

PROCEDURES FOR CONDEMNATION
AND REGULATION OF LAND USE:
CONSTITUTIONAL RESTRICTIONS

GEORGIA ASSOCIATION OF ZONING ADMINISTRATORS

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PROCEDURES FOR CONDEMNATION BY LOCAL GOVERNMENTS

I. DEFINITIONS

- A.** “Blighted property” means any developed property that is:
- 1.** Conducive to ill health, transmission of disease, infant mortality, or crime in the immediate proximity of the property; and
 - 2.** It must also meet 2 of these 6 conditions:
 - 1)** It has uninhabitable, unsafe, or abandoned structures;
 - 2)** It has inadequate provisions for ventilation, light, air, or sanitation;
 - 3)** It is an imminent harm to life or other property (upon notice to the owner to correct);
 - 4)** It is a Superfund site per the EPA;
 - 5)** There is repeated illegal activity on the property; or
 - 6)** The maintenance of the property is below state, county, or municipal codes for at least one year after notice of the code violation.
 - 3.** Property is not “blighted” due solely to esthetic conditions. O.C.G.A. § 22-1-1(1)
- B.** “Condemnor” includes any county or municipality.
- C.** “Economic development” means any economic activity to increase tax revenue, tax base, or employment or improve general economic health, when the activity does not result in:
- 1.** transfer of land to public ownership;
 - 2.** transfer of property to a public utility;
 - 3.** lease of property to private entities that occupy an incidental area within a public project; or
 - 4.** the remedy of blight.

D. “Public use” means:

1. the possession, occupation, or use of the land by the general public or governmental entities;
2. the use of land for public utilities;
3. roads, defenses, or the providing of channels of trade or travel;
4. the acquisition of property where title is clouded due to the inability to identify or locate all owners of the property;
5. the acquisition of property by consent of all owners; or
6. the remedy of blight.
7. It does not mean merely economic development. O.C.G.A. § 22-1-1(9)

E. “Public utility” means:

1. any line, facility, or system for producing, transmitting, or distributing:
 - 1) communications, power, electricity, light, heat, gas, oil products, water, steam, clay, waste, storm water not connected with highway drainage, publicly owned fire and police and traffic signals and street lighting systems, common carriers and railroads.
2. Also, any other entity which owns or manages a utility.

II. EMINENT DOMAIN IS THE RIGHT OF THE STATE, TO REASSERT ITS DOMINION OVER ANY PORTION OF THE SOIL OF THE STATE

A. The General Assembly may exercise the right of eminent domain:

1. through the officers of the state;
2. through corporations; or
3. by means of individual enterprise. O.C.G.A. § 22-1-4.

- B. The power of eminent domain may only be used for a public use.
 - 1. Whether the condemnation is for “Public use” is determined by the courts and the condemnor bears the burden of proof. O.C.G.A. § 22-1-11.
 - 2. Condemned property must remain in public use for at least 20 years after condemnation. O.C.G.A. § 22-1-2(b)
- C. If property is not put to a public use within five years, the former property owner may apply for a reconveyance or additional compensation (except Title 32 cases). O.C.G.A. § 22-1-2(c)

III. COMPENSATION

- A. Just compensation must be provided PRIOR to the exercise of eminent domain.
 - 1. An exception exists for cases of extreme necessity. O.C.G.A. § 22-1-5
- B. The value of the condemned property may be determined through lay or expert testimony.
 - 1. Daubert does not apply to expert testimony concerning valuation. O.C.G.A. § 22-1-14.

IV. HOW TO CONDEMN § 22-1-9

- A. The condemning authority shall make every reasonable effort to acquire the property by negotiation. O.C.G.A. § 22-1-9
 - 1. Prior to negotiation, if a fee simple interest is sought:
 - 1) The real property must be appraised. O.C.G.A. § 22-1-9(2)
 - (1) The owner has the option of accompanying the appraiser during his or her inspection of the property,
 - (a) except for property with a low fair market value; or a donation of the property by the owner.

- 2) The condemnor must make a prompt offer to buy the property for just compensation. O.C.G.A. § 22-1-9(3)
 - (1) The offer must be equal to/greater than the condemnor's appraisal.
 - (2) The owner must be provided a written basis for the appraised amount.
 - (3) The condemnor must consider alternative sites suggested by the owner.
 2. The owner need not surrender possession of real property before the condemnor pays the purchase price or deposits with the court the appraised amount.
 3. The condemnor must allow an occupier on the property 90 days' written notice before the occupier must move.
 4. If the condemnor allows a tenant to remain on the property (such as the owner), the amount of rent required cannot exceed the fair rental value.
 5. A person may still donate property subject to condemnation so long as he is fully informed of his rights, i.e., "friendly condemnations" are still allowed.
- B.** The condemnor must not act in bad faith in order to compel an agreement on the price to be paid for the property. O.C.G.A. § 22-1-9
1. The condemnation cannot be used as a coercive means to lower the price.
 2. The condemnor should initiate formal condemnation proceedings, not force the owner to file for an inverse condemnation.
- C.** The exercise of condemnation. O.C.G.A. § 22-1-10. Prior to exercising the power of eminent domain, a governmental condemnor shall:
1. place a sign on the right-of-way of the property to be condemned 15 days before the exercise of eminent domain is to be considered.
 - 1) The sign must state the time, date, and place of the public meeting to consider the condemnation.

2. personally serve the property owner with notice of the meeting not less than 15 days before the meeting.
 - 1) The notice must contain a statement of the rights that the condemnee possesses including but not limited to:
 - (1) the right to notice, damages, hearing, and appeal of any award entered by the special master as described in this title;
 - (2) the right to bring a motion pursuant to O.C.G.A. § 22-1-11; and
 - (a) i.e., the court must determine if the condemnation is for a public use and the condemnor has the authority to condemn
 - (3) a sample motion. O.C.G.A. § 22-1-10(d)
3. If personal service is unsuccessful, it can be mailed by statutory overnight delivery to the property owner, return receipt requested.
4. Cooling off period: The condemnation cannot be filed until 30 days after the notice has been served on the owner. O.C.G.A. § 22-1-10.1
5. Publish notice of the meeting in the county legal organ,
 - 1) but not in the legal notices section of such newspaper.
6. Commence the meeting after 6:00 P.M.
7. Pass a resolution that specifically and conspicuously delineates each parcel to be affected.
8. This does not apply to acquisitions for construction and improvement of electric transmission lines, certain railroad lines (O.C.G.A. § 46-8-121) or highways under Title 32.
 - 1) The property owner may waive any of his or her rights.
 - 2) There is also an exception for a declared emergency. O.C.G.A. § 22-1-10.1(b)

V. PROCEDURAL MATTERS. O.C.G.A. § 22-1-11

- A. The court determines:
1. whether the exercise of the power of eminent domain is for a public use;
 2. whether the condemning authority has the legal authority to exercise the power of eminent domain; and
 3. whether to stay other pending condemnation proceedings (such as a hearing before a special master.)
 4. This determination comes before the vesting of title in the condemnor and upon motion of the condemnee (or within ten days of the entry of the special master's award.)

Illustrative case: A property owner sued the city seeking to prevent it from taking surveys on her property for the purpose of installing a city sewer. The property owner argued that the city must first show that the sewer was a lawful exercise of its power and that this was a public use. The court ruled that O.C.G.A. § 22-1-11 was not applicable before the initiation of a condemnation action. Fox v. City of Cumming, 289 Ga.App. 803 (2008).

- B. Condemnor is still the exclusive judge of need and necessity of condemnation. O.C.G.A. § 22-2-102.1
- C. These requirements are retroactively applied to proceedings filed on or after February 9, 2006 where title has not vested in condemnor.

VI. PROPERTY OWNER'S REIMBURSEMENT

- A. The property owner (condemnee) is entitled to reimbursement for his reasonable costs, including attorney's fees, engineering fees, and appraisal fees if:
1. the final judgment is that the condemning authority cannot acquire the real property by condemnation; or
 2. the condemnor abandons the condemnation. O.C.G.A. § 22-1-12

- B.** Besides any other damages, any condemnee that is displaced is entitled to:
1. moving expenses for family, business and personal property;
 2. actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation; and
 3. such other relocation expenses as authorized by law.
 4. With the consent of the condemnee, the condemnor may provide alternative property as compensation. O.C.G.A. § 22-1-13

VII. APPOINTMENT OF A SPECIAL MASTER: THE CONDEMNOR MAY FILE A PETITION SEEKING A SPECIAL MASTER. O.C.G.A. § 22-2-102

- A.** That petition is to be presented to the superior court judge at or before the time of filing the petition.
- B.** The judge sets a hearing for between 10 and 30 days of the petition to be held in court, in chambers or by phone.
1. After this hearing, the judge shall order the condemnor and those with a claim in the property to a hearing before the special master to take place between 30 and 60 days from this Order.
 2. The hearing may be continued up to 5 extra days.
- C.** At the hearing before the special master, the special master is to ascertain the value of the property.
1. The special master is to issue an award within 3 days of the hearing; and
 2. that award is to be served on all parties with a certificate of service filed with the court.
- D.** At any time during these proceedings, the condemnee can have a hearing in the superior court concerning whether the condemnation is for public use, and the condemnor has the authority to condemn.
1. The condemnee does not have to seek a special master award prior to seeking the hearing in superior court.

- E.** The pay of the special master is left to the discretion of the superior court. O.C.G.A. § 22-2-106
- F.** Appeal – an appeal of the special master award must be filed within 10 days (plus 3 days mailing time) of the award.
 - 1.** The condemnee has a right to a jury trial on the issue of compensation during the next term of court.
 - 2.** The condemnee may waive the right to a jury trial on value to be held at the next term of court. O.C.G.A. § 22-2-112.

CONSTITUTIONAL CLAIMS

Taking under Georgia Constitution.

The issue is the constitutionality of the existing zoning, not whether the proposed zoning is constitutional or provides a higher and better use.

In a zoning case, the most common challenge is to the constitutionality of the existing zoning classification under a takings analysis. DeKalb County v. Dobson, 267 Ga. 624, 482 S.E.2d 239 (1997).

The zoning ordinance is presumptively valid. Gradous v. Bd. of Commr's of Richmond County, 256 Ga. 469, 471, 349 S.e.2d 707 (1986). "The presumption that a governmental zoning decision is valid can be overcome only by a plaintiff landowner's showing by clear and convincing evidence that the zoning classification is a significant detriment to him, and is insubstantially related to the public health, safety, morality and welfare. Only after both of these showings are made is a governing authority required to come forward with evidence to justify a zoning ordinance as reasonably related to the public interest. If a plaintiff landowner fails to make a showing by clear and convincing evidence of a significant detriment and an insubstantial relationship to the public welfare, the landowner's challenge to the zoning ordinance fails." DeKalb County v. Dobson, 267 Ga. 624, 626, 482 S.E.2d 239 (1997) Id.

The significant detriment can be difficult to show. See Gwinnett Co. v. Davis, 271 Ga. 158, 517 S.E.2d 324 (1999) (evidence that a landowner would suffer economic loss without rezoning was insufficient to show substantial detriment). There are a number of cases where the courts found a property has not suffered a significant detriment. "[A] significant detriment to the landowner is not shown by the fact that the property would be more valuable if rezoned, or by the fact that it would be more difficult to develop the property as zoned than if rezoned." DeKalb v. Dobson, 267 Ga. at 626. Delta Cascade Partners, II v. Fulton Co., 260 Ga. 99, 100, 390 S.E.2d 45 (1990). "[E]vidence only that it would be difficult to develop the property under its existing zoning or that the owner will suffer an economic loss unless the property is rezoned is not sufficient to support the legal conclusion that the owner suffers a significant detriment." Gwinnett Co. v. Davis, 268 Ga. 653, 654, 492 S.E.2d 523 (1997); see, Holy Cross Lutheran Church, Inc. v. Clayton Co., 257 Ga. 21, 23, 354 S.E.2d 151 (1987).

The decisions recognize that increasing density or intensity almost always increases value, but that does not prove that the current zoning is unconstitutional. "[I]n zoning challenges, the pertinent question is not whether rezoning would increase the value of property, but rather whether the existing zoning classification serves to deprive a landowner of property rights without due process of law. Hence, the evidence

that the subject property would be more valuable if rezoned border on being irrelevant.” DeKalb Co. v. Dobson, 267 Ga. at 626; see, DeKalb Co. v. Chamblee Dunwoody Hotel Partnership, 248 Ga. 186, 190, 281 S.E.2d 525 (1981). The notion that a property is not zoned for its “highest and best use,” a concept appraisers like to use, does not show that the existing zoning imposes a significant detriment. Gwinnett Co. v. Davis, 268 Ga. at 654. Furthermore, “the fact that the property currently has no economic return to the owners is immaterial; by definition, undeveloped property never offers owners any economic return.” DeKalb Co. v. Chamblee Dunwoody Hotel Partnership, 248 Ga. at 190. All this is not to say that the significant determinant requirement is an insurmountable burden; courts can and have found a significant detriment on numerous occasions, but the property owner will need to be prepared to put forth a detailed and compelling case on this point.

A case to discuss the concept of significant detriment is Legacy Inv. Group, LLC v Kenn, 279 Ga. 778, 621 S.E.2d 453 (2005), which was on appeal from the grant of the local government's motion for summary judgment. There, the property owner had paid about \$12,000 per acre for land zoned for agricultural land, with the presumption that it would be rezoned for residential uses. When the rezoning was denied, the property owner appealed, arguing that it could not be developed in an economically feasible fashion based upon the purchase price. The superior court found that the fact that the property owner overpaid for the property did not mean that the zoning ordinance was a significant detriment to the property. On appeal, the Supreme Court reversed because the evidence was that the property would have to be purchased for no more than just over \$5,000 per acre in order to be developed in an economically viable manner, and the county's appraiser said the property was worth between \$5,000 and \$9,000 per acre. Thus, giving the non-movant the benefit of all the inferences from the evidence, the property would have to be purchased for several thousand dollars less per acre than it was worth in order to be developed in an economically feasible manner. The court also mentioned that the evidence was also that the property was not suited for agricultural uses; while not discussed much by the court, this would seem to be an important piece of evidence.

In City of Tyrone v. Tyrone, LLC, 275 Ga. 383, 565 S.E.2d 806 (2002), the Supreme Court found that part of a property subject to the appeal of a rezoning denial suffered a significant detriment, but part did not. The property in question was partially zoned for agricultural-residential uses, and partly zoned for office-institutional uses. The property owner wanted it all zoned for commercial uses. The court held that there was evidence that the portion zoned for agricultural-residential could not be developed as zoned, but there was no such evidence as to the office-institutional portion, and so the trial court erred in finding a significant detriment to that portion of that property. In reaching this conclusion, the Supreme Court discussed the fact that the owner had not tried to develop the property for office-institutional uses, and the fact that there was evidence of a need for such property in the community and region. From these cases,

we can see that the evidence needed is not that the property can make more money with the rezoning, but that the property is not suited for development under the existing zoning classification, such that it cannot be used in an economically feasible manner under the existing zoning classification.

After a plaintiff shows significant detriment, he still needs to prove that the current zoning is insubstantially related to the public health, safety, morality and welfare. DeKalb Co. v Dobson, 267 Ga. at 626; Browning v. Cobb County, 259 Ga. 430, 383 S.E.2d 126 (1989) (showing of detriment outweighed by public benefit of present zoning classification). This requires proof that there is no logic to the existing zoning classification. It can be shown by pointing to the incompatibility of the subject zoning with the neighborhood or the changing character of the neighborhood. However, it can be difficult to prove if the property is simply on the boundary of the zoning district, which is commonly referred to as a “fringe area.” See Holy Cross Lutheran Church v. Clayton County, 257 Ga. 21, 354 S.E.2d 151 (1987).

The degree of consistency between the existing and proposed zoning and the comprehensive or future land plan is a common element in this analysis. In City of Atlanta v. TAP Associates, 273 Ga. 681, 683, 544 S.E.2d 433 (2001), the court placed great emphasis on the fact that the existing zoning was consistent with the land use plan of Atlanta: “[T]he city’s zoning decision is consistent with the policies and long-range planning goals for the area as adopted in the comprehensive development plans and the Buckhead transit station report....The fact that TAP presented evidence that its proposed mixed-use development would also protect the single-family neighborhood is irrelevant. The issue is not whether the city could have made a different decision or better designation in zoning TAP’s property, but whether the choice that it did make benefits the public in a substantial way.” 273 Ga. at 685. Thus, if an existing zoning classification is consistent with the comprehensive plan, it is more likely to be upheld.

Takings claims are challenging to prove under Georgia law, but under federal law they are even more so. Federal courts have held that the property owner must show that the property has been deprived of all economically viable use. Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1072 (11th Cir. 1996). Cobb County v. McColister, 261 Ga. 876, 413 S.E.2d 441 (1992). Federal takings claims are generally not ripe unless the state has failed to provide a remedy. A federal claim cannot ripen if the state provides method of redress for a taking without just compensation, and the federal courts have held that Georgia provides such a remedy. See Bickerstaff Clay Products Co., Inc. v. Harris County, Ga., 89 F.3d 1481, 1491 (11th Cir. 1996). Because of these holdings, the aggrieved property owner will normally bring the takings claim in superior court.