

# **BASIC GEORGIA ZONING LAW**

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While many of the attendees of this seminar are experienced zoning attorneys, it is anticipated that some attorneys without much experience in zoning will also chose to attend in the hopes of garnering the fundamental knowledge necessary to bring or defend a zoning case. This paper and the author's talk are geared to providing those attorneys with a framework of the basic concepts of zoning law and with a general reference tool for litigation. The paper is mainly provided in outline form to be more accessible as a ready reference in the future.

A. GENERAL LEGAL THEORY

1. Zoning is delegated to local governments (i.e., municipalities and counties) by the Constitution as a part of Home Rule. However, state can impose procedures governing the exercise of the zoning power.

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

2. The state has adopted procedures governing the making of a zoning decision, and the local government is required to strictly follow the procedures set out in the Zoning Procedures Law, O.C.G.A. Title 36, Chapter 66.

McClure v. Davidson, 258 Ga. 706, 373 S.E.2d 317 (1988).

Tilley Properties, Inc. v. Bartow County, 261 Ga. 153, 401 S.E.2d 527 (1991).

3. The act of zoning by a local government is legislative in nature and thus the adoption of a zoning ordinance is presumed valid.

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).

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.

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 insubstantial 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.

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

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.

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

3. Property owner must make a constitutional challenge to the local board. Constitutional challenges, which all zoning cases are, cannot be brought for the first time in superior court. The scope and particularity of the challenge has recently been eased.

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).

4. Appeals of rezoning decisions are "de novo" reviews. Review is not on the record, and new evidence can be introduced. Writ of certiorari is not a proper method to appeal rezoning decisions.

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).

5. Appeals to the Superior Court from local government administrative (quasi-judicial) zoning decisions are considered judicial reviews "on the record." Examples are variance, denial of permit. No longer includes special use

permit because of amendment to Zoning Procedures Law. Writ of certiorari is an acceptable method to appeal, as is mandamus.

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)

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.

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 nearly property must show fraud, corruption or manifest abuse of zoning power to reverse the local government's rezoning decision.

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

2. Neighbors must satisfy "substantial interest-aggrieved citizen" test. Plaintiffs must have substantial interest in decision and suffer some special damage or injury not common to all similarly situated property owners. Civic associations alone do not have standing.

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).

3. Testimony about increasing traffic and other inconvenience is not 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 have standing.

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).

D. FEDERAL LAW ON ZONING

1. The Federal test is much tougher. It requires a showing that the property owner has been deprived of all economic use prior to a taking being found.

Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1072 (11th Cir. 1996).

Baytree of Inverrary Realty Partners v. City of Lauderhill, 873 F.2d 1407 (11th Cir. 1989).

Cobb County v. McColister, 261 Ga. 876, 413 S.E.2d 441 (1992).

2. Federal takings claim not ripe unless 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. Georgia provides a remedy.

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

3. Federal takings claim also cannot ripen if not final decision has been reached. 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 is not ripe.

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).

#### E. ADDITIONAL LAND USE ISSUES

1. Vested rights of a property owner to use property in a certain way may not be infringed upon by the adoption of a zoning ordinance which prohibits such use.

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).

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. Unjust results can occur if property owners rely on statements from clerks or even permits issued in violation of the ordinance.

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).

3. Where a city annexes property, the county may make an objection to the proposed zoning which must be resolved before the annexation is effective.

O.C.G.A. § 36-70-24(4)(C)

O.C.G.A. § 36-36-11