ZONING AND LAND USE LAW 2019: THE COURT AWAKENS

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I. INTRODUCTION

The Georgia Constitution (1983 Ga. Const. Art. 9, Sec. 2, Par. 4) reserves to local governments the substantive power to zone and plan for land within their respective jurisdictions: cities having jurisdiction over properties in their city limits, and counties having zoning jurisdiction over the unincorporated areas.[1] In the exercise of this power, city councils and county boards of commissioners receive many types of land-development applications, often collectively referred to as "zoning" matters. However, the Georgia courts have developed different legal standards for different types of applications. After a long hiatus, the Georgia Supreme Court has recently bestirred itself, issuing several significant decisions that impact some of those long-standing court standards. This paper presents an overview of the different types of land-use applications that are presented to local governing authorities for action and the legal standards applicable to each.

II. ZONING PROCEDURES

A. The Zoning Procedures Law

As noted above, the Georgia Constitution does allow the state to legislate on matters of procedure in the zoning and land-use context. Using that authority, the General Assembly has enacted the Zoning Procedures Law ("ZPL")(O.C.G.A. § 36-66-1, *et seq*.), which sets out certain procedural requirements for a local government's exercise of its zoning powers. The stated purpose of the statute is to provide the minimum procedures that must be followed in order to assure "that due process is

[1] The same constitutional provision grants the General Assembly, however, the power to adopt procedural rules governing local governments' exercise of this power. The General Assembly's enactments pursuant to this power are discussed below.

afforded to the general public when local governments regulate the uses of property." O.C.G.A. § 36-66-2(a). The "zoning decisions" to which these procedures apply are legislative actions resulting in:

1) adoption of a zoning ordinance;

2) adoption of an amendment to the text of a zoning ordinance;

3) rezonings of property;

4) a city's adoption of a zoning ordinance amendment that zones property that is being annexed into that city; and

5) special use permits.

O.C.G.A. § 36-66-3(4).

> **PRACTICE POINTER**: There is some question as to the extent and application of the special-use permit provision in the ZPL. As noted, the ZPL defines zoning decisions by reference to *legislative* actions. As discussed in Section IV, below, however, the grant or denial of special use permits or conditional use permits are generally interpreted to be quasi-judicial. The tension between these concepts was recently discussed by the Court of Appeals in York v. Athens College of Ministry, Inc., 348 Ga. App. 58, 63 and fn. 9 (2018)(physical precedent only). Regardless, the safer approach is for local governments to apply the ZPL process to special/conditional use permit applications.

O.C.G.A. § 36-66-4 outlines the specific minimum procedures that must be followed for the above decisions. The local government must "provide for a hearing" on the proposed zoning decision, with prior advertisement in the newspaper that serves as the county legal organ. This advertisement must be published between 15 and 45 days

prior to the public hearing and must state the time, place, and purpose of the hearing. For rezonings, a sign advertising the public hearing must be posted on the subject property at least 15 days prior to the public hearing. This section also imposes additional notice requirements for actions in conjunction with annexation by a municipality as well as for any of the above decisions that relate to halfway houses, drug rehabilitation centers, or other facilities for the treatment of drug dependency. See O.C.G.A. § 36-66-4(d), (e), and (f). Local governments are also required to adopt procedural rules for public hearings on the above categories of zoning decisions, including equal hearing time for proponents and opponents of not less than ten minutes each. O.C.G.A. § 36-66-5(a). If a rezoning application is ultimately denied, the ZPL provides that no new rezoning of that property may be considered by the local government for at least six months. O.C.G.A. § 36-66-4(c). Failure to strictly follow the procedural requirements of the ZPL will invalidate the local government's action. C&H Development, LLC v. Franklin County, 294 Ga. App. 792 (1), 670 S.E.2d 491 (2008). Based on the idea that zoning restrictions are in derogation of a common-law right of an owner to use property as he or she sees fit, the same strict compliance is required for any additional procedural requirements set out in the local zoning ordinance. See, e.g., Monumedia II, LLC v. Dept. of Transp., 343 Ga. App. 49, 56 (2017).

As noted above, O.C.G.A. § 36-66-4(a) requires the local government to "provide for a hearing" on the proposed zoning action. Historically, many zoning ordinances delegate to a separate planning commission the duty to hold that public hearing. While not prohibiting that practice, a 2018 Supreme Court case placed significant qualifications on such a process. In Hoechstetter v. Pickens County, there was a substantial delay between that hearing and the county board of commissioners' the

Court emphasized that "the whole point of the statutory notice-and-hearing requirements is to afford interested citizens with a *meaningful* opportunity to be heard on a proposed zoning decision." 303 Ga. 786, 787 (2018). In concluding that the planning commission hearing was insufficient to satisfy the ZPL in that case, the Court stated:

> If an adequate record of the hearing before the Planning Commission had been made and transmitted to the Board — such that the final zoning decision of the Board could be said to have been meaningfully informed by what happened at the hearing — the hearing before the Planning Commission perhaps might satisfy the requirements of the ZPL. But it appears that the only record of that hearing is a one-page memorandum to the Board from the county director of public relations, which was prepared nearly a month after the hearing and discloses merely that the Planning Commission had heard "testimony from the applicant and considerable objections from the surrounding neighborhood in attendance." The memorandum fails to disclose even the general nature of those "considerable objections," and as such, we fail to see how the memorandum informed the Board in a meaningful way of what happened at the hearing.

In light of this decision, local governments delegating the public hearing on zoning decisions should closely review their procedures for meaningfully conveying those hearing proceedings to the governing body prior a final decision. Of course, the alternative of holding the public hearing before the governing body (as many and perhaps most already do) is always available, but that may require amendments to the zoning ordinance for those not currently using such a hearing procedure.

Finally, the ZPL states that

> each local government shall adopt standards governing the exercise of the zoning power, and such standards may include any factors which the local government finds relevant in balancing the interest in promoting the public health, safety, morality, or general welfare against the right to the unrestricted use of property.

O.C.G.A. § 36-66-5(b). Again, because city councils and boards of commissioners are

acting in a legislative capacity in adopting zoning ordinances, local governments have broad discretion in identifying these factors. Until its repeal in 2012, Chapter 67 of Title 36[2] imposed certain minimum factors to be considered by large counties and cities when considering certain zoning requests. While those so-called "Steinberg factors" are no longer mandatory for any local government, many if not most local zoning ordinances still contain provisions identical or similar to these factors. Because the former Steinberg factors address the same interests that O.C.G.A. § 36-66-5(b) requires all cities and counties to address in their zoning ordinances, use of those factors can be a simple way for a local government to satisfy this requirement of the Zoning Procedures Law. The erstwhile Steinberg factors were:

1. Whether the zoning proposal will permit a use that is suitable in view of the use and development of adjacent and nearby properties;
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;
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 adopted a land use plan, whether the zoning proposal is in conformity with the policy and intent of the land use plan; and

[2] This chapter was commonly referred to as "the Steinberg Act" after its sponsor, former DeKalb State Representative Cathey Steinberg. See Northridge Comm. Ass'n, Inc. v. Fulton County, 257 Ga. 722 (1988).

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.

Former O.C.G.A. § 36-67-3. Under its legislative discretion, a local government is free to augment these rezoning factors or to select other factors that the government determines best address the interests described in O.C.G.A. § 36-66-5(b).

B. The Conflicts of Interest in Zoning Actions Law

State law also sets out certain provisions to prevent conflicts of interest in rezoning decisions. O.C.G.A. § 36-67A-1, *et seq.*, requires that a member of a local governing body or planning commission who knows or should know that he/she or an immediate family member has an ownership interest (either directly or through the ownership of any stock of an entity that has an ownership interest) in a property that is the subject of a rezoning action must 1) disclose, in writing, the nature of that interest in writing to the local governing body, 2) disqualify himself/herself from voting on the rezoning, and 3) refrain from taking any other action to influence action on the rezoning application. Separately, this law also requires rezoning applicants to disclose all campaign contributions of $250.00 or more made within the previous two years to local government officials who will be acting on the application.

As written, this law only applies to rezoning applications (as described in Section II, above), and not to other land-use applications such as special use permits and variances. However, general constitutional provisions and court decisions prohibit conflicts of interest in all official actions. The general rule is that an "improper conflict exists when a public officer, in the discharge of his public function, acts upon a measure relating to a *specific transaction* and such transaction shall *directly* and *immediately*

affect his pecuniary interest." DOT v. Brooks, 254 Ga. 303, 317, 328 S.E.2d 705 (1985)(emphasis in original).

III. REZONINGS

In general, initial adoption of a zoning ordinance includes the assignment (usually via designations on zoning maps that are incorporated into the zoning ordinance) of particular "zoning districts" to each property within the particular government's jurisdiction. Each zoning district usually allows a particular range of permissible uses without the need of any additional zoning change, such as residential, office, commercial or industrial uses within parameters set out in the ordinance. A "rezoning" involves situations in which the underlying zoning district, as shown on the zoning maps, is changed so as to allow a new range of uses on the property in question. Rezonings are parcel-specific. Any desired change in the existing zoning district requires legislative action by the governing authority to amend the zoning ordinance's zoning maps by "rezoning" the parcel to another zoning district. *See, e.g.*, Hall Paving Co. v. Hall County, 237 Ga. 14, 16 (1976); Olley Valley Estates, Inc. v. Fussell, 232 Ga. 779, 781 (1974).

A. Litigation following Rezoning Denials

If the local governing authority denies a rezoning application, the dissatisfied applicant, of course, may file a lawsuit. Such a lawsuit must be filed within 30 days of the local government's final decision. See, e.g., Village Centers, Inc. v. DeKalb County, 248 Ga. 177 (3) (1981). However, while the main question before the governing authority at its hearing is whether the proposed zoning district is appropriate, the issue before the court is the constitutionality of the existing zoning, which is an equitable question resolved in a bench trial. *See, e.g.*, DeKalb County v. Chamblee Dunwoody

Hotel, 248 Ga. 186, 190 (1981). *See also* Village Centers, *supra,* 248 Ga. at 178 ("[W]e agree that the issue is the constitutionality of the zoning ordinance as opposed to the constitutionality of the decision of the governing authority denying rezoning"); Dover v. City of Jackson, 246 Ga. App. 524, 529-530 (2000)(overruled on other grounds, Greater Atlanta Homebuilders Ass'n v. City of McDonough, 322 Ga. App. 627 (2013)("[T]he issue to be determined is whether the zoning ordinance applicable to the property is constitutional, not whether a governing authority's decision not to rezone a property to another zoning classification is arbitrary").

> **PRACTICE POINTER:** While a city council or board of commissioners is not authorized to determine whether an existing zoning classification is indeed unconstitutional (a judicial determination), the rezoning applicant is required to make such an allegation of unconstitutionality before the local government in order to preserve the issue for court review. See generally Ashkouti v. City of Suwanee, 271 Ga. 154 (1999). While no specific formulation of such a constitutional challenge is required, an applicant's failure to make an allegation of an existing zoning classification's unconstitutionality will subject a subsequent lawsuit to dismissal. This requirement does not apply to facial constitutional challenges to zoning ordinances, as opposed to property-specific rezoning decisions. See Shelley v. Town of Tyrone, 302 Ga. 297, 307 (3)(2017).

While dissatisfied landowners/developers often seek to argue the reasons their rezoning applications should have been approved and/or that their applications met the rezoning criteria set forth in the local zoning ordinance, the cases further indicate that factual issues regarding the proposed zoning classification are not relevant to the

question which is properly before the court – i.e., the constitutionality of the existing zoning classification. *See, e.g.,* Moon v. Cobb County, 256 Ga. 539, 540 (1986)("We do not ask whether another zoning classification might be more logically and economically 'reasonable' or desirable on all the facts than the one attacked, because that is not the question")(quoting Guhl v. MEM Corp., 242 Ga. 354, 355 (1978)); City of Atlanta v. TAP Associates, 273 Ga. 681, 683 (2001)("The issue is not whether the city could have made a different decision or better designation in zoning [the plaintiff's] property, but whether the choice that it did make benefits the public in a substantial way"); DeKalb County v. Chamblee Dunwoody Hotel, 248 Ga. 186, 190 (1981)("Thus, the question is not whether rezoning would increase the value of the land; the question is whether the existing zoning classification is depriving the landowner of property without due process of law. . . . Hence, the evidence that the subject property would be more valuable if rezoned for use as a hotel borders on being irrelevant."). See also Jervey v. City of Marietta, 274 Ga. 754 (2002); Town of Tyrone v. Tyrone, LLC, 275 Ga. 383 (2002). This distinction follows from the legislative character of a local government's zoning actions: the courts cannot rule on what legislative action a legislative body *should* have taken; rather, under separation of powers principles, the courts may only rule on the constitutionality of those legislative actions actually taken – in this case, the constitutionality of the zoning classification that is in place for a particular property.

So what exactly is the constitutional question at issue? Historically, the courts were vague on this point, referring both to due process concepts (see Chamblee Dunwoody Hotel, *supra*) and to takings without compensation (see, e.g., Barrett v. Hamby, 235 Ga. 262, 265 (1975), a seminal Georgia case on zoning). In 2017, the Georgia Supreme Court clarified the issue, holding that the traditional zoning test (as

described below) "is rooted in due process guarantees against arbitrary exertion of the police power rather than in the government's authority to take private property through eminent domain." Diversified Holdings, LLP v. City of Suwanee, 302 Ga. 597, 610 (2017).[3] While not completely foreclosing the potential of a takings claim in this context, the Court stated that "[z]oning … does not ordinarily present the kind of affirmative public use at the expense of the property owner that effects a taking." Id. See also City of Tybee Island v. Live Oak Group, LLC, 324 Ga. App. 476 (2013). While the constitutional basis of zoning claims may seem to have little practical impact, other Court precedent holds that sovereign immunity bars constitutional claims (other than inverse condemnation claims) against the state and counties. See Lathrop v. Deal, 301 Ga. 408 (2017). HB 311 (2018), effective July 1, 2019 and waiving sovereign immunity for certain injunctive and declaratory judgment claims, may alter this analysis. However, the more significant impact of Diversified Holdings could be the potential of takings claims being brought in federal court. This issue is discussed in more detail in Section VI, below.

Notwithstanding the above issues, the well-established (due process, as we now know) standards for the court to apply in a zoning lawsuit remain fully viable and applicable:

> A zoning ordinance is presumed to be valid. In a rezoning action, the only question is the constitutionality of the existing zoning on the property. The property owner has the burden of proving by clear and convincing evidence that (1) the existing zoning presents a significant detriment to the landowner and (2) the existing zoning is not substantially related to the public health, safety, morality, and welfare. If the property owner meets its burden, then the governing authority must introduce evidence showing the existing zoning is reasonably related to the public health, safety, and welfare. Once the [governing authority] justifies its zoning as reasonably

[3] In reevaluating the basis of the Georgia test, the Court largely followed the U.S. Supreme Court's own re-analysis of the distinctions between federal takings and due process claims in Lingle v. Chevron, 544 U.S. 528 (2005).

> related to the public interest, the trial court must weigh the public benefit of the existing zoning against the detriment to the property owner. When the validity of the legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control.

TAP Associates, 273 Ga. at 683 (citations omitted); *see also* Barrett v. Hamby, *supra*; Diversified Holdings, *supra*, 302 Ga. at 612.

Evidence of a significant detriment may include, for example, inability to economically develop the property as zoned; inability to market/sell the property as zoned; or a property value of the subject property that is substantially lower than similarly zoned property. Gwinnett County v. Davis, 268 Ga. 653 (1997) summarizes the types of evidence that have been held sufficient to establish a significant detriment. Similarly, local governments may be able to show the absence of a significant detriment by showing that such factors do not exist in the case in question.

Evidence regarding an existing zoning district's relationship to the public interest often revolves around planning issues: the appropriateness of the existing zoning, the existing zoning's relationship/compliance with the government's comprehensive land-use plan and map, etc. The TAP Associates case includes language very favorable to local governments in situations where the existing zoning classification is in line with the government's comprehensive plan and map. *See* TAP Associates, 273 Ga. at 685.

If the owner fails to make out a *prima facie* case, the governing authority need not present evidence, and the case is subject to dismissal under O.C.G.A. § 9-11-41(b). *See, e.g.*, Jones v. City of Atlanta, 257 Ga. 727 (1988); Gradous v. Richmond County, 256 Ga. 469 (1986). If the owner meets its burden, the local government presents its case in support of the public interest served by the existing zoning district, and may also present evidence to challenge the significance/validity of the owner's evidence of

detriment caused by that existing zoning. In balancing detriment against the public interest, the so-called Guhl factors are often used. Guhl v. Holcomb Bridge Road Corp., 238 Ga. 322 (1977). The Guhl factors include consideration of: (1) existing uses and zoning of nearby property; (2) the extent to which property values are diminished by the particular zoning restrictions; (3) the extent to which the destruction of plaintiff's property values promotes health, safety, morals or general welfare of the public; (4) the relative gain to the public, as compared to the hardship imposed upon the individual property owner; (5) the suitability of the subject property for the zoned purposes; and (6) the length of time the property has been vacant as zoned, considered in the context of land development in the area in the vicinity of the property. Id. at 323, 324, 232 S.E.2d at 832. See also Diversified Holdings, *supra*, 302 Ga. at 612. As a practical matter, the Guhl factors are evidentiary points relevant to the substantial detriment/public interest balancing test quoted above, rather than an independent test to be applied.

In the final analysis, if the court determines that the detriment to the owner outweighs the public purposes served by keeping the property in its current zoning, the existing zoning will be declared unconstitutional. The case will then be remanded to the local government with direction to rezone the property to a constitutional classification. *See, e.g.,* Hall Paving Co. v. Hall County, 237 Ga. 14, 15, 226 S.E.2d 728 (1976). Because the courts do not have substantive zoning power, however, the court may not specify which zoning district/classification must be placed upon the property. See, generally, City of Atlanta v. TAP Associates, 273 Ga. 681, 683 (2001). If the landowner is dissatisfied with the outcome of its rezoning application on remand, it may seek to have the local government held in civil contempt and/or challenge the constitutionality of the

new zoning classification. Alexander v. DeKalb County, 264 Ga. 362, 364-365 (1994).

IV. SPECIAL USE PERMITS

Special use permits (also sometimes called "conditional use permits" or just "conditional uses", depending on the terminology in the particular local jurisdiction), allow for flexibility in determining whether a particular use of property is appropriate for a specific piece of property. Such uses are not allowed automatically in a given zoning district, but only as a "specially permitted" use upon approval by the local governing authority. "This zoning device allows the local governing body to anticipate proposed future land uses potentially in conflict with existing permitted uses, and affords the flexibility of permitting the proposed use upon compliance with conditions set out in the ordinance, or in the discretion of the local governing body." Dougherty County v. Webb, 256 Ga. 474, 475 (1986)(disapproved on other grounds, City of Cumming v. Flowers, 300 Ga. 820 (5(d))(2017)). As articulated in Moon v. Cobb County, 256 Ga. 539 (1986), the landowner in a special use permit case presents the facts and law to the governing body, which then decides whether the special use permit will issue.

Historically, appeals of special/conditional use permit cases would go to Superior Court by direct appeal if the local ordinance so provided, and otherwise by mandamus. Moon, 256 Ga. at 540; Webb, 256 at 475. However, this is likely no longer the law. In City of Cumming v. Flowers, 300 Ga. 820 (2017), the Court disapproved a long line of cases that allowed the local ordinance to dictate whether a variance action (see Section IV, below) traveled to superior court via certiorari or mandamus, instead ruling that challenges to variance decisions must follow the statutory certiorari process regardless of what the local ordinance may say on the topic. In a footnote, the Court stated that "it

is not clear that conditional and special use permit cases are meaningfully different from variance cases in this context…." Flowers, 300 Ga. at 827 (fn. 5). Because the Court did not disturb the portions of Moon, Webb, and other cases characterizing special use permit decisions as quasi-judicial, it is likely the case that challenges to such decisions must be filed via the certiorari procedures of O.C.G.A. § 5-4-1, et seq. And in fact, the Court of Appeals (citing Flowers) recently held that a particular special use permit decision was quasi-judicial and thus certiorari was the proper procedure for challenging that decision. York v. Athens College of Ministry, Inc., 348 Ga. App. 58 (1)(2018)(physical precedent only). It is worth noting, however, the tension between these concepts and the language quoted in the following paragraph, lumping special use permits into the general category of "zoning" and characterizing zoning as legislative rather than judicial.

The superior court decides these cases solely on the record created before the governing body. In Gwinnett County v Ehler Enterprises, Inc., 270 Ga. 570, 512 S.E.2d 239 (1999), the Court held that

> [t]he trial court is bound by the facts presented to the board [of commissioners] and thus the trial court's obligation is to review the sufficiency of the evidence before the board, but now to reweigh that evidence. If there is *no evidence* to support the board's decision, the decision constitutes an abuse of discretion and may be reversed…By focusing on whether the board's decision is supported by *any evidence,* we recognize that zoning is a legislative and not judicial function.

Id. (emphasis supplied). See also Macon-Bibb Planning & Zoning Comm'n v. Epic Midstream, LLC, 2019 Ga. App. LEXIS 197, 2019 WL 1210362 (Mar. 15, 2019)(physical precedent only). This standard is consistent with appellate decisions regarding the standard for certiorari review. While O.C.G.A. § 5-4-12 tells the court on certiorari to determine whether the lower decision was supported by "substantial evidence", the

Court of Appeals has held that this test is the same as an "any evidence" standard. City of Atlanta v. Smith, 228 Ga. App. 864 (1997); Epic Midstream, *supra,* at *8. That court relied on Supreme Court decisions holding that "in Georgia the substantial-evidence standard is effectively the same as the any-evidence standard." Emory Univ. v. Levitas, 260 Ga. 894, 897 (1991). It is worth noting, however, that Levitas did not involve interpretation of the certiorari statutes.

Dissatisfied special-use-permit applicants often rely on a trio of special use permit cases decided by the Supreme Court in 1988: Fulton County v. Bartenfeld, 256 Ga. 766, 363 S.E.2d 555 (1988); Crymes v. DeKalb County, 258 Ga. 30, 364 S.E.2d 852 (1988); and Lithonia Asphalt Co. v. Hall County Planning Comm., 258 Ga. 8, 364 S.E.2d 860 (1988). Lifting reasoning from cases involving alcohol licenses, these cases generally stand for the propositions that 1) a local government must set forth objective criteria for special use permits within its zoning ordinance, and 2) an applicant who meets those objective criteria is entitled to issuance of the special use permit.

While never overruled, it is difficult to reconcile the objective-criteria requirement from these cases with the earlier language of Webb, which indicated that local governments could exercise discretion in approving or denying special use permit applications, and subsequent Supreme Court cases, including Ehler Enterprises, quoted above. *See also* City of Alpharetta v. Estate of Sims, 272 Ga. 680, 680-681 (2000); Fulton County v. The Congregation of Anshei Chesed, 275 Ga. 856, 860 (n.7)(2002)("A local ordinance that sets out criteria containing 'subjective aspects' that must be satisfied before a special use permit may issue is one that requires the local governing body to exercise discretion."); Jackson County v. Earth Resources, Inc., 280 Ga. 389 (2006); City of Roswell v. Fellowship Christian School, Inc., 281 Ga. 767 (2007).

Attempting to reconcile these cases, it appears that local governments must set forth criteria for the grant of special use permits within their zoning ordinances. However, there is no prohibition against those criteria being subjective and requiring the exercise of discretion.

> **PRACTICE POINTER:** While the above standard of review is favorable to local governments, it is important to remember that subsequent litigation in the special use permit context is solely a review of the sufficiency of the evidence developed before the local government – no new evidence may be considered by the court. Thus, from the local government perspective it is essential that at least some evidence be present in the record before the local governing body upon which that governing body may reasonably conclude that one or more of its special use permit criteria is/are not met by the application in question. As noted in Section V below, in challenges filed by neighbors, evidence relating to whether the neighbor has standing to bring such a challenge must also be contained in the record.

V. VARIANCES

Variances are requests for relief from strict application of provisions of a zoning ordinance, such as reductions of setbacks, increases in allowable height, and other development standards as may be set out in particular zoning ordinances. In most jurisdictions, authority over variance decisions has been delegated to an administrative board, such as a Board of Zoning Appeals or Board of Zoning Adjustment. Because there is authority for the proposition that true legislative discretion cannot be delegated (*see* Berkelbaugh v. Green, 258 Ga. 150 (1988)), criteria contained within a zoning

ordinance for the grant or denial of variances should be as objective as possible. Nevertheless, the applicable standard in litigation over variance decisions, as described below, does appear to acknowledge that some level of delegation of discretion is permissible for such administrative boards.

Until recently, the method of challenging a variance decision depended on the text of the relevant zoning ordinance. Under Jackson v. Spalding County, 265 Ga. 792 (1995), mandamus was the proper vehicle for such a challenge "[w]hen the zoning ordinance fails to prescribe a method of judicial review...." *Id.* at 793. In Jackson, the Spalding County ordinance stated that review would be via petition for certiorari, and the Supreme Court therefore affirmed that as the proper mechanism to get to court. *Id.* at 793-794. Recently, however, the Supreme Court recognized that it is beyond the power of local governments to dictate the jurisdiction of superior courts and overruled Jackson. City of Cumming v. Flowers, 300 Ga. 820, 834 (2017). Instead, because variance decisions are quasi-judicial (as further described below), the proper mechanism for a court challenge to a variance decision is a petition for certiorari under O.C.G.A. § 5-4-1, et seq. *Id.* at 834 (7).[4]

The Georgia Supreme Court has repeatedly held that, because administrative zoning boards are acting in a quasi-judicial or administrative (rather than legislative) capacity in variance decisions, Superior Court appeals from such boards' decisions are heard entirely on the record created before that board. *See* Jackson v. Spalding County, 265 Ga. 792, 794 (1995)(disapproved on other grounds, City of Cumming v. Flowers, 300 Ga. 820 (2017)); LaFave v. City of Atlanta, 258 Ga. 631 (4) (1988); City of Atlanta v.

[4] This decision resolved the tension between the Jackson rule in the quasi-judicial context and an earlier decision holding that local governments have no "power to confer a right of direct appeal" from rezoning decisions. Walton County v. Scenic Hills Estates, 261 Ga. 94, 95 (1991).

Midtown North, Ltd., 257 Ga. 496 (4)(1987); Bentley v. Chastain, 242 Ga. 348 (1) (1978); Emory University v. Levitas, 260 Ga. 894, 898 (1991)(the "any evidence" standard is to be applied to review of zoning appeals board decisions).

Jackson v. Spalding County, *supra*, involved an appeal from a decision of the Spalding County Board of Zoning Appeals. The Court held:

> [A] superior court may not engage in a de novo review of a zoning appeals board's decision. Under Bentley, a court reviews the zoning board's decision to determine whether it (1) acted beyond the scope of its discretionary powers; (2) abused its discretion; (3) or acted in an arbitrary or capricious manner.

265 Ga. at 794. In Bentley v. Chastain, 242 Ga. 348 (1978), the Supreme Court considered the proper standard of review of a decision of the Cobb County Board of Zoning Appeals. With respect to such administrative bodies, the Court stated:

> their decisions are not to be taken lightly or minimized by the judiciary. Review overbroad in scope would have the effect of substituting the judgment of a judge or jury for that of the agency, thereby nullifying the benefits of legislative delegation to a specialized body . . . .[T]he focus of the courts in reviewing administrative decisions should be to evaluate the extent of discretion delegated to that agency and to see that the agency acts within the limits of its discretion in order to protect individuals against the unnecessary and uncontrolled use of that power . . . . Therefore, the only review authorized is that inherent in the power of the judiciary: Whether the agency acted beyond the discretionary powers conferred upon it, abused its discretion, or acted arbitrarily or capriciously with regard to an individual's constitutional rights.

Id. at 351, 352. *Accord*, City of Atlanta Board of Zoning Adjustment v. Midtown North, Ltd. 257 Ga. 496 (4) (1987). In sum, the court's role, functioning as an appellate body in the variance context, is to review the record developed below to determine whether, in a variance decision, the administrative body (1) acted beyond the scope of its discretionary powers; (2) abused its discretion; or (3) acted in an arbitrary or capricious manner. Jackson v. Spalding County, 265 Ga. at 794.

VI. NEIGHBOR SUITS

Of course, not all lawsuits are brought by landowners/developers following a local government's denial of a zoning/special use permit/variance application. Oftentimes such suits are brought by unhappy neighbors following approval of a zoning-related application. In such lawsuits, the successful applicant (developer or owner) is a proper and necessary party defendant. Riverhill Comm. Ass'n v. Cobb County, 236 Ga. 856 (3)(1976).

A. Court Standards.

Many of the rules described above for the various types of land-use decisions also apply to neighbor suits. For example, in the special use permit and variance contexts, challenges by neighbors are confined to the record below and decided on the any-evidence standard. See, e.g., York v. Athens College of Ministry, Inc., 348 Ga. App. 58 (2)(2018)(physical precedent only); Bentley v. Chastain, 242 Ga. 348 (1)(1978)(variance case). In such cases, the neighbor has to prove, via the record, that the application did not meet the standards or criteria for grant of the special use permit or variance.

In rezoning cases, the neighbor's burden is much higher: when challenging the merits of the rezoning, that rezoning will be invalidated "only if fraud or corruption is shown or the rezoning power is being manifestly abused to the oppression of the neighbors." Cross v. Hall County, 238 Ga. 709, 711 (1977). The few cases where this burden has been met usually involve conflicts of interest by government decision-makers. See, e.g., Dunaway v. Marietta, 251 Ga. 727 (3)(1983). See also Olley Valley Estates v. Fussell, 232 Ga. 779 (1)(1974); Wyman v. Popham, 252 Ga. 247 (2)(1984)(preponderance of the evidence standard applies to claims of fraud or corruption). Because of this extremely high burden, it is more often the case that

neighbors will seek to find a flaw in the process by which the rezoning application was heard. The courts require strict compliance both with the Zoning Procedures Law (O.C.G.A. § 36-66-1, et seq.) as well as with the procedural requirements of zoning ordinances, and this can provide an opening for neighbors to have a decision overturned. See Brand v. Wilson, 252 Ga. 416 (2)(1984); Moore v. Maloney, 253 Ga. 504 (2)(1984).

B. Standing.

Often the key issue in neighbor suits is whether that neighbor has standing to challenge the zoning/land use decision of which he complains. After all, in this context the decision does not directly apply to that neighbor's property.

> The interest shown must be more than merely that of a taxpayer of the municipality seeking to have a strict enforcement of zoning regulations for the benefit of the general welfare of the community or general enhancement of property values. Plaintiff may not assume the role of champion of a community to challenge public officers to meet him in courts of justice to defend their official acts.

Tate v. Stephens, 245 Ga. 519, 520 (1980)(internal punctuation omitted). See also Columbus v. Diaz-Verson, 258 Ga. 698 (1)(1988("It is important to keep in mind that we deal now with the right or power of neighbors to deny to the landowner the right to use the property as the landowner desires and as approved by the governing authority."). The court's test for neighbor standing is generally called the "substantial interest-aggrieved citizen" test; although the test had its origin in now-repealed statute regarding boards of zoning appeals, it now applies to any neighbor challenge to a land-use decision, including rezonings, special use permits, and variances. Brand v. Wilson, 252 Ga. 416 (1)(1984); see also Massey v. Butts County, 281 Ga. 244 (2006). The test is as follows: "First, a person claiming to be aggrieved must have a substantial interest in the

zoning decision, and second, this interest must be in danger of suffering some special damage or injury not common to all property owners similarly situated." The Stuttering Foundation, Inc. v. Glynn County, 301 Ga. 492, 494 (2017)(quoting DeKalb County v. Wapensky, 253 Ga. 47, 48 (1984)(internal punctuation removed). "By 'similarly situated,' we refer to persons in the general community who may merely suffer inconvenience and exclude those persons who stand to suffer damage or injury to their property which derogates from their reasonable use and enjoyment of it." Wapensky, *supra*, 253 Ga. at 48. In order to have a "substantial interest," the plaintiff must hold an estate or interest in real property. For example, a tenant holding only a usufruct or the spouse of the actual titleholder does not have a substantial interest for standing purposes. See The Stuttering Foundation, *supra*, 301 Ga. at 496-497.

Examples of evidence sufficient to satisfy the substantial interest-aggrieved citizen test include:

- Expert testimony that the neighbor's property would suffer a reduction in value of 15-20 percent due to the rezoning in question (Brand v. Wilson, *supra*, 252 Ga. at 417)
- Diminution of $20,000 in property value of a homeowner living across the road from a proposed development, with that loss being "considerably more" than that of other homeowners more distantly located (Burry v. DeKalb County, 165 Ga. App. 246, 248 (1983))
- Evidence of decreased property value and "additional damages via noise, odor, and visual intrusions on peace and privacy … in varying degrees" (Wapensky, *supra*, 253 Ga. at 49)

While evidence of a diminution the neighbor's property may satisfy the test, it is

not indispensable. AT&T Wireless PCS v. Leafmore Forest Condo. Ass'n, 235 Ga. App. 319, 321 (1998). In addition, there is case law at least implying that ownership of property adjacent to the property subject to the zoning action automatically satisfies the substantial interest-aggrieved citizen test. See Moore v. Maloney, *supra*, 253 Ga. at 506 (fn. 1); AT&T Wireless PCS, *supra*, 235 Ga. App. at 321. Homeowners associations only have contingent standing: they have no independent standing to bring zoning-related lawsuits, but may participate in suits brought by property owners that independently meet the above standing test. Lindsey Creek Area Civic Ass'n v. Consolidated Gov't of Columbus, 249 Ga. 488, 490 (1982).

If the local government (or successful applicant) wishes to contest the standing (as described above) of a neighbor to challenge an on-the-record decision (such as a special use permit or variance), it is important to note the Court of Appeals has repeatedly held that evidence relating to that standing must be contained within the record below. See, e.g., York v. Athens College Ministry, Inc., 348 Ga. App. 58, 60, 64 (2018)(physical precedent only); Druid Hills Civic Ass'n v. Buckler, 328 Ga. App. 485 (3)(2014); RCG Properties v. City of Atlanta Bd. of Zoning Adjustment, 260 Ga. App. 355, 362 (1)(2003). It is difficult to square these cases with the principle that standing to bring a court action is a jurisdictional issue that can (and must) be addressed by the courts at any time. See, e.g., Parker v. Leewenburg, 300 Ga. 789, 790 (2017). In addition, the Court of Appeals may be mixing court standing with standing to receive notice and be heard before the local government – a topic often addressed in local zoning ordinances. Compare Columbus v. Diaz-Verson, 258 Ga. 698 (2)(1988)("[W]e deal here the standing of neighbors to enjoin rezoning granted a property owner, not the standing of neighbors to be heard by a governing authority when considering a proposed

zoning change." (quoting Lindsey Creek Area Civic Ass'n, *supra*, 249 Ga. at 490)). It is hard to conceive how a local government (or applicant) could place into the record evidence regarding the standing of any and all unknown neighbors who might later challenge a decision – after all, a zoning-related hearing isn't an adversarial process with specific and known opposing parties. Nevertheless, these Court of Appeals rulings reflect the state of the law at present.

VII. FEDERAL ISSUES

A. Viability of Cases Brought in Federal Court

There are significant differences between the above Georgia standards for zoning-related actions and the standards applicable to federal challenges to those same actions. On the issue of forum, it is rare that a Georgia zoning case is brought in federal court. Under U.S. Supreme Court precedent, a federal takings claim cannot first be brought in federal court if a state provides a remedy for compensation for a taking. See Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985). The Eleventh Circuit has previously held that Georgia does, in fact, provide a takings *compensation* remedy for zoning regulations via a state takings claim.[5] In Bickerstaff Clay Products Co. v. Harris County, 89 F.3d 1481, 1490-91 (11th Cir. 1996), the Court phrased this in the negative: "We find no Georgia cases denying a landowner just compensation for the temporary loss of use of his property while burdened with an invalid zoning classification; nor do we find any cases denying a landowner just compensation where a valid zoning classification effectively condemns his property." *Id.* at 1491. This phrasing likely reflects the federal courts' extreme reluctance to get

[5] In large part based on this hurdle, most Supreme Court cases addressing state/local level takings claims under the U.S. Constitution have arisen on certiorari from a state's highest court, rather than progressing through the federal court system.

involved in local zoning matters: "[T]he federal courts do not sit as zoning boards of review and should be most circumspect in determining that constitutional rights are violated in quarrels over zoning decisions." Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1389 (1993).

However, a recent Georgia Supreme Court decision could eventually lead to a conclusion by the federal courts different than that in Bickerstaff Clay Products. As described in Section I, above, the Georgia court's recent Diversified Holdings decision re-cast the Georgia standards for review of zonings as a due process test rather than a takings/just compensation test. Diversified Holdings, LLP v. City of Suwanee, 302 Ga. 597, 610 (2017). In doing so, the Court came close to rejecting the idea that a zoning/regulatory decision could ever give rise to compensation under Georgia law, effectively saying the opposite of the Bickerstaff Court: "we have identified no zoning case where the party claiming inverse condemnation received a 'takings' remedy, that is, financial damages to compensate for the loss of their property." *Id.*, 302 Ga. at 611. This may breathe new life into the possibility of zoning challenges being filed in federal court in the first instance. It is also worth noting that, as of this writing, a case pending in the U.S. Supreme Court asks whether the Court should overrule Williamson County's requirement that property owners first exhaust state-court remedies before bringing a federal takings claim in federal court. Knick v. Township of Scott, PA, Docket No. 17-647. Be that as it may, state courts have concurrent jurisdiction over federal constitutional claims under 42 U.S.C. § 1983 (see, e.g., Cobb County v. McColister, 261 Ga. 876 (1992); Haywood v. Drown, 556 U.S. 729, 731 (2009)), and thus an overview of the federal tests may prove helpful.

B. Takings

For Fifth Amendment takings purposes,[6] zoning and land-use actions are analyzed as "regulatory takings" – distinguishing such actions from direct physical appropriations of property by the government. Unlike the state-law analysis of zoning actions described above – where an unconstitutional action results in invalidation of the zoning restriction rather than compensation – an action amounting to a federal regulatory taking is compensable. "[The Takings Clause] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987)(emphasis in original). In this arena of regulatory action, the U.S. Supreme Court has set out two categories of "*per se* takings" that require compensation:

- A governmental regulation that requires a permanent physical invasion of an owner's property, "however minor". Loretto v. Teleprompter Manhattan CATV Corp., 489 U.S. 419 (1982)(state law requiring landlords to permit cable companies to install cable infrastructure); and
- A governmental regulation that completely deprives an owner of all economically beneficial or productive use of the property. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-1019 (1992). In this scenario, compensation can only be avoided if "background principles of state law" – such as the common law of nuisances – would already have prohibited use of the property. *Id.* at 1028-1030.

[6] "... nor shall private property be taken for public use, without just compensation." U.S. Const., Amendment 5. The Fifth Amendment applies to state and local governmental actions via the Fourteenth Amendment. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).

Outside of these two *per se* takings categories, a federal takings analysis involves not a "set formula", but rather an *ad hoc* application of several factors the U.S. Supreme Court has deemed relevant, as set forth in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978):

- The economic impact of the regulation on the owner;
- The extent to which the regulation interferes with distinct investment-backed expectations; and
- The "character of the governmental action"

Id. See also Lingle v. Chevron, 544 U.S. 528, 538-539 (2005).[7] As one would guess, the third Penn Central factor is particularly amorphous, but can be loosely thought of as a sliding scale: the closer an action is to a physical taking, the more likely a regulatory taking has occurred, and the more an action is merely part of "a public program adjusting the benefits and burdens of economic life to promote the common good", the less likely a regulatory taking has occurred. Penn Central, 438 U.S. at 124.

A subcategory of takings analysis is also worth mentioning because of its common applicability in zoning cases: where the government requires dedication of land for public purposes as a condition of development approval (often referred to as an "exaction"). In order to avoid being deemed a regulatory taking for which compensation is required, the government-imposed exaction/condition must 1) have an "essential nexus" with the development's expected impacts and 2) be roughly proportional to those expected impacts. This is known as the Nollan/Dolan test, after the two cases establishing each of the test's prongs. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994). Thus, for example, a zoning

[7] Lingle is likely the best one-stop shop for a summary of federal takings law.

condition requiring construction and dedication of a turn lane into a proposed large commercial development would appear to satisfy the test and not be a compensable federal taking. On the other hand, a requirement to dedicate a substantial amount of property for a public park as a condition of approving a three-house subdivision would likely fail the Nollan/Dolan test and amount to a federal taking.

C. Substantive Due Process/Equal Protection

"[Z]oning regulations will not be declared unconstitutional as violative of substantive due process unless they are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Greenbriar, Ltd. v. Alabaster, 881 F.2d 1570, 1577 (11th Cir. 1989)(quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the seminal U.S. Supreme Court case on zoning). To prove a substantive due process violation, the plaintiff must show the government "(1) deprived him of a constitutionally protected property interest (2) for an improper motive and by means that were pretextual, arbitrary, capricious, and without any rational basis." Weiss v. City of Gainesville, 468 Fed. Appx. 898, 910 (11th Cir. 2012). As with other rational-basis standards, his is an extremely difficult standard for a property owner to meet. Even evidence that a zoning application was denied because of citizen opposition is insufficient:

> Nothing is more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition; it does not outlaw the characteristic operations of democratic government, operations which are permeated by pressure from special interests. The fact that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws does not state a claim of denial of substantive due process.

Greenbriar, Ltd., *supra*, 881 F.2d at 1579 (quoting Coniston Corp. v. Village of Hoffman

Estates, 844 F.2d 461, 467 (7th Cir. 1988)(internal punctuation omitted).

Similarly, a high bar is faced by those alleging of a Fifth Amendment equal protection violation in the zoning context. In general the Equal Protection Clause requires that similarly situated persons be treated the same. Leib v. Hillsborough Cty. Pub. Transp. Comm'n, 558 F.3d 1301, 1305 (11th Cir. 2009)("At bottom, the Equal Protection Clause requires the government to treat similarly situated persons in a similar manner."). In the zoning/land-use regulation setting, an equal protection violation "requires a finding that there were developments which were similarly situated to the … proposed development, because different treatment of dissimilarly situated persons does not violate the equal protection clause." Campbell v. Rainbow City, 434 F.3d 1306, 1313-1314 (11th Cir. 2006)(internal punctuation omitted)(holding that denial of a variance for an apartment development could not rise to an equal protection violation, where the plaintiffs identified no similarly situated apartment development that was "identical to Plaintiffs' development in all relevant aspects").

Even where similarly situated properties/developments are identified, a rational basis standard generally applies to an equal protection claim because a zoning decision will rarely involve a suspect classification (e.g., race, national origin, gender). Rational-basis scrutiny involves two steps:

> The first step in determining whether legislation survives rational-basis scrutiny is identifying a legitimate governmental purpose – a goal – which the enacting body *could* have been pursing. The *actual* motivations of the enacting governmental body are entirely irrelevant…. Moreover, the Equal Protection Clause does not require governmental decisionmakers to articulate any reason for their actions, … nor does it require any record evidence of a legitimate purpose…. The second step of rational-basis scrutiny asks whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose. The proper inquiry is concerned with the *existence* of a conceivably rational basis, not whether that basis was actually considered

> by the legislative body.... As with the legitimate purpose inquiry, courts are not confined to the record when determining whether a rational basis for the classification exists.... In sum, those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it.

Haves v. City of Miami, 52 F.3d 918, 921-922 (11th Cir. 1995)(internal citations and punctuation omitted; emphasis in original)(upholding a zoning ordinance prohibiting residential use of houseboats).

VIII. CONCLUSION

While the relevant legal standards relating to local zoning and other land-use decisions have generally been static for several decades, the Georgia Supreme Court, in particular, has recently awakened and issued several very significant decisions in this arena. Zoning practitioners need to be aware of cases such as Diversified Holdings, LLP v. City of Suwanee and City of Cumming v. Flowers and their potential future consequences on litigation practice at both the state and federal levels.