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EMINENT DOMAIN AND ATTORNEYS' FEES IN GEORGIA: A GROWING STATE'S NEED FOR A NEW FEE-SHIFTING STATUTE

Crystal Genteman*

INTRODUCTION

“The domestic tranquility is gone,” said Jacksonville, Florida resident Joseph Santoni, whose front yard was partially taken by the Jacksonville Transit Authority (JTA) for a four year construction easement.¹ After the JTA started widening the two lane historic and scenic Fort Caroline Road² into a four lane, Santoni often found his driveway blocked by construction equipment and his landscaping torn up.³ Like many state constitutions and the Federal Constitution,⁴ Florida’s constitution guarantees that property owners receive just compensation when their property is taken.⁵ For the forty-eight month easement, the JTA offered Santoni a mere \$1,400 in compensation.⁶ Dissatisfied with the JTA’s offer, Santoni, along with nineteen other Fort Caroline Road property owners, took their cases to trial.⁷

Although Florida juries awarding just compensation typically are not allowed to consider the impact of a taking on the adjacent property, Santoni’s attorney argued that Florida case law often recognized an exception in road projects.⁸ Thus, Santoni’s attorneys,

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1. Tony Quesada, *Jury to Decide Compensation in Road Project Partial Takings*, JACKSONVILLE BUS. J., Aug. 18, 2006, available at <http://jacksonville.bizjournals.com/jacksonville/stories/2006/08/21/story04.html>.

2. Kandace Lankford, *Canal, Trees on Minds of Planners*, FLA. TIMES-UNION, Mar. 20, 2002, available at http://jacksonville.com/tu-online/stories/032002/neR_8904323.shtml.

3. Quesada, *supra* note 1.

4. U.S. CONST. amend. V.

5. FLA. CONST. art. X, § 6.

6. Tony Quesada, *JTA Must Pay More for Wonderwood Property*, JACKSONVILLE BUS. J., Aug. 28, 2006, available at <http://jacksonville.bizjournals.com/jacksonville/stories/2006/08/28/daily1.html>.

7. *Id.*

8. *Id.*

who also represented the other homeowners, argued that the JTA had failed to recognize the damage that would be done to the homeowners' property adjacent to the road in addition to the damages caused to the actual part taken.⁹ Mr. Santoni's trial was combined with two of the other homeowners, and at the joint trial, the jury awarded Mr. Santoni \$40,000.¹⁰ The total judgment for all three homeowners was \$105,150 more than the JTA had originally offered.¹¹ "We wanted to make them whole because they were sacrificing for the good of the community," said one juror.¹² Florida's fee-shifting statute requires that property owners are made whole through the reimbursement of their attorneys' fees,¹³ and following an extensive hearing, the circuit judge entered a final judgment on costs requiring the JTA to pay a substantial portion of the owners' litigation expenses.¹⁴ Without a fee-shifting statute, would the Fort Caroline Road residents have been able to challenge the government's offers? Is mandating that the government pay property owners' attorneys' fees in eminent domain cases therefore necessary to ensure that property owners receive just compensation and are made whole?

Until 2006, Georgia also had a fee-shifting statute.¹⁵ However, the General Assembly repealed the statute as part of Georgia's eminent domain reform,¹⁶ which was enacted in reaction to the Supreme Court's decision in *Kelo v. City of New London*.¹⁷ Georgia, like

9. *Id.*

10. *Id.*

11. *Id.*

12. Quesada, *supra* note 6.

13. FLA. STAT. § 73.092(1) (2009).

14. Jacksonville Transp. Auth. v. McEldowney, No. 02-02083-CA CV-C, Duval County, Fla. (2007) (on file with author). See *infra* notes 145-57 for a detailed explanation of the mechanics of Florida's fee-shifting statutes.

15. GA. CODE ANN. § 22-2-84.1 (1982), repealed by 2006 Ga. Laws 39, § 6.

16. HB 1313, 2006 Ga. Gen. Assem.

17. *Kelo v. City of New London*, 545 U.S. 469 (2005) (holding that the city could authorize a private developer to take landowners' properties for a large-scale redevelopment project because it constituted a "public use" under the Fifth Amendment). In a dissenting opinion, Justice O'Connor warned that following the holding, "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." *Id.* at 503 (O'Connor, J., dissenting).

Public outcry was swift and fierce to the Court's interpretation of "public use." Michael Allen Wolf, *Hysteria Versus History: Public Use in the Public Eye*, in PRIVATE PROPERTY, COMMUNITY

almost every other state,¹⁸ passed substantial eminent domain reform with the intent of preventing eminent domain from being used in redevelopment projects as it was in *Kelo*, while also providing citizens with more procedural protections.¹⁹ One such procedural protection was the repeal of Georgia's former fee-shifting statute²⁰ because the statute had a chilling effect on eminent domain litigation.²¹ A property owner who appealed an award of just compensation could not be reimbursed for his *own* litigation expenses even if he received a larger amount on appeal than the government's initial offer; however, if the property owner did not recover a certain amount on appeal, he would be forced to pay the government's expenses.²² Through repealing the statute, the General Assembly removed an important barrier to litigation for property owners who feared having to pay the government's expenses. However, this left a gap in Georgia law because the General Assembly failed to enact a new fee-shifting statute, such as Florida's statute, that would reimburse property owners who are successful in their appeals for their attorneys' fees in eminent domain litigation—thus ensuring they are made whole.

Georgia's constitution guarantees that private property will not be taken without "just and adequate compensation."²³ Although owners and condemning authorities often disagree about a dollar figure that is "just and adequate," many property owners lack the sufficient resources to challenge the government in an eminent domain proceeding if they feel the government's offer is too low. For those

DEVELOPMENT, AND EMINENT DOMAIN 15 (Robin Paul Malloy ed., 2008) (documenting the chronology of extensive negative media coverage following the decision and arguing that the newsworthiness of the decision at the time it was announced, the sharp dissents in *Kelo*, and the explosion of politically conservative media were substantial factors influencing public response to the opinion).

18. CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN LEGISLATION SINCE KELO 1 (2007) (noting that two years after the *Kelo* decision, forty-two states had passed some form of eminent domain reform).

19. Jody Arogeti et al., *General Provisions and Condemnation Procedure: Provide a Comprehensive Revision of Provisions Regarding the Power of Eminent Domain, Crimes and Offenses*, 23 GA. ST. U. L. REV. 157 (2006).

20. *Id.* at 179.

21. *See infra* notes 115–26.

22. GA. CODE ANN. § 22-2-84.1 (1982), *repealed by* 2006 Ga. Laws 39, § 6.

23. GA. CONST. art. I § 3, ¶ 1.

who can either afford to hire an attorney or find an attorney who will work on a contingent fee basis, any potential recovery is offset by litigation expenses, including attorneys' fees.²⁴

Due to Georgia's extensive growth in recent years, Georgia landowners are in special need of a statute authorizing the recovery of attorneys' fees for property owners in eminent domain proceedings. Between 1990 and 2000, Georgia saw a 26.4% population increase.²⁵ Experts expect this rapid growth to continue and predict that the state's population will swell by 34% between the years 2000 and 2015.²⁶ Population growth increases demand for state services, which in turn results in more instances of condemnation of private property for public use.²⁷ With such dramatic changes in a relatively short period of time, Georgia has encountered some severe growing pains.²⁸ Although Atlanta is the eighth-largest metropolitan

24. See *infra* notes 194–223 for a detailed discussion of financial limitations on the property owner's ability to litigate his position.

25. GOVERNOR'S OFFICE OF PLAN. & BUDGET, GEORGIA IN PERSPECTIVE 8 (2009), http://opb.georgia.gov/vgn/images/portal/cit_1210/45/18/162784478Georgia_in_Perspective_2009.pdf. Between 2000 and 2007, Georgia's population grew at 16.6%, "more than twice the national growth rate of 7.2%." *Id.* at 9. During the same time period, Georgia's population growth was the fastest of all Southern states, even outpacing Florida. *Id.*

26. GOVERNOR'S OFFICE OF PLAN. & BUDGET, GEORGIA 2015 POPULATION PREDICTIONS 1 (2005), http://www.opb.state.ga.us/media/3016/georgia_population_projections_reduced_web_5_25_05.pdf.

27. See Memorandum from the Georgia Department of Transportation Office of Right of Way Acquisition (Nov. 6, 2009) (on file with author) [hereinafter *GDOT Memorandum*]. The information referenced from this Memorandum is unpublished and was gained from the author's public records request to the Georgia Department of Transportation (GDOT).

Between 2000 and 2007, the number of properties acquired by the GDOT, in the areas of both acquisitions by deed as well as condemnations, increased in Georgia. In 2000, GDOT acquired 1,715 properties by deed, as compared to 2,307 in 2005. The number of acquisitions by deed was greatest in 2006 at 3,226 properties, then declined somewhat in 2007 and 2008 with 2,948 and 2,748 acquisitions by deed respectively. In those same years, the number of properties acquired by eminent domain showed a similar pattern. In 2006, GDOT acquired 409 properties via eminent domain as compared to only 169 acquisitions via eminent domain in 2000. The number of acquisitions via eminent domain then dropped to 372 in 2007. *Id.*

Consequently, eminent domain is a growing area of practice in Georgia, as evidenced by the State Bar of Georgia's addition of an eminent domain section in 2001. *State Bar Appoints Charles Ruffin as Chairman of Eminent Domain Section*, BUSINESS WIRE, Feb. 12, 2002, available at <http://www.allbusiness.com/legal/legal-services-law-practice-major-us-firms/5897403-1.html> ("Ruffin says, eminent domain litigation is a growing practice in the state of Georgia due to the surge in population growth over the past twenty years.").

28. Christopher Quinn, *State No. 1 in Growing Counties; Population Boom Brings Gifts, Problems*, ATLANTA J.-CONST., Mar. 16, 2006, at 1C ("[As] tax bases grow . . . so do headaches . . . as leaders scramble to keep up with demand for new roads, schools and services.").

city²⁹ and second-fastest growing city³⁰ in the United States, it has the second-worst metropolitan traffic congestion in the nation.³¹ Despite being the country's fourth-fastest growing state, Georgia is fourth from the bottom in transportation funding.³²

As with many states, severe budget constraints due to the economic downturn have compounded funding problems in Georgia.³³ However, the American Reinvestment and Recovery Act of 2009 (commonly known as the federal stimulus package) provided a sudden boom of funding for state infrastructure projects.³⁴ As of September 2009, Georgia allocated nearly \$300 million to highway stimulus projects that were at work or were about to begin, with an additional \$450 million in projects planned throughout the remainder of the year.³⁵ With this rapid explosion in population growth and money made available to fund much-needed public infrastructure projects through stimulus funding, increased condemnation of private property was both necessary and inevitable.

29. Mary Lou Pickel, *Atlanta Still a Magnet*, ATLANTA J.-CONST., Mar. 19, 2009, at 1A.

30. *Id.* Between the years 2000 and 2008, the only city outpacing Atlanta in growth was Dallas, Texas. During that time period Atlanta added over one million people. *Id.*

31. Doug Stoner, *Solutions Now, Not Later*, GA. TREND, Dec. 2007, available at http://www.georgiatrend.com/guest-commentary/12_07_guest.shtml. As of 2007, the only United States city with worse traffic congestion than Atlanta was Los Angeles. *Id.*

32. Jerry Grillo, *Traffic Gridlock: Can Atlanta's Traffic Be Fixed?*, GA. TREND, Apr. 2009, available at http://www.georgiatrend.com/features-economic-development/10_07_transportation_01.shtml. Two of Georgia's metropolitan statistical areas (MSAs) rank in the country's twenty-five fastest-growing MSAs, with six counties experiencing growth rates over 40%. GEORGIA IN PERSPECTIVE, *supra* note 25, at 8. Although such a plan has not been implemented, a 2006 article reported that "[t]he latest proposal on the transportation front is a 23-lane I-75 north of town" to deal with the growth. Quinn, *supra* note 28.

33. Alan Essig, *Cutting State Spending May Only Worsen Georgia's Budget Crisis*, ATHENS BANNER-HERALD, Jan. 8, 2009, available at http://www.onlineathens.com/stories/010809/opi_374971938.shtml ("Georgia is facing the most severe fiscal crisis since the Great Depression."); James Salzer, *Revenue Dip May Mean More Cuts*, ATLANTA J.-CONST., Apr. 9, 2009, at 1A (reporting that the state is "struggling with the worst fiscal crisis since the Great Depression"). In fact, the budget crisis is so dire in Georgia that teachers and university employees were furloughed. Laura Diamond, *Unpaid Days Off Set at Colleges*, ATLANTA J.-CONST., Aug. 7, 2009, at 1A.

34. Tom Crawford, *Money from Washington*, GA. TREND, Apr. 2009, available at http://www.georgiatrend.com/politics/04_09_politics.shtml (reporting that of the six billion dollars allocated to Georgia, one billion will go to the Department of Transportation for road and bridge projects). The Georgia Department of Transportation tracks these projects on its homepage at <http://www.dot.state.ga.us/informationcenter/gastimulus/Pages/default.aspx>.

35. Press Release, Ga. Dep't of Transp., \$51 Million in GA Transportation Projects Awarded (Sept. 1, 2009), available at <http://www.dot.state.ga.us/informationcenter/gastimulus/Documents/Releases/d7-9-1-09.pdf>.

As Georgia continues to expand, legislators must work to ensure that property owners receive their constitutionally guaranteed just and adequate compensation. Part I of this Note reviews the requirement of just compensation both federally and in Georgia, the condemnation procedure in Georgia, and Georgia's limited statutory authorization for a landowner recovering attorneys' fees in condemnation cases.³⁶ Part II discusses the federal government's approach and other states' approaches to fee-shifting statutes in eminent domain proceedings.³⁷ Finally, Part III analyzes Georgia's need for a new fee-shifting statute in eminent domain cases that would mandate that property owners be compensated for their attorneys' fees in valuation challenges and proposes a model statute to be introduced in the General Assembly.³⁸ Such a statute is crucial to ensuring that property owners are made whole and receive just and adequate compensation in condemnations.

I. BACKGROUND

A. *The Requirement of Just Compensation and Attorneys' Fees*

1. *The Federal Constitution*

The Fifth Amendment of the United States Constitution guarantees that private property not be taken for "public use, without just compensation."³⁹ Although the Supreme Court has held that "an owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken,"⁴⁰ the standard for compensation is generally fair market value.⁴¹ The Court has defined fair market value as "what a willing buyer would pay in cash to a

36. See *infra* Part I.

37. See *infra* Part II.

38. See *infra* Part III.

39. U.S. CONST. amend. V.

40. *United States v. Miller*, 317 U.S. 369, 373 (1943); see also *United States v. Reynolds*, 397 U.S. 14, 16 (1970) (holding that "fair and just compensation" should restore the property owner to "the same position monetarily" that he would have been in had the taking not occurred).

41. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 379 (1945) (holding that "the compensation to be paid is the value of the interest taken," and "[i]n the ordinary case, for want of a better standard, market value, so called, is the criterion of that value").

willing seller' at the time of the taking."⁴² Although many property rights advocates as well as scholars have proposed alternate methods for determining just compensation, fair market value continues to be the standard.⁴³

In *Armstrong v. United States*, Justice Black asserted, "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁴⁴ However, under federal law a property owner's attorneys' fees have not been interpreted to be a burden that the public should have to pay, and the property owner must bear these alone since they are not recoverable as part of just compensation under the United States Constitution.⁴⁵

2. Georgia Constitution

a. Just and Adequate Compensation

Georgia's constitution, similar to the federal Constitution, mandates that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first

42. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979) (citing *Miller*, 317 U.S. at 374).

43. See generally Rachel D. Godsil & David Simunovich, *Just Compensation in an Ownership Society*, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 133 (Robin Paul Malloy ed., 2008); Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 874 (2007) (noting that some scholars have proposed that property owners receive no compensation at all for small takings, while others "doubt[] the wisdom of the eminent domain power altogether"). In *Kelo*, the most recent Supreme Court eminent domain case, the Court declined to address the issue of fair compensation, noting that "[w]hile important, [fair compensation is] not before us in this litigation." *Kelo v. City of New London*, 545 U.S. 469, 489 n.21 (2005).

44. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). See generally Gideon Kanner, "Unequal Justice Under Law": *The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1088 (2007) (arguing that despite the Court's "flowery language" and "benign-sounding judicial rhetoric," its rulings are "harsh" and "exclude factors that sellers and buyers in voluntary transactions would consider").

45. *United States v. Bodcaw Co.*, 440 U.S. 202, 204 (1979) (in assessing whether petitioner was entitled to the recovery of appraisal fees, the Court commented that "[p]erhaps it would be fair or efficient to compensate a landowner for all the costs he incurs as a result of a condemnation action," but nevertheless rejected petitioner's request, holding that "such compensation is a matter of legislative grace rather than constitutional command"); *Dohany v. Rogers*, 281 U.S. 362, 368 (1930) ("Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain.").

paid.”⁴⁶ Furthermore, the constitution provides that “[t]he General Assembly may provide by law for the payment by the condemnor of reasonable expenses, including attorney’s fees, incurred by the condemnee in determining just and adequate compensation.”⁴⁷ Thus, although the constitution allows for the payment of attorneys’ fees, it does not require it.

A property’s value is calculated according to the fair market value at the time of the taking.⁴⁸ Much like the Supreme Court’s definition of fair market value, the Georgia Supreme Court has held that fair market value is “the price a seller who desires, but is not required, to sell and a buyer who desires, but is not required, to buy, would agree is a fair price, after due consideration of all the elements reasonably affecting value.”⁴⁹

b. Attorneys’ Fees as Part of Just and Adequate Compensation

Georgia property owners cannot recover their attorneys’ fees in eminent domain litigation as a component of just compensation.⁵⁰ However, this has not always been the case. Although the Georgia Supreme Court has not changed its position on this issue in nearly forty years, in the 1960s the court waived in its jurisprudence as to whether the Georgia constitution requires that property owners be reimbursed for their attorneys’ fees as part of just compensation and whether the court has the authority to make that decision.⁵¹

According to the Georgia Supreme Court’s most recent decision on this issue in 1971 in *Bowers v. Fulton County*, litigation expenses such as attorneys’ fees and expert testimony fees are not included in just and adequate compensation.⁵² Instead, these costs are “recoverable only where authorized by some provision or contract.”⁵³

46. GA. CONST. art. I, § III, ¶ I.

47. *Id.*

48. *Wright v. MARTA*, 283 S.E.2d 466, 468 (1981).

49. *Clary v. City of Stockbridge*, 686 S.E.2d 288, 291 (Ga. Ct. App. 2009) (emphasis omitted).

50. *Bowers v. Fulton County*, 183 S.E.2d 347, 349 (Ga. 1971).

51. See discussion *infra* notes 52–75.

52. *Id.*

53. *Id.* at 348 (“No provision is made in the Constitution or by statute that authorizes the award of attorney fees and expenses of litigation as a part of just compensation.”). In reaching its decision, the

In *Bowers*, the court reasoned that a right to recover attorneys' fees in condemnation litigation did not exist at common law and therefore held to the general rule that attorneys' fees are not recoverable absent statutory provision.⁵⁴ Justice Hawes, joined by two other justices, dissented and pointed out that the majority cited to persuasive authority rather than to any Georgia cases.⁵⁵ Additionally, Justice Hawes argued that the majority had explicitly disregarded the court's prior 1966 ruling in *Bowers v. Fulton County* requiring that the condemnee be "compensated for all damage to his property and expenses caused by the condemnation proceeding."⁵⁶

In addition to lacking a precedential foundation, Justice Hawes argued that the majority's holding was neither logical nor reasonable and that it failed to recognize the unique circumstances of an eminent domain proceeding.⁵⁷ Contrary to a typical lawsuit, the defendant in a condemnation action has "done no wrong" yet is "being forced to give up his property against his will."⁵⁸ The government has the advantage of knowing that if a landowner attempts to challenge the condemnation by going to court, then she will likely recover less than fair market value once litigation fees are paid.⁵⁹ Justice Hawes therefore reasoned that allowing a landowner to recover attorneys' fees in condemnation actions would actually reduce rather than foster litigation since agents, knowing that they might be subject to paying

court analogized to the judicial interpretations of "fair compensation" provisions in the Wisconsin and California constitutions which do not provide for attorneys' fees or other litigation expenses. *Id.* Interestingly, both Wisconsin and California now have statutory provisions allowing for the recovery of attorneys' fees in limited circumstances. In California, attorneys' fees and appraisal fees are recoverable where "the condemnee's final demand for compensation is deemed reasonable, and the condemnor's final offer is deemed unreasonable, in light of the evidence admitted in trial and the compensation awarded." CAL. CIV. PROC. CODE § 1250.410 (2007). In condemnation for sewers and transportation facilities in Wisconsin, attorneys' fees are recoverable where the jury verdict as approved by the court "exceeds the jurisdictional offer or the highest written offer prior to the jurisdictional offer by at least \$700 and at least 15%." WIS. STAT. § 32.28 (2006).

54. *Bowers*, 183 S.E.2d at 348.

55. *Id.* at 350 (Hawes, J., dissenting).

56. *Id.* (citing *Bowers v. Fulton County*, 146 S.E.2d 884 (Ga. 1966))

57. *Id.* at 351 ("I think that reason and logic require the conclusion that compensation to a landowner for the taking of his property can never be 'just and adequate' unless he receives that sum which leaves him whole and undiminished after the completion of the process of taking.").

58. *Id.*

59. *Id.*

the property owner's litigation fees, would be forced to make more reasonable offers.⁶⁰ Justice Hawes also argued that the courts, not the legislature, were the proper authority for construing the meaning of just compensation within the constitution.⁶¹

Five years later, the court changed direction when deciding to exercise its power to interpret the constitutional provision for just and adequate compensation. In *White v. Georgia Power Co.*, the court held that private property owners in Georgia could recover attorneys' fees and "all reasonable and necessary expenses of litigation" as part of "just and adequate compensation."⁶² The court offered little reasoning for its decision to overturn *Bowers* other than noting that since the time of the 1971 ruling in *Bowers*, five new justices had joined the court and a majority of these justices felt it necessary to "reassess the constitutional issue."⁶³ Chief Justice Nichols's concurring opinion echoed the dissent in *Bowers*, arguing that the 1971 *Bowers* court had misapplied the court's holding in *Bowers v. Fulton County* of 1966.⁶⁴

In *White*, the court laid out a procedure for courts to use in condemnation cases until the General Assembly could adopt formal legislation.⁶⁵ The court's recommended procedure contained three basic steps.⁶⁶ First, the fact finder would determine the fair market value of the condemned property as well as consequential damages to any of the condemnee's remaining property.⁶⁷ Next, the fact finder would determine if the condemnee had suffered any additional damages "such as attorney fees and reasonable and necessary

60. *Bowers*, 183 S.E.2d at 351. According to Justice Hawes, recovery of attorney fees would not apply where the jury found that the condemnor's initial offer represented fair market value.

61. *Id.* at 352.

62. *White v. Ga. Power Co.*, 227 S.E.2d 385, 388 (Ga. 1976), *rev'g*, *Bowers*, 183 S.E.2d 347 (1971).

63. *Id.* at 342-43.

64. *Id.* at 385 (Nichols, C.J., concurring) (citing *Bowers v. Fulton County*, 146 S.E.2d 884 (Ga. 1966)). In a separate concurring opinion, Justice Ingram agreed that the decision reflected the majority's ruling in the 1966 *Bowers* case and opined, "In my view, this provision includes reasonable and necessary attorney fees, and expenses of litigation, which the condemnee *must incur* in order to obtain fair market value of his property taken, and, where appropriate, any consequential damages to the remainder of his property." *Id.* at 392 (Ingram, J., concurring).

65. *Id.* at 343 (majority opinion).

66. *Id.*

67. *Id.* The fact finder might be "three assessors, a special master, or a jury." *Id.*

expenses of litigation” and make recommendations to the trial judge.⁶⁸ Finally, upon the fact finder’s recommendation for damages, the judge would hold a hearing to receive evidence on the amount of damages and then award the appropriate amount to the property owner as part of “fair and just compensation.”⁶⁹

Following *White*, the Georgia Supreme Court further developed the law related to attorneys’ fees in two key cases. In *Department of Transportation v. Doss*, the court clarified its holding in *White* by holding that only *reasonable* attorneys’ fees could be awarded.⁷⁰ Furthermore, in *Department of Transportation v. Flint River Cotton Mills*, the court held that a property owner must receive a jury award greater than, and not just equal to, the government’s original offer in order to recover attorneys’ fees.⁷¹

Only two years after *White*, however, the Georgia Supreme Court changed course yet again. The court took notice of the General Assembly’s failure to adopt the model procedure the court had laid out in *White*, and in *DeKalb County v. Trustees, Decatur Lodge No. 1602*, the court overturned *White*, along with the body of law that it had developed since its holding.⁷² In holding that attorneys’ fees and other litigation expenses were *not* required as part of just and adequate compensation under the constitution, the court emphasized that the question was one for legislative determination.⁷³

Chief Justice Nichols sharply dissented to the majority’s reversal of *White*, arguing that the court indeed did have the authority to interpret the constitution of Georgia and that condemnors should not be able “to coerce a homeowner into accepting less than the full value of his property based upon a threat, expressed or implied, that if he

68. *White*, 227 S.E.2d at 343.

69. *Id.* at 343–44.

70. Dep’t of Transp. v. Doss, 233 S.E.2d 144, 145 (Ga. 1977).

71. Dep’t of Transp. v. Flint River Cotton Mills, 235 S.E.2d 31, 32–33 (Ga. 1977) (reasoning that “[n]one of the expenses of litigation, including attorney fees, was necessary in this case,” and “[b]ecause there was no need for the condemnee to have a jury trial in order to be adequately compensated for the taking in this case, the expenses of litigation, including attorney fees, are not a necessary part of ‘just and adequate’ compensation here”).

72. DeKalb County v. Trs., Decatur Lodge No. 1602, 251 S.E.2d 243, 244 (Ga. 1978).

73. *Id.* (“[T]he development of the law in this area by the court illustrates the difficulties encountered when appellate courts attempt to legislate.”).

refuses the sum tendered, he will be subjected to the protracted and costly litigation against the condemning authority's legions of lawyers and experts."⁷⁴ Despite Justice Nichols's prediction that "[t]he people of Georgia surely will demand restoration of their rights by way of a constitutional amendment,"⁷⁵ neither the court, the people, nor the legislature have yet to revise the constitution's guarantee of full and adequate compensation.

B. Condemnations in Georgia Generally

1. Eminent Domain Reform Following Kelo

In the wake of *Kelo*, Georgia Governor Sonny Perdue introduced his "Private Property Protection Act" and announced that "[g]overnment must always respect the property rights of its citizens."⁷⁶ The proposal included several provisions aimed at protecting the property owner, such as "increased notice requirements," "additional damages for property owners for relocation expenses and lost business revenues," and "awarding attorneys' fees to property owners who prevail on appeal."⁷⁷ The General Assembly held extensive hearings debating various aspects of Governor Perdue's proposal as well as other proposals,⁷⁸ and less than a year after *Kelo*, Governor Perdue signed Georgia's eminent domain reform into law.⁷⁹

Generally, the Act provided several important procedural safeguards for property owners by adding new requirements for the

74. *Id.* at 245 (Nichols, C.J., dissenting).

75. *Id.* Justice Undercofler wrote a separate dissent in which he asserted, "It is not right; it is not fair . . . [w]hen you are forced to surrender [land] for the public good, you must be offered its fair price. If you are forced to sue to obtain its fair price then you must also recover the reasonable costs, including attorney fees, of waging battle." *Id.* at 245 (Undercofler, J., dissenting).

76. *Purdue Enters Eminent Domain Fray*, ATLANTA BUS. CHRON., Feb. 8, 2006, available at <http://atlanta.bizjournals.com/atlanta/stories/2006/02/06/daily29.html>.

77. Press Release, Ga. Republican Party, Gov. Perdue Announces Legislation to Protect Private Property Rights (Feb. 8, 2006), available at http://www.georgia.gov/00/article/0,2086,78006749_83363896_83365243,00.html [hereinafter *Perdue Press Release*].

78. See Arogeti et al., *supra* note 19, at 166, for a detailed summary of legislative hearings concerning eminent domain reform.

79. *Id.*

condemnor while granting additional rights to the condemnee.⁸⁰ First, the Act added “[p]olicies and practices guiding [the] exercise of eminent domain,” which were enacted with the stated intention to “encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, [and] to assure consistent treatment for property owners.”⁸¹ The statute largely resembles the federal Uniform Relocation and Real Policy Acquisition Act of 1970⁸² and includes requirements that “[t]he condemning authority shall make every reasonable effort to acquire expeditiously real property by negotiation”⁸³ and that “[i]n no event shall the condemnor act in bad faith in order to compel an agreement on the price to be paid for the property.”⁸⁴ The Act also added a statutory provision allowing condemnees to recover “actual reasonable expenses” in moving.⁸⁵

As a direct reaction to the *Kelo* holding, the Act virtually eliminates the use of eminent domain for redevelopment by providing

80. *Id.* at 157–58. The Castle Coalition issued a report grading all fifty states and gave Georgia a “B+” for its eminent domain reform efforts. CASTLE COALITION, *supra* note 18, at 14. The report stated, “Georgia is another state in which 2006 will be remembered as a banner year for the protection of private property rights.” *Id.* However, the report’s narrow focus was whether states had made efforts to protect against *Kelo*-type public use and stated that the “basic question” of the study was “[h]ow hard is it now for the government to take a person’s home or business and give it to someone else for private gain?” *Id.* at 4. The report did not take into consideration states’ policies on recovery of attorneys’ fees. Some critics have argued that the Act will ultimately lead to a more extensive condemnation process resulting in increased costs for all parties. *E.g.*, Fred D. Bentley, Jr., *House Bill 1313 Overview*, EMINENT DOMAIN PROGRAM MATERIALS 7 (Institute of Continuing Legal Education in Georgia 2007) (stating that the bill will affect condemnations by causing “[e]xtensive delays for legal processes in condemnation proceedings and increased costs for all parties” and that “[m]ore condemnations will likely result”). The Georgia Municipal Association expressed concerns about Governor Sonny Perdue’s proposal for eminent domain reform, suggesting that certain provisions “would unduly burden state courts and overly complicate the redevelopment process by requiring a court hearing on the proposed use of eminent domain and by limiting its use to a property-by-property basis.” Editorial, *OUR OPINIONS: Property Owners Count; Perdue’s Eminent Domain Plan Rightly Increases Protection for Residents, Retains Crucial Local Powers*, ATLANTA J.-CONST., Feb. 10, 2006, at 14A. As part of H.B. 1313, a court must determine “whether the exercise of the power of eminent domain is for a public use and whether the condemning authority has the legal authority to exercise the power of eminent domain” in condemnations filed after February 9, 2006 before title can vest with the condemnor. GA. CODE ANN. § 22-1-11 (2009).

81. *Id.* § 22-1-9 (2009).

82. CHRISTIAN F. TORGRIMSON, EMINENT DOMAIN: STATE OF GEORGIA 13 (AMERICAN BAR ASSOCIATION 2006) (citing 42 U.S.C. § 4651–4655).

83. GA. CODE ANN. § 22-1-9(1) (1982 & Supp. 2010).

84. *Id.* § 22-1-9(7).

85. *Id.* § 22-1-13(1).

that an agency's condemnation power can only be exercised for "public use."⁸⁶ Public use is restricted to instances where the public will generally have the right to use the acquired property such as with roads or utilities.⁸⁷ Exercise of the eminent domain power is expressly forbidden for "the public benefit of economic development."⁸⁸ Additionally, the Act repealed Georgia Code section 36-42-8, allowing downtown development authorities to use the power of eminent domain.⁸⁹

2. Georgia's Condemnation Process

Condemnors⁹⁰ in Georgia begin the process of eminent domain through the Special Master method,⁹¹ the Declaration of Taking method,⁹² or the Assessor method.⁹³ Although the three methods follow different procedures, the basic process underlying each is similar.⁹⁴ In each method, the condemnor must provide the

86. *Id.* § 22-1-2 ("[N]either this state nor any political subdivision thereof nor any other condemning authority shall use eminent domain unless it is for public use. Public use is a matter of law to be determined by the court and the condemnor bears the burden of proof.").

87. *Id.* § 22-1-1(9)(A). Public use is defined to mean:

- (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; (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.

Id.

88. *Id.* § 22-1-1(9)(B).

89. TORGRIMSON, *supra* note 82, at 14.

90. GA. CODE. ANN. § 22-1-1(3) defines "condemnor" to include public utilities, the State of Georgia, counties and municipalities, and other political subdivisions. School boards and the Georgia Department of Transportation also have the power of eminent domain. GA. CODE. ANN. §§ 20-2-521, 32-3-1 (1982 & Supp. 2010).

91. TORGRIMSON, *supra* note 82, at 3 (citing GA. CODE. ANN. §§ 22-2-101 to -114).

92. *Id.* at 5 (citing GA. CODE. ANN. §§ 22-3-140, 32-3-4 to -7, -12, -14, -16, -36(b)). The declaration of taking method allows municipalities, counties, and the Department of Transportation to acquire property for roads and highways and provides for a "quick take" procedure whereby the title of the property is immediately transferred to the condemning authority. *See* Andrea Cantrell Jones, *Assessor Hearings*, in EMINENT DOMAIN SECTION SEMINAR PROGRAM MATERIALS 097032, 1 (Institute of Continuing Legal Education in Georgia, 2009) ("The most common condemnation procedure I see is the acquisition of property by a declaration of taking.").

93. TORGRIMSON, *supra* note 82, at 6 (citing GA. CODE. ANN. §§ 22-1-6, -7, 22-2-26, -40-42, -62, -65, -80-81).

94. *See* DANIEL F. HINKEL, GEORGIA EMINENT DOMAIN 6 (2000 ed.); Jones, *supra* note 92, at 1.

condemnee with a notice of the condemnation⁹⁵ that includes the facts showing the right to condemn, the persons whose interests will be affected, and the interests taken.⁹⁶

Under the Special Master method, a Special Master appointed by the judge has the authority to determine just compensation.⁹⁷ However, property owners may appoint their own assessors to make determinations in questions of value, and then the condemnors will appoint their own assessors as well.⁹⁸ At the hearing, the property owners may present witnesses who may testify concerning the property's value.⁹⁹ The panel then determines the amount of fair compensation.¹⁰⁰

Though rarely utilized,¹⁰¹ the Assessor method operates similarly to the Special Master method. In the Assessor method, the condemnor chooses an assessor,¹⁰² the condemnee may then choose an assessor,¹⁰³ and then these two assessors together choose a third assessor.¹⁰⁴ The three assessors then set the value of compensation based on evidence presented at a hearing.¹⁰⁵

The Declaration of Taking method, by contrast, differs significantly from the other two methods. Since a Declaration of Taking involves sewers, gas lines, water or wastewater systems, or public roads,¹⁰⁶ this procedure provides an expedited process in order to more quickly get the project underway. In addition to providing

95. GA. CODE ANN. § 22-2-20. The condemnor must provide notice to "the owner of the property or of any remainder, reversion, mortgage, lease, security deed, or other interest therein." *Id.*

96. *Id.* § 32-3-5.

97. *Zuber Lumber Co. v. City of Atlanta*, 227 S.E.2d 362, 367 (Ga. 1976) (holding that "[t]he primary duty of the Special Master is to ascertain the total amount in money that will be equivalent to 'just and adequate compensation' for the property and interests in property being taken by the condemnor").

98. GA. CODE ANN. § 22-2-108.1(A) (1982 & Supp. 2010).

99. GA. CODE ANN. § 24-9-65 (1995 & Supp. 2010).

100. GA. CODE ANN. § 22-2-108.1 (1982 & Supp. 2010).

101. TORGRIMSON, *supra* note 82, at 6 ("Although applicable to most public entities for most public purposes, the Assessor method of condemnation has universally fallen out of favor with condemnors and is rarely employed.").

102. GA. CODE ANN. § 22-2-26 (2009) (1982 & Supp. 2010).

103. *Id.*

104. *Id.* § 22-2-42.

105. *Id.* § 22-2-63.

106. *Id.* § 22-3-140.

notice, the condemnor must file a Declaration of Taking which includes an appraiser's estimate of just and adequate compensation.¹⁰⁷ The condemnee then has sixty days to surrender possession of the property to the condemnor.¹⁰⁸

In each method, the property owners have the right to challenge the amount of compensation. However, they must file an appeal in a timely manner or forfeit the right to appeal.¹⁰⁹ Following a Special Master or Assessor determination, the property owner has thirteen days and ten days, respectively, to file a written notice of appeal requesting a de novo jury trial.¹¹⁰ The Declaration of Taking method allows for a thirty-day period to file a notice of appeal following the declaration of taking requesting a jury trial.¹¹¹

C. Georgia Statutes Regarding Attorneys' Fees

1. Current Eminent Domain Fee-Shifting Statutes

Attorneys' fees in eminent domain litigation can be recovered in Georgia where allowed by statute.¹¹² Statutory allowance of attorneys' fees is limited to three distinct situations, all of which were enacted through the eminent domain legislation of 2006.¹¹³ The Act codified the recovery of attorneys' fees where (1) the government cannot acquire the property through condemnation,¹¹⁴ (2) the

107. GA. CODE ANN. § 32-3-6 (2009).

108. *Id.* § 32-3-12(b) (2009). In a condemnation procedure under any method, compensation must be paid before title is passed to the condemnor. *See* Dep't of Transp. v. Garrett, 267 S.E.2d 643, 645 (Ga. Ct. App. 1980) (affirming trial court's ruling of partial summary judgment in favor of plaintiff where condemning authority failed to follow several procedural requirements including failure to pay compensation).

109. Dep't of Transp. v. Palmer, 263 S.E.2d 514, 516 (Ga. Ct. App. 1979) ("The trial court does not have any discretionary right to extend the time for filing an appeal based on dissatisfaction with the compensation.").

110. GA. CODE ANN. §§ 22-2-112(a), 22-2-80 (1982 & Supp. 2010). Since a Special Master's award is mailed to the property owner, the code was revised in 2006 to allow for three additional days for the time of mailing. *See id.*

111. GA. CODE ANN. § 32-3-14 (2009).

112. *Bowers v. Fulton County*, 183 S.E.2d 347, 348 (Ga. 1971).

113. GA. CODE ANN. § 22-1-12 (1982 & Supp. 2010).

114. *Id.*

government abandons the condemnation proceeding,¹¹⁵ or (3) “any person, family, business, farm operation, or nonprofit organization” wins against a public entity in an inverse condemnation action.¹¹⁶

2. *The Repeal of the Former Eminent Domain Fee-Shifting Statute*

Additionally, the Act adopted the governor’s proposal¹¹⁷ to repeal Georgia’s former fee-shifting statute, section 22-2-84.1.¹¹⁸ The statute was originally enacted in 1998 in response to “a concern that private property owners were being ‘low balled’ by condemning parties, especially the Department of Transportation.”¹¹⁹ The legislature structured the statute with a punitive as well as compensatory element in an attempt to discourage frivolous litigation while also encouraging just compensation.¹²⁰ Specifically, the statute required a party, either a condemnee or condemnor, who appealed a Special Master’s award to the superior court to pay the other party’s “reasonable expenses” if it failed to obtain a judgment changing the original appeal by at least 20%.¹²¹ Since the ability to recover attorneys’ fees hinged on which party filed the appeal, the property

115. *Id.* Property owners can recover attorneys’ fees when “(1) The final judgment is that the condemning authority cannot acquire the real property by condemnation; or (2) The proceeding is abandoned by the condemning authority.” *Id.*

As of March 2011, no appellate decisions interpreting the statute’s application have been decided. The Georgia Court of Appeals did reference the statute in one case; however, the court found that the statute was inapplicable since it only applied to condemnations filed after February 9, 2006 and the condemnation act in question had been filed the year before. *Gramm v. City of Stockbridge*, 676 S.E.2d 818, 820 (Ga. Ct. App. 2009).

116. GA. CODE ANN. § 22-4-8 (1982 & Supp. 2010). The common law already supported this proposition. *See, e.g., Columbia County v. Doolittle*, 512 S.E.2d 236, 237 (Ga. 1999) (holding that the lower court correctly granted attorneys’ fees and costs in an inverse condemnation action where a jury found that a nuisance amounted to a taking).

117. *Perdue Press Release*, *supra* note 77.

118. 2006 Ga. Laws 39, § 6 (repealing GA. CODE ANN. § 22-2-84.1).

119. Glen R. Fagan, *Eminent Domain Condemnation Procedure Generally: Provide for Award of Reasonable Expenses in Condemnation Cases; Provide for Substantial Revision of Provisions Relating to Special Masters in Condemnation Cases; Provide for Special Master Panels; Provide for Powers, Duties, and Procedures; Change Provisions Relating to Notices and Advertisements Regarding Acquisition of Property for Transportation Purposes; Changes Provisions Relating to Interlocutory Hearings Regarding Adequate Compensation*, 15 GA. ST. U. L. REV. 115, 116–17 (1998) (providing a summary of H.B. 155 which made changes to eminent domain law including the addition of GA. CODE ANN. § 22-2-84.1).

120. *Id.* at 119.

121. GA. CODE ANN. § 22-2-84.1 (1982), *repealed by* 2006 Ga. Laws 39, § 6.

owner could only recover where the government filed the appeal and then failed to obtain a judgment of at least 20% over the Special Master's award.¹²² Thus, the property owner put herself at risk of having to pay the government's expenses if she appealed and did not obtain a high enough judgment, but would be forced to bear her own litigation costs even if she obtained a judgment greater than the required increase.¹²³

In 2005, landowners challenged the statute as unconstitutional, claiming that it infringed on their constitutional right to recover just and adequate compensation.¹²⁴ The landowners had been dissatisfied with the Special Master's award of \$6,500 and filed an appeal with the superior court.¹²⁵ There, the jury only awarded them \$6,900. Since this was less than the required 20% increase over the Special Master's award, the trial court entered a judgment requiring the landowners to pay \$3,500 of the government's reasonable attorneys' fees pursuant to Georgia Code section 22-2-84.1.¹²⁶ The supreme court upheld the statute reasoning that since the ability to appeal a Special Master's award is "a matter of legislative grace, and because a property owner does not have a constitutional right to a trial by jury on the question of just and adequate compensation," the statute was constitutional.¹²⁷ Additionally, the court pointed out that several other states had held that imposing the condemnor's costs on property owners did not violate their right to just compensation.¹²⁸

122. *Id.* If the condemnee appealed, he was required to obtain a judgment of at least 20% more, and if the condemnor appealed, he needed to obtain a reduced judgment of at least twenty percent, for the fee-shifting statute to apply. In the case that both parties appealed, neither would be held liable for the other side's costs no matter the final judgment. *Id.*

123. *Id.*

124. *Martin v. Henry County Water & Sewage Auth.*, 610 S.E.2d 509, 510 (Ga. 2005).

125. *Id.*

126. *Id.*

127. *Id.* at 511.

128. *Id.* at 511 nn.7, 9. The court cited to cases from Colorado, Minnesota, California, Oklahoma, and Montana. However, the court did not acknowledge that all of these states have enacted fee-shifting provisions since those cases were decided, and none of the five states include a punitive element requiring the landowner to pay the condemnor's fees. *See* COLO. REV. STAT. § 38-1-122(1.5) (2009); MINN. STAT. ANN. § 117.031 (West 2005); CAL. CIV. PROC. CODE § 1250.410 (2007); OKLA. STAT. tit. 27 § 11(3) (1997); MONT. CODE ANN. § 70-30-305 (2009). Delaware allows the trial court to require the landowner to pay the condemnor's fees, however this is at the judge's discretion. DEL. CODE ANN. tit. 10 § 6111(3) (1999).

Concerned that the statute had “a chilling effect on landowners’ willingness to appeal assessor’s valuation determinations,” Governor Perdue, in his proposed eminent domain legislation, urged Georgia Code section 22-2-84.1 be stricken.¹²⁹ Although this part of the Governor’s proposal was adopted and the statute was repealed, his proposal of adding a new fee-shifting statute that would enable landowners to recover their attorneys’ fees on appeal was not adopted as part of the final bill.¹³⁰

3. *Applicability of General Fee-Shifting Statutes*

As in other civil cases, parties in eminent domain proceedings can recover litigation costs when the other party has brought frivolous claims and defenses¹³¹ or “acted in bad faith, [is] stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense.”¹³²

II. APPROACHES TO ATTORNEYS’ FEES IN EMINENT DOMAIN PROCEEDINGS

Only a small minority of states allow for the recovery of attorneys’ fees in condemnation cases as a component of just compensation under the state constitution.¹³³ The general rule is that attorneys’ fees are not recoverable absent statutory authorization.¹³⁴ Legislators, both federally and in many state governments, have provided this authorization by enacting fee-shifting statutes requiring that a

In 2009 in *Clary v. City of Stockbridge*, the Georgia Court of Appeals held that the trial court erred in failing to award attorneys’ fees to the City where the landowners had appealed a Special Master’s award of \$609,000 and then only received a \$452,000 verdict at trial. *Clary v. City of Stockbridge*, 686 S.E.2d 288, 294–95 (Ga. Ct. App. 2009). Since the action began before the 2006 repeal of Georgia Code section 22-2-84.1, the statute applied. The court ruled that “under the plain language” of the statute the fees are mandatory, and therefore “the condemnees are responsible for the City’s reasonable expenses incurred during the appeal to the superior court.” *Id.* at 293.

129. Press Release, Ga. Republican Party, Gov. Perdue Announces Legislation to Protect Private Property Rights (Feb. 8, 2006).

130. HB 1313, 2006 Ga. Gen. Assem.

131. GA. CODE ANN. § 9-15-14 (2006).

132. GA. CODE ANN. § 13-6-11 (2010).

133. 27 AM. JUR. 2d *Eminent Domain* § 672 (2008).

134. *Id.*

property owner's litigation expenses be reimbursed in certain circumstances.

A. Federal Statutes Authorizing Recovery of Attorneys' Fees in Eminent Domain Proceedings

In limited circumstances, a property owner may recover litigation costs in federal eminent domain proceedings when allowed by statute.¹³⁵ The main provisions that entitle a property owner to all "reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings" are much like those in Georgia.¹³⁶ Litigation costs are recoverable where a federal government agency initiates a condemnation action and then abandons the proceeding,¹³⁷ a federal court rules that the agency cannot acquire the property through condemnation,¹³⁸ or a property owner successfully sues a federal agency in an inverse condemnation action.¹³⁹ Additionally, under the Equal Access to Justice Act,¹⁴⁰ an individual property owner with a net worth under two million dollars¹⁴¹ who is a "prevailing party" against a government agency¹⁴² is also entitled to recover costs including attorneys' fees¹⁴³ where the agency's position was not "substantially justified."¹⁴⁴

135. David S. Black, *Recovery of Litigation Fees and Expenses in Federal Condemnation Proceedings Under the Equal Access to Justice Act*, 72 APPRAISAL J. 92 (2004).

136. Compare 42 U.S.C. § 4654(a) (2006), with GA. CODE ANN. §§ 22-1-12, 22-4-8 (2009); see also discussion *supra* Part I.

137. 42 U.S.C. § 4654(a) (2006).

138. *Id.*

139. *Id.* § 4654(c).

140. Black, *supra* note 135 (citing 28 U.S.C. § 2412 (2006)).

141. 28 U.S.C. § 2412(d)(2)(B) (Supp. 2010). In addition to an individual property owner, "any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000" is also entitled to recovery. *Id.*

142. *Id.* § 2412(d)(2)(H). The statute defines "prevailing party" as one obtaining a final judgment at trial, "which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government." *Id.*

143. *Id.* § 2412(d)(1)(A).

144. *Id.* § 2412(d)(1)(B). In order to receive an award of fees and expenses, the party must submit a report within thirty days of the judgment showing that the criteria of the statute is met and alleging that the government's position was not "substantially justified." *Id.*

B. State Approaches to Recovery of Attorneys' Fees in Eminent Domain Litigation

Forty years ago, the vast majority of states had no legislation concerning attorneys' fees in condemnation cases.¹⁴⁵ Now, many states provide for recovery of attorneys' fees for abandonment, inverse condemnation, or where the government fails to acquire the property.¹⁴⁶ More importantly, a growing number of states have enacted statutes either requiring or allowing that landowners be reimbursed for their litigation costs if they prevail on valuation issues against the condemnor.¹⁴⁷ The various state approaches providing for reimbursement of the property owner's litigation expenses include: an interpretation by the judiciary requiring reimbursement as part of the state's constitutionally-required just compensation; mandatory statutes requiring an award of expenses where certain conditions are met; allowing judges to decide where reimbursement is appropriate based on statutorily defined guidelines; and a statute providing fees up to a certain dollar limit.

1. Constitutionally Mandated Attorneys' Fees

Florida has long been known for providing the most generous recovery scheme of all states.¹⁴⁸ Unlike Georgia, the Florida Supreme Court has ruled that recovery of attorneys' fees and litigation costs are part of the state constitution's requirement of just

145. Barry L. Friedman, *Attorneys' Fees in Condemnation Proceedings*, 20 HASTINGS L.J. 694, 715 (1969) (noting that at the time, "[o]nly four [American] jurisdictions allow[ed] a condemnee to receive compensation for his attorneys' fees in completed condemnation actions," and two-thirds of states did not require the government to pay the condemnor's litigation expenses when the condemnor abandoned the condemnation).

146. See *infra* notes 149–91 and accompanying text.

147. Bell & Parchomovsky, *supra* note 43, at 890 n.108 (listing eighteen states that had statutes in 2007 awarding full or partial reimbursement of attorneys' fees in condemnation litigation either based on the court's discretion or a requirement that the jury awards exceeds the government's initial offer by a specified percentage).

148. See Friedman, *supra* note 145, at 704–05 (describing Florida's provisions for attorneys' fees as "generous" and "the most liberal found in any state"); Ted Jackovics, *Eminent Domain Keeps Losing Ground*, TAMPA TRIB., July 18, 1999, at 1 ("[M]ost observers agree [that Florida laws] are the most favorable in the nation for landowners.").

compensation.¹⁴⁹ In interpreting Florida's constitutional guarantee of just compensation,¹⁵⁰ the Florida Supreme Court reasoned that a private property owner "forced into court by one to whom he owes no obligation" does not receive just compensation when he must "pay out of his own pocket the expenses of establishing the fair market value of the property, which expenses in some cases could conceivably exceed such value."¹⁵¹ The court recognized that the government's power and resources often exceed those of the property owners in condemnation cases and that requiring the government to pay the property owners' costs would level the playing field.¹⁵²

Early cases interpreting this constitutional mandate allowed condemnees to recover attorneys' fees even where they did not prevail at trial.¹⁵³ However, the Florida legislature amended the statutes relating to attorneys' fees in 1994 to require that legal fees be computed according to the difference between the state's original offer and the final award to the landowner.¹⁵⁴ Under the statute, "the court, in eminent domain proceedings, shall award attorney's fees based solely on the benefits achieved for the client."¹⁵⁵ The amount of the "benefits to the client" is based on the difference between the initial offer made by the condemning authority before the property owner hires an attorney and the final judgment or settlement.¹⁵⁶ The court then uses a schedule set forth in the statute to calculate the

149. *Dade County v. Brigham*, 47 So. 2d. 602, 605 (Fla. 1950); *see also Jacksonville Expressway Auth. v. Henry G. Du Pree Co.*, 108 So. 2d 289, 292 (Fla. 1958) ("A person who is put to expense through no desire or fault of his own can only be made whole when his reasonable expenses are included in compensation.").

150. FLA. CONST. art. X, § 6.

151. *Dade County*, 47 So. 2d. at 604–05.

152. *Id.* at 604.

153. *E.g.*, *Hodges v. Dep't of Transp.*, 323 So. 2d 275 (Fla. Dist. Ct. App. 1975) (holding that attorney's fees should be awarded where the question of business damages were close, even though the property owner did not prevail on the issue); *City of Miami Beach v. Liflans Corp.*, 259 So. 2d 515, 516 (Fla. Dist. Ct. App. 1972) (holding that condemnor was required to pay attorneys' fees even though the jury awarded no compensation).

154. *Jackovics*, *supra* note 148.

155. FLA. STAT. § 73.092(1) (2009).

156. The statute defines benefits as "the difference, exclusive of interest, between the final judgment of settlement and the last written offer made by the condemning authority before the defendant hires an attorney." *Id.* § 73.092(1)(a). Additionally, the court may consider nonmonetary benefits that the attorney obtains for the client where such benefits can be quantified to a reasonable degree of certainty. *Id.* § 73.092(1)(b).

amount of attorneys' fees.¹⁵⁷ In deciding whether attorneys' fees are reasonable, Florida courts look to what the property owner would likely pay if he were the one responsible for the fees rather than the government agency.¹⁵⁸ In cases where the property owners successfully defeat an order of taking, the court must use several factors to assess a reasonable award of attorneys' fees.¹⁵⁹ Florida also allows property owners to recover attorneys' fees during the acquisition process, and these are limited by the statute as well.¹⁶⁰

2. Conditional Recovery Based on Percentage of Increase

Several states condition recovery of attorneys' fees on the condemnee prevailing at trial. If the jury's final award of compensation is greater than the condemnor's initial offer and the statute's requirements are met, then courts must award costs.¹⁶¹ Some states, including Montana,¹⁶² Oregon,¹⁶³ and Michigan,¹⁶⁴ only

157. *Id.* § 73.092(1)(c). For example, for any benefit up to \$250,000, attorneys' fees that are up to 33% of that amount may be awarded. *Id.*

158. *Id.* § 73.092(3); § 73.091(4). A Florida court found in one condemnation case that \$225,000 in attorney's fees was reasonable where an experienced condemnation attorney had spent between 2,000 and 3,000 hours on the case, the jury's verdict was a 300% increase over the condemnor's original offer, other attorneys testified as to the reasonableness of the fee, and where the condemnor took no steps to try to settle prior to trial. *Dep't of Transp. v. Condo. Int'l*, 317 So. 2d 811, 814 (Fla. Dist. Ct. App. 1975).

159. *Id.* § 73.092(2). Some of the relevant factors that the court considers include "[t]he novelty, difficulty, and importance of the questions involved;" the attorney's skill; the amount of money involved; the attorney's time and labor compared the benefit achieved for the client; and the customary legal fees of a comparable service. *Id.*

160. FLORIDA DEPARTMENT OF TRANSPORTATION OFFICE OF RIGHT OF WAY, THE REAL ESTATE ACQUISITION PROCESS 6 (2007), available at <http://www.dot.state.fl.us/rightofway/documents/AcquisitionHandbookEnglish.pdf>. This booklet is given to property owners when DOT acquisition agents seek to buy their property. The booklet states, "The department will reimburse you for certain fees and costs you incur during the acquisition process, primarily for the services of an attorney and/ or appraiser. However, the law places certain limits on this reimbursement." *Id.*; see also OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY, OPPAGA PROGRESS REPORT 2 (Oct. 2001), available at <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/0146rpt.pdf> ("Florida is one of three states that pay landowner costs during negotiation.").

161. Bell & Parchomovsky, *supra* note 43, at 890 n.108. In 2007, Alaska, California, Florida, Iowa, Michigan, Montana, Oregon, South Dakota, Washington, and Wisconsin all had statutes awarding full or partial reimbursement of attorneys' fees in condemnation litigation based on the requirement the jury awards exceeds the government's initial offer by a specified percentage. *Id.*

162. MONT. CODE ANN. § 70-30-305 (2009).

163. OR. REV. STAT. § 35.346(7) (2007). The statute mandates that the trial court award costs when: (1) the trial court's award is greater than the condemnor's initial written settlement offer, or (2) the court

require that the condemnee recover an award greater than the offer. However, the Michigan statute, much like Florida's benefits-based rule, limits the award of attorneys' fees to one-third of the difference between the agency's offer and the final judgment.¹⁶⁵

Other states require that the final judgment be a certain percentage over the offer in order to recover. Alaska,¹⁶⁶ Washington,¹⁶⁷ and Iowa¹⁶⁸ all require that the final judgment be more than 10% greater than the condemnor's offer. South Dakota requires a greater increase and only awards costs when the final award is at least a 20% more.¹⁶⁹ Colorado has an even more stringent requirement, only mandating recovery of fees for judgments of a 30% or more increase over the condemnor's last written offer.¹⁷⁰ Of the states using this approach, Minnesota's 40% increase is the highest requirement.¹⁷¹ However, Minnesota employs a hybrid approach by giving the court discretion to make an award of attorneys' fees where the difference is at least 20%, but less than 40%.¹⁷²

3. *Judicial Discretion*

In another group of states, landowners who prevail at trial *may* recover costs based on the court's discretion. Similar to the mandatory provisions, condemnees must often meet certain

finds that the condemnor's written offer "did not constitute a good faith offer of an amount reasonably believed by condemnor to be just compensation." *Id.*

164. MICH. COMP. LAWS ANN. § 213.66(3) (1998).

165. *Id.*

166. ALASKA R. CIV. P. 72(k)(3). Alaska awards attorneys' fees where "the award of the court was at least ten percent (10%) larger than the amount deposited by the condemning authority or the allowance of the master from which an appeal was taken by the defendant." *Id.*

167. WASH. REV. CODE § 8.25.070(1)(b) (2008). The statute mandates that the court award reasonable attorney and expert fees when the final judgment is at least 10% greater than the agency's final settlement offer made thirty days before trial. *Id.*

168. IOWA CODE § 6B.33 (2008). The acquiring agency must pay all costs where the commissioners' award "exceeds one hundred ten percent of the final offer of the applicant prior to condemnation." Additionally, in appeals, the agency must pay all costs of the appeal unless the final judgment is either the same or less than the commissioner's award. *Id.*

169. S.D. CODIFIED LAWS § 21-35-23 (2004). Courts must award expenses where the final judgment is more than 20% greater than the condemnor's final offer. *Id.*

170. COLO. REV. STAT. § 38-1-122(1.5) (2007).

171. MINN. STAT. § 117.031 (2005).

172. *Id.*

requirements before the judge decides whether costs should be awarded. Louisiana has the most general statute, only requiring that the highest amount offered from the condemnor is less than the actual compensation awarded.¹⁷³ California awards attorneys' fees where the condemnee's final demand for compensation is deemed reasonable and the condemnor's compensation is deemed unreasonable.¹⁷⁴ Delaware requires that the final award is closer to the condemnee's valuation evidence at trial than the condemnor's offer, in order for the condemnee to request an award of litigation expenses.¹⁷⁵ This law cuts both ways and allows the condemnor to request costs where the final award is lower than the condemnor's offer.¹⁷⁶ Regardless, costs are not allowed to exceed the amount of just compensation awarded.¹⁷⁷

Whereas Oklahoma and Idaho both require that the award of just compensation exceed a set amount of 10% of the condemning authority's offer in order to invoke the discretion of the court,¹⁷⁸ New York requires that the award be "substantially in excess of the amount of the condemnor's proof" and be "deemed necessary by the court for the condemnee to achieve just and adequate compensation."¹⁷⁹ New York courts have held an award of 29% is "substantially in excess of the initial offer and thus qualif[ies] [the condemnee] for reimbursement of fees and costs."¹⁸⁰ However, an award of almost 23% has been deemed insubstantial.¹⁸¹ Generally, awards over 35% have been deemed to meet the requirement.¹⁸²

173. LA. REV. STAT. ANN. §§ 19:8, 19:109 (2004).

174. CAL. CIV. PROC. CODE § 1250.410 (2007).

175. DEL. CODE ANN. tit. 10, § 6111 (1999). The court may award fees at its discretion, taking into account whether the condemnee unnecessarily delayed the proceeding, whether the condemnor's position was substantially justified, or if there are "special circumstances [that] make an award of expenses unjust." *Id.*

176. *Id.*

177. *Id.*

178. IDAHO CODE ANN. § 7-711A (2004); OKLA. STAT. tit. 27, § 11(3) (1997).

179. N.Y. EM. DOM. PROC. LAW § 701 (1987).

180. William D. Siegel & Saul R. Fenchel, *Reimbursement of Fees, Costs in Eminent Domain Cases*, 237 N.Y. L. J. 20 (2007).

181. *Id.*

182. MICHAEL RIKON, *EMINENT DOMAIN: STATE OF NEW YORK*, AMERICAN BAR ASSOCIATION, at 16.

Kansas and Nebraska both make recovery of attorneys' fees contingent upon which party appeals the initial award. In Kansas, the judge has discretion to render a judgment of attorneys' fees whenever the condemnor files the appeal and then the jury renders a verdict for the landowner above the appraisers' award.¹⁸³ Nebraska has a more complex system, allowing the court discretion to award reasonable attorneys' fees to the condemnee where: the condemnee appeals and is awarded a judgment 15% greater than the appraisers' award; the condemnor appeals and the final judgment is not less than 85% of the appraisers' award; or, both parties appeal and the final judgment is greater than the appraisers' award.¹⁸⁴ Where only the condemnee appeals and does not receive a judgment equal to or greater than the appraisers' award, the court may award costs to the condemnor, not including expert or attorney fees.¹⁸⁵

4. *Fee Capping*

Pennsylvania takes a unique approach to the recovery of attorneys' fees in eminent domain litigation. Under its statute, a property owner in an eminent domain action generally receives reimbursement of reasonable expenses, including attorneys' fees; however, the amount is capped at \$4,000.¹⁸⁶

5. *Georgia Compared to Other Southeastern States*

Many of the southeastern states, like Georgia, have experienced above-average growth in recent years.¹⁸⁷ These states generally limit recovery of attorneys' fees to the same instances as Georgia and federal law: when the property owner is successful in an inverse condemnation action, the government agency fails to acquire the property, or the government agency abandons the condemnation after

183. KAN. STAT. ANN. § 26-509 (2000).

184. NEB. REV. STAT. § 76-720 (2009).

185. *Id.*

186. 26 PA. CONS. STAT. § 710 (2009).

187. GEORGIA IN PERSPECTIVE, *supra* note 25, at 9. Between 2000 and 2007, Florida, Tennessee, South Carolina, and North Carolina all had population growth rates which were above the national average. Alabama and Mississippi's growth rates, however, were below the national average. *Id.*

the action has commenced. This is the case in Alabama,¹⁸⁸ Mississippi,¹⁸⁹ North Carolina,¹⁹⁰ and Virginia.¹⁹¹

In addition to providing for the recovery of attorneys' fees in the above mentioned scenarios, South Carolina also follows the judicial discretion approach and statutorily provides that "[a] landowner who prevails in the trial of a condemnation action, in addition to his compensation for the property, may recover his reasonable litigation expenses," subject to the judge's discretion.¹⁹² This provision does not apply to settlements and defines "prevails" to mean the compensation awarded "is at least as close to the highest valuation of the property that is attested to at trial on behalf of the landowner as it is to the highest valuation of the property that is attested to at trial on behalf of the condemnor."¹⁹³

188. In *White v. State*, the Alabama Supreme Court ruled that attorneys' fees and expert witness fees were not part of "just compensation" in eminent domain actions. 319 So. 2d 247, 247 (Ala. 1975). Alabama Code section 18-1A-232 provides for litigation expenses where an action is dismissed by the plaintiff or the court determines that the condemning authority cannot acquire the property. This code section mandates the inclusion of a property owner's litigation expenses as part of a plaintiff's compensation in an inverse condemnation proceeding. ALA. CODE § 18-1A-232 (2009). Additionally, Alabama Code section 18-1A-95 provides that attorneys' fees in a direct condemnation act are recoverable where the condemning agency lacks the authority to condemn the property. ALA. CODE § 18-1A-95 (2009).

189. MISS. CODE ANN. § 43-37-9 (2009) provides for the recovery of litigation expenses including attorneys' fees in inverse condemnation actions. MISS. CODE ANN. § 11-27-37 (2009) provides attorneys' fees to property owners where "the plaintiff is not entitled to a judgment condemning the property" or if the plaintiff dismisses the suit. The Supreme Court of Mississippi held in *Maples v. Mississippi State Highway Commission* that litigation expenses are not recoverable by a defendant in an eminent domain proceeding as part of just compensation. 617 So. 2d 265, 271 (Miss. 1993).

190. In *Department of Transportation v. Winston Container Co.*, the Court of Appeals of North Carolina held that the landowner's litigation expenses and costs are not considered part of just compensation. 263 S.E.2d 830, 831 (N.C. Ct. App. 1980). By statute, judges have the discretion to award attorneys' fees if the condemnor abandons the action, if the court issues a final judgment denying the condemnation, or in an inverse condemnation action. N.C. GEN. STAT. § 40A-8 (2009).

191. A state agency must reimburse a property owner for reasonable costs, including reasonable attorneys' fees where the owner obtains a final judgment that the agency cannot acquire the property or the agency abandons the action. VA. CODE ANN. § 25.1-419 (2003). Attorneys' fees are also recoverable where a plaintiff receives just compensation in an inverse condemnation proceeding. VA. CODE ANN. § 8.01-187 (2001).

192. S.C. CODE ANN. § 28-2-510(B)(1) (2007). The court has the discretion to reduce the amount of the award, or even deny the award, upon a finding that the landowner "engaged in conduct which unduly and unreasonably protracted the final resolution of the action," the condemnor's position was "substantially justified," or that "special circumstances make an award unjust." *Id.*

193. *Id.* § 28-2-510(B)(2). The requirements of the statute are illustrated in *City of Folly Beach v. Atlantic House Properties, Ltd.* There, the landowner stipulated at trial that the value of its property was \$642,500, whereas the city stipulated that it was worth \$31,000. The compensation awarded by the jury

An outlier, Tennessee does not allow recovery of attorneys' fees in these situations and is especially harsh in requiring that if a party appeals the finding of a jury of inquest and the jury verdict at trial either affirms the ruling or makes a less favorable finding, then the appellant must pay court costs.¹⁹⁴

6. Evaluation of State Approaches

Although the Southern states may be slow in adopting fee-shifting provisions, the general trend in recent years has been a recognition by many states that fee-shifting statutes, whether mandatory or discretionary, are necessary in eminent domain litigation in order to make landowners whole. Florida's approach¹⁹⁵ of providing reimbursement of attorneys' fees as part of constitutionally guaranteed just compensation offers the strongest protection for landowners since this right can only be overturned by the Florida Supreme Court or an amendment to the Florida Constitution. However, because many states, including Georgia, follow the general rule that attorneys' fees are a matter of legislative grace rather than constitutional command, they would not adopt this aspect of Florida's approach. Nevertheless, Florida's benefits based statute could be incorporated by many states and would provide a bright-line rule for recovery while encouraging meritorious claims by only allowing the recovery of litigation expenses on the amount of the benefit that the attorney gains for the property owner.

The conditional mandatory provisions, which provide reimbursement when a landowner gains a specified increase on appeal, also provide a bright-line rule. However, these statutes are

was \$250,000. The court found that the landowner did not prevail because the difference (\$392,500) between the value that he offered at trial (\$642,500) and the compensation that was awarded to him (\$250,000) was greater than the difference (\$219,000) between the value that the City offered at trial (\$31,000) and the awarded compensation (\$250,000). *City of Folly Beach v. Atl. House Props., Ltd.*, 467 S.E.2d 928, 929 (S.C. 1996).

194. TENN. CODE ANN. § 29-16-119 (2002). "If the verdict of the jury, upon the trial, affirms the finding of the jury of inquest, or is more unfavorable to the appellant than the finding of such jury, the costs shall be adjudged against such appellant; otherwise the court may award costs as in chancery cases." *Id.*

195. See *supra* notes 148-60 and accompanying text.

based on arbitrary percentages and allow little flexibility. Alternately, the purely judicial discretion approach offers flexibility but fails to provide a bright-line rule, which is crucial to accomplishing a fee-shifting statute's dual purposes of providing a check on the government so that more fair offers are made from the outset and making property owners whole when they must litigate to receive fair compensation.¹⁹⁶ Finally, though mandatory, a statute that caps fees at a low amount, such as Pennsylvania's statute,¹⁹⁷ would not be substantially different from no provision at all, since the award would be so limited that none of the statute's goals would be accomplished.

III. A PROPOSAL FOR A FEE-SHIFTING STATUTE IN GEORGIA

Both the Georgia Supreme Court and the General Assembly have acknowledged the need for a statute authorizing the recovery of attorneys' fees in eminent domain actions in Georgia.¹⁹⁸ Of the various statutory approaches, Georgia should adopt a fee-shifting statute much like Florida's benefits based statute,¹⁹⁹ while also incorporating an element of judicial discretion.

A. Georgia's Current Statute

Since the repeal of Georgia's former fee-shifting statute, Georgia Code section 22-2-84.1, Georgia landowners no longer face the fear that they may have to pay the government's expenses on appeal. However, by repealing the entire statute and failing to enact an alternative, the legislature has put Georgia landowners largely in the same position that they were in prior to the enactment of the statute. Despite the significant reform in 2006 adding procedural protections for property owners, condemnees still need the procedural protection of a statute that will require a condemning authority to pay the

196. See discussion *infra* Part III.

197. 26 PA. CONS. STAT. § 710 (2009).

198. See discussion *supra* Part II.

199. FLA. STAT. § 73.092(1) (2009).

landowner's attorneys' fees in the event that the landowner is forced to litigate in order to recover just compensation.

B. Justifications for a Fee-Shifting Statute

Two primary justifications exist for enacting a fee-shifting statute reimbursing property owners for their litigation expenses in eminent domain litigation. First, because of the uniqueness of the eminent domain process, a statute requiring that the government must pay the landowner's attorneys' fees in the event that the landowner must go to court to receive just compensation encourages the government to make more fair offers from the outset. A fee-shifting statute provides a check on the government's negotiations in the acquisition process. Second, reimbursing a property owner who must litigate and incur expenses in order to receive just compensation is fundamentally fair because it makes the property owner whole.

1. Preserving Checks and Balances

Government appraisers have often been criticized for "low-ball" offers.²⁰⁰ News reports abound with stories of owners receiving an offer for significantly less than the value actually awarded when the case is litigated.²⁰¹ Although critics have argued that such cases represent extreme and gross exaggerations of the norm,²⁰² few studies

200. *E.g.*, Fagan *supra* note 119, at 116–17 (Georgia Code section 22-2-84.1 was originally enacted to combat perceived lowball offers by the Georgia DOT); Dustin Block, *The Price of Progress: Wisconsin Department of Transportation and Eminent Domain*, THE DAILY REP., Apr. 10, 2009 ("Lawyers argue that their ability to challenge WisDOT at all proves the agency lowballs property owners.").

201. *See, e.g.*, Block, *supra* note 200 (reporting case where the Wisconsin DOT offered a property owner \$300,000 for a piece of land, the property owner appealed, and then the DOT settled with the owner for \$1.6 million); Robin Fields, *Eminent Domain: It's the Brigham Family Way*, SUN-SENTINEL (Fort Lauderdale, Fla.), June 22, 1998, at 12A (reporting case where the state offered a condemnee \$25 million for almost 600 acres of beachfront property, the state refused a counteroffer of \$45 million, and then the condemnee won a settlement of \$84 million); Charlie Frago, *Eminent-Domain Proposal Falters: Measure Deals with Making State Pay Some Attorneys*, ARK. DEMOCRAT GAZETTE, Apr. 2, 2009 (reporting case of an attorney who paid \$400,000 for billboards that were condemned only three years later, was offered \$50,000 for them by the DOT, and eventually received \$150,000 after litigating his case).

202. *E.g.*, Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 105 (2006) ("Not only are Takers legally obligated to attempt to negotiate a voluntary purchase before resorting to a formal eminent domain proceeding, but they operate under legal and

have been conducted concerning whether a condemning agency's offer routinely falls below the fair market value.

A study of over 2,000 condemned parcels in New York in the 1960s known as the "Nassau Study"²⁰³ is often cited by scholars discussing just compensation.²⁰⁴ Nassau County, which at the time of the study included parts of Long Island, Queens, and Kings, New York, was one of the fastest growing areas in the country at the time of the study.²⁰⁵ After analyzing 110 acquisitions occurring in a four-year period,²⁰⁶ the study concluded that "gross underpayment can now be substantiated" in Nassau County.²⁰⁷ The study further expressed that "the practices and attitudes of Nassau County, as we have reported them, may indeed typify those of condemnors elsewhere."²⁰⁸

A more recent study examining 207 transactions of single-family homes during the construction of a California state highway between April and October of 1991 argues the opposite.²⁰⁹ This study

financial incentives that strongly encourage them to succeed. As a result, they may offer property owners more than market value for their property in order to avoid costly eminent domain proceedings.").

203. Curtis J. Berger & Patrick J. Rohan, *The Nassau County Study: An Empirical Look Into the Practices of Condemnation*, 67 COLUM. L. REV. 430 (1967).

204. See Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to "Fulfill Their Unique Role?" A Response to Professor Dyal-Chand*, 31 U. HAW. L. REV. 423, 444 n.87 (2009) (citing to a plethora of law review articles that have discussed the Nassau Study including the following: W. Harold Bigham, "Fair Market Value," "Just Compensation" and the Constitution: A Critical View, 24 VAND. L. REV. 63 (1970); Nathan Burdell, *Just Compensation and the Seller's Paradox*, 20 BYU J. PUB. L. 79, 82 (2005); Michael DeBow, *Unjust Compensation: The Continuing Need for Reform*, 46 S.C. L. REV. 579 (1995); James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277 (1985); Frank A. Aloï & Arthur Abba Goldberg, *A Reexamination of Value, Good Will, and Business Losses in Eminent Domain*, 53 CORNELL L. REV. 604, 647 (1968); Gideon Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME L. REV. 765, 770-87 (1973); Frank S. Sengstock & John W. McAuliffe, *What Is the Price of Eminent Domain? An Introduction to the Problems of Valuation in Eminent Domain Proceedings*, 44 U. DET. MERCY L. REV. 185, 191 (1966); Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283 (1991); Michael Risinger, *Direct Damages: The Lost Key to Constitutional Just Compensation When Business Premises are Condemned*, 15 SETON HALL L. REV. 483 (1985)).

205. Berger & Rohan, *supra* note 203, at 432.

206. *Id.* at 434.

207. *Id.* at 457.

208. *Id.* at 458.

209. Krisandra Guidry & A. Quang Do, *Eminent Domain and Just Compensation for Single-Family Homes*, 66 APPRAISAL J. 231 (1998).

concluded that the owners were not undercompensated but instead had received a premium of 4.7% for their properties.²¹⁰ Only five pages long, the study offered no explanation for the types of takings involved. The study seemed to analyze only instances where the entire property was taken and then compared the negotiated prices to the fair market values which were determined by examining the homes' various features such as number of bathrooms, view, square footage, age, and number of garages.²¹¹ If this is the case, the study fails to consider cases of easements or partial takings. In both of these scenarios, which are common when properties are taken for roads, the fair market value is more difficult to calculate because consequential damages must be taken into consideration.²¹²

Following the Court's decision in *Kelo*, Congress mandated that the Government Accountability Office (GAO) conduct "a nationwide study on the use of eminent domain by state and local governments."²¹³ Like much of the eminent domain reports following *Kelo*, the report mainly focused on the purposes for which eminent domain can be used.²¹⁴ However, the report also examined the acquisition process used by states.²¹⁵ In doing so, the GAO met with multiple property owners and property rights groups.²¹⁶ The GAO found that these groups believe that condemnors often make below-market offers and that property owners cannot afford to litigate to obtain additional compensation because the court costs are too high.²¹⁷

Data gained from Georgia Department of Transportation (DOT) records indicates that these property rights groups' arguments may have merit and that Georgia property owners may not receive just

210. *Id.*

211. *See id.* at 233.

212. *See supra* notes 1–12 and accompanying text for an example of consequential damages in a road project condemnation.

213. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-28, EMINENT DOMAIN: INFORMATION ABOUT ITS USES AND EFFECT ON PROPERTY OWNERS AND COMMUNITIES IS LIMITED (2006), available at <http://www.gao.gov/new.items/d0728.pdf>.

214. *Id.*

215. *Id.*

216. *Id.* at 30.

217. *Id.* at 35–36.

compensation for DOT takings.²¹⁸ The concern that the DOT was making lowball offers to Georgia property owners prompted the General Assembly in 1998 to enact a fee-shifting statute.²¹⁹ Because this practice likely continues, this concern should again prompt the legislature to act. Many condemnations by the DOT are carried out through the Declaration of Taking method, meaning that the appraiser pays in the amount of just compensation to the court and then the condemnee has the opportunity to appeal.²²⁰ Of those condemnees that appeal their awards, many reach a legal settlement and never actually go to a jury trial.²²¹ In the case of legal settlements, as well as with jury trials, the final amount usually far exceeds the pay-in amount.²²² If the final settlement amount or jury award represents the actual fair market value, then the pay-in amounts often fall well below fair market value. This could indicate that the DOT is not offering adequate compensation, and the owner must fight the appraiser's determination in order to receive just compensation.

However, a comparison of the number of acquisitions by deed to condemnations via eminent domain shows that most people are able to negotiate a suitable price with the DOT and condemnation is usually not necessary.²²³ This data could be construed as showing

218. See *GDOT Memorandum*, *supra* note 27. The author makes no claims that any conclusions drawn are the result of thorough statistical analysis. This Note reports raw numbers as supplied by the DOT and attempts to evaluate those numbers as evidence in trends in acquisitions in Georgia.

219. Fagan, *supra* note 119, at 116–17.

220. GA. CODE ANN. § 32-3-6(b) (2009).

221. *GDOT Memorandum*, *supra* note 27. Of the 169 condemnations in 2000, 60 resulted in legal settlements and only eight went to jury trials. *Id.* In 2005, 120 condemnations resulted in legal settlements with only 13 going to jury trials. *Id.*

222. *Id.* In 2000, the final award in eight jury trials ranged from 10% to 757% greater than the pay-in amount. Of thirteen jury trials in 2005, final judgments ranged from 32% to almost 10,000% increases over the pay-in amount. In 2006, awards ranged from 16% to almost a 5,000% increase. *Id.* Settlements also show disparities, sometimes very large, between the pay in amount and the final award. Of the forty-three listed settlements in 2000 that contained data for both pay-in amounts and final awards, twenty-two showed a 100% increase or greater in the pay-in amount. *Id.* An additional eight had increases between 50% and 99% increases. *Id.* In 2005, of the 108 settlements with available data, forty-nine resulted in final settlements over 100% greater than the pay-in amount and twenty-four settlements were in the 50% to 99% increase range. *Id.*

223. *Id.*

Breakdown of Georgia Acquisitions in Four Selected Years

Year	2000	2005	2006	2007
Acquisition by deed	1,715	2,307	3,226	2,948
Acquisition by Eminent Domain	169	201	409	372

that the DOT offers a fair price from the outset, thus alleviating the necessity of eminent domain. However, another possible explanation is that property owners accept these offers because they lack either the resources or the knowledge to challenge the government's offer.²²⁴ Confronted with the possibility of hundreds, and often thousands, of dollars in litigation expenses, property owners make the economical choice of accepting the government's offer.²²⁵ Quite often, the potential for recovery is outweighed by these possible costs.²²⁶ Since eminent domain attorneys in Georgia often work on a contingent fee basis, they are simply unable to take on cases unless there is a large enough potential recovery.²²⁷

A chief acquisition officer in Minnesota said the following to landowners whose property was being acquired for a state park project in that state:²²⁸

224. Kanner, *supra* note 44, at 1105 (2007) (arguing that property owners often accept offers despite their inadequacy because the property owners "lack the knowledge and funds necessary to ascertain true value and mount an effective legal defense" or "the economic stakes do not justify litigation because probable increases over and above the condemnor's initial offer may be close to or less than the unrecoverable cost of litigation").

225. Friedman, *supra* note 145, at 696. Friedman explains the landowner's inferior bargain power: [F]ollowing the announcement of the condemnor's intent to condemn and the initial offer to purchase, the condemnee will be prejudiced during any subsequent negotiations due to a fear of incurring substantial litigation expenses in the event that he and the condemnor are unable to reach a settlement. It is this fear that compels many landowners to settle out of court for less than just compensation: they wish to avoid what may be a *greater* loss occasioned by a jury award of the fair market value, from which is to be deducted the costs of the litigation.

Id.

226. In commenting on Arkansas' proposed legislation which would require the condemnor to pay attorneys' fees where a final award exceeds the state's offer by ten percent or more, Republican Andrea Lea expressed fear "that many people wouldn't know enough to find an attorney who worked on contingency and wouldn't have enough money to fight the state. 'How many people just throw in the towel?' she asked." Frago, *supra* note 201; *see also* Marie Price, *Lawmakers Rethink Attorney Fees for Eminent Domain Deals*, JOURNAL-RECORD (Okla.), Dec. 16, 1999 (quoting attorney Kim Ritchie as saying, in regard to the debate over an attorneys' fee statute in Oklahoma, "[Landowners] could cave in because they think they can't fight the state").

227. *See* Kanner, *supra* note 44, at 1105 ("The consensus among condemnation lawyers is that, unless the 'spread' between the condemnor's offer and the property's demonstrable value is on the order of \$75,000 to \$100,000, litigation is not economically feasible."); *see also* Dustin Block, *Attorney Rallies Opposition to Wisconsin Department of Transportation Rule*, DAILY REP., Mar. 23, 2009 (quoting a Wisconsin eminent domain attorney as saying that if Wisconsin sets a cap on attorneys' fees, which are currently recoverable under statute, "[c]ases where the state wants to take 10 to 20 acres from a farmer would not be economical to pursue").

228. *See* Althaus v. United States, 7 Cl. Ct. 688, 691-92 (1985).

Even though we know what your lands are worth, we are going to try and get them for 30 cents on every dollar that we feel they are worth. Of course, you don't have to accept this 30 cents on the dollar. . . . After a couple of years if you won't take 30 cents on the dollar, we are going to condemn it. We will condemn your property. You know what that is going to mean? That means that you are going to have to hire an expensive lawyer from the city and he is going to take one-third of what you get. Plus, you know who is going to have to pay the court costs. You are. That is in addition to these expensive lawyers.²²⁹

The officer's unvarnished remarks illustrate the government's awareness of its supreme bargaining power in a situation where legal redress is often an uneconomical choice for the condemnee. Although many acquisition agents are likely wise enough not to make such a blatant declaration of disregard for a property owner's rights, such a mindset potentially exists where the condemnor knows that a legal battle is simply not feasible for the landowner.²³⁰

Acquisition agents in Georgia are undoubtedly aware that property owners will not be able to afford to litigate in many cases. Although Georgia's statutes require that acquisition agents "make every reasonable effort to acquire expeditiously real property by negotiation"²³¹ and forbid agents from acting in "bad faith,"²³² without the threat of a challenge to their offers, an important check on excessive government power is missing. A fee-shifting statute would encourage more fair offers from the outset, while also encouraging the government to settle prior to trial.²³³ This is because

229. *Id.*

230. See Bell & Parchomovsky, *supra* note 43, at 887 (noting that "[p]rivate property rights activists allege that the undercompensation problem is further exacerbated by the government's superior bargaining position in its negotiations with owners").

231. GA. CODE ANN. § 22-1-9(1) (1982 & Supp. 2010).

232. *Id.* § 22-1-9(7).

233. Garnett, *supra* note 202, at 130 ("[F]ee-shifting statutes penalize the government for unreasonably refusing to settle prior to trial.").

the condemnor must take into account not only the possibility of his own legal expenses, but those of the condemnee as well.²³⁴

Critics of fee-shifting statutes may argue that a system like Florida's provides its citizens with this procedural safeguard, and yet eminent domain litigation persists in Florida. For example, in one case, an elderly couple's retirement was suddenly jeopardized when they received a check for a mere \$109,750 for the apartment building they purchased upon moving to Florida.²³⁵ After learning that a neighbor had received twice as much, the couple engaged in a three-year-legal-battle that produced a jury award of \$305,000 plus interest.²³⁶ In yet another case, a K-mart store received a \$3.2 million verdict at trial after challenging the state's offer of \$158,000.²³⁷ The trial court judge opined that the DOT had "prolong[ed], at the taxpayers' expense, as well as at the expense of judicial economy, what should have been a normal eminent domain case."²³⁸ These examples show that the procedural protections implemented by the state sometimes fail. Although Georgia added significant protections for property owners with its eminent domain legislation in 2006,²³⁹ the system does not always work perfectly in practice. Checks, therefore, should be instituted to make sure that procedures are followed. However, when the system fails and property owners must litigate in order to be made whole, they should be compensated for the expenses they incur.

2. *Fundamental Fairness*

In an eminent domain case decided at the end of the Great Depression, Justice Douglas announced, "The law of eminent domain

234. Florida's DOT manual requires that when evaluating a potential settlement, the anticipated costs of litigation including the landowner's attorneys' fees must be taken into consideration. See STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION RIGHT OF WAY MANUAL, ADMINISTRATIVE SETTLEMENTS 2-4 (2009), available at <http://www.dot.state.fl.us/rightofway/documents/ROWmanual/guide6.pdf>.

235. Jackovics, *supra* note 148.

236. *Id.*

237. *Id.*

238. *Id.*

239. See *supra* notes 76-89 and accompanying text.

is fashioned out of the conflict between the people's interest in public projects and the principle of indemnity to the landowner."²⁴⁰ As Georgia faces the growing pains of rapid expansion in a time of severely constrained budgets and an economic downturn, Justice Douglas's characterization of this inherent tension in eminent domain law rings true now more than ever. Georgia undoubtedly has a need to create the public infrastructure to support its growing population while also protecting a private property owner's right to just compensation.²⁴¹

Many courts have recognized that indemnity requires property owners to be made whole and those who must litigate to receive just compensation for their property are not made whole.²⁴² Inevitably, any recovery that the landowner receives is reduced by the amount that she must spend to obtain that recovery, effectually penalizing the landowner the amount of her litigation expenses.²⁴³ Once the property owner deducts the costs of mounting her legal defense, she is left with an amount below just compensation. Fundamental fairness therefore requires that society as a whole should bear the burden of litigation costs rather than the individual.²⁴⁴

A common concern is that such fee-shifting provisions in the eminent domain context will lead to increased costs of land

240. *United States ex rel. Tenn. Valley Auth. v. Powelson*, 319 U.S. 266, 280 (1943).

241. *See discussion supra* Introduction.

242. *E.g.*, *Lehigh Clay Prods., Ltd. v. Iowa Dep't of Transp.*, 545 N.W.2d 526, 529 (Iowa 1996) (explaining that the purpose Iowa's fee-shifting statute is "to more nearly make whole those property owners whose lands are taken by eminent domain and who must litigate in the courts in order to obtain a proper determination of their just compensation;" otherwise, if property owners are "required to pay their own attorney fees, much of the benefit that might be gained by a successful appeal would be offset by the resulting legal costs"); *Meyers v. State*, 634 N.Y.S.2d. 642, 645 (Ct. Cl. 1995) ("The purpose of [New York's fee-shifting statute] is neither to chill nor encourage attorney advocacy," but it is intended "to permit an additional, discretionary allowance to ameliorate expenses which might otherwise diminish an appropriation award to something less than just compensation."); *Dade County v. Brigham*, 47 So. 2d 602, 605 (Fla. 1950); *Friedman, supra* note 145, at 703 (citing *City & County of San Francisco v. Collins*, 33 P. 56, 57 (Cal. 1893) (requiring the defendants to pay trial costs for themselves or the condemnor "would reduce the just compensation awarded by the jury, by a sum equal to that paid by them for such costs").

243. *Friedman, supra* note 145, at 697.

244. In commenting on Illinois's proposed statute in 2006 for reimbursement of attorney fees, John Bradley, a sponsor of the bill, put it well when saying, "It's a philosophical decision we have to make . . . [w]here does the pendulum land? In my view, it lands with the private property owner." Philip Ewing, *House OKs Curbs on Eminent Domain*, ST. LOUIS POST-DISPATCH, Apr. 20, 2006, at A1.

acquisition.²⁴⁵ In its annual report on rights of way and surveys, the Minnesota DOT commented, “We are beginning to see some of the effects of the eminent domain legislation passed by the Legislature in 2006. Payments for attorney fees and costs are beginning to rise.”²⁴⁶ Increases in land acquisition costs are inevitable if the statute works as intended. A fee-shifting statute theoretically forces acquisition agents to make fair offers from the outset, which in turn increases land acquisition costs. If offers are not increased to the fair market value, then the statute causes an increase in costs to the state when it must pay the condemnee’s expenses for litigating to receive his fair compensation. Either way, costs will rise when a fee-shifting statute is implemented. However, just like the payment of relocation expenses that Georgia added in 2006,²⁴⁷ which will obviously result in greater acquisition costs to the state, legislative grace provides for the reimbursement of these costs and is necessary to ensure that property owners are made whole.

C. Proposed Fee-Shifting Statute

Reimbursement of Owner’s Attorneys’ Fees in Eminent Domain Actions

- (1) In all eminent domain actions, the court shall award attorneys’ fees to the property owner based on the benefits achieved for the client.
 - (a) As used in this section, the term “benefits” means the difference, exclusive of interest, between the final judgment

245. *Id.* Opponents of the then proposed attorney fee reimbursement statute in Illinois said, “the new legal hurdle could slow or stop economic revitalization.” *Id.*; see also Price, *supra* note 226 (“Having to pay landowners’ attorney fees in some eminent domain cases for acquiring highway rights-of-way adds substantially to the costs of road projects.”); Bill Moss, *Lawyers Target Two Who Pushed Fee Cuts*, ST. PETERSBURG TIMES (Fla.), Oct. 9, 1992, at 1B (“‘The expensive process of acquiring the land—not the land itself—is what has driven the cost skyward, critics say’ regarding Florida’s ‘spiraling cost of right of way for highway projects.’”).

246. STATEWIDE ANNUAL REPORT: RIGHT OF WAY AND SURVEYS FISCAL YEAR 2009, MINNESOTA DEPARTMENT OF TRANSPORTATION 12 (2009), available at <http://www.olmweb.dot.state.mn.us/reports/Annualreports/AnnualReportFY2009.pdf>.

247. GA. CODE ANN. § 22-1-13 (1982 & Supp. 2010).

or settlement and the last written offer by the acquisition agent prior to condemning the property.

(b) The court may also consider nonmonetary benefits obtained for the client through the efforts of the attorney, to the extent such nonmonetary benefits are specifically identified by the court and can, within a reasonable degree of certainty, be quantified.

(c) Attorneys' fees based on benefits achieved shall be awarded in accordance with the following schedule:

1. Thirty-three percent of any benefit up to \$250,000; plus
2. Twenty-five percent of any portion of the benefit between \$250,000 and \$1 million; plus
3. Twenty percent of any portion of the benefit exceeding \$1 million.

(2) Attorneys' fees as defined under this section shall include all reasonable costs that are necessary to litigate the action.

(3) In determining whether the attorneys' fees to be paid by the petitioner under subsection (1) are reasonable under subsection (2), the court shall be guided by the fees the defendant would ordinarily be expected to pay for these services if the petitioner was not responsible for the payment of those fees.

(4) At least 30 days prior to a hearing to assess attorneys' fees under subsection (1), the condemnee's attorney shall submit to the condemning authority and to the court the complete time records and a detailed statement of services rendered by date, nature of the services performed, time spent performing such services, and costs incurred.

(5) The condemnee shall provide to the court a copy of any fee arrangement that may exist between the defendant and his or her attorney, and the court must reduce the amount of attorneys' fees to be paid by the defendant by the amount of any attorneys' fees awarded by the court.

(6) The trial court may at its discretion deny or reduce any recovery under section (1) if it finds that in light of the evidence admitted at trial and the compensation awarded that:

- (a) the condemnee unnecessarily delayed the proceeding;
- (b) the condemnee's position was substantially unjustified;
- or
- (c) special circumstances exist that make an award of expenses unjust.

This proposed statute represents a combination of Florida's²⁴⁸ and Delaware's²⁴⁹ eminent domain fee-shifting statutes with some alterations. Recovery of attorneys' fees for the landowner is mandatory as in Florida; however, much like Delaware's statute, the trial judge retains the discretion to limit the award of fees when she finds that the condemnee unnecessarily delayed the proceeding, his position was substantially unjustified, or special circumstances would make an award of fees unjust. This built-in element of discretion would further deter frivolous or unjustified litigation.

A mandatory provision with a discretionary element is superior to a pure discretionary provision because it provides a bright-line rule. If property owners, as well as condemnors, are unsure whether property owners will be able to recover under the statute, then part of the statute's purpose is defeated. The statute cannot provide a necessary check on government unless all parties are assured of the landowner's right to recovery. Without mandatory provisions the landowner will still be deterred from litigating meritorious claims. However, the amount that the government will have to pay must be enough to deter inadequate offers.

For the mandatory portion of the statute, Florida represents the best statute for Georgia to replicate for several reasons. Florida has one of the oldest fee-shifting provisions in the nation dating back nearly sixty years.²⁵⁰ Over this time span Florida has been able to evaluate the effects of this provision and fine tune its statutes. In 1994, the Florida Legislature enacted its current benefit-based statute in

248. FLA. STAT. § 73.092(1) (2009).

249. DEL. CODE ANN. tit. 10, § 6111(3) (2009).

250. Florida established that landowners are entitled to attorneys' fees in eminent domain actions in 1950. *Dade County v. Brigham*, 47 So. 2d 602, 605 (Fla. 1950).

reaction to escalating right of way costs.²⁵¹ Unlike other conditional statutes that require the final award be a set percentage of increase in order for the landowner to recover,²⁵² Florida adopted a statute that conditions the award of attorneys' fees on the dollar amount of increase that the attorney is able to obtain for his client.²⁵³ Whereas a strict percentage based statute arbitrarily sets a number that *seems* like it will be effective in deterring claims without substantial merit, Florida's statute bases recovery on the amount of increase the attorney gained for the client and then allows a portion of that benefit, which reflects a contingent fee schedule, to be recovered.²⁵⁴ Florida found that following the enactment of this statute, land acquisition costs associated with attorneys' fees decreased without stifling litigation altogether.²⁵⁵

This statute represents a compromise between making land acquisition cost prohibitive versus making litigation for landowners cost prohibitive. Unlike with statutes that only require the landowner to gain a judgment above the government's initial offer, litigation still might not be feasible in very low value cases.²⁵⁶ However, on the whole, the statute will provide most landowners with an important procedural safeguard, while also taking into account taxpayer concerns by not over-incentivizing litigation.

Contrary to the Florida statute, which allows for the recovery of attorneys' fees in the acquisition process,²⁵⁷ the proposed statute would limit the recovery of attorneys' fees to condemnations. The

251. OFF. OF PROGRAM POL'Y ANALYSIS AND GOV'T ACCOUNTABILITY, REPORT 99-02, JUSTIFICATION REVIEW RIGHT-OF-WAY ACQUISITION PROGRAM FLORIDA DEPARTMENT OF TRANSPORTATION 11 (1999), *available at* <http://www.oppaga.state.fl.us/MonitorDocs/Reports/pdf/9902rpt.pdf>.

252. *See supra* notes 160–71 and accompanying text.

253. FLA. STAT. § 73.092(1) (2009).

254. *Id.*

255. OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY, *supra* note 160, at 3.

256. *See Block, supra* note 227 for an example of this situation. Louis Prange, a Wisconsin dairy breeder, was offered \$14,000 by the Wisconsin DOT for land it needed to rebuild a highway. After three years of litigation, he won a \$28,000 verdict. Prange's legal fees exceeded the actual settlement amount, but the state was forced to pay Prange's attorneys' fees. Under a proposed law in Wisconsin to use a benefits-based approach, Prange's fees would be limited to one-third the benefit achieved, equal to \$4,700, making litigation cost-prohibitive for a landowner in a similar position to Prange. *Id.*

257. FLA. STAT. § 73.092 (2009).

justification for this difference is that prior to the condemnation, the government has not acted upon the property owner. During the negotiation phase, the property owner and condemning authority attempt to settle at a fair price, just as any two private parties attempting to reach a settlement would.

Once the government condemns the property, the property owner should have the right to seek legal advice in order to evaluate whether the government's offer is fair. When the attorney thinks that, based on the relevant law, the offer is too low, the attorney can then help her client build his case of valuation and defend the value of his property throughout the condemnation procedure. Because the statute only awards fees where the attorney achieves a benefit for her client, this will discourage frivolous litigation. When the state condemns through the Special Master or Assessor method and the offer is too low, the condemnee will need the assistance of an attorney from the point of the condemnation so that he can hire an appropriate appraiser to determine the value of his taking and then gather the necessary evidence and expert witnesses to establish his property's value at the hearing.²⁵⁸ Likewise, a property owner appealing his award from a Declaration of Taking, or appealing from a Special Master or Assessor hearing, to the Superior Court will need access to these important litigation tools. This statute reimburses the property owner for these litigation expenses, however, only where they are necessary to receive just and adequate compensation.

CONCLUSION

The Georgia General Assembly must constantly strive to implement the Georgia Constitution's guarantee that property owners receive just compensation when their property is taken for public use.²⁵⁹ In order for society to reap the benefit of being able to acquire private property for public projects, society must make the owner

258. See *supra* notes 95–103 and accompanying text for the procedure of the Special Master and Assessor condemnation methods.

259. GA. CONST. Art. I § III, para. I (2009).

whole. As the Georgia Supreme Court has acknowledged, making an owner whole includes reimbursing him for his costs when he must litigate to receive just compensation.²⁶⁰

The legislature correctly decided to repeal Georgia's former fee-shifting statute,²⁶¹ since it deterred litigation and resulted in harm to property owners when they were forced to pay the condemnor's expenses on appeal. However, the legislature left a void in Georgia law by failing to adopt a new fee-shifting statute. At least twenty other states have recognized the importance of this procedural protection for landowners and have thus implemented fee-shifting statutes.²⁶²

Such a statute is crucial to ensuring that property owners in Georgia receive just compensation in eminent domain actions. The legislature should enact the proposed fee-shifting statute that applies Florida's benefits based approach while incorporating an element of judicial discretion from Delaware's statute. This statute will serve to encourage condemnors to make more reasonable offers from the outset, make property owners who are forced to litigate to receive just compensation whole again, and also deter frivolous or unjustified litigation—all while taking into consideration taxpayers' concerns associated with the cost of land acquisition.

Although public outcry from *Kelo* has largely died down, Georgia's focus on eminent domain should not end. Legislators must continue to scrutinize the state's procedural protections in order to protect property owners. In times of dire need for public infrastructure coupled with constrained budgets, the General Assembly might be tempted to shy away from legislation that has the potential for increasing the state's acquisition costs. The legislature must undoubtedly balance what is fair to property owners with what is the least burdensome for taxpayers. A system requiring no payment of compensation would be the extreme of a scheme favoring taxpayers. However, this is not what the Georgia Constitution

260. *White v. Ga. Power Co.*, 227 S.E.2d 385, 388 (Ga. 1976), *rev'g Bowers v. Fulton County*, 183 S.E.2d 347 (Ga. 1971).

261. GA. CODE ANN. § 22-2-84.1 (2005) (repealed 2006).

262. *See supra* Part II.B and accompanying text.

requires. Property owners have a right to just compensation and this constitutional guarantee should not be compromised, no matter the state's economic climate.

The General Assembly should grant Georgia property owners this important legislative grace. If in the state's struggle to provide infrastructure for its ever-growing number of residents the government makes a landowner an inadequate offer for her property, she, like Florida resident Mr. Santoni,²⁶³ deserves to be reimbursed for the costs she must bear in mounting a legal battle to fight for her guaranteed just and adequate compensation.

263. See *supra* notes 1–12 and accompanying text.