

NUTS & BOLTS OF LOCAL GOVERNMENT LAW

by

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INTRODUCTION

Zoning law, like most areas of the law, is characterized by issues and rules that are peculiar to it alone. It is an area of the law defined by distinct burdens of proof, short time frames, and judicial mandates, that, if not complied with, can be fatal to your case. This paper is intended to discuss these peculiarities, so that they can be properly addressed.

A. GENERAL LEGAL THEORY

1. Substantive zoning power is delegated to local governments (i.e., municipalities and counties) by the Georgia Constitution.¹ The zoning power, in Georgia and in most other States, is considered to be derived from the police power to provide for the public health, safety and welfare. The Georgia Constitution reserved to the General Assembly the authority to impose procedures on the exercise of the zoning power, and it has done so in the Zoning Procedures Law (ZPL).²

¹ Georgia Constitution of 1983, Art. 9, Sec. 2, Para. 4.

² O.C.G.A. Title 36, Chapter 66; see Little v City of Lawrenceville, 272 Ga. 340, 528 S.E.2d 515 (2000).

2. The procedure required by the ZPL must be strictly followed, or any resulting zoning decision will be invalid.³ The ZPL requires public notice of a zoning decision and a public hearing. Local ordinances often require additional procedures.
3. The act of zoning by a local government (including rezoning) is legislative in nature and the adoption of a zoning ordinance is presumed valid.⁴
4. Under the Georgia Constitution, the issue of takings is a balancing test, balancing the detriment to landowner with the benefit to the health, safety and welfare of the public.⁵

³ Tilley Properties, Inc. v. Bartow County, 261 Ga. 153, 401 S.E.2d 527 (1991). McClure v. Davidson, 258 Ga. 706, 373 S.E.2d 317 (1988).

⁴ Gradous v. Board of Commissioners of Richmond County, 256 Ga. 469, 349 S.E.2d 707 (1986). Olley Valley Estates, Inc. v. Fussell, 232 Ga. 779, 208 S.E.2d 801 (1974).

⁵ Barrett v. Hamby, 235 Ga. 262, 219 S.E.2d 399 (1975). DeKalb County v. Dobson, 267 Ga. 624, 482 S.E.2d 239 (1997).

B. TRIAL AND APPEAL OF ZONING CASES

1. 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.⁶

2. A property owner who sues to challenge the failure of a local government to rezone property must file suit within thirty days of the final decision by the local government.⁷ The Courts have held that the 30-day clock begins to run from the time the rezoning decision is reduced to writing, which may be done by letter, by resolution or ordinance, or by minutes reflecting the outcome of the vote.⁸ Such

⁶ DeKalb County v. Dobson, 267 Ga. 624, 482 S.E.2d 239 (1997).

⁷ Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981).

⁸ Chadwick v. Gwinnett County, 257 Ga. 59, 354 S.E.2d 420 (1987).

minutes are commonly not adopted until the next regularly-scheduled meeting.

3. Constitutional challenges to a local government legislative decision cannot be brought for the first time in superior court. Instead, constitutional objections must be raised before the local government governing body. The courts do not require great specificity in these challenges.⁹
4. Appeals of rezoning decisions are de novo reviews. Review is not on the record established before the local government, and new evidence can be introduced at a bench trial. Writ of certiorari is not a proper method to appeal rezoning decisions.¹⁰
5. Appeals to the Superior Court from local government administrative (quasi-judicial) zoning decisions are considered judicial reviews on the record. Examples are applications for variances or permits. This

⁹ Ashkouti v. City of Suwanee, 271 Ga. 154, 516 S.E.2d 785 (1999).
DeKalb County v. Bremby, 252 Ga. 510, 314 S.E.2d 900 (1984).

¹⁰ Dougherty County v. Webb, 256 Ga. 474, 350 S.E.2d 457 (1986).
Kohl v. Manning, 117 Ga.App. 398, 160 S.E.2d 666 (1968).

does not include special use permits because these are specifically defined by the Zoning Procedures Law to be legislative decisions.

Writ of certiorari is an acceptable method to appeal, as is mandamus.

This means that the property owner, and the local government, must put up its case before the local government.¹¹ In a lawsuit challenging such a local government decision, discovery is not appropriate.¹²

6. Appeals in zoning cases are always by application, even if O.C.G.A. § 5-6-34 suggests the appeal should be a direct appeal (i.e., a mandamus petition). The Supreme Court takes few zoning appeals. Typically zoning cases go to the Supreme Court because they involve constitutional questions. This means the superior court will frequently be the only court to review the local government decision.¹³

¹¹ Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995).
Beugnot v. Coweta County, 231 Ga.App. 715, 500 S.E.2d 28 (1998).

¹² RCG Properties, LLC v. City of Atlanta Bd. of Zoning Adjustment, 260 Ga.App. 355, 579 S.E.2d 782 (2003).

¹³ O.S. Advertising Corp of Georgia, Inc. v. Rubin, 267 Ga. 723, 482 S.E.2d 295 (1997).

C. CHALLENGES BY NEIGHBORS

1. Neighboring property owners who challenge a rezoning of adjacent or nearby property must show fraud, corruption or manifest abuse of zoning power to reverse the local government's rezoning decision.¹⁴
2. "It is important to keep in mind that the governing authority has approved the zoning change, thereby giving its permission to the landowner to use the property as the landowner desires. It is also important to keep in mind that we deal now with the right or power of neighbors to deny to the landowner the right to use the property as the landowner desires and as approved by the governing authority."¹⁵
3. Neighbors must satisfy the "substantial interest-aggrieved citizen" test. Plaintiffs must have substantial interest in the decision and suffer some special damage or injury not common to all similarly situated property owners.¹⁶

¹⁴ Cross v. Hall County, 238 Ga. 709, 235 S.E.2d, 379 (1977).

¹⁵ Lindsey Creek Area Civic Assoc. v. Columbus, 249 Ga. 488 at 490, 292 S.E.2d 61 (1982).

¹⁶ Massey v. Butts County, 281 Ga. 244, 637 S.E.2d 385 (2006).

4. Civic associations alone do not have standing, but must rely upon the standing of individual members.¹⁷
5. Testimony about increasing traffic and other inconvenience may not be sufficient. Reduction in value of property, and intrusions of noise, odor and privacy, can suffice to provide standing. Adjoining property owners who bear the brunt of the change normally should have standing.¹⁸

D. FEDERAL LAW ON ZONING

1. The Federal takings test is more difficult than the Georgia test. It requires a showing that the property owner has been deprived of all economic use prior to a taking being found.¹⁹

¹⁷ Macon-Bibb County Planning and Zoning Commission v. Vineville Neighborhood Assoc., 218 Ga.App. 668, 462 S.E.2d 764 (1995).
Lindsey Creek Area Civic Assoc. v. Columbus, 249 Ga. 488, 292 S.E.2d 61 (1982).

¹⁸ DeKalb County v. Wapensky, 253 Ga. 47, 315 S.E.2d 873 (1984).
AT & T Wireless PCS, Inc. v. Leafmore Forest Condominium Assoc. of Owners, 235 Ga.App. 319, 509 S.E.2d 374 (1998).

¹⁹ Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1072 (11th Cir. 1996).
Baytree of Inverrary Realty Partners v. City of Lauderdale Lakes, 873 F.2d 1407 (11th Cir. 1989). Cobb County v. McColister, 261 Ga. 876, 413 S.E.2d 441 (1992).

2. A federal takings claim is not ripe unless the State has failed to provide a remedy. A federal claim cannot ripen if the State provides a method of redress for a taking without just compensation.²⁰ Nor does a federal takings claim ripen if no final decision has been rendered. The federal court cannot determine if there has been a taking if it cannot determine what use can be made of the property. If a variance can be applied for, or the property owner has not sought to develop his property under the current zoning, his claim may not be ripe.²¹
3. Certain types of uses are subject to protection by federal law. In such cases, the federal statute may provide an enforcement mechanism; otherwise, 42 USC § 1983 will apply.
4. Zoning regulations affecting people with a disability must satisfy the Fair Housing Act, the Fair Housing Amendments Act of 1988 and the

²⁰ Bickerstaff Clay Products Co., Inc. v. Harris County, Ga., 89 F.3d 1481, 1491 (11th Cir. 1996).

²¹ MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). Reahard v. Lee County, 30 F.2d 1412, 1215 (11th Cir. 1994).

Americans with Disabilities Act.²² A zoning ordinance that places burdens on residences of, and institutions serving, people with disabilities, will be closely scrutinized. A common example is a special use permit requirement for personal care homes.

5. Land use ordinances regulating based upon the religious nature of a use must satisfy the Free Exercise Clause of the First Amendment and also the Religious Land Use and Institutionalized Persons Act of 2000.²³ Courts will look to whether the zoning regulation places a substantial burden on religious exercise or whether it discriminates against religious uses. If so, the Court will apply the strict scrutiny test: whether the regulation is the least restrictive means of achieving a compelling governmental interest.

²² Pack v. Clayton County, (Not published, 1993 WL 837007)(N.D. Ga., 1993), affirmed at 47 F.3d 430 (11th Cir, 1995); Open Homes Fellowship, Inc. v. Orange County, 325 F.Supp.2d 1349 (M.D. Fl., 2004); and City of Cleburne v. Cleburne Living Center, 105 S.Ct. 3249 (1985).

²³ 42 USC § 2000cc; Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 at 1227 (11th Cir., 2004); Konikov v. Orange County, Florida, 410 F.3d 1317 (11th Cir., 2005); Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County. 450 F.3d 1295 (11th Cir. 2006).

6. A very substantial body of First Amendment case law has evolved around adult entertainment and zoning regulation thereof.²⁴
7. Similarly, a substantial body of First Amendment case law surrounds zoning regulation of signs, including billboards and outdoor advertising. Generally speaking, an ordinance that regulates based upon the content of signs will be subject to strict scrutiny.²⁵

E. ADDITIONAL LAND USE ISSUES

1. Vested rights versus non-conforming uses: A vested right is a right to establish a use that a person acquires by acting in reliance of an existing ordinance. An example would be applying for a building permit under an existing zoning ordinance. A non-conforming use is one that has been rendered illegal by the passage or amendment of a land use regulation. A property owner's vested rights to use property in a certain way may not be infringed upon without the owner's

²⁴ Zibtluda, LLC v. Gwinnett County, Ga. ex rel. Bd. of Com'rs of Gwinnett, 411 F.3d 1278 (11th Cir, 2005).

²⁵ See generally Tanner Advertising Group, LLC v. Fayette County, Georgia, 451 F.3d 777 (11th Cir., 2006); Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir., 2005).

consent.²⁶ Vested rights are non-transferable, however, because selling the property is considered a consenting action. Non-conforming uses can apparently be regulated and even eventually phased out in a reasonable time frame, although there is not yet much Georgia case law on this issue.²⁷

2. Improperly issued permits are void, and void permits do not vest rights, even if they have been relied upon and money has been expended. Seemingly unjust results can occur if property owners rely on statements from clerks or even permits issued in violation of the ordinance.²⁸
3. Where a city annexes property, the county may make an objection to the proposed zoning which must be resolved before the annexation is

²⁶ W.M.M. Properties, Inc. v. Cobb County, 255 Ga. 436, 339 S.E.2d 252 (1986). Banks County v. Chambers of Georgia, Inc., 264 Ga. 421, 444 S.E.2d 783 (1994).

²⁷ BBC Land & Dev. Inc v Butts County, 281 Ga. 472, 640 S.E.2d 33 (2007).

²⁸ Corey Outdoor Advertising v. Bd. of Adjustment of Atlanta, 254 Ga. 221, 327 S.E.2d 178 (1985). Matheson v. DeKalb County, 257 Ga. 48, 354 S.E.2d 121 (1987).

effective.²⁹ This involves a relatively lengthy procedure. Unless the municipality and the county agree to the zoning change proposed by the municipality, an arbitration panel is appointed by the Department of Community Affairs which conducts a hearing and renders a decision that is binding on the municipality. If the municipality is dissatisfied with the decision of the panel, it may appeal the decision to the superior court or it may abandon the annexation.

4. Developments of Regional Impact (DRI): Developments of certain type and size are required to be reviewed by the Department of Community Affairs (and its regional development commissions). Whether or not DRI review is required depends upon the type of use, its size, and its location. The decision of the reviewing State authority is non-binding on the local government, but it must await the decision before acting.³⁰

F. PROFESSIONAL AND ETHICAL CONSIDERATIONS

1. The practitioner must be mindful of the propriety of ex parte

²⁹ O.C.G.A. § 36-36-110 *et seq.*

³⁰ Ga. Admin. Code 110-12-3

communications with local government decision makers. Because of the difficulty in getting an appeal and the onerous burdens placed upon challengers to local government decisions, it is of great importance to win before the local government. This raises the question of how much the practitioner can do outside of public hearings to represent the client. The general consensus among zoning attorneys is that whether or not *ex parte* communications are appropriate depends on whether the local government decision is legislative or administrative / quasi-judicial.

In the former case, the practitioner is essentially a lobbyist, trying to get an ordinance changed in a manner desirable to the client. In the latter case, the practitioner is contesting the applicability of the ordinance to the client; these decisions will often, but not always, be made by administrative boards rather than the governing authority. Because the latter will be reviewed in the superior court on the record, an *ex parte* communication essentially gives one side the opportunity to present more evidence than the other, and without the opportunity of cross-examination. This obviously has due process implications. Thus, while *ex parte*

communications are normally considered acceptable in the context of a legislative change (such as a rezoning), they are not appropriate in the context of an administrative or quasi-judicial decision. That said, local government officials and non-attorney citizens often will not be cognizant of this distinction.

2. Supporting or opposing a legislative decision before a local government (including rezoning) on behalf of a private client is considered lobbying by statute.³¹ While some would argue that such statute impermissibly interferes with the Supreme Court and Bar's authority to regulate the practice of law, nonetheless State law does require lobbyists to register with the State Ethics Commission, and lawyers have been cited and fined for appearing before local governments on rezoning matters without first registering.

³¹ O.C.G.A. § 21-5-70(5)(d)