

Land Development Application Review

Prepared and Presented by:

Brandon L. Bowen
JENKINS & OLSON, P.C.
15 South Public Square
Cartersville, GA 30120-3350
(770) 387-1373
Fax (770) 387-2396
bbowen@jnlaw.com

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I. THE REZONING APPLICATION

A. The Law

1. The Constitutional grant of authority to the local government

The Georgia Constitution provides that the power to zone property and the power to regulate land use planning is granted to the cities and counties of the State.¹ The only authority reserved to the State is the power to provide for procedures. The State has done so, in the form of the Zoning Procedures Law and other laws, and the courts have held that the State laws pre-empt local government regulation of zoning procedures.²

2. The Zoning Procedures Law

The Zoning Procedures Law (ZPL) established the general procedures required for the adoption of a zoning decision.³ The law defines "zoning decision" to include the adoption or amendment of a zoning ordinance, a rezoning decision, as well as decisions as to special use permits. The process required is not burdensome: there must be a public hearing, for which notice must run in a newspaper between 15 and 45 days prior to the public hearing, and a sign must be posted on the property to be rezoned.⁴ At that public hearing, both the applicant and opponents must be given the opportunity to speak. Policies and procedures for the conduct of the hearing, and standards for the

¹ Ga. Const. Art. 9, § 2, ¶ 4

² Little v. City of Lawrenceville, 272 Ga. 340, 528 S.E.2d 515 (2000)

³ O.C.G.A. § 36-66-1 *et seq.*

⁴ O.C.G.A. § 36-66-4

exercise of the zoning power, must be established and available to the public at the hearing.⁵

As to zoning decisions, compliance with the ZPL is mandatory, and failure to comply with the process will render the resulting decision invalid.⁶ Thus, it is incumbent upon a rezoning applicant to ensure that the process is followed (even if it is the local practice for the local government to perform the procedural obligations), because savvy objectors will look for flaws to attack the successful rezoning decision.

3. The Steinburg Act

The General Assembly has established additional procedural requirements for the large local jurisdictions at the core of metropolitan Atlanta.⁷ This law requires the rezoning applicant, the planning staff, and the planning commission to each prepare a written record examining the following considerations:

- (1) Whether the zoning proposal will permit a use that is suitable in view of the use and development of adjacent and nearby property;
- (2) Whether the zoning proposal will adversely affect the existing use or usability of adjacent or nearby property;
- (3) Whether the property to be affected by the zoning proposal has a reasonable economic use as currently zoned;

⁵ O.C.G.A. § 36-66-5

⁶ Tilley Properties, Inc. v. Bartow County, 261 Ga. 153, 401 S.E.2d 527 (1991)

⁷ O.C.G.A. § 36-61-1 *et seq.*

(4) Whether the zoning proposal will result in a use which will or could cause an excessive or burdensome use of existing streets, transportation facilities, utilities, or schools;

(5) If the local government has an adopted land use plan, whether the zoning proposal is in conformity with the policy and intent of the land use plan; and

(6) Whether there are other existing or changing conditions affecting the use and development of the property which give supporting grounds for either approval or disapproval of the zoning proposal.⁸

The purpose of the act is that, in the event that the local government's decision on the rezoning application is challenged in the courts, there is an extensive record for the court to review in deciding whether or not the local government's decision was appropriate.

4. Developments of Regional Impact

The State has imposed special review procedures on developments which may have an impact beyond the local jurisdiction, which are called developments of regional impact, or DRIs. Whether or not a particular development will qualify as a DRI depends upon how big it is, the type of use, and whether or not it is in the metropolitan region, which is defined as a county with a population of greater than 50,000. For example, a residential development that proposes more than 400 homes in the metropolitan area would trigger review as a DRI; if the

⁸ O.C.G.A. § 36-67-3

residential development is located in the non-metropolitan region of the State, then it will undergo DRI review if it has more than 125 lots. Developments that are of a commercial or industrial nature are measured by their gross square footage or other means; some types of uses (such as quarries) are always subject to DRI review.⁹

Once a local government receives a request which would authorize a DRI, which expressly includes a rezoning request, it must notify the local regional development commission, commonly known as the RDC.¹⁰ The RDC makes an initial review to determine whether the development warrants full review. If it determines that the development is a DRI, then it will prepare a report that considers the impact of the development on the region, including such aspects as transportation, utilities, the environment, housing and the economy. If the RDC determines that there will be no adverse impact on the region, then the local government may continue with the rezoning application process. If the RDC does find an adverse impact, then it will likely suggest mitigation efforts and make a public finding. This decision is advisory only and does not necessarily prevent the local government from then approving the rezoning application.

5. The local zoning ordinance

It goes without saying that the zoning ordinance must be carefully consulted in regards to the rezoning application. First, the zoning ordinance may include other procedural requirements in addition to those imposed by the ZPL.

⁹ Georgia Administrative Code, § 110-12-3-.04

¹⁰ Pursuant to 2008 Ga. Laws 436, RDCs will hereafter be known as regional commissions.

It will likely include standards for the exercise of the zoning power, which should guide the decision makers in deciding whether or not to rezone the property. The zoning ordinance may also contain a provision that prevents a particular development, or it may contain other provisions which must be addressed, such as parking requirements. In some cases, the use sought is not listed as a permitted use in the zoning ordinance; in that case the rezoning applicant will need to seek a text amendment to make the desired use a permitted use under the ordinance. The important consideration is that every jurisdiction's zoning ordinance is different, and, as the zoning power has been conferred by the Georgia Constitution directly on the local governments, they generally can follow their own format, so long as they comply with the applicable procedural laws.

B. The Rezoning Process and Considerations

1. The Comprehensive Plan and the Future Land Use Map

Most cities and counties have some form of either comprehensive plan or future land use map, or both. These documents are a tool for a local government to plan its future development. They are often prepared by planning staff or outside experts, then adopted by the local government. Keep in mind, however, that the composition of local government governing bodies changes frequently, so the officials that vote on a rezoning application may not have the same goals as the city council or county commission that adopted the comprehensive plan.

These documents may be general, containing only narrative guidelines for the development of the community, or very specific, even listing the appropriate future uses and zoning classification for each lot. When making a rezoning application, it is important that the proposed rezoning be consistent with the comprehensive plan or future land use map. Otherwise, opponents will argue that a grant of the rezoning is not well reasoned and inconsistent with the community's goals, out of character, and an example of spot-zoning. While comprehensive plans are generally considered aspirational and not binding on local governments, the consistency of the rezoning with the comprehensive plan will invariably be addressed in any litigation that follows the grant or denial of a rezoning application. If a local government routinely ignores its comprehensive planning, it may become a political issue, or may affect the local government's eligibility for grants.

If the comprehensive plan is more general, it may be necessary for the applicant to show the local government that the proposed rezoning is consistent with the plan. This may be done by focusing on the themes in the comprehensive plan, and by showing how the rezoning will support the goals of the plan. It may be that there are stipulations or mitigation actions that can be pursued which square the proposed development with the comprehensive plan.

Sometimes, particularly in the case of future land use maps, the rezoning application cannot be reconciled with the planning document. In that case, the applicant will at a minimum need to show that the proposed development is

justifiable despite the inconsistency. The applicant may also need to request an amendment to the future land use map, so that the rezoning is consistent with the future land use map.

2. Annexation and rezoning

As counties frequently have different zoning classifications than cities, rezoning is commonly part of the annexation process. In order to avoid having a situation where a parcel is annexed in, but not yet subject to the zoning restrictions classification, the General Assembly has provided additional procedural requirements for the rezoning of annexed property. The rules are also designed to give the county a say in the rezoning application as well.

The ZPL requires that when annexed property is to be rezoned, the notice and public hearing required by the ZPL must be accomplished prior to the vote on the annexation. The publication required by the ZPL must run in a newspaper of general circulation of the county. The final vote on the rezoning then takes place immediately after (or as part of) the vote to annex the property.¹¹

This process becomes more complicated if the county objects to the annexation. Upon receipt of the annexation request, the local government must provide notice to the county.¹² If the county does not object, the city may annex and rezone the property, but it may not change the zoning classification to a more intense zoning classification for a period of one year following annexation.¹³ If

¹¹ O.C.G.A. 36-66-4(d)

¹² O.C.G.A. 36-36-111

¹³ O.C.G.A. 36-36-112

the county does object, then the matter goes to arbitration. In this event, the arbitration panel will consider the rezoning request in light of a number of factors contained within the code which go to the merits of the county's objection and the land use patterns in the city and the county. The county normally will bear 75% of the costs of the arbitration, including the costs of the property owner, but these costs may be shifted.¹⁴

The decision of the arbitration panel is binding, and may even result in restrictions being placed in the public deed records.¹⁵ The decision may be appealed to the superior court. This is an expedited process; the appeal must be filed within 10 days, and a decision is required within twenty.¹⁶

3. Neighbors

One of the biggest obstacles to obtaining a successful rezoning is neighbors. A well-organized neighborhood opposition group can exert tremendous political pressure on the local government governing body, and will often be able to obtain either mitigation efforts or out-right concessions in exchange for support of the rezoning application. Some jurisdictions even informally require property owners to meet with neighbors and obtain their approval.

If the rezoning application is granted over neighbors' objections, then they lose much of their ability to prevent the development. The Georgia courts are

¹⁴ O.C.G.A. 36-36-115

¹⁵ O.C.G.A. 36-36-115(b)

¹⁶ O.C.G.A. 36-36-116

increasingly strict in applying the standing requirement, requiring allegations and evidence of a substantially-aggrieved interest. If the neighbor can meet this standing threshold, the burden of proof is also high; he must show manifest abuse of the zoning power or fraud.

4. Conditional zoning

Many zoning ordinances allow conditional zoning. In general, this means that the rezoning application is granted upon the condition that certain actions are taken. This is permissible so long as the goal of the conditions is to mitigate or advance the land use of the area. A condition which is simply geared toward profiting the community is an exaction and may not be upheld.

Sometimes the condition is very specific, such as in the case of a stipulation to zoning. The rezoning is granted, but may require certain precise actions, or limit the rezoning such that only particular uses are approved. This can be an effective way to allay concerns about potential negative effects from a proposed rezoning. The conditional or stipulated zoning may limit the proposed use to a certain size or density, or may prohibit certain uses which are otherwise permitted in the requested zoning classification.

It should also be remembered that, regardless of what the rezoning applicant says he intends to do, once the rezoning is granted, he can do anything which is permitted in the new zoning classification. Conditional or stipulated zonings are an effective way to prevent against a bait and switch.

5. How to get your rezoning

Every local government is different, and it is important to know the ground rules of the jurisdiction in which you are appearing. It is always good practice to know the standards for the exercise of the zoning power, and to show that they support grant of the rezoning. Likewise, it is important to show why the proposed rezoning is consistent with or supports the comprehensive plan. If there are obvious inconsistencies, then this should be addressed and mitigation efforts should be proposed.

It is important to remember that a rezoning is legislation and the applicant's representative is a lobbyist. It is a good idea to open a dialogue with the local government, particularly the representative of the area where the property is located. The practitioner should also try to determine if the rezoning will be controversial, and if so, address neighbors, homeowners associations and other entities that may be interested. These individuals should be shown that the rezoning will be good for the community, and any negative effects can be mitigated.

6. Protecting your rights, in case you lose

Sometimes, regardless of the merit of the proposed rezoning, the application will be denied. In that case, if the matter is worth pursuing, the remedy is an appeal to the superior court. In order to have a chance to appeal, the rezoning applicant must have preserved his rights in the local government. In order to do so, he must put the local government on notice of any flaws in the

process so that the local government can fix the deficiency, either by amending the zoning ordinance or rezoning the property.

The burden of specificity is not high; the local government must be generally apprised that a deficiency is asserted.¹⁷ It is the better practice to do this in a non-confrontational manner, either by filing a letter of constitutional objections with the application, or delivering one to the clerk during the public hearing. The goal here is to preserve one's rights, rather than to challenge the governing body; the applicant will be best served by filing the objection, but then focusing on why the proposed rezoning will be beneficial for the community.

7. A brief overview of the trial of the rezoning denial

While commonly referred to as a rezoning appeal, the precise nature of the lawsuit is a challenge to the constitutionality of the zoning ordinance as applied to the subject property.¹⁸ It is a de novo trial, so the applicant and the local government can normally put forth evidence that was not considered by the local government governing body. This will often include evidence from appraisers and land planners. Because appeals to the superior court are subject to Title 5 of the Georgia code, the action must be filed within 30 days of the rezoning denial.

In the lawsuit, the disgruntled applicant bears the burden of showing that the existing zoning classification is a significant detriment to him, which is insubstantially related to the public welfare. Then the burden shifts to the local

¹⁷ Ashkouti v. City of Suwanee, 271 Ga. 154, 516 S.E.2d 785 (1999)

¹⁸ Dougherty County v. Webb, 256 Ga. 474 at 478, fn 3; 350 S.E.2d 457 (1986)

government to show that the ordinance is substantially related to the public welfare.¹⁹

If the challenger wins the case, the appropriate course is for the court to remand the case to the local government for it to rezone the property in a constitutional manner.²⁰ Thus, the applicant may still not get the desired rezoning. The appeal of the superior court's decision is discretionary.

II. SUBDIVISION ORDINANCE

A. The Purpose

Subdivision ordinances commonly serve several purposes. First, these ordinances regulate subdivision in the sense of any division of a parcel. Pursuant to Georgia law, it is the existence of a subdivision ordinance that prevents people from recording plats without local government approval.²¹ Thus, a subdivision ordinance is the best way to prevent the creation of illegal or substandard lots. Second, a subdivision ordinance normally provides the procedure for subdivisions in the neighborhood sense. It will provide the process by which a subdivision obtains approval. Finally, the subdivision ordinance will often provide engineering requirements, such as how the roads and utilities of a subdivision should be constructed.

¹⁹ DeKalb County v. Dobson, 267 Ga. 624, 482 S.E.2d 239 (1997)

²⁰ Board of Commissioners of Hall County v. Skelton, 248 Ga. 855, 286 S.E.2d 729 (1982)

²¹ O.C.G.A. 15-6-67(d)

B. Conservation Subdivisions

Conservation ordinances are becoming more common, and indeed some cities and counties are required to adopt conservation ordinances. They generally allow a developer to concentrate the total density of a tract on only a portion of the property, while requiring that some of the property be preserved as green space, either in a land trust or through a deed to the local government. Sometimes the developer gets a density bonus; sometimes the benefit comes in reduced infrastructure costs.

C. The Process

Just as with zoning, subdivision ordinances vary widely from jurisdiction to jurisdiction, so it is important to know the procedure of the ordinance in the particular jurisdiction in which the subject property is located. That said, most subdivision ordinances follow a procedure similar to the following model for approval of subdivisions in the neighborhood sense.

1. Sketch plan

The process may begin with the developer presenting a sketch plan for tentative review to make sure that the general proposal is consistent with the zoning ordinance. This initial review may be done only by an administrative official, or it may go to either a planning commission or even the local government.

2. Preliminary plat

This is a plat which shows the layout of the streets and infrastructure, the number of lots, and so forth. It is a draft of what the development will look like when developed. Normally this will require approval by the local government's staff (zoning, engineering, public works, etc.) and also a planning commission, but again may require approval by the governing body.

3. Land disturbance permit

The land disturbance permit normally issues with approval of the preliminary plat. Land disturbance permits are normally issued by local governments as local issuing authorities under state law and the Federal Clean Water Act. The land disturbance permit will allow construction of the roads and utility infrastructure.

4. Final plat

Once the infrastructure is in place, a final plat is normally approved. The final plat is a document which is approved by the planning commission or governing body, and then filed with the Clerk of the Superior Court, much like a deed. It allows for the transfer of individual lots, and also for the issuance of building permits.

5. Building permits

Building permits will issue once the final plat has been approved, and will allow the construction of residences or buildings on individual lots.

6. Certificates of occupancy

Once the house is substantially complete, building officials will issue certificates of occupancy.

D. What Do You Do If Your Plan Is Denied?

Because there are so many steps in this process requiring different officials and bodies to approve plats and permits, there are numerous areas where the proposal can be derailed. Once again, it is fundamental to know what the subdivision ordinance requires to determine the proper course of action. While normally mandamus will lie to compel the issuance of a building permit or plat approval, if the ordinance itself provides for an appeal procedure, as they often do, then that procedure should be followed. That will often require putting the grounds of an appeal before a board of zoning appeals or some such body. Keep in mind that, in the event that further appeal to the superior court is necessary, then it may be a record review, as opposed to a de novo appeal. Also, any appeal from the superior court may be discretionary.

III. ODDS AND ENDS

A. Other Ordinances

There are a myriad of other ordinances that may come into play to affect a development of a particular property. As every local jurisdiction is different, the codes of each jurisdiction must be consulted to determine what regulations must be addressed. Here is a sampling of regulations that may be applicable.

1. Tree Ordinances

Tree ordinances regulate the number of trees that can be cut, the species, and the size. The goal is generally to avoid the clear cutting of property prior to development. Often the ordinance will require a certain density, measured in caliper inches or some other measurement, and will punish a failure to maintain such density by requiring the property owner to replace the amount cut plus an additional amount of trees. The ordinance may favor certain trees, and often times will require the property owner to hire an arborist to do a tree survey to show which specimen trees must be kept. This will commonly be part of the preliminary plat phase of the development.

2. Architectural Requirements

The International Building Code (IBC) has been adopted by Georgia as a state minimum code, and is automatically enforceable in every local jurisdiction, with or without an ordinance. With the approval of the Department of Community Affairs, local governments may amend changes to the IBC.

Some jurisdictions have passed architectural requirements regulating the height, structure, and building materials applicable to certain zoning districts. They may even make very specific regulations applicable to certain developments as a condition of rezoning or by ordinance, such as required craftsman style construction.

3. Historic preservation

Many local governments have adopted historic preservation ordinances and created historic districts. This is subject to state law, and there are a number of procedural requirements to the creation of such an ordinance and district. Within such districts, there are normally historic preservation commissions that have the authority to approve or disapprove the use and modification of property within the district, subject to appeal to the local government and ultimately the superior court.

4. Overlay districts

Overlay districts are like zoning districts, but they generally are tied to a particular feature of the community, such as a river or a commercial corridor. They generally have the specific regulations that are tailored to support the local government's goals for the feature to which they are attached. For example, a river overlay district may have greater buffers from water bodies, and limit the amount of impervious surfaces. These are zoning districts by another name, and so should also comply with the ZPL.

B. Variances

Sometimes in the development process the property owner will encounter a regulation (such as a setback) which, while it may be reasonably applied to most properties, because of the particular aspects of the subject property, cannot be applied without substantially impairing the development of the property. Where such a regulation prevents a property from being used in an economically viable

manner, it may result in a taking or inverse condemnation of the property. To avoid these situations, and the inequitable result of applying one-size-fits-all regulations, the proper remedy is a variance.

Once again, every zoning and subdivision ordinance is different, but they generally provide that variances should be granted when, due to a particular aspect of the subject property, the regulation cannot be applied without unreasonably affecting the use of the property, and when the goals of the ordinance can be achieved by removing, reducing or modifying the regulation. Thus, the key is generally that a condition of the property, such as its shape, its topography or its surroundings, makes it inequitable to apply the regulation strictly to the property.

It should be understood that variances are properly intended to modify the application of a regulation, as opposed to allowing a particular use. A 'use variance' would essentially allow a property owner to obtain a rezoning without complying with the ZPL, and as such would not be appropriate.

An example is the application of a setback to a very narrow piece of property. If the setback is applied strictly, then it may render the property unbuildable, and result in a taking. The property owner may seek to have the setbacks reduced such that it allows enough space for the property to be built in an economically feasible manner.

Normally, variance requests will go to either a planning commission or a board of zoning appeals. The ordinance may provide an appeal from that board

to either the governing body or to the superior court; the property owner must be sure to understand and follow the ordinance's appeal procedures, or risk losing his case on a procedural technicality. If an appeal is taken to the superior court, it will often be a record review, meaning the evidence put up before the local government board will be the only evidence considered by the superior court. Thus, it is important to affirmatively show the impact of the regulation upon the property at the local government hearing on the variance. Also, as in rezoning cases, it is wise to put the local government on notice that the regulation cannot be applied to the subject property in a constitutional manner.

C. Vested Rights and Non-Conforming Uses

"Vested rights" and *"non-conforming uses"*, along with *"grandfathered"*, are terms that are often used indiscriminately; however, they have distinctly different meanings, and can affect property owners and their rights in drastically different ways.

A *vested right* is a right to a future use of a property, despite a change in the regulations, that is obtained through actions of the property owner before the regulation changes. For example, if a property owner seeks a building permit for a permitted use, and the regulation is then changed such that it is no longer a permitted use, then he will have a vested right. There are several ways that vested rights can arise, and they are best laid out in the seminal case WMM

Properties.²² Where a vested right exists, that right is generally enforceable by mandamus.

Non-conforming uses are established uses which at one time were legal, but, due to a change in the ordinance, are no longer permitted. If the ordinance expressly allows such uses to continue, then they are considered *grandfathered*. If the ordinance simply renders a non-conforming use illegal, then it may result in a taking; however, there appears to be support for amortization clauses, which require a non-conforming use to be removed over a time period which is sufficient to allow the property owner to achieve a reasonable return on his investment-backed expectations. Ordinances commonly contain a non-conforming use provision regulating when a non-conforming use expires either through abandonment, destruction or misuse.

In 2007, the Georgia Supreme Court issued a decision which was intended to clear up confusion between vested rights and non-conforming uses, BBC Land & Development, Inc. v. Butts County; however, as is often the case, this decision seems to create as thorny an issue as the one it purported to resolve.²³ Specifically, the Court determined that once vested rights were acquired, they could not be divested without consent. However, the Court also stated that the act of conveying a property was itself an act of consent. This seems to create a trap for many developers and builders.

²² WMM Properties v. Cobb County, 255 Ga. 436, 339 S.E.2d 252 (1986)

²³ 281 Ga. 472, 640 S.E.2d 33 (2007)

Commonly, a developer will begin the development process and carry it through the final plat stage. At that point, the developer will sell individual lots in the development to builders or the final property owner. Traditionally, it was assumed that if the plat was approved, the builder could build under the regulations applicable at the time that the plat application was filed, even if there were intervening changes in the ordinance, such as changes in the minimum lot size or setbacks. The BBC Land Development, Inc. v. Butts County case indicates that that is still true for the developer, but not necessarily for the builder or the final property owner.