

**TRIAL OF LEGISLATIVE AND
QUASI-JUDICIAL ZONING AND
LAND USE CASES, INCLUDING
SIGNIFICANT DIFFERENCES**

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I. NATURE OF LEGISLATIVE AND ADMINISTRATIVE ZONING DECISIONS

Zoning decisions at the local government level are of two types. One is legislative, the other administrative. Different procedural rules apply depending on which type of decision is being made. It is therefore imperative that we first understand the different nature of these decisions and then how the procedural rules differ.

II. ADMINISTRATIVE ZONING DECISIONS DEFINED

Administrative zoning decisions are defined, not by the body or board that makes the decision, but by the nature of the decision being made.¹ For example, at one instance a board of commissioners may make administrative decisions, such as the grant of a variance, while at another it makes legislative decisions, such as the rezoning of property. We must then examine the nature of the decision to determine whether it is administrative or legislative.

Usually, local government administrative decisions are judicial in nature; in fact, they are often referred to as quasi-judicial.² That is because the decisions are made in accordance with the typical judicial decision-making process. They usually affect directly the rights of individuals or entities who have an interest in the property subject

to an administrative decision. Typical local administrative zoning decisions include the grant or denial of variances, approval or disapproval of subdivision plats, and review of administrative decisions made by zoning officials. The board or commission receives evidence, usually during a public hearing, decides the facts, and applies the facts to the standards in the zoning ordinance to arrive at a decision either approving or not approving the issue at hand.³

III. PROCEDURAL DUE PROCESS PROTECTION IN ADMINISTRATIVE ZONING HEARINGS

Since administrative zoning decisions typically affect the rights of individuals whose property is subject to regulation by a local government, certain procedural due process safeguards are necessary. Those safeguards generally include notice of a hearing, a right to present evidence, a right to representation by counsel, the right to cross-examine witnesses, and the right to a written decision based on the evidence presented at the hearing.⁴

Due process at the local government level does not require strict procedural rules as would be expected in a court of law. Not only that, public hearings are conducted by non-lawyers who are not expected to follow rules of civil procedure as required of a court. Thus, a more relaxed proceeding is acceptable, although it must meet a minimal level of fairness.⁵ For added protection, administrative zoning decisions are subject to appeal to the superior court.

Of supreme importance is the right to a fair hearing and a written decision based on the record of evidence adduced at the hearing.

IV. JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

A. NATURE OF APPEAL

In Georgia, appeals of administrative local government decisions are taken directly to the superior court. Appeals are initiated in one of three ways: writ of certiorari, appeal, or mandamus.⁶ The local government dictates the method or procedure for appeal in its ordinance. For example, the local government may provide that appeals from local government administrative decisions must be made to the superior court by writ of certiorari.⁷ In such case, the procedures under O.C.G.A. chapt. 5-4 must be followed. Those provisions for certiorari apply to appeals from decisions of inferior tribunals to the superior court. The second procedure is found in O.C.G.A. chapt. 5-3, which deals with appeals from inferior tribunals to the superior court.⁸ The standards are different than certiorari, but the procedures are detailed in the appeals chapter and must be followed. The third is by petition for mandamus. This procedural vehicle for appeal is required when the local zoning ordinance is silent as to the method of appeal to the superior court.⁹

B. ON THE RECORD REVIEW

Judicial review of a local government zoning or administrative decision is a review of the record only. Our constitutionally based doctrine of separation of powers

requires a very limited judicial review of administrative decisions. Thus, the court in its review will not receive new evidence, but will review the record of evidence presented to the administrative agency. The court does not substitute its judgment for that of the administrative agency, but merely reviews the record to determine whether the agency acted beyond its discretionary powers, abused its discretion, or acted arbitrarily or capriciously regarding an individual's constitutional rights.¹⁰

This limited judicial review of the record applies regardless of the method used to appeal the decision to the superior court. That is, whether the appeal is by writ of certiorari, appeal under the statutory provisions, or mandamus, the court is still limited to a review of the record before the local government administrative agency.¹¹

C. STANDARD OF REVIEW

The superior court, in its review of the record of evidence presented to the administrative decision agency, determines whether the agency abused its discretion or whether the appellant is entitled to relief as a matter of law. Under this review, the "any evidence" rule of administrative review applies. Thus, the court, in consideration of the record of the proceedings before the administrative agency, determines whether there is any evidence which supports the decision of the administrative agency.¹² If so, then the court's duty is to uphold the administrative decision.

V. LEGISLATIVE ZONING DECISIONS DEFINED

Legislative decisions are those which have broad-based application and are in the nature of policy making by the local government. They are more apt to apply to the general population than impact specific individuals.¹³ Adoption of an ordinance, in our case a zoning ordinance, is the most typical example of legislative decision making. Under the Georgia Zoning Procedures Law, the General Assembly defined the following as legislative decisions: adoption of a zoning ordinance, amendment to a zoning ordinance, the rezoning of property from one zoning classification to another, and the grant of a special use permit.¹⁴ Since these are deemed legislative decisions, only the governing body of the local government may make them. In the case of cities, that is reserved exclusively to the city council or city commission; in the case of counties, legislative decisions are reserved exclusively to the board of commissioners. A planning commission appointed by the local governing body may make recommendations to the governing body, but the ultimate decision rests within the legislative discretion of the local governing body.

Legislative decisions are not bound by specific rules or standards. They are intended to have broad application, and though subject to constitutional limitations, legislative decisions are based upon broad discretionary powers inherent in the legislative process.¹⁵ This is true although the local government is required to adopt standards governing decisions of rezoning property.

VI. JUDICIAL REVIEW OF LEGISLATIVE DECISIONS

A. NATURE OF APPEAL

Like the appeal of administrative decisions, legislative decisions are subject to a limited judicial review. But the court in its review is not limited only to a review of the evidence presented to the local government. The superior court conducts a de novo review of the challenges to the zoning decision.¹⁶ Therefore, the court is not limited by the facts or evidence presented to the local governing body, nor is it limited by the lower court's determination of the applicable law. It is a fresh appeal, and new evidence, including expert testimony, may be offered to the court. The court is free to make an independent determination of whether the procedural or substantive challenges may be sustained based on the evidence presented to the court and based on the applicable law.

The constitutional challenges to a legislative zoning decision are generally of two types. One is facial, meaning that a challenge is made to the ordinance as adopted without regard to how the ordinance is applied. The other type is commonly called an "as applied" challenge, which usually asserts that a zoning ordinance as applied to specific property is unconstitutional.¹⁷ This more commonly occurs in challenges to the rezoning of property or grant of a special use permit.

Whether the appeal is a facial challenge or an as applied challenge, the superior court is authorized to receive evidence de novo and make a decision as to whether the legislative decision will survive constitutional attack.

B. NATURE OF REMEDY

In an “as applied” constitutional challenge, an appeal to the superior court is initiated by filing a complaint challenging the decision by the local government. Although it is in the nature of an appeal, it is treated as a complaint in equity.¹⁸ Of course, if damages apply, then legal remedies as well as equitable may be availed to the complaining party.

The trial court is not limited to the record of the evidence presented to the administrative agency, but may take a fresh look at new evidence presented by the parties.¹⁹

When appeals involve zoning decisions, the separation of powers doctrine prohibits the court from rezoning property. The court’s remedy to a complaining party, other than damages, is limited to declaring a zoning decision unconstitutional. After that, utilizing its injunctive powers, the court remands the case to the local government with direction to rezone the property to a constitutional zoning classification.²⁰ In this way, the legislative discretion of the local government is not judicially usurped, although the local government must rezone the property to a classification different from that found unconstitutional by the court.

C. BURDEN OF PROOF IN REZONING DECISIONS

Since a zoning decision is a legislative decision, it enjoys the presumption of validity as is true of all legislative decisions.²¹

The burden of proof of the landowner who challenges the denial of a rezoning petition is different from that of a neighboring property owner who challenges the grant of a rezoning petition. 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.²²

Where a neighboring property owner challenges a rezoning of property, he is required to show fraud, corruption, or a manifest abuse of discretion to the detriment of the neighboring property owners. This too, is a very heavy burden; one that certainly favors the property owner.²³

VII. SUMMARY AND CONCLUSION

Local government zoning decisions are generally of two types: administrative and legislative. Request for variances, subdivision plat approval, and review of zoning decisions by zoning officials are examples of administrative zoning decisions. Due process safeguards are required in administrative decision making, including the right to notice, to present evidence, to cross-examine witnesses, to develop a record of the proceedings, and to a written decision based on the record. It is a decision that is judicial in nature, as the decision-maker determines the facts and applies the facts to the legal standards in the zoning ordinance.

Legislative decisions, on the other hand, are those which result in the adoption of a zoning ordinance, an amendment to the zoning ordinance, the rezoning of property, and the approval of a special use permit. These decisions must be made by the local governing authority. As legislative decisions, they are policy-making decisions with usually far-reaching application. Due process, trial-type hearings are not required, but the local government is required to conduct a hearing in which applicants and opponents may present their case to the decision-maker. Legislative decisions are limited by the Constitution, and thus the typical issue on appeal of a legislative decision is whether it violates any of the protections afforded under either the Georgia or Federal Constitutions.

¹ Southview Cemetary Ass'n v. Hailey, 199 Ga. 478, 34 S.E.2d 863 (1945); Mack II v. City of Atlanta, 227 Ga. App. 305, 489 S.E.2d 357 (1998).

² Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995), (variance decision by a local board of appeals is quasi-judicial in nature); Bentley v. Chastain, 242 Ga. 348, 249 S.E.2d 38 (1978).

³ Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995), (for variance, board considers whether facts applying to property warrant relief from zoning under standards in ordinance); Bentley v. Chastain, 242 Ga. 348, 249 S.E.2d 38 (1978).

⁴ Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995).

⁵ Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995)(strict adherence to rules of evidence not required; hearing may be conducted informally).

⁶ Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995); Dougherty County v. Webb, 256 Ga. 474, 350 S.E.2d 457 (1986).

⁷ O.C.G.A. chapt. 5-4; Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995).

⁸ O.C.G.A. chapt. 5-3; Dougherty County v. Webb, 256 Ga. 474, 350 S.E.2d 457 (1986).

⁹ Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995)(mandamus is remedy when zoning ordinance is silent as to judicial review); Shockley v. Fayette County, 260 Ga. 489, 396 S.E.2d 883 (1990).

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- ¹⁰ Jackson v. Spalding County, 265 Ga. 792, 462 S.E.2d 361 (1995).
- ¹¹ Emory University v. Levitas, 260 Ga. 894, 401 S.E.2d 691 (1991).
- ¹² Gwinnett County v. Ehler Enterprises, Inc., 270 Ga. 570, 512 S.E.2d 239 (1999); Emory University v. Levitas, 260 Ga. 894, 401 S.E.2d 691 (1991).
- ¹³ Crymes v. DeKalb County, 923 F. 2d 1482 (11th Cir. 1991).
- ¹⁴ O.C.G.A. § 36-66-3.
- ¹⁵ Crymes v. DeKalb County, 923 F. 2d 1482 (11th Cir. 1991).
- ¹⁶ Dougherty County v. Webb, 256 Ga. 474, 350 S.E.2d 457 (1986).
- ¹⁷ Jacobs v. The Florida Bar, 50 F.3d 901 (11th Cir. 1995); O. S. Advertising Co. of Georgia v. Rubin, 267 Ga. 723, 482 S.E.2d 295 (1997); Village Centers, Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981).
- ¹⁸ Dougherty County v. Webb, 256 Ga. 474, 350 S.E.2d 457 (1986).
- ¹⁹ Dougherty County v. Webb, 256 Ga. 474, 350 S.E.2d 457 (1986).
- ²⁰ Speedway Grading Corp. v. Barrow County Board of Commissioners, 258 Ga. 693, 373 S.E.2d 205 (1988); DeKalb County v. Post Properties, Inc., 245 Ga. 214, 263 S.E.2d 905 (1979).
- ²¹ Gradous v. Board of Commissioners of Richmond County, 256 Ga. 469, 349 S.E.2d 707 (1986).
- ²² DeKalb County v. Dobson, 267 Ga. 624, 482 S.E.2d 239 (1997); Barrett v. Hamby, 235 Ga. 262, 219 S.E.2d 399 (1975).
- ²³ Cross v. Hall County, 238 Ga. 709, 235 S.E.2d 379 (1977).