

PROCEDURAL ISSUES AND LEGAL
TECHNICALITIES IN TRYING AND
APPEALING A ZONING CASE

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I. INTRODUCTION

Zoning is an area of law full of arcane rules and procedural traps that are neither intuitive nor obvious. This applies at all stages of a zoning or land use case, from the initial application and presentation to the local board of commissioners or city council, through the trial in superior court, through to the appeal in the Supreme Court or Court of Appeals. This paper attempts to provide a roadmap to handling zoning matters, and to point out the issues that should be considered in handling these matters, whatever side the attorney may be on.

II. PROCEEDINGS BEFORE THE LOCAL GOVERNING BODY

The first stage of any zoning case will be the proceedings before the governing body, whether of a city or a county. Savvy landowners will often consider hiring a lawyer to represent their interests at this stage to make sure all the procedural issues are handled properly. However, many clients chose to represent themselves at this stage, and only afterwards consult an attorney. Similarly, on the defense side, the defense attorney often only first sees the case after suit has been filed, and has had no input at this stage.

Either way, the following are issues that either should be covered at this initial stage, or should be checked first once the attorney receives the case, to determine whether the case is viable.

The first hurdle is generally filing a rezoning application. A property owner cannot challenge the currently existing zoning on his property without first filing for a rezoning. Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 178, 281 S.E.2d 522 (1981). After filing an application, proper constitutional objections must be presented in writing to the governing body, prior to their decision. Failing to meet this requirement will bar the suit. Subsequent to the vote, the suit must be brought within thirty days of the governing body's vote on the zoning matter. Once again, failing to meet this requirement will bar the suit. Consideration must be given to the proper defendants and proper claims to bring. Attempting to seek damages in addition to the constitutional challenge raises its own problems, because of the difficulty of meeting the ante litem notice requirements and yet filing within thirty days.

A. FILING A REZONING APPLICATION

Filing a rezoning application is a necessary prerequisite to filing a zoning suit if the challenge is to the ordinance as applied to the land owner's property. Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 178, 281 S.E.2d 522 (1981). In other words, a traditional case is where a property owner requests a zoning classification, his request is denied, and suit is brought. The rationale for this requirement is the exhaustion of remedies. Under general legal principles, courts will not intervene in equity if a legal

remedy is available. As a practical matter, the courts have said that filing an application first allows the local governing body the opportunity to fix the problem before suit is brought. O.S. Advertising Co. of Georgia, Inc. v. Rubin, 263 Ga. 761, 438 S.E.2d 907 (1994). If a land owner attempts to challenge a zoning ordinance without first filing an application, the case will typically be easily dismissed.

Like many legal rules, however, this rule has exceptions. The exception is the futility doctrine. In brief, the courts have carved out an exception to the requirement of first filing a rezoning application when it appears that it would be a futile act. Powell v. City of Snellville, 266 Ga. 315, 467 S.E.2d 540 (1996). However, the evidence has to be strong that the application would be futile, not just an expectation. It is generally safest to always file an application. The futility doctrine is a judicially created exception which cannot be relied upon.

The second exception is when the property owner is making a “facial” challenge to the ordinance, rather than an “as applied” challenge. A facial challenge is a challenge to the provisions of the ordinance in general, and an as applied challenge is a challenge to the particular zoning applied to the subject property. The type of case that does not require first filing an application to rezone is a facial challenge to the zoning ordinance. This is a much broader challenge where the claim is that the ordinance is unconstitutional as to every property within its purview. No zoning application need be filed, but the case is much more difficult to establish.

The question becomes whether the very principles in the ordinance are unconstitutional. O.S. Advertising Co. of Georgia, Inc. v. Rubin, 263 Ga. 761, 438 S.E.2d 907 (1994). More specifically, the Supreme Court has said that for a facial challenge to succeed, the challenger must show that the ordinance does not serve a legitimate government interest, and that it deprives the property owner of any economic use of his property. Greater Atlanta Homebuilders Association v. DeKalb Co., 277 Ga. 295, 588 S.E.2d 694 (2003). This is an extremely tough burden to carry. The GAHA v. DeKalb case involved a facial challenge to the DeKalb County Tree Ordinance, which was upheld as constitutional.

Facial challenges are also brought, for example, to attack a sign ordinance as violating free speech. A zoning ordinance could also be attacked as violating the Fair Housing Act, or a variety of other Federal discrimination laws. These types of suits are more frequently brought by public interest groups or industry associations, rather than individual property owners. The vast majority of zoning cases are as applied challenges brought over a single parcel of property.

B. RAISING CONSTITUTIONAL QUESTIONS

The next key question is whether the property owner raised constitutional objections to the existing zoning at the hearing before the local governing body. Typical zoning suits begin with the rezoning decision. If the property owner initiates the request for a rezoning, the process begins when he submits an application. On the other hand, the process can begin when the local government publishes notice that it intends

to rezone the owner's property for its own reasons. Occasionally, the situation will also arise where the local government is adopting a new zoning ordinance.

When the property owner gets an indication that he will not receive the zoning classification requested, or that a new, unwanted zoning classification is going to be imposed, the owner must present his constitutional objections to the local governing body. This is sometimes known as "exhausting his legislative remedies." Cobb County Board of Commissioners v. Poss, 257 Ga. 393, 359 S.E.2d 900 (1987). This requirement affords the local government an opportunity to amend the zoning ordinance to the classification sought or to an intermediate classification which is constitutional, and puts them on notice of possible litigation if they do not. Moreover, it focuses the consideration on the factors affecting the constitutionality of the existing zoning classification. DeKalb County v. Bremby, 252 Ga. 510, 511, 314 S.E.2d 900 (1984).

Failure to raise constitutional challenges will result in the property owner being barred from challenging the zoning classification, unless the owner is making a facial challenge. The Supreme Court has repeatedly stated that constitutional challenges to a zoning classification cannot be brought in superior court for the first time; they must be raised first with the local governing body.

Constitutional challenges need not be made with great specificity. Under Ashkouti v. City of Suwanee, 271 Ga. 154, 516 S.E.2d 785 (1999), the Court considerably lightened the requirements for making a constitutional challenge. No longer are applicants required to state the explicit provision of the constitution that is violated and

state the manner of the violation. Now, a simple assertion that the denial of the rezoning would violate the applicant's constitutional rights to equal protection and due process is sufficient. However, failure to satisfy this requirement will bar the suit.

C. TIMEFRAME FOR FILING SUIT

Another trap for the unwary is the speed at which a rezoning challenge must be brought. Unlike personal injury cases with two year statutes of limitations, or the even longer statutes applying to fraud or contract cases, challenges to zoning decisions must be brought within thirty days. Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981). The logic of this requirement, which was imposed by the Supreme Court rather than the legislature, is that conditions otherwise could change substantially, and any notion of exhausting remedies would be rendered meaningless. This requirement can catch property owners unawares when the rezoning at issue is one instituted by the local governing body, such as the adoption of a new zoning ordinance and map. The new ordinance cannot be challenged years later, without first applying for a rezoning. Wilson v. City of Snellville, 256 Ga. 734, 352 S.E.2d 759 (1987). This time limit cannot be extended by the superior courts.

Like other rules, there are exceptions to this rule as well. The thirty-day requirement does not apply universally. If the property owner is seeking the issuance of a building permit under the existing zoning classification, the proper action would be a petition for a writ of mandamus, and neither the thirty-day requirement, nor the rezoning application requirement, would exist. Martin v. Hatfield, 251 Ga. 638, 308

S.E.2d 833 (1983). This type of case is not a constitutional challenge to a zoning ordinance, but rather the attempt to force a public officer to do his duty. The courts view this as attempting to enforce a right established by the current zoning, rather than a challenge to the current zoning. However, that being said, most practitioners will bring a suit even vaguely resembling a zoning suit within thirty days to prevent a challenge to its timeliness, and to preserve the opportunity to bring constitutional challenges.

In addition, in cases concerning improper notice, which is to say, a denial of procedural due process, the Courts have allowed challenges much later, even years later. The reasoning is that without due process, the rezoning is void and can be challenged at any time, as it was void. Golden v. White, 253 Ga. 111, 316 S.E.2d 460 (1984). This of course can be very frustrating to an innocent developer who is relying on actions taken years before. In the Golden case, it did not matter that the persons bring the due process challenge for lack of notice did not even live in the area at the time of the rezoning, and could not possibly have received notice. Rezoning runs with the land and not the person, and if the notice was defective, the rezoning is defective. This is all the more the case nowadays, with the Zoning Procedures Law in effect.

In addition, the Courts have viewed a challenge brought by neighbors which questioned what occurred at a rezoning hearing as not subject to the 30 day limit. Head v. DeKalb Co., 246 Ga.App. 756, 542 S.E.2d 176 (2000). In this case, there was confusion as to whether the vote actually approved or denied the rezoning, because of

particular procedural rules of DeKalb County. The county attorney offered an opinion that the rezoning failed, and the neighbors went home happy. The developer's attorney convinced the county attorney that the rezoning actually did satisfy the procedural technicalities, and so the map was changed and permits issued. It was several months before the neighbors learned of this, when dirt started to be moved. They brought suit several months after the rezoning, and were not barred by the thirty day limitation.

D. ZONING PROCEDURES LAW ISSUES

The Zoning Procedures Law (ZPL), O.C.G.A. § 36-66-1 et seq., was adopted in 1986, under the grant of authority in the Constitution given to the State to impose procedures on planning and zoning. Ga. Const., Art. 9, Sec. 2, Para. IV. The ZPL contains minimal procedural requirements, but they are significant. Prior to the hearing, the important issue is whether the proper public advertisement had run, and whether the proper sign has been erected. The advertisement must show the time, place and purpose of the hearing, and if the application is by anyone other than the local government itself, it must show the location of the property, the present zoning classification, and the proposed zoning classification. The sign containing the same information must be erected on the property at least 15 days prior to the hearing.

These are not general requirements. The Supreme Court requires strict compliance, not the usual "substantial compliance" with the terms of the Zoning Procedures Law. McClure v. Davidson, 258 Ga. 706, 373 S.E.2d 617 (1988). Hence, even a one-day defect in the timing can render the zoning void. As a practical matter,

the staff of the local government typically handles much of this aspect, but it is something to be followed closely. If the time limits have not been satisfied, ask for a tabling of the application to insure all requirements are met.

E. OPEN MEETING ACT VIOLATIONS

On occasion, a rezoning decision will be taken in violation of the Open Meetings Act, O.C.G.A. § 51-14-1 et seq., which can also tend to be violations of the ZPL. A rezoning decision issued by letter, for example, is not a valid zoning decision. Similarly, the vote to grant a rezoning in an executive session is improper, even if an attorney has appeared and made a constitutional challenge and scared the local governing body into believing a suit is imminent. That is not justification for a vote in closed session, which is in fact never justified. The attorney-client exception to the open meetings act should only be used to discuss litigation, never to vote; votes should always be public, even votes to settle a zoning case. Thus, the applicant should insure the vote taken is proper.

F. COMPLIANCE WITH LOCAL CHARTER OR ENABLING ACT

Another much subtler pitfall is when the vote does not comply with the local enabling act or charter. All municipalities are created by a charter adopted by the General Assembly and available in the General Laws volumes. Unfortunately, these are not available on Westlaw beyond the last ten years or so, and many cities operate under much older charters. They are indexed in volume 42 of the O.C.G.A., and must be hunted up in law libraries. Likewise, the Board of Commissioners of counties were all created by enabling acts, likewise un-codified and listed in the General Laws. These

documents will often contain the procedures governing the adoption of resolutions and ordinances, and may be applicable to the rezoning change.

This becomes critical if the necessary procedure is not followed. A recent example is the previously mentioned Head v. DeKalb Co., 246 Ga.App. 756, 542 S.E.2d 176 (2000) case. In this case, DeKalb County had a procedural rule that the rezoning would only carry if the commissioner in whose district the property was located voted for it, or if one of two “at large” commissioners voted for it. Years prior to the vote, the enabling act had been amended to replace the two “at large” commissioner with two “superdistrict” commissioners, each representing one-half of the county geographically. However, the zoning procedures had not been amended, and so there was an inconsistency in the language. The vote was four to three in favor of granting the rezoning, with neither the district commissioner nor the superdistrict commissioner for the property voting in favor, but the other superdistrict commissioner voting in favor. The county attorney concluded the rezoning passed, but the Court of Appeals ultimately reversed. Hence, very subtle issues of interpretation of the enabling act meant that a four to three vote in favor did not carry the rezoning.

One interesting exception to this issue is the question of when the procedure involves the due process notice and hearing. In the case of Little v. City of Lawrenceville, 272 Ga. 340, 528 S.E.2d 515 (2000), the neighbor challenging a rezoning contended the city did not follow the procedure required in its charter for adopting a rezoning. The Court held that the Zoning Procedures Law preempts any local procedure

applying to rezoning. Hence, if the provision can be seen as a procedural provision, it may be preempted by the ZPL.

III. PROCEEDINGS IN SUPERIOR COURT

The foregoing is a fairly lengthy, but undoubtedly not exhaustive, list of problems to watch for at the local government level. If the lawyer has been involved since filing the application, those issues have presumably been dealt with, and the suit is ready to be prepared and filed. However, if twenty-five days after the denial if the first time the property owner approaches the unsuccessful applicant, the first thing to think about are the above issues. There may not be time to address all of the issues prior to having to get a complaint filed, but the essential ones to look at are the thirty-day time limit and the raising of constitutional challenges. Many of the other issues will not necessarily help the applicant who has been denied, and are more relevant to the applicant who has prevailed. If there has been a defect in the proceedings to deny, such as an Open Meetings Act violation, the city could simply have another hearing and do things properly; likewise on ZPL violations.

Once preliminary issues have been satisfied, the question turns to the legal issues regarding proceeding in superior court.

A. PROPER VENUE, JURISDICTION, AND DEFENDANTS

Zoning suits are suits in equity, and are heard in superior courts. Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 178, 281 S.E.2d 522 (1981). The typical challenge is

a challenge to the constitutionality of a zoning ordinance, and hence cannot be tried in state court. The challenge, incidentally, is always to the constitutionality of the existing zoning, not whether the proposed zoning is constitutional or provides a higher and better use.

Zoning cases are brought against the city or county making the zoning decision. Suits against counties should be brought against the county. Ga. Const., Art. 9, Sec. 1, Para. I. The entity such as the Board of Commissioners an equivalent entity. Guhl v. Tuggle, 242 Ga. 412, 249 S.E.2d 219 (1978). Entities such as planning commissions or boards of zoning appeals are not proper parties as they do not have the power to zone. Riverhill Community Ass'n v. Cobb County Bd. of Com'rs, 236 Ga. 856, 226 S.E.2d 54 (1976).

If the challenge is to a successful rezoning of other person's property, the successful applicant should be named as a party. Riverhill Community Ass'n v. Cobb County Bd. of Com'rs, 236 Ga. 856, 226 S.E.2d 54 (1976). They would have the right to intervene were they not named, and the decision needs to be binding on them as well.

Individual city council members or county commissioners are not necessary or proper defendants in their individual capacity. They can be named in their official capacity, but that is generally superfluous. Technically, mandamus requires naming an individual, but many mandamus cases proceed simply against the city or county themselves. If a claim of personal wrongdoing exists, claims can of course be brought against individual government officials. Otherwise, claims against officials in their

individual capacity are dangerous, and can lead to sanctions. The officials have legislative immunity in their individual capacity against challenges in zoning suits.

Whipple v. City of Cordele, 231 Ga.App. 274, 499 S.E.2d 113 (1998).

The proper jurisdiction is of course the county where the local government sits, which is also where the land sits, and so this is never an issue.

B. STANDING OF THE PLAINTIFFS

Property owners have standing to file suits regarding their own property. Similarly, persons who have an interest in property, such as a contingent contract, have been held to have standing to bring a rezoning challenge. Gifford Hill & Co. v. Harrison, 229 Ga. 260, 191 S.E.2d 85 (1972). The sticking point is neighbors. Neighbors do not have an automatic right to challenge a rezoning. To even have standing to get into court, a neighbor must show that he has a special interest different from the area in general that has been specifically damaged. This issue is discussed more fully in the paper on representing neighbors, presented in this same seminar.

C. PROPER FORM OF SUIT

Zoning appeals are frequently either brought as declaratory judgment actions or mandamus cases. Sometimes they are simply styled appeals. Because the appeal of a zoning decision is a de novo review, this aspect of the form matters relatively little.

The courts have curiously given some discretion to the local government as to how an administrative appeal proceeds, holding that there can be a direct appeal, if the ordinance so provides, or otherwise it should go by mandamus. Beugnot v. Coweta

County, 231 Ga.App. 715, 500 S.E.2d 28 (1998). An administrative appeal would be a permit or variance denial. Mandamus, under O.C.G.A. § 9-6-20 et seq., has some of its own rules, including a very short timeframe for the hearing. Thus, the well-prepared applicant can get its case ready, and file mandamus and seek a quick hearing, leaving the local government little time to prepare. The courts have even approved requiring such an appeal to go by writ of certiorari, a truly arcane proceeding under O.C.G.A. § 5-4-1 et seq. Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995). Electing the writ of certiorari prevents the mandamus sort of ambush, and so it has been selected by many jurisdictions.

The zoning appeal will ultimately be decided by the judge, as the constitutionality of a zoning decision is not a jury question. Dover v. City of Jackson, 246 Ga.App. 524, 541 S.E.2d 92 (2000). Further, the appropriate decision, if the court finds the current zoning unconstitutional, is not to rezone the property, but only to order the property rezoned in a constitutional fashion. Town of Tyrone v. Tyrone LLC, 275 Ga. 383, 384, 565 S.E.2d 806 (2002).

D. POTENTIAL CLAIMS

As an unsuccessful applicant, the basic claim is that the current zoning is unconstitutional. In the former, the property owner must show by clear and convincing evidence that he has suffered substantial detriment without a countervailing benefit to the public health, safety, morality, and welfare. It is only upon this showing that the local government must then come forward with evidence to rebut the evidence adduced

on behalf of the property owner. DeKalb County v. Dobson, 267 Ga. 624, 482 S.E.2d 239 (1997).

The unsuccessful applicant can also claim that there was some defect in the zoning procedure, and perhaps obtain another rezoning hearing. However, if the votes were not there before, absent some change on the composition of the council, obtaining another vote is often a waste of time.

In addition, the unsuccessful applicant should look at the validity of the zoning ordinance and map. If the zoning ordinance and/or map were not adopted in compliance with the Zoning Procedures Law, there would potentially be no zoning on the property. Hence, it is always worthwhile to send some discovery on this point. Discovering a defect from years before can be sufficient to knock down the entire ordinance, and relieve the applicant, and the entire jurisdiction, of zoning restrictions. Tilley Properties, Inc. v. Bartow County, 261 Ga. 153, 401 S.E.2d 527 (1991). Not only would a defect in advertising the hearing work, a defect in not having proper policies and procedures, or not having proper standards governing the exercise of the zoning power, or not having properly had separate hearings to adopt those, would all be sufficient to have the ordinance declared void. As time passes, this becomes less and less of a possibility, but it is still worth checking for.

An additional question is the validity of the zoning map. The official zoning map must either be spread upon the minutes, or referred to by reference, and clearly. If the minutes and the ordinance refer to a map kept in the clerk's office with a certain date

and signature on it, and that map is long lost, with the county staff using instead tax maps, those would not be official zoning maps. There would in effect be no map.

The challenge by the neighbor is of a different flavor. Neighbors have no desire to knock down all zoning in the jurisdiction, and have a different standard. The accompanying paper on representing neighbors covers these issues in detail.

E. DAMAGES CLAIMS

There has been no success on the part of plaintiffs in seeking damages for unconstitutional rezonings. One avenue that has been tried is to assert a temporary taking. That is, for the period that a property was unconstitutional zoned R-1, what are the damages? Some cases in federal court have awarded temporary takings, but Georgia courts have rejected them, unless the owner can show a complete deprivation of all economic use. Powell v. City of Snellville, 275 Ga. 207, 563 S.E.2d 860 (2002).

Obtaining any damages from a city requires compliance with the ante litem notice provisions of O.C.G.A. § 36-33-5. That provision requires giving a city thirty days notice before filing suit, but that of course impacts the thirty-day rule in zoning, which creates a bit of a conundrum. Some applicants solve this by filing suit timely, and amending to add a damage claim later, and this theory has not been tested by the appellate courts. Of course, damages are not likely to be obtained unless the taking is total, meaning absolutely nothing can be done on the property, and it is the equivalent to an inverse condemnation. There has not been a regulatory taking case of this severity in Georgia.

42 U.S.C. § 1983 claims have not been very successful in state court either, in that the state court's do not view there having been a violation of the federal law of zoning unless the taking is complete, and there has been a deprivation all economic use of the property. Dover v. City of Jackson, 246 Ga.App. 524, 541 S.E.2d 92 (2000).

F. FEDERAL COURT PROCEEDINGS

Because of the difficulty of obtaining damages in state court, and because of the often difficult task of winning against a local government in its home county, some litigants try to bring cases in federal court. Federal courts do not want to be the zoning courts of final appeal, and have stated so frequently. They have generally determined that, if the state provides a remedy, the federal claims are not ripe. The Eleventh Circuit addressed the issue of in the case Bickerstaff Clay Products Company, Inc. v. Harris County, Georgia, et al., 89 F.3rd 1481 (11th Cir., 1996), where plaintiffs challenged on Fifth and Fourteenth Amendment grounds the county's failure to rezone their property in accordance with their wishes. The Eleventh Circuit determined that those claims were not ripe under the Supreme Court's decision in Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108 (1985), and ruled that a Takings Clause claim does not become ripe unless the state provides no remedy to compensate the landowner for the taking. A property owner cannot claim a violation of the Clause unless the state provides the landowner no procedure (such as an action for inverse condemnation) for obtaining just compensation. That is not the case in Georgia,

and so it is nearly impossible to proceed directly to federal court. Likewise, once the superior court has ruled, the decision would be res judicata.

IV. PROCEEDINGS IN APPELLATE COURT

Once a verdict has been obtained in superior court, the potential arises for an appeal. The traditional thirty day appeal clock applies, and the first question is whether the appeal should be by application or direct.

A. EVOLVING APPELLATE 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. A variety of cases began to cloud the issue. 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.

In King v. City of Bainbridge, 272 Ga. 427, 531 S.E.2d 350 (2000), 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.

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 adjoining property (seeking to force the Board to rescind the rezoning). The Court approved a direct appeal, noting that the order was not an appeal to review an administrative decision, and was therefore subject to direct 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.

However, the tide began to turn in 2002. In Powell v. City of Snellville, 275 Ga. 207, 563 S.E.2d 860 (2002), the Court 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.

The change continued in Ferguson v. Composite State Bd. of Medical Examiners, 275 Ga. 255, 564 S.E.2d 715 (2002), which was not in fact a zoning case, but which was used to overrule Sprayberry. The case involved a doctors' appeal of a medical license revocation. The losing ex-doctor filed both a direct appeal and a 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.

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.

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, the Court 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.

B. THE CURRENT POSTURE FOR APPEALS

The question a practitioner thus faces today is, what sort of appeal 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 the 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 the client had the opportunity to appear before the tribunal, even if they did not, the safest bet would be an application.

C. 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.

D. CRAFTING AN APPLICATION FOR APPEAL

Once a discretionary appeal has been decided upon, consideration turns to having the 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 in closely reviewing the opinions, it becomes clear that 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.