

**IN THE SUPREME COURT  
STATE OF GEORGIA**

DILLARD LAND INVESTMENTS, LLC,

Petitioner for Certiorari,

v.

FULTON COUNTY, GEORGIA,

Respondent in Certiorari,

Georgia Court of Appeals  
No.: A13A0562

Supreme Court Case  
No.: S13C1582

**BRIEF OF AMICUS CURIAE OWNERS' COUNSEL OF AMERICA IN  
SUPPORT OF APPELLANT DILLARD LAND INVESTMENTS, LLC'S  
PETITION FOR WRIT OF CERTIORARI**

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COMES NOW Owners' Counsel of America, appearing as Amicus Curiae, and files this brief in support of Dillard Land Investments, LLC's (Dillard) Petition for Writ of Certiorari pursuant to Rule 23 of this Court.

**I. IDENTITY AND INTEREST OF AMICUS CURIAE**

Owners' Counsel of America (OCA) is a national, invitation-only network of the most experienced eminent domain and property rights attorneys who seek to advance, preserve and defend the rights of private property owners and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right" and the basis of a free society.

*See JAMES W. ELY, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998).*

OCA has no financial interest in this case. Rather, OCA, as lawyers well-versed in the specialized field of condemnation law, is motivated to file this brief out of its concern for the rights of property owners in the State of Georgia. The Court of Appeals' decision, if it is allowed to stand, will severely and adversely affect the rights and interests of property owners in Georgia who find themselves involved in condemnation proceedings. The Court of Appeals decision bestows upon condemning parties a heretofore unforeseen degree of power in condemnation proceedings. In so doing, the Court expands the authority of condemnors in a manner not contemplated by the Georgia legislature while simultaneously circumscribing the rights of property owners. It is in light of these concerns that OCA files this amicus brief.

OCA brings unique expertise to this task. OCA is a non-profit organization, organized under IRC § 501(c)(6) and sustained solely by its members. Only one member lawyer is admitted from each state. Since its founding, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and to make that opportunity available and effective to property owners nationwide. OCA member attorneys have been involved in landmark property law cases in nearly every jurisdiction nationwide. Additionally, OCA members have represented parties or appeared as amicus curiae in many takings cases before the Supreme Court of the United States. See, e.g., Kaiser Aetna v. United States, 444 U.S. 164 (1979); Agins v. City of Tiburon, 447 U.S. 255 (1980); First

English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990); Yee v. City of Escondido, 503 U.S. 519 (1992); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Dolan v. City of Tigard, 512 U.S. 374 (1994); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999); Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005); Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005); Kelo v. City of New London, 545 U.S. 469 (2005); Winter v. Natural Res. Def. Council, 555 U.S. 7 (2008); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection, 130 S. Ct. 2592 (2010); Arkansas Game & Fish Comm'n v. United States, 568 U.S. \_\_\_\_ (2012); and Koontz v. St. Johns River Water Management District, 570 U. S. \_\_\_\_ (2013).

OCA members have also authored various treatises, books, and law review articles in the area of takings law, including MICHAEL M. BERGER, TAKING SIDES ON TAKINGS ISSUES (Am. Bar Ass'n 2002 (chapter: *What's "Normal" About Planning Delay?*); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U.J.L. & POLICY 99 (2000); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 9 LOY. L.A.L. REV. 685

(1986); WILLIAM G. BLAKE, THE LAW OF EMINENT DOMAIN – A FIFTY STATE SURVEY (Am. Bar Ass'n 2012) (editor); LESLIE A. FIELDS, COLORADO EMINENT DOMAIN PRACTICE (2008); JOHN HAMILTON, KANSAS REAL ESTATE PRACTICE AND PROCEDURE HANDBOOK (2009) (chapter on *Eminent Domain Practice and Procedure*); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL OF RTS. J. 679 (2005); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a “Partnership of Planning?”*, 4 ALB. GOV'T L. REV. 154 (2011); Randall A. Smith, *Eminent Domain After Kelo and Katrina*, 53 LA. BAR J. 363 (2006); ROBERT H. THOMAS, EMINENT DOMAIN: A HANDBOOK ON CONDEMNATION LAW (Am. Bar Ass'n 2011) (chapters on *Prelitigation Process, Flooding and Erosion*); Robert H. Thomas, *et al.*, *Of Woodchucks and Prune Yards: A View of Judicial Takings From the Trenches*, 35 VT. L. REV. 437 (2010).

OCA's members believe that the issue at bar is of great importance to Georgia's property owners. For that reason, OCA respectfully submits its amicus brief in support of Appellant Dillard Land Investments, LLC's Petition for Writ of Certiorari.

## **II. SIGNIFICANCE OF CASE**

The Court of Appeals' opinion stands to severely and adversely affect the rights and interests of private property owners in Georgia. Accordingly, the issue before the Court is one of great concern, gravity, and importance to the public.

As the law currently stands under the Court of Appeals' opinion (a copy of which is attached hereto as "Exhibit A"), a condemnor may initiate condemnation proceedings under the special master method, await the special master's decision as to the value of the property and, if the condemnor is dissatisfied with the special master's valuation, dismiss the case and refile the condemnation at a later date. Fulton County v. Dillard Land Invs., LLC., No. A13A0562, (Ga. App. June 19, 2013); see also O.C.G.A. § 9-11-41. Strong policy considerations counsel against allowing a condemnor to unilaterally dismiss the case following entry of the special master's award.

First, providing condemnors with the power to dismiss proceedings after entry of the special master's award contravenes the general public policy in favor of finality of judgments or proceedings. Bates v. Bates, 317 Ga. App. 339, 339 (2012) (explaining that there is a "compelling public interest in the finality and certainty of judgments"); Gruben v. Gittelman, 269 Ga. 686, 687 (1998), overruled on other grounds by Scott v. Scott, 282 Ga. 36 (2007). As explained in Appellant's Petition as well as in the argument section here, special master awards are legally indistinguishable from assessors' awards, which are

considered conclusive. See Section IV(B) of Petition for Writ of Certiorari; Woodside v. City of Atlanta, 214 Ga. 75, 82 (1958); Thomas v. Cent. of Ga. Ry. Co., 169 Ga. 269, 271 (1929). Accordingly, special master awards should be given similar effect and likewise considered conclusive and binding as to the amount of just and adequate compensation owed the condemnee. The decision below, however, despite the similarities between the two awards, treats special master awards as fundamentally different from assessors' awards and therefore not binding or conclusive as to any issue. Dillard, No. A13A0562, (Ga. App. June 19, 2013). Because condemnors are free to disregard the award and dismiss the case without prejudice, condemnees can no longer be assured that their involvement in the condemnation will terminate at the end of the special master proceeding. Under the Court's rule, a condemnor can reinitiate the condemnation at a later date in hopes of obtaining a more favorable award. § 9-11-41. As a result, any condemnee forced to participate in a special master condemnation may be mired in uncertainty indefinitely.

By prolonging uncertainty regarding a condemnation, a condemnor adversely affects a property owner's interests. The Court of Appeals in *Gramm* recognized prolonged uncertainty in condemnation actions as one policy consideration counseling against allowing condemnors to set aside judgments. Gramm v. City of Stockbridge, 297 Ga. App. 165, 168 (2009). Although the factual situation at bar is somewhat different—the condemnor here, unlike in *Gramm*, had not paid the award or taken possession of the property when it

dismissed the action—the concerns are nevertheless the same. If the *Gramm* Court sided with the condemnor and allowed it to dismiss proceedings without prejudice after the condemnor paid and took possession of the property, condemnees could not be certain of the time at which their involvement in the litigation would terminate. Likewise, if condemnors are allowed to dismiss after entry of the special master's award and refile, a condemnee will have no way of knowing whether his involvement will terminate after entry of the award or whether the condemnor will reject the award, dismiss the case, and seek to acquire his property at a later date. Uncertainty as to whether property will be condemned inherently effects the property's marketability as well as the owner's ability to confidently invest in his property. Due to the uncertainty created by the Court's rule, property owners will not be able to freely sell or use the property in accordance with their wishes even after condemnation proceedings are dismissed. A system that allows the government to indefinitely interfere with private property rights is in clear contravention of good public policy. See *Gramm*, 297 Ga. App. at 168.

The Court's decision provides condemnors with an inequitable advantage over landowners. If the condemnor is dissatisfied with a special master's award, it can, having had the opportunity to see the condemnee's evidence, dismiss and make adjustments in the second proceeding. Dillard, No. A13A0562 (Ga. App. June 19, 2013) (allowing dismissal without prejudice). A dissatisfied condemnee, however, has no such opportunity. A dissatisfied condemnee's sole

remedy is to appeal the award to the superior court. § 22-1-12. In Cent. of Ga. Ry. Co. v. Thomas, an assessors' method case, this Court stated

Equity will certainly not tolerate that a condemnor . . . after having had the benefit of a trial before assessors, take the chance of getting a lower award in a second proceeding, by dismissing the first proceeding and refusing to enter an appeal, as the statute provides, in case he is not satisfied with the amount awarded. To allow the condemnor to do this, that is, dismiss his first proceeding after the award or judgment, would be giving him an inequitable advantage over the owner of the land—a clear and distinct advantage in many cases.

Cent. of Ga. R. Co. v. Thomas, 167 Ga. 110, 113 (1928).

Clearly, equity and public policy disfavor giving condemnors such an unfair advantage over condemnees. That the case below was decided under the special master method rather than the assessors' method does not change that fact.

Yet another policy consideration is that the Court's decision gives condemnors the power to assess, at the expense of the property owner, whether taking his or her property is financially viable—an improper use of the eminent domain power. McKemie v. City of Griffin, 272 Ga. 843, 844 (2000) ("A governmental entity should invoke its power of eminent domain only for the purpose of actually accomplishing a public goal, and not as a means merely of establishing the most cost effective means of doing so."). Under the Court's rule, a condemnor can take an owner's property and, if the property proves to be too expensive, it can dismiss the case. Dillard, No. A13A0562 (Ga. App. June 19, 2013). Although the condemnee may be compensated for expenses incurred in

defending the suit under O.C.G.A. § 22-1-12, he will undoubtedly have expended a substantial amount of time and effort for which he will not be compensated. § 22-1-12 (providing condemnees with the right to recover expenses in the event of abandonment by the condemnor). To allow condemnors to force landowners to expend time and effort defending the value of their land merely so the condemnor can determine whether taking the land makes financial sense not only sanctions improper use of the eminent domain power, Mckemie, 272 Ga. at 844, it is grossly unfair to Georgia's property owners.

As set forth in the foregoing, the Court of Appeals' decision stands to have serious adverse ramifications on the rights of private property owners in Georgia—ramifications which, in many instances, contravene good public policy. Consequently, this case is of great concern, gravity, and importance to the public of Georgia within the sense of Rule 40 of the Rules of the Supreme Court of Georgia. For this reason the Petition for Writ of Certiorari advanced by Appellant Dillard Land Investments, LLC. should be granted. Moreover, the decision of the Georgia Court of Appeals should be reversed on the grounds set forth below.

### **III. STATEMENT OF THE FACTS**

The Amicus Curiae adopts the statement of the facts as it appears in Section III of Appellant Dillard Land Investments, LLC.'s Petition for Writ of Certiorari.

### **IV. ARGUMENT AND CITATION OF AUTHORITY**

The Amicus Curiae adopts all arguments of the Appellant advanced in its Petition for Writ of Certiorari. The arguments offered herein are intended to supplement those contained in the Petition.

**A. Neither O.C.G.A. § 22-1-12 nor *Gramm v. City of Stockbridge* support the Court of Appeals' holding below.**

**a. O.C.G.A. § 22-1-12**

The Court of Appeals' opinion suggests that O.C.G.A. § 22-1-12, in concert with *Gramm v. City of Stockbridge*, authorizes condemnors using the special master method to dismiss proceedings at any time prior to payment of the master's award. Dillard, No. A13A0562 (Ga. App. June 19, 2013). § 22-1-12, however, says no such thing.

Condemnors have no rights except those expressly granted by statute. State Hwy. Dep't v. Pierce, 46 Ga. App. 52, 52 (1932); Johnson v. Fulton Cnty., 103 Ga. App. 873, 876 (1961) (holding that the condemnor could not divest itself of title to property upon appeal because there was no statutory provision authorizing such action). O.C.G.A. § 22-1-12 does not provide condemnors with the authority to abandon proceedings at any point prior to payment of the

special master's award. Although the statute clearly contemplates abandonment in some instances, it is "silent as to when and under what circumstances an abandonment may be authorized." § 22-1-12; Gramm, 297 Ga. App. at 167. Because the statute does not purport to set forth situations in which abandonment is proper, the Court of Appeals erred to the extent it interpreted § 22-1-12 to broaden condemnors' rights to abandon.

The more appropriate interpretation of § 22-1-12 is not that it granted condemnors previously nonexistent rights to abandon but that it merely provided condemnees with an express statutory remedy to recover litigation expenses when a condemnor lawfully abandoned a condemnation under existing precedent. Prior to the passage of § 22-1-12, condemnees in certain situations did not have the express right to recover expenses incurred in defending against a condemnation when the condemnor decided to abandon proceedings. See Gatefield Corp. v. Gwinnett Cnty., 234 Ga. App. 621, 622–23 (1998); Mckemie, 272 Ga. at 844. To avoid unfair results, courts relied on their equitable powers or on more generalized fee recovery statutes to ensure that condemnees would not be left without a remedy to recover expenses upon abandonment of a condemnation. Gatefield Corp., 234 Ga. App. at 622–23 (ordering that the judgment permitting abandonment of condemnation would be reversed unless the condemnor reimbursed the condemnee for its expenses); Mckemie, 272 Ga. at 844 (holding that condemnee was entitled to recover expenses under statute authorizing recovery in actions initiated "without

substantial justification."). In 2006, the Georgia legislature enacted the Private Property Protection Act, of which § 22-1-12 was a part, to bestow certain rights upon property owners and increase due process by implementing procedural safeguards in condemnation procedures. Gramm, 297 Ga. App. at 167; Arogeti, Jody, et al., "EMINENT DOMAIN General Provisions and Condemnation Procedure: Provide a Comprehensive Revision of Provisions Regarding the Power of Eminent Domain," 23 Ga. St. L. Rev. 189–91 (2006). Given the absence of an express remedy to recover litigation expenses at the time and the intent of the legislature to provide additional procedural protections to condemnees, it follows that the legislature was merely attempting to provide condemnees the express *right* to recover expenses in the event the condemnor lawfully abandoned the condemnation. The statute in no way indicates that it broadens the rights of condemnors to abandon beyond the limits existing at the time. If, as the Court of Appeals suggests by disregarding pre-§ 22-1-12 authority, the statute occasioned an expansion of condemnors rights to abandon, property owners would be greatly disadvantaged. Dillard, No. A13A0562 (Ga. App. June 19, 2013) (stating that authority preceding § 22-1-12 was inapplicable to the case at hand). The legislature could not have intended this result in passing an act designed to protect private property owners.

Because § 22-1-12 makes no mention of the situations under which abandonment may be proper, and the Court's interpretation contravenes the legislature's intent in passing the statute, the Court erred to the extent it relied on

§ 22-1-12 in holding that condemnors may lawfully abandon proceedings at any point before payment.

**b. *Gramm v. City of Stockbridge***

The Court of Appeals cites *Gramm v. City of Stockbridge* for the proposition that condemnors are entitled to abandon proceedings provided they do so before payment of the award. Dillard, No. A13A0562 (Ga. App. June 19, 2013). *Gramm*, however, merely holds that when the condemnor *has* paid the award and taken possession of the property, it cannot *then* abandon proceedings. Gramm, 297 Ga. App. at 166. *Gramm* does not purport to set forth the definitive rule regarding abandonment of proceedings. It does not hold that in all situations other than the one at issue, a condemnor is entitled to abandon. In fact, as noted above, *Gramm* concedes that the circumstances under which a condemnor may or may not abandon are unclear under the law. Id. at 167. The Court of Appeals erroneously broadens the *Gramm* holding to cover the factual situation at bar despite no indication that it is intended to apply.

Neither § 22-1-12 nor *Gramm* support the Court of Appeals' holding that a condemnor is entitled to abandon proceedings at any point before payment of the special master's award. The trial court was therefore authorized to find that condemnors could not dismiss after entry of the award, and the Court of Appeals erred in reversing the trial court's decision. Accordingly, Appellant Dillard Land Investments, LLC's Petition for Writ of Certiorari should be granted and the Court of Appeals' decision reversed.

**B. O.C.G.A. § 22-2-107(g) does not authorize the Court's holding that condemnors are entitled to dismiss proceedings before payment of the award.**

The Court relies principally upon *Gramm* in holding that a condemnor using the special master method can dismiss provided he has not yet paid the amount of the award into court. No. A13A0562 (Ga. App. June 19, 2013). The *Gramm* Court held that a condemnor cannot dismiss after title has vested therein. Gramm, 297 Ga. App. at 166. In reaching its conclusion, the *Gramm* Court relied substantially on O.C.G.A. § 22-2-107(g), which reads in pertinent part

Insofar as concerns the right of the condemning body to take or damage the property or any interest therein, upon the payment of the amount awarded by the special master into the registry of the court, the award of the special master and the judgment of the court condemning the property or interest to the use of the condemning body shall be conclusive.

§ 22-2-107(g).

The *Gramm* Court reasoned that, upon payment of the award into court, the condemnor's title became conclusive and that because the title was conclusive the condemnor no longer had the right to unilaterally dismiss the proceeding.

Gramm, 297 Ga. App. at 166. As mentioned above, the Court of Appeals broadened the *Gramm* holding to mean that condemnors may dismiss at any time before payment of the award and vesting of title. Dillard, 774 S.E.2d at 880–81. Although the *Gramm* holding may be supported by § 22-2-107(g), § 22-2-107(g) does not, as the Court of Appeals suggested below, authorize

condemnors to abandon proceedings at any point before title vests in the condemnor.

A plain reading of § 22-2-107(g) indicates that it purports only to designate the time at which the condemning body may lawfully take or damage property and the amount of property the condemnor may take. § 22-2-107(g); Johnson v. Fulton Cnty., 103 Ga. App. 873, 877–78 (1961) (stating that § 36-613a, a predecessor to § 22-2-107(g) with similar language, establishes the time at which a taking occurs as well as the amount of property the condemnor is entitled to take). The statute clearly states that "insofar as concerns the rights of the condemning body *to take or damage the property*," the award or judgment shall be conclusive upon payment by the condemnor. § 22-2-107(g) (emphasis added). Georgia's constitution provides that property may only be taken if just and adequate compensation is first paid. Ga. Const. art. I. § 3. The statute echoes this requirement. A condemnor has no right to take or damage private property until he has paid for it. Id.; § 22-2-107(g).

The statute, in providing that condemnors may take property only upon payment, does not purport to affect any other rights of the parties that may have arisen as a result of the condemnation proceeding. See §22-2-107(g). The statute does not suggest or imply that just because a condemnor may not take property until he has paid for it that he may somehow avoid liability on the special master award by dismissing proceedings. To the extent the Court relied

on § 22-2-107 in holding that condemnors may abandon proceedings at any time before payment of the award, the Court's holding was in error.

**C. The Court of Appeals erred in disregarding the cases decided under the assessor method as inapplicable.**

**a. Special master awards are virtually indistinguishable from assessor awards; therefore, assessor cases should be applied to the case before the Court**

Under the assessor method of condemnation, it is indisputable that a condemnor may not dismiss proceedings following entry of the assessor's award. Hodges v. S. Ga. Natural Gas Co., 111 Ga. App. 180 (1965); Woodside, 214 Ga. at 1958; Georgia Power Co. v. Fountain, 207 Ga. 361, 367 (1950). The Court of Appeals, however, found these cases inapplicable to the case at bar, which was decided under the special master method. Dillard, No. A13A0562 (Ga. App. June 19, 2013). In distinguishing between assessor cases and special master cases, the Court focused on the time at which judgments become conclusive under each method. Id. at 880-881. Under the assessor method, the courts have held that awards are self-executing and are therefore binding and conclusive upon entry of the award. E.g., Housing Auth. of City of Atlanta v. Mercer, 123 Ga. App. 38, 38 (1970); Hodges, 111 Ga. App. at 180. In contrast, the Court held, citing *Gramm* and § 22-2-107(g), special master awards do not become conclusive until the condemnor pays the amount of the award or judgment into the court. Dillard, No. A13A0562 (Ga. App. June 19, 2013). According to the Court of Appeals, when the condemnor pays the amount of the

special master's award, title to the property vests in the condemnor, and it is at that point the action is "conclusive" and the condemnor is no longer entitled to dismiss proceedings. Id. Therefore, the Court suggests, title vesting in the condemnor—which occurs automatically upon payment of the award—is a condition precedent to a special master award becoming conclusive. Id. A condemnor is free to voluntarily dismiss the case before this point.

The Court of Appeals reaches this conclusion despite the fact that a statute similar to § 22-2-107(g) exists in the assessor portion of Title 22 that has never been held to permit post-award, pre-payment dismissals. O.C.G.A. § 22-2-85, which applies to assessors, reads

Upon the payment by the condemnor of the amount of the award, or of the final judgment if there is an appeal, the condemnor shall become vested with such interest in the property taken as may be necessary to enable the condemnor to exercise his franchise or conduct his business.

§ 22-2-85.

As in special master proceedings, title does not vest until payment of the assessor's award. Ga. Dep't of Transp. v. Woodard, 254 Ga. 587, 588 (1985).

Under the Court of Appeals' reasoning, assessors actions should not be considered "conclusive" until that point because, as with special master proceedings, the condemnor has no rights in the property prior thereto. See § 22-2-107(g). The assessor cases have never held, however, despite the existence of this statute, that just because title has yet to vest in the condemnor, the action is not conclusive and the condemnor is entitled to dismiss the action.

See, e.g., Mercer, 123 Ga. App. 38, 43–44 (1970) (holding that the condemnor could not dismiss after the appraiser made his award but recognizing that title would not vest in the condemnor until payment).

The courts in assessor cases have instead focused on the nature of the award by the assessors in determining that condemnees have no right to abandon proceedings following entry of the award. The courts have consistently held that an award of assessors constitutes a judgment competent to fix the rights of the parties. E.g., Hodges v. S. Ga. Natural Gas Co., 111 Ga. App. at 180. Woodside, 214 Ga. at 82. Because such an award is the equivalent of a judgment, the reasoning goes, a condemnor is not free to dismiss the proceeding after entry thereof. Id.

A special master award, like an assessor award, is similar to a judgment in that both are rendered by tribunals, Hodges, 111 Ga. App. at 180; Martin v. Henry Cnty. Water and Sewerage Auth., 279 Ga. 197, 199 (2005) (referring to special masters as "tribunals"); both are judicial in nature, Johnson, 103 Ga. App. at 877 (stating that special masters' decisions are "judicial or at least-quasi judicial"), and both may fix the rights of parties as to compensation. See § 22-2-83 (requiring the court to issue execution on assessor's award if the condemnor fails to pay award within ten days); § 22-2-113 (requiring court to issue execution on Special master's award if condemnor fails to pay within ten days). The only discernible difference between the two types of awards is that the statutes require entry of judgment on a special master's award after it is

entered while an assessor's award need only be filed with the Clerk. § 22-2-110; Woodside, 214 Ga. at 82 (assessors awards have force and effect of judgment upon filing with the clerk). This difference can be attributed to the fact that special masters, unlike assessors, are entitled to rule on legal issues. See Sims v. City of Toccoa, 256 Ga. 368, 369–70 (explaining that because special masters are authorized to make non-value determinations, the legislature realized that it was necessary to have judicial supervision and ascertainment over all question and proceedings connected to the matter); Shoemaker v. Dep't of Transp., 240 Ga. 573 (1978); Zuber Lumber Co. v. City of Atlanta, 237 Ga. 358 (1976). Due process requires that before the award can become effective the parties must have the opportunity to file exceptions to non-value issues with the superior court. Sims, 256 Ga. at 370. That the special master portion of Title 22 provides for a delay in entry of judgment on the award to protect parties' constitutional rights does not mean, as the Court of Appeals suggests, that a special master's findings are without legal effect. If no exceptions are filed, the court is required to make the master's findings the judgment of the court. § 22-1-111; Ward v. Housing Auth. of Atlanta, 157 Ga. App. 825, 826 (1981). Furthermore, as with assessor awards, if the condemnor fails to pay the amount of the award within ten days, the court is required to issue execution upon the award. § 22-2-113(d). Special master awards, like assessor awards, have independent legal significance.

Because special master awards so closely resemble assessor awards and have similar legal effect, the Court of Appeals erred in finding the assessor cases inapplicable.

**b. Policy and equitable considerations counsel in favor of applying the assessor cases to the special master method.**

If the assessor cases are not applied to the case at bar, and the Court of Appeals' ruling is allowed to stand, condemnors using the special master method will be provided an unfair advantage over condemnees in condemnation proceedings. If the Court's rule is upheld, a condemnor will be able to try the case to completion before the special master, assess the special master's award, and, if dissatisfied with the result, dismiss the case and refile it. The rule effectively allows condemnors to have two shots at trying their case—if the condemnor disagrees with the initial special master's award he can, with full knowledge of the case the condemnee intends to present, dismiss and refile in hopes of getting a more favorable award in the second action.

This Court has previously stated, in an assessor case, that equity will not tolerate a system that allows a condemnor, "having had the benefit of a trial before assesssors," to dismiss proceedings and refile with the hopes of getting a lower award in the second action. Cent. of Ga. Ry. Co. v. Thomas, 167 Ga. 110, 113 (1928). Such a system would give condemnors a "clear and undeniable" inequitable advantage over landowners in many cases. Id. The Court of Appeals' ruling creates the exact same situation that was rejected in Thomas, the only

difference being that the case before the Court below was decided under the special master method rather than the assessor method. There is simply no logical reason for tolerating an inequitable result under one method but not under another. Accordingly, the cases decided under the assessor method, which prevent this inequitable result, should apply to the case before this Court to do the same.

## **V. CONCLUSION**

The Court of Appeals' ruling below stands to severely and adversely affect the rights of landowners in the State of Georgia who find themselves subject to condemnation proceedings. Therefore, the issue is of great importance to the public. The Amicus Curiae respectfully requests that this Court grant Appellant Dillard Land Investments, LLC's Petition for Writ of Certiorari and reverse the decision of the Court of Appeals for the reasons set forth in the Petition and in the brief above.

Respectfully submitted this 3rd day of September, 2013.

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No.: S13C1582

**CERTIFICATE OF SERVICE**

COMES NOW OWNERS' COUNSEL OF AMERICA, appearing as amicus curiae in the above-captioned action, and files this certificate of service to certify that I have this date served the following as counsel of record in the foregoing matter with a copy of the **BRIEF OF AMICUS CURIAE OWNERS' COUNSEL OF AMERICA IN SUPPORT OF APPELLANT DILLARD LAND INVESTMENTS, LLC'S PETITION FOR WRIT OF CERTIORARI** by email and by placing a copy of the same in the U.S. Mail with sufficient postage affixed thereon and properly addressed to:

Larry W. Ramsey Jr.  
Office of the County Attorney  
141 Pryor St., SW, Suite 4038  
Atlanta, GA 30303

This 3<sup>rd</sup> day of September, 2013.

s:\ Charles L. Ruffin  
CHARLES L. RUFFIN  
State Bar No. 619150  
Counsel for Owners' Counsel of America.

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# **EXHIBIT A**

EXHIBIT "A"  
**FOURTH DIVISION**  
**DOYLE, P. J.,**  
**MCFADDEN and BOGGS, JJ.**

NOTICE: Motions for reconsideration must be  
*physically received in our clerk's office within ten*  
days of the date of decision to be deemed timely filed.  
<http://www.gaappeals.us/rules/>

**June 19, 2013**

## In the Court of Appeals of Georgia

A13A0562. FULTON COUNTY v. DILLARD LAND DO-032  
INVESTMENTS, LLC et al.

DOYLE, Presiding Judge.

In this condemnation case, Fulton County appeals the superior court's order setting aside its voluntary dismissal of its condemnation petition, as well as the court's order abrogating the judgment to allow for the filing of non-value exceptions to the special master's award (the "award"). The pivotal issue in this case is whether Fulton County was authorized to voluntarily dismiss its condemnation action after the superior court adopted the award but before the amount of the award was paid into the court's registry or to the condemnee. We conclude that Fulton County was entitled to do so and reverse, for the following reasons.

On February 24, 2012, Fulton County filed a petition for condemnation before a special master under OCGA § 22-2-100 et seq. to acquire 12 acres of land owned by Dillard Land Investments, LLC (“Dillard”), to expand its library facilities. A special master was appointed on March 27, 2012. On May 10, 2012, after a hearing, the special master filed his award with the trial court, concluding that the actual market value of the property was \$5,187,500. On May 16, 2012, the trial court entered its judgment adopting the award. On May 18, 2012, Fulton County filed a voluntary dismissal of the petition. On June 12, 2012, Dillard filed an emergency motion to vacate and set aside the voluntary dismissal. On June 15, 2012, Fulton County moved to set aside or vacate the trial court’s judgment. On August 14, 2012, the trial court entered an order granting Dillard’s motion to set aside the voluntary dismissal and a second order abrogating the judgment to allow the parties to file non-value exceptions to the award. Fulton County filed an application for interlocutory appeal, which this Court granted, and this appeal followed.

Fulton County argues that it was authorized to voluntarily dismiss its condemnation petition. We agree.

OCGA § 22-1-12, which was amended in 2006 and made applicable to all condemnation proceedings filed on or after February 9, 2006, provides:

In all actions where a condemning authority exercises the power of eminent domain, the court having jurisdiction of a proceeding instituted by a condemnor to acquire real property by condemnation shall award the owner of any right or title to or interest in such real property such sum as will in the opinion of the court reimburse such owner for his or her reasonable costs and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if: (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.*<sup>1</sup>

OCGA § 22-1-12 was enacted to bestow certain rights to property owners in condemnation actions.<sup>2</sup> Therefore, under the statute, in the case of abandonment by the condemnor, property owners are entitled to recover their expenses incurred in the process.

The only case to date in which this statute is cited is *Gramm v. City of Stockbridge*,<sup>3</sup> wherein a similar issue arose.<sup>4</sup> In *Gramm*, the City of Stockbridge filed

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<sup>1</sup> (Emphasis supplied.)

<sup>2</sup> *Gramm v. City of Stockbridge*, 297 Ga. App. 165, 167 (676 SE2d 818) (2009).

<sup>3</sup> *Id.*

<sup>4</sup> Even though the condemnation action in *Gramm* was filed before the effective date of the statute, the opinion is instructive on the issue presented here. See *id.* at 167.

a petition for condemnation before a special master, the special master granted the petition and awarded just compensation to the condemnee, and the city paid the award to the condemnee.<sup>5</sup> The condemnee appealed the value, and before the hearing on the value could be held, the city voluntarily dismissed the condemnation action, relying on OCGA § 22-1-12.<sup>6</sup> This Court held as follows:

[i]n a condemnation proceeding under OCGA § 22-2-100 et seq., title to the property vests in the condemnor upon entry of the condemnation judgment and payment of the special master's award into the court. . . . OCGA § 22-2-107 (g) provides that "upon the payment of the amount awarded by the special master into the registry of the court, the award of the special master and the judgment of the court condemning the property or interest to the use of the condemning body shall be conclusive." Accordingly, after a condemnation judgment has been entered, the condemnor cannot assent to the judgment adopting the master's findings, pay in its money and seek to take possession of the property, and then disown the very property it has paid for[] and sought possession of in the action.<sup>7</sup>

This Court reasoned that

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<sup>5</sup> See *id.* at 165.

<sup>6</sup> *Id.* at 166-167.

<sup>7</sup> (Citation and punctuation omitted). *Id.* at 166.

[a] property owner should be allowed to rely upon the condemnation as being final when . . . the condemnor has obtained a condemnation judgment; the award has been paid and disbursed; the condemnee has filed no exceptions to the taking; and the condemnor has retained possession of the property for a significant period of time.<sup>8</sup>

Addressing the city's argument that OCGA § 22-1-12 permitted the filing of the dismissal, this Court noted that the statute was inapplicable because the city's condemnation petition was filed before the effective date of the statute, but stated that the statute "[was] silent as to when and under what circumstances an abandonment may be authorized."<sup>9</sup>

Unlike the condemnor in *Gramm*, Fulton County did not pay the amount of the award to the condemnee or into the court registry, nor did it take title of the land for any period of time. Instead, it obtained the condemnation judgment but dismissed the petition two days after the entry of the trial court's judgment, which was entered prematurely.<sup>10</sup> Under these circumstances, the trial court erred by concluding that

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<sup>8</sup> Id. at 168.

<sup>9</sup> Id. at 167.

<sup>10</sup> OCGA § 22-2-112 (a) provides that any party dissatisfied with a special master's award could file an appeal in superior court "within ten calendar days from the service of the award, plus three additional calendar days for mailing of the award." "The statute . . .

Fulton County could not dismiss its condemnation action.

The cases relied upon by Dillard do not require a different result. The cases cited were decided under the assessor's method of condemnation, and they all preceded OCGA § 22-1-12.<sup>11</sup> As explained in *Woodside v. City of Atlanta*, assessors' rulings on condemnation cases were self-executing.<sup>12</sup> "Their award[s] [were] to be filed in the office of the clerk of the superior court, and . . . recorded, after which [they would have] the force and effect of a judgment or decree of the superior court."<sup>13</sup> In proceedings before special masters, however, which are governed by OCGA § 22-2-100 et seq., the legislature required that special masters' awards be

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. sets forth no exceptions to the ten-day period." *Stafford v. Bryan County Bd. of Educ.*, 267 Ga. 274, 275 (476 SE2d 727) (1996). "Because all conditions and limitations provided by the Special Master's Act must be strictly followed, a superior court's entry of judgment on an award prior to the expiration of the ten-day period is reversible error absent an acquiescence or waiver." *Fowler v. City of Warm Springs*, 238 Ga. App. 601, 602 (3) (519 SE2d 703) (1999). Here, there is no evidence of acquiescence or waiver.

<sup>11</sup> See *Woodside v. City of Atlanta*, 214 Ga. 75, 82 (3) (103 SE2d 108) (1958); *Ga. Power Co. v. Fountain*, 207 Ga. 361, 366 (b) (61 SE2d 454) (1950); *Thomas v. Central of Ga. R. Co.*, 169 Ga. 269, 272 (149 SE 884) (1929); *Housing Auth. of Atlanta v. Mercer*, 123 Ga. App. 38, 42 (179 SE2d 275) (1970); *Hodges v. South Ga. Natural Gas Co.*, 111 Ga. App. 180, 180-181 (141 SE2d 182) (1965).

<sup>12</sup> *Woodside*, 214 Ga. at 82 (2).

<sup>13</sup> (Punctuation omitted.) *Id.*

adopted by the trial judge.<sup>14</sup> Thus, the assessor condemnation cases are inapposite and inapplicable to the instant case. Accordingly, we reverse the trial court's order setting aside Fulton County's voluntary dismissal of the condemnation petition.

*Judgment reversed. McFadden and Boggs, JJ., concur.*

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<sup>14</sup> See OCGA § 22-2-111.