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Goode v. Mountain Lake Invs., L.L.C., No. S99A01710, 1999 WL 1048240 (Ga. Nov. 22, 1999)

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opposed to actual availability charges. Palm Coast argued that actual service availability charges were available to the Commission as of November 1996 when the Commission approved the new charges of Palm Coast. The court rejected the Commission's argument that it was not required to use the actual service availability records because they were not in the record of the case. The court held that the Commission was capable of taking notice of its own orders.

The court affirmed the remaining issues without discussion.

Julie E. Hultgren

GEORGIA

Goode v. Mountain Lake Invs., L.L.C., No. S99A01710, 1999 WL 1048240 (Ga. Nov. 22, 1999) (holding the trial court had broad discretion in fashioning an equitable remedy in a case to control the excess flow of water running from one property to another).

The plaintiffs, David, Marjorie, and James Goode ("Goodes"), filed suit against Mountain Lake Investments, L.L.C. ("MLI") claiming MLI caused excessive surface water and sediment laden surface water to flow onto the Goode's property. The Goodes' property lay at the bottom of a forty-acre drainage basin, and MLI owned about fifteen acres of property uphill from the Goodes. After acquiring its property, MLI added a road, parking lot, and small manufacturing plant, and altered the property's slope. The Goodes contended MLI's development diverted sediment laden surface water onto their property causing a nuisance.

The trial court ordered MLI to reduce the flow of water from its property to the Goodes' property to the level that existed prior to MLI's development. MLI constructed a detention pond to correct the water flow and sediment discharge problems. On the Goodes' request, the court entered an order for permanent injunctive relief. The court noted that siltation, caused by runoff from MLI's property, created the impetus for the prior injunction, and the detention pond constructed by MLI alleviated the problem. The court found that water flow from MLI's property to the Goodes' property still exceeded the natural flow, but evidence showed this problem existed prior to MLI's development. To remedy the situation, the court found that the water flow needed to be controlled on the Goodes' property with the construction of a ditch. Therefore, the court ordered MLI to contribute fifty percent of the money needed to construct a ditch across the Goodes' property.

The Goodes appealed the trial court's order. The Goodes first contended the trial court abused its discretion in not requiring MLI to bring the water flow back to pre-development levels. Recent precedent, however, held that a trial court's order to return surface water runoff to pre-development levels constituted an "impossible and overreaching

mandate," and an abuse of discretion. Therefore, the court held the trial court had the discretion whether or not to require MLI to return the water flow onto the Goodes' property to pre-development levels.

Second, the Goodes contended the trial court erred in finding that no further reasonable remedies existed to limit the flow of water from MLI's property to the Goodes' property beyond the limit attained by the detention pond. Furthermore, the Goodes argued the trial court erred by ordering the ditch to be constructed on their property rather than MLI's property. The court stated that the trial court has broad discretion in fashioning equitable remedies based on the exigencies of the case. Moreover, the court would not disturb an injunction fashioned by the trial court unless it found a manifest abuse of discretion. In reviewing the record, the court could not conclude that requiring the parties to share the cost of constructing a drainage ditch across the Goodes' property constituted an abuse of discretion.

The dissent argued the trial court abused its discretion by refusing to fashion a remedy which addressed abatement of the nuisance, and by compelling the affected party to bear responsibility to clean up a nuisance it did not create. Furthermore, the dissent argued the majority overlooked expert testimony that presented evidence of further reasonable steps available for decreasing the water flow from MLI's property.

Ryan O. Reimers

Rouse v. Georgia Dep't of Natural Resources, No. S99A1148, 1999 WL 1048241 (Ga. Nov. 22, 1999) (holding that the Protection of Tidewaters Act was not unconstitutional for vagueness of terms and neither infringed on fundamental rights nor violated equal protection).

The Protection of Tidewaters Act ("Act"), passed in 1992, included provisions that allowed the Department of Natural Resources ("Department") to order the removal of any "structure" that was located in the "tidewaters" of the State. A grandfather provision allowed some structures predating the Act to remain for a maximum of five years. Rouse owned a houseboat and a river house on the tidal portion of the Altamaha River. The houseboat consisted of a styrofoam bottomed, six-sided wood frame bolted on top with a roof tied to a tree with four lines. The river house was on stilts and was embedded in the river bottom with concrete cylinders. The Department permitted Rouse's houseboat to remain until 1997, but denied a permit for the riverboat due to "sanitation and safety" concerns.

Rouse argued the Act was unconstitutional on a variety of grounds. The court addressed three central arguments: (1) the vagueness of the terms "structure" and "tidewaters;" (2) the denial of equal protection; and (3) an unconstitutional taking.

In addressing the first issue, the court noted that a statute would violate