ACCESS MANAGEMENT AND PROPERTY DEVELOPMENT

David Kall, Brian Jacobs, Paul Jones, Alfred Politzer, and Andre Hendrick

Growth Management Law Final Report
Professor Reuter
Professor Juergensmeyer
April 23, 2007

Table of Contents

***** References for the Legal Chapters of this Report are in footnote format (as opposed to alphabetical bibliographic format) as required for legal writing pursuant to THE BLUEBOOK, A UNIFORM SYSTEM OF CITATION (Harvard Law Review Association, 18th ed. 2005).

Introduction

Georgia Regional Transportation Authority has powers granted under its enabling legislation to regulate road access. The Georgia Department of Transportation provides access permits. Local governments subdivide property and otherwise create access issues.

Restricting or consolidating property access to roads is important to the efficient operation of highways. Unfortunately, Georgia communities and the state have limited examples of using regulatory powers to fix or limit access. Often as quickly as a public investment to widen a road occurs, it becomes congested with new development by land speculators and retail outlets.

In light of these problems, this Report focuses on access management and property development. The Report examines the feasibility of using government regulations to fix or limit access in order to provide for more efficient operation of the state's roads and highways. The Report conducts this analysis from both a planning perspective and a legal perspective.

The planning component of the Report includes: consideration of general access management techniques; the role subdivision regulations play in an access management program; and the relationship between access management and context sensitive solution models. The legal component of the Report includes: analysis of the basic legal issues arising from the implementation of access management programs; the legal standards in Georgia and other jurisdictions for restricting access; the drafting of a model ordinance restricting access in Georgia; an examination of takings jurisprudence and its relevance to

subdivision regulations; and examples judicial interpretation of access management regulations in Florida.

In Chapter One, David Kall provides an overview of access management from a traffic engineering perspective. In Chapter Two, Brian Jacobs examines subdivision regulations and their relationship to access management. In Chapter Three, Paul Jones analyzes access management issues through utilization of the context sensitive solutions model. In Chapter Four, Alfred Politzer provides an overview of the legal basis for access management, an examination of the legal framework for access management in Georgia, and a model ordinance for the regulation of access management in Georgia. In Chapter Five, Andre Hendrick further examines exactions and takings issues related to access management, and provides specific examples of how Florida courts have interpreted access management regulations.

Chapter One

Description of Access Management

David Kall

Growth Management Law Final Report
Professor Reuter
Professor Juergensmeyer
April 23, 2007

Description of Access Management

INTRODUCTION

Access management refers to the practice of limiting the access of land developments to roadways in order to promote the safety and efficiency of the transportation system. This Chapter of the Report will provide a description of access management from a traffic engineering perspective and describe how improving the physical design of roadways and their access points can improve safety and efficiency. Also, an overview of comprehensive access management programs around the country will be provided. The Chapter will conclude with a discussion of access management in Georgia and a case study of GA 20 south of Atlanta.

I. DESCRIPTION OF ACCESS MANAGEMENT

A. Definition of Access Management

One definition of access management is "the careful planning of the location, design, and operation of driveways, median openings, interchanges, and street connections" (Florida DOT). These four elements are all considered different types of access points that allow vehicles to enter a certain parcel of land from an adjoining roadway. It is important to pay close attention to the location of these access points because it can affect the traffic on the adjoining roadway. For example, creating a number of very closely spaced driveways along a certain stretch of roadway will increase the number of vehicles attempting to turn into and out of those driveways. These turning movements will decrease the speed and efficiency of the traffic on the main roadway and decrease the safety of the roadway due to the increased number of "conflict points," which are locations where vehicles cross paths and could potentially collide. Access

management reduces the number of access points to a roadway in order to improve the safety and efficiency of the roadway.

When implementing access management it is important to first understand the function of the roadway. Some roadways, such as expressways and main arterials, are meant to move large volumes of traffic across long distances. In these cases it is appropriate to limit access to these roadways. Other roads, such as local roads and neighborhood streets, serve the purpose of collecting vehicles to provide connections to arterial roadways. For these roads unlimited access is perfectly appropriate. These examples show that there is a tradeoff between access and mobility. In other words roadways that move large volumes of vehicles, and provide a lot of mobility, must have limited amounts of access. In contrast, roadways that have greater access will not be able to provide as much mobility. This concept is illustrated in Figure 1 below.

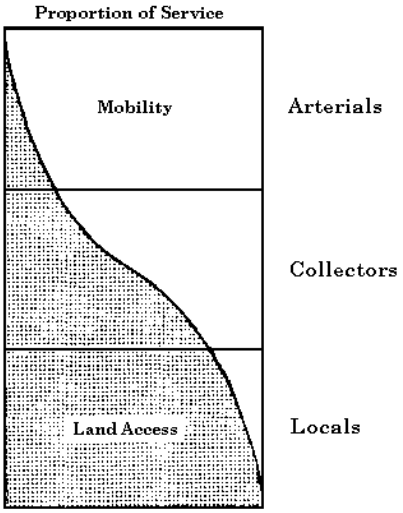

Figure 1. Tradeoff between access and mobility

B. Design Features

Access Management can be implemented through a number of physical design features, which are discussed below, and through planning and policy actions, which are discussed in the next two portions of the report on Subdivision Regulations and Context Sensitive Solutions. A great number of technical resources exist that describe in great detail a wide variety of physical design features to be used for access management; however, the following will provide a brief overview of some of these available design features and their effect on efficiency and safety:

- *Spacing Standards*—It is often useful to regulate the distance between access points to a roadway, such as signalized intersections, unsignalized intersections, and driveways. Providing longer spaces between these intersecting roadways and driveways can increase the capacity of a roadway and reduce the number of vehicle crashes. According to a National Cooperative Highway Research Program Study (NCHRP) study, each traffic signal added to a one-mile length of roadway reduced the average vehicle operating speed by 2.5 mph. According to the Highway Capacity Manual, every unsignalized access point (including both cross streets and driveways) along a roadway reduces speed by 0.25 miles per hour. One study conducted in the State of Georgia found that doubling the number of signalized intersections per mile from two to four resulted in a 40% increase in total crashes. A study of unsignalized access points found that every 10 additional access points per mile resulted in approximately 0.33 additional crashes (Dumbaugh 6-8).

- *Medians*—Medians can be used to restrict left turn movement to only certain locations. When combined with left turn lanes this can improve the efficiency of a roadway by preventing a build up of vehicles behind another vehicle waiting to turn left. A picture of a median with a left turn lane can be found in Figure 2. In addition, certain geometric designs employing medians can reduce the number of conflict points, which represent locations where vehicles have the opportunity to collide. This in turn reduces the number of vehicle crashes. Figures 3 and 4 are an example of using a median to reduce the number of conflict points.

Figure 2. Median with left turn lane

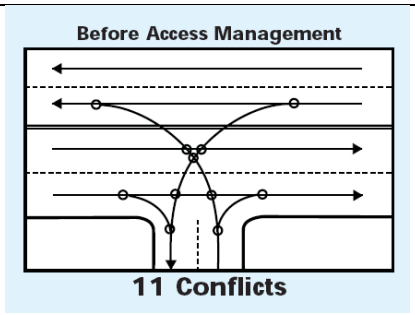

Figure 3. Conflict points before median

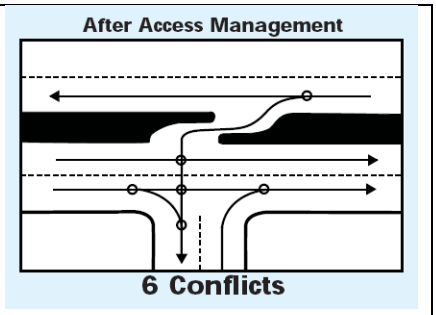

Figure 4. Conflict points after median

- *Internal Circulation*—Another way to promote access management is to encourage vehicles to make short trips between stores by using an internal roadway network. Encouraging these trips to stay on internal roadways prevents them from returning to the main roadway to travel a short distance. These trips could be on the same site or between adjacent parcels of land. Frontage and backage roads provide this internal circulation by connecting sites with a smaller roadway parallel to the main roadway at the front or back of a site. Internal circulation allows multiple property owners to consolidate

their access to a main roadway into one driveway. Figure 5 shows an example of a backage roadway that connects multiple sites and consolidates access to one driveway.

Figure 5. Example of Internal Circulation

II. COMPREHENSIVE ACCESS MANAGEMENT PROGRAMS

Many states have statewide driveway permitting programs that require access management standards to be met before a permit for roadway access is granted. Other states go beyond these traditional driveway permitting programs and have created comprehensive access management programs. The comprehensive programs differ because they set a statewide policy of access control that establishes a framework for local municipalities to follow (Williams and Forester 8). The comprehensive access management programs from Colorado and Florida will be examined below because they are two of the oldest and most developed programs in the country.

A. Colorado

Colorado had the first comprehensive access management program and it is now fully developed due to the length of time it has been in place. The Colorado State Highway Access Code establishes specific warrants for each access design element and criteria for the spacing of access and traffic signals. Furthermore, it requires internal

street networks for subdivisions and prohibits access to individual lots or parcels. The Colorado Department of Transportation (CDOT) has the authority to determine if proposed plats abutting state highways conform with the state highway access code (Williams and Forester 8).

B. Florida

Florida has developed a system of state highways that are designated for high-speed and high-volume traffic movement within the state. All roadways in this statewide system are subject to strict access controls. All segments of the network are supposed to come into compliance with these controls within a 20-year period. The Florida Department of Transportation (FDOT) also has plans to enter into formal agreements with local governments to coordinate land planning with state access control standards (Williams and Forester 9). Florida is extremely proactive in educating the businesses community about the benefits of access management along the roadways where they reside. The large amount of access management activities in Florida is likely the reason for the extensive legal precedents from this state, which will be explored further in a later portion of this report.

III. ACCESS MANAGEMENT IN GEORGIA

Access management in Georgia is not as fully developed as it is other states, such as those mentioned in the previous section. Its program is best characterized as a traditional driveway permitting program and does not exhibit the comprehensiveness of the Colorado and Florida programs. The Georgia Department of Transportation (GDOT) is the primary state agency involved in access management standards; however, the Georgia Regional Transportation Authority (GRTA) was also given authority to regulate

access to roadways within its jurisdiction. The access management activities of these two organizations will be examined below along with brief case study of a newly created overlay district in Henry County along GA 20, which is unique for Atlanta due to its prescription of access management standards.

A. Georgia Department of Transportation (GDOT)

In 2004, the Georgia Department of Transportation (GDOT) issued a manual entitled "Regulations for Driveway and Encroachment Control," which establishes permit procedures, access criteria, and geometric design criteria. It enforces these regulations and procedures by requiring permits for construction work within the right of way of a roadway, which effectively requires permits for any driveway connect to a state roadway. The regulations and procedures in this manual are limited to the jurisdiction of GDOT, which includes only roadways on the state highway network.

B. Georgia Regional Transportation Authority (GRTA)

While many State Departments of Transportation (DOTs) have the authority to limit access to roadways, Georgia is unusual due to the ability of the Georgia Regional Transportation Authority to limit access to any state, county, or municipal road within its jurisdiction (currently the metropolitan Atlanta area). This authority was provided to GRTA in its enabling legislation. So far the only access management activities conducted by GRTA seem to be associated with their review of developments of regional impact (DRI), during which they conduct an analysis of site access between proposed DRIs and public roads (*GRTA DRI Review Package*). While it still remains to be seen if and how GRTA will use this power, it is possible that it could be used in a number of ways. The GRTA could deny access of DRIs to roads or limit the number of dwelling

units that could take access from the roads. These powers could conceivably be used by the GRTA for even larger planning purposes, such as compelling local governments to prepare land-use plans that preserve open spaces from development (Nelson 635). The legal ramifications of this authority will be discussed further in a later portion of this report.

C. Case Study of GA 20 in Henry County

Henry County recently passed an ordinance creating an overlay district along Georgia State Route 20 (GA 20) in the southern part of the Atlanta metropolitan area. This district is officially called the Bruton Smith Parkway Development District and it covers a variety of development guidelines, including access management. The district stretches along GA 20 in Henry County between I-75 in McDonough and the Atlanta Motor Speedway in Hampton. Figure 6 shows this section of GA 20, but labels it Hampton-McDonough Rd.

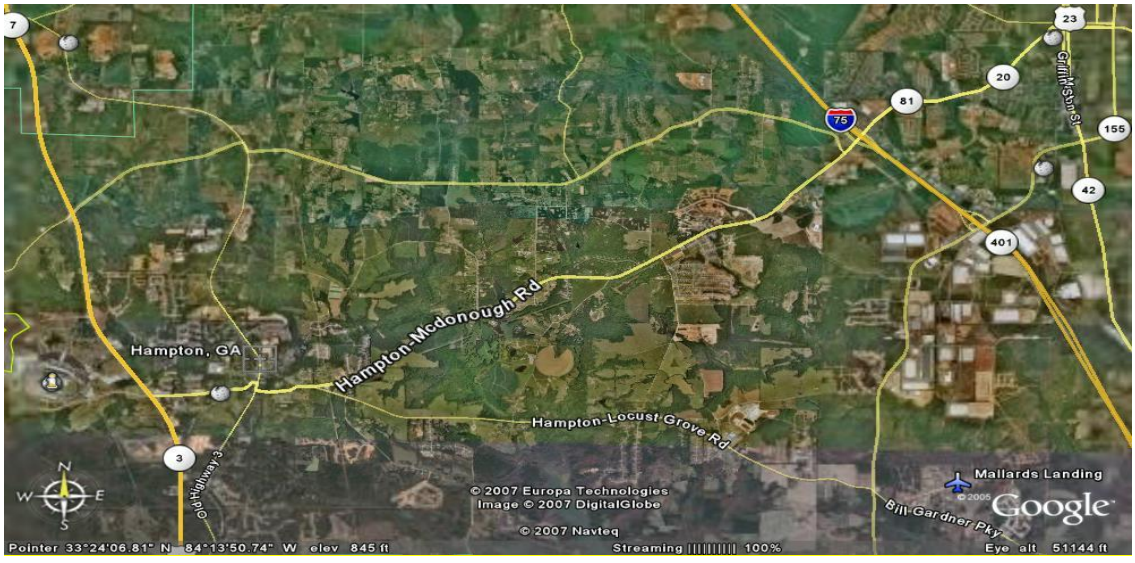

Figure 6. GA 20 in Henry County

In 2005 the roadway was expanded from 2 to 4 lanes to accommodate traffic headed to the Atlanta Motor Speedway on race days. This additional capacity makes the roadway ripe for development, which could change its current rural setting. Already, a mixed use center called South Point is under construction on the eastern portion of the roadway close to I-75. This development will have 570,000 square feet of retail space and is scheduled for completion in late 2007 (Seymour 1JM).

The overlay district is split into four "character" areas: urban activity, rural, Hampton Gateway, and an event village. Each district sets different aesthetic standards to correspond with the existing surroundings. Besides aesthetic standards, access management principles are also being employed. The following describes how the three design features (spacing, medians, and internal circulation) described in Section I.B. above are prescribed in the overlay district.

- *Spacing Standards*—The Henry County overlay district sets minimum spacing between access points based upon the design speed of the roadway at that point. Table 1 shows the required minimum distances.

Table 1. GA 20 Access Point Spacing

Design Speed of Road	Minimum Access Point Spacing
Less than 35 mph	185 feet
36 to 45 mph	245 feet
Greater than 45 mph	440 feet

- *Medians* –The overlay district does not have specific requirements for medians, but it does say that "a deceleration lane, larger turning radius, traffic islands, and any other devices or designs may be required at the sole discretion of the Development Plan Review Department staff" (Code of Henry

County). This language allows for the eventual requirements of left-turn lanes (deceleration lanes) and medians (traffic islands).

- *Internal Circulation*—The overlay district has good provisions for internal site circulation by requiring joint driveways, cross access drives, and pedestrian access "to allow circulation between parcels." Additionally, easements are provided along GA 20 to build frontage roads that extend the entire length of the block served and allow for separation of driveways of at least 1,000 feet.

While the text of the overlay district does a good job of incorporating the three access management design features described above, it is currently unclear if these features will be implemented correctly. Since the overlay district was just placed in the Henry County Ordinance in December 2006, there has not been enough time for development to occur that would be required to meet the standards. Therefore, this overlay district could be considered currently untested. The GA 20 case study will be mentioned again throughout later portions of the report to illustrate other planning and legal principles.

CONCLUSION

This Chapter of the Report described access management from a traffic engineering perspective and showed how design features, such as spacing standards, medians, and internal circulation can be used to increase the efficiency and safety of a roadway. Some states, such as Colorado and Florida, have incorporated these elements into comprehensive access management programs. While access management activities in Georgia are more limited, some localities, such as Henry County, are making strides.

REFERENCES

Code of Henry County, Georgia.
http://www.municode.com/Resources/gateway.asp?pid=10910&sid=10

Dumbaugh, Eric. *Access Management Planning Assistance Program: Enhancing the Safety of Arterial Roadways in the Atlanta Metropolitan Region.* 7 August 2006.

Florida Department of Transportation. *Access Management: Balancing Access and Mobility.* Brochure.

Georgia Department of Transportation (GDOT). *Regulations for Driveway and Encroachment Control.* March 2, 2004.

Georgia Regional Transportation Authority (GRTA). *GRTA DRI Review Package: Technical Guidelines.* Effective January 14, 2002.

Nelson, Arthur C. "New Kid in Town: The Georgia Regional Transportation Authority and its Role in Managing Growth in Metropolitan Georgia." *Wake Forest Law Review*. Volume 25. 2000.

Seymour, Add Jr. "Henry County: Officials Take New Route on Development." *Atlanta Journal Constitution.* 4 Jan. 2007, main edition: 1JM.

Williams, Kristine and J. Richard Forester. National Cooperative Highway Research Program (NCHRP) Synthesis 233. *Land Development Regulations that Promote Access Management.* Washington D.C.: Transportation Research Board, National Research Council: National Academy Press, 1996.

Chapter Two

Subdivision Regulations

Brian Jacobs

Growth Management Law Final Report
Professor Reuter
Professor Juergensmeyer
April 23, 2007

Subdivision Regulations

INTRODUCTION

Despite the creative efforts of local governments to mitigate access management issues, the problem continues to persist. Much of their progress and efforts continue to be stymied by the often conflicting goals of state and regional transportation authorities. In Georgia, the Georgia Regional Transportation Authority has powers granted under its enabling legislation to regulate road access while Georgia DOT provides access permits. Under this construct, local governments have limited options to fix or limit access.

For many of Georgia's communities, the most effective management of access has been through the enforcement of subdivision regulations. Subdivision regulations guide the division and subdivision of land into lots, blocks, and public ways. They typically complement zoning, which establishes development standards related to land use, parking, and loading, lot dimensions, and lot coverage.

Subdivision regulations provide an opportunity to assure proper access and street layout in relation to existing or planned roadways. Most subdivision ordinances establishes: review procedures for processing plats; information to be included on the plat; design principles and standards for lots, blocks, streets, public places, pedestrian ways, and utilities; required improvements, including streets, sidewalks, water, sewer, and curbs and gutters; and financing and maintenance responsibilities.[1] Undoubtedly, the revision and enforcement of subdivision regulations continues to be the most effective local strategy for mitigating traffic related issues.

I. HENRY COUNTY: AN OVERVIEW

With the Atlanta Region continuing to experience record increases in population, the need for effective access management tools become even more important. Henry County, one of the Atlanta Region's fastest growing counties, anticipates a drastic increase in traffic related issues associated with growth. Despite these predictions, Henry County is not standing idle. Instead, the county plans to embrace and manage its growth through aggressive changes of its local ordinances.

Like other Georgia counties, Henry's most promising method for regulating access will be through its subdivision regulations. Because of its interrelatedness to zoning, Henry County's subdivision regulations are nested in its County Code. To date, their processes involved in subdivision regulations are typical of what one would find in an average subdivision regulation.

What will differentiate Henry from other growing counties is how they creatively revise and enforce their current standards. The challenges Henry will face are apparent almost everyday of the week. Congested interstates (75 South) and state roads (138) continue to plague the county during heavy traffic hours. The congestion is obviously attributed to the drastic and unpredicted growth over the last five years. Albeit, the problem is not irresolvable.

II. HENRY COUNTY AND SUBDIVISION REGULATIONS

Like many other jurisdictions, Henry County's subdivision regulation provides for a phased review process that encourages conceptual review and submission of a preliminary plat prior to a final plat application. Conceptual review allows planning and engineering staff to advise developers on access standards and issues before they have

invested in a surveyor or engineer to prepare the plat. This allows problems to be caught early, when the opportunity for effective changes is much greater.[2] Access related issues that could be addressed in the subdivision or site plan review process include:

- Is the road system sufficient to meet the projected traffic demand and does the road network consist of a hierarchy of roads designed according to function?
- Are connections and intersections properly planned in relation to sight distance, connection spacing, operational capacity, and other related considerations?
- Do units front on residential access streets rather than major roadways?
- Does site layout allow on-site vehicular circulation, without having to use the peripheral road network?
- Does the pedestrian and bicycle path system link buildings with parking areas, entrances to the development, open space, and recreational and other community facilities?[3]

In addition to the above criterion, Henry County's review process could require an applicant to provide additional information. The amount of information required on a plat review varies with the complexity of the project. Additionally required information could include the following:

- Location of access points on both sides of the road;
- Distances to neighboring constructed access points, median openings, traffic signals, intersections, type of approach roads, and other transportation features on both sides of the property;
- Number and direction of lanes to be constructed on the driveway;
- Striping and signing plans for both the road and the driveway;
- All proposed transportation features (such as auxiliary lanes, signals, median treatments, etc.);

- Appropriate traffic studies; including trip generation data;
- Parking and internal circulation plans;
- Plat map showing property lines, right-of-way, easements, and ownership of abutting properties;
- A detailed description of any requested variance, the reason the variance is requested, proof of necessity, and related information;
- A cross-section of the main road.[4]

As in the case with most local governments, Henry County's subdivision review provides both theoretical and practical access management expectations. Far too often, where theory does not result in practice is in the area of minor subdivisions and lot splits. Minor subdivision and lot split regulations provide for local review of minor land division activity that would otherwise be exempted from subdivision review.

These regulations provide a streamlined, administrative review procedure for smaller subdivisions and lot splits to assure that public requirements are met, without placing an unnecessary burden on the property owner.[5] Types of lots that may cause access problems include flag lots, corner lots, and double frontage lots (Figure 1).

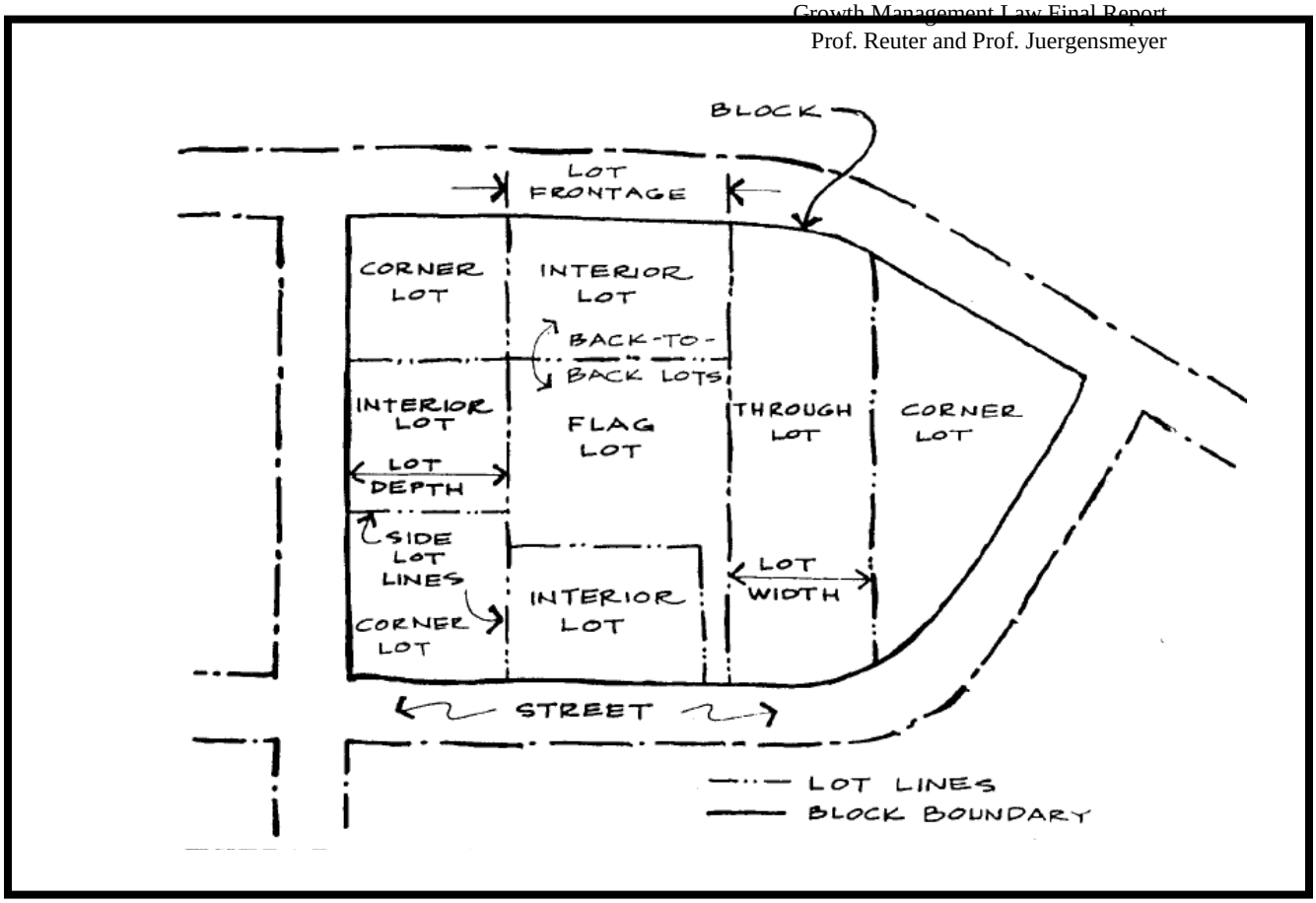

Figure 1.

Because minor lots account for a majority of the impediments to traffic throughput, its management is vital to any successful traffic access program. In response, counties such as Henry must forcibly apply the same level of review and oversight given to major subdivisions. Regulations governing minor subdivisions such as flag lots, corner lots, and double frontage lots require consistent updates and revisions to be effective. Flag lots are lots shaped like flags with long access "poles.[6]

They are useful for providing private access to internalized lots in a recorded plat, or where unique site constraints create access problems. They are often abused, however, to provide interior lots with direct access to a public road, while avoiding the expense of platting and providing a road. Some solutions to this problem have been in the form or

easements and joint agreements between property owners. However, property owners are often reluctant to assume responsibility for the shared costs. The more preferred alternative is to require sites to be designed with an internal street system that conforms to established standards and good site design practices. If should only be allowed in residential development if the following conditions are met:

- no flag lot shall abut more than one other flag lot, nor shall flag lots be double stacked across a common street;
- in no instance shall flag lots constitute more than 10 percent of the total number of building sites in a given development, or 3 lots (whichever is more);
- the lot area occupied by the flag driveway shall not be counted as part of the required minimum lot area;
- flag lots shall not be permitted whenever their effect would be to increase the number of building sites taking driveway access to a collector or arterial street; and
- no flag driveway shall be longer than 150 feet.[7]

Subdivision regulations must continue to address additional minor subdivisions such as reverse frontage and outparcel lots. Reverse frontage requirements guide the design of subdivisions along thoroughfares to assure that lots abutting the roadway obtain access from a local road.[8] Outparcels are lots on the perimeter of a larger parcel that break its frontage along the roadway.

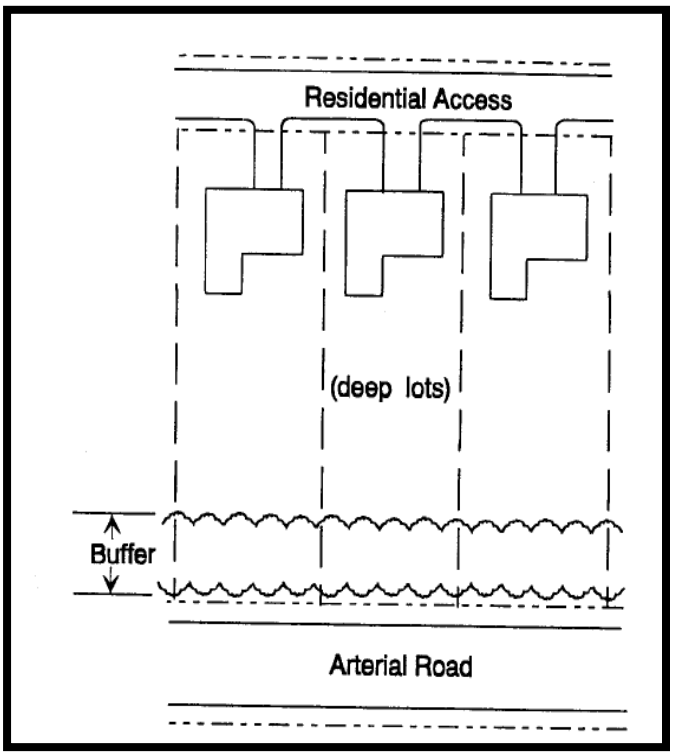

Figure 2. Reverse Frontage

Such lots are often created along the thoroughfare frontage of shopping center sites, and leased or sold to capitalize on these highly valued locations. Outparcel regulations should include standards governing: the number of parcels; minimum lot frontage; access; unified parking and circulation; landscaping and pedestrian amenities; building height, coverage, and setback requirements; and signage.[9]

CONCLUSION

To effectively manage today's congestion problems, subdivision regulations should be rewritten to implement access control measures and address the retrofitting of nonconforming access. Typically, the first step in an access control program is to implement an access classification system. An access classification system is a

hierarchical ranking system for roadways that matches access management standards with the purpose, functional characteristics, and design features of a roadway.[10]

A classification system strives to reduce the number of access points along higher priority roadways by assigning it as a high level of access control as possible, given abutting land use characteristics. Additional effective measures for managing access consist of the regulation of driveway design, location, and spacing. Driveway design considerations that relate to access management include turning radius or flare, width, required lanes, throat length, and auxiliary turn lanes and directional controls.[11]

Driveway location issues include placing driveway approaches so that an exiting vehicle has an unobstructed sight distance, and motorists on the roadway have an adequate stopping sight distance. Driveway spacing standards minimize curb cuts on a roadway by mandating a minimum separation distance between driveways. This reduces the potential for collisions as travelers enter or exit the roadway and encourages sharing of access.

Because land development regulations are not retroactive, access management regulations must address nonconforming land developments. Existing properties that do not meet new regulations must be designated as nonconforming and may continue in the same manner as they existed before land development regulations were adopted-a process commonly known as grandfathering.[12] However, because of the negative effects of nonconforming properties, new regulations must be adopted.

NOTES

[1] Kristine M. Williams, AICP and J. Richard Forester, National Cooperative Highway Research Program, "Synthesis of Highway Practice 233: Land Development Regulations that Promote Access Management," National Academy Press, Washington D.C. 1996, page 11.
[2] page 11
[3] page 11.
[4] page 11.
[5] page 12.
[6] page 13.
[7] page 13.
[8] page 14.
[9] page 14.
[10] page 15.
[11] page 15.
[12] page 15.

REFERENCES

[1.] Code of Henry County, Georgia.
http://www.municode.com/Resources/gateway.asp?pid=10910&sid=10

Chapter Three

Context Sensitive Solutions

Paul Jones

Growth Management Law Final Report
Professor Reuter
Professor Juergensmeyer
April 23, 2007

Context Sensitive Solutions and Access Management

INTRODUCTION

Now that you have a familiarity with access management, I would like to explore the decision-making context that it exists in. The current trend for making transportation related decisions is Context Sensitive Design (CSD) or Context Sensitive Solutions (CSS). This trend stands in stark contrast to how transportation decisions have traditionally been made.

I. BACKGROUND

Traditionally, transportation projects have relied very heavily on the technocratic knowledge of civil engineers. This has led to structurally sound and geographically relevant transportation decisions but has severely neglected the cultural, social, historical, and environmental contexts of transportation projects. Historically, roadway decisions have been largely based on the efficient movement of automobiles i.e. reducing congestion so as to make car transit easier. This framework has neglected other forms of transit, created environments hostile to pedestrians, and had a detrimental effect on our urban form (sprawling car-based suburbs). Critics of this framework have been emerging over the past decade and proposing CSS as a new model for making transit decisions.

Surprisingly, this new model has grown out of the civil engineering profession, in response to the criticisms mentioned earlier. This new model is defined by a collaborative, interdisciplinary approach that involves all stakeholders to develop transportation projects that fit in their physical setting and preserve scenic, aesthetic, historic and environmental resources, while maintaining safety and mobility (USDOT 2007).

II. General Principles

CSS is an approach that considers the total context within which a transportation improvement project will exist. CSS principles include the employment of early, continuous and meaningful involvement of the public and all stakeholders throughout the project development process. Above all, CSS is a process that attempts to create design excellence through interdisciplinary teams and meaningful stakeholder involvement.

Context sensitive solutions are defined by 5 major principles. The first of these is the creation of interdisciplinary teams. This is necessary in order to produce all of the best alternatives and options. Second is a shift from a technocratic engineering focus to a community and stakeholder focus. This allows for the project to truly reflect local needs and creates a "buy-in" from the community that is necessary for sustainability. Thirdly, the overall design must be environmentally sensitive. This means that the roadway should both fit into the existing landscape as well as minimize its effect on important natural resources. The fourth principle is design flexibility in reaching solutions. This is a big and important step for engineers because they are not used to examining new ways of approaching problems based on the interdisciplinary teams. Engineers and planners must present multiple options for stakeholders to choose from. Lastly, CSS is an early and continuous process (USDOT 2007).

While CSS is a relatively new phenomenon, it does have an interesting history that is worth noting. It could be argued that CSS was initiated in 1969 when the National Environmental Policy Act (NEPA) called for a thorough analysis of a project's natural and human impacts before receiving federal funds. However, it was not until the early 1990's that the momentum of the CSS approach began to gain steam. In 1991, the

Intermodal Surface Transportation Efficiency Act (ISTEA) was passed, and among other things emphasized that, in addition to safety, projects should be sensitive to their surrounding environment and increase public involvement. This was followed in 1995 with the National Highway System Designation Act, which said that designs should take into account the built and natural environment of the projects area. Both of these laws were followed by conferences and publication that further solidified the movement toward CSS for transportation decisions (GDOT 2006).

Although these legislative acts make the application and use of CSS much easier, these new multi-stakeholder projects are still liable to tort laws. Tort law protects citizens against negligence in the design of a roadway. Since the CSS process involves more stakeholders and a movement away from the exacting science of engineering, there may be more avenues for citizens to sue based on a claim of negligence. If citizens take such avenues it may put the entire CSS process in danger.

> "In order to be successful in a claim of negligence in the design of a roadway, a plaintiff must show that there was a "defect" in the design and that the defect was a "proximate cause" of the injuries suffered. Further, to overcome "design immunity" the plaintiff may have to show that the transportation agency failed to exercise discretion in the design process by preparing the design without adequate care, by making arbitrary or unreasonable design decisions, or by creating a design that contained an inherently dangerous defect from the beginning of use (NCHRP 2004)."

However, given that roadway decisions are discretionary, it is likely that courts

will support the role and decisions of the designer or a CSS design process. As long as the roadway decisions are well documented and well reasoned there is not likely to be much of a problem.

CONCLUSION

Given all of this basic information, how does CSS relate to access management of roadways? Since CSS is primarily a decision-making process, it does advocate a specific position on managing roadway access. The frequency and type of access is to be determined by the stakeholders involved with a respect for the context. The context will likely involve assessing and possibly changing current roadway classifications. If, through a CSS process, a roadway's purpose is determined to be moving traffic between nodes, then limiting access points would be the smart decision to decrease congestion and increase car and transit mobility.

However, since CSS is emerging from a movement away from auto dependency and transit/roadway decisions solely based on automobiles, it is likely that the "livability" framework of CSS will lead to more mixed use-type development with smaller streets, smaller block sizes, and a better pedestrian and bicycle environment. This type of roadway environment will increase the amount of access points along the roadway, which will in turn slow traffic. It seems that a CSS process will complicate access management decisions because access management is generally seen as a tool to decrease congestion and increase the efficiency of automobile movement. For this reason, it becomes very important for access management decisions to be an integral part of any CSS process, so that access can be balanced with livability.

REFERENCES

Georgia Department of Transportation (GDOT). "Context Sensitive Design: Online Manual ver. 1.0." http://www.dot.state.ga.us/csd/index.html. 04.21.2006.

National Cooperative Highway Research Program (NCHRP). *Report 480: A Guide to Best Practices for Achieving Context Sensitive Solutions*. "Tort Liability, Design Exceptions, and Risk Management and Overview of Tort Issues." http://www.contextsensitivesolutions.org/content/topics/what_is_css/legal-professional-basis/liability/. 04.02.04

US Department of Transportation: Federal Highway Administration (USDOT). "What is CSS." http://www.fhwa.dot.gov/csd/what.cfm. 02.05.07

Chapter Four

An Examination of the Legal Framework For Access Management and the Development of a Model Access Management Ordinance For Georgia

Alfred R. Politzer

Growth Management Law Final Report
Professor Reuter
Professor Juergensmeyer
April 23, 2007

An Examination of the Legal Framework For Access Management and the Development of a Model Access Management Ordinance For Georgia

INTRODUCTION

This Chapter of the Report will address the legal issues relevant to the implementation of an access management program in Georgia. Part I will provide an overview of the legal basis for access management, including a summary of how courts in other jurisdictions have interpreted the right of access. Part II will provide an analysis of the legal framework for access management in Georgia, including an overview of the relevant state court decisions construing access rights. Part III will examine, in light of the various considerations discussed in Parts I and II, the development of a model access management ordinance for Georgia. Appendix A will set forth the "Model Access Management Ordinance For Georgia," a model ordinance drafted by this Chapter for the regulation of the right of access in Georgia as part of a comprehensive access management program.

I. AN OVERVIEW OF THE LEGAL BASIS FOR ACCESS MANAGEMENT

A. General Legal Considerations

The feasibility of an access management program is determined by the ability of an authority to regulate access without having to compensate landowners.[1] Two conflicting rights underlie this discussion: the public right to safe and efficient movement

[1] *See* INDIANA DEPARTMENT OF TRANSPORTATION, *Access Management Authority in Indiana*, in INDIANA STATEWIDE ACCESS MANAGEMENT STUDY (Urbitran, 2006).

versus the landowners' right to suitable and sufficient access.[2] When regulating access, governmental units attempt to balance public powers with private property rights.[3]

B. Rights of Property and Access

1. The Protection of Property Rights

The legal basis for the protection of property rights is the taking clause in the U.S. Constitution and similar provisions in state constitutions.[4] When the government takes property for public benefit, compensation is required.[5] There are two general categories of takings: physical takings and regulatory takings.[6]

Physical takings occur when the government actually takes or physically occupies the land for a public use.[7] Regulatory takings occur when governmental regulations impose an inordinate burden on a specific piece of property, thereby depriving the owner of the use or enjoyment of that property.[8] The standard for determining when a physical taking occurs is straightforward, but the standards for determining when a regulatory taking occurs are very complex.[9]

---

[2] *See* Kristine Williams and J. Richard Forester, *Land Development Regulations That Promote Access Management*, NATIONAL HIGHWAY COOPERATIVE RESEARCH PROGRAM, NCHRP SYNTHESIS 233, TRANSPORTATION RESEARCH BOARD, NATIONAL RESEARCH COUNCIL (National Academy Press, 1996).

[3] *See id.*

[4] U.S. Const. Amend. 5.

[5] *Id.*

[6] *See* Allison J. Midden, Note, *Taking of Access: Minnesota Supreme Court Declines to Allow Admission of Evidence of Diminished Access Due to Installation of a Median in a Takings Case*, 25 WM. MITCHELL L. REV. 329, 332 (1999).

[7] *See* GEORGE SKOURAS, TAKINGS LAW AND THE SUPREME COURT 17 (David A. Shultz ed., 1998).

[8] *See* Terri L. Lindfors, Note, *Regulatory Takings and the Expansion of Burdens on Common Citizens*, 24 WM. MITCHELL L. REV. 255, 262 (1998) (discussing regulatory takings law).

[9] *See* Arthur G. Boylan, *Losing Clarity in Loss of Access Cases: The Minnesota Supreme Court's Muddled Analysis in* Dale Properties, LLC v. State, 29 WM. MITCHELL L. REV. 695, 698 (2002).

2. The Right of Access is a Property Right

Throughout the United States, courts have held that a landowner whose property abuts a public highway possesses an easement of access to that highway.[10] This right of access is subject to the constitutional right of just compensation when government action causes a loss of access.[11] The vast majority of courts have held that total deprivation of access is equivalent to a compensable taking, particularly when the easement of access to the highway is recognized by state law.[12] Even if the government does not totally deprive

[10] *See* Lesley v. City of Montgomery, 485 So. 2d 1088, 1089 (Ala. 1986); City of Yuma v. Lattie, 572 P.2d 108, 113 (Ariz. Ct. App. 1977); People v. Edgar, 32 Cal. Rptr. 892, 897 (Cal. Dist. Ct. App. 1963); Pinellas County v. Austin, 323 So. 2d 6, 8 (Fla. Dist. Ct. App. 1975); Metropolitan Atlanta Rapid Transit Auth. v. Fountain, 352 S.E.2d 781 (Ga. 1987); Brown v. City of Twin Falls, 855 P.2d 876, 878 (Idaho 1993); Streeter v. County of Winnebago, 357 N.E.2d 1371, 1374 (Ill. App. Ct. 1976); Simkins v. City of Davenport, 232 N.W.2d 561, 564 (Iowa 1975); Lewis v. Globe Constr. Co., 630 P.2d 179, 183 (Kan. Ct. App. 1981); Rieke v. City of Louisville, 827 S.W.2d 694, 696 (Ky. Ct. App. 1991); Hay's Western Wear, Inc. v. State, 624 So. 2d 975, 976 (La. Ct. App. 1993); Lim v. Michigan Dep't of Transp., 423 N.W.2d 343, 345 (Mich. Ct. App. 1988); Hendrickson v. State, 127 N.W.2d 165, 173 (Minn. 1964); State Highway Comm'n v. McDonald's Corp., 509 So. 2d 856, 861 (Miss. 1987); Capitol Plumbing & Heating Supply Co. v. State, 363 A.2d 199, 200 (N.H. 1976); Hill v. State Highway Comm'n, 516 P.2d 199, 200 (N.M. 1973); Department of Transp. v. Craine, 365 S.E.2d 694, 697 (N.C. Ct. App. 1988); Boehm v. Backes, 493 N.W.2d 671, 673 (N.D. 1992); Gruner v. Lane County, 773 P.2d 815, 817 (Or. Ct. App. 1989); Truck Terminal Realty Co. v. Commonwealth, 403 A.2d 986, 989 (Pa. 1979); Woods v. State, 431 S.E.2d 260, 262 (S.C. Ct. App. 1993); State v. Gorman, 596 S.W.2d 796, 797 (Tenn. 1980); City of San Antonio v. Guidry, 801 S.W.2d 142, 148 (Tex. Ct. App. 1990); State Highway Comm'r v. Easley, 207 S.E.2d 870, 875 (Va. 1974); Keiffer v. King County, 572 P.2d 408, 409 (Wash. 1977); Narloch v. Dep't of Transp., 340 N.W.2d 542, 548 (Wis. 1971).

[11] *See* State Department of Transportation v. S.W. Anderson, Inc., 744 So.2d 1098 (Fla. Dist. Ct. App. 1st Dist. 1999); Jenkins v. Board of County Com'rs of Madison County, 698 N.E.2d 1268 (Ind. Ct. App. 1998); Eberth v. Carlson, 266 Kan. 726 (1999); County of Anoka v. Maego, Inc., 541 N.W.2d 375 (Minn. Ct. App. 1996), *aff'd*, 566 N.W.2d 331 (Minn. 1997); Simmons v. Mississippi Transp. Com'n, 717 So. 2d 300 (Miss. 1998).

[12] *See* U.S. v. Smith, 307 F.2d 49 (5th Cir. 1962); State ex rel. Morrison v. Thelberg, 87 Ariz. 318 (1960); State by Lord v. Casey, 263 Minn. 47 (1962); State ex rel. State Highway Commission v. Brockfeld, 388

an abutting owner of all access, however, a substantial interference with the owner's right of reasonable access may nevertheless be a compensable taking of his property.[13]

In order to show substantial interference with access, it is sufficient if the landowner demonstrates that there has been a total temporary restriction or a partial permanent restriction of access.[14] Most courts hold, however, that a compensable taking does not occur when the government merely regulates access, such as prohibiting left turns, specifying the location of driveways in and out of abutting property, or establishing one-way traffic.[15] Thus, the government can reasonably regulate a property owner's right of access, but it cannot deny that right without the payment of just compensation.[16]

3. The Scope of the Right of Access

The right of access includes the right to provide the physical means for access, such as curb cutting.[17] While the general rule that the right to access can be regulated – but not denied – has been applied to invalidate governmental regulation of access, no strict definition of what constitutes denial of access has been developed.[18] It is clear,

---

S.W.2d 862 (Mo. 1965); Mueller v. New Jersey Highway Authority, 59 N.J. Super. 583 (App. Div. 1960); Rothwell v. Linzell, 163 Ohio St. 517 (1955); State By and Through Dept. of Transp. v. Henrikson, 1996 SD 62 (S.D. 1996); Blevins v. Johnson County, 746 S.W.2d 678 (Tenn. 1988); State ex rel. Ashworth v. State Road Commission, 147 W. Va. 430 (1962).

[13] *See* In re Primary Road No. Iowa 141, 253 Iowa 1130 (1962); Beer v. Minnesota Power & Light Co., 400 N.W.2d 732 (Minn. 1987); Cady v. North Dakota Dept. of Transp., 472 N.W.2d 467 (N.D. 1991).

[14] *See* State v. Allen, 870 S.W.2d 1 (Tex. 1994).

[15] *See* Dept. of Transp. v. Gayety Theatres, Inc., 781 So. 2d 1125 (Fla. Dist. Ct. App. 3d Dist. 2001).

[16] *See* Lucas Martin, Mitchell Waldman, and Anne Melley, *Highways, Streets, and Bridges*, 39 AM. JUR. 2D § 154 (2007).

[17] *See* Hillyard v. Chevy Chase, 215 Md. 243 (1958) (specifically recognizing that an abutter's right of access includes the right to cut a curb).

[18] *See* C. C. Marvel, *The Power To Directly Regulate or Prohibit Abutter's Access to Street or Highway*, 73 A.L.R.2D 652, § 3 (2007).

however, that the right to access is subject to regulation; this limitation is generally the basis for upholding governmental regulation of access.[19]

The right of access is a right to *reasonable* access.[20] While entire access may not be denied, a landowner is not entitled to access at all points along the boundary between his land and the highway.[21] If the landowner has convenient access to his property, and the government has not substantially interfered with his means of ingress and egress, courts generally dismiss the complaint.[22]

Another factor limiting the scope of the right of access is that there is generally no right of direct access.[23] Courts ruling on regulations enacted under access management program guidelines often find restricted access reasonable even when it is more circuitous or indirect than another route.[24]

---

[19] *See id.*; Martin, Waldman, and Melley, *supra* note 16, at § 154.

[20] *See* Leonard v. People ex rel. Dept. of Transp., 73 Cal. Rptr. 2d. 328 (1998) (discussing how right of access is reasonable and customary access); East Lake Partners v. City of Dover Planning Com'n, 655 A.2d 821 (Del. Super. Ct. 1994) (limiting right of access to reasonable access); City of Wichita v. McDonald's Corp., 266 Kan. 708, 971 P.2d 1189 (1999) (holding that the right of access is only a right to reasonable and customary ingress and egress).

[21] *See* Jenkins v. Board of County Com'rs of Madison County, 698 N.E.2d 1268 (Ind. Ct. App. 1998) (holding no right to access at all points along property); Grossman Investments v. State by Humphrey, 571 N.W.2d 47 (Minn. Ct. App. 1997); High Horizons Development Co. v. State, Dept. of Transp., 120 N.J. 40, 575 A.2d 1360 (1990).

[22] *See* State ex rel. Dept. of Highways v. Linnecke, 86 Nev. 257 (1970); Speight v. Lockhart, 524 S.W.2d 249 (Tenn. Ct. App. 1975).

[23] *See* State v. Lewis, 785 P.2d 24 (Alaska 1990).

[24] *See* State ex rel. State Highway Commission v. Mauney, 76 N.M. 36 (1966); Beljac Holding Corp. v. New York State Dept. of Transp., 345 N.Y.S.2d 165 (1973).

Finally, because access is a property interest, it does not include a right to traffic flow from the highway (which is subject to regulation by state highway authorities).[25] This is true even though businesses may suffer adverse economic effects as a result of the reduced traffic flow.[26]

C. Acquisition and Control of Property Rights

1. Eminent Domain

Eminent domain is the right of a state to take private property for a public or semipublic use.[27] The Due Process Clause of the Fourteenth Amendment makes the Compensation Clause of the Fifth Amendment applicable to the states.[28] Due process requires that when property is taken for public use, compensation be paid to the landowner.[29] Thus, when the government exercises its power of eminent domain, the Constitution requires the government to pay compensation to the landowner.[30]

2. Police Power

Under police power, government may restrict the use of private property to protect the public safety, welfare, or public interest.[31] Generally, the landowner is not entitled to any compensation, because the law concludes that the owner is sufficiently compensated by sharing in the general benefits resulting from the exercise of the police

[25] *See* Department of Transp. v. Gefen, 636 So. 2d 1345 (Fla. 1994); Missouri Real Estate and Ins. Agency, Inc. v. St. Louis County, 959 S.W.2d 847 (Mo. Ct. App. E.D. 1997).

[26] *See Gefen*, 636 So. 2d at 1345.

[27] *See* Ray v. State Highway Comm'n, 410 P.2d 278, 281 (Kan. 1966).

[28] *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980).

[29] *See* Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 236 (1897).

[30] *See id.* at 238.

[31] *See* House v. Mayes, 219 U.S. 270, 282 (1911).

power.[32] Thus, police power "encompass[es] the government's ability to regulate land use and personal property without incurring the obligation of paying compensation."[33]

3. Eminent Domain v. Police Power

The police power and eminent domain are often difficult to distinguish. Tellingly, there have been many cases "where a plaintiff has brought a suit against a governmental entity for "taking" his land but the courts have found that the "taking" was a valid exercise of police powers."[34] While the general rule is that damage, loss, or injury from a valid exercise of the police power does not give a right to recover compensation,[35] courts also find that police power regulations that go "too far" can constitute a taking for which compensation must be paid.[36] The efforts of state and federal courts to define "what may

[32] *See* CORPUS JURIS SECUNDUM, Police Powers and Related Powers in General, 29A C.J.S. EMINENT DOMAIN § 8 (2007).

[33] *See* Brian D. Lee, Note, *Regulatory Takings Depriving All Economically Viable Use of a Property Owner's Land Require Just Compensation Unless the Government Can Identify Common Law Nuisance or Property Principles Furthered by the Regulation*, 23 SETON HALL L. REV. 1840, 1844 n.26 (1993).

[34] *See* Nicole M. Zomberg, *Flooding of Private Property by the Construction of a Public Improvement: Isn't it Time for Kansas To Call It What It Really Is – A Compensable Taking?*, 38 WASHBURN L.J. 209, 233-34 (1998).

[35] *See* Hulen v. City of Corsicana, C.C.A.Tex., 65 F.2d 969 (1933), *cert. denied* 290 U.S. 662 (1933); DeMello v. Town of Plainville, 170 Conn. 675 (1976); Maryland-National Capital Park and Planning Commission v. Chadwick, 286 Md. 1 (1979); State v. Bernhard, 173 Mont. 464 (1977); Blue Cross and Blue Shield of Michigan v. Milliken, 422 Mich. 1 (1985), *appeal dismissed*, 474 U.S. 805 (1985); Kraft v. Malone, 313 N.W.2d 758 (1981).

[36] *See* Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

be an indefinable threshold between the police power and eminent domain have yielded only profound confusion for practitioners."[37]

Thus, "courts must determine when a regulation that is otherwise a valid exercise of the police power should be converted into an exercise of the power of eminent domain due to its excessive effect or unwarranted nature."[38] The Constitution does not prohibit the taking of property, therefore "crossing the line from the police power to the eminent domain power does not invalidate the regulation."[39] It only means that compensation is due: the government may either keep the regulation in place and pay compensation for the taking, or it may rescind the excessive regulation and pay only for the period of the taking.[40]

D. Regulating the Right of Access

A property owner who is deprived of some degree of access to his property would likely assert that this deprivation of access resulted in a compensable taking of his property right of access.[41] In response, the governmental authority would assert that such actions do not result in a taking, but are a valid exercise of the generally noncompensable police power.[42]

---

[37] *See* Floyd B. Olson, *The Enigma of Regulatory Takings*, 20 WM. MITCHELL L. REV. 433, 450 (1994) (opining that "the real basis for many of these decisions may simply be an unarticulated sense of fairness or justice that is shrouded in a cloud of paraphrased quotes from unreconciled state and federal decisions").

[38] *See* JULIAN CONRAD JUERGENSMEYER AND THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW §10.2 (West Group 2003) (1998).

[39] *Id.*

[40] *See id.* at § 10.9.

[41] Kurt H. Garber, *Eminent Domain: When Does a Temporary Denial of Access Become A Compensable Taking?*, 25 U. MEM. L. REV. 271, 277 (1994).

[42] *See id.*

The private right of access is generally construed as subservient to the public right of safe and efficient use of the roads.[43] Access management is a congestion management tool, and prevention of excessive congestion is viewed by the courts as falling within the police powers.[44] Thus, courts generally hold that a properly authorized governmental body has the police power to reasonably regulate – in the public interest – the extent of an abutter's private right of access.[45] Courts emphasize, however, that the regulation of access must serve the public interest, as opposed to serving the private interests of other abutters.[46]

Some courts hold that the right of access for business purposes may be more strictly regulated than ordinary private access.[47] However, the business interest in liberal access for profitable operation remains a legitimate interest to be balanced against

[43] *See* Johnston v. Biose City, 87 Idaho 44 (1964) (elaborating that since an abutter's right of access is subservient to the public's right to use the streets, the closing by a city of curb cuts was reasonable and not compensable, because the abutting owner had other access to his property, the existing curb cut did not conform to regulations, and it was a burden on the municipality). *See also* Garrett v. City of Topeka, 259 Kan. 896 (1996) (holding right of access as subservient to rights of public at large); Cornish v. State, Dept. of Transp. and Development, 647 So.2d 1170 (La. Ct. App. 1994), *writ denied*, 654 So.2d 324 (La. 1995) (holding private right of access subservient to public interest); Paul's Lobster, Inc. v. Com., 53 Mass. App. Ct. 227 (2001) (holding right of access subservient to rights of general public).

[44] *See* Williams and Forester, *supra* note 2, at 25.

[45] *See* Heckendorf v Littleton, 132 Colo. 108 (1955) (generally recognizing power of municipality to regulate right of ingress and egress under police power); Miami v Girtman, 104 So. 2d. 62 (Fl. App. 1958) (holding municipality has the right, in the exercise of its police power, to impose reasonable regulations upon an abutter's access); State ex rel. Gebelin v Department of Highways, 200 La. 409 (1942) (holding that state department of highways could reasonably regulate access); San Antonio v Pigeonhole Parking of Tex., Inc., 311 SW2d 218 (1958) (holding that access may be at least regulated, if not prohibited, by reasonable exercise of police power).

[46] *See* Alan Constr. Co. v. Gerding, 209 Md. 71 (1956).

[47] *See* Miami v. Girtman, 104 So.2d 62 (1958); Alexander Co. v. Owatonna, 222 Minn. 312 (1946).

hazards to the public due to the additional traffic created.[48] Moreover, courts are more likely to find regulation of this business interest as an unreasonable denial of access if the land where the business is located was zoned to accommodate that particular type of business.[49]

Municipalities and other governmental units responsible for the maintenance and regulation of roads in their jurisdiction are usually authorized to regulate access by general, or in some cases specific, statutory provisions.[50] If the statute does not specify reasonable standards for the regulation of access, however, some courts may find the statute invalid and the associated regulation of access unreasonable.[51]

---

[48] *See* Karl's Mariner's Inn, Inc. v. Incorporated Village of Northport, 242 N.Y.S.2d 297 (1963) (granting injunction against enforcement of regulation restricting access where enforcement would have caused plaintiff to lose customers at its place of business).

[49] *See* Adams Holding Corp. v. Spitz, 180 NYS2d. 233 (1958) (holding that it was beyond the power of a municipality to withhold a permit for a curb cut to provide access to a gasoline station, where the area had been rezoned to permit gasoline stations, and factors such as traffic hazards and public interest (bases for the rejection of the curb cut) were all matters which had already been before the city council when it rezoned the area, leaving its function in respect to the curb cut merely ministerial).

[50] *See* Miami v. Girtman, 104 So.2d. 62 (1958) (upholding authority to regulate access under broad charter powers relating to management of streets); Continental Oil Co. v. Twin Falls, 49 Idaho 89 (1930) (upholding municipality's authority to regulate access under municipality's statutory powers to regulate traffic across sidewalks, remove obstructions therefrom, and promote general welfare); Anzalone v. Metropolitan Dist. Com., 257 Mass. 32 (1926) (upholding metropolitan district commission's authority to regulate access under commission's authority to make rules and regulations for parkway); Newman v. Newport, 57 A2d. 173 (1948) (recognizing the power of the city to reasonably regulate driveways and curb cuts by abutting owners, under the authority found in a statute granting to a municipality the power to "order sidewalks").

[51] *See* Pure Oil Co. v. Northlake, 140 NE2d. 289 (1956) (holding that the ordinance was invalid because it failed to spell out any reasonable standards to be met by an abutter, and further, it apparently authorized the outright denial of a permit in any situation, depending upon the will of the city council); City of Richmond v. S. M. O., Inc., 165 Ind. App. 641 (1975) (holding that when the state highway commission had granted an application for a curb cut along the state highway, the city's general power to regulate traffic and control

Some courts require that the governmental unit denying access give the abutting landowner a proper hearing on the issue of access.[52] Moreover, courts tend to apply a heightened level of scrutiny in cases where the regulation is cutting off existing access, as opposed to cases where the governmental unit is merely refusing to permit a new access.[53]

II. AN ANALYSIS OF THE LEGAL FRAMEWORK FOR ACCESS MANAGEMENT IN GEORGIA

A. Rights of Property and Access

1. Georgia Constitution

Like the U.S. Constitution, the Georgia Constitution provides that private property shall not be taken for public purpose without adequate compensation being paid.[54]

---

use of the streets did not empower it to deny that access, because the city had no specific ordinances providing reasonable rules and regulations dealing with curb cuts).

[52] *See* Hardee's Food Systems, Inc. v. Department of Transp. of Pennsylvania, 495 Pa. 514 (1981) (holding that where the state department of transportation denied landowner permission to make curb cuts for access to abutting state highway, on basis of anticipation of increased traffic volume, without affording landowner any hearing whatsoever, trial court order upholding departmental denial would be vacated and case would be remanded to department for further proceedings, including reasonable notice to landowner of opportunity to be heard).

[53] *Compare* Starr v. Linzell, 129 NE2d 659 (1955) (holding that the owner of a service station which had had unlimited access for more than 25 years could not, without compensation, constitutionally have this access restricted by access management regulations), *and* Jacobsen v. Incorporated Village of Russel Gardens, 201 N.Y.S.2d 183 (1960) (holding that city could not restrict access where plaintiff had had unlimited access for 22 years), *with* Krieger v. Planning Commission of Howard County, 224 Md. 320 (1961) (holding that with regard to a property previously having unlimited access to highway, a regulation requiring that *future* subdivisions must provide access either by access drive, cul-de-sac, or parallel street, was not improper taking) (emphasis added).

[54] GA. CONST. ARTICLE 1 § 3 PARAGRAPH 1(A) (2006).

2. Georgia Courts

Georgia courts hold that the right of access to a public road is a property right that arises from the ownership of land next to the public road.[55] An authority's acts that take, damage, or otherwise substantially interfere with the right of access entitle the owner to compensation.[56] The right of access includes the landowner's use of the access for customers and other third parties to do business on the land.[57]

B. Acquisition and Control of Property Rights

In order to implement an access management program, an authority must have the ability to restrict new development from connecting to public roads, typically by restricting or removing driveway connections (curb-cuts).[58] One way to accomplish this is by managing curb-cuts through the use of permits – requiring property owners to apply to the agency responsible for the roadway.[59] An alternative method for the scenario where the driveway already exists is to acquire the access rights from the landowner, either through sale, or by a taking under eminent domain.[60] The Georgia Code provides

[55] *See* Department of Transp. v Whitehead, 253 Ga. 150 (1984); Metropolitan Atlanta Rapid Transit Authority v Datry, 235 Ga. 568 (1975); Circle K General, Inc. v DOT, 196 Ga. App. 616 (1990).

[56] See Department of Transp. v. Bridges, 268 Ga. 258 (1997); Department of Transp. v. Robinson, 260 Ga.App. 666 (2003); Hanson v. City of Roswell, 262 Ga. App. 671 (2003), *cert. denied*, (Jan. 12, 2004); Brown v DOT, 195 Ga. App. 262 (1990).

[57] *See* Rome v Lecroy, 59 Ga. App. 644 (1939).

[58] *See* Eric Dumbaugh and Parsons Brinkerhoff, *Enhancing the Safety and Operational Performance of Arterial Roadways in the Atlanta Metropolitan Region*, in ACCESS MANAGEMENT PLANNING ASSISTANCE PROGRAM, THE ATLANTA REGIONAL COMMISSION (August 7, 2006).

[59] *See id.*

[60] *See id.*

for access management practices under the police powers, such as driveway permitting, as well as the acquisition of existing access rights under eminent domain.[61]

1. Statutory Authority for Eminent Domain

The Georgia Code provides that the property right of access may be acquired by a state agency, county or municipality through eminent domain for transportation purposes, but compensation is required.[62] In general, the feasibility of a successful access management program depends on its ability to be enforced without having to resort to the power of eminent domain – due to the accompanying compensation requirement.[63]

2. Statutory Authority for Police Power

Under the Georgia Code, the Georgia Regional Transportation Authority (GRTA) has the police power to control or limit access to most roads in the state; because this power is a police power, compensation is not necessarily required.[64] However, GRTA has yet to describe how it may use this potentially dynamic land-use power.[65] Similarly the Code provides the Georgia Department of Transportation (GDOT) with the power to regulate access to the extent necessary in the public interest as well – and instructs that this power should be *liberally* construed.[66] Thus, GDOT has the authority to enact access

[61] *See id.*

[62] O.C.G.A. § 32-3-1(a) (2006).

[63] See INDIANA DEPARTMENT OF TRANSPORTATION, *Access Management Authority in Indiana*, *supra* note 1, at 4.

[64] *Compare* O.C.G.A. § 50-32-11 (2006) (providing no explicit provision requiring just compensation), *with* O.C.G.A. § 32-3-1(a) (specifically requiring just compensation when eminent domain is utilized).

[65] See Arthur C. Nelson, *New Kid in Town: The Georgia Regional Transportation Authority and Its Role in Managing Growth in Metropolitan Georgia*, 35 WAKE FOREST L. REV. 625, 634-35 (2000).

[66] O.C.G.A. § 32-2-2(a)(10) (2006); O.C.G.A. § 32-2-2(b) (providing that "[i]n addition to the powers specifically delegated to it in this title, the department [of transportation] shall have the authority to perform all acts which are necessary, proper, or incidental to the efficient operation and development of the

management regulations – including specifying the circumstances when commercial driveway permits may be issued or revoked – provided that the regulations do not "deprive the landowner of reasonable access to the public road on the state highway system."[67]

C. Regulating Rights of Access

1. Georgia Courts: Eminent Domain and Police Power Are Not Mutually Exclusive

Georgia courts interpret eminent domain as the state's power to acquire property for making public improvements, whereas the police power is the state's ability to prohibit all things adverse to the comfort, safety, health, and welfare of society.[68] Thus, the courts draw a basic distinction between eminent domain and police power – holding that eminent domain involves the compensable taking of property rights because those rights are *needed for public benefit*, while the police power involves the generally noncompensable regulation of property to prevent its use in a manner *detrimental to the public interest*.[69]

As a practical matter, many states treat eminent domain and the police power as mutually exclusive powers: a governmental action is classified as either one or the other,

---

department and of the state highway system and of other modes and systems of transportation; and this title shall be *liberally* construed to that end.") (emphasis added).

[67] O.C.G.A. § 32-6-133 (2006).

[68] *See* Boatwright v Flemington, 189 Ga. App. 676 (1988), *rev'd on other grounds* 259 Ga. 175 (1989) *and vacated, on other grounds en banc* 191 Ga. App. 665 (1989).

[69] *See* Mayor and Aldermen of City of Savannah v. Savannah Cigarette and Amusement Services, Inc., 267 Ga. 173 (1996); Gradous v Board of Comm'rs, 256 Ga. 469 (1986); Pope v Atlanta, 242 Ga. 331 (1978), *cert. denied* 440 US 936 (1979); De Kalb County v Glaze, 189 Ga. App. 1 (1988).

but cannot be both.[70] Georgia courts, however, agree with states that view the two concepts of eminent domain and police power as *not* mutually exclusive; although the State has authority to regulate the use of property under its broad police powers, a valid exercise of that power does not per se require a finding that no compensable taking has occurred.[71] While Georgia courts agree with the U.S. Supreme Court in finding that there are clear cases where police power regulations do not require compensation,[72] there are also many cases where Georgia courts hold that governmental regulations, though validly

[70] *See* Ray v. State Highway Com., 410 P.2d 278 (1966), *cert. denied* 385 U.S. 820 (1966) (holding that an act by the highway commission must be classified as either an exercise of the compensable eminent domain power or the noncompensable police power – it cannot be both); William B. Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733, 740 (1969).

[71] *See* Lamar Advertising of South Georgia, Inc. v Albany, 260 Ga. 46 (1990). *See generally* Hendrickson v. State, 127 N.W.2d. 165 (1964) (holding that prohibiting or limiting access to a highway may well be an exercise of police power in the sense that it is designated to promote traffic safety, but at the same time it may cause compensable injury to an abutting owner).

[72] *See* Lucas v South Carolina Coastal Council, 112 S Ct 2886 (1992); Pope v Atlanta, 242 Ga. 331 (1978), *cert. den.* 440 U.S. 936 (1979) (holding that an authority, under police power and without compensation, may preclude construction of impervious surfaces in flood zones); Lewis v De Kalb County, 251 Ga. 100 (1983) (holding that under the police powers and without compensation, an authority may breach a dam under emergency conditions despite flooding downstream property); Georgia Marble Co. v Whitlock, 260 Ga. 350 (1990), *cert. den*. 498 U.S. 1026 (1991) (holding that under police power, the State may condition retention of property rights upon reasonable conditions, such as payment of taxes, and treat property as abandoned where such conditions are not met, without paying compensation); Bray v Houston County, 180 Ga. App. 166 (1986) (holding that state may use a private citizen's volunteered motor vehicle to search for criminal evidence under police power without compensation); Boatwright v Flemington, 189 Ga. App. 676 (1988) (holding that under the police power, an authority may, without paying compensation, preclude parking cars on property near an intersection and prohibit storage of inoperable vehicles on property); Kelleher v State, 187 Ga. App. 64 (1988) (holding that under police power, state may seek forfeiture of property used in criminal racketeering – without payment of compensation).

enacted under the police power, take or damage property in such a manner as to require compensation.[73]

2. Georgia Courts and the Scope of the Right To Access

Georgia courts recognize that a properly authorized governmental unit has the power to regulate – at least reasonably – in the public interest, the extent of an abutter's private right of access.[74] The landowner's right of access is subordinate to the public right of maintaining the safety and efficiency of the roads.[75] Thus, the courts find that governmental units having general responsibility for the regulation of streets within their jurisdiction are ordinarily authorized by general charter powers to regulate access.[76] Of course, recognizing a power of *reasonable* regulation, the power does not extend to depriving an abutter of all access to the public road without compensation.[77]

[73] *See* Dougherty County v Hornsby, 213 Ga. 114 (1957) (holding that an authority must pay compensation when closing all driveways to property for public safety); Shaffer v Atlanta, 223 Ga. 249 (1967) (holding that an authority must pay compensation when enforcing a slum clearing ordinance that requires the removal of substandard dwellings without giving the owner the opportunity to make the dwellings comply with the code); Metropolitan Atlanta Rapid Transit Authority v Datry, 235 Ga. 568 (1975) (holding that an authority must pay compensation when prohibiting vehicular traffic on adjoining roads); Lamar Advertising of South Georgia, Inc. v Albany, 260 Ga. 46 (1990) (holding that an authority must pay compensation for enforcing an ordinance requiring removal of non-conforming structures existing at the time of the enactment of the ordinance).

[74] *See* Buffington v. Crowe, 65 Ga. App. 417 (1941); Panos v. Department of Transp., 162 Ga. App. 53 (1982).

[75] *See* Barham v. Grant, 185 Ga. 601 (1937).

[76] *See* Howell v. Quitman, 169 Ga. 74 (1929).

[77] *See Howell,* 169 Ga. at 74 (1929); *Buffington,* 65 Ga. App. at 417; Harper Investments, Inc. v. Department of Transp., 251 Ga. App. 521 (2001).

The courts limit the right of access by elaborating that a landowner is not entitled to access at all points along the boundary between his property and the public road.[78] Rather, the landowner is only entitled to "convenient access."[79] For example, inconveniences that are shared by the general public, such as changes in the circuity of travel brought about by governmental actions, are not compensable.[80]

Thus, a greater difficulty in ingress and egress which is occasioned by a regulation of access that changes the circuity of travel or reduces the number of allowable curb-cuts is not necessarily a compensable interference with the right of access.[81] This is true even if the change drastically affects the traffic flow of potential customers to a business establishment.[82] Other examples of regulatory actions that Georgia courts have

[78] *See* Department of Transp. v. Robinson, 260 Ga. App. 666, 667 (2003).

[79] *See id.*

[80] *See* Tift County v Smith, 219 Ga. 68 (1963) (holding that governmental action reducing access is not compensable if there remains some circuitous access to all points that the owner could originally reach); BIK Associates v. Troup County, 236 Ga. App. 734 (1999).

[81] *See BIK Associates*, 236 Ga. App. at 735 (discussing how if the landowner has the same access to the highway as he did before the closing, his damage is not special, but is of the same kind, although it may be greater in degree, as that of the general public, and he has lost no property right for which he is entitled to compensation); Homeyer v State Highway Dep't, 112 Ga. App. 462 (1965) (elaborating that if the curb-cuts permitted by an authority provide adequate access, even though less than the owner originally had prior to the governmental action, no compensation is due); Johnson v Burke County, 101 Ga. App. 747 (1960).

[82] *See* Metropolitan Atlanta Rapid Transit Authority v Fountain, 256 Ga. 732 (1987) (holding that converting the street on which the property abuts into a dead-end street or a cul-de-sac is not compensable if there remains some circuitous access to all points that the owner could originally reach, even though the conversion results in a marked decrease in the number of business patrons); Department of Transp. v. Bridges, 268 Ga. 258 (1997) (holding that there was no compensable taking of a commercial property located on a side street near its intersection with a major street when the government closed the side street at its entrance to the major street, which required that the owner access his commercial property by driving through a residential neighborhood, despite the severe adverse effect on the commercial nature of his property).

held do not require compensation are the construction of medians in an abutting road to prevent left turns directly into or from the abutting property,[83] the relocation of cross-overs in medians away from the property,[84] and the conversion of a two-way road to one-way travel.[85]

The ultimate question comes down to one of substantial interference: existing means of ingress and egress may not be "substantially interfered" with in the absence of just compensation.[86] If the impairment is not "substantial," however, the owner is not entitled to compensation.[87] The question of whether the interference is substantial is usually reserved for a jury.[88] The measure of damages for compensation in such a case is any diminution in market value of property by reason of the substantial interference.[89]

[83] *See* Hadwin v Savannah, 221 Ga. 148 (1966); Cobb County v Princeton Assoc., 205 Ga. App. 72 (1992), *cert. denied* 1992 Ga Lexis 718 (1992); Dougherty County v Snelling, 132 Ga. App. 540 (1974).

[84] *See* Clark v Clayton County, 133 Ga. App. 171 (1974).

[85] *See* Department of Transp. v Katz, 169 Ga. App. 310 (1983).

[86] *See* Department of Transp. v Taylor, 264 Ga. 18 (1994) (discussing how the test to determine whether a road change causes compensable damages is whether the change substantially interferes with a right of access to the property); *Harper Investments, Inc.*, 251 Ga. App. at 522 (elaborating that for a landowner to be entitled to compensation, it is not necessary that a condemning authority totally cut off a landowner's access to an abutting road – any substantial interference with existing rights of ingress and egress will entitle a landowner to damages, because interfering with access to premises, by impeding or rendering difficult ingress or egress, is a taking and entitles the party injured to compensation).

[87] *See* Bridges v Department of Transp., 209 Ga App 33, 432 SE2d 634 (1993).

[88] *See* City of Dalton v Smith, 210 Ga. App. 858 (1993), *reconsideration denied* (Nov 12, 1993) *and cert. denied* 1994 Ga. LEXIS 230 (1994).

[89] *See Robinson*, 260 Ga. App. at 667.

III. THE DEVELOPMENT OF AN ACCESS MANAGEMENT ORDINANCE FOR GEORGIA

A. Surviving Georgia Judicial Scrutiny in Georgia Law's Gray Area

Under Georgia law, between the extreme of where regulations affecting the use of property under police powers do not require compensation and the opposite extreme where the property right was damaged in a manner as to require compensation, lies a gray area where it is determined on a case by case basis whether the regulation under the police power is treated as a compensable taking of property.[90] Therefore, because in Georgia the right of access is a property right which arises from the ownership of land contiguous to a public road, an access management regulation that substantially interferes with that right may require compensation, even though that regulation was validly enacted under the normally noncompensable police powers.[91]

Factors Georgia courts consider in this gray area include: whether the regulation's purpose is to obtain a public benefit or to avoid public injury; how closely the regulation is connected to the operation of a public facility; whether the regulation singles out a small number of properties to bear the burden; the degree to which the regulation limits the beneficial use of the property; and whether the prohibited beneficial use already exists.[92]

B. Developing A Model Access Management Ordinance

This Chapter's goal is to draft an ordinance that regulates access so that it survives scrutiny in Georgia law's gray area as a valid (and noncompensable) exercise of

[90] *See* Charles M. Cork, *Nature of Taking or Damaging Property*, 2 GA. JUR. PROPERTY § 19:26 (2006).

[91] *See* Howell v. Quitman, 169 Ga. 74 (1929) (holding that a city ordinance deprived an abutter's right of access to a such a degree that it required just compensation, even though the regulation was a valid exercise of the police power).

[92] *See* Cork, *supra* note 90, at § 19:26.

the police power, while not simultaneously being found as a compensable taking.[93] Thus, the regulation must be carefully drafted to restrict access while not simultaneously "substantially interfering" with the owner's right of access.[94]

This Chapter theorizes that such an ordinance would survive judicial scrutiny in Georgia because under the existing judicial "substantial interference" standard, an owner does not have a right of access along all points of his property,[95] and has no right to direct access.[96] Thus, the ordinance may make an abutting landowner's access more circuitous by eliminating curb cuts while leaving him with noncompensable "convenient access," such as via a service road.[97] Further, the ordinance may require the construction of medians to prevent left turns, relocate cross-overs in medians, and convert two-way roads to one-way travel.[98]

In drafting a Model Access Management Ordinance for Georgia,[99] this Chapter has included these judicially defined noncompensable limitations on the right of access

[93] *See supra* Part III.A. (discussing the gray area in Georgia law that arises when an ordinarily noncompensable police power action is nevertheless held to be compensable taking).

[94] *See supra* Part II.C.2 (discussing the scope of the right of access and elaborating that Georgia courts generally find regulations that do not "substantially interfere" with the right of access as noncompensable).

[95] *See supra* Part II.C.2 (discussing how Georgia courts hold that the right of access does not necessarily extend along all points of the boundary between a landowner's property and an abutting road).

[96] *See supra* Part II.C.2 (discussing how Georgia courts hold that the right to access is not a right to direct access – the access may be made more circuitous yet still not constitute a "substantial interference" with the right to access).

[97] *See supra* Part II.C.2 (elaborating that in Georgia, if an authority merely regulates the right of access, resulting in more circuitous access, that action is not compensable if the landowner retains "convenient access").

[98] *See supra* Part II.C.2 (summarizing the limitations on access that Georgia courts find noncompensable because they do not substantially interfere with the right of access).

[99] *See infra* Appendix A.

from Georgia case law.[100] The ordinance is based the on the access management portion of an overlay district draft formulated by the Atlanta Regional Commission (ARC) for Route 20 in Henry County, Georgia.[101] Guided by existing Georgia case law, this Chapter adds several access management provisions to the ARC model, including the introduction of medians; the closing of existing median openings; the elimination of left-turn access; the conversion of two-way roads to one-way travel; and the replacement of direct access with service road access.[102] The ordinance also specifically provides for compensation of any extreme results that substantially interfere with a landowner's right of access.[103]

CONCLUSION

This Chapter concludes that GDOT and GRTA may use their current statutory authority to implement an access management program based on the Model Access Management Ordinance for Georgia set forth in Appendix A. The ordinance has been drafted to implement only those access management techniques that Georgia courts already find as noncompensable limitations on the right of access.[104] Thus, the ordinance should survive judicial scrutiny and its implementation should generally not result in compensable takings.

---

[100] *See supra* Part II.C.2 (summarizing the limitations on access that Georgia courts find noncompensable because they do not substantially interfere with the right of access).

[101] *Bruton Smith Parkway Design District*, ATLANTA REGIONAL COMMISSION (2005).

[102] *See infra* Appendix A.

[103] *See infra* Appendix A.

[104] *See supra* Part II.C.2 (summarizing the limitations on access that Georgia courts find noncompensable because they do not substantially interfere with the right of access).

Moreover, Georgia's existing "substantial interference" standard developed by the courts is based on the interpretation of regulations authorized under police powers inferred, for the most part, from general charter powers.[105] However, Georgia law explicitly authorizes the regulation of the right of access, and specifically states that its authorization should be *liberally* construed.[106] In order to comply with the Legislature's intent that such authority be liberally construed, it follows that the courts should raise the substantial interference standard – requiring even more interference before compensation is due – when interpreting a regulation enacted pursuant to the legislative authority granted to GDOT and GRTA for the regulation of access.

Thus, when interpreting the effect of regulations promulgated by GDOT and GRTA – and particularly when those regulations are based on this Report's model ordinance – the majority of such regulations should be interpreted by Georgia courts as noncompensable exercises of the police power pursuant to those departments' specific statutory authority to regulate access. This ability to regulate access in a noncompensable manner will make it feasible to fully implement a comprehensive access management program for the state of Georgia.

[105] *See supra* Part II.C.2.

[106] *See supra* Part II.B.2.

APPENDIX A

MODEL ACCESS MANAGEMENT ORDINANCE FOR GEORGIA

Section __-__-___. Access Management.

The regulations set out herein shall apply to all subdivisions and projects requiring a land development permit where access is taken from a State or Federal route or a road classified as a major or minor arterial or collector road in the _____County Functional Road Plan.

Access to any State or Federal Route shall comply with the Traffic Access Requirements, established by _____ County, the Georgia Department of Transportation (GDOT), and the Georgia Regional Transportation Authority (GRTA); as part of those entities' Access Management programs.

These Traffic Access Requirements which must be referenced and complied with include, but are not limited to, specific standards for: the introduction of medians; the closing of median openings; the elimination of left-turn access; the conversion of two-way roads to one-way travel; and the replacement of direct access with service road access.

The following standards shall apply in addition to the standards specified in the Traffic Access Requirements, unless a more restrictive conflicting standard is required by GDOT or GRTA or _____ County:

(1) Required joint driveways, cross access drives, and pedestrian access shall be provided to allow circulation between parcels.

(2) Cross access easements and pedestrian access shall be established along State or Federal Routes. Building sites having access to any State or Federal Route shall incorporate the following:

a. Continuous access road or cross access corridor extending the entire length of each block served to provide for driveway separation of at least 1,000 feet of linear frontage and providing a two-way travel aisle width of a minimum of twenty-four (24) feet and other features as required herein.

b. Stub-outs and other features indicating that abutting properties may be connected to provide cross access via a service drive.

(3) All developments shall have access to a public right-of-way. Regardless of the minimum number of access points, minimum spacing requirements as described in Paragraph (4) (below) shall be maintained. The number of access points shall be as follows:

Access Points

Type of Development	**Minimum Number of Access Points**
Residential, under 60 units	1
Residential, 60-150 units	2
Residential, 151-300	3
Residential over 300 units	4 or More as Determined
Non-Residential, less than 300 required parking spaces	1
Non-Residential, 300--999 required parking spaces	2

Non-Residential, 1,000 or more required parking spaces	3 or More as Determined

(4) The separation of access points on any State or Federal route shall be determined by the design speed of the road from which access is taken with the following minimum spacing requirements:

Access Point Spacing

Design Speed of Road	**Minimum Access Point Spacing**
Less than 35 mph	185 feet
36 to 45 mph	245 feet
Greater than 45 mph	440 feet

a. The distance between access points shall be measured from the centerline of the proposed driveway or public street to the centerline of the nearest existing adjacent driveway or public street.

b. Driveway spacing at intersections and corners shall provide required sight distance, response time, and permit required queuing space.

c. No driveway shall be allowed within one hundred (100) feet of the centerline of an intersecting arterial or collector street.

d. Nothing within this Article shall be construed to mean that a single parcel may have more than the number of approved access points.

e. The requirements of this Article shall in no way be construed to eliminate all access to a parcel of land that was legally subdivided prior to the enactment of this section.

(5) For access points along any State or Federal Route a deceleration lane, larger turning radius, traffic islands, and any other devices or designs may be required at the sole discretion of the Development Plan Review Department staff.

(6) Deceleration lanes are required for entrances of subdivisions consisting of twenty (20) or more units as specified below.

Deceleration Lanes

Design Speed	**Deceleration Lanes**
Internal Streets	Not Required
55 mph or Less	250'+100' taper
Greater than 55 mph	300'+100' taper or More as Determined

Deceleration lanes located within seventy-five feet (75') of an intersection radius shall be extended to that intersection.

Compensation

(1) If in any instance as a result of any regulation pursuant to this Article, an abutting landowner to a public road is completely denied access via any route to that public road, just compensation is required for enforcement of such regulation.

(2) Additionally, any regulation that "substantially interferes," as that phrase is limited in paragraph (3) of this Article, with an abutting landowner's ingress and egress to his property, requires just compensation for enforcement of such regulation.

(3) The phrase "substantially interferes" shall be strictly construed. The following non inclusive list provides examples of interferences that do not constitute a "substantial interference" with the right of access:

a. An abutting landowner whose access has been restricted, but alternative access, even though more circuitous, such as via a service road, remains.
b. An abutting landowner whose access has been restricted and as a result of such restrictions experiences a reduction in business.
c. An abutting landowner whose access has been restricted by the construction of medians in an abutting road to prevent left turns directly into or from his property.
d. An abutting landowner whose access has been restricted by the relocation of cross-overs in medians away from his property.
e. An abutting landowner whose access has been restricted by the conversion of a two-way road to one-way travel.

Chapter Five

Exactions, Takings Jurisprudence, and Access Management:

Examples From Florida

Andre Hendrick

Growth Management Law Final Report
Professor Reuter
Professor Juergensmeyer
April 23, 2007

INTRODUCTION

This Chapter of the Report will elaborate on the takings issues introduced in Chapter Four, and will also address the legal issues relevant to exactions and the subdivision regulation concepts introduced in Chapter Two. Part I will provide a legal examination of exactions and subdivision regulations. Part II will provide an extensive analysis of takings issues jurisprudence. Part III will conclude by providing examples from Florida on how that state's courts have interpreted access management regulations.

I. EXACTIONS

The rapid urbanization of the United States has placed a heavy strain on local governments to provide the infrastructure necessary to support the new subdivisions that have sprawled across the country.[107] Local governments have had to respond to this growth and ensure that these new communities have adequate sewer and water, utilities, police and fire services, and open spaces.[108] One way that these local governments have funded many of these necessities is through the imposition of exactions on developers.[109] Exactions require developers to share the burden that these new communities place on the surrounding area by providing some of the public capital improvements at their own expense.[110] Not surprisingly, these exactions have been the focus of most subdivision litigation.[111] The Dual Rational Nexis Test, set forth in *Jordan v. Menomonee Falls,*[112] is

---

107 *See* JULIAN CONRAD JUERGENSMEYER AND THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 274 (West Group 2003) (1998).

108 *Id.*

109 *Id.*

110 *Id.*

111 *Id.*

becoming the standard by which exactions are judged. The first rational nexis test is met if "the local government could demonstrate that a series of subdivisions had generated the need to provide educational and recreational facilities for the benefit of this stream of new residents."[113] The second rational nexis test is met "if a local government can demonstrate that its actual or projected extradevelopment capital expenditures earmarked for the substantial benefit of a series of developments are greater than the capital payments required of these developments"[114] Exactions will continue to be at the forefront of subdivision litigation in Georgia. The ability of local governments to demand exactions from developers will directly impact the drain and strain that sprawl and development have on local communities.

II. TAKINGS JURISPRUDENCE

The 5th Amendment of the U.S. Constitution states "nor shall private property be taken for public use, without just compensation."[115] This one phrase has served as the legal backdrop for regulatory takings litigation.[116] Traditionally, a private citizen files a law suit against the government, claiming that a land use regulation has, in effect, taken their property without compensation, violating the Fifth Amendment.[117] Over the years,

---

112 *Jordan v. Menomonee Falls,* 28 Wis.2d 608, 137 N.W.2d 442 (1965).

113 JULIAN CONRAD JUERGENSMEYER AND THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 361 (West Group 2003) (1998).

114 *Id.*

115 U.S. Const. amend. V.

116 *See* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 652 (Lexis Publishing 2000).

117 *Id.*

there have been numerous landmark cases that have formed the body of law that constitutes takings jurisprudence.[118] In order to better understand the courts' holdings in the access management setting, it is important to first review the general takings analysis employed by the courts.

Over the years, takings jurisprudence has evolved through rulings by the Supreme Court of the United States.[119] Takings analysis begins with the threshold question: "What is the denominator of the parcel?"[120] Currently, the Court follows the "Whole Parcel Rule."[121] This doctrine prohibits the Court from dividing a single parcel into discrete segments to find a taking when only one segment has been entirely abrogated.[122] The next step in a takings analysis actually deals with substantive due process.[123] The court asks two questions: Are the "Ends" legitimate? and Are the "Means" rationally related?

---

118 *See generally* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 652-673 (Lexis Publishing 2000). *See also Kelo v. City of New London,* 126 S. Ct. 326 (2005); *Palazzolo v. Rhode Island,* 533 U.S. 606, 121 S.Ct. 2448 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 216 F.3d 764 (9th Cir. 2000); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982); *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978); *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915).

119 *See generally* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 652-673 (Lexis Publishing 2000).

120 *See* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 658 (Lexis Publishing 2000).

121 *Id. See also Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987).

122 *Id.*

123 *See Kelo v. City of New London,* 126 S. Ct. 326 (2005).

If the answer to either of these questions is "NO," then the plaintiff's Fifth Amendment rights have been violated because the regulation has failed the "public use" requirement, violating the plaintiff's substantive due process.[124]

Next, the Court asks if there has been a categorical taking.[125] A categorical taking can occur in two different ways.[126] The first is by destroying an essential property right.[127] Authorizing a physical occupation of a private individual's property is one such way to destroy an essential property right.[128] In fact, a permanent physical occupation, authorized by government, is *always* a taking, regardless of the purpose served (degree of public benefit) or economic impact on the owner because the "right to use" is destroyed if it is impaired at all.[129] The second way a categorical taking can occur is if the regulation destroys ALL economically viable use of the property.[130] However, anything short of a 100% destruction of value is not a categorical taking.[131] Furthermore, if the regulation is time-limited (i.e. temporary from outset), even if it destroys all use for that period, 100%

---

124 *Id.*

125 *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

126 *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

127 *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

128 *Id.*

129 *Id.*

130 *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

131 *See id.*

of the property's value has not been "permanently" destroyed and there is no categorical taking.[132]

If there has not been a categorical taking, the Court engages in an ad hoc factual balancing test.[133] During this stage of the analysis, the court looks at five different factors to determine if there was a regulatory taking despite the fact that there was not a categorical taking.[134] The first factor that the Court considers is whether the government's purpose for the regulation is sufficient to justify the adverse impact on the property.[135]

The Court next considers the economic impact of the regulation on the property.[136] It is important to note that the court evaluates the impact on the property, not on the owner.[137] Unfortunately for property owners, diminution in value is only a taking if it "goes too far," and it only "goes too far" if the entire value has been destroyed.[138] The Court then looks at the regulations interference with the owner's investment-backed expectations.[139] For example, a buyer who purchases land already devoted to a legally-permitted use has a reasonable investment-backed expectation that the use will continue.

---

132 *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764 (9th Cir. 2000).

133 *See Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

134 *See id.*

135 *See id.*

136 *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

137 *See Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448 (2001).

138 *See Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

139 *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

However, a complete lack of "investment-backed expectations" is not dispositive to the ad hoc balancing test, it's simply one factor.[140]

The Court also looks at the Character of the government's action.[141] A physical invasion of property is more likely to be a taking,[142] whereas a benefit-conferring regulation is much less likely to be a taking.[143] For example, a nuisance-preventing regulation is less likely to be a taking[144] than a historic preservation ordinance that is mainly oriented toward benefiting the public.[145]

Finally, the Court looks at the benefit of the regulation to the public and asks if there is an average reciprocity of advantage.[146] The court will ask if the plaintiff, despite being harmed by the regulation, also receives a general benefit because of the regulation.[147] For example, if a regulation designates a parcel as a landmark, the owner, while deprived of the ability to alter the property's use, can enjoy the benefits of visiting the historical site.[148] The general public could also benefit by a regulation if it prohibits a nuisance or a nuisance-like use.[149] The government's interest in regulating nuisances

---

140 *See Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448 (2001).

141 *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

142 *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

143 *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

144 *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

145 *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

146 *See id.*

147 *See id.*

148 *See id.*

149 *See Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

(preventing harms) ALWAYS outweighs the individual's right to use, as long as some value is left in the property.[150]

Based on these decisions, it is clear that the courts have been reluctant to find a regulatory taking in the absence of a physical invasion or a complete diminution in a property's value. With that as the backdrop for our analysis of access management claims, it becomes apparent that this area of takings law is sui generis.

The Georgia courts, as yet, have not really addressed takings claims within the access management arena. However, a review of the decisions from the Florida courts reveals that this area of takings law does not follow the traditional strictures of takings jurisprudence.[151]

III. FLORIDA DECISIONS

In 1956, the Supreme Court of Florida addressed the takings issue within the context of access management in the case of *Weir v. Palm Beach County.*[152] Beginning in 1951 and continuing until 1953, Palm Beach County, the defendant in this case, engaged in highway improvements that included the area abutting one side of Plaintiff's property.[153] As part of the improvements, Atlantic Avenue, the thoroughfare that bordered the northern portion of Plaintiff's property, was widened, the public sidewalk

---

150 *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

151 *See generally Palm Beach County v. Tessler*, 538 So.2d 846 (Fla. 1989), *Pinellas County v. Austin*, 323 So.2d 6 (Fla. Dist. Ct. App. 1975), *State Dep't of Transp. v. Stubbs,* 285 So.2d 1 (Fla. 1973), *Weir v. Palm Beach County*, 85 So.2d 865 (Fla. 1956).

152 *Weir v. Palm Beach County*, 85 So.2d 865 (Fla. 1956).

153 *Id.* at 866.

was destroyed, and a retaining wall was erected.[154] Consequently, direct access to Plaintiff's property from Atlantic Avenue was destroyed.[155] There was still access, however, to the Plaintiff's property from Canal Street, which intersected Atlantic Avenue.[156]

The plaintiff alleged, inter alia, that the improvements constituted a takings because direct access to the property from Atlantic Avenue had been destroyed.[157] The court held that while "the owner of property abutting a public way has a right of ingress to and egress from his property… [that] these are rights which are subordinate to the underlying right of the public to enjoy the public way to its fullest extent as well as the right of the public to have the way improved to meet the demands of public convenience and necessity."[158] This holding appears to follow typical takings jurisprudence and is consistent with the overarching rule that either a governmentally authorized physical occupation or a 100% reduction in the value of the plaintiff's property must occur to find a takings.[159]

---

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Weir v. Palm Beach County*, 85 So.2d 865, 868-69 (Fla. 1956).

159 *See generally Lucas* ; *Loretto.* This is an oversimplification of takings jurisprudence. The plaintiff's substantive process can also be infringed upon if the ends of the governmental action are not legitimate and the means are not rationally related.

In 1973, the Supreme Court of Florida addressed a similar issue in *State Dep't of Transp. v. Stubbs.*[160] In *Stubbs,* plaintiff's property was officially condemned in connection with the construction of Interstate 295.[161] As a result of the construction, the county abandoned a portion of the road fronting on plaintiff's land.[162]

The road was closed to northbound and southbound traffic just south of the northern boundary of the plaintiff's tract and relocated in the form of an overpass.[163] Thus, after the construction, Plaintiff's land was only accessible from the north by traversing an overpass.[164] While the court did agree that the Plaintiffs were entitled to compensation for the portion of the property that was officially condemned, the plaintiff's property interest did not "presently include a right to traffic flow even though commercial property might very well suffer adverse economic effects as a result of a diminution in traffic."[165]

In 1975, the District Court of Appeals of Florida carved out a narrow exception in *Pinellas County v. Austin* to the aforementioned holdings.[166] This case involved the question of whether the "vacation of a street by a public body which results in a substantial deprivation of access constitutes a taking of property so as to entitle the owner

---

160 *State Dep't of Transp. v. Stubbs,* 285 So.2d 1 (Fla. 1973).

161 *Id.* at 2.

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.* at 4.

166 *See Pinellas County v. Austin,* 323 So.2d 6 (Fla. Dist. Ct. App. 1975).

to a recovery under the theory of inverse condemnation."[167] The plaintiffs owned five acres of land in Pinellas County.[168]

A canal, running in a northeasterly direction, intersected plaintiff's property near the southeast corner.[169] The county vacated portions of two streets that connected to the Austins' land from the north and the west.[170] After the county vacated these two streets, the plaintiffs were left with only two means to access their property – one was a dirt road and the other was a street that ran along the southern border of the property, east of the canal.[171] Additionally, the second means of access was only reachable by way of a small wooden bridge which crossed over the canal.[172]

In reaching its decision, the court affirmed that the right of access to one's land is a property right.[173] Therefore, "even where a public body has properly exercised its discretion in determining to vacate a street, a property owner may be entitled to compensation for the consequent loss of access."[174] However, the court restricted its holding – explicitly stating that "not everyone owning property near a street which has been vacated is entitled to be compensated."[175] Rather, a "landowner must demonstrate

---

167 *Id.* at 7.

168 *Id.* at 7.

169 *Id* at 8.

170 *Id.*

171 *Id.*

172 *Pinellas County v. Austin,* 323 So.2d 6, 8 (Fla. Dist. Ct. App. 1975).

173 *Id.* at 8.

174 *Id.*

175 *Id.*

that he has suffered special damages which are not common to the general public."[176] The court explained that just because a person loses the most convenient method of access is not "such damage which is different in kind from damages sustained by the community at large" if the property has "suitable access from another street even though the alternate route is longer."[177]

Ultimately, the court held that the plaintiffs were not totally deprived of access to their property.[178] The court conceded, however, that the "quality of their access was diminished."[179] Furthermore, the court found that the plaintiffs had suffered a "sufficient impairment of their right of access as to be different in kind from the public at large."[180] While the court admitted that the mere existence of an alternative means of access may reduce the amount of the recovery, it still held that the plaintiff's were entitled to compensation because of the other access limitations.[181]

In 1989, however, the Supreme Court of Florida revisited this question and introduced a new standard with which to evaluate takings claims when government action interfered with access to private property.[182] It had already been established by the Florida courts that where governmental action destroyed an individual's access to

---

176 *Id.*

177 *Id.* at 8-9.

178 *Pinellas County v. Austin,* 323 So.2d 6, 9 (Fla. Dist. Ct. App. 1975).

179 *Id.*

180 *Id.*

181 *Id.*

182 *See Palm Beach County v. Tessler,* 538 So.2d 846 (Fla. 1989).

property, the government was required to compensate the landowners.[183] But in *Palm Beach County v. Tessler*, the Supreme Court of Florida expanded the protection afforded private landowners.[184]

Plaintiffs owned and operated a beauty salon that fronted a public road.[185] The county was widening said road as part of a bridge construction project and planned to construct a retaining wall directly in front of plaintiff's business.[186] Access would not have been destroyed but customers wishing to reach plaintiff's business from the public road would have to take an indirect winding route through a residential neighborhood.[187]

The trial court determined that the government was liable for inversely condemning plaintiff's property because the plaintiff's had been denied suitable access to their property as a result of the retaining wall.[188] Consequently, the court held that a takings had occurred and that the plaintiff deserved compensation.[189] Both the district court and the Supreme Court of Florida affirmed this ruling, establishing a new test for takings claims in the context of access management and expanding on the protection previously afforded private land owners.[190]

---

183 *See Dep't of Transportation v. Jirink*, 498 So.2d 1253 (Fla. 1986). *See also State Dep't of Transp. v. Stubbs*, 285 So.2d 1 (Fla. 1973).

184 *Palm Beach County v. Tessler*, 538 So.2d 846 (Fla. 1989).

185 *Id.* at 847.

186 *Id.*

187 *Id.*

188 *Id. at 850.*

189 *Id.*

190 *See generally Palm Beach County v. Tessler*, 538 So.2d 846 (Fla. 1989).

CONCLUSION

While decisions from Florida are not binding on Georgia's courts, this body of takings jurisprudence could serve as persuasive authority when Georgia's courts encounter and address these issues as the local public bodies attempt to mold a comprehensive access management plan. This line of cases extends the rights and protections of private landholders above and beyond the traditional takings jurisprudence established by the U.S. Supreme Court and, if followed in Georgia, could become an issue with regard to local governments' abilities to promote an effective access management program.

Conclusion

This Report has described access management from a traffic engineering perspective and showed how design features, such as spacing standards, medians, and internal circulation can be used to increase the efficiency and safety of a roadway. With regard to subdivision regulations, the modification and drafting of new subdivision regulations provide an opportunity to assure proper access and street layout in relation to existing or planned roadways. However, it is clear that access management decisions must be an integral part of any context sensitive solutions process, so that access can be balanced with livability.

This Report has also addressed the legal issues associated with access management. While the right of access traditionally has been a protected private property right in Georgia – it is a right that may be regulated under the police powers. This Report has set forth a model ordinance for the regulation of access in Georgia that incorporates the state judicial standards generally required for the noncompensable regulation of the right of access. In addition, the takings issues relating to access management have been examined, and specific examples of judicial interpretation of access management regulations in Florida have been provided.

In conclusion, this Report examined whether it would be feasible to use government regulations to fix or limit access in order to provide for more efficient operation of the Georgia's roads and highways. After conducting this analysis from both a planning perspective and a legal perspective, this Report concludes that implementation of a comprehensive access management program would not only be viable in Georgia – it would be an extremely powerful growth management tool for the state.