

Condemnation FAQ for Georgia Land Trusts¹

These FAQs address the condemnation process in Georgia with a specific focus on the condemnation of a conservation easement held by a land trust.

1. What is eminent domain?

- Eminent domain is the broad, inherent power held by the government to take, either temporarily or permanently, private property, “on account of public exigency and for the public good.”²
- In Georgia, this power is constrained by:
 - The 5th Amendment to the U.S. Constitution, which requires that the government take the land for a public use and pay just compensation;³
 - The Georgia Constitution, which requires that the government take the land for a public purpose and pay fair and just compensation before the taking;⁴ and
 - Georgia statutes (the “Georgia Code, also abbreviated as O.C.G.A.”), which include provisions requiring the government to provide just compensation to a landowner before exercising eminent domain except for in extreme cases.⁵
- Thus, eminent domain is a government power to take private property, and it is limited in two very important respects: The taking must be (1) for a public use and (2) just compensation must be paid.

2. What is meant by public use?

- The Georgia Code defines “public use” as:
 - (i) The possession, occupation, or use of the land by the general public or by state or local governmental entities;
 - (ii) The use of land for the creation or functioning of public utilities;
 - (iii) The opening of roads, the construction of defenses, or the providing of channels of trade or travel;
 - (iv) The acquisition of property where title is clouded due to the inability to identify or locate all owners of the property;

¹ Prepared by the University of Georgia School of Law Land Conservation Clinic for general educational purposes on May 2, 2025. This FAQ is not intended to be, and does not constitute, legal advice. Laws and how courts interpret them can change rapidly and vary by jurisdiction. Readers should consult an attorney for specific situations.

² O.C.G.A. § 22-1-2(a); *see also* State Highway Dep’t v. Smith, 219 Ga. 800, 803-804 (1964).

³ U.S. Cons. Amend. V. provides: “nor shall private property be taken for public use, without just compensation.”

⁴ GA. Const. 1983, Art. I, § III, para. I. provides: “Except as otherwise provided in this Paragraph, private property shall not be taken or damaged for public purpose without just and adequate compensation being first paid.”

⁵ Under O.C.G.A. § 22-1-5, the government cannot exercise eminent domain “without first providing just compensation to the owner for the interference with his exclusive rights.” There are exceptions in cases of extreme necessity and great urgency. *Id.*

- (v) The acquisition of property where unanimous consent is received from each person with a legal claim that has been identified and found; or
 - (vi) The remedy of blight.⁶
- Importantly, “public use” does not include the public benefit of economic development.⁷
 - A court will determine whether the particular use is for public use,⁸ and the condemnor bears the burden of proof.⁹
 - A condemnor or its successor has five years to put a property to public use, or else the former owner may apply for reconveyance or quitclaim of the property to the former property owner or for additional compensation.¹⁰ This subsection of the Georgia Code considers a property as having been put to public use when the condemnor or its successor has expended a “substantial good faith effort” on a project to put the property to public use, even if the project has not been completed.¹¹

3. What is condemnation?

- Condemnation occurs when the government acquires or takes private property using its eminent domain powers.¹² In Georgia, O.C.G.A. §22-1-1 governs the exercise of eminent domain and the condemnation process.
- The Georgia Code provides for four methods of condemnation: The three assessor method,¹³ the three assessor method in rem procedures,¹⁴ the special master in rem procedure,¹⁵ and the declaration of taking method.¹⁶ Each method has its own

⁶ O.C.G.A. § 22-1-1(9)(A).

⁷ O.C.G.A. § 22-1-1(9)(B).

⁸ O.C.G.A. § 22-1-2(a); *see also* Nolan v. Central Ga. Power Co., 134 Ga. 201 (1910).

⁹ O.C.G.A. § 22-1-2(a).

¹⁰ O.C.G.A. § 22-1-2(c)(1).

¹¹ *Id.*

¹² *See* Legal Info. Inst., *Condemnation*, CORNELL L. SCH., <https://www.law.cornell.edu/wex/condemnation> (last visited Jan. 14, 2025).

¹³ O.C.G.A. §§ 22-2-40 to 22-2-43, 22-2-60 to 22-2-65, and 22-2-80 to 22-2-86. This method is covered more in-depth in Question 7.

¹⁴ O.C.G.A. §§ 22-2-130 to 22-2-142. The three assessor method in rem procedures are not covered in the FAQs because they occur under a very specific set of circumstances. The Georgia Code explains these procedures occur when the condemnor “believes that the title of the apparent or presumptive owner of such property is defective, doubtful, incomplete, or in controversy or that there are or may be unknown persons or nonresidents who have or may have some claim or demand thereon or some actual or contingent interest or estate therein or that there are minors or persons under disability who are or may be interested therein or that there are taxes due or that should be paid thereon or concludes for any reason that it is desirable to have a judicial ascertainment of any question connected with the matter, such government or person may, through any authorized representative, petition the superior court of the county having jurisdiction for a judgment in rem against the property or interest, condemning the same to the use of the petitioner upon payment of just and adequate compensation therefor to the person or persons entitled to such payment.” O.C.G.A. § 22-2-130. Readers should consult an attorney if they need to learn more about these procedures.

¹⁵ O.C.G.A. § 22-2-100 to 22-2-114. This method is covered more in-depth in Question 8.

¹⁶ O.C.G.A. §§ 32-3-1 to 32-3-20. The declaration of taking method is not covered in the FAQs because it occurs under a very specific set of circumstances. The Georgia Code explains this method is available when a state agency,

procedures. Each proceeding begins with notice or petition that is served on the property owner and any other party who has an interest, according to the methods and guidelines provided in the Georgia Code.¹⁷ A condemner generally must make an initial payment of compensation before it takes title.¹⁸ Condemnees may appeal the amount of compensation on the basis that it is not adequate and just.¹⁹ Each procedure also allows the condemnee to present non-valuation issues, such as public use or the condemnor's authority, to the court prior to the condemner taking possession.²⁰

4. Can a conservation easement be condemned?

- While conservation easements (CEs) are generally perpetual,²¹ conservation property protected by a conservation easement and conservation easements themselves (which represent a prohibition on certain uses) may be condemned.²²
- While Georgia's CE enabling statute provides that no CE can be created or expanded using eminent domain,²³ it does not prohibit the condemnation of a CE. In fact, it provides that "Except as otherwise provided in this article, a conservation easement may be created . . . released, modified, terminated, or otherwise altered or affected in the same manner as other easements"²⁴ The statute does, however, require that the easement holder "be a necessary party in any proceeding of or before any governmental agency which may result in a license, permit, or order for any demolition, alteration, or construction on the property."²⁵ Thus, authorized condemners can use the power of eminent domain to condemn land which is perpetually protected under a CE in order to build power lines, roads, sewer lines, and other public improvements.

5. What is purchase in lieu of condemnation, and why do this?

- Instead of condemning property by filing a condemnation action, condemners may acquire property via a negotiation process with the landowner, and the outcome is commonly called a purchase, sale, or deed "in lieu of condemnation[.]"²⁶

county, or municipality seeks to take land "for public road purposes or for any other public transportation purposes" O.C.G.A. § 32-3-4. Readers should consult an attorney if they need to learn more about these procedures.

¹⁷ O.C.G.A. §§ 22-2-20 to 22-2-26, 22-2-102.2, 22-2-107, 22-2-131 to 22-2-134, 32-3-5, 32-3-8 to 32-3-10.

¹⁸ Ga. Const. 1983, Art. I, § III, ¶ I; *see also* O.C.G.A. § 22-1-5; Metropolitan Atlanta Rapid Transit Authority v. Datry, 235 Ga. 568 (1975); Athens Terminal Co. v. Athens Foundry & Machine Works, 129 Ga. 393 (1907).

¹⁹ O.C.G.A. § 22-2-80; *see also* Benton v. Georgia Marble Co., 258 Ga. 58 (1988).

²⁰ O.C.G.A. § 22-1-11.

²¹ O.C.G.A. § 44-10-3(c) states that conservation easements are "unlimited in duration" unless otherwise provided.

²² *See* Woodside v. City of Atlanta, 214 Ga. 75, 83-84, 103 S.E.2d 108, 115 (1958) ("[T]here need not be a physical taking of the property or even dispossession; any substantial interference with the elemental rights growing out of ownership of private property is considered a taking." (quoting Smith v. Erie R. Co., 134 Ohio St. 135, 16 N.E.2d 310, 313)).

²³ O.C.G.A. § 44-10-3(a).

²⁴ *Id.*

²⁵ O.C.G.A. § 44-10-4(b).

²⁶ DANIEL F. HINKEL, 1 PINDAR'S GEORGIA REAL ESTATE LAW & PROCEDURE WITH FORMS § 2:7 (7th ed. 2024).

- The Georgia Code encourages condemnors to acquire the required interest via negotiation if possible: “The condemning authority shall make every reasonable effort to acquire expeditiously real property by negotiation.”²⁷

6. What is the general condemnation process, known as the three assessor method?

Prior to Exercising the Power of Eminent Domain through Condemnation Proceedings

1. At least 15 days before a meeting to consider a resolution on eminent domain, the condemning agency should post a sign with the meeting's time, date, and location in the right of way adjacent to each affected property.²⁸
2. The agency must attempt to personally serve the condemnee with notice of the meeting at least 15 days before, unless the condemnee waives or acknowledges the service.²⁹
 - i. If unsuccessful, service may be mailed or delivered overnight to the property owner at the address of record and, if they are not the property owners, to the parties in possession of the property, with return receipt requested.³⁰
3. Any required notice should be published in the county legal newspaper but not in the legal notices section.³¹
4. The agency must ensure that the meeting begins after 6:00 P.M.³²
5. The condemning agency must attempt to procure the property by contract and make a tender of “just and adequate compensation.”³³
 - i. A condemnee is entitled to recover at least the fair market value of the property rights acquired by the governmental entity as just and adequate compensation.³⁴
 - ii. If the condemnee and agency do not reach mutually agreeable terms through good-faith negotiations, the agency may file a condemnation action to acquire these property rights through eminent domain.³⁵
 - iii. The agency may not file a condemnation action concerning a condemnee’s property until 30 days after the date of the resolution approving the exercise of eminent domain unless there is an emergency condition or consent.³⁶

²⁷ O.C.G.A. § 22-1-9(1).

²⁸ O.C.G.A. § 22-1-10(a)(1).

²⁹ O.C.G.A. § 22-1-10(a)(2).

³⁰ *Id.*

³¹ O.C.G.A. § 22-1-10(a)(3).

³² O.C.G.A. § 22-1-10(a)(4).

³³ O.C.G.A. § 22-1-6.

³⁴ *Dep't of Transp. v. Mendel*, 237 Ga. App. 900, 901, 517 S.E.2d 365, 367 (1999); *see also* *State Highway Dep't v. Thomas*, 106 Ga. App. 849, 128 S. E. 2d 520 (1962).

³⁵ O.C.G.A. §§ 22-1-7, 22-1-9.

³⁶ O.C.G.A. § 22-1-10.1.

Condemnation Action under Three Assessor Method

1. If the parties cannot agree on the compensation for the condemning agency to pay the condemnee,³⁷ the agency may initiate a condemnation action through a notice served on the property owner and any other person having an interest in the property.³⁸
 - a. For property or interests held in trust, the agency must serve notice on the trustee and any other persons who have an interest under the conveyance.³⁹
 - b. The Georgia Code requires that notice must:
 - i. “Describe the property or franchise and the amount of interest therein sought to be condemned;
 - ii. Fix the time when the hearing will be had on the premises;
 - iii. Give the name of the assessor selected by the person seeking condemnation; and
 - iv. Request the owner or owners, the trustee, or the representative, as the case may be, to select an assessor.”⁴⁰
2. Notably, this condemnation action focuses on the appropriate compensation to be paid.⁴¹
 - a. If the condemnee wants to challenge the legality or the necessity of the condemnation, they must bring a separate suit and seek to enjoin the condemnation proceeding.⁴²
 - b. As long as the condemnee does not accept the proceeds of the award under this procedure, appointing a processor and participating in the hearing will not waive the condemnee’s right to challenge the condemnation.⁴³
3. The condemning agency and the condemnee each select an assessor, then the two assessors appoint a third assessor.⁴⁴
 - a. The assessors are responsible for hearing the parties’ evidence regarding the value of the property, the damages to the condemnee, and the benefits to the condemnee from the condemning agency’s use of the property, if applicable.⁴⁵
 - b. Assessors have no authority to decide questions of law, such as compensability.⁴⁶
4. A majority of the assessors must agree upon the amount of just and adequate compensation to be awarded to the condemnee.⁴⁷
 - a. The amount of just and adequate compensation is calculated by assessing “the consequential damages to the property or interests not taken” and then deducting “the consequential benefits to be derived by the owner from the operation of the

³⁷ O.C.G.A. § 22-1-7.

³⁸ O.C.G.A. § 22-2-25.

³⁹ O.C.G.A. § 22-2-22.

⁴⁰ O.C.G.A. § 22-2-26(a).

⁴¹ See O.C.G.A. § 22-1-7.

⁴² DANIEL F. HINKEL, *GEORGIA EMINENT DOMAIN* § 2-4 (2024).

⁴³ *Id.* (citing *Johnston v. Clayton County Water Auth.*, 222 Ga. 39, 148 S. E. 2d 417 (1966)).

⁴⁴ O.C.G.A. § 22-2-40.

⁴⁵ O.C.G.A. § 22-2-62.

⁴⁶ O.C.G.A. § 22-2-40(b).

⁴⁷ O.C.G.A. § 22-2-63.

franchise by the condemnor or from the carrying on of the business of the condemnor”⁴⁸

- b. Within 10 days of the assessors making the award, it must be filed in superior court in the county of the property.⁴⁹
 - c. The condemning agency is not authorized to take possession of the property until the award is paid.⁵⁰
5. Either party may file an appeal within 10 days of the filing of the award and request a trial by jury to determine the appropriate amount of just and adequate compensation.⁵¹

7. What is the special master method of condemnation?

1. The special master method of condemnation is “supplementary to and cumulative of” the procedures under the three assessor method.⁵²
 - i. The government uses this method when it seeks a “quick and effective adjudication of the just and adequate compensation” and “a judicial ascertainment and judicial supervision of all questions and proceedings”⁵³
 - ii. This in rem procedure can be used when “there are numerous parties, conflicting interests, persons under disability, nonresidents or when there are questions or issues that make judicial supervision desirable.”⁵⁴
2. If an agency seeks to have a judgment in rem against a property, it may file a condemnation petition to acquire a condemnee’s property in the superior court of the property’s county.⁵⁵
 - i. The agency must serve the condemnee with a copy of this petition.⁵⁶
 - ii. The petition must include:
 - 1) “The facts showing the right to condemn;
 - 2) The property or interest to be taken or damaged;
 - 3) The names and residences of the persons whose property or interests are to be taken or otherwise affected, so far as known;
 - 4) A description of any unknown persons or classes of unknown persons whose rights in the property or interest are to be affected;

⁴⁸ *Id.*

⁴⁹ O.C.G.A. § 22-2-65.

⁵⁰ HINKEL, *supra* note 42 (citing *Williams v. City of LaGrange*, 213 Ga. 241, 98 S. E. 2d 617 (1957)).

⁵¹ O.C.G.A. § 22-2-80.

⁵² O.C.G.A. § 22-2-101.

⁵³ O.C.G.A. § 22-2-102.1.

⁵⁴ HINKEL, *supra* note 42, § 2-5 (citing O.C.G.A. § 22-2-101).

⁵⁵ O.C.G.A. § 22-2-102.1.

⁵⁶ O.C.G.A. § 22-2-107(a).

- 5) A statement setting forth the necessity to condemn the private property and describing the public use for which the condemnor seeks the property; and
 - 6) Such other facts as are necessary for a full understanding of the cause.”⁵⁷
- iii. Unlike in the three assessor method, under the special master method, the condemning agency is not required to make an offer of compensation before filing the petition.⁵⁸
3. Unless waived by the parties, the judge who receives the petition will have a hearing at least 10 days, but no more than 30 days, after the agency filed the condemnation petition.⁵⁹
 - i. Afterwards, the judge will enter an order scheduling a hearing before a special master and appointing a special master.⁶⁰
 - ii. The hearing before a special master must occur at least 30 days, but not more than 60 days, after the order appointing the special master.⁶¹
4. During the special master hearing, the special master’s primary duty is “to ascertain the value of the property sought to be condemned”⁶²
 - i. However, unlike in the three assessor method, the special master may also hear and determine legal issues raised by the parties, such as “the right of the condemnor to condemn, the interest to be condemned, the nature of the interest taken and the effect of the condemnation upon the respective rights of the parties.”⁶³
 - ii. If a condemnee desires, at any time prior to 5 calendar days before the hearing, they may opt to create a special master panel, comprised of the special master, an assessor selected by the condemnee, and an assessor selected by the condemnor, to decide all valuation issues.⁶⁴
5. A party can seek review of the legal issues by filing objections or exceptions to the findings of the special master.⁶⁵
 - i. A party must file these exceptions before the court enters its judgment adopting the award of the special master and condemning the property.⁶⁶

⁵⁷ O.C.G.A. § 22-2-102.2.

⁵⁸ *Harwell v. Georgia Power Co.*, 154 Ga. App. 142, 148 S.E.2d 769, 775 (1980).

⁵⁹ O.C.G.A. § 22-2-102(a)(2).

⁶⁰ *Id.*

⁶¹ O.C.G.A. § 22-2-102(b).

⁶² *Shoemaker v. Dep’t of Transp.*, 240 Ga. 573, 577, 241 S.E.2d 820, 823 (1978).

⁶³ *Id.*

⁶⁴ O.C.G.A. § 22-2-108.1. Readers should consult an attorney if they want to learn more about the specifics of creating a special master panel.

⁶⁵ *Shoemaker v. Dep’t of Transp.*, 240 Ga. 573, 577, 241 S.E.2d 820, 823 (1978).

⁶⁶ *City of Atlanta v. Turner Advertising Co.*, 234 Ga. 1, 214 S.E.2d 501 (1975).

- ii. If a party fails to file exceptions to the special master's award, the party waives its right to litigate any nonvalue issues.⁶⁷
- 6. Once a special master or special master panel hears the case, they must file an award with the court within 3 days.⁶⁸
 - i. They must mail the award to the condemnor, any condemnees or condemnee's attorney, and all other parties involved then provide a certificate of service to evidence the mailings.⁶⁹
 - ii. The condemning agency can take possession of the property after the judgment is entered and the award is paid.⁷⁰
- 7. Either party may file an appeal for a jury trial on the issue of just and adequate compensation.⁷¹
 - i. Any appeal must be filed within 10 calendar days from the service of the award, plus 3 additional calendar days for the mailing of the award.⁷²

8. What are ways to challenge a condemnation?

- Those with property impacted property interests may challenge a proposed condemnation based on the following:
 - Lack of condemnation authority⁷³
 - Lack of public use/public purpose⁷⁴
 - Process – failure to adhere to the statutory proper process and notice requirements⁷⁵
 - Valuation⁷⁶

9. What types of interests can the condemner acquire?

- A condemner may condemn or acquire the entire fee simple ownership or, alternatively, a lesser interest such as right of way easement.⁷⁷ Sometimes condemners also take a temporary construction easement.⁷⁸

⁶⁷ Cann v. Metropolitan Atlanta Rapid Transit Authority, 196 Ga. App. 495, 396 S. E. 2d 515 (1990).

⁶⁸ O.C.G.A. § 22-2-110(a).

⁶⁹ *Id.*

⁷⁰ O.C.G.A. § 22-2-111.

⁷¹ O.C.G.A. § 22-2-112.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*; O.C.G.A. § 22-1-2.

⁷⁵ See O.C.G.A. §§ 22-2-20 to 22-2-26, 22-2-102.2, 22-2-107, 22-2-131 to 22-2-134, 32-3-5, 32-3-8 to 32-3-10.

⁷⁶ O.C.G.A. § 22-2-112.

⁷⁷ O.C.G.A. §§ 22-2-102.1, 22-2-138, 32-3-7; see also *Sadtler v. City of Atlanta*, 236 Ga. 396, 223 S. E. 2d 819 (1976).

⁷⁸ See e.g., *Dorsey v. Dep't of Transp.*, 248 Ga. 34, 279 S. E. 2d 707 (1981); *Canada West, Ltd. v. MARTA*, 169 Ga. App. 907, 315 S. E. 2d 442 (1984); *Collins v. MARTA*, 163 Ga. App. 168, 291 S. E. 2d 742 (1982).

10. What interests are compensated in a condemnation?

- Many types of property rights may be condemned and compensated,⁷⁹ including fee simple ownership, leasehold values, buildings, access rights, air rights, easements, etc.
- A conservation easement is an interest in real property that is distinct from the underlying fee interest,⁸⁰ and, as such, if condemned, the holder of the CE should be entitled to compensation. The easement holder may also be entitled to consequential damages for the additional damage to the remaining CE.
 - Georgia's CE enabling act defines a "conservation easement" as "a nonpossessory interest of a holder in real property[.]"⁸¹
 - Georgia's CE enabling act also requires that the easement holder be a necessary party to any proceeding "of or before any governmental agency which may result in a license, permit, or order for any demolition, alteration, or construction on the property."⁸²
 - Most CEs themselves also provide that the CE is a real property interest which immediately vests in the holder upon execution.
 - It is well established in Georgia that the extinguishment of an ordinary (non-conservation) easement by condemnation is entitled to compensation.⁸³
 - Georgia law provides that a CE is created and terminated in the same manner as other easements, "except that a conservation easement may not be created or expanded by the exercise of the power of eminent domain."⁸⁴ Since the power of eminent domain is not being exercised to create or expand a CE in these cases but, instead, to condemn one, this exception does not apply.
 - Thus, a CE is a property interest and, if taken, the holder of that CE should be compensated.

11. Can the condemnor ignore the conservation easement and only condemn the fee simple ownership?

- Typically, no. In some cases, the condemnor's public use (road, utility line, etc.) may be permitted by the CE. In that case, the CE permits the use, the land trust's property interest is not impacted, and the land trust does not need to be compensated. However, in most cases, the condemnor's prospective use is prohibited either explicitly or because of its impact to the conservation purposes, and, thus, the CE must be extinguished or released via condemnation. Therefore, when a condemnor

⁷⁹ See generally *Bowers v. Fulton County*, 221 Ga. 731, 146 S. E. 2d 884 (1966); *Woodside v. City of Atlanta*, 214 Ga. 75, 103 S.E.2d 108 (1958).

⁸⁰ O.C.G.A. § 44-10-2(1).

⁸¹ *Id.*

⁸² O.C.G.A. § 44-10-4(b).

⁸³ *Lee v. City of Atlanta*, 219 Ga. App. 264, 265-66 (1995).

⁸⁴ O.C.G.A. § 44-10-3(a).

seeks to acquire a CE-protected property, it typically must obtain both the landowner's interest and the land trust's interest in order to conduct the proposed activity.

- Georgia law requires that a land trust be a necessary party to any government agency's action to alter or construct on the protected property, which strongly implies that the land trust has an interest that must be considered.⁸⁵

12. Why should a land trust holder of conservation easement be compensated?

- It is important to remember that a CE is more than just a prohibition of certain uses or development. It is created to protect conservation values, support various conservation purposes, and provide public benefit.⁸⁶ This property interest is therefore significant.
- A CE is a real property interest.⁸⁷
- All property interests must be compensated in a condemnation action.
- The condemner cannot use the land without extinguishment of the CE,⁸⁸ so it should have to pay for that interest.
- Ensuring that the land trust is also compensated will disincentivize condemning protected (and otherwise cheaper) land. CE-protected land may appear to be less expensive land, as the property's ability to be developed is restricted, thereby reducing its market value. However, this simplistic view of the property does not consider that there are actually two interests present: the landowner's fee simple ownership right and the land trust's CE. Both interests must be taken and compensated. The land trust holds the development rights (or the right to disturb the land in the way the condemner would like to), and without these rights, the condemner cannot use the land as they wish. Thus, if the condemner needs those rights, they must pay for them.

13. How is compensation determined?

- In Georgia, a property owner is entitled to both the fair market value of their property and consequential damages⁸⁹ when their property is taken by condemnation.⁹⁰ The condemner must pay the fair market value of the property, unless the court determines that in unique circumstances, compensation should exceed the total value.⁹¹

⁸⁵ O.C.G.A. § 44-10-4(b).

⁸⁶ See O.C.G.A. § 44-10-2(1).

⁸⁷ *Id.*

⁸⁸ See O.C.G.A. §§ 44-10-3, 44-10-4.

⁸⁹ Consequential damages may be available when a portion of the owner's property is taken. A property owner must establish that damages "proximately and naturally arose from the condemnation and taking of the Condemnee's own property." Dept. of Transp. v. Simon, 151 Ga. App. 807, 810 (1979), *aff'd*, 245 Ga. 478, 265 S.E.2d 777 (1980).

⁹⁰ State Highway Dep't v. Thomas, 115 Ga. App. 372 (1967); see also Canada W., Ltd. v. City of Atlanta, 169 Ga. App. 907, 909 (1984); Simon v. Dep't of Transp., 245 Ga. 478, 478 (1980); Dep't of Transp. v. Foster, 262 Ga. App. 524, 525 (2003).

⁹¹ State Highway Dep't v. Thomas, 115 Ga. App. 372 (1967).

- Market Value, or **Fair Market Value (FMV)**, is “the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it. In estimating its value, all the capabilities of the property, and all the uses to which it may be applied or for which it is adapted, are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner. . . . All the facts as to the condition of the property and its surroundings, its improvements and capabilities, may be shown and considered in estimating its value.”⁹²
- In determining FMV, the court is not limited to present use but may consider all the uses to which the property is reasonably adapted.⁹³ The jury may consider all purposes to which the property might be legitimately put even at a future date.⁹⁴
- If multiple parties have an interest in the land, the sum of the interests of all parties usually will equal the FMV of the property.⁹⁵
- Property value is based on an inquiry “into all legitimate purposes, capabilities and uses to which the property might be adapted, provided that such use is reasonable and probable and not remote or speculative.”⁹⁶
- Consequential damages arise when the condemnor only takes a portion of the landowner’s property, and this taking reduces the market value of the remaining land.⁹⁷ The damage must be different in kind from those suffered by the general public.⁹⁸ The property owner must establish that damages “proximately and naturally arose from the condemnation and taking of the Condemnee’s own property.”⁹⁹
- Consequential damages are measured by reduction in FMV of remaining property proximately caused by the proposed public use.¹⁰⁰

14. What if the conservation easement was donated for a federal tax deduction?

- Donated CEs must follow federal tax requirements concerning the determination and allocation of proceeds between the grantor and the land trust.¹⁰¹
- A land trust must review the CE to determine how this issue is addressed.
 - A donated CE typically explicitly addresses condemnation and proceeds in the CE, often in a “Proceeds Clause.”
 - Treasury Regulations required that CEs donated for charitable tax purposes use a set fraction or ratio to allocate the condemnation proceeds between the landowner and the land trust. This fraction, often termed the CE %, is typically as follows:

⁹² Cent. Ga. Power Co. v. Mays, 137 Ga. 120, 72 S.E. 900, 902 (1911) (quoting LEWIS ON EMINENT DOMAIN § 706 (3d Ed.)).

⁹³ *Id.*; see also Dep’t of Transp. v. Kanavage, 183 Ga. App. 143 (1987); O.C.G.A. § 22-2-62.

⁹⁴ Dep’t of Transp. v. Kanavage, 183 Ga. App. 143, 143 (1987).

⁹⁵ See State Hwy Dept v. Thomas, 106 Ga. App. 849, 853-54 (1962).

⁹⁶ Carriage Hills Assocs., Inc. v. Mun. Elec. Auth., 264 Ga. App. 192, 193 (2003) (quoting Elliott v. Henry County Water & Sewerage Auth., 238 Ga. App. 15, 17, 517 S.E.2d 545 (1999)) (emphasis omitted).

⁹⁷ See O.C.G.A. § 22-2-62; Wright v. Marta, 248 Ga. 372 (1981).

⁹⁸ Tift County v. Smith, 219 Ga. 68 (1963); see also Marta v. Fountain, 256 Ga. 732 (1987).

⁹⁹ Dept. of Transp. v. Simon, 151 Ga. App. 807, 810 (1979), *aff’d*, 245 Ga. 478 (1980).

¹⁰⁰ *Id.*

¹⁰¹ Treas. Reg. §1.170A-14(g)(6) (as amended in 2024).

- Value of the CE at time of the donation/FMV of property without the CE at the time of donation
 - The land trust should be entitled to a share of the condemnation proceeds calculated as follows: [the CE %] x [Unrestricted property FMV at date of condemnation].
- The value of the encumbered land plus the value of the CE equals the value of the land unencumbered.

15. What if the nondonated conservation easement is silent on condemnation or if the CE was purchased?

- The land trust is still be entitled to the value of the CE. As explained in Question 14, Georgia law requires condemnors to compensate property owners for the fair market value of their property, as well as consequential damages. Without an agreement or the extinguishment of the CE, the condemning authority cannot obtain clear title or the ability to undertake the work it seeks to do on the property. Thus, it must address the land trust's property rights. Since a CE is a recognized property interest,¹⁰² land trusts should receive compensation for the condemnation of a CE.
- The value of the CE can be determined as: Value of the CE = [current FMV of property without CE restrictions] - [current FMV of property with CE restrictions].

16. What happens to the land trust's share of the proceeds?

- The land trust will want to consult both the CE and its policy on this matter.
- Federal tax regulations require that the proceeds for donated CEs be used to advance the condemned property's conservation purposes.¹⁰³
- The land trust should document in writing how the proceeds will be used according to the conservation easement requirements. The land trust must use its best judgment when determining how to best accomplish this goal. Possible ways to advance the original easement's conservation purposes might include:
 - Place proceeds in a dedicated stewardship and legal defense fund to ensure protection of properties with similar conservation purposes.
 - Use to purchase similar land with similar conservation purposes.
 - Use to restore land with these conservation purposes.

17. What is the land trust's role in a condemnation action?

The following are general recommendations. Land trusts will want to review their own policies and any other requirements, including regulatory requirements, to determine their role and response in a condemnation action.

¹⁰² See *supra* Questions 10 & 12.

¹⁰³ Treas. Reg. §1.170A-14(g)(6) (as amended in 2024).

- A land trust holder has an ethical obligation to further its charitable mission of land conservation, protect the protected property's conservation purposes, and enforce the CE.¹⁰⁴ The CE usually provides numerous public benefits and often has been supported via direct public funding or by tax benefits.¹⁰⁵ Thus, a land trust typically does not willingly agree to a condemnation.
- The land trust should work to persuade the condemning agency to move the route or prospective impact, minimize the impact, and possibly mitigate the impact.
- The land trust should coordinate with the landowner, if possible, or as the CE may explicitly require, and also:
 - Determine if there are coholders or federal or state funding involved. This may impact the condemnation process and allocation of proceeds.
 - CEs co-held with government agencies may impede condemnation.
- The land trust must ensure the condemnor followed proper procedures as set forth in the Georgia Code.
- The land trust should ensure that the condemnor has the authority to condemn and that the condemnation is for a public purpose. Any time before title vests in government, the property owner may submit a motion asking the court to determine if for a public use and whether the government has legal authority to exercise eminent domain.¹⁰⁶
- The land trust must work to educate the condemning authority.
 - Sometimes a condemning authority is unaware that land is conserved due to insufficient title work, or they do not understand what a CE is.
 - The land trust should educate the condemnor about what a CE is, and the conservation purposes that have been protected.
 - The land trust must make sure the condemnor understands that the LT must be a party to all proceedings and negotiations, as it holds an interest that must be addressed and as required by statute. The CE will either permit the use or prohibit it. If the use is prohibited, then the land trust's interest must be compensated and extinguished or released.
 - The land trust must be included in communications, notices, offers, and pleadings.
 - A land trust should emphasize the public investments in and use of the conserved land and urge alternative routes, minimization, and mitigation.
 - Advocate strongly that the condemnor not condemn the CE protected land and to find an alternative route.

¹⁰⁴ See STANDARDS ADVISORY TEAM & STANDARDS CORE TEAM, LAND TR. ALL., LAND TRUST STANDARDS AND PRACTICES 11 (2017), https://avalonia.org/wp-content/uploads/2017/04/LandTrustStandardsandPractices2017_0.pdf.

¹⁰⁵ See Nancy A. McLaughlin, *Condemning Conservation Easements: Protecting the Public Interest and Investment in Conservation*, 41 U.C. DAVIS L. REV. 1897 (2008).

¹⁰⁶ See *Nolan v. Central Ga. Power Co.*, 134 Ga. 201 (1910).

- In some instances, land trusts will choose to compel a condemner to formally condemn the property through judicial action, especially when the prospective impact to the CE's conservation purposes is significant, or if the land trust's attorney advises it that the terms of the CE require judicial extinguishment as part of a condemnation process. Some land trusts will always choose to compel a formal condemnation process.
- In other instances, upon its attorney's advice, a land trust may determine that (1) the condemner has the authority to condemn; (2) the condemnation will serve a public purpose; (3) condemnation is unavoidable and therefore, that a purchase in lieu of condemnation, albeit under written and certain threat of condemnation, may be appropriate. The land trust may use the negotiation process to minimize and/or mitigate impact to the protected property, as well as to ensure the proper valuation of the land trust's interest.
- Regardless of approach, the land trust must ensure that:
 - The condemnor is aware of the proper valuation approach.
 - The condemnor should have to pay for the land and the CE. Thus, it will be paying in total the value of the unencumbered land.
 - The property is correctly valued and proceeds properly allocated.
 - The documents that extinguish or release the CE are properly worded and recorded. Easement release or termination/extinguishment methods include a quitclaim deed or an Easement Release, or the grant of a use easement that includes a partial release of the conservation easement's provisions. The land trust should only extinguish or release the minimum amount of the CE, both in terms of area and rights.