

# **HIGHWAYS, ROADS AND EMINENT DOMAIN**

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### A. Public Road Creation

On July 24, 2003, the House Appropriations Committee voted to fund highways for fiscal year 2004 at \$33.8 billion, an increase of 6% from current levels and \$4.5 billion more than requested in President Bush's budget. An additional \$685 million is earmarked for hazard elimination and highway railroad grade crossing safety. The major source of transportation funds are collected from taxes on motor fuel. In Georgia, three distinct taxes are levied on gasoline: federal (18.4 cents/gallon), state (7.5 cents/gallon), and the state sales tax (3%). The 18.4 cents portion forms the core of federal-aid highway funds and is deposited in to a trust fund account called the Highway Trust Fund.

The programming of federal aid highway dollars for the three phases of a transportation project; preliminary engineering, rights-of-way and construction activities is spelled out in federal authorization legislation passed by Congress and approved by the President. Georgia is currently funded under the Transportation Equity Act for the 21st Century of 1998, typically referred to as TEA-21.

States receive the Federal funds as an apportionment based on various formulas that include lane miles, population, and other measures. Other Federal funding comes from congressional direction in a transportation act. These usually result in specific demonstration projects and these demonstration funds are not distributed by formula.

The Georgia DOT is charged with the responsibility of developing the prioritization of projects that will be developed and constructed in areas less than 50,000 in population. The Department does this in cooperation with county and city officials, which include organizations representing transportation operations (rail, ports, bikeways, public transit, aviation and highways), their employees, environmental and conservation groups, as well as interested citizens.

TEA-21 requires that the Statewide Transportation Improvements Program, which is made up of projects identified from both of the above processes, to be balanced in terms of project costs and expected available funds. Through consultation with local governments

and transportation regional forums, the Georgia DOT identifies funding priorities which equitably addresses the needs of the rural and urbanized areas. The first funding priority is always maintenance of transportation facilities already in place. Next, the DOT looks for projects that have been identified by one or more of an on-going evaluation processes as being deficient in some way (safety, traffic, accidents, design standards). Finally, the DOT look at projects which leverage the most local and federal money to match DOT gasoline tax dollars.

#### B. Regional Planning for Funds

The Georgia Department of Transportation largely takes a back seat in the role of regional planning for funds. A joint partnership between the local authorities and the DOT is used to finance most transportation improvements because it is easier for the DOT to prioritize projects. Local transportation participation, or the lack of, therefore, is an important fact used to make decisions as to whether to proceed with a particular transportation project.

Local contributions to projects do not necessarily have to be made in cash, but can be of other things of value such as right-of-way donations and use of local work forces for grading or relocating utilities. Without vital local participation many needed projects could not and would not be built.

Georgia law allows local jurisdictions, as of July 1, 1985, to use SPLOST (Special Purpose Local Option Sales Tax) proceeds for capital that would otherwise be paid for with General Fund or property tax revenues. The governing authority of any county in this state may, subject to the requirement of referendum approval and the other requirements of O.C.G.A. § 48-8-110, impose within a county a special sales and use tax for a limited period of time. The imposition of the tax is at a rate of 1% and may be used for a variety of county projects.

#### C. Roadway Funding

On the county level, funding is also available through the Local Assistance Road Program (LARP). Counties rely on LARP funding to maintain thousands of miles making up

their paved road systems. However, funding for LARP and other local transportation needs have met less than a third of the need in Georgia counties over the last five years.

County and municipality governments are responsible for 84% of the maintenance costs of the state's roadways. For the past few years, the Georgia DOT has identified at least \$100 million in county and city maintenance needs. However, DOT staff estimates that two to three times the amount of annual resurfacing needs exist but remain unidentified on the LARP priority list that counties submit.

Unfortunately, roadways will continue to deteriorate so the fact remains that state and local elected officials will need to continue making steps to ensure adequate road funding statewide. This will be challenging. County governments have pursued a variety of potential revenue sources, including an increase in the statewide motor fuel tax, the local option motor fuel tax and the transportation infrastructure fund (TIF).

#### D. Dedications

Besides condemnation, a public authority may acquire property for public road or transportation purposes by dedication. Pursuant to O.C.G.A. § 32-3-1, any interest in property, including scenic easements, airspace, and rights of access may be acquired through gift, devise, exchange, purchase, prescription, dedication, eminent domain or any other manner provided by law. Dedication, simply, is a conveyance and an acceptance. Glass v. Carnes, 260 Ga. 627 (1990). The mere use of realty by a small portion of the public, even for an extended period of time, will not amount to a dedication, unless it appears clearly that there was an intention to dedicate, and an acceptance by public authorities. Dunaway v. Windsor, 197 Ga. 705 (1944).

An owner of land may dedicate land to public use as a roadway through either an express or implied dedication. Glass v. Carnes, 260 Ga. 627 (1990). In the case of an implied dedication, it must appear that the property has been in the exclusive control of the public for a period long enough to raise the presumption of a gift. However, the mere fact that the public uses the property is not necessarily inconsistent with the retention of dominion by the owner. Dunaway v. Windsor, 197 Ga. 705 (1944). Where an implied dedication of property

as a public road is claimed, the facts relied on must be such as to clearly indicate a purpose on part of the owner to abandon his personal dominion over the property and to devote the same to a definite public use. For example, in Dunaway, the property was used for 20 years as a public highway. This raised a presumption of dedication against the owner, but to complete the status as a "public road" there must have been action on the part of the county authorities in accepting the road by use, work, maintenance and control. Id.

#### E. Easements

An easement or right of way is a property interest that allows the holder certain rights in the property while title to the property remains with the original landowner. The landowner may continue to use the property as long as the use does not interfere with the terms of the easement or right of way. Easements or rights of way are typically used for utility lines. Normally, the compensation due a landowner for an easement or right of way is the difference between the value of the property before the easement or right of way and the value of the property after the easement or right of way.

Where an easement is acquired for a particular public purpose, the property will revert to the owner if the condemnor ceases to use the property for that purpose. O.C.G.A. § 22-2-85. Before any reversion would occur, the owner would have to show the actual lack of use by the condemnor and the absence of intent to use the easement in the future. City of Atlanta v. Fulton County, 210 Ga. 784 (1954). The particular language used in the condemnation action to create the easement would be controlling as to the amount of use necessary to continue the operation of the easement. MARTA v. Datry, 235 Ga. 568 (1975).

- Right of access or easement of access to public road is property right and owner cannot be deprived of right without compensation. Brock v. DOT, 151 Ga. App. 905 (1979), quoting MARTA v. Datry, 235 Ga. 568 (1975).
- However, loss of access because of loss of an easement on adjoining owner property must be brought in an inverse condemnation case. McConnell Drum Services, Inc. v. Dekalb County, A92 A0348, July 9, 1992.

- It was necessary to take the entire tract of land rather than a right of way or easement where Georgia Power said it was necessary for the overall purpose of providing electric power to the public. Harwell v. Georgia Power Co., 154 Ga. App. 142 (1980).

F. Vacation and Abandonment

When a section of the state highway system has for any reason ceased to be used for public purposes, the authority may declare it abandoned under O.C.G.A. § 32-7-3 by producing a certificate of abandonment. As noted above, failure to maintain a road is adequate to find a lack of acceptance, however, when the authority has an interest in fee, simply neglecting to maintain is inadequate to abandon. Glass v. Carnes, 260 Ga. 627 (1990). If a county or municipality would like to take over the responsibility to maintain the road, the certificate of abandonment must reflect the county's or municipality's intent. Whenever an authority abandons a road and another authority takes over the road to maintain it, the abandoning authority must convey, by quitclaim deed, the road to the subsequent authority. O.C.G.A. § 32-7-2(a)(2). In the event that the appropriate authority is unwilling to take over the road, the property may be disposed of by selling the property back to the original owner, or, if the property has been subsequently sold, a sale may be made to the owners of the abutting land as provided in O.C.G.A. § 32-7-4(a)(2). If an entire parcel is acquired, the price for the property may not be less than the amount originally paid by the authority to acquire the property. However, when only remnants or portions of the original acquisition are being disposed of, they may be acquired for the market value at the time the authority decides the property is no longer needed. O.C.G.A. § 32-7-4(a)(2).

A quick read of O.C.G.A. § 32-7-4 would lead some to believe that when a condemnor abandons a particular project, they must first offer it to the county or municipality concerned, and then attempt to resell to the original owner. This is not the case. If the condemnor abandons a particular project, but has not decided that the property is no longer needed for transportation purposes, the prior owner is not entitled to repurchase the property. DeWolff v. Fulton County, 253 Ga. 744 (1985). Even if the condemned property is rezoned this does not, in itself, mean that the property is not needed for public purposes. However, if an authority acquires property for public road purposes, rezones it in a manner increasing

its value, and then decides to sell the property, the county or municipality has decided that property was not longer needed for public road purposes at the time of rezoning, and, thus, property must be offered to original owner based on its value under its rezoning application.

Id.

- Upon abandonment by the municipality, land acquired by deed of gift, will, or donation is subject to such conditions as may be specified in the instrument giving or donating the property. O.C.G.A. § 36-37-6(E)(2)(a).
  
- If the governing authority has not acquired fee simple title to a roadway, upon abandonment of roadway (subject to O.C.G.A. § 36-37-6(E)(2)(a) abutting landowners are presumed to own fee to the middle of the road, free of former rights to the general public. Glass v. Carnes, 260 Ga. 627 (1990).