

CONSTITUTIONAL LIMITATIONS ON
ZONING AND LAND USE ACTIONS

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This paper discusses the three most common constitutional attacks on zoning actions: takings without just compensation, due process challenges, and equal protection attacks.

A. TAKINGS

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 government has the benefit of the doubt. The zoning ordinance is presumptively valid. Id., 267 Ga. at 626; Gradous v. Bd. of Commr's of Richmond County, 256 Ga. 469, 471, 349 S.e.2d 707 (1986). If the validity of a zoning ordinance is "fairly debatable," the governmental judgment will control. Id.

"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." Id.

That is a tough burden for the landowner plaintiff to overcome. In fact, many cases, such as DeKalb Co. v. Dobson, supra, have fallen because the landowner could not even show a significant detriment. If a significant detriment cannot be shown, the analysis goes no further. See, Gwinnett Co. v. Davis, 271 Ga. 158, 517 S.E.2d 324 (1999)(evidence that landowner would suffer economic loss without rezoning was insufficient to show substantial detriment). If the plaintiff cannot show a significant detriment, the analysis need go no further.

To show a significant detriment requires more than just showing that the property would be more valuable if rezoned or it would be difficult to develop as zoned: "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 Courts recognize that increasing density 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 [quotes omitted]; 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.

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. That is what is known as a "fringe area": right on the boundary between two different classifications. In such circumstances, the local government gets even more deference. As the Supreme Court held in Holy Cross Lutheran Church v. Clayton County, 257 Ga. 21, 354 S.E.2d 151 (1987), "We are increasingly called to review controversies regarding

'fringe areas' such as the property in question here – residential property bordering commercial property, with the economic value of the property for residential use lessening with encroaching commercial development. We take this opportunity to reiterate that the local governing body is the more appropriate one to shape and control the local environment according to the best interests of the locality and its citizens. The local government has drawn the line as to these encroachments, and in our review of the evidence under the clearly erroneous standard, Holy Cross has not demonstrated by clear and convincing evidence that denial of their rezoning request was so unreasonable as to constitute an unconstitutional taking of their property." 257 Ga. at 23 [cits. and quotes omitted].

Furthermore, the Supreme Court has recently given greater strength to a local government's comprehensive plan. 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. The question is never whether the proposed classification has some benefit or value, but whether the existing zoning benefits the public.

Hence, a takings challenge is very difficult to prove. 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). Cobb County v. McColister, 261 Ga. 876, 413 S.E.2d 441 (1992). 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). 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).

B. DUE PROCESS

The vast majority of rezoning challenges are takings challenges. Due process encompasses a more limited challenge, mainly in the context of procedural due process. Substantive due process has been held to be subsumed into takings, and so does not typically constitute a separate challenge to a rezoning decision.

However, procedural due process is an avenue to challenge a rezoning. Basic procedural due process requires notice and a hearing. The procedures required in conducting a rezoning hearing have been codified in the Zoning Procedures Law, O.C.G.A. § 36-66-1 et seq. The basis requirements are published and posted notice, and sufficient equal time at the hearing for all parties to speak (at least ten minutes per side). Failure to comply with the Zoning Procedures Law voids the zoning ordinance. McClure v. Davidson, 258 Ga. 706, 373 S.E.2d 617 (1988); Tilley Properties, Inc. v. Bartow County, 261 Ga. 153, 401 S.E.2d 527 (1991). In McClure, the defendant county did not give proper notice under O.C.G.A. § 36-66-4(a) of a rezoning hearing, and the Court ruled that the rezoning was therefore void for failure to comply with the ZPL. The Court held, "the General Assembly intended noncompliance with the procedures to invalidate any zoning decision...we therefore conclude that the trial court properly ruled that the county's failure to comply with O.C.G.A. § 36-66-4(a) invalidates the subject zoning action." 258 Ga. at 710.

Tilley Properties involved the notice and hearing requirements of O.C.G.A. § 36-66-5(c). O.C.G.A. § 36-66-5(c) requires notice and a hearing both for the adoption of standards and for the adoption of policies and procedures governing the conduct of zoning hearings – the two are handled identically by the ZPL. Tilley Properties dealt with a Bartow County's failure to provide notice or a separate hearing when it adopted its policies and procedures. This failure invalidated the entire zoning ordinance of the county. The Court held, "Prior to the adoption of the policies and procedures, O.C.G.A. § 36-66-5(c), a local government must publish within a newspaper of general circulation

a notice of the public hearing, O.C.G.A. § 36-66-4, and a public hearing must be held on the proposed action.... The trial court erred in failing to hold that the County did not comply with the statute and that the ordinance is void." 261 Ga. at 154.

This is a dangerous result, because a void ordinance imposes no restrictions on property without restriction from the Zoning Ordinance.

C. EQUAL PROTECTION

A final challenge to zoning ordinances is under the equal protection clause of the Georgia Constitution. This is mainly an "as applied" attack, meaning it is a challenge to how the zoning ordinance is being applied. Zoning ordinances must be enforced in a reasonable and nondiscriminatory manner in order to satisfy equal protection requirements, and whether they are so uniformly enforced is a question of fact. Matthews v. Fayette County, 233 Ga. 220, 226, 210 S.E.2d 758 (1974); City of Smyrna v. Parks, 240 Ga. 699, 706, 242 S.E.2d 73 (1978). However, just finding some places where the property owner is treated differently will likely not be sufficient, as the Supreme Court has held, that because a county zoning department cannot reasonably be expected to be aware of all possible zoning violations within the jurisdiction, the mere existence of a similar improper use does not establish discriminatory enforcement. Cobb Co. v. Peavy, 248 Ga. 870, 286 S.E.2d 732 (1982).