or substantially interfered with the owner's right of access.

Consequential benefits to the remaining property may be offset against consequential damages, but benefits may not be used as an offset against the value of the property actually taken.[57] Only special benefits can be used to offset consequential damages, but general benefits cannot be considered.[58] A special benefit is one that adds to the convenience, accessibility or usefulness of the property as distinguished from benefits arising incidentally from the improvement enjoyed by the public in general.[59] There must be specific evidence of the amount of consequential benefits before the issue can be submitted to the jury.[60]

The effect of the taking on the fair market value of the remaining property is usually shown by the testimony of a real estate appraiser or other expert witness with knowledge of property values. Although the jury is only required to return a lump sum verdict, the evidence must be sufficient to allow separate figures for the value of the property taken, consequential damages and consequential benefits.[61] In order to prove these elements, the testimony should be structured along a five-step procedure:

1. The witness should first state his opinion of the value of the entire property before the taking;
2. The witness should then give his opinion of the value of the part actually taken;
3. The witness next should state the value of the remainder before the taking also known as the value of the remainder as part of the whole, which is merely the result of subtracting the value of the part taken from the value of the property before the taking;
4. The witness should then state his opinion of the value of the remainder property after the taking, considering the negative impact of the taking and the public improvement. The difference between this figure and the value of the remainder before the taking represents the amount of consequential damages;
5. Finally, the witness should state his opinion of the value of the remainder property after the taking, considering the positive impact of the taking and the public improvement. The difference between this figure and the value of the remainder before the taking represents the amount of consequential benefits. This amount can

[56] Whitehead, 253 Ga. APP. 152.
[57] O.C.G.A. §§ 22-2-62 and 22-2-63; Merritt v. Department of Transportation, 147 Ga. App. 316 (1978), judgment rev'd in part by 243 Ga. 52; Department of Transp. v. Knight, 143 Ga. App. 748 (1977); Dep't of Transp. v. Kirk, 137 Ga. App. 180 (1976); Fulton County v. Bailey, 107 Ga. App. 512 1963); Nichols on Eminent Domain, § 5-8 (2007).
[58] Williams v. State Hwy. Dep't, 124 Ga. App. 645 (1971); Nichols on Eminent Domain, § 5-8 (2007).
[59] Knight, 143 Ga. App. 748; Williams, 124 Ga. App. 645; Nichols on Eminent Domain, § 5-8 (2007).
[60] Barrow v. City of Atlanta, 188 Ga. App. 400, 401 (1988); Smith v. DeKalb County, 184 Ga. App. 628 (1987); Cont'l Corp v. DOT, 172 Ga. App. 766, 768 (1984).
[61] State Hwy. Dep't v. Brand, 121 Ga. App. 165 (1970); Nichols on Eminent Domain, § 6-6 (2007)

only be offset against consequential damages and not against the value of the property taken.[62]

IV. Demonstrative Evidence

Demonstrative evidence such as photographs, drawings, maps, plats and models are extremely helpful to show the appearance, location and characteristic of the property before and after the condemnation. A drawing, diagram or map does not have to be prepared to an exact scale to be admissible.[63] The trial court has broad discretion to admit evidence shown to be substantially accurate, and any inaccuracies go to the weight to be given the exhibit by the jury.[64]

Photographs of the condemned property made subsequent to the date of taking but which are shown to be a fair and accurate representation of the property on the date of taking are admissible.[65] A photograph is authenticated by showing that it is a fair and accurate representation of the scene depicted. Any witness who is familiar with the scene depicted can authenticate the photograph; it is not necessary that the witness be the photographer or even that the witness have been present when the photograph was taken.[66] The admission or exclusion of photographs, even when there is admittedly some difference in the situation portrayed and that which existed, is a matter within the discretion of the trial court, and will not be controlled unless abused.[67]

It is reversible error to allow an expert's written calculation regarding value to be sent out with the jury.[68] Diagrams may be used during the course of the trial for the purpose of illustrating testimony but are excluded as being a continuing witness in the jury room.[69]

V. Business Damage

Subject to several elements of proof, a property owner whose business is totally destroyed or a lessee whose business is totally or partially destroyed can recover for business damage as a separate item of recovery in a condemnation case.[70] Business damage is recoverable as a separate item only if the property is shown to be "unique" and the loss is not remote or speculative.[71] When the issue of business damage is properly before the court,[72] the measure of compensation for such damage is the difference between the market value of the business before the taking and its market value after the taking.[73] Elements such as lost profits, loss of customers, or decrease in the earning capacity of the business may be considered in

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[62] O.C.G.A. §§ 22-2-62 and 22-2-63; Merritt v. Department of Transportation, 147 Ga. App. 316 (1978), judgment rev'd in part by 243 Ga. 52; Department of Transp. v. Knight, 143 Ga. App. 748 (1977); Dep't of Transp. v. Kirk, 137 Ga. App. 180 (1976); Fulton County v. Bailey, 107 Ga. App. 512 1963); Nichols on Eminent Domain, § 6-6 (2007).
[63] Fountain v. DeKalb County, 154 Ga. App. 302 (1980).
[64] Id.
[65] Dep't of Transp. v. Petkas, 189 Ga. App. 633 (1988).
[66] Dep't of Transp. v. Millen, 222 Ga. App. 519 (1996); Nichols on Eminent Domain, § 7-11 (2007).
[67] Id.
[68] Nichols on Eminent Domain, § 7-11 (2007).
[69] Dep't of Transp. v. Benton, 214 Ga. App. 227 (1994); Nichols on Eminent Domain, § 7-11 (2007).
[70] Bowers v. Fulton County, 122 Ga. App. 45 (1970).
[71] Dep't of Transp. v. Acree Oil Co., 266 Ga. 336 (1996).
[72] For a discussion of the circumstances under which business damage may be recovered in a condemnation case, see Nichols on Eminent Domain, §§ 5-11 to 5-16 (2007).
[73] Bowers, 122 Ga. App. 45; Old South Bottle Shop, Inc. v. Dep't of Transp., 175 Ga. App. 295 (1985).

determining the decrease in the value of the business, but they are not separate elements of damage themselves.[74]

Expert witnesses, such as accountants, financial analysts and other business valuation experts, are typically called to testify to the value of the business before and after the taking. Such expert witnesses typically rely upon the business records of the subject business as part of the basis of their opinion of business damage in a condemnation case. There are two changes in the new Georgia Evidence Code that make the introduction of business records easier. The first change allows the foundation for the business record exception to hearsay[75] to be laid by affidavit. Under the old Georgia Evidence Code, a "qualified witness" was required to appear at trial and lay the requisite foundation for a business record.[76] The new Georgia Evidence Code offers an additional option.[77] Under the new Code, a party can acquire a certification from the custodian or other person qualified to lay foundation for the record under the business record exception.[78] The party must give all opposing parties advanced written notice of its intent to use the certification in lieu of live testimony and make the record available for inspection prior to trial.[79]

The second change in the new Code allows a business to lay the foundation for business records received from a different business. Under the old Code, Georgia courts struggled with the problem of one business laying foundation for records received from a different business.[80] The cases are inconsistent and have permitted, in some cases, a witness to "lay foundation" for a business record without any evidence that the witness has a clue as to how the record was

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[74] Id.

[75] O.C.G.A.§ 24-8-803(6) (2013): Records of regularly conducted activity. Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness and subject to the provisions of Chapter 7 of this title, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with paragraph (11) or (12) of Code Section 24-9-902 or by any other statute permitting certification. The term "business" as used in this paragraph includes any business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Public records and reports shall be admissible under paragraph (8) of this Code section and shall not be admissible under this paragraph

[76] See Paul S. Milich, Georgia Rules of Evidence, § 19:15.

[77] See O.C.G.A. § 24-8-803(6) (2013); Milich, Paul S. (2011) "Georgia's New Evidence Code- An Overview," p. 395.

[78] Id.

[79] Id.; O.C.G.A. § 24-9-902(12) (2013): In a civil proceeding, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

(A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) Was kept in the course of the regularly conducted activity; and

(C) Was made by the regularly conducted activity as a regular practice.

The declaration shall be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration.

[80] Milich, Paul S. (2011) "Georgia's New Evidence Code- An Overview," p. 395.

produced.[81] The new business record exception is based on the Federal Rule and takes advantage of the "integrated records rule" as developed by the federal courts to address this problem. [82] The basic requirements for the integrated records rule are (1) a business relationship between the business that initially made the record and the one who received it, (2) the recipient of the business record routinely relies upon the accuracy of the record and integrates it into its own files, (3) the recipient of the business has a witness who is sufficiently familiar with how the originating business routinely prepared the record to establish that the record was made and kept in the ordinary course of business at or near the time of the events described in the cord, and (4) circumstances support the trustworthiness of the record.[83]

VI. Opinion Evidence

A. Expert Witnesses

The issue of just and adequate compensation for the property taken, consequential damages to the remaining property and value are generally matters of opinion, and particularly suited to evaluation of expert witnesses. In a condemnation case, you may have an engineer testifying about the acquisition's impact on the property, a real estate appraiser testifying about the value of the property, and a business valuation expert testifying about the value of the business and business damage.

Following is a summary of the sections from the new Georgia Evidence Code that are pertinent to expert witness testimony in condemnation cases:

- O.C.G.A. § 24-7-703: "The facts or data in the particular proceeding upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field forming opinions or inferences upon the subject, such facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Such facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."
- O.C.G.A. § 24-7-704: "…testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact."
- O.C.G.A. § 24-7-705: "An expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court

[81] Id.. See e.g. Walter R. Thomas Assoc., Inc. v. Media Dynamite, Inc., 643 S.E2d. 883, 886 (Ga. 2007); see also Paul S. Milich, Georgia Rules of Evidence, § 19:15.
[82] Milich, Paul S. (2011) "Georgia's New Evidence Code- An Overview," p. 396.
[83] Id.; See Air Land Forwarders, Inc. v. United States, 175 F.3D 1338, 1342-45 (Fed. Cir. 1999); see also Kolmes v. World Fibers Corp, 107 F.3d 1534, 1542-43 (Fed. Cir. 1997); United States v. Bueno-Sierra, 99 F.3d 375, 375 (11th Cir. 1996); NLRB v. First Termite Control Co., 646 F.2D 424, 427 (9th Cir. 1981).

requires otherwise. An expert may in any event be required to disclose the underlying facts or data on cross-examination."

The question of whether a witness is qualified to give his opinion as an expert is a legal issue for the court, and the determination will not be disturbed unless there is a manifest abuse of discretion.[84] Where a witness has been qualified as an expert, he may state his opinion without stating the basis of that opinion, but it is always proper for the witness to state his basis if requested.[85] This principal is codified by O.C.G.A. § 24-7-705, which eliminates any requirement that an expert be questioned by way of hypothetical questions.

Under Georgia case law, the fact that the matters upon which the opinion is based are hearsay or otherwise inadmissible in themselves is not a proper ground for exclusion the opinion.[86] This principal is codified by O.C.G.A. § 24-7-703. Most expert appraisers base their opinions of value, in large part, on statements by third parties, which would clearly be hearsay under the rules of evidence. While it is not necessary to elicit facts upon which an expert bases his opinion, trial counsel often understandably choose to elicit not only the opinion of value but also the data upon which that opinion is based. For example, an appraiser typically testifies to the details of comparable sales even though such testimony is based on hearsay.[87] Furthermore, under existing Georgia case law it is reversible error to refuse to permit an expert witness to state the facts upon which he bases his opinion.[88] The new Georgia Evidence Code provides, however, that "facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."[89] This was also the rule under the old Georgia Evidence Code.[90] Technically, under this statute, experts should not be able to testify to hearsay evidence unless the court makes the determination that the probative value of such evidence substantially outweighs the prejudicial effect. Under the new Georgia Evidence Code, however, hearsay evidence is no longer deemed illegal evidence: "[I]f a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible." [91] Accordingly, expert appraisers and other expert witnesses in condemnation trials will probably continue to testify to facts or data that constitute hearsay and this evidence will be deemed legal and admissible unless an objection is made by opposing counsel.

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[84] Dep't of Transp. v. Great Southern Enterprises, Inc., 137 Ga. App. 710 (1976); Georgia Power Co. v. Bishop, 162 Ga. App. 122 (1982); Panos v. Dep't of Transp. 162 Ga. App. 53 (1982).
[85] O.C.G.A. § 24-7-705 (2013)
[86] White v. Georgia Power Co., 237 Ga. 341 (1976), overruled in part by DeKalb County v. Trustees, Decatur Lodge No. 1602, B.P.O. Elks, 242 Ga. 707 (1978); Howard, 119 Ga. App. 298 (1969); and State Hwy Dept. v. Edmonds, 113 Ga. App. 298 (1969).
[87] White, 237 Ga. 341; Alabama Power Co. v. Chandler, 217 Ga. 550 (1962); Merritt, 147 Ga. App. 316; Howard, 119 Ga. App. 298; Hollywood Baptist Church, 114 Ga. App. 98.
[88] McDaniel v. Dep't of Transp, 200 Ga. App. 674 (1991).
[89] O.C.G.A. § 24-7-703 (2013).
[90] O.C.G.A. § 24-9-67.1 (2012).
[91] O.C.G.A. §24-8-802 (2013).

One change under the new Georgia Evidence Code that relates to expert witness testimony, and non-expert witness testimony as well, is the abolishment of the "ultimate issue rule." The old Georgia Evidence Code embraced a limited form of the "ultimate issue rule" by prohibiting lay or expert opinion that mixes law and fact.[92] For example, there was no problem under the old Georgia Evidence Code if an expert testified in a legal malpractice case that the defendant failed to use the degree of care and skill expected of an ordinary lawyer practicing in Georgia.[93] The standard of care for attorneys is beyond the ken of ordinary jurors, and thus, they require expert assistance in drawing opinions and inferences from the evidence.[94] However, the old Georgia Evidence Code did not allow a witness to testify in legal terms or state legal conclusions.[95] For instance, within the context of condemnation cases, the "ultimate issue rule" prohibits an expert or other witness from expressing an opinion that a piece of property is or is not "unique" for the purposes of recovering business damage. Whether property is "unique" is a "legal conclusion to be reached by the jury" and not a proper subject for witness testimony.[96] Instead, parties may present evidence of the facts supporting a showing of uniqueness, and from there, the jury draws its own conclusions based on the evidence.

The new Georgia Evidence Code adopts Federal Rule 704, which states that evidence "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[97] Although abolished in name, the federal courts still will not allow witnesses to present opinions or invade the province of the jury by drawing inferences that the jurors are fully capable of drawing on their own.[98] Rather than stating such opinions violate the "ultimate issue rule", courts exclude them on the grounds that they are not helpful or will not assist the trier of fact.[99]

B. Non-Expert Witnesses

Following is a summary of the sections of the new Georgia Evidence Code that are pertinent to non-expert witness/lay opinions in condemnation cases:

- O.C.G.A. §24-7-701: Lay opinion is limited to opinions which are "(1) Rationally based on the perception of the witness; (2) Helpful to a clear understanding of the witness's

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[92] Milich, Paul S. (2011) "Georgia's New Evidence Code- An Overview," p. 400; § O.C.G.A. 24-9-65 (2012) ; see Metro Life Insurance Co. v. Saul, 5 S.E.2d 214, 214 (Ga. 1939).
[93] Milich, Paul S. (2011) "Georgia's New Evidence Code- An Overview," p. 401; See e.g., Bilt Rite of Augusta, Inc. v. Gardiner, 472 S.E.2d 709, 710 (Ga. Ct. App. 1996).
[94] Id.
[95] Milich, Paul S. (2011) "Georgia's New Evidence Code- An Overview," p. 401; See e.g., Allen v. Columbus Bank & Trust Co., 534 S.3.2d 917, 924 (Ga. Ct. App. 2000).
[96] DOT v. Franco's Pizza & Delicatessen, Inc., 200 Ga. App. 723, 725-26 (1991), overruled on other grounds by White v. Fulton County, 264 Ga. 393 (1994).
[97] Milich, Paul S. (2011) "Georgia's New Evidence Code- An Overview," p. 401; Fed. R. Evid. 704; O.C.G.A. § 24-7-704 (2013).
[98] Milich, Paul S. (2011) "Georgia's New Evidence Code- An Overview," p. 401; See e.g., Montgomery v. Aetna Cas. & Sur. Co., 898 F.2d 1537, 1541 (11TH Cir. 1990) (holding that an expert's testimony that defendant "had a duty to hire tax counsel" should have been excluded); Shahid v. City of Detroit, 889 F.2d 1543, 1547-48 (6th Cir. 1989) (holding that an expert's testimony that police officer was negligent was inadmissible).
[99] Milich, Paul S. (2011) "Georgia's New Evidence Code- An Overview," p. 401; These requirements that opinion testimony be helpful or assist the trier of fact are contained in Federal Rule 701(b) (lay opinions) and 702 (expert opinions). See Fed. R. Evid. 701-02; see also O.C.G.A. §§ 24-7-701 to -702 (2013).

testimony or the determination of a fact in issue; and (3) Not based on scientific, technical, or other specialized knowledge . . . ."

- O.C.G.A. § 24-7-701(b): "A witness need not be an expert or dealer in an article or property to testify as to its value if he or she has had an opportunity to form a reasoned opinion."

A non-expert witness may give an opinion as to the highest and best use of the property and as to its fair market value, but only if he states the facts upon which his opinion is based prior to giving his opinion.[100] The non-expert witness must demonstrate to the court an opportunity for the formation of the correct opinion as to the highest and best use and the value of the subject property. In the determination of the admissibility of such opinions, the trial court is vested with wide discretion.[101] Owners of property may testify concerning their opinions of the value of their property if the owner "has had an opportunity for forming a correct opinion."[102] The property owner cannot, however, give testimony of the property's particular value to him but only as to its fair market value.[103]

An owner's opinion of value cannot be excluded merely because evaluation depends upon hearsay.[104] Market value may rest wholly or partially upon hearsay provided the witness has had the opportunity of forming a correct opinion.[105] If the owner's opinion is based upon hearsay, this would go merely to its weight and credibility and is not a ground for exclusion of the testimony.[106]

C. Contemporaneous Objection Rule

Regardless of the complexity of an expert's testimony or the applicable rules of evidence, opposing counsel must make any objections contemporaneously.

The new section of O.C.G.A. § 24–1–103 codifies the basic requirement that a party must object to a trial court ruling in order to preserve error, but clarifies that this does not prevent the appellate courts from considering plain error in all instances.[107] This new section also clarifies that counsel does not have to seek and receive a continuing objection from the trial judge in lieu of objecting each and every time the same evidence is offered or discussed.[108]

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[100] State Highway Dep't v. Raines, 129 Ga. App. 123 (1973); City of Alma v. Morris, 180 Ga. App. 420 (1986).
[101] City of Dalton v. Smith, 210 Ga. App. 858 (1993); Clayton County Water Auth. v. Harbin, 192 Ga. App. 257 (1989).
[102] Dep't of Transp. v. Into, 219 Ga. App. 311, 311 (1995); Harbin, 192 Ga. App. at 258.
[103] Clark v. City of Kennesaw, 237 Ga. 42 (1999).
[104] Nichols on Eminent Domain, § 7-3 (2007).
[105] Id.
[106] Id.; Dep't of Transp. v. Swanson, 191 Ga. App. 752 (1989).
[107] O.C.G.A. § 24–1–103 (2013): (a) "Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and:
(1) In the case ruing is one admitting evidence, a timely objection or motion to strike appears of record . . .; or
(2) In the case the ruling is one excluding evidence, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked.
Once the court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal. …
(d)Nothing in this Code section shall preclude a court from taking notice of plain errors affecting substantial rights."
[108] Id.

D. Impeachment

Submitting the testimony of a witness to disprove the facts testified to by the other party is a proper method of impeachment under the new and old Georgia Evidence Code.[109]

1. Offers, Contracts and Options

Although offers and options (and sometimes contracts) may not be admissible as direct evidence of value, they are admissible for the purpose of impeaching an owner of property as to his estimate of value.[110]

2. Prior Inconsistent Statements or Appraisals

Appraisers and other expert witnesses may be impeached by prior inconsistent statements or appraisals.[111] While such evidence can be used to impeach the witness during cross-examination, it is not admissible as evidence when different time frames and sets of circumstances are involved.[112]

The new Georgia Evidence Code relaxes the foundation requirements for impeachment by a prior inconsistent statement. When impeaching a witness with a prior oral inconsistent statement, the new rule does not require that counsel draw the witness' attention to "the time, place, person, and circumstances attending the former statement."[113] Nor must counsel show the witness a prior written inconsistent statement before asking if the witness made the prior statement.[114] The new rule still requires, however, that the witness be given an opportunity to explain or deny the prior inconsistent statement before any extrinsic evidence of the statement is offered into evidence.[115]

3. Tax Assessments and Returns

A property tax assessment or return is not admissible as direct evidence of value of the subject property, but they may be admitted to impeach or contradict the testimony of the property owner or his witnesses.[116] The evidence must show that the return was prepared or approved by

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[109] See O.C.G.A. § 24-6-621 (2013) and O.C.G.A. § 24-9-82 (2012)

[110] Atlanta Warehouses, Inc. v. Atlanta Housing Authority of Atlanta, 143 Ga. App. 588 (1977).

[111] O.C.G.A. § 24-6-613 (2013). See e.g., State Highway Dep't v. J.A. Worley & Co., 103 Ga. App 25 (1961) (appraiser's prior assessment); Raines, 129 Ga. App. at 126 (condemnee's tax return); DeKalb County v. Queen, 135 Ga. App. 307, 309-310 (1975) (award of assessors which witness had signed); Atlanta Warehouses, Inc., 143 Ga. App. 590 (prior contracts and options to sell).

[112] DOT v. Mills, 197 Ga. App. 234 (1990); Brookhaven Assocs. v. DeKalb County, 187 Ga. App. 749 (1988).

[113] Milich, Paul S. (2011) "Georgia's New Evidence Code- An Overview," p. 403-404; Compare O.C.G.A. § 24-9-83 (2012) with § 24-6-613 (2013), which provides:

(a) In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time; provided, however, upon request the same shall be shown or disclosed to opposing counsel.

(b) Except as provided in Code Section 24-8-806, extrinsic evidence of a prior inconsistent statement by a witness shall not be admissible unless the witness is first afforded an opportunity to explain or deny the prior inconsistent statement and the opposite party is afforded an opportunity to interrogate the witness on the prior inconsistent statement or the interests of justice otherwise require. This subsection shall not apply to admissions of a party-opponent as set forth in paragraph (2) of subsection (d) of Code Section 24-8-801.

[114] Milich, Paul S. (2011) "Georgia's New Evidence Code- An Overview," p. 404; O.C.G.A. § 24-6-613 (2013).

[115] Id. § 24-6-613(b) (2013).

[116] State Hwy. Dep't v. Raines, 129 Ga. App. 123 (1973); Housing Auth. of Atlanta v. Republic Land & Investment Co., 127 Ga. App. 84 (1972); Seymour v. Housing Auth. of Dublin, 109 Ga. App. 613 (1964); State Highway Dept. v. Wilkes, 106 Ga. App. 634, overruled in party by State Highway Dept. v. Howard, 119 Ga. App. 298 (1969); Nichols on Eminent Domain, § 7-9 (2007).

the property owner; and when an oath is required, the giving of the oath must be shown before the return or assessment can be admitted. [117]

4. Other Employment of an Expert by a Party Litigant

Evidence may be introduced to show that a witness has done several appraisals for the same party for purposes of impeaching the witness to show bias.[118] Conversely, one party can support the impartiality of a witness by showing that he previously has appraised property for the opposing party.[119]

5. Appraisers Not Called

Neither party to a condemnation case is bound by rejected opinions of expert witnesses employed by them to appraise property being condemned.[120] The rejected expert witness, however, can be called by the other parties to testify as witness and be compelled to testify as to his opinions about the value of the property.[121] Under such circumstances, however, an expert witness originally employed by one party and called to testify by the opposing party cannot be questioned in regard to his employment by the opposing party nor can another witness for the party who employed the rejected appraiser testify to the same effect.[122] If such an expert is called, the expert then becomes that party's witness, rather than the witness of the litigant who originally retained him. Neither party is allowed to refer at trial to the fact that other expert witnesses were not called to testify.[123]

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[117] Raines, 129 Ga. App. 123, Seymour, 109 Ga. App. 613; Wilkes, 106 Ga. App. 634; Nichols on Eminent Domain, § 7-9 (2007).
[118] Smaha v. State Hwy. Dep't, 114 Ga. App. 60 (1966) (Smaha's harmless error analysis overruled by Dep't of Transp. v. Adams, 193 Ga. App. 866 (1983)); Sutton v. State Hwy. Dep't, 103 Ga. App. 29 (1961); Nichols on Eminent Domain§ 7-12 (2007).
[119] Cochran, 160 Ga. App. 583 (1981); Queen, 135 Ga. App. 307; Nichols on Eminent Domain§ 7-12 (2007).
[120] Logan v. Chatham County, 113 Ga. App. 491, 493 (1966).
[121] Id. At 492; Cochran, 160 Ga. App. at 585.
[122] Cochran, 160 Ga. App. at 585; Swanson, 191 Ga. App. at 752.
[123] Wright, 169 Ga. App. 332, 336-337 (1983).