

TAX EQUITY ANALYSIS FOR THE CITY OF BERKELEY LAKE, GEORGIA APRIL 2011

Engagement Approach

The objective of our engagement has been to provide Berkeley Lake with viable options for offering equitable fee, tax levies and/or service delivery assessments. Our methodology was based on a holistic approach to funding City-provided services including necessary improvements to the Lake Berkeley dam. In order to gain a clear understanding of tax equity and the financial situation in the City of Berkeley Lake, and to develop a methodology of analysis, Governmental Enterprises collected and analyzed the following data:

- City Financial Data
 - 2009 Financial Statements and Audit Report
 - 2010 Statement of Income and Expense
 - 2011 Approved City Budget
 - Tax Digests for 2009 and 2010
 - Estimated costs of restoring or removing the Lake Berkeley dam
 - Estimated costs of the General Obligation Bond approved by the voters on March 15, 2011.

- Current Service Delivery Breakdown (the list of Current City Services is shown on page 4 of this report)

In addition, we conducted site visits to all residential areas of the City.

Finally, we sought to gain input through meetings with the following:

City Personnel

Our meetings with Mayor Salter and City Administrator Tom Rozier provided us with a solid understanding of the situation with the Lake Berkeley dam, while providing historical context and an understanding of the (then) upcoming special bond election.

Interviews with Representatives of all the Various Homeowners' Associations

We interviewed designated representatives of each of the seven (7) homeowners' associations within the City of Berkeley Lake, individually:

- Rick Chambers, President of the Miramont Homeowners' Association
- Barbara Carroll, President of the Berkeley Walk Homeowners' Association
- Jeff Sprinkle, designated representative of the River District Homeowners' Association
- President John Barta and designated representative, John Hackney of the Berkeley Field Homeowners' Association
- Phil Johnson, designated representative of the Berkeley Lake Homeowners' Association
- Andy Galeziowski, President of the Berkeley Commons Homeowners' Association
- Dunbar Harrison III, designated representative of the River Mansions Homeowners' Association

Our findings from the individual HOA interviews are summarized below:

- Feedback from the HOA's reflected generally positive attitudes towards the Mayor, City Council and City Management.
- A recurring theme throughout the interviews was that there existed within the City a somewhat contentious atmosphere between the homeowners on the lake and those who were not on the lake. This atmosphere seemed to be driving much of the emotional energy surrounding the issue with the dam.
- There seemed to be consensus among the HOA's that
 - Funding should be through millage rate adjustment, as opposed to any type of special assessment
 - The Green Space funding model (through general millage rate) is fair and equitable
 - There is some value of the lake to all parties, but not equal value
 - Repairing the dam is the correct and logical action
- The one main disagreement is that lake front owners feel that, because their land is valued so much higher by being on the lake, the resulting additional property taxes already sufficiently make up for any differential in the value of the lake. Generally, those property owners not located on the lake disagreed.

The Georgia Municipal Association (GMA)

We had a discussion with Lamar Norton of the Georgia Municipal Association (GMA) seeking parallels or comparable situations. The only comparable situation Mr. Norton could offer was in the North Fulton County city of Mountain Park, Georgia, where the city had experienced some adverse legal rulings regarding siltation problems in their lake. Mountain Park was seeking

funding alternatives for restoring the lake and recovering expenditures for same. A follow-up call to Mountain Park's City Administrator revealed that they were not as far along in the process as was Berkeley Lake, and that they were watching to see how Berkeley Lake solved the funding issue.

The Gwinnett County Tax Assessor's Office

On March 18, Governmental Enterprises team members met with a group from the Gwinnett County Tax Assessor's Office. The group was assembled with specific attention to their knowledge of Berkeley Lake and lake property in general. It was clear from the outset that the Tax Assessor's team does not deal in hypothetical answers, so they were reluctant to provide any specific numbers. However, their general guidance forecasted a significantly negative impact on the City's Tax Digest were it not for the presence of the lake. This negative impact, according to the Tax Assessor's Office, would likely manifest itself as significant value loss to the lake-front property, with a potential "domino effect" rippling through the values of other properties in the City.

Analysis and Conclusions

General City Services

The City of Berkeley Lake provides the following services to its residents and commercial citizens:

City Services

Service	City Exceptions
Building Permits & Inspections	
Business Licenses	
City Directory	Limited to residential information.
Communications	
Municipal Court	Ordinance Enforcement only.
Cultural Arts	
Emergency Management	City efforts are limited to bridging gap between event and FEMA/GEMA/County arrival.
Environment	
Events	
Garbage/Recycling	Private provider, but City negotiates rates.
Ordinance Enforcement	
Parks & Recreation	
Planning & Zoning	
Public Safety	
Right of Way Regularly-Scheduled Maintenance	Miramont, River District, River Hollow, Berkeley Field, Berkeley Commons, River Mansions
Roads & Streets	River District, River Hollow, Bush Rd, N/S Berkeley Lake Rd.
Septic System Regulation	
Sewer – Stormwater	
Sidewalks	Berkeley Walk, River District, River Hollow, Ridge Rd, Little Ridge Rd, Lakeshore Dr., Bush Rd, N/S Berkeley Lake Rd.
Storage - Non-Profit Records	
Street Lights	River District, River Hollow

Please note that the Lake Berkeley Dam has been purposely omitted from the list above, as it will be addressed in detail below.

A thorough review of general services currently provided by the City revealed no “real” and very few “perceived” inequities. We note that two gated subdivisions have privately-owned streets and have chosen to provide for their own street and (in the case of River District) sidewalk repair. However, the level and expense of repair was termed to be minimal and not worth pressing for a millage differential.

Green Space Acquisition

We reviewed the past acquisition of the green space at the corner of Peachtree Industrial Boulevard and North Berkeley Lake Road. This property was acquired by the City, partly to

serve as a buffer to commercial activity and traffic along Peachtree Industrial Boulevard, and partly to function as a city park. We received one or two comments from homeowners suggesting that homeowners along Ridge Road benefitted exclusively from this acquisition. Yet, surprisingly, we found consensus among the various homeowners' associations that the green space acquisition was funded properly through common millage rate. We also found this method of funding consistent with other similar acquisitions in other jurisdictions. Our conclusion, therefore, is that the City acted appropriately in funding the green space acquisition through common millage rate.

One homeowner president did comment that the lake had significantly more value to the community than the green space.

Restoration of the Lake Berkeley Dam

Governmental Enterprises found only one significant issue related to tax equity that required more analysis, and that was the issue of funding for the proposed restoration of the Lake Berkeley dam.

The majority of homeowners' representatives we interviewed conceded that the lake was of value to them, but maintained that the lake front owners should bear a larger portion of the bill than those away from the lake. This view is in stark contrast to the widely held opinion that the green space acquisition was found to be funded properly through common millage rate. In short, the lake issue was seen as different from the green space issue.

We believe the key to this paradox is the undercurrent that we heard repeated many times - that there existed within the City an "Us *versus* Them" atmosphere between residents who live away from the lake and those who live on the lake. This attitude almost certainly accounts for the fact that many residents see the lake issue as different from the green space issue.

Judging from the homeowners' comments, virtually everyone seemed to be expecting Governmental Enterprises to develop a weighting formula to assign each homeowner's individual valuation of the lake based upon their property's proximity to the lake. However, faced with the knowledge that the issue over the dam was, for many or most City residents, an emotional issue, we rejected any thoughts of developing a metric for valuation of the lake based upon proximity to the lake as being too subjective and too open for interpretation.

Instead, we sought to examine the financial value of the lake (if any) to the community as a whole. We did this by analyzing the effect on City revenues from property taxes if the lake had not existed.

It is important to note here that under no circumstances are we advocating that draining the lake is a viable option. To the contrary, a 2005 ruling by the Georgia Supreme Court, in the case of "Forsyth County v. Martin," appears to indicate that the City has a legal obligation to repair the dam (a copy of the Supreme Court ruling is included in the Appendix section of this report).¹

¹ Please note that the Governmental Enterprises team members are not attorneys and are not qualified to provide legal advice. The City should rely on their City Attorney for guidance on this and all legal issues.

Rather, we are quantifying the impact of the lake on the City of Berkeley Lake as a whole and how the lake's existence generates property tax revenues that keep the current level and mix of City services available to the community.

First, we set out to establish the relative property tax contributions from the various residential areas of the City. Table 1 and Figure 1 on the following page show the relative numbers of lots in each area:

Table 1

City of Berkeley Lake - Lot Distribution		
Subdivision	Total	%
Lakefront	143	20.2%
Miramont	110	15.6%
Lakefront 2nd Tier*	116	16.4%
River District	85	12.0%
Berkeley Walk	83	11.7%
River Mansions	37	5.2%
Berkeley Commons	48	6.8%
Old City	61	8.6%
Berkeley Field	18	2.5%
River Hollow	6	0.8%
TOTAL	707	100.0%

* Lots that are across the street or one lot removed from the lake.

Figure 1
City of Berkeley Lake - Relative Number of Lots

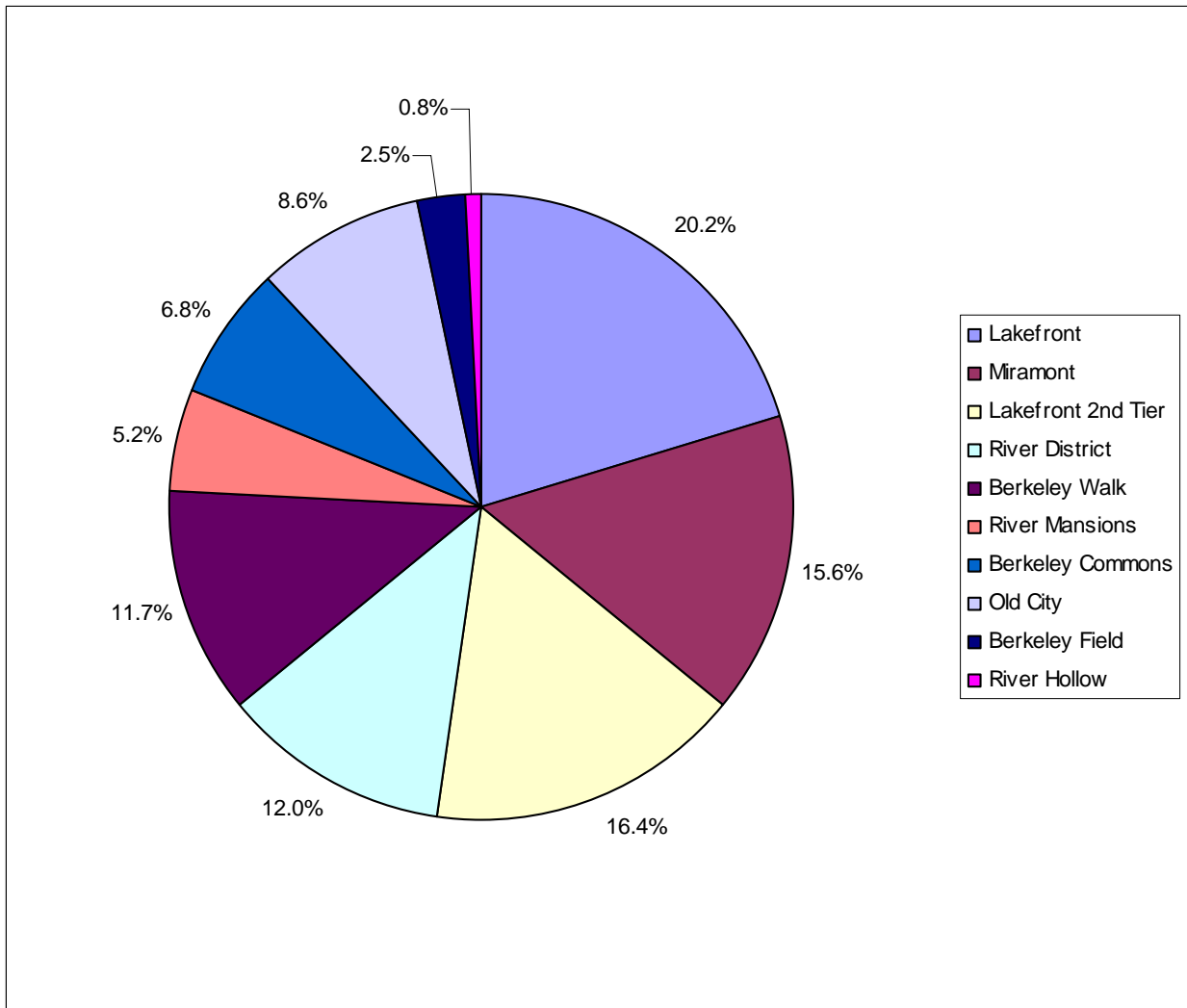


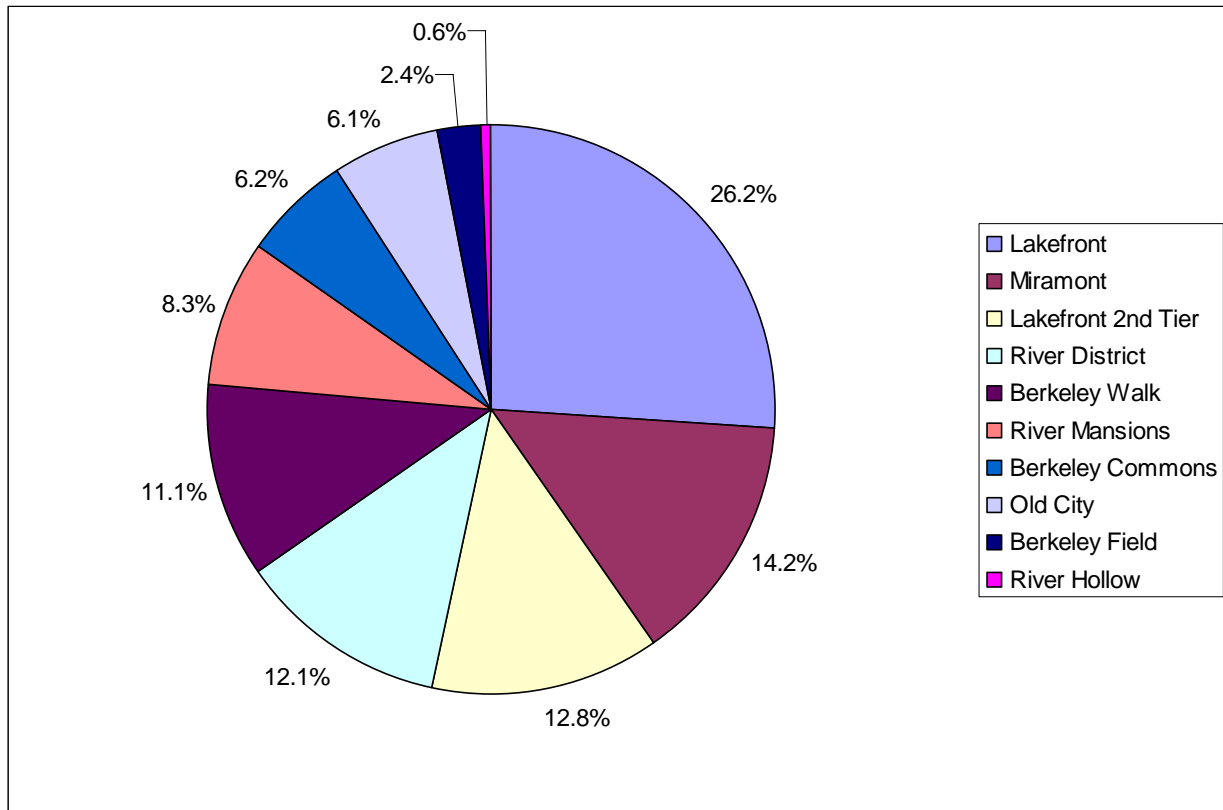
Table 2 and Figure 2 show the relative property tax contribution from each area, based upon 2010 figures:

Table 2
City of Berkeley Lake – Property Tax Contribution
 Millage Rate **4.9**

Subdivision	Property Tax Contribution - Total			
	Land	Bldg	Total	%
Lakefront	\$ 80,946	\$ 56,321	\$ 137,267	26.2%
Miramont	\$ 17,824	\$ 56,641	\$ 74,465	14.2%
Lakefront 2nd Tier*	\$ 27,161	\$ 40,264	\$ 67,426	12.8%
River District	\$ 24,873	\$ 38,360	\$ 63,233	12.1%
Berkeley Walk	\$ 10,569	\$ 47,623	\$ 58,191	11.1%
River Mansions	\$ 9,581	\$ 34,150	\$ 43,731	8.3%
Berkeley Commons	\$ 5,779	\$ 26,573	\$ 32,353	6.2%
Old City	\$ 14,182	\$ 17,897	\$ 32,078	6.1%
Berkeley Field	\$ 2,293	\$ 10,438	\$ 12,731	2.4%
River Hollow	\$ 2,576	\$ 696	\$ 3,272	0.6%
TOTAL	\$ 195,784	\$ 328,964	\$ 524,747	100.0%

* Lots that are across the street or one lot removed from the lake.

Figure 2
City of Berkeley Lake - Relative Property Tax Contribution



We note from this comparison that, in the case of Lakefront properties, 20.2% of the owners produce 26.2% of the contribution for funding city services. This, of course, is due to higher land values on the lake.

Our next step was to “normalize” current land values to correct for different-sized lots. Table 3 shows the 2010 Tax Digest data broken down into Dollars per Acre.

Table 3 - Normalized Property Values (Land Only)

City of Berkeley Lake Subdivision	FMV	# Acres	2010 FMV \$/acre
Lakefront	\$ 41,298,900	85.03	\$ 485,698
River District	\$ 12,690,300	56.93	\$ 222,911
Old City	\$ 7,235,500	41.99	\$ 172,315
Lakefront 2nd Tier	\$ 13,857,900	87.03	\$ 159,231
Miramont	\$ 9,093,800	61.18	\$ 148,640
Berkeley Field	\$ 1,170,000	8.74	\$ 133,867
River Hollow	\$ 1,314,100	11.43	\$ 114,969
River Mansions	\$ 4,888,400	44.49	\$ 109,876
Berkeley Commons	\$ 2,948,600	28.66	\$ 102,882
Berkeley Walk	\$ 5,392,200	56.73	\$ 95,050
Total	\$ 99,889,700	482.21	\$ 207,150

Thus, Lakefront property is currently valued at \$485,698 per acre. River District came in second place at \$222,911 per acre, or only 46% the value of Lakefront property.

The preceding analyses begs the question: What would happen to the Berkeley Lake Tax Digest if the lake were not there, and what would have to happen to everyone’s millage rates to maintain the current level of City services to the community?

At this point, we took general direction from the Gwinnett County Tax Assessor’s Office, along with our own experience, and ran two scenarios. The first scenario is conservative and the second is somewhat more aggressive.

Scenario 1 - Conservative

- Lakefront land value drops to the average of all other City subdivisions.
- Lakefront home values remain stable
- All non-Lakefront property values (land and homes) remain stable.

First, we re-ran the normalized land values, removing Lakefront from the data set (see Table 3a).

Table 3a - Normalized Property Values (Land Only) w/o Lakefront

City of Berkeley Lake Subdivision	FMV	# Acres	2010 FMV \$/acre
River District	\$ 12,690,300	56.93	\$ 222,911
Old City	\$ 7,235,500	41.99	\$ 172,315
Lakefront 2nd Tier	\$ 13,857,900	87.03	\$ 159,231
Miramont	\$ 9,093,800	61.18	\$ 148,640
Berkeley Field	\$ 1,170,000	8.74	\$ 133,867
River Hollow	\$ 1,314,100	11.43	\$ 114,969
River Mansions	\$ 4,888,400	44.49	\$ 109,876
Berkeley Commons	\$ 2,948,600	28.66	\$ 102,882
Berkeley Walk	\$ 5,392,200	56.73	\$ 95,050
Total w/o Lakefront	\$ 58,590,800	397.18	\$ 147,517
		down	69.6%

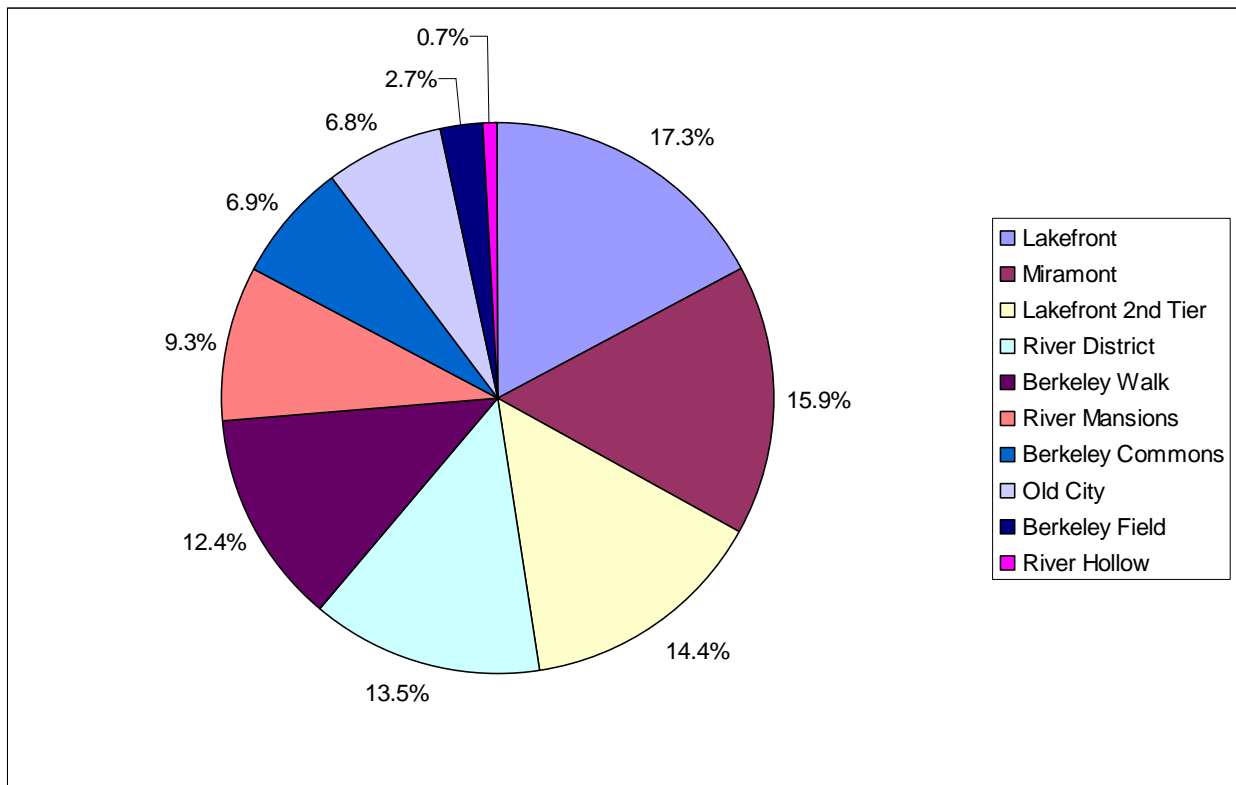
This shows that the average Fair Market Value for City lots without Lakefront is \$147,517 per acre. Therefore, this scenario shows the result of Lakefront properties dropping 69.6% to the average of all other City residential properties.

Table 4 and Figure 4 show the impact of the Scenario 1 assumptions:

Table 4
City of Berkeley Lake – Impact of Lake on Community (Scenario 1)
 Millage Rate **4.9**

Subdivision	Assumed FMV Reduction w/o Lake		Property Tax Contribution - Total			
	Land	Bldg	Land	Bldg	Total	%
Lakefront	69.6%	0%	\$ 24,585	\$ 56,321	\$ 80,906	17.3%
Miramont	0%	0%	\$ 17,824	\$ 56,641	\$ 74,465	15.9%
Lakefront 2nd Tier	0%	0%	\$ 27,161	\$ 40,264	\$ 67,426	14.4%
River District	0%	0%	\$ 24,873	\$ 38,360	\$ 63,233	13.5%
Berkeley Walk	0%	0%	\$ 10,569	\$ 47,623	\$ 58,191	12.4%
River Mansions	0%	0%	\$ 9,581	\$ 34,150	\$ 43,731	9.3%
Berkeley Commons	0%	0%	\$ 5,779	\$ 26,573	\$ 32,353	6.9%
Old City	0%	0%	\$ 14,182	\$ 17,897	\$ 32,078	6.8%
Berkeley Field	0%	0%	\$ 2,293	\$ 10,438	\$ 12,731	2.7%
River Hollow	0%	0%	\$ 2,576	\$ 696	\$ 3,272	0.7%
TOTAL			\$ 139,423	\$ 328,964	\$ 468,387	100.0%

Figure 4
City of Berkeley Lake – Impact of Lake on Community (Scenario 1)



Scenario 1 drops the Lakefront contribution from 26.2% to 17.3%, and overall revenue from residential property taxes is down \$56,361. This is revenue that is needed to provide the current level of City services to the community. Therefore, we calculated the millage rate increase that would be needed to replace that revenue. Table 4a shows the result:

Table 4a
City of Berkeley Lake – Impact of Lake on Community (Scenario 1)
 Revenue-neutral Millage Rate **5.5**

Subdivision	Assumed FMV Reduction w/o Lake		Property Tax Contribution - Total			
	Land	Bldg	Land	Bldg	Total	%
Lakefront	69.6%	0%	\$ 27,595	\$ 63,218	\$ 90,813	17.3%
Miramont	0%	0%	\$ 20,006	\$ 63,577	\$ 83,583	15.9%
Lakefront 2nd Tier	0%	0%	\$ 30,487	\$ 45,195	\$ 75,682	14.4%
River District	0%	0%	\$ 27,919	\$ 43,057	\$ 70,976	13.5%
Berkeley Walk	0%	0%	\$ 11,863	\$ 53,454	\$ 65,317	12.4%
River Mansions	0%	0%	\$ 10,754	\$ 38,332	\$ 49,086	9.3%
Berkeley Commons	0%	0%	\$ 6,487	\$ 29,827	\$ 36,314	6.9%
Old City	0%	0%	\$ 15,918	\$ 20,088	\$ 36,006	6.8%
Berkeley Field	0%	0%	\$ 2,574	\$ 11,716	\$ 14,290	2.7%
River Hollow	0%	0%	\$ 2,891	\$ 782	\$ 3,673	0.7%
TOTAL			\$ 156,495	\$ 369,245	\$ 525,740	100.0%

Therefore, our most conservative estimates indicate that, if the lake did not exist, property tax revenue would be reduced by 11% (\$56,361), and to recover that lost revenue, everyone's millage rate must increase from 4.9 to 5.5. Table 4b shows the impact on the property tax bill for the average home in each area of the City:

Table 4b
City of Berkeley Lake – Impact of Lake on Individual Property Tax (Scenario 1)
 Revenue-neutral Millage Rate **5.5**

Subdivision	Assumed FMV Reduction w/o Lake		Impact on Avg. Property Tax Bill	
	Land	Bldg	Total	%
Lakefront	69.6%	0%	\$ (324.85)	-33.8%
Miramont	0%	0%	\$ 82.89	12.2%
Lakefront 2nd Tier	0%	0%	\$ 71.17	12.2%
River District	0%	0%	\$ 91.09	12.2%
Berkeley Walk	0%	0%	\$ 85.85	12.2%
River Mansions	0%	0%	\$ 144.73	12.2%
Berkeley Commons	0%	0%	\$ 82.53	12.2%
Old City	0%	0%	\$ 64.39	12.2%
Berkeley Field	0%	0%	\$ 86.61	12.2%
River Hollow	0%	0%	\$ 66.78	12.2%

Scenario 2 – More Aggressive

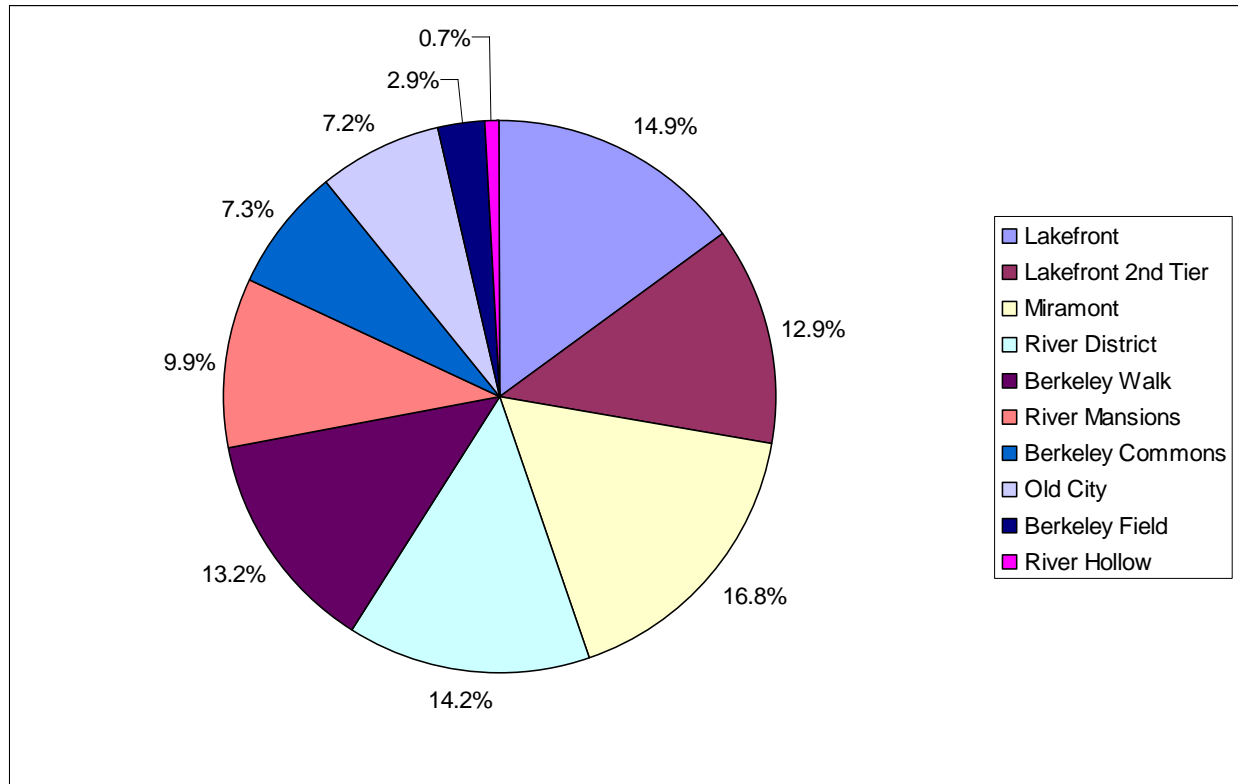
- Lakefront land value drops to the average of all other City subdivisions.
- Lakefront home values drop 30%
- Because of proximity to and/or view of the lake, Lakefront 2nd Tier land value drops 30% and home values drop 10%
- For all other non-Lakefront property values, land value drops 7% and home values drop 2%.

Table 5 and Figure 5 show the impact of the Scenario 2 assumptions:

Table 5
City of Berkeley Lake – Impact of Lake on Community (Scenario 2)
 Millage Rate **4.9**

Subdivision	Assumed FMV Reduction w/o Lake		Property Tax Contribution - Total			
	Land	Bldg	Land	Bldg	Total	%
Lakefront	69.6%	30%	\$ 24,585	\$ 39,425	\$ 64,010	14.9%
Lakefront 2nd Tier	30%	10%	\$ 19,013	\$ 36,238	\$ 55,251	12.9%
Miramont	7%	2%	\$ 16,576	\$ 55,508	\$ 72,085	16.8%
River District	7%	2%	\$ 23,132	\$ 37,593	\$ 60,724	14.2%
Berkeley Walk	7%	2%	\$ 9,829	\$ 46,670	\$ 56,499	13.2%
River Mansions	7%	2%	\$ 8,911	\$ 33,467	\$ 42,378	9.9%
Berkeley Commons	7%	2%	\$ 5,375	\$ 26,042	\$ 31,417	7.3%
Old City	7%	2%	\$ 13,189	\$ 17,539	\$ 30,728	7.2%
Berkeley Field	7%	2%	\$ 2,133	\$ 10,229	\$ 12,362	2.9%
River Hollow	7%	2%	\$ 2,395	\$ 682	\$ 3,078	0.7%
TOTAL			\$ 125,137	\$ 303,393	\$ 428,530	100.0%

Figure 5
City of Berkeley Lake – Impact of Lake on Community (Scenario 2)



Scenario 2 drops the Lakefront contribution from 26.2% to 14.9%, and overall revenue from residential property taxes is down \$96,217. Again, this is revenue that is needed to provide the

current level of City services to the community. Therefore, we calculated the millage rate increase that would be needed to replace that revenue. Table 5a shows the result:

Table 5a
City of Berkeley Lake – Impact of Lake on Community (Scenario 2)
 Millage Rate **6.0**

Subdivision	Assumed FMV Reduction w/o Lake		Property Tax Contribution - Total			
	Land	Bldg	Land	Bldg	Total	%
Lakefront	69.6%	30%	\$ 30,104	\$ 48,275	\$ 78,379	14.9%
Lakefront 2nd Tier	30%	10%	\$ 23,281	\$ 44,373	\$ 67,654	12.9%
Miramont	7%	2%	\$ 20,297	\$ 67,970	\$ 88,267	16.8%
River District	7%	2%	\$ 28,325	\$ 46,032	\$ 74,356	14.2%
Berkeley Walk	7%	2%	\$ 12,035	\$ 57,147	\$ 69,182	13.2%
River Mansions	7%	2%	\$ 10,911	\$ 40,980	\$ 51,891	9.9%
Berkeley Commons	7%	2%	\$ 6,581	\$ 31,888	\$ 38,469	7.3%
Old City	7%	2%	\$ 16,150	\$ 21,476	\$ 37,626	7.2%
Berkeley Field	7%	2%	\$ 2,611	\$ 12,526	\$ 15,137	2.9%
River Hollow	7%	2%	\$ 2,933	\$ 836	\$ 3,769	0.7%
TOTAL			\$ 153,229	\$ 371,502	\$ 524,731	100.0%

Therefore, our more aggressive estimates indicate that, if the lake did not exist, property tax revenue would be reduced by 18% (\$96,217), and to recover that lost revenue, everyone’s millage rate must increase from 4.9 to 6.0. Table 5b shows the impact on the property tax bill for the average home in each area of the City:

Table 5b
City of Berkeley Lake – Impact of Lake on Individual Property Tax (Scenario 2)
 Revenue-neutral Millage Rate **6.0**

Subdivision	Assumed FMV Reduction w/o Lake		Impact on Avg. Property Tax Bill	
	Land	Bldg	Total	%
Lakefront	69.6%	30%	\$ (411.80)	-42.9%
Lakefront 2nd Tier	30%	10%	\$ 1.97	0.3%
Miramont	7%	2%	\$ 125.47	18.5%
River District	7%	2%	\$ 130.87	17.6%
Berkeley Walk	7%	2%	\$ 132.42	18.9%
River Mansions	7%	2%	\$ 220.53	18.7%
Berkeley Commons	7%	2%	\$ 127.43	18.9%
Old City	7%	2%	\$ 90.94	17.3%
Berkeley Field	7%	2%	\$ 133.66	18.9%
River Hollow	7%	2%	\$ 82.79	15.2%

It is very important for us to note that even Scenario 2 may not be the worst case scenario. The one point that was emphasized the most in our meeting with the Gwinnett County Tax Assessor’s Office was that the tax digest was ultimately driven by the housing market, which would seek its own level based upon demand, and that in a scenario without the lake, it was

difficult to say just how low property taxes could ultimately go, or to what extent there could be a “domino effect” to the rest of the City’s residential areas if the lake were not present.

After running the two scenarios detailed above, we conclude that:

- Because land values around the lake are so much higher than the rest of the City’s residences, lake front owners, who only represent about 20% of the residents, are already carrying 26% of the financial burden for all city services to the community.
- This differential in taxable value between Lakefront and non-lake front lots serves, in effect, as a special fee to the lake front owners for City services, a fee that is a direct result of their proximity and access to the lake.
- It is not immediate access to the lake that determines the major portion of the value to each resident, but rather the common financial gain to the community that is represented by the lake.
- Funding the dam restoration through a general increase in millage rate is fair and equitable to all parties.

Summary of Findings

In summary, our overall findings are as follows:

- A thorough review of services currently provided by the City revealed no “real” and very few “perceived” inequities. Therefore, we recommend no modifications.
- Despite anecdotal evidence to the contrary, we found consensus among the various homeowners’ associations that the green space acquisition a few years ago was funded properly through a common millage rate adjustment; the implication being that all residents benefitted by the acquisition of the green space and all should pay equitably. We also found this method of funding consistent with other similar acquisitions in other jurisdictions.
- We sought to examine the financial value, if any, of the lake to the community as a whole. We did this by analyzing the effect on City revenues from property taxes if the lake had not existed. It is important to note here that, under no circumstances are we advocating that draining the lake is a viable option, nor was analysis of that option a part of our assignment. Rather, we are quantifying the impact of the lake on revenues that keep the City services available to the community. The result of this analysis is as follows:
 - Our most conservative estimates indicate that, if the lake did not exist, property tax revenue would be reduced by 11% (\$56,000). To recover that lost revenue, millage rate must increase from 4.9 to 5.5 on every parcel in the city
 - Our more aggressive estimates indicate that the effect on revenue would approximate 18% (\$96,000). To recover that lost revenue, parcel millage rate must increase from 4.9 to 6.0 mills
 - We conclude, therefore, that:

- Because land values around the lake are so much higher than the rest of the City's parcels, lake front owners, who only represent about 20% of the residents, are already carrying 26% of the financial burden for all city services to the community.
- This differential in taxable value between Lakefront and non-lake front lots serves, in effect, as a special fee to the lake front owners for City services, a fee that is a direct result of their proximity and access to the lake.
- It is not immediate access to the lake that determines the major portion of the value to each resident, but rather the common financial gain to the community that is represented by the lake.
- Funding the dam restoration through a general increase in millage rate is fair and equitable to all parties.

APPENDIX

Supreme Court of Georgia
Case Nos. S04A2031, S042032

Forsyth County v. Martin
(reprinted from Westlaw)

Westlaw

610 S.E.2d 512
 279 Ga. 215, 610 S.E.2d 512, 05 FCDR 653
 (Cite as: 279 Ga. 215, 610 S.E.2d 512)

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Supreme Court of Georgia.
FORSYTH COUNTY, et al.

v.
 MARTIN, et al.
 Martin, et al.

v.
Forsyth County, et al.

Nos. S04A2031, S04X2032.
 March 7, 2005.

Reconsideration Denied April 14, 2005.

Background: Owners of lakefront property brought action against **county** for declaratory judgment and writ of mandamus on obligation to assume ownership, repair, and maintenance of dam that had been classified as high hazard. Following affirmance of administrative determination that **county** was an owner for purposes of Safe Dam Act, **county** filed counterclaim and cross-claim for declaratory judgment on rights and obligations to property owners if **county** breached the dam. The Superior Court, **Forsyth County**, John S. Langford, Senior Judge, directed verdict against **county** on ownership issue and entered judgment on jury verdict requiring repair of dam and awarding attorney fees and costs. Appeal and cross-appeal were taken.

Holdings: The Supreme Court, Benham, J., held that: (1) **county** was collaterally estopped from relitigating its ownership; (2) the property owners' interests in **lake** limited **county's** ability to breach the dam; (3) governmental entities can be subject to an award of litigation expenses and attorney fees; and (4) the judgment should have required the repair of the dam so that it impounded a **lake** with a normal pool elevation of 1141, rather than 1140, feet above mean sea level (MSL).

Affirmed in part, vacated in part, and re-

manded.

West Headnotes

[1] Judgment 228 ⚡ **642**

228 Judgment
 228XIV Conclusiveness of Adjudication
 228XIV(A) Judgments Conclusive in General
 228k635 Courts or Other Tribunals Rendering Judgment
 228k642 k. Appellate courts. Most Cited Cases

Superior court's affirmance of administrative law judge's (ALJ) decision that county was an owner of dam for purposes of Safe Dam Act collaterally estopped county from relitigating its ownership in suit by lakefront property owners to require county to assume ownership, repair, and maintenance of dam. West's Ga.Code Ann. § 12-5-370 et seq.

[2] Water Law 405 ⚡ **1753**

405 Water Law
 405IX Artificial Ponds, Reservoirs, Channels, Dams, and Other Works
 405k1751 Removal or Abatement of Dams or Other Works
 405k1753 k. Right to remove or abate, and rights and liabilities as to affected waters. Most Cited Cases

(Formerly 405k174)

Homeowners' interests' in lake by purchasing lakefront property according to a subdivision plat which had a lake area designated on it limited the legal ability of the county, as an owner of the dam under the Safe Dams Act, to breach dam built by private entity. West's Ga.Code Ann. § 12-5-370 et seq.

[3] Costs 102 ⚡ **194.44**

102 Costs
 102VIII Attorney Fees

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102k194.44 k. Bad faith or meritless litigation. Most Cited Cases

Governmental entities can be subject to an award of litigation expenses and attorney fees under statute permitting them if the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense; the award is not intended to penalize or punish. West's Ga.Code Ann. § 13-6-11.

[4] Costs 102 ↪ 208

102 Costs

102IX Taxation

102k208 k. Duties and proceedings of taxing officer. Most Cited Cases

Questions concerning bad faith, stubborn litigiousness, and unnecessary trouble and expense under statute permitting award of litigation expenses are generally questions for the jury to decide. West's Ga.Code Ann. § 13-6-11.

[5] Costs 102 ↪ 208

102 Costs

102IX Taxation

102k208 k. Duties and proceedings of taxing officer. Most Cited Cases

Question whether county had been stubbornly litigious in its efforts to relitigate issue of ownership interest in dam after resolution in administrative action was for jury with regard to lakefront homeowners' claim for litigation expenses and attorney fees in suit to resolve dispute over repair of dam. West's Ga.Code Ann. § 13-6-11.

[6] Costs 102 ↪ 194.18

102 Costs

102VIII Attorney Fees

102k194.18 k. Items and amount; hours; rate. Most Cited Cases

When an award of expenses of litigation and attorney fees is factually supportable, the amount of the award is limited to the amount of attorney fees attributable solely to the claim on which plaintiffs

prevailed.

[7] Costs 102 ↪ 194.18

102 Costs

102VIII Attorney Fees

102k194.18 k. Items and amount; hours; rate. Most Cited Cases

Plaintiffs who partially prevailed were not entitled to all attorney fees and expenses claimed by them, where no testimony or evidence distinguished attorney fees and costs expended on the claims on which the plaintiffs prevailed from those which were decided adversely to plaintiffs. West's Ga.Code Ann. § 13-6-11.

[8] Water Law 405 ↪ 1760(4)

405 Water Law

405IX Artificial Ponds, Reservoirs, Channels, Dams, and Other Works

405k1754 Judicial Intervention, Actions, and Review

405k1760 Proceedings and Review

405k1760(4) k. Admissibility of evidence. Most Cited Cases

(Formerly 405k179(3))

Environmental Protection Division (EPD) order and the rulings of the administrative law judge (ALJ) and the superior court that county owned dam purposes of Safe Dam Act could be admitted in suit by lakefront property owners to require county to assume ownership, repair, and maintenance of dam; the documents were evidence that the county had an ownership interest in the dam, and the ownership of the dam was an issue in the case. West's Ga.Code Ann. § 12-5-370 et seq.

[9] Pretrial Procedure 307A ↪ 3

307A Pretrial Procedure

307AI In General

307Ak3 k. Motions in limine; preclusion of evidence, argument, or reference. Most Cited Cases

A "motion in limine" is a pretrial method of determining the admissibility of evidence; by its

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very nature, the grant of a motion in limine suggests that there is no circumstance under which the evidence under scrutiny is likely to be admissible at trial.

[10] Pretrial Procedure 307A ⚡3

307A Pretrial Procedure

307A1 In General

307Ak3 k. Motions in limine; preclusion of evidence, argument, or reference. Most Cited Cases

The grant of a motion in limine excluding evidence is a judicial power which must be exercised with great care.

[11] Appeal and Error 30 ⚡964

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k963 Proceedings Preliminary to Trial

30k964 k. In general. Most Cited Cases

A trial court's ruling on a motion in limine is reviewed for abuse of discretion.

[12] Highways 200 ⚡105(1)

200 Highways

200VII Construction, Improvement, and Repair

200k105 Authority and Duty to Improve, Maintain and Repair

200k105(1) k. In general. Most Cited Cases

Instructions on the use of a writ of mandamus to enforce a county's duty to repair roads and the statutory procedure a county must follow to abandon a county road were permissible in suit by lake-front property owners raising issue of county's duty to repair road on top of dam.

[13] Water Law 405 ⚡1760(6)

405 Water Law

405IX Artificial Ponds, Reservoirs, Channels, Dams, and Other Works

405k1754 Judicial Intervention, Actions, and

Review

405k1760 Proceedings and Review

405k1760(6) k. Instructions. Most

Cited Cases

(Formerly 405k179(5))

Instructions requested by county on the subject of homeowners' possible ownership interest in dam due to their easements were not appropriate in their lawsuit to require county to repair dam after it had been designated owner by Environmental Protection Division (EPD) order; issue in case was, taking into consideration the property interest of the lake-front owners in the lake, how those designated by EPD as owners of the dam could comply with the EPD order to breach or repair the dam, and the issue was not whether others not designated as owners in the EPD order had interests in the dam that could qualify as ownership interests under the Safe Dams Act. West's Ga.Code Ann. § 12-5-370 et seq.

[14] Judgment 228 ⚡256(1)

228 Judgment

228VI On Trial of Issues

228VI(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings

228k256 Conformity to Verdict and Findings

Cases

228k256(1) k. In general. Most Cited

Cases

Judgment entered on jury verdict requiring county to repair dam should have required the repair of the dam so that it impounded a lake with a normal pool elevation of 1141, rather than 1140, feet above mean sea level (MSL); the evidence reflected a pool elevation of 1141 MSL prior to the emergency partial breach of the dam, and the issue for resolution was the action to be taken by the dam owners to comply with the Environmental Protection Division (EPD) order without diminishing the homeowners' property interest in their irrevocable easement. West's Ga.Code Ann. § 9-12-9.

**514 Terry E. Williams, & Associates, Terry E. Williams, Jason C. Waymire, Lawrenceville, Banks, Stubbs, Neville & Cunat, John R. Neville,

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Cumming, for appellants.

Miles, McGoff & Moore, Dana B. Miles, Larry A. Pankey, Kevin J. McDonough, Lynwood D. Jordan, Jr., Cumming, for appellees.

*215 BENHAM, Justice.

This case revolves around the legal effect of the property interests of lakefront property owners on the decision whether to breach or to repair the earthen dam that impounds the lake, as ordered by the Environmental Protection Division of the Georgia Department of Natural Resources, acting pursuant to the Georgia Safe Dams Act, OCGA § 12-5-370 et seq. **Forsyth County** appeals the judgment entered against it in a lawsuit brought by the lakefront homeowners in which the trial court directed a verdict that **Forsyth County** owned the earthen dam, and the jury, given the choice of requiring the **County** to repair the dam or to breach the dam, returned a verdict requiring the **County** to repair the dam.

The earthen dam was built several decades ago by a private entity in order to create a 21-acre lake which the developer bordered with residential homesites that were sold pursuant to a subdivision plat showing the lake area. After the earthen dam was built, **Forsyth County** paved a road across the top of it in the mid-1970s. In 1998, the Environmental Protection Division (EPD) sent notice of the dam's reclassification to "high-hazard" status to the county as a "partial owner of the dam."^{FN1} In 2002, the EPD director, concerned the dam was in danger of sudden and complete failure, directed the dam's owners * to lower the lake level by ten feet, decide whether to breach or repair the dam, and submit plans to EPD pursuant to the owners' decision to breach or to repair the dam. The **County** took immediate emergency action to alleviate the danger by digging a trench perpendicular to the dam across the county's road, which allowed the level of the lake to be reduced, and closed the county road. Those designated as owners of the dam appealed the EPD order to an administrative

law judge who concluded the EPD had established that the **County** was an owner of the ** dam.^{FN2} The **County** appealed the ALJ's decision to superior court which affirmed the decision in an order filed January 16, 2003.

FN1. Plaintiffs Roger and Karen Martin, Sawnee Lake F. & B. D., Inc. (a corporation that was administratively dissolved in 1988 by the Office of the Georgia Secretary of State), and Lynwood Jordan, one of the lakeside property owners, were also determined by the EPD to be partial owners of the dam under the Safe Dams Act.

FN2. The ALJ ruled that the EPD had established that the County and Lynwood Jordan were "owners" of the dam and that Sawnee Lake F. & B.D., Inc. was an administratively dissolved corporation. The ALJ granted summary judgment to Roger and Karen Martin on the issue of their purported partial ownership of the dam.

In February 2002, a month after the trench across the dam was dug and the road closed, the lakefront homeowners filed the instant action in which they sought, among other things, a declaratory judgment that the **County** owned the dam and a writ of mandamus ordering the **County** to assume ownership, repair, and maintenance of the dam. After the superior court affirmed the ALJ's decision finding the **County** to be an "owner" of the dam under the Safe Dams Act, the **County** filed in the instant action a counterclaim and cross-claim for declaratory judgment to determine the **County's** rights and obligations with respect to the homeowners should the **County** breach the dam pursuant to the EPD order.^{FN3} At the close of the evidence, the trial court directed a verdict against the **County** with regard to ownership of the dam and submitted to the jury the question of whether the **County** should be required to repair the dam or be permitted to breach the dam. Following the jury's verdict that the dam should be repaired, the superior court issued a judgment in which it ordered the **County** to

“rebuild and repair Pine Lake Dam in accordance with current EPD requirements so that the Dam will impound a lake with an elevation, at normal pool, of 1140 MSL and will impound a lake of approximately 21+/-acres.” The County was also ordered to pay nearly \$79,000 to the lakefront homeowners for the expenses of litigation, including attorney fees. The County appeals, contending the trial court erred in directing a verdict on the question of the ownership of the dam, in making several evidentiary rulings, and in ordering the County to pay appellees’ expenses of *217 litigation. The homeowners have filed a cross-appeal in which they contend the judgment of the trial court requiring an impounded pool with an elevation of 1140 feet MSL (“mean sea level”) does not conform to the jury verdict which they allege requires the dam to impound a pool with an elevation of 1141 feet MSL.

FN3. The County sought a declaration that breaching the dam would be an act done pursuant to the County’s police powers and that breach of the dam as an exercise of the County’s police powers would not subject the County to liability from the plaintiffs or Jordan, the homeowner who was also the cross-claim defendant, under theories of inverse condemnation, nuisance, or any other theory of liability.

1. The County unsuccessfully sought a directed verdict on plaintiffs’ claims for declaratory judgment, mandamus, and injunctive relief. Asserting the County is not the fee simple owner of the dam, it has no legal duty to repair the dam, and it is the lakefront homeowners who have the duty to repair their claimed easement, the County contends on appeal the trial court erred when it denied the County’s motion for directed verdict and directed a verdict against the County on its counterclaim and cross-claim for declaratory judgment.

[1] The issue in this case is not the ownership of the earthen dam in the usual sense of fee simple title ownership of real property. In the administrative action, the EPD determined that the condition of

the dam was such that it “may cause the sudden and complete failure of the Dam” and ordered those found to be the dam “owners” under the Safe Dams Act to repair or to breach the dam. The issue of the County’s ownership of the dam under the Safe Dams Act was litigated in the appeal of the administrative order, and the County was determined to be an “owner” of the dam for purposes of complying with the EPD order to repair or to breach the dam. In the case at bar, the issue presented was what effect the plaintiffs’ ownership of property adjacent to the lake formed by the dam had on whether to repair or to breach the dam, as required by the EPD order. The trial court correctly directed a verdict against the County on the issue of ownership because the issue of the County’s ownership interest requiring compliance with the EPD order was resolved against the County in the **516 earlier administrative action and judicial appeals thereof.

[2] As for the issue of the effect of the plaintiffs’ ownership of lakefront property on the decision whether to breach or repair the dam, the plaintiffs established they purchased their lots according to a subdivision plat which had a lake area designated on it and paid more for their lakefront lots than the purchase price for non-lakefront lots, thereby acquiring an irrevocable easement in the lake. *Walker v. Duncan*, 236 Ga. 331, 223 S.E.2d 675 (1976). See also *Higgins v. Odom*, 246 Ga. 309, 271 S.E.2d 211 (1980); *Patterson v. Powell*, 257 Ga.App. 336, 571 S.E.2d 400 (2002). The homeowners’ interest in the lake limited the legal ability of the County, as owner of the dam under the Safe Dams Act, to breach the dam. See *Dillard v. Bishop Eddie Long Ministries*, 258 Ga.App. 507(3), 574 S.E.2d 544 (2002). The County’s contention that the homeowners’ irrevocable interest in the lake necessarily extends to the dam and with that extension comes a *218 duty on the part of the homeowners to repair the dam, suggests the homeowners have an ownership interest in the dam under the Safe Dams Act. However, even if the homeowners’ irrevocable easement in the lake extends to the dam, the issue in the case at bar was

not whether there are additional entities with an ownership in the dam under the Safe Dams Act,^{FN4} but whether the homeowners' interest in the lake limited the options presented by the EPD to the parties the EPD had designated as having ownership interests in the dam that required them to take the action mandated by the EPD administrative order issued pursuant to the Safe Dams Act. Accordingly, the trial court did not err when it directed a verdict against the County on the plaintiffs' claims for declaratory judgment, mandamus, and injunctive relief.

FN4. In its order affirming the EPD Director's administrative order addressed to the County as an owner of the dam under the Safe Dams Act, the ALJ noted the EPD Director is not required to bring an action against all possible owners of a dam in order to hold any single owner to the standards set forth in the Act and the Dam Rules. [Cit.]. The question in this case, therefore, is not whether the Director has issued an Administrative Order to ALL possible owners of the dam, but rather whether the entities to whom the Director has issued an Administrative Order have any ownership interests in the dam thus subjecting them to regulation by EPD.

Lastly, the trial court did not commit reversible error when it denied a directed verdict to the County on its counterclaim and cross-claim for declaratory judgment. Since the jury was not asked to decide issues of inverse condemnation, nuisance, or other claims of County liability for damages purportedly caused when the County dug a trench across the dam in response to the EPD's demand for immediate action due to the danger the dam posed, the County was not harmed by the denial of a directed verdict.

2. The jury awarded plaintiffs \$78,899.28 as expenses of litigation and attorney fees after finding the County had caused the plaintiffs unnecessary trouble and expense, but had not been stub-

bornly litigious or acted in bad faith.^{FN5} See OCGA § 13-6-11. On appeal, the County contends public policy should prevent counties from being subject to damages under OCGA § 13-6-11, the trial court erroneously denied the County's motion for directed verdict on the issue since there was a bona fide controversy, and the evidence did not support the monetary award.

FN5. On the verdict form, the jury placed a check mark by "Has caused the plaintiff unnecessary trouble and expense," and drew lines through "Acted in bad faith" and "Has been stubbornly litigious," acting in accordance with the trial court's instruction to "put a check by that one that is there that you find, and mark through any that you don't find."

[3] (a) Citing this Court's decision in *MARTA v. Boswell*, 261 Ga. 427, 405 S.E.2d 869 (1991), involving an award of punitive damages, the County maintains that counties should not be subject to an award of *219 litigation expenses made pursuant to OCGA § 13-6-11 since governmental entities are not subject to awards designed to penalize or punish. The County misapprehends the purpose of an award of litigation expenses and attorney fees—it is not intended to penalize or punish, but to compensate an injured party for the costs incurred as a result of having to seek **517 legal redress for the injured party's legitimate grievance. *City of Warner Robins v. Holt*, 220 Ga.App. 794(1)(b), 470 S.E.2d 238 (1996). We decline to adopt the County's position that a governmental entity cannot be subject to an award of litigation expenses and attorney fees under OCGA § 13-6-11. See *Eastern Air Lines v. Fulton County*, 183 Ga.App. 891(4), 360 S.E.2d 425 (1987).

[4][5] (b) Expenses of litigation and attorney fees may be awarded pursuant to OCGA § 13-6-11 if the fact-finder determines the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense. "Questions concerning bad faith, stubborn li-

tigiousness, and unnecessary trouble and expense under OCGA § 13-6-11 are generally questions for the jury to decide.” *American Med. Trans. Group v. Glo-An*, 235 Ga.App. 464, 467(3), 509 S.E.2d 738 (1998). The County sought a directed verdict on the issue of litigation expenses and attorney fees, contending there was no evidence of bad faith or stubborn litigiousness and there was a reasonable dispute concerning the dam's ownership and any obligations the lake easement holders might have in conjunction with the dam's upkeep. As Division 1 makes clear, there was not a viable issue of the County's ownership interest in the dam under the Safe Dams Act in this trial since that issue was resolved in the administrative action. In denying the County's motion for directed verdict on the issue of attorney fees and expenses of litigation, the trial court opined the jury could find the County had been stubbornly litigious in its efforts to re-litigate the issue of its ownership interest in the dam. Inasmuch as there was evidence from which the jury could have concluded the County's actions fell within OCGA § 13-6-11, the trial court did not err when it denied the County's motion for directed verdict. *Assaf v. Coker*, 157 Ga.App. 432(5), 278 S.E.2d 82 (1981).

[6][7] (c) As stated previously, the jury awarded attorney fees and expenses of litigation to plaintiffs after finding the County had caused them unnecessary trouble and expense. When an award of expenses of litigation and attorney fees is factually supportable, the amount of the award is limited to “the amount of attorney fees attributable solely to the claim on which [plaintiffs] prevailed....” *United Cos. Lending Corp. v. Peacock*, 267 Ga. 145, 147(2), 475 S.E.2d 601 (1996); *St. Paul Fire & c. Ins. Co. v. Clark*, 255 Ga.App. 14(5)(a), 566 S.E.2d 2 (2002). The trial court directed verdicts in favor of the *220 County on all of plaintiff Charles Wester's claims and on all plaintiffs' claims for punitive damages, as well as on all plaintiffs' claims for damages based on inverse condemnation and nuisance. Through the testimony of their attorney, plaintiffs presented the attorney's itemized bill of

\$58,899.28 that ran from January 28, 2002, when the attorney was first contacted by the clients, through the week before trial in mid-April 2004. It did not include the attorney's time spent in trial or in pre-trial preparation, and the attorney estimated the bill for the trial to be \$20,000 (five days of trial at \$4,000/day). Neither the testimony nor the evidence distinguished the attorney fees and costs expended on the claims on which the plaintiffs prevailed from those which were decided adversely to plaintiffs. Accordingly, we vacate the award and remand the case to the trial court with direction to conduct a hearing on the award of expenses of litigation and attorney fees and limit the award to the amount attributable to the claims on which plaintiffs prevailed. *United Cos. Lending Corp. v. Peacock*, supra, 267 Ga. 145(2), 475 S.E.2d 601; *St. Paul Fire & c. Ins. Co. v. Clark*, supra, 255 Ga.App. 14(5)(a), 566 S.E.2d 2. See also *R.T. Patterson Funeral Home v. Head*, 215 Ga.App. 578(5), 451 S.E.2d 812 (1994) (failure of defendant to cross-examine plaintiffs' counsel with regard to distinguishing fees charged on various theories of liability when plaintiffs did not prevail on all theories did not affect appellate court's decision to reverse the award and remand it to the trial court for an evidentiary hearing).

(d) Plaintiffs assert remand is not necessary because this Court determined in *Jennings v. McIntosh County Bd. of Commrs.*, 276 Ga. 842, 583 S.E.2d 839 (2003), that a party is entitled to all fees in a mandamus action even though the party did not receive all the relief sought. However, the attorney fees at issue in *Jennings* were not awarded **518 pursuant to OCGA § 13-6-11, but pursuant to this Court's decision in *Gwinnett County v. Yates*, 265 Ga. 504(2), 458 S.E.2d 791 (1995), that a trial court may require a county to pay the reasonable attorney fees incurred by a successful county official who was not represented by the county attorney due to a conflict of interest. See also OCGA § 45-9-21 (e)(2). *Jennings's* request for attorney fees pursuant to OCGA § 13-6-11 was not addressed. *Jennings v. McIntosh Bd. of Commrs.*, 276 Ga. at 847, n. 7, 583

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S.E.2d 839. Inasmuch as plaintiffs are not county officials who were entitled to representation by the county attorney but could not be represented by the county attorney due to a conflict of interest, they cannot rely on this Court's holding in *Jennings*.

[8] 3. The County maintains the trial court erred when it denied the County's motion in limine concerning the admission of the EPD order and the rulings of the ALJ and the superior court in the County's appeals thereof, and compounded the error when it admitted the documents into evidence. The County also contends the trial court *221 erred in denying its motion in limine and admitting into evidence the minutes from the Board of Commissioners' October 1975 meeting.

[9][10][11] A motion in limine is a pretrial method of determining the admissibility of evidence.... By its very nature, the grant of a motion in limine excluding evidence suggests that there is no circumstance under which the evidence under scrutiny is likely to be admissible at trial. [Cit.] In light of that absolute, the grant of a motion in limine excluding evidence is a judicial power which must be exercised with great care.

Andrews v. Wilbanks, 265 Ga. 555, 556, 458 S.E.2d 817 (1995). A trial court's ruling on a motion in limine is reviewed for abuse of discretion. See *Johnson v. State*, 275 Ga. 650(3), 571 S.E.2d 782 (2002); *Presswood v. Welsh*, 271 Ga.App. 459, 461(3), 610 S.E.2d 113 (2005). Inasmuch as all the documents at issue are evidence that the County had an ownership interest in the dam ^{FN6} and the ownership of the dam was an issue in the case at bar when the motion in limine was decided and the evidence admitted, we cannot say the trial court abused its discretion in refusing to exclude the evidence. Moreover, if any of the trial court's rulings concerning evidence that went to the ownership of the dam was erroneous, that error was rendered harmless by the trial court's direction of a verdict against the County on the issue of the dam's ownership. See Division 1, *supra*.

FN6. The minutes from the Board of Commissioners' October 1975 meeting reflected the Board's action "to acknowledge the previous Commissioners' acceptance of the dam," and the EPD order and the judicial rulings entered on the appeals therefrom reflected a determination that the County had an ownership interest in the dam for purposes of the Safe Dams Act.

[12][13] 4. The County contends the trial court's instructions to the jury erroneously included charges on the use of a writ of mandamus to enforce a county's duty to repair roads and the statutory procedure a county must follow to abandon a county road. Since the duty to repair the road was made an issue in the case, as is reflected in the jury verdict,^{FN7} giving jury instructions on the subject was not error. The County also finds fault with the trial court's failure to include the County's requested instructions on the duty of an easement owner, rather than the servient tenement owner, to repair and the requirement that a dam owner's duty to maintain for the benefit of others must be preceded by an express or specific covenant or agreement. The issue in the case at bar was, taking into consideration the property interest of the lakefront owners in the lake, how those *222 designated by EPD as "owners" of the dam could comply with the EPD order to breach or repair the dam. The issue was not whether others not designated as owners in the EPD order had interests in the dam that could qualify as ownership interests under the Safe Dams Act. Accordingly, jury instructions on the subject of the homeowners' possible ownership interest in the dam were not appropriate, and the trial court did not err when it declined to give them.

FN7. The verdict form offered the jury a choice of returning a verdict requiring that the dam and road be repaired or requiring that the dam be breached and a county road be constructed in the immediate area of the former dam.

**519 5. Inasmuch as the judgment entered

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against the County is affirmed, we need not address the County's contention that it is entitled to a grant of summary judgment should the judgment entered on the directed verdict and the jury's verdict be reversed.

[14] 6. We next address the cross-appeal in which the lakefront homeowners contend the judgment requiring the repair of the dam to impound a lake with a pool elevation of 1140 MSL does not conform to the jury's verdict. See OCGA § 9-12-9, which states "Judgment and execution shall conform to the verdict." The jury returned a verdict requiring "Repair of the dam and road in conformity with requirements as permitted by the Georgia [EPD]." Based on the jury verdict, the homeowners submitted to the trial court a proposed judgment requiring a dam that impounds a lake with an elevation of 1141 MSL, the elevation reported by engineers employed as consultants by the County in 1999 as the elevation at which the lake has a normal pool area of approximately 21 acres, and described by the same consultants as the "current pool level" in 2000. The County proposed a judgment requiring a dam that impounds a lake with an elevation of 1139 MSL, relying on a repair design submitted in 1999 by its engineering consultants that would result in a lake with a normal pool elevation of 1139 MSL, which the consultants described as "approximately two feet lower than what has previously existed at the subject site." ^{FN8} Since the evidence reflected that the lake had a pool elevation of 1141 MSL prior to the emergency partial breach of the dam in 2002, and the issue for resolution in this case was the action to be taken by the dam "owners" to comply with the EPD order without diminishing the homeowners' property interest in their irrevocable easement, the judgment entered on the jury verdict in favor of the homeowners must require the repair of the dam so that it impounds a lake with a normal pool elevation of 1141 MSL. Accordingly, that portion of the judgment specifying the normal pool elevation of the lake is vacated and the trial court is directed on remand to enter a judgment specifying the normal

pool elevation of the lake to be 1141 MSL.

FN8. We note that the subdivision plat from which springs the homeowners' irrevocable easement in the lake does not contain the pool elevation of the lake.

**223 Judgment affirmed in part and vacated and remanded in part in Case No. S04A2031. Judgment vacated in part and remanded with direction in Case No. S04X2032.*

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