

APPEAL ISSUES IN ZONING AND
LAND USE CASES

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TABLE OF CONTENTS

	Page
I. Introduction	1
II. Appellate Practice History for Zoning Cases	1
III. The Current Posture for Appeals	9
IV. Proper Court for Appeals	10
V. Crafting an Application for Appeal	12
VI. Conclusion.....	13

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I. INTRODUCTION

Pity the poor zoning practitioner. The Supreme Court has made life difficult for the appellate lawyer over the last five or so years with a series of decisions that perhaps indicate some tension in the Court over the proper avenue to pursue zoning appeals. This paper will track the recent history of zoning appeals, and offer suggestions for appealing a zoning and land use case.

II. APPELLATE PRACTICE HISTORY

O.C.G.A. § 5-6-35(a)(1) provides that appeals from superior courts reviewing decisions of local administrative agencies require an application for appeal. In Trend Development Corporation v. Douglas County, 259 Ga. 425, 383 S.E.2d 123 (1989), the Supreme Court held that all appeals in zoning cases required an application because they were appeals from court decisions “reviewing a decision of an administrative agency within the meaning of O.C.G.A. § 5-6-35(a)(1).” This is so even though a zoning decision is typically thought of as a legislative decision, in contrast to the administrative or quasi-judicial decision such as granting a variance. The holding in Trend established what the Court termed a bright-line rule for both litigants and the appellate courts: if the underlying subject-matter is zoning, an application for discretionary appeal must be

filed.

There is a logic to this position, as the Court explained in later decisions. First, the matter has already been before two tribunals: the original zoning board, and the superior court. Second, an application for discretionary appeal should really be thought of as an expedited appeal, in that the briefs on the merits are read and considered. Hence, an appeal is had, just not the full process of a normal appeal. A 1994 non-zoning decision clarified that the underlying substance of the case controls over the form. Rebich v. Miles, 264 Ga. 467, 448 S.E.2d 192 (1994). That is to say, just because a case is a mandamus case (which is entitled to a direct appeal under O.C.G.A. § 5-6-34), if the underlying subject matter is in O.C.G.A. § 5-6-35, an application will be required.

While there are certainly zoning cases that do not involve the traditional appeal of a zoning board's decision, that inconsistency was ignored in pursuit of consistency. The Court maintained this position for several years, and required an application in any case involving zoning in any fashion. This of course made it difficult to get a full appeal in a zoning case, as the Court grants relatively few applications. Persistent attorneys began to look for a way around this restriction and obtain a direct appeal. In 1997, a creative appellant sought a direct appeal on the grounds that its challenge to a zoning ordinance was a "facial" challenge, rather than an "as applied" challenge. That is to say, the challenge was to the terms of the zoning ordinance on its face, rather than a challenge to how the ordinance was applied to the specific property. Thus, the issue had never gone before the local zoning tribunal, and the superior court was not acting as a reviewing court, and so there had not been two tribunals reviewing the case. O.S. Advertising Corp of Georgia, Inc. v. Rubin, 267 Ga. 723, 482 S.E.2d 295 (1997).

The Court was not biting, however. The Court recognized that, “although there are fallacies in the rationale in Trend,” it declined to create any exception to the bright line rule. Justice Carley dissented, beginning a long campaign to require an application only in strict zoning appeals, and not in zoning cases that do not involve review of a decision of a local zoning agency or board.

In 1998, Justice Carley had the opportunity to explore his theory and author a new precedent, evidently having convinced his colleagues of the logic of his position. In Harrell v. Little Pup Development, 269 Ga. 143, 498 S.E.2d 251 (1998), neighboring landowners sought injunctive relief to enforce a zoning condition on another property. The Court approved a direct appeal because the neighbors “did not join their action for injunctive relief with any appeal from an adverse administrative decision.... Therefore, this appeal in no way involves superior court review of an administrative decision.” 269 Ga. at 144. Direct appeal was authorized, in a unanimous decision. This seemed to promise new life in zoning cases. If a practitioner could frame the challenge as something other than an appeal, perhaps a direct appeal was authorized.

Justice Carley dissented again in Chordegian v. Williams, 271 Ga. 179, 518 S.E.2d 878 (1999), when the Court dismissed the direct appeal of a case appealing the dismissal of a mandamus petition on jurisdictional grounds. Justice Carley argued that, while the underlying case may touch zoning, the resolution of that case would in no way have required the application or interpretation of any zoning ordinance.

The Court of Appeals applied the new standard in Merritt v. City of Warner Robbins, 243 Ga.App. 693, 534 S.E.2d 149 (2000). In that case, a neighbor brought an injunctive action seeking to prohibit the city and his neighbor from acting in reliance on

a particular annexation and rezoning. The neighbor made the mistake, in the Court's eyes, of joining his action for injunctive relief with an appeal of the zoning decision, thus requiring a discretionary appeal. The Court referenced Harrell, suggesting that if the appellant had only declined to include the appeal and only sought injunctive relief, the direct appeal would have been acceptable. Certiorari was apparently not sought on that decision.

In 2000, Justice Hunstein, who often agrees with Justice Carley on this particular issue, wrote the opinion for a unanimous Court in King v. City of Bainbridge, 272 Ga. 427, 531 S.E.2d 350 (2000). In that case, a property owner ignored a zoning ordinance and placed a mobile home in violation of the ordinance's restrictions. The City wrote a letter which was ignored, and subsequently the City brought an injunctive enforcement action to enforce its ordinance and have the home removed. In defense, King asserted that the zoning ordinance was facially unconstitutional. The Court authorized a direct appeal, noting that King failed to seek a decision from the local zoning board, and instead the City filed injunctive relief. Because the order did not involve the review of a decision of a local administrative agency, the Court found the order directly appealable.¹

The Supreme Court again applied this doctrine in the case of Sprayberry v. Dougherty County, 273 Ga. 503, 543 S.E.2d 29 (2001). In this case, neighboring property owners filed a mandamus action to attack the validity of a rezoning decision on

¹In a great irony, this case was remanded for consideration of the facial constitutional attack. The subsequent decision overturned Cannon v. Coweta County, 260 Ga. 56, 389 S.E.2d 329 (1990) the seminal pro-mobile home decision, and upheld a zoning ordinance that severely

adjoining property (seeking to force the Board to rescind the rezoning). The Court approved a direct appeal, in a decision written by Justice Carley, noting that the order was not an appeal to review an administrative decision, and was therefore subject to direct appeal. Hence, Carley again carried the day on his notion that, unless the zoning case is the actual appeal of a zoning board or agency's decision, it should be directly appealable.

Justice Hines dissented to this otherwise unanimous decision, arguing that the Court was allowing litigants to control the appeal process by the form of their attack. This was, in Justice Hines' view, a case with the underlying subject matter of zoning, and was a case that should have been brought through the route of superior court review of administrative decisions, and discretionary appeal.

The Court of Appeals continued to follow this new rationale in White v. Bd. of Commissioners of McDuffie County, 252 Ga.App. 120, 555 S.E.2d 45 (2001), wherein neighbors challenged a rezoning decision on various conflict of interest and procedural grounds. The Court noted that the neighbors did not file an appeal of a particular zoning decision, they instead "filed lawsuits directly against the defendants, seeking injunctive and declaratory relief." Hence, there was no administrative decision, and no application was required. This decision raises the same issue that concerned Justice Hines in Sprayberry: litigants controlling the appeal process. The Court of Appeals was untroubled, despite the fact that the case did involve a rezoning decision, made just prior to the neighbor's challenges.

The Court of Appeals likewise in SMD, LLP v. City of Roswell, 252 Ga.App. 438,

restricted mobile homes. See, King v. City of Bainbridge, 276 Ga. 484, 577 S.E.2d 772 (2003).

555 S.E.2d 813 (2001) relied on the same law to the same effect, and found that the direct injunctive action brought by a billboard company challenging the validity of a sign ordinance, and seeking to prevent enforcement thereof, entitled the plaintiff to a direct appeal. This case is of note because the action was brought by the billboard applicant itself, not neighbors. This party, in other words, had access to the appeal process administratively, and was not an outsider to the decisions of the City. Nonetheless, it was able to shape the litigation such that it was entitled to an appeal.

Thus, the law was evolving into a position whereby neighbors seeking to challenge a rezoning decision, and even an applicant denied a use permit, could shape their cases into direct appeals by refusing to cast them as “appeals” and instead cast them as direct attacks.

The author had occasion to try and get some clarity on these issues when the case of Powell v. City of Snellville, 275 Ga. 207, 563 S.E.2d 860 (2002) reached the Supreme Court for the second time. The plaintiff had filed suit challenging the rezoning applied to her property, and also adding other claims of malfeasance in office and bad faith against city council members and the mayor. Ultimately, all claims were dismissed in a series of motions, and the plaintiff filed both direct and discretionary appeals (the route of the prudent practitioner). To our great surprise, in a brief unpublished opinion, the Court dismissed the applications, stating that the plaintiff had the right to a direct appeal because some of the orders granted summary judgment on claims that were not appeals of the zoning decisions (i.e., the malfeasance claims, etc.); this despite the fact that the case began as a zoning appeal by the landowner. The unpublished opinion cited to Sprayberry, supra. Thus, the Sprayberry holding was now being stretched to include

an actual zoning applicant who was denied her rezoning, and simply added additional claims to the appeal. Keen interest was shown in this question at oral argument by several justices. The Court ultimately concluded that the inclusion of other claims and prayers for relief in a decision appealing a zoning decision does not transform the case into a direct appeal. In such a case, an application would still be required. The Court reversed its ruling granting a direct appeal, held that a discretionary appeal was required, and rejected the applications for appeal.

In 2002, the Court further backed off the holding of Sprayberry, and reasserted the notion that the underlying subject matter controls the appeal, not the form of the case. Surprisingly, it was not a zoning case, but rather the appeal of the denial of a license reinstatement for a doctor. Ferguson v. Composite State Bd. of Medical Examiners, 275 Ga. 255, 564 S.E.2d 715 (2002). In this case, Ferguson filed a mandamus suit seeking to compel the Board to reinstate his license. He lost, and filed both a direct and discretionary application. As the appeal of the decision of an administrative body, the case fell into the ambit of O.C.G.A. § 5-6-35, but as mandamus, it fell under O.C.G.A. § 5-6-34. Reaffirming the rule of Rebich v. Miles, 264 Ga. 467, 448 S.E.2d 192 (1994), the Court held that the underlying substance controls, and that an application was required.

This somewhat routine decision under Rebich triggered something with the Court, as it realized Sprayberry had gone too far. The Court examined Sprayberry at length, and clarified its logic, noting that if the request for mandamus relief “attacks or defends the validity” of an administrative decision, then the trial court must necessarily “review” the administrative decision before ruling on the request for mandamus relief,

and hence a discretionary appeal is appropriate. The Court overruled Sprayberry to the extent it held that filing a mandamus decision to “review” an administrative decision is not an attack or defense of such decision, and it overruled any holding that mandamus actions do not require applications.

In a fascinating footnoted “aside,” the Court noted that the Court may have had jurisdiction in Sprayberry for a reason not examined in that decision. Specifically, the Court noted that it was not addressing the question of whether a litigant who attacks an administrative ruling for the first time in superior court is bound by the requirements of the discretionary appeal statute, and that such determination would required consideration of whether the appellant had standing to challenge the decision at the administrative level, or whether they opted out at that level in order to obtain a direct appeal. Hence, this leaves open a large potential route to direct appeals.

Justice Carley concurred in part, but wrote separately to object to the majority’s characterization of Sprayberry, noting that the appellants in Sprayberry were not owners but neighbors, and arguing that there should be a distinction based on whether the appellant is the actual applicant, and thus a part of the administrative process; or is an outside challenger, who under most ordinances will not have access to any particular ordinance-based appeal. In sum, Justice Carley argues that the discretionary appeal provisions should only apply to superior court decisions reviewing zoning decisions of local administrative agencies. He argues that the Georgia Code does not authorize the Court to require an application every case where any zoning decision is called into question.

No further clarity was provided in Cooper v. Unified Gov’t of Athens-Clarke Co.,

275 Ga. 433, 569 S.E.2d 855 (2002). In this case, Justice Hunstein write for the unanimous Court and applied the holding in Powell, supra, to the effect that the appellant's addition of other claims to the basic zoning challenge would not transform it to a direct appeal. The Court had already dismissed the discretionary appeal on the basis that direct appeal was warranted, but reversed that decision and granted the discretionary appeal.

Most recently, in Fulton County v. Congregation of Anshei Chesed, 275 Ga. 856, 572 S.E.2d 530 (2002), the Court followed its traditional analysis and noted that, despite the fact that the appellant filed a mandamus case challenging the denial of a use permit, the decision was from an administrative body, and an application was required.

III. THE CURRENT POSTURE FOR APPEALS

The question a practitioner thus faces today is, what sort of appeal do I need to file? The safest answer in any case that touches on zoning in any fashion is, both a direct appeal and a discretionary application. While the appellate statutes have been revised to state that an application will count as a notice of appeal if only a direct appeal is authorized, see O.C.G.A. § 5-6-35(j), the Court sometimes changes its mind, and better to have the second bite at the apple, so to speak. The only downside is the cost of the record in a direct appeal.

For more specific guidance, the precedent seems to indicate the following:

- 1) if you are an applicant turned down for a rezoning application, file an application for discretionary appeal.
- 2) if you are an applicant turned down for a conditional use permit, special use

permit, variance, etc., file an application for discretionary appeal.

3) if you are a neighbor upset with a city or county's decision to grant a rezoning, or another form of permit, consider filing an injunctive or mandamus action, and your appeal is potentially direct, especially if you can argue you have no opportunity to participate in the administrative process.

4) if you are a property owner upset at the city or county's enforcement action on your property, file an injunctive action to challenge the validity of the ordinance, and you may get a direct appeal.

In all of the above cases, filing an application would be prudent. Certainly in any case where your client has actually been in front of a board or agency prior to going to superior court, the "two tribunal" rule would likely apply, and thus an application would be the best bet. Similarly, if your client had the opportunity to appear before the tribunal, even if they did not, the safest bet would be an application.

IV. PROPER COURT FOR APPEALS

A less critical issue would be the proper court for an appeal. The Supreme Court's and Court of Appeal's jurisdictions are defined by the Georgia Constitution of 1983, in Article 6, Sections 5 and 6. The Court of Appeals has jurisdiction over all cases not reserved to the Supreme Court. Ga. Const., Art. 6, Sec. 5, Para. III. The Supreme Court has exclusive appellate jurisdiction over all cases involving the constitutionality of a law or ordinance. Ga. Const., Art. 6, Sec. 6, Para. II. For a zoning case, the question is generally the constitutionality of the zoning ordinance. As a constitutional decision, the Supreme Court gets the case. As Justice Smith put it in Trend, supra, "Where an appeal

from a decision of a court reviewing a zoning decision involves a constitutional question, this Court has jurisdiction; where it does not involve a constitutional question, the Court of Appeals has jurisdiction.” 259 Ga. at 425. Of course, Art. 6, Sec. 6, Para. III gives the Supreme Court jurisdiction over “all cases involving extraordinary remedies,” and mandamus is an “extraordinary remedy,” thus suggesting the Supreme Court should take jurisdiction over all mandamus cases, whether or not they involve a constitutional question. In practice, that does not always happen. On occasion, the Supreme Court has sent a constitutional case down to the Court of Appeals on the premise that the constitutional question is well settled, and simply requires application of the law to the facts – a curious decision, but there is nothing that can be done if the Supreme Court declines jurisdiction for whatever reason, except petition for certiorari after the Court of Appeals decides the case.

Either Court will transfer to the proper Court (or at least what that Court thinks is proper), so there is no penalty for getting things wrong. If the Court of Appeals transfers a case to the Supreme Court, asserting that Court has jurisdiction, the Supreme Court has jurisdiction to send it back if it disagrees.

The other consideration regarding which Court would be the difficult task of trying to predict which Court would be more favorable to one’s position, and which Court is more likely to at least take the appeal. As the very subjective viewpoint of the author, the Court of Appeals seems more willing to take applications for discretionary appeal in zoning cases, perhaps because they are out of the ordinary and different from their more usual fare. Of course, with four panels of judges, it is more difficult to predict the outcome. Since the same seven Justices hear all zoning appeals in the Supreme

Court, it is both harder to get an appeal (they hear so many, and they take few), but it is somewhat more consistent and predictable, since the same panel hears all cases.

V. CRAFTING AN APPLICATION FOR APPEAL

A frequent recommendation of this paper has been to file a discretionary appeal. Thus the consideration turns to getting an appeal granted. The Court of Appeals has reported that it grants perhaps one-third of the applications filed (in all sorts of cases), and the Supreme Court is reportedly less than that. It is therefore important to carefully consider the criteria each Court lists in its Rules for consideration of grant of a discretionary appeal, and cast your brief accordingly.

The application should not be looked at as a cursory document. Simply asserting that error was made and an appeal should be granted is insufficient. Remember that the Court treats this as a mini-appeal, and thus the brief needs to be essentially a full appellant's brief. Excerpts from the record need to be attached, tabbed and indexed, to allow the Court to review some of the underlying record, which they do not otherwise have at this stage. In general, for the Supreme Court, an argument showing some broader impact or necessity of establishing precedent seems to work better than simply alleging error. Undoubtedly this is because everyone alleges error, and relatively few decisions are reversed, compared to the amount affirmed.

The Supreme Court takes few zoning appeals. It is important to try and frame the review to focus on an issue that the Courts have not addressed, or a new issue. Simply another routine rezoning denial where the trial court found or did not find a taking will hardly ever be accepted. Hence, the proliferation of recent appeals that have new and

different arguments, relating to direct attacks and other non-appeal features. In addition to the merits of one's case, it would be worthwhile to see if the case would fit into a discussion about appellate procedure on direct and discretionary appeals, because Justices Carley and Hines clearly are not satisfied with the current state of the law. In other words, addressing the question of whether the appeal should be direct or discretionary may help tip the balance in favor of an appeal.

VI. CONCLUSION

The bright-line rule in Trend has evidently been unsatisfactory for the Supreme Court. Zoning appeals have gone from requiring an application if they touch zoning in the least, to a patchwork of decisions that suggest in some circumstances, a non-appeal zoning related case may authorize a direct appeal. This is an issue that should be considered from the outset, prior to filing suit, so that the complaint can be cast in such a way as to maximize the possibility of a direct appeal. Persons who are not applicants themselves but are rather neighbors seeking to challenge a zoning decision or enforce a zoning ordinance or condition have the best chance at securing a direct appeal. Nonetheless, a prudent course is still to file both types of appeals, any time zoning is involved.